

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

In re:	X	
	:	Case No. 06-51848
	:	(Jointly Administered)
CEP HOLDINGS, LLC, <u>et al.</u> ,	:	
Debtors.	:	Chapter 11
	:	Honorable Marilyn Shea-Stonum
	:	
	:	Related Docket No. 685
	:	
	:	Hearing Date: 10/02/07 at 9:30 a.m.
	:	Objection Deadline: 09/28/07 at 4:00 p.m.
	X	

**OBJECTION OF THE CEP LIQUIDATING TRUST TO MOTION OF HONDA OF AMERICA MFG., INC. FOR DETERMINATION OF ADMINISTRATIVE CLAIM IN ACCORDANCE WITH THE TERMS OF FIRST AMENDED JOINT PLAN OF LIQUIDATION PROPOSED BY THE DEBTORS AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS**

Shaun M. Martin, the Liquidating Trustee of the CEP Liquidating Trust and successor in interest to the above-captioned debtors (the “**Debtors**”), hereby files this objection (the “**Objection**”) to Motion of Honda of America Mfg., Inc. for Determination of Administrative Claim in Accordance with the Terms of First Amended Joint Plan of Liquidation Proposed by the Debtors and the Official Committee of Unsecured Creditors (the “**Motion**”). Pursuant to this Objection, the Liquidating Trustee requests that the Court enter an order denying the Motion. In support of this Objection, the Liquidating Trustee respectfully represents as follows:

**INTRODUCTORY STATEMENT**

Honda of America Mfg., Inc. (“**HAM**”), on behalf of itself and Honda of South Carolina Mfg., Inc., (“**HSC**” together with HAM, collectively “**Honda**”), seek an order granting them an administrative expense claim pursuant to section 503 of the Bankruptcy Code in the amount of \$1,081,487.60 (the “**Honda Administrative Expense Request**”). The Honda Administrative Expense Request is itemized as follows:

	<b><u>Summary Description of Costs and Expenses</u></b>	<b><u>Amount</u></b>

1.	Expedites (HAM)	\$	12,641.38
2.	Manpower (HAM)		47,097.00
3.	Travel Expenses (HAM)		27,648.34
4.	Morton Custom Plastic Compensation (HAM)		34,079.00
5.	Morton Custom Plastic Compensation (HSC)		147,031.00
6.	Expedites (HSC)		49,828.00
7.	Manpower (HSC)		93,958.00
8.	Miscellaneous (HSC)		11,762.00
9.	Travel Expenses (HSC)		8,226.00
10.	Professional Fees (HAM)		60,604.00
11.	November Cost Impact (HAM)		462.82
12.	November Cost Impact (HSC)		49,149.07
13.	Assisting Customer Payment Demand (October)		539,000.00
	<b>Total</b>	\$	1,081,487.60

See Motion at ¶ 15. Honda asserts the Honda Administrative Expense Request is warranted for one or more of several reasons including (i) “economic duress” under Ohio law; (ii) costs related to resourcing product to alternative suppliers constitute post-petition breach of pre-petition agreements giving rise to allegedly administrative claims; (iii) purported representations of the Debtors in a bankruptcy pleading allegedly support the assertion that Honda enhanced estate value post-petition; and (iv) provisions of the Bankruptcy Code allegedly support the proposition that Honda is entitled to attorneys fees as an administrative claim. See Motion at ¶ 13-18. For the reasons set forth in this Objection, no portion of the Honda Administrative Expense Request constitutes an allowed or allowable administrative claim.

## **JURISDICTION AND VENUE**

1. The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 157 and 1334 and Article 12.1(d) of the Plan (as such term is defined below). Consideration of this Objection is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief requested herein are sections 105(a) and 502 of title 11 of the United States Code (the “**Bankruptcy Code**”) and Rule 3001 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

## **BACKGROUND**

### **General Background**

4. On September 20, 2006 (the “**Petition Date**”), each Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

5. By an Order entered on July 25, 2007 (Docket No. 661), the Court confirmed the *First Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code Proposed by the Debtors and the Official Committee of Unsecured Creditors Dated May 25, 2007* (the “**Plan**”).

6. Pursuant to Article 8.1 of the Plan, the Liquidating Trustee has the right to object to administrative expense claims, including the Honda Administrative Expense Request. See Plan at § 8.1.

### **Honda’s Involvement in the CEP Bankruptcy**

7. On September 26, 2006, counsel to Honda filed the Notice of Appearance and Request for Service of Papers to be Added to Service List (Docket 80).

8. As discussed below, Honda filed an objection to the DIP Motion (defined below) and subsequently withdrew said objection.

9. On August 27, 2007, Honda filed the Motion seeking the allowance of administrative expense claims in the amount of \$1,081,487.60.

### **Honda's Prepetition Relationship with the Debtors**

10. Prior to the Petition Date, the Debtors sold component parts produced at their facility in Bishopville, South Carolina (the "**Honda Facility**") to Honda pursuant to the terms and conditions of various blanket purchase orders (collectively, the "**Purchase Orders**") and the Debtors shipped to release orders issues by Honda.

### **The Bankruptcy Filing**

11. As of the Petition Date, the Debtors undertook a fast paced dual-track approach for the disposition of their operations and assets: (i) sale of individual facilities designated by Participating Customers as a "going concern" facilities; and (ii) auction sales of all other facilities. The DIP Motion, and various other pleadings filed with the Court, establish that in the aggregate, operations of the Debtors were not cash flow positive. The Debtors' existing senior secured lender refused to advance additional new funds to cover operating losses and unsecured creditors, organized prior to the Petition Date as an unofficial committee and thereafter as the Committee, refused to permit further customer funding necessary to sustain operations to take the form of additional debt, as any such additional debt. Accordingly, the funding mechanism necessary to cover operating losses and sustain transitional operations of the Debtors for the benefit of customers ultimately was created in the form of "Cash Infusions" under the Final DIP Order.

12. Through mechanisms under the Final DIP Order, the Participating Customers (and thereafter Assisting Customers) agreed to fund Cash Infusions necessary to sustain minimally break even operations for a period of time sufficient to permit such customers to determine whether to acquire assets and facilities from the Debtors or to resource production to alternative suppliers. Under the dire financial circumstances of the Debtors, where their (i) senior secured lender would not advance additional new credit and (ii) Participating Customers determined prior to the Petition Date not support a going concern restructuring of the Debtors,

Participating Customers and Assisting Customers continued to receive product from the Debtors in consideration of funding operating shortfalls of the Debtors in the form of Cash Infusions.

13. Against this backdrop, the Participating Customers designated every facility of the Debtors as a liquidating facility with the exception of the Debtor's Facility in Tuscaloosa, Alabama. Honda attempted to negotiate a purchase of the Honda Facility, but as a result of timing issues related to Honda's ability to take control of the Honda Facility and interim funding demands upon Honda made by the Participating Customers during the intervening period, Honda ultimately did not pursue the Honda Facility, and instead the Honda Facility was liquidated.

#### **Debtors' Financing**

14. On the Petition Date, the Debtors filed the Motion of the Debtors and Debtors in Possession for Emergency Order Authorizing Debtors to: (A) Use Cash Collateral on an Emergency Basis; (B) Incur Postpetition Debt on an Emergency Basis; (C) Grant Adequate Protection and Provide Security and Other Relief to Wachovia Capital Finance Corporation (Central); and (D) Grant Certain Related Relief (the "**DIP Motion**") (Docket No. 22).

15. On September 25, 2006, the Court entered the Emergency Order Re: Motion of Debtors in Possession, Pursuant to Sections 362, 363 and 364 of the Bankruptcy Code and Bankruptcy Rules 4001(B) and 4001(C), for Interim and Final Orders (I) Authorizing Debtors to Incur Postpetition Secured Indebtedness, (II) Grant Security Interests and Priority Claims, (III) Granting Adequate Protection, (IV) Modifying Automatic Stay and (V) Setting Final Hearing (Docket No. 66) (the "**Interim DIP Order**").

16. On October 27, 2006, the Court entered the Final Order Authorizing Debtors To: (A) Use Cash Collateral; (B) Incur Postpetition Debt; (C) Grant Adequate Protection and Provide Security and Other Relief to Wachovia Capital Finance Corporation (Central); and (D) Grant Certain Related Relief (Docket No. 192) (the "**Final DIP Order**")

17. The Final DIP Order approved and incorporated the “Customer Agreement” and authorized the Debtors to bind Assisting Customers (as defined in the Customer Agreement) to the provisions of the Customer Agreement and Final DIP Order. See Final DIP Order at § 15. Honda was the Debtors’ most significant customer at the Honda Facility and agreed to become an Assisting Customers under the Customer Agreement. The rights and obligations of Assisting Customers are generally defined by paragraph 4 of the Customer Agreement. A copy of paragraph 4 to the Customer Agreement is attached hereto and incorporated herein by reference as Exhibit A.

18. Under the Final DIP Order, the Cash Infusions were characterized as “price adjustments” and not “loans” or “extensions of credit.” Final DIP Order at G (“The Cash Infusions shall constitute purchase price adjustments for the Component Parts and not loans or extensions of credit under Code § 364 or otherwise.”). These Cash Infusions represented the following costs related to the Debtors’ bankruptcy cases: (a) the forecast cash burn on a facility by facility basis covering the costs of manufacturing component parts as each such facility (the “**Manufacturing Charges**”); (b) the general corporate overhead (the “**Corporate Charges**”); (c) the restructuring charges (the “**Restructuring Charges**”); and (d) the wind down charges (the “**Wind Down Charges**” and, together with the Manufacturing Charges, the Corporate Charge and the Resourcing Charges, the “**Cash Infusions**”).

19. The Cash Infusions were allocated by and among the Assisting Customers and Participating Customers based upon production levels at each of the Debtors’ facilities. At the Honda Facility, Honda was allocated one hundred percent (100%) of the budgeted portion of the Manufacturing Charges, the Corporate Charges and the Restructuring Charges (collectively, the “Production Charges”) for the Honda Facility. Under the Final DIP Order and the Customer Agreement, Honda was required to provide Cash Infusions in the form of Production Charges with respect to the Honda Facility.

20. The Production Charges attributable to Honda were directly related to costs incurred by the Debtors for the production of component parts for Honda at the Honda Facility. Put simply, the Production Charges would cover all postpetition losses associated with the production of Honda's component parts at the Honda Facility.

21. The Production Charges were a subset of the Cash Infusions, which were not debt or loans. To that end, the Court considered the relief sought in the DIP Motion at the hearing held on September 22, 2006 (the "**First Day Hearing**"), at which time counsel for the Participating Customers and the Debtors explained the key parts of the proposed debtor-in-possession financing and the Participating Customers' role in financing the Debtors' cases.

22. Specifically, counsel for the Participating Customers represented to the Court that the vast majority of the Cash Infusions provided by the Participating Customers would not amount to new debt but constituted a "gift" to the Debtors. See Tr. of First Day Motions 77:20-23, Sept. 22, 2006 ("[F]rom the customer's perspective, [the Cash Infusion is a] gift. I mean this is money that's coming to the company. Yeah, we're getting parts out of it, but we're never going to get repaid, and there's no hope we ever will.") (Statement of Mr. Hammer); Tr. of First Day Motions 79:21-23, Sept. 22, 2006 ("Because what other case can you imagine there's \$13 million coming in to fund a company and 11 and a half million dollars is just given to the company?") (Statement of Mr. Hammer); Tr. of First Day Motions 81:5-9, Sept. 22, 2006 ("Ultimately you say what benefit or harm is there to the estate? Well, there's really no harm to the estate. We're covering the cash needs. The only thing that comes in as debt is a million and a half dollars.") (Statement of Mr. Hammer); Tr. of First Day Motions 81:19-21, Sept. 22, 2006 ("But I mean I think it's a great deal because we're covering all the cash needs in a way that we're not expected to get repaid.") (Statement of Mr. Hammer); accord Tr. of First Day Motions 66:6-8, Sept. 22, 2006 ("The \$13 million right off the bat, starting out, is a cash infusion. It's not a loan. It's not going to be repaid unless something happens.") (Statement of Mr. Hutchinson); Tr. of First Day Motions 82:4-7, Sept. 22, 2006 ("The Court: Thank you. Mr.

Radom, has Visteon [said] everything that needs to be said about the participating customers? Mr. Radom: Yes, they have, Your Honor.”) (Statement of Mr. Radom). Indeed, the only way part of the Cash Infusions could constitute debt was if a Participating Customer designated a facility as a sale facility within ten (10) days of the Petition Date, in which event only the Cash Infusions paid by that Participating Customer related to the sale facility would be recharacterized as debt (up to a maximum amount of \$1.5 million).

### **OBJECTION**

23. In the Motion, Honda seeks allowance and payment of the Honda Administrative Expense Request (\$1,081,487.60). Honda’s bases for allowance of the Honda Administrative Expense Request are fourfold: (i) “economic duress” under Ohio law; (ii) costs related to diverting purchase orders to alternative suppliers; (iii) purported prior representations of the Debtors post-Petition; and (iv) the provisions of the Bankruptcy Code. See Motion at ¶¶ 13-18. For the reasons set forth below, each of these bases fail as a matter of law and indisputable facts of the Debtors’ bankruptcy cases.

#### **Lack of Economic Duress**

24. Honda asserts the right to recover no less than \$539,000, or the amount of its Cash Infusion (presumably plus certain other amounts asserted by Honda), as all allowed administrative priority claim under a theory of economic duress. In support of this position, Honda cites Blodgett v. Blodgett, 551 N.E.2d 1249, 49 Ohio St.3d 243 (Ohio 1990) as precedent for the contention that the “Debtors committed a wrongful act and/or threat, a threat of failure to produce the component parts, which impacted Honda’s continued production lines within a limited time to respond.” Motion at ¶ 13. Essentially, Honda is seeking to utilize the doctrine of “economic duress” under Ohio law to recoup the \$539,000 cash infusion authorized by the Final DIP Order and the costs of “added production costs, moving expenses, professional fees, and other related expenses for moving production out of Bishopville . . .” Motion at ¶ 14.

25. In Blodgett, the Ohio Supreme Court recognized the doctrine of “economic duress” as a remedy to avoid a contract. Blodgett, 551 N.E.2d at 1251. To establish “economic duress” under Blodgett, Honda must prove that it was subjected to “. . . a wrongful or unlawful act or threat, . . .” and that it [the Debtors] . . . deprive[d] the victim [Honda] of his unfettered will.” Id. quoting 13 Williston on Contracts (3 Ed.1970) 704, Section 1617.

26. Blodgett further notes that to establish economic duress, a party (like Honda) must display:

“(1) that one side [Honda] involuntarily accepted the terms of another [the Debtors]; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party [the Debtors]. \* \* \* The assertion of duress must be proven to have been the result of the defendant’s [the Debtors’] conduct and not by the plaintiff’s [Honda’s] necessities.”

Id. citing Urban Plumbing & Heating Co. v. United States, 408 F.2d 382, 389-390 (U.S.Ct. of Claims 1969) quoting Fruhauf Southwest Garment Co. v. United States, 111 F.Supp. 945, 951, (U.S.Ct. of Claims 1953).

27. Blodgett also states “[T]o avoid a contract on the basis of duress, a party must prove coercion by the other party to the contract. It is not enough to show that one assented merely because of difficult circumstances that are not the fault of the other party.” Id. at 1251-2.

28. In the instant matter, Honda fails to establish and cannot prove that the alleged economic duress suffered by Honda resulted from the coercive actions of the Debtors, as the term “coercive” is contemplated under Blodgett.

29. First, Honda does not (and cannot) display that the \$539,000 Cash Infusion or the costs related to Honda resourcing production of its parts from CEP arose due to any “wrongful” or “unlawful” act of the Debtors. Both the Cash Infusion and the alleged costs incurred by Honda in resourcing of production arise from implementation of the Final DIP Order approved by this Court. Although Honda initially objected to the DIP Motion, it subsequently withdrew its objection and agreed to become an Assisting Customer. The DIP Motion was a

contested matter that this Court approved with notice to all parties (including Honda). All actions taken by the Debtors and authorized by the Final DIP Order cannot now be characterized by Honda as “wrongful” or “unlawful”. The Court of Appeals of Ohio established that, “duress cannot be caused by the enforcement of a legal right.” See Hagood v. Gail, 664 N.E.2d 1373, 1379, 105 Ohio App.3d 780, 790 (Ohio App. (Trumbull) 1995). The Final DIP Order, which was noticed to all parties (including Honda), authorized the liquidation of the Debtors’ business and assets and established the manner in which such process would be funded, including provisions for the Cash Infusions.

30. In light of the above, Honda is unable to assert “economic duress” as a basis for allowance of any portion of the Honda Administrative Expense Request.

**The Debtors’ “Representations” Regarding the Honda Facility**

31. The Motion, at ¶ 16, suggests that Honda’s contribution to funding of the Honda Facility through Cash Infusions contributed to maximization of value of the Honda Facility, and thus Honda satisfies the requirements of section 503(b) of the Bankruptcy Code with respect to allowance of the administrative claim that it asserts. Honda asserts that the Debtors admitted to such alleged contribution to value in their sale motion filed at Docket 103 (the “**Sale Motion**”), because the Sale Motion alleges that a going concern sale of the Honda Facility would have more value. See Motion at ¶ 16. Honda’s characterization of the Sale Motion is incorrect. To the contrary, the Sale Motion seeks sale procedures for both those facilities designated as “Sale Facilities”, and those designated as “Closing Facilities”, and clearly contemplates that the Debtors’ facilities (including the Honda Facility) may be designated **either** a “Sale Facility” (a going concern sale) **or** a “Closing Facility” (a liquidation). See Sale Motion at ¶¶ 11-15.

32. The Sale Motion does not make any representations with respect to whether any of the facilities (including the Honda Facility) were to be a “Sale Facility” or “Closing Facility.” This is true because, consistent with the Final DIP Order’s process for designation of the Debtors’ facilities as a “Sale Facility” or “Closing Facility”, such designations were not

determination to be made by the customers and not the Debtor. Ultimately, the Honda Facility was designated as a Closing Facility and thus liquidation value was obtained for this facility. In fact, due to duration of the negotiations among the Participating Customers and Honda with respect to responsibility for carrying costs of the Honda Facility pending a proposed purchase by Honda (when negotiations were not successfully concluded), the Honda Facility was not even part of the fixed guaranty by the Court authorized auctioneer for the Closing Facilities, but instead was liquidated separately without guaranty of return to the Debtors.

33. As such, this Court should not allow any portion of the Honda Administrative Expense Request based upon Honda's characterization of or reliance upon the Sale Motion.

**The Bankruptcy Code Does Not Contemplate Allowance of Honda's Attorneys' Fees**

34. Honda cites section 503(b)(4) of the Bankruptcy Code as permitting it to seek reimbursement of its attorneys' fees.

35. Section 503(b)(4) permits allowance of reasonable attorneys' fees for the following limited situations: (i) a petitioning creditor in an involuntary bankruptcy; (ii) a creditor that recovers concealed or transferred assets for the estate's benefit; (iii) a creditor in connection with the criminal prosecution of the debtor; (iv) a creditor making a substantial contribution to the case; and (v) a custodian. See 11 U.S.C. § 503(b)(4). Honda has not plead that it fulfills any of the above situations. None of the requisite elements necessary for the allowance of attorney fees under section 503(b)(4) of the Bankruptcy Code exists with respect to the Honda Administrative Expense request.

36. As such, this Court should deny the Honda Administrative Expense Request with respect to attorneys' fees.

**RESERVATION OF RIGHTS**

37. The CEP Liquidating Trust reserves the right to object further to the Motion on any and all additional factual and/or legal grounds. Without limiting the generality of the foregoing, the CEP Liquidating Trust specifically reserves the right to (i) amend this Objection,

