

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

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In re: :
 : Case No. 06-61796
CEP HOLDINGS, LLC, et al.,¹ : (Jointly Administered)
 :
Debtors. : Chapter 11
 :
 : Honorable Russ Kendig
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**MOTION OF DEBTORS AND DEBTORS
IN POSSESSION, PURSUANT TO SECTIONS 105(a),
363(b), 507(a)(4), 507(a)(5) AND 541(d) OF THE BANKRUPTCY CODE,
FOR ENTRY OF AN ORDER (I) AUTHORIZING THEM TO PAY: (A)
PREPETITION EMPLOYEE AND INDEPENDENT CONTRACTOR WAGES,
SALARIES AND RELATED ITEMS; (B) PREPETITION EMPLOYEE AND
INDEPENDENT CONTRACTOR BUSINESS EXPENSES; (C) PREPETITION
CONTRIBUTIONS TO AND BENEFITS UNDER EMPLOYEE BENEFIT
PLANS; (D) PREPETITION EMPLOYEE PAYROLL DEDUCTIONS
AND WITHHOLDINGS; (E) ADDITIONAL WORKFORCE COSTS AND (F)
ALL COSTS AND EXPENSES INCIDENT TO THE FOREGOING PAYMENTS
AND CONTRIBUTIONS; AND (II) GRANTING CERTAIN RELATED RELIEF**

CEP Holdings, LLC and its affiliated debtors and debtors in possession (each a “**Debtor**” and collectively, the “**Debtors**” or “**CEP**”) in the above-captioned Chapter 11 cases (the “**Cases**”), hereby move (the “**Motion**”), pursuant to sections 105(a), 363(b), 507(a)(4), 507(a)(5) and 541(d) of title 11 of the United States Code (the “**Bankruptcy Code**”), for entry of an order (i) authorizing them to pay: (a) prepetition employee and independent contractor wages, salaries and related items; (b) prepetition employee and independent contractor business expenses; (c) prepetition contributions to and benefit under employee benefit plans; (d) prepetition employee payroll deductions and withholdings; (e) additional workforce costs; and (f) all costs and

¹ The Debtors include: CEP Holdings, LLC, Creative Engineered Polymer Products, LLC and Thermoplastics Acquisition, LLC.

expenses incident to the foregoing payments and contributions; and (ii) granting certain related relief. In support of the Motion, the Debtors refer to and rely upon the Affidavit of Joseph Mallak in Support of Chapter 11 Petitions and First Day Motions (the “**Mallak Affidavit**”), filed contemporaneously herewith, and respectfully represent as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of the Motion 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), 363(b), 507(a)(4), 507(a)(5) and 541(d) of the Bankruptcy Code.

BACKGROUND

4. On the date hereof (the “**Petition Date**”), each Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtors have requested that the Cases be jointly administered for procedural purposes only.

5. The Debtors are operating their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee, examiner or official committee of unsecured creditors has been appointed.

A. Summary of Capital Structure and Current Business Operations

6. Creative Engineered Polymer Products, LLC, (“**CEPP**”) is a limited liability company formed under the laws of the State of Ohio. CEPP is wholly owned by CEP Holdings, LLC (“**Holdings**”), a privately-held limited liability company formed under the laws of the State of Ohio. Holdings is a holding company whose sole asset is its membership interests in CEPP. CEPP has three subsidiaries: (i) Composite Parts Mexico S.A. de C.V. (the “**CEP Mexico**”), a Mexican corporation which is 99.9% owned by CEPP and .01% owned by non-debtor Reserve

Capital Group, Ltd; (ii) Thermoplastics Acquisition, LLC (“**Thermoplastics**”), an Ohio limited liability company which is wholly owned by CEPP and is a debtor in these cases; and (iii) CEP Latin America, LLC (“**CEP LA**”), a non-debtor Ohio limited liability company which is wholly owned by CEPP. CEP LA was never funded and has no operations or debt. The principal place of business of the Debtors is 3560 West Market Street, Suite 340, Akron, Ohio 44333.

7. The Debtors operate 10 manufacturing plants in Ohio, Michigan, Alabama, South Carolina and Mexico, including a plant in Canton, Ohio. CEPP operates six plants in Ohio, Michigan and Alabama. Non-debtor CEP Mexico operates two plants in Mexico. Thermoplastics operates one plant in Ohio and one in South Carolina.

8. CEP and its debtor subsidiaries are custom molders and extruders of rubber and plastic products, primarily for the OEM automotive market. The Debtors have achieved a unique position as preferred suppliers of high quality products to major customers, including General Motors, Delphi Corporation, Visteon, Nissan, Daimler-Chrysler, Honda and GKN Automotive. CEP has maintained this position as a leader in the marketplace through innovative manufacturing techniques and by continuously improving its broad base of material and process technology.

9. Gross sales for the Debtors’ businesses are projected to be approximately \$190 million for fiscal 2006. The Debtors’ nearly 1,106 employees manufacture the Debtors’ products at ten strategically located manufacturing facilities in Ohio, Michigan, South Carolina, Alabama and Mexico.² The Debtors also maintain a Technical Center in Livonia, Michigan which offers design assistance and program management services for the Debtors’ businesses.

² CEP Mexico, a non-debtor, produces high quality plastic products at two factories in Mexico.

B. Prepetition Debt Structure

10. The Debtors were formed as part of two separate purchase transactions on August 16, 2005 and December 20, 2005, respectively. As part of the August 16, 2005 transaction, the CEPP and CEP Mexico businesses were purchased from the Carlisle Companies. In conjunction with the transaction, CEP Acquisition LLC n/k/a CEPP entered into a Loan and Security Agreement, dated as of August 16, 2005 (the “**Prepetition CEPP Credit Agreement**”) with Wachovia Capital Finance Corporation (Central) (“**WCFC**”), as both Agent and Lenders thereunder. The Prepetition CEPP Credit Agreement provided two term loans and a revolving credit facility to CEPP in the maximum amount of \$45 million (collectively, the “**CEPP Prepetition Loan**”). The CEPP Prepetition Loan is secured by substantially all the assets of CEPP, including, without limitation, all accounts, general intangibles, goods, inventory, equipment, real property, accounts receivable, other personal property and proceeds thereof (collectively, the “**Prepetition CEPP Collateral**”). As of the Petition Date, the amount outstanding under the CEPP Prepetition Loan was not less than \$21,693,507.60 (not taking into account pre-petition and post-petition interest, fees and expenses to which Agent may be entitled under the Prepetition CEPP Credit Agreement and applicable law).

11. As part of the December 20, 2005 transaction, CEPP purchased the Thermoplastics business from Parker Hannifan Corporation. In conjunction with the transaction, Thermoplastics entered into a Loan and Security Agreement, dated as of December 21, 2005 (the “**Prepetition Thermoplastics Credit Agreement**” and together with the Prepetition CEPP Credit Agreement, the “**Prepetition Credit Agreements**”) with WCFC, as both Agent and Lenders. The Prepetition Thermoplastics Credit Agreement provided a term loan and a revolving credit facility to Thermoplastics in the maximum amount of \$5 million (collectively, the “**Thermoplastics Prepetition Loan**” and together with the CEPP Prepetition Loan, the

“**Prepetition Loans**”). The Thermoplastics Prepetition Loan is secured by substantially all the assets of Thermoplastics, including, without limitation, all accounts, general intangibles, goods, inventory, equipment, accounts receivable, other personal property and proceeds thereof (collectively, the “**Prepetition Thermoplastics Collateral**” and together with the Prepetition CEPP Collateral, the “**Prepetition Collateral**”). As of the Petition Date, the amount outstanding under the Thermoplastics Prepetition Loan was not less than \$4,219,688.58 (not taking into account pre-petition and post-petition interest, fees and expenses to which Agent may be entitled under the Prepetition Thermoplastics Credit Agreement and applicable law). The Prepetition Credit Agreements are cross-defaulted and cross-collateralized.

12. Prior to the Petition Date, Visteon Corporation, General Motors Corporation and Delphi Corporation (collectively, the “**Customers**”) and WCFC entered into a Subordinated Participation Agreement dated June 30, 2006 and a First Amendment to Subordination Participation Agreement dated August 18, 2006 pursuant to which the Customers purchased subordinated, last out participation interests (the “**Participation Interests**”) in the Prepetition Loan Facilities. The Customers purchased \$2.9 million of Participation Interests, the proceeds of which were used by the Debtors to fund their operations and the building of the Customers’ parts.

C. Events Leading To The Filing Of These Chapter 11 Cases

13. The Debtors and other automotive suppliers and manufacturers have faced a series of unanticipated operational and market challenges that have adversely affected their operations and cash flows. These challenges have impaired both the Debtors’ suppliers and customers which in turn have severely affected the Debtors’ operations and businesses.

14. With respect to suppliers, the September 2005 hurricanes in the Gulf Coast region have disproportionately damaged manufacturers who rely on plastic resins. Shortly after the

hurricanes, the Debtors began experiencing sharp increases in their principal raw materials (plastic resins) which increases were attributable to interrupted refining capacity. With prices already high due to increased global demand, insecurity and supply constraint issues, the hurricanes magnified the rise in the price of crude oil and natural gas. The Debtors have continued to experience significantly higher costs for raw materials.

15. With respect to the Debtors' customers, the Debtors have been unsuccessful in recovering much of these increases in raw material costs from their customers through price increases. The structure of the American automotive industry is such that it is difficult for manufacturers such as the Debtors to pass rising material costs on to customers. Faced with rising costs, the Debtors have expended substantial effort in attempting to source cheaper alternatives (such as recycled materials and alternative formulations) for substitution of higher cost materials. Despite these efforts, most of the Debtors' customers have delayed approving these material substitutions. Although the Debtors are now starting to experience success in receiving approvals of the material substitutions, the damage to the Debtors' liquidity is irreversible outside the protections of the Bankruptcy Code.

16. In addition to increased material costs, the general instability of the industry has directly harmed the Debtors' liquidity. For example, the Debtors have been impaired by the bankruptcy filing of several large OEM's, including Delphi Corporation, the Debtors' second largest customer. The bankruptcy filing of Delphi in October 2005 alone resulted in a cash loss to the Debtors of nearly \$1.7 million based on the Debtors' unpaid prepetition claim in that case.

17. In addition to bankruptcy filings in the industry, the general credit downgrade has led to delays and increasingly delinquent customer payments for approved tooling programs. These programs are typically managed and paid for by the Debtors for the benefit of a particular

customer which subsequently reimburses the Debtors. The increased delays and failure of customers to pay for these programs have decreased the portion of accounts receivable against which Wachovia will lend under the Prepetition Credit Agreements. This, in turn, has further impaired the Debtors' liquidity.

18. The Debtors have further experienced excess capacity at their plants due to decisions by their customers. For example, GM's transfer from the GMT800 platform to the GMT900 platform has led to substantial idling of capacity. In late 2005, GM started phasing out the GMT800 platform, a manufacturing platform in which the Debtors were heavily involved. The Debtors have been harmed by this action because (i) the Debtors have significant up front costs invested in the GMT800 platform and (ii) GM has not provided the Debtors with replacement work in the new GMT900 platform. Thus, the Debtors have not recovered their costs associated with the GMT800 platform and are operating at significantly lower capacity at several manufacturing plants due to a failure to receive work under the GMT900 platform.

D. Prepetition Activities

19. In an attempt to create maximum value for the Debtors' creditors, the Debtors worked with the Customers and WCFC to allow the Debtors to formulate a restructuring plan which would reorganize the Debtors outside of a chapter 11 proceeding. As part of this plan, in May 2006 the Debtors entered into a series of forbearance, accommodation and access and security agreements with WCFC and the Customers, which agreements provided a 120-day window for the Debtors to effectuate an out-of-court restructuring plan. This window expired September 6, 2006.

20. Given the size and complexity of the Debtors' operations and the continuation of the market circumstances described above, the Customers, WCFC and the Debtors ultimately determined that an out-of-court restructuring was not feasible. Thus, after exploring all options

and faced with a severe liquidity crisis, the Debtors have no choice but to commence these cases as the only means of preserving the Debtors as going concerns, and, thus, maximize the value of the Debtors' assets for their creditors.

21. With the aide of this Court and the support of WCFC and the Customers, the Debtors' goal is to stabilize their business operations and financial situation and sell their assets in a manner to maximize value for the Debtors' Creditors. As detailed in the Debtors' DIP Financing Motion,³ filed contemporaneously herewith, WCFC and the Customers have agreed to provide post-petition financing and cash infusions to the Debtors which financing and cash infusions will fund the Debtors' costs of operations, wind down, restructuring and liquidation until such time that the Debtors' assets are sold pursuant to section 363 of the Bankruptcy Code. The Debtors believe that this course of action will maximize the value of their assets for all creditors.

RELIEF REQUESTED

22. By this Motion, the Debtors seek the entry of an order, pursuant to sections 105(a), 363(b), 507(a)(4), 507(a)(5) and 541(d) of the Bankruptcy Code, (a) authorizing the Debtors, in accordance with their stated policies (as such policies may be modified from time to time) and in the Debtors' sole discretion, to pay: (i) certain prepetition wages, salaries, overtime pay, incentive pay, contractual compensation, sick pay, vacation pay, holiday pay and other accrued compensation (collectively, the "**Prepetition Compensation**") to Employees and Independent Contractors (as such terms are defined below); (ii) prepetition business expenses, including travel, lodging, moving and other relocation expenses and other reimbursable business

³ The full title of the DIP Financing Motion is CEP Holdings, LLC's Motion 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.

expenses (collectively, the “**Prepetition Business Expenses**”) to Employees and Independent Contractors; (iii) prepetition contributions to, and benefits under, the Employees’ benefit plans; (iv) prepetition payroll deductions and withholdings with respect to Employees; (v) certain prepetition Additional Workforce Costs (as such term is defined below); and (vi) all costs and expenses incident to the foregoing payments and contributions (including payroll-related taxes and processing costs); and (b) granting certain related relief.

FACTS RELEVANT TO THIS MOTION

Employees

23. The Debtors’ workforce currently includes approximately 1,106 full-time and part-time hourly and salaried employees, including approximately 455 union employees (collectively, the “**Employees**”) in Ohio, Michigan, Pennsylvania, South Carolina and Alabama. The Debtors’ hourly Employees in Canton, Ohio and Middlefield, Ohio are paid on a bi-weekly basis. The remaining hourly Employees are paid on a weekly basis. The Debtors’ salaried Employees are paid twice a month. The Employees perform a variety of critical functions for the Debtors’ businesses and their skills and specialized knowledge and understanding of the Debtors’ infrastructure and operations, as well as their relationships with customers, vendors and other third parties, are essential to the success of the Debtors’ continuing operations and their ability to maximize the value of their assets.

Independent Contractors

24. In addition to their Employees, the Debtors currently employ approximately 4 independent contractors — C.H. Raches, EAP Associates Inc., Norris Sales and Fabnet Associates — to perform essential employee functions on a cost-effective basis (collective, the “**Independent Contractors**”). The Debtors employ the Independent Contractors through direct contractual arrangements with certain individuals or their personal businesses. The Independent

Contractors provide critical sales services to the Debtors in connection with the day-to-day operation of their business, and have acquired substantial knowledge regarding the Debtors' infrastructure, business systems and particularized needs. The Debtors believe that many of the Independent Contractors will cease providing services to the Debtors, to the direct detriment of the Debtors' businesses, if they are not paid amounts owing to them as of the Petition Date. The replacement of any of the Independent Contractors at this juncture would be difficult and could be accomplished only after a significant retraining period — all at increased cost to the Debtors. As a result, the payment of amounts owing to the Independent Contractors is essential to the success of the Debtors' continuing operations and their ability to maximize the value of their assets.

Additional Workforce

25. In addition to the Employees and the Independent Contractors, the Debtors also rely on other individuals to provide essential employee services (collectively, the “**Additional Workforce**”). The Additional Workforce is comprised of employees of various temporary agencies (collectively, the “**Temporary Agencies**”). As of the Petition Date, the Debtors' Additional Workforce consists of 203 employees that fulfill various positions, including engineers, accounting professionals, direct labor and supervisory staff, at the Debtors' manufacturing facilities.

26. The Debtors believe that if they are not permitted to pay the Temporary Agencies on account of the Additional Workforce (the “**Additional Workforce Costs**”), the Temporary Agencies will (a) withdraw the Additional Workforce and (b) refuse to provide the Debtors with replacement employees, to the direct detriment of the Debtors' businesses. Although the Debtors potentially could replace the Additional Workforce over an extended period of time, the Debtors believe that: (a) the abrupt departure of the Additional Workforce necessarily would cause

disruptions in the Debtors' operations and could severely impact the Debtors' relationships with their customers at a time when the importance of maintaining such relationships is paramount; and (b) the costs associated with identifying and training replacement employees, including the costs associated with the disruption to the Debtors' businesses caused by the loss of the Additional Workforce, would exceed any amounts owing to the Temporary Agencies. The Debtors estimate that the total amounts owing as Additional Workforce Costs as of the Petition Date is \$559,056.97.

Prepetition Compensation, Business Expenses and Related Claims

27. As described above, the continued and uninterrupted support of the Employees and Independent Contractors is essential to the Debtors' ongoing operations and their ability to maximize the value of their assets. As of the Petition Date, many Employees were owed or had accrued various sums for Prepetition Compensation and Prepetition Business Expenses. In addition, as of the Petition Date, the Debtors had obligations in respect of Prepetition Compensation for deductions from Employees' paychecks used to make payments on behalf of the Employees for or with respect to, among other things: (a) child support payments, garnishments, 401(k) savings plans, pension plans, flexible spending accounts, union dues, charitable contributions, a safety glasses and safety shoes program, a uniform program and other similar programs on account of which the Debtors deduct a sum of money from an Employee's paycheck and pay that amount to a third party (collectively, the "**Deductions**"); and (b) withholdings from Employees' paychecks on account of various federal, state and local income, FICA, Medicare and other taxes for remittance to the appropriate federal, state, or local taxing authority (collectively, the "**Withholdings**"). Prepetition Compensation, Prepetition Business Expenses, Deductions and Withholdings were due and owing as of the Petition Date because, among other things:

- a. the Debtors filed their chapter 11 petitions in the midst of certain of their regular and customary payroll periods, as well as in the midst of their regular reimbursement cycle for Employee and Independent Contractor business expenses;
- b. certain checks issued to the Employees and Independent Contractors prior to the Petition Date (including expense reimbursement checks) have not yet been presented for payment or have not yet cleared the banking system and, accordingly, were not honored and paid as of the Petition Date;
- c. certain Employees and Independent Contracts have not yet been paid portions of their salaries, contractual compensation and wages for services previously rendered to the Debtors or have not yet been reimbursed for business expenses previously advanced on behalf of the Debtors; and
- d. certain other forms of compensation (including sick pay, vacation pay and holiday pay) related to prepetition services have not yet been paid to, or for the benefit of, the Employees because such amounts, although accrued in whole or in part prior to the Petition Date, were not payable at such time, but rather will become payable in the future in the ordinary course of the Debtors' businesses.

28. The Debtors seek authority to pay all (a) Prepetition Compensation, (b) Prepetition Business Expenses, (c) Deductions and (d) Withholdings attributable to the period prior to the Petition Date. The Debtors estimate that, as of the Petition Date, approximately \$1,298,998.40 in Prepetition Compensation,⁴ approximately \$2,099.51 in Prepetition Business Expenses and approximately \$128,473.27 in Deductions had accrued but remain unpaid. In addition, the Debtors estimate that the amount of Withholdings attributable to compensation earned prior to the Petition Date but not yet remitted to the applicable taxing authority is approximately \$156,265.09 in the aggregate. Tables setting forth the estimated amounts of (a) the principal categories of Prepetition Compensation and Prepetition Business Expenses and (b) the principal types of Deductions are attached hereto as **Exhibit A-1** and **Exhibit A-2** respectively, and incorporated herein by reference.

⁴ Of this amount, only approximately \$452,500.06 represents obligations to Independent Contractors. Historically, Independent Contractors receive monthly compensation in the range of \$200,000.00.

Prepetition Employee Benefits

29. The Debtors maintain a number of employee benefit programs, including but not limited to: (a) health, dental, vision, prescription drug, life and disability insurance; (b) 401(k) savings plans and flexible spending accounts for certain of their Employees; and (c) other similar programs (collectively, and as described in more detail below, the “**Benefit Programs**”). The contributions to or benefits paid under the various Benefit Programs are referred to herein collectively as the “**Benefits.**”⁵

30. As of the Petition Date, certain Benefits were owed but remained unpaid because certain obligations under the Benefit Programs accrued either in whole or in part prior to the Petition Date, but will not become payable in the ordinary course of the Debtors’ businesses until a later date. A nonexclusive schedule of Benefit Programs under which prepetition Benefits are owed is attached hereto as **Exhibit B** and incorporated herein by reference.

31. The Debtors seek authority to pay all Benefits that, as of the Petition Date, had accrued but remained unpaid. The Benefits that the Debtors seek authority to pay include, but are not limited to, those owing under the following types of Benefit Programs:

- a. **Self-Insured Plans.** The Debtors maintain self-insured plans that provide general health, prescription drug, dental and short term disability (collectively, the “**Self-Insured Plans**”). Under the Self-Insured Plans, the Debtors assume liability for and initially pay certain Benefits, rather than paying premiums for independent insurance coverage. Various third parties serve as claims agents for, and process and pay, the medical, dental and short-term disability claims (collectively, the “**Self-Insured Claims**”) presented by covered Employees. The Debtors anticipate that various claims that accrued under the Self-Insured Plans prior to the Petition Date will continue to be submitted postpetition. Based on the historical levels of claims, the Debtors estimate that, as of the Petition Date, approximately \$159,043.86 in prepetition claims under the Self-Insured Plans will be submitted by Employees postpetition.

⁵ In addition, the Debtors provide the Employees with statutorily-mandated benefits such as military duty leave, jury duty leave and family medical leave.

- b. **Third-Party Insured Plans.** The Debtors also maintain certain insured benefit plans under which the Debtors, the Employees or both contribute to the payment of premiums for insurance or other coverage provided by third parties (collectively, the “**Insured Plans**”). The Insured Plans include: (i) life insurance and (ii) long term disability. Based on the historical levels of premiums under the Insured Plans, the Debtors estimate that their accrued but unpaid share of premium contributions, as of the Petition Date, was approximately \$45,300.51.

- c. **Company-Sponsored Benefit Programs.** The Debtors also maintain certain other Benefit Programs under which the Debtors, the Employees or both contribute to the Benefits provided to the Employees (collectively, the “**Noninsured Programs**”). The Noninsured Programs include, among others: (i) 401(k) savings plans; (ii) flexible spending accounts, which permit the payment of health care costs on a pre-tax basis; (iii) a vehicle allowance program; (iv) a relocation program; (v) an employee assistance program; (vi) an incentive and attendance bonus program and a gainsharing program for hourly and salaried Employees; and (vii) a savings bond program. Based on the historical levels of participation in the Noninsured Programs, the Debtors estimate that their accrued but unpaid obligations under the Noninsured Programs, as of the Petition Date, were approximately \$77,300.92.⁶

32. The Debtors seek authority to pay all Benefits, including all prepetition Benefits that already have accrued, as described herein and on the attached **Exhibit B**. The Debtors estimate that the aggregate amount of accrued Benefits, as described above, was approximately \$300,680.57 as of the Petition Date.

Processing Costs

33. The Debtors incur costs incident to Prepetition Compensation and Deductions, such as processing costs and the employer portion of payroll-related taxes, as well as accrued but unpaid prepetition charges for administration of the Benefit Programs (collectively, the

⁶ In the ordinary course of their businesses, the Debtors periodically make contributions to pension plans maintained by the Debtors for covered Employees in Crestline, Ohio and Canton, Ohio (collectively, the “**Pension Plans**”) in accordance with the Pension Plans' documents and applicable law. All funding obligations due as of the Petition Date have been paid for the Pension Plans. Additionally, the Debtors participate in a Union Sponsored Pension Plan for covered Employees in Middlefield, Ohio. As the Petition Date, the Debtors owe \$19,035.28 with respect to their obligations under this Union Sponsored Pension Plan and hereby request authority to honor this obligation postpetition.

“**Prepetition Processing Costs**”). The Debtors estimate that the aggregate amount of Prepetition Processing Costs accrued but unpaid, as of the Petition Date, was approximately \$70,000.00. Payment of the Prepetition Processing Costs is justified because the failure to pay any such amounts might disrupt services of third-party providers with respect to Prepetition Compensation, Deductions and Benefits. By paying the Prepetition Processing Costs, the Debtors may avoid even temporary disruptions of such services and thereby ensure that the Employees obtain all compensation and benefits without interruption.

BASIS FOR RELIEF REQUESTED

34. The payment of the Prepetition Compensation, Prepetition Business Expenses, Additional Workforce Costs, Deductions, Withholdings, Benefits and Prepetition Processing Costs is warranted under sections 105(a), 363(b), 507(a)(4), 507(a)(5) and 541(d) of the Bankruptcy Code and case law in this District and elsewhere.

Amounts Owed to Employees and Independent Contracts Enjoy Priority Status Under the Bankruptcy Code

35. Under section 507(a)(4) of the Bankruptcy Code, employees are granted a priority claim for:

allowed unsecured claims, but only to the extent of \$10,000 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for —

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor

11 U.S.C. § 507(a)(4). Likewise, under section 507(a)(5) of the Bankruptcy Code, employees are granted a priority claim for:

allowed unsecured claims for contributions to an employee benefit plan —

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of —

(i) the number of employees covered by each such plan multiplied by \$10,000; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

11 U.S.C. § 507(a)(5).

36. In addition, the costs of administrating employee benefits programs are also entitled to priority under section 507(a)(5) of the Bankruptcy Code. *See In re Cardinal Indus., Inc.*, 164 B.R. 76, 78 (Bankr. S.D. Ohio 1993) (“[U]nder a self-insured plan which is administered by a third party, giving priority solely to the direct contributions from the employer accomplishes only half the desired result. Unless the employees’ claims are properly administered, processed and paid, affording priority to the contributions is meaningless.”); *accord Allegheny Int’l, Inc. v. Metro. Life Ins. Co.*, 145 B.R. 820, 822-23 (W.D. Pa. 1992) (holding that the prepetition claims of a medical benefits plan administrator for fees charged for performing administrative, actuarial and claims services in connection with the medical benefits plans of a debtor were entitled to priority under former section 507(a)(4) of the Bankruptcy Code, and stating “[i]t would be useless to prioritize expenses for contributions to an employee benefit plan and not prioritize the expenses necessary to administer those plans.”).

37. In the instant case, the Debtors believe that the amount of prepetition wages, salaries and contractual compensation owing to or on account of any particular Employee and Independent Contractor will not exceed the sum of \$10,000 allowable as a priority claim under section 507(a)(4) or section 507(a)(5) of the Bankruptcy Code. Therefore, the payment of these amounts pursuant to this Motion would not deplete assets otherwise available to other unsecured creditors under a plan. Likewise, because the Prepetition Processing Costs are entitled to priority under section 507(a)(5) of the Bankruptcy Code, amounts paid on account of such Prepetition Processing Costs also are not available for distribution to unsecured creditors.

Funds Held in Trust Are Not Available for General Distribution to Creditors

38. Section 541(d) of the Bankruptcy Code excludes “property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest.” 11 U.S.C. § 541(d). It is well established under section 541(d) of the Bankruptcy Code that taxes collected on behalf of taxing authorities are not property of the estate. *See Begier v. IRS*, 496 U.S. 53, 59 (1990) (holding that taxes such as excise taxes, FICA taxes and withholding taxes are property held by the debtor in trust for another and, as such, do not constitute property of the estate); *McCafferty v. McCafferty*, 96 F.3d 192, 196 (6th Cir. 1996) (citing *Begier* with approval and stating that “[s]ection 541(d) [of the Bankruptcy Code] has often been invoked as the basis for excluding from a bankruptcy estate assets held in constructive trust by a debtor in favor of another.”); *City of Farrell v. Sharon Steel Corp. (In re Sharon Steel Corp.)*, 41 F.3d 92, 98-103 (3d Cir. 1994) (holding that funds withheld from employees’ paychecks may be subject to a trust, and thus are not property of a debtor’s estate, even where such funds are commingled with the debtor’s other property). Accordingly, such funds are not available for general distribution to a debtor’s creditors.

39. To avoid the serious disruption of the Debtors' reorganization efforts that could result from the nonpayment of any withholding taxes, the Debtors seek authority to remit all Withholdings, including prepetition Withholdings collected on behalf of the Employees, to the applicable taxing authorities to the extent that the Withholdings have not already been remitted. The Withholdings are held in trust for the benefit of the appropriate federal, state or local taxing authority for employees on behalf of whom such payment is being made. As such, the Withholdings are not property of the Debtors' estates within the meaning of section 541 of the Bankruptcy Code. Because the Withholdings are held in trust on behalf of others and thus do not constitute property of the Debtors' estates, the remittance of the Withholdings will not adversely affect the Debtors' estate or their creditors and is warranted.

40. Further, many federal, state and local taxing authorities impose personal liability on the officers and directors of entities responsible for collecting taxes from employees to the extent any such taxes are collected but not remitted. Accordingly, if these amounts remain unpaid, there is a risk that the Debtors' officers and directors may be subject to lawsuits on account of any such nonpayment during the pendency of these Cases. Such lawsuits obviously would constitute a significant distraction for officers and directors at a time when they should be focused on the Debtors' efforts to (a) stabilize their postpetition business operations and (b) maximize the value of their assets.

The Doctrine of Necessity Provides a Basis for Granting the Requested Relief

41. Section 105(a) of the Bankruptcy Code, which codifies the equitable powers of bankruptcy courts, authorizes the Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a).

42. It is well established under the “doctrine of necessity” that bankruptcy courts have the equitable power to authorize the payment of prepetition claims where such payments are necessary to preserve the going concern value of a debtor's business, thereby facilitating its reorganization. *See, e.g., Miltenberger v. Logansport, Crawfordsville and Sw. Ry. Co.*, 106 U.S. 286, 311 (1882) (holding that “[m]any circumstances may exist which may make it necessary and indispensable to . . . the preservation of the property, for the receiver to pay pre-existing debts of certain classes out of the earnings of the receivership . . .”); *see also In re Federated Dep’t. Stores*, No. 1-90-00130, 1990 Bankr. LEXIS 122, at *3 (Bankr. S.D. Ohio Jan. 15, 1990) (“It is well established that a bankruptcy court has authority to authorize payment of pre-petition claims where the payment of such claims is necessary to facilitate reorganization.”).

43. As such, a bankruptcy court's use of its equitable powers to “authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept.” *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (citing *Miltenberger*, 106 U.S. at 311); *see In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (supporting principle that bankruptcy court can authorize payment of pre-petition claims where such payment is necessary to survival of debtor); *In re SIS Corp.*, 108 B.R. 608, 609-10 (Bankr. N.D. Ohio 1989) (recognizing that courts may authorize payments on account of pre-petition claims “premised upon overriding practical and policy reasons”); *In re Structurelite Plastics Corp.*, 86 B.R. 922, 931-932 (Bankr. S.D. Ohio 1988) (agreeing in “principle that a bankruptcy court may exercise its equitable powers under section 105(a) to authorize payment of prepetition claims where such payment is necessary to permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately”) (citation omitted).

44. The bankruptcy court's exercise of its authority under the “doctrine of necessity” is appropriate to carry out specific statutory provisions of chapter 11, specifically sections 1107(a), 1108 and 363(b)(1) of the Bankruptcy Code, which authorize a debtor in possession to maintain and operate the debtor’s business and use estate property outside of the ordinary course of business. Indeed, a debtor in possession operating a business under section 1108 of the Bankruptcy Code has a duty to protect and preserve the going concern value of an operating business, and prepetition claims may be paid if necessary to perform the debtor's duty. *See In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (“There are occasions when this duty can only be fulfilled by the preplan satisfaction of a prepetition claim.”). A bankruptcy court's exercise of its authority under section 105(a) of the Bankruptcy Code is also appropriate to carry out two central policies underlying Chapter 11: (a) to permit the successful rehabilitation of the debtor; and (b) to preserve going concern value and maximize property available to satisfy all creditors.

45. In the first reorganization of The LTV Corporation and its affiliated debtors, this Court authorized the payment of certain prepetition wages, salaries and employee benefits and reimbursement of expenses, as well as certain workers’ compensation obligations, aggregating in excess of \$250 million. *See Mich. Bureau of Workers' Disability Comp. v. Chateaugay (In re Chateaugay Corp.)*, 80 B.R. 279, 281 (S.D.N.Y. 1987). On appeal, one creditor challenged the order on the ground that the debtor should have been required to pay *all* similarly situated prepetition claimants. The district court, however, affirmed the bankruptcy court's order authorizing the debtor to make selective prepetition payments, finding that such payments did not violate the claim priority provisions of section 507 of the Bankruptcy Code:

A rigid application of the priorities of § 507 would be inconsistent with the fundamental purpose of reorganization and of the Act's grant of equity

powers to bankruptcy courts, which is to create a flexible mechanism that will permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately.

* * *

In this case a restrictive interpretation of § 507 or of the powers accorded the bankruptcy court judge would similarly defeat the very end of Chapter 11 petitions.

Id. at 287; *see also Ionosphere Clubs, Inc.*, 98 B.R. at 175-76; *In re Gulf Air, Inc.*, 112 B.R. 152 (Bankr. W.D. La. 1989) (authorizing the debtor to pay certain prepetition employee claims for wages, health and life insurance and workers' compensation premiums). The court in *Gulf Air* found that such payments were in the best interests of creditors, the debtor and the debtor's employees and were essential to a successful reorganization. *See Gulf Air*, 112 B.R. at 153-54.

46. The relief sought herein is essential to the Debtors' reorganization. The Debtors seek the relief requested in this Motion with respect to the Employees and Independent Contractors because any delay or disruption in the provision of employee benefits or payment of compensation (including the payment of Prepetition Compensation, Prepetition Business Expenses, Additional Workforce Costs, Deductions, Withholdings, Benefits and Prepetition Processing Costs) will destroy the Debtors' relationships with the Employees, the Independent Contractors and Temporary Agencies and irreparably impair workforce morale at the very time when the dedication, confidence and cooperation of the Employees, Independent Contractors and the Additional Workforce are most critical. The Debtors face the risk that their operations may be severely impaired if authority is not granted immediately for the Debtors to make the payments described above

47. In addition, bolstering the morale of the Employees, Independent Contractors and the Additional Workforce and ensuring the uninterrupted availability of their services will assist

the Debtors in (a) maintaining a “business as usual” atmosphere, and (b) preserving the Debtors’ relationships with customers and vendors, as well as the general public, with which the Employees and Independent Contractors are the Debtors’ primary interface. Finally, the Debtors must continue their corporate policies of permitting certain Employees and Independent Contractors to incur business related expenses and thereafter seek reimbursement by submitting appropriate invoices or vouchers to maintain necessary oversight and quality control and to enable many key Employees and Independent Contractors to perform their jobs effectively.

48. Because the amounts represented by Prepetition Compensation, Prepetition Business Expenses and Deductions are needed to enable the Employees and Independent Contractors to meet their own personal obligations, the Employees and Independent Contractors will suffer undue hardship and, in many instances, serious financial difficulties absent the relief requested herein. Moreover, without the requested relief, the stability of the Debtors’ businesses would be undermined by the threat that otherwise loyal Employees at all levels, as well as Independent Contractors, would seek other employment.

49. In light of the foregoing, the Debtors respectfully submit that the payment of the Prepetition Compensation, Prepetition Business Expenses, Additional Workforce Costs, Deductions, Withholdings, Benefits and Prepetition Processing Costs is essential for the Debtors’ reorganization, represents an exercise of the Debtors’ sound business judgment and is in the best interests of the Debtors’ estates and creditors.

50. Relief similar to the relief requested herein has been granted by courts in this District and elsewhere in other Chapter 11 cases. *See, e.g., In re Nexpak Corp.*, No. 04-63816 (RK) (Bankr. N.D. Ohio July 19, 2004) (authorizing the debtors to pay prepetition employee obligations); *In re Am. Way Invs. Corp.*, No. 04-42629 (RB) (Bankr. N.D. Ohio June 9, 2004)

(same); *In re Summitville Tiles, Inc.*, No. 03-46341 (WTB) (Bankr. N.D. Ohio Dec. 12, 2003) (same); *In re Waving Leaves, Inc.*, No. 03-66524 (RK) (Bankr. N.D. Ohio Dec. 5, 2003) (same); *In re Republic Engineered Prods. LLC.*, No. 03-55118 (MSS) (Bankr. N.D. Ohio Oct. 8, 2003); *In re Harry London, Inc.*, No. 03-60137 (RK) (Bankr. N.D. Ohio Jan. 15, 2003) (same); *In re LTV Steel Co.*, No. 00-43866 (WTB) (Bankr. N.D. Ohio Dec. 29, 2000) (same); *accord In re Dana Corp.*, No. 06-10354 (BRL) (Bankr. S.D.N.Y. Mar. 3, 2006) (same); *In re Musicland Holding Corp.*, No. 06-10064 (SMB) (Bankr. S.D.N.Y. Feb. 1, 2006) (same); *In re Calpine Corp.*, No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 21, 2005) (same).⁷

REQUEST FOR AUTHORITY FOR BANKS TO HONOR CHECKS AND PAY CHECKS ISSUED TO PAY PREPETITION COMPENSATION, PREPETITION BUSINESS EXPENSES, ADDITIONAL WORKFORCE COSTS DEDUCTIONS, WITHHOLDINGS, BENEFITS AND PREPETITION PROCESSING COSTS

51. In addition, by this Motion, the Debtors request that all applicable banks and other financial institutions be authorized and directed, when requested by the Debtors in the Debtors' sole discretion, to receive, process, honor and pay any and all checks presented for payment of, and to honor all fund transfer requests made by the Debtors related to Prepetition Compensation, Prepetition Business Expenses, Additional Workforce Costs, Deductions, Withholdings, Benefits and Prepetition Processing Costs, whether such checks were presented or fund transfer requests were submitted prior to or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments. The Debtors represent that these checks are drawn on identifiable payroll and disbursement accounts and can be readily identified as relating directly to the authorized payment of Prepetition Compensation, Prepetition Business Expenses, Additional Workforce Costs, Deductions, Withholdings, Benefits and Prepetition Processing

⁷ Because of the voluminous nature of these unreported orders, they are not attached to this Motion. Copies of these orders will be made available to parties upon request from the Debtors' counsel.

Costs. Accordingly, the Debtors believe that checks other than those relating to authorized payments will not be honored inadvertently.

52. The Debtors further represent that they have anticipated access to sufficient debtor in possession financing to pay all Prepetition Compensation, Prepetition Business Expenses, Additional Workforce Costs, Deductions, Withholdings, Benefits and Prepetition Processing Costs, to the extent described herein, as such amounts become due in the ordinary course of their businesses.

53. Nothing contained herein is intended or should be construed as: (a) an admission as to the validity of any claim against the Debtors; (b) a waiver of the Debtors' rights to dispute any claim on any grounds; (c) a promise to pay any claim; (d) an implication or admission that any particular claim is a claim for Prepetition Compensation, Prepetition Business Expenses, Additional Workforce Costs, Deductions, Withholdings, Benefits and Prepetition Processing Costs; or (e) a request to assume any executory contract or unexpired lease, pursuant to section 365 of the Bankruptcy Code.

NOTICE

54. Notice of the Motion has been given to (a) the Office of the United States Trustee for the Northern District of Ohio, (b) the Debtors' secured lenders, and (c) the Debtors' fifty (50) largest unsecured creditors on a consolidated basis. The Debtors submit that, under the circumstances, no other or further notice need be given.

55. Because this Motion presents no novel issues of law and the authorities relied upon are stated herein, the Debtors respectfully request that this Court waive the requirement contained in Local Bankruptcy Rule 9013-1(a) that the Debtors file a separate memorandum of law in support of this Motion.

56. Notwithstanding the possible applicability of Bankruptcy Rules 6004(h), 7062, 9014 or otherwise, the Debtors request the relief sought by this Motion be immediately effective and enforceable upon entry of the order requested hereby.

57. No prior request for the relief sought in this Motion has been made to this or any other Court.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court (a) enter an order substantially in the form annexed hereto as **Exhibit C**, granting the relief requested herein; and (b) grant such other and further relief to the Debtors as the Court may deem proper.

Dated: September 20, 2006
Cleveland, OH

CEP HOLDINGS, LLC, et al.,
Debtors and Debtors-in-possession

By: /s/ Joseph F. Hutchinson, Jr.
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