

**IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

<b>In re:</b>	)	
	)	<b>Case No: 09-14089 (BLS)</b>
<b>Taylor-Wharton International LLC, et al.</b>	)	<b>Jointly Administered</b>
	)	
<b>Debtors.</b>	)	<b>Hearing Date: 2/16/10 @ 10:00 a.m.</b>
<hr/>	)	<b>Objections Due: 2/8/2010 @ 4:00 p.m.</b>

**LIMITED OBJECTION OF WORTHINGTON CYLINDER CORPORATION TO  
CONFIRMATION OF JOINT PLAN OF REORGANIZATION OF TAYLOR-  
WHARTON INTERNATIONAL LLC AND ITS AFFILIATED DEBTORS UNDER  
CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE**

Worthington Cylinder Corporation (“Worthington”), by and through its undersigned counsel, hereby files this Limited Objection (the “Limited Objection”) to confirmation of the Joint Plan of Reorganization of Taylor-Wharton International LLC and its Affiliated Debtors under Chapter 11 of the United States Bankruptcy Code (the “Plan”) (Dkt. No. 77). In support of its Limited Objection, Worthington respectfully states:

**SUMMARY OF OBJECTION**

1. Worthington generally supports the Debtors’<sup>1</sup> efforts to reorganize, and most aspects of the Plan. Worthington solely objects to confirmation of the Plan to the extent that the injunction and release language, and any similar language, in the Plan, as proposed, could be construed to impair Worthington’s rights to funds held in escrow pursuant to agreements (collectively, as further described and defined below, the “Agreement”) entered into between Worthington and Debtor Taylor-Wharton International LLC (“TWI”) as part of Worthington’s prepetition purchase of the membership interest in a TWI subsidiary. Among other things, the

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<sup>1</sup> Debtors include: Taylor-Wharton International LLC (09-14089), TWI-Holding LLC (09-140101), Taylor-Wharton Intermediate Holdings LLC (09-14096), Alpha One, Inc (09-14090), Beta Two Inc. (09-14092), Gamma Three Inc. (09-14095) Delta Four Inc. (09-14093), Epsilon Five Inc. (09-14094), TW Cryogenics LLC (09-14094), TW Cylinders LLC (09-14090), TW Cylinders LLC (09-14099), Sherwood Valve LLC (09-14097), American Welding & Tank LLC (09-14091), and TW Express LLC (09-14100).

Agreement provided that \$2,000,000 of the purchase price would be held in escrow for specified periods as security for Worthington's indemnification rights against TWI under the Agreement. TWI's right to the escrowed funds (the "Funds") – and therefore the estate's right – is limited to receiving any Funds to which Worthington does not become entitled by agreed-upon deadlines under the Agreement. Accordingly, the Plan cannot lawfully discharge any claims Worthington has against the Funds under the Agreement, and cannot vest the Funds in the Debtors post-confirmation except as provided by the Agreement. Worthington therefore objects to the Plan, solely to the extent that the Plan would enjoin, release, discharge or otherwise adversely affect Worthington's rights under the Agreement to the Funds.

### **FACTS**

1. On November 18, 2009 (the "Petition Date"), the Debtors filed voluntary chapter 11 petitions with this Court. No committee of unsecured creditors, trustee or examiner has been appointed in Debtors' bankruptcy cases.
2. On December 4, 2009, the Debtors filed the Plan. The Plan states that with inapplicable exceptions, any person or entity holding a Claim (as defined in the Plan) against the Debtors shall be deemed to have released the Debtors and others from "any and all Claims, Equity Interest, obligations, rights, suits, damages, causes of action, remedies, and liabilities whatsoever." Plan § 5.3. The Plan also enjoins any holder of a Claim from attempting to collect any obligation (etc.) so released. Plan § 5.4. Finally, Section 4.10 of the Plan establishes that all property of the estate not specifically disposed pursuant to the Plan will revert in the Debtors on the effective date of the Plan. Plan § 4.10; see 11 U.S.C. § 1141(b).
3. Prior to the Petition Date, on or around September 3, 2009, Worthington and TWI entered into a certain Membership Interest Purchase Agreement (the "Purchase Agreement") whereby TWI sold to Worthington TWI's membership interest in Structural Composites

Industries LLC (the “Acquired Company”), which up until that time had been a wholly owned subsidiary of TWI.

4. Section 2.2(b) of the Purchase Agreement provided that \$2,000,000 would be withheld from the purchase price and put in escrow (the “Escrow Agreement”) in order to secure Worthington’s indemnification rights under the Purchase Agreement.<sup>2</sup>

5. The Purchase Agreement, the Escrow Agreement and all related agreements are individually and collectively referred to herein as the “Agreement”.<sup>3</sup>

6. Section 9.1 of the Purchase Agreement obligated TWI to indemnify Worthington for several different post-closing contingencies, including TWI’s failure to perform any covenant or agreement of TWI contained in the Purchase Agreement. One such covenant is that TWI is required to pay any amount by which the Acquired Company’s estimated net working capital on the closing date was subsequently adjusted downward. Worthington has provided a closing balance sheet to TWI in accordance with the Purchase Agreement, showing what Worthington believed the Acquired Company’s actual net working capital was on the closing date. Further, as required by the Purchase Agreement, the parties agreed that the Final NWC Adjustment (as that term is defined in the Purchase Agreement) was in Worthington’s favor by \$130,000. TWI

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<sup>2</sup> The Escrow Agreement is an indemnity escrow agreement among Worthington, TWI and Wells Fargo Bank, N.A. as escrow agent (the “Agent”). The Escrow Agreement establishes a process whereby Worthington may make indemnification claims in writing to TWI and the Agent; TWI may object; and upon the passage of 20 days without objection or the resolution of any objection, the Agent is required to pay the amount of the claim to Worthington. To the extent that Worthington’s indemnification claims do not consume the Funds, the Escrow Agreement requires the Agent to disburse some of the Funds on specified dates. For example, six months after the closing date (i.e., March 3, 2010), the Agent must pay TWI the sum of \$1,000,000, less amounts claimed in paid or pending indemnification claims from Worthington. On December 31, 2010, the termination date of the Escrow Agreement, the Agent must pay TWI all remaining funds in the escrow account, less amounts sufficient to satisfy any pending indemnification claims. See Escrow Agreement Article 5.

<sup>3</sup> As a counterparty to the Agreement, TWI is believed to have possession of the Agreement. Due to the confidential nature of certain portions of the Agreement, no copy is attached to this Limited Objection. However, upon the request of any party in interest and after the implementation of a protective order or other mechanism to address the confidentiality of the Agreement that is satisfactory to Worthington and TWI, a copy will be provided. Further, Worthington will file a copy of the Agreement under seal to the extent required by or helpful to the Court.

confirmed its agreement with this amount on January 4, 2010 and conveyed its intent to wire those funds upon receipt of Worthington's wire instructions.

7. At a minimum, Worthington is presently owed at least \$130,000 of the Funds. However, several weeks have passed since TWI's confirmation was received, and notwithstanding the Purchase Agreement's requirement that the Final NWC Adjustment be paid to Worthington within three business days of the date when the parties agreed on the amount of the Final NWC Adjustment, TWI has not paid this amount to Worthington. This non-payment represents a breach of a covenant or agreement in the Purchase Agreement; accordingly, Worthington is entitled to deduct this amount from the escrow account established pursuant to the Escrow Agreement (the "Escrow Account").

#### **LIMITED OBJECTION TO CONFIRMATION OF THE PLAN**

8. In order to be confirmed, a plan must comply with all the requirements of Section 1129(a) of the Bankruptcy Code. The proponent has the burden of establishing that the requirements for a confirmable chapter 11 plan are met. See, e.g., In re H.H. Distributions, L.P., 400 B.R. 44, 50 (Bankr. E.D. Pa. 2009). The Plan cannot be confirmed to the extent that it would purport to vest the Funds in the Debtors post-confirmation except as provided by the Agreement or to the extent that it would purport to discharge any claims Worthington has against the Funds under the Agreement.

9. Section 541(d) of the Bankruptcy Code properly limits property of the estate to the debtor's interest in property as of the petition date.

Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to

such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d).

10. Accordingly, when—as here—a debtor has a contingent right to receive payments from an escrow account, the only interest the estate has is the right to receive those payments when the contingency occurs. See e.g., In re Atlantic Gulf Communities Corp., 369 B.R. 156, 164 (Bankr. D. Del. 2007). Stated differently, the escrow account **itself** is not property of the estate; only the debtor’s contingent interest in potential future payments is property of the estate. Id. at 164-65.

11. Neither the Plan nor a confirmation order can lawfully vest the Funds in the Debtors. The only property that confirmation of a chapter 11 plan may properly vest in the debtor is property of the estate. See 11 U.S.C. § 1141(b), (c). Because the Escrow Account is not property of the estate, the Plan is unconfirmable to the extent it seeks to vest the Escrow Account – or any interest in the Funds beyond TWI’s contingent right to receive payments on the dates specified in the Escrow Agreement – in the Debtors.

12. For the same reason, neither the Plan nor the confirmation order can release or enjoin or otherwise prejudice Worthington’s claims to or rights in the Funds. The Bankruptcy Code does not authorize a chapter 11 plan to release a non-debtor’s claims against property that is not property of the estate, especially where such property, by agreement, may not be used for any purpose other than paying such claims and returning any excess to the debtor.

## CONCLUSION

13. For the foregoing reasons, Worthington respectfully objects to confirmation of the Plan on a limited basis and requests that the Court deny such confirmation unless the Plan and proposed confirmation order clarify that the Plan does not vest the Funds in the Debtors (except as provided by the Agreement) and does not discharge, release, or otherwise prejudice any claims and/or rights that Worthington has against or in the Funds under the Agreement.

Dated: February 8, 2010

**BLANK ROME LLP**



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Attorneys for Worthington Cylinder Corporation

**CERTIFICATE OF SERVICE**

I, Michael D. DeBaecke, hereby certify that on February 8, 2010, I caused a copy of the following document to be served on the parties listed on the attached service list in the manner indicated.

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*/s/ Michael D. DeBaecke*  
Michael D. DeBaecke

Taylor-Wharton International LLC, *et al.*

Service List

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