

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

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In re: : Case No. 06-51848
: (Jointly Administered)
CEP HOLDINGS, LLC, et al.,¹ :
: Chapter 11
Debtors. :
: Honorable Marilyn Shea-Stonum
: :
: Hearing Date: 1/16/07 at 9:30 a.m.
: Objection Deadline: 1/12/07 at 4:00 p.m.
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**MOTION OF DEBTORS AND DEBTORS IN POSSESSION,
PURSUANT TO SECTION 365(d)(4) OF THE BANKRUPTCY CODE,
FOR ENTRY OF AN ORDER EXTENDING THEIR TIME TO ASSUME OR
REJECT UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY**

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 section 365(d)(4) of title 11 of the United States Code (the “**Bankruptcy Code**”), for entry of an order extending their time to assume or reject certain unexpired leases of nonresidential real property. In support of the Motion, the Debtors 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.

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

3. The statutory predicate for the relief requested herein is section 365(d)(4) of the Bankruptcy Code.

BACKGROUND

4. On September 20, 2006 (the “**Petition Date**”), each Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Pursuant to an order entered by the Court on September 26, 2006, the Cases are being 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. On September 28, 2006, the United States Trustee appointed the official committee of unsecured creditors. No trustee or examiner has been appointed.

6. On October 4, 2006, the Debtors filed the *Motion for Order (A) Granting Authority for the Sale of Assets Pursuant to § 363(b); (B) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Such Sale and Determining and Adjudicating Cure Amounts with Respect to Such Contracts and Leases Pursuant to § 365; (C) Establishing Bidding Procedures; (D) Setting Date for Auction and Hearing on Approval of Sale of Assets; and (E) Approving Form of Notice* (Docket No. 103) (the “**Sales Motion**”).

7. On November 8, 2006, the Debtors filed the *Application of Debtors and Debtors in Possession, Pursuant to Sections 327(a), 328 and 330 of the Bankruptcy Code and Bankruptcy Rule 6005, for Entry of Interim and Final Orders Authorizing Them to Employ Biditup Auctions Worldwide, Inc. as Auctioneer* (Docket No. 217) (the “**Biditup Application**”).

8. On November 21, 2006, upon consideration of the Biditup Application, the Court entered the *Final Order, Pursuant to Sections 327(a), 328 and 330 of the Bankruptcy Code and*

Bankruptcy Rule 6005, Authorizing the Debtors and Debtors in Possession to Employ Bidity Auctions Worldwide, Inc. as Auctioneer (Docket No. 247) (the “**Bidity Order**”). Pursuant to the Bidity Order, the Debtors have retained Bidity Auction Worldwide, Inc. (“**Bidity**”) as the auctioneer in these Cases.

9. Also, on November 21, 2006, upon consideration of the Sales Motion, the Court entered the *Order Authorizing (A) Auctions of Liquidating Facilities, (B) Sale of Assets Free and Clear of All Claims, Liens and Encumbrances, and (C) Debtors’ Entry into an Asset Marketing Agreement on an Interim Basis* (Docket No. 248) (the “**Sales Order**”). Pursuant to the Sales Order, the Debtors are in the process of liquidating substantially all of the assets located at the Debtors’ facilities in Vandalia, Ohio, Bishopville, South Carolina, Crestline, Ohio, Canton, Ohio, LaPeer, Michigan and Middlefield, Ohio (the “**Liquidating Facilities**”).

RELIEF REQUESTED

10. By this Motion, the Debtors seek the entry of an order, pursuant to section 365(d)(4) of the Bankruptcy Code, granting them a 90-day extension of the time to assume or reject the Unexpired Leases (as such term is defined below), through and including April 18, 2007, without prejudice to the right of the Debtors to seek further extensions upon the consent of the affected lessors.

FACTS RELEVANT TO THIS MOTION

The Unexpired Leases

11. In connection with the liquidation of their businesses pursuant to the Sales Order, certain of the Debtors currently are lessors under approximately seven unexpired leases of nonresidential real property (the “**Unexpired Leases**”). A schedule of the Unexpired Leases is attached hereto as **Exhibit A** and incorporated herein by reference (the “**Unexpired Lease Schedule**”). The Unexpired Lease Schedule identifies, for each Unexpired Lease: (a) the

location of the underlying property; and (b) the name and address of the lessor for the property (collectively, the “**Lessors**”).

12. Listing an agreement on the Unexpired Lease Schedule is not an acknowledgment by the Debtors that such agreement is, in fact, an unexpired lease subject to section 365(d)(4) of the Bankruptcy Code, and the Debtors reserve all of their rights with respect to such issue, including the right to argue that certain of these agreements constitute financing transactions rather than leases.

13. As of the date of this Motion, the Unexpired Leases remain in effect and have not expired or terminated according to their respective terms. Thus, each Unexpired Lease may constitute an “unexpired lease” subject to assumption or rejection under section 365 of the Bankruptcy Code.

Conclusion of the Auctions

14. Pursuant to the asset marketing agreement approved under the Biditup Order (as amended, the “**Asset Marketing Agreement**”), Biditup shall conduct one or more public auctions for all of the Assets (as such term is defined in the Asset Marketing Agreement), other than the Assets located at the facilities in Middlefield, Ohio and Bishopville, South Carolina, on or before December 20, 2006. Asset Marketing Agreement at § II.B. Biditup has until March 9, 2007 to conclude these auctions, which means that purchasers have until March 9, 2007 to remove their equipment from the premises. *Id.* at § II.A. With respect to the Assets located at the facilities in Middlefield, Ohio and Bishopville, South Carolina, Biditup shall conduct auctions of these Assets on or before February 15, 2007. *Id.* at § II.C. Biditup has until March 6, 2007 to conclude these auctions, which means that purchasers have until March 6, 2007 to remove their equipment from the premises. *Id.* at § II.A.

15. Accordingly, while the Debtors' business operations have essentially ceased, the Debtors continue to occupy the premises leased under the Unexpired Leases in connection with the auctions authorized under the Sales Order. The Debtors may be able to vacate certain of the premises leased under the Unexpired Leases prior to March of 2007, pending on the date Biditup concludes the auctions. It is possible, however, that the Debtors will need to retain their rights under the Unexpired Leases through March 9, 2007 in order to permit Biditup to conclude the auctions. The Debtors anticipate filing motions to reject the Unexpired Leases once the Debtors know when they will be able to fully vacate the premises.

BASIS FOR RELIEF REQUESTED

16. Granting the Debtors a 90-day extension in which to assume or reject the Unexpired Leases is warranted under section 365(d)(4) of the Bankruptcy Code and applicable case law.

17. Section 365(d) of the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("**BAPCPA**"), which became effective on October 17, 2005, provides as follows:

(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of —

- (i) the date that is 120 days after the date of the order for relief; or
- (ii) the date of the entry of an order confirming a plan.

(B) (i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

11 U.S.C. § 365(d)(4). Accordingly, the Debtors have 120 days from the Petition Date, or until January 18, 2007, to assume or reject the Unexpired Leases, unless this deadline is extended for up to an additional 90 days by order of the Court, or longer by consent of the applicable Lessor.²

18. Section 365(d)(4)(B)(i) of the Bankruptcy Code provides that upon a showing of “cause” by a debtor, a court may extend the time period in which a debtor must assume or reject unexpired leases of nonresidential real property for an additional 90 days beyond the 120 days provided for in section 365(d)(4)(A) of the Bankruptcy Code.

19. At least one court has held that such 90-day extension must actually be granted within 120 days from the petition date. *See In re Tubular Techs., LLC*, 348 B.R. 699, 708-09 (Bankr. D.S.C. 2006) (holding that a debtor may not obtain an extension to assume or reject an unexpired lease of nonresidential real property “if the extension is not *granted* within the first 120 days of [the] case”) (emphasis added). Accordingly, the Court must determine whether the Debtors have made a sufficient showing of “cause” to warrant a 90-day extension prior to January 18, 2007. To this end, the Debtors have filed this Motion in time for the Court to hold a hearing on the Motion on January 16, 2007 — prior to the January 18, 2007 deadline.

20. In determining whether “cause” exists to extend the time period in which a debtor may assume or reject unexpired leases of nonresidential real property, courts generally consider the following factors:

- a. Whether the lease is a primary asset central to the reorganization;

² The Debtors request that any unexpired lease of nonresidential real property (a) that is not listed on **Exhibit A** of this Motion and for which the 120-day deadline is not extended and (b) that has not been assumed, assumed and assigned or rejected pursuant to another order of this Court, be deemed rejected under section 365(d)(4)(A) of the Bankruptcy Code effective as of January 18, 2007.

- b. Whether the debtor needs additional time to act intelligently in making the judgment to assume or reject;
- c. Whether the lease in question is one of a number of business properties whose acceptance or rejection requires additional time for study and determination;
- d. Whether the debtor complied with its postpetition obligations under the lease; and
- e. The affect of the debtor's continued possession of the premises on the lessor.

See In re Columbus One Parcel Serv., Inc., 138 B.R. 194, 195 (Bankr. S.D. Ohio 1992); *In re Perfectlite Co.*, 116 B.R. 84, 86 (Bankr. N.D. Ohio 1990); *see also In re Cook United, Inc.*, 83 B.R. 456, 458 (Bankr. N.D. Ohio 1988) (extending the time period for the assumption and rejection of unexpired leases for the purpose of “conclud[ing] anticipated sales transactions pertaining to the Debtor’s leasehold interests.”).

21. These factors support a finding of cause to extend the 120-day period by 90 days in these Cases. First, the Unexpired Leases provide the Debtors with, among other things, facilities that are needed to conduct the auctions contemplated under the Sales Order. The loss of the premises subject to the Unexpired Leases prior to the conclusion of the sale process would be highly detrimental to the Debtors’ efforts to maximize the value of their estates for the benefit of all parties in interest. *See Cook United, Inc.*, 83 B.R. at 458.

22. Second, until the sales process is further along, the Debtors cannot intelligently make a judgment regarding the assumption or rejection of the Unexpired Leases. It generally is known that the Debtors will be rejecting the Unexpired Leases related to the Liquidating Facilities. However, the Debtors will not be in a position to vacate the underlying premises and properly reject certain of the Unexpired Leases until March of 2007. Accordingly, forcing the Debtors to make a decision with respect to the Unexpired Leases prior to January 18, 2007

would result in the premature and improvident assumption of certain Unexpired Leases that the Debtors later reject — thus creating needless administrative claims that would be detrimental to the Debtors' unsecured creditors and other parties in interest. *See* 11 U.S.C. § 365(b)(1)(A) (providing that a debtor must cure certain defaults as a condition to assumption under section 365(a) of the Bankruptcy Code). Granting the Debtors additional time to make a decision would eliminate the risk of such an improvident assumption.

23. Third, the Unexpired Leases involve approximately seven business properties located in Ohio, Michigan and South Carolina. The Debtors' operations are sufficiently complex that granting an extension under section 365(d)(4) of the Bankruptcy Code is appropriate.

24. Fourth, the Debtors, by and through their DIP Facility, have remained current on all or nearly all of their postpetition obligations under the Unexpired Leases.

25. Finally, because the Debtors are continuing to pay rent and honor their obligations under the Unexpired Leases, the Debtors do not believe that their continued possession of the premises at issue is detrimental to the Lessors. Pending the Debtors' election to assume or reject each of the Unexpired Leases, the Debtors will continue to perform substantially all of their obligations arising under the Unexpired Leases from and after the Petition Date in a timely fashion. Thus, the 90-day extension requested by this Motion will not prejudice the Lessors under the Unexpired Leases. Further, the Debtors propose that any order granting the relief requested in this Motion be entered without prejudice to the right of any Lessor to seek an order requiring the Debtors to elect to assume or reject a particular Unexpired Lease prior to April 18, 2007.

26. For all of these reasons, the Debtors submit that it would be imprudent to make assumption or rejection decisions with respect to all of the Unexpired Leases prior to January 18,

2007. Thus, there is cause to extend the deadline by which the Debtors must assume or reject the Unexpired Leases from January 18, 2007, by an additional 90 days, to April 18, 2007, pursuant to section 365(d)(4)(B)(i) of the Bankruptcy Code.

27. Relief similar to that requested by this Motion has been granted by courts in other Chapter 11 cases since the enactment of BAPCPA and the recent amendments to section 365 of the Bankruptcy Code. *See, e.g., In re Oneida Ltd.*, No. 06-10489 (ALG) (Bankr. S.D.N.Y. July 13, 2006) (order granting 90-day extension of the time period in which the debtors must assume or reject unexpired leases of nonresidential real property); *In re Dana Corp.*, No. 06-10354 (BRL) (Bankr. S.D.N.Y. June 28, 2006) (same); *In re Calpine Corp.*, No. 05-60200 (BRL) (Bankr. S.D.N.Y. Apr. 11, 2006) (same); *In re Flyi, Inc.*, No. 05-20011 (MFW) (Bankr. D. Del. Mar. 1, 2006) (same); *In re Refco, Inc.*, No. 05-60006 (RDD) (Bankr. S.D.N.Y. Jan. 17, 2006) (same).

NOTICE

28. Notice of the Motion has been given to the parties listed on the Core Group and the 2002 Service List maintained by the Debtors and any other parties in interest directly affected by this Motion, including the Lessors.

29. 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.

30. 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 attached hereto as **Exhibit B**, granting the relief requested herein; and (b) grant such other and further relief to the Debtors as the Court may deem proper.

Dated: December 19, 2006
Cleveland, OH

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

By: /s/ Joseph F. Hutchinson, Jr.
One of Their Attorneys

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