

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

IN RE:	:	Case No. 06-51848
	:	Jointly Administered
CEP Holdings, LLC, et al.,	:	
	:	Chapter 11
	:	
Debtors.	:	Judge Marilyn Shea-Stonum

**AMENDED APPLICATION OF CARLISLE ENGINEERED PRODUCTS, INC.
FOR THE ALLOWANCE OF ADMINISTRATIVE EXPENSE CLAIM**

Carlisle Engineered Products, Inc. (“Carlisle”), through its undersigned counsel, hereby submits this Amended Application for the Allowance of an Administrative Expense Claim (the “Application”) pursuant to 11 U.S.C. §§ 365(d)(5) and 503(b)(1). In this Application, Carlisle respectfully requests that this Court enter an order granting Carlisle an allowed administrative expense claim in the amount of \$244,294.08, which includes (1) a claim in the amount of \$81,431.36 pursuant to § 365(d)(5) of the Bankruptcy Code; and (2) a claim, pursuant to § 503(b)(1), in the amount of \$162,862.72 as an actual, necessary cost and expense of preserving the estates of CEP Holdings, LLC (“CEP Holdings”) and Creative Engineered Polymer Products, LLC (“CEPP,” collectively with CEP Holdings, the “Debtors”). This request is in addition to Carlisle’s proofs of claim for lease rejection damages in the amount of \$1,796,911.64, filed January 9, 2007 as Claim No. 5 in Case No. 06-51847 and Claim No. 7 in Case No. 06-51848. Carlisle’s

administrative expense claim is for unpaid, post-petition, pre-rejection amounts that have accrued under the Equipment Lease (defined hereafter).

STATEMENT OF FACTS

Carlisle was the original lessee under that certain Master Lease dated August 28, 1998 and that certain Lease Schedule No. 1000108960 (collectively, the “Equipment Lease”), in which Banc One Leasing Corporation and, through various mergers and acquisitions, Chase Equipment Leasing Inc. (“Chase”) were the original lessors, of four (4) HPM Injection Molding Machines, Model MLH 3300WP-4000, Serial Nos. 97063, 97064, 97065, and 99099 and four (4) HPM Injection Molding Machines, Model MLH165DWP-260, Serial Nos. 97059, 97060, 97061 and 97062 (collectively, the “Molding Equipment”). A copy of the Master Lease and the Lease Schedule No. 1000108960 is attached hereto and incorporated by reference herein as Exhibit A.

The Debtors acquired their interest in the Equipment Lease and the Molding Equipment as a result of that certain Asset Purchase Agreement CEP Acquisition, LLC, n/k/a Creative Engineered Polymer Products, LLC (“CEPP”) entered into with Carlisle on August 17, 2005.¹ Subsequently, Carlisle acquired Chase’s interests as the lessor through an assignment dated December 18, 2006. A copy of the pertinent assignment documents is attached hereto and incorporated by reference herein as Exhibit B.

On September 20, 2006 (the “Petition Date”), the Debtors filed their voluntary petition under Chapter 11 of the Bankruptcy Code. The Debtors did not elect to reject the Equipment Lease during the 60-day payment moratorium provided by 11 U.S.C.

¹ Carlisle believes that CEPP is the appropriate Debtor for the purposes of this claim; however, Carlisle also submits its claim for administrative expenses against CEP Holdings in order to protect its interests to the extent that CEP Holdings is obligated to Carlisle in relation to the matters set forth in this Application.

§365(d)(5). Instead, the Debtors utilized the Molding Equipment in their Tuscaloosa, Alabama and Crestline, Ohio facilities.

Under the authority granted in this Court’s Order (A) Granting Authority for the Sale of Assets Pursuant to § 363(b), and (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 (the “Sale Order”), the Debtors rejected the Equipment Lease effective December 14, 2006 (the “Rejection Date”). As of the Rejection Date, the Debtors owed the monthly payment, late fee and use tax for the months of October, November and December of 2006 under the Equipment Lease. The accrued unpaid post-petition amounts due under the Equipment Lease total \$244,294.08.²

STATEMENT OF LAW

I. Administrative Claim Pursuant to § 365(d)(5).

11 U.S.C. § 365(d)(5) states:

The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. (Emphasis added.)

² Post-petition lease payments = (monthly payment + monthly late fee + monthly use tax) * 3 = (\$75,577.60 + (5% * 75,577.60) + \$2,074.88) * 3 = \$244,294.08

Section 365(d)(5), therefore, expressly and unambiguously requires that a Chapter 11 debtor start making timely payments under an unexpired personal property lease once the 60-day administrative stay has expired, and keep making payments until the court approves the debtor's rejection of the underlying lease. *See In re Elder-Beerman Stores Corp.*, 201 B.R. 759, 764 (Bankr.S.D.Ohio 1996); *In re Eastern Agri-Systems, Inc.*, 258 B.R. 352, 354 (Bankr.E.D.N.C. 2000); *In re Magnolia Gas Co., LLC*, 255 B.R. 900, 917 (Bankr.W.D.Okla. 2000). Section 365(d)(5) expressly provides that it overrides § 503(b)(1), thereby eliminating the analysis of whether the accrued rent was "actual" or "necessary." 7 ALAN RESNICK ET AL., *COLLIERS ON BANKRUPTCY* § 365.04[6] (5th ed. 2006).³

After the 60-day suspension of payments provided by § 365(d)(5), but before the Rejection Date, the December 1, 2006 payment became due and owing. Pursuant to § 365(d)(5), the Debtors were obligated to make their December lease payment, in the amount of \$81,431.36.⁴ Accordingly, Carlisle is entitled to an administrative expense claim in the amount of \$81,431.36 pursuant to § 365(d)(5).

II. Administrative Claims Pursuant to § 503(b)(1).

Section 503 of the Bankruptcy Code provides in pertinent part:

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed

³ *In re Phar-Mor, Inc., et al.*, 336 B.R. 326, 335-337 (Bankr. N.D. Ohio 2006), *aff'd Giant Eagle, Inc., et al. v. Phar-Mor, Inc.*, 2006 WL 2165640 (N.D. Ohio July 31, 2006), recognized that a debtor "must" perform all obligations owing under a lease, particularly the obligation to pay rent at the contract rate until the lease is rejected. The *Phar-Mor* court's consideration of the equitable arguments presented demonstrates that absent a showing by the debtor that the equities demand that such rent be denied or reduced, § 365(b)(5) claimants are entitled to payment of post-petition, pre-rejection rents due under leases of personal property.

⁴ December lease payment = monthly payment + late fee + use tax = \$75,577.60 + \$3,778.88 + \$2,074.88 = \$81,431.36.

administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1)(A) the actual, necessary costs and expenses of preserving the estate...

11 U.S.C. § 503.

In re Phar-Mor, Inc., et al., 336 B.R. 326, 335-337 (Bankr. N.D. Ohio 2006), examined whether an equipment lessor was entitled to administrative expense status pursuant to § 503(b)(1) for rent that accrued post-petition, pre-rejection under a personal property lease. After finding that the debtor used the leased equipment and benefited from that use, the Court held that the lessor was entitled to its administrative expense claim. Id., at 336 and 338.

Similar to Phar-Mor, the Debtors utilized and benefited from the leased Molding Equipment. From the Petition Date through the 60 day payment suspension period under § 365(d)(5) (and up until the Rejection Date), the Debtors operated and used the Molding Equipment located at their Tuscaloosa facility. The Molding Equipment at the Tuscaloosa facility was vital to production and ongoing operations, and facilitated the Debtors' ultimate sale of Tuscaloosa as a going concern. Similarly, the Debtors utilized the remaining pieces of Molding Equipment at their Crestline facility during at least some part of the § 365(d)(5) 60-day moratorium period and prior to the cessation of operations at Crestline. Accordingly, the Molding Equipment clearly benefited the Debtor's Crestline operations for some definable time period and arguably enhanced the auction conducted there.

The Debtors' post-petition, pre-rejection use of the Molding Equipment during the moratorium period provided a benefit to the Debtors and their respective estates. During

this time period, the October 1 and November 1, 2006 rental payments, in the aggregate amount of \$162,862.72⁵, became due and owing. This unpaid, post-petition, pre-rejection obligation constitutes an actual and necessary cost and expense of preserving the Debtors' respective bankruptcy estates. Therefore, this amount—or a substantial portion thereof—should be allowed as an administrative expense pursuant to § 503(b)(1) of the Bankruptcy Code.

CONCLUSION

By this Application, Carlisle respectfully seeks the allowance of an administrative expense claim in the amount of \$244,294.08, for amounts due under the Equipment Lease during the period following the Petition Date and preceding the Rejection Date. Carlisle submits that unpaid amounts accruing during the 60-day moratorium imposed by § 365(d)(5) (\$162,862.72) constitute administrative expenses pursuant to § 503(b)(1). Carlisle further submits that the December, 2006 payment (\$81,431.36) is an administrative expense under §365(d)(5), notwithstanding the requirements of §503(b)(1), and should be allowed in its entirety. Finally, Carlisle requests that its allowed administrative claim be paid at such time as deemed appropriate by the Court.

⁵ Post-petition moratorium lease payments = (monthly payment + monthly late fee + monthly use tax) * 2 = (\$75,577.60 + (5% * 75,577.60) + \$2,074.88) * 2 = \$162,862.72

Respectfully submitted,

/s/ Carrie M. Brosius

Drew T. Parobek (0016785)

Carrie M. Brosius (0075484)

Vorys, Sater, Seymour and Pease LLP

2100 One Cleveland Center

1375 East Ninth Street

Cleveland, Ohio 44114

(216) 479-6100 (Telephone)

(216) 479-6060 (Facsimile)

dtparobek@vssp.com

cmbrosius@vssp.com

Attorneys for Attorneys for Carlisle
Engineered Products, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2007, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Donald F Baty dbaty@honigman.com
Brenda K Bowers bkbowers@vssp.com, eplitfin@vssp.com;cdfricke@vssp.com
Lynn M Brimer lbrimer@strobplpe.com, sfraser@strobplpc.com
Carrie M Brosius cmbrosius@vssp.com, jahelse@vssp.com
Darrell A Clay dclay@walterhav.com
Kimberly A. Coleman bankruptcy@leechee.com
Jeremy M. Downs jeremy.downs@goldbergkohn.com
Richard L Ferrell ferrell@tafflaw.com
Mark E. Freedlander mfreedlander@mcguirewoods.com,
hhickman@mcguirewoods.com
David M Fusco dfusco@smenlaw.com, dmfuscolaw@yahoo.com
Eric R. Goodman egoodmanbakerlaw.com
Michael C Hammer mchammer@dickinsonwright.com
John 3 Hunter jrhunter@hunterschank.com,
pclemens@hunterschank.com;jrhunterwcnet.org
Joseph F. Hutchinson jhutchinson@bakerlaw.com
Shira R. Isenberg shira.isenberg@goldbergkohn.com, amy.halpin@goldbergkohn.com
Kristi A. Katsma kkatsma@dickinsonwright.com
Nicole Y Lamb-Hale nlamb-hale@foley.com, pkinney@foley.com
David M Neumann dneumann@bfca.com,
docket@bfca.com;lbehra@bfca.com;cthompson@bfca.com
Michael M. Parker mparker@fulbright.com, bbuchan@fulbright.com
Drew T Parobek dtparobek@vssp.com
James A Plemmons jplemmons@dickinsonwright.com
Thomas B Radom radom@butzel.com, Vangorpbutzel.com
Carl D Rafoth crafoth@fandrlaw.com
Eric T. Ray eray@balch.com, rmjohnson@balch.com
Jean Robertson jrobertson@mcdonaldhopkins.com, jrobertson@mcdonaldhopkins.com
Edward T. Sable tsable@honigman.com
Sarah Seewer sseewer@honigman.com
toole@buckleyking.com
Andrew L. Turscak andrew.turscak@thompsonhine.com
W Clark Watson cwatson@balch.com
Thomas M Wearsch twearsch@bakerlaw.com
Gilbert B Weisman NOTICES@BECKET-LEE.COM
Maria D. Giannirakis ustO6 maria.d.giannirakis@usdoj.gov

/s/ Carrie M. Brosius
One of the Attorneys for Carlisle Engineered
Products, Inc.