

(D29580/mts)

IN THE UNITED STATE BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE:	)	Case No. 06-51848
	)	
CEP Holding, LLC	)	Judge Marilyn Shea-Stonum
	)	
	)	Chapter 11
	)	
Debtor.	)	

**CITICAPITAL COMMERCIAL CORPORATION’S MOTION FOR (1) ADEQUATE PROTECTION; (2) FOR ALLOWANCE AND IMMEDIATE PAYMENT OF POST-PETITION LEASE OBLIGATIONS; (3) TO COMPEL ASSUMPTION OR REJECTION OF MASTER EQUIPMENT LEASE AGREEMENTS; AND (4) TO GRANT IT RELIEF FROM THE AUTOMATIC STAY**

CitiCapital Commercial Corporation, creditor and party in interest in the above-captioned case, hereby moves this Court pursuant to 11 U.S.C. § 362(d)(1), 363(e), 365(d)(2), 365(d)(10), 502(f), 503, and 507(a) for adequate protection for the allowance and immediate payment of post-petition lease obligations, to compel the assumption or assignment of leases, or provide it relief from the automatic stay. In support of this motion, CitiCapital Commercial Corporation states as follows:

**MEMORANDUM OF LAW IN SUPPORT**

**BACKGROUND**

1. On or about September 20, 2006, CEP Holdings, LLC, filed for relief under chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”).

2. Since the filing of the Chapter 11, the Debtor has remained in possession of CitiCapital Commercial Corporation’s property and has continued to operate their businesses pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

3. The Court has jurisdiction of this matter pursuant to Sections 157 and 1334 of Title 28 of the United States Code. This is a core proceeding pursuant to Section 157(b)(2) of Title 28 of the United States Code.

## THE LEASE AGREEMENTS

### **A. Lease Agreement of Genie GS1930 Electric Scissor Lift**

4. On or about September 22, 2000 CEP Holdings, LLC, the Debtor herein entered into a lease agreement herein with CitiCapital Commercial Corporation to lease a certain Genie GS1930 Electric Scissor Lift Serial #GS30-49303 Contract Number 005-0066342-014. Under said lease the Debtor was obligated to make sixty (60) monthly payments of \$234.21 each. A copy of said lease is attached hereto as Exhibit "A".

5. Debtor has not made a payment under the lease since November 6, 2006. The Lease as of January 25, 2007 is three (3) months past due. The post-petition arrearage is \$1,061.80.

6. Movant has reason to believe that Debtor has not maintained insurance coverage on Movant's collateral for loss and damages as required by the Contract.

### **B. Lease Agreement of Two Mitsubishi FGC30KLP 186 Triplex Mast/60" Forks/SS/HSG**

7. On or about December 24, 2003 CEP Holdings, LLC, the Debtor herein entered into a lease agreement with CitiCapital Commercial Corporation to lease a certain Two (2) Mitsubishi FGC30KLP 186" Triplex Mast/60" Forks/SS/HSG Serial Number AF83D00393 and AF83D00394 Contract Number 005-0066342-015. Under said lease the Debtor was obligated to make thirty-six (36) monthly payments of \$968.31 each. A copy of said lease is attached hereto as Exhibit "B".

8. Debtor has not made a payment under the lease since November 6, 2006. The Lease as of January 23, 2007 has matured. The total balance due and owing \$14,086.41 is due immediately.

9. Movant has reason to believe that Debtor has not maintained insurance coverage on Movant's collateral for loss and damages as required by the Contract.

### **C. Lease Agreement of Two Caterpillar GC25KLP 188" Triplex S/S 48" FKS**

10. On or about January 6, 2004 CEP Holdings, LLC, the Debtor herein entered into a lease agreement with CitiCapital Commercial Corporation to lease a certain two (2) Caterpillar GC25KLP 188" Triplex, S/S 48" FKS Serial Numbers AT82D03632 and AT82D03633, Contract number 005-0066342-016. Under said lease the Debtor was obligated to make forty-eight (48) monthly payments of \$667.20 each. A copy of said lease is attached hereto as Exhibit "C".

11. Debtor has not made a payment under the lease since November 6, 2006. The Lease as of January 24, 2007 is four (4) months past due. The post-petition arrearage is \$2,838.85.

12. Movant has reason to believe that Debtor has not maintained insurance coverage on Movant's collateral for loss and damages as required by the Contract.

**D. Lease Agreement of Caterpillar GC18KLP 217" Triplex, SS, 42" FKS**

13. On or about May 6, 2004 CEP Holdings, LLC, the Debtor herein entered into a lease agreement with CitiCapital Commercial Corporation to lease a certain Caterpillar GC18KLP 217" Triplex, SS 42" FKS Serial Number AT81E00032, Contract Number 005-0066342-017. Under said lease the Debtor was obligated to make forty-eight (48) monthly payments of \$283.21 each. A copy of said lease is attached hereto as Exhibit "D".

14. Debtor has not made a payment under the lease since November 6, 2006. The Lease as of January 24, 2007 is four (4) months past due. The post-petition arrearage is \$1,232.82.

15. Movant has reason to believe that Debtor has not maintained insurance coverage on Movant's collateral for loss and damages as required by the Contract.

**E. Lease Agreement of Mitsubishi FGC30KLP Triple, SS, 60 FKS**

16. On or about October 22, 2004, CEP Holdings, LLC, the Debtor herein entered into a lease agreement with CitiCapital Commercial Corporation to lease a certain Mitsubishi FGC30KLP Triple, SS 60 FKS Serial Number AF83F00061, Contract Number 005-0066342-018.

Under said lease the Debtor was obligated to make forty-eight (48) monthly payments of \$499.70 each. A copy of said lease is attached hereto as Exhibit "E".

17. Debtor has not made a payment under the lease since November 10, 2006. The Lease as of January 24, 2007 is four (4) months past due. The post-petition arrearage is \$1,834.89.

18. Movant has reason to believe that Debtor has not maintained insurance coverage on Movant's collateral for loss and damages as required by the Contract.

**F. Lease Agreement of Mitsubishi FGC25N Triplex Mast, Integrated Sideshifter 46" Pallet Forks**

19. On or about February 16, 2006, CEP Holdings, LLC, the Debtor herein entered into a lease agreement with CitiCapital Commercial Corporation to lease a certain Mitsubishi FGC25N Triplex Mast, Integrated Sideshifter, 46" Pallet Forks Serial Number AF82F01912, Contract Number 005-0246879-001. Under said lease the Debtor was obligated to make thirty-six (36) monthly payments of \$525.38 each. A copy of said lease is attached hereto as Exhibit "F".

20. Debtor has not made a payment under the lease since December 14, 2006. The Lease as of January 24, 2007 is one (1) month past due. The post-petition arrearage is \$496.12.

21. Movant has reason to believe that Debtor has not maintained insurance coverage on Movant's collateral for loss and damages as required by the Contract.

22. Upon information and belief, Debtor CEP Holdings, LLC, is using the collateral provided under the Master Equipment Lease Agreement in the day-to-day operation of their business and the leased collateral is essential to the conduct of Debtor's business. The Debtor has failed to make any payment for its post-petition continued use of the collateral.

**BASIS FOR RELIEF**

**Adequate Protection**

23. Pending the Debtor's assumption or rejection of the Master Equipment Lease Agreement, the Debtor is obligated, pursuant to Section 363(e) of the Bankruptcy Code, to provide

adequate protection for the interests of CitiCapital Commercial Corporation in the equipments subject to the Equipment Leases. Section 363(e) provides that the Court with or without a hearing shall prohibit or condition the use, sale of leases of property, including personal property subject to an unexpired leases, as is necessary to provide adequate protection of such interest. *In Re Elder-Beerman Stores, Corp.*, 201 B.R. 759 (Bankr. S.D. Ohio 1996). The most likely form of adequate protection is requiring the trustee or debtor-in-possession to make the scheduled lease payments. *See In Re Republic Technologies, Intern., LLC*, 267 B.R. 548, 554 (Bankr. N.D. Ohio 2001) (“A lessor is only entitled to that amount of adequate protection which would enable him to receive the benefit of his bargain.”)(quotation marks and citation omitted); *see also* 3 Lawrence P. King et al., COLLIER ON BANKRUPTCY § 361.02[1] (15<sup>th</sup> ed. Rev. 1998).

24. Monthly adequate protection payments to CitiCapital Commercial Corporation for the amounts contemplated under the Equipment Leases are necessary if the Debtors continue to possess or use the property. CitiCapital Commercial Corporation incurs a loss equal to the amount of the monthly lease obligations owed to it for each month or portion of a month post-petition for which the Debtor fails to make payment. Obviously, a particular equipment can only be leased once at any one particular period of time. Furthermore, the specific equipment covered under these Master Equipment Lease Agreements continues to depreciate in value with time. Because the Debtor’s projected budget does not specifically provide for the payment of equipment leases, CitiCapital Commercial Corporation has substantial risk that it will not receive any payment from the Debtor under the Master Equipment Lease Agreements. The Court should require the Debtor to immediately pay for its post-petition use of the equipment as adequate protection to CitiCapital Commercial Corporation.

25. Monthly adequate protection payments should be ordered in the amount of \$2,991.78, the amounts owed under the Equipment Leases. If the Debtor is unable to provide such

adequate assurance payments, the Court, pursuant to Section 363(e), should prohibit any continued use by the Debtor of the equipment provided under the Master Equipment Lease Agreements. As of January 24, 2007, the total amount owed to CitiCapital Commercial Corporation for the post-petition period equals \$20,318.04, plus additional sums resulting from the Debtor's defaults.

**Administrative Expense Claim or Gap Period Priority Claim**

26. To the extent payments are not received under Section 363(e), CitiCapital Commercial Corporation requests that it be granted an allowed administrative expense claim and/or Gap Period priority claim for the unpaid post-petition obligations that are immediately payable. Section 503(b)(1) sets out the requirements for administrative expense priority. Seeing that these rental obligations arose after the order for relief and that the Debtor's possession of the equipment is essential to Debtor's generation of revenue, CitiCapital Commercial Corporation is entitled to an administrative claim for all post-petition rental obligations arising after the entry of the orders for relief. *Pension Benefit Guaranty Corporation v. Sunarbauserman, Inc. (In Re Sunarbauserman, Inc.)*, 126 F.3d 811, 816 (6<sup>th</sup> Cir. 1997); *In re Fred Rogers*, 22B.R. 902, 906-07 (Bankr. E.D. Mich. 1982)(finding that a section 503 claim must be based on the reasonable rental value of the property without regard of the debtor-in-possession's actual use). The reasonable rental value of the property is presumed to be the rent specified in the lease itself. *See In re Raymond Cossette Trucking Inc.* 231 B.R. 80,85 (Bankr. N.D. Ohio 1999)(citing numerous cases supporting this presumption). The monthly rental obligations incurred after the order of relief is essential to the Debtor's ability to generate revenue. CitiCapital Commercial Corporation should be granted an immediately payable administrative expense claim for the rent due and owing under the Master Equipment Lease Agreements for the period following the entry of the order for relief. These amounts total \$2,991.78.

27. Similarly, CitiCapital Commercial Corporation has section 507(a)(2) second priority claim for the rental obligations under the Master Equipment Lease Agreements for the Gap Period.

Section 502(f) provides for the treatment of “claims arising in the ordinary course of the debtor’s business of financial affairs after the commencement of the case but before...the order for relief...”

Section 507(a)(2) grants these section 502(f) claims a second priority in order to encourage creditors to continue to do business with debtor during the Gap Period. As this Court has stated,

Section 502(f) is intended to protect creditors who deal with an involuntary debtor during the gap period, such as lessors, ... consistent with section 303(f) specific authority allowing an involuntary debtor to conduct business in the ordinary manner while its ultimate status is adjudicated.

*In re Manufacture’s Supply Co.*, 132 B.R. 127, 129 (Bankr. N.D. Ohio 1991). As the Master Equipment Lease Agreements obligations are claims which arise from the ordinary course of business of the Debtor, it should have been paid in the ordinary course and should be immediately paid by the Debtor. This Court should order the immediate payment of the Gap Period amounts with total \$21,054.77.

Compliance with 11 U.S.C. § 365(d)(10)

28. Furthermore, pending the Debtor’s assumption or rejection of the Master Equipment Lease Agreements, the Debtor is obligated, pursuant to Section 365(d)(10) of the Bankruptcy Code, to timely perform all of its obligations under the Master Equipment Lease Agreements, except those specified in Section 365(b)(2), first arising from or after 60 days after the order for relief under chapter 11 in this case. The sixty-first day after the chapter 11 order of relief was November 20, 2006. Section 365(d)(10) shifts the burden of proof from the lessor to the debtor and “makes it unnecessary for the lessor to make an initial showing of benefit conferred to the estate in order to be entitled to administrative rent.” *In re Elder-Beerman Stores Cor.*, 201 B.R. 759, 763 (Bankr. S.D. Ohio 1996). “After the passage of the sixty-day abeyance period, the entitlement to such rent is now automatic under §365(d)(10)”. *Id.* at 763.

29. “Where an agreement at issue appears on its face to be a commercial personal property lease, the debtor is charged by § 365(d)(10) to timely perform all duties of the agreement

which arise 60 days after the Chapter 11 petition, until such time as the debtor is relieved of the obligation.” *Elder-Beerman*, 201 B.R. at 764 (emphasis added). Consequently, the Debtor must pay all monies owed under the Master Equipment Lease Agreements. The Debtor’s continued use and possession of the vehicles under the Master Equipment Lease Agreements should be conditioned on prompt payment of the rent obligations up through the resolution of the Master Equipment Lease Agreements by assumption or rejection.

### **Compelling Assumption or Rejection of Master Equipment Lease Agreements**

30. Section 365(d)(2) of the Bankruptcy Code provides that a trustee or the debtor-in-possession has the choice, subject to court approval of either assuming or rejecting an executory contract or unexpired lease. *See City of Covington v. Covington Land Ltd. Partnership*, 71 F. 3<sup>rd</sup> 1221 (6<sup>th</sup> Cir. 1995). The Debtor may assume or reject an executory contract or unexpired lease, including the Master Equipment Lease Agreements, at any time prior to plan confirmation, unless the Court on the request of the other party to the contract, requires that the decision be made at an earlier point in time. *See* U.S.C. §365(d)(2). As the Debtor has failed to fulfill its obligations under the Master Equipment Lease Agreements and failed to make post-petition payments, CitiCapital Commercial Corporation requests that this Court require the Debtor to assume or reject the Master Equipment Lease Agreements forthwith.

### **Relief From the Automatic Stay**

31. Should the Debtor not provide the adequate protection requested herein, CitiCapital Commercial Corporation requests that it be granted relief from the automatic stay to recover the vehicle under the Master Equipment Lease Agreements. Section 362(d)(1) of the Bankruptcy Code provides that relief from the automatic stay shall be granted “for cause, **including the lack of adequate protection of an interest in property of such party interest.**” Debtor failed to promptly pay its lease obligations to CitiCapital Commercial Corporation and its failure to provide



adequate protection of future payment of these rents is sufficient cause to grant CitiCapital Commercial Corporation relief from the automatic stay. Thus, to the extent the Debtor is unable or unwilling to provide the adequate protection required, cause exists to grant CitiCapital Commercial Corporation relief from the automatic stay to recover the vehicle pursuant to Section 362(d)(1). CitiCapital Commercial Corporation also requests relief from stay to the extent the Debtor rejects any of the Master Equipment Lease Agreements.

32. No prior request for the relief sought in this motion has been made to this or any other court in connection with this case.

WHEREFORE, CitiCapital Commercial Corporation requests that the Court (1) condition any future use of the vehicle provided under the Master Equipment Lease Agreements on the Debtor's provision of adequate protection payments for the post-petition amounts owed under the Master Equipment Lease Agreements, or in the alternative, grant CitiCapital Commercial Corporation an immediately payable administrative expense claim and Gap Period priority claim for the post-petition amounts due under the Master Equipment Lease Agreements; (2) order the Debtor to timely perform all obligations arising under the Master Equipment Lease Agreements pursuant to 11 U.S.C. §365(d)(10); (3) order the Debtor to assume or reject the Master Equipment Lease

Agreements forthwith; (4) to the extent adequate protection is not provided or leases are rejected, to grant it relief from the automatic stay; and (5) grant CitiCapital Commercial Corporation any other relief it deems appropriate.

Respectfully submitted,

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Automotive Components Holdings, LLC c/o Michael C. Hammer, Esq. Dickinson Wright PLLC 301 E. Liberty Street Suite 500 Ann Arbor, MI 48104 United States	Biditup Auctions Worldwide Inc Attn: Steven Mattes, President 11426 Ventura Boulevard Studio City, CA 91604	By-Lo Oil Co Inc PO Box 611371 Port Huron, MI 48061-1371
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(u)Valeo Inc. - Engine Cooling Division

(u)WachoviaCapital Finance Corporation (Centr

(u) Washington Penn Plastic Co., Inc.

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End of Label Matrix	
Mailable recipients	69
Bypassed recipients	20
Total	89

**CERTIFICATE OF SERVICE**

A copy of the foregoing Motion was served by electronic mail or mailed by regular U.S. mail, postage prepaid on January 29, 2007 to the attached service list.

Respectfully submitted,

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