

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

IN RE:	X	
	:	CASE NO. 06-51848
CEP HOLDINGS, LLC, et al., <sup>1</sup>	:	(Jointly Administered)
	:	
Debtors.	:	(Chapter 11)
	:	Honorable Marilyn Shea-Stonum
	X	

**MOTION TO COMPEL DEBTOR TO IMMEDIATELY PAY §365(d)(3) CLAIMS OR,  
ALTERNATIVELY, ADMINISTRATIVE EXPENSE CLAIMS**

NL Ventures V Carlisle, L.P. (“NL Ventures”), pursuant to 28 U.S.C. §959 and 11 U.S.C. §§365(d)(3) and 503(b)(1)(A),<sup>2</sup> moves that this Court enter an order compelling the Debtors to immediately pay NL Ventures’ §365(d)(3) claims or, alternatively, administrative expense claims, and as grounds therefore would show:

**I.  
BACKGROUND**

1. NL Ventures leased three real property facilities to CEP Acquisition, LLC in Tuscaloosa, Alabama (“**Tuscaloosa Lease**”), Belleville, Michigan (“**Belleville Lease**”) and Canton, Ohio (“**Canton Lease**”).

2. The debtor Creative Engineered Polymer Products, LLC (“**CEPP**” or “**Debtor**”), a successor in interest to CEP Acquisition, LLC, assumed the Tuscaloosa Lease and assigned it to an affiliate or subsidiary of Visteon Corporation.

3. During December 2006 and January 2007 the Debtor auctioned, sold and otherwise liquidated personal property assets in the Belleville and Canton facilities and has not

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<sup>1</sup> The Debtors include: CEP Holdings, LLC, Creative Engineered Polymer Products, LLC and Thermoplastics Acquisition, LLC

<sup>2</sup> All section references herein will refer to Title 11 of the United States Code (“**Bankruptcy Code**”).

yet rejected those leases. The Debtor previously indicated its intention to reject the Belleville Lease and the Canton Lease, effective January 15, 2007, but failed to do so. The Debtor has filed a motion requesting the Court allow it to reject both leases effective January 31, 2007.

4. A true and correct copy of the Belleville Lease Agreement, along with its amendments, is attached hereto as **Exhibit A**.

5. A true and correct copy of the Canton Lease Agreement, along with its amendments, is attached hereto as **Exhibit B**.

**II.**  
**DEBTOR'S FAILURE TO ALLOW ACCESS TO BELLEVILLE FACILITY, AND TO**  
**PAY RENT ON BELLEVILLE AND CANTON FACILITIES**

6. The Belleville Lease allows NL Ventures to inspect the leasehold premises upon reasonable notice. Belleville Lease ¶2.01(a).

7. During a couple of weeks in mid-January 2007, NL Ventures made repeated requests to the Debtor to allow NL Ventures to inspect the Belleville facility because of NL Ventures legitimate fear that the facility was not being properly maintained and protected against the subfreezing temperatures being experienced in the Belleville, Michigan area at that time. Despite these repeated requests, NL Ventures was not been provided contact information or allowed access to the Belleville, Michigan facility.

8. Despite demand as to both the Belleville Lease and Canton Lease, Debtor failed to timely pay rent on January 1, 2007. Debtor made a *partial* rent payment for January on January 10, 2007, 9 days late.

9. After that partial payment, Debtor continued to owe a rent and tax escrow total of \$28,920 until a payment of remaining base rent and escrow (without any late fees) was made on or about January 26, 2007 (25 days late).

10. In January, after repeated, unsatisfied demands for rent payments and after approximately two weeks of requesting that the Debtor allow NL Ventures access to the Belleville facility, NL Ventures instructed its counsel to prepare a motion to compel the debtor to comply with its duties. That motion was prepared and ready to file on January 24, 2007, but on that date the Debtor's principal Joe Mallick told counsel for NL Ventures (counsel for the Debtor was present) that NL Ventures could physically visit and inspect the Belleville facility and could gain access to the facility by "telling the two maintenance employees at the facility that we had permission from Joe Mallick to enter and inspect the facility. When Debtor made the remaining rent payment on Friday, January 26, 2007, NL Ventures decided its emergency motion to compel compliance did not need to be immediately filed, as most of the emergency relief had been belatedly given, but that it would be necessary to seek recompense for all the additional efforts and costs incurred by NL Ventures trying to get the Debtor to comply with its duties under §365(d)(3).

11. The attorney fees and expenses to address these defaults (and those below) and prosecute this Motion are currently estimated to be \$15,000. This amount will be refined and supported before any hearing on this matter.

### **III.**

#### **DEBTOR'S FAILURE TO MAKE CONTRACTUAL LEASE PAYMENTS WHEN DUE**

12. Debtor filed its voluntary petition for chapter 11 bankruptcy protection on September 20, 2006.

13. As to both the Belleville Lease and Canton Lease, Debtor failed to timely pay rent on October 1, 2006. As to both the Belleville Lease and Canton Lease, Debtor paid the October rent on October 5, 2006, 4 days late.

14. As to both the Belleville Lease and Canton Lease, Debtor failed to timely pay rent on November 1, 2006. Debtor paid the November rent on November 3, 2007, 2 days late.

15. As to both the Belleville Lease and Canton Lease, Debtor failed to timely pay rent on December 1, 2006. Debtor paid the December rent on December 8, 2007, 7 days late.

16. NL Ventures is due another late fee for the rental payment the Debtor missed on February 1, 2007. The Debtor has not yet rejected either the Belleville or Canton Lease. This amount continues to compound if rent is not paid.

17. Not counting late fees and rental due on February 1, Debtor owes NLV late fees of \$2,403.02 as of January 31, 2007 and an additional \$29.96 as of February 9, 2007.

#### IV.

#### **DEBTOR FAILED TO LEAVE THE BELLEVILLE, MICHIGAN AND CANTON, OHIO FACILITIES IN BROOM-CLEAN CONDITION.**

18. On January 31, 2007 Debtor's representative sought to turn the keys to the Belleville and Canton facilities back over to NL Ventures.

19. NL Ventures demanded that the Debtor clean and remove extensive rubbish and possible environmental hazards from the facilities (oil drums and other drums and two large silos containing unknown chemicals). Debtor's local representative refused to conduct any clean up.

20. Counsel for NL Ventures contacted Debtor's counsel and advised that NL Ventures demanded that the Debtor clean up and leave the Belleville facility and the Canton facility in "broom-clean" condition and remove and clean up any environmental hazards as required by each Lease. Debtor's counsel indicated that while the Debtor would like to comply, neither the Committee nor the Debtor's DIP lender would authorize the use of cash to fund such a clean up. In fact, Debtor indicated it only was allowed sufficient funding to allow one person to maintain each facility.

21. These costs are still being finalized, but have been roughly estimated to approach \$50,000. These costs will be provided when finalized.

**V.**  
**THE COURT SHOULD SURCHARGE THE PROCEEDS OF SALES CONDUCTED IN  
THE BELLEVILLE AND CANTON FACILITIES**

Debtor could not have conducted its liquidation sales absent the use of the Belleville and Canton facilities. Under §365(d)(3), Debtor was required to timely pay NL Ventures rent for that use, but failed to do so triggering the late fee provisions and attorney fee recompense provisions of the leases. Belleville Lease ¶¶ 1.04, 703(e) and (f), 9.09. Canton Lease ¶¶ 1.04, 7.03(e) and (f), 9.09. The Debtor should be required to immediately compensate NL Ventures for those costs and expenses pursuant the Debtor’s contractual obligations, which must be complied with under §365(d)(3). To the extent that the Debtor fails to immediately do so, NL Ventures asks that the Court surcharge per §506(c) the proceeds of sale generated by the use of NL Ventures facilities for those costs and expenses and direct the Debtor to turn those proceeds over to NL Ventures in an amount sufficient to satisfy the Debtor’s obligations.

**VI.**  
**ARGUMENT**

22. As a result of the Debtor’s failure to comply with its duties under §365(d)(3), NL Ventures incurred attorneys fees and expenses that it would not have had to incur, but for Debtor’s failure to comply with Debtor’s duties under §365(d)(3).

23. NL Ventures is entitled to compensation for attorneys fees it had to spend compelling, through the motion and otherwise, the debtor to comply with its duty (i) to pay timely rent, (ii) to allow NL Ventures facility access, inspect and secure such facilities from the elements, (iii) to leave the Belleville and Canton facilities in “broom clean” condition upon return of such facilities to NL Ventures.

24. NL Ventures also did not get paid late fees for post-petition times when Debtor failed to timely pay rent, notwithstanding Debtor's obligation to timely pay under §365(d)(3). NLV is entitled to these fees under the Lease and §365(d)(3).

25. Before lease rejection, Debtor is also obligated to return leased facilities in broom-clean condition. Debtor should have to pay clean up costs.

26. Finally, NL Ventures is entitled to February 2007 rent.

A. Debtor Must Timely Perform All Obligations Under the Belleville Lease and Canton Lease

27. Section 365(d)(3) provides in pertinent part:

(3) The trustee shall *timely perform all the obligations of the debtor*, except those specified in section 365(b)(2), *arising from and after the order for relief* under any unexpired lease of nonresidential real property, *until such lease is assumed or rejected*, notwithstanding section 503(b)(1) of this title. . . . Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

11 U.S.C. §365 (emphasis added).

28. Borrowing from controlling Sixth Circuit authority on the issue, Judge Bodoh has fairly recently described the application of §365(d)(3):

Section 365(d)(3) now requires debtor-tenants to provide landlords of nonresidential real property full and timely payment for services due under an unexpired lease during the post-petition, pre-rejection period. *See* 11 U.S.C. §365(d)(3). The purpose of §365(d) is to “prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-a-vis the estate.” *Tully Constr. Co., Inc. v. Cannonsburg Envtl. Assocs., Ltd. (In re Cannonsburg Envtl. Assocs., Ltd.)*, 72 F.3d 1260, 1266 (6th Cir.1996) (citations and quotations omitted). Section 365(d)(3) was enacted because §503(b)(1) left landlords in the position of being forced to keep a debtor-tenant while other creditors have the option to continue doing business with the debtor or to cease doing business with the debtor. In response to this situation, Congress passed §365(d)(3) “to relieve the burden placed on nonresidential real property lessors (or “landlords”) during the period between [the date] a tenant's bankruptcy petition [is filed] and assumption or rejection of a lease.” *Omni Partners, L.P. v. Pudgie's Dev. of NY, Inc. (In re Pudgie's Dev. of NY, Inc.)*, 239 B.R. 688, 692 (S.D.N.Y.1999) (quotations omitted).

Interpreting the legislative history in this way, the Sixth Circuit Court of Appeals determined that when a lease is a month-to-month, payment-in-advance lease, and the lease payment comes due during the post-petition, pre-rejection time period, a lessor is entitled to the full month's rent, regardless of the amount of time that has passed since the date the rent became due and the date the bankruptcy petition was filed. *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986, 989 (6th Cir.2000). The Court stated, “[t]he specific obligation to pay rent for December 1997 arose on December 1, which was during the postpetition, prerejection period. *Under these circumstances*, §365(d)(3) is unambiguous as to the debtor's rent obligation and requires payment of the full month's rent.” *Id.* (emphasis added).

*In re Phar-Mor, Inc.*, 290 B.R. 319, 323 (Bankr. N.D. Ohio 2003).

29. In *Koenig*, the debtor rejected a lease on December 2, 1997, and vacated the property the same day. *Id.* at 988. The lease required monthly rent to be paid in full on the first day of month. *Id.* at 987. The debtor argued it was only required to pay rent on a pro rata basis for the two days of month before the lease was rejected and the premises vacated. *Id.* at 988. The court rejected this argument and determined the debtor was obligated to pay the rent for the entire month of December. *Id.* at 989.

30. Pursuant to the Belleville Lease and the Canton Lease, Debtor is obligated to pay NL Ventures an aggregated rental and tax escrow payment of **\$57,840** on the first of the month. Debtor's filing of a bankruptcy petition did not relieve the Debtor of this obligation. 11 U.S.C. §365; *Id.*

31. Because §365 specifically requires “timely” performance of “all the obligations of the debtor”, failure to submit a timely rental payment subjected the Debtor to late fees under the leases. Belleville Lease ¶ 1.04, 7.03(e); Canton Lease ¶ 1.04, 7.03(e). Debtor's filing of a bankruptcy petition did not relieve the Debtor of this obligation. 11 U.S.C. §365; *Id.*

32. Because §365(d)(3) requires timely performance of all the obligations of the Debtor, failure to submit a timely rental payment and/or failure to allow appropriate facility

access triggered defaults under both leases, NLV is entitled to be compensated to attorneys fees and costs it incurred dealing with those defaults.

33. Because §365(d)(3) requires timely performance of all the obligations of the Debtor, failure to submit a timely rental payment and/or failure to allow appropriate facility access triggered defaults under both leases, NLV is also entitled to February rent, which was due February 1, 2007.

34. Alternatively, to the extent NLV is found not entitled to be paid any of the above costs as §363(d)(3) expenses, NLV asserts it is entitled to collect same as administrative expenses per §503(b)(1)(A).

35. NL Ventures reserves its right to bring additional §365(d)(3) and administrative claims against the Debtors in the future.

**VII.**  
**PRAYER**

WHEREFORE, NL Ventures V Carlisle, L.P. requests that this Court enter an order directing the Debtor to immediately pay NL Ventures V Carlisle, L.P. its cost to put the Belleville, Michigan and Canton, Ohio facilities in broom-clean condition, its late fees for Debtor's failure to timely comply with is lease obligations, its attorneys fees for matters described above, its February rent, and all its other §365(d)(3) expenses on or before five (5) business days after the Court enters an order granting relief herein, and granting such other and further relief as the Court deems just.



Dated: February 9, 2007.

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

By: /s/ Michael M. Parker

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**COUNSEL FOR NL VENTURES V  
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**CERTIFICATE OF SERVICE**

I certify that on February 9, 2007, a copy of the foregoing Motion to Compel Debtor to Immediately Pay §365(d)(3) and/or Administrative Expense Claim was served via first class U.S. mail, postage prepaid, or electronically as indicated to the entities on the attached Service List. Exhibits were not served via first class U.S. mail because they were voluminous (and interested parties already have a copy or will receive one electronically), but will be provided on request.

/s/ Michael M. Parker

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

<b>IN RE:</b>  <b>CEP HOLDINGS, LLC, et al.,<sup>3</sup></b>  <p style="text-align: center;"><b>Debtors.</b></p>	X : : : : : : X	<b>CASE NO. 06-51848</b> <b>(Jointly Administered)</b>  <b>(Chapter 11)</b> <b>Honorable Marilyn Shea-Stonum</b>
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<sup>3</sup> The Debtors include: CEP Holdings, LLC, Creative Engineered Polymer Products, LLC and Thermoplastics Acquisition, LLC

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