

**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: 4/10/07 at 10:00 a.m.
: Objection Deadline: 4/6/07 at 4:00 p.m.
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**MOTION OF DEBTORS AND DEBTORS IN POSSESSION,
PURSUANT TO SECTIONS 105(a) AND 365 OF THE BANKRUPTCY
CODE AND BANKRUPTCY RULE 6006, FOR ENTRY OF AN ORDER
AUTHORIZING THEM TO REJECT AN UNEXPIRED REAL PROPERTY LEASE
FOR PROPERTY IN MIDDLEFIELD, OHIO, EFFECTIVE AS OF MARCH 20, 2007**

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 sections 105(a) and 365 of title 11 of the United States Code (the “**Bankruptcy Code**”) and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), for entry of an order authorizing them to reject the unexpired real property lease attached hereto as **Exhibit A** and incorporated herein by reference (as amended, the “**Lease**”), by and between CEP Acquisition, LLC n/k/a Creative Engineered Polymer Products LLC (“**CEPP**”) and Carlisle Engineered Products, Inc. (the “**Lessor**”), effective as of March 20, 2007. In support of the Motion, the Debtors respectfully represent as follows:

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

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.
3. The statutory predicates for the relief requested herein are sections 105(a) and 365 of the Bankruptcy Code and Bankruptcy Rule 6006.

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 an official committee of unsecured creditors (the “**Committee**”). No trustee or examiner has been appointed.
6. On December 12, 2006, the Debtors filed the *Motion of Debtors and Debtors in Possession, Pursuant to Sections 501 and 502 of the Bankruptcy Code and Bankruptcy Rules 2002 and 3003(c), for an Order Establishing Bar Dates for Filing Proofs of Claim and Approving Form and Manner of Notice Thereof* (Docket No. 280) (the “**Bar Date Motion**”).
7. On December 15, 2006, upon consideration of the Bar Date Motion, the Court entered the *Order, Pursuant to Sections 501 and 502 of the Bankruptcy Code and Bankruptcy Rules 2002 and 3003(c)(3), Establishing Bar Dates for Filing Proofs of Claim and Approving Form and Manner of Notice Thereof* (Docket No. 284) (the “**Bar Date Order**”).

8. Under the Bar Date Order, the time period by which holders of claims arising from the rejection of an executory contract or unexpired lease in these Cases is the earlier of: (a) the date that is 30 days after the effective date of rejection identified in the notice of rejection or order authorizing rejection with respect to such executory contract or unexpired lease; or (b) the date that is 30 days following the effective date of any plan of reorganization confirmed by the Court in these Cases (the “**Rejection Bar Date**”). Bar Date Order at ¶ 8.

9. On February 5, 2007, the Debtors and the Committee filed the *Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code Proposed by the Debtors and the Official Committee of Unsecured Creditors* (Docket No. 330) (the “**Plan**”) and the *Disclosure Statement to Accompany Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code Proposed by the Debtors and the Official Committee of Unsecured Creditors Dated February 5, 2007* (Docket No. 331) (the “**Disclosure Statement**”).

RELIEF REQUESTED

10. By this Motion, the Debtors seek the entry of an order, pursuant to sections 105(a) and 365 of the Bankruptcy Code and Bankruptcy Rule 6006, authorizing the Debtors to reject the Lease effective as of March 20, 2007.

FACTS RELEVANT TO THIS MOTION

11. Prior to the Petition Date, on or about August 1, 2005, CEPP leased certain real property in Middlefield, Ohio, commonly known as 15332 Old State Road, Middlefield, Geauga County, Ohio (the “**Leased Property**”) from the Lessor. The Leased Property was used as one of the Debtors’ manufacturing facilities. The term of the Lease commenced on or about August 16, 2005 and is set to expire upon the earlier of the delivery to CEPP of certain remediation approvals or the last day of the tenth (10th) lease year. Lease at § 2.

12. Under the Lease, CEPP is required to pay utility charges, insurance, taxes and other charges — such amounts being deemed “additional rent” under the terms of the Lease. Lease at § 3. The Lease, however, does not provide for the payment of fixed or base rent, mainly due to the fact that the Leased Property is undergoing environmental remediation related to groundwater contamination that originated on the property and/or resulted from historical operations that occurred on the Leased Property prior to the Debtors’ taking possession under the Lease. *See* Disclosure Statement at § VI.F.1. Under the Lease, the Lessor bears the burden of completing all environmental work and remedial obligations. Lease at § 22(a)(iii).

13. Because the Debtors’ operations have ceased, the Debtors have no need for the Leased Property. On or before March 20, 2007, the Debtors will completely vacate the Leased Property and will surrender possession of the Leased Property to the Lessor. By this Motion, the Debtors seek to reject the Lease to stop the accrual of postpetition claims under section 365(d)(3) of the Bankruptcy Code.² The continued payment of utility charges, insurance, taxes and other charges under the Lease is economically burdensome and constitutes an unnecessary drain on the assets of the Debtors’ estates. The Debtors further believe that the Lease has no realizable market value for assignment to a third party given market conditions in Middlefield, Ohio and the existing environmental contamination on the Leased Property.

14. Accordingly, the Leased Property no longer is necessary to the Debtors’ businesses and it is in the Debtors’ best interest to extinguish any continuing obligations under the Lease. As a result, in the exercise of their business judgment, the Debtors seek to reject the Lease. Because the Debtors will surrender the Leased Property back to the Lessor on or before

² The Debtors hereby reserve their rights to object to any claims that may be asserted by the Lessor under sections 365 and 502 of the Bankruptcy Code or otherwise.

March 20, 2007, it is equitable and appropriate that the rejection of the Lease be effective as of March 20, 2007 — a date that is subsequent to the date of this Motion.

ARGUMENT

A. Rejection of the Lease Is Warranted Under Section 365 of the Bankruptcy Code

15. Rejection of the Lease is warranted under section 365 of the Bankruptcy Code. Section 365(a) of the Bankruptcy Code provides that a debtor, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease.” 11 U.S.C. § 365(a).

16. Courts routinely approve motions to assume, assume and assign or reject executory contracts or unexpired leases upon a showing that the debtor’s decision to take such action will benefit the debtor’s estate and is an exercise of sound business judgment. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (stating that the traditional standard applied by courts to authorize the rejection of an executory contract is that of “business judgment”); *Phar-Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. 948, 951-52 (Bankr. N.D. Ohio 1997) (“Whether an executory contract is ‘favorable’ or ‘unfavorable’ is left to the sound business judgment of the debtor.”); *In re Beare Co.*, 177 B.R. 879, 882 (Bankr. W.D. Tenn. 1994) (considering whether the debtor’s decision to assume a contract under section 365 of the Bankruptcy Code was “an exercise of ‘reasonable business judgment’”); *accord Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993) (stating that section 365 of the Bankruptcy Code “permits the trustee or debtor-in-possession, subject to the approval of the bankruptcy court, to go through the inventory of executory contracts of the debtor and decide which ones it would be beneficial to adhere to and which ones it would be beneficial to reject.”); *In re Market Square Inn, Inc.*, 978 F.2d 116, 121 (3d Cir.

1992) (stating that “[t]he resolution of this issue of assumption or rejection will be a matter of business judgment by the bankruptcy court”).

17. Courts generally will not second-guess a debtor’s business judgment concerning the assumption or rejection of an executory contract or unexpired lease. *See Phar-Mor, Inc.*, 204 B.R. at 952 (“Courts should generally defer to a debtor’s decision whether to reject an executory contract.”); *accord Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc., (In re Richmond Metal Finishers, Inc.)*, 756 F.2d, 1043, 1047 (4th Cir. 1985) (explaining that, under the business judgment test, “courts should defer to — should not interfere with — decisions of corporate directors upon matters entrusted to their business judgment except upon a finding of bad faith or gross abuse of their ‘business discretion.’”).

18. The “business judgment” test is not a strict standard — it merely requires a showing that either assumption or rejection of the executory contract or unexpired lease will benefit the debtor’s estate. *See, e.g., In re Federated Dep’t Stores, Inc.*, 131 B.R. 808, 812 (S.D. Ohio 1991) (finding that in authorizing a debtor’s rejection of an unexpired lease, a “bankruptcy court ‘need determine only whether disaffirmance would be advantageous to the debtor.’”); *In re Holly’s, Inc.*, 140 B.R. 643, 680 (Bankr. W.D. Mich. 1992) (stating that a debtor may reject an executory contract that is “burdensome” to the estate based upon the “Debtor’s business judgment”); *In re Pesce Baking Co.*, 43 B.R. 949, 956 (Bankr. N.D. Ohio 1984) (“A court will approve the rejection of an executory contract under the business judgment test if rejection would benefit the debtor’s estate.”).

19. Here, rejecting the Lease constitutes a reasonable exercise of the Debtors’ business judgment. This is a liquidating Chapter 11 case. As described above, the Leased Property is not necessary to the Debtors’ businesses, the utility charges, insurance, taxes and

other charges due under the Lease are economically burdensome and wasteful of estate resources and the Lease does not appear to have any market value that could be captured by the Debtors' estates. As such, rejection of the Lease is appropriate and is in the best interests of the Debtors and their estates and other parties in interest.

B. Rejection Should Be Effective as of March 20, 2007

20. The approval of the proposed rejection of the Lease as of March 20, 2007 is warranted under the circumstances. It is well established that where the principles of equity so dictate, a bankruptcy court may approve the rejection of a nonresidential real property lease under section 365 of the Bankruptcy Code as early as the motion filing date. *See Pacific Shores Dev., LLC v. At Home Corp. (In re At Home Corp.)*, 392 F.3d 1064, 1072 (9th Cir. 2004) (holding that a bankruptcy court has the authority to approve the rejection of a nonresidential real property lease retroactive to the motion filing date); *Thinking Machines Corp. v. Mellon Fin. Servs. (In re Thinking Machines Corp.)*, 67 F.3d 1021, 1028 (1st Cir. 1995) (same); *In re CCI Wireless, LLC*, 279 B.R. 590 (Bankr. D. Colo. 2002) (same). "To grant nunc pro tunc rejection, the Debtors must have stated an unequivocal intent to reject the leases." *In re Fleming Cos.*, 304 B.R. 85, 96 (Bankr. D. Del. 2003). At least one court has approved the rejection of nonresidential real property leases under section 365 of the Bankruptcy Code retroactive to the date the debtor surrendered possession of the leased premises to the landlord. *See In re Chi-Chi's, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004) (approving the rejection of nonresidential real property leases retroactive to the date the debtor surrendered possession of the premises to the landlord).

21. Here, rejection of the Lease retroactive to March 20, 2007 is warranted under the circumstances. First, as set forth above, the Debtors will surrender possession of Leased Property to the Lessor on or before March 20, 2007. *See, e.g., At Home Corp.*, 392 F.3d at 1074

(affirming the bankruptcy court's decision to approve rejection retroactive to the motion filing date where the debtor did not occupy the leased premises on the motion filing date and stating, "most cases approving the rejection of a lease retroactively to the motion date highlight the fact that the debtor has vacated the premises"); *Chi-Chi's, Inc.*, 305 B.R. at 399 (approving the rejection of nonresidential real property leases retroactive to the "day the Debtors surrendered the premises to the Landlords"); *CCI Wireless, LLC*, 279 B.R. at 595 (approving rejection retroactive to the motion filing date where "most or perhaps all of the leased premises were vacated before, on or shortly after the date of filing"). Accordingly, approving the rejection of the Leases retroactive to March 20, 2007 should not be prejudicial to the Lessor's right to possession of the Leased Property.

22. Second, by this Motion, the Debtors have stated their unequivocal intent to reject the Lease. Because the Debtors have nearly completed the process of liquidating their assets, there is no chance that the Debtors will decide to assume the Lease subsequent to the filing of this Motion and the surrender of the Leased Property to the Lessor. Finally, rejection of the Lease retroactive to March 20, 2007 will prevent the Debtors from incurring additional liability for administrative claims that is unrelated to the Debtors' use of the Leased Property and, thus, is not beneficial to the Debtors' estates. Accordingly, rejection of the Lease retroactive to March 20, 2007 is warranted under the circumstances.

23. Additionally, because the Debtors propose that the rejection of the Lease be effective as of March 20, 2007, the Debtors move that the Lessor have until 30 days from the entry of the proposed Order, attached hereto as **Exhibit B**, to file a proof of claim, if any, for any claims arising from the rejection of the Lease. This will prevent the Lessor from suffering any

prejudice under the Bar Date Order on account of the proposed retroactive rejection of the Lease.³

NOTICE

24. 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 Lessor.

25. No prior request for the relief sought in this Motion has been made to this or any other Court.

³ Absent this relief, the Lessor would have until April 19, 2007, or 9 days after the hearing on this Motion, to file a proof of claim for claims arising out of the rejection of the Lease. *See* Bar Date Order at ¶ 8.

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: March 16, 2007
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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