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.,[1]	:	**(Jointly Administered)**
	:	
Debtors.	:	**(Chapter 11)**
	:	**Honorable Marilyn Shea-Stonum**
	x	

NL VENTURES V CARLISLE, L.P.' S OBJECTION TO CONFIRMATION OF FIRST AMENDED JOINT PLAN OF LIQUIDATION

TO THE HONORABLE MARILYN SHEA-STONUM,
UNITED STATES BANKRUPTCY JUDGE:

NL Ventures V Carlisle, L.P. ("**NL Ventures**") files this objection to confirmation of First Amended Joint Plan of Liquidation ("**Plan**") and would show:

I.
JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 11 U.S.C. § 157(b)(2)(A), (B), (M) and (O).[2]

II.
BACKGROUND

2. NL Ventures entered into three lease agreements with the Debtors for real property facilities at Tuscaloosa, Alabama ("**Tuscaloosa Lease**"), Belleville, Michigan ("**Belleville Lease**") and Canton, Ohio ("**Canton Lease**").

3. The Debtors assumed and assigned the Tuscaloosa Lease to an affiliate or subsidiary of Visteon Corporation.

[1] The Debtors include: CEP Holdings, LLC, Creative Engineered Polymer Products, LLC and Thermoplastics Acquisition, LLC
[2] All section references are to Title 11 of the United States Code, unless otherwise noted.

4. The Debtors rejected the Belleville Lease and the Canton Lease earlier this year. NL Ventures has asserted rejection and other claims against the Debtors.

III.
OBJECTIONS TO CONFIRMATION

A. Objection No. 1: Implementation, Feasibility and Good Faith – Payment "As Soon Thereafter As is Reasonably Practicable" is Not Sufficient

5. The Plan does not comply with the applicable provisions of Title 11. § 1129(a)(1) and (3), and § 1123(a)(5). In particular, the Plan has not been proposed in good faith, does not provide adequate means for its implementation and is not feasible because the plan's distribution and payment provisions do not comply with the bankruptcy code.

6. NL Ventures objects to Plan ¶¶2.1, 6.2(a) that seeks to pay administrative claims on the "Effective Date or as soon thereafter as is reasonably practicable." This is not sufficient under the Code. Administrative claims must receive cash equal to the allowed amount of such claims on the Effective Date of the Plan. §1129(a)(9)(A). The Plan language fails to comply with the Code.

7. NL Ventures also objects to Plan ¶4.4 that seeks to pay Class 4 claims as soon as the Trustee deems practicable. NL Ventures does not oppose granting the Trustee some discretion, NL Ventures merely believes that some boundaries should be placed on that discretion.

B. Objection No. 2: Plan is Not Fair and Equitable - Security Deposits Not Protected

8. The Plan does not comply with the applicable provisions of Title 11. § 1129(b)(2)(A). In particular, the Plan is not fair and equitable because it fails to protect and preserve to NL Ventures security interests in the security deposits NL Ventures holds related to the Belleville Lease and the Canton Lease.

9. NL Ventures claims possessory security interests (and alternatively ownership rights) in security deposits ("**Security Deposits**") it holds for each of the referenced leases. NL Ventures objects to the Plan to the extent the Plan seeks to transfer the Security Deposits to the Trust or the Trustee in contravention of NL Ventures' continuing interests in the Security Deposits it holds. See Plan ¶¶ 7.1(c).

C. Objection No. 3: Implementation and Feasibility – The Plan Lacks a Definitive Effective Date

10. The Plan does not comply with the applicable provisions of Title 11. § 1129(a)(1) and § 1123(a)(5). In particular, the Plan does not provide adequate means for its implementation and is not feasible because it has no definitive Effective Date. §§ 1123(a)(5), 1129(a)(11).

11. NL Ventures objects to the Plan's lack of a definitive Effective Date and lack of limits on when that Effective Date might occur. Such an open-ended definition severely limits NL Ventures' ability and the ability of all creditors to obtain an Effective Date, which in turn affects distributions rights and other substantive rights under the Plan.

12. The Plan defines the "Effective Date" as a Business Day on or after the Confirmation Date specified by the Debtors on which (i) no stay of the Confirmation Order is in effect and (ii) the conditions to the effectiveness of the Plan in section 10.2 hereof have been satisfied or waived. Plan ¶1.42.

13. This definition allows the Debtors to determine, or not, the Effective Date of the Plan. As defined, the Debtors do not ever even have to establish an Effective Date.

14. Appropriate limits should be placed on the occurrence of the Effective Date.

D. Objection No. 4: Implementation, Feasibility and Good Faith - Assets of the Estate Should Revert back to the Estate in the Event of Conversion to Chapter 7.

15. The Plan does not comply with the applicable provisions of Title 11. § 1129(a)(1) and (3) and § 1123(a)(5). In particular, the Plan has not been proposed in good faith, does not

provide adequate means for its implementation and is not feasible because the Plan lacks a revesting provision.

16. A revesting provisions would revest assets of the Estates back into the Estates upon the post-confirmation conversion of the Debtors' bankruptcy cases back into chapter 7 cases. Theoretically, upon the Trustee's failure to perform, the Court might order the conversion of the Debtors' cases to cases under chapter 7 of the Bankruptcy Code. The Court's ability to do so, and the creditors' substantial benefit from such a conversion, is severely restricted without a revesting provision in the Plan.

E. Objection No. 5: Implementation, Feasibility, Good Faith and Means Forbidden by Law - Substantive Consolidation is Not Warranted or Properly Implemented

17. The Plan fails to comply with § 1129(a)(1) and (3), and § 1123(a)(5). In particular, the Plan does not provide adequate means for its implementation, is not feasible, has not be proposed in good faith and has been proposed in a means forbidden by law.

18. NL Ventures objects to the Plan's partial substantive consolidation of the Debtors' Estates. In Plan ¶5.1 the Plan seeks to implement a partial substantive consolidation of the "Estates of CEP and Thermoplastics", defined as the Debtors Creative Engineered Polymer Products, LLC ("**CEP**"), CEP Holdings, LLC ("**Holdings**") and Thermoplastics Acquisition, LLC ("**Thermoplastics**").

19. Substantive consolidation is an extraordinary remedy that is only rarely granted.

20. Substantive consolidation is a judicially created doctrine considered to arise from the general equity powers exercised by bankruptcy courts.[3] Although no specific provision of the

[3] *F.D.I.C. v. Colonial Realty Co.*, 966 F.2d 57 (2d Cir. 1992); *Eastgroup Prop. v. Southern Motel Assocs., Ltd.*, 935 F.2d 245 (11th Cir. 1991); *Drabkin v. Midland-Ross Corp. (In re Auto-Train Corp.)*, 810 F.2d 270 (D.C. Cir. 1987); *In re Continental Vending Mach. Corp.*, 517 F.2d 997 (2d Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723 (Bankr. S.D. N.Y. 1992); *In re Alico Mining, Inc.*, 278 B.R. 586, 588 (Bankr. M.D. Fla. 2002).

Bankruptcy Code expressly authorizes a bankruptcy court to order substantive consolidation, such authority (when exercised) is asserted under Bankruptcy Code § 105(a), which provides that: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title [the Bankruptcy Code]."[4] Under the doctrine of substantive consolidation, a bankruptcy court may, if appropriate circumstances are determined to exist, consolidate the assets and liabilities of different entities by merging the assets and liabilities of the entities and treating the entities as a consolidated entity for purposes of the bankruptcy proceedings.[5] The effect of substantive consolidation of corporate entities has been described as follows: "[T]he intercompany claims of the debtor companies are eliminated, the assets of all debtors are treated as common assets and claims of outside creditors against any of the debtors are treated as against the common fund."[6]

21. Given that the power to order substantive consolidation derives from the equity jurisdiction of the bankruptcy courts, the issue of whether to order consolidation is determined on a case-by-case basis, and the decisions reflect the courts' analyses of the particular factual circumstances presented.[7] A court's inquiry requires an examination, *inter alia*, of the structures

---

[4] *See generally* Lawrence P. King, 2 COLLIER ON BANKRUPTCY, 105.04[2], at 105-62 to 105-63, (15th ed. Rev. 2001); *Alico*, 278 B.R. at 588. The Supreme Court has recognized the remedy of substantive consolidation as early as 1941, in *Sampsell v. Imperial Paper & Color Corp*., 313 U.S. 215 (1941). *In re American Homepatient, Inc*., 298 B.R. 152, 164 (Bankr. M.D. Tenn. 2003); *see also In re Bonham*, 229 F.3d 750, 765 (9th Cir. 2000) (stating that "[e]ven though substantive consolidation was not codified in the statutory overhaul of bankruptcy law in 1978, the equitable power undoubtedly survived enactment of the Bankruptcy Code…and [n]o case has held to the contrary").

[5] *See American Homepatient*, 298 B.R. at 164*; see also In re WorldCom Inc*., 2003 Bankr. LEXIS 1401, *103 (Bankr. S.D. N.Y. 2003).

[6] *Chem. Bank New York Trust Co. v. Kheel,* 369 F.2d 845, 847 (2d Cir. 1966); *see F.D.I.C. v. Colonial Realty Co*., 966 F.2d 57, 58-59 (2d Cir. 1992); *Eastgroup Prop. v. Southern Motel Assocs., Ltd.*, 935 F.2d 245, 248 (11th Cir. 1991) ("[Substantive consolidation] involves the pooling of assets and liabilities of two or more related entities; the liabilities of the entities involved are then satisfied from the common pool of assets created by consolidation."); *In re Augie/Restivo Baking Co.,* 860 F.2d 515, 518 (2d Cir. 1988).

[7] *In re Permian Producers Drilling, Inc*., 263 B.R. 510, 517 (Bankr. W.D. Tex. 2000) (stating that "whether the circumstances warrant substantive consolidation is a highly fact specific analysis that must be made on [a] case-by-case basis"); *see also In re American Homepatient, Inc*., 298 B.R. 152, 166 n.9 (Bankr. M.D. Tenn. 2003) (stating that the analysis is highly fact-specific in every case"); *FDIC v. Colonial Realty Co*., 966 F.2d 57 (2d Cir. 1992) (stating that substantive consolidation analysis requires "a searching review of the record, on a case-by-case basis"); *In re World Access, Inc*., 301 B.R. 217, 272 (Bankr. N.D. Ill. 2003).

of the entities proposed to be consolidated, their intercompany relationships, and their relationships with their respective creditors and other third parties. Since the doctrine of substantive consolidation is an equitable one, the court will also examine the impact upon the creditors of each entity if consolidation were to be ordered, and whether such parties would be unfairly prejudiced or benefited by substantive consolidation, as well as such other factors it finds relevant in the particular case before it.[8]

22. Bankruptcy decisions generally recognize that substantive consolidation is an **extraordinary remedy vitally affecting substantive rights**, which, because of the potential inequities caused by the redistribution of wealth among the creditors of consolidated entities, **should only rarely be granted**.[9] Indeed, recent Supreme Court authority severely limits the power of a bankruptcy court, absent some form of inequitable conduct, to categorically reorder creditor priorities, as is indirectly done with substantive consolidation of estates, in contravention of the priority scheme established by Congress in the Bankruptcy Code.[10] Creditors can be

[8] *See Reider v. F.D.I.C. (In re Reider)*, 31 F.3d 1102, 1107-08 & n.8 (11th Cir. 1994); *In re Augie/Restivo Baking Co.,* 860 F.2d 515, 518 (2d Cir. 1988).

[9] *Augie/Restivo*, 860 F.2d at 518; *Chem. Bank New York Trust Co. v. Kheel,* 369 F.2d 845, 847 (2d Cir. 1966) ("The power to consolidate should be used sparingly because of unfair treatment of creditors of a corporate debtor who have dealt solely with that debtor without knowledge of its interrelationship with others."); *In re Snider Bros., Inc.*, 18 B.R. 230, 234 (Bankr. D. Mass. 1982) ("[S]ubstantive consolidation, in almost all instances, threatens to prejudice the rights of creditors….This is so because separate debtors will almost always have different ratios of assets to liabilities."); *see also Eastgroup Prop. v. Southern Motel Assocs., Ltd.*, 935 F.2d 245, 248 (11th Cir. 1991) (recognizing that substantive consolidation should be "used sparingly," but acknowledging the modern trend toward allowing substantive consolidation); *Drabkin v. Midland-Ross Corp. (In re Auto-Train Corp.)*, 810 F.2d 270, 276 (D.C. Cir. 1987); *In re Continental Vending Mach. Corp*., 517 F.2d 997, 1001 (2d Cir. 1975); *In re Flora Mir Candy Corp.,* 432 F.2d 1060, 1062-63 (2d Cir. 1970); *Helena Chem. Co. v. Circle Land & Cattle Corp. (In re Circle Land & Cattle Corp.)*, 213 B.R. 870, 875-76 (Bankr. D. Kan. 1997) (quoting 3 David G. Epstein, *et al*., *Bankruptcy Prac. Treatise*, § 11-41 at 90 (1992)); *In re Julien Co*., 120 B.R. 930, 936 (Bankr. W.D. Tenn. 1990); *In re DRW Prop. Co.* 82, 54 B.R. 489, 494 (Bankr. N.D. Tex. 1985); *In re Harris*, 2001 Bankr. LEXIS 1638, *5 (Bankr. Md. 2001) (acknowledging that with substantive consolidation, some creditors may receive a distribution greater or less than that to which they would have been entitled otherwise); *In re Huntco Inc*., 302 B.R. 35 (Bankr. E.D. Mo. 2003) (stating that "[b]ecause substantive consolidation usually harms some creditors, courts should apply the doctrine sparingly").

[10] *U.S. v. Noland*, 517 U.S. 535, 536 (1996) (holding that "bankruptcy courts may not equitably subordinate claims on a categorical basis in derogation of Congress' scheme of priorities"); *U.S. v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 229 (1996) (stating that, "Categorical reordering of priorities that takes place at the

harmed, for example, if the "to-be-consolidated" debtors have different debt-to-asset ratios, resulting in payments on claims that may differ materially from the amounts creditors would have received had the entities not been consolidated.[11]

23. NL Ventures argues that the Plan is categorically reordering creditor priorities through substantive consolidation in contravention of the priority schemed established by Congress. NL Ventures believes its claims and the claims of other creditors would receive a substantially greater pro rata distribution if the Estates were not consolidated.

24. Moreover, NL Ventures argues that the Plan inappropriately seeks only a partial substantive consolidation. In other words, the Plan seeks to have its cake and eat it too. The Plan wants the benefits of substantive consolidation, but does not want the burdens. The Plan improperly seeks to reverse the normal effects of substantive consolidation for "determining the right of set-off under section 553 of the Bankruptcy Code" and, **at the option of the Trustee**, "for purposes of determining the Plaintiff of, and availability of defenses to, Avoidance Actions." Plan ¶5.1.

25. NL Ventures argues that the Court lacks the power and jurisdiction to give the Trustee the right to determine that substantive consolidation applies to the Estates when the Trustee wants it to, but not when the Trustee does not want it to.

26. While NL Ventures objects to the proposed substantive consolidation, if the Court orders it, such consolidation should be complete, and not subject to the Trustee's whim and not with restrictions on when it might apply for a setoff or for Avoidance Action defenses.

---

legislative level of consideration is beyond the scope of judicial authority to order equitable subordination under § 510(c)").

[11] *See In re I.R..C.C., Inc.*, 105 B.R. 237, 241 (Bankr. S.D. N.Y. 1989); *see also In re World Access, Inc.*, 301 B.R. 217, 272 (Bankr. N.D. Ill. 2003) (noting that with substantive consolidation, "intercompany claims are eliminated and wealth is redistributed among the creditors of the various entities, because every entity is likely to have a different asset-to-liability ratio.") *Id*. Because of this, courts have generally held that it should be used sparingly. *Id*.

F. Objection No. 6: Implementation and Feasibility - Given the Amounts at Stake, the Trustee Should be Required to Post a Bond

27. The Plan does not comply with the applicable provisions of Title 11. § 1129(a)(1) and § 1123(a)(5). In particular, the Plan does not provide adequate means for its implementation and is not feasible because creditors are not protected in the event of negligent or bad acts of the Trustee or others under the direction of the Trustee.

28. Given the amounts at stake and the value of the assets held by the Estates, the Trustee should be required to post a bond. NL Ventures objects that the Plan does not require that the Trustee post a bond of adequate value to compensate creditors for losses that might be sustained to those assets. A bond approximating the anticipated value of assets to be held by the Trustee would be appropriate.

G. Objection No. 7: Implementation and Feasibility - Restriction on Transfer of Claim Post Confirmation

29. The Plan does not comply with the applicable provisions of Title 11. § 1129(a)(1) and § 1123(a)(5). In particular, the Plan does not provide adequate means for its implementation and is not feasible because it seeks to restrict the ability of holders of claims to transfer such claims post-confirmation.

30. Without providing a definitive limit on when distributions will take place (see Objection No. 1), the Plan inappropriately limits in ¶7.2 the transfer of an allowed claim post-confirmation by restricting who the Liquidating Trustee has to deal with to only holders of claims on the Confirmation Date. In so doing, the Plan limits the ability of the holder of a claim to transfer that claim and thereby limits the value of that claim. The Plan should not be able to so limit such transfers, and thereby the value of such claims, merely for the convenience of the Liquidating Trustee.

H. Objection No. 8: Implementation and Feasibility - Trustee's Fees and Trustee's Professionals' Fees Not Subject to Court Review

31. The Plan does not comply with the applicable provisions of Title 11. § 1129(a)(1) and (4). In particular, NL Ventures objects to the Plan's lack of judicial review of the Trustee's fees and the Trustee's professional's fees. Plan ¶7.1(h).

32. Section 1129(a)(4) provides, in pertinent part:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

33. The Plan makes no provision for judicial review of the Trustee's fees or the Trustee's professional's fees.

I. Objection No. 9: Implementation and Feasibility – Trustee's Affiliations and Connections

34. The Plan does not comply with § 1129(a)(5)(A). In particular, NL Ventures objects to the Plan's lack adequate description of the connections and affiliations of the Trustee, Shaun Martin, to the Debtors and the professionals connected to the case. Plan ¶1.56.

J. Reservation of Objections

35. NL Ventures reserves its right to raise objections under §§ 1129(a)(7), (a)(8), (a)(9) and (a)(10) once the ballots have been tallied and submitted and these objections become possible.

IV.
RELIEF REQUESTED

WHEREFORE, PREMISES CONSIDERED, NL Ventures requests that the Court enter an order denying confirmation to the First Amended Joint Plan of Liquidation.

Dated: July 13, 2007.

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

/s/Michael M. Parker

Michael M. Parker
State Bar No. 00788163
300 Convent Street, Suite 2200
San Antonio, Texas 78205-3792
Telephone: (210) 224-5575
Facsimile: (210) 270-7205

COUNSEL FOR NL VENTURES V CARLISLE, L.P.

CERTIFICATE OF SERVICE

I certify that on July 13, 2007, a copy of the foregoing Objection to Confirmation of First Amended Joint Plan of Liquidation, was served via electronically to the entities listed below.

Joseph F. Hutchinson
Baker & Hostetler LLP
3200 National City Center
1900 East 9th Street
Cleveland, OH 44114-3485

Mark E. Freedlander
McGuireWoods LLP
625 Liberty Avenue
23rd Floor Dominion Tower
Pittsburgh, PA 15222

Maria D. Diannirakis
Office of the US Trustee
Howard M. Metzenbaum US Courthouse
201 Superior Ave., East, Suite 441
Cleveland, OH 44114

/s/ Michael M. Parker
Michael M. Parker