

**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	

**APPLICATION FOR ALLOWANCE AND PAYMENT OF  
§365(d)(3) CLAIMS AND 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 allowing and directing payment of NL Ventures’ §365(d)(3) expense claims and related administrative expense claims, and would show:

**I.  
JURISDICTION**

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

**II.  
BACKGROUND**

1. NL Ventures entered into three lease agreements with the debtor for real property facilities at Tuscaloosa, Alabama (“**Tuscaloosa Lease**”), Belleville, Michigan (“**Belleville Lease**”) and Canton, Ohio (“**Canton Lease**”).

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

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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**”).

3. The Debtor used the Belleville and Canton facilities (“**Properties**”) to liquidate personal property assets and has rejected those leases. The Debtor failed to pay all the costs associated with that liquidation and with those leases.

4. Seeking payment on or about February 9, 2007, NL Ventures filed its Emergency Motion to Compel Debtor to (I) Comply With the Belleville and Canton Lease Agreements, (II) Immediately Allow Access to the Belleville, Michigan Facility, (III) Timely Pay Established Contractual Rent, and (IV) Immediately Pay Postpetition, Contractual Late Charges and Fees Incurred Pursuant to 11 U.S.C. §365(d)(3) (“**Motion to Compel**”).

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

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

7. After the Motion to Compel was filed, the Debtor allowed NL Ventures access to the Belleville, Michigan facility and untimely paid some of the established contractual rent complained about in the Motion to Compel. NL Ventures and the Debtor continued to negotiate regarding the other issues raised in the Motion to Compel, in particular, the parties continued to negotiate regarding the Debtor’s failure to comply (pre-rejection) with the Belleville and Canton Leases and the Debtor’s failure to pay postpetition contractual late charges and related fees.

8. During those negotiations, the parties exchanged alleged amounts due and offers of settlement. The negotiations also raised issues not specifically detailed in the Motion to Compel, but that were items NL Ventures alleged were §365(d)(3) or administrative expenses.

9. Despite NL Ventures' desire to continue to resolve those outstanding issues, those negotiations ceased when the Court indicated it would not hear NL Ventures' Motion to Compel until after the Debtor had confirmed its proposed joint chapter 11 plan of reorganization.

10. On information and belief, at that point the Creditors Committee instructed the Debtor to cease the negotiations pending plan confirmation.

11. NL Ventures asserts §365(d)(3) and/or administrative claims against the Debtors. Attached as **Exhibit C** is NL Ventures' claim summary, and related supporting invoices.

### **III.** **ARGUMENT**

12. Debtor did not pay rent timely on the Canton Lease and the Belleville Lease, notwithstanding Debtor's obligation to timely pay under §365(d)(3), regardless of benefit to the estate or reasonableness. NL Ventures is therefore entitled to be paid late fees for post-petition, pre-rejection periods of time when Debtor failed to timely pay rent. *In re Lunn*, 129 B.R. 476, 477 (Bankr. N.D. Ohio 1991) (any requirement of reasonableness or benefit to the estate is inapplicable to 11 U.S.C. §365(d)(3)); see also *In re Phar-Mor, Inc.*, 290 B.R. 319, 322 (Bankr. N.D. Ohio, 2003). NL Ventures also did not receive from the Debtor insurance, utility and other payments timely, if at all. NL Ventures is entitled to these late fees and payments under the Leases and §365(d)(3).

13. At the time of the filing of the Motion to Compel, Debtor owed NL Ventures **\$28,920** for the remainder of the January rental and tax escrow payment under the Belleville Lease and Canton Lease. Debtor made a partial payment of the January rent and tax escrow amount ONLY AFTER NL Ventures filed its Motion to Compel. Debtor also only allowed NL Ventures access to the Belleville facility after NL Ventures filed its Motion to Compel.

14. The Debtor's non-compliance and non-cooperation necessitated the retention of a property management company to monitor and care for the Properties and the retention and payment of counsel to research, prepare and prosecute the Motion to Compel. NL Ventures is entitled to a §365(d)(3) or administrative expense claim for the amounts it expended on property management fees and attorney fees and costs pre-rejection related to Debtor's non-compliance, as NL Ventures is entitled to such fees and payments under the Leases and §365(d)(3).

15. Before Lease rejection, Debtor is obligated to return leased facilities to NL Ventures in broom-clean condition. To the extent the Debtor fails to do so, the Debtor is obligated to pay clean up costs under §365(d)(3) and as an administrative expense. In this case, the Debtor intentionally understaffed the Properties, failed to maintain and repair them, allowed buyers and prospective buyers to access, trash and damage the Properties and generally failed to comply with its obligation under §365(d)(3). NL Ventures is entitled to a §365(d)(3) or administrative expense claim for the amounts it expended to correct, clean and repair the Properties the Debtor allowed to be damaged pre-rejection because of the Debtor's non-compliance with §365(d)(3).

16. Debtor should not be allowed to escape its responsibilities under §365(d)(3) merely by failing to comply, before rejection, with the dictates of §365(d)(3), then pleading immunity after rejection of a contract. Debtor's filing of a bankruptcy petition did not relieve the Debtor of this obligation. 11 U.S.C. §365.

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

17. 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).

18. 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).

19. 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. Thus, Debtor's statutory obligations to pay NL Ventures are well established under controlling case law.

**IV.**  
**§365(D)(3) AND ADMINISTRATIVE CLAIMS**

**A. Debtor's Failure to Make Contractual Lease Payments When Due**

20. Pre-rejection, Debtor made contractual Lease payments late or not at all. Under the Belleville and Canton Leases, NL Ventures is be entitled to payment and a late fee for this failure.

21. Debtor filed its voluntary petition for chapter 11 bankruptcy protection on September 20, 2006 ("**Petition Date**"). 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.

22. 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.

23. 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.

24. 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 24, 2007, 23 days late. Debtor made a second *partial* rent payment for January in mid-February, 2007.

25. 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.

26. The Belleville Lease and the Canton Lease both obligate the Debtor to pay as Additional Rent, additional fees for the identified tardy payments. 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.*

B. **Debtor’s Failure to Pay Utility Payments Under the Terms of the Belleville Lease and the Canton Lease**

27. Each Lease is a triple net lease requiring Debtor to cover all expenses related to the Properties, including utility payments. To the extent Debtor has failed to pay utilities associated with the Belleville Lease and the Canton Lease, and any associated penalties or fees for such late payments, NL Ventures asserts a §365(d)(3) and/or administrative expense claim against the Debtor for all it is due for utility payments under the Leases. The currently known utility payment that the Debtors failed to pay is from the Van Buren Township Water & Sewer Department for \$1917.30. NL Ventures has been required to make such payment as the property owner, and is due reimbursement from the Debtor for such pre-rejection period utility payments under the Lease. NL Ventures asserts a §365(d)(3) and/or administrative expense claim for such costs and reimbursements due.

C. **Debtor’s Failure to Pay Property Insurance Payments Under the Terms of the Belleville Lease and the Canton Lease**

28. Each Lease is a triple net lease requiring Debtor to cover all expenses related to the Properties, including property insurance payments. To the extent Debtor has failed to pay property taxes associated with the Belleville Lease and the Canton Lease, and any associated penalties or fees for such property taxes, NL Ventures asserts a §365(d)(3) and/or administrative

expense claim against the Debtor for all it is due for property insurance payments made on behalf of the Debtor under the Leases.

D. **Debtor's Failure to Pay Property Management Fees Under the Terms of the Belleville Lease and the Canton Lease**

29. Debtors pre-rejection non-compliance with §365(d)(3) during the course of the case necessitated NL Ventures' retention of a property management firm to monitor and assure such compliance, such as the freeze securing protection of the facilities in the winter months and the pursuit of unpaid fees and uncompleted repairs. NL Ventures is entitled to an administrative expense claim for the small amount it had to expend to retain a project manager for the Belleville and Canton facilities.

30. Each Lease is a triple net lease requiring Debtor to cover all expenses related to the Properties. The Debtor has failed to pay property management fees associated with Debtor's non-compliance with the Belleville Lease and the Canton Lease. NL Ventures asserts a §365(d)(3) and/or administrative expense claim against the Debtor for all it is due for property management fees and payments made because of the Debtor under the Leases for such services.

E. **Debtor's Failure to Pay Attorney Fees Under the Terms of the Belleville Lease and the Canton Lease**

31. Debtors pre-rejection non-compliance with §365(d)(3) and the Leases during the course of the case necessitated NL Ventures' retention of counsel to compel compliance with the Leases. NL Ventures is entitled to a §365(d)(3) or an administrative expense claim for the amount it had to expend on attorneys fees and expenses to compel Debtors' compliance with the Belleville and Canton Leases.

32. NL Ventures repeatedly requested timely payment of its rent – even though such a request was not required. NL Ventures warned the Debtor on multiple occasions that if it continued to fail to timely pay rent, that NL Ventures would be forced to file a motion to compel



such payment, and if forced to file such a motion, NL Ventures would request reimbursement for its fees and costs of bringing such a motion, including its attorneys fees.

33. Each Lease is a triple net lease requiring Debtor to cover all expenses related to the Properties, including attorneys fees where attorneys fees and costs are necessitated by Debtor's default or non-compliance with such leases. The Debtor has failed to pay attorneys fees incurred by NL Ventures related to NL Ventures' attempt to compel the Debtor to comply with the Belleville Lease and the Canton Lease. NL Ventures asserts a §365(d)(3) and/or administrative expense claim against the Debtor for all it is due for attorney fees and payments made on behalf of the Debtor under the Leases.

34. The exact amount of such fees and expenses will be established at a hearing on this motion, but during previous negotiations NL Ventures estimated that such fees and costs approximated \$15,000. Failure to pay NL Ventures attorneys fees for bringing this motion would encourage the Debtor to continue to ignore its contractual obligations not only to NL Ventures, but also to all the other counter parties to contracts with the Debtor.

F. **Debtor's Failure to Maintain, Repair and Leave the Belleville and Canton Properties in Broom-Clean Condition**

35. On information and belief, pre-rejection the Debtor intentionally understaffed the Belleville and Canton Lease facilities. This understaffing caused Debtor to violate its obligations under the Belleville Lease, Canton Lease and §365(d)(3), by failing to adequately repair and maintain the leased facilities pre-rejection, by allowing equipment buyers and auctioneers to access and damage such facilities and by otherwise failing to leave the Belleville and Canton Lease Facilities in the proper condition at the rejection of the Leases date. NL Ventures is entitled to §365(d)(3) and/or administrative expense claims related to such pre-rejection failures and damages in violation of §365(d)(3).

G. **Alternatively, NL Ventures is Entitled to An Administrative Expense Claim for the Amounts Requested**

In the event that the Court determines that §365(d)(3) does not require payment of the identified expenses or the Debtor to timely comply with all of its contractual obligations under the Belleville Lease and the Canton Lease, then, in the alternative, NL Ventures argues that it is entitled to an administrative expense claim for such amounts under 11 U.S.C. §503(b)(1).

36. NL Ventures reserves its right to raise additional §365(d)(3) and administrative claims against the Debtors related to the Leases when same become known.

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

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.**  
**PRAYER**

WHEREFORE, NL Ventures requests that this Court enter an order allowing its claims and directing the Debtor to immediately pay NL Ventures for claims it asserts herein, and granting such other and further relief as the Court deems just.

Dated: August 23, 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 August 23, 2007, a copy of the foregoing Application for Allowance and Payment of §365(d)(3) Claims and Administrative Expense Claims 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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