

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

----- X  
In re: : Case No. 06-51848  
 : (Jointly Administered)  
CEP HOLDINGS, LLC, et al., :  
 : Chapter 11  
Debtors. :  
 : Honorable Marilyn Shea-Stonum  
 :  
 : Related Docket No. 657, 658  
 :  
 : Hearing Date: 10/02/07 at 9:30 a.m.  
 : Objection Deadline: 09/28/07 at 4:00 p.m.  
----- X

**OBJECTION OF THE CEP LIQUIDATING TRUST TO APPLICATION  
OF CARLISLE ENGINEERED PRODUCTS, INC. FOR THE ALLOWANCE OF  
ADMINISTRATIVE EXPENSE CLAIM**

Shaun M. Martin, the Liquidating Trustee of the CEP Liquidating Trust and successor in interest to the above-captioned debtors (the “**Debtors**”), hereby files this objection (the “**Objection**”) to Application of Carlisle Engineered Products, Inc. for the Allowance of Administrative Expense Claim (the “**Application**”). Pursuant to this Objection, the Liquidating Trustee requests that the Court enter an order denying the Application. In support of this Objection, the Liquidating Trustee respectfully represents as follows:

**JURISDICTION AND VENUE**

1. The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 157 and 1334 and Article 12.1(d) of the Plan (as such term is defined below). Consideration of this Objection 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 502 of title 11 of the United States Code (the “**Bankruptcy Code**”) and Rule 3001 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

## BACKGROUND

### General Background

4. On September 20, 2006 (the “**Petition Date**”), each Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

5. By an Order entered on July 25, 2007 (Docket No. 661), the Court confirmed the *First Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code Proposed by the Debtors and the Official Committee of Unsecured Creditors Dated May 25, 2007* (the “**Plan**”).

6. Pursuant to Article 8.1 of the Plan, the Liquidating Trustee has the right to object to administrative expense claims, including the Carlisle Administrative Expense Request. See Plan at § 8.1.

### West Alexandria Lease

7. On January 12, 2001, Carlisle Engineered Products, Inc. (“**Carlisle**”) entered into a lease (the “**Lease**”) with Botting-Thompson Realty, Ltd. (“**Landlord**”) for a facility located in West Alexandria, Ohio (the “**Facility**”). In August 2005, Creative Engineered Polymer Products, LLC (“**CEP**”), one of the Debtors, purchased certain operations from Carlisle including those operations located at the Facility (the “**2005 Transaction**”). In connection with the 2005 Transaction, Carlisle and an affiliate of CEP (The Reserve Group Management Company) unconditionally guaranteed performance under the Lease to Landlord.

8. Prior to the Petition Date, in June 2006, CEP abandoned the Facility.

9. On or about November 17, 2006, Landlord filed the Complaint for Breach of Lease against Carlisle and The Reserve Group Management Company in Common Pleas Court, Preble County, Ohio at Case No. 06CV26036 (the “**Landlord Complaint**”) seeking damages related to CEP’s breach of the Lease. A copy of the Landlord Complaint was attached to the Landlord Proof of Claim (defined below). In the Landlord Complaint, Landlord admits that

CEP ceased operations and vacated the Facility on or about June 2006. See Landlord Complaint at ¶¶ 21-22.

10. On January 16, 2007, Landlord filed a proof of claim in the Debtors' bankruptcy proceeding at BMC Claim No. 429 in the amount of \$986,543.61, for unpaid rent from June 2006 to January 2011 and a "Lease Termination Fee" of \$125,000 (the "**Landlord Proof of Claim**").

11. Under the Plan, the bar date for administrative expense claims was September 17, 2007 (the "**Administrative Expense Bar Date**"). Notice of the Administrative Expense Bar Date was timely served by BMC on all parties in interest including but not limited to Landlord on August 27, 2007. See BMC Affidavit of Service dated August 27, 2007 (Docket 691).

12. To date, Landlord has not filed any request for allowance and/or payment of an administrative expense claim against the Debtors.

**Carlisle Engineered Products, Inc.'s Administrative Expense Request**

13. On July 25, 2007, Carlisle Engineered Products, Inc. ("**Carlisle**") filed the Application for the Allowance of Administrative Expenses Claim (the Application) (Docket 658). By the Application, Carlisle seeks allowance of an administrative expense claim in the purportedly amount of \$98,294.64 (\$48,833.32 rent, \$49,461.32 taxes) pursuant to section 365(d)(3) of the Bankruptcy Code for pre-rejection unpaid rent and taxes due under the Lease.

14. As noted above, Carlisle is the guarantor of the Debtors' obligations under the Lease to Landlord. Carlisle asserts that because the Debtors did not pay Landlord rent and taxes otherwise due under the Lease during the administration of the Debtors chapter 11 cases, Landlord is entitled to such amounts as a Bankruptcy Code section 365(d)(3) claim, and Carlisle, as guarantor of Landlord, is entitled to same.

**OBJECTION**

15. The CEP Liquidating Trust submits that by virtue of CEP's abandonment of the Facility prior to the Petition Date and Landlord's conduct thereafter, the Lease was terminated

prior to the Petition Date, in accordance with applicable non-bankruptcy law and therefore, no claim for an administrative expense may be asserted against the CEP Liquidating Trust by either Landlord or Carlisle as its guarantor.

16. The CEP Liquidating Trust submits that (i) the Landlord's representations in the Landlord Complaint regarding CEP vacating the Facility in June 2006 (Landlord Complaint at ¶¶ 21-22); (ii) the Landlord's assertion of a right to the "Lease Termination Fee" (Landlord Complaint at ¶¶ 9-29, Landlord Proof of Claim); and (iii) the fact that Landlord has not filed any request for allowance of an administrative expense claim (which is now time-barred by virtue of the passage of the Administrative Expense Bar Date) all suggest that Landlord does not dispute that the Lease was terminated as a matter of applicable non-bankruptcy law prior to the Petition Date.

17. The holdings by the New Towne and Frenchtown Courts require this Court to determine, utilizing the principles of contracts, whether the Lease terminated prior to the Petition Date. The Lease, by its terms, provides the Landlord discretion to terminate the Lease upon Debtors' default. See Lease at ¶ 13. The CEP Liquidating Trust submits that the Landlord's actions (representations of breach, vacation and cessation, assertion of Lease Termination Fee and filing the Landlord Complaint) are all suggestive that Landlord terminated the Lease pre-petition, and therefore, the Lease was terminated prior to the Petition Date. As such, Landlord is unable to assert any claims under 365(d)(3) (administrative claims) against the CEP Liquidating Trust.

18. It is textbook bankruptcy law that the pre-bankruptcy termination of a lease means that the bankruptcy estate has no property interest in such lease. See In re 1345 Main Partners, Ltd., 215 B.R. 536, 541 (Bankr.S.D. Ohio 1997) ("... as a general rule, the filing of a bankruptcy petition does not resurrect a lease, and a bankruptcy court does not have the power to resurrect a lease which was properly terminated under state law prior to the bankruptcy petition".) To this end, section 365(d)(3) is inapplicable to the Lease.

19. Carlisle asserts that its alleged administrative claim has been filed pursuant to Bankruptcy Rule 3005(a), which permits a guarantor to file a proof of claim in the stead of the primary obligee of the debtor. Such right to assert a claim by a guarantor, however, cannot be more valid, or provide Carlisle with greater rights, than the claim of the primary obligee of the debtor. See In re Regal Cinemas, Inc., 393 F.3d 647, 649-650 (6<sup>th</sup> Cir. 2004) (claims of guarantors for reimbursement or contribution are subject to section 502(e)(1) and may not be allowed in a more favorable manner than the claims of the primary obligee). As the lease was terminated prior to the Petition Date, the Landlord is not entitled to an allowable claim under section 364(d)(3) of the Bankruptcy Code, and to this end, the administrative claim asserted by Carlisle is invalid as well.

20. In light of the above, this Court must deny the Carlisle Administrative Expense Request.

#### **RESERVATION OF RIGHTS**

21. The CEP Liquidating Trust reserves the right to object further to the Application, or any other claims asserted by Carlisle, on any and all additional factual and/or legal grounds. Without limiting the generality of the foregoing, the CEP Liquidating Trust specifically reserves the right to (i) amend this Objection, (ii) file additional papers in support of this Objection, (iii) file a subsequent objection on any ground or grounds to any part of the Application that are not disallowed in their entirety as requested herein and (iv) take other appropriate actions to (a) respond to any allegation or pleading that may be filed in response to this Objection by or on behalf of Carlisle or other interested parties, (b) further object to any claim for which Carlisle provides (or attempts to provide) additional documentation or substantiation or (c) further object to any claim based on any additional information that may be discovered upon further review by the CEP Liquidating Trust or through discovery pursuant to the applicable provisions of Part VII of the Bankruptcy Rules.

**CONCLUSION**

WHEREFORE, the CEP Liquidating Trust respectfully requests that the Court deny the Application and grant such other and further relief the Court may deem proper.

Dated: September 28, 2007

McGuireWoods LLP

By: /s/ Mark E. Freedlander

Mark E. Freedlander (PA I.D. #70593)

Sally E. Edison (PA I.D. #78678)

William C. Price (PA I.D. #90871)

625 Liberty Avenue, 23<sup>rd</sup> Floor

Pittsburgh, PA 15222

Telephone: 412-667-6000

Fax: 412-667-6050

*Counsel for the CEP Liquidating Trust*

V4798193.4