

**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., :  
 : Chapter 11  
Debtors. :  
 : Honorable Marilyn Shea-Stonum  
 :  
 : Related Docket No. 677  
 :  
 : Hearing Date: 10/02/07 at 9:30 a.m.  
 : Objection Deadline: 09/28/07 at 4:00 p.m.  
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**OBJECTION OF THE CEP LIQUIDATING TRUST TO APPLICATION OF  
NL VENTURES V CARLISLE, L.P. FOR ALLOWANCE AND PAYMENT OF § 365(d)(3)  
CLAIMS AND ADMINISTRATIVE EXPENSE CLAIMS**

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 the Application of NL Ventures V Carlisle, L.P. (“**NL Ventures**”) for Allowance and Payment of § 365(d)(3) Claims and Administrative Expense Claims (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 NL Ventures Administrative Expense Request. See Plan at § 8.1.

### Rejection of the NL Venture’s Leases

7. Prior to the Petition Date, certain of the Debtors were parties to leases of nonresidential real property with NL Ventures located at Canton, Ohio (“**Canton Lease**”) and Belleville, Michigan (“**Belleville Lease**” together with Canton Lease, collectively the “**NL Ventures Leases**”).

8. On January 26, 2007, the Debtors filed the motion to reject the NL Ventures Leases pursuant to sections 105(a) and 365 of the Bankruptcy Code (the “**Lease Rejection Motion**”) (Docket 322).

9. On February 27, 2007, this Court granted the Lease Rejection Motion (the “**Lease Rejection Order**”) (Docket 387). Pursuant to the Lease Rejection Order, the NL Ventures Leases were rejected effective January 31, 2007 (the “**Lease Rejection Date**”).

### NL Venture’s Administrative Expense Request

10. On August 23, 2007, NL Ventures filed the Application. By the Application, NL Ventures seeks allowance of an administrative expense claim in the amount of \$145,317.36 itemized as follows (the “**NL Ventures Administrative Expense Request**”):

a.	Rent Late Fee	-	\$2,500.00
b.	Utilities	-	\$1,278.20
c.	Property Insurance	-	\$13,910.36
d.	Property Management Fees	-	\$1,500
e.	Attorneys' Fees	-	\$15,000
f.	Property Maintenance	-	\$111,128.80
	Total	-	\$145,317.36

**OBJECTION**

11. The CEP Liquidating Trust objects to the NL Ventures Administrative Expense Request on the following grounds (i) the amounts asserted for rent late fees, utilities, property insurance and property management fees have not been substantiated with supporting documentation; (ii) the terms and conditions of the NL Ventures Leases do not provide an absolute right to attorneys' fees and the conditions precedent to allowance of attorneys fees under the NL Ventures Leases are not present; and (iii) the property maintenance occurred post-rejection and are more appropriately classified as rejection damages.

**Lack of Supporting Documentation**

12. The NL Ventures Administrative Expense Request includes \$19,188.56 in the form of late fees, utilities, property insurance and property management fees (the "**Net Charges**"). In the Application, NL Ventures does not provide any supporting documentation evidencing the Net Charges.

13. The CEP Liquidating Trust objects to the allowance of the Net Charges absent a showing of supporting documentation for the actual costs arising during the period from the Petition Date through the Lease Rejection Date.

**Impermissible Attorneys' Fees**

14. NL Ventures seeks reimbursement of attorneys' fees. With respect to such fees and expenses, the Lease provides "If Lessee shall be in default in the performance of any of its

obligations under this Lease beyond any applicable grace or cure period hereunder, Lessee shall pay to Lessor, on demand, all expenses incurred by Lessor as a result thereof . . . including reasonable attorneys' fees and expenses . . . " See Belleville Lease Section 7.03(d), Canton Lease Section 7.03(d).

15. The NL Ventures Leases provide a thirty (30) day cure period. See Belleville Lease Section 7.01(a)(i), Canton Lease Section 7.01(a)(i).

16. Upon information and belief, the Debtors (at no time) were in default of the NL Ventures Leases for a period exceeding thirty (30) days prior to the Lease Rejection Date. As such, this Court should deny the NL Ventures Administrative Expense Request with respect to its request for attorneys' fees.

**Property Maintenance is Post-Rejection Date**

17. Each of the Bellville Lease and the Canton Lease contain surrender provisions at section 9.01 thereof that provide, in pertinent part "upon the expiration or termination of this Lease, Lessee shall surrender the Premises to Lessor in as good repair and condition as received... except for any damage resulting from... normal wear and tear not required to be repaired by Lessee." (the "**Repair Provision**").

18. NL Ventures alleges that as a result of conduct of equipment purchasers or auctioneers prior to the Lease Rejection Date, NL Ventures incurred repair and clean up costs with respect to the Bellville and Canton Facilities following the Lease Rejection Date in an amount totaling \$111,128.80 (the "**Clean up/Removal Claim**"). NL Ventures suggests that it is entitled to payment in full of such amount as either a Bankruptcy Code section 365(d)(3) claim or a section 503(b)(1) claim.

19. The assertions by NL Ventures, however, fail as a matter of law. With respect to claims for clean up and repair arising upon surrender due to lease rejection, case law has established that such claims do not constitute administrative claims or otherwise allowable claims arising under section 365(d)(3) of the Bankruptcy Code, but instead, are more properly

treated as rejection damage claims arising under section 365(g)(1) of the Bankruptcy Code. See In re Ames Dept. Stores, Inc., 306 B.R. 43, 59 (Bankr.S.D.N.Y. 2004) (clean up and removal costs arising post-rejection date of non-residential real property lease are properly classified (if allowed) as 365(g) pre-petition, general unsecured “rejection” damages claims and not administrative expense claims).

20. In Ames, the debtor and landlord entered into a non-residential lease of real estate that contained a provision similar to the Repair Provision. Id. at 58. Analyzing the “repair obligation provision” the Ames Court determined that such obligations arose upon or after termination of the subject lease. Id. at 59. In particular, Ames found that the subject “repair obligation provision,” by its express terms, only arose upon the termination of the lease contrary to rental obligations (which arose monthly during the course of the lease and the administrative of the bankruptcy case). Taken in this context, the Ames Court held that the clean up costs should be treated as arising and occurring on or after the rejection of the subject lease, and therefore, were properly classified as “rejection damages” pursuant to section 365(g)(1) of the Bankruptcy Code as the obligation did not arise prior to the rejection/termination of the subject lease. Id. at 58.

21. Similar to the “repair obligation provision” in Ames, the Repair Provision is inextricably linked to the termination of the Lease and, by its express terms, only arises upon such a termination. The Debtors rejected the Lease on the Rejection Date, which is **prior to** the dates of any clean up/removal claims that NL Ventures asserts against the CEP Liquidating Trust. To the extent the Clean Up/Removal Claims are allowed or allowable, this Court should classify such claims as “rejection damages” due to holding of Ames and a literal reading of section 365(d)(3).

### **RESERVATION OF RIGHTS**

22. The CEP Liquidating Trust reserves the right to object further to the Application 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 NL Ventures or other interested parties, (b) further object to any claim for which NL Ventures 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

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