UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re	:	Case Nos. 06-51848 (Jointly Administered)
CEP HOLDINGS, LLC, *et al.,*	:	Chapter 11
	:	Honorable Marilyn Shea-Stonum
Debtors.	:	
	:	Related to Doc No. 97

OBJECTION TO THE MOTION OF DEBTORS AND DEBTORS IN POSSESSION, PURSUANT TO SECTIONS 105(a), 363(b) AND 503(c)(3) OF THE BANKRUPTCY CODE, FOR ENTRY OF AN ORDER AUTHORIZING THEM TO ADOPT A PERFORMANCE BONUS PLAN AND MAKE PAYMENTS THEREUNDER

The Official Committee of Unsecured Creditors (the "Committee"), by and through its proposed undersigned counsel, files this Objection (the "Objection") to the Motion of Debtors and Debtors in Possession Pursuant to Sections 105(a), 363(b) and 503(c)(3) of the Bankruptcy Code, For Entry of an Order Authorizing Them to Adopt a Performance Bonus Plan and Make Payments Thereunder (the "Motion"), and in support hereof states as follows:

I. INTRODUCTION

1. The Committee has three principal objections to the Motion and the approval of the bonus plan proposed therein: (i) considering the fact that the bonus plan proposed in the Motion contemplates performance starting on the Petition Date (defined below) and ending on October 31, 2006, by virtue of the passage of time, the plan has proven to be unnecessary for purposes of employee retention and performance; (ii) the discretionary nature of yet to be disclosed bonus components makes the plan an unlawful retention/severance plan rather than a true incentive plan; and (c) the plan is inappropriately skewed in favor of a few members of senior management and James Van Tiem (who is the Chairman of the Debtors, a stockholder of the Debtors and principal of The Reserve Group, which entity was responsible for leveraging the

Debtors beyond a point where they could reasonably expect to have cash flow sufficient to operate successfully).

II. BACKGROUND

2. On September 20, 2006 (the "Petition Date"), the Debtors each filed their respective voluntary petitions for relief under chapter 11 of title 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their affairs pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been requested or appointed in these cases.

3. In July 2006, at the suggestion of the pre-petition Debtors that their trade vendors organize and form an unofficial committee for purposes of representing the interests of trade creditors in an out-of-court restructuring effort by the Debtors, the trade creditors formed an unofficial trade committee (the "Unofficial Trade Committee").

4. On September 28, 2006, the Office of the United States Trustee appointed an Official Committee of Unsecured Creditors (the "Committee") comprised of five (5) members, including four (4) of whom served on the Unofficial Trade Committee that was represented by McGuireWoods LLP. On October 12 2006, the Office of the U.S. Trustee expanded the Committee by adding two additional members, one of which was a participant on the Unofficial Trade Committee.

5. On October 3, 2006, the Committee selected McGuireWoods LLP to represent its interests in the Debtors' cases, subject to this Court's approval. The Committee's application to engage McGuireWoods as counsel is currently pending.

6. On October 3, 2006, the Debtors filed the Motion seeking this Court's authority to commence a "Performance Bonus Plan" (the "Bonus Plan"), which appears to be a hybrid of a performance-based plan for certain employees and a retention/severance plan for certain members of management. The Motion was not noticed on an expedited basis. The Motion is scheduled to be heard on October 24, 2006.

A. The Proposed Bonus Plan.

7. The Motion seeks retroactive authority to implement a Bonus Plan that could pay as much as $1.3 million to officers, management and other employees. See Motion ¶17(c). Over 50% of the proposed bonuses are allocated to the officers and management classified in Tier 1 (comprising 21% of the total number of persons eligible to receive a bonus) and are effectively a retention/severance payments as discussed below.

8. As described in greater detail in the Motion and the Bonus Plan attached thereto as Exhibit "A", the Bonus Plan runs through two "Bonus Periods". See Motion 17(a). The first period ("Period One") is defined in the Motion as "the period from the Petition Date to October 15, 2006." Id. The second period ("Period Two") is defined in the Motion "as the period from October 15, 2006 to October 31, 2006." Id. The bonus payment date for each of the Bonus Periods is to be November 15, 2006. Id.

9. Under the Bonus Plan, each employee, manager or officer is assigned a potential monetary bonus on Exhibit A to the Bonus Plan, which is referred to in the Motion as a Bonus Period Potential Award. For the Tier 1A Group (which is comprised of James Van Tiem, Chairman, Joseph Mallak, CEO and President, Marshall Tucker, Director of M&A, and Bruce Fassett, EVP Customer/Sales), Tier 1B Central Group, Tier 2 Group and Tier 3 Group, bonuses are purportedly based on the overall performance of the facilities in reaching targets multiplied by a factor that has yet to be determined by management (who comprise the very same individuals entitled to receive such bonuses).

10. Bonuses are to be calculated for the Tier 1A Group, Tier 1B Central Group, Tier 2 Group and Tier 3 Group, by multiplying the Bonus Period Potential Award by what is referred to in the Motion as a General Bonus Percent factor. The General Bonus Percent factor is calculated by (i) multiplying the "Normal Plant Percent" factor, an undisclosed number that management believes reasonably represents the percentage of production to be reasonably expected by each facility, by the "Plant Earned Bonus Percent" factor for each facility, and then

(ii) summing the results for each facility. The "Plant Earned Bonus Percent" factor is derived from the percentage of days in the Bonus Period that a facility meets its daily scheduled targeted releases of bank parts (which targets are also deemed satisfied if the Customers require no product from a facility).

11. Notably, because management can assign the Normal Plant Percentage factor to a facility in its discretion after the work has been performed at that facility, an unfavorable Plant Earned Bonus Percent factor resulting from unsatisfactory performance (which should result in a smaller bonus) can be minimized if management reasonably believes that the Normal Plant Percent factor for that facility should be a lower number. Likewise, a favorable Plant Earned Bonus Percent factor resulting from a facility meeting its performance targets (which should result in a higher bonus) can be enhanced by management's decision that the Normal Plant Percent factor for that facility should be higher.

12. The Bonus Period Potential Awards identified on Exhibit A to the Bonus Plan can also be increased based on the reallocation of forfeited bonuses.

13. The Motion provides that the proposed bonuses are to be funded by (i) $1.275 million in grants from the Visteon Corporation, General Motors Corporation and Delphi Corporation (collectively, the "Customers") and (ii) $50,000 from a reserve established under the Debtor's Postpetiton Facility and funded by Wachovia Capital Finance Corporation ("Wachovia"), subject to the sale of certain equipment. See Motion, Exhibit A. Any unused funds remaining after the proposed bonuses are paid are to be returned to the Customers regardless of the original source. See Motion ¶ 17(e).

III. COMMITTEE'S OBJECTION

14. The Committee recognizes that value can be derived for the benefit of a bankruptcy estate by implementing incentive-based bonus programs in certain liquidation scenarios, however the facts surrounding the current matter do not justify implementation of the Bonus Plan as proposed by the Debtors in their Motion because: (i) by virtue of the passage of

time the Bonus Plan has proven to be unnecessary, (ii) the discretionary nature of yet to be disclosed bonus components makes the Bonus Plan an impermissible retention/severance plan for those people identified in Tier 1B Central Group, Tier 1A Group, Tier 2 Group and Tier 3 Group, and (iii) the Bonus Plan is inappropriately skewed in favor of a few members of senior management and James Van Tiem (Chairman).

A. The Motion Should Be Denied Because The Bonus Plan Is No Longer Necessary.

15. The Motion should be denied because the Bonus Plan is unnecessary. Period One has passed and by the time the Motion will have been heard by this Court only one week of the Bonus Plan will remain. The mass employee exodus that the Debtors predict in the Motion has not occurred and the Bonus Periods are nearly over. The Bonus Plan has proven to be unnecessary for purposes of employee retention and performance.

16. Alternatively, if the Court determines that the Bonus Plan is nevertheless necessary, the Committee, in fulfilling its statutory duties, must note that any plan that may be approved should be narrowly tailored to include only those employees critical to the wind down of the Debtors operations. See In re Allied Holdings Inc., 337 B.R. 716, 722 (Bankr. N.D. Ga. 2005) (employees retained were "critical" to the goals of the debtor). Furthermore, such plan should comply with the requirements of section 503(c)(1) (concerning retention plans) and 503(c)(2) (concerning severance plans), depending upon how the Court views the retroactive Bonus Plan. 11 U.S.C. §§ 503(c)(1-2).

17. Finally, considering the Bonus Plan has apparently been implemented for one month and the Period One has concluded, the Debtors should be required to disclose (i) exactly what each person identified on Exhibit A will have earned to date (or at least for Period One) assuming the Court approves the Bonus Plan retroactively, (ii) what the Normal Plant Percentage factors are, (iii) the amount of increased production, and (iv) how many target days were met due to a lack of customer demand, before the Bonus Plan is approved.

B. The Motion Should Be Denied Because The Discretionary Nature Of Yet to Be Disclosed Bonus Components Makes The Bonus Plan An Impermissible Retention/Severance Plan.

18. Notwithstanding the fact that the performance contemplated in the Bonus Plan commenced upon the Petition Date and most of the work required thereunder has already been performed, the Normal Plant Percentage factors have yet to be disclosed and remain in the discretion of management. Because management can manipulate at its sole discretion the Normal Plant Percentage factor to minimize the effect of less productive facilities and maximize the effect of more productive facilities, it effectively can preserve the Bonus Period Potential Award identified on Exhibit A to the Bonus Plan almost without regard to facility performance. Accordingly, the proposed bonuses for those identified in Tier 1B Central Group, Tier 1A Group, Tier 2 Group and Tier 3 Group are not performance based rather they are either (a) retention bonuses (due to the retroactive relief sought in the Motion), prohibited under section 503(c)(1) of the Bankruptcy Code absent certain findings discussed below, see In re Dana Corp., *et al.*, -- B.R. --, 2006 WL 2563458 (No. 06-10354) (Bankr. S.D. N.Y. Sept. 5, 2006), or severance plans that are impermissible under section 503(c)(2) of the Bankruptcy Code absent additional findings by the Court.

19 Section 503(c) provides in relevant part:

> [T]here shall neither be allowed, nor paid—
>
> (1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that--
>
> > (A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;
> >
> > (B) the services provided by the person are essential to the survival of the business; and
> >
> > (C) either--

> (i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or
>
> (ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2) a severance payment to an insider of the debtor, unless--

> (A) the payment is part of a program that is generally applicable to all full-time employees; and
>
> (B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; . . ..

11 U.S.C. 503(c)(1-2).

20. Due to the retroactive nature of the relief sought in the Motion, the Bonus Plan could be classified as a retention program in that it apparently was implemented without Court authority on the Petition Date and requires continued employment to October 31, 2006. In light of the fact that some of the participants in the Bonus Plan are "insiders" (as that term is defined in section 101(31) of the Bankruptcy Code), section 503(c)(1) is applicable in this instance. Under section 503(c)(1), the Bonus Plan cannot be approved absent the Court making the findings required under section 503(c)(1) (identified above) based on evidence in the record. The Debtors do not contend that they have satisfied the elements of section 503(c)(1) (instead, they argue that the Bonus Plan is not a retention program) nor do they attach to their Motion any evidence that would support the required findings under section 503(c)(1).

21. Likewise, because the work that was to be performed during the Bonus Periods has been substantially completed, eliminating the argument that the Court's approval of the Bonus Plan will encourage such work, coupled with the facts that a resignation by any of the officers, management and employees on or after November 1, 2006 will not deprive the resigning person of the bonus contemplated under the Bonus Plan and many of the facilities will be closing in the near future, the Bonus Plan certainly could be classified as a severance program governed by section 503(c)(2) of the Bankruptcy Code. In this instance, the Bonus Plan cannot be approved absent the Court making the findings required under section 503(c)(2) based on evidence in the record. The Debtors do not contend that they have satisfied the elements of section 503(c)(2) (rather they argue that section Bonus Plan is not a severance plan) nor do they attach to their Motion any evidence that would support findings under section 503(c)(2).

22. The Debtors contend that the Bonus Plan is performance-based; yet, it is difficult to determine whether performance beyond what is normally required in the ordinary course of operations is/was actually necessary to earn a bonus under the Bonus Plan because it commenced on the Petition Date and the Debtor's management has yet to identify the Normal Plant Percentage factors for each facility. Because targeted production requirements for each facility can be met simply if customers do not require product from a facility and the Debtor's management has the sole discretion to assign Normal Plant Percentage factors to each facility, it is possible that a facility having (i) minimal performance due to a lack of customer demand during the Bonus Periods and (ii) a high Normal Plant Percentage factor, will yield significant bonuses to employees. Thus, technically, officers, management and employees could benefit from *less* performance.

C. The Motion Should Be Denied Because It Is Inappropriately Skewed In Favor Of A Few Members of Senior Management and James Van Tiem (Chairman).

23. Of the 97 officers, management, and employees eligible for the bonuses, the four people in the Tier 1A Group (approximately 4% of the pool of people eligible for bonuses), can receive as much as 19% ($250,000) of the proposed bonus funds payable for six weeks of post-petition supervision ($41,666 per week). See Motion ¶ 17(c).

24. As discussed above, due to the discretionary aspect of certain elements of the bonus formula set forth in the Bonus Plan, management can effectively preserve their respective Bonus Period Potential Award irrespective of performance. Accordingly, absent a determination that Chairman James Van Tiem and other members of senior management were critical to the wind down efforts of the Debtors and the requirements of section 503(c)(1-2) are met, members of senior management in Tier 1(A) Group should not receive the bonuses designated on Exhibit A to the Bonus Plan.

D. No Debt Should Be Used To Fund the Bonus Plan.

25. Finally, the Committee acknowledges that the Bonus Plan is funded primarily by way of cash infusions, however, because the goal of the Bonus Plan has been to produce bank parts for the Customers, no postpetition debt should be incurred by the Debtors to fund the Bonus Plan (in the event the Motion is approved) as such funding would directly harm the interests of unsecured creditors. All bonuses should be paid by the Customers as cash infusions.

WHEREFORE, the Official Committee of Unsecured Creditors respectfully requests that this Court deny the Debtors' Motion and grant such other relief as the Court deems just and appropriate.

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