

**IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

In re:	:	
	:	Case No. 06-51848
CEP HOLDINGS, LLC, et al.	:	(Jointly Administered)
	:	
	:	Chapter 11
Debtors	:	
	:	Judge Marilyn Shea-Stonum

**UNITED STATES TRUSTEE’S OBJECTION TO MOTION OF DEBTORS
AND DEBTORS IN POSSESSION, PURSUANT TO SECTION 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**

Now comes Saul Eisen, United States Trustee for Region 9 and objects to the Motion of Debtors and Debtors in Possession, Pursuant to Section 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 (“Motion”). In support of his objection, the United States Trustee, states as follows:

1. This Court has jurisdiction to hear the above-referenced Objection.
2. Pursuant to 28 U.S.C. § 586, the United States Trustee is charged with the administrative oversight of cases commenced pursuant to title 11 of the United States Bankruptcy Code. This duty is part of the United States Trustee’s overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990).

3. Pursuant to 11 U.S.C. § 307, the United States Trustee has standing to be heard with regard to the above-referenced Objection.

Factual Background

4. On September 20, 2006, the Debtors each filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses as a debtors-in-possession. 11 U.S.C. §§ 1107, 1108. The cases are being jointly administered for procedural purposes per Order of this Court.

5. On October 3, 2006, the United States Trustee appointed an Official Committee of Unsecured Creditors.

6. On October 3, 2005, the above captioned Motion was filed.

Preliminary Statement

7. The United States Trustee objects to the Motion because the Debtors have not and cannot demonstrate that the payments are appropriate under Section 503(c) of the Bankruptcy Code, as amended. In fact, the Debtors have not even alleged that they can satisfy all of the new requirements/restrictions imposed under Section 503(c). The Debtors contend that the Bonus Plan is performance based and therefore not subject to Section 503(c). The Bonus Plan, however, appears to rename a key employee retention plan or a severance plan as a performance based plan so that Debtors may request approval of the same without satisfying the requirements of Section 503(c).

Grounds for Relief

8. As noted above, the Debtors filed the Motion on October 3, 2006. In the Motion, the Debtors seek the Court's approval of a Performance Bonus Plan ("Bonus Plan"). The Bonus Plan is for management employees with an approximate payout of \$1.3 million. The Bonus Plan includes

two Bonus Periods, the first from the petition date to October 15, 2006; the second period from October 15, 2006 to October 31, 2006. See Motion, para. 17.

9. The Bonus Plan includes tiers of Covered Employees; Tier 1A, Tier 1B, Tier 2, Tier 3 and Tier 4. See Motion, para. 17. Tier 1 consist of 21 employees or officers with Tier 1A consisting of Mssrs. Van Tiem, Mallak, Marshall and Fassat. Tier 2 consists of 16 accountants, managers and other employees in Akron, Ohio. Tier 3 consists of five sales and engineering employees in Livonia, Michigan. Tier 4 consists of 55 engineers, supervisors, controllers and other employees in certain identified facilities.

10. The Bonus Plan contemplates payments based on either performance of specific plants or performance for all plants. For plant specific positions, which covers Tier 1B and Tier 4 employees, the amount of the employees bonus is based on a “Targeted Achieved Date.” For all other employees, the bonus amounts are based on “General Bonus Percent” as defined in the Motion.

11. Under the Bonus Plan, the amounts allocated to each group of employees is as follows: Tier 1 employees, up to \$715,000; Tier 2 and 3 employees, \$108,000; and Tier 4 employees, \$500,000. Each of the bonuses may be increased due to the redistribution enhancement that may arise as a result of reallocation of forfeited bonus period.

12. The United States Trustee respectfully objects to the Motion on the grounds that the payments to be made under the Bonus Plan do not comply with Section 503(c) of the Bankruptcy Code. The United States Trustee further alleges that despite the Debtors’ attempts to characterize their Bonus Plan as a performance based plan falling outside the scope of Section 503(c), the Bonus Plan appears to be performance based in name only and is really a key employee retention plan and/or a severance plan.

13. The Debtors have the burden of proof with respect to the Motion.

14. Under Section 503(c) of the Bankruptcy Code, the Debtor must “based on evidence in the record” demonstrate all of the required elements set forth in Section 503(c)(1) and (c)(2).

Section 503(c)(1) and (c)(2) provide, in pertinent part, as follows:

(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 individual 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 non-management 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; or

(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; ...

15. The Debtors have the burden of demonstrating that all the elements under Section 503(c) are present. Here, the Debtor has not and cannot provide sufficient evidence to meet the requirements under Section 503(c).

16. The Debtors do not identify any type of performance other than what appears to be normal ordinary course performances at the plants that would justify the bonuses. Nothing in the Bonus Plan requires a positive increase in Debtors' performance to qualify for the Bonus Plan. In addition, the first bonus period has expired.

17. The Bonus Plan should be rejected since it does not meet the requirements subject to 11 U.S.C. §503(c). Recently, in denying an executive compensation plan that did not meet the requirements of §503, Judge Lifland stated that the specific standards of 503 "must be met before a bankruptcy court may authorize payments made to an insider for the purpose of inducing such person to remain with a debtor's business." *In re Dana Corporation*, 2006 WL 2563458 (Bkrctcy. S.D.N.Y). The plan as proposed by Debtors' fails to meet this standard, and as a result, must be denied.

WHEREFORE the United States Trustee requests that this Court issue an order denying approval of the Motion as filed and granting such other relief as this Court deems appropriate.

Respectfully submitted,

SAUL EISEN
UNITED STATES TRUSTEE

By: /s/ Maria D. Giannirakis
Maria D. Giannirakis
Trial Attorney
Office of the U.S. Trustee
H.M. Metzenbaum U.S. Courthouse
201 Superior Avenue, Suite 441
Cleveland, OH 44114-1240
Phone: (216) 522-7900 ext. 222
Fax: (216) 522-7193

CERTIFICATE OF SERVICE

A copy of the foregoing Objection was sent by electronic mail via the Court's ECF/CM system or facsimile mail to the following parties:

Joseph F. Hutchinson, Jr.
Thomas M. Wearsch
Eric R. Goodman
Baker & Hostetler LLP
counsel for Debtors and Debtors in Possession

Mark E. Freedlander
Sally E. Edison
McGuire Woods LLP
counsel for Official Committee of Unsecured Creditors

Michael C. Hammer
mchammer2@dickinsonwright.com

David M. Neumann
dmeumann@bfca.com

Richard L. Ferrell
Ferrell@taftlaw.com

Eric T. Ray
eray@balch.com

Shira R. Isenberg
Shira.isenberg@goldbergkohn.com

Edward T. Sable
tsable@honigman.com

Kristi Katsma
Kkatsma@dickensonwright.com

Sarah Seewer
sseewer@honigman.com

Brenda K. Bowers
bkbowers@vssp.com

Carrie M. Broosius
cmbrosius@vssp.com

Kimberly A. Coleman
bankrutcy@leechtishman.com

Jeremy M. Downs
Jeremy.downs@goldbergkohn.com

/s/ Maria D. Giannirakis
Maria D. Giannirakis