

**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.,¹ :
: Chapter 11
Debtors. :
: Honorable Marilyn Shea-Stonum
: :
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**EMERGENCY MOTION OF DEBTORS AND
DEBTORS IN POSSESSION TO (I) ENFORCE THE
PERFORMANCE BONUS PLAN ORDER AND (II) COMPEL
PARTICIPATING CUSTOMERS TO RELEASE FUNDS FROM
THE BBK TRUST ACCOUNT SO THAT THE DEBTORS CAN MAKE
APPROVED PAYMENTS UNDER THE PERFORMANCE BONUS PLAN**

CEP Holdings, LLC and its affiliated debtors and debtors in possession (each a “**Debtor**” and collectively, the “**Debtors**” or “**CEP**”) in the above-captioned Chapter 11 cases (the “**Cases**”), hereby move (the “**Motion**”),² pursuant to section 105(a) of title 11 of the United States Code (the “**Bankruptcy Code**”), for entry of an order: (i) enforcing the Court’s order approving the Performance Bonus Plan (as defined below) entered by the Court on October 26, 2006, and as set forth in writing pursuant to the Court’s *Entry of Judgment* dated November 17, 2006 (Docket No. 242) (the “**Performance Bonus Plan Order**”); and (ii) compelling Visteon Corporation, General Motors Corporation and Delphi Corporation (collectively, the “**Participating Customers**”) and BBK, Ltd., as agent to the Participating Customers (“**BBK**”),

¹ The Debtors are: CEP Holdings, LLC, Creative Engineered Polymer Products, LLC and Thermoplastics Acquisition, LLC.

² Contemporaneously with the filing of this Motion, the Debtors have filed a motion requesting the entry of an order scheduling an emergency hearing on this Motion.

to release funds from the BBK Trust Account³ so that the Debtors can make approved payments under the Performance Bonus Plan. In support of the Motion, the Debtors respectfully represent as follows:

PRELIMINARY STATEMENT

This Court has authorized the Debtors to make payments under the Performance Bonus Plan to non-insider employees. By agreement of all parties, including the Participating Customers, the payments at issue are to be funded solely from Participating Customers' cash infusions. These cash infusions have been deposited into the BBK Trust Account. BBK, as agent for the Participating Customers, in violation of the DIP Order and the Performance Bonus Plan Order, improperly refuses to release Performance Bonus Plan payments from the BBK Trust Account. This has and will create prejudice to the Debtors and their continued operations in Chapter 11. Accordingly, the Debtors hereby seek an order of the Court, pursuant to section 105(a) of the Bankruptcy Code, enforcing the Performance Bonus Plan Order and the DIP Order and directing BBK, as agent for the Participating Customers, to release funds from the BBK Trust Account so that the Debtors can make approved payments under the Performance Bonus Plan.

JURISDICTION AND VENUE

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of the Motion 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 predicate for the relief requested herein is section 105(a) of the Bankruptcy Code.

³ The term "BBK Trust Account" as used herein has the meaning given to it in the Customer Agreement (as defined below).

BACKGROUND

General

4. On September 20, 2006 (the “**Petition Date**”), each Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Pursuant to an order entered by the Court on September 26, 2006, the Cases are being jointly administered for procedural purposes only.

5. The Debtors are operating their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. On September 28, 2006, the United States Trustee appointed an official committee of unsecured creditors (the “**Committee**”). No trustee or examiner has been appointed.

The Debtors’ DIP Financing

6. On the Petition Date, the Debtors filed the *Motion of Debtors and Debtors in Possession, Pursuant to Sections 362, 363, and 364 of the Bankruptcy Code and Bankruptcy Rules 4001(B) and 4001(C), For Interim and Final Orders (I) Authorizing Debtors to Incur Postpetition Secured Indebtedness, (II) Granting Security Interests and Priority Claims, (III) Granting Adequate Protection, (IV) Modifying Automatic Stay and (V) Setting Final Hearing* (Docket No. 22) (the “**DIP Motion**”). The DIP Motion contemplates that the Participating Customers will fund the Debtors’ restructuring costs on a monthly basis and the Debtors’ wind down costs upon the entry of the DIP Order (as defined below). *See generally* DIP Motion at ¶ 28(b).

7. On October 27, 2006, the Court entered the *Final Order Authorizing Debtors to: (A) Use Cash Collateral; (B) Incur Postpetition Debt; (C) Grant Adequate Protection and Provide Security and Other Relief to Wachovia Capital Finance Corporation (Central); and (D) Grant Certain Related Relief* (Docket No. 192) (the “**DIP Order**”). The DIP Order incorporated

the terms and conditions of the Customer Agreement attached to the DIP Order as Exhibit C (the “**Customer Agreement**”). See DIP Order at ¶ 15.

8. Pursuant to the terms of the Customer Agreement, the Participating Customers are required to pay “Cash Infusions”⁴ to the extent that the Debtors do not have “Postpetition Debt”⁵ otherwise sufficient to fully pay, among other things, “Wind Down Charges.” Customer Agreement at ¶ 3(a). BBK has no discretion to refuse to release funds with respect to a payment approved by the Court when so directed by the Debtors. See Customer Agreement at ¶ 3(c) (“Funds in the BBK Trust Account *shall be released* by BBK to Debtors . . . when due . . . as approved by the Court . . .”) (emphasis added). BBK and the Participating Customers only have one day to “review” any such request made by the Debtors, and no discretion to deny any such request at the conclusion of this one day period. *Id.* (“Funds in the BBK Trust Account shall be released by BBK to Debtors . . . when due . . . as approved by the Court; provided that the Participating Customers shall have one business day to review the Debtors’ request for a release of funds from the BBK Trust Account before BBK is *required* to release the funds.”) (emphasis added).

9. The term “Wind Down Charges” in the Customer Agreement includes, among other things, the \$1.273 million referenced in the Performance Bonus Plan Motion (as defined below) relating to the funding for the Performance Bonus Plan (as defined below). See Customer Agreement at 1(b)(xiv) (“**Wind Down Charges.**” Those charges listed in Exhibit 4 attached

⁴ The term “Cash Infusions” is defined to include “all cash provided directly to Debtors by the Participating Customers, and Assisting Customers, pursuant to the Customer Agreement.” DIP Order at Exhibit A ¶ 13.

⁵ The term “Postpetition Debt” is defined to include “all indebtedness or Obligations of Debtors to Lender or the Participating Customers upon full and final repayment in cash of all of Lender’s interests in the Aggregate Debt incurred on or after the Petition Date pursuant to this Order, the Postpetition Documents or otherwise, including any advances made by Lender to pay Allowable 506(b) Amounts, plus . . . the Postpetition Charges.” DIP Order at Exhibit A ¶ 40.

hereto and as the same may be increased by mutual agreement of the Debtors and Participating Customers.”); Customer Agreement at Exhibit 4 (“Employee Incentive Plan — \$1.273”).⁶

10. Accordingly, upon (a) the entry of an order approving the payment of performance bonuses and (b) a request by the Debtors to release funds to pay such performance bonuses, BBK is *required*, at the conclusion of the one day review period, to release such funds pursuant to paragraph 3 of the DIP Order.

The Approval of the Performance Bonus Plan

11. After the Petition Date, on October 20, 2006, the Debtors filed 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* (Docket No. 97) (the “**Performance Bonus Plan Motion**”).

12. By the Performance Bonus Plan Motion, the Debtors sought the entry of an order, pursuant to sections 105(a), 363(b) and 503(c)(3) of the Bankruptcy Code, authorizing the Debtors to adopt the performance bonus plan, as attached to the Performance Bonus Plan Motion as Exhibit A (the “**Performance Bonus Plan**”), and to make payments in accordance therewith. The terms and conditions of the Performance Bonus Plan were negotiated extensively with the Participating Customers prepetition.

13. By the Performance Bonus Plan Motion, the Debtors represented to the Court that the Performance Bonus Plan would primarily⁷ be funded by the Participating Customers. *See* Performance Bonus Plan Motion at ¶ 16 (“Wachovia and the Customers have agreed to fund the

⁶ Upon information and belief, this amount has been paid into the BBK Trust Account by the Participating Customers.

⁷ The Debtors use the term “primarily” in this Motion (and the Performance Bonus Plan Motion) because a small fraction of the funding for the Performance Bonus Plan consists of debt and a small cash infusion from Wachovia (depending on the sale price of certain machinery). The funds requested by the Debtors at this time are solely from Participating Customers’ cash infusions.

Performance Bonus Program through cash infusions.”); Performance Bonus Plan Motion at ¶ 17(e) (“Certain of the customers of CEP (the ‘Participating Customers’) will fund \$1.275 million of the cost of the Performance Bonus Plan.”); Performance Bonus Plan Motion at ¶ 30 (“[The Customers] must fund most, if not all, of the Performance Bonus Plan”).

14. Indeed, this was clearly the understanding of the Participating Customers as set forth in the *Visteon Corporation’s Proposed Findings of Fact and Conclusions of Law Regarding Hearing to Consider Entry of Final Financing Order* (Docket No. 175) (the “**Visteon Findings**”). See *Visteon Findings* at ¶ 14 (“[T]he Participating Customers have agreed to: . . . fund professional fees and US Trustee fees of \$1,787,400, and an employee incentive plan totaling \$1.3 million.”).

15. Certain parties (collectively, the “**Objectors**”)⁸ filed the following objections (collectively, the “**Objections**”) to the Performance Bonus Plan Motion:

- a. *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* (Docket No. 165) (the “**Committee Objection**”);
- b. *Objection of United Steelworkers to Debtors’ Motion for Authorization to Adopt a Performance Bonus Plan and Make Payments Thereunder* (Docket No. 168);
- c. *Objection of Independent Contractors to Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a), 363(b) of the Bankruptcy Code, for Entry of an Order Authorizing Them to Adopt a Performance Bonus Plan and Make Payments Thereunder* (Docket No. 170); and
- d. *United States Trustee’s Objection to Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a), 363(b) and 503(b) of the Bankruptcy Code, for Entry of an order Authorizing Them to Adopt a*

⁸ The Objectors were: the Committee, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Fabnet Associates, Inc., Norris Sales Associates, Inc. and C.H. Raches, Inc., and the United States Trustee.

Performance Bonus Plan and Make Payments Thereunder (Docket No. 180).

16. In its objection, the Committee stated that “no postpetition debt should be incurred by the Debtors to fund the Bonus Plan (in the event that the Motion is approved) as such funding would directly harm the interests of unsecured creditors.” Committee Objection at ¶ 25. The Participating Customers did not object to the Performance Bonus Plan Motion or file any documents with the Court contradicting the Debtors’ representation that Performance Bonus Plan would primarily be funded by the Participating Customers.

17. On October 23, 2006, the Debtors filed the *Consolidated Reply to Objections 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* (Docket No. 178) (the “**Consolidated Reply**”). By the Consolidated Reply, the Debtors argued, among other things, that the Objectors lacked standing to object to the Debtors’ adoption of the Performance Bonus Plan to the extent that the Performance Bonus Plan is funded by cash infusions from the Participating Customers. See Consolidated Reply at ¶¶ 7-10.

18. On October 24, 2006, the Court held a hearing (the “**Hearing**”) and considered, among other things, the Performance Bonus Plan Motion. At the Hearing, counsel for the Debtors represented to the Court that the Performance Bonus Plan would primarily be funded by the Participating Customers. Additionally, counsel for the Committee informed the Court that he saw no harm to the Debtors’ adoption of the Performance Bonus Plan to the extent that it is funded by cash infusions from the Participating Customers.

19. The Participating Customers had notice of the Hearing and were represented by counsel at the Hearing. At no point during the Hearing did the Participating Customers object to

the Debtors' adoption of the Performance Bonus Plan or dispute the representations made by the Debtors at the Hearing, in the Performance Bonus Plan Motion or the Consolidated Reply, including the representations concerning the source of funding for the Performance Bonus Plan.

20. On October 26, 2006, the Court entered the Performance Bonus Plan Order, and concluded that the Performance Bonus Plan could be approved as to non-insiders. *See* Performance Bonus Plan Order at ¶ 7 (“The Court does not believe that the payments are justified with respect to employees who are not insiders and approves the payments to them called for in the Plan.”). The Court’s order was based, in part, “by the fact that the Participating Customers, who are the primary beneficiaries of the concerted efforts sought under the Plan, have chosen to infuse cash to make the Plan payments.” *Id.*

Payments Under the Performance Bonus Plan

21. On November 21, 2006, the Debtors sought the release of \$861,310.00 from the BBK Trust Account in order to make approved payments under the Performance Bonus Plan. The Participating Customers have paid \$1.273 million of the funding for the Performance Bonus Plan into a BBK Trust Account in the form of “Cash Infusions,” as such term is defined in the Customer Agreement. *See id.* at ¶ 5. BBK, as agent for the Participating Customers, however, refused to release the \$861,310.00 to the Debtors so that the Debtors can make payments under the Performance Bonus Plan as approved by the Court. Accordingly, the Debtors seek the entry of an order compelling BBK and the Participating Customers to release \$861,310.00 from the BBK Trust Account so that the Debtors can make approved payments under the Performance Bonus Plan.

RELIEF REQUESTED

22. By this Motion, the Debtors seek the entry of an order, pursuant to section 105(a) of the Bankruptcy Code, enforcing the Performance Bonus Plan Order and the DIP Order and

directing the Participating Customers and BBK to release funds from the BBK Trust Account so that the Debtors can make approved payments under the Performance Bonus Plan.

ARGUMENT

23. It is well established that a bankruptcy court has the authority under section 105(a) of the Bankruptcy Code to take any action or make any determination necessary or appropriate to enforce or implement its orders. 11 U.S.C. § 105(a) (“The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, *taking any action or making any determination necessary or appropriate to enforce or implement court orders* or rules, or to prevent an abuse of process.”) (emphasis added); *In re Walker*, 257 B.R. 493, 496 (Bankr. N.D. Ohio 2001) (“The bankruptcy court’s contempt powers flow from Bankruptcy Code § 105(a) and the inherent power of a court to enforce compliance with its lawful orders.”); *In re Seal*, 192 B.R. 442, 455 (Bankr. W.D. Mich. 1996) (“A bankruptcy court has statutory power to utilize civil contempt to enforce its orders. 11 U.S.C. § 105(a).”).

24. By the Performance Bonus Plan Order, the Court authorized the Debtors to make payments under the Performance Bonus Plan to non-insiders. *See* Performance Bonus Plan Order at ¶ 7. The Performance Bonus Plan Order is based, in part, in the Debtors’ representations to the Court that the Performance Bonus Plan would primary be funded by the Participating Customers. *Id.*; *see* Performance Bonus Plan Motion at ¶ 16; Performance Bonus Plan Motion at ¶ 17(e); Performance Bonus Plan Motion at ¶ 30; Consolidated Reply at ¶¶ 7-10. The Participating Customers did not object to the Performance Bonus Plan Motion or otherwise dispute the funding assumptions set forth therein at the Hearing.

25. Under the DIP Order and the Customer Agreement the Participating Customers are required to release the requested funds to the Debtors. *See* Customer Agreement at ¶ 3(a); Customer Agreement at 3(c). Notwithstanding the Participating Customers obligations under the DIP Order and the Customer Agreement, BBK, as agent for the Participating Customers, has refused to release \$861,310.00 from the BBK Trust Account so that the Debtors can make approved payments under the Performance Bonus Plan. Accordingly, the Debtors hereby seek the entry of an order compelling the Participating Customers to release these funds to the Debtors.

NOTICE

26. Notice of the Motion has been given to the parties listed on the Core Group and the 2002 Service List maintained by the Debtors and any other parties in interest directly affected by this Motion (where applicable).

27. No prior request for the relief sought in this Motion has been made to this or any other Court.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court (a) enter an order substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein; and (b) grant such other and further relief to the Debtors as the Court may deem proper.

Dated: November 27, 2006
Cleveland, OH

CEP HOLDINGS, LLC, et al.,
Debtors and Debtors-in-Possession

By: /s/ Joseph F. Hutchinson, Jr.
One of Their Attorneys

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