UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

VISTEON CORPORATION'S OBJECTION TO 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

Visteon Corporation, through its counsel, Dickinson Wright PLLC, states as follows for its Objection to 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 (the "Debtors' Motion").[1]

I. INTRODUCTION

The Debtors' Motion seeks to compel BBK to disburse monies from the BBK Trust Account immediately to fund the payment of amounts the Debtors claim are due under the Performance Bonus Plan. As presented to the Court by the Debtors, the only issue relevant to this request for relief is the Debtors' contention that the payments are now due under the Performance Bonus Plan. Visteon believes this materially understates the analysis.

Visteon does not dispute that the payments may be due under the terms of the Performance Bonus Plan, once amounts are finally determined (see discussion *infra*). Visteon

[1] The "Debtors" herein are CEP Holdings, LLC and their affiliated Debtors.

does not dispute, generally, that Visteon agreed that it would provide funding for the payment of amounts due under the Performance Bonus Plan up to the dollar amount set forth in the Court's Bonus Plan Order. ***However***, Visteon disputes the inherent contention in the Debtors' Motion that Visteon must be the sole source of funding for these payments, and that Visteon's payment obligations are governed solely and exclusively by the Bonus Plan Order. Rather, Visteon contends that, in order to determine whether it is required to fund the amounts due under the Performance Bonus Plan the Court must ***also*** make reference to its 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 (the "DIP Order"). The DIP Order clearly requires the Debtors to first pay Wind Down Charges – including employee incentive plans – ***from availability under the postpetition revolver***, and requires the Participating Customers to then make cash infusions ***only to the extent there is insufficient availability under the postpetition revolver***.

Visteon believes firmly that at the time this Court entered its Bonus Plan Order and DIP Order, it was crystal clear to both the Debtors and the Participating Customers that, although the Participating Customers would provide funds for the purposes described above, those funds would be used only in accordance with the provisions of the DIP Order. In other words, Visteon believes that it was everyone's understanding that the Participating Customers were funding ***shortfalls only***.[2] As is discussed in more detail below, the Participating Customers had no reason to suspect that the Debtors had a different understanding, or that the Debtors would fail to focus on the plain language of the DIP Order. As such, the Participating Customers had no

[2] The Participating Customers' anticipated funding obligations were calculated based on the net shortfall contained in the Debtors' budget after taking into account projected availability less expenses.

reason to object when the Debtors stated that the Participating Customers would make funds available for a bonus plan – a representation that was consistent with the Participating Customers' belief that those funds would be used only in accordance with the DIP Order. Thus, Visteon is not seeking to escape its obligations pursuant to the Bonus Payment Order, and is in no way changing any position it has previously taken before the Court. Visteon will immediately cause BBK to disburse the amounts payable to fund the payment of amounts due under the Performance Bonus Plan that Visteon agreed to fund — after the Debtors' first fund those amounts to the extent of availability under the postpetition revolver, as the DIP Order requires.[3]

For these reasons, Visteon Corporation respectfully requests that this Court deny the Debtors' Motion.

II. ARGUMENT

A. The Court Must Give Effect to *Both* the Final Order and the Order Approving the Debtors' Performance Bonus Plan.

At the heart of the issues raised by the Debtors' Motion are two orders entered by this Court: (1) the Court's October 26, 2006 oral decision (later incorporated into the Court's November 17, 2006 Entry of Judgment, the "Bonus Plan Decision") approving the Debtors' Performance Bonus Plan (the "Bonus Plan Order"), and (2) the DIP Order which was filed on October 26, 2006.

[3] Visteon hastens to add that it believes that no party has in any way sought to mislead the Court or made any intentional misrepresentation to the Court regarding these matters. Visteon believes that the Debtors have simply failed to focus on the mechanics of payments, and the terms of the DIP Order. Moreover, as set forth below, Visteon believes that merely requiring compliance with the DIP Order as a predicate to funding the Performance Bonus Plan will not have any negative impact upon the unsecured creditors in this case, and that the Debtor's estate will in no way be diminished.

In the Bonus Plan Decision and Order, the Court authorized the Debtors to adopt a performance bonus plan. According to the Court's findings of fact, this plan was to be funded "primarily" by the Participating Customers.[4] Bonus Plan Order, Ex. A, ¶ 1. Although the Debtors' argument that the Participating Customers must fund *all* of the Performance Bonus Plan relies exclusively on this Bonus Plan Order, this Court in fact entered another final order at approximately the same time — the DIP Order — which also impacts funding of the Performance Bonus Plan.

The DIP Order of October 27, 2006 includes a Customer Agreement, the terms of which were incorporated in the DIP Order by reference. DIP Order at 30, ¶ 15. The Customer Agreement, in turn, provided that the Participating Customers would provide cash infusions, which could be used to satisfy certain costs – ***but only "to the extent Debtors do not have Postpetition Debt otherwise sufficient to fully pay" those costs***. Customer Agreement at 12, ¶ 3. Those costs included "Wind Down Charges," which were defined as "those charges listed in Exhibit 4 attached hereto and as the same may be increased by mutual agreement of the Debtors and Participating Customers." Customer Agreement at 8, ¶ 1(xiv). Exhibit 4 to the DIP Order specifically listed the Employee Incentive Plan as a Wind Down Charge. Customer Agreement, Ex. 4. Plainly, then, the intent of the DIP Order was that Participating Customers were to fund the bonus plan ***only to the extent the Debtors were unable to do so from postpetition***

[4] Accordingly, the Debtors' argument that the bonus plan was to be funded "solely" by the Participating Customers is not accurate.

availability. Moreover, the DIP Order[5] expressly provided that any positive cash flow in the Debtors' operations would be used for Wind Down Charges:

> In those facilities that generate positive cash flow from operations (including the Mexican facilities), such case remaining after payment of all current operating expenses ***shall be first applied to reduce or eliminate*** the Restructuring Charges and ***Wind Down Charges*** allocable to the Participating and Assisting Customers at such facilities, provided that such application shall only be deemed applicable for purposes of allocation of funding responsibility among the Participating Customers.

Customer Agreement at 13-14 n. 1 (emphasis added). Again, this paragraph makes it clear that bonus plan – which, by definition, is a "Wind Down Charge" covered by the DIP Order – was to be funded first by the Debtors from postpetition revolver availability.[6]

As would be expected, the DIP Order provided that its terms were binding on the Debtors and could not be modified except by a duly executed written agreement: "No term or provision of this Customer Agreement may be waived, altered, modified, or amended except by a written instrument, duly executed by the Debtors, Participating Customers and Lender." Customer Agreement at 24 ¶ 8(d). In addition, the DIP Order contained an integration clause, which provides that the "Customer Agreement together with the Final Financing Order constitutes the entire understanding of the parties in connection with the subject matter" of the DIP Order. *Id.* at

[5] The Customer Agreement is expressly incorporated into the DIP Order; therefore, this Brief will refer to both as the "DIP Order." The Customer Agreement was framed as a separate document only at the Debtors' request.

[6] Because the parties based their projections on a "worst case scenario," at the time of the bonus plan hearing, the parties were operating under the good faith belief that there would be no significant availability and that the Participating Customers therefore would have to make cash infusions to fund the bonus plan as required under the Financing Order. Nonetheless, the Participating Customers specifically negotiated the protection contained in the Customer Agreement at 12, paragraph 3 in the event there was in fact availability to pay the bonus plan payments. That same protection is contained in the initial term sheet between the parties that predated any of the financing orders, the Interim Financing Order and the Final Financing Order.

25, ¶ 8(h). The DIP Order was heavily negotiated. The Debtors cannot suggest to the Court that they were unaware of any of the foregoing provisions.

Nonetheless, the Debtors argument would have the Court make reference to ***only*** the Bonus Plan Order. This is simply inconsistent with the intent of the parties, and with the terms of the DIP Order. Indeed, granting the Debtors' requested relief will render the DIP Order a nullity, and will completely disregard the express language of the DIP Order that belies the Debtors' position.

Instead, the Court should give effect to the parties' agreement and enforce *both* agreements according to their plain language. Visteon respectfully submits that the Court should hold that, although the Participating Customers agreed that their Cash Infusion would fund these performance bonuses, the Cash Infusion must be made in accordance with the DIP Order – that is, only once the Debtors' postpetition assets and receivables are depleted or otherwise unavailable. Visteon respectfully suggest that this is the better option, both legally and equitably.

B. Enforcing the DIP Order is consistent with the Bonus Plan Decision and Order, and will not negatively impact the estate.

Visteon acknowledges that one of the fundamental premises of the approval of the funding of the Performance Bonus Plan was the premise that funding should not lessen the recovery to the Debtors. This concept was addressed by the terms of ***both*** the Bonus Plan Order and the DIP Order. The Customer Agreement at paragraph 3(a) provides that the…Participating Customers shall pay Cash Infusions…to the extent ***Debtor does not have Postpetition Debt (i.e. debt under the postpetition revolver) otherwise sufficient to fully pay…***(4) Wind Down Charges. In other words, to the extent the Debtor has available in-formula-lending – i.e., lending covered by ***current assets such as inventory and receivables*** – they must first use those

funds to pay their expenses, including bonus plan payments. It was precisely to address the requirement that the estate not be diminished that the parties agreed that any funding the Participating Customers would provide would be in the form of cash infusions rather than out-of-formula postpetition advances. Out of formula advances would burden the Debtors with debt for which there would be no related working capital assets to pay.

Conversely, funding the bonus plan first through in-formula availability does not lessen the recovery to the Debtors: in fact, by definition, the Debtors are required to fund the bonus plan ***only when there are sufficient postpetition inventory and receivables to pay down the associated increase in the postpetition revolver***. If the Debtors lack sufficient funds based on in-formula lending, the Participating Customers are obligated to make up the ***shortfall***. In other words, payment of the bonus plan payments first through postpetition availability will leave the Debtors in precisely the same position they were in prior to payment—thus, there will be no negative impact on the Debtor's estate. However, if the Debtors are not required to use their current availability to make the bonus payments before receiving the cash infusion (which is what the parties agreed to), the Debtors will have unfairly improved their position at the expense of the Participating Customers, and the parties will have lost the benefit of their bargain. This result directly contradicts the heavily negotiated and contemporaneously entered DIP Order.

C. Counsel for Visteon Corporation Was Not Required to Object at the October 26, 2006 Hearing.

The Debtors' Motion suggests that, because counsel for Visteon failed to object at the October 26, 2006 hearing, Visteon should now be estopped from arguing that the DIP Order – in addition to the Bonus Plan Order – is controlling here. However, at the October 26, 2006 hearing there was no indication that anyone believed there was an issue as to interplay between the Bonus Plan Order and the then pending DIP Order — hence, there was no objection to raise.

Perhaps, in retrospect, all of the parties could have advised the Court of the corresponding provisions of the two anticipated Orders, but as pointed out above, Visteon had no reason to think (and still does not believe) that the terms of the two Orders, read in tandem, had any negative impact on the estate. Notably, no other party suggested to the Court that the terms of the DIP Order had any negative effect in conjunction with the Bonus Plan Order. Thus, Visteon respectfully suggests that the reason no mention was made of the foregoing issues on October 26 is that no one believed any issue existed that mandated mention. It was not until the Debtors took a position that Visteon believes, in good faith, is inconsistent with the DIP Order that the foregoing issues came to light. Visteon should not be estopped from raising its objections under these circumstances.

D. Debtors Are Unable to Calculate Bonuses in Accordance with this Court's Order.

Finally, it is important to note that the Debtors have not established eligibility for bonus payments. Under the Performance Bonus Plan, earned bonus points must be determined over two separate bonus periods: 9/20/06 to 10/15/06 and 10/16/06 to 10/3106. *See, e.g.,* Bonus Plan Order at 2, ¶ 3. Moreover, although the Performance Bonus Plan requires the Debtors to determine eligibility for bonuses on a daily basis, the Debtors have not provided data to confirm that the bonus calculation is in conformity with the Bonus Plan. *Id.* at 3, ¶ 10. *See also* Performance Schedules, attached as **Exhibit A**. Although BBK asked the Debtor to provide bonus calculations using the Performance Bonus Calculation method set forth in the plan or to provide a legal opinion stating why the new approach satisfies the requirements under the Performance Bonus Plan, the Debtors have provided no response. Consequently, the Debtors have not established that *any* bonus payments are required by the Bonus Plan Order or the DIP Order.

III. CONCLUSION

For the foregoing reasons, Visteon Corporation respectfully requests that this Court deny the Debtors' Motion.

Respectfully submitted,

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