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. 255

RESPONSE OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN SUPPORT OF THE EMERGENCY MOTION TO ENFORCE 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 Official Committee of Unsecured Creditors (the "Committee"), by and through its undersigned counsel, files this Response (the "Response") in support of the 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 "Motion to Enforce"), and in support hereof states as follows:

INTRODUCTION

1. The Debtors seek simple relief in the Motion to Enforce - a definitive direction from this Honorable Court that the Bonus Plan (as defined below) shall be funded from Cash Infusions (as defined below) held by BBK, Ltd. Based on the pleadings, the record and this Honorable Court's previous findings, the Committee respectfully requests that this Honorable Court mandate, consistent with its previous findings, that the Participating Customers are required to fund the Bonus Plan and that

BBK must disburse the funds already deposited by the Participating Customers with BBK and earmarked for the Bonus Plan to the Debtors.

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. On September 28, 2006, the United States Trustee appointed the Committee, which represents the interests of the Debtors' general unsecured creditors.

3. 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").

4. Thereafter, on October 27, 2006, this Honorable Court entered the Final Order granting the DIP Motion (Docket No. 192) (the "DIP Order"). The DIP Order attaches by reference and likewise incorporates the terms and conditions of the "Customer Agreement" attached to the DIP Order. DIP Order at ¶ 15. Under the DIP Order, by virtue of the Customer Agreement, General Motors Corporation, Visteon Corporation and Delphi Corporation (the "Participating Customers") are required to fund certain "Wind Down Charges," which includes the funds related to the Bonus Plan (as defined below) to the extent the Debtors do not have availability under the credit facility approved under the DIP Order (the "DIP Loan"). *See* Customer Agreement at ¶ 3(a).

The Customer Agreement requires BBK, Ltd. ("BBK") to hold the funds related to the Bonus Plan (as defined below) in a trust account (the "BBK Trust Account"). Id.

5. Upon the Debtors' request for release of funds held in the BBK Trust Account for expenses previously approved by this Honorable Court, BBK and Participating Customers are afforded one day to submit objections to such a request. Id. at ¶ 3(c). Absent such an objection, BBK is required to release the funds to the Debtors. Id.

6. On October 3, 2006, the Debtors filed their Motion (the "Bonus Plan Motion") seeking this Court's authority to commence a "Performance Bonus Plan" (the "Bonus Plan") (Docket No. 97). The Bonus Plan Motion clearly and unequivocably provides that the Bonus Plan was to be funded through Cash Infusions. *See* Bonus Plan Motion at ¶ 10 (incorporating footnote 2) ("**. . . and which is being financed by grants from the Customers and Wachovia**[2]." Footnote 2 provides further "**A small fraction of the postpetition financing under the Interim DIP Order, including funding for the Performance Bonus Plan, will be debt. The vast majority of the funding for the Performance Bonus Plan, however, will be from cash infusions from the Customers and a small cash infusion from Wachovia, depending on the sale price of certain machinery**;" ¶ 16 ("**. . . Wachovia and the Customers have agreed to fund the Performance Bonus Plan through cash infusions**"); Bonus Plan Order No. 1 at ¶ 1 ("**Thus, the primary funding for the Plan would come from payments by the Participating Customers earmarked solely for the Plan**"); ¶ 5 ("**$1.273 million of the funding for the Plan has been paid by the 'Participating Customers', as that term is defined in the 'Paticipating Customer Participation Agreement', to a BBK Trust Account in the form of 'Cash Infusions' . . .**").

7. With respect to the Bonus Plan Motion, parties in interest filed the following objections:

a. Objection to the Motion of Debtors and Debtors in Possession, Pursuant to 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 Bonus Plan Objection");

b. Objection of United Steelworkers to Debtors' Motion for Authorization to Adopt a Performance Bonus Plan and Make Payments Thereunder (Docket No. 186) (the "Union Bonus Plan Objection");

c. Objection of Independent Contractors to Motion of Debtors and Debtors in Possession, Pursuant to 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. 170) (the "Independent Contractors Bonus Plan Objection"); and

d. United States Trustee's Objection to Motion of Debtors and Debtors in Possession, Pursuant to 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. 180) (the "U.S. Trustee Bonus Plan Objection," together with the Committee Bonus Plan Objection, Union Bonus Plan Objection and Independent Contractors Bonus Plan Objection, the "Bonus Plan Objections").

8. The Committee Bonus Plan Objection makes absolutely clear that the Committee objected to any funding of the Bonus Plan with debt (*See* Committee Bonus Plan Objection at ¶ 25, which provides "**[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.**")

9. The Debtors replied to the Bonus Plan Objections in its Consolidated Reply to Objections to the Motion of Debtors and Debtors in Possession, Pursuant to 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.

180) (the "Consolidated Bonus Plan Reply"). The Consolidated Bonus Plan Reply likewise makes clear in unambiguous terms that funding of the Bonus Plan will occur through Cash Infusions (*See* Consolidated Bonus Plan Reply at ¶ 9, which provides "**The only pecuniary interest that the Objectors have in this matter is contingent upon a *de minimus* portion of the funding for the Performance Bonus Plan being postpetition debt.**")

10. The Participating Customers, apparently active participants in the negotiation of the Bonus Plan, did not file a response or objection to the relief requested in the Bonus Plan Motion notwithstanding the fact that the Bonus Plan Motion unequivocably defined the source of funding for the Bonus Plan as Cash Infusions, nor did the Participating Customers reply to responsive pleadings of the Debtors or the Committee which reiterate this point.

11. On October 24, 2006, this Honorable Court held a hearing (the "Bonus Plan Hearing") on the Bonus Plan Motion. The following parties, among others, attended and participated in the Bonus Plan Hearing prior to the taking of testimony (at which time counsel to Wachovia, the Committee and the Participating Customers departed the Bonus Plan Hearing for further negotiations with respect to the DIP Order): (i) counsel to the Debtors; (ii) counsel to each of the Participating Customers; and (iii) counsel to the Committee.

12. At the Bonus Plan Hearing, the Committee understands counsel to the Participating Customers as having made the following statements on the record with respect to the source of funding for the Bonus Plan[1]:

[1] An official transcript of the Bonus Plan Hearing has been ordered on an expedited basis but is not yet available. By way of a request to the Clerk of this Honorable Court, the Committee obtained a CD-ROM of the Bonus Plan Hearing (the "CD-ROM Transcript"). A copy of the relevant portions of the CD-ROM Transcript is attached hereto and marked as Exhibit "A." Any and all citations to the record of the Bonus Plan Hearing are made pursuant to the Committee's transcription of the CD-ROM Transcript. The Committee believes this transcription to be true and correct, however, the Committee will supplement this Response immediately upon receipt of an official transcript of the Bonus Plan Hearing to the extent of any

> Counsel to Visteon Corporation – "Your Honor, I'm Mike Hammer on behalf of Visteon Corporation, I guess from the Participating Customers' perspective, I just wanted to clarify how the funding worked for the fund [Bonus Plan] and we [Participating Customers] funded the money for the incentive plan [Bonus Plan] up front, but it's held kind of in escrow and set aside to be used for the incentive plan [Bonus Plan] purposes. If the Court then were to reduce the incentive plan [Bonus Plan], it would be our position that money would not be released and would go back to the Participating Customers so I don't know if that helps or not, but that's at least our view of how the funding would work for us."
>
> Honorable Marilyn Shea-Stonum: "OK and on several occasions, I believe I have expressed a strong preference for factual matters that can be addressed through stipulation to do that, you know to have that process work, and with respect to this matter, would it be useful for me to take a five to ten minute recess to allow discussion of the processing of these funds, so that for instance, is there a dedicated account into which these funds have gone, etc.? I'm not sure that that's the total determinate with respect to this Motion [Bonus Plan Motion], but I would prefer to have that kind of factual matter addressed through stipulation if it's possible and it may not be, I mean it may be that there's simply disputes about those issues, but how the money has come to be wherever the money is and what characteristics those accounts have perhaps is capable of stipulation."
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> Counsel to Visteon Corporation – "I would leave that to Mr. Wearsch [counsel to the Debtors] because we have agreed to fund the full amount and we're not taking a position in this motion. I just wanted to kind of clarify that point."

See CD-ROM Transcript.

13. At no time did any counsel to the Participating Customers attempt to correct or modify statements made by counsel to the Debtors (as set forth below) or counsel to Visteon Corporation.

14. At the Bonus Plan Hearing, counsel to the Committee made the following statement with respect to the Bonus Plan:

> "If I just may, Your Honor. Again for the record, I am Mark Freedlander on behalf of the official committee. Your Honor, the Committee has filed an objection of record and the Committee will simply rest upon that objection."

Id.

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inconsistency between the Committee's CD-ROM Transcript and the official transcript of the Bonus Plan Hearing.

15. With respect to the source of funding of the Bonus Plan, counsel to the Debtors responded to the following inquiry from this Honorable Court:

> Honorable Marilyn Shea-Stonum – "Who bears the cost of the program [Bonus Plan] that is proposed here? Is it appropriate to view it as being borne by the bankruptcy estate or is there a legitimate case to be made that the cost is not coming out of the bankruptcy estate."
>
> Counsel to the Debtors – "It's a mix Your Honor. I would hope that the parties would stipulate, and actually I think if you parse the objections, you'll realize that there is an acknowledgement that the vast majority of the funding that is coming here is coming by way of cash infusions. Other than . . . as of right now, it [Bonus Plan] ***is fully funded $1.27 million through cash infusions, no payment will be owed back to the customers on those payments***. There's a $50,000 portion that Wachovia agreed to step in and fund based on certain sales being receipt for the Vandalia equipment. A separate motion has been filed with respect to that and it will be heard on November 7th. There is a possibility under the agreement that's been reached by the parties here that a small portion of those cash infusions with respect to Tuscaloosa could convert over to debt based on certain milestones being reached, so there is a small portion there, but the vast majority, probably 90% of the funding for this program is coming by way of cash infusion from the participating customers. It was negotiated with Wachovia and the participating customers. They are essentially deciding how their gifts, their price increases, will be used. They've determined that this is the best way to have their parts built is to incentivize these employees. They've made that decision, they're willing to fund it and not be repaid on those amounts, not force it upon the estate and therefore, I think there's an argument to be made that what we're doing here with respect to at least that portion is more so out of an abundance of caution because it's [funds for the Bonus Plan] ***not really property of the estate***, because to the extent it's not paid to these employees because either the program does not get approved by this Court or the employees do not meet their incentive milestones, the money is directly returned to these customers. ***It [funds for the Bonus Plan] is not available to pay other creditors of the estates***."

Id. (emphasis added)

16. Finally, this Honorable Court expressed the following consideration with respect to the source of funding the Bonus Plan:

> Honorable Marilyn Shea-Stonum – "Just for everybody to know, part of my analysis on this [Bonus Plan] is going to turn on Section 541; I'm letting everybody know that up front."

Id.

17. On November 17, 2006, this Honorable Court entered an Entry of Judgment granting the Bonus Plan Motion, in part (Docket No. 242) (the "Bonus Plan Order No. 1"). The Bonus Plan Order No. 1 states, *inter alia*, the following:

> "**[T]he primary driver of the motion appears to be the desire of the Participating Customers to have an orderly transition of the tooling and equipment necessary to the production of their components to parties capable of meeting their ongoing needs, coupled with the production by the Debtors of sufficient inventory to the specifications of the Participating Customers to meet their needs during the period of transition. Thus, the primary funding of the Plan [Bonus Plan] would come from payments by the Participating Customers earmarked solely for the Plan.**"

Bonus Plan Order No. 1 at ¶ 1.

> "**$1.273 million of the funding for the Plan [Bonus Plan] has been paid by the 'Participating Customers' . . . to a BBK Trust Account in the form of 'Cash Infusions' . . . [T]o the extent that the Plan [Bonus Plan] is not approved by the Court or the funds are not earned by the covered participants, the Cash Infusions will be returned to the Participating Customers.**"

Bonus Plan Order No. 1 at ¶ 5.

18. The Participating Customers filed neither a motion to reconsider nor an appeal of the Bonus Plan Order No. 1.

19. On November 28, 2006, this Honorable Court entered an Interim Opinion on Debtors' Motion for Approval of Performance Bonus Plan (Docket No. 257) (the "Bonus Plan Order No. 2"). With respect to funding of the Bonus Plan, Bonus Plan Order No. 2 states:

> "**With respect to the Plan's [Bonus Plan's] impact upon creditors, the record has established without a doubt that payments made pursuant to the Plan [Bonus Plan] will not lessen the amount of any recovery by creditors of the Debtors' estates. The Plan [Bonus Plan] payments are being funded by the 'Participating Customers' . . .**

Bonus Plan Order No. 2 at n. 4.

20. The only document filed of record by a Participating Customer that even mentions the Bonus Plan was 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 Proposed Findings"). In the Visteon Proposed Findings, Visteon Corporation proposed that this Honorable Court make a finding of fact that "**[T]he Participating Customers have agreed to: . . . fund . . . an employee incentive plan totaling $1.3 million.**" *See* Visteon Proposed Findings at ¶ 14.

21. On November 27, 2006, the Debtors filed the Motion to Enforce seeking "entry of an order, pursuant to section 105(a) of the Bankruptcy Code, enforcing the Performance Bonus Plan Order [Bonus Plan Order No. 1] 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 [Bonus Plan]." Motion to Enforce at ¶ 22.

22. In the Motion to Enforce, the Debtors allege, *inter alia,* the following:

a. On November 21, 2006, the Debtors requested release of $861,310.00 from the BBK Trust Account to make payments under the Bonus Plan;

b. The Participating Customers have funded the BBK Trust Account with the funds earmarked for the Bonus Plan; and

c. BBK has refused to release the funds held in the BBK Trust Account.

Motion to Enforce at ¶ 21.

23. The Debtors filed the Motion to Enforce to compel BBK to release funds held in the BBK Trust Account to the Debtors for payments related to the Bonus Plan.

COMMITTEE'S RESPONSE

24. The Committee supports the relief requested in the Motion to Enforce and joins in the Debtors' arguments set forth therein.

25. This Honorable Court should grant the relief sought in the Motion to Enforce based upon the following facts:

a. The Bonus Plan Order No. 1 expressly finds that the Participating Customers were the source of funding for the Bonus Plan;

b. The Bonus Plan Order No. 2 expressly finds that the Participating Customers were the source of funding for the Bonus Plan;

c. The Participating Customers did not object or otherwise respond to the Bonus Plan Motion; and

d. The Participating Customers represented to this Honorable Court through the Visteon Proposed Findings and at the Bonus Plan Hearing, without qualification regarding potential alternative funding sources for the Bonus Plan, that the Participating Customers provided the funding for the Bonus Plan.

26. The findings of this Honorable Court in the Bonus Plan Order No. 1 and Bonus Plan Order No. 2 are clear: the Participating Customers provided the funding for the Bonus Plan.

27. Notwithstanding the provision of the Customer Agreement allegedly inconsistent with the Bonus Plan Motion, the Participating Customers funded the Bonus Plan prior to its partial approval by this Honorable Court and made representations under oath to that effect. Relying upon these representations, as well as representations by counsel to the Debtors in both the Bonus Plan Motion and at the Bonus Plan Hearing (and uncontroverted by the Participating Customers) this Honorable Court approved of the Bonus Plan Motion and the Committee chose not to actively pursue the Committee Bonus Plan Objection beyond resting on the pleading.

28. In addition to the Debtors' arguments related to section 105(a) of the Bankruptcy Code, the doctrine of judicial estoppel is also applicable to the instant matter.

29. Judicial estoppel is an equitable doctrine that preserves the integrity of courts by preventing party from abusing judicial process through cynical gamemanship, achieving success on one position, then arguing opposite to suit exigency of the

moment. Teledyne Indus., Inc. v. N.L.R.B., 911 F.2d 1214, 1218 (6th Cir. 1990). To invoke the doctrine of judicial estoppel, a party must show that an opponent took contrary position under oath in prior proceeding and that the prior position was accepted by the court. Id.

30. The Sixth Circuit Court of Appeals recently noted that no set formula exists for assessing when judicial estoppel should apply. In re Commonwealth Insti. Sec., Inc., 394 F.3d 401, 406 (6th Cir. 2005) *citing* New Hampshire v. Maine, 532 U.S. 742, 750, 121 S.Ct. 1808 (2001). The Commonwealth court sets forth three considerations relevant to the application of the doctrine of judicial estoppel: (i) "a party's later position must be 'clearly inconsistent' with its earlier position;" (ii) "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.;" and (iii) "whether the party advancing an inconsistent position would gain an unfair advantage if allowed to proceed with the argument." Id. In this matter, the Participating Customers' position is clearly inconsistent.

31. First, Visteon Corporation made affirmative representations in the form of oral and written statements that the Participating Customers would fund the Bonus Plan.

32. The Participating Customers made no representations in the Visteon Proposed Findings or at the Bonus Plan Hearing that conditioned payment of the Bonus Plan on availability under the DIP Loan, nor were any pleadings filed by the Participating Customers that challenged the representations contained in the Bonus Plan Motion nor the relief contained in the proposed order attached to the Bonus Plan Motion.

33. This Honorable Court clearly relied upon these representations with respect to the source of funding for the Bonus Plan from "Cash Infusions" as evidenced by its findings in the Bonus Plan Order No. 1 and the Bonus Plan Order No. 2.

Specifically, this Honorable Court expressed its concern that the funds utilized for the Bonus Plan not be property of the Debtors' estates. *See* CD-ROM Transcript. The Committee in choosing not to aggressively pursue the Committee Bonus Plan Objection relied upon the Bonus Plan Motion and representations from Debtors' counsel in response to the Committee Bonus Plan Objection that the Bonus Plan was to be funded from Cash Infusions. The Participating Customers took no action and made no statements to dissuade the Court or Committee of this notion notwithstanding their allegedly clear impression that by virtue of the Customer Agreement, the mechanics of the Bonus Plan were different than as represented to the Court. If any portion the Bonus Plan were funded from availability under the DIP Loan, property of the Debtors' estates would be used to fund the Bonus Plan, in contravention of this Honorable Court's concern of using the Debtors' property for the Bonus Plan and contrary to the Committee's understanding of the Bonus Plan.

34. Finally, the Participating Customers will obtain an unfair advantage to the extent the Bonus Plan is not funded from the BBK Trust Account in that the Committee, and presumably other objecting parties, acquiesced to the approval of the Bonus Plan Motion on the basis that the Bonus Plan's funding would be borne by the Participating Customers. Any funds used from availability under the DIP Loan to fund the Bonus Plan will result in a dollar for dollar reduction in amounts otherwise available to pay claims of the Debtors' estates.

35. Under Teledyne and Commonwealth, the Participating Customers must be bound both by their previous representations and their failure to clarify the alleged mischaracterization regarding funding mechanisms for the Bonus Plan within the Bonus Plan Motion and statements of record by counsel to the Debtors. As such, this Honorable Court should grant the Motion to Enforce.

36. At this juncture, the findings and conclusions contained in the Bonus Plan Order No. 1 are final. The Participating Customers have not sought reconsideration of the entry of the Bonus Plan Order No. 1. Under Fed. R. Civ. P. 59(e), as made applicable pursuant to Fed. R. Bankr. P. 9023, any motion to alter or amend a judgment shall be filed no later than ten (10) days after the entry of the judgment. As noted above, this Honorable Court entered the Bonus Plan Order No. 1 on November 17, 2006, and under Fed. R. Civ. P. 59(e), the Participating Customers' ability to request this Honorable Court to alter or amend the Bonus Plan Order No. 1 has been foreclosed.

37. To the extent that this Honorable Court vacates or modifies its findings in the Bonus Plan Order No. 1 and/or the Bonus Plan Order No. 2, the Committee renews the Committee Bonus Plan Objection in its entirety.

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.

Date: 11/29/2006

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