UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	:	Case No. 06-51848
	:	(Jointly Administered)
CEP HOLDINGS, LLC, et al.,[1]	:	
	:	Chapter 11
Debtors.	:	
	:	Honorable Marilyn Shea-Stonum
	:	

CONSOLIDATED REPLY TO OBJECTIONS TO 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

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 file this consolidated reply (the "**Reply**") to the objections (collectively, the "**Objections**") filed by certain parties (collectively, the "**Objectors**")[2] 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* (Docket No. 255) (the "**Motion**")[3] on November 29, 2006. In support of this Reply and the Motion,[4] the Debtors respectfully represent as follows:

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

[2] The Objectors are: Visteon Corporation ("**Visteon**") and Delphi Automotive Systems, LLC ("**Delphi**").

[3] Capitalized terms not otherwise defined herein have the meanings given to them in the Motion.

PRELIMINARY STATEMENT

"[T]he record has established ***without doubt*** that payments made pursuant to the Plan will not lessen the amount of any recovery by creditors of the Debtors' estates." Interim Performance Bonus Order at p.4 n.4 (emphasis added). As set forth by the Debtors and Visteon, the Participating Customers agreed to fund the Performance Bonus Plan through Cash Infusions. The Court's orders with respect to this matter and the Committee's acquiesce to the approval of the Performance Bonus Plan are based upon this fact. Having made representations to the Court concerning the funding for the Performance Bonus Plan, and having failed to correct or otherwise oppose the representations made by the Debtors, the Objectors now are judicially estopped from refusing to release the funds requested by the Debtors to make bonus payments under the Performance Bonus Plan to non-insiders.

Additionally, under the terms of the DIP Order, bonus payments made under the Performance Bonus Plan must be funded by Cash Infusions from the Participating Customers. The Objectors' primary argument — that the Debtors must look first to availability under the Debtors' postpetition revolver before the Participating Customer are required to fund the Performance Bonus Plan — fails to consider the DIP Order in the context of the uncontested representations made by the Debtors to the Court regarding the funding of the Performance Bonus Plan and the Court's orders entered with respect to the Performance Bonus Plan Motion. The Performance Bonus Plan must be funded by the Participating Customers under the DIP Order because, under this Court's rulings, the Debtors cannot use the postpetition revolver to

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[4] In support of the Motion, the Committee filed the *Response of the Official Committee of Unsecured Creditors 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* (Docket No. 271) (the "**Committee Response**").

fund the Performance Bonus Plan. In order for the Court to give effect to both the DIP Order and the Bonus Plan Orders (as defined below), the Participating Customers must be required to fund the Performance Bonus Plan.

For these reasons, and the reasons set forth in the Committee Response, the Objections should be overruled and the Motion granted in its entirety.

BACKGROUND[5]

General

1. On September 20, 2006, 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.

2. 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 the Committee. No trustee or examiner has been appointed.

The DIP Order

3. On the Petition Date, the Debtors filed the DIP Motion. On October 27, 2006, the Court entered the DIP Order. The DIP Order incorporates the terms of the Customer Agreement. Under the Customer Agreement, the "Participating Customers shall pay Cash Infusions . . . to the extent Debtors do not have Postpetition Debt otherwise sufficient to fully pay . . . Wind Down Charges." Customer Agreement at ¶ 3(a). The term "Wind Down Changes" includes the funding for the Performance Bonus Plan.

4. Also under the DIP Order, BBK, as agent for the Participating Customers, is required to release funds with respect to payments approved by the Court when so directed by

[5] For the convenience of the Court, attached to this Reply as **Exhibit A** are proposed findings of fact and conclusions of law with respect to this matter.

the Debtors. *See* Customer Agreement at ¶ 3(c). BBK and the Participating Customers 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.*

The Performance Bonus Plan Order

5. On October 20, 2006, the Debtors filed the Performance Bonus Plan Motion. The Performance Bonus Plan Motion identifies the Participating Customers as the source of funding for the Performance Bonus Plan, *see* Performance Bonus Plan Motion at ¶¶ 16, 17(e) & 30, as does the Consolidated Reply filed by the Debtors, *see* Consolidated Reply at ¶¶ 7-10, and the Visteon Findings, *see* Visteon Findings at ¶ 14. The Performance Bonus Plan itself provides that "[a]ny money allocated for bonuses under this Plan that remains after payment for all bonuses for both bonus periods, shall be returned to the Participating Customers." Performance Bonus Plan at ¶ 8.

6. On October 24, 2006, the Court held the Hearing and received the testimony of Mr. Joseph Mallak, the Debtors' Chief Executive Officer. The Participating Customers were represented by counsel at the Hearing. Counsel to Visteon represented to the Court that "[the Participating Customers] have agreed to fund the full amount [of the Performance Bonus Plan]." CD-ROM Transcript.

7. 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 Court entered the Performance Bonus Plan Order. The Performance Bonus Plan Order identifies the Participating Customers as the source of funding for the Performance Bonus Plan. *See* Performance Bonus Plan Order at ¶ 7.

8. On November 28, 2006, the Court entered the *Interim Order on Debtors' Motion for Approval of Performance Bonus Plan* (Docket No. 257) (the "**Interim Performance Bonus Plan Order**" and, together with the Performance Bonus Plan Order, the "**Bonus Plan Orders**").

The Interim Performance Bonus Plan Order provides that the only source of funding available for payments under the Performance Bonus Plan is Cash Infusions from the Participating Customers. *See* Interim Performance Bonus Plan Order at p.4 n.4 ("With respect to the Plan's impact upon creditors, the record has established without doubt that payments made pursuant to the Plan will not lessen the amount of any recovery by creditors of the Debtors' estates. The Plan payments are being funded by the 'Participating Customers' . . . No further evidence need be introduced on this point.").

BBK's Refusal to Release Funds

9. On November 21, 2006, the Debtors sought the release of $861,310.00[6] from the BBK Trust Account in order to make approved payments under the Performance Bonus Plan. To date, BBK, as agent for the Participating Customers, has refused to release funds requested by the Debtors from the BBK Trust Account so that the Debtors can make approved payments under the Performance Bonus Plan, notwithstanding the dictates of the DIP Order and the Customer Agreement. Accordingly, on November 27, 2006, the Debtors filed the Motion seeking to compel BBK and the Participating Customers to release funds from the BBK Trust Account.

The Objections

10. On November 29, 2006, the Objectors filed the following Objections to the Motion:

[6] The Debtors now seek the release of $891,310.00 to pay approved bonuses to non-insiders under the Performance Bonus Plan.

a. *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* (Docket No. 266) (the "**Visteon Objection**"); and

b. *Joinder of Delphi Automotive Systems, LLC in 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* (Docket No. 268) (the "**Delphi Objection**").

11. By the Objections, the Objectors make the following arguments and assertions in opposition to the Debtors' Motion:

a. The Participating Customers were not required to object to the Performance Bonus Plan Motion because there was no reason for Visteon to suspect that the Debtors would rely on Cash Infusions to fund the Performance Bonus Plan if there was availability under the postpetition revolver (Visteon Objection at pp. 7-8);

b. Under the DIP Order and the Customer Agreement, the Participating Customers are not required to provide cash infusions to fund the Performance Bonus Plan if there is availability under the postpetition revolver (Visteon Objection at p. 4);

c. The DIP Order expressly provides that positive cash flow would be used for Wind Down Charges, including funding for the Performance Bonus Plan (Visteon Objection at p. 5); and

d. Requiring the Debtors to use availability under the postpetition revolver to make payments under the Performance Bonus Plan will not negatively impact the Debtors' estates (Visteon Objection at p. 6); and

e. The Debtors should be required to provide supporting data and a legal opinion to BBK before BBK should be required to release the funds requested by the Debtors to make payments under the Performance Bonus Plan (Visteon Objection at p. 8).[7]

[7] The Delphi Objection is a joinder to the Visteon Objection. Accordingly, all arguments made by Delphi in the Delphi Objection with respect to this matter also are made by Visteon in the Visteon Objection.

12. For the reasons set forth herein and in the Motion, each of these arguments should be rejected, the Motion should be granted and BBK and the Participating Customers should be directed to release $891,310.00 from the BBK Trust Account to the Debtors so that the Debtors can make approved payments under the Performance Bonus Plan.

ARGUMENT

A. The Objectors Are Judicially Estopped from Refusing to Fund the Performance Bonus Plan Given the Representations Made Before the Court

13. As an initial matter, the Objectors are judicially estopped from refusing to fund the Performance Bonus Plan in the manner set forth before the Court by the Debtors and Visteon.

14. "The doctrine of judicial estoppel forbids a party 'from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.'" *Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1217 (6th Cir. 1990) (quoting *Reynolds v. Comm'r of Internal Revenue*, 861 F.2d 469, 472-73 (6th Cir. 1988)); *see Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982) ("The doctrine of judicial estoppel applies to a party who has successfully and unequivocally asserted a position in a prior proceeding; he is estopped from asserting an inconsistent position in a subsequent proceeding.").

15. "There is no set formula for assessing when judicial estoppel should apply." *In re Commonwealth Institutional Sec.*, Inc., 394 F.3d 401, 406 (6th Cir. 2005). The Sixth Circuit, however, has set forth three considerations relevant to the application of the doctrine of judicial estoppel: (1) "a party's later position must be 'clearly inconsistent' with its earlier position"; (2) "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 . . . [the] court was misled.'"; and (3) "the court should evaluate whether the party advancing an inconsistent position would gain an unfair advantage if allowed to proceed

with the argument." *Id.* (quotation omitted). Consideration of these factors supports the application of judicial estoppel in this matter.

1. The Objectors' Position Is Clearly Inconsistent with the Representations Made at the Hearing on the Performance Bonus Plan Motion

16. The Debtors and Visteon represented to the Court that the Performance Bonus Plan would be funded by Cash Infusions from the Participating Customers. First, the Visteon Findings state that the Participating Customers would fund the Performance Bonus Plan. *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.")

17. Second, the Performance Bonus Plan provides that the Participating Customers would fund the Performance Bonus Plan. *See* Performance Bonus Plan at p.2 ("WHEREAS, certain customers of CEP (the 'Participating Customers') have funded $1.275 million of the cost of this Plan."); Performance Bonus Plan at ¶ 8 ("Any money allocated for bonuses under this Plan that remains after payment of all bonuses for both bonus periods, shall be returned to the Participating Customers.").

18. Third, the Performance Bonus Plan Motion explicitly provides that the Performance Bonus Plan will be funded by the Customers. Performance Bonus Plan Motion at ¶ 17(e) ("**Funding**: Certain of the customers of CEP (the '**Participating Customers**') will fund $1.275 million of the cost of the Performance Bonus Plan.") (emphasis in original); *see* Performance Bonus Plan Motion at ¶ 16 ("Wachovia and the Customers have agreed to fund the Performance Bonus Program through cash infusions."); Performance Bonus Plan Motion at ¶ 30 ("[The Customers] must fund most, if not all, of the Performance Bonus Plan").

19. Additionally, the Performance Bonus Plan Motion explicitly indicates that a "small fraction" of the funding for the Performance Bonus Plan will be debt. *See* Performance

Bonus Plan Motion at ¶ 10 n.2. If the Objectors' construction of the DIP Order were correct, this statement is categorically false and should have been corrected by the Participating Customers.

20. Fourth, the Consolidated Reply asserts that the parties that objected to the Performance Bonus Plan Motion lacked standing to do so because the Performance Bonus Plan was being funded primarily by the Participating Customers. *See* Consolidated Reply at ¶¶ 7-10.

21. Fifth, the Debtors and Visteon represented to the Court at the Hearing that the Performance Bonus Plan would primarily be funded by the Participating Customers.

22. The Participating Customers were served with copies of the Performance Bonus Plan, the Performance Bonus Plan Motion and the Consolidated Reply and were represented by counsel at the Hearing and did not object or otherwise indicate to the Court that the representations made with respect to the funding of the Performance Bonus Plan were incorrect.

23. Additionally, as set forth above, the Debtors explicitly explained the circumstances and extent to which debt could be used to fund the Performance Bonus Plan. If the Participating Customers' construction of the DIP Order is correct, and all of the funding for the Performance Bonus Plan could come from the Debtors' incurrence of additional debt under the postpetition revolver (depending on the existence of sufficient availability), then the Participating Customers had an obligation to correct the record with respect to this matter. They did not. Accordingly, the Objectors' position as set forth in the Objections is inconsistent with the prior representations made before the Court.

2. The Representations Made to the Court Succeeded in Persuading the Court to Approve the Performance Bonus Plan as to Non-Insiders

24. The Debtors and the Participating Customers, based on their representations made with respect to the funding of the Performance Bonus Plan, succeeded in persuading the Court to approve the Performance Bonus Plan as to non-insiders. *See* Performance Bonus Plan Order at

¶ 7; Interim Performance Bonus Plan Order at p.4 n.4. For the Court to permit the funding of the Performance Bonus Plan with additional debt at this time would create the impression that the Court was mislead. Accordingly, the second element of judicial estoppel is satisfied.

3. The Participating Customers Will Gain an Unfair Advantage If the Performance Bonus Plan Is Not Funded with Cash Infusions

25. Finally, the Participating Customers will gain an unfair advantage if the Performance Bonus Plan is not funded with Cash Infusions given the prior representations made to the Court. As set forth in the Committee Response, the Committee "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." Committee Response at ¶ 34. As set forth below, if the Performance Bonus Plan were funded in the manner now proposed by the Objectors, the Debtors' estates would be negatively impacted to the detriment of the Debtors' unsecured creditors. Indeed, the Committee has renewed its objection to the Performance Bonus Plan Motion to the extent that the Court vacates its findings in the Bonus Plan Orders with respect to the Participating Customer's funding obligations. *Id.* at 37.

26. Accordingly, for the reasons set forth herein, the Objectors should be judicially estopped from asserting that the Performance Bonus Plan should be funded with anything other than Cash Infusions.

B. The Customers Are Required to Fund the Performance Bonus Plan Under the Terms of the DIP Order and the Performance Bonus Plan Order

27. The Customers are required to make Cash Infusions to fund the Performance Bonus Plan under the terms of the DIP Order ***and*** the Bonus Plan Orders irrespective of whether there is availability under the Debtors' postpetition revolver.

28. It is well established that this Court is in the best position to interpret its own orders. *See In re Zevitz*, No. 99-2400, 2000 WL 1478371, at *1 (6th Cir. Sept. 28, 2000)

("Reviewing courts typically defer to a lower court's interpretation of its own order. . . . Such rulings will not be reversed unless the record clearly shows an abuse of discretion, for the lower court is obviously in the best position to interpret its own order."); *accord Enodis Corp. v. Employers Ins. of Wausau (In re Consol. Indus.)*, 360 F.3d 712, 716 (7th Cir. 2004) ("We will not reverse a court's interpretation of its own order unless it is a 'clear abuse of discretion,' because a court that issued an order is in the best position to interpret it.").

29. Here, consideration of both the DIP Order and the Bonus Plan Orders support the Debtors' position with respect to the funding of the Performance Bonus Plan. According to the DIP Order, which incorporates the Customer Agreement, "Participating Customers shall pay Cash Infusions . . . to the ***extent Debtors do not have Postpetition Debt*** otherwise sufficient to fully pay . . . Wind Down Charges." Customer Agreement at ¶ 3(a) (emphasis added).

30. Under the Bonus Plan Orders, however, the Debtors cannot use "Postpetition Debt" to pay bonuses under the Performance Bonus Plan. The Court's approval of the Performance Bonus Plan as to non-insiders was based upon plan payments being funded by the Participating Customers and not by assets of the Debtors' estates. *See* Performance Bonus Plan Order at ¶ 7; Interim Performance Bonus Plan Order at p.4 n.4. Accordingly, the Debtors do not have authority to use Postpetition Debt to make payments under the Performance Bonus Plan.

31. Therefore, under the terms of the DIP Order, where, as here, (a) the Debtors have an obligation to pay a Wind Down Cost (namely, the bonuses due under the Performance Bonus Plan) and (b) Postpetition Debt is not available to make the payment, the Participating Customers are required to fund the expense through Cash Infusions. *See* Customer Agreement at ¶ 3(a). The Debtors have read and fully considered the DIP Order, and believe that it is consistent with the Bonus Plan Orders and Debtors' and the Court's understanding of how the Performance

Bonus Plan is funded. Accordingly, the Objectors' second argument in opposition to the Motion should be rejected.

C. The Debtors Do Not Have Any Positive Cash Flow that Can Be Used for Bonus Payments

32. For the reasons set forth above, the Debtors do not have any "cash flow" that can be used for bonus payments under the Performance Bonus Plan. The Court has authorized the Debtors to make bonus payments under the Performance Bonus Plan to non-insiders using Cash Infusions provided by the Participating Customers. Accordingly, the footnote on pages 13-14 of the Customer Agreement is irrelevant.

D. Requiring the Debtors to Incur Additional Postpetition Debt Would Negatively Impact the Debtors' Estates

33. Requiring the Debtors to incur additional postpetition debt to make payments to non-insiders under the Performance Bonus Plan would negatively impact the Debtors' estates. There are two sources of funding for the Performance Bonus Plan. The first source of funding is Cash Infusions from the Participating Customers. To the extent that this source of funding is not utilized, the funds must be returned to the Participating Customers under the DIP Order. The second source of funding is the Debtors' postpetition revolver. If this source of funding is utilized, there will be less cash available to pay Wachovia and lower likelihood that there will be any recovery to unsecured creditors. Accordingly, payment through postpetition availability will negatively impact the Debtors' estates and unsecured creditors in these Cases.

E. The Debtors Are Not Required to Provide Additional Data or a Legal Opinion to BBK Under the DIP Order

34. Finally, BBK does not have the authority to refuse to release $891,310.00 from the BBK Trust Account to the Debtors. Under the DIP Order, BBK has one day to review the Debtors' requests. *See* Customer Agreement at ¶ 3(c). Glass & Associates, Inc., the Debtors'

financial advisors and investment bankers, have provided BBK with sufficient data to support the release of the requested funds. Having failed to dispute the requested payment within the one day period set forth in the DIP Order, BBK and the Participating Customers have waived their right to protest the bonus payments at this time. Additionally, nowhere in the DIP Order is BBK entitled to a "legal opinion" regarding Court approved disbursements from the BBK Trust Account.

CONCLUSION

For the reasons set forth herein and in the Motion, the Motion should be granted and BBK and the Participating Customers should be directed to release $891,310.00 from the BBK Trust Account to the Debtors so that the Debtors can make approved payments under the Performance Bonus Plan.

Dated: November 29, 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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