**EXHIBIT A**

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

**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 |
| | : | |

**DEBTORS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING 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 submits its Proposed Findings of Fact and Conclusions of Law regarding 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. 255) (the "**Emergency Motion**"):

## PROPOSED FINDINGS OF FACT

***General Background***

1. 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

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

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 an official committee of unsecured creditors (the "**Committee**"). No trustee or examiner has been appointed.

***The DIP Motion***

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**"). 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).

***The DIP Order***

4. 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.

5. 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) (emphasis added).

6. 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 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").

7. Also under the DIP Order, BBK, Ltd., as agent to the Participating Customers ("**BBK**"), is required to release funds with respect to payments 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 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).

***The Performance Bonus Plan Motion***

8. 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**").

9. 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.

10. 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.")

11. The Performance Bonus Plan Motion also identifies the Participating Customers as the source of funding for the Performance Bonus Plan. 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").

12. 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. The Performance Bonus Plan Motion does not indicate that any other amount of debt could be used to fund the Performance Bonus Plan.

***The Visteon Findings***

13. That the Participating Customers would fund the Performance Bonus Plan also was 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.").

***The Committee Objection***

14. On October 20, among other parties, the Committee filed the *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**"). 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 Consolidated Reply***

15. In response to the Committee Objection and other objections to the Performance Bonus Plan Motion, 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**"). In the Consolidated Reply, the Debtors argued, among other things, that the objecting parties 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.

***The Hearing***

16. 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 and Visteon 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.

17. 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.

***The First Performance Bonus Plan Order***

18. On October 26, 2006, the Court, as set forth in writing pursuant to the Court's *Entry of Judgment* dated November 17, 2006 (Docket No. 242) (the "**First Bonus Plan Order**"), concluded that the Performance Bonus Plan could be approved as to non-insiders. *See* First 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."). This 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.*

***BBK's Refusal to Pay***

19. 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 requested funds to the Debtors so that the Debtors can make payments under the Performance Bonus Plan as approved by the Court.

***The Emergency Motion***

20. On November 27, 2006, the Debtors filed the Emergency Motion. By the Emergency Motion, the Debtors seek an order of the Court, pursuant to section 105(a) of the Bankruptcy Code, enforcing the Bonus Plan Orders (as defined below) 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.

***The Second Performance Bonus Plan Order***

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

***The Objections to the Emergency Motion***

22. On November 29, 2006, the Visteon Corporation ("**Visteon**") and Delphi Automotive Systems, LLC ("**Delphi**" and, together with Visteon, the "**Objectors**") filed the following objections to the Emergency Motion: (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**" and, together with the Visteon Objection, the "**Objections**").

**PROPOSED CONCLUSIONS OF LAW**

Upon consideration of the terms and conditions of the DIP Order, the Bonus Plan Orders, the Performance Bonus Plan Motion, the Performance Bonus Plan, the objections to the Performance Bonus Plan Motion, the Consolidated Reply, the Visteon Findings, the statements and representations made at the Hearing held with respect to the Performance Bonus Plan Motion, the Emergency Motion and the Objections thereto, and the hearing held on the Emergency Motion on November 30, 2006, the Court finds as follows:

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. Notice of the hearing on the Emergency Motion was sufficient under the circumstances.

4. The Emergency Motion is granted in its entirety. The Participating Customers and BBK are hereby directed, pursuant to section 105(a) of the Bankruptcy Code, 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, in addition all other payments required under the Performance Bonus Plan.

5. "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.").

6. "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 either 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).

7. Consideration of these factors supports the application of judicial estoppel in this matter. First, the Debtors and Visteon represented to the Court that the Performance Bonus Plan would be funded by Cash Infusions from the Participating Customers. Second, 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. 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. Third, 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.

8. This Court has the authority to enforce and implement its orders, including the DIP Order and the Bonus Plan Orders. *See* 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).").

9. 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.").

10. Under the Bonus Plan Orders, the Debtors do not have Postpetition Debt (as such term is defined in the Customer Agreement) that is available, pursuant to the Bonus Plan Orders, to pay the bonuses that are due and payable under the Performance Bonus Plan.

11. The only funds that are available under the Bonus Plan Orders to pay bonuses under the Performance Bonus Plan are Cash Infusions (as such term is defined in the Customer Agreement).

12. BBK, as agent for the Participating Customers, is obligated to release funds for the payment of bonuses under the Performance Bonus Plan under the terms and conditions of the DIP Order irrespective of whether the Debtors have availability under the Debtors' postpetition revolver.

13. Having failed to dispute the Debtors' request for $891,310.00 from the BBK Trust Account to make approved payments under the Performance Bonus Plan within one business day, BBK and the Participating Customers have waived their right under the DIP Order to dispute the Debtors' request for $891,310.00 from the BBK Trust Account to make approved payments under the Performance Bonus Plan.

14. The Debtors reserve the right to add additional findings of fact and conclusions of law as they become known to it in connection with the hearing on November 30, 2006 or otherwise.

Respectfully submitted by:

/s/ Joseph F. Hutchinson, Jr.
Joseph F. Hutchinson, Jr. (0018210)
Thomas M. Wearsch (0078403)
Eric R. Goodman (0076035)
BAKER & HOSTETLER LLP
3200 National City Center
1900 East 9th Street
Cleveland, Ohio 44114-3485
Phone: 216.621.0200
Fax: 216.696.0740

*Counsel for the Debtors and Debtors-in-Possession*