

**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
: :
: Hearing Date: 10/24/06 at 9:30 a.m.
: Objection Deadline: 10/20/06 at 4:00 p.m.
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**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**

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”), pursuant to sections 105(a), 363(b) and 503(c)(3) of title 11 of the United States Code (the “Bankruptcy Code”), for entry of an order authorizing them to adopt a performance bonus plan (as described in this Motion and the attached **Exhibit A**, the “Performance Bonus Plan”) and make payments in accordance therewith. In support of the Motion, the Debtors respectfully represent as follows:

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.

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

3. The statutory predicates for the relief requested herein are sections 105(a), 363(b) and 503(c)(3) of the Bankruptcy Code.

BACKGROUND

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. No trustee, examiner or official committee of unsecured creditors has been appointed.

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 Financing Motion**”).

7. On September 25, 2006, the Court entered the *Emergency Order Re: 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 the Debtors to Incur Postpetition Secured Indebtedness, (II) Granting Security Interests and Priority Claims, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay and (V) Setting Final Hearing* (Docket No. 66) (the “**Interim DIP Order**”).

8. The Debtors’ goal is to stabilize their business operations and financial situation and sell their assets in a manner to maximize value for the Debtors’ creditors. As detailed in the

Debtors' DIP Financing Motion, Wachovia Capital Finance Corporation (Central) (“**Wachovia**”) and Visteon Corporation, General Motors Corporation and Delphi Corporation (collectively, the “**Customers**”) have agreed to fund the Debtors' bankruptcy through postpetition financing and cash infusions until such time as all of the Debtors' manufacturing facilities are either sold as going concerns or liquidated pursuant to section 363 of the Bankruptcy Code.

RELIEF REQUESTED

9. By this Motion, the Debtors seek 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 and to make payments in accordance therewith.

FACTS RELEVANT TO THIS MOTION

10. The Debtors in their business judgment have determined that they need to adopt a Performance Bonus Plan to enable them to carry out their necessary objectives through the end of this year. Accordingly, the Debtors are proposing a Performance Bonus Plan that is completely based on plant performances, is not dependent on workers staying on as long as the Debtors wish them to, and which is being financed by grants from the Customers and Wachovia.² The Debtors consider the Performance Bonus Plan to be central in meeting the challenges before them.

11. This is a liquidating Chapter 11. In order to avoid as many additional claims as possible, and in order to conserve any going concern value that may still exist, it will be necessary to run certain plants until such plants are sold as going concerns or are liquidated. The Debtors have determined in their business judgment that it will be necessary to provide

² 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.

additional incentives to certain employees in order to maintain production. There are many reasons for this.

12. For one, it is difficult to operate in the context of a liquidating Chapter 11 — even in comparison to a standard Chapter 11. Notwithstanding the relief granted by the Court pursuant to the entry of the order authorizing the Debtors to honor certain prepetition obligations due and owing to the Debtors' employees, some of the Debtors' employees are distracted by the knowledge that they will be soon out of work and must deal with all the cascading issues that result from that fact. At this time, however, it is crucial that the Debtors' employees remain focused on operating the Debtors' manufacturing facilities to the best of their abilities through the sale process in order to maximize estate value.

13. Second, the Debtors cannot afford to lose their existing workforce. The Debtors' existing workforce has institutional knowledge with respect to the Debtors' operations and has established relationships with the Debtors' customers. At this juncture, it is not possible for the Debtors to replace this institutional knowledge. The Debtors do not have time to train replacement workers, and any new potential new hire knows that his or her job will be short term. The loss of the Debtors' existing workforce would decrease the value of the Debtors' assets in the context of a section 363 sale and, thus, would be detrimental to all parties in interest, including the trade creditors.

14. Additionally, all of the normal financial interactions involved in running a business, from ordering supplies to obtaining outside services as needed, become more complex in Chapter 11. Promises are easy to make but hard to fulfill as the financial and legal ground shifts. Concerned suppliers and customers become more difficult to deal with, especially when people know that some of the Debtors' manufacturing facilities will be shutting down. On top of

that, the mechanics of operating in Chapter 11 impose an additional burden in dealing with new and previously unknown legal, filing, testimonial and operational requirements.

15. The Chapter 11 filing and rumors of plant shutdowns have adversely affected the morale of the Debtors' employees. Under these circumstances, it is important to provide the employees who will have the most effect on the outcome of these Cases, with specific incentives to keep their concentration on production. Given that many of the Debtors' employees will soon be out of work, financial incentives to encourage optimal performance are warranted under the circumstances and are in the best interest of all parties in interest.

16. The persons who will be immediately affected if the Debtors are unable to reliably continue production are all of the Debtors' customers and Wachovia. The general concepts contained in the Performance Bonus Plan have been negotiated with the Customers and Wachovia. In addition, Wachovia and the Customers have agreed to fund the Performance Bonus Program through cash infusions.³

17. A copy of the Performance Bonus Plan⁴ is attached hereto as **Exhibit A**. Its significant points are as follows:

- a. **Timing:** There are two Bonus Periods — defined in the Performance Bonus Plan as “Period One” and “Period Two” respectively. Period One is defined as the period from the Petition Date to October 15, 2006. Period Two is defined as the period from October 15, 2006 to October 31, 2006. The Bonus Payment Date for each of the Bonus Periods shall be on or before November 15, 2006.
- b. **Coverage:** There are four tiers of covered employees or officers (collectively, the “**Covered Employees**”).

³ See *supra* footnote 2.

⁴ Capitalized terms not otherwise defined herein shall have the meanings given to them in the Performance Bonus Plan. The description set forth herein of the Performance Bonus Plan is not intended to modify or contradict the terms of the Performance Bonus Plan. To the extent that there is a conflict between this Motion and the Performance Bonus Plan, the terms of the Performance Bonus Plan control.

Tier 1. The Tier 1 Employees consist of twenty-one (21) employees or officers, who are further divided into the Tier 1A Group (consisting of Mssrs. Van Tiem, Mallak, Marshall and Fassat) and the Tier 1B Group (consisting of the remaining Tier 1 Employees). Tier 1B is further divided into the Tier 1B Plant Specific Group (consisting of eight (8) plant managers and the managing director of CEP Mexico) and the Tier 1B Central Group (consisting of all other Tier 1B employees).

Tier 2. The Tier 2 Employees consist sixteen (16) accountants, managers and other employees in Akron, Ohio.

Tier 3. The Tier 3 Employees consist of five (5) sales and engineering employees in Livonia, Michigan.

Tier 4. The Tier 4 Employees consist of fifty-five (55) engineers, supervisors, controllers and other employees in Canton, Crestline, Middlefield, Lapeer, Tuscaloosa, Belleville and Vandalia.

- c. **Cost:** The maximum bonus payable to all Covered Employees is approximately \$1.3 million. This amount is allocated across the four tiers of Covered Employees. The maximum bonus payable to Tier 1 Employees is \$715,000.00 in the aggregate, of which \$50,000.00 is subject to obtaining the Wachovia funding described below. Of the \$715,000.00, between \$200,000.00 and \$250,000.00 is allocated to the Tier 1A Group, depending on the Wachovia funding, and \$465,000.00 is allocated to the Tier 1B Group. The maximum bonus payable to Tier 2 Employees and Tier 3 Employees is \$108,000.00 in the aggregate. The maximum bonus payable to the Tier 4 Employees is \$500,000.00 in the aggregate.
- d. **Allocation:** For the Tier 1, the individual potential allocations of the subtier's collective gross amount for each Bonus Period (each such Bonus Period allocation of an individual employee, a "**Bonus Period Potential Award**") are shown on Exhibit A to the Performance Bonus Plan, except that for Tier 1A only, those numbers will be reduced pro rata if for any shortfall in the Wachovia funding. For other Tiers and subtiers, the allocation of the collective amounts allowed for each Tier into individual Bonus Period Potential Awards will be in the discretion of management.
- e. **Funding:** Certain of the customers of CEP (the "**Participating Customers**") will fund \$1.275 million of the cost of the Performance Bonus Plan. Wachovia will fund \$50,000.00 of the cost of the Performance Bonus Plan through the establishment of a reserve under the Debtors' Postpetition Facility earmarked for the Tier 1 Employees, and has agreed to subordinate its claim to such \$50,000.00 to the Participating Interests of the Participating Customers, subject, however, to the delivery

by the Debtors of a letter of intent for the purchase of Vandalia equipment that is acceptable to Wachovia. Any money allocated for bonuses under the Performance Bonus Plan that remains after the payment of all bonuses for both bonus periods shall be returned to the Participating Customers.

- f. **Forfeiture and Reallocation of Payment:** Persons who leave the employ of, or leave (as opposed to change) their positions with, the Debtors prior to the expiration of a Bonus Period shall become ineligible for a bonus for that period unless their departure is neither voluntary nor for cause, and any potential bonus for that person will be forfeited. A person who leaves his or her employment or position after the end of a bonus period but prior to actual payment of the bonus for such period, shall remain eligible for, and entitled to be paid, any bonus earned for such period. A person who is laid off (as opposed to terminated for cause) prior to the end of a Bonus Period shall remain eligible for any bonus awarded for that Bonus Period, but shall be ineligible for a bonus for any succeeding Bonus Period, and any such potential bonus for the succeeding Bonus Period shall be forfeited. A forfeited potential bonus from anyone who becomes ineligible, will be reallocated among the remaining persons in the same tier in the discretion of management, but subject to a maximum limit described below.

Notwithstanding the reallocated bonuses, in no event shall a Tier 2 Employee, a Tier 3 Employee or a Tier 4 Employee receive bonuses of more than \$25,000.00 nor shall a Tier 1B Employee receive a bonus of more than 120% of the amount set out next to his or her name on Exhibit A to the Performance Bonus Plan. These maximum limits on individual bonuses constitute the “**Bonus Cap**” for each Covered Employee. The additional amounts of bonus that a Covered Employee receives for a bonus period by reason of reallocations, and as limited by the Bonus Cap, is referred to as his or her “**Redistribution Enhancement**.”

- g. **Periodic Bonus Criteria:** Upon the conclusion of each Bonus Period, each eligible Covered Employee shall become entitled to a periodic performance bonus, which shall generally reflect the performance of his or her particular plant (for plant-specific positions), or to the performance of all plants (for general positions). To calculate the amount of bonuses owed for a Bonus Period the following shall be determined:

1. **Target Achieved Day.** A Target Achieved Day for a particular Covered Plant in any given Bonus Period, is a day, within the Bonus Period in which either the Covered Plant completely achieves and fulfills all its scheduled releases on that day or it fails to do so because of Capacity limitations (as Capacity is defined below). If for any reason no releases are scheduled for a day, including, for example (and without limitation), because of lack of

customers still requiring product, the Covered Plant will treat the day as a Target Achieved Day.

2. **Plant Earned Bonus Percent.** The Plant Earned Bonus Percent of a Covered Plant shall equal 100% for any given Bonus Period if, all days during that Bonus Period constitute Target Achieved Days for that Covered Plant, and its corresponding Plant Earned Bonus Percent factor shall in that event equal 1.0. If not all days in a Bonus Period constitute Target Achieved Days for the Covered Plant, then its Plant Earned Bonus Percent shall be decreased to the percentage of days in the Bonus Period that were Target Achieved Days, and the Plant Earned Bonus Percent factor also decreases proportionally (*e.g.*, if 80% of the days in a Bonus Period were Target Achieved Days for a Covered Plant, its Plant Earned Bonus Percent for that Bonus Period shall be 80% and the Plant Earned Bonus Percent factor will be 0.8). For purposes of this Performance Bonus Plan, the two Mexico plants shall be aggregated and considered as a single Covered Plant.
3. **Capacity.** As negotiated for the DIP Financing Motion, and as to be used for purposes of this Performance Bonus Plan, the definition of Capacity is as follows: “Capacity. Reasonably applied constraints on production, including reasonably required equipment maintenance, any contractual restriction under existing labor contracts and such constraints as may be outside the reasonable control of Debtors, including equipment breakdowns, employee attrition or inability to obtain material on an expedited basis Subject to the foregoing, Debtors shall work maximum overtime, including holidays (excluding Thanksgiving, Christmas Day, and New Year’s Day) and weekends, outsourcing production where reasonably possible, allowing Participating Customers to temporarily move tooling at Closing Facilities, and take all other reasonable steps necessary to build part banks.”
4. **General Bonus Percent.** To determine the bonuses of persons other than those in the Tier 4 Group or in the Tier 1B Plant Specific Group, a General Bonus Percent factor will be calculated as follows. Each Covered Plant is assigned a percentage (the “**Normal Plant Percent**”) (for example, 15%), which in the opinion of management reasonably represents the percentage of production normally represented or to be reasonably expected by that plant, out of the total production of all Covered Plants. Each Normal Plant Percentage has a corresponding and proportionate Normal Plant Percent factor (for a Normal Plant Percent of 15%, the corresponding Normal Plant Percent factor would be 0.15). The sum of the Normal Plant Percents for all Covered Plants will equal 100% and the sum of the proportionate corresponding

Normal Plant Percent factors will equal 1.0. For each Bonus Period, the General Bonus Percent factor will be calculated by multiplying the Normal Plant Percent factor by the respective Plant Earned Bonus Percent factor for each Covered Plant, and summing the results. Therefore if each Covered Plant succeeds in making all days in a Bonus Period qualify as Target Achieved Days for that Covered Plant, the General Bonus Percent factor, which is determined on the basis of all Covered Plants, would equal its maximum number of 1.0.

5. **Calculation of Bonus.** Upon the conclusion of each Bonus Period, the Bonus for each eligible Covered Employee shall be calculated as follows:

(a) **Tier 4 Payouts.** Each Tier 4 Employee who is eligible for a bonus for a Bonus Period shall receive his or her Bonus Period Potential Award share, as determined by management, of the total bonus amount listed on Exhibit A to the Performance Bonus Plan for Tier 4, times the Plant Earned Bonus Percent factor for that Bonus Period for the Covered Plant in which that Employee works. To that bonus shall be added any Redistribution Enhancement that may arise from the reallocation of forfeited Tier 4 bonuses for that Bonus Period.

(b) **Tier 1B Plant Specific Group.** Each Plant Manager or Mexico Managing Director who is eligible for a bonus for a Bonus Period shall receive a bonus equal to the product of his or her Bonus Period Potential Award as listed on Exhibit A to the Performance Bonus Plan for that employee for the applicable Bonus Period, times the Plant Earned Bonus Percent factor for that Bonus Period for the Covered Plant associated with that Plant Manager or Mexico Managing Director. To that bonus shall be added his or her Redistribution Enhancement arising from any reallocation of Tier 1 bonuses for that Bonus Period that were forfeited by persons in the Tier 1 group who became ineligible.

(c) **Tier 1B Central Group.** The bonus for each Bonus Period for each person in the Tier 1B Central Group will be calculated by multiplying the Bonus Period Potential Award next to his or her name on Exhibit A to the Performance Bonus Plan by the General Bonus Percent factor, and then adding his or her Redistribution Enhancement, if any.

(d) **Remaining Payouts.** The bonus of each person in the Tier 1A Group, the Tier 2 Group, and the Tier 3 Group for each Bonus Period will be calculated by multiplying his or her individual Bonus Period Potential Award as determined by management, by

the General Bonus Percent factor, and then adding his or her Redistribution Enhancement, if any.

- h. **Reservation of Rights:** The Debtors' management reserves the right to make at any time such changes in this plan as will in its business judgment assist in meeting its intended purpose of helping the Debtors meet their operating and business requirements through the winddown and protecting the value of the Debtors' assets; provided, however, that the changes shall not affect the payment of any bonus that has been already earned, nor, without any necessary Bankruptcy Court approval, materially increase either the overall amounts to be paid out under the Performance Bonus Plan, or the relative amounts to be paid to senior management. In addition, no material changes shall be made without approval of the Participating Customers except pursuant to an order of this Court.

18. As set forth above, the criteria for payment under the Performance Bonus Plan primarily is tied to the performance of the Covered Plants. The Performance Bonus Plan is specifically designed to reward collective effort and achievement. Additionally, the Performance Bonus Plan is based on production and is not directly tied to retention.

19. Bonus amounts for each Tier and for each Covered Employee have been set by the Debtors' management, with the input of their consultants, at the levels which, in their business judgment, will accomplish the most good for the Debtors and their estates. As set forth below, the Debtors believe that the adoption of the Performance Bonus Plan is in the best interest of the Debtors' estates, their creditors and other parties in interest.

BASIS FOR RELIEF REQUESTED

20. The adoption of the Performance Bonus Plan and the making of payments thereunder is warranted under sections 105(a), 363(b) and 503(c)(3) of the Bankruptcy Code and applicable case law.

The Adoption of the Performance Bonus Plan Is Warranted Under Section 105(a) of the Bankruptcy Code

21. Section 105(a) of the Bankruptcy Code, which codifies the equitable powers of bankruptcy courts, authorizes the Court to "issue any order, process, or judgment that is

necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a).

22. A bankruptcy court's exercise of its authority under section 105(a) of the Bankruptcy Code is appropriate to carry out two central policies underlying Chapter 11: (a) to permit the successful rehabilitation of the debtor; and (b) to preserve going concern value and maximize property available to satisfy creditors. *See, e.g., In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (supporting principle that bankruptcy court can authorize payment of pre-petition claims where such payment is necessary to survival of debtor); *In re Federated Dep't. Stores*, No. 1-90-00130, 1990 Bankr. LEXIS 122, at *3 (Bankr. S.D. Ohio Jan. 15, 1990) (“It is well established that a bankruptcy court has authority to authorize payment of pre-petition claims where the payment of such claims is necessary to facilitate reorganization.”); *In re SIS Corp.*, 108 B.R. 608, 609-10 (Bankr. N.D. Ohio 1989) (recognizing that courts may authorize payments on account of pre-petition claims “premised upon overriding practical and policy reasons”).

23. The relief sought herein is critical to the Debtors’ ongoing ability to operate, conduct the sales of plants as going concerns, and to protect the assets of the estates for the purpose of confirming a plan. The Debtors seek the relief requested in this Motion because any delay or disruption in timely production of quality parts will destroy the Debtors’ relationships with the Customers, will create massive claims that can otherwise be avoided, will make it more difficult to sell any divisions on an operating basis, and will impair workforce morale at the very time when the dedication, confidence and cooperation of the personnel are most critical. The Debtors face the risk that their operations may be severely impaired if authority is not granted immediately for the Debtors to make the payments described above.

24. In light of the foregoing, the Debtors respectfully submit that the adoption of the Performance Bonus Plan and making payments in accordance therewith is essential for the Debtors' reorganization, represents an exercise of the Debtors' sound business judgment and is in the best interests of the Debtors' estates and creditors.

***The Adoption of the Performance Bonus Plan Is
Warranted Under Section 363(b) of the Bankruptcy Code***

25. Section 363(b) of the Bankruptcy Code provides a further basis for the approval of the Performance Bonus Plan. Section 363(b) of the Bankruptcy Code provides, in relevant part, that "the trustee, after notice and a hearing, may use, . . . other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). A court has the statutory authority to authorize a debtor to use property of the estate pursuant to section 363(b) when such use is an exercise of the debtor's sound business judgment and is proposed in good faith. *See Stephen Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) (adopting the "sound business purpose" standard for sales proposed pursuant to section 363(b) of the Bankruptcy Code).

26. Performance bonus plans are commonplace in the business world and consequently are not necessarily outside of the ordinary course of business. Other types of special compensation arrangements have been determined by courts to be within the ordinary course of business. *See, e.g., In re Crystal Apparel*, 207 B.R. 406, 410 (S.D.N.Y. 1997) (holding that "golden parachute" employment contracts may constitute transactions undertaken in the ordinary course of business). However, because the instant Performance Bonus Plan is specifically being adopted with reorganization in mind, the Debtors seek authority from the Court to adopt a plan and make the payments provided thereunder.

27. Under section 363(b) of the Bankruptcy Code, a debtor has the burden to establish it has a valid business purpose for using estate property outside the ordinary course of business.

See In re Lionel Corp., 722 F.2d 1063, 1070-71 (2d Cir. 1983). Once the debtor has articulated such a valid business purpose, however, a presumption arises that the debtor's decision was made on an informed basis, in good faith, and in the honest belief that the action was in the debtor's best interest. *See In re Integrated Resources, Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992). A party in interest seeking to challenge the debtor's valid business purpose must "produce some evidence supporting its objection." *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 155 (Bankr. D. Del. 1999).

28. Where, as here, certain employees are an essential component of a debtor's continued operations, this has been generally sufficient to meet the legal standard for approval of a reorganization incentive program. *See, e.g., In re EaglePicher Holdings, Inc.*, No. 05-12601, 2005 Bankr. LEXIS 2894, at *14 (Bankr. S.D. Ohio Aug. 26, 2005) (approving the debtors' adoption of a key employee retention plan as "an exercise of sound business judgment"). Bankruptcy courts have been directed to "exercise great deference in reviewing a corporation's decision to pay its employees." *Crystal Apparel*, 207 B.R. at 410. In this regard, courts have articulated "that section 363(c)(1) [of the Bankruptcy Code] authorizes a debtor to provide for employee compensation in routine situations." *In re Enron Corp.*, No. 01-16034, 2003 WL 1562202, at *18 (Bankr. S.D.N.Y. Mar. 21, 2003).

29. Implementing the Performance Bonus Plan has a sound business purpose — preserving and maximizing the value of the Debtors' estates and motivating the Covered Employees to perform at optimal levels during the duration of the Cases. The Debtors' employees are experienced and talented workers who are intimately familiar with the Debtors' businesses and operations. The replacement of Covered Employees, under the circumstances, would come at a substantial cost to the Debtors and would be highly detrimental to the Debtors'

creditors and all parties in interest. Indeed, the success or failure of the Debtors' reorganization and future section 363 sales hinge on the present and future efforts of the Debtors' employees. To maintain a cohesive and motivated workforce during a bankruptcy process, debtors frequently implement various combinations of compensation programs, including performance bonus plans. Without such programs, essential employees may not be motivated to perform at their highest levels if they perceive that the benefits of performance are negligible.

30. The Debtors' Performance Bonus Plan is designed to provide incentives sufficient to (a) motivate the employees and (b) maximize the value of the Debtors' estates. At the same time, keeping in mind the financial constraints under which the Debtors' operate and the demands of the Customers, who ultimately must fund most, if not all, of the Performance Bonus Plan, the Debtors believe that the incentives proposed herein are reasonable and appropriate and that the requested approval of the Performance Bonus Plan will allow the Debtors to motivate employees to maximize the value of the Debtors' estates. The approval of the Performance Bonus Plan is therefore in the best interest of the Debtors, their creditors and other parties in interest.

The Adoption of the Performance Bonus Plan Is Warranted Under Section 503(c)(3) of the Bankruptcy Code

31. Incentive plans similar to the Performance Bonus Plan have been approved by courts in other Chapter 11 cases since the enactment of BAPCPA and the recent amendments to section 503(c) of the Bankruptcy Code. *See, e.g., In re Musicland Holding Corp.*, No. 06-10064 (SMB) (Bankr. S.D.N.Y. Aug. 10, 2006) (approving, over the committee's objection, an incentive program divided into two classes: a \$1 million pool for the top five officers and a \$200,000.00 pool for additional management employees, with payment conditioned on the earlier to occur of a (a) 363 sale or (b) the consummation of a plan of reorganization.); *In re Flyi*,

Inc., No. 05-20011 (MFW) (Bankr. D. Del. Aug. 8, 2006) (approving an incentive plan negotiated with the committee for the 12 remaining employees in a wind-down incentive plan; under the plan, each non-insider employee would be entitled to 75% of their salary and the insider could receive 40% on the earlier to occur of the confirmation of a liquidating plan or December 29, 2006, provided that they continued to remain employed by the debtors, with the maximum amount payable being \$1.4 million); *In re Calpine Corp.*, No. 05-60200 (BRL) (Bankr. S.D.N.Y. May 15, 2006) (approving (a) an emergence incentive plan providing cash awards payable only on emergence from bankruptcy to 20 senior management employees, (b) a management incentive plan for 600 management employees based on achieving certain performance goals, (c) a supplemental bonus plan — only for certain “critical” managers who the Debtors’ risked losing to competitors, not tied to performance, and (d) a discretionary bonus plan consisting of \$500,000.00 per year to be awarded up to \$25,000.00 per employee at the complete discretion of the CEO); *In re Riverstone Networks, Inc.*, No. 06-10110 (CSS) (Bankr. D. Del. Mar. 28, 2006) (approving (a) payments due under an existing employee bonus program, (b) a modified employee bonus program, and (c) the continuation of the management bonus program); *In re Pliant Corp.*, No. 06-10001 (MFW) (Bankr. D. Del. Mar. 14, 2006) (approving the continuation of a prepetition Management Incentive Plan that allowed management to receive bonus payments based on a mix of company performance and personal performance.); *In re Nobex Corp.*, No. 05-20050 (MFW) (Bankr. D. Del. Dec. 21, 2006) (approving an incentive plan for the CEO and for the vice president of finance to support a section 363 sale process, with the chairman and CEO obtaining 6.5% of up to \$4 million of proceeds; 7.5% of the proceeds between \$4 million and \$10 million; and 8.5% of the proceeds over \$10 million, and the vice

president of finance obtaining 2.5% of up to \$4 million of proceeds; 3.5% of the proceeds between \$4 million and \$10 million; and 4.0% of the proceeds over \$10 million).⁵

32. The restrictions contained in the newly amended section 503(c) should not affect the Debtors' ability to adopt the Performance Bonus Plan. As recently amended by BAPCPA, section 503(c) of the Bankruptcy Code restricts transfers or payments by debtors to the extent that such payments are outside of the ordinary course of business. Section 503(c) of the Bankruptcy Code provides, in relevant part:

Notwithstanding subsection (b), there shall neither be allowed, nor paid —

(1) a transfer made to, or an obligation incurred for the benefit of, an *insider* of the debtor ***for the purpose of inducing such person to remain with the debtor's business***, absent a finding by the court based on evidence in the record that —

* * *

(2) a ***severance payment to an insider*** of the debtor, unless —

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3) ***other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case***, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

11 U.S.C. § 503(c) (emphasis added).

⁵ Because of the voluminous nature of these unreported orders, they are not attached to this Motion. Copies of these orders will be made available to parties upon request from the Debtors' counsel. Additionally, the Debtors are permitted to file motions without attached unreported orders pursuant to an order of this Court.

33. Accordingly, amended section 503(c) of the Bankruptcy Code restricts payments and other transfers in three ways. First, section 503(c)(1) of the Bankruptcy Code limits payments to “insiders” to the extent such payments are made “for the purpose of inducing such person[s] to remain with the debtor’s business.” Second, section 503(c)(2) places restrictions on “severance payments” to “insiders.” Third, section 503(c)(3) of the Bankruptcy Code limits payments made to management and employees, among other, made outside of the ordinary course unless such payments are shown to be justified under the facts and circumstances of a Chapter 11 case.

34. Section 503(c) of the Bankruptcy Code is inapplicable to the Performance Bonus Plan. First, to the extent that proposed payments under the Performance Bonus Plan are to persons that qualify as “insiders” under the Bankruptcy Code, such payments are not “retention” payments that are restricted under section 503(c)(1) of the Bankruptcy Code because they are not provided “for the purpose of inducing [insiders] to remain” with the Debtors’ businesses. Rather, the Performance Bonus Plan rewards employees for performance tied directly to critical restructuring and output goals for the purpose of preserving the value of the Debtors’ estates and do not provide compensation for mere continued employment — the hallmark of a “retention” program. The fact that the proposed payments under the Performance Bonus Plan may have some retentive effect does not mean that the Performance Bonus Plan falls within the scope of section 503(c)(1) of the Bankruptcy Code. *See In re Dana Corp.*, No. 06-10354, 2006 Bankr. LEXIS 2181, at *16 (Bankr. S.D.N.Y. Sept. 5, 2006) (“I do not find that incentivizing plans which may have *some* components that arguably have a retentive effect, necessarily violate section 503(c)’s requirements.”) (emphasis in original). Moreover, the vast majority of the employees covered by the Performance Bonus Plan are not “insiders,” but are plant managers

and other personnel that are essential to maintaining the Debtors' operations pending the sale process.

35. Second, section 503(c)(2) of the Bankruptcy Code is inapplicable because the Performance Bonus Plan does not provide for any "severance payments." No transfer or payment under the proposed Performance Bonus Plan is designed to pay an employee a specified amount upon "termination."

36. Instead, the transfers and payments proposed herein are justified by the facts and circumstances of these Cases. The payments are based on plant (or overall) performance to budget. The Performance Bonus Plan incentivizes optimal performance. Therefore, the Performance Bonus Plan satisfies the standard of sections 363 and 503(c)(3) of the Bankruptcy Code to the extent that the Performance Bonus Plan may be characterized as outside the ordinary course of business. *See Dana Corp.*, 2006 Bankr. LEXIS 2181, at *16 (stating that it is "possible to formulate a compensation package that passes muster under the section 363 business judgment rule or section 503(c) limitations, or both").

37. Employee morale, focus and performance, much of which have been adversely impacted by the Debtors' Chapter 11 filing and pending sale process, are essential to success of the Debtors' restructuring and ability to maximize the value of the Debtors' estates. Indeed, no potential purchaser is likely to be willing to purchase any of the Debtors' manufacturing facilities on a going-concern basis unless the Debtors are able to preserve their workforce during this critical period. In addition, the employees are converting what would otherwise be worthless inventory to cash and are permitting the Debtors to make substantial payments to Wachovia. This debt reduction is of significant benefit to the Debtors' estates and could result in a dividend

to unsecured creditors. Right now, the Debtors' employees are their most valuable resource. The importance of preserving and enhancing the value of this resource cannot be overstated.

38. The Debtors further represent that they have anticipated access to sufficient debtor in possession financing to fund the Performance Bonus Plan, to the extent described herein, as such obligations become due in the ordinary course of their businesses. The general concepts contained in the Performance Bonus Plan were negotiated with the Customers and Wachovia before the Debtors filed this Motion requesting the Court's approval of the Performance Bonus Plan.

NOTICE

39. 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).

40. Notwithstanding the possible applicability of Bankruptcy Rules 6004(h), 7062, 9014 or otherwise, the Debtors request the relief sought by this Motion be immediately effective and enforceable upon entry of the order requested hereby.

41. 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 B**, granting the relief requested herein; and (b) grant such other and further relief to the Debtors as the Court may deem proper.

Dated: October 3, 2006
Cleveland, OH

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

By: /s/ Joseph F. Hutchinson, Jr.
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