



1  
2 **PRELIMINARY STATEMENT**

3 1. The Petitioner does not deny the need of the Debtors’ to create compensation  
4 programs to retain and/or provide incentives to its employees. The Petitioner further  
5 acknowledges that the proposed program’s cost to the Debtors’ estate amounts to approximately  
6 \$50 million dollars, which is de minimis in light of the Debtors’ recent announcement of a \$7.1  
7 billion impairment charge. However, the Debtors’ decision to implement the program comes at a  
8 uniquely inopportune time and reflects a lack of consideration to seek consensus among all  
9 parties, notably of the equity security holders.

10  
11 2. Although the Debtors’ stated goals in the Motion are to implement a  
12 compensation program that “ensure[s] continued job performance necessary for the Debtors’  
13 ongoing business operations and successful reorganization – and to ... enhance the value of the  
14 Debtors’ estate,”<sup>1</sup> the Debtors’ Calpine Incentive Program (the “CIP”) falls short of the burden  
15 required under sections 363(b) and 503(c) of the Bankruptcy Code for the reasons described in  
16 greater detail below. Consequently, the Debtors’ Motion should be denied, at least until the CIP  
17 can be reviewed and revised to more closely align the interests of the Debtors’ targeted insiders  
18 and that of the Debtors’ creditors and equity holders.

19  
20 **FACTUAL BACKGROUND**

21  
22 3. The Petitioner currently owns 30,000 pre-bankruptcy shares of common stock  
23 purchased while he was an employee of the Debtor through the Debtors’ employee stock  
24 purchase program and shortly thereafter. After the Debtors’ bankruptcy filing, the Petitioner  
25

26  

---

<sup>1</sup> Motion, Page 1

1 organized an Ad Hoc Committee of Equity Security Holders (the “AHC”), which now represents  
2 approximately 200 retail equity holders holding approximately 19 million shares, and as such, is  
3 the largest single holder of the Debtors’ common stock, either among retail or institutional  
4 holders.<sup>2</sup> Accordingly, the Petitioner and the AHC have a keen interest in ensuring the ultimate  
5 success of the Debtors’ reorganization case, and the maximization of the value available for  
6 distribution to creditors and equity holders in connection therewith.

7  
8 4. On December 20, 2005, the Debtors filed their voluntary petition for relief under  
9 chapter 11 of the Bankruptcy Code, the largest such filing in 2005. On January 6, 2006, the  
10 United States Trustee appointed an official committee of the unsecured creditors (the “Unsecured  
11 Committee”).

12  
13 5. On March 27, 2006, the Trustee determined that an official equity committee was  
14 justified on the basis of the size and complexity of the Debtors’ filing and the nearly 180,000  
15 common shareholders impacted.<sup>3</sup> The Trustee instructed the Debtors’ counsel to provide a list of  
16 top 50 beneficial owners by April 3, 2006, in order to help the Trustee select members for an  
17 official equity committee. The Debtors’ counsel did not meet the proscribed deadline. Currently  
18 the Trustee has requested that all interested parties submit an application by April 25, 2006.

19  
20 6. Since an official equity committee will not be empanelled in time to submit a  
21 response to the Debtors’ Motion, the Petitioner, who was one of three parties petitioning for the  
22 formation of the official equity committee with the Trustee, is compelled to act on behalf of all

---

23 <sup>2</sup> According to the latest available SEC 13-G filings, the largest institutional holder of the  
24 Debtors’ common stock holds 8 million shares as of December 31, 2005.

25 <sup>3</sup> Letter from the Office of the United States Trustee, Southern District of New York, Dated March  
26 27, 2006

1 equity holders. As the Debtors' Motion indicates that it has received the input and support from  
2 the Unsecured Committee, the Petitioner is compelled to raise the issues of the equity holders not  
3 addressed by the Motion.  
4

### 5 **GROUNDS FOR THE OBJECTION**

6  
7  
8 7. The proposed CIP, comprised of four separate components, does not represent a  
9 reasonable exercise of the Debtors' business judgment and violates the conditions promulgated  
10 under the Bankruptcy Abuse Prevention and Consumer Protection Action of 2005 ("BAPCPA").  
11

12 **A. The Debtors' decision to implement the CIP does not represent a sound**  
13 **exercise of the Debtors' business judgment under the application of 11 U.S.C. Section**  
14 **363(b)**  
15

16  
17 8. The Debtors' decision to implement the CIP does not represent a sound exercise  
18 of the Debtors' business judgment under the application of 11 U.S.C. Section 363(b). Under  
19 section 363(b), the Debtors bear the burden of demonstrating good business judgment, and the  
20 Court has a right to "consider all salient factors pertaining to the proceeding, and ... act to further  
21 the diverse interests of the debtor, creditors and equity holders, alike." In re Lionel Corp., 722  
22 F.2d 1063, 1071 (2d Cir. 1983). In other words, the Debtors should not assume a deferential  
23 standard with little or no consideration for equity holders.  
24  
25  
26

1           9. Debtors' Motion asserts that the CIP meets this burden because it maximizes the  
2 value of the Debtors' estate and motivates the employees covered.<sup>4</sup> However, whether it  
3 actually accomplishes the first goal of maximizing the estate is dubious at best. The Adjusted  
4 Enterprise Value (the "AEV") targets used to justify the payments to select insiders under the  
5 first component of the CIP, the Executive Incentive Program (the "EIP"), are asserted with no  
6 basis of independent evaluation. Indeed, the AEV targets selected by the Debtors and Creditors  
7 permits no review by the equity holders to determine whether the performance targets put forth  
8 by the Debtors are appropriately set in terms of the compensation bestowed for achieving them.  
9 The Petitioner does not deny the need to retain the Debtors' management to maximize the value  
10 of the estate, but without objective, independent review of the target metrics, the EIP may well  
11 constitute no more than an unmerited gift to a few select insiders.

12  
13           10. Moreover, improvements in the Debtors' AEV are governed by many factors  
14 beyond any conceivable influence by the insiders designed for compensation. For example, the  
15 Debtors' recent SEC 8-k filing cites "historically high natural gas prices"<sup>5</sup> as contributing  
16 significantly to the massive impairment charges. In addition, the Debtors' petition cited low  
17 capacity rates for its plant assets as a factor in filing for protection under Chapter 11. However,  
18 future improvements to either of these critical areas would be purely fortuitous, and could not be  
19 reasonably attributed to the performance of the 20 insiders identified as eligible for bonuses  
20 under the EIP. For these and other reasons, there are no arguments raised by the Motion nor  
21 none that are reasonable, to provide any support to the Debtors' assertion that the CIP will  
22 effectively maximize the estate's value.

23  
24  
25 \_\_\_\_\_  
26 <sup>4</sup> Motion , Page 20

<sup>5</sup> Debtors' Filed SEC Form 8-k, April 12, 2006

1           11.     Finally, the CIP was implemented in lieu of the Debtors’ normally anticipated  
2 bonus structure for all its employees in 2006. The Petitioner contends that it was the very actions  
3 of the Debtors’ current management to discard the status quo structure that led to the many ills  
4 cited by the Debtors – namely below market compensation of the employees and the  
5 accompanying retention problems. Indeed, the Debtors’ Motion states that the second  
6 component of the CIP, the Management Incentive Plan (the “MIP”), is at “its core ... similar to  
7 the traditional bonus programs ... utilized by the Debtors pre-petition.”<sup>6</sup> Indeed, the recent  
8 departure of a significant number of employees from the Debtors’ energy trading operations was  
9 attributed to the cancellation of the status quo bonus for 2006.

10  
11           12.     Thus, the Debtors’ assertion that the CIP will motivate its employees to perform  
12 at optimal levels is hardly proven by the empirical departures. Stripped to its core, CIP is  
13 nothing more than the status quo bonus system, with the added EIP plan which simply offers  
14 select insiders additional compensation to burden the Debtors’ estate. The Petitioner contends  
15 that the sound business judgment standard cannot be justified by the Debtors’ belated attempt to  
16 fix a problem that was created by their own inability to properly gauge the sentiments and needs  
17 of its employees. The Petitioner further contends that there is no reason why the Debtors’ status  
18 quo bonus plan cannot be reinstated, except to make additional and/or greater payments to select  
19 insiders.

20  
21           **B.     The Debtors’ CIP is prohibited under the BAPCPA**

22  
23           13.     The Debtors’ CIP is prohibited under the BAPCPA. The Debtors’ Motion asserts  
24 that the CIP does not violate section 503(c)(1) because the goal of the CIP is not to “provide  
25

26  

---

<sup>6</sup> Motion, Page 13

1 compensation for mere continued employment.”<sup>7</sup> It is abundantly clear from the Debtors’  
2 Motion, however, that despite the claims asserted to the contrary, the CIP is clearly a retention  
3 program. The Debtors cites the need to “maintain the focus, morale and loyalty of Calpine’s  
4 workforce...”<sup>8</sup> The Debtors further cite the below market compensation of its employees as  
5 creating a lose-lose situation of either “employee distraction [or] ... uncontrolled attrition.”<sup>9</sup>  
6 Stripped of its disingenuous hyperbole, the CIP is in fact more accurately described as a plan  
7 designated to provide compensation to employees in order to retain their services.  
8 Characterizing this situation as “distractions” or “uncontrolled attrition” should not obscure the  
9 Debtors’ goal of employee retention.

10  
11 14. Moreover, the Debtors’ Motion acknowledges the CIP’s retentive nature when it  
12 states that if the Court finds certain components of the CIP to be in violation of BAPCPA (these  
13 are identified as the Supplemental and Discretionary Bonus Plans, the “SBP” and “DBP”,  
14 respectively), these two components are nonetheless permissible under 503(c)(1), because they  
15 do not constitute payments to “insiders.”<sup>10</sup>

16  
17 15. The Petitioner contends that the Debtors’ acknowledgment of the possible  
18 retentive nature of the SBP and DBP shows the true nature of the CIP. Even if the SBP and DBP  
19 are permitted under BAPCPA, the EIP and MIP are not because they are in fact impermissible  
20 payments to “insiders.” In any event, if the Court finds only certain portions of the CIP in  
21

---

22  
23 <sup>7</sup> Motion, Page 21

24 <sup>8</sup> Motion, Page 5

25 <sup>9</sup> Motion, Page 6

26 <sup>10</sup> Motion, Page 21

1 violation of BAPCPA, the Petitioner requests that Debtors' Motion be rejected until the required  
2 revisions are made.

3  
4 **CONCLUSION**

5 For the reasons set forth above, the Petitioner requests that the Debtors' Motion be  
6 denied, or in the alternative, be delayed until the official equity committee has an opportunity to  
7 review the CIP for any revisions if necessary.

8  
9  
10  
11 Dated this April 19, 2006

12 /s/ Alan Ku  
13 Alan Ku  
14 2470 Holly Oak Drive  
15 Danville, CA 94506  
16 Telephone: (925) 548-8914  
17 Facsimile: (650) 649-1920  
18  
19  
20  
21  
22  
23  
24  
25  
26