**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:	)	Chapter 11
	)	
THE BUDD COMPANY, INC.,	)	Case No. 14-11873
	)	
Debtor.	)	Hon. Jack B. Schmetterer
	)	

DEBTOR'S RESPONSE TO UAW'S POST-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE DEBTOR'S APPLICATION TO APPROVE MODIFICATION OF UAW RETIREE BENEFITS PURSUANT TO 11 U.S.C. § 1114

The above-captioned debtor and debtor in possession, the Budd Company, Inc. ("**Debtor**"), hereby respectfully submits the following Response to the UAW's Post-trial Proposed Findings of Fact and Conclusions of Law in the above-captioned contested matter.[1] For ease of review, the Debtor has reprinted the text of the UAW's Proposed Findings and Conclusions and responds on a paragraph-by-paragraph basis. The Debtor's responses to the footnotes in the UAW's Proposed Findings and Conclusions are set forth in brackets and italicized typeface in the text of the footnotes themselves.[2]

PROPOSED FINDINGS OF FACT

I. Introduction

1. On January 6, 2016, The Budd Company, Inc. ("Budd" or the "Debtor") filed an application[3] pursuant to section 1114 of chapter 11 of title 11 of the United States Code (the "Bankruptcy Code," and the "1114 Application"), seeking an order authorizing the Debtor to modify certain retirement benefits owed to its retirees who were members of the UAW. **UAWX 61**. The Court conducted an evidentiary hearing on the 1114 Application on January 21, 22, 28, and 29, 2016, and February 1, 4 and 5, 2016, and, based on the evidence adduced at the hearing, now makes the following findings of fact.

RESPONSE: Not disputed.

II. Background

2. It has now been almost two years since the Debtor voluntarily filed for bankruptcy under chapter 11 of the Bankruptcy Code. The Debtor was once a major manufacturer of automotive parts and other products, but as of the petition date, March 31, 2014 (the "Petition Date"), the Debtor had not operated for several years. **UAWX 60 at 31 of 103**.

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[1] Capitalized words used but not defined herein have the meanings ascribed to them in the Disclosure Statement for Fourth Amended Chapter 11 Plan For the Budd Company, Inc. Dated February 3, 2016, as may be further amended. [Dkt. No. 1539]. References to "UAWX" are to the UAW's trial exhibits, and references to "DX" are to the Debtor's trial exhibits. References to "Tran." are to the trial transcripts.

[2] Capitalized terms used but not defined herein will have the meaning given to them in the Debtor's Proposed Findings and Conclusions (defined *infra)*.

[3] Although the Debtor refers to its filing seeking relief under § 1114 as a "motion," the proper terminology under the Bankruptcy Code is an "application." [*This is of no substantive or procedural consequence, as the relief sought by the Debtor is clear and procedurally proper.*] This Court will use the terminology prescribed by Congress in the Bankruptcy Code and not the term(s) selected by the Debtor.

The Debtor is a wholly owned subsidiary of ThyssenKrupp North America, Inc. ("TKNA"), which is wholly owned by the German steel and technology company ThyssenKrupp AG ("TKAG"). **UAWX 59 at 44 of 148**.

RESPONSE: Not disputed.

3. The vast majority of the Debtor's creditors are its former employees and their surviving spouses, domestic partners and eligible dependents. **DX 1 at 2-3**. There are two groups of retirees: (1) former hourly and salaried unionized employees ("UAW Retirees"), and (2) former salaried executive and administrative employees ("E&A Retirees"). As of September 30, 2015, there were 4,092 UAW Retirees and 1,054 E&A Retirees. **DX 2 at 6; DX 3 at 7**. The UAW Retirees are represented in these bankruptcy proceedings by the UAW, and the E&A Retirees are represented by the Executive and Administrative Committee (the "E&A Committee"). The Debtor's obligations to its retirees consist of pension benefits, as well as other post-employment benefits such as health, dental, vision, and life insurance (the post-employment benefits collectively, "Retiree Benefits"). **Tran. Jan. 29 at 29 (Parson).**

RESPONSE: The UAW's representation of the UAW Retirees in this case is limited to that which is authorized by 11 U.S.C. § 1114. Otherwise, not disputed.

4. The Debtor maintains three pension plans—one for the UAW Retirees, and two for the E&A Retirees. **Tran. Jan. 22 at 87-88 (Lane).** The UAW pension plan and one of the two pension plans for the E&A Retirees are covered by the Employee Retirement Income Security Act of 1974 ("ERISA"). **Tran. Jan. 22 at 88, 91 (Lane).** The second pension plan for the E&A Retirees—known as the Supplemental Employee Retirement Plan (the "SERP")—is not covered by ERISA. **Tran. Jan. 22 at 88, 90 (Lane).** The ERISA pension plans for the UAW and E&A Retirees are guaranteed by the Pension Benefit Guarantee Corporation (the "PBGC"), and TKNA bears liability for them under ERISA as a member of the Debtor's control group. **Tran. Jan. 22 at 89-91 (Lane).** The E&A Retirees' SERP is not guaranteed by the PBGC, and TKNA is not similarly liable for it under ERISA. **Tran. Jan. 22 at 90-91 (Lane).**

RESPONSE: This proposed finding is irrelevant to the Court's determination of the Debtor's 1114 Motion. As the Court itself noted during the hearing on the 1114 Motion, pension benefits are not within the scope of Section 1114. **1/22/16 Tr. at 94-97**. Moreover, this proposed finding is based solely on the testimony of Carl Lane, a fact witness, who is not competent to provide a legal analysis of the rights and obligations of the various parties under the Debtor's various pension plans.

5. The Retiree Benefits (*i.e.*, post-employment benefits such as health insurance, dental insurance, vision insurance, and life insurance) are currently provided to the UAW Retirees and the E&A Retirees pursuant to a defined benefit model. **UAWX 9 at 3 of 4; DX 13 at 1**. The Retiree Benefits owed to the UAW Retirees were collectively bargained for by the UAW and are provided pursuant to various collective bargaining agreements and plant closing agreements. **UAWX 9 at 3 of 4; UAWX 60 at 11, 31 of 103; Tran. Jan. 22 at 77 (Lane); Tran. Feb. 1 at 92-93 (Nicholson); Tran. Feb. 4 at 93 (Nicholson)**. The Retiree Benefits for the E&A Retirees were not collectively bargained and are provided pursuant to a post-retirement healthcare plan. **DX 13 at 1; UAW 60 at 9 of 103; Tran. Feb. 4 at 20, 93 (Nicholson)**.

RESPONSE: The Debtor does not dispute that Retiree Benefits are currently provided to all Retirees pursuant to a defined benefit model. The genesis of the Retiree Benefits currently provided is not relevant to the Court's determination of the Debtor's 1114 Motion.

6. As of the Petition Date, the Debtor's obligation to pay Retiree Benefits to the UAW Retirees totaled approximately $831 million, and its obligation to pay Retiree Benefits to the E&A Retirees totaled approximately $101 million, in each case as calculated by the Debtor's actuary, Willis Towers Watson P.L.C. ("Towers Watson"). **UAWX 60 at 31 of 103**. These amounts were certified by Towers Watson and reported on a form known as International Accounting Standard ("IAS") 19 ("Form IAS 19"). **DX 4 at 7; DX 5 at 6.** The Debtor scheduled these obligations as claims on its bankruptcy schedules and has never disputed them. **Tran. Jan. 22 at 54-56 (Lane)**.

RESPONSE: Disputed. As of the Petition Date, the estimated net present value of the Debtor's unliquidated Retiree Benefits obligations under its Current Benefits Plans were $830.5 million for UAW Retirees and $101.5 million for E&A Retirees. **DX1 at ¶8**. This is the estimated net present value of what the Debtor projects the cost to it will be *to purchase healthcare benefits* under the Debtor's outdated and inefficient Current Benefit Plans, not *the value* of the healthcare benefits themselves. As discussed in the Debtor's Post-Trial Proposed Findings of Fact and Conclusions of Law on Motion to Modify UAW Retiree Benefits Pursuant to 11 U.S.C. §1114 (the "**Debtor's Proposed Findings and Conclusions**"), similar levels of healthcare benefits can be purchased in today's insurance markets for less money. *See* **Debtor's Proposed Findings and Conclusions, ¶¶43-52; DX63**. The Debtor further disputes that the

dollar amounts cited by the UAW constitute "claims" in the aforesaid amounts against the Debtor's Estate under the Bankruptcy Code.

7. The Debtor's obligation to pay Retiree Benefits has declined since the Petition Date. As of September 30, 2014, the obligation owed to the UAW Retirees was approximately $761 million, and the obligation owed to the E&A Retirees was approximately $88 million. **DX 4 at 7; DX 5 at 6**. As of September 30, 2015 (the most recent date for which this information is available), the obligation owed to the UAW Retirees was $733 million, and the obligation owed to the E&A Retirees was $77 million. **DX 2 at 6; DX 3 at 7**. These amounts are updated as of September 30 every year, when Towers Watson certifies a new Form IAS 19. **Tran. Jan. 21 at 105-06 (Lane).** These amounts will continue to decrease as time passes. **Tran. Jan. 22 at 58-59 (Lane); Tran. Jan. 28 at 144-50 (Grondin).**

RESPONSE: The Debtor disputes this proposed finding for the reasons stated in Debtor's Response to the UAW's Proposed Findings, ¶6. Moreover, since the commencement of this case, the Debtor has spent approximately $4-5 million on Retiree Benefits each month (the vast majority of which are for UAW Retiree benefits), necessarily reducing the amount of the aforementioned figures. **DX10**. The decrease in obligations is due, in large part, to these ongoing payments of Retiree Benefits. **1/28/16 Tr. at 150-51.**

8. The Retiree Benefits owed to the UAW Retirees pursuant to the collective bargaining agreements and plant closing agreements are more valuable than the Retiree Benefits owed to the E&A Retirees. **Tran. Feb. 4 at 90, 93-94 (Nicholson).** The UAW negotiated a compensation package for its members that provided for relatively more valuable Retiree Benefits, taking into account the lower pensions that would be paid to UAW Retirees and the lower compensation they received while working. **Tran. Feb. 4 at 91 (Nicholson).** Thus, the average yearly pension for the UAW Retirees is $7,000, whereas the average yearly pension for the E&A Retirees is $14,000—twice as much as the UAW Retirees receive. **Tran. Feb. 4 at 101 (Nicholson).** Additionally, the UAW Retirees receive less income from Social Security than the E&A Retirees. **Tran. Feb. 4 at 91 (Nicholson).**

RESPONSE: The Debtor does not dispute that the Benefit Plan for the UAW Retirees is "richer" than the Benefit Plan for the E&A Retirees, but the balance of this proposed finding (*e.g.*, the alleged explanation for why such plans are so "rich" and the relationship, if any, to the Debtor's unrelated pension obligations to the UAW Retirees versus the E&A Retirees) is not

relevant to the Court's determination of the Debtor's 1114 Motion. Moreover, the UAW's assertions are "supported" solely by the statements of Mr. Nicholson and not supported by any documentary evidence in the record. Mr. Nicholson's "testimony" is neither reliable nor of any probative value. Mr. Nicholson was not so much a witness as he was an attorney advocate for the UAW. In other words, Mr. Nicholson's "testimony" was, in large part, long-winded argument of counsel, rather than fact testimony by a percipient witness. Unless otherwise specifically noted herein, this objection and observation applies to the entirety of Mr. Nicholson's "testimony" which, the Debtor respectfully submits, the Court should in large part ignore.

9. On November 30, 2015, the Debtor had cash on hand in the amount of $292 million. **UAWX 60 at 15 of 103**. The Debtor also believes that it holds substantial legal claims against its corporate affiliates, including TKNA and TKAG, and at least nineteen (19) other individuals and entities. **UAWX 60 at 15, 36 of 103**. There are two main types of claims: (a) contract claims against TKNA for alleged breaches of a tax sharing agreement; and (b) claims arising out of the Debtor's 2012 sale of its last remaining material asset, a wholly owned subsidiary called Waupaca Foundry, Inc. ("Waupaca") that owned and operated iron foundries in Wisconsin and elsewhere. **UAW 60 at 36-43 of 103.** Other than these claims, the Debtor has no prospect of increasing the cash it currently holds or of augmenting the assets available for distribution to its creditors. **UAWX 9 at 3 of 4**.

RESPONSE: The Debtor disputes this proposed finding to the extent it asserts that the Debtor has claims against "at least 19 other individuals and entities," as the number of defendants may be more or less. Moreover, many of the claims are not for a liquidated sum and their potential value is subject to dispute.

III. TKNA Settlement Negotiations

10. Rather than litigate its claims, the Debtor has entered into a settlement agreement with TKNA (the "TKNA Settlement Agreement"), which has not been approved by this Court. **UAWX 31; UAWX 60 at 38 of 103.** Although whether or not this Court should approve the Debtor's entry into the TKNA Settlement Agreement is not an issue for this proceeding, the TKNA Settlement Agreement is inextricably tied to the 1114 Application for at least three reasons. First, because the TKNA Settlement Agreement would cause the Debtor to release all

of its legal claims against all potential defendants, if approved, it would cap the Debtor's available assets to pay creditors, including the available assets to pay the UAW Retirees. **UAWX 31 at 22-25 of 53**. The Debtor contends that its assets, as capped by the TKNA Settlement Agreement, are insufficient to pay its creditors, which makes it necessary for the Debtor to modify the UAW Retiree Benefits. **UAWX 61 at 4 of 47**. Second, not only does the TKNA Settlement Agreement cap the Debtor's assets, it also specifies how all of the Debtor's assets must be allocated between the UAW Retirees and the E&A Retirees and requires the modification of the UAW Retiree Benefits in a manner consistent with the TKNA Settlement Agreement. **UAWX 31 at 6-8 of 53**. Third, the Debtor negotiated the TKNA Settlement Agreement without involving the UAW after the Debtor informed the UAW that it intended to modify UAW Retiree Benefits. **Tran. Jan. 22 at 160-64 (Lane); Tran. Feb. 1 at 56 (Nicholson); UAWX 9; UAWX 31.**

RESPONSE: The Debtor disputes the last sentence of this proposed finding as the UAW was not, as it contends, excluded from the negotiations that ultimately led to the TKNA Settlement Agreement. *See, e.g.*, **Debtor's Proposed Findings and Conclusions, ¶¶16-34**. Perhaps most tellingly, the UAW's self-identified "lead negotiator" testified that he never once attempted to engage the Debtor or TKNA in negotiations during the period of time in which the UAW now contends it was "excluded" from negotiating with TKNA. **2/4/16 Tr. at 10-16**. Further, the TKNA Settlement Agreement "is inextricably tied" to the 1114 Motion only in the sense that the proposed modification of Retiree Benefits will become effective, if at all, only upon the Effective Date of a chapter 11 plan that incorporates the terms of the TKNA Settlement Agreement. Finally, it is false that the TKNA Settlement Agreement "would cause the Debtor to release all of its legal claims against all potential defendants." On the contrary, under the settlement the UAW would have the option to cause the Debtor's Estate to bring claims against KPS and Perella Weinberg (**1/21/16 Tr. at 47-48**), claims which even the overtly partisan Mr. Nicholson acknowledged could result in a massive recovery. **2/4/16 Tr. at 72-75.**

11. Before discussing the parties' negotiations concerning modifications to the UAW Retiree Benefits, therefore, it is necessary first to consider the history of the TKNA Settlement Agreement because it provides important background that is relevant to the legal issues in this matter. Further details of the TKNA Settlement Agreement are set out below.

RESPONSE: The UAW cites no support for this proposed finding, and the Debtor reiterates that anything to do with the history of the negotiations concerning the TKNA Settlement Agreement is irrelevant to the Court's determination of the Debtor's 1114 Motion.

12. On the Petition Date, the Debtor filed a motion seeking approval of a settlement with TKNA that would have required TKNA to pay $10 million to the Debtor and provided for TKNA's assumption of the Debtor's three pension plans. **UAWX 60 at 34**. Following pressure from the UAW and the E&A Committee and the Debtor's discovery of a previously missing tax sharing agreement, the original settlement was withdrawn. **UAWX 60 at 35-36.**

RESPONSE: The Debtor does not dispute that its motion to approve the original settlement agreement with TKNA was withdrawn, but disputes the proposed finding to the extent it alleges that the withdrawal resulted solely from "pressure" exerted by the UAW and the E&A Retiree Committee (which proposed finding is not supported by the record cites). The original settlement agreement also has no bearing on the Court's determination of the Debtors' 1114 Motion.

13. After the Petition Date, the UAW and the E&A Committee conducted an extensive investigation into potential claims held by the Debtor (the "Investigation"). **Tran. Jan. 22 at 99-101 (Lane)**. The Investigation revealed numerous potential claims against 21 potential defendants, including TKNA, arising out of the Debtor's 2012 sale of Waupaca. **UAWX 60 at 35-36 of 103; Tran. Jan. 22 at 98-100 (Lane); Tran. Jan. 29 at 147 (Luria)**. The UAW, the E&A Committee and the Debtor also discovered that the Debtor possessed additional potential claims arising out of the newly discovered tax sharing agreement between the Debtor and TKNA. **UAWX 60 at 35-36 of 103; Tran. Jan. 29 at 147 (Luria)**.

RESPONSE: The Debtor disputes this proposed finding to the extent it asserts that the Debtor has claims against "at least" 21 potential defendants arising out of the Waupaca sale, as the number of defendants may be more or less. Further, the Debtor was also a participant in the Investigation. The Investigation is not, however, relevant to the Debtor's 1114 Motion.

14. Following the Investigation, in August 2015, the UAW, the E&A Committee and the Debtor together commenced settlement negotiations with TKNA. **Tran. Jan. 21 at 87-88**

(Lane). On August 11, 2015, the UAW, the E&A Committee and the Debtor met with TKNA and presented an overview of the claims held by the Debtor that had been discovered during the Investigation. **Tran. Jan. 21 at 88 (Lane)**. On August 27, 2015, the UAW and the E&A Committee issued a joint settlement demand to TKNA (the "August Joint Settlement Demand"). **UAWX 6.** In light of what they perceived to be the strength and magnitude of the claims, the UAW and the E&A Committee together demanded that TKNA pay to the Debtor an amount sufficient to enable the Debtor to satisfy in full the total amount of the Debtor's defined benefit obligations to its retirees, which at that time were calculated at $850 million. **UAWX 6 at 1 of 2**. On September 1, 2015, TKNA presented the UAW, the E&A Committee and the Debtor with the defenses and counterclaims TKNA believed it could raise. **Tran. Jan. 21 at 88 (Lane)**; **Tran. Jan. 22 at 104-05 (Lane)**.

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion.

15. Around the second week of September, the Debtor and TKNA engaged in separate discussions regarding a settlement process and the framework of a possible settlement agreement. **Tran. Jan. 21 at 89-90 (Lane)**. In mid-September, TKNA proposed to pay a total nominal amount of $300 million over a period of six years, starting in 2025, in exchange for a mutual release of all claims. **Tran. Jan. 21 at 128 (Lane); Tran. Jan. 29 at 120-21 (Luria); Tran. Feb. 1 at 14 (Nicholson)**.

RESPONSE This proposed finding is not relevant to the Debtor's 1114 Motion. In addition, the Debtor disputes this proposed finding's characterization of $300 million as "nominal."

16. The E&A Committee subsequently informed the UAW that it wanted to receive, on the effective date of a plan of reorganization, a total of $80 million for the Retiree Benefits owed to the E&A Retirees, to come from the Debtor's cash and any settlement recovery from TKNA. **Tran. Jan. 29 at 122 (Luria)**. At the time of the E&A Committee's $80 million demand, the only information available on the amount of the obligation owed to the E&A Retirees was the Debtor's 2014 IAS Form 19, which showed the amount owing as $88 million. **DX 5 at 6; Tran. Feb. 1 at 20-23, 25.** Shortly thereafter, the Debtor's 2015 IAS Form 19 was released, which showed the amount owing to the E&A Retirees as $77 million. **DX 3 at 7.**

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion. The Debtor also disputes this proposed finding to the extent it suggests that the amounts identified in the Debtor's 2014 IAS Form 19 were "owed" to the E&A Retirees, as this amount simply reflected the estimated net present value, at that time, of the cost to the Debtor of providing Retiree Benefits under the E&A Benefit Plan. **1/28/16 Tr. at 146-47.** The Debtor also disputes

this proposed finding to the extent it claims that the 2014 IAS Form 19 was "the only information available"; the UAW and E&A Retiree Committee were aware that benefits were being paid to Retirees monthly, thereby decreasing the estimated net present value of the cost to the Debtor of providing Retiree Benefits under the Debtor's Benefit Plans. **DX10.**

17. On September 30, 2015, the UAW sent to the E&A Committee a proposed joint counterproposal to respond to TKNA's $300 million offer (the "Draft Joint Counterproposal"). **UAWX 10**. When transmitting the Draft Joint Counterproposal, the UAW informed the E&A Committee that it did not view the E&A Committee's $80 million request as feasible. **UAWX 10 at 1 of 6**. The UAW explained that it would not agree to a settlement arrangement under which the UAW Retirees were paid on a different schedule or in a different manner than the E&A Retirees. **UAWX 10 at 1 of 6**. The UAW explained that if the E&A Retirees were to receive $80 million in cash on the effective date of a plan, in order for the UAW Retirees to receive the same percentage recovery on the Debtor's obligations as the E&A Retirees would receive, TKNA would need to contribute $400 million in cash to the Debtor's estate, which "would likely be a non-starter." **UAWX 10 at 1 of 6**.

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion.

18. Instead, the Draft Joint Counterproposal required TKNA to contribute $33 million on the effective date of a plan and then make annual payments of $48 million over a period of nine years. **UAWX 10 at 3 of 6**. The Draft Joint Counterproposal stated that TKNA's contributions would be allocated between the UAW Retirees and the E&A Retirees "pursuant to a mutually agreed allocation." **UAWX 10 at 3 of 6**. The E&A Committee did not agree to join the Draft Joint Counterproposal. **Tran. Jan. 29 at 161-62 (Luria)**.

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion. In addition, the Debtor disputes the last sentence of this proposed finding, as it is not supported by the citation to Mr. Luria's testimony at the hearing. Instead, Mr. Luria testified that the E&A Retiree Committee sought additional information from the UAW to understand the economics of its proposal for the E&A Retirees. **1/29/16 Tr. at 161-62.**

19. On October 2, 2015, the UAW sent the Debtor a letter "insist[ing] that all settlement communications with TKNA, whether in writing, on the telephone or in person, include representatives of the E&A Committee and the UAW." **UAWX 12 at 3 of 3**. The Debtor did not comply with the UAW's request. Instead, only days after receiving the UAW's

letter, the Debtor and the E&A Committee began engaging in settlement discussions with TKNA that excluded the UAW. **Tran. Jan. 21 at 115-18 (Lane); Tran. Jan. 22 at 106-07, 112 (Lane)**. The first of these meetings occurred on October 6, 2015. **Tran. Jan. 22 at 106-07, 112 (Lane)**. The Debtor and the E&A Committee did not invite the UAW to participate in these discussions, nor did either inform the UAW that these discussions were occurring. **Tran. Jan. 21 at 118-20 (Lane); Tran. Jan. 22 at 112 (Lane)**.

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion. Although the UAW, in its October 2 letter, tried to limit the Debtor's ability to pursue a potential settlement, the Debtor had no obligation to accede to the UAW's demand, especially when the Debtor reasonably believed the UAW was intent on pursuing a litigation path that was not necessarily in the best interest of all of the Debtor's creditors. Further, the Debtor disputes the proposed finding to the extent it asserts that the UAW was "excluded" from future discussions with TKNA. For example, on October 7, TKNA circulated a draft settlement agreement to the Debtor, the E&A Retiree Committee *and the UAW*. *See* **Debtor's Proposed Findings and Conclusions, ¶20**. The UAW, however, never provided any comments to the draft agreement. *Id.*, ¶21. Additionally, on October 22, 2015, TKNA, the Debtor, the E&A Retiree Committee *and the UAW* met to engage in further settlement dialogue. *Id.*, **¶24**. Based on the UAW's conduct during October 2015, the Debtor and the E&A Retiree Committee both concluded that a settlement with the UAW at that juncture was unlikely, as the UAW appeared intent on pursuing the litigation. *See, e.g.*, *id.*, **¶¶21-25**. Nonetheless, while TKNA, the Debtor and the E&A Retiree Committee engaged in 3-way discussions, Mr. Lane encouraged separate negotiations **between the UAW and TKNA**. *Id.*, **¶31**. Moreover, while the UAW's "lead negotiator," Mr. Nicholson, testified that he was concerned that the E&A Retiree Committee might try to negotiate a separate agreement with TKNA, neither he nor the Cleary Gottlieb firm attempted to communicate with TKNA, the Debtor or the E&A Retiree Committee so as to ensure that the UAW was not "excluded." *Id.*, **¶32**.

20. Although the UAW was not informed about the October 6 meeting, the next day, October 7, 2015, TKNA circulated to the UAW, the Debtor and the E&A Committee a draft of a settlement agreement (the "Draft TKNA Settlement Agreement"). **UAWX 14**. The Draft TKNA Settlement Agreement contemplated that TKNA would pay to or at the direction of the Debtor, over a period of seven years, a total nominal amount of $300 million, and that the Debtor would irrevocably direct TKNA to make these payments to a voluntary employee benefits association ("VEBA") set up for the benefit of the UAW Retirees (the "UAW VEBA"). **UAWX 14 at 10 of 27**. The Draft TKNA Settlement Agreement also contemplated that TKNA would assume the Debtor's pension obligations. **UAWX 14 at 11 of 27**. Although the Draft TKNA Settlement Agreement provided that the entirety of the $300 million would be paid to the UAW VEBA, it also provided that on the effective date of a plan, the Debtor would fund a VEBA set up for the benefit of the E&A Retirees (the "E&A VEBA") with an unspecified sum of money. **UAWX 14 at 14 of 27**.

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion. In addition, the Debtor disputes this proposed finding's characterization of the $300 million as a nominal amount.

21. Subsequent to the circulation of the TKNA Settlement Agreement, the E&A Committee and the Debtor met with TKNA in Chicago on October 14, 2015—again, without inviting or informing the UAW. **Tran. Jan. 29 at 141-43 (Luria)**. At this meeting, the parties discussed a settlement framework under which the E&A VEBA would receive a total of $70 million. **Tran. Jan. 29 at 146 (Luria)**.

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion. In addition, the allegation in the proposed finding that the UAW was not invited or informed of the October 14 meeting is not supported by the citation to the record.

22. On October 16, 2015, the UAW sent the E&A Committee another proposed counterproposal for TKNA (the "October UAW Draft Counterproposal"). **UAWX 16**. The October UAW Draft Counterproposal suggested proposing that TKNA pay the Debtor a sum, either on the effective date of a plan or over time, sufficient to enable the Debtor to pay 85% of the Debtor's Retiree Benefits obligations owed to the UAW Retirees. **UAWX 16 at 3 of 6**. This constituted a material decrease from the August Joint Settlement Demand, through which the UAW and the E&A Committee had jointly demanded that TKNA pay an amount sufficient to enable the Debtor to pay 100% of the Debtor's Retiree Benefits obligations.

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion. In addition, the Debtor disputes the statement in the proposed finding that the October UAW Draft Counterproposal constituted a "material decrease from the August Joint Settlement Demand." Rather, applying conservative investment assumptions, this proposed settlement would, *as the UAW had already demanded months earlier*, make UAW Retirees "whole." In other words, through investment returns on the 85% payment, the UAW VEBA would likely be able to fund healthcare benefits under the Debtor's Current (unmodified) UAW Benefits Plan for the balance of the UAW Retirees' lifetimes**. 1/21 Tr. at 108-109 and 110-111**. Thus, there was no "material decrease." On the contrary, it was yet another "make whole" demand.

23. Because the E&A Committee had by that point communicated to the UAW that it wanted $80 million in cash for the E&A Retirees, the October UAW Draft Counterproposal did not demand a specific recovery for the E&A Retirees. **UAWX 16 at 3 of 6**. Instead, it provided that if the E&A Retirees' recovery exceeded 85% of the E&A Retiree Benefits obligations, the UAW Retirees' percentage recovery would be increased from 85% to match the E&A Retirees' percentage recovery. **UAWX 16 at 3 of 6**. In substantially contemporaneous email correspondence, the UAW told the E&A Committee that the October UAW Draft Counterproposal had been drafted as a UAW proposal rather than a joint proposal, but the UAW was providing it to the E&A Committee in advance of sending it to the Debtor and TKNA in hopes that the E&A Committee would support it. **UAWX 95 at 1 of 2**. The UAW stated that it continued to "hope that the E&A Committee and the Union [could] work together towards a mutually acceptable overall settlement." **UAWX 95 at 1 of 2**. The E&A Committee did not indicate support for or opposition to the October UAW Draft Counterproposal. **Tran. Feb. 1 at 52-53 (Nicholson)**.

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion. In addition, the Debtor disputes the first sentence of this proposed finding, since there is nothing in **UAWX16** supporting the contention that the October UAW Draft Counterproposal did not demand a specific recovery for the E&A Retirees because the E&A Retiree Committee has made a prior offer of $80 million.

24. The E&A Committee met again with TKNA on October 19, 2015, this time without informing either the Debtor or the UAW. **Tran. Jan. 29 at 147-48 (Luria)**. The E&A

Committee informed TKNA at this meeting that the E&A Committee wanted the E&A VEBA to receive the $70 million up front on the effective date of a plan and did not want it to receive its recovery over time. **Tran. Jan. 29 at 146, 148 (Luria)**. TKNA asked the E&A Committee not to inform either the Debtor or the UAW that this meeting took place. **Tran. Jan. 29 at 112, 147-48 (Luria).**

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion.

25. In anticipation of an all-hands meeting scheduled to take place in New York on October 22, 2015, the UAW transmitted the 85% counterproposal to TKNA and the Debtor on October 20, 2015 (the "UAW October Counterproposal"). **UAWX 21**. The UAW October Counterproposal attached a term sheet that provided TKNA with the UAW's comments on numerous terms of the Draft TKNA Settlement Agreement. **UAWX 22.**

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion. In addition, the Debtor disputes that the UAW October Counterproposal provided "comments" on any terms of the Draft TKNA Settlement Agreement. Indeed, the UAW document does not even refer to the Draft TKNA Settlement Agreement. *Compare* **UAWX22** to **UAWX14**.

26. On October 22, 2015, the UAW, the Debtor and TKNA met in New York, with the E&A Committee attending by video conference, to discuss the UAW October Counterproposal. **Tran. Jan 29 at 154-55 (Luria); Tran. Feb. 1 at 46-48 (Nicholson)**. At the end of the meeting, counsel for TKNA stated that TKNA would get back to the UAW with a response. **Tran. Jan. 22 at 157-58 (Lane)**.

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion.

27. After the October 22 meeting, as the UAW waited for a response from TKNA, the E&A Committee and the Debtor continued to negotiate with TKNA to finalize a settlement agreement, without including the UAW or informing the UAW that these negotiations were occurring. **Tran. Jan. 22 at 161-62 (Lane); Tran. Jan. 29 at 111-12, 147-48, 158-59 (Luria); Tran. Feb. 1 at 56-57 (Nicholson)**. In fact, TKNA asked that the UAW not be informed of the meetings. **Tran. Jan. 29 at 159 (Luria).**

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion. The Debtor disputes this proposed finding for the reasons stated in Debtor's Response to the UAW's Proposed Findings, ¶19.

28. On November 16, 2015, the E&A Committee, the Debtor and TKNA executed the TKNA Settlement Agreement. **UAWX 31**. That same day, TKNA finally contacted the UAW and purported to provide a response to the UAW October Counterproposal. **UAWX 28 at 2 of 3**. TKNA's purported response summarized the terms memorialized in the TKNA Settlement Agreement. **UAWX 28 at 2 of 3**. However, TKNA did not inform the UAW of the execution of the TKNA Settlement Agreement. **UAWX 28 at 2 of 3**. The UAW did not receive a copy of the TKNA Settlement Agreement, and was not aware an agreement had been signed, until the executed version was filed with the Court on November 19, 2015. **Tran. Jan. 22 at 164-65 (Lane); Tran. Feb. 1 at 58 (Nicholson)**.

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion.

IV. The TKNA Settlement Agreement

29. The TKNA Settlement Agreement provides that the E&A Retirees will receive the entirety of their recovery for their Retiree Benefits up front, in cash, on the effective date of a plan. Specifically, TKNA will pay to the E&A VEBA on the effective date the sum of $15 million, and the Debtor will pay to the E&A VEBA an additional $55 million out of the Debtor's cash, for a total cash recovery to the E&A VEBA on the effective date of $70 million. **UAWX 31 at 7, 17 of 53**. If the TKNA Settlement Agreement is approved, the E&A VEBA is guaranteed to receive this $70 million and is not at risk of receiving anything less, regardless of what happens before the effective date (*e.g.*, a decrease in the Debtor's cash or unforeseen events in the bankruptcy case).

RESPONSE: The Court is respectfully referred to the TKNA Settlement Agreement for its terms. **UAWX 31.** The construct of the Plan is to leave the UAW VEBA everything the Debtor has after it funds the $55 million and TKNA funds $15 million into the E&A VEBA, and therefore, the UAW controls its own destiny as to the amount that will be left for the UAW VEBA on the Plan Effective Date. If the UAW is intent on spending significant sums on scorched earth litigation, that will, unfortunately, leave that much less for the UAW Retirees to fund Retiree Benefits.

30. By contrast, the TKNA Settlement Agreement provides that the Debtor will pay to the UAW VEBA, on the effective date, the cash remaining in the estate, after paying $55 million to the E&A VEBA and after paying all other creditors and other expenses (including professional expenses). **UAWX 31 at 6, 17 of 53**. TKNA will then pay to the UAW VEBA, over a period of seven years, a total of $285 million in equal annual installments. **UAWX 31 at 7-8 of 53**. If the UAW agrees to release from liability certain third parties not affiliated with

TKNA, TKNA will increase the size of the installments so that they total $320 million. **UAWX 31 at 8 of 53**.

<u>RESPONSE</u>: The Court is respectfully referred to the TKNA Settlement Agreement for its terms.

31. The UAW VEBA is not guaranteed to receive any set amount from the Debtor's cash. The cash remaining in the estate is decreasing as the Debtor pays its ongoing Retiree Benefits obligations and other expenses. The cash is also at risk of decreasing as the Debtor increases payments to other creditors in an effort to secure their agreement to the Debtor's proposed plan of reorganization.[4]

<u>RESPONSE</u>: The Court is respectfully referred to the TKNA Settlement Agreement for its terms. The Debtor disputes this proposed finding. First, the reduction in effective date cash noted in footnote 3 is substantially due to the fact that the Effective Date was pushed out a month (during which time the UAW Retirees will continue to receive their Current Benefits). Second, the Debtor disputes this proposed finding to the extent it purports to suggest that the UAW Retirees or any of the Debtor's other creditors would be better off if the Debtor pursued litigation, because, absent a settlement with TKNA, the risks identified by the UAW would still be present, and may, in fact, be magnified as there is no "guarantee" of collecting any sums from the putative defendants in connection with the Litigation Claims. The Debtor further objects to footnote 4 as none of the statements therein were supported by testimony at the hearing.

32. Nor is the UAW VEBA guaranteed to receive the seven annual payments from TKNA. The TKNA Settlement Agreement provides security for only one of the payments through an evergreen letter of credit in the amount of one annual payment. **UAWX 31 at 10 of**

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[4] For example, on February 3, 2016, the Debtor estimated that the effective date cash left for the UAW Retirees would be $185 million. *Disclosure Statement For Fourth Amended Chapter 11 Plan For The Budd Company, Inc.* at 3 [D.I. 1539]. On February 23, 2016, the Debtor estimated that the effective date cash left for the UAW Retirees would be only $179 million. *See Objection Of The UAW To The Debtor's Motion For Entry Of An Order Approving The Fifth Amended Disclosure Statement And Plan Confirmation Procedures* [D.I. 1603]. Part of the decrease resulted from the Debtor increasing by $1 million the proposed size of a fund set up to provide payments to uninsured asbestos claimants. This $1 million increase to the uninsured asbestos claimants fund decreased the money available for UAW Retiree Benefits by $1 million, but it had no effect on the $70 million set aside for the E&A Retiree Benefits.

53. Although the TKNA Settlement Agreement also requires TKNA to certify annually that its equity value is not less than two times the remaining payment obligations and contains an acceleration clause, these provisions do not actually secure any payments for the UAW Retirees. **UAWX 31 at 9, 27-28 of 53**.

RESPONSE: The Court is respectfully referred to the TKNA Settlement Agreement for its terms. The Debtor disputes this proposed finding for the reasons stated in Debtor's Response to the UAW's Proposed Findings, ¶31. The Debtor further disputes this proposed finding, as it fails to take into account the fact that the risk associated with the timing of the payments is reflected in the discount rate used to determine the present value of the settlement payments. **1/22/16 Tr. at 21-23; 1/28/15 Tr. at 149**.

33. The E&A Retirees can never receive less than $70 million under the TKNA Settlement Agreement, but they have the opportunity to receive more. The TKNA Settlement Agreement provides that if, for whatever reason, TKNA agrees to increase the amount of settlement payments, the E&A Retirees will receive 12.5% of that increase. **UAWX 31 at 20 of 53**.

RESPONSE: The Court is respectfully referred to the TKNA Settlement Agreement for its terms. The E&A Retirees will only have the opportunity to receive "more" if TKNA agrees to pay the UAW more.

34. In exchange for TKNA's payment obligations, the TKNA Settlement Agreement would release from liability TKNA and all its affiliates, as well as certain directors, officers and employees of TKNA, TKNA's affiliates and the Debtor. **UAWX 31 at 22-25 of 53**. As described above, the TKNA Settlement Agreement would also release from liability certain third parties not affiliated with TKNA, at the election of the UAW. **UAWX 31 at 26 of 53**.

RESPONSE: The Court is respectfully referred to the TKNA Settlement Agreement for its terms. The Debtor disputes the first sentence of this proposed finding in that: (a) the release under the TKNA Settlement is conditioned upon more than just TKNA's payment obligations, and includes, *inter alia*, assumption of the Debtor's obligations under its Pension Plans; and (b)

the list of releases is not complete, as it ignores certain entities included in the definition of Released TKNA Parties in the TKNA Settlement Agreement. **UAWX31**.

35. The $70 million allocated to the E&A Retirees under the TKNA Settlement Agreement would provide the E&A Retirees with a recovery of at least 91% of the amount they are owed for Retiree Benefits ($77 million as of September 30, 2015). At the time of the hearing on the 1114 Application, the Debtor estimated that, using a 4% discount rate, the present value of the funds provided to the UAW Retirees on the effective date of a plan will be $461 million. **DX 62 at 41**. Using this present value figure, the UAW Retirees would receive only approximately 63% of the amount they are owed for Retiree Benefits ($733 million as of September 30, 2015).

RESPONSE: The Debtor disputes this proposed finding for the reasons stated in Debtor's Response to the UAW's Proposed Findings, ¶6. The Debtor further disputes the analysis in this proposed finding because it is not meaningful to compare the estimated benefits that the Retirees will receive under the TKNA Settlement Agreement and the Debtor's 1114 Proposal to the estimated net present value of the cost of providing Retiree Benefits to the Retirees under the Debtor's current outdated, and inefficient Benefit Plans (for the reasons stated in Paragraph 103 of the Debtor's Proposed Findings and Conclusions).

36. TKNA designed the payment structure under the TKNA Settlement Agreement to enable it to realize substantial tax benefits. **Tran. Jan. 22 at 49, 114 (Lane)**. TKAG recently disclosed in its annual report that TKNA's payments under the TKNA Settlement Agreement "will be largely offset by the resultant tax effects and will impact earnings after taxes by an amount in the low two-digit millions." **DX 37 at 641**.

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion. Indeed, as the Court observed during the hearing, "[w]hat does that matter to [the UAW] if [TKNA] get[s] a tax benefit? … I always wondered whether or not a perfect generic settlement would be where one party pays a lot of money to another party, and the government bears the burden. Somehow, that makes it possible for people to settle, and I'm not clear on the point you're trying to make." **1/22/16 Tr. at 116-17**.

37. On November 20, 2015, the UAW met with the Debtor in Chicago, Illinois to discuss the TKNA Settlement Agreement filed the previous day. **Tran. Jan. 22 at 165 (Lane); Tran. Feb. 1 at 62-63 (Nicholson)**. The Debtor stated that it had done the UAW a "big favor" by entering into the TKNA Settlement Agreement, that the TKNA Settlement Agreement set a "floor," and that the UAW could try to negotiate more value from TKNA. **Tran. Feb. 1 at 64 (Nicholson)**. When the UAW asked why it had been excluded from the negotiations that produced the TKNA Settlement Agreement, the Debtor provided no justification but instead replied "it is what it is." **Tran. Feb. 1 at 64 (Nicholson)**.

RESPONSE: Mr. Nicholson's testimony about this meeting is unreliable. At this same meeting, the UAW's representatives acknowledged that the UAW's actuary had not, even at this late date, done the work necessary for the UAW to estimate how much additional consideration, if any, from TKNA would be satisfactory to the UAW. **1/21/16 Tr. at 125-26**. Consistent with the Debtor's (and the E&A Retiree Committee's) view of the UAW's intentions in the months leading up to the TKNA Settlement Agreement, just ten days later the UAW demanded that the Debtor prosecute the Litigation Claims or permit the UAW to do so. *See* **UAWX36**.

V. Section 1114 Negotiations

A. The Purported September 30 1114 Proposal and Original Plan

38. On September 30, 2015, while settlement negotiations with TKNA were still ongoing, the Debtor sent a letter to the UAW purporting to be a proposal to modify the UAW Retiree Benefits pursuant to § 1114 (the "September 30 Letter"). **UAWX9**. The September 30 Letter stated that the Debtor wanted to replace the UAW defined benefit model with a defined contribution model. **UAWX 9 at 3 of 4**. It further stated that the Debtor intended to establish "Health Reimbursement Accounts" ("HRAs") for the UAW Retirees, which would provide funds to the UAW Retirees to enable them to purchase healthcare insurance and pay for medical expenses. **UAWX 9 at 3 of 4**. The HRAs would be funded by the UAW VEBA. **UAWX 9 at 3 of 4**.

RESPONSE: The Debtor respectfully refers the Court to the September 30 Letter for its contents. This proposed finding omits certain critical information from the Debtor's September 30 Letter, including, *inter alia*, the Debtor's invitation to the UAW to "contact [the Debtor] with any alternatives to modification of the Retiree Benefits as proposed by the Plan, so that any non-

consensual modification of Retiree Benefits can be implemented as efficiently as possible."

UAW9.

39. Notwithstanding the fact that no settlement agreement had been executed with TKNA at that time (much less approved by this Court), the September 30 Letter stated that the UAW VEBA would be funded by the Debtor's cash as well as by contributions "that would be made by TKNA on behalf of the Debtor directly to the UAW VEBA pursuant to the TKNA Settlement Agreement." **UAWX 9 at 3 of 4**. The September 30 Letter asserted that "[t]he proposed modifications will allow UAW Retirees for the rest of their lives to purchase on the individual insurance market insurance policies that provide meaningful coverage, at a cost that is significantly less than what the Debtor currently pays for Retiree Benefits." **UAWX 9 at 4 of 4**.

<u>RESPONSE</u>: The Debtor respectfully refers the Court to the September 30 Letter for its contents.

40. Also on September 30, 2015, the Debtor filed a Chapter 11 Plan (the "<u>Original Plan</u>") and accompanying Disclosure Statement (the "<u>Original DS</u>"). **UAWX 7 and 8**. The Original Plan contained blanks for the percentage of the Debtor's cash to be deposited into the UAW VEBA and the amount of the payment from TKNA to be deposited into the UAW VEBA. **UAWX 7 at 7 of 37**. The Original DS said that the Debtor and TKNA would "apply the Cash allocated for Retirees in any reasonable manner requested by the UAW." **UAWX 8 at 7 of 39**.

<u>RESPONSE</u>: The Debtor respectfully refers the Court to the Original Plan and DS for their contents. The Debtor disputes this proposed finding to the extent it insinuates that the blanks in the Original Plan and Original DS were included without the knowledge and consent of the UAW, which they were not, as the UAW was fully aware of the status of the settlement negotiations with TKNA through this date and specifically requested that the blanks be included. *See, e.g.*, **UAWX12; UAW's Proposed Findings, ¶¶14-18**.

41. None of the September 30 Letter, the Original Plan or the Original DS contained any information with respect to (1) the amount of the Debtor's cash to be deposited into the UAW VEBA, (2) the material and economic terms of any settlement with TKNA, including how much TKNA would pay to the UAW VEBA, (3) what type of Retiree Benefits would be offered to UAW Retirees, (4) how those Retiree Benefits would be offered, (5) by what entity those Retiree Benefits would be offered, and (6) how those Retiree Benefits differed from what was currently provided. **UAWX 7; UAWX 8; UAWX 9**.

RESPONSE: The Debtor respectfully refers the Court to the Original Plan and DS, and the September 30 Letter, for their contents. The Debtor disputes this proposed finding for the reasons stated in Debtor's Response to the UAW's Proposed Findings, ¶40, and because it inaccurately claims that the September 30 Letter, the Original Plan and/or the Original DS contained no information about: (a) the type of Retiree Benefits that would be offered to UAW Retirees (which they did by explaining that money would be deposited into a UAW VEBA that would fund HRAs for individual UAW Retirees who could then spend that money as they saw fit for Retiree Benefits); (b) how those Retiree Benefits would be offered (which they did, *i.e.*, through a VEBA/HRA structure); (c) by what entity those Retiree Benefits would be offered (which they did, *i.e.*, by the funding of a UAW VEBA, which, in turn, would fund individual notional HRA accounts for the individual UAW Retirees); and (d) how those Retiree Benefits differed from what was currently provided (which they did by explaining that the Retiree Benefits would no longer receive benefits under the current defined benefit model and would instead receive them through a defined contribution model from which the UAW Retirees would then have the choice of selecting their own mix of Retiree Benefits and paying for them from their HRA accounts). *See* **UAWX7-9**.

42. In response to the September 30 Letter, on October 5, 2016, the UAW wrote to the Debtor, explaining that the September 30 Letter "contain[ed] no specific information from which the UAW [could] meaningfully evaluate the offer or proposal that it purports to make" and that the UAW did not consider the September 30 Letter to be a valid § 1114 proposal. **UAWX 13 at 1 of 4**.

RESPONSE: While the Debtor does not dispute that this proposed finding accurately summarizes the UAW's October 5, 2015 letter, the Debtor does dispute the accuracy of the statements therein for, among other things, the reasons set forth in the Debtor's Response to UAW Proposed Finding, ¶41.

43. The UAW also requested that the Debtor provide information pertaining to the purported 1114 proposal, including relevant reports from Towers Watson and documents in support of certain assertions made in the Debtor's September 30 Letter (the "October Information Requests"). **UAWX 13 at 2-4 of 4**. In particular, the UAW asked the Debtor to provide documents supporting the statement in the September 30 Letter that "[t]he proposed modifications will allow UAW Retirees for the rest of their lives to purchase on the individual insurance market policies that provide meaningful coverage, at a cost that is significantly less than what the Debtor currently pays for Retiree Benefits." **UAWX 13 at 3 of 4**. On October 8, 2015, the UAW reiterated its request for certain documents. **UAWX 20 at 1-2 of 201.**

RESPONSE: The Debtor does not dispute that the UAW made such information requests, but notes that much of the information requested was either: (a) already in the UAW's possession; or (b) not relevant to the analysis of the Debtor's 1114 Proposal. (See **UAWX 13)** Nevertheless, the Debtor responded to the UAW's requests for information and documents. *See, e.g.,* **DX18-19.**

44. On October 16 and 17, 2015, the Debtor provided the UAW with certain Towers Watson actuarial reports stating the calculated present value of the Debtor's Retiree Benefits obligations to the UAW and E&A Retirees as of September 30, 2015. **UAW**X **20**. However, the Debtor did not provide materials in response to the majority of the October Information Requests. **UAW**X **20**.

RESPONSE: The Debtor disputes this proposed finding as the Debtor did provide the UAW with information relevant to the UAW's analysis of the Debtor's 1114 Proposal and offered to meet and confer on various information requests to obtain clarity as to exactly what the UAW was seeking in response to a number of very broad and otherwise objectionable requests. *See* **DX15; DX18-19; 1/21/16 Tr. at 44-46**. This information included, *inter alia*, the underlying census data and assumptions used by the Towers Watson to generate the IAS 19 Reports, significant financial information regarding the Debtor and its financial inability to satisfy its Current Benefit Plan obligations and other obligations owed to its Retirees and other creditors, projected cash flows for the periods of time leading up to the expected confirmation of the Plan and following confirmation of the Plan. *Id.*

B. The Purported November 19 § 1114 Proposal and First Amended Plan

45. On November 19, 2015, the Debtor filed a First Amended Chapter 11 Plan (the "First Amended Plan") and accompanying Disclosure Statement (the "First Amended DS"). **UAWX 30; UAWX 32**. The TKNA Settlement Agreement was filed as an exhibit to the First Amended Plan.

RESPONSE: Not disputed.

46. Also on November 19, 2015, the Debtor sent another letter to the UAW (the "November 19 Letter"). **UAWX 29**. The November 19 Letter stated that the Debtor was amending its purported September 30 § 1114 proposal "to reflect the treatment afforded UAW Retiree Benefits in the [First] Amended Plan." **UAWX 29 at 3 of 6**. However, the only additional information about the Debtor's proposed modifications in the First Amended Plan, the First Amended DS and the November 19 Letter itself was that the UAW VEBA would be funded with cash from the Debtor as well as either $285 million or $320 million from TKNA (as provided in the TKNA Settlement Agreement). **UAWX 29 at 3 of 6**.

RESPONSE: The Debtor respectfully refers the Court to the First Amended Plan, First Amended DS and November 19 Letter for their contents. The Debtor disputes the proposed finding's characterization that the "only additional information" was the amount of funding, as the First Amended Plan, First Amended DS and the November 19 Letter cumulatively provided much more detail relevant to the Debtor's 1114 Proposal, including, *inter alia*, the timing of the funding of amounts to the UAW VEBA and various payment protections provided under the TKNA Settlement Agreement. **UAWX 29-32**.

47. Also on November 19, 2015, the Debtor provided information responsive to some of the October Information Requests—over six weeks after the UAW had requested this information (the "November 19 Production"). **UAWX 29 at 5-6 of 6**. The documents produced were disorganized, and nearly half were irrelevant as they related to a deposition taken months earlier. **UAWX 37.**

RESPONSE: The Debtor disputes that its production was untimely or disorganized, and, to the extent any allegedly irrelevant information was included in the Debtor's production, it was included in direct response to the broad information requests propounded by the UAW. In its

November 19, 2015 production, the Debtor provided the UAW and its professionals with, among other information: (a) copies of the Debtor's Current Benefits Plans; (b) annual IAS 19 actuarial reports disclosing information about the Current Benefits Plans; (c) census information and assumptions used to generate the IAS 19 reports; and (d) information on the Debtor's financial condition demonstrating that, upon approval of the TKNA Settlement Agreement, modifications to the Current Benefits Plan will be necessary. **UAW29 at 5-6**.

48. On November 23, 2015, this Court found the First Amended DS to be deficient and *sua sponte* ordered the Debtor to provide additional information. Specifically, this Court ordered that:

> In the introduction [to the disclosure statement], there should also be clear statements as to whether or not, and if so how exactly, the healthcare and retirement benefits are to change, the sources of funding for each, and a statement as to how long money to pay healthcare and retirement benefits are projected to last and what such projection is based on.

UAWX 35 at 1 of 2.

RESPONSE: The Debtor does not dispute the statement made by the Court in the above proposed finding. The "deficiency," however, resulted in large part from the UAW's own refusal to provide the Debtor, despite repeated requests, with the information requested by the Court. *See, e.g.,* **DX12 at 2; DX14 at 8**; **UAWX38**; **1/21/16 Tr. at 53, 63**.

49. The UAW sent a letter to the Debtor on December 7, 2015, that pointed out the deficiencies of the November 19 Production and requested an amended production (the "December 7 Letter"). **UAWX 37**. The UAW's letter reiterated the October Information Requests and added additional requests in light of new representations made by the Debtor in the November 19 Letter and the First Amended Plan and First Amended DS (the "December Information Requests"). **UAWX 37**.

RESPONSE: The Debtor does not dispute the proposed finding's description of the December 7, 2015 letter, but disputes certain allegations made in that letter, including those concerning the alleged deficiencies in the Debtor's production of information *See*, *e.g.*, **DX15; DX18-19**.

50. On December 11, 2015, the Debtor replied to the UAW's December 7 Letter. **UAWX 42**. The Debtor refused to provide any documents supporting the Debtor's statement in its September 30 Letter that the proposed modifications would allow UAW Retirees "for the rest of their lives to purchase on the individual insurance market insurance policies that provide meaningful coverage, at a cost that is significantly less than what the Debtor currently pays for Retiree Benefits." **UAWX 42 at 3 of 5**. Instead, the Debtor stated that "[t]his request is very broad and we are having difficulty understanding what the UAW seeks." Notwithstanding the fact that the Debtor had not at that point filed a motion to modify the UAW Retiree Benefits and no litigation had been initiated, the Debtor also stated that "[m]uch of the analysis supporting this statement will be presented by way of expert testimony and any required expert disclosures." **UAWX 42 at 3 of 5**.

RESPONSE: The UAW *actually* requested:

> **All documents** constituting or concerning any analysis leading to the statement in the September 30 Letter that '[t]he modifications will allow UAW Retirees for the rest of their lives to purchase on the individual insurance market insurance policies that provide meaningful coverage, at a cost that is significantly less than what the Debtor currently pays for Retiree Benefits.

UAWX13 at 3 (emphasis added). The Debtor did not refuse to provide the UAW with documents supporting the Debtor's September 30, 2015 statement, and, in fact, provided the underlying source materials that were relied upon at the time by the Debtor's own actuaries and other professionals to support the Debtor's quoted statement. *See, e.g.*, **DX15; DX18-19**. Rather, because of the breadth of the UAW's request (in so far as it sought *all documents*), the Debtor sought guidance from the UAW with respect to the particular information it sought beyond what had already been provided. *See* **UAWX42 at 3**. Nor is the Debtor's mention of future expert testimony and disclosures inappropriate (as the UAW would have this Court believe), as such expert testimony (in the form of the expert reports by Messrs. Grondin, Lane and Parsons and the exhibits thereto (**DX62-64**)) had not yet been prepared. Indeed, the UAW did not need the Debtor's expert reports to review and analyze the Debtor's 1114 Proposal; the UAW's own actuary, Ms. Taranto, testified that by December 2015 she had been able to review the materials provided by the Debtor and prepare several proposed Retiree Benefit Plans for the

UAW Retirees using the funding amounts set forth in the Debtor's Plan and the TKNA Settlement Agreement, *none of which the UAW ever provided to the Debtor despite its repeated requests for such information and which the UAW instructed Ms. Taranto not to testify about at her deposition immediately prior to the 1114 hearing*. **2/4/16 Tr. 189-192, 197-199; 2/5/16 Tr. 20-21**.

51. On December 14, 2015, the UAW sent the Debtor a letter explaining that a defined contribution plan like the HRA structure proposed in the First Amended Plan and DS was not appropriate for the UAW Retirees. **UAWX 43 at 5 of 5**. The UAW stated that it preferred a VEBA structure similar to those established for retirees of General Motors, Ford and Chrysler (the "Big Three VEBAs"). **UAWX 43 at 5 of 5**.

RESPONSE: The Debtor does not dispute that the UAW sent a letter on December 14, 2015 expressing its (unsupported) opinion that an HRA structure would not be appropriate for UAW Retirees. And, although the UAW indicated that it would prefer a VEBA structure similar to those established for retirees of General Motors, Ford and Chrysler, it did not provide any information about the specifics of such a structure. **UAWX43 at 5**. *Nor did the UAW provide to the Debtor, in response to its multiple requests, any of the proposed Retiree Benefit Plans developed by Ms. Taranto using the funding levels set forth in the Debtor's Plan and the TKNA Settlement Agreement, which would have conserved Estate resources*. **2/4/16 Tr. 189-192, 197-199; 2/5/16 Tr. 20-21.**

C. The Second Amended Plan

52. On December 17, 2015, the Debtor filed the Second Amended Chapter 11 Plan (the "Second Amended Plan") and Second Amended Disclosure Statement (the "Second Amended DS"). **UAWX 45; UAWX 46**.

RESPONSE: Not disputed.

53. The Second Amended Plan and DS provided additional and different information regarding the UAW Retiree Benefits and the E&A Retiree Benefits. The Second Amended Plan stated that "[t]he UAW VEBA will be structured in a manner similar to the VEBAs established

for nearly 800,000 UAW Retirees of General Motors, Ford and Chrysler, which structure, according to the UAW, 'is most familiar' to the Debtor's UAW Retirees." **UAWX 45 at 7 of 146**. It also disclosed that "[t]he E&A VEBA will provide benefits to the Post-Medicare E&A Retirees either through a fully funded self-insurance plan or a Medicare advantage plan. For the Pre-Medicare E&A Retirees, the E&A VEBA will provide such retirees with an HRA. It is expected that the funds in the E&A VEBA will last for 25 years, through 2041." **UAWX 45 at 8 of 146**. The Second Amended DS further provided that " . . . the average value of the health and welfare benefits to be provided will be approximately $113,000 per UAW Retiree participant and $66,000 per E&A Retiree participant." **UAWX 46 at 9 of 71**.

RESPONSE: The Court is respectfully referred to the Second Amended Plan and DS for their contents. The Debtor was ultimately unable to provide for a structure preferred by the UAW in its 1114 Proposal or any plan because the UAW failed to provide the Debtor with the type of information required by the Court. *See* **UAW's Proposed Finding, ¶48; Debtor's Response to UAW's Proposed Findings, ¶¶50-51**.

54. On December 21, 2015, the UAW emailed the Debtor to request a meeting to discuss the § 1114 process, and indicated that the UAW was collecting examples of the Big Three VEBAs and other UAW-negotiated VEBA trust agreements to provide to the Debtor. **UAWX 49**. In that email, Michael Nicholson—formerly the General Counsel of the UAW—indicated that he would serve as the lead negotiator for the UAW during the § 1114 negotiations. **UAWX 49**.

RESPONSE: Not disputed.

55. On December 22, 2015, the Debtor replied, requesting documents informing the Debtor how the UAW would like the UAW Retirees' healthcare plans to be structured. **UAWX 50 at 2 of 4**. The UAW responded with two emails that same day and provided the Debtor with documentation used in the bankruptcy of Dana Corporation, an auto parts manufacturer with a union retiree population similar in size to the Debtor's. **UAWX 50; UAWX 52; Tran. Jan. 21 at 69-70 (Lane)**. The materials provided included the Interim Trust Agreement for the Dana VEBA. **UAWX 52 at 395 of 429**.

RESPONSE: The Debtor disputes this proposed finding to the extent the UAW maintains that the information provided was sufficient to allow the Debtor to design an 1114 Proposal acceptable to the UAW Retirees since, as Mr. Lane testified, the Dana materials that the UAW forwarded did not provide the necessary level of detail to allow the Debtor to design a Plan for the UAW Retirees in this case, particularly given the UAW's statement that the level of

benefits provided under the Dana VEBA should not be utilized for the Debtor's UAW Retirees. **1/21/16 Tr. at 69-70; 1/28/16 Tr. at 30-31**.

56. The next day, December 23, 2015, the UAW and the Debtor met in Chicago. **Tran. Feb. 1 at 81 (Nicholson).** The Debtor rejected the Dana VEBA structure as purportedly outdated. **Tran. Feb. 1 at 86 (Nicholson)**. The Debtor threatened to revert to the HRA structure it had initially proposed unless the UAW made progress in reaching an agreement with TKNA. **Tran. Feb. 1 at 86-87 (Nicholson)**. The Debtor conditioned its acceptance of the UAW's proposed Dana VEBA structure on the UAW's arriving at an agreement with TKNA on money. **Tran. Feb. 1 at 92 (Nicholson)**. The Debtor stated that as a result of entering into the TKNA Settlement Agreement, it could not negotiate with the UAW about the amount of funds available to satisfy UAW Retiree Benefits. **Tran. Feb. 1 at 97 (Nicholson)**. The Debtor suggested that the UAW negotiate with TKNA regarding the amount of money available for the UAW Retiree Benefits. **Tran. Feb. 1 at 97-98 (Nicholson)**. The Debtor also told the UAW that the Debtor reserved the right to attempt to cram down a chapter 11 plan on the UAW Retirees with the support of the E&A Committee. **Tran. Feb. 1 at 97 (Nicholson)**.

RESPONSE: The Debtor does not dispute that a meeting took place on December 23, 2015 in Chicago, but disputes the proposed finding to the extent it mischaracterizes (based entirely on Mr. Nicholson's unreliable testimony) what occurred at that meeting. *See, e.g.*, **Debtor's Proposed Findings and Conclusions, ¶63**. For example, the Debtor did not: (1) reject the Dana VEBA structure as outdated; or (2) "threaten" to revert to an HRA structure unless the UAW made progress in reaching an agreement with TKNA. Rather, the Debtor, in keeping with its previous and consistent position, requested that the UAW provide it with sufficient detail concerning its preferred structure and benefit levels to enable the Debtor to include that information in the Plan and Disclosure Statement. *See, e.g.*, **1/28/16 Tr. at 30-31; Debtor's Proposed Findings and Conclusions, ¶¶65-67; DX26**. The UAW, however, refused to provide the Debtor with this information and consistently conditioned any counterproposal to the Debtor's 1114 Proposal on a new TKNA Settlement Agreement. *See, e.g.*, **Debtor's Proposed Findings and Conclusions, ¶¶65-67; 1/21/16 Tr. at 70-73; 1/28/16 Tr. at 30-31; 2/4/16 Tr. at 189-192, 197-199; 2/5/16 Tr. at 20-21**.

57. The Debtor subsequently threatened that the UAW could have the Dana VEBA structure only if the UAW agreed to the TKNA Settlement Agreement. On January 4, 2016, the Debtor emailed the UAW, stating that the Debtor would not agree to use the UAW's desired Dana VEBA structure "without an agreement of the UAW to the TK[NA] settlement, and an affirmative vote of the UAW retirees to the Debtor's plan." **UAWX 56 at 1 of 6**.

RESPONSE: The Debtor disputes that it "threatened that the UAW could have the Dana VEBA structure only if the UAW agreed to the TKNA Settlement Agreement." Rather, by January 4, 2016, after reviewing the Dana documents the UAW provided, the Debtor was concerned that the Dana *benefit levels* were so vastly inferior to the HRA treatment proposed by the Debtor that the Dana treatment would not be fair and equitable to the UAW Retirees and would therefore render the plan unconfirmable without the affirmative support of the UAW Retirees. To prevent this result (*i.e.*, rendering an otherwise confirmable plan unconfirmable by providing the UAW with its requested treatment), the Debtor conditioned including the Dana treatment on the support of the UAW for the Plan. **UAWX56**. *The UAW clearly understood this was the Debtor's concern*, as it quickly clarified that it did not want the Debtor to use the Dana benefit levels in this case. *See* **UAWX64**. The UAW did not provide adequate information about the structure of the Dana VEBA until January 10, 2016, but it expressly conditioned the Debtor's use of that structure on its right to veto the TKNA Settlement Agreement or any renegotiated agreement. **1/21/16 Tr. at 73-75; UAWX69; UAWX70**.

D. The 1114 Proposal

58. On January 6, 2016, the Debtor filed the Third Amended Chapter 11 Plan (the "Third Amended Plan") and the Third Amended Disclosure Statement (the "Third Amended DS"). **UAWX 59; UAWX 60**. Less than one hour after filing the Third Amended Plan and DS, the Debtor filed its 1114 Application to modify the UAW Retiree Benefits. **UAWX 59; UAWX 60; UAWX 61**.

RESPONSE: Not disputed.

59. The Third Amended Plan and DS constitute the § 1114 proposal that is at issue in this proceeding (the "1114 Proposal"). In the Third Amended Plan and DS, the Debtor changed, once again, its proposed modifications to the UAW Retiree Benefits. The Third Amended Plan and DS state that the UAW Retirees would receive HRAs rather than benefit structures similar to those provided by the Big Three VEBAs, which is what had been contemplated in the Second Amended Plan. **UAWX 59 at 7-8 of 148; UAWX 62 at 11-12 of 122**. The Third Amended DS also provides that "[t]he UAW VEBA will be funded [over time] with an estimated $505 million, consisting of an estimated $185 million of Effective Date Cash, $285 million from the Settlement Payments, and either $35 million from the Additional Payments or the proceeds from the KPS Causes of Action." **UAWX 60 at 17 of 103**.

RESPONSE: The Debtor disputes this proposed finding to the extent it implies that the Debtor's 1114 Proposal on January 6, 2016 was the first or only 1114 Proposal. On the contrary, it was simply the latest iteration of the Debtor's 1114 Proposal, made as part of its ongoing efforts since at least September 30, 2015 to implement a structure for the modification of the UAW Retiree Benefits that was acceptable to the UAW (while at the same time preserving the UAW's right to object to the TKNA Settlement Agreement). *See* **Debtor's Proposed Findings and Conclusions**, **¶¶53-67**. However, the Debtor agrees that for purposes of its 1114 Motion, the January 6, 2016 proposal is the one that the Court should focus on, even though the Debtor has tried to work with, and will continue to try to work with, the UAW in an effort to obtain a mutually acceptable resolution of the 1114 issue. The Debtor also disputes this proposed finding to the extent it suggests that the Debtor "changed" to an HRA structure to somehow punish the UAW or leverage some form of concession out of the UAW with respect to the TKNA Settlement Agreement, which is not the case. The Debtor had no choice but to revert to the HRA structure given the UAW's refusal to provide the details (including benefit levels) of its preferred structure. **2/4/16 Tr. at 189-192, 197-199; 2/5/16 Tr. at 20-21**.

60. The Third Amended DS further provides that each UAW Retiree is to receive an annual allocation to an HRA—$4,500 for post-Medicare retirees, and $10,000 for pre-Medicare retirees—that will be administered by a healthcare exchange provider, whereby UAW Retirees can select coverage of their choosing and obtain reimbursement of such costs up to the amount of

their allocation. **UAWX 60 at 19 of 66.** By contrast, under the Debtor's current plan, UAW Retiree Benefits cost the Debtor approximately $6,500 for post-Medicare retirees and $10,000 for pre-Medicare retirees each year. **DX 64 at 4.** In the aggregate, the difference between the cost of current benefits—$733 million—and the proposed benefits—$461 million—represents a proposed reduction of $272 million, or 37%. **UAWX 92 at 10.** This proposed reduction will be covered by implementing more efficient healthcare plans, foregoing services (such as dental, vision, and life insurance), and shifting costs (*e.g.*, for prescription drugs) to UAW Retirees. **UAWX 92 at 10.**

RESPONSE: The $4,500 HRA stipend for Medicare-eligible retirees represents an amount that would buy the "richest" coverage (*i.e.*, coverage with the least possible out-of-pocket costs to individual retirees) available for those retirees on the individual market. **1/29/16 Tr. at 8**. Because this amount buys the best available care with the lowest co-pays, giving the Medicare-eligible UAW Retirees "more money essentially means that it's money they cannot spend." **1/29/16 Tr. at 9**. Moreover, the decision of whether or not to forego "services" (such as dental, vision, and life insurance) will be made by the UAW VEBA, which will be administered by a committee selected by the UAW itself. **1/28/16 Tr. at 52-55.** As the UAW's actuary admitted, dental, vision and death benefits can be purchased with HRA funds (or otherwise by the UAW VEBA). **2/4/16 Tr. at 206**. Although some UAW Retirees may pay more out of pocket costs for prescription drugs in a given year under the HRA structure, the vast majority will actually pay less out of pocket than they do currently. **1/29/16 Tr. at 53-54**.

61. The Third Amended DS includes details relating to the exchange that would facilitate the HRAs under the 1114 Proposal. **UAWX 60 at 68 of 103**. The proposed exchange, called OneExchange, is owned by the Debtor's actuary Towers Watson, which earns a profit from its operations. **Tran. Jan. 28 at 58-60 (Lane).** Although the function of OneExchange is to assist retirees in selecting health insurance plans, OneExchange does not have an automatic enrollment option to ensure that no retirees are left without insurance. **Tran. Jan. 28 at 63-64 (Lane); Tran. Jan. 29 at 50 (Parson).**

RESPONSE: The Debtor disputes this proposed finding to the extent it incorrectly suggests that the Debtor's 1114 Proposal requires that Towers Watson's OneExchange program be used by the UAW VEBA. OneExchange is used in the 1114 Proposal *as an illustrative*

example of a private healthcare exchange that could be utilized, with the UAW VEBA making the ultimate decision regarding which exchange to use. **1/28/16 Tr. at 13, 91-92; 1/29/16 Tr. at 19, 85-86.** The Debtor further disputes this proposed finding to the extent it incorrectly states that some UAW Retirees could be left without insurance under the Debtor's 1114 Proposal. First, if a UAW Retiree is Medicare-eligible, he or she will always have Medicare benefits, and all UAW Retirees could use their HRA funds to be reimbursed for healthcare expenses. **1/29/16 Tr. at 86**. Second, other private exchanges have auto-enrollment options and the UAW VEBA would be free to select such an exchange for the UAW Retirees. **1/29/16 Tr. at 86**.

62. Under the 1114 Proposal, the proposed reduction in benefits for the UAW Retirees is significantly higher than the reduction in benefits to which the E&A Committee has agreed under the TKNA Settlement Agreement and the Third Amended Plan. **UAWX 92 at 11.** Specifically, the present value obligation of providing benefits to the E&A Retirees under the Debtor's current medical plan is $77 million, and the Debtor is proposing to fund the E&A VEBA with $70 million on the effective date of the Plan. This treatment represents a reduction of only $7 million, or 9%. **UAWX 92 at 11**.

RESPONSE: The Debtor disputes this proposed finding for the reasons stated in Debtor's Response to the UAW's Proposed Findings, ¶¶6 and 35, and in the Debtor's Proposed Findings, ¶103, and because the percentage reduction does not reflect a reduction in "retiree benefits" but rather a reduction in the costs/contributions to the VEBA.

63. Moreover, the Debtor's obligation to pay Retiree Benefits for both the UAW Retirees and E&A Retirees "will decline" from amounts identified in the 2015 September Towers Watson Reports (the $733 million and $77 million figures) due to, among other factors, continued payments of claims by the Debtor and deaths of E&A and UAW Retirees. **Tran. Jan. 22 at 58-59 (Lane); Tran. Jan. 28 at 144-50 (Grondin).** As a result, by the effective date of the Debtor's Plan, the E&A Retirees will likely receive a 100% recovery because the E&A Retirees will receive $70 million on the effective date of the Plan, and their claim, as of September 30, 2015, was only $77 million (this will decrease by the effective date, and it is before any upward recovery adjustment to the E&A Retirees under the TKNA Settlement Agreement for increased consideration paid by TKNA to the UAW Retirees because the E&A Retirees will get 12.5% of any such increased consideration). **Tran. Jan. 22 at 153-54 (Lane).**

RESPONSE: The Debtor disputes this proposed finding for the reasons stated in Debtor's Response to the UAW's Proposed Findings, ¶¶6 and 35, and in the Debtor's Proposed Findings, ¶103, and to the extent it suggests that Mr. Lane testified that "the E&A Retirees will likely receive a 100% recovery." He said no such thing.

64. Incredibly, and notwithstanding the simplicity of doing so, the Debtor did not calculate the percentage recovery comparing what the UAW and E&A Retirees are owed to what they will receive under the Third Amended Plan and DS because, in the Debtor's view, it is not "an appropriate calculation to determine fairness" or even "a relevant calculation." **Tran. Jan. 22 at 61-63 (Lane).** The record is clear, however, that under the Debtor's Third Amended Plan, which forms the basis of the 1114 Proposal, the UAW Retirees are to receive 63 cents on the dollar for their claims; the E&A Retirees are to receive at least 91 cents on the dollar for their claims; and General Unsecured Creditors are to receive 67 cents on the dollar for their claims. **UAWX 92 at 11 of 17; UAWX 60 at 15 of 103; Tran. Jan. 28 at 75 (Lane).**

RESPONSE: The Debtor disputes this proposed finding for the reasons stated in Debtor's Response to the UAW's Proposed Findings, ¶¶6 and 35, and in the Debtor's Proposed Findings, ¶103, and because "percentage recovery" on the basis of liabilities estimated by Towers Watson on September 30, 2015 is simply not an appropriate metric by which to assess the fairness of the proposed allocation of funds. **1/22/16 Tr. at 62-63**. Also, this proposed finding confuses the benefits paid to the retirees with amounts contributed to the VEBA.

65. The Debtor's HRA structure contained in the 1114 Proposal creates "winners and losers" and is a "one-size-fits-all" proposal. It also ignores the fact that the average cost of healthcare varies by person. **UAWX 92 at 12 of 17.** For example, the HRA structure creates winners and losers because it depends on whether UAW Retirees correctly anticipate their needs and choose appropriate coverage, the UAW Retirees' risk profile, the UAW Retirees' geographic location, and the ability of retirees to adequately choose appropriate coverage for themselves. **UAWX 92 at 12 of 17.** The HRA structure will also cause some individuals to incur substantial out-of-pocket costs for prescription drugs when compared to the current plan or a modified plan based on a group structure. **UAWX 92 at 13-14 of 17.**

RESPONSE: The Debtor disputes this proposed finding to the extent it suggests that the UAW Retirees will fare better in the absence of the Debtor's 1114 Proposal. If the Debtor's current Retiree Benefit Plans are not modified, even with the $300-$335 million in TKNA Payments under the proposed TKNA Settlement Agreement, *all of the UAW Retirees* – as

opposed to a relatively small percentage of such UAW Retirees under the Debtor's 1114 proposal – will be losers, as the Debtor estimates that at the current burn rate there will not be enough funds to pay *any* UAW Retiree Benefits beyond 2029 or 2031. **DX62, ¶8 and Ex. 2; 1/21/16 Tr. at 145; 1/29/16 Tr. at 14-15**. To the extent the UAW truly believes another structure would be preferable, it should have provided one to the Debtor without qualification. Instead, the UAW opted to play a shell game for tactical reasons that appear to have nothing to do with the interests of the UAW Retirees the UAW is supposed to represent. *See* **Debtor's Response to UAW Proposed Findings, ¶¶50-51**.

66. The Debtor asserts and says that it believes that its 1114 Proposal offers Retiree Benefits to UAW Retirees that are consistent with and/or substantially similar to the benefits they are currently receiving. **DX 63 at 4.** The Debtor's analysis tells only half the story, however, because the Debtor's actuaries only reviewed the UAW Retirees' current medical and prescription drug plans and did not include any analysis of the dental, vision or life insurance benefits that the UAW Retirees receive under their current benefits plan. **Tran. Jan. 29 at 28, 30, 41 (Luria)**. While it may be currently possible for UAW Retirees to purchase comparable coverage for medical services with their HRA allocations, doing so would require a substantially heightened risk of increased out-of-pocket prescription drug costs and forgoing services such as dental, vision, and life insurance, which are provided under the current Retiree Benefits plan. **Tran. Feb. 4 at 146, 166-68 (Taranto).** Accordingly, the Debtor's statements that the 1114 Proposal will provide UAW Retirees with Retiree Benefits that are consistent with and/or substantially similar to their current benefits are false and misleading. **Tran. Feb. 4 at 138-39, 146 (Taranto).**

RESPONSE: The Debtor disputes that (1) its statements that the 1114 Proposal will provide UAW Retirees with Retiree Benefits that are consistent with and/or substantially similar to their current benefits are false or misleading; and (2) having UAW Retirees purchase comparable coverage for medical services with their HRA allocations would require a substantially heightened risk of increased out-of-pocket prescription drug costs and forgoing services such as dental, vision, and life insurance, which are provided under the current Retiree Benefits plan, as the cited testimony does not support these proposed findings nor does Ms. Taranto's report. Indeed, Ms. Taranto confirmed that she had not calculated the loss associated

with any foregone benefits. **2/4/16 Tr. at 206-07**. In contrast, Mr. Parsons testified that a significant percentage (approximately 80%) of the UAW Retirees would be "winners" under the Debtor's proposed HRA structure, and such winnings, on average, would save approximately $1,000 per year. **1/29/16 Tr. at 11-12, 46**. Ms. Taranto then conceded on cross-examination that some or all of this $1,000 in average savings per UAW Retirees could be applied to cover dental, vision and life insurance products (and the UAW offered no evidence that such UAW Retirees would be net losers if dental, vision and life insurance were taken into account). **2/4/16 Tr. at 206**. Moreover, Mr. Nicholson conceded that the life insurance benefits available to the UAW Retirees are only $3,000 to $4,000 for "older retirees." **2/4/16 Tr. at 25-26**.

67. The Debtor's 1114 Proposal to utilize an HRA structure is not the only model capable of achieving efficiencies in the delivery of healthcare services. Specifically, cost savings can be achieved through group coverage, including through group Medicare Advantage plans. **UAWX 92 at 15 of 17.** It is therefore understandable that the E&A Committee rejected an HRA structure similar to that proposed by the Debtor for the UAW Retirees. **Tran. Jan. 28 at 67 (Lane); Tran. Jan. 29 at 56 (Luria)**. The Towers Watson actuaries did not even analyze alternative delivery structures to the HRA structure proposed by the Debtor, such as a group plan structure like the one used in the Dana Corporation bankruptcy. **Tran. Jan. 29 at 45 (Luria).**

RESPONSE: The Debtor does not dispute that its proposed HRA structure is not the only possible plan to achieve cost savings or that the E&A Retiree Committee has elected not to use an HRA structure (it did not "refuse" to use that structure; rather, in contrast to the UAW, it took the Debtor up on its good faith offer to propose an alternative structure). But, the UAW provided no financial analysis to support its claims of cost savings under other structures. Further, the Debtor disputes this proposed finding to the extent it suggests that the Debtor or its actuaries were somehow delinquent in not pursuing other structures, as the Debtor repeatedly requested that the UAW (which has significant experience in providing healthcare to its members) provide its preferred structure and the nature of the change in Retiree Benefits

necessitated by such a structure. *See, e.g.,* **DX21, DX23, DX26, 1/21/16 Tr. at 42-43, 53, 63, 66, 69-70, 80-83; 1/28/16 Tr. at 55-56**. Again, while the UAW's actuary, Ms. Taranto, developed various proposed Retiree Benefits Plans at the funding levels set forth in the Plan and the TKNA Settlement Agreement, the UAW nonetheless inexcusably refused (up through and including the end of the hearing) to provide this information to the Debtor or to the Court. **2/4/16 Tr. at 189-192, 197-199; 2/5/16 Tr. at 20-21.** Finally, the Debtor disputes this proposed finding to the extent that it relies on testimony from *Mr. Luria* (the E&A Committee's Financial Restructuring Advisor), in which he states that he did not analyze the Dana VEBA to support the assertion that Towers Watson undertook no such analysis. Obviously, Mr. Luria is not the Debtor's actuary (and not an actuary at all) and does not work for Towers Watson.

68. Alternatives to the Debtor's current delivery structure, such as a group plan, can take better advantage of government subsidies; encourage healthy or cost-effective choices; better manage the delivery of healthcare to members; ensure coverage in line with individual and group needs and appropriate for an individual's risk profile; mitigate the impact of geographic region on individuals' costs; and provide for default enrollment to avoid the risk of retirees becoming uninsured. **UAWX 92 at 15 of 17.** Despite these advantages, the Debtor's 1114 Proposal seeks to impose an HRA structure upon the UAW Retirees. The UAW has extensive experience with VEBAs that administer group coverage, including the founding of the Auto VEBAs, the largest VEBAs in the United States, and there is no reason to doubt the merits of the UAW's position that a group insurance coverage structure is more appropriate for the UAW Retirees than an HRA structure would be. **UAWX 92 at 16.**

RESPONSE: The Debtor disputes the UAW's assertion in this proposed finding that a group alternative is necessarily "better" than an HRA structure, as Mr. Parson concluded that the HRA structure is the delivery vehicle that, given the finite assets available, will make the retiree benefits last as long as possible while providing benefits most similar to those provided under the Debtor's Current Benefits Plans, and the UAW did not offer any testimony or other evidence suggesting that a group plan will provide comparable level of benefits for the same period of time. **DX63; 1/28/16 Tr. at 173**. Further, and perhaps most importantly, the UAW could have

proposed an alternative structure, but refused to do so unless it was granted veto power over any settlement with TKNA. Despite repeated requests by the Debtor for details regarding the UAW's desired alternative structure, including at hearings before the Court on Section 1114 and other matters Debtor (**1/21/16 Tr. at 42-43, 78-79**), *the UAW continued in its obstinate refusal to propose, unconditionally, an alternative structure*. *See, e.g.*, **Debtor's Response to UAW's Proposed Findings, ¶¶48, 50-51.**

E. Post-1114 Application Negotiations

69. The UAW and the Debtor continued negotiating after the Debtor filed the 1114 Application. On January 8, 2016, the UAW transmitted a § 1114 proposal to the Debtor via email (the "UAW Modified Proposal"). **UAWX 64**. The UAW proposed that the UAW Retirees and the E&A Retirees each receive parity of recovery in the amount of 78.5% of their scheduled Retiree Benefits claims. **UAWX 64 at 1 of 6**. The UAW also reiterated that the Dana materials had been provided as a model for benefits delivery structure and not for benefits delivery levels. **UAWX 64 at 2 of 6**.

RESPONSE: The UAW is, in this proposed finding, asserting that its January 8, 2016 letter constitutes a section 1114 proposal when it, among other things, failed to identify the benefit levels for the UAW Retirees. The UAW cannot, on the one hand, legitimately contend that its January 8, 2016 letter constitutes a section 1114 proposal and at the same time argue that the Debtor's September 30 and November 19 1114 Proposals, which contain essentially the same level of detail in terms of benefit levels, do not.

70. The UAW, in a separate communication, also sought additional information in order to facilitate the § 1114 negotiation process (the "1114 Information Requests"). **UAWX 63.**

RESPONSE: The Debtor disputes this proposed finding to the extent the UAW contends that the information it requested was necessary for it to engage in a good faith section 1114 negotiation.

71. The next day, on January 9, 2016, the Debtor rejected the UAW Modified Proposal on the ground that it contemplated more resources than the Debtor had available

following execution of the TKNA Settlement Agreement. **UAWX 66 at 1 of 4**. The Debtor further made clear that it would only accept a proposal predicated on the Third Amended Plan and TKNA Settlement Agreement construct. **UAWX 66 at 1 of 4**. The Debtor stated that it would not negotiate over economic terms because "the issue of the quantum of the Debtor's assets available to fund retiree benefits is one for the [TKNA Settlement Agreement approval] and plan confirmation process. **UAWX 66 at 1 of 4.** The Debtor also reiterated its position that it would not accept the UAW's proposed Dana VEBA structure unless the UAW were to agree to the terms of the TKNA Settlement Agreement, writing, "unless the UAW and the UAW [R]etirees are prepared to support the TKNA [S]ettlement and the plan, the Debtor cannot seek to implement an inferior Dana-like structure for UAW [R]etirees." **UAWX 66 at 1 of 4.**

RESPONSE: The Debtor disputes this proposed finding as it mischaracterizes the Debtor's January 9, 2016 response. In particular, the Debtor's counsel stated that "as we have consistently advised the UAW since September, 2015, the Debtor is prepared to incorporate into its chapter 11 plan a benefits delivery system acceptable to the UAW, provided that (1) the UAW describes the model in sufficient detail to achieve the level of disclosure the UAW is demanding of the Debtor regarding the HRA model described in the Third Amended Plan and related disclosure statement and (2) either (a) the model will provide a level of benefits coverage sufficient for the Third Amended Plan to be approved or (b) the UAW and the UAW retirees agree to support the Third Amended Plan." **UAWX66**. The UAW's January 8, 2016 proposal did not comply with this reasonable request. The Debtor also made clear that any 1114 counterproposal would need to comply with the funding levels in the TKNA Settlement Agreement *solely because* the Debtor's proposal to modify Retiree Benefits was e*xpressly contingent* on approval of the Plan and the TKNA Settlement Agreement – a fact the UAW refused (and apparently continues to refuse) to acknowledge. *Id*.

72. As the Debtor had suggested during the December 23 meeting, the UAW also engaged in negotiations with TKNA during this time. The UAW and TKNA met on January 4, 2016. **Tran. Feb. 1 at 98-99 (Nicholson)**. On January 11, 2016, the UAW sent TKNA a settlement proposal calling for the UAW Retirees to receive a sum with a present value of $524 million. **UAWX 67**. The UAW and TKNA met that same day to discuss the proposal. **Tran. Feb. 1 at 114-15 (Nicholson)**.

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion.

73. On January 12, 2016, the UAW sent to the Debtor a document titled "Key Mechanics of Proposed UAW VEBA Structure" (the "Key Mechanics Document"), along with the Dana Restated Trust Agreement. **UAWX 69; UAWX 70**. The terms of the Key Mechanics Document, which were modeled upon the Dana Corporation materials that the UAW had previously provided to the Debtor, described the UAW's proposal as to (1) how the UAW VEBA should be structured, (2) the Health and Welfare Plan that would offer benefits to UAW Retirees, (3) how the UAW VEBA should be managed, and (4) how funds would be disbursed from the UAW VEBA to UAW Retirees. **UAWX 70 at 7-8 of 8**. The Key Mechanics Document further provided that a settlement agreement with TKNA would need to be agreeable to the UAW. **UAWX 70 at 7 of 8**.

RESPONSE: Not disputed, although the UAW expressly conditioned its section 1114 proposal in this Key Mechanics Document on its ability to veto the TKNA Settlement Agreement and, indeed, *any* settlement with TKNA. **UAWX70; 1/21/16 Tr. at 73-78**.

74. That same day, January 12, 2016, the UAW met with the Debtor. The Debtor once again said it would only discuss a proposal predicated on the Third Amended Plan and TKNA Settlement Agreement, and rejected the Key Mechanics Document proposal that Retiree Benefits be provided to UAW Retirees pursuant to a group insurance plan because it was "unworkable, as it is conditioned on a settlement with TKNA acceptable to the UAW." **UAWX 72 at 1 of 6.** The Debtor stated that the UAW was "stuck with the . . . dollars in the TKNA [S]ettlement [Agreement]." **Tran. Feb. 1 at 124 (Nicholson).** The Debtor also reiterated its position that it would accept the UAW's proposed Dana VEBA structure only if the UAW accepted the dollar amounts in the TKNA Settlement Agreement. **Tran. Feb. 1 at 124 (Nicholson); Tran. Feb. 4 at 43 (Nicholson)**.

RESPONSE: The Debtor disputes this proposed finding. First, the UAW's January 12, 2016 counterproposal was unworkable because, among other things, it again refused to acknowledge that the Debtor's 1114 Motion and Proposal were both *expressly contingent* upon the Court's approval of the TKNA Settlement Agreement – a point that had been made to UAW on numerous prior occasions. **1/21/16 Tr. at 81-82; 2/1/16 Tr. at 113**; **UAWX72**. Second, the UAW's January 12, 2016 proposal still failed to identify the benefit levels for the UAW Retirees. The Debtor did not make the demands described in this proposed finding, the sole cited "support" for which is Mr. Nicholson's unreliable testimony. On the contrary, during the meeting the Debtor once again explained that the UAW would be free to object to the TKNA

Settlement Agreement, but the UAW's representatives pretended that they didn't understand this basic point. **1/21/16 Tr. at 78-83**.

75. On January 15, 2015, the UAW sent to the Debtor and TKNA another settlement proposal calling for the UAW VEBA to receive (1) cash on the effective date of a plan totaling $225 million, to come from the Debtor's cash on hand with the balance supplied by TKNA; (2) eight annual payments from TKNA in the amount of $45 million each; and (3) start-up costs for the UAW VEBA, not to exceed $500,000. **UAWX 80 at 3-4 of 5**. The proposal also called for a small increase in the UAW Retirees' pension benefits to help them pay for their Medicare insurance premiums. **UAWX 80 at 4 of 5**.

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion. The January 15, 2016 proposal was not a section 1114 proposal, but rather a proposal to renegotiate the TKNA Settlement Agreement. The Debtor was unable to unilaterally accept the proposal, as it lacks the assets necessary to fund it. .

76. On January 15, 2016, the Debtor provided to the UAW, for the first time, over a week after filing the 1114 Application, three expert reports that contained detailed information regarding the Debtor's proposed modifications of the UAW Retiree Benefits. **Tran. Jan. 28 at 22-23 (Lane).** These expert reports disclosed for the first time the relevant and necessary information that the UAW needed to evaluate the Debtor's proposed modification.

RESPONSE: The Debtor disputes this proposed finding. First, all of the information utilized by the Debtor's expert analysis was derived from the source materials that had been provided to the UAW prior to the 1114 hearing, and the UAW has not cited any credible evidence to the contrary. *See, e.g.*, **DX15; DX18-19**; **DX15; DX18-19**; **1/21/16 Tr. at 44-45, 105-06; 1/22/16 Tr. at 36-37; 1/28/16 Tr. at 20-23**. Second, the proposed finding ignores the fact that the expert reports did not exist prior to January 14, 2015 – the day prior to the Court's deadline for their submission. *See* **DX62-64**. Third, in patent disregard for this Court's scheduling order, the UAW refused to provide the Debtor with Ms. Taranto's expert report – submitting that report nearly a week after the deadline. *See* **UAWX92**. The UAW continued its dilatory litigation tactics when it attempted to have Ms. Taranto provide additional expert opinions at trial, despite the absence of any such opinions in her expert report and her sworn

testimony at her deposition that she would not provide any additional expert opinions beyond what was in her report. *See, e.g.*, **2/4/16 Tr. at 169-173.**

77. On January 20, 2016, TKNA informed the UAW that it was rejecting the settlement proposal the UAW had made on January 15. **UAWX 90**.

RESPONSE: This proposed finding is not relevant to the Debtor's 1114 Motion.

78. On January 25, 2016, the UAW sent the Debtor a letter attaching four economic scenarios for discussion purposes. **UAWX 96; Tran. Feb. 1 at 146-48 (Nicholson)**. The four scenarios showed different recoveries from TKNA, and they all provided for parity of recovery as between the UAW Retirees and the E&A Retirees. **UAWX 96; Tran. Feb. 1 at 148 (Nicholson)**.

RESPONSE: The Debtor disputes that the four scenarios showed parity of recoveries for the UAW and the E&A VEBAs. On the contrary, each scenario would result in a modification that is not fair and equitable to the E&A Retirees, and could in certain instances result in a windfall to the UAW VEBA. *See* **DX62 at ¶¶10-16 and Exs. 4-7**.

79. The Debtor responded to the UAW's January 25, 2016 letter on January 26, 2016. **DX 69**. Rather than encourage further discussion, the Debtor instructed the UAW to "[p]lease stop" sending such proposals. **DX 69 at 4; Tran. Feb. 1 at 151-52 (Nicholson)**.

RESPONSE: The Debtor disputes this proposed finding as it mischaracterizes the Debtor's January 26, 2016 letter, which did not, as the UAW contends, demand that the UAW stop making section 1114 counterproposals. Rather, **DX69** requested that the UAW stop "sending extraneous documents and nonsensical emails and letters" and instead "focus on providing [the Debtor] with 'the language [the UAW] want[s] in the [Plan and Disclosure Statement],' as directed by the Court on January 8, 2016." As the Debtor noted, that would "resolve the pending 1114 dispute and the UAW's 'objections' to the disclosure statement, conserve the estate's finite resources, and move this case forward." The Debtor's reference to "stop" related to prior "proposals" that the UAW knew were unreasonable and unworkable, as

they exceeded the value of the TKNA Settlement Agreement and thus could not be accepted by the Debtor. For example, **DX69** stated that:

> You are incorrect that the proposal set forth in settlement communication from James Bromley on January 15 and 17 remains "on the table". That is because the proposal requires payments to a UAW VEBA of $585 million, an amount that is more than double that of the Debtor's projected Effective Date Cash… As the UAW knew when it made the proposal, and as you well know now, the Debtor had and has no ability to accept the proposal because it is unable to satisfy the terms of the UA W's offer solely from its cash assets. It is unproductive, and a waste and abuse of estate resources, for the UAW to declare that a proposal remains "on the table" when it knows the Debtor cannot implement the proposed economic terms. It is equally unproductive to pretend that the UAW requires the Debtor to "respond" when the UAW already knows what the response must be. Moreover, as you know, on January 20, 2016, TKNA communicated its rejection of the UAW's January 15 and 17 proposal by email from its counsel Terry Myers, who characterized the proposal as "unworkable and financially of a magnitude totally out of line with any reasonable settlement offer." To be clear, TKNA did not confer with the Debtor about its response; we saw it when you did.

DX69 further states that:

> The statement in yesterday's letter that the UAW has "so far not refused the Debtor's outstanding Section 1114 proposal" is false, and misses the mark. The UAW has repeatedly refused to accept the Debtor's proposal by, among other things, refusing to acknowledge its inherently contingent nature. Indeed, it is troubling (and also a waste and abuse of estate resources) that the UAW continues to pretend it does not understand the contingent nature of the Debtor's pending 1114 proposal- *i.e.,* that the Debtor is proposing a mechanism to distribute to its creditors 100% of the Debtor's cash and more than $300 million of consideration to be provided by TKNA *only* in the event that the Bankruptcy Court confirms the Chapter 11 Plan and determines the TKNA Settlement Agreement to be a reasonable compromise of the Debtor's most potentially valuable unliquidated assets. There is no good faith basis for the UAW to continue the pretense that it doesn't understand the contingent proposal or to claim that it cannot respond for fear of being "locked in to" its economic terms.

DX69 further noted that the UAW's 1114 counterproposals were unfair and inequitable because they each sought "parity of recovery percentages," stating that:

> First, each proposal sought by the UAW seeks "parity of recovery percentages" of approximately 90% to UAW retirees and 10% to UAW retirees, on the false premise that retiree groups hold what amount to liquidated claims of $733 million and $70 million,

respectively. The Debtor, however, currently is obligated to provide its retirees with health care benefits, not cash, and the cost estimates on which the UA W is basing its "recovery" analysis do not reflect the cost to the Debtor of providing health care benefits under alternative structures available in the current marketplace.

While the cost estimate to provide UAW retiree health care benefits in the October 2015 Towers Watson report has a present value of$733 million, it is premised on the Debtor paying for health care based on the current UA W retiree "Cadillac plans" that are inefficient, outdated and unnecessarily expensive. The Debtor can provide its UA W retirees with health care benefits for far less in the current market, and it is this "market" cost that should form the basis for any comparison of "recovery" between UA W retirees and E&A retirees.

The Debtor believes a UAW proposal would be much more palatable, and thus more likely to be accepted by the E&A retirees and TKNA, if it were to recognize the cost efficiencies that will be achieved by providing UAW retirees with healthcare through a modern and efficient defined contribution structure rather than continue to focus on the artificially high cost of providing UA W retiree healthcare under the current defined benefits structure.

DX69 also noted that the UAW's 1114 counterproposals were unfair and inequitable because they each sought "parity of timing of payments" with the E&A Retirees:

Second, each proposal by the UAW also seeks parity of timing of payments between UAW and E&A retirees. In this case, however, parity of timing seems neither fair nor equitable because it fails to account for the significantly increased rate of investment return that the UAW VEBA will be able to achieve compared to the E&A VEBA. Under no scenario will the E&A VEBA receive more than $70 million on the effective date of any modification of E&A retiree benefits. The UA W VEBA, however, likely will receive at least $185 million on the effective date of retiree benefit modifications. With this far larger "up front" amount available for investment (as well as the $320 million the UAW VEBA would receive over the next 8 years), the UAW VEBA would have the opportunity to generate significantly greater investment returns than the E&A VEBA. Here too, the UAW's focus should be on the amount that will be available to the UAW VEBA inclusive of TKNA settlement payments and investment returns, rather than on a simple comparison of the initial amount available to each VEBA prior to receipt of TKNA settlement payments and investment returns.

In addition, contrary to the implication in the proposed finding that the Debtor put a unilateral stop to all discussions regarding the 1114 process, **DX69** explicitly states that:

… the Debtor reiterates its outstanding requests to the UAW to: (1) provide the Debtor with details of the health care benefits that the UAW would like the Debtor to provide to UAW retirees if the Chapter 11 Plan is confirmed and the TKNA Settlement Agreement is approved so that the Debtor can include those

details (in lieu of the currently proposed HRA structure) in its Chapter 11 Plan and disclosure statement; and (2) provide the Debtor with specific proposed language for the disclosure statement to the Chapter 11 Plan in a form and manner that would satisfy the adequacy standards of§ 1125… [W]e do not believe it is helpful to the discussion for you to refer to the "*Dana* model". As you are aware, a VEBA is simply a funding vehicle to hold assets that fund benefits to be delivered to retirees. We have asked and continue to ask the UAW to explain with specificity the terms of the group health plan for retirees that the UA W would prefer be implemented under the Chapter 11 Plan, if it is confirmed.

80. Finally, on February 4, 2016, the Debtor transmitted a letter to the UAW in open court, which letter proposed to modify the UAW Retiree Benefits in a manner different than the 1114 Proposal contained in the Third Amended Plan and DS dated January 6, 2016 (the "Post-Application Proposal"). **DX 80.** The Post-Application Proposal stated that a UAW VEBA would be formed that would be governed by a trust agreement similar to the Dana Corporation VEBA trust agreement. **DX 80.** Initially, benefits would be supplied through an HRA structure, but after the UAW VEBA was functioning, the VEBA committee would have sole discretion to change the benefits delivery structure. **DX 80.** The Post-Application Proposal delivered on February 4 came after a series of statements were made during testimony by the Debtor's witness Mr. Lane, and statements by Debtor's counsel, that indicated that the Debtor was modifying its January 6 1114 Proposal. **Tran. Jan. 28 at 88-89 (Lane); Tran. Jan. 29 at 167-69 (Marwil).** For reasons detailed below, the Post-Application Proposal is not under consideration because it was not made prior to the commencement of the hearing on the 1114 Application.

RESPONSE: Not disputed.

PROPOSED CONCLUSIONS OF LAW

I. THE STANDARD FOR MODIFICATION OF RETIREE BENEFITS UNDER 11 U.S.C. § 1114

81. Section 1114 of the Bankruptcy Code governs the treatment of retiree benefits[5] in chapter 11 proceedings. It imposes strict procedural and substantive requirements on a debtor before it can modify retiree benefits. *See Nelson v. Stewart*, 422 F.3d 463, 471-72 (7th Cir. 2005).

RESPONSE: The Debtor does not dispute that section 1114 of the Bankruptcy Code governs the treatment of retiree benefits and imposes procedural and substantive requirements.

[5] The term "retiree benefits," as defined in 11 U.S.C. § 1114(a), means "payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title."

82. Section 1114 allows for two different ways to modify benefits. *First*, the Debtor and the authorized retiree representative can agree to modify benefits under 11 U.S.C. § 1114(e)(1)(B). *Second*, the bankruptcy court can order the modification under 11 U.S.C. § 1114(g) over the objection of the retiree representative if each of nine elements of § 1114 are satisfied. It is important to satisfy each one of these conditions because a plan of reorganization may only be confirmed if the plan "provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in [§ 1114], at the level established pursuant to subsection (e)(1)(B) or (g) of [§ 1114] at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits." 11 U.S.C. § 1129(a)(13).

RESPONSE: Not disputed.

83. Accordingly, in any chapter 11 case, there are three possible outcomes when retiree benefits are involved. *First*, a debtor can opt not to modify retiree benefits and continue providing them after confirmation in the same manner as before bankruptcy. *Second*, a debtor can reach an agreement with the authorized representative to modify retiree benefits under § 1114(e)(1)(B). *Third*, the debtor can seek court-ordered modification of retiree benefits under § 1114(g). In this case, the Debtor seeks to modify the UAW's retiree benefits pursuant to court order under § 1114(g).

RESPONSE: Not disputed, but the Debtor notes that it has attempted, and will continue to attempt, to reach a mutually acceptable agreement with the UAW on the modification of UAW Retiree Benefits, contingent upon Court approval of the TKNA Settlement Agreement.

84. Section 1114(g) requires the Debtor to prove, by a preponderance of the evidence, each of nine separate elements prescribed by § 1114 (the "§ 1114 Elements"). *See* 11 U.S.C. § 1114(f), (g); *In re Chi. Constr. Specialties, Inc.*, 510 B.R. 205, 211 (Bankr. N.D. Ill. 2014) ("[a] debtor—as the movant—has the burden of proof with respect to a request under [§ 1114]").[6]

The § 1114 Elements are as follows:

(i) *prior* to submission of an application to modify retiree benefits, the debtor has made a proposal to the authorized representative to modify retiree benefits [*see* § 1114(f)(1)(A)];

(ii) the proposal is based on the most complete and reliable information available at the time of the proposal [*see id.*];

[6] While *In re Chicago Construction Specialties, Inc.* was decided in the context of 11 U.S.C. § 1113, the § 1113 analysis also applies in the § 1114 context. *See In re Ionosphere Clubs, Inc.*, 134 B.R. 515, 520 (Bankr. S.D.N.Y. 1991) ("[C]ompliance with § 1114 is substantively and procedurally the same as compliance with § 1113.")

(iii) the proposed modifications are necessary to permit the reorganization of the debtor [*see id.*; § 1114(g)(3)];

(iv) the proposed modifications assure that all creditors, the debtor and all other affected parties are treated fairly and equitably [*see* §§ 1114(f)(1)(A), 1114(g)(3)];

(v) *prior* to submission of an application to modify retiree benefits, the debtor has provided the authorized representative such relevant information as is necessary to evaluate the proposal [*see* § 1114(f)(1)(B)];

(vi) after making a proposal and prior to the hearing date on the application, the debtor met at reasonable times with the authorized representative [*see* § 1114(f)(2)];

(vii) after making a proposal and prior to the hearing date on the application, the debtor conferred with the authorized representative in good faith [*see id.*];

(viii) the authorized representative refused to accept the debtor's proposal without good cause [*see* § 1114(g)(2)]; and

(ix) the balance of equities clearly favors modification of the retiree benefits [*see* § 1114(g)(3)].

See, e.g., In re Chi. Constr. Specialties, Inc., 510 B.R. at 216.

RESPONSE: Not disputed.

85. Section 1114 requires the Court to consider only the Debtor's proposals to modify benefits that were made *prior to* the commencement of the hearing on the 1114 Application. *See* 11 U.S.C. § 1114(g)(1) ("The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that . . . the trustee has, *prior to the hearing*, made a proposal that fulfills the requirements of subsection (f) . . . .") (emphasis added); *In re Patriot Coal Corp.*, 493 B.R. 65, 113 (Bankr. E.D. Mo. 2013); *Teamsters Airline Div. v. Frontier Airlines, Inc.*, No. 09 Civ. 343 (PKC), 2009 WL 2168851, at *9-10 (S.D.N.Y. July 20, 2009). Accordingly, the Post-Application Proposal of February 4, 2016 was not made prior to the hearing, and therefore this Court will not consider it. Instead, this Court will consider only the January 6, 2016 1114 Proposal and determine whether it meets the procedural and substantive requirements of § 1114.

RESPONSE: Although the February 4, 2016 iteration of the 1114 Proposal was not made prior to the commencement of the 1114 Hearing, it was not materially different from the January 6, 2016 iteration. The February 4 iteration is evidence of the Debtor's continuing good faith efforts to reach an accommodation with the UAW inasmuch as it tracks the language of the Key Mechanics Document that that UAW provided on January 10, 2016.

86. As detailed below, this Court finds that the Debtor has failed to meet its burden to prove the § 1114 Elements with respect to the 1114 Proposal, so the 1114 Application is denied.

RESPONSE: Disputed. As articulated in ¶¶77-114 of the Debtor's Proposed Findings and Conclusions, the Debtor has satisfied each element of section 1114 and the Debtor's 1114 Motion should be granted.

II. SECTION 1114 PROCEDURAL ELEMENTS

a. The Debtor Did Not Make A Qualifying Proposal Prior To Filing The Application[7]

87. Section 1114 requires a debtor to make a qualifying proposal *prior to* the submission of an application to modify retiree benefits. The retirees' authorized representative must be afforded some time during which to consider, understand, negotiate concerning, and—once negotiations have concluded—accept or reject the proposal *before* the debtor submits an application with the court. *See* 11 U.S.C. § 1114(f)(1)(A). To qualify as a proposal under § 1114, the proposal need not contain all supporting documentation necessary for the retiree constituency to evaluate the proposal. *See In re Chi. Constr. Specialties*, 510 B.R. at 218. However, any proposal must present and describe its key terms, including by explaining what modified retiree benefits the Debtor is proposing to provide. *See*, *e.g.*, *Motion Of Debtors And Debtors In Possession To (A) Reject Certain Collective Bargaining Agreements And (B) Modify Certain Retiree Benefit Obligations, Pursuant To Sections 1113(C) and 1114(G) Of The Bankruptcy Code*, *In re Hostess Brands, Inc., et al.*, Case No. 12-22052 (RDD) (Bankr. S.D.N.Y. Jan. 25, 2012), [D.I. 174], Ex.1 (proposal included proposed schedule of post-modification Retiree Benefits).

RESPONSE: The Debtor disputes that section 1114(f)(1)(A) requires that there be any specific length of time between a 1114 proposal and a 1114 motion to modify benefits, and the UAW has not cited any authority for this point. *See In re AMR Corp.*, 477 B.R. 384, 413 (Bankr. S.D.N.Y. 2012) ("The statute does not include any restraints on when a debtor may invoke the Section 1113 process"); *In re Century Brass Prods., Inc.*, 55 B.R. 712, 716 (D. Conn. 1985) ("Section 1113 has no time restraint relative to when the debtor, following the submission of a

[7] The Debtor disputes each of the headings for the proposed Findings of Facts and Conclusions of Law to the extent they seek to incorporate proposed factual and/or legal conclusions. The Debtor's specific responses are set forth in response to each paragraph.

proposal, may file its rejection application."), *rev'd on other grounds*, 795 F.2d 265 (2d Cir. 1986); *see also* Martha S. West, Life After Bildisco: Section 1113 and the Duty to Bargain in Good Faith, 47 Ohio St. L.J. 65, 107 n. 177 (1986) ("Theoretically, the bankruptcy petition could be filed, the proposal be made, the relevant information given to the union, and the rejection application filed all in one day, as long as these events took place in the correct sequence."). The Debtor further disputes that a proposal must include and describe *all* key terms, including the fine details of the modified retiree benefits the Debtor is proposing to provide. The UAW's citation to a single example of a proposal in a New York bankruptcy case that included a schedule of post-modification benefits is hardly authority for the proposition that an 1114 proposal *must* contain such information. *See, e.g.*, *In re Pierce Terminal Warehouse, Inc.*, 133 B.R. 639, 647 (Bankr. N.D. Iowa 1991) ("A fair reading of section 1113[] does not require that the initial proposal by the [debtor] be the [proposal] that satisfies the substantive requirements of [the statute]."). In any event, even if that were the standard, which it is not, it was met here.

88. None of the September 30 Letter, the Original Plan, the Original DS, the November 19 Letter, the First Amended Plan, the First Amended DS, the Second Amended Plan, the Second Amended DS or any other information presented to the UAW prior to January 6, 2016 contained information sufficient to constitute a "proposal" within the meaning of § 1114. While these documents disclosed generally that the Debtor was proposing to modify Retiree Benefits, the description shifted materially in each iteration (from an HRA structure, to a Big 3 VEBA structure, and back to an HRA structure). None of these documents actually disclosed what modified Retiree Benefits the UAW Retirees would receive if the Debtor's "proposal" was accepted.

RESPONSE: The Debtor disputes this proposed conclusion for the reasons stated in Debtor's Response to the UAW's Proposed Findings, ¶¶41 and 46. Each 1114 Proposal made prior to January 6, 2016 that proposed to implement an HRA structure disclosed to the UAW Retirees that their Retiree Benefits would be modified from their existing Defined Benefit Plan to a structure whereby the UAW Retirees would be allocated dollar amounts to their individual

HRA Accounts by the UAW VEBA that they could then use to make their own healthcare selections (*e.g.*, from a combination of medical, prescription drug, dental, vision and life insurance coverage). Due to the intransigence of the UAW, the Debtor in its January 6, 2016 proposal set the initial HRA allocations on a conservative basis to ensure meaningful benefits for the anticipated lifetime of all UAW Retirees. Again, at each stage of the process since September 30, 2015, the Debtor consistently requested that the UAW provide it with the UAW's preferred structure and level of benefits, but the UAW consistently refused to do.

89. The Debtor only provided the necessary information on January 6, 2016. On that date, the Debtor finally disclosed in the Third Amended DS that the modified benefits would be provided through HRAs using the Towers Watson OneExchange product, and finally disclosed how much money the UAW Retirees would receive annually in their HRAs to purchase Retiree Benefits. **UAWX 60 at 11, 19, 95 of 103.** The Debtor filed the 1114 Application only one hour later, which is hardly enough time to evaluate the proposal.

RESPONSE: The Debtor disputes this proposed conclusion of law for the reasons stated in Response to ¶88. In addition, the UAW knows full well that the Debtor's 1114 Proposal *does not require the use of the OneExchange product*. **1/28/16 Tr. at 13, 91-92; 1/29/16 Tr.at 19, 85-86.** In any event, this proposed conclusion is an admission that the Debtor made a proposal which satisfied Section 1114(g). The hearing did not end until four weeks after January 6, leaving the UAW ample time to consider the January 6 iteration of the Debtor's 1114 Proposal and negotiate in good faith had it chosen to do so.

90. The Debtor cites *In re Chicago Construction Specialties, Inc*., 510 B.R. at 218 for the proposition that a proposal is a "'routine formality'" and therefore was satisfied as early as September 30, 2015 with the transmittal of the September 30 Letter and the filing of the Original Plan and DS. *Debtor's Post-Trial Proposed Findings Of Fact And Conclusions Of Law On Motion To Modify UAW Retiree Benefits Pursuant To 11 U.S.C. § 1114* [D.I. 1580] at ¶78 ("*Debtor's Proposed FoF and CoL*"). However, *In re Chicago Construction Specialties* was a case under § 1113 of the Bankruptcy Code and as such related not to *modification* of Retiree Benefits, but rather to the *rejection* of a collective bargaining agreement. 510 B.R. at 209. While it is true that the same nine-factor test for § 1113 applies to § 1114, the proposal in *In re Chicago Construction Specialties* was one simply to reject a collective bargaining agreement—a proposal for which no further details are necessary aside from the proposed rejection itself. 510

B.R. at 218. By contrast, a proposal to modify retiree benefits must describe, at the very least, how the Debtor is proposing to modify retiree benefits and what modified retiree benefits the Debtor is proposing to provide through that modification.

RESPONSE: The Debtor disputes this proposed conclusion of law for the reasons stated in Response to ¶88. *In re Chicago Constr. Specialties, Inc*. is apposite. As the UAW admits, the same nine-factor test for §1113 applies to §1114. That is because the requirements under these sections are the same. *See In re Horsehead Indus*., 300 B.R. 573, 583 (Bankr. S.D.N.Y. 2003); *In re Ionosphere Clubs, Inc.*, 134 B.R. 515, 519-20 (Bankr. S.D.N.Y. 1991) ("Compliance with §1114 is substantively and procedurally the same as compliance with §1113"). The UAW itself relies on *In re Chicago Constr. Specialties, Inc.* in ¶87 when discussing this very same requirement of making a proposal.

91. By filing the Third Amended DS and then filing the 1114 Application one hour later, the Debtor failed to comply with the express statutory requirement that a proposal be made prior to the filing of an application. There was no way for the UAW to evaluate the proposal and negotiate with the Debtor concerning it before the Debtor filed the 1114 Application. It is unnecessary to decide exactly how long a debtor must wait after making a qualifying § 1114 proposal before it files an application to modify retiree because one hour is not enough.

RESPONSE: The Debtor disputes this proposed conclusion of law for the reasons stated in Response to ¶88. Further, the UAW's suggestion that it had "one hour" to evaluate the proposal is disingenuous, since the UAW argues in the same breath that negotiations between the parties continued throughout the entirety of the trial. Finally, the notion that the UAW did not have enough time to consider the January 6, 2016 iteration of the 1114 Proposal is belied by the fact that when the Court asked the UAW's counsel during the January omnibus hearing whether the UAW was "ready to proceed" with the trial on the 1114 Motion, the UAW's counsel responded: "We are, your Honor." **1/8/16 Tr. at 11**.

b. The Debtor Failed To Provide The UAW With Relevant Information Necessary To Evaluate The Proposal Prior To The 1114 Application

92. Similar to the statutory requirement that a proposal be made prior to the filing of an application, a debtor must also provide the authorized representative with the relevant information necessary to evaluate the proposal *prior to* filing an application to modify retiree benefits. *See* 11 U.S.C. § 1114(f)(1)(B). It is reversible error for a bankruptcy court to approve a § 1114 modification without a finding that "relevant information necessary to evaluate the proposal" has been provided *prior to* filing a § 1114 Application. *Frontier Airlines, Inc.*, 2009 WL 2168851 at *11-13. Information necessary to evaluate a proposal should include "detailed projections and recommendations, perhaps made by a management consultant, preferably one who is independent of the interested parties. The debtor should present full and detailed disclosure of its difficulties and its proposed short-run and long-run solutions." *In re K&B Mounting, Inc.*, 50 B.R. 460, 467 (Bankr. N.D. Ind. 1985). This requirement ensures that the authorized representative can understand and evaluate the proposal and decide on an informed basis whether to accept or reject it.

RESPONSE: Not disputed.

93. The Retiree Benefits information contained in the Third Amended DS was absolutely essential (though not sufficient) to evaluate the Debtor's 1114 Proposal. Without such information, the UAW could not understand *what* modified Retiree Benefits were being proposed, let alone have sufficient information available to make an informed decision regarding whether to accept or reject the Debtor's 1114 Proposal. Similarly, the Retiree Benefits information contained in the Debtor's three expert reports filed in anticipation of litigation and after the 1114 Application was made (and not in furtherance of the Debtor's § 1114 statutory duty to provide such information beforehand) were essential to evaluate the proposal. These reports disclosed information concerning how the Debtor prepared its proposal, how the Debtor viewed the UAW Retiree Benefits in relation to the E&A Retirees Benefits, and the Debtor's reasons for making the proposal. All of that information was requested and should have been provided well before the 1114 Application was made, not over a week after it was made.

RESPONSE: The Debtor disputes the assertion that the information contained in the Third Amended DS was not sufficient to evaluate the Debtor's 1114 Proposal for, among other reasons, those stated in Response to ¶88. The Debtor provided the UAW with all source materials used to formulate its 1114 Proposal and that were relied upon by the Debtor's actuaries and other professionals. **1/22/16 Tr. at 36-37; DX15; DX18-19**. The UAW most certainly did *not* need the Debtor's expert reports (served on the UAW in accordance with the Court's Scheduling Order) to evaluate the Debtor's 1114 Proposal. That this is so is vividly

demonstrated by the fact that the UAW's own actuarial expert, Ms. Taranto, had *by December 2015* reviewed the materials provided by the Debtor and prepared several proposed Retiree Benefit Plans for the UAW Retirees using the funding amounts set forth in the Debtor's Plan and the TKNA Settlement Agreement. **2/4/16 Tr. at 189-192, 197-199; 2/5/16 Tr. at 20-21**.

94. The UAW began requesting information from the Debtor related to § 1114 modifications as early as October 2015. Notwithstanding the UAW's requests for information in October, November and December, the Debtor's information disclosures prior to the Third Amended DS amounted, in relevant part, to nothing more than (i) the Towers Watson reports and (ii) the November 19 Production, much of which was irrelevant and all of which was backward-looking. In other words, the Debtor provided only historical data with respect to UAW Retiree Benefits, instead of forward-looking data and backup relating to the modified Retiree Benefits the UAW Retirees would be receiving under the Debtor's proposal. Furthermore, in response to the UAW's request for information pertaining to the Debtor's assertion that the UAW Retirees would receive meaningful benefits for the rest of their lives, the Debtor refused to provide such information and instead said that it would be provided only through expert reports and expert testimony. The Debtor did not provide its expert reports until *after* filing the 1114 Application.

RESPONSE: The Debtor disputes that its information disclosures were insufficient. *See* **Debtor's Proposed Findings and Conclusions, ¶¶83-88**; **Debtor's Response to UAW's Findings, ¶¶44, 49-50 and 76**. In addition, the Debtor – unlike the UAW – promptly provided its expert reports (which, as noted, the UAW did not actually need to evaluate the 1114 Proposal) in accordance with the deadline set by the Court. **DX62-64**.

95. The Debtor argues that it provided sufficient information to the UAW because, based on the information provided, the Debtor's actuary was able to model healthcare delivery structures, and the UAW's actuary was also able to do so. *Debtor's Proposed FoF and CoL* at ¶86. The Debtor argues that it "was not obligated to provide the UAW with details regarding . . . what types or amounts of Retiree Benefits would be provided to any individual post modification." *Debtor's Proposed FoF and CoL* at ¶87.

RESPONSE: Not disputed, except that the Debtor's 1114 Proposal did, in fact, provide details about the amount and type of Retiree Benefits to be provided to the UAW Retirees post-modification. *See, e.g.*, **Debtor's Response to UAW's Proposed Findings, ¶¶41, 46 and 88**.

96. The Bankruptcy Code, however, requires a debtor to provide "information as is necessary to evaluate the proposal," 11 U.S.C. § 1114(f)(1)(B), not just the raw data that was

used to formulate the proposal. In fact, on November 23, 2015, this Court *sua sponte* ordered the Debtor to include in the introduction to the disclosure statement "clear statements as to whether or not, and if so how exactly, the healthcare and retirement benefits are to change." **UAWX 35 at 1 of 2.** The Debtor has therefore long been on notice that it was required to disclose such information. And contrary to the Debtor's argument, information about "what types or amounts of Retiree Benefits would be provided to any individual post-modification" is exactly the sort of information that is critical to understanding a debtor's proposed modifications, and is therefore precisely the sort of information that the Debtor was required to provide to the UAW prior to filing the 1114 Application.

RESPONSE: As discussed in Response, ¶¶41, 46, 88 and 93, *supra*, the UAW did not need the Debtor's expert reports to analyze the Debtor's 1114 Proposal.

97. The Debtor's additional argument that the information it provided to the UAW prior to filing the 1114 Application was sufficient because, based on this same information, the E&A Committee accepted the § 1114 proposal made to it, is based on a factual premise that is both false and irrelevant. Although the Debtor made similar purported § 1114 proposals to the UAW and the E&A Committee, **DX 15; DX 16**, the E&A Committee negotiated its own economic recovery in the TKNA Settlement Agreement, did *not* accept the Debtor's purported proposal on the mechanism to deliver benefits and instead designed its own structure for providing benefits that uses a combination of a group insurance plan and HRAs. **UAWX 60 at 12 of 103**. The Debtor has agreed to implement the E&A Committee's desired structure. What is more, § 1114 does not require the Court to evaluate the sufficiency of the information provided to the retirees' representative when the Debtor and the representative have agreed upon benefit modifications, so whether the E&A Committee may have been satisfied with the information it received has no bearing upon the sufficiency of the Debtor's disclosures to the UAW, which the Bankruptcy Code requires.[8]

RESPONSE: The Debtor disputes the UAW's assertion that the E&A Retiree Committee's acceptance of the Debtor's 1114 Proposal "has no bearing" upon the sufficiency of the Debtor's disclosures, and the UAW's suggestion that the E&A Retiree Committee had additional information that was not disclosed to the UAW is unsupported speculation. As the record clearly demonstrates, the UAW was given the exact same opportunity to design its own preferred plan to modify UAW Retiree Benefits that was afforded to the E&A Retiree

[8] There is also no evidence in the record to show that the Debtor did not provide additional information to the E&A Committee that was not provided to the UAW, whether through further correspondence or through oral conversations. To the contrary, there is evidence in the record that the E&A Committee negotiated directly with the Debtor and TKNA for the E&A Retirees' own economic recovery and for the allocation of the Debtor's assets between the E&A Retirees and the UAW Retirees. [*There is no evidence that the E&A Retiree Committee received any additional or different information than did the UAW*].

Committee. *See, e.g.,* **DX21, DX23, DX26, 1/21/16 Tr. at 42-43, 53, 63, 66,69-70, 80-83; 1/28/16 at Tr. 55-56.**

98. It is contrary to the Bankruptcy Code to allow a debtor to delay providing necessary information for months, provide a portion of such necessary information only an hour before filing an application to modify retiree benefits and the remainder of the relevant information through expert reports after filing the application, and then claim that all such information has been provided and that a ruling on its application to modify retiree benefits should promptly follow. That is exactly what the Debtor did here. Consequently, the Debtor did not provide, prior to submission of the 1114 Application, and as requested on multiple occasions, information sufficient for the UAW to evaluate its proposed modifications to UAW Retiree Benefits.

RESPONSE: The Debtor disputes this proposed conclusion for the reasons stated *supra* and in Paragraphs ¶¶83-88 of the Debtor's Proposed Findings and Conclusions.

c. The Debtor Did Not Negotiate With The UAW In Good Faith

99. Section 1114 requires that, after a proposal is made, a debtor negotiate in good faith with the authorized representative through the time of the hearing. *See* 11 U.S.C. § 1114(f)(2). While a debtor is, of course, permitted to be "stubborn" or "steadfast" during negotiations, *see In re Chi. Constr. Specialties,*, 510 B.R. at 223, a series of "take it or leave it" proposals do not satisfy the requirement of good-faith bargaining, the standard that gave rise to §§ 1113 and 1114. *See N.L.R.B. v. Gen. Elec. Co.*, 418 F.2d 736, 756-57 (2d Cir. 1969) (determining that—in the collective bargaining context—an employer failed to negotiate with a union in "good faith" where the employer negotiated with "take-it-or-leave-it proposals," coupled with a failure to furnish necessary information to the union, and responses to union proposals with "vague and uninformative" replies—a tactic that has since come to be widely rejected as "Boulwarism"); *see also* Archibald Cox, *The Duty To Bargain In Good Faith*, 71 HARV. L. REV. 1401, 1418 (1958) ("Stalling the negotiations by unexplained delays in answering correspondence and by the unnecessary postponement of meetings indicates a desire not to reach an agreement with the union; so does sending negotiators without authority to do more than argue or listen."). At least one court has found that negotiating with one retiree constituency while refusing to negotiate with another is evidence of bad faith. *See In re Horsehead Indus., Inc.*, 300 B.R. 573, 582, 588 (Bankr. S.D.N.Y. 2003) (holding that the debtor did not engage in "good faith" negotiations as to one group of union retirees because the debtor refused the offer to meet with them and instead "opted to devote [its] efforts to reaching agreements with [the unions representing 83% of the unionized workers]").

RESPONSE: Not disputed.

100. The reference to good faith bargaining in the labor context is not idly made. Good-faith labor bargaining is carried over into the Bankruptcy Code in both §§ 1113 and 1114. 7 *Collier on Bankruptcy* ¶1113.05[5] (16th ed. 2015) (noting that labor law cases "would seem to be the ideal reference point" for the good faith standard "since the purpose of both section 1113 and labor law is to encourage good faith collective bargaining"). The structures of §§ 1113 and 1114, both of which were adopted to add additional protections that do not exist under § 365 of the Bankruptcy Code, set out structures that are modeled on organized labor negotiations. *See In re Trump Enter. Resorts Unite Here Local 54*, 810 F.3d 161, 171 (3d Cir. 2016) (noting that "[u]nlike § 365, which does not constrain a debtor's rejection of burdensome executory contracts, § 1113 prescribes strict procedural and substantive requirements before a CBA can be rejected" by balancing the concerns of a debtor and the "unions' goals of preserving labor agreements and maintaining influence in the reorganization process"). A debtor cannot simply ignore the careful procedural structure dictated by Congress. To allow such behavior would be to gut both §§ 1113 and 1114.

RESPONSE: Not disputed, except for the gratuitous and unsupported rhetoric in the last two sentences in this proposed conclusion of law.

101. Here, the Debtor both (a) transmitted a series of take-it-or-leave it proposals and (b) negotiated with the E&A Committee and TKNA about the funds that would be available to fund Retiree Benefits to the UAW Retirees, while excluding the UAW from those negotiations. As previously discussed, the negotiations over the TKNA Settlement Agreement were tied inextricably to the Debtor's purported proposal to modify the UAW Retiree Benefits, because the TKNA Settlement Agreement capped the amount of money available for Retiree Benefits, allocated that money between the UAW Retirees and the E&A Retirees and dictated the use of the Debtor's remaining cash, both for § 1114 and plan purposes. Nevertheless, the Debtor excluded the UAW from the negotiations that produced the TKNA Settlement Agreement and negotiated the agreement in secret with the E&A Committee and TKNA. This does not constitute good-faith bargaining for purposes of § 1114.

RESPONSE: The Debtor disputes the entirety of this proposed conclusion as the Debtor negotiated in good faith. *See* **Debtor's Proposed Findings and Conclusions, ¶¶105-110**. Contrary to the UAW's assertion, the Debtor did not transmit "take-it-or leave it proposals." To the contrary, the Debtor repeatedly sought to engage the UAW by asking it – like it had asked the E&A Retiree Committee – to provide the Debtor's with the UAW's preferred Retiree Benefit structure and how it would modify the benefits currently being received by the UAW Retirees under the Debtor's current Defined Benefit Plans (*i.e.*, the same information that the UAW was requesting from the Debtor concerning its 1114 Proposal). **1/21/16 Tr. at 42-43 and 70; DX12,**

DX15; DX18-19; DX21; UAW's Proposed Finding, ¶48. Second, the UAW's refusal to acknowledge that the 1114 Proposal is ***contingent*** upon the Court's approval of the TKNA Settlement Agreement and confirmation of the Plan – does not mean that the Debtor did not negotiate in good faith. To the contrary, the UAW's continued insistence that a new economic deal be cut with TKNA (a demand that the UAW knew was beyond the Debtor's sole control to effectuate) further demonstrates *the UAW's* bad faith. *See In re Ormet Corp.*, 324 B.R. 655, 660 (Bankr. S.D. Ohio 2005) (finding Debtor negotiated in good faith where the union focused on its alternative proposal rather than reacting to and negotiating based on the Debtor's proposal), *aff'd*, 355 B.R. 37 (S.D. Ohio 2006). Finally, the UAW was not "excluded" by the Debtor from settlement negotiations. *See, e.g.*, **Debtor's Proposed Findings and Conclusions, ¶¶16-34**; **Debtor's Response to UAW's Proposed Findings, ¶¶10-28**. The Debtor could not (and still cannot) control who TKNA bargains with or what conclusions TKNA may have reached about whether, in the face of the UAW's bellicose litigation threats, any purpose would be served in trying to negotiate with the union.

102. A Debtor cannot negotiate in good faith if it categorically refuses to discuss or negotiate the economic terms of a § 1114 proposal. *See In re Pinnacle Airlines Corp.*, 483 B.R. 381, 389, 423 (Bankr. S.D.N.Y. 2012) (indicating that categorically refusing to negotiate the economics of a § 1113 proposal can constitute bad faith, and declining to find bad faith only because the debtor had excusably misread the applicable law). This is exactly what the Debtor has done, asserting on no less than three occasions (December 23, 2015, January 9, 2016, and January 12, 2016) that it could not discuss economic issues because its hands were tied by the TKNA Settlement Agreement. This must be contrasted with the fact that from at least early October to November 16, the Debtor negotiated modifications in the E&A Retiree Benefits with the E&A Committee *and* TKNA at a time when the Debtor's hands were not tied on economic issues. In fact, it is the result of those very negotiations with the E&A Committee and TKNA—the TKNA Settlement Agreement—that the Debtor has asserted ties its hands vis-à-vis the UAW Retirees. It is neither fair and equitable nor good-faith bargaining for the Debtor to have included the E&A Committee in the economic negotiations with TKNA, but to have presented the UAW with an economic fait accompli.

RESPONSE: The Debtor disputes the entirety of this proposed conclusion for the reasons stated in the Debtor's Response to the UAW's Proposed Findings, ¶101. *See also* **Debtor's Response to UAW's Proposed Findings, ¶¶56, 71, 74 and 79**. For the reasons stated in Debtor's Response to UAW's Proposed Findings, ¶¶10 and 19, *supra*, the Debtor disputes the UAW's assertion that the Debtor negotiated with the E&A Retiree Committee, and not the UAW, during the period from early October to November 16, 2015.

103. By excluding the UAW from the negotiations over the TKNA Settlement Agreement and then surreptitiously entering into that agreement, the Debtor foreclosed its ability to negotiate with the UAW over (1) the amount of money that would be provided for UAW Retiree Benefits, (2) the timing of the payment of that money to the UAW VEBA, (3) the security protections to ensure payment is actually made to the UAW VEBA, and (4) how the modified Retiree Benefits for the UAW Retirees would compare to the modified Retiree Benefits for the E&A Retirees. These are all critical terms that a debtor must be prepared to meaningfully negotiate after making a qualifying § 1114 proposal. The Debtor here did not meaningfully negotiate with the UAW on any of these items.

RESPONSE: The UAW was not excluded from negotiations regarding the TKNA Settlement Agreement and the Debtor disputes the entirety of this proposed conclusion. *See, e.g.*, **Debtor's Proposed Findings and Conclusions, ¶¶16-34; Debtor's Response to UAW's Proposed Findings, ¶¶10-28**. Further, the Debtor disputes the proposed conclusion because it fails to acknowledge the contingent nature of the relief requested by the Debtor. The UAW is free to make all of the arguments set forth in this proposed conclusion in opposing the TKNA Settlement Agreement and Plan. They have no bearing on whether the Debtor conducted *1114* negotiations with the union in good faith.

104. Separate and apart from the Debtor's refusal to negotiate economic terms, the Debtor also refused to discuss alternatives to its proposed HRA structure in good faith. The Debtor instead wielded the benefits delivery structure as negotiating leverage, telling the UAW that it would allow the UAW to choose the mechanism for the delivery of modified retiree benefits to the UAW Retirees, but only if the UAW would support the TKNA Settlement Agreement. The Debtor also told the UAW that if it could not make progress in its ongoing discussions with TKNA, the Debtor would seek to force the UAW Retirees to receive their

benefits through an HRA structure. Only after the § 1114 hearing was well underway did the Debtor moderate its position. This is not good-faith negotiating.[9]

RESPONSE: As discussed *supra* in the Debtor's Response to UAW Proposed Findings ¶¶56, 79, the threats and demands supposedly made by the Debtor are not supported by any credible evidence. *See, e.g.*, **Debtor's Response to UAW Proposed Findings, ¶¶56-57, 71, 74 and 79; Debtor's Proposed Findings and Conclusions, ¶107**. From its very first 1114 Proposal letter on September 30, 2015, the Debtor invited the Retiree representatives to "propose alternative modifications" to Retiree Benefits. **DX12 at 2**. Each subsequent revised1114 Proposal included the same request, and the Debtor repeated this request to the UAW continually, including at hearings before the Court on Section 1114 and other matters. **1/21/16 Tr. at 42-43, 78-79**.

105. The Debtor's additional threat during the December 23, 2015 meeting regarding its ability to cram down a chapter 11 plan on the UAW Retirees with the support of the E&A Committee further demonstrates the Debtor's lack of good faith. By making this threat, the Debtor let the UAW know in no uncertain terms that it had excluded the UAW from negotiations with TKNA and included the E&A Committee precisely so that it could later cram down on the UAW Retirees a plan incorporating the TKNA Settlement Agreement, with the support of the E&A Retirees. The Debtor garnered the E&A Committee's support for the TKNA Settlement Agreement by providing the E&A Retirees with a sweetheart recovery of at least 91%, while the UAW Retirees will recover only about 63%. The disparate percentage recovery between the E&A Retirees and the UAW Retirees evidences the Debtor's bad faith in excluding the UAW from the negotiations that led to such disparate treatment.

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[9] The Debtor contends that "there is no credible evidence" that it wielded the benefits delivery structure in this way, *Debtor's Proposed FoF and CoL* at ¶107, but emails from Debtor's counsel show clearly that it did. On January 4, 2015, Debtor's counsel wrote as follows: "Accordingly, at this time, without an agreement of the UAW to the TK settlement, and an affirmative vote of the UAW retirees to the Debtor's plan, the Debtor cannot seek to implement an inferior Dana-like structure for UAW retirees." **UAWX 56 at 1 of 6.** On January 9, 2015, Debtor's counsel wrote as follows: "Thus, unless the UAW and the UAW retirees are prepared to support the TKNA settlement and the plan, the Debtor cannot seek to implement an inferior Dana-like structure for UAW retirees." **UAWX 61 at 1 of 4.** The UAW's witness Mr. Nicholson also testified that the Debtor wielded the benefits delivery structure as leverage to attempt to secure the UAW's assent to the TKNA Settlement Agreement. **Tran. Feb. 1 at 87, 92, 124 (Nicholson); Tran. Feb. 4 at 43 (Nicholson).** This Court finds Mr. Nicholson's testimony credible, particularly in light of the corroborating documentary evidence. [*As discussed supra in the Debtor's Response to UAW Proposed Findings ¶¶*8, 56, 79, *the UAW grossly mischaracterizes the correspondence it cites and Mr. Nicholson's testimony was far from "credible."*]

RESPONSE: The Debtor disputes this proposed conclusion for the reasons stated in its Response to the UAW's Proposed Findings, ¶¶56-57, 71, 74, 79 and 104. Further, as previously articulated, "percentage recovery" is an inappropriate metric for measuring the comparative impact of modifications to retiree benefits. *See, e.g.,* ***Debtor's*** **Response to UAW's Proposed Finding, ¶¶35 and 62-64; Debtor's Proposed Findings and Conclusions, ¶103**.

106. Stated differently, the Debtor's entry into the TKNA Settlement Agreement, which both fixed the amount of money in the estate, and established how and when that amount is to be allocated among creditors and paid to them, foreclosed the Debtor's ability to negotiate on these key terms with the UAW, even though the Debtor had negotiated those exact terms with the E&A Committee. This is not a good-faith negotiation, as a simple example demonstrates. If one party to the negotiation (in this case, the Debtor) had a statutory obligation to negotiate with a counterparty (in this case, the UAW Retirees), yet voluntarily cut a deal immediately prior to the negotiation that tied the first party's hands (in this case, the Debtor's hands) while the counterparty (in this case, the UAW Retirees) had the ability, desire and wherewithal to participate in discussing terms that would not tie the first party's hands, but the counterparty was intentionally excluded from the discussion, that conduct would never pass muster as being in good faith. This simple example is what happened here.

RESPONSE: The Debtor disputes this proposed conclusion for the reasons stated in its Response to the UAW's Proposed Findings in ¶¶101-105. The Debtor further disputes this proposed conclusion as it wholly ignores the conditional nature of the Debtor's 1114 Proposal, and that the statutory negotiations at issue here are section 1114 negotiations – not settlement negotiations. Further, the "simple example" is not at all what happened here. Far from having "the ability, desire and wherewithal to participate in discussing terms[,]" the UAW, intent on pursuing the Litigation Claims, demonstrated an unwillingness to engage in any meaningful settlement negotiations. *See* **Debtor's Proposed Findings and Conclusions, ¶¶20-25**. Indeed, is was not until *after* the TKNA Settlement Agreement was entered into and the 1114 Motion was made that the UAW first made a settlement proposal to TKNA that was not, in effect, a "make whole" demand.

107. As a result, even assuming that a qualifying § 1114 proposal was made earlier than January 6, 2016, the Debtor at all relevant times failed in its statutory obligation to negotiate in good faith with the UAW.

RESPONSE: The Debtor disputes this proposed conclusion. *See* **Debtor's Proposed Findings and Conclusions, ¶¶105-110**.

III. SECTION 1114 SUBSTANTIVE ELEMENTS

a. The Debtor's 1114 Proposal Does Not Treat All Parties Fairly And Equitably, Nor Does The Balance Of Equities Clearly Favor Implementing The 1114 Proposal

108. For four primary reasons, the Debtor's 1114 Proposal, which is premised upon the TKNA Settlement Agreement, does not treat all parties fairly and equitably, nor does the balance of equities clearly favor implementing the proposal.

RESPONSE: The Debtor disputes this conclusion for the reasons stated in Debtor's Proposed Findings and Conclusions, ¶¶93-104 and in its Response to the UAW's Proposed Findings at ¶¶109-127.

109. The first reason the 1114 Proposal is not fair and equitable is that it provides unfair, unjustifiable, inequitable and disparate treatment to the UAW Retirees when compared to other constituencies in the case. Under the 1114 Proposal, the E&A Retirees are to receive at least a 91% recovery on their estimated entitlement to Retiree Benefits (calculated as of September 30, 2015) and unsecured creditors are to receive a 67% recovery on their claims,[10] while the UAW Retirees are to receive only a 63% recovery on their estimated entitlement to Retiree Benefits based on calculations as of September 30, 2015. These disparate recovery percentages are inequitable on their face.

RESPONSE: The Debtor disputes this proposed conclusion for the reasons stated in Debtor's Response to the UAW's Proposed Findings, ¶¶6, 35 and 64. The UAW's "percentage

[10] The Debtor's proposed 67% recovery to general unsecured creditors is premised on another problematic compromise of the rights of the UAW Retirees. The Debtor's proposed plan has consistently ignored that § 1114 requires that retirees who have their benefits modified under § 1114 must receive an unsecured claim for the difference between the value of the benefits promised and the value of the benefits as modified. Here, using the September 30, 2015 numbers certified by the Debtor's actuary, the amount of this claim for the UAW Retirees is $272 million, which should be included in the general unsecured creditor class (and would thus substantially dilute the percentage recovery to holders of claims in that class). [*This (meritless) argument is one to be raised during the plan confirmation process. It has no legal relevance to the 1114 Motion.*]

recovery" calculation is a measure not of fairness, but rather only of the inefficiency of the UAW's current benefits.

110. The Debtor contends that "'percentage recovery' on the basis of liabilities estimated by Towers Watson on September 30, 2015 is not an appropriate metric by which to determine the fairness of the proposed allocation of funds." *Debtor's Proposed FoF and CoL* at ¶103. The Debtor's contention is incorrect. The Debtor does not compare the percentage recoveries of each of the UAW Retirees and E&A Retirees based on their claim amounts, which comports with established principles of bankruptcy law. *See, e.g.*, *In re Quay Corp., Inc.*, 372 B.R. 378, 386 (Bankr. N.D. Ill. 2007) (Schmetterer, J.) (quoting *In re Armstrong World Indus.*, 348 B.R. 111, 121 (Bankr. D. Del. 2006)) (finding that percentage recovery "'measured in terms of the net present value of all payments'" is a relevant inquiry to evaluate fairness and unfair discrimination). The Debtor instead urges this Court to compare (i) the ratio of the present value (*i.e.* discounted) of the benefits owed to each group of retirees under the Debtor's current benefits plans, and (ii) the ratio of the nominal (*i.e.*, non-discounted) amount of payments that would be made to each group of retirees under the life of the Debtor's proposed modified plans, which is conveniently and unsurprisingly the same ratio in this case. *Debtor's Proposed FoF and CoL* at ¶102. The Debtor points out that the UAW and E&A Retirees held 89.1% and 10.9%, respectively, of the scheduled Retiree Benefits claims (these are discounted to present value), and that the UAW and E&A Retirees will receive 89.1% and 10.9%, respectively, of the total nominal benefits (these are not discounted) purportedly estimated to be paid out over time under the 1114 Proposal. *Debtor's Proposed FoF and CoL* at ¶102.

RESPONSE: The Debtor disputes this proposed conclusion. *See* **Debtor's Response to UAW Proposed Finding, ¶109**. Further, the cases cited by the UAW do not stand for the proposition that percentage recovery is a relevant inquiry to evaluate the fairness of modifications to outdated and inefficient healthcare benefits under Section 1114. Neither *In re Quay Corp.* 372 B.R. 378 (Bankr. N.D. Ill. 2007) nor *In re Armstrong World Indus.*, 348 B.R. 111 (Bankr. D. Del. 2006) involved Section 1114. *In re Quay Corp.* involved an objection to a settlement agreement and plan and *In re Armstrong World Indus.* involved an objection to a plan. In both cases, the claim amounts at issue were for *money* that was actually owed to creditors. This contextual difference is crucial. The Debtor does not dispute that percentage recovery can be a useful metric where, as in the cited cases, the claims are for *liquidated dollar amounts*. Here, the "claim" of the UAW Retirees is not for liquidated dollar amounts, but rather

for future provision of healthcare benefits of an unliquidated amount. Accordingly, percentage recovery does not serve the same utility here as it does in assessing fairness where the claim amount is for a liquidated amount and the question is how much money will be distributed to various creditors.

111. The Debtor's proposed comparison is misleading for at least three reasons. First, the Debtor's ratio with respect to the total nominal benefits estimated to be paid out over time assumes that Retiree Benefits will be provided to E&A Retirees via an HRA structure. **DX 62 at 8.** But the E&A Committee has chosen to provide benefits using a group insurance plan, not an HRA structure. The Debtor has not provided an analysis of the nominal benefits estimated to be paid out over time under a group insurance plan. The Debtor's ratio with respect to the total nominal benefits estimated to be paid out is therefore founded on a counterfactual premise that in no way accurately represents the total value of the Retiree Benefits that will be paid to the E&A Retirees over time.

RESPONSE: The Debtor disputes this proposed conclusion. The fact that the E&A Retiree Committee has indicated that it will not use an HRA structure does not make the Debtor's analysis misleading or inapposite. Rather, using a proposed HRA structure for both the UAW and the E&A Retirees allows the Court, *on an apples-to-apples basis*, to calculate and compare the healthcare benefits that are available to each group of retirees. Notably, the UAW did not offer any group insurance plan vs. group insurance plan comparison, so the UAW's argument that the ratios might be different is purely self-serving and speculative

112. Second, the Debtor compares the ratio of the *present value* of benefits owed to the UAW and E&A Retirees with the ratio of the *nominal amount* of benefits that would be paid out over time to the UAW and E&A Retirees under the Debtor's 1114 Proposal (again, under the counterfactual assumption that Retiree Benefits will be provided to E&A Retirees using an HRA structure). If anything, the Debtor should compare the ratio of the *present value* of benefits owed to the UAW and E&A Retirees with the ratio of the *present value* of the payments that would be made to the UAW and E&A Retirees.[11] According to the Debtor's own calculations, the UAW

[11] The Debtor argues that it is appropriate to make the counterfactual assumption that the E&A Retirees will receive benefits under an HRA structure because the HRA structure "serves as a pricing mechanism to calculate and compare the healthcare benefits that can be obtained in the marketplace on an apples-to-apples basis." *Debtor's Proposed FoF and CoL* at fn.24. But it is simply not appropriate to compare the benefits the UAW Retirees *will receive* under the 1114 Proposal to the benefits the E&A Retirees *will not receive* under the 1114 Proposal. It is much simpler, and logically sounder, to look instead at the present value of the payments that will be received by the two retiree constituencies.

Retirees will receive 86.8% of the present value of payments, while the E&A Retirees will receive 13.2%. **DX 62 at Ex. 7.** The difference between the 86.8%/13.2% ratio of payments that will be made the UAW and E&A Retirees under the 1114 Proposal (which gives the E&A Retirees $70 million) and the 89.1%/10.9% ratio of the UAW and E&A Retirees' scheduled claims (which, if applied to the present value of the total payments to the Debtor's retirees would give the E&A Retirees $58 million) represents a $12 million swing and is a significant and material amount.

RESPONSE: The Debtor disputes this proposed conclusion for the reasons stated in Debtor's Response to the UAW's Proposed Findings, ¶¶6, 35 and 64, and because the "present value of payments" utilized in the above analysis reflects the contributions to the VEBAs (*not* the amount of benefits that will be paid by each VEBA to Retirees) and therefore ignores the investment returns to be realized by the VEBAs and paid out to the Retirees in the form of additional benefits. But even if the UAW's proposed comparison were meaningful (and it is not), the Debtor disputes the assertion that the "$12 million swing" is a material amount to the UAW. As Ms. Taranto testified in response to the Court's pointed questioning, "$10 million means more to the E&A than it does to the UAW." **2/4/16 Tr. at 154-55**. In other words, taking $10 million away from the E&A VEBA would more sharply impact the E&A Retirees' healthcare benefits than adding $10 million more to the UAW VEBA impact the healthcare benefits to be received by the UAW Retirees. *Id.* Further, and as explained at greater length in the Debtor's Proposed Findings and Conclusions at ¶¶97-104, the HRA structure proposed by the Debtor is fair and equitable because: (a) it would provide meaningful benefits to *all* Retirees for the remainder of their lives at levels consistent with what they are receiving now (other than for vision, dental and life insurance, which is not proposed to be provided to *any* Retirees under the Debtor's 1114 Proposals but which can nonetheless be provided for by the VEBAs should they so desire) (**DX62 at Ex. 3**); (b) the ratio of the benefits being provided to each group of Retirees under the Debtor's Current Benefits Plans and under the Debtor's 1114 Proposals are

exactly the same (**DX62 at Ex. 7; 1/22/16 Tr. at 34-35**); and (c) by contrast, under the *pari passu* allocation proposed by the UAW, "the E&A [Retiree C]ommittee would not be able to pay its retiree benefits beyond 2035, and the UAW would have money [$500 million] left over" in 2094 after payment of all projected UAW Benefits over the anticipated lifetime of its Retirees. **1/22/16 Tr. at 14-15; *see also* 2/4/16 Tr. at 153-156**.

113. Third, even this alternative ratio—86.8%/13.2%—is misleading and does not demonstrate a fair allocation because the disparity in the size of the obligations owed to the two retiree groups is so large (*i.e.*, the UAW Retirees' contract-based claims are nearly 10 times larger than the E&A Retirees' claims). A simple example shows why. According to the Debtor's own calculations, the present value of the payments to the UAW Retirees under the TKNA Settlement Agreement is $461 million, and the present value of the payments to the E&A Retirees is $70 million (resulting in the 86.8% / 13.2% payment ratio just described). If the E&A Retirees' recovery were increased to, say, $77 million, the recovery ratios of the two groups would hardly change at all—the UAW Retirees would receive 85.5% of the total payments (or $454 million), and the E&A Retirees would receive 14.5% of the total payments ($77 million). However, under this scenario, there would be no question that E&A Retirees would recover 100% of their estimated entitlement to Retiree Benefits as of September 30, 2015 ($77 million), whereas the UAW Retirees would recover only 62% of their estimated entitlement to Retiree Benefits as of that date ($733 million).

RESPONSE: The Debtor disputes this proposed conclusion for reasons stated in its Response to ¶¶6, 35, 64 and 112 of the UAW's Proposed Findings. Further, although the UAW's argument in this proposed conclusion is not a model of clarity, it again appears to be one based on the fiction that the net present value amounts calculated by Towers Watson ($461 million for the UAW Retirees and $71 million for the E&A Retirees) are actual dollar amount, *i.e.* liquidated claims, rather than a reflection of the projected cost to provide future health care benefits under the Debtor's Current Retiree Benefits Plans, *i.e.* unliquidated claims. The issue is not the relative cost of providing future health benefits to the two Retiree groups' "claims," since those amounts are not liquidated and the Retirees have a claim for the provision of health care services, not for dollars. Rather, the issue is whether, under the Debtor's 1114 Proposals, the relative disparity in the "richness" of the two groups' healthcare benefits is maintained. The

evidence shows that it is. *See* **Debtor's Proposed Findings and Conclusions, ¶102.** In other words, this version of the UAW's numbers game sheds no light on the actual fairness to the two Retiree groups under the proposed modifications.

114. There can be no argument that the law is concerned first and foremost about how much a given creditor receives compared to what that creditor is owed. By the same token, the law is completely unconcerned about whether one creditor receives the same or similar recovery as a creditor that has different legal rights or a different size claim. Fairness and equity require that similarly situated creditors (*i.e.*, creditors holding general unsecured claims relating to Retiree Benefits), receive recoveries on their claims in substantially similar percentages. One creditor should not receive a lower percentage recovery solely because that creditor has a larger claim. To conclude otherwise would equate the requirement of fairness and equity with the remedy of redistribution. In bankruptcy, redistribution only occurs through extreme measures such as equitable subordination, substantive consolidation, or recharacterization, each of which is only available where the party suffering the penalty has engaged in bad faith or inequitable conduct. Here, there is no basis whatsoever for such extreme relief, and not even a hint of any allegation of the sort of behavior on the part of the UAW, that would justify redistribution of the recoveries of the UAW Retirees to the E&A Retirees.

RESPONSE: The Debtor disputes this proposed conclusion for reasons stated in its Response to ¶¶6, 35, 64 and 112-113 of the UAW's Proposed Findings. The Debtor disputes the assertion that redistribution is contemplated in, or would be effectuated by, its 1114 Proposal. There is no evidence at all that any redistribution would occur. Moreover, the UAW cites no authority whatsoever to support its rhetorical arguments about what the law is supposedly concerned with.

115. It is for these reasons that this Court will not concern itself with the nominal dollar recovery ratios of different groups of creditors. Instead, the appropriate metric is to use percentage recovery of what is *owed* versus what is recovered when evaluating relative treatment under a plan. A simple example puts this into perspective: if one unsecured creditor holds a $500 million claim, and another unsecured creditor holds a $1 million claim, it is inappropriate to award a higher percentage of recovery to the creditor with the $1 million claim simply because it costs relatively little to disproportionately benefit the small creditor. Yet that is exactly what the Debtor seeks to do here in an effort to justify disparate treatment, and this Court refuses the invitation.

<u>RESPONSE</u>: The Debtor disputes this proposed conclusion for reasons stated in its Response to ¶¶6, 35, 64 and 112-113 of the UAW's Proposed Findings.

116. The Debtor's proposed approach is also inconsistent with the legislative history of § 1114, which clearly contemplates evaluating a retiree class's recovery *based on the simple comparison of what it receives versus what it is owed* (not, as the Debtor suggests, through the manipulative method of comparing the nominal dollar recovery ratios of multiple creditor constituencies). The legislative history clearly provides that "[t]he retirees will also have an unsecured claim, payable in accordance with the provisions of the Bankruptcy Code and the reorganization plan, for those retiree benefit payments which have been lost as a result of Section 1114 modifications." *See* S. Rep. No. 119, at 6 n.2 (1987), *as reprinted in* 1988 U.S.C.C.A.N. 683,689. Moreover, the legislative history goes to great lengths to illustrate how this claim resulting from reduced benefits should be calculated by offering the following example: "[i]f the present value of the health insurance benefits of a retiree is 100 million at the time the petition is filed and the court orders a modification reducing benefits payments by 25 million, the retirees have an unsecured claim for the full 25 million. . . ." *Id.* at 688 n.2. The legislative history provides a crystal clear statement of Congress' intent.

<u>RESPONSE</u>: The Debtor disputes this proposed conclusion for reasons stated in its Response to ¶¶6, 35, 64 and 112-113 of the UAW's Proposed Findings. The numerical calculation contained within footnote 2 of the cited legislative history is distinguishable from the facts in this case. The Debtor is not asking for a modification that would result in the reduction of a specific dollar amount (the $25 million reduction in payments contemplated in the example). It is not seeking, for example, to keep its Current Retiree Benefits Plans in place but reduce the amount by which they are funded by a particular percentage or dollar amount. Rather, as discussed in Response, ¶113, *supra*, the Debtor is asking for the right to (a) terminate its inefficient Current Retiree Benefits Plans; and (b) replace them with a more efficient structure that will provide comparable benefits at current market rates. The modification represents an increase in efficiency (particularly when it comes to the cost of providing healthcare to Medicare-eligible UAW Retirees), not a "loss" to the Retirees. And, as a practical point, if the Debtor were to terminate its Current Retiree Benefit Plans and cut a check to the UAW Retirees for the amount of their "scheduled claims," that payment would be taxable, severely reducing

the funds that could be utilized to secure future healthcare coverage. To be sure, this is not what the UAW is asking the Debtor to do (in fact, the only thing the UAW has asked the Debtor to do since the 1114 Proposal was made is to allow the UAW sue TKNA and other parties derivatively). But it is what would happen if the UAW's argument about "percentage recoveries" is taken to its logical conclusion.

117. With this understanding, the comparison between the UAW Retirees and E&A Retirees becomes easy. As of September 30, 2015, the Debtor estimated that the actuarial value of the benefits *owed to the UAW Retirees and E&A Retirees* was approximately $733 million and $77 million, respectively. **DX 2 at 6; DX 3 at 7**. Under the Debtor's 1114 Proposal, UAW Retirees would receive only $461 million, when they are *owed* $733 million (approximately 63%), and the E&A Retirees would receive $70 million, when they are *owed* $77 million (approximately 91%).[12] A disparity of 28% in relative recovery is hardly fair, and it is certainly not equitable.

RESPONSE: The Debtor disputes this proposed conclusion for reasons stated in its Response to ¶¶6, 35, 64 and 112-113 of the UAW's Proposed Findings.

118. The Debtor relies on *In re Pinnacle Airlines Corp*., 483 B.R. 381 (Bankr. S.D.N.Y. 2012) to justify the disparate percentage recovery. *Debtor's Proposed FoF and CoL* at ¶94. *Pinnacle Airlines* involved a motion to reject a CBA under § 1113, not a motion to modify retiree benefits under § 1114, as the Debtor misleadingly states. *Id.* at 387. Furthermore, the facts of *Pinnacle* are readily distinguishable. There, the Court found that because the pilots' compensation exceeded the market rates to a greater degree than the compensation of other employee constituencies, it was fair for the pilots' compensation to be reduced to a greater degree. *Id.* at 415. This finding was appropriate because the debtor was reorganizing as a going concern with active employees and had an interest and need to pay all employees a reasonable market wage (justifying the disparate reductions) in an effort to keep them from seeking an alternative employ and to keep the debtor's business afloat. Here, the Debtor has no active employees, is not a going-concern operation (*i.e.*, this is a liquidating chapter 11), and has no business other than establishing the E&A VEBA and the UAW VEBA and funding the UAW VEBA into the future (in the event the Debtor's plan is confirmed).

RESPONSE: The Debtor disputes this proposed conclusion for reasons stated in its Response to ¶¶6, 35, 64 and 112-113 of the UAW's Proposed Findings. In addition, contrary to

[12] By the effective date of the Plan, the amount owed to E&A Retirees will likely be even lower than $77 million due to deaths and interim payment of Retiree Benefits. As a result, the E&A Retirees may in fact receive more than 100% of what they are owed. [*This is speculation and, in any case, might also be the case for the UAW Retirees.*]

the UAW's assertion, *In re Pinnacle* supports the fairness of the Debtor's proposal. First, because the requirements under sections 1113 and 1114 are the same, courts consistently apply precedent interpreting one section to cases involving the other section. *See, e.g., In re Horsehead Indus*., 300 B.R. 573 (noting that "the discussion relating to the requirements under §1113 also applies to §1114" and analyzing the sections in tandem); *In re Family Snacks, Inc*., 257 B.R. 884, 896-97 (8th Cir. 2001) (relying on §1114 cases to interpret §1113). Accordingly, the fact that *In re Pinnacle* involved section 1113 is of no moment. Second, the UAW fails to explain why the fact that the Debtor in *In re Pinnacle* was a going concern should make any difference. The UAW does not dispute that the Current UAW Retiree Benefits Plan is inordinately "rich." That being the case, the holding in *Pinnacle* applies with equal force here.

119. The second reason the 1114 Proposal is not fair and equitable is that it fails to account for the fact that the E&A Retirees will receive much larger pension benefits than the UAW Retirees. Under the TKNA Settlement Agreement, TKNA will assume the two E&A pension plans, which are either underfunded or unfunded and which provide benefits substantially in excess of benefits provided to UAW Retirees under their pension plan. Under the 1114 Proposal, not only would the E&A Retirees receive a substantially higher percentage recovery on their Retiree Benefits claims, they would also receive pension payments that average twice the pension payments to the UAW Retirees. Because the total compensation (pension plus healthcare benefits) of the two groups must be considered, it is not fair and equitable to reduce UAW Retiree Benefits by a much higher percentage than the E&A Retiree Benefits if both groups get the same percentage recovery on their pensions (*i.e.* 100%), especially when the E&A Retirees' pension payments are double the UAW Retirees' pension payments.

RESPONSE: The Debtor disputes this proposed conclusion as pension benefits are irrelevant to the Court's determination of the Debtor's 1114 Motion. This issue may or may not be relevant at the plan confirmation stage, but it is wholly irrelevant now.

120. The third reason the 1114 Proposal is not fair and equitable is that it requires the UAW Retirees to bear all the credit risk (and the risk of greater than expected inflation) of a recovery over an eight-year period. The UAW Retirees are also required to bear the risk of decreases in the Debtor's remaining cash as other creditor constituencies are paid in this case. By contrast, under the TKNA Settlement Agreement and the debtor's plan which seeks to implement the settlement, the E&A Retirees are guaranteed to receive $70 million on the effective date of the plan and bear no credit risk associated with payments over time or any risk

of a decrease in the Debtor's remaining cash. All other creditors are similarly paid in cash on the effective date. Only the UAW Retirees will be forced to bear the risk that TKNA might not fulfill its obligation to make payments under the TKNA Settlement Agreement and that the Debtor's cash might decline before the effective date of a plan. That is neither fair nor equitable.

RESPONSE: The Debtor disputes this proposed conclusion for the reasons discussed in the Debtor's Response to ¶¶29 and 31-32 of the UAW's Proposed Findings. In addition, the requirement that the UAW receive some of its payments over an 8-year period is fair and equitable for the reasons stated in ¶¶98-102 of the Debtor's Proposed Findings and Conclusions. Further, the Debtor's present value calculations of the contributions to the VEBAs already reflect any credit risk to the UAW Retirees. **1/22/16 Tr. at 121-22, 136**. Moreover, the Debtor negotiated multiple payment certainty clauses in the TKNA Settlement Agreement including: obtaining TKNA's agreement to certain payment protections, including (a) a rolling 1-year letter of credit equal to one settlement payment (either $35.6 million or $40.0 million); (b) a provision accelerating all future settlement payments upon a TKNA default (**1/21/16 Tr. at 135 -136**); (c) requiring TKNA and its subsidiaries to maintain equity value of not less than two times its remaining settlement payments (**DX25 at Ex. B, ¶3(f)**); and (d) providing that the UAW and E&A VEBAs would be intended third party beneficiaries of the settlement agreement (**1/21/16 Tr. at 136- 137**). Finally, TKAG, TKNA's parent company has $4 billion in lines of credit available, and another $1.5 billion of commercial paper available which are available to TKNA. **1/22/16 Tr. at 122 -125**. In any case, this proposed conclusion is one for the plan confirmation stage.

121. The Debtor argues that it is necessary for the E&A Retirees to receive their recovery up front in cash because the E&A VEBA would otherwise have insufficient cash "to invest in order to generate material investment returns over the life of the E&A VEBA so as to pay Retiree Benefits over the anticipated lifetimes of the E&A Retirees." *Debtor's Proposed*

FoF and CoL at ¶98. However, even if it were true,[13] it is irrelevant. The E&A Retirees are entitled to receive a percentage recovery on the value of their claims that is identical to the percentage recovery of other similarly situated creditors, namely the UAW Retirees. The Debtor has pointed to no caselaw or other authority that would entitle one group of creditors to a more favorable payment schedule than another similarly situated group of creditors. It is simply inappropriate to consider, in a bankruptcy case no less, as the Debtor would have this Court do, what a particular creditor could do with the money it receives when deciding how much money that creditor is entitled to receive. The E&A Retirees are entitled to receive the same percentage recovery as the UAW Retirees. The trustees of the E&A VEBA can then invest this money as they see fit, and design healthcare benefit plans for the E&A Retirees based on the amount of money to which the E&A Retirees are entitled. The E&A Retirees' entitlement to funds from the estate depends on their right to recovery as a creditor of the Debtor. It would be inequitable to take money owed to the UAW Retirees and redistribute it to the E&A Retirees.

RESPONSE: The Debtor disputes this proposed conclusion for the reasons stated in ¶¶98-102 of the Debtor's Proposed Findings and Conclusions. In addition, "[i]t is not necessary for all affected parties to receive identical modifications, and concessions asked of various labor groups may reflect differences in the groups' wage and benefit levels." *In re Patriot Coal Corp.*, 493 B.R. at 131 (internal citations and quotations omitted). Further, contrary to the UAW's assertion, how the various parties – including the E&A Retirees – fare under 1114 Proposal goes to the heart of the fairness inquiry. Under the *pari-passu* allocation proposed by the UAW, and using an HRA structure (in other words, using an apples-to-apples comparison), "the E&A committee would not be able to pay its retiree benefits beyond 2035, and the UAW would have money [$500 million] left over at the end." **1/22/16 Tr. at 14 -15**; *see also* **Debtor's Proposed Findings and Conclusions, ¶101**. This can be hardly be deemed fair or equitable.

122. The fourth reason the 1114 Proposal is not fair and equitable is that it provides unfair, inequitable and disparate treatment to the UAW Retirees when compared to the Debtor's corporate affiliates and insiders, which are the very entities and persons that engaged in the wrongdoing that underlies the claims that the Debtor proposes to release in the TKNA Settlement

[13] The Debtor's expert, Mr. Lane, identified only a single type of high risk investment opportunity—private equity funds—that could be available to the UAW VEBA and not to the E&A VEBA as a result of the UAW VEBA receiving more money than the E&A VEBA, and he did not explain the economic impact of having this one potential investment option. **Tran. Jan. 22 at 7 (Lane).** [*Mr. Lane's testimony concerning the need for the E&A VEBA to receive cash up front in order to generate the necessary investment returns stands unrebutted. The fact that he focused on one example of diversification hardly impugns the reliability of his testimony or opinions.]*

Agreement. The Debtor's corporate parents, according to TKAG's own annual report, are realizing significant tax benefits through the TKNA Settlement Agreement and will ultimately only be paying an amount in the low two-digit millions in exchange for the release of all claims against them. **DX 37 at 641**. Furthermore, under the TKNA Settlement Agreement and the chapter 11 plan it contemplates, TKNA would continue to own the Debtor's equity in likely violation of the absolute priority rule. **UAW 31 at 21 of 53.** Although there is nothing inherently wrong in designing a settlement agreement to take advantage of tax attributes, it is neither fair nor equitable for the Debtor's insiders to realize significant tax benefits that reduce the net cost of their alleged wrongdoing to almost nothing, while the UAW Retirees are required to take an almost 40% reduction in their Retiree Benefits, nor that the alleged "burden sharing" should violate the absolute priority rule.

RESPONSE: The Debtor objects to this proposed conclusion because whether or not TKAG realizes a tax benefit is irrelevant to the Court's determination of the Debtor's 1114 Motion. *See, e.g.*, **1/22/16 Tr. at 116** (Court's question to the UAW: "What does that matter to you if they get a tax benefit?"). The appropriate inquiry is whether *the Debtor* received fair value for compromising its claims, which the Debtor believes is the case, and the UAW will have the ability to challenge as part of the confirmation and Rule 9019 settlement approval process. Indeed, the UAW put on no evidence at the 1114 hearing to support any claim that TKNA and/or TKAG would be willing to pay more money in light of the tax-advantaged structure of the TKNA Settlement Agreement, and the UAW's own proposed findings confirm that this was not the case in light of TKNA's rejection of the UAW's demands for more money. *See* **UAW's Proposed Findings, ¶¶72, 75 and 77**. Indeed, the only logical conclusion to be drawn is that, absent such a tax-efficient structure, TKNA and/or TKAG would not have been willing to pay as much as they are agreed to pay under the TKNA Settlement Agreement. Furthermore, there has been no adjudication of wrongdoing by TKNA, TKAG or any other putative defendant. What the UAW is really arguing is that TKNA should pay more. But that is an objection to the TKNA Settlement Agreement. It has no relevance to the 1114 Motion. (Nor does the UAW's complaint

that, under the Plan, the TKNA will retain Budd's equity. That is a Plan objection, and a bad one at that.)

123. The Debtor's additional arguments in support of finding the 1114 Proposal fair and equitable are unavailing. The Debtor contends that its 1114 Proposal is fair and equitable because it "will allow [UAW] Retirees to obtain healthcare that is similar to what they currently receive." *Debtor's Proposed FoF and CoL* at ¶96. Even if the Debtor were correct that the 1114 Proposal would allow UAW Retirees to obtain similar healthcare (and for the reasons stated above, it is not), the statement ignores that Congress has defined "retiree benefits" under § 1114(a) more broadly than the Debtor would like—that is, the term includes vision, dental and life insurance provided to the UAW Retirees under the Debtor's current healthcare plan. The Debtor has not shown, or even contended for that matter, that its 1114 Proposal will provide similar vision, dental and life insurance in addition to similar healthcare coverage. Accordingly, the Debtor has not proven that under the 1114 Proposal the UAW Retirees will receive "retiree benefits"—as that term has been defined by Congress—similar to the "retiree benefits" they currently receive.

RESPONSE: The Debtor disputes that its statements that the 1114 Proposal will provide UAW Retirees with Retiree Benefits that are consistent with and/or substantially similar to their current benefits are false. The analysis performed by Towers Watson did not specifically budget for life insurance, or vision or dental coverage, for *either* the E&A Retirees or the UAW Retirees. According to Ms. Taranto, however, the VEBA for either group could choose to use its funds to buy such a benefit for its respective Retirees, and, under the HRA proposal, the UAW Retirees could choose to allocate a portion of their HRA account to pay for such benefits. *See* **2/4/16 Tr. at 206**. Mr. Nicholson suggested that these benefits may be relatively *de minimis*, testifying that the life insurance benefits available to the Retirees are approximately $3,000 to $4,000 for "older retirees." *See* **2/4/16 Tr. at 25-26**. Moreover, despite the UAW's implication in the above proposed conclusion, nothing in section 1114 actually requires the Debtor to demonstrate that the modified benefits will be similar to the benefits retirees currently receive.

124. The Debtor also contends that the UAW Retirees will not be subject to having their Retiree Benefits modified or terminated "under language in the current UAW Retiree Benefit Plan documents and applicable non-bankruptcy law." *Debtor's Proposed FoF and CoL*

at ¶96. There is simply no evidence in the record that the UAW Retiree Benefits could be modified or terminated under language in the applicable documents that govern these benefits. Whether or not the Debtor's unsupported assertion is accurate, it is therefore not a remotely appropriate consideration for this proceeding.

RESPONSE: The Debtor disputes this conclusion for the reasons stated in ¶96 of the Debtor's Proposed Findings and Conclusions.

125. The Debtor further argues that it is beneficial to all retirees that the 1114 Proposal would provide Retiree Benefits in a tax-free manner. *Debtor's Proposed FoF and CoL* at ¶104. There is no evidence in record that other alternative options would not similarly provide Retiree Benefits in a tax-free manner, so this consideration is similarly not one that merits any weight.

RESPONSE: It goes without saying that receiving the benefits in a tax free manner is beneficial to the Debtor's Retirees. Moreover, the tax consequences of other proposals that would be acceptable to the UAW is unknown because despite the fact that the Debtor has requested that the UAW provide such proposals to the Debtor (*and the UAW's expert, Ms. Taranto, has, in fact, prepared several proposed Retiree Benefits Plans*) the UAW has refused to provide any of these proposals to the Debtor. **2/4/16 Tr. at 189-192, 197-199; 2/5/16 Tr. at 20-21**.

126. In short, a proposed modification that substantially limits the recovery of UAW Retirees, which hold more than 80% of the Debtor's scheduled claims, while providing much more favorable treatment to other constituencies—especially to insiders and to the E&A Retirees—and failing to provide the UAW Retirees with retiree benefits that are similar to their current benefits, cannot be said to meet the burden under either of the § 1114 Elements that require fairness and equity. As a result, the Debtor has failed to meet its burden with respect to these statutory elements.

RESPONSE: The Debtor disputes this proposed conclusion for the reasons stated, *supra*, and in ¶¶93-104 of the Debtor's Proposed Findings and Conclusions.

b. The Debtor's Proposal Is Not Necessary To Permit The Reorganization Of The Debtor

127. Courts vary in their formulation of the applicable standard with respect to what is "necessary to permit the reorganization," but what is clear is that the proposed modification to retiree benefits must be necessary to confirm a Chapter 11 plan. A Chapter 11 "reorganization"

can take many forms and is inclusive of several types of debt adjustments; it is not confined to the situation where a debtor continues as an operational going concern. *See United Food & Commercial Workers Union v. Family Snacks, Inc.* (*In re Family Snacks, Inc.*), 257 B.R. 884, 894-95 (B.A.P. 8th Cir. 2001).

RESPONSE: Not disputed.

128. At this point in the case, at the most basic level, the Debtor's proposed modifications are not necessary because they turn on the TKNA Settlement Agreement, which has not yet been approved. The Debtor has expressly stated—repeatedly—that the relief it seeks through the 1114 Application is contingent upon this Court's approval of the TKNA Settlement Agreement. *Debtor's Proposed FoF and CoL* at ¶92. The Debtor has provided no support for its theory that this Court could enter an order modifying benefits that is contingent upon approval of the TKNA Settlement Agreement. Nor does the Debtor demonstrate how the UAW and the UAW Retirees can possibly determine the necessity to reorganization of the Debtor's 1114 Proposal, and judge whether to accept it, when the UAW and the UAW Retirees do not know if the Court will approve the TKNA Settlement Agreement upon which the Debtor's 1114 Proposal is based.

RESPONSE: The Debtor disputes this proposed conclusion. Contrary to the UAW's assertion, the Debtor has in fact provided support for the proposition that this Court is able to enter a contingent Section 1114 order. *See* authority cited in **Debtor's Proposed Findings and Conclusions, ¶108**. The UAW, however, has not refuted or distinguished any of that authority, including, *inter alia*, *In re Ormet Corp.*, 324 B.R. at 657.

129. It is clear from the statute that a contingent order cannot satisfy the clear dictates of § 1114. Such an order would be merely a finding that the Debtor's proposed modifications *could be necessary to its reorganization*, depending upon a future ruling on the TKNA Settlement Agreement. But § 1114(g)(3) explicitly requires this Court to find that a retiree benefits modification proposed by a debtor "*is necessary* to permit the reorganization of the debtor." The necessity must be an actual and current one, not a contingent and future one. *See In re Ran*, 607 F.3d 1017, 1025 (5th Cir. 2010) ("While *Section 1502* does not expressly discuss a temporal framework for determining [the center of the debtor's main interest for purposes of determining a foreign main proceeding], the grammatical tense in which it is written provides guidance to the court. . . . Congress's choice to use the present tense requires courts to view the [center of the debtor's main interest] determination in the present, i.e. at the time the petition for recognition was filed."). Without a finding that the modification "*is necessary* to permit the reorganization of the debtor," § 1114 does not permit this Court to modify the UAW Retiree Benefits.

RESPONSE: The Debtor disputes this proposed conclusion. *In re Ran* involved section 1502, not section 1114. Further, a flexible approach to section 1114 modifications best realizes

the intent of the Bankruptcy Code. *See In re Ormet Corp.*, 324 B.R. at 657 (rejecting a challenge to the timing of a Section 1114 application (post-confirmation) as "unduly restrictive").

130. Of course, if the Debtor had wanted to, it could have filed a motion under Bankruptcy Rule 9019 seeking approval of the TKNA Settlement Agreement, and only after that motion was granted, filed its application to modify benefits under § 1114. In that case, the Debtor would not have been seeking contingent relief and could perhaps have demonstrated that its proposed modification was necessary. But the Debtor chose not to do so, and it cannot now escape the consequences of its choice by framing its 1114 Application as "contingent."

RESPONSE: The Debtor disputes this proposed conclusion. Although the UAW might not like the order in which the Court ordered the Debtor to proceed in this matter, this does not mean that it is not within this Court's power to grant the requested relief. *See* **Debtor's Proposed Findings, ¶108**. Moreover, the Debtor filed the 1114 Motion when it did to put everything related to confirmation of the Plan before the Court, and, nonetheless, had offered to have the 1114 hearing held at the same time as the Court's Rule 9019 hearing on the Settlement Agreement. The Debtor also has no opposition to the Court holding in abeyance its ruling on the Debtor's 1114 Motion pending its decision on a motion to approve the TKNA Settlement and to confirm the Plan.

131. Furthermore, notwithstanding the procedural defects of the Debtor's § 1114 approach, the Debtor (and the E&A Committee) have repeatedly argued to this Court that the necessity standard is met because the TKNA Settlement is the best that can be obtained from TKNA without highly uncertain litigation and, as such, the amount of money that will be available for distribution is fixed. This *ipse dixit* reasoning fails. There can be no question that TKNA's insistence on negotiating only with the Debtor and the E&A Committee was intended to create the very argument presented on necessity. TKNA has little incentive to contribute more funds to this situation so long as the rigged structure has a chance to succeed. It has increased its settlement offer since the Petition Date by over $300 million without ever having to negotiate with the UAW. The facts do not demonstrate necessity; they demonstrate leverage obtained from TKNA manipulating its wholly owned subsidiary and buying off the smaller creditor constituencies, and nothing more.

RESPONSE: The Debtor disputes this conclusion for the reasons set forth in its Response to ¶130 of the UAW's Proposed Findings and in ¶¶89-92 of the Debtor's Proposed

Findings and Conclusions. There is no evidence whatsoever that TKNA has "manipulated" the Debtor. On the contrary, the evidence shows that the Debtor acted entirely independently and for reasons that were not in any way designed to provide benefit to TKNA. *See, e.g.,* **Debtor's Proposed Findings and Conclusions, ¶¶28-30**. That TKNA did not accept the UAW's various proposals made during the course of the 1114 Motion hearing speaks, at most, to the UAW's misguided strategies in this case. At bottom, this proposed conclusion amounts to nothing more than a challenge to the TKNA Settlement Agreement, which is not at issue on the Debtor's 1114 Motion. The UAW will retain the opportunity to object to the TKNA Settlement Agreement on the grounds asserted in this proposed conclusion and any others during the section 9019 and plan confirmation process

132. Plus, if the TKNA Settlement Agreement is not approved and the Debtor subsequently recovers more value for its claims—either through further negotiations or through litigation—the Retiree Benefits may need to be reduced by a lesser amount, or perhaps not at all. The Debtor cannot demonstrate on this record that its 1114 Proposal is "necessary to permit the reorganization," since the Court has yet to approve (or reject) the TKNA Settlement Agreement. Only after such approval or rejection should the Court entertain a § 1114 proposal application necessitated by the failure of the relevant authorized representative to reach a § 1114(a)(1)(B) agreement with the Debtor. Consequently, the Debtor at the present time has failed to carry its burden with respect to this § 1114 Element.

RESPONSE: The Debtor disputes this conclusion for the reasons set forth in its Response to ¶130 of the UAW's Proposed Findings and in ¶¶89-92 of the Debtor's Proposed Findings and Conclusions. The fact that things may change in this case in the future does not make the proposed modifications any less necessary under the current facts and circumstances.

c. The UAW Has Not Rejected The Debtor's Proposal Without Good Cause

133. With respect to this last element, as with all others, the burden of persuasion lies with the Debtor. However, "once the Debtor has shown that the [u]nion has refused to accept its proposal the [u]nion must produce evidence that it[s refusal] was not without good cause. Again, once the [u]nion has come forward with evidence on [the good cause of the union's refusal], the ultimate burden of persuasion . . . still lies with the debtor." *In re Am. Provisions Co.*, 44 B.R. 907, 910 (Bankr. D. Minn. 1984).

RESPONSE: Not disputed.

134. Most importantly, there is no evidence that the UAW has even rejected the Debtor's 1114 Proposal. First, the UAW did not reject the January 6 1114 Proposal in the hour between when the 1114 Proposal was made and the 1114 Application was filed. Second, even if the prior communications from the Debtor are able to be construed to be qualifying § 1114 proposals, the mere fact the UAW engaged in negotiations (and even provided counterproposals) does not amount to rejection in the labor (and thus the § 1114) context. *See NLRB v. Burkart Foam, Inc.*, 848 F. 2d 825, 830 (7th Cir. 1988) (An offer in the collective bargaining context remains "on the table" unless it is explicitly withdrawn or circumstances would lead the parties to reasonably believe the offer has been withdrawn; "the common law rule that a rejection or counterproposal necessarily terminates the offer has little relevance in the collective bargaining setting.").

RESPONSE: The Debtor disputes this conclusion for the reasons set forth in ¶¶89-92 of the Debtor's Proposed Findings and Conclusions. Given the zeal with which the UAW has opposed the 1114 Motion, the notion that it has not rejected the 1114 Proposal is not only ridiculous, but emblematic of the UAW's bad faith here. If the UAW truly contends that it has not rejected the Debtor's 1114 Proposal, and admittedly has not provided the Debtor with its preferred delivery structure and benefit levels in order to ensure the contested (and expensive) 1114 trial, that would cast significant doubt on the adequacy of the UAW's representation of the interests of the UAW Retirees *in this case* because every dollar spent on fruitless litigation is a dollar less than can be distributed to the UAW VEBA to fund healthcare benefits for the UAW Retirees.

135. Moreover, even if the UAW were found to have rejected some proposal from the Debtor, the law provides that while a simple preference for different treatment or a rejection without explanation is not sufficient, a union is justified in rejecting a proposal where the Debtor has failed to meet the substantive § 1114 elements. *See In re Matter of GCI, Inc.*, 131 B.R. 685, 696 (Bankr. N.D. Ind. 1991) ("[T]he union is not permitted to simply refuse to accept a proposal. Instead, it must articulate the reasons it is unwilling to do so."); *In re Ind. Grocery Co., Inc.*, 138 B.R. at 196 (Union's preference for treatment in a liquidation was not good cause to reject the proposal); *In re K&B Mounting, Inc.*, 50 B.R. at 465 ("[A] union probably has good cause to reject 'any proposal that is not necessary for the reorganization of the debtor or that unfairly burdens the unionized workers relative to other parties.'"). Furthermore, at least one court has

found that a union had good cause for rejecting a § 1113 proposal when the debtor refused to negotiate the economics of the proposal and would only negotiate the mechanics, which is exactly what the Debtor has done here. *In re Pinnacle Airlines Corp.*, 483 B.R. 381, 423 (Bankr. S.D.N.Y. 2012).

RESPONSE: The Debtor disputes this proposed conclusion to the extent it assumes the Debtor's 1114 Proposals "failed to meet substantive §1114 elements" for all the reasons stated in response to the UAW's Proposed Findings and in the Debtor's own Proposed Findings. Further, the UAW's reliance on *In re Pinnacle Airlines Corp.*, 483 B.R. 381, 423 (Bankr. S.D.N.Y. 2012) is misplaced. In *Pinnacle*, the court explained that "parts of a debtor's section 1113 proposal may be non-negotiable if they are essential to a debtor's reorganization" and when that is the case (as it is here), "a debtor may not be obligated to reduce the total amount of cost savings requested in its original proposal. . . ." *Id.* at 421.

136. The Debtor contends that the UAW has rejected the Debtor's proposal without good cause because it has not put forth counterproposals except those that required modifying the terms of the TKNA Settlement Agreement. *Debtor's Proposed FoF and CoL* at ¶112. The irony of this argument is apparently lost on the Debtor. The Debtor's proposal to the UAW effectively amounted to "offering" the UAW treatment according to the terms of an agreement the Debtor had *already entered into* and to which the UAW was not a party, yet which unquestionably dictated the § 1114 treatment of both the E&A Retirees and the UAW Retirees. The Debtor complains that the UAW's only counterproposals contemplated re-writing the terms of the TKNA Settlement Agreement, but this is an entirely reasonable position, given that the UAW was excluded from the discussions that led to the TKNA Settlement Agreement. The Debtor cannot present a "take-it-or-leave-it" proposal to the UAW, and then complain that the UAW rejected it without good cause simply because the UAW will not abandon its right to negotiate over what it would have to take under a § 1114 modification. The simple fact is that the TKNA Settlement Agreement is the relevant agreement fixing the § 1114 modifications for the UAW Retirees and the E&A Retirees. While the Debtor negotiated this agreement with the E&A Retirees and obtained a § 1114(e)(1)(A) agreement with the E&A Committee, the Debtor never negotiated this agreement with the UAW. The Debtor's attempts to create a § 1114 process after executing the TKNA Settlement Agreement fail. The true § 1114 process took place when the TKNA Settlement Agreement was negotiated, and the UAW was excluded from that process.

RESPONSE: The Debtor disputes this proposed conclusion for reasons stated in its Response to ¶¶10-28, 79 and 101 of the UAW's Proposed Findings and in ¶¶16-34 of the Debtor's Proposed Findings and Conclusions.

137. In addition, notwithstanding the substance of any counterproposals made by the UAW, the law is clear that the UAW is entitled to reject any proposal that unfairly burdens the unionized workers relative to other constituencies in the case. *See In re Ind. Grocery Co., Inc.*, 138 B.R. at 196. As set forth in detail above, the Debtor's 1114 Proposal is patently unfair and inequitable, which would further justify rejection by the UAW regardless of the form or substance of any UAW counterproposal that followed.

RESPONSE: The Debtor disputes this proposed conclusion. The Debtor's 1114 Proposal treats all parties, including the UAW, fair and equitably. *See* **Debtor's Proposed Findings and Conclusions, ¶¶93-103**.

138. For the forgoing reasons, the 1114 Application is denied.

RESPONSE: For the reasons articulated in the Debtor's Proposed Findings and Conclusions and in the above Response to the UAW's Proposed Findings, the Debtor's 1114 Motion should be granted.

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Respectfully submitted,

THE BUDD COMPANY, INC.

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