Dated: July 19 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 06-30601
	)	
G & C Foundry Company, Ltd.,	)	Chapter 11
	)	
	)	
Debtor.	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION AND ORDER REGARDING MOTION TO REJECT COLLECTIVE BARGAINING AGREEMENT

This case is before the court on Debtor's motion [Doc. # 66] for an order under 11 U.S.C. § 1113(c) authorizing rejection of its collective bargaining agreement with Local No. 714, United Electrical Radio and Machine Workers of America (the "Union"), the Union's response [Doc. ## 97, 145], and Debtor's reply [Doc. ## 108, 144]. The court held an evidentiary hearing on the motion on June 23, 2006, and a continued hearing on June 30, 2006.

This memorandum of decision constitutes the court's findings of fact and conclusions of law under Fed. R. Civ. P. 52, made applicable to this contested matter by Fed. R. Bankr. P. 9014 and 7052. Regardless of whether or not specifically referred to in this decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the following reasons, Debtor's motion will be denied.

FACTUAL BACKGROUND

Debtor is a gray and ductile iron foundry that operates in Sandusky, Ohio. Ownership of the business has changed twice in the past ten years, most recently in August 2003 when it was acquired by Clarke Castings. The Union is the exclusive bargaining representative of Debtor's hourly employees. After the 2003 acquisition, Debtor and the Union continued the collective bargaining agreement ("CBA") then in force. Shortly thereafter there was a downturn in Debtor's business. Many Union members were laid off, and those who remained were working less than forty hours per week. As a result, in early 2004, Debtor sought to modify the CBA in order to freeze the pension plan of hourly employees, eliminate incentive pay and attendance bonuses, and obtain vacation and health care concessions. Although negotiations with the Union occurred, no agreement was reached. Nevertheless, sales began to increase, workers were recalled from layoff, new employees were hired, and employees were working considerable overtime through the balance of 2004 and into 2005.

In mid-2005, Debtor and the Union negotiated a two-year renewal contract, effective July 1, 2005 through June 30, 2007. The parties agreed to leave pension benefits and health insurance benefits unchanged, with Debtor continuing to provide a self-insured health care plan that requires no employee premium contributions. During the 2005 negotiations, Debtor told the Union that it had more orders than it could handle and was turning work away. It, therefore, asked the Union to agree to a continued wage freeze, after two years without an increase, in order to help the company pay for a new molding line that would expand Debtor's capacity. The parties ultimately agreed to a small increase of 15 cents per hour during the contract and the capacity improvements were completed.

In mid-January, 2006, Debtor experienced the loss of business of its largest customer, the hydraulic valve division of Parker Hannifin ("Parker"). Parker's business represented approximately two-thirds of Debtor's sales of $18 million in 2005. As a result of this loss of business, both salaried and hourly employees were laid off. Before the layoff, there were approximately 150 hourly employees in the bargaining unit. By mid-March 2006, there were only 42 bargaining unit members still working.

James Gagan, who is a certified public accountant as well as Debtor's chief financial officer and general manager, testified at the hearing on Debtor's motion regarding negotiations with the Union. He testified that Debtor can no longer meet the cost of benefits under the CBA, which Gagan estimated to be $1.6 million in 2005. Although the decrease in the workforce will result in a decrease in cost of benefits, Debtor will still experience large expenses under its self-insured health care plan. In the first few months of 2006, Debtor incurred liabilities up to $90,000 per month for employee health care. Gagan credibly explained that a self-insured health care plan is no longer feasible given Debtor's reduced size. Under such

a plan, Debtor is at risk for catastrophic expenses that it simply cannot pay. Thus, on February 27, 2006, Debtor presented to the Union a proposal to modify the pay and benefits provided under the existing CBA. Union members unanimously passed a motion not to vote on the proposal and to authorize its Negotiating Committee to reject any further proposals for concessions. The Union reported the outcome of the vote to Debtor. On March 31, 2006, Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

On April 10, 2006, Debtor presented to the Union a second proposal for concessions under the CBA. The proposal contained all but one of the modifications outlined in the February 27 proposal,[1] as well as several additional modifications. A summary of the changes in the April 10 proposal is as follows:

Overtime: Changes overtime from daily to weekly by eliminating overtime pay unless the employee has worked in excess of forty hours in a work week. Currently employees are paid overtime for hours in excess of 8 hours in a workday, as well as for hours worked on Saturday and Sunday.

Holidays: Reduces paid holidays from eleven to eight.

Vacations: Caps vacation time at three weeks. Currently employees with more than twelve years of seniority earn up to six weeks vacation, depending upon length of service.

Pension Plan: Freezes the current defined benefit plan permanently.

Subcontracting: Expressly allows management the right to subcontract for "legitimate reasons." The CBA is currently silent on the issue of subcontracting.

Insurance: Eliminates accidental death and dismemberment, life, dental and retiree insurance. Also eliminates the existing self-insured health plan and replaces it with an indemnity insurance plan from United Healthcare with monthly employee premium contributions of $214 for family coverage and $78 for individual coverage as well as significantly higher out-of-pocket costs.

Wages: Eliminates all incentive pay.

Clean-up time: The twelve-minute personal clean-up time permitted at the end of a shift must be used to clean up around the employee's work area.

FMLA: Eliminates employees' ability to exempt two weeks vacation time at the employee's option from the requirement that all available paid time off be used for FMLA leave.

[1] The February 27 proposal included a provision that limited insurance benefits to the end of the month in which an employee is laid off, rather than providing such benefits for the thirteen week period following layoff as provided in the CBA.

[Debtor's Ex. B].

Gagan testified that he is the decision maker with respect to negotiations with the Union and testified regarding the process he employed in developing the April 10 proposal. He explained that he used "zero-based budgeting" in which he assumed sales would continue at their current level. Under this approach, Gagan started from zero, added the non-labor cost of sales at their current level, added base wages, and then added benefit costs that he determined would not exceed sales less all other expenses. [*See* Debtor's Ex. C]. With respect to the proposed health care plan, Gagan enlisted the services of a broker to assist him in finding a substitute plan. According to Gagan, the April 10 proposal constitutes the minimum concessions necessary for the company to survive.

After the February 27 proposal, the Union had requested of Debtor certain information that included, among other things, a calculation of the anticipated cost savings of each of the proposed concessions. In response, in March 2006, Debtor provided a list of estimated savings, without any indication of how the estimated savings were calculated. Although requested to do so after the April 10 meeting, Debtor was unable to provide documentation supporting many of its estimates. As Gagan testified, using the zero-based budget model, he did not calculate specific savings that the terms of the proposal would provide and, therefore, did not generally consider historical data to determine the savings that any particular proposed term would provide the company.

On April 20 and 25, 2006, the Union requested additional information of Debtor. On May 1, 2006, Debtor provided to the Union various financial statements, including profit and loss statements, balance sheets and cash flow statements, and responded to specific requests for information made by the Union. [*See* Hart Decl., Ex. 16 attached thereto]. On May 15, 2006, the Union requested additional information to which Debtor responded on May 18. Debtor's responses included information regarding salaried employees. Specifically, Debtor indicated that the proposal's provisions for vacations and holidays will be similarly imposed on non-union employees, both Union and non-union employees will have the same health care plan, accidental death and dismemberment and life insurance will also be eliminated for non-union employees, and non-union employees have already had their defined benefit pension plan and retiree benefits frozen. Debtor also indicated that it did not maintain separate records concerning overtime and incentive pay but that it would make its payroll records from which it contends such information can be gleaned available to the Union. Although several union officials spent several hours perusing boxes of payroll records, they were unable to "glean" the information sought from them. With respect to records regarding entitlement to vacation, Debtor initially indicated that it did not keep the records requested by the

Union. However, it later informed the Union that various supervisors did keep such records and provided those to the Union on June 14, 2006.

According to Gagan, throughout the period after the April 10 meeting, Debtor made clear its willingness to meet again to discuss the proposal. However, the Union membership did not authorize the Negotiating Committee to bargain with Debtor until May 18, 2006. [Hart Decl. ¶ 32]. In the meantime, on May 8, 2006, Debtor filed the motion to reject the CBA that is now before the court.

On May 25, 2006, Debtor, represented by Gagan, Attorney Michael Frantz and Production Manager Neil Poffenberger, met with the Union, which was represented by Alan Hart, the Union Field Organizer, as well as the Union president and several others. Frantz acknowledged at the meeting that there had not been any major disputes regarding subcontracting in the past and had previously stated that Debtor has no plans to do any new subcontracting during 2006 -2007. [Hart Decl. ¶ 40 and attached Ex. 16, p.2]. When asked regarding the FMLA provision of reserving two weeks vacation, Debtor did not know if anyone had ever done this and does not keep any records to so indicate. Nevertheless, without further explanation, Frantz stated that the proposal would be beneficial to the company. [*Id.* at ¶ 48]. At the May 25 meeting, Debtor indicated new work was being secured that should allow employees to work five-day work weeks. In response to Hart's questions at the meeting, Gagan stated that it was Debtor's plan to emerge from bankruptcy between September and November of 2006. Gagan further stated that Debtor wanted to lower its labor costs permanently and would reject any counter proposal that concessions be temporary. [*Id*. at ¶ 50].

After further discussion, the Union presented a counter proposal to Debtor at the May 25 meeting. While not accepting Debtor's proposals, the Union's counter proposal moved on several proposed modifications, including those concerning overtime, holidays, vacations, and the pension plan. But it rejected changes to the clean-up time, subcontracting and FMLA provisions as the Debtor had not demonstrated any savings would result from those modifications. It rejected the elimination of incentive pay, as it believed it to be harmful to productivity and would have a disparate impact on some employees' pay, and it rejected limiting the number of weeks laid off employees would receive benefits, since recalls rather than layoffs were anticipated. The Union also rejected elimination of accidental death and dismemberment, life and dental insurance. Finally, and perhaps most significantly, the Union rejected the health care plan as proposed by Debtor but indicated a willingness to negotiate a reasonable alternative. The Union also included a provision that would require Debtor to restore to the seniority list all employees laid off in 2006, waiving retroactively the seniority and recall rights notification requirement in the CBA.

[Union Ex. 2].

Debtor responded in writing that same day, rejecting the Union's counter proposal in its entirety and stating that it needs the relief requested in its April 10 proposal. It further stated that it cannot agree to retroactively waive the seniority and recall rights notification requirement. [Union Ex. 4]. Debtor did, however, express a willingness to consider an alternative health care plan if it is at or below the cost of Debtor's proposed plan. The parties had discussed obtaining a quote for health insurance through the Steelworkers Fund. Although they had agreed to meet again on May 26, the parties agreed that there would be no purpose in meeting unless they had obtained the quote from the Steelworkers Fund, which would not yet be available. They agreed then to meet on June 2, 2006.

Because the Steelworkers Fund quote was not actually received until June 10, 2006, the parties did not meet again until June 16. At that time, the Union submitted its next counter proposal. It had learned that the Steelworkers health care plan would not be feasible. The Union, therefore, changed its approach to the healthcare issue and accepted the plan proposed by Debtor if debtor agreed to pay deductibles in excess of $100 per individual and $300 per family per year[2] and if the monthly employee premium contributions were $60 for individual coverage and $120 for family coverage. The other terms of the Union's counter proposal remained the same as its May 25 proposal. [Union Ex. 10].

In response, Debtor withdrew its request to modify the FMLA provision of the CBA and otherwise addressed only the proposed subcontracting provision and the health care plan. It proposed including language that management has the right to subcontract following notification to the Union. It also offered as an option to the Union a second health care plan from the same insurer, albeit a more costly plan for employees, and indicated it would agree to either the first or the second plan. [Union Ex. 11]. The Union's second June 16 counter proposal modified Debtor's subcontracting language to require not only notification but also discussion with the Union before subcontracting. It also accepted the originally proposed health care plan as set forth in its earlier counter proposal with some adjustment in prescription costs. An additional concession included giving up a second paid holiday. The remaining terms of the Union's counter proposal remained unchanged. [Union Ex. 12].

Debtor's final proposal on June 16 included the same terms proposed on April 10 with the following exceptions. Debtor withdrew its proposed modification of the FMLA provision and agreed to include

[2] Under Debtor's proposed health care plan the deductible for individuals is $500 for network services and $1,000 for non-network services; the deductible for families is $1,500 for network services and $3,000 for non-network services. [Debtor's Ex. B, p. 3].

language regarding subcontracting rights to require Debtor to first notify the Union and, if requested, to discuss alternatives with the Union. It also agreed that if the Union Negotiating Committee unanimously recommended Debtor's proposal and the union members ratified, Debtor would waive the seniority and recall rights notification requirement in the CBA as proposed by the Union. [Debtor Ex. 5]. The Union accepted the modification regarding subcontracting but rejected the remaining terms of Debtor's proposal.

Debtor and the Union met again on June 27 and 29, 2006.[3] The Union offered a counter proposal that offered additional concessions to the terms of the CBA. In addition to concessions previously made, the Union agreed to capping vacations at three weeks for all employees except those entitled to five or more weeks, in which case vacation entitlement would be capped at four weeks. It also agreed to freeze the pension for a period of one year and to limit entitlement to insurance coverage after an employee is laid off to eight weeks, down from thirteen weeks under the CBA. And finally, it doubled the amount of health insurance deductibles that its members would pay to $200 and $600 for individuals and families, respectively, and increased the monthly employee premium contribution that members would pay to $70 for individuals and $150 for family coverage. [Debtor Ex. G]. Debtor responded by proposing to extend the contract for three years, through June 30, 2010, and freezing the pension plan for the life of the contract. It also accepted the Union's offer to accept the proposed health care plan but conditioned its acceptance on Debtor paying only 65% of the monthly premiums. [Debtor's Ex. F]. According to Gagan, the insurance company had informed Debtor that the premium rates had already increased by six percent since originally quoted. The Union refused to extend the contract for three years and did not accept Debtor's proposal regarding health care. [Union Ex. 13].

Debtor's final proposal, submitted to the Union on June 29, 2006, contains the same terms proposed in its April 10 proposal with the exception of the FMLA provision that it had previously withdrawn and the notification and discussion language to which it had previously agreed to add to its subcontracting provision. In addition, Debtor proposes to pay only 65% of the monthly health insurance premiums and, the Union having rejected a three-year extension of the contract, to permanently freeze the pension plan.

At the hearing, Gagan repeatedly testified that the April 10 proposal was the minimum necessary to survive. With respect to the subcontracting provision, he testified that the current CBA does not preclude subcontracting and Debtor has in fact subcontracted certain jobs but that subcontracting has been the subject

[3] On June 23, 2006, the court held a hearing on Debtor's motion to reject the CBA. The hearing was not concluded and was scheduled to be continued on June 30, 2006. With strong encouragement from the court, the parties continued to negotiate during this interim period. The proposals made by the parties during these negotiations were presented to the court at the June 30 hearing for consideration in determining Debtor's motion.

of grievances by the Union. He has made no calculation, however, regarding any savings or economic benefit that would result from this provision. Gagan testified that Debtor's proposal to require employees to use their twelve minutes of personal clean-up time to instead clean their work area would result in savings in maintenance costs. However, he testified that no calculation of savings was actually made. Debtor's monthly budget under the proposed contract as compared with the existing contract shows no anticipated savings in maintenance costs. [*See* Debtor Ex. C].

In support of the necessity of Debtor's proposal, it offers its monthly and annual budget at current business levels. [*Id.*] Gagan testified that Debtor currently has average monthly base sales of approximately $500,000 plus an additional $81,000 in surcharges, for total monthly sales of $581,000. With the proposed modifications to the CBA, and after all expenses are deducted, including capital replacement costs[4] and labor costs, Debtor's budget shows a negative monthly "cash profit" of $2,358. Under the current CBA and considering the average monthly health care costs experienced in 2005, Debtor's budget shows a negative monthly "cash profit" of $50,201. Debtor has also calculated a budget under the existing CBA that includes average monthly health care costs since January 2006. Those monthly costs are $44,000 more than Debtor's experience in 2005. Gagan could not explain this drastic increase but testified that it could be an aberration. Nevertheless, he indicated that is the very problem with a small company being self-insured – it is exposed to risks that it cannot afford.

Regarding future prospects for the company, Gagan testified that he expects monthly sales to increase by approximately $100,000 by November or December of 2006. He testified that all employees are now working a five-day work week due to increased production and he will be recalling some people from layoff. Gagan also testified that, in the event of a strike if the CBA is rejected, he does not believe the company would be shut down.

Debtor also offers the testimony of Todd Peter, employed by Evarts Capital, and retained by Debtor as a financial advisor both pre-petition and post-petition. Peter testified that he has reviewed Debtor's balance sheet and income data at least monthly and has analyzed its finances and its need for the proposed modifications to the CBA. Peter's testimony was clear that he was not familiar with the negotiations that had occurred between Debtor and the Union but was familiar only with Debtor's April 10 proposal. He testified that Gagan had crafted the proposal and Peter reviewed it in order to understand the cost and develop financial projections based on the cost of the proposal. Peter's testimony shed no additional light

[4] Capital replacement costs in the amount of $15,000 per month are included in Debtor's budget. Gagan testified, however, that Debtor is not in need of any capital improvements at this time.

on cost or economic considerations of any particular term of the April 10 proposal other than that provided by Gagan. Peter opined that the April 10 proposal is the minimum reduction in labor costs necessary to successfully reorganize or effect a sale under 11 U.S.C. § 363. He testified that reorganization will require outside capital and that the April 10 proposal falls within a narrow band of what is required to attract outside investors. He also testified that Debtor's reorganization will likely result in a substantial deficiency in recovery by unsecured creditors and that equity has no realistic prospect of recovery.

LAW AND ANALYSIS

The rejection of labor contracts in bankruptcy is governed by 11 U.S.C. § 1113. In *NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 526 (1984), the Supreme Court allowed a debtor to reject a collective bargaining agreement unilaterally under 11 U.S.C. § 365 by showing that the agreement "burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract." In response to that decision, Congress enacted § 1113 in order to "reconcile the reorganization imperatives of a Chapter 11 debtor with the collective bargaining interests of organized employees." *In re Northwest Airlines Corp.*, 2006 WL 1776455, *5 (Bankr. S.D.N.Y. June 29, 2006). In doing so, Congress imposed certain procedural and substantive standards that must be met before a debtor can reject a collective bargaining agreement. Section 1113 was designed to create "an expedited form of collective bargaining with several safeguards designed to insure that employers did not use Chapter 11 as medicine to rid themselves of corporate indigestion." *In re Century Brass*, 795 F.2d 265, 272 (2d Cir. 1986).

Section 1113 provides in relevant part as follows:

> (a) The debtor in possession . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.
>
> (b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall--
>
> > (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
> > (B) provide . . . the representative of the employees with such relevant information as is necessary to evaluate the proposal.
>
> (2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the

> trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.
>
> (c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that--
>
> > (1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);
> > (2) the authorized representative of the employees has refused to accept such proposal without good cause; and
> > (3) the balance of the equities clearly favors rejection of such agreement.

Courts often examine the requirements necessary for rejection of a collective bargaining agreement under the nine-factor test articulated in *In re American Provision Co.*, 44 B.R. 907 (Bankr. D. Minn. 1984). *See, e.g., In re Walway Co.*, 69 B.R. 967, 972 (Bankr. E.D. Mich.1987); *In re Amherst Sparkle Mkt., Inc.*, 75 B.R. 847, 849 (Bankr. N.D. Ohio 1987); *In re Family Snacks, Inc.*, 257 B.R. 884, 892 (B.A.P. 8th Cir. 2001). Those factors, which the parties agree should be applied in determining Debtor's motion, are as follows:

> 1. The debtor must make a proposal to the union to modify the collective bargaining agreement.
> 2. The proposal must be based on the most complete and reliable information available at the time of the proposal.
> 3. The proposed modifications must be necessary to permit the reorganization of the debtor.
> 4. The proposed modifications must assure that all creditors, the debtor and all the affected parties are treated fairly and equitably.
> 5. The debtor must provide the union such relevant information as is necessary to evaluate the proposal.
> 6. Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the union.
> 7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.
> 8. The union must have refused to accept the proposal without good cause.
> 9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.

American Provision Co., 44 B.R. at 909. While Debtor has the burden of proving each factor by a preponderance of the evidence in order to reject a contract, the burden of going forward with evidence can shift to the union, particularly as to factors five, seven and eight. *Id.*; *Amherst Sparkle Mkt., Inc.*, 75 B.R. at 849. The court will separately address each of the above factors.

1. Postpetition Proposal

There is no dispute that Debtor has presented a proposal to the Union after its Chapter 11 petition was filed but before filing its motion to reject the CBA. The court notes, however, that one of the terms of the proposal is to eliminate retiree insurance. It is not clear that such proposal to modify retiree benefits was presented to an authorized representative of the retirees as required under § 1114(f) and (g).[5] The court need not resolve that issue, however, since it finds that Debtor has not otherwise met its burden under § 1113.

2. Complete and reliable information

Debtor has failed to demonstrate that its proposal was based on the most complete and reliable information available at the time of the proposal. Debtor based its proposal on its zero-based budgeting analysis and simply took a snapshot view of its current financial situation. Although Gagan testified that new business was on the horizon and he expected to increase monthly base sales by $100,000 before the end of 2006, there is no evidence that those projections were considered in developing the proposal presented to the Union. *See Truck Drivers Local 807 v. Carey Transportation Inc.*, 816 F.2d 82, 89 (2d Cir. 1987) (explaining that it is "impossible to weigh necessity as to reorganization without looking into the debtor's ultimate future and estimating what the debtor needs to attain financial health"); *In re Mesaba Aviation, Inc.*, 341 B.R. 693, 712-13 (Bankr. D. Minn. 2006) (explaining that "complete and reliable" information must include "a thorough analysis of all of the incidents of income and expense that would bear on [the debtor's] ability to maintain a going concern in the future" and that the union's objections must "go to whether the Debtor mustered a sufficiently comprehensive, detailed portrait of its financial posture and prospects before it formulated its proposals"). The inadequacy of the snapshot view of the revenue side of Debtor's financial situation as a basis for the relief requested is underscored by the fact that at least one of the proposed changes–freezing the defined benefit pension plan–is presented as permanent.

Debtor responded to the Union's request for information needed to evaluate several terms of

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[5] Section 1114 governs the modification of retired employees' insurance benefits. 11 U.S.C. § 1114(a). It requires a debtor to "make a proposal to the authorized representative of the retirees" after filing a petition but before filing an application seeking modification of the retiree benefits. *Id.* § 1114(f)(1)(A). The procedural and substantive requirements for modification of retiree benefits generally track those imposed under § 1113. *See id.* § 1114(f) and (g). Section 1114(c)(1) provides that "[a] labor organization shall be, for purposes of this section, the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, unless (A) such labor organization elects not to serve as the authorized representative of such persons, or (B) the court, upon a motion by any party in interest, after notice and hearing, determines that different representation of such persons is appropriate."

In this case, the Union has consistently responded to Debtor's proposed elimination of retiree insurance, stating that it "does not legally represent current retirees and cannot legally negotiate away their life insurance." [*See* Union Ex. 2, 10, 13; Debtor Ex. G]. Although § 1114(c)(1) appears to provide authority for the Union to represent retirees for purposes of negotiating modifications to their retiree benefits, it is not clear whether the Union has elected not to serve in that capacity, as there may certainly be conflict of interest concerns, *see In re Century Brass Products, Inc.*, 795 F.2d 265, 275-76 (2d Cir. 1986), or whether it believes it is not legally permitted to do so. It is clear, however, that retirees were not represented in the negotiating process.

Debtor's proposal, including elimination of incentive pay and modifying overtime pay provisions, by stating that such information could be gleaned from the payroll records. Although Debtor provided an estimation of the cost savings for each proposal, it obviously had not itself "gleaned" such information from its records.

3. Necessity of the proposed modifications

Under § 1113, the proposed modifications to the CBA must be "necessary to permit the reorganization of the debtor." 11 U.S.C. § 1113(b)(1)(A). After enactment of the statute, two different interpretations of the necessity requirement emerged in decisions from the Second and Third Circuits. In *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*, 791 F.2d 1074 (3d Cir. 1986), the Third Circuit construed necessity strictly to signify only modifications that the debtor is constrained to accept to prevent a debtor's liquidation, finding that the court should not focus on the debtor's general long-term viability. *Id.* at 1088-89. The Second Circuit rejected such a restrictive construction. *Carey Transportation, Inc.*, 816 F.2d at 89-90. In doing so, the court considered the fact that a debtor is required to negotiate in good faith over the proposed modifications and truly minimal changes would leave no room for negotiation. *Id.* at 89. It also considered the backdrop of requirements for confirmation of a Chapter 11 plan under § 1129, requiring a court to determine that neither liquidation nor a need for further reorganization is likely to follow. *Id.* The court concluded that "the necessity requirement places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully." *Id.* at 90.

The Sixth Circuit has not interpreted § 1113(b)(1)(A). The majority of courts outside of the Third Circuit have adopted the Second Circuit's construction of the statute, *see Mesaba Aviation, Inc.*, 341 B.R. at 731 (collecting cases), as have bankruptcy courts within the Sixth Circuit, *e.g.*, *Amherst Sparkle Mkt., Inc.*, 75 B.R. at 851. Nevertheless, even applying this more flexible standard, Debtor has failed to meet its burden in this case to prove that its proposed modifications to the CBA are necessary.

In *Mesaba*, the debtor's proposed modifications to the CBA were based on a business plan developed by the debtor that projected revenues and expenses over several years. *Id.* at 712. Because the business plan dictated the ultimate depth of labor cost reduction, the court found it necessary to examine the plan's assumptions and methodology. *Id.* at 731. Similarly, in this case, Debtor has based its proposal on its zero-based budget analysis, [*see* Debtor's Ex. B], which, according to Gagan, has dictated the extent of the proposed modifications presented to the Union. However, as indicated above, Debtor's approach provides only a snap-shop view of its financial condition and includes no projection of revenues, which

Gagan testified he fully expects to increase substantially by the end of the year. Such a myopic view cannot be the sole basis for a good faith proposal that union members forego benefits previously negotiated by them and is insufficient proof in this case that the proposed modifications, which Debtor insists must be permanent, are necessary.

It is clear that the driving force behind Debtor's motion to reject the CBA is its inability to continue a self-insured health care plan. Debtor's workforce has decreased to such an extent that such a plan is obviously no longer feasible, and the Union does not seriously contest this fact. According to Gagan, Debtor has experienced medical claims as high as $98,000 per month in the first few months of 2006. While such extensive claims may not be the norm, as indicated by the average monthly expense for health care claims of $54,000 in 2005, the financial risk imposed on Debtor under a self-insured plan is clearly not feasible with a work force of only 42 hourly employees and approximately 15 salaried employees, even with the anticipated increase in business. Debtor enlisted the services of a broker to find an insurer that would provide an indemnity plan for a company in bankruptcy. Debtor investigated other plans, however, the plan proposed to the Union was least costly for employees. Although Debtor's final proposal increases the amount of the monthly premium that will be paid by employees since the April 10 proposal, the premium has been increased by the insurer even since that time. Debtor's proposal need not be the absolute minimal change required - it need only be a necessary modification to enable Debtor to reorganize. The Union does not argue that the self-insured plan should not be modified. The court finds that Debtor has met its burden with respect to its proposed modification of the health care plan.

Nevertheless, Debtor must prove the necessity of its entire proposal. It cannot rely on the necessity of one key term of the proposal in order to bootstrap a wish list of modifications of the CBA for which there is no evidence supporting a finding of necessity. In this case, Debtor's final proposal includes modifications for which there is no apparent benefit with respect to increasing the likelihood of successful reorganization. For example, Debtor's insistence that subcontracting language be added to the CBA to make clear the company's right to subcontract is not necessary where the CBA does not now preclude subcontracting. In any event, Debtor has not demonstrated that subcontracting work will result in any economic benefit to the company, except perhaps in circumstances where it otherwise lacks the capacity to perform the work. Debtor has in the past, and does now, have the right to subcontract under those circumstances. Moreover, during negotiations with the Union, Frantz acknowledged that there had not been any major disputes regarding subcontracting in the past and stated that Debtor has no plans to do any new subcontracting in 2006 to 2007, the period in which the CBA is effective. Although during their negotiations, the Union

ultimately accepted the proposal to include subcontracting language, as modified by the Union, Debtor has failed to demonstrate that this term of its proposal has any bearing on its ability to reorganize.

Debtor's proposal also modifies a provision of the CBA that allows employees twelve minutes of personal clean-up time at the end of their shift to require them to use the time to clean up their work area. Gagan testified that this will result in maintenance cost savings. However, no calculation regarding such savings was made and, as indicated earlier in this opinion, Debtor's monthly budget under the contract with the proposed modifications as compared with the budget under the existing contract shows no anticipated savings in maintenance costs. There is no evidence suggesting that this modification will have any influence on Debtor's ability to reorganize.

The remaining terms of the proposal dealing with overtime, holidays, vacations, incentive pay, pension plan, and insurance other than medical, will obviously result in cost savings to Debtor. However, on the evidence before the court, it cannot determine that each of these terms are necessary. The fact that a proposal will decrease a debtor's expenses is not alone sufficient evidence of necessity. Again, Debtor's snap-shot view of its finances, without any projection to account for expected increases in sales, is an insufficient basis on which the court can find that Debtor's proposals are necessary. This is especially true in light of Debtor's insistence that all modifications, including freezing the pension plan, be permanent.

The court has also considered Peter's testimony that Debtor's proposal contains the minimum reductions in labor costs necessary to reorganize. Although he testified in a conclusory fashion that the modifications are necessary to reorganize and to attract investment capital that will be necessary for reorganization, it is not clear on what facts his opinion is based. There is no evidence that Debtor is targeting any particular operating margin, or what operating margin would be required in order to attract investment capital. Peter did not enlighten the court as to how any particular term of the proposal would influence Debtor's ability to reorganize except to state that Debtor's employee compensation package is too high for its income level. This is no doubt true, presumably in large part because of Debtor's self-insured health care plan. But it does not inform the court as to the necessity of the remaining terms of the proposal. As discussed above, it does not appear that at least some of the terms will have any bearing at all on Debtor's ability to reorganize. Although Peter testified that he reviewed Debtor's balance sheet and income data at least on a monthly basis and helped prepare Debtor's budget, there is no indication that he has considered anything other than the snap-shot view of Debtor's finances that the court has already found to be an insufficient basis on which to determine necessity. As such, the court does not credit Peter's opinion testimony regarding necessity.

For the foregoing reasons, the court finds that Debtor has not met its burden of showing that its proposal is necessary to permit its reorganization.

4. Fair and equitable treatment of all parties

This factor requires Debtor to assure that "all creditors, the debtor and all of the affected parties are treated fairly and equitably." 11 U.S.C. § 1113(b)(1)(A). The purpose of this requirement "is to spread the burdens of saving the company to every constituency while ensuring that all sacrifice to a similar degree." *Carey Transp.*, 816 F.2d at 90 (quoting *Century Brass*, 795 F.2d at 273). It does not, however, require that all parties be treated identically. *Mesaba Aviation, Inc.*, 341 B.R. at 749 (citing *Walway Co.*, 69 B.R. at 974 (explaining that equity under § 1113 "means fairness under the circumstances, not a comparative dollar-for-dollar concession")); *In re Allied Delivery System Co.*, 49 B.R. 700, 703 (Bankr. N.D. Ohio 1985). The "requirement of equivalent sacrifice does not mean that the debtor must formally propose his plan of reorganization prior to seeking rejection of the collective bargaining agreement. Rather the court must look not only to the changes proposed, but also to concessions to be made by creditors, stockholders or owners of the debtor, as well as by other nonunion employees." *In re Kentucky Truck Sales, Inc.*, 52 B.R. 797, 802 (Bankr. W.D. Ky. 1985) (cited approvingly in *Carey Transp.*, 816 F.2d at 91 (recognizing that a § 1113 application will almost always be filed before an overall reorganization plan can be prepared)). Recognizing the difficulty in comparing the differing sacrifices of parties in interest, "courts apply a flexible approach in determining 'fair and equitable treatment.'" *Northwest Airlines Corp.*, 2006 WL 1776455 at *11.

In this case, the evidence shows that both Union and non-Union employees will have the same health care plan, that accidental death and dismemberment and life insurance will be eliminated for non-union as well as union employees, and that non-union employees have already given up their defined benefit pension plan and retiree benefits. The proposal's provisions for vacations and holidays will also be imposed on non-union employees. In addition, Peter testified that Debtor's reorganization will result in a substantial deficiency in recovery by unsecured creditors and that equity has no prospect of recovery. Although the specific level of concessions that will be required of unsecured creditors is unclear at this time since a plan of reorganization has not yet been filed, the Union did not challenge Peter's testimony in this regard at the hearing. The court finds this evidence sufficient to demonstrate that all constituencies will be required to share in the burden of Debtor's reorganization and that Debtor has met its burden under this factor.

5. Provision of relevant information to the Union

After making a proposal to the union, a debtor must provide the union "with such relevant information as is necessary to evaluate the proposal." 11 U.S.C. § 1113(b)(1)(B). The purpose of this

provision is to promote the process of collective bargaining before involving the bankruptcy court. *Mesaba Aviation, Inc.*, 341 B.R. at 713-14. Debtor has the initial burden of producing evidence as to what information was provided. The burden then shifts to the Union to provide evidence that the information provided was not the relevant information that was necessary for it to evaluate the proposal. *Id.* at 713; *American Provision Co.*, 44 B.R. at 909-10.

In this case, Debtor provided various financial information to the Union and explained the treatment of management employees as well. At the hearing, the Union produced evidence that Debtor failed to provide requested records needed to evaluate any economic benefits relating to certain terms of Debtor's proposal, specifically, the terms relating to clean-up time, overtime, subcontracting, and incentive pay.[6] Debtor's response was that it did not have the records the Union was requesting but, with respect to records regarding overtime and incentive pay, the requested information could be gleaned from Debtor's payroll records that it made available to the Union.[7] While Debtor must provide any relevant documentation that it has, it cannot be faulted under this factor for not producing nonexistent records. *See Mesaba Aviation, Inc.*, 341 B.R. at 719. As discussed above, Debtor's failure to perform the financial analysis necessary to properly evaluate the terms of the proposal is more properly considered in determining its evidence of the necessity of the proposal.

The Union also offered testimony that it had requested but had not received certain health care census information it claims was needed to allow it to evaluate Debtor's proposed health care plan and to shop for alternatives. However, Gagan's unrebutted testimony was that, due to privacy issues, the Union was given a confidentiality agreement to sign before such information would be provided, and the Union failed to return the agreement. Similarly, the Union had requested information regarding upper management salaries but failed to return a confidentiality agreement relating to its request. [Doc. # 108, Gagan Decl. ¶ 15 attached thereto].

On this evidence, the court concludes that Debtor has met its burden of proving that it provided such relevant records and information as existed that were necessary to evaluate the proposal.

6. Meeting with the Union at reasonable times

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[6] The Union also objected to Debtor's failure to produce its calculation regarding savings under a modification of a provision relating to the Family Medical Leave Act. However, this term of the proposal was withdrawn by Debtor before the final proposal was submitted.

[7] Debtor similarly responded to the Union's request regarding vacation hours of employees. But Gagan and/or Frantz, the representatives of Debtor with whom the Union was dealing, learned on May 25, 2006, that the vacation records sought were, in fact, kept by various company supervisors and so informed the Union. The vacation records were then provided to the Union on June 14, 2006, before the June 16 meeting of the parties and before the hearing on Debtor's motion.

As noted in *Mesaba*, this requirement only relates to the *fact* of the meetings taking place and the reasonableness of the arrangements. *Mesaba Aviation, Inc.*, 341 B.R. at 719. The court finds that Debtor has satisfied its burden under this factor.

Debtor had met with the Union on February 27, 2006, before filing it Chapter 11 petition, at which time Debtor had explained its financial condition and presented a proposal to the Union, asking for concessions in the CBA. After Debtor's petition was filed, it contacted Hart to arrange another meeting with the Union. Hart agreed that the Union Negotiating Committee would meet with Debtor on April 10, 2006, in order to receive Debtor's new proposal but that it would not be prepared to bargain because Hart could not be present on that date. The April 10 meeting did take place and Debtor made clear its willingness to meet again. While the Union made several requests for information, it did not respond to the Debtor's proposal or request a further meeting until after Debtor's petition was filed. After a Union membership meeting on May 18 at which the membership authorized the Negotiating Committee to bargain with Debtor, the parties scheduled a meeting and met on May 25 and again on June 16. Negotiations continued at meetings on June 27 and 29 held during the interim period between hearing dates on Debtor's motion. Although no meeting occurred after the April 10 meeting until after Debtor filed its motion to reject the CBA, Debtor will not be faulted for this since the Union was not authorized to bargain with Debtor until May 18. Given the necessity to address mounting health care claims and the unlimited exposure attendant to its self-insured status, Debtor reasonably filed its motion on May 8, 2006, before a second meeting with the Union. *Cf. Allied Delivery Sys.*, 49 B.R. 700 at 703 (finding the debtor should not be penalized where the reason that more sessions were not held between the time of the making of the proposal and the hearing on the motion was mutual scheduling difficulties).

7. Conferring in good faith

This factor requires that a debtor "confer in good faith in attempting to reach mutually satisfactory modifications of the [collective bargaining] agreement." 11 U.S.C. § 1113(b)(2). Since Debtor has met its burden with respect to meeting with Union representatives, the burden of production on this factor shifts to the Union. *See American Provision*, 44 B.R. at 910. "Good faith bargaining is conduct indicating an honest purpose to arrive at an agreement as the result of the bargaining process." *Walway Co.*, 69 B.R. at 973. The court finds that Debtor did not engage in good faith negotiations with the Union.

At the hearing, the Union offered evidence of the parties' negotiations. During those negotiations, with the exception of adding language to its subcontracting provision regarding notification to and discussion with the Union and ultimately withdrawing its proposal to modify a FMLA provision for which

there is no demonstrated necessity, it basically refused to move on any term of its proposal, notwithstanding that, as discussed earlier, it had no basis to believe that several of its terms would have any influence on its reorganization. Although Debtor stated that it would agree not to eliminate incentive pay if additional cost reductions in the amount of $800 per week could be achieved through a health care plan proposed by the Union, this counter proposal does not evidence Debtor's good faith in bargaining since it was unlikely, and perhaps unrealistic, that such savings could ever be realized. Although the Union submitted several counter proposals that included significant concessions on its part, with the exceptions noted above, Debtor's response was simply that it needed the relief it was requesting. Debtor's negotiation efforts were perfunctory at best. *See Northwest Airlines Corp.*, 2006 WL 1776455 at *12 (recognizing that the good faith requirement has been held to preclude a debtor from simply offering a "take it or leave it" proposal). Although Debtor attempts to justify its failure to negotiate by arguing that its initial proposal on April 10 is the minimum necessary for it to survive, as already discussed, Debtor failed to prove such necessity.[8]

8. Union's refusal to accept proposal without good cause

Debtor must prove that the Union "has refused to accept [the] proposal without good cause." 11 U.S.C. § 1113(c)(2). Debtor has the burden under this requirement to show that the Union has refused to accept its proposal. The burden of production then shifts to the Union to produce evidence that it's refusal was not without good cause. *American Provision*, 44 B.R. at 910. As one court observed, "the result will almost invariably be compelled by the sum of the analysis performed up to this point: if a debtor-in-possession goes through the procedural prerequisites for its motion, and if the substance of the proposal ultimately passes muster under § 1113(b)(1), its union(s) will not have good cause to have rejected the proposal." *Mesaba Aviation*, 341 B.R. at 755.

In this case, the substance of the proposal does not pass muster under § 1113(b)(1) since Debtor has not demonstrated that its proposal was based on the most complete and reliable information available and has not demonstrated, with the exception of its proposed modification of the health care plan, the necessity of the terms of its proposal. As such, the Union had good cause to reject the proposal. *See id.* (finding the unions had good cause to oppose the debtor's proposal since it contained a few provisions that the court held substantively lacking under § 1113(b)(1)). Debtor has, therefore, not met its burden with respect to this

[8] The Union also argued that Debtor's violation of the CBA with respect to layoffs and its failure to provide the Union with information relating to its bankruptcy is evidence of its lack of good faith in bargaining. However, Debtor's alleged violation of the CBA in laying off employees is not evidence of its lack of good faith in bargaining with respect to the terms of Debtor's proposal. And the Union's charge filed with the National Labor Relations Board ("NLRB") regarding not receiving timely information relating to Debtor's bankruptcy case was dismissed as unwarranted by the NLRB. [*See* Doc. # 145, Ex. B attached thereto].

factor.

9. Balancing of equities

Under this factor, Debtor must demonstrate that "the balance of the equities clearly favors rejection of such agreement." Although courts have identified at least six factors that the court should consider in making this determination, *see, e.g.*, *Carey Transp.*, 816 F.2d at 93, the court need not discuss those factors since Debtor has failed to meet the other specific requirements under § 1113(c), namely, that its proposal fulfills the requirements of § 1113(b)(1) and the Union has refused to accept the proposal without good cause.

CONCLUSION

While Debtor has clearly experienced a financial crisis in the loss of it largest customer and has a real need to modify the health care plan required of it under the CBA, it has not demonstrated that it has presented a proposal to the Union that is based on the most complete and reliable information available, that the terms of its proposal are necessary to permit its reorganization, or that it conferred in good faith in attempting to reach an agreement on its proposed modifications of the CBA. The Union, therefore, had good cause to reject the proposal presented to it by Debtor.

The court's decision on the motion is without prejudice to Debtor's continued pursuit of the process of rejection established by, and filing another motion for relief under, § 1113. The shortcomings the court has identified in Debtor's process to date can probably be fixed. So it is incumbent on all involved to start talking again, quickly, and to try and reach agreement on modifications to the CBA without further court involvement. If that does not happen, the court will be prepared to hear any renewed motion filed by Debtor.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that Debtor's motion to reject the collective bargaining agreement [Doc. # 66] be, and hereby is, **DENIED.**