IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
COLT HOLDING COMPANY LLC, *et al.*,[1]	Case No. 15-11296 (LLS)
Debtors.	Jointly Administered
	Hearing Date: Dec. 16, 2015 at 9:00 a.m. (EST) **Obj. Deadline: Dec. 14, 2015 at 4:00 p.m. (EST)**

DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO MODIFY RETIREE HEALTH BENEFITS

Colt Holding Company LLC ("**Colt**") and its affiliated debtors and debtors in possession (collectively, the "**Debtors**") respectfully move this Court (this "**Motion**") for entry of an order, substantially in the form attached hereto as **Exhibit A** (the "**Proposed Order**"), authorizing the Debtors to modify certain retiree health benefits as more fully set forth below. In support of this Motion, the Debtors rely on the declarations of (a) John H. Coghlin (attached as **Exhibit D**, the "**Coghlin Declaration**"), Secretary, Senior Vice President, and General Counsel of Debtor Colt Defense LLC ("**Colt Defense**"), (b) Keith A. Maib, Chief Restructuring Officer of Colt Defense (attached as **Exhibit E**, the "**Maib Declaration**"), (c) Randy Kelley of Cambridge Advisory Group Inc. (attached as **Exhibit F**, the "**Kelley Declaration**"), and (d) Timothy Brosnan of Willis of New York, Inc. (attached as **Exhibit G**, the "**Brosnan**"), and respectfully represent as follows:

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are Colt Holding Company LLC (0094); Colt Security LLC (4276); Colt Defense LLC (1950); Colt Finance Corp. (7687); New Colt Holding Corp. (6913); Colt's Manufacturing Company LLC (9139); Colt Defense Technical Services LLC (8809); Colt Canada Corporation (5534); Colt International Coöperatief U.A. (6822); and CDH II Holdco Inc. (1782). The address of the Debtors' corporate headquarters is: 547 New Park Avenue, West Hartford, Connecticut 06110.

PRELIMINARY STATEMENT

1. The Debtors are preparing for their exit from chapter 11, and have obtained the support of significant portions of their various constituencies—including the statutory committee of unsecured creditors (the "**Creditors' Committee**")—around a plan of reorganization that will leave the Debtors appropriately capitalized, strongly situated to continue their business in West Hartford, and provide meaningful recoveries to unsecured creditors. The Debtors are on track to satisfy the terms of the Restructuring Support Agreement, dated as of October 9, 2015 (as amended on November 10, 2015 and as may be further amended, restated, supplemented, or otherwise modified the "**RSA**") that they have entered into with certain of those constituencies and which forms the basis for the Debtors' plan. Following their entry into the RSA, the Debtors and the RSA Creditor Parties (as defined in the RSA) also modified the treatment to be provided to certain general unsecured creditors and obtained the support of the Creditors' Committee for the Plan.

2. As part of the Debtors' obligations under the RSA, and a critical element of the Debtors' efforts to rationalize the cash burden and liabilities, the Debtors have engaged with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 376 (together the "**Union**") on the terms of certain modifications to their collective bargaining agreement, as well as modifications to retiree benefits for individuals on whose behalf the Union speaks. As relevant here, the Debtors have made certain proposals that will allow them to rein in the costs of the post-retirement health benefit program. As currently implemented, program include substantial administrative costs that burden the Debtors' estates without any commensurate benefit to the participants under the program. Moreover, because one of the components is self-insured, and the historical claims experience is relatively low compared

with available coverage, the Debtors face a substantial risk that their future claims experience will increase and exceed the Debtors' ability to meet their obligations. Accordingly, while the Debtors' negotiations with the Union have included initiatives to increase productivity, increase manufacturing flexibility and align employee incentives with the Debtors' goals, the need to modify the post-retirement health benefit programs has been central to the Debtors' negotiations with the Union and a central focus of those negotiations.

3. Unfortunately, as the Debtors approach their hard deadlines to confirm their plan and exit from chapter 11 protection under the terms of the RSA and DIP financing credit agreements, the Debtors have reached an impasse with the Union on the changes they have been negotiating with respect to retiree benefits. In an effort to salvage something from those negotiations and meet the Debtors' obligations under the RSA, the Debtors have made a Final Proposal (as defined below) to the Union with respect to the Retiree Health Program. To be clear, the Debtors and the Union are continuing their discussions, and neither side considers the filing of this Motion as the end of negotiations but a continuation of the process. Instead, both recognized that it is a necessary step in light of the Debtors obligations under the RSA and Plan to keep the confirmation process and the Debtors' emergence from chapter 11 before the end of this year on track (before the Debtors' DIP financing matures). To that end, concurrently with the filing of this Motion, the Debtors and the Union will be issuing the joint public statement attached hereto as **Exhibit B**.

4. The Debtors' proposed modifications to the Retiree Health Program (as defined below) seeks to convert the program from a self-insured component and a fully-insured component (both with costs that exceed the Debtors' average claims experience), to a health reimbursement account ("**HRA**") model with a fixed, per participant contribution by the

Debtors—set at a level that is consistent with the Debtors' historical average claims experience—and a fixed administrative cost component. The HRA model allows the Debtors' to control their costs for the program, while given program participants greater flexibility with respect to their Medicare supplemental insurance—including the ability to rollover the unused portion of each participants' HRA benefit from year to year and the ability to share benefit with household members. The Debtors are also prepared to commit not to change to modified program for at least 10 years.

5. Because the Union has refused this proposal, without good cause, the Debtors are left without no alternative but to seek modification of their retiree health benefits pursuant to section 1114 of the Bankruptcy Code in connection with confirmation of the Plan. The Final Proposal is based on the best available information, all of which has been shared with the union, is necessary to satisfy the closing conditions of the RSA and the Plan and reorganize the Debtors, treats the retirees participating in the program fairly, and embodies the Debtors' good-faith efforts to reach a fair and equitable resolution of its post-retirement health benefit obligations. Accordingly, the Debtors respectfully submit that this Motion should be granted and the Final Proposal implemented as soon as possible for avoid any delay in or disruption to the Debtors' plan confirmation process.

JURISDICTION

6. This Court has jurisdiction to consider this motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b).[2]

[2] Pursuant to rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "**Local Rules**"), the Debtors hereby expressly confirm their consent to the entry of a final order by this Court in connection with this motion if it is later determined that this

7. The predicate for the relief sought herein is section 1114 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "**Bankruptcy Code**").

BACKGROUND

8. On June 14, 2015 (the "**Petition Date**"), each of the Debtors filed a voluntary petition with this Court for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to manage and operate their businesses as debtors in possession under sections 1107(a) and 1108 of the Bankruptcy Code. On June 16, 2015, this Court entered an order directing joint administration of the Debtors' chapter 11 cases for procedural purposes only pursuant to Bankruptcy Rule 1015(b) and Local Rule 1015-1 [D.I. 69].

9. On June 25, 2015, the Office of the United States Trustee for the District of Delaware appointed the Creditors' Committee pursuant to section 1102(a)(1) of the Bankruptcy Code.

10. On November 10, 2015, the Court entered an order [D.I. 682] (the "**Disclosure Statement Order**") that, among other things, approved the Debtors' Disclosure Statement[3] as containing "adequate information," authorizing the Debtors to begin soliciting votes in respect of the Debtors' Plan,[4] and scheduled a hearing to consider confirmation Plan on December 16, 2015 at 9:00 a.m. (Eastern Standard Time). As the Court is aware, the Plan contemplates meaningful recoveries for creditors in light of the Debtors' economic circumstances—but a substantial amount of sacrifice by all stakeholders, who made meaningful concessions to bring about the

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Court, absent consent of the parties, cannot enter final orders or judgments in connection therewith consistent with Article III of the United States Constitution.

[3] The *Disclosure Statement for Debtors' Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [D.I. 688] (as it may be amended, modified, and/or supplemented, the "**Disclosure Statement**").

[4] The *Debtors' Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [D.I. 675] (as it may be amended, modified, and/or supplemented, the "**Plan**").

support that has been generated for the Plan. Both the RSA Creditor Parties and the Creditors' Committee support confirmation of the Plan.

RELIEF REQUESTED

11. By this Motion, the Debtors respectfully request that this Court enter an order substantially in the form of the Proposed Order authorizing the Debtors to modify their Retiree Health Program by implementing the terms of their best and final proposal to their union, attached hereto as **Exhibit C** (the "**Final Proposal**").

FACTUAL BASES FOR RELIEF

I. OVERVIEW OF THE DEBTORS' RETIREE HEALTH PROGRAM AND ATTENDANT COSTS.

12. As of the Petition Date, the Debtors employ 729 employees across North America, of whom 462 are paid on an hourly basis and are represented by the Union under a collective bargaining agreement dated as of April 1, 2014 (the "**CBA**").

13. The Debtors maintain a number of programs and plans for their U.S. union employees, retirees, and their eligible dependents, pursuant to the CBA. These include profit-sharing plans, medical, dental, and vision benefits for current employees and their eligible dependents, and health plans that provide coverage to retirees and their eligible dependents.

14. In particular, the Debtors maintain two retiree health care plans for retired union employees and their spouses and dependents (the "**Retiree Health Program**") that provide coverage that supplements Medicare. The Retiree Health Program is administered by Anthem Blue Cross/Blue Shield ("**Anthem**"). The Debtors estimate that there are approximately 531 participants (sometimes referred to as "**Covered Lives**", with each being a "**Covered Life**") in the Retiree Health Program.

15. An employee's eligibility to subscribe to one of the Retiree Health Program depends (among other eligibility requirements such as attaining 65 years of age and completing 5 years of service with the Debtors) on whether such employee retired before or after April 1, 2007. For employees who met eligibility requirements and retired on or before April 1, 2007, the Retiree Health Program provides for a component that is self-insured by the Debtors with medical coverage and a $500 per-year prescription drug reimbursement benefit (the "**Self-Insured Component**"). For those employees who met eligibility requirements and retired after April 1, 2007, the Retiree Health Program is a third-party insured arrangement with a fixed annual premium cost for the Debtors, but does not include prescription drug reimbursement coverage (the "**Fully-Insured Component**").

16. Under the Self-Insured Component, the Debtors pay for actual claims incurred by the participants, while under the Fully-Insured Component, the Debtor's pay an annual, per-employee premium to Anthem. In addition, the Debtors also pay administrative costs for Anthem to administer the Self-Insured Component. For 2015, the annual per-participant premium for the Fully-Insured Component was $2,782, which was fully paid by the Debtors. This annual premium is expected to increase each year but will be capped at $3,000. Of the 531 subscribers to the Retiree Health Program, approximately 327 participate in the Self-Insured Component and 204 participate in the Fully-Insured Component.

17. The Retiree Health Program, and in particular the Self-Insured Component, have substantial costs associated with them. Under the Fully-Insured Component, the Debtors spend approximately $543,000 per year in premiums. This number will increase as additional retirees join this program.

18. With respect to the Self-Insured Component, the costs are even more significant. For 2015, the expected cost of paying claims is estimated at approximately $715,000. Moreover, in addition to the existing approximately 327 participants in the Self-Insured Component, there are 24 eligible participants (*i.e.*, eligible retirees and their spouses and dependents) who could participate in the Self-Insured Component but have chosen not to do so. Assuming that their claims experience would be in line with historical averages, their additional claims would add $32,400 per year to the cost of the Self-Insured Component, and potentially more if their claims experience was above the historical averages for the program.

19. For 2015 alone, the Debtors will spend approximately $1.4 million on post-retirement health benefits, which includes approximately $200,000 in administrative fees. The Debtors expect these expenses to increase over time.

20. Moreover, review of the program participant census data reveals that, with respect to the Self-Insured Component, participants are not taking full advantage of the available benefit. In particular, participants do not appear to be availing themselves of the $500 prescription-drug reimbursement benefit in significant numbers. Thus, for example approximately one quarter of the participants have annual claims averaging approximately $2,700 over the last five years. Of these, approximately 55 participants make up the bulk of the claims experience with annual claims experience averaged over the last five years of $2,700 or more. In contrast, the median five-year average for all participant claims is only $600, and the average over that same five-year period is approximately $1,150 per participant. Moreover, as noted above, there are approximately 24 individuals (*i.e.*, eligible retirees and their spouse and dependents) who could participate in the Self-Insured Component but have chosen not to do so. It is unclear why the Debtors have experienced such low Self-Insured Component claims experience for current

participants, or why some eligible retirees have chosen not to participate. Whatever the reason, if the Self-Insured Component claims experience increases to a level more consistent with similarly structured programs, the Debtors' associated claims payment and administrative costs could skyrocket.

21. With respect to the Fully-Insured Component, the Debtors' annual premium costs of $2,782 per participant is also well beyond the Debtors' claims experience. Given the Debtors' claim experience, this means that the Debtors are paying approximately $180,000 more per year in premiums than they otherwise should or would need to, based on program participants' actual claims experience—because the Debtors are required to insure the program pursuant to the terms of the CBA. Moreover, while the Fully-Insured Component premium costs to the Debtor are capped at $3,000 per participant, the total cost of the program will increase substantially as additional employees retire and additional participants join the program.[5]

22. As a result of these ongoing and future costs, the Debtors' best actuarial calculations place the Debtors' total book liabilities for the post-retirement health benefits at $25.75 million, along with annual costs (as noted above) of approximately $1.4 million.

II. THE DEBTORS' NEGOTIATIONS WITH THE UNION REGARDING MODIFICATIONS TO THE RETIREE HEALTH PROGRAM.

23. As part of the Debtors' review of their operations and costs structures, the Debtors identified the need to make certain changes to the CBA, in particular with respect to health benefits, as a key element to controlling the Debtors' cash burn and overall liabilities. The Debtors explored a sale process during these cases, but that process never yielded a transaction

[5] For the avoidance of doubt, nothing in the Final Proposal purports to modify the right of current employees who may become eligible to participant under the Fully-Insured Component upon retirement to do so. However, the Debtors reserve all of their rights under the applicable plan documents as to future modifications. Participation in the Self-Insured Component is based on retirement prior to April 1, 2007 and is therefore closed to new participants.

as favorable to the Debtors' estates as the one embodied in the RSA that forms the basis for the Debtors' plan of reorganization. Following their entry into the RSA, the Debtors and the RSA Parties (as defined in the RSA) also modified the treatment to be provided to certain general unsecured creditors and obtained the support of the Creditors' Committee for the Plan.

24. Similarly, as the Debtors worked with the parties committing to invest capital needed to reorganize the Colt in conjunction with the RSA, it became very clear that modifications to the CBA, including the health benefits for active and retired employees, would be an essential element of the Debtors' operational restructuring to drive profitability. Specifically, both the Debtors and the other RSA parties recognized that the risk factors around the Self-Insured Component costs (which the Debtors have no mechanism to control) and the inefficient pricing associated with the Fully-Insured Component that exceed the Debtors' claim experience would need to be adjusted. Accordingly, the RSA obligates the Debtors to "use diligent efforts to negotiate with the union to obtain favorable modifications to the CBA" and further provides that the non-Debtor parties' obligations to close on the transactions contemplated by the RSA is conditioned upon the Debtors obtaining "modifications to the collective bargaining agreement reasonably acceptable to the Company and the RSA Creditor Parties." (Ex. A to RSA, p. 17.) The Plan includes a similar condition precedent to confirmation. *See* Plan § 9.2(i). In obtaining these modifications and cost savings, the Debtors goal has been, and continues to be, to reduce the premium and administrative costs of its health care programs, while maintaining actual benefit levels for active employees and retirees to the extent possible.

25. Knowing that controlling these costs is necessary to the reorganization process, beginning on or about September 17, 2015 (*i.e.*, even before the RSA was signed), the Debtors

contacted the Union by telephone regarding negotiating certain changes to the CBA. Following that initial call, on September 18, 2015, the Debtors met with representatives for the Debtors' local union office, Local No. 376. Prior to that meeting, the Debtors prepared an outline of goals and areas most critical to reorganization efforts. While a number of these goals focused on improvements to productivity and supply-chain and manufacturing flexibility, the Debtors also specifically identified and presented to the Union the need to obtain material reductions in their overall Retiree Health Program liability and the annual cash burden of maintaining the program.

26. Between the September 18, 2015 meeting with the local unit and October 16, 2015, the Debtors engaged in further conferences and correspondence with the Union at the national/regional, and local levels, and also the committee for the Debtors' own union employees. These meetings coincided with the Debtors' entry into the RSA (with its condition of the Debtors' obtaining acceptable modifications), which enhanced the importance of obtaining cost savings in connection with the Retiree Health Program. On October 16, 2015, the Debtors shared an initial draft Memorandum of Understanding (the "**MOU**") with the Union that identified, among other objectives, the Debtors' target of a 50% reduction in post-retirement health plan liability and annual expense, which the Debtors hoped to achieve through a combination of the use of health care exchanges, limited subsidies from the Debtors, and limited "grandfathering" provisions with respect to retiree eligibility. During this time, the Debtors also shared information extensively with the Union regarding the Retiree Health Program, including the annual financial statement disclosure prepared by the Debtors' actuary, Cambridge Advisory Group Inc. ("**Cambridge**"). The Union also retained its own benefits advisor, Segal Group ("**Segal**"), and the Debtors provided the Union with additional information as requested by the Union or Segal. Principally, the Union indicated an interest in clarifying provisions of the CBA

that would allow the parties to make headway in a number of "big ticket" areas, to help the Debtors to realize needed productivity gains. The Union also acknowledged that the Retiree Health Program were inefficient in their structure due largely to administrative costs and agreed to explore ways to reduce the Debtors' Retiree Health Program costs and overall liability while minimizing the impact on participant benefits.

27. Over the course of the next few weeks, the Debtors and the Union continued discussions and negotiations, and the Debtors provided the Union's representatives with additional information, but no further progress was made with respect to the MOU. The Union proposed a number of scenarios for structural changes to the Retiree Health Program that focused on aggregating both components of the health benefit program, capping benefits at or near the cost of the Fully-Insured Component premium, and reducing future eligibility for participation in the modified post-retirement health benefit program. Working with their benefits advisor, Willis of New York, Inc. ("**Willis**") and Cambridge, the Debtors analyzed these structures and shared their analyses with the Union. While the Debtors tried to accommodate the Union's proposed structures, in each case the analysis demonstrated that the various scenarios would not result in sufficient expense and liability reductions to meet the Debtors' goals and satisfy the Debtors' obligations under the RSA.

28. At the same time, the Debtors were moving forward on the RSA and Plan and needed to obtain some progress on the MOU. On November 9, 2015, in an effort to move the process forward, the Debtors shared a revised MOU with the Union. In response to the November 9, 2015 MOU draft, the Debtors received variations on earlier proposals from the Union relating to changes to the Retiree Health Program and provided economic analysis of these variations.

29. Faced with the inability to obtain the necessary cost savings from the Union's proposals for modifying the Retiree Health Program, the Debtors began to explore the possibility of converting the program to an HRA model. The Debtors review and analysis of this model with the assistance of Cambridge and Willis demonstrated that it would provide the Debtors with substantial expense and liability reductions that was in line with the Debtors' goals—while maintaining benefit levels consistent with historical averages. Thus, on November 17, 2015, the Debtors provided the Union with a revised MOU that incorporated the HRA model. The parties engaged in further negotiations, meetings, and discussions, but made it clear that the Union was not prepared to move forward with the HRA model.

30. On November 22, 2015, the Debtors sent the Final Proposal to the Union, indicating that it was the Debtors' best and final offer.

31. On November 23, 2015, the Union provided the Debtors with a revised MOU that excluded any mention of the Retiree Health Program. Further follow-up telephone conferences with the Union's counsel confirmed that they have rejected the Debtors' Final Proposal.

Summary of the Final Proposal

32. As set forth on **Exhibit B**, the Final Proposal, the Debtors propose to modify the Retiree Health Program with respect to current retirees as follows:[6]

(a) The Debtors will be obligated to make quarterly cash subsidy payments to fund HRAs for all eligible retirees, spouses, and dependents (the "**Plan Participants**" and each a "**Plan Participant**") for expenses that qualify for reimbursement under the HRA guidelines.

(b) The Debtors will fund each of the HRA accounts in the amount of $1,350 per year, per Covered Life. This amount reflects the actuarial average cost

[6] Again, as noted above, nothing in the Final Proposal purports to modify the right of current employees who may become eligible to participant under the Fully-Insured Component upon retirement to do so. However, the Debtors reserve all of their rights under the applicable plan documents as to future modifications. Participation in the Self-Insured Component is based on retirement prior to April 1, 2007 and is therefore closed to new participants.

that the Debtors currently play for Covered Lives, as opposed to the five-year average of $1,150 per Covered Life described above and is an improvement upon the Debtors' original November 17, 2015 proposal (also attached to **Exhibit C**) in which the Debtors first proposed the HRA model.

(c) All current retirees and their current spouses and dependents would continue to be eligible to participate in the modified Retiree Health Program with the HRAs. Moreover, while the Debtors are not seeking any relief with respect to the eligibility of active employees to participate once they retire, the Final Proposal indicates that the Debtors would be prepared to extend eligibility to current employees who currently have 10 years or more of service with the Debtors and complete at least 15 years of service by the time they retire. Effectively this would allow employees hired before January 1, 2006 who have 15 years of service upon retirement at age 65 to also be eligible to participate in the program.

(d) The Debtors would agree not to exercise their rights to terminate the HRA program or make further amendments to the program for the longer of (i) 10 years or (ii) the expiration of the second future CBA (*i.e.*, the CBA that replaces the CBA that will eventually replace the current CBA)—even though, as set forth below, the Debtors otherwise have the unilateral right to terminate the Retiree Health Program outside of bankruptcy, post-reorganization.

(e) Under the HRA program, Covered Lives who are part of the same household could be reimbursed for eligible medical expenses from each other's HRAs. Thus, for example, if a retiree had expenses that exceeded his or her HRA but that person's spouse still had available funds, the spouse's funds could be applied to the retiree's expenses.

(f) Any HRA amounts that are not used in a given year will roll over completely to the following year.

(g) In addition, the Debtors will offer information sessions and materials to educate retirees regarding the HRA accounts. This will help ensure that participants with high-dollar claims experience will be able to maximize their replacement coverage and use of the available benefits under the HRA program.

LEGAL BASES FOR RELIEF REQUESTED

33. A debtor is permitted to modify its retiree benefit obligations if the proposed modifications comply with Section 1114 of the Bankruptcy Code. 11 U.S.C. § 1114(g). To determine whether modification of retiree benefits is appropriate under 11 U.S.C. § 1114, courts

generally apply a nine part test substantially similar to the test for determining whether a collective bargaining agreement should be rejected or terminated under § 1113:

(a) the debtor in possession must have made a proposal to the retirees;

(b) the proposal must be based on the most complete and reliable information available at the time of the proposal;

(c) the modification must be necessary to permit reorganization;

(d) the modification must provide that all affected parties are treated fairly and equitably;

(e) the debtor must provide the retirees with such relevant information as is necessary to evaluate the proposal;

(f) the debtor must have met with the retiree representative at reasonable times subsequent to making the proposal;

(g) the debtor must have negotiated with the retirees concerning the proposal in good faith;

(h) the retirees must have refused to accept the proposal without good cause; and

(i) the balance of the equities must clearly favor modification of the retiree benefits.

See, e.g., In re Horizon Natural Res. Co., 316 B.R. 268, 282 (Bankr. E.D. Ky. 2004).

34. The Debtors respectfully submit that the Motion should be granted because they have satisfied each of the applicable requirements as to their proposed modification to the Retiree Health Program set forth in the Final Proposal.

I. THE UNION IS THE RETIREES' AUTHORIZED REPRESENTATIVE.

35. Section 1114(f) of the Bankruptcy Code requires a debtor seeking to modify retiree benefits must make its proposal to the "authorized representative of the retirees." Further, Section 1114(c) provides that where the benefits are covered by a collective bargaining agreement, the labor organization that is a signatory to that collective bargaining agreement is the authorized representative." Here, the Union is a signatory to the CBA and has represented,

both to the Debtors and to the Court, that is the authorized representative of the retirees. Accordingly, in making the Final Proposal to the Union, the Debtors have satisfied section 1114(f) of the Bankruptcy Code.

II. THE FINAL PROPOSAL IS NECESSARY TO THE DEBTORS' REORGANIZATION.

36. Section 1114 provides that proposed modifications must be "necessary to permit the reorganization of the debtor." 11 U.S.C. § 1114(f)(1)(A). In the Third Circuit, modifications meet this requirement if "the trustee is constrained to accept [them] because they are directly related to the Company's financial condition and its reorganization." *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*, 791 F.2d 1074, 1088 (3d Cir. 1986) (interpreting "necessary" requirement under 11 U.S.C. 1113); *see also United Food & Commercial Workers Union, Local 211 v. Family Snacks, Inc. (In re Family Snacks, Inc.)*, 257 B.R. 884, 896–97 (8th Cir. B.A.P. 2001) (noting the Third Circuit in *Wheeling* interpreted "necessary" strictly, reasoning that Congress deliberately chose the term to "focus on the somewhat shorter-term goal of preventing the debtor's liquidation rather than on the far-sighted goal of ensuring a long-term reorganization.").

37. Here, the proposed modifications are necessary to permit the Debtors' reorganization for two reasons.

38. **First**, there is a substantial risk that the costs of the current Retiree Health Program may balloon and exceed the Reorganized Debtors' ability to meet their cash obligations. As noted above, the Debtors' claims experience under the Self-Insured Component indicates that participants are not using the program anywhere near the extent to which they would be entitled to do so. In particular, the participants have, for the most part, not availed themselves of the prescription drug benefit. While the Debtors' financial projections demonstrate that the

Reorganized Debtors can sustain current benefit levels, given the nature of the Self-Insured Component, there is no guarantee that the claims expense and administrative costs of the program will remain as they are. If the Debtors claims experience increases, the costs of those additional claims could exceed the Reorganized Debtors' ability to meet its obligations under the Self-Insured Component and operate within its projections. Implementing the Debtors' proposed modifications to the Retiree Health Program will reduce the Reorganized Debtors' costs associated with post-retirement health benefits, ensuring that these costs will not exceed its ability to meet its cash obligations.

39. **Second**, the savings obtained through the proposed modifications are necessary to satisfy the Debtors' RSA obligations and a condition of confirmation of the Plan. Specifically, the proposed modification set forth in the Final Proposal will substantially reduce the Debtors administrative costs associated with post-retirement health benefits and will cap the per-participant cost of providing those benefits to $1,350, an amount that approximates the Debtors' current annual per-participant costs on an actuarial basis. This will allow the Debtor to realize approximately $480,000 in reductions to its per-year expense burden and will reduce its benefits liabilities by approximately $8.5 million, all while maintaining a benefit that is in line with that offered under the current Retiree Health Program. Not only does the RSA require the Debtors to use "diligent efforts to negotiate with the union to obtain favorable modifications to the CBA", but it conditions the RSA Creditor Parties closing obligations on the Debtors obtaining "modifications to the collective bargaining agreement reasonably acceptable to . . . the RSA Creditor Parties." (Ex. A to RSA, p. 17; *see also* Plan § 9.2(i).) Despite the Debtors' diligent efforts to reach agreement with the Union on modifications to the CBA with respect to productivity and manufacturing issues, those modifications remain unresolved. Moreover, the

Debtors have reached a complete impasse with the Union on the issue of modifications to the Retiree Health Program (though discussions remain ongoing), one of the key areas in which both sides acknowledge that there is significant room for reduction of costs. The Plan also requires that the changes to the CBA must be reasonably acceptable to the RSA Creditor Parties. (Plan § 9.2(i).) As discussed above, the proposed modifications eliminate the risk that costs under the Self-Insured Component will balloon over time. This risk is one that is unacceptable for the Reorganized Debtor to carry going forward.

40. Absent approval of the proposed modifications to the Retiree Health Program, the Debtors run the risk that one or more of the RSA Creditor Parties will take the position that no "reasonably acceptable" modifications to the CBA have been obtained and that, therefore, the RSA's closing conditions have not been satisfied an the Plan cannot be confirmed. If the Plan cannot be confirmed, the Debtors have no way to reorganize (as the Debtors will lack DIP financing—which matures in at the end of this month—and no financing to exit chapter 11), leaving no doubt that the modifications are "necessary" to confirmation of the Plan. Numerous courts have found the "necessary to permit the reorganization of the debtor" requirement to be satisfied so long as the modifications are "necessary to accommodate confirmation of a Chapter 11 plan." *See, e.g., In re Ionosphere Clubs, Inc.*, 134 B.R. 515, 525 (Bankr. S.D.N.Y. 1991); *In re Horizon Natural Res. Co.*, 316 B.R. 268, 282 (Bankr. E.D. Ky. 2004); *In re Chi. Constr. Specialties, Inc.*, 510 B.R. 205, 221 (Bankr. N.D. Ill. 2014).

III. COMPLETE AND RELIABLE INFORMATION NECESSARY TO EVALUATE THE PROPOSED MODIFICATIONS AND WILLINGNESS TO NEGOTIATE IN GOOD FAITH.

41. Pursuant to section 1114, a debtor's proposal must be "based on the most complete and reliable information available," 11 U.S.C. § 1114(f)(1)(A); a debtor must provide the union with "such relevant information as is necessary to the evaluate proposal," 11 U.S.C.

§ 1114(f)(1)(B); and a debtor must meet with the retiree representative "at reasonable times" and must "confer in good faith." 11 U.S.C. § 1114(f)(2). The Debtors have satisfied each of these elements.

42. In addition, subsequent to making a proposal under section 1114 but prior to any hearing thereon, the debtor must meet at reasonable times with the retiree representative and at such meetings confer in good faith in an attempt to reach a consensual resolution regarding the proposed modifications of the retiree benefits. 11 U.S.C. § 1114(f)(2). Once the debtor has shown it has met with the retiree's representative, it is incumbent upon the representative of the retirees to show that the debtor did not confer in good faith. *In re Am. Provision Co.*, 44 B.R. 907, 910 (Bankr. D. Minn. 1984) (citing 11 U.S.C. § 1113); *see also* 11 U.S.C. § 1114(f)(1)(A).

43. Here, as set forth above, the Debtors have been entirely "open kimono" with the Union regarding the information available to the Debtors, responding promptly to numerous informational requests, directing Willis and Cambridge to run projections for the various scenarios proposed by the Union, and sharing that information with the Union in real time. The record set forth above and in the Coghlin Declaration demonstrate that the Debtors have made efforts to meet with the Union and to negotiate in good faith. These efforts included telephone calls, e-mail correspondence, and several in-person meetings with Union representatives at the national/regional level, as well as the Debtors' local and the committee for the Debtors' own union employees.

44. After reaching an impasse in these discussions, the Debtors have made their best and final proposal to the Union regarding the Retiree Health Program. Indeed, the Final Proposal reflects an increase in the proposed benefit above the Debtors' initial proposal of the HRA structure on November 17, 2015. Significantly, the proposed benefit under the modified

program is in line with the Debtors' historical, actuarial claims experience for all participants. In other words, a majority of the savings and reductions in liabilities the Debtors are hoping to achieve will come not from reduced benefits but from elimination of the administrative costs associated with the Self-Insured Component. This focus on maintaining benefit levels while achieving costs savings with respect to third-party administrative costs demonstrates the Debtors' commitment to putting forward the best proposal that they are financially able to maintain. The Union has been provided with the same information that is available to the Debtors and is well aware that the Final Proposal is, indeed, the best that the Debtors can do. Indeed, the Debtors have gone a step further and have agreed to provide retirees with information sessions and materials that will assist them with getting the most out of their HRAs. This assistance will be of particular benefit to the relatively small group of claimants (about 25% of the Self-Insured Component) who have above-average claims experience.

IV. THE BALANCE OF THE EQUITIES SUPPORTS GRANTING THE MOTION.

45. The remaining inquiry under section 1114 focuses on the equities. Here, the Final Proposal treats all parties "fairly and equitably," 11 U.S.C. § 1114(f)(1)(A). The Debtors believe the evidence will show that the Union has rejected the proposals without "good cause," 11 U.S.C. § 1114(g)(2); and the "balance of the equities" favor modification of the Retiree Health Program, 11 U.S.C. § 1114(g)(2).

46. As noted above, the proposed benefit of $1,350 is well above the median claim experience for most participants of only $600 and also exceeds the five-year average for participant claims of $1,150. Accordingly, the vast majority of participants within the Retiree Health Program, some 75% stand to reap a windfall, as the HRA structure will allow them to accrue the annual benefit on a tax-efficient basis, give the participants greater flexibility with respect to their healthcare spending choices and even, if it proves necessary, be able to share

their personal HRA benefit with other members of their household if unforeseen medical expenses arise. Moreover, while there are, as noted above, a small population of participants in the Retiree Health Program whose annual costs exceed the claim experience average, the Final Proposal treats them fairly and equitably as well. Specifically, the $1,350 annual benefit will, in many cases be more than enough to cover the cost of a standard Medicare supplemental plan and, where a participant desires premium levels of coverage, will go a long way toward covering the cost of a premium supplemental plan. Moreover, the information sessions and materials that the Debtors will provide will help these individuals identify plans that are tailored to their particular needs.

47. The Debtors proposed modifications maintain the maximum benefit for post-retirement health plan participants that the Debtors can afford, while ensuring that the Debtors will be able to reorganize. The Final Proposal, therefore, "assure[s] that all creditors, the debtor, and all other affected parties are treated fairly and equitably." *Family Snacks*, 257 B.R. at 892 (*citing In re Am. Provision Co.*, 44 B.R. at 909). "[E]quity means fairness under the circumstances," and does not require the proposal to give every constituency the very same treatment. *See In re Ind. Grocery Co., Inc.*, 138 B.R. 40, 48 (Bankr. S.D. Ind. 1990); *In re Walway Co.*, 69 B.R. 967, 974 (Bankr. E.D. Mich. 1987) ("a comparative dollar-for-dollar concession" is not mandated by the fairness-and-equity requirement). That standard is amply satisfied by the Debtors' proposed modifications to the Retiree Health Program.

48. If the Union continues in its refusal to accept the Final Proposal, the Motion must therefore be granted unless the Union is able to produce evidence that its refusal is not lacking in "good cause." *Am. Provision*, 44 B.R. at 910; *Valley Steel*, 142 B.R. at 342 (holding that union refused to accept the proposals without good cause because, in part, it failed to offer any

evidence or examples to substantiate its assertion of good cause). A lack of good cause also may be demonstrated by the retiree representative's adherence to demands that are impossible for the debtor to meet and failure to offer alternatives that take into account the debtor's reorganization plan. *See In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 90 (2d Cir. 1992). The Debtor submits that the Union will not be able to demonstrate good cause for its refusal to accept the Final Proposal. *See Royal Composing Room*, 848 F.2d at 345 ("When the union fails to articulate its reasons for rejection of a debtor's proposal during prehearing negotiations, rejection is without good cause"); *Horsehead*, 300 B.R. at 371 ("Where the union rejects a proposal that is necessary, fair, and equitable, it must explain the reasons for its opposition"). Indeed, the Union has not provided the Debtors with any reason for refusing the proposed changes that would constitute good cause, and the Debtors believe there is none.

49. As discussed above, the Final Proposal is the best that the Debtors are able to do for the Retiree Health Program participants, and the failure to implement the modifications will result in the Debtor being unable to confirm the Plan. The hard deadlines under the Plan and RSA make it a virtual certainty that the failure to confirm the Plan before the end of the year will leave the Debtors with no viable plan of reorganization, and with DIP financing on the brink of maturity. This will surely lead to a scenario that is far worse for program participants than the proposed modifications, such as a conversion of these cases to cases under chapter 7 and a liquidation of the Debtors.

50. For these reasons, the Debtors respectfully submit that the evidence will show that they have satisfied the requirements of section 1114 of the Bankruptcy Code and that the Motion should therefore be granted.

V. MODIFICATION OF THE RETIREE HEALTH PROGRAM WILL NOT RESULT IN ADDITIONAL CLAIMS AGAINST THE DEBTORS' ESTATES.

51. Authorizing the Debtors to implement the proposed modifications set forth in the Final Proposal will not result in parties affected by the modification with claims (of any priority) against the Debtors' estates because such parties have no vested benefits that would give rise to a claim. The law is clear that benefits provided pursuant to welfare benefit plans do not vest pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("**ERISA**"), except to the extent that such plans expressly provide for the vesting of such benefits. If the employer chooses to provide other post-employment benefits ("**OPEB**"), the duration, terms, and conditions of the benefits are (unlike for pension benefits) governed solely by the plan documents. In the Third Circuit, and most other circuits, courts presume that such benefits are not "vested" (*i.e.*, do not extend beyond the expiration of the CBA). If the documents are silent on the question, or if the employer reserves in the plan documents its unilateral right to amend or terminate benefits, the employer may change or eliminate such benefits at any time and for any reason. *See Int'l Union U.A.W. v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999). As the Third Circuit has explained, "[a]lthough ERISA contains elaborate vesting requirements for pension plans, it does not mandate vesting of welfare benefit plans, such as those providing retiree health and life insurance benefits." *In re Visteon Corp.*, 612 F.3d 210, 232 (3d Cir. 2010); *see also In re Lucent Death Benefits ERISA Litig.*, 541 F.3d 250, 253 (3d Cir. 2008) ("ERISA provides elaborate requirements for the vesting of pension benefits, but it does not provide automatic vesting of welfare benefits."). As the *Visteon* court explained, this omission was intentional:

> Congress did not impose vesting requirements on welfare benefit plans because "it determined that [t]o require the vesting of those ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income. . . . In rejecting the automatic

> vesting of welfare plans, Congress evidenced its recognition of the need for flexibility with regard to an employer's right to change medical plans.

Visteon, 612 F.3d at 232 (quoting *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 58 F.3d 896, 901 (3d Cir. 1995); *see also Curtiss-Wright v. Schoonerjongen*, 514 U.S. 73, 78 (1995). For this reason employers are "generally free . . . for any reason at any time, to adopt, modify, or terminate welfare plans . . . [unless they agree] to relinquish their right to unilaterally terminate those benefits and provide for lifetime vesting." *Curtiss-Wright*, 514 U.S. at 78; *see also Visteon*, 612 F.3d at 232; *Skinner*, 188 F.3d at 138.

52. According to the Third Circuit, "an employer's commitment to vest such benefits is not to be inferred lightly and must be stated ***in clear and express language*** . . . [in the documents that provide] the employee welfare benefits." *Skinner*, 188 F.3d at 139 (emphasis added, internal citations omitted); *see also Unysis*, 58 F.3d at 902 ("[A]ny retiree's right to life-time medical benefits under a plan ***can only be found if it is established by the terms of the ERISA-governed employee benefit plan***.") (emphasis added). Indeed, "there is a presumption against" finding that other post-employment benefits ("***OPEB***") have vested. *Smathers v. Multi-Tool, Inc.*, 298 F.3d 191, 196 (3d Cir. 2002). This is because courts are "reluctant to read more benefits into an ERISA plan that its plain language confers," *John Morrell & Co. v. United Food & Commercial Workers Int'l Union*, 38 F.3d 1302, 1304 (8th Cir. 1994). This presumption is particularly strong where a determination that benefits were fully vested would render the benefits "forever unalterable." *Skinner*, 188 F.3d at 1139. Accordingly, it is the plan participants or the union, not the employer, who "bear the burden of proving by a preponderance of the evidence that the employer ***intended the welfare benefits to be vested***." *Unisys*, 58 F.3d at 902 (emphasis added).

53. The terms of the documents that provide retirees' welfare benefits are thus the key to determining whether benefits are allegedly vested.[7] Here, at the threshold (and dispositive of the issue) the relevant plan documents do not demonstrate the Debtors' "clear and express" intent to vest the benefits provided under the Retiree Health Program. *Skinner*, 188 F.3d at 139. To the contrary they repeatedly demonstrate the Debtors' reservation of their rights to alter or terminate the program at will:

- "The Employer Group has the right to change the benefits under the Benefit Program, subject to the terms specified in the Administrative Services Only Agreement."[8]
- "Amendments to this Summary Booklet may occur."[9]
- "The Benefit Program may be terminated in accordance with applicable law as follows: at the option of the Employer Group."[10]
- "The Member hereby acknowledges that the termination, expiration, non-renewal, or cancellation of the contract will automatically result in the termination of the Benefit Program."[11]
- "This Benefit Program shall remain in effect unless amended, terminated, rescinded, suspended or cancelled as described herein."[12]

54. These multiple references to the Company's right to amend or terminate the benefits are dispositive on the issue of the Company's reservation of rights, and defeat any claim that the Debtors intended to provide vested benefits under Third Circuit case law. For example, in *Unisys*, the Third Circuit rejected a group of retirees' challenge to their former employer's unilateral modification of their healthcare benefits holding that SPDs "reserving the employer's

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7 Under ERISA, the "plan documents" include any written welfare benefit plan and SPDs. 29 U.S.C. § 1022; *see also Unisys*, 58 F.3d at 902 (noting that "written documents and summary plan descriptions are the statutorily established means of informing participants and beneficiaries of the terms of their plan and its benefits").

8 SPD, page 0.

9 SPD, page 1.

10 SPD, page 69.

11 SPD, page 70.

12 SPD, page 80.

right to modify or terminate at 'any time' and 'for any reason' the plan under which these benefits were provided . . . were unambiguous." *Unisys*, 58 F.3d at 898; *see also Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 856 (4th Cir. 1994) ("Th[e] express reservation of the company's right to modify or terminate the participants' benefits is highly inconsistent with any alleged intent to vest those benefits."). This language unambiguously gives the Debtors a right to terminate benefits at any time.

55. Nor does the Debtor's CBA alter the analysis. The Third Circuit has held that the same interpretive "principles apply without regard to whether the employee welfare benefits are provided under a collective bargaining agreement, SPD, or other plan document." *Skinner*, 188 F.3d at 139. Thus, hourly retirees that were covered by the current CBA cannot overcome the presumption against vesting merely by pointing to language in a CBA that provides that the Debtor "will provide" healthcare benefits or even that the healthcare benefit "is a lifetime benefit." *See id*. at 141. The reason is simple: there can be no vesting of benefits as a matter of law unless the "employer's commitment to vest such benefits" is "stated in clear and express language." *Id.* at 139; *see also Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 617 (7th Cir. 1993) (*en banc*) ("the presumption is and always has been that benefits mentioned in a collective bargaining agreement do not vest"). As the Third Circuit and other courts have held, such language is not "clear and express language" providing benefits for life, and cannot "create an ambiguity about vesting." *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806, 816 (7th Cir. 1992); *Skinner*, 188 F.3d at 141 ("It cannot be said that the phrases [such as 'will continue' and 'shall remain'] clearly and expressly indicate vesting since there is simply no durational language to qualify these phrases."). Instead, CBAs that contain such durational language are considered "[a]t best . . . silent on the specific duration of the retiree benefits. Silence on

duration, however, may not be interpreted as an agreement by the company to vest retiree benefits in perpetuity." *Skinner*, 188 F.3d at 147; *see also Senn*, 951 F.2d at 816 ("The mere silence of Collective Bargaining Agreements and plan documents concerning the vestment of welfare benefits fails to give rise to an ambiguity.").

56. Indeed, this is true regardless of whether the SPDs or CBA also contain language providing for "lifetime" benefits:

> An employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan under which those benefits were provided, has informed plan participants of the time period during which they will be eligible to receive benefits *provided* the plan continues to exist.

Unisys, 58 F.3d at 904; *see also Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034, 1042 (3d Cir. 1994) ("Even if the plan contained unambiguous assurances that all retirees would have health insurance benefits for life so long as [the employer] maintained a post-employment health insurance program, the general reserved right to amend the terms of the plan in whole or in part would render the right of any retiree or group of retirees terminable by the adoption of a legally effective amendment."); *rev'd on other grounds*, 514 U.S. 73 (1995). In sum, the Debtors preserved the right to amend or terminate retiree benefits at any time. Because the Debtors' right to terminate retiree benefits is set forth in the applicable plan documents, and because the CBA does not alter that right, those benefits are not vested and may be terminated at will.

57. Accordingly, it follows that if the benefits under the Retiree Health Program are not vested, and the Debtors may terminate their obligation to provide future benefits under the program at any time, persons affected by modifications to the benefits would have no "right to payment" or "right to an equitable remedy for breach of performance" that would give rise to a right to payment under the plan documents or controlling non-bankruptcy law. 11 U.S.C. § 101(5). It is true that section 1114(e)(2) provides that payments that come due under the current

terms of the Retiree Health Program prior to the entry of an order granting this Motion constitute administrative expenses in these chapter 11 cases, and the Debtors will honor those obligations. However, if this Court grants the Motion, the Debtors' obligations to make payments under the program will be subject to the proposed modifications set forth in the Final Proposal.

58. Furthermore, the Third Circuit's ruling in *Visteon* does not alter the application of this analysis or create a right to a claim that would not otherwise exist. Although the *Visteon* court held that section 1114 applies even where a retiree benefit plan reserves the employer's right to amend or terminate the benefits provided, the court made clear that section 1114 is a ***procedural*** right, "neither entirely nor permanently in derogation of underlying contractual rights." *Visteon*, 612 F.3d at 236. As a result, the *Visteon* holding does not vest benefits that would otherwise be terminable at will—it merely provides retirees with a procedural right to use as a "microphone" should such changes take place during the course of a former employer's chapter 11 proceedings. *Id.* Moreover, the law is clear that after a company has emerged from bankruptcy, it retains any existing contractual right to terminate benefits. *See id.* ("Additionally, it must be remembered that § 1114's protections terminate upon plan confirmation," and noting that section 1129(a)(13) does not vest benefits.).

NOTICE

59. On the date hereof, the Debtor has caused notice of this Motion to be given to the following parties via overnight delivery: (a) the U.S. Trustee; (b) counsel to the Creditors' Committee; (iii) counsel to the Debtors' prepetition senior loan agent; (iv) counsel to the Debtors term loan agent; (v); counsel to the Debtors' senior note indenture trustee; (vi) the Debtors' debtor-in-possession term loan lender and prepetition term loan lender; (vii) counsel to the Debtors' debtor-in-possession term loan lender and prepetition term loan lender; (viii) the

Debtors' debtor-in-possession senior loan lenders and prepetition senior loan lenders; (ix) counsel to the Debtors' debtor-in-possession senior loan lenders and prepetition senior loan lenders; (x) the Internal Revenue Service and Canada Revenue Agency; (xi) the Securities and Exchange Commission; (xii) the Pension Benefit Guaranty Corporation; (xiii) any local, state, provincial, or federal agencies that regulate the Debtors' businesses; (xiv) any party that has requested notice pursuant to Bankruptcy Rule 2002(i); (xv) counsel to the Union; and (xvi) the participants in the Retiree Health Program, whose rights will be affected by the relief requested in this Motion if granted. A copy of the Motion is also available on the Debtors' case website at http://www.kccllc.net/coltdefense.

[*Concluded on the following page.*]

NO PRIOR MOTION

60. The Debtors have not made any prior motion for the relief sought in this Motion to this Court or any other.

WHEREFORE, the Debtors respectfully request entry of an order, substantially in the form of the Proposed Order, granting the relief requested in this Motion, and granting such other and further relief as the Court deems just and proper.

Dated: December 3, 2015

/s/ Joseph C. Barsalona II

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