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(By agreement with the Debtors)

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Thomas Moers Mayer (TM-9357)
P. Bradley O'Neill (PO-5832)
Matthew J. Williams (MW-4081)
Douglas H. Mannal (DM-6408)
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100
Counsel for the Official Committee
of Unsecured Creditors of Dana Corporation, *et al*.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	
DANA CORPORATION, *et al.*,	Chapter 11
	Case No. 06-10354 (BRL)
Debtors.	Jointly Administered

OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO MOTION OF DANA CORPORATION, PURSUANT TO SECTIONS 363, 365 AND 105 OF THE BANKRUPTCY CODE, FOR AN ORDER AUTHORIZING DANA CORPORATION TO (A) ENTER INTO EMPLOYMENT AGREEMENTS WITH MICHAEL BURNS, ITS PRESIDENT AND CHIEF EXECUITVE OFFICER, AND FIVE KEY EXECUTIVES OF HIS CORE MANAGEMENT TEAM, AND (B) ASSUME CERTAIN CHANGE OF CONTROL AGREEMENTS, AS AMENDED

The duly-appointed Official Committee of Unsecured Creditors (the "Official Creditors' Committee") of the above-captioned debtors and debtors-in-possession (collectively, the "Debtors"), by and through its undersigned counsel, hereby submits this objection (the "Objection") to the motion (the "Motion") of Dana Corporation, pursuant to sections 363, 365 and 105 of the Bankruptcy Code, for an order authorizing Dana Corporation to (A) enter into employment agreements (the "Employment Agreements") with Michael J. Burns, its president, chairman of the board and chief executive officer (the "CEO" or "Mr. Burns"), and five key executives of his core management team (the "Executives"), and (B) assume certain change of control agreements, as amended (the "Change of Control Agreements"). In support of the Objection, the Official Creditors' Committee represents as follows:

PRELIMINARY STATEMENT

1. The Debtors state that the relief sought is necessary to stem post-filing employee attrition. As is typical of retention programs, the proposed "Minimum Completion Bonuses" and severance payments are payable regardless of whether the Debtors achieve any performance metrics. In short, the relief being sought by the Debtors is for "the purpose of inducing [the six Executives] to remain with the Debtor's business."

2. Prior to the amendments to Bankruptcy Code section 503, similar executive retention and severance plans were approved by Bankruptcy Courts subject only to relatively low threshold of the "business judgment standard". But Congress amended the Bankruptcy Code by enacting section 503(c) because Congress determined that the "business judgment standard" used in evaluating retention and severance plans had resulted in routine overcompensation of executives. The Debtors have failed to even address, let alone meet, the applicable statutory standard, and the relief sought is therefore wholly impermissible under the Bankruptcy Code. See 11 U.S.C. § 503(c).

3. Ironically, the recently-filed Supplement to the Motion makes matters substantially worse, not better, for creditors. The cosmetic changes to certain of the Employment Agreements do not solve the § 503(c) issues. The approach set forth in the Supplement misaligns Executives' interests with those of creditors by seeking - without any justification - to assume Mr. Burns' prepetition SERP that, if allowed, would have otherwise been paid with other unsecured creditors. Equally troubling is the Debtors' use of "Total Enterprise Value" ("TEV")

as a metric for calculating bonuses payable above the Minimum Completion Bonus, which incentivizes the Executives to reject any contract if such a rejection will boost TEV, regardless of the dilutive effect the resulting rejection damage claim may have on creditor recovery. Finally, the Debtors seek to pay the additional "incentive" bonuses over and above the Minimum Completion Bonuses even if the Debtors' post-confirmation TEV drops from where it currently stands today.

4. In short, the proposed compensation scheme, especially for Mr. Burns, does not pass muster. After conversations with the Ad Hoc Committee of Bondholders and the Official Committee of Equity Holders, the Official Creditors' Committee believes that every major constituency in this case has[1] or will oppose Mr. Burns' contract as proposed in the Motion and the Supplement. The Official Creditors' Committee respectfully submits that the Motion should be denied.

FACTUAL BACKGROUND

A. Procedural History

5. On March 3, 2006 (the "Petition Date"), the Debtors filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). On March 3, 2006, this Court entered an Order, Pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure Directing Joint Administration Of the Debtors' Chapter 11 Cases. The Debtors continue to manage and operate their businesses and property as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed.

[1] The UAW has already filed its objection to the Debtors' motion.

6. On March 10, 2006, the United States Trustee for the Southern District of New York ("UST") appointed the Official Creditors' Committee. The current members of the Official Creditors' Committee are: (i) Wilmington Trust Company, (ii) P. Schoenfeld Asset Management LLC, (iii) International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW"), (iv) Sypris Solutions, Inc., (v) Eaton Corporation, (vi) Julio Gonzalez, Jr., as Administrator for the estate of Julio Gonzalez, and (vii) The Timken Company.

B. Mr. Burns' Pre-Petition Contract

7. Approximately two years prior to the Petition Date, Dana's Board of Directors named Michael J. Burns as CEO. Since that time, Mr. Burns has presided over the Debtors' deteriorating performance and the filing of their chapter 11 petitions. Mr. Burns continues to serve as Dana's CEO. See Motion at ¶ 8.

8. Mr. Burns' pre-petition employment agreement called for an annual salary of \$1.035 million, an additional cash incentive bonus of \$1.035 million, plus additional variable compensation (i.e., stock options, performance shares and restricted stock). See Exhibit 2 to Mercer Report. His target 2005 compensation was roughly \$6.07 million, consisting of \$2.070 million (or 34%) in cash and \$4 million (or 66%) in stock options, performance shares and restricted stock. Id.

C. The Annual Incentive Plan

9. On March 6, 2006, Dana filed a Form 8K with the Securities and Exchange Commission announcing that its Board had approved an annual incentive plan (the "AIP") for 2006-2007 three days prior to the Petition Date. The AIP provides that it "is intended to reward key members of the management of the company and its consolidated subsidiaries for

achieving specific performance goals. . . " See Dana Corp. 2005 Form 10k Exhibit 10.S. Among other things, the AIP provides for a bonus payment of 200% of the CEO's annual salary if the Debtors meet certain "target" levels of EBITDAR established by the Compensation Committee and provides for semi-annual payments. Id. Although entered only days prior to the bankruptcy filing, and although payments under the AIP will be made post-petition, the Debtors have taken the position that the AIP was entered in the ordinary course of business and, accordingly, payments made thereunder are not subject to this Court's approval.

D. The Employment Agreements and Change of Control Agreements

10. On June 29, 2006 the Debtors filed the Motion, pursuant to which they sought Court authority to assume the Employment Agreements and amended Change of Control Agreements of certain of the Debtors' Executives. In addition to (i) annual base salaries of between $336,000 and $1.035 million, (ii) post-petition "incentive payments" under the AIP of between $336,000 and $2.07 million at target; and (iii) the retention of prepetition claims arising under unqualified retirement plans (which, based upon current trading prices of unsecured claims against the Debtors, were worth over $4.7 million as to Mr. Burns alone), the Debtors originally sought authority to pay the Executives:

- Completion Bonuses ranging from $800,000 to $6.2 million (for Mr. Burns) in the event an Executive remained employed by the Debtors through confirmation of a Plan or a 363 sale of substantially all of the Debtors' assets, no matter how poorly the Debtors' businesses performed, how ill-fated the restructuring or how little would be distributed to creditors in either a 363 sale or plan; plus

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➢ Severance Payments consisting of between

- Cash severance ranging from $1.5 million up to $7.2 million (for Mr. Burns) in the event an Executive is "terminated without cause" or voluntarily leaves the Debtors' employment "for good reason" prior to emergence (as of December 31); and

- Cash severance payments ranging from approximately $1.1 million to approximately $10 million (for Mr. Burns) under "Change of Control Agreements" in the event the Executive was terminated within three years of a "change of control" (as of March 1), which would include consummation of a plan of reorganization or 363 sale.

11. Unlike payments to be made under the AIP, the Completion Bonuses and Severance Payments did not incentivize the Executives to meet any particular performance goals. The Debtors stated that such bonuses and payments were nonetheless warranted insofar as the Completion Bonuses and Severance Payments were a necessary component of "assuring Dana of an effective management team," by "providing to each of the key Executives sufficient certainty and security . . . ." see Motion at ¶ 22, and necessary to reduce the Debtors' high attrition rate. Id. at ¶ 40.

12. Subsequent to the filing of the Motion, on August 4, 2006, the Debtors filed a supplement to the Motion (the "Supplement") which, according to the Debtors, was intended to address the purportedly "unfounded" concerns of estate constituencies regarding the motion's compliance with 11 U.S.C. § 503(c). See Supplement at ¶ 10. The major changes set forth in the Supplement are as follows:[2]

➢ Completion Bonus – Each Executive's minimum guaranteed Completion Bonus is reduced by 50% from the amount set forth in the original Motion (the "Minimum Completion Bonus"), but the Minimum Completion Bonus is now subject to increase (with no cap) based upon the Debtors'

[2] According to the Supplement, the Change of Control Payment and certain other issues are "deferred" until a later point and time. Presumably, Mr. Burns and the other Executives are waiving their rights under the Change of Control Agreements.

Total Enterprise Value ("TEV") six months after the effective date. The guaranteed Minimum Completion Bonuses (ranging from $400,000 to $3.1 million, in the case of Mr. Burns) are still paid no matter how poorly the Debtors' businesses perform, how ill-fated the restructuring or how little would be distributed to creditors in either a 363 sale or plan.

- A $4 million Completion Bonus would be paid to Mr. Burns if the TEV drops to an amount equal to the TEV the day prior to the bankruptcy filing (close to the 52-week low), which, in effect, allows Mr. Burns to benefit from the company's sub-standard pre-petition performance.

- A $6.2 million Completion Bonus would be paid to Mr. Burns if TEV merely stays at its current level, which, in effect, provides incentive only to preserve the status quo.

➢ Severance – Severance payments proposed to be made to Mr. Burns are no longer expressly called "severance" but are instead called "payments in exchange for non-compete agreements", even though - as part and parcel of the original Motion – Mr. Burns would have been bound by a non-compete clause. See Motion ¶ 24(f). Moreover, the Supplement apparently seeks to pay Mr. Burns severance even if he is terminated for cause or leaves without good reason. See Supplement ¶ 5.

➢ SERP - For reasons unexplained in the Supplement, Mr. Burns' pre-petition SERP – which was previously nothing more than an unsecured $6 million claim under the original Motion - will be assumed upon the earlier of termination "without cause or with good reason"[3], confirmation of a Plan, or death or disability.

OBJECTION

13. Notwithstanding the fact that the stated purpose and effect of the relief sought is to implement a retention and severance plan, the Motion and the Supplement are devoid of any discussion of the recently-enacted 11 U.S.C. §§ 503(c)(1) and (2) which govern transfers made and obligations incurred in connection "for the purpose of inducing such person to remain with the debtor's business," and "a severance payment". See 11 U.S.C. §§ 503(c)(1) and (2). Rather than tackle the statute on the merits, the Debtors state that the Motion "does not

[3] The Committee assumes that "termination . . . . with good reason" refers to Mr. Burns' right to terminate his employment agreement "for good reason".

raise any novel issues of law" and therefore should be granted based upon the Debtors' sound business judgment. See Motion at ¶ 41. Because the Debtors have failed to even attempt to meet the statutory burden, the Motion should be denied.

I. The Debtors Have Failed to Show that the Proposed Minimum Completion Bonuses Payable Under the Employment Agreements Meet The Requisite Standards Under 11 U.S.C. § 503(c)(1)

14. Section 503(c)(1) – provides as follows:

> (c) . . . there shall neither be allowed, nor paid -
>
> (1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor ***for the purpose of inducing such person to remain with the debtor's business***,[4] absent a finding by the court based on evidence in the record that –
>
> (A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;
>
> (B) the services provided by the person are essential to the survival of the business; and
>
> (C) either –
>
> (i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or
>
> (ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit

[4] Emphasis added.

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> of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred . . .

15. The Bankruptcy Code defines an "insider" of a corporate debtor as including the officers of the debtor, directors of the debtor, and any person in control of the debtor. See 11 U.S.C. § 101(31).

16. Although the Debtors admit that the Executives are "insiders," see Motion at ¶ 39, the Debtors would have this Court rule that the statute does not govern here because the proposed bonuses are labeled "Minimum Completion Bonuses" as opposed to retention bonuses.

17. However, the name of the payments does nothing to change the fact that the intent and effect of this Motion (and, in particular, the Minimum Completion Bonus) is to induce the insider Executives to remain in the Debtors employment.

18. Payment of the Minimum Completion Bonus (ranging from $400,000 to $3.1 million) is not tied to any incentive metric – it is only based upon whether the insider Executives remain employed by the Debtors. The Motion itself admits that the relief sought is necessary to reduce the post filing attrition rate, see Motion at ¶ 40, by ensuring that the "management team will be sufficiently protected so that the members can dedicate themselves . . . without distraction from the imminent risk to their futures." Id. at ¶ 19. The stated objectives of the Motion are "assuring Dana of an effective management team," by "providing to each of the key Executives sufficient certainty and security . . . ." and "providing transition services to any successor board of directors." Id. at ¶ 22.

19. Because the stated purpose and effect of the Minimum Completion Bonus is to induce the insider Executives to remain with the Debtors' business, it is nothing more than a typical retention bonus governed by 11 U.S.C. § 503(c)(1), regardless of the label the Debtors ascribe to it. See e.g., Schachter v. Lefrak (In re Lefrak), 223 B.R. 431,435 (Bankr. S.D.N.Y.

1998) (bankruptcy court looks to "economic substance of the transaction", not the label given to the transaction, in determining rights under Bankruptcy Code); Liona Corp. v. PCH Assocs. (In re PCH Assocs.), 804 F.2d 193 (2d Cir. 1986) (merely labeling an agreement a "lease" is insufficient to have contract treated as lease under bankruptcy code without examination of underlying substance of transaction); Int'l. Trade Admin. v. Rensselaer Polytechnic Inst., 936 F.2d 744 (2d Cir. NY 1991) (same).

20. Here, the Debtors have not attempted to show that the Minimum Completion Bonuses meet the strict standard of 11 U.S.C. § 503(c)(1). Notably, there has been no allegation that any of the Executives have a bona fide job offer at the same or greater rate of compensation (see 11 U.S.C. § 503(c)(1)(A)) or showing that the services provided by the Executives are "essential to the survival of the business" (see 11 U.S.C. § 503(c)(1)(B)). Upon information and belief, each of the Completion Bonuses are each substantially greater than 10 times the mean completion bonuses given to nonmanagement this year and the Completion Bonuses are greater than 25 percent of the amount of similar obligations incurred for the benefit of the Executives last year (upon information and belief, no "completion bonuses" were awarded last year). Because the proposed Minimum Completion Bonuses fail the §503(c)(1) test, the Motion should be denied.

II. The Debtors Have Failed to Show that the Proposed Severance Payments under the Employment Agreements and the Change of Control Agreements Meet The Requisite Standards under 11 U.S.C. § 503(c)(2)

21. Section 503(c)(2) – provides as follows:

(c) . . . there shall neither be allowed, nor paid -

(2) a ***severance payment***[5] to an insider of the debtor, unless -

[5] Emphasis added.

> (A) the payment is part of a program that is generally applicable to all full-time employees; and
>
> (B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made...

22. Notwithstanding the plain language contained in Section 503(c)(2), the Debtors seek this Court's authority to allow and pay severance payments to the Executives. The original Motion admitted that these were, in effect, severance payments. See Motion ¶ 24(e) (noting that Executives forfeit "severance" if they are terminated for cause); also see Motion ¶ 24(c) (noting that Mr. Burns and each Executive will receive substantial lump sum payments upon involuntary termination without cause or resignation for good reason). Although the Supplement now alleges that these payments are consideration in exchange for "non-compete agreements," the simple fact is that Burns was subject to a non-compete agreement as part of the contracts being assumed in the original Motion and under the pre-petition contracts See Motion ¶ 24(f); ("Neither Mr. Burns nor any Executive will engage in any Competition (as defined in the Agreements) for the remainder of the term of the Agreements upon termination for any reason. Following a Successful Emergence, the non-compete clause applies for a 2-year period upon a termination of their employment without cause or a resignation for good reason"); see also Motion Exhibit "D" "Overview of Pre-petition Arrangements". The fact that the Supplement changes the name of the payment does nothing to alter its underlying purpose – to provide Mr. Burns with severance.[6]

23. Here, the Debtors have not, and can not, meet the § 503(c)(2) standard as it applies to severance payments and obligations. First, the Debtors are seeking severance only

[6] "[S]everance pay is compensation for the hardship which all employees, regardless of their length of service, suffer when they are terminated . . ." Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc., 789 F.2d 98, 104 (2d Cir. 1986).

as to the six Executives, and it is therefore not "generally applicable to all full-time employees." See 11 U.S.C. § 503(c)(2)(A). Moreover, upon information and belief, the amount of the proposed severance payments are substantially greater than 10 times the amount of the mean severance pay given to nonmanagement employees last year. Accordingly, the Motion should be denied.

III. The Facts and Circumstances of this Case do Not Currently Justify the Assumption of the Burns Contract

24. Section 503(c)(3) of the Bankruptcy Code provides that a transfer of the debtor's property or the incurrence of obligations by the debtor outside of the ordinary course of a debtor's business, "including transfers made to, or obligations incurred for the benefit of officers, managers, or consultants . . ." must be "justified by the facts and circumstances of the case." 11 U.S.C. § 503(c)(3). The Official Creditors' Committee submits that the unified opposition of every major constituency in this case – the Official Creditors' Committee, the Ad Hoc Committee of Noteholders, the Official Equity Committee and the UAW – shows that the assumption of Mr. Burns' modified contract is not justified by the facts of this case at this time.

A. The Use of "TEV" to Calculate Bonuses Above the Minimum Completion Bonus Incentivizes Management to Reject Contracts Even if Such Rejection Dilutes Creditor Recoveries.

25. In the Supplement, the Debtors propose a Completion Bonus scheme that generally provides as follows: (i) regardless of the Debtors' TEV, all Executives are rewarded a Minimum Completion Bonus for staying with the company through the bankruptcy process; (ii) if the Debtors meet the "Threshold TEV" (i.e., the TEV immediately prior to the Petition Date), then the Executives are rewarded 2/3 of their Target TEV bonus (which range from $500,000 to $4.1 million (for Mr. Burns)) for implementing no improvement in TEV during the Chapter 11 process whatsoever; (iii) if the Debtors meet the "Target TEV" (i.e, the TEV as of July 13,

2006), then the Executives receive their "Target" Completion Bonuses (which range from $800,000 to $6.2 million (for Mr. Burns)), even though TEV will not be a single dollar greater than it is today; and (iv) if the TEV six months after the effective date is greater than "Target TEV", the Executives get an additional .50% of the excess, allocated proportionally. See Supplement at ¶ 5.

26. As noted above, the Minimum Completion Bonus is improper under 11 U.S.C. § 503(c)(1). Moreover, the Debtors' Executives receive additional and substantial "incentive" compensation for reaching the TEV as it existed as of the Petition Date and an additional "incentive" bonus for reaching the TEV as it exists today. In short, the Executives get multi-million dollar "incentive" bonuses over and above the Minimum Completion Bonus merely for maintaining the status quo, or even if they fail to do so. The incentive targets are set so low that they are basically guaranteed.

27. Equally problematic is that the proposed structure incentivizes the Executives to take actions that may be detrimental to their fiduciary duty to maximize recoveries for creditors. See Clarkson Co. Ltd. v. Shaheen, 660 F.2d 506, 512 (2d Cir. 1981), cert. denied, 455 U.S. 990 (1982) (recognizing officers and directors of insolvent corporation have fiduciary duty to creditors); see also, In re Acomazzo, 226 B.R. 426 (D. Ariz. 1998) ("Part of the bankruptcy trustee's fiduciary duty is to conserve assets of the estate and maximize distributions to creditors.") (citing In re Rigden, 795 F. 2d 727, 730 (9th Cir. 1986)).

28. For instance, based upon the current proposal before the Court, the Executives will be incentivized to increase the hypothetical TEV at all times. But an increased hypothetical TEV has no relationship to recovery to general unsecured creditors. To the contrary, creditors could suffer substantial harm.

29. The following example makes the point: Assume the Debtors were to reject a long-term contract today that saved the Debtors $100 million per year. Using a 5x EBITDA multiple, the increase in TEV would be $500 million, and the Executives would be receiving a $2.5 million ($500 million multiplied by .50%) additional bonus for rejecting that contract. In such an instance, the Executives would be incentivized to reject the contract, and increase their bonus. But such a rejection could undermine creditor recovery. If the rejection resulted in a $800M damage claim, unsecured creditor recoveries would be diluted based upon the current trading prices of unsecured claims (roughly 80 cents) as the incremental value created in the example is only 62.5% of the resulting claim. At the same time, Executives receive a windfall in an increased bonus for making the decision to reject the contract.

30. This issue is not hypothetical – it is explicitly posed by the Debtors' declared intent to modify their retiree medical and life insurance plans ("Welfare Benefits") under Bankruptcy Code section 1114. Scenarios for such rejection include an example where the incremental benefit from modifying retiree Welfare Benefits – that is, the increase in TEV – could be less the cost of the modification.[7] In that situation, the Debtors' proposed bonus scheme would enrich the Executives at the expense of every constituency in the case, including retirees who would suffer from the loss of their benefits, as well as creditors and shareholders,

[7] If the Debtors' terminated their retiree medical benefits at the cost of allowing, to retirees, claims calculated using the low discount rates applicable under the Financial Accounting Standards Board Statement of Financial Accounting Standards 106 ("FAS 106"), Employers' Accounting for Postretirement Benefits Other Than Pensions, other creditors could be substantially diluted. FAS 106 uses low discount rates and ignores a debtor's contractual (i.e., non-bankruptcy) rights to modify some or all retirees' benefits without creating any claims. If the Debtors agreed to claims based on FAS 106, the Debtors would save at most $130 million per year while creating a claim which could be as much as $1.5 billion, or a 11.5x multiple – substantially diluting recoveries to general unsecured creditors. The Debtors do not trade at a multiple sufficient to justify this modification, and the Debtors' financial advisors have not suggested that they do trade or will ever trade at such a multiple, but the Debtors' Executives are incentivized, in the form of higher bonuses, to implement an unjustifiable, dilutive retiree Welfare Benefit modification.

whose recoveries would decrease because the cost of modification would outweigh the benefits.[8] For more than a month, the Official Creditors' Committee has urged the Debtors to change their proposed Executive bonus plan to avoid this result, and the Debtors have refused to do so.

B. The Proposed Assumption of the SERP Misaligns the Executives' Interests with Creditor Interests.

31. In the original Motion, the Debtors alleged that the proposed compensation was reasonable because, among other things "as a result of the chapter 11 filing, none of the six senior Executives will receive prior unqualified retirement benefits ["SERPs"], but, rather, they have only general unsecured prepetition claims against Dana for these benefits," (Motion at ¶27). Now, in the Supplement, the Debtors seek to rectify this situation by assuming Mr. Burn's SERP, relief that was not even sought in the original Motion. See Supplement at ¶ 5.

32. Not only does the proposed assumption of the SERP undermine the alleged reasonableness of the relief sought in the original Motion (see Motion at ¶ 27), it is unsupported by any factual or legal argument whatsoever. Even if the Supplement explained some rationale for the change of course, the proposed assumption is ill-advised because it misaligns the interests of management with those of creditors. At least under the original Motion, Mr. Burns had some inherent incentive to maximize recoveries to unsecured creditors because it inured to his own interests (as his SERP claim could constitute a general unsecured claim). The Supplement has eliminated this incentive and elevated Mr. Burns' SERP claim to administrative priority status above those of general unsecured creditors, leaving general unsecureds to receive a recovery only out of what is left after Mr. Burns is paid in full in cash on account of his SERP.

[8] The intent of Section 1114 is to enable a debtor to achieve decreases in retiree benefits to effectuate a plan of reorganization and assure the viability of the going concern. Modifying Welfare Benefits and in turn enriching executives is inconsistent with the spirit and language of Section 1114.

33. There is yet another problem with the proposed assumption of the SERP. It is currently unclear whether the SERP gives rise to an allowed unsecured claim (let alone an administrative priority one) in the full amount of the SERP. Based upon the Committee's preliminary understanding of the applicable documents, there appears to be a strong argument that the SERP payments are liquidated damages for termination of employment agreements as opposed to vested retirement benefits. Such payments could be subject to the one-year cap set forth in 11 U.S.C. § 502(b)(7). See In re: Integrated Health Services, Inc., 2001 WL 1820426 *3, (Bankr. D. Del. Jan. 3, 2001) (debtors sought to approve 9019 settlement with the former CEO, whereby the debtors agreed to pay the CEO $1.5 million in exchange for a release of $26.5 million SERP: "[T]here is at least a litigable issue that may result in a claim by [the CEO based on his SERP] which substantially exceeds the section 502(b)(7) cap or the amount provided in the settlement agreement.")

C. The Other Economic and Legal Terms of Mr. Burns' Agreement are Not Justified by the Facts and Circumstances of this Case.

34. Under the agreements as proposed, Mr. Burns would be entitled to the following compensation in the event the status quo "TEV" remains stagnant throughout the rest of this bankruptcy case:

PAYMENT	AMOUNT
Base Salary	**$1,035,000**
AIP Bonus	**$2,070,000** (at target)
Completion Bonus	**$6,200,000**
Employment Contract Severance	**$3,000,000**
SERP	**$6,000,000**

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As shown above, if the company's TEV six months after the Effective Date shows absolutely no improvement from where it stands today and Mr. Burns is terminated upon consummation of a plan, he is guaranteed $18.305 million in compensation.

35. In the original Motion, the Debtors alleged that this substantial compensation was reasonable because, among other things (i) "absent these modifications, Mr. Burns compensation would be reduced by 49% from his expected 2005 compensation." (Motion at ¶ 37); (ii) "[w]hen compared to similar large chapter 11 debtors, the proposed aggregate total compensation package of Mr. Burns and the Executives will be approximately [the market] median" (Motion at ¶ 29); and (iii) the compensation of Mr. Burns "rests, in significant part, on the Debtors' Successful Emergence." (Motion at ¶ 29).

36. The Official Creditors' Committee submits that such terms are not "justified by the facts and circumstances of the case . . ." See 11 U.S.C. § 503(c)(3). Although it is true that Mr. Burns will be taking a 49% haircut from 2005 "expected" compensation, Mr. Burns' "expected" that such compensation would be paid in two components – 34% in cash and the remaining 66% in stock and options. See Exhibit 2 to Mercer Report. The weight (and uncertainty) of the consideration was designed to induce Mr. Burns' performance; the form of consideration (stock and options) was designed to align Mr. Burns' interests with Dana's stakeholders. Now that those options have become worthless and the stock (according to Dana's own SEC filings) is unlikely to be worth much, the Debtors are seeking to "re-load" his target compensation with 67% in cash payments, and variable compensation that is not aligned with the interests of Dana's stakeholders (now, creditors and shareholders).

37. Moreover, although the Debtors claim that Mr. Burns' compensation is "similar to the median of other large chapter 11 corporations," see Motion at ¶ 29, the Mercer's

Report indicates that Mr. Burns' target 2006 compensation - is 23% greater than the Chapter 11 median. See Dempsey Declaration at ¶ 13.

38. Although the Debtors allege that Mr. Burns' compensation rests on a "Successful Emergence" and is therefore reasonable and subject to uncertainty, the Debtors definition of "Successful Emergence" eviscerates any significance to the term in that it encompasses any plan of reorganization or a sale of substantially all of the Debtors' assets regardless of the price. Mr. Burns gets the $3.1 million Minimum Completion Bonus no matter what happens - the payment is guaranteed so long as Mr. Burns agrees to remain employed by the Debtors, and he is paid $6.2 million if TEV remains the same throughout the rest of the case. This is hardly a "success" worthy of such a substantial bonus, which is purportedly designed to incentivize management.

39. Putting economics aside, there are a littany of other business reasons why the Debtors sould not assume the Burns contract at this time. Among others:

- **Waiver of other Claims**: Mr. Burns should be required to waive any other claims that he has against the Debtors as part and parcel of any assumption of his contract. For example, Mr. Burns should make it clear that he has no intent on asserting any rights during or after the case in connection with his pre-petition Change of Control Agreement.

- **AIP Has Not Been Approved**: By the Motion, the Debtors apparently seek Court authority to pay Mr. Burns his performance bonus under the AIP. See Motion at ¶ 24(b). But the AIP, which was implemented just 3 days prior to the bankruptcy filing and covers bonuses to be paid post-petition, has yet to be brought before, let alone approved by, the Bankruptcy Court. Unless and until the Debtors have shown that the AIP meets the standards set forth under 11 U.S.C. § 503(c), no payments should be made to Mr. Burns thereunder.[9]

[9] The AIP's semi-annual payments to Mr. Burns exceed $1 million per year and do not appear to be tax-deductible under the Internal Revenue Code, 26 U.S.C. § 162(m). Under IRC section 162(m), annual compensation above a threshold of one million dollars paid to the chief executive officer (and the four other most highly-compensated executive officers) of a public company is not deductible unless such compensation is "performance based." To be performance-based under IRC section 162(m) and applicable Treasury regulations thereunder, a bonus must be measured against specific performance goals that are set while the achievement of those goals is still substantially

- **Definition of Termination Without Cause**: The definition of "termination without cause" - i.e., when Mr. Burns would be entitled to severance and change of control payments - is too narrow. "Cause" only encompasses (i) a felony conviction and (ii) spending insufficient time or breaching confidentiality or restrictive covenants. See Motion, Exhibit A, page 4. If the contract is assumed as currently drafted, the company could not terminate Mr. Burns' employment even if he were convicted of a non-felony crime of dishonesty, moral turpitude, or fraud without paying him massive severance. Similarly, Mr. Burns and the Executives are exonerated (and can not be terminated for cause) as a result of any actions they take in "good faith". See Burns Contract 4(b). These provisions need to be addressed before the contract is assumed.[10]

- **Definition of Good Reason**: The "Good Reason" definition in the Burns contract (i.e., the circumstances upon which he can leave the company and be entitled to severance) should contain a provision allowing the Company a reasonably opportunity to cure and/or rectify any issues (in particular, the status of the Executive's responsibilities) before the Executive can be deemed to have left "for Good Reason". See Burns Contract 4(c).

- **Severance**: The severance payments to Mr. Burns (called "non-compete payments in the Supplement) should not be paid in the event he is terminated for cause or leaves without good reason.

- **Actual Contracts Not Provided**: The actual contracts for the Executives are not provided, instead, only "term sheets" are attached to the Motion. All parties in interest should have the opportunity to review all of the actual contracts being assumed before the Motion is granted.

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uncertain, and in any event that are set no more than a quarter of the way into the performance period. See 26 C.F.R. 1.162-27(e)(2)(i). In this case the performance thresholds have been set so low that Mr. Burns was assured of "earning" his substantial bonus at the time the program was approved. Even if that were debatable, it is indisputable that setting performance goals at the end of February for a performance period ending -- unusually -- in the middle of a fiscal year destroyed any possibility that the bonus paid to Mr. Burns would be considered performance-based and therefore fully deductible under IRC section 162(m). On information and belief, employers in general and Dana in particular have avoided semi-annual payments in order to maintain tax-deductibility under Section 162(m). The AIP's semi-annual payments to Mr. Burns are therefore not "in the ordinary course". The Committee does not object to payments to any other executive or employee under the AIP.

[10] The Committee notes that the SEC is investigating Dana for accounting matters that arose after Mr. Burns became CEO. Although the Committee has no reason to believe that Mr. Burns is in any way a target of that investigation, the Committee's diligence into such investigation has thus far been extremely limited.

IV. The Debtors Request for a Declaratory Judgment
Limiting the Definition of "Insider" Lacks Merit

40. By the Motion, the Debtors ask this Court to declare that the definition of insiders is "limited" to (i) Mr. Burns and the Executives and (ii) any director of the Debtors at the time of inquiry. See Motion at ¶¶ 38-39.

41. This request for a declaratory judgment should be denied.[11] First, the Motion is devoid of any rationale or reasoning as to why such relief is necessary or appropriate in the context of this case. Second, the definition of "insider" offered by the Debtors would substantially alter the very statute itself. The Bankruptcy Code already expressly defines an "insider" of a corporate debtor as including the following individuals: (i) directors of the debtor; (ii) officers of the debtor; (iii) persons "in control of" the debtor; (iv) partnerships in which the debtor is a general partner; (v) general partners of the debtor; and (vi) relatives of a general partner, director, officer or person in control of the debtor. See 11 U.S.C. §101(31)(B). Under the Debtors' proposed definition of "insider", clauses (iii), (iv), (v) and (vi) referenced above would be deemed deleted from the Bankruptcy Code for the purposes of this case.[12]

42. Third, it is well-settled that whether a party is an "insider" within the meaning of the Bankruptcy Code is strictly a question of fact. "'Although the Bankruptcy Code defines the term 'insider', 11 U.S.C. § 101(31), courts have uniformly held that the Bankruptcy Code's definition is merely illustrative and that the term 'insider' must be flexibly applied on a case-by-case basis.'" KDI Specialty Foods, Inc. v. Austin Financial Services, Inc. (In re KDI

[11] The request is also procedurally improper. Requests for declaratory judgments are properly brought through an adversary proceeding commenced through summons and complaint. See Fed. R. Bankr. P. 7001(9).

[12] The Committee does not object to a non-precedential determination that employees other than the Executives named in the Motion are not "insiders" solely for the purpose of exempting such employees' 2006 AIP and pre-petition severance arrangements from section 503(c). The Committee reserves its rights to object, under section 503(c) or otherwise, to any other compensation or severance arrangements.

Holdings, Inc.), 277 B.R. 493, 511 (Bankr. S.D.N.Y. 1999) (quoting Pan Am Corp. v. Delta Air Lines, Inc. 175 B.R. 438, 498-500 (S.D.N.Y. 1994) (following a "flexible approach" to consider "a wide variety of factors" as to whether party was an "insider")). See also CPY Co. v. Ameriscribe Corp. (In re Chas P. Young Co.), 145 B.R. 131 (Bankr. S.D.N.Y. 1992) ("insider status must be determined on a case by case basis through examination of the totality of the circumstances and the creditor's degree of involvement on the debtor's affairs.") (citations omitted). Cf. Official Committee of Unsecured Creditors v. McConnell (In re Grumman Olson Indus, Inc.), 329 B.R. 411, 427-28 (Bankr. S.D.N.Y. 2005) ("Under section 101(31)(B) of the Bankruptcy Code, an 'insider' of a corporation includes a 'person in control.' The Bankruptcy Code does not define 'person in control,' and the determination must be made on light of the facts and circumstances on a case-by-case basis.") (citations omitted). Here, the Debtors have offered no factual basis as to why certain individuals should or should not be deemed insiders and it is wholly impossible, based upon the record before this Court, for anyone to determine that, other than the half a dozen individuals designated in the Motion, there are no other individuals that may fall within the definition of the term. In essence, the Debtors are asking the Court to enter an order that proves a negative, i.e., that no person in this case (but a select few) are now nor ever will be "insiders" as such term is defined under the Code. This simply cannot be done without examining the facts and circumstances of each person in the infinite universe that is deemed "not an insider". This is an impossible task, and the request should be denied.

43. Finally, the Debtors' are asking this Court to issue an impermissible advisory opinion. See In re Adelphia Commc'ns Corp., 327 B.R. 143, 171 (Bankr. S.D.N.Y. 2005) (denying request to issue advisory opinion on how court might construe order in the event a controversy arose over such order, when no present controversy existed.) The Motion is

devoid of any fact or issue that would necessitate a ruling by the Court on this issue at this time, other than (presumably) the Debtors may seek, at sometime in the future, to implement a retention or severance plan outside of the rubric of Bankruptcy Code § § 503(c)(1) and (2).

CONCLUSION

WHEREFORE, the Official Creditors' Committee respectfully requests that the Court (i) deny the relief sought in the Motion and (ii) grant such other and further relief which is just and proper.

Dated: August 14, 2006

KRAMER LEVIN NAFTALIS & FRANKEL LLP

By: /s/ Thomas Moers Mayer
Thomas Moers Mayer (TM 9357)
P. Bradley O'Neill (PO-5832)
Matthew J. Williams (MW 4081)
Douglas H. Mannal (DM 6408)
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

Counsel for Official Committee of
Unsecured Creditors of Dana Corporation, *et al.*