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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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:
In re: : Chapter 11
: Case No. 06-10354 (BRL)
Dana Corporation, *et al.* :
: (Jointly Administered)
Debtors. :
:
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**OBJECTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY
HOLDERS WITH RESPECT TO DEBTORS' MOTION FOR AN ORDER
AUTHORIZING DANA CORPORATION TO (A) ENTER INTO
EMPLOYMENT AGREEMENTS WITH MICHAEL J. BURNS, ITS
PRESIDENT AND CEO, AND FIVE KEY EXECUTIVES OF HIS CORE
MANAGEMENT TEAM, AND (B) ASSUME CERTAIN CHANGE OF
CONTROL AGREEMENTS, AS AMENDED**

**TO THE HONORABLE BURTON R. LIFLAND
UNITED STATES BANKRUPTCY JUDGE:**

The official committee of equity security holders (the "Equity Committee") of Dana Corporation and the other above-captioned debtors (collectively, the "Debtors"), submits this objection (the "Objection") to the Motion of Debtor 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 J. Burns, its President and Chief Executive Officer, and Five Key Executives of his Core Management Team, and (B) Assume Certain Change of Control Agreements, as

Amended (the “Motion”) as modified by the Supplement (Docket No. 2696) (the “Supplement”) dated August 4, 2006. In support of its Objection, the Equity Committee respectfully states as follows:¹

INTRODUCTION

1. The Equity Committee recognizes that in order for the Debtors to successfully reorganize, the Debtors must have a management team that is appropriately incentivized to maximize the value of the Debtors’ estates. Unfortunately, the Debtors’ proposed compensation scheme falls woefully short of achieving this objective. Rather than seeking to implement an appropriate incentive program, the Debtors are seeking to pay exorbitant sums to the senior management team simply to remain with the Debtors through the effective date of a chapter 11 plan or a sale of the Debtors (regardless of whether the result is a success); on top of those amounts, the Debtors are proposing payment of substantial bonuses to the management team merely to maintain the current value of the Debtors. Given that the Debtors’ performance has substantially lagged its industry peers and given that by the Debtors’ own admission, the Debtors must fix their U.S. operations to successfully emerge from chapter 11, rewarding management for simply maintaining the status quo is unacceptable.

2. The compensation program that the Debtors are seeking to implement exhibits all of the evils that the “Kennedy Amendments” to section 503 of the Bankruptcy Code were intended to eradicate. Rather than working with their constituencies to implement a program that complies with the language and spirit of the Kennedy Amendments, the Debtors are asking this Court to approve a key employee retention plan that is prohibited under section 503(c) of the Bankruptcy Code and a severance plan prohibited under section 503(c)(2) of the Bankruptcy Code. Under the Debtors’ proposed plan, the top six senior most members of the management team, Michael J. Burns, Paul E. Miller, Thomas R. Stone, Michael L. DeBacker, Ralf Goettel and Nick L. Stanage (collectively, the

¹ All capitalized terms not defined herein shall have the meaning ascribed to such terms in the Motion and the Supplement.

“Executives”), will receive in excess of \$5.2 million in retention payments -- which the Debtors have labeled the “fixed component” of the Completion Bonuses in a facile attempt to avoid the section 503(c) limitations -- for simply remaining with the Debtors through the effective date of a chapter 11 plan or until the sale of the Debtors. This is a boilerplate retention plan prohibited by the Bankruptcy Code. Likewise, the Debtors are seeking authority to pay in excess of \$7 million to these six insiders if they are terminated by or leave the Debtors (whether voluntarily or involuntarily). Whatever label the Debtors seek to attach to it, these amounts are severance payments that violate section 503(c)(2) of the Bankruptcy Code.

3. In addition to renaming the severance and retention plans to avoid the statutory prohibitions on such payments, the Debtors have purported to tie part of the Completion Bonus to performance levels to create an appearance that the payments are for performance, rather than retention. As currently proposed, however, the incentive portion of the Debtors’ compensation program is not tied to any meaningful performance levels. Instead, the enterprise value milestones for payment of the “incentive” portion of the Completion Bonus, if approved, would reward the Executives for preserving the Debtors’ current mediocre financial performance. Indeed, the absurdity of labeling the Debtors’ proposed scheme as an incentive based program is highlighted by the fact that even if the Debtors’ management is, by all measures, unsuccessful in their efforts to restructure the Debtors and the total enterprise value of the Debtors falls by over half a billion dollars during these cases, the senior management team will receive aggregate “fixed” and “incentive” payments of \$7,013,000 upon the effective date of a chapter 11 plan or upon a sale of the Debtors.²

² The Debtors’ Annual Incentive Plan for 2006 and 2007 (the “AIP”), which was implemented on the eve of, and in connection with, the Debtors’ bankruptcy filing, also sets unreasonably low thresholds upon which the Debtors’ Executives and other employees would be entitled to an annual “incentive” bonus. For example, it appears that even if the Debtors missed the projections in their DIP budget, the employees would still be paid “incentive” bonuses. Such an outcome is simply inappropriate and is yet another example of the Debtors’ efforts to make significant payments to management without regard to actual performance. So that all constituents have an opportunity to consider and reflect upon the total

4. As noted above, the Equity Committee recognizes the need to incentivize management and would embrace a program that rewards management for performance. Because the Debtors' program fails this objective, as detailed in this Objection, the Equity Committee is outlining a proposed incentive compensation program that would appropriately reward management performance, and which the Equity Committee believes would be embraced by all of the Debtors' constituencies. As discussed in the Equity Committee's proposal below, see infra at ¶¶ 21-23, to the extent that the Debtors achieve better performance, the Equity Committee is fully supportive of a program that provides significant and even above-market bonuses so that the Executives share in the value they create. Unfortunately, rather than seizing the opportunity to work with its constituencies to craft such a plan, the Debtors have unilaterally devised a compensation scheme that encourages retention, mediocrity and the status quo.

BACKGROUND

5. On March 3, 2006 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). By an order entered on the Petition Date, the Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being administered jointly. Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtors continue to operate their businesses and manage their property as debtors in possession.

6. On June 27, 2006, the Office of the United States Trustee for the Southern District of New York appointed the Equity Committee pursuant to section 1102 of the Bankruptcy Code. On June 29, 2006, the members of the Equity Committee determined to engage, subject to

compensation proposed to be paid to the Executives, the terms and conditions of the AIP should be fully disclosed and Bankruptcy Court approval of the AIP should be sought by the Debtors. Absent Bankruptcy Court approval, payments under the AIP may be subject to disgorgement as unauthorized post-petition transfers. At a minimum, it is essential that the Debtors work with all significant constituencies with respect to the 2007 annual incentive plan to establish reasonable performance thresholds.

Bankruptcy Court authorization and approval, Fried, Frank, Harris, Shriver & Jacobson LLP as its counsel.

7. On June 29, 2006, the Debtors filed the Motion seeking, among other things, authority to enter into employment agreements with the Executives. As detailed in the Motion, the Debtors originally proposed that the Executives will receive compensation composed of: (a) an annual base salary, (b) the Annual Bonus and (c) a Completion Bonus. The Completion Bonus of \$10,525,000 for all six of the Executives collectively was earned by the Executives upon the Debtors' emergence from bankruptcy. The Motion also included proposed severance arrangements under which the Executives would receive between 18 months and 2 years of base salary and Annual Bonus, as well as a pro-rata portion of the Completion Bonus if terminated before the Debtors' emergence from chapter 11. In addition, the Executives received twice their base salary and Annual Bonus and the Completion Bonuses if terminated after a emergence from chapter 11.

8. On August 4, 2006, the Debtors filed the Supplement to the Motion proposing modifications to the employment agreements (as modified, the "Employment Agreements"). The Debtors' modifications to their management compensation proposal provide window dressing but do not change the substance of a scheme that violates the letter and spirit of section 503(c) of the Bankruptcy Code.

THE DEBTORS' PROPOSED COMPENSATION SCHEME

9. The Employment Agreements provide that the Executives will receive compensation comprised of: (a) an annual base salary, (b) an Annual Bonus that is achieved if the Debtors "reach" certain performance targets that are set below the Debtors' DIP budget projections, and (c) a Completion Bonus comprised of a fixed minimum component each Executive would earn simply by staying employed during the bankruptcy cases and a variable "incentive" component based on the total enterprise value ("TEV") of the Debtors on the six month anniversary of the effective date

of a chapter 11 plan or a sale of the Debtors. In addition to the proposed payments under the Employment Agreements, the Debtors seek authority to: (i) pay severance equal to each Executive’s annual salary and Annual Bonus in exchange for the Executive’s agreement to an 18 month non-compete and non-solicitation period, as well as ongoing confidentiality and non-disparage covenants,³ and (ii) assume the Debtors’ obligations under the existing pre-petition senior executive retirement plans on the effective date.

10. The following chart illustrates the amounts that the Debtors propose to pay the Executives under the Employment Agreements assuming an 18 month chapter 11 case:

	Burns	Miller	Stone	DeBacker	Goettel	Stanage
Base Salary	\$1,552,500	\$562,500	\$660,000	\$607,500	\$577,500	\$504,000
2006 Annual Bonus ⁴	\$2,070,000	\$450,000	\$528,000	\$486,000	\$385,000	\$336,000
Completion Bonus to be paid upon effective date (regardless of outcome of case)	\$3,100,000	\$560,000	\$400,000	\$400,000	\$400,000	\$400,000
Additional Completion Bonus to be Paid if Debtors “achieve” a TEV of \$2 billion (which would be a decrease of \$600 million from the current TEV)	\$1,033,000	\$187,000	\$133,250	\$133,250	\$133,250	\$133,250
Additional Incentive Bonus to be Paid if Debtors “achieve” current TEV (\$2.6 billion)	\$3,100,000	\$560,000	\$400,000	\$400,000	\$400,000	\$400,000
Severance Payments (Salary plus Annual Bonus) due upon involuntary termination without cause, voluntary termination for Good Reason (with respect to Mr. Burns) or failure to enter into a replacement employment agreement	\$3,000,000	\$825,000	\$968,000	\$891,000	\$770,000	\$672,000
SERP obligations to be assumed upon effective date	\$5,900,000	\$2,283,000	\$1,322,000	n/a	n/a	\$2,095,000
Total Compensation to Executives assuming Employment Agreements are not renewed upon effective date and TEV remains \$2.6 billion ⁵	\$18,722,500	\$5,240,500	\$4,278,500	\$2,784,500	\$2,532,500	\$4,407,000

³ As discussed in Section I.B. below, although the Debtors have ascribed a different label to their proposed severance packages, the substance of the severance payments remains the same and violates section 503(c)(2) of the Bankruptcy Code.

⁴ The Annual Bonus amounts are calculated for a one-year employment period and will increase if the Debtors’ chapter 11 cases continue beyond one year.

⁵ Total compensation will increase if the Debtors’ chapter 11 cases continue beyond one year and the Annual Bonus amounts are increased accordingly.

OBJECTION

I. The Debtors' Proposed Program Violates Section 503(c)(1) and Section 503(c)(2) of the Bankruptcy Code and Fails to Appropriately Incentivize Management

A. The Proposed Employment Agreements Constitute Retention Payments

11. Section 503(c) of the Bankruptcy Code⁶ was enacted in response to growing public discontent with lavish rewards for senior managers of bankrupt debtors. See In re U.S. Airways, Inc., 329 B.R. 793, 797-98 (Bankr. E.D. Va. 2005) (discussing the enactment of section 503(c) as a prohibition and restriction on the typical KERPs).⁷ Section 503(c)(1) of the Bankruptcy Code prohibits Debtors from paying money to insiders for purposes of retaining them without meeting

⁶ Section 503(c) of the Bankruptcy Code provides as follows:

Notwithstanding subsection (b), 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 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 non-management 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 non-management 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 of such insider for any purpose during the calendar year in which such transfer is made or obligation is incurred;
- (2) a severance payment to an insider of the debtor, unless –
 - (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 non-management employees during the calendar year in which the payment is made; or
- (3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition. 11 U.S.C. § 503(c)(1)-(3).

⁷ In the summer of 2002, when Congress debated changes to the Bankruptcy Code, a few senators and House representatives introduced legislation specifically designed to control abuse by executives whose actions led their companies to bankruptcy. See Employee Abuse Prevention Act of 2002, H.R. 5221, 107th Cong. (2d Sess. 2002) (sponsored by Representative William D. Delahunt [MA]); Employee Abuse Prevention Act of 2002, S. 2798, 107th Cong. (2d Sess. 2002) (sponsored by Senator Richard Durbin [IL] and cosponsored by Senators Edward Kennedy [MA], John Kerry [MA], Patrick J. Leahy [VT], and John D. Rockefeller [WV]). Although, the Employee Abuse and Prevention Act of 2002 was not enacted, in 2005, the provision of the Employee Abuse Prevention Act of 2002 dealing with KERPs was included in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCA"). Thus, section 503(c) of the BAPCA was intended to curb large and unearned payouts to corporate executives of bankrupt companies.

certain heightened standards. See In re Nobex Corp., Case No. 05-20050 (Jan. 12, 2006, Bankr. Del.), Hearing Transcript p. 86, attached to this Objection as Exhibit A (stating that [section 503] “(c)(1) was meant to impose specific standards and criteria for a retention program. [Section 503] (c)(2) was meant to provide similar guidance with respect to a severance program. And (c)(3) was meant to provide a standard ... for any other transfers or obligations outside the ordinary course of business.”); see also In re Eaglepicher Holdings, Inc., 2005 WL 4030132, at *2 (noting that after October 17, 2005, “the amendment to 11 U.S.C. § 503 will generally affect the use and approval of KERPs by setting forth limitations on the payment or allowance of claims for retention bonuses or severance pay to the debtor’s insiders, “key” or otherwise.”).

12. Despite the restrictions on retention payments, courts can approve appropriate incentive plans. As this Court noted in connection with the chapter 11 case of Calpine Corporation, it can generally be argued that any compensation program, promised bonuses or salary increases is in part aimed at retaining qualified employees by providing adequate pay and making employees happy. See In re Calpine Corp., Case No. 05-60200 (Apr. 26, 2006, Bankr. S.D.N.Y.), Hearing Transcript p.84-85, attached to this Objection as Exhibit B. Yet, it is not difficult to distinguish between retention compensation and plans that are structured so as to provide incentives for management to bring enhanced value into the estate. See id.; see also In re Nobex Corp., Case No. 05-20050 (Jan. 12, 2006, Bankr. Del.), Hearing Transcript p. 87, attached to this Objection as Exhibit A (distinguishing between incentive compensation and retention payments by pointing to the fact that the compensation program in question was structured so that senior management got paid not merely for staying with the company but based on certain criteria being met such as the amounts of proceeds from the sale of the company).

13. The Debtors couch the proposed payments as incentive rather than retention payments to avoid the restrictions of section 503(c)(1) of the Bankruptcy Code. Here, however, the

Employment Agreements are structured to provide inappropriate retention payments to the Executives, rather than an appropriate incentive structure designed to maximize value and, thus, the Motion cannot be approved.

14. Initially, the Motion provided that the entirety of the Completion Bonus would be earned if the Executives remained employed by the Debtors throughout the duration of the bankruptcy cases. After objections were filed pointing out that the amendments to section 503(c) prohibited the Debtors' proposed compensation program, the Debtors filed the Supplement. The modifications contained in the Supplement do not alter the fact that the Debtors are seeking to provide retention payments to management rather than bonuses based on performance. As set forth above, the proposed Employment Agreements provide that the Executives will earn 50% of their target Completion Bonus (an aggregate of more than \$5.2 million) simply for remaining with the Debtors through the effective date of a chapter 11 plan or sale of the Debtors, regardless of the results achieved. By definition, that is a retention bonus subject to the strict requirements of section 503(c) of the Bankruptcy Code. The Debtors have not and cannot make a showing that their compensation program satisfies the rigid requirements of section 503(c).

15. The second component of the Debtors' proposed Completion Bonus program is the variable component, which uses a TEV metric to determine whether the Executives are entitled to a bonus. While a TEV metric can be an appropriate metric to align the interests of senior management with creditors and equity holders, the Debtors have set the thresholds at such absurdly low levels that their proposed structure is nothing more than a thinly disguised KERP program.⁸ In that regard, the

⁸ While the Equity Committee believes that TEV as of the effective date is the appropriate metric for determining the Completion Bonus, the Equity Committee also recognizes that a balance must be struck so as to not create perverse incentives for management to focus exclusively on enterprise value without considering the ramifications of their actions on the pool of unsecured claims. Any measure of TEV must include a mechanism to adjust for substantial claims created as a result of the Debtors' determination to reject or modify certain significant contractual relationships or to make any divestitures.

Debtors propose that if the TEV of the Debtors on the six month anniversary of the effective date is \$2 billion, the Executives would be entitled to 66% of their respective Completion Bonuses. By the Debtors' own admission, based on current market values, the TEV of the Debtors is approximately \$2.6 billion. See Exhibit B to the Supplement. It goes without saying that if the Debtors lose \$600 million dollars of enterprise value during these chapter 11 cases, all will agree that the bankruptcy cases will have been an abject failure. The Debtors, however, are seeking to reward the Executives with over \$7 million in incentive bonuses for achieving such a result.

16. And that is not all. If the Debtors were to emerge from chapter 11 in one year's time with a TEV of \$2 billion and determine not to renew Michael Burns' Employment Agreement because of disappointing results, Mr. Burns would be entitled to receive in excess of \$16 million broken down as follows:

Annual Base Salary	\$1,035,000
2006 Annual Bonus	\$2,070,000
Completion Bonus to be paid upon effective date	\$4,133,000
Severance Payments	\$3,000,000
SERP obligations to be assumed upon effective date	\$5,900,000
Total Compensation	\$16,138,000

That is, having led a company whose TEV declined during bankruptcy, Mr. Burns would receive a total package of \$16 million of which approximately \$7.2 million could constitute a bonus and severance payment. Such a result is inappropriate and should not be sanctioned by this Court.

17. While retention plans for insiders are strictly proscribed by the Bankruptcy Code, a debtor may implement an appropriate incentive plan to motivate senior management to create value. Given the Debtors' past lackluster performance, an incentive plan must have as its goal, to bring the Debtors' financial performance in line with industry peers and to encourage enhancement of value for all. Rewarding the Executives for maintaining status quo or limiting the forfeiture of value

violates section 503(c) of the Bankruptcy Code and is not permitted. Unfortunately, for all constituencies, however, that is exactly what the Debtors have sought to accomplish by their Motion.

18. As the foregoing demonstrates, the proposed Employment Agreements do not properly incentivize performance but rather further the Debtors' objectives of providing guaranteed retention payments to the Executives in violation of section 503(c) of the Bankruptcy Code. Thus, the Equity Committee respectfully submits that the Motion should not be approved.

B. The Proposed Employment Agreements Include Severance Payments

19. In addition to proposing a compensation scheme that violates section 503(c)(1), the Debtors are also asking this Court to approve severance payments to the Executives prohibited by section 503(c)(2) of the Bankruptcy Code. Section 503(c)(2) provides that a severance payment should not be paid to an insider of the debtor unless the payment is part of a program that is generally applicable to all full-time employees and the amount of the payment is not greater than 10 times the amount of the mean severance pay given to non-management employees during the calendar year in which the payment is made. See 11 U.S.C. § 503(c)(2). The Debtors cannot make such a showing.

20. The Debtors originally sought authority to provide for certain severance payments to the Executives upon involuntary termination both before and after emergence from bankruptcy. See Exhibit A of the Motion. Specifically, the initial Motion provided that if the Executives were terminated or resigned for good reason prior to the Debtors' emergence from bankruptcy, the Executives would receive severance payments equal to between 18 months and 2 years of base salary and Annual Bonus, as well as a pro-rata portion of the Completion Bonus if terminated before the emergence from bankruptcy. If the Executives were terminated or resigned for good reason after the Debtors' emergence from bankruptcy, the Executives would receive twice their base salary and Annual Bonus and the outstanding unpaid Completion Bonuses.

21. Following objections that noted that the Debtors requested relief was prohibited by section 503(c)(2), the Debtors filed the Supplement where the Debtors state that they are no longer seeking to grant the Executives severance payments. Instead, the Debtors seek to accomplish the same objective with a “separation agreement” that would require the Debtors to provide an Executive with a payment equal to one year salary plus the Annual Bonus if such Executive is terminated or his Employment Agreement is not renewed following good faith negotiations. See Exhibit A to the Supplement. While, the Debtors claim that this payment of one year salary and annual target is not a severance payment restricted under section 503(c)(2), but rather is a payment in consideration for non-compete and non-solicitation period, the Debtors’ position is yet another example of their disregard for the clear spirit and language of the Bankruptcy Code.

22. First, the Debtors have not advanced any legitimate basis for which they need non-compete and non-solicitation provisions, and given the state of the industry, it is hard to fathom one. Second, the Debtors also have not set forth any reason as to why a significant separation payment is necessary to induce the Executives to enter the non-compete and non-solicitation provisions; rather, a rational person would readily conclude that the salary and annual bonus under the Employment Agreements suffice as consideration for those provisions. In fact, the Employment Agreements as originally proposed in the Motion contemplated both the severance payments and the non-compete and other restrictive provisions. The Debtors cannot avoid statutory requirements on payment of severance by simply moving the severance payments into a separate agreement, changing the name for such payments and slightly modifying the amounts of the severance payments to the Executives. Accordingly, the Debtors’ request for approval of the severance arrangements violates section 503(c)(2) of the Bankruptcy Code and should be denied.

II. Equity Committee Proposal

23. As noted above, the Equity Committee is sensitive to the Debtors’ need to incentivize its senior management team and would fully support a program that had appropriate thresholds to permit the Executives to share in any value creation. In that regard, building from the Debtors’ proposal, the Equity Committee has developed the following alternative to the Debtors’ proposed Completion Bonus structure that would provide appropriate incentives to align the interests of management with the Debtors’ creditors and equity holders.

24. The Equity Committee proposes that at a TEV of \$2.6 billion on the effective date, the Executives would be entitled to 25% of the \$10,520,000 Target Completion Bonus pool.⁹ The Equity Committee further proposes that if the TEV of the Debtors on the effective date is higher than \$2.6 billion, then the Executives’ bonus pool will be expanded by 3% of the incremental value over \$2.6 billion, without a cap.¹⁰ The following chart reflects a comparison between the Equity Committee proposal and the Debtors’ proposal at various TEV levels:¹¹

Total Enterprise Value (\$Millions)	Michel Burns		Paul Miller		Tom Stone		Nick Stange		Mike DeBacker		Ralf Goettel	
	Debtor Proposal	Equity Proposal	Debtor Proposal	Equity Proposal	Debtor Proposal	Equity Proposal	Debtor Proposal	Equity Proposal	Debtor Proposal	Equity Proposal	Debtor Proposal	Equity Proposal
TEV of \$2.0 b	\$4,133	\$0.000	\$0.747	\$0.000	\$0.533	\$0.000	\$0.533	\$0.000	\$0.533	\$0.000	\$0.533	\$0.000
Current Level TEV of \$2.6 b	\$6.200	\$1.550	\$1.120	\$0.280	\$0.800	\$0.200	\$0.800	\$0.200	\$0.800	\$0.200	\$0.800	\$0.200
TEV of \$3.0 b	\$7.379	\$8.662	\$1.333	\$1.558	\$0.952	\$1.113	\$0.952	\$1.113	\$0.952	\$1.113	\$0.952	\$1.113
TEV of \$3.5 b	\$8.852	\$17.463	\$1.599	\$3.115	\$1.142	\$2.253	\$1.142	\$2.253	\$1.142	\$2.253	\$1.142	\$2.253

⁹ In light of the fact that a fixed “retention” component to any proposal violates the Bankruptcy Code and does not properly incentivize management, the Equity Committee’s proposal is based solely on a variable incentive component that will provide the Executives with significantly greater upside to the extent that value is created.

¹⁰ As provided in the Debtors’ Motion, the Equity Committee’s proposal contemplates that up to \$3.1 million of the Completion Bonus will be paid in cash with the remainder paid in the common stock of reorganized Dana Corporation.

¹¹ As noted above, the Equity Committee proposal is based on TEV on the effective date of a plan of reorganization, which the Equity Committee believes is a more appropriate measuring date than the measuring date proposed by the Debtors in the Supplement (i.e., 6 months after the effective date of a plan of reorganization).

25. As the foregoing demonstrates, the Equity Committee is not opposed to paying larger Completion Bonuses to the Executives for achieving high performance levels. As long as the Executives are provided with appropriate incentives to enhance value, the Executives deserve and should be well compensated. The Completion Bonus modifications proposed by the Equity Committee aim to ensure greater stakes for senior management in the Debtors' present and future financial performance. As a result, the proposed modifications would result in a program that encourages first rate performance and the maximization of value for all of the Debtors' constituencies.¹²

III. The Debtors have not Established that the Executives are the Only "Insiders" of the Debtors

26. The Motion and the Supplement seek a determination from this Court that, on a postpetition basis, the term insider, as defined in section 101(31) of the Bankruptcy Code, applies only to the Executives and directors of the Debtors.¹³ Such a finding is presumably being sought to permit the Debtors to effectuate a KERP program with respect to the employees of the Debtors other than the Executives without having to create a fictional incentive program to disguise a KERP or develop other creative ways to disguise severance payments. The Debtors, however, have provided no evidence or basis for the Court's determination regarding insider status. In fact, given the size and complexity of the Debtors' corporate structure, there may indeed be other individuals that qualify as insiders under section 101(31) and there is no factual basis to conclude otherwise.

27. The statutory definition of an insider is not limited or exhaustive. The determination of whether an individual is an insider under section 101(31) of the Bankruptcy Code

¹² In the context of implementing a consensual program to appropriately incentivize the Executives, the Equity Committee is willing to discuss appropriate protections for the Executives in the event they are terminated.

¹³ As a preliminary matter, the Debtors are seeking a declaratory judgment with respect to which parties are insiders. It is unclear whether the type of declaratory relief sought by the Debtors can be obtained without filing an adversary proceeding under Fed. R. Bankr. P. 7001. See Alan N. Resnick and Henry J. Sommers, Editors, *Collier on Bankruptcy* (15th ed. Rev.) (Matthew Bender & Co., 1996) Vol. 10, §7001.10 (citing In re Harry C. Partridge, Jr. & Sons, Inc., 43 B.R. 669 (Bankr. S.D.N.Y. 1984)).

involves a fact intensive analysis performed on a case-by-case basis and with the consideration of the relevant facts and circumstances. See In re KDI Holdings, Inc., 277 B.R. 493, 511 (Bankr. S.D.N.Y. 1999) citing Pan Am Corp. v. Delta Air Lines, Inc., 175 B.R. 438, 498 (S.D.N.Y.) (“the term ‘insider’ must be flexibly applied on a case-by-case basis”). To the extent that the Debtors determine to implement a KERP plan with respect to their other executives and employees, the Debtors should file a motion and create a sufficient record to establish that the relevant executives and employees are not “insiders” under the Bankruptcy Code. At present, it is impossible for the Court to review all of the Debtors’ executives and employees aside from the six Executives covered by the instant Motion and conclude that they are not insiders. Moreover, there is no reason why this determination should be made at this point. The Debtors are seeking an advisory opinion in a complete vacuum and this Court should not grant such an opinion without a pending case or controversy. See, e.g. Penguin Books USA Inc. v. Walsh, 929 F.2d 69, 72 (2d Cir. 1991) (“A federal court lacks the power to render advisory opinions”) (quoting North Carolina v. Rice, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L.Ed.2d 413 (1971)); In re Alcibiades, 2000 WL 655983, at *6 (E.D.N.Y. Mar. 17, 2000) (“bankruptcy courts cannot issue advisory opinions”).

Conclusion

28. The Debtors' businesses have significantly underperformed over the last several years. As the Debtors have acknowledged on several occasions, the Debtors' U.S. operations have been operating at considerable losses and are in need of a significant operational restructuring. The Debtors' margins, both overall and on a division-by-division basis, have lagged significantly behind the Debtors' peer companies. The challenges facing the Debtors are extensive and it is essential that the Debtors put in place an appropriate compensation structure that aligns management with the Debtors' significant creditor and equity constituents and incentivizes management to maximize value for all. The proposed compensation fails to do so. For these and the foregoing reasons set forth above, the Equity Committee respectfully requests that this Court deny the Debtors' Motion and grant such further relief as is just and equitable.

Dated: New York, New York
August 14, 2006

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP
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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 05-20050
. .
. .
NOBEX CORPORATION, .
. . 824 Market Street
. . Wilmington, Delaware 19801
Debtor. .
. . January 12, 2006
..... . 2:05 p.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE MARY F. WALRATH, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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I N D E X

<u>WITNESSES:</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>	<u>Further Redirect</u>
Charles Dimmler	20	41 45 56	44	44	59

<u>EXHIBITS:</u>		<u>MARKED</u>	<u>RECEIVED</u>
<u>For the Debtor:</u>			
D-1 Chart		20	

1 THE COURT: And you are satisfied with the structure?

2 MR. CARICKHOFF: Yes, we are, Your Honor.

3 THE COURT: Thank you.

4 Well, let me first deal with the legal issue raised
5 by the United States Trustee's objection. I guess I can agree
6 with everybody that the language is not that clear, but this is
7 my take on it.

8 I agree with the debtor that (c)(1) was meant to
9 impose specific standards and criteria for a retention program.
10 (c)(2) was meant to provide similar guidance with respect to a
11 severance program. And (c)(3) was meant to provide a standard,
12 albeit not as clear, for any other transfers or obligations
13 outside the ordinary course of business.

14 I agree that the including transfers made to
15 officers, managers or consultants hired after the petition date
16 is not exclusive. That's clear from other provisions in the
17 Bankruptcy Code.

18 So I do read (c)(3) to be the catch-all and the
19 standard under (c)(3) for any transfers or obligations made
20 outside the ordinary course of business are those that are
21 justified by the facts and circumstances of the case. Nothing
22 more -- no further guidance being provided to the Court by
23 Congress, I find it quite frankly nothing more than a
24 reiteration of the standard under 363 and -- well, 363 under
25 which courts had previously authorized transfers outside the

1 ordinary course of business and that is, based on the business
2 judgement of the debtor, the court always considered the facts
3 and circumstances of the case to determine whether it was
4 justified. And I'll do the same in this case.

5 I think in this case it is clear that from structure
6 of the plan that this is not a retention plan. It is not
7 providing payment to the employees or senior management solely
8 for being retained, staying on the job. In fact, they can stay
9 on the job all they want if the criteria are not meant. That
10 is, the sale does not produce sufficient funds, they will not
11 get anything.

12 Similarly, they can leave the day after the sale and
13 get the incentive if in fact the sale produces more than the
14 minimums required under this. So I see it as not a retention
15 plan and therefore not subject to the (c)(1) strictures.

16 The question is whether or not, based on the evidence
17 that was presented, whether this incentive plan or the
18 transfers contemplated by it are justified by the facts and
19 circumstances of the case. And I think that burden has been
20 met here.

21 I do place great weight in the fact that the plan has
22 been presented and negotiated with the creditors committee,
23 who, as well as the debtor, has a fiduciary duty to all
24 creditors, but has a particular interest in assuring that
25 general unsecured creditors get some recovery.

1 I think it's significant that the plan provides no
2 incentive or no payment for simply achieving a sale already
3 contemplated by the stalking horse bid. And I think providing
4 such would not have been justified under the circumstances of
5 this case since that bid is already in hand.

6 I think it is designed to assure that senior
7 management and the marketing team go above and beyond the --
8 what they are required to do as fiduciaries. Gives them an
9 incentive to come up with additional recoveries for the general
10 unsecured creditors. And in that sense, I think it is
11 reasonable.

12 With respect to whether or not the numbers meet some
13 standard, I've always found it hard to compare incentive plans
14 in the context of a bankruptcy case with those articulated
15 often by expert witnesses as to what is generally set. I think
16 each case is fact specific and the parties with the best
17 knowledge of the facts that are relevant are the debtor and the
18 committee. And to the extent, the committee has felt that this
19 is a reasonable percentage to take out of their recovery to
20 give an incentive to management to potentially increase that
21 recovery, I will accept as justified.

22 That said, I don't think given the suggested example
23 that if somebody had come in and suggested 30 percent, I would
24 have looked at that as scants. But even that percentage may be
25 justified in the circumstances of a case and I would hear the

1 presentation on that. But I'm satisfied that what has been
2 presented is justified under the circumstances of this case and
3 I will approve it.

4 MR. ABBOTT: Thank you, Your Honor. May I have a
5 moment to confer with my colleagues about a form of order?

6 THE COURT: All right.

7 (Pause/counsel confer.)

8 MR. ABBOTT: Your Honor, we had debated with the
9 committee to some extent on the form of an order. I'd like to
10 -- we had contemplated further tinkering with it. I'm inclined
11 to just hand up the order. Your Honor's explanation of the
12 ruling on the record I think is probably adequate.

13 (Pause/counsel confer.)

14 MR. ABBOTT: Your Honor, perhaps --

15 THE COURT: You want to take a five minute recess?

16 Or --

17 MR. ABBOTT: Yes, Your Honor. Thank you.

18 THE COURT: All right. And you had handed me one
19 order. I don't know what you want.

20 So, let's take a recess.

21 (Recess)

22 THE CLERK: You may be seated.

23 MR. ABBOTT: Thank you, Your Honor, for that time.

24 It's been a long day for all of us. We are going to revise our
25 order in accordance with the committee's comments, circulate it

EXHIBIT B

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of

Case No.
05-60200

CALPINE CORPORATION, et al.,

Debtors.

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April 26, 2006
United States Custom House
One Bowling Green
New York, New York 10004

Hearing Pursuant to Agenda of Matters.

B E F O R E:

HON. BURTON R. LIFLAND,

U.S. Bankruptcy

Judge

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A P P E A R A N C E S:

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1 CALPINE CORPORATION
2 as a prohibition anyway. But you are right, the
3 contract has been changed so that the severance
4 papers are not in there, nor are 4 million dollar
5 severance bonus.

6 MR. YETNIKOFF: All we is ask is to
7 be served with the new agreements and the proposed
8 orders so it's a fairly large amount of information
9 to swallow and it's new, and I would appreciate
10 being served with the new orders.

11 THE COURT: Most of it is not new,
12 much of it is contained in the reply apparently
13 served on you and received in the court.

14 MR. YETNIKOFF: I have not yet seen
15 the reply, but in the event it's not new but very
16 recent.

17 THE COURT: I have one problem, Mr.
18 Cantor before I rule.

19 There is a provision for the CEO and
20 Mr. David, I believe, to receive some compensation
21 if they leave for a good reason. I don't know what
22 good reason is. It's a very subjective term that I
23 can anticipate good reason being something very
24 favorable to Mr. May and Mr. Davido but not
25 favorable to others. It's very subjective and I

1 CALPINE CORPORATION

2 don't know, unless you can define it better, I
3 would have a problem with that because the trigger
4 for the payment for good reason could be a good
5 reason being bad health, that's one thing. A good
6 reason could be an opportunity to take over General
7 Motors, and that's another thing.

8 MR. CANTOR: Your Honor, on page 7
9 of my black line version of the agreement, would
10 you like me to hand it up. It will be a very
11 specific definition and I can summarize it for you.
12 It means the occurrence of any of the following
13 facts, or occurrences: That a material adverse
14 change in the executive's duties, reporting
15 responsibilities, titles, or elected or appointed
16 officers, including but not limited to the
17 appointment of any person to an executive position
18 at the company that is co equal or senior to that
19 of the executive, other than the CEO. We have any
20 reduction for failure to pay when due the base
21 salary, the minimum 06 and 07 signing bonuses, a
22 reduction in the company executive's target bonuses
23 basically a reduction in the time and material, and
24 I'm also reading on a black line. Do you have a
25 cleaner copy?

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83

1 CALPINE CORPORATION

2 THE COURT: Is that list limiting or
3 is it precatory?

4 MR. CANTOR: It means the things set
5 forth in the agreement, I believe, your Honor.

6 THE COURT: And then it's infinity.

7 MR. CANTOR: Yes. I can read the
8 remainder of them. The companies' failure to
9 timely renew agreement. There is a renewal period,
10 I think it's 100 or 150 days near the end. The
11 companies breach of any material term of the
12 agreement that is not corrected within 10 days of
13 delivery or service of notice, or the failure of
14 the company to obtain the assumption in writing of
15 this agreement by any successor or acquirer of all
16 the substantial assets. And there's a limitation
17 on even that says for purposes of the definition,
18 none of the actions described in clauses A through
19 F, what I just describe, shall constitute good
20 reason with respect to the executive, if it was an
21 isolated, an inadvertent action, not taken in bad
22 faith by the company, and if it is remedied within
23 10 days after the receipt of notice.

24 THE COURT: Does anyone else want to
25 be heard?

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1 CALPINE CORPORATION

2 Well, based upon this record, and
3 it's certainly clear to the court that these plans
4 and agreements are proposed in good faith and based
5 upon appropriate business judgment. Further, the
6 record before me validates that the focus of the
7 plans and agreement is to maximize value for all
8 the estates; the plans are apparently designed as
9 incentive plans as opposed to retention or KERP's.

10 The argument that you were going to
11 make under Section 503, if you want to make it, you

12 can. If you want me to rule, I can.

13 MR. CANTOR: Your Honor, I pass on
14 the argument.

15 THE COURT: I do find, based upon
16 this record, that the prohibitions of Section 503
17 have, if not been avoided, are not applicable based
18 upon the structure of these plans and the
19 agreements. To the one area where there might be
20 potentially an argument to be made that 503(c)
21 would be applicable, that would be in the
22 supplemental plan, but that does not involve
23 insiders, and I think 503(c)(3) is appropriately
24 analyzed to agree with that.

25 In short, I do agree that these are

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1 CALPINE CORPORATION
2 incentive plans to bring enhanced value into the
3 estate. They are not retention plans, although
4 anyone can always make an argument that if people
5 are made happier than they were before, then they
6 are excited enough to stay with the company, but
7 that's not the focus of these plans. And this
8 would be clearly, based upon this record, not
9 KERP's and they are not in violation of 503(c).
10 And I will approve the appropriate orders submitted
11 to the court and according to this record.

12 MR. CANTOR: Thank you, your Honor.
13 We will submit an order. Have we prepared an
14 order?

15 MR. STAMER: Yes.

16 MR. CANTOR: Thank you.