

MEMORANDUM OPINION
(bench opinion)

August 29, 2003

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

IN RE:	:	
	:	
FULTON BELLOWS &	:	Case No. 03-33186
COMPONENTS, INC.	:	Chapter 11
f/k/a JRGACQ CORPORATION	:	
	:	
Debtor	:	

BEFORE THE HONORABLE RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR THE DEBTOR:

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APPEARANCES (Continued):

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FOR INTERNATIONAL ASSOCIATION OF
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FOR THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS:

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FOR THE UNITED STATES TRUSTEE:

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1 THE COURT: This matter is before the court upon the Motion and
2 Supporting Memorandum by the Debtor Seeking Rejection of Collective Bargaining
3 Agreements Pursuant to 11 U.S.C. § 1113, filed by the Debtor Fulton Bellows &
4 Components, Inc., on August 6, 2003. By this Motion, the Debtor asks the court to
5 allow it to reject a Collective Bargaining Agreement dated October 16, 1999 with the
6 United Steelworkers of America, AFL-CIO-CLC, Local 5431, and a Collective
7 Bargaining Agreement dated October 26, 1999 with the International Association of
8 Machinists and Aerospace Workers Union, Lodge 555. Objections to the Motion
9 were filed by the United Steelworkers and the Machinists Unions on August 15, 2003.

10 The trial on the Motion was held on August 25 and 26, 2003. The record
11 before me consists of forty-one exhibits introduced into evidence through the
12 testimony of representatives of the Debtor and each Union. This is a core proceeding
13 under 28 U.S.C. § 157(b)(2)(A) and (O).

14 The Debtor manufactures high-quality bellows, which are devices used in
15 jet engines, gas and electrical engines, and other sophisticated equipment, to control
16 and sense changes in temperature. The company, through the Debtor and various
17 predecessor entities, has been in business in Knoxville since 1904. Its 450,000 square
18 foot facility is located near the University of Tennessee and occupies approximately
19 twelve acres. The Debtor occupies its facilities under the terms of a 15-year lease
20 with Robert Shaw for a \$1.00 per year annual rental.

21 The Debtor employs approximately 28 salaried and 165 hourly employees,
22 services more than 200 customers, and utilizes the services of more than 100 vendors,
23 many of which are local companies. The manufacturing facility and the Unions share
24 a long history, predating the current ownership of the Debtor. The Union members
25 make up the hourly employees of the Debtor, performing the day-to-day operational

1 tasks associated with production of the bellows along with the maintenance of the
2 equipment and machinery, among other duties, which requires considerable skill and
3 experience. The parties agree that the working conditions at the Debtor's facility are
4 not ideal and are, in fact, unpleasant at times, because of the heat and humidity, noise,
5 age of the machinery, and the periodic exposure of the employees to sometimes toxic
6 chemicals and acids. Nevertheless, a majority of the hourly Union members have
7 been employed with the company for more than 25 years, and at least one Union
8 member has been employed by the company for more than 40 years.

9 Since March 2000 when the Debtor acquired the business, many changes
10 have occurred, including a change in its chief executive officer four different times.
11 The current Chief Executive Officer, E. Roger Clark, has been with the Debtor for
12 four and one-half months, and the current Chief Financial Officer, J. Michael Francis,
13 has been with the Debtor only slightly longer. As a result of these management
14 changes, coupled with the Debtor's labor costs and a decrease in sales, the Debtor has
15 suffered serious financial difficulties, incurring losses of approximately \$5,000,000.00
16 in 2001, \$11,000,000.00 in 2002. Losses in 2003 are projected to exceed
17 \$5,000,000.00.

18 On June 10, 2003, the Debtor filed the Voluntary Petition initiating this
19 Chapter 11 bankruptcy case. Following the commencement of its case, the Debtor
20 negotiated a Debtor-in-Possession Financing Agreement with its only secured
21 creditor, American Capital Strategies, Ltd., and the Final Order (1) Authorizing
22 Debtor-in-Possession to Use Cash Collateral, (2) Granting Replacement Liens and
23 Other Adequate Protection, (3) Authorizing Debtor-in-Possession to Borrow Money
24 Post-Petition, (4) Granting Priming Liens and Super-Priority Administrative Expense
25 to Post-Petition Lender, and (5) Affording Other Related Relief was entered by the

1 court on July 3, 2003, *nunc pro tunc* to July 1, 2003. American Capital Strategies,
2 Ltd., is also the sole shareholder of the Debtor.

3 Additionally, on July 2, 2003, the court granted the Debtor interim relief
4 under 11 U.S.C. § 1113(e) from provisions in the two Collective Bargaining
5 Agreements requiring the Debtor to pay vacation benefits to the Union members in
6 lump sum payments. Pursuant to the court's Order entered on July 2, 2003, the
7 Collective Bargaining Agreements were modified, whereby the Debtor was not
8 required to pay the aggregate sum of \$628,000.00 due under the Agreements, but was
9 instead required to pay 25% of that sum, or roughly \$157,000.00, on July 3, 2003.
10 Additionally, the court directed the parties to continue negotiations to resolve their
11 issues, allowing the interim relief to be in effect through August 8, 2003, at which
12 time the Debtor-in-Possession Financing Agreement with American Capital Strategies,
13 Ltd. required the Debtor to have either executed modified Agreements with the
14 Unions or to have filed a motion to reject the existing Agreements.

15 On August 6, 2003, the Debtor filed the motion presently before me,
16 stating that rejection of the Collective Bargaining Agreements is necessary for its
17 effective reorganization. The United Steelworkers and the Machinists Unions oppose
18 the Motion, alleging that the statutory requirements necessary for rejection have not
19 been satisfied.

20 The Debtor may reject the Collective Bargaining Agreements only in
21 accordance with 11 U.S.C. § 1113, which states, in material part:

22 (b)(1) Subsequent to filing a petition and prior to filing an
23 application seeking rejection of a collective bargaining
24 agreement, the debtor in possession . . . shall—

25 (A) make a proposal to the authorized representative of

1 the employees covered by such agreement, based on the
2 most complete and reliable information available at the
3 time of such proposal, which provides for those
4 necessary modifications in the employees benefits and
5 protections that are necessary to permit the
6 reorganization of the debtor and assures that all
7 creditors, the debtor and all of the affected parties are
8 treated fairly and equitably; and
9 (B) provide . . . the representative of the employees with
10 such relevant information as is necessary to evaluate the
11 proposal.

12 (2) During the period beginning on the date of the making of a
13 proposal provided for in paragraph (1) and ending on the date of
14 the hearing . . . the [debtor in possession] shall meet, at
15 reasonable times, with the authorized representative to confer in
16 good faith in attempting to reach mutually satisfactory
17 modifications of such agreement.

18 (c) The court shall approve an application for rejection of a
19 collective bargaining agreement only if the court finds that—

20 (1) the [debtor in possession] has, prior to the hearing,
21 made a proposal that fulfills the requirements of
22 subsection (b)(1);

23 (2) the authorized representative of the employees has
24 refused to accept such proposal without good cause; and

25 (3) the balance of the equities clearly favors rejection of

1 (5) The Debtor has provided to the Unions such relevant
2 information as was necessary to fully evaluate the proposals.

3 (6) Between the time it made the proposals and the time of the
4 hearing concerning its Motion to Reject, the Debtor met, at
5 reasonable times, with Union representatives.

6 (7) At the meetings, the Debtor conferred, in good faith, and
7 attempted to reach mutually satisfactory modifications of the
8 existing Collective Bargaining Agreements.

9 (8) The Unions refused to accept the proposals without good
10 cause.

11 (9) The balance of the equities clearly favors rejection of the
12 existing Collective Bargaining Agreements.

13 *In re Blue Diamond Coal Company*, 131 B.R. 633, 643 (Bankr. E.D. Tennessee
14 1991) (citing *In re American Provision Company*, 44 B.R. 907, 909 (Bankr. D.
15 Minnesota 1984)). The Debtor bears the initial burden of proof by a preponderance
16 of the evidence on each of the nine factors; however, the burden of going forward
17 may shift to the Unions, particularly concerning factors (5), (7), and (8) regarding
18 relevancy of information, the Debtor's good faith, and the Unions' cause for rejection.
19 *Blue Diamond Coal Company*, 131 B.R. at 643; *American Provision Company*, 44
20 B.R. at 909-10.

21 The parties do not dispute, and the proof establishes, that the Debtor has
22 fulfilled the first requirement by making a proposal to each Union to modify the
23 existing Collective Bargaining Agreements. Additionally, the record establishes, and
24 the parties do not dispute, that the Debtor, through its representatives, met with
25 representatives of each Union, at reasonable times, for negotiation sessions and that

1 the Debtor has provided relevant information, satisfying the fifth and sixth
2 requirements. Finally, the parties are in agreement that both Unions rejected the
3 Debtor's proposals; however, the Unions deny that they did so without good cause.
4 Accordingly, the issues before the court arise under requirement two— were the
5 Debtor's proposals based on the most complete and reliable information available at
6 the time of the proposals; requirement three— are the Debtor's proposals necessary to
7 permit the Debtor's effective reorganization; requirement 4— under the proposed
8 modifications, will all affected parties, creditors, and the Debtor be treated fairly and
9 equitably; requirement seven— did the Debtor confer in good faith with the Unions,
10 in order to reach mutually satisfactory modifications of the existing Collective
11 Bargaining Agreements; requirement eight— did the Unions refuse the proposals
12 without good cause; and requirement nine— does a balance of the equities clearly
13 weigh in favor of rejecting the existing Collective Bargaining Agreements. I will
14 address each of these requirements in order.

15 I. Complete & Reliable Information

16 There is no question that the primary area of contention between the
17 Debtor and the Unions regarding the proposed modifications is the wage reduction
18 proposed by the Debtor. The Debtor's proposals call for all Union workers to forego
19 a \$.50 pay raise due in October 2003, together with an average wage reduction of
20 \$2.47 per hour for the United Steelworkers and an average wage reduction of \$2.88
21 for the Machinists. According to the Debtor's calculations, these reductions will
22 result in savings between \$800,000.00 and \$900,000.00 in 2003, and twice that
23 amount in succeeding years.

24 The Debtor's representative, Mark Swift, has been employed by the Debtor
25 as a full-time consultant since September 2002. Mr. Swift was hired to analyze all

1 business aspects of the Debtor, to negotiate with the labor unions, and to assist senior
2 management with the Debtor's rehabilitation and reorganization. Additionally, he was
3 instrumental in authoring the proposed modifications to the Collective Bargaining
4 Agreements, beginning prepetition and continuing postpetition. Mr. Swift testified
5 that the Debtor's proposals are based upon his analysis of various information,
6 including medical insurance plans and costs quotes from insurance carriers, a Health
7 Insurance Survey produced by the Tennessee Valley Human Resource Association,
8 the Debtor's financial history since 2000, the Knoxville Metropolitan Statistical Area
9 Report produced by the Tennessee Department of Labor and Workforce Development
10 Employment Security Division, the Tennessee Occupational Wage Tables produced by
11 the Tennessee Department of Labor, and due diligence information that he has
12 personally compiled.

13 The United Steelworkers did not object to the Debtor's compliance with
14 this factor, but the Machinists did, disagreeing with the Debtor's reliance upon
15 statistical information which it asserts does not accurately reflect the skill levels of the
16 Union workers or the market rates for other similarly situated workers in and around
17 Knox County, including employees of Boeing and Y-12 in Oak Ridge or employees of
18 Alcoa in Blount County. Additionally, the Machinists argue that Mr. Swift
19 incorrectly compared its workers to the "Installation, Maintenance, and Repair
20 Occupations" listed on the Department of Labor Statistics Report rather than to the
21 "Production Occupations" which actually includes machinists and tool and die makers.

22 The court believes that the Debtor, through Mr. Swift, relied upon
23 complete and reliable information available at the time of the proposed modifications.
24 While the court agrees that there are certainly more occupations under which the
25 Machinists would fit within the Department of Labor Statistical Report, the fact that

1 Mr. Swift chose one category over another in making his overall analysis does not
2 render the entire analysis incomplete or unreliable, especially in light of the fact that
3 the \$16.61 average wage rate for all "Installation, Maintenance, and Repair
4 Operations" is higher than the \$15.35 average wage rate for "Machinists" and lower
5 than the \$19.73 average rate for "Tool and Die Makers," which, the court notes,
6 averages out to only \$0.93 more than the "Installation, Maintenance, and Repair
7 Operations" wage rate. Additionally, Mr. Swift testified that he relied upon many
8 sources to make the final modification proposals, and there is no evidence that any of
9 the information upon which he relied was inaccurate, incomplete, or unreliable. The
10 Debtor has satisfied this factor.

11 II. Necessity for Reorganization

12 Next, the Debtor argues that in order to effectively reorganize, rejection of
13 the existing Collective Bargaining Agreements is mandatory. In opposition, the
14 Unions argue that the Debtor has not proved that the proposed modifications are, in
15 fact, necessary to permit its effective reorganization or rehabilitation, especially in
16 light of the fact that the Debtor intends to sell its business and all of its assets as a
17 going concern, as reflected in the court's Order Establishing Bidding Procedures
18 entered on July 3, 2003.

19 The Debtor introduced into evidence an outline of its restructuring plan,
20 which proposes institution of across-the-board changes in its operations, restructuring
21 of its labor agreements, reorganization of management, consolidation of its facility,
22 and various other cost-reduction activities which are designed to enable it to again
23 become profitable and competitive. The Debtor contends that it has begun
24 implementation of that plan by outsourcing labor, instituting layoffs, changing the
25 previous medical insurance coverage, auctioning off excess machinery, and

1 consolidating within the facility. Additionally, as part of its rehabilitation or
2 reorganization, the Debtor seeks to sell the business, arguing that as long as changes
3 are made to make the company more profitable, the subsequent purchaser will be able
4 to continue operations.

5 As a preliminary matter, a sale of assets can be construed as a plan of
6 reorganization. See, e.g., *In re Lady H Coal Company*, 193 B.R. 233, 243-44
7 (Bankr. S.D. West Virginia 1996). Therefore, the only question is whether the
8 modifications proposed by the Debtor were necessary for it to reorganize. In *Blue*
9 *Diamond Coal Company*, this court recognized that there is a split of authority as to
10 what constitutes "necessary modifications that are necessary to reorganize" under
11 § 1113(b)(1)(A). The Third Circuit, in *Wheeling-Pittsburgh Steel Corporation v.*
12 *United Steelworkers of America*, 791 F.2d 1074 (3d Circuit 1986), found the term
13 "necessary" to be synonymous with "essential." See *Wheeling-Pittsburgh*, 791 F.2d
14 at 1088. The majority of most other courts, however, have construed "necessary" to
15 mean something less than "absolutely necessary" but something more than "absolutely
16 minimal." *Sheet Metal Workers' International Association Local 9 v. Mile Hi Metal*
17 *Systems, Inc. (In re Mile Hi Metal Systems, Inc.)*, 899 F.2d 887, 893 (10th Circuit
18 1990) (citing *Truck Drivers Local 807 v. Carey Transportation, Inc.*, 816 F.2d 82, 90
19 (2d Circuit 1987)). Under either definition, "a court must focus on the total impact of
20 the changes in the debtor's ability to reorganize, not on whether any single proposed
21 change will achieve that result." *United Food & Commercial Workers Union Local*
22 *Nos. 455, 408, 540 & 1000 v. Appletree Markets, Inc. (In re Appletree Markets,*
23 *Inc.)*, 155 B.R. 431, 441 (S.D. Texas 1993).

24 In *Blue Diamond Coal Company*, this court declined to adopt either
25 standard, holding that "[t]he record clearly establishes that if the debtor is to

1 reorganize it is essential that it be permitted to purchase coal in an unlimited quantity
2 from contract miners.” *Blue Diamond Coal Company*, 131 B.R. at 645. Once again,
3 the court declines to adopt either of these standards, because “[t]he evidence is
4 indisputable that if [the Debtor does] not receive major economic concessions[, it]
5 cannot continue in business.” *See In re Sun Glo Coal Company, Inc.*, 144 B.R. 58,
6 63 (Bankr. E.D. Kentucky 1992).

7 Based upon the Debtor’s financial statements, it is clear that the Debtor is
8 in severe financial distress. Mr. Clark testified that the Debtor incurred net income
9 losses in excess of \$11,000,000.00 in 2002, and based upon the figures for January 1
10 through June 30, 2003, the company stands to incur losses in excess of \$5,000,000.00
11 for 2003. While the court believes that labor costs are one component, it is also clear
12 that several other factors have contributed to these losses, including the decrease in
13 sales, the age of the machinery, the management changes, and poor management
14 choices over the past several years. Finally, under the terms of the Debtor-in-
15 Possession Financing Agreement, if the Debtor does not either modify or reject the
16 existing Collective Bargaining Agreements, it is in default, and American Capital
17 Strategies, Ltd. may cease funding the Debtor, which would most likely force the
18 Debtor to close its doors. Taking all of these considerations together, the court agrees
19 that in order to effectively reorganize or rehabilitate, the Debtor will be required to
20 institute across-the-board changes, including a modification of its labor costs.
21 However, as all parties testified, modification of the Collective Bargaining
22 Agreements alone will not cure the Debtor’s financial troubles, but instead, will make
23 up only a portion of the shortfall facing the Debtor. The Debtor has met its burden of
24 proof under this requirement.

25 III. Fair & Equitable Treatment of the Parties

1 The next issue is whether the Debtor’s modifications proposed to treat all
2 affected parties, i.e., salaried employees, hourly employees, customers, vendors, and
3 American Capital Strategies, Ltd., fairly and equitably. The Debtor argues that all
4 parties connected with the Debtor will be required to make sacrifices to allow its
5 continued operations, and its rejection of the existing Collective Bargaining
6 Agreements is only the first step in the rehabilitation process. Both Unions disagree,
7 arguing that the only parties to bear the burden of reorganization in this case under the
8 proposals are the Union members, while other parties are being asked to make
9 minimal, in any, sacrifices.

10 The purpose of this section “is to spread the burden of saving the company
11 to every constituency while ensuring that all sacrifice to a similar degree.” *Carey*
12 *Transportation, Inc.*, 816 F.2d at 90 (quoting *Century Brass Products, Inc.*, 795 F.2d
13 at 273). In other words, “a disproportionate share of the financial burden of avoiding
14 liquidation [may not be placed] upon bargaining unit employees[, but instead,] must
15 be spread fairly and equitably among all affected parties.” *Bowen Enterprises, Inc. v.*
16 *United Food & Commercial Workers International Union, Local 23, AFL-CIO (In re*
17 *Bowen Enterprises, Inc.)*, 196 B.R. 734, 743 (Bankr. W.D. Pennsylvania 1996). Fair
18 and equitable treatment, however, does not mean identical treatment. *Bowen*
19 *Enterprises, Inc.*, 196 B.R. at 743. Nor does it require that “in all instances . . .
20 managers and non-union employees [must] have their salaries and benefits cut to the
21 same degree that union workers' benefits are to be reduced.” *Blue Diamond Coal*
22 *Company*, 131 B.R. at 645 (quoting *Carey Transportation, Inc.*, 816 F.2d at 90).
23 Instead, “concessions sought from various parties must be examined from a realistic
24 standpoint.” *Bowen Enterprises, Inc.*, 196 B.R. at 743. “[F]actors to be considered
25 include the relative amount of management salaries compared to the union wages; . . .

1 other creditors[,] the amounts of their claims[,] and the impact of continuing the
2 existing labor contracts on same; whether the employees would react to rejection by
3 striking, and if that would injure the debtor; . . . and the impact thereof on the chance
4 of confirming a plan of reorganization.” *Garofalo’s Finer Foods, Incorporated*, 117
5 B.R. at 371.

6 The Debtor’s proposals to the Unions ask for concessions concerning
7 medical insurance coverage, the annual lump sum vacation payment, loss of the
8 scheduled October 2003 pay increase, elimination of two holidays, changes to the
9 leave of absence plans, hourly wage rate decreases, elimination of Safety Day for the
10 Machinists, elimination of a tool allowance for the Machinists, and changes to the
11 current vacation benefit structure “going forward.” The proposals also included new
12 successor language whereby the Debtor would facilitate a meeting between the
13 purchaser and the Unions, reinstatement of the plant chairman to the floor as Labor
14 Grade 6, retention of the current dental insurance plan with slight modifications,
15 retention of the 401(k) plan with slight modifications, retention of the disability
16 insurance with slight modifications, and institution of a profit sharing plan if the
17 company rebounds. The Unions argue that the concessions being required by them
18 impose a much greater burden than what is being asked of any other party connected
19 with the Debtor, primarily the salaried employees, including management, that are not
20 being asked to take a pay cut.

21 In support of the proposed modifications, Mr. Clark testified that all
22 constituencies associated with the Debtor will be making sacrifices to effectuate the
23 Debtor’s rehabilitation plan. First, he testified that all employees, salaried and
24 hourly, were subject to the new medical plan, with less coverage and higher copays.
25 Additionally, he testified that because three or four salaried employees have recently

1 left the company, the remaining salaried employees were being required to assume
2 additional responsibilities and work longer hours, even though they are not being
3 asked to take a reduction in their pay. In exchange, the Debtor has proposed a Key
4 Employee Retention Plan whereby \$24,000.00 would be given to various salaried
5 employees that remain with the Debtor through the course of the bankruptcy
6 proceeding, which Mr. Swift testified was comparable to the profit sharing plan
7 offered to the Union members. Mr. Clark and Mr. Francis also testified that the
8 Debtor has been attempting to increase its prices, and that some customers have
9 agreed to increases, but that this program was primarily directed towards obtaining
10 increased prices from new customers. Similarly, Mr. Clark testified that the Debtor's
11 vendors have been loyal, with some providing postpetition terms and/or goods;
12 however, he also acknowledged that he was not aware of any vendors giving
13 concessions to the Debtor on their more than \$900,000.00 total scheduled debt.
14 Finally, Mr. Clark testified as to the sacrifices made by American Capital Strategies,
15 Ltd., which has provided debtor-in-possession financing and infused more than
16 \$8,000,000.00 for a total investment of more than \$33,000,000.00 in the Debtor,
17 including its prepetition secured debt of \$21,500,000.00.

18 While the court agrees that fair and equitable treatment does not require
19 identical treatment, the court does not agree that one affected party must bear a
20 disproportionate burden over other affected parties. In this case, there are five
21 affected parties to be considered: (1) customers; (2) vendors; (3) American Capital
22 Strategies, Ltd.; (4) salaried employees; and (5) the hourly Union employees. The
23 record indicates that only a few existing customers have been asked to increase their
24 prices, even though the Debtor has continued to lose money on eight out of its "Top
25 20" customers. Similarly, Mr. Clark acknowledged that none of the Debtor's vendors

1 have actually offered any concessions, even though some have provided the Debtor
2 with postpetition terms and/or goods.

3 As for American Capital Strategies, Ltd., this entity is the sole shareholder
4 and sole secured creditor of the Debtor. It has a prepetition debt of more than
5 \$21,500,000.00 and has supported the Debtor throughout its financial difficulties over
6 the past several years. Obviously, as its counsel admitted, even under the best of
7 circumstances, American Capital Strategies, Ltd. faces tangible losses in connection
8 with this Debtor. The prospects of American Capital Strategies, Ltd. ever recouping
9 the funds infused into this Debtor are negligible at best. In the event an outside buyer
10 purchases the Debtor, the sale will be free and clear of all liens, and while American
11 Capital Strategies, Ltd. may credit bid up to the maximum amount of its secured debt,
12 the record reflects that it has a total investment in this Debtor of more than
13 \$33,000,000.00. Furthermore, the undisputed testimony of Mr. Francis at the July 1,
14 2003 hearing on the Debtor's motion requesting interim relief from the Collective
15 Bargaining Agreements under 11 U.S.C. § 1113(e), was that the Debtor's assets,
16 including inventory, fixed assets, accounts receivable, and cash, had a value, at that
17 time, of approximately \$13,000,000.00, a sum well below the amount of American
18 Capital Strategies, Ltd.'s secured claim. If American Capital Strategies, Ltd. were to
19 credit bid, take ownership of the Debtor, and succeed in turning the Debtor into a
20 profitable business, the chances of recoupment of such a large sum still remains slim.
21 Nevertheless, the majority of these funds were invested in the Debtor prepetition, and
22 American Capital Strategies, Ltd. would be facing these losses even if the Debtor had
23 not filed for bankruptcy. Moreover, American Capital Strategies, Ltd. has protected
24 itself through the Debtor-in-Possession Financing Agreement by having the option to
25 cease any future funding to the Debtor in the event that the labor contracts were not

1 modified or rejected. American Capital Strategies, Ltd.'s burden is no greater in this
2 rehabilitation than it was prior to the Chapter 11 reorganization.

3 The record shows that the salaried employees are being asked to accept
4 some share of the burden of this rehabilitation. The undisputed testimony of
5 Mr. Clark, Mr. Francis, and Mr. Swift establishes that three or four employees have,
6 in fact, left the Debtor over the past few months, and these employees have not been
7 replaced. Instead, the remaining 28 or so salaried employees have been required to
8 assume additional responsibilities, including working longer hours. Mr. Clark
9 testified that none of the salaried employees have been asked to take any sort of
10 decrease in their wages, in part, because they are already at a market rate of pay.

11 The court is satisfied that the Unions are being asked to bear a
12 disproportionate amount of the burden during the Debtor's rehabilitation. As
13 previously outlined, the Union members are being asked to take pay reductions, lose
14 vacation days, accept inferior medical insurance, and accept modifications to current
15 401(k) and dental plans, among other things, while being offered a profit sharing
16 program that, based on past financial figures, will most likely never materialize. On
17 the other side, the salaried employees' sacrifices are limited to absorption of the
18 attrition, while they maintain their current salaries. Moreover, the Debtor has
19 requested a bonus plan calling for the division of \$24,000.00 between four to six of
20 these salaried employees, an amount that is a substantial portion of the yearly salary
21 for many of the Union workers. Additionally, Mr. Francis testified that five or six of
22 the salaried employees are entitled to and are receiving overtime, although he stated
23 that he has attempted to keep all overtime to a minimum. With the exception of
24 foregoing their initially requested retention bonuses, totaling \$30,000.00, Mr. Clark
25 and Mr. Francis have not agreed to any financial sacrifices. Additionally, the Debtor

1 continues to employ Mr. Swift on a contract basis at a rate of \$4,000.00 per week,
2 plus expenses of roughly \$1,000.00 per week. The court recognizes Mr. Clark's
3 testimony that since January 2001, there has been a 56% decrease in the headcount of
4 salaried employees, compared to a decrease of 48% in the headcount of hourly
5 workers. However, the court observes that these figures actually translate to
6 approximately 12 salaried employees versus approximately 85 hourly employees.
7 Additionally, there was no indication that the hourly employees were not also being
8 required to "pick up the slack" caused by this attrition. The Debtor's current
9 rehabilitation plan does not treat all affected parties fairly and equitably.

10 IV. The Debtor's Good Faith

11 The next issue is whether the Debtor negotiated in good faith. The Debtor
12 argues that it has negotiated in good faith, meeting with the Unions more than ten
13 times each since the filing of the Chapter 11 case, with proposals and counter-
14 proposals, all in an attempt to bring labor costs more in line with market conditions
15 and with what the Debtor can actually afford to pay, to enable the Debtor to remain in
16 business. The Unions contend, however, that the Debtor's prepetition actions,
17 coupled with its lesser postpetition offers, indicate lack of good faith negotiations.

18 Good faith requires "conduct indicating an honest purpose to arrive at an
19 agreement as a result of the bargaining process," including "serious[] attempts to
20 negotiate . . . reasonable modifications." *Bowen Enterprises, Inc.*, 196 B.R. at 744
21 (citing *In re Walway Company*, 69 B.R. 967, 973 (Bankr. E.D. Michigan 1987) and
22 *In re Kentucky Truck Sales, Inc.*, 52 B.R. 797, 801 (Bankr. W.D. Kentucky 1985)).
23 Relief under § 1113 "is improper when the debtor has unilaterally ceased performing
24 its obligations under the [contract] prior to seeking Court permission to modify or
25 reject[.]" *Birmingham Musicians' Protective Association v. Alabama Symphony*

1 *Association (In re Alabama Symphony Association)*, 211 B.R. 65, 69 (N.D. Alabama
2 1996); *see also United Food & Commercial Workers Union, Local 211 v. Family*
3 *Snacks, Inc. (In re Family Snacks, Inc.)*, 257 B.R. 884, 896 n.8 (B.A.P. 8th Cir.
4 2001). “[A] breach prior to obtaining permission from the bankruptcy court to
5 terminate or modify a [Collective Bargaining Agreement] precludes its rejection.”
6 *Alabama Symphony Association*, 211 B.R. at 71. Additionally, a debtor “has a duty
7 under § 1113 to not obligate itself prior to negotiations with its union employees,
8 which would likely preclude reaching a compromise.” *Lady H Coal Company*, 193
9 B.R. at 242.

10 The record indicates that from the date that the Debtor filed this Chapter 11
11 bankruptcy case, Mr. Swift, as the Debtor’s representative, met with representatives
12 of the United Steelworkers on at least eleven occasions and with representatives of the
13 Machinists at least twelve times to negotiate. These meetings each lasted a couple of
14 hours, and proposals and counterproposals were offered and entertained by both
15 parties, culminating with the Debtor making its “final offers” on August 4, 2003.
16 Throughout the course of these postpetition negotiations, each side made concessions,
17 and in fact, at trial, the Debtor and both Unions agreed that the only areas where
18 modifications could not be substantially agreed upon were those concerning wages and
19 vacation.

20 While it is clear to the court that both sides offered and accepted
21 concessions from their original proposals, and all proposals reflected modifications of
22 the existing Collective Bargaining Agreements, there are, nevertheless, facts causing
23 the court concern as to the Debtor’s good faith. First, in March 2003, the Debtor
24 unilaterally modified the medical benefits contracted for in the Collective Bargaining
25 Agreements by increasing copays, out-of-pocket costs, and deductibles, and by

1 reducing coverage, an action which was, arguably, in violation of the Collective
2 Bargaining Agreements. Additionally, in April 2003, the Debtor also unilaterally
3 changed the attendance policy and declined to pay accrued vacation benefits to Union
4 members no longer employed at the Debtor's facility, also arguably in violation of the
5 Collective Bargaining Agreements. The Unions filed grievances as to these actions,
6 and an arbitration of these disputes in accordance with the Collective Bargaining
7 Agreements was scheduled for June 2003, which was stayed by the filing of the
8 Debtor's bankruptcy case.

9 In addition, in February 2003, eleven members of the Machinists Union
10 were laid off, leaving only five remaining Union members working for the Debtor. In
11 their place, the Debtor began outsourcing by hiring subcontractors at much higher
12 hourly rates. The Machinists, believing this constituted a breach of its Collective
13 Bargaining Agreement, filed a grievance which has not yet been resolved. At trial,
14 Mr. Swift testified that the Debtor has already saved approximately \$75,000.00 this
15 year from outsourcing this labor, while conceding that the eleven laid-off workers had
16 been replaced by three to four subcontractors that were being paid approximately
17 \$7.00 more per hour than the Machinists they replaced. The court need not, however,
18 make a determination as to whether any of the Debtor's actions prepetition were in
19 fact breaches of the Collective Bargaining Agreements.

20 Next, the Debtor and the United Steelworkers held negotiations pre-
21 petition, culminating in an offer in February 2003, which was voted upon and rejected
22 by the Union members. The wage concessions sought in the February 2003
23 modification were approximately 25% above the proposed wage concession offered in
24 the Debtor's August 2003 proposal. Similarly, the Machinists argue that the Debtor
25 has not offered anything substantially different from what it has previously offered,

1 indicating a lack of good faith "negotiations." When questioned as to why the offers
2 decreased and/or barely changed in some aspects, Mr. Swift explained that due to the
3 company's continued financial struggles, the new proposal reflected what the Debtor
4 was able to pay at this time, rather than what it was able to pay six months earlier in
5 February 2003. While this explanation, on its face, makes sense, the court agrees
6 with the Unions' reasoning that the Debtor should have expected the rejection when
7 other, arguably more attractive offers had already been rejected. At any rate, while
8 the court finds that the Debtor attempted negotiations that were not in bad faith, the
9 Debtor's actions as outlined above do not evidence to the court that the Debtor has
10 acted in good faith regarding these Unions. The Debtor has not satisfied this
11 requirement.

12 V. Cause for Rejection

13 Just as the Debtor must negotiate in good faith, the Unions may not reject
14 the modifications without good cause. "[W]here the union makes compromise
15 proposals during the negotiating process that meet its needs while preserving the
16 debtor's savings, its rejection of the debtor's proposal would be with good cause."
17 *New York Typographical Union No. 6 v. Maxwell Newspapers, Inc. (In re Maxwell*
18 *Newspapers, Inc.)*, 981 F.2d 85, 90 (2d Cir. 1992). Likewise, "[a] modification that
19 does not treat all parties fairly and equitably fails the test of § 1113 for rejection, and
20 can give a debtor cause to reject a proposal." *Walway Company*, 69 B.R. at 974. "If,
21 on the other hand, the union refuses to compromise, it is unlikely it could be found to
22 have acted with good cause." *New York Typographical Union No. 6 v. Royal*
23 *Composing Room, Inc. (In re Royal Composing Room, Inc.)*, 848 F.2d 345, 349 (2d
24 Circuit 1988).

25 The Debtor urges the court to find that the Unions did not have good cause

1 to reject its proposals, arguing that the Union members were "angry, distrustful, and
2 dismissive," that the wage rates offered were all that the Debtor can afford to pay,
3 and that the Unions have "put a stake in the ground." On the other hand, the Unions
4 argue that, although they are angry at and distrustful of management, they have reason
5 to be, based upon the Debtor's course of conduct throughout this year, that the Debtor
6 is trying to "intimidate" the hourly workers into submission, and that the Unions
7 offered compromises that the Debtor ignored.

8 The proof shows that the Unions did make concessions and counteroffers in
9 compromise that were below those in the existing Collective Bargaining Agreements
10 but higher than those in the Debtor's offer that would have allowed the Debtor to save
11 money without forcing the Union workers to accept such drastic concessions as to
12 their wages and vacation. The Debtor's final proposal of August 4, 2003, offered
13 wages that were lower than those previously rejected by the United Steelworkers after
14 voluntary prepetition negotiations in February 2003. Additionally, the Unions were
15 particularly angered by their being asked to make such drastic concessions on the
16 heels of the Debtor's proposed Key Employees Retention Program, which initially, as
17 I have noted, included a \$20,000.00 bonus to Mr. Clark and a \$10,000.00 bonus to
18 Mr. Francis and still seeks to set aside \$24,000.00 to pay salaried employees that have
19 not been asked to take reductions in pay.

20 In light of these facts, together with the court's earlier finding that the
21 Debtor's rehabilitation proposal places a disproportionate burden on the Unions, the
22 court finds that the Unions had cause to reject the Debtor's proposals.

23 VI. Balance of the Equities

24 Finally, the court must balance the equities of the parties. "By the
25 inclusion of the word 'clearly' in § 1113(c)(3), Congress intended to clarify that

1 rejection was only appropriate where the equities balanced decidedly in favor of
2 rejection.” *In re Salt Creek Freightways*, 47 B.R. 835, 841 (Bankr. D. Wyoming
3 1985).

4 The balancing of the equities test requires: . . . balancing the
5 interests of the affected parties—the debtor, creditors, and
6 employees. The Bankruptcy Court must consider the likelihood
7 and consequences of liquidation for the debtor absent rejection,
8 the reduced value of the creditors' claims that would follow
9 from affirmance and the hardship that would impose on them,
10 and the impact of rejection on the employees. In striking the
11 balance, the Bankruptcy Court must consider not only the
12 degree of hardship faced by each party, but also any qualitative
13 difference between the types of hardship each may face.

14 *In re Cook United, Inc.*, 50 B.R. 561, 564 (Bankr. N.D. Ohio 1985) (quoting
15 *National Labor Relations Board v. Buildisco & Buildisco*, 104 S. Ct. 1188, 1197
16 (1984)).

17 The Debtor argues that the community of Knoxville, as a whole, will
18 benefit from the Debtor’s effective reorganization, and thus, the equities weigh in
19 favor of the Debtor. Mr. Clark testified that four prospective bidders have performed
20 due diligence with regards to the sale of the Debtor’s business and that all have
21 inquired as to the status of the Union contracts. He testified that he does not believe
22 that the Debtor will receive any bids unless it is allowed to reject the existing
23 Collective Bargaining Agreements. Additionally, he testified that unless the Debtor
24 can reject the Agreements, it will be in default to American Capital Strategies, Ltd.
25 under the Debtor-in-Possession Financing Agreement, that American Capital

1 Strategies, Ltd. will cease funding the Debtor, and that it will be forced to liquidate;
2 that is, close its doors. Accordingly, Mr. Clark testified that it is in the best interests
3 of all parties to reject the Agreements, allow the Debtor to implement its
4 modifications and rehabilitation plan, and continue operating its business.

5 On the other side, the Unions contend that rejection will benefit only
6 American Capital Strategies, Ltd., the sole shareholder and secured creditor of the
7 Debtor, since it will be in the position to credit bid its debt if no outside bids are
8 received, and in effect, become the new owner of the Debtor, whereby it might be
9 bound by the existing Collective Bargaining Agreements if not rejected. Additionally,
10 the Unions argued that the Debtor's primary purpose for filing this Chapter 11
11 bankruptcy case was to reject the Union contracts.

12 After balancing the equities, the court finds that the equities do not balance
13 decidedly in favor of rejection. The court agrees that the Debtor is obviously in need
14 of cost reductions, increased revenues, and cash infusion; however, the evidence does
15 not clearly show that rejection of the existing Collective Bargaining Agreements is the
16 primary solution to the Debtor's financial problems. While the court agrees that the
17 Debtor does need to cut its costs, it may not do so solely at the expense of the hourly
18 Union workers.

19 Because the statutory requirements of § 1113 have not been met, the
20 Debtor's Motion shall be denied. However, just because the Debtor is not granted
21 permission to reject the existing Collective Bargaining Agreements to unilaterally
22 implement changes does not mean that these parties should not continue to negotiate
23 and attempt to reach a mutually agreeable modification to these Collective Bargaining
24 Agreements. If the Debtor is to possibly remain in business, whether it be under the
25 funding and/or ownership of American Capital Strategies, Ltd. or some other

1 purchaser, the Collective Bargaining Agreements will need to be modified, and labor
2 costs will need to be cut. To that end, the court encourages the Debtor and the
3 Unions to continue negotiations, realizing that both sides must make concessions to
4 keep the Debtor in operation and retain the employees' jobs.

5 This is not to suggest that only the Unions will be required to make
6 concessions. As I have tried to emphasize throughout this opinion, the Debtor's cost
7 associated with the Collective Bargaining Agreements is but one component of its
8 financial distress. The Debtor must take other substantial cost-cutting measures and
9 must increase revenues if it is to survive as a viable business.

10 This Memorandum constitutes findings of fact and conclusions of law as
11 required by FED. R. CIV. P. 52(a). An order memorializing this ruling will be entered
12 this afternoon.

13 FILED: September 2, 2003

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/s/ Richard Stair, Jr.
RICHARD STAIR, JR.
U.S. BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-33186

FULTON BELLOWS & COMPONENTS, INC.
f/k/a JRGACQ CORPORATION

Debtor

ORDER

For the reasons stated in the memorandum dictated orally from the bench on August 29, 2003, containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, the court directs that the Motion and Supporting Memorandum of Debtor Seeking Rejection of Collective Bargaining Agreements Pursuant to 11 U.S.C. § 1113 filed by the Debtor on August 6, 2003, is DENIED.

SO ORDERED.

ENTER: August 29, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE