IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
	Case No. 17-12082 (KJC)
APPVION, INC., *et al.*,	(Jointly Administered)
Debtors.	Related Docket No. 753
	Hearing Date: July 12, 2018
	Objection Deadline: June 19, 2018

THE PENSION BENEFIT GUARANTY CORPORATION'S
MOTION FOR RECONSIDERATION OF
THE MAY 14, 2018 SETTLEMENT ORDER [ECF 753]

The Pension Benefit Guaranty Corporation ("**PBGC**"), on behalf of itself and the Appvion, Inc. Retirement Plan (the "**Pension Plan**"), respectfully moves this Court pursuant to Federal Rule of Bankruptcy Procedure 9023,[1] to alter or amend its May 14, 2018 Order (the "**Order**") [ECF 753] approving a settlement between the Debtors and other parties in interest (the "**Settlement Agreement**") [ECF 734-1]. Although PBGC supports the parties' goal of resolving these cases and does not wish to cause delay, limited relief is necessary to protect the rights of PBGC and the Pension Plan. The Settlement Agreement sets a framework for resolving the Debtors' cases and disposing of estate assets in a manner that appears to prejudice certain administrative claimants, including PBGC. Even if the Debtors cannot confirm a plan of liquidation and pay other administrative claims, the Settlement Agreement protects

[1] "Federal Rule of Bankruptcy Procedure 9023, which incorporates Federal Rule of Civil Procedure 59, governs motions for reconsideration. A motion to alter or amend a judgment under Rule 59(e), often styled as motion seeking reconsideration, must be grounded on: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct a clear error of law or prevent manifest injustice." *In re Tribune Co.*, 464 B.R. 208, 213 (Bankr. D. Del. 2011).

professionals' recovery by creating and funding an escrow for their benefit. The Settlement Agreement also provides for the payment of certain administrative and priority claims in accordance with a "Wind Down Budget"[2] that excludes any amounts for PBGC's administrative and priority claims. Therefore, in order to prevent manifest injustice and avoid a clear error of law or fact, PBGC seeks the Court's reconsideration of the Order and clarification that the Court has not authorized the use of estate assets (including the Wind Down Budget amount) to pay professional fees or other administrative claims without providing equal treatment for PBGC's administrative claim. PBGC further requests that the Debtors hold in reserve any distributions for administrative and priority claims until this issue is resolved.

JURISDICTION

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are 11 U.S.C. § 105(a) and Rule 59(e) of the Federal Rules of Civil Procedure, which is made applicable to these proceedings through Rule 9023 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**").

BACKGROUND

I. PBGC and the Pension Plan

3. PBGC is a wholly owned United States government corporation, and an agency of the United States, that administers the defined benefit pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 ("**ERISA**"),

[2] Terms not defined herein are defined in the Settlement Agreement.

as amended, 29 U.S.C. §§ 1301-1461 (2012 & Supp. IV 2016). PBGC guarantees the payment of certain benefits upon the termination of single-employer pension plans covered by Title IV of ERISA. When an underfunded plan terminates, PBGC generally becomes trustee of the plan and, subject to certain statutory limitations, pays the plan's unfunded benefits with its insurance funds. *See* 29 U.S.C. §§ 1321-1322, 1342, 1361.

4. Appvion is the "contributing sponsor" of the Pension Plan within the meaning of 29 U.S.C. § 1301(a)(13). Each of the other Debtors is a member of Appvion's "controlled group" within the meaning of 29 U.S.C. § 1301(a)(14).

5. The Pension Plan is a single-employer defined benefit pension plan covered by Title IV of ERISA. *See* 29 U.S.C. § 1321. The Pension Plan is underfunded. PBGC calculates that as of October 31, 2017, the Pension Plan only had $341 million of assets to pay total benefit liabilities of $489.9 million, leaving unfunded benefit liabilities of $148.9 million.

II. The Debtors' Bankruptcy Proceedings

6. On October 1, 2017, the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue to manage their business as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

7. On March 12, 2018, the Court approved bidding procedures for the sale of substantially all of the Debtors' assets under section 363(b) of the Bankruptcy Code. [ECF 565]. The stalking horse bidder was Appvion Holding Corp. ("**AHC**"), a Delaware corporation formed by the agent for the holders of the Debtors' first-lien debt. AHC's form of Asset Purchase Agreement ("**APA**") expressly excluded the Pension Plan and all liabilities relating to the Pension Plan. [ECF 565-2, at §§ 1.2(j), 1.4(r)]. As part of its consideration for the sale,

AHC agreed to pay an amount in cash to fund a wind down budget. [ECF 565-2, at § 2.1(a)(iii)].

8. No other qualifying bid was received by the bid deadline, April 30, 2018. On that date, the Debtors filed notice that the auction was cancelled and that AHC was the successful bidder. [ECF 709].

9. On May 9, 2018, the Debtors filed a motion under Bankruptcy Rule 9019, on an expedited basis, for approval of the Settlement Agreement between the Debtors, the Official Committee of Unsecured Creditors, the Ad Hoc Group of Second Lien Noteholders, Franklin Advisers, Inc. ("**Franklin**"), and AHC. [ECF 734]. The Court granted the Debtors' request for expedited treatment and scheduled a hearing for May 14, 2018. [ECF 738].

10. The Settlement Agreement contains a Wind Down Budget for resolving the Debtors' bankruptcy cases. It provides that the Wind Down Budget amount of $17.019 million "shall be funded in full by the Purchaser at the closing of the sale . . . in accordance with the Final APA." [ECF 753-1, Art. II § 3]. According to the Settlement Agreement, this amount covers "the Debtors' estimates of all priority claims, all administrative claims, . . . all unpaid post-petition obligations, and professional fees." [*Id.*].

11. The Wind Down Budget comprises of $14.09 million in professional fees, $2.21 million in 503(b)(9) claims, $212,000 in wind-down costs, $234,000 in priority taxes, and $263,000 in post-petition taxes. [ECF 753-1, at 19]. It specifically excludes any amount for PBGC's administrative and priority claims. [ECF 753-1, at 19-20]. And the Settlement Agreement explains that "[t]he Wind Down Budget amount was determined based upon assumptions that were reasonable and appropriate at the time of its determination and is subject to change based upon actual facts and circumstances." [ECF 753-1, at 18].

12. The Settlement Agreement provides that on the Sale Closing Date, the $14.09 million of budgeted professional fees will be placed into escrow (the "**Professional Fee Escrow**"). [ECF 753-1, Art. II § 8(i)]. The Settlement Agreement does not explain who will hold this escrow and it does not provide for a release of any escrowed funds to the Debtors' estates if the Debtors have insufficient funds to pay other administrative claims. [*See generally id.*].

13. The Settlement Agreement further provides that AHC will fund a cash pool of $600,000 for the Debtors' general unsecured creditors (the "**GUC Cash Pool**") and make a forgivable loan of $350,000 to fund a litigation trust (the "**Liquidating Trust**") for the benefit of the Debtors' general unsecured creditors (including the Second Lien Noteholders). [ECF 753-1, Art. II §§ 1, 4(b)]. Each of the GUC Cash Pool and the Liquidating Trust will be held in escrow by the Debtors' counsel until the effective date of an Acceptable Plan. [ECF 753-1, Art. II §§ 1, 4(b)]. If the Plan Effective Date does not occur, then these escrowed funds will be released to the Debtors' estates. [ECF 753-1, Art. II §§ 1, 4(b)]. The Settlement Agreement also provides for AHC's issuance of warrants to the Second Lien Noteholders. [ECF 753-1, Art. II § 2].

14. The Debtors have explained that the Settlement Agreement will "allow the Debtors to proceed with the orderly wind down of these Chapter 11 Cases through a confirmed plan that embodies the terms of the Settlement Agreement and seeks to maximize the recovery for the Debtors' creditors." [ECF 734 at 11 ¶ 22]. But the Settlement Agreement's effectiveness is not contingent upon an Acceptable Plan. [ECF 753-1, Art. IV].

15. On May 10, 2018, PBGC filed a motion for allowance and payment of administrative expense, seeking entry of an order (a) allowing the Pension Plan an

administrative claim pursuant to 11 U.S.C. § 503(b)(1) in the amount of $3,276,329;[3] and authorizing and directing the Debtors to pay such claim within ten days of the entry of that order. [ECF 740].[4]

16. On May 14, 2018, the Court approved the sale of Debtors' assets to AHC. The Court also approved the Settlement Agreement, over the objection of PBGC.[5] The Court signed and entered the Order on May 14, 2018.

17. On May 18, 2018, and May 21, 2018, PBGC filed limited objections to seven fee applications submitted by various professionals. [ECF 771, 775-84]. PBGC did not object to the amount of fees contained in those applications. Rather, PBGC objected to any immediate payment of professional fees because of the possibility that the Debtors' estates will have insufficient assets to pay PBGC's administrative claim and will become administratively insolvent.[6]

ARGUMENT

18. PBGC seeks the Court's reconsideration and clarification of its interlocutory Order.[7] Motions for reconsideration and clarification are permitted under Rule 59(e) of the

---

[3] While a pension plan is ongoing, the sponsor must satisfy certain obligations to the plan, including statutorily required minimum funding contributions. 26 U.S.C. §§ 412(b)(1), (2); 29 U.S.C. §§ 1082(b)(1), (2). Since the petition date, the Debtors have missed two required contributions to the Pension Plan: a contribution of $1,539,664 due January 15, 2018, and a contribution of $2,023,456 due April 15, 2018.

[4] A hearing on PBGC's Motion for Allowance has not yet been scheduled. PBGC has also asserted a priority claim on behalf of the Pension Plan under § 507(a)(5) for unpaid contributions resulting from employees' work during the 180-day period before the Debtors' bankruptcy filing. PBGC and the Debtors are continuing to discuss the administrative and priority portions of PBGC's claims.

[5] At the hearing, PBGC made an oral objection to the Settlement Agreement.

[6] No hearing has been scheduled for the fee objections.

[7] In determining whether an order is final or interlocutory, the Third Circuit takes a flexible, "pragmatic" approach. *In re Energy Future Holdings Corp*., 575 B.R. 616, 631 (D. Del. 2017); *Century Glove, Inc. v. First Am. Bank of N.Y.*, 860 F.2d 94, 97 (3d Cir. 1988); *In re Reliant Energy Channelview,*

Federal Rules of Civil Procedure, which applies to these proceedings through Bankruptcy Rule 9023, and authorizes "[a] motion to alter or amend a judgment" after its entry.[8]

19. A court may reconsider its order where necessary "to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999); *In re Energy Future Holdings Corp.*, 575 B.R. 616, 636 (Bankr. D. Del. 2017). A prior decision should be reconsidered "where it appears [the Court] has overlooked or misapprehended some factual matter that might reasonably have altered the result reached by the Court." *In re Energy*, 575 B.R. at 628 (internal citations omitted). And while the exact meaning of "manifest injustice" and "clear error of law or fact" is unsettled, the error "'must be apparent to the point of being indisputable.'" *Id.* (citation omitted).

20. Even if the court's reconsideration is not required, it may still clarify an earlier order to explain the court's intent. *See, e.g., Accenture Global Servs., GmbH v. Guideware Software, Inc.*, 800 F. Supp. 2d 613, 623 (D. Del. 2011) (granting motion for clarification and clarifying order).

I. PBGC's Request for Reconsideration

21. PBGC is not asking the Court to reject the parties' settlement. Rather, PBGC respectfully requests that the Court alter or amend the Order to make certain clarifications that protect the rights of PBGC and other administrative and priority claimants. This limited relief is

LP, 397 B.R. 697, 699 (D. Del. 2008). An order remains interlocutory where "[t]he parties' rights and obligations remain unsettled" *In re Energy*, 575 B.R. at 633 (citing *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1693 (2015)). Because further steps remain pending until the final disposition of these cases, the Order is interlocutory.

[8] To the extent that the Court considers the Order final, reconsideration remains appropriate under Bankruptcy Rule 9024. *See In re Energy*, 575 B.R. at 630 (explaining that the court applies the same substance in considering reconsideration motions under Bankruptcy Rules 9023 and 9024).

necessary to ensure that the Debtors' assets are distributed in accordance with the Bankruptcy Code.

A. The Settlement Agreement establishes an escrow account that appears to fund the administrative claims of professionals even if the Debtors cannot pay other administrative claims.

22. Although settlements are favored, they must be carefully examined to ensure compliance with the bankruptcy process. *Will v. Northwestern Univ. (In re Nutraquest, Inc.)*, 434 F.3d 639, 644 (3d Cir. 2006). A settlement agreement proposed outside of the plan confirmation process which has the practical effect of dictating the terms of a prospective Chapter 11 plan constitutes an improper *sub rosa* plan and may not be approved. *In re Nortel Networks, Inc.*, 522 B.R. 491, 508 (Bankr. D. Del. 2014) (citing *In re Capmark Fin. Grp. Inc.*, 438 B.R. 471, 513 (Bankr. D. Del. 2010)).

23. Settlements in bankruptcy, whether negotiated outside the plan confirmation context or as part of a plan, may be approved only if they allow the debtor to conclude its case in accordance with the Bankruptcy Code's requirements. And where a settlement provides for a distribution of estate assets to creditors, that distribution must conform to the Bankruptcy Code's priority scheme absent consent of the affected creditors.[9] *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 979 (2017).

24. Even if the Settlement Agreement is not structured as a *sub rosa* plan, it sets a framework for paying professionals' administrative claims regardless of whether the Debtors confirm and consummate an Acceptable Plan. Upon closing of the asset sale, AHC will pay the $17.019 million Wind Down Budget amount as part of the sale consideration. [ECF 565-2, at

[9] Chapter 11 permits some flexibility with regards to distributions, but a court cannot confirm a plan that contains priority-violating distributions over the objection of an impaired creditor class. 11 U.S.C. §§ 1129(a)(7), (b)(2).

§ 2.1(a)(iii)]. More than $14 million of those proceeds will be immediately placed into the Professional Fee Escrow for the benefit of the professionals. [ECF 753-1, Art. II § 8(i)]. The Settlement Agreement is otherwise silent about the terms of that escrow. But unlike the amounts in the GUC Cash Pool or the Liquidating Trust, the Settlement Agreement does not provide for return of the funds in the Professional Fee Escrow if the Debtors become administratively insolvent. [*Compare* 753-1, Art. II 8(i), *with* 753-1, Art. II §§ 1, 4(b)].

25. PBGC's concern about the funds in the Professional Fee Escrow is exacerbated by the circumstances of this case. The Debtors arrived at the $17.019 million wind-down budget by excluding PBGC's $3.2 million administrative claim and its priority claim. While the Settlement Agreement nominally states that the "Wind-Down Budget is adequate and otherwise appropriate to fund all unpaid priority and administrative claims" [ECF 753-1, Art. II § 3], counsel for the Debtors and counsel for Franklin Advisors, Inc. both emphasized that the Wind Down Budget provides a finite amount of cash for the Debtors' estates and that the parties should not expect that amount to be increased. [Hr'g Tr., 38:2-3 (Chesley); 43:21-44:4 (Shamah) (*attached as Exhibit A*)].

26. The net effect of these circumstances is that the Debtors will probably not have sufficient assets to pay all administrative and priority claims. The Court recognized this issue, asking about timing and whether the case could work out in such a way that other administrative claims are paid, but PBGC is not. [Hr'g Tr., 45:2-5]. And while Debtor's counsel conceded that a plan of liquidation could not provide for such a result [*Id.*, 45:6-9], the Settlement Agreement appears to have that very effect.

27. The Settlement Agreement is silent about a *pro rata* distribution of estate assets to administrative claimants in the event of a shortfall. But the Settlement Agreement is clear that

$14 million of sale proceeds will fund a Professional Fee Escrow for the benefit of professionals' administrative claims. And it appears that those funds will remain segregated from the Debtors' other assets, even in the event of administrative insolvency.

28. If PBGC's presumption is correct, then the Settlement Agreement will lead to disparate treatment for PBGC's administrative claim in the likely event of a shortfall. This drastic, and presumably unintended, effect of approving the Settlement Agreement will violate the priority distribution scheme of the Bankruptcy Code. 11 U.S.C. § 1129(b).

B. The Settlement Agreement and its Wind Down Budget also appear to create an impermissible waterfall under the Bankruptcy Code.

29. By creating a Wind Down Budget that provides for the payment of certain administrative and priority claims, the Settlement Agreement also appears to set the terms for distributions to those creditors if an Acceptable Plan is not confirmed and consummated.

30. As explained above, any creditor distributions made pursuant to a settlement must conform to the Bankruptcy Code's priority scheme. *Jevic Holding Corp.*, 137 S. Ct. at 979. Section 1129(b)(1) of the Bankruptcy Code states that a confirmable plan does "not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired . . . under the plan." Under this absolute priority rule, "a senior class must receive 100% of its claim . . . before a junior class gets any payment." 11 U.S.C. § 1129(b)(2)(B)(ii); *Corestates Bank, N.A. v. United Chem. Techs., Inc.*, 202 B.R. 33 n.16 (E.D. Pa. 1996); *In re Armstrong World Industries, Inc.*, F.3d 507, 513 (2005); 6 Collier Bankruptcy Practice Guide ¶ 91.05 (2018).

31. At the approval hearing for the Settlement Agreement, the parties asserted that PBGC's concern of non-payment and priority-violating distributions was an issue reserved for

plan confirmation. [Hr'g Tr., 42:16-19]. However, the Settlement Agreement's terms do not exist in a vacuum.

32. The Settlement Agreement and its Wind Down Budget will become effective regardless of whether an Acceptable Plan is confirmed. [753-1, Art. IV § 1 (conditioning effectiveness on entry of the Proposed Sale Order, entry of the Order, and sale closing); *see also* Hr'g Tr., 44:20-24]. And the Settlement Agreement provides specific amounts for paying the Professional Fee Escrow, 503(b)(9) claimants, other post-petition costs, and priority tax claims, all while carving out any payment for PBGC's administrative and priority claims. As a result, the Settlement Agreement is intertwined with the final disposition of the case and could be read to provide for payments of certain administrative and priority claims while excluding payment of others (namely PBGC's claims). This result would violate the priority distribution scheme of the Bankruptcy Code. *Jevic Holding Corp.*, 137 S. Ct. at 977 (holding that bankruptcy courts cannot allow distributions that do not follow ordinary priority rules without consent of the affected creditors); *see also In re Armstrong*, 432 F. 3d at 507 (affirming denial of a plan that violated the absolute priority rule); *In re Am. Capital Equip., LLC*, 688 F.3d 145 (3d Cir. 2012) (deeming the settlement unreasonable, denying plan confirmation, and converting the case to chapter 7).

33. In approving the Settlement Agreement, the Court may have considered the Debtors' representation that all administrative and priority claims will be paid in full. [Hr'g tr. 38:5, 44:24-25]. Debtors' counsel also noted that "[PBGC is] not going to be left behind," while emphasizing that there is a "finite pot of cash . . . to resolve all priority claims." [Hr'g Tr. 37:22-23, 38:3]. And counsel conceded that the Debtors "may find [themselves] in a difficult position" if their cash proves insufficient. [Hr'g Tr., 38:7-11].

34. The Debtors did not offer a solution in the event that their estates enter into a "difficult position." But in that situation, the Settlement Agreement appears to still provide for payment of the claims specified in the Wind Down Budget.

35. Accordingly, in order to prevent manifest injustice and clear error of law or fact, the Court should amend its Order to clarify that: (1) the cash in the Wind Down Budget and any Professional Fee Escrow is property of the Debtors' estates and must be distributed in accordance with the Bankruptcy Code; (2) any funds in the Professional Fee Escrow will be available to pay non-professional administrative claims if the Debtors have insufficient assets to pay all administrative claims; and (3) if there is insufficient cash to pay all allowed administrative and priority claims in full, then all claims in the same priority class will receive a *pro rata* share of available assets.

Reservation of Rights

36. If the Court is not inclined to amend its Order to clarify that the Settlement Agreement cannot provide for disparate treatment of administrative claimants or otherwise distribute estate assets in manner that violates the Bankruptcy Code, PBGC requests that the Court issue an opinion that explains why approval of the Settlement Agreement remains appropriate. PBGC further reserves its rights to seek additional relief, including leave to file an immediate appeal and to obtain a stay of any creditor distributions pending resolution of that appeal.

CONCLUSION

For the foregoing reasons, PBGC respectfully asks that the Court alter or amend its Order to clarify that: (1) the cash in the Wind Down Budget and any Professional Fee Escrow is property of the Debtors' estates and must be distributed in accordance with the Bankruptcy Code; (2) any funds in the Professional Fee Escrow will be available to pay non-professional administrative claims if the Debtors have insufficient assets to pay all administrative claims; and (3) if there is insufficient cash to pay all allowed administrative and priority claims in full, then all claims in the same priority class will receive a *pro rata* share of available assets. PBGC further requests that while the Court considers this motion, all funds paid into the Debtors' estate, including all amounts paid under the Wind Down Budget, be held in reserve for the payment of claims in accordance with the Bankruptcy Code. PBGC further requests that the Court grant such other relief as it deems just and proper.

Dated: May 29, 2018
Washington, D.C.

Respectfully submitted,

/s/ Aditi Kumar
JUDITH STARR, General Counsel
KARTAR KHALSA, Deputy General Counsel
COLIN ALBAUGH, Assistant General Counsel
JOHN GINSBERG, Acting Assistant General Counsel
ADITI KUMAR, Attorney
KIMBERLY NEUREITER, Attorney
Office of the General Counsel
PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W.
Washington, D.C. 20005-4026
Phone: (202) 326-4020, ext. 6224
Fax: (202) 326-4112
Email: Kumar.Aditi@pbgc.gov *and*
efile@pbgc.gov