IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re:	)	
	)	Chapter 11
BUCKINGHAM OIL INTERESTS, INC.,	)	
	)	Case No. 15-13441 (JNF)
	)	
Debtor.	)	

OBJECTION OF THE PENSION BENEFIT GUARANTY CORPORATION TO THE CHAPTER 11 TRUSTEE'S THIRD MODIFIED PLAN OF REORGANIZATION FOR BUCKINGHAM OIL INTERESTS, INC.

The Pension Benefit Guaranty Corporation ("PBGC"), an unsecured creditor in the above-mentioned bankruptcy proceeding, hereby objects to the Third Modified Plan of Reorganization for Buckingham Oil Interests, Inc. (D.I. 470) ("POR") filed by Charles A. Dale III, the Chapter 11 Trustee ("Trustee"), on December 21, 2015.

The POR cannot be confirmed because it fails to satisfy Section 1129(a)(1), (3) of the Bankruptcy Code ("Code") by improperly releasing non-debtor third parties from liability. In addition, the POR fails to satisfy Section 1129(a)(11) because it is not feasible. Further, the POR cannot be confirmed because it may run afoul of Section 1129(b)(2)(B)(ii) by proposing to pay equity interests without first paying general unsecured claims in full. Accordingly, the POR cannot be confirmed.

I. BACKGROUND

A. PBGC and ERISA

1. PBGC is the federal government agency that administers and enforces the defined benefit pension plan termination insurance program under Title IV of the Employee Retirement

Income Security Act of 1974 ("ERISA"). *See* 29 U.S.C. §§ 1301-1461 (2012 & Supp. II 2014). The program guarantees a secure, predictable retirement for approximately 40 million American workers.[1]

2. Pursuant to ERISA, a sponsor of a pension plan covered by Title IV and the sponsor's controlled group members must satisfy certain financial obligations to the plan. While a pension plan is ongoing, the responsibilities of the plan sponsor and controlled group members include the following: (1) paying the statutorily required minimum funding contributions to the pension plan, 26 U.S.C. §§ 412(b)(1), (2), 430, and (2) paying insurance premiums to PBGC, 29 U.S.C. §§ 1306, 1307. The liabilities of the plan sponsor and controlled group members with regard to the pension plan are joint and several.

3. ERISA provides the exclusive means for a plan sponsor to terminate a pension plan. *See* 29 U.S.C. § 1341(a)(1); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999). One of such means is a standard termination, which requires a showing, among other things, that a plan has sufficient assets to pay all of its promised benefits. *See* 29 U.S.C. § 1341(b)(1)(D). If the pension plan properly terminates in a standard termination pursuant to Section 4041(b) of ERISA, as determined by PBGC, the plan sponsor has no further obligation to the pension plan.

4. Separate from a plan sponsor initiating termination of a pension plan, PBGC can also initiate termination of a pension plan pursuant to Section 4042 of ERISA ("PBGC-initiated termination"). 29 U.S.C. § 1342. Upon a PBGC-initiated termination of a pension plan, the contributing sponsor controlled group members are still subject to certain liabilities with regard

[1] PBGC 2015 annual report at p.1, http://www.pbgc.gov/Documents/2015-annual-report.pdf.

to the terminated pension plan. For example, they become jointly and severally liable to PBGC for unfunded benefit liabilities of the pension plan. 29 U.S.C. § 1362(a), (b).

5. Upon termination other than through a standard termination, the plan sponsor and controlled group members remain jointly and severally liable to PBGC for any unpaid premiums — not just the flat-rate and variable-rate premiums, but also a termination premium. *See* 29 U.S.C. § 1306(a)(7).

6. Finally, because PBGC typically becomes the statutory trustee of a pension plan that terminated other than through a standard termination, it has authority to collect all amounts owed to the pension plan, including any unpaid minimum funding contributions for which the plan sponsor and controlled group members are jointly and severally liable. *See* 29 U.S.C. §§ 1082(c), 1342(d), 1362(a), (c); 26 U.S.C. § 412(c).

7. Typically, in a pension plan sponsor's bankruptcy proceeding, PBGC will file proofs of claims for the pension plan's unpaid minimum funding contributions, unpaid premiums, and unfunded benefit liabilities.

8. As statutory trustee of a terminated pension plan, PBGC has the power to take any action authorized by the plan and to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan. *See* 29 U.S.C. § 1342(d). PBGC therefore has authority to investigate and prosecute any fiduciary or party-in-interest that has participated in or committed a fiduciary breach or prohibited transaction with respect to the pension plan. *See* 29 U.S.C. §§ 1002(14), (21), 1104, 1106, 1109. Individual fiduciaries and parties-in-interest are personally liable for any losses to the pension plan resulting from each fiduciary breach and/or prohibited transaction. *See* 29 U.S.C. §§ 1106, 1109.

B. The Debtor's Pension Plan

9. Buckingham Oil Interests, Inc. ("Debtor") sponsors the Buckingham Oil Interests, Inc. Defined Benefit Pension Plan ("Pension Plan"), a single-employer defined benefit pension plan covered under Title IV of ERISA. PBGC has been verbally informed that the Pension Plan is an insured defined benefit plan pursuant to Section 412(e)(3), meaning that the Pension Plan is, among other things, "funded exclusively by the purchase of individual insurance contracts." *See* 26 U.S.C. § 412(e)(3). PBGC is still waiting to receive documentation evidencing that the Pension Plan is, in fact, an insured defined benefit plan pursuant to Section 412(e)(3).

10. PBGC did not learn of the Debtor's bankruptcy filing until December 23, 2015, at which time PBGC immediately contacted the Trustee and requested documents and information regarding the Pension Plan and its participants. In addition, PBGC contacted and requested documents and information from First Actuarial Corporation, the Pension Plan's actuary, and New York Life Insurance Company, an insurance company which may fund some or all of the Pension Plan. PBGC is still waiting for the requested documents and information in order to complete a valuation and analysis of the Pension Plan.

11. PBGC has been informed of the following: there were four participants in the Pension Plan; Darryl Buckingham and Mia Green were and are no longer participants because they already received the full amount of their respective benefits from the Pension Plan; and there are only two remaining participants in the Pension Plan, Janet Buckingham and Dennis Buckingham.

12. The Trustee verbally informed PBGC that the Pension Plan will undergo a standard termination. If the Pension Plan properly terminates in a standard termination pursuant to Section 4041(b) of ERISA, as determined by PBGC, then the Debtor and Liquidating Trustee

have no further obligation to the Pension Plan, except for possible, unpaid insurance premiums owed to PBGC.

13. If the Pension Plan does not properly terminate in a standard termination, the Debtor remains liable for any unpaid minimum funding contributions under Sections 412 and 430 of the Internal Revenue Code ("IRC") and unpaid PBGC premiums under Sections 4006 and 4007 of ERISA, and become liable to PBGC for the Pension Plan's unfunded benefit liabilities under Section 4062 of ERISA. *See* 26 U.S.C. §§ 412(c), 430; 29 U.S.C. §§ 1306, 1307, 1362.

14. PBGC is still waiting to receive documentation evidencing that Darryl Buckingham and Mia Green received their full benefits under the Pension Plan. In addition, PBGC is still waiting for the Debtor to initiate and complete a standard termination of the Pension Plan. Due to statutory requirements for a 60-day PBGC review period and a 60-day noticing period to participants, the standard termination will take at least two months to complete once the process is initiated.

15. As a result of PBGC receiving late notice of this bankruptcy and due to the timeline for completing a standard termination pursuant to ERISA, PBGC is presently unable to determine whether the Debtor will be obligated to PBGC for unpaid minimum funding contributions, unpaid PBGC premiums, or unfunded benefit liabilities. Therefore, PBGC files this objection to ensure that the Pension Plan is protected in the event that a standard termination is not properly completed.

C. The Debtor's Bankruptcy Proceeding

16. On September 1, 2015 ("Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of the Code. The bankruptcy proceeding was precipitated by the death of Darryl Buckingham, the individual who conducted the Debtor's business, shortly before the

Petition Date. Also on the Petition Date, the United States Trustee moved to appoint a Chapter 11 Trustee, which the Court granted on the same date.

17. According to the Debtor's Petition, PBGC was not included on the service list. PBGC did not learn of the Debtor's bankruptcy until December 23, 2015.

18. On October 26, 2015, the Trustee filed the Motion of the Chapter 11 Trustee for Entry of an Order Authorizing and Approving Entry into a Plan Support Agreement ("PSA") (D.I. 272). On November 20, 2015, the PSA was amended (D.I. 390). On November 30, 2015, the Court entered an Order authorizing and approving the PSA (D.I. 405). The PSA provided, among other things, that the parties to the PSA, other than the Trustee ("Supporting Investors") would support the POR, and that some of the Supporting Investors would be severally and not jointly responsible for any funding shortfall with respect to the POR ("Back Stop Parties").

19. On November 6, 2015, the Trustee filed the Chapter 11 Trustee's Plan of Reorganization (D.I. 346) and the Disclosure Statement for the Chapter 11 Trustee's Plan of Reorganization (D.I. 347).

20. On December 7, 2015, the Trustee filed the First Modified Plan of Reorganization (D.I. 412) and First Amended Disclosure Statement (D.I. 413).

21. On December 14, 2015, the Trustee filed the Second Amended Chapter 11 Plan (D.I. 438) and Second Amended Disclosure Statement (D.I. 439).

22. On December 21, 2015, the Trustee filed this current POR and the Third Amended Disclosure Statement ("Disclosure Statement") (D.I. 472).

23. On December 22, 2015, the Court entered an Order approving the Disclosure Statement, setting a deadline of January 28, 2016 at 5:00PM EST to object to confirmation of the

POR, and scheduling the confirmation hearing for February 10, 2016 at 11:00AM EST (D.I. 477).

II. ARGUMENT

The POR, in its current state, cannot be confirmed. A Chapter 11 plan must comply with each of the requirements set forth in Section 1129(a) of the Code to be confirmed, except Section 1129(a)(8). *See* 11 U.S.C. § 1129(a); *see also In re Mahoney Hawkes, LLP*, 289 B.R. 285, 296 (Bankr. D. Mass. 2002). Three requirements are that (i) the plan comply with the applicable provisions of Title 11; (ii) the plan be proposed in good faith and not by any means forbidden by law; and (iii) the plan must be feasible. *See* 11 U.S.C. § 1129(a)(1), (3), (11).

Further, if a Chapter 11 plan is not a consensual plan—in other words, if a plan meets all of the applicable requirements of Section 1129(a) except Section 1129(a)(8)—the plan may still be "crammed down" under Section 1129(b). *See* 11 U.S.C. § 1129(a), (b)(1). In order for a Plan to be crammed down under Section 1129(b)(1), the plan (1) must not unfairly discriminate and (2) must be fair and equitable. *See* 11 U.S.C. § 1129(b)(1), (2).

Here, the POR fails to satisfy the three requirements in Section 1129(a)(1), (3), and (11). In particular, the POR improperly provides for releases of non-debtor third parties, without any proof of fairness, necessity to the reorganization, or reasonable consideration. In addition, the POR violates Section 1129(a)(11) of Title 11 because it is silent with regard to the Debtor's intentions or obligations with respect to the Pension Plan. Further, the POR is not fair and equitable to unsecured claims because it is potentially violative of the absolute priority rule.

A. The POR cannot be confirmed because it provides for improper releases of non-debtor third parties

The relevant provisions of the POR that provide for improper releases are Sections 9.1, 9.2, and 9.3:

9.1 **Certain Releases by the Estate**

As of the Effective Date, for good and valuable consideration, the adequacy of which is hereby confirmed, the Released Parties[2] are deemed released and discharged by the Estate and any person or entity seeking to exercise the rights of the Estate (including the Liquidating Trustee) from any and all Claims, obligations, suits, judgments, damages, demands, debts, remedies, Causes of Action (including Avoidance Actions), rights of setoff, other rights, and liabilities whatsoever, whether for tort, contract, violations of federal or state securities laws, Avoidance Actions, including any derivative Claims, asserted or that could possibly have been asserted directly or indirectly on behalf of the Debtor, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity, or otherwise, and any and all Causes of Action asserted or that could possibly have been asserted on behalf of the Debtor, or that the Debtor or the Estate would have been legally entitled to assert in their own right or on behalf of the holder of any Claim or Interest or other Entity, based on or in any way relating to, or in any manner arising from, in whole or in part: the Debtor or its Affiliates, the conduct of the Debtor's business, the [PSA], the formulation, preparation, solicitation, dissemination, negotiation, or filing of the Disclosure Statement or [POR] for any contract, instrument, release, or other agreement or document created or entered into in connection with or pursuant to the [PSA], the Disclosure Statement, or the [POR], the allocation of Designated Assets amongst Programs or the classification of the Wildcat Assets, the filing and prosecution of the Chapter 11 Case, the pursuit of Confirmation, the pursuit of Consummation, the sale of the Legacy Programs' assets, the purchase, sale, or rescission of the purchase or sale of any Security of the Debtor or the Program LLCs, the subject matter of, or the transactions or events giving rise to, any

[2] "Released Parties" is defined in the POR as:

> [C]ollectively, each of the following in its/their capacity as such: (a) the Back Stop Parties; (b) the Supporting Investors; (c) holders of Allowed Current Investor Claims that subscribe to any Program LLCs for which they are eligible in accordance with Section 5.3(c) herein (including paying any Receivable); (d) the DIP Lender; (e) the Wildcat Lender; and (f) NEU Oil; and in each case, the term "Released Parties" shall include the respective Related Persons of each of the foregoing Entities. No other Entity shall be a Released Party, including, but not limited to, the ollowing Persons and their respective Related Persons: (i) Darryl Buckingham and his estate; (ii) Janet Buckingham; (iii) Andrew Buckingham; (iv) Brett Buckingham; (v) Rob Larkin; (vi) John (aka "Jack") Chafin; (vii) McKinnon & Associates, LLC; (viii) Buckingham Exploration, LLC; (ix) Greenwood Drilling, LLC; (x) Greenwood Land, LLC; (xi) Greenwood Well Service, LLC; (xii) Greenwood Contractors, LLC; (xiii) Paint Rock Operating, LLC; (xiv) Petrol's Rest, LLC; (xv) Growing Grace, LLC; (xvi) Bluehead Tequila, LLC; (xvii) Clint Bounds; and (xviii) Jeffrey Brown.
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> POR § 1.1(107).

Claim or Interest that is treated in the [POR], the business or contractual arrangements between the Debtor and any Released Party, prepetition contracts and agreements with the Debtor, or any other act or omission, transaction, agreement, event, or other occurrence taking place before the Effective Date; provided that to the extent that a Claim or Cause of Action is determined by a Final Order to have constituted fraud, gross negligence or willful misconduct, such Claim or Cause of Action shall not be so released; provided, further, that any Causes of Action initiated by the Trustee prior to the Voting Deadline shall not be so released; provided, further, that nothing in this Section 9.1 shall compromise the rights of the Estate, the Trustee, or the Liquidating Trustee to setoff distributions payable hereunder against Receivables.

9.2 **Exculpation**

Effective as of the Effective Date, no Exculpated Party[3] shall have or incur, and each Exculpated Party is hereby released and exculpated from, any Exculpated Claim or any obligation, Cause of Action, or liability for any Exculpated Claim; provided, however, that the foregoing "exculpation" shall have no effect on the liability of any Entity that results from any act or omission that is determined in a Final Order to have constituted actual fraud, gross negligence or willful misconduct. The Exculpated Parties have, and upon Confirmation shall be deemed to have, participated in good faith and in compliance with the applicable provisions of the Bankruptcy Code with regard to the solicitation of acceptances and rejections of the [POR] and the making of distributions pursuant to the [POR] and, therefore, are not and shall not be liable at any time for the violation of any applicable, law, rule, or regulation governing the solicitation of acceptances or rejections of the [POR] or such distributions made pursuant to the [POR].

9.3 **Injunction**

Except as otherwise provided herein or in the Confirmation Order, from and after the Effective Date, all Entities are, to the fullest extent provided under section 524 and other applicable provisions of the Bankruptcy Code, permanently enjoined from taking any of the following actions against, as applicable, the Program LLCs, the Wildcat Program LLC, the Released Parties, or the Exculpated Parties (collectively, the "*Protected Parties*"): (a) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any Claims or Interests; (b) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against the Protected Parties or their respective property and assets on account of or in connection with or with

[3] "Exculpated Party" is defined in the POR as: "[C]ollectively: (a) the Trustee; (b) the Liquidating Trustee; (c) NEU Oil; (d) the DIP Lender; (e) the Wildcat Lender; and (f) the Supporting Investors; and in each case, the respective Related Persons of each of the foregoing Entities." POR § 1.1(51).

> **respect to any such Claims or Interests; (c) creating, perfecting, or enforcing any encumbrance of any kind against the Protected Parties or their respective property and assets on account of or in connection with or with respect to any such Claims or Interests; (d) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from the Protected Parties or their respective property and assets on account of or in connection with or with respect to any such Claims or Interests unless such holder has filed a motion requesting the right to perform such setoff on or before the Confirmation Date; and (e) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests released, exculpated or settled pursuant to the [POR]; provided that nothing in this Section 9.3 shall compromise the rights of the Estate, the Trustee, or the Liquidating Trustee to setoff distributions payable hereunder against Receivables.**

24. Because Sections 9.1, 9.2, and 9.3 improperly provide releases (collectively, the "Releases"), the Trustee's POR should not be confirmed.

25. The First Circuit has identified but not ruled on the issue of whether non-debtor third party releases and injunctions are permissible in Chapter 11 plans. *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 983 (1st Cir. 1995); *see also In re Mahoney Hawkes*, 289 B.R. 285, 298 (Bankr. D. Mass. 2002).

26. Lower courts in this district have addressed the issue by acknowledging a bankruptcy court's authority to approve non-debtor third party releases and injunctions if certain factors are met. *See, e.g.*, *Mahoney Hawkes*, 289 B.R. at 300; *In re M.J.H. Leasing, Inc.*, 328 B.R. 363, 369-71 (Bankr. D. Mass. 2005); *see also In re Quincy Med. Ctr., Inc.*, No. 11-16394-MSH, 2011 WL 5592907, at *2 (Bankr. D. Mass. Nov. 16, 2011). In *In re Salem Suede, Inc.*, Judge Feeney denied confirmation of a Chapter 11 plan of reorganization because those factors were not met; but she left open the possibility that even if those factors were met, she may still find that Section 524(e) of the Bankruptcy Code *per se* prohibits non-debtor third party releases and injunctions. *In re Quincy Med. Ctr.*, 2011 WL 5592907, at *2 (discussing *In re Salem Suede, Inc.*, 219 BR. 922, 936-37 (Bankr. D. Mass. 1998)). Judge Feeney went even

further to suggest that the bankruptcy court lacks jurisdiction to bar the claims of one non-debtor against another non-debtor. *In re Salem Suede*, 219 BR. at 932-33 n.8; *see also In re Adley*, 333 B.R. 587, 602 (Bankr. D. Mass. 2005).

27. Even if Section 524(e) were not to *per se* prohibit non-debtor third party releases and injunctions, and the bankruptcy court were to have jurisdiction to allow them, the factors that courts consider in determining whether non-debtor third party releases and injunctions are appropriate are not met. Those factors are the following:

1. An identity of interests between the debtor and the third-party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
2. The non-debtor has contributed substantial assets to the reorganization;
3. The injunction is essential to the reorganization;
4. A substantial majority of the creditors agree to such injunction, specifically, the impacted class, or classes, has overwhemingly voted to accept the proposed plan treatment;
5. The plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction.

In re Adley, 333 B.R. at 610-11 (quoting *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994)).

28. In this case, there is no identity of interests between the Debtor and the third parties included in the Releases. A suit against a third party is not, in essence, a suit against the Debtor. In fact, Darryl Buckingham, the individual who managed the Debtor's operations prior to his death, and Janet Buckingham, the Debtor's sole shareholder after Darryl Buckingham's death, are explicitly *not* included in the definition of "Released Parties." *See* POR § 1.1(107). Also, any action by the Pension Plan or PBGC against a non-debtor third party would be to remedy a fiduciary breach or prohibited transaction by recovering assets of the Pension Plan. Such an action would not deplete the Debtor's estate. Indeed, any such recovery would increase the Pension Plan's assets and decrease the amount of PBGC's claim against the Debtor for the

Pension Plan's unfunded benefit liabilities – which would leave more for other creditors in Debtor's bankruptcy proceeding.

29. As to the second factor, some third parties included in the definition of "Released Parties," including, but not limited to, the Back Stop Parties and the Supporting Investors have not contributed substantial assets to the reorganization. Unless there is a funding shortfall with regard to the POR, it appears that the Back Stop Parties will not be required to make any kind of monetary contribution to the reorganization at all.

30. Moreover, there has been no showing that the Releases are essential to the reorganization. For example, there is no evidence that the Back Stop Parties would not support the POR without the Releases.

31. Further, because the deadline to vote on the POR is on the same date as the deadline to object to the POR, it is presently unclear whether a substantial majority of creditors will agree to the Releases.

32. Finally, the POR does not provide for payment of all, or substantially all, of the claims of the affected class. Accordingly, because the POR improperly provides for non-debtor third party releases, it cannot be confirmed.

B. The POR is not feasible because it fails to account for the Debtor's obligations to the Pension Plan

33. Despite verbal representations from the Trustee and his counsel that the Debtor will fund a standard termination of the Pension Plan, the POR is utterly silent with regard to the Pension Plan.

34. The Debtor has the burden of showing that the POR is feasible, as required by Section 1129(a)(11) of the Code. *See In re Ropt Ltd. P'ship*, 152 B.R. 406, 410 (Bankr. D. Mass. 1993). Section 1129(a)(11) provides that a plan may only be confirmed if "[c]onfirmation

of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11); *see also In re Charles St. African Methodist Episcopal Church of Boston*, 499 B.R. 66, 108 (Bankr. D. Mass. 2013).

35. "This 'feasibility test' requires the court to make an independent determination as to whether the Plan is workable and has a reasonable likelihood of success." *In re Charles St. African Methodist Episcopal Church*, 499 B.R. at 108 (citation omitted). The purpose of this test "is to ensure that the plan is not a 'visionary scheme'"; in other words, "[t]he purpose of the feasibility test is to determine whether there is a reasonable probability that creditors will receive the payments provided for in the plan." *In re Chicago Invs., LLC*, 470 B.R. 32, 107 (Bankr. D. Mass. 2012) (citing *In re Merrimack Valley Oil Co.*, 32 B.R. 485, 488 (Bankr. D. Mass 1983); *In re Trenton Ridge Investors, LLC*, 461 B.R. 440, 478 (Bankr. S.D. Ohio 2011)).

36. In order to determine whether a plan is feasible, courts consider:

1. The adequacy of the capital structure;
2. The earning power of the business;
3. Economic conditions;
4. The ability of management;
5. The probability of the continuation of the same management; and
6. Any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

Id. (quoting *In re Trenton Ridge*, 461 B.R. at 478).

37. In this case, the Debtor is unable to show that the POR "has a reasonable likelihood of success" because the POR is silent on the Debtor's obligations regarding the Pension Plan. *See In re Charles St. African Methodist Episcopal Church*, 499 B.R. at 108 (citation omitted).

38. Although the Trustee and his counsel have verbally informed PBGC of the Debtor's intention to effectuate a standard termination of the Pension Plan, there is currently nothing on the record to that effect.

39. If the Debtor intends to initiate a termination of the Pension Plan through a standard termination, the POR should provide for it. Specifically, the POR should lay out a timeline whereby it will meet the statutory requirements under ERISA to complete a standard termination and provide a date certain by when the standard termination will be completed.

40. In addition, a standard termination requires that the Pension Plan's assets be sufficient to pay all promised benefits under the Pension Plan. The POR should therefore provide how the Debtor will fund the Pension Plan so that it is sufficient to pay all promised benefits. Currently, the POR does not contain any provisions for the Debtor to meet such an obligation before or after confirmation.

41. In the event that the Debtor does not effectuate a standard termination, the Pension Plan will remain ongoing. Therefore, the Debtor remains liable for all obligations regarding to the Pension Plan, including but not limited to minimum funding contributions and PBGC premiums. The POR should provide how the Debtor intends to satisfy its benefit liabilities on an ongoing basis in the event that a standard termination is not properly completed.

42. Until the Debtor properly completes a standard termination of the Pension Plan pursuant to Title IV of ERISA, or if the Debtor never completes a standard termination, the Debtor continues to be responsible for funding and maintaining the Pension Plan pursuant to ERISA and the IRC. The POR should provide for the Debtor's continued obligation to maintain the Pension Plan pursuant to ERISA and IRC through confirmation.

43. Because the POR fails to address the Debtor's obligations and intention regarding the Pension Plan, it is not feasible and cannot be confirmed.

C. The POR cannot be confirmed because it violates the absolute priority rule

44. A court may confirm a plan of reorganization under Section 1129(b) as long as "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." *See* 11 U.S.C. § 1129(b)(2).

45. A plan is fair and equitable if the allowed value of such claimants' claims are paid in full, or if junior classes of claimants do not receive any property under the plan on account of such junior creditors' claim or interest ("Absolute Priority Rule"). 11 U.S.C. § 1129(b)(2)(B)(ii); *see also In re Charles St. African Methodist Episcopal Church*, 499 B.R. at 111.

46. As discussed above, although the Trustee has verbally informed PBGC of the Debtor's intent to initiate a standard termination with respect to the Pension Plan, the completion of a successful standard termination is not guaranteed; here, the Debtor has not yet initiated the standard termination process.

47. Until such time as the Debtor successfully completes a standard termination of the Pension Plan or until such time as the PBGC receives all documents necessary to confirm that it has no remaining claims against the Debtor, PBGC wants to maintain the status quo. PBGC has until the governmental bar date, March 1, 2016 at 4:00PM EST, to file proofs of claims with respect to the Pension Plan. PBGC's claims would be impaired because the Plan does not propose to fully satisfy those claims in full. *See* POR § 3.2.

48. The PSA, among other things, characterizes and establishes the priority of the investors' claims, which is embodied in the POR. The POR classifies investors' claims in Class 4A (Legacy Investor Claims) and Class 4B (Current Investor Claims). The POR classifies general unsecured claims in Class 5.

49. Although PBGC acknowledges that the PSA was a settlement between the Trustee and the Supporting Investors, PBGC also avers that this settlement could be a violation of the Absolute Priority Rule if claims in Class 5 (general unsecured claims) vote to reject the POR.[4] *See* POR § 5.1; PSA Term Sheet 3. At the time that the Court approved the PSA on November 30, 2015, PBGC had not yet received notice of the Debtor's bankruptcy filing. In fact, PBGC did not learn of the Debtor's bankruptcy until December 23, 2015 and was therefore unable to object to the PSA prior to its approval.

50. The Absolute Priority Rule dictates that any transfer of property, or other distribution, to the equity holders must be made *only after* general unsecured claims are satisfied in full. *See In re Cantonwood Assocs. Ltd. P'ship*, 138 B.R. 648, 657 (Bankr. D. Mass. 1992). The classification and characterization of the investors' claims as provided in the PSA and provided for in the POR violates the Absolute Priority Rule by paying equity holders while failing to first pay PBGC—a general unsecured creditor—in full.

51. Further, the "new value exception" to the Absolute Priority Rule is not applicable here. The new value exception allows the Debtor's old equity interest holders to receive a payment without payment in full to all creditors if they make a "fresh contribution" to the Debtor "in money or money's worth, in return for 'a participation reasonably equivalent to their

[4] On December 22, 2015, the Court entered an Order setting the voting deadline for the POR for January 28, 2016 at 5:00 PM EST (D.I. 477). Therefore, at this time, it is unclear whether Class 5 will vote to reject the plan, and thus, whether the absolute priority rule is applicable in this case.

contribution.'" *In re Bjolmes Realty Trust*, 134 B.R. 1000, 1005 (Bankr. D. Mass. 1991) (citations omitted); *see also In re Shepcaro*, 144 B.R. 3, 4 (Bankr. D. Mass. 1992).

52. In this case, the Supporting Investors have not made a "fresh contribution" to the Debtor in the form of money or money's worth. On the contrary, only some of the Supporting Investors have agreed to be Back Stop Parties in the event that there is a funding shortfall with respect to the POR. Further, these Back Stop Parties are receiving a distribution that is not "reasonably equivalent" to their contribution because at this time, it is unclear whether there will be a funding shortfall which will trigger the need for a contribution by the Back Stop Parties.

53. Therefore, the POR may violate the Absolute Priority Rule and cannot be confirmed.

III. PROPOSED LANGUAGE

54. PBGC and counsel for the Trustee have agreed to include the following language in the Confirmation Order, and upon the Court's approval of the Confirmation Order, PBGC will withdraw its objection:

> "Nothing in this Confirmation Order, the Plan, the Bankruptcy Code, or any other document filed in the Chapter 11 Case shall in any way be construed to discharge, release, limit, or relieve the Debtor or any other party, in any capacity, from any liability or responsibility with respect to the Buckingham Oil Interests, Inc. Defined Benefit Pension Plan ("Pension Plan") or any other defined benefit pension plan under any law, governmental policy, or regulatory provision. The Pension Benefit Guaranty Corporation ("PBGC") and the Pension Plan shall not be enjoined or precluded from enforcing such liability or responsibility by any of the provisions of the Plan, Confirmation Order, Bankruptcy Code, or any other document filed in the Chapter 11 Case.
>
> Prior to and following the Effective Date, the Liquidating Trustee shall remain obligated to effectuate the prompt termination of the Pension Plan pursuant to applicable law. The Liquidating Trustee is hereby authorized to take all necessary steps to effectuate the termination of the Pension Plan, including but not limited to employing the Pension Plan's actuary and other service providers to assist in such

termination. Until the Pension Plan is properly terminated pursuant to ERISA, prior to and following the Effective Date, the Debtor and Liquidating Trustee are obligated to administer the Pension Plan pursuant to applicable law, and the Debtor remains liable for all obligations relating to the Pension Plan, including but not limited to Minimum Funding Contributions under IRC §§ 412, 430 and PBGC Premiums under ERISA §§ 4006, 4007.

If the Pension Plan properly terminates in a Standard Termination pursuant to ERISA § 4041(b), as determined by PBGC, then the Debtor and Liquidating Trustee have no further obligation to the Pension Plan. But, if the Pension Plan terminates other than through a Standard Termination, prior to and following the Effective Date, the Debtor and Reorganized Debtors are liable for any unpaid Minimum Funding Contributions under IRC §§ 412, 430 and unpaid PBGC Premiums under ERISA §§ 4006, 4007, and become liable to PBGC for the Pension Plan's Unfunded Benefit Liabilities under ERISA § 4062."

IV. CONCLUSION

For the foregoing reasons, confirmation of the POR must be denied. However, PBGC will withdraw its objection if the Court approves a Confirmation Order that includes PBGC's proposed language.

DATED: January 28, 2016
Washington, D.C.

Respectfully submitted,

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