PENSION BENEFIT GUARANTY CORPORATION
Office of the Chief Counsel
1200 K Street, N.W.
Washington, D.C. 20005-4026
Telephone: 202-326-4020
Facsimile: 202-326-4112
Israel Goldowitz, Chief Counsel
Charles L. Finke, Deputy Chief Counsel
Michael C. Miller, Assistant Chief Counsel
Merrill D. Boone, Attorney

Hearing Date: March 10, 2014
Hearing Time: 10:00am (EST)

Obj. Deadline: March 7, 2014
(Extended by Agreement)

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
	)	
LONG BEACH MEDICAL CENTER,	)	Case Nos. 14-70593-ast
et al.	)	14-70597-ast
Debtors.	)	(Jointly Administered)

LIMITED OBJECTION OF PENSION BENEFIT GUARANTY CORPORATION TO THE DEBTORS' MOTION (DOCKET NO. 13) FOR ENTRY OF AN ORDER APPROVING BIDDING PROCEDURES FOR THE SALE OF THE DEBTOR'S REAL ESTATE AND DESIGNATED PERSONAL PROPERTY ASSETS

Pension Benefit Guaranty Corporation ("PBGC"), a secured and unsecured creditor of the above-captioned debtors ("Debtors"), hereby makes this limited objection to the Debtors' motion for an order approving proposed bidding procedures for the sale of substantially all the Debtors' assets ("Bid Procedures"; the motion, which ultimately seeks approval of such a sale, Docket No. 13, "Sale Motion"). The Bid Procedures, 1) in conjunction with the Debtors' motion for an order authorizing them to obtain post-petition secured, superpriority financing (Docket No. 12, "DIP Loan Motion"), allow the DIP lender to credit bid for substantially all of the Debtors' assets a) certain fees of bankruptcy professionals, b) its entire prepetition claim, and c) liabilities that it "may" assume; and 2) permit the Debtors to deem bids unqualified based on criteria contrary to the interests of creditors.

BACKGROUND

PBGC and the Pension Plans

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"), *as amended*, 29 U.S.C. §§ 1301-1461 (2006 & Supp. V 2011). A defined benefit pension plan is "one where the employee, upon retirement, is entitled to a fixed periodic payment," according to the terms set forth in the plan. *See Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 154 (1993). PBGC guarantees the payment of certain pension benefits upon the termination of a single-employer pension plan 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 pension plan's unfunded benefits with its insurance funds. *See* 29 U.S.C. §§ 1321-1322, 1342, 1361.

Debtor Long Beach Medical Center ("LBMC") is the contributing sponsor of the Long Beach Medical Center Pension Plan ("LBMC Plan"). Debtor Long Beach Memorial Nursing Home, Inc., dba The Komanoff Center for Geriatric and Rehabilitative Medicine ("Komanoff") is the contributing sponsor of the The Komanoff Center for Geriatric and Rehabilitative Medicine Pension Plan ("Komanoff Plan", and with the LBMC Plan, the "Pension Plans").

Section 430(k) of the Internal Revenue Code provides that if a pension plan sponsor fails to make statutorily-required contributions to the pension plan, and the balance of contributions exceeds $1 million, a lien arises on all property of the sponsor and its controlled group for the amount of such balance. 26 U.S.C.§ 430(k). Only PBGC may perfect and enforce such liens. *Id.* LBMC and Komanoff, which belong to the same controlled group, failed to make required contributions to the Pension Plans, such that a lien arose in favor of each Pension Plan ("LBMC Plan Lien", "Komanoff Plan Lien", and collectively, the "PBGC Liens"), on all property of both Debtors.

In January 2009, PBGC perfected the LBMC Plan Lien on all property of LBMC. On June 12, 2009, PBGC perfected the LBMC Plan Lien on all property of Komanoff. On March 29, 2009, PBGC perfected the Komanoff Plan Lien on all personal property of LBMC and Komanoff. On April 7, 2010, PBGC perfected the Komanoff Plan Lien on all real property of LBMC and Komanoff. PBGC has filed periodic updates of the amounts of each of the PBGC Liens. As of October 31, 2013, the amount of the LBMC Plan Lien was $7,260,142; and the amount of the Komanoff Plan Lien was $1,874,875.

By agreement of October 20, 2010, the LBMC Plan was terminated with a termination date of July 31, 2009. By agreement of October 4, 2011, the Komanoff Plan was terminated with a termination date of July 31, 2009. Termination of the Pension Plans gave rise to claims of PBGC under 29 U.S.C. §§ 1307, 1362, jointly and severally against Komanoff and Long Beach, as to each Pension Plan. The claim under Section 1362(b) is equal to the unfunded benefit liabilities of the terminated plan as of the termination date, plus interest from that date. PBGC estimates that as of the Pension Plans' termination date, the Section 1362(b) claims were $28,304,088 for the LBMC Plan; and $7,783,618 for the Komanoff Plan. The claim under Section 1307 is for termination premiums. PBGC estimates that the principal amount of termination premiums is $4,586,250 for the LBMC Plan, and $1,608,750 for the Komanoff Plan.

Bankruptcy

According to the DIP Loan Motion, on December 30, 2013, South Nassau Communities Hospital ("SNCH") agreed to lend the Debtors $1.5 million ("Prepetition Loan") secured by a lien on all of the Debtors' assets ("SNCH Prepetition Lien"). On February 19, 2014, the Debtors filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code with this Court, along with numerous other papers, including the Sale Motion and the DIP Loan Motion.

Under the DIP Loan Motion, SNCH would lend the Debtors $4.5 million ("DIP Loan") secured by a lien on all of LBMC's assets, and a lien on all of Komanoff's assets priming all secured interests, including the PBGC Liens, under Section 364(d) of the Bankruptcy Code ("Priming Lien"). Among other adequate protections measures, PBGC and the other prepetition secured creditors of Komanoff would receive replacement liens to the same extent and priority as they held prepetition.[1] Under the Sale Motion, the Debtors seek the approval of the sale to SNCH of most of the Debtors' assets for $21 million, of which some portion would be paid by the offset of the Prepetition Loan, the DIP Loan, liabilities to employees of the Debtors that SNCH may assume, and the fees of bankruptcy professionals.

The Debtors initially sought approval for the first $900,000 of the DIP Loan with the above-described security ("Emergency DIP Loan Motion"), at a hearing two days after they filed their bankruptcy petitions and numerous other papers. By order of February 26, 2014 ("Emergency DIP Loan Order"), this Court approved the Emergency DIP Loan Motion, and scheduled a final hearing on the DIP Loan Motion.

[1] In the event that liens on Komanoff assets junior to the Komanoff Plan Lien are excepted from priming, or the adequate protection provisions set forth in the DIP Loan Motion are materially changed to PBGC's detriment, PBGC reserves the right to make further objections.

Under Paragraph 4 of the Emergency DIP Order (the apparent template for the final DIP order), SNCH may credit bid a) "the Carve-Out as hereafter defined in paragraph 7"; and b) the allowed amount of SNCH's claim, as set forth in the Asset Purchase Agreement ("APA").

Under Paragraph 7 of the Emergency DIP Order, the Carve-Out is all allowed fees of bankruptcy professionals incurred during the bankruptcies until the closing of a sale to SNCH or a default under the DIP credit agreement, plus up to $600,000 in such fees incurred thereafter. It is unclear, however, whether, in order to credit bid such fees, SNCH actually has to pay them, apart from making the DIP Loan.

Under Section 3.1, the APA provides that the purchase price of $21 million shall be reduced by the Prepetition Loan, the DIP Loan, and the "Assumed Employee Liabilities". The APA defines "Assumed Employee Liabilities" as debts of the Debtors to their employees to be hired by SNCH or its designee, which SNCH "may agree in writing to assume." There is no reason why SNCH should be able to credit bid debts that it does not actually assume.

As to credit bidding the Prepetition Loan, while all of the Debtors' assets are subject to the SNCH Prepetition Lien, it was not perfected (if at all) before December 2013, when SNCH and the Debtors entered into the agreement for the Prepetition Loan; and will not prime previously-perfected liens. There are numerous liens on the assets subject to the Sale Motion ("Sale Assets"), including the PBGC Liens, which are senior to the SNCH Prepetition Lien. *See* Paragraphs 43-55 of the Affidavit of Douglas Melzer, President and Chief Executive Officer of each Debtor. Moreover, the Debtors are seeking authorization to give SNCH the Priming Lien, in the amount of up to $4.5 million. SNCH should not be allowed to include the Prepetition Loan in its credit bid, except to the extent that its bid exceeds the value of all valid, prior liens.

Additionally, the Bid Procedures, which are Schedule 1 to a proposed order filed with the Sale Motion, provide at Paragraph I.(a) that only "Qualified Bidders" will be eligible to purchase the Debtors' assets; and at Paragraph G.(k), that "[t]he Debtors, after consultation with the Creditor's Committee, will have the right to determine that a bid is not a Qualified Bid if… the following condition[s] [is] satisfied: (A) the ability of the Potential Bidder to use the Acquired Assets is not consistent with the Debtors' mission;…" ("Mission Clause"). Thus, under the Bid Procedures, the Debtors may attempt disregard any bid, regardless of its economic value, if the bidder's ability to use the assets is inconsistent with the Debtors' mission.

ARGUMENT

SNCH Should Not Be Allowed To Credit Bid Fees Of Bankruptcy Professionals, Liabilities That It "May" Assume, Or Its Prepetition Claim

As noted above, the DIP Loan Motion asks the Court to allow SNCH to credit bid fees of bankruptcy professionals and its entire claim, as defined to include the Prepetition Loan and liabilities that it "may" assume. Under Section 363(k) of the Bankruptcy Code, the holder of a lien on property being sold may bid its claim at the sale of the property, "unless the court for cause orders otherwise". 11 U.S.C. § 363(k). SNCH should not be allowed to credit bid the fees of bankruptcy professionals which, apart from the DIP Loan that SNCH presumably will be allowed to credit bid, SNCH hasn't paid; or liabilities that it "may" assume, unless it actually does assume them.

As noted above, based on SNCH's own offer for the Sale Assets, SNCH's interest in the SNCH Prepetition Lien may well have no value. At least one court would require a creditor to pay any liens senior to its own lien on the property being purchased, before bidding its secured claim. *In re Daufuskie Island Properties, LLC,* 441 B.R. 60, 64 (Bankr.D.S.C. 2010). At a minimum, SNCH should not be allowed to credit bid the Prepetition Loan claim on the Sale Assets except to the extent that it can show that its interest in that claim has value.

The Bidding Procedures Should Encourage Properly Qualified Bidders

A debtor may sell substantially all of its assets under Section 363(b) of the Bankruptcy Code, as these Debtors propose. 11 U.S.C. § 363(b); *In re Chrysler*, 576 F.3d 108, 117 (2nd Cir. 2009) (sale need not be rejected "simply because it is a sale of all or substantially all of a debtor's assets"). But there must be a "good business reason" for a Section 363(b) transaction, *Chrysler*, 576 F.3d at 114, *quoting Comm. of Equity Sec. Holders v. Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983), and in entering into such a sale, the Debtors must act in the best interest of creditors. *See, e.g., In re Planet 10, L.C.*, 213 B.R. 478, 480 (E.D.Va. 1997), *citing Collier on Bankruptcy*, ¶ 363.02 (15th ed. rev. 1997).

It is essential that the sale process be as open as possible, and free of procedures that inhibit any interested and qualified purchaser from participating. It is especially important to PBGC, where the assets to be sold are subject to the PBGC Liens, which the Debtor is seeking to "prime" under the DIP Loan Motion. The Bankruptcy Code recognizes a secured party's interest in the sale of the secured party's collateral. *See* 11 U.S.C. § 363(e).

Under the Mission Clause, the Debtors may seek to disregard an otherwise qualified bid based on the bidder's intention to use purchased assets for a purpose that is lawful but not consistent with the Debtors' mission. Indeed, the Mission Clause may discourage otherwise qualified bidders from bidding. In any case, the Mission Clause allows the Debtors to act in a way contrary to the best interest of their creditors, and should be stricken from the Bid Procedures.

CONCLUSION

For the foregoing reasons, PBGC requests that this Court grant the Motion only as modified based on this Limited Objection; and reserves its rights regarding the priming of the PBGC Liens as indicated in footnote 1 above.

Dated: March 7, 2014
Washington, D.C.

/s/ Merrill D. Boone
ISRAEL GOLDOWITZ
Chief Counsel
CHARLES L. FINKE
Deputy Chief Counsel
MICHAEL C. MILLER
Assistant Chief Counsel
MERRILL D. BOONE
Attorney

PENSION BENEFIT GUARANTY CORPORATION
Office of the Chief Counsel
1200 K Street, N.W.
Washington, D.C. 20005-4026
Telephone: 202-326-4020, ext 3656
Facsimile: 202-326-4112
Emails: boone.merrill@pbgc.gov and efile@pbgc.gov

Attorneys for the Pension Benefit Guaranty Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2014, the Pension Benefit Guaranty Corporation's Limited Objection to the Debtors' Motion (Docket No. 13) for Entry of an Order Approving Bidding Procedures for the Sale of the Debtors' Real Estate and Designated Personal Property Assets was served on the following:

Burton S. Weston, Esq. Afsheen A. Shah, Esq. Adam T. Berkowitz, Esq. Garfunkel Wild, P.C. 111 Great Neck Road Great Neck, NY 11021 **Debtors' Counsel** **via CM/ECF**	Alfred M. Dimino, Esq. The Office of the United States Trustee for the Eastern District of New York Alfonse D'Amato Federal Courthouse 560 Federal Plaza Central Islip, NY 11722-4456 **U.S. Trustee** **via CM/ECF**
Sean C. Southard Klestadt & Winters 570 Seventh Avenue 17th Floor New York, NY 10018 ssouthard@klestadt.com **Counsel for the Official Committee of Unsecured Creditors** **via E-mail**	Frank A. Oswald, Esq. Brian F. Moore, Esq. Scott A. Griffin, Esq. Togut, Segal & Segal LLP One Penn Plaza, Suite 3335 New York, NY 10119 **Counsel for South Nassau Communities Hospital** **via CM/ECF**
Richard J. Zall, Esq. Lee A. Barkan, Esq. Proskauer Rose, LLP Eleven Times Square New York, NY 10036-8299 rzall@proskauer.com lbarkan@proskauer.com **Counsel for South Nassau Communities Hospital** **via E-mail**	

/s/ Merrill Boone
Merrill Boone

File an answer to a motion:

8-14-70593-ast Long Beach Medical Center

U.S. Bankruptcy Court

Eastern District of New York

Notice of Electronic Filing

The following transaction was received from Merrill Boone entered on 3/7/2014 at 8:44 PM EST and filed on 3/7/2014

Case Name:	Long Beach Medical Center
Case Number:	8-14-70593-ast
Document Number:	69

Docket Text:
Limited Objection *of Pension Benefit Guaranty Corporation to the Debtors' Motion for Entry of an Order Approving Bidding Prodecures for the Sale of the Debtor's Real Estate and Designated Personal Property Assets* Filed by Merrill Boone on behalf of Pension Benefit Guaranty Corporation (RE: related document(s)[13] Motion to Authorize/Direct filed by Debtor Long Beach Medical Center) (Attachments: # (1) Certificate of Service) (Boone, Merrill)

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename: Long Beach_Objection Bidding Procedure_FINAL.pdf
Electronic document Stamp:
[STAMP bkecfStamp_ID=979333796 [Date=3/7/2014] [FileNumber=15352751-0]
[212d0de2b31eb6f42a179a9c34832d3d35ee874e05c2951f22b433242dad3b5356ba
0b1bb596f2bce760494d96bf688b75c4af6e02739b0fed7375800caa6946]]
Document description: Certificate of Service
Original filename:C:\fakepath\Long Beach_Objection Bidding Procedure_COS.pdf
Electronic document Stamp:
[STAMP bkecfStamp_ID=979333796 [Date=3/7/2014] [FileNumber=15352751-1]
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d9d377bf04e6b327aafc2c9a41146edfacadeb6405c07955ca3ac2d8665a]]

8-14-70593-ast Notice will be electronically mailed to:

Michael S Amato on behalf of Interested Party South Shore Family Medical Associates
mamato@rmfpc.com, dolsen@rmfpc.com

Michael Eric Berman on behalf of Creditor Elaine Peck. vs. Long Beach Medical Center
MICHAEL@MEBERMAN.COM

Bruce W. Bieber on behalf of Attorney Bruce Bieber
bbieber@zblaw.com

Merrill Boone on behalf of Creditor Pension Benefit Guaranty Corporation
boone.merrill@pbgc.gov, efile@pbgc.gov

Arthur Goldstein on behalf of Creditor First Central Savings Bank
agoldstein@scsnylaw.com, snobles@scsnylaw.com

Suzanne Hepner on behalf of Creditor 1199SEIU National Benefit Fund for Health and Human Service Employees, et al (the "Funds")
shepner@levyratner.com,
rbarbur@levyratner.com;psherer@levyratner.com;jcisneros@levyratner.com;sroza@levyratner.com;lblackstone@levyratner.com;ssommers@levyratner.com

Suzanne Hepner on behalf of Creditor 1199SEIU United Healthcare Workers East
shepner@levyratner.com,
rbarbur@levyratner.com;psherer@levyratner.com;jcisneros@levyratner.com;sroza@levyratner.com;lblackstone@levyratner.com;ssommers@levyratner.com

Robert M Hirsh on behalf of Interested Party Medline Industries, Inc.
hirsh.robert@arentfox.com, nova.alindogan@arentfox.com;indelicato.lisa@arentfox.com

Akshara Kannan on behalf of Creditor Anthony Arslan
akannan@weisszarett.com

Akshara Kannan on behalf of Creditor Christie Leal
akannan@weisszarett.com

Akshara Kannan on behalf of Creditor Dipesh Patel
akannan@weisszarett.com

Akshara Kannan on behalf of Creditor Jennifer Khachadurian
akannan@weisszarett.com

Akshara Kannan on behalf of Creditor Michael Nguyen
akannan@weisszarett.com

Akshara Kannan on behalf of Creditor Samantha Benjamin
akannan@weisszarett.com

Lauren Catherine Kiss on behalf of Creditor Committee Official Committee Of Unsecured Creditors
lkiss@klestadt.com

Thomas A McFarland on behalf of Creditor Department of Health and Human Services
thomas.mcfarland@usdoj.gov

Frank F McGinn on behalf of Creditor Iron Mountain Information Management, LLC
ffm@bostonbusinesslaw.com

Frank A Oswald on behalf of Interested Party South Nassau Communities Hospital
frankoswald@teamtogut.com, dpaul@teamtogut.com;dcahir@teamtogut.com;aquirk@teamtogut.com;cstachon@teamtogut.com

Elisa M Pugliese on behalf of Creditor KeySpan Gas East Corporation d/b/a National Grid
epugliese@cullenanddykman.com

Elisa M Pugliese on behalf of Creditor PSEG Long Island LLC
epugliese@cullenanddykman.com

Michael L Schein on behalf of Creditor NorthStar Recovery Services, Inc. and its affiliates
mschein@vedderprice.com, ecfnydocket@vedderprice.com

Sean C Southard on behalf of Creditor Committee Official Committee Of Unsecured Creditors
ssouthard@klestadt.com

Fred Stevens on behalf of Creditor Committee Official Committee Of Unsecured Creditors
fstevens@klestadt.com

United States Trustee
USTPRegion02.LI.ECF@usdoj.gov

Burton S Weston on behalf of Debtor Long Beach Medical Center
bweston@garfunkelwild.com, ehuggler@garfunkelwild.com;ashah@garfunkelwild.com

Burton S Weston on behalf of Debtor Long Beach Memorial Nursing Home, Inc.
bweston@garfunkelwild.com, ehuggler@garfunkelwild.com;ashah@garfunkelwild.com

8-14-70593-ast Notice will not be electronically mailed to:

GCG, Inc
190 S. LaSalle Street
Ste 1925
Chicago, IL 60603

Iron Mountain Information Management, LLC
One Federal Street
Boston, MA 02110

Long Beach Memorial Nursing Home, Inc.
375 E Bay Drive
Long Beach, NY 11561