UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re:	)	Chapter 11
NEW ENGLAND CONFECTIONERY COMPANY, INC.,	)	Case No. 18-11217 (MSH)
	)	Hearing: May 23, 2018 at 1:30PM
Debtor.	)	Objection Deadline: May 18, 2018 at 4:30PM

LIMITED OBJECTION OF THE PENSION BENEFIT GUARANTY CORPORATION TO THE AMENDED NOTICE OF INTENT TO SELL ASSETS BY PRIVATE SALE FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS

The Pension Benefit Guaranty Corporation ("PBGC"), a creditor in the above-captioned proceedings, hereby files this limited objection to the *Amended Notice of (1) Intent to Sell Assets By Private Sale Free and Clear of Liens, Claims, Encumbrances, and Interests; (2) Deadline for Submitting Counteroffers and Objections; and (3) Hearing Date* (as amended, the "Notice of Intent to Sell") [Docket No. 127] filed on May 2, 2018.[1] PBGC files this limited objection on its own and on behalf of the Sixth Amended and Restated NECCO Pension Plan (the "Pension Plan").

PBGC does not object to the proposed sale of the Debtor's assets pursuant to the terms of the asset purchase agreement (as amended, the "APA") [Docket. No. 141]. Rather, PBGC's concerns pertain to potential provisions in any Competing Bid or sale order. Since the

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Notice of Intent to Sell.

Competing Bids and proposed sale order were not available as of the objection deadline, PBGC files this limited objection as a protective measure to preserve its rights.

PBGC's limited objection can be resolved by incorporating language into the sale order that precludes certain releases and requires the Purchaser and the chapter 11 trustee to preserve Pension Plan Documents, as defined below. PBGC has discussed its concerns with counsel to the chapter 11 trustee. PBGC hopes its concerns will be resolved by agreement before the hearing scheduled for May 23, 2018.

I. BACKGROUND

A. PBGC and ERISA

PBGC is a wholly owned United States government corporation, and an agency of the United States, 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. IV 2016). 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 supplements any assets remaining in the plan with its insurance funds to pay to the retired employees their pension benefits, subject to statutory limits. *See* 29 U.S.C. §§ 1321-1322, 1342, 1361.

Under 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.[2] ERISA imposes responsibility on a controlled group member regardless of whether its employees

[2] A group of trades or business under common control, referred to as a "controlled group," includes, for example, a parent and its 80% owned subsidiaries. Another example includes brother-sister groups of trades or business under common control. *See* 29 U.S.C. § 1301(14)(A), (B); 26 U.S.C. § 414(b), (c); 26 C.F.R. §§ 1.414(b)-1, 1.414(c)-1, 1.414(c)-2.

participate in the pension plan. The responsibilities of the plan sponsor and controlled group members to an ongoing pension plan include the following: (1) paying the statutorily required minimum funding contributions to the pension plan, 26 U.S.C. § 412(b)(1), (2); 29 U.S.C. § 1082(b)(1), (2); and (2) paying flat-rate and variable-rate 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. *See* 26 U.S.C. § 412(b)(2); 29 U.S.C. § 1082(b)(2); *see also* 29 U.S.C. §§ 1307(e)(2), 1362(a).

ERISA provides the exclusive means for a plan sponsor to terminate a pension plan: a standard termination or a distress termination. *See* 29 U.S.C. § 1341(a)(1); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999). A standard termination requires sufficient assets to pay all of the pension plan's promised benefits. *See* 29 U.S.C. § 1341(b)(1)(D). A distress termination requires a showing, among other things, that the plan sponsor and each controlled group member satisfy one of the three financial distress criteria: (i) liquidation in bankruptcy; (ii) inability to reorganize in bankruptcy unless the pension plan terminates; or (iii) inability to pay debts when due and continue in business unless the pension plan terminates. *See* 29 U.S.C. § 1341(c)(2)(B). Separate from a standard and distress termination, PBGC can initiate termination of a pension plan pursuant to section 4042 of ERISA ("PBGC-initiated termination"). 29 U.S.C. § 1342.

Upon a distress termination or a PBGC-initiated termination of a pension plan, the contributing sponsor and controlled group members are still subject to certain liabilities with regard 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). ERISA explicitly assigns the recovery of a terminated pension plan's unfunded benefit liabilities exclusively to PBGC. 29 U.S.C. § 1362(b).

Upon termination, the plan sponsor and controlled group members remain jointly and severally liable to PBGC for any unpaid premiums, including flat-rate and variable-rate premiums, as well as a termination premium at the rate of $1,250 per plan participant per year for three years. *See* 29 U.S.C. § 1306(a)(7).

Finally, because PBGC typically becomes the statutory trustee of the terminated pension plan, 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. 29 U.S.C. §§ 1082(b)(2), 1342(d), 1362(c); 26 U.S.C. § 412(b)(2).

B. The Debtor's Pension Plan

The Debtor sponsors the Pension Plan, a single-employer defined benefit pension plan covered under Title IV of ERISA. The Pension Plan covers an estimated 150 of the Debtor's current and former employees and is underfunded by an estimated $5,199,711. PBGC's investigation into the status and funding levels of the Pension Plan is ongoing.

PBGC anticipates filing claims against the Debtor for the following statutory liabilities: (i) the unfunded benefit liabilities of the Pension Plan, 29 U.S.C. § 1362(a), (b); (ii) due and unpaid minimum funding contributions owed to the Pension Plan, 29 U.S.C. § 1342(d); and (iii) statutory premiums owed to PBGC, 29 U.S.C. § 1306(a)(7). PBGC's claim for the unfunded benefit liabilities of the Pension Plan is contingent upon termination of the Pension Plan.

C. The Debtor's Bankruptcy Proceedings

On April 3, 2018, certain creditors of the Debtor filed an involuntary petition for relief under Chapter 7 of the Bankruptcy Code [Docket No. 1]. On April 17, 2018, the Debtor filed an emergency motion for entry of an order for relief and to convert case to Chapter 11, along with various first day motions, including the original Sale Motion [Docket No. 33]. On April 19, 2018, the Court held a hearing on the Debtor's various first-day motions. The Court granted the Motion to Convert and, upon oral motion of the United States Trustee, ordered the appointment of a chapter 11 trustee [Docket Nos. 58, 59]. On April 20, 2018, Harold B. Murphy was appointed chapter 11 trustee (the "Trustee") [Docket No. 69]. The Trustee and Buyer have agreed to proceed with the sale, subject to certain modifications to the APA [Docket. No. 141]. The Trustee filed the Notice of Intent to Sell on May 2 [Docket No. 127]. A hearing on the approval of the Sale Motion and related amendments is scheduled for May 23, 2018.

II. ARGUMENT

A. Trustee and Purchaser Must Store and Preserve Pension Plan Documents.

The Trustee is selling substantially all of the Debtor's assets and the Debtor will cease operations in the near future. Thus, the Debtor will no longer be able to sponsor the Pension Plan. If the Pension Plan terminates, PBGC will become statutory trustee of the Pension Plan and, as such, will have all of the rights and powers of a trustee specified in ERISA or otherwise granted by law with respect to the Pension Plan. 29 U.S.C. §§ 1301-1461. Moreover, if PBGC becomes statutory trustee it will become responsible for paying benefits under the Pension Plan. *See* U.S.C. §§ 1321-1322, 1342, 1361. Consequently, preservation and retention of records of the Pension Plan and employee records of Pension Plan participants are essential to enable PBGC to fully carry out its responsibilities under Title IV of ERISA to protect the rights of Pension Plan participants and pay benefits.

Accordingly, PBGC seeks to protect the Pension Plan and employee records from loss, destruction and abandonment and requests the following insertion into the sale order:

> To the extent the Purchased Assets contain records of the Sixth Amended and Restated NECCO Pension Plan ("Pension Plan") or personnel records of participants in the Pension Plan, the Purchaser shall store and preserve any such records until the Pension Benefit Guaranty Corporation ("PBGC") has completed its investigation regarding the Pension Plan and shall make such documents available to PBGC upon request. Such records include, but are not limited to, any of the Pension Plan's governing documents, actuarial documents, and personnel files of participants in the Pension Plan (the "Pension Plan Documents"). The Trustee shall retain and not abandon any Pension Plan Documents that are not Purchased Assets and shall make such documents available to the PBGC. Further, the Trustee and the Purchaser shall notify PBGC at least 90 days prior to the destruction of any Pension Plan Documents so that PBGC may have the opportunity to take possession of any necessary Pension Plan Documents in advance of destruction.

B. The Sale Order and APA Must Not Contain Releases of Any Pension Plan Fiduciary or Controlled Group Member.

Although the APA contains no releases to which PBGC objects, it is unknown what terms and releases might be included in an asset purchase agreement proposed in a Competing Bid. The Trustee's "Bid Procedures Motion" [Docket No. 124] states that qualified Competing Bids must be "accompanied by an executed asset purchase agreement substantially in the same form as the APA and made upon terms substantially similar to those set forth in the APA, except for modifications for the identity of the successful Competing Bidder and the increased consideration to be paid to Seller." *Id.* at 5. However, the Bid Procedures Motion does not explicitly preclude releases that might impact the Pension Plan and PBGC.

Further, PBGC has not been given an opportunity to review the proposed sale order for possible releases not contained in the APA.

If the Pension Plan terminates and PBGC becomes its statutory trustee, PBGC has the power to take any action authorized by the Pension Plan and to commence, prosecute, or defend on behalf of the Pension Plan any suit or proceeding involving it. *See* 29 U.S.C. § 1342(d). PBGC 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, thereby allowing PBGC to replenish any plan assets lost due to misconduct. *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 breach and/or prohibited transaction. *See* 29 U.S.C. §§ 1106, 1109. Accordingly, PBGC requests that the sale order expressly prohibit releases to any party for fiduciary breach.

In addition, as set forth in Section I(A) above, if the Pension Plan terminates, the Debtor and its controlled group members will become jointly and severally liable to PBGC for the Pension Plan liabilities, including the total amount of unfunded benefit liabilities of the Pension Plan. 29 U.S.C. §§ 1301(a)(18), 1362(a), (b). PBGC continues to gather information regarding the extent of the controlled group, and whether it may include entities in addition to the Debtor. Controlled group members will bear joint and several liability for Pension Plan liabilities upon Pension Plan termination. Thus, PBGC requests that the sale order expressly prohibit releases regarding controlled group liability.

PBGC's limited objection regarding releases can be resolved by inserting the following language into the sale order:

> Nothing in this Order or the Asset Purchase Agreement shall in any way be construed to discharge, release, limit, or relieve any party for controlled group liability or fiduciary breach related to the Pension Plan. PBGC and the Pension Plan shall not be enjoined or precluded from enforcing such liability or responsibility by any of the provisions of this Order or the Asset Purchase Agreement.

C. PBGC's Reservation of Rights

Asset purchase agreements for Competing Bids and the proposed sale order are not yet available for review. Accordingly, PBGC reserves the right to amend or supplement this limited objection, including in response to the filing of any documents related to the APA, Competing Bids and the sale order.

III. CONCLUSION

For the foregoing reasons, PBGC requests that the sale order include the language provided above.

Dated: May 18, 2018
Washington, DC

PENSION BENEFIT GUARANTY CORPORATION

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