

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

EXIDE TECHNOLOGIES,

Debtor.¹

Chapter 11

Case No. 13-11482 (KJC)

**Hearing Date: 1/12/15 at 1:00 p.m. (Eastern)
Objection Deadline: 1/2/15 at 4:00 p.m. (Eastern)**

LIMITED OBJECTION OF THE PENSION BENEFIT GUARANTY CORPORATION TO THE DEBTOR'S MOTION FOR ENTRY OF AN ORDER (A) APPROVING THE ADEQUACY OF THE DEBTOR'S DISCLOSURE STATEMENT; (B) APPROVING SOLICITATION AND NOTICE PROCEDURES WITH RESPECT TO CONFIRMATION OF THE DEBTOR'S PROPOSED PLAN OF REORGANIZATION; (C) APPROVING THE FORM OF VARIOUS BALLOTS AND NOTICES IN CONNECTION THEREWITH; AND (D) SCHEDULING CERTAIN DATES WITH RESPECT THERETO (DOC. 2714)

The Pension Benefit Guaranty Corporation (“PBGC”), on its own and on behalf of the Exide Technologies Retirement Plan (“Pension Plan”), hereby objects to the above described motion (“Motion”) (Docket No. 2714) filed on December 4, 2014 and the corresponding Disclosure Statement (“Disclosure Statement”) (Docket No. 2631) filed by the Debtor on November 17, 2014.²

The Disclosure Statement fails to provide “adequate information,” as that term is defined under 11 U.S.C. § 1125(a). In particular, the Disclosure Statement lacks adequate information because it does not properly state how the claims of PBGC will be treated under the Debtor’s proposed Plan of Reorganization (“POR”)(Docket No. 2632), given that the Debtor intends to continue administering the Pension Plan. Further, it does not contain adequate information

¹ The last four digits of the Debtor’s taxpayer identification number are 2730. The Debtor’s corporate headquarters are located at 13000 Deerfield Parkway, Building 200, Milton, Georgia 30004.

² Capitalized terms not defined herein shall retain the meaning ascribed to them in the Disclosure Statement and/or POR.

necessary to justify the need for the overbroad non-debtor third party releases described in the Disclosure Statement and included in the POR.

PBGC has provided proposed language to be inserted in the Disclosure Statement (and, as necessary, the POR) to resolve its objection, has communicated to the Debtor its request for certain modifications to the Disclosure Statement and POR, and hopes that its concerns will be resolved by agreement at or before the hearing scheduled for January 12, 2015. Because the parties have not yet reached agreement, PBGC files this objection as a protective measure in order to preserve its rights.

I. BACKGROUND

A. PBGC and the Employee Retirement Income Security Act

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”), 29 U.S.C. §§ 1301-1461 (2012). The program guarantees a secure, predictable retirement for nearly 41 million American workers in nearly 24,000 private sector pension plans.³ When a pension plan covered by Title IV terminates without sufficient assets to pay promised benefits, PBGC typically becomes the statutory trustee of the plan and pays covered plan participants and their beneficiaries their pension benefits up to the limits established by Title IV. *See* 29 U.S.C. §§ 1321, 1322, 1361.

³ PBGC 2014 Annual Report at 2, <http://www.pbgc.gov/documents/2014-annual-report.pdf>.

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.⁴ ERISA imposes responsibility on a controlled group member regardless of whether its employees participate in the pension plan. The responsibilities of the plan sponsor and controlled group members to an ongoing pension plan include the following: (i) 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 (ii) 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). Therefore, should the plan sponsor default on its obligations to a pension plan, the resulting liability for the plan rests with its controlled group members.

B. Plan Termination

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*

⁴ 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.

29 U.S.C. § 1341(c)(2)(B). Separate from a standard or distress termination, PBGC can initiate termination of a pension plan pursuant to section 4042 of ERISA (“PBGC-initiated termination”). *See* 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 subject to certain liabilities with regard to the terminated pension plan: (i) they are jointly and severally liable to PBGC for the unfunded benefit liabilities of the pension plan, 29 U.S.C. § 1362(a), (b); (ii) they are jointly and severally liable to PBGC for any unpaid flat-rate and variable-rate premiums, 29 U.S.C. § 1307; and (iii) they are jointly and severally liable for termination premiums at the rate of \$1,250 per plan participant per year for three years, 29 U.S.C. § 1306(a)(7). If the plan termination occurs while the plan sponsor and any controlled group members are attempting to reorganize in Chapter 11, and they ultimately obtain confirmation of a Chapter 11 plan of reorganization, their obligation to PBGC for termination premiums does not arise until after the Chapter 11 plan is confirmed and the Debtor exits bankruptcy. *See* 29 U.S.C. § 1306(a)(7)(B). Thus, under those circumstances, termination premiums are not a dischargeable claim or debt within the meaning of 11 U.S.C. §§ 101(5), 1141.

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. *See* 29 U.S.C. §§ 1082(b)(2), 1342(d), 1362(c); 26 U.S.C. § 412(b)(2).

C. The Debtor and the Pension Plan

The Debtor is the contributing sponsor of the Pension Plan within the meaning of ERISA. *See* 29 U.S.C. §1301(a)(13). Upon information and belief, the Pension Plan is a defined benefit plan covered by Title IV of ERISA. *See* 29 U.S.C. § 1321.

PBGC's most recent estimate indicates that the amount of the Pension Plan's unfunded benefit liabilities is \$125,300,000. PBGC's claim for this amount is contingent on, and arises upon, the termination of the Pension Plan. Additionally, if the Pension Plan terminates in either a distress or PBGC-initiated termination during the bankruptcy's reorganization process, the Debtor would be responsible for (i) approximately \$47,741,250 in termination premiums upon its emergence from bankruptcy, payable in equal installments over three years; (ii) any outstanding flat-rate and variable-rate premiums due to PBGC; and (iii) any unpaid minimum funding contributions owed to the Pension Plan. *See* 29 U.S.C. §§ 1082(b)(2), 1306(a)(7), 1307, 1342(c), 1362(a), (c); 26 U.S.C. § 412(b)(2).

However, if the Pension Plan continues, the Debtor will be responsible for all unpaid minimum funding contributions due to the Pension Plan, as well as any unpaid flat-rate and variable-rate premiums owed to PBGC. *See* 29 U.S.C. §§ 1082, 1306, 1307; 26 U.S.C. § 412.

D. The Debtor's Bankruptcy Proceeding

On June 10, 2013, the Debtor filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code ("Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware. On October 30, 2013, PBGC timely filed proofs of claims relating to the Pension Plan for unfunded benefit liabilities, minimum funding contributions, and premiums

(collectively, “PBGC’s Claims”).⁵ On November 17, 2014, the Debtor filed the Disclosure Statement and POR. The Motion was filed on December 4, 2014.

II. ARGUMENT

PBGC, on its own behalf and on behalf of the Pension Plan, objects to the Disclosure Statement because it fails to provide “adequate information,” as that term is defined under 11 U.S.C. § 1125. As used in that section of the Bankruptcy Code, adequate information means:

“information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor . . . that would enable a hypothetical reasonable investor . . . to make an informed judgment about the plan. . . .”

11 U.S.C. § 1125(a)(1). See *In re Lower Bucks Hosp.*, 571 Fed.Appx. 139, 142 (3d. Cir. 2014); *In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir. 2000); *First American Bank v. Century Glove, Inc.*, 81 B.R. 274, 278-279 (D. Del. 1988).

The Disclosure Statement lacks adequate information regarding the treatment of PBGC’s Claims under the POR. While the Debtor clearly indicates that the Pension Plan will continue to be maintained by Reorganized Exide post-confirmation, it incorrectly assumes that continuance of the Pension Plan allows the Debtor to unilaterally expunge PBGC’s Claims upon the Effective Date of the POR.⁶ Further, the Disclosure Statement does not contain adequate information necessary to justify the inclusion of overbroad non-debtor third party releases in the POR. For these reasons, the Disclosure Statement should not be approved. However, PBGC believes its objections and concerns can be resolved if certain modifications are made to the Disclosure Statement and POR, as described in more detail below.

⁵ See Proofs of Claim Nos. 2377, 2378 and 2379. PBGC’s Claims are estimates of liabilities at the time of filing and may differ from current estimates.

⁶ See Disclosure Statement, Articles IV(F)(1), VI(F)(16)(c); see also POR, Article VI, Section 6.16(d).

A. The Disclosure Statement Does Not Adequately Inform Creditors Of How PBGC's Claims Will Be Treated Under The POR If The Pension Plan Remains Ongoing.⁷

In the Disclosure Statement, the Debtor states that Reorganized Exide will continue to administer and maintain the Pension Plan.⁸ The Disclosure Statement further indicates that, because the Pension Plan will continue post-confirmation, PBGC's Claims "will not be triggered" or "shall be deemed disallowed and expunged as of the Effective Date" of the POR.⁹ While PBGC supports the Debtor's decision to maintain the Pension Plan, PBGC objects to the Disclosure Statement's improper characterization of the treatment of PBGC's Claims in the bankruptcy proceeding as a result of this decision.

The Debtor's statement that PBGC's Claims will be disallowed and expunged as of the Effective Date of the POR has no force or effect, and is therefore misleading to creditors. By definition, claims may be, *inter alia*, fixed, contingent, liquidated, unliquidated, matured or unmatured. *See* 11 U.S.C. § 101(5)(A). Under section 502(a) of the Bankruptcy Code, a proof of claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a); *see also Lampe v. Lampe*, 665 F.3d 506, 514 (3d. Cir. 2011); *In re FKF Madison Park Group Owner, LLC*, 2013 Bankr. LEXIS 5154 at *6 (Bankr. D. Del. Dec. 9, 2013). An objection must be in writing and filed with the Court. *See* Fed. R. Bankr. Proc. § 3007. After an objection to a claim is filed, the bankruptcy court – not the debtor – decides whether the claim should be allowed and, if so, the amount of the allowed claim. *See* 11 U.S.C. § 502(b).

⁷ PBGC hereby reserves any and all rights, including its rights with respect to PBGC's Claims and how PBGC's Claims should be treated under any Chapter 11 plan, should the Debtor decide to seek termination of the Pension Plan, or if the Pension Plan terminates, at any time during the bankruptcy proceeding.

⁸ *See* Disclosure Statement, Articles IV(F)(1); VI(F)(16)(c).

⁹ *See Id.* Identical language is contained in the POR. *See* POR, Article VI, Section 6.6(c).

No provision in the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure gives the Debtor the power to unilaterally dispose of properly filed claims. The Disclosure Statement therefore lacks adequate information regarding PBGC's Claims and how they will be treated under the POR because it provides for a disposition of PBGC's Claims that is inaccurate and invalid. Moreover, the Disclosure Statement does not address the fact that certain of PBGC's Claims are not contingent on termination of the Pension Plan. It fails to disclose that even if the Pension Plan continues, the Debtor remains responsible for any unpaid minimum funding contributions due to the Pension Plan and flat-rate and variable-rate insurance premiums owed to PBGC, as explained above.

Because the Pension Plan will remain ongoing and will be administered by Reorganized Exide post-confirmation, PBGC believes this portion of its objection can be resolved if the objectionable language is struck from and the following language is included in Article VI(F)(16)(c) of the Disclosure Statement:

“PBGC and the Debtor agree that all proof of claims filed by PBGC conditioned upon the termination of the Pension Plan shall be deemed to be withdrawn as of the Plan's Effective Date. Notwithstanding the foregoing, however, PBGC's proof of claim number 2377 shall remain a valid claim against the Debtor, but only to the extent that it asserts a claim for flat and variable rate premiums due to PBGC.”

The same language should be substituted in the appropriate section of the POR, specifically Article VI, Section 6.16(c), which contains language identical to that contained in the Disclosure Statement.

B. The Disclosure Statement Lacks Adequate Information Necessary To Justify The Overbroad Non-Debtor Third Party Release Provisions In The POR.

Article VI(K)(5) and (6) of the Disclosure Statement describes the releases in Article XI, Sections 11.5 and 11.6 of the POR. The release described in Article VI(K)(5) of the Disclosure Statement, which corresponds with POR Article XI, Section 11.5, applies to “Released Parties” –

a term defined under the POR as “all current and former officers, directors, principals, employees, agents, subsidiaries, current and former affiliates, financial advisors, attorneys, accountants, investment bankers, consultants, representatives...” of the Debtor and various third parties, such as the DIP Agent. *See* POR, Article I, Section 1.139.

Furthermore, the release described in Article VI(K)(6) of the Disclosure Statement, which corresponds with POR Article XI, Section 11.6, applies to “Exculpated Parties” – a term that the POR defines as including (i) the Debtor and its affiliates, (ii) the Reorganized Debtor, (iii) the Unsecured Creditors’ Committee, (iv) the Unofficial Noteholder Committee, and (v) each such parties’ “subsidiaries, affiliates, officers, directors, principals, members, managers, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, and other representatives and professionals.” *See* POR, Article I, Section 1.78.

Despite the inclusion of these extensive release provisions, the Disclosure Statement fails to provide adequate information to sufficiently justify the need for such overly broad non-debtor third party releases in the POR. It does not contain any information that explains why the extensive non-debtor third party releases are necessary and appropriate under the circumstances, nor does it explain if and how they are consistent with applicable law.

PBGC is concerned that the extensive release could be construed to include possible fiduciaries of the Pension Plan, which could improperly affect the future ability of PBGC or the Pension Plan to pursue personal liability for any harm to the Pension Plan resulting from a fiduciary breach or prohibited transaction in the future, if and when such harm is identified. *See, e.g.,* 29 U.S.C. §§ 1002(14), (21); 1104-1113; 1132; 1342(d). This concern can be alleviated if the following provision is included in Article VI(K)(6) of the Disclosure Statement and Article XI, Section 11.6 of the POR:

“Nothing in the Debtor's bankruptcy proceedings, Confirmation Order, Plan of Reorganization, the Bankruptcy Code (and section 1141 thereof), or any other document filed in the Debtor's bankruptcy 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 for 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 the Plan of Reorganization, Confirmation Order, Bankruptcy Code, or any other document filed in the Debtor's bankruptcy case.”

III. CONCLUSION

For the forgoing reasons, PBGC objects to the Debtor's Disclosure Statement and requests that it be modified as stated above.

Dated: January 2, 2015
Washington, D.C.

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