

Hearing Date and Time: April 9, 2014 at 10:00 a.m.
Objection Deadline: April 2, 2014 at 4:00 p.m.

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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In re:	Chapter 11
Interfaith Medical Center, Inc.,	:
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Debtor.	:
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**OBJECTION OF THE PENSION BENEFIT GUARANTY CORPORATION
TO DEBTOR’S DISCLOSURE STATEMENT FOR PLAN OF REORGANIZATION**

The Pension Benefit Guaranty Corporation (“PBGC”), on its own and on behalf of the Health Services Retirement Plan (the “HSR Plan”) and the Interfaith Medical Center Nurses Pension Plan (the “Nurses Plan,” and together with the HSR Plan, the “Pension Plans”), hereby objects to the Debtor’s proposed Disclosure Statement. The Disclosure Statement should not be approved because it fails to provide “adequate information,” as that term is defined under 11 U.S.C. §1125(a), and therefore fails to inform creditors of facts and circumstances that may

affect the value of their claims and the confirmability of the Debtor's Plan of Reorganization. PBGC counsel has conveyed PBGC's concerns to counsel for the Debtor, and is hopeful that this objection will be resolved by agreement prior to the April 9, 2014 hearing.

BACKGROUND

1. The Pension Benefit Guaranty Corporation ("PBGC") is the United States government agency that administers the pension insurance program under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), which covers most private defined-benefit pension plans.¹ The program guarantees a secure, predictable retirement for approximately 42 million American workers.² 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 benefits up to the limits established by Title IV.³

2. The Interfaith Medical Center, Inc. ("Debtor") is a contributing sponsor of the Pension Plans within the meaning of 29 U.S.C. § 1301(a)(13). The Pension Plans are single-employer defined benefit pension plans covered by Title IV of ERISA.⁴

3. 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.⁵ The responsibilities of the plan sponsor and controlled-group members to an ongoing pension plan

¹ 29 U.S.C. §§ 1301-1461 (2012).

² PBGC 2013 Annual Management Report at 4, <http://www.pbgc.gov/res/reports/ar2013.html>.

³ *See* 29 U.S.C. §§ 1321, 1322, and 1361.

⁴ *See* 29 U.S.C. § 1321.

⁵ 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(a)(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.

include, *inter alia*: (1) paying the statutorily required minimum funding contributions to the pension plan;⁶ and (2) paying insurance premiums to PBGC.⁷

4. ERISA provides the exclusive means for a plan sponsor to voluntarily terminate a pension plan in a standard termination or a distress termination.⁸ In a standard termination, the plan must have sufficient assets to pay all of the pension plan's promised benefit liabilities to participants and their beneficiaries.⁹

5. A plan administrator may initiate a distress termination of a pension plan that does not have sufficient assets to provide for all of the plan's benefit liabilities. A pension plan will terminate in a distress termination only if PBGC determines that the plan sponsor, and each member of its controlled group, meets one of three statutory tests and the plan administrator complies with the other statutory requirements. The three statutory financial distress tests are (i) liquidation in bankruptcy; (ii) inability to reorganize in bankruptcy unless the pension plan terminates, and; (iii) inability to pay debts when due and continue in business unless the pension plan terminates.¹⁰

6. When a pension plan is terminated, the contributing sponsor becomes liable to PBGC for the:

⁶ 26 U.S.C. § 412(c)(11) (2007) (effective for pension plan years beginning on or before Dec. 31, 2007); 29 U.S.C.A. § 1082(c)(11) (2007) (same); *see also* 26 U.S.C. § 412(b)(1), (2) (2009) (effective for pension plan years beginning after Dec. 31, 2007); 29 U.S.C.A. § 1082(b)(1), (2) (2009) (same).

⁷ 29 U.S.C. §§ 1306, 1307(e)(2).

⁸ 29 U.S.C. § 1341(a)(1); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999).

⁹ 29 U.S.C. § 1341(b)(2)(A)(i)(III).

¹⁰ 29 U.S.C. § 1341(c)(2)(B).

- (i) unfunded benefit liabilities of the pension plan;¹¹
- (ii) unpaid minimum funding contributions due to the pension plan, and;¹²
- (iii) unpaid flat or variable rate premiums related to the pension plan.¹³

7. Additionally, if a pension plan terminates in a distress or PBGC-initiated termination, the plan sponsor and its controlled group members are liable to PBGC for a termination premium at the rate of \$1,250 per plan participant per year for three years.¹⁴ If the pension plan is terminated while the plan sponsor and any of its controlled group members are debtors in a Chapter 11 proceeding and a plan of reorganization is ultimately confirmed, their obligation to PBGC for termination premiums does not exist until after the plan of reorganization is confirmed and the sponsor and its controlled group members have exited bankruptcy.¹⁵ Under these circumstances, termination premiums are not a dischargeable claim or debt within the meaning of the Bankruptcy Code.¹⁶ PBGC estimates the amount of the termination premium liability for the Debtor's two Pension Plans would total approximately \$5.38 million.

8. On December 2, 2012, the Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code.

9. Upon information and belief, as of the petition date, the Pension Plans cover approximately 1437 employees, former employees, or retirees.

¹¹ 29 U.S.C. § 1362(a),(b).

¹² See *supra* note 6. As statutory trustee, PBGC has the authority to collect unpaid minimum funding contributions due the pension plan. See 29 U.S.C. §§ 1082(c), 1342(d), 1362(a), (c).

¹³ See *supra* note 7.

¹⁴ See 29 U.S.C. § 1306(a)(7), as amended by § 8101(b) the Deficit Reduction Act of 2005 (Pub. L. 109-B171) and by §§ 401(b) and 402(g)(2)(B) of the Pension Protection Act of 2006 (Pub. L. 109-B280).

¹⁵ 29 U.S.C. § 1306(a)(7)(B).

¹⁶ 11 U.S.C. §§ 101(5) and 1141; *PBGC v. Oneida Ltd.*, 562 F.3d 154, 157 (2d Cir. 2009).

10. On March 27, 2013, PBGC filed the following six claims against the Debtor's bankruptcy estate:

- a) contingent claim in the estimated amount of \$20,125,925 for unfunded benefit liabilities on account of the HSR Plan;
- b) estimated claim in the amount of of \$2,304,163 for contributions owed to the HSR Plan, of which PBGC asserts \$70,466 is entitled to administrative priority under 11 U.S.C. § 507(a)(2) and \$87,258 is entitled to priority under 11 U.S.C. § 507(a)(5);
- c) unliquidated claim for statutory premiums owed to PBGC on account of the HSR Plan;
- d) contingent claim in the estimated amount of \$48,394,719 for unfunded benefit liabilities on account of the Nurses Plan;
- e) estimated claim in the amount of \$7,204,819 for contributions owed to the Nurses Plan, of which PBGC asserts \$867,625 is entitled to administrative priority under 11 U.S.C. § 507(a)(2) and \$952,280 is entitled to priority under 11 U.S.C. § 507(a)(5); and
- f) unliquidated claim for statutory premiums owed to PBGC on account of the Nurses Plan.

11. On March 21, 2014, the Debtor filed a Disclosure Statement and Plan of Reorganization for Interfaith Medical Center (the "POR"). The Disclosure Statement and POR do not provide any information about the Pension Plans, Debtor's intentions with respect to the Pension Plans, or potential liability to PBGC.

12. The Disclosure Statement and the POR contain provisions ("Release Provisions") releasing certain non-debtors from claims that arise before the effective date of the POR.¹⁷ The POR defines "Released Parties" as:

[T]he Debtor, the Creditors' Committee, the Obudsman, and DASNY, and any of their current or former agents, representatives, directors, trustees, officers, members, sponsors, managers, attorneys, accountants, financial advisors, or other professionals, solely in such

¹⁷ Disc. Stmt. Art. VI.6.14(c) and POR Art. IX.9.5(c).

capacities.¹⁸

The Release Provisions appear to release any liability arising under Titles I and IV of ERISA, including liability for breach of fiduciary duty by a party who was responsible to the Pension Plans.¹⁹

13. Lastly, the Disclosure Statement states that all Allowed Administrative Claims will be determined prior to POR confirmation as part of the Debtor's Plan Supplement, and further explains that based on the amounts contained in the Plan Supplement, DASNY will provide the corresponding funds to the estate for payment of all Allowed Administrative Claims which will be binding on all holders of Allowed Administrative Claims.²⁰ Because the Debtor's intentions with regard to the Pension Plans are unclear from PBGC's review of the Disclosure Statement, it is unclear if PBGC's administrative claims will be definitive at the time the Plan Supplement is filed. The Disclosure Statement and POR should explain and provide a process for the approval and payment of administrative claims.

14. PBGC has presented the above concerns to Debtor's counsel and intends to work with the Debtor to resolve these issues prior to the April 9, 2014 hearing.

OBJECTIONS

15. PBGC objects to the Disclosure Statement because it fails to provide adequate information as required by 11 U.S.C. § 1125. The primary purpose of a disclosure statement is to give creditors adequate information necessary to understand and accept the proposed plan of reorganization. Adequate information is:

¹⁸ POR Art. I.1.66.

¹⁹ If one or both of the Pension Plans are terminated in conjunction with the POR, the Debtor alone is the party released from the liabilities relating to the Pension Plan(s).

²⁰ Disc. Stmt. Art. V.5.2(a)(1).

Information of a kind and in sufficient detail, as far as is reasonable 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...²¹

A court may confirm a plan, only if, among other things, “the plan complies with the applicable provisions of this title.”²² Thus, approval of a disclosure statement is to be withheld if it does not contain such information necessary so that all creditors can make an intelligent and informed decision as to whether to accept or reject the plan.²³

As described below, the Disclosure Statement filed by the Debtor fails to meet this threshold.

I. A Description of the Pension Plans, the Debtor’s Intentions Regarding the Pension Plans, and the Impact of the Pension Plans’ Treatment on the Estate Must be Disclosed to Creditors

16. PBGC objects to the Debtor’s Disclosure Statement because it omits important information regarding the Pension Plans and the Debtor’s obligations with respect to them that may affect the value of creditors' claims and the feasibility of the Plan. The Disclosure Statement should: (i) include a detailed description of the Pension Plans sponsored by the Debtor; (ii) explain the funding level of the Pension Plans; (iii) explicitly state the Debtor’s intentions with respect to the Pension Plans; and (iv) disclose the resulting liabilities relating to the decision to continue or move to terminate one or both of the Pension Plans, to enable creditors to make an informed decision on the POR.

17. If the Debtor’s intention is to continue one or both of the Pension Plans, the Disclosure Statement and POR should provide that the Pension Plan(s) shall be continued in

²¹ 11 U.S.C § 1125(a).

²² *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 980 (Bankr. S.D.N.Y. 1988).

²³ *Id.*

accordance with their terms, the Reorganized Debtor shall satisfy the minimum funding standards under 26 U.S.C. §§ 412, 430, and 29 U.S.C. §§ 1082, 1083 and be liable for the payment of PBGC premiums in accordance with 29 U.S.C. §§ 1306 and 1307, subject to any and all applicable rights and defenses of the Debtors, and shall administer the Pension Plan(s) in accordance with the provisions of ERISA and the Internal Revenue Code. Additionally, the Disclosure Statement should explain the costs associated with maintaining the Pension Plan(s) after the effective date.

18. Nowhere in the Disclosure Statement does the Debtor assert that it has or will apply for termination of one or both Pension Plans, nor does the Debtor provide any information for creditors to assess whether the distress termination criteria under 29 U.S.C. § 1341(c) can be satisfied. If the Debtor intends to seek a distress termination under the “Reorganization in Bankruptcy” test under section 1341(c)(2)(B)(ii), the Disclosure Statement should inform creditors that it is the Debtor’s burden to prove that, unless one or both of Pension Plans are terminated, it will not be able to pay its debts under a plan of reorganization and continue in business outside the Chapter 11 reorganization process.²⁴ The disclosure statement should also inform creditors that the Bankruptcy Court is charged with making the factual findings under the “reorganization in bankruptcy” test, and it should communicate the uncertainty of court and PBGC approval of a termination of the Pension Plan(s). Furthermore, it should explain the effect that such a denial would have on the feasibility of the POR, and should make creditors aware that PBGC may oppose any motion by the debtor to terminate one or both of the Pension Plans.

If the Debtor’s intention is to terminate one or both of the Pension Plans, the proposed Disclosure Statement should give creditors “adequate information” that fully informs them of the impact of a termination of one or both of the Pension Plans. In the event that one or both of the

²⁴ See, e.g., *Phillip Services*, 310 BR 802 (S.D. Texas 2004).

Pension Plans terminate prior to confirmation of the POR, PBGC will have administrative expense claims, priority claims, and general unsecured claims against the Debtor, and the Disclosure Statement should inform creditors of PBGC's asserted claims and the impact PBGC's claims will have on anticipated distributions under the POR.

19. In addition, the disclosure statement should explain that the termination premium obligation under 29 U.S.C. §1306 applies to the reorganized Debtor and cannot be discharged, released or enjoined by the proposed POR.²⁵ PBGC estimates that the termination premium liability would be approximately \$2.8 million for the Nurses Plan and \$2.4 million for the Health Services Plan, and the Disclosure Statement should explain to creditors how the termination premium obligation will be satisfied by the reorganized Debtor.

20. Lastly, the Disclosure Statement should explain that PBGC is a wholly owned United States government corporation, created by ERISA, 29 U.S.C. § 1301 *et seq.*, to administer the mandatory pension plan termination insurance program established under Title IV of ERISA, and that PBGC guarantees the payment of certain pension benefits upon termination of a pension plan covered by Title IV. The Disclosure Statement should state that the Pension Plans are defined benefit pension plans covered by Title IV.

II. Overly Broad Discharge, Release, Exculpation and Injunction Provisions.

21. PBGC objects to the Disclosure Statement's and POR's overly broad release provisions that release certain non-debtors from claims that arise prior to the effective date.²⁶

²⁵ If the Pension Plan terminates in a distress termination pursuant to 29 U.S.C. §§ 1341(c)(2)(B)(ii) or (iii), or in an involuntary termination under 29 U.S.C. § 1342, Termination Premiums at the rate of \$1,250 per plan participant per year for three years. *See* 29 U.S.C. § 1306(a)(7), *as amended* by § 8101(b) the Deficit Reduction Act of 2005 (Pub. L. 109-171) and by §§ 401(b) and 402(g)(2)(B) of the Pension Protection Act of 2006 (Pub. L. 109-280).

²⁶ Disc. Stmt. Art. VI.6.14, and POR Art. IX.9.5.

The Disclosure Statement does not indicate what circumstances exist, if any, to warrant the non-debtor relief requested in the Release Provisions. Moreover, if the Debtor believes such circumstances exist, the Disclosure Statement is inadequate because it fails to inform creditors that to the extent the releases of non-debtors is a necessary element of the Debtors' POR, the POR may not be confirmable.

22. Section 524(e) of the Bankruptcy Code provides that “the discharge of a debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.” 11 U.S.C. § 524(e). In extremely rare circumstances, however, some bankruptcy courts use their equitable powers to grant nondebtor releases. In the Second Circuit this means that permanent injunctions against non-debtors are allowed under section 105 only when the relief is essential to a debtor's ultimate reorganization or if the enjoined creditor has received consideration for the release.²⁷ Other courts also consider whether the enjoined creditor has consented to the release.²⁸ The Second Circuit has upheld such releases when the respective plans also provided consideration to the parties who would be enjoined from suing non-debtors.²⁹ Ultimately, courts have not viewed this authority as giving debtors unfettered discretion when releasing or discharging non-debtors from liability.³⁰

23. Even if some release of non-debtor liability was found appropriate here, release of

²⁷ See, e.g., *Securities & Exch. Comm'n v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 288, 293 (2d Cir. 1992); *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 640, 649 (2d Cir. 1988); *In re United Health Care Organization*, 210 B.R. 228, 232-33 (S.D.N.Y. 1997), *appeal dismissed as moot*, 147 F.3d 179 (2d Cir. 1998).

²⁸ See, e.g., *In re Airport Lumber, Inc.*, No. Civ.A.94-CV-1213, 1995 WL 779275, at *7 (N.D.N.Y. Dec. 29, 1995); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999).

²⁹ *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d at 293.

³⁰ *In re Continental Airlines*, 203 F.3d 203, 213 (3d Cir. 2000).

non-debtors relating to liabilities of the Pension Plans should not be allowed on the grounds that the Debtor has not shown that such release is an integral role in its reorganization nor is it apparent that such a release will be integral in the Debtor's reorganization. Additionally, the release is not valid because the Debtor has provided no consideration to PBGC, the Pension Plans, or Pension Plan participants as to the potential enjoyment from suing third parties and non-debtors as established by the Second Circuit.³¹

24. Accordingly, the potential release of non-debtors for breach of fiduciary duty under ERISA, 29 U.S.C. §§ 1101-1114, with respect to the Pension Plans would be outside the scope of the relief that can be granted in a POR.

III. Method for Payment of Administrative Claims

25. PBGC objects to the proposed process for resolution and payment of Administrative Claims as explained in 5.2(a)(1) of the Disclosure Statement, which states:

The amount of funds to be provided by DASNY for payment of all Allowed Administrative Claims shall be determined prior to the Confirmation Date in consultation with DASNY and the Debtor, be included in a Plan Supplement filed with the Court for Consideration in connection with Confirmation of the Plan, and be binding on all holders of Allowed Administrative Claims.

The Debtor has not disclosed its intention with regard to the Pension Plans, and it is unclear when any resolution regarding the Pension Plans will be finalized.

26. The Disclosure Statement should describe the process for determining the Allowed Administrative Expenses. Also, in light of Section 5.2(a)(1) of the Disclosure Statement, the Debtor should explain how administrative claims that might not mature until after Confirmation but prior to the effective date will be addressed.

³¹ *In re Johns-Manville Corp.*, 843 F.2d at 640, 649.

CONCLUSION

PBGC requests the Court to require the Debtor to make the modifications described above to its proposed Disclosure Statement and POR.

Dated: April 2, 2014

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