

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

COX ENTERPRISES, INC., a)
Delaware corporation,)
)
Plaintiff,)

vs.)

CASE NO.: 6:04-CV-698-JA-DAB

NEWS-JOURNAL CORPORATION, a)
Florida corporation, HERBERT)
M. DAVIDSON, JR., MARC L.)
DAVIDSON, JULIA DAVIDSON)
TRUILO, JONATHAN KANEY, JR.,)
DAVID KENDALL, ROBERT TRUILO,)
GEORGIA KANEY, and PMV, INC.,)
a Florida corporation,)
)
Defendants.)

**THE PENSION BENEFIT GUARANTY CORPORATION'S
RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION
TO COX ENTERPRISES, INC.'S MOTION TO SHOW CAUSE**

Cox Enterprises, Inc. (“Cox”) has filed a motion seeking an order requiring PMV, Inc. (“PMV”) and its Chief Financial Officer to show cause why the members of News-Journal Corporation’s (“NJC”) “controlled group” should not be required to pay the Pension Benefit Guaranty Corporation (“PBGC”) its claim for the unfunded benefit liabilities of the Pension Plan of News-Journal Corporation (the “Pension Plan”). Cox asserts that it brings its motion pursuant to 29 U.S.C. § 1370, which gives certain parties a private right of action to enforce enumerated provisions in Title IV of the Employee Retirement Income Security Act of 1974, *as amended* (“ERISA”). As an initial matter, it appears that the Court lacks jurisdiction to consider Cox’s motion because Cox’s appeal of the final judgment in the case is pending. Moreover, even if the Court had jurisdiction to address Cox’s motion, the motion does not comply with the

requirements for bringing an action under 29 U.S.C. § 1370. Accordingly, the motion should be denied.

BACKGROUND

In April 2009, the Court appointed James Hopson as Receiver for NJC.¹ After selling NJC's assets, the Receiver conducted a claims review process. PBGC timely submitted claims with the Receiver for liabilities relating to termination of the Pension Plan.² After the Court issued an order under which all of NJC's assets were paid to Cox, PBGC filed an appeal.

In January 2012, the Eleventh Circuit vacated the award of NJC's assets to Cox, holding that Cox was a shareholder of NJC for the purposes "of Fla. Stat. § 607.06401, which prohibits the distribution of corporate assets to a shareholder if it would render the corporation insolvent."³ Because the Eleventh Circuit considered "any payment to Cox a distribution to a shareholder within the meaning of § 607.06401," it held that the district court must apply the statute's insolvency test.⁴ The Eleventh Circuit further explained that the Court must apply the insolvency test "at the time of payment to Cox," and remanded for the Court to "reevaluate the claims of all of News-Journal's creditors consistent with [its] opinion."⁵

Following the remand, the Court ordered the parties to file briefs describing their claims against NJC. The Court then scheduled an evidentiary hearing to address the amount of PBGC's

¹ See Order, April 17, 2009, (Doc. No. 507).

² The Pension Plan was terminated by agreement between PBGC and the Receiver, with a plan termination date of March 23, 2010. See (Doc. No. 675 at 11-13).

³ *Cox Enters., Inc. v. PBGC*, 666 F.3d 697, 699 (11th Cir. 2012).

⁴ *Id.*

⁵ *Id.* at 707-08.

claims against NJC.⁶ After an evidentiary hearing on January 14, 2014, Magistrate Judge Baker issued a report and recommendation finding that the amount of PBGC's claim against NJC for the Pension Plan's unfunded benefit liabilities was \$13,887,822.⁷ The Court affirmed and adopted Magistrate Judge Baker's report over Cox's objection.⁸ On August 13, 2014, the Court issued an order "pursuant to the appellate court's remand," requiring Cox to deposit the amount of PBGC's claim against NJC with the Court's registry by September 12, 2014.⁹

On August 28, 2014, Cox filed a motion seeking a stay of the Court's August 13, 2014 order without being required to post a bond.¹⁰ Cox further sought a stay of the order to pursue certain claims against members of NJC's controlled group.¹¹ On September 9, 2014, the Court denied Cox's motion for a stay in its entirety.¹² While its motion for a stay was pending, Cox filed the instant motion seeking an order to show cause (the "Motion").¹³ On September 11, 2014, Cox filed a notice of appeal of the Court's August 13, 2014 order.¹⁴

⁶ Order & Notice of Hearing, June 11, 2013, (Doc. No. 751).

⁷ Report & Recommendation, March 21, 2014, (Doc. No. 791 at 19); *see also* 29 U.S.C. §§ 1301(a)(18), 1362(a), (b).

⁸ Order, April 24, 2014, (Doc. No. 794).

⁹ Order, Aug. 13, 2014, (Doc. No. 796).

¹⁰ Cox's Emergency Motion to Stay Order Directing Payment into Registry without Requirement of Bond Pending Appeal, Aug. 28 2014, (Doc. No. 797).

¹¹ *Id.* at 13-15.

¹² Order, Sept. 9, 2014, (Doc. No. 803). Cox subsequently posted a supersedeas bond in the amount of \$13,887,822. It is unclear whether the Court has approved that bond and given effect to a stay. *See* Fed. R. Civ. P. 62(d).

¹³ Cox's Motion for Order to Show Cause with Mem., Sept. 8, 2014, (Doc. No. 802).

¹⁴ Cox's Notice of Appeal, Sept. 11, 2014, (Doc. No. 804).

ARGUMENT

I. By Filing its Notice of Appeal, Cox Has Divested the Court of Jurisdiction to Address Cox's Request for an Order to Show Cause.

As a threshold matter, Cox has not explained why the Court has jurisdiction to adjudicate its Motion. On August 13, 2014, after reevaluating the claims of NJC's creditors, and applying the insolvency test contained in Fla. Stat. 607.06401 as directed by the Eleventh Circuit, the Court ordered Cox to return \$13,887,822 of NJC's assets to the Court for payment of PBGC's claim against NJC for the Pension Plan's unfunded benefit liabilities.¹⁵ The Court's order addressed all of the remaining issues in NJC's receivership.¹⁶ Thereafter, Cox appealed.

When Cox filed its notice of appeal, the Court was divested of its jurisdiction over this case.¹⁷ “The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”¹⁸ Although the Court retains jurisdiction to, *inter alia*, enforce its orders, it cannot alter the status of the case resting with the Eleventh Circuit.¹⁹

¹⁵ (Doc. No. 796 at 9, 17-18).

¹⁶ Indeed, the Court found it necessary to expressly retain “jurisdiction to effect the distribution of” the \$13,887,822 of NJC assets to be returned by Cox. (*Id.* at 18).

¹⁷ *See, e.g., Weaver v. Fla. Power & Light*, 172 F.3d 771, 773 (11th Cir. 1999) (“It is well-settled law that the filing of a notice of appeal divests the district court of jurisdiction over a case.” (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982))).

¹⁸ *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1309 (11th Cir. 2003) (quoting *Griggs*, 459 U.S. at 58).

¹⁹ *See id.* at 1309 (noting that in the case of an interlocutory appeal, the district court retains jurisdiction over those portions of the case unrelated to the appealed claims); *see also Mahone v. Ray*, 326 F.3d 1176, 1179 (11th Cir. 2003) (discussing the effect of filing a notice of appeal on the district court's jurisdiction).

Cox does not dispute that the Court’s August 13, 2014 order resolved all remaining issues in this case.²⁰ Indeed, Cox has treated its appeal as involving a final judgment.²¹ Nonetheless, Cox now moves for alternative relief from the Court’s August 13, 2014 order.²² Specifically, Cox requests an order to show cause why the members of NJC’s controlled group should not be required to pay PBGC’s claim for the Pension Plan’s unfunded benefit liabilities – the very same claim against NJC that is the subject of Cox’s appeal.²³ And Cox explicitly intends that any payments received by PBGC as a result of its Motion will reduce the amount of NJC assets that Cox must return for payment of PBGC’s claim against NJC.²⁴ Thus, “[i]t would be inappropriate for this Court to address such motions at this time, during the pendency of this appeal.”²⁵

²⁰ See (Doc. No. 797 at 11-13) (discussing Cox’s anticipated arguments for appeal).

²¹ See 28 U.S.C. § 1292; see also *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1255-56 (11th Cir. 2004) (discussing procedure for seeking an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)).

²² Cox was aware of the *Durango-Georgia Paper Co.* case months ago, well before the Court’s final order in the case, but failed to pursue relief under § 1370 until *after* this Court had issued a final judgment. See Notice, Jan. 9, 2014, (Doc. No. 780).

²³ See Cox’s Motion at 14 (noting that Cox seeks payment by NJC’s controlled-group members of PBGC’s claim for the Pension Plan’s unfunded benefit liabilities, which the Court has already determined that “PBGC may imminently extract from NJC”); see also (Doc. No. 796 at 9-11).

²⁴ In its now-denied Motion for Emergency Stay, Cox argued that any payment ordered pursuant to its Motion “will necessarily reduce or eliminate any required payment by NJC and, in turn, the amount of money required from Cox, even if the Court’s [August 13, 2014 order] is affirmed in full by the Eleventh Circuit.” (Doc. No. 797 at 15).

²⁵ *Madura v. BAC Home Loans Servicing L.P.*, 8:11-cv-2511-T-33TBM, 2013 WL 140614, at *1 (M.D. Fla. Jan. 11, 2013) (explaining that “a district court does not have the power to alter the status of the case as it rests before the Court of Appeals.” (quoting *Green Leaf Nursery*, 341 F.3d at 1309)).

Federal Rule of Civil Procedure 62.1 provides the Court with a framework for addressing any motions that are barred by a pending appeal.²⁶ The Court can elect to defer consideration of the motion, deny the motion, or indicate that it would grant the motion if remanded or that the motion presents a substantial issue.²⁷ Any action by this Court other than denying the motion would defer consideration of the motion until after the appeal. However, at that point, PBGC would have an immediate right to collect from Cox, rendering the motion moot.²⁸ Accordingly, the Motion should be denied.

II. Cox Cannot “Bring an Action” for Purposes of 29 U.S.C. § 1370 by Filing a Motion for an Order to Show Cause.

Even if Cox’s notice of appeal has not divested the Court of jurisdiction to address the Motion, Cox has not properly initiated a proceeding under 29 U.S.C. § 1370. In the Motion, Cox requests equitable relief against “PMV and other non-NJC members of the NJC pension plan controlled group” pursuant to 29 U.S.C. §§ 1370 and 1362.²⁹ Cox asserts that it has standing to

²⁶ *See generally* Fed. R. Civ. P. 62.1.

²⁷ *Id.* at 62.1(a). In its opposition to Cox’s Emergency Motion for a Stay, PBGC explained why it would be improper to stay or otherwise delay the payment of its claim against NJC for the Pension Plan’s unfunded benefit liabilities. *See generally* PBGC’s Resp. & Mem. of Law in Opposition to Cox’s Emergency Motion for a Stay, Sept. 5, 2014, (Doc. No. 801 at 9-13).

²⁸ As PBGC argued in its opposition to Cox’s Emergency Motion for a Stay, any delay in Cox’s payment of PBGC’s claim to allow Cox to pursue controlled-group members would effectively negate PBGC’s statutory right to joint and several liability. *Id.* This result is inconsistent with ERISA, and Cox could have timely sought the relief it now seeks months ago and had it timely decided by the Court.

²⁹ Cox’s Motion at 1-2. To be clear, the determination of controlled-group membership for purposes of Title IV of ERISA is based upon the persons’ relationship with the contributing sponsor of a pension plan, not the plan itself. *See* 29 U.S.C. §§ 1301(a)(13), (14).

pursue an action under § 1370 based on the Court's August 13, 2010 order, which granted NJC's potential causes of action to Cox.³⁰

Section 1370 provides certain parties with a private right of action to enforce enumerated provisions in Title IV of ERISA. Generally, § 1370 provides that:

Any person who is with respect to a single-employer pension plan a fiduciary, contributing sponsor, member of a contributing sponsor's controlled-group, participant or beneficiary, and is adversely affected by an act or practice of any party (other than [PBGC]) in violation of any provision of section [1341], [1342], [1362], [1363], [1364], or [1369] . . . **may bring an action** [to obtain an injunction or other appropriate equitable relief].³¹

Section 1370 also contains a detailed provision addressing the jurisdiction and proper venue for any "civil actions [brought] under this section."³² It further affords PBGC the right to intervene in any civil action brought pursuant to § 1370, and requires the plaintiff to serve PBGC with "[a] copy of the complaint."³³

Cox asserts that it is seeking to pursue a private right of action on behalf of NJC to enforce 29 U.S.C. § 1362. Section 1362 addresses the liability to PBGC that matures upon the termination of a single-employer pension plan covered by Title IV of ERISA, including that the pension plan's contributing sponsor and each member of its controlled group are jointly and

³⁰ Cox's Motion at 13-14 (citing Doc. No. 674).

³¹ 29 U.S.C. § 1370(a) (emphasis added).

³² *Id.* § 1370(c). 29 U.S.C. § 1303 addresses the jurisdiction and venue provisions for any civil action involving PBGC.

³³ *Id.* § 1370(d).

severally liable to PBGC for the full amount of a pension plan's unfunded benefit liabilities.³⁴

As Cox acknowledges, under the plain language of § 1362, NJC (as well as any members of its controlled group) is jointly and severally liable to PBGC for the full amount of the Pension Plan's unfunded benefit liabilities,³⁵ which is why the Court ordered Cox to return \$13,887,822 of NJC assets to pay PBGC's claim against NJC in full.

Despite expressing its intention to seek relief under § 1370, Cox has not complied with the statute's procedure for initiating such an action. By its plain language, § 1370 requires that a party seeking relief bring a civil action.³⁶ And a plaintiff can only initiate a civil action by filing a complaint.³⁷ This procedure is confirmed by § 1370(d), which directs the plaintiff to notify PBGC of its civil action by serving PBGC with the complaint.³⁸

Not only is the process for initiating an action under § 1370 addressed by ERISA's plain language, but the practical implications of ignoring that process are apparent here. Despite a lengthy discussion about the background of NJC's receivership, the elements of Cox's cause of

³⁴ 29 U.S.C. § 1362(a), (b); *see also* *PBGC v. Am. Shelter Indus., Inc.*, 821 F. Supp. 1465, 1469 (M.D. Fla. 1993) (finding members of the plan sponsor's controlled group jointly and severally liable for the unfunded benefit liabilities).

³⁵ Cox's Motion at 18-19; *see also* Order, Sept. 18, 2013, (Doc. No. 763 at 3) (citing *Cent. States, Se. & Sw. Areas Pension Fund v. Lloyd L. Sztanyo Trust*, 693 F. Supp. 531, 541 (E.D. Mich. 1988) ("A joint and several liability is one in which the creditor may sue one or more of the parties to the liability separately or together at the creditor's option.")).

³⁶ 29 U.S.C. § 1370(a), (c); *see also id.* § 1370(b) (discussing how a pension plan may be sued under § 1370, and explaining the procedure by which that plan can be served with any "summons, subpoena, or other legal process").

³⁷ Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court.").

³⁸ *See* 29 U.S.C. § 1370(d) (also requiring service to PBGC of any notice of appeal).

action under § 1370 remain unclear.³⁹ For example, the Motion does not define the parties against whom Cox is ultimately seeking relief. Cox seeks relief against PMV and against other “non-NJC members of the NJC pension plan controlled group.” The Motion indicates that this group may include Induprop, Inc., an entity that does not appear to have even been a party in NJC’s receivership proceeding.⁴⁰

Fundamentally, the Motion does not provide the Court with a proper basis for addressing the relief that Cox intends to seek on behalf of NJC. In *Durango-Georgia Paper Co. v. H.G. Estate, LLC*, the Eleventh Circuit addressed whether a bankruptcy trustee could pursue a former member of the debtor’s controlled group under § 1370.⁴¹ The trustee alleged that § 1370 provided him with a private right of action to seek relief against the defendants for violating 29 U.S.C. § 1369, which imposes liability upon any person that enters into a transaction with a principal purpose of evading pension liability, provided that the plan terminates within a five-year period.⁴² The Eleventh Circuit ultimately determined that the trustee had failed to state a claim for relief against the defendants.⁴³ In making this determination, the Eleventh Circuit focused on the allegations contained in the trustee’s complaint as well as the relief requested

³⁹ The Motion appears to conflate various actions that adversely affected NJC in general, with acts or practices that violated 29 U.S.C. § 1362. *See* Cox’s Motion at 13.

⁴⁰ *Id.* at 4, 18.

⁴¹ *Durango-Ga. Paper Co. v. H.G. Estate, LLC*, 739 F.3d 1263 (11th Cir. 2014). The trustee commenced its proceeding against the defendants under 29 U.S.C. § 1370 by filing a lawsuit in the U.S. District Court for the Southern District of Georgia. *Id.* at 1268-69.

⁴² *Id.* at 1269-70; *see also* 29 U.S.C. § 1369(a).

⁴³ *Durango-Ga. Paper Co.*, 739 F.3d at 1270, 1273.

therein.⁴⁴ Here, by contrast, there is no complaint from which to assess Cox's entitlement to relief on behalf of NJC pursuant to 29 U.S.C. §§ 1370 and 1362.⁴⁵

In sum, Cox has not properly initiated an action under § 1370, therefore, its Motion should be denied.

CONCLUSION

For the foregoing reason, the Court should deny Cox's motion.

DATED: September 25, 2014
Washington, D.C.

Respectfully submitted,

/s/ Colin B. Albaugh
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⁴⁴ *Id.* at 1271-72 & n.23 (discussing the court's reading of the trustee's complaint).

⁴⁵ PBGC does not express any opinion on the merits of whether Cox is entitled to seek relief under 29 U.S.C. § 1370, but reiterates that no such action can be used as a means to delay recovery on PBGC's claim against NJC.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September 2014, the Pension Benefit Guaranty Corporation's foregoing Response and Memorandum of Law, was served electronically through the Court's CM/ECF system on all registered users.

/s/ Colin B. Albaugh _____
Colin B. Albaugh
Attorney