

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

In re:)
) Chapter 11
)
CONCO, INC.) Case No. 12-34933
)
 Debtor.) Hon. Joan A. Lloyd
)
_____)

**OBJECTIONS BY PENSION BENEFIT GUARANTY CORPORATION
TO THE DEBTOR’S DISCLOSURE STATEMENT**

The Pension Benefit Guaranty Corporation objects to the proposed Disclosure Statement¹ filed by the Debtor, Conco, Inc., because it does not provide adequate information concerning the anticipated distress termination of the Conco Pension Plan (“Pension Plan”) and related risks; the obligation of the reorganized Conco to satisfy the liability for termination premiums if the Pension Plan is terminated; any justification for discriminating between two classes of general unsecured claims; and the distribution \$325,000 of annual cash flow to Reorganized Conco post-emergence. Pension Benefit Guaranty Corporation (“PBGC”) has proposed language to the Debtor for the Disclosure Statement, to resolve all but the last objection.² Because a revised Disclosure Statement has not been filed as of the date on which this objection is due, PBGC files this protective objection.

¹ The Disclosure Statement is Doc. No. 185 on the Court’s docket.

² PBGC reserves its right to raise additional objections at the Disclosure Statement hearing, confirmation hearing, or to other pleadings.

BACKGROUND

A. PBGC and the Employee Retirement Income Security Act.

1. 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” or “Title IV”), *as amended*, 29 U.S.C. §§ 1301-1461 (2006 & Supp. V 2011), which covers most private defined-benefit pension plans. The program guarantees a secure, predictable retirement for approximately 43 million American workers and retirees.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 benefits up to the limits established by Title IV.⁴ PBGC is self-financed.

2. Pursuant to ERISA, the sponsor of a pension plan covered by Title IV and each of the sponsor’s controlled group members, if any,⁵ must satisfy certain financial obligations to the pension plan. These responsibilities to a pension plan include, *inter alia*: (1) paying the statutorily required minimum funding contributions to the pension plan;⁶ (2) paying insurance

³ PBGC 2012 Annual Report at 1, <http://www.pbgc.gov/documents/2012-annual-report.pdf?fs=1>.

⁴ *See* 29 U.S.C. §§ 1321, 1322, and 1361.

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 is a 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.

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).

premiums to PBGC;⁷ and (3) paying unfunded benefit liabilities to PBGC if the pension plan is terminated.⁸

3. ERISA provides the exclusive means for a plan sponsor to voluntarily terminate a pension plan in a standard termination or a distress termination.⁹ 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.¹⁰

4. 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.¹¹

5. The bankruptcy court is charged with making the factual findings under the "reorganization in bankruptcy" test that, unless the pension plan is terminated, the debtor will not be able to pay its debts under "a plan of reorganization and continue in business outside the Chapter 11 reorganization process". As one bankruptcy judge described the court's role:

⁷ 29 U.S.C. §§ 1306, 1307(e)(2).

⁸ 29 U.S.C. § 1362.

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

¹⁰ *See* 29 U.S.C. § 1341(b)(2)(A)(i)(III).

¹¹ 29 U.S.C. § 1341(c)(2)(B).

[T]he Court does not find itself faced with the ultimate question of the Debtor's entitlement to the termination of its pension plan. Instead, the Court simply must perform one narrow factual determination, the satisfaction of which will compose a single element in the Debtor's individual case for reorganizational "distress." The ultimate sufficiency of that distress showing, as well as the adequacy of the Debtor's required disclosures and the qualifications of any "controlled group" parties, then will become a collective matter for the PBGC's consideration as it makes a final determination of the Debtor's right to a distressed [sic] termination.¹²

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

- (i) unfunded benefit liabilities of the pension plan;¹³
- (ii) unpaid minimum funding contributions due the pension plan, and;¹⁴
- (iii) unpaid flat or variable rate premiums related to the pension plan.¹⁵

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.¹⁶ If the

¹² *In re Sewell Mfg.*, 195 B.R. 180, 184-85 (Bankr. N.D. Ga. 1996).

¹³ 29 U.S.C. § 1362(a),(b).

¹⁴ *See* 26 U.S.C. § 412(c)(11) (2007) (effective for pension plan years beginning on or before December 31, 2007); 26 U.S.C. §§ 412(b)(1), (2), 430 (2008) (effective for pension plan years beginning after December 31, 2007). *See also* 29 U.S.C. § 1082(c)(11) (effective for pension plan years beginning on or before December 31, 2007); 29 U.S.C. § 1082(b)(1), (2) (effective for pension plan years beginning after December 31, 2007). 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).

¹⁵ 29 U.S.C. § 1306.

¹⁶ *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).

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.¹⁷ Under these circumstances, termination premiums are not a dischargeable claim or debt within the meaning of the Bankruptcy Code.¹⁸ PBGC estimates the amount of the termination premium liability for the Debtor would total approximately \$1.4 million.

B. The Pension Plan.

8. The Pension Plan is covered by Title IV of ERISA and is insured by PBGC.

9. As of January 1, 2012, approximately 78 current employees, 179 terminated vested employees and 113 retired employees of Conco, Inc. (“Conco” or “Debtor”) were participants in the Pension Plan.¹⁹

10. The Pension Plan, according to the Debtor, was amended effective June 30, 2007, to freeze further benefit accruals.²⁰

C. Debtors’ Bankruptcy Proceedings.

11. The Debtor filed a petition in this Court seeking relief under Chapter 11 of the United States Bankruptcy Code on November 5, 2012 (the “Petition” and “Petition Date,” respectively).

12. PBGC estimated that the unfunded benefit liabilities of the Pension Plan on a termination basis were approximately \$6,522,488, as of November 30, 2012. PBGC filed an

¹⁷ 29 U.S.C. § 1306(a)(7)(B).

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

¹⁹ DS, Art. II.D.3 at 6-7.

²⁰ *Id.* at 6.

estimated claim against the Debtor's bankruptcy estate for this amount. This claim is contingent upon the termination of the Pension Plan. The amount of this claim may change if the Pension Plan is terminated with a different termination date.

13. PBGC filed a contingent claim against the Debtor's bankruptcy estate for unpaid minimum funding contributions due the Pension Plan. The estimated amount of this claim was \$653,350, as of November 30, 2012. PBGC asserts priority status under 11 U.S.C. §§ 507(a)(2) and (5) for the normal cost portion of the unpaid minimum funding contributions due post-Petition and within the 180 day period before the Petition Date, respectively. The obligation to make minimum funding contributions continues until after the Pension Plan is terminated. The amount of this liability is increasing over time.

14. PBGC filed an unliquidated claim for unpaid flat and variable rate premiums related to the Pension Plan. The obligation to pay premiums to PBGC continues until a pension plan is terminated in a standard termination or until a statutory trustee is appointed in a distress or PBGC-initiated termination. Liability to PBGC for unpaid premiums will increase if Conco does not pay them as due.

OBJECTIONS

PBGC objects to the Disclosure Statement ("Disclosure Statement") because it does not inform creditors of facts that may affect the value of their claims and the confirmability of the Plan of Reorganization. A disclosure statement contains "adequate information" if it provides:

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.²¹

²¹ 11 U.S.C. § 1125(a); *see also Enron Corp. v. New Power Co. (In re New Power Co.)*, 438 F.3d 1113, 1117-18 (11th Cir. 2006) (per curiam); *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. GMC*, 337 F.3d 314, 321-22 (3d Cir. 2003); *Mabey v. Southwestern Elec. Power Co. (Matter of Cajun Elec. Power Co-op, Inc.)*, 150 F.3d 503, 518 (5th Cir. 1998); *In re Keisler*,

The Disclosure Statement submitted by the Debtor fails to provide adequate information as required by 11 U.S.C. § 1125(a), in the following respects:

A. Distress Termination of the Pension Plan.

15. The Disclosure Statement should disclose that it is seeking a distress finding from the court under the “Reorganization in Bankruptcy” test under 29 U.S.C. § 1341(c), and that the burden is on the Debtor to provide adequate evidence to prove that, unless the Pension Plan is 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.²²

16. The Disclosure Statement should reveal the uncertainty of Pension Plan termination in light of the Debtor’s burden of proof in procuring the necessary finding from the Court.²³ And the Debtor should discuss the effect that such a denial would have on the feasibility of the proposed Plan of Reorganization.

2009 WL 1851413 (Bankr. E.D. Tenn. 2009); *In re Quigley Co.*, 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007) (stating that a Disclosure Statement must contain adequate information describing a confirmable plan, and that if the plan is patently unconfirmable on its face, the application to approve the Disclosure Statement must be denied); *In re C.C. Ming (U.S.A.) Ltd. P’Ship*, 2005 Bankr. LEXIS 2815 (Bankr. S.D.N.Y. Mar. 22, 2005);

²² *In re Philip Serv. Corp.*, 310 B.R.802, 806 (Bankr. S.D. Tex. 2004) (debtors did not prove by a preponderance of the evidence that the plan of reorganization would not be consummated unless the pension plan was terminated); *In re US Airways Group*, 296 B.R. 734, 743-44 (Bankr. E.D. Va. 2003) (the burden of proof is on the debtors to establish that they meet the reorganization in bankruptcy test), *aff’d* on other grounds, 369 F.3d 806 (4th Cir. 2004) (equitable mootness because, absent a stay, the Plan of Reorganization was confirmed and consummated and reversing the distress termination would adversely affect the rights of third parties who rely on the consummated Plan of Reorganization); *In re Sewell Mfg.*, 195 B.R. 180, 184-85 (Bankr. N.D. Ga. 1996); *In re Resol Mfg. Co.*, 110 B.R. 858, 862 (Bankr. N.D. Ill. 1990) (describing the reorganization test as a “*but for*” test).

²³ *Philip Serv. Corp.*, 310 B.R. at 806 (debtors did not prove by a preponderance of the evidence that the Plan of Reorganization would not be consummated unless the pension plan was terminated).

B. Treatment of Nondischargeable Pension Related Claims.

17. The Disclosure Statement does not disclose that if the Pension Plan is not terminated during the course of the Chapter 11 reorganization proceeding, the related liabilities to the Pension Plan and the PBGC will not be discharged. This disclosure should be made in the Disclosure Statement so that creditors can make an informed decision about the proposed Plan of Reorganization.

18. The Disclosure Statement states that the termination premium was added to ERISA “to provide for a special termination premium in the event that an underfunded defined benefit pension plan is terminated in a distress termination.”²⁴ But, the Disclosure Statement does not disclose that the termination premium obligation applies to the reorganized Debtor and cannot be discharged, released or enjoined by the proposed Plan of Reorganization.²⁵ The Disclosure Statement should inform creditors that the termination premium obligation applies to the reorganized Debtor and cannot be discharged, released or enjoined by the proposed Plan of Reorganization. And, the Disclosure Statement should explain to creditors how the approximately \$1.4 million termination premium obligation will be satisfied.

C. Potential Unfair Discrimination between General Unsecured Creditors & Annual Cash Flow Payments to Conco.

19. PBGC objects to the Disclosure Statement as proposing a plan that is unconfirmable because it violates the unfair discrimination test.²⁶ Discrimination may exist if

²⁴ DS, Art. II.D.3 at 7.

²⁵ *Oneida Ltd.*, 562 F.3d at 157.

²⁶ 11 U.S.C. § 1129(b).

there is a difference in treatment between a dissenting class and another class of the same priority that results in a materially lower recovery to the dissenting class . . .”.²⁷

20. Class 3-A is described as “unsecured estimated claims arising from the Debtor’s liabilities under 26 U.S.C. §§ 412, 430 and 29 U.S.C. §§ 1306, 1307, 1362 and 1368.” The Disclosure Statement describes Class 3-B as “allowed claims against the Debtor which are not Administrative Claims, Priority Claims, Priority Tax Claims, Secured Claims, Pension Claims, or Claims required to be paid in order to cure Debtor’s default of an unexpired lease or executory contract that is to be assumed by the Debtor.” Both Class 3-A and Class 3-B claims are impaired.²⁸

21. The Disclosure Statement states that the estimated amount of Class 3-A claims is \$7,175,838 million per proofs of claims filed. Debtor has reserved the right to object to one or more Class 3-A claims. The Disclosure Statement states that the estimated aggregate amount of Class 3-B claims is \$5,766,421.62.²⁹

22. The Disclosure Statement states that the Debtor will make a sum total of \$922,000 available for pro-rata distributions to all holders of Class 3-A claims. And, the Disclosure Statement states that the Debtor will make a sum total of \$922,000 available for pro-rata distributions to all holders of allowed Class 3-B claims.³⁰

23. The Debtor must adequately disclose why distribution to general unsecured creditors is not *pari passu* as between PBGC’s general unsecured claims and the claims of all other

²⁷ *Id.*

²⁸ DS, Art. III.C.3 at 16

²⁹ *Id.*

³⁰ *Id.*

general unsecured creditors. In other words, the Debtor should explain why distributing \$922,000 to PBGC for approximately \$7.1 million in estimated contingent unsecured claims and distributing \$922,000 to other general unsecured creditors who have \$5.7 million in claims does not violate the unfair discrimination test.

24. Exhibit C to the Disclosure Statement indicates that Reorganized Conco will retain part of its annual cash flow, totaling \$325,464.09. The largest of these payments is projected to be \$136,996.76 in 2016 and the smallest is projected to be \$27,079.40 in 2014.³¹ The Debtor should explain in the Disclosure Statement why these payments will be made so that creditors can make an informed choice regarding the proposed Plan of Reorganization.

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³¹ DS, Ex. C at 2. Ex. C is Doc 185-3 on the Court's docket.

CONCLUSION

For the forgoing reasons, PBGC objects to the Debtor's Disclosure Statement and requests that it be modified in accordance with its objections.

Dated: December 3, 2013
Washington, D.C.

Respectfully submitted,

/s/ Kimberly E. Neureiter

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2013, a true and correct copy of the foregoing was (a) mailed electronically through the U.S. Bankruptcy Court's ECF system at the electronic addresses as set forth in the ECF system to the U.S. Trustee, and all other persons receiving electronic notifications in this case, and (b) mailed, first-class, postage prepaid, to the Unsecured Creditors Committee and to those persons, if any, identified in the Court's Notice of Electronic Filing who do not receive electronic notice but are entitled to be served.

/s/ Kimberly Neureiter
Kimberly Neureiter