Hearing Date and Time: May 12, 2014 at 11:00 a.m.
Objection Deadline: May 5, 2014 at 4:00 p.m.

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

In re:	)	Chapter 11
	)	
Interfaith Medical Center, Inc.,	)	Case No. 12-48226 (CEC)
	)	
	)	
Debtor.	)	

OBJECTION OF THE PENSION BENEFIT GUARANTY CORPORATION
<u>TO DEBTOR'S FIRST AMENDED PLAN OF REORGANIZATION</u>

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 First Amended Plan of Reorganization. PBGC counsel has presented PBGC's concerns to counsel for the Debtor regarding the First Amended POR but has not been able to resolve them before the May 5, 2014 objection deadline.

BACKGROUND

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

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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.

6 26 U.S.C.§ 412(c)(11) (2007) (effective for pension plan years beginning on or before Dec. 31, 2007);

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. PBGC may initiate a termination of a pension plan if it determines that: (i) the plan has not met the minimum funding requirements under the Internal Revenue Code; (ii) the plan will be unable to pay benefits when due; (iii) a reportable event described in section 4043(c)(7) [concerning distribution to a substantial owner] has occurred; or (iv) the possible long-run loss of [PBGC] with respect to the plan may reasonably be expected to increase

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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).

unreasonably if the plan is not terminated.[11]

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

(i) unfunded benefit liabilities of the pension plan;[12]

(ii) unpaid minimum funding contributions due to the pension plan, and;[13]

(iii) unpaid flat or variable rate premiums related to the pension plan.[14]

8. 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.[15]

9. Upon information and belief, as of the petition date, the Pension Plans cover approximately 1437 employees, former employees, or retirees. The Pension Plans are underfunded on a termination basis by a total of approximately $68,000,000, according to PBGC's calculations.

10. On March 21, 2014, the Debtor filed a Disclosure Statement and Plan of Reorganization ("POR"). The Disclosure Statement and POR did not provide any information about the Pension Plans, Debtor's intentions with respect to the Pension Plans, or potential liability to PBGC. In its First Amended Disclosure Statement, the Debtor included language that

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[11] 29 U.S.C. § 1342(a).

[12] 29 U.S.C. § 1362(a),(b).

[13] *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).

[14] *See supra* note 7.

[15] *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).

explained its intention to seek termination of the Pension Plans and also included language that addressed most of PBGC's disclosure statement objections, except for its objection relating to the non-debtor releases.

11. The release provisions ("Release Provisions") in the First Amended Plan of Reorganization ("First Amended POR") would, among other things, release certain non-debtors from claims that arise before the effective date.[16] The First Amended POR defines "Released Parties" as:

> [T]he Debtor, the Creditors' Committee, the Ombudsman, and DASNY, and any of their current or former agents, representatives, directors, trustees, officers (including, without limitation, for the Debtor, Melanie Cyganowski as CRO, Steven Korf as Chief Executive Officer, and Robert Mariani as Chief Financial Officer), members, sponsors, managers, attorneys, accountants, financial advisors, or other professionals, solely in such capacities.[17]

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.[18]

12. PBGC is working with the Debtor and the Dormitory Authority of the State of New York ("DASNY") on a potential PBGC-initiated termination of the Pension Plans. PBGC generally expects a reorganizing debtor that wishes to terminate its plan(s) to file a distress termination application and to demonstrate to the bankruptcy court and to PBGC that the reorganized entity will be unable to afford its plan(s) upon emergence from Chapter 11. In this case, because a distress termination would take several months and because of the ongoing losses

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[16] POR Art. IX.9.5(c).

[17] POR Art. I.1.73.

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

of the hospital, the Debtor is asking PBGC to initiate its own termination of the plan, and to expedite the process so that the Pension Plans will terminate before the effective date. The Debtor, DASNY, and PBGC are currently working toward a global resolution that would among other things, provide for termination of the Pension Plans, settlement of PBGC's claims, and an appropriate carve-out, for claims relating to the Pension Plans, to the release language in the First Amended POR. At this point, it is unclear whether all open issues will be resolved before the confirmation hearing scheduled for May 12, 2014.[19]

OBJECTION

13. PBGC objects to the language in the current Release Provisions, as those provisions are overly broad and any resulting liability, including for a fiduciary breach, with respect to the Pension Plan by non-debtors, would be released as of the POR's effective date. While PBGC at this time is not aware of any fiduciary breaches with respect to the Pension Plans, PBGC often learns of a fiduciary breach well after its termination of a pension plan. PBGC generally has 3 years from the date it trustees a pension plan in which to file a fiduciary-breach action, and 6 years from the date of plan termination in which to file a collection action for termination liability under Title IV of ERISA.[20]

14. 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 non-debtor releases. In the Second Circuit this means that

[19] PBGC has been informed by the Debtor and DASNY that termination of the Pension Plans is a condition to consummation of the First Amended POR. However, if the Pension Plans are not terminated by the effective date, and the Debtor nonetheless emerges from Chapter 11, the Pension Plans' liabilities would be the obligation of the reorganized Debtor.

[20] 29 U.S.C. § 4003(e).

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.[21] Other courts also consider whether the enjoined creditor has consented to the release.[22] 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.[23] Ultimately, courts have not viewed this authority as giving debtors unfettered discretion when releasing or discharging non-debtors from liability.[24]

15. The Release Provisions should not be allowed because the facts and circumstances in this case do not rise to the level of "truly unusual circumstances" set forth in *Metromedia*. Even if some release of non-debtor liability was found appropriate, the Debtor has not demonstrated that a release of liability under Titles I and IV of ERISA plays an integral role under the First Amended POR, nor is it apparent that such a release is an essential element in the Debtor's reorganization. Furthermore, in this case, the Debtor and non-debtors have not provided any consideration to the Pension Plans, PBGC, or Pension Plan participants in exchange for the releases, thereby making the Release Provisions unjustifiable under Second Circuit law.

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[21] *Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143 (2d Cir. N.Y. 2005) (noting that "[a] nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to success of the plan. . ."). 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).

[22] *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).

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

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

16. Accordingly, the potential release of non-debtors for any claim relating to the Pension Plans, including breach of fiduciary duty under ERISA, 29 U.S.C. §§ 1101-1114 and liabilities under Title IV of ERISA, 29 U.S.C. §§ 1341-1461, with respect to the Pension Plans would be outside the scope of the relief that can be granted in a plan of reorganization.

17. In the event the Pension Plans do not terminate before the effective date of the First Amended POR and the Debtor nonetheless emerges from Chapter 11, no party -- including the Debtor – may be released from any Pension Plan-related liabilities. The Pension Plans will continue and become the obligation of the Reorganized IMC.

CONCLUSION

For the forgoing reasons, unless the Debtor makes the changes that PBGC has requested to the Release Provisions, the First Amended POR should not be approved. PBGC reserves all of its claims, defenses, and rights to assert objections to any modifications the Debtor may make to the First Amended POR or subsequent plan of reorganization.

Dated: May 5, 2014

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