

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO**

In re:)	
)	Chapter 11
MUNDY RANCH, INC.,)	
)	Case No.: 12-13015
Debtor.)	
)	

**PENSION BENEFIT GUARANTY CORPORATION’S OBJECTION TO DEBTOR’S
SECOND AMENDED PLAN OF REORGANIZATION**

The Pension Benefit Guaranty Corporation (“PBGC”) files this objection to the Debtor’s Second Plan of Reorganization Dated May 2, 2014, as modified, docket numbers 283 and 296 (the “Plan”).

The Plan ignores PBGC’s \$1.4 million claims while proposing to distribute property to Mundy Ranch’s equity holders, in violation of the absolute priority rule. Moreover, the Plan fails to pay PBGC’s priority claim of \$26,957 in full on the Plan’s effective date. For those reasons, and as more fully explained below, the Plan cannot be confirmed.

BACKGROUND

(a) General

1. PBGC is a federal agency and wholly owned United States government corporation. PBGC administers the pension insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”).¹ PBGC guarantees the pension benefits of nearly 42 million participants in more than 24,000 pension plans.² When an underfunded

¹ 29 U.S.C. §§ 1301-1461 (2012).

² 2013 PBGC Annual Management Report at 4, *available at* <http://www.pbgc.gov/documents/2013-annual-report.pdf>

pension plan terminates, PBGC generally becomes trustee of the plan and, subject to statutory limitations, pays the plan's unfunded benefits with its insurance funds.³

2. The Debtor is the contributing sponsor of the Mundy Ranch Inc. Defined Benefit Pension Plan (the "Pension Plan"),⁴ a defined benefit plan covered by Title IV of ERISA.

3. The sponsor of a pension plan and members of its controlled group are financially responsible for the pension plan.⁵ The joint-and several⁶ responsibilities of the plan sponsor and controlled group members to a pension plan include, *inter alia*: (1) paying the statutorily required minimum funding contributions to the pension plan;⁷ (2) paying insurance premiums to PBGC;⁸ and (3) paying any unfunded benefit liabilities to PBGC if the pension plan terminates.⁹

4. The Debtor is the plan administrator and fiduciary of the Pension Plan within the meaning of 29 U.S.C. §§ 1002(16), 1102(a).

5. On August 10, 2012, the Debtor filed for Chapter 11 bankruptcy protection.

6. On October 24, 2103, PBGC issued a Notice of Determination ("Notice") that the Pension Plan should be terminated as of October 24, 2013 ("PBGC's Determination").

Specifically, the Notice states that PBGC has determined that, *inter alia*, the Pension Plan does

³ See 29 U.S.C. §§ 1321-22, 1342, 1361.

⁴ See 29 U.S.C. § 1301(a)(13), (14).

⁵ See 29 U.S.C. § 1082(c)(11)(B).

⁶ See 29 U.S.C. §§ 1082(c)(11)(B), 1307(e)(2), 1362.

⁷ 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).

⁸ 29 U.S.C. §§ 1306, 1307(e)(2).

⁹ 29 U.S.C. § 1362.

not have assets available to pay benefits which are currently due, has not met the minimum funding standard required under section 412 of the Internal Revenue Code, will be unable to pay benefits when due, and that a reportable event described in ERISA section 4043(c)(7) has occurred.

7. On October 24, 2013, Pension Plan participants were notified of PBGC's Determination via publication in the Rio Grande Sun.

8. On October 24, 2013, PBGC filed two amended proofs of claim against the Debtor relating to the Pension Plan: (1) due and unpaid minimum funding contributions in the amount of \$190,637 (including \$26,957 in priority claims),¹⁰ and (2) unfunded benefit liabilities in the amount of \$1,186,873.¹¹ PBGC's claim against the Debtor for pension insurance premiums,¹² filed on January 23, 2013, remains unliquidated.

9. The Debtor has not objected to PBGC's claims.

10. On November 26, 2013, PBGC filed a complaint in the United States District Court for the District of New Mexico seeking, *inter alia*, termination of the Pension Plan, establishment of October 24, 2013 as the Pension Plan's termination date, and appointment of PBGC as the Pension Plan's statutory trustee ("Termination Action").¹³ The Termination Action will move forward on the PBGC's summary judgment motion.

11. On May 2, 2014 and June 2, 2014, the Debtor filed its Plan and first amendment to the Plan, respectively.

¹⁰ Claim No. 3.

¹¹ Claim No. 5.

¹² Claim No. 4.

¹³ *Pension Benefit Guaranty Corp. v. Mundy Ranch, Inc.*, 13-cv-01137-LAM-KBM (D. N.M. Nov. 26, 2013).

12. On July 3, 2014, PBGC voted to reject the Plan.

Classification and treatment of claims

13. Under the Plan, PBGC's claims are classified into two classes: (1) PBGC's claim for statutory liability to the Pension Plan for unpaid minimum funding contributions in the amount of \$26,957 is classified as a Class 2 claim, and (2) PBGC's unsecured claims for unfunded benefit liabilities, unpaid minimum funding contributions, and premiums due to the PBGC are classified as Class 5 claims. PBGC is the only Class 5 Claimant.

14. The Plan classifies the Debtor's current shareholders' interests as Class 9 interests.

15. The Debtor proposes to satisfy both PBGC's Class 2 claim and Class 5 claims through a standard termination of the Pension Plan under 29 U.S.C. §§1341(a) and (b) and the regulations thereunder. Because the Debtor alleges the standard termination cannot be completed prior to confirmation of the Plan, the Debtor proposes to sequester \$360,000, which it believes will be sufficient "to fully fund the Pension Plan in satisfaction of the Class 2 and Class 5 claims of the PBGC."

16. The Debtor proposes to resolve the Class 9 claim by effecting a transfer of a significant portion of the Debtor's property (which debtor claims is valued at \$1.9 million) to a separate entity to be owned by the Class 9 claimants. The Plan requires that this transfer occur within 45 days after the Plan's effective date.

ARGUMENT

17. Section 502 of the Bankruptcy Code provides that a claim for which a proof of claim has been filed under section 501 is deemed allowed unless a party in interest objects.

18. As discussed above, PBGC filed general unsecured claims in the total amount of \$1,377,510 (“PBGC General Unsecured Claims”).

19. Because the Debtor has not objected to the PBGC General Unsecured Claims, the PBGC General Unsecured Claims are deemed allowed.

I. The Plan cannot be confirmed because it violates the absolute priority rule.

20. Section 1129 of the Bankruptcy Code provides that a plan of reorganization can only be confirmed if, *inter alia*, each holder of a claim or interest accepts the plan or is not impaired.¹⁴ If a class of claims is impaired under the plan, that class must either (1) accept the plan, or (2) receive under the plan on account of such claim property of a value, as of the effective date, that is not less than what the claimant would have received in a chapter 7.¹⁵

21. Even if an impaired class of claims does not accept the plan, assuming all other requirements under 11 U.S.C. § 1129(a) are satisfied, the court shall nonetheless confirm the plan under 11 U.S.C. § 1129(b) as long as “the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.”¹⁶ With respect to a class of impaired unsecured claims, a plan is fair and equitable if junior classes of claimants do not receive any property under the plan (the “Absolute Priority Rule”).¹⁷

¹⁴ 11 U.S.C. §1129(a)(8).

¹⁵ 11 U.S.C. §1129(a)(7).

¹⁶ 11 U.S.C. § 1129(b)(2).

¹⁷ 11 U.S.C. §1129(b)(2)(B)(ii); *Stephens v. Stephens*, 704 F.3d 1279, 1282-83 (10th Cir. 2013); *In re DBSD N. Am., Inc.*, 634 F.3d 79 (2d Cir. 2011); *In re: ARS Analytical, LLC*, 433 B.R. 848, 864 (D. N.M. 2010); *In re Lotspeich*, 328 B.R. 209, 220 (B.A.P 10th Cir. 2005).

22. Here, the plan violates the Absolute Priority Rule—a “fundamental rule of bankruptcy law”¹⁸—because (1) PBGC holds claims in Class 5, which is impaired under the Plan and which has voted to reject the Plan, and (2) a junior class of interests, the Class 9 equity holders, is receiving a distribution of property under the Plan.

23. PBGC’s Class 5 claims in the amount of almost \$1.4 million are impaired under the Plan because the Plan does not propose to satisfy those claims in full.¹⁹ Rather, the Plan proposes to attempt a standard termination of the Pension Plan under 29 U.S.C. § 1341 and sequester only \$360,000 to resolve PBGC’s claims. This amount is not nearly enough to satisfy the PBGC General Unsecured Claims.

24. PBGC does not accept such treatment of its claims.

25. Even assuming, *arguendo*, that PBGC would be agreeable to the Debtor attempting to complete a standard termination to satisfy PBGC’s claims, completion of a successful standard termination is not guaranteed. First, the Debtor must complete all the necessary steps under PBGC’s regulations.²⁰ This includes issuing a notice of intent to terminate to affected parties between 60-90 days before the proposed date of plan termination; issuing a notice of plan benefits to participants and beneficiaries, filing a standard termination notice with PBGC, receiving participants’ and beneficiaries’ benefit election forms, distributing the plan assets to satisfy all plan benefits, providing a notice of annuity contract to participants and

¹⁸ *In re Geneva Steel Co.*, 281 F.3d 1173, 1180-81 & n.4 (10th Cir. 2002).

¹⁹ Section 4.1 of the Plan also acknowledges that all classes of claims under the Plan are impaired.

²⁰ See 29 C.R.F. §§ 4041.1 to 4041.31. See also PBGC Standard Termination Filing Instructions available at <http://www.pbgc.gov/documents/500-instructions.pdf>.

beneficiaries receiving an annuity, and filing a post-distribution certification with PBGC.²¹ The Debtor has not even initiated this process.

26. Moreover, James Mundy, the majority owner of the Debtor, must waive his benefit, which he has not yet done, and which is purely voluntary.²² And the fact that this Debtor has, in the recent past, unashamedly engaged in prohibited transactions that caused the Pension Plan to lose at least \$350,000, leaving the Pension Plan with almost no assets, makes the successful completion of a standard termination in compliance with all the rules and regulations even more doubtful.

27. Debtor's proposed treatment of PBGC's claim thus shifts the risk of plan failure away from junior interests and onto PBGC, in violation of the absolute priority rule. As the District Court stated in *In re Monarch Beach Venture, Ltd.*,

[t]he concept of fair and equitable involves more than an application of a mechanical calculation of absolute priority based on distribution of property valued abstractly. When the proposed distribution would substantially shift the risk of failure of the plan from a junior class to a senior dissenting class for no legitimate purpose, the plan is not fair and equitable to the dissenting class.²³

28. Because of the risk inherent in an as-yet unperformed standard termination, PBGC would accept a standard termination to satisfy PBGC's claims only if the standard termination was successfully executed, and determined by PBGC to be compliant, prior to junior interest holders receiving a distribution of the Debtor's property under the Plan. In other words, PBGC wants to maintain the status quo and its place in line until it confirms it has no remaining claims against the Debtor.

²¹ *Id.*

²² See 29 C.F.R. § 4041.21(b)(2).

²³ *In re Monarch Beach Venture, Ltd.*, 166 B.R. 428, 436 (C.D. Calif. 1993); see also *In re SLC Ltd. V*, 137 B.R. 847, 856 (Bankr. D. Utah 1992) (the plan cannot be fair and equitable if most of the risk of loss is shifted to the unsecured creditors).

29. If the Debtor does everything it is supposed to do with respect to the standard termination of the Pension Plan, then PBGC could very likely inform the Debtor within **four months** of initiation of the standard termination whether the standard termination was completed correctly and whether PBGC has any further claims against the Debtor. Apparently, the equity holders—the class of interests that are last in line under the Plan—do not want to wait four months to receive their distribution.

30. Because PBGC does not accept the Debtor’s proposed treatment of its claims, if the Debtor wants to accommodate the equity holders in making the Class 9 distribution immediately, then the Debtor needs to sequester funds sufficient to provide for PBGC’s approximately \$1.4 million Class 5 claims in full pending the outcome of the Termination Action. Anything less is a clear violation of the Absolute Priority Rule and renders the Plan unconfirmable.

II. The Plan cannot be confirmed because it does not pay PBGC’s administrative claims in full.

31. Section 1129(a)(9) of the Bankruptcy Code requires that each holder of a claim under section 507(a)(5) who has voted not to accept the plan receive “cash on the effective date of the plan equal to the allowed amount of such claim.”

32. PBGC has filed a priority claim under 11 U.S.C. §507(a)(5) for due and unpaid contributions to the Pension Plan in the amount of \$26,957 (“PBGC Priority Claim”). Because the Debtor has not objected to the PBGC Priority Claim, the PBGC Priority Claim is allowed.

33. PBGC has voted to reject the Plan. Therefore, PBGC must receive \$26,957 on behalf of the Pension Plan on the effective date of the Plan. The Plan does not propose to make such a payment to PBGC. Therefore, the Plan cannot be confirmed because it violates section 1129(a)(9) of the Bankruptcy Code.

CONCLUSION

For the foregoing reasons, PBGC respectfully requests that this Court find that the Plan does not meet the requirements for confirmation under 11 U.S.C. § 1129(a) and cannot be confirmed under 11 U.S.C. § 1129(b). PBGC further requests this Court to grant other relief as it deems just and proper.

Dated: July 3, 2014
Washington, D.C.

/s/ Katherine B. Kohn
ISRAEL GOLDOWITZ
Chief Counsel
KAREN L. MORRIS
Deputy Chief Counsel
STEPHANIE THOMAS
Assistant Chief Counsel
KATHERINE B. KOHN
DESIREE M. AMADOR
Attorneys
PENSION BENEFIT GUARANTY
CORPORATION
Office of the Chief Counsel
1200 K Street, NW, Suite 340
Washington, D.C. 20005-4026
202-326-4020, ext. 4779
202-326-4112 (facsimile)
efile@pbgc.gov

Attorneys for Pension Benefit Guaranty Corporation

CERTIFICATE OF SERVICE

I certify that on the **3rd day of July, 2014**, I filed the foregoing pleading electronically through the CM/ECF system, which caused all parties or counsel requesting notice to be served by electronic means on the date of filing.

/s/ Katherine B. Kohn
Katherine B. Kohn
Attorney