

ISRAEL GOLDOWITZ

Chief Counsel

CHARLES L. FINKE

Deputy Chief Counsel

LORI A. BUTLER

Assistant Chief Counsel

CAMEO M. KAISLER

MICHAEL BAIRD

Attorneys

PENSION BENEFIT GUARANTY
CORPORATION

Office of the Chief Counsel

1200 K Street, N.W.

Washington, D.C. 20005

Tel.: (202) 326-4020, ext. 6912

Fax: (202) 326-4112

Emails: kaisler.cameo@pbgc.gov and
efile@pbgc.gov

*Attorneys for Pension Benefit Guaranty
Corporation*

Hearing Date: February 2, 2016 at 10:00 am (ET)

**Objection Deadline: January 22, 2016 at 4:00 pm
(ET)**

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

SHELLEY FOOD STORES, INC. II
dba SHELLEY'S FOODSERVICE

Debtor.

Chapter 11

Case No. 15-23535 (RDD)

**OBJECTION OF THE PENSION BENEFIT GUARANTY CORPORATION
TO MOTION OF DEBTOR FOR ORDER (I) AUTHORIZING ENTRY INTO USE &
OCCUPANCY AND ADMINISTRATIVE SERVICES AGREEMENTS BETWEEN THE
DEBTOR AND SOLOMON FOODSERVICE, INC.; (II) PURSUANT TO §§ 105, 363 OF
THE BANKRUPTCY CODE AND RULES 2002 AND 6004 OF THE FEDERAL RULES
OF BANKRUPTCY PROCEDURE AUTHORIZING A PRIVATE SALE OF
SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS TO SOLOMON
FOODSERVICE, INC. FREE AND CLEAR OF ANY AND ALL LIENS, CLAIMS,
ENCUMBRANCES AND OTHER INTERESTS; (III) APPROVING THE PURCHASE
AND SALE AGREEMENT IN CONNECTION THEREWITH; AND (IV) PURSUANT
TO §§ 105 AND 365 OF THE BANKRUPTCY CODE AND RULES 6006 AND 9014 OF
THE FEDERAL RULES OF BANKRUPTCY PROCEDURE AUTHORIZING THE
ASSUMPTION AND ASSIGNMENT OF THE DEBTOR'S NONRESIDENTIAL REAL
PROPERTY LEASE USED IN CONNECTION WITH THE PURCHASED BUSINESS
AND FIXING APPLICABLE CURE COSTS FOR SUCH LEASE**

The Pension Benefit Guaranty Corporation (“PBGC”), a creditor in the above-captioned proceedings, hereby files this objection to the above-mentioned Motion filed by Shelley Food Stores, Inc. II (“Debtor”) on January 12, 2016 (Docket No. 62). The Motion seeks, among other things, authorization of a private sale of substantially all of the Debtor’s assets free and clear of all claims, liens, encumbrances and interests, to Solomon Foodservice, Inc. (“Purchaser”) and approval of the Purchase and Sale Agreement (the “Purchase Agreement”).¹

PBGC objects to the Motion because the Purchase Agreement fails to disclose whether the Debtor’s defined benefit pension plan will be assumed by the Purchaser. Rather, the Purchase Agreement inexplicably recites that the Debtor has no obligation to any pension plan.

PBGC also objects to the Motion because it does not provide protection for pension plan and participant records.

PBGC further objects because there has been no marketing process for the sale of the Debtor’s assets. Moreover, there is no opportunity for others to bid on the assets via auction or otherwise.

PBGC will communicate its concerns to the Debtor and will provide the Debtor with proposed language that will resolve at least some of its objections. While PBGC hopes that a consensual resolution is possible, it nonetheless files this objection as a protective measure to preserve its rights because a resolution may not be reached before the objection deadline.

¹ Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

I. BACKGROUND

A. PBGC and ERISA

PBGC is a wholly owned United States government corporation and an agency of the United States that administers and enforces the defined benefit pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”). *See* 29 U.S.C. §§ 1301-1461 (2012 & Supp. II 2014). PBGC guarantees the payment of certain pension benefits upon the termination of a single-employer pension plan covered by Title IV of ERISA. When an underfunded plan terminates, PBGC generally becomes trustee of the plan and supplements any assets remaining in the plan with its insurance funds to pay to the retired employees their pension benefits, subject to statutory limits. *See* 29 U.S.C. §§ 1321-1322, 1342, 1361. PBGC’s insurance funds are made up of, among other things, (i) the agency’s recoveries of terminated pension plans and (ii) premiums paid by pension plan sponsors.

ERISA provides the exclusive means for a plan sponsor to terminate a pension plan: a standard termination or a distress termination. *See* 29 U.S.C. § 1341(a)(1); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999). A standard termination requires sufficient assets to pay all of the pension plan’s promised benefits. *See* 29 U.S.C. § 1341(b)(1)(D). A distress termination requires a showing, among other things, that the plan sponsor and each controlled group member satisfy one of the three financial distress criteria: (i) liquidation in bankruptcy; (ii) inability to reorganize in bankruptcy unless the pension plan terminates; or (iii) inability to pay debts when due and continue in business unless the pension plan terminates. *See* 29 U.S.C. § 1341(c)(2)(B). Separate from a standard or distress termination, PBGC can initiate

termination of a pension plan pursuant to section 4042 of ERISA when certain statutory criteria are satisfied (“PBGC-initiated termination”). *See* 29 U.S.C. § 1342.

Upon a distress termination or a PBGC-initiated termination, the contributing sponsor and its controlled group members are subject to certain liabilities with regard to the terminated pension plan, for which they are jointly and severally liable to PBGC: (i) the unfunded benefit liabilities of the pension plan, 29 U.S.C. § 1362(a), (b); (ii) any unpaid flat-rate and variable-rate premiums, 29 U.S.C. § 1307; and (iii) termination premiums at the rate of \$1,250.00 per plan participant per year for three years, 29 U.S.C. § 1306(a)(7). If the plan termination occurs while the plan sponsor and any controlled group members are attempting to reorganize in Chapter 11, and they ultimately obtain confirmation of a Chapter 11 plan of reorganization, their obligation to PBGC for termination premiums does not arise until after the Chapter 11 plan is confirmed and the Debtor exits bankruptcy. 29 U.S.C. § 1306(a)(7)(B). Thus, under those circumstances, termination premiums are not a dischargeable claim or debt within the meaning of 11 U.S.C. §§ 101(5), 1141.

Finally, because PBGC typically becomes the statutory trustee of the terminated pension plan, it has authority to collect all amounts owed to the pension plan, including any unpaid minimum funding contributions for which the plan sponsor and controlled group members are jointly and severally liable. 29 U.S.C. §§ 1082(b)(2), 1342(d), 1362(c); 26 U.S.C. § 412(b)(2).

B. The Debtor’s Pension Plan

The Debtor is a contributing sponsor to the Shelley Food Stores, Inc. II Pension Trust (the “Pension Plan”). Upon information and belief, the Pension Plan is a single-employer defined benefit pension plan covered by Title IV of ERISA. *See* 29 U.S.C. § 1321. The Pension Plan is estimated to cover 31 of the Debtor’s current and former employees, with an estimated

unfunded benefit liability of \$404,997.00. PBGC's investigation into the status and funding levels of the Pension Plan is ongoing.²

PBGC anticipates filing claims against the Debtor for the following statutory liabilities, as explained above: (i) the unfunded benefit liabilities of the Pension Plans; (ii) due and unpaid minimum funding contributions owed to the Pension Plans; and (iii) statutory premiums owed to PBGC. PBGC's claim for the unfunded benefit liabilities of the Pension Plans will be contingent upon termination of the Pension Plan. Termination, however, is not the preferred outcome for the Pension Plan, nor should it be treated as a *fait accompli*.

C. The Debtor's Bankruptcy Proceedings

On October 23, 2015, the Debtor filed a voluntary Chapter 11 petition with this Court. The Motion was filed on January 12, 2016. A hearing on relief sought in the Motion—specifically, the approval of the sale and the buyer protections asserted therein—is scheduled for February 2, 2016.

II. ARGUMENT

A. The Purchase Agreement Must Be Modified To Acknowledge the Existence of the Pension Plan and Clarify Whether the Purchaser Will Assume the Pension Plan and, If It Will Assume the Pension Plan, that the Purchaser Will Maintain the Plan Pursuant to ERISA

In Section 4.3(1) of the Purchase Agreement, the Debtor represents and warrants that it has no obligation to any defined benefit pension plan covered by Title IV of ERISA. Contrary to this representation, in its answer to question number 25 in Debtor's Statement of Financial

² Although the Debtor filed its Chapter 11 petition with this Court on October 23, 2015, PBGC did not receive notice of the Debtor's bankruptcy filing until November 4, 2015. Despite numerous information requests sent to the Debtor both before and after the bankruptcy filing, the Debtor did not begin to provide any requested Pension Plan information to PBGC until January 18, 2016, and not all of the requested information has been provided or reviewed.

Affairs, the Debtor reports that it is responsible for contributions to the Pension Plan. (Docket No. 24.) The Purchase Agreement must be amended to correctly reflect the Debtor's sponsorship of the Pension Plan.

In addition, Section 4.3(1) states that any single-employer pension plan to which Seller has any obligation "shall be terminated effective upon the Closing Date." As set forth above, ERISA provides the exclusive means for termination of a pension plan and a pension plan must be terminated in coordination with PBGC. The Debtor has not sought to terminate the Pension Plan and PBGC has not commenced a PBGC-initiated termination. PBGC objects to this provision of the Purchase Agreement and the language should be removed.

Further, the Purchase Agreement is silent with regard to Pension Plan assumption. PBGC will contact the Debtor and Purchaser to inquire whether the Purchaser intends to assume the Pension Plan and the Purchase Agreement must clarify whether the Pension Plan will be assumed. If the Purchaser will assume the Pension Plan, then the Purchase Agreement should make clear that the Purchaser will assume, administer, and maintain the Pension Plan in accordance with ERISA.

B. The Purchase Agreement Should Ensure Access to Records Needed for Pension Plan Administration

Section 1.3(e) of the Purchase Agreement specifically defines Excluded Assets to include the Debtor's "books and business records of every kind." However, this provision is silent with regards to documents pertaining to the Pension Plan. If the Pension Plan terminates, PBGC will become statutory trustee of the Pension Plan and, as such, will have all of the rights and powers of a trustee specified in ERISA or otherwise granted by law with respect to the Pension Plan. Moreover, if PBGC becomes statutory trustee it will become responsible for paying benefits under the Pension Plan. Consequently, preservation and retention of records of the Pension Plan

and employee records of Pension Plan participants are essential to enable PBGC to fully carry out its responsibilities under Title IV of ERISA to protect the rights of Pension Plan participants and pay benefits.

Since Debtor apparently intends to liquidate all of its assets as expeditiously as possible, it is crucial that access to such records be preserved. PBGC will provide the Debtor with language that can be added to the Purchase Agreement and, to any sale order, specifically requiring the Purchaser to store, preserve, and provide access to all pension documents, personnel records, employee files, and any related documents or information for all participants in the Pension Plan, if the Purchaser obtains such records..

C. The Debtor Fails to Disclose Any Marketing Efforts and the Private Sale Precludes Competitive Bidding that Could Maximize Value to the Debtor's Estate

When selling estate assets, a debtor has a duty to obtain the highest price or greatest overall benefit possible for the estate. *See In re Integrated Res., Inc.*, 147 B.R. 650, 659 (S.D.N.Y. 1992) (citing *In re Atlanta Packaging Prods., Inc.*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988)); *see also In re Reading Broad, Inc.*, 386 B.R. 562, 575 (Bankr. E.D. Pa. 2008) (noting that “the purpose of a bankruptcy sale is to obtain the highest and best price for the estate and thus for its creditors and equity holders”). To that end, “it is the overarching objective of sales in bankruptcy to maximize value to the estate.” *In re Metaldyne Corp.*, 409 B.R. 661, 667-68 (Bankr. S.D.N.Y. 2009).

The Debtor's request for approval of the Purchase Agreement and lack of any meaningful marketing of the sale of its assets greatly concerns PBGC. The Debtor has a fiduciary duty to establish a sale process which will “maximize value to the estate.” *In re Metaldyne Corp.*, 409 B.R. at 668. In this case, the Debtor fails to disclose what marketing, if any, has been conducted.

The Debtor claims although it is “currently operational, it is not generating sufficient revenues to maintain profitability, and has, therefore made a reasonable business decision to maximize the value of its assets for creditors by seeking an **immediate and expedited** strategic transaction ... pursuant to the terms of Purchase Agreement.” Motion, pp. 5-6 (emphasis added). However, it is unclear whether additional time could be provided to allow for a competitive auction process that maximizes value to the estate, which in turn, could benefit creditors.

Further, the Debtor has not proffered any documentation to support the assertions made in the Motion that the sale to Purchaser is in the best interests of the estate. In order to assess whether the Debtor’s proposed sale is justified and is in the best interests of the estate, the Debtor should disclose at a minimum the process and timing through which the property was marketed, any recent appraisals of the property, and any valuations obtained from sources other than the Debtor. Additionally, the Motion contemplates that Scott Geller, the Debtor’s owner, will be offered both employment and equity by the Purchaser at a future date. This arrangement requires heightened scrutiny of this private sale. Unless and until the Debtor provides this information, the Debtor has failed to provide justification for approval of the Purchase Agreement and has failed to demonstrate that the proposed sale is in the best interests of the estate.

III. CONCLUSION

For the foregoing reasons, PBGC requests that the Motion be denied unless modified as described above.

DATED: January 21, 2016
Washington, D.C.

Respectfully submitted,

By: /s/ Cameo M. Kaisler

ISRAEL GOLDOWITZ

Chief Counsel

CHARLES L. FINKE

Deputy Chief Counsel

LORI A. BUTLER

Assistant Chief Counsel

CAMEO M. KAISLER

MICHAEL BAIRD

Attorneys

Office of the Chief Counsel

**PENSION BENEFIT GUARANTY
CORPORATION**

1200 K Street, N.W.

Washington, D.C. 20005

Tel.: (202) 326-4020, ext. 6912

Fax: (202) 326-4112

Emails: kaisler.cameo@pbgc.gov and
efile@pbgc.gov

*Attorneys for Pension Benefit Guaranty
Corporation*