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

In re:)	
)	Chapter 11
CENVEO, INC., <i>et al.</i> , ¹)	
)	Case No. 18-22178 (RDD)
Debtors.)	
)	(Jointly Administered)
)	

**PENSION BENEFIT GUARANTY CORPORATION’S OBJECTION
 TO MOTION OF CENVEO, INC., *ET AL.*, FOR ENTRY OF AN ORDER
 APPROVING: (I) THE ADEQUACY OF INFORMATION IN THE DISCLOSURE
 STATEMENT; (II) SOLICITATION AND NOTICE PROCEDURES;
 (III) FORMS OF BALLOTS AND NOTICES IN CONNECTION THEREWITH; AND
(IV) CERTAIN DATES WITH RESPECT THERETO**

¹ The last four digits of Cenveo, Inc.’s tax identification number are 0533. Due to the large number of debtor entities in these chapter 11 cases, which cases are being jointly administered for procedural purposes, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of Cenveo’s claims and noticing agent at <https://cases.primeclerk.com/cenveo>.

The Pension Benefit Guaranty Corporation (“PBGC”) hereby objects on its own behalf and on behalf of The Cenveo Corporation Pension Plan and The Lancaster Press Pressmen and Bindery Workers Pension Plan (collectively, the “Pension Plans”) to Cenveo, Inc. and its debtor affiliates’ (collectively, “Cenveo” or the “Debtors”) proposed Disclosure Statement (ECF No. 255, the “Disclosure Statement”). The Disclosure Statement fails to provide “adequate information” as defined under the Bankruptcy Code,² because it does not provide creditors with critical information about (1) the status of the Pension Plans and the statutory procedures required for any contemplated termination of the Pension Plans; and (2) PBGC’s contingent claims of over \$179 million – the largest unsecured claims in this case.

First, the Disclosure Statement does not adequately inform creditors about the disposition of the Pension Plans and the impact of any contemplated termination of the Pension Plans on the effectiveness of the Debtors’ Plan of Reorganization (ECF No. 254, the “POR”). PBGC has grave concerns that Cenveo seeks a decision by this Court on termination of the Pension Plans without: (i) properly moving this Court for such relief; (ii) providing PBGC with the information it needs to evaluate such a motion; and (iii) creating a record that will enable this Court to make informed findings of fact, as required by statute.

The Debtors cannot simply terminate the Pension Plans by including provisions in a proposed confirmation order; PBGC is entitled to seek discovery and conduct an evidentiary hearing to enable the Court to determine whether the test is met. Since termination of the Pension Plans is a condition precedent to effectiveness of the proposed POR, creditors need information about the statutory process for terminating the Pension Plans and the impact of termination proceedings on the effectiveness of the POR.

² 11 U.S.C. §§ 101-1532; *see* § 1125(a) (the “Bankruptcy Code”).

Second, PBGC is the largest unsecured creditor in this case, yet the Disclosure Statement is devoid of any reference to the nature and amount of all of PBGC's claims. The Disclosure Statement must inform creditors of the significant PBGC claims, particularly those that would arise upon termination of the Pension Plans — swamping the claims pool and drastically reducing the already limited recoveries for other unsecured creditors. Creditors also need information about certain PBGC claims that create non-dischargeable, *post-emergence* liabilities for the *reorganized* Debtors, impacting feasibility of the POR.

Accordingly, this Court should not approve the Disclosure Statement in its current form because it fails to meet the standard for adequate information, particularly with respect to information about claims asserted against the Debtors and information relevant to the risks posed to creditors under the POR.

I. BACKGROUND

A. Statutory Background of PBGC & ERISA

1. PBGC is a United States government agency that administers the nation's defined benefit pension insurance program created under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA").³ When an underfunded pension plan covered by Title IV of ERISA terminates, PBGC typically becomes the statutory trustee of the plan and, subject to certain statutory limitations, pays the plan participants and their beneficiaries guaranteed benefits from its insurance funds.⁴

2. The contributing sponsor of a pension plan and members of its controlled group⁵ are financially responsible for the pension plan, which includes, *inter alia*, (1) paying the

³ *As amended*, 29 U.S.C. §§ 1301-1461 (2012 & Supp. IV 2016).

⁴ *See* 29 U.S.C. §§ 1322, 1361.

⁵ *See* 29 U.S.C. § 1301(a)(13), (14); 26 U.S.C. § 414(b), (c).

statutorily required minimum funding contributions to the pension plan;⁶ (2) paying statutory premiums to PBGC;⁷ and (3) paying any unfunded benefit liabilities to PBGC if the pension plan terminates.⁸

3. If the pension plan terminates, the sponsor and its controlled group members are also liable for termination premiums to PBGC at the rate of \$1,250 per plan participant per year for three years (“Termination Premiums”).⁹ This obligation applies to a plan sponsor in bankruptcy proceedings. For a sponsor that reorganizes in chapter 11, however, the reorganized debtor must pay the Termination Premiums after the chapter 11 plan is confirmed and the reorganized debtor emerges from bankruptcy.¹⁰ Thus, under these circumstances, Termination Premiums are not a dischargeable claim or debt within the meaning of 11 U.S.C. §§ 101(5) and 1141.

4. The sponsor and its controlled group members are each jointly and severally liable for all these financial obligations and liabilities of a pension plan¹¹ and PBGC is empowered to collect any amounts owed to it or to a pension plan for which it has become trustee.¹²

5. PBGC provides a backstop—it ensures that employees and their beneficiaries are not “completely ‘deprived of anticipated retirement benefits by the termination of pension plans before sufficient assets have been accumulated in the plans.’”¹³ Accordingly, Title IV

⁶ 26 U.S.C. §§ 412(b)(1), (2); 29 U.S.C. §§ 1082(b)(1), (2).

⁷ 29 U.S.C. §§ 1306, 1307(e)(2).

⁸ 29 U.S.C. §§ 1301(a)(18), 1362.

⁹ See 29 U.S.C. § 1306(a)(7).

¹⁰ *PBGC v. Oneida Ltd.*, 562 F.3d 154, 157 (2d Cir. 2009). See also 29 U.S.C. §§ 1306, 1307(e)(2); 11 U.S.C. §§ 101(5), 1141.

¹¹ 29 U.S.C. §§ 1082(b)(2), 1362(a), 1307(e)(2); see 29 U.S.C. § 1301(a)(18).

¹² 29 U.S.C. § 1342(d)(1)(B)(ii).

¹³ *PBGC v. LTV Corp.*, 496 U.S. 633, 637 (1990)(citations omitted).

establishes the exclusive means for terminating a pension plan.¹⁴ If a pension plan has sufficient assets to cover its liabilities, the sponsor can terminate it in a standard termination under 29 U.S.C. § 1341(b). If a plan does not have the assets to pay those benefits, PBGC can initiate termination of a pension plan under certain circumstances.¹⁵ Additionally, the sponsor can apply for a distress termination under 29 U.S.C. § 1341(b) if it and its controlled group members meet certain distress tests.¹⁶

6. For a distress termination, the sponsor must submit an application package to PBGC that includes information demonstrating that the sponsor and each of its controlled group members satisfy one of three statutory criteria, which are: (1) liquidation in bankruptcy; (2) reorganization in bankruptcy; and (3) inability to pay debts when due.¹⁷ Additionally, the sponsor must provide affected parties, including PBGC and plan participants, at least 60 days advance written notice of its intent to voluntarily terminate the pension plan.¹⁸

7. PBGC then reviews the information to ensure that the distress termination application is completed in accordance with statutory and regulatory requirements. However, PBGC cannot process the distress termination if it would “violate the terms and conditions of an existing collective bargaining agreement.”¹⁹

8. Under the “reorganization in bankruptcy” test, ERISA requires the sponsor to make a showing to the bankruptcy court that without termination of the pension plan, it will be

¹⁴ 29 U.S.C. §§ 1341, 1342.

¹⁵ *See* 29 U.S.C. § 1342.

¹⁶ *See* 29 U.S.C. § 1341(c).

¹⁷ *Id.*

¹⁸ 29 U.S.C. § 1341(a)(2).

¹⁹ 29 U.S.C. § 1341(a)(3).

unable to pay all its debts under *any* plan of reorganization and will be unable to continue in business outside of chapter 11.²⁰

9. Congress carefully considered how these ERISA provisions should operate in a chapter 11 bankruptcy proceeding. Congress intended the “reorganization in bankruptcy” distress test to be a test of last resort that would apply only in those cases of severe business hardship.²¹ As one court has observed, the purpose of the statute is to “limit to cases of severe business hardship the ability of plan sponsors to terminate their pension plans and thereby shift liability for guaranteed benefits onto other insurance premium payers in the PBGC programs.”²²

10. A plan sponsor must demonstrate that it has pursued and exhausted *all* realistic measures short of termination that would make funding and maintaining the pension plan affordable, such as obtaining minimum funding waivers or freezing future accruals of benefits under the pension plan; cutting non-pension expenditures such as payroll, capital acquisitions, and overhead so that more cash flow will be available to satisfy pension funding requirements; or finding an investor or lender who will finance the employer while it continues to fund and maintain the pension plan.

²⁰ 29 U.S.C. § 1341(c)(2)(B)(ii)(IV). See *In re US Airways Grp.*, 296 B.R. 734, (Bankr. E.D. Va. 2003); *In re Wire Rope Corp. of Am., Inc.*, 287 B.R. 771, 777 (Bankr. W.D. Mo. 2002); *In re Seqell Mfg. Co.*, 195 B.R. 180, 185 (Bankr. N.D. Ga. 1996)(quoting “The reference in the statute to “a” plan of reorganization does not permit a distress termination simply because a particular plan requires it; rather the test is whether the debtor can obtain confirmation of *any* plan of reorganization without termination of the retirement plan.”).

²¹ H.R. Rep. No. 300, 99th Cong., 1st Sess. 278, 279 (1985), reprinted in 1986 U.S.C.C.A.N. 929-30.

²² *US Airways*, 296 B.R. at 743 (quoting *Wire Rope*, 287 B.R. at 777). See also, H.R. Rep. No. 300, 99th Cong., 1st Sess. 278, 279 (1985), reprinted in 1986 U.S.C.C.A.N. 929-30.

11. The rigorous nature of the distress test makes it especially important to establish a fully-developed factual record. PBGC is entitled to request discovery and an evidentiary hearing to gather and evaluate the facts relevant to such a judicial finding.²³

12. After the bankruptcy court makes a factual determination regarding whether a pension plan must be terminated to enable the debtor to reorganize, PBGC then makes a determination regarding the ultimate sufficiency of the distress application.²⁴

B. The Pension Plans, the Debtors' Bankruptcy Case, and PBGC's Claims

13. The Debtors sponsor the Pension Plans, which are two single-employer defined benefit plans covered under Title IV of ERISA. The Pension Plans collectively cover an estimated 6,591 of the Debtors' current and former employees.

14. On February 2, 2018, the Debtors each filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in this Court.²⁵

15. On February 5, 2018, this Court entered an order directing that these chapter 11 cases be jointly administered.²⁶

16. On February 14, 2018, the United States Trustee ("UST") appointed an Official Committee of Unsecured Creditors ("Committee") pursuant to section 1102(a) of the Bankruptcy Code.²⁷

17. On March 15, 2018, this Court entered an order directing the UST to appoint an examiner to review and report on the Debtors' and Committee's investigations regarding

²³ *See In re Sewell Mfg.*, 195 B.R. at 185.

²⁴ *See id.*

²⁵ ECF No. 1.

²⁶ ECF No. 33.

²⁷ ECF No. 93.

transactions involving members of the Burton family.²⁸ The UST appointed Susheel Kirpalani as the examiner.²⁹

18. On April 2, 2018, the Debtors filed their Disclosure Statement and POR.

19. On April 9, 2018, PBGC filed contingent claims against each of the Debtors for the following statutory liabilities for the Pension Plans: (1) the unfunded benefit liabilities of the Pension Plans totaling \$155 million; (2) due and unpaid minimum funding contributions owed to the Pension Plans in an amount of \$5,432,722; and (3) statutory premiums, including Termination Premiums, owed to PBGC in an unliquidated amount. PBGC estimates that, if both Pension Plans terminate, the amount of Termination Premiums for the Pension Plans would be \$8.2 million per year – more than \$24 million total owed to PBGC by the reorganized Debtors over the three years following the Debtors’ emergence from bankruptcy.

II. OBJECTIONS

20. The Disclosure Statement fails to provide “adequate information” as required under 11 U.S.C. § 1125(a) because it does not provide creditors with vital information about (1) the status of the Pension Plans and the statutory procedure required for any contemplated termination of the Pension Plans; and (2) PBGC’s claims – the largest unsecured claims in this case. The Bankruptcy Code states that “adequate information” is:

information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records...that would enable such a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan.³⁰

²⁸ ECF No. 203.

²⁹ ECF No. 234.

³⁰ 11 U.S.C. § 1125(a).

21. As the Debtors noted, when determining whether a disclosure statement contains adequate information as required under section 1125 of the Bankruptcy Code, courts look for disclosures related to a list of topics, including “claims asserted against the debtor” and “information relevant to the risks posed to creditors under the plan.”³¹

22. The Debtors’ Motion asserts that disclosure regarding all topics is not necessary in every case.³² Although disclosure of all topics listed may not be necessary in some cases, courts have found that in other cases the list is not exhaustive and may not sufficiently provide adequate information for creditors to evaluate a plan.³³ Nonetheless, courts have found that the list provides “a useful starting point for the Court’s analysis of the adequacy of the disclosure statement.”³⁴

23. In all cases, however, the “facts which inform claimants about the financial results of acceptance or rejection of a plan, must be included.”³⁵ Specifically, information regarding claims against the debtor and risks posed to creditors under a plan of reorganization is information affecting the financial impact of a plan that creditors in all cases would consider crucial to their voting.

³¹ Motion of Cenveo, Inc. *et al.*, for Entry of an Order Approving: (I) The Adequacy of Information in the Disclosure Statement; (II) Solicitation and Notice Procedures; (III) Forms of Ballots and Notices in Connection Therewith; and (IV) Certain Dates with Respect Thereto (ECF No. 256)(hereinafter the “Motion”) at 11-12 (listing 15 topics for disclosure)(citing to *In re U.S. Brass Corp.* 194 B.R. 420, 424-25 (Bankr. E.D. Tex 1996); *see also In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 170-71 (Bankr. S.D. Ohio 1988)(enumerating factors courts have considered in determining the adequacy of information provided in a disclosure statement); *In re Metrocraft Pub. Serv., Inc.*, 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984).

³² Motion at 12.

³³ *In re Metrocraft Pub. Serv., Inc.*, 39 B.R. at 568.

³⁴ *Id.*

³⁵ *In re Galerie Des Monnaies of Geneva, Ltd.*, 55 B.R. 253, 259 (Bankr. SDNY 1985).

24. The Debtors' Disclosure Statement fails to meet the Bankruptcy Code's standard for adequate information, particularly with respect to information about claims asserted against the Debtors and information relevant to the risks posed to creditors under the POR.

A. The Disclosure Statement fails to provide adequate information about the disposition of the Pension Plans and the impact of any contemplated termination of the Pension Plans on the effectiveness of the POR.

25. The Disclosure Statement fails to provide *any* information about the Debtors' method, timing, or likelihood of success in effecting termination of the Pension Plans, even though the Debtors include termination of the Pension Plans as a condition precedent to the Plan's effectiveness. The Debtors simply state, ". . . it is a condition to the effectiveness of the Plan that the Bankruptcy Court enter an order (which may include the Confirmation Order), either terminating the Defined Benefit Pension Plans or providing for the treatment of such pension plans that is satisfactory to the Debtors and the Requisite First Lien Creditors."³⁶

26. The Disclosure Statement should disclose that, for the Pension Plans to be terminated, the Debtors are required to meet the applicable requirements of 29 U.S.C. § 1341(c) and the regulations thereunder. ERISA requires that the Debtors, *inter alia*, provide advance notice of a potential termination to all participants and obtain a finding from this Court that termination satisfies the "reorganization in bankruptcy" test—*i.e.*, that unless the Pension Plans are terminated, the Debtors will not be able to pay their debts under *any* plan of reorganization and continue in business outside the chapter 11 reorganization process.³⁷ The Debtors bear the

³⁶ Disclosure Statement, p. 12, ECF No. 255.

³⁷ *In re Philip Serv. Corp.*, 310 B.R. 802, 806 (Bankr. S.D. Tex. 2004)(holding 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 Sewell Mfg.*, 195 B.R. at 184-85; *In re Resol Mfg. Co.*, 110 B.R. 858, 862 (Bankr. N.D. Ill. 1990)(describing the reorganization test as a "*but for*" test).

burden of proof to show that they meet the test. PBGC is entitled to seek discovery and conduct an evidentiary hearing to enable the Court to determine whether the test is met.³⁸

27. The Disclosure Statement fails to provide that, under the distress termination provisions of ERISA, the Pension Plans may terminate only if: (1) the plan administrator provides affected parties, including PBGC and plan participants, at least 60-day advance written notice of its intent to voluntarily terminate the Pension Plans, as required under 29 U.S.C. § 1341(a)(2); (2) the plan administrator provides the PBGC with the information set forth in 29 U.S.C. § 1341(c)(2)(A); and (3) PBGC makes certain determinations based upon the required disclosures.³⁹ For the Debtors to terminate the Pension Plans, they must also file a motion with this Court requesting a factual finding that, but for the termination of the Pension Plans, the Debtors cannot confirm *any* plan of reorganization and emerge from bankruptcy.⁴⁰ Further, every controlled group member, *i.e.* all of the Debtors, as well as all non-Debtor controlled group members, must qualify under one of the four distress tests set forth in subparagraphs (i) through (iv) of 29 U.S.C. § 1342(c)(2)(B), although it is not necessary for every controlled group member to qualify under the same test.⁴¹

28. Additionally, the Disclosure Statement should explain that since the Pension Plans are part of a collective bargaining agreement, the Debtors have the additional burden of showing that they are entitled to modify the collective bargaining agreement under Section 1113

³⁸ *In re US Airways*, 296 B.R. at 743-44 (finding the burden of proof is on the debtors to establish that they meet the reorganization in bankruptcy test).

³⁹ 29 U.S.C. §§ 1341(c)(1)(A), (B). PBGC reviews the notice of intent to terminate to determine whether it complies with ERISA's requirements. PBGC must notify the plan administrator of its determination in this regard. 29 U.S.C. §§ 4041.44(a), (b). PBGC must also make a determination regarding the plan's sufficiency for guaranteed benefits or benefit liabilities. 29 U.S.C. § 1341(c)(3)(A); 29 C.F.R. § 4041.47.

⁴⁰ 29 USC § 1341(c)(2)(B)(ii)(IV).

⁴¹ 29 U.S.C. § 1342(c)(2)(B) ("The requirements of this subparagraph are met if each person who is (as of the proposed termination date) a contributing sponsor of such plan or member of such sponsor's controlled group meets the requirements of any of the following clauses").

of the Bankruptcy Code. Congress made it more difficult to terminate a pension plan maintained under a collective bargaining agreement. In those instances, PBGC reviews the distress termination application information to ensure that the distress termination is completed in accordance with statutory and regulatory requirements. However, PBGC cannot process the distress termination if it would “violate the terms and conditions of an existing collective bargaining agreement.”⁴² Here, the collective bargaining agreement for at least one of the Debtors’ plants remains in effect and provides for the continuation of the Pension Plans.

29. Because of the statutory requirements under ERISA and the requisite fact-finding by this Court to terminate the Pension Plans, the Debtors cannot simply terminate the Pension Plans by including provisions in a proposed confirmation order – a separate motion to this Court supported by a full factual record is required. Since termination of the Pension Plans is a condition precedent to effectiveness of the proposed POR, creditors need information about the statutory process for terminating the Pension Plans and that termination proceedings could delay or impede the POR’s effectiveness.

B. The Disclosure Statement fails to provide adequate information about PBGC’s claims, the largest unsecured claims in this case, and the financial impact for other unsecured creditors.

30. PBGC is the largest unsecured creditor in this case, yet the Disclosure Statement contains not a single reference to the nature and amount of all of PBGC’s claims. The Disclosure Statement should inform creditors of the significant PBGC claims that would arise upon termination of the Pension Plans. PBGC has a claim, *inter alia*, for unfunded benefit liabilities of the Pension Plans, totaling an estimated \$155 million. This claim arises only if the

⁴² 29 U.S.C. § 1341(a)(3).

Pension Plans are terminated and would drastically reduce recoveries for other unsecured creditors.

31. Additionally, if the Pension Plans are terminated, and the Debtors obtain confirmation of their POR, then each of the reorganized Debtors will be liable to PBGC for Termination Premiums totaling an estimated \$24,127,500, to be paid over a period of three years *following the Debtors' exit from bankruptcy*. As discussed above, Termination Premiums are not a dischargeable claim or debt within the meaning of 11 U.S.C. §§ 101(5) and 1141. As a result, the Debtors will be required to pay the Termination Premiums in full and in cash in the three years following their emergence from bankruptcy.

32. The Disclosure Statement also fails to contemplate the possibility that efforts at Pension Plan termination may fail, given the stringent standard that must be met for the Pension Plans to be terminated. Should that occur, the Debtors' ongoing obligations and liabilities to the Pension Plans and PBGC will not be discharged. Creditors need this information to make an informed decision about how to vote on the POR.

33. For the reasons set forth above, the current form of the Debtors' Disclosure Statement fails to meet the Bankruptcy Code's standard for adequate information, particularly with respect to information about claims asserted against the Debtors and information relevant to the risks posed to creditors under the POR. Absent substantial modification to the Disclosure Statement as described above, the Court should deny the Debtors' motion for its approval.

III. RESERVATION OF RIGHTS

PBGC reserves all claims, defenses, and rights to object to any modification of the Debtors' Disclosure Statement.

IV. CONCLUSION

WHEREFORE, in consideration of this Objection, PBGC respectfully requests that this Court enter an order (1) denying the Motion as currently presented, or, in the alternative, modifying the provisions of the Disclosure Statement and the final order granting the Motion to include the information about the Pension Plans and PBGC's claims, as outlined above; and (2) granting any and all relief as this Court deems just and proper.

Dated: April 25, 2018

Respectfully submitted,

/s/ Shari D. Williams

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