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UNITED STATES BANKRUPTCY COURT
 SOUTHERN DISTRICT OF NEW YORK

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In Re:)	Chapter 11
)	
)	
)	
ROBERT E. DERECKTOR, INC.)	Case No. 12-22393 (RDD)
)	
)	
Debtor)	
_____)	

LIMITED OBJECTION OF THE PENSION BENEFIT GUARANTY CORPORATION TO THE FIRST AMENDED PLAN OF REORGANIZATION

The Pension Benefit Guaranty Corporation (“PBGC”)¹, on its own and on behalf of the Retirement Income Plan for Bargaining Unit Employees of Robert E. Derecktor of Rhode Island, Inc. (“Pension Plan”), hereby files this limited objection to the Debtor’s First Amended Plan of Reorganization (“POR”) (Docket No. 172) filed by the Debtor on or about July 24, 2014. PBGC

¹ Capitalized terms not defined herein are defined in the Disclosure Statement or the Plan of Reorganization.

objects to the POR because (1) the POR does not address the Debtor's obligations to the Pension Plan and (2) it contains illegal discharges, releases, and injunctions.

BACKGROUND

A. PBGC and the Employee Retirement Income Security Act

PBGC is a wholly-owned United States government corporation, and an agency of the United States, that administers the defined benefit pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1301-1461 (2012). The program guarantees a secure, predictable retirement for nearly 32 million American workers in approximately 23,000 private sector pension plans.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 plan participants and their beneficiaries their pension benefits up to the limits established by Title IV. *See* 29 U.S.C. §§ 1321, 1322, 1361. PBGC is self-financed and is funded from four sources: (i) premiums paid by plan sponsors and their controlled group members; (ii) recoveries from employers whose underfunded pension plans terminate and their controlled group members; (iii) remaining assets, if any, in terminated plans; and (iv) investment income.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. ERISA imposes responsibility on a controlled group member regardless of whether its employees participate in the pension plan. The responsibilities of the plan sponsor and controlled group members to an on-going pension plan include the following: (1) paying the statutorily required minimum

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

³ 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(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.

funding contributions to the pension plan, 26 U.S.C. § 412(b)(1), (2); 29 U.S.C.A. § 1082(b)(1), (2); and (2) paying flat-rate and variable-rate insurance premiums to PBGC, 29 U.S.C. §§ 1306, 1307.

The liabilities of the plan sponsor and controlled group members with regard to the pension plan are joint and several. *See* 26 U.S.C. § 412(b)(2); 29 U.S.C.A. § 1082(b)(2). *See also* 29 U.S.C. §§ 1307(e)(2), 1362(a). Therefore, should the plan sponsor default on its obligations to a pension plan, the resulting liability for the plan rests with its controlled group members.

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 and distress termination, PBGC can initiate termination of a pension plan pursuant to section 4042 of ERISA (“PBGC-initiated termination”). 29 U.S.C. § 1342.

Upon a distress termination or a PBGC-initiated termination of a pension plan, the contributing sponsor and controlled group members are still subject to certain liabilities with regard to the terminated pension plan. For example, they become jointly and severally liable to PBGC for unfunded benefit liabilities of the pension plan. 29 U.S.C. § 1362(a), (b). ERISA

explicitly assigns the recovery of a terminated pension plan's unfunded benefit liabilities exclusively to PBGC. 29 U.S.C. § 1362(b).

Upon termination, the plan sponsor and controlled group members remain jointly and severally liable to PBGC for any unpaid premiums — not just the flat-rate and variable-rate premiums, but also a termination premium at the rate of \$1,250 per plan participant per year for three years. *See* 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 exist until after the Chapter 11 plan is confirmed and the Debtor exits bankruptcy. *See* 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. *See* 29 U.S.C. §§ 1082(c), 1342(d), 1362(a), (c); 26 U.S.C. § 412(c).

B. Debtor and the Pension Plan

The Debtor is the sponsor of the Pension Plan, within the meaning of Title IV of ERISA. *See* 29 U.S.C. §1301(a)(13). It is believed that the Pension Plan is a defined benefit plan covered by Title IV of ERISA. *See* 29 U.S.C. § 1321. If the Pension Plan were to terminate, the Debtor and any other members of its controlled group would become jointly and severally liable to PBGC for the Pension Plan's unfunded benefit liability, unpaid premiums, and any unpaid minimum funding contributions. *See* 29 U.S.C. §§ 1082(b), 1306(a)(7), 1362(a); 26 U.S.C. §

412(b).

C. Debtor's Bankruptcy Proceedings

On February 27, 2012, the Debtor filed a voluntary petition under Chapter 11 of Title 11, United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York (the "Court").

PBGC timely filed proofs of claims relating to the Pension Plan for unfunded benefit liabilities, minimum funding contributions, and premiums. The Debtor informed PBGC that it has paid to the Pension Plan the minimum funding contributions owed for plan years 2013 and 2014. PBGC estimates that the amount of the Pension Plan's unfunded benefit liabilities is \$697,128; this claim is contingent on the termination of the Pension Plan. Also, if the Pension Plan terminates in either a distress or PBGC-initiated termination during the bankruptcy's reorganization process, the Debtor would be responsible for approximately \$502,500 in termination premiums upon its emergence from bankruptcy, payable in equal installments over three years.

On June 8, 2014, the Debtor filed its Disclosure Statement. On July 17, 2014, PBGC objected to the Disclosure Statement. In response to the PBGC's objections, *inter alia*, on July 24, 2014, the Debtor filed its First Amended Disclosure Statement ("Disclosure Statement") and on the same day the Court held a hearing on the First Amended Disclosure Statement. At this hearing the Debtor represented on the record that it intended to terminate the Pension Plan in a standard termination and that the POR would reflect that intention, thereby resolving PBGC's objections.

On July 25, 2014, the Court approved the Disclosure Statement, procedures for balloting and scheduled a hearing on the POR for August 28, 2014.

Argument

I. The Debtor's POR Is Not Feasible Until It Properly Addresses Its Obligations Regarding The Pension Plan

Despite the Debtor's representations at the Disclosure Statement hearing that it would fund a standard termination of the Pension Plan, the POR is deafeningly silent as to the Pension Plan's fate. The Debtor has the burden of showing that the POR is feasible, as required by section 1129(a)(11) of the Bankruptcy Code. *See In re Gramercy Twins Associates*, 187 B.R. 112, 126 (Bkrcty.S.D.N.Y. 1995) (the debtor's proposed Chapter 11 plan was not sufficiently feasible to be confirmed because the plan failed to provide for the likely contingency that the debtor would have to repay secured creditor's payment of administrative expenses from its cash collateral). Section 1129(a)(11) provides,

Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

11 U.S.C. § 1129(a)(11); *see also In re Adelpia Bus. Solutions, Inc.*, 341 B.R. 415, 421–22 (Bankr.S.D.N.Y. 2003). “The purposes of section 1129(a)(11) [of the Bankruptcy Code] is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation.” *In re Adelpia Bus. Solutions*, 341 B.R. at 421. There must be a reasonable assurance of success. *Id.* at 422. In this case, it is impossible for the Court or any creditor to infer any assurance of success without the Debtor clearly spelling out what its obligations are regarding the Pension Plan.

Because the Debtor stated on the record its intention to effectuate a standard termination

of the Pension Plan, the POR should provide for it. The POR should lay out a time-table whereby it will meet the statutory requirements under ERISA to complete a standard termination and provide a date certain by when the standard termination will be completed. The standard termination requires that the Pension Plan's assets be sufficient to pay all promised benefits under the Plan. The POR should therefore provide how the Debtor will fund the Pension Plan so that it is sufficient to pay all promised benefits. PBGC currently estimates that the Pension Plan's assets are insufficient by approximately \$670,000. But, the POR does not contain any provisions for the Debtor or Reorganized Debtor to meet such an obligation before or after confirmation.

Until the Debtor properly completes a standard termination of the Pension Plan pursuant to Title IV of ERISA or if the Debtor never completes a standard termination, the Debtor and/or the Reorganized Debtor continue to be responsible for funding and maintaining the Pension Plan pursuant to ERISA and the Internal Revenue Code ("IRC"). The POR should provide for the Debtor's and Reorganized Debtor's continued obligation to maintain the Pension Plan pursuant to ERISA and IRC through confirmation.

PBGC would withdraw this aspect of its objection if the following language were added to the POR and Confirmation Order:

Pension Plan. Until and following the Effective Date, the Debtor and the Reorganized Debtor, respectively, will continue to be the contributing sponsor, within meaning of Title IV of the Employee Retirement Income Security Act ("ERISA"), of the Retirement Income Plan for Bargaining Unit Employees of Robert E. Derecktor of Rhode Island, Inc. ("Pension Plan") and will maintain and administer the Pension Plan in accordance with its terms and the applicable provisions of ERISA and the Internal Revenue Code, including funding the Pension Plan in satisfaction of the minimum funding standards and paying all insurance premiums due and owing to the PBGC.

II. The POR Should Clarify That Its Injunction Provision Does Not Prevent Any Effort To Pursue and Correct Any Fiduciary Breach or Prohibited Transaction Committed In Relation To The Pension Plan

ERISA imposes upon the Debtor and Reorganized Debtor, as a fiduciary, a “prudent man standard of care” in discharging duties with respect to the Pension Plan and prohibits the Debtor and Reorganized Debtor from causing the Pension Plan to engage in transactions with certain parties in interest.⁴ The POR cannot remain silent as to the future of the Pension Plan, leaving it in limbo, and, at the same time, prohibit PBGC from pursuing any losses to the Pension Plan caused by fiduciary breach or prohibited transaction.

PBGC would withdraw this aspect of its objection if the following provision were included in the POR and Confirmation Order:

Nothing in the Debtor’s bankruptcy proceedings, Confirmation Order, Plan of Reorganization, the Bankruptcy Code (and section 1141 thereof), or any other document filed in the Debtor’s bankruptcy case shall in any way be construed to discharge, release, limit, or relieve the Debtor or any other party, in any capacity, from any liability or responsibility with respect to the Retirement Income Plan for Bargaining Unit Employees of Robert E. Derektor of Rhode Island, Inc. or any other defined benefit pension plan under any law, governmental policy, or regulatory provision. PBGC and the Pension Plan shall not be enjoined or precluded from enforcing such liability or responsibility by any of the provisions of the Plan of Reorganization, Confirmation Order, Bankruptcy Code, or any other document filed in the Debtor’s bankruptcy case.

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⁴ 29 U.S.C. §§ 1001(14), 1001(21), 1104, 1106.

CONCLUSION

For the forgoing reasons, PBGC objects to the Debtor's POR and requests that it be modified as stated above.

Dated: August 21, 2014
Washington, DC

/s/ Vicente Matias Murrell
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