

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

MOLYCORP, INC., *et al.*¹

Debtors.

Chapter 11

Case No. 15-11357 (CSS)
(Jointly Administered)

Hearing Date: December 8, 2015 at 10:00 a.m. (ET)

**OBJECTION OF THE PENSION BENEFIT
GUARANTY CORPORATION TO DEBTORS' MOTION**

The Pension Benefit Guaranty Corporation (“PBGC”), a creditor in the above-captioned proceeding, hereby files this objection to Debtors’ Motion to Approve Bidding Procedures for the Sale of the Debtors' Assets, (B) Approving Certain Bidder Incentives in Connection With the Debtors' Entry Into a Stalking Horse Agreement, if any and (C) Approving Procedures for the Assumption and Assignment of Executory Contracts and Unexpired Leases (“Motion”), which was filed on November 11, 2015.

¹ The Debtors are the following 21 entities (the last four digits of their respective taxpayer identification numbers, if any, follow in parentheses): Molycorp, Inc. (1797); Industrial Minerals, LLC; Magnequench, Inc. (1833); Magnequench International, Inc. (7801); Magnequench Limited; Molycorp Advanced Water Technologies, LLC (1628); MCP Calco ULC; MCP Canada Holdings ULC; MCP Canada Limited Partnership; MCP Exchangeco Inc.; Molycorp Chemicals & Oxides, Inc. (8647); Molycorp Luxembourg Holdings S.à.r.l.; Molycorp Metals & Alloys, Inc. (9242); Molycorp Minerals Canada ULC; Molycorp Minerals, LLC (4170); Molycorp Rare Metals Holdings, Inc. (4615); Molycorp Rare Metals (Utah), Inc. (7445); Neo International Corp.; PP IV Mountain Pass, Inc. (1205); PP IV Mountain Pass II, Inc. (5361); RCF IV Speedwagon Inc. (0845). Molycorp’s United States headquarters is located at 5619 DTC Parkway, Suite 1000, Greenwood Village, Colorado 80111.

PBGC objects to the Motion because the bidding procedures proposed by the Debtors fail to take into account the possibility that a Qualified Bidder² may wish to assume all or some portion of the Magnequench International, Inc. Hourly Pension Plan (the “Pension Plan”), a defined benefit pension plan sponsored by the Debtors. Similarly, the Bidding Procedures do not expressly state that the Debtors will provide appropriate credit for the value of any pension liabilities assumed when determining the highest and best bid.

PBGC has communicated its concerns with the Bidding Procedures to the Debtors and has provided the Debtors with proposed language that will hopefully resolve its objections. While PBGC hopes that a consensual resolution is possible, it nonetheless files this objection as a protective measure to preserve its rights.

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. I 2013). 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 pension plan terminates, PBGC generally becomes trustee of the plan and supplements any assets remaining in the pension plan with its insurance funds to pay 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

² Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

agency's recoveries of terminated pension plan's underfunding and (ii) premiums paid by pension plan sponsors.

ERISA provides the exclusive means for a 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 an involuntary termination of a pension plan pursuant to section 4042 of ERISA ("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 per plan participant per year for three years, 29 U.S.C. § 1306(a)(7). If a pension plan is terminated while the pension 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. *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. For example, under the Internal Revenue Code and ERISA, the employer and each member of its controlled group are jointly and severally liable to pay any unpaid minimum funding contributions owed to the pension plan. *See* 29 U.S.C. §§ 1082(b)(2), 1342(d), 1362(c); 26 U.S.C. § 412(b)(2).

B. The Debtors' Pension Plan

Magnequench International, Inc. sponsors the Pension Plan, a single-employer defined benefit pension plan covered under Title IV of ERISA. The Pension Plan covers an estimated 94 plan participants and is underfunded by approximately \$3,868,912. PBGC is continuing to investigate the funding level of the Pension Plan.

On October 8, 2015, PBGC filed consolidated claims against the Debtors for the following statutory liabilities: (i) the unfunded benefit liabilities of the Pension Plan; (ii) due and unpaid minimum funding contributions owed to the Pension Plan; and (iii) statutory premiums owed to PBGC. PBGC's claim for the unfunded benefit liabilities of the Pension Plan is contingent upon the 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 Debtors' Bankruptcy Proceeding

On June 25, 2015, the Debtors each filed a voluntary petition under chapter 11 of the Bankruptcy Code. They subsequently filed this Motion on November 11, 2015. A hearing on the relief sought in the Motion is scheduled for December 8, 2015.

II. ARGUMENT

When selling estate assets, a debtor has a duty to obtain the highest price or greatest benefit possible for bankruptcy 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, 667-8 (Bankr. S.D.N.Y. 2009). Accordingly, bid procedures should be designed to facilitate an open and fair sale process. *See In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998); *see also In re Dura Auto. Sys.*, No. 06-11202 (KJC), 2007 Bankr. Lexis 2764, at *253 (Bankr. D. Del. Aug. 15, 2007).

The Bidding Procedures Should Be Modified To Encourage Assumption Of The Pension Plan.

The Bidding Procedures do not provide for the assumption of the Pension Plan by bidders. The Debtors should not foreclose the possibility that a potential bidder may wish to assume all or part of the Pension Plan’s liabilities as part of a Qualified Bid. Not only is there no valid reason to foreclose assumption of the Pension Plan, but continuation of the Pension Plan would benefit the Debtors’ estates and the Pension Plan’s participants. As stated above, if the Pension Plan terminates, the Debtors’ contingent liability for unfunded benefit liabilities to the Pension Plan is estimated to be \$3,868,912. In that case, the general creditor body would share any distributions to unsecured creditors with PBGC. Therefore, the Debtors should encourage, or at least allow for, Qualified Bids that assume the Pension Plan.

The Debtors should make two modifications to the Bidding procedures to encourage Qualified Bidders to assume the Pension Plan.

First, the Bidding Procedures should require all bidders to explicitly state their intention with respect to the Pension Plan. If a potential bidder does not state an intent to assume the Pension Plan in its entirety, the bidder should state whether it intends to assume any portion of the Pension Plan.

Second, the Bidding Procedures should provide that, in determining the Successful Bid, the Debtors will give appropriate credit for the value of the liabilities under the Pension Plan that a Qualified Bidder agrees to assume. Accordingly, the Bidding Procedures should state that all Qualified Bids may be a combination of cash and certain assumed obligations, including obligations with respect to the Pension Plan. The highest and best bid for the Debtors' assets should be the one that provides the greatest total amount of consideration to the Debtors, including any pension liabilities transferred to the Successful Bidder.

Additionally, PBGC requests that the Court direct the Debtors to timely provide PBGC with copies of all Qualified Bids that propose to assume all or any portion of the Pension Plan's liabilities. PBGC further requests that the Court direct any Successful Bidder who proposes to assume all or any portion of the Pension Plan's liabilities to timely provide PBGC with sufficient information in advance of the Sale Hearing so that the PBGC may confirm the Successful Bidder's financial ability to maintain the Pension Plan (or any portion thereof) on an ongoing basis.

Reservation of Rights

If circumstances warrant that the Pension Plan be terminated in the future, PBGC reserves its rights to request the Debtor, the Stalking Horses Bidders, or any Successful Bidder(s) to timely provide to PBGC employees, agents and representatives copies of and/or access to all

pension documents, personnel records, employee files, and any related documents or information for all participants in the Pension Plan. PBGC further reserves its rights to seek appropriate related relief from this Court as necessary.

PBGC reserves all rights with respect to this Motion, including its rights to file further pleadings.

III. CONCLUSION

For the foregoing reasons, PBGC requests that the Court sustain PBGC's objection and that the Bidding Procedures set forth in the Motion be modified as stated above.

DATED: November 24, 2015
Washington, D.C.

Respectfully submitted,

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