

**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
MOTION FOR APPROVAL OF COMPROMISE OF CONTROVERSY PURSUANT TO
BANKRUPTCY RULE 9019(a)**

The Pension Benefit Guaranty Corporation (“PBGC”) files this objection to the Debtor’s Motion for Approval of Compromise Pursuant to Bankruptcy Rule 9019(a), docket number 260 (the “Motion”). The Motion seeks approval of a Mutual Settlement Agreement and Release in Full by and among James Mundy and other shareholders of the Debtor (“Settlement Agreement”), which provides for a distribution of the Debtor’s assets to current shareholders and requires that distribution to be incorporated into the Debtor’s plan of reorganization. To the extent that the Debtor seeks to carry out the terms of the Settlement Agreement prior to confirmation of a plan of reorganization, the Settlement Agreement is an impermissible *sub rosa* plan and, because the Debtor has not resolved PBGC’s significant claim in this case, the proposed settlement violates the absolute priority rule under 11 U.S.C. § 1129(b)(2)(B). To the extent the Debtor seeks to implement the terms of the Settlement Agreement through an amended plan of reorganization, as more fully explained below, PBGC reserves its rights to object to that plan.

BACKGROUND

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 43 million participants in more than 26,000 pension plans.² When an underfunded 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

¹ 29 U.S.C. §§ 1301-1461 (2006 & Supp. V 2011).

² 2012 PBGC Annual Management Report at 1, *available at* <http://www.pbgc.gov/documents/2012-annual-report.pdf>.

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)

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, 2013, 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 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.

(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.

¹⁰ Claim No. 3.

¹¹ Claim No. 5.

¹² Claim No. 4.

9. 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.¹³

10. PBGC is the Debtor's largest unsecured creditor, with claims in excess of \$1.2 million.

SETTLEMENT AGREEMENT

11. As PBGC understands it, the Settlement Agreement provides, *inter alia*, that the Debtor will form a new wholly-owned subsidiary called Mundy Brothers, Inc. ("Mundy Brothers"). The Debtor will then convey to Mundy Brothers certain of Debtor's real property free and clear of all liens and encumbrances. All the current individual shareholders, with the exception of James Mundy, will then exchange all of their stock in Mundy Ranch for all of Mundy Ranch's stock in Mundy Brothers (the transfer of property to Mundy Brothers and the stock exchange, together, the "Transaction"). In exchange, the parties to the Settlement Agreement will provide full and mutual releases.

12. Under the terms of the Settlement Agreement, the Debtor is required to file an amended Plan of Reorganization encompassing the terms and conditions of the Settlement Agreement.

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

OBJECTION AND RESERVATION OF RIGHTS

13. The current shareholders are not creditors of Mundy Ranch. Father Robert Mundy filed an unliquidated claim as an equity security holder, not as a creditor of the Debtor.¹⁴ None of the other shareholders have filed claims against the Debtor's estate. The deadline to file claims was March 11, 2013.¹⁵

14. The Transaction results in a distribution to equity, as the Settlement Agreement requires the transfer of a significant portion of the Debtor's property to the Debtor's current shareholders.

15. To the extent that the Debtor seeks to consummate the Transaction—specifically, transfer any of its assets to Mundy Brothers—prior to the confirmation of any plan of reorganization, PBGC objects.

16. First, the Transaction would change the composition of the Debtor's estate and constitute a prohibited *sub rosa* plan by dictating the terms of a future plan of reorganization, namely inclusion of the Settlement Agreement terms.¹⁶

17. Second, the Transaction would potentially violate the absolute priority rule under 11 U.S.C. § 1129(b)(2)(B) by transferring property to equity holders while failing to pay PBGC—a priority and general unsecured creditor—in full.¹⁷ It is not clear that the assets that

¹⁴ Claim no. 8.

¹⁵ See Order Fixing Time for Filing Proofs of Claim and Interests, docket no. 59.

¹⁶ See *Pension Benefit Guaranty Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 939-40 (5th Cir. 1983); *In re Podzemny*, No. 09-14226-j11, 2011 WL 576591 at *8 (Bankr. D.N.M. Feb. 8, 2011).

¹⁷ 11 U.S.C. § 1129(b)(2)(B); *In re Lotspeich*, 328 B.R. 209, 220 (10th Cir. 2005); *In re SLC Ltd. V.*, 137 B.R. 847, 850 (Bankr. D. Utah 1992).

would remain at Mundy Ranch, the Pension Plan's sponsor, would be sufficient to fully satisfy PBGC's claims.

18. To the extent that the Debtor seeks to consummate the Transaction through confirmation of an amended plan of reorganization—and no sooner—PBGC reserves its right to object to that plan. As discussed above, PBGC has significant concerns that any plan of reorganization that provides for the transfer of a substantial portion of assets from the Debtor to another entity will not leave assets sufficient to satisfy PBGC's approximately \$1.2 million claim.

19. Section 1129(b)(2)(B) requires that, with respect to a class of unsecured claims, the holder of a claim in such class receive the full value of his allowed claim before a holder in a junior class can receive any value. Therefore, PBGC's priority claims in the amount of \$26,957 must be paid before any general unsecured creditors.¹⁸ Then, PBGC and any other general unsecured creditors must share *pari passu* in recovery from the Debtor's estate.¹⁹

20. Any transfer of property, or other distribution, to the Debtor's shareholder must be made only *after* PBGC's claims are satisfied in full. PBGC reserves its right to object to any plan of reorganization that attempts to do otherwise, in violation of the absolute priority rule in section 1129 of the Bankruptcy Code.

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¹⁸ 11 U.S.C. § 507(a).

¹⁹ See 11 U.S.C. § 1123(a)(4).

CONCLUSION

For the foregoing reasons, PBGC respectfully ask this Court to deny the Debtor's Motion for Approval of Compromise Pursuant to Bankruptcy Rule 9019(a) to the extent the Debtor seeks to consummate the Transaction prior to confirmation of a plan of reorganization. Alternatively, PBGC reserves its right to object to any plan of reorganization. Finally, PBGC asks this Court to grant other relief as the Court deems just and proper.

Dated: January 28, 2014
Washington, D.C.

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CERTIFICATE OF SERVICE

I certify that on the **28th day of January, 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/ M. Katherine Burgess
M. Katherine Burgess