IN THE UNITED STATES BANKRUPTCY COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

In re:	)	Chapter 11
	)	
Cain Lithographers, Inc,	)	Case No. 14-03646
	)	
	)	Hearing date: 8/25/2015, 1:30 pm
Debtor.	)	Objection deadline: 8/19/2015

LIMITED OBJECTION OF THE PENSION BENEFIT GUARANTY CORPORATION TO THE DEBTOR'S PROPOSED DISCLOSURE STATEMENT

The Pension Benefit Guaranty Corporation ("PBGC"), on its own and on behalf of the Cain Lithographers, Inc. Pension Plan (the "Pension Plan"), hereby objects to the disclosure statement proposed by Cain Lithographers, Inc. (the "Debtor") on July 13, 2015 (the "Disclosure Statement") (Dkt #66).

BACKGROUND

I. PBGC and ERISA.

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, Supp. I 2013). 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.[1]

Under ERISA, a sponsor of a pension plan covered by Title IV must satisfy certain financial obligations with respect to the plan, including: (1) paying the statutorily required minimum funding contributions to the pension plan, 26 U.S.C. § 412(b)(1), (2); and (2) paying flat-rate and variable-rate insurance premiums to PBGC, 29 U.S.C. §§ 1306, 1307.

ERISA provides the exclusive means for a plan sponsor to initiate termination of 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 factors, that the plan sponsor satisfies one of three enumerated 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). Apart from a standard or distress termination, PBGC can also initiate termination of a pension plan pursuant to section 4042 of ERISA (a "PBGC-initiated termination"). 29 U.S.C. § 1342.

Upon a distress termination or a PBGC-initiated termination of a pension plan, the contributing sponsor remains subject to certain liabilities with regard to the terminated pension plan. For example, it becomes liable to PBGC for the 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).

[1] 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.

Upon termination, the plan sponsor also remains liable to PBGC for any unpaid premiums, including 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 is attempting to reorganize in Chapter 11, and it ultimately obtains confirmation of a Chapter 11 plan of reorganization, its 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 is liable. *See* 29 U.S.C. §§ 1082(c), 1342(d), 1362(a), (c); 26 U.S.C. § 412(c).

II. The Debtor and the Pension Plan.

The Debtor is the contributing sponsor of the Pension Plan within the meaning of Title IV of ERISA. *See* 29 U.S.C. §1301(a)(13). 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 would become 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).

On November 11, 2014, the Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code.

PBGC timely filed proofs of claims relating to the Pension Plan for unfunded benefit

liabilities, minimum contributions owed to the Plan, and insurance premiums. PBGC estimates that the amount of the Pension Plan's unfunded benefit liabilities is $2,070,091; this claim is contingent on the termination of the Pension Plan. PBGC estimates that the contributions owed to the Pension Plan total $1,286,160. 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 $131,250 in termination premiums upon its emergence from bankruptcy, payable in equal installments over three years.

On July 13, 2015, the Debtor filed the Disclosure Statement and proposed a corresponding plan of reorganization (the "Plan of Reorganization").

On July 14, 2015, the Court entered an order setting August 25, 2015, as the date that it will consider and rule on the adequacy of the information contained in the Disclosure Statement, and August 19, 2015, as the deadline for parties to propose to the Court modifications to the Disclosure Statement and for submitting objections thereto.

PBGC raised its concerns with the Disclosure Statement, as articulated below, with the Debtor's counsel. While it hopes for a consensual resolution to its concerns, the Debtor's counsel has not yet responded to PBGC's requested modifications in time to avoid the filing of this objection.

ARGUMENT

PBGC, on its own behalf and on behalf of the Pension Plan, objects to the Disclosure Statement because it fails to provide "adequate information," as that term is defined under 11 U.S.C. § 1125. As used in that section, adequate information means:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor . . . that would enable a hypothetical

reasonable investor . . . to make an informed judgment about the plan….

11 U.S.C. § 1125(a)(1). Furthermore, Section 1125(b) of the Bankruptcy Code requires that in order to solicit votes on a plan of reorganization, concurrent with the solicitation, "a written disclosure statement approved . . . by the court as containing adequate information" must have been transmitted to the holders of claims and interests. 11 U.S.C. § 1125(b). Before approval by the Court, a disclosure statement should "contain[] 'adequate information' about the assets, liabilities, and financial affairs of the debtor sufficient to enable creditors to make an 'informed judgment' about the plan." *In re Woerner*, 758 F.3d 693, 699 (5th Cir. 2014). In other words, a reorganizing debtor must "clearly and succinctly inform the average unsecured creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991). The Disclosure Statement submitted by the Debtor fails to meet this threshold for the reasons discussed below.

I. The Disclosure Statement Is Silent As to Whether the Debtor Will Seek to Continue the Pension Plan, Seek to Terminate the Pension Plan, or Expects a PBGC-initiated Termination of the Pension Plan.

The Disclosure Statement is completely silent with respect to the Pension Plan. The Debtor should disclose whether it intends to continue the Pension Plan post-reorganization, seeks to terminate the Pension Plan in either a standard or distress termination, or expects a PBGC-initiated termination of the Pension Plan. If the Debtor intends to continue the Pension Plan, it must disclose its financial wherewithal to afford it. If the Debtor intends to pursue a standard termination, it must disclose how it will satisfy the benefit liabilities under the Pension Plan. If the Debtor intends to pursue a distress termination, it must disclose how the statutory distress criteria for such a termination are met.

II. The Disclosure Statement Fails to Disclose the Debtor's Obligations and Liabilities Relating to the Pension Plan.

The Disclosure Statement should disclose the Debtor's statutory liabilities relating to the Pension Plan under ERISA and the Internal Revenue Code.

PBGC requested that Debtor's counsel add the following passage to the Disclosure Statement, in order to satisfy PBGC's concerns. The Debtor's counsel, however, has not responded to PBGC's request.

> "The Debtor, Cain Lithographers, Inc., is the contributing sponsor with respect to the Cain Lithographers, Inc. Pension Plan (the "Pension Plan"). The Pension Plan is a single-employer defined benefit pension plan covered by Title IV of the Employment Retirement Income Security Act of 1974 ("ERISA"), *as amended*, 29 U.S.C. §§ 1301 – 1461 (2012 & Supp. I 2013), which created the federal pension plan termination insurance program. The Pension Benefit Guaranty Corporation ("PBGC") is a wholly owned United States Government corporation and agency of the United States created under Title IV of ERISA to administer the federal pension insurance program and enforce compliance with the provisions of Title IV. PBGC guarantees the payment of certain benefits upon termination of a pension plan covered by Title IV of ERISA.
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> "Under ERISA, the contributing sponsor of a pension plan covered by Title IV of ERISA and each member of the sponsor's "controlled group" are jointly and severally liable for certain obligations relating to such plan. For purposes of ERISA, a "controlled group" is determined according to 29 U.S.C. § 1301(a)(14). A pension plan may be terminated *only if* the statutory requirements of either 29 U.S.C. § 1341 or 29 U.S.C. § 1342 are met. The Pension Plan may not be rejected as an executory contract under the Bankruptcy Code.
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> "PBGC has filed proofs of claim against the Debtor for: (1) the Pension Plan's unfunded benefit liabilities under 29 U.S.C. § 1362(b) in the amount of $2,070,091; (2) statutorily required minimum funding contributions under 26 U.S.C. § 412(c)(11) and 29 U.S.C. § 1082(c)(11), due to the Pension Plan in the amount of $1,286,160; and (3) statutory insurance premiums due to PBGC under 29 U.S.C. § 1306(a)(3) and (a)(7), in the amount of $267,331.22 (collectively, "the Pension Claims"). The Pension Claims are contingent upon termination of the Pension Plan, and are subject to modification.
>
> "The Pension Plan will continue until the statutory termination requirements of either 29 U.S.C. § 1341(c) (a distress termination) or 29 U.S.C. § 1342 (a PBGC-

initiated termination) are met. The Debtor expects PBGC to initiate termination of the Pension Plan before the Plan of Reorganization takes effect, and will take all steps necessary to consummate termination of the Pension Plan."

III. The Disclosure Statement Fails to Disclose Adequate Information Justifying the Overly Broad Release Provisions in the Plan of Reorganization.

The Disclosure Statement fails to provide adequate information justifying the need for the Plan of Reorganization's overly broad release, exculpation, and injunction provisions that release non-debtors from liability.[2] The Debtor should disclose why these releases, injunctions and exculpations are necessary and why they do not violate the Bankruptcy Code.

PBGC would withdraw this aspect of its objection if the following provision were included in the Disclosure Statement, which PBGC requested from the Debtor's counsel, to no avail.

> "Nothing in the Plan of Reorganization, the Disclosure Statement, any Order Confirming the Plan of Reorganization, or section 1141 of the Bankruptcy Code shall be construed as discharging, releasing, or relieving the Debtor, or its reorganized form, or any entity in the Debtor's controlled group, or any such parties' officers, directors, or other representatives, or any other person or entity, in any capacity, from any liability with respect to the Pension Plan under ERISA, the Internal Revenue Code, or any other law, government policy, or regulatory provision. PBGC and the Pension Plan shall not be enjoined or precluded from enforcing such liability against any party as a result of the Plan of Reorganization's provisions for satisfaction, release, and discharge of claims."

[2] *See* Plan of Reorganization, Article VII.

CONCLUSION

For the forgoing reasons, PBGC objects to the Debtor's Disclosure Statement and requests that it be modified as stated above. If the Debtor cannot adequately disclose the issues identified above, it calls into question the viability of the Plan of Reorganization. If the Plan of Reorganization is not confirmable, the Court should not approve the Disclosure Statement.

Dated: August 18, 2015
Washington, DC

Respectfully submitted,

/s/ Marc S. Pfeuffer

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