

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION**

In re:

NORANDA ALUMINUM, Inc., *et al.*,¹

Debtor(s).

Chapter 11

Case No. 16-10083-399

(Jointly Administered)

Hearing Date and Time:

March 21, 2016 at 9:30 a.m.
(prevailing Central Time)

Hearing Location:

St. Louis Courtroom 5 North

**OBJECTION OF THE PENSION BENEFIT GUARANTY CORPORATION
TO DEBTORS' MOTION FOR (I) AN ORDER ESTABLISHING BIDDING
PROCEDURES FOR THE SALE OF THE DOWNSTREAM BUSINESS AND
GRANTING RELATED RELIEF AND (II) AN ORDER APPROVING THE SALE OF
THE DOWNSTREAM BUSINESS**

The Pension Benefit Guaranty Corporation (“PBGC”), a creditor in the above-captioned proceedings, hereby files this objection to the Debtors’ above-captioned motion, Docket Number 270 (“Motion”).²

¹ The Debtors in these cases are: Noranda Aluminum, Inc., Gramercy Alumina Holdings Inc., Gramercy Alumina Holdings II, Inc., NHB Capital, LLC, Noranda Alumina LLC, Noranda Aluminum Acquisition Corp., Noranda Aluminum Holding Corp., Noranda Bauxite Ltd. (Jamaica), Noranda Bauxite Holdings Ltd. (St. Lucia), Noranda Intermediate Holding Corp., and Norandal USA, Inc.

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

PBGC objects to the Motion because the proposed Bidding Procedures³ fail to take into account the possibility that a Qualified Bidder may wish to assume the defined benefit pension plans sponsored by the Debtors. Similarly, the Bidding Procedures fail to expressly provide that the Debtors will credit the value of any pension liabilities assumed when determining the highest and best bid. Further, the Bidding Procedures reserve certain rights to a Stalking Horse Agreement that does not exist. Last, the truncated sale timeline and the lack of any meaningful marketing of the Debtors' property suggest that this is not a sale process with the proper goal to obtain the highest price or greatest overall benefit possible for the estate. Consequently, more time must be allocated to this process if a truly robust sale process is to occur.

PBGC will communicate its concerns with the Bidding Procedures to the Debtors and provide the Debtors with proposed language regarding assumption of the defined benefit pension plans. PBGC hopes that a consensual resolution of its objection is possible. Because such resolution may not be reached before the March 21, 2016, hearing, PBGC files this objection.

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. II 2014). 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 plan terminates, PBGC generally becomes trustee of the plan and supplements any assets remaining in the plan with its insurance funds to

³ The Bidding Procedures are attached to the Motion as Exhibit A.

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

A Chapter 11 filing does not mean that the debtors' pension plans will terminate. Indeed, 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 or distress termination, PBGC can initiate termination of a pension plan under section 4042 of ERISA when certain statutory criteria are satisfied ("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 regarding 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 plan termination occurs while the plan sponsor and any controlled group members are attempting to reorganize in Chapter 11, and

they obtain confirmation of a Chapter 11 plan of reorganization, the obligation to PBGC for termination premiums does not arise until after the Chapter 11 plan is confirmed and the debtor exits bankruptcy. 29 U.S.C. § 1306(a)(7)(B). In 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. 29 U.S.C. §§ 1082(b)(2), 1342(d), 1362(c); 26 U.S.C. § 412(b)(2).

B. The Debtors' Pension Plans

Noranda Aluminum, Inc. and its subsidiaries and affiliates (collectively, the “Debtors”) filed voluntary petitions under Chapter 11 in this jointly administered case. The Debtors sponsor five pension plans covered by PBGC’s insurance program: Retirement Plan for Hourly-Rated Employees of Noranda Aluminum Inc., Noranda Aluminum Group Retirement Plan, Norandal USA Inc. Pension Plan For Hourly Employees of the Newport Rolling Mill, Norandal USA Inc. Pension Plan For Hourly Paid Employees at the Salisbury, NC Plant, and Noranda Alumina LLC Hourly Employee Pension Plan (all five plans, collectively, “Plans”). The Plans cover an estimated 4,260 participants. The Debtors represent that the Plans are underfunded by \$159 million, and PBGC estimates that the underfunding of the Plans on a termination basis is approximately \$219 million. Although the Debtors’ list of the 30 largest creditors omits PBGC, PBGC’s contingent underfunding claim appears to be the Debtors’ largest unsecured claim.

Because the Debtors filed their Chapter 11 petitions with this Court only a month ago, PBGC has not yet filed claims against the Debtors for their statutory obligations to the Plans and PBGC. The PBGC anticipates filing claims against each of the Debtors for the following

statutory liabilities, as explained above: (i) the unfunded benefit liabilities of the Plans; (ii) due and unpaid minimum funding contributions owed to the Plans; and (iii) statutory premiums owed to PBGC. PBGC's claim for the unfunded benefit liabilities of the Plans will be contingent upon termination of the Plans. Termination, however, is not the preferred outcome for the Plans, nor should it be treated as a *fait accompli*.

C. The Debtors' Bankruptcy Proceedings

On February 8, 2016, the Debtors filed voluntary Chapter 11 petitions with this Court. On February 29, 2016, the Debtors filed this Motion, seeking to launch an expedited sale process for the Downstream Business. Three of the five Plans covered by PBGC's insurance program cover employees in the Downstream Business: Noranda Aluminum Group Retirement Plan⁴, Norandal USA Inc. Pension Plan for Hourly Employees of the Newport Rolling Mill, and Norandal USA Inc. Pension Plan for Hourly Paid Employees at the Salisbury, NC Plant (collectively, "Downstream Business Pension Plans").

II. ARGUMENT

When selling estate assets, a debtor has a duty to obtain the highest price or greatest overall benefit possible for the 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").

⁴ The Noranda Aluminum Group Retirement Plan also covers employees that do not work in the Downstream Business.

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, 667-68 (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 Eighth Circuit has observed that “the bankruptcy judge must retain the capability to conduct sales in a manner that most benefits the bankruptcy estate.” *In re Food Barns Stores, Inc.*, 107 F.3d 558, 568 (8th Cir. 1997). Further, in this Court, “structured bid procedures should provide a vehicle to enhance the bid process and should not be a mechanism to chill prospective bidders’ interests.” *In re President Casinos, Inc.*, 314 B.R. 784, 786 (Bankr. E.D. Mo. 2004).

A. The Bidding Procedures Must Be Modified To Encourage Assumption of the Downstream Business Pension Plans

The Bidding Procedures do not provide for the assumption of the Downstream Business Pension Plans by the potential bidders. It is premature to foreclose the possibility that a Qualified Bidder may wish to assume all or part of any of the Downstream Business Pension Plans’ liabilities as part of a Qualified Bid.

When employees are transferred to a new employer, they wish to keep their benefits intact. Assumption of all or part of the Downstream Business Pension Plans (or of its liabilities associated with the seller’s employees) will enhance employee satisfaction because that benefit is maintained. Moreover, employers may receive tax benefits for contributions to the Downstream Business Pension Plans. It is in the interest of the Debtors’ estates and their creditors to attract bidders willing to assume the liabilities of the Downstream Business Pension Plans. PBGC is by far one of the largest creditors of the Debtors. Assumption of any liabilities relating to the Downstream Business Pension Plans would effectively eliminate or reduce PBGC’s claims

against each of the Debtors, thereby providing value to the Debtors' respective estates and increasing recoveries for other creditors.

In order to encourage Qualified Bidders to assume the Downstream Business Pension Plans, the Debtors should make a few modifications to the Bidding Procedures. First, the Bidding Procedures should require all bidders to expressly state their intention with respect to the Downstream Business Pension Plans.

Second, the Bidding Procedures should provide that, in determining the Successful Bid, the Debtors will give credit for the value of the Downstream Business Pension Plans' liabilities a Qualified Bidder agrees to assume. 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.⁵

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 Downstream Business Pension Plans' liabilities. PBGC further requests that the Court direct any Successful Bidder who proposes to assume all or any portion of the Downstream Business Pension Plans' 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 assumed Downstream Business Pension Plans on an ongoing basis.

⁵ These modifications are neither burdensome nor unprecedented. PBGC routinely requests this language in bankruptcy cases involving an ongoing pension plan and a sale of substantially all of the assets of the plan sponsor and members of its controlled group. *The Great Atlantic & Pacific Tea Company, Inc.*, Case No. 15-23007 (RDD) (Bankr. S.D.N.Y. Aug. 11, 2015) (Docket No. 495); *see also In re Journal Register Company*, Case No. 12-13774 (SMB) (Bankr. S.D.N.Y. Dec. 21, 2012) (Docket No. 294); *In re Vertis Holdings, Inc.*, Case No. 12-12821 (CSS) (Bankr. D. Del. Nov. 2, 2012) (Docket No. 206).

B. Any Stalking Horse Agreement Should Include Assumption of the Downstream Business Pension Plans

The Bidding Procedures discuss a hypothetical Stalking Horse Bidder and, in turn, a hypothetical Stalking Horse Agreement. The Debtors appear to reserve certain rights to the hypothetical Stalking Horse Bidder, such as expense reimbursement and a break-up fee. There is no Stalking Horse Agreement and thus, it cannot be evaluated.

In the event a Stalking Horse Agreement is proposed, it should provide for the Downstream Business Pension Plans to be assumed. In addition, the Stalking Horse Bidder should take all liabilities associated with participants of the Downstream Business Pension Plans in connection with the sale.

C. The Proposed Timing of the Sale Process and Inadequate Marketing Does Not Facilitate A Competitive Auction Process That Maximizes Value to the Debtors' Estates.

There is simply a dearth of information in the Motion and docket to date. The Debtors have not filed their schedules of assets and liabilities, but obtained an extension to March 28, 2016 to do so. Coupled with the lack of information in the Motion, PBGC is simply unable to understand exactly what assets are included in the Downstream Business and why it must be sold on an expedited timeline. Given that the Debtors seek to sell these unknown assets free and clear of all liens and interests, sufficient information should be presented to creditors prior to approving an expedited sale process.

The Debtors' rushed schedule for bidding and approval and a lack of any meaningful marketing of the sale also greatly concerns PBGC as the process is drastically out of step with core bankruptcy principles. Indeed, "the purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate." *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998); *see also In re Reading Broad, Inc.*, 386 B.R. 562, 575 (Bank.

E.D. Pa. 2008). Further, the Debtors have a fiduciary duty to establish bidding procedures and a sale process which will “maximize value to the estate.” *In re Metaldyne Corp.*, 409 B.R. at 668. The Eighth Circuit has cautioned that bankruptcy courts should “remain mindful of the ubiquitous desire of the unsecured creditors, and a primary objective of the Code, to enhance the value of the estate at hand.” *In re Food Barns Stores, Inc.*, 107 F.3d at 565-66.

With a hearing date on this Motion on March 21, 2016; a Bid Deadline of April 28, 2016; and an Auction on May 6, 2016, the truncated schedule is far from conducive to a vigorous and open auction and will likely have a chilling effect on the auction process. Such a short period does not allow potential bidders the opportunity to investigate the financial condition and business prospects of the Debtors, prepare a bid, and obtain financing. The Bidding Procedures anticipate the Sale but do not provide for a competitive sale process. Prospective bidders need time to investigate the Downstream Business, a difficult and timely process.

This is not the proverbial melting ice cube but rather a complex business that will need to be carefully evaluated by prospective buyers if anything other than fire sale prices are to be realized for the estate. As such, absent an extension of the Bid Deadline, this will not be a competitive sale process that maximizes value to the estate, which in turn, could benefit creditors. Lastly, it is unclear what marketing has been done to promote a robust bidding process. Impatience by secured creditors—that seem to want their money yesterday—should not eviscerate any semblance of bankruptcy process.

D. Reservation of Rights

If circumstances warrant that any of the Plans terminate in the future, PBGC reserves its rights to request the Debtors or any Successful Bidder to timely provide to PBGC employees, agents and representatives copies of and access to all pension documents, personnel records,

employee files, and any related documents or information for all participants in the Plans. PBGC further reserves all rights with respect to this Motion, including the right to file further pleadings.

III. CONCLUSION

For the foregoing reasons, PBGC requests that the Motion be denied unless modified as described above.

DATED: March 14, 2016
Washington, D.C.

Respectfully submitted,

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Certificate of Service

I certify that, on March 14, 2016, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Eastern District of Missouri and as indicated on the attached Service List pursuant to the case management order entered in this case on February 12, 2016.

/s/ Michael Baird

Michael Baird