IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

In re:	)	
	)	Chapter 11
	)	
CONCO, INC.,	)	Case No. 12-34933
	)	
Debtor.	)	Hon. Joan A. Lloyd
	)	

PENSION BENEFIT GUARANTY CORPORATION'S RESPONSE AND OBJECTION TO THE DEBTOR'S MOTION FOR A RULING THAT DEBTOR'S MEET THE REQUIREMENTS FOR A DISTRESS TERMINATION OF THE PENSION PLAN

PRELIMINARY STATEMENT

The Pension Benefit Guaranty Corporation ("PBGC"), the federal agency charged with administering and enforcing the pension plan termination provisions in Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended*[1], responds and objects to Conco, Inc.'s (the "Debtor" or "Conco") motion for an order authorizing the distress termination of its defined benefit pension plan under the Title IV "reorganization in bankruptcy test"[2] (the "Distress Motion").[3] PBGC is a party in interest and the largest unsecured creditor in this case.

PBGC objects to the Distress Motion because Conco has not presented any evidence with the Distress Motion to demonstrate that it meets the statutorily mandated financial test for distress termination under the reorganization in bankruptcy distress test.[4]

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

[2] 29 U.S.C. § 1341(c)(2)(B)(ii)

[3] The Distress Motion is Document Number 198 on the Court's docket.

[4] See 29 U.S.C. § 1301(a).

Under ERISA, a bankruptcy court's role in the distress termination process is to determine only whether the debtor will be unable to:

(i) "pay all its debts pursuant to a plan of reorganization" and,

(ii) "continue in business outside the chapter 11 reorganization process,"[5]

unless the pension plan is terminated.

This is a factual finding for which the Debtor has not yet presented any evidence. PBGC urges the Court to carefully review any evidence ultimately presented by the Debtor in support of the Distress Motion and make the necessary determinations as to whether the Debtor has proven by a preponderance of the evidence that it meets the strict financial criteria for a distress termination under the reorganization in bankruptcy test.[6] If Conco does not present evidence of the projected costs of maintaining the Pension Plan, its financial resources and whether these resources are sufficient to permit Conco to fund and maintain the Pension Plan while simultaneously fulfilling its obligations to creditors under any possible plan of reorganization and continuing in business outside of Chapter 11, PBGC urges the Court to deny the Distress Motion.

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[5] 29 U.S.C. § 1341(c)(2)(B)(ii)(IV); 29 C.F.R. § 4041.41(c)(2)(iv); *In re US Airways Group*, 296 B.R. 734, 743 (Bankr. E.D. Va. 2003), *aff'd on other grounds*, 369 F.3d 806 (4th Cir. 2004) (equitably moot because, absent a stay, the POR was confirmed and consummated and reversing the distress termination would adversely impact the rights of third parties who rely upon the consummated POR); *In re Resol Mfg. Co.*, 110 B.R. 858, 862 (Bankr. N.D. Ill. 1990) (describing the reorganization in bankruptcy test as a"*but for*" test).

[6] *In re Philip Serv. Corp.*, 310 B.R. 802, 806 (Bankr. S.D. Tex. 2004) (debtors did not prove by a preponderance of the evidence that the plan of reorganization would not be consummated unless the pension plan was terminated); *US Airways Group*, 296 B.R. at 743-44 (the burden of proof is on the debtors to establish that they meet the reorganization in bankruptcy test); *In re Sewell Mfg.*, 195 B.R. 180, 184-85 (Bankr. N.D. Ga. 1996).

I. PBGC AND THE DEBTOR'S PENSION PLAN

PBGC is a wholly-owned United States government corporation that administers the defined benefit pension plan termination insurance program established under Title IV of ERISA. When a pension plan covered by Title IV terminates without sufficient assets to pay benefits, PBGC generally becomes trustee of the plan and, subject to certain statutory limitations, pays the plan's unfunded benefits from PBGC's insurance funds.[7]

On November 5, 2012, the Debtor filed a voluntary petition with this Court for relief under Chapter 11 of the Bankruptcy Code. The Debtor sponsors a defined benefit pension plan (the "Pension Plan") called the Conco Pension Plan.[8] The Debtor asserts that the Pension Plan is covered by Title IV of ERISA and that it covers approximately 361 of Conco's retired, terminated vested and active employees.[9]

If the Pension Plan continues, the Debtor must make contributions to the Pension Plan as required under the minimum funding standards of ERISA and the Internal Revenue Code ("Minimum Funding Contributions"), and must pay premiums to the PBGC.[10] Upon termination of an underfunded pension plan and PBGC's appointment as statutory trustee of the plan, PBGC has claims for the unpaid Minimum Funding Contribution claims[11] and unpaid insurance premiums, if any, due to PBGC under 29 U.S.C. § 1307. Additionally, if the Pension Plan terminates, the Debtor will be jointly and severally liable to PBGC for the amount of unfunded

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[7] *See* 29 U.S.C. §§ 1321, 1322, 1361.

[8] *See* Distress Motion at ¶¶ 7, 8.

[9] Conco's Disclosure Statement, Doc. No. 185, Art. II.D.3 at 6-7.

[10] *See* 29 U.S.C. §§ 1082, 1342; I.R.C. §§ 412, 430.

[11] *See* 29 U.S.C. § 1342(d)(1)(B)(ii).

benefit liabilities of the Pension Plan ("Unfunded Benefit Liabilities").[12] Also, if the Pension Plan terminates, following discharge or dismissal of the reorganization proceedings, the reorganized Debtor will become liable for termination premiums under 29 U.S.C. § 1306(a)(7) ("Termination Premiums").[13]

In addition, if the Pension Plan is terminated, following discharge or dismissal from the reorganization proceeding, the reorganized Debtor will be liable to PBGC for Termination Premiums.[14]

On October 14, 2013, the Debtor filed the Distress Motion. The Debtor seeks to establish December 8, 2013, as the Pension Plan's termination date.[15]

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[12] *See* 29 U.S.C. § 1301(a)(18), 1362(a), (b). A group of trades or businesses under common control, referred to as a "controlled group," includes, for example, a parent and its 80-percent owned subsidiaries or a "brother-sister" set of corporations owned by five or fewer individuals. 29 U.S.C. § 1301(a)(14); 29 C.F.R. § 4001.3; 26 U.S.C. §§ 414(b),(c); Treas. Reg. §§ 1.414(b)-1, (c)-2.

[13] The Debtor is liable to PBGC for Unfunded Benefit Liabilities and to the Pension Plan for unpaid Minimum Funding Contributions on the termination date of the Pension Plan. In the case of a distress termination, the termination date proposed by the administrator of the pension plan is established as the date of plan termination if the PBGC agrees. 29 U.S.C. § 1348(a)(2). PBGC has filed estimated claims related to the Pension Plan (1) for Unfunded Benefit Liabilities under 29 U.S.C. § 1362(b), in the amount of $6,522,488, contingent on termination of the Pension Plan; for unpaid Minimum Funding Contributions under 26 U.S.C. §§ 412, 430, and 29 U.S.C. § 1082 in the estimated amount of $653,350 as of November 30, 2012, and PBGC asserts priority status under 11 U.S.C. §§ 507(a)(2) and (5) for the normal cost portion of the unpaid post-Petition minimum funding contributions and the unpaid minimum funding contributions for the 180 day period preceding the Petition Date, respectively; and, (3) for variable and flat rate premiums due to PBGC under 29 U.S.C. § 1307 in an unliquidated amount.

[14] PBGC estimates that the liability for Termination Premiums will be $1,353,750 ($451,250 each year for three years).

[15] Distress Motion at 3, ¶10.

II. STATUTORY AND REGULATORY REQUIREMENTS FOR DISTRESS TERMINATION

Title IV of ERISA provides the exclusive means for terminating a defined benefit pension plan.[16] To proceed with a distress termination, the Debtor, as the contributing sponsor of the Pension Plan, and each member of its controlled group, if any, must satisfy one of the four statutory distress termination tests under 29 U.S.C. § 1341(c)(2)(B). These tests are: (a) liquidation in bankruptcy; (b) reorganization in bankruptcy; (c) inability to pay debts when due; and (d) unreasonably burdensome pension costs.[17]

Under the "reorganization test," ERISA requires a debtor to make a showing to the bankruptcy court that, without termination of the pension plan, it will be unable to pay all of its debts under a plan of reorganization and will be unable to continue in business outside of Chapter 11.[18] Under the distress termination procedures, a pension plan may terminate only if: (1) the plan administrator provides affected parties, including PBGC and plan participants, at least 60-day advance written notice of its intent to voluntarily terminate the pension plan, as required under 29 U.S.C. § 1341(a)(2); (2) the plan administrator provides PBGC with the information set forth in 29 U.S.C. § 1341(c)(2)(A); and (3) PBGC makes certain determinations based upon the required disclosures.[19] PBGC also must determine that each person within the

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[16] *See* 29 U.S.C. § 1341(a)(1); *Hughes Aircraft Co. v. Jacobsen*, 525 U.S. 432, 446 (1999); *see also In re Philip Servs. Corp.*, 310 B.R. 802, 806, 808-09 (Bankr. S.D. Tex. 2004).

[17] 29 U.S.C. § 1341(c); *see also,* 29 C.F.R. § 4041.41(c).

[18] 29 U.S.C. § 1341(c)(2)(B)(ii)(IV).

[19] 29 U.S.C. § 1341(c)(1)(A), (B). PBGC reviews the notice of intent to terminate to determine whether it complies with ERISA's requirements. PBGC must notify the plan administrator of its determination in this regard. 29 C.F.R. § 4041.44(a) and (b). PBGC must also make a determination regarding the plan's sufficiency for guaranteed benefits or benefit liabilities. 29 U.S.C. § 1341(c)(3)(A); 29 C.F.R. § 4041.47.

pension plan sponsor's controlled group (as defined under 29 U.S.C. § 1301(a)(14)) meets the requirements of one of four distress tests.[20]

Congress first enacted the distress termination provisions as part of the Single-Employer Pension Plan Amendments Act of 1986 ("SEPPAA"), Pub. L. No. 99-272, 100 Stat. 237 (1986). SEPPAA did not set an explicit standard under the "reorganization in bankruptcy" test; it merely required the bankruptcy court to "approve[] the termination."[21] Congress adopted an explicit standard in 1987 when it enacted the Pension Protection Act ("PPA"), Pub. L. 100-203, 101 Stat. 1330-333. The PPA amendments specifically required a debtor in chapter 11 to show that it "will be unable to pay all of its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization."[22] As explained by Rep. Schultz, a PPA conferee:

> The conference agreement narrowed the ability of a pension plan sponsor to transfer his pension plan obligations to the PBGC by the mere filing of a bankruptcy petition under chapter 11. Under the conference agreement a bankruptcy court judge will not allow a distress termination of a pension plan unless he determines that the company is unable to pay its debts pursuant to a plan of reorganization and continue in business outside of chapter 11.
>
> Furthermore, a pension plan termination would be allowed *only if it otherwise would force the sponsor into liquidation*; and where, for example, the court had found that the sponsor had made meaningful sacrifices, such as in its pay package agreements.

133 Cong. Rec. H11970, Dec. 21, 1987 (emphasis added).

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[20] *See* 29 U.S.C. § 1341(c)(2)(B)(i)-(iii).

[21] Pub. L. 99-272, § 11009, 100 Stat. 237, 249-250.

[22] Pub. L. 100-203, 101 Stat. 1330-333.

As one court has observed, the purpose of the statute is to "limit to cases of severe business hardship the ability of plan sponsors to terminate their pension plans and thereby shift liability for guaranteed benefits onto other insurance premium payers in the PBGC programs."[23]

Under the "reorganization test, the debtor must make a showing to the bankruptcy court that, without termination of the pension plan, it will be unable to pay all of its debts under a plan of reorganization and will be unable to continue in business outside of Chapter 11.[24] The appropriate standard of review . . . pursuant to [29 U.S.C.] Section 1341(c)(2)(B)(ii), that should be applied by the bankruptcy court, is whether *but for* the termination of the pension plan, the debtor will not be able to pay its debts when due and will not be able to continue in business."[25]

Additionally, "[t]he reference [in the statute] to 'a' plan of reorganization does not permit a distress termination simply because a particular plan of reorganization requires it; rather the test is whether the debtor can obtain confirmation of *any* plan of reorganization without termination of the retirement plan."[26]

In making its determination under the "reorganization in bankruptcy" distress test, a bankruptcy court should, therefore, inquire whether the debtor has exhausted all other less drastic measures that would enable the debtor to pay its debts under a plan of reorganization and continue in business outside Chapter 11. These measures can and should include evidence from

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[23] *US Airways Group*, 296 B.R. at 743, *quoting In re Wire Rope of Am., Inc.*, 287 B.R. 771, 777 (Bankr. W.D. Mo. 2002). The legislative history shows that "[t]he basic policy of the legislation is to limit the ability of plan sponsors to shift liability for guaranteed benefits onto other PBGC premium payers and to avoid responsibility for the payment of certain nonguaranteed benefits, to cases of severe business hardship." H.R. Rep. No. 300, 99th Cong., 1st Sess. 278, 279 (1985), *reprinted in* 1986 U.S.C.C.A.N. 929-930.

[24] 29 U.S.C. § 1341(c)(2)(B)(ii)(IV).

[25] *Resol*, 110 B.R. at 862 (emphasis added); *see also Wire Rope*, 287 B.R. at 777.

[26] *US Airways*, 296 B.R. at 743-744; *Philip Servs.*, 310 B.R. at 808, *quoting US Airways*, 296 B.R. at 743-744; *Wire Rope,* 287 B.R. at 777*; Sewell Mfg.*, 195 B.R. at 185.

the debtor, as applicable, of such considerations as the costs of maintaining the pension plan if a funding waiver is obtained,[27] the costs of maintaining the plan with a freeze on future accruals of benefits,[28] the projected costs of the pension plan using different actuarial assumptions or cost methods, and evidence on whether there are other cost savings or discretionary spending in the debtor's business plan that could be used to fund the pension plan.[29] Only after a fully developed record is made on such issues can a court decide whether "but for" the termination of the pension plan, the debtor would be forced to liquidate, and thereby make the necessary findings required by ERISA.

III. COMPLETION OF A DISTRESS TERMINATION

In this case, the Debtor seeks to emerge from bankruptcy as a reorganized business.[30] The statute gives the bankruptcy court an important and clearly defined role – to determine whether the Debtor meets the "reorganization in bankruptcy" test, which requires this Court to carefully evaluate the Debtor's factual showing, and make findings whether, *but for* the termination of the Pension Plan, the Debtor will be forced into liquidation. The significance of this statutory standard is that creditors sometimes will have to accept lower recoveries in order to

[27] A defined benefit plan must be funded in accordance with the minimum funding standard prescribed by the Internal Revenue Code ("I.R.C.") and ERISA. I.R.C. §§ 412, 430; 29 U.S.C. § 1082. The sponsor of a defined benefit pension plan may request from the Internal Revenue Service a waiver of the minimum funding contributions owed for a plan year if the employer is unable to satisfy the minimum funding standards for the plan year without temporary substantial business hardship. I.R.C. § 412(c).

[28] Conco asserts that benefit accruals under the Pension Plan were frozen, effective June 30, 2007. Distress Motion at 3, ¶7.

[29] *See, e.g., US Airways Group, Inc.*, 296 B.R. at 744-46; *In re Phillip Servs, Inc.*, 310 B.R. at 808.

[30] *See* Distress Motion at 6 ¶22.

allow a pension plan to continue as long as *some* plan of reorganization is feasible without termination of the pension plan.[31]

Here, although the Court will determine whether the Pension Plan must be terminated in order to enable the Debtor to reorganize, it is important to note that the ultimate determination of whether the Pension Plan may be terminated in a distress termination rests with PBGC.[32] As one court explained:

> [T]he Court does not find itself faced with the ultimate question of the Debtor's entitlement to the termination of its pension plan. Instead, the Court simply must perform one narrow factual determination, the satisfaction of which will compose a single element in the Debtor's individual case for reorganizational "distress." The ultimate sufficiency of that distress showing, as well as the adequacy of the Debtor's required disclosures and the qualification of any "controlled group" parties, then will become a collective matter for the PBGC's consideration as it makes a final determination of the Debtor's right to a distressed termination.[33]

IV. BANKRUPTCY COURT REVIEW OF THE DISTRESS MOTION

PBGC asks this Court to follow the statutory language in evaluating the Debtor's factual showing for plan termination and make factual findings as to whether, *but for* the termination of the Pension Plan, the Debtor will be forced into liquidation. The Court's determination of whether the Debtor meet the reorganization test necessarily must be based on an assessment of the Debtor's financial resources and whether those resources are sufficient to permit the

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[31] As the responsible agency, the PBGC's views on the correct interpretation of the distress termination statute have substantial weight and are offered to help inform the Court's consideration of this critically important issue. *See PBGC v. LTV Corp.*, 496 U.S. 633, 647-48 (1990), *citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also PBGC v. Republic Tech. Int'l, LLC*, 386 F.3d 659, 668 (6th Cir. 2004), *cert. denied sub nom. United Steelworkers of Am. v. PBGC*, 125 S. Ct. 1594 (2005); *cf. United States v. Mead*, 533 U.S. 218 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (agency's views on legal issues entitled to respect based on "power to persuade").

[32] *See Wire Rope*, 287 B.R. at 777.

[33] *Sewell*, 195 B.R. at 185.

reorganized Debtor to fund and maintain the Pension Plan in accordance with ERISA and the Internal Revenue Code and to simultaneously fulfill its obligations to creditors pursuant to a plan of reorganization and continue in business outside of Chapter 11.

V. PBGC'S OBJECTION TO DISTRESS TERMINATION

The Debtor has not provided any evidence regarding the projected costs of maintaining the Pension Plan, its financial resources and whether these resources are sufficient to permit Conco to fund and maintain the Pension Plan while simultaneously fulfilling its obligations to creditors under any plan of reorganization and continuing in business outside of Chapter 11. For example, while the Debtor alleges generally that "[t]he minimum funding requirements of the Plan over the next few years would prevent the Debtor from reorganizing and exiting from Chapter 11 and would effectively prohibit the Debtor surviving outside of bankruptcy based upon the Debtor's projected earnings," it does not even state what those contributions and earnings are expected to be, let alone provide any evidence proving them. Accordingly, unless adequate evidence is presented to the Court, PBGC asks the Court to grant its objection and deny the Distress Termination motion without prejudice.

CONCLUSION

The Debtor must make the factual and legal showings required by ERISA for this Court to make the necessary determination that the strict criteria for distress termination of the Pension Plan are satisfied. This Court may make this determination only if it is satisfied that the Debtor cannot generate enough cash flow to meet its obligations under any feasible plan of reorganization unless the Pension Plan is terminated.

Dated: December 2, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2013, a true and correct copy of the foregoing was (a) mailed electronically through the U.S. Bankruptcy Court's ECF system at the electronic addresses as set forth in the ECF system to the U.S. Trustee, and all other persons receiving electronic notifications in this case, and (b) mailed, first-class, postage prepaid, to the Unsecured Creditors Committee and to those persons, if any, identified in the Court's Notice of Electronic Filing who do not receive electronic notice but are entitled to be served.

/s/ Kimberly Neureiter
Kimberly Neureiter