

**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' PROPOSED DISCLOSURE STATEMENT**

Section 1125 of the Bankruptcy Code requires that a disclosure statement contain adequate information that would enable a hypothetical investor to make an informed judgment of the proposed plan of reorganization. The Debtors' proposed Disclosure Statement [Docket No. 746] should not be approved because it fails to provide "adequate information," as that term is defined under 11 U.S.C. § 1125,² with regard to the: (i) the status of the Pension Plan; and (ii) the treatment of the claims of the PBGC and the Pension Plan. Additionally, the Disclosure Statement describes certain discharge, release and injunction provisions that could be interpreted

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.

² 11 U.S.C. § 1125(a)(1).

to release claims against non-debtors for fiduciary breaches arising under the Employee Retirement Income Security Act of 1974, *as amended* (“ERISA”). These provisions violate public policy and are prohibited under section 524(e) of the Bankruptcy Code and section 410(a) of ERISA.³

PBGC has communicated its concerns with the Disclosure Statement 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.

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 ERISA.⁴ 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.⁵ 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.

³ 11 U.S.C. § 524(e); 29 U.S.C. § 410(a).

⁴ *See* 29 U.S.C. §§ 1301-1461 (2012, Supp. I 2013).

⁵ *See* 29 U.S.C. §§ 1321-1322, 1342, 1361.

ERISA provides the exclusive means for a sponsor to terminate a pension plan — a standard termination or a distress termination.⁶ A standard termination requires sufficient assets to pay all of the pension plan’s promised benefits.⁷ 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.⁸ 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”).⁹

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;¹⁰ (ii) any unpaid flat-rate and variable-rate premiums;¹¹ and (iii) termination premiums at the rate of \$1,250 per plan participant per year for three years.¹² 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.¹³ Thus, under those

⁶ See 29 U.S.C. § 1341(a)(1); see also *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999).

⁷ See 29 U.S.C. § 1341(b)(1)(D).

⁸ See 29 U.S.C. § 1341(c)(2)(B).

⁹ See 29 U.S.C. § 1342.

¹⁰ 29 U.S.C. § 1362(a), (b).

¹¹ 29 U.S.C. § 1307.

¹² 29 U.S.C. § 1306(a)(7).

¹³ See 29 U.S.C. § 1306(a)(7)(B).

circumstances, termination premiums are not a dischargeable claim or debt within the meaning of 11 U.S.C. §§ 101(5), 1141.¹⁴

Any party who is a fiduciary of a covered pension plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by Title I and IV of ERISA shall be liable to pay for losses to the plan or perhaps to the plan's participants resulting from such breach.¹⁵ Provisions in an agreement or instrument that purport to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under ERISA are void as against public policy.¹⁶

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.¹⁷

B. The Pension Plan

Magnequench International, Inc. ("MII") 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

¹⁴ See 29 U.S.C. §§ 101(5), 1141.

¹⁵ See 29 U.S.C. §§ 1109(a), 1342(d).

¹⁶ See 29 U.S.C. § 1110.

¹⁷ See 29 U.S.C. §§ 1082(b)(2), 1342(d), 1362(c); 26 U.S.C. § 412(b)(2).

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 3, 2015. A hearing on the relief sought in the Motion is scheduled for December 8, 2015.

ARGUMENT

I. The Disclosure Statement fails to provide adequate information.

The primary purpose of a disclosure statement is to provide creditors adequate information necessary to understand and accept, or reject, the proposed plan of reorganization.

Bankruptcy Code § 1125(a)(1) defines "adequate information" as:

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.¹⁸

In determining whether a disclosure statement contains adequate information, the court must consider "the complexity of the case, the benefit of additional information to creditors...and the cost of providing additional information."¹⁹ For the reasons discussed below, the Disclosure Statement submitted by the Debtors fails to provide creditors with sufficient information.

¹⁸ 11 U.S.C. § 1125(a)(1).

¹⁹ *Id.*

a. The Disclosure Statement is silent as to whether the Debtors 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 Debtors should disclose whether: (i) MII or any other Debtor intends to sponsor the Pension Plan post-reorganization; (ii) MII seeks to terminate the Pension Plan in either a standard or distress termination; or (iii) MII expects a PBGC-initiated termination of the Pension Plan. If MII or any other Debtor intends to continue the Pension Plan, it must disclose its financial wherewithal to afford it. If MII intends to pursue a standard termination, it must disclose how it will satisfy the benefit liabilities under the Pension Plan. If MII intends to pursue a distress termination, it must disclose how the statutory distress criteria for such a termination are met.

b. The Disclosure Statement fails to disclose the Debtors' obligations and liabilities relating to the Pension Plan.

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

PBGC has filed an estimated contingent claim in the Debtors' jointly administered bankruptcy cases against each Debtor, jointly and severally, for unfunded benefit liabilities owed upon Pension Plan termination in the approximate amount of \$3,868,912. PBGC has also filed unliquidated claims for minimum funding contributions owed to the Pension Plan and for statutory premiums owed to PBGC. If the Pension Plan terminates in a distress termination pursuant to 29 U.S.C. §§ 1341(c)(2)(B)(ii) or (iii), or in an involuntary termination under 29 U.S.C. § 1342 statutory termination premiums arise.²⁰ PBGC estimates the total amount of such termination premiums at \$1,087,500.

²⁰ 29 U.S.C. § 1306(a)(7).

II. The Disclosure Statement violates section 524(e) of the Bankruptcy Code and Title IV of ERISA.

Section 524(e) of the Bankruptcy Code limits the effect of a debtor's discharge. That section states that the "discharge of a debt of the debtor does not affect the liability of any entity on, or the property of any other entity for, such debt."²¹

The Third Circuit, as set forth in *In re Continental Airlines*, considers the "hallmarks of permissible non-consensual releases" include "fairness, necessity to the reorganization, and specific factual findings to support these conclusions."²² And "even if the threshold *Continental* criteria of fairness and necessity for approval of non-consensual third-party releases were marginally satisfied," "the broader context of the *Continental* discussion" provides that such releases should be approved only "in the context of **extraordinary cases**" like mass tort litigation cases.²³

The Disclosure Statement, in particular, Article XIV, describes releases that purport to release claims against non-debtors.²⁴ If the Pension Plan terminates in the future, PBGC will have the authority to investigate and pursue claims for fiduciary breach and prohibited transactions under Title I and Title IV of ERISA. The releases in the proposed Disclosure Statement, however, might be interpreted to extinguish possible claims against non-debtor fiduciaries or other third parties covered in those provisions. Debtors have made no showing of fairness or necessity, let alone extraordinary circumstances needed to warrant the release of non-debtors from their fiduciary obligations to the Pension Plan. Furthermore, the Debtors have not

²¹ See 11 U.S.C. § 524(e).

²² *In re Continental Airlines*, 203 F.3d 203, 214, 217 (3d Cir. 2000); see also *In re PWS Holding Corp.*, 228 F.3d 224, 237 (3d Cir. 2000).

²³ *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 608 (Bankr. D. Del. 2001), appeal dismissed by, 280 B.R. 339 (D. Del. 2002) (emphasis added).

²⁴ See Disclosure Statement, Article XIV.

demonstrated, nor can they demonstrate, that the release of non-debtors from their fiduciary obligations to the Pension Plan is integral to the Debtors' reorganization. Without such evidence, the releases cannot be allowed, and the Debtors' proposed plan cannot be confirmed.

Moreover, Section 401(a) of ERISA prohibits such releases because they violate public policy:

[A]ny provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.²⁵

Accordingly, the Disclosure Statement violates Section 524(e) of the Bankruptcy Code and Title IV of ERISA.

CONCLUSION

This Court should sustain PBGC's objection to the Disclosure Statement. The Disclosure Statement fails to include adequate information as defined under 11 U.S.C. § 1125 of the Bankruptcy Code concerning: (i) the status of the Pension Plan; and (ii) the treatment of the claims of the PBGC and the Pension Plan. Additionally, the proposed discharge, release, and injunction provisions violate public policy and are prohibited under section 524(e) of the Bankruptcy Code and section 410(a) of ERISA.²⁶

WHEREFORE, PBGC requests that this Court sustain PBGC's Objection and require the Debtors to modify the Disclosure Statement as stated above.

²⁵ See 29 U.S.C. § 1110(a).

²⁶ In the attached Exhibit A, PBGC has provided language that would cure the proposed Disclosure Statement.

Dated: Washington, DC
December 1, 2015

Respectfully submitted,

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