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) **Ref. D.I. 1393** **Reply deadline: 3/28/16, 12:00 noon (ET)** **Hearing Date: 3/29/16, at 10:00 a.m. (ET)**

OBJECTION OF THE PENSION BENEFIT GUARANTY CORPORATION
TO CONFIRMATION OF DEBTORS' PROPOSED PLAN OF REORGANIZATION

The Pension Benefit Guaranty Corporation ("PBGC"), an agency of the United States government and a creditor with unsecured claims against each of the Debtors in this case, hereby objects to the Debtors' Third Amended Joint Plan of Reorganization and any revisions (the "POR"). The POR's release, discharge, exculpation, and injunction provisions are overbroad, and could be interpreted as releasing non-debtors for fiduciary breaches arising under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[2] These provisions violate public policy and are prohibited under section 524(e) of the Bankruptcy Code and section 410(a) of ERISA.[3] Furthermore, discharges of any of the Debtors that may liquidate under the POR in these proceedings is barred under the Bankruptcy Code.[4] The POR fails to satisfy Sections 1129(a)(1), (3) of the Bankruptcy Code, and cannot be confirmed.

[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 Callco 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).
[2] 29 U.S.C. §§ 1001-1461 (2012, Supp. II 2014).
[3] 11 U.S.C. § 524(e); 29 U.S.C. § 1110(a).
[4] 11 U.S.C. §§ 1141(d)(3), 727(a)(1).

PBGC has repeatedly communicated its concerns to the Debtors and has provided the Debtors with proposed language to resolve its objections. While PBGC continues to hope for and seek a consensual resolution, 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.[5] 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.[6] PBGC's insurance funds are made up of, among other things, (i) the agency's recoveries of terminated pension plans' underfunding and (ii) premiums paid by pension plan sponsors.

ERISA provides the exclusive means for a sponsor to terminate a pension plan — a standard termination or a distress termination.[7] A standard termination requires sufficient assets to pay all of the pension plan's promised benefits.[8] 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

[5] *See* 29 U.S.C. §§ 1301-1461 (2012, Supp. II 2014).
[6] *See* 29 U.S.C. §§ 1321-1322, 1342, 1361.
[7] *See* 29 U.S.C. § 1341(a)(1); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999).
[8] *See* 29 U.S.C. § 1341(b)(1)(D).

continue in business unless the pension plan terminates.[9] Separate from a standard or distress termination, PBGC can initiate a termination of a pension plan pursuant to section 4042 of ERISA ("PBGC-initiated Termination").[10]

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;[11] (ii) any unpaid flat-rate and variable-rate premiums;[12] and (iii) termination premiums at the rate of $1,250 per plan participant per year for three years.[13] 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.[14] Thus, under those circumstances, termination premiums are not a dischargeable claim or debt within the meaning of 11 U.S.C. §§ 101(5), 1141.[15]

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 becomes liable to pay for losses to the plan or, in effect, to the plan's participants, resulting from such breach.[16] Provisions in an agreement or instrument that purport to relieve a fiduciary from

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9 *See* 29 U.S.C. § 1341(c)(2)(B).
10 *See* 29 U.S.C. § 1342.
11 29 U.S.C. § 1362(a), (b).
12 29 U.S.C. § 1307.
13 29 U.S.C. § 1306(a)(7).
14 *See* 29 U.S.C. § 1306(a)(7)(B).
15 *See* 11 U.S.C. §§ 101(5), 1141.
16 *See* 29 U.S.C. §§ 1109(a), 1342(d).

responsibility or liability for any responsibility, obligation, or duty under ERISA are void as against public policy.[17]

Finally, because PBGC typically becomes the statutory trustee of a 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.[18] As statutory trustee of a terminated plan, PBGC has the power to take any action authorized by the plan and to commence, prosecute, or defend on behalf of the plan any suit or proceeding with respect to the pension plan.[19] PBGC therefore has authority to investigate and prosecute any fiduciary or party-in-interest that has participated in or committed a fiduciary breach or prohibited transaction with respect to the pension plan.[20] Individual fiduciaries and parties-in-interest are personally liable for any losses to the pension plan resulting from each fiduciary breach and/or prohibited transaction.[21]

B. The Pension Plan

Magnequench International, Inc. ("MII") sponsors the Magnequench International Hourly Pension Plan (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.

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[17] *See* 29 U.S.C. § 1110.
[18] *See* 29 U.S.C. §§ 1082(b)(2), 1342(d), 1362(c); 26 U.S.C. § 412(b)(2).
[19] *See* 29 U.S.C. § 1342(d).
[20] *See* 29 U.S.C. §§ 1002(14), (21), 1104, 1106, 1109.
[21] *See* 29 U.S.C. §§ 1106, 1109.

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 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. In general, plan termination is necessary if a plan's sponsor and its controlled group members liquidate, but may be avoidable in some reorganizations. 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. The Debtors' cases have been administratively, but not substantively, consolidated. As described above, PBGC filed timely claims asserting liabilities to PBGC or to the Pension Plan. All Debtors are believed to be members of the controlled group of the Pension Plan's sponsor, so these claims were asserted against each and every Debtor, jointly and severally.

From its first version, the Debtors' POR has provided for the possibility of either reorganization or liquidation of various Debtors, with flexibility regarding the extent of asset sales from multiple Debtors' estates and varying possible recoveries.[22] After entry of the Court's January 20, 2016 Order Approving Disclosure Statement ("Disclosure Order"), solicitation packages were sent out.[23]

On or about February 2, 2016, PBGC received a Notice of Non-Voting Status that states PBGC claims are in a class deemed to accept the POR, and that "you will also be deemed to

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[22] *See* Joint Plan of Reorganization, D.I. 746.
[23] See Disclosure Order, D.I. 1144.

consent to the third party releases contained in Article IX.E of the" POR. The supplemental notices sent to claimholders of non-voting status inform of the new submission deadline "[i]f you previously received an opt-out election form," but as provided in the Disclosure Order, claimholders like PBGC were not previously sent and did not receive any opt-out election form regarding the third party releases.[24]

The POR was subsequently amended, chiefly to reflect the terms of a proposed settlement negotiated among the Debtors, Oaktree, and the Creditors' Committee. PBGC was not a party to the settlement or the negotiations. The settlement is scheduled to be considered by the Court during the confirmation hearing.

Pursuant to the Court's March 11, 2016 Order regarding supplemental disclosure ("Supplemental Disclosure Order"), objections to confirmation are due March 23, and a confirmation hearing is scheduled to begin March 29, 2016.[25]

As set forth in the Debtors' POR filed March 11, 2016,[26] below-referenced provisions relating to release, discharge, injunction, and exculpation provide releases to non-debtors. For convenience, these provisions are provided in the attached exhibit.

ARGUMENT

The POR, in its current state, cannot be confirmed. A Chapter 11 plan must comply with each of the requirements set forth in Section 1129(a) of the Code to be confirmed, except Section 1129(a)(8). Two of these requirements are that:

1) The plan comply with applicable provisions of Title 11; and

2) The plan be proposed in good faith and not by any means forbidden by law.[27]

[24] See Disclosure Order, D.I. 1144, at 7.
[25] See Supplemental Disclosure Order, D.I. 1391, at 3.
[26] Debtors' Third Amended Joint Plan of Reorganization, D.I. 1393, at 21, 69-74.
[27] *See* 11 U.S.C. § 1129(a)(1), (3); *see also In re Armstrong World Indus.*, 432 F.3d 507,511.

Further, even if a plan meets all requirements of Section 1129(a) except 1129(a)(8), it may only be "crammed down" under Section 1129(b) if the plan does not unfairly discriminate and is fair and equitable.[28]

Here, the POR cannot meet the requirements of Section 1129(a)(1) and (3). The POR improperly provides for releases of non-debtor third parties, without any evidence that the releases are fair, necessary to the reorganization (which is itself in question), based upon reasonable consideration, or based upon voluntary consent of creditors. Moreover, the POR's potential releases of pension plan fiduciaries is forbidden under ERISA. And any discharge of a liquidating corporate Debtor violates the Bankruptcy Code.

I. The POR 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."[29]

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."[30] 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.[31]

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[28] *See* 11 U.S.C. 1129(a), (b)(1), (2).
[29] *See* 11 U.S.C. § 524(e).
[30] *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).
[31] *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).

To determine whether non-debtor releases are necessary to a reorganization, the POR's proponent must demonstrate that there is a relationship between the debtors' successful reorganization and the non-consensual parties' release, and that the releases have provided a critical financial contribution to the debtors' plan that is necessary to make the plan feasible in exchange for receiving a release of liability.[32] Where the debtors are liquidating, (as some or all of the Debtors in this proceeding may be), non-consensual, third party releases can never be necessary to the reorganization because the liquidation can be successfully accomplished with or without the releases.[33]

After PBGC, among others, earlier raised their objections to the third party releases, the Debtors defended them, in part, as being "**consensual—** that is, the only parties that will be giving a release under the [POR] are those that (a) have the opportunity to opt out" and "choose not to do so or (b) are being paid in full."[34] Yet the proposed settlement requires, in part, in its definition of "Releasing Parties" that all holders of claims that are deemed to accept the POR are also deemed to accept the third party releases. PBGC does not consent to the releases. And whether PBGC is ultimately "paid in full" cannot be known until after termination of the Pension Plan and PBGC, as statutory trustee, has received an opportunity to audit the Pension Plan for any breach of fiduciary duty.

Furthermore, even the opt out is limited in application by its own terms. For example, the injunction provision states, in part, that all who "have held, hold, or may hold claims" that "are subject to compromise and settlement pursuant to the terms of the" POR are "permanently

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32 *In re Genesis Health*, 266 B.R. at 607.

33 *See In re Nickels Midway Pier, LLC*, 2010 WL 20345442, at *13 (Bankr. D.N.J. May 21, 2010), *cited by In re Wash. Mut., Inc.*, 442 B.R. 314, 352 (Bankr. D. Del. 2011).

34 Omnibus Reply of Debtors to Objections to Motions to Approve Bidding Procedures, Disclosure Statement and Related Relief, D.I. 1009, at 24-25.

enjoined and precluded" from pursuing them.[35] If opting out does not allow a creditor to pursue its claims, there is no real consent to a release.[36]

The POR, in particular, the POR provisions of Article IX, describe releases that purport to release claims against non-debtors. 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 Article IX provisions, 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 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. Nor have they borne their burden of proving that Non-Debtor Affiliates, who bear joint and several responsibility for the Pension Plan as members of the Pension Plan's controlled group, should be released. 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 of fiduciaries 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.[37]

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[35] POR, at Article IX.G.

[36] *See In re Wash. Mut.*, 442 B.R. at 351 (third party releases were non-consensual where the POR provided that "even parties who thought they were opting out of the releases by checking the box would be bound by the releases").

[37] *See* 29 U.S.C. § 1110(a).

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

II. The POR improperly seeks discharge of even a liquidating Debtor.

The Debtors in this case have filed a joint POR, and are administratively consolidated. They are not substantively consolidated, but remain separate bankruptcy estates.[38] And some or all of them may ultimately liquidate under the flexible terms of the POR.

Section 1141(d)(3) of the Code bars the Chapter 11 discharge of a debtor that liquidates substantially all property of its estate, that does not engage in business after consummation of a Chapter 11 plan, and that would be denied discharge under Code Section 727(a). Section 727(a) does not grant a discharge if the debtor is not an individual.[39] These Debtors are corporations, and if they liquidate in bankruptcy, they are not entitled to a discharge.

The broad provisions in Article IX of the POR, such as the Injunction section, improperly attempt to have the effect of providing liquidating Debtors with a discharge.[40] Here, the Debtors chose to seek maximum flexibility in their joint POR, allowing reorganization and liquidation to both be possibilities as late as possible in the bankruptcy proceeding. But the POR cannot be used to allow a liquidating Debtor to receive what would be forbidden if that Debtor were seeking to confirm a simple liquidating Chapter 11 plan.

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[38] *See* POR, at Article IV.O.

[39] 11 U.S.C. §§ 727(a)(1), 1141(d)(3).

[40] *See In re Bigler LP*, 442 B.R. 537, 545-46 (Bankr. S.D. Tex. 2010)(POR's injunction provision "would certainly operate as a discharge of the" debtor); *see also In re Sis Corp.*, 120 B.R. 93, 96 (Bankr. N.D. Ohio 1990)(POR language would effectively "discharge on those specific obligations which are not otherwise treated in the" POR).

CONCLUSION

The POR cannot be meet the requirements of Section 1129 of the Code, and should not be confirmed. The proposed discharge, release, and injunction provisions are overbroad. They violate public policy and are prohibited under section 524(e) of the Bankruptcy Code and section 410(a) of ERISA. Finally, the POR seeks to provide an impermissible discharge to any Debtors who may ultimately liquidate under the POR.

WHEREFORE, PBGC requests that this Court sustain PBGC's Objection, require the Debtors to modify the POR accordingly and grant such other and further relief as appropriate.

Dated: Washington, DC
March 23, 2016

Respectfully submitted,

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