IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:	)	Chapter 11
MUNDY RANCH, INC.,	)	Case No.: 12-13015
Debtor.	)	

PENSION BENEFIT GUARANTY CORPORATION'S OBJECTION TO DEBTOR'S MOTION FOR COURT APPROVAL OF DISTRIBUTION OF SALE PROCEEDS TO LEE WEISS

The Pension Benefit Guaranty Corporation ("PBGC") files this objection to the Debtor's Motion for Court Approval of Distribution of Sale Proceeds to Lee Weiss, docket number 241 (the "Motion"). Despite filing for protection under Chapter 11 of the Bankruptcy Code, the Debtor appears to be attempting to pay its creditors by motion, rather than through a plan of reorganization, and has not yet fully addressed PBGC's significant claims in this case. For these reasons, and as more fully explained below, PBGC objects to the Motion and to any payment to unsecured creditors or shareholders that is not made pursuant to a plan of reorganization or in accordance with the Bankruptcy Code.

BACKGROUND

1. PBGC is a federal agency and wholly owned United States government corporation. PBGC administers the pension insurance program under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA").[1] PBGC guarantees the pension benefits of nearly 43 million participants in more than 26,000 pension plans.[2] When an underfunded

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

[2] 2012 PBGC Annual Management Report at 1, *available at* http://www.pbgc.gov/documents/2012-annual-report.pdf.

pension plan terminates, PBGC generally becomes trustee of the plan and, subject to statutory limitations, pays the plan's unfunded benefits with its insurance funds.[3]

2. The Debtor is the contributing sponsor of the Mundy Ranch Inc. Defined Benefit Pension Plan (the "Pension Plan"),[4] a defined benefit plan covered by Title IV of ERISA.

3. The sponsor of a pension plan and members of its controlled group are financially responsible for the pension plan.[5] The joint-and several[6] responsibilities of the plan sponsor and controlled group members to a pension plan include, *inter alia*: (1) paying the statutorily required minimum funding contributions to the pension plan;[7] (2) paying insurance premiums to PBGC;[8] and (3) paying any unfunded benefit liabilities to PBGC if the pension plan terminates.[9]

4. On information and belief, the Debtor is the plan administrator and fiduciary of the Pension Plan within the meaning of 29 U.S.C. §§ 1002(16), 1102(a).

5. On August 10, 2012, the Debtor filed for Chapter 11 bankruptcy protection.

6. On January 9, 2013, Robert Mundy filed a plan of reorganization and disclosure statement and, docket numbers 54 and 55, respectively.

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[3] *See* 29 U.S.C. §§ 1321-22, 1342, 1361.

[4] *See* 29 U.S.C. § 1301(a)(13), (14).

[5] *See* 29 U.S.C. § 1082(c)(11)(B).

[6] *See* 29 U.S.C. §§ 1082(c)(11)(B), 1307(e)(2), 1362.

[7] 26 U.S.C.§ 412(c)(11) (2007) (effective for pension plan years beginning on or before Dec. 31, 2007); 29 U.S.C.A. § 1082(c)(11) (2007) (same); *see also* 26 U.S.C. § 412(b)(1), (2) (2009) (effective for pension plan years beginning after Dec. 31, 2007); 29 U.S.C.A. § 1082(b)(1), (2) (2009) (same).

[8] 29 U.S.C. §§ 1306, 1307(e)(2).

[9] 29 U.S.C. § 1362.

7. On January 23, 2013, the Debtor filed a plan of reorganization and disclosure statement, docket numbers 75 and 76, respectively.

8. On October 24, 2103, PBGC issued a Notice of Determination ("Notice") that the Pension Plan should be terminated as of October 24, 2013 ("PBGC's Determination"). Specifically, the Notice states that PBGC has determined that, *inter alia*, the Pension Plan does not have assets available to pay benefits which are currently due, has not met the minimum funding standard required under section 412 of the Internal Revenue Code, will be unable to pay benefits when due, and that a reportable event described in ERISA section 4043(c)(7) has occurred.

9. On October 24, 2013Pension Plan participants were notified of PBGC's Determination via publication in the Rio Grande Sun.

10. On October 24, 2013, PBGC filed two amended proofs of claim against the Debtor relating to the Pension Plan: (1) due and unpaid minimum funding contributions in the amount of $190,637 (including $26,957 in priority claims),[10] and (2) unfunded benefit liabilities in the amount of $1,186,873.[11] PBGC's claim against the Debtor for pension insurance premiums, [12] filed on January 23, 2013, remains unliquidated.

ARGUMENT

11. The Debtor's disclosure statement states that, upon emergence, the Debtor will assume and continue the Pension Plan. However, Debtor's plan of reorganization does not detail

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[10] Claim No. 3.

[11] Claim No. 5.

[12] Claim No. 4.

how it intends to continue sponsoring the Pension Plan and make contributions required under section 412 of the Internal Revenue Code.

12. At the hearing on the disclosure statements, the Court ordered Robert Mundy and the Debtor to each file an amended disclosure statement. Specifically, the Court ordered that the Debtor's amended disclosure statement, *inter alia*, "give greater detail and deadlines regarding its proposed sales of property [and] whether the debtor intends to make payments from sales proceeds as sales are made…."[13] The Debtor has not filed an amended disclosure statement, but has agreed to file it within 21 days following this Court's entry of an order resolving Robert Mundy's Motion for Appointment of Trustee or Examiner.[14]

13. In the meantime, the Debtor has filed three motions to pay certain of its creditors. On September 17, 2013, the Debtor filed a motion to pay H. Candelaria Enterprises, Inc. and the Pension Plan in the amount of $350,000 to repay funds borrowed from H. Candelaria Enterprises, as well as an additional $50,000 toward satisfaction of PBGC's claims.[15] On October 1, 2013, the Debtor filed a motion to distribute sale proceeds to secured creditors Rabo Agrifinance and Valley National Bank.[16] Finally, on October 9, 2013, the Debtor filed the instant Motion.[17]

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[13] Clerk's Minutes for Hearing Before the Honorable Robert H. Jacobvitz, February 27, 2013 at 9:00 am, docket number 116.

[14] Stipulated Order Extending Deadline for Debtor and Robert Mundy to File Amended Disclosure Statements, docket number 173. As of the date of filing this objection, the Court has not entered such an order.

[15] Docket number 217.

[16] Docket number 237.

[17] Docket number 241.

14. PBGC is the Debtor's largest unsecured creditor, with claims in excess of $1.1 million. To the extent that Mr. Weiss has been monetarily damaged as a result of the sale of property to Dinero Land and Cattle Co., he is also an unsecured creditor, although he has not, to PBGC's knowledge, filed a proof of claim. Mr. Weiss appears to be an ordinary, unsecured creditor of the estate. Nothing in the Motion offers any rationale as to why Mr. Weiss should be paid immediately, rather than through a plan of reorganization.

15. The Bankruptcy Code mandates that, first, PBGC's priority claims in the amount of $26,957 be paid before any general unsecured creditors.[18] Then, Mr. Weiss and PBGC, and any other general unsecured creditors, must share *pari passu* in recovery from the Debtor's estate.[19]

16. The Debtor cannot pay Mr. Weiss, or any other general unsecured creditor, without first resolving PBGC's priority and general unsecured claims.[20] Therefore, PBGC objects to the Motion and to the Debtor making any payments to Mr. Weiss while PBGC's claims remain unresolved. A debtor may not use assets of the estate or enter into transactions that allow it to short-circuit the confirmation requirements of Chapter 11.[21] The proposed

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[18] 11 U.S.C. § 507(a).

[19] *See* 11 U.S.C. § 1123(a)(4).

[20] *See* 11 U.S.C. § 1129(b)(2)(B)(ii). Additionally, PBGC has now determined that the Pension Plan should be terminated, which gives rise to termination premiums in the amount of $11,250 per year for three years ("Termination Premiums"). See 29 U.S.C. ' 1306(a)(7), as amended by § 8101(b) the Deficit Reduction Act of 2005 (Pub. L. 109B171) and by §§ 401(b) and 402(g)(2)(B) of the Pension Protection Act of 2006 (Pub. L. 109B280). Because the Debtor is reorganizing in Chapter 11, the Termination Premiums do not arise until after the Chapter 11 plan is confirmed and the Debtor obtains a discharge. See 29 U.S.C. § 4006(a)(7)(B). The Debtor must demonstrate the ability to pay the Termination Premiums after emerging from bankruptcy. 11 U.S.C. § 1129(a)(11).

[21] *See In Re Iridium Oper. LLC,* 478 F.3d 452, 466 (2d Cir. 2007), *citing Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.),* 700 F.2d 935, 940 (5th Cir.1983).

payment would circumvent the requirements of the absolute priority rule, 11 U.S.C. § 1129(b)(2)(B)(ii), and thus is impermissible.

CONCLUSION

For the foregoing reasons, PBGC respectfully ask this Court to deny the Debtor's Motion for Court Approval of Distribution of Sale Proceeds to Lee Weiss, and grant other relief as the Court deems just and proper.

Dated: October 25, 2013
Washington, D.C.

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CERTIFICATE OF SERVICE

I certify that on the **25th day of October, 2013,** I filed the foregoing pleading electronically through the CM/ECF system, which caused all parties or counsel requesting notice to be served by electronic means on the date of filing.

/s/ M. Katherine Burgess
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