UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

COX ENTERPRISES, INC., a Delaware corporation,	)	
Plaintiff,	)	
vs.	)	CASE NO.: 6:04-CV-698-JA-DAB
NEWS-JOURNAL CORPORATION, a Florida corporation, HERBERT M. DAVIDSON, JR., MARC L. DAVIDSON, JULIA DAVIDSON TRUILO, JONATHAN KANEY, JR., DAVID KENDALL, ROBERT TRUILO, GEORGIA KANEY, and PMV, INC., a Florida corporation,	)	
Defendants.	)	

THE PENSION BENEFIT GUARANTY CORPORATION'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO COX ENTERPRISES, INC.'S MOTION FOR RECONSIDERATION

The Pension Benefit Guaranty Corporation ("PBGC") objects to the motion of Cox Enterprises, Inc. ("Cox") for reconsideration of its motion to compel discovery (the "Reconsideration Motion"). Cox seeks to compel discovery about the members of News-Journal Corporation's ("NJC") "controlled group," as defined in the Employee Retirement Income Security Act of 1974 ("ERISA").[1] According to Cox, the Court should consider evidence about NJC's controlled-group members and their financial condition when determining the amount and allowability of PBGC's claims against NJC. After reviewing the plain language of ERISA, which provides that NJC is jointly and severally liable for the full amount of PBGC's claims,

[1] A group of trades or business under common control, referred to as a "controlled group," includes, for example, a parent and its 80% owned subsidiaries. *See* 29 U.S.C. § 1301(a)(14)(A), (B); 26 U.S.C. § 414(b), (c); 26 C.F.R. §§ 1.414(b)-1, 1.414(c)-1, 1.414(c)-2.

Magistrate Judge Baker correctly concluded that information about the controlled-group members was not relevant. Cox now moves for reconsideration based on its mistaken notions that "equity" is somehow boundless, subject neither to statue or precedent.[2] While equity is broad, it is not limitless and especially cannot be used to thwart the will of Congress as expressed in statute. The magistrate judge thus correctly relied on the provisions of ERISA in his analysis, and his decision should be upheld.

BACKGROUND

A. NJC's Receivership and the Pension Plan's Termination.

In April 2009, the Court appointed James Hopson as Receiver for NJC, with the power to operate NJC's business and attempt to sell its assets.[3] Thereafter, the Receiver entered into an agreement to sell substantially all of NJC's assets to Halifax Media Acquisition LLC, which was approved by the Court. The sales agreement did not include Halifax Media's assumption of the Pension Plan of News-Journal Corporation (the "Pension Plan"), which remained with the liquidating NJC.

Even before the Receiver sought to sell NJC's assets, PBGC began working closely with the Receiver and his pension counsel to obtain necessary information about NJC and the Pension Plan.[4] As is typical in any situation where a plan sponsor is liquidating, PBGC's staff also

---

[2] Reconsideration Motion at 14 ("[L]egal precedent . . . is not required….").

[3] *See* Order, Apr. 17, 2009, (Doc. No. 507).

[4] *See* Transcript of Proceedings, Hearing on Motion for Approval of Sale, Feb. 1, 2010, (Doc. No. 594 at 100 (Testimony of William G. Beyer, Receiver's pension counsel)) ("I have to take a step back, the reason I did this, PBGC and I have been in touch since mid summer, late summer, and October 16 I believe they sent me a shopping list of some 50 items they wanted delivered to them. Actually that's 50 categories of documents, I believe, with subcategories, multiple documents in each category as [PBGC] built [its] administrative record . . . .").

initiated the process for making a formal determination of whether the Pension Plan should be terminated.[5]

Title IV of ERISA provides the exclusive means for terminating a covered pension plan.[6] Plan termination can be initiated by the sponsoring employer or by PBGC. An employer may terminate a plan in a standard termination under 29 U.S.C. § 1341(b) if the plan has sufficient assets to cover all future benefit payments (through the purchase of private sector annuities or lump sum payments), or in a distress termination under 29 U.S.C. § 1341(c) if the plan is underfunded and the employer meets certain statutory financial distress tests. In addition, PBGC has discretion to initiate the termination of an underfunded plan if it determines that one of the four criteria set forth in 29 U.S.C. § 1342(a) has been met. Among these criteria is that the plan will be unable to pay benefits when due.[7]

On May 14, 2010, PBGC issued a notice of determination (the "Notice") to NJC that the Pension Plan should be terminated under 29 U.S.C. § 1342. Shortly before PBGC issued the Notice, the Receiver filed a separate application for a distress termination of the Pension Plan under 29 U.S.C. § 1341(c). Because PBGC made a determination to initiate Pension Plan termination under 29 U.S.C. § 1342, it was unnecessary for PBGC to make any determination on the Receiver's application for a distress termination of the Pension Plan.

Upon issuing the Notice, PBGC sent to the Receiver a trusteeship agreement providing for, *inter alia*, the Pension Plan's termination under 29 U.S.C. § 1342(c), establishment of March

---

[5] *See generally* PBGC's Letter Brief, Feb. 25, 2010, (Doc. No. 611) (describing PBGC's administrative process for initiating termination of a pension plan, and attaching the relevant PBGC internal directive).

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

[7] 29 U.S.C. § 1342(a).

23, 2010, as the Pension Plan's termination date, and appointment of PBGC as the Pension Plan's statutory trustee. The Receiver resisted signing the trusteeship agreement for reasons related to PBGC's claims, and, less than a week after sending the trusteeship agreement, PBGC offered to discuss settlement of the claims. PBGC sent a letter to the Receiver on July 8, 2010, reiterating PBGC's request that the Receiver sign the trusteeship agreement and effectuate the Pension Plan's termination.[8] Only after PBGC and the Receiver reached a settlement on the amount of PBGC's claims, did the Receiver sign the trusteeship agreement terminating the Pension Plan.[9]

B. PBGC's Claims against NJC.

ERISA is a "complex and reticulated statute."[10] It provides that upon termination of a pension plan covered by Title IV, certain liabilities arise. The plan sponsor and each member of its controlled group become jointly and severally liable to PBGC for the amount of the plan's unfunded benefit liabilities, plus interest as of the plan's termination date.[11] The amount of a pension plan's unfunded benefit liabilities equals the value of the benefit liabilities[12] as of the plan's termination date minus the current value of the pension plan's assets.[13]

---

[8] *See* Letter to William Beyer from Jennifer Tontz, July 8, 2010, (Doc. No. 720-2).

[9] *See* Receiver's Resp. to Objs. to Receiver's Report & Recommendation, Aug. 5, 2010, (Doc. No. 669 at 3) ("As consideration for PBGC's [agreement on treatment of its claims], the Receiver agreed to drop his procedural objection and to execute documents which would terminate the pension plan").

[10] *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980).

[11] *See* 29 U.S.C. § 1362(a), (b)(1)(A).

[12] "'Benefit liabilities' means the benefits of employees and their beneficiaries under the [pension] plan . . . ." 29 U.S.C. § 1301(a)(16).

[13] 29 U.S.C. § 1301(a)(18); 29 C.F.R. §§ 4044.41-.75.

Additionally, ERISA and the Internal Revenue Code make the plan sponsor and its controlled-group members jointly and severally liable for contributions to the plan pursuant to statutory minimum funding standards.[14] If PBGC becomes statutory trustee of the plan after termination, on behalf of the plan, it collects any amounts owed to the plan, including any unpaid contributions.[15] Moreover, the plan sponsor and each member of its controlled group are jointly and severally liable for statutory premiums owed to PBGC.[16] If the plan terminates under certain conditions, this premium liability includes a termination premium payable at the rate of $1,250 per plan participant per year, for three years.[17]

On April 16 2010, PBGC timely filed claims with the Receiver for the (1) unfunded benefit liabilities of the Pension Plan under 29 U.S.C. §§ 1362 and 1368 in the estimated amount of $15,102,012.00,[18] (2) unpaid premiums due to PBGC under 29 U.S.C. §§ 1306 and 1307 in the estimated amount of $4,203,750.00, (3) unpaid minimum funding contributions due to the Pension Plan under 26 U.S.C. §§ 412, 430, and 29 U.S.C. § 1082 in the estimated amount of $650,142.00, and (4) statutory liability for the shortfall and waiver amortization charge under 29 U.S.C. § 1362(c) in the estimated amount of $6,504,080.00.[19] PBGC calculated these estimated claims in accordance with Title IV of ERISA and PBGC's regulations thereunder, following the

---

[14] *See* 29 U.S.C. § 1082(b); 26 U.S.C. § 412(b).

[15] *See* 29 U.S.C. § 1362(c).

[16] *See* 29 U.S.C. § 1307(e).

[17] *See* 29 U.S.C. § 1306(a)(7); *see also PBGC v. Oneida Ltd.*, 562 F.3d 154, 157 (2d Cir.), *cert denied*, 130 S. Ct. 1022 (2009).

[18] This estimate of the Pension Plan's unfunded benefit liabilities was based on a plan termination date of March 31, 2010.

[19] *See* Exhs. to Receiver's Report & Recommendation, (Doc. No. 652-5 at 96-112).

same process that PBGC routinely uses to calculate its claims for bankruptcy and other insolvency proceedings.[20]

After the Receiver filed his initial Report and Recommendation, PBGC and the Receiver engaged in extensive settlement negotiations concerning the amount of PBGC's claims. PBGC's and the Receiver's respective estimated claims formed the basis for these negotiations,[21] leading to a settlement of the amount of PBGC's claims against NJC for the Pension Plan's unfunded benefit liabilities ($14,272,500) and unpaid funding contributions owed to the Pension Plan ($455,000).[22] Notwithstanding the good faith and diligence of the Receiver and PBGC in reaching this settlement, the settled amount of PBGC's claim for the Pension Plan's unfunded benefit liabilities has been superseded by a more recent calculation.

After the Pension Plan terminated and PBGC became the statutory trustee, PBGC began its usual process of preparing a final valuation of the Pension Plan's unfunded benefit liabilities. As with every terminated plan, PBGC calculated the final benefit amounts for each participant and beneficiary in accordance with Title IV of ERISA and PBGC's regulations thereunder.[23] During this process, PBGC's actuaries calculated the Pension Plan's benefit liabilities on a participant-by-participant (seriatim) basis. It normally takes PBGC between two and three years

---

[20] PBGC routinely calculates and files estimated claims in bankruptcy cases. *See, e.g., In re Wolverine, Proctor & Schwartz, LLC*, 436 B.R. 253, 255-56 (D. Mass. 2010) (noting that PBGC filed estimated claims, contingent on plan termination).

[21] During these negotiations, PBGC continued to refine its estimated claim amounts to account for additional information from the Receiver. PBGC further revised its claim for the Pension Plan's unfunded benefit liabilities to reflect the proposed termination date of March 23, 2010.

[22] *See* Receiver's Resp. to Objs. to Receiver's Report & Recommendation, Aug. 5, 2010, (Doc. No. 669 at 2-4). As part of this settlement, PBGC agreed to withdraw its claims for statutory premiums and the 29 U.S.C. § 1362(c) shortfall and waiver amortization charge.

[23] *See Davis v. PBGC*, 571 F.3d 1288, 1291 (D.C. Cir. 2009); *see also* Transcript of Proceedings, Hearing on Motion for Approval of Sale, (Doc. No. 594 at 104, lines 7-16).

to make the final determination of benefits for each participant.[24] On August 22, 2013, PBGC finalized its calculation of the Pension Plan's unfunded benefit liabilities in the amount of $13,887,822. This represents PBGC's final calculation of the Pension Plan's unfunded benefit liabilities and will form the basis for PBGC's expert testimony concerning the amount of its corresponding claim.[25]

C. Remand and the Parties' Discovery Requests.

After PBGC and the Receiver settled PBGC's claims, the district court awarded virtually all assets to Cox, and PBGC appealed. In January 2012, the Eleventh Circuit remanded the case to this Court to "reevaluate the claims of all of News-Journal's creditors consistent with [its] opinion."[26] In that opinion, the Eleventh Circuit held that "Florida's election-to-purchase statute [requires] that any payment made as a result of a corporation's share repurchase decision [must] comply with the distribution requirements of Fla. Stat. § 607.06401, which prohibits the distribution of corporate assets to a shareholder if it would render the corporation insolvent."[27] Because the Eleventh Circuit considered "any payment to Cox a distribution to a shareholder within the meaning of § 607.06401," it held that the district court must apply Fla. Stat. § 607.06401's insolvency test to Cox's payment.[28]

---

[24] *See Davis*, 571 F.3d at 1291.

[25] PBGC is no longer seeking its claim for the Pension Plan's unfunded benefit liabilities in the amount settled with the Receiver, which has been superseded by this final calculation. PBGC informed Cox's counsel that it intended to rely on the seriatim calculation rather than the settlement amount in a telephone conference on August 29, 2013.

[26] *Cox Enters., Inc. v. PBGC*, 666 F.3d 697, 708 (11th Cir. 2012).

[27] *Id.* at 699.

[28] *Id.*

After the remand, the Court set a briefing schedule concerning the parties' respective claims against NJC. The Court heard argument on those briefs in August 2012, but left open the possibility of an evidentiary hearing on the claim amounts.[29] On June 11, 2013, the Court entered an order scheduling an evidentiary hearing for November 7 and 8, 2013,[30] and providing the parties until September 30, 2013 "to engage in limited discovery [. . . concerning, in relevant part,] the issues of the amount of the claim(s) of the Pension Benefit Guaranty Corporation"[31]

On July 1, 2013, Cox sent its initial discovery requests to PBGC. In those requests, Cox sought documents and information concerning the calculation of PBGC's claims and PBGC's negotiations with the Receiver. Cox also included multiple requests concerning the members of NJC's controlled group, communications between PBGC and the controlled-group members, PBGC's decisions on whether it may pursue claims against the controlled-group members, and information about the controlled-group members' net worth. PBGC timely served its responses and objections to these requests, and produced about 5,200 pages of non-privileged documents to Cox.[32] Thereafter, Cox filed the motion to compel. In that motion, Cox argued, based on a single outdated case, that despite the statute's grant of joint and several liability, the Court could compel PBGC to pursue controlled-group members for part of the liability, or change the amount of PBGC's claims. Cox also argued that the equitable doctrine of marshaling applied.

---

[29] In earlier briefs, Cox asserted that an evidentiary hearing was necessary about, *inter alia*, whether PBGC was pursuing members of NJC's controlled group. Then as now, PBGC responded that because NJC is jointly and severally liable for the full amount of the claims, the controlled-group members had no relevance to the amount of PBGC's claims against NJC. *See* Reply in Support of PBGC's Claims, July 27, 2012, (Doc. No. 720 at 10-11).

[30] The evidentiary hearing has been continued to January 14 and 15, 2014.

[31] Order and Notice of Hearing, June 11, 2013, (Doc. No. 751).

[32] *See generally* Cox's Motion to Compel, Aug. 16, 2013, (Doc. No. 757 at Ex. A & Ex. B).

On September 18, 2013, Magistrate Judge Baker issued an order denying Cox's motion to compel.[33] Judge Baker correctly concluded that ERISA makes NJC jointly and severally liable for the full amount of PBGC's claims. He further concluded that the nature of joint and several liability meant that it could not be used to force PBGC to allocate liability among controlled-group members and thus that discovery concerning the controlled-group members was "of no moment at this point."[34] Judge Baker further concluded that the doctrine of marshaling did not apply to these facts, and that in the event of any inconsistency, ERISA would control.[35]

Cox then brought its current motion for reconsideration of the magistrate's decision. The Reconsideration Motion barely addresses the arguments Cox stressed in its original motion to compel. Instead, the Reconsideration Motion relies on nothing more than broad statements about the power of equity and a number of unfounded accusations toward PBGC.

ARGUMENT

In reviewing Magistrate Judge Baker's order on a discovery motion, the Court "is, in general, limited by statute and rule to reversing that order only if it is 'clearly erroneous or contrary to law."[36] Absent any clear legal error, the order should only be reversed for an abuse of discretion.[37]

---

[33] Order, Sept. 18, 2013, (Doc. No. 763).

[34] *Id.* at 4.

[35] *Id.* at 4-5.

[36] *SEC v. Merkin*, 283 F.R.D. 699, 700 (S.D. Fla. 2012) (citing 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P. 72(a)); *see also* Fed. R. Civ. P. 72(a).

[37] *See Merkin*, 283 F.R.D. at 700 (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990)).

Federal Rule of Civil Procedure 26 addresses the scope of discovery. Unless limited by court order, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ."[38] Although the standard for discovery is broad, "[it] is not without limits."[39] Indeed, the scope of discovery "'is not so liberal as to allow a party to roam in the shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.'"[40] Moreover the Court has limited the scope of issues for discovery to: "issues of the amount of the claim(s) of [PBGC]."[41]

I. Because NJC is Jointly and Severally Liable, the Order Denying Cox's Motion to Compel Was Neither Clearly Erroneous Nor an Abuse of Discretion.

A. Equitable Principles Cannot Override the Plain Language of ERISA.

As the magistrate recognized, ERISA provides PBGC with joint and several claims against a pension plan's contributing sponsor for, *inter alia*, the plan's unfunded benefit liabilities.[42] Cox does not contradict this point. Instead, Cox argues that the Court may nonetheless consider evidence about NJC's controlled-group members and PBGC's pursuit thereof in determining the amount of PBGC's claims and creating a "plan for distribution of the

---

[38] Fed. R. Civ. P. 26(b)(1).

[39] *Auto-Owners Ins. Co. v. Se. Floating Docks, Inc.*, 231 F.R.D. 426, 430 (M.D. Fla. 2005) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351-52 (1978)).

[40] *City of Ocala v. Safety Nat'l Cas. Corp.*, 5:12-CV-48-Oc-10PRL, 2013 WL 1760184, at *2 (M.D. Fla. Apr. 24, 2013) (quoting *Donahay v. Palm Beach Tours & Transp., Inc.*, 2007 WL 1119206 (S.D. Fla. Apr. 16, 2013)).

[41] Order and Notice of Hearing, June 11, 2013, (Doc. No. 751).

[42] "In any case in which a single-employer pension plan is terminated [under 29 U.S.C. §§ 1341(c) or 1342], any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's controlled group shall incur liability under this section. The liability under this section of all such persons shall be joint and several." 29 U.S.C. § 1362(a)

assets of NJC."[43] Presumably, Cox intends to argue that the Court should decrease the amount of PBGC's claims against NJC based on information about the controlled-group.[44] To that end, Cox relies only on broad statements regarding the discretion afforded to this Court in federal receivership proceedings.[45]

Cox acknowledges no boundaries to the Court's equitable powers. The Reconsideration Motion ignores the bedrock principle that "[c]ourts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute."[46] Indeed, the Eleventh Circuit implicitly recognized that the application of equitable principles cannot undo statutory law by deciding that it was unnecessary to resolve whether Cox had an equitable lien on NJC's assets because no distribution to Cox could violate the Florida statute, "irrespective of . . . an equitable lien."[47]

---

[43] Reconsideration Motion at 2, 11. The cases cited by Cox do not suggest that a court may use equity as a tool to disregard statutory law.

[44] *See* Reconsideration Motion at 14; *see also* Cox's Motion to Compel, Aug. 16, 2013, (Doc. No. 757 at 9) (raising the issue of whether, *inter alia*, "PBGC has a responsibility to pursue assets of NJC's controlled group to satisfy any shortfall in the Pension Plan's unfunded benefit liabilities").

[45] Reconsideration Motion at 11-13 (collecting cases about equitable receiverships, primarily in cases involving complex issues of securities fraud).

[46] *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001); *see also Great-West Life & Annuity Co. v. Knudson*, 534 U.S. 204, 217-18 (2002) ("It is, however, not our job to find reasons for what Congress has plainly done; and it *is* our job to avoid rendering what Congress has plainly done . . . devoid of reason and effect."); *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1238 (11th Cir. 2005) ("This rationale . . . ignores the vital principle that '[c]ourts are not authorized to rewrite a statute because they might deem its effects susceptible to improvement.'" (quoting *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1552 (11th Cir. 1996))).

[47] *Cox Enters., Inc. v. PBGC*, 666 F.3d 697, 705 (11th Cir. 2012).

"Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought."[48] In ERISA, Congress has decided the order of priorities for liability to PBGC by providing PBGC with a joint and several claim against NJC for the full amount of the Pension Plan's unfunded benefit liabilities.[49] The Eleventh Circuit has recognized that "joint and several liability" means that every liable entity is "individually responsible for the entire obligation," and can be pursued directly at the creditor's option.[50] The creditor's discretion is a critical component of joint and several liability.[51]

Because NJC is jointly and severally liable for PBGC's claims, Magistrate Judge Baker correctly concluded that "the existence of other who may *also* be liable [to PBGC] is of no moment at this point."[52] Magistrate Judge Baker's decision comports with the decisions of other courts, which have rejected attempts to reduce a defendant's joint and several pension plan

---

[48] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

[49] *See, e.g.*, 29 U.S.C. § 1362; *see also PBGC v. Am. Shelter Indus., Inc.*, 821 F. Supp. 1465, 1467 (M.D. Fla. 1993).

[50] *See Martin v. Auto. Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1337 (11th Cir. 2012) (discussing appellants' joint and several liability for sanctions, and citing Black's Law Dictionary for the definition of "joint and several liability"); *see also* BLACK'S LAW DICTIONARY 997 (9th ed. 2009) ("Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion.").

[51] *See Martin*, 307 F.3d at 1337; *SEC v. J.W. Barclay & Co.*, 442 F.3d 834, 843 (3d Cir. 2006); *Tavery v. United States*, 897 F.2d 1032, 1034 (10th Cir. 1990).

[52] Order, Sept. 18, 2013, (Doc. No. 763 at 4); *accord Cox Enters., Inc.*, 666 F.3d at 704 ("When interpreting a statute, we give effect to the Florida legislature's intent and accord meaning to all parts of a statute.") (citation omitted).

liability under ERISA based on the plaintiff's ability to recover from other defendants.[53] Because the Reconsideration Motion proposes applying equity to override NJC's joint and several liability in a manner that would "'ignore the judgment of Congress, deliberately expressed in legislation," the Reconsideration Motion should be denied.[54]

B. Cox Does Not Seriously Challenge the Magistrate's Holding on the Inapplicability of the *Ouimet* Case.

While Cox's original brief relied heavily on *PBGC v. Ouimet Corp.*, 711 F.2d 1085 (1st Cir. 1983), a single, old ERISA case that had been rendered moot by statutory changes, it barely mentions the case in its current Reconsideration Motion. Cox does not address the magistrate's decision that *Ouimet* relied on a provision of ERISA that had been removed by later amendments and was distinguishable on its facts. Cox merely argues that an article by PBGC's Chief Counsel stated that Congress had endorsed *Ouimet* in later amendments of ERISA. That argument is wrong.

---

[53] *See PBGC v. Reorganized CF&I Fabricators of Utah, Inc.* (*In re CF&I Fabricators of Utah, Inc.*), 179 B.R. 704, 711-12 (D. Utah 1994) (affirming the bankruptcy court's determination that ERISA mandated application of joint and several liability for PBGC's claims, even if it may impact other creditors); *see also Cent. States, Se. & Sw. Areas Pension Fund v. Chatham Props.*, 929 F.2d 260, 263-64 (6th Cir. 1991) (rejecting appellant controlled-group members' suggestion that the court should create an exception to their joint and several liability for withdrawal from a multiemployer pension plan); *Cent. States, Se. & Sw. Areas Pension Fund v. Lloyd L. Sztanyo Trust*, 693 F. Supp. 531, 540-41 (E.D. Mich. 1988) (striking defendant's affirmative defense that a multiemployer pension fund had waived its rights against defendants by first pursuing other jointly and severally liable entities); *In re Ne. Dairy Co-op. Fed'n, Inc.*, 88 B.R. 21, 23-24 (Bankr. N.D.N.Y. 1988) (rejecting dairy cooperative's argument that a multiemployer pension fund's withdrawal liability claim should be reduced by any amounts recovered from another member of its jointly and severally liable controlled group).

[54] *Oakland Cannabis Buyers' Co-op.*, 532 U.S. at 497 (quoting *Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 551 (1937)); *see also Jones v. LMR Int'l, Inc.*, 457 F.3d 1174, 1179 (11th Cir. 2006) (concluding that ERISA's plain language dictated rejection of the plaintiff's proposed interpretation of the term "established plan," because it "would effectively write the term out of [ERISA].").

Ouimet was a bankruptcy case that involved more than one appeal of PBGC's claims. In the first appeal, *Ouimet I*, published at 630 F.2d 4 (1st Cir. 1980), the First Circuit addressed the liability of the controlled-group members and the net worth valuation. It was this first opinion, *Ouimet I*, that was cited in the article relied on by Cox.[55] The decision that Cox relied on in its original brief was a later decision, *Ouimet II*, published at 711 F.2d 1085 (1st Cir. 1983). Thus, Cox's argument is based on the wrong case.[56] And the decision in *Ouimet II* and the doctrine of marshaling remain inapplicable for the reasons addressed in PBGC's response to Cox's motion to compel.[57] Because Cox has no other argument concerning Magistrate Judge Baker's analysis, the Order should be upheld.

II. NJC's Payment of PBGC's Claims Resulting from Termination of NJC's Pension Plan is Not Inequitable.

Cox, in an apparent effort to bolster its arguments regarding equity, accuses PBGC of "inaction, obstruction and overreaching."[58] Most of these accusations are based on

---

[55] I. Goldowitz & T. Gigot, *The Controlled Group Rule for Purposes of the Withdrawal Liability Provisions of the Employee Retirement Income Security Act*, 90 W. VA. L. REV. 773, 775-76 & nn.11-15 (1988).

[56] The Reconsideration Motion also cites to a description of the *Ouimet II* holding from a litigation outline published on PBGC's website. Reconsideration Motion at 14-15 n.8. The litigation outline merely provides brief summaries of various PBGC cases, and the decision from *Ouimet II* remains inapposite for the reasons discussed in this Response and in PBGC's response to Cox's motion to compel.

[57] *See generally* PBGC's Resp. to Cox's Motion to Compel, Aug. 29, 2013 (Doc. No. 759 at 6-12).

[58] The Reconsideration Motion contends that PBGC mocked the Receiver internally. Reconsideration Motion at 17 n.8. A review of the email purportedly mocking the Receiver reflects that PBGC staff was excited about the idea "that the federal receiver may be inclined to get the court to approve putting enough money into the [pension] plan from the proceeds of the sale so that a standard termination could occur." PBGC-NJC-002207-08 (May 19, 2009 internal email).

misunderstandings of ERISA, the record, and the Receiver's actions, as will be discussed briefly. However, Cox has also accused PBGC of being "content with stiffing NJC's employees,"[59] and that accusation is simply irresponsible. Congress's purpose in creating PBGC "was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated."[60] Under PBGC's enabling statute, one of PBGC's purposes is "to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries."[61] The program guarantees a secure, predictable retirement for approximately 43 million American workers and retirees.[62] The Receiver's ERISA counsel testified that in his experience, PBGC "will not let a check be missed."[63] And not a check was missed for any retiree of NJC. Indeed, PBGC's customer satisfaction scores are among the best in the government.[64]

Cox's Reconsideration Motion inappropriately and unnecessarily reopens the Receiver's actions in this case, without evident cause. This Court, at Cox's motion and recommendation, appointed James Hopson as Receiver for NJC. Mr. Hopson's role was to manage and oversee all aspects of NJC's operation and sale, to marshal the assets of the company, and to take any action

---

[59] Reconsideration Motion at 17 n.8.

[60] *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980).

[61] 29 U.S.C. § 1302(a)(2).

[62] PBGC 2012 Annual Report at 1, *available at* http://www.pbgc.gov/documents/2012-annual-report.pdf (last visited Oct. 15, 2013).

[63] Transcript of Proceedings, Hearing on Motion for Approval of Sale, Feb. 1, 2010, (Doc. No. 594 at 98, lines 24-25).

[64] PBGC 2012 Annual Report at II, *available at* http://www.pbgc.gov/documents/2012-annual-report.pdf (last visited Oct. 15, 2013).

to protect the interests of the creditors.[65] The Receiver was also represented by knowledgeable ERISA counsel.[66] At the August 9, 2010 hearing, the Court complimented Mr. Hopson on his report and stated that he had "done an excellent job assisting the court."[67]

As the Receiver's own pension counsel testified, PBGC began working closely with the Receiver to obtain information about NJC and the Pension Plan in late summer 2009.[68] Thereafter, PBGC began the process of calculating estimates of the Pension Plan's liabilities and developing an administrative record concerning termination of the Pension Plan. When the Receiver moved to sell NJC's assets, PBGC determined not to file any objection because it believed that the Receiver had acted capably in managing the sale.

After the sale of NJC's assets, PBGC continued the process of preparing a recommendation to seek termination of the Pension Plan under 29 U.S.C. § 1342. When it received notice of the claims deadline, PBGC prepared and timely filed estimated claims with the Receiver for, *inter alia*, the Pension Plan's unfunded benefit liabilities.[69] As in every other case where the pension plan has not yet terminated and a final valuation has not been prepared,

---

[65] Order, Apr. 17, 2009, (Doc. No. 507).

[66] William Beyer, a former Deputy General Counsel at PBGC. Transcript of Proceedings, Hearing on Motion for Approval of Sale, Feb. 1, 2010, (Doc. No. 594 at 96 (Testimony of William G. Beyer, Receiver's pension counsel)).

[67] Transcript of Hearing on Receiver's Report, Aug. 9, 2010, at 4, lines 5-9.

[68] *See, e.g.*, Transcript of Proceedings, Hearing on Motion for Approval of Sale, Feb. 1, 2010, (Doc. No. 594 at 100 (Testimony of William G. Beyer, Receiver's pension counsel)); *see also* Receiver's Report & Recommendation, June 10, 2010 (Doc. No. 652 at 17).

[69] Exhs. to Receiver's Report & Recommendation, June 10, 2010 (Doc. No. 652-5 at 96-112).

PBGC filed estimated claims.[70] Cox suggests that PBGC's claims were untimely, but the Receiver, who set the process, never objected to PBGC's claims as untimely.

In May 2010, PBGC issued the Notice that the Pension Plan should be terminated. Although PBGC sent to the Receiver a trusteeship agreement to effectuate termination of the Pension Plan, the Receiver initially declined to sign it until the parties could resolve the amount of PBGC's claims.[71] PBGC continued to request that the Receiver sign the trusteeship agreement, but PBGC and the Receiver also commenced negotiations toward a settlement of PBGC's claims against NJC. After considerable negotiation, including discussions between PBGC's actuary and NJC's actuary, PBGC and the Receiver reached a settlement on the amount of PBGC's claims.[72] Additionally, the Receiver signed the trusteeship agreement, *inter alia*, terminating the Pension Plan. Thereafter, PBGC staff began the process of collecting the Pension Plan's records, assets, and other materials necessary for PBGC to fulfill its obligations as the Pension Plan's statutory trustee, as well as complete the final valuation. Now that PBGC

---

[70] Cox attempts to make much of the fact that PBGC filed estimated claims for NJC's liabilities with the Receiver. *See* Reconsideration Motion at 17-18 n.8. However, it is unremarkable that PBGC filed estimated claims when the Pension Plan was not yet terminated and PBGC had not obtained complete plan records or prepared the benefit liability valuation that would follow plan termination.

[71] The Receiver wanted PBGC to make a determination on its application for a distress termination of the Plan, rather than initiate termination under 29 U.S.C. § 1342. The Receiver argued that a distress termination would eliminate a claim by PBGC for termination premiums against NJC. PBGC ultimately waived its termination premium claim as part of the settlement.

[72] Cox asserts that "PBGC blatantly extorted Receiver acquiescence to an inflated claim amount in exchange for finally agreeing to relieve the Receiver of the administrative burden of the Plan." This statement denigrates the professionalism and diligence of the Receiver, PBGC, and their counsel in their negotiations over the amount of PBGC's claims. Moreover, it is curious that PBGC extorted the Receiver with "wildly exaggerated" claims when the Receiver himself acknowledged that NJC's actuary estimated the Pension Plan's unfunded benefit liabilities at approximately $14 million as of the February 1, 2010 sales hearing. Receiver's Report & Recommendation, June 10, 2010, (Doc. No. 652 at 16).

has completed its final valuation of the Pension Plan's unfunded benefit liabilities, that valuation will serve as the basis of PBGC's expert actuarial testimony at the evidentiary hearing.

Perhaps because PBGC's record in this case is unremarkable, the Reconsideration Motion attempts to extend any inequality arising from the prior actions of NJC's controlled-group members to PBGC's pursuit of its claims.[73] Clearly PBGC had nothing to do with any such actions. The Reconsideration Motion further characterizes PBGC's claims against NJC as an inequitable "claw-back from Cox," stating that any payment on PBGC's claims would reduce Cox's eventual recovery.[74] However, there is nothing improper or inequitable about PBGC recovering its claims against NJC, resulting from termination of NJC's own Pension Plan, ahead of NJC's shareholder. Indeed, the Eleventh Circuit remanded this case for a determination of the claims of NJC's creditors, and stated that "News-Journal's other creditors should receive payment before any distribution is made to Cox."[75]

Information about NJC's controlled-group members is wholly irrelevant to the amount of PBGC's claims against NJC. Accordingly, the Reconsideration Motion should be denied.

---

[73] *See* Reconsideration Motion at 16 & n.7.

[74] Reconsideration Motion at 18-19.

[75] *Cox Enters., Inc. v. PBGC*, 666 F.3d 697, 699 (11th Cir. 2012) (emphasis added).

CONCLUSION

For the foregoing reasons, the Reconsideration Motion should be denied.

DATED: October 15, 2013
Washington, D.C.

Respectfully submitted,

/s/ Colin B. Albaugh
Colin B. Albaugh (CA 3283)
M. Katherine Burgess (MD 17810)
Attorneys
Pension Benefit Guaranty Corporation
Office of the Chief Counsel
1200 K Street, N.W., Suite 340
Washington, D.C. 20005-4026
Ph: 202-326-4020, ext. 3176
Fax: 202-326-4112
E-mails: albaugh.colin@pbgc.gov *and*
efile@pbgc.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October 2013, the Pension Benefit Guaranty Corporation's foregoing Response and Memorandum of Law, was served electronically through the Court's CM/ECF system on all registered users.

/s/ Colin B. Albaugh
Colin B. Albaugh
Attorney