

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

)		
In re:)	Chapter 11	
)		
Philadelphia Newspapers, LLC, <i>et al.</i> , ¹)	Case No. 09-11204 (SR)	
)		
Debtors.)	Jointly Administered	

**PLAN PROPONENTS' OBJECTION
TO CLAIMS OF PENSION BENEFIT
GUARANTY CORPORATION**

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¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are: Philadelphia Media Holdings, LLC (4680), PMH Acquisition, LLC (1299), Broad Street Video, LLC (4665), Philadelphia Newspapers, LLC (3870), Philadelphia Direct, LLC (4439), Philly Online, LLC (5185), PMH Holdings, LLC (1768), Broad Street Publishing, LLC (4574) and Philadelphia Media, LLC (0657).

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The above-captioned debtors and debtors in possession (collectively, the “Debtors”) and PN Purchaser Co, LLC (the “Purchaser” and, together with the Debtors, the “Plan Proponents”) object to the various claims filed by the Pension Benefit Guaranty Corporation (the “PBGC”) on behalf of the Philadelphia Newspapers, LLC CWA Union 14199 Pension Fund (the “Pension Plan”) seeking allowance and payment for (1) at least \$10 million in purported post-petition administrative expense claims based on an argument that unfunded benefit liabilities are a tax as defined by 11 U.S.C. §§ 503(b)(1)(B), 507(a)(2) (the “Unfunded Benefit Liabilities Claims”), which as been rejected by virtually all courts; (2) an “unliquidated” amount of minimum funding contributions (the “Minimum Funding Contributions Claims”); and (3) an “unliquidated” amount of pension insurance premiums (the “Pension Insurance Premiums Claims” and collectively, the “PBGC Claims”). The PBCG Claims, the allowance of which, according to Purchaser, will derail the upcoming Sale, should be disallowed for the reasons demonstrated below.

FACTS

A. The Debtors, Their Business and Events Leading To Bankruptcy

The factual background relating to the Debtors’ commencement of these cases is set forth in detail in the Declaration of Richard R. Thayer, Debtors’ Executive Vice President, Finance, in Support of First Day Motions [*Docket No.* 23] filed on February 23, 2009 and incorporated herein by reference.

The Debtors are a media company that publishes the *Philadelphia Inquirer* and the *Philadelphia Daily News*, both in print and online, and operates philly.com. On February 22, 2009 (the “Petition Date”), the Debtors, other than Debtor Philadelphia Media Holdings LLC commenced these voluntary cases by filing petitions for relief under chapter 11 of the Bankruptcy Code. PMH filed its petition for relief under chapter 11 of the Bankruptcy Code on

June 10, 2009. On March 2, 2009, the Office of the United States Trustee appointed the Official Committee of Unsecured Creditors in these cases.

B. The Pension Plan

The Pension Plan is a tax-qualified, single employer defined benefit plan covered by Title IV of ERISA. Each of the Debtors is a contributing sponsor, as defined in ERISA § 4001(a)(13), 29 U.S.C. § 1301(a)(13) or a controlled group member of a contributing sponsor, as defined in ERISA 4001(a)(14), 29 U.S.C. § 1301(a)(14).

The Pension Plan was amended, effective December 31, 2006 to freeze future benefit accruals so that the future benefits payable to employees under the Pension Plan became fixed and frozen as of December 21, 2006. In other words, no benefits have been accrued by employees under the Pension Plan since the end of December, 2006.

The Pension Plan has not been terminated and the Debtors have paid, and continue to pay, all obligations that it has to the fund, including all statutory premiums that have come due.²

C. The PBGC Claims

On May 15, 2009, the PBGC filed 26 claims [*Claim Nos. 137-159, 578-580*] against the Debtors, essentially filing the exact same three claims against each of the nine Debtors.³

First, the PBGC filed an identical copy of an unfunded benefits liabilities claim against each of the nine Debtors⁴, seeking an administrative claim valued at \$10,340,763. The PBGC alleges that it is entitled to recover a deficiency from the Debtors pursuant to ERISA sections 4062 and 4068, 29 U.S.C. §§ 1362, 1368 (the “Unfunded Benefit Liabilities Claims”). The

² The Debtors’ liability to the PBGC is inchoate and contingent in nature unless the Pension Plan is terminated or a default occurs in the payment of statutory premiums. We assume that the PBCG listed the claims as contingent for this reason.

³ The PBCG did not file a Pension Insurance Premium Claim against Philadelphia Newspapers, LLC.

⁴ [*Claim Nos. 137, 142, 143, 146, 149, 154, 157, 158, 580*].

Unfunded Benefit Liabilities Claims allege that the assets of the Pension Plan might be insufficient to cover the benefit liabilities of the Pension Plan and that the amount that the assets are insufficient is the amount of the unfunded liabilities. The PBGC estimates the amount of underfunding at \$10,340,763.⁵ Further, the PBGC alleges that the Unfunded Benefits Liability Claims are entitled to priority as administrative expenses in an amount up to 30 percent of the controlled group's collective net worth pursuant to Bankruptcy Code sections 503(b)(1)(B), and 507(a)(1) or an eighth priority tax claim under Bankruptcy Code section 507(a)(8).

However, for the reasons demonstrated below, the Unfunded Benefits Liability Claims should only be allowed as general unsecured claims.

The PBGC also filed the exact same minimum funding contribution claim against each of the nine Debtors⁶, alleging that it is entitled to recover minimum funding contributions in an unliquidated amount. The PBCG alleges that it is to recover the unliquidated amount from the Debtors pursuant to section 302(c)(11) of ERISA, 29 U.S.C. §1082(c)(11) and that such claim is entitled to priority as (a) an administrative expense: (i) as a tax pursuant to Bankruptcy Code sections 503(b)(1)(B), 507(a)(1), and/or (ii) as an ordinary business expense under Bankruptcy Code sections 503(b) and 507(a)(1), (b) a fourth priority under Bankruptcy Code section 507(a)(4), and/or (c) an eighth priority under Bankruptcy Code section 507(a)(8).

However, the Minimum Funding Contributions Claims are duplicative of the Unfunded Benefit Liabilities Claims and, as such, should be entirely disallowed. In the event that this Court finds the Minimum Funding Contributions Claims are not duplicative and are allowed,

⁵ The Unfunded Benefits Liabilities Claim is contingent because unfunded benefit liabilities do not accrue and are not determined until the Pension Plan is terminated.

⁶ [*Claim Nos. 138, 140, 144, 148, 151, 152, 155, 159, 579*].

then the claims should be allowed as general unsecured claims because the Pension Plan was frozen long before the Petition Date and before any date that would give the PBCG priority.

Third, the PBGC filed the exact same pension insurance premium claim against each of the nine Debtors⁷, alleging that it was entitled to recover an unliquidated amount of unpaid statutory premiums (insurance premiums) from Debtors pursuant to ERISA section 4007, 29 U.S.C. § 1307. The PBGC asserts that these claims are entitled to priority as administrative expenses to the extent such premiums arose during the administration of this case and is a general unsecured claim as to the balance.

However, the PBGC never shows that the premiums were not paid nor demonstrates an entitlement to administrative priority. In fact, the Debtors have paid the annual premiums that were due in 2009 and 2010 and no premiums are currently owing or overdue.⁸

In addition, Debtors reserve the right to raise further objections to the PBGC Claims on any grounds, including when the PBGC amends any claim to state a liquidated amount.

DISCUSSION

A. The Unfunded Benefit Liabilities Claims are General Unsecured Claims.

The Pension Plan is currently underfunded, which means that its assets are less than the total amount of its liabilities payable to Pension Plan participants and beneficiaries. When a pension plan is underfunded, ERISA gives the PBGC a right of recovery against contributing sponsors of that plan. A contributing sponsor of a defined benefit plan and each member of the contributing sponsor's controlled group are each liable to the PBCG in an amount equal to the plan's unfunded benefit liabilities upon termination. ERISA § 4062(b), 29 U.S.C. § 1362(b). ERISA does not specify the level of priority accorded such a claim. Courts, however, have

⁷ [Claim Nos. 139, 141, 145, 147, 150, 153, 156, 578].

⁸ Testimony will be offered at the hearing that will substantiate that payments have been made.

uniformly held that a claim for unfunded benefit liabilities brought by the PBGC is an unsecured claim that is not entitled to administrative priority.

The PBGC asserts two bases for the priority status of its Unfunded Benefit Liabilities Claims: (1) that the claims are for taxes incurred by the estate in an amount up to 30 percent of the controlled group's collective net worth and are entitled to priority under Bankruptcy Code sections 503(b)(1)(B) and 507(a)(1), and (2) that the claims are entitled to priority as taxes in an amount up to 30 percent of the controlled group's collective net worth under Bankruptcy Code section 507(a)(8). As explained below, both arguments are without merit.

1. The Unfunded Benefit Liabilities Claims Are Not Priority Claims Under Bankruptcy Code Sections 503(b)(1)(B) and 507(a)(1).

The PBGC asserts priority under Bankruptcy Code sections 503(b)(1)(B) and 507(a)(1). Bankruptcy Code section 507(a)(1) accords first priority status to administrative expenses allowed under section 503(b) of the Bankruptcy Code. 11 U.S.C. § 507(a)(1). Bankruptcy Code 503(b)(1)(B) allows administrative expense claims for “any tax – (i) incurred by the estate, except a tax of a kind specified in 507(a)(8) of this title” 11 U.S.C. § 503(b)(1)(B). The PBGC argues that the Unfunded Benefit Liabilities Claims are a tax based on the ERISA provisions that provide that when a party “fails to pay the liability after demand, a lien arises in favor of the PBGC as of the termination date of the plan” and that the lien is “treated in the same manner a tax due and owing to the United States.” PBGC Claim No. 137; 29 U.S.C. § 1362, 1368. Accordingly, the PBGC asserts that the Unfunded Benefit Liabilities Claim is a tax that is treated as a first priority administrative expense. This argument fails for several reasons.

First, the PBGC's alleged tax claim is barred by the automatic stay that arose in the Debtors' cases under Bankruptcy Code section 362. 11 U.S.C. §362. As set forth above, ERISA provides that the lien is “treated in the same manner as a tax due and owing to the United States.”

This lien, however, does not arise until the pension plan is terminated. Since the Pension Plan was not terminated on the Petition Date, the automatic stay would prevent the demand of payment in the Unfunded Benefit Liabilities Claims and would prevent the lien, which forms the basis for the purported “tax,” from arising postpetition. *LTV Corp. v. Pension Benefit Guar. Corp. (In re Chateaugay Corp.)* 115 B.R. 760, 780 (Bankr. S.D.N.Y. 1990), *aff’d by, LTV Corp. v. Dole (In re Chateaugay Corp.)*, 130 B.R. 690, 697 (S.D.N.Y. 1991), *vacated, op. withdrawn (per consent order)*, 1993 U.S. Dist. LEXIS 21409 (S.D.N.Y. June 7, 1993); *see also Pension Benefit Guar. Corp. v. CF&I Fabricators of Utah, Inc. (In re CF&I Fabricators of Utah, Inc.)*, 150 F.3d 1293, 1299 (10th Cir. 1998); *In re Kent Plastics Corp.* 183 B.R. 841, 846 (Bankr. S.D. Ind. 1995). Accordingly, the PBGC has no tax claim entitled to priority under sections 503(b)(1)(B) and 507(a)(1) of the Bankruptcy Code. *See, e.g., Pension Benefit Guar. Corp. v. Belfance (In re CSC Indus., Inc.)* 232 F.3d 505 (6th Cir. 2000) (in the context of 11 U.S.C. 507(a)(8)).

Second, as set forth above, Bankruptcy Code 503(b)(1)(B) allows administrative expense claims for “any tax - (i) incurred by the estate.” 11 U.S.C. § 503(b)(1)(B) (emphasis added). The Unfunded Benefit Liabilities Claims, however, were not incurred by the Debtors’ “estates.” Rather, these claims arose from the underfunding related to the prepetition labor performed by plan participants. Even if the so-called “functional test” for determination of a tax advanced by the PBGC in other cases is applied, as the 10th Circuit Court of Appeals had held, the liability simply was not incurred by the estate and, therefore, there cannot be a tax on the estate. *See, Pension Benefit Guar. Corp. v. Skeen (In re Bayly Corp.)*, 163 F.3d 1205, 1208 (10th Cir. 1998). Since the Debtors’ “estates” were not created until they filed their chapter 11 petitions, and the Unfunded Benefit Liabilities Claims arose from labor performed prepetition prior to the

formation of the estates, the Unfunded Benefit Liabilities Claims do not qualify as administrative expense claims under Bankruptcy Code section 503(b)(1)(B). *Id.* at 1211; *LTV Corp.*, 115 B.R. at 774-76.

Third, there is no congressional intent to provide the Unfunded Benefit Liabilities Claims tax treatment in the bankruptcy context. There is no “explicit connection” between ERISA and the Bankruptcy Code that would provide priority tax status to Unfunded Benefit Liabilities Claims.⁹ *See, e.g., In re CSC Indus.*, 232 F.3d at 510.

2. The Unfunded Benefit Liabilities Claims Are Not Priority Claims Under Bankruptcy Code § 507(a)(8).

The PBGC also asserts that the Unfunded Benefit Liabilities Claims are entitled to priority under Bankruptcy Code section 507(a)(8). 11 U.S.C. § 507(a)(8). Bankruptcy Code section 507(a)(8) provides an eighth priority for certain types of enumerated tax claims. *Id.* For many of the same reasons set forth in detail above in the context of Bankruptcy Code section 503(b)(1)(B), the Unfunded Benefit Liabilities Claims are not tax claims. In particular, the lien did not arise prepetition and cannot arise postpetition because of the automatic stay, and the statutes do not express congressional intent for the contributions to be treated as taxes. *Id.* *See In re CSC Indus.*, 232 F.3d at 510.

Furthermore, Bankruptcy Code section 507(a)(8) sets forth the specific types of tax claims that qualify for priority treatment. 11 U.S.C. § 507(a)(8). Notably, ERISA Unfunded Benefit Liabilities are not listed as one of the six (6) enumerated tax categories entitled to priority under section 507(a)(8). Judge Lifland found, accordingly in *LTV Corp.*:

The PBGC’s claims do not constitute ‘taxes’ entitled to priority under [section] 507(a)([8]) nor did its claims ever ripen into liens.

⁹ Congress did provide for special treatment of certain ERISA claims and liens in bankruptcy. *See, e.g.,* Bankruptcy Code sections 507(a)(4), 724, 11 U.S.C. §§ 507(a)(4), 724. *LTV Corp.*, 115 B.R. at 779.

First, [section] 507(a)([8]) of the Code carefully enumerates taxes that are entitled to [eighth] priority. No ERISA claim is included in this detailed list, nor is reference made in the legislative history to any intent of Congress to include any PBGC lien.

LTV Corp., 115 B.R. at 779-80. *See also, In re Kent Plastics*, 183 B.R. at 845-47; *In re Divco Philadelphia Sales Corp.*, 64 B.R. 232 (Bankr. E.D. Pa. 1986) (holding that the PBGC was not entitled to special notice provisions benefiting the holders to tax claims); *White Plains v. A & S Galleria Real Estate, Inc. (In re Federated Dep't Stores, Inc.)*, 270 F.3d 994, 1000 (6th Cir. 2001), (holding that “in determining whether a claim is a valid administrative expense, a court must decide (1) whether the taxes were ‘incurred’ by the estate and (2) whether the taxes are of a kind specified in [section] 507(a)(8)”) (citations omitted).

Accordingly, the Unfunded Benefit Liabilities Claims are not eighth priority tax claims.

3. The Debtors’, and Thus the Controlled Group’s, Collective Net Worth is Zero.

The PBGC recognizes that the Unfunded Benefit Liabilities Claims are limited to “an amount up to 30 percent of the controlled group’s collective net worth” as of the proposed date of termination of the Pension Plan. As this Court is aware, each Debtor is individually insolvent and the Debtors are collectively insolvent, and thus the controlled group’s collective net worth is negative as its liabilities exceed its assets. Accordingly, since each Debtor and the controlled group’s net worth is negative, no portion of the Unfunded Benefit Liabilities Claims can be accorded priority status.

B. The Minimum Funding Claims Should be Disallowed to the Extent they are Duplicative, and Otherwise Treated Primarily as General Unsecured Claims.

Section 302 of ERISA, 29 U.S.C. § 1082, establishes minimum funding standards for defined benefit plans. It provides that the plan sponsor of a defined benefit plan shall make minimum funding contributions to a plan and the sponsor and the sponsor’s controlled group are

liable for the payment of the contributions. ERISA § 302(c)(11), 29 U.S.C. § 1082(c)(11). Citing these statutes in its Minimum Funding Contributions Claims, the PBGC alleges that it is entitled to a priority claim against the Debtors because the Debtors failed to make minimum funding contributions to the Pension Plan for the period between the date of the filing of the chapter 11 petition and the Pension Plan's termination date. Additionally, the PBGC contends that it has unliquidated claims entitled to priority under Bankruptcy Code section 507(a)(4) for unpaid minimum funding contributions for the 180 day period preceding the petition date, and section 507(a)(8) for prepetition tax priority. Together, these claims comprise the Minimum Funding Contributions Claims.

1. The Minimum Funding Contribution Claims are Duplicative of the Unfunded Benefit Liabilities Claims and Should be Disallowed in their Entirety.

Bankruptcy courts have held that minimum funding claims and unfunded benefit liabilities claims are interrelated, and that to allow the PBGC to recover on both claims is to permit a double recovery. *Dole*, 130 B.R. at 698; *In re Simeco, Inc.*, 1996 Bankr. LEXIS 1399, at *11-*12 (Bankr. N.D. Ohio Feb. 15, 1996), *aff'd*, 1996 U.S. Dist. LEXIS 22979 (N.D. Ohio July 23, 1996); *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 160 B.R. 882, 893-94 (Bankr. S.D.N.Y. 1993).

The interrelationship between these two types of claims is clear. A payment on the Minimum Funding Contributions Claims will reduce the Debtors' total unfunded benefit liabilities simply because there will then be more assets in the Pension Plans to pay current and future retirement benefits (and the amount of unfunded benefits will decline accordingly). Stated differently, the more money that is contributed to an underfunded pension plan, the less underfunded the plan becomes, and the unfunded benefits liability declines in a corresponding

fashion. Minimum funding contributions reduce the unfunded benefit liabilities associated with a defined benefit plan.

Recognizing such interrelationship and claim duplication, the bankruptcy court in *Simetco* stated as follows:

Accepting the PBGC's position would effectively give it \$2.00 of claims for each \$1.00 of loss on its MFC Claim [i.e., minimum funding contribution claim]. The first dollar is the MFC Claim itself. The second dollar results from the fact that a portion of the Unfunded Benefit Liabilities Claim [i.e., unfunded benefit liabilities claim] arises because the Debtor failed to make its minimum funding contributions.

In re Simetco, 1996 Bankr. LEXIS 1399, at *10. Similarly, the bankruptcy court in *In re Finley, Kumble*, recognized the overlap between these two types of claims, stating that “[t]he \$500,000 minimum funding requirement is part of the total \$1,000,000 asset insufficiency.” 160 B.R. at 894 n. 26.

The PBGC itself has acknowledged that its claim for unpaid employer contributions is subsumed in its employer liability claim upon plan termination. In one of its earliest opinion letters, Opinion Letter 75-121, dated December 19, 1975, the agency opined:

An employer maintaining a plan that is unable to pay guaranteed basic benefits at termination is liable to the PBGC for payments it makes to cover these benefits. Any employer contributions which were in arrears prior to the plan termination will generally be recovered by the PBGC pursuant to Title IV's employer liability sections [providing for liability for underfunding upon plan termination].

<http://www.pbgc.gov/docs/OpLtr131.htm>.

Because the Minimum Funding Contribution Claims are actually part of the Unfunded Benefit Liabilities Claims, they should be disallowed in their entirety in order to prevent double recoveries by the PBGC.

2. Assuming *Arguendo* That All or a Portion of the Minimum Funding Contributions Claims are Not Duplicative, They Should Be Allowed Priority Only As General Unsecured Claims.

The PBGC argues that “post-petition contributions” entitled to administrative priority as “ordinary business expenses, regardless of the total unpaid amount” and cites to Bankruptcy Code sections 503(b) and 507(a)(1). PBCG Claim No. 138, ¶ 6(a). Bankruptcy Code section 507(a)(1) accords first priority status to administrative expenses allowed under section 503(b) of the Bankruptcy Code. 11 U.S.C. § 507(a)(1). Bankruptcy Code 503(b)(1)(A) allows administrative expense claims for the actual, necessary costs of preserving the estate.¹⁰

However, the Pension Plan has not incurred any postpetition minimum funding contribution claims that are entitled to administrative priority because it was frozen over two years before the date the chapter 11 petitions were filed. In *Kent Plastics*, the PBGC filed a claim for \$46,689 in unpaid postpetition minimum funding contributions owed by the debtor to a defined benefits plan. The PBGC asserted that such claim was entitled to priority classification as an administrative expense. The bankruptcy court, noting that the defined benefits plan had been “frozen” before the filing of the petition, concluded that the “expenses that the PBGC now seek to claim as administrative bear no relation to the ongoing affairs of the debtor-in-possession while in Chapter 11...” 183 B.R. at 847. “Because the debtor’s minimum funding liability is based upon and related to prepetition services ... the Court finds that these claims are not entitled to administrative priority status under § 503.” *Id.* at 847-48. The court in *Kent Plastics* then held that the PBGC’s minimum funding contribution claim was merely a general unsecured claim. 183 B.R. at 848. *Cf., Pension Benefit Guar. Corp. v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.)*, 126 F.3d 811 (6th Cir. 1997) (reducing the postpetition administrative

¹⁰ While the PBGC Claim only cites to Bankruptcy Code section 503(b), the Debtors assume that the citations were intended to be to Bankruptcy Code section 503(b)(1)(A) as this section applies to the argument asserted.

priority claim to reflect reduced accruals as a result of reduction in employment levels).¹¹ Accordingly, the PBGC is not entitled to priority treatment for Minimum Funding Contribution Claims for the Pension Plan.¹²

C. The Statutory Premium Claims are General Unsecured Claims

The PBGC is entitled to charge premiums in consideration for the insurance coverage it provides and ERISA § 4007, 29 U.S.C. § 1307 requires a plan sponsor to pay premiums imposed by the PBGC. Liability for statutory premiums arises in full on the first day of the plan year. Although PBGC purports to claim for unpaid premiums, the burden of any such claim is upon it, and it has not demonstrated – and at the hearing will be unable to demonstrate – that it has any such claim.¹³

¹¹ Courts hold that the minimum funding contribution claims are general unsecured claims except to the extent that they arise from the provision of postpetition labor by plan participants regardless of when such claims accrue or payment is due. *In re Sunarhauserman*, 126 F.3d at 821; *see, also, In re Bayly Corp.*, 163 F.3d at 1208-09 (holding same in the unfunded benefit liabilities context).

¹² The same reasoning applies to the PBGC's argument that it is entitled to priority under 11 U.S.C. § 507(a)(5), which allows priority for contributions attributable to the 180-days immediately preceding the petition filing date. *See* PCBG Claim No. 138, ¶ 6(b). Because Pension Plan's assets were frozen more than two years ago, there are no minimum funding contributions allocable to that period that would be entitled to priority.

¹³ Furthermore, the Debtors have paid and continue to pay all of their premium obligations. The Debtors will be prepared to present testimony on this point at the hearing at this Court's discretion

CONCLUSION

For all of the foregoing reasons, the Plan Proponents respectfully request that this Court enter an order disallowing the priority claims asserted by the PBGC Claims or setting them at zero, and reserving all rights of the Debtors and the PBGC regarding the general unsecured claims filed by the PBGC.

Dated: August 20, 2010
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