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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re ARIZONA NEUROLOGICAL INSTITUTE, P.C., Debtor and Debtor in Possession.	Case No. 2:14-bk-17602-MCW Chapter 11 Case **OBJECTION TO CONFIRMATION OF DEBTOR'S CHAPTER 11 PLAN OF REORGANIZATION BY THE PENSION BENEFIT GUARANTY CORPORATION** Hearing Date: September 1, 2015 Hearing Time: 2:30 p.m. Hearing Place: Courtroom 702

The Pension Benefit Guaranty Corporation ("PBGC") files this Objection ("Objection") to the Chapter 11 Plan of Reorganization of Arizona Neurological Institute, P.C. (the "POR"), filed by Arizona Neurological Institute, P.C. (the "Debtor"), the debtor and debtor-in-possession in the above-captioned chapter 11 bankruptcy.

Like the Debtor's initial Disclosure Statement, *see* PBGC's Limited Objection to Debtor's Disclosure Statement to Accompany Chapter 11 Plan of Reorganization dated March 2, 2015 (Dkt. 165), the Debtor's POR fails to make any mention of the Debtor's intentions with regard to the Arizona Neurology, P.C. Defined Benefit Pension Plan (the "Pension Plan"), or PBGC's related contingent claims. PBGC and the Debtor are working to develop language to include in the POR that addresses these issues, and aim to reach a resolution prior to the hearing on the POR. Because a revised POR has not been filed, PBGC submits this protective objection.

BACKGROUND

A. PBGC and the Employee Retirement Income Security Act.

1. PBGC is the United States government agency that administers the pension insurance program under Title IV of the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1301-1461 (2012, Supp. I 2013) ("ERISA" or "Title IV"), which covers most private defined benefit pension plans. The program guarantees a secure, predictable retirement for approximately 43 million American workers and retirees.[1] When a pension plan covered by Title IV terminates without sufficient assets to pay promised benefits, PBGC typically becomes the statutory trustee of the plan and pays covered benefits up to the limits established by Title IV.[2] PBGC is self-financed.

2. Pursuant to ERISA, the sponsor of a pension plan covered by Title IV and each of the sponsor's controlled group members, if any,[3] must satisfy certain financial obligations to the pension plan. These responsibilities to a pension plan include, *inter alia*: (1) paying the

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[1] PBGC 2012 Annual Report at 1, http://www.pbgc.gov/documents/2012-annual-report.pdf?fs=1.

[2] *See* 29 U.S.C. §§ 1321, 1322, and 1361.

[3] 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. Another example is a brother-sister group of trades or business under common control. *See* 29 U.S.C. § 1301(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.

statutorily required minimum funding contributions to the pension plan;[4] (2) paying insurance premiums to PBGC;[5] and (3) paying unfunded benefit liabilities to PBGC if the pension plan is terminated.[6]

3. ERISA provides the exclusive means for terminating a pension plan covered by ERISA. 29 U.S.C. § 1341(a)(1). Pursuant to Title IV, a pension plan may be terminated in only three ways: (1) through a standard termination, (2) through a distress termination, or (3) through a PBGC-initiated termination.

4. In a standard termination, the pension plan must have sufficient assets to pay all of the pension plan's promised benefit liabilities to participants and their beneficiaries.[7]

5. In a distress termination or in a PBGC-initiated termination, the contributing sponsor becomes liable to PBGC for the:

(i) unfunded benefit liabilities of the pension plan;[8]

(ii) unpaid minimum funding contributions due the pension plan, and;[9]

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[4] 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).

[5] 29 U.S.C. §§ 1306, 1307(e)(2).

[6] 29 U.S.C. § 1362.

[7] *See* 29 U.S.C. § 1341(b)(2)(A)(i)(III).

[8] 29 U.S.C. § 1362(a), (b).

[9] *See* 26 U.S.C. § 412(c)(11) (2007) (effective for pension plan years beginning on or before December 31, 2007); 26 U.S.C. §§ 412(b)(1), (2), 430 (2008) (effective for pension plan years beginning after December 31, 2007). *See also* 29 U.S.C. § 1082(c)(11) (effective for pension plan years beginning on or before December 31, 2007); 29 U.S.C. § 1082(b)(1), (2) (effective for pension plan years beginning after December 31, 2007). As statutory trustee, PBGC has the authority to collect unpaid minimum funding contributions due the pension plan. *See* 29 U.S.C. §§ 1082(c), 1342(d), 1362(a), (c).

(iii) unpaid flat or variable rate premiums related to the pension plan.[10]

6. Additionally, if a pension plan terminates in a distress or PBGC-initiated termination, the plan sponsor and its controlled group members are liable to PBGC for a termination premium at the rate of $1,250.00 per plan participant per year for three years.[11]

B. The Pension Plan.

7. The Pension Plan is covered by Title IV of ERISA and is insured by PBGC.

8. As of November 26, 2014, approximately 43 active employees and 34 terminated vested employees of the Debtor were participants in the Pension Plan.

C. Debtor's Bankruptcy Proceedings.

9. The Debtor filed a petition in this Court seeking relief under Chapter 11 of the United States Bankruptcy Code on November 26, 2014 (the "Petition Date").

10. PBGC estimated that the unfunded benefit liabilities of the Pension Plan on a termination basis were approximately $3,328,543.00, as of the Petition Date. PBGC filed an estimated claim against the Debtor's bankruptcy estate for this amount. This claim is contingent upon the termination of the Pension Plan in a distress termination or a PBGC-initiated termination.

11. PBGC filed an unliquidated contingent claim against the Debtor's bankruptcy estate for unpaid minimum funding contributions due the Pension Plan. PBGC asserts priority status under 11 U.S.C. §§ 507(a)(2) and (5) for the normal cost portion of the unpaid minimum

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[10] 29 U.S.C. § 1306.

[11] *See* 29 U.S.C. § 1306(a)(7), as amended by § 8101(b) of the Deficit Reduction Act of 2005 (Pub. L. 109-B171) and by §§ 401(b) and 402(g)(2)(B) of the Pension Protection Act of 2006 (Pub. L. 109-B280).

funding contributions due post-Petition Date and within the 180 day period before the Petition Date, respectively. The obligation to make minimum funding contributions continues until after the pension plan is terminated. The amount of this liability is increasing over time.

12. PBGC filed a claim for unpaid flat and variable rate premiums and termination premiums related to the Pension Plan in the amount of $295,961.00. The obligation to pay unpaid flat and variable rate premiums to PBGC continues until a pension plan is terminated in a standard termination or until a statutory trustee is appointed in a distress or PBGC-initiated termination. Liability to PBGC for unpaid premiums will increase if the Debtor does not pay them as due.

D. The Intended Standard Termination of the Pension Plan.

13. The Debtor, as sponsor of the Pension Plan, initiated a standard termination of the Pension Plan under 29 U.S.C. § 1341, by filing, with PBGC, a PBGC Form 500, Standard Termination Notice. As part of this submission, the Debtor also submitted a PBGC Schedule EA-S, Standard Termination Certification of Sufficiency, wherein the Pension Plan actuary certified that, to the best of the actuary's knowledge and belief, the "plan's assets equal or exceed the value of its plan benefits as of the proposed distribution date."

14. In the event the standard termination of the Pension Plan is not completed, the Debtor and all members of its controlled group will be jointly and severally liable for the claims filed by PBGC. *See* 29 U.S.C. § 1362(a); 26 U.S.C. § 412; 29 U.S.C. §§ 1306-1307.

14. Furthermore, pursuant to section 4003(a) of ERISA, PBGC is required to audit a statistically significant number of plans terminating pursuant to a standard termination to determine whether participants and beneficiaries have received their benefit commitments and whether section 4050(b) of ERISA, relating to missing participants, has been satisfied.

15. Following receipt of the PBGC Form 500, PBGC commenced an audit of the Plan, and anticipates that it will complete the audit by the end of August 2015.

16. In the event that the standard termination of the Pension Plan is not completed, or the audit of the Plan reveals that participants and beneficiaries have not received their benefit commitments, and those commitments remain unpaid by the Debtor, PBGC submits this objection, to ensure that there are funds available to satisfy PBGC's claims.

OBJECTIONS

16. PBGC objects to the POR to the extent it calls for a distribution to creditors in advance of: (1) the completion of the standard termination of the Pension Plan in accordance with 29 U.S.C. §§ 1341(a) and (b), and the regulations thereunder, and (2) PBGC's conclusion of the audit of the Pension Plan, at which time PBGC will make a determination regarding whether additional amounts are owed to participants and beneficiaries by the Debtor and members of the Debtor's controlled group. Until the completion of the standard termination and PBGC's audit, the Debtor cannot know the extent of the creditors' pool, and therefore cannot ensure that PBGC's claims will be given appropriate treatment.

17. In the alternative, PBGC objects to the POR to the extent the POR does not provide for a reserve of funds sufficient to pay PBGC's claims in the event the standard termination of the Pension Plan is not completed, or PBGC's audit of the Pension Plan's standard termination reveals that participants and beneficiaries have not received their benefit commitments. Without a reserve, PBGC's claims may not be given appropriate treatment.

18. PBGC further objects to the POR to the extent Section 13 of the POR purports to release or exculpate the Debtor, members of the Debtor's controlled group, the Creditor Trustee,

and/or the Debtor's professionals, *i.e.*, non-debtor third parties. These provisions are precluded by 11 U.S.C. § 524(e), absent a showing of fairness or necessity. Debtor has made no such showing, and no extraordinary circumstances exist to warrant such broad relief. Also, in the event the Pension Plan is not terminated prior to the entry of the order confirming the POR, obligations of the Debtor under the Pension Plan as of the Effective Date of the POR become obligations of the Reorganized Debtor and the Reorganized Debtor's controlled group.

19. Finally, PBGC objects to the POR to the extent Section 13 of the POR purports to release any claim the PBGC or the Pension Plan may have relating to fiduciary obligations under ERISA. These provisions could be extremely damaging to the PBGC and the Pension Plan participants. For instance, these provisions could be read to extinguish possible claims against the non-debtor fiduciaries or parties in interest covered in those provisions, and, as a result, could adversely affect PBGC's ability to pursue claims for fiduciary misconduct or prohibited transactions. ERISA prohibits such releases, because they violate public policy. As a result, these claims are not subject to release under chapter 11.

CONCLUSION

For the forgoing reasons, PBGC objects to the Debtor's POR and requests that it be modified in accordance with this objection.

Dated: August 24, 2015
Washington, D.C.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2015, the Pension Benefit Guaranty Corporation's Objection to Confirmation of Debtor's Chapter 11 Plan of Reorganization was served on the following and via the Court's CM/ECF system to all parties registered to receive such notifications for this case:

Christopher C. Simpson Stinson Leonard Street, LLP 1850 N. Central Ave., #2100 Phoenix, AZ 85004 ***Counsel for Debtor*** **via CM/ECF**	**Katherine R. Branch** United States Attorney's Office Two Renaissance Square 40 North Central Avenue, Suite 1200 Phoenix, AZ 85004-4408 ***Local Counsel*** **via e-mail**
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/s/ Louisa A. Fennell
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