

PRELIMINARY STATEMENT

1. PBGC is the United States government agency that administers the nation's pension insurance program under Title IV of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA").² On September 10, 2009, the U.S. Trustee for the District of Delaware appointed PBGC to the Committee.³

2. Once appointed, members of an unsecured creditors' committee have certain fiduciary duties.⁴ To enable the Committee to satisfy its statutory and fiduciary duties, the Bankruptcy Code grants the Committee certain powers.⁵

3. Shortly after forming, the Committee chose to exercise its statutory power to "investigate the acts, conduct, assets, liabilities, and financial condition" of the Debtors and "other matter(s) relevant to the[ir] cases" in order to timely discover issues of concern to unsecured creditors and effectively participate in the resolution of motions pending before this Court.⁶ As part of this investigation, the Committee served document requests, interrogatories, and notices of deposition on the Debtors.

4. In response, the Debtors refused to produce, other than to the Committee's professionals, certain documents the Debtors deem confidential. The Debtors insist that each Committee member enter into a nondisclosure agreement (attached as Exhibit A), despite the fact

² 29 U.S.C. §§ 1301-1461 (2006).

³ *See* Docket No. 71.

⁴ *See, e.g., In re Nutritional Sourcing Corp.*, 398 B.R. 816, 836 (Bankr. D. Del. 2008) (recognizing that "an official committee of unsecured creditors holds a fiduciary duty to the committee's constituents"); *In re TSIC, Inc.*, 393 B.R. 71, 78 (Bankr. D. Del. 2008) (finding that an unsecured creditors' committee can negotiate with secured creditors rather than the debtor because, in part, the unsecured creditors' committee "owes its responsibility and duty to the class that it represents, *viz.*, the general unsecured creditors of Debtor").

⁵ *See, e.g.*, 11 U.S.C. §1103(c).

⁶ *Id.*

that each Committee member, including PBGC, had executed bylaws that mandate confidentiality.

5. As the government agency that administers the nation's pension insurance program under Title IV of ERISA, PBGC has obligations to Congress and other departments, agencies, and officials of the Executive Branch that restrict PBGC's capacity to enter into the precise nondisclosure agreement proposed by the Debtors. More specifically, PBGC cannot agree to withhold documents, whether or not deemed confidential by the Debtors, if those documents are requested by Congress (or committees, joint committees, or subcommittees thereof) pursuant to its legislative or oversight powers, or requested by other departments, agencies, or officials of the Executive Branch who have a need to know the information as part of their job responsibilities. PBGC and the proposed counsel for the Committee explained these limitations to the Debtors, via their counsel, and requested modification of the nondisclosure agreement.

6. The Debtors, however, have refused to accommodate PBGC's status as a government agency. Rather, the Debtors insist that PBGC either forgo receiving documents deemed confidential, thus limiting PBGC's ability to function as a member of the Committee, or agree to withhold the documents deemed confidential, if the documents are requested by Congress or the Executive Branch.

7. The Debtors seek to limit PBGC's role on the Committee to that of a bystander. The Debtors suggest that PBGC be allowed to listen to discussions regarding information the Debtors deem confidential, but that PBGC not be allowed to review any documents containing the information the Debtors deem confidential. In effect, under the Debtors' proposal, PBGC would be unable to analyze evidence, contribute to substantive discussion, or draft, revise, or join

motions, briefs, settlement agreements, or other legal documents incorporating, under seal or otherwise, any information the Debtors deem confidential.

8. Debtors may not restrict the role of a Committee member in such a way. Doing so usurps the U.S. Trustee's sole discretion to appoint members of the Committee. Furthermore, it severely limits PBGC's ability to act as a Committee member and hamstring the Committee's ability to function.

9. The Court should compel the Debtors to produce the same information to PBGC that the Debtors produce, or have produced, to the rest of the Committee. Appreciating the Debtors' interest in maintaining confidentiality, PBGC has offered to enter into the nondisclosure agreement signed by other Committee members, as amended with the following paragraph:

Governmental Agency Exception. Notwithstanding the [remainder of the nondisclosure agreement], Committee member PBGC, as a governmental agency, may disclose Confidential Information: (a) to the Executive Branch of the United States, PBGC and PBGC Board of Directors' officials, advisors, consultants, and representatives who have a need to know the information as part of their job responsibilities; (b) as required by law; (c) in connection with any court or administrative proceeding, or (d) upon request from Congress or any committee, joint committee or subcommittee thereof or the Comptroller General, provided that as to the foregoing item (c), including the service of a subpoena, the Debtor is provided with advance notice of such disclosure. Further, PBGC may disclose information about the amount of underfunding in any pension plan covered by Title IV of ERISA, including information about guaranteed benefit liabilities, unfunded benefit liabilities, plan assets, and funding ratios, and may provide analyses of Confidential Information to rebut publicly any public statement, release, or announcement by the Debtors regarding their pension plans.

JURISDICTION AND VENUE

10. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. §§ 157(b). Venue is proper under 28 U.S.C. §§ 1408 and 1409.

11. The predicates for relief sought herein are 11 U.S.C. §§ 105(a) and 1103.

ARGUMENT

I. The Debtors Cannot Require PBGC To Ignore Its Obligations As A Government Agency In Order To Serve As A Fully Functioning Member Of The Committee.

12. In 1994, the Bankruptcy Code was amended by Congress *specifically* to allow certain governmental units, including PBGC, to serve as members of a creditors' committee.⁷ In enacting the amendment, Congress did not mandate that PBGC shed its obligations as a government agency to serve on such committees.

13. It is undisputed that PBGC is a "wholly owned Government corporation"⁸ and, as such, is an Executive agency of the United States.⁹ Thus, PBGC is plainly an agency for purposes of the Judicial Code,¹⁰ and for purposes of the Federal Rules of Civil Procedure.¹¹

14. It is also undisputed that PBGC is part of the Executive Branch of the federal government.¹² PBGC is administered by a Director, who is appointed by the President and confirmed by the Senate.¹³ The Director must act in accordance with the policies established by

⁷ *Bankruptcy Reform Act*, Pub. L. No. 103-394, § 106, 108 Stat. 4111 (1994); *See also* 11 U.S.C. §§ 101(41)(B) and 1102(b).

⁸ 31 U.S.C. § 9101(3)(J).

⁹ 5 U.S.C. §§ 103, 105.

¹⁰ 28 U.S.C. § 451.

¹¹ *See PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 728 (1984) (noting probable jurisdiction under 28 U.S.C. § 1252 (repealed 1988), which provided for appeal from judgment holding an Act of Congress unconstitutional where "the United States or any of its agencies . . . is a party"); *Kauble v. State Street Bank & Trust Co.*, Nos. 91-3866, 91-3867, 91-3868, 1992 U.S. App. LEXIS 1955 (7th Cir. Feb. 11, 1992) ("The presence of the PBGC as a party entitled the plaintiffs to 60 days within which to appeal, *see* Fed. R. App. P. 4(a)(1)"); *accord Helm v. Resolution Trust Corp.*, 18 F.3d 446, 447-48 (7th Cir. 1994).

¹² *See* 29 U.S.C. §§ 551, 1302(a).

¹³ *See* 29 U.S.C. § 1302(a).

PBGC's board of directors, whose members are the Secretaries of Labor, Treasury, and Commerce.¹⁴

15. As a government agency, PBGC also has unique obligations to Congress that restrict PBGC's ability to withhold documents, whether or not deemed confidential by a debtor in the context of bankruptcy. Courts have recognized the unique duty of government agencies to provide documents, including confidential documents, to Congress upon demand.¹⁵ For example, in *Exxon v. FTC*, the United States Court of Appeals for the D.C. Circuit held, *inter alia*, that, absent a showing that Congress intended to make confidential information divulged to it by a government agency publicly available, the agency may, on proper demand, release the confidential information to Congress without providing prior notice (unless the agency had agreed to do so).¹⁶

16. Moreover, the Freedom of Information Act, a federal statute that governs the dissemination of records held by government agencies, does not relieve an agency from its duty to disclose information to Congress. The Act states that “[t]his section is not authority to withhold information from Congress.”¹⁷

17. Fully cognizant that PBGC is the government agency that administers the nation's pension insurance program, the U.S. Trustee appointed PBGC to the Committee. This appointment was not conditioned upon PBGC disregarding its obligations as a government agency. Rather, the U.S. Trustee appointed PBGC to serve as a Committee member without restriction. Just as the Debtors cannot rewrite the Bankruptcy Code and require government

¹⁴ See 29 U.S.C. § 1302(a), (b) and (d).

¹⁵ See *FTC v. Owens Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980); *Exxon v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978).

¹⁶ *Exxon*, 589 F.2d at 589. See also *FTC*, 626 F.2d at 970.

¹⁷ See 5 U.S.C. § 552(d).

agencies to ignore their statutory and constitutional obligations, the Debtors cannot usurp the U.S. Trustee's authority and prevent PBGC from meaningfully participating on the Committee merely because the agency cannot lawfully agree to withhold the Debtors' information from Congress or the Executive Branch, if duly requested.

18. For fifteen years, PBGC has participated as an active and productive member of creditors' committees in over a hundred large, complex bankruptcy reorganizations across the country, including the District of Delaware. For example, PBGC has participated as an active member of the creditors' committees in the bankruptcy cases of United Airlines, Delta Airlines, Chrysler, General Motors, Delphi, Kmart and Circuit City, to name a few. PBGC is an active member of the creditors' committees in several ongoing bankruptcy cases in the District of Delaware, including those of Visteon Corporation, AbitibiBowater, Inc., and The Tribune Company. In each of these cases, PBGC has obtained access to information deemed confidential subject to exemptions similar to those presented to the Debtors.

II. The Debtors' Interest In Keeping Information Confidential Is Protected Under The Exception That PBGC Proposes To Include In The Nondisclosure Agreement.

19. It is extremely improbable that either Congress or the Executive Branch will ask PBGC to produce documents deemed confidential by the Debtors that it receives in connection with its service on the Committee. Further, the Debtors have offered no evidence that any member of Congress or official of the Executive Branch may seek information the Debtors deem confidential.

20. The release of information to Congress, moreover, does not constitute a public disclosure.¹⁸ "The courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties."¹⁹

¹⁸ *Exxon v. FTC*, 589 F.2d at 589.

21. In the very unlikely circumstance that Congress or a department, agency, or official of the Executive Branch were to request documents deemed confidential by the Debtors, PBGC would immediately inform the persons requesting access to the documents that the documents are deemed confidential, and to use its best efforts to protect the documents or information as “confidential commercial and financial information” for purposes of 29 C.F.R. § 4901.24.

22. As a practical matter, this should assuage the Debtors’ fears that their documents deemed confidential will somehow wind into the public venue.

CONCLUSION

23. In order to fully exercise its role as a Committee member, PBGC must be able to analyze the same information that the Debtors provide to other members of the Committee. Debtors do not have the authority to act outside the Bankruptcy Code and ignore the decision of the U.S. Trustee to mute the voice of a Committee member. As it has done in numerous other large bankruptcy cases, PBGC has proposed language to be incorporated into a nondisclosure agreement that protects the interests of the Debtors to keep certain documents confidential while respecting PBGC’s duties as a government agency. With the signing of such agreement, the Court should compel the Debtors to provide PBGC with all confidential information that has been produced and that will be produced to the Committee.

¹⁹ *Id.*; see also *FTC v. Owens Corning Fiberglass Corp.*, 626 F.2d at 970.

WHEREFORE, PBGC requests that:

- A. the Motion be GRANTED;
- B. the Debtors be compelled to produce to PBGC all confidential information that has been produced and that will be produced to the Committee, subject to the protections offered herein by PBGC; and
- C. the Court grant such other and further relief to PBGC as the Court deems appropriate.

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Washington, D.C.

Respectfully submitted,

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