UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PENSION BENEFIT GUARANTY CORPORATION, Plaintiff, - against - THE RENCO GROUP, INC., *et al*., Defendants.	:	13 Civ. 621 (RJS) ECF Case

THE PENSION BENEFIT GUARANTY CORPORATION'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

In January 2012, Renco demanded that Cerberus, its counterparty in an arrangement to provide additional financing to the then rapidly-failing RG Steel, LLC, take 24.5% of the nearly worthless equity in RG Steel as part of the consideration for the financing. Renco's lead attorney has admitted, in sworn testimony, that Renco made this demand, in the face of protests from Cerberus, to ensure that the controlled-group relationship between Renco and RG Steel would be broken as part of the transaction. Breaking the controlled group meant that the multi-billion-dollar conglomerate Renco evaded about $70 million in potential pension liability to PBGC. A financially strong company evading its pension liabilities in this manner is precisely what Congress sought to address by enacting 29 U.S.C. § 1369. When PBGC threatened to block Renco's plans and to protect the pension insurance system by terminating the RG Steel pensions before Renco could shed its liability, Renco fabricated the status of the transaction and its willingness to reach an agreement with PBGC. PBGC relied upon Renco's fabricated story and halted its termination process at the eleventh hour, allowing Renco to win the race, closing the Cerberus deal and breaking the controlled group before PBGC could move to terminate.

Renco argues in its motion for summary judgment that the Court should allow it to avoid the consequences of its actions, by urging the Court to ignore the clear language of 29 U.S.C. § 1369 and adopt a reading of ERISA that other courts have consistently rejected. Renco further asks the Court to ignore the factual record and find Renco's statement to PBGC that no deal was imminent to be true, despite the abundant and undisputed evidence that teams of Renco and Cerberus lawyers were working day and night to close the transaction as soon as possible and were, in fact, predicting that the closing would occur the very next business day after Renco's

statement to PBGC. The Court should reject Renco's arguments, deny Renco's motion for summary judgment, and grant PBGC's motion.

COUNTER STATEMENT OF FACTS

In its own motion for summary judgment, PBGC provided the Court with a comprehensive statement of the facts relevant to deciding this lawsuit.[1] Rather than restate all the facts here, PBGC only highlights those necessary to respond to Defendants' motion.

Renco Acquires the RG Steel Mills; RG Steel Founders.

PBGC first discussed the financial condition of RG Steel with The Renco Group, Inc. ("Renco") in March of 2011. At that time, Renco had agreed to purchase various steel mills from Severstal through its newly-formed subsidiary, RG Steel. PBGC SOF ¶ 9; Defs. SOF ¶ 4.[2] When PBGC expressed its concerns about the steel businesses and two associated pension plans (the "Pension Plans") moving from Severstal's huge international controlled group to the smaller Renco controlled group, Renco argued that PBGC was better off with RG Steel in the Renco controlled group after the Severstal-Renco transaction. PBGC SOF ¶¶ 10-12. Renco's assurances centered on its assertion that the Pension Plans would be backed by the financial strength of the multi-billion-dollar Renco controlled group. *See* PBGC SOF ¶ 12.

Based on Renco's representation of the financial strength of its business, PBGC took no action, and the Severstal-Renco transaction closed. PBGC SOF ¶ 13. But Renco's efforts to make RG Steel's operations profitable quickly foundered. PBGC SOF ¶ 14; Defs. SOF ¶¶ 8-10. By December 2011, Renco had loaned RG Steel more than $100 million; but as RG Steel's finances continued to deteriorate, it prepared to file for bankruptcy protection. PBGC SOF

[1] *See generally* PBGC's Memorandum of Law in Support of Summary Judgment at 3-16.

[2] "PBGC SOF" refers to PBGC's Local Rule 56.1 Statement of Material Facts on Motion for Summary Judgment. "Defs. SOF" refers to Defendants' Rule 56.1 Statement of Material Facts Not In Dispute.

¶¶ 15, 22; Defs. SOF ¶¶ 11, 22. Not wishing to put any more of its own capital at risk in the RG Steel business, Renco instead solicited third-party financing for RG Steel. PBGC SOF ¶ 16; Defs. SOF ¶¶ 15-16.

This effort did not fare well. Defs. SOF ¶ 20. Cerberus Capital Management, L.P. ("Cerberus"), was one of more than twenty financing parties contacted by Renco and RG Steel. PBGC SOF ¶ 17; *see* Defs. SOF ¶ 25. Between November and early December 2011, Cerberus conducted diligence of the proposed RG Steel financing transaction. *See* PBGC SOF ¶ 18; Defs. SOF ¶ 25. Although Renco initially proposed a financing transaction with no RG Steel equity component, Cerberus considered "several potential approaches to a possible investment in RG Steel." Menke Decl. Ex. 5.[3] These approaches included Cerberus's receipt of "warrants for a significant portion of the company (e.g. 30+% of the equity)." *Id.* Even after taking into account the possibility of receiving those warrants, Cerberus declined to pursue any investment in RG Steel. PBGC SOF ¶¶ 18, 21; *see* Defs. SOF ¶ 25. All the other potential financiers likewise declined. *See* Defs. SOF ¶ 21.

Renco's Discussions with PBGC.

By December 16, 2011, having failed in its initial efforts to obtain new financing for RG Steel, Renco decided to pursue a financing transaction for RG Steel that included Renco's transfer of more than 20% of its equity in RG Steel. PBGC SOF ¶ 19; Defs. SOF ¶¶ 65-66. Because the transfer of that amount of equity ownership would break the controlled-group tie between RG Steel and Renco, Renco filed a Form 10 Advanced Notice (the "Notice") with PBGC. PBGC SOF ¶ 19; Defs. SOF ¶ 65.

[3] "Menke Decl." refers to the Declaration of John Menke dated June 19, 2014, and submitted in support of PBGC's motion for summary judgment.

PBGC was immediately concerned when it received the Notice, especially given Renco's earlier assurances about the importance of the Renco controlled-group's financial strength to the future of the Pension Plans, assurances that Renco had touted to PBGC a mere nine months earlier. *See* PBGC SOF ¶ 12; First Amended Compl., Ex. A. PBGC immediately realized that it needed to take steps to ensure that the protections of the Renco controlled group remained in place, either voluntarily through a settlement with Renco, or involuntarily through termination of the Pension Plans, which would mature PBGC's claim for the Pension Plans' underfunding against Renco. Timing was critical, because if a settlement with Renco could not be reached, the termination had to be effective before the proposed financing closed and the controlled group was severed. Therefore, from the very first call between PBGC and Renco on January 4, 2012, PBGC was intently focused on obtaining information about the status of any transaction and the timeframe for any potential closing.

On January 4, 2012, Renco told PBGC that it was in discussions with two potential investors, each of which required equity in RG Steel as part of the investment. PBGC SOF ¶¶ 26-27; *see also* Defs. SOF ¶¶ 23, 67. Renco told PBGC that "[t]he Transaction could be struck next week (ending January 13, 2012) with a financial close within a week or two." Menke Decl. Ex. 10 at PBGC-000051769. On January 6, PBGC requested an update on the status of the potential transaction timing. Menke Decl. Ex. 12 at PBGC-000037305. John Grimaldi of Renco responded that "[t]here is nothing new to report since our conference call on Wednesday [January 4] and negotiations are continuing." *Id.*

On January 9, 2012, Dana Cann of PBGC contacted Ari Rennert of Renco for an update about the timing of the transaction, because Renco had sent PBGC a document listing a "placeholder" closing date of January 10, 2012, an earlier date than the January 20-27 closing

implied in the parties' January 4 conference call. Menke Decl. Ex. 14 at PBGC-000038836; *see also* Menke Decl. Ex. 11, Cann Dep. at 133. Ari Rennert immediately responded by e-mail to Mr. Cann that "[n]othing is imminent," noting that one of the potential investors needed to complete two weeks of diligence, and that the status of any transaction with the other potential investor was unclear.[4] *Id.* Ari Rennert closed his e-mail by assuring Mr. Cann that "we will work with you and keep you apprised as soon as we learn anything." *Id.* Renco repeated this message during a conference call with PBGC later that same day. PBGC SOF ¶ 40.

PBGC's Dual Approach in Requesting a Guarantee, Terminating the Pension Plans.

As noted above, the PBGC case team pursued a dual-track approach to protect itself from the serious financial risk PBGC would suffer if the Pension Plans left the protection of the multi-billion-dollar Renco controlled group: PBGC sought a voluntary guarantee from Renco, and also proceeded with the administrative steps required for PBGC to initiate termination of the Pension Plans before any transaction closed. PBGC SOF ¶ 50. While the conversations with Renco discussed above were proceeding, the PBGC case team also moved expeditiously to complete the administrative process required to terminate the Pension Plans if Renco rejected PBGC's settlement proposal. *See* PBGC SOF ¶¶ 34, 36-37, 51-52; Defs. SOF ¶ 77. By Friday, January 13, the PBGC case team had obtained the Director's approval on its recommendation to terminate the Pension Plans. PBGC SOF ¶¶ 51-52.

While the PBGC case team worked expeditiously to be able to initiate termination of the Pension Plans before any transaction closed, PBGC also tried to discuss a settlement with Renco. In general, PBGC asked that Renco guarantee the liability of the Pension Plans, if the Pension

[4] Before the transaction closed on January 17, 2012, Renco never identified Cerberus to PBGC as one of the potential RG Steel investors. PBGC only learned that Elliott Management Corporation was a potential investor after Renco produced one of its term sheets to PBGC in response to an administrative subpoena.

Plans were to terminate within the next five years. Albaugh Decl. Ex. 1.[5] When PBGC first raised the concept of the guarantee during the January 4 conference call, Renco stated that it had not considered the idea of a guarantee. Menke Decl. Ex. 10 at PBGC-000051769. PBGC then reiterated its guarantee request to Renco on January 5 and 6. Menke Decl. 12 at PBGC-000037305-08. During the January 9 conference call, Renco and its advisors asked PBGC for more information about a potential guarantee, including seeing the proposed terms in writing. Menke Decl. Ex. 15 at PBGC-000051460-61. PBGC then prepared an outline of terms for the guarantee, which Mr. Cann sent to Ari Rennert on January 10, 2012. Albaugh Decl. Ex. 1. Ari Rennert responded that Renco would review the terms and "come back to [PBGC]." Albaugh Decl. Ex. 2.

Renco Pursues a Transaction with Cerberus.

While Renco was repeatedly telling PBGC that no financing transaction was imminent, Renco in fact continued to work with potential investors to complete a transaction as soon as possible. On January 4, Elliott Management Corporation ("Elliott") issued a term sheet to Renco for a transaction whereby Elliott would lend RG Steel $125 million in exchange for certain security interests and warrants providing the option to purchase 39% of RG Steel's equity. PBGC SOF ¶ 25.

Also on January 4, Renco and Cerberus met to discuss Renco's proposal that Cerberus loan RG Steel $125 million in exchange for 49% of the RG Steel equity. PBGC SOF ¶¶ 23-24; Defs. SOF ¶ 28. Strikingly, and in contrast to Renco's earlier position that it did not wish to invest more of its own money in RG Steel, Renco also agreed to provide direct credit support to

[5] "Albaugh Decl." refers to the Declaration of Colin Albaugh dated July 18, 2014, and submitted herewith in opposition to Defendants' motion for summary judgment.

Cerberus. Defs. SOF ¶ 32. That new Renco credit support grew to about $162.5 million,[6] an amount bearing a striking similarity to the more than $155 million in total RG Steel pension liability that Renco would evade by removing RG Steel from the Renco controlled group.[7]

While the negotiations between Cerberus and Renco proceeded apace, Renco was careful to conceal the fact of them from PBGC. On January 9, 2012, while Renco was telling PBGC that the Elliott deal was delayed and that the deal with the other unnamed financial party was "unclear," Renco and Cerberus instructed their counsel to begin preparing the transaction documentation as soon as possible. PBGC SOF ¶ 41. By January 10, Renco and Cerberus had reached an agreement in principal on the deal terms. PBGC SOF ¶¶ 42-43; Defs. SOF ¶ 34; *see also* Defs. SOF ¶ 32. That same day, Renco asked RG Steel's first-lien bank group to accommodate the Cerberus transaction, and sent a detailed list of requests for changes to the bank deal and for bank approvals to be accomplished as soon as possible. PBGC SOF ¶ 44. By January 11, Renco recognized that it could not "string" Elliott along any further, and told Elliott to stop any work on its proposal. PBGC SOF ¶ 45. And throughout this period, Renco and Cerberus's counsel worked around the clock, furiously drafting documents in order to close the transaction as soon as possible. PBGC SOF ¶ 41. By January 11, Renco and Cerberus's counsel were exchanging draft documentation. Defs. SOF ¶ 35; *see* PBGC SOF ¶ 46.

Michael Ryan of Cadwalader, Wickersham & Taft LLP was Renco's lead attorney handling the Cerberus transaction. PBGC SOF ¶ 46. When he received the first draft documents

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[6] *See* Menke Decl. Ex. 2 ¶¶ 90, 92-95.

[7] On January 6, 2012, PBGC informed Renco that the Pension Plans were underfunded by about $70 million. PBGC SOF ¶ 31. At that time, Renco was also aware of its potential liability to the Steelworkers Pension Trust, for withdrawal liability related to RG Steel's participation in a multiemployer plan. Menke Decl. Ex. 40. Following RG Steel's bankruptcy filing, the Steelworkers Pension Trust demanded payment from Renco for about $85 million in withdrawal liability. In sum, by dropping RG Steel from its controlled group, Renco evaded roughly $155 million in pension liability.

from Cerberus's counsel, he spotted a serious problem. The agreement in principal between Cerberus and Renco provided that Cerberus would receive two tranches of warrants, each of which gave Cerberus the option to purchase 24.5% of RG Steel's equity for nominal consideration. PBGC SOF ¶¶ 46-47; Defs. SOF ¶ 47. Mr. Ryan immediately realized that Cerberus's receipt of warrants would not break the RG Steel controlled group, because the ownership of the RG Steel equity would not change hands at the closing of the financing transaction, but only if and when Cerberus exercised the warrants. PBGC SOF ¶ 47. Therefore, he called Cerberus's counsel and demanded that Cerberus take 24.5% of RG Steel's actual equity in order to ensure that RG Steel left Renco's controlled-group. Menke Decl. Ex. 17, Ryan Dep. at 100-02, 146-47.

Cerberus vigorously resisted Renco's demand that it take direct equity in RG Steel, explaining that Cerberus always received penny warrants in these types of transactions due to concerns about lender liability. PBGC SOF ¶ 48. Undeterred by Cerberus's resistance, Renco's counsel repeated its demand that Cerberus receive direct equity in RG Steel over the next four days. *See* PBGC SOF ¶ 49; Albaugh Decl. Ex. 6.

The January 13 Conference Call.

Despite all of this activity to complete a transaction with Cerberus, Renco did not contact PBGC to disclose any of these events, contrary to its January 9 promise to keep PBGC fully informed of any developments. PBGC SOF ¶ 50. Therefore, as of January 13, PBGC had heard nothing from Renco since the phone conference on January 9 and had received no response to its guarantee proposal. PBGC had completed its preparations to initiate termination of the Pension Plans before any RG Steel transaction closed. PBGC SOF ¶¶ 52-53. PBGC recognized the immediate and seriously negative repercussions a termination action would cause RG Steel's

business and any prospective financing. PBGC also knew that termination would have a significant impact on the Pension Plans' participants, who could see their benefits reduced by PBGC's guarantee limits. To avoid those repercussions if possible, Mr. Cann called Renco to obtain more specific information about the timing of the potential transaction and to persuade Renco to provide the guarantee,[8] or short of a guarantee, to enter into a standstill agreement to allow the parties to negotiate the guarantee after any transaction closed. PBGC SOF ¶¶ 54-56.

Mr. Cann relayed this message in a brief call with Mr. Grimaldi. Ari Rennert and Ira Rennert immediately called Mr. Cann back. PBGC SOF ¶¶ 55-58; Defs. SOF ¶ 85. After Mr. Cann explained the situation to the Rennerts, Ari Rennert responded with the unchanging message that Renco had repeated over that past ten days – that "no transaction was about to happen, that a transaction was dead." PBGC SOF ¶ 60. The Rennerts asked PBGC not to proceed with termination, explained the grave consequences of any termination action, and asked Mr. Cann to send a draft standstill agreement for Renco's review. PBGC SOF ¶ 61. The record further reflects that the Rennerts told Mr. Cann that equity was "off the table" with respect to any transaction, and that Renco would consider the standstill agreement. PBGC SOF ¶ 62.

Immediately after the call, Mr. Cann updated the PBGC case team, and PBGC's counsel drafted a standstill agreement, which Mr. Cann sent to Ari Rennert on the afternoon of January 13. PBGC SOF ¶¶ 63-64. Ari Rennert did not tell PBGC that Renco would not agree to the proposed standstill; to the contrary, he told Mr. Cann by e-mail that he would have his counsel review the draft and would then "revert back to [PBGC]." PBGC SOF ¶ 64; Menke Decl. Ex. 39. At this point, the Rennerts' statements about the non-imminence of any transaction and their willingness to consider the standstill proposal convinced PBGC that there was sufficient time to

[8] Contrary to Defendants' statements, Renco never rejected PBGC's request for a guarantee. Renco asked for information about the guarantee, and then never responded. Renco's silence prompted Mr. Cann to continue to ask the Rennerts about the guarantee on January 13.

obtain a consensual resolution of the situation that would protect the Pension Plans, while at the same time avoiding the disruption to RG Steel's business that involuntary termination of the Pension Plans was certain to cause. Therefore, PBGC decided that it was not necessary to proceed with termination of the Pension Plans on January 13. PBGC SOF ¶¶ 63, 65; Menke Decl. Ex. 24, Rae Dep. at 95-99; Albaugh Decl. Ex. 3, Messina Dep. at 200-04.

Renco and Cerberus Complete and Close the Transaction.

PBGC subsequently learned that the statements that the Rennerts made to Mr. Cann in the morning of January 13 were false. In contrast with the Rennerts' statements that nothing was imminent, that the transaction was at a standstill, and that the RG Steel equity was off the table, the reality was completely different. In fact, Renco and Cerberus's counsel were diligently working to close the Transaction as soon as possible. PBGC SOF ¶ 71. Indeed, only an hour after Mr. Cann spoke with the Rennerts, Cerberus's counsel emailed Renco's counsel, referencing a closing on Tuesday, January 17. PBGC SOF ¶ 72. Renco was also continuing to press Cerberus to take actual RG Steel equity as part of the financing – Renco never backed off that demand until Cerberus agreed. PBGC SOF ¶ 49.

Later on January 13, Cerberus and Renco did have a disagreement on certain deal terms. PBGC SOF ¶ 73; *see* Defs. SOF ¶ 39. Cerberus told its lawyers to stop work, but then immediately opened "back channel" discussions with Renco and arranged a meeting between the chief executives of Cerberus and Renco for the following evening to discuss and reach agreement on the points of disagreement that the legal drafting had uncovered. PBGC SOF ¶¶ 73, 75-76; Defs. SOF ¶¶ 41-43. But throughout the purported "impasse" period, Renco's counsel continued to work on documenting the transaction. PBGC SOF ¶¶ 73-74. And while Cerberus's counsel briefly stopped work, Cerberus continued discussions with an entity called

Corepoint about possibly participating in one of the RG Steel term loans. *See* Albaugh Decl. Ex. 4 at PBGC-000017241.

The Cerberus and Renco leaders met on Saturday evening, and resolved the deal issues in less than an hour. PBGC SOF ¶ 77. They instructed their lawyers to continue working around the clock toward a closing. PBGC SOF ¶ 78; Defs. SOF ¶ 45. During a telephone conference on Sunday morning, Cerberus acquiesced to Renco's demand that it take 24.5% of the actual RG Steel equity, after Cerberus's lawyers were finally convinced that Cerberus would not risk taking on any of RG Steel's pension liability. PBGC SOF ¶ 80.

Renco never informed PBGC of this status before the Transaction closed. Even when Mr. Cann emailed Ari Rennert on the morning of January 17, to check on Renco's review of the standstill agreement, Ari Rennert did not provide any update on the impending transaction. PBGC SOF ¶¶ 83-84; Menke Decl. Ex. 39. Only later that day, after the Transaction closed, did Ari Rennert inform Mr. Cann of the Transaction. PBGC SOF ¶ 85. And the record further reflects that neither Renco nor its counsel reviewed the draft standstill agreement before the Transaction closed. PBGC SOF ¶ 89.

ARGUMENT

I. Renco Entered into the Transaction with a Principal Purpose of Evading Liability for RG Steel's Pension Plans.

The sole issue before the Court with respect to PBGC's claim against Defendants under 29 U.S.C. § 1369 is whether Renco entered into the Transaction with "a principal purpose" of evading liability for the Pension Plans.[9] Defendants ask the Court to decide this question in the

[9] The parties agree that the Pension Plans terminated within five years of the Transaction. *See, e.g.,* PBGC SOF ¶ 92.

negative. They urge the Court to ignore the plain language of the law, and couple that request with an incomplete version of the facts. Defendants' position is unavailing.

A. 29 U.S.C. § 1369 applies to any person who enters into any transaction with "a principal purpose" of evading pension liabilities.

Title IV of ERISA establishes a detailed framework for PBGC to administer the pension termination insurance program.[10] Title IV sets the conditions for pension-plan termination, and provides for PBGC's guarantee of certain benefits when an underfunded plan terminates.[11] But plan termination does not relieve the plan's sponsor of liability. Rather, the plan sponsor and each member of its controlled group[12] become jointly and severally liable to PBGC for, *inter alia*, the plan's "unfunded benefit liabilities."[13]

After ERISA's enactment, Congress became concerned that companies were engaging in transactions to remove weak companies from their financially strong controlled groups or otherwise evade pension liabilities.[14] To address this concern, Congress enacted 29 U.S.C. § 1369,[15] which provides that:

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[10] *See generally* 29 U.S.C. §§ 1301-1461 (2012).

[11] 29 U.S.C. §§ 1302(a), 1321, 1322, 1341, 1342.

[12] *See* 29 U.S.C. §§ 1306, 1307, 1362.

[13] 29 U.S.C. § 1362(a), (b); *see also* 29 U.S.C. § 1301(a)(18) (providing that the "amount of the unfunded benefit liabilities" of a plan is determined by subtracting the value of the plan's assets from the value of its benefit liabilities).

[14] *PBGC v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1198 (3d Cir. 1993) ("*WCI I*") ("Congress made clear that it enacted section 1369 to prevent employers from avoiding [pension termination] liability by simply transferring underfunded pension plans to undercapitalized companies . . . .") (citing H.R. REP. NO. 99-300, at 279 (1985), *reprinted in* 1986 U.S.C.C.A.N. 756, 930).

[15] *See* H.R. REP. NO. 99-300, at 279 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 930 ("Legislation is also needed to provide an explicit prophylactic rule to protect the [PBGC] insurance program

> If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date of the termination on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date.[16]

The facts here present a paradigm § 1369 case. The wealthy Renco controlled group engaged in a transaction to foist some $70 million of defined-benefit pension liability on the financially poor, failing, and soon after insolvent RG Steel. In large part, concern over such an outcome explains why PBGC fought to ameliorate the impact on the pension insurance system by having Renco guarantee the Pension Plans' liability or by terminating the Pension Plans before any transaction could close.

In their brief, Defendants suggest that the Court should ignore the plain language of § 1369 and adopt a narrow reading of "a principal purpose."[17] Defendants cherry-pick dictionary definitions and argue that the Court should define principal as "'a matter or thing of primary importance' and 'a main or most important element.'"[18] Defendants suggest that this definition is incompatible with a transaction encompassing more than one principal purpose.

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from companies that transfer large amounts of unfunded benefits to a weaker company *or that otherwise attempt to evade liability for their pension promises*.") (emphasis added).

[16] 29 U.S.C. § 1369(a).

[17] *See generally* Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Defendants' Brief"), filed on June 20, 2014, at 23-29.

[18] Defendants' Brief at 24 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Merriam-Webster 2002 unabridged)). Defendants also define transaction ("a business deal") and evade ("acting with an improper purpose"). *Id.* Defendants' definition of evade is based solely upon cases about tax avoidance under provisions of the Internal Revenue

Defendants' selective definitions ignore the bedrock principles directing the Court to begin with the statute's plain language[19] and consider that language as a whole.[20] Section 1369 applies whenever "*a* principal purpose" of a person in entering any transaction is to evade pension liabilities.[21] Section 1369 is not limited to cases where the sole purpose of a sham transaction is pension evasion. Indeed, courts construing the exact same language in 29 U.S.C. § 1392(c), which applies to multiemployer pension plans,[22] have consistently concluded that Congress's use of "a principal purpose" reflects that a transaction can have more than one principal purpose.[23] Ignoring this precedent, Defendants cavalierly suggest that prior courts' reading of "a principal purpose" as encompassing more than one principal purpose "can be questioned."[24] Defendants cite no support for this statement.[25] Accordingly, section 1369 applies to any transaction, so long as one of its principal purposes is pension evasion.[26]

Code. *Id.* at 24-25 (citing *Altria Grp. Inc. v. United States*, 658 F.3d 276, 284 (2d Cir. 2011), and *Stewart v. Comm'r of Internal Revenue*, 714 F.2d 977, 988 (9th Cir. 1983)).

[19] *United States v. DiCristina*, 726 F.3d 92, 96 (2d Cir. 2013) ("When interpreting a statute, we 'must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" (quoting *United States v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) (internal citations and quotations omitted))).

[20] *DiCristina*, 726 F.3d at 96 ("Statutory enactments should, moreover, be read so as 'to give effect, if possible, to every clause and word of a statute.'") (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal citations and quotations omitted)).

[21] 29 U.S.C. § 1369(a) (emphasis added).

[22] Section 1392(c) applies "[i]f a principal purpose of any transaction is to evade *or avoid* liability under this part." 29 U.S.C. § 1392(c) (emphasis added).

[23] *See, e.g., Santa Fe Pac. Corp. v. Cent. States, Se. & Sw. Areas Pension Fund*, 22 F.3d 725, 727 (7th Cir. 1994) ("[W]e would be doing violence to the language and the purpose of the statute if we read "a principal" as "the principal."); *see also Sherwin-Williams Co. v. N.Y. State Teamsters Conference Pension & Ret. Fund*, 158 F.3d 387, 395 (6th Cir. 1998) (same); *Lopresti v. Pace Press, Inc.*, 868 F. Supp. 2d 188, 201 (S.D.N.Y. 2012) (same).

[24] Defendants' Brief at 26.

The case law analyzing section 1369 provides a framework of relevant factors for determining whether a person had a principal purpose of evading pension liabilities. In *PBGC v. White Consolidated Industries*,[27] the Third Circuit considered whether WCI entered into the sale of its loss-making steel subsidiaries with a principal purpose of evading those subsidiaries' pension liability.[28] The record provided ample evidence that pension evasion was a principal purpose of the transaction, playing "a major role in shaping the terms of that transaction."[29] Among other things, WCI rejected certain transactions that could have left WCI liable for the pension plans, and its lawyers "clearly . . . structur[ed] the deal so as to minimize WCI's unfunded pension liability exposure."[30] The Third Circuit concluded that "[t]his is simply not a case in which a corporation sought to transfer pension liabilities as part of a legitimate divestiture

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[25] Moreover, reading "a" to acknowledge the possibility of multiple purposes is not unique to ERISA. For example, the D.C. Circuit recently formulated the test for determining applicability of the attorney client privilege as: "Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication?" *In re Kellogg Brown & Root, Inc.*, 14-5055, 2014 WL 2895939, *5 (D.C. Cir. June 27, 2014) (engaging in extensive discussion about the meaning of the phrase "a primary purpose" after noting that "trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task").

[26] *See Lopresti*, 868 F. Supp. 2d at 201 ("For example, one purpose may motivate an employer's decision to conduct a transaction, while another purpose may motivate the decision about how to structure this transaction.").

[27] *PBGC v. White Consol. Indus., Inc.*, 215 F.3d 407 (3d Cir. 2000) ("*WCI II*").

[28] *Id.* at 414 ("The key section 1369 inquiry is whether WCI had 'a principal purpose' of evading its pension liabilities.").

[29] *Id.*

[30] *Id.* at 415-16.

of unprofitable subsidiaries[, but rather, WCI] sought to use the transfer of a group of failing businesses as a means of evading the pension liabilities associated with those businesses."[31]

The Third Circuit's decision in *White Consolidated Industries* confirms that a company's actions when it structures a transaction can establish that pension evasion was a principal purpose. Courts analyzing liability under the same language in 29 U.S.C. § 1392(c) (applicable to multiemployer pension plans) have reached similar conclusions. For example, the Seventh Circuit determined that Santa Fe Pacific Corporation violated section 1392(c) when, after deciding to dispose of its loss-producing trucking subsidiary, it proceeded with a stock sale rather than an asset sale.[32] Although an asset sale would have produced considerably more revenue, Santa Fe chose to conduct a stock sale with the awareness that a stock sale would free Santa Fe from withdrawal liability.[33] In response to testimony by Santa Fe's President about an alternative reason for preferring the stock sale (to maintain employee morale), the court noted that "at most [this testimony] establishes that the avoidance of withdrawal liability was not the only consideration in the structuring of the transaction, not that avoidance did not play an important part in the decision."[34] And in a case involving Sherwin-Williams' disposition of its own loss-producing trucking subsidiary, the Sixth Circuit explained that "one principal purpose [of a transaction] can be said to motivate the decision about whether to sell the company at all,

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[31] *Id.* at 418.

[32] *Santa Fe Pac. Corp. v. Cent. States, Se. & Sw. Areas Pension Fund*, 22 F.3d 725, 728 (7th Cir. 1994) (explaining the distinction between Santa Fe's desire to rid itself of its trucking subsidiary, and its method for accomplishing that goal); *see also Lopresti v. Pace Press, Inc.*, 868 F. Supp. 2d 188, 201 (S.D.N.Y. 2012) ("In order to establish evade/avoid liability, it is sufficient that evading or avoiding withdrawal liability be a principal purpose of structuring the transaction in a particular fashion.") (citation omitted).

[33] *Santa Fe*, 22 F.3d at 728-29.

[34] *Id.* at 729.

while another principal purpose can be said to motivate the decision about how to sell the company."[35] Although Sherwin-Williams was motivated to sell its subsidiary to stop the negative cash flow, the way it structured the transaction convinced the Sixth Circuit that another principal purpose was evasion of withdrawal liability.[36]

Even the cases cited by Defendants, in which courts have declined to impose liability under section 1392(c), provide guidance for assessing whether a company had "a principal purpose" of pension evasion. In *Lopresti v. Pace Press, Inc.*, the court determined that the defendants did not violate section 1392(c) when they engaged in an asset sale transaction that, among other things, resulted in no recovery for the multiemployer pension plan.[37] After noting that "it is sufficient [to establish] that evading or avoiding withdrawal liability be a principal purpose of structuring the transaction in a particular fashion," the court found that the asset sale was actually structured to prevent Pace Press's bankruptcy and protect its owners from significant liability on personal guarantees.[38] Because the plaintiff presented no evidence of the defendants' intention to evade withdrawal liability, the court granted judgment for the defendants.[39] The court in *Teamsters Joint Council No. 83 Virginia Pension Fund v. Empire*

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[35] *Sherwin-Williams Co. v. N.Y. State Teamsters Conference Pension & Ret. Fund*, 158 F.3d 387, 395 (6th Cir. 1998).

[36] *Id.* (affirming an arbitrator's decision that while "Sherwin –Williams's 'number one, first reason' for deciding to sell Lyons may have been to eliminate the negative cash flow, . . . a principal purpose in selling Lyons to a shell corporation with no assets or corporate affiliations in a highly-leveraged cash-for-stock swap was to evade withdrawal liability").

[37] *Lopresti*, 868 F. Supp. 2d at 202-04.

[38] *Id.* at 201-202 (citing *Sherwin-Williams Co.*, 158 F.3d at 395; *Santa Fe*, 22 F.3d at 728-29).

[39] *Id.* at 204 (explaining that "while the defendants were aware that . . . there would be virtually no assets available to satisfy withdrawal liability [or even to fully repay Pace Press's secured creditor] . . . it was not a principal purpose or aim of the transaction or the transaction's structure").

Beef Co., similarly found that a composition agreement, which restructured ownership of a company's affiliate to protect the president's father from all of the company's unsecured creditors did not violate section 1392(c).[40] The court explained that the plaintiff had not established any specific intent to evade withdrawal liability, noting that "[a]rguably, eschewing withdrawal liability was merely an incidental *effect* – not an actively contemplated *purpose* – of the transaction."[41]

B. Renco expressly structured the Transaction to evade responsibility for the Pension Plans.

The undisputed factual record in this case shows that Renco deliberately and intentionally structured the Transaction in such a way to remove RG Steel from Renco's controlled group, and that it did so even in the face of strident opposition from Cerberus. Defendants argue that Cerberus insisted on receiving an ownership interest in RG Steel, thereby breaking the controlled-group.[42] Defendants also note that both "Renco and Cerberus saw tremendous potential value in the ownership interest exchanged," which was "not a mere 'front' to [evade] pension liabilities."[43] These arguments are baseless.

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[40] *Teamsters Joint Council No. 83 Va. Pension Fund v. Empire Beef Co.*, 3:08CV340-HEH, 2011 WL 201492, at *2, *4-5 (E.D. Va. Jan. 20, 2011) (noting that mere awareness of withdrawal liability is not the same as evasive intent).

[41] *Id.* at *3 n.5. The remaining cases cited by Defendants are clearly inapposite. *See, e.g., Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 903 F. Supp. 2d 107, 122-23 (D. Mass. 2012), *rev'd in part*, 724 F.3d 129 (1st Cir. 2013) (determining that section 1392(c) did not apply to an *investor's* decision to *purchase* less than 80% of a company); *CIC-TOC Pension Plan v. Weyerhaeuser Co.*, 911 F. Supp. 2d 1088, 1098-99 (D. Or. 2012) (finding that a company's acceleration of an already planned plant closure so as to prevent withdrawal liability did not violate section 1392(c), and noting that the employer did not pursue a specific transaction structure in order to prevent the liability).

[42] Defendants' Brief at 4, 28-29.

[43] Defendants' Brief at 28.

In fact, Cerberus did not demand RG Steel equity as part of its price for agreeing to the Transaction. To the contrary, Cerberus consistently sought warrants to possibly purchase the equity in the future, not actual equity at the time of the Transaction.[44] *See, e.g.*, Menke Decl. Exs. 5, 20. Cerberus said it routinely receives penny warrants, not direct equity, in its financing transactions. *See* Albaugh Decl. Ex. 5 at RENCO0009848. When Renco and Cerberus reached an agreement in principle on the proposed transaction, Cerberus was set to receive two tranches of warrants, each providing Cerberus with the option to purchase 24.5% of RG Steel's equity. Menke Decl. Ex. 20.

By January 11, 2012, Cerberus's counsel sent draft equityholder documents to Michael Ryan, Renco's lead counsel. Defs. SOF ¶¶ 35, 47; Menke Decl. Ex. 17, Ryan Dep. at 100-01. It appears that this was the first time Mr. Ryan learned of the warrant structure Cerberus wanted. He immediately recognized a problem, and called Cerberus's counsel to discuss. Mr. Ryan demanded that Cerberus take 24.5% of the warrants as membership units (direct equity) in RG Steel. Menke Decl. Ex. 17, Ryan Dep. at 100-02, 146-47; PBGC SOF ¶¶ 46-47.

In demanding that Cerberus take a 24.5% direct equity ownership in RG Steel, Mr. Ryan knew that Cerberus's receipt of warrants for 49% of the RG Steel equity would not remove RG Steel from Renco's controlled group, and therefore, would not free Defendants from their liability for the Pension Plans. Menke Decl. Ex. 17, Ryan Dep. at 100-02, 146-47.[45] Mr. Ryan testified that Cerberus needed to convert half of its warrants (24.5%) into direct equity, which

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[44] Elliott, the only other potential investor, also wanted warrants for 39% of the RG Steel equity.

[45] Counsel recognized that the controlled-group rules treat warrants as options, the granting of which does not reduce the current stockholder's ownership interest unless and until those warrants are exercised. *Cf.* 26 C.F.R. § 1.414(c)-4(b)(1) (providing that options "to acquire any outstanding interest in an organization" are assessed for purposes of determining constructive (not actual) ownership).

would reduce Renco's ownership interest in RG Steel to less than 80%, to ensure that PBGC did not have even a "crazy" argument that RG Steel had not been removed from Renco's controlled group. *Id.* at 146-47.

Defendants imply that Mr. Ryan's statements about the Transaction structure were insignificant because Renco never indicated that this structural change was a deal-breaker. But the factual record clearly reflects Renco's dogged insistence on disposing of enough equity in RG Steel to evade liability for the Pension Plans. After Renco's counsel edited the equityholder documents to reflect Mr. Ryan's demand that Cerberus take direct equity, Cerberus immediately objected. Daniel Wolf, a senior executive at Cerberus, protested that the parties had always discussed warrants, and that Cerberus should not be forced to hold any direct equity in RG Steel. PBGC SOF ¶ 48. But over the next three days, Renco and its counsel continued to press Cerberus to take direct equity. PBGC SOF ¶¶ 49, 79; Albaugh Decl. Ex. 6 at CRG-PBGC0031929. Cerberus eventually capitulated, but only after it became comfortable that Cerberus would not be liable for the Pension Plans. PBGC SOF ¶ 80.

Defendants also attempt to deflect attention from Renco's demands by referring to "undisputed" facts about the value of RG Steel's equity.[46] Regardless of whether these facts are accurate, they are irrelevant. As noted above, the value of the RG Steel equity was not the fundamental reason Cerberus agreed to provide financing to RG Steel. Cerberus only agreed to consider Renco's proposed transaction after requiring Renco to directly support, through

[46] Defendants also attach importance to the fact that Renco initially sought an RG Steel-financing transaction that did not involve equity. Defendants' Brief at 28. The significance of this fact is questionable, especially because Renco later entered into the Transaction, which Renco explicitly structured in order to break RG Steel's controlled group. *See WCI II*, 215 F.3d at 410 (noting that WCI initially sought a sale transaction that would not transfer the pension liabilities before ultimately engaging in a transaction that violated 29 U.S.C. § 1369).

guarantees and collateral, most of Cerberus's loans to RG Steel.[47] Indeed, Cerberus initially declined to pursue *any* transaction involving RG Steel, even a transaction that included warrants for a significant portion of RG Steels' equity. Menke Decl. Ex. 5. Defendants also highlight the potential upside value of RG Steel's equity, but fail to mention that Cerberus valued *all* of RG Steel's equity at a mere $200,000 at the time of the Transaction. Menke Decl. Ex. 41. This means that Cerberus valued its own portion of the RG Steel equity and warrants at less than $100,000, relative to its loans of more than $100 million. Even this $200,000 valuation quickly proved an overstatement, when RG Steel filed for bankruptcy and commenced liquidation five months later.

In sum, the undisputed record reflects that Renco intentionally structured the Transaction to evade liability for the Pension Plans – the evasion of liability was not a mere accident or incidental result of the Transaction. Renco's counsel was aware that Cerberus needed to receive direct equity in RG Steel to break Defendants from the controlled group, and insisted on structuring the Transaction to achieve that result. The importance of this structure to Renco is further confirmed in emails from Renco's counsel, stressing the need to clarify terms that address the controlled-group issue.[48] Based on this record, it is clear that Renco acted with a principal purpose of evading liability for the Pension Plans.

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[47] PBGC SOF ¶¶ 42-43. Defendants further reference the amount of money that Renco "stood to lose" as a result of the Transaction, to somehow diminish Renco's efforts to evade the Pension Plans' liability. How Renco chose to spend the money that it "saved" by removing RG Steel from its controlled group does not change the fact that Renco deliberately acted to evade the Pension Plans' unfunded benefit liabilities of about $70 million, a significant amount of money.

[48] Menke Decl. Ex. 41 ("We have reintroduced capital accounts because we think it is important to demonstrate that Renco has less than 80% of [RG Steel's] capital."); Menke Decl. Ex. 43 at RENCO0001186 ("I think we will want to make clear that Cerberus has 24.95% of the capital accounts initially. That's the substance of your email but we'll want to be explicit about that (relevant to control group analysis).").

C. Renco's misrepresentations to PBGC about the Transaction and Renco's expressed amenability to the standstill agreement provide further evidence that Renco acted with a principal purpose of pension evasion.

In addition to Renco's undisputed efforts to structure the Transaction in a fashion that broke RG Steel's controlled group, Renco's evasive intent is further confirmed by its misrepresentations to PBGC. Renco's discussions with PBGC in the period before the Transaction closed present a common theme. Throughout this period, Renco told PBGC that no disposition of RG Steel was imminent, implying that PBGC and Renco had plenty of time to work out a settlement to protect the Pension Plans. But as time passed and Renco failed to respond to PBGC's settlement proposal, PBGC simultaneously prepared to terminate the Pension Plans before any transaction closed. PBGC SOF ¶¶ 34-37, 50-52. In the morning of January 13, 2012, PBGC told Renco that it was moving to terminate the Pension Plans before any transaction could close, thus maturing the pension liability with the Renco controlled group. PBGC SOF ¶¶ 55, 59. Renco responded that "no transaction was about to happen," that "equity was off the table" with respect to any transaction, and that Renco was amenable to entering a standstill agreement with PBGC. PBGC SOF ¶¶ 60-62.

As more fully explained in PBGC's separate motion for summary judgment,[49] Renco's statements to PBGC were vastly different from the actual status of the Transaction. In fact, Renco and Cerberus had been preparing documentation for a transaction since January 9. PBGC SOF ¶ 41; Menke Decl. Ex. 16. And those efforts had progressed to the point that Renco requested approval for the Transaction from RG Steel's bank group on January 10, and told

[49] PBGC's Memo. of Law in Support of Summary Judgment at 26-28.

Elliott to stop work on January 11.[50] PBGC SOF ¶¶ 44-45, 68-69. By the morning of January 13, Renco and Cerberus were working to close the Transaction on January 17. PBGC SOF ¶ 72.

Defendants claim that Renco's misrepresentations were not blatant because Renco and Cerberus reached an impasse later on January 13. Again, this statement ignores the record – even as the supposed impasse was brewing, Cerberus's counsel were accurately predicting that the Transaction would close on January 17. Menke Decl. Ex. 36 at RENGRP0020648. After Cerberus instructed its lawyers to stop work on the Transaction (several hours after the call between the Rennerts and Mr. Cann), Renco's counsel continued to work and send revised deal documents to Cerberus's counsel. PBGC SOF ¶¶ 73-74; Defs. SOF ¶ 40. Cerberus and Renco continued discussions, quickly arranging a dinner meeting for the next evening to resolve their dispute. PBGC SOF ¶¶ 75-76; Defs. SOF ¶¶ 41-43. And when PBGC sent Renco a draft standstill agreement on January 13, Renco responded that it would forward the agreement to its counsel for review and then "revert back" to PBGC. PBGC SOF ¶¶ 63-64. Renco never "reverted back" about the standstill agreement; it closed the Transaction the very next business day.

Renco plainly misrepresented the imminence of the Transaction to PBGC and its amenability to entering standstill agreement with PBGC so that Renco could close the Transaction, thereby breaking the controlled group before PBGC could hold Defendants liable for the Pension Plans. These actions, coupled with Renco's insistence on structuring the Transaction to break RG Steel's controlled group, indisputably establish that Renco acted with a

[50] Defendants' assertion that Renco told Elliott to stop work on January 11 because Elliott required too much time for diligence is belied by the record. As clearly stated in Renco's own email, Elliott was told to stop work because Renco and Cerberus had reached agreement. Menke Decl. Ex. 22.

principal purpose of evading RG Steel's pension liabilities. Therefore, the Court should deny Defendants' motion, and grant summary judgment for PBGC under 29 U.S.C. § 1369.

II. The Record Supports a Ruling in Favor of PBGC on PBGC's State Common Law Fraud and Misrepresentation Claims.

The record additionally supports summary judgment against Renco on PBGC's state-law fraud claims. PBGC's separate motion outlines the undisputed facts that entitle PBGC to summary judgment against Renco for state-law fraud, fraudulent concealment, and negligent misrepresentation.[51] Defendants do not dispute in their motion that Renco had a duty to provide PBGC with correct information about the Transaction.[52] Defendants nonetheless claim that PBGC's state-law fraud and negligent misrepresentation claims are groundless, for three reasons: (1) Renco told the truth; (2) PBGC did not rely on what it was told; and (3) PBGC was not prepared to terminate the Pension Plans before the Transaction closed.[53] The record establishes quite the opposite.[54]

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[51] *See generally* PBGC's Memo. of Law in Support of Summary Judgment at 28-35; *see also Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421 (1996) (detailing elements required for claims of fraud); *Swerdsky v. Dreyer & Traub*, 219 A.D.2d 321, 326 (N.Y. App. Div. 1st Dep't 1996) (detailing elements required for claims of fraudulent concealment); *HealthNow N.Y., Inc. v. APS Healthcare Bethesda, Inc.*, 1:05CV612, 2006 WL 659518, at *2 (N.D.N.Y. Mar. 10, 2006) (detailing elements for claims of negligent misrepresentation).

[52] *See HealthNow N.Y., Inc.*, 2006 WL 659518, at *2 (requiring a duty to provide correct information, resulting for a special relationship between the parties).

[53] Defendants' Brief at 30.

[54] While Defendants assert that PBGC's state-law claims are based on a conference call on Friday morning, January 13 (Defendants' Brief at 30), these claims stem from Renco's communications with PBGC throughout the week of January 9, including the call on January 13, and culminating on January 17, when PBGC reached out to Renco for an update on the standstill agreement, only to be told later that day that the Transaction had closed that afternoon.

A. Renco made misrepresentations to PBGC and omitted material facts.

The parties agree that a material misrepresentation is a necessary element of a fraud claim.[55] Renco was not truthful with PBGC when it stated (1) that no transaction was about to occur, and that equity was off the table, and (2) that Renco was amenable to considering the standstill agreement. Instead, the record confirms that Renco misled PBGC so that it could close the Transaction before PBGC terminated the Pension Plans, thereby allowing Renco to evade the pension liabilities.

1. On Friday January 13, a Transaction Was About to Occur, which Included Renco's Transfer of Direct Equity in RG Steel.

Defendants maintain that Renco's statement that "no transaction was about to occur involving the transfer of equity" was "truthful and accurate when made."[56] The record confirms the opposite. By Friday, January 13, a flood of activity had occurred, all of which moved the Transaction closer to consummation, and none of which was disclosed to PBGC.

On January 9, 2012, Renco and Cerberus had formed their legal teams, and instructed their counsel to begin preparing the transaction documentation as soon as possible. PBGC SOF ¶ 41. On January 10, Renco and Cerberus reached an agreement in principal on the deal terms. PBGC SOF ¶¶ 42-43; Defs. SOF ¶ 34; *see also* Defs. SOF ¶ 34. That same day, Renco asked that RG Steel's first-lien bank group to accommodate the Transaction, sending a detailed list of requests for approval as soon as possible. PBGC SOF ¶ 44. The next day, Renco told the only other potential investor, Elliott, to stop all work on its alternative transaction. PBGC SOF ¶ 45. Throughout this period, counsel for Renco and for Cerberus worked around the clock to close the Transaction as soon as possible. *See* PBGC SOF ¶ 41. By January 11, Renco and Cerberus were

[55] *See Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421 (1996) (requiring, *inter alia*, that defendant have made a material misrepresentation to plaintiff).

[56] Defendants' Brief at 31.

exchanging draft documentation. Defs. SOF ¶ 35; *see* PBGC SOF ¶ 46. These material developments, kept hidden from PBGC, reveal that a transaction was about to occur as of Friday, January 13, and all that remained was for Renco and Cerberus to hammer out the lingering issues, which they accomplished in less than an hour the very next day. PBGC SOF ¶ 77.

Defendants nevertheless assert that, as of the conference call between PBGC and Renco on the morning of January 13, "it no longer appeared that a deal with Cerberus could be reached," and therefore Renco "accurately" informed PBGC that no transaction was about to occur.[57] Again, the record reflects that a deal would be reached. As noted above, Renco and Cerberus had already taken material steps toward closing the Transaction. Even after the conference call, counsel for Renco and for Cerberus continued working toward the closing. Menke Decl. Ex. 36. Even the purported "impasse" between Cerberus and Renco later in the day does not alter this conclusion, since Renco's counsel never stopped working on the deal, and continued to send revised documents to Cerberus and its counsel. PBGC SOF ¶ 73. As Mr. Ryan explained, he "was comfortable that Renco wanted to continue to get a deal done." PBGC SOF ¶ 74; PBGC Ex. 17, Ryan Dep. at 130. Cerberus was similarly confident that a deal could be reached, such that, about five minutes after the alleged break-down, Cerberus reached out to Renco to continue negotiating the deal. PBGC SOF ¶ 75. A meeting was quickly arranged between the principals, for the very next day, to finalize the deal. PBGC SOF ¶ 76.

Even assuming, *arguendo*, that the negotiations had reached a brief impasse on Friday, the parties returned to the negotiating table by Friday afternoon. Having told PBGC that no deal

[57] Defendants' Brief at 31.

was about to happen, Renco was obligated to correct that information, once it proved no longer accurate.[58]

Moreover, as Defendants explain, between the call on Friday morning and the closing of the Transaction on Tuesday afternoon, "there were four intervening days . . . that were, for all intents and purposes, business days for the persons involved in the transaction. Indeed, the parties' lawyers worked around the clock over the weekend and holiday (MLK Day) to close the deal on January 17."[59] Again, even assuming, *arguendo*, that during these intervening days the Transaction shifted from no deal to a deal, Renco was obligated to correct the information that it had previously provided to PBGC, when that information was no longer correct.[60] But Renco said nothing.

The record further establishes that, throughout the week of January 9, Renco continually pressed Cerberus to take direct equity, such that a transaction with equity was clearly contemplated by Renco and "on the table" as of the January 13 conference call with PBGC.[61] PBGC SOF ¶ 46. To suggest otherwise is wrong. Even after Cerberus sent Renco a strongly

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[58] *See E*Trade Fin. Corp. v. Deutsche Bank AG*, 631 F. Supp. 2d 313, 382 (S.D.N.Y. 2009) ("The common law has long required that a person who has made a representation must correct that representation if it becomes false and if he knows people are relying on it." (internal quotations and citations omitted)).

[59] Defendants' Brief at 31-32, n.9.

[60] *E*Trade Fin. Corp.*, 631 F. Supp. 2d at 382.

[61] Defendants say that it "makes no sense" for Renco to have told PBGC that equity was not part of the transaction, because "[i]f Renco had said that it was no longer contemplating a transaction involving the transfer of its ownership interest, PBGC would no longer have had cause for concern, and no longer would have needed to take any action or to communicate with Renco." Defendants' Brief at 18-19. But that is exactly the point. Renco fraudulently sought to ease PBGC's concerns about the transaction to persuade PBGC that immediate termination was not necessary. This statement was coupled with an additional false statement from Renco suggesting that the financing was not necessary in the near term. The record reflects that Renco told PBGC of its possible intention to work with RG Steel and its first-lien bank group to restart the blast

worded email, stating that Cerberus was a lender and should not be "forced" to hold direct equity (PBGC SOF ¶ 48), Renco stayed the course, stating on January 12 that "we [still] take the position that Cerberus should be receiving equity rather than warrants." Menke Decl. Ex. 35. Renco's insistence paid off, and the consummated deal included 24.5% direct equity. PBGC SOF ¶ 81. Accordingly, Renco made material misrepresentations and omissions to PBGC about the status and critical terms of the Transaction.

2. Renco Told PBGC That Renco Was Willing to Consider Entering into The Standstill Agreement.

The record also confirms that Renco told PBGC of its willingness to consider entering into a standstill agreement. On Friday, January 13, PBGC's Dana Cann informed Renco that PBGC would terminate the Pension Plans unless Renco agreed to provide a guarantee or, short of that, a standstill agreement. In response, Ira Rennert, Renco's Chairman, asked PBGC to "draft it up and send it to us, and we'll take a good look at it." Menke Decl. Ex. 32, I. Rennert Dep. at 107-08. In reliance on Renco's stated willingness to consider a standstill, PBGC drafted the agreement and sent it to Renco. *Id. See* Menke Decl. Ex. 39. Ari Rennert acknowledged receipt of the draft standstill agreement at 6:18PM on January 13, and told Mr. Cann that he would send the draft to Renco's attorneys for review and then "revert back." Menke Decl. Ex. 39.

This sequence of events demonstrates that Renco conveyed to PBGC a willingness to consider the standstill agreement. Renco could have told PBGC that the imminence of the deal with Cerberus made a standstill with PBGC unfeasible. But Renco deliberately kept that

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furnace at RG Steel's Sparrows Point mill, at a possible cost of $6 million. Menke Decl. Exs. 33, 34.

information from PBGC, because Renco knew that PBGC would have completed the termination process, and thereby blocked Renco's evasion of the Pension Plans' liabilities.[62]

Finally, Defendants' disingenuously state that Renco "repeatedly indicated" that a guarantee agreement was "unacceptable," thereby suggesting that PBGC could not reasonably rely on Renco's misrepresentations.[63] The record reflects that Renco did not reject the idea of a guarantee. PBGC first raised the idea of a guarantee during a conference call on January 4, to which Renco responded that it had not considered the idea. Menke Decl. Ex. 10, at PBGC-000051769. PBGC followed up by requesting a guarantee from Renco on January 5 and 6. Menke Decl. Ex. 12, at PBGC-000037307-08. On January 9, *Renco* furthered the conversation by asking PBGC for the general terms of the proposed guarantee. Menke Decl. Ex. 15, at PBGC-000051460-61. In response, PBGC prepared an outline of the terms PBGC would expect in a guarantee agreement; PBGC forwarded this outline to Renco on January 10. Albaugh Decl. Ex. 1. In response, Renco said it would review the outline and get back to PBGC. Albaugh Decl. Ex. 2.

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[62] Defendants' assertion that "the Rennerts did *not* communicate a willingness to *sign* whatever agreement Cann would eventually draft" (Defendants Brief at 32), in contrast to the Rennerts' unequivocal willingness *to review* a draft agreement, makes too fine a distinction. First of all, Mr. Cann never told his superiors that Renco would sign whatever PBGC drafted; Mr. Cann indicated that Renco had expressed its amenability to entering the standstill agreement. Menke Decl. Ex. 11, Cann Dep. at 206-07. Second, this amenability was not based upon an explicit statement that Renco would sign whatever draft standstill PBGC drafted, but upon all of the Rennerts' statements during the conference call. *Id.* at 200, 206-09. And third, as a practical matter, the Rennerts' agreement to review a draft standstill implies a willingness to enter into one, provided agreeable terms are presented. To ask PBGC to draft and send a standstill agreement would be nonsensical otherwise, absent some other motivation.

[63] Defendants appear to have derived this "fact" from a heading in the PBGC case team's memorandum to the PBGC Director requesting to use exigency circumstances to terminate the Pension Plans. *See* Bobroff Decl. Ex. 28 at PBGC-000055730. Although this memo contains the heading "Rejection of protection for the Plan," the text therein clearly states that PBGC had requested a guarantee from Renco on multiple occasions, and that Renco had not agreed to provide such protection. *Id.*

B. PBGC Relied on Renco's Misrepresentations and Material Omissions.

Defendants next contend that PBGC's state-law fraud claims fail because PBGC cannot demonstrate any reliance on Renco's statements.[64] Contrary to Defendants' statements, the record clearly establishes that PBGC relied on Renco's assertions that (1) no transaction was imminent, and therefore there would be time for PBGC to terminate the Pension Plans if it became necessary, and (2) Renco was amenable to a standstill agreement. After Ari Rennert told Mr. Cann that no transaction was about to occur and the Rennerts asked PBGC to send the standstill agreement, PBGC halted the termination process and prepared and sent Renco the draft standstill agreement.[65] PBGC SOF ¶¶ 63, 65. In the face of this clear reliance, Defendants assert that the Rennerts' statements to Mr. Cann were not the proximate cause of PBGC's failure to terminate the Pension Plans before the Transaction closed.

Seeking to support this theory, Defendants reference an email sent by Mr. Cann to the PBGC case team, immediately following his January 13 call with the Rennerts, in which he noted that Renco was amenable to a standstill agreement, and that PBGC could hold the termination if the standstill was completed.[66] PBGC then drafted a standstill agreement, and sent

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[64] Defendants' Brief at 32 (citing *Home Mut. Ins. Co. v. Broadway Bank & Trust Co.*, 53 N.Y.2d 568, 578 (1981); *Shea v. Hambros PLC*, 244 A.D.2d 39, 46 (N.Y. App. Div. 1st Dep't 1998)).

[65] *See Shea*, 244 A.D.2d at 46 (requiring demonstration that the plaintiff "was induced to 'act [or] refrain from acting' to his detriment by virtue of the alleged misrepresentation or omission") (internal citation omitted).

[66] Defendants also assert that there is no proximate cause between Renco's misrepresentations and PBGC's reliance because PBGC staff continued to work on termination after the January 13 call. Defendants' Brief at 33 & n.10. In support, Defendants cite emails between certain members of the PBGC case team and the PBGC public affairs department about the draft termination notice that PBGC would publish in the newspaper. *See* Defs. SOF ¶ 90; Bobroff Decl. Exs. 31, 33, 34. But the fact that PBGC wanted to have the newspaper notice ready for the future, if it became necessary, does not negate all of the undisputed evidence reflecting PBGC's reliance on Renco's misrepresentations – *i.e.*, drafting the standstill agreement, and halting the termination of the Pension Plans.

it to Renco. Menke Decl. Ex. 39. Because of the time required to draft the standstill agreement, however, it did not appear that PBGC and Renco would be able to finalize the standstill on January 13. Therefore, in light Renco's unqualified assertion that no transaction was about to happen, and its expressed amenability to entering the standstill agreement, PBGC decided to suspend its efforts to terminate the Pension Plans and allow for negotiation of the standstill agreement.[67] PBGC SOF ¶¶ 63, 65; Menke Decl. Ex. 24, Rae Dep. at 95-98; Albaugh Decl. Ex. 3, Messina Dep. at 200-04. Based on the Rennerts' statements to Mr. Cann, PBGC's actions were reasonable.[68] Indeed, later that afternoon, Ari Rennert responded to Mr. Cann that Renco would provide the draft standstill to its counsel, and then "revert back" with comments. PBGC SOF ¶ 64. But Renco did not do so; rather Renco closed on the Transaction, removing RG Steel from Renco's controlled group.

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[67] Moreover, the proximate cause cases cited by Defendants are clearly inapposite. *See First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994) (finding that a borrower's alleged misrepresentation about the value of certain real property was not the proximate cause of the bank's injury because, *inter alia*, there was a five-year interval between the alleged misrepresentations and the bank's losses, during which the real estate market crashed); *Jordan (Bermuda) Inv. Co. v. Hunter Green Invs. LLC*, 00 Civ. 9214, 2007 U.S. Dist. Lexis 75376, at *56 (S.D.N.Y. Oct. 3, 2007) (finding that even if a misrepresentation had been made about the risk of certain investments, plaintiff failed to review his monthly account statements, which revealed the nature of the investments and would have caused plaintiff to redeem the shares before any loss).

[68] Defendants assert that, based on Renco's repeated rejections of the guarantee, Mr. Cann was not justified in assuming that Renco would enter into the standstill agreement. Defendants' Brief at 33. As stated above, Renco *never* rejected the concept of a guarantee agreement to PBGC, much less *repeatedly*. Moreover, the Rennerts indicated that they would "take a good look" at the draft standstill, and have their counsel review the draft. PBGC SOF ¶¶ 61, 64. In these circumstances, PBGC was justified in believing the Rennerts' statements, and in acting upon those statements by sending the draft. *See Allison v. Round Table Inv. Mgmt. Co., LP*, 447 F. App'x 274, 275 (2d Cir. 2012) (requiring that a plaintiff's reliance be justified, both in believing and acting upon the representation) (citation omitted). Before the Transaction closed, neither Renco nor its counsel reviewed the draft. PBGC SOF ¶ 89.

C. PBGC Was Prepared to Terminate the Pension Plans before the Transaction Closed; PBGC Suspended the Termination in Reliance on Renco's Misrepresentations and Material Omissions.

Finally, the record reflects that PBGC was damaged as a result of its reliance on Renco's material misrepresentations.[69] PBGC was prepared to terminate the Pension Plans as of Friday, January 13; Renco's assertions to the contrary are based on a misreading of the record. Between January 6 and 13, the PBGC case team moved expeditiously to terminate the Pension Plans. PBGC SOF ¶¶ 34-37, 51-52; *see* Defs. SOF ¶ 77. Between January 11 and 13, the PBGC case team circulated its termination recommendation (and accompanying exigency memos) for the necessary review and approval. PBGC SOF ¶ 51. And on the morning of January 13, PBGC's Director signed the Termination and Trusteeship Decision Record, and approved the request to terminate the Pension Plans. PBGC SOF ¶ 52. Having had the termination approved, the only remaining step to initiate termination was to sign and issue the Notices of Determinations, and then notify participants and beneficiaries of the termination. PBGC SOF ¶ 53.

Ignoring the undisputed fact that PBGC's Director approved the termination of the Pension Plans on Friday morning, January 13, Defendants rely on a procedural argument that PBGC could not have terminated the Pension Plans before the Transaction closed because, as of Friday, January 13, "newspaper notice could not be published before Thursday, January 19."[70] This is incorrect. The record actually reflects that January 19 would have been the earliest date that PBGC could publish a local newspaper notice *if* PBGC relied upon Renco's fraudulent statements and waited until January 17 to secure newspaper space. *See* Albaugh Decl. Ex. 7 at PBGC-000046060; *see also* Albaugh Decl. Ex. 3, Messina Dep. at 178-79. Had Renco told

[69] *See, e.g., Swerdsky v. Dreyer & Traub*, 219 A.D.2d 321, 326 (N.Y. App. Div. 1st Dep't 1996) (requiring that the plaintiff suffer damage as a result of its reliance).

[70] Defendants' Brief at 34.

PBGC the truth on January 13 – that Renco and Cerberus were working toward a transaction close of Tuesday, January 17, and that Renco was unwilling to consider the standstill agreement – PBGC would have immediately moved to secure space in the local newspapers, thereby allowing for publication within three days.

Moreover, Defendants incorrectly assume that PBGC would have been limited to notifying the Pension Plans' participants and beneficiaries of the impending termination through local newspaper publication. In fact, all that is required is "actual or constructive notice of the Plan's termination, *i.e.*, notice sufficient to extinguish their reliance interest."[71] And while PBGC has, in the past, published notices in print newspapers, the cases addressing this issue, some decided more than thirty years ago, do not preclude notification through other means. Had PBGC known that Renco and Cerberus were feverishly working to close the Transaction by Tuesday (Menke Decl. Ex. 36), or that Renco was unwilling to enter into a standstill, PBGC could have employed all means necessary to ensure notification and termination prior to the closing. Menke Decl. Ex. 11, Cann Dep. at 103-05; Menke Decl. Ex. 3, Gran Dep. at 195-96; Albaugh Decl. Ex. 3, Messina Dep. at 191-92. But Renco denied PBGC that opportunity, by lying to PBGC and omitting material information about the Transaction.

[71] *In re Pension Plan for Emps. of Broadway Maint. Corp.*, 707 F.2d 647, 652-53 (2d Cir. 1983); *see also In re Pan Am. World Airways, Inc.*, 777 F. Supp. 1179, 1184 (S.D.N.Y. 1991) ("[A]ctual notice is not required; constructive notice will do.").

CONCLUSION

For all of the foregoing reasons, the Court should deny Defendants' motion, and grant summary judgment in favor of PBGC on all counts of the First Amended Complaint.

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New York, NY

By: /s/

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