UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	(Jointly Administered)
VERTELLUS SPECIALTIES, INC., *et al*[1]	)	
	)	Case No. 16-11290 (CSS)
Debtors.	)	
	)	Hearing Date: September 7, 2016 at 2:00pm
	)	
	)	Related Docket No.: 165, 341
	)	

PENSION BENEFIT GUARANTY CORPORATION'S
JOINDER AND MOTION TO VACATE AND
MODIFY FINAL ORDER (DOCKET NO. 165)[2]

The Pension Benefit Guaranty Corporation ("PBGC") is the largest pre-petition creditor of the bankruptcy estates of Debtors[3] MRM Toluic Company, Inc., Solar Aluminum Technology Services, and Tibbs Avenue Company (the "Excluded Debtors"). PBGC holds contingent claims

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are: Vertellus Specialties Holdings Corp. (9569); Vertellus Specialties Inc. (7240); Vertellus Agriculture & Nutrition Specialties LLC (5687); Tibbs Avenue Company (9642); Vertellus Specialties PA LLC (0900); Vertellus Health & Specialty Products LLC (6325); Vertellus Specialties MI LLC (0398); Vertellus Performance Materials Inc. (7461); Rutherford Chemicals LLC (8878); Solar Aluminum Technology Services (d/b/a S.A.L.T.S.) (3632); and MRM Toluic Company, Inc. (0544). The mailing address of each of the Debtors, solely for purposes of notices and communications, is 201 N. Illinois Street, Suite 1800, Indianapolis, IN 46204.

[2] On August 26, 2016, the Official Committee of Unsecured Creditors filed its Motion of the Official Committee of Unsecured Creditors to Vacate and Modify Those Portions of the Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Adequate Protection to Prepetition Secured Parties, and (III) Granting Related Relief, with Respect to Debtors MRM Toluic Company, Inc., Solar Aluminum Technology Services and Tibbs Avenue Company (the "Committee's Motion") (Docket No. 341). PBGC files this Joinder and Motion in support of the Committee's Motion. If the Committee's Motion is resolved, PBGC seeks to pursue relief in its own capacity as the largest creditor of the Excluded Debtors (as defined herein).

[3] Capitalized terms not defined herein shall have the same meaning as set forth in the Committee's Motion.

jointly and severally against each of the Debtors' bankruptcy estates totaling approximately $40 million.

PBGC submits this Joinder and Motion because the DIP Order was entered under the mistaken understanding that the Excluded Debtors were parties to the Prepetition Loan Agreements, either as borrowers or guarantors, and their assets were already subject to liens that secured the obligations under those agreements. PBGC has since learned that is not the case. The Excluded Debtors' assets are not subject to the obligations under the Prepetition Loan Agreements. Yet the DIP Order pledged all of the Excluded Debtors' assets, even though the DIP Loans provided no benefit to the Excluded Debtors' estates. Unless this Joinder and Motion is granted, the Prepetition Term Facility Secured Parties would be able to inappropriately obligate the assets of the Excluded Debtors to the DIP Loan to the detriment of the unsecured creditors of the Excluded Debtors, namely, PBGC.

BACKGROUND

PBGC and the Pension Plan

1. PBGC is a United States government agency that administers the nation's pension program under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1301-1461. When an underfunded pension plan is terminated, PBGC typically becomes trustee of the plan and, subject to certain statutory limitations, pays the plan participants and their beneficiaries guaranteed benefits from its insurance funds.

2. Debtor Vertellus Specialties, Inc. ("VSI") is the plan sponsor of the Vertellus Specialties, Inc. Defined Benefit Retirement Plan (the "Pension Plan"). The Pension Plan is covered by the federal pension plan termination insurance program established under Title IV of ERISA.

3. The sponsor of a pension plan and each members of its controlled group are financially responsible for the pension plan. The responsibilities of the plan sponsor and controlled group members include, among other things, (1) paying the statutorily required minimum funding contributions to the pension plan;[4] (2) paying statutory premiums to PBGC;[5] and (3) paying any unfunded benefit liabilities to PBGC if the pension plan terminates.[6] These obligations include termination premiums in the amount of $1,250 per pension plan participant per year for three years ("Termination Premiums").[7] These liabilities of the plan sponsor and controlled group members with regard to the pension plan are joint and several.[8]

4. The Excluded Debtors are members of VSI's controlled group and are jointly and severally liable for any liabilities owed to PBGC and the Pension Plan.[9]

5. PBGC is the largest creditor of the Excluded Debtors.[10] PBGC's contingent claims on its own behalf and on behalf of the Pension Plan against the Excluded Debtors total approximately $42 million and make up the overwhelming majority of claims in dollars against each of the Excluded Debtors.

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[4] *See* 26 U.S.C. § 412(b)(1) & (2); *see also* 29 U.S.C. § 1082(b)(1) & (2).
[5] *See* 29 U.S.C. § 1307.
[6] *See* 29 U.S.C. § 1362(a) & (b).
[7] Termination Premiums are a post-confirmation liability of the reorganized debtors to PBGC pursuant to 29 U.S.C. § 1306(a)(7) resulting from the termination of the Pension Plan.
[8] *See* 26 U.S.C. § 412(b)(1) & (2); 29 U.S.C. §§ 1082(b)(1) & (2), 1307, 1362(a) & (b).
[9] 29 U.S.C. § 1301(a)(14), 29 C.F.R. § 4001.3, 26 U.S.C. §§ 414(b) & (c), Treas. Reg. §§ 1.414(b)-1 and (c)-2.
[10] On each of the Excluded Debtors' Schedule E/F: Creditors Who Have Unsecured Claims, the respective Excluded Debtor did not list any unsecured creditors. *See* Schedule of Assets and Liabilities for MRM Toluic Company, Inc., Schedule E/F (Docket No. 202); Schedule of Assets and Liabilities for Solar Aluminum Technology Services, Schedule E/F (Docket No. 201); Schedule of Assets and Liabilities for Tibbs Avenue Company, Schedule E/F (Docket No. 195).

The Prepetition Term Facility and Prepetition ABL Credit Agreement.

6. On October 31, 2014, the Prepetition Term Guarantors and the Prepetition Term Facility Parties entered into the Prepetition Term Facility Credit Agreement with Wilmington Trust as the Prepetition Term Facility Agent and the Prepetition Term Facility Secured Parties for a $455 million Prepetition Term Facility and other Prepetition Term Facility Obligations. The Prepetition Term Facility Parties secured the Prepetition Term Facility Obligations by granting Prepetition Term Facility Agent Liens upon and security interests in the Prepetition Term Facility Collateral.

7. Also on October 31, 2014, the Prepetition Borrowers, the Prepetition Guarantor, the Prepetition ABL Parties, and the Prepetition Term Facility Parties entered into the Prepetition ABL Credit Agreement with PNC Bank, N.A. as the Prepetition ABL Agent and the Prepetition Secured Parties for a Prepetition ABL Revolver and other Prepetition APL Obligations. Under the terms of the Prepetition ABL Credit Agreement, the Prepetition ABL Parties purported to grant Prepetition ABL Liens.

8. Under their respective agreements and the inter-creditor agreement, the Prepetition ABL Agent and Prepetition ABL Secured Parties had a first priority lien upon and security interest in revolving collateral and a second priority lien upon and security interest in term loan collateral. The Prepetition Term Facility Agent and Prepetition Term Facility Secured Parties had a first priority lien upon and security interest in the term loan collateral and a second priority lien upon and security interest in the revolving collateral. The Excluded Debtors' assets are not subject to the obligations under the Prepetition Loan Agreements.

Debtors' DIP Motion

9. On the Petition Date, eleven Debtors each filed with the Court voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors' cases are being jointly administered under Case No. 16-11290.[11]

10. On the Petition Date, the Debtors filed their DIP Motion.

11. While the DIP Motion did include copies of the Prepetition Loan Agreements as exhibits, it failed to include all of the related schedules and ancillary documents, including, among other information, Schedule 1.01(a) to the Prepetition Term Facility Credit Agreement setting forth the "Subsidiary Guarantors."[12]

12. The DIP Motion also failed to include the amendments and ancillary documents to the Prepetition Loan Agreements.

13. Without having the opportunity to review Schedule 1.01(a) and the other omitted documents, PBGC, and more importantly, the Court, were unable to determine whether the Excluded Debtors were also Prepetition Loan Parties.

14. On July 8, 2016, the Debtors filed their Schedules. In doing so, the Debtors appear to have erroneously believed that the Excluded Debtors were parties to the Prepetition Loan Agreements. The Debtors' *Schedule H* indicates that each of the Excluded Debtors were "guarantors and co-obligors" under both of the Prepetition Loan Agreements.[13]

15. Recently, the Official Committee of Unsecured Creditors (the "Committee") in the Debtors' bankruptcy cases informed PBGC that contrary to the Debtors' Schedules, the

[11] *See* Order Granting Motion of the Debtors for an Order Directing the Joint Administration of Their Chapter 11 Cases (Docket No. 39).
[12] *See* DIP Motion, Ex. C-D.
[13] *See* Sch. H, p. 55 ("Name of Creditor – PNC Bank, Wilmington Trust).

Excluded Debtors were not a party to either of the Prepetition Loan Agreements, had not granted liens or security interests to the Prepetition Secured Parties, and their assets were unencumbered as of the Petition Date. Nevertheless, the Excluded Debtors' assets were now mistakenly encumbered with the DIP Liens and the Prepetition Term Facility Adequate Protection Liens, even though the DIP Loans provided absolutely no benefit to the Excluded Debtors' estates.

16. The Committee further informed PBGC that, at least with respect to the Excluded Debtor Tibbs, it holds either directly or indirectly the equity interests of eight foreign subsidiaries. And these eight foreign subsidiaries are valued on the Debtors' books and records on a consolidated basis in excess of $10 million.

RELIEF REQUESTED

17. Federal Rule 60(b), made applicable herein by Bankruptcy Rule 9024, states, in pertinent part, that "the court may relieve a party … from [an] order … for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence that … could not have been discovered in time to move for a new trial under Rule 59(b); or (6) any other reason that justifies relief."[14]

18. The DIP Order was entered by the Court based on the mistaken belief that the Excluded Debtors were parties to the Prepetition Loan Agreements. Allowing the DIP Order to stand as-is would let the Prepetition Term Facility Secured Parties to improperly use unencumbered assets of the Excluded Debtors to satisfy debts of other Debtors to the detriment of the Excluded Debtors' legitimate unsecured creditors, including PBGC and the Pension Plan.

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[14] FED. R. CIV. P. 60(b); *Cf. G.W. Palmer & Co., Inc. v. Dye (In re Tanimura Distrib., Inc.),* No. CC-10-1220-KiPaD, 2011 Bankr. LEXIS 1489, at *19-20 (9th Cir. BAP Mar. 11, 2011) ("[a]s courts of equity, bankruptcy courts have broad discretion under Rule 9024 to reconsider, vacate or modify past orders. [Rule 9024] does not restrict the bankruptcy court's power to reconsider any of its previous orders when equity so requires.") (internal quotations and citation omitted).

19. This Court should vacate and modify those portions of the DIP Order related to the Excluded Debtors as the DIP Order was entered based on the mistaken belief that the Excluded Debtors were subject to the Prepetition Loan Agreements, either as borrowers or guarantors, and their assets were already subject to liens securing the obligations under these agreements.

20. Alternatively, if the Court is not inclined to vacate and modify the DIP order as requested, PBGC requests that the Court impose the equitable doctrine of marshaling on the DIP Lenders and the Prepetition Term Facility Secured Parties by requiring that the DIP Obligations in excess of the amount necessary to pay off the prepetition ABL Obligations and the Prepetition Term Facility Adequate Protection Obligations, if any, be satisfied first from the proceeds of the Prepetition Collateral and, only then, from proceeds of the Excluded Debtors' assets. And these obligations should be satisfied from the proceeds of the Excluded Debtors' assets only to the extent that there was actual benefit provided by the DIP Loans to the Excluded Debtors. Marshaling will ensure that the legitimate creditors of the Excluded Debtors, mainly PBGC and the Pension Plan, are not unfairly prejudiced by the improper pledge of the Excluded Debtor's unencumbered assets to satisfy secured debt for which the Excluded Debtors had no liability.

21. As the largest creditor in the Excluded Debtors' bankruptcies, the current DIP Order significantly diminishes PBGC's ability to recover value from the unencumbered assets of the Excluded Debtors.

22. PBGC hereby incorporates by reference the facts and arguments stated in the Committee's Motion.

WHEREFORE, PBGC requests that this Court enter an order:

(a) Vacating and modify those provisions of the DIP Order concerning the Excluded Debtor, or

(b) Alternatively, imposing the equitable doctrine of marshaling by requiring the DIP Obligations in excess of the amount necessary to pay off the Prepetition ABL Obligations and the Prepetition Term Facility Adequate Protection Obligations to be satisfied from the proceeds of the Prepetition Collateral first, and then from proceeds of the Excluded Debtors' assets or other Debtors' unencumbered prepetition assets, but only to the extent of the actual benefit, if any, received by such Debtors from the DIP Loans; and

(c) Granting such further relief as it deems just and proper.

Dated: August 31, 2016
Washington, D.C.

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