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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	**Chapter 11**
JCK LEGACY COMPANY, *et al.*,	)	**Case No. 20-10418 (MEW)**
Wind-Down Debtors.[1]	)	**(Jointly Administered)**

[1] The Wind-Down Debtors in these chapter 11 cases and the last four characters of each Wind-Down Debtor's tax identification number are: JCK Legacy Company (0478) and Herald Custom Publishing of Mexico, S. de R.L. de C.V. (5UZ1). The location of the Plan Administration Trustee's service address for purposes of these chapter 11 cases is: 1201 W Peachtree Street, NW, Suite 500, Atlanta, Georgia 30309.

PENSION BENEFIT GUARANTY CORPORATION'S OPPOSITION TO GUC RECOVERY TRUSTEE'S OBJECTION TO TERMINATION PREMIUMS ASSERTED BY THE PENSION BENEFIT GUARANTY CORPORATION IN PROOF OF CLAIM NO. 2689

The Pension Benefit Guaranty Corporation ("PBGC") hereby files this opposition to the GUC Recovery Trustee's Objection to Termination Premiums Asserted by the Pension Benefit Guaranty Corporation in Proof of Claim No. 2689 (Dkt. No. 1267) (the "Objection").

The GUC Recovery Trustee's Objection asks that this Court disregard the text of 29 U.S.C. § 1306(a)(7), the Employee Retirement Income Security Act ("ERISA") statute governing PBGC's claim for termination premiums ("Termination Premium Claim") and ignore the facts of this case. Subsection A of 29 U.S.C. § 1306(a)(7) contains the general rule for when the premium applies, including for all PBGC-initiated terminations such as occurred here. Subsection B of that provision (the "Special Rule") is a timing exception which provides that if a pension plan terminates during a bankruptcy reorganization, the liability does not arise until the debtors emerge from, or are dismissed from, bankruptcy. A reorganized debtor thus owes PBGC termination premiums as a post-emergence liability.

The GUC Recovery Trustee (the "Trustee") misconstrues both ERISA and the facts of this case. First, the Trustee mischaracterizes this bankruptcy as a reorganization and asserts that the Special Rule discharges the Termination Premium Claim because the McClatchy Company Retirement Plan (the "Pension Plan") terminated during the bankruptcy. But the statute plainly provides that termination premium liability is deferred only in the context of reorganization – *not* liquidation. While the Debtors initially filed for chapter 11 protection with a proposed plan for reorganization, the Debtors later pivoted to a liquidation sale and the Pension Plan subsequently terminated in a PBGC-initiated termination. The Special Rule, therefore, does not apply to this case.

Further, the Trustee misrepresents that ERISA does not impose termination premium liability for pension plans terminated during any liquidation. But a pension plan that terminates under a PBGC-initiated termination under 29 U.S.C. § 1342(c), as it did here pursuant to a Trusteeship Agreement with the Debtors, is an enumerated basis for termination premiums with no exception for bankruptcy liquidations. Accordingly, the Court should deny the Trustee's Objection in its entirety.

Background

A. PBGC and ERISA

PBGC is a wholly owned United States government corporation that administers the nation's termination insurance program for defined benefit pension plans under Title IV of ERISA. 29 U.S.C. §§ 1301-1461 (2018). PBGC guarantees the payment of certain pension benefits upon the termination of a single-employer pension plan covered by Title IV. When an underfunded pension plan terminates, PBGC generally becomes trustee of the pension plan and, subject to certain statutory limitations, pays the pension plan's unfunded benefits with its insurance funds. *See* 29 U.S.C. §§ 1321-1322, 1342, 1361. Title IV of ERISA provides the exclusive means to terminate a defined benefit pension plan, and PBGC regulates such terminations. *See* 29 U.S.C. §§ 1341, 1342. An employer may terminate a pension plan in a "standard" termination pursuant to 29 U.S.C. § 1341(b) if the pension plan is fully funded or seek termination in a "distress" termination pursuant to 29 U.S.C. § 1341(c) if the sponsor and each member of its controlled group demonstrate that they meet certain requirements relating to their financial viability. PBGC may initiate termination of a pension plan if certain statutory criteria are met and must seek to terminate it if a pension plan runs out of money to pay benefits currently due. 29 U.S.C.§ 1342(a).

When an underfunded pension plan terminates in a distress or PBGC-initiated termination, PBGC typically becomes trustee of the pension plan and assumes an unconditional obligation to pay participants and beneficiaries their lifetime Title IV benefits. *See* 29 U.S.C. §§ 1322, 1361. The employer, however, is not relieved of its liability for the benefits it promised to its employees. Instead, under ERISA, the employer and each member of its controlled group become jointly and severally liable as follows: (1) to PBGC for the "amount of unfunded benefit liabilities" of the pension plan pursuant to 29 U.S.C. §§ 1362(a) and (b); (2) to the pension plan for unpaid minimum funding contributions owed under 26 U.S.C. §§ 412 and 430 pursuant to 29 U.S.C. §§ 1082, 1342, and 1362 (a) and (c); and (3) to PBGC for any unpaid premiums owed pursuant to 29 U.S.C. §§ 1306, 1307.

1. Annual Premiums.

Employers that sponsor pension plans covered under Title IV of ERISA must pay annual insurance premiums to PBGC, consisting of a flat-rate component (a set dollar amount per participant) and a variable-rate component (based on the unfunded vested benefits in the pension plan). *See* 29 U.S.C. §§ 1306, 1307. These annual premiums continue to accrue until the pension plan has been terminated and either its assets have been distributed or a statutory trustee has been appointed, whichever occurs earlier. *See* 29 U.S.C. § 1307(a), (e). The Trustee has not challenged PBGC's right to receive, and its claim for, the annual premiums owed with respect to the Pension Plan.

2. Termination Premiums.

When a pension plan terminates under 29 U.S.C. § 1341(c)(2)(B)(ii) or (iii) or § 1342, another statutory premium payment arises "at a rate equal to $1,250 multiplied by the number of individuals who were participants in the pension plan immediately before the termination date." 29 U.S.C. § 1306(a)(7)(A).[2] This premium (the "Termination Premium") applies to all pension plans terminating under these specific provisions, whether or not the plans are in bankruptcy. The Termination Premium provision includes both a general rule for these premiums as well as the Special Rule, establishing a timing rule for when the liability arises for pension plans terminated during a bankruptcy reorganization. Termination Premiums are owed for each of three consecutive 12-month periods. The statute's definition for the applicable 12-month periods also emphasize the timing issue of the Special Rule, with section 1306(a)(7)(C)(i) providing the rule "in general" and (C)(ii) defining the period for "Plans terminated in bankruptcy reorganization."

The statute provides, in part:

(7) PREMIUM RATE FOR CERTAIN TERMINATED SINGLE-EMPLOYER PLANS.—

> **(A)** In general.—
> If there is a termination of a single-employer plan under clause (ii) or (iii) of section 1341(c)(2)(B) of this title or section 1342 of this title, there shall be payable to the corporation, with respect to each applicable 12-month period, a premium at a rate equal to $1,250 multiplied by the number of individuals who were participants in the plan immediately before the termination date. Such premium shall be in addition to any other premium under this section.
>
> **(B)** Special rule for plans terminated in bankruptcy reorganization.—
> In the case of a single-employer plan terminated under section 1341(c)(2)(B)(ii) of this title or under section 1342 of this title during pendency of any bankruptcy reorganization proceeding under chapter 11 of title 11 or under any similar law of a State or a political subdivision of a State (or a case described in section

[2] The Objection does not dispute PBGC's calculation of the Termination Premium Claim amount. *See* Objection.

> 1341(c)(2)(B)(i) of this title filed by or against such person has been converted, as of such date, to such a case in which reorganization is sought), subparagraph (A) shall not apply to such plan until the date of the discharge or dismissal of such person in such case.
>
> **(C)** Applicable 12-month period.—For purposes of subparagraph (A)—
> **(i)** In general.—The term "applicable 12-month period" means—
> **(I)** the 12-month period beginning with the first month following the month in which the termination date occurs, and
> **(II)** each of the first two 12-month periods immediately following the period described in subclause (I).
> **(ii)** Plans terminated in bankruptcy reorganization.—
> In any case in which the requirements of subparagraph (B) are met in connection with the termination of the plan with respect to 1 or more persons described in such subparagraph, the 12-month period described in clause (i)(I) shall be the 12-month period beginning with the first month following the month which includes the earliest date as of which each such person is discharged or dismissed in the case described in such clause in connection with such person.

29 U.S.C. § 1306(a)(7)(A)-(C).

Under the Special Rule for pension plans terminated in bankruptcy reorganization, the Termination Premium obligation does "not apply" *until* the date of a debtor's discharge or dismissal from a bankruptcy reorganization proceeding. 29 U.S.C. § 1306(a)(7)(B). The Special Rule thus defers the timing of this requirement for pension plans terminated in chapter 11 bankruptcy reorganizations such that the obligation does not arise until after debtors have emerged from bankruptcy protection. However, the Special Rule does not exempt pension plans terminated in chapter 11 liquidations from having to pay the Termination Premium. *See* 29 U.S.C. § 1306(a)(7)(B); 29 C.F.R. § 4007.13(a). Rather, the liquidating debtors must pay the Termination Premiums as an unsecured claim that is entitled to be treated similarly to all other unsecured claims. *See PBGC v. Asahi Tec Corp.*, 979 F. Supp. 2d 46, 76 (D.D.C. 2013).

PBGC promulgated regulation 29 C.F.R. § 4007.13 providing additional detail regarding Termination Premium liability and when it is owed to PBGC. Under the regulation, a termination resulting in a Termination Premium occurs when a single-employer pension plan terminates in a (1) PBGC-initiated termination under 29 U.S.C. § 1342; or (2) plan sponsor-initiated "distress" termination under section 1341(c) where at least one contributing sponsor of or member of the contributing sponsor's controlled group meets the requirements of section 1341(c)(2)(B)(ii) (the "reorganization test") or (iii) (the "business continuation test").[3] 29 C.F.R. §§ 4007.13(a)(1), (4). One or more controlled group members may thus fall under the test for a distress termination due to liquidation proceedings pursuant to Section 1341(c)(2)(B)(i) (the "liquidation test"), and not negate the Termination Premium for the controlled group, so long as at least one controlled group member meets either the reorganization test or the business continuation test. *Id.* The regulation also treats the Special Rule as nothing more than a timing rule for "[c]ertain reorganization cases" for establishing when the 12-month period occurs for purposes of setting when the first premium payment is due to PBGC. 29 C.F.R. § 4007.13(e). Notably, neither the statute nor the regulation exclude the Termination Premium from all bankruptcy proceedings.

3. The Pension Plan.

The Pension Plan, sponsored by The McClatchy Company ("McClatchy"), terminated in a PBGC-initiated termination under 29 U.S.C § 1342(c) effective August 31, 2020, after the Debtors withdrew their motion seeking approval of a distress termination of the Pension Plan on August 21, 2020. Dkt. No. 776. On September 4, 2020, PBGC became the statutory trustee of

[3] For a pension plan to terminate under 29 U.S.C. § 1341(c), a distress termination, each controlled group member must meet one of the tests under sec. 1341(c)(2)(B): (i) liquidation in bankruptcy or insolvency proceedings; (ii) reorganization in bankruptcy or insolvency proceedings; or (iii) termination required to enable payment of debts while staying in business or to avoid unreasonably burdensome pension costs caused by declining workforce. Controlled group members do not all need to meet the same test. 29 C.F.R. § 4041.41(c).

the Pension Plan pursuant to 29 U.S.C. § 1342(c) by an agreement between PBGC and The McClatchy Company, the administrator of the Pension Plan ("Trusteeship Agreement"). The Trusteeship Agreement is attached hereto as Exhibit 1. At termination, the Pension Plan had approximately 24,056 participants.

Argument

The Trustee argues that the Special Rule, deferring when the Termination Premium obligation arises for pension plans terminated during a chapter 11 reorganization, should apply to this case, thus disallowing PBGC's Termination Premium Claim. However, the actual language of the statute and substantive case law support the applicability of the Termination Premium for PBGC-initiated terminations in the context of a chapter 11 liquidation, such as this one, and negate the GUC Trustee's incorrect assertions.

I. Statutory Interpretation Requires that Every Word Be Given Meaning.

Rules of statutory interpretation require that every word and provision in a statute should be given meaning. It has been long established that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning it employed."[4] The Supreme Court held that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . ."[5] And the Supreme Court has also emphasized, "courts must presume that a legislature says in a statute what it means and means in a statute what it says

[4] *Inhabitants of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

[5] *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoted in *Corley v. United* States, 556 U.S. 303, 314 (2009)); *Life Technologies Corp. v. Promega Corp.*, 137 S.Ct. 734, 740 (2017) ("Whenever possible. . . we should favor an interpretation that gives meaning to each statutory provision.")

there." The Trustee's interpretation of ERISA ignores these bedrock principles of statutory interpretation.

The Bankruptcy Code is extensive, and chapter 11 explicitly provides for both liquidations and reorganizations. Congress clearly understands this. The various pension plan termination provisions enumerated in the general rule of the Termination Premium itself distinguish between distress terminations due to liquidations in chapter 11 and those due to reorganizations in chapter 11. *See* 29 U.S.C. §§ 1306(a)(7)(A) (Termination Premium explictly applies to distress terminations due to reorganizations under 1341(c)(2)(B)(ii) and to all PBGC-initiated terminations under 1342, but distress terminations due to liquidations under 1341(c)(2)(B)(i) are not enumerated); 1341(c)(2)(B)(i) (distress terminations due to liquidations), (ii) (distress terminations due to reorganizations). Ignoring other provisions in the very statute at issue where Congress clearly recognizes the distinction between liquidations and reorganizations in chapter 11, would give a contradictory interpretation to different parts of the same statute.

ERISA and the Bankruptcy Code must also be harmonized if at all possible.[6] Here, reading the full Termination Premium statute as providing a special timing rule only applying to bankruptcy reorganization proceedings allows such harmonization, and does not require further interpretation of the Bankruptcy Code. If Congress had intended to have the Special Rule apply to all chapter 11 proceedings, it could simply have omitted the word "reorganization" from the

[6] *See, e.g., Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666-67 (2007) (holding that the agency's interpretation appropriately harmonized the Endangered Species Act and the Clean Water Act); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001); *Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490, 511 (1989) (construing Railway Labor Act and the Interstate Commerce Act to "harmonize the two statutes"); *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520, 549 (S.D.N.Y. 2006) ("The two statutes must be read together harmoniously.") (discussing the New York Disaster Act and the New York State Defense Emergency Act), *aff'd in part*, 521 F.3d 169 (2d Cir. 2008).

phrase "during the pendency of any bankruptcy reorganization proceeding under chapter 11 of title 11." That would have unambiguously given the statute the meaning the GUC Recovery Trustee espouses, as he essentially asks the court to interpret the word "reorganization" as meaningless.

The Trustee's interpretation of that small portion of the Special Rule also ignores most of the words immediately following. There, the statute refers to three categories of bankruptcy reorganizations, not just to chapter 11, which further emphasizes that the phrase "bankruptcy reorganization proceeding" is intended to modify each of the categories that immediately follow it: (1) "under chapter 11 of title 11," (2) "under any similar law of a State or a political subdivision of a State," and (3) "a case described in section 1341(c)(2)(B)(i) of this title filed by or against such person has been converted, as of such date, to such a case in which reorganization is sought." The GUC Recovery Trustee conveniently ignores these additional phrases.

The statute explicitly provides that Termination Premiums apply to all PBGC-initiated terminations under 29 U.S.C. § 1342 – there are no exceptions. The GUC Recovery Trustee argues that Termination Premiums do not apply to any liquidations, which is incorrect – they apply to any terminations under section 1342. As 29 C.F.R. § 4007.13(a)(1)(ii) sets out, Termination Premiums also apply to terminations where at least one controlled group member meets distress criteria under section 1341(c)(2)(B)(ii) or (iii), even if other controlled group members only meet the distress termination criteria under section 1341(c)(2)(B)(i). Again, Congress could have limited its broad language to specifically provide specified that Termination Premiums did not apply to bankruptcy liquidations, but it did not.

II. The Special Rule was Created to Impose Some Post-Emergence Obligation on Employers Who Remain in Business Post-Bankruptcy.

The Trustee's incorrect interpretation of the statute is not only contrary to the text of the statute and principles of statutory interpretation, but also the purpose of the Special Rule. The Special Rule was intended to treat an emerging debtor and its controlled group members differently from debtors liquidating in bankruptcy or from sponsors terminating a pension plan outside of bankruptcy. Indeed, the Second Circuit has recognized that the Special Rule was created as an exception to the Termination Premium general rule, to prevent plan sponsors from unnecessarily pushing pension plan liabilities onto PBGC in bankruptcy and then emerging. *PBGC v. Oneida, Ltd.*, 562 F.3d 154, 157 (2d Cir. 2009). Under this exception, in a bankruptcy reorganization, the Termination Premium "shall not apply to such [pension] plan until the date of the discharge or dismissal of such person." 29 U.S.C. § 1306(a)(7)(B).[7] As the Second Circuit recognized:

> If there is any ambiguity in the statutory language of the Special Rule-and we perceive none-it is resolved in the PBGC's favor by the legislative history of the Deficit Reduction Act and the Pension Protection Act. The Termination Premiums were established in response to mounting financial pressure on the PBGC as a result of an increasing number of pension plan terminations. See H.R. Rep. 109-276, at 345-48 (2005). Congress recognized, however, that its Termination Premium program could be jeopardized by employers seeking bankruptcy protection. It thus created the Special Rule. The House Committee on Education and the Workforce stated:
>
> > [T]he Committee believes that a termination premium for former plan sponsors who initiate and complete a distress termination while in bankruptcy is appropriate. The bankruptcy courts should not be used as a mechanism for eliminating the burden of an underfunded pension plan; therefore, an additional premium paid to the PBGC to recognize the agency's assumption of unfunded plan liabilities is reasonable.

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[7] The Trustee's assertion that a Termination Premium does not arise in a liquidation until a reorganization is sought simply ignores the statute. The Special Rule provides that *if* the case converts into a reorganization, then the liability arises after the debtor emerges from bankruptcy. However, if the case is a liquidation, then liability arises at the time the pension plan terminates.

> H.R.Rep. No. 109-276, at 348. Treating the Special Rule's Termination Premium as a pre-petition claim would therefore directly thwart Congress's aim in establishing the Special Rule.

Oneida, 562 F.3d at 157-58 (footnote omitted).

Thus the Special Rule was intended to advantage PBGC. Congress explicitly provided for a post-emergence obligation to pay the Termination Premium in 100 cent dollars for employers and their controlled group members who successfully emerge from bankruptcy. Those claims cannot be dismissed as bankruptcy claims paid at a mere fraction of the liability because for debtors emerging from bankruptcy, the Termination Premium does not arise until the bankruptcy is terminated. *Id.*, at 157.[8]

This does not mean that the bankruptcy estate should be entirely exempt from liability for the Termination Premium where debtors do not emerge from bankruptcy. The Termination Premium provision contains nothing to indicate that the premium is not intended to be a claim in a bankruptcy liquidation. Where a pension plan terminates during a bankruptcy liquidation, then the Termination Premium is an unsecured claim entitled to be treated similarly to all other unsecured claims. The Trustee's interpretation would frustrate Congress' purpose in enacting the statute. The Special Rule is limited to bankruptcy *reorganization*, where the reorganizing entity could continue to shoulder some financial responsibility for its pension obligations by providing a limited period of support to PBGC. Under the statute's general rule, which applies here, liability for the Termination Premium arises when a pension plan terminates. Therefore, the estate in this case became liable to PBGC for the Termination Premium upon the termination of the Pension Plan under 29 U.S.C. § 1342.

[8] *In re Briggs*, No. 11-cv-73A, 2011 WL 2457875 (W.D.N.Y. June 16, 2011), cited by the Trustee, does no more than acknowledge the ruling in *Oneida* and note that it is not relevant in looking at a pre-petition claim.

III. This Case is a Liquidation.

The Trustee's argument boils down effectively to an argument that any proceeding under chapter 11 should be considered a reorganization, regardless of whether the debtors themselves actually reorganize. But the present bankruptcy proceeding is clearly a liquidation proceeding. The confirmed plan documents, court orders, trust documents, and more, all establish that this is a liquidation. Under any common sense or dictionary definition of reorganization, this case is not a reorganization.

While the Debtors initially filed a proposed plan of reorganization when they sought bankruptcy protection in February 2020, notably not all of their major creditors agreed to the proposed plan of reorganization. Dkt. No. 57. Within months, it became apparent that Debtors would be unable to confirm a plan that provided for any continuance of the entities that sought bankruptcy protection. On August 7, 2020, the Court approved the sale of substantially all assets to the asset purchasers.[9] After the Court approved the sale, Debtors withdrew their motion seeking approval of a distress termination of the Pension Plan, on August 21, 2020. Dkt. No. 776. By agreement with the Debtors, PBGC terminated the Pension Plan under 29 U.S.C. § 1342(c) on September 4, 2020.

The confirmed plan in this case is a Plan of Distribution (the "POD"), which equates to a liquidation.[10] As such, it is not surprising that the POD does not include the words

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[9] Order (I) Approving the Sale of the Acquired Assets Free and Clear of Claims, Liens, Interests and Encumbrances; (II) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (IIII) Granting Related Relief, Dkt. No. 744.

[10] *See* Exhibit 1 to Notice of Filing of Amended Plan of Distribution and Proposed Confirmation Order, Dkt. No. 867. The Court approved the POD and related Disclosure Statement on September 25, 2020. Findings of Fact, Conclusions of Law, and Order Approving the Disclosure Statement and Confirming the First Amended Joint Chapter 11 Plan of Distribution of JCK Legacy Company and Its Affiliated Debtors and Debtors in Possession, Dkt. No. 879. The POD's effective date occurred on September 30, 2020.

"reorganization," "reorganize," or "reorganized." The GUC Recovery Trust, handling the distribution of funds to unsecured claimants, is explicitly a "liquidating trust" under section 6.20 of the POD. And the POD repeatedly provides for the dissolution of all Debtors. *E.g.*, POD, pars. 1.181, 4.6, and 6.10. On February 16, 2021, and July 23, 2021, the Plan Administration Trustee filed notices of Certification of Dissolution of Certain Debtors, listing 52 debtors deemed dissolved effective December 27, 2020. Dkt. Nos. 1121 and 1217. Only Wind-Down Debtor JCK Legacy Company temporarily remains with the POD requiring that

> any Debtor whose continued legal existence is necessary to preserve, claim, and receive the Tax Refund shall not be dissolved until the receipt of the Tax Refund [which is expected to largely provide any recovery available to unsecured creditors] or the GUC Recovery Trustee making a final determination that the Tax Refund is not available. The Plan Administration Trustee is authorized to take all necessary or appropriate actions to dissolve the Wind-Down Debtors in and withdraw the Wind-Down Debtors from applicable states.

POD, par. 6.10. No entity that sought bankruptcy protection in this case will survive these bankruptcy proceedings and none of those entities has an object of continuing in a trade or business.

Incongruously, the Trustee attempts to argue that this liquidation is a "reorganization," on the theory that a "reorganization" means any case under chapter 11, whether the debtor is reorganized under a common sense understanding or not. This follows the Nevada court's poorly reasoned and simplistic bench ruling in *In re USA Commercial Mortgage Co.*, 802 F. Supp. 2d 1147 (D. Nev. 2011), which effectively ignored that chapter 11 includes liquidations as well as reorganizations and largely disregarded the ERISA statutes at issue. Neither *In re Ocean Beach Properties*, 148 B.R. 494 (Bankr. E.D. Mich. 1992) nor *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973 (Bankr. N.D.N.Y. 1988), cited by the GUC Recovery Trustee, hold that all chapter 11 proceedings must be classified as reorganizations – rather, they acknowledge that chapter 11 proceedings may include both liquidations and reorganizations. And neither concerns how the term "reorganization" is used in the ERISA statute at issue.

The Trustee is simply treating all chapter 11 proceedings as reorganizations with a tortured argument that an asset purchaser "reorganizes" a company by purchasing the assets and continuing operations that were previously performed by the entity that sought bankruptcy protection. But the statute being interpreted is in ERISA, and the Special Rule is focused on whether the entity itself reorganizes or liquidates, not whether a different entity takes over business operations. The Special Rule specifically provides that Termination Premium liability shall not apply "until the date of the discharge or dismissal of *such person*." 29 U.S.C. § 1306(a)(7)(B) (emphasis added). And if one were to follow the reasoning of the Trustee that asset purchasers "reorganize" debtors, that begs the question of whether he considers the asset purchasers to be, in effect, the emerging debtors. If so, then the Termination Premium should be the post-emergence obligation of the asset purchasers, because the Trustee apparently argues that the Termination Premium cannot be a bankruptcy claim.

But such a result would be contrary to general bankruptcy law, which recognizes that asset purchasers are entirely separate entities from the debtors, purchasing the right to continue operations, but not continuing the entity that sought bankruptcy protection. It is far more logical that if a debtor cannot emerge or be discharged from bankruptcy, that Congress's carve out of the Special Rule, imposing the Termination Premium as a post-emergence obligation of the employer who underfunded its pension plan and forced it on PBGC, does not apply. The Special Rule provides a timing rule taking the obligation outside of bankruptcy where debtors themselves actually emerge from bankruptcy.

Where the timing rule of the Special Rule does not apply, the Termination Premium arises at pension plan termination, which here occurred during the bankruptcy. As such, the obligation remains with the bankruptcy estate just as with any other bankruptcy claim arising during a bankruptcy. Like all other unsecured obligations owed by a liquidating debtor, the Termination Premium incurred by a liquidating debtor is an unsecured claim against the bankruptcy estate.

IV. The Special Rule Under ERISA Does Not Apply Because the Pension Plan Was Terminated Pursuant to the Debtors' Liquidation.

The Special Rule, on which the Trustee relies, does not eliminate Termination Premiums from bankruptcy liquidation proceedings, but rather regulates when the liability arises only for debtors that will be emerging from bankruptcy. The most recent court to address the issue has provided a well-reasoned opinion that is squarely on point and examines the substantive law at issue. *See Asahi Tec Corporation*, 979 F.Supp.2d at 75-76. Specifically, ERISA provides:

> In the case of a single-employer plan terminated under . . . section 1342 of this title during pendency of any bankruptcy reorganization proceeding under chapter 11 of title 11 . . . subparagraph (A) shall not apply to such plan *until* the date of the discharge or dismissal of such person in such case.

29 U.S.C. § 1306(a)(7)(B) (emphasis added).

Section 1306(a)(7)(A) plainly states that liability for the Termination Premium will arise "[i]f there is a termination of a single-employer plan under . . . section 1342 of this title." Therefore, the statutory language allows for Termination Premiums to apply in liquidations where PBGC initiates termination of a debtor's pension plan. 29 U.S.C. § 1306(a)(7)(A); *see also Asahi*, 979 F.Supp.2d at 75 ("[29 U.S.C. § 1306(a)(7)(A)] imposes liability on companies whose plans are terminated by [PBGC] under section 1342 regardless of whether they are liquidating or reorganizing.").

The Trustee's reliance on *Pension Benefit Guaranty Corporation v. Oneida Ltd.*, 562 F.3d 154 (2d Cir. 2009) is misplaced, as the debtor in that case emerged from chapter 11 reorganization without having to liquidate. The Second Circuit's *Oneida* ruling in no way supports treating all chapter 11 proceedings as reorganizations subject to the Special Rule. In fact, the Second Circuit, as discussed above, explicitly addressed the legislative history supporting the Special Rule as directed only at emerging debtors.

The Court should therefore look to the reasoning of the U.S. District Court for the District of Columbia in *Pension Benefit Guaranty Corporation v. Asahi Tec Corporation*, 979 F. Supp. 2d 46 (D.D.C. 2013), in which PBGC's Termination Premium claim was allowed in the context of the debtor's chapter 11 liquidation. In *Asahi*, the District Court found that "the need to give each word in [29 U.S.C. § 1306(a)(7)(B)] some meaning [wa]s an important consideration" in determining when liability for the Termination Premium attaches for a given debtor. *Id.* at 74; *see also id.* at 75 ("There is nothing about section 1306(a)(7)(B) that indicates that the special rule was meant to be an exception to the liability for termination premiums imposed in section 1306(a)(7)(A) for a category of debtors. The text reveals that the Special Rule is meant to be a timing provision only."). Indeed, the *Asahi* Court reasoned that because the provision explicitly delays *when* rather than *if* the liability arises for an emerging debtor in reorganization proceedings, "interpreting the special rule to apply to debtors who liquidate under chapter 11 and for whom the date [of emergence] will never come fails to give meaning to the phrase 'until the date of discharge or dismissal.'" *Id.* at 75-76.

The *Asahi* Court also held that the allowance of Termination Premium claims in chapter 11 liquidations was consistent with the Congressional intent evident in legislative histories. The District Court determined:

> To prevent corporations from discharging [termination] premiums in bankruptcy, Congress created the special rule, which applies when 'a plan is terminated under bankruptcy *reorganization* or a petition seeking *reorganization* under bankruptcy.' This legislative history demonstrates that the special rule is intended to ensure that reorganizing debtors will pay the termination premium after they emerge from bankruptcy. *But since liquidating debtors will not emerge from bankruptcy, the special rule was not designed to apply to them; rather they must pay the termination premium under the schedule imposed by the general rule.*

Id. at 76 (emphasis added) (quoting H.R. Rep. 109-276, at 348-49). The same logic applies in this case, where the Debtor began its insolvency in a reorganization but pivoted to liquidating all its assets under that same chapter, *e.g.,* a liquidating chapter 11. Further, if Congress had meant for Termination Premium claims to be discharged or deferred for all chapter 11 proceedings, regardless of the outcome, it would not have specified that the Special Rule applied only to "bankruptcy *reorganization* proceedings." This Court should therefore follow the holding of the *Asahi* Court and the rationale of Congress in creating the Special Rule, allowing PBGC's Termination Premium Claim.

V. The Trustee's Other Arguments to Escape the Termination Premium Claim are Unavailing.

The Trustee makes two additional side arguments that are not well explained. The Trustee argues that the cost of an unsecured claim for the Termination Premium would be borne by other unsecured claimants. Objection at 10. But that is no different than could be said of any other unsecured claim in a bankruptcy. The burden of a claim is not on the other claimants in a bankruptcy, but on the estate itself, as the debtors incurred the liability.

Finally, in another blatant misreading of ERISA, the Trustee argues that the Termination Premium is somehow a penalty. It is not. The Trustee's argument is based on the idea that 29 U.S.C. § 1307(d) provides the Termination Premium is payable even if other premiums owed to PBGC are unpaid. Section 1307(d) does not say that. Rather, the statute provides that PBGC guarantees defined benefit pension plans even if a sponsor fails to pay its premiums. PBGC thus protects participants in defined benefit pensions of delinquent sponsors by continuing to provide the pension insurance program to those participants. All premiums, whether they are annual premiums or the Termination Premium, are statutory obligations of the sponsor and its controlled group to PBGC as federal guarantor, and PBGC files bankruptcy claims for all unpaid premiums. Accordingly, this Court should reject the Trustee's arguments as none of them have any basis in law or fact.

Therefore, the Court should deny the Trustee's Objection in its entirety.

Conclusion

For the foregoing reasons, PBGC respectfully requests that this Court overrule the Trustee's Objection.

Dated: October 13, 2021

Respectfully submitted,

/s/ *Erika E. Barnes*

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Exhibit 1

AGREEMENT FOR APPOINTMENT OF TRUSTEE AND TERMINATION OF PLAN

This is an AGREEMENT between the Pension Benefit Guaranty Corporation ("PBGC") and The McClatchy Company (the "Company" and collectively with PBGC, the "Parties").

RECITALS:

A. PBGC is a United States government agency established by Title IV of the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1301-1461 ("ERISA").

B. The Company is a corporation organized under the laws of Delaware, with its principal place of business located in Sacramento, California**.**

C. The Company maintains The McClatchy Company Retirement Plan (the "Plan") to provide retirement benefits for certain of its employees. The Plan was established effective November 1, 1944**.**

D. The Plan is an employee pension benefit plan to which 29 U.S.C. § 1321(a) applies and is not exempt under 29 U.S.C. § 1321(b). The Plan is therefore covered by Title IV of ERISA.

E. The Company is the administrator of the Plan within the meaning of 29 U.S.C. §§ 1002(16) and 1301(a)(1).

F. On February 13, 2020, the Company filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").

G. On August 7, 2020, the Bankruptcy Court approved the sale of substantially all of the Company's assets. The purchaser of those assets did not assume any of the Plan liabilities.

H. On August 31, 2020, the Company was a contributing sponsor of the Plan within the meaning of 29 U.S.C. § 1301(a)(13).

I. PBGC has issued to the Company a Notice of Determination under 29 U.S.C. § 1342(a)(2) that the Plan will be unable to pay benefits when due and that the Plan should be terminated under 29 U.S.C. § 1342(c).

NOW THEREFORE, the Parties agree:

1. The Plan is terminated under 29 U.S.C. § 1342(c).

2. The Plan termination date is August 31, 2020, under 29 U.S.C. § 1348.

3. PBGC is appointed trustee of the Plan under 29 U.S.C. § 1342 (c).

4. The Company and any other person having possession or control of any records, assets or other property of the Plan shall convey and deliver to PBGC any such records, assets or property in a timely manner. PBGC reserves all its rights to pursue such records, assets, and other property by additional means, including but not limited to issuance of administrative subpoenas under 29 U.S.C. § 1303.

5. PBGC will have, with respect to the Plan, all of the rights and powers of a trustee specified in ERISA or otherwise granted by law.

The persons signing this Agreement are authorized to do so. The Agreement will take effect on the date the last person signs below.

THE MCCLATCHY COMPANY, Plan Administrator

Dated: Sep 4, 2020 By: Craig I Forman (Sep 4, 2020 05:50 PDT)
Name: Craig I. Forman
Title: President and Chief Executive Officer

PENSION BENEFIT GUARANTY CORPORATION

NICHOLAS SMITH Digitally signed by NICHOLAS SMITH
Date: 2020.09.04 14:30:45 -04'00'

Dated: ____________ By: ______________________________

McCl-PBGC - Trustee-Term Agreement 092020 - Final

Final Audit Report 2020-09-04

Created:	2020-09-04
By:	David Levine (davidmove@yahoo.com)
Status:	Signed
Transaction ID:	CBJCHBCAABAAAgON2vxif6I0GabnrLUxUYriXiMitIPG

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Counsel for Pension Benefit Guaranty Corporation

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	**Chapter 11**
JCK LEGACY COMPANY, *et al.*,	)	**Case No. 20-10418 (MEW)**
Wind-Down Debtors.[1]	)	**(Jointly Administered)**

[1] The Wind-Down Debtors in these chapter 11 cases and the last four characters of each Wind-Down Debtor's tax identification number are: JCK Legacy Company (0478) and Herald Custom Publishing of Mexico, S. de R.L. de C.V. (5UZ1). The location of the Plan Administration Trustee's service address for purposes of these chapter 11 cases is: 1201 W Peachtree Street, NW, Suite 500, Atlanta, Georgia 30309.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2021, the **Pension Benefit Guaranty Corporation's Opposition to GUC Recovery Trustee's Objection to Termination Premiums Asserted by the Pension Benefit Guaranty Corporation in Proof of Claim No. 2689** was filed electronically through the Court's NextGen system, which caused all parties or counsel that requested notification to be served by the Court's CM/ECF system on the date of filing including the following:

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/s/ *Erika E. Barnes*

Erika E. Barnes