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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11**
THE McCLATCHY COMPANY, *et al.*,	:	**Case No. 20-10418 (MEW)**
Debtors.[1]	:	**(Joint Administration Pending)**

MOTION FOR AN ORDER (A) DETERMINING THAT THE FINANCIAL REQUIREMENTS FOR A DISTRESS TERMINATION ARE SATISFIED AND (B) APPROVING A DISTRESS TERMINATION OF THE MCCLATCHY COMPANY RETIREMENT PLAN

[1] The last four digits of Debtor The McClatchy Company's tax identification number are 0478. Due to the large number of debtor entities in these chapter 11 cases, for which the Debtors have requested joint administration, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' proposed claims and noticing agent at http://www.kccllc.net/McClatchy. The location of the Debtors' service address for purposes of these chapter 11 cases is: 2100 Q Street, Sacramento, California 95816.

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The McClatchy Company ("**McClatchy**" or "**Company**") and certain of its debtor subsidiaries and affiliates that are in McClatchy's controlled group within the meaning of the Employee Retirement Income Security Act of 1974, *as amended* ("**ERISA**") section 4001(a)(14), 29 U.S.C. § 1301(a)(14) (collectively, "**ERISA Debtors**"), submit this motion ("**Motion**")[2] for entry of an order, substantially in the form attached hereto as **Exhibit A** ("**Order**"), granting the relief described below. In support of this Motion, the ERISA Debtors rely upon and incorporate by reference the Declaration of Sean Harding in Support of Chapter 11 Petitions and First Day Papers (the "**First Day Declaration**"), filed contemporaneously herewith. In further support of this Motion, the ERISA Debtors, by and through their undersigned proposed counsel, respectfully represent as follows:

RELIEF REQUESTED

1. The ERISA Debtors respectfully request entry of an Order (a) determining that the financial requirements for a distress termination of The McClatchy Company Retirement Plan ("**Plan**") under section 4041(c) of ERISA, 29 U.S.C. § 1342(c), are satisfied, (b) approving a distress termination of the Plan with a termination date of April 13, 2020, and (c) granting such further relief as the Court may deem just and proper.

JURISDICTION

2. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334, 29 U.S.C. § 1341(c)(2)(B)(ii)(IV), and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York* dated January 31, 2012. The Debtors confirm their consent, pursuant to Rule 7008 of the Federal Rules of Bankruptcy

[2] As required under ERISA section 4041(c)(2)(B)(ii)(III), the Pension Benefit Guaranty Corporation has been provided with a copy of this Motion.

Procedure (the "**Bankruptcy Rules**"), to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. This is a core proceeding under 28 U.S.C. § 157(b).

3. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

PRELIMINARY STATEMENT

4. McClatchy is a 163-year-old media company that produces extraordinary independent community journalism for 30 local communities in 14 states. McClatchy has worked diligently to adapt to the profound changes in the media industry over the past two decades, but the Company's legacy pension obligations are simply too great a burden. McClatchy cannot survive unless it is permitted to restructure its balance sheet and terminate the unaffordable Plan.

5. The media industry has undergone a dramatic transformation in recent years due to the shift from print to digital media and the impact of the Great Recession on revenue. The changes have negatively affected McClatchy and all other print media companies. Evidencing the headwinds facing McClatchy, between 2006 and 2018, McClatchy's advertising revenues fell by 80%, and its total daily print circulation fell by 58.6%.

6. For years, the Company has taken steps to restructure its operations and overcome those headwinds. For example, McClatchy's management successfully implemented a business plan to effect the Company's digital transformation, paid down debt, and sought to undertake strategic transactions to increase revenues. However, all of those efforts were hindered, in large part, because of McClatchy's outsized legacy obligation to the Plan.

7. Unlike most of its competitors, McClatchy still maintains a defined benefit pension plan. The Plan was established in 1944. Until this year, McClatchy has not only satisfied all minimum required contributions to the Plan, but contributed money or other assets in excess of those required contributions. In the last decade alone, McClatchy made $228 million in excess cash contributions to the Plan and an excess contribution of real property valued at $47.1 million; since 2001, the Company has made voluntary contributions of nearly $580 million. These cash and in kind contributions are in addition to the $65.5 million in required contributions McClatchy made to the Plan. Even with these additional and required contributions to the Plan, the Plan is still underfunded by over $323 million (calculated on an ERISA basis). And, going forward, the contributions that Company will have to make annually are too large for the Company to pay and remain in business.

8. McClatchy has taken all reasonable steps to meet its obligations to the Plan and avoid having to terminate the Plan in bankruptcy. The Company slashed expenses and sought to increase revenues. It attempted to enter into strategic transactions, but was unable to secure financing. The Company also petitioned the Internal Revenue Service to grant a pension funding waiver, which would have temporarily reduced the Company's required contributions. In addition, the Company lobbied for a legislative fix to provide more time for it to fund the Plan. Those efforts were unsuccessful, leaving McClatchy no option but to pursue a distress termination of the Plan in bankruptcy.

9. ERISA permits a distress termination of a pension plan in a bankruptcy reorganization where the plan sponsor (or a member of the sponsor's controlled group) demonstrates that, unless the plan is terminated, it (1) cannot "pay all of its debts pursuant to a plan of reorganization," and (2) cannot "continue in business outside the chapter 11

reorganization process". McClatchy and each of the ERISA Debtors easily meet these criteria, as discussed in more detail below. Thus, the Company is seeking to terminate the Plan as part of a reorganization under these Chapter 11 proceedings.

10. If McClatchy is unable restructure its balance sheet and terminate the Plan quickly, this 163-year-old company will not survive. The ERISA Debtors respectfully request that the Court grant this Motion to allow the Plan to be terminated.

BACKGROUND

I. THE CHAPTER 11 CASES

11. On February 13, 2020 (the "**Petition Date**"), each ERISA Debtor commenced a case by filing a petition for relief under chapter 11 of the Bankruptcy Code (collectively, the "**Chapter 11 Cases**"). The ERISA Debtors continue to operate their businesses and manage their properties as debtors and debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. On the Petition Date, the ERISA Debtors filed a Plan of Reorganization.

12. To date, the Office of the United States Trustee for the Southern District of New York (the "**U.S. Trustee**") has not appointed a creditors' committee in the Chapter 11 Cases, nor has any trustee or examiner been appointed therein.

II. THE MCCLATCHY COMPANY

13. McClatchy is a publicly-traded, family-controlled company[3] established in 1857. Declaration of Sean Harding in Support of Chapter 11 Petitions and First Day Papers ("**Harding Decl.**"), at ¶ 13. The Company operates 30 media outlets in 14 states, including well-respected publications such as the *Miami Herald*, *The Kansas City Star*, *The Sacramento Bee*, *The*

[3] The Company is controlled through non-publically traded Class B Common Stock that can be held only by descendants of Charles K. McClatchy. Harding Decl. at ¶ 13, n.3.

Charlotte Observer, *The* (Raleigh) *News & Observer*, and the (Fort Worth) *Star-Telegram*, as well as select national news coverage through its Washington, D.C. bureau. *Id.* The Company is dedicated to fiercely independent community journalism. *See id.*

14. In 2006, the Company expanded its portfolio by 20 newspapers when it purchased Knight-Ridder, Inc. *Id.* at ¶ 36. To consummate the transaction, the Company took on $5.0 billion in debt. *Id.* At the time of the acquisition, both the Company and the debt to finance the acquisition had an investment grade rating from both Moody's Investor Services and Standard & Poor's. *Id.*

15. As described in detail in the Declaration of Sean Harding in Support of Chapter 11 Petitions and First Day Papers, as of the Petition Date, the Debtors' principal funded debt obligations are as follows:

	Pro Forma ($ millions)	**Interest Rate**	**Maturity**
Secured Debt			
ABL Facility[4]	—		
First Lien Notes	$262.9	9.000%	Jul-2026
Second Lien Term Loan	$157.1	7.795%	Jul-2030
Third Lien Notes	$268.4	6.875%	Jul-2031
Total Secured Debt	**$688.4**		
Unsecured Debt			
2027 Debentures	$7.1	7.150%	Nov-2027
2029 Debentures	$7.8	6.875%	Mar-2029
Total Unsecured Debt	**$14.9**		
Total Funded Debt	**$703.3**		

[4] The ABL Credit Agreement by and among The McClatchy Company as parent, the borrowers thereto, the lenders thereto, and Wells Fargo Bank, National Association dated as of July 16, 2018 provides for up to $65.0 million secured asset-backed revolving credit facility (the "**ABL Facility**") with a letter of credit subfacility and a swing line subfacility. Harding Decl. at ¶ 19. In addition, the ABL Credit Agreement provides for a separate $35.0 million cash secured letter of credit facility ("**LOC Facility**"). *Id.* The commitments under the ABL Credit Agreement expire July 16, 2023. *Id.*

Harding Decl. at ¶ 18.

16. Chatham Asset Management ("**Chatham**") is the Company's largest debtholder. *Id.* at ¶ 62. Brigade Capital Management (together with Chatham, the "**Secured Parties**") is another significant holder of the Company's First Lien Notes. *Id.* at ¶ 68.

III. PENSION BENEFIT GUARANTY CORPORATION

17. The PBGC is a wholly-owned government corporation that guarantees certain private-sector defined benefit pension plans. *See generally* 29 U.S.C. §§ 1301-1461. When a pension plan guaranteed by the PBGC terminates without sufficient assets to pay all benefits, the PBGC trustees the plan and pays benefits up to guarantee limits set by law. *See* 29 U.S.C. § 1322 (describing guaranteed benefits). Upon the date of plan termination, the PBGC asserts joint-and-several claims against the plan sponsor and each member of the sponsor's controlled group for the plan's unfunded benefit liabilities ("**UBL**"), unpaid contributions to the plan, unpaid the PBGC flat-rate and variable-rate insurance premiums, and, in certain circumstances, termination premiums. 29 U.S.C. §§ 1082(b)(2), 1301(a)(18), 1306, 1307(e)(2), 1342(d)(1)(B)(ii), 1362(a).

IV. THE MCCLATCHY COMPANY RETIREMENT PLAN

18. The Plan is a qualified single-employer defined benefit pension plan covered by the PBGC. Harding Decl. at ¶ 55. With each successive business acquisition throughout the 1990s and 2000s, the Company assumed pension plans that covered the current and former employees of the acquired company. *Id.* As of January 1, 2019, the Plan covered nearly 24,500 employees or former employees or their beneficiaries. *Id.* The Plan was amended in March 2009 to "freeze" benefits by eliminating future benefit accruals. *Id.* at ¶ 158.

19. The Plan does not have sufficient assets to satisfy all benefits. As of January 1, 2019, the Plan was underfunded by $323.6 million based on the standards required by the Internal Revenue Code for non-terminated pension plans.[5] *Id.* at ¶ 57.

20. Given the Plan's underfunding, the required contributions to the Plan are significant. In fiscal year 2020 alone, the required contributions will be approximately $124 million.[6] *Id.* In fiscal years 2021 and 2022, the projected required contributions are approximately $88 million and $117 million, respectively. *Id.*

21. On February 12, 2020, the Board of Directors of the Company resolved to seek a distress termination of the Plan. *Id.* at ¶ 68. On February 13, 2020, the Company sent a Notice of Intent to Terminate to "affected parties," including participants, beneficiaries of deceased participants, alternate payees under qualified domestic relations orders, and certain unions that currently or recently represented affected employees. Also on February 13, 2020, the Company submitted a Form 600, Notice of Intent to Terminate, to the PBGC.

V. DISTRESS TERMINATION

22. Under ERISA, a pension plan may be terminated by the plan sponsor (as opposed to by the PBGC) only in a "standard termination" or a "distress termination". 29 U.S.C. § 1341(a)(1); *see also In re Falcon Prod., Inc.*, 354 B.R. 889, 893 (E.D. Mo. 2006), *aff'd*, 497 F.3d 838 (8th Cir. 2007) (a plan sponsor may voluntarily terminate a plan in a standard

[5] Under a different method of measuring benefit liabilities that assumes a termination of the Plan, PBGC estimates that as of July 19, 2019, the Plan's UBL is $805.2 million. Harding Decl. at ¶ 159. The ERISA Debtors reserve all rights with respect to the validity and amount of any claim PBGC has or may file in these proceedings.

[6] A required contribution to the Plan was due on January 15, 2020 in the amount of approximately $4 million. On January 14, 2020, PBGC and McClatchy entered into a Standstill Agreement under which PBGC agreed to forbear from filing Notices of Federal Lien to perfect any liens enforceable by PBGC under Internal Revenue Code section 430(k).

termination or a distress termination); *In re Wire Rope Corp. of Am., Inc.*, 287 B.R. 771, 776 (Bankr. W.D. Mo. 2002) ("a plan may be terminated only in a standard termination under § 1341(b) or a distress termination under § 1341(c)). A standard termination requires that the pension plan's assets be sufficient to cover all benefit liabilities. 29 U.S.C. § 1341(b)(1)(D).

23. If a plan does not have sufficient assets to cover all benefit liabilities, the plan may be terminated in a distress termination so long as certain criteria are met. 29 U.S.C. § 1341(c)(1). A distress termination, which "shift[s] liability for guaranteed benefits into other insurance premium payers in the PBGC program" is reserved for "cases of severe business hardship". *In re Wire Rope*, 287 B.R. at 777 (citing H.R. Rep. No. 300, 99th Cong., 1st Sess. 279 (1985), *reprinted in* 1986 U.S.C.C.A.N. 930).

BASIS FOR RELIEF AND APPLICABLE AUTHORITY

24. The Plan has become a crushing weight on the Company, primarily contributing to the Company's inability to continue as a going concern without relief under these bankruptcy proceedings. Despite the Company's efforts to fund the Plan over and above the legal requirements, the Plan is still underfunded, and the Company does not now, and is not expected to ever, have the cash to continue to make the required annual contributions to the Plan going forward. The Plan must be terminated.[7]

I. Legal Standard

25. A pension plan may be terminated in a distress termination if (1) the plan administrator notifies "affected parties" (including participants, beneficiaries, alternate payees, unions, and, the PBGC) of the proposed termination at least 60 days (but not more than 90 days)

[7] McClatchy estimates that substantially all of the Plan's participants and beneficiaries will receive their full benefits and will not be affected by the PBGC guarantee limits.

in advance of the proposed termination date; (2) the plan administrator provides certain information to PBGC sufficient to establish the criteria for distress termination; and (3) the PBGC (or, in the case of a reorganization of a plan sponsor or controlled group member, the bankruptcy court) determines that the distress termination criteria under ERISA are met. 29 U.S.C. § 1341(c)(1); *see also In re Diversified Indus., Inc.*, 166 B.R. 141, 143 (Bankr. E.D. Mo. 1993) (discussing requirements for distress termination).

26. Because the ERISA Debtors are in Chapter 11 reorganization proceedings, the "Reorganization Test" under ERISA section 4041(c)(2)(B)(ii) governs whether the Plan can be terminated in a distress termination. *See In re Kaiser Aluminum Corp.*, No. BANKR. 02-10429JKF, 2005 WL 735551, at *2 (D. Del. Mar. 30, 2005), *aff'd*, 456 F.3d 328 (3d Cir. 2006) (describing the reorganization test); *In re Falcon Prod.*, 354 B.R. at 893 ("the reorganization test includes four requirements which must be satisfied for a distress termination"). The Reorganization Test provides that a pension plan may terminate in a distress termination if:

> **(I)** such person has filed, or has had filed against such person, as of the proposed termination date, a petition seeking reorganization in a case under Title 11 or under any similar law of a State or political subdivision of a State . . . ,
>
> **(II)** such case has not, as of the proposed termination date, been dismissed,
>
> **(III)** such person timely submits to [the PBGC] any request for the approval of the bankruptcy court . . . of the plan termination, and
>
> **(IV)** the bankruptcy court . . . determines that, unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process and approves the termination.

29 U.S.C. § 1341(c)(2)(B)(ii).

27. The PBGC has an administrative process to decide whether the required elements for a distress termination have been satisfied. *See Pension Ben. Guar. Corp. v. Saint-Gobain Corp. Benefits Comm.*, No. CIV.A. 13-2069, 2013 WL 5525693, at *4 (E.D. Pa. Oct. 4, 2013) (describing the PBGC's administrative process in the context of a PBGC-initiated termination). That administrative process is set forth in the PBGC Directive No. TR 00-2 ("**PBGC Directive**," attached as Exhibit B). Generally, under the Directive, the "Trusteeship Working Group," which consists of actuaries, financial analysts, auditors, and attorneys, determines, based on the information provided to the PBGC, whether termination criteria have been met. PBGC Directive at Sections 6(k); 8; 9.

28. While the PBGC, generally through the Trusteeship Working Group, determines whether the first three parts under the Reorganization Test are met, it is the Court that determines whether the last part of the test is met, namely whether, unless the Plan is terminated, the Company will be unable to pay all of its debts pursuant to a plan of reorganization and will be unable to continue in business outside the bankruptcy process. 29 U.S.C. § 1341(c)(2)(B) (the PBGC determines whether the distress termination requirements are met, except where the bankruptcy court makes a determination regarding the financial requirements of termination); *see also* 29 C.F.R. § 4041.41(d) (the PBGC will be bound by a final and non-appealable court order regarding termination); *In re Wire Rope*, 287 B.R. at 777 (The court can approve termination of the pension plans "only if it finds that, unless the Plans are terminated, the Debtor (1) will be unable to pay all of its debts under a plan of reorganization and (2) will be unable to continue in business outside of bankruptcy."); PBGC Directive at 8(a)(4). A debtor seeking such a determination from the bankruptcy court must notify the PBGC of the request by "concurrently

filing with the PBGC a copy of the motion requesting court approval, including any documents submitted in support of the request. . . ." 29 C.F.R. § 4041.41(c)(2)(iii).

29. In determining whether the last part of Reorganization Test is met, the Court must first consider whether the ERISA Debtors can "obtain confirmation of *any* plan or reorganization without termination of the [pension plan]". *In Re Wire Rope*, 287 B.R. at 777 (emphasis in original). This means that termination cannot be granted simply because "a" plan of reorganization requires a distress termination; rather, the test is whether the debtor can obtain confirmation of *any* plan of reorganization without termination of the [pension] plan." *In re US Airways Grp., Inc.*, 296 B.R. 734, 743–44 (Bankr. E.D. Va. 2003) (emphasis in original). If the answer is no, then the Court should find that ERISA Debtors "cannot pay [their] debts under a plan of reorganization". *In Re Wire Rope*, 287 B.R. at 777-78.

30. The Court must also consider whether the ERISA Debtors will be unable to continue in business outside the bankruptcy process. This standard is met if "but for the termination of the pension plan, the debtor will not be able to pay its debts when due and will not be able to continue in business." *In re Resol Mfg. Co., Inc.*, 110 B.R. 858, 862 (Bankr. N.D. Ill. 1990).

31. The burden of proof to establish the distress criteria are met lies with the plan sponsor. *In re Wire Rope*, 287 B.R. at 777. McClatchy meets its burden here.

II. THE ERISA DEBTORS CANNOT REORGANIZE WITHOUT TERMINATION OF THE PLAN.

32. The Company has been in discussions with the Secured Parties and PBGC for months,[8] with the goal of finding permanent solutions to the Company's pension and debt challenges that threatened the Company's ability to continue as a going concern.[9] *Id.* at ¶¶ 62-63. Throughout these intense negotiations, where all parties were represented by external advisors and had access to thousands of pages of diligence, no party—including the PBGC—indicated that it disputes that the Plan must be terminated. *Id.* at ¶ 63.

33. Under the Company's proposed Plan of Reorganization ("**POR**") filed on the Petition Date, generally PBGC would receive, in settlement of its claims (which are expected to total at least $805.2 million[10]) against the ERISA Debtors, (a) ten annual payments of $3.3 million, commencing in 2023, secured by junior liens, and (b) 3% of the equity of the reorganized company (subject to dilution). *Id.* at ¶ 237. If the Effective Date of the POR is within 45-days of the Petition Date, the annual payments would commence on the one month anniversary of the Effective Date. *Id.*

34. The PBGC, the guarantor of the Plan, is not the only creditor that would sacrifice under the POR. Under the POR, the Second Lien Term Loan and Third Lien Notes would receive their pro-rata share of 97% equity of the reorganized company (subject to dilution). *Id.*

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[8] The Company began discussions with the PBGC in September 2019, and thereafter began negotiations with the Secured Parties. Harding Decl. at ¶¶ 62-68. PBGC, the Company, and Chatham attended several telephonic and in-person meetings with both the Company's advisors and management. *Id.* at ¶¶ 62-68.

[9] When negotiations with the PBGC and Chatham commenced in late 2019, the IRS funding waiver application was still pending, and the Company was still hopeful that Congress would pass a form of the SECURE Act that would grant McClatchy pension funding relief. *See* Harding Decl. ¶¶ 59-60. When the waiver application was denied and the SECURE Act was passed without relief for McClatchy, these negotiations became the lifeline for the Company's ability to continue operating.

[10] The ERISA Debtors reserve all rights with respect to the validity and amount of any claim PBGC has or may file in these proceedings.

at ¶ 234. Additionally, general unsecured creditors would recover through either a $3 million cash pool or warrants of 2.5% of the equity of the reorganized debtors, to be shared pro-rata. *Id.* at ¶ 236.

35. The POR maximizes value for all the Company's stakeholders, including the Plan and PBGC. And, importantly, no plan of reorganization could provide for Plan continuation because the Company's projected EBITDA cannot sustain the projected required pension contributions. *Id.* at ¶ 239. Therefore, the Company "can[not] obtain confirmation of *any* plan of reorganization without termination of the [P]lan." *In re US Airways*, 296 B.R. at 743–44.

III. THE ERISA DEBTORS CANNOT CONTINUE IN BUSINESS UNLESS THE PLAN IS TERMINATED.

36. As discussed above, the Company's revenues have been declining since the Great Recession, and are projected to further decline in the future. Indeed, the Company's EBITDA, which must cover interest expense, capital expenditures, taxes, and, if applicable, pension contributions, is far less the projected required pension contributions alone:

Fiscal Year	Est. 2020	Est. 2021	Est. 2022
Adj. EBITDA (in $1,000's)	$92,295	$74,771	$65,945
Pension Contributions	$120,100	$88,100	$117,100

Id. at ¶ 162.

37. The Company's financial reality is despite years of efforts to strengthen the Company and meet its obligations to the Plan. Specifically, as discussed further below, the Company has (A) implemented a business plan to transform into a digital company, (B) slashed expenses, (C) aggressively paid down debt, and (D) explored strategic transactions, none of which have materialized.

A. The Company Has Taken Steps To Avoid Plan Termination

38. The Company has taken all reasonable steps to avoid Plan termination; however, in spite of these efforts, the Plan's projected required contributions greatly exceed the Company's projected revenues. *Id.* at ¶ 162. Plan termination is now the Company's only option to continue in business. *See In re Resol Mfg.*, 110 B.R. at 862 (The test is met if "but for the termination of the pension plan, the debtor will not be able to pay its debts when due and will not be able to continue in business.").

1. The Company's Digital Transformation

39. The media industry at large is adjusting to the changes in the industry, including negative revenue and circulation trends, by transitioning to digital revenue models. While McClatchy is still in the process of its digital transformation, the Company has made great strides toward strengthening its operations and adapting to the new, digital era. For instance, the Company:

- increased digital-only subscribers to 219,806, up 114% between Q4 2017 and Q4 2019,
- grew digital-only subscribers by 10% sequentially from Q3 2019, making Q4 2019 the 15th consecutive quarter of growth in digital-only subscribers, which is a key area for gauging the success of McClatchy's digital transformation,
- achieved an improving trend in adjusted EBITDA over the first three consecutive quarters of 2019, and
- increased total digital users to approximately 535,265 at the end of the fourth quarter of 2019, up 18% from a year earlier.

Harding Decl. at ¶ 39.

40. Moreover, the Company continues to pursue new and expanded digital offerings such as:

- expansion of comprehensive digital marketing solutions for local businesses via excelerate,® which offers advertisers integrated packages including website

customization, search engine marketing and optimization, social media presence and marketing services, and other multi-platform advertising opportunities,

- growth of its real-time, programmatic buying and selling of digital advertising inventory,

- addition of a new sports-only subscription product branded as SportsPass™, which was launched in 11 of McClatchy's markets during 2018, and

- partnership with Google to offer a way for readers to purchase a subscription to each of McClatchy's digital brands.

Id. at ¶¶ 40-42.

2. The Company Has Cut Expenses

41. Since the Great Recession, the Company has focused on strategic implementation of dramatic cost-cutting initiatives, which has resulted in a decrease by approximately 60% of operating cash expenses between 2006 and 2018. *Id.* at ¶ 50. These cost-cutting initiatives include:

- **Outsourcing production and printing facilities**. Outsourcing of production and printing facilities has allowed the Company to cut its newsprint and printing costs by 16.4% for 2019.

- **FTE reduction**. Since 2006, the Company has reduced the number of full time equivalent employees from over 15,000 to approximately 2,800. And, in the first half of 2019, alone, McClatchy's full time equivalents declined by 20.6%, resulting in removal of more than $41 million of legacy costs due largely to job eliminations and consolidations. For example, in 2019 McClatchy restructured and centralized the advertising division, resulting in $4.9 million in savings in the advertising department in the second quarter of 2019 compared to the second quarter of 2018.

- **ERIP**. In February 2019, McClatchy announced a one-time voluntary Early Retirement Incentive Program ("**ERIP**") that was offered to approximately 450 employees. The ERIP allowed such employees to accept a special termination benefit based on years of continuous service and the option to take their vested benefits under the Company's pension plan in a lump sum payment. Nearly 50% of the eligible employees opted into the program. Lump sum pension and termination payments made under the ERIP resulted in a net reduction to the pension liability of approximately $13.1 million and the recognition of a one-time non-cash charge of $6.8 million.

Id. at ¶¶ 43, 50-53.

3. The Company Has Aggressively Paid Down Debt

42. McClatchy has successfully restructured and/or refinanced a large amount of its corporate debt over the past decade. In the years following the Great Recession, McClatchy refinanced its debt twice. In 2010, McClatchy issued $875 million of 11.5% bonds due in 2017 which replaced all of its bank debt and extended its maturities. Harding Decl. at ¶ 46. In 2012, when the market was more favorable, it again refinanced its notes into 9.0% bonds due in 2022 and it continued to repurchase other bonds, further reducing debt. *Id*. By mid-2018, McClatchy had paid down its debt from $1.77 billion at the end of 2010 to $710 million, and had extended the maturities on its first-lien debt and converted unsecured debt due in 2027 and 2029 to second-lien debt due in 2030 and 2031, respectively. *Id.* at ¶¶ 46-47. As of January 15, 2020, McClatchy had approximately $703 million in total aggregate principal amount of debt outstanding. *Id.* at ¶ 46.

43. The Company has also sold assets to pay down debt. In April 2019, McClatchy recognized a net gain of $2.3 million related to the sale of a distribution center in Miami, Florida. *Id.* at ¶ 49. In May 2019, McClatchy closed a sale and leaseback of real property in Kansas City, Missouri, resulting in net proceeds of $29.7 million. *Id*. In June 2019, in accordance with the Company's 2026 Notes Indenture, McClatchy redeemed $32 million aggregate principal amount of its 2026 Notes from the net proceeds of the Kansas City and Miami asset dispositions. *Id*. As a result of the $36.6 million principal amounts redeemed in these transactions, McClatchy recorded a loss on extinguishment of debt of $2 million in the quarter and six months ended June 30, 2019. *Id*.

4. The Company's Attempts to Consolidate Have Been Unsuccessful

44. McClatchy has actively explored transactions that would allow it to participate in the industry-wide consolidation that is presently occurring. The transactions McClatchy has considered would have leveraged economies of scale and synergies. Harding Decl. at ¶ 37. In the past year, McClatchy reached agreement on the terms of two separate strategic transactions that would have de-levered the business. *Id*. However, on both occasions, the transactions never came to fruition because McClatchy was unable to come to agreeable terms on financing. *Id*. The impediments to obtaining financing were both the Company's funded debt and pension obligations. *Id*.

45. Notwithstanding these efforts and cost-cutting measures, the Company's revenues are insufficient to meet its ongoing pension obligations, including the minimum required contributions to the Plan. *See id*. at ¶¶ 61, 162 (showing Adjusted EBITDA and pension contribution projections).

A. The ERISA Debtors Can Continue To Operate If The Plan Is Terminated

46. Although the ERISA Debtors certainly cannot continue in business if the Plan is not terminated, they can meet its obligations outside of Chapter 11 if the Plan is terminated. The Company's management, with the assistance of their advisors, have prepared projections for fiscal years 2020 through 2022 ("**Financial Projections**").[11] Harding Decl. at ¶ 61. Based on these projections, the reorganized ERISA Debtors, with a significantly de-leveraged capital structure, including termination of the Plan, will be able to satisfy their financial obligations

[11] The Financial Projections in their entirety are attached to the Disclosure Statement with Respect to the Joint Prepackaged Chapter 11 Plan of Reorganization of The McClatchy Company and its Affiliated Debtors and Debtors in Possession, at Exhibit B, filed on the Petition Date.

while maintaining sufficient liquidity and capital resources. *Id.* If the Plan were not terminated, the Debtors would not be able to meet their obligations under the POR. *Id*.

MOTION PRACTICE

47. This Motion includes citations to the applicable rules and statutory authorities upon which the relief requested herein is predicated, and a discussion of their application to the Motion. Accordingly, the Debtors submit that this Motion satisfies Local Bankruptcy Rule 9013-1(a).

NOTICE

48. Notice of this Motion will be given to: (a) the U.S. Trustee, (b) counsel to the DIP Agent, (c) counsel to the Prepetition Agents, (d) counsel to Chatham, (e) counsel to Brigade, (f) the PBGC, (g) the parties included on the Debtors' consolidated list of their 30 largest unsecured creditors, (h) any party that has requested notice pursuant to Bankruptcy Rule 2002, (i) the Banks, and (j) all parties entitled to notice pursuant to Local Bankruptcy Rule 9013-1(b). The Debtors submit that no other or further notice is required.

NO PRIOR REQUEST

49. No previous request for the relief sough therein has been made to this Court or any other court.

CONCLUSION

For the foregoing reasons, the Company cannot obtain confirmation of a plan of reorganization or continue in business outside of the Chapter 11 reorganization process without termination of the Plan. As such, the ERISA Debtors respectfully request that the Court (1) determine that the financial requirements under 4041(c)(2)(B)(ii)(IV) have been satisfied as to McClatchy and each of its debtor controlled group members, and (2) approve a distress termination of the Plan. *See In re Wire Rope*, 287 B.R. at 777.

Dated: New York, New York
February 13, 2020

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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EXHIBIT A

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------	x	
In re	:	**Chapter 11**
	:	
THE McCLATCHY COMPANY, *et al.*,	:	**Case No. 20-10418 (MEW)**
	:	
Debtors.[1]	:	**(Joint Administration Pending)**
	:	
----------	x	

ORDER (A) DETERMINING THAT THE FINANCIAL REQUIREMENTS FOR A DISTRESS TERMINATION ARE SATISFIED AND (B) APPROVING A DISTRESS TERMINATION OF THE MCCLATCHY COMPANY RETIREMENT PLAN

Upon the motion (the "**Motion**")[2] of the ERISA Debtors for an order (this "**Order**") (a) determining that the financial requirements for a distress termination are satisfied, and (b) approving a distress termination of the McClatchy Company Retirement Plan ("**Plan**"); and upon consideration of the Harding Declaration; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, 29 U.S.C. § 1341(c)(2)(B)(ii)(IV), and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated January 31, 2012; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due and sufficient notice of the Motion having been given under the particular

---

[1] The last four digits of Debtor The McClatchy Company's tax identification number are 0478. Due to the large number of debtor entities in these chapter 11 cases, for which the Debtors have requested joint administration, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' proposed claims and noticing agent at http://www.kccllc.net/McClatchy. The location of the Debtors' service address for purposes of these chapter 11 cases is: 2100 Q Street, Sacramento, California 95816.

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Motion.

circumstances; and it appearing that no other or further notice is necessary; and it appearing that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and after due deliberation thereon; and good and sufficient cause appearing therefor; it is hereby;

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is GRANTED on an interim basis as set forth herein.

2. The Court hereby finds and determines that:

   (a) The financial requirements set forth in 29 U.S.C. § 1341(c)(2)(B)(ii)(IV) for a voluntary distress termination of the Plan are met by each of the ERISA Debtors.

   (b) But for the termination of the Plan, each of the ERISA Debtors will be unable to (i) pay all of their debts pursuant to a plan of reorganization and (ii) continue in business outside of the chapter 11 reorganization process.

   (c) The termination of the Plan is therefore approved pursuant to 29 U.S.C. § 1341(c)(2)(B)(ii)(IV).

Dated: New York, New York
_____, 2020

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

PBGC Directive

Pension Benefit
Guaranty Corporation

PBGC
Protecting America's Pension

Directive

Subject: Termination and Trusteeship of Single-Employer Pension Plans

Directive Number: TR 00-02

Originator: ONR

Alice C. Maroni
Chief Management Officer

ALICE MARONI

Digitally signed by ALICE MARONI
Date: 2019.09.18 11:13:23 -04'00'

1. **PURPOSE:** This Directive sets forth the internal administrative process of the Pension Benefit Guaranty Corporation (PBGC) for determining whether the statutory termination criteria are met for a single-employer pension plan to be terminated and/or trusteed in either a distress termination under section 4041(c) of the Employee Retirement Income Security Act of 1974, *as amended* (ERISA), or a PBGC-initiated termination under section 4042 of ERISA.

   Nothing in this Directive overrides any statutory or regulatory provision, and in the event of inconsistencies between this Directive and ERISA or PBGC's regulations, ERISA and the regulations control. This Directive does not create binding norms or impose obligations on the public and is not enforceable against PBGC.

2. **EFFECTIVE DATE:** This Directive replaces Directive TR 00-2 dated 12/11/2014, on the effective date noted above.

3. **SCOPE:** The provisions of this Directive address certain aspects of the Termination and Trusteeship process of Single-Employer pension plans.

   a. These aspects include:

      (1) Termination process
      (2) Termination criteria
      (3) Trusteeship Working Group (TWG) membership
      (4) TWG responsibilities

   b. This Directive does not apply to "standard" terminations of fully funded plans under section 4041(b) of ERISA.

4. **AUTHORITIES:** Relevant authority is as follows:

   a. Section 4041 of ERISA with regard to distress terminations
   b. Section 4042 of ERISA with regard to PBGC-initiated terminations
   c. Section 4021 of ERISA with regard to Title IV coverage
   d. Section 4048 of ERISA with regard to setting the plan termination date

5. **BACKGROUND:** PBGC staff prepares a Termination Package that addresses termination issues (see Section 8.a. of this Directive for Distress Termination Cases and Section 8.b. for PBGC- initiated Termination Cases). The TWG reviews certain Termination Packages for completeness and to recommend whether termination criteria have been met. When a case is exempt from full TWG review, the Chairperson of the TWG reviews the relevant Termination Package (Section 9). The Termination Package, along with the TWG recommendation, if applicable, is then forwarded to the PBGC official who has authority to approve the termination of the plan (Section 10). Upon such approval, PBGC typically seeks to become trustee by executing a Trusteeship Agreement with the plan administrator or by filing an action in court. Special rules may apply to unusual facts and circumstances, such as cases involving exigent circumstances or modification or withdrawal of a termination decision (Section 10).

6. **DEFINITIONS:**

   a. **Aggregate Amount of PBGC's Claims.** The case staff's best estimate of the total amount of PBGC's claims for unfunded benefit liabilities with respect to all nontrusteed underfunded plans maintained by the sponsor and the sponsor's controlled group.

   b. **Deciding Official.** The official with authority to approve a recommendation regarding termination and/or trusteeship of a pension plan. The Deciding Official is:

      (1) The Chairperson of the TWG, or designee, for Exempt cases as described in Section 9.b.

      (2) The Chief of Negotiations and Restructuring, or designee, for Non-Exempt cases in which the aggregate amount of PBGC's claims is $100 million or less, and no significant policy issue is involved, and for Exempt cases as described in Section 10.

      (3) The PBGC Director, or designee, for cases in which the aggregate amount of PBGC's claims is more than $100 million, any case in which there is a significant policy issue, and for cases described in Sections 9.j. and 10.

   c. **Distress Termination Letter.** The letter from PBGC notifying the applicant for a distress termination that the application has been approved or denied.

d. **Exempt Case.** A case that may be decided by the TWG Chairperson alone, without requiring a meeting of the full TWG. The criteria for an Exempt case are set forth in Section 9.b.

e. **Non-Exempt Case.** A case that does not meet the definition of Exempt case. A Non-Exempt case must be reviewed by the TWG.

f. **Notice of Determination (NOD).** The determination issued by PBGC under section 4042(a) that a plan should or must be terminated.

g. **Termination Recommendation.** The memorandum that sets forth a summary of the factual, legal, actuarial, and financial record relied upon to reach a recommendation on whether or not a plan should be terminated. The memorandum should include, but is not limited to: a discussion of the plan sponsor's business and whether there is a reorganization, liquidation, asset sale, or some other corporate transaction that could affect the pension plan; the identification of the plan sponsor's controlled group; the financial condition of the plan sponsor and its controlled group; the funding status of the plan; and any relevant actuarial or benefit issues. In addition, it should confirm that the plan is covered under section 4021; discuss the grounds for termination and in the case of a distress termination, explain whether the termination complies with section 4041 and the regulations thereunder; contain a recommendation regarding the Plan Termination Date under section 4048; and recommend whether PBGC should become plan trustee.

h. **Termination and Trusteeship Decision Record (TDR).** The form used to document the approval of PBGC's termination decisions.

i. **Termination Package.** The materials presented to the TWG, or in an Exempt case to the TWG Chairperson. It should include, but not be limited to: the Termination Recommendation memorandum, a draft TDR, relevant supporting materials, including but not limited to PBGC estimates of unpaid minimum funding contributions, unfunded benefit liabilities, a projection of estimated minimum required contributions in distress cases other than liquidations, and in appropriate 4042 cases, financial models, forecasts and projections, any Notices of Intent to Terminate (NOIT), relevant court filings, and relevant transactional documents, e.g., asset purchase agreements.

j. **Trusteeship Agreement (TA).** The written agreement between PBGC and the plan administrator terminating a plan, usually appointing PBGC as trustee of the plan, and establishing the plan termination date.

k. **The Trusteeship Working Group (TWG).** An intra-agency group representing the various professional disciplines involved in processing underfunded single-employer pension plans under sections 4041 and 4042 of ERISA. The TWG's responsibilities are set forth in Section 9 of this Directive.

7. **RESPONSIBILITIES:** (See Section 10. **CONCURRENCE AND APPROVAL)**

8. **PROCEDURES:**

a. **DISTRESS TERMINATION CASES UNDER SECTION 4041**

(1) **Overview**. A plan administrator may voluntarily initiate a termination of a single-employer plan in a distress termination under section 4041(c) of ERISA. To do so, the plan administrator must comply with the requirements of section 4041(c) and the regulations thereunder. Case staff should address whether the plan is a covered plan under section 4021 of ERISA, whether the plan administrator's distress termination application is complete and complies with all of the requirements of section 4041 of ERISA and the regulations thereunder, whether one or more of the criteria under section 4041(c) is satisfied (for each member of the pension plan's controlled group), and whether PBGC should seek to become trustee of the plan, and an appropriate plan termination date.

(a) Under section 4041.41(b)(2)(i) of the regulations, PBGC may decide to waive any requirement for the Notice of Intent to Terminate (Form 600) or the Distress Termination Notice (Form 601) that must be filed with PBGC. For example, PBGC may decide to waive a requirement if PBGC believes it will be less costly or less administratively burdensome to do so. Such a waiver is effective only if granted in writing.

(b) Even though a distress termination request may be pending, PBGC retains the authority in any case to initiate a plan termination in accordance with the provisions of section 4042 of ERISA (*see* section 4041.41(b)(2)(ii) of the regulations).

(2) **Covered Plan**. Case staff should ensure that the record supports a finding that the plan is a covered plan under section 4021 of ERISA (e.g., the plan has received a favorable Determination Letter from the Internal Revenue Service).

(3) **Section 4041(c)(2)(B)**. Distress criteria are met when each controlled group member satisfies at least one of the distress tests set forth in this section as follows:

(a) **Liquidation Test:** The controlled group member is in liquidation in bankruptcy or similar federal or state insolvency proceeding.

(b) **Reorganization Test:** The controlled group member is involved in reorganization in bankruptcy or similar state proceeding; and the bankruptcy court or other appropriate court has determined that the controlled group member will be unable to reorganize unless the plan is terminated and has approved the termination of the plan with regard to that controlled group member.

(c) **Business Continuation Test:** Unless a distress termination occurs, the controlled group member will be unable to pay debts and continue in business.

(d) **Pension Costs Test:** The cost of providing pension coverage has become unreasonably burdensome solely as a result of a decline in the workforce.

(4) **Section 4041.41(d),** entitled "Non-duplicative efforts," explains what PBGC will do when a debtor in a reorganization case applies for a determination from a bankruptcy court that the debtor meets the reorganization distress test. It says that in such a case, PBGC will:

(a) Enter an appearance to ask the bankruptcy court to make specific findings as to whether the debtor meets the distress test.

(b) Provide the court with any information it has that PBGC decides may be germane to the court's ruling.

(c) Defer acting on any request that the debtor may make to PBGC for a similar distress determination until the court makes its determination.

(d) Be bound by a final and non-appealable order of the court.

Note: "Final and non-appealable" means that PBGC would be bound by the order, as the time for appeal has run and no party has filed an appeal.

(5) **Plan Termination Date.** For distress terminations, section 4048(a)(2) provides that the plan termination date is "the date established by the plan administrator and agreed to by PBGC . . ." The recommendation for agreeing to or rejecting the plan termination date established by the plan administrator should be based on several factors, including whether the date is within the period described in the statute and the earliest date upon which participants' expectations of plan continuance ceased, and then determining whether a later date would be in PBGC's interest.

(6) **Distress Termination Notice (Form 601) and Schedule EA-D.** The plan administrator must file a Form 601, Distress Termination Notice, with the Schedule EA-D, Distress Termination Certification of Sufficiency, completed in accordance with the regulations and the instructions to the form.

(a) The Corporate Finance and Restructuring Department (CFRD) will review the submission to ensure that it is complete and that it contains all of the information required to be filed with Form 601.

(b) If the only reason for PBGC's determining that the plan does not qualify for a distress termination is that the Form 601 is incomplete, or that PBGC otherwise lacks sufficient information, PBGC shall advise the plan administrator of the missing items of information. PBGC will consider the original filing complete if the missing or

additional information is filed with PBGC no later than the 120th day after the proposed termination date or the 30th day after the date of PBGC's written notice, whichever is later, or if the plan administrator obtains a written waiver of the requirement from PBGC. (PBGC may waive or extend deadlines under this paragraph).

(7) **Case Team Review.** Based on the Form 600, the Form 601, and any other relevant information, CFRD and the Office of the General Counsel (OGC) will evaluate whether the requirements for a distress termination have been satisfied, including whether each controlled group member satisfies one of the distress tests set forth in section 4041(c)(2)(B) of ERISA (*i.e.*, the Liquidation Test, the Reorganization Test, the Business Continuation Test, or the Pension Costs Test).

Note: CFRD and OGC will evaluate whether the plan is sufficient for guaranteed benefits and whether trusteeship by PBGC is appropriate.

(8) **Prepare and forward Termination Package.** Case staff will assemble the materials for review by the TWG and/or Deciding Official, including the Termination Package. Case staff will then forward the Termination Package to the TWG Chairperson, and will make all assembled materials available for review by the Deciding Official in exempt cases, and the TWG and the Deciding Official in non-exempt cases. If the case requires review by the TWG, the TWG Chairperson will schedule a meeting of the TWG (*see* Section 9 of this Directive). After the TWG recommendation is made, the case staff should forward the Termination Package for concurrence and approval pursuant to Section 10 of this Directive.

b. **PBGC-INITIATED TERMINATION CASES UNDER SECTION 4042**

(1) **Overview**. Section 4042 of ERISA governs PBGC's initiation of the termination and trusteeship of a single-employer pension plan. Case staff should address whether the plan is a covered plan under section 4021 of ERISA, whether one or more of the termination criteria under section 4042(a) is satisfied, whether one or more of the criteria under section 4042(c) are satisfied, and whether PBGC should seek to become trustee of the Plan. The staff should also propose a date of plan termination under section 4048. If case staff concludes that PBGC should take action to terminate the plan, the case staff prepares the Termination Package and forwards it to the TWG and/or Deciding Official for review.

(2) **Covered Plan.** Case staff should ensure that the record supports a finding that the plan is a covered plan under section 4021 of ERISA (*e.g.*, the plan has received a favorable Determination Letter from the Internal Revenue Service).

(3) **Section 4042(a).** PBGC initiates termination proceedings only if at least one of the following criteria under section 4042(a) is present:

(a) **Mandatory Termination.** Under the language of section 4042(a), the PBGC must terminate a plan if "the plan does not have assets available to pay benefits which are currently due under the terms of the plan." Case staff should process mandatory termination cases on an expedited basis. In such cases, PBGC may place participants into pay status prior to becoming trustee of the plan.

(b) **Failure to Satisfy Minimum Funding Requirements.** Under section 4042(a)(1), PBGC has discretion to initiate termination proceedings if it determines that "the plan has not met the minimum funding standard required under section 412 of the Internal Revenue Code."

(c) **Unable to Pay Benefits When Due.** Under section 4042(a)(2), PBGC has discretion to initiate termination proceedings if it determines that "the plan will be unable to pay benefits when due." In general, case staff should consider the extent of the plan's underfunding and whether the plan will be abandoned (*e.g.*, due to liquidation of the plan sponsor).

(d) **Distribution to Substantial Owner.** Under section 4042(a)(3), PBGC has discretion to initiate termination proceedings if it determines that "the reportable event described in section 4043(c)(7) has occurred." Section 4043(c)(7) involves certain distributions to substantial owners.

(e) **Long Run Loss.** Under section 4042(a)(4), PBGC has discretion to initiate termination proceedings if it determines that "the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated."

(4) **Section 4042(c).** If one or more of the grounds for termination under section 4042(a) is present, section 4042(c) provides that PBGC may apply to a federal district court for a decree adjudicating that the plan be terminated "in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of [PBGC]." The Termination Recommendation should include a discussion of which of these criteria under section 4042(c) applies.

(5) **Plan Termination Date.** For PBGC-initiated terminations, section 4048(a)(3) provides that the date of plan termination is "the date established by [PBGC] and agreed to by the plan administrator. . . ." CFRD and OGC staff should prepare their recommendation for the plan termination date by ascertaining the earliest date upon which participants' expectations of plan continuance ceased, or are expected to cease, and then determining whether a later date would be in PBGC's interest. However, if the plan is being recommended as a mandatory termination, consideration should be given to setting the

plan termination date no later than the date the plan became unable to pay benefits.

(6) **PBGC Trusteeship.** Case staff should recommend whether, pursuant to section 4042(c) of ERISA, PBGC should take action to become trustee of the plan.

(7) **Prepare the Administrative Record and forward the Termination Package.** Case staff will assemble the materials for review by the TWG and/or Deciding Official, including the Termination Package. Case staff will then forward the Termination Package to the TWG Chairperson, and will make all assembled materials available for review by the Deciding Official in exempt cases, and the TWG and the Deciding Official in non-exempt cases. If the case requires review by the TWG, the TWG Chairperson will schedule a meeting of the TWG (*see* Section 9 of this Directive). After the TWG makes a recommendation of termination and/or trusteeship, the case staff or TWG Chairperson should forward the Termination Package for concurrence and approval pursuant to Section 10 of this Directive.

9. TRUSTEESHIP WORKING GROUP

a. **The Purpose of the TWG**. The purpose of the TWG is to provide an objective review of termination recommendations to ensure that:

(1) The administrative record supporting the termination decision is complete.

(2) The various actuarial, financial, factual and legal issues in the case are appropriately developed.

(3) The termination criteria have been met.

(4) The Deciding Official has sufficient information to make a termination decision based on the relevant statutory criteria.

b. **Cases Exempt From TWG Review.** Each Termination Package is reviewed by the full TWG unless a case is Exempt from TWG review. However, the TWG must review a case that otherwise meets the criteria for an Exempt case if so requested by the Chief of Negotiations and Restructuring, the General Counsel, or the TWG Chairperson. A case is Exempt if:

(1) The aggregate amount of PBGC's claims totals $10 million or less.

or

(2) The aggregate amount of PBGC's claims totals $50 million or less providing:

(a) There are fewer than 5,000 participants in the relevant plans.

(b) No significant policy issue is involved.

(c) One or more of the following criteria is also met:

(i) The plan is recommended for mandatory termination under section 4042(a).

(ii) The plan is recommended for discretionary termination under section 4042(a)(2) and, within the next six months, the plan will not have assets available to pay benefits when due.

(iii) The plan is recommended for discretionary termination under section 4042(a)(1) or 4042(a)(2), there is no ongoing plan sponsor, and the combined projected annual gross revenues of all known ongoing controlled group members are less than 50% of the projected annual minimum funding requirements with respect to the plan.

or

(iv) The plan is recommended for distress termination on the grounds that the plan's sponsor and each controlled group member, if any, meet the liquidation test under section 4041(c)(2)(B)(i), the reorganization test under 4041(c)(2)(B)(ii), or, as of the proposed termination date, are not engaged in any substantial business or commercial activity, have no assets or only nominal assets, and have no employees or a nominal number of employees.

c. **TWG Membership**. The TWG will be comprised of seven members, including the TWG Chairperson, who shall be designated by the Chief of Negotiations and Restructuring. The Chairperson, or Chairperson's designee, will preside at meetings of the TWG. Additionally, the TWG will have (i) two attorneys; (ii) two financial analysts; (iii) one actuary, and (iv) one additional professional from the above or another relevant discipline.

d. **TWG Vacancies**. TWG membership vacancies (whether caused by a member leaving PBGC, changing position/duties, or other factors determined by their supervisor) will be filled in the following manner. All attorney members will be named by the General Counsel, or the General Counsel's designee. All other voting members will be recommended by the heads of the Departments and Offices listed below, and selected by the Chief of Negotiations and Restructuring in consultation with the TWG Chairperson. Not all of the Offices and Departments listed below will have membership. Candidates for membership should have substantial professional experience with Title IV of ERISA. In general, this means that TWG members must have credentials, skill sets, and

experience sufficient to enable them to meaningfully analyze the most complex termination cases. They need not currently work in the Departments or Offices listed below. For situations where a voting member cannot attend or is recused, the Chief of Negotiations and Restructuring will establish a roster of approved alternates, selected in the same manner and having the same qualifications as the regular members. The non-attending or recused TWG member will be responsible for assuring that an approved alternate can attend, and for informing the TWG chair who will be attending. If the TWG Chairperson determines that exigencies require a meeting and there is not a quorum possible from available members and alternates, the Chairperson may approve a replacement that is not on the approved alternate list if he or she otherwise meets the above criteria.

(1) Office of Benefits Administration (OBA)
(2) Office of Negotiations and Restructuring (ONR)
(3) Corporate Finance and Restructuring Department (CFRD)
(4) Negotiations and Restructuring Actuarial Division (NRAD)
(5) Office of the General Counsel (OGC)

e. **Recusal.** If a TWG member has done work on the recommendation being presented, that member shall recuse himself/herself from voting. The recused TWG member will be responsible for assuring that an approved alternate can attend, and for informing the TWG chair who will be attending.

f. **Quorum and Majority Vote.** A quorum is necessary for the TWG to make a recommendation. A minimum of the TWG Chairperson, or the Chairperson's designee, and at least one member representing each of the disciplines listed in Section 9.c. must be present and eligible to vote in order to constitute a quorum. Members recused from voting on a case are not counted for purposes of determining a quorum. Members who abstain from a vote are counted for quorum purposes. A recommendation requires support from a majority of those present and voting to pass.

g. **TWG Meetings & Nonvoting Members.** Upon receiving a Termination Package for a non-exempt case, the TWG Chairperson will review the Termination Package for completeness, and, if the Termination Package is complete, will schedule a meeting. As part of that review, the TWG Chairperson will review the contents of the Termination Recommendation to ensure that it is complete and includes all of the information required under Section 8. If it does not, the Chairperson may return the Termination Recommendation to the organizational unit that prepared it with an explanation of the basis for requesting that it be supplemented. Barring exigent circumstances, the Termination Package normally will be distributed to the TWG members one week prior to the TWG meeting.

Case staff will present their Termination Recommendation at the TWG meeting. The TWG will discuss the recommendation and will concur in the staff's recommendation, reject the staff's recommendation, make its own recommendation, or ask the staff to prepare further analysis of the case. TWG members are expected to fully review the termination package prior to the TWG meeting in all circumstances.

The Financial Operations Department (FOD) and the Corporate Investments Department (CID) may each designate a non-voting member. Directors of affected other departments, or their designee, including OBA and the Communication Outreach and Legislative Affairs Department (COLA), will be notified of all TWG meetings and may send observers.

h. **Significant Policy Issues.** Significant policy issues identified by the TWG are forwarded by the Chairperson and the Chief of Negotiations and Restructuring to the appropriate legal, financial, actuarial and/or policy authorities for review, including the General Counsel and the Director of the Policy, Research and Analysis Department.

i. **TWG Meeting Minutes.** Minutes will be taken at all TWG meetings, and will include a list of all attendees at the TWG meeting and issues discussed. When a vote is taken, a summary of the vote (number of individuals in favor, number opposed, and number abstaining) will be recorded. In the event that a vote is not taken and the TWG needs more information in advance of voting, a list of information needed by the TWG will be specified.

(1) The Chairperson of TWG or the Chairperson's designee is responsible for draft minutes being prepared within one week after the TWG meeting.

(2) The draft minutes will then be circulated to TWG members and case team members. Except when the Chairperson determines that exigencies require otherwise, these parties will be given at least one week to submit suggested changes before the minutes become final. A final copy of the minutes will be circulated to TWG members and case team members.

j. **TWG Recommendation**. If the TWG concurs with the case team's recommendation, the TWG File described in Section 10.a. will be forwarded to the Deciding Official for decision. If the TWG does not concur in the recommendation, or, in an Exempt case if the TWG Chair does not concur in the recommendation, the Director of CFRD may develop the package further, withdraw it, or request the Chief of Negotiations and Restructuring to review the case. In the latter event, if the Chief of Negotiations and Restructuring concurs with the staff recommendation, the case will be forwarded to the Director (or designee) for review and determination, with an informational copy sent to the General Counsel and to the TWG chairperson.

10. CONCURRENCE AND APPROVAL

a. **Concurrence and Approval.** In Exempt Cases, the TWG File will have been forwarded as set forth in Sections 10.a and b. In Non-Exempt Cases, after the TWG has made a recommendation of termination and/or trusteeship, or the denial of a distress application, case staff should assemble and forward the TWG File for concurrences and for review and decision by the Deciding Official.

(1) **Approval of Cases Reviewed by the TWG.** The TWG File for cases that have been reviewed by the TWG should include:

(a) Outgoing correspondence for signature (Notice of Determination or Distress Termination letter; Trusteeship Agreement and Cover Letter).
(b) Termination Decision Record for signature.
(c) Termination Package.
(d) TWG meeting minutes.
(e) Other additional appropriate information.

(2) **Approval of Exempt Cases.** The TWG File for Exempt cases should include:

(a) Outgoing correspondence for signature (Notice of Determination or Distress Termination letter; Trusteeship Agreement and Cover Letter).
(b) Termination Decision Record for signature.
(c) Termination Package.
(d) Other additional appropriate information.

b. **Required Signatures.** Concurrence with the Termination Recommendation is evidenced by signing the TDR, except in the case of the Deciding Official, where concurrence in 4042 cases is evidenced by signing the NOD. The following signatures are required, although additional concurring signatures may be included on the TDR:

(1) Where the Deciding Official is the Chairperson of the TWG:

(a) Director or Deputy Director, CFRD.
(b) Assistant General Counsel.
(c) Chairperson, TWG.

(2) Where the Deciding Official is the Chief of Negotiations and Restructuring, in addition to all the signatures specified above, also:

(a) Deputy General Counsel.
(b) Chief of Negotiations and Restructuring.

(3) Where the Deciding Official is the PBGC Director, or designee in addition to all signatures specified above, also:

(a) General Counsel.
(b) PBGC Director, or designee

c. **Mailing Outgoing Correspondence.** After final approval, the Deciding Official will return the TWG File to the TWG Chairperson. The TWG Chairperson is responsible for mailing outgoing correspondence (*e.g.*, the Notice of Determination or the Distress Termination Letter, the Trusteeship Agreement) to the plan administrator and other necessary parties.

d. **Reports and Records.** The TWG Chairperson will maintain records of all termination decisions and will distribute copies of the decisions to appropriate staff. The reports and records discussed in this Directive are part of, but not necessarily the entire administrative record. For cases approved for trusteeship, the TWG Chairperson will also route a copy of the signed TDR to: the Director, COLA; the Chief of Benefits Administration, OBA; the Chief, Investment Accounting Branch, Controller Operations Division (COD)/FOD; the Financial Reporting Account and Analysis Group (FRAAG)/FOD; and the General Counsel.

e. **Trusteeship.** Mailing of Trusteeship Agreements. Two copies of the unsigned Trusteeship Agreement normally will be sent to the plan administrator or the plan administrator's duly authorized representative with instructions that the documents are to be signed and returned to the TWG office. Upon receipt of the agreements signed by the plan administrator, the TWG office will forward them to OBA and provide copies to OGC.

f. **Special Circumstances Cases.** Notwithstanding anything in this Directive, when time is of the essence and facts and circumstances make it impractical to convene a meeting of the TWG with regard to a Non-Exempt case, the Chief of Negotiations and Restructuring may propose that a plan should be terminated under section 4042 by forwarding the recommendation to the PBGC Director, or designee, for a determination on whether to approve the recommendation. An informational copy will be forwarded to the Deputy General Counsel, the Director of CFRD, the General Counsel, and the TWG Chairperson in these situations.

In an Exempt case, when facts and circumstances make it impracticable to obtain a decision from the TWG Chairperson on a recommendation, or if the TWG Chairperson so requests, the Chief of Negotiations and Restructuring will determine whether to approve the recommendation.

g. **Modification or Withdrawal of Notices of Determination.**

(1) If a NOD has been issued, but a plan has not yet been trusteed, and case staff concludes that the NOD should be modified, the case staff will prepare a memorandum recommending modification of the NOD. The memorandum, along with a modified NOD, will be routed to the Deciding Official with the same concurrences as for the termination recommendation.

(2) If a NOD has been issued, but the plan has not yet been trusteed, and case staff concludes that PBGC should not proceed with a PBGC-initiated termination of the plan, case staff will prepare a memorandum recommending withdrawal of the NOD. The memorandum, along with the proposed Notice of Withdrawal of Termination Decision, will be routed to the Deciding Official with the same concurrences as for the termination recommendation.

(3) The Deciding Official approves a recommendation to modify or withdraw an NOD by signing and issuing the modified NOD or Notice of Withdrawal. The TWG Chairperson will route a copy of the executed NOD or Notice of Withdrawal to: OGC; to CFRD; to BAPD; to the Chief, Investment Accounting Branch, COD/FOD; to the FRAAG/FOD; and to other staff as appropriate.

h. **Coordination with Other Departments.** Case staff should closely coordinate with other PBGC departments and divisions to ensure that plan termination and benefit administration tasks are accomplished efficiently. For example:

(1) COLA should be notified early in the process of any case in which the cut-off of participant expectations of plan continuation by published notice is anticipated, where the aggregate amount of PBGC's claims is $25 million or more, where there are 5,000 or more participants in the relevant plans, or situations that otherwise may be newsworthy.

(2) The Chief of Negotiations and Restructuring and the General Counsel should be notified early in the process of any case in which congressional interest has been expressed, or appears likely.

(3) The appropriate OBA staff should be notified of large cases so they can coordinate benefit administration activities.

(4) The TWG Chairperson should be notified early in the process of any cases that present unusual facts or circumstances or policy issues.

(5) The Office of the General Counsel should be notified of any novel or significant issues in any case.

(6) The Chief Management Officer should be notified of any large cases early in the process to incorporate potential workload surges within normal budget, procurement, IT, personnel, and workplace solutions support planning processes.