MINUTES OF THE MEETING OF THE BOARD OF TRUSTEES OF THE INDUSTRY AND LOCAL 338 PENSION FUND HELD ON MARCH 4, 2020

A meeting of the Board of Trustees of the Industry and Local 338 Pension Fund was held on March 4, 2020.

Union Trustees in Attendance

Roberta Dunker
Barry Russell
Mickey Smith

Employer Trustees in Attendance

Theresa Bresten
Chris Palmer

Others in Attendance

Alicia Cochran, Associated Administrators, LLC
Elizabeth O'Leary, Kauff McGuire & Margolis LLP
Marc Tenenbaum, Virginia & Ambinder, LLP

The meeting was held via conference call.

I. Call to Order

The meeting was called to order at 3:00 p.m. Ms. Cochran stated that today's meeting had been scheduled for the purpose of having Marc Tenenbaum of Virginia & Ambinder, LLP ("V&A") provide an update on the Chapter 11 bankruptcy proceedings involving the College of New Rochelle ("CNR").

II. The College of New Rochelle Bankruptcy

Ms. O'Leary introduced Mr. Tenenbaum and reviewed his experience in representing multiemployer plans in complicated ERISA litigations and bankruptcy cases. She noted that Mr. Tenenbaum previously worked in the Office of the General Counsel of the Pension Benefit Guaranty Corporation ('PBGC"), serving as the senior staff attorney on PBGC's bankruptcy litigation team and was involved in some of the country's largest bankruptcy cases. Ms. O'Leary then asked Mr. Tenenbaum to update the Trustees on this matter.

Mr. Tenenbaum began by stating V&A's conclusion that it is unlikely that the Fund will have any recovery in this case. He noted that although there is one potential avenue of obtaining a small recovery, the cost of doing so may not be worth it and that, in order to avoid additional fees, the Trustees may wish to authorize V&A to cease serving on the official committee of unsecured creditors (the "Committee") following the effective date of the plan of liquidation.

Mr. Tenenbaum referred the Trustees to his previously distributed memo dated January 13, 2020 and reviewed in detail the proceedings to date, noting that CNR filed a petition for relief under Chapter 11 on September 20, 2019 and that CNR was retained to represent the Fund on October 15, 2019. He noted that V&A timely filed a proof of claim on behalf of the Fund in the amount of $4,114,249.72, consisting of withdrawal liability of $3,972,338.00, retroactive contribution increases of $135,431.40, the findings of an audit covering 2016 through 2018 in the principal amount of $5,517.15, interest thereon in the amount of $374.33, and interest on other late payments in the amount of $588.84. He reported that V&A was instrumental in having the Committee established and has been serving on the Committee. He stated that his report includes certain non-public information that has been made available to the Committee and stated that there is an obligation to keep such information confidential. He then discussed in detail the work of the Committee.

Mr. Tenenbaum stated that CNR's primary asset was its 15.6-acre campus. He stated that, following an auction for the sale of the campus in accordance with court-approved procedures, the successful bidder was the Trustees of the Masonic Hall and Asylum Fund, whose final bid was $32 million. He noted that City of New Rochelle was apparently reluctant to re-zone the property to permit the construction of a high-rise residential building and that this factor may have resulted in less interest in the campus from potential buyers. He stated that the sale was consummated in January of 2020.

Mr. Tenenbaum reviewed CNR's proposed plan of liquidation pursuant to which CNR's assets would be transferred to a liquidating trust for the benefit of creditors. He stated that CNR's proposed plan projects that no assets will be available for distribution to general unsecured creditors, such as the Fund. He stated his opinion that CNR's projection is likely correct because the proceeds of the sale of CNR's real and personal property will be insufficient to cover the claims of the lenders and the taxing authorities, which total more than $64 million.

Mr. Tenenbaum discussed one potential avenue of recovery. He explained that the Committee is exploring whether CNR possesses any valid causes of action that could conceivably lead to a partial recovery for general unsecured creditors. He explained that CNR's former controller was convicted of fraud and failure to pay federal payroll taxes, and that CNR apparently informally asserted malpractice claims against its auditor, KPMG, on the ground that it failed to detect the controller's fraud. He stated that the Committee's counsel has advised that the damages arguably exceeded $20 million, but that KPMG and CNR reached a confidential settlement, well before the bankruptcy, pursuant to which KPMG paid $5 million to CNR in full satisfaction of those claims. He further stated that, according to the Committee's counsel, CNR's former president was a former partner of KPMG, and that the Committee's counsel is investigating whether there are any grounds for invalidating the settlement and asserting additional claims against KPMG and whether officers of CNR, or members of CNR's board of trustees, could possibly be held responsible. Mr. Tenenbaum stated there is an insurance policy of $10 million that could cover any damages for which the officers or board members are held liable.

Mr. Tenenbaum stated that it is questionable whether any of these claims would be viable and that, even if they were, other factors suggest that the Fund's recovery would likely be minimal. He explained that, at the request of the Committee's counsel, CNR included in the proposed plan of liquidation a provision authorizing the Committee, on behalf of CNR's estate, to prosecute the above-discussed potential claims, or any other tort claims that CNR might possess, and "carving out" 50% of the net proceeds of such claims from the taxing authorities' secured claims. He explained that the taxing authorities cannot legally be required to agree to this provision, but that the Committee thought that they might be persuaded that a carve-out of 50% (or some other negotiated percentage) would further their interests because, in the absence of a carve-out, general unsecured creditors would have no chance of recovering any of the litigation proceeds, and the Committee would consequently have no incentive to prosecute such claims. Mr. Tenenbaum stated that he learned this week that the taxing authorities will not agree to the proposed 50/50 split of any recoveries. He stated that negotiations between the Committee and the taxing authorities are ongoing, but that it looks like the best that can be hoped for is for general unsecured creditors to receive 20% of any net tort recoveries (after attorneys' fees).

Mr. Tenenbaum stated that he had crunched some numbers to obtain a sense of a potential recovery under various assumptions. As one example, he explained that if there is a gross recovery from the insurance company in the amount of $1,000,000, and the Committee's counsel's contingency fee is 25%, there would be net recoveries of $750,000, of which the taxing authorities would get $600,000, and general unsecured creditors would get no more than $150,000 and potentially less, or even zero. He further stated that, based on the amount of the Fund's claim, its recovery might be approximately $16,000 to $20,000. However, he further noted that CNR's attorneys have a potential objection to the amount of the Fund's withdrawal liability claim on the ground that it must be reduced by 50% under Section 4225 of ERISA. He stated that, in this scenario, the Fund's total recovery would be approximately $8,000 to $10,000. Mr. Tenenbaum noted that, if the recoveries exceed $1,000,000, then the amounts in his example would increase proportionally. However, he cautioned that, even in the unlikely event of a recovery in the gross amount of $10 million (which is the limit of the insurance policy), general unsecured creditors could receive as much as 4 to 5 cents per dollar, which is still a disappointingly small amount.

Mr. Tenenbaum stated that if a determination is made that there is a claim that is valuable enough to pursue, it will probably take several years to litigate. He stated that, even if V&A's work in such a litigation is limited to a few hours per month for monitoring the litigation, the Fund's attorney's fees would add up over time, and the potential upside for the Fund is likely not enough to make it worthwhile to have the Fund continue to serve on the Committee. Mr. Tenenbaum stated that the Committee's counsel believes he can proceed without the Fund serving on the Committee, and that the Trustees may wish to have the Fund cease serving on the Committee following the effective date of the plan of liquidation (which will probably be later this month). He stated that if litigation results in a recovery for general unsecured creditors, the Fund would still receive its proportionate share, regardless of whether it is a member of the Committee, and that the only difference would be that the Fund would not have input regarding the conduct and/or settlement of the litigation. Mr. Tenenbaum stated that, if the taxing authorities had been amenable to a 50-50 split, he may have reached a different conclusion on whether the Fund should remain on the Committee.

The Trustees and Ms. O'Leary asked Mr. Tenenbaum numerous questions about the bankruptcy proceedings, the sale of the campus, the negotiations with the taxing authorities and other issues regarding potential recovery. After discussion, the Trustees agreed with Mr. Tenenbaum's assessment that, given the unlikelihood of any meaningful recovery even under the best of assumptions, the ability to have input on any potential litigation by continuing to serve on the Committee did not justify the continued expenditure of attorneys' fees and, upon motion made, seconded, and adopted, authorized the Fund to cease serving on the Committee following the effective date of the plan of liquidation.

III. Adjournment

There being no further business to come before the Trustees, the meeting was adjourned at 3:33 p.m.