

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case No. 09-02140-hb

ORDER

The relief set forth on the following pages, for a total of 22 pages including this page, is hereby **ORDERED**.

**FILED BY THE COURT
11/29/2010**



A handwritten signature in black ink, appearing to read "John L. Currie".

US Bankruptcy Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re:)
) Chapter 11
BI-LO, LLC *et al.*,)
) Case No. 09-02140-hb
Reorganized Debtors.¹)
) (Jointly Administered)
)
_____)

ORDER DENYING BAR DATE CHALLENGE

This matter came before the Court for hearing on October 28, 2010 (the "Hearing"), pursuant to the *Stipulation and Consent Order Resolving Motion for Arbitration* [Docket No. 3537] (the "Consent Order") among BI-LO, LLC ("BI-LO"), LSF5 Grocery Holdings, LLC (the "Investor"), Lone Star Fund V (U.S.), L.P. ("Lone Star Fund V"), and the United Food and Commercial Workers Unions and Employers Pension Fund (the "Pension Fund"), entered on August 23, 2010. The Consent Order transferred all issues relating to the objections to the Pension Fund Claim (defined below) to the United States District Court for the Northern District of Georgia except for the following two issues: (a) whether the Pension Fund Claim encompassed "evade or avoid" liability under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and (b) whether any claims/theories based upon an "evade or avoid" claim/theory of liability are time barred (the "Bar Date Challenge").

Having reviewed the record² and having considered the arguments of counsel at the Hearing, the Court concludes that the Pension Fund Claim encompassed "evade or avoid" liability under

¹ The Reorganized Debtors and the last four digits of their respective tax identification numbers are: BI-LO, LLC (0130); BI-LO Holding, LLC (5011); BG Cards, LLC (4159); ARP Ballentine LLC (6936); ARP James Island LLC (9163); ARP Moonville LLC (0930); ARP Chickamauga LLC (9515); ARP Morganton LLC (4010); ARP Hartsville LLC (7906); and ARP Winston Salem LLC (2540).

ERISA, and that the Pension Fund's claims/theories based upon an "evade or avoid" claim/theory of liability are not time barred. In support of the Court's determination, the Court makes the following findings of fact and conclusions of law.³

FINDINGS OF FACT

BI-LO Corporate History

1. BI-LO, headquartered in Greenville, South Carolina, operates as a major food retailer primarily under the "BI-LO" and "Super BI-LO" banners. *Disclosure Statement for the Debtors' Third Amended Plan of Reorganization* [Docket No. 2833] (the "Third Amended Disclosure Statement"), p. 12. As of March 23, 2009 (the "Petition Date"), BI-LO was one of the largest food retailers in the Southeast United States, operating over 200 stores in South Carolina, North Carolina, Georgia and Tennessee, with the majority of stores in South Carolina. *Id.*

2. As of December 2004, BI-LO was the wholly owned subsidiary of BI-LO Holding, LLC ("BI-LO Holding") and the parent corporation and owner of Bruno's Supermarkets, Inc., which subsequently changed its name to Bruno's Supermarkets, LLC, and then to BFW Liquidation, LLC ("Bruno's"). *Id.* at p. 19.

3. As of December 2004, Bruno's, like BI-LO, operated as a food retailer, but Bruno's served different regions, demographics and customer bases. *Id.*

² At the Hearing, the parties requested that the Court take judicial notice of certain pleadings, which was done without objection: Docket Nos. 174, 619, 1036, 1367, 1484, 1725, 1834, 2026 2605, 2769, 2833, 3225, 3371, 3517, 3537, 3560, 3559, 3571, 3606, and 3608. (*Transcript of Objection to Claim of United Food and Commercial Workers Unions and Employers Pension Fund held October 28, 2010* [Docket Entry No. 3635] (the "Hearing Transcript"), pp. 5-6.)

³ To the extent that any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and *vice versa*.

4. According to the Pension Fund, Bruno's was at all pertinent times a major contributing employer to the Pension Fund, a multi-employer pension plan within the meaning of ERISA. (Appendix (defined below), p. 1.)

5. On December 22, 2004, Lone Star Fund V, LSF V International Finance, L.P. (Bermuda) ("Lone Star Bermuda") or their affiliates (collectively, "Lone Star") acquired all of the membership interests of BI-LO Holding from Koninklijke Ahold NV, or certain of its affiliates (collectively, "Ahold"). (Third Amended Disclosure Statement, p. 19.)

6. At the time of the purchase, BI-LO Holding continued to own BI-LO and BI-LO continued to own Bruno's. Id.

7. On March 25, 2007, BI-LO sold all of its membership interests in Bruno's to LSF5 Bruno's Investments, LLC, a sister portfolio company within Lone Star. Id. at p. 20; see also *Objection to Proof of Claim Nos. 1026-29, 1036-39, and 1042-43 Filed By United Food and Commercial Workers Unions and Employers Pension Fund* [Docket. No. 1367] (the "Debtors' Initial Objection"), n. 3. This transaction is what is referred to by both the Debtors and the Pension Fund as the "Spin-Off" (the "Spin-Off"). Id.

Bruno's Bankruptcy

8. On February 5, 2009, Bruno's filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"), initiating the matter styled *In re Bruno's Supermarkets, LLC*, Case No. 09-00634 (the "Bruno's Bankruptcy Case"), United States Bankruptcy Court for the Northern District of Alabama. (Third Amended Disclosure Statement, p. 20.)

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9. The Pension Fund alleges that, in connection with the Bruno's Bankruptcy Case, Bruno's permanently ceased to have any covered operations under the Pension Fund on or before June 30, 2009, and that, as a result, Bruno's incurred a complete withdrawal from the Pension Fund within the meaning of Section 4201(a) of ERISA. (Appendix, p. 1.)

BI-LO's Bankruptcy

10. On the Petition Date, BI-LO and the other above-captioned Reorganized Debtors (collectively, the "Debtors") filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code.

11. The Debtors' schedules did not reflect any liability owed to the Pension Fund. (Hearing Transcript, p. 10.)

12. Pursuant to the *Notice of Proof of Claim Deadline* dated May 11, 2009 [Docket Entry No. 619], the Court established August 13, 2009, as the deadline (the "Bar Date") for filing proofs of claim against the Debtors by creditors (other than governmental units).

Pension Fund Proof of Claim

13. On or about August 11, 2009, the Pension Fund timely filed separate, identical proofs of claims against each of the Debtors, each in the amount of \$63,806,631.00. As a result of the later substantive consolidation of the Debtors and their estates, the Court entered the *Sixth Omnibus Order Expunging and Disallowing Certain Proofs of Claim* [Docket No. 3283] on May 21, 2010, expunging as duplicate claims all of the claims filed by the Pension Fund with the exception of the claim filed against BI-LO [Claim No. 1036] (the "Pension Fund Claim").

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14. The Pension Fund Claim was filed on Official Form 10 and (a) includes the name of the Debtor: BI-LO, (b) includes the name of the creditor: the Pension Fund, (c) includes the amount of the claim as of the date the case was filed: \$63,806,631.00, (d) is dated, and (e) is signed.

15. In the area of Form 10 requesting information relating to the "Basis for Claim," the Pension Fund Claim references an attached appendix (the "Appendix"). The Appendix provides that the Pension Fund Claim relates to the alleged joint and several liability of the Debtors under ERISA for the "withdrawal liability" incurred by the Debtors' affiliate, Bruno's, upon Bruno's complete withdrawal from the Pension Fund in connection with the Bruno's Bankruptcy Case.

16. The Appendix to the Pension Fund Claim states in pertinent part as follows:

Prior to filing the Bruno's Bankruptcy Case, Bruno's was a major contributing employer to the United Food and Commercial Workers Unions and Employers Pension Fund (the "Pension Fund"), a multi-employer pension plan within the meaning of the **Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq.** In connection with the Bruno's Bankruptcy Case, Bruno's permanently ceased to have any covered operations under the Pension Fund on or before June 30, 2009. As a result, Bruno's has incurred a complete withdrawal from the Pension Fund, within the meaning of Section 4201(a) of ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980.

Upon information and belief, each of the Debtors, including, without limitation, BI-LO, LLC, is a member of Bruno's "controlled group" of organizations as that term is defined in Section 4001(b) of ERISA and the regulations promulgated thereunder. Therefore, Bruno's and each of the Debtors, including, without limitation, BI-LO, LLC, is jointly and severally liable for **any withdrawal liability** incurred by Bruno's. Based on the formula set forth in Section 4211(b) of ERISA, the Pension Fund has computed Bruno's withdrawal liability to the Pension Fund to be \$63,806,631.00.

Through this proof of claim (the "Proof of Claim"), the Pension Fund asserts a claim against BI-LO, LLC, in the full amount of its liability under ERISA and the pension plan documents, including, without limitation, principal, accrued interest, and all other expenses, fees (including attorneys' fees), costs, and charges which the Pension Fund is entitled to recover from BI-LO, LLC, under ERISA, the pension plan documents and applicable law (the "Pension Fund Claim").

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(Appendix, p. 1) (emphasis added).

17. The Pension Fund Claim asserts a claim for the full amount of the alleged "withdrawal liability" incurred by Bruno's. The amount of the withdrawal liability is calculated under Section 4211 of ERISA. (Hearing Transcript, p. 22.); see also 29 U.S.C. § 1391. The amount of the claim has remained the same and is not altered by whether or not issues of BI-LO's intent in connection with the Spin-Off to "evade or avoid" are implicated. (Hearing Transcript, p. 60.)

18. On August 31, 2009, the Debtors objected to the Pension Fund Claim. See Debtors' Initial Objection. In the Debtors' Initial Objection, the Debtors requested disallowance of the Pension Fund Claim on the grounds that none of the Debtors were members of Bruno's "controlled group" of organizations as that term is defined in ERISA because BI-LO sold its ownership interest in Bruno's to another affiliate of Lone Star on March 25, 2007, as part of the Spin-Off, and therefore was no longer a member of the "controlled group." (Debtors' Initial Objection, pp. 4-5, n. 3.)

19. On September 30, 2009, the Pension Fund filed its *Response of the United Food and Commercial Workers Unions and Employers Pension Fund to Debtors' Objections to Proof of Claim Nos. 1026-29, 1036-39, and 1042-43* [Docket No. 1484] (the "Pension Fund's Initial Response") stating that the Debtors remained liable for Bruno's withdrawal liability notwithstanding the Spin-Off, which was being disregarded by the Pension Fund because a principal purpose was to "evade or avoid" withdrawal liability. The Pension Fund's Initial Response stated:

[T]he present existence of a "parent-subsidiary" or "brother-sister" relationship does not end the inquiry with regard to the Debtors' withdrawal liability to the Pension Fund. Rather, because the Debtors engaged in a restructuring transaction with a principal purpose being to evade or avoid withdrawal liability, the Pension Fund may

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evaluate the Debtors' "controlled group" membership and impose withdrawal liability **as if the restructuring transaction never occurred.**

Because it cannot be disputed that the Debtors were members of the "controlled group" prior to the Spin-Off and because the Spin-Off transaction is disregarded under well-settled ERISA law, the Pension Fund Claim is proper and should be allowed as filed.

(Pension Fund's Initial Response, pp. 2, 5) (emphasis added).

BI-LO Plan Process

20. Subsequent to the filing of the Pension Fund Claim and the Pension Fund's Initial Response, the Debtors filed several disclosure statements recognizing the existence of the Pension Fund Claim, the amount of liability asserted against the Debtors' estates, and the nature of that liability. For example, the Third Amended Disclosure Statement provides:

On August 11, 2009, the [Pension Fund] filed claims against each of the Debtors, alleging that the Debtors are members of the "controlled group" of organizations of Bruno's and, accordingly, are allegedly jointly and severally liable for "withdrawal liability" in the amount of \$63,806,631.00.00 (the "Pension Fund Claims") **that the [Pension Fund] asserts arise pursuant to the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, et seq., in connection with Bruno's liquidation sale in its bankruptcy case.**

(Third Amended Disclosure Statement, p. 35) (emphasis added).⁴

21. The Pension Fund Claim was the subject of review and consideration over the six months following its filing as reflected by the substantial changes made to the Debtors' plan of reorganization regarding the treatment to be afforded the Pension Fund Claim.

⁴ Nearly identical statements were included in other disclosure statements at Docket Entry Nos. 1834, 2026, 2605, and 2769.

22. The Debtors filed their *Debtors' Second Amended Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* (the "Second Amended Plan") [Docket No. 2606] on February 12, 2010. The Second Amended Plan had one general unsecured class of creditors, which included the Pension Fund, that was to receive a pro rata share of \$30 million in the event that they voted against the Second Amended Plan, or a pro rata share of \$35 million in the event that they voted in favor of the plan and thereby agreed to a broad release of estate claims against Lone Star and others.

23. The Debtors later filed their *Debtors' Third Amended Plan of Reorganization* [Docket No. 2770] (the "Third Amended Plan") on March 15, 2010, changing the prior plan and providing for, among other things:

- (i) the separate classification of the Pension Fund and the Bruno's estate from the general unsecured creditors into a new Class 5;
- (ii) the payment of the claims of general unsecured creditors in Class 4 (other than the Pension Fund or Bruno's) through a pro rata distribution of \$40 million;
- (iii) a release of estate claims against Lone Star and others that, unlike the release contained in the Second Amended Plan, was not conditioned on a favorable vote by the general unsecured creditor class; and
- (iv) the payment of the Class 5 Claims by the Investor (with Lone Star Fund V and Lone Star Bermuda providing a guaranty of such payment), and not by the Debtors or the Debtors' estates.

Compare Second Amended Plan, §§ 2.6, 9.8 *with* Third Amended Plan, §§ 2.6, 9.8. These terms were incorporated into the *Debtors' Fourth Amended Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 3122] (the "Plan") filed by the Debtors on April 13, 2010, as modified by the *Order Confirming Debtors' Fourth Amended Plan of Reorganization Pursuant to*

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Chapter 11 of the Bankruptcy Code [Docket No. 3224] (the "Confirmation Order") entered by the Court on April 30, 2010. See Plan at §§ 2.6, 9.8.

24. The specifics regarding the Plan treatment of the Pension Fund Claim are set forth in Paragraph 115 of the Confirmation Order, which provides as follows:

115. Provisions in Settlement of Potential Plan Objections of Class 5 Claimants.
The informal objections of the Class 5 Claimants to Confirmation have been resolved as follows:

a. The following sections of the Plan are hereby revised as follows:

1. Section 2.6(e)(2): Treatment.

Replace existing paragraph with the following:

On the Effective Date, in full and complete settlement, satisfaction and discharge of such Claim, each holder of an Allowed Class 5 Claim **shall be entitled to receive from the Investor** (or its designee for distribution purposes only) on the Distribution Dates its Class 5 Payment calculated at the same percentage as paid to holders of Allowed Class 4 Claims (for clarity, if the Pro Rata Share ultimately paid to Class 4 Claims is 50%, then Class 5 Claims will likewise ultimately receive 50% of their Allowed Claim). **Lone Star Fund V (U.S.) L.P. and Lone Star Fund V (Bermuda), L.P. shall guarantee the Class 5 Payment to be made pursuant to the Plan.** The final version of the Guaranty was filed with the Court on April 28, 2010 as an amended Plan Document, and the form of the guaranty that is on file as Plan Document shall be revised accordingly for execution and delivery on the Effective Date.

(Confirmation Order, ¶ 115) (emphasis added).

25. The effect of Section 2.6(e)(2) of the Plan is to insure that the Pension Fund Claim will not impact in any way the property of the Debtors' estate or the amount of distributions received by the Debtors' other creditors.

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26. The Plan grants exclusive authority to the following entities to object to Class 5 Claims: the Reorganized Debtors, their designee or the Investor. Specifically, the Plan provides:

6.1 Objections to and Settlement of Claims.

(b) On and after the Effective Date, the **Reorganized Debtors or their designee (and/or the Investor with respect to Class 5 Claims)** shall have the exclusive right and authority (1) to file, withdraw or litigate to judgment objections to Claims or Equity Interests other than Class 4 and Class 6 Claims; (2) to settle, resolve or compromise any Disputed Claim (other than a Disputed Class 4 or Disputed Class 6 Claim) subject to the dollar thresholds and notice provisions set forth in Section 5.4(e); and (3) to administer and adjust the Claims Register to reflect any such settlements or compromises without any further notice to or action, order or approval by the Bankruptcy Court.

(Plan, § 6.1) (emphasis added). Despite all of the focused attention in the disclosure statements and Plan regarding the treatment of the Pension Fund Claim, the Debtors never stated that the Pension Fund Claim was time-barred, and there is no evidence in the record that any of the Debtors' creditors misunderstood the claim being asserted by the Pension Fund.

27. The Plan does not obligate or require the Debtors to object to the Pension Fund Claim or to pay the cost of defending the claim. See generally Plan.⁵

Pension Fund Arbitration Motion

28. On September 30, 2009, the Pension Fund filed its *Motion of the United Food and Commercial Workers Unions and Employers Pension Fund to Compel Arbitration or, Alternatively, for Relief from Automatic Stay to Pursue Arbitration of Claim* [Docket Nos. 1487 1489] (the

⁵ See also Transcript of Confirmation Hearing held on April 29, 2010 [Docket Entry No. 2770], p. 159. Though this transcript was not made part of the record at the Hearing, the Court takes judicial notice of its prior recognition of the absence of any Plan obligation on the part of the Debtors or the Reorganized Debtors to pay the cost of defending the Pension Fund Claim.

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"Motion to Arbitrate") requesting that the Court compel arbitration of any objections to the Pension Fund Claim. The Motion to Arbitrate was opposed by the Debtors, Lone Star Fund V and others.

29. On June 25, 2010, nearly a year after the Debtors' Initial Objection, almost two months after confirmation of the Debtors' Plan, and four days before the hearing on the Motion to Arbitrate, the Debtors raised for the first time the Bar Date Challenge (which Lone Star Fund V joined or reiterated in separate pleadings). *See Debtors' Reply to Response of the United Food and Commercial Workers Unions and Employers Pension Fund to Debtors' Objection to Proof of Claim Nos. 1026-29, 1036-39, and 1042-43 Filed by the Union Pension Fund* [Docket No. 3371].

30. The Court conducted a hearing on the Motion to Arbitrate on June 29, 2010. Prior to a ruling, however, BI-LO, the Investor, Lone Star Fund V and the Pension Fund resolved the Motion to Arbitrate by agreeing to the entry of the Consent Order. The Consent Order provided for the transfer (the "Transfer") of the objections to the Pension Fund Claim [Docket Nos. 1367, 1415, 1553, 1725 and 3371] to the United States District Court for the Northern District of Georgia, to be consolidated for pre-trial purposes with the claims pending in the matter styled *Lone Star Fund V (US) L.P. v. United Food and Commercial Workers Unions and Employers Pension Fund*, Case No. 09-2886.

31. Pursuant to the Consent Order, the parties agreed that, notwithstanding the Transfer, this Court should determine the Bar Date Challenge.

32. Following the entry of the Consent Order, and in accordance therewith, the Debtors, Lone Star Fund V and the Pension Fund filed their respective briefs setting forth their positions on the Bar Date Challenge [Docket Nos. 3559, 3560, 3571, 3608, 3606].

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CONCLUSIONS OF LAW

Jurisdiction, Venue, Notice and Applicable Standard

A. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B) and (O). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. Appropriate notice of this matter was provided, and no other or further notice is necessary.

B. The Bar Date Challenge is before the Court pursuant to the agreement of the parties as reflected in the Consent Order. At the Hearing, the parties agreed that the Court has not been requested to resolve any disputed issues of material fact, but rather that the Court should determine as a matter of law (a) whether the Pension Fund Claim as filed encompassed "evade or avoid" liability, and (b) whether any claims/theories based upon an "evade or avoid" claim/theory of liability are time barred.

The Pension Fund Claim and Bankruptcy Code Notice Requirements

C. The filing of proofs of claim in bankruptcy cases is governed by Section 501 of the Bankruptcy Code and Rule 3001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

D. Section 501(a) provides in part that "[a] creditor or an indenture trustee may file a proof of claim...."

E. Bankruptcy Rule 3001, provides in pertinent part as follows:

Rule 3001. Proof of Claim

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(a) Form and content. A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.

Fed. R. Bankr. Proc. 3001(a); see also Fed. R. Bankr. Proc. 9001.

F. Official Form 10 is the standard bankruptcy proof of claim form, and Official Form 10 only requires the creditor to include "basic facts as to the identity of the claimant, and the amount, nature, and basis of the claim." In re Today's Destiny, Inc., 2008 Bankr. LEXIS 3577 at *23; see also Gens v. Resolution Trust Corp., 112 F.3d 569, 575 (1st Cir. 1997) (A proof of claim should conform to the appropriate form and need only provide "adequate notice of the existence, nature and amount of the claim as well as the creditor's intent to hold the estate liable."); In re Key, 64 B.R. 786, 789 (Bankr. M.D. Tenn. 1986) ("If a general rule can be drawn from the cases [interpreting Rule 3001(a)], it is that a document(s) constitutes a proof of claim...which states the existence, nature and amount of the claim and contains 'an explicit demand against the estate evidencing an intent to hold the estate liable.'")

G. The limited information needed to constitute a sufficient proof of claim is evidenced by Official Form 10, which has been described as follows:

[Form 10] and accompanying instruction evidences an intent for a single word or, at most, a single sentence description of the claim. For example, line 2 of the proof of claim asks for the "basis of the claim." Line 2 provides a single line for an answer and refers the claimant to instruction # 2 on the reverse side of the proof of claim for how to answer the question. Instruction # 2 states: State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. Form 10 does not have the space for a claimant to assert a factual predicate in the detail required by the Federal Rules of Civil Procedure. Nor does Form 10 suggest that a claimant is required to file an attachment in response to Line 2.

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In re Today's Destiny, Inc., 2008 Bankr. LEXIS 3577 at *23; see also 9-3001 Collier on Bankruptcy P 3001.03.

H. The Pension Fund Claim was submitted on Official Form 10, and one reading of the claim is that it asserts a claim for any withdrawal liability under ERISA.

I. The Pension Fund Claim provides considerably more detail regarding the nature and basis of the claim than is required by Form 10 or typically received by the Court in bankruptcy cases. The Appendix states that each of the Debtors is jointly and severally liable for "any withdrawal liability." It further states that: "[t]hrough this proof of claim (the "Proof of Claim"), the Pension Fund asserts a claim against BI-LO, LLC, in the **full amount of its liability under ERISA** and the pension plan documents, including, without limitation, principal, accrued interest, and all other expenses, fees (including attorneys' fees), costs, and charges which the Pension Fund is entitled to recover from BI-LO, LLC, under ERISA, the pension plan documents and applicable law (the "Pension Fund Claim")." (emphasis added). The Appendix also provides various facts regarding Bruno's and its relationship to BI-LO as a member of the "controlled group."

J. The Court concludes that the Pension Fund Claim provided adequate notice that the Pension Fund was seeking to hold BI-LO's estate liable in the amount of \$63,806,631.00 for any withdrawal liability under ERISA, that such notice of withdrawal liability sufficiently encompassed "evade or avoid" issues, and that such issues are not time barred.

K. BI-LO and Lone Star Fund V's objection to the Pension Fund Claim is based upon their assertion that, to the extent the claim requires consideration of whether the Spin-Off had as principal purpose the "evade or avoid" withdrawal liability, it is a separate and distinct claim from

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withdrawal liability under ERISA, and the Pension Fund Claim did not provide adequate notice of this allegedly separate and distinct claim.

L. To support this position, BI-LO and Lone Star Fund V emphasize that the effect of a person's intent to evade or avoid withdrawal liability is stated in a separate subsection of ERISA from the section stating the scope of withdrawal liability for members of the "controlled group." (Hearing Transcript, pp. 24-25.) BI-LO and Lone Star Fund V argue that, because it is in a separate subsection, it must be a separate and distinct claim.

M. The Court finds this "section" argument unpersuasive as it pertains to the issue of the adequacy of the Pension Fund Claim to fulfill the notice requirements of Section 501 of the Bankruptcy Code and Bankruptcy Rule 3001.

N. This argument ignores the scope of the Pension Fund Claim. As previously noted, the Pension Fund Claim broadly references "withdrawal liability" and the ERISA statute in its entirety, not just one subsection of ERISA. The breadth of the Pension Fund Claim was recognized by the Debtors in the Third Amended Disclosure Statement (and other disclosure statements), which describes the Pension Fund Claim as being asserted for withdrawal liability pursuant to provisions of ERISA in its entirety, not a just a specific and limited subsection of ERISA. The "section" argument, therefore, seems to conflict with the Debtors' own description to the creditor body of the Pension Fund Claim.

O. Furthermore, BI-LO and Lone Star Fund V have not cited any authority for the proposition that the nature of a withdrawal liability claim premised upon "controlled group" membership is altered by the presence of "evade or avoid" issues or that such issues constitute

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separate and distinct claims under ERISA. Nor has any case has been cited to the Court that holds that "evade or avoid" liability is separate cause of action from withdrawal liability. Rather, "evade or avoid" issues flow like a straight line from the withdrawal liability claim and ultimately lead the analysis right back to the question of whether withdrawal liability under ERISA exists.

P. No analytical basis exists for dividing ERISA into subsections and then characterizing the subsections as separate and distinct claims. At its foundation, the Pension Fund Claim is one for withdrawal liability and this does not vary depending on the number of ERISA subsections at play. The dollar amount of the claim, which is determined according to Section 4211(b) of ERISA, is, and remains, the same amount of \$63,806,631.00, regardless of whether "evade or avoid" issues are implicated. This is the amount stated in the Pension Fund's Proof of Claim and has never changed.

Q. The substance and operation of ERISA, which was described by the Pension Fund in its *Response of the United Food and Commercial Workers Unions and Employers Pension Fund to Bar Date Objection* [Docket No. 3571], pp. 12-23, and never disputed by BI-LO or Lone Star Fund V, further supports the Court's conclusion that the "evade or avoid" issue should not be viewed as a separate or distinct claim for purposes of determining the adequacy of the notice provided by the Pension Fund Claim.

R. ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA"), imposes a mandatory "withdrawal liability" on employers who cease contributing to a pension plan or who cease covered operations. See generally 29 U.S.C. § 1381, *et seq.*; CenTra, Inc. v. Cent. States, 578 F.3d 592, 594 (5th Cir. 2009).

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S. All trades or businesses under common control, which are referred to as the "controlled group," are treated as a single employer under ERISA, and are jointly and severally liable for the withdrawal liability. See, e.g., Teamsters Joint Council No. 83 v. CenTra, Inc., 947 F.2d 115 (4th Cir. 1991).

T. In enacting the MPPAA, Congress recognized that employers owing significant pension liability may attempt to avoid their obligations through evasive transactions. Bd. of Trs. of Trucking Emples. of N. Jersey Welfare Fund Inc. - Pension Fund v. Kero Leasing Corp., 377 F.3d 288, 306 (3d Cir. 2004) (Rosen, dissenting) (citing Flying Tiger Line v. Teamsters Pension Trust Fund, 830 F.2d 1241, 1250 (3d Cir. 1987)). "To remedy this evasive practice, ERISA provides that if the primary purpose of a transaction is to 'evade or avoid' pension liability, a pension fund may **disregard the transaction**, and 'liability shall be determined and collected...**without regard to such transaction.**'" Id. at 306-307 (quoting ERISA § 4212(c), 29 U.S.C. § 1392) (emphasis added). This issue is left to the pension fund to determine in assessing and a presumption arises in favor of the pension fund's determination that a company or individual remains a member of the "controlled group" despite such transaction. See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 610-611 (1993).

U. If the member of the "controlled group" claims to have severed itself from the "controlled group" for purposes of withdrawal liability, the onus is on such member under ERISA to establish the *bonafides* of the transaction in order to escape such liability. Id. at 629; see also Teamsters Pension Trust Fund v. Laidlaw Industries, Inc., 745 F. Supp. 1016, 1025 (D. Del. 1990) ("Once an employer is within a controlled group, the responsibility of lawfully avoiding withdrawal

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liability lies within the power of that entity."). Courts have held that the issue of whether an entity ceased to be a controlled group member in time to avoid withdrawal liability "unavoidably raises an 'evade or avoid' issue under section 1392(c)." Flying Tiger Line, 830 F.2d at 1250; see also Centra, 947 F.2d at 123.

V. For the purpose of judging the adequacy of the notice provided by a proof of claim, it is difficult to square the manner in which "evade or avoid" issues arise under ERISA with the assertion that "evade or avoid" issues constitute separate and distinct claims which are wholly independent of claims for withdrawal liability. The fundamental claim appears to always be for withdrawal liability, a claim for which all members of the "controlled group" are liable. The issue of "evade or avoid" only arises when the admitted member of the "controlled group" asserts a transaction as relieving it of that liability. This necessarily implicates the issue of "evade or avoid" which is the basis for disregarding the transaction and leaving the entity liable for withdrawal liability. See, e.g., Centra, 947 F.2d at 123. As such, the assertion of withdrawal liability under ERISA seems more than adequate to provide notice in a proof of claim of all of these issues, including any arguments and counter-arguments regarding whether a transaction was properly disregarded by a pension fund as having the principal purpose to "evade or avoid" withdrawal liability.

W. This Court's conclusion is further supported by the ERISA notice requirements and the arbitration provisions. Under ERISA, notice of withdrawal liability does not need to separately state facts or theories of "evade or avoid" to be adequate notice to the liable party and attempts to challenge the adequacy of a notice based on such omissions have been rejected by courts. See Chi.

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Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. El Paso CGP Co., 525 F.3d 591, 598 (7th Cir. 2008). With regard to arbitration, the Fourth Circuit has recognized the integrated nature of withdrawal liability in holding that ERISA arbitration requirements encompass all issues relating to the withdrawal liability of an alleged former member of the "controlled group," including arguments that a transaction asserted as a defense should be disregarded based on a principal intent to "evade or avoid" liability. Centra, at 122-123 (The Fourth Circuit held that the "evade or avoid" argument of an admitted former member of the control group was subject to arbitration as a part of withdrawal liability, noting that the defense based on the 1985 stock transaction "would unavoidably implicate the issue of whether the stock repurchase transaction was designed at least in part to avoid withdrawal liability on the part of Centra.").

X. In ruling, the Court is mindful of acknowledged Congressional intent and policy issues relating to any ERISA claim, which has been described as follows:

The MPPAA was designed "(1) to protect the interests of participants and beneficiaries in financially distressed multiemployer plans, and (2) . . . to ensure benefit security to plan participants." H.R. Rep. No. 869, 96th Cong., 2d Sess. 71, reprinted in 1980 U.S. Code Cong. & Ad. News 2918, 2939. Liberal construction of the MPPAA's notice provisions in favor of pension funds would be consistent with both these goals. Courts have indicated that because ERISA (and the MPPAA) are remedial statutes, they should be liberally construed in favor of protecting the participants in employee benefit plans. (citing Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 589 (9th Cir. 1984); Rettig v. PBGC, 240 U.S. App. D.C. 118, 744 F.2d 133, 155 (D.C. Cir. 1984)).

IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118, 127 (3d Cir. 1986). The restrictive reading of the Pension Fund Claim urged by BI-LO and Lone Star Fund V directly conflicts with this policy concern.

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Y. The Court's conclusion is also consistent with the Fourth Circuit's strong preference for resolution of claims on the merits. Colleton Preparatory Acad., Inc. v. Hoover Universal, 616 F.3d 413, 417 (4th Cir. 2010) ("We have repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits.").

Z. Equity likewise dictates this result as there appears to be no meaningful argument by BI-LO or Lone Star Fund V that they were unaware or surprised by the nature and basis of the Pension Fund Claim. Withdrawal liability was asserted, BI-LO responded thereafter that it was no longer a member of Bruno's "controlled group" after the Spin-Off, and the Pension Fund responded to this defense that the Spin-Off was disregarded under applicable law. All of this was in the record by September 30, 2009, and no party prior to confirmation of the Plan ever asserted that it did not understand that the withdrawal liability claim under ERISA encompassed all provisions of ERISA, including "evade or avoid" issues. Furthermore, no creditor of the bankruptcy estate is prejudiced by the Court's reading of the Pension Fund Claim because the estate is not liable for payment of the Pension Fund Claim or obligated to challenge it. The Plan provides that the Investor, a Lone Star entity, or Lone Star Fund V or Lone Star Bermuda, as guarantors, are responsible for payment of the Pension Fund Claim to the extent that the claim is allowed. Under these circumstances, the Court's conclusion that the Pension Fund Claim encompassed "evade or avoid" liability will not prejudice the Debtors, their estates or the other creditors in any way.

IT IS HEREBY, ORDERED

1. The Pension Fund Claim as filed encompassed "evade or avoid" liability, and any claims/theories based upon an "evade or avoid" claim/theory of liability are not time barred.

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2. The Bar Date Challenge is **DENIED**.

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