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Attorney for the Pension Benefit Guaranty Corporation

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

| | | |
|---|---|----------------------------------|
| _____ |) | |
| In re: |) | |
| |) | Case No. 15-13511 |
| ABBAS GHASSEMI, |) | |
| |) | Chapter 7 |
| Debtor. |) | |
| |) | Honorable Brian F. Kenney |
| _____ |) | |
| |) | |
| PENSION BENEFIT GUARANTY |) | |
| CORPORATION, |) | |
| |) | Adversary No. _____ |
| Plaintiff, |) | |
| v. |) | |
| |) | |
| ABBAS GHASSEMI, |) | |
| Trustee and Administrator of the |) | |
| Capital Investments, LLC Pension Plan, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

The Pension Benefit Guaranty Corporation (“PBGC”), on behalf of the Capital Investments, LLC Pension Plan (the “Pension Plan”), brings this adversary proceeding pursuant

to 11 U.S.C. §§ 523 and 553 and Bankruptcy Rule 4007 to determine the dischargeability of a debt to the Pension Plan.

JURISDICTION AND VENUE

1. This Court possesses jurisdiction over the subject matter of this adversary proceeding under 28 U.S.C. §§ 157(a)-(b) and 1334(b).

2. Venue is proper in this Court under 28 U.S.C. § 1409(a) because this proceeding is related to the above referenced bankruptcy case, currently pending in the United States Bankruptcy Court for the Eastern District of Virginia.

3. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) because it concerns a determination of the dischargeability of a particular debt.

COMMON ALLEGATIONS

The Parties

4. PBGC is a wholly owned United States Government corporation and federal agency that administers the nation's pension insurance program established by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1301-1461 (2012 & Supp. II 2014). When a pension plan covered by Title IV terminates without sufficient assets to pay all of its promised benefits, PBGC typically becomes trustee of the plan and pays plan participants their pension benefits up to the limits established by Title IV. 29 U.S.C. §§ 1321, 1322, 1361.

5. On October 7, 2015, Abbas Ghassemi (the "Debtor") filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in the above referenced case.

6. PBGC is a party in interest in this bankruptcy case and is prepared to file a protective claim on behalf of the Pension Plan once it receives notice to do so. *See* Docket No. 8, Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines.

7. The Debtor is a resident of this district and owns several businesses, including Capital Investments, LLC (“Capital Investments”), New Spring, LLC (“New Spring”), and AG Capital Realty, Inc. (“AG Capital”).

8. The Debtor is the manager and sole member of Capital Investments, which filed its own case under Chapter 11 of the Bankruptcy Code on October 15, 2015 (Case Number 15-13600). That case is currently pending in the United States Bankruptcy Court for the Eastern District of Virginia.

9. On the same date, New Spring filed a case under Chapter 11 of the Bankruptcy Code (Case No. 15-13601), currently pending in the United States Bankruptcy Court for the Eastern District of Virginia. The Debtor is the manager and sole member of New Spring.

10. PBGC has filed protective claims on behalf of itself and the Pension Plan in the Capital Investments and New Spring bankruptcy cases.

11. Upon information and belief, the Debtor served as Capital Investment’s manager at all times relevant to this Complaint.

The Pension Plan

12. Capital Investments established the Pension Plan effective January 1, 2006, to provide pension benefits to certain of its employees.

13. The Pension Plan is a defined-benefit pension plan covered by Title IV of ERISA.

14. Upon information and belief, the Pension Plan currently has two participants, including the Debtor.

15. Upon information and belief, Capital Investments has ceased operations and will likely convert its bankruptcy to a Chapter 7 liquidation.

16. Therefore, PBGC anticipates that it will initiate termination of the Pension Plan under 29 U.S.C. § 1342 and seek appointment as statutory trustee of the Pension Plan. As statutory trustee, PBGC will be authorized to sue on behalf of the Pension Plan to recover all amounts due and payable to the Pension Plan. 29 U.S.C. §§ 1342(d), 1362(c).

Debtor's Status as a Fiduciary of the Pension Plan

17. The Debtor is identified in the Pension Plan and Trust Agreement as the trustee of the Pension Plan.

18. Upon information and belief, at all times relevant to this Complaint, the Debtor was the sole trustee of the Pension Plan. As trustee, the Debtor exercised authority and control with respect to the management of the Pension Plan's assets.

19. The Debtor signed an "Acceptance of Administrator" to act as the ERISA administrator of the Pension Plan, within the meaning of 29 U.S.C. § 1301(a)(1), in the Pension Plan and Trust Agreement.

20. Upon information and belief, at all times relevant to this Complaint, the Debtor acted as the ERISA administrator of the Pension Plan. As administrator, the Debtor exercised discretionary authority and control with respect to the management of the Pension Plan.

21. As the trustee and administrator, the Debtor was a fiduciary of the Pension Plan within the meaning of 29 U.S.C. § 1002(21) in that he exercised discretionary authority and

control respecting the management of the Pension Plan, and in that he exercised control respecting the management and disposition of the Pension Plan's assets.

The Pension Plan Transactions

22. On or about April 28, 2010, the Debtor opened an account for the Pension Plan at Burke and Herbert Bank and Trust Company (the "Account").

23. Upon information and belief, the Debtor was the only authorized signer on the Account.

24. On or about April 30, 2010, Capital Investments deposited \$150,000 into the Account.

25. On or about January 16, 2013, Capital Investments deposited \$2,000 into the Account.

26. Upon information and belief, Capital Investments has not made any other contributions to the Pension Plan.

27. Upon information and belief, the Debtor caused the Pension Plan to enter into an investment agreement with G.W. Investments, Inc. ("GW") and/or Wilson Investment Co., L.L.C. ("Wilson") to invest Pension Plan assets.

28. To date, PBGC has been unable to obtain a copy of that investment agreement.

29. Upon information and belief, GW and Wilson are related companies that are owned by Donald Wilson.

30. The Debtor has a long-standing business relationship with Donald Wilson. Over the last fifteen years, GW has provided loans to certain of the Debtor's companies, including

Capital Investments, for its construction and renovation projects. The Debtor often guaranteed these loans.

31. The Debtor listed a 50% membership interest in an entity called GW REI, LLC on his amended Schedule A/B – Property. Upon information and belief, GW REI, LLC is a joint venture between the Debtor and Donald Wilson.

32. Additionally, the Debtor listed a 100% membership interest in entities called GW Holdings, LLC and GW Management, LLC on his amended Schedule A/B – Property.

33. Between October 2010 and August 2013, the Debtor caused the Pension Plan to transfer, through a series of transactions, a total of \$395,000 to Wilson and GW. The Debtor has characterized these transactions as “investments.”

34. Upon information and belief, GW and Wilson used these Pension Plan assets to fund loans for real property transactions.

35. Between November 2010 and March 2015, the Pension Plan received periodic distributions from GW and Wilson totaling \$324,485.76.¹

36. Upon information and belief, GW and Wilson have ceased making distributions to the Pension Plan and owe the Pension Plan at least \$70,514.24.²

¹ Based on the Account’s statements and information provided by the Debtor, it appears that on at least two occasions, GW or Wilson transferred amounts owed to the Pension Plan to Capital Investments. Capital Investments then deposited those amounts into the Account for the Pension Plan.

² The Account statements show that the Pension Plan received its last payment from GW and Wilson on March 13, 2015.

37. Between October 2012 and March 2015, the Debtor caused the Pension Plan to transfer, through a series of transactions, a total of \$114,200 to AG Capital. The Debtor has characterized these transactions as “investments.”

38. On or about June 7, 2013, AG Capital distributed \$33,000 to the Pension Plan.³

39. Upon information and belief, AG Capital has not made any additional distributions to the Pension Plan and owes the Pension Plan at least \$81,200.

40. AG Capital has ceased operations. Upon information and belief, AG Capital will be unable to repay the Pension Plan.

41. On November 13, 2015, the Account held \$381.61.

42. On or about November 13, 2015, the Debtor closed the Account by issuing a check in the amount of \$381.61 to Jhan Rogers.

43. Jhan Rogers is a former employee of AG Capital. Upon information and belief, Jhan Rogers is not a participant or beneficiary in the Pension Plan.

44. Upon information and belief, the Pension Plan has no remaining assets to pay benefits due to participants and their beneficiaries or to defray reasonable administrative expenses under the terms of the Pension Plan.⁴

³ AG Capital characterized this payment as “investment repayment plus 10% interest.”

⁴ A schedule of the Account’s activity prepared by the Debtor is attached as Exhibit A.

COUNT I: OBJECTION TO DISCHARGE OF DEBT
PURSUANT TO 11 U.S.C. § 523(a)(4)

Liability for Breach of Fiduciary Duty under 29 U.S.C. § 1104

45. PBGC restates and realleges paragraphs 1 through 44 above as if fully set forth herein.

46. Under 11 U.S.C. § 523(a)(4), an individual debtor may not discharge any debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.”

47. As a fiduciary, the Debtor is required to comply with Title I of ERISA.

48. Title I of ERISA provides that “a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan.” 29 U.S.C. § 1104(a)(1)(A).

49. Title I of ERISA further provides that a fiduciary must exercise “the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” 29 U.S.C. § 1104(a)(1)(B).

50. Title I of ERISA further provides that a fiduciary must “diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.” 29 U.S.C. § 1104(a)(1)(C).

51. The Debtor failed to use the Pension Plan assets to pay benefits when due to the Pension Plan’s participants and their beneficiaries or to defray reasonable expenses of administering the Pension Plan.

52. Rather, the Debtor transferred Pension Plan assets to persons and entities that are not Pension Plan participants or beneficiaries.

53. The Debtor caused the Pension Plan to transfer assets to AG Capital, another company wholly owned by the Debtor.

54. The Debtor further caused the Pension Plan to transfer assets to GW and Wilson, companies that provided financing to Capital Investments, the plan sponsor.

55. The Debtor further caused the Pension Plan to transfer assets to Jhan Rogers, a former employee of AG Capital.

56. By authorizing the use of Pension Plan assets for purposes other than paying benefits to the Pension Plan's participants and their beneficiaries or to defray reasonable expenses of administering the Pension Plan, the Debtor breached his fiduciary duties under 29 U.S.C. § 1104(a)(1)(A), and failed to act "with the care, skill, prudence, and diligence" of a prudent fiduciary under similar circumstances. *See* 29 U.S.C. § 1104(a)(1)(A)-(B).

57. To the extent that any of the Pension Plan's transactions with GW, Wilson, or AG Capital are properly characterized as investments, each of these companies is involved in real estate transactions.

58. Accordingly, the Debtor failed to diversify the Pension Plan's investments in violation of 29 U.S.C. § 1104(a)(1)(C).

59. The Pension Plan suffered substantial losses as a result of the Debtor's fiduciary breaches; indeed, the Pension Plan has no remaining assets.

60. Pursuant to 29 U.S.C. § 1109(a), the Debtor is personally liable for all losses, including interest, incurred by the Pension Plan as a result of his violations of fiduciary duty.

61. The Debtor knew, or acted with gross recklessness with respect to the fact, that transferring the Pension Plan's assets to AG Capital, another company owned by the Debtor, violated the fiduciary provisions of ERISA and thus constituted a defalcation.

62. The Debtor knew, or acted with gross recklessness with respect to the fact, that transferring the Pension Plan's assets to GW and Wilson violated the fiduciary provisions of ERISA and thus constituted a defalcation.

63. The Debtor knew, or acted with gross recklessness with respect to the fact, that transferring the Pension Plan's assets to Jhan Rogers, an employee of AG Capital, violated the fiduciary provisions of ERISA and thus constituted a defalcation.

64. The Debtor may not discharge any debt "for fraud or defalcation while acting in a fiduciary capacity" with respect to the Pension Plan. *See* 11 U.S.C. § 523(a)(4).

COUNT II: OBJECTION TO DISCHARGE OF DEBT
PURSUANT TO 11 U.S.C. § 523(a)(4)

Liability for Breach of Fiduciary Duty under 29 U.S.C. § 1106

65. PBGC restates and realleges paragraphs 1 through 64 above as if fully set forth herein.

1. Transactions by the Pension Plan benefitting Capital Investments and the Debtor

66. Title I of ERISA provides that "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . lending of money or other extension of credit between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(B).

67. Title I of ERISA also prohibits a fiduciary from "caus[ing] the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . .

transfer to, or use by or for the benefit of a party in interest, of any assets of the plan.” 29 U.S.C. § 1106(a)(1)(D).

68. As a fiduciary, the Debtor is a party in interest with respect to the Pension Plan. 29 U.S.C. § 1002(14)(A), (H).

69. As an employer of persons covered by the Pension Plan, Capital Investments is a party in interest with respect to the Pension Plan. 29 U.S.C. § 1002(14)(C).

70. The Debtor knowingly caused the Pension Plan to transfer a total of \$395,000 to GW and Wilson.

71. The Debtor was aware that these Pension Plan assets were used by GW to provide real estate loans.

72. The Debtor was also aware that Capital Investments received loans from GW, and knew or should have known that transferring assets from the Pension Plan to GW and Wilson could result in an indirect transfer of Pension Plan assets to Capital Investments.

73. As a result of the transactions between the Pension Plan and GW and Wilson, the Pension Plan suffered substantial losses of at least \$70,514.24.

74. Accordingly, the Debtor violated 29 U.S.C. § 1106(a)(1)(B) and (D) by causing the Pension Plan to engage in prohibited transactions, and is personally liable for the Pension Plan’s losses. *See* 29 U.S.C. § 1109(a).

2. Transactions between the Pension Plan and AG Capital.

75. AG Capital is a party in interest with respect to the Pension Plan because it is a company wholly owned by a Pension Plan fiduciary, the Debtor. *See* 29 U.S.C. § 1002(14)(G)(i).

76. The Debtor knowingly caused the Pension Plan to transfer a total of approximately \$114,200 to AG Capital.

77. As a result of the transactions between the Pension Plan and AG Capital, the Pension Plan suffered substantial losses of at least \$81,200.

78. Accordingly, the Debtor violated 29 U.S.C. § 1106(a)(1)(D) by causing the Pension Plan to engage in prohibited transactions, and is personally liable to the Pension Plan for these losses. *See* 29 U.S.C. § 1109(a).

3. Transaction between the Pension Plan and Jhan Rogers

79. Jhan Rogers is a party in interest with respect to the Pension Plan as a former employee of AG Capital, a company wholly owned by the Debtor. *See* 29 U.S.C. § 1002(14)(H), (G)(i).

80. The Debtor knowingly caused the Pension Plan to transfer \$381.61 to Jhan Rogers.

81. As a result of this transaction, the Debtor caused the Pension Plan to engage in a prohibited transaction, resulting in a loss to the Pension Plan of at least \$381.61, for which the Debtor is personally liable. *See* 29 U.S.C. § 1109(a).

4. Transactions in Violation of 29 U.S.C. § 1106(b)

82. Title I of ERISA prohibits a fiduciary from “(1) deal[ing] with the assets of the plan in his own interest or for his own account, [or] (2) in his individual or in any other capacity act[ing] in any transaction involving the plan on behalf of a party (or represent[ing] a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.” 29 U.S.C. § 1106(b)(1)-(2).

83. Upon information and belief, the Debtor knowingly caused the Pension Plan to transfer \$114,200 of its assets to AG Capital, a company of which the Debtor is the sole owner.

84. Upon information and belief, the Debtor knowingly caused the Pension Plan to transfer \$395,000 of its assets to GW and Wilson, companies that provided financing to Capital Investments, the plan sponsor.

85. Upon information and belief, the Debtor knew that transferring Pension Plan assets to GW and Wilson would indirectly benefit Capital Investments by supporting and providing liquidity for Capital Investments' lender.

86. Accordingly, the Debtor engaged in self-dealing in violation of 29 U.S.C. § 1106(b)(1)-(2), and the Debtor is personally liable for all losses to the Pension Plan, including interest, that resulted from his violations of fiduciary duty. *See* 29 U.S.C. § 1109(a).

87. The Debtor knew, or acted with gross recklessness with respect to the fact, that transferring the Pension Plan's assets to GW, Wilson, AG Capital, and Jhan Rogers violated the fiduciary provisions of ERISA and thus constituted a defalcation.

88. The Debtor may not discharge any debt "for fraud or defalcation while acting in a fiduciary capacity" with respect to the Pension Plan. *See* 11 U.S.C. § 523(a)(4).

COUNT III: DECLARATORY JUDGMENT

The Pension Plan May Set Off the Debtor's Fiduciary Breach Liability Against his Benefits

89. PBGC restates and realleges paragraphs 1 through 88 above as if fully set forth herein.

90. The Debtor is a participant in the Pension Plan, and the Pension Plan owes to the Debtor any benefits that the Debtor will be entitled to receive from the Pension Plan.

91. The Debtor earned these benefits under the Pension Plan as a result of his pre-petition work at Capital Investments.

92. As provided in Counts I and II above, the Pension Plan has a claim against the Debtor for his breach of fiduciary duties under 29 U.S.C. §§ 1104 and 1106.

93. Under 29 U.S.C. § 1056(d)(4), the Pension Plan is authorized to offset any plan benefits owed to the Debtor under the Pension Plan against any amount the Debtor is ordered or required to pay to the Pension Plan as a result of his fiduciary breach pursuant to, *inter alia*, a civil judgment.

94. The Pension Plan's debt owed to the Debtor for pension benefits, and the Pension Plan's claim against the Debtor for fiduciary breach, are mutual.

95. With certain exceptions that are not applicable to this case, 11 U.S.C. § 553 provides that the Bankruptcy Code "does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before commencement of [the bankruptcy case] against a claim of such creditor against the debtor that arose before the commencement of the case."

96. Pursuant to 11 U.S.C. § 553, the Pension Plan has a valid right to offset its debt for any benefits owed to the Debtor against the Pension Plan's claim for fiduciary breach.

WHEREFORE, Plaintiff demands judgment and prays this Court:

1. Declare and adjudge that any claim of the PBGC for recovery of losses incurred by the Pension Plan through the Debtor's breaches of fiduciary duty both as alleged herein and for any and all other breaches of fiduciary duty to the Pension Plan are exempt from discharge, pursuant to 11 U.S.C. § 523(a)(4);
2. Declare and adjudge that the Debtor's pension benefits under the Pension Plan may be set off against the claim for recovery of losses incurred by the Pension

Plan through the Debtor's breaches of fiduciary duty, pursuant to 11 U.S.C.

§ 553;

3. Order the Debtor to account fully for all assets of the Pension Plan; and
4. Award such other relief as is just and equitable.

Dated: May 16, 2016
Washington, D.C.

Respectfully submitted,

By: /s/ Melissa T. Ngo

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