

beneficiaries. Following its established administrative procedures, PBGC determined that this statutory condition exists with respect to the Hancock Fabrics, Inc. Consolidated Retirement Plan (the “Pension Plan” or the “Plan”). PBGC further determined that the Pension Plan should be terminated to protect the interests of participants, the plan termination date should be established as March 31, 2016, and PBGC should be appointed as trustee of the terminated Pension Plan. PBGC issued a notice of its determinations (the “Notice of Determination” or the “NOD”) to the plan administrator of the Pension Plan, Hancock Fabrics, Inc. (“Hancock” or the “Company”).

PBGC sent the Notice of Determination to Hancock. In an effort to effect a consensual termination, PBGC also sent its standard form termination and trusteeship agreement (the “PBGC Agreement”) and asked Hancock to execute it.

Before the Court is a Motion by Hancock and the other Debtors, ostensibly to approve Hancock’s execution of the “PBGC Agreement” (the “Motion”). The Motion, however, seeks to modify the PBGC Agreement, as set forth in the Proposed Order which the Debtors filed with the Motion.² PBGC cannot and will not execute the modified agreement sought by Hancock. Among other things, the modification violates Title IV’s statutory provision granting the trustee of a terminated plan the power to require the transfer of all (or any part of) the plan’s records and assets to himself as trustee.

As Hancock admits in the Motion, the PBGC and Hancock have not reached agreement on the terms of a consensual termination. Granting the Motion thus will not lead to a consensual termination of the Pension Plan under Title IV. Instead, absent the consent of both Hancock and

² Debtors’ Motion for Entry of an Order Authorizing the Debtor, Hancock Fabrics, Inc., to Enter into an Agreement with the PBGC Terminating the Pension Plan and Appointing PBGC as Statutory Trustee Thereof, filed on September 23, 2016 as DOC 1089 on the Court’s electronic docket, at 6-7, ¶¶ 15 and 17, hereinafter referred to as DOC 1089.

PBGC, the only available means for terminating the Pension Plan under Title IV is for PBGC to seek a decree from the United States District Court. Accordingly, there is no reason for the Bankruptcy Court to consider the Motion.

Additionally, the Court lacks jurisdiction over the Motion. Accordingly, pursuant to Local Rule 9013-1(h), PBGC does not consent to the entry of final orders or judgments by this Bankruptcy Court if it is determined that the Bankruptcy Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

STATUTORY BACKGROUND

PBGC is the United States government agency created by Title IV to administer and enforce the nation's pension termination insurance program established by Title IV.³ When a pension plan covered by Title IV terminates with insufficient assets to pay promised benefits to plan participants and their beneficiaries, PBGC typically becomes statutory trustee of the terminated plan and pays participants and their beneficiaries benefits, up to the statutory limits in Title IV.⁴ PBGC's termination insurance program protects the pensions of more than 40 million workers and retirees in nearly 24,000 private sector defined benefit pension plans.⁵

³ 29 U.S.C. §§ 1301-1461.

⁴ *See* 29 U.S.C. §§ 1322, 1361.

⁵ PBGC Annual Management Report, Fiscal Year 2015, at 1, 2 (available at <http://www.pbgc.gov/Documents//2015-annual-report.pdf#page=1>). *See generally* *PBGC v. LTV Corp.*, 496 U.S. 633 (1990).

Title IV covers tax-qualified defined benefit pension plans and provides the exclusive means for terminating these plans.⁶ PBGC may initiate termination or it can be initiated by the sponsoring employer. An employer may terminate a plan in a standard termination under 29 U.S.C. § 1341(b) if the plan has sufficient assets to cover all future benefit payments, or in a distress termination under 29 U.S.C. § 1341(c), if the plan is underfunded and the employer meets certain statutory financial distress tests. To initiate a distress termination in a bankruptcy reorganization, the plan sponsor and members of its “controlled group”⁷ must demonstrate to the bankruptcy court that unless the plan is terminated, they will be unable to pay all their debts pursuant to a plan of reorganization and will be unable to continue in business outside bankruptcy.⁸

PBGC may initiate termination of an underfunded plan if it determines that one of four criteria set forth in 29 U.S.C. § 1342(a) has been met, including: the plan has not met the minimum funding standard under section 412 of the Internal Revenue Code, 29 U.S.C. § 1342(a)(1); the plan will be unable to pay benefits when due, 29 U.S.C. § 1342(a)(2); or the possible long-run loss to the PBGC insurance program with respect to the plan may reasonably

⁶ 29 U.S.C. § 1341(a)(1); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999); *PBGC v. Mize Co., Inc.*, 987 F.2d 1059, 1063 (4th Cir. 1993).

⁷ *See* 29 U.S.C. §§ 1362(a), (b); 1301(a)(18). A “controlled group” includes a parent-subsidary or brother-sister group of trades or businesses connected through ownership of at least 80% controlling interest by a common entity. *See* 29 U.S.C. § 1301(a)(14), (b); 26 U.S.C. § 414(b), (c); 26 C.F.R. §§ 1.414(b)-1, 1.414(c)-1, 1.414(c)-2.

⁸ 29 U.S.C. § 1341(c)(2)(B)(ii).

be expected to increase unreasonably if the plan is not terminated.⁹ PBGC shall initiate termination if the plan's assets are no longer sufficient to pay benefits that are immediately due participants.¹⁰

PBGC notifies the plan administrator of its determinations by sending a Notice of Determination. PBGC usually attempts first to effect a consensual termination and trusteeship. With the Notice of Determination, PBGC sends the plan administrator PBGC's standard form of termination and trusteeship agreement. After receiving the plan administrator's signature, PBGC executes the agreement. The provisions of this agreement for the most part, mirror the statutory elements set forth in 29 U.S.C. §§ 1342(c) and (d). The great majority of the nearly 4,800 terminated pension plans have been terminated by such agreement between PBGC and the plan administrator.

If PBGC and the plan administrator cannot agree on consensual termination, Title IV authorizes PBGC to apply to the appropriate United States District Court for a decree adjudicating that the plan must be terminated, establishing the date of plan termination, and appointing a trustee for the terminated plan.¹¹

If the court to which the PBGC has applied, grants the decree, the trustee of the terminated pension plan—invariably the PBGC—shall have the powers set forth in both 29 U.S.C. §

⁹ 29 U.S.C. § 1342(a)(4). While terminations initiated by PBGC are sometimes referred to as “involuntary,” the word “involuntary” does not appear in the statutory language of 29 U.S.C. § 1342.

¹⁰ 29 U.S.C. § 1342(a).

¹¹ 29 U.S.C. § 1342(c); *see* 29 U.S.C. § 1348(a)(4).

1342(d)(1)(A) and (B), including the power to “require the transfer of all (or any part) of the assets and records of the plan to himself as trustee.”¹²

FACTUAL BACKGROUND

Hancock is the Pension Plan administrator and the contributing sponsor of the Pension Plan within the meaning of 29 U.S.C. §§ 1002(16)(A), 1301(a)(1), and 1301(a)(13).¹³ The Plan covers approximately 4,149 participants.¹⁴ As of March 31, 2016, PBGC estimates that the Pension Plan is underfunded for benefit liabilities, in the amount of \$57.9 million.

On February 2, 2016, Hancock Fabrics, Inc. and six of its affiliates filed a voluntary petition under Chapter 11 of the Bankruptcy Code.¹⁵ Subsequently, the Debtors began liquidating their assets.¹⁶ On May 10, 2016, PBGC’s Acting Director of Negotiations and Restructuring signed and issued the Notice of Determination that the Pension Plan must be terminated under 29 U.S.C. § 1342(a)(2) and (c).

PBGC sent the NOD,¹⁷ the PBGC Agreement, and a cover letter requesting that the plan administrator to execute the agreement. The letter also explained that if PBGC did not receive

¹² 29 U.S.C. § 1342(d)(1)(A)(ii).

¹³ Motion, DOC 1089, at 5, ¶ 11.

¹⁴ PBGC Information Profile, attached hereto and incorporation herein as Ex. 1, at 1.

¹⁵ Motion, DOC 1089, at 2, ¶ 2.

¹⁶ Motion, DOC 1089, at 3-5, ¶¶ 6-10.

¹⁷ NOD dated May 10, 2016, attached hereto and incorporated by reference herein as Ex. 2, at 1.

the executed agreement, the termination would be turned over to PBGC's counsel to seek a decree from the United States District Court.¹⁸

In the ensuing months, Hancock has sought significant changes to the agreement for the benefit of the Debtors. PBGC attempted to explain to Hancock that the terms of the termination and trusteeship agreement simply implement the provisions of §1342, are for the benefit of the plan and its participants.

On September 23, 2016, Hancock filed the Motion¹⁹ together with the Proposed Order, even though PBGC had informed Hancock that it would not sign the PBGC Agreement as modified by Hancock's proposed order. The Debtors sought certain modifications to the PBGC Agreement. Among other things, the Order contained language limiting the obligations of the debtors and their employees and professionals and a retention of jurisdiction provision for the Bankruptcy Court over issues relating to the Order.

The Debtors agree that the Pension Plan should be terminated and that PBGC should be appointed statutory trustee of the terminated Pension Plan.²⁰ The Motion is silent as to the March 31, 2016 termination date.²¹

¹⁸ Cover Letter from PBGC to Pension Plan administrator dated May 10, 2016, attached hereto and incorporated by reference herein as Ex. 3.

¹⁹ The Motion contains some misstatements about the operation of 29 U.S.C. § 1342, but those misstatements are generally not material to the issue before the Court.

²⁰ Motion at 6, ¶¶ 16, 20.

²¹ The establishment of a plan termination date fixes PBGC's liability for guaranteed benefits and serves as the date upon which participants' right to accrue additional benefits ceases. It also serves as the date upon which the liability of the employer and its controlled group for the plan's unfunded benefit liabilities is measured under 29 U.S.C. §1362(b)(1)(A).

PBGC continues to discuss a consensual agreement with the Debtors and for this reason has refrained from filing for a decree in the appropriate United States District Court.

ARGUMENT

1. The Court lacks jurisdiction to consider the motion

The Debtors assert that the Motion is a core proceeding under 28 U.S.C. § 157(b) which the Bankruptcy Court has jurisdiction to consider, pursuant to 28 U.S.C. §§ 157 and 1334. The Debtors fail, however, to identify any interest or issue under Title 11 that qualifies the Motion as a core proceeding. The Debtors have not identified any requirement in the Bankruptcy Code that the plan administrator of a Title IV covered pension plan-- a separate legal entity from its contributing sponsor and the sponsor's controlled group members²²- seek the approval of the bankruptcy court to execute an agreement with PBGC to terminate the pension plan. The Pension Plan is not a party to the Chapter 11 proceeding, and its assets are separate from the assets of the estate. And the Debtors have not identified any requirement in Title 11 that the contributing sponsor of a plan seek bankruptcy court approval before executing a consensual agreement with PBGC on plan termination and trusteeship either. Identifying such a requirement would be difficult because the termination of Title IV-covered pension plans under § 1342, the establishment of a plan termination dates, and the appointment of a trustee for a terminated plan are ERISA issues rather than bankruptcy issues.²³

²² While the sponsor can be the plan administrator, it is not necessarily the plan administrator. A plan administrator can be the company, a committee, or a named individual. *See* 29 U.S.C. § 1002(16). The administrator has a fiduciary obligation to act solely in the interests of the participants and beneficiaries. 29 U.S.C. §§ 1002(14), 1104(a)(1).

²³ However, some debtors choose to seek bankruptcy court approval. If PBGC and a plan administrator have agreed on the terms of a consensual termination, PBGC ordinarily does not oppose a motion for bankruptcy court approval authorizing the debtor(s) to execute the standard

Under Title IV, if, as here, PBGC and the plan administrator cannot agree to a consensual termination, PBGC may apply to the appropriate United States District Court for a decree terminating the Pension Plan, establishing the plan termination date, appointing a trustee and ordering the plan administrator to turn over the Pension Plan's records and assets to the trustee. PBGC is preparing to file a complaint in the appropriate United States District Court seeking the decree in accordance with Title IV, its enabling act.

2. PBGC will not sign an agreement that is modified to limit its statutory rights as trustee

The relief sought by the debtors' motion has no practical effect. A pension plan can be terminated by agreement, but PBGC does not and will not agree to the modifications the Debtors propose. Granting the Debtors' motion would actually accomplish the opposite of the desired effect—it would prevent the pension plan from being terminated by agreement. Because the Debtors “lack a cognizable interest in the outcome” of the Motion, it is moot and not subject to decision by this Court.²⁴

PBGC would not sign the trusteeship agreement as modified by the proposed order because it will not give up its statutory rights. When a plan is terminated, certain statutory powers are conferred on the appointed trustee of the terminated plan, among them, the power to require the transfer of all or any part of the assets and records of the plan to himself as trustee.²⁵

The standard PBGC Agreement contains this similar provision:

the plan administrator and any other person having possession or control of any records, assets or other property of the plan shall convey and deliver any such

PBGC Agreement. Here, PBGC and the Debtors have not reached agreement on the terms of a consensual termination.

²⁴ See *Brown v. Phila. Hsg Auth.*, 350 F.3d 338, 343 (3d Cir. 2007).

²⁵ 29 U.S.C. § 1342(d)(1)(A)(ii).

records, assets or property to PBGC in a timely manner. The PBGC reserves all its rights to pursue such records, assets and other property by additional means, including but not limited to issuance of administrative subpoenas under 29 U.S.C. §1303.²⁶

When PBGC becomes the statutory trustee of a terminated plan, the agency is usually a stranger to the particular plan, its participant and beneficiary population, and its past administrative processes and practices. As statutory trustee of the Pension Plan, PBGC will be obligated to pay benefits under the terminated plan up to the statutory limits of Title IV until the last participant or beneficiary of the plan has passed away and any benefit payments due him or her have been paid to his or her beneficiaries.

The statutory trustee's power to gather the plan's records from the plan administrator and from any third parties who have or have had contractual relationships with Hancock or prior plan administrators to manage assets or perform functions related to benefit payments is one means by which a statutory trustee can obtain benefit and plan asset information.

For these practical reasons, the broad power to gather and obtain plan records is particularly important to a statutory trustee. If the plan administrator, plan sponsor and the sponsor's controlled group members are liquidating, the breadth of this power is even more important.

Hancock's Motion states that:

The Debtors commenced these cases to effectuate an orderly sale of their assets for the benefit of their stakeholders, either by selling the business to a going-concern buyer or liquidating their assets through store closing sales to be conducted at some or all of their locations.

²⁶ The establishment of a plan termination date fixes PBGC's liability for guaranteed benefits and serves as the date upon which participants' right to accrue additional benefits ceases. It also serves as the date upon which the liability of the employer and its controlled group for the plan's unfunded benefit liabilities is measured under 29 U.S.C. §1362(b)(1)(A).

The Motion also describes in some detail sales by Hancock and the other Debtors of stores, inventory, store closings, sales by the liquidator, the auction and sale of intellectual property, and the sale of Hancock's headquarters and national distribution center.

CONCLUSION

For the reasons above, PBGC urges the Court to deny the motion because PBGC has not consented to the terms of the termination advocated by Hancock and the other Debtors and, therefore, the Court does not have jurisdiction to approve it.

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Respectfully submitted,

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