

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: REVSTONE INDUSTRIES, LLC, <u>et al</u> ¹ Debtors.	Chapter 11 (Jointly Administered) Case No. 12-13262 (BLS) Hearing Date: May 6, 2014 at 11:00 a.m. Related Docket Nos.: 1322, 1334, 1368, 1375, 1376, 1377, 1378, 1399, 1432
In re: TPOP, LLC ² Debtor.	Chapter 11 Case No. 13-11831 (BLS) Hearing Date: May 6, 2014 at 11:00 a.m. Related Docket Nos.: 402, 420, 421, 451

**PENSION BENEFIT GUARANTY CORPORATION’S JOINDER TO DEBTORS’
OMNIBUS REPLY AND SECOND SUPPLEMENTAL RESPONSE IN SUPPORT OF
MOTIONS OF REVSTONE INDUSTRIES, LLC ET AL. AND TPOP, LLC FOR ORDER
PURSUANT TO 11 U.S.C. §§ 105 & 363 AND BANKRUPTCY RULE 9019
AUTHORIZING AND APPROVING SETTLEMENT AGREEMENT WITH
PENSION BENEFIT GUARANTY CORPORATION**

The Pension Benefit Guaranty Corporation (“PBGC”) hereby joins in the Debtors’ Omnibus Reply [Docket Nos. 1432 (Revstone), 451 (TPOP)] (“Debtors’ Reply”) in Support of the Motions of Revstone Industries, LLC (“Revstone”) et al. [Docket No. 1322] and TPOP, LLC (“TPOP”) [Docket No. 402] (together, the “9019 Motions”) ³ for Order Pursuant to 11 U.S.C. §§ 105 & 363 and Bankruptcy Rule 9019 Authorizing and Approving Settlement Agreement with Pension Benefit Guaranty Corporation, and submits this second supplemental response to

¹ The Debtors in these Chapter 11 Cases and the last four digits of each Debtor’s federal tax identification numbers are: Revstone Industries, LLC (7222); Spara, LLC (6613); Greenwood Forgings, LLC (9285); and US Tool and Engineering, LLC (6450). The location of the Debtors’ headquarters and the service address for each of the Debtors is 230 N. Limestone St., Ste. 100, Lexington, KY 40507.

² The Debtor in this Chapter 11 case is TPOP, LLC f/k/a Metavation, LLC and the last four digits of the Debtor’s federal tax identification number is (5884). The location of the Debtor’s headquarters is 230 N. Limestone St., Ste. 100, Lexington, KY 40507.

³ Capitalized terms not defined herein shall have the meanings set forth in the 9019 Motions.

its initial response [Docket No. 1368 (Revstone)] (the “Initial Responses”) and first supplemental response [Docket No. 1399 (Revstone)] (“First Supplemental Response”) to the objections filed by 1) Boston Finance Group, LLC (“BFG”), 2) the Official Committee of Unsecured Creditors of Revstone Industries, LLC (“Committee”), and 3) Ascalon Enterprises, LLC (“Ascalon” and together with BFG and the Committee, the “Objecting Parties”) to the 9019 Motions. For the reasons previously stated in the Initial Response and First Supplemental Response, and for the reasons stated below in this joinder and second supplemental response, the Court should overrule the Objecting Parties. PBGC respectfully states as follows:

JOINDER TO DEBTORS’ REPLY

1. PBGC joins and supports the Debtors’ Reply with respect to all arguments set forth therein.

I. STANDARD OF REVIEW

2. The Objecting Parties continue to incorrectly argue that the well-established standards for this Court’s review and approval of settlements should be disregarded or replaced with inapplicable standards.

3. In its supplemental objection, BFG concedes that “[Sections 105 and 363 of the Bankruptcy Code and Bankruptcy Rule 9019] are the statutory predicates for the relief requested.”⁴ However, BFG then contradicts that statement by asserting that those statutory predicates are not applicable to review of the 9019 Motions. Arguments that those statutory predicates do not apply are unavailing. This Court clearly has the authority to approve settlements involving debtors, as explained in the 9019 Motions, PBGC’s First Supplemental Response and the Debtors’ Reply.

⁴ BFG’s First Supplemental Objection to 9019 Motions, Revstone Docket No. 1377, ¶ 17.

4. BFG also contends that that the settlement must be considered debtor by debtor. Putting aside that such analysis is not required by the applicable standard of review, a debtor by debtor analysis would result in a finding that the settlement is reasonable and fair to each of the Debtors. With respect to Revstone, and the other Debtors jointly administered with it, no estate assets are being used to fund the Settlement Agreement. In fact, BFG concedes that the Settlement Agreement does not use assets or property of the estates, but rather, of non-debtors.⁵ As a result, it follows that potential harm to the Debtors' estates, if any, is correspondingly limited. Additionally, the Debtors are only seeking approval as to the Debtors' roles in the Settlement Agreement, and that is all this Court need consider.

5. The Settlement Agreement actually facilitates the upstreaming of funds from non-debtor subsidiaries to Revstone and Spara, which would otherwise not be available to those estates. Absent the Settlement Agreement, the Revstone and Spara estates are administratively insolvent and, thus, the upstreaming of funds to those estates is a clear, unmitigated benefit for the Debtors.

6. BFG also unfoundedly asserts that the Debtors stand "on all sides" of the settlement. This is patently false, as no Debtor stands on the same side as PBGC.

PBGC'S SECOND SUPPLEMENTAL RESPONSE

II. PBGC HAS NEITHER COLLUDED NOR OVERREACHED, BUT RATHER, HAS CARRIED OUT ITS STATUTORY MANDATE BY ENTERING INTO THE SETTLEMENT AGREEMENT

7. The Objecting Parties allege that the Settlement Agreement did not result from arm's length negotiations and that PBGC has overreached and colluded with the Debtors to come to that settlement. PBGC has neither colluded nor overreached. Such allegations are baseless

⁵ BFG's First Supplemental Objection to 9019 Motions, Revstone Docket No. 1377, ¶¶ 19-20

and inappropriate as PBGC is simply carrying out its statutory mandate to minimize loss to the ERISA Title IV insurance funds.

8. This Court has previously recognized that agencies like the PBGC must carry out their statutory mandates to the best of their ability. In *In re Sea Containers Ltd., et al.*, 2008 Bankr. LEXIS 2363 (Bankr. D. Del. 2008), this Court approved a settlement between the debtors and pension plan trustees, which included, *inter alia*, the following terms: (i) a single allowed general unsecured claim against the debtors in the aggregate amount of \$194 million to be allocated among the two relevant pension plans; and (ii) certain financial support payment arrangements for pension plan debt in response to an official Financial Support Direction (“FSD”) from the U.K. Pensions Regulator (“TPR”). TPR was a regulatory entity statutorily created under U.K. pension law to monitor and ensure adequate funding of pension plans in order to protect the benefits of pension participants. The committee of unsecured creditors in that case objected to the settlement asserting that the FSD term in the settlement was a result of inappropriate collaboration between the debtors, the pension plans’ trustees and the TPR. Judge Carey concluded:

“The Court does not believe that there was an underhanded collaboration between the Trustees and the Schemes at play. Rather, the FSDs reflect that the TPR was fulfilling its statutory objective of ensuring that pension schemes are properly funded and maintained.”

In re Sea Containers, 2008 Bankr. LEXIS 2363 at 14.

Judge Carey not only acknowledged the statutory mandate of a *foreign* pension regulator but also confirmed the need to give credence to the regulator’s efforts to carry out that mandate through its collaboration with the pension trustees and debtors resulting in the negotiation of settlement terms that fulfill the pension regulator’s mission.

9. Here, as in *In re Sea Containers*, the PBGC Settlement is grounded in PBGC's statutory obligation to preserve and protect pension plans in accordance with Title IV of ERISA. PBGC is a regulatory agency, created under ERISA, whose mission is to ensure that the pension plans are adequately funded and maintained in order to protect the benefits of pension plan participants.

III. PBGC'S CALCULATION OF UNFUNDED BENEFIT LIABILITIES IS PRESCRIBED BY ERISA AND PBGC REGULATIONS

10. As stated in PBGC's First Supplemental Response, PBGC's calculation of unfunded benefit liabilities is prescribed by ERISA and PBGC regulations and, thus, the application of a "prudent investor rate," is improper. Additionally, as a matter of law, this Court need not decide the issue of whether a "prudent investor rate" should be used in calculating PBGC's claims.⁶ Nonetheless, if the Court is inclined to decide the issue of the proper interest rate, the Court must find that the regulatory interest rate employed by PBGC in calculating the unfunded benefit liabilities is proper, as further explained in PBGC's First Supplemental Response at ¶¶ 41-49.

11. Since PBGC filed its First Supplemental Response, other courts have analyzed the issue of alternative interest rates in calculating PBGC's claim for unfunded benefit liabilities and concluded that the proper interest rate is the regulatory interest rate employed by PBGC. In *Cox Enterprises, Inc. v. News-Journal Corporation, et al.*,⁷ the U.S. District Court for the Middle District of Florida recently held that "the Court must give [PBGC's regulatory interest rate] deference and must find that it controls the formulation of the [PBGC's claim for unfunded benefit liabilities]." *Id.* at 19. In arriving at that conclusion, the *Cox* court explained:

⁶ See PBGC's First Supplemental Response, Revstone Docket No. 1399, at ¶40.

⁷ Report and Recommendation, No. 6:04-cv-698-Orl-28DAB (M.D.Fl. March 21, 2014).

“Although Cox and its expert actuary offer alternative interest rate assumptions...than those set forth pursuant to [PBGC’s] Valuation Regulation, and contend that this results in “a more reasonable value of the benefit liabilities to be funded,” *PBGC’s interpretation of ERISA and its own regulation is entitled to deference.*

Id. at 17 (emphasis added)(citing *Durango-Georgia Paper Co. V H.G. Estate, LLC*, 739 F.3d 1263, 1273 (11th Cir. 2014)(“We give deference to PBGC’s interpretation of ERISA”); *Lyons v. Georgia-pacific Corp. Salaried Employees Retirement Plan*, 221 F.3d 1235, 1244-1245 (11th Cir. 2000)(“...agency regulations, like the one at issue here, are to be given deference ‘unless they are arbitrary, capricious, or manifestly contrary to the statute’”)).

12. The *Cox* court further states that “[w]hether the [PBGC] Valuation Regulation may or may not be susceptible to improvement and whether Cox’s interpretation is “more reasonable” *are not determinative.*” *Id.* at 18 (emphasis added). The court goes on to summarize the Eleventh Circuit’s deference to regulations of the PBGC and other administrative agencies:

“As a preliminary matter, we note that we owe great deference to the interpretations and regulations of the Pension Benefit Guaranty Corporation... the Internal Revenue Service...and the Department of Labor, which are the administrative agencies responsible for enforcing and interpreting ERISA. As the Supreme Court stated, “a court that tries to chart a true course to the Act’s purpose embarks on a voyage without a compass when it disregards the agency’s views.” The Supreme Court has consistently advised that courts must adhere to the “venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong...” Furthermore, we only must determine whether the agency’s interpretation is reasonable. In making this determination, we “need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding...[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency.” Finally, we must defer not only to the regulations promulgated by administrative agencies charged with the enforcement and interpretation of ERISA and the Internal Revenue Code but also, when a regulation can be interpreted in more than one plausible way, we must recognize and defer to the agencies’ interpretation of the regulation.”

Id. (internal citations omitted)(citing *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1167-1168 (11th Cir. 1988)(en banc)).

13. The *Cox* court also acknowledges PBGC's representations, as discussed in detail in PBGC's First Supplemental Response, that PBGC's regulatory interest rate has been applied to determine the underfunding in every pension plan that has terminated and been trustee'd by PBGC, for more than thirty five years, and that every court that has considered the issue since 2003 has rejected efforts to depart from PBGC's regulatory interest rate. *See Id.* at 18-19. In reviewing the authorities cited by PBGC in support of those representations, the court states, "[w]hile these authorities are not binding on the Court, and there is earlier, contrary authority in the context of bankruptcy,⁸ the Court finds the great weight of authority supports application of the [PBGC] Valuation Regulation, consistent with the letter of the law." *Id.* at 19. (emphasis added).

14. PBGC's use of its regulatory interest rate in determining its claim for unfunded benefit liabilities continues to be supported by courts in addition to being prescribed by ERISA and PBGC regulations.

15. Moreover, *this* Court has rejected the application of an alternative "prudent investor rate." In *In re Sea Containers*, creditors opposed the settlement with TPR, the British pension regulator noted above, and argued, *inter alia*, that the pension-related claims should be calculated using a prudent investor rate, rather than the method used by TPR (which is similar to PBGC's rate). 2008 Bankr. LEXIS 2363. The court rejected the creditors' argument, finding that the TPR's calculations were within the market's range, and that "[t]he SCL Committee [creditors committee], for purposes of this objection, contends that those figures should be nearer the low end of any range, but that doesn't render the proposed settlement improper or unreasonable." *In re Sea Containers*, 2008 Bankr. LEXIS 2363 at 21. Furthermore, the court notes that "use of a

⁸ The *Cox* court footnotes to *In re CF & I Fabricators of Utah, Inc.*, 150 F. 3d 1293, 1301 (10th Cir. 1998) and *In re CSC Indus., Inc.*, 232 F. 3d 505 (6th Cir. 2000).

“prudent investor” rate under U.S. law has been questioned.” *Id.* (citing *In re Kaiser Aluminum Corp.*, 339 B.R. 91, 95-96 (D. Del. 2006)). Thus, the applicability of a “prudent investor rate” continues to be questioned, at best, while PBGC’s regulatory rate is well supported by statute, regulations and substantial case law.

IV. PBGC’S CLAIMS ARE NOT TRULY CONTINGENT BECAUSE THERE IS NO SCENARIO IN WHICH THE PENSION PLANS CAN BE MAINTAINED

16. As stated in PBGC’s First Supplemental Response, PBGC’s claims are not contingent and must be resolved.⁹ BFG and the Committee’s assertions that PBGC’s claims are contingent because certain actions have not yet been taken, are merely technical, not substantive, points and not dispositive.

17. In *In re Sea Containers*, creditors objected to a settlement between the debtors, the pension plans, and the pension regulator on the basis that the pension regulator’s claims were contingent because certain actions had not yet been taken to mature the claims. *In re Sea Containers*, 2008 Bankr. LEXIS 2363. The court dismissed that argument, pointing to the fact that the pension plans having the power to take those actions at any time substantially reduced the contingency: “Merely because the Schemes [pension plans] have not yet taken such action does not mean that they will not take action. The power of the Schemes to take action unilaterally renders such trigger events all the more possible.” *Id.* at 17.

18. Here, as in *In re Sea Containers*, PBGC and the plan administrator have the authority and ability to take the requisite actions to complete termination of the Pension Plans at any time, and, thus, mature PBGC’s claims. Therefore, PBGC’s claims are not contingent and must be resolved.

⁹ See PBGC’s First Supplemental Response, Revstone Docket No. 1399, ¶¶ 34-36

CONCLUSION

For the foregoing reasons and the reasons set forth in PBGC's Initial and First Supplemental Responses, PBGC respectfully requests that this Court approve the 9019 Motions and overrule the Objecting Parties.

Dated: April 16, 2014
Washington, D.C.

Respectfully Submitted,

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