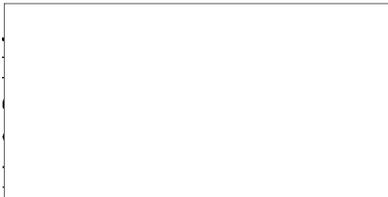




Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

January 14, 2009



Re: ; Arkansas General Industries, Inc., Hourly-Wage
Employees Group Pension Plan (PBGC Case No. 19724100); LaSalle
Bank N.A. and LaSalle Business Credit, LLC (Appellants)

Dear :

By letter dated February 15, 2008, the Pension Benefit Guaranty Corporation ("PBGC") notified LaSalle Bank N.A. and LaSalle Business Credit, LLC (collectively "LaSalle") that PBGC had determined that LaSalle was jointly and severally liable to PBGC, based on 29 U.S.C. § 1362, for the unfunded benefit liabilities of the Arkansas General Industries, Inc., Hourly-Wage Employees Group Pension Plan (the "Plan").

PBGC's determination further stated that, as of the Plan's termination date of February 19, 2002, LaSalle was in a controlled group with: (1) Arkansas General Industries, Inc. ("AGI"), who was the Plan's contributing sponsor; (2) AGI's ultimate North American parent, ABN AMRO North America Holding Company ("ABN Holding"); and (3) other corporations which ABN Holding owned, directly or indirectly. Additionally, PBGC determined that the Plan's unfunded benefit liabilities, as of the Plan's termination date, were \$728,569.00, and that interest in the amount of \$325,619.64 had accrued through January 1, 2008.

In your October 10, 2008 appeal filed on behalf of LaSalle, you assert that LaSalle is not liable to PBGC because LaSalle was never a member of AGI's controlled group. For the reasons explained below, the Appeals Board concluded that LaSalle was not a member of AGI's controlled group. Accordingly, the Board granted your appeal. LaSalle is not liable to PBGC for the Plan's unfunded benefit liabilities.

I. BACKGROUND

A. Facts

AGI manufactured electric motors in Bald Knob, Arkansas.¹ On January 1, 1972, AGI established the Arkansas General Industries, Inc. Hourly-Wage Employees Group Pension Plan (“Plan”) to provide retirement benefits to certain employees.² AGI was the administrator and contributing sponsor of the Plan.

AGI filed a Chapter 11 bankruptcy petition on July 28, 1995.³ As part of the plan of reorganization, LaSalle made loans to AGI consisting of a term loan of \$8,500,000 and a revolving credit facility of up to \$5,000,000.⁴ The loans were secured by a first security interest in AGI’s assets.⁵ AGI emerged from bankruptcy on August 30, 1996.⁶

On or about December 11, 1998, AGI and LaSalle entered into a pledge agreement whereby AGI pledged its stock to LaSalle.⁷ At that time, all of AGI’s stock was owned by General Industries, Inc. (“GII”), which, in turn, was owned by [redacted] (the “GII Owners”).⁸ After AGI defaulted on its obligations to LaSalle in 2000, LaSalle retained the law firm of Schwartz Cooper Greenberger Krauss Chartered (“Schwartz Cooper”) to represent it in matters relating to AGI.⁹ LaSalle also contacted AGI’s board of directors—which consisted of [redacted]—to gather information on how best to protect the bank’s collateral.¹⁰ According to [redacted] a partner at Schwartz Cooper, it soon became “apparent that the AGI board of directors was not willing to work to salvage the failing

¹ Exhibit 2 to the LaSalle Appeal (Trustee Processing Division 4’s (“TPD-4”) February 15, 2008 Controlled Group Analysis of Arkansas General Industries, Inc., p. 2) (hereinafter “Controlled Group Analysis”).

² *Id.*

³ Controlled Group Analysis, p. 2.

⁴ Exhibit 14 to the LaSalle Appeal (June 7, 2002 Letter from [redacted], p. 1).

⁵ *Id.*

⁶ Controlled Group Analysis, p. 2.

⁷ Exhibit 9 to the LaSalle Appeal (December 11, 1998 Pledge Agreement).

⁸ Exhibit 3 to the LaSalle Appeal (January 22, 2008 Memorandum from OCC to TPD-4).

⁹ Exhibit 11 to the LaSalle Appeal (Affidavit of [redacted] ¶ 4) (hereinafter “[redacted] Affidavit”).

[redacted] Affidavit ¶ 8.

business, and had no realistic desire to run the business going forward.”¹¹ As a result, LaSalle began to investigate the potential sale of AGI.¹²

Thereafter, [redacted] of Schwartz Cooper suggested to [redacted] a Senior Vice President of LaSalle at the time, that the existing AGI shareholders transfer their shares to a company controlled by Schwartz Cooper.¹³ According to [redacted] and [redacted] of Schwartz Cooper, the GII Owners would agree to transfer the AGI stock to a Schwartz Cooper-controlled entity only if LaSalle agreed to release them from personal liability.¹⁴ They also stated that, under the terms of the December 1998 stock pledge, any transfer of AGI stock would require LaSalle’s consent.¹⁵ LaSalle subsequently agreed to the stock transfer and to the releases as long as the releases were mutual.¹⁶

On February 20, 2001, LaSalle released the GII Owners from any liability relating to the financing of AGI, and GII transferred the stock of AGI to the Iowa County Wisconsin Corporation (“ICWC”), an entity controlled by [redacted].¹⁷ ICWC then transferred the stock to [redacted] who was also a partner with Schwartz Cooper.¹⁸ Finally, on April 5, 2001, [redacted] transferred the stock to RS Holding Company (“RS Holding”), a corporation controlled by him, which was incorporated for the purpose of holding the stock of AGI.¹⁹

RS Holding apparently operated AGI from February 20, 2001, until February 19, 2002, at which time AGI sold most of its assets to DMI Holdings, Inc. (“DMI”).²⁰ The Asset Purchase Agreement, which is dated February 14, 2002, provided for a Purchase Price of cash in the amount of \$5,750,000 (subject to a Purchase Price Adjustment at

¹¹ [redacted] Affidavit ¶ 9.

¹² [redacted] Affidavit ¶ 10, which further states that the potential sale was investigated “with the sole objective of preserving or enhancing the value of its collateral.” *Id.*

¹³ [redacted] Affidavit ¶ 13; see also, Exhibit 10 to the LaSalle Appeal (Affidavit of [redacted] ¶ 8) (hereinafter “[redacted] Affidavit”).

¹⁴ [redacted] Affidavit ¶ 16; Exhibit 12 to the LaSalle Appeal (Affidavit of [redacted] ¶ 13) (hereinafter “[redacted] Affidavit”).

¹⁵ [redacted] Affidavit ¶ 13; [redacted] Affidavit ¶ 17.

¹⁶ [redacted] Affidavit ¶ 17.

¹⁷ [redacted] Affidavit ¶ 18.

¹⁸ [redacted] Affidavit ¶ 18; [redacted] Affidavit ¶ 15.

¹⁹ [redacted] Affidavit ¶ 19; [redacted] Affidavit ¶ 16.

²⁰ [redacted] Affidavit ¶ 22.

closing). On February 22, 2002, Schwartz Cooper (as attorneys for AGI) filed a Reportable Event Notice to PBGC concerning the “foreclosure sale” of substantially all of AGI’s assets. This filing, among other things, stated: “Proceeds of the sale were paid to LaSalle, which retains unsatisfied obligations of AGI in excess of \$4 million. As the result of the sale AGI has ceased operations and all of its employees have been terminated.”

On September 29, 2003, the United States District Court for the Eastern District of Arkansas issued an order terminating the Plan under section 4042(c) of ERISA, and setting a termination date of February 19, 2002.²¹

B. The Initial Determination and LaSalle’s Administrative Appeal

On February 15, 2008, PBGC issued an initial determination, in which it determined that as of the Plan’s termination date, 100% of AGI’s stock was owned by LaSalle Bank.²² Based on this determination, PBGC concluded that “AGI . . . was a member of a controlled group with LaSalle; its ultimate North American parent, ABN AMRO North America Holding Company (“ABN Holding”); and the other corporations of which ABN Holding owned, directly or indirectly, stock with 80% or more of the voting power as of the termination date (“AGI Controlled Group”).”²³ The initial determination was based on PBGC’s conclusion that, by providing the consideration—i.e. the releases—for the stock transfer to ICWC, LaSalle became the beneficial owner of the AGI stock. PBGC further determined that, as the beneficial owner, LaSalle “owned directly” the stock of AGI.

In addition, PBGC determined that the Plan’s unfunded benefit liabilities as of February 19, 2002, the Plan’s termination date, were \$738,569.00, and that interest in the amount of \$325,619.64 had accrued through January 1, 2008.²⁴ Based on the foregoing, PBGC determined that, as of January 31, 2008, the amount of employer liability owed to PBGC totaled \$1,064,188.64.²⁵

On February 19, 2008, PBGC filed suit against LaSalle and other related parties in the U.S. District Court for the District of Columbia.²⁶ On March 31, 2008, LaSalle filed an administrative appeal under protest with PBGC. Thereafter, PBGC filed an

²¹ Exhibit 1 to the LaSalle Appeal (PBGC’s February 15, 2008 Employer Liability Determination).

²² Exhibit 1 to the LaSalle Appeal (PBGC’s February 15, 2008 Employer Liability Determination).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Exhibit 4 to the LaSalle Appeal (February 19, 2008 Complaint).

amended complaint on May 23, 2008. On August 28, 2008, the court granted PBGC's Motion to Stay the Proceedings until December 31, 2008, pending resolution of LaSalle's administrative appeal.²⁷

On June 16, 2008, the Appeals Board issued an order requiring LaSalle to file a brief in support of its appeal by July 16, 2008. At LaSalle's request, the Appeals Board extended the due date to August 22, 2008. On August 15, 2008, LaSalle requested another extension, and on August 20, 2008, the Appeals Board extended the due date to October 10, 2008. LaSalle submitted its brief on that date.

In its appeal, LaSalle argues that it was not a member of AGI's controlled group under ERISA and the Internal Revenue Code ("IRC" or "Code") because it never owned—directly, constructively, or otherwise—the stock of AGI.²⁸ It asserts that PBGC failed to follow the common control rules under ERISA, the IRC, and the regulations thereunder in making its initial determination. In addition, LaSalle argues that PBGC's initial determination of the amount of termination liability is not supported by the record.²⁹

C. Controlled Group Rules

Section 4001(a)(14) of ERISA provides that, for purposes of Title IV of ERISA:

In the case of a single-employer plan—(A) 'controlled group' means, in connection with any person, a group consisting of such person and all other persons under common control with that person; (B) the determination of whether two or more persons are under 'common control' shall be made under regulations of the corporation which are consistent and coextensive with regulations prescribed by the Secretary of the Treasury under subsections (b) and (c) of §414 of the Internal Revenue Code of 1986.

ERISA § 4001(a)(14).

PBGC's regulations state that, in the case of a single-employer plan, "(1) In connection with any person, a controlled group consists of that person and all other persons under common control with such person. [and] (2) persons are under common control if they are members of a 'controlled group of corporations,' as defined in regulations prescribed under 414(b) of the Code, or if they are 'two or more trades or

²⁷ The court directed the parties to file a Joint Status Report by January 15, 2009.

²⁸ LaSalle Appeal, p. 11-29.

²⁹ LaSalle Appeal, at p. 30. Since we are granting the appeal, it is unnecessary for the Appeals Board to address LaSalle's contentions concerning the amount of the underfunding.

businesses under common control,' as defined in regulations prescribed under section 414(c) of the Code."³⁰

The regulations under section 414 of the Code provide, in part, that, with certain exceptions, "the term 'controlled group of corporations' has the same meaning as is assigned to the term under section 1563(a) and the regulations thereunder"³¹ Under section 1563(a) of the Code, a "controlled group of corporations" includes a parent corporation and a subsidiary corporation where the parent owns stock in the subsidiary possessing at least 80% of the total combined voting power of all classes of stock entitled to vote. Section 1563(d)(1), in turn, provides that:

(1) Parent-subsidiary controlled group.—

For purposes of determining whether a corporation is a member of a parent-subsidiary controlled group of corporations (within the meaning of subsection (a)(1)), stock owned by a corporation means—

(A) stock owned directly by such corporation, and

(B) stock owned with the application of paragraphs (1), (2), and (3) of subsection (e).

26 U.S.C. § 1563(d)(1).³²

II. DISCUSSION AND ANALYSIS

The issue in this appeal is whether, as of the Plan's termination date, LaSalle was a member of AGI's controlled group based on its ownership of AGI's stock. This question has two parts. First, was LaSalle an owner of the AGI stock as of the Plan's termination date? Second, if LaSalle was an owner, was the stock "owned directly" by LaSalle within the meaning of 26 U.S.C. § 1563(d)(1)?

There is no dispute that: (1) RS Holding, not LaSalle, held legal title to 100% of AGI's stock on the Plan termination date; and (2) RS Holding and LaSalle are corporations that (with respect to each other) are not under "common control" within the strict stock ownership rules set forth by IRS regulations under IRC section 414(b) and (c). PBGC determined, however, that the AGI stock was held by RS Holding in a resulting trust for the benefit of LaSalle and, consequently, LaSalle was the beneficial owner of the AGI stock. PBGC further determined that, based on this beneficial

³⁰ 29 C.F.R. § 4001.3(b)(1), (2).

³¹ Treas. Reg. § 1.414(b)-1(a).

³² Sections 1563(e)(1), (2), and (3) of the Code set forth rules governing the constructive ownership of stock through options, partnerships, and estates or trusts, respectively.

ownership, LaSalle was a member of the AGI controlled group.³³ LaSalle contends that it did not directly, constructively, or otherwise own the AGI stock, and therefore cannot be a member of AGI's controlled group.

The Appeals Board concluded that the determination of whether LaSalle, as of the Plan's termination date, owned 100% of AGI's stock depends on whether the stock was held in a resulting trust for the benefit of LaSalle on the termination date.³⁴ The Appeals Board further decided, for the reasons explained below, that the evidence before the Appeals Board does not establish that LaSalle was a beneficial owner of the stock based on a resulting trust.³⁵

A. Legal Framework for the Finding of a Resulting Trust

It is well settled that "a resulting trust [arises] wherever the circumstances surrounding the disposition of property raise an inference, not rebutted, that the transferor does not intend that the person taking or holding the property . . . should have the beneficial interest therein."³⁶ The burden of proof is generally on the proponent of the resulting trust.³⁷

³³ In response to your request for information, PBGC's Disclosure Officer provided you with the following two documents that provide detailed explanations of PBGC's reasons for asserting controlled group liability against LaSalle: (1) a January 22, 2008 Memorandum ("OCC Memorandum") from PBGC's Office of the Chief Counsel to the Manager of PBGC's Trusteeship Processing Division 4 ("TPD-4"), which explained the law and identified facts that appear to be relevant to LaSalle's liability as a potential controlled group member; and (2) a February 15, 2008 Memorandum titled "Controlled Group Analysis of Arkansas General Industries, Inc.," ("Controlled Group Analysis"), which sets forth the reasons for TPD-4's determination that LaSalle is in a parent-subsidiary controlled group with AGI.

³⁴ We note that the OCC Memorandum states, at p. 17, that "whether LaSalle was the owner of the AGI stock at DOPT for controlled group purposes depends on whether the stock was held in a resulting trust for the benefit of LaSalle at DOPT." Likewise, TPD-4's controlled group analysis focuses solely on whether the stock was held in a resulting trust for the benefit of LaSalle. See Controlled Group Analysis, p. 1-2. The Appeals Board did not identify any alternative basis for finding LaSalle liable as a controlled group member that is supported by the record in this case.

³⁵ Both the appeal and the OCC Memorandum address this issue at some length. The appeal suggests that the reference in IRC § 1563(d)(1) to "stock owned directly by such corporation" precludes a finding that a beneficial owner of stock can be held liable as a controlled group member. PBGC, referring to, among other things, IRS Private Letter Ruling 88-01-042 (October 13, 1987) and IRS General Counsel Memorandum 39,710 (March 10, 1998), which address how the IRS has applied the "owned directly" phrase with respect to another section of the Code (IRC § 1504), asserts that controlled group status can be established based on the beneficial ownership of stock.

The OCC memorandum also discussed a theory under which LaSalle, as the beneficiary of a resulting trust, would have constructively owned the stock of AGI under 26 U.S.C. § 1563(d)(1)(B). Because the Appeals Board found that the evidence in the record does not establish that there was a resulting trust, it is unnecessary to address this issue.

³⁶ *Hong Kong Electro-Chemical Works, Ltd. v. Less*, 539 F.3d 795, 798 (7th Cir. 2008).

³⁷ See, e.g., *Hong Kong Electro-Chemical Works, Ltd.*, 539 F.3d 795, 798 (7th Cir. 2008); Restatement

One relevant consideration in determining whether a resulting trust exists is whether an entity (other than the title owner) provided the consideration for the purchase of the property. Section 9 of the Restatement (Third) of Trusts (“Restatement”) provides, in pertinent part, that “where a transfer of property is made to one person and the purchase price is paid by another, a . . . resulting trust arises in favor of the person by whom the purchase price is paid . . . unless the latter manifests an intention that no resulting trust should arise”³⁸

In essence, under the Restatement and case law, the payment of the purchase price creates a rebuttable presumption.³⁹ The presumption or “inference of a resulting trust may be overcome by written or spoken words or by the conduct of the parties, or by other evidence, showing in the circumstances an intention that a resulting trust should not arise but rather that the transfer was to serve another purpose.”⁴⁰ If the presumption is overcome by such a showing, then the ultimate burden shifts back to the proponent of the resulting trust to establish the existence and extent of such a trust.⁴¹ Finally, the comments to the Restatement note that a “resulting trust is, in effect, a last resort based on a legally presumed intention when no other explanation for the transfer is established.”⁴²

B. The Presumption of a Resulting Trust

Courts generally presume that the person who provided the consideration, which allowed another person to take legal title to property, intended to create a trust at the time of the transfer of consideration and legal title.⁴³ In its Controlled Group Analysis of AGI, TPD-4 determined that the GII Owners “bargained for a release from LaSalle, such that the release was consideration for the stock of AGI.”⁴⁴

(Third) of Trusts § 9 cmt. f(1) (2003); 23 , The Law of Trusts and Trustees § 464 (Third Ed. 2005).

³⁸ Restatement (Third) of Trusts § 9(1)(a) (2003).

³⁹ See, e.g., *Wagner v. Hendry*, 2000 Del. Ch. LEXIS 33, *24-*26 (Del. Ch. 2000); *Hudak v. Procek*, 727 A.2d 841, 843 (Del. 1999) (citing *Adams v. Jankouskas*, Del. Supr., 452 A.2d 148, 152 (Del. 1982)); *Greenly v. Greenly*, 49 A.2d 126, 128-130 (Del. Ch. 1946).

⁴⁰ Restatement (Third) of Trusts § 9 cmt. e (2003).

⁴¹ Restatement (Third) of Trusts § 9 cmt. f (1) (2003).

⁴² Restatement (Third) of Trusts § 9 cmt. e (2003).

⁴³ See, e.g., *Scott v. Comm.*, 226 F.3d 871, 874 (7th Cir. 2000); *Ward v. Unitrin Direct Property & Cas. Co. (In re Stafford)*, 357 B.R. 730, 737-738 (Bankr. W.D.N.C. 2006); *Hudak v. Procek*, 727 A.2d 841, 843 (Del. 1999)

⁴⁴ Controlled Group Analysis, p. 2.

LaSalle, on the other hand, contends that it did not pay any consideration for the stock transfer to ICWC.⁴⁵ Specifically, in disputing that the mutual release constituted consideration for the AGI stock, LaSalle states that it “agreed to mutual releases because it made sense to preserve LaSalle Bank N.A.’s collateral and because LaSalle Bank N.A. had no claims against the owner/directors anyway.”⁴⁶ In essence, LaSalle contends that the releases cannot be considered consideration because the GII Owners were not personally liable to LaSalle for AGI’s debt. Under this view, even if the releases had not been granted, LaSalle would not have been able to pursue any claims against the GII Owners because none of them had personally guaranteed the loan.

There is nothing in the record that explains why the GII Owners wanted a release from LaSalle. However, the release must have had some value to the GII Owners because they would not agree to the transfer without it. In a June 7, 2002 letter to PBGC, LaSalle’s former attorney, [redacted] of Schwartz Cooper, states that the stock transfer was conditioned on a release from LaSalle:

Pursuant to discussions between [redacted] and members of my firm, however, we learned that [redacted] would agree to a transfer to (sic) the outstanding capital stock of AGI to a third party acceptable to LaSalle. *As a condition of the transfer*, [redacted] wanted a release from LaSalle. LaSalle agreed to that, provided that the release was mutual. *No other consideration* was given for the transfer and on or about February 20, 2001, General Industries, Inc. transferred to (sic) stock of AGI to a nominee designated by our firm.

June 7, 2002 Letter from [redacted] (emphasis added). Similarly, in a sworn affidavit submitted to the Appeals Board, [redacted] of Schwartz Cooper states that “the AGI shareholders would not agree to the transfer unless LaSalle agreed to release them from personal liability.”⁴⁷

Based on the foregoing, the Appeals Board found that the releases executed by LaSalle constituted consideration for the stock transfer. The evidence establishes that the GII Owners would only transfer the stock if LaSalle agreed to release them from personal liability, and thus GII obtained something of value to it in return for its transfer of the AGI stock. And, as noted in [redacted] letter, no other consideration was given for the transfer of the stock. Therefore, the Appeals Board determined that a presumption of a resulting trust arose in favor of LaSalle because it paid the “purchase price” for the stock transfer.

⁴⁵ See LaSalle Appeal, at 21.

⁴⁶ *Id.* at 22.

⁴⁷ [redacted] Affidavit ¶ 16.

The Appeals Board also found, however, that neither the property involved (the AGI stock) nor the consideration for its transfer (the releases) was of great value at the time of the transfer. It appears that AGI was insolvent, there were no prospective purchasers of the AGI stock, and the stock ultimately proved to be worthless upon AGI's liquidation. We also found nothing in the record indicating that LaSalle had a basis for successfully establishing legal claims against the owners/directors of GII.

The relatively low financial value of the releases and stock, in our view, diminishes the strength of the resulting trust presumption. This is because if a business entity provides valuable consideration in transactions involving a transfer of property, it logically would want to obtain an ownership interest in the property (or some other valuable consideration) in return. If instead both the property and consideration are of little value, the presumption that the party providing the consideration had sought an ownership interest is weaker, and hence the presumption is easier to rebut.

C. Corroboration and Rebuttal of the Resulting Trust Presumption

As previously noted, the presumption or "inference of a . . . resulting trust may be overcome by written or spoken words or by the conduct of the parties, or by other evidence, showing in the circumstances an intention that a resulting trust should not arise but rather that the transfer was to serve another purpose."⁴⁸ Intent is the crucial element.⁴⁹

With respect to intent, the comments to the Restatement provide, in pertinent part, that "a resulting trust does not arise if the person by whom the purchase price is paid manifests a contrary intention."⁵⁰ "That intention may be found in evidence of either an intention of the payor or an agreement of the payor and transferee that the transaction is to serve some donative, business, or other purpose."⁵¹ The comments note, for example, that "parol evidence may establish a business purpose with the underlying agreement providing for the involvement or participation of the payor and others, including possibly the transferee, in any of a variety of roles."⁵²

Both PBGC and LaSalle have addressed at length this question of intent. In its Controlled Group Analysis, TPD-4 first considered three possible means of rebutting a

⁴⁸ Restatement (Third) of Trusts § 9 cmt. e (2003).

⁴⁹ See, e.g., *Hong Kong Electro-Chemical Works, Ltd. v. Less*, 539 F.3d 795, 798 (7th Cir. 2008); *In re Valente*, 360 F.3d 256, 262 fn. 3 (1st Cir. 2004); *Estate of Horstmeier v. Commissioner*, 77 T.C.M. (CCH) 1940 (Tax Court 1999).

⁵⁰ Restatement (Third) of Trusts § 9 cmt. e (2003).

⁵¹ Restatement (Third) of Trusts § 9 cmt. e (2003).

⁵² Restatement (Third) of Trusts § 9 cmt. e (2003).

presumption of a resulting trust: (1) whether the intent was to make a gift; (2) whether property was transferred to discharge a debt or other obligation owed to the transferee; or (3) whether the payor was making a loan of the purchase price to the transferee.⁵³ Here, TPD-4 concluded that there was no evidence in the record of any of these circumstances.⁵⁴ Restricting the analysis to these factors alone, however, does not appear to be appropriate in a business context in which the involved parties are corporations. Therefore, in considering evidence concerning LaSalle's intent, the Appeals Board examined other aspects (in addition to the initial three identified by TPD-4) that relate to the business purpose of the stock transfer transactions.⁵⁵

LaSalle was a secured creditor of AGI. It asserts that its actions with respect to the stock transfer were in furtherance of its interest as a secured creditor to be repaid. Thus, according to LaSalle, its intent (or purpose) has "always been to seek repayment of a debt, not to become owners of AGI stock."⁵⁶ LaSalle has submitted a number of affidavits in support of this proposition. For example, LaSalle's former Senior Vice President, [redacted] states that "LaSalle's one and only interest as a creditor of AGI was to protect AGI's assets so they could be liquidated for the maximum amount."⁵⁷ Similarly, [redacted] of Schwartz Cooper states that "LaSalle's actions with regard to AGI and its managers was in LaSalle's capacity as a creditor only."⁵⁸

In examining this issue, the Appeals Board first looked for any documentary or other evidence that would show whether or not LaSalle explicitly had manifested the intent not to be the beneficial owner of the AGI stock. The documents the Board examined, however, are silent with respect to any beneficial ownership of the stock, with the exception of the three affidavits described above and certain letters that were sent by Schwartz Cooper to PBGC. The affidavits of [redacted] [redacted] and [redacted] essentially all deny that LaSalle had intended to own the stock, either legally or beneficially. The affidavit statements, however, were prepared and signed after PBGC had initiated litigation. They were signed by a former officer of the potentially liable party (LaSalle) and by two attorneys in the law firm that had served as LaSalle's

⁵³ See Controlled Group Analysis at page 3.

⁵⁴ These factors are cited in numerous cases, virtually all of which involve consideration for property transfers by individuals, typically family members. See, e.g., *Bird v. Stein*, 258 F.2d 168, 176 (5th Cir. 1958); *U.S. v. Schroeder*, 242 F. Supp. 430, 433, affd. 348 F.2d 223 (8 Cir. 1965); *Cook v. Blazis*, 365 Ill. 625, 628 (1937).

⁵⁵ This broader approach is consistent with the Comments to the Restatement, which, as discussed, state that a contrary intention is indicated by a showing that the transaction is to serve some "donative, business, or other purpose." Restatement (Third) of Trusts § 9 cmt. e (2003).

⁵⁶ LaSalle Appeal at 21.

⁵⁷ [redacted] Affidavit ¶ 7.

⁵⁸ [redacted] Affidavit ¶ 26.

legal counsel on a number of issues related to the AGI secured loans. The Appeals Board recognized that the affidavits had the potential of being self-serving; thus, we examined the totality of the circumstances in the case to determine whether the statements in the affidavits had additional support in the record.

The Appeals Board concluded that LaSalle's assertion that its primary purpose was to maximize the value of its collateral is reasonable and, thus, is entitled to some weight. The agreement in which GII pledged the stock of AGI to LaSalle provided that LaSalle could sell the stock in a private or public sale upon a default under the Loan Agreement.⁵⁹ The formal stock sale remedy clearly would yield little (or nothing) of value to LaSalle, however, in light of (1) the clear record of AGI's financial distress, and (2) the willingness of [redacted] to assign the stock to a third party and to receive only the Release in return. Thus, it is reasonable to view the informal actions LaSalle took (i.e, the execution of the Release and its approval of the AGI stock transfer to a third party) as maximizing its potential recovery as a secured creditor, even it had no ownership interest in the AGI stock. Accordingly, the Appeals Board found that LaSalle provided a plausible alternative explanation of a business purpose, which is supported by the record and is consistent with LaSalle's status as a secured creditor. The Appeals Board further concluded that this evidence of a business purpose other than to become a beneficial owner tends to rebut the presumption of a resulting trust.

The Appeals Board next examined whether or not LaSalle enjoyed (or suffered) any of the rights normally incident to the ownership of stock.⁶⁰ PBGC also had made a similar inquiry and had identified the following ownership rights: (1) management; (2) receipt of dividends; (3) the filing of tax returns (which, in the case of consolidated tax returns, includes the possible offset of tax losses against tax gains); and (4) the right to share in any increase in the value of the business, which would occur (for example) if the business was sold for a favorable price.

The Appeals Board found that, with respect to the AGI stock, LaSalle did not exercise any of the above-listed ownership rights or receive any of their benefits. As is discussed in more detail later in this decision, the Board did not find any substantial evidence that LaSalle had managed AGI's business operations. LaSalle also did not receive dividends, which (to the Board's knowledge) were not paid to anyone during the period in question. Nor did LaSalle file a tax return on behalf of AGI. Finally, while LaSalle received a cash payment upon the sale of AGI's assets, it was paid as a secured creditor (for less than its full security interest), rather than as a stockholder. The Appeals Board concluded that the lack of these ownership rights and obligations was evidence that tended to rebut the presumption of a resulting trust.

⁵⁹ Exhibit 9 to the LaSalle Appeal (December 11, 1998 Pledge Agreement, ¶ 4(b)).

⁶⁰ As PBGC correctly stated in the OCC Memorandum at 12, "a resulting trustee is 'entitled to the beneficial ownership of the property subject to a resulting trust[]' . . . And beneficial ownership means entitlement to rights normally incident to the ownership of stock." OCC Memorandum at 12 (quoting *Wagner v. Hendry*, 2000 WL 238009, *6 (Del. Ch. 2000)).

In addition to the above-listed indicia of beneficial ownership, PBGC considered other circumstances that either corroborated, or rebutted, the presumption of a resulting trust. In examining this evidence, PBGC focused upon: (1) the relationship of the payor (LaSalle) and the transferees (ICWC, [redacted], and RS Holding); (2) the declarations of the payor; and (3) the conduct of the payor and transferee. The Appeals Board similarly analyzed these factors, which are discussed below.

Relationship of the Payor and the Transferees. In examining the relationship between the parties, TPD-4 notes that, after the stock transfer, each of the three title owners of the AGI stock has been either an attorney at Schwartz Cooper, or a corporation wholly owned by a Schwartz Cooper attorney, and that “[a]ttorneys are agents of their clients.” Because of this agency relationship between attorney and client, TPD-4 suggests that any act taken by a Schwartz Cooper attorney or a wholly-owned corporation, including the acquisition of the AGI stock, must have been done as agent for LaSalle.

LaSalle disputes that Schwartz Cooper or RS Holding acted as its agent with respect to the stock transfer. For example, [redacted] states that “RS Holding was not acting as an agent of LaSalle when it acquired and later participated in the operation of the manufacturing business of AGI.”⁶¹ Schwartz Cooper similarly disputes that it acted as LaSalle’s agent in this regard. [redacted] states that “Schwartz Cooper...did not act as LaSalle’s agent when making the decision that Schwartz Cooper would take on AGI.”⁶² Finally, according to [redacted] of Schwartz Cooper “[n]either [redacted] nor I acted as LaSalle’s agent in connection with the transfer of AGI’s stock to RS Holding.”⁶³

Based on our review of the record, the Appeals Board found that the evidence is insufficient to establish that LaSalle explicitly had authorized Schwartz Cooper to act as its agent for the purpose of obtaining ownership of the AGI stock for the bank. Additionally, the Board concluded that an agency relationship regarding the stock transfer cannot be presumed based solely on the attorney/client relationship between Schwartz Cooper and LaSalle. While Schwartz Cooper provided LaSalle with legal advice and legal services on other matters, the transfer of the AGI stock to (ultimately) RS Holding involved business transactions that were outside the scope of the usual attorney/client relationship. Accordingly, the Appeals Board found that the Schwartz Cooper attorneys did not act as LaSalle’s agent when the AGI stock was transferred.⁶⁴

⁶¹ [redacted] Affidavit ¶ 15.

⁶² [redacted] Affidavit ¶ 14.

⁶³ [redacted] Affidavit ¶ 17.

⁶⁴ [redacted] affidavit states that Schwartz Cooper’s proposal to purchase the AGI stock “had the secondary benefit of increasing Schwartz Cooper’s prospects of obtaining future business from LaSalle.” [redacted] Affidavit, ¶ 15. And that “...the proposed transaction was intended, in part, to assist LaSalle...” *Id.* at ¶ 14. This does not necessarily mean, however, that the entities acquired the stock as a resulting trustee. Rather, as is discussed

Declarations of the Payor. With respect to this factor, TPD-4 notes that, in a June 2, 2002 letter to PBGC, [] described the first title owner of the AGI stock as a “nominee” selected by Schwartz Cooper. Because a nominee is typically understood to be a person who acts in the place of another, TPD-4 determined that [] use of the term “nominee” to refer to ICWC corroborates the presumption of a resulting trust.

In disputing this determination, LaSalle states that, in a subsequent letter, [] clarified that he used the term nominee “not in the legal sense...but as the word is commonly used to mean one who is ‘nominated.’”⁶⁵ In the letter referred to by LaSalle, [] states that:

The use of the term ‘nominee’ in my June 7, 2002 letter to you to describe the stock of AGI having been transferred ‘to a nominee designated by our firm’ meant only that Iowa County Wisconsin Corp . . . was the party named, or ‘nominated,’ to be the transferee of the AGI stock. This is not a case in which LaSalle acquired beneficial ownership of the AGI stock and then named another party to hold legal title while retaining the beneficial ownership.

August 29, 2002 Letter from [] to PBGC.

The Appeals Board concluded that the reference to “nominee” in the June 7, 2002 letter is insufficient to establish either the intention of the payor (LaSalle) or an agreement between the payor and transferee to create a resulting trust. The pertinent language in the letter, which is quoted on page 8 of this decision, first states that, pursuant to “discussions between [] and members of my firm,” [] learned that GII would agree to a transfer of “the outstanding capital stock of AGI to a third party acceptable to LaSalle.” Then, after discussing [] request for a release from LaSalle and LaSalle’s subsequent agreement to mutual releases, the letter states that, on or about February 20, 2001, GII “transferred (sic) stock of AGI to a nominee designated by our firm.” The letter does not specifically identify, however, the party on whose behalf the “nominee” was acting. Furthermore, the reference earlier in this paragraph to “a third party acceptable to LaSalle” implies that an entity other than LaSalle would be the owner of the AGI stock. Thus, even if the term “nominee” is viewed in its legal sense, the language in the letter does not, by itself, establish that LaSalle was the beneficial owner of the stock, either based on a resulting trust or for some other reason.⁶⁶

later, there were business reasons for LaSalle to have supported the sale of the AGI stock to the Schwartz Cooper-controlled entities, even if LaSalle did not become the beneficial owner of the stock.

⁶⁵ LaSalle Appeal at 26.

⁶⁶ The OCC Memorandum, at footnote 48, suggests a “nominee theory” under which LaSalle would be liable as the direct owner of the AGI stock. Since this nominee theory requires a factual finding that ICWC is the “nominee” of LaSalle, we found that the evidence is insufficient to establish LaSalle’s liability

As an additional basis in support of its finding of a resulting trust,” TPD-4 states that there was an assignment of the stock each time it was transferred, and that each of the assignments define the nominal transferee as the “Assignee.”⁶⁷ Here, TPD-4 notes that the first Assignment refers to AGI’s indebtedness to the Assignee; GII’s guarantee of AGI’s obligation to the Assignee; GII’s pledge of the stock to the Assignee; and delivery of the stock to the Assignee. Similarly, the second and third Assignments state that the stock certificate “has already been delivered to Assignee.” Although LaSalle was not a party to the assignments, the references to “Assignee” describe LaSalle—not the title owners. Given this, TPD-4 concluded that, if LaSalle and the title owners “intended that the [t]itle [o]wners have the beneficial ownership of the stock, it seems likely that... [they]...would have protected their ownership by insisting that the identity of the Assignee be clarified, and LaSalle would not have objected.”⁶⁸

LaSalle, on the other hand, argues that the use of the term “Assignee” to refer to LaSalle was “clearly erroneous,” and that PBGC cannot rely on such an error to avoid the necessity of proving the legal elements of beneficial ownership.⁶⁹ [redacted] also addressed this issue in his August 29, 2002 letter to PBGC, stating that GII’s “[a]ssignment of AGI’s capital stock was not an assignment to LaSalle.”⁷⁰ Rather, according to [redacted] the “...recitals in the Assignment document erroneously described Iowa County Wisconsin Corp. as if it were the secured lender, but that error is not evidence that LaSalle became the beneficial owner of the AGI stock, which it did not become.”⁷¹

The Appeals Board found that the Assignments clearly contained errors in certain of their factual representations.⁷² The Appeals Board concluded that these errors do not shed much light upon the central question of whether or not a resulting trust was intended, since the errors and the failure to correct them could have occurred for a number of different reasons.

Conduct of the Payor and the Transferees. In addition to finding an agency relationship with respect to the stock transfer, TPD-4 noted that Schwartz Cooper represented

as a direct owner.

⁶⁷ Controlled Group Analysis, p. 3.

⁶⁸ Controlled Group Analysis, p. 3.

⁶⁹ LaSalle Appeal at p. 26.

⁷⁰ Exhibit 15 to the LaSalle Appeal (August 29, 2002 Letter from [redacted])

⁷¹ *Id.*

⁷² It is a quandary to the Appeals Board why these mistakes in drafting occurred, when the parties affected by it presumably were sophisticated in financial matters.

both AGI and LaSalle, and that there was some evidence that Schwartz Cooper billed LaSalle for legal work that it performed for AGI.⁷³ The legal work TPD-4 identified is a January 12, 2001 letter from [redacted] of Schwartz Cooper to Firststar Investment Advisory (“Firststar”).⁷⁴ Firststar was an investment manager for the Plan. According to TPD-4, Schwartz Cooper’s “bill to LaSalle for ‘Arkansas General Industries credit facility work’...lists the drafting of . . . [a] letter by . . . [redacted] . . . on July 11, 2001.”⁷⁵ TPD-4 inferred from this that LaSalle was billed for work done for AGI, which it states is more typical of a parent-subsidary relationship than a debtor-creditor relationship.

Without specifically addressing this letter, LaSalle contends that it was never billed for any of AGI’s legal work.⁷⁶ Similarly, [redacted] deny that LaSalle was ever billed for legal work associated with the incorporation of RS Holding, and the stock transfer to the Schwartz Cooper-controlled entities.⁷⁷

The record contains only a heavily redacted copy of the billing statement.⁷⁸ Although the bill shows that Schwartz Cooper charged LaSalle for a letter that [redacted] had drafted on July 11, 2007, the redacted copy does not indicate the recipient of the letter. Thus, it is not clear whether LaSalle was billed for the Firststar letter, or for some other legal work. Moreover, the June/July 2001 billing statement is the only evidence in the record that LaSalle was billed for legal work done for AGI. The Appeals Board thus is unable to find, based solely on this bill, that LaSalle was paying AGI’s legal fees.

Somewhat stronger support for creation of a resulting trust is found in the Release, dated February 20, 2001, which was executed by a LaSalle officer and by the individual stockholders of GII. This Release states that “GII, on the date hereof, is assigning the Pledged Stock to Iowa County Wisconsin, Corp. at the request of LaSalle.” While LaSalle in its capacity of Pledgee clearly was required to give its approval before the AGI stock could be assigned from GII to a different entity, the recital that the transfer was “at the request of LaSalle” suggests that LaSalle took a more active role in the transaction than merely approving the change in ownership.⁷⁹ Nevertheless, as discussed above, it clearly was in LaSalle’s

⁷³ Controlled Group Analysis, p. 3.

⁷⁴ July 12, 2001 Letter from [redacted]

⁷⁵ Controlled Group Analysis, p. 3.

⁷⁶ LaSalle Appeal at 27.

⁷⁷ [redacted] Affidavit ¶ 20; [redacted] Affidavit ¶ 18.

⁷⁸ August 24, 2001 Statement from Schwartz Cooper to LaSalle.

⁷⁹ We note that the Pledge Agreement prohibited GII from transferring the AGI stock, and it also provided that LaSalle could sell the AGI stock in a private or public sale upon a default under the Loan Agreement. Although the appeal asserts that there was a default under the Loan Agreement prior to the transfer of the AGI stock, there is no evidence that LaSalle formally executed its rights under the Pledge Agreement to sell the AGI stock.

interest for the AGI stock to be transferred from GII to a third party - who then would be expected to preserve AGI's value as a going concern - even if the third party was both the titular and the beneficial owner of the stock. Thus, the language in the Release does not, by itself, provide conclusive evidence of LaSalle's intent to be the beneficial owner under a resulting trust.

Although AGI continued to be operated as a going concern for a year between the date of the stock transfer (February 20, 2001) and the sale of substantially all of AGI's assets (February 19, 2002), there is surprisingly little evidence in the record as to who was involved in AGI's business operations and management during this time period. The only information concerning AGI's management that we found noteworthy are the execution of the following five documents by RS Holding: (1) two documents, executed in February 2001, which changed the number of directors on AGI's Board of Directors to one and elected [redacted] as Director; and (2) three documents, executed shortly before the sale of AGI's assets to DMI, which named an Assistant Secretary of AGI, approved the Asset Purchase Agreement and related documents, and changed AGI's name, as required by the Asset Purchase Agreement. Each of these documents is consistent with RS Holding acting as the sole owner of AGI during this period, with no input from LaSalle concerning the Company's operations and management. Additionally, we examined the Asset Purchase Agreement, which identifies RS Holding as the "Stockholder" and LaSalle as the "Secured Party." [redacted] signed this Agreement on behalf of RS Holding. We found nothing in the Asset Purchase Agreement that would indicate that LaSalle was the beneficial owner of RS Holding.

D. Our Conclusions on the Resulting Trust Issue

While LaSalle's appeal makes a number of specific arguments, the crux of its position is that its intent (or purpose) has "always been to seek repayment of a debt, not to become owners of AGI stock." More specifically with respect to the transfer of AGI stock, LaSalle asserts (as stated in the [redacted] affidavit) that "LaSalle's one and only interest as a creditor of AGI was to protect AGI's assets so they could be liquidated for the maximum amount."

While we accepted LaSalle's position that its primary goal was to obtain liquidation of AGI's assets for the maximum amount, this did not end our analysis. As discussed above, LaSalle provided the requested releases of claims that were needed for the transfer of AGI stock to an entity established by a partner in the Schwartz Cooper law firm. That law firm had represented LaSalle on this and other matters, and the firm and at least two of its attorneys admitted they were motivated, in part, by their desire for future legal business from LaSalle.

Under these stock transfer transactions, the AGI stock either could have been held: (1) both in law and beneficially by RS Holding, as LaSalle claims; or (2) by RS Holding in law but by LaSalle beneficially, as PBGC claims. Either of those arrangements would have met LaSalle's purpose of liquidating AGI's assets for the maximum amount. For this reason, the Appeals Board found the resulting trust issue to

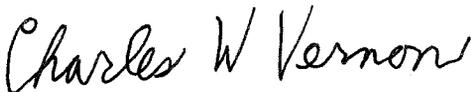
be a close question that required a careful examination of all the evidence that is probative of LaSalle's actual intent.

Based on the particular circumstances of the case, we determined that, on balance, the evidence is insufficient to support the finding of a resulting trust. This determination is based on the factual findings and the analysis discussed above. Particularly, the Appeals Board concluded: (1) while a resulting trust presumption is established because LaSalle provided the consideration for the stock transfer, the low financial value of the consideration diminishes the strength of the presumption; (2) this presumption is rebutted because, based on the available evidence, we found it reasonable that LaSalle could have taken its actions to further its interest as a secured creditor; (3) LaSalle did not exercise the rights normally incident to stock ownership, and it did not receive the benefits or incur the obligations of stock ownership during the time period in question; and (4) other evidence concerning the relationships among the parties, the declarations of the payor (LaSalle), and the conduct of the parties is inconclusive concerning whether LaSalle intended to be the beneficial owner of the AGI stock.

III. DECISION

Based on the foregoing facts and authorities, the Appeals Board decided that, under Title IV of ERISA, LaSalle was not under common control with AGI, or with the other members of the AGI controlled group, as of the date the Plan terminated. Accordingly, the Board granted your appeal. LaSalle is not liable to PBGC for the Plan's unfunded benefit liabilities. This is PBGC's final administrative action with respect to the matters decided in this decision.

Sincerely,



Charles W. Vernon
Chair, Appeals Board