IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

In re: DURANGO GEORGIA PAPER COMPANY, DURANGO GEORGIA CONVERTING CORPORATION, and DURANGO GEORGIA CONVERTING, LLC, Debtors.	Chapter 11 Case No. 02-21669-JSD Jointly Administered

PENSION BENEFIT GUARANTY CORPORATION'S RESPONSE TO OBJECTION AND MOTION FOR ALLOWANCE OF CLAIMS

The bankruptcy claims process is intended to be a simple procedure for determining creditors' entitlements in the bankrupt estate. The law is clear that these entitlements arise in the first instance from substantive nonbankruptcy law,[1] which in this case is Title IV of ERISA[2] and its implementing regulations. After 14 years of bankruptcy and two attempts to state cognizable substantive objections to PBGC's claims, the Debtor has wholly failed to meet its burden. The Debtor invites the Court to ignore the statutory scheme that governs the nation's pension-plan insurance system, as well as the clear and consistent precedent that establishes that PBGC's regulations govern the calculation of its claims. The Court should hold that ERISA controls the calculation

[1] *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000).

[2] Title IV of the Employee Retirement Income Security Act of 1974 is codified at 29 U.S.C. §§ 1301-1461.

of PBGC's claims, overrule the Debtor's Objection in all respects, and allow PBGC's claim.

The Debtor's Objection alludes to the possibility of additional briefing or factual development in this matter. Accordingly, PBGC reserves all rights to fully respond to further arguments or evidence adduced by the Debtor.

BACKGROUND

A. The PBGC and ERISA

The Pension Benefit Guaranty Corporation ("PBGC") is the U.S. government agency that administers the pension plan insurance program under ERISA. PBGC guarantees the payment, up to statutory limits, of the benefits promised to American workers and retirees participating in nearly 24,000 private-sector defined benefit pension plans, and is the statutory trustee of more than 4,700 failed plans.[3] Title IV of ERISA provides a backstop — a guarantee that participants in covered plans will not suffer the "great personal tragedy" of losing all of their promised retirement income.[4] Accordingly, ERISA establishes the exclusive means of terminating a pension plan.[5] If a pension plan has sufficient assets to cover its liabilities, the sponsor can terminate it in a standard termination under 29 U.S.C. § 1341(b). Under a standard termination, the sponsor typically purchases annuities from a private insurer to pay participants' benefits.[6] If a

[3] 2015 PBGC Annual Report at 2, http://www.pbgc.gov/Documents/2015-annual-report.pdf.

[4] *See Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980).

[5] *See* 29 U.S.C. §§ 1341, 1342.

[6] *Id.* § 1341(b)(3)(A)(i)

pension plan does not have the assets to pay those benefits, the sponsor can apply for a distress termination under 29 U.S.C. § 1341(b) if it and its controlled group members meet certain distress tests. Additionally, PBGC can initiate termination of a pension plan under certain circumstances.[7] If a pension plan terminates with insufficient assets to pay promised benefits, PBGC assumes an unconditional obligation to pay participants their lifetime guaranteed benefits.[8]

When a pension plan terminates, its sponsor becomes liable to PBGC for "the total amount of unfunded benefit liabilities" of the pension plan, as of its termination date.[9] "Amount of unfunded benefit liabilities" is defined as the amount by which the value of a pension plan's benefit liabilities — determined as of its termination date "on the basis of assumptions prescribed by [PBGC] for purposes of [29 U.S.C. § 1344]" — exceeds the current value of the pension plan's assets as of its termination date.[10] In 1975, PBGC proposed a valuation regulation that prescribed these assumptions.[11] The regulation — issued in compliance with the notice and comment requirements of the Administrative Procedures Act ("APA")[12] — was adopted on an interim basis in 1976,[13] and finalized in

[7] *Id.* § 1342.

[8] *Id.* §§ 1322, 1361.

[9] *Id.* § 1362(b)(1)(A).

[10] *Id.* § 1301(a)(18).

[11] 40 Fed. Reg. 57,982 (Dec. 12, 1975) (proposed rule).

[12] *See* 5 U.S.C. § 553.

[13] 41 Fed. Reg. 48,484 (Nov. 3, 1976) (interim rule).

1981.[14] It was then amended in 1993,[15] and in 2005,[16] again in compliance with the APA, to modernize and clarify certain assumptions without any change in the overall approach.[17] That regulation is codified at 29 C.F.R. pt. 4044 (the "Valuation Regulation").

The actuarial assumptions in the Valuation Regulation are used to calculate PBGC's Claim number 1581 (the "UBL Claim"), for which PBGC does not seek any priority treatment.[18] To calculate each participant's benefit under a terminated pension plan, PBGC's Office of Benefits Administration performs an audit of participant and plan information by collecting relevant data from the former plan sponsor, and then calculates the value of benefits on an individual-by-individual basis. The value of plan assets is then deducted from the resulting total plan liability to yield a final amount of unfunded benefit liabilities, which is reported, along with a final participant count, in the "Actuarial Case Memo." PBGC provided the Debtor with the Actuarial Case Memo for the Pension Plan on January 4, 2012.

[14] 46 Fed. Reg. 9492 (Jan. 28, 1981) (final rule).

[15] 58 Fed. Reg. 5128 (Jan. 19, 1993) (proposed rule); 58 Fed. Reg. 50,812 (Sept. 28, 1993) (final rule).

[16] 70 Fed. Reg. 12,429 (Mar. 14, 2005) (proposed rule); 70 Fed. Reg. 72,205 (Dec. 2, 2005) (final rule).

[17] The 1993 amendment continued the regulation's historical approach of assigning values to annuity benefits that are in line with private-sector group annuity price; it did not significantly affect the valuations produced for most plans.

[18] "UBL" is an acronym for 'unfunded benefit liabilities,' defined above at footnote 10.

B. The Claims

In April 2003, PBGC timely filed three claims against each of the three Debtors in this bankruptcy case. The claims pertained to the Durango-Georgia Paper Company Pension Plan for Hourly Employees ("Pension Plan"),[19] of which debtor Durango was the contributing sponsor. By stipulation, these nine claims were reduced to three when the debtors were substantively consolidated. PBGC subsequently withdrew one of the claims. This contested matter mainly pertains to PBGC's remaining large claim for the unfunded benefit liabilities of the Pension Plan, defined here as the UBL Claim. PBGC's original estimate of the amount of the UBL Claim was $35,196,000. The final, audited amount of the UBL Claim was $52,218,964, which is stated in the Pension Plan's Actuarial Case Memo and which PBGC asserted in a November, 2015 amendment to the UBL Claim. (The amendment did not change the substantive grounds for the claim.)

In October, 2006, the U.S. District Court for this district entered an order approving the termination of the Pension Plan, establishing March 1, 2004, as the Pension Plan's termination date, and transferring trusteeship of the Pension Plan to PBGC.

[19] The claims were for the unfunded benefit liabilities of the Pension Plan, *see* 29 U.S.C. § 1362, minimum funding contributions owed to the plan, *see id.* § 1082, and pension insurance premiums owed to PBGC, *see id.* § 1307. Claims were asserted against each debtor because liability under the foregoing provisions is joint and several.

ARGUMENT

I. PBGC has met its burden of going forward, but the Debtor has not.

Bankruptcy Rule 1001 provides that the Rules "shall be construed to secure the just, speedy, and inexpensive resolution of every case and proceeding." Accordingly, "[t]he claims process is intended to be a simple, manageable process — not one full of pitfalls that prevent legitimate claims from being paid. The harder courts make it for legitimate creditors to get paid, the farther they get from the goals of bankruptcy and the pursuit of justice."[20] Under the Bankruptcy Rules, the UBL Claim, as amended, is "*prima facie* evidence of the validity and amount of the claim."[21] A claim is properly filed if it conforms substantially to the official bankruptcy form that generally sets forth the basis and amount of the debtor's liability.[22] There are no requirements beyond those found in the Bankruptcy Rules and on the claim form itself.[23]

[20] *In re Crutchfield*, 492 B.R. 60, 68 (M.D. Ga. 2013).

[21] Fed. R. Bankr. P. 3001(f).

[22] *In re Bareford*, 2010 WL 3528604, at *1 (S.D. Ga. Aug. 3, 2010) (a proof of claim executed in accordance with Rule 3001 and Official Form 10 is *prima facie* evidence of the validity and amount of the claim). *Accord In re Bertelt*, 206 B.R. 587, 594 (Bankr. M.D. Fla. 1996) (Claim was valid because it conformed substantially with Form 10 and identified (1) the kind of tax, (2) the tax period, (3) the date of assessment, and (4) the specific amount of each tax, plus the penalties and interest).

[23] *See Walston v. PYOD, LLC (In re Walston)*, 606 Fed. Appx. 543, 547 (11th Cir. 2015) (rejecting an argument that evidence submitted needed to meet criteria not set forth in the Rules).

Thus, the Debtor's charge that the UBL Claim was insufficiently documented,[24] or that PBGC somehow failed to meet its initial burden,[25] is simply incorrect. The Debtor does not identify any way in which PBGC's claim failed to address any requirement in the Bankruptcy Rules or to conform substantially to the official form.[26] PBGC filed its proofs of claim using the official bankruptcy form and a statement in support was attached to each claim, providing additional information about its nature, amount, and statutory basis. Thus, PBGC's proofs of claim established the *prima facie* validity and amount of PBGC's claims.

Indeed, the documents that support the UBL Claim are *the Debtor's own documents*, including (i) the Pension Plan document and its amendments, (ii) pension provisions of collective bargaining agreements, (iii) Pension Plan related documents prepared by the Debtor or its agents, such as Actuarial Valuation Reports and Department of Labor Forms 5500, and (iv) the Debtor's employment records. As noted above, PBGC has given the Debtor the Actuarial Case Memo, which records how PBGC calculated the UBL Claim. The Debtor's accusation that PBGC "hides the ball" is baseless.

Accordingly, the burden shifts to the Debtor to "produce evidence equivalent in probative value to that of the creditor to rebut the *prima facie* effect of the proof of

[24] *See* Objection ¶¶ 41-47.

[25] *Id.* ¶ 45.

[26] In its instructions, the official proof of claim form requires a creditor to provide the amount and basis of the claim. It includes examples, such as, "goods sold, money loaned, services performed, personal injury or wrongful death, and… credit card."

claim."[27] The Debtor "cannot overcome the *prima facie* validity of the claims simply by objecting," but "must support his objections with *evidence* to negate a fact set forth in the proof of claim."[28] *If* the Debtor comes forward with enough evidence to rebut the *prima facie* case, the claim is determined under applicable law.

II. The applicable law in calculating PBGC's UBL Claim is the underlying substantive law set forth in ERISA.

A. *Raleigh* and its progeny make clear that bankruptcy law defers to nonbankruptcy law on the validity and amount of claims.

The Debtor's main argument is that the UBL Claim should be determined using a "prudent investor rate."[29] But the Debtor does not make any showing of how such a rate would be derived, what rate should apply, or how it would affect the amount of the Pension Plan's underfunding. In any case, courts have rejected the prudent-investor-rate argument and have held that the underlying, nonbankruptcy law in ERISA and the Valuation Regulation determines the UBL Claim amount.

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[27] *In re Jordan*, 2000 WL 33943202 at *1 (Bankr. S.D. Ga. Sept. 27, 2000) (noting that a claim objector must produce evidence equivalent in probative value to that of the creditor to rebut the *prima facie* effect of the proof of claim); *see also In re Chambliss*, 315 B.R. 166, 169 (Bankr. S.D. Ga. 2004) ("Affirmative proof must be offered to overcome the presumed validity of the claim."); *Beasley v. Moore (In re Hampton County Warehouses, Inc.)*, 2000 WL 33943205 at *3 (Bankr. S.D. Ga. Mar. 24, 2000) ("Upon objection to the claim, the burden is on the objector, here Trustee, to come forth with sufficient evidence to place the claim in issue.").

[28] *Walston*, 606 Fed. Appx. at 548; *see also Chambliss*, 315 B.R. at 169 ("Affirmative proof must be offered to overcome the presumed validity of the claim.").

[29] "Prudent investor rate" is not defined in ERISA or the Bankruptcy Code. Neither is it an actuarially accepted term. *In re U.S. Airways Group, Inc.*, 303 B.R. 784, 794 (E.D. Va. 2003). One recent court found the term "confusing" because it deals with hypothetical earnings on assets rather than discounted liabilities. *Dugan v. PBGC* (*In re Rhodes, Inc.*), 382 B.R. 550, 555 (Bankr. N.D. Ga. 2008).

A bankruptcy claim is a function of the nonbankruptcy law under which it arises.[30] Bankruptcy law does not displace that substantive law, but rather provides a forum for the resolution of claims under such law. The substantive law that controls the calculation of PBGC's claim is the Valuation Regulation, which has the force of law and is entitled to deference.[31]

In *Raleigh*, the Supreme Court confirmed the principle that "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation."[32] Additionally, the Court held that "[b]ankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditor's entitlements."[33] The Supreme Court later applied *Raleigh* in holding that a creditor could receive attorneys' fees incurred in defending its claims in bankruptcy under a contract that provided for the payment of such fees.[34] There, the Court held that claims that arise under the substantive law are to be allowed under section 502(b), *unless* one of the nine enumerated exceptions applies.[35]

In this case, the underlying substantive law includes the definition of "amount of unfunded benefit liabilities," which expressly incorporates the Valuation Regulation.[36]

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[30] *Butner v. United States*, 440 U.S. 48, 55 (1979); *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161-62 (1946).

[31] *See infra* note 39.

[32] 530 U.S. at 20.

[33] *Id.* at 24-25.

[34] *Travelers Cas. & Sur. Co. v. Pac. Gas & Elec.*, 549 U.S. 443, 450-51 (2007).

[35] *Id.*

[36] *See* 29 U.S.C. § 1301(a)(18).

Congress provided that upon termination of a pension plan, liability arises for, *inter alia*, the total amount of the unfunded benefit liabilities of the plan.[37] That amount is determined by subtracting the value of the plan's assets from the value of its benefit liabilities as of the termination date.[38]

Courts, including the Eleventh Circuit, have without exception upheld the validity of PBGC's regulations. The Eleventh Circuit has held:

> [W]e 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. . . ."[39]

The Valuation Regulation prescribes interest factors "derived from annuity price data obtained by PBGC from the private insurance industry," which, when coupled with the

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[37] *Id.* § 1362(b)(1)(A).

[38] *Id.* § 1301(a)(18).

[39] *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1167-68 (11th Cir. 1988) (quoting *Ford Motor Co. v. Milhollin*, 444 U.S. 555, 568 (1980) and *Red Lion Broadcasting Co. v. FCC.*, 395 U.S. 367, 381 (1969)); *cf. Durango-Georgia Paper Co. v. H.G. Estate, LLC*, 739 F.3d 1263, 1273 n.25 (11th Cir. 2014) (PBGC's interpretations of ERISA deference are entitled to deference); *accord Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1245 (11th Cir. 2000); *see also Cox Enterprises, Inc.*, 2014 WL 3511228 at *12-13 (holding that the Court must give the Valuation Regulation deference and that it controls the formulation of the PBGC's claim for unfunded benefit liabilities).

mortality assumptions found in the regulation, yield benefit values "in line with industry annuity prices."[40]

Indeed, the Valuation Regulation has the force of law. As noted above, ERISA's definition of the amount of unfunded benefit liabilities requires that the value of the benefit liabilities be determined "on the basis of assumptions prescribed by [PBGC]."[41] It is well settled that administrative regulations adopted pursuant to an express delegation give rise to legislative rules that have the "force and effect of law."[42] "In a situation of this kind, Congress entrusts to the [agency], rather than to the courts, the primary responsibility for interpreting the statutory term."[43]

Congress has also ratified the Valuation Regulation. It was first proposed in 1975, adopted on an interim basis in 1976, and finalized in 1981, in a notice-and-comment rulemaking under the Administrative Procedures Act. When Congress amended ERISA in 1987 to add the provision in 29 U.S.C. § 1301(a)(18) explicitly referring to "assumptions prescribed by [PBGC]" for valuing benefit liabilities, Congress endorsed the applicability of a specific, preexisting regulation.[44]

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[40] *See* Interim Regulation on Valuation of Plan Benefits, 41 Fed. Reg. 48,484; 48,485 (1976).

[41] 29 U.S.C. § 1301(a)(18).

[42] *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

[43] *Batterton*, 432 U.S. at 425.

[44] Pension Protection Act of 1987, Subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9313(a)(2)(F), 1987 U.S.C.C.A.N. (101. Stat.) 1330-365 (1987); *US Airways*, 303 B.R. at 796 ("[PBGC's] regulation was already in effect when [section 1301(a)(18)] was amended to its present form, and the court must therefore presume that Congress knew and approved of the PBGC's general methodology.").

The Debtor asks the Court to ignore the substantive nonbankruptcy law under which the liability arose, relying on the 1998 decision of the Tenth Circuit in *In re CF&I Fabricators* and the 2000 decision of the Sixth Circuit in *In re CSC Industries, Inc*.[45] The Debtor refers to these as "the competing cases,"[46] but if that is so, the competition has been overwhelmingly one-sided. Since the Sixth Circuit's *CSC* decision in 2000, every court to have considered the issue has applied PBGC's Regulation and rejected the reasoning of the Sixth and Tenth Circuits.

In the 2003 case of *In re US Airways Group, Inc.*,[47] the bankruptcy court, in a carefully reasoned opinion citing *Raleigh*, agreed that PBGC's Regulation, not the "prudent investor rate," should be used to calculate the UBL Claim. The court rejected the decisions of the Sixth and Tenth Circuit.[48] It found that "*Raleigh* is very clear that a creditor's claim 'in the first instance' is a function of the nonbankruptcy law giving rise to the claim."[49] The court stated:

> [T]he PBGC's claim for unfunded benefit liabilities should be determined using the PBGC valuation regulation, since Congress has chosen to define the claim by reference to that regulation. Although the amount calculated under the regulation may exceed the amount a hypothetical 'prudent investor' would have to set aside to pay the promised benefits as they became due, the use of a 'prudent

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[45] *See* Objection ¶ 57, 60 (citing *Pension Benefit Guaranty Corp. v. Belfance (In re CSC Indus., Inc.)*, 232 F.3d 505, 509-10 (6th Cir. 2000) and *PBGC v. CF&I Fabricators of Utah, Inc.* (*In re CF&I Fabricators of Utah, Inc.)*, 150 F.3d 1293, 1300-01 (10th Cir. 1998), *cert. den.* 526 U.S. 1145 (1999)).

[46] *See* Objection ¶ 59.

[47] 303 B.R. 784 (Bankr. E.D. Va. 2003).

[48] *Id.* at 792-93.

[49] *Id.* at 792.

> investor' rate impermissibly shifts the risk of loss from adverse stock-market performance . . . to the retirees. Because the PBGC's valuation regulation . . . gives proper weight to Congress's goal of protecting the health of the nation's private pension system, it is to be preferred over the use of a discount rate premised on uncertain projections of future stock market returns.[50]

The *U.S. Airways* court's reasoning has been uniformly followed by various courts, including in *In re UAL Corp.*;[51] *In re Wolverine, Proctor & Schwartz, LLC*;[52] and *In re High Voltage Eng'g Corp.*;[53] and in a well-reasoned decision by a bankruptcy court in this judicial circuit in *In re Rhodes, Inc.*, which held that PBGC's determination of its claim consistent with the Valuation Regulation is binding on debtors and bankruptcy courts.[54]

The Debtor argues that the *Rhodes* court "falls prey to the false premise" that the UBL Claim is a present right to payment of the Debtor's liability under 29 U.S.C. § 1362(b).[55] It contends that PBGC "accelerated" its obligation to the terminated Pension Plan's participants and beneficiaries "via a self-serving regulation."[56] But the Debtor's view of the applicable law is simply incorrect. Congress, not the PBGC, provided that the Debtor is liable on the UBL Claim as of the Pension Plan's termination date, and

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[50] *Id.* at 798.

[51] *In re UAL Corp.*, No. 02-48191 (Bankr. N.D. Ill. Dec. 30, 2005) (Order and Trans. of Hearing, Dec. 16, 2005, at 32-33) (See Exhibit 1).

[52] 436 B.R. 253, 262-63 (D. Mass. 2010).

[53] *In re High Voltage Eng'g Corp.*, No. 05-10787, slip op. at 2 (Bankr. D. Mass. July 26, 2006) (following *In re UAL Corp.* for the reasons there stated) (See Exhibit 2).

[54] *Dugan v. PBGC* (*In re Rhodes, Inc.*), 382 B.R. 550, 559-60 (Bankr. N.D. Ga. 2008)

[55] Objection ¶ 69.

[56] *Id.*

Congress carefully defined that liability by reference to PBGC's Valuation Regulation.[57] *Raleigh* makes clear that bankruptcy courts must defer to this law. Though PBGC has a separate obligation under 29 U.S.C. § 1321 to pay participants and beneficiaries their guaranteed benefits, this is not part of Congress's definition of the Debtor's liability on the UBL Claim.

The Debtor vows to challenge the Valuation Regulation as well,[58] but as explained above, it has the force of law. Under *Raleigh*, the amount of the UBL Claim is determined by reference to ERISA and the Valuation Regulation, and bankruptcy courts must defer to that.

B. Bankruptcy Code section 1123(a)(4) is inapplicable to the calculation of PBGC's claim.

The Debtor invites the Court to follow *CF&I* and use 11 U.S.C. § 1123(a)(4) to trump the nonbankruptcy law that is the basis for the UBL Claim, on the ground that creditors in the same class must be treated equally.[59] But *Raleigh* speaks directly to this point:

> Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides.[60]

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[57] *See* 29 U.S.C. § 1301(a)(18).

[58] Objection ¶ 70.

[59] "Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . . provide the same treatment for each claim or interest in a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4).

[60] 530 U.S. at 24-25.

In the wake of *Raleigh*, no court has agreed with *CF&I* on this issue. Indeed, not only are bankruptcy courts limited to what the Bankruptcy Code provides, the grounds for disallowance of claims is limited to a handful of specific reasons listed under section 502(b).[61]

The court in *Rhodes* provided a particularly thoughtful analysis of the limits of section 1123(a)(4). It reasoned that section 1123 is not at all concerned with how claims should be calculated. Rather, it governs "what a plan of reorganization may and must provide."[62] It explained that the main function of section 1123(a)(4) is to prevent a plan proponent from "rigging the vote" of a particular class by giving special treatment to a dominant member of that class. "It is not a purpose of section 1123(a)(4) to insure that claims are computed correctly, and that section has nothing to do with the allowance of claims."[63]

The *Rhodes* court found that the confirmed plan in that case, with PBGC's claim calculated under ERISA and the Valuation Regulation, did not violate section 1123(a)(4):

> It treated every class member the same way. It did not provide that PBGC would receive a larger, disproportionate dividend relative to other members of that class. Therefore, Debtors' confirmed plan in fact complied with section 1123(a)(4) and with section 1122 with respect to all claims in Class 3, including PBGC's claim, which reveals the argument for revaluing PBGC's claim based on section 1123(a)(4) to be unfounded and without merit.[64]

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[61] 11 U.S.C. § 502(b); *see Travelers*, 549 U.S. at 450.

[62] 382 B.R. at 556.

[63] *Id.*

[64] *Id.* at 556-57.

Accordingly, there is nothing in section 1123(a)(4) that would require PBGC's UBL Claim to be calculated using the "prudent investor rate."

C. Bankruptcy Code section 502(b) does not provide a basis for recalculating the UBL Claim.

The Debtor argues that the UBL Claim is a claim for a stream of future payments that must, under section 502(b), be reduced to present value. This reasoning has been soundly rejected. The *U.S. Airways* court, addressing this issue, held:

> In fixing the amount of a claim "as of the date of the filing of the petition," there is no dispute that the court must discount future damages to present value. Thus, if the PBGC held merely a common-law indemnity claim for future benefits owed to the pilots, there can be little doubt that this court would have full authority to determine an appropriate discount rate as well as related assumptions as to mortality and expected retirement age . . . [t]he distinction here is that the court is not simply valuing a contingent future loss. Rather, Congress, by statute, has expressly given the PBGC a present right to recover an amount determined in accordance with the valuation regulation.[65]

In *Rhodes*, PBGC argued, as it does here, that the UBL Claim has already been reduced to present value. The court agreed with PBGC, stating, "[d]iscovering in the computation of a claim some reference to future payments does not necessarily justify a conclusion that the amount of the claim may be recomputed. . . . [I]t is critical to determine whether the amount of a claim thought to involve future payments already reflects its current value relative to claims presently due."[66] The court concluded that

[65] *U.S. Airways*, 303 B.R. at 793.

[66] *Id.* at 558.

PBGC's UBL Claim is already reduced to a present value by the Valuation Regulation, which has the force of law and is to be given deference.[67]

Thus, the *Rhodes* court concluded that the liquidating agent's argument was really a disagreement with the result produced by the Valuation Regulation, to which the bankruptcy courts must defer under the teachings of *Raleigh*. Because none of the exceptions under section 502(b) applied, PBGC's UBL Claim was allowed in the claimed amount. The same result must obtain in this case.

D. None of the exceptions in section 502(b) apply to PBGC's claim.

Section 502(b) of the Bankruptcy Code governs the allowance of bankruptcy claims, "except as provided in subsections (e)(2), (f), (g), (h) and (*i*)" of section 502.[68] Subsection (e)(2) relates to a claim by a party who is co-liable with the debtor on a debt. It does not apply here, because only the PBGC has liability to the Pension Plan's participants and beneficiaries.[69] Subsection (f) doesn't apply, because PBGC's UBL Claim didn't arise between the date of the involuntary petition and the date of the Order for Relief. Subsection (g) doesn't apply, because the Pension Plan is not an executory contract, and the UBL Claim does not arise from the rejection of an executory contract, but rather from operation of 29 U.S.C. § 1362 as applicable to the Pension Plan's

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[67] *Id.* at 559.

[68] The Supreme Court recently reiterated the principle that a bankruptcy court "shall allow" a claim under section 502(b) unless it falls within 9 specific exceptions. *Travelers*, 549 U.S. at 450-51.

[69] *See United Steelworkers of Am. v. United Eng'g*, 839 F. Supp. 1279, 1285 (N.D. Ohio 1993) (holding that only PBGC has a claim for unfunded benefit liabilities after termination of a covered pension plan).

termination. Subsection (h) doesn't apply, because the UBL Claim is not one for the recovery of property. And subsection (*i*) doesn't apply, because the UBL Claim is not a priority tax claim under section 507(a)(8) of the Bankruptcy Code. Thus, as the *Rhodes* court observed, "[n]one of the exceptions provided in subsections (e)(2), (f), (g),[70] (h) and (i) are relevant to the objection of the [Debtor]."[71]

It is equally clear that none of the nine enumerated exceptions to section 502(b) are applicable here. There is no agreement or law that renders the UBL Claim unenforceable.[72] The UBL Claim "has nothing to do with property tax, child support or alimony, services provided by an attorney for the debtor, damages resulting from the termination of a lease or employment contract, or the late payment of any employment tax."[73] And the UBL Claim was timely filed.[74] Thus, none of the enumerated exceptions to section 502(b) are applicable to the UBL Claim. The Debtor's attempt to shoehorn its claim into one of these subsections should be rejected.

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[70] The Debtor attempts to recharacterize PBGC's statutory claim as a contract claim, asserting that termination of the Pension Plan is actually rejection of an executory contract, and that PBGC's claim should be treated as damages from an executory contract. This is wholly specious. The PBGC's claim, codified at 29 U.S.C. § 1362, is manifestly a statutory claim. Moreover, ERISA provides the exclusive means of pension plan termination. As a result, pension plans cannot be rejected as executory contracts. *See Phillips v. Bebber*, 914 F.2d 41 (4th Cir. 1990) (strict compliance with the terms and procedures set forth in Title IV of ERISA is a prerequisite to pension plan termination).

[71] 382 B.R. at 557.

[72] 11 U.S.C. § 502(b)(1).

[73] *Travelers*, 549 U.S. at 450 (citing 11 U.S.C. § 502(b)(2)-(8)).

[74] *See* 11 U.S.C. § 502(b)(9).

E. PBGC's gains and losses after pension plan termination are irrelevant.

The Debtor also asserts an objection to the UBL Claim based on its view that PBGC's interest rate assumptions are too low and do not accurately reflect the actual return that PBGC received on the Pension Plan's assets after the Pension Plan terminated. As discussed extensively above, the Valuation Regulation controls the assumptions used in the calculation of the UBL Claim.

If Congress had intended for plan sponsors to ameliorate their liability under 29 U.S.C. § 1362 by examining the post-termination performance of PBGC's corporate assets, it would have specifically stated that limitation. But section 1362 makes no mention of this. The Courts should not be in the business of adding to, or limiting, the remedies already provided in the text of ERISA.

F. The Debtor's plea for "commercially reasonable terms" under section 1362 is misplaced.

The liability provisions of Title IV of ERISA provide that the Debtor's liability is due and payable as of the Pension Plan's termination date.[75] It also provides a "Special Rule" that may ameliorate the payment of liability under certain circumstances. The rule is:

> Payment of so much of the liability . . . as exceeds 30 percent of the collective net worth of the [Debtor and its controlled group] (including interest) shall be made under commercially reasonable terms prescribed by [PBGC].[76]

[75] *See* 29 U.S.C. § 1362(b)(1)(A).

[76] *Id.* § 1362(b)(2)(B).

The Debtor argues that this provision entitles it to make installment payments of its liability, and that these payments, being a future stream of payments, must then be discounted to present value. The Court should reject this argument.

The Special Rule is designed to ameliorate the payment of liability when it would be very large relative to a plan sponsor's net worth. The idea is to prevent ERISA liability from putting a company out of business. Here, however, there is no risk of that. In addition, because the Debtor is a liquidating debtor in bankruptcy, its only "commerce" at this point is the liquidation of its estate and the payment of its creditors in accordance with its approved plan of liquidation. That would be the only "commercially reasonable" arrangement after 14 years of bankruptcy.

Conclusion

The Debtor's Objection fails to meet its burden of going forward. It does not put forth any evidence of another claim amount that the Debtor believes reflects a correct calculation of PBGC's UBL Claim. The Debtor's legal arguments hinge on a pair of obsolescent cases that have been rejected by every court to address the calculation of PBGC's claims. *Raleigh* and its progeny set forth the rule of law in this case, and based

[REMAINDER OF PAGE LEFT INTENTIONALLY BLANK]

on those cases, the Court should summarily overrule the Objection and allow the UBL Claim in the claimed amount.

Dated: October 26, 2016
Washington, D.C.

Respectfully submitted,

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Counsel for the Pension Benefit Guaranty Corporation

EXHIBIT 1

Appendix 3

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable Eugene R. Wedoff | Hearing Date December 30, 2005

Bankruptcy Case No. 02 B 48191 | Adversary No.

Title of Case UAL Corporation, et al.

Brief Statement of Motion: Motion of PBGC for partial summary judgment (Docket entry no. 13442)

Names and Addresses of moving counsel:

Representing:

ORDER

It is hereby ordered that the above-stated motion, being treated as a motion in limine, is granted for the reasons stated on the record on December 16, 2005.

Eugene R. Wedoff

THE COURT: Well, if you can give ten days notice, you would do it electronically, pursuant to the case management order.
MR. LIPKE: We will.
THE COURT: I would expect that would

probably be enough. If someone opposes the diminution of the time, I will hear the objection. But I would expect that won't be objected to and we'll be able to go ahead.
MR. LIPKE: Understood, Your Honor.
THE COURT: Okay.
MR. LIPKE: Thank you. Have a good day.
MR. CIMINO: Your Honor, can I hand these up?
THE COURT: If you'd like.
(Document tendered.)
THE COURT: Okay. The next items on the agenda are items 22 through 24, having to do with the creditors committee's objection to the PBGC claim.
MR. ABBOTT: Your Honor, David Abbott from General Foods Credit Corp. I'd just like to interrupt for a moment. You had skipped item number 18.
THE COURT: Oh, excuse me.
MR. ABBOTT: And we can certainly come back to it after you continue with where you are. But the --
THE COURT: Oh, I didn't skip it. That's the omnibus objection.

MR. ABBOTT: No, the -- that was item number 17, the duplicative issue. General Foods Credit Corp. does not have that duplicative issue. And we're prepared to proceed on that argument.
THE COURT: Okay. Well, I'm not prepared. We're going to continue that for status until the 30th of December.
MR. ABBOTT: Okay. Thank you, Your Honor.
THE COURT: Okay. Again then, items 22 through 24 dealing with the creditors committee's objection to the PBGC claim.
MR. SELIGMAN: Good morning, Your Honor. David Seligman on behalf of the debtors.
MR. PRINCE: Good morning, Your Honor. Christopher Prince of Sonnenschein Nath & Rosenthal for the committee.
MR. BOYLE: Good morning, Your Honor. Joe Boyle from Kelley Drye & Warren on behalf of PBGC.
MS. CECCOTTI: Good morning, Your Honor. Babette Ceccotti for the Air Line Pilots Association.
MS. HEERMANS: And, Your Honor, Nancy Heermans and Shannon Novey here for PBGC on the phone.
THE COURT: Okay. Thank you, Ms. Heermans.

Anyone else want to enter an appearance?
(No response.)
THE COURT: All right. This matter, as I said, is before the court on the creditors committee's objection to the claim of the PBGC, but

this claim is subject to a motion for what's called partial summary judgment. I think it's more properly considered as a motion in limine. There is some authority for the proposition that summary judgment is inappropriate unless it completely disposes of a claim, and this does not completely dispose of a claim. But, either way, as we had discussed at the last omnibus, this motion is part of an effort to potentially narrow the issues that would have to be determined at a trial. And so it is of real significance in advancing the resolution of the dispute and the reorganization in general.

There is a number 24, a motion of the creditors committee to exceed the page limit, and that will be granted.

As to the motion for summary judgment, the PBGC seeks a determination that its claim should be valued according to a regulation that it has adopted for such valuation. The applicable

0077

bankruptcy law is found in Section 502(b) of the Bankruptcy Code which states --

The parties may want to sit down. This isn't as long as some of the other ones I've had to read, but still long enough that you might be more comfortable sitting.

Section 502(b) states that claims are to be allowed, quote, "as of the date of the filing of the petition," close quote, and then quoting again, "except to the extent," close quote, that they are subject to disallowance under one of the grounds specified in the nine paragraphs set out in Section 502(b).

Allowance under Section 502(b) necessarily involves the amount of the claim in addition to its validity, since many of the grounds set out in Section 502(b) deal only with the amount of the claim. For example, see Section 502(b)(4) which disallows a claim for services of an insider or an attorney of the debtor to the extent that the claim exceeds the reasonable value of the services rendered. Thus -- or I should say the question of payment is distinct from allowance. Allowed claims may be separately classified by the debtor or they may be subject to equitable subordination. But

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allowance under 502(b) is in the amount that would be applicable under nonbankruptcy law except to the extent that one of the provisions of Section 502(b) applies. There is no general equitable power in bankruptcy courts to disallow claims since that would conflict with Section 502(b). See Raleigh versus Illinois Department of Revenue, 503 U.S. 15, a 2000 decision of the United States Supreme Court.

The amount of a valid claim must therefore be determined as of the petition date according to applicable nonbankruptcy law unless one of the grounds in the nine paragraphs of Section 502(b) applies.

Now, the governing nonbankruptcy law here provides that upon an involuntary termination of a pension plan covered by ERISA, the sponsoring employer and each member of its control group are liable to the PBGC in the amount of, quote,

"unfunded benefit liabilities," close quote, 29 U.S.C. Section 1362(a) and (b).

Under Section 1362(b)(1)(A), the amount of the unfunded benefit liabilities is to be, quote, "calculated from the termination date in accordance with regulations proscribed by the PBGC." Under Section 1301(a)(18), the, quote, "amount of

0079

unfunded benefit liabilities," close quote, means the excess of the benefit liabilities under the plan determined on the basis of assumptions prescribed by the PBGC for purposes of Section 1344 of this title over the current value of the assets of the plan.

The PBGC has adopted regulations under Section 1334 for calculating the amount of unfunded benefit liabilities, 29 CFR 4044.52 to 4044.75, and neither the committee nor ALPA have argued that the regulations are inapplicable or would not be used to determine the amount of United's unfunded benefit liabilities under applicable nonbankruptcy law. Thus, they are binding here in determining PBGC's claim.

In reviewing the precedent on this question, the reasoning that I've outlined is consistent with the decision in In re US Airways Group, Inc., 303 BR 784, Bankruptcy Court for the Eastern District of Virginia, 2003. The contrary decisions in In re CF&I Fabricators of Utah, Inc., 150 F.3d 1293, 10th Circuit, 1998, and In re CSC Industries, Inc., 232 F.3d 505, Sixth Circuit, 2000, are based on holdings that bankruptcy courts do have an equitable power to determine the amount of claims in a manner different than what applicable

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nonbankruptcy law would require. Those holdings do not accurately reflect the provisions of the code that I outlined earlier and so cannot be followed.

On that basis then, the PBGC's motion, treated as a motion in limine, would be granted. And we need to discuss what remaining steps should take place to determine the amount of that claim, including the need to determine the claim as of the petition date.

MR. SELIGMAN: Your Honor, if I could perhaps just make a suggestion on behalf of the debtors? Obviously this narrows the issues. I think we had said before that we thought that the relative -- you know, the relevant actuaries with this ruling could probably get together and figure out the amounts. So I would suggest that perhaps we continue this for a short period of time. I don't even think next -- maybe we can do it in two weeks when there is going to be already the hearing on --

THE COURT: Well, I was going to say as long as the parties are going -- some of the parties are going to be present on the 30th. If that works, I would be happy to have you come in on the 30th and tell me where things stand.

MR. PRINCE: Your Honor, I think you've

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properly characterized it as a motion in limine. And in that connection, I'm not sure that it narrows the issues as much as is presented. And this was an issue raised in our opposition, the 1362(b)(2)(B),

EXHIBIT 2

Appendix 4

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MASSACHUSETTS

In re
HIGH VOLTAGE ENGINEERING CORPORATION, et al.,
Debtors

Chapter 11
Case No. 05-10787-JNF

ORDER

Upon consideration of 1) the Preliminary Objection of the Chapter 11 Trustee to Claims Asserted by Pension Benefit Guaranty Corporation against Debtors High Voltage Engineering Corporation, et al. (the "Preliminary Objection); 2) the PBGC's Response to the Preliminary Objection; 3) the representations and arguments made at the June 21, 2006 hearing on the Preliminary Objection, at which hearing the parties agreed to narrow the initial issue for determination to whether this Court should utilize the underlying substantive law, namely the PBGC's regulations, to determine the amount of its claim or whether the Court should utilize a prudent investor approach advocated by the Chapter 11 Trustee ; 4) the Joint Statement of Facts of the Chapter 11 Trustee and Pension Benefit Guaranty Corporation; 5) the Supplemental Brief in Support of the Preliminary Objection of the Chapter 11 Trustee; 6) the PBGC's Response to the Supplemental Brief; 7) the decisions cited by the parties including, *inter alia*, Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15 (2002); In re US Airways Group, Inc., 303 B.R. 784 (Bankr. E.D. Va. 2003); and In re UAL

Corp., No. 02 B 48191 (Bankr. N.D. Ill. December 30, 2005), the Court hereby overrules the Chapter 11 Trustee's Preliminary Objection. For the reasons stated by Judge Wedoff in UAL Corp., the Court finds that ERISA and the regulations found in 29 C.F. R. § 4044 control the calculation of the PBGC's claim in these solvent Chapter 11 cases.

By the Court,

Joan N. Feeney

Joan N. Feeney
United States Bankruptcy Judge

Dated: July 26, 2006
cc: Jeffrey B. Cohen, Esq., Stephanie Thomas, Esq., John F. Ventola, Esq.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

In re: DURANGO GEORGIA PAPER COMPANY, DURANGO GEORGIA CONVERTING CORPORATION, DURANGO GEORGIA CONVERTING, LLC, Debtors.	Chapter 11 Case No. 02-21669-JSD Jointly Administered

ORDER GRANTING PENSION BENEFIT GUARANTY CORPORATION'S MOTION FOR ALLOWANCE OF CLAIMS

This matter came before the Court upon Creditor Pension Benefit Guaranty Corporation's ("PBGC") *Response to Objection and Motion for Allowance of Claims*. Finding that good cause exists to grant the relief requested, it is hereby:

ORDERED, that the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1301 1461 (2012 & Supp. II 2014), ("ERISA") controls the calculation of PBGC's claims,

ORDERED, that the Debtor's Amended and Restated Objection to Allowance of PBGC's Claim for Unfunded Benefit Liabilities is overruled in all respects, and

ORDERED, that PBGC's Unfunded Benefit Liabilities claim (number 1581) is allowed in the amount of 52,218,964.

SO ORDERED this _____ day of_____, 2016.
Brunswick, Georgia

_____
JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Prepared and presented by:

Local Counsel:

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2016, the Pension Benefit Guaranty Corporation's Response to Objection and Motion for Allowance of Claims was filed using the ECF system and served on the following parties via CM/ECF:

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/s/ Nathaniel Rayle
Nathaniel Rayle