

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

PENSION BENEFIT GUARANTY CORPORATION)	
)	
)	Civil Action No. 4:14-cv-00449-AGF
Plaintiff,)	Honorable Audrey G. Fleissig
)	
v.)	
)	
FBI WIND DOWN, INC.)	
(f/k/a Furniture Brands International, Inc.),)	
as Plan Administrator for the)	
Furniture Brands Retirement Plan)	
)	
Defendant.)	

PBGC’S MEMORANDUM IN SUPPORT OF THE MOTION FOR ENTRY OF AN ORDER TO SHOW CAUSE WHY THE FURNITURE BRANDS RETIREMENT PLAN SHOULD NOT BE TERMINATED IN ACCORDANCE WITH SECTION 4042(c) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

Pension Benefit Guaranty Corporation (“PBGC”) files this memorandum in support of PBGC’s Motion for Entry of an Order to Show Cause Why the Furniture Brands Retirement Plan Should Not Be Terminated in Accordance with Section 4042(c) of the Employee Retirement Income Security Act of 1974 (“Motion to Show Cause”).¹

STATUTORY BACKGROUND

1. PBGC is the United States government agency created to administer the defined benefit pension plan termination insurance program under Title IV of the Employee Retirement

¹ 29 U.S.C. § 1342(c) (2012).

Income Security Act of 1974 (“ERISA”).² The termination insurance program covers more than 32 million workers participating in over 23,000 private sector defined benefit pension plans.³

2. Under 29 U.S.C. § 1342(a), PBGC may institute proceedings to terminate a pension plan covered by Title IV of ERISA whenever it determines, *inter alia*, that: (a) the plan has not met the minimum funding standard required under 26 U.S.C. § 412;⁴ or (b) the plan will be unable to pay benefits when due;⁵ or (c) its possible long-run loss with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.⁶

3. After determining that a plan should be terminated and issuing a notice of its determination to the plan administrator, PBGC may apply under 29 U.S.C. § 1342(c) to the appropriate United States district court for a decree adjudicating that, *inter alia*, the Plan should be terminated in order to protect the interests of the participants or to avoid any unreasonable increase in the liability of the PBGC insurance fund.

FACTS

A. The Pension Plan

4. FBI Wind Down, Inc. (f/k/a Furniture Brands International, Inc.) (“Furniture Brands”) sponsors the Furniture Brands Retirement Plan (“Plan”), a defined-benefit plan covered by Title IV of ERISA.

5. Furniture Brands is the Plan administrator of the Plan as defined in ERISA.⁷

6. PBGC estimates the Plan is underfunded on a termination basis by \$260,800,000 (calculated as of November 2013).

² 29 U.S.C. §§ 1301-1461 (2012).

³ 2013 *PBGC Ann. Rep. 4*, available at <http://www.pbgc.gov/documents/2013-annual-report.pdf>.

⁴ 29 U.S.C. § 1342(a)(1).

⁵ *Id.* § 1342(a)(2).

⁶ *Id.* § 1342(a)(4).

⁷ 29 U.S.C. §§ 1301(a)(1), 1002(16)(A) (2012).

7. The Plan has 18,588 participants, including 9,195 retirees currently receiving benefits.

B. Furniture Brands

8. Furniture Brands is a home furnishings company that began in 1911 as International Shoe Company.

9. On September 9, 2013, Furniture Brands and 18 direct or indirect wholly-owned U.S. subsidiaries filed voluntary petitions for Chapter 11 bankruptcy protection in United States Bankruptcy Court for the District of Delaware.⁸

10. On November 21, 2013, the Bankruptcy Court held a hearing to approve a sale of substantially all of Furniture Brands' assets to a third-party under section 363 of the Bankruptcy Code (the "363 Sale"). The Bankruptcy Court approved the sale on November 22, 2013.

11. The Plan was not transferred to the asset purchaser and remains a liability of Furniture Brands.

12. As a result of the 363 Sale, substantially all of Furniture Brands' employees were terminated and rehired by the asset purchaser. As a result, the employees that formerly assisted with the administration of the Plan are no longer employed by Furniture Brands.

13. In place of the employees that would normally help administer the Plan by assisting participants with routine requests such as address changes, applications for benefits, and missing payment inquiries, Furniture Brands has contracted with a single person for "handling the Debtors' employee benefits, as applicable."⁹ That one person is employed pursuant to a six month contract and is also responsible for managing all aspects of the wind-down of Furniture

⁸ *In re FBI Wind Down, Inc.* (f/k/a Furniture Brands International, Inc.), Ch. 11 Case No. 13-12329-CSS (Bankr. D. Del.).

⁹ Debtors' Mot. to Approve Engagement Agreement with Meredith M. Graham at 6, Case No. 13-12329-CSS (Bankr. D. Del.), Docket No. 859.

Brands' bankruptcy estate.

C. PBGC's Determination

14. On November 21, 2013, in accordance with 29 U.S.C. § 1342(c), PBGC issued a Notice of Determination (the "Notice") to Furniture Brands, as Plan administrator, stating that PBGC has determined: (1) the Plan has not met the minimum funding standard required under 26 U.S.C. § 412; (2) the Plan will be unable to pay benefits when due; (3) PBGC's possible long-run loss with respect to the Pension Plan may reasonably be expected to increase unreasonably if the Plan is not terminated; and (4) November 21, 2013, should be set as the Plan's date of termination. A copy of the Notice is attached hereto as Exhibit 1.

15. PBGC also published a notice in *USA Today* on November 21, 2013, advising the Plan's participants of PBGC's determination both to terminate the Plan and establish November 21, 2013, as the Plan's termination date.

16. Simultaneously with the Notice, PBGC sent to Furniture Brands, as Plan Administrator, a draft Agreement for Appointment of Trustee and Termination of Pension Plan ("Trusteeship Agreement") for execution. Furniture Brands has, to date, refused to execute the Trusteeship Agreement.

17. Simultaneously with its Motion to Show Cause, in accordance with Federal Rule of Civil Procedure 3, PBGC filed a complaint seeking an order terminating the Pension Plan in accordance with 29 U.S.C. § 1342(c).

ARGUMENT

18. Title IV of ERISA does not require the filing of a complaint to terminate a pension plan. Rather, after notice to the plan administrator of its determination that the plan should be terminated, PBGC "may apply to the appropriate United States district court for a

decree adjudicating that the plan must be terminated . . .” 29 U.S.C. § 1342(c). Nonetheless, PBGC has filed a complaint in this matter because the Federal Rules of Civil Procedure specify that a civil action be initiated by a complaint.¹⁰

19. PBGC must become the Plan’s statutory trustee immediately so that it may ensure the continuation of payments to participants and beneficiaries of the Plan and begin the process of taking over the administration of the Plan.

20. Furniture Brands is now a liquidating bankruptcy estate that is incapable of administering or making contributions to the Plan. No other party has stepped forward to sponsor the Plan. As a result, there is no doubt that the Plan must terminate and that PBGC must be appointed as statutory trustee.

21. If the sole remaining employee of Furniture Brands is unable or unwilling to administer the Plan, the Plan’s 18,588 participants would suffer. Newly eligible retirees could incur delays in receiving their pension benefits, and current retirees could risk an interruption in benefit payments. PBGC believes that this is untenable, and is acting now to mitigate any potential harm to the Plan or its participants.

CONCLUSION

The Court should grant PBGC’s Motion to Show and set a hearing as soon as possible so that it may enter a decree to terminate the Pension Plan, appoint PBGC statutory trustee of the

¹⁰ Fed. R. Civ. P. 3.

Pension Plan, and establish November 21, 2013, as the Pension Plan's termination date.

Dated: Washington, D.C.
March 13, 2014

Respectfully submitted,

/s/ Ralph L. Landy

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