

Hearing Date: November 18, 2016 at 10:00 a.m. EPT
Objection Deadline: November 11, 2016 at 4:00 p.m. EPT
RE: Docket No. 298

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

**INTERNATIONAL SHIPHOLDING
CORPORATION, *et al.*,¹**

Debtors.

Chapter 11

**Case No. 16-12220 (SMB)
Jointly Administered**

**RESPONSE OF THE PENSION BENEFIT GUARANTY CORPORATION TO
DEBTORS' MOTION FOR AN ENTRY OF AN ORDER AUTHORIZING
THE DEBTORS TO ENTER INTO THE RESTRUCTURING SUPPORT
AGREEMENT WITH SEACOR CAPITAL CORP.**

¹ The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: International Shipholding Corporation (9662); Enterprise Ship Co. (9059); Sulphur Carriers, Inc. (8965); Central Gulf Lines, Inc. (8979); Coastal Carriers, Inc. (6278); Waterman Steamship Corporation (0640); N.W. Johnsen & Co., Inc. (8006); LMS Shipmanagement, Inc. (0660); U.S. United Ocean Services, LLC (1160); Mary Ann Hudson, LLC (8478); Sheila McDevitt, LLC (8380); Tower LLC (6755); Frascati Shops, Inc. (7875); Gulf South Shipping PTE LTD (8628); LCI Shipholdings, Inc. (8094); Dry Bulk Australia LTD (5383); Dry Bulk Americas LTD (6494); and Marco Shipping Company PTE LTD (4570). The service address for each of the above Debtors is 601 Poydras Street, Pan American Building, Suite 1850, New Orleans, Louisiana 70130.

Pension Benefit Guaranty Corporation (“PBGC”), on its own and on behalf of the International Shipholding Corporation Retirement Plan (the “Pension Plan”), files this response to the Debtors’ Motion for Entry of an Order Authorizing the Debtors to Enter into the Restructuring Support Agreement with SEACOR Capital Corp. (“Motion for an Order to Enter into an RSA”), filed on October 28, 2016 [ECF No. 298].

The Restructuring Support Agreement (the “RSA”) fails to disclose whether the Debtors’ defined benefit single-employer pension plan will be assumed by SEACOR Capital Corp., (the “Purchaser”). A pension plan can only be terminated as provided in Title IV of the Employee Retirement Income Security Act of 1974, *as amended* (“ERISA”). PBGC has communicated its concerns to the Debtors, who have not yet determined how they will treat the single-employer pension plan. Although PBGC hopes for a consensual resolution of this matter, it nonetheless files this response as a protective measure to preserve its rights.

I. BACKGROUND

A. PBGC and ERISA

PBGC is a wholly owned United States government corporation and an agency of the United States established to administer and enforce the defined benefit pension plan termination insurance program under Title IV of ERISA.² PBGC guarantees the payment of certain pension benefits upon the termination of a single-employer pension plan covered by Title IV of ERISA. When an underfunded plan terminates, PBGC generally becomes trustee of the plan and supplements any assets remaining in the plan with its insurance funds to pay retired employees their pension benefits, subject to statutory limits.³ PBGC’s insurance funds are made up of

² See 29 U.S.C. §§ 1301-1461 (2012 & Supp. II 2014).

³ See 29 U.S.C. §§ 1321-1322, 1342, 1361.

(i) the assets of terminated underfunded pension plans, (ii) the agency's recoveries from entities legally responsible for those terminated pension plans, (iii) premiums paid by pension plan sponsors, and (iv) investment income.

Title IV of ERISA provides the exclusive means for a plan sponsor to terminate a defined benefit pension plan: a standard termination or a distress termination.⁴ A standard termination requires sufficient assets to pay all of the pension plan's promised benefits.⁵ A distress termination requires a showing, among other things, that the plan sponsor and each controlled group member satisfy one of the three financial distress criteria: (i) liquidation in bankruptcy; (ii) inability to reorganize in bankruptcy unless the pension plan terminates; or (iii) inability to pay debts when due and continue in business unless the pension plan terminates.⁶ Apart from a standard or distress termination, PBGC can initiate termination of a pension plan pursuant to section 4042 of ERISA when certain statutory criteria are satisfied ("PBGC-initiated termination").⁷

Upon a distress termination or a PBGC-initiated termination, the contributing sponsor and its controlled group members are subject to certain liabilities with regard to the terminated pension plan, for which they are jointly and severally liable to PBGC: (i) the unfunded benefit liabilities of the pension plan;⁸ (ii) any unpaid flat-rate and variable-rate premiums;⁹ and (iii) termination premiums at the rate of \$1,250.00 per plan participant per year for three years.¹⁰ If

⁴ See 29 U.S.C. § 1341(a)(1); see also *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999).

⁵ See 29 U.S.C. § 1341(b)(1)(D).

⁶ See 29 U.S.C. § 1341(c)(2)(B).

⁷ See 29 U.S.C. § 1342.

⁸ 29 U.S.C. § 1362(a), (b).

⁹ 29 U.S.C. § 1307.

¹⁰ 29 U.S.C. § 1306(a)(7).

the plan termination occurs while the plan sponsor and any controlled group members are attempting to reorganize in Chapter 11, and they ultimately obtain confirmation of a Chapter 11 plan of reorganization, their obligation to PBGC for termination premiums does not arise until after the Chapter 11 plan is confirmed and the Debtor exits bankruptcy.¹¹ Thus, under those circumstances, termination premiums are not a dischargeable claim or debt within the meaning of the Bankruptcy Code.¹²

Finally, because PBGC typically becomes the statutory trustee of the terminated pension plan, it has authority to collect all amounts owed to the pension plan, including any unpaid minimum funding contributions for which the plan sponsor and controlled group members are jointly and severally liable.¹³

B. The Debtors' Pension Plan

The Debtors are either the contributing sponsors of the Pension Plan, or they are members of the contributing sponsor's controlled group.¹⁴ The Pension Plan is a single-employer defined benefit plan covered by Title IV of ERISA,¹⁵ and it covers approximately 414 employees and retirees of the Debtors, including roughly 88 current employees.

PBGC anticipates filing timely claims against the Debtors for the following statutory liabilities, as explained above: (i) the unfunded benefit liabilities of the Pension Plan; (ii) due and unpaid minimum funding contributions owed to the Pension Plan; and (iii) statutory premiums

¹¹ 29 U.S.C. § 1306(a)(7)(B).

¹² *See* 11 U.S.C. §§ 101(5), 1141.

¹³ 29 U.S.C. §§ 1082(b)(2), 1342(d), 1362(c); 26 U.S.C. § 412(b)(2).

¹⁴ 29 U.S.C. §§ 1301 (A)(13), 14.

¹⁵ 29 U.S.C. § 1321.

owed to PBGC. PBGC's claim for the unfunded benefit liabilities of the Pension Plan will be contingent upon termination of the Pension Plan.

C. The Debtors' Bankruptcy Proceedings

On July 31, 2016, each of the Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "Court"). On October 28, 2016, the Debtors filed the Motion for an Order to Enter into an RSA. A hearing on relief sought in the motion is scheduled for November 18, 2016, at 10:00 a.m.

II. ARGUMENT

A. The RSA is silent as to whether the Debtors will continue to sponsor the Pension Plan, seek to terminate the Pension Plan, or seek a PBGC-initiated termination of the Pension Plan.

The RSA itself does not include mention of any pension plan. The Term Sheet, attached to the RSA and incorporated by reference, includes the following excerpt under "Union Settlement":

The RSA and its associated Term Sheet...contemplate that pursuant to the [plan of reorganization] and the transactions contemplated thereby, SEACOR will: . . . offer employment opportunities to the Debtors' union members on terms contained in CBAs modified to contain terms not less favorable than the terms proposed by the unions currently utilized by SEACOR for substantially similar jobs (with such terms not including any obligation to contribute to any defined benefit pension plans that would be new to SEACOR).¹⁶

The defined benefit pension plans, as described, appear to refer to the multi-employer pension plans. There is no mention of the single-employer pension plan, and no indication as to the Debtors' intentions.

¹⁶ Debtors' Mot. for Entry of an Order Authorizing the Debtors to Enter into the Restructuring Supp. Agreement with SEACOR Capital Corp., Ex. A, Ex.1, Ex. A, at 5-6, ECF No. 298.

B. The Pension Plan may only terminate pursuant to ERISA.

As explained above, if the Debtors wish to terminate the Pension Plan, or seek a PBGC-initiated termination of the Pension Plan, ERISA provides the exclusive means to do so.¹⁷ The Debtors have not contacted PBGC regarding a standard or PBGC-initiated termination, and it is not clear to PBGC that the Debtors could demonstrate the financial distress criteria under ERISA to qualify for a distress termination.¹⁸

Termination of the pension plan should neither be presumed nor preferred. If, under the RSA, the Purchaser will employ employees of the Debtors, those employees will wish to keep their benefits. The Purchaser may wish to take advantage of tax benefits available for contributions to the Pension Plan. Finally, assumption of any liabilities related to the Pension Plan will eliminate or reduce PBGC's anticipated claims against each of the Debtors, thus providing value to the Debtors' respective estates and increasing the recovery for other creditors.

C. PBGC reserves all its rights.

If circumstances warrant that the Pension Plan terminates in the future, PBGC reserves its rights to request the Debtors, the Purchaser, or any other responsible party to timely provide to PBGC employees, agents and representatives copies of and access to all pension documents, personnel records, employee files, and any related documents or information for all participants in the Pension Plans. PBGC further reserves its rights to seek appropriate related relief from this Court if necessary.

¹⁷ See 29 U.S.C. § 1341(a)(1); see also *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999).

¹⁸ See 29 U.S.C. § 1341(c)(2)(B).

III. CONCLUSION

For the foregoing reasons, PBGC files this response to the RSA, to provide notice to the Court and all parties of the Debtors' obligations to the Pension Plan, which arise under ERISA, and to preserve all of PBGC's rights.

DATED: November 9, 2016
Washington, D.C.

Respectfully submitted,

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**UNITED STATES BANKRUPTCY COURT
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**INTERNATIONAL SHIPHOLDING
CORPORATION, *et al.*,¹**

Debtors.

Chapter 11

**Case No. 16-12220 (SMB)
Jointly Administered**

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2016, the Response of the Pension Benefit Guaranty Corporation to Debtors' Motion for an Entry of an Order Authorizing

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the Debtors to Enter into the Restructuring Support Agreement with SEACOR Capital Corp. was served on the following:

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