

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:)
) Bankruptcy #13-43894
SCICOM DATA SERVICES, LTD.)
) Chapter 11 Bankruptcy Case
Debtor.)
_____)

**RESPONSE OF THE PENSION BENEFIT GUARANTY CORPORATION
TO THE UNITED STATES TRUSTEE’S
MOTION TO DISMISS OR CONVERT CASE**

The Pension Benefit Guaranty Corporation (“PBGC”), on its own and on behalf of the Scicom Data Services, Ltd. Employee Pension Plan (the “Pension Plan”), hereby responds to the United States Trustee’s Motion to Dismiss or Convert Case (“Motion”).

BACKGROUND

A. PBGC and the Employee Retirement Income Security Act

1. PBGC is the United States government agency that administers the nation’s defined benefit pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”).¹ The program guarantees a secure, predictable retirement for approximately 42 million American workers.² When a pension plan covered by Title IV terminates without sufficient assets to pay promised benefits, PBGC typically becomes the statutory trustee of the plan and pays covered benefits to the plan’s participants and beneficiaries, subject to certain limitations set forth in Title IV.³

¹ 29 U.S.C. §§ 1301-1461 (2012).

² PBGC 2013 Annual Management Report at 4, <http://www.pbgc.gov/res/reports/ar2013.html>.

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

2. Scicom Data Services, Ltd. (“Debtor”) is a contributing sponsor of the Pension Plan within the meaning of 29 U.S.C. § 1301(a)(13). The Pension Plan is a single-employer defined benefit pension plan covered by Title IV of ERISA.⁴

3. Pursuant to ERISA, a sponsor of a pension plan covered by Title IV and the sponsor’s controlled group members must satisfy certain financial obligations to the plan. The responsibilities of the plan sponsor and controlled-group members to an ongoing pension plan include: (1) paying the statutorily required minimum funding contributions to the pension plan; and (2) paying insurance premiums to PBGC.⁵

4. ERISA provides the exclusive means for a plan sponsor to voluntarily terminate a pension plan in a standard termination or a distress termination.⁶ In a standard termination, the plan must have sufficient assets to pay all of the pension plan’s promised benefit liabilities to participants and their beneficiaries.⁷

5. A plan administrator may initiate a distress termination of a pension plan that does not have sufficient assets to provide for all of the plan’s benefit liabilities. A pension plan will terminate in a distress termination only if PBGC determines that the plan sponsor, and each member of its controlled group, meets one of three statutory tests and the plan administrator complies with the other statutory requirements. The three statutory financial distress tests are (i) liquidation in bankruptcy; (ii) inability to reorganize in bankruptcy unless the pension plan terminates, and (iii) inability to pay debts when due and continue in business unless the pension plan terminates.⁸

⁴ See 29 U.S.C. § 1321.

⁵ 26 U.S.C. § 412(c)(11) (2007) (effective for pension plan years beginning on or before Dec. 31, 2007); 29 U.S.C.A. § 1082(c)(11) (2007) (same); see also 26 U.S.C. § 412(b)(1), (2) (2009) (effective for pension plan years beginning after Dec. 31, 2007); 29 U.S.C.A. § 1082(b)(1), (2) (2009) (same); 29 U.S.C. §§ 1306, 1307(e)(2).

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

⁷ 29 U.S.C. § 1341(b)(2)(A)(i)(III).

6. PBGC may initiate termination of a pension plan if it determines that: (i) the plan has not met the minimum funding requirements under the Internal Revenue Code; (ii) the plan will be unable to pay benefits when due; (iii) a reportable event described in section 4043(c)(7) [concerning distribution to a substantial owner] has occurred; or (iv) the possible long-run loss of PBGC with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.⁹

7. When an underfunded pension plan is terminated, the contributing sponsor becomes liable to PBGC for the: (i) unfunded benefit liabilities of the pension plan; (2) unpaid minimum funding contributions due to the pension plan; and (iii) unpaid flat or variable rate premiums related to the pension plan.¹⁰ Additionally, if a pension plan terminates in a PBGC-initiated termination or in certain distress terminations, the plan sponsor and its controlled group members are liable to PBGC for a termination premium at the rate of \$1,250 per plan participant per year for three years.¹¹

B. Debtor's Bankruptcy Proceeding

8. On August 6, 2013, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

9. On September 13, 2013, PBGC was appointed to the Official Committee of Unsecured Creditors.

⁸ 29 U.S.C. § 1341(c)(2)(B).

⁹ 29 U.S.C. § 1342(a).

¹⁰ 29 U.S.C. §§ 1082(c), 1306, 1307(e)(2), 1342(d), 1362(a), (b), (c).

¹¹ See 29 U.S.C. § 1306(a)(7).

10. On December 5, 2013, PBGC filed proofs of claim on its behalf and on behalf of the Pension Plan for (a) unfunded benefit liabilities in the amount of \$17,081,868.00, (b) premiums in the amount of \$1,098,750, and (c) unpaid minimum funding contributions in the amount of \$375,382.00.

11. On February 20, 2014, the Debtor filed a plan and proposed disclosure statement, and the Court approved the disclosure statement on April 4, 2014.¹²

C. PBGC's Determination

12. On June 3, 2014, in accordance with 29 U.S.C. § 1342, PBGC issued a Notice of Determination ("Notice") to the Debtor, as Pension Plan Administrator, stating that PBGC has determined that: (1) the Pension Plan has not met the minimum funding standard required under 26 U.S.C. § 412; (2) the Pension Plan will be unable to pay benefits when due; and (3) September 30, 2013 [the date of the closing of the asset sale in this bankruptcy case] should be set as the Pension Plan's date of termination.

13. Simultaneously with the Notice, PBGC sent to the Debtor, as Pension Plan Administrator, a draft Agreement for Appointment of Trustee and Termination of Plan ("Trusteeship Agreement") for execution. The Debtor has not executed the Trusteeship Agreement, as of this date.

14. PBGC and the Debtor are currently working toward a global resolution that would, among other things, provide for termination of the Pension Plan, appointment of PBGC as statutory trustee of the Pension Plan, and settlement of PBGC's claims.

¹² Docket #144, #145, #159. The plan includes provision for a post-confirmation Oversight Committee. The Motion notes that PBGC was excluded from this committee. Rather, PBGC elected not to serve on the Oversight Committee.

RESPONSE

PBGC appreciates the United States Trustee's consideration of the agency's interests in this bankruptcy case. Further, PBGC acknowledges that the United States Trustee raises serious and legitimate concerns for PBGC and other creditors that should be addressed.

We understand that PBGC holds approximately ninety percent of the unsecured claims and presumably will be entitled to about ninety percent of any distribution of estate assets. As the largest creditor, PBGC has a significant interest in the efficient resolution of this case and in the remaining funds in the bankruptcy estate that will be available for distribution through either a chapter 11 liquidating plan or a chapter 7 liquidation.

In the Motion, the United States Trustee argues that cause for conversion to chapter 7 exists here, and, accordingly, that conversion is appropriate for this case. Like any creditor, PBGC seeks to maximize its recovery within the boundaries of the law, and believes that the focus here should be on reasonably limiting future administrative expenses. However, PBGC does not have sufficient facts to assess the relative administrative expenses of a chapter 7 case in comparison to the chapter 11 liquidating plan. For example, the liquidation analysis attached to the approved disclosure statement includes "Section 326(a) Trustee Fees", based on statutory compensation, in the amount of \$258,338.00.¹³ These fees are substantial administrative expenses for a chapter 7 case. In addition, the Motion highlights the "extraordinary" litigation costs and professional fees, exceeding \$600,000 in just a few months. However, PBGC is unable to compare the chapter 11 or potential chapter 7 case expenses on a dollar for dollar basis.

In light of this, if the United States Trustee can demonstrate that the chapter 7 costs will be significantly smaller than the costs of the chapter 11 liquidating plan, PBGC will support conversion to chapter 7 because it will maximize PBGC's (and other creditor's) recovery. Given

¹³ Docket #158, p.37.

that we do not have sufficient information to weigh the costs of continuing the chapter 11 case versus converting to a chapter 7 case, PBGC cannot support or oppose the Motion at this time.

Dated: August 22, 2014

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