

PBGC's collateral, which no party has demonstrated a right to do. Those issues should be decided in separate proceedings, with all parties reserving their arguments.

BACKGROUND

I. PBGC's Guaranty Program and the Debtor's Pension Plan

1. PBGC is the United States government corporation established under 29 U.S.C. § 1302(a) to administer the pension plan termination insurance program created under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended*, 29 U.S.C. §§ 1301-1462 (2012 & Supp. IV 2016). If a pension plan terminates with insufficient assets to pay promised benefits, PBGC assumes an unconditional obligation to pay participants their lifetime guaranteed benefits and typically becomes the statutory trustee of the terminated pension plan. *See* 29 U.S.C. §§ 1322, 1361; *see also*, 29 U.S.C. §§ 1082(b)(2), 1342(d), 1362(c); 26 U.S.C. § 412(b)(2).

2. The Debtor sponsors and administers the R.C.A. Rubber Company Pension Plan (the "Pension Plan"), which is a tax-qualified, defined-benefit pension plan covered under Title IV of ERISA.

3. While a pension plan is ongoing, a sponsor of a plan covered by Title IV must satisfy certain financial obligations to the plan. These obligations include paying the statutorily required minimum-funding contributions to the pension plan. 26 U.S.C. §§ 412(b)(1), (2); 29 U.S.C. §§ 1082(b)(1), (2).

4. If the sponsor fails to pay a required minimum-funding contribution before the due date and the unpaid amount, when added to the aggregate unpaid balance of all preceding such payments (including interest), exceeds \$1 million, a statutory lien arises in favor of the pension plan against the sponsor upon all property and rights to property, whether real or personal, belonging to the sponsor. 29 U.S.C. § 1083(k); 26 U.S.C. § 430(k). This lien is

enforceable by PBGC, 26 U.S.C. § 430(k)(5), and is treated as a tax lien, 26 U.S.C. § 430(k)(4)(C).

5. Between 2012 and 2016, Debtor failed to make most of its minimum-funding contributions to the Pension Plan. PBGC determined that, as of June 15, 2016, Debtor had missed minimum-funding contributions to the Pension Plan (including interest) in excess of \$1 million¹ and that, as of July 15, 2016, Debtor had missed minimum-funding contributions (including interest) of \$1,079,138. 29 U.S.C. § 1083(k); 26 U.S.C. § 430(k).

6. On October 24, 2016, PBGC filed a notice of federal lien under 26 U.S.C. § 430(k) against Debtor in the amount of \$1,079,138 for unpaid minimum-funding contributions and interest owed to the Pension Plan (the “PBGC Lien”). By filing the notice, PBGC perfected the PBGC Lien against all real and personal property of Debtor, which is enforceable regardless of plan termination.

7. If the Pension Plan terminates, the Debtor will be liable for the Pension Plan’s unfunded benefit liabilities. 29 U.S.C. § 1362(b). As of November 30, 2016, PBGC estimates that on a termination basis the underfunding of the Pension Plan’s assets is about \$5.7 million. *See* Claims Register, claim no. 31-1. As this liability is contingent on the Pension Plan’s termination, however, it may be different if the Plan terminates with a later termination date. PBGC is currently updating its estimate of the Pension Plan’s underfunding with the latest available actuarial information and will amend its claim as appropriate. There is also a liability for termination premiums, contingent on the Pension Plan’s termination, in the amount of about \$900,000. *See* Claims Register, claim no. 12-1.

¹ A statutory lien against Debtor had therefore arisen on behalf of the Pension Plan in June 2016.

II. Debtor's Bankruptcy Proceedings

8. On November 18, 2016, the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code.

9. The Trustee filed the Sale Motion on April 19, 2018, seeking to approve a sale of certain of the Debtors assets for \$750,000 on an expedited basis to Blue Shore Holdings, LLC ("Purchaser"), a company whose sole member is an insider of the Debtor. Purchaser made its offer to the Trustee in the form of the APA, which it did not discuss with PBGC. The APA nevertheless contains a condition requiring PBGC to consent to a sale order and to arguably broad waivers of "any rights or claims against Purchaser" and its shareholders, officers and other individuals. APA § 6.2.

LIMITED OBJECTION

I. PBGC cannot be treated differently than any other creditor with regard to the Sale Motion and APA.

A. PBGC has not consented to an additional obligation requiring it to execute an agreed sale order and a waiver that arguably grants broad releases.

10. The APA requires PBGC to consent to and execute an "agreed" sale order. APA § 6.2. The Sale Motion and the APA further state that PBGC will release and waive any successor liability claims against Purchaser, as well as its shareholders, officers, and other individuals. Sale Motion ¶ 21; APA § 6.2.

11. PBGC, however, has not consented to any of these additional obligations, and the Trustee has cited no authority for imposing an affirmative duty on a single creditor to consent to the sale or provide a particular waiver of claims. Thus, the Trustee cannot perform under the APA, as written.

B. An additional obligation requiring PBGC to execute a waiver is unnecessary for the assets to be sold “free and clear” pursuant to Section 363(f) of the Bankruptcy Code.

12. After receiving the Sale Motion and the APA, PBGC notified both the Trustee and the Purchaser’s counsel that it would not consent to the waivers and that it did not consider them necessary given that the Court has the authority to order the sale free and clear of liens and encumbrances, with such liens and encumbrances attaching to the proceeds. PBGC informed Purchaser’s counsel that PBGC does not object to the assets being transferred “free and clear” of successor claims against the Purchaser, so long as such language applied to all creditors.

13. PBGC communicated to Purchaser’s counsel and the Trustee that it would agree to the following language to replace Section 6.2 in the APA: “The Court enters a Sale Order, approving the sale of the Purchased Assets to Purchaser and consummation of the transactions under this Agreement, which releases and discharges any rights or claims against Purchaser, its successors or assigns, for any successor liability relating to all applicable Retained Liabilities.”²

14. The Sale Motion already seeks authority that assets be sold free and clear of all liens, claims, encumbrances, and interests, *including* claims for successor liability. Section 363 provides for sales “free and clear of any interest in such property of an entity other than the estate.” 11 U.S.C. § 363(f). As such, “[t]his section authorizes sales free and clear of specific interests in the property being sold; liens, for example.” *Volvo White Truck Corp. v. Chambersburg Beverage, Inc.*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) (citations omitted).

15. Although a claim for successor liability is not specific to an interest in property, the Court nevertheless has the authority to order the sale of assets free and clear of such a claim, which is “implicit in the court’s general equitable powers and in its duty to distribute

² As defined in § 2.3 of the APA, which includes “any liabilities under any Debtor employee plans . . . including The R.C.A. Rubber Co. Pension Plan . . .” § 2.3 (d)).

debtor's assets and determine controversies thereto." *Id.* at 948 (citing *Van Huffel v. Harkelrode*, 284 U.S. 225 (1931)). Indeed, "a sale conducted through the court's equitable powers can provide the debtor the same degree of relief effected by a sale in a plan of reorganization . . ." *Id.* at 949. The Court can order the transfer of assets free and clear of claims of successor liability against the Purchaser, obviating the need for any specific waiver from PBGC.

C. Third-party claims for breach of fiduciary duty or a prohibited transaction related to the Pension Plan cannot be released.

16. If a pension plan is terminated and PBGC becomes its statutory trustee, PBGC has the power to take any action authorized by the plan and to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving it. *See* 29 U.S.C. § 1342(d).³ PBGC has authority to investigate and prosecute any fiduciary or party-in-interest that has participated in or committed a fiduciary breach or prohibited transaction with respect to the pension plan, thereby allowing PBGC to replenish any plan assets lost due to misconduct. *See* 29 U.S.C. §§ 1002(14), (21), 1104, 1106, 1109. Individual fiduciaries and parties-in-interest are personally liable for any losses to the pension plan resulting from each breach and/or prohibited transaction. *See* 29 U.S.C. §§ 1106, 1109.

17. Although it is not clear, the APA could be read to seek a waiver of claims related to breach of fiduciary duty or a prohibited transaction regarding the Pension Plan. *See* APA § 6.2. However, certain of the individuals identified are insiders, and as such were fiduciaries or parties-in-interest of the Pension Plan (*e.g.*, Debtor's employees, officers, or shareholders). The Trustee has not and cannot cite any authority that allows a sale under § 363 to be used to release

³ Likewise, the Pension Plan participants and the U.S. Department of Labor are authorized to bring civil actions for specified relief. *See* 29 U.S.C. § 1132(a).

a nondebtor from potential claims against him that arose apart from any action in the bankruptcy case. *See In re Arter & Hadden, LLP*, 373 B.R. 31, 38 (Bankr. N.D. Ohio 2007) (“[n]o case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique. . .” (quoting *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir.2005))). Moreover, ERISA prohibits such releases because they violate public policy. *See* 29 U.S.C. § 1110(a).

18. For the avoidance of doubt, PBGC has provided Purchaser’s counsel and the Trustee with the following standard language to insert into the proposed sale order that addresses this concern: “. . . nothing in the Sale Motion, the APA, or this Sale Order shall in any way be construed to discharge, release, limit, or relieve the Debtor or any other party (except the Purchaser), in any capacity, from any liability or responsibility for breach of fiduciary duty or a prohibited transaction concerning the Pension Plan. PBGC and the Pension Plan shall not be enjoined or precluded from enforcing such liability or responsibility by any of the provisions of the Sale Motion, the APA, or this Sale Order.”

II. PBGC has a valid security interest that is not subject to avoidance as a preference or otherwise.

19. The Trustee states that he, “does not believe, based upon the information provided from the Debtor, that the Purchased Assets are subject to any valid, perfected, enforceable or unavoidable liens as it appears PBGC filed within the 90-day period prior to the bankruptcy filing.” Sale Motion ¶ 19.

20. But the PBGC Lien arose by operation of statute, 26 U.S.C. § 430(k), and thus is a statutory lien within the meaning of 11 U.S.C § 101(53). Accordingly, the PBGC Lien is not subject to avoidance as a preference. *See* 5-545 Collier on Bankruptcy P 545.01 (“[a] statutory

lien not avoidable under section 545 may not be avoided as a preference even though it might otherwise fit the definition of a preferential transfer.” (citing 11 U.S.C. § 547(b)(6)).

21. Section 545 of the Bankruptcy Code, 11 U.S.C. § 545, is the exclusive provision pursuant to which a statutory lien can be avoided. The PBGC Lien is not avoidable pursuant to section 545, as this section explicitly enumerates the circumstances under which a lien may be avoided, and the PBGC Lien does not fit into any of these circumstances. *See* 11 U.S.C. § 545.

22. Therefore, the PBGC Lien is a valid, perfected, enforceable, unavoidable lien that encumbers all real and personal property of the Debtor. It does not appear that the Sale Motion depends on a decision of this issue at this point and, therefore, PBGC does not object to the relief sought. However, to the extent that the Trustee seeks a finding on this issue, PBGC objects.

III. Payment of administrative claims should be held in abeyance.

23. In the Sale Motion, the Trustee asserts that, “[a]ll bankruptcy administrative expenses are subject to section 506(c) surcharge, to the extent applicable.” Sale Motion ¶ 20. Though the Trustee may merely be preserving his right to assert a surcharge at a later date, PBGC would like to clarify that it is premature to address the extent to which any particular administrative claim should be paid.

24. As a general rule, a lien “must be satisfied out of the asset(s) it encumbers before any proceeds of the asset(s) are available to unsecured claimants, including those having priority (such as holders of administrative claims).” *In re Computer Sys.*, 446 B.R. 837, 843 (Bankr. N.D. Ohio 2011) (citation omitted). A narrow statutory exception to this rule is found in 11 U.S.C. § 506(c), which allows a trustee to recover from property securing an allowed secured claim the “reasonable, necessary costs and expenses of preserving, or disposing of, such property.” To prevail on a § 506(c) claim, the trustee bears the burden of proving that the costs

were reasonable, necessary, and a benefit to the secured party. *In re Ferncrest Court Partners, Ltd.*, 66 F.3d 778, 782 (6th Cir.1995).⁴

25. The PBGC Lien encumbers all assets of the Debtor and is generally entitled to payment ahead of administrative claims from the proceeds of any sale of the Debtor's assets.⁵ Moreover, the Debtor's estate may be administratively insolvent. *See Creditor SMR's Motion to Convert Case to Chapter 7* [Doc. No. 167] ¶ 18 (“[C]ounsel for SMR further stated that SMR’s expert opinion is that the Debtor is administratively insolvent. Specifically, the Debtor is unable to pay its administrative expenses, such as legal and other professional fees.”). To the extent that the Trustee is merely reserving rights, PBGC has no objection to all parties reserving their rights regarding the priority of payments in this case. Because no party has met its burden of proving that it is entitled to surcharge, the application of section 506(c) to the payment of any particular administrative claims should be held in abeyance pending an appropriate motion and notice.

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⁴ To demonstrate benefit to the secured party, the expenditure must generally have resulted in a direct and quantifiable benefit on the secured creditor. *Guy v. Grogan (In re Grogan)*, 75 B.R. 699, 702 (Bankr. E.D. Mich. 1987).

⁵ Because no party has objected to PBGC’s proof of claim establishing its security interest, Claims Register, claim no. 11-1, it must be treated as allowed. *See* 11 U.S.C. § 502(a) (“[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest ... objects.”).

CONCLUSION

For the foregoing reasons, PBGC asks that any order entered with respect to the sale not single out PBGC or improperly include any affirmative duties of consent and waiver on PBGC. Furthermore, PBGC requests that the Court exclude from the sale order any provision that may purport to release or discharge any nondebtor or other third-party from any liabilities arising under ERISA for breach of fiduciary duty or a prohibited transaction with respect to the Pension Plan.

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Respectfully submitted,

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