

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

PENSION BENEFIT GUARANTY CORPORATION 1200 K Street, N.W. Washington, D.C. 20005)	
)	
Plaintiff,)	Case No. 1:11-CV-02788
)	
v.)	Honorable Robert W. Gettleman
)	
FBOP CORPORATION, as administrator of the FBOP Corporation Pension Plan 1100 Lake Street, Suite 210 Oak Park, IL 60301)	
)	
Defendant.)	

AMENDED COMPLAINT

1. This action arises under Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”), *as amended*, 29 U.S.C. §§ 1301-1461. On April 27, 2010, Plaintiff, the Pension Benefit Guaranty Corporation (“PBGC”), filed a complaint, pursuant to 29 U.S.C. §§ 1342(c) and 1348(a), seeking an order (a) terminating the FBOP Corporation Pension Plan (the “Plan”), (b) appointing PBGC statutory trustee of the Plan, and (c) establishing April 21, 2011, as the termination date for the Plan (the “Initial Complaint”). PBGC now files this Amended Complaint as allowed under Federal Rule of Civil Procedure 15(a) seeking an order (a) terminating the FBOP Corporation Pension Plan (the “Plan”), (b) appointing PBGC statutory trustee of the Plan, and (c) establishing April 21, 2011, as the termination date for the Plan.

2. FBOP Corporation (“FBOP”) filed a complaint in Judge Castillo’s court on April 26, 2011 seeking, *inter alia*, a declaratory judgment that PBGC’s actions with respect to the Plan

were arbitrary and capricious and enjoining PBGC from involuntarily terminating the Plan. That case, 11-cv-02782, was reassigned to this Court on May 11, 2011. FBOP filed an amended complaint on May 18, 2011 (“FBOP’s Amended Complaint”).

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 29 U.S.C. § 1342(e) and (f), and has jurisdiction without regard to the amount in controversy, 29 U.S.C. § 1303(e)(3). “[E]xclusive jurisdiction of the plan involved and its property” resides in the United States District Court “notwithstanding the pendency in the same or any other court. . . any proceeding [regarding the plan or its property]”. 29 U.S.C. § 1342(e), (f).

4. Venue lies in this Court under 29 U.S.C. §§ 1303(e)(2) and 1342(g).

PARTIES

5. Plaintiff, PBGC, is a wholly owned United States government corporation established under 29 U.S.C. § 1302(a) to administer the pension plan termination insurance program created by Title IV of ERISA. When an underfunded pension plan terminates, PBGC pays statutorily guaranteed pension benefits to plan participants. 29 U.S.C. §§ 1302(a)(2), 1321, 1322.

6. Defendant, FBOP is the Plan administrator within the meaning of 29 U.S.C. §§ 1301(a)(1), 1002(16)(A). On information and belief, FBOP is located in Oak Park, Illinois.

FBOP

7. Since 1990, FBOP has primarily been a bank holding company, but also owns various other assets, including real estate assets and a car wash business called Wash Depot Holding, Inc. and its subsidiaries (“Wash Depot”).

8. On October 30, 2009, all of FBOP's banks were taken over by the FDIC, which simultaneously entered into purchase and assumption agreements with U.S. Bank, N.A. to assume all of the deposits and essentially all of the assets of each of the failed banks. The banks owned by FBOP and taken over by the FDIC on October 30, 2009 are: Bank USA, N.A., California National Bank, San Diego National Bank, Pacific National Bank, Park National Bank, Community Bank of Lemont, North Houston Bank, Madisonville State Bank, and Citizens National Bank, Teague, Texas.

9. Subsequent to the bank failure, FBOP initiated a wind down and is proceeding to sell its remaining assets. FBOP estimates it will receive \$23.4 million from the sale of its remaining real estate and \$15 million from the sale of Wash Depot, and will use the proceeds to pay company obligations, including secured debt, subordinated debt and deferred compensation. Additionally, FBOP anticipates receiving an estimated \$200 million federal income tax refund in June 2011.

10. FBOP has given PBGC projections of the legally required minimum funding contributions the company must pay into the Plan from 2012-2015. *See* 29 U.S.C. §1082(a). Based on FBOP's cash flow projections for the same period, however, the company has not demonstrated its ability to meet these funding requirements.

11. FBOP is the contributing sponsor of the Plan within the meaning of 29 U.S.C. § 1301(a)(13).

12. FBOP is the Plan administrator, within the meaning of 29 U.S.C. §§ 1301(a)(1), 1002(16).

THE PLAN

13. The Plan is a tax-qualified, single-employer, defined benefit pension plan that is covered by Title IV of ERISA. 29 U.S.C. § 1321(a).

14. The Plan provides pension benefits to certain former employees of FBOP, and to the employees' beneficiaries.

15. The Plan has approximately 2,589 participants.

COUNT 1

16. Paragraphs one through 15 are incorporated by reference as if set forth fully herein.

17. PBGC is authorized by 29 U.S.C. § 1342 to commence proceedings to terminate a plan whenever PBGC determines, *inter alia*, that a plan will be unable to pay benefits when due, 29 U.S.C. § 1342(a)(2).

18. Pursuant to 29 U.S.C. § 1342(c), a district court may order the termination of a pension plan if necessary to protect the interests of participants or to avoid any unreasonable deterioration of the financial condition of the pension plan.

19. On information and belief, FBOP is liquidating all or virtually all the assets of its controlled group members over approximately the next two years.

20. On information and belief, FBOP and its controlled group members have liabilities of approximately \$882 million. Of those, approximately \$309 million are secured.

21. On information and belief, FBOP expects to have approximately \$281 million available for creditors after liquidating its assets.

22. Using the assumptions sets forth in 29 U.S.C. § 1344 and the regulations thereunder, PBGC estimates that the Plan's assets total \$55,013,523 and its liabilities total \$106,802,256. Thus the Plan is only 52% funded with an asset shortfall of \$51,788,733.

23. The Plan continues and will continue to expend assets in payment of benefits and Plan expenses. Those payments will deplete the assets of the Plan.

24. On information and belief, after FBOP's liquidation, there will be inadequate assets remaining within the ownership of the contributing sponsor and its controlled group to pay the statutorily required minimum funding contributions due to the Plan in the future. The Plan will be a wasting trust.

25. The Plan document names FBOP as the Plan Administrator. After FBOP liquidates, there will be no entity remaining to administer the Plan.

26. Before filing its Initial Complaint, PBGC made several requests of FBOP to provide details regarding how it intends to keep the Plan adequately funded to pay benefits and expenses but received no response. FBOP now alleges that it has hired an investment advisor and "reasonably believes that a reallocation of the Pension Plan assets to more long-term investments will generate more than sufficient returns to enable FBOP to continue to meet all its funding obligations with respect to the Pension Plan." FBOP's Amended Complaint ¶ 13.

27. However, FBOP cannot use Plan assets to meet its minimum funding obligations under 26 U.S.C. § 412, 29 U.S.C. § 1082, and the company will not have adequate revenue to otherwise meet its funding obligations

28. Termination of the Plan is necessary to protect the interests of participants and to avoid unreasonable deterioration of the financial condition of the Plan.

Count II

29. Paragraphs one through 28 are incorporated by reference as if set forth fully herein.

30. PBGC is authorized by 29 U.S.C. § 1342 to commence proceedings to terminate a plan whenever PBGC determines, *inter alia*, that 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. 29 U.S.C. § 1342(a)(4).

31. Pursuant to 29 U.S.C. § 1342(c), a district court may order the termination of a pension plan if necessary to avoid any unreasonable increase in liability to the PBGC insurance fund.

32. Under 31 U.S.C. § 3720A, a federal agency that is owed a past-due, legally enforceable debt may collect the debt through offset against the debtor's tax refund, after certain regulatory notice provisions are met.

33. PBGC will have a right of offset against the unfunded benefit liabilities, as defined in 29 U.S.C. §§ 1301(a)(18) and 1362(a) and (b), against any tax refund owed to FBOP or any of its controlled group members under 31 U.S.C. § 3720A.

34. If PBGC does not exercise this right prior to payment of the refund to FBOP and/or any controlled group members and distribution to FBOP's creditors, PBGC will lose the ability to collect its debt by offset.

35. Therefore, PBGC must terminate the Plan to protect its right to the offset, and avoid an unreasonable increase in its expected long run loss.

36. Termination of the Plan is necessary to avoid any unreasonable increase in liability to the PBGC insurance fund.

COUNT III

37. Paragraphs one through 36 are incorporated by reference as if set forth fully herein.

38. On April 21, 2011, in accordance with 29 U.S.C. § 1342(c), PBGC issued a Notice of Determination (the "Notice") to FBOP, as plan administrator of the Plan, notifying FBOP that PBGC has determined that the Plan will be unable to pay benefits when due, and that 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. A copy of the Notice is attached hereto as Exhibit 1.

39. PBGC has also caused a notice to be published in USA Today on April 21, 2011, advising Plan participants of PBGC's determination both to terminate the Plan and to have April 21, 2011 established as the Plan's termination date.

40. Pursuant to 29 U.S.C. § 1348(a)(4), a district court establishes the date of termination of a pension plan covered by Title IV when PBGC and the plan administrator have not agreed on a date of termination.

41. PBGC and the Plan administrator have not agreed on a date of plan termination.

42. April 21, 2011 should be established as the date of Plan termination pursuant to 29 U.S.C. § 1348(a)(4), because as of that date, Plan participants received constructive notice of the Plan termination and no longer had any justifiable expectations of Plan continuation. And, establishment of that date furthers the interests of PBGC by preventing PBGC's long-run loss from increasing unreasonably, thus preventing an unreasonable increase in the liability of the PBGC insurance fund.

43. Pursuant to 29 U.S.C. § 1342(c), a trustee for a pension plan shall be appointed by the court upon granting a decree of plan termination. Further, 29 U.S.C. § 1342(b)(1) provides that PBGC “may request that it be appointed as trustee of a plan in any case.”

44. The PBGC is ready, willing and able to serve as statutory trustee of the Plan.

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REQUEST FOR RELIEF

WHEREFORE, PBGC respectfully requests this Court grant judgment for PBGC and issue an order granting the following relief:

1. Adjudicating the Plan terminated pursuant to 29 U.S.C. § 1342(c);
2. Appointing PBGC statutory trustee of the Plan pursuant to 29 U.S.C. § 1342(c);
3. Establishing April 21, 2011 as the termination date of the Plan pursuant to 29 U.S.C. § 1348(a)(4);
4. Directing FBOP and any other person or entity having possession, custody or control of any records, assets or other property of the Plan, to transfer, convey and deliver all such records, assets, and property to PBGC as statutory trustee upon request under 29 U.S.C. § 1342(d)(1); and
5. Granting such other relief as the Court deems just and proper.

Dated: May 20, 2011
Washington, D.C.

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