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**UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK
POUGHKEEPSIE DIVISION**

In re:)	
)	
)	Chapter 11
NEW YORK MILITARY ACADEMY,)	
)	15-35379 (CGM)
Debtor.)	
)	
)	

**PENSION BENEFIT GUARANTY CORPORATION'S
MEMORANDUM OF LAW IN SUPPORT OF THE
MOTION FOR AN ORDER TO SHOW CAUSE**

Pension Benefit Guaranty Corporation (“PBGC”) files this Memorandum of Law in Support of the Motion for an Order to Show Cause Why PBGC Should Not Receive Immediate Access to all Documents and Information Relating to the Pension Plan and its Participants Under

its Investigatory Authority Under the Employee Retirement Income Security Act of 1974 (the “Motion to Show Cause”).¹

I. 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 Income Security Act of 1974 (“ERISA”).² The termination insurance program covers more than 41 million workers participating in over 24,000 private sector defined benefit pension plans.³

2. ERISA provides the exclusive means for a plan sponsor to terminate a pension plan — a standard termination or a distress termination.⁴ Separate from a standard or distress termination, PBGC can initiate termination of a pension plan pursuant to section 4042 of ERISA (“PBGC-initiated termination”).⁵

3. 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 to the retired employees their pension benefits, subject to statutory limits.⁶

4. In carrying out its statutory obligations, PBGC may make any investigation it deems necessary to enforce any provision under Title IV of ERISA or any rule or regulation thereunder.⁷ For the purposes of such investigation, PBGC may subpoena witnesses, compel

¹ 29 U.S.C. § 1303 (2012, Supp. I 2013).

² 29 U.S.C. §§ 1301-1461 (2012, Supp. I 2013).

³ 2014 *PBGC Ann. Rep.* 2, available at <http://www.pbgc.gov/documents/2014-annual-report.pdf>.

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. § 1342.

⁶ See 29 U.S.C. §§ 1321-1322, 1342, 1361.

⁷ 29 U.S.C. § 1303(a).

their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda or other records which PBGC deems relevant or material.⁸

II. FACTS

A. The Pension Plan

5. New York Military Academy (the “Debtor”) sponsors the N.Y.M.A. Employees’ Pension Plan and Trust (the “Pension Plan” or “Plan”). Upon information and belief, the Pension Plan is a defined-benefit plan covered by Title IV of ERISA.

6. The Debtor is the administrator of the Plan within the meaning of ERISA.⁹

7. PBGC estimates the Plan has fifteen participants and is underfunded on a termination basis by \$586,458.¹⁰

B. The Debtor’s Bankruptcy Proceeding

8. On March 3, 2015, the Debtor filed a voluntary petition for Chapter 11 bankruptcy protection in this Court.

9. On July 10, 2015, this Court entered the Stipulation and Order for Modification of the Automatic Stay (“Cornwall Order”) which affords Cornwall Improvement, LLC (“Cornwall”) the right to conduct a foreclosure sale in New York state court no earlier than September 18, 2015.¹¹

10. In late July 2015, PBGC sent to the Debtor a detailed request for documents and information relating to the Debtor and the Pension Plan. This request was mailed to the Debtor’s

⁸ 29 U.S.C. § 1303(b).

⁹ See 29 U.S.C. § 1002(16).

¹⁰ This estimate is calculated as of August 31, 2015 using the best available information to PBGC at this time.

¹¹ See Docket No. 84.

listed address of 78 Academy Avenue, Cornwall on Hudson, NY 12520 (“Property”).

11. PBGC subsequently contacted Debtor’s counsel via telephone and email multiple times. On August 4, 2015, PBGC emailed to Debtor’s counsel a second written request for documents and information relating to the Debtor and the Pension Plan. A copy of this request is attached hereto as Exhibit A. No response to PBGC’s telephone calls, emails, or written requests was received.

12. On August 31, 2015, PBGC appeared before this Court at the Debtor’s status conference. PBGC informed the Court that it was struggling to get a response from the Debtor with respect to its multiple written requests for information and documents. The Court instructed the Debtor to be responsive to PBGC’s requests going forward.

13. On September 3, 2015, PBGC emailed to Debtor’s counsel another request for documents and information – PBGC’s third such written request. A copy of this request is attached hereto as Exhibit B. PBGC followed up on this request multiple times via telephone and email, but no response was received until September 17, 2015, when Debtor’s counsel indicated that responsive documents would be forthcoming.

14. On September 4, 2014, the Debtor filed a Motion Pursuant to §§ 105(a), 363 of the Bankruptcy Code and Fed.R.Bankr.P. 6004(h) for the Entry of an Order Approving Procedures to Sell Debtor’s Assets (“Sale Motion”). The Motion sought the approval of sale notice procedures, bidding procedures, and auction procedures so that the Debtor’s assets, including the Property, could be sold at auction on September 30, 2015.

15. On September 17, 2015, PBGC filed with this Court a reservation of rights with respect to the Sale Motion (“Reservation of Rights”).¹² The Reservation of Rights further

¹² See Docket Nos. 135, 140.

detailed PBGC's struggle to get documents and information from the Debtor, highlighted PBGC's concerns with respect to its ability to obtain all of the documents and information it needs in light of the Cornwall Order and the Sale Motion, and reserved PBGC's right to seek related relief from this Court at a later date.

16. On or about September 21, 2015, PBGC received from the Debtor copies of the Debtor's financial statements for the 2012 and 2013 fiscal years, as well as the Debtor's 2011, 2012 and 2013 federal returns. PBGC also received a written response ("September Response") from the Debtor that directed PBGC to non-debtor third parties who, according to the Debtor, each provide or provided services to the Pension Plan and therefore would possess the documents and information repeatedly requested by PBGC. A copy of the September Response is attached hereto as Exhibit C.

17. On September 29, 2015, this Court entered the Order Approving Sale Notice Procedures, Bidding Procedures and Auction Procedures.¹³ Upon information and belief, the auction of the Debtor's assets took place on September 30, 2015 – a winning bidder was named and the sale of the Debtor's assets is expected to close by the end of October, pending approval of this Court. Upon further information and belief, in light of the results of the auction, Cornwall has cancelled the state foreclosure sale scheduled for October 2, 2015 but reserved its rights under the Cornwall Order.

III. ARGUMENT

18. The Debtor is a liquidating bankruptcy estate that is incapable of administering or making contributions to the Pension Plan. No other party has stepped forward to sponsor the Plan. As a result, PBGC anticipates that the Plan will need to be terminated and PBGC will need

¹³ See Docket No. 156.

to be appointed statutory trustee to take over the administration of the Plan.

19. PBGC believes that a PBGC-initiated termination of the Pension Plan is imminent since no other party has stepped forward to sponsor the Plan. However, PBGC cannot take the steps necessary to protect the Pension Plan without first receiving the requisite documents and information from the Debtor. PBGC needs access to all documents and information relating to the Debtor, the Pension Plan, and the Plan's participants and beneficiaries that are necessary to terminate and trustee the Pension Plan (collectively, the "Required Documents and Information"). Examples of the Required Documents and Information include, but are not limited to, executed copies of the Plan document and all amendments thereto, complete employee and personnel records for the Plan's participants, and information relating to the Debtor's Board of Trustees.

20. The impending liquidation of the Debtor's assets, combined with the Debtor's indifference towards PBGC and the Pension Plan, poses a great risk that the Required Documents and Information will be sold, transferred, lost or destroyed before PBGC can secure them.

21. PBGC has reached out to all non-debtor third party contacts listed in the September Response. The agency has not yet been able to verify the Debtor's claims that such non-debtor third parties possess all Required Documents and Information. Moreover, the September Response explicitly states that some Required Documents and Information are currently in the Debtor's possession – located at the Property, which was just sold at auction.¹⁴

22. Time is of the essence for PBGC to secure the Required Documents and Information. As stated above, PBGC has broad investigatory authority under ERISA that allows

¹⁴ See Exhibit C, question 15.

the agency to subpoena witnesses and compel the production of documents.¹⁵ But the Debtor's demonstrated history of unresponsiveness, as detailed above, provides little comfort to PBGC that the Debtor will timely or fully comply with any administrative subpoena that PBGC would issue. In the event of non-compliance, PBGC could enforce the administrative subpoena in United States district court.¹⁶ Nonetheless, the time delay in seeking relief from another court increases the risk that the Required Documents and Information would not be properly secured for eventual transfer to the agency – especially here, where the sale of the Debtor's assets (including the Property where Required Documents and Information are being held) is expected to close by the end of October, pending approval from this Court.

23. Moreover, PBGC's physical access to the Required Documents and Information in the Debtor's possession is imperative. The term "Required Documents and Information" as defined herein, is purposefully broad because, at this moment, PBGC cannot fully define or list every document that would be needed for termination and trusteeship. Every pension plan is different. PBGC employees, representatives and agents work to transition trusteeship of terminated pension plans to the agency every day. They have the training and the knowledge of technical rules, regulations, and procedures necessary to determine whether a document is necessary or helpful for PBGC as statutory trustee of a pension plan. The Debtor, on the other hand, does not.

24. PBGC employees, representatives and agents routinely travel to locations where documents like the Required Documents and Information requested herein are located. While on site, they parse through records, scanning or copying any document related to the Pension Plan

¹⁵ See 29 U.S.C. § 1303(a).

¹⁶ See 29 U.S.C. § 1303(c).

or Plan participants that would be necessary or helpful for PBGC in administering the Pension Plan. Any documents that need to be shipped back to PBGC are prepared at the agency's sole expense, and interviews of employees are often conducted so that PBGC can get a sense of how the Pension Plan was normally administered by the Plan sponsor as it transitions into the administration role itself.

25. PBGC needs immediate access to the Required Documents and Information so that it can quickly and completely gather the Required Documents and Information to facilitate a transition of the Pension Plan from the Debtor to PBGC once a termination and trusteeship of the Plan by PBGC is completed. The Debtor has demonstrated that it is incapable of and/or unwilling to handle this task.

26. While PBGC could use its statutory authority to gather the Required Documents and Information, doing so still relies on the Debtor to be responsive and the Debtor has proven itself to be unreliable. Action needs to be taken immediately before the Debtor's assets are completely liquidated. The relief sought herein provides the best chance for PBGC to be able to secure all Required Documents and Information to protect the Plan and its participants in the wake of the Debtor's liquidation.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the Motion for Order to Show Cause and enter an order (a) requiring that the Debtor or any other person, business, or entity with possession or control over any Required Documents and Information, including any of the Debtor's assets where Required Documents and Information may be stored or located, immediately secure all Required Documents and Information for the benefit of PBGC; (b) directing the Debtor or any other person, business, or entity with possession or control over any

Required Documents and Information to provide PBGC with complete, immediate physical access to said Required Documents and Information at mutually agreeable dates and times, but in any event no later than 10 calendar days before any sale of the Debtor's assets is expected to close; (c) requiring, at PBGC's sole option and shipping expense, the Debtor or any other person, business, or entity with possession or control over any Required Documents and Information to, within 5 calendar days of receiving written notice from PBGC, transfer any Required Documents and Information requested therein to PBGC; (d) prohibiting the Debtor or any other person, business or entity with possession or control over any Required Documents and Information from transferring, destroying, or otherwise disposing of any Required Documents and Information without the express written consent of PBGC; and (e) granting such other relief as is just and proper.

Dated: October 2, 2015
Washington, D.C.

Respectfully submitted,

/s/ Courtney L. Morgan
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