

On November 9, 1992, this court ruled on certain legal issues related to the objections raised by these debtors-in-possession (Debtors)¹ and the Official Unsecured Creditors Committee (Committee) to twenty amended proofs of claim filed by the Pension Benefit Guaranty Corporation (the PBGC)². The court allowed the PBGC's claims against these Debtors on a joint and several basis, but ruled that certain portions of the PBGC's claims were not entitled to priority status as taxes due and owing to the United States. The court denied the PBGC's claims pre-petition priority or post-petition administrative status except to the extent such claims represented "normal pension costs." The court reserved for an evidentiary hearing the allowed amount of the claims, whether there existed any equitable grounds for the court to modify the present value of a portion of the PBGC's claims, and the extent to which the PBGC's claims were duplicative. If the court found that grounds existed for modification of the PBGC's claims, the parties were to present evidence regarding the appropriate interest rate or other applicable adjustments.

An evidentiary hearing was held on the remaining factual issues on November 10, 12 and 30, 1992. The court has weighed the evidence adduced at the hearing, considered the arguments of counsel, and has made an independent review of applicable case law. Now being fully informed, the court determines that the PBGC has met its burden of proving the substance of portions of its claims according to applicable non-bankruptcy law, and that the claims are allowed in part, subject to the modifications set forth below.

¹ The Debtors in these jointly administered Chapter 11 cases are related steel production companies.

² The PBGC is a wholly-owned United States government corporation required to guarantee payment of non-forfeitable or vested benefits under terminated pension plans.

JURISDICTION

This court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B) and (O) as a matter involving the administration of the estate, the allowance and priority of claims and the adjustment of the debtor-creditor relationship. The matter is before the court under Rule 404(a) of the United States District Court for the District of Utah. Rule 404(a) automatically refers bankruptcy cases and proceedings to this court for hearing and determination.

BURDEN OF PROOF

The PBGC's claims are allowed pursuant to 11 U.S.C. § 502(a) unless a party in interest objects. Upon objection, the court shall determine the amount of the claim pursuant to 11 U.S.C. § 502(b). The Debtors have produced evidence indicating that the PBGC may have calculated its claims in amounts that are excessive. The Debtors' evidence is equal in probative force to that underlying the PBGC's claims, thus shifting the burden to the PBGC to prove its claims generally. *Fullmer v. United States (In re Fullmer)*, 962 F.2d 1463, 1466 (10th Cir. 1992), citing *In re Wells*, 51 B.R. 563, 566 (D. Colo. 1985). Substantive federal law determines the validity of the PBGC's claims. *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 657-8 (1991). The PBGC must prove its claims by a preponderance of the evidence. *Wells*, 51 B.R. at 567.

HISTORY OF THE CASE³

At the time of filing, the Debtors were sponsors and CF&I Steel Corporation (CF&I) was the administrator of two pension plans. CF&I promised to provide fixed pension benefits under these plans that would be calculated with reference to each employee's pay and years of service. CF&I was obligated to provide annual plan funding contributions based on the actuarial valuation of the benefits earned by its employees. CF&I failed to make the minimum funding payment that became due on one of the plans (Master Plan) on September 15, 1990. On November 7, 1990, the Debtors filed petitions for reorganization under chapter 11 of the United States Bankruptcy Code.

On March 19, 1992, the PBGC instituted proceedings to terminate the Master Plan. CF&I consented to the termination on behalf of the Master Plan, and entered into a trusteeship agreement with the PBGC effective March 19, 1992. Pursuant to this agreement, the PBGC became the successor trustee of the Master Plan. The PBGC also became liable for guaranteed benefits to plan participants.

The PBGC filed two proofs of claim against each of the Debtors in connection with the Master Plan. These claims fall into two general categories: (1) claims for due and unpaid minimum funding contributions allegedly due and owing the Master Plan pursuant to 29 U.S.C. § 1082 (ERISA § 302), and 26 U.S.C. § 412 (I.R.C. § 412) (the Minimum Contribution Claims); and (2) claims on behalf of the PBGC for unfunded benefit liabilities

³ The facts of the case are more fully set forth in the prior opinion of the court dated November 9, 1992.

under the Master Plan pursuant to 29 U.S.C. § 1362 (the Unfunded Benefit Claims) designed to reimburse the PBGC for at least a portion of the amounts that it must pay to pensioners (collectively the Claims).

On July 31, 1992, after termination of the Master Plan, the PBGC amended its proofs of claim. The amendments increased the amount of each of the ten Minimum Contribution Claims to an estimated amount of \$64,874,511, and the amount of each of the ten Unfunded Benefit Claims to an estimated amount of \$263,200,000. At closing argument, the PBGC asserted that the evidence supported allowance of the following claims: 1) pre-petition normal pension costs of \$429,232 pursuant to 11 U.S.C. § 507(a)(4); 2) post-petition normal pension cost for the period from November 7, 1990 to March 19, 1992, of \$1,565,198 pursuant to 11 U.S.C. § 507(a)(1); 3) general unsecured claims for the balance of the unpaid Minimum Contribution Claims of \$69,228,372; and 4) general unsecured claims for the Unfunded Benefit Claims of \$212,286,000. The \$212,286,000 figure represented the present value of Master Plan liabilities on the date of plan termination, less the value of plan assets on that same date, and less the value of the unpaid Minimum Contributions Claims to be paid through the Debtors' proposed plan.

MINIMUM CONTRIBUTION CLAIMS

1. Total Minimum Contribution Claims.

The unpaid Minimum Contribution Claims were computed as of the March 19, 1992, termination date of the Master Plan. They reflect the difference between the minimum funding requirements that the enrolled actuary for the plan certified CF&I must

contribute to the Master Plan, and the amounts actually contributed. The PBGC, through its independent contract actuary, relied upon the work and assumptions of the enrolled actuary for the Master Plan contained in Schedules B of the 1988, 1989, and 1990 actuarial reports to make the calculations for the Claims. The PBGC also received from the Master Plan's enrolled actuary, and relied upon, cost pages from a draft of the 1992 actuarial valuation report and a 1991 draft actuarial report. Based upon that updated information, the PBGC recalculated the total due and unpaid Minimum Contribution Claims at \$71,222,802. Although the updated 1991 and 1992 information was in draft form, there was no contradictory evidence to indicate that the data was erroneous or unreliable. To the extent that the data supplied by the draft report was the basis for calculation of portions of the Minimum Contribution Claims, it is credible evidence of the amount of the claims unless refuted or impeached.

2. Calculation of normal pension costs for purposes of determining 11 U.S.C. § 507(a)(4) priority claim.

The court previously determined that a portion of the Minimum Contribution Claims representing normal pension costs⁴ would be allowed 11 U.S.C. section 507(a)(4) priority status. The parties stipulated that the normal pension costs, for the 180 days prior to filing bankruptcy, were \$429,232. The parties disagree regarding the method of calculating what portion of the normal pension costs should be allowed priority status under 11 U.S.C. § 507(a)(4).

⁴ Normal pension cost is an actuarial term that consists of the present value of the benefits paid in the future allocated in today's dollars to a particular year under the employers funding method.

The first component of the equation provided by 11 U.S.C. § 507(a)(4) is the calculation of the maximum amount of allowed unsecured claims for contributions to employee benefit plans; in this case the normal pension costs. This maximum amount is then reduced by the amount of the second component, the actual distribution under 11 U.S.C. § 507(a)(3). The Debtors' method of calculation based on pension plan contributions attributable to each employee on an individual basis reduces the PBGC's entire pre-petition normal pension costs claims by \$9,457.03. This amount equals the total amount of pension plan contributions attributable to individual employees in excess of a \$2,000 limit for each employee. The PBGC argues that the statute should be interpreted to provide a maximum allowable contribution claim calculated by multiplying 1856 (number of employees)⁵ by \$2,000. That amount is \$3,712,000. The PBGC argues that because the pre-petition normal pension costs are \$429,232, an amount much smaller than \$3,712,000, the entire \$429,232 claim for normal pension costs is well within the maximum amount allowed by 11 U.S.C. § 507(a)(4).

The court agrees with the PBGC's interpretation. The wording of the statute is quite specific and should be afforded its plain narrow meaning. *In re Pittston Stevedoring Corp.*, 40 B.R. 424, 428 (Bankr. S.D.N.Y. 1984). The statute provides an aggregate figure for the maximum amount of contribution claims arising from services performed within 180 days before the petition date for each plan. The maximum allowable claim is not based on an employee specific calculation.

⁵ Debtors' Exhibit 1 provided the number of employees included in the calculation. The Debtors prepared an exhaustive accounting of the accrued wage claims paid pre-petition, allocation of normal pension costs and amount of 11 U.S.C. § 507(a)(3) priority claim available to each employee.

The second component of the equation provided by 11 U.S.C. § 507(a)(4) is determined by subtracting the aggregate distribution to employees under 11 U.S.C. § 507(a)(3) from the normal pension costs. The amount of allowed unsecured claims for contributions to employee benefit plans entitled to administrative priority is tied directly to the 11 U.S.C. § 507(a)(3) wage priority claims. *In re Unimet Corp.*, 100 B.R. 881, 886 (Bankr. N.D. Ohio 1988).

The Debtors paid current wages due and owing to their employees by issuing cashier's check on November 6, 1990, the day prior to filing, in order to avert a strike or other labor disturbance. If the Debtors had not paid the wages current on November 6, 1990, the wage claims up to the amount of \$2,000 per employee would have had priority wage status pursuant to 11 U.S.C. § 507(a)(3). The effect of the payment of all wage claims prior to filing was to eliminate any offset under 11 U.S.C. § 507(a)(3) against the maximum allowable pension plan contributions payable under 11 U.S.C. § 507(a)(4). As of the date of filing, there were no unsecured and unpaid 11 U.S.C. § 507(a)(3) priority wage claims against the Debtors' estate.

The Debtors argue that they could bring preference actions against their employees to recover the wages paid pre-petition and then seek court approval for priority payment of the wage claims. By extension, the same argument could be applied to recover all wages to the extent of \$2,000 paid to employees within the 90 day period prior to the petition date. There is no logical reason this argument should be limited only to the amounts paid by the Debtors on November 6, 1990. Alternatively, the Debtors argue that the cashier's checks would not have been presented for payment until November 7, 1990,

at the earliest, and extending the holding of *Barnhill v. Johnson (In re Antweil)*, 112 S.Ct. 1386 (1992), the cashier's checks represented post-petition 11 U.S.C. § 507(a)(3) payments. In *Barnhill*, the Supreme Court held that for purposes of establishing a voidable preference under 11 U.S.C. § 547(b), the transfer of a check occurs when the check is honored by the drawee bank.

The evidence indicated that the cashier's checks were issued and mailed on November 6, 1990, but there was no credible evidence as to the date of delivery. A cashier's check, unlike the check at issue in *Barnhill*, is the legal equivalent of currency. In *re Kimball*, 16 B.R. 201, 203 (Bankr. S.D. Fla. 1981). A certified check constitutes an immediate assignment of funds and, therefore, is payment of the underlying debt. In *re Midwest Boiler & Erectors, Inc.*, 54 B.R. 793, 795 (Bankr. E.D. Mo. 1985). Because there is no significant difference between cashier's checks and currency, payment occurs upon delivery. *Kimball*, 16 B.R. at 203.

The court will not accept the Debtors' rationalization because it flies in the face of the facts, defeats the clear language of the statute and advances alternatively inconsistent positions. Payment of unpaid wage claims by cashier's check one day prior to the petition date either eliminated all priority wage claims under 11 U.S.C. § 507(a)(3) or, as a logical extension of the Debtor's alternative argument, it represented an unauthorized post-petition distribution of estate assets to pre-petition creditors. The evidence does not adequately establish a post-petition delivery date for the cashier's checks. Furthermore, the testimony does establish that the Debtors' made a calculated business decision to issue wage payments prior to the petition date.

Because no allowed unsecured wage claims existed on the date of filing, there could be no distribution under 11 U.S.C. § 507(a)(3), and the Claims cannot be reduced by the \$85,019.28 pre-petition distribution to employees. Based on the testimony and evidence before the court, the PBGC's total priority claim under 11 U.S.C. § 507(a)(4) is \$429,232.

3. Normal pension costs as post-petition administrative claims pursuant to 11 U.S.C. § 507(a)(1).

Evidence indicates that the normal pension costs that accrued post-petition are as follows: for 1990 a pro-rated figure for the post-filing period of \$119,653⁶; for 1991 a total of \$1,150,902; and for 1992 the amount of \$294,643 up to the date of plan termination. The post-petition normal pension costs total \$1,565,198. The Debtors argued that these figures are based upon draft actuarial reports that were not signed by the enrolled actuary for the plan. They failed, however, to present evidence that the figures were incorrect or to present credible evidence that the PBGC's calculations of the post-petition normal pension costs were erroneous. The evidence presented by the PBGC preponderates. Based on the testimony and evidence before the court, the PBGC's total administrative claim under 11 U.S.C. §§ 503(b)(1)(A) and 507(a)(1) is \$1,565,198.

4. Interest on the Unsecured Portion of the Minimum Contribution Claims.

The evidence indicated that \$69,228,372 of the Minimum Contribution Claims not attributable to normal pension costs was calculated according to 26 U.S.C. § 412 (I.R.C. § 412) using an interest factor to both discount the amount and to "get us to an appropriate

⁶ \$808,767 representing the normal costs for the entire year of 1990, divided by .147945 representing 54/365, the number of days left in the year after the date of filing.

place in time." (Dezube, transcript November 10, 1992, p. 41.) To the extent an interest factor is used to discount the claim to present value, it reflects the appropriate methodology provided by substantive law to calculate the PBGC's claim. However, the evidence indicates that interest was also used to bring the claim forward in time and that the claim includes interest that allegedly accrued as a result of the Debtors' failure to make contributions to the Master Plan after the filing date.

The PBGC's exhibit 8 (Exhibit) purported to itemize the components of its \$71,222,802 Minimum Contributions Claims⁷. The Exhibit summarized the dates and amount of each contribution due to the Master Plan, as well as a summary of contributions actually made by the Debtors from the beginning of 1989 and forward through 1993. The Exhibit then purported to total the amount of the Minimum Contribution Claims. The Exhibit includes amounts after the date of the filing of the chapter 11 petitions, as well as amounts after termination of the Master Plan. It also includes contributions due and credits for contributions made through 1993.

The testimony regarding the calculation described by the Exhibit indicated that over \$5,000,000 of the \$71,222,802 claim itemized in the Exhibit included interest attributable to contributions due after termination of the plan. It is impossible to determine from the evidence what specific portions of the Minimum Contribution Claims are attributable to post-petition interest. The PBGC argues that the Internal Revenue Code requires it to include interest in the calculation of its Minimum Contribution Claims. Although the

⁷ Amounts due and credits reflected in the Exhibit do not total the Minimum Contribution Claim of \$71,222,802 illustrated by the Exhibit.

substantive law may control calculation of the PBGC's claim, it does not allow accrual of interest in derogation of the rights of other unsecured creditors. Post-petition interest on the pre-petition portion of the Minimum Contribution Claims will not be allowed. *United States v. Fullmer (In re Fullmer)*, 962 F.2d 1463, 1467 (10th Cir. 1992)(unmatured interest is disallowed against estate pursuant to 11 U.S.C. § 502(b)(2)); *see also, In re Kentucky Lumber Co.*, 860 F.2d 674, 676-79 (6th Cir. 1988); *In re Burgess Wholesale Mfg. Opticians, Inc.*, 721 F.2d 1146, 1147 n.1 (7th Cir. 1983).

The Exhibit also appears to include amounts for minimum funding contributions that came due after the PBGC terminated the Master Plan. All of the testimony and argument referred to the Debtors' liability to the PBGC and the Master Plan as of the March 19, 1992, termination date. The PBGC offered no explanation nor evidence why post-termination funding requirements were included in the calculation contained in the Exhibit. The PBGC's claims should have been calculated as of the date of plan termination after which the Debtors were no longer liable to make contributions to the Master Plan. The PBGC's apparent inclusion of post-termination minimum funding payments in the Exhibit is inexplicable and without evidentiary support.

Neither the testimony, the Exhibit, nor reference to any other specific exhibit, clarified the source of the figures set forth on the Exhibit or precisely how the \$69,228,372 was calculated. The evidence only indicated that the figures contained post-petition interest, post-termination charges, and charges attributable to amounts due in the future. The PBGC argues that it is not possible, nor is it required, to allocate its Claims. To the contrary, the burden has shifted to the PBGC to prove the validity of all aspects of its proofs of claim

rather than the Debtors having the burden of proving the Claims' invalidity. *In re Lewis*, 80 B.R. 39, 43 (Bankr. E.D. Pa. 1987)(mortgagee's claim for late charges would be disallowed absent showing of how charges were computed). The PBGC is required to prove all elements of its Claims or those portions not proven by the creditor must be disallowed. The Exhibit is generally of no probative value and the evidence is insufficient to establish the correct amount of the Minimum Contributions Claims. The PBGC has not met its burden to prove the Minimum Contributions Claims by a preponderance of the evidence. Based upon the lack of credible evidence regarding the components of the \$69,228,372 portion of the Minimum Contribution Claims, \$69,228,372 of the claim will be disallowed.

UNFUNDED BENEFIT CLAIMS

The Unfunded Benefit Claims are equal to the excess of the benefits promised to the Debtors' current and former employees in today's dollars over the current value of funds in the trust fund at plan termination. The factual issues regarding the amounts of these claims relate to the method used by the PBGC to compute the value of its claims, and whether there is an improper duplication between the Unfunded Benefit Claims and the Minimum Contribution Claims.

1. Applicable rate and retirement age assumptions.

The PBGC, through its contract actuary, calculated the Unfunded Benefit Claims by using figures provided by the Master Plan's enrolled actuary. The Master Plan's enrolled actuary computed the figures using one set of assumptions. The PBGC actuary converted the figures to a different amount using a different set of assumptions. Those

revised assumptions were calculated according to the provisions of 29 C.F.R. § 2619 (1991)(Regulation) applicable at the time of plan termination. The purpose of the Regulation is to establish a method of determining the value of plan benefits under terminating pension plans covered by the Employee Retirement Income Security Act of 1974. The Regulation determines the current value of projected benefits as of a specific date that is equal to the amount of money needed on that date to pay benefits over future years. The Regulation requires the plan administrator to determine the present value of all plan benefits using the applicable formulas contained in the Regulation, or any other formulas or approximations that are at least as accurate, together with prevailing PBGC interest, expected retirement age, and mortality rates in effect at the valuation date.

The Debtors challenged the expected retirement age used in the calculation as not representative of the actual experience of this plan, especially during the plan's pre-termination period. Pre-termination evidence is not conclusive as it relates to this plan or the experience of the plan once terminated. The court finds the more credible evidence of the expected retirement age under terminated plans is that experienced by the PBGC. The PBGC is familiar with a multitude of terminated plans as compared to the Debtors' experience with this specific plan in the seven month post-termination period.

The Debtors also challenged the method used by the PBGC in discounting its claims to present value. The PBGC used as a component of that calculation a 6.5% interest rate.⁸ The interest rate, adjusted periodically by the PBGC, reflects current conditions in

⁸ The evidence indicates that the 6.5% figure is applicable to only a part of the calculation, but because it is the largest percentage used, will be referred to simply as the 6.5% rate.

the financial and annuity markets. The most recent recalculation applicable here raised the highest portion of the interest rate from 6 1/4% to 6 1/2%.⁹ The Regulation replicates the market price from an insurance company for the close out of annuities from a terminated pension plan. The Regulation produces a discount factor, not an interest rate. The interest rate is applicable only in conjunction with the other factors set forth in the Regulation. There is no evidence the PBGC improperly calculated the Unfunded Benefit Claims according to the Regulation. There is only a dispute regarding whether the interest rate and expected retirement age assumptions should be employed in this case to discount the Claims.

The Debtors introduced evidence to illustrate that in light of the PBGC's historical record of its investment activity, the use of the 6.5% rate would disproportionately favor the PBGC and would result in the PBGC receiving a profit from the estate at the expense of other creditors. The Debtors advocated two alternative interest rates to substitute for the PBGC's 6.5% rate. Evidence was presented of a debtor-specific approach that generated a rate of 13.4%, and a prudent-investor approach that generated a rate of 12.3%. If the Unfunded Benefit Claims were calculated using the 13.4% interest rate instead of the PBGC's 6.5% interest rate, the PBGC's claim would be reduced to approximately \$114,398,000, almost one-half of the amended Claims. If the Unfunded Benefit Claims were calculated using the 12.3% interest rate instead of the PBGC's 6.5% interest rate, the PBGC's claim would be reduced to approximately \$124,441,000. The

⁹ The adjustment to the interest rate is not subject to notice and public comment. The PBGC indicated that to do so would be impracticable and contrary to public interest because the issuance of new interest rates must be done promptly so that the rate can reflect, as accurately as possible, current market conditions.

significance of the impact on other unsecured creditors compels the court to weigh the evidence to determine whether the PBGC's calculation of its Claims unjustifiably inflates its Claims to the detriment of the balance of the creditors in this case.

The court finds that there is little support for the use of the debtor-specific approach, either in case law or as indicated by the witnesses for both parties. The method uses the pre-bankruptcy credit risk of the financially risky Debtors to derive a rate. Other courts have rejected the approach and the Debtors' expert had little enthusiasm for the method.

The prudent-investor approach attempts to determine what a prudent investor could expect to earn on the portfolio of assets available at the time of termination. The prudent-investor approach allocated the mix of investment of fund assets in a balanced portfolio that contained sixty per cent equities and forty per cent fixed income securities. Such investments would yield 12.3%. The prudent-investor approach was carefully developed analyzing generally accepted source materials used in financial markets and was introduced by a witness qualified by this court as an expert on the calculation of the present value of claims in bankruptcy cases.

The prudent-investor approach, however, fails to account for immediate cash draws against the fund. Since the approach did not include a cash reserve, there was no consideration of how that may affect the yield. The prudent-investor approach also produced a rate that was generally higher than many large pension plans projected they would receive on long term investments. The approach also assumes a risk factor that may be inconsistent with the PBGC's statutory role as a guarantor of pension funds, and fails to

provide adequate compensation to the PBGC for the assumption of additional risk. The Debtors argue that the PBGC has already been compensated for any risk through receipt of premiums previously paid by the Debtors. The court rejects that argument. The Debtors' argument does not account for risk that may be encountered by the PBGC in the future. The PBGC interest rate is also only one part of a three part formula required by the valuation regulations. If one portion of the formula is modified, then the presumptions as to the expected retirement age and the mortality rates also required modification. Utilization of the interest rate set forth in the prudent-investor approach does not replicate the market price from an insurance company for the close out of annuities from a terminated pension plan.

Evidence indicated that the PBGC should not utilize a risk-free rate, but should be allowed a rate that reflects the riskiness of the stream of payments and the organization insuring it. Such a low-risk rate may be equivalent to a federal agency rate rather than the United States treasury rate. No evidence was offered regarding a specific low-risk rate other than the 6.5% interest rate provided by the valuation regulations. The PBGC's interest rate is not designed solely to enhance its claims and the interest rate is not inconsistent with the risk the PBGC should be required to incur.

The court has considered all the evidence relating to the multitude of rates advocated by the parties, and whether equitable factors unique to this bankruptcy filing should influence the selection of that interest rate. Such consideration included recognition of the PBGC's obligation to guarantee performance on all defaulted pensions plans, its obligation to provide conservative investment management, the interrelationship of the

various factors used by the PBGC to arrive at an appropriate discount factor, as well as the impact the choice of interest rate has on other creditors. It is undisputed that calculation of the PBGC's Unfunded Benefit Claims according to all elements of substantive non-bankruptcy law will severely impact the distribution to other similarly situated creditors. That is but one element the court should consider because allowance of one claim almost always adversely impacts the distribution to the remaining creditors in the same class. If, however, the rate employed by the PBGC was designed to improperly enhance the Unfunded Benefit Claims at the expense of the other creditors, the court has authority to modify the rate. *In re Chateaugay Corp.*, 130 B.R. 690, 696 (S.D.N.Y. 1991)(adopting bankruptcy court report and recommendation as giving proper credit to PBGC's ability to calculate value of future liabilities according to agency procedures reported at 115 B.R. 760, 771 (Bankr. S.D.N.Y. 1990)). Reduction in the interest rate used by the PBGC should be done only if there is manifest unfairness or unreasonableness. If not, the PBGC's regulations should be given due deference. *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977). The court should also be circumspect in engaging in judicial review on a case-by-case basis when a regulatory scheme is devised that takes into consideration a larger constituency. *Dunivent v. Schollett*, (*In re Schollett*) 1992 WL 347228 (10th Cir., Nov. 25, 1992).

Based upon the weight of the evidence and upon all applicable equitable factors, the court will not disturb the application of the PBGC valuation regulations to this case. The appropriate interest rate to be utilized in discounting the PBGC's Unfunded Benefit Claims to present value is 6.5% utilizing the methodology provided by the Regulation.

2. Claim Duplication.

Part of the assets of the Master Plan include the unpaid Minimum Contribution Claims. The court previously ruled that the Unfunded Benefit Claims owed to the PBGC and the Minimum Contribution Claims owed to the Master Plan were disallowed to the extent that they overlapped or were duplicative of each other. The amount of the Unfunded Benefit Claims is comprised of the amount of the plan liabilities of \$254,300,000, less the value of the plan assets as of the date of termination. The evidence indicates that after offsetting the assets of the terminated plan, the amount of the remaining Unfunded Benefit Claims is \$222,866,000. This figure does not reflect a reduction for the value for the unpaid Minimum Contributions Claims that are also assets of the plan on the date of plan termination.

The PBGC was able to employ a reiterative process to calculate the value assigned to its \$71,223,000 Minimum Contribution Claims pursuant to information contained in the Debtors' proposed plan. The PBGC assigned a value of \$11,013,000 to those claims and further discounted the value of the Minimum Contribution Claims to \$10,580,000. Subtracting the value of the Minimum Contribution Claims (a plan asset) from the Unfunded Benefit Claims, as calculated by the PBGC, produced a total Unfunded Benefit Claim of \$212,286,000. This process does not reduce the Unfunded Benefit Claims by the total amount of the Minimum Contribution Claims. The process used by the PBGC only reduces the Unfunded Benefit Claims by the amount of the PBGC's probable recovery on the Minimum Contribution Claims.

In this case, giving the PBGC credit for the probable value of the Minimum Contribution Claims, a plan asset, as opposed to the dollar amount of the claim, provides the correct determination of the total Unfunded Benefit Claims. The determination of value is analogous to treatment of a secured claim under 11 U.S.C. § 506 where the value of the collateral and, correspondingly the amount of a creditor's secured claim may vary according to the intended use of the property or the purpose for which the valuation is made. *In re Weber*, 140 B.R. 707, 710 (Bankr. S.D. Ohio 1992)(if debt not paid according to its terms, there will be slippage between value of property, based on appropriate market standard, and amount creditor will receive). The PBGC's calculation of its Minimum Contribution Claims contains the \$69,228,372 claim presently disallowed by the court. The reiterative calculation process is not accurate at this point to the extent that it incorporates the total value of the disallowed claim and accounts for a recovery the PBGC will not receive. However, once the PBGC incorporates this correction in its reiterative calculation of the amount of the Minimum Contribution Claims, the methodology eliminates any duplication prohibited by the court's prior order.

Based upon the foregoing, it is hereby

ORDERED, that the allowed amount of normal pension costs entitled to priority under 11 U.S.C. Section 507(a)(4) is \$429,232; and it is further

ORDERED, that the allowed amount of normal pension costs entitled to administrative expense status under 11 U.S.C. Section 507(a)(1) is \$1,565,198; and it is further

ORDERED, that the remaining amount of the Minimum Contribution Claims in the amount of \$69,228,372 is disallowed; and it is further

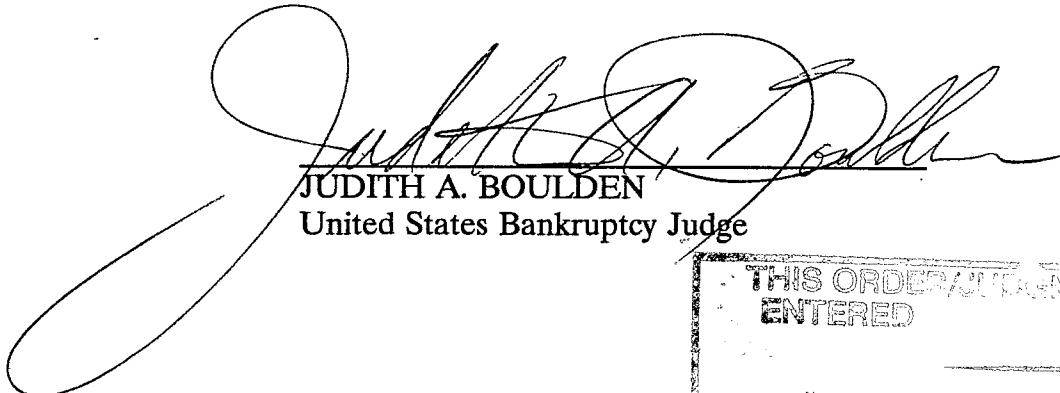
ORDERED, that the Unfunded Benefit Claims shall be calculated and allowed utilizing the interest rate set forth in the Regulation that was in effect as of the date of the termination of the Master Plan; and it is further

ORDERED, that the unsecured claim for the Unfunded Benefit Claims is allowed in an amount utilizing the reiterative process to value the Minimum Contribution Claims; and it is further

ORDERED, that the PBGC recalculate the amount of the Unfunded Benefit Claims utilizing the reiterative method after adjustment for the disallowance of \$69,228,372 of the Minimum Contribution Claims; and it is further

ORDERED, that if the amount to be received by the PBGC on its Claims pursuant to the Debtors' plan, if confirmed, is further modified by the Debtors or by other factors outside the scope of this opinion, the PBGC shall amend its Claims accordingly to correctly reflect the adjusted recovery.

DATED this 31 day of December, 1992.



JUDITH A. BOULDEN
United States Bankruptcy Judge

THIS ORDER/JUDGMENT
ENTERED
DEC 31 1992
DEPUTY CLERK
U.S. BANKRUPTCY COURT