

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

_____)
PENSION BENEFIT GUARANTY)
CORPORATION)
1200 K Street, N.W.)
Washington, D.C. 20005)

Plaintiff,)

v.)

OPTIMUM APPLIED SYSTEMS, INC.)
900 Dutchess Turnpike)
Poughkeepsie, NY 12603)

Defendant.)
_____)

Case No. 7:16-CV-01103

**COMPLAINT OF PLAINTIFF
PENSION BENEFIT GUARANTY CORPORATION**

1. This action arises under Title IV of the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1301-1461 (“ERISA”).

2. Plaintiff, Pension Benefit Guaranty Corporation (“PBGC”), brings this action under 29 U.S.C. § 1303(e)(1) to enforce the provisions of Title IV of ERISA, and to enforce a final agency determination that violations of Title IV have occurred with respect to the Optimum Applied Systems, Inc. Defined Benefit Pension Plan (the “Plan”).

3. This is an action for enforcement of PBGC’s final agency determination based on a review of the agency’s administrative record under 5 U.S.C. § 706.

Jurisdiction and Venue

4. This Court has jurisdiction over this action under 29 U.S.C. § 1303(e)(3), as well as under 28 U.S.C. §§ 1331 and 1345.

5. Venue is proper in this Court under 29 U.S.C. § 1303(e)(2).

Parties

6. PBGC is a wholly owned United States government corporation established under 29 U.S.C. § 1302 to administer and enforce the provisions of the plan-termination insurance program under Title IV of ERISA.

7. PBGC regulates the termination of single-employer, defined benefit pension plans covered by Title IV of ERISA. Pension plans that have sufficient assets to pay all benefit liabilities may be terminated in a “standard termination” under 29 U.S.C. § 1341(b).

8. For pension plans that terminate in a standard termination, PBGC ensures compliance with Title IV of ERISA. 29 U.S.C. §§ 1303(a) and 1341(b)(4).

9. Defendant, Optimum Applied Systems (“OAS”), is an engineering corporation in Poughkeepsie, New York.

10. OAS was the Plan’s contributing sponsor, within the meaning of 29 U.S.C. § 1301(a)(13), and the Plan administrator, within the meaning of 29 U.S.C. §§ 1002(16) and 1301(a)(1).

Title IV – Standard Terminations

11. In a standard termination, the plan administrator must allocate and distribute assets to participants and beneficiaries in accordance with Title IV of ERISA. 29 U.S.C. § 1341(a)(1).

12. In a standard termination, before distributing any plan assets, the plan administrator must send PBGC a “Standard Termination Notice – PBGC Form 500” (“Form 500”) with information about plan assets and benefit liabilities. *See* 29 U.S.C. § 1341(b)(2)(A);

29 C.F.R. § 4041.25. PBGC then has 60 days to determine whether there is any reason to believe that the plan is not sufficient for benefit liabilities. *See* 29 U.S.C. § 1341(b)(2)(C); 29 C.F.R. § 4041.26. Absent a finding from PBGC that the plan is not sufficient for benefit liabilities, the plan administrator must distribute plan assets in accordance with Title IV of ERISA within a specified time period. *See* 29 U.S.C. §§ 1341(b)(2)(D), 1341(b)(3); 29 C.F.R. § 4041.28.

13. The plan administrator must distribute the plan’s assets by (a) purchasing “irrevocable commitments” (*i.e.*, annuities) from a private insurer to satisfy all benefit liabilities, or (b) making alternative forms of distribution (*e.g.*, lump sum payments) “in accordance with the provisions of the plan and any applicable regulations.” 29 U.S.C. §§ 1341(b)(3)(A)(ii), (ii).

14. A “majority owner” with respect to a corporate contributing sponsor of a single-employer, defined benefit pension plan is an individual who owns 50 percent or more of the voting stock of the corporation or the value of all of the stock of the corporation. 29 C.F.R. § 4041.2.

15. A participant who is a majority owner may waive his accrued benefit under 29 C.F.R. § 4041.21(b)(2) “to the extent necessary to enable the plan to satisfy all other plan benefits liabilities . . .” Absent a majority owner waiver, however, ERISA prohibits the assignment or alienation of a benefit. *See* 26 U.S.C. § 401(a)(13); 29 U.S.C. § 1056(d).¹

16. Once plan assets are distributed, the plan administrator must file a “Post-Distribution Certification for Standard Termination – PBGC Form 501” (“Form 501”), attesting

¹ There are limited exceptions to these prohibitions (not applicable here) for things such as qualified domestic relations orders and the repayment of moneys owed to a plan. *See generally*, 29 U.S.C. § 206(d); 26 U.S.C. § 401(a)(13).

that all benefits under the plan were paid in accordance with Title IV of ERISA. *See* 29 U.S.C. § 1341(b)(3)(B); 29 C.F.R. § 4041.29.

17. Following receipt of the Form 501, PBGC continues to have authority regarding matters relating to the plan, 29 U.S.C. § 1341(b)(4), and is required, under 29 U.S.C. § 1303(a), to audit a statistically significant number of standard terminations to determine if participants entitled to a benefit have received their full benefits under the terms of the plan. PBGC's audits are subject to review under PBGC's administrative review procedures. 29 C.F.R. §§ 4003.1(b)(3)(iii), 4003.21-4003.35.

Facts

18. OAS adopted the Plan, effective December 31, 1982.

19. The Plan is a single-employer, defined benefit pension plan covered under Title IV of ERISA.

20. On June 12, 2007, OAS filed a Form 500 with PBGC, with a proposed termination date of July 31, 2007.

21. On July 27, 2007, a participant who had only a 37.67% interest in the stock of OAS ("Participant A") signed an alleged majority-owner, partial-benefit waiver.

22. Because Participant A's interest in the stock of OAS was less than 50%, he was not a majority owner. *See* 29 C.F.R. § 4041.2. The alienation or assignment of Participant A's benefit was therefore prohibited under 29 U.S.C. § 1056(d) and 29 C.F.R. § 4041.2.

23. Participant A's full lump-sum benefit under the Plan was \$117,305.16; he was paid only \$28,054.76 at the time of distribution.

24. On September 5, 2008, OAS filed a Form 501 with PBGC, certifying that all benefit liabilities under the Plan were satisfied.

25. On January 26, 2009, PBGC notified OAS that the Plan's standard termination had been selected for audit.

26. On June 9, 2011, PBGC issued its initial determination to OAS with respect to its audit (the "Initial Determination").

27. In the Initial Determination, PBGC found that Participant A improperly waived part of his benefit because he was not a majority owner of OAS under 29 C.F.R. § 4041.2.²

28. PBGC's Initial Determination required that OAS: (1) recalculate Participant A's lump-sum benefit; and (2) pay the additional amount owed Participant A within 30 days of PBGC's approving that calculation.

29. By letter dated July 8, 2011, OAS, through counsel, requested reconsideration of PBGC's Initial Determination. OAS argued that Participant A could waive his benefit because he was a substantial owner of OAS and consented to a waiver.³

30. On August 8, 2011, PBGC issued its final determination ("Final Determination"). Because Participant A was not a majority owner, the Final Determination upheld the Initial Determination that Participant A improperly waived part of his benefit.

² PBGC made one other finding. Another participant who had a 50.33% stock ownership interest in OAS ("Participant B") did not receive his full benefit. However, after receiving a valid majority-owner benefit waiver signed by Participant B, PBGC determined that no further action was necessary with regard to this finding.

³ A "substantial owner" is an individual who, in the case of a corporation, owns more than 10 percent in value of either the voting stock of that corporation or all the stock of that corporation. 29 U.S.C. § 1321(d)(3). Under 29 U.S.C. § 1321(b)(9)—a provision not applicable here—a pension plan established and maintained exclusively for substantial owners is not covered by Title IV of ERISA.

31. After PBGC issued the Final Determination, OAS did not pay Participant A the additional amount of benefit he was owed. PBGC therefore commenced proceedings against OAS in this Court on July 19, 2012, seeking enforcement of the Final Determination (the “Enforcement Action”).

32. On October 15, 2012, PBGC and OAS entered into an agreement to settle the Enforcement Action (the “Settlement Agreement”), which is attached as Exhibit 1.

33. Under the Settlement Agreement, OAS agreed to provide Participant A his full benefit by paying Participant A the principal amount of \$89,250, plus 0.5% interest, in 20 installments, each in the amount of \$4,521.32. The first installment was due on October 25, 2012; the last installment is due on July 1, 2017.

34. On October 15 2012, PBGC and OAS agreed and stipulated to the dismissal of the Enforcement Action without prejudice.

35. OAS paid eleven consecutive installments to Participant A under the Settlement Agreement, but has failed to pay every installment due since April 1, 2015.

36. Participant A is owed an additional \$40,162.50, plus interest.

Claim for Relief

37. PBGC repeats and realleges paragraphs 1-36.

38. The alienation or assignment of Participant A’s Plan benefit was prohibited under 26 U.S.C. § 401(a)(13) and 29 U.S.C. § 1056(d). And to date, Participant A has not been paid his full benefit under the Plan. Therefore, OAS has not paid all benefit liabilities under the Plan in violation of the Plan provisions and 29 U.S.C. § 1341.

39. OAS is liable for additional distributions to Participant A, plus interest, in

accordance with PBGC's Final Determination under 29 U.S.C. §§ 1303 and 1341.

WHEREFORE, PBGC respectfully requests that this Court:

1. Enter judgment in favor of PBGC and against OAS enforcing PBGC's Final Determination, requiring OAS to pay the remainder of Participant A's benefit, plus interest, in accordance with Title IV of ERISA;
2. Award to the PBGC all costs and expenses of litigation incurred in connection with this action; and
3. Grant such other legal or equitable relief as shall be just and proper.

Respectfully submitted,

Dated: February 12, 2016

/s/ Adrian Zareba
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