

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS**

**PENSION BENEFIT GUARANTY  
CORPORATION,**

**Plaintiff,**

**v.**

**LYONS-RYAN FORD SALES, INC.,**

**Defendant.**

**Case No. 1:13-cv-08958  
Judge Joan H. Lefkow**

**MOTION FOR DEFAULT JUDGMENT  
& MEMORANDUM IN SUPPORT**

**RELIEF REQUESTED**

The Pension Benefit Guaranty Corporation (“**PBGC**”) moves for entry of default judgment against Lyons-Ryan Ford Sales, Inc. (“**LRF**”) on each of PBGC’s four claims for relief and for an order granting the corresponding relief requested in the Complaint:

1. decreeing that the Lyons-Ryan Ford Sales, Inc. Frozen Defined Benefit Pension Plan (the “**Plan**”) is terminated;
2. appointing PBGC as statutory trustee of the Plan;
3. establishing March 31, 2011 as the termination date of the Plan; and
4. ordering LRF to transfer to PBGC all assets of the Plan and all documents and records of the Plan in LRF’s possession, custody or control that either (A) relate to the Plan or to any asset of the Plan or (B) may be necessary for calculation and payment of Plan benefits or for the administration of the Plan.

**BACKGROUND**

1. PBGC is a federal agency and corporation established to administer the defined benefit pension plan termination insurance program created by Title IV of the Employee

Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1001-1461 (2006 & Supp. V 2011) (“**ERISA**”). When an underfunded pension plan covered under Title IV terminates, PBGC pays statutorily guaranteed pension benefits, drawing from PBGC’s insurance fund to cover unfunded benefit liabilities. See 29 U.S.C. §§ 1302(a)(2), 1321, 1322.

2. The Plan is a single-employer defined benefit pension plan covered by PBGC’s guaranty of benefits under Title IV. Compl. ¶ 2.

3. LRF established the Plan to provide retirement benefits for its employees. Id.

4. LRF is a corporation organized under the laws of the State of Illinois. Compl. ¶ 8. Until 2007, when LRF ceased operations, LRF operated an automobile dealership in Antioch, Illinois. Id. In or about 2010, LRF voluntarily dissolved under 805 Ill. Comp. Stat. 5/12. Compl. ¶ 9.

5. Although LRF’s voluntary dissolution terminated its corporate existence, LRF remains empowered to conduct business necessary to wind up its affairs, and LRF may still be sued in its corporate name. See 805 Ill. Comp. Stat. § 5/12.30(a), (c)(4); Compl. ¶ 10.

6. LRF is contributing sponsor of the Plan within the meaning of 29 U.S.C. § 1002(16)(B)(i) and administrator of the Plan within the meaning of 29 U.S.C. §§ 1002(16)(A) and 1301(a)(1) and has not wound up its duties in those capacities. Compl. ¶¶ 10, 12.

7. LRF failed to make minimum funding contributions to the Plan as required by law. Consequently, the Plan is underfunded and will be unable to pay promised retirement benefits. Compl. ¶¶ 13-14.

8. Under 29 U.S.C. § 1342(c), if PBGC has (1) determined that a plan covered under Title IV should be terminated under 29 U.S.C. § 1342 and (2) issued notice of that determination to the plan’s administrator, PBGC is authorized to apply to a United States District Court for a

decree that the plan must be terminated either to protect the interests of plan participants, to avoid any unreasonable deterioration of the financial condition of the plan, or to avoid any unreasonable increase in the liabilities of PBGC's insurance fund.

9. On September 26, 2013, PBGC determined:

- a. under 29 U.S.C. § 1342(a)(1) and (2), that the Plan had not met the minimum funding standard required under section 412 of the Internal Revenue Code, that the Plan will be unable to pay benefits when due, and that the Plan should therefore be terminated;
- b. under 29 U.S.C. § 1342(c), that the Plan must be terminated to protect the interests of the Plan's participants; and
- c. under 29 U.S.C. § 1348, that the Plan's termination date should be March 31, 2011. Compl. ¶ 16.

10. On September 26, 2013, PBGC issued notice of the foregoing determinations to LRF. Compl. ¶¶ 17-18; Declaration of Attorney John Ginsberg, filed herewith (“**Ginsberg Decl.**”) ¶ 6 & Attach.

11. On December 16, 2013, PBGC brought this action to terminate the Plan, to establish March 31, 2011 as the termination date of the Plan and to become statutory trustee of the Plan, whereupon PBGC will pay Plan benefits to the extent of PBGC's statutory guaranty, drawing from PBGC's insurance fund to cover the Plan's unfunded guaranteed liabilities.

12. On December 17, 2013, this Court issued summons as to LRF.

13. As declared to this Court under penalty of perjury by process server Michael Fahey, on January 2, 2014, the summons and complaint were served on LRF by direct personal delivery to: (1) Mr. James R. Hardt, LRF's registered agent for service of process in the State

of Illinois, under whose laws LRF is incorporated; (2) the offices of Donald Carnow, Esq., attorney for LRF who, on information and belief, LRF has authorized to receive service of process on LRF's behalf; and (3) Mr. Kevin Lyons, president and sole shareholder of LRF, at his home, which is also, on information and belief, LRF's principal place of business. Return of Service, Jan. 13, 2014, ECF No. 6.

14. LRF was required to serve PBGC with an answer within 21 days after being served with the summons and complaint—that is, no later than January 23, 2014. See Fed. R. Civ. P. 12(a)(1)(A)(i). That time period was not extended by any stipulation of the parties. Ginsberg Decl. ¶ 8. Nor was it extended by any order of this Court. If, during that time period, LRF had served PBGC with a motion under Federal Rule of Civil Procedure 12, that might have altered the deadline for service of LRF's answer. Fed. R. Civ. P. 12(a)(4).

15. LRF did not, within 21 days of being served with the summons and complaint, serve PBGC with either an answer or any motion under Federal Rule of Civil Procedure 12. Ginsberg Decl. ¶ 9.

16. On February 4, 2014, the Clerk entered LRF's default. Notification of Docket Entry, Feb. 4, 2014, ECF No. 8.

17. PBGC now seeks to convert the default entered against LRF into a judgment and to obtain an order that provides the relief requested in the Complaint.

### **GROUND FOR RELIEF**

#### **I. The Court should enter default judgment for PBGC on each of its four claims for relief.**

18. In a case such as this, where claims for relief are not for a sum certain or that can be made certain by computation, a party seeking default judgment must apply to the court. Fed. R. Civ. P. 55(b)(2). Any request for a court order must be made by motion. Fed. R. Civ. P.

7(b)(1). By this Motion, PBGC applies for default judgment and requests an order providing relief requested in the Complaint.

19. The Complaint states four enumerated claims for relief:

- I. under 29 U.S.C. § 1342(c), for a decree that the Plan must be terminated to protect the interests of Plan participants;
- II. under 29 U.S.C. § 1342(c), for appointment of PBGC as statutory trustee of the Plan;
- III. under 29 U.S.C. § 1348(a)(4), to establish March 31, 2011 as the termination date of the Plan; and
- IV. under 29 U.S.C. §§ 1342(d)(1)(A)(ii), (A)(vii) and (B), to require transfer to the trustee appointed by this Court of all assets and records of the Plan and any information the trustee may reasonably need to pay Plan benefits or administer the Plan. Compl. ¶¶ 21-33.

20. PBGC alleged facts sufficient to support judgment for PBGC on each of those four claims. See Compl. ¶¶ 21-33. By defaulting, LRF has admitted those allegations. See Fed. R. Civ. P. 8(b)(6); Wehrs v. Wells, 688 F.3d 886, 892 (7th Cir. 2012) (upon entry of default, the well-pled allegations of the complaint relating to liability are taken as true); United States v. Di Mucci, 879 F.2d 1488, 1497 (7th Cir. 1989) (same).

21. By failing to answer, defend or appear in this action, LRF has demonstrated lack of interest in, or creditable argument in opposition to, this Court's rendering judgment for PBGC.

22. Therefore, this Court should enter default judgment for PBGC on each of PBGC's four claims.

**II. The Court should enter an order granting PBGC the relief requested.**

23. The Complaint includes five specific prayers for relief. See Compl. at 7. The first four correspond to PBGC's four enumerated claims and follow from judgment for PBGC on those claims. Compare Compl. at 7 with Compl. ¶¶ 21-33. Each of those four forms of relief is fully justified by facts that LRF has admitted by its default.

24. PBGC's fifth prayer for relief was for costs incurred in this action. Award of costs under 29 U.S.C. § 1303(e)(5) would be justified. LRF knowingly put PBGC to this action by declining to execute an agreement that would have terminated the Plan, established the Plan's termination date and appointed PBGC statutory trustee of the Plan. See Compl. ¶¶ 19-20. Executing that agreement would have cost LRF virtually nothing. Instead, PBGC had to file this action in order to fulfill PBGC's statutory duties and cover retirement benefits that LRF promised its employees. Having put PBGC to the expense of this action, LRF then failed to appear, answer or otherwise defend, demonstrating LRF's lack of significant or creditable opposition to this Court granting the relief that LRF declined to provide by agreement.

25. Although an award of costs would be justified, PBGC withdraws its request for such relief in order to streamline adjudication of this Motion and in light of practical impediments to enforcing monetary judgment against LRF. No award of costs would be provided by the Court entering the proposed form of order submitted herewith.

**III. No hearing is necessary to enter or effectuate default judgment.**

26. The court receiving an application for default judgment:

may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

- (A) conduct an accounting;
- (B) determine the amount of damages;
- (C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

Fed. R. Civ. P. 55(b)(2).

27. Though PBGC welcomes any hearing on the Motion that this Court may deem appropriate, no hearing is necessary to enter or effectuate default judgment. PBGC seeks no money damages; no accounting or investigation is necessary for this Court to enter or effectuate judgment; and LRF has, by failing to answer, admitted all allegations in the Complaint and thereby all facts necessary to PBGC's claims for relief, from which claims follow all forms of relief that PBGC requests by this Motion. *See supra*, ¶¶ 23-25.

**IV. LRF is not entitled to protections from default judgment accorded minors, incompetents and persons in military service.**

28. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. Fed. R. Civ. P. 55(b)(2). LRF is a corporation and so is not, and could not be, an infant or incompetent. Ginsberg Decl. ¶ 7.

29. Under the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501 *et seq.*, before entering a default judgment for nonappearance, the plaintiff must file an affidavit either: (1) stating whether the defendant is in military service—as defined by 50 U.S.C. App. § 511(2)—and facts supporting such conclusion; or (2) stating that the plaintiff is unable to make such determination. 50 U.S.C. App. § 521(a), (b)(1). If the defendant is in military service or if the affidavit is inconclusive, the court must take certain measures to protect the defendant's interests. 50 U.S.C. App. §§ 521 *et seq.* LRF is a corporation and so is not, and could not be, in military service within the meaning of 50 U.S.C. App. § 511(2). Ginsberg Decl. ¶ 7.

**V. LRF is not entitled to written notice of the Motion.**

30. If the party against whom a default judgment is sought has appeared personally or by representative, that party or its representative must be served with written notice of the application at least 7 days before any hearing thereon. Fed. R. Civ. P. 55(b)(2). Neither LRF nor its representative has appeared in this action. Accordingly, neither LRF nor any representative is entitled to written notice of this Motion.

Respectfully submitted,

February 11, 2014  
Washington, D.C.

/s/John H. Ginsberg  
ISRAEL GOLDOWITZ, Chief Counsel  
KAREN L. MORRIS, Deputy Chief Counsel  
KARTAR S. KHALSA, Assistant Chief Counsel  
JOHN H. GINSBERG, Attorney  
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*Attorneys for the Pension Benefit Guaranty Corporation*



**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS**

**PENSION BENEFIT GUARANTY CORPORATION,**

**Plaintiff,**

v.

**LYONS-RYAN FORD SALES, INC.,**

**Defendant.**

**Case No. 1:13-cv-08958  
Judge Joan H. Lefkow**

**DECLARATION OF  
JOHN H. GINSBERG**

I, John Holland Ginsberg, declare under penalty of perjury that:

1. I am over 18 years of age and competent to testify from personal knowledge to all facts stated herein.

2. I am a member in good standing of the bars of the Commonwealth of Pennsylvania, the State of Maryland and the District of Columbia.

3. I am employed by the Pension Benefit Guaranty Corporation (“**PBGC**”) as an attorney in its Office of the Chief Counsel.

4. By admission *pro hac vice*, I am attorney for PBGC in the above-captioned action (hereinafter, “**this action**”).

5. I am personally familiar with records that PBGC maintains regarding this action, Lyons-Ryan Ford Sales, Inc. (“**LRF**”) and the Lyons-Ryan Ford Sales, Inc. Frozen Defined Benefit Pension Plan (the “**Plan**”).

6. Attached hereto is an accurate and complete copy of PBGC’s notice to LRF of PBGC’s determination that the Plan must be terminated to protect the interests of Plan participants. PBGC caused that notice to be delivered to LRF via (1) e-mail to Mr. Kevin

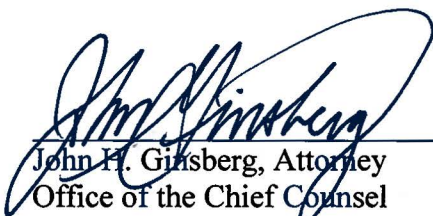
Lyons, (2) overnight delivery service to Mr. Lyons at his home address in Antioch, Illinois, and (3) e-mail and overnight delivery service to Mr. Donald S. Carnow, Esq., an attorney who has represented LRF and Mr. Lyons in dealings with PBGC regarding the Plan.

7. LRF is a corporation and so is not, and could not be, an infant or incompetent person within the meaning of Federal Rule of Civil Procedure 55(b)(2) or in military service within the meaning of 50 U.S.C. App. § 511(2).

8. The 21-day time period during which LRF was required by Federal Rule of Civil Procedure 12 to serve PBGC with a pleading or motion in this action has not been extended by any stipulation between LRF and PBGC.

9. LRF did not, on or before January 23, 2014, serve PBGC with an answer or with any motion under Federal Rule of Civil Procedure 12, and, to my knowledge, has not done so at any time since.

Dated: February 11, 2014  
Washington, D.C.



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**ATTACHMENT**

**TO DECLARATION OF JOHN H. GINSBERG**

**PBGC's notice to Lyons-Ryan Ford Sales, Inc. of PBGC's determination  
that the Lyons-Ryan Ford Sales, Inc. Frozen Defined Benefit Pension  
Plan must be terminated to protect the interests of the plan's participants**



Pension Benefit Guaranty Corporation  
1200 K Street, N.W., Washington, D.C. 20005-4026

SEP 26 2013

Lyons Ryan Ford Sales Inc.  
c/o Mr. Kevin E. Lyons, President  
21498 W. Bayview Dr.  
Antioch, IL 60002

EIN/PN: 36-2480166/001  
PBGC Case Number: 22004600  
Plan Name: Lyons Ryan Ford Sales Inc. Frozen  
Defined Benefit Pension Plan

&

Lyons Ryan Ford Sales Inc.  
ATTN: Mr. Kevin E. Lyons, President  
c/o Donald S. Carnow, Esq.  
Carnow and Carnow, Ltd.  
778 Frontage Road, Suite 101  
Northfield, Illinois 60093

### NOTICE OF DETERMINATION

PLEASE TAKE NOTICE that the Pension Benefit Guaranty Corporation ("PBGC") has determined under section 4042(a)(1) and (a)(2) of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. § 1342(a)(1) and (2), that the Lyons Ryan Ford Sales Inc. Frozen Defined Benefit Pension Plan ("Plan") has not met the minimum funding standard required under section 412 of the Internal Revenue Code and will be unable to pay benefits when due and should therefore be terminated. PBGC has further determined, under ERISA § 4042(c), 29 U.S.C. § 1342(c), that the Plan must be terminated in order to protect the interests of the Plan's participants. Accordingly, PBGC intends to proceed under ERISA § 4042, 29 U.S.C. § 1342, to have the Plan terminated and PBGC appointed as statutory trustee, and under ERISA § 4048, 29 U.S.C. § 1348, to have March 31, 2011, established as the Plan's termination date.

PBGC has completed its decision-making process in this matter; accordingly, this determination is effective on the date it is issued.

PENSION BENEFIT GUARANTY CORPORATION

Andrea E. Schneider  
Chairperson, Trusteeship Working Group

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS**

**PENSION BENEFIT GUARANTY CORPORATION,**

**Plaintiff,**

v.

**LYONS-RYAN FORD SALES, INC.,**

**Defendant.**

**Case No. 1:13-cv-08958  
Judge Joan H. Lefkow**

**ORDER**

This Court, having subject matter jurisdiction over this action under 29 U.S.C. §1303(e)(3), and having carefully considered the motion by the Pension Benefit Guaranty Corporation (“**PBGC**”) for default judgment against Lyons-Ryan Ford Sales, Inc. (“**LRF**”) and for an order granting corresponding relief requested in the Complaint, and having carefully considered all arguments of the parties regarding the motion, and there appearing good cause for granting the relief requested, the motion is GRANTED, default judgment for PBGC is GRANTED and shall be promptly entered on all four of claims for relief enumerated in PBGC’s complaint, and it is hereby ORDERED:

- I. the Lyons-Ryan Ford Sales, Inc. Frozen Defined Benefit Pension Plan (the “**Plan**”) is terminated;
- II. PBGC is appointed statutory trustee of the Plan;
- III. March 31, 2011 is the termination date of the Plan; and
- IV. LRF shall transfer to PBGC all assets of the Plan and all documents and records of the Plan in LRF’s possession, custody or control that either (A) relate to the Plan or to any asset of the Plan or (B) may be necessary for calculation and payment of Plan benefits

or for the administration of the Plan.

SO ORDERED,

Dated: \_\_\_\_\_, 2014

\_\_\_\_\_  
Joan H. Lefkow  
United States District Judge