

ISRAEL GOLDOWITZ, Chief Counsel  
CHARLES L. FINKE, Deputy Chief Counsel  
SARA B. EAGLE, Assistant Chief Counsel  
ERIN C. KIM, Attorney, CA 273710  
Pension Benefit Guaranty Corporation  
Office of the Chief Counsel  
1200 K Street, N.W.  
Washington, D.C. 20005-4026  
Tel.: (202) 326-4020, ext. 3399  
Fax: (202) 326-4112  
E-mails: kim.erin@pbgc.gov and efile@pbgc.gov

*Attorneys for Plaintiff Pension Benefit Guaranty Corporation*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

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

Plaintiff,

v.

IDAHO HYPERBARICS, INC.  
as Plan Administrator  
of the Idaho Hyperbarics, Inc.  
Defined Benefit Plan

c/o Jeffery L. Hampsten,  
as Registered Agent and President  
1125 West Alameda Road  
Pocatello, ID 83201

Defendant.

Case No. 4:16-cv-00325

**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 (2012 & Supp. II 2014) (“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 Idaho Hyperbarics, Inc. Defined Benefit 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, Idaho Hyperbarics, Inc. (“Idaho Hyperbarics”), is a wound care and hyperbaric treatment provider incorporated in the State of Idaho. The Defendant’s primary place of business is in Pocatello, Idaho.

10. Idaho Hyperbarics 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, benefits are determined under the plan provisions in effect on the plan's termination date. 29 U.S.C. § 1341(b)(1)(D); 29 C.F.R. § 4041.8.

13. 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.

14. In a standard termination, 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)(i), (ii).

15. Participants in an Internal Revenue Code (“IRC”) Section 412(e)(3) plan, a plan which is fully and solely funded through insurance policies under 26 U.S.C. § 412(e), are entitled to the full cash surrender value of their insurance policies in a standard termination.

16. 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.

17. 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).<sup>1</sup>

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

19. Following receipt of the Form 501, PBGC continues to have authority regarding matters relating to the plan under 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

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<sup>1</sup> 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).

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**

20. Idaho Hyperbarics adopted the Plan, effective December 27, 2004.
21. The Plan was a single-employer, defined benefit pension plan covered under Title IV of ERISA.
22. The Plan was established as an IRC Section 412(i) plan, which is fully and solely funded through insurance policies. IRC § 412(e).<sup>2</sup>
22. The insurance policy which funded the Plan were issued by MONY Life Insurance Company of America ("MONY").
23. On May 27, 2009, Idaho Hyperbarics filed a Form 500 with PBGC, with a proposed termination date of December 26, 2008.
23. On November 15, 2010, Idaho Hyperbarics filed a Form 501 with PBGC, certifying that all benefit liabilities under the Plan were satisfied.
24. On the Form 501, Idaho Hyperbarics stated that it paid a total of \$575,900 to the 15 Plan participants on March 19, 2009, more than 2 months before Idaho Hyperbarics filed the Form 500.
25. On April 28, 2011, PBGC notified Idaho Hyperbarics that the Plan's standard termination had been selected for audit because, in violation of Title IV or ERISA, the Plan assets were distributed to participants before filing the Form 500.

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<sup>2</sup> IRC § 412(i) is now known as IRC § 412(e) after the 2006 PPA moved the contents of IRC § 412(i) to § 412(e).

26. During the audit, Idaho Hyperbarics submitted documentation showing that only a total of \$228,884 was distributed to participants, far less than the \$575,900, reported on the Form 501 and the aggregate value of the cash surrender checks that MONY issued on March 29, 2009.

27. On July 15, 2014, PBGC issued its initial determination to Idaho Hyperbarics with respect to its audit (the “Initial Determination”).

28. In the Initial Determination, PBGC found that Idaho Hyperbarics did not pay the Plan participants the full cash surrender value of their contracts, as required under IRC Section 411(b)(1)(F) (“Finding 1”).

29. In the Initial Determination, PBGC found that in addition to not receiving the full cash surrender value of his insurance contract, Participant A did not receive the full amount reported on his benefit election form and Form 1099-R (“Finding 2”).

30. In the Initial Determination, PBGC found that two participants who terminated employment prior to Plan termination, Participant B and Participant C, were not vested 100% in their benefits upon Plan Termination as required by law. 29 U.S.C. § 411(d)(3) and (a)(4) (“Finding 3”).

31. In the Initial Determination, PBGC found that the benefits for non-majority owners may have been incorrectly waived (“Finding 4”).<sup>3</sup>

32. Regarding Finding 1, Finding 2, and Finding 3, the Initial Determination required Idaho Hyperbarics to (a) calculate the underpayments due to participants by determining the difference between the amount each participant actually received and the full cash surrender value of their annuity contract and adding a reasonable rate of interest to the additional amounts

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<sup>3</sup> In the Initial Determination, PBGC made two more findings; however, PBGC did not request any corrective action concerning those findings.

due, (b) submit such calculations for PBGC's review, and (c) pay participants the additional amounts due.

33. Regarding Finding 4, the Initial Determination requested proof of majority ownership for participants that reportedly waived their benefit.<sup>4</sup>

34. By letter dated November 12, 2014, Idaho Hyperbarics, through counsel, requested reconsideration of PBGC's Initial Determination and supplemented the request for reconsideration by an email dated March 3, 2015 (the "Reconsideration Request").

35. With respect to Finding 1, Idaho Hyperbarics argued that (a) because all premiums were paid as instructed by the Plan's actuary, the Plan should not be subject to IRC § 411; and (b) all available Plan assets were fairly distributed to participants, after taking out expenses and losses the Plan incurred.

38. The Reconsideration Request did not dispute Finding 2.<sup>5</sup> Accordingly, Finding 2 became a final determination on February 22, 2015. See 29 C.F.R. § 4003.22.

37. With respect to Finding 3, Idaho Hyperbarics argued that Participants B, C, and an additional Participant E, should not be fully vested after leaving employment with Idaho Hyperbarics.

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<sup>4</sup> Specifically, PBGC informed Idaho Hyperbarics that Participant D may be able to waive the remaining portion of any additional benefit due to him by submitting the required documentation, if Participant D is a majority owner of Idaho Hyperbarics as defined in 29 C.F.R. § 4041.2.

<sup>5</sup> With regard to Finding 2, the Reconsideration Request stated that proof of a \$2,000 payment allegedly accounting for the difference between the benefit reported on Participant A's benefit election and Form 1099-R, and the amount he received on Plan termination would be forwarded to PBGC. To date, PBGC has received no proof of the alleged \$2,000 payment.

38. With regard to Finding 4, the Reconsideration Request stated that Participant E agreed to receive a lesser benefit, but did not argue that Participant E was a majority owner of Idaho Hyperbarics.

39. The Reconsideration Request did not dispute Finding 4 with respect to any other Participant. Accordingly, with respect to all participants, except Participant E, Finding 4 became a final determination on February 22, 2015. See 29 C.F.R. § 4003.22.

40. On April 28, 2015, PBGC issued its final determination (“Final Determination”).

41. The Final Determination upheld Finding 1 on the grounds that, inter alia, (1) IRC § 411(b)(1)(F) specifically requires that a participant’s accrued benefit in a 412(e)(3) plan be at least the cash surrender value of their insurance contracts of any applicable date; (2) ERISA § 4041(b)(3) requires all benefits liabilities to be paid upon a standard termination and does not allow for expenses or losses by the plan to be deducted from a participant’s benefits; and (3) IRC § 401(a)(2) and ERISA § 403(c)(1) requires that Plan assets be used exclusively to the benefit of participants until all benefits liabilities are satisfied.

42. The Final Determination upheld Finding 3 on the grounds that IRC § 411(d)(3) requires that the non-vested portion of benefits of all affected participants, including terminated participants who have not yet incurred a five year break in service, become non-forfeitable on the date of the Plan termination.

43. The Final Determination upheld Finding 4 with respect to Participant E on the grounds that no documentation had been provided showing that Participant E waived her benefit or that she was a majority owner eligible to waive her benefit under 29 C.F.R. § 4041.2.

44. On information and belief, as of the date of this Complaint, Idaho Hyperbarics has not made any of the additional benefit payments to plan participants as required by the Initial Determination or Final Determination.

### **Claim for Relief**

45. PBGC repeats and re-alleges paragraphs 1-44.

46. On Plan termination, Plan benefit liabilities were not paid in accordance with the Plan and applicable law.

47. Idaho Hyperbarics did not pay Plan participants the full cash surrender value of their Plan insurance contracts at Plan termination as required under 26 U.S.C. § 411(b)(1)(F).

48. Idaho Hyperbarics did not vest Participants B, C, and E 100% on the Plan's termination as required under 26 U.S.C. § 411(d)(3).

49. Idaho Hyperbarics reduced the benefits of Plan participants who were not majority owners eligible to waive their benefits under 29 C.F.R. § 4041.2; thereby violating 26 U.S.C. § 401(a)(13); 29 U.S.C. § 1056(d).

50. Idaho Hyperbarics failed to provide evidence that Participant A received the amount reported on his benefit statement and Form 1099-R; thereby violating 26 U.S.C. § 411(b)(1)(F) and 29 U.S.C. § 1341.

50. Accordingly, Idaho Hyperbarics violated Title IV of ERISA and applicable regulations, by failing to distribute Plan assets in full satisfaction of the Plan's benefit liabilities. See 29 U.S.C. § 1341. Additional amounts, plus interest, are owed to participants and beneficiaries.

WHEREFORE, PBGC respectfully requests that this Court:

1. Enter judgment in favor of PBGC and against Idaho Hyperbarics enforcing PBGC's Final Determination and PBGC's Initial Determination findings that became final on February 22, 2015, and requiring Idaho Hyperbarics to comply with the provisions of 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: July 21, 2016

/s/ Erin C. Kim  
ISRAEL GOLDOWITZ  
Chief Counsel  
CHARLES L. FINKE  
Deputy Chief Counsel  
SARA B. EAGLE  
Assistant Chief Counsel  
ERIN C. KIM, CA 273710  
Attorney  
Pension Benefit Guaranty Corporation  
Office of the Chief Counsel  
1200 K Street, N.W.  
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efile@pbgc.gov