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13 **UNITED STATES BANKRUPTCY COURT**
14 **EASTERN DISTRICT OF CALIFORNIA**
15 **SACRAMENTO DIVISION**

16 In Re:)
17 JOHN S. NOTMAN and) CASE NO. 14-24824
18)
19 JEANETTE M. NOTMAN) CHAPTER 7
20)
21 d/b/a NOTMAN FINANCIAL GROUP,)
22)
23 Debtors.)
24 _____)
25)
26 PENSION BENEFIT GUARANTY CORPORATION)
27)
28 Plaintiff,)
29 v.)
30)
31 JOHN S. NOTMAN)
32)
33 Defendant.)
34 _____)

35 **COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT**

36 The Pension Benefit Guaranty Corporation (“PBGC”), on behalf of the Notman
37 Financial Group Defined Benefit Pension Plan (“Pension Plan”), brings this adversary
38 proceeding, pursuant to 11 U.S.C. §§ 523 and 553 and Bankruptcy Rule 4007, to determine the
39 dischargeability of a debt to the Pension Plan.

1 underfunding of the Pension Plan since Notman Financial Group is not an incorporated entity.

2 16. Upon information and belief, the Debtors deposited \$110,000.00 to an account
3 held by the Pension Plan at Charles Schwab & Co on December 23, 2013. PBGC believes this
4 deposit to be a Pension Plan contribution. Over the course of the next 5 months, the Debtors made
5 withdrawals totaling \$40,000.
6

7 17. Upon information and belief, during calendar year 2013, Debtor John Notman
8 withdrew over \$100,000 from the Pension Plan account held at Bank of Agriculture and
9 Commerce.

10 18. During the relevant period, neither Debtor was retired or entitled to receive
11 pension payments under the Pension Plan.

12 19. The foregoing withdrawals constitute violations of 29 U.S.C. § 1104(a)(1)(A)(i),
13 which requires a pension plan fiduciary to act solely in the interest of plan participants and
14 beneficiaries.
15

16 20. The foregoing withdrawals constitute breaches of fiduciary duty under 29 U.S.C. §
17 1104(a)(B) which states that “[a] fiduciary with respect to a plan shall not cause the plan to
18 engage in a transaction, if he knows or should know that such transaction constitutes a direct or
19 indirect lending of money or other extension of credit between the plan and a party in interest.”
20

21 21. Pension Plan asset statements provided to PBGC by the Debtors state that as of
22 December 31, 2013, the Pension Plan assets totaled \$1,792,543.73 of which \$1,677,366.00 was
23 real estate holding and mortgages. A copy of that asset statement is attached hereto as Exhibit A.

24 22. Upon information and belief, some portion of the assets described in the preceding
25 paragraph are jointly owned by Debtor John Notman and the Pension Plan.

26 23. Debtor John Notman’s investment decisions with respect to the Pension Plan are in
27 violation of 29 U.S.C. § 1104(a)(1)(C), which requires a fiduciary to diversify plan investments to
28

1 minimize the risk of loss.

2 24. To the extent that any Pension Plan assets are jointly or co-owned by Debtor John
3 Notman, the Debtor is in violation of 29 U.S.C. §§ 1106(a) and (b), which prohibit certain
4 transactions between a pension plan and a party in interest, and between a pension plan and a
5 fiduciary.
6

7 25. To the extent that any real property owned by the Pension Plan is leased to the
8 Debtors, the Debtors are in violation of 29 U.S.C. § 1106(a)(2), which provides that “[n]o
9 fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the
10 plan to hold any employer security or employer real property if he knows or should know that
11 holding such security or real property violates section 407(a)”.

12 26. ERISA provides that a “fiduciary shall discharge his duties with respect to a plan
13 solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: (i)
14 providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses
15 of administering the plan.” 29 U.S.C. § 1104(a)(1)(A).
16

17 27. A fiduciary must exercise “the care, skill, prudence, and diligence under the
18 circumstances then prevailing that a prudent man acting in a like capacity and familiar with such
19 matter would use in the conduct of an enterprises of a like character and with like aims.” 29
20 U.S.C. § 1104(a)(1)(B).
21

22 28. A fiduciary must also act “in accordance with the documents and instruments
23 governing the plan,” insofar as those documents are consistent with the provisions of ERISA. 29
24 U.S.C. § 1104(a)(1)(D).

25 29. ERISA provides that “[a] fiduciary with respect to a plan shall not cause the plan
26 to engage in a transaction, if he knows or should know that such transaction constitutes a direct or
27 indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the
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1 plan.” 29 U.S.C. § 1106(a)(1)(D). ERISA also prohibits a fiduciary from “(1) deal[ing] with the
2 assets of the plan in his own interest or for his own account, [or] (2) in his individual or in any
3 other capacity, act[ing] in any transaction involving the plan on behalf of a party (or
4 represent[ing] a party) whose interests are adverse to the interests of the plan or the interests of its
5 participants or beneficiaries” 29 U.S.C. § 1106(b)(1)-(2).
6

7 30. To the extent that Debtor used the Pension Plan assets for any purpose other than
8 for the express purpose of providing benefits to plan participants and beneficiaries and to defray
9 reasonable administrative expenses of the Pension Plan, Debtor breached his fiduciary duties to
10 the Pension Plan in violation of 29 U.S.C. §§ 1104(a)(1)(A), (a)(1)(B), (a)(1)(D) and
11 29 U.S.C. 1106 §§ (a)(1)(D) and (b)(1)-(2).
12

13 31. Pursuant to 29 U.S.C. § 1109(a), Debtor is personally liable for all losses,
14 including interest, incurred by the Pension Plan as a result of his violations of fiduciary duty.
15

16 32. PBGC has only recently obtained certain documents in connection with the
17 Pension Plan and is continuing its investigation into any breach of fiduciary duty that occurred
18 with respect to the Pension Plan.
19

20 34. In light of the foregoing, and in anticipation of its appointment as statutory trustee
21 of the Pension Plan, PBGC brings this adversary proceeding on behalf of the Pension Plan under
22 29 U.S.C. §§ 1303(e) and 1342(d)(1).
23

24 **COUNT I: OBJECTION TO DISCHARGEABILITY OF DEBT**
25 **PURSUANT TO 11 U.S.C. § 523(a)(4)**
26 **Liability for Breach of Duty under 29 U.S.C. § 1104(a)(1)**
27

28 35. PBGC restates and realleges paragraphs 1 through 34 above as if fully set forth
herein.

36. Under 11 U.S.C. § 523(a)(4), an individual debtor may not discharge any debt “for
fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny.”

1 37. Upon information and belief, Debtor, a fiduciary of the Pension Plan, has breached
2 his fiduciary duties regarding the Pension Plan in one or more of the following particulars:

3 (a) By committing over 90% of the Pension Plan’s assets to non-diversified real
4 estate investment; and

5 (b) By committing the Pension Plan’s assets to unreasonably risky investments.

6 38. As a result of Debtor’s breaches of fiduciary duty, the Pension Plan suffered losses
7 from the investment of the Pension Plan’s assets in non-diversified and unreasonably risky
8 investments.
9

10 39. Debtor may not discharge any debt for fraud or defalcation while acting in a
11 fiduciary capacity with respect to the Pension Plan.

12 40. Under 29 U.S.C. § 1109(a), Debtor John Notman is personally liable for the
13 Pension Plan’s losses caused by his breach of fiduciary duty in an amount to be proven at trial.
14

15 **COUNT II – OBJECTION TO DISCHARGEABILITY OF DEBT**
16 **Pursuant to 11 U.S.C. § 523(a)(4)**
17 **Liability for Breach of Duty under 29 U.S.C. § 1104(a)(1)(B)**

18 41. Plaintiff restates and realleges paragraphs 1 through 40 above as if fully set forth
19 herein.

20 42. Debtor John Notman failed to act “with the care, skill, prudence, and diligence”
21 that a prudent man acting in a like capacity and familiar with such matters would use in the
22 conduct of an enterprise of a like character with like aims.”

23 43. Debtor John Notman’s breach of fiduciary duty under 29 U.S.C. § 1104(a)(1)(B)
24 caused the Pension Plan to suffer substantial losses.

25 44. Under 29 U.S.C. § 1109(a), Debtor John Notman is personally liable for the
26 Pension Plan’s losses caused by his breach of fiduciary duty in an amount to be proven at trial.
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1 **COUNT III – OBJECTION TO DISCHARGEABILITY OF DEBT**

2 **Pursuant to 11 U.S.C. § 523(a)(4)**

3 **Liability for Breach of Duty under 29 U.S.C. § 1104(a)(1)(C)**

4 45. Plaintiff restates and realleges paragraphs 1 through 44 above as if fully set forth
5 herein.

6 46. By placing over 90 percent of the Pension Plan’s assets in real estate investments,
7 Debtor failed to diversify the investments of the Pension Plan so as to minimize the risk of large
8 losses. And this was clearly not prudent under the circumstances alleged herein.

9 47. Debtor’s breach of fiduciary duty under 29 U.S.C. § 1104(a)(1)(C) caused the
10 Pension Plan to suffer substantial losses.

11 48. Under 29 U.S.C. § 1109(a), Debtor John Notman is personally liable for the
12 Pension Plan’s losses caused by his breach of fiduciary duty in an amount to be proven at trial.

13 **COUNT IV – OBJECTION TO DISCHARGEABILITY OF DEBT**

14 **Pursuant to 11 U.S.C. § 523(a)(4)**

15 **Liability for Prohibited Transactions under 29 U.S.C. § 1106**

16 49. Plaintiff restates and realleges paragraphs 1 through 48 above as if fully set forth
17 herein.

18 50. ERISA provides that “[a] fiduciary with respect to a plan shall not cause the plan
19 to engage in a transaction, if he knows or should know that such transaction constitutes a direct or
20 indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the
21 plan.” 29 U.S.C. § 1106(a)(1)(D). ERISA also prohibits a fiduciary from “(1) deal[ing] with the
22 assets of the plan in his own interest or for his own account, [or] (2) in his individual or in any
23 other capacity, act[ing] in any transaction involving the plan on behalf of a party (or
24 represent[ing] a party) whose interests are adverse to the interests of the plan or the interests of its
25 participants or beneficiaries” 29 U.S.C. § 1106(b)(1)-(2).

26 51. Debtor John Notman breached his fiduciary duties under 29 U.S.C. § 1104 by
27
28

1 engaging in following transactions which are prohibited under 29 U.S.C. § 1106:

- 2 (a) By withdrawing over \$40,000 from the Pension Plan account held at Charles
3 Schwab & Co. Inc., at a time when no pension benefits were due to Debtors John and
4 Jeanette Notman;
- 5 (b) By co-owning real property with the Pension Plan;
- 6 (c) By causing the Pension Plan to lease real property to a party in interest;
- 7 (d) By dealing with the plan assets for Mr. Notman's personal interest and for his own
8 account; and
- 9 (e) By withdrawing over \$101,000 from the Pension Plan account held at Bank of
10 Agriculture & Commerce for personal purposes at a time when no pension benefits were
11 due to Debtors John and Jeanette Notman.

12
13 **WHEREFORE**, Plaintiff respectfully requests that this Court:

- 14 (1) Declare and adjudge that any claim of PBGC for recovery of losses incurred by the
15 Pension Plan through the Debtor's breaches of fiduciary duty is exempt from
16 discharge, pursuant to 29 U.S.C. § 523(a)(4);
- 17 (2) Declare and adjudge that Debtor is personally liable for any losses incurred by the
18 Pension Plan through Debtor's breaches of fiduciary duty, pursuant to 29 U.S.C. §
19 1109(a);
- 20 (3) Declare and adjudge that Debtor's pension benefits under the Pension Plan may be
21 set off against the claim for recovery of losses incurred by the Pension Plan
22 through Debtor's breaches of fiduciary duty, pursuant to 11 U.S.C. § 553;
- 23 (4) Declare and adjudge that Debtor shall be barred from acting as a fiduciary under
24 ERISA; and
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(5) Award such other relief as is just and equitable.

Date: August 7, 2014

Respectfully submitted,

/s/ Cassandra B. Caverly, Esq.
Cassandra B. Caverly, Esq.
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Exhibit A

NOTMAN FINANCIAL GROUP RETIREMENT PLAN

YEAR ENDING DECEMBER 31, 2013

TOTAL ASSET REPORT

Bank of Ag & Commerce 30073526	\$522.04
Berthel Fisher MF1-077364	\$0.45
Valley Property Mortgage	\$1,060,000.00
Charles Schwab 3534-3069	\$110,000.24
Jackson National Life 92475429A	\$0.00
TripleNet GREIT	\$4,655.00
Ridgewood Energy	\$50,000.00
6403 Embarcadero, Stockton, CA	\$242,366.00
Waterfront Lot, Stockton, CA	\$325,000.00

TOTAL ASSET IN PENSION PLAN 12/31/13

\$1,792,543.73

SUMMARY FOR 2009¹³

DEPOSITS, WITHDRAWALS, & TRANSFERS

DEPOSITS

08/06/13	3,000.00	Bank of Ag & Commerce 30073526
12/23/13	110,000.00	Charles Schwab 3534-3069

TRANSFERS

02/05/13	1915.43	Bank of Ag & Commerce 30073526 from G REIT Liquidating Trust
01/07/13	112.37	Bank of Ag & Commerce 30073526 from Ridgewood Energy Fund
02/07/13	47.50	Bank of Ag & Commerce 30073526 from Ridgewood Energy Fund
03/04/13	88.67	Bank of Ag & Commerce 30073526 from Ridgewood Energy Fund
04/08/13	69.71	Bank of Ag & Commerce 30073526 from Ridgewood Energy Fund
05/06/13	68.29	Bank of Ag & Commerce 30073526 from Ridgewood Energy Fund
06/06/13	43.08	Bank of Ag & Commerce 30073526 from Ridgewood Energy Fund
07/05/13	39.69	Bank of Ag & Commerce 30073526 from Ridgewood Energy Fund
08/05/13	32.12	Bank of Ag & Commerce 30073526 from Ridgewood Energy Fund
08/28/13	78,843.25	Bank of Ag & Commerce 30073526 from Jackson Nat. 92475429A
09/03/13	28.69	Bank of Ag & Commerce 30073526 from Ridgewood Energy Fund
10/07/13	28.64	Bank of Ag & Commerce 30073526 from Ridgewood Energy Fund
11/08/13	33.17	Bank of Ag & Commerce 30073526 from Ridgewood Energy Fund
12/02/13	34.98	Bank of Ag & Commerce 30073526 from Ridgewood Energy Fund

WITHDRAWALS

01/04/13	3,492.50	Associated Pension Consultants from Bank of Ag & Commerce 30073526
04/01/13	10,000.00	John S. Notman from Bank of Ag & Commerce 30073526
04/29/13	13,800.00	John S. Notman from Bank of Ag & Commerce 30073526
09/13/13	20,000.00	John S. Notman from Bank of Ag & Commerce 30073526
09/17/13	3,557.50	Associated Pension Consultants from Bank of Ag & Commerce 30073526
09/30/13	20,000.00	John S. Notman from Bank of Ag & Commerce 30073526
10/31/13	10,000.00	John S. Notman from Bank of Ag & Commerce 30073526
11/27/13	10,000.00	John S. Notman from Bank of Ag & Commerce 30073526
12/02/13	18,000.00	John S. Notman from Bank of Ag & Commerce 30073526

7627
 NOTMAN FINANCIAL GROUP DEFINED
 BENEFIT PENSION PLAN
 3802 FOURTEEN MILE DRIVE
 STOCKTON, CA 95219-3809

1028
 80-25661297

DATE: 12-18-12

PAY TO THE ORDER OF: APC \$ 3,492.⁰⁰

Three thousand four hundred and ninety two and 00/100 DOLLARS

BAC Stockton 209-941-1000
 Bank of Agriculture & Commerce

MONEY MARKET

MEMO: Pension Withdrawal #7627 *JM*

⑆121125660⑆03007352E⑆ 1028

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DDA Debits - 01/04/2013

MONEY WITHDRAWN FROM ACCOUNT 1/4/13

NOTMAN FINANCIAL GROUP DEFINED
BEBFIT PENSION PLAN
3802 FOURTEEN MILE DRIVE
STOCKTON, CA 95219-3809

1029
90-2566/1211

DATE 9-11-13

PAY TO THE
ORDER OF

APC

\$ 3557.50

Three thousand five hundred and fifty seven 50/100 DOLLARS

BAC Stockton 209-944-1830
Bank of Agriculture & Commerce

MONEY MARKET

MEMO _____

JL. Nye MP

⑆ 1211 256601 0300 73526 ⑈ 1029

PROFESSIONAL CHECK SYSTEMS