

1 **NICOLE C. HAGAN, D.C. Bar #482274**
2 **PENSION BENEFIT GUARANTY CORPORATION**
3 **1200 K STREET, N.W.**
4 **WASHINGTON, D.C. 20005**
5 **(202) 326-4020 ext. 6543**
6 **(202) 326-4122 (fax)**
7 **hagan.nicole@pbgc.gov**

8 **Attorney for Plaintiff**

9 **UNITED STATES DISTRICT COURT**

10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 **PENSION BENEFIT GUARANTY**
12 **CORPORATION, AS STATUTORY**
13 **TRUSTEE OF THE KACHAY**
14 **HOMES, INC. DEFINED BENEFIT**
15 **PENSION PLAN,**

16 **Plaintiff,**

17 **vs.**

18 **ILANA KARP AND SAMUEL KARP,**
19 **Defendants.**

Case No.: 18-cv-0652-MMA-AGS

**PLAINTIFF’S OPPOSITION TO
DEFENDANT’S EX PARTE
APPLICATION FOR SEPARATE
ADJUDICATION OF PLAINTIFF’S
CASE**

20 Plaintiff, Pension Benefit Guaranty Corporation (“PBGC”), files this
Opposition to Defendant’s Ex Parte Application for Separate Adjudication of
Plaintiff’s Case. Defendant Ilana Karp seeks to separate PBGC’s case against the
Defendants, Samuel Karp and Ilana Karp, and to proceed with separate
adjudications.

1 As set forth below, the Defendant has not met her burden to establish the
2 necessity of severance or bifurcation of PBGC's case against Samuel and Ilana
3 Karp.

4 **BACKGROUND**

5 The Kachay Homes Inc. Defined Benefit Pension Plan (the "Plan") was
6 established by Kachay Homes Inc. in 2001 to provide benefits to certain
7 employees. Defendants Samuel Karp and Ilana Karp were trustees of the Plan. As
8 trustees of the Plan, the Defendants are plan fiduciaries and are jointly and
9 severally liable for any losses sustained as a result of any breach of their fiduciary
10 duties to the Plan.

11 PBGC is the wholly owned United States government corporation created to
12 administer the pension termination insurance program established by Congress
13 under Title IV of the Employee Retirement Income Security Act of 1974, *as*
14 *amended*, 29 U.S.C. §§ 1001-1461 ("ERISA"). *See also* 5 U.S.C. § 105. Subject
15 to statutory limits, PBGC guarantees benefits earned by participants in pension
16 plans covered under Title IV. 29 U.S.C. § 1322. When a pension plan covered
17 under Title IV terminates without sufficient assets to pay benefits, PBGC typically
18 becomes the statutory trustee of the plan, takes over the plan's assets and liabilities,
19 and pays guaranteed benefits to plan participants and their surviving beneficiaries.

1 In 2013, the Plan terminated and PBGC became statutory trustee of the Plan.
2 On March 30, 2018, PBGC filed this action against Samuel and Ilana Karp for
3 transfers and loans that were made from the Plan's assets. Defendants filed their
4 Answers to PBGC's Complaint on April 20, 2018. By Notice and Order dated
5 April 27, 2018, the Court requested that the parties schedule a Rule 26(f)
6 Conference by May 18, 2018. In response to PBGC's request to schedule a date
7 for a Rule 26(f) Conference, Defendants requested that PBGC agree to separate its
8 case against the Defendants. Defendants informed PBGC that if PBGC did not
9 agree to separate its case, Defendants would file a petition with the court to request
10 that the case be separated. Further, Defendants stated that they would not schedule
11 a Rule 26(f) Conference until this issue had been resolved. PBGC declined
12 Defendants request and on May 10, 2018, Defendants filed its Ex Parte Motion
13 requesting that the Court separate PBGC's case against the Defendants.

14 Under Local Rule 83.3(g) and Section VIII of Judge Anello's Civil
15 Chambers Rules, before filing an ex parte motion the moving party must contact
16 the opposing party to meet and confer on the subject of the motion. Defendant
17 Ilana Karp filed the ex parte motion without contacting PBGC to meet and confer
18 on the motion. In fact, PBGC did not know the basis nor timing of the motion until
19 it was filed. Defendant therefore did not satisfy the requirements under the Local
20 Rules and the Civil Chambers Rules.

1 **DISCUSSION**

2 Federal Rule of Civil Procedure (“FRCP”) 21 grants courts the authority to
3 “sever any claim against a party.” FRCP 21. In determining whether to sever a
4 claim under FRCP 21, courts consider the following factors: 1) whether the claims
5 arise out of the same transaction or occurrence; 2) whether the claims present some
6 common questions of law or fact; 3) whether judicial economy would be
7 facilitated; 4) whether prejudice would be avoided if severance were granted; and
8 5) whether different witnesses and documentary proof are required for the separate
9 claims. *Anticancer, Inc. v. Pfizer Inc.*, 2012 WL 1019796 (S.D. Cal. March 26,
10 2012)(citing *SEC v. Leslie*, No. 07-3444, 2010 WL 2991038 (N.D. Cal. July 29,
11 2010)(quoting *Morris v. Northrop Grumman Corp.*, 37 F. Supp. 2d 556, 580
12 (E.D.N.Y. 1999)). As discussed below, Defendants do not satisfy any of these
13 factors and the application should be denied.

14 In its Complaint, PBGC alleges that both Defendants are liable for losses
15 that were sustained by the Plan as a result of the Defendants’ violations of their
16 ERISA fiduciary duties. PBGC’s allegations against the Defendants arise out of
17 the same series of transactions, transfers and loans from the Plan’s assets in
18 violation of 29 U.S.C. § 1104 (a)(1)(A), (B) and prohibited by 29 U.S.C. § 1106.
19 Further, PBGC’s allegations against the Defendants are based on the same set of
20

1 facts and the same questions of law. PBGC has not asserted different facts or
2 questions of law as to each Defendant.

3 Given that the allegations in this case arise out of the same series of
4 transactions and are based on the same set of facts and questions of law, judicial
5 economy would not be facilitated if this case were severed. The same evidence
6 and documentary proof support PBGC's allegations against the Defendants.
7 Severance of this matter would require the same evidence and documentary proof
8 to be brought in two separate adjudications. Therefore, severance of this matter
9 would result in judicial inefficiency and would not promote judicial economy.

10 Lastly, Defendant Ilana Karp alleges that she will be prejudiced if the case is
11 not separated because the Defendants have conflicting interests and their "defenses
12 are different". Ex Parte Motion at p.3, line 8. Ms. Karp cites no case law to
13 support this argument or any argument in the motion. Moreover, Ilana Karp's
14 affirmative defenses are almost identical to Samuel Karp's defenses. Each of the
15 Defendant's Answers include 20 affirmative defenses, which are *identical*, except
16 for changes to reference "his" or "her". Ilana Karp's Answer lists only one
17 additional affirmative defense. Accordingly, there is no prejudice to Ilana Karp.

18 In sum, Defendant Ilana Karp has not met the heavy burden of establishing
19 that this case should be bifurcated.

20

1 **CONCLUSION**

2 For the reasons stated above, the Defendant’s Ex Parte Motion should be
3 denied, with prejudice.

4 DATED: May 11, 2018
5 Washington, D.C.

Respectfully submitted,

6 By: /s/ Nicole C. Hagan
7 NICOLE C. HAGAN

8 JUDITH STARR
9 General Counsel
10 CHARLES L. FINKE
11 Deputy General Counsel
12 ISRAEL GOLDWITZ
13 Deputy General Counsel
14 KENNETH COOPER
15 Assistant General Counsel
16 LORI A. BUTLER
17 Assistant General Counsel
18 NICOLE C. HAGAN
19 Deputy Assistant General
20 Counsel
MAI LAN G. RODGERS
Attorney
Office of the General
Counsel

**PENSION BENEFIT
GUARANTY
CORPORATION**
1200 K Street, N.W.
Washington, D.C. 20005
(202) 326-4020 ext. 6543
(202) 326-4122 (fax)
hagan.nicole@pbgc.gov
efile@pbgc.gov

Attorneys for Pension Benefit Guaranty Corporation