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

**PENSION BENEFIT GUARANTY
CORPORATION**

Plaintiff,

v.

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

Defendant.

Case No. 4:16-cv-00325-BLW

**PLAINTIFF PENSION BENEFIT
GUARANTY CORPORATION'S
RESPONSE TO DEFENDANT'S
MOTION TO DISMISS AMENDED
COMPLAINT**

RE: Docket No. 13

I. INTRODUCTION

Plaintiff, Pension Benefit Guaranty Corporation (“PBGC”) opposes the motion of Defendant, Idaho Hyperbarics, Inc. (the “Defendant”) to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) (Dkt. No. 13, the “Motion to Dismiss” or “Motion”). Defendant argues that PBGC’s Amended Complaint is insufficient to state a claim because it is time barred under § 4003(e)(6) of the Employee Retirement Income Security Act of 1974 (“ERISA”). 29 U.S.C. § 1303(e)(6). Defendant has the burden to prove that PBGC filed its Complaint beyond the statute of limitations period. Defendant fails to meet this burden. Defendant’s arguments begin the counting of the applicable statute of limitations periods from erroneous dates that have no relation to this cause of action. Accordingly, there is no basis to dismiss PBGC’s Amended Complaint. In any event, irrespective of Defendant not having met its burden, PBGC’s Amended Complaint was timely filed.

II. BACKGROUND

A. **Agency Background; Statutory and Regulatory Framework**

PBGC is the United States government agency that administers and enforces the nation’s defined benefit pension plan termination insurance program under Title IV of ERISA (“Title IV”). A single-employer defined benefit plan covered under Title IV that has sufficient assets to pay all participants their full benefits may be terminated voluntarily through a “standard termination.” 29 U.S.C. § 1341(b). A standard termination requires that the pension plan have sufficient assets to pay all promised benefits. *Id.* For a plan that is fully and solely funded by insurance policies under 26 U.S.C. § 412(e) (a “412(e) plan”), participants are entitled to the full cash surrender value of their insurance contracts. 26 U.S.C. § 411(b)(1)(F). ERISA also

requires PBGC to audit a “statistically significant number” of standard terminations “to determine whether participants and beneficiaries received their benefit commitments.”

29 U.S.C. § 1303(a).

PBGC’s standard termination audits by PBGC are governed by its administrative review procedures. 29 C.F.R. §§ 4003.1(b)(3)(iii), 4003.21 - 4003.35. Upon PBGC’s completion of an audit, if any violations were found by the auditor, PBGC issues an initial determination letter, informing the pension plan sponsor or administrator of the auditor’s determinations, the reason for the determinations, and the process to request review of those determinations. 29 C.F.R. § 4003.21. The pension plan sponsor or administrator generally has 30 days to submit a request for reconsideration. 29 C.F.R. §§ 4003.32, 4003.34. Absent a request for reconsideration, PBGC’s initial determination becomes final. 29 C.F.R. § 4003.22. When a request for reconsideration is received in a standard termination audit case, generally (as in this case) the manager of PBGC’s Standard Termination and Compliance Division reviews the request and makes the final agency determination of whether the initial determination should be overturned, or upheld. *See* 29 C.F.R. § 4003.35.

B. PBGC’s Audit of the Pension Plan

Effective December 27, 2004, Defendant established the Idaho Hyperbarics, Inc. Defined Benefit Plan (the “Plan” or “Pension Plan”), a single-employer, defined benefit pension plan. Amended Complaint (“Am. Cpl.”) at ¶ 20-21. The Plan is covered under Title IV. *Id.* at ¶ 21. On May 27, 2009, Defendant filed an application to terminate the Plan (“Form 500”) with PBGC stating that the Plan would be terminated and certifying that the Plan’s assets were sufficient to satisfy all Plan benefit liabilities on the date of Plan termination. *Id.* at ¶ 24. On or about

November 15, 2010, PBGC received a post-distribution certification (“Form 501”) from Defendant certifying that it had paid a total of \$575,900 to 15 Plan participants, no later than March 19, 2009 – more than 2 months before filing the Form 500.¹ *Id.* at ¶¶ 25, 26. Because the Defendant certified in its Form 501 that it had made all necessary distributions to participants before the Form 500 filing date, PBGC notified the Defendant on April 28, 2011, that the Plan’s standard termination was flagged for an audit to determine if participants received their full benefits under the terms of the Plan (such audit, the “Audit”). *Id.* at ¶ 19 & 28. During the Audit, PBGC found that, contrary to Defendant’s Form 501 certification, no Plan benefit distributions were made on or before March 19, 2009. In reality, 2 Plan participants received no distributions; the other Plan participants received their distributions as follows: 13 participants between April 14, 2011, and May 5, 2011; 2 participants on April 27, 2009; and 1 participant on March 1, 2010. *Id.* at ¶ 29. On July 15, 2014, upon completion of its Audit, PBGC issued its initial determination to Defendant stating that additional distributions were owed to the Plan participants (the “Initial Determination”). *Id.* at ¶ 30 - 36. Defendant requested reconsideration of PBGC’s Initial Determination on November 12, 2014, and supplemented their request on March 3, 2015. *Id.* at ¶ 37. On April 28, 2015, PBGC issued its final determination upholding its Initial Determination (the “Final Determination”). *Id.* at ¶ 30 - 36. PBGC subsequently filed suit to enforce its Final Determination on July 21, 2016. Initial Complaint (Dkt. No. 1).

¹ Assets in a standard termination plan cannot be distributed prior to the plan’s termination date. 29 C.F.R. §§ 4041.26, 4041.28, 4041.25.

III. STANDARD OF REVIEW AND APPLICABLE STATUTE

A. Standard of Review

Statute of limitations is an affirmative defense for which “the defendant bears the burden of proving that the plaintiff filed beyond the limitations period.” *Payan v. Aramark Mgmt. Servs. L.P.*, 495 F.3d 1119, 1122 (9th Cir. 2007) (citing *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1284 (9th Cir. 1993)); *see U.S. v. Real Prop.*, 120 F.3d 947, 949 (9th Cir.1997) (citing *Cal. Sansome Co. v. U.S. Gypsum*, 55 F.3d 1402, 1406 (9th Cir. 1995)). That burden is especially high for the Defendant here as the Supreme Court has repeatedly stated that “when a statute of limitations is sought to be applied to bar rights of the [g]overnment, it must receive a strict construction in favor of the [g]overnment.” *Badaracco v. Comm’r of Internal Revenue*, 464 U.S. 386, 391-392 (1984) (quoting *E. L. du Pont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924); and citing *Lucas v. Pilliod Lumber Co.*, 281 U.S. 245, 249 (1930)) (internal quotations omitted); *see also FDIC v. Former Officers & Directors of Metro. Bank*, 884 F.2d 1304, 1309 (9th Cir. 1989).

In addition, as an agency responsible for enforcing ERISA, deference is given to PBGC’s interpretation of ERISA. *See Beck v. Pace*, 551 U.S. 96, 104 (2007) (stating that the Supreme Court traditionally defers to PBGC when interpreting ERISA, to do otherwise would be “to embark upon a voyage without a compass”) (quoting with approval *Mead Corp. v. Tilley*, 490 U.S. 714, 722 (1989)); *see also PBGC v. LTV Corp.*, 496 U.S. 633, 647-651 (1990); *see also Chem. Mfrs. Ass’n v. Natural Res. Def. Council*, 470 U.S. 116, 125 (1985) (the agency charged with administering the statute is entitled to considerable deference). Further, in reviewing the Motion to Dismiss, the Court must accept “all facts alleged in the complaint as true and construe

them in the light most favorable to the plaintiff.” *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) (citing *Karam v. City of Burbank*, 352 F.3d 1188, 1192 (9th Cir. 2003)).

B. Applicable Statute of Limitations

The statute of limitations for PBGC to bring a civil action to enforce Title IV is set forth in 29 U.S.C. § 1303(e)(6). Under 29 U.S.C. § 1303(e)(6), a civil action by the PBGC to enforce its standard termination audit may not be brought after *the later of* (i) six years after the date on which the cause of action arose or (ii) three years after the earliest date on which PBGC acquired or should have acquired “actual knowledge” of the existence of such cause of action. In the case of fraud or concealment, the period is extended from 3 years to 6 years from the earliest date on which PBGC acquired or should have acquired “actual knowledge” of the existence of such cause of action. 29 U.S.C. § 1303(e)(6)(C).

IV. ARGUMENT

A. PBGC’s Cause of Action is for the Underpaid Benefits Liabilities.

Under 29 U.S.C. § 1303(e)(6)(A), absent fraud or concealment, PBGC has until the *later* of 6 years from when *the* cause of action arose (the “6-year period”), or 3 years from when PBGC acquired or should have acquired “actual knowledge” of such a cause of action (the “3-year period”). Accordingly, to properly determine when the statute of limitations expires in this case, the proper cause of action must be identified. Here, PBGC’s cause of action is to enforce its Final Determination that the Defendant did not pay participants their full benefit liabilities as required under 29 U.S.C. § 1341. Am. Cpl. at ¶ 54. Accordingly, both the 6-year and 3-year periods are calculated in relation to this specific cause of action.

B. The Defendant’s Argument Provides no Basis to Determine that the Applicable 3-Year Period has Expired

Defendant correctly states that PBGC’s determinations in this case found that Defendant “violated Title IV of ERISA and applicable regulations, by failing to distribute Plan assets in full satisfaction of the Plan’s benefit liabilities.” Motion to Dismiss at 3. However, in a baffling and simply wrong analysis of the law, Defendant argues that the specific cause of action that PBGC seeks to enforce does not matter in determining whether PBGC’s action is timely. Rather, Defendant says the 3 year period begins to run from the “*first*” date that PBGC determines *any* violation of Title IV has occurred. In this case, Defendant says that PBGC “was on notice [of Defendant’s first Title IV ERISA violation] by, at the very least, April 28, 2011.” Motion to Dismiss at 6. That date is when PBGC notified the Defendant that the Plan had been flagged for audit because it prematurely distributed Plan assets in violation of Title IV. Am. Cpl. ¶ 27; *see* 29 U.S.C. § 1341(b)(D); 29 C.F.R. §§ 4041.22, 4041.28(a).

To justify its analysis, Defendant wrongly relies on *PBGC v. Ferfolia Funeral Homes, Inc.*, 835 F. Supp. 2d 416 (N.D. Ohio 2011). In that case, as here, PBGC determined on audit that the Ferfolia Funeral Homes, Inc. (“Ferfolia”) had failed to pay the total amount of benefit liabilities due in a standard termination and filed suit to enforce that determination. Ferfolia argued that the 6-year period under 29 U.S.C. § 1303(e)(6)(A)(i) ran from the date of plan termination. However, the insufficient benefit payments in that case were not made (as required under Title IV) until after the date of Plan termination. *See* 29 C.F.R. §§ 4041.25, 4041.26, 4041.28. PBGC argued that a cause of action for failing to pay all benefit liabilities to Plan participants could not arise until Ferfolia actually made the insufficient distributions. The Court agreed and said there must be a violation of Title IV before a cause of action arises. *Ferfolia*

Funeral Homes, Inc., 835 F. Supp. 2d at 421 (stating that “a noncompliant act that gives rise to a cause of action is required to trigger a statute of limitations, including both the six-year and three-year limitations periods contained in 29 U.S.C. § 1303(e)(6)”). Defendant cites *Ferfolia* in an attempt to argue that it supports its illogical and unfounded position that any Title IV violation can start the statute of limitations clock, regardless of whether it has any relation to the cause of action at issue. *Ferfolia* does not stand for this proposition. The cause of action in that case was failure to pay full benefit liabilities under the Plan, and the Court found that it was not until *Ferfolia* actually failed to pay those benefits that the applicable statute of limitations period began to run. *Ferfolia Funeral Homes, Inc.*, 835 F. Supp. 2d at 421.

Here, the Defendant argues that PBGC’s statute of limitations should run from when PBGC notified the Defendant that the Plan’s standard termination was flagged for audit because Plan assets were distributed prematurely in violation of Title IV. However, this event has no connection to when PBGC acquired or should have acquired “actual knowledge” of the Title IV violation that it seeks to enforce in this case – the Defendant’s failure to distribute Plan assets in full satisfaction of the Plan’s benefit liabilities. Defendant’s reasoning is nonsensical. It requires that PBGC know the results of its audit before it even conducts the audit. It is analogous to beginning to count the statute of limitations period for assault with a deadly weapon from when the perpetrator buys the knife, not when he actually commits the assault. Defendant’s argument is based on an erroneous premise that fails to prove that PBGC filed its Initial Complaint after

expiration of the applicable 3-year period under 29 U.S.C. §1303(e)(6)(A)(ii). Therefore, Defendant has not met its burden and its Motion must be denied². *Payan*, 495 F.3d at 1122 - 23.

C. PBGC's 3-Year Period has Not Expired

While not necessary to dispensing with Defendant's motion, PBGC notes that it filed the Initial Complaint (as well as its Amended Complaint) within the applicable 3-year period under § 1303(e)(6)(A)(ii). Moreover, when that period is extended for fraud or concealment under 29 U.S.C. § 1303(e)(6)(C), as is appropriate here, PBGC has 3 more years after the expiration of the 3-year period to bring its cause of action.

The 3-year period under 29 U.S.C. § 1303(e)(6)(A)(ii) runs from when PBGC acquired or should have acquired "actual knowledge" of the "cause of action." PBGC cannot and should not have "actual knowledge" of a cause of action in a standard termination audit case until its initial determination becomes a final determination. In fact, PBGC's cause of action in this case seeks to enforce its Final Determination that Defendant failed to distribute Plan assets in full satisfaction of the Plan's benefit liabilities. While PBGC's auditor may determine there were ERISA violations in an initial determination, it is only upon a final determination that arguments made on any request for reconsideration are reviewed by PBGC's Standard Termination and

² PBGC need not address Defendant's argument regarding the 6-year period under 29 U.S.C. § 1306(e)(6)(A)(i). PBGC has until the *later* of 6 years after the cause of action arose or 3 years from when it acquired or should have acquired "actual knowledge" of that cause of action. Because Defendant has failed to prove that the 3-year period has expired, it is unnecessary to address whether the 6-year period has expired. PBGC, however, notes that Defendant has also failed to prove that the 6-year period has passed. Again, Defendant calculated the running of the 6-year period from an erroneous date. Defendant argues that PBGC's cause of action arose when the Defendant failed to distribute Plan assets, citing March 19, 2009, the date that the Defendant falsely reported as the last date Defendant distributed Plan assets on the Form 501. This irrelevant date has no bearing on when the Plan assets were required to be distributed. While the reporting of a fictitious date of on the Form 501 may give rise to a cause of action for providing false statements to the government, it has no relation to the current cause of action.

Compliance Division Manager, and she determines whether the initial determination should be overturned or upheld. It is not until then that PBGC acquired or should have acquired “actual knowledge” of whether there is a cause of action in a standard termination audit case. Here, PBGC’s Final Determination was issued on April 28, 2015, only a little over a year before filing its Initial Complaint.

Even if one were to assume, *arguendo*, that PBGC acquired or should have acquired “actual knowledge” of its cause of action at some date before the Final Determination, the earliest date one could propose for such acquisition is the date of the Initial Determination. Not until PBGC has gathered all the necessary records and completed the audit based on those records could it or should it have “actual knowledge” of whether there is a cause of action for failure to pay all benefit liabilities under a plan. In this case, that process was not complete until PBGC issued its Initial Determination on July 15, 2014. Am. Cpl. at ¶ 30. PBGC filed the Initial Complaint on July 21, 2016, well within three years of its Initial Determination.³

Finally, irrespective of whether the date of the Initial Determination or the Final Determination are the date on which PBGC acquired or should have acquired “actual knowledge” of the cause of action in this case, PBGC had 6 years from that date (not 3 years) to file its complaint against the Defendant. Under 29 U.S.C. § 1303(e)(6)(C), the 3-year period

³ PBGC’s determination of whether full benefit liabilities have been paid under a plan involves consideration of countless factors such as what benefit liabilities were owed to each participant under the terms of the Plan document; what legitimate offsets to those benefits might have been made; what factors were applied in the actuarial calculations; and whether, in the case of a plan funded solely by insurance contracts (like the Plan), those contracts were properly funded, and, if they were not, what default formula is applicable to determine benefits, etc. Therefore, even evidence showing that the amount on the Form 501 may not have been paid to Plan participants is not conclusive in determining if full benefit liabilities have been paid under a plan.

under 29 U.S.C. § 1303(e)(6)(A)(ii) is extended to 6 years in the case of fraud or concealment. In this case, there is specific evidence of fraud or concealment. Documents submitted during the Audit revealed that the Defendant made multiple false statements on the Form 501.⁴ Defendant falsely certified in the Form 501 that all distributions to the participants had been completed by March 19, 2009, and that the total distribution amount was \$575,900. Am. Cpl. at ¶ 26. However, documents submitted by Defendants during PBGC's Audit showed that the Defendant had not made any distributions to the participants by March 19, 2009. In fact, the majority of distributions did not occur until April and May of 2011. Am. Cpl at ¶ 29. Additionally, the documents revealed that the actual amount distributed to Plan participants was \$228,884, not the reported \$575,900 that the Defendant certified on the Form 501. Am. Cpl. at ¶ 28.

Defendant's false statements concealed the actual amount and date of the benefit distributions. It was only through an extensive audit that PBGC was able to determine the true facts in this case. Accordingly, 29 U.S.C. § 1303(e)(6)(C) adds 3 additional years to the 3-year period under 29 U.S.C. § 1303(e)(6)(A)(ii) (for a total of 6 years) from when PBGC acquired or should have acquired "actual knowledge" of a cause of action to file its complaint in this case. July 15, 2020, and April 28, 2021, are six years from the dates of PBGC's Initial Determination and Final Determination, respectively. Therefore, under all possible analyses, PBGC's Complaint to enforce its Final Determination in this case is timely.

IV. CONCLUSION

For the forgoing reasons, PBGC respectfully requests this Court to deny Defendant's Motion to Dismiss.

⁴ See *Brasley v. Fearless Farris Serv. Stations, Inc.*, CV-08-173-S-BLW, 2009 U.S. Dist. LEXIS 19785, 17-18 (D. Idaho Mar. 9, 2009).

Respectfully submitted,

Dated: September 30, 2016

/s/ Erin C. Kim

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of September, 2016, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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/s/ Erin C. Kim
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