Colin B. Albaugh (Bar No. MD 3283)
PENSION BENEFIT GUARANTY CORPORATION
Office of the Chief Counsel
1200 K Street, NW
Washington, D.C. 20005
Phone: (202) 326-4020, ext. 3176
Fax: (202) 326-4112
E-mails: albaugh.colin@pbgc.gov *and*
efile@pbgc.gov

Attorney for Creditor Pension Benefit Guaranty Corporation

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re: CARL P. BOMMARITO and PAULA S. BOMMARITO Debtors.	Chapter 7 Case No. 2:12-bk-04311-EPB Filed March 6, 2012
PENSION BENEFIT GUARANTY CORPORATION, As Statutory Trustee of the Vision/5 Development, L.L.C. Defined Benefit Pension Plan, 1200 K Street, NW Washington, D.C. 20005, Plaintiff, v. CARL P. BOMMARITO, 582 W. 6th Street Tempe, AZ 85281, Defendant.	Adversary No.: 2:15-________

<u>COMPLAINT FOR DECLARATORY JUDGMENT</u>

The Pension Benefit Guaranty Corporation ("PBGC"), as statutory trustee of the Vision/5 Development, L.L.C. Defined Benefit Pension Plan (the "Pension Plan"), brings this adversary proceeding, pursuant to 11 U.S.C. § 553 and Bankruptcy Rule 7001, for a declaratory judgment that Debtor Carl Bommarito ("Debtor") breached his fiduciary duties to the Pension Plan, and that PBGC has a valid right to setoff Debtor's liability resulting from such fiduciary breach against any benefits owed to Debtor by the Pension Plan.

JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this adversary proceeding under 28 U.S.C. §§ 157(a), 157(b), 1331, and 1334(b).

2. Venue is proper in this Court under 28 U.S.C. § 1409(a) because this proceeding is related to the above referenced bankruptcy case, currently pending in the United States Bankruptcy Court for the District of Arizona.

3. This adversary proceeding concerns the adjustment of the debtor-creditor relationship, and presents a core proceeding under 28 U.S.C. § 157(b)(2)(O).

COMMON ALLEGATIONS

The Parties

4. PBGC is a wholly owned United States Government corporation and Federal agency that administers the nation's pension insurance program established by Title IV of the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1301-1461 (2012, Supp. I 2013) ("ERISA"). When a pension plan covered by Title IV terminates without sufficient assets to pay all of its promised benefits, PBGC typically becomes trustee of the plan and pays plan participants their pension benefits up to the limits established by Title IV. 29 U.S.C. §§ 1321, 1322, 1361.

5. On March 6, 2012, Debtor filed a joint petition for relief under Chapter 7 of the Bankruptcy Code in the above referenced case, currently pending in the United States Bankruptcy Court for the District of Arizona.

6. PBGC is a party in interest in this bankruptcy case.

7. Upon information and belief, Debtor is a resident of this district and formerly served as president of Vision/5 Development, L.L.C. ("Vision/5").

8. Vision/5 had its principal place of business in Mesa, Arizona.

9. Upon information and belief, Debtor was an equity holder of Vision/5 at all times relevant to this Complaint.

10. Upon information and belief, Debtor served as Vision/5's president at all times relevant to this Complaint.

11. On or before March 6, 2012, Vision/5 ceased operations.

The Pension Plan

12. Vision/5 established the Pension Plan effective January 1, 2006, to provide pension benefits to certain of its employees.

13. The Pension Plan is a single-employer defined-benefit pension plan covered by Title IV of ERISA.

14. On or about October 17, 2012, Vision/5 filed a PBGC Form 600 application for a "distress termination" of the Pension Plan pursuant to 29 U.S.C. § 1341(c).

15. Debtor signed the PBGC Form 600 as the "Plan Administrator" of the Pension Plan.

16. On February 7, 2014, PBGC issued a notice of determination that the Pension Plan should be terminated pursuant to 29 U.S.C. § 1342.

17. On April 16, 2014, the Pension Plan was terminated by an agreement between PBGC and Vision/5 (the "Trusteeship Agreement"). Debtor signed the

Trusteeship Agreement on behalf of Vision/5 as Plan Administrator.

18. The Trusteeship Agreement established the Pension Plan's termination date as March 6, 2012, and appointed PBGC as statutory trustee of the Pension Plan.

19. As statutory trustee, PBGC is authorized to recover amounts due and payable to the Pension Plan. 29 U.S.C. §§ 1342(d), 1362(c).

20. The Plan's claims and rights include any causes of action under Title I of ERISA for violations of ERISA's fiduciary standard of care. *See e.g.*, 29 U.S.C. §§ 1002(21), 1103, 1104, 1106.

Debtor's Status as a Fiduciary of the Pension Plan

21. Upon information and belief, at all times relevant to this Complaint, Debtor was a trustee of the Pension Plan. As trustee, Debtor exercised authority and control with respect to management of the Pension Plan's assets.

22. Upon information and belief, at all times relevant to this Complaint, Debtor acted as the "administrator" of the Pension Plan within the meaning of 29 U.S.C. § 1301(a)(1). As administrator, Debtor exercised discretionary authority and control with respect to the management of the Pension Plan.

23. As trustee and administrator, Debtor was a fiduciary of the Pension Plan within the meaning of 29 U.S.C. § 1002(21) in that he exercised discretionary authority and control respecting management of the Pension Plan, and in that he exercised control respecting management and disposition of the Pension Plan's assets.

Debtor's Status as a Pension Plan Participant

24. Debtor is a participant in the Pension Plan.

25. As a participant in the Pension Plan, Debtor may be entitled to receive pension benefits under the Pension Plan from PBGC, subject to the limitations provided in Title IV of ERISA and PBGC's rules and regulations thereunder.

The Pension Plan Withdrawals

26. On January 9, 2009, Debtor issued a memorandum titled "Vision/5 Defined Benefit Pension Plan" to the Pension Plan's other participants (the "Memorandum"). The Memorandum is attached to this Complaint as Exhibit A.[1] Debtor signed the Memorandum as "Plan Representative."

27. In the Memorandum, Debtor stated his "wish to withdraw money [from] the Defined Benefit Pension Plan to use for health care, payroll and other operating costs" of Vision/5.

28. The Memorandum indicated that Debtor intended to withdraw money from the Pension Plan, to be treated as a loan, bearing 6% interest and to be repaid within 12 months.

29. The Memorandum requested that the Pension Plan's participants consent to Debtor's withdrawal of Pension Plan assets to pay for Vision/5 operating expenses.

30. Debtor stated that "[a]s the pension plan 'Representative,' I take full responsibility for this withdrawal of pension funds should there be any ramifications with state or federal agencies."

31. The Memorandum was signed by Debtor and the Pension Plan's other two participants.

32. Before filing the application for a distress termination of the Pension Plan, on September 1, 2012, Debtor sent a letter to PBGC requesting termination of the Pension Plan (the "PBGC Letter"). The PBGC Letter is attached to this Complaint as Exhibit B.[2]

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[1] This exhibit has been redacted to remove personally-identifiable information of the other Plan participants.

[2] This exhibit has been redacted to remove personally-identifiable information of the other Plan participants.

33. In the PBGC Letter, Debtor listed four withdrawals that had been made from the Pension Plan between July 2008 and May 2009. Debtor stated that these withdrawals were used to pay for operating expenses of Vision/5.

34. The PBGC Letter indicates that around July 31, 2008, Debtor authorized the withdrawal of $100,000.00 from the Pension Plan's trust (the "2008 Withdrawal"). As indicated in the PBGC Letter, Debtor authorized that this $100,000.00 be used to pay for operating expenses of Vision/5.

35. The PBGC Letter further indicates that in April 2009, Debtor authorized the withdrawal of $25,000.00 from the Pension Plan's trust (the "2009 Withdrawal," and together with the 2008 Withdrawal, the "Withdrawals"). This $25,000.00 was withdrawn by a check dated April 1, 2009, and made payable to Vision/5 Development, LLC Defined Benefit Pension Plan. Debtor signed the check for deposit, a copy of which is attached to this Complaint as Exhibit C. As indicated in the PBGC Letter, Debtor authorized that this $25,000.00 be used to pay for operating expenses of Vision/5.

36. Debtor also received payments from the Pension Plan of $25,000.00 and $42,300.00 on or about January 15, 2009, and May 26, 2009, respectively.[3]

37. To date, the Pension Plan has not been repaid any of the withdrawn assets. As a result of the Withdrawals, as of September 28, 2012, the Pension Plan had only $46.00.

38. In the joint bankruptcy petition, Debtor listed that the Pension Plan has an unsecured, non-priority claim in the amount of $192,300.00 for "[p]ossible claim related to use of Plan Withdrawals." Debtor did not list this claim as contingent, unliquidated, or disputed.

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[3] These payments were made directly from the Pension Plan to Debtor, and constitute partial distributions of Debtor's plan benefit under the Pension Plan. Accordingly, these payments are not the subject of this adversary proceeding.

COUNT I: DECLARATORY JUDGMENT
Debtor breached his fiduciary duties to the Pension Plan under 29 U.S.C. § 1104

39. PBGC restates and realleges paragraphs 1 through 38 above as if fully set forth herein.

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

41. Title I of ERISA further provides that a fiduciary must exercise “the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” 29 U.S.C. § 1104(a)(1)(B).

42. Debtor authorized the Withdrawals from the Pension Plan, but did not use the $125,000.00 of Pension Plan assets to pay benefits due to the Pension Plan’s participants and their beneficiaries or to defray the reasonable expenses of administering the Pension Plan.

43. Rather, Debtor used the Pension Plan assets to pay for Vision/5’s operating expenses.

44. By authorizing the use of Pension Plan assets for a purpose other than paying benefits to the Pension Plan’s participants and their beneficiaries or defraying reasonable expenses of administering the Pension Plan, Debtor breached his fiduciary duties under 29 U.S.C. § 1104(a)(1).

45. Pursuant to 29 U.S.C. § 1109(a), Debtor is liable to the Pension Plan for all losses, including interest, that resulted from Debtor’s violations of fiduciary duty under 29 U.S.C. § 1104.

46. PBGC, on behalf of the Pension Plan, seeks a declaratory judgment that Debtor is liable to the Pension Plan for $125,000.00 resulting from his breach of fiduciary duty under 29 U.S.C. § 1104, but solely for the purpose of setoff and not for the purpose of obtaining any affirmative recovery against Debtor.

COUNT II: DECLARATORY JUDGMENT
Debtor breached his fiduciary duties to the
Pension Plan under 29 U.S.C. § 1106

47. PBGC restates and realleges paragraphs 1 through 46 above as if fully set forth herein.

48. Title I of ERISA provides that "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . lending of money or other extension of credit between the plan and a party in interest[, or] . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(B), (D).

49. Title I of ERISA also prohibits a fiduciary from "(1) deal[ing] with the assets of the plan in his own interest or for his own account, [or] (2) in his individual or in any other capacity, act[ing] in any transaction involving the plan on behalf of a party (or represent[ing] a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. § 1106(b)(1)-(2).

50. As a fiduciary, Debtor was a party in interest with respect to the Pension Plan at all relevant times. 29 U.S.C. § 1002(14)(A); *see also* 29 U.S.C. § 1002(14)(H).

51. As an employer of persons covered by the Pension Plan, Vision/5 was a party in interest to the Pension Plan at all relevant times. 29 U.S.C. § 1002(14)(C).

52. Debtor's authorizations, as described in Paragraphs 34 and 35 above, to use $125,000.00 of Pension Plan assets to pay for Vision/5's operating expenses

constituted an improper lending of money by the Pension Plan to Vision/5, a party in interest.

53. Debtor's authorizations to use $125,000.00 of Pension Plan assets to pay for Vision/5's operating expenses also constituted an improper transfer of Pension Plan assets to or for the benefit of Vision/5, a party in interest.

54. Accordingly, Debtor's authorization to use Pension Plan assets to pay for Vision/5's operating expenses constituted a prohibited transaction under 29 U.S.C. § 1106(a)(1)(D), and self-dealing under 29 U.S.C. § 1106(b)(1)-(2).

55. Pursuant to 29 U.S.C. § 1109(a), Debtor is liable to the Pension Plan for all losses, including interest, that resulted from Debtor's violations of fiduciary duty under 29 U.S.C. § 1106.

56. PBGC, on behalf of the Pension Plan, seeks a declaratory judgment that Debtor is liable to the Pension Plan for $125,000.00 resulting from his breach of fiduciary duty under 29 U.S.C. § 1106, but solely for the purpose of setoff and not for the purpose of obtaining any affirmative recovery against Debtor.

COUNT III: DECLARATORY JUDGMENT
PBGC, as statutory trustee of the Pension Plan, has a valid right to setoff Debtor's liability to the Pension Plan for fiduciary breach against any plan benefits owed by the Pension Plan to Debtor

57. PBGC restates and realleges paragraphs 1 through 56 above as if fully set forth herein.

58. Debtor is a participant in the Pension Plan, and the Pension Plan owes to Debtor any benefits that Debtor is entitled to receive from the Pension Plan subject to the limitations in Title IV of ERISA and PBGC's rules and regulations thereunder.

59. Debtor earned these benefits under the Pension Plan as a result of his pre-petition work at Vision/5.

60. As provided in Counts I and II above, the Pension Plan has a claim against Debtor for Debtor's breach of fiduciary duties under 29 U.S.C. §§ 1104 and 1106. This claim arose based on Debtor's prepetition Withdrawals of Pension Plan assets to pay for Vision/5's operating expenses.

61. Under 29 U.S.C. § 1056(d)(4), the Pension Plan is authorized to offset any plan benefits owed to Debtor under the Pension Plan against any amount Debtor is ordered or required to pay to the Pension Plan as a result of fiduciary breach pursuant to, *inter alia*, a civil judgment.

62. Debtor scheduled an unsecured, non-priority claim of the Pension Plan in the amount of $192,300.00 for "[p]ossible claim related to use of Plan Withdrawals." Debtor scheduled this claim as undisputed.

63. The Pension Plan's debt owed to Debtor for pension benefits, and the Pension Plan's claim against Debtor for fiduciary breach are mutual.

64. With certain exceptions that are not applicable to this case, 11 U.S.C. § 553 provides that the Bankruptcy Code "does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before commencement of [the bankruptcy case] against a claim of such creditor against the debtor that arose before commencement of the case."

65. Pursuant to 11 U.S.C. § 553, the Pension Plan has a valid right to offset its debt for any benefits owed to Debtor against the Pension Plan's claim for fiduciary breach.

WHEREFORE, Plaintiff demands judgment and prays this Court:

1) Declare and adjudge that Debtor breached his fiduciary duties to the Pension Plan under 29 U.S.C. §§ 1104 and 1106, and that, solely for purposes of the Pension Plan seeking to conduct a setoff, Debtor has liability to the Pension Plan in the amount of $125,000.00;

2) Declare and adjudge that pursuant to 11 U.S.C. § 553, PBGC, as statutory trustee of the Pension Plan, has a valid right to setoff any benefits owed to Debtor under the Pension Plan against Debtors' liability to the Pension Plan for his breach of fiduciary duties in an amount up to $125,000.00; and

3) Award such other relief as is just and equitable.

DATED: August 4, 2015
Washington, D.C.

Respectfully Submitted,

LOCAL COUNSEL

/s/ Katherine R. Branch (AZ 025128)
John S. Leonardo
U.S. Attorney
Katherine R. Branch
Assistant U.S. Attorney
Two Renaissance Square
40 North Central Avenue, Suite 1200
Phoenix, AZ 85004-4408
Phone: (602) 514-7500
Fax: (602) 514-7760
Email: katherine.branch@usdoj.gov

/s/ Colin B. Albaugh (MD 3283)
Israel Goldowitz, Chief Counsel
James J. Armbruster, Acting Deputy Chief Counsel
Stephanie Thomas, Assistant Chief Counsel
Colin B. Albaugh, Attorney
Pension Benefit Guaranty Corporation
Office of the Chief Counsel
1200 K Street, N.W.
Washington, D.C. 20005
Phone: (202) 326-4020, ext. 3176
Fax: (202) 326-4112
Emails: albaugh.colin@pbgc.gov *and* efile@pbgc.gov

Attorney for Creditor Pension Benefit Guaranty Corporation

EXHIBIT A

VISION DEVELOPMENT, L.L.C.

MEMORANDUM

TO: [redacted]

FR: Carl Bommarito

DATE: January 9, 2009

RE: Vision/5 Defined Benefit Pension Plan

Vision/5 Development finds itself in a very difficult financial position. Very little revenue has come into the company throughout 2007 and 2008. As of today we have approximately $12,000 in the company bank account. I believe revenue will begin to come into the company in February or March at a level sufficient enough to continue operations. Unfortunately, something needs to be done immediately. I wish to withdraw money form the Defined Benefit Pension Plan to use for health care, payroll and other operating costs. None of this money will be utilized to pay me. Only what is needed will be withdrawn in the form of a loan and all funds will be placed back into the pension plan within the next 12 months, including the interest on borrowed funds calculated at 6% annually.

As the pension plan "Representative", I take full responsibility for this withdrawal of pension funds should there be any ramifications with state or federal agencies. Please acknowledge, by executing this memorandum below, that you do not oppose my borrowing funds from the Vision/5 Development Defined Benefit Pension Plan, as long as all borrowed funds, plus interest earned, are repaid to the said pension plan as indicated herein.

Thank you.

By: Carl Bommarito
Its: Plan Representative

[redacted]
Its: Plan Participant

[redacted]
Its: Plan Participant

2855 E. Brown Rd., #6 • Mesa, Arizona 85213
Tel. 480-837-9300 • Cell 602-818-2053 • Fax 480-837-5203

EXHIBIT B

Vision 5 Development, LLC

September 1, 2012

Tracy J. Dobbins
Financial Analyst
Pension Benefit Guaranty Corporation
Corporate Finance and Restructuring Department
1200 K Street, NW
Washington, DC 20005-4026

Delivered by: E-Mail / Facsimile

Subject: Termination of Defined Benefit Plan, Case # 22110800

This is to request a distress termination of the defined benefit plan for Vision 5 Development, LLC (Vision 5). We believe the plan is eligible for a distress termination due to the personal and business Chapter 7 bankruptcy proceedings for Carl [redacted] Bommarito and Vision 5. Vision 5 is insolvent and is unable to pay business or plan obligations. Vision 5 has no employees. Vision 5 and hence the plan were victims of the declining Arizona real estate market, in particular the massive contraction in the years 2008 and 2009.

1. Vision 5 has filed bankruptcy and has no source of funds. Merkley, Newman & McLaws, Inc. issued a Notice of Discontinuance effective January 1, 2011 terminating their sponsorship of the plan (Exhibit 1). The notice was issued on June 27, 2011 and signed by Karen McLaws. Consequently, Carl Bommarito has assumed Administrator and Sponsor positions.

2. Vision 5 will be unable to continue to be making payment s for plan participants. As noted in your letter, the plan sponsor filed business bankruptcy, chapter 7 on March 6, 2012. Carl Bommarito also filed Chapter 7 personally at approximately the same time. This was due to the insolvency of the company. We thought it might be useful to review the ordinary business income (or loss) for Vision 5 for the 5 years 2007 through which reported taxable incomes as follow (exhibits 2a – 2e). Over the 5-year period, Vision 5 reported a total income of a net loss of $49,058 and an annual average net loss of $9,812.

Year	Ordinary Business Income / Loss	Exhibit
2007	6,039	2a
2008	4,511	2b
2009	(103,444)	2c
2010	22,425	2d
2011	21,411	2e
Total	**(49,058)**	
Average	**(9,812)**	

3. On January 9, 2009, Carl Bommarito, Plan Representative for Vision 5 provided a memorandum (Exhibit 3) to the plan participants, [redacted] advising that the plan did not have sufficient funds to continue supporting the plan and authorized borrowing

monies from the plan to pay for company operating expenses. Direct payments to Carl Bommarito were prohibited under the scope of this memo. In anticipation of an improvement in the market and in the company fortunes, the memo expressed the intent to repay any such loans from future income. Those loans have been included in the bankruptcy proceedings.

4. The only distributions from the plan have been in the form of loans for Vision 5 operating expenses. In the ten months from June 30, 2008 to May 29, 2009 the balance was reduced by loans of $192,300, from $190,612 (the highest balance) to $96.00. The differential is explained by continued earnings of the remaining balances. As of June 29, 2012, the balance was $46.00. Again, we should reiterate that that neither Carl nor [redacted] were recipients of the funds borrowed from the plan. The timing of the loans from the plan from First Allied as reported was as follows:

Statement Date	Net Equity This Period	Loan Withdrawals
6/30/2008	$190,612.00	
7/31/2008	91,167.00	$100,000.00
12/31/2008	92,340.00	
1/30/2009	67,382.00	25,000.00
3/31/2009	67,396.00	
4/30/2009	42,396.00	25,000.00
5/29/2009	96.00	42,300.00
Net Changes	($190,516.00)	$192,300.00

5. We've attached the three most recent reports from Merkley, Newman & McLaws, Inc , including the Annual Reports and Actual Valuations for 2007, 2008 and 2009 (Exhibits 4a, 4b and 4c). No reports were prepared for 2010 or 2011.

To summarize, the business is closed and has no assets. The business and the principals are bankrupt. There are no employees. The plan participants agreed to loans from the plan to continue the operation of Vision 5. We believe that the plan qualifies for distress termination. Please let us know if there is additional documentation and or information to process this termination.

Sincerely,

Carl Bommarito
Vision 5 Development, LLC

CB/dwk

EXHIBIT C

https://disburse-pws.jpmorgan.com/pws/custapp/ExternalInquire.do - Windows Internet Explorer provided by JPMorgan Chas...

Print

Check/Serial#:404916 Account#[redacted] Amount: 25,000.00

THIS CHECK IS VOID IF ALTERED OR COLORED BACKGROUND IS DISTURBED

J.P. Morgan Clearing Corp.
Dept. B 4th Fl.
One MetroTech Center North
Brooklyn, NY 11201-3859

CH 404916

NOT VALID AFTER 180 DAYS

CHECK NO	ACCOUNT NUMBER	DATE	AMOUNT
404916	[redacted]	04/01/09	$ **********25,000.00

PAY TO THE ORDER OF
VISION/5 DEVELOPMENT, LLC.
DEFINED BENEFIT PENSION PLAN
DTD 1/1/2006
2855 E BROWN RD #6
MESA AZ 85213-4214

JP MORGAN CHASE, SYRACUSE, NEW YORK 13200

James M. Collins
AUTHORIZED SIGNATURE

[redacted]

FEDERAL RESERVE BOARD OF GOVERNORS REG CC

Pay any bank JPMorgan Chase Bank [redacted]

FOR DEPOSIT TO THE ACCOUNT OF THE WITHIN NAMED PAYEE

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