



Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

JUN 30 2005

[Redacted]

Subject: Refractory Handling, Inc. Defined Benefit Plan
PBGC Case No.: 19320400
EIN/PN: 381642295/001
Date of Plan Termination: July 15, 1999
Date of Trusteeship: May 18, 2001

[Redacted]

Dear [Redacted]

I. INTRODUCTION

By letter dated May 21, 2002, the Pension Benefit Guaranty Corporation ("PBGC") determined that Steamatic Cleans Carpets, Inc. ("Steamatic") and the commercial rental property located at 308 Antoine Street, Wyandotte, Michigan 48192 ("Antoine Street business"), were under common control with Refractory Handling, Inc. ("Refractory"), sponsor of the Refractory Handling, Inc. Defined Benefit Plan (the "Plan"), as of the date of the Plan's termination ("DoPT"; July 15, 1999). Additionally, PBGC determined that (1) those entities were liable to PBGC under 29 United States Code ("U.S.C.") § 1362(b) for the Plan's unfunded benefit liabilities, and (2) the amount of the liability was \$60,330.75 as of DoPT, plus interest in the amount of \$15,336.87 for the period between July 15, 1999 and May 31, 2002.¹

On July 2, 2002, you filed a timely appeal of PBGC's determination letter on behalf of your client, [Redacted]. For the reasons stated in this decision, the Appeals Board denied your appeal. Accordingly, the Board sustained PBGC's determinations that, under Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), Steamatic and the Antoine Street business were under common control with Refractory as of DoPT, and that all three businesses are liable to the PBGC for the above amount, plus the additional interest that has accrued since May 31, 2002.

¹ PBGC's regulation at 29 Code of Federal Regulations ("C.F.R.") § 4062.7, which incorporates section 6601 of the Internal Revenue Code ("I.R.C.") by reference, establishes the applicable interest rate.

II. BACKGROUND

A. Facts

Refractory, a Michigan corporation, was the Plan's sponsor. Until July 15, 1999, Refractory operated as a general commodity warehousing and distribution center in the state of Michigan. On July 15, 1999, Refractory ceased business operations and terminated its employees.

On April 17, 2001, PBGC issued a Notice of Determination that the Plan should be terminated based in part on Refractory's failure to meet the minimum funding standards under I.R.C. § 412. PBGC and [redacted] acting on behalf of Refractory, entered into an agreement for the termination of the Plan and the appointment of PBGC as trustee. This agreement also established July 15, 1999, as DoPT under 29 U.S.C. § 1348. PBGC became trustee of the Plan on May 18, 2001.

Based on an audit of various corporate records and income tax returns provided by Refractory's accountant, Robert Bovitz, PBGC concluded that Refractory and Steamatic were 100 percent owned by [redacted] as of DoPT, July 15, 1999, and that [redacted] owned the commercial property at 308 Antoine Street, which was leased to Refractory and sold after DOPT.

The 1999 Federal Income Tax return filed jointly by [redacted] shows, on the Schedule E form, the amounts of income and expenses claimed for tax purposes with respect to the Antoine Street business. The 1999 tax return also indicates (on Form 4797, "Sale of Business Property") that the commercial property was sold on October 6, 1999. The Form 4797 further shows a depreciation deduction for the property.

B. [redacted] Appeal

In your July 2, 2002 appeal, you asserted that the following grounds exist for changing PBGC's determinations:

1. PBGC incorrectly determined that Refractory, Steamatic, and the Antoine Street business were under common control as defined under 26 U.S.C. § 414(c); and
2. PBGC erred in its determination of the amount of unfunded benefit liabilities of the Plan because it failed to consider the death of [redacted] a participant who died on October 22, 2000, and is no longer entitled to any payments under the Plan.

You demonstrated that when Refractory was incorporated, [redacted]

[redacted] owned only 33 1/3% of the stock, and that his brothers, [redacted] owned the remaining 67 2/3%. With your appeal, you provided a copy of the June 4, 1961 articles of incorporation ("Articles"). The Articles show that [redacted] each initially owned one-third of Refractory.

You also acknowledged [redacted] later owned 100% of Refractory. You provided the September 2, 1977 minutes of a special meeting of shareholders, which stated that [redacted] resigned from Refractory's Board of Directors and that they intended to assign their shares in Refractory to [redacted]. Refractory's annual corporate tax returns (Form 1120S, Schedule K-1) for the years 1997, 1998, and 1999 show [redacted] was the 100% owner of Refractory, indicating that [redacted] had in fact assigned their shares of Refractory to him. Thus, the Appeals Board found that [redacted] owned 100% of Refractory on the Plan's termination date.

You stated the following facts about Steamatic: (1) it was a franchise of a larger company, Franchiser Steamatic, Inc., located in Fort Worth, Texas; (2) it never owned any equipment, and (3) it ceased operations in May 2000. You also said that although [redacted] spouse, was an officer of Steamatic, it was a separate company, and she was not an officer of Refractory.

You also stated that the commercial real estate located at 308 Antoine Street was jointly owned by [redacted]. You argued that since [redacted] did not own more than 50% of Refractory, Steamatic, and the Antoine Street business, those businesses were not a controlled group as defined by 29 U.S.C. § 1301(a)(14). You further requested that PBGC "make a determination that [redacted] is not a control group member."

III. DISCUSSION

A. Control Group Liability

ERISA § 4062 provides that liability for an underfunded single-employer pension plan upon its termination is incurred by any "person" who is, on the termination date, a contributing sponsor of the pension plan or a member of the sponsor's controlled group. That section further states that the liability of all such persons is "joint and several." A "controlled group" means, with respect to any person, "a group consisting of such person and all other persons under common control with such person."² ERISA further provides that the determination of whether two or more

² See 29 U.S.C. § 1301(a)(14)(A); 29 C.F.R. § 4001.2 (definition of "controlled group").

persons are under common control is made under PBGC regulations.³ PBGC's regulations state that persons are under common control if they are members of a "controlled group of corporations" or if they are "two or more trades or businesses under common control."⁴ These terms are defined by Treasury Regulations under sections 414(b) and 414(c) of the Internal Revenue Code.⁵

The applicable regulation for determining "common control" under the definition of a brother-sister group of trades or businesses is Treas. Reg. § 1.414(c)-2(c). It states that two or more trades or businesses must meet both a 50% test and an 80% test. The 50% test is met if the same five or fewer persons own a total of more than 50% of each of the trades or businesses in question, taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such trade or business. The 80% test is met if the same five or fewer persons own a total of at least 80% of the trades or businesses.

The Appeals Board concluded that [redacted] was the 100% owner of Refractory as of DoPT. This conclusion is based on the 1997, 1998, and 1999 tax returns showing that [redacted] was the 100% owner of Refractory, as well as the other information discussed above which indicates that [redacted] had assigned their shares in Refractory to [redacted] before DoPT.

In a November 7, 2001 letter to PBGC, [redacted] stated that he was the 100% owner of Steamatic until it was liquidated on June 30, 2000.

Treas. Reg. § 1.414(c)-4(b)(5) provides for attribution of ownership interest between spouses. As a general rule, an individual is considered to own an interest in a trade or business that is owned directly or indirectly by or for his spouse. Thus, pursuant to the constructive ownership rules of Treas. Reg. § 1.414(c)-4(b)(5), [redacted] owned 100% of the Antoine Street business.

Based on the foregoing facts and authorities, PBGC correctly determined that Steamatic and the Antoine Street business were under common control with Refractory as of DoPT (July 15, 1999) based on [redacted] ownership interests in these business and the constructive ownership rules of Treas. Reg. § 1.414(c)-4(b)(5). Accordingly, all of the above commonly controlled entities ("the

³ See 29 U.S.C. § 1301(a)(14)(B).

⁴ See 29 C.F.R. § 4001.3(b)(2).

⁵ See 29 C.F.R. § 4001.3(b)(2).

Refractory Group") are jointly and severally liable for the liability imposed by § 4062 of ERISA, 29 U.S.C. § 1362, upon the termination of the Plan.

Your request that PBGC "make a determination that [redacted] is not a control group member" appears to be related to your assertions that Steamatic and the unincorporated Antoine Street business were not under common control with Refractory. Thus, you seem to be suggesting that [redacted] is insulated from liability for this reason. As discussed above, the Appeals Board rejected the assertions upon which your request is based. We further observe that courts have held that the owners of unincorporated business entities may incur personal liability under ERISA if the unincorporated business is a controlled group member. See *Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009, 1015 (9th Cir. 1987); *Central States, Southeast and Southwest Areas Pension Fund v. Skyland Leasing Co.*, 691 F.Supp. 6 (W.D. Mich. 1987), *aff'd*, 892 F.2d 1043, 1990 WL 231 (6th Cir. 1990) (unpublished disposition); *PBGC v. Don's Trucking Co.*, 309 F.Supp. 2d 827 (E.D. Va. 2004), *aff'd sub nom. PBGC v. Beverley*, 404 F.3d 243 (4th Cir. 2005).⁶ Accordingly, the Appeals Board is unable to make the determination you seek with respect to [redacted] liability, to the extent that liability is based upon his ownership of the unincorporated Antoine Street Business.

B. Amount of Liability

In its May 21, 2002 initial determination that was addressed to [redacted] PBGC states that the amount of the Refractory Group's liability is \$60,330.75 as of DoPT. You contended that PBGC erred in its determination of the amount of the Plan's unfunded benefit liabilities. You stated that PBGC's original claims should be less than \$60,330.75 because [redacted] a participant in the Plan, died on October 22, 2000.

ERISA § 4062(b)(1), 29 U.S.C. § 1362(b)(1), provides that the

⁶ The facts in *PBGC v. Beverley* were very similar to those in this appeal. Don Beverley and his wife Martha were the joint owners of Don's Trucking Co., which was the sponsor of an underfunded pension plan that was terminated by PBGC. The Beverleys also co-owned an unincorporated business that leased real property to Don's Trucking. The Sixth Circuit held that both Donald and Martha Beverley were personally liable to PBGC based upon their ownership of the leasing business, which was under common control with Don's Trucking. 404 F.3d at 250-53.

We also note that the District Court in that case found that the unincorporated leasing activity owned by the Beverleys qualified as a "trade or business" for purposes of employer liability (see 309 F.Supp. 2d at 831), and the Sixth Circuit affirmed that holding.

liability to PBGC upon plan termination "shall be the total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan, together with interest (at a reasonable rate) calculated from the termination date in accordance with regulations prescribed by [PBGC]."

Because ERISA § 4062(b)(1) provides that the amount of the Refractory Group's liability is determined as of DoPT (July 15, 1999) the death of [redacted] on October 22, 2000 (after DoPT) has no bearing on the assessed amount. The Board further notes that the Plan's DoPT was established by a formal agreement between PBGC and Refractory that was effective May 18, 2001, and was in conformity with the requirements of ERISA § 4048, 29 U.S.C § 1348. The Appeals Board, therefore, is bound to apply July 15, 1999, as the date of Plan termination for purposes of determining the amount of liability under ERISA § 4062. The Board, therefore, decided that you have presented no grounds for changing the amount of liability determined by PBGC.

C. Request for Hearing

PBGC's Rules for Administrative Review of Agency Decision [29 C.F.R. § 4003.55] provide that the opportunity to appear before the Appeals Board "will be permitted at the Board's discretion." In general, the Appeals Board will permit an opportunity for a hearing before the Board if the Board determines that there is a dispute as to a material fact. Because there is no dispute as to the material facts in this case, the Appeals Board denied your request for an oral hearing.

IV. DECISION

The Appeals Board concluded that, under Title IV of ERISA, Steamatic and the Antoine Street business were under common control with Refractory as of the date the Plan terminated and that all three businesses are jointly and severally liable for the full amount PBGC determined, plus applicable interest.

Pursuant to 29 C.F.R. §4003.59, your client has exhausted his administrative remedies and may seek judicial review of this decision. If you have any questions, please call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,



Michel Louis,
Appeals Board Member