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18 Attorneys for Plaintiff Pension Benefit Guaranty Corporation

19 **IN THE UNITED STATES DISTRICT COURT**
20 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
21 **WESTERN DISTRICT**

PENSION BENEFIT GUARANTY CORPORATION 1200 K Street N.W. Washington, D.C. 20005-4026 Plaintiff, v. 2011 CORPORATION as Plan Administrator of the 2011 Corporation Defined Benefit Pension Plan and Trust, Defendant.)) Case No. 2:13-CV-5663-CBM (JCx))) <i>EX PARTE</i> APPLICATION OF) THE PENSION BENEFIT) GUARANTY CORPORATION) FOR AN ORDER TO SHOW) CAUSE WHY THE 2011) CORPORATION DEFINED) BENEFIT PENSION PLAN AND) TRUST SHOULD NOT BE) TERMINATED IN) ACCORDANCE WITH SECTION) 4042(c) OF THE EMPLOYEE) RETIREMENT SECURITY ACT) OF 1974
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1 **EX PARTE APPLICATION FOR AN ORDER TO SHOW CAUSE WHY**
2 **THE 2011 CORPORATION DEFINED BENEFIT PENSION PLAN AND**
3 **TRUST SHOULD NOT BE TERMINATED IN ACCORDANCE WITH**
4 **SECTION 4042(c) OF THE EMPLOYEE RETIREMENT INCOME**
5 **SECURITY ACT OF 1974**

6 The Pension Benefit Guaranty Corporation (“PBGC”) hereby applies to this
7 Court for an Order to Show Cause Why the 2011 Corporation Defined Benefit
8 Pension Plan and Trust (also known as the 2011 Corporation Defined Benefit
9 Pension Plan, the “Pension Plan” or the “Plan”) Should Not be Terminated in
10 Accordance With Section 4042(c) of the Employee Retirement Income Security
11 Act of 1974. 29 U.S.C. § 1342(c). The grounds for this *Ex Parte* Application are
12 set forth in the accompanying Memorandum.

13 Pursuant to Local Rule 7-19.2, PBGC requests waiver of Notice of this *Ex*
14 *Parte* Application for the reasons set forth in the accompanying Declaration.

15 WHEREFORE, PBGC requests this Court grant its *Ex Parte* Application for
16 an Order to Show Cause and set a Hearing **on or before August 30, 2013** to
17 consider entry of a decree to terminate the Plan and appoint PBGC statutory trustee
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1 of the Pension Plan in accordance with the briefing schedule set forth in the
2 accompanying proposed order.

3
4 August 16, 2013
5 Washington, D.C.

Respectfully Submitted,

6 /s/ Erin C. Kim
7 ISRAEL GOLDOWITZ
8 Chief Counsel
9 KAREN L. MORRIS
10 Deputy Chief Counsel
11 KARTAR S. KHALSA
12 Assistant Chief Counsel
13 ERIN C. KIM (CBN 273710)
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18 Attorneys for Plaintiff Pension Benefit Guaranty Corporation

19 **IN THE UNITED STATES DISTRICT COURT**
20 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
21 **WESTERN DISTRICT**

22 PENSION BENEFIT GUARANTY CORPORATION	23)	
24 1200 K Street N.W.	25)	26 Case No. 2:13-CV-5663-CBM (JCx)
27 Washington, D.C. 20005-4026	28)	MEMORANDUM OF THE PBGC
29 Plaintiff,	30)	IN SUPPORT OF ITS <i>EX PARTE</i>
31 v.	32)	APPLICATION FOR AN ORDER
33 2011 CORPORATION	34)	TO SHOW CAUSE
35 as Plan Administrator	36)	WHY THE 2011 CORPORATION
36 of the 2011 Corporation Defined	37)	DEFINED BENEFIT PENSION
37 Benefit Pension Plan and Trust,	38)	PLAN AND TRUST SHOULD
38 Defendant.	39)	NOT BE TERMINATED IN
		ACCORDANCE WITH SECTION
		4042(c) OF THE EMPLOYEE
		RETIREMENT INCOME
		SECURITY ACT OF 1974

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1 **MEMORANDUM IN SUPPORT OF ITS *EX PARTE* APPLICATION FOR**
2 **AN ORDER TO SHOW CAUSE WHY THE 2011 CORPORATION**
3 **DEFINED BENEFIT PENSION PLAN AND TRUST SHOULD NOT BE**
4 **TERMINATED IN ACCORDANCE WITH SECTION 4042(c) OF THE**
5 **EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974**

6 Plaintiff, Pension Benefit Guaranty Corporation (“PBGC”), files this
7 memorandum in support of its *Ex Parte* Application for an Order to Show Cause
8 Why the 2011 Corporation Defined Benefit Pension Plan and Trust (also known as
9 the 2011 Corporation Defined Benefit Pension Plan, the “Pension Plan” or the
10 “Plan”) Should Not Be Terminated in Accordance With Section 4042(c) of the
11 Employee Retirement Income Security Act of 1974. 29 U.S.C. § 1342(c).

12 **STATUTORY BACKGROUND**

13 1. PBGC is the United States government agency created to administer
14 the defined benefit pension plan termination program under Title IV of the
15 Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29
16 U.S.C. §§ 1301-1461 (2006 & Supp. V 2011).

17 2. Pursuant to 29 U.S.C. §1342(a), PBGC may institute proceedings to
18 terminate a pension plan covered under Title IV of ERISA if it determines, *inter*
19 *alia*, (i) that, pursuant to 29 U.S.C. § 1342(a)(1), the plan has not met the minimum
20 funding standard required under 26 U.S.C. § 412; or (ii) that, pursuant to 29 U.S.C.
21 § 1342(a)(2), the plan will be unable to pay benefits when due.

22 3. After making a determination that a plan should be terminated and
23 issuing a notice of its determination to the plan administrator, PBGC may apply
24 under 29 U.S.C. § 1342(c) to the appropriate United States district court for a
25 decree adjudicating that, *inter alia*, the plan should be terminated in order to
26 protect the interests of the participants.

27 4. When an underfunded pension plan terminates, PBGC typically
28 becomes statutory trustee and pays participants their benefits under the plan, up to
the statutory limits. *See* 29 U.S.C. §§ 1321, 1322, 1361.

1 on the Bond is September 7, 2013. To date, the Plan administrator, 2011
2 Corporation, has failed to submit a claim on the Bond.

3 13. As noted above, upon termination of the Pension Plan, 2011
4 Corporation and each of its controlled group members will become jointly and
5 severally liable to PBGC for, *inter alia*, the Pension Plan's Unfunded Benefit
6 Liabilities. PBGC expects that the Bond would be its sole source of recovery for
7 such Unfunded Benefit Liabilities.

8 2011 Corporation

9 14. 2011 Corporation is a real estate and property developing company
10 incorporated in the State of Delaware with its primary place of business in Los
11 Angeles, California.

12 15. 2011 Corporation has ceased operations and has not made a
13 contribution to the Pension Plan as required under applicable provisions of ERISA
14 and the Internal Revenue Code since the Plan year of 2008.

15 PBGC's Determination

16 16. On August 5, 2013, in accordance with 29 U.S.C. § 1342(c), PBGC
17 issued a Notice of Determination (the "Notice") to 2011 Corporation, as the Plan's
18 administrator. Exhibit A of the Complaint. The Notice states that PBGC has
19 determined that the Plan has not met the minimum funding standard required under
20 26 U.S.C. § 412 and will be unable to pay benefits when due. The Notice further
21 states that PBGC determined August 5, 2013 is the appropriate termination date for
22 the Plan.

23 17. On August 5, 2013, PBGC published notice of its determination in the
24 Los Angeles Daily News, a general newspaper circulated throughout the Los
25 Angeles, where 2011 Corporation primarily operates.

26 18. On August 6, 2013, PBGC filed a complaint requesting this Court to
27 enter an order (i) terminating the Pension Plan in accordance with 4042(c) of
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1 ERISA; (ii) appointing PBGC as statutory trustee of the Pension Plan; (iii)
2 establishing August 5, 2013, as the termination date of the Pension Plan; and (iv)
3 requiring that 2011 Corporation and any other person or entity having possession,
4 custody, or control of any of the records, assets, property, or documents of or
5 relating to the Pension Plan transfer, convey, and deliver all such records, assets,
6 property and documents to PBGC.

7 **ARGUMENT**

8 19. Title IV of ERISA does not expressly require PBGC to file a
9 complaint to terminate a pension plan. Rather, after notice to the plan
10 administrator of its determination that the plan should be terminated, PBGC “may
11 apply to the appropriate United States district court for a decree adjudicating that
12 the plan must be terminated” 29 U.S.C. § 1342(c). Nonetheless, PBGC has
13 filed a complaint in this matter because the Federal Rules of Civil Procedure
14 specify that a civil action is initiated by a complaint.

15 20. PBGC must become the Plan’s statutory trustee immediately so it may
16 begin payment of statutorily guaranteed pension benefits to the participants and
17 beneficiaries of the Pension Plan. Without anyone currently administering the
18 Plan, participants and beneficiaries of the Pension Plan may not be able to receive
19 their benefit payments.

20 21. If entry of an order terminating the Plan is delayed until this Court can
21 rule on the matter pursuant to the normal pleading and briefing schedule: (A)
22 PBGC’s ability to collect monies from the Bond may be endangered, causing
23 irreparable financial losses to PBGC’s insurance fund; and (B) benefit payments to
24 the Pension Plan’s participants may be delayed when at least one participant may
25 become eligible to begin receiving benefit payments in October 1, 2013.

26 22. Further, despite the fact that the Pension Plan’s ability to submit a
27 claim against the Bond expires on September 7, 2013, the Pension Plan’s
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1 administrator, 2011 Corporation, has failed to submit a claim on the Bond. PBGC
2 must become the Pension Plan’s trustee immediately to ensure that its ability to
3 recover monies available to the Pension Plan is not endangered and avoid any
4 unreasonable increase in the liability of PBGC’s insurance fund.

5 **CONCLUSION**

6 The Court should grant PBGC’s *Ex Parte* Application for Order to Show
7 Cause Why the 2011 Corporation Defined Benefit Pension Plan and Trust Should
8 Not Be Terminated in Accordance With Section 4042(c) of the Employee
9 Retirement Income Security Act of 1974 and set a Hearing as soon as possible

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1 so that this Court may enter a decree to terminate the Pension Plan and appoint
2 PBGC statutory trustee of the Pension Plan.

3
4 August 16, 2013
5 Washington, D.C.

Respectfully Submitted,

6 /s/ Erin C. Kim

7 ISRAEL GOLDOWITZ

8 Chief Counsel

9 KAREN L. MORRIS

10 Deputy Chief Counsel

11 KARTAR S. KHALSA

12 Assistant Chief Counsel

13 ERIN C. KIM (CBN 273710)

14 Attorney

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18 Attorneys for Plaintiff Pension Benefit Guaranty Corporation

19 **IN THE UNITED STATES DISTRICT COURT**
 20 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
 21 **WESTERN DISTRICT**

22 PENSION BENEFIT GUARANTY) 23 CORPORATION) Case No. 2:13-CV-5663-CBM (JCx) 24 1200 K Street N.W.) 25 Washington, D.C. 20005-4026) DECLARATION OF ERIN C. KIM 26) IN SUPPORT OF PBGC'S 27 Plaintiff,) <i>EX PARTE</i> APPLICATION FOR 28) AN ORDER TO SHOW CAUSE) WHY THE 2011 CORPORATION) DEFINED BENEFIT PENSION 2011 CORPORATION) PLAN AND TRUST SHOULD as Plan Administrator) NOT BE TERMINATED IN of the 2011 Corporation Defined) ACCORDANCE WITH SECTION Benefit Pension Plan and Trust,) 4042(c) OF THE EMPLOYEE) RETIREMENT INCOME Defendant.) SECURITY ACT OF 1974

DECLARATION IN SUPPORT OF *EX PARTE* APPLICATION

1 **DECLARATION OF ERIN C. KIM IN SUPPORT OF PBGC'S *EX PARTE***
2 **APPLICATION FOR AN ORDER TO SHOW CAUSE WHY THE 2011**
3 **CORPORATION DEFINED BENEFIT PENSION PLAN AND TRUST**
4 **SHOULD NOT BE TERMINATED IN ACCORDANCE WITH SECTION**
5 **4042(c) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT**
6 **OF 1974**

7 I, Erin C. Kim, make this declaration in support of the Pension Benefit
8 Guaranty Corporation's ("PBGC") *Ex Parte* Application for an Order to Show
9 Cause Why the 2011 Corporation Defined Benefit Pension Plan and Trust (also
10 known as the 2011 Corporation Defined Benefit Pension Plan, the "Pension Plan"
11 or the "Plan") Should Not Be Terminated in Accordance With Section 4042(c) of
12 the Employee Retirement Income Security Act of 1974.

13 1. I am an attorney within PBGC's Office of the Chief Counsel.

14 2. I am personally familiar with the records that PBGC maintains related
15 to this case.

16 3. I submit this declaration based upon my review of these records.

17 4. I submit this declaration contemporaneously with an *ex parte*
18 application for an order to show cause, proposed order, and memorandum in
19 support of the *ex parte* application.

20 5. PBGC has not previously requested any expedited treatment regarding
21 this matter.

22 6. PBGC is not aware of any individual acting as counsel for 2011
23 Corporation.

24 7. PBGC has contacted the registered agent of 2011 Corporation to ask
25 whether 2011 Corporation was represented by counsel. The registered agent of
26 2011 Corporation stated that they not aware of any person acting as counsel to
27 2011 Corporation.

28 8. PBGC has also attempted to contact George Herscu, the president of
29 2011 Corporation ("Mr. Herscu") to no avail.

1 9. Mr. Herscu is the only known person with the authority to act on
2 behalf of 2011 Corporation.

3 10. PBGC understands that Mr. Herscu is incapacitated and is unable to
4 act on behalf of the Defendant.

5 11. PBGC has contacted all known former counsels of Mr. Herscu and the
6 Conservator of the Estate of Mr. Herscu to ask whether 2011 Corporation was
7 represented by counsel. Former counsels of Mr. Herscu and the Conservator of the
8 Estate of Mr. Herscu all stated that they were not aware of any person acting as
9 counsel to 2011 Corporation.

10 12. Therefore, pursuant to Local Rule 7-19.2, PBGC requests waiver of
11 notice of its *Ex Parte* Application as there was no counsel for 2011 Corporation
12 that PBGC could give notice to before filing its *Ex Parte* Application as required
13 under Local Rule 7-19.1.

14 13. The Pension Plan is a single-employer defined benefit pension plan
15 and is covered under Title IV of ERISA. *See* 29 U.S.C. §§ 1002(35); 1301(a)(15),
16 1321(a).

17 14. 2011 Corporation is the Plan administrator, within the meaning of 29
18 U.S.C. §§ 1002(16)(A) and 1301(a)(1), of the Pension Plan. 2011 Corporation is
19 also the contributing sponsor of the Pension Plan within the meaning of 29 U.S.C.
20 § 1301(a)(13).

21 15. 2011 Corporation is a real estate and property developing company
22 incorporated in the State of Delaware with its primary place of business in Los
23 Angeles, California.

24 16. 2011 Corporation has ceased operations and has not made a
25 contribution to the Pension Plan as required under applicable provisions of ERISA
26 and the Internal Revenue Code since the Plan year of 2008.

1 17. As of July 31, 2013, PBGC estimates that the Pension Plan has no
2 assets but has pension obligations to the Pension Plan participants and their
3 beneficiaries in the amount of \$1,055,748.

4 18. The Pension Plan provides benefits to three former employees of 2011
5 Corporation and the beneficiaries of such employees.

6 19. At least one Pension Plan participant may be eligible to receive
7 benefits by October 1, 2013.

8 20. 2011 Corporation is not administering the Pension Plan; nor are there
9 any known individuals or entities administering the Pension Plan.

10 21. The Pension Plan is the holder of a bond or policy in the amount of
11 \$500,000 for which the Pension Plan may be eligible to submit a claim to recover
12 up to \$500,000 in Pension Plan assets (the "Bond"). The last day to submit a claim
13 on the Bond is September 7, 2013. To date, the Plan administrator, 2011
14 Corporation, has failed to submit a claim on the Bond. PBGC expects that the
15 Bond would be its sole source of recovery for the shortfall between the Pension
16 Plan's assets and promised benefits as of the Pension Plan's termination date.

17 22. On August 5, 2013, in accordance with 29 U.S.C. § 1342(c), PBGC
18 issued a Notice of Determination (the "Notice") to 2011 Corporation, as the Plan's
19 administrator. Exhibit A of the Complaint. The Notice states that PBGC has
20 determined that the Plan has not met the minimum funding standard required under
21 26 U.S.C. § 412 and will be unable to pay benefits when due. The Notice further
22 states that PBGC determined August 5, 2013 is the appropriate termination date for
23 the Plan.

24 23. On August 5, 2013, PBGC published notice of its determination in the
25 Los Angeles Daily News, a general newspaper circulated throughout the Los
26 Angeles where 2011 Corporation primarily operates.

27 24. On August 6, 2013, PBGC filed a complaint requesting this Court to
28 enter an order (i) terminating the Pension Plan in accordance with 4042(c) of

1 ERISA; (ii) appointing PBGC as statutory trustee of the Pension Plan; (iii)
2 establishing August 5, 2013, as the termination date of the Pension Plan; and (iv)
3 requiring that 2011 Corporation and any other person or entity having possession,
4 custody, or control of any of the records, assets, property, or documents of or
5 relating to the Pension Plan transfer, convey, and deliver all such records, assets,
6 property and documents to PBGC.

7 25. PBGC must become the Plan's statutory trustee immediately so it may
8 begin payment of statutorily guaranteed pension benefits to the participants and
9 beneficiaries of the Pension Plan. Without anyone currently administering the
10 Plan, participants and beneficiaries of the Pension Plan may not be able to receive
11 their benefit payments.

12 26. If entry of an order terminating the Plan is delayed until this Court can
13 rule on the matter pursuant to the normal pleading and briefing schedule: (A)
14 PBGC's ability to collect monies from the Bond may be endangered, causing
15 irreparable material financial losses to PBGC's insurance fund; and (B) benefit
16 payments to the Pension Plan's participants may be delayed when at least one
17 participant may become eligible to begin receiving benefit payments in October 1,
18 2013.

19 27. Despite the fact that the Pension Plan's ability to submit a claim
20 against the Bond expires on September 7, 2013, the Pension Plan's administrator,
21 2011 Corporation, has failed to submit a claim on the Bond. **PBGC must become**
22 **the Pension Plan's trustee before September 7, 2013** to ensure that its ability to
23 recover monies available to the Pension Plan is not endangered and avoid any
24 unreasonable increase in the liability of PBGC's insurance fund.

25 28. Accordingly, PBGC respectfully requests expedited treatment in this
26 matter and respectfully requests that the Court grant PBGC's *Ex Parte* Application
27 and enter the proposed Order to Show Cause for a hearing **on or before August**
28 **30, 2013.**

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August 15, 2013
Washington, D.C.



ERIN C. KIM