

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Case No. ___ Civ _____ ()

PENSION BENEFIT GUARANTY)
CORPORATION)
1200 K Street, N.W.)
Washington, D.C. 20005)
)
Plaintiff,)
)
v.)
)
ENDODONTIC SPECIALISTS OF)
COLORADO, P.C.)
5745 Erindale Drive, Suite 200)
Colorado Springs, CO 80918)
)
Defendant.)

COMPLAINT

1. This action arises under Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”), *as amended*, 29 U.S.C. §§ 1301-1461.

2. Plaintiff, Pension Benefit Guaranty Corporation (“PBGC”) brings this action under 29 U.S.C. § 1303(e)(1) to enforce the provisions of Title IV of ERISA, and to enforce a final agency determination that violations of Title IV have occurred with respect to the Endodontic Specialists of Colorado, P.C. Defined Benefit Pension Plan (the “Plan”).

3. This is an action for enforcement of PBGC’s final agency determination based on review of the agency’s administrative record, pursuant to 5 U.S.C. § 706.

Parties

4. PBGC is a wholly owned United States government corporation established under 29 U.S.C. § 1302 to administer and enforce the provisions of the pension termination insurance program under Title IV of ERISA.

5. PBGC regulates the termination of defined-benefit pension plans covered by Title IV of ERISA. Pension plans that have sufficient assets to pay all benefit liabilities may be terminated in a “standard termination” under 29 U.S.C. § 1341(b).

6. For plans that terminate in a standard termination, PBGC ensures compliance with the requirements of Title IV of ERISA. Pursuant to 29 U.S.C. § 1303(a), PBGC is required to audit a statistically significant number of standard terminations to determine whether participants and beneficiaries have received their full plan benefits.

7. Defendant, Endodontic Specialists of Colorado, PC, (“Defendant” or “Endodontic”) is a dental practice, with its principal place of business in Colorado Springs, Colorado.

8. Endodontic is the Plan’s contributing sponsor within the meaning of 29 U.S.C. § 1301(a)(13). Endodontic is also the Plan Administrator within the meaning of 29 U.S.C. §§ 1301(a)(1) and 1002(16).

Jurisdiction and Venue

9. This Court has jurisdiction over this action under 29 U.S.C. § 1303(e)(3), as well as under 28 U.S.C. §§ 1331 and 1345.

10. Venue is proper in this Court under 29 U.S.C. § 1303(e)(2).

Title IV - Standard Terminations

11. In a standard termination, the Plan administrator is required to provide notice to plan participants of its intent to terminate the plan (a “NOIT”). 29 U.S.C. § 1341(a)(2), (b)(1)(A); 29 C.F.R. § 4041.23. The NOIT serves as written notice to plan participants of the intended plan termination and provides the proposed termination date. 29 U.S.C. § 1341(a)(2). The plan administrator may change that date to a later date in certain circumstances not applicable here. 29 U.S.C. § 1348(a)(1).¹

12. In a standard termination, the plan administrator must allocate and distribute assets to participants and beneficiaries in accordance with 29 U.S.C. §§ 1341 and 1344.

13. The plan administrator must distribute the plan’s assets by (a) purchasing “irrevocable commitments” (*i.e.*, annuities) from a private insurer to satisfy all benefit liabilities, or (b) making an alternative form of distribution (*e.g.*, a lump sum payment) “in accordance with the provisions of the plan and any applicable regulations.” 29 U.S.C. §§ 1341(b)(3)(A)(i), (ii).

14. In a standard termination, the plan’s assets must be sufficient for all benefit liabilities, determined as of the plan’s termination date. 29 U.S.C. § 1341(b)(1)(D).

Accordingly, benefits must be determined under the plan provisions in effect on the plan’s termination date. 29 C.F.R. § 4041.8(a).

¹ Along with providing the NOIT to participants, a Plan administrator is required to file a Form 500 with PBGC prior to plan termination. The Form 500 lists, among other things, the proposed plan termination date. PBGC’s regulations allow a Plan administrator to change the proposed termination date listed in the NOIT to the date proposed in the Form 500 if that date is later than the NOIT date. The later date, however, may not be more than 90 days after the earliest date on which the NOIT was issued, and participants must receive notice of the change. 29 C.F.R. § 4041.25(b); 29 C.F.R. § 4041.23(b)(2).

15. Additionally, the present value of lump sum benefits paid in a standard termination must be valued as of the date of distribution. 29 C.F.R. § 4041.28(c)(2).

The Plan

16. The Plan is a single-employer, defined-benefit pension plan covered under Title IV of ERISA. 29 U.S.C. § 1321.

17. Endodontic adopted the Plan, effective January 1, 2000.

18. On or about November 21, 2008, Endodontic issued a notice to participants and beneficiaries that Endodontic intended to freeze the Plan, effective December 21, 2008.

19. On or about March 6, 2009, Endodontic issued a NOIT to Plan participants and beneficiaries in accordance with 29 U.S.C. § 1341(a)(2), with a proposed termination date of May 15, 2009.

20. On July 20, 2009, PBGC received a Form 500 - Standard Termination Notice for the Plan, indicating a proposed termination date of May 15, 2009.

21. On or about March 31, 2010, Endodontic filed a Form 501 - Post Distribution Certification with PBGC that certified, *inter alia*, that all benefits payable under the Plan were calculated correctly in accordance with ERISA and PBGC's regulations thereunder, and that all benefit liabilities under the Plan were satisfied.

22. As of the Plan's May 15, 2009 termination date, Plan Section 1.9 defined a participant's Average Annual Compensation as:

[A] Participant's Compensation averaged over the highest 3 consecutive Plan Years (or over the actual number of consecutive Plan Years, if less) ending at the earlier of (1) the date the Participant ceased to be an active Participant; or (2) the later of

Normal Retirement Age or actual retirement. If a Participant is employed or covered under the Plan for less than the full accounting period for determining Compensation, Average Annual Compensation will be the annual equivalent of his or her actual Compensation for such period if the Participant qualifies for a Year of Service or Year of Credited Service.

23. As of the Plan's May 15, 2009 termination date, Plan participants could elect certain optional forms of benefit, including a lump sum payment that was the "Actuarial Equivalent of the Participant's Accrued Benefit payable as a Normal Form of Retirement Benefit beginning at the Participant's Normal Retirement Date or actual retirement date if later." The Plan further required that a participants' Accrued Benefit in a given year not be less than the Actuarial Equivalent of his or her Accrued Benefit as of the end of the prior Plan Year, except as otherwise permitted by law.

24. On the Plan's May 15, 2009 termination date, Plan Section 1.2 provided that Actuarial Equivalence for purposes of lump sum payments would be determined using whichever of the following factors produced the greatest benefit:

- (a) **Plan Factors:** Pre-Retirement: 6% interest; Post-retirement: 6% interest and 1983 GAM Blended IRC 95-6 [mortality table] without setback.
- (b) **Code § 417(e) GATT Factors:** The applicable interest will be the annual interest rate on 30 year Treasury Securities as specified by the Commissioner [of Internal Revenue] for the second calendar month preceding the first day of the Plan Year during which the Annuity Starting Date occurs and the mortality assumption post-retirement will be the 1983 Group Annuity Mortality Table, gender neutral, blended 50/50 Male/Female [the ("GATT Assumptions")]

25. On January 19, 2010, more than eight months after the Plan’s termination date, Endodontic amended the Plan to, *inter alia*, change the definition of Actuarial Equivalence for purposes of calculating lump sums (the “PPA Amendment”).² Specifically, Endodontic amended the Plan to provide that “for plan years after January 31, 2007, the provisions of [26 U.S.C.] § 417(e)(3), as amended by [the Pension Protection Act of 2006], for calculating the minimum value of certain optional forms of benefit, including lump sums, apply to the Plan.” The PPA Amendment provided the following assumptions (the “PPA Assumptions”) for calculating lump sum payments:

Applicable Mortality Table. For Plan Years beginning before January 1, 2009, the mortality table set forth in Revenue Ruling 2001-62, or successor guidance. Effective for Plan Years beginning on or after January 1, 2009, the applicable annual mortality table within the meaning of [26 U.S.C.] § 417(e)(3)(B), as described in Revenue Ruling 2007-67

Applicable Interest Rate. . . . the term ‘Applicable Interest Rate’ means the adjusted first, second, and third segment rates applied under rules similar to the rules of [26 U.S.C.] § 430(h)(2)(C) for the calendar month (“lookback month”) before the first day of the Plan Year in which the annuity starting date occurs (“stability period”). In determining the Applicable Interest Rate, the provisions of Revenue Ruling 2007-67 apply.

CLAIM FOR RELIEF

26. PBGC repeats and re-alleges paragraphs 1-25.

27. By a letter dated on or about July 22, 2010, PBGC notified Endodontic that the Plan’s termination had been selected for audit.

² Calculations using higher interest rates produce lower lump sum present values. The PPA Amendment rates typically produce lower lump sum present values than 30-year Treasury securities rates.

28. On February 28, 2012, PBGC issued an initial determination letter to Endodontic with respect to its audit (the “Initial Determination”).

29. In the Initial Determination, PBGC found that: (1) one participant’s 2008 compensation was not projected to its annual equivalent in accordance with Plan Section 1.9 concerning Average Annual Compensation; (2) the PPA Amendment, adopted after the date of Plan termination to replace the GATT Assumptions with the PPA Assumptions, decreased the value of benefits for participants and beneficiaries who elected lump sums, in violation of 29 U.S.C. § 1341(b)(1)(D) and 29 C.F.R. § 4041.8; and (3) six participants who waived part of their benefits were not majority owners of Endodontic, and were thus not permitted to waive any benefits.³

30. The Initial Determination required Endodontic to take certain steps to comply with Plan provisions and applicable laws.

31. First, the Initial Determination required Endodontic to recalculate one participant’s accrued benefit using that participant’s correct compensation – his annualized 2008 Plan Year compensation.

32. Second, the Initial Determination required Endodontic to recalculate the lump sum distributions made from the Plan. Specifically, Endodontic was required to pay the highest benefit value (plus interest from the date of the initial payment) calculated using: (1) the 6% Plan interest rate and the 1983 GATT Mortality Table, post-retirement only; (2) the GATT

³ PBGC also found that the Plan required benefit accruals equal to 2.7% of Average Annual Compensation per Year of Credited Service, but that the participant distribution worksheet provided to PBGC indicated that 2.75% was used. The Initial Determination stated that no action was required for this finding.

Assumptions (4% interest rate and the 94 GAR Mortality Table, post-retirement only); and (3) the PPA Assumptions (November 2008 segment rates in effect for the 2009 Plan Year [1st-5.24%, 2nd-5.69%, 3rd-5.37%] and the 2009 Applicable Mortality Table).

33. Finally, PBGC's Initial Determination required Endodonic to pay any benefit amounts waived by participants who were not majority owners of Endodonic.

34. By letter dated May 13, 2012, Endodonic, through its third party administrator, requested reconsideration of the Initial Determination (the "Reconsideration"). The Reconsideration only sought reconsideration of PBGC's determination that six participants were not majority owners, and thus not permitted to waive any portion of their Plan benefit. The Reconsideration did not dispute PBGC's remaining findings in the Initial Determination.⁴ Accordingly, those determinations became final on May 14, 2012. *See* 29 C.F.R. § 4003.22.

35. On August 27, 2012, PBGC issued a final determination, reversing its Initial Determination regarding the six owners/participants, and determining that each was a majority owner under the constructive ownership rules of 26 U.S.C. § 414(b).

⁴ Endodonic did not challenge PBGC's findings that: (1) one participant's 2008 compensation was not projected to its annual equivalent in accordance with Section 1.9 of the Plan provisions for Average Annual Compensation; and (2) the PPA Amendment, adopted after the date of Plan termination to replace the GATT Assumptions with the PPA Assumptions, decreased the value of benefits for participants and beneficiaries who elected lump sums, in violation of 29 U.S.C. § 1341(b)(1)(D) and 29 C.F.R. § 4041.8. As a result, Endodontics has waived any challenge to these findings.

36. On information and belief, as of the date of the filing of this Complaint, Endodontic has not made any of the additional benefit payments to Plan participants and beneficiaries required by PBGC's audit determinations.

37. Endodontic did not complete the standard termination of the Plan by valuing benefits and distributing assets in accordance with the Plan provisions in effect on the Plan's termination date and applicable law. Additional benefits—calculated in accordance with applicable Plan provisions and applicable law, plus interest—are owed to Plan participants and beneficiaries.

38. Because the lump sum benefits were not valued as of the date of distribution using the Plan provisions in effect on the termination date, and as required by applicable law, and further because the appropriate compensation, pursuant to the Plan's provisions, was not used to value one participant's benefit, Endodontic has not fully provided all benefit liabilities under the Plan as required by 29 U.S.C. § 1341.

39. Pursuant to 29 U.S.C. §§ 1303 and 1341, Endodontic is liable for additional distributions to the Plan participants and beneficiaries, in accordance with PBGC's audit determinations.

WHEREFORE, PBGC respectfully requests that this Court:

1. Enter judgment in its favor against Endodontic enforcing PBGC's audit determinations, and requiring Endodontic to comply with the provisions of Title IV of ERISA;
2. Award PBGC all of its costs of litigation in this case pursuant to 29 U.S.C. § 1303(e)(5); and
3. Grant such other legal or equitable relief as shall be just and proper.

Respectfully submitted,

Dated: April 24, 2014

/s/ Damarr M. Butler
ISRAEL GOLDOWITZ
Chief Counsel
KAREN L. MORRIS
Deputy Chief Counsel
SARA B. EAGLE
Assistant Chief Counsel
COLIN B. ALBAUGH
DAMARR M. BUTLER
Attorneys
Pension Benefit Guaranty
Corporation
Office of the Chief Counsel
1200 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 326-4020, ext. 6883
Fax: (202) 326-4112
Emails: butler.damarr@pbgc.gov
and efile@pbgc.gov