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10 *Attorney for Plaintiff*

11 **IN THE UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 \_\_\_\_\_ )  
14 PENSION BENEFIT GUARANTY )  
15 CORPORATION, )

16 *Plaintiff,* )

17 v. )

18 OCEAN LABEL, INC., )

19 *Defendant.* )  
20 \_\_\_\_\_ )

Case No.: 14-cv-01129-JSW

Honorable Jeffrey S. White

**MOTION FOR DEFAULT  
JUDGMENT**

21 Plaintiff Pension Benefit Guaranty Corporation (“PBGC”) moves the Court for  
22 default judgment on its Complaint. The Court should grant the Motion because (i) PBGC  
23 has accomplished proper service on the nonresponsive corporate Defendant by personally  
24 serving process on the California Secretary of State, in accordance with the rules of this  
25 Court; (ii) the Defendant has not answered or otherwise responded to the Complaint; and  
26 (iii) granting the requested relief will not prejudice any party. As the PBGC explains  
27 below, the relief sought is necessary for PBGC to assure that participants in the  
28 Defendant’s pension plan receive the retirement benefits they are owed under the plan.

1 **Factual Background and Procedural History**<sup>1</sup>

2 PBGC is the federal agency created by Title IV of ERISA<sup>2</sup> to insure the pension  
3 benefits in many private, defined-benefit pension plans, including the Dennis J. Brennan  
4 Defined Benefit Pension Plan (the “Pension Plan”), which is sponsored and administered  
5 by Defendant Ocean Label, Inc. Under ERISA, when PBGC makes a determination that  
6 one or more statutory criteria have been met with respect to a covered pension plan,  
7 PBGC may apply to an appropriate district court for an order terminating the Pension Plan  
8 and appointing a statutory trustee to pay benefits under the terminated plan.<sup>3</sup> PBGC may  
9 also ask the district court to fix the pension plan’s termination date.<sup>4</sup>

12 On August 20, 2013, PBGC issued a determination (“Determination”) that the  
13 Pension Plan will be unable to pay benefits when due under 29 U.S.C. § 1342(a)(2) and  
14 that the Pension Plan must be terminated under 29 U.S.C. § 1342(c).<sup>5</sup> PBGC sent notice  
15 of its Determination to Defendant, and also published notice of its Determination in the  
16 Tri-Valley Times newspaper, which covers the area in which the Pension Plan was  
17 administered and benefits under the Pension Plan were earned (Pleasanton, California).  
18 This notice, which informed participants that PBGC was proceeding to terminate the  
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21 <sup>1</sup> PBGC has submitted herewith an Affidavit for Judgment that attests to the operative facts on  
22 which this Motion is based.

23 <sup>2</sup> The Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1301-1461  
24 (2012).

25 <sup>3</sup> *See* 29 U.S.C. § 1342(a), (c).

26 <sup>4</sup> *See* 29 U.S.C. § 1348(a)(4).

27 <sup>5</sup> As stated in the Complaint, this determination was based on PBGC’s conclusions that the Plan  
28 was not being properly administered and that Defendant had not been responsive to participants’  
inquiries. *See* Complaint, Docket no. 1, at ¶ 19.

1 Pension Plan in accordance with ERISA, extinguished participants' reasonable  
2 expectations that the Pension Plan would continue.

3 PBGC attempted to terminate and assume trusteeship of the Pension Plan  
4 consensually, inviting Defendant to enter into an agreement to that effect, but did not  
5 receive a response to its overture. PBGC then filed this action to implement the  
6 Determination, as authorized by 29 U.S.C. § 1342(c).<sup>6</sup>

7  
8 PBGC served the Complaint on Defendant's registered agent on March 24, 2014.  
9 The registered agent then wrote to PBGC to confirm receipt of the Complaint and advise  
10 PBGC that Defendant's corporate status was "suspended," which meant, among other  
11 things, that Defendant could not appear as a defendant in this proceeding.<sup>7</sup> To date,  
12 Defendant has not appeared or otherwise communicated with PBGC. On PBGC's motion,  
13 the Court on August 12, 2014, granted PBGC permission to make alternate service of the  
14 Complaint on the California Secretary of State. PBGC served the California Secretary of  
15 State with the Complaint on August 14, 2014.

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18 On September 30, 2014, PBGC moved for entry of default against Defendant,  
19 pursuant to Rule 55(a) of the Federal Rules of Civil Procedure, because more than  
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22 \_\_\_\_\_  
23 <sup>6</sup> "If [PBGC] . . . has determined that the plan should be terminated, it may, upon notice to the  
24 plan administrator, apply to the appropriate United States district court for a decree adjudicating  
25 that the plan must be terminated in order to protect the interests of the participants or to avoid any  
unreasonable deterioration of the financial condition of the plan or any unreasonable increase in  
the liability of the [PBGC insurance] fund." 29 U.S.C. § 1342(c).

26 <sup>7</sup> See Exhibit A to Attachment 1 to PBGC's Motion for Entry of Default, Docket no. 14 (letter  
27 from Gagen McCoy to PBGC advising of Defendant's corporate status). Information available  
28 on the California Secretary of State's website indicates that Defendant's corporate status is "FTB  
Suspended," suggesting that it was suspended for failure to meet tax requirements.

1 twenty-one days passed after the Defendant was served with the Complaint without the  
2 Defendant answering or otherwise responding to the Complaint.<sup>8</sup>

### 3 **Request for Default Judgment**

4  
5 Rule 55 of the Federal Rules of Civil Procedure provides that where, as here, the  
6 judgment sought is for something other than a “sum certain,” default judgment shall be  
7 the province of the Court.<sup>9</sup> In this case, the Complaint did not seek money damages, but  
8 rather an order terminating the Pension Plan, appointing PBGC statutory trustee of the  
9 Pension Plan, and establishing August 30, 2013, as the Pension Plan’s termination date.  
10 Thus, default judgment in this case is committed to the sound discretion of the Court.  
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12 The Ninth Circuit has noted several factors that a court may consider in exercising  
13 its discretion to enter a default judgment. These include:  
14

- 15 • The possibility of prejudice to the Plaintiff
- 16 • The merits of plaintiff’s substantive claim
- 17 • The sufficiency of the complaint
- 18 • The sum of money at stake in the action
- 19 • The possibility of a dispute concerning the material facts
- 20 • Whether the default was due to excusable neglect, and
- 21 • The strong policy underlying the Federal Rules of Civil Procedure favoring  
22 decisions on the merits.<sup>10</sup>

23 The foregoing factors weigh in favor of granting default judgment in this case.  
24 First, there is clear prejudice to PBGC if the judgment is not entered. Under 29 U.S.C.

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26 <sup>8</sup> See Motion for Entry of Default, Docket no. 22 (Sept. 30, 2014).

27 <sup>9</sup> Fed. R. Civ. P. 55(b)(2).

28 <sup>10</sup> *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9<sup>th</sup> Cir. 1986).

1 § 1342(c), pension plan termination can be achieved only by consent of the pension plan's  
2 administrator or by decree of a district court. In this case, the absence of the Defendant  
3 renders it impossible to terminate the Pension Plan consensually. Thus, without a court  
4 order terminating the Pension Plan, PBGC will be unable to pay Pension Plan benefits  
5 under the ERISA insurance program. Unless the Court appoints PBGC statutory trustee  
6 of the Pension Plan, the interests of Pension Plan participants will continue to be ignored  
7 and disserved, and their retirement benefits will be at risk.<sup>11</sup>  
8  
9

10 The underlying merits of the Complaint also favor granting a default judgment. In  
11 accordance with 29 U.S.C. § 1342(a) and (c), PBGC made administrative determinations  
12 that grounds for plan termination existed and that the Pension Plan should be terminated  
13 to protect the interests of the participants and the assets of the Pension Plan. PBGC  
14 published notice of its determinations and duly advised the Defendant of them but  
15 received no response. PBGC respectfully submits that, on the merits, the Court has  
16 ample basis to conclude that PBGC's determinations were not arbitrary and capricious,  
17 and that August 30, 2013, is an appropriate termination date for the Pension Plan.  
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20 The Complaint in this case was more than sufficient to support judgment. When  
21 PBGC cannot achieve consensual termination of a pension plan due to absence or  
22 recalcitrance of the plan administrator, ERISA instructs PBGC to seek an order from an  
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26 <sup>11</sup> As PBGC discusses herein, the partial basis for seeking termination of the Pension Plan was the  
27 effective abandonment of the Pension Plan by its administrator. PBGC also continues to  
28 investigate allegations that Pension Plan assets were converted for the benefit of persons other  
than Pension Plan participants.

1 appropriate district court.<sup>12</sup> The Complaint in this case provides details about PBGC's  
2 determinations and the facts that support them. It also provides justifications for  
3 appointing PBGC as trustee of the Pension Plan and establishing the Pension Plan's  
4 termination date. Further, the Complaint seeks no action or money by Defendant and calls  
5 for no fact-finding by the Court, as the facts are those developed by PBGC in the course  
6 of making its administrative determinations. Accordingly, there are no material facts or  
7 sums of money in dispute. Thus, addressing the third, fourth, and fifth considerations  
8 noted above, the Complaint was sufficient, there is no money in dispute, and there are no  
9 disputed material facts.

12 Defendant's default is not the result of excusable neglect. To the contrary,  
13 Defendant's corporate status has apparently been suspended for nonpayment of taxes,  
14 which disables it from appearing in this case. Its neglect of this lawsuit, like its neglect of  
15 the Pension Plan, is possibly the result of a cessation of operations that began years ago,  
16 but the Court need not make that finding. The Defendant has not pleaded excusable  
17 neglect in this case, and PBGC was unable to find a case that holds that an inability to  
18 appear in court due to nonpayment of corporate taxes constitutes excusable neglect. Nor  
19 has Defendant, to PBGC's knowledge, taken steps to revive its corporate status under  
20 California law, so as to enable it to appear in this matter.

23 Finally, the policy favoring judgments on the merits will not be offended by entry  
24 of a default judgment here. PBGC has submitted herewith an Affidavit for Judgment that  
25 verifies the operative facts of its Complaint. First, the Affidavit attests to the fact that  
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<sup>12</sup> See 29 U.S.C. §§ 1342(c), 1348(a)(4).

1 PBGC made a determination under 29 U.S.C. § 1342(a) and (c) that one or more statutory  
2 grounds for terminating the Pension Plan are present. ERISA provides that the Court,  
3 when presented with such determinations, may issue a decree terminating the pension  
4 plan.<sup>13</sup> Second, the Affidavit attests to PBGC's willingness to become statutory trustee of  
5 the Pension Plan, and ERISA expressly authorizes the Court to appoint PBGC trustee.<sup>14</sup>  
6 And third, the Affidavit confirms that PBGC provided notice to Pension Plan participants  
7 that it would seek to have the Pension Plan terminated as of August 30, 2013, thereby  
8 extinguishing their expectation interests and making August 30, 2013, an appropriate plan  
9 termination date for the Court to establish under 29 U.S.C. § 1348(a)(4).  
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12 In light of the foregoing, PBGC submits that under the applicable standard in this  
13 circuit, entry of default judgment in favor of PBGC is appropriate and in the best interests  
14 of both PBGC and the Pension Plan's participants. The Court should therefore enter an  
15 Order granting default judgment and (i) terminating the Pension Plan, (ii) appointing  
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27 <sup>13</sup> 29 U.S.C. § 1342(c).

28 <sup>14</sup> *Id.* § 1342(b)(1).

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PBGC statutory trustee thereof, and (iii) establishing August 30, 2013, as the Pension Plan's termination date.

Dated: October 7, 2014

Respectfully submitted,

/s/ Nathaniel Rayle  
Nathaniel Rayle  
PENSION BENEFIT GUARANTY  
CORPORATION  
Office of the Chief Counsel  
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10 *Attorney for Plaintiff*

11 **IN THE UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**

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14 PENSION BENEFIT GUARANTY )  
15 CORPORATION, )  
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17 *Plaintiff,* )  
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19 v. )  
20 )  
21 OCEAN LABEL, INC., )  
22 )  
23 )  
24 *Defendant.* )  
25 \_\_\_\_\_ )

Case No.: 14-cv-01129-JSW

Honorable Jeffrey S. White

**AFFIDAVIT FOR  
JUDGMENT**

26 I, Nathaniel Rayle, being first duly sworn, hereby state as follows:

- 27 1. I have personal, first-hand knowledge of the facts and matters herein.
- 28 2. At all times relevant hereto, I was employed as an attorney for the Pension Benefit Guaranty Corporation (“PBGC”).
3. PBGC is the federal agency that administers the defined benefit pension plan insurance program that is codified as Title IV of the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1301-1461 (2012) (“ERISA”).

- 1 4. PBGC is authorized by 29 U.S.C. § 1342 to make determinations with respect to  
2 defined benefit pension plans that are covered by Title IV of ERISA.  
3
- 4 5. Among the matters assigned to me at PBGC is The Dennis J. Brennan Defined  
5 Benefit Pension Plan (the “Pension Plan”), a defined benefit pension plan covered  
6 by Title IV of ERISA.  
7
- 8 6. In 2012, the Employee Benefit Security Administration of the U.S. Department of  
9 Labor alerted PBGC of numerous complaints from Pension Plan participants that  
10 the Pension Plan was not being properly administered, and that there was evidence  
11 of prohibited transactions with Pension Plan assets by the Pension Plan’s fiduciary.  
12
- 13 7. On August 20, 2013, PBGC made an administrative determination (the  
14 “Determination”), on the basis of an administrative record, that the Pension Plan  
15 will be unable to pay benefits when due within the meaning of 29 U.S.C.  
16 § 1342(a)(2), and that the Pension Plan must be terminated to protect the interests  
17 of its participants, as provided in 29 U.S.C. § 1342(c). A true copy of the  
18 Determination is attached hereto as Exhibit A.  
19
- 20 8. On August 30, 2013, PBGC sent a copy of the Determination to Ocean Label, Inc.,  
21 the administrator of the Pension Plan. PBGC also that day published notice of the  
22 Determination in the Tri-Valley Times, a newspaper that serves the greater  
23 Pleasanton, California area, where the Pension Plan was administered and where  
24 benefits under the Pension Plan were earned. The notice, which made clear that  
25 PBGC would proceed to terminate the Pension Plan, extinguished any reasonable  
26 expectations that the Pension Plan would continue.  
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9. At all times relevant hereto, PBGC has been ready, willing, and able to act as statutory trustee of the Pension Plan and to pay benefits thereunder in accordance with Title IV of ERISA.

10. A termination date for the Pension Plan of August 30, 2013, is in the best interests of PBGC.

11. Based on my personal knowledge of the records in PBGC's possession, neither Ocean Label, Inc. nor any person known to be associated with Ocean Label, Inc., is an infant, incompetent, officer or agency of the United States, or a member of the United States armed forces.

Further Affiant Sayeth naught.

Nathaniel Rayle



Sworn to and Subscribed,  
Before Me, this  
7<sup>th</sup> day of October 2014.

Mark F. Maddrey  
Notary Public  
My Commission Expires:

**Mark F. Maddrey  
Notary Public, District of Columbia  
My Commission Expires 9/30/2018**

# EXHIBIT A



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

AUG 20 2013

Ocean Label Corporation  
3910 Valley Avenue  
Pleasanton, CA 94566

EIN/PN: 943265400/001

PBGC Case Number: 22277000

Plan Name: The Dennis J. Brennan Defined  
Benefit Pension Plan

**NOTICE OF DETERMINATION**

PLEASE TAKE NOTICE that the Pension Benefit Guaranty Corporation ("PBGC") has determined under section 4042(a)(1) and (2) of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. § 1342(a)(1) and (2), that The Dennis J. Brennan Defined Benefit Pension Plan ("Plan") has not met the minimum funding standard required under sections 412 and 430 of the Internal Revenue Code and will be unable to pay benefits when due. PBGC has further determined, under ERISA § 4042(c), 29 U.S.C. § 1342(c), that the Plan must be terminated. Accordingly, PBGC intends to proceed under ERISA § 4042, 29 U.S.C. § 1342, to have the Plan terminated and PBGC appointed as statutory trustee, and under ERISA § 4048, 29 U.S.C. § 1348, to have August 30, 2013, established as the Plan's termination date.

PBGC has completed its decision-making process in this matter; accordingly, this determination is effective on the date it is issued.

PENSION BENEFIT GUARANTY CORPORATION

Andrea Schneider  
Chairperson, Trusteeship Working Group

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9 efile@pbgc.gov

10 *Attorney for Plaintiff*

11 **IN THE UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 \_\_\_\_\_ )  
14 PENSION BENEFIT GUARANTY )  
15 CORPORATION, )

16 *Plaintiff,* )

17 v. )

18 OCEAN LABEL, INC., )

19 *Defendant.* )  
20 \_\_\_\_\_ )

Case No.: 14-1129

Honorable Jeffrey S. White

**ORDER**

21 Before the Court is the motion (“Motion”) of Plaintiff Pension Benefit Guaranty  
22 Corporation (“PBGC”), pursuant to Rule 55(b) of the Federal Rules of Civil Procedure,  
23 for default judgment against Defendant Ocean Label, Inc. The Court has considered the  
24 papers submitted in connection with the Motion and other relevant papers on file in this  
25 action; and it appearing that Defendant has been validly served with a copy of the  
26 Complaint in this case; and it further appearing that Defendant has failed to answer or  
27 otherwise respond to the Complaint; and it further appearing that the Clerk of the Court  
28 has entered default against Defendant under Rule 55(a) of the Federal Rules of Civil

**ORDER**  
**CASE NO. 14-CV-01129-JSW**

1 Procedure; and it further appearing that the Court is empowered by sections 4042 and  
2 4048 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1342, 1348,  
3 to render the relief sought in the Complaint; and it further appearing that PBGC has  
4 determined under 29 U.S.C. § 1342(a) and (c) that one or more criteria have been met for  
5 terminating the Dennis J. Brennan, Inc. Defined Benefit Pension Plan (“Pension Plan”);  
6 and it further appearing that PBGC is ready and willing to become statutory trustee of the  
7 Pension Plan under 29 U.S.C. § 1342(c); and it further appearing that August 30, 2013, is  
8 an appropriate termination date for the Pension Plan under 29 U.S.C. § 1348(a)(4); it is  
9 hereby  
10 hereby

11  
12 **ORDERED** that the Motion is **GRANTED**; and it is further

13 **ORDERED** that:

- 14
- 15 a) the Pension Plan is terminated under 29 U.S.C. § 1342(a) and (c);
  - 16 b) PBGC is appointed statutory trustee of the Pension Plan under 29 U.S.C.  
17 § 1342(c);
  - 18 c) August 30, 2013, is established as the termination date of the Pension Plan  
19 under 29 U.S.C. § 1348(a)(4); and
  - 20 d) All persons having possession, custody, or control of any records, assets, or  
21 other property of the Pension Plan are directed to transfer such items to  
22 PBGC as the Pension Plan’s statutory trustee.  
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25 Dated: \_\_\_\_\_

26 \_\_\_\_\_  
27 Jeffrey S. White  
28 United States District Judge

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CERTIFICATE OF SERVICE

I hereby certify that on this 7<sup>th</sup> day of October, 2014, copies of the foregoing Motion for Default Judgment and Affidavit for Judgment were sent via FedEx to the following:

California Secretary of State  
on behalf of Ocean Label, Inc.  
1500 11th Street  
3<sup>rd</sup> Floor  
Sacramento, CA 95814

Ocean Label, Inc.  
3910 Valley Avenue  
Pleasanton, CA 94566

/s/ Nathaniel Rayle  
Nathaniel Rayle