

STATE OF INDIANA
IN THE ST. JOSEPH CIRCUIT COURT

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| THOMAS H. KRAMER, Member and | : | |
| Manager of Domus Property Investments, | : | |
| L.L.C., | : | Cause No. 71C01-0510-PL-00292 |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | |
| | : | |
| MARK KRAMER, | : | |
| | : | |
| Defendant. | : | |

**PENSION BENEFIT GUARANTY CORPORATION'S
MOTION TO INTERVENE IN MATTER FOR
PURPOSE OF BEING HEARD ON PENDING
MOTION TO CORRECT JUDGMENT**

The Pension Benefit Guaranty Corporation (“PBGC”), on behalf of itself and the Domus Property Investment LLC Defined Benefit Plan (“Pension Plan”), respectfully requests permission to intervene in this matter so that PBGC may present two issues for the Court to consider in conjunction with the pending Motion to Correct Judgment. First, PBGC requests that the Court correct an error in the calculation of the damages. The Court erred when it determined that Thomas Kramer (“Tom”) and Mark Kramer (“Mark”), each 50% owners of Domus Property Investments, LLC (“Domus”), were each entitled to 50% of the amount Domus lost as a result of Mark’s breach of a non-compete agreement. Rather, under Indiana limited liability company law, Tom and Mark are each only entitled to a distribution of 50% of what remains after Domus’s creditors are paid in full. Here, the Pension Plan and PBGC, when PBGC becomes the trustee of the Pension Plan, are creditors and should be paid in full before either Tom or Mark

retains any of Domus's lost revenue. Thus, in order to correct the error, PBGC respectfully requests that the Court amend the judgment upward to properly reflect that the full amount due to Domus as a result of Mark's breach of the non-compete is \$666,312. Second, with respect to Mark's request that the Court permit him to assign a portion of his pension benefit in order to partially satisfy the judgment, such an assignment is prohibited by the anti-alienation provisions of both the Pension Plan and the Employee Retirement Income Security Act, *as amended*, 29 U.S.C. §§ 1301-1461 ("ERISA"). Thus, PBGC respectfully requests that the Court deny Mark's request to assign his pension benefits.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Breach of the Operating Agreement

1. In 1996, Tom and Mark formed Domus "for the purpose of purchasing and renting housing in South Bend." *Kramer v. Kramer*, 13 N.E.3d 559 (table), 2014 WL 2446618, at *1 (Ind. Ct. App. 2014).

2. The brothers are 50/50 members of the LLC. *Id.* at *2.

3. The Domus operating agreement includes a non-compete clause that prohibits Tom and Mark from engaging in business ventures in direct competition with Domus (the "non-compete"). *Id.*

4. In July 2005, Domus discontinued its operations, sold its assets, and distributed more than \$1.75 million to *each* brother. *Id.* at *2-*3.

5. In October 2005, Tom – *in his capacity as Member and Manager of Domus* – filed this lawsuit. *Id.* at 1.

6. The Court of Appeals found that Mark violated the non-compete by purchasing, renting, and managing three properties. *Id.* at 6-7.

B. The Judgment Amount

7. Domus lost \$481,000 in profit on the sale of the properties and \$185,312 in rental revenues. *Id.* at 10.

8. Presumably because neither brother informed the Court of Appeals of Domus's debt to the Pension Plan, the Court of Appeals calculated the damages without considering the amount due to the Pension Plan and determined that Tom was due one-half of the \$666,312 that Domus lost as result of Mark's breach of the non-compete. *Id.*

9. On January 11, 2017, this Court entered a judgment against Mark for \$372,800. *See* March 17, 2017 Order (referencing the amount and date of the judgment).

C. The Debt to the Pension Plan

10. Domus is a contributing sponsor of the Pension Plan. *See* Declaration of Jon Curton, Exhibit 1, Pension Plan Document and ERISA § 4001(a)(13); 29 U.S.C. § 1301(a)(13).

11. The Pension Plan was established effective January 1, 1998. *See* Declaration of Jon Curton, Exhibit 1, Pension Plan Document.

12. The Pension Plan is a single-employer defined benefit pension plan covered by Title IV of ERISA. *See* ERISA §4021; 29 U.S.C. § 1321.

13. Both Tom and Mark are named as trustees of the Pension Plan. *See* Declaration of Jon Curton, Exhibit 1, Pension Plan Document. Accordingly, they are both named fiduciaries of the Pension Plan. *See* ERISA § 402(a); 29 U.S.C. §1102(a).

14. Despite terminating its operations, and distributing more than \$3.5 million to its members in 2005, Domus did not terminate its Pension Plan. *See* Declaration of Jon Curton, Exhibit 2, Actuarial Valuation Report.

15. As a result, starting in 2010, Domus did not have sufficient funds to make the contributions to the Pension Plan required under § 412 of the Internal Revenue Code, to fund the Pension Plan's liabilities, including:

- a. \$ 2,923 for 2010;
- b. \$13,715 for 2011;
- c. \$22,078 for 2012;
- d. \$45,856 for 2013;
- e. \$43,716 for 2014; and
- f. \$75,790 for 2015.

See id.

16. In addition, \$82,597 is due for 2016 by September 15, 2017, and the total amount of the missed contributions will then be \$358,900. *Id.*

17. The Pension Plan is underfunded, and PBGC estimates that – on a termination basis – the total amount of Domus's unfunded benefit liabilities is \$588,077, based on a date of plan termination of September 30, 2016. *See* Declaration of Jon Curton, ¶3 and ERISA § 4001(a)(18); 29 U.S.C. § 1301(a)(18).

D. PBGC as Trustee of the Pension Plan

18. PBGC is a wholly owned United States government corporation established under ERISA §4002(a), 29 U.S.C. §1302(a), to administer the pension plan termination insurance program created under Title IV of ERISA. When an underfunded pension plan terminates, PBGC ensures the timely and uninterrupted payment of statutorily guaranteed pension benefits to plan participants and their beneficiaries. ERISA §§ 4002(a)(2), 4021, and 4022; 29 U.S.C. §§ 1302(a)(2), 1321, and 1322.

19. On or about March 3, 2017, PBGC determined that the Pension Plan must be terminated under ERISA §§ 4042(a)(1) and (2), 29 U.S.C. §§ 1342(a)(1) and (2), because the Pension Plan has not met the minimum funding standard and will not be able to pay benefits when due. *See* Declaration of Jon Curton, Exhibit 3, Correspondence enclosing Notice of Determination.

20. PBGC mailed its Notice of Determination to Domus c/o Tom, by letter dated March 3, 2017, and requested that Domus agree to terminate the Pension Plan, appoint PBGC statutory trustee of the Pension Plan, and establish a termination date of September 30, 2016. *See id.*

21. If Domus does not consent to the termination, PBGC may be forced to apply to an appropriate United States District Court for a decree adjudicating that the plan should be terminated and appointing PBGC as trustee of the Pension Plan. *See* ERISA § 4042(c); 29 U.S.C. § 1342(c).

22. Once PBGC is appointed trustee, Domus will owe PBGC the full amount of the unfunded pension liabilities. ERISA § 1362(b); 29 U.S.C. §1362(b).

E. The Pending Motion to Correct Judgment

23. Mark filed the pending motion, arguing that he should be permitted to assign his interest in the Pension Plan in order to satisfy the judgment in part.

24. However, ERISA § 206(d) and section 12.2(a) of the Pension Plan prohibit such an assignment. *See* Pension Plan.

LEGAL ARGUMENT

- A. PBGC can intervene as a matter of right, because (1) PBGC has an interest in making sure that Domus funds its pension obligations and (2) neither Tom nor Mark has acted to protect the Pension Plan's rights in this matter, despite being Pension Plan fiduciaries.

Trial Rule 24(A)(2) permits intervention as a matter of right when (1) an intervenor has an interest in the subject of the action, (2) disposition of the action may impede protection of the interest, and (3) the existing parties do not adequately represent the interest. *Westfield Ins. Co. v. Axsom*, 684 N.E.2d 241, 242 (Ind. Ct. App. 1997); *Llewellyn v. Beasley*, 415 N.E.2d 789, 792 (Ind. Ct. App. 1981). “Although post-judgment intervention is generally ‘disfavored,’ it is appropriate in certain ‘extraordinary and unusual circumstances,’ particularly when ‘the petitioner’s rights cannot otherwise be protected.’” *Citimortgage, Inc. v. Barabas*, 975 N.E.2d 805 (Ind. 2012) (citing *Bd. of Comm’rs. of Benton Cnty. v. Whistler*, 455 N.E.2d 1149, 1153-54 (Ind. Ct. App. 1983)).

This is the extraordinary and unusual circumstance in which post-judgment intervention should be allowed. PBGC clearly has an interest in collecting Domus’s pension liabilities. And Domus will not have sufficient assets to satisfy its debts to the Pension Plan and PBGC, when PBGC becomes trustee of the Pension Plan, unless the judgment is amended. In addition, neither Tom nor Mark has acted to insure that Domus will be able to satisfy its pension liabilities, despite both being named Pension Plan fiduciaries. Moreover, neither Tom nor Mark has informed the Court that Mark’s proposed assignment violates the terms of the Pension Plan and ERISA. Furthermore, PBGC has acted within weeks of its determination that the Pension Plan must be terminated, a determination that was not made until after the subject judgment was entered. Accordingly, PBGC should be permitted to intervene in this matter for the purpose of being heard on the pending Motion to Correct Judgment.

B. The Judgment in favor of Tom, in his capacity as Member and Manager of Domus, should be corrected to reflect the full amount of Domus's damages.

Under Indiana limited liability company law, members of a limited liability company are only entitled to distributions after the company's debts are paid in full. Indiana Code § 23-18-5-6; *see Perkins v. Brown*, 901 N.E.2d 63, 66 (Ind. Ct. App. 2009) (citing this provision of the Indiana Business Flexibility Act). Here, the full amount of Domus's damages as a result of the breach of the non-compete is \$666,312. But, the judgment allowed Mark to retain one-half of that amount. Thus, the judgment effected a distribution to Mark of \$333,156. However, because the amount of the pension liabilities exceeds the amount awarded to Tom, in his capacity as Member and Manager of Domus, Domus cannot satisfy its pension liabilities unless the distribution to Mark is voided. Accordingly, the judgment should be amended, to reflect the full amount of the damages to Domus.

C. Despite the amount of time that has passed since the entry of the judgment, this Court can amend the judgment in conjunction with its consideration of Mark's pending Motion to Correct Judgment.

Indiana Trial Rules 52(B) and 59 permit trial courts to correct errors in conjunction with a pending motion to correct error, even if the party requesting a correction did not file a motion within the thirty day period following entry of the judgment. *See Hubbard v. Hubbard*, 690 N.E.2d 1219, 1221 (Ind. Ct. App. 1998) (noting that "at least up to and including the ruling on a motion to correct error, the trial court is permitted to alter, amend or modify its judgment without limitation"); *Indiana & Michigan Elec. Co. v. Harlan*, 504 N.E.2d 301, 307 (Ind. Ct. App. 1987) (noting that "ample authority exists which permits a trial court, at least up to and including the ruling on the motion to correct error, to alter, amend or modify its judgment without limitation"); *Holtzleiter v. Holtzleiter*, 908 N.E.2d 1279, at *5-6 (table) (Ind. Ct. App. 2009) (finding that trial court did not err when it amended findings in favor of wife while husband's motion to correct

error was pending); *State ex rel. Jackson v. Owen Circuit Court*, 314 N.E.2d 73, 76 (Ind. Ct. App. 1974) (trial court may change its record at any time until it rules on a motion to correct error). Accordingly, this Court can correct the judgment and make it possible for Domus to satisfy its pension obligations.

D. Mark cannot satisfy any part of the judgment by assigning his pension benefits.

ERISA states that “[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.” ERISA § 206(d)(1); 29 U.S.C. § 1056(d)(1). The only exceptions are for domestic relations, assignments prior to 1974, and certain offsets against amounts due to a pension plan. ERISA §§ 206(d); 29 U.S.C. § 1056(d). In compliance with ERISA, Section 12.2(a) of the Pension Plan prohibits assignment of pension benefits, except in limited circumstances provided by law. Neither allows Mark to assign his benefits in order to satisfy his debts. Accordingly, Mark’s request to assign his benefits in order to partially satisfy the judgment should be denied.

CONCLUSION

For the foregoing reasons, PBGC respectfully requests that the Court allow PBGC to intervene in this matter, correct the judgment to reflect the full amount of the damages to Domus, and deny Mark’s request to assign his pension benefits in order to satisfy part of the judgment.

Dated: Washington, D.C.
April 25, 2017

Respectfully submitted,



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