

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

In re:	)	Bankruptcy No. 13-18208-PMC
	)	Honorable Pat Morgenstern-Clarren
BERNICE A. McPHEE,	)	Chapter 7
	)	
_____ Debtor.	)	
	)	
PENSION BENEFIT GUARANTY	)	
CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No.
	)	
BERNICE A. McPHEE,	)	
	)	
_____ Defendant.	)	

**COMPLAINT FOR DECLARATORY JUDGMENT**

1. This adversary proceeding is brought under 11 U.S.C. §§ 101(5), 101(12), 362(a), and 727(b) (2006 and Supp. V 2011) and Bankruptcy Rules 7001(6) and (9) for a declaratory judgment that the scheduled amount Debtor asserts is owed to the Pension Benefit Guaranty Corporation (“PBGC”) for overpayment of benefits with respect to the Republic Technologies International, LLC Pension Plan for Union Eligible Employees of the Lorain Facility (the “Pension Plan”) is a right of recoupment that is not subject to the automatic stay or the discharge injunction.

**Jurisdiction and Venue**

2. This court has jurisdiction of this adversary proceeding under 28 U.S.C. §§ 157(a), (b)(2)(G) and (I), and 1334(b).

3. Venue lies in this court under 28 U.S.C. § 1409(a).

## **Parties**

4. PBGC is a wholly owned United States Government corporation created by 29 U.S.C. § 1302(a) to administer the pension plan termination insurance program established by Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”), *as amended*, 29 U.S.C. §§ 1301-1461.

5. Bernice A. McPhee (“Debtor”) is a debtor in the above-referenced bankruptcy proceeding and a resident of Amherst, Ohio.

## **Cause of Action**

6. Upon information and belief, the Pension Plan is a single-employer defined benefit pension plan covered by Title IV of ERISA.

7. On September 30, 2003, the United States District Court for the Northern District of Ohio entered an order terminating the Pension Plan under 29 U.S.C. § 1342 and appointing PBGC statutory trustee to administer payment of guaranteed benefits under the Pension Plan.

8. The Pension Plan’s termination date is June 14, 2002.

9. Upon information and belief, Debtor’s former husband, John McPhee, is a participant in the Pension Plan who retired on December 31, 1999.

10. PBGC has paid Debtor a portion of Mr. McPhee’s pension benefits from the Plan beginning in July 2002, pursuant to a qualified domestic relations order that apportioned Mr. McPhee’s retirement benefits.

11. On April 10, 2009, PBGC issued a determination to Debtor that PBGC overpaid her benefits by \$62,201.10, and that her benefits would be reduced by \$40.86 per month until the overpayment is repaid, pursuant to 29 C.F.R. §§ 4022.81 and 4022.82.

12. Debtor appealed the determination to PBGC’s Appeals Board on April 14, 2009.

13. On February 2, 2010, PBGC's Appeals Board denied Debtor's appeal.
14. PBGC commenced recoupment of the overpayment from Debtor beginning April 1, 2010, at the rate of \$40.86 per month, and continuing through the present.
15. Debtor filed her petition in bankruptcy under Chapter 7 of the Bankruptcy Code on November 21, 2013.
16. Schedule F of Debtor's Statement of Assets and Liabilities lists an unsecured claim due PBGC for "overpayments" in the amount of \$62,201.10.
17. Under 29 C.F.R. § 4022.82(a), PBGC may recover benefit overpayments through recoupment, limited to 10% of the payee's monthly benefit. *See also Bechtel v. PBGC*, 781 F.2d 906, 907 (D.C. Cir. 1986) ("Congress must have contemplated that PBGC may recoup payments in excess of guaranteed levels.").
18. Controlling legal authority in this Court states that a right to reduce a participant's employee benefits to recover benefits that have already been paid to the participant is neither a claim within the meaning of 11 U.S.C. § 101(5) nor a debt within the meaning of 11 U.S.C. § 101(12). *Mullen v. United States*, 696 F.2d 470, 472 (6<sup>th</sup> Cir. 1983); *Eisen v. Thompson*, 370 B.R. 762, 768 (N.D. Ohio 2007); *In re Lewis*, 2007 WL 2742854, \*2-3 (Bankr. N.D. Ohio, Sept. 17, 2007).
19. Since recoupment is neither a claim within the meaning of 11 U.S.C. § 101(5) nor a debt within the meaning of 11 U.S.C. § 101(12), PBGC's right to recoupment is neither subject to the automatic stay under 11 U.S.C. § 362(a) nor the discharge injunction under 11 U.S.C. § 727(b). *See In re Beaumont*, 586 F.3d 766, 780-81 (10<sup>th</sup> Cir. 2009) ("If the recoupment doctrine applies, then there is no 'debt' or 'claim' here as defined in the Bankruptcy Code, and [the Department of Veterans Affairs] has not violated the automatic stay nor the discharge

injunction.”); *Kosadnar v. Metro. Life Ins. Co. (In re Kosadnar)*, 157 F.3d 1011, 1015-16 (5<sup>th</sup> Cir. 1998) (holding recoupment of commission overpayments from employee’s future commissions did not violate the automatic stay).

WHEREFORE, PBGC demands judgment and prays this Court:

1. Declare and adjudge that PBGC’s right to recoup overpayments to the Debtor with respect to the Pension Plan through reduction of future monthly benefits due the Debtor, as authorized by 29 C.F.R. §§ 4022.81 and 4022.82, is neither a claim within the meaning of 11 U.S.C. § 101(5) nor a debt within the meaning of 11 U.S.C. § 101(12).
2. Declare and adjudge that PBGC’s recoupment of Debtor’s pension benefits under the Pension Plan in the amount of \$40.86 per month does not violate the automatic stay;
3. Declare and adjudge that the amount of the overpayment to Debtor, \$62,201.10, is not subject to discharge or to any discharge injunction; and
4. Award such other relief as is just and equitable.

/s/ Ralph L. Landy  
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Dated: February 25, 2014