

the renovation and close on a sale of the Rental Property within one year after the effective date of the Settlement Agreement, and have not provided PBGC with updates regarding renovation and sale efforts every six months as the Settlement Agreement requires. Defendants' failures to comply with the Settlement Agreement deprive PBGC of the benefit of its bargain.

2. PBGC brings this action to obtain declaratory judgments that: (a) defendants Fay Construction and Fay Development are jointly and severally liable to PBGC for statutory liability arising under 29 U.S.C. § 1362(a) and (b) for unfunded benefit liabilities owed as a result of the termination of the Pension Plan ("UBL Liability"); (b) Fay Construction and Fay Development are jointly and severally liable to PBGC for statutory liability arising under 29 U.S.C. §§ 1306, 1307 and 1362(c) for unpaid pension insurance premiums and termination premiums ("Premium Liability"); and (c) the Settlement Agreement is valid, binding, and enforceable.

3. PBGC further brings this action for a permanent injunction requiring Defendants and their directors, officers, shareholders, employees, agents, successors-in-interest, and assigns to use their best efforts to complete the renovation and close on a sale of the Rental Property, in accordance with Section 3(a) of the Settlement Agreement, and to provide semiannual progress reports on those efforts, in accordance with Section 3(b) of the Settlement Agreement.

4. PBGC further brings this action for a permanent injunction prohibiting Defendants and their directors, officers, shareholders, employees, agents, successors-in-interest, and assigns from selling the Rental Property for a price resulting in net proceeds to PBGC of less than \$319,000 minus rent payments to PBGC under the Settlement Agreement unless PBGC provides prior written consent.

5. PBGC further seeks judgment directing Defendants and their successors-in-interest and assigns to pay to PBGC monthly rent payments of \$1,525 per month with respect to the Rental Property, including retroactive rent payments from June 6, 2023, to the date of the judgment and interest thereon, until the sale of the Rental Property is closed, in accordance with section 3(i) of the Settlement Agreement.

6. If the Court cannot grant the injunctive relief requested in ¶ 3 of this Complaint, PBGC seeks liquidated monetary damages in the amount of \$319,000, plus interest from June 6, 2022, the effective date of the Settlement Agreement (“Effective Date”) against Defendants.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action without regard to the amount in controversy, pursuant to 29 U.S.C. §§ 1303(e)(3), 1368.

8. Venue in this district is proper under 28 U.S.C. § 1391(b)(2) and 29 U.S.C. § 1303(e)(2).

THE PARTIES

9. Plaintiff, PBGC, is the federal government agency that administers the nation’s pension insurance program established by Title IV of ERISA.

10. Upon information and belief, defendants Fay Construction and Fay Development are corporations organized under the laws of Delaware.

11. Upon information and belief, the last-known principal offices of Fay Construction and Fay Development are located in Media, Delaware County, Pennsylvania.

12. At all relevant times, Fay Development was and is the owner of the Rental Property.

13. At all relevant times, the Rental Property was and is Fay Development's principal asset.

STATUTORY BACKGROUND

14. PBGC is a wholly owned United States government corporation, and an agency of the United States, established under Title IV of ERISA to administer and enforce the nation's defined benefit pension plan termination insurance program. 29 U.S.C. § 1302(a); *see* 5 U.S.C §§ 103, 105. Subject to statutory limits, PBGC guarantees the payment of benefits to participants and beneficiaries of pension plans that terminate when covered under Title IV of ERISA. 29 U.S.C. §§ 1321, 1322, 1361.

15. Title IV of ERISA provides the exclusive means by which a pension plan covered by its provisions may be terminated. *See* 29 U.S.C. § 1341.

16. If a pension plan lacks sufficient assets to pay accrued benefits, and PBGC determines that certain statutory criteria have been met, PBGC may initiate termination under 29 U.S.C. § 1342.

17. When an underfunded plan terminates, PBGC generally becomes statutory trustee of the plan and supplements any assets remaining in the plan with its insurance funds to pay to the retired employees their pension benefits, subject to statutory limits. *See* 29 U.S.C. §§ 1321-1322, 1342, 1361.

18. Upon a PBGC-initiated termination, the contributing sponsor of the terminated pension plan and each member of the sponsor's controlled group ("Controlled Group")¹ are

¹ A group of trades or business under common control, referred to as a "controlled group," includes, for example, a parent and its 80% owned subsidiaries. Another example includes brother-sister groups of trades or business under common control. *See* 29 U.S.C. § 1301(a)(14); 26 U.S.C. § 414(b), (c); 26 C.F.R. §§ 1.414(b)-1, 1.414(c)-1, 1.414(c)-2, 1.414(c)-4.

jointly and severally liable to PBGC for: (i) the unfunded benefit liabilities of the pension plan, plus interest (the “Unfunded Benefit Liabilities”) 29 U.S.C. § 1362(a), (b); (ii) any unpaid minimum funding contributions owed to the pension plan, plus interest, 29 U.S.C. §§ 1082(b)(2), 1342(d), 1362(c); 26 U.S.C. § 412(b)(2); (iii) any unpaid flat-rate and variable-rate premiums, plus interest, 29 U.S.C. § 1307; and (iv) termination premiums at the rate of \$1,250 per plan participant per year for three years, plus interest, 29 U.S.C. § 1306(a)(7).

19. As statutory trustee for a pension plan, PBGC has the power to “collect for the plan any amounts due the plan,” including any unpaid minimum funding contributions for which the plan sponsor and its controlled group members are jointly and severally liable, and to “commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan.” *See* 29 U.S.C. §§ 1082(b)(2), 29 U.S.C. § 1342(d)(1)(B)(ii), (iv); 1362(c); 26 U.S.C. § 412(b)(2).

FACTUAL BACKGROUND

A. The Pension Plan

20. Effective January 1, 1985, Fay Construction established the Pension Plan to provide retirement benefits for certain of its employees.

21. At all relevant times, the Plan has been a single-employer pension plan and has been covered by the pension plan termination insurance program established under Title IV of ERISA. *See* 29 U.S.C. § 1321(a).

22. On June 14, 2017, PBGC issued notice to Fay Construction, the Plan’s administrator, of PBGC’s determination pursuant to 29 U.S.C. § 1342(a) that the Pension Plan should be terminated.

23. On June 14, 2017, PBGC brought a civil action in the United States District Court for the Eastern District of Pennsylvania against Fay Construction, as the Pension Plan's administrator (the "Termination Proceeding") seeking an order terminating the Pension Plan, establishing the Pension's Plan's termination date as June 14, 2017, and appointing PBGC statutory trustee of the Pension Plan. The Termination Proceeding was captioned *Pension Benefit Guaranty Corporation v. Fay Construction Co., Inc.*, Case No. 2:17-cv-2733 (GEKP).

24. On June 14, 2021, PBGC and Fay Construction, as the administrator of the Pension Plan, entered into an agreement (the "Trusteeship Agreement") that (i) terminated the Pension Plan, (ii) established the Pension Plan's termination date as June 14, 2017, and (iii) appointed PBGC statutory trustee of the Pension Plan.²

25. On June 17, 2021, PBGC and Fay Construction filed a Joint Stipulation of Dismissal for the Termination Proceeding.

26. On June 23, 2021, the Court ordered the dismissal of the Termination Proceeding.

27. As of June 14, 2017, Fay Development was a member of the Controlled Group of Fay Construction.

28. As of June 14, 2017, PBGC estimates that Fay Construction and Fay Development owed PBGC UBL Liability of \$1,529,572 and Premium Liability of \$19,403.37, including both annual fixed-rate and variable-rate premiums and termination premiums, with respect to the Pension Plan.³

²A true, complete, and correct copy of the fully executed Trusteeship Agreement is attached as Exhibit 1.

³ PBGC estimates that Fay Construction and Fay Development did not owe minimum funding contributions to the Pension Plan.

29. Under Title IV of ERISA, PBGC holds claims against Fay Construction and Fay Development relating to the Pension Plan in a total amount of \$1,548,975.37, plus interest.

B. The Settlement Agreement

30. PBGC and Defendants executed the Settlement Agreement on June 6, 2022, the Effective Date.

31. Stephen J. Fay, as managing partner of Fay Construction and Fay Development, signed the Settlement Agreement for Fay Construction and Fay Development.

32. Under Section 3(a) of the Settlement Agreement, Fay Construction and Fay Development must use their best efforts to complete the renovation and close on a sale of the Rental Property within six months of the Effective Date.

33. Under Section 3(b) of the Settlement Agreement, Fay Construction and Fay Development must give PBGC semiannual progress reports on their efforts to renovate and sell the Rental Property.

34. Under Section 3(c) of the Settlement Agreement, Fay Construction and Fay Development must pay PBGC the first \$319,000, less rents paid to PBGC under Section 3(i) of the Settlement Agreement, in net proceeds from the sale of the Rental Property.

35. Under Section 3(f) of the Settlement Agreement, Fay Construction and Fay Development must not sell the Rental Property for an amount that results in net proceeds to PBGC of less than \$319,000, less rents paid to PBGC under section 3(i) of the Settlement Agreement, unless PBGC provides prior written consent.

36. Under Section 3(i) of the Settlement Agreement, Fay Construction and Fay Development must pay PBGC rent of \$1,525 per month with respect to the Rental Property if the Rental Property is not sold within a year after the Effective Date. The initial rent payment was

due one year after the Effective Date, and subsequent rent payments are due on the first day of each following month until the closing of the sale of the Rental Property. Rents paid under Section 3(i) reduce the amount of net proceeds that are due PBGC under Section 3(c) of the Settlement Agreement dollar-for-dollar.

37. Under Section 4 of the Settlement Agreement, PBGC must give releases of liability to Fay Construction and Fay Development 95 days after PBGC receives the agreed-upon net proceeds from the sale of the Rental Property.

38. Under Section 8(a) of the Settlement Agreement, violations of Sections 2, 3, or 5 constitute Events of Default.

39. Under Section 10 of the Settlement Agreement, if an Event of Default occurs, PBGC may, among other things: (a) exercise its statutory right to collect UBL Liability and Premium Liability; or (b) exercise any or all remedies available under the Settlement Agreement, at law or in equity.

C. Renovation and Sale of the Rental Property

40. Under Section 3(a) of the Settlement Agreement, Fay Construction and Fay Development “shall use their best efforts to complete the renovation and close on a sale of the Rental Property” by December 6, 2022.

41. Under Section 3(b) of the Settlement Agreement, Fay Construction and Fay Development must give PBGC semiannual progress reports on their efforts to renovate and sell the Rental Property.

42. Under Section 3(c) of the Settlement Agreement, Fay Construction and Fay Development must pay PBGC \$319,000, less rents paid to PBGC under Section 3(i) of the

Settlement Agreement, from the net proceeds of the sale of the Rental Property no later than 30 days after the date of closing of the sale.

43. Under Section 3(f) of the Settlement Agreement, Fay Construction and Fay Development may not sell the Rental Property for a price that results in net proceeds to PBGC of less than \$319,000, less rents paid to PBGC under Section 3(i) of the Settlement Agreement, unless PBGC provides prior written consent.

44. Upon information and belief, Defendants have not used their best efforts to complete the renovation and close on a sale of the Rental Property.

45. Defendants' failure to use their best efforts to complete the renovation and close on a sale of the Rental Property violates Section 3(a) of the Settlement Agreement and constitutes an Event of Default under Section 8(a) of the Settlement Agreement.⁴⁶

Defendants' failure to provide PBGC semiannual reports on their efforts to renovate and sell the Rental Property violates Section 3(b) of the Settlement Agreement and constitutes an Event of Default under Section 8(a) of the Settlement Agreement.

D. Rent

47. Under Section 3(i) of the Settlement Agreement, Fay Construction and Fay Development must pay PBGC monthly rent of \$1,525 per month with respect to the Rental Property if the Rental Property is not sold within one year after the Effective Date.

48. Because the Rental Property remained unsold as of June 6, 2023, one year after the Effective Date, the liability of Fay Construction and Fay Development for rent began on June 6, 2023, and continues until the date the sale of the Rental Property closes.

49. Fay Construction and Fay Development have not made any of the rent payments required under the Settlement Agreement.

50. Defendants' failure to pay any rent payments to PBGC required under the Settlement Agreement violates Section 3(i) of the Settlement Agreement and constitutes an Event of Default under Section 8(a) of the Settlement Agreement.

COUNT I: DECLARATORY JUDGMENT FOR UBL LIABILITY
(29 U.S.C. §§ 1362(a) AND (b))

51. PBGC restates and realleges each and every allegation contained in the preceding paragraphs herein.

52. When a pension plan terminates under 29 U.S.C. § 1342, the pension plan's contributing sponsor and each member of its controlled group, as of the plan's termination date, are jointly and severally liable for the pension plan's unfunded benefit liabilities. *See* 29 U.S.C. § 1362(a).

53. PBGC estimates that, as of June 14, 2017, the present value of the Pension Plan's benefit liabilities was \$1,529,572 and the value of the Pension Plan's assets was zero. Therefore, PBGC estimates that as of the Pension Plan's termination date, June 14, 2017, the amount of the Pension Plan's UBL Liability was \$1,529,572.

54. Based on the foregoing, Fay Construction is the Pension Plan's contributing sponsor within the meaning of 29 U.S.C. § 1301(a)(13) and Fay Development is in Fay Construction's controlled group within the meaning of 29 U.S.C. § 1301(a)(14). Therefore, Fay Construction and Fay Development are jointly and severally liable for the Pension Plan's Unfunded Benefit Liabilities under 29 U.S.C. § 1362(a) and (b) in the amount of \$1,529,572, plus interest from June 14, 2017, calculated in accordance with 29 C.F.R. § 4062.7.

WHEREFORE, PBGC respectfully requests that this Court issue judgment declaring that Fay Construction, as the Pension Plan's contributing sponsor, and Fay Development, as a member of the Plan Sponsors' controlled group, are jointly and severally liable to PBGC for

Unfunded Benefit Liability in the amount of \$1,529,572, plus pre-judgment interest computed under 29 C.F.R. § 4062.7 for its liability to PBGC under 29 U.S.C. § 1362.

COUNT II: DECLARATORY JUDGMENT FOR PREMIUM LIABILITIES
(29 U.S.C. § 1307)

55. PBGC restates and realleges each and every allegation contained in the preceding paragraphs herein.

56. The contributing sponsor of a terminated pension plan and each controlled group member are required to pay insurance premiums to PBGC through the pension plan year in which PBGC becomes trustee of the pension plan. *See* 29 U.S.C. §§ 1306, 1307(a), (e); *see also* 29 C.F.R. § 4007.11(d).

57. Fay Construction, as the Pension Plan's contributing sponsor, and Fay Development, as a member of Fay Construction's controlled group, are jointly and severally liable to PBGC for unpaid insurance premiums, and interest and penalties on late-paid or unpaid premiums, with respect to the Pension Plan. *See* 29 U.S.C. § 1307.

58. As of June 14, 2017, the amount of unpaid flat and variable rate premiums due to the PBGC was \$4,403.37.

59. In addition, because the Pension Plan terminated in a PBGC-initiated termination under 29 U.S.C. § 1342, the PBGC insurance premiums for the Pension Plan include termination premiums at the rate of \$1,250 per Plan participant for each of the three years following the Plans' termination ("Termination Premiums"). *See* 29 U.S.C. § 1306(a)(7).

60. On information and belief, as of the Plans' termination date, the Plan had four participants. Accordingly, the total Termination Premium is \$15,000 (\$5,000 per year times three years). *See* 29 U.S.C. § 1306(a)(7)(A).

61. Fay Construction, as the Pension Plan's contributing sponsor, and Fay Development, as a member of Fay Construction's controlled group, are jointly and severally liable for unpaid Termination Premiums, plus interest and penalties. *See* 29 C.F.R. § 1307.13(g).

WHEREFORE, PBGC respectfully requests that this Court issue judgment declaring that Fay Construction, as the Pension Plan's contributing sponsor, and Fay Development, as a member of Fay Construction's controlled group, are liable to PBGC for Premium Liability in the amount of \$19,403.37, plus interest and penalties, consisting of flat and variable rate premiums owed in the amount of \$4,403.57, and Termination Premiums due in three separate annual installments of \$5,000.

COUNT III: JUDGMENT DECLARING THE SETTLEMENT AGREEMENT
VALID, BINDING, AND ENFORCEABLE
(29 U.S.C. §§ 1342(d)(1)(B)(ii), (iv), 1362, AND 1367)

62. PBGC restates and realleges each and every allegation contained in the preceding paragraphs herein.

63. Under 29 U.S.C. § 1367, PBGC is authorized to make arrangements with contributing sponsors of terminated pension plans and members of their controlled groups for payment of liabilities under 29 U.S.C. § 1362.

64. As trustee of the Pension Plan, PBGC is authorized to settle claims for amounts due the Pension Plan, including Fiduciary Liability. *See* 29 U.S.C. §§ 1342(d)(1)(B)(ii), (iv).

65. In its respective capacities, PBGC negotiated a settlement agreement with Defendants to resolve UBL Liability, Premium Liability, and Fiduciary Liability.

66. The Settlement Agreement is supported by mutual consideration.

67. PBGC's authorized official, the Deputy Director of PBGC's Corporate Finance and Restructuring Division, signed the Settlement Agreement for PBGC.

68. Stephen J. Fay, as managing partner of Fay Construction and Fay Development, signed the Settlement Agreement for Fay Construction and Fay Development.

WHEREFORE, PBGC respectfully requests that this Court issue judgment declaring that the Settlement Agreement is a valid, binding, and enforceable contract.

COUNT IV: INJUNCTIVE RELIEF
(SETTLEMENT AGREEMENT §§ 3(a), 3(b) AND 3(f))

69. PBGC restates and realleges each and every allegation contained in the preceding paragraphs herein.

70. As stated in the previous paragraphs, PBGC has a reasonable probability of eventual success in this litigation. PBGC has established the existence of a binding settlement agreement, violations of that settlement agreement, and remedies under that settlement agreement.

71. There is little, if any, risk that issuing a permanent injunction would harm Defendants. Under the Settlement Agreement, the amounts due from Defendants are less than the UBL Liability and Premium Liability that Defendants would be liable for in the absence of the Settlement Agreement. An injunction here only requires Defendants to perform their obligations under the Settlement Agreement.

72. The public interest is served by granting injunctive relief. Here, public interests militate in favor of issuing a permanent injunction. PBGC's congressionally mandated purpose is to insure pensions for participants of defined benefit pension plans nationwide. PBGC receives no funds from general tax revenues with which to insure benefits in single-employer defined benefit pension plans such as the Pension Plan. PBGC is funded, among other things, by recoveries on statutory claims such as those at issue here. In order to protect the viability of the Title IV program, PBGC must recover the liabilities of plan sponsors and their controlled group

members to the maximum extent possible. Should Defendants be allowed to violate the Settlement Agreement and delay the process the Settlement Agreement established for recovery of agreed-upon amounts, the pension insurance system, which protects all pension plan participants' interest in receiving the pension benefits promised to them, will be irreparably harmed.

WHEREFORE, PBGC respectfully requests that this Court enter a permanent injunction: (1) ordering Fay Construction and Fay Development and their directors, officers, shareholders, employees, agents, successors-in-interest, and assigns to use their best efforts to complete the renovation and close on a sale of the Rental Property; (2) ordering Fay Construction and Fay Development to provide PBGC semiannual reports on their efforts to complete the renovation and close on a sale of the Rental Property; and (3) ordering Fay Construction and Fay Development and their directors, officers, shareholders, employees, agents, successors-in-interest, and assigns not so sell the Rental Property for a price resulting in net proceeds to PBGC of less than \$319,000, minus rents paid to PBGC under Section 3(i) of the Settlement Agreement, unless PBGC provides prior written consent.

COUNT V: JUDGMENT FOR RENT
(SETTLEMENT AGREEMENT § 3(i))

73. PBGC restates and realleges each and every allegation contained in the preceding paragraphs herein.

74. Fay Construction and Fay Development are jointly and severally liable for unpaid rents of \$1,525 per month due PBGC under Section 3(i) of the Settlement Agreement.

WHEREFORE, PBGC respectfully requests that this Court enter judgment against Fay Construction and Fay Development for payment of past-due unpaid rent of \$1,525 per month from June 6, 2023, to the date of the judgment plus pre-judgment interest thereon, and for

payment of rent of \$1,525 per month from the first day of each month after the date of the judgment to date of the closing of the sale of the Rental Property.

COUNT VI: JUDGMENT FOR LIQUIDATED DAMAGES
(SETTLEMENT AGREEMENT § 3(c))

75. PBGC restates and realleges each and every allegation contained in the preceding paragraphs herein.

76. If the Court does not grant the injunctive relief requested in Count IV, PBGC's reasonable measures of damages are the amount of net proceeds due PBGC under Section 3(c) of the Settlement Agreement for UBL Liability and Premium Liability.

WHEREFORE, PBGC respectfully requests this Court enter judgment against Defendants Fay Construction and Fay Development for liquidated damages in the amount of \$319,000, plus pre-judgment interest thereon.

COUNT VII: JUDGMENT FOR FEES AND COSTS INCURRED BY PBGC IN
CONNECTION WITH THIS ACTION

77. PBGC restates and realleges each and every allegation contained in the preceding paragraphs herein.

78. PBGC has incurred costs in preparing this action and expects to incur further costs in prosecuting this action.

79. This Court has the power to relieve PBGC of the expense of this litigation under 29 U.S.C. § 1303(e)(5), which provides that the Court may award PBGC judgment for costs of litigation incurred in any action brought under Title IV of ERISA.

80. PBGC has brought this action under Title IV against Defendants.

WHEREFORE, PBGC respectfully requests that this Court enter judgment against Defendants for all expenses PBGC shall have incurred in connection with this action.

PRAYER FOR RELIEF

WHEREFORE, PBGC requests that this Court grant the following relief:

1. Judgment declaring that Fay Construction and Fay Development are jointly and severally liable to PBGC for UBL Liability in the amount of \$1,529,572, plus interest that continues to accrue through the date of judgment, calculated in accordance with 29 C.F.R. § 4062.7(a), (c).

2. Judgment declaring that Fay Construction and Fay Development are jointly and severally liable to PBGC on account of its failure to pay statutory premiums owed to PBGC, including Termination Premiums in three separate annual installments of \$5,000, for total Premium Liability in the amount of \$19,403.37, plus interest and penalties, calculated in accordance with 29 C.F.R. §§ 4007.7, 4007.8, 4007.13(c).

3. Judgment declaring that the Settlement Agreement is a valid, binding, and enforceable contract.

4. Judgment imposing a permanent injunction: (1) ordering Fay Construction and Fay Development and their directors, officers, shareholders, employees, agents, successors-in-interest, and assigns to use their best efforts to complete the renovation and close on a sale of the Rental Property; (2) ordering Fay Construction and Fay Development and their directors, officers, shareholders, employees, agents, successors-in-interest, and assigns to provide PBGC semiannual reports on their efforts to complete the renovation and close on a sale of the Rental Property; and (3) prohibiting Fay Construction and Fay Development from selling the Rental Property for a price resulting in net proceeds to PBGC of less than \$319,000 minus rents paid to PBGC under Section 3(i) of the Settlement Agreement unless PBGC provides prior written consent.

5. Judgment awarding PBGC past-due unpaid rent of \$1,525 per month from June 6, 2023, to the date of the judgment from Fay Construction and Fay Development, plus pre-judgment interest thereon, and payment of rent of \$1,525 per month from Fay Construction and Fay Development from the first day of each month after the date of the judgment to date of the closing of the sale of the Rental Property.

6. Judgment awarding PBGC liquidated damages of \$319,000 against Fay Construction and Fay Development, plus pre-judgment interest thereon.

7. Judgment awarding PBGC all of its costs of litigation in this case pursuant to 29 U.S.C. § 1303(e)(5).

WHEREFORE, PBGC respectfully requests that the Court grant such additional relief as the Court deems just and proper.

DATED: May 1, 2024
Washington, D.C.

Respectfully submitted,

By: /s/ Ralph L. Landy
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