ISRAEL GOLDOWITZ, Chief Counsel
JAMES J. ARMBRUSTER
Actg. Deputy Chief Counsel
SARA B. EAGLE, Assistant Chief Counsel
ADRIAN ZAREBA, Attorney
PBGC, Office of the Chief Counsel
1200 K Street, N.W.
Washington, D.C. 20005-4026
Tel.: (202) 326-4020, ext. 3016
Fax: (202) 326-4112
E-mails: zareba.adrian@pbgc.gov *and* efile@pbgc.gov
<u>LOCAL COUNSEL</u>
EILEEN M. DECKER, United States Attorney
LEON W. WEIDMAN, Assistant United States Attorney
Chief, Civil Division
GWENDOLYN M. GAMBLE, Assistant United States Attorney
California Bar No. 143267
Federal Building, Suite 7516
300 North Los Angeles Street
Los Angeles, California 90012
Tel.: (213) 894-6684
Fax: (213) 894-7819
E-mail: gwen.gamble@usdoj.gov
Attorneys for Plaintiff Pension Benefit Guaranty Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PENSION BENEFIT GUARANTY CORPORATION 1200 K Street, N.W. Washington, D.C. 20005 Plaintiff, v. PEPPONE CORPORATION 11628 Barrington Court West Los Angeles, CA 90049 Defendant.	Civil Action No. **COMPLAINT TO ENFORCE FINAL DETERMINATION OF ERISA VIOLATIONS BY PENSION BENEFIT GUARANTY CORPORATION**

1. This action arises under Title IV of the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1301-1461 (2012, Supp. I 2013) ("ERISA").

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 Peppone Corporation 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 under 5 U.S.C. § 706.

Jurisdiction and Venue

4. 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.

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

Parties

6. 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.

7. 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).

8. For plans that terminate in a standard termination, PBGC ensures compliance with the requirements of Title IV of ERISA. 29 U.S.C. §§ 1320(a) and 1341(b)(4).

9. Defendant, Peppone Corporation ("Peppone"), is a restaurant in West Los Angeles, California.

10. Peppone was the Plan's contributing sponsor, within the meaning of 29 U.S.C. § 1301(a)(13), and plan administrator, within the meaning of 29 U.S.C. §§ 1301(a)(1) and 1002(16).

Title IV - Standard Terminations

11. In a standard termination, the plan administrator must allocate and distribute assets to participants and beneficiaries in accordance with Title IV of ERISA. In a standard termination, benefits are determined under the plan provisions in effect on the plan's termination date. 29 U.S.C. § 1341(a)(1); 29 C.F.R. § 4041.8(a).

12. Before January 1, 2002, a frozen top heavy defined benefit plan was required to continue providing certain minimum benefits. 26 U.S.C. § 416(c) (2001), *amended by* The Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16 § 613(e), 115 Stat. 38 (2001).

13. In a standard termination, before distributing any plan assets, the plan administrator must send PBGC a "Standard Termination Notice – PBGC Form 500" ("Form 500") with information including the proposed date of plan termination, and

information about plan assets and benefit liabilities. *See* 29 U.S.C. § 1341(b)(2)(A); 29 C.F.R. § 4041.25. PBGC then has 60 days to determine that there is no reason to believe that the plan is not sufficient for benefit liabilities. *See* 29 U.S.C. § 1341(b)(2)(C); 29 C.F.R. § 4041.26. Absent a finding from PBGC that the plan is not sufficient for benefit liabilities, the plan administrator must distribute plan assets in accordance with Title IV of ERISA within a specified time period. *See* 29 U.S.C. §§ 1341(b)(2)(D), 1341(b)(3); 29 C.F.R. § 4041.28.

14. 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).

15. The valuation of lump sums requires a two-step process. First, the amount of the monthly pension benefit must be calculated in accordance with plan provisions. Second, the projected stream of future benefit payments must be discounted to present value, as of the date of the distribution, 29 C.F.R. § 4041.28(c)(2), using assumptions for interest and mortality specified in the plan. *See* 26 U.S.C. § 401(a)(25).

16. To meet the qualification requirements of section 401(a) of the Internal Revenue Code (the "Code"), a pension plan must, among other things, comply with the requirements of Code § 411. 26 U.S.C. § 401(a)(7). Code § 411(a) establishes a floor

for lump sum valuations, providing that the present value of a lump sum shall not be less than the present value calculated using the specified "applicable interest rate" and "applicable mortality table" assumptions, outlined in Code § 417(e). *See* 26 U.S.C. §§ 411(a)(11)(B), 417(e)(3).

17. The applicable interest rate under Code § 417(e) is the adjusted first, second, and third segment rates for the month before the date of distribution, or such other time as prescribed by regulation. 26 U.S.C. § 417(e)(3)(C).

18. 26 C.F.R. § 1.417(e)-1 prescribes that a pension plan must specify a "Stability Period" and "Lookback Month" to determine the time for choosing the applicable interest rate:

a. The "Stability Period" is the length of time during which the plan uses the same interest rate for determining the value of lump sum distributions. The Stability Period may be one month, one quarter, or one year. *See* 26 C.F.R. § 1.417(e)-1(d)(4)(ii).

b. The "Lookback Month" is the month used to determine the applicable interest rate within the applicable Stability Period. It is either the first, second, third, fourth, or fifth full calendar month preceding the first day of the stability period that contains the starting date for lump sum distributions. *See* 26 C.F.R. § 1.417(e)-1(d)(4)(iii).

19. When the plan does not specify a Lookback Month, the month before the date of distribution is used. 26 U.S.C. § 417(e)(3)(C).

20. The applicable mortality table under Code § 417(e) is the table specified under Code § 430(h)(3)(A) for the Stability Period in which distribution of the benefit

occurs. 26 U.S.C. § 417(e)(3)(B).

21. Once Plan assets are distributed, the plan administrator must file a "Post-Distribution Certification for Standard Termination – PBGC Form 501" ("Form 501"), attesting that all benefits under the plan were paid in accordance with Title IV. *See* 29 U.S.C. § 1341(b)(3)(B); 29 C.F.R. § 4041.29.

22. Following receipt of the Form 501, PBGC continues to have authority regarding matters relating to the plan, 29 U.S.C. § 1341(b)(4), and is required, under 29 U.S.C. § 1303(a), to audit a statistically significant number of standard terminations to determine if everyone entitled to a benefit has received their full benefits under the terms of the plan. PBGC's audits are subject to review under PBGC's administrative review procedures. 29 C.F.R. §§ 4003.1(b)(3)(iii), 4003.21-4003.35.

Facts

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

24. Peppone adopted the Plan, effective October 25, 1985.

25. The Plan is a proto type plan adopted by Peppone pursuant to an adoption agreement (the "Adoption Agreement").

26. The Plan was top heavy at all relevant times.

27. On October 15, 1999, Peppone froze the Plan, effective November 1, 1999.

28. Peppone subsequently amended the Plan to resume benefits, effective November 1, 2001.

29. On July 2, 2010, Peppone filed a Form 500 with PBGC, indicating a proposed termination date of May 1, 2010 (the "Termination Date").

30. On the Termination Date, Plan section 5.3 allowed participants to elect to work past normal retirement age, and receive a deferred late retirement benefit ("Late Retirement Benefit").

31. On the Termination Date, Late Retirement Benefits were calculated in accordance with Section X(D) of the Adoption Agreement, which defined Late Retirement Benefit as the Actuarial Equivalent of the basic normal retirement benefit, plus credit for benefits earned after attainment of normal retirement age.

32. On the Termination Date, under Plan section 1.2, an "Actuarial Equivalent" was calculated using the interest rate and mortality table specified in Section III of the Adoption Agreement.

33. On the Termination Date, under Section III(B) of the Adoption Agreement, the Actuarial Equivalent of the basic normal retirement benefit was calculated using a 6% interest rate, post-retirement, and the 1983 IAM mortality table, post-retirement with no setback.

34. On the Termination Date, Plan section 5.10 allowed Plan participants to elect optional forms of benefit, including lump sums that were the Actuarial Equivalent of the basic normal retirement benefit.

35. On the Termination Date, Section III(B) of the Adoption Agreement provided that the present value of an optional benefit be calculated using whichever of the following assumptions produced a higher benefit: (1) 6% interest rate, pre- and post-retirement and 1983 IAM mortality table, post-retirement only with no setback (the "Plan Assumptions"); or (2) the Code § 417(e) assumptions as implemented by the Adoption Agreement (the "§ 417(e) Assumptions").

36. On the Termination Date, Section III(B)(6) of the Adoption Agreement implemented the § 417(e) Assumptions by designating a Stability Period of one plan year and a Lookback Month of the fifth full calendar month preceding the first day of the Stability Period.

37. On the Termination Date, Section III(L) of the Adoption Agreement provided that the Plan year was from November 1 to October 31.

38. Peppone made distributions during the Plan year beginning November 1, 2010.

39. Pursuant to the Plan's provisions on the Termination Date, for distributions during the Plan year beginning November 1, 2010, the applicable Code § 417(e) interest

rate was the June 2010 segment rates (3.06%, 4.86%, 5.43%), and the applicable Code § 417(e) mortality table was the 2010 PPA mortality table.

40. For distributions during the Plan year beginning November 1, 2010, the § 417(e) Assumptions resulted in higher lump sums for participants than the Plan Assumptions.

41. On or about January 13, 2011, Peppone filed a Form 501 with PBGC, certifying 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.

42. By a letter dated April 25, 2011, PBGC notified Peppone that the Plan's termination had been selected for audit.

43. On November 28, 2012, PBGC issued its initial determination to Peppone with respect to its audit (the "Initial Determination").

44. In the Initial Determination, PBGC found that Peppone did not include benefits earned while the Plan was top heavy and frozen from November 1, 1999 to October 31, 2001, resulting in lower benefits to participants ("Finding 1").

45. In the Initial Determination, PBGC found that Peppone calculated Late Retirement Benefits using the following incorrect assumptions: 5% interest rate, post-retirement and the 1983 IAM mortality table (male), post-retirement with two year

setback, resulting in lower benefits to participants than those obtained by using the required Plan Assumptions ("Finding 2").

46. In the Initial Determination, PBGC found that Peppone calculated the present value of lump sums using a Code § 417(e) interest rate and mortality table for the year prior to distribution, and that Peppone did not provide PBGC any documents establishing a Plan Lookback Month ("Finding 3").[1]

47. With regard to Finding 1, the Initial Determination required Peppone to recalculate benefits, in accordance with 26 U.S.C. § 416(c) (2001), to include required benefits earned while the Plan was top heavy and frozen from November 1, 1999 to October 31, 2001.

48. With regard to Finding 2, the Initial Determination required Peppone to recalculate Late Retirement Benefits using the required Plan Assumptions of a 6% interest rate, post-retirement, and the 1983 IAM mortality table, post-retirement with no setback.

49. With regard to Finding 3, the Initial Determination required Peppone to recalculate the present value of lump sums using the Code § 417(e) interest rate for the month before the date of distribution (as no Lookback Month was provided to PBGC) and the applicable 2010 mortality table. *See* 26 U.S.C. §§ 417(e)(3)(B), (e)(3)(C).

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[1] PBGC made seven other findings; however, after receiving additional information upon reconsideration, PBGC either reversed these findings or determined that no further action was necessary to protect participants.

50. By letter dated December 27, 2012, Peppone requested reconsideration of the Initial Determination (the "Reconsideration").

51. The Reconsideration did not dispute Finding 1 or Finding 2. Accordingly, those determinations became final determinations on December 28, 2012. *See* 29 C.F.R. § 4003.22.

52. The Plan's actuary subsequently sent PBGC revised calculations with regard to Finding 1 and Finding 2.

53. The Reconsideration did not dispute Finding 3, that Peppone calculated the present value of lump sums using an interest rate and a mortality table for the year prior to distribution. However, the Reconsideration included a document establishing a Plan Lookback Month of the fifth full calendar month preceding the first day of the Stability Period.

54. By letter dated February 20, 2015, PBGC issued its final determination (the "Final Determination").

55. The Final Determination approved the revised calculations with regard to Finding 1 and Finding 2, and directed Peppone to pay participants the additional amounts due.

56. Having received a document establishing a Lookback Month of the fifth full calendar month preceding the first day of the Stability Period, the Final Determination

reversed the finding that Peppone use the Code § 417(e) interest rate for the month before the date of distribution.

57. The Final Determination upheld that incorrect 2009 § 417(e) assumptions were used in valuing the present value of lump sum benefits, resulting in lower benefits to participants.

58. As such, the Final Determination directed Peppone to recalculate the present value of lump sums using the § 417(e) interest rate for June 2010 (3.06%, 4.86%, 5.43%) and the 2010 PPA mortality table.

Claim for Relief

59. PBGC repeats and re-alleges paragraphs 1-58.

60. On information and belief, as of the date of the filing of this Complaint, Peppone has not made any of the additional benefit payments to participants and beneficiaries required by the Initial Determination or Final Determination.

61. Peppone 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 with regard to top heavy benefits earned during the Plan's freeze period, Late Retirement Benefits, and lump sum benefits, resulting in lower benefits to Plan participants and beneficiaries.

62. Accordingly, Peppone violated Title IV of ERISA and applicable regulations, by failing to distribute Plan assets in full satisfaction of the Plan's benefit

liabilities *See* 29 U.S.C. § 1341. Additional amounts, plus interest, are owed to participants and beneficiaries.

WHEREFORE, PBGC respectfully requests that this Court:

1. Enter judgment in favor of PBGC against Peppone enforcing PBGC's final determinations, and requiring Peppone 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.

Dated: November 19, 2015

Respectfully submitted,

Adrian Zareba

ISRAEL GOLDOWITZ
Chief Counsel
JAMES J. ARMBRUSTER
Acting Deputy Chief Counsel
SARA B. EAGLE
Assistant Chief Counsel
ADRIAN ZAREBA
Attorney
Pension Benefit Guaranty Corporation
Office of the Chief Counsel
1200 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 326-4000, ext. 3016
Emails: zareba.adrian@pbgc.gov *and* efile@pbgc.gov

<u>LOCAL COUNSEL</u>
EILEEN M. DECKER
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
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Assistant United States Attorney
California Bar No. 143267
Federal Building, Suite 7516
300 North Los Angeles Street
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Tel.: (213) 894-6684
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E-mail: gwen.gamble@usdoj.gov