

**UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MICHIGAN**

**PENSION BENEFIT GUARANTY CORPORATION,)
on its own behalf and on behalf of the APL/NVF)
Consolidated Pension Plan)**

Plaintiff,)

v.)

Case No. 1:14-cv-00782

**EVANS TEMPCON, INC., and)
STATE OF MICHIGAN,)**

Defendants.)

COMPLAINT

Plaintiff Pension Benefit Guaranty Corporation (“PBGC”), on its own behalf and on behalf of the APL/NVF Consolidated Pension Plan (the “Pension Plan”), for its Complaint against Defendant Evans Tempcon, Inc. (“Evans” or “Defendant Evans”) and Defendant State of Michigan (“Defendant Michigan”) alleges as follows:

PRELIMINARY STATEMENT

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) (“ERISA”). PBGC, on its own behalf and on behalf of the Pension Plan, brings this action pursuant to 29 U.S.C. § 1303(e)(1) to: (1) obtain judgment against Evans under 26 U.S.C. § 412(b)(2) and 29 U.S.C. § 1082 in the amount of \$16,237,566, plus interest continuing to accrue after July 15, 2014 to the date of payment; (2) obtain a declaration that the Pension Plan holds validly perfected, first priority statutory liens against all property and interests in property (“Property”) of Evans, except to the extent of any previously perfected lien against such Property, pursuant to 26 U.S.C. §§ 430(k), 6323 and 29 U.S.C. § 1083(k); (3) enforce the statutory liens through execution of judgment and

foreclosure against Defendant Evans's Property pursuant to 26 U.S.C. § 430(f) and 29 U.S.C. § 1083(k), 1303(e)(1)(10); and (4) reimburse PBGC's cost of this action pursuant to 29 U.S.C. § 1303(e)(5).

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action, without regard to the amount in controversy, pursuant to 29 U.S.C. § 1303(e)(3), and 28 U.S.C. §§ 1331, 1332 and 1345. This action arises under U.S. law, is between citizens of different States, and is brought by an agency or officer of the U.S. authorized to sue by Act of Congress.

3. Venue properly lies in this Court, pursuant to 29 U.S.C. § 1303(e)(2) and 28 U.S.C. § 1391.

PARTIES

4. PBGC is a wholly owned United States government corporation and an agency of the United States established under 29 U.S.C. § 1302 to administer and enforce the provisions of the defined benefit pension termination insurance program under Title IV of ERISA. *See* 29 U.S.C. §§ 1321-1322, 1342, 1361. PBGC may perfect and enforce liens on behalf of a covered pension plan for unpaid minimum funding contributions. *See* 26 U.S.C. § 430(k)(5).

5. The Pension Plan is an ongoing single-employer defined benefit plan covered by Title IV of ERISA. *See* 29 U.S.C. § 1321.

6. Defendant Evans is a Michigan corporation with its principal place of business located in Grand Rapids, Michigan. At all relevant times, the Estate of Victor Posner (the "Estate") directly or indirectly owned 100% of the stock of Evans. The Estate is the contributing sponsor of the Pension Plan. *See* 29 U.S.C. § 1301(a)(13). Evans is a member of the Estate's controlled group. *See* 29 U.S.C. § 1301(a)(14).

7. Defendant Michigan is named as a defendant pursuant to 26 U.S.C. 7403(b) because it has or may claim an interest in the real property against which PBGC seeks to enforce certain tax liens.

BACKGROUND

Evans's Liability as a Controlled Group Member for the Pension Plan's Minimum Funding Contributions under Title IV of ERISA

8. Prior to his death in 2002, Victor Posner owned, directly or indirectly, 100% of the stock of Evans, among other businesses. Upon Mr. Posner's death, the Estate succeeded to Victor Posner's stock interest in Evans.

9. Certain entities within the Estate sponsored nine defined benefit pension plans. Effective December 31, 2008, those nine plans were consolidated into the Pension Plan and the Estate was named the Pension Plan's sponsor.

10. Under ERISA, the contributing sponsor of the Pension Plan and each member of its controlled group are jointly and severally liable for the amount of any and all contributions due the Pension Plan. *See* IRC § 412(b)(1) & (2); *see also* 29 U.S.C. § 1082(b)(1) & (2). As a member of the Estate's controlled group, Defendant Evans is jointly and severally liable for the amount of any and all contributions due the Pension Plan.

PBGC's Perfection of Statutory Liens to Secure Payment of Missed Minimum Funding Contributions to the Pension Plan

11. PBGC is authorized to perfect statutory liens arising as a result of missed minimum funding contributions and to bring a civil action for appropriate relief to enforce those liens. *See* 26 U.S.C. § 430(k)(5); 29 U.S.C. § 1083(k)(5); 29 U.S.C. § 1303(e)(1)(B).

12. On April 5, 2013, PBGC received a Form 200, Notice of Failure to Make Required Contributions, indicating that the Estate had failed to make the first quarterly required contribution for the 2011 plan year of \$559,348. *See* attached Exhibit 1, Form 200 submitted to

PBGC by the Estate. The Form 200 also indicated that the Estate had failed to make required contributions for the 2010 plan year, which caused the amount of unpaid minimum funding contributions owed to the Pension Plan to exceed \$1 million. *See* Exhibit 1.

13. When the balance of unpaid contributions to the Pension Plan exceeded \$1 million, which occurred as a result of missed contributions for the 2010 plan year, a federal tax lien (the “Lien”) against the Estate and members of its controlled group arose under section 430(k) of the Internal Revenue Code (“IRC”) in favor of the Pension Plan for the sum of such missed contributions, plus accrued interest. *See* 26 U.S.C. §§ 430(k); 29 U.S.C. § 1083(k). The Lien encumbers all property and rights to property of Defendant Evans. *See* 26 U.S.C. §§ 430(k); 29 U.S.C. § 1083(k).

14. Liens for unpaid minimum funding contributions arising under 26 U.S.C. §§ 430(k) and 29 U.S.C. § 1083(k) are perfected upon PBGC’s filing of a notice of federal lien in the appropriate jurisdiction(s). *See* IRC § 430(k)(4)(C) (such liens are treated as federal tax liens); 29 U.S.C. § 1083(k)(4)(C) (making 29 U.S.C. § 1368(c) applicable to such liens); 29 U.S.C. § 1368(c) (perfection to be effected pursuant to 26 U.S.C. § 6323(f)); 26 U.S.C. § 6323(a) & (f) (federal tax liens perfected by filing notices).

15. On July 25, 2013, PBGC perfected the Lien against the real property of Defendant Evans by filing a notice of federal lien with the Kent County Register of Deeds in Grand Rapids, Michigan (“Kent County Register”) in the amount of \$10,128,398, which was the sum of due and unpaid minimum funding contributions up through July 15, 2013 (“July 2013 Real Property Filing”).

16. On July 29, 2013, PBGC also perfected the Lien against the personal property of Defendant Evans by filing a notice of federal lien with the Florida Department of State, Division

of Corporations, Judgment Lien Section in Tallahassee, Florida (“Florida Department of State”) in the amount of \$10,128,398, which was the sum of due and unpaid minimum funding contributions up through July 15, 2013 (“July 2013 Personal Property Filing”, collectively, “July 2013 Filings”).

17. On or about November 19, 2013, PBGC filed additional notices of federal lien in the amount of \$1,720,948 with the Kent County Register and the Florida Department of State to reflect additional sums due for unpaid contributions owed to the Pension Plan by the Estate and the members of the controlled group, including Defendant Evans, up through September 15, 2013 (“November 2013 Filing”).

18. On or about February 3, 2014, PBGC filed additional notices of federal lien in the amount of \$972,388 with the Kent County Register and the Florida Department of State to reflect additional sums due for unpaid contributions owed to the Pension Plan by the Estate and the members of the controlled group, including Defendant Evans, up through October 15, 2013 (“February 2014 Filing”).

19. On or about March 3, 2014, PBGC filed additional notices of federal lien in the amount of \$1,081,689 with the Kent County Register and the Florida Department of State to reflect additional sums due for unpaid contributions owed to the Pension Plan by the Estate and the members of the controlled group, including Defendant Evans, up through January 15, 2014 (“March 2014 Filing”).

20. On or about May 27, 2014, PBGC filed additional notices of federal lien in the amount of \$1,436,778 with the Kent County Register and the Florida Department of State to reflect additional sums due for unpaid contributions owed to the Pension Plan by the Estate and the members of the controlled group, including Defendant Evans, up through April 15, 2014

(“May 2014 Filing”). Appended to this Complaint as Exhibit 2 is a table showing the dates on which PBGC perfected the Lien against Defendant Evans’s Property, by filing notices of federal lien, and the jurisdictions and amounts in which PBGC filed such notices.

21. The aggregate amount of filed lien notices total \$15,905,950, plus accrued interest. Including accrued interest through July 15, 2014, the lien amount is \$16,237,566. Additional contributions continue to become due. PBGC may continue to file notices for future missed contributions.

22. On July 10, 2014, as a protective measure, PBGC filed a notice of federal lien in the amount of \$15,905,950 with the Michigan Department of State (“July 2014 Filing”). PBGC asserts that Florida is the principal executive office of Defendant Evans. However, for avoidance of any doubt that the Pension Plan’s lien was perfected against Defendant Evans’s personal property, the notice was filed with the Michigan Department of State. *See* 26 U.S.C. § 6323(f)(2)(B). The IRC provides that for purpose of filing a notice of lien on personal property such property shall be deemed to be situated at the residence of the corporation, and that the residence of the corporation is defined to be the place at which the principal executive office of the business is located. *See* IRS Rev. Rul. 74-571.

Defendant Evans’s Failure to Pay Amounts Owed to the Pension Plan

23. Defendant Evans has failed to pay its liabilities to the Pension Plan.

24. Defendant Evans has also ceased all communications with PBGC. Brenda Nestor (“Nestor”) is Defendant Evans’s president and the Estate’s representative. PBGC has had discussions with Ms. Nestor and her counsel concerning payment of the minimum funding contributions owed to the Pension Plan. PBGC proposed a cash collateral arrangement to facilitate the Estate’s and Defendant Evans’s payment of such liabilities. Unfortunately, Ms. Nestor and her counsel have stopped responding to PBGC’s outreach.

COUNT I:
STATUTORY LIABILITY FOR UNPAID MINIMUM FUNDING CONTRIBUTIONS

25. PBGC realleges and hereby incorporates by reference all allegations set forth in paragraphs 1 through 24 of this Complaint as if fully set forth herein.

26. Defendant Evans is jointly and severally liable for minimum funding contributions to the Pension Plan. *See* IRC § 412(b)(1) & (2); see also 29 U.S.C. § 1082(b)(1) & (2).

27. Thus, Defendant Evans is jointly and severally liable to the Pension Plan for the balance of missed minimum funding contributions, including interest calculated in accordance with 29 C.F.R. § 4062.7(a), (c) accruing until time of payment.

28. By filing this Complaint, PBGC seeks judgment against Defendant Evans in the amount of \$16,237,566, plus interest continuing to accrue after July 15, 2014 to the date of payment for such statutory liability.

COUNT II:
JUDGMENT DECLARING THE LIEN VALIDLY PERFECTED AND HAVING PRIORITY

29. PBGC realleges and hereby incorporates the allegations set forth in paragraphs 1 through 28 of this Complaint as if fully set forth herein.

30. Pursuant to 26 U.S.C. § 430(k) and 29 U.S.C. § 1083(k), the Lien in favor of the Pension Plan arose on all property and rights to property of Defendant Evans when the balance of unpaid minimum funding contribution due for the 2010 plan year exceeded \$1,000,000.

31. By virtue of the July 2013 Filings, November 2013 Filing, February 2014 Filing, March 2014 Filing and May 2014 Filing in the Kent County Register and Florida Department of State and the July 2014 Filing in the Michigan Department of State, the Pension Plan has validly perfected the Lien on all property and rights to property of Defendant Evans for the amounts of

missed minimum funding contributions, plus additional accrued interest through date of payment.

32. Pursuant to 26 U.S.C. § 6323, as a result of the perfection of the Lien, the Lien is valid against all interests of shareholders and third party creditors in the Property of Defendant Evans, except to the extent of any previously perfected lien against such Property.

33. Based upon a search of the Kent County Register, Michigan Department of State and Florida Department of State, attached hereto as Exhibit 3, except to the limited extent of the Michigan Lien (defined below), no creditor has perfected a lien against Defendant Evans's Property prior to the perfection of the July 2013 Filings, November 2013 Filing, February 2014 Filing, March 2014 Filing, May 2014 Filing and July 2014 Filing. Defendant Michigan filed a state lien notice with the Kent County Register in the amount of \$1,001.18 ("Michigan Lien"), recorded on May 19, 2014, after PBGC had perfected its Lien in the Kent County Register by the July 2013 Filings, November 2013 Filing, February 2014 Filing and March 2014 Filing.

34. By filing this Complaint, PBGC seeks a declaration that the Lien securing Defendant Evans's obligations for the Pension Plan's minimum funding contributions is valid and perfected against all of Defendant Evans's Property with priority over any interests of shareholders and creditors in or against Defendant Evans's Property, except as to the extent the Michigan Lien is previously perfected against such Property.

COUNT III:
WRITS OF EXECUTION AND DECREES OF FORECLOSURE

35. PBGC realleges and hereby incorporates by reference the allegations set forth in paragraphs 1 through 34 of this Complaint as if fully set forth herein.

36. PBGC is authorized to bring a civil action for appropriate relief to enforce the Lien pursuant to 26 U.S.C. § 430(k) and 29 U.S.C. §§ 1083(k) and 1303(e)(1)(10).

37. Defendant Evans and other members of the Estate's controlled group have failed or refused to pay the full amount of missed funding contributions due to the Pension Plan. By filing the Complaint, PBGC seeks judgment foreclosing on the Lien securing the amounts due the Pension Plan for missed funding contributions, together with interest thereon, and if such amounts are not paid in full in the time set by the Court, that the Property be sold to satisfy Defendant Evans's obligation to the Pension Plan.

WHEREFORE, Plaintiff PBGC, on its own behalf and on behalf of the Pension Plan, respectfully requests that this Court:

1. With respect to Count I, enter judgment in favor of the Pension Plan and against Defendant Evans for all due and unpaid minimum funding contributions to the Pension Plan in the amount of \$16,237,566, plus interest calculated in accordance with CFR § 4062.7(a), (c) accruing after July 15, 2014 until time of payment;

2. With respect to Count II, enter judgment declaring:

(a) that the Lien securing Defendant Evans's obligations for the Pension Plan's minimum funding contributions is valid and perfected against all of Defendant Evans's Property for contributions due and owing as of July 15, 2014, including interest accruing until such date; and

(b) that the Lien securing Defendant Evans's obligations for the Pension Plan's minimum funding contributions has priority over any interest of shareholders and creditors in or against the Defendant Evans's Property, except to the limited extent the Michigan Lien is previously perfected in the Kent County Register against such Property;

3. With respect to Count III, enforce the Lien by the issuance of writs of execution and decrees of foreclosure:
 - (a) authorizing and directing the execution and levy upon Property secured by the Lien and the transfer to PBGC for the benefit of the Pension Plan of all cash, cash equivalents and other proceeds in excess of superior liens, if any, thereon, except (i) Property that PBGC may ask the Court to exclude from foreclosure, and (ii) any real property located outside of Michigan and with respect to which the proper venue for foreclosure lies in the state and district where the real property is located, or, if the real property is located in more than one district in a single state, then in any such other district, pursuant to 28 U.S.C. § 1392; and
 - (b) Order that all sales pursuant to the Court's decree of foreclosure shall be free and clear of all liens, security interests and other property rights that the Court may declare to exist in the property sold; and
 - (c) If the amount received through execution and foreclosure does not satisfy the judgment of PBGC on behalf of the Pension Plan, that this Court retain jurisdiction to enter a deficiency judgment on behalf of the Pension Plan, and grant such other and further relief to which PBGC may be entitled;
4. Awarding PBGC all of its costs of litigation in this case pursuant to 29 U.S.C. § 1303(e)(5); and

5. Awarding PBGC such other and further relief as may be just and proper.

Dated: July 22, 2014

Respectfully submitted,

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