



**Issue Date: 23 February 2009**

Case No.: 2007-RIS-00113

In the Matter of

U. S. DEPARTMENT OF LABOR,  
EMPLOYEE BENEFITS SECURITY ADMINISTRATION,  
Complainant,

v.

PRODUCT MANAGEMENT, INC. PROFIT SHARING PLAN,  
Respondent.

**INITIAL DECISION AND ORDER GRANTING SUMMARY JUDGMENT**

Complainant, U. S. Department of Labor, Employee Benefits Security Administration, filed a motion for summary judgment on January 26, 2009. Complainant included eleven proposed exhibits in support of the factual assertions made in the motion.<sup>1</sup> Complainant's motion was served by facsimile, electronic transmission, and by first class mail, postage prepaid to Respondent's legal representative on January 26, 2009. Complainant also notified Respondent that "[a]ny factual assertions contained in this motion or the accompanying moving papers may be accepted by the Court as true unless the Respondent submits, within 10 days, after service of this motion, its own affidavits or declarations or other documentary evidence contradicting them." See 29 C.F.R. §§ 18.40(a)-(d) and 18.41. Respondent has failed to file any response to the motion for summary judgment.

Findings of Fact

The Presiding Judge accepts as undisputed facts the following assertions made by Complainant in the motion for summary judgment:

1. Product Management, Inc. ("PMI" or "Respondent") is the plan administrator of the Product Management, Inc. Profit Sharing Plan. (EBSA Exhibit No. 1).

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<sup>1</sup> The proposed exhibits will be marked for identification and received into evidence as EGSA Exhibit Nos. 1 through 11.

2. Under ERISA, the plan administrator of an employee benefit plan is required to file an annual report with the federal government within 210 days after the end of the plan year. See ERISA § 104, 29 U.S.C. §1024.
3. The Plan, at the beginning of the 2004 plan year, had 313 participants and held assets in trust. (EBSA Exhibit No. 1 at p. 2, lines 6, at end of 2004 pye – 89 participants line 7(g), and held assets in trust, line 9(a)).
4. Under ERISA, a plan with more than 100 participants that hold assets in trust is required to have an annual audit performed on the plan and to attach the report of an independent qualified public accountant (IQPA) to the plan’s annual report. 29 CFR § 2520.104-20(b)).
5. PMI did not file an IQPA report with the original 2004 Form 5500 Annual Return.
6. PMI filed the 2004 Form 5500 annual report for on or about October 17, 2005, without attaching an IPQA report, although item 6 indicated that the total number of participants in the plan at the beginning of the plan year was 313, item 9a indicated that the plan’s funding arrangement is a trust and item 9b indicated that the benefit arrangement is a trust. Therefore, the Plan was not exempt from the audit requirement. (EBSA Exhibit No. 1 – 2004 Deficient Form 5500).
7. EBSA issued two thirty-day request letters to PMI on or about December 26, 2005, (“First 30-day letter”) and February 10, 2006 (“Second 30-day letter”), requesting clarification and submission of the missing Schedule H information. (EBSA Exhibit Nos. 3 and 5).
8. On January 26, 2006, in response to the First 30-day letter, DeMars Pension Consulting Services, Inc. (“DeMars”), as the third party service provider for the Plan, represented that it had requested plan financial information from investment companies that had held plan assets and that it would amend the 2004 Form 5500 to include the Schedule H information. PMI did not file and amended 2004 report with corrective Schedule H information. Also, PMI did not respond to the Second 30-day letter.
9. EBSA issued a Notice of Rejection (NOR) o PMI on or about October 26, 2006, which set forth the request to file an amended satisfactory report with the 2004 IQPA report and Schedule H information. The NOR advised PMI that it had 45 days within which to comply without incurring a penalty. (EPSA Exhibit NO. 6) The NOR, inter alia, specifically contains the following notice:

**“WARNING: Read this Notice carefully. YOU must file a written response within 45 days of the date of the Notice to avoid potential civil penalties authorized by Title 1 of ERISA. The law does not allow for extensions of time to respond to this Notice, therefore no extensions will be granted by the Department.”** (EBSA Exhibit No. 6, p. 1).

10. PMI did not file an amended 2004 Form 5500 within 45 days from the date of the NOR.
11. EBSA issued a Notice of Intent to Assess a Penalty (NOI) on or about December 12, 2006, again requesting submission of the 2004 IQPA report and Schedule H information for the plan and proposing a penalty against PMI for its failure to file the 2004 IQPA report. (EBSA Ex. 7). The NOI further advised PMI that it had thirty-five days within which to submit a statement of reasonable cause -- which requires setting forth the facts alleged as reasonable cause in writing and under penalty of perjury -- for the failure to file the 2004 IQPA report or why the penalties, as calculated, should not be assessed. The NOI, inter alia, specifically contains the following:

**“WARNING: Read this Notice carefully, YOU must file a written response within 35 days of the date to preserve your administrative rights. The law does not allow for extensions of time to respond to this Notice, therefore no extensions will be granted by the Department.”** (EBSA Exhibit No. 7, p. 1).
12. PMI responded by letter dated December 28, 2006, signed by Barbara Vaculcik, on behalf of the Plan Administrator, under penalty or perjury (“Reasonable Cause Statement”). (EBSA Exhibit 8) The Reasonable Cause Statement conceded that the 2004 annual report was filed without the required IQPA report. (See EBSA Exhibit No. 8, p. 1 and p. 2) The RC Statement alleged that Respondent encountered significant obstacles when the company experienced tremendous growth, and its employees grew from 75 to over 200 employees within two years. Additionally, Respondent explained that it experienced significant turnover with its Plan Administrator and Trustees. Respondent continued to retain DeMars Pension and Consulting, as its third party administrator. In July 2003, PMI converted or replaced the 401(k) program with a program with Nationwide Trust. This required having to change the company name, plan name, and trustee information. The consolidation required a merge of 50 individual 401(k) accounts with eight different brokers into a single account. PMI discovered that not all of the trustees had properly updated their accounts with participant information. According to Respondent, DeMars claimed that it did not have information or files on the individual accounts and could not assist with individual brokerage firms and with updating plan information. Respondent stated that it was discouraged when it learned that DeMars, in its capacity as a third-party administrator and preparer of the annual Form 5500 reports, claimed to not have any information or files. The Plan consolidation was completed, PMI attempted to produce the required audit report; however, the process was very slow. Respondent also alleged that it learned that DeMars had incorrectly prepared prior Forms 5500 based on estimated values. PMI learned that because prior returns, starting in 1996, were completed based on possible inaccurate information, then newly amended returns would need to be filed. Respondent stated that despite its frustrations with DeMars, it could not fire DeMars because they were the only consultants with a thorough understanding of how the old pension plan was administered and what was needed for reporting compliance. (EBSA Exhibit No. 8)

13. Attached to the RC Statement are December 2006 e-mail correspondence among PMI, DeMars and McCannon, Rogers, Driscoll & Associates, LLP stating, inter alia, that PMI's accountants had the participant account investment information, and that the accountants had not begun to work on the 2003 and 2004 reports. (EBSA Ex No. 8 – see 2 page e-mail).
14. The Reasonable Cause Committee reviewed Respondent Reasonable Cause Statement and recommended not to reduce the \$50,000 intended penalty because Respondent failed to file an amended filing, which should have included an IQPA report and audited financial statements for the 2004 plan year, in response to the NOI. (EBSA Exhibit No. 9)
15. EBSA issued a Notice of Determination on Statement of Reasonable Cause (NOD) to PMI on or about February 12, 2007, rejecting its reasons for its failure to file a 2004 IQPA report and assessing a \$50,000.00 penalty against PMI for the failure to file the 2004 IQPA report. (EBSA Exhibit No. 10).
16. On January 23, 2009, PMI has not filed an amended 2004 Form 5500 with the required IQPA report. Complainant has not determined that the amended report is satisfactory.

### **DISCUSSION**

This matter arises under § 502(c)(2), 29 U. S. C. § 1132(c)(2), of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. §§ 1001, *et seq.* EBSA, by way of its Office of the Chief Accountant (“OCA”), Division of Reporting Compliance (“DRC”), which assessed a \$50,000.00 penalty against Respondent Produce Management, Inc. (“PMI”), as plan administrator of the Product Management, Inc. Profit Sharing Plan (“Plan”), an employee retirement benefit plan, for reporting deficiencies in connection with the Plan’s 2004 plan year annual report. The specific deficiency was the failure to include the report of an independent qualified public accountant (“IQPA report”) as required by ERISA §§ 103 and 104, 29 U.S.C. §§ 1023 and 1024, and regulations issued there under. At the start of the 2040 plan year, the Plan had 313 participants. Thus, the Plan was required to include an IQPA report in its 2004 filing. *See* ERISA § 104(a)(2), 29 U.S.C. § 1024(a)(2) (exempting plans with fewer than 100 participants from the requirements to file an IQPA report).

The standard of review in these cases is the deferential abuse of discretion or arbitrary and capricious standard. *See* 5 U.S.C. §§ 704 and 706; *Northwestern Institute of Psychiatry v. Martin*, 1993 WL 52553, 16 Employee Benefits Cas. 2066 (E.D. Pa. Feb. 24, 1993). As the undisputed facts and exhibits demonstrate, the Secretary’s penalty assessment was appropriate. Respondent had ample opportunities to correct its failure to file a compliant 2004 annual report. Complainant did not receive a 2004 Form 5500 Annual Report at the time the Statement of Reasonable Cause was submitted. On January 23, 2009, approximately two years after the

February 12, 2007, NOD was issued, Complainant finally received, for its review, and amended 2004 Form 5500 Annual Report with the required IQPA report for the Plan.

EBSA did not abuse its discretion in rejecting Respondent's Statement of Reasonable Cause and assessing the \$50,000 penalty. Thus, the agency's decision should be upheld.

The Department followed the statute as well as the procedures, guideline and regulations for assessing the penalty in this manner. As stated in the Notice of Determination, the penalty was assessed because no reasonable cause was shown for failing to file an amended 2004 return with the required IQPA report. As stated above, it is undisputed that Respondent did not timely comply with ERISA's reporting and disclosure requirements, nor did it timely cure the noted deficiencies for the 2004 return.

Prior to issuing the NOI and NOD, EBSA sent Notices, giving Respondent the opportunity to comply with the annual reporting requirements and to avoid the penalty. This notice also informed Respondent that its filing must include all required schedules and attachments and made clear to Respondent that an incomplete filing would not be sufficient to avoid the penalty. Respondent's failure to file a compliant 2004 annual report within 3 years from the date it first received EBSA's first notice does not demonstrate either good faith or diligence in the performance of its responsibilities as plan administrator.

In summary, Respondent was given 105 days to come into compliance prior to an assessment of any penalty. When Respondent failed to satisfactorily correct the 2004 filing, and upon considering the Reasonable Cause Statement (see EBSA Ex. No. 9), EBSA properly determined that Respondent did not demonstrate reasonable cause to waive or abate the intended \$50,000 assessed penalty. It is the Plan Administrator's responsibility to comply with ERISA and its failure to timely follow up to correct the deficient filing before and after receiving EBSA's Notices, did not demonstrate either good faith or diligence in the performance of that responsibility. Respondent acknowledged its obligation to timely file an acceptable return, however, it failed to take the necessary steps and procedures to ensure compliance under ERISA's provisions.

### **ORDER**

1. EBSA's Motion for Summary Judgment is **GRANTED**.
2. Respondent shall pay to the U. S. Department of Labor a civil penalty in the amount of \$50,000.00 within 45 days of the date of this Order.
3. Any portion of this penalty that is not paid by that date shall be subject to such penalties and interest as ERISA and its implementing regulations have provided.

4. The hearing previously scheduled for March 11 and 12, 2009, commencing at 9:00 a.m. in Charlotte, North Carolina, is hereby **CANCELED**.

**A**

Daniel A. Sarno, Jr.  
Administrative Law Judge

DAS/dlh

**NOTICE OF APPEAL RIGHTS:** Pursuant to 29 C.F.R. § 2570.69, a notice of appeal must be filed with the Secretary of Labor within 20 days of the date of the issuance of this Decision and Order, or the decision of this court will become the final agency action within the meaning of 5 U.S.C. § 704.