IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROYAL OAK ENTERPRISES, LLC,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 1:13-cv-01040 (GK)
	)	
PENSION BENEFIT GUARANTY CORPORATION,	)	
	)	
Defendant.	)	

PENSION BENEFIT GUARANTY CORPORATION'S
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Dated: January 22, 2014
Washington, D.C.

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INTRODUCTION

The Pension Benefit Guaranty Corporation ("PBGC") files this memorandum of points and authorities in support of its motion for summary judgment upholding its final determination that the standard termination of the Royal Oak Enterprises, Inc. Retirement Plan for Hourly and Salaried Employees (the "Plan") was not completed in accordance with the Plan's provisions in effect on the Plan's date of termination, nor with applicable laws and regulations. Accordingly, additional benefits are owed to Plan participants and beneficiaries.

PRELIMINARY STATEMENT

When an employer elects to terminate a defined benefit pension plan, and the plan has sufficient assets to pay all benefits, plan participants and beneficiaries must receive the benefits to which they are entitled under the plan's provisions in effect *as of the date of plan termination*. *See* 29 U.S.C. § 1341(b)(1)(D); 29 C.F.R. § 4041.8. In choosing to terminate the Plan, however, employer Royal Oak Enterprises, LLC ("Royal Oak" or "Plaintiff") failed to pay Plan participants and beneficiaries their required benefit amounts. Instead, as fully supported by PBGC's Administrative Record (Dkt. 13-15), Royal Oak calculated and paid reduced lump sums to certain Plan participants and beneficiaries using Plan provisions Royal Oak adopted over a month after its selected termination date.

PBGC's determination is an informal adjudication by an agency applying its expertise in implementing its governing statute and regulations. Thus, it must be upheld by the Court unless it is arbitrary and capricious, or not in accordance with law. PBGC's determination is completely supported by the Administrative Record, thoroughly reasonable, and in accordance with law. Accordingly, the Court should uphold PBGC's final agency determination and require payment of additional benefits owed to Plan participants and beneficiaries.

STATUTORY AND REGULATORY BACKGROUND

I. ERISA and PBGC

Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA") to provide minimum standards that assure the equitable character and financial soundness of employee pension plans. *See* 29 U.S.C. § 1001(c). Congress also declared it to be a policy of ERISA "to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full benefits." 29 U.S.C. § 1001b(c)(3).

ERISA consists of four Titles. Title I sets forth the reporting and disclosure, participation and vesting, funding, and fiduciary obligations provisions, pertaining to ongoing pension plans. *See* 29 U.S.C. §§ 1001-1191c. Title II relates to the qualification of pension plans for favorable tax treatment. *See* 26 U.S.C. §§ 401-424. Title III relates to coordination of jurisdictional, administrative, and enforcement issues among the PBGC, the Internal Revenue Service ("IRS"), and the Department of Labor. *See* 29 U.S.C. §§ 1201-1242. Finally, Title IV sets forth the rules governing termination of defined benefit plans covered by Title IV, including mandatory procedures for terminating covered plans and distributing their assets, as well as termination insurance to pay pension benefits under covered plans that terminate without sufficient assets to pay those benefits. *See* 29 U.S.C. §§ 1301-1461.

Congress established PBGC as the federal government agency responsible for enforcing and administering the termination insurance program. *See* 29 U.S.C. § 1302.

II. Plan Terminations

A. Overview

Title IV of ERISA provides the exclusive means for terminating a defined benefit pension plan. *See* 29 U.S.C. § 1341(a)(1).[1] Plan termination can be initiated by the sponsoring employer or by PBGC. An employer may terminate a plan in a standard termination under 29 U.S.C. § 1341(b) if the plan has sufficient assets to cover all benefit liabilities, or in a distress termination under 29 U.S.C. § 1341(c) if the plan is underfunded and the employer meets certain statutory financial distress tests. In addition, PBGC has discretion to initiate the termination of an underfunded plan. *See* 29 U.S.C. § 1342(a).

B. Standard Terminations

1. *Procedure*

When an employer decides to terminate its defined benefit pension plan in a standard termination, the plan administrator selects a plan termination date that must be at least 60 days later than the date it notifies Plan participants of the termination.[2] The plan administrator must then send notices to each plan participant, beneficiary, alternate payee, and to each employee organization representing any participants, informing them of the proposed termination date. The plan administrator must also provide those parties with a notice explaining the benefits the plan owes to each affected party. *See* 29 U.S.C. §§ 1341(a)(2), 1341(b)(2)(B); 29 C.F.R. §§ 4041.23, 4041.24. 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 detailed information about plan assets and

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[1] *See also Beck v. PACE Int’l Union*, 551 U.S. 96, 102-03 (2007); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999).

[2] *See* 29 U.S.C. § 1341(a)(2); 29 C.F.R. § 4041.23.

benefit liabilities. *See* 29 U.S.C. § 1341(b)(2)(A); 29 C.F.R. § 4041.25. The Form 500 includes detailed instructions for completing the standard termination process.[3] PBGC then has 60 days to determine that there is no reason to believe that the plan is not sufficient for benefit liabilities based upon its review of the required documents from the plan administrator, the plan's actuary or other affected parties, including an attestation that the plan is sufficient for benefit liabilities (the "60 Day Review Period"). *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.[4]

Once the plan administrator has distributed the plan's assets, he must notify PBGC by filing 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.[5] 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, pursuant to 29 U.S.C. § 1303(a), to audit a statistically significant number of standard terminations to determine, *inter alia*, if everyone entitled to a benefit has received their full benefits under the terms of the plan. PBGC is not required to audit standard terminations prior to

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[3] *See* Form 500 Instructions, http://www.pbgc.gov/Documents/500_Instructions.pdf. Standard termination "procedures are exhaustive, setting detailed rules" for all phases of the process. *See, e.g.*, *Beck*, 551 U.S. at 102.

[4] Generally, plan administrators must distribute plan assets within 180 days after PBGC's 60 Day Review Period has expired. 29 C.F.R. § 4041.28. However, if the plan has requested an IRS determination letter on the plan's qualification at termination, plan assets must be distributed within 120 days of the plan's receipt of the requested determination letter. *Id.* *See also* 29 C.F.R. § 4041.25(c).

[5] Form 501 must be filed within 30 days of the last distribution of plan assets. 29 C.F.R. § 4041.29(a).

a distribution of assets. 29 U.S.C. § 1303(a). 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.

2. *ERISA's Goal Is To Assure Full Payment Of Benefits In A Standard Termination*

Before distributing plan assets in a standard termination, the plan administrator must ensure that the plan assets are sufficient to pay all participants their benefit liabilities determined as of the plan's termination date. 29 U.S.C. § 1341(b)(1)(D). Accordingly, benefits must be determined under the plan provisions in effect on the plan's termination date. 29 C.F.R. § 4041.8.[6] Because Title IV requires that participants receive the benefits to which they are entitled as of the plan administrator's chosen termination date, the plan administrator must adhere to the statutory requirement that an exact plan termination date be set,[7] and a written plan document be maintained.[8] A "plan's termination date is significant in both voluntary and

[6] In a standard termination, the plan termination date is chosen by the plan administrator, and is generally the proposed date of plan termination that must be included in the Notice of Intent to Terminate ("NOIT") provided to plan participants. *See* 29 U.S.C. §§ 1341(a)(2), 1348(a)(1). PBGC's regulations do allow a plan administrator to change the proposed date to the date proposed in the Form 500, if that date is later than the proposed date in the NOIT. *See* 29 C.F.R. §§ 4041.2, 4041.25(b). However, that later date may not be more than 90 days after the earliest date on which the NOIT was issued, 29 C.F.R. § 4041.25(b), and participants must receive notice of the change. 29 C.F.R. § 4041.23(b)(2).

[7] *See* 29 U.S.C. §§ 1348 (addressing plan termination dates), 1341(a)(2) (requiring issuance of a notice of intent to terminate a pension plan with the proposed termination date); 29 C.F.R. §§ 4041.23(b)(2) (discussing the content of a notice of intent to terminate a plan), 4041.25 (discussing the standard termination notice that must be filed with PBGC).

[8] *See* 29 U.S.C. § 1102(a)(1) ("Every employee benefit plan shall be established and maintained pursuant to a written instrument.").

involuntary [pension plan] termination proceedings."[9] That is the date on which all benefit accruals cease, and as of which all benefits owed to plan participants are determined.[10]

Congress devoted an entire section of Title IV to termination dates to ensure that, for each type of plan termination, there is a clear means of determining this important date. *See* 29 U.S.C. § 1348. In the context of a standard termination, the termination date is the date proposed by the plan administrator in the NOIT that must be sent to each affected party. *See* 29 U.S.C. § 1348(a)(1). The plan administrator must calculate plan benefits using the plan's provisions on the plan administrator's proposed termination date. ERISA requires that defined benefit plans "be established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), and "specify the basis on which payments are made . . . from the plan." 29 U.S.C. § 1102(b)(4). Thus, ERISA "has an elaborate scheme in place for enabling beneficiaries to learn their rights and obligations at any time [including on a plan's termination date], a scheme that is built around reliance on the face of written plan documents."[11] Accordingly, it "would defeat congressional intent . . . if retroactive amendments after termination could alter substantive rights of [a] pension plan."[12]

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[9] *PBGC v. Broadway Maint. Corp.* (*In re Pension Plan for Emps. of Broadway Maint. Corp.*), 707 F.2d 647, 649 (2d Cir. 1983).

[10] *See* 29 U.S.C. § 1341(b)(1)(D) (mandating that plan liabilities be determined as of the plan's termination date); *PBGC v. Republic Techs. Int'l, LLC*, 386 F.3d 659, 662 (6th Cir. 2004) (citing *In re Pension Plan for Emps. of Broadway Maint. Corp.*, 707 F.2d at 649).

[11] *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (emphasis omitted).

[12] *Audio Fid. Corp. v. PBGC*, 624 F.2d 513, 517 (4th Cir. 1980) (disallowing retroactive amendments after the date of plan termination). *See also Powell Valley Nat'l Bank v. PBGC*, No. 2:12CV00018, 2013 U.S. Dist. LEXIS 125975, at *11-12 (W.D. Va. Sept. 4, 2013) (upholding PBGC's determination that post-termination PPA amendment that decreased benefits was invalid).

3. *29 C.F.R. § 4041.8*

To ensure that participants and beneficiaries do in fact receive the benefit they earned under the plan's provisions in effect as of the date of plan termination, PBGC promulgated 29 C.F.R. § 4041.8, formalizing the longstanding interpretation that Title IV bars post termination amendments that reduce benefits. Under that regulation, benefits must be determined using the plan provisions in effect on the plan's termination date, *see also* 29 U.S.C. § 1341(b)(1)(D), and prohibits (except where required for tax qualification purposes) amendments adopted after the date of plan termination that reduce the value of benefits. 29 C.F.R. § 4041.8.

In relevant part, PBGC Regulation 4041.8 states:

> (a) A participant's or beneficiary's plan benefits are determined under the plan's provisions in effect on the plan's termination date. Notwithstanding the preceding sentence, an amendment that is adopted after the plan's termination date is taken into account with respect to a participant's or beneficiary's plan benefits to the extent the amendment –
>
> (1) Does not decrease the value of the participant's or beneficiary's plan benefits under the plan's provisions in effect on the termination date . . . .
>
> (c) For purposes of this section, an amendment shall not be treated as decreasing the value of a participant's or beneficiary's plan benefits . . . to the extent –
>
> (1) The decrease is necessary to meet a qualification requirement under section 401 of the [Internal Revenue] Code . . . .

29 C.F.R. § 4041.8.

4. *Distribution of Assets and Calculation of Lump Sums*

The plan administrator must distribute the plan's assets in a standard termination by (a) purchasing "irrevocable commitments" (*i.e.*, annuities) from a private insurer to satisfy all benefit liabilities, 29 U.S.C. § 1341(b)(3)(A)(i), or (b) an alternative form of distribution (*e.g.*, lump sum payment) "in accordance with the provisions of the plan and any applicable regulations . . . ." 29 U.S.C. § 1341(b)(3)(A)(ii). The valuation of a lump sum distribution 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). The interest rates used to discount to present value are inversely related to the amount of the lump sum (*i.e.*, the greater the interest rate, the lower the lump sum). Additionally, due to the power of compounding and the long-term nature of pension liabilities, a slight change in the interest rate can have a significant impact on the lump sum amount a participant or beneficiary receives.

III. Internal Revenue Code Provisions

A. IRS Determination Letters

Plans meeting the qualification requirements of section 401(a) of the Internal Revenue Code (the "Code") are entitled to favorable tax treatment. For example, contributions to a plan made in accordance with the plan document are generally deductible. *See generally* 26 U.S.C. §§ 162, 404 (discussing deductible expenditures). To obtain advance assurance that a pension plan satisfies the Code's qualification requirements under 26 U.S.C. § 401, a taxpayer may request a determination letter from the IRS that plan provisions meet qualification requirements. *See* 26 C.F.R. §§ 601.201(a)(3), 601.201(c)(5), 601.201(o); IRS Publication 794 (Rev. 1-2013). However, determination letters only address the issue of tax qualification on the materials submitted to the IRS, and are not "determination[s] regarding the effect of other federal or local statutes." PBGC's Administrative Record 0252-0258.[13] *See* 26 C.F.R. § 601.201(c)(5).

[13] All subsequent references herein to PBGC's Administrative Record shall be abbreviated as "AR".

B. Code § 417(e)

To meet the qualification requirements of Code § 401(a), a pension plan must, *inter alia*, comply with the requirements of Code § 411. 26 U.S.C. § 401(a)(7). Section 411(a) establishes a floor for lump sum valuations, providing that the present value of a lump sum benefit shall not be *less than* the present value calculated using the specified "applicable interest rate" and "applicable mortality table" assumptions, outlined in Section 417(e). *See* 26 U.S.C. §§ 411(a)(11)(B), 417(e)(3). These Code-specified assumptions have changed periodically since ERISA's enactment.

Most recently, for plan years beginning after December 31, 2007, the Pension Protection Act of 2006 ("PPA"), Pub. L. No. 109-280, 120 Stat. 780 (2006), amended the Code to change the "applicable interest rate" from the annual rate of interest on 30-year Treasury securities (prescribed by GATT, Retirement Protection Act of 1994, within the Uruguay Round Agreements Act, Pub. L. No. 103-465, § 767, 108 Stat. 4809, 5039-40 (1994)), to the adjusted first, second, and third segment rates derived from a corporate bond yield curve. *See* PPA § 302, 120 Stat. 780, 920-21. *See also* 29 U.S.C. § 1055(g). PPA also replaced the 1994 Group Annuity Reserving Table as the "applicable mortality table" used for lump sum calculations, with a mortality table specified under Code § 430(h)(3)(A). *See* 26 U.S.C. § 417(e)(3)(B). *See also* 2001-53 I.R.B. 632-37, Rev. Rul. 2001-62; 2007-48 I.R.B. 1047-50, Rev. Rul. 2007-67. Under the PPA, the "applicable mortality table" for distributions in 2009 was the PPA 2009 Mortality Table. *See generally* 2008-42 I.R.B. 905-25, IRS Notice 2008-85.

C. Code § 411(d)(6) and the PPA

Code § 411(d)(6), as well as ERISA § 204(g), prohibit plan amendments that reduce accrued benefits. *See* 26 U.S.C. § 411(d)(6); 29 U.S.C. § 1054(g). Recognizing that certain required PPA amendments might reduce accrued benefits under plans, the PPA provided that plans would not violate Code § 411(d)(6) and ERISA § 204(g) when making amendments necessary to comply with the PPA's changes, so long as the amendment is adopted before the last day of the play year beginning on or after January 1, 2009, and the plan is run in good faith compliance with that amendment prior to its adoption. *See* PPA § 1107; AR-0859-0860. The PPA did not, however, provide relief for violations of Title IV of ERISA.

STATEMENT OF MATERIAL FACTS

1. PBGC is the wholly owned United States government corporation that administers and enforces the defined benefit pension plan termination insurance program under Title IV of ERISA. 29 U.S.C. § 1302; Compl. ¶ 5.

2. Royal Oak is a limited liability company established under Delaware law. AR-0216; Compl. ¶ 4.

3. The Plan was adopted by Royal Oak with an effective date of January 1, 1971. AR-0405; AR-0437; AR-0246.[14]

4. The Plan is a defined benefit pension plan covered by Title IV of ERISA. *See, e.g.*, AR-0001-0006; Compl. ¶ 7. *Cf.* AR-0745-0747; AR-0748-0839.

5. Royal Oak is the Plan Sponsor within the meaning of 29 U.S.C. § 1301(a)(13). AR-0003.

[14] Upon information and belief, from the date of its adoption in 1971 through, at least, 1986, the Plan was called the Salaried Employees' Retirement Plan of Husky Industries, Inc. At some point between 1986 and 1997, the name of the Plan was changed to its current form. *Compare* AR-0437-0444 (Amendment 2 to Salary Employees' Retirement Plan of Husky Industries, Inc., executed on December 22, 1986), *with* AR-0562 (Amendment 1997-1 to Royal Oak Enterprises, Inc. Retirement Plan for Hourly and Salaried Employees, executed on November 18, 1997).

6. On August 27, 2008, Royal Oak sent NOITs to participants, notifying them of the Plan's proposed termination, establishing October 31, 2008, as the proposed date of Plan termination. AR-0004; AR-0259-0260.

7. On December 31, 2008, Royal Oak notified PBGC of the proposed termination date of October 31, 2008, by filing a Form 500. AR-0001-0006.

8. Royal Oak's notice to PBGC also stated that Royal Oak had sent benefit notices to participants and beneficiaries by December 31, 2008. AR-0004. *See* AR-0449-0474.

9. On November 28, 2009, PBGC received a Form 501, 29 C.F.R. § 4041.29, from Royal Oak, certifying, *inter alia*, that all benefits payable under the Plan were calculated correctly in accordance with ERISA's provisions and regulations, and that all benefit liabilities under the Plan were satisfied. AR-0013.

10. According to Royal Oak's Form 501, the Plan had 361 participants, 328 of whom elected to and received their benefits in the form of a lump sum payment, distributed by October 27, 2009. *Id.*[15]

11. On the October 31, 2008 Plan termination date established by Royal Oak, the Plan document, at section 5.02, allowed participants to elect various alternate forms of benefits, including a lump sum payment, which "shall be the Actuarial Equivalent of the Participant's Accrued Benefit." AR-0160-0161. *See generally* AR-0124-0215. Plan section 1.02, defining Actuarial Equivalent, specified that the present value of the Participant's Accrued Benefit be calculated using whichever of the following mortality table and interest rate assumptions

[15] As discussed below, PBGC subsequently audited the standard termination of the Plan. *See infra* ¶¶ 13-15. Lola Adeleke, the Auditor in PBGC's Standard Termination and Compliance Department assigned to the case, stated in her audit notes that the Plan had 351 participants, not 361, and that, of these 351 participants, 320 participants received benefits in the form of a lump sum payment. *See* AR-0014-0016; Declaration of Lola Adeleke, ¶¶ 9-10 (Dkt. 10). This correction to the reported number of Plan participants was confirmed by Royal Oak in a letter to PBGC dated May 26, 2010. *See* AR-0020-0021; AR-0034.

produced a higher benefit: (1) a 7% interest rate per annum and the 1984 UP Mortality Table; or (2) the "applicable interest rate," namely the rate on 30-year U.S. Treasury securities for the month of November ("look back month") preceding the Plan Year in which the calculation is made ("GATT Interest Rate"), and the "applicable mortality table," namely the 1994 Group Annuity Reserving Table ("GATT Mortality Table") (together, the "GATT Assumptions"). AR-0133-0134.

12. On December 5, 2008, over a month after Royal Oak's Plan termination date, Royal Oak amended the Plan (the "PPA Amendment"). AR-0107-0123. The PPA Amendment amended § 1.02 of the Plan to provide, in relevant part, that the "applicable interest rate(s)" shall be the rate(s) designated by the Secretary of the Treasury pursuant to Code Section 417(e)(3) (the "PPA Interest Rate") for the month of November prior to the beginning of the Plan Year, and the "applicable mortality table" shall satisfy the requirements of Section 417(e) of the Code as prescribed in Revenue Ruling 2007-67 (the "PPA Mortality Table") (together, the "PPA Assumptions"). AR-0107.

13. By letter dated April 27, 2010, PBGC notified Royal Oak that the Plan's termination had been selected for audit. AR-0017-0019.

14. After receiving necessary information, PBGC notified Royal Oak of the sample participants selected for the Plan's standard termination audit on December 20, 2010. AR-0341-0342.

15. On December 22, 2010, Royal Oak forwarded calculation sheets for the sample participants selected, showing that those participants' lumps sum benefits were calculated using the PPA Assumptions specified in the post-termination date PPA Amendment. *See, e.g.*, AR-0445-0474; AR-0476-0547.

16. On March 16, 2012, PBGC issued its initial determination, finding that the PPA Amendment, adopted after the date of plan termination to replace the GATT Mortality Table and the GATT Interest Rate assumptions with the PPA Mortality Table and the PPA Interest Rate assumptions, decreased benefits, in violation of 29 C.F.R. § 4041.8, as the amendment was adopted after Plan termination and was not necessary to meet qualifications under Code § 401 (PBGC's "Initial Determination"). AR-0722-0724.

17. By letter dated April 30, 2012, Royal Oak requested reconsideration of PBGC's Initial Determination (Royal Oak's "Reconsideration Letter"). AR-0734-0860. Royal Oak argued in the Reconsideration Letter that: (1) the PPA Amendment provisions adopting the PPA Assumptions were deemed to be in effect, by operation of law, on October 31, 2008, the Plan termination date; and (2) even if the PPA Amendment were considered a post-termination amendment, the amendment did not violate 29 C.F.R. § 4041.8 because the Plan's use of the PPA Assumptions did not decrease benefits and was necessary to meet qualifications under Code Section 401(a). *See* AR-0734-0743.

18. By letter dated June 7, 2013, PBGC issued its final determination, affirming its Initial Determination and informing Royal Oak that all administrative remedies were exhausted pursuant to 29 C.F.R. § 4003.35 (PBGC's "Final Determination"). AR-0874-0876. The Final Determination concluded that the arguments in Royal Oak's Reconsideration Letter provided no defense to PBGC's Initial Determination that the PPA Amendment decreased benefits for participants and beneficiaries who elected lump sum distributions, and was unnecessary to meet the Code's tax qualification requirements, and thereby violated 29 C.F.R. § 4041.8. *Id.*

19. On July 9, 2013, Royal Oak filed the instant Complaint. Dkt 1. PBGC was properly served on July 18, 2013.

20. PBGC filed its Answer and Counterclaim on September 16, 2013. Dkt. 11.

21. PBGC's Counterclaim seeks to enforce the provisions of Title IV of ERISA, and PBGC's Final Determination. *Id.*

STANDARD OF REVIEW

Generally, summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[16] The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact.[17] However, when the Court must decide a case on the basis of an administrative record, as in the instant case, the administrative record provides the complete factual predicate for the Court's review,[18] and the Court may not "find" underlying facts.[19] As a result, there can be no genuine issue of material fact; rather, the legal questions presented in the civil action are ripe for resolution on summary judgment.[20]

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[16] FED. R. CIV. P. 56(a).

[17] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[18] *See* 5 U.S.C. § 706 (in reviewing agency action, "the court shall review the whole record or those parts of it cited by a party"); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (noting that "the task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court"); *Camp v. Pitts*, 411 U.S. 138, 142 (1973)("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.") *Cf. Basic Unit Ministry of Alma Karl Schurig v. United States,* 511 F. Supp. 166, 168 (D.D.C. 1981) ("In actions for [summary judgment] such as this, the scope of review is confined to the administrative record unless good cause is shown.").

[19] *See, e.g., James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) ("Ordinarily, courts confine their review to the 'administrative record'"); *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021, 1024 (4th Cir. 1975) (denying an evidentiary hearing in an administrative record case).

[20] *See Deppenbrook v. PBGC*, CV No. 11-600, 2013 WL 2948193, at *4 (D.D.C. June 17, 2013) (noting that "it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas the function of the district court is to determine

Under the Administrative Procedure Act (the "APA"), a court will set aside agency determinations only if the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[21] Accordingly, the court must determine whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.[22] While the court's inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.[23] An agency must review relevant data and articulate a satisfactory explanation that establishes a rational connection between the facts found and the choices made.[24]

Furthermore, the court is not empowered to substitute its judgment for that of the agency.[25] Instead, review under this standard is highly deferential with an initial presumption in favor of finding the agency action valid.[26] As the Supreme Court has stated:

> [The] view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of [the] very 'complex statute' [it administers] is a sufficiently rational one to preclude a court from substituting its judgment for

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whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did") (internal citations and quotations omitted).

[21] 5 U.S.C. § 706(2)(A).

[22] *See Bloch v. Powell*, 348 F.3d 1060, 1070 (D.C. Cir. 2003).

[23] *See Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981); *Bloch*, 348 F.3d at 1068 ("Our review under the arbitrary-and-capricious standard is narrow; we will uphold an agency decision of less than ideal clarity if the agency's path may reasonably be discerned.") (internal citations and quotations omitted).

[24] *See Nat'l Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd.*, 618 F.2d 819, 826-27 (D.C. Cir. 1980).

[25] *See Sara Lee Corp. v. Am. Bakers Ass'n Ret. Plan*, 512 F. Supp. 2d 32, 38 (D.D.C. 2007) ("Under the APA, the court presumes the validity of agency action and cannot substitute its judgment for that of an agency.") (internal quotations and citations omitted).

[26] *See Envtl. Def. Fund*, 657 F.2d at 283; *Nat'l Small Shipments*, 618 F.2d at 826.

that of [the agency].[27]

Deference is even more appropriate when a case is highly technical or scientific, and the agency is acting within its special area of expertise.[28] Thus, where an agency has acted in an area in which it has special expertise, the court must be particularly deferential to the agency's determination.[29]

Finally, an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulation.[30] When reviewing an agency's interpretation of its own regulation, the reviewing court does not have much leeway.[31]

ARGUMENT

THE COURT SHOULD UPHOLD PBGC'S DETERMINATION THAT THE PPA AMENDMENT WAS ADOPTED AFTER THE DATE OF PLAN TERMINATION IN VIOLATION OF TITLE IV AND 29 C.F.R. § 4041.8

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[27] *Chem. Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 125 (1985) (internal citations omitted).

[28] *See Baltimore Gas & Elec. Co. v. Nat'l Res. Def. Council*, 462 U.S. 87, 103 (1983). *See also Sara Lee Corp.*, 512 F. Supp. 2d at 38 ("As this is an area in which PBGC has authority and expertise, the court sees no reason why it should not apply the deferential standard of the APA [to PBGC's determination].").

[29] *See Sara Lee Corp.*, 512 F. Supp. 2d at 37. *See also Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989) (concluding that "[f]or a court to attempt to answer these [ERISA-related] questions without the views of the agencies responsible for enforcing ERISA would be to embark upon a voyage without a compass") (internal quotations and citations omitted); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980); *Davis v. PBGC*, 864 F. Supp. 2d 148, 155 (D.D.C. 2012) (finding that PBGC has practical agency expertise in ERISA that makes it better equipped to interpret and apply ERISA than the courts).

[30] *See Auer v. Robbins*, 519 U.S. 452, 461 (1997).

[31] *See Pettiford v. Sec'y of the Navy*, 858 F. Supp. 2d 86, 91 (D.D.C. 2012) ("[A]n agency's interpretation of its own regulations commands substantial judicial deference and becomes controlling weight unless plainly erroneous or inconsistent with the regulations being interpreted.") (internal citations and quotations omitted); *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425, 439 (4th Cir. 2003) (determining that the court does not have much leeway in undertaking the interpretation of an agency regulation unless plainly erroneous or inconsistent with the regulation).

In its request for reconsideration, Royal Oak did not dispute that it adopted the PPA Amendment on December 5, 2008, over one month after the Plan's date of termination, AR-0734-0860, or that the lump sum benefits calculated using the PPA Assumptions were smaller than those calculated using the Plan provisions in effect on its termination date. Rather, Plaintiff challenged PBGC's enforcement of ERISA and its regulations. None of these arguments, however, render PBGC's Final Determination arbitrary or capricious, or not in accordance with law; nor could they, as the Administrative Record fully supports PBGC's Final Determination that the PPA Amendment violated law. *See* 29 U.S.C. § 1341(b)(1)(D); 29 C.F.R. § 4041.8.

I. PPA § 1107 Does Not Provide Relief From ERISA's Title IV Standard Termination Requirements

In its request for reconsideration, Royal Oak first argued that what they refer to as a "special timing rule" set forth in PPA § 1107 gave plan sponsors up until the last day of the plan year beginning on or after January 1, 2009, to include new PPA-specific plan changes in their plan documents, subject to certain conditions. Specifically, PPA § 1107 provides, *inter alia*, that a plan which makes a retroactive amendment to comply with the PPA shall be treated pre-amendment as operating in accordance with the terms of the plan, so long as the amendment is adopted before the last day of the plan year beginning on or after January 1, 2009, and the plan is run in good faith compliance with that amendment prior to its adoption. *See* AR-0859-0860. Therefore, according to Royal Oak, although the PPA Amendment was adopted on December 5, 2008, after the date of Plan termination, the provisions of the PPA Amendment, namely the PPA Interest Rate and PPA Mortality Table, were deemed to be in effect under the Plan on its October 31, 2008 termination date by operation of PPA § 1107.

But once Royal Oak decided to terminate the Plan, and selected a termination date, nothing in the PPA prohibited Royal Oak from adopting the PPA Amendment *before* its proposed termination date. In fact, when Royal Oak actually adopted the PPA Amendment, it did so well before the last date specified by PPA. It just did not manage to do so before the termination date it had picked, and PPA § 1107 does not relieve Plaintiff of its Title IV obligation to pay all benefit liabilities determined *as of the date of plan termination*. *See* 29 C.F.R. § 4041.8; 29 U.S.C. § 1341(b)(1)(D). Rather, once PPA amendments are adopted, PPA § 1107 only provides relief from the anti-cutback provisions of Title I of ERISA, 29 U.S.C. § 1054(g), and the Code, 26 U.S.C. § 411(d)(6), and states that plans will be deemed to have been operated in compliance with PPA for qualification purposes, for plans that were amended within a prescribed time period.

Because Royal Oak did not adopt the PPA Amendment as of the date of Plan termination, Plaintiff must recalculate the lump sum benefits using the GATT Interest Rate and the GATT Mortality Table – the terms of the Plan in effect on the date of termination, as mandated by PBGC's Final Determination.

II. The PPA Amendment Violates 29 C.F.R. § 4041.8

Plaintiff alternatively argued in its request for reconsideration that, even though Royal Oak failed to adopt the PPA Amendment until after the date of Plan termination it had established, the PPA Amendment is nonetheless a permissible post-termination amendment under the regulation because: (1) the PPA Amendment does not decrease plan benefits; and (2) even if the PPA Amendment does decrease plan benefits, this decrease in plan benefits is necessary for plan qualification under the Code. Plaintiff is wrong on both counts.

First, there is no dispute that the PPA Amendment decreases benefits. This is the very reason Plaintiff is challenging PBGC's Final Determination – Plaintiff will have to pay larger benefit amounts to participants and beneficiaries under the terms of the Plan on the date of plan termination than under the terms of the PPA Amendment.

Second, the PPA Amendment was not necessary for plan qualification under the Code because Code § 417 only provides the interest rate and mortality table that a plan must use to determine the *minimum* amount of lump sums. A plan may pay a larger lump sum if required by another statutory provision or a provision of the plan, as is the case here.

A. *The PPA Amendment Decreases Plan Benefits*

Royal Oak does not dispute that if it had to calculate benefits under the terms of the Plan as of the date of termination, rather than the PPA Amendments, it would have to pay additional benefit amounts to participants and beneficiaries.

Instead, Plaintiff embarks on an analysis of the actuarial equivalence of optional forms of accrued benefits. According to Royal Oak, in Code § 417(e), Congress prescribed the rules for calculating actuarial equivalence for lump sum distributions, and therefore Plaintiff need look no further. However, as PBGC's Final Determination explains, Code § 417(e) does not, as Plaintiff alleges, "pr[e]scribe how actuarial equivalents *must* be calculated for lump sum distribution." AR-0869 (emphasis added). Rather, Code § 417(e) simply requires that lump sum benefits be no less than the actuarial equivalent determined using the assumptions specified in that section. *See* AR-0874-0876; 26 U.S.C. § 417(e)(3)(A). Nothing in Code § 417(e) prohibits the use of assumptions that produce larger lump sum benefits. And Title IV mandates that plan participants receive the benefits to which they are entitled under the plan's provisions in effect *as of the date of plan termination.* As of that date, the Plan provisions in effect required the values of lump sum benefits to be calculated using GATT Assumptions.

In this case, use of GATT Assumptions produces larger benefit amounts than those calculated using PPA Assumptions. PBGC Regulation 4041.8 makes no reference to "accrued benefits" or "actuarial equivalents," but simply states that a post-termination amendment will not be recognized if it "decrease[s] the value of the participant's benefit under the plan's provisions in effect on the termination date." On its termination date, the Plan required the payment of lump sums calculated using GATT Assumptions, which produce higher benefits values then PPA Assumptions. Even the Plan language reflects that the value of a lump sum benefit is determined by the assumptions used to calculate actuarial equivalence. Section 1.02 of the Plan, defining "Actuarial Equivalent" specifies that an "Accrued Benefit shall be calculated using the interest rate(s) and mortality table specified in (b) or (c) below, *whichever produces a larger benefit*." AR-0757-758 (emphasis added). By using the terms of a post-termination amendment to calculate lump sums as of the termination date, Royal Oak decreased the benefit amounts paid to participants and beneficiaries in violation of 29 C.F.R. § 4041.8. Accordingly, Royal Oak must now recalculate benefits in accordance with PBGC's Final Determination and the terms of the Plan in effect as of the date of plan termination, and pay the additional benefits owed to plan participants and beneficiaries.

B. *The PPA Amendment Is Not Necessary To Meet Qualification Requirements Under Code § 401(a)*

Plaintiff's final argument in its request for reconsideration is equally unavailing. Plaintiff maintained that the PPA Amendment was necessary to meet plan qualification requirements under Code § 401(a), because Code § 401(a) requires compliance with Code § 417(e), which the PPA amended. But Plaintiff has misconstrued Code § 417(e) and the requirements for plan qualification. AR-0874-0876.

Under the PPA amendment deadlines, Royal Oak was legally able to adopt the PPA Amendment *before* the termination date it established. And while it is true that the PPA required that plans be amended to adopt the PPA Assumptions to calculate *minimum* lump sum benefits, it did not bar plans from calculating lump sums using assumptions that produced benefits greater than the required minimums. Consequently, it is simply untrue that the only post-termination amendment that could be made in order for the Plan to comply with the PPA, remain qualified under the Code, and comply with PBGC's regulation, was one that completely eliminated GATT Assumptions.[32] Rather, as explained in PBGC's Final Determination, Plaintiff could have, for example, adopted an amendment paying participants the greater of lump sums calculated using GATT Assumptions and PPA Assumptions.[33]

PBGC Regulation 4041.8 states that, to be given effect, the post-termination amendment must be necessary for a plan to remain qualified. As the Final Determination makes clear, Plaintiff did not have to adopt the PPA Amendment to remain qualified. It need only have adopted an amendment that complied with the PPA's mandate that lump sum benefits be no less than those calculated using PPA Assumptions. Consequently Regulation 4041.8 requires that the PPA Amendment be disregarded.

However, disregard of the PPA Amendment does not, as Plaintiff suggests, require "overpayments," which would result in an "operational failure," thereby disqualifying the Plan under the Code. As the Internal Revenue Bulletin, cited by Plaintiff, states:

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[32] Royal Oak implied in its request for reconsideration that issuance of a determination letter by the IRS indicates that the PPA Amendment was the only amendment Plaintiff could make and that the amendment somehow meets the requirements for plan termination under Title IV of ERISA. However, this is not the case. The letter itself explicitly states that the IRS only considered the information it was sent and that the letter is "not a determination regarding the effect of other federal or local statutes." AR-0252-0258.

[33] *See* 2008-12 I.R.B. 638-42, IRS Notice 2008-30.

> The term “Overpayment” means a Qualification Failure due to a payment being made to a participant or beneficiary that exceeds the amount payable to the participant or beneficiary under the terms of the plan or that exceeds a limitation provided in the Code or regulations.

2008-35 I.R.B. 464-562, 473, Rev. Proc. 2008-50. Thus, PBGC’s Final Determination requires Royal Oak to pay participants and beneficiaries precisely the benefit amounts provided for under the terms of the Plan on the date of Plan termination, not overpayments.

Therefore, and consistent with PBGC’s Final Determination, because the PPA Amendment is not necessary for plan qualification, and decreases benefits, it violates Regulation 4041.8.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment upholding PBGC's Final Determination.

Respectfully submitted,

Dated: January 22, 2014
Washington, D.C.

/s/ Louisa A. Fennell

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