IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 1:14-cv-01163-RPM

PENSION BENEFIT GUARANTY CORPORATION	)
Plaintiff,	)
v.	)
ENDODONTIC SPECIALISTS OF COLORADO, P.C.	)
Defendant.	)

PLAINTIFF'S BRIEF IN SUPPORT OF AGENCY FINAL DETERMINATION

Dated: December 5, 2014
Washington, D.C.

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INTRODUCTION

The Pension Benefit Guaranty Corporation ("PBGC") files this brief in support of its complaint to enforce PBGC's final determination that the standard termination of the Endodontic Specialists of Colorado, P.C. Defined Benefit Pension Plan (the "Plan") was not completed in accordance with the Plan's provisions in effect on the Plan's date of termination, nor with applicable law and regulations. Accordingly, approximately $255,000 of additional benefits, plus interest, are owed to 34 Plan participants.

PRELIMINARY STATEMENT

When an employer terminates a defined-benefit pension plan that 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, Endodontic Specialists of Colorado, P.C. ("Endodontics") failed to pay Plan participants and beneficiaries those required benefits. Instead, as fully supported by PBGC's Administrative Record (ECF Nos. 11, 12), the benefits of 34 Plan participants were reduced by calculating their lump sum benefit payments in accordance with a Plan amendment made more than eight months after the Plan's termination date. Additionally, Endodontic failed to calculate one participant's benefits using his annualized compensation as required by the Plan.

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 administrative record shows that the agency's determination is completely supported, thoroughly reasonable, and in accordance with the law. Accordingly, the Court should uphold PBGC's final agency determination and

require Endodontic to pay the additional benefits owed to certain 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. 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 separate 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 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 in Title IV. *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. *See* 29 U.S.C. § 1341(a)(2); 29 C.F.R. § 4041.23. The plan administrator must then send a notice of intent to terminate ("NOIT") to each plan participant, beneficiary, alternate payee, and to each employee organization representing any participants, informing them of the proposed termination date. *Id.* 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(b)(2)(B); 29 C.F.R. § 4041.24. Before distributing any plan assets, the plan administrator must send PBGC a Standard Termination Notice – PBGC Form

[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).

500 ("Form 500") with information including the proposed date of plan termination, and detailed information about plan assets and 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.[2] 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 (a)(1).[3]

Once the plan administrator has distributed the plan's assets, it 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.[4] 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

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[2] *See* Form 500 Instructions, available at http://www.pbgc.gov/Documents/500_Instructions.pdf (last visited Nov. 30, 2014). The standard termination "procedures are exhaustive, setting detailed rules" for all phases of the process. *See, e.g.*, *Beck*, 551 U.S. at 102.

[3] 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 a determination letter from the IRS about the plan's qualification at termination, then 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). No determination letter was requested in this case. Administrative Record, AR003.

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

to determine, *inter alia*, 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-.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. *Id.*; *see also* 29 C.F.R. § 4041.8.[5] 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,[6] and a written plan document be maintained.[7]

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[5] 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 NOIT. *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).

[6] *See* 29 U.S.C. §§ 1348 (addressing plan termination dates), 1341(a)(2) (requiring issuance of an NOIT with the proposed termination date); 29 C.F.R. §§ 4041.23(b)(2) (discussing the content of an NOIT), 4041.25 (discussing the Form 500 that must be filed with PBGC).

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

A "plan's termination date is significant in both voluntary and involuntary [pension plan] termination proceedings."[8] That is the date on which all benefit accruals cease, and as of which all benefits owed to plan participants are determined.[9] It is so significant that Congress devoted an entire section of Title IV to termination dates to ensure that, for each type of plan termination, including standard terminations, there is a clear means of determining this important date. *See* 29 U.S.C. § 1348.[10]

Consistent with its purpose of "increase[ing] the likelihood that full benefits will be paid to participants and beneficiaries of [pension] plans,"[11] ERISA also 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). Courts interpreting the requirement that plans must be "maintained pursuant to a written instrument" have opined that this language requires a written document executed by a party who is authorized to effect such amendment or termination.[12] Moreover, the amendment must meet any

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

[9] *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).

[10] *See supra* note 5.

[11] 29 U.S.C. § 1001b(b)(1).

[12] *Bellino v. Schlumberger Techs., Inc.*, 944 F.2d 26, 33 (1st Cir. 1991) (concluding that amendment of written ERISA plans be accomplished through a written document); *cf. Law v. Ernst & Young*, 956 F.2d 364, 370 n. 9 (1st Cir. 1992) (same); *Coffin v. Bowater Inc.*, 501 F.3d 80, 86-92 (1st Cir. 2007) (same); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120 (4th Cir. 1989) (affirming the district court's decision where it ruled that modification of a pension plan by informal and unauthorized amendment was impermissible pursuant to 29 U.S.C. § 1102(b)(3)).

other requirements laid out for such amendments in the plan's governing documents.[13] 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."[14] Accordingly, it "would defeat congressional intent . . . if retroactive amendments after termination could alter substantive rights of [a] pension plan."[15]

3. *29 C.F.R. § 4041.8*

To ensure that participants and beneficiaries do in fact receive the benefits they earned under the plan's provisions in effect as of the date of plan termination, PBGC promulgated 29 C.F.R. § 4041.8, which formalized the longstanding interpretation that Title IV bars post-termination amendments that reduce benefits. That regulation confirms that benefits must be determined using the plan provisions in effect on the plan's termination date, 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:

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[13] *Allison v. Bank One – Denver*, 289 F.3d 1223, 1236 (10th Cir. 2002); *see also Coffin*, 501 F.3d at 91-92; *Pizlo*, 884 F.2d at 120 (stating that informal or unauthorized modification of pension plans is impermissible under ERISA); *Depenbrock v. Cigna Corp.*, 389 F.3d 78, 81 (3d Cir. 2004); *Confer v. Custom Eng'g Co.*, 952 F.2d 41, 43 (3d. Cir. 1991) (holding that only a formal written amendment, executed in accordance with the Plan's own procedure for amendment could change the Plan).

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

[15] *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 a post-termination amendment that decreased benefits was invalid); *PBGC v. Ky. Bancshares, Inc.*, 7 F. Supp. 3d 689, 699-700 (E.D. Ky. 2014) (same).

> (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) making 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. Code § 417(e)

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). But 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).[16] *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).[17] PPA also replaced the 1994 Group Annuity Reserving Table as the

[16] The Code prescribes a minimum floor for valuing a lump sum, the Code does not prohibit a plan from paying a larger lump sum if required by another statutory provision or a provision of the plan. 26 U.S.C. § 417(e)(3).

[17] Calculations using higher interest rates produce lower lump sum present values. The PPA Amendment rates typically produce lower lump sum present values than 30-year Treasury

"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* Rev. Rul. 2001-62, 2001-53 I.R.B. 632-37; Rev. Rul. 2007-67, 2007-48 I.R.B. 1047-50. Under the PPA, the "applicable mortality table" for distributions in 2009 was the PPA 2009 Mortality Table. *See generally* I.R.S. Notice 2008-85, 2008-42 I.R.B. 905-24.

B. Code § 411(d)(6) and the PPA

Code § 411(d)(6), as well as 29 U.S.C. § 1054(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 29 U.S.C. § 1054(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. The PPA did not, however, provide relief for violations of Title IV of ERISA.

STATEMENT OF MATERIAL FACTS

1. 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. Compl. ¶ 4, Answer ¶ 4.

2. Endodontic is a dental practice, with its principal place of business in Colorado Springs, Colorado. Compl. ¶ 7, Answer ¶ 7.

3. The Plan is a single-employer, defined-benefit pension plan covered under Title IV of ERISA. 29 U.S.C. § 1321, Compl. ¶ 16, Answer ¶ 16.

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securities rates. As is relevant to this case, the GATT rate, as of May 15, 2009, was 4% and the November 2008 PPA segment rates in effect for the 2009 Plan Year was 5.24%, 5.69%, and 5.37.

4. Endodontic adopted the Plan, effective January 1, 2000. Compl. ¶ 17, Answer ¶ 17; PBGC's Administrative Record 118.[18]

5. Endodontic is the Plan's contributing sponsor within the meaning of 29 U.S.C. § 1301(a)(13). AR 3, 118, 122, 132. Endodontic is also the Plan Administrator within the meaning of 29 U.S.C. §§ 1301(a)(1) and 1002(16). AR 5, 120, 122.

6. On or about November 21, 2008, Endodontic issued a notice to participants and beneficiaries that Endodontic intended to freeze the Plan, effective December 21, 2008. Compl. ¶ 18, Answer ¶ 18; AR 304.

7. On or about March 6, 2009, Endodontic issued a NOIT to Plan participants and beneficiaries in accordance with 29 U.S.C. § 1341(a)(2), with a proposed termination date of May 15, 2009. Compl. ¶ 19, Answer ¶ 19; AR 302.

8. On July 20, 2009, PBGC received a Form 500 for the Plan, indicating a proposed termination date of May 15, 2009. Compl. ¶ 20, Answer ¶ 20; AR 1-6.

9. On or about March 31, 2010, Endodontic filed a Form 501 with PBGC that certified, *inter alia*, 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. Compl. ¶ 21, Answer ¶ 21; AR 10-11; *see also* Exhibit A, Decl. of Christopher Choe, attached hereto.

10. As of the Plan's May 15, 2009 termination date, Plan participants could elect certain optional forms of benefit, including a lump sum payment that was the "Actuarial Equivalent of the Participant's Accrued Benefit payable as a Normal Form of Retirement Benefit beginning at the Participant's Normal Retirement Date or actual retirement date if later." AR 119,

[18] All subsequent references herein to PBGC's Administrative Record are abbreviated as "AR".

120, 137, 143. The Plan further required that a participant's Accrued Benefit in a given year not be less than the Actuarial Equivalent of his or her Accrued Benefit as of the end of the prior Plan Year, except as otherwise permitted by law. Compl. ¶ 23, Answer ¶ 23; AR 119.

11. On the Plan's May 15, 2009 termination date, Plan Section 1.2 provided that Actuarial Equivalence for purposes of lump sum payments would be determined using whichever of the following factors produced the greatest benefit:

> (a) **Plan Factors:** Pre-Retirement: 6% interest; Post-retirement: 6% interest and 1983 GAM Blended IRC 95-6 [mortality table] without setback.
>
> (b) **Code § 417(e) GATT Factors:** The applicable interest will be the annual interest rate on 30 year Treasury Securities as specified by the Commissioner [of Internal Revenue] for the second calendar month preceding the first day of the Plan Year during which the Annuity Starting Date occurs and the mortality assumption post-retirement will be the 1983 Group Annuity Mortality Table, gender neutral, blended 50/50 Male/Female [the ("GATT Assumptions")] . . . .

AR 119-20.

12. On January 19, 2010, more than eight months after the Plan's termination date, Endodontic amended the Plan to, *inter alia*, change the definition of Actuarial Equivalence for purposes of calculating lump sums (the "PPA Amendment"). *See generally* AR 343-60. Specifically, Endodontic amended the Plan to provide that "for plan years after January 31, 2007, the provisions of [26 U.S.C.] § 417(e)(3), as amended by [the Pension Protection Act of 2006], for calculating the minimum value of certain optional forms of benefit, including lump sums, apply to the Plan." AR 347. The PPA Amendment provided the following assumptions (the "PPA Assumptions") for calculating lump sum payments:

> **Applicable Mortality Table.** For Plan Years beginning before January 1, 2009, the mortality table set forth in Revenue Ruling 2001-62, or successor guidance. Effective for Plan Years beginning

> on or after January 1, 2009, the applicable annual mortality table within the meaning of [26 U.S.C.] § 417(e)(3)(B), as described in Revenue Ruling 2007-67 . . . .
>
> **Applicable Interest Rate.** . . . the term 'Applicable Interest Rate' means the adjusted first, second, and third segment rates applied under rules similar to the rules of [26 U.S.C.] § 430(h)(2)(C) for the calendar month ("lookback month") before the first day of the Plan Year in which the annuity starting date occurs ("stability period"). In determining the Applicable Interest Rate, the provisions of Revenue Ruling 2007-67 apply.

AR 347, 359.

14. As of the Plan's May 15, 2009 termination date, Plan Section 1.9 defined a participant's Average Annual Compensation as: [A] Participant's Compensation averaged over the highest 3 consecutive Plan Years (or over the actual number of consecutive Plan Years, if less) ending at the earlier of (1) the date the Participant ceased to be an active Participant; or (2) the later of Normal Retirement Age or actual retirement. If a Participant is employed or covered under the Plan for less than the full accounting period for determining Compensation, Average Annual Compensation will be the annual equivalent of his or her actual Compensation for such period if the Participant qualifies for a Year of Service or Year of Credited Service. Compl. ¶ 22, Answer ¶ 22, AR 120-121.

15. By a letter dated on or about July 22, 2010, PBGC notified Endodontic that the Plan's termination had been selected for audit. Compl. ¶ 27, Answer ¶ 27, AR 394.

16. On February 28, 2012, PBGC issued an initial determination letter to Endodontic with respect to its audit (the "Initial Determination"). AR 446-48. Specifically, the Initial Determination found that: (1) one participant's 2008 compensation was not projected to its annual equivalent in accordance with Plan Section 1.9 concerning Average Annual Compensation; (2) the PPA Amendment, adopted after the date of Plan termination to replace the GATT Assumptions

with the PPA Assumptions, decreased the value of benefits for participants and beneficiaries who elected lump sums, in violation of 29 U.S.C. § 1341(b)(1)(D) and 29 C.F.R. § 4041.8; and (3) six participants who waived part of their benefits were not majority owners of Endodontic, and were thus not permitted to waive any benefits.[19] AR 447.

17. By letter dated May 13, 2012, Endodontic, through its third party administrator, requested reconsideration of the Initial Determination (the "Reconsideration"). AR 463-560. The Reconsideration only sought reconsideration of PBGC's determination that six participants were not majority owners, and thus not permitted to waive any portion of their Plan benefit. AR 464. The Reconsideration did not dispute PBGC's remaining Initial Determination findings.[20] AR 463-64; *see also* AR 466-560. Accordingly, those determinations became final on May 14, 2012. *See* 29 C.F.R. § 4003.22.

18. In its May 13, 2012 letter to PBGC, Endodontic also submitted revised benefit calculations as required by the unchallenged portion of PBGC's Initial Determination. Specifically, Endodontic submitted a revised benefit calculation for the participant whose 2008 compensation had not been projected to its annual equivalent in accordance with Plan Section 1.9 concerning Average Annual Compensation. AR 463, 468, 532. Endodontic also submitted revised benefit calculations for the 34 Plan participants who elected to receive their Plan benefit as a lump

[19] PBGC also found that the Plan required benefit accruals equal to 2.7% of Average Annual Compensation per Year of Credited Service, but that the participant distribution worksheet provided to PBGC indicated that 2.75% was used. AR 451. The Initial Determination stated that no action was required for this finding, given that it produced higher benefits. *Id.*

[20] Endodontic did not challenge PBGC's findings that: (1) one participant's 2008 compensation was not projected to its annual equivalent in accordance with Section 1.9 of the Plan; and (2) the PPA Amendment, adopted after the date of Plan termination to replace the GATT Assumptions with the PPA Assumptions, decreased the value of benefits for participants and beneficiaries who elected lump sums, in violation of 29 U.S.C. § 1341(b)(1)(D) and 29 C.F.R. § 4041.8. AR 463-560. As a result, Endodontic waived any challenge to these findings.

sum. Endodontic's revised lump sum calculations used the GATT Assumptions required by the terms of the Plan on its termination date. *See generally* AR 463-534, AR 541. Despite submitting the revised calculations, to date, Endodontic has not made any of the required payments.

19. On August 27, 2012, PBGC issued its final determination, reversing its Initial Determination regarding the six owners/participants, and determining that each was a majority owner under the constructive ownership rules of 26 U.S.C. § 414(b), and informing Endodontic that all administrative remedies were exhausted pursuant to 29 C.F.R. § 4003.35 (the "Final Determination"). AR 584-86.

20. On April 24, 2014, PBGC filed the instant Complaint. ECF No. 1.

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

STANDARD OF REVIEW

Under the Administrative Procedures Act (the "APA"), a court will set aside agency determinations only if the agency's action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[21] The court's review under the arbitrary and capricious standard is narrow and very deferential to the agency.[22] Review is limited to consideration of the agency's administrative record, and the court may not substitute its judgment for that of the

[21] 5 U.S.C. § 706(2)(A); *PBGC v. LTV Corp.*, 496 U.S. 633, 656 (1990); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Council Tree Investors, Inc. v. FCC*, 739 F.3d 544, 555 (10th Cir. 2014).

[22] *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989); *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps. of Eng'rs.*, 702 F.3d 1156, 1165 (10th Cir. 2012); *Jagers v. Fed. Crop Ins. Corp.*, No. 10-00956, 2012 WL 2675262, at *9 (D. Colo. Jul. 6, 2012) (holding that even when the Court disagrees with the agency's decision, it must give the agency's decision deference under the APA); *Colo. Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1243 (D. Colo. 2012) ("The fact that reasonable people might have reached a different decision than did the agency is not a basis to overturn a decision that is otherwise procedurally proper.").

agency.[23] A presumption of validity attaches to the agency action and the burden of proof rests with the parties who challenge such action.[24]

In reaching a decision, an agency must review relevant data and articulate a satisfactory explanation that establishes a rational connection between the facts found and the choice made.[25] Agency action will be set aside if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[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 that of [the agency].[27]

Deference is even more appropriate when a case is highly technical or scientific, and the

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[23] *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Citizens to Preserve Overton Park*, 401 U.S. at 420; *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1028 (10th Cir. 2001).

[24] *Hillsdale Envtl. Loss Prevention, Inc.*, 702 F.3d at 1165.

[25] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *Colo. Wild Inc. v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006).

[26] *Colo. Wild Inc.*, 435 F.3d at 1213.

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

agency is acting within its special area of expertise.[28] It is not the court's duty to substitute its judgment for that of the agency's on matters within the agency's expertise.[29] 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.[30]

Finally, an agency's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'"[31] When reviewing an agency's interpretation of its own regulation, the reviewing court does not have much leeway.[32] As the government agency that administers and enforces Title IV of ERISA, PBGC is afforded broad deference in interpreting the

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[28] *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983); *see also Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 691 (10th Cir. 2010); *Utah Envtl. Congress v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006).

[29] *Colo. Wild Inc.*, 435 F.3d at 1213.

[30] *See Beck v. PACE Int'l Union*, 551 U.S. 96, 104 (2007) ("We have traditionally deferred to the PBGC when interpreting ERISA, for 'to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embar[k] upon a voyage without a compass.') (quoting *Mead Corp.* v. *Tilley*, 490 U.S. 714, 722, 725-726 (1989)) (alteration in original); *see also Davis v. PBGC*, 864 F. Supp. 2d 148, 155-56 (D.D.C. 2012), *aff'd*, 734 F.3d 1161 (D.C. Cir. 2013) (noting that PBGC "has 'practical agency expertise' that makes it 'better equipped' to interpret and apply ERISA than the courts") (citation omitted); *Sara Lee Corp. v. Am. Bakers Ass'n Ret. Plan*, 512 F. Supp. 2d 32, 37 (D.D.C. 2007).

[31] *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted); *Oklahoma v. EPA*, 723 F.3d 1201, 1211 (10th Cir. 2013).

[32] *See Fetty v. PBGC*, 915 F. Supp. 230, 234 (D. Colo. 1996), *aff'd*, 104 F.3d 367 (10th Cir. 1996) (noting that "[u]pon review, an agency's interpretation and application of its own regulation is entitled to substantial deference); *see also 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).

statute and its regulations, including those pertaining to standard termination audits.[33]

ARGUMENT

I. Endodontic Waived Its Challenge to PBGC's Final Determination by Failing to Raise Any Arguments with PBGC during the Administrative Process.

As an initial matter, Endodontic has waived any challenge to the determinations that PBGC seeks to enforce in this lawsuit. When it filed the Reconsideration, Endodontic did not dispute PBGC's Initial Determination that the PPA Amendment was executed on January 19, 2010, more than eight months after the Plan's selected date of termination. AR 463-560; *see also* AR 450-52. Similarly, Endodontic did not dispute PBGC's finding that Endodontic's use of the PPA Amendment resulted in a decrease in the value of Plan participants' and beneficiaries' lump sums. AR 463-64; *see also* AR 450-52. In fact, Endodontic not only did not dispute PBGC's Initial Determination that Endodontic's use of the PPA Assumptions rather than the GATT reduced lump sums post-termination in violation of § 4041.8, and that it failed to calculate one participant's compensation using his annualized 2008 compensation as required by the Plan, but, it submitted recalculated benefits for the affected Plan participants and beneficiaries to PBGC for its review and approval. *See generally* AR 463-464, 466-534, 541; *see also* AR 584-85. Endodontic's sole disagreement with PBGC's Initial Determination was that six participants were not majority

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[33] *E.g., Piggly Wiggly So. Inc. v. PBGC*, 1995 U.S. Dist. LEXIS 21934, at *14 (N.D. Ala. Apr. 4, 1995) (enforcing PBGC's standard termination determination), *aff'd*, 82 F.3d 430 (11th Cir. 1996); *see also PBGC v. Wilson N. Jones Mem'l Hosp.*, 250 F. Supp. 2d 676, 682 (E.D. Tex. 2003) (concluding "that PBGC's views on the issues in this [standard termination enforcement] case are entitled to deference"), *aff'd*, 374 F.3d 362 (5th Cir. 2004); *see also Davis v. PBGC*, 571 F.3d 1288, 1293 (D.C. Cir. 2009) ("[W]e defer to the PBGC's authoritative and reasonable interpretations of ambiguous provisions of ERISA."); *Boivin v. US Airways, Inc.*, 446 F.3d 148, 156-57 (D.C. Cir. 2006) (noting that deference applies to PBGC's interpretations of statutory and regulatory provisions); *Sara Lee*, 512 F. Supp. 2d at 37 (granting deference to PBGC on an issue of plan classification under Title IV of ERISA).

owners who were entitled to waive a portion of their benefits in connection with the standard termination.[34] AR 463-64, 542-59. PBGC ultimately agreed with Endodontic on the majority owner issue, which PBGC reversed in its Final Determination. AR 584.

By failing to challenge PBGC's relevant findings in the Initial Determination, Endodontic waived any challenge to these findings, which became final on May 14, 2012. *See* 29 C.F.R. § 4003.22; *see also* AR 584-85. It would be inappropriate for the Court to consider any arguments that were not raised before PBGC.[35] The Court's review of arguments not presented to PBGC would usurp the agency's function, depriving PBGC of an opportunity to consider the matter, make its ruling, and state the reasons for its action.[36] Accordingly, the Court should enforce PBGC's Final Determination.

II. Endodontic Adopted the PPA Amendment after the Date of Plan Termination in Violation of Title IV and 29 C.F.R. § 4041.8.

Under Title IV of ERISA, a plan must be sufficient to pay all benefit liabilities determined as of the date of plan termination. 29 U.S.C. § 1341(b)(1)(D). To that end, post-termination

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[34] Only majority owners are entitled to waive all or part of their plan benefits to make a plan's assets sufficient to complete a standard termination. *See* 29 C.F.R. § 4041.21(b)(2) (discussing requirements for a majority owner's election for alternative treatment in a standard termination).

[35] *See Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010) (noting that "we often refuse to consider arguments — sometimes very good arguments — that were not presented to the agency before being presented to us") (citation omitted).

[36] *Unemployment Comp. Comm'n of Alaska v. Aragan*, 329 U.S. 143, 155 (1946); *Osborne v. Babbitt*, 61 F.3d 810, 814 (10th Cir. 1995) (concluding that the court would not consider arguments not raised in the administrative proceedings); *Micheli v. Dept. of Labor*, 846 F.2d 632, 635 (10th Cir. 1988) (same); *LeBlanc v. EPA*, 310 Fed. Appx. 770, 776 (6th Cir. 2009) ("A reviewing court may not consider arguments that were not previously raised before an administrative agency under the doctrine of issue exhaustion or the administrative waiver doctrine"); *Marfork Coal Co. v. Weis*, 251 Fed. Appx. 229, 237 (4th Cir. 2007) (holding that a party who failed to challenge an administrative law judge's ruling on an issue waived such argument for consideration by the court).

amendments that retroactively reduce plan benefits are prohibited. 29 C.F.R. § 4041.8. As of its date of termination, the Plan provided for the valuation of lump sum benefits using whichever of the GATT Assumptions or the "Plan Factors" produced a greater lump sum amount. AR 119-20. However, on January 19, 2010, more than eight months after the Plan's selected termination date, Endodontic amended the Plan to replace the GATT Assumptions with the PPA Assumptions when calculating lump sum payments. AR 347; *see also* AR 343-60. By adopting the post-termination PPA Amendment and using the PPA Assumptions to calculate lump sums, Endodontic decreased the value of benefits for Plan participants and beneficiaries who elected lump sums by approximately $255,000, and did not pay all benefit liabilities due under the Plan on its termination date in violation of 29 U.S.C. § 1341(b)(1)(D) and 29 C.F.R. § 4041.8.

III. Endodontic Violated Title IV of ERISA by Failing to Calculate Compensation with the Plan's Provisions.

As of the Plan's May 15, 2009 termination date, Plan Section 1.9 contained the requirements for determining a participant's Average Annual Compensation. AR 120-21. In general, the Plan provided that a participant's "Average Annual Compensation" would be determined by averaging the participant's compensation for the three highest consecutive years. *See id.* The Plan further provided that if a participant was employed or covered under the Plan for less than the full period for calculating such compensation, then that participant's Average Annual Compensation "will be the annual equivalent of his or her actual Compensation for such period if the Participant qualifies for a Year of Service or Year of Credited Service." *Id.* In other words, if the participant was covered by the Plan for less than a full year, then the Average Annual Compensation must be determined by projecting that participant's compensation for the partial year to its annual equivalent. For example, if a participant makes $5,000 a month and works only six month in a year, his compensation for that year must assume that he worked the whole year and

earned $60,000 not the $30,000 that he actually earned. However, in calculating one participant's benefit, Endodontic did not project that participant's 2008 compensation to its annual equivalent as required by the Plan's terms. AR 446-48, 584-85. Accordingly, Endodontic must recalculate this participant's Average Annual Compensation with a project of his 2008 compensation to its annual equivalent in accordance with the terms of the Plan.

For the foregoing reasons, Endodontic did not comply with the terms of the Plan, as of the Plan's date of termination, when it calculated the benefits for certain Plan participants and their beneficiaries. Therefore, Endodontic must recalculate the benefits in accordance with PBGC's Final Determination and the terms of the Plan in effect on the date of plan termination.

CONCLUSION

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

Respectfully submitted,

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Washington, D.C.

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