

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 0:14-cv-62302-Dimitrouleas-Snow

In re: APL/NVF Consolidated Pension Plan

PENSION BENEFIT GUARANTY
CORPORATION,

Plaintiff,

v.

ASSET MANAGER, INC.,

Defendant.

**PLAINTIFF PENSION BENEFIT GUARANTY CORPORATION'S
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

PRELIMINARY STATEMENT

The Pension Benefit Guaranty Corporation (“PBGC”) hereby moves for summary judgment on its Complaint seeking a decree adjudicating that the APL/NVF Consolidated Pension Plan (the “Plan”) must be terminated.¹ The Plan covers over 2,000 participants and is underfunded on a termination basis by approximately \$39.2 million. The Plan sponsor, the Estate of Victor Posner (the “Estate”), is in the process of liquidating its assets. The Estate owns all of the shares of the Defendant, Asset Manager, Inc. (“Asset Manager”), the Plan administrator. The Estate has made no provisions to close out the Plan, nor has it made any attempt to ensure continuation of the Plan with a viable entity. The Estate also denied PBGC’s repeated requests to consensually terminate the Plan without PBGC having to file this action for plan termination. After analyzing the materials in the administrative record, PBGC has exercised its statutory authority and has determined that the Plan should be terminated because (1) the plan

¹ 29 U.S.C. § 1342(c).

has not met the minimum funding standard required by the Employee Retirement Security Act of 1974, *as amended* (“ERISA”), and (2) it will ultimately be unable to pay benefits when due. Accordingly, PBGC has concluded that the Plan should be terminated in order to protect the interests of the participants. PBGC’s determination is an informal adjudication by an agency applying its expertise in implementing its governing statute, and thus must be upheld by the Court unless it is arbitrary and capricious. PBGC’s administrative record shows that, far from being arbitrary and capricious, the agency’s determination is fully supported by the administrative record and thoroughly reasonable. Accordingly, the Court should enforce PBGC’s determination and order that the Plan be terminated to protect participants pursuant to 29 U.S.C. § 1342(c).

STATUTORY BACKGROUND

A. PBGC

PBGC is a federal agency and wholly owned United States government corporation.² PBGC administers the termination insurance program under Title IV of ERISA, a “complex and reticulated statute”³ that protects participants in private sector defined benefit pension plans.⁴

PBGC guarantees the pension benefits of more than 41 million participants in approximately 24,000 pension plans,⁵ and is the statutory trustee of nearly 4,700 failed pension plans.⁶ The insurance program administered by PBGC acts as a backstop for American workers, providing retirement income for more than 1 million workers.⁷

PBGC is self-financed, and obtains its revenues exclusively from four sources: (1)

² 29 U.S.C. § 1302(a).

³ *Nachman v. PBGC*, 446 U.S. 359, 361 (1980).

⁴ *See generally PBGC v. LTV Corp.*, 496 U.S. 633, 636-39 (1990).

⁵ 2014 PBGC Annual Report at 2; <http://www.pbgc.gov/about/reports/ar2014.html>.

⁶ *Id.*

⁷ *Id.*

premiums paid by employers sponsoring ongoing plans; (2) investment income; (3) the assets in terminated plans; and (4) recoveries, if any, from employers whose underfunded plans have terminated.⁸ As of the end of fiscal year 2014, PBGC's liabilities for single employer plans exceeded its assets by approximately \$19.3 billion.⁹ PBGC's statutory objectives are to keep premiums as low as possible, as well as providing for the timely and uninterrupted payment of benefits, and encouraging the maintenance of pension plans.¹⁰

B. Plan Termination

Title IV of ERISA provides the exclusive means of terminating a defined benefit pension plan.¹¹ 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 future benefit payments (through the purchase of private sector annuities or payment of lump sums), 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 if it determines that one of the four criteria set forth in 29 U.S.C. § 1342(a) has been met. Among these criteria are: (1) the plan has not met the minimum funding standard; and (2) that the plan will be unable to pay benefits when due.¹² Under 29 U.S.C. § 1342(c), a plan may terminate to avoid "any unreasonable increase in the liability of the [PBGC insurance] fund" and to protect the interests of the participants.

Pursuant to an internal directive, PBGC follows an established administrative process to

⁸ *Id.* at 10.

⁹ *Id.* at 20.

¹⁰ 29 U.S.C. § 1302(a).

¹¹ 29 U.S.C. § 1341(a)(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).

¹² 29 U.S.C. § 1342(a)(1) and (a)(2).

determine whether an underfunded pension plan should be involuntarily terminated and to select a proposed termination date.¹³ PBGC staff collects and examines relevant information and prepares a written recommendation that one or more of the criteria under 29 U.S.C. § 1342(a) has been met, and that the pension plan should be terminated. The staff then submits the recommendation along with supporting documents for PBGC's internal decision making process. Ultimately, PBGC's designated deciding official reviews the recommendations and supporting documents, and determines whether the plan should be terminated and PBGC appointed its statutory trustee.¹⁴ The deciding official also determines the appropriate plan termination date that should be proposed to the plan administrator. The decision is documented in a Notice of Determination ("NOD") and a Termination and Trusteeship Decision Record.¹⁵ PBGC notifies the plan administrator of its determination by sending the administrator a copy of the NOD.¹⁶

PBGC typically effectuates the termination, trusteeship and establishment of termination date of an underfunded plan by agreement with the plan administrator.¹⁷ If PBGC and the plan administrator cannot agree, ERISA authorizes the agency to apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated, and PBGC be appointed its trustee.¹⁸ ERISA also directs that the court establish the termination date if PBGC and the plan administrator cannot agree on a date.¹⁹

¹³ Harclerode Declaration, Exh. 1 (PBGC Directive TR-00-2).

¹⁴ *See id.* at § 5(b).

¹⁵ *See id.* at § 8.

¹⁶ 29 U.S.C. § 1342(c).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 29 U.S.C. § 1348(a)(4).

C. Joint and Several Liability

When an underfunded pension plan terminates in a distress or PBGC-initiated termination, PBGC assumes an unconditional obligation to pay participants and beneficiaries their lifetime Title IV benefits.²⁰ PBGC uses the plan's assets and adds its own funds to make up the remainder of the guaranteed benefits.²¹ The employer, however, is not relieved of its liability for the benefits it promised to its employees. Instead, under ERISA, the employer and each member of its controlled group become jointly and severally liable to PBGC for the "amount of the unfunded benefit liabilities" of the pension plan pursuant to 29 U.S.C. §§ 1362(a) and (b).

STATEMENT OF FACTS

A. The Estate of Victor Posner

Victor Posner died on February 11, 2002.²² The Estate was created February 11, 2002 following the death of Victor Posner. The Estate is subject to probate proceedings in the Circuit Court of the 11th Judicial Circuit, in and for Miami-Dade County, Florida, Probate Division (the "Probate Court"), case no. 02-0595 CP 04. The Estate is currently liquidating all assets of the Estate and expects to complete its liquidation by 2018.²³

Prior to his death, Victor Posner owned, directly or indirectly, approximately 40 business entities.²⁴ Upon his death, the Estate succeeded to Victor Posner's stock interest in these entities.²⁵ Asset Manager was incorporated in the State of Florida on January 16, 2002 to serve

²⁰ 29 U.S.C. §§ 1322, 1361.

²¹ *PBGC v. LTV Corp.*, 496 U.S. 633, 637 (1990).

²² Kenneth N. Gilpin, *Victor Posner*, 83, *Master of Hostile Takeover*, N.Y. TIMES, Feb. 13, 2002, <http://www.nytimes.com/2002/02/13/business/victor-posner-83-master-of-hostile-takeover.html>.

²³ PBGC-S AR at 00036; PBGC-S AR at 00050; PBGC-S AR at 00418-00420. Reference to PBGC's Unsealed Administrative Record volume will be noted herein as PBGC AR. Reference to PBGC's Sealed Administrative Record volume will be noted herein as PBGC-S AR.

²⁴ PBGC-S AR at 00040.

²⁵ FLA. STAT. § 731.201(14) (2014).

as administrator of the Estate and those entities owned by the Estate.²⁶

Certain entities within the Estate sponsored nine defined benefit pension plans.²⁷

Effective December 31, 2008, those nine plans were consolidated into the Plan and the Estate was named the Plan's sponsor.²⁸

On April 5, 2013, PBGC received from the Estate a Form 200, Notice of Failure to Make Required Contributions indicating that the Estate had failed to make the first quarterly required contribution to the Pension Plan for the 2011 plan year of \$559,348.00.²⁹ The Form 200 also indicated that the Estate had failed to make required minimum funding contributions for the 2010 plan year, which caused the amount of the unpaid minimum funding contributions owed to the Pension Plan to exceed \$1 million.³⁰

B. The Plan

The Plan has 2,091 participants.³¹ Asset Manager, Inc. is the plan administrator for the Plan, as defined by 29 U.S.C. §§ 1002(16)(A)-(B), 1301(a)(1).³²

On July 21, 2014, PBGC calculated that as of July 15, 2014, missed minimum funding contributions owed to the Plan totaled \$17,494,136.00, plus accrued interest.³³ On July 23, 2014, PBGC estimated that as of July 31, 2014, the Plan would be collectively underfunded on a termination basis by approximately \$39.2 million.³⁴

²⁶ Asset Manager, Inc. Domestic Filing, Articles of Incorporation, January 16, 2002; Secretary of State, Tallahassee, Florida, <http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=EntityName&directionType=Initial&searchNameOrder=ASSETMANAGER%20P020000056180&aggregateId=domp-p02000005618-42ab605a-9b13-4bed-9bee-1ba143181e8d&searchTerm=asset%20manager&listNameOrder=ASSETMANAGER%20P020000056180>.

²⁷ PBGC-S AR at 00037.

²⁸ *Id.*; PBGC-S AR at 00086. PBGC-S AR at 00136-00189.

²⁹ PBGC-S AR at 00102-00106.

³⁰ *Id.*

³¹ PBGC-S AR at 00037; PBGC-S AR at 00058.

³² Asset Manager, Inc. Answer, ECF No. 12, at 2; PBGC-S AR at 00037.

³³ PBGC-S AR at 00095-00098.

³⁴ PBGC-S AR at 00037; PBGC-S AR at 00041; PBGC-S AR at 00046; PBGC-S AR at 00099.

C. PBGC's Determination

On July 28, 2014, PBGC issued a NOD for the Plan stating that PBGC had determined that the Plan should terminate effective July 31, 2014. In accordance with ERISA, PBGC sent the NOD to Asset Manager, care of Derrick Douglas, Plan Trustee and a member of Asset Manager's management team.³⁵ On July 29, 2014, PBGC published notice of the NOD in *USA Today*, a national newspaper serving the regions where the Plan's participants reside.³⁶ On July 29, 2014, PBGC also issued a press release announcing its determination, which the agency posted on its website.³⁷

PBGC filed this suit on October 6, 2014 requesting, among other relief, a decree from this Court adjudicating that the Plans must be terminated, appointing PBGC statutory trustee, and setting the Plan termination date as July 31, 2014.

PBGC has requested Asset Manager to sign a termination and trusteeship agreement for the Plan, but Asset Manager has refused.³⁸

STANDARD OF REVIEW

The Court reviews PBGC's determination that the Plan should be terminated under the Administrative Procedure Act, and may overturn the determination only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accord with law."³⁹ The arbitrary and

³⁵ PBGC-S AR at 00027-00028; PBGC-S AR at 00029.

³⁶ *Attention All Participants and Beneficiaries of: APL/NVF Consolidated Pension Plan*, USA TODAY, July 29, 2014, at 2A.

³⁷ Agency to Pay Benefits for a Plan Sponsored by the Estate of Victor Posner, PBGC RETIREMENT MATTERS BLOG, (July 29, 2014), <http://www.pbgc.gov/blog/post/2014/07/29/PBGC-to-pay-benefits-for-retirees-covered-by-the-Estate-of-Victor-Posner-Plan.aspx>.

³⁸ Asset Manager, Inc. Answer, ECF No. 12, at 3; PBGC-S AR at 00027-00028; PBGC-S AR at 00030-00035.

³⁹ 5 U.S.C. § 706(2); *PBGC v. LTV Corp.*, 496 U.S. 633, 656 (1990); *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, Inc. v. Volpe*, 401 U.S. 402 (1971). See also *McNichol v. DEA*, 2013 U.S. App. LEXIS 21023, *1 (11th Cir. 2013); *Wright v. Everson*, 543 F.3d 649, 654 (11th Cir. 2008); *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1254 (11th Cir. 2007).

capricious standard of review is narrow.⁴⁰ The Court’s review is limited to a consideration of the agency’s administrative record,⁴¹ and the Court may not substitute its judgment for that of the agency.⁴² Instead, the Court must “consider whether the decision was based on a consideration of relevant factors and whether there was clear error of judgment.”⁴³ Furthermore, the Court is to “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”⁴⁴ In other words, in order to overrule an agency’s decision, the Court must find that the agency’s decision is not reasonable and does not “sensibly conform to the purpose and wording of the regulations.”⁴⁵ The Court’s “obligation to defer to an agency’s reasonable interpretation of its own regulations is rooted not only in [the Court’s] case law, but also in binding Supreme Court precedent.”⁴⁶

Summary judgment is an appropriate vehicle for resolving this case, as this case presents one question of law – whether the administrative record here supports the agency’s determination or whether it shows that the agency’s determination was arbitrary and capricious:

Summary judgment is particularly appropriate in cases in which the court is asked to review or enforce a decision of a federal administrative agency. The explanation for this lies in the relationship between the summary-judgment standard of “no genuine issue of any material fact” and the nature of judicial review of administrative decisions.... [T]he administrative agency

⁴⁰ *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989).

⁴¹ *Overton Park*, 401 U.S. at 420; *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *In re Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). See also *Preserve Endangered Areas of Cobb’s History v. United States Army Corps of Eng’rs*, 87 F.3d 1242, 1246-48 (11th Cir. 1996); *Monarch Shipping Co. v. United States*, 2013 U.S. Dist. LEXIS 152076, *28-29 (S.D. Fla. Aug. 15, 2013).

⁴² *Marsh*, 490 U.S. 376; *Overton Park*, 401 U.S. at 416 (1971); *Sierra Club v. Johnson*, 436 F.3d 1269, 1273 (11th Cir. 2006); *Sierra Club v. United States Army Corps of Eng’rs*, 295 F.3d 1209, 1216 (11th Cir. 2002) (citing *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43).

⁴³ *Overton Park*, 401 U.S. at 416. See also *Johnson*, 436 F.3d at 1273-74 (citing *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43).

⁴⁴ *Wright v. Everson*, 543 F.3d at 654 (11th Cir. 2008) (citing *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43).

⁴⁵ *Johnson*, 436 F.3d at 1274. See also *Legal Envtl. Assistance Found. v. EPA*, 276 F.3d 1253, 1262 (11th Cir. 2001).

⁴⁶ *Id.* See also *U.S. Steel Mining Co. v. Dir., Office of Workers’ Comp. Programs*, 386 F.3d 977, 985 (11th Cir. 2004).

is the ‘fact finder.’ Judicial review has the function of determining whether the administrative action is consistent with law – that and no more.⁴⁷

PBGC’s decision should only be set aside if the decision “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 products of expertise.”⁴⁸ Courts have granted summary judgment to PBGC in numerous administrative record cases.⁴⁹

ARGUMENT

I. PBGC’S DETERMINATION THAT THE PLAN SHOULD BE TERMINATED IS REASONABLE AND FULLY SUPPORTED BY PBGC’S ADMINISTRATIVE RECORD

In Title IV of ERISA, Congress specifically authorized PBGC to determine that a pension plan should be terminated if PBGC concludes that the plan meets any of four criteria specified in 29 U.S.C. § 1342(a). Here, PBGC determined that the Plan should be terminated under 29 U.S.C. § 1342(a)(1) and (2) because the Plan has not met the minimum funding standard and the Plan will be unable to pay benefits when due. PBGC has also determined that the Plan should be terminated under 29 U.S.C. § 1342(c) to protect the interests of the Plan’s participants

⁴⁷ 10B. WRIGHT, A. MILLER & M. KANE, *Federal Practice & Procedure: Civil 2d* § 2733 (3d ed., updated April 2014).

⁴⁸ *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1254 (11th Cir. 2007). *See also McNichol v. DEA*, 2013 U.S. App. LEXIS 21023, *1 (11th Cir. 2013); *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009).

⁴⁹ *See, e.g., PBGC v. Haberbush*, 2000 WL 33362003, *11 (C.D. Cal. Nov. 3, 2000) (terminating a pension plan); *see also PBGC v. Pension Comm. of Pan Am. World Airways, Inc.*, 777 F. Supp. 1179, 1181, 1185 (S.D.N.Y. 1991) (granting order to show cause terminating a pension plan). *See also Piggly Wiggly S. Inc. v. PBGC*, 19 Employee Ben. Cas. 1163 (N.D. Ala. 1995) (granting summary judgment to PBGC in an action concerning standard terminations); *PBGC v. J.D. Indus., Inc.*, 887 F. Supp. 151, 155 (W.D. Mich. 1994) (granting partial summary judgment for PBGC in an action concerning controlled group liability).

and to prevent any unreasonable increase in the liability of the PBGC insurance fund.⁵⁰

If the record supports PBGC's basis for termination of the Plan under either 29 U.S.C. § 1342(a)(1) or (2), PBGC's determination should be upheld.⁵¹ This Court must enforce PBGC's determination unless it finds that the agency's decision was unreasonable and does not "sensibly conform to the purpose and wording of the regulations."⁵²

Here, PBGC's determination is well supported by its administrative record and is most reasonable.

A. The Plan Has Not Met the Minimum Funding Standard

ERISA provides that PBGC may terminate a covered pension plan whenever it determines that the plan has not met the minimum funding standard under the Internal Revenue Code ("IRC").⁵³ PBGC determined that the Plan failed to meet the minimum funding standard.

The administrative record shows that Asset Manager, as plan administrator, and the Estate, as plan sponsor, has made virtually none of the required funding contributions due to the Plan since 2010.⁵⁴ Additionally, on July 25, 2013, PBGC filed Notices of Federal Lien under IRC § 430(k) ("Lien Notices") with certain filing offices in the amount of \$10,128,398.00 against all then-known controlled group members. Because of Asset Manager's and the Estate's failure to make required contributions due by September 15, 2013, October 15, 2013, January 15, 2014, April 15, 2014, and July 15, 2014, PBGC sent to certain filing offices additional Lien Notices against the Estate and all EVP entities for an additional \$7,365,738.00, plus accrued

⁵⁰ PBGC-S AR at 00029; PBGC-S AR at 00036-00037; PBGC-S AR at 00047.

⁵¹ See e.g., *Assoc. of Flight Attendants v. PBGC*, 2006 WL 89829, *11 (D.D.C. Jan. 13, 2006) (PBGC's assessment under § 1342(a)(2) was a reasonable conclusion based on the information available to the agency at the time it made its decision, and thus, it cannot be considered as arbitrary and capricious under the APA.").

⁵² *Sierra Club v. Johnson*, 436 F.3d 1269, 1274 (11th Cir. 2006). See also *Legal Envtl. Assistance Found. v. EPA*, 276 F.3d 1253,1262 (11th Cir. 2001).

⁵³ 29 U.S.C. § 1342(a)(1).

⁵⁴ Since 2010, the following contributions were made to the Plan: (i) October 28, 2013, in the amount of \$40,000.00; (ii) December 26, 2013, in the amount of \$40,000.00; and (iii) October 9, 2014, in the amount of \$100,000.00.

interest, except for those controlled group members who filed bankruptcy in January 2014.⁵⁵ At the time of the Plan's termination recommendation, missed contributions owed to the Plan totaled \$17,494,136.00, plus accrued interest. Thus, PBGC's determination that the Plan has not met the minimum funding standard under the IRC is fully supported by the administrative record and should be sustained.⁵⁶

B. The Plan Will Be Unable to Pay Benefits When Due

ERISA authorizes PBGC the discretion to initiate termination of a pension plan when PBGC finds that the pension plan will be unable to pay benefits when due.⁵⁷ ERISA does not require a finding of when a plan will definitely become unable to pay benefits when due; it simply requires a finding that the plan will eventually, at some point, be unable to pay benefits when due.⁵⁸

The administrative record shows that as of July 31, 2014, the Plan was estimated to be underfunded on a termination basis by approximately \$39.2 million.⁵⁹ Additionally, the administrative record shows that the Estate, which owns Asset Manager, is liquidating its assets.⁶⁰ The Estate is a probate estate being adjudicated in the Probate Division of the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida.⁶¹ Under Florida law, the Estate must liquidate its assets as part of the probate process.⁶² Furthermore, the Estate has

⁵⁵ On January 13, 2014, Boardwalk & Baseball, Inc., Boardwalk Land Development, Inc., and Coleridge Corporation filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code. These cases are being jointly administered in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, *In re Boardwalk & Baseball, Inc.*, Case No. 8:14-bk-317.

⁵⁶ See *PBGC v. Haberbusch*, 2000 WL 33362003, *8 (C.D. Cal. Nov. 3, 2000). As discussed below, this undisputed failure to pay all pension plan contributions required by law was also a key factor in PBGC's other determination that the Plan will ultimately be unable to pay benefits when due.

⁵⁷ 29 U.S.C. § 1342(a)(2)

⁵⁸ *Id.*

⁵⁹ PBGC-S AR at 00037; PBGC-S AR at 00041; PBGC-S AR at 00046.

⁶⁰ PBGC-S AR at 00028; PBGC-S AR at 00036; PBGC-S AR at 00418-00420.

⁶¹ *In re Estate of Victor Posner*, Case No. 02-0595.

⁶² FLA. STAT. §§ 731-739 (2014); FLA. PROB. R. P., 39 FLW S664 (December 26, 2013).

stated that it expects to liquidate its assets by 2018.⁶³

Based on this information, PBGC determined that the Plan faces imminent abandonment.⁶⁴ Specifically, PBGC determined that the Plan will be unable to pay benefits when due.⁶⁵

PBGC's determination that the Plan will be unable to pay benefits when due under 29 U.S.C. § 1342(a)(2) is reasonable and is wholly supported by the administrative record. Accordingly, the Court should grant PBGC's Motion for Summary Judgment, and enter an order terminating the Plan under 29 U.S.C. § 1342(c) to protect the interests of the Plan participants, and appoint PBGC as statutory trustee.

II. THE COURT SHOULD ESTABLISH JULY 31, 2014 AS THE PLAN'S TERMINATION DATE.

In addition to adjudicating the Plan's termination, this Court must also establish an appropriate termination date for the Plan. When PBGC and the plan administrator cannot agree on a date of termination, the Court must set such date.⁶⁶ The courts have fashioned a two-step process for establishing a termination date, which addresses the interests of both plan participants and PBGC:

[T]he District Court ... should begin its analysis by determining the earliest date when the Plan's participants had actual or constructive notice of the Plan's termination, i.e., notice sufficient to extinguish their reliance interest.... Once that date is ascertained, the District Court should then select whatever later date serves the interests of PBGC.⁶⁷

⁶³ PBGC-S AR at 00028; PBGC-S AR at 00036; PBGC-S AR at 00418-00420.

⁶⁴ PBGC-S AR at 00036-00037; PBGC-S AR at 00042.

⁶⁵ PBGC-S AR at 00029; PBGC-S AR at 00036-00037; PBGC-S AR at 00046.

⁶⁶ 29 U.S.C. § 1348(a)(3).

⁶⁷ *PBGC v. Broadway Maint. Corp. (In re Pension Plan for Employees of Broadway Maint. Corp.)*, 707 F.2d 647, 652-53 (2d Cir. 1983) (citation omitted); *see also PBGC v. United Air Lines, Inc.*, 436 F. Supp. 2d 909, 919 (N.D. Ill. 2006), *aff'd sub nom., In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006); *PBGC v. Republic Techs. Int'l, LLC*, 386

Applying these steps to this case leads to the conclusion that the Plan's termination date should be July 31, 2014. By this date, participants had appropriate constructive notice that PBGC was proceeding to terminate the Plan, with a termination date of July 31, 2014. It is also the date PBGC chose as serving the financial interest of the insurance fund because it avoids increased liability. The facts establishing these two key points are undisputed; therefore, PBGC is entitled to judgment as a matter of law.⁶⁸

A. Participants Received Notice by July 29, 2014.

The first appellate court to consider the termination date issue in an involuntary termination action was the Third Circuit in *Heppenstall*.⁶⁹ As the *Heppenstall* court explained, employees may have an “expectation or reliance interest” in the continuation of the pension plan which must be recognized to the extent that the reliance is “justifiable.”⁷⁰ But as soon as the employees have been put on notice that their pension plan may be terminating, they no longer have a “justifiable expectation in a plan’s continuation.”⁷¹ Accordingly, “the earliest date which could properly be selected by the court [as the date of plan termination] is that date on which plan participants had some reasonable notice that PBGC was seeking termination,” and thus the date that they no longer had a justifiable expectation in the continuation of the plan.⁷²

Subsequent courts to review the termination date issue have followed *Heppenstall's* lead, and consistently found that the reliance interests for participants are extinguished on the earliest date

F.3d 659, 666-68 (6th Cir. 2004); *Pension Comm. for Farmstead Foods Pension Plan v. PBGC*, 991 F.2d 1415, 1420 (8th Cir. 1993); *PBGC v. Mize Co.*, 987 F.2d 1059, 1062-63 (4th Cir. 1993); *United Steelworkers of Am. v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1296 (3d Cir. 1983); *PBGC v. Pension Comm. of Pan Am. World Airways, Inc.*, 777 F. Supp. 1179, 1184 (S.D.N.Y. 1991); *PBGC v. Haberbush*, 2000 WL 33362003, *9-10 (C.D. Cal. Nov. 3, 2000).

⁶⁸ See Fed. R. Civ. P. 56(c).

⁶⁹ *PBGC v. Heppenstall Co.*, 633 F.2d 293, 301 (3d Cir. 1980).

⁷⁰ *Id.* at 301.

⁷¹ *Id.*

⁷² *Id.* at 302.

they receive reasonable notice of a termination.⁷³ This notice can be constructive, and courts have routinely held publication to be sufficient notice.⁷⁴

In this case, the participants' expectations that the Plan would continue were extinguished by July 29, 2014, the date on which PBGC published notice on its website stating that it had determined that the Plan should terminate effective July 31, 2014, and the date on which PBGC disseminated notice to a national news service, *USA Today*.⁷⁵ On that date and immediately thereafter, *USA Today* published notice regarding PBGC's determination.⁷⁶ This publication constitutes sufficient notice to extinguish participants' reasonable expectations that the Plan would continue.⁷⁷

B. July 31, 2014 is the Date that Best Protects PBGC's Interests.

Once a court has identified the earliest date on which participants received reasonable notice of their pension plan's termination, it should select a termination date on or after that date

⁷³ See e.g., *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1172-73 (11th Cir. 1988) (en banc) (following the courts in *In re Pension Plan for Employees of Broadway Maint. Corp.*, *PBGC v. Heppenstall Co.*, and *PBGC v. John Hancock Mutual Life Ins. Co.*, 698 F.2d 199 (3d Cir. 1983)); *Mize*, 987 F.2d at 1062 ("participants should be protected until the earliest date on which they received some notice of termination that they no longer had any 'reasonable expectation in the accrual of vested pension rights.'") (quoting *Heppenstall*, 633 F.2d 293); *Broadway Maint.* 707 F.2d at 652-53 ("earliest date when the Plan's participants had actual or constructive notice of the plan's termination" is sufficient to extinguish their reliance interests); *United Steel*, 706 F.2d at 1296 n.16 (3d Cir. 1983) ("[i]n considering the interests of participants, the date on which they first received notice that the plan is to be terminated is significant, and often will be the earliest possible termination date"); *Haberbush*, 2000 WL 33362003 at *9 ("[t]he earliest appropriate termination date is the date on which participants received actual or constructive notice of the plan's termination ... such notice should be sufficient to extinguish the participants' reliance interest in further benefit accruals under the plan") (internal citations omitted); *Pan Am.*, 777 F. Supp. at 1184 (S.D.N.Y. 1991) (following the Court's reasoning in *In re Pension Plan for Employees of Broadway Maint. Corp.*).

⁷⁴ See *PBGC v. Republic Techs. Int'l, LLC*, 386 F.3d 659, 668 (6th Cir. 2004); *Broadway Maint. Corp.*, 707 F.2d at 652-53; *PBGC v. United Air Lines, Inc.*, 436 F. Supp. 2d 909, 920 (N.D. Ill. 2006), *aff'd sub nom.*, *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006).

⁷⁵ *Attention All Participants and Beneficiaries of: APL/NVF Consolidated Pension Plan*, USA TODAY, July 29, 2014, at 2A.

⁷⁶ *Attention All Participants and Beneficiaries of: APL/NVF Consolidated Pension Plan*, USA TODAY, July 29, 2014, at 2A.

⁷⁷ *Republic Techs.*, 386 F.3d at 668 ("the participants' reliance interest where extinguished when PBGC sent out notices indicating its intent to seek termination of the plans.").

that best serves PBGC's interests.⁷⁸ Not surprisingly, courts have concluded that PBGC is the best judge of its own interests.⁷⁹ PBGC has an undeniable interest in protecting its insurance fund from increased liabilities because those funds must be used "to protect the minimally guaranteed benefits of the beneficiaries of all covered plans..., not just the benefits of [one plan sponsor's] employees."⁸⁰

Courts further agree the PBGC's interests should control the establishment of a plan's termination date as long as the date PBGC proposes is on or after the earliest date that the participants' justifiable expectations of plan continuation have been extinguished. If on or after the date the employees received reasonable notice of PBGC's intent to terminate the pension plan was such that PBGC was at risk of an increase in liability on its guaranty, courts have held that they must require selection of such date or a close date thereafter.⁸¹

PBGC is proposing a termination date of July 31, 2014 for the Plan after applying the appropriate standards, expressly accounting for the expectation interests of the Plan's participants, and carefully analyzing its own interests. PBGC thus respectfully asks the Court to

⁷⁸ See, e.g., *Broadway Maint.*, 707 F.2d at 652-53; *Pension Comm. for Farmstead Foods Pension Plan v. PBGC*, 991 F.2d 1415, 1420 (8th Cir. 1993); *Mize*, 987 F.2d at 1062; *United Steel*, 706 F.2d at 1296.

⁷⁹ See *Mize*, 987 F.2d at 1062-64 ("PBGC's interests should be deemed to be best served by the date proposed by PBGC"); *PBGC v. Haberbusch*, 2000 WL 33362003, *10 (C.D. Cal. Nov. 3, 2000) ("PBGC is deemed best able to determine its own interests"); *Republic Techs.*, 386 F.3d at 667 (overturning the district court for failing to give "appropriate deference to PBGC's conclusion that it faced an unreasonable increase in its liability").

⁸⁰ *PBGC v. Pension Comm. of Pan Am. World Airways, Inc.*, 777 F. Supp. 1179, 1183 (S.D.N.Y. 1991); see also *Republic Techs.*, 386 F.3d at 668 (recognizing PBGC's interest in avoiding "unreasonable increase in liability of the fund"); *Farmstead*, 991 F.2d at 1419 (acknowledging PBGC's interest in "protecting the fund from overpayment"); *Mize*, 987 F.2d at 1062 (determining that "PBGC's interest as a self-financing mutual insurer is to protect its fund and the other plans that pay into the fund in the form of termination premiums"); *Broadway Maint.*, 707 F.2d at 652 (identifying "the financial implications of termination for PBGC" as PBGC's interest to be considered); *PBGC v. DiCenso (PBGC v. John Hancock Mutual Life Ins. Co.)*, 698 F.2d 199, 201 (3d Cir. 1983) (stating that PBGC's interest "is the protection of the fund and future premium payments").

⁸¹ *PBGC v. Heppenstall Co.*, 633 F.2d 293, 302 (3d Cir. 1980); *Farmstead*, 991 F.2d at 1420-21; *Mize*, 987 F.2d at 1063; *Broadway Maint.*, 707 F.2d at 653 ("It is appropriate for the District Court to select whatever date, after the participants have had notice, inures to the benefit of PBGC"); *United Steel*, 706 F.2d at 1296; *Haberbusch*, 200 WL 33362003 at *10. See also *PBGC v. Dickens*, 535 F. Supp. 922, 925-26 (W.D. Mich. 1982), *aff'd on other grounds sub nom. In re Challenge Stamping & Porcelain Co.*, 719 F.2d 146 (6th Cir. 1983) (selecting PBGC's proposed date "presumably minimizes the liability of PBGC").

accept the agency's proposed date of July 31, 2014 – when plan participants received notice that their Plan would be terminating – as the Plan's termination date under 29 U.S.C. § 1348(a)(4) and issue an Order accordingly.

CONCLUSION

For the reasons set forth above, the Court should grant summary judgment in favor of PBGC that upholds PBGC's determination that the Plan must be terminated to protect participants, terminates the Plan under 29 U.S.C. § 1342(c), appoints PBGC as statutory trustee of the Plan under 29 U.S.C. § 1342(c), establishes July 31, 2014 as the date of Plan termination under 29 U.S.C. § 1348(a)(4), and grants PBGC any other form of requested and appropriate relief.

Dated: January 21, 2015
Washington, D.C.

Respectfully submitted,

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