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
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Dated: February 21, 2014
Washington, D.C.

ISRAEL GOLDOWITZ
Chief Counsel
KAREN L. MORRIS
Deputy Chief Counsel
SARA B. EAGLE
Assistant Chief Counsel
LOUISA A. FENNELL
Attorney
Pension Benefit Guaranty Corporation
Office of the Chief Counsel
1200 K St., N.W., Suite 340
Washington, D.C. 20005-4026
Phone: (202) 326-4020, ext. 3278
Fax: (202) 326-4112
Emails: fennell.louisa@pbgc.gov
and efile@pbgc.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Plaintiff, Royal Oak,[1] accuses PBGC of trying to expand the requirements of PPA section 1107, which Royal Oak says it followed "to the letter".[2] However, the Final Determination that PBGC seeks to enforce does not concern violations of PPA, but violations of Title IV of ERISA. Assuming that Royal Oak did comply with PPA section 1107, it did not comply with Title IV's standard termination requirement that participants receive the benefits to which they are entitled under the plan's provisions in effect as of the date of plan termination. 29 U.S.C. § 1341(b)(1)(D); 29 C.F.R. § 4041.8. Rather, imbued with its myopic view of the law, Royal Oak chose to adopt the PPA Amendment post-termination, thereby apparently hoping to take advantage of PPA § 1107's anti-cutback relief under the Internal Revenue Code ("IRC") and Title I of ERISA, while ignoring Title IV's prohibition of benefit-reducing, post-termination amendments. *See, e.g.*, PBGC's Final Determination, AR-0874-0876. So, contrary to Plaintiff's allegations, PBGC does not seek to expand its authority, but rather to enforce a Title IV violation of the Plaintiff's own making.

Congress created ERISA and the PBGC, in part, "to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full benefits." 29 U.S.C. § 1001(b)(c)(3). *See also* 29 U.S.C. § 1302. PBGC's Final Determination fulfills this mandate, requiring Royal Oak to pay Plan participants the amounts Royal Oak promised as of the date of plan termination (roughly an additional $2.1 million) – no

---

[1] PBGC incorporates herein the definitions from its Memorandum of Points and Authorities in Support of its Motion for Summary Judgment ("PBGC's S.J. Memo.") (Dkt. 20).

[2] Memorandum of Points and Authorities in Support of Motion for Summary Judgment by Plaintiff, Royal Oak Enterprises, LLC ("Royal Oak's S.J. Memo.") (Dkt. 19) at 13.

more and no less.[3] In accord with PBGC's Final Determination, Royal Oak admits that it calculated lump sum benefits as of the termination date of the Plan using the PPA Amendment, which it adopted *after* the Plan's termination date, and that, in so doing, Royal Oak reduced the value of those benefits.[4] Royal Oak maintains, nonetheless, that it should be permitted to pay participants less than promised on the date of Plan termination because: (1) pursuant to PPA § 1107, the PPA Amendment was effective by operation of law prior to the date of Plan termination; (2) even if the PPA Amendment was not effective pre-termination, it did not decrease benefits in violation of 29 C.F.R. § 4041.8; and (3) even if the PPA Amendment was not effective pre-termination, and it decreased benefits, it is exempted from the 29 C.F.R. § 4041.8 prohibition against benefit-reducing, post-termination amendments, because the decrease in benefits was necessary for plan qualification under the IRC.

But, as PBGC's Final Determination explains, PPA § 1107 provides no relief from Title IV's requirement that all benefits be paid in accordance with the plan provisions in effect on the date of plan termination, the PPA Amendment did decrease benefits, and that decrease in benefits was not necessary for Plan qualification. Accordingly, the Court should uphold the Final Determination.

STATUTORY AND REGULATORY BACKGROUND

In addition to the information provided below, the statutory and regulatory background pertinent to this memorandum is set forth in PBGC's S.J. Memo. at 2-10.

---

[3] *See* PBGC's Final Determination, AR-0874-0876; Royal Oak's S.J. Memo. at 2 (estimating that Royal Oak will have to pay an additional $2.1 million in benefits if the Court upholds PBGC's Final Determination).

[4] *See* Royal Oak's S.J. Memo. at 2; PBGC's Final Determination, AR-0874-0876.

I. PBGC Oversight of Standard Terminations

Title IV's current standard termination procedures were enacted by the Single-Employer Pension Plan Amendments Act of 1986 ("SEPPAA"),[5] which, *inter alia*, streamlined procedures for determining whether a plan had sufficient assets to complete a standard termination, shifting the bulk of responsibility for that procedure to plan administrators and professionals. This change was intended to ease PBGC's administrative burden, and to reduce the filing requirements of plan sponsors.

SEPPAA gave PBGC 60 days from the date a plan sponsor files its standard termination notice to determine whether there is reason to believe that the plan is not sufficient for benefit liabilities, based upon the agency's review of the required documentation (including the Form 500) 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. § 4041.31. Absent a finding from PBGC that the plan is not sufficient for benefit liabilities, after the 60-Day Review Period, the plan administrator must distribute plan assets to participants and beneficiaries in accordance with Title IV of ERISA. *See* 29 U.S.C. § 1341(b)(2)(D), (b)(3); 29 C.F.R. § 4041.28.

Upon receiving a Form 500, PBGC sends (as it did in this case) an acknowledgment of receipt to the filer, stating that assets may be distributed following the 60-Day Review Period. *See* AR-0010-0012. That acknowledgment includes a checklist of Title IV requirements. *See* AR-0011-0012. Alerting plan sponsors and administrators to PBGC's audit program, that checklist includes the following requirement:

---

[5] *See* Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82, 237-82 (1986).

> **Maintain and preserve plan records relating to this termination (including, for example, worksheets prepared by or at the direction of the enrolled actuary to determine the amount, form and value of individual pension benefits) for six years after the date the Form 501 [Post-Distribution Certification] is filed with PBGC.**
>
> *Note: ERISA requires that PBGC annually audit a sample of plans terminating in a standard termination. The sponsor or plan administrator is responsible for making plan records available to PBGC upon request for inspection and photocopying*.

AR-0012 (emphasis in original).

After the plan administrator distributes the plan's assets to participants and beneficiaries, the plan administrator must file a Form 501 – a Post-Distribution Certification for Standard Termination – with PBGC, attesting that all benefits under the plan have been paid in accordance with Title IV. *See* 29 U.S.C. § 1341(b)(3)(B); 29 C.F.R. § 4041.29. After all assets have been distributed and the Form 501 is filed, PBGC continues to have authority over matters relating to the termination of 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. *See also* 29 U.S.C. §§ 1341(b)(1)(D), 1341(b)(3)(A). The instructions for completion of the Forms 500 and 501 also

warn of possible audit.[6]

II. Employers Control When Plans Are Created, Amended, and Terminated

A plan sponsor is generally free to create, modify, or terminate its pension plan at any time,[7] and undertakes those actions as the settlor of a trust.[8] Under Title IV, it is the employer who determines that the plan will be terminated, controls the execution of all plan amendments necessary for termination, and, through its chosen plan administrator, sets the plan's termination date.[9]

STATEMENT OF MATERIAL FACTS

The facts pertinent to this case are set forth in PBGC's S.J. Memo. at 10-14, and are incorporated herein.

---

[6] PBGC's Standard Termination Filing Instructions at 15-16, *available at* http://www.pbgc.gov/documents/500_instructions.pdf.

Therefore, contrary to Royal Oak's implications, the company should not have been surprised that PBGC issued an audit notice after Royal Oak had filed a Form 501 on November 28, 2009. *See* Royal Oak's S.J. Memo. at 9; AR-0013; AR-0017-0019. Royal Oak also disingenuously implies that, having sent the audit notice, PBGC simply waited two years to issue its initial determination. *See* Royal Oak's S.J. Memo. at 2, 9. From the time the audit letter was sent until October of 2011, PBGC was actively engaged in obtaining and analyzing information from Royal Oak to complete the audit. *See, e.g.,* AR-0020 (letter from Royal Oak, dated May 26, 2010, attaching several hundred pages of requested information); AR-0341-0342 (email from PBGC, dated December 20, 2010, requesting additional information); AR-0343-0345 (email from Royal Oak, dated December 22, 2010, attaching additional information); AR-0548-0563 and AR-0586-0617 (series of email exchanges between PBGC and Royal Oak, dated between January 19, 2011, and October 25, 2011, regarding additional information needed to complete PBGC's audit).

[7] *See, e.g.*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999).

[8] *See id.* at 443; *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996).

[9] *See, e.g.*, *Beck v. Pace Int'l Union*, 551 U.S. 96, 101-02 (2007); 29 U.S.C. §§ 1341(a)(2), 1348(a)(1).

STANDARD OF REVIEW

The scope of the Court's review in administrative review cases, like this one, is narrow – PBGC's Final Determination may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[10] Under this standard of review, contrary to Royal Oak's assertions, the first question that confronts the Court is not whether Congress has spoken to the precise question at issue, but rather whether the Administrative Record supports the agency's determination. As long as PBGC's determination "was based on a consideration of the relevant factors," and the "agency has exercised a reasoned discretion," it must be enforced.[11] The agency has done so if it "articulate[s] . . . a rational connection between the facts found and the choice made."[12] The Court's role is to sit as an appellate tribunal reviewing the purely legal question of whether an agency acted in an arbitrary and capricious manner.[13] This standard exists "to ensure that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional."[14]

When an agency's interpretation of its governing statute is at issue, and where Congress has not spoken directly, the agency's determination is entitled to deference unless it is "arbitrary,

---

[10] 5 U.S.C. § 706(2)(A). *See Deppenbrook v. PBGC*, No. 11-600, 2013 WL 2948193, at *4 (D.D.C. June 17, 2013). *See also PBGC v. LTV Corp.*, 496 U.S. 633, 656 (1990).

[11] *Nat'l Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd.*, 618 F.2d 819, 826-27 (D.C. Cir. 1980) (internal quotations and citations omitted).

[12] *Deppenbrook*, 2013 WL 2948193, at *4 (internal quotations and citations omitted).

[13] *See id.*

[14] *Virginia Agric. Growers Ass'n v. Donovan*, 774 F.2d 89, 92-93 (4th Cir. 1985). *See also United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. PBGC*, 839 F. Supp. 2d 232, 245 (D.D.C. 2012) ("[W]here an agency has acted in an area in which it has special expertise, the court must be particularly deferential to the agency's determination.").

capricious, or manifestly contrary to the statute."[15] The Court will apply even greater deference to an agency's interpretation of its own regulations, which "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation."[16] This deference applies where the agency has been given responsibility to issue regulations under the statute in question, to explain responsibilities of those subject to the statute, and to enforce the statute in court.[17] Moreover, an agency's construction of its regulation "need not be the *only* reasonable one before [the court] will sustain it."[18]

In this case, in its role as administrator of Title IV, PBGC interpreted Title IV and PBGC's own regulations in determining that Royal Oak did not fully comply with the Title IV requirements for completing a standard termination of a defined benefit pension plan.[19] Namely, PBGC found that all benefit liabilities owed to plan participants under the Plan's provisions and applicable law had not been paid. Plaintiff's assertions, notwithstanding, PBGC's analysis does

---

[15] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

[16] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotations and citations omitted).

[17] *See Bragdon v. Abbott*, 524 U.S. 624, 646 (1998).

[18] *A.D. Transp. Express, Inc. v. United States*, 290 F.3d 761, 767 (6th Cir. 2002) (internal quotations and citations omitted) (noting that A.D. Transport made "a plausible [] argument" concerning the agency's regulation, but affirming the agency's interpretation). *Cf. LTV Corp.*, 496 U.S. at 656 ("We conclude that the PBGC's failure to consider all potentially relevant areas of law did not render its [] decision arbitrary and capricious."); *United Steel*, 839 F. Supp. 2d at 245 ("While the agency's explanation cannot run [] counter to the evidence, courts should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.") (internal quotations and citations omitted).

[19] PBGC's role in this case bears no resemblance to the role of the Director of the Office of Workers' Compensation Program in *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997), cited by Royal Oak, who the Supreme Court noted would not receive deference in his interpretation of the *APA* itself, which he did not administer. *See* Royal Oak's S.J. Memo. at 10, 20.

not hinge on interpretation of IRC provisions,[20] which merely provide the rate used to determine minimum lump sums and require that the assumptions used to determine actuarial equivalence be stated in the plan.[21] *See* IRC §§ 401(a)(25), 417(e). Moreover, in carrying out its statutory audit obligations, PBGC often must look to ERISA provisions beyond those in Title IV,[22] and PBGC has been afforded broad deference in interpreting the statute and its regulations, including those pertaining to standard termination audits.[23]

---

[20] *See, e.g.*, Royal Oak's S.J. Memo. at 4, 10, 20.

[21] To the extent that any interpretation of PPA § 1107 is relevant to PBGC's Final Determination, PBGC's evaluation of PPA § 1107 is not in opposition to the views of the IRS, which included in its publications an announcement that, with respect to terminating plans, PPA amendments must be adopted before the date of plan termination to be in compliance with Title IV. IRS, Tax Exempt & Gov. Entities Div., EMPLOYEE PLANS NEWS, Vol. 7, Spring 2007, at 12 (IRS Publ'n 3749), *available at* http://www.irs.gov/pub/irs-tege/spr07.pdf. And, in any event, PPA § 1107 is not part of the IRC.

[22] When appropriate, PBGC consults with its sister agencies, IRS and DOL, to ensure consistent interpretation of provisions administered by those agencies.

[23] *See, e.g.*, *PBGC v. Wilson N. Jones Mem'l Hosp.*, 250 F. Supp. 2d 676, 682 (E.D. Tex. 2003) (concluding that PBGC's views on an issue in a standard termination enforcement case, which required interpretation of provisions of Title II of ERISA, were entitled to deference), *aff'd*, 374 F.3d 362 (5th Cir. 2004); *Piggly Wiggly S. Inc. v. PBGC*, CV94-H-1648-S, 1995 U.S. Dist. LEXIS 21934, at *14 (N.D. Ala. Apr. 4, 1995) (enforcing PBGC's standard termination determination requiring interpretation of provisions of Title II of ERISA), *aff'd*, 82 F.3d 430 (11th Cir. 1996). *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. U.S. 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); *Vanderkam v. PBGC*, 943 F. Supp. 2d 130, 144 (D.D.C. 2013) (enforcing a PBGC determination which required interpretation of provisions of Title II of ERISA); *Sara Lee Corp. v. Am. Bakers Ass'n Ret. Plan*, 512 F. Supp. 2d 32, 37-38 (D.D.C. 2007) (granting deference to PBGC on issue of plan classification under Title IV of ERISA). *But see Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 140-41 (1st Cir. 2013) (allowing *Skidmore* deference to PBGC Appeals Board decision requiring the interpretation of provisions of Title II of ERISA).

ARGUMENT

THE COURT SHOULD UPHOLD PBGC'S DETERMINATION BECAUSE IT IS FULLY SUPPORTED BY THE ADMINISTRATIVE RECORD AND IS NOT ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW

As PBGC's Final Determination explains, Royal Oak adopted the PPA Amendment too late – plain and simple. *See* AR-0874-0876. The statute and regulations governing standard terminations are very clear on this point – benefits must be determined as of the date of plan termination using the plan provisions in effect on the plan's termination date. *See* 29 U.S.C. § 1341(b)(1)(D); 29 C.F.R. § 4041.8(a). As outlined in the Final Determination, because the PPA Amendment was adopted over a month *after* the Plan terminated, the terms of the PPA Amendment were not terms of the Plan on its termination date, and therefore cannot be used to calculate and pay benefits that were less than the amounts owed to participants and beneficiaries on termination. Contrary to Royal Oak's assertions, PPA § 1107 does not change this analysis, nor can the PPA Amendment be painted as not decreasing benefits or as being exempt from PBGC Regulation § 4041.8 as necessary for Plan qualification.

I. PPA § 1107 Does Not Change the Fact That the Post-Termination PPA Amendment Is Not Taken Into Account on Plan Termination

A. PPA § 1107 Does Not Change The Adoption Date Of The PPA Amendment

PBGC is not, as Royal Oak accuses, attempting to "engraft" additional requirements onto PPA § 1107. *See* Royal Oak's S.J. Memo. at 13-14. PBGC is enforcing the requirements of its regulation, which are separate from those of PPA § 1107. So, while it is true that, to receive the anti-cutback relief provided by PPA § 1107, an amendment could be made up until the last day of the 2009 plan year, it nonetheless is also true that, to comply with Title IV's requirements, a

PPA amendment that reduced benefits had to be made by the Plan's termination date. And, contrary to Royal Oak's assertions, nothing in PPA § 1107 changes this fact.

PPA § 1107 provides no relief from Title IV. And, while PPA § 1107 allows for retroactive amendments in certain circumstances, it does not transform the PPA Amendment (retroactive or not) into one adopted before the date of Plan termination. It merely provides that, to ensure relief from the IRC and ERISA Title I anti-cutback prohibitions, once an amendment is made, the plan will be treated as operating in accordance with the amendment prior to its adoption, so long as the amendment was 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.[24] *See* PPA § 1107, AR-0859-0860.

Certainly, if it chose to do so, Congress could have provided relief from Title IV's requirements in PPA § 1107, especially given that the issue is not new. Back in 1994, in connection with the adoption of the GATT rates for calculating lump sums, Congress provided plan sponsors with relief from the anti-cutback provisions of the IRC and ERISA, as it did in PPA § 1107. In standard termination audits where sponsors amended their plans after the selected termination date to adopt and pay lower lump sums using GATT rates, PBGC similarly disallowed the post-termination GATT amendments that reduced benefits, finding them not

[24] As noted below, Royal Oak asserts that it "brought the Plan into operational compliance with the PPA beginning January 1, 2008," Royal Oak S.J. Memo. at 7, but fails to provide any details about this purported "operational compliance," or to explain how this allows Royal Oak to ignore the Plan terms on the date of Plan termination in order to pay participants and beneficiaries less than they were promised.

necessary for plan qualification.[25]

It is also consistent with Title IV that PPA § 1107 did not include Title IV relief. Under Title IV, the termination date must be specified and adhered to, setting a known date as of which plan benefits must be determined. In the standard termination context, Congress explicitly required that all benefit liabilities to participants and beneficiaries be determined as of the termination date. *See* 29 U.S.C. § 1341(b)(1)(D).[26]

B. PBGC's Enforcement Of Title IV Does Not Create Irreconcilable Conflicts

1. IRS Determination Letters Have No Bearing On PBGC's Enforcement Of Title IV

Royal Oak maintains that PBGC's Final Determination "cannot be reconciled with the IRS's favorable determination of this Plan's qualification upon termination." Royal Oak's S.J. Memo. at 14. The actual IRS determination letter suggests otherwise. As explained in PBGC's S.J. Memo. at 8, the IRS letter merely states that, based on the information Royal Oak provided to the IRS, the termination does not adversely affect the Plan's qualification for federal tax purposes. *See* AR-0745-0747. In noting that it is only reviewing materials provided by Royal Oak, the IRS implicitly acknowledges that it is neither commenting on how a different plan amendment would affect plan qualification, nor stating that only the plan amendment submitted

---

[25] *See, e.g.*, David A. Pratt, *Focus on…Interest Rates for Terminating Defined Benefit Plans*, J. PENSION BENEFITS, Spring 2008, at 5, 6; Harold J. Ashner, *PPA Lump Sum Amendments in Standard Terminations: Watch Out!*, ASSPA GOV'T AFFAIRS COMM. PUBL. 06-38 (Nov. 1, 2006) (addressing PBGC's disallowance of benefit-reducing, post-termination amendments after the passage of GATT, and noting that the agency would evaluate similarly benefit-reducing, post-termination PPA amendments).

[26] PBGC could not effectively administer ERISA's Title IV termination program if it could not rely on plan administrators to follow a plan's terms as of the selected termination date in calculating and paying benefits to participants and beneficiaries, leaving PBGC to wait and see if and when plan administrators might adopt post-termination amendments, or whether plan liabilities might increase or decrease after a plan's termination date.

for IRS review, and no other amendment, would be acceptable for purposes of plan qualification. The letter continues: "Please note that this is not a determination regarding the effect of other federal or local statutes." AR-0745. Given these caveats, the IRS determination letter in no way conflicts with the PBGC's determination that the PPA Amendment violated PBGC Regulation § 4041.8.

2. PBGC's Determination Of Benefits In Terminated Plans Is Irrelevant To Standard Terminations

Royal Oak next asserts that PBGC's Final Determination conflicts with "the way that PBGC determines the effective date of plan provisions in cases where PBGC itself pays benefits," as outlined in the case *Davis v. PBGC*, 734 F.3d 1161 (D.C. Cir. 2013). *See* Royal Oak's S.J. Memo. at 15. *Davis*, however, does not concern a post-termination amendment, nor does it address PBGC's interpretation of its regulation at 29 C.F.R. § 4041.8. Rather, it involves the termination of an underfunded plan initiated by PBGC, not a standard termination, and the interpretation of the plan terms in effect on the date of plan termination. Moreover, the regulations discussed are not at issue in this case.[27]

At most, the language cited by Plaintiff indicates that plan amendments can be retroactive. But, PBGC does not maintain that plan amendments cannot be retroactive, only that, if the amendments decrease benefits and are adopted after the date of plan termination, they

[27] The regulations discussed in *Davis* are used to determine the order in which plan assets are allocated to plan benefits under ERISA § 4044. *See* 29 U.S.C. § 1344. That section is used in all Title IV terminations, allocating plan assets through six categories of benefits. *See* 29 U.S.C. § 1344(a). In a standard termination, however, benefits must be allocated and paid through all six stated priority categories. *See* 29 U.S.C. § 1341(b)(1)(D). In an involuntary termination, by contrast, PBGC allocates a plan's assets through the six categories until they run-out. But in the case of all terminations under Title IV, benefit liabilities must be determined as of the date of plan termination. *See, e.g.*, 29 U.S.C. §§ 1341(b)(1)(D), (c), 1362(b).

cannot be used to value benefits in a standard termination. *See* PBGC's Final Determination, AR-0874-0876.

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

Given that the PPA Amendment is in fact a post-termination amendment, Royal Oak next argues that the post-termination amendment is permitted by PBGC Regulation § 4041.8 because it does not decrease benefits, or, if it does decrease benefits, that decrease is allowed because it is necessary for Plan qualification. *See* Royal Oak's S.J. Memo. at 15-20. These arguments are meritless.

A. The PPA Amendment Decreases Plan Benefits

Despite the fact that Royal Oak openly admits that Plan participants received $2.1 million less in benefits under the post-termination PPA Amendment than they would have received under the plan terms in effect on the termination date, it argues that this large decrease in lump sum benefits is, in fact, not a decrease at all. And, therefore, there is no violation of PBGC Regulation § 4041.8. This conclusion, however, is based on a completely erroneous application of 26 U.S.C. § 417(e), and Plaintiff's flawed interpretation of PPA § 1107, which has already been discussed. *See supra* Argument, Part I.A.

Royal Oak persists in arguing that IRC § 417(e) provides the means for calculating lump sum benefits. *See, e.g.*, Royal Oak's Request for Reconsideration, AR-0734-0743; Royal Oak's Compl. at ¶¶ 15, 18 (Dkt. 1); Royal Oak's S.J. Memo. at 16-17. But, as PBGC's Final Determination makes clear, IRC § 417(e) simply provides that the lump sum actuarial equivalent of an annuitized benefit "*shall not be less than*" a lump sum calculated using the actuarial

assumptions prescribed in that section.[28] *See* PBGC's Final Determination, AR-0874-0876. Nothing in IRC § 417(e) prohibits a plan from paying larger lump sums, and nothing in that section allows a plan to ignore: (1) the terms of a plan that provide for a larger lump sum; or (2) Title IV's requirement that benefits be determined in accordance with the plan provisions in effect on the date of plan termination. Accordingly, there is no credible argument that, because Royal Oak calculated lump sums using the rates prescribed in IRC § 417(e), it did not decrease benefits.

Royal Oak nonetheless urges the Court to ignore the fact that participants and beneficiaries are entitled to receive more money if the terms of Plan, as of the date of Plan termination, are applied. Royal Oak maintains that, because Congress changed actuarial assumptions for calculating the minimum lump sum that could be paid under a plan, this means that, even if a plan's provisions require payment of a larger lump sum, the plan can simply pay the minimum required by IRC § 417(e). Royal Oak says this is proven by the fact that Congress allowed anti-cutback relief under the IRC and Title I of ERISA for plans that adopted PPA minimums by the end of the 2009 plan year. *See* Royal Oak's S.J. Memo. at 17. But the relief allowed by Congress did not include relief from the Title IV requirement that all benefit liabilities be paid in a standard termination as of the date of plan termination, and PBGC Regulation § 4041.8 ensures that benefit-reducing, post-termination amendments will not be

[28] Although Plaintiff suggests that PBGC is interpreting this section, it is clear that there is absolutely no need for interpretation. The words used, "shall not be less than," plainly indicate that a minimum is required.

taken into account.[29]

Because the PPA Amendment, which Royal Oak chose to adopt post termination, resulted in participants and beneficiaries receiving roughly $2.1 million less than they were entitled to receive under the terms of the Plan on the date of Plan termination, and because IRC § 417(e) does not change this fact, PBGC's Final Determination, concluding that the PPA Amendment violates Title IV and PBGC Regulation § 4041.8, should be upheld.

B. The PPA Amendment Does Not Satisfy PBGC Regulation § 4041.8's Plan Qualification Exemption

Finally, Royal Oak argues that even though PBGC appears to require that the Plan pay the "richer" of lump sums calculated using PPA assumptions and GATT assumptions, "[n]othing in PPA, IRC section 417(e), or IRS guidance thereunder requires" it to do so. Royal Oak's S.J. Memo. at 19. While PBGC acknowledges that plans had to be amended to provide for the payment of lump sums that were not less than those required by PPA's amendment to IRC § 417(e), PBGC does not dictate the form of a plan's PPA amendments. It is the plan sponsor that determines when and how to amend its plan. PBGC's Regulation § 4041.8 only requires that, if an amendment is made after plan termination, that amendment not be taken into account if it results in a benefit decrease.

If Royal Oak had attended to Title IV's requirements as closely as it did to the IRC's requirements when it terminated the plan, it easily could have avoided violating Title IV and

---

[29] The technical explanation cited by Royal Oak simply states that the proposed PPA bill will change the interest rate and mortality table used to calculate minimum lump sums, and that the bill provides relief from the "anticutback" rule for certain retroactive amendments that meet certain requirements. *See* Royal Oak's S.J. Memo. at 17; Joint Comm. on Taxation, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006," as Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006, JCX-38-06, at 76 n.86 (Aug. 3, 2006), *available at* http://www.dol.gov/ebsa/pdf/x-38-06.pdf.

PBGC's regulations, while still complying with the IRC. For instance, Royal Oak need only have adopted the PPA Amendment before the date of Plan termination, or adopted a post-termination amendment that did not result in a benefit decrease. But, PBGC does not dictate, as Royal Oak suggests, how the Plan should have been amended. PBGC's discussion of an amendment paying the greater of lump sums calculated using PPA-dictated minimums or those prescribed under the plan is simply an illustration of the fact that Royal Oak (having chosen to adopt a post-termination amendment) did not have to adopt the PPA Amendment to comply with the new IRC § 417(e) minimums. Thus, as PBGC's Final Determination states, the PPA Amendment was not the only amendment that Royal Oak could have made for IRC qualification purposes, and therefore was not an amendment required for Plan qualification.[30]

Having run afoul of Title IV, Royal Oak attempts to use its disregard of PBGC's standard termination requirements to excuse its decision to adopt the PPA Amendment post-termination. Royal Oak tells the Court that, for the Plan to remain qualified, it must now comply with its chosen post-termination PPA Amendment, by paying $2.1 million less in benefits to plan participants and beneficiaries. To do otherwise, according to Royal Oak, would require making overpayments, not in compliance with the PPA Amendment. *See* Royal Oak's S.J. Memo. at 19-

[30] Although Royal Oak disagrees, PBGC's Final Determination is entirely consistent with IRC Regulations. PBGC's Final Determination states: "[Royal Oak] could have amended the Plan to pay the greater of the PPA interest rates and the 30-year Treasury rates [*i.e.*, the rates outlined in the Plan]. As a result, the PPA Amendment eliminating the use of 30-year Treasury rates and the GAM 94 mortality table for valuing lump sums was not necessary for Plan qualification, and the exception under 29 C.F.R. § 4041.8(c)(1) does not apply." AR-0875-0876. IRC Regulation 1.417(e)-1(d)(5) specifically contemplates such treatment, providing that, for example, "if a plan provides for use of an interest rate of 7% and the UP-1984 Mortality Table . . . in calculating single-sum distributions, the plan must provide that any single-sum distribution is calculated as the greater of the single-sum benefit calculated using 7% and the UP-1984 Mortality Table and the single-sum benefit calculated using the applicable interest rate and the applicable mortality table." IRC Reg. 1.417(e)-1(d)(5). IRS PPA guidance likewise provided for such amendments to comply with PPA. *See* 2008-12 I.R.B. 638-42, IRS Notice 2008-30.

20. Royal Oak says this course of action is allowable under Title IV because PBGC Regulation § 4041.8 takes into account benefit-decreasing, post-termination amendments that are necessary for plan qualification.

PBGC's Regulation § 4041.8, however, does not allow Royal Oak to take the PPA Amendment into account. PBGC Regulation § 4041.8 speaks only to the amendment itself, and whether the decrease in benefits it makes is necessary for plan qualification. In the instant case, the amendment decreasing benefits was not necessary for Plan qualification. What a plan sponsor has to do to comply with an unnecessary, post-termination, benefit-decreasing amendment is not considered in determining whether the amendment itself was necessary for plan qualification. That being said, on the date of Plan termination, Royal Oak had not yet adopted its PPA Amendment. Therefore, payments calculated pursuant to the terms of the Plan on the date of Plan termination, as required under Title IV, do not result in overpayments, but instead result in participants and beneficiaries receiving exactly what they were promised on plan termination, as was intended by Congress under Title IV, which is administered solely by PBGC. Accordingly, PBGC's Final Determination cannot be considered arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

CONCLUSION

For the foregoing reasons, the Court should deny Royal Oak's motion for summary judgment and enter an order upholding PBGC's Final Determination.[31]

Respectfully submitted,

Dated: February 21, 2014
Washington, D.C.

/s/ Louisa A. Fennell
ISRAEL GOLDOWITZ (DC 291120)
Chief Counsel
KAREN L. MORRIS (DC 419786)
Deputy Chief Counsel
SARA B. EAGLE (DC 421818)
Assistant Chief Counsel
LOUISA A. FENNELL (NY 4616736)
Attorney
Pension Benefit Guaranty Corporation
Office of the Chief Counsel
1200 K St., N.W., Suite 320
Washington, D.C. 20005-4026
Phone: (202) 326-4020, ext. 3278
Fax: (202) 326-4112
Emails: fennell.louisa@pbgc.gov
and efile@pbgc.gov

[31] Pursuant to Local Civil Rule 7(f), Royal Oak requested oral argument on the summary judgment motions. The local rule provides that the allowance of oral argument "shall be within the discretion of the court." D.D.C. Civ. R. 7(f). PBGC believes that the issues in this case are straightforward and will have been fully briefed by the parties, and that oral argument would not be particularly useful to the Court in rendering its decision.