

JUDITH STARR, General Counsel  
KARTAR S. KHALSA, Deputy General Counsel  
SARA B. EAGLE, Assistant General Counsel  
ERIN C. KIM, Attorney, CA 273710  
Pension Benefit Guaranty Corporation  
Office of the General Counsel  
1200 K Street, N.W.  
Washington, D.C. 20005-4026  
Tel.: (202) 326-4020, ext. 3399  
Fax: (202) 326-4112  
E-mails: kim.erin@pbgc.gov and efile@pbgc.gov

*Attorneys for Plaintiff Pension Benefit Guaranty Corporation*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

PENSION BENEFIT GUARANTY  
CORPORATION

Plaintiff,

v.

IDAHO HYPERBARICS, INC.  
as Plan Administrator  
of the Idaho Hyperbarics, Inc.  
Defined Benefit Plan

Defendant.

Case No. 4:16-cv-00325-CWD

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

**TABLE OF CONTENTS**

PRELIMINARY STATEMENT .....1

STATUTORY AND REGULATORY BACKGROUND.....2

    I. ERISA and PBGC.....2

    II. Plan Terminations .....2

        A. Overview.....2

        B. Standard Terminations .....3

            1. Procedure .....3

            2. Audit .....4

STATEMENT OF MATERIAL FACTS.....5

STANDARD OF REVIEW .....11

ARGUMENT .....13

    PBGC’s Determinations That Idaho Hyperbarics Failed to Pay the Participants’ Full  
    Benefits Is Reasonable and Fully Supported by PBGC’s Administrative Record .....13

CONCLUSION.....18

## TABLE OF AUTHORITIES

### Cases

<i>Arizona Cattle Growers’ Association v. U.S. Fish &amp; Wildlife Service</i> , 273 F.3d 1229 (9th Cir. 2001) .....	11
<i>Asarco, Inc. v. EPA</i> , 616 F.2d 1153 (9th Cir. 1980) .....	11
<i>Beck v. PACE International Union</i> , 551 U.S. 96 (2007).....	2, 3
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971).....	11, 12
<i>Ecology Center v. Castaneda</i> , 574 F.3d 652 (9th Cir. 2009) .....	13
<i>Flo-Con Systems, Inc. v. Pension Benefit Guaranty Corporation</i> , 39 F. Supp. 2d 995 (C.D. Ill. 1998) .....	13
<i>Florida Power &amp; Light Co. v. Lorion</i> , 470 U.S. 729 (1985).....	11
<i>Friends of the Earth v. Hintz</i> , 800 F.2d 822 (9th Cir. 1986) .....	11
<i>Hughes Aircraft Co. v. Jacobson</i> , 525 U.S. 432 (1999).....	2
<i>Johnson v. U.S. Forest Service</i> , 93 F. App’x 133 (9th Cir. 2004) .....	12, 13
<i>Kauble v. Pension Benefit Guaranty Corporation</i> , No. IP 93-1331, 1994 WL 722966 (S.D. Ind. 1994), <i>aff’d mem.</i> , 94 F.3d 647 (7th Cir. 1996) .....	13
<i>Kootenai Tribe of Idaho v. Veneman</i> , 142 F. Supp. 2d 1231 (D. Idaho 2001) .....	12
<i>Lands Council v. Powell</i> , 395 F.3d 1019 (9th Cir. 2005) .....	11
<i>Northwest Ecosystem Alliance v. U.S. Fish &amp; Wildlife Service</i> , 475 F.3d 1136 (9th Cir. 2007) .....	12

<i>Northwest Motorcycle Association v. U.S. Department of Agriculture</i> , 18 F.3d 1468 (9th Cir. 1994) .....	11, 13
<i>Occidental Engineering Co v. I.N.S.</i> , 753 F.2d 766 (9th Cir. 1985) .....	11, 13
<i>Pacific Coast Federation of Fishermen’s Associations v. Blank</i> , 693 F.3d 1084 (9th Cir. 2012) .....	12
<i>Pension Benefit Guaranty Corporation v. FEL Corporation</i> , 798 F. Supp. 239 (D.N.J. 1992) .....	13
<i>Pension Benefit Guaranty Corporation v. Haberbusch</i> , No. 2631GHKAIJX, 2000 WL 33362003 (C.D. Cal. Nov. 3, 2000).....	13
<i>Pension Benefit Guaranty Corporation v. J.D. Industries, Inc.</i> , 887 F. Supp. 151 (W.D. Mich. 1994) .....	13
<i>Pension Benefit Guaranty Corporation v. Kentucky Bancshares, Inc.</i> , 597 F. App’x 841 (6th Cir. 2015), <i>aff’g</i> , 7 F. Supp. 3d 689 (E.D. Ky. 2014) .....	13
<i>Pension Benefit Guaranty Corporation v. LTV Corporation</i> , 496 U.S. 633 (1990).....	11
<i>Pension Benefit Guaranty Corporation v. Pension Committee of Pan American World Airways</i> , 777 F. Supp. 1179 (S.D.N.Y. 1991) .....	13
<i>Pension Benefit Guaranty Corporation v. Town &amp; Country Bank &amp; Trust Co.</i> , No. 3:11-cv-602-H, 2012 WL 4753352 (W.D. Ky. Oct. 4, 2012).....	13
<i>Pension Benefit Guaranty Corporation v. Wilson H. Jones Memorial Hospital</i> , 374 F.3d 362 (5th Cir. 2004), <i>aff’g</i> , 250 F. Supp. 2d 676 (E.D. Tex. 2003).....	13
<i>Piggly Wiggly Southern Inc. v. Pension Benefit Guaranty Corporation</i> , No. 94-01648-CV-H-S, 19 Employee Benefits Cases (BNA) 1163 (N.D. Ala. 1995) .....	13
<i>Powell Valley National Bank v. Pension Benefit Guaranty Corporation</i> , No. 2:12cv00018, 2013 WL 4759242, 56 Employee Benefits Cases (BNA) 2835 (W.D. Va. Sept. 4, 2013) .....	13
<i>Royal Oak Enterprise, LLC v. Pension Benefit Guaranty Corporation</i> , 78 F. Supp. 3d 431 (D.D.C. 2015).....	13

U.S. Codes

Title 5

Section 706(2)(A) .....11

Title 26

Section 401(a)(2) .....14  
Section 411(b)(1)(F) .....1, 3, 14  
Section 411(a)(4) .....15  
Section 411(d)(3) .....1, 15  
Section 412(e) .....6

Title 29

Section 1001(c) .....2  
Section 1001b(c)(3) .....2  
Section 1002(16) .....6  
Section 1103(c)(1) .....14  
Section 1301(a)(1) .....6  
Section 1301(a)(13) .....6  
Section 1302 .....2, 5  
Section 1303(a) .....4  
Section 1341(a)(1) .....2  
Section 1341(a)(2) .....3  
Section 1341(b) .....2, 3, 4  
Section 1341(b)(1)(D) .....1, 4  
Section 1341(b)(2)(A) .....3  
Section 1341(b)(2)(B) .....3  
Section 1341(b)(2)(C) .....4  
Section 1341(b)(2)(D) .....4  
Section 1341(b)(3) .....4  
Section 1341(b)(3)(B) .....4  
Section 1341(b)(4) .....4

Other Authorities

29 C.F.R. § 4003.1(b)(3)(iii) .....4  
29 C.F.R. § 4003.21 .....5  
29 C.F.R. §§ 4003.21-4003.35 .....4  
29 C.F.R. § 4003.22 .....5, 9, 10  
29 C.F.R. § 4003.32 .....5  
29 C.F.R. § 4003.34 .....5  
29 C.F.R. § 4003.35 .....5

29 C.F.R. § 4041.2 .....	1, 9, 11, 16, 17
29 C.F.R. § 4041.8 .....	1
29 C.F.R. § 4041.23 .....	3, 16
29 C.F.R. § 4041.24 .....	3
29 C.F.R. § 4041.25 .....	3
29 C.F.R. § 4041.25(c).....	4
29 C.F.R. § 4041.26 .....	4
29 C.F.R. § 4041.28 .....	4
29 C.F.R. § 4041.29 .....	4
29 C.F.R. § 4041.29(a).....	4
ERISA § 403(c)(1).....	17
ERISA § 4041(b)(3).....	17
IRC § 401(a)(2).....	17
IRC § 411(b)(1)(F).....	7, 10, 17
IRC § 411(d)(3).....	17
Pension Benefit Guaranty Corporation, Form 500 Instructions, <a href="http://www.pbgc.gov/Documents/500_Instructions.pdf">http://www.pbgc.gov/Documents/500_Instructions.pdf</a> .....	3

Plaintiff, Pension Benefit Guaranty Corporation (“PBGC”), files this memorandum in support of its motion for summary judgment upholding its administrative determination that Idaho Hyperbarics, Inc. (“Idaho Hyperbarics” or the “Defendant”) failed to complete the standard termination of the Idaho Hyperbarics, Inc. Defined Benefit Plan (the “Plan”) in accordance with the Plan’s provisions and applicable laws. Accordingly, over \$370,000 in additional benefits are owed to Plan participants.

### **PRELIMINARY STATEMENT**

When an employer terminates a pension plan that has sufficient assets to pay all benefits, plan participants must receive the benefits to which they are entitled under the plan’s provisions and applicable law. *See* 29 U.S.C. § 1341(b)(1)(D); 29 C.F.R. § 4041.8. Idaho Hyperbarics, however, has failed to pay Plan participants those required benefits. Instead, as fully supported by PBGC’s administrative record, Idaho Hyperbarics improperly reduced the benefits of approximately 17 Plan participants by: (1) failing to pay Plan participants the full cash surrender value of their Plan insurance contracts at Plan termination as required under 26 U.S.C. § 411(b)(1)(F); (2) failing to pay the full amount of benefits elected by a participant; (3) failing to vest certain Plan participants on the Plan’s termination as required under 26 U.S.C. § 411(d)(3); and (4) improperly reducing of the benefits of Plan participants who were not majority owners eligible to waive their benefits under 29 C.F.R. § 4041.2.

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, far from being arbitrary and capricious, the agency’s determination is completely

supported by the administrative record, thoroughly reasonable, and in accordance with law.<sup>1</sup>

Accordingly, the Court should affirm PBGC's final agency determination and require Idaho Hyperbarics to pay the additional benefits owed to Plan participants.

## **STATUTORY AND REGULATORY BACKGROUND**

### **I. ERISA and PBGC**

Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA") to provide minimum standards that assure the equitable character and financial soundness of employee pension plans. *See* 29 U.S.C. § 1001(c). Congress also declared it to be a policy of ERISA "to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full benefits." 29 U.S.C. § 1001b(c)(3). Congress established PBGC as the United States government agency that administers and enforces the nation's defined benefit pension plan termination insurance program under Title IV of ERISA ("Title IV"). 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).<sup>2</sup> In the case of a single-employer defined benefit plan covered under Title IV that has sufficient assets to pay all participants their full benefits, such plan may be terminated voluntarily through the "standard termination" filing procedure.

29 U.S.C. § 1341(b). A standard termination requires that the pension plan have sufficient assets

---

<sup>1</sup> PBGC has filed the administrative record supporting its determination against Idaho Hyperbarics. *See generally* Administrative Record (Dkt No. 11, hereinafter the "Administrative Record" or "AR").

<sup>2</sup> *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).



to pay all promised benefits. *Id.* For a 412(e) plan, a plan which is fully and solely funded through insurance policies under 26 U.S.C. § 412(e), participants are entitled to the full cash surrender value of their insurance contracts. 26 U.S.C. § 411(b)(1)(F).

## **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. 29 U.S.C. § 1341(a)(2); 29 C.F.R. § 4041.23. The plan administrator must then send notices to each plan participant, beneficiary, alternate payee, and to each employee organization representing any participants, informing them of the proposed termination date. The plan administrator must also provide those parties with a notice explaining the benefits the plan owes to each affected party. *See* 29 U.S.C. §§ 1341(a)(2), 1341(b)(2)(B); 29 C.F.R. §§ 4041.23, 4041.24. Before distributing any plan assets, the plan administrator must send PBGC a Standard Termination Notice – PBGC Form 500 (“Form 500”) with information including the proposed date of plan termination, and detailed information about plan assets and 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.<sup>3</sup> 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.

---

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

§ 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.<sup>4</sup>

A final distribution of assets may only occur in a standard termination if plan assets are sufficient to pay all participants for benefit liabilities determined as of the plan's termination date. 29 U.S.C. § 1341(b)(1)(D). Once the plan administrator has distributed the plan's assets, he must notify PBGC by filing a Post-Distribution Certification for Standard Termination – PBGC Form 501 (“Form 501”), attesting that all benefits under the plan were paid in accordance with Title IV. *See* 29 U.S.C. § 1341(b)(3)(B); 29 C.F.R. § 4041.29.<sup>5</sup> Following receipt of the Form 501, PBGC continues to have authority regarding matters relating to the plan, 29 U.S.C. § 1341(b)(4).

## **2. Audit**

Title IV of ERISA mandates that PBGC audit a statistically significant number of standard terminations to determine, *inter alia*, if everyone entitled to a benefit has received their full benefits under the terms of the plan. 29 U.S.C. § 1303(a). PBGC's audits are subject to review under PBGC's administrative review procedures. 29 C.F.R. §§ 4003.1(b)(3)(iii), 4003.21-4003.35.

---

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

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

Upon PBGC's completion of an audit, if any violations were found by the auditor, PBGC issues an initial determination letter, informing the pension plan sponsor or administrator of the auditor's determinations, the reason for the determinations, and the process to request review of those determinations. 29 C.F.R. § 4003.21. The pension plan sponsor or administrator generally has 30 days to submit a request for reconsideration. 29 C.F.R. §§ 4003.32, 4003.34. Absent a request for reconsideration, PBGC's initial determination becomes final. 29 C.F.R. § 4003.22. When a request for reconsideration is received in a standard termination audit case, generally (as in this case) the manager of PBGC's Standard Termination and Compliance Division reviews the request and makes the final agency determination of whether the initial determination should be overturned, or upheld. *See* 29 C.F.R. § 4003.35.

#### **STATEMENT OF MATERIAL FACTS**

PBGC's Statement of Material Facts ("SOMF") is being submitted contemporaneously with this Memorandum, and is incorporated by reference herein. For the Court's convenience, the facts in the SOMF are repeated below.

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 plan-termination insurance program under Title IV of ERISA. 29 U.S.C. § 1302.
2. Defendant, Idaho Hyperbarics, Inc., is a wound care and hyperbaric treatment provider incorporated in the State of Idaho. Amended Complaint ¶ 9; Answer ¶ 9. The Defendant's primary place of business is in Pocatello, Idaho. *Id.*; Answer ¶ 9.
3. Idaho Hyperbarics adopted the Plan effective December 27, 2004. AR 39-67, 623-25, 684-757.
4. The Plan was a single-employer, defined benefit pension plan covered under Title

IV of ERISA. AR 36-67, 74, 470-72, 291-92, 623-25, 697-794.

5. The Plan was established as an IRC Section 412(i) plan, which is fully and solely funded through insurance policies.<sup>6</sup> AR 181, 255-60, 1090-2052.

6. The insurance policy which funded the Plan was issued by MONY Life Insurance Company of America (“MONY”). AR 181, 255-60, 1090-2052; Amended Complaint ¶ 23; Answer ¶ 23.

7. Idaho Hyperbarics was the Plan’s contributing sponsor, within the meaning of 29 U.S.C. § 1301(a)(13), and the Plan administrator, within the meaning of 29 U.S.C. §§ 1002(16) and 1301(a)(1). AR 36-67, 74, 470-72, 291-92, 623-25, 697-794.

8. On May 27, 2009, Idaho Hyperbarics filed a Form 500 with PBGC, with a proposed termination date (“DOPT”) of December 26, 2008. AR 1-5, 162-65.

9. On November 15, 2010, Idaho Hyperbarics filed a Form 501 with PBGC, certifying that all benefit liabilities under the Plan were satisfied. AR 13-14.

10. On the Form 501, Idaho Hyperbarics stated that it paid a total of \$575,900 to 15 Plan participants no later than March 19, 2009, more than 2 months before Idaho Hyperbarics filed the Form 500. *Id.*

11. On January 4, 2011, PBGC notified Idaho Hyperbarics that the Plan would be audited. AR 14.

12. On April 28, 2011, PBGC issued an audit initiation letter to Idaho Hyperbarics, stating that the Plan’s standard termination had been selected for audit because, in violation of Title IV of ERISA, Plan assets were distributed to participants before filing the Form 500, and requesting certain information for the audit. AR 15-16.

---

<sup>6</sup> 26 U.S.C. § 412(e). 26 U.S.C. § 412(i) is now known as 26 U.S.C. § 412(e) after the 2006 PPA moved the contents of 26 U.S.C. § 412(i) to § 412(e).

13. During the audit, PBGC determined that, contrary to the information reported on the Form 501, there were 17 Plan participants. AR 390-406, 474-490, 731-47, 981-82. Of those participants, 2 received no distribution, 12 received their distributions between April 14, 2011 and May 5, 2011, two received their distributions on April 27, 2009, and one received her benefit on March 1, 2010. AR 842-45, 963-67, 2054-60, 2063-81, 2175-76. All distributions were after the DOPT and March 19, 2009, the last date of distribution reported on the Form 501. AR 842-45, 963-67, 2054-60, 2080-81.

14. During the audit, Idaho Hyperbarics submitted documentation showing that pursuant to its insurance policy surrender requests to MONY, Idaho Hyperbarics received \$575,900 in insurance policy surrender checks from MONY on or about March 29, 2009. AR 321-34, 523-42, 2221-50.

15. During the audit, Idaho Hyperbarics submitted documentation showing that only a total of \$228,884 was paid to the 15 participants who did receive a distribution, far less than the \$575,900 aggregate value of the cash surrender checks from MONY and total distribution amount reported on the Form 501. AR 826-45, 962-67, 2054-2060, 2080-81, 2175-76, 2221-50, 2263-78.

16. On July 15, 2014, upon completion of the Plan audit, PBGC issued its initial determination to Idaho Hyperbarics with respect to its audit (the “Initial Determination”). AR 2203-06.

17. In the Initial Determination, PBGC found that Idaho Hyperbarics did not pay the Plan participants the full cash surrender value of their contracts, as required under IRC Section 411(b)(1)(F), because the total distribution amount to participants was only \$228,884 – not the \$575,900 that Idaho Hyperbarics falsely certified that they distributed and far less than the full

cash surrender value of the participants' insurance contracts ("Finding 1"). AR 13, 826-45, 842-45, 962-67, 2054-2060, 2080-81, 2175-76, 2203-06, 2221-35, 2263-78.

18. In the Initial Determination, PBGC found that in addition to not receiving the full cash surrender value of his insurance contract, Participant A did not receive the full amount reported on his benefit election form and Form 1099-R ("Finding 2"). AR 2203-06. Participant A only received \$6,346.62 when his insurance contract's full cash surrender value was \$29,252.04, and the benefit amount that was reported on that participant's benefit election and Form 1099-R was \$10,433.27. AR 820, 832, 962, 966, 971, 2203-06.

19. In the Initial Determination, PBGC found that two participants who terminated employment before Plan termination, Participant B and Participant C (who Idaho Hyperbarics failed to account for on the Form 501), were not vested 100% in their benefits upon Plan Termination as required by law ("Finding 3").<sup>7</sup> AR 288-90, 292-93, 495, 509, 656, 962, 1004-11, 1039-41, 2058-59, 2203-06.

20. In the Initial Determination, PBGC found that the benefits for non-majority owners had been incorrectly waived because Idaho Hyperbarics failed to submit evidence that the participants were majority owners eligible to waive benefits ("Finding 4").<sup>8</sup> AR 897, 2203-06.

21. Regarding Finding 1, Finding 2, and Finding 3, the Initial Determination required Idaho Hyperbarics to (a) calculate the underpayments due to participants by determining the

---

<sup>7</sup> Documents submitted by Idaho Hyperbarics during the audit show that Idaho Hyperbarics issued checks to Participant B and Participant C in the amounts of far less than the cash surrender values of their insurance contract; \$2,244.93 versus \$8,497.44, and \$3,330.44 versus \$14,647.44, respectively. AR 288-90, 292-93, 495, 509, 656, 962, 1004-11, 1039-41, 2058-59.

<sup>8</sup> In the Initial Determination, PBGC made two more findings; however, PBGC did not request any corrective action concerning those findings. AR 2203-06.

difference between the amount each participant actually received and the full cash surrender value of their annuity contract and adding a reasonable rate of interest to the additional amounts due, (b) submit such calculations for PBGC's review, and (c) pay participants the additional amounts due. AR 2203-06.

22. Regarding Finding 4, the Initial Determination requested proof of majority ownership for participants that reportedly waived their benefit.<sup>9</sup> *Id.*

23. By letter dated November 12, 2014, Idaho Hyperbarics, through counsel, requested reconsideration of PBGC's Initial Determination and supplemented the request for reconsideration by an email dated March 3, 2015 (together, the "Reconsideration Request"). AR 2211-17, 2283-2326.

24. With respect to Finding 1, Idaho Hyperbarics argued that (a) because all premiums were paid as instructed by the Plan's actuary, the Plan should not be subject to IRC § 411; and (b) all available Plan assets were fairly distributed to participants, after taking out expenses and losses the Plan incurred. AR 2211-17, 2283-2326.

25. The Reconsideration Request did not dispute Finding 2.<sup>10</sup> AR 2211-17, 2283-2326. Accordingly, Finding 2 became a final determination on February 22, 2015. *See* 29 C.F.R. § 4003.22.

---

<sup>9</sup> Of the participants that did not receive their full benefits, it appeared that one participant, Participant D, might be a majority owner. Accordingly, PBGC informed Idaho Hyperbarics that Participant D may be able to waive the remaining portion of any additional benefit due to him by submitting the required documentation, if Participant D is a majority owner of Idaho Hyperbarics as defined in 29 C.F.R. § 4041.2. AR 2203-2206. To date, PBGC has received no such documentation.

<sup>10</sup> With regard to Finding 2, the Reconsideration Request stated that Idaho Hyperbarics would forward to PBGC proof of a \$2,000 payment allegedly accounting for the difference between the benefit reported on Participant A's benefit election and Form 1099-R, and the amount he received on Plan termination. AR 2211-17. To date, PBGC has received no proof of the alleged \$2,000 payment.

26. With respect to Finding 3, Idaho Hyperbarics argued that Participants B, C, and an additional Participant E, should not be fully vested after leaving employment with Idaho Hyperbarics. AR 2211-17, 2283-2326.

27. The Reconsideration Request generally stated that some participants agreed to receive a lesser benefit and, with regards to Finding 4, specified that Participant E had agreed to such reduction but did not argue that Participant E was a majority owner eligible to waive benefits. AR 2208, 2211, 2283-2326.

28. The Reconsideration Request did not dispute Finding 4 with respect to any other participant. AR 2208, 2211, 2283-2326. Accordingly, with respect to all participants, except Participant E, Finding 4 became a final determination on February 22, 2015. *See* 29 C.F.R. § 4003.22.

29. On April 28, 2015, PBGC issued its final determination (“Final Determination”). AR 2330-34.

30. The Final Determination upheld Finding 1 on the grounds that, *inter alia*, (1) IRC § 411(b)(1)(F) specifically requires that a participant’s accrued benefit in a 412(e)(3) plan be at least the cash surrender value of their insurance contracts of any applicable date; (2) ERISA § 4041(b)(3) requires all benefits liabilities to be paid upon a standard termination and does not allow for expenses or losses by the plan to be deducted from a participant’s benefits; and (3) IRC § 401(a)(2) and ERISA § 403(c)(1) requires that Plan assets be used exclusively to the benefit of participants until all benefits liabilities are satisfied. *Id.*

31. The Final Determination upheld Finding 3 on the grounds that IRC § 411(d)(3) requires that the non-vested portion of benefits of all affected participants, including terminated participants who have not yet incurred a five-year break in service, become non-forfeitable on



the date of the Plan termination. *Id.*

32. The Final Determination upheld Finding 4 with respect to Participant E on the grounds that no documentation had been provided showing that Participant E waived her benefit or that she was a majority owner eligible to waive her benefit under 29 C.F.R. § 4041.2. *Id.*

33. PBGC subsequently filed suit to enforce the portion of its Initial Determination that became final on February 22, 2015, and its Final Determination on July 27, 2016 (such determinations collectively, the “Determinations”) and amended its complaint on August 25, 2016. *See* Initial Complaint and Amended Complaint.

### **STANDARD OF REVIEW**

Under the Administrative Procedures Act (“APA”), a court must uphold a final agency determination unless the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.<sup>11</sup> The arbitrary and capricious standard of review is narrow.<sup>12</sup> The Court’s review is limited to consideration of the agency’s administrative record,<sup>13</sup> and the Court may not substitute its judgment for that of the agency.<sup>14</sup> Instead, the Court must

---

<sup>11</sup> 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, 414 (1971).

<sup>12</sup> *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Overton Park*, 401 U.S. at 420; *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994).

<sup>13</sup> *Lorion*, 470 U.S. at 743-44; *Overton Park*, 401 U.S. at 420.

<sup>14</sup> *Overton Park*, 401 U.S. at 416; *See also*, *Nw. Motorcycle Ass’n*, 18 F.3d at 1472 (“[T]his case involves review of a final agency determination under the [APA]; therefore, resolution of this matter does not require fact finding on behalf of this court. Rather, the court’s review is limited to the administrative record ...”); *Occidental Eng’g Co. v. I.N.S.*, 753 F.2d 766, 769-70 (9th Cir. 1985) (noting that the “administrative agency [...] is itself the finder of fact” and that in deciding whether to grant summary judgment in an APA case, the district court “is not required to resolve any facts in a review of an administrative proceeding”). *See also* *Lands Council v. Powell*, 395 F.3d 1019, 1029 (9th Cir. 2005); *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001); *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir.1986); *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

“consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>15</sup>

The Ninth Circuit endorses the use of summary judgment as an appropriate vehicle for resolving an administrative record case, as it presents only a question of law – whether the administrative record supports the agency’s determination or shows that the determination was arbitrary and capricious.<sup>16</sup> In cases involving the review of agency actions, the Court does not employ the usual summary judgment standard for determining whether a genuine issue of material fact exists; instead, the “function of the district court is to determine whether or not, as a matter of law, the evidence in the administrative record permitted the agency to make the decision it did.”<sup>17</sup>

Indeed, review under this standard is highly deferential with an initial presumption in favor of finding the agency action valid.<sup>18</sup> The agency’s decision should only be set aside if it “relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation 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

---

<sup>15</sup> *Overton Park*, 401 U.S. at 416.

<sup>16</sup> *See, e.g., Johnson v. U.S. Forest Serv.*, 93 F. App’x 133, 134 (9th Cir. 2004); *Nw. Motorcycle Ass’n*, 18 F.3d at 1471-72; *Occidental Eng’g Co.*, 753 F.2d at 770.

<sup>17</sup> *See Occidental Eng’g Co.*, 753 F.2d at 769.

<sup>18</sup> *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012); *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007); *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1236 (D. Idaho 2001).

agency expertise.”<sup>19</sup> Courts have granted summary judgment to PBGC in numerous administrative record cases, including standard termination cases.<sup>20</sup>

## ARGUMENT

### **PBGC’s Determinations That Idaho Hyperbarics Failed to Pay the Participants’ Full Benefits Is Reasonable and Fully Supported by PBGC’s Administrative Record.**

As explained above, PBGC’s Determinations must be upheld if they are not arbitrary and capricious, and are in accordance with applicable law. PBGC’s Administrative Record fully supports its Determinations that Idaho Hyperbarics failed, for numerous reasons, to pay the full amount of benefit owed to the Plan’s participants under the Plan’s provisions and applicable law. Accordingly, PBGC’s Determinations must be upheld.<sup>21</sup>

---

<sup>19</sup> *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 656 (9th Cir. 2009) (internal quotes omitted).

<sup>20</sup> See, e.g., *PBGC v. Kentucky Bancshares, Inc.*, 597 F. App’x 841 (6th Cir. 2015), *aff’g* 7 F. Supp. 3d 689 (E.D. Ky. 2014) (affirming summary judgment to PBGC in an action concerning standard terminations), *Royal Oak Enter., LLC v. PBGC*, 78 F. Supp. 3d 431 (D.D.C. 2015) (granting summary judgment to PBGC in an action concerning standard terminations); *PBGC v. Town & Country Bank and Trust Co.*, 3:11–CV–602–H, 2012 WL 4753352 (W.D. Ky. Oct. 4, 2012)(same); *Powell Valley Nat’l Bank v. PBGC*, No. 2:12CV00018, 2013 WL 4759242, 56 Emp. Ben. Cas. (BNA) 2835 (W.D. Va. Sept. 4, 2013) (same); *PBGC v. Wilson H. Jones Mem’l Hosp.*, 374 F.3d 362 (5th Cir. 2004), *aff’g* 250 F. Supp. 2d 676 (E.D. Tex. 2003) (affirming summary judgment to PBGC in an action concerning standard terminations)). See also, *Flo-Con Sys., Inc. v. PBGC*, 39 F. Supp. 2d 995 (C.D. Ill. 1998) (granting judgment to PBGC in action concerning standard termination); *Piggly Wiggly S. Inc. v. PBGC*, No. 94-01648-CV-H-S, 19 Emp. Ben. Cas. (BNA) 1163 (N.D. Ala. 1995) (granting summary judgment to PBGC in an action concerning standard terminations). See also *PBGC v. Haberbush*, No. 2631GHKAIJX, 2000 WL 33362003, at \*11 (C.D. Cal. Nov. 3, 2000) (terminating a pension plan); *PBGC v. FEL Corp.*, 798 F. Supp. 239, 242 (D.N.J. 1992) (same); *PBGC v. Pension Comm. of Pan Am. World Airways*, 777 F. Supp. 1179, 1181-1185 (S.D.N.Y. 1991) (granting order to show cause terminating a pension plan).; *Kauble v. PBGC*, No. IP 93-1331, 1994 WL 722966 (S.D. Ind. Dec. 27, 1994), *aff’d mem.*, 94 F.3d 647 (7th Cir. 1996) (granting summary judgment to PBGC in action concerning participant benefits); *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).

<sup>21</sup> *Johnson*, 93 F. App’x at 134; *Nw. Motorcycle Ass’n*, 18 F.3d at 1471-72; *Occidental Eng’g Co.*, 753 F.2d at 770.

First, the Administrative Record supports PBGC's finding that Idaho Hyperbarics did not pay the Plan participants the full cash surrender value of their insurance contracts. In a standard termination of a pension plan, Title IV of ERISA requires that a pension plan sponsor or administrator pay all participants their full benefits under the Plan and applicable laws. 29 U.S.C. § 1341(b). For a 412(e) plan, a plan that is fully and solely funded by insurance policies, the pension plan sponsor or administrator must pay all participants the full cash surrender value of their insurance contracts. 26 U.S.C. § 411(b)(1)(F). Failure to do so also violates the requirement that Plan assets be used exclusively for the benefit of participants until all benefit liabilities are satisfied. 26 U.S.C. § 401(a)(2) and 29 U.S.C. § 1103(c)(1). As determined in Finding 1, and fully supported in the Administrative Record, Idaho Hyperbarics failed to comply with these statutory requirements and the Plan's provisions mandating that Idaho Hyperbarics pay Plan participants the full cash surrender value of their annuities.

The Administrative Record undisputedly shows that Idaho Hyperbarics failed to pay, in aggregate, more than half of the cash surrender value of the participants' insurance contracts. Documents submitted by Idaho Hyperbarics during PBGC's audit indicate that Idaho Hyperbarics received \$575,900 in insurance policy surrender checks from MONY but did not transfer such amount to the participants. AR 321-34, 523-42, 962-67, 2054-2060, 2080-81, 2175-76, 2221-50, 2263-78. Instead, the documents revealed that Idaho Hyperbarics kept the majority of money from those checks; falsely certified to PBGC that the full amount of those checks was distributed to the participants and that all participants were paid in full by March, 2009; and failed to pay distributions to the majority of participants until after PBGC notified Idaho Hyperbarics that an audit would be initiated. AR 13, 321-34, 523-42, 826-45, 962-67, 2080-81, 2175-76, 2221-50, 2263-78. Furthermore, the Administrative Record shows, and Idaho

Hyperbarics does not refute in its Reconsideration Request, that even after Idaho Hyperbarics eventually paid the majority of participants in 2011, the total distribution amount to participants was only \$228,884 – not the \$575,900 that Idaho Hyperbarics falsely certified that they distributed and far less than the full cash surrender value of the participants’ insurance contracts. AR 321-34, 523-42, 826-45, 962-67, 2080-81, 2175-76, 2211-17, 2221-50, 2263-78, 2283-2326. Accordingly, PBGC’s Final Determination regarding Finding 1 is fully supported by the Administrative Record and must be upheld.

Further, the Administrative Record fully supports Finding 2, revealing that Idaho Hyperbarics failed to pay the total cash surrender value of Participant A’s annuity contract. Participant A only received \$6,346.62 when his insurance contract’s full cash surrender value was \$29,252.04, and the benefit amount that was reported on that participant’s benefit election form and Form 1099-R was \$10,433.27. AR 820, 832, 962, 966, 971, 2203-06. In the Reconsideration Request, Idaho Hyperbarics neither refuted such fact nor provided documentation showing that it fully paid Participant A. AR 2211-17, 2283-2326. Accordingly, Finding 2 of PBGC’s Initial Determination should be upheld.

The Administrative Record also fully supports PBGC’s determination regarding Finding 3 that, contrary to applicable law, Idaho Hyperbarics failed to vest and pay the benefits of certain participants. Upon termination of a pension plan, non-vested portions of the benefits of all affected participants, including terminated employees, must be fully vested. 26 U.S.C. § 411(d)(3) and (a)(4). The Administrative Record shows, and Idaho Hyperbarics does not refute in its Reconsideration Request, that it failed to vest certain participants that terminated employment at Idaho Hyperbarics before Plan termination, and did not pay the full cash

surrender value of their insurance contracts.<sup>22</sup> AR 288-90, 292-93, 495, 509, 656, 962, 1004-11, 1039-41, 2058-59, 2203-06, 2211-17, 2283-2326. Therefore, PBGC's Final Determination regarding Finding 3 should be upheld.

Additionally, the Administrative Record fully supports Finding 4 of PBGC's Final Determination that participant benefits were improperly waived. In a standard termination, a participant can only waive benefits if the participant is a majority owner within the meaning of 29 C.F.R. § 4041.2 and submits documentation waiving his benefit in accordance with 29 C.F.R. § 4041.23. The Administrative Record supports, and Idaho Hyperbarics did not refute in the Reconsideration Request, the fact that Idaho Hyperbarics failed to submit proper written documentation of participant waivers and proof that any participant was a majority owner. AR 897, 2208, 2211-17, 2283-2326. Thus, PBGC's Final Determination with regard to Finding 4 should be upheld.

Accordingly, PBGC determined that Idaho Hyperbarics underpaid participant benefits by (1) failing to pay the full cash surrender value of the participants' insurance policy; (2) failing to pay the full amount of benefits elected by a participant; (3) failing to vest certain participants; and (4) improperly waiving participant benefits. While Idaho Hyperbarics submitted its Reconsideration Request, it did not refute the underlying facts of such findings.<sup>23</sup> Rather, the Reconsideration Request merely argued that the law should not pertain to Idaho Hyperbarics and

---

<sup>22</sup> Documents submitted by Idaho Hyperbarics during the audit show that Idaho Hyperbarics issued checks to Participant B and Participant C in the amounts of far less than the cash surrender values of their insurance contract; \$2,244.93 versus \$8,497.44, and \$3,330.44 versus \$14,647.44, respectively. AR 288-90, 292-93, 495, 509, 656, 962, 1004-11, 1039-41, 2058-59.

<sup>23</sup> AR 2211-17, 2283-2326.

the Plan<sup>24</sup> Upon review, PBGC issued its Final Determination concluding that the arguments in Idaho Hyperbarics' Reconsideration Request provided no defense to PBGC's findings that Idaho Hyperbarics failed to pay the participants their full benefits in violation of Title IV of ERISA.<sup>25</sup>

In light of the foregoing, it is clear that PBGC's Determinations – that Idaho Hyperbarics underpaid participant benefits, and, therefore, must pay those participants the additional benefits they are due under the terms of the Plan and applicable law – are thoroughly reasonable, wholly supported by the Administrative Record, and in accordance with applicable law.

---

<sup>24</sup> AR 221117, 2283-2326. The Reconsideration Request stated that, *inter alia*, the Plan should not be subject to IRC § 411 because all premiums were paid as instructed by the Plan's actuary; all available Plan assets were fairly distributed to participants, after taking out expenses and losses the Plan incurred; certain participants should not be fully vested after leaving employment; and generally that some participants, specifically Participant E, agreed to receive a lesser benefit.

<sup>25</sup> The Final Determination upheld the Initial Determination on the grounds that, *inter alia*, (1) IRC § 411(b)(1)(F) specifically requires that a participant's accrued benefit in a 412(e)(3) plan be at least the cash surrender value of their insurance contracts of any applicable date; (2) ERISA § 4041(b)(3) requires all benefits liabilities to be paid upon a standard termination and does not allow for expenses or losses by the plan to be deducted from a participant's benefits; (3) IRC § 401(a)(2) and ERISA § 403(c)(1) requires that Plan assets be used exclusively to the benefit of participants until all benefits liabilities are satisfied; (4) IRC § 411(d)(3) requires that the non-vested portion of benefits of all affected participants, including terminated participants who have not yet incurred a five year break in service, become non-forfeitable on the date of the Plan termination; (5) Defendant provided no documentation showing that a participant waived her benefit or that she was a majority owner eligible to waive her benefit under 29 C.F.R. § 4041.2.

**CONCLUSION**

Accordingly, for the reasons stated above, PBGC respectfully requests that the Court enter summary judgment upholding PBGC's Determinations.

Respectfully submitted,

Dated: January 12, 2017  
Washington, D.C.

/s/ Erin C. Kim  
JUDITH STARR  
General Counsel  
KARTAR S. KHALSA  
Deputy General Counsel  
SARA B. EAGLE  
Assistant General Counsel  
ERIN C. KIM  
Attorney  
Pension Benefit Guaranty  
Corporation  
Office of the General Counsel  
1200 K Street, N.W.  
Washington, D.C. 20005  
Telephone: (202) 326-4020 ext. 3399  
Fax: (202) 326-4112  
Emails: kim.erin@pbgc.gov  
and efile@pbgc.gov