



Pension Benefit Guaranty Corporation

1200 K Street, N.W., Washington, D.C. 20005-4026

December 31, 2013

- Re: • Appeal 2013-[redacted], PBGC Case Number [redacted]
• Home Meridian International, Inc. ("HMI")
• Pulaski Furniture Corporation Pension Plan for Employees (the "Plan")

Dear Mr. [redacted]:

The Appeals Board has reviewed your appeal ¹ on behalf of your client, HMI, of PBGC's March 22, 2013 revised determination. PBGC determined HMI has incurred liability in the amount of \$8,030,363 under section 4062(e) of the Employee Retirement Income Security Act ("ERISA") with respect to the Plan. ²

Your appeal is denied for the reasons explained in this decision. This decision is PBGC's final Agency action with respect to HMI's liability under section 4062(e).

Introduction

Section 4062(e) provides financial protection for pension plans, their participants, and PBGC. The section 4062(e) liability rules are triggered when "an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment." ³

¹ Citations to the Appeals Brief are referenced as "AB." Citations to the Appeals Brief's Exhibits are referenced as "HMI Exh." followed by the Exhibit number.

² ERISA section 4062(e), which we will refer to as "section 4062(e)," is published at 29 USC section 1362(e). In this decision, we will cite only to ERISA, without the parallel citations to the USC.

³ PBGC uses the term "section 4062(e) event" when it refers to the conditions under which section 4062(e) liability is incurred. See 29 CFR section 4062.8(b) (example of "section 4062(e) event"). In this decision, we similarly

These are strict criteria. Individual factors such as the financial condition of the sponsor or the plan's funding level are not relevant in determining liability. PBGC may, however, take such factors into account in its enforcement decisions. The Appeals Board reviews only determinations of liability under ERISA §4062(e).

ERISA section 4063 provides that an employer may satisfy section 4062(e) liability by placing the amount owed in escrow with PBGC.⁴ Alternatively, PBGC may require a bond for up to 150 percent of the section 4062(e) liability.⁵ If the pension plan remains underfunded and terminates within five years of the section 4062(e) event, the escrowed amount is forfeited, or PBGC will "realize on the bond."⁶ The proceeds held in escrow (or covered under the bond) then become assets of the terminated pension plan.⁷ If the plan does not terminate within the five-year-period, the escrow will be refunded to the employer, without interest, or the bond is cancelled.⁸

As discussed in this decision, on August 28, 2009, HMI ceased operations at its Pulaski, VA manufacturing and corporate facility (the "Pulaski facility"). PBGC first learned of the cessation on September 15, 2010, when HMI filed two "PBGC Form 10s" (PBGC Post-Event Notice of Reportable Events). HMI formally notified PBGC of relatively small declines in the Plan's active participant population:

- from 96 to 76 (20.83%) between January 1, 2008 and April 8, 2008, and
- from 52 to 41 (21.15%) between January 1, 2009 and February 6, 2009.

HMI included with its September 15, 2010 filing:

- a statement that the Company was completing the last phases of a corporate consolidation that began in 2008, culminating with the closing of the Pulaski, VA distribution center in August 2009;

use the term "section 4062(e) event" to refer to the conditions under which section 4062(e) liability is incurred.

⁴ ERISA section 4063(b).

⁵ ERISA section 4063(c).

⁶ ERISA section 4063(c)(3).

⁷ *Id.*

⁸ ERISA section 4063(c)(2).

- data on participant counts; and
- a statement that the Plan was fully funded in 2007.⁹

HMI's notifications (Form 10s) caused PBGC to investigate potential section 4062(e) liability.

PBGC's Determination

PBGC's March 22, 2013 determination notified HMI that the company had incurred liability under section 4062(e) in the amount of \$8,030,363.¹⁰ HMI is the Plan's contributing sponsor.¹¹ PBGC gave the following reasons:

- The Company's facilities in Pulaski, VA ceased operations during the period April 13, 2007 to August 28, 2009.
- The Plan's active-participant population declined from 296 to 18 during the April 13, 2007 - August 28, 2009 cessation period, or a decline of 93.92 percent.¹²
- The closure meets the criteria for a section 4062(e) event, because more than 20% of the employees who were participants under the Plan were separated from employment with HMI as a result of the cessation of operations.
- HMI's liability under section 4062(e) as a result of the cessation of operations was \$8,030,363¹³ (the "4062(e) liability").

⁹ ERISA section 4043(c)(3) requires filing such a Notice in certain instances where the number of a plan's active participants declines by certain percentages of 20% or more. In certain instances dependent on a plan's funding, 29 CFR 4043.23(c)(2) waives the ERISA section 4043(c)(3) filing requirement.

¹⁰ Liability arises under ERISA section 4063(c)(2) by reference from section 4062(e).

¹¹ The term "contributing sponsor" is defined in ERISA section 4001(a)(13).

¹² $93.92\% = (296 \{ \text{actives on 4/13/2007} \} - 18 \{ \text{actives on 8/28/2009} \}) \div 296$
Under 29 CFR section 4062.8(a), this percentage is a fraction:

(1) the numerator of which is the number of the employer's employees who are participants under the plan and are separated from employment as a result of the cessation of operations; and

(2) the denominator of which is the total number of the employer's employees, as determined immediately before the cessation of operations, who are participants under the plan.

¹³ $\$8,030,363 = (\$19,338,839 \{ \text{Plan liabilities} \} - \$10,788,623 \{ \text{Plan assets} \})$
 $\times 93.92\% \text{ decline in the Plan's active population}$

Assets and liabilities are as of August 29, 2009.

PBGC's determination further states that HMI may satisfy its liability under ERISA sections 4062(e) and 4063 by placing the \$8,030,363 amount in escrow with PBGC, or, alternatively, by posting a bond for up to 150 percent of the 4062(e) liability. PBGC also informed HMI that PBGC has the authority to consider alternative arrangements for satisfying the 4062(e) liability.

If the Plan terminates under section 4041(c) or 4042 of ERISA by August 28, 2014 (five years from the date of the Cessation of Operations), the escrow will be forfeited to PBGC, or PBGC will realize against the bond. If the Plan does not terminate within the five-year period, the escrow will be refunded to HMI without interest, or the bond will be cancelled.

Your Appeal

On September 5, 2013, you filed a 43-page appeal brief (your "appeal" or "AB") that requests the Appeals Board "reverse the determination of PBGC staff in this case." AB at 4. You filed supplements to your appeal on October 22, 2013, December 2, 2013, and December 18, 2013. The six issues in your appeal and supplements are as follows:

1. Was HMI's closure of its facility in Pulaski, Virginia a cessation of operations for the purposes of section 4062(e)? (AB at 22-29)
2. Should 4062(e) liability be based only on the decline in active participation on the final day of the cessation? (AB at 35-36)
3. Was the Plan "established and maintained" by HMI within the meaning of section 4062(e)? (AB at 29-30)
4. Does PBGC's 4062(e)-liability calculation conflict with IRC funding rules and PBGC's duties under ERISA? (AB at 36-38)
5. Should HMI be exempt from 4062(e) liability based on its credit-worthiness and the risk of plan termination? (AB at 31-35 and your first and third supplemental briefs)
6. Does determining HMI's 4062(e) liability while PBGC is withholding certain documents requested under the Freedom of Information Act ("FOIA") deny HMI due process? (AB at 38-42 and your first two supplemental briefs)

Relevant Statutory and Regulatory Background

The Statutory Language in Section 4062(e)

Section 4062(e), which applies to single-employer plans covered by Title IV of ERISA, states:

If an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections [4063, 4064, and 4065 of ERISA] shall apply.

Additional Requirements in ERISA Section 4063

Section 4062(e) provides that, if an event triggering liability occurs, the employer "shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections [4063, 4064, and 4065 of ERISA] shall apply."¹⁴ While the requirements in ERISA section 4063 are important with respect to your appeal, ERISA sections 4064 and 4065 do not appear to impact upon the issues you have raised.¹⁵

ERISA section 4063 applies to single-employer plans that have two or more contributing sponsors, at least two of whom are not under common control (i.e., multiple employer plans). Liability under section 4063 is triggered when a "substantial employer" withdraws from a multiple employer plan. As PBGC stated in its preamble to its section 4062(e) regulation (June 16, 2006), the cessation of operations at a facility (as defined in section

¹⁴ Under section 4001(a)(2) of ERISA, "substantial employer," for any plan year of a single-employer plan, means one or more persons--

- (A) who are contributing sponsors of the plan in such plan year,
- (B) who, at any time during such plan year, are members of the same controlled group, and
- (C) whose required contributions to the plan for each plan year constituting one of--
 - (i) the two immediately preceding plan years, or
 - (ii) the first two of the three immediately preceding plan years, total an amount greater than or equal to 10 percent of all contributions required to be paid to or under the plan for such plan year.

¹⁵ ERISA section 4064 applies to the termination of a single-employer pension plan that has, or had, two or more sponsors that are not members of the same controlled group. ERISA section 4065 requires PBGC-covered, single-employer plans to file annual reports with PBGC.

4062(e)) is "analogous," but not "equivalent," to a withdrawal from a multiple employer plan.¹⁶

Under section 4063, if a section 4062(e) event occurs:

- The employer must notify PBGC of the event within 60 days. PBGC shall, as soon as "practicable" thereafter, determine the amount of the liability and notify liable persons;¹⁷ and
- Any amount collected by PBGC shall be held in escrow.¹⁸ In the alternative, the employer may be required to furnish a bond to PBGC in an amount not exceeding 150 percent of the liability.¹⁹

The Duration and End of Liability

ERISA section 4063(c)(2) provides that, if the plan does not terminate within five years, "the liability is abated and any payment held in escrow shall be refunded without interest (or the bond cancelled) in accordance with bylaws or rules prescribed by the corporation."

ERISA section 4063(c)(3) provides that the following shall occur in the event of pension plan termination within the five-year-period:

If the plan terminates under [ERISA] section 4041 (c) or 4042 within the 5-year period . . . , [PBGC] shall-

- (A) demand payment or realize on the bond and hold such amount in escrow for the benefit of the plan;
- (B) treat any escrowed payments under this section as if they were plan assets and apply them in a manner consistent with this subtitle; and
- (C) refund any amount to the contributing sponsor which is not required to meet any obligation of [PBGC] with respect to the plan.

Alternative Arrangements for Satisfying Liability

ERISA section 4067 authorizes PBGC to make "alternative arrangements" with any contributing sponsors or members of their controlled group for satisfaction of liability. As authorized by this provision, PBGC has taken a flexible enforcement approach as

¹⁶ 71 Fed. Reg. 34,819, 34,821 (June 16, 2006).

¹⁷ ERISA section 4063(a). We refer to the amount of this liability as the "4062(e) liability."

¹⁸ *Id.*

¹⁹ ERISA section 4063(c).

to how a plan sponsor satisfies its 4062(e) liability, evaluating each case based on its facts and circumstances. For example, PBGC and employers often agree on "alternative arrangements" for liability under which additional funding contributions are made to pension plans.

Regulations and Enforcement Program

Section 4062(e) was included in the original 1974 version of ERISA. In 2006, PBGC exercised its authority under section 4063 and promulgated a final liability calculation rule for section 4062(e). From 2006 to 2010, PBGC negotiated settlements in 37 enforcement actions under section 4062(e) for more than \$600 million.

In 2010, PBGC decided to "clarify the meaning of statutory terms used to describe when an event covered by section 4062(e) occurs" through a proposed section 4062(e) regulation. 75 Fed. Reg. 48283, 48284 (Aug. 10, 2010). The proposed regulation sought to clarify PBGC's interpretation of several terms in the statute. For example, it explained PBGC's position that a section 4062(e) cessation of operations occurs when an employer ceases a single operation – an "organizationally, operationally, or functionally distinct unit of an employer." 75 Fed. Reg. 48285. The proposed regulation also indicated that "section 4062(e) may apply to an employer's cessation of an operation at one facility even if the employer continues or resumes the operation at another facility." *Id.* The 2010 proposed regulation has not become a final regulation.

On November 2, 2012, PBGC established a "4062(e) Enforcement Pilot Program" (the "Pilot Program"). Under this program, PBGC focuses its 4062(e) enforcement efforts on plan sponsors who present the greatest risk of plan termination.

The Appeals Board's Factual Findings

Corporate History

Pulaski Furniture Corporation was incorporated in Pulaski, VA on October 28, 1955.²⁰ It manufactured and sold a variety of bedroom, dining, occasional, and youth furniture as well as curio cabinets to the middle and upper consumer markets.

In September 2006, Pulaski Furniture Corporation became a subsidiary of Home Meridian International, Inc. ("HMI Parent"), as part of a corporate merger. In 2008, all of the common stock of Pulaski's parent company was purchased by a higher-level parent company, Home Meridian Acquisition, Inc. ("HMA"). In 2010:

²⁰ AB at 5 acknowledges Pulaski Furniture Corporation, was "founded in 1955 in Pulaski, Virginia." Enclosure 3 to this decision show HMI, formerly Pulaski Furniture Corporation, was incorporated on October 28, 1955.

- HMI Parent was renamed Home Meridian Holdings, Inc. ("HMH"), and
- Pulaski Furniture Corporation was renamed Home Meridian International, Inc. ("HMI").²¹
- HMI (formerly Pulaski Furniture Corporation) today remains an ongoing Virginia stock corporation.²²

The Pension Plan's History

Pulaski Furniture Corporation established the Plan effective November 1, 1955.²³ Accrued benefits under the Plan were frozen effective March 31, 2005. The Plan was closed to new entrants effective April 1, 2005.

*Employment Started Declining and Outsourcing Began In 2006
Manufacturing Ceased In April 2007*

Significant reductions in the number of active Plan participants began in 2006. See the Appendix to this decision. Also, in late 2006, "HMI undertook to source furniture for all its companies through HMI's manufacturing partners in Malaysia, China, and Vietnam."²⁴

In February 2007, the Company announced that it would "cease manufacturing operations in Pulaski, Virginia in April 2007."²⁵ On February 16, 2007, the Company issued a WARN notice to its manufacturing employees, advising of an imminent:

permanent closing of the entire Pulaski Furniture Corporation Plant 1 facility located at 301 North Madison Avenue, Pulaski, Virginia.... We estimate that your date of separation from Pulaski Furniture Corporation will be between April 15, 2007 and April 30, 2007.

²¹ We use the term "Company" in this decision to refer to Pulaski Furniture Corporation (old name), the same corporation as is now named HMI (effective January 6, 2010).

²² HMI Exh. 1 page 3 paragraph 8 references HMI Parent's purchase of Pulaski in 2006. HMA's acquisition of all of HMI Parent's common stock in 2008 is described in HMH's audited financial statements - see Enclosure 1 page 8. The renaming of Pulaski Furniture Corporation to Home Meridian International, Inc. effective January 6, 2010 is described in both Enclosure 1 page 8 and in Enclosure 2. Enclosure 3 also shows Pulaski, now named HMI, remains ongoing as a Virginia stock corporation. The renaming of Pulaski's parent in 2010, from HMI Parent to HMH (using our abbreviations) is also described in Enclosure 1 page 8.

²³ Pursuant to a December 31, 1985 acquisition, the Pension Plan of Gravely Furniture Company, Inc. was merged into the Plan effective January 1, 1986.

²⁴ HMI Exh. 1 pages 2-4 paragraphs 6 and 9.

²⁵ HMI Exh. 1 page 6 paragraph 18.

Afterward, a local newspaper reported:

In April 2007, Pulaski Furniture's Plant One on Fifth Street shut down. It was the company's last domestic manufacturing facility.... 260 workers were displaced.²⁶

This evidence shows Pulaski Furniture ceased all manufacturing at the Pulaski facility in April 2007.

*Reductions Continued After Manufacturing Ended In April 2007
Some Remaining Operations Transferred During 2008-2009*

According to the appeal, HMI began transferring operations from the Pulaski, Virginia to HMI's new location in North Carolina in 2007. The appeal states the following:

Beginning in mid 2007, corporate, warehouse, customer service, and other company activities were gradually relocated to HMI's new facilities in High Point. Operations in Pulaski did not cease completely until August 28, 2009.²⁷

You also provided the Appeals Board with a 2007 newspaper report showing that HMI had announced a prospective plan to relocate its headquarters and a design, sourcing and marketing center to a 20,000-square foot facility at an address in High Point, NC.²⁸

However, on the Form 10 Notices that HMI filed with PBGC on September 15, 2010, HMI indicated that its corporate consolidation and relocation started in 2008 and continued into 2009. Moreover, an April 8, 2008 industry publication stated the new facility cited in the 2007 newspaper report quoted above was opened in January 2008:

[HMI Parent] has announced it will relocate some jobs from its Pulaski, Va., and Phoenix locations to its corporate headquarters [in High Point]... In January, HMI opened the 20,000-square-foot office as the home base for all four of its divisions.²⁹

²⁶ The news report is at <http://www.southwesttimes.com/2009/04/archive-3387>. The two addresses for Plant 1, in the WARN notice and in the newspaper account, coincide because 301 North Madison Avenue is at the intersection with East Fifth Street, N.E.

²⁷ HMI Exh. 1 page 7 paragraph 20. The same statement is at AB at 12-13.

²⁸ HMI Exh. 44

²⁹ See *Furniture Today*, April 8, 2008, at Enclosure 4 to this letter and http://www.furnituretoday.com/article/45580-Home_Meridian_to_shift_jobs_to_High_Point.php.

Based on this information, the Appeals Board concluded that any transfer of any remaining operations at the Pulaski facility to North Carolina began in 2008 and ended in 2009. Over the period from January 1, 2006 to August 28, 2009, which includes the corporate consolidation and relocation, the number of active participants in the Plan declined from 448 to 18, or 95.98%.³⁰ This calculation is based on documents submitted by HMI. See the Appendix to this letter.

Summary of the Board's Factual Findings

In summary, the Appeals Board found the following facts:

- (1) The Company ceased operations at the Pulaski facility gradually over a period beginning in 2006. Operations in Pulaski did not cease completely until August 28, 2009.³¹
- (2) In April 2007, during the 2006-2009 cessation period, the company's manufacturing operations ceased and were not transferred to any other Company location or facility.
- (3) The 2006 to August 28, 2009 cessation period includes the smaller April 13, 2007 - August 28, 2009 cessation period PBGC used to calculate HMI's 4062(e) liability.
- (4) Any transfer of the remaining Company operations from the Pulaski facility to new and/or existing facilities in North Carolina began in January 2008 and ended on August 28, 2009.

Discussion

We address below the six issues that you raised in your appeal.

1. *Was HMI's closure of its facility in Pulaski, Virginia a cessation of operations for the purposes of section 4062(e)? (AB 22-29)*

Your primary argument is that the shutdown of the Pulaski facility was not a cessation of operations but merely a relocation of operations to North Carolina. You therefore argue that the first criterion for liability under section 4062(e) - cessation of operations - was not met.

³⁰ 430 = 448 {on January 1, 2006} - 18 {on August 28, 2009}.

95.98% = 430 decline ÷ 448 {actives on January 1, 2006}. See the data in the Appendix to this letter.

³¹ That is not to say that section 4062(e) applies only when all operations cease, although that is the factual background in this case. Rather, liability arises under section 4062(e) whenever an operation ceases at a facility and, as a result, more than 20% of the active participants in a plan are separated from employment. See *PBGC Appeals Board Decision on Munksjo, Inc.* (December 31, 2013).

You base your argument on a comparison of the Company's circumstances to those in PBGC Opinion Letter 77-134 (what we call "77-134," dated March 18, 1977). You quote 77-134:

The plant is being re-located within * * * and in connection therewith more than 20% of the active participants will be laid-off or discharged. The remaining active participants will continue participation (i.e. accruals and vesting) under the Plan while those laid-off or discharged with vested rights under the Plan will retain such rights and the Company will continue to fund them. Under the foregoing facts there is neither a termination of the Plan under Title IV of the Act nor do the provisions of Sec. 4062(e) of [ERISA] apply. ³²

You also state:

Opinion Letter 77-134 clearly states PBGC's formal interpretation that mere relocation of operations do not create risk of distress or involuntary plan terminations "nor do the provisions of Sec. 4062(e) of the Act apply" to such relocations. ³³ (underlining added)

The Appeals Board finds your reliance on 77-134 to be misplaced. 77-134 describes a specific plan where only one fact was given as material to the decision: operations ceased at an employer's facility and were merely transferred to another of the employer's facilities.

The facts surrounding the Company's cessation of its operations at the Pulaski facility are very different. Operations ceased over a period beginning in 2006, ending completely on August 28, 2009. During the cessation period, in April 2007, the Company's manufacturing operations ceased entirely and permanently. Employment fell 78.6% ³⁴ during 2006 - 2007, before any transfer of operations began in 2008. Thus, the majority of HMI's operations were never transferred anywhere. The transfer of some remaining operations to North Carolina was simply a small and final part of a larger cessation. ³⁵

These facts are distinguishable from those surrounding the transfer of operations described in 77-134, in which there was a

³² AB at 25.

³³ AB at 25.

³⁴ (448 {actives on 1/1/2006} - 96 {on 1/1/2008}) ÷ 448 {on 1/1/2006}
See the data in the Appendix to this letter.

³⁵ Some operations transferred after manufacturing ceased, such as logistical and warehousing operations.

mere transfer of operations. We concluded HMI's transfer of its remaining operations to North Carolina is materially different than the transfer of operations described in 77-134.

For the reasons explained above, the Appeals Board concluded that the advice offered in Opinion Letter 77-134 is not applicable to HMI's cessation of operations at its Pulaski facility.³⁶

2. *Should 4062(e) liability be based only on the decline in active participation on the final day of the cessation?*
(AB at 35-36)

You questioned how PBGC calculated the Company's 4062(e) liability (\$8,030,363) for the cessation ending August 28, 2009. PBGC used the 93.92% decline in the participant population (the "reduction ratio") between April 13, 2007 and August 28, 2009, a period of 2 1/2 years.³⁷ You propose instead using a 53.66%³⁸ decline over 1 day, from August 27, 2009 to August 28, 2009. You conclude PBGC should have calculated \$4.58 million³⁹ instead of \$8,030,363.

We affirm operations ceased throughout the April 13, 2007 - August 28, 2009 period that PBGC used to calculate HMI's 4062(e)

³⁶ Because the facts in this case are different from those in Opinion Letter 77-134, the Appeals Board does not need to address your argument that "[i]f PBGC wants to reverse the longstanding guidance of PBGC Opinion Letter 77-134, PBGC must adopt a new regulation pursuant to the notice and comment process required by 5 U.S.C. § 553." AB at 31. The Appeals Board notes, however, that the authority you cite does not support this position. The cases you cite indicate that an agency may not change its interpretation of its own regulation without formally changing the regulation itself. By contrast, "there is no barrier to an agency altering its initial interpretation [of a statute] to adopt another reasonable interpretation." *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). And "an agency is free to alter its past rulings and practices even in an adjudicatory setting" if it "provides a reasoned explanation for any failure to adhere to its own precedents." *Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981).

³⁷ The 93.92% reduction ratio is calculated in footnote 12 above.
\$8,030,363 = 93.92% x \$8,550,216 Unfunded Benefit Liabilities
\$8,550,216 = \$19,338,839 benefit liabilities - \$10,788,623 assets

³⁸ 53.66% = 22 {decline} + 41 {"immediately before" August 28, 2009}
We calculated 56.10% instead of 53.66% using the method you propose and the data in the Appendix to this letter:

56.10% = 23 {decline} + 41 {"immediately before" August 28, 2009}
The discrepancy (56.10% vs. 53.66%) is not material to deciding whether the method you propose is correct.

³⁹ \$8,550,216 Unfunded Benefit Liability x 53.66% decline
The \$4.58 million amount you propose is at AB at 34.

liability. Also, PBGC's regulation requires calculating the percentage decline in the active participant population using:

the number of the employer's employees who are participants under the plan and are separated from employment as a result of the cessation of operations.⁴⁰

For these reasons, we must deny your request to replace the 2 1/2-year decline PBGC used with the 1-day decline you propose.

93.92% Decline Due To Cessation During April 2007 - August 2009

We reviewed PBGC's calculation of the percentage (93.92%) of the active participants whose employment was terminated as a result of the cessation of operations ending in August 2009. We found:

- PBGC's calculation may be skewed slightly too high, as one of the exhibits you submitted suggests.⁴¹ Typically, some active employees would retire during a 2 1/2-year period, even if operations remained steady. Such retirements would cause the active-participant population to decline, because the frozen Plan could not add any new employees as participants. The retiree population, however, increased by only 3 participants⁴² during 2005, the year before the merger occurred. Thus, including approximately 7.5⁴³ retirees in an active-employee decline of 278⁴⁴ would slightly reduce the 93.92% decline PBGC calculated.

- PBGC's calculation (93.92%) may be skewed slightly too low, because the active-participant population declined by 156 participants (33.93%⁴⁵) during the 15 months from January 1, 2006 to April 17, 2007. Your appeal provides an explanation, stating that after the September 2006 merger:

⁴⁰ See 29 CFR section 4062.8(a)(1).

⁴¹ See HMI Exh. 30 paragraph 4 pages 4-5.

⁴² 3 = 552 {retirees as of 1/1/2006} - 549 {retirees as of 1/1/2005}, based on data in the Plan's Form 5500s - see the Appendix to this letter.

⁴³ 7.5 = 3 {per year} x 2.5 years {April 2007 - August 28, 2009}

⁴⁴ 296 {actives on 4/13/2007} - 18 {actives on 8/28/2009}
See footnote 12.

⁴⁵ 33.93% = (448 {actives on 1/1/2006} - 296 {actives on 4/13/2007}) ÷ 448, a calculation similar to PBGC's 93.92% calculation summarized in footnote 12 above. See the data in the Appendix to this letter.

HMI promptly began implementing its strategic plan to streamline operations, control costs, consolidate, and improve efficiencies.⁴⁶

This evidence indicates the decline PBGC determined, beginning in April 2007 (93.92%), is the continuation of a 33.93% cessation that began in 2006 or earlier. Combining the two active-participant declines (156 and 278) would slightly increase the 93.92% decline PBGC determined.⁴⁷

We found that on balance, the 93.92% PBGC determined for the percentage of Plan participants whose employment was terminated as a result of the cessation operations at the Pulaski facilities is slightly favorable for the Company.

3. Was the Plan "established and maintained" by HMI within the meaning of section 4062(e)? (AB at 29-30)

Your appeal states that although HMI has funded the Plan liability, the HMI control group "did not establish the plan and has not 'maintained' the plan for section 4062(e) purposes because participants have not accrued benefits under the plan since April 2005."⁴⁸

However, because Pulaski Furniture Corporation established the Plan in 1955, and HMI is simply a new name for that entity and remains legally obligated to maintain the Plan, HMI "established and maintained" the Plan, regardless of whether participants continue to accrue plan benefits. As plan sponsor, the Company made and continues to make contributions to the Plan.⁴⁹ Accordingly, all evidence shows the Plan was "established and maintained" for the purposes of section 4062(e) by the corporate entity now named HMI.

HMI's legal obligations to maintain the Plan, for example to pay PBGC premiums and fund the Plan, were not changed by the 2005 amendment that froze accruals and participation.⁵⁰ HMI remains the plan sponsor, and accordingly retains duties imposed by ERISA to

⁴⁶ AB at 9.

⁴⁷ We calculated the combined decline (95.98%) in footnote 30 above.

⁴⁸ AB at 29.

⁴⁹ The Plan sponsor's name "Pulaski Furniture Company" is shown on the Form 5500s as the Company through 2009. Following the corporate renaming in 2010, HMI was listed as plan sponsor. Further, as plan sponsor, HMI stated that it "plans to *maintain* and fund the Pulaski Plan." AB at 17 and Exh. 1 paragraph 31. (*italics added*).

⁵⁰ Amendment 3 to the Plan froze accruals and participation. It did not freeze vesting, in accordance with ERISA section 203(c).

maintain the Plan. While you argue that 77-134 provides guidance on this issue, we found that 77-134 is inapplicable. 77-134 makes no reference to when a plan is "established and maintained" by an employer under section 4062(e). Therefore, we must deny your claim that the Plan's 2005 freeze changes HMI's status as the entity that established and maintained the Plan for the purpose of determining liability under section 4062(e).

4. *Does PBGC's 4062(e)-liability calculation conflict with IRC funding rules and PBGC's duties under ERISA? (AB at 36-38)*

After some discussions, the Agency and the Plan actuary agreed \$8,030,363 is the correct mathematical result for calculating 4062(e) liability as of August 29, 2009, when using:

- the 93.92% reduction ratio;
- participant data that HMI asked PBGC to use;
- actual plan assets; and
- PBGC's plan-termination assumptions.

Your appeal claims use of PBGC's plan-termination actuarial assumptions is unreasonable. You assert PBGC's assumptions are inconsistent with the actuarial assumptions that an ongoing pension plan must use to comply with the tax-qualification requirements in the Internal Revenue Code.⁵¹

PBGC's regulation states PBGC must determine 4062(e) liability based on the amount of liability "described in section 4062 of ERISA for the entire plan," as if the plan terminated immediately after the date of the cessation of operations.⁵² Therefore, PBGC used the actuarial assumptions that would have applied as if the Plan had terminated on August 29, 2009. The actuarial assumptions that PBGC uses on a termination basis (the same assumptions as required under 4062(e)) are required by PBGC regulation 29 CFR section 4044.⁵³ Therefore, we must deny your request to change the actuarial assumptions PBGC used.

You claim further that PBGC's valuation assumptions when assessing 4062(e) liability conflict with PBGC's duty under ERISA section 4002(a)(1) "to encourage the continuation and maintenance

⁵¹ AB at 36-38.

⁵² 29 CFR section 4062.8(a).

⁵³ For a terminated plan, the actuarial assumptions in 29 CFR section 4044 are based on annuity purchase rates, i.e. on what it would cost to settle obligations in the annuity marketplace.

of voluntary private pension plans for the benefit of their participants." ⁵⁴

The Plan's funding has deteriorated from 98.8% in January 2008 to 82% in January 2013, even under the ongoing-plan actuarial assumptions you propose that PBGC should use. ⁵⁵ For an underfunded pension plan such as the Plan PBGC's enforcement of section 4062(e) provides financial protection to the plan, its participants, and to PBGC. You have demonstrated no imbalance between how PBGC has carried out its dual responsibilities under sections 4002(a)(1) and 4062(e).

5. *Should HMI be exempt from 4062(e) liability based on its credit-worthiness and the risk of plan termination?* (AB at 31-35 and your first and third supplemental briefs)

You state PBGC's section 4062(e) claim is based on Company actions that strengthened the Company and enhanced its ability to fund the Plan. For example, referring to the events in question (cessation of most operations and the transfer of remaining operations to North Carolina), you state:

Thanks to the savings and efficiencies achieved from the relocation, HMI has contributed more than \$3.4 million to the Pulaski Plan since April 2010. ⁵⁶

You also state:

PBGC has identified no evidence that the Pulaski Plan will experience an involuntary or distress termination before August 28, 2014, less than a year from now. ⁵⁷

Section 4062(e) does not excuse section 4062(e) liability based on any assessment of risk that a plan will terminate. To the contrary, section 4062(e) simply creates the liability and contemplates releasing the liability (if paid as a bond or escrow) after 5 years if a plan does not terminate. Moreover, PBGC has

⁵⁴ AB at 4 and at 38.

⁵⁵ The 98.8% Funding Target Attainment Percentage ("FTAP") as of January 1, 2008 is at AB at 35. You noted the 82% FTAP as of January 1, 2013 on page 6 of your October 22, 2013 supplemental brief. The FTAP is calculated on an ongoing-plan basis and is based in part on past corporate-bond interest rates.

You provide an alternate plan funding percentage as of January 1, 2008, 118.3% instead of 98.8%, at Exhibit 54 to your third supplemental brief. As permitted by the Financial Accounting Standards Board's standard 35 ("FASB 35"), the 118.3% calculation is based on alternative actuarial assumptions, including the Plan sponsor's choice of a 7.5% interest rate for all future years.

⁵⁶ AB at 2.

⁵⁷ AB at 34.

historically enforced section 4062(e) regardless of the size of the plan or the financial condition of the plan sponsor.

More recently, PBGC announced its Pilot Program in which PBGC may forbear 4062(e) enforcement based on certain factors, including risk.⁵⁸ PBGC determined the Company does not qualify for forbearance under the Pilot Program because:

- The Company has reported weak financial performance, a significant level of debt that is secured by substantially all Company assets, as well as other aspects of financial distress.
- The Plan has more than 100 participants.

The Appeals Board does not have the authority to review PBGC's discretionary decisions concerning actions PBGC could take to recover funds owed to PBGC or to PBGC-trusted pension plans. In particular, the Appeals Board does not have the authority to review PBGC's exercise of discretion under the Pilot Program.⁵⁹

For the reasons given above, the Board cannot use the Company's credit-worthiness or any risk assessment of plan termination as a basis for changing PBGC's determination.

- 6: *Does determining HMI's 4062(e) liability while PBGC is withholding certain documents requested under the Freedom of Information Act ("FOIA") deny HMI due process? (AB at 38-42 and your first two supplemental briefs)*

Your appeal and your October 22, 2013 and December 2, 2013 supplemental briefs noted documents that would be responsive to your multiple requests for information under FOIA were withheld by PBGC's Disclosure Division based on exceptions that it cited in its FOIA responses. You list 8 categories of documents on pages 38-41 of your appeal.

Please note that the Disclosure Division's FOIA responses are not subject to review by the Appeals Board. The Appeals Board has no authority to change the Disclosure Division's decision as to what documents it releases as part of the FOIA process. Nor is the Appeals Board involved in: (1) the PBGC General Counsel's decisions on FOIA appeals, or (2) FOIA litigation.

The documents PBGC provided HMI give the basis for PBGC's determination. The Board's decision is fully documented by the PBGC-provided documents and the documents submitted on appeal. Therefore, the administrative record for the Board's decision on

⁵⁸ Granting such forbearance is consistent with ERISA section 4067, which allows PBGC to settle liability under alternative arrangements.

⁵⁹ 29 CFR section 4003.

your appeal is complete, notwithstanding that PBGC withheld from HMI certain documents based on FOIA exemptions. The Board, in deciding your appeal, did not rely on the withheld documents. We find you have identified no violation of HMI's due process rights.

Decision

The Appeals Board has reviewed your appeal of PBGC's determination that HMI had incurred liability, in the amount of \$8,030,363, under ERISA section 4062(e). For the reasons explained in this decision, the Board found your appeal did not provide a sufficient basis for changing PBGC's determination. We must, therefore, deny your appeal. This decision is PBGC's final Agency action with respect to HMI's liability under section 4062(e). HMI, accordingly, has exhausted its administrative remedies. HMI may, if it wishes, seek review of this decision in US District Court.

Sincerely,

William D. Ellis

William D. Ellis
Appeals Board Member

Appendix: Data on the Plan's Population of Active Participants

Enclosures:

1. 2010 audited financial statements of Home Meridian Holdings, Inc. for the Year ended October 31, 2010 and Period from December 31, 2008 to November 1, 2009. (30 pages)
2. Articles of Amendment Changing the Name of a Virginia Stock Corporation, renaming Pulaski Furniture Corporation as Home Meridian International, Inc. (HMI), effective January 6, 2010. (3 pages)
3. Virginia State Corporation Commission documents showing that on August 28, 2013, HMI (incorporated October 28, 1955) paid its annual registration fee, \$190 based on 20,000 authorized shares. (2 pages)
4. April 8, 2008 *Furniture Today* report stating HMI opened a new 20,000-square foot facility in High Point in January 2008.

Appendix: Data on the Plan's Population of Active Participants

The Appeals Board's decision is based on the following data on the number of participants in the Plan who were actively employed as of certain dates. All data comes from HMI-provided documents, including your appeal.

As Of Date	Participants		Data Source
	Total	Actives	
1/01/2005	1,601	501	2005 Form 5500 Schedule B
1/01/2006	1,525	448	2006 Form 5500 Schedule B
1/01/2007	1,450	327	2007 Form 5500 Schedule B
4/13/2007	NA *	296 ⁶⁰	11/24/2010 HMI e-mail
1/01/2008	1,392	96	2008 Form 5500 Schedule SB
4/11/2008	NA	76	HMI Form 10
1/01/2009	1,270	52	2009 Form 5500 Schedule SB
2/06/2009	NA	41	HMI Form 10
8/28/2009	NA	18	data from Plan's actuary
12/31/2009	1,235	18	2009 Form 5500 and data from Plan's Actuary

* "NA" = Not Available

⁶⁰ 31 active participants left covered employment prior to a general layoff that began on April 13, 2007.