UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PENSION BENEFIT GUARANTY CORPORATION, Plaintiff, v. KENTUCKY BANCSHARES, INC., Defendant.	))))))))))	Civil Action No. 5:13-cv-00143-KSF

PENSION BENEFIT GUARANTY CORPORATION'S MEMORANDUM IN REPLY TO KENTUCKY BANCSHARES' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Dated: December 9, 2013
Washington, D.C.

SARA B. EAGLE
Assistant Chief Counsel
ELISABETH FRY
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. 6863
Fax: (202) 326-4112
Emails: fry.elisabeth@pbgc.gov
and efile@pbgc.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

United States Codes Cited

Other Authorities Cited

INTRODUCTION

Defendant Kentucky Bancshares, Inc. rightly states that one of the principal purposes of PPA was to insure the soundness of on-going pension plans. (Def. Br. 2).[1] However, Defendant did not use PPA to shore-up the Plan. Rather, it amended the Plan to provide cheaper lump sums, which are less expensive for plan sponsors to provide than annuities,[2] and used the savings to fund the Plan's termination.[3] In their rush to take advantage of PPA, Kentucky Bancshares disregarded the requirements of Title IV of ERISA.

Specifically, as fully supported by the PBGC's Administrative Record and applicable law, Kentucky Bancshares failed to adopt the PPA Amendment (which provided lower lump sums than those calculated using GATT assumption) until after their chosen Plan termination date; thereby reducing accrued benefits post-termination in violation of PBGC's regulation at 29 C.F.R. § 4041.8.[4] Defendant also reduced accrued benefits, in violation of 26 U.S.C. §

---

[1] PBGC incorporates herein the definitions from its Memorandum in Support of Summary Judgment (herein referred to as "Pl. Br."). Citations to Kentucky Bancshares' Memorandum of Law in Support of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment will be referred to herein as "Def. Br."

[2] *See, e.g.*, Edward Price Financial, *One Lump or Many? Consider Pension Payout Options Carefully*, http://www.epricefinancial.com/FinArt79.htm; Mary Beth Franklin, *Pensions: Take a Lump Sum or Not?*, (September 2011), http://www.kiplinger.com/article/retirement/T037-C000-S002-pensions-take-a-lump-sum-or-not.html. Generally, annuities are more expensive because annuity providers add significant administrative fees to the cost of annuities, which can include *inter alia* sales commissions, underwriting fees, and fund management fees. *See, e.g., Passing the Buck: the Hidden Costs of Annuities* (August 25, 2012), http://www.investopedia.com/articles/retirement/02/031302.asp. The Annuity Contract here includes: annuity issue fees of $325 to issue each annuity; state premium tax, if applicable; and 4% commission. (AR 721).

[3] The lump sums paid by the Plan cost approximately $1.3 million less calculated using PPA Assumptions rather than the GATT assumptions specified under the Plan at termination. (Def. Br. 5).

[4] Kentucky Bancshares owes additional lump sum benefits to an estimated 220 Plan participants. *See* AR 7.

411(d)(6), by failing to preserve the lump sum benefit option in the annuity contract purchased for Plan participants who had not yet elected a benefit distribution.[5] As determined by PBGC, these actions resulted in Defendant's failure to pay all benefit liabilities under the Plan in its standard termination in violation Title IV of ERISA. AR 838-41; *see also* 29 U.S.C. § 1341(b)(3).

Kentucky Bancshares does not dispute that it adopted the PPA Amendment after its Plan termination date, and that it paid lower lump sums than those calculated using the Plan's GATT Assumptions, or that the Annuity Contract did not provide a lump sum option. Rather, Defendant argues that the Final Determination was arbitrary and capricious, and not in accordance with law because:

1. Defendant de facto amended the Plan to comply with PPA prior to Plan termination, (Def. Br. at 19-23; AR 780-83);
2. The PPA Amendment fell within 29 C.F.R. § 4041.8's exception allowing post-termination amendments that reduce accrued benefits if they are necessary for tax qualification. Defendant says this is so because the Plan paid two participants their lump sums calculated using PPA Assumptions before the termination date, thereby establishing an operating plan practice to which the PPA Amendment had to conform. (Def. Br. at 23-27; AR 783-85);
3. PPA § 1107 expressly demonstrated Congress's intent to authorize post termination plan amendments that reduce accrued benefits, (*id.*); and
4. Lump sum options did not have to be preserved in the Annuity Contract because participants entitled to deferred annuities had already made a benefit distribution election, (Def. Br. at 27-29; AR 785-86).

[5] Defendant alleges that six participants were affected by this issue. (Def Br. at 17) (AR 785).

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 Memorandum in Support of Summary Judgment ("Pl.'s Br.") at 2-10, and incorporated by reference herein.

I. PBGC'S Audit of Standard Terminations

Title IV's current standard termination procedures were enacted by Congress in the Single-Employer Pension Plan Amendments Act of 1986 ("SEPPAA")[6], 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 eased PBGC's administrative burden, as well as the filing requirements on plan sponsors.

Prior to SEPPAA, PBGC essentially conducted a plan termination audit prior to the distribution of plan assets. The agency had 90 days to determine -- after the submission of, among other things, plan documents, participant notices, detailed information about the plan's assets and liabilities, and a proposed asset allocation -- whether the plan assets were sufficient to pay all benefit liabilities in accordance with Title IV. *See* 29 U.S.C. § 1341(a) (as amended through 1984); 29 C.F.R. § 2616.5 (1987); Form 5310, and Instruction, revised April, 1979.[7]

Under SEPPAA, in lieu of a pre-distribution plan audit, PBGC has 60 days from receiving a plan's Form 500 – Standard Termination Notice ("Form 500") 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 documentation from the plan administrator, the plan's actuary or other

---

[6] Title XI of P.L. 99-272, the Consolidated Omnibus Budget Reconciliation Act of 1985.

[7] *See* Exhibits A, B and C hereto, attaching copies of superseded 29 U.S.C. § 4041; 29 C.F.R. § 2616.5, and Form 5310 with instructions.

affected parties, including an attestation that the plan is sufficient for benefit liabilities (the "60-Day Review Period"). 29 U.S.C. § 1341(b)(2)(C); 29 C.F.R. § 4041.31. Absent a finding from PBGC, after the 60-Day Review Period, that the plan is not sufficient for benefit liabilities, the plan administrator must distribute plan assets in accordance with Title IV of ERISA. 29 U.S.C. § 1341(b)(2)(D) and (b)(3); 29 C.F.R. § 4041.28.

After assets are distributed, a Post-Distribution Certification for Standard Termination-PBGC Form 501 ("Form 501") must be filed 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. Following the filing of Form 501, PBGC continues to have authority regarding matters relating to the plan, 29 U.S.C. § 1341(b)(4), and is required, pursuant to 29 U.S.C. § 1303(a), to audit a statistically significant number of standard terminations to determine, *inter alia*, if affected parties have received the benefits they are entitled to under "the provisions of the plan [in effect on the date of plan termination] and any applicable regulations." *See* 29 U.S.C. §§ 1303(a), 1341(b)(1)(D), and 1341(b)(3)(A).

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 if PBGC does not issue a Notice of Noncompliance within the 60 Day Review Period. *See* AR 6. That refers the plan sponsor to PBGC termination instructions requiring the sponsor to retain plan records for six years, as PBGC may audit its termination. *See* AR 6; PBGC's Standard Termination Filing Instruction, at p. 16, *available at* http://www.pbgc.gov/documents/500_instructions.pdf. After receiving a Form 501, PBGC again reminds plan sponsors and administrators of its audit program, sending (as it did in this case) an acknowledgment of receipt, stating, *inter alia.,* "[y]our plan may be selected for audit," "you will know within about four months whether we have selected your plan for audit," and providing a list of documents that may be requested upon audit. *See* AR 8.[8]

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,[9] and undertakes those actions as the settlor of a trust.[10] 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.[11]

---

[8] Given the law and the facts at issue, there is no basis for the righteous indignation the Defendant appears to voice at the fact to the Plan was audited in spite of the 60-Day Review Period, and how long it took PBGC to complete the audit and issue its Initial Determination in April, 2011. (Def. Br. 5, 16). Defendant had been on notice of the possibility of a termination audit, AR 6, 8, and was notified of the Plan audit on January 21, 2010, AR 9, just a little over two months after filing the Form 501. However, it then took the Defendant until November 2010 to submit the sample participant data PBGC requested in March 2010. AR 353, 356. And, PBGC did not receive a copy of the PPA Amendment until January 25, 2011, AR 654, and a copy of the documents regarding the group annuity contract until March of 2011, AR 702-32.

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

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

[11] *See Beck v. PACE Int'l Union,* 551 U.S. 96, 101-02 (2007); 29 U.S.C. §§ 1341(a)(2), 1348(a)(1). As such, it is surprising that the Defendant and its Plan professionals were "astonished" by PBGC's finding that the PPA Amendment violated its regulation 4041.8. (*See* Def. Br. at 6). The fact that PPA amendments needed to be made before plan termination was not hidden from plan sponsors. To the contrary, the pension community should have been well aware of the requirement. The IRS, and numerous other sources, published articles and made presentations regarding the issue. *See, e.g.*, Employee Plans News, Vol. 7 (Spring 2007) at 12 *available at* http://www.irs.gov/pub/irs-tege/spr07.pdf.; Thomas J. Finnegan & James E. Holland, Jr., *PPA Update on DB Plans*, (Presented at the 2008 Northeast Benefits Conference (noting, in Slide 53, that "PBGC said that plan must honor the plan provisions in effect on the plan termination date"), *available at* http://www.asppa.org/Document-Vault/Docs/Conferences/Northeast-Area-Benefits-Conference/2008/Workshop%201%20-%20Panel.Outline.ppt.aspx; PBGC's Standard Termination filing instructions at 14-15, *available at* http://www.pbgc.gov/documents/500_ instructions.pdf; Harold J. Ashner, *PBGC Issues: Planning a Standard Termination—A Checklist for Practitioners,* 16 J. PENSION BENEFITS 67, 69-70 (Winter 2009) (discussing PBGC's interpretation of 29 C.F.R. § 4041.8 and recommending that amendments be adopted "on or before the plan's proposed termination date"); David A. Pratt, *Focus on Interest Rates for Terminating Defined Benefit Plans,* 15 J.

III. Internal Revenue Service Determination Letters

Plans meeting the qualification requirements of section 401(a) of the Internal Revenue Code ("I.R.C.") are entitled to favorable tax treatment. For example, contributions to a plan made in accordance with the plan document are generally deductible. *See generally*, 26 U.S.C. §§ 162, 404. To obtain advanced assurance that a pension plan satisfies the I.R.C. qualification requirements under 26 U.S.C. § 401, a taxpayer may request a determination letter that plan provisions meet qualification requirements.[12] *See* 26 C.F.R. § 601.201(a)(3), (c)(5), and (o); IRS Publication 794. However, determination letters speak only to the issue of tax qualification on the materials submitted to the IRS, and are not "determination[s] regarding the effect of other federal or local statutes."[13]

IV. 417(e) Benefit Elections

To be tax qualified under the I.R.C., except as provided under I.R.C. § 417, a plan must

---

PENSION BENEFITS 5, 6 (Spring 2008) (discussing PBGC's interpretation of 29 C.F.R. § 4041.8); and Harold J. Ashner, *PPA Lump Sum Amendments in Standard Terminations: Watch Out!*, ASSPA Gov't Affairs Comm. Publ. 06-38 (Nov. 1, 2006) *available at* http://www.keightleyashner.com/publications/ASPPA_111606.pdf (stating that "[i]f you intend to use the PPA assumptions (subject to the transition rule) to determine lump sum values for post-2007 distributions as part of a standard termination, you will need to ensure that the PPA lump sum amendment is adopted on or before the plan's termination date"). If Defendant had chosen to adopt the PPA amendment prior to the date of Plan termination, as it was in its sole authority to do, they would not have run afoul of regulation 4041.8.

[12] If a taxpayer requests an IRS determination letter of a pension plan's qualification status upon a standard termination, PBGC's regulations extend the period in which plan assets must be distributed until 120 days after the receipt of the determination letter. *See* 29 C.F.R. §§ 4041.25(c), 4041.28(a)(1)(ii).

[13] Consequently, the Defendant's implied reliance of the Plan's IRS determination letter to ensure that the PPA Amendment complied with Title IV of ERISA is misplaced. (Def. Br. 6). As is any assumption that the IRS would not have approved an amendment other than the PPA Amendment. 26 C.F.R. § 601.201(c)(5).

provide vested participants who do not die before their "annuity starting date" their accrued benefits in the form of a qualified joint and survivor annuity ("QJSA").[14] 26 U.S.C. § 401(a)(11). Under I.R.C. § 417, they must also allow a participant to waive the QJSA form of benefit if the plan provides for other optional forms of benefit. 26 C.F.R. § 1.401(a)-11(a)(1)(ii); 26 U.S.C. § 417(a)(1)(A)(i). But, a participant may elect to waive a QJSA in lieu of another form of benefit only during the 180-day period ending on the participant's "annuity starting date," 26 U.S.C. §§ 417(a)(1) and (6), and the participant's spouse, if any, must consent, in writing, to the waiver, 26 U.S.C. § 417(a)(2). If a participant elects a lump sum in lieu of an annuity, the annuity starting date is the date on which all events have occurred that entitle the participant to a lump sum. The annuity starting date for an annuity is the first date of the first period that a benefit is payable as an annuity. *See* 26 U.S.C. §417(f)(2). This date is keyed not to the purchase of the annuity, but to payments under the annuity contract. *See Id.* This concept is more fully explained in the I.R.C. § 401 regulations --

> . . . benefits under 401(a)(11) and 417 may not be eliminated or reduced because the plan uses annuity contracts to provide benefits merely because . . . such contracts are distributed upon plan termination. Thus, the requirements of sections 401(a)(11) and 417 (requiring the option to waiver the QJSA) apply to payments under the annuity contracts, not to the distribution of the contracts.

26 C.F.R. § 1.401(a)-(20), Q &A-2. Thus, elections to waive a QJSA benefit must be obtained within 180 days of being able to commence payment under the annuity contract, not within 180 days of purchasing the annuity contract.

[14] In the case of a participant who dies before the "annuity start date", and has a surviving spouse, accrued benefits must be provided in the form of a qualified preretirement survivor annuity. 26 U.S.C. § 401(a)(11)(A)(ii).

STATEMENT OF MATERIAL FACTS

The facts pertinent to this case are set forth in PBGC's Memorandum in Support of Summary Judgment at 10-15 and are incorporated herein.

STANDARD OF REVIEW

As Defendant acknowledges, the appropriate standard of review in this case is found under the APA, and directs the Court to uphold PBGC's Final Determination unless it is "arbitrary, capricious, an abuse of discretion, or not in accordance with law."[15] (Def. Br. at 18; *see also* Document 12, Joint Report of the Parties, filed September 13, 2013.) Under this standard of review, contrary to Defendant's assertions, the first question that confronts the Court is not whether Congress has spoken to any of the specific questions 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 does not constitute "a clear error of judgment," it must be enforced.[16] The agency has done so if it "articulate[s] a rational connection between the facts found and the choice made."[17] 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.[18] This standard exists "to ensure that administrative

---

[15] 5 U.S.C. § 706(2)(A); *see Sierra Club v. Slater*, 120 F.3d 623, 632 (6th Cir. 1997); *see also PBGC v. LTV Corp.*, 496 U.S. 633, 656 (1990).

[16] *Sierra Club*, 120 F.3d at 633 (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)).

[17] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto.*, 463 U.S. 29, 42-43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). *See also Smereka v. Glass*, 945 F.2d 405 (6th Cir. 1991) (Table) at 3.

[18] *Virginia Agricultural Growers Ass'n v. Donovan*, 774 F.2d 89, 92-93 (4th Cir.1985).

responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional."[19]

When, an agency's interpretation of its governing statute is at issue, and Congress has not spoken directly to the matter, a court will accord deference to the agency's determination unless it is "arbitrary, capricious, or manifestly contrary to the statute."[20] 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.'"[21] This deference applies where "the agency has been given responsibility to issue regulations under the statute in question, to explain responsibilities of those concerned under the statute, and to enforce the statute in court."[22] Moreover, an agency's construction of its regulation "'need not be the *only* reasonable one before [the court] will sustain it.'"[23]

In the this case, in its role as administrator of Title IV, PBGC interpreted Title IV and PBGC's own regulations in determining that Kentucky Bancshares did not fully comply with the Title IV's requirements for completing a standard termination of a defined benefit pension plan.[24] Namely, PBGC determined that all benefit liabilities owed to plan participants under the

---

[19] *Id.* at 90.

[20] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

[21] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

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

[23] *A.D. Transp. Express, Inc. v. United States*, 290 F.3d 761, 767 (6th Cir. 2002) (internal quotes and citation omitted) (noting that A.D. Transport had "made a plausible argument" concerning the agency's regulation, but affirming the agency's interpretation).

[24] PBGC's role in this instance bears no resemblance to the role of the Director of the Office of Workers' Compensation Program in *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9, cited by Defendant, who the Supreme Court noted would not receive deference in his interpretation of the APA itself, which he does not administer. (Def. Br. at 18.)

Plan's provisions and applicable law had not been paid. To perform this statutorily mandated audit function, PBGC must interpret ERISA provisions beyond those in Title IV.[25] This is something that PBGC must frequently do in carrying out its responsibilities under Title IV.[26] PBGC has been afforded broad deference in interpreting the statute and its regulations, including those pertaining to standard termination audits.[27]

---

[25] In addition to Title IV, ERISA includes: Title I (setting forth the reporting and disclosure, participation and vesting, funding, and fiduciary obligation provisions, pertaining to ongoing pension plan, 29 U.S.C. §§ 1001-1194; Title II (relating to the qualification of pension plans for favorable tax treatment, *See* 26 U.S.C. §§ 401-424); and Title III (relating to coordination of jurisdictional, administrative, and enforcement issues between the PBGC, the Internal Revenue Service ("IRS"), and the Department of Labor ("DOL")), 29 U.S.C. §§ 1201-1242.

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

[27] *E.g., Piggly Wiggly So. Inc. v. PBGC*, 1995 U.S. Dist. LEXIS 21934, *14 (N.D. Ala. Apr. 4, 1995) (enforcing PBGC's standard termination determination requiring interpretation of Title II ERISA provisions), *aff'd*, 82 F.3d 430 (11th Cir. 1996); *see also PBGC v. Wilson N. Jones Mem'l Hosp.*, 250 F. Supp. 2d 676, 682 (E.D. Tex. 2003) (concluding "that PBGC's views on the issues in this [standard termination enforcement] case which required interpretation of Title II ERISA provisions are entitled to deference"), *aff'd*, 374 F.3d 362 (5th Cir. 2004); *see also Vanderkam v. PBGC,* 2013 WL 1882329 (D.D.C.)(enforcing a QDRO determination which required interpretation of ERISA Title II provision); *see also Davis v. PBGC*, 571 F.3d 1288, 1293 (D.C. Cir. 2009) ("[W]e defer to the PBGC's authoritative and reasonable interpretations of ambiguous provisions of ERISA."); *Boivin v. US Airways, Inc.*, 446 F.3d 148, 156-57 (D.C. Cir. 2006) (noting that deference applies to PBGC's interpretations of statutory and regulatory provisions); *Sara Lee v. ABA Retirement Plan*, 512 F. Supp. 2d 32, 37 (D.D.C. 2007) (granting deference to PBGC on an 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) (only allowing *Skidmore* deference to a PBGC appeals board decision requiring the interpretation of ERISA Title II provisions in enforcement of Title IV).

ARGUMENT

I. *PBGC's determination that there was no de facto amendment to the plan was neither arbitrary nor capricious and is in accord with the law.*

A. *There is no evidence of a plan amendment*.

Defendant does not dispute that the PPA Amendment was a post-termination amendment, as it was not executed until February 24, 2009 (two months after the Plan's December 2008 termination date). (AR 783) (Def. Br. at 15.) Rather, Defendant argues that PBGC's Final Determination is arbitrary and capricious, because the Plan allegedly effected a de facto amendment prior to its termination. (AR 780-83) (Def. Br. at 14-15, 19-23.) According to the Defendant, that de facto amendment was the result of 1) Kentucky Bancshares receiving a list of PPA changes from The Standard (the Plan's record keeper and actuary) that it would use in ongoing Plan administration;[28] 2) e-mails between Kentucky Bancshares' Director of Special Projects and The Standard; 3) a presentation made to Kentucky Bancshares' management by The Standard explaining PPA's changes (including those made to minimum lump-sum calculations), and 4) the subsequent payment of lump sums calculated using PPA Assumptions to two Plan participants. (AR 780-781, 787-790) (See Def. Br. at 15, 22-23.) However, as PBGC determined, these actions are not sufficient to amend a pension plan. (AR 839-840).

One of ERISA's purposes is "to increase the likelihood that full benefits will be paid to participants and beneficiaries of [pension] plans." To this end, ERISA requires that all employee benefit plans be established and maintained pursuant to a written instrument,[29] ensuring that "every employee may, on examining the plan document, determine exactly what his rights and

[28] That list included a notation that the actuarial assumptions used to "determine minimum lump-sum distributions" had changed. (AR 789).

[29] 29 U.S.C. § 1102(a)(1).

obligations are under the plan."[30] It is well established that plan sponsors are generally free under ERISA to adopt, modify, or terminate [pension] plans.[31] However, the requirement that plans must be "maintained pursuant to a written instrument" requires a written document executed by a party who is authorized to effect such amendment or termination.[32] And, the Sixth Circuit has consistently refused ". . . to sanction informal 'plans' or plan 'amendments' – whether oral or written – [as doing so] would leave the law of employee benefits in a state of uncertainty and would create disincentives for employers to offer benefits in the first place."[33] A written document cannot serve to amend a plan unless it actually professes to amend the plan.[34]

None of the documents provided by Defendant comes close to meeting these standards.[35]

---

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

[31] *Id.* at 77.

[32] *See, e.g.*, *Bellino v. Schlumberger Techs., Inc.*, 944 F.2d 26, 33 n.8 (1st Cir. 1991) (concluding that letter purporting to explain a change to a plan was not a valid plan amendment); *cf. Law v. Ernst & Young*, 956 F.2d 364, 370 n.9 (1st Cir. 1992) (amendment of written ERISA plan must be accomplished through a written document); *Coffin v. Bowater Inc.*, 501 F.3d 80, 86-92 (1st Cir. 2007) ("only those written documents that clearly indicate that a plan is being changed or terminated meet ERISA's procedural requirements"); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120 (4th Cir. 1989) (affirming the district court's determination that modification of a pension plan by informal and unauthorized amendment was impermissible pursuant to 29 U.S.C. § 1102(b)(3)).

[33] *See Sprague v. General Motors Corp.*, 133 F.3d 388, 403 (6th Cir. 1998); *see also Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 138 (6th Cir. 1993) (noting that "[i]t is well-established that the written terms of a plan may not be modified or superseded by oral assurances or other extrinsic evidence"). PBGC notes, with respect to Defendant's comment that PBGC's citation of *Sprague* is inapposite, (Def. Br. at 20), that Defendant misconstrues PBGC's citation of this case for the Sixth Circuit's holding eschewing informal plan amendments as an argument related to the specific facts of the case.

[34] *See Sprague*, 133 F.3d at 403 (*citing Borst v. Chevron Corp*., 36 F.3d 1308, 1323 (5th Cir. 1994), *cert. denied* 514 U.S. 1066 (1995)).

[35] Defendant protests that the cases cited by PBGC finding that informal writings are not plan amendments are inapposite because the "documents created and executed *prior to the Plan's termination*" amply reflect a "*fully authorized* change to the operation of the Plan." (*See* Def.

(AR 787-807). First, though stating that the Plan will be run in compliance with certain PPA amendments, the listing of operational changes is authored by The Standard, a party without any authority to amend the Plan. In fact, The Standard notes that a plan amendment adopting the changes must be made. AR 787.

Second, contrary to Defendant's assertions, the emails between Proctor Caudill, Kentucky Bancshares Director of Special Projects, and Robert Beaton at The Standard do not authorize any amendment to the Plan. Rather, The Standard merely stated that it was providing "additional information on what [The Standard could] provide [Kentucky Bancshares] in order to make plan freeze and/or termination decisions for [Mr. Caudill] and the board members of Kentucky Bank." AR 791-92. The information offered included various cash projections and explanations of the administrative requirements for termination, as well as the costs for replacing the Plan with a defined contribution plan. *Id.* Mr. Caudill replied that "[w]e are in agreement with and would like to engage your services to proceed with all the items in your proposal but need to make sure that this proposal does include a personal visit from you or your representative to review and explain in detail your projections." AR 791-2. Thus, Mr. Caudill authorized nothing more than the provision of the offered information.

Third, the presentation made by The Standard to Kentucky Bancshares summarizes PPA requirements and lists next steps that The Standard proposes to take. Nothing in this document authored by The Standard for an informational meeting with Kentucky Bancshares, authorizes any amendment to the Plan.

Finally, while the benefit elections form provided by Defendant show that two lump sums

---

Br. at 20, n.16.) However, Defendant's insistence underscores the failing of its argument, because Defendant has not identified a single *pre-termination* document in the record that actually professes to amend the plan.

were paid prior to Plan termination, which both were allegedly calculated using PPA Assumptions, payment of benefits under a plan not in accordance with plan terms does not serve to amend a plan. While, as Defendant points out, PPA provided relief from the anti-cutback provisions in Title I of ERISA and the I.R.C. for plans run in good faith compliance with PPA's changes, to take advantage of that relief a formal plan amendment had to be adopted while the plan was in operation. Nothing suggests that by simply paying lump sums using PPA Assumptions the Plan will be deemed to be amended.

B. Defendant cites no precedent that support an amendment.

Additionally, none of five authorities cited by Kentucky Bancshares supports its argument.[36] In four of the five authorities cited, unlike the current case, there was a document clearly evidencing that an amendment to the plan at issue had been authorized. In *Horn v. Berdon, Inc. Defined Benefit Pension Plan*, the Ninth Circuit found that a formal resolution of a company's board of directors satisfied ERISA's requirement that the plan be established and maintained as a "written instrument" under 29 U.S.C. § 1102(a)(1), because it was signed by directors of the corporation.[37] Though of no precedential value,[38] IRS Private Letter Ruling 200407021 again found that a board resolution documented by corporate minutes constituted a plan amendment.   PBGC Opinion Letter 90-4 also found a plan amendment under a collectively bargained multiemployer plan based on documented approval of the amendment at a meeting of Union and Employer trustees. Finally, the PBGC Appeals Board decision letter, dated

[36] *See also* Final Determination, AR 839-40, discussing four of the five precedents now cited by Kentucky Bancshares.

[37] 938 F.2d 125 (9th Cir. 1991).

[38] 26 U.S.C. § 6110(k)(3); *see also Glass v. C.I.R.*, 417 F.3d 698, 709 (6th Cir. 2006) (noting that "a Private letter Ruling cannot be used as precedent").

September 30, 2005, involved a collectively bargained plan.[39] In that case, a copy of the plan in effect when a benefit increase had gone into effect was not available. Accordingly, the PBGC Appeals Board relied primarily on a collective bargaining agreement that provided the necessary terms to show an increase in plan benefits. Courts often look to collective bargaining agreements, which are authorized by both the union and the employer, and are one of documents under which collectively bargained pension plans are maintained, when interpreting the terms of collectively bargained ERISA plans.[40] Unlike the facts of those cited authorities, Defendant has not provided any documents evidencing a resolution or authorization of a Plan amendment, nor has it provided a plan document evidencing an amendment.

Finally, the fifth case defendant cites, *DiCioccio v. Duquesne Light Company,* is simply inapposite. That case concerned trying to determine if a letter drafted by the plan administrator explaining a change in the interpretation of existing plan language, reducing benefit amounts, triggered the required notice of plan amendment to participants under 204(h) of ERISA.[41] However, because the new interpretation did not change the existing plan provisions, an actual amendment to the plan's language was not necessary, and only evidence of the plan administrator's new interpretation of the existing plan language could serve to show the change

---

[39] *See, e.g.*, 26 U.S.C. § 413 (discussing collectively bargained plans).

[40] *See, e.g.*, *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 578 (6th Cir. 2006) (looking to collective bargaining agreement to interpret employee health benefits under ERISA plan).

[41] ERISA § 204(h) "requires pension plans to provide notice to all plan participants when an amendment to the plan will result in a significant reduction to accrued benefits." *Hollowell v. Cincinnati Ventilating Co., Inc.*, 711 F. Supp. 2d 751, 767 (E.D. Ky. 2010); 29 U.S.C. § 1054(h). A plan amendment normally is not effective unless the plan complies with those notice provisions. 29 U.S.C § 1054(h)(6).

in plan interpretation.[42] The reduction in benefit amounts that defendant attempted to make here required changes to the Plan's existing language, and Defendant has provided no evidence that an authorized plan representative amended the Plan to adopt PPA Assumptions prior to the termination date selected by Defendant.[43] It should also be noted that by finding a plan amendment in *DiCioccio,* the Court did not find that the plan sponsor could reduce benefit amounts without complying with ERISA. Rather, by finding the new interpretation to be a plan amendment, the court protected participants by finding a violation of ERISA §204(h), prohibiting a reduction in benefits without notice.[44]

II. *The PPA Amendment violated 29 C.F.R. § 4048.1, because it reduced participants' benefits post-termination and was neither required for tax qualification, nor sanctioned by PPA § 1107*

PBGC's regulation at 29 C.F.R. § 4041.8(c)(1) provides:

> For purposes of this section, an amendment shall not be treated as decreasing the value of a participant's or beneficiary's plan benefits . . . to the extent the decrease is necessary to meet a qualification requirement under section 401 of the Code."

(Def. Br. at 23.) Defendant's post-termination amendment was not required for tax qualification nor did PPA § 1107 create an exemption from 29 C.F.R. §4048.1.

A. *The PPA Amendment was not required for plan qualification.*

Defendant does not dispute that I.R.C. § 417(e) sets a floor for valuing a lump sum or that the I.R.C. does not prohibit a plan from paying a larger lump if required by another statutory

[42] *DiCioccio v. Duquesne Light Company*, 911 F.Supp. 880, 899 (W.D. Pa. 1995).

[43] Defendant notes that in *Curtiss-Wright,* the Supreme Court suggested that an "executive vice president's letters" could result an effective amendment. However, in *Curtiss-Wright*, the question was not whether a document constituted a plan amendment. Rather, the Court addressed whether an amendment appearing in a summary plan description had been ratified by an individual with authority to amend the plan. The letter in question was considered as possible proof of ratification. *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120 (3d Cir. 1998).

[44] *DiCioccio*, 911 F.Supp. at 899.

provision or a provision of the plan. 26 U.S.C. § 417(e); *see* AR 779-86. Kentucky Bancshares attempts to distinguish this case from similar cases wherein courts affirmed PBGC's determination that post-termination amendments reduced benefits in violation of 29 C.F.R. § 4041.8[45] because the Plan paid two lump sums calculated using PPA Assumptions prior to Plan termination (*See* Def. Br. at 19, n.14), thereby establishing a Plan operating practice to which the PPA Amendment had to conform. (*See Id.* at 26-27.) *See also* 26 U.S.C. § 411(d)(6) and 29 U.S.C. § 1054(g). However, the I.R.S. clearly allows plan sponsors that had implemented PPA Assumptions to return to the GATT assumptions without risking disqualification. *See* I.R.S. Notice 2008-30 (allowing amendments providing the greater of lump sums calculating using GATT or PPA Assumptions, with no restriction for any prior payments calculated using PPA Assumptions). Thus, while Defendant may have calculated and paid certain benefits before the Plan's termination date using the PPA Assumptions, when it got around to actually amending the Plan, it could have specified that the Plan must pay the greater of the PPA interest rates and the 30-year Treasury rates (GATT rates), and made supplemental payments, as necessary, to any affected participants, thereby insuring that the pre-termination lump sum payments complied with the amendment. Accordingly, PBGC's Final Determination that the PPA Amendment was not necessary for Plan qualification, and thereby violated PBGC Regulation 4041.8 is not arbitrary or capricious, and is in accordance with law.[46] *See* AR 839.

[45] *See generally, Powell Valley Nat'l Bank v. PBGC*, Civil Action No. 2:12CV00018, 2013 WL 4759242 (W.D. Va. Sept. 4, 2013)*; PBGC v. Town & Country Bank and Trust*, Civil Action No. 3:11-CV-602-H, 2012 WL 4753352 (W.D. Ky. October 4, 2012) (both granting summary judgment to PBGC and finding invalid post-termination PPA amendments that reduced benefits).

[46] Defendant insists that its intention to adopt PPA Assumptions was clear as a result of the documents cited as de facto amendments. (Def. Br. 4, 26). However, PBGC is not charged with divining the intentions of employer; but, rather, is bound to enforce the provisions of plan in effect on the date of termination. PBGC also notes that it has audited standard terminations in

B. ***PPA § 1107 did not authorize the post-termination reduction in benefits.***

Kentucky Bancshares also argues that PPA § 1107 either amended, or preempted PBGC's regulation at 29 C.F.R. § 4041.8 prohibiting post-termination reductions in benefits. (*See* Def. Br. at 27.) PPA § 1107 amended the I.R.C., but did not alter Title IV's prohibition against benefit reducing, post-termination amendments. (See Pl. Br. at 21-22.) This is the case despite the fact that PBGC had previously disallowed post-termination GATT amendments that reduced benefits, finding them unnecessary for plan qualification regardless of GATT's anti-cut back relief.[47] It is consistent with Title IV's requirements that Congress did not include Title IV relief in PPA § 1107. Title IV requires the payment of all benefit liabilities determined on the date of plan termination. 29 U.S.C. § 1341(b)(1)(D). Under Title IV, that date must be specified and adhered to, setting a known date as of which plan benefits can be determined. In the standard termination context, Congress explicitly provided that benefit liabilities to participants and beneficiaries be determined as of the termination date. 29 U.S.C. § 1341(b)(1)(D).

Moreover, PBGC could not run ERISA's Title IV program if it was required to wait and see if and when plan administrators might adopt post-termination amendments, or whether plan assets might increase or decrease after a plan's termination date. In such circumstances, PBGC's hands would be tied, leaving it unable to determine, *inter alia*: 1) if, in a standard termination, a plan had assets sufficient to pay all of its benefit liabilities; 2) the amount of unfunded benefit liabilities that would be owed to PBGC in an involuntary or distress termination; 3) the amount of unfunded benefits PBGC would be required to guarantee under a plan that was determined to be underfunded; and 4) what claims PBGC should and could enforce in its standard termination audit capacity, or as a statutory trustee of underfunded plans terminated PBGC terminates and

which the employer amended the plan to provide the greater GATT benefits to their employees without risking its tax qualification.

[47] *See supra* note 10.

trustees. By contrast, an ongoing plan is generally not required to account for all of its benefit liabilities at a specified point in time, rather, it is administered on an ongoing basis from a trust that remains funded and available to satisfy any benefit liabilities.

III. *The annuity contract must be amended to add a lump sum option.*

Finally, persisting in its inaccurate interpretation of the I.R.C. § 411(d)(6) regulations, the Defendant argues that it does not need to amend the annuity contracts purchased for Plan participants not currently in pay status to include a lump sum option. However, as PBGC's Final Determination explains, failing to provide optional forms of benefit in an annuity purchased for participants that have not received or begun to receive a benefit violates I.R.C. § 411(d)(6). *See* AR 839-40.

The Defendant's stubborn adherence to their position appears to be based on a failure to understand what constitutes a valid benefit distribution election and when it can be made. Kentucky Bancshares would have the Court believe that the forms it distributed to participants, and which participants returned, having checked a box indicating their preference for an annuity to be paid at age 65, the normal retirement age under the Plan, constituted a benefit distribution election. (AR 785, Def. Br. at 27-29.) However, a participant cannot make a valid benefit distribution election to waive a deferred qualified joint and survivor annuity ("QJSA") until 180 days prior to the "annuity starting date for the benefit." 26 U.S.C. §§ 417(a)(1) and (6). And, the annuity starting date does not occur until the first day of the first period in which the annuity is payable to the participant. *See* 26 U.S.C. § 417(f)(2). Therefore, not making an election to receive an immediate form of benefit is, in fact, a deferral of an election,[48] and all forms of benefits provided under the plan must be preserved until an election to receive an immediately

[48] *See* 26 C.F.R. § 1.411(d)-4, Q&A-2(a)(3)(ii)(B), Example 2 (providing that "a participant may defer both benefit commencement and the election of a particular benefit form to any later date . . .").

payable benefit is made.

Defendant continues to selectively cite only portions of 26 C.F.R. § 1.411(d)-4, Q&A-2, paragraphs (a)(2)(ii) and (a)(3)(ii) to support their misguided argument. When read in their entirety, however, these citations prove Kentucky Bancshares' argument to be wrong. First, while Q&A-2, paragraph (a)(2)(ii) does state that:

> a plan does not violate section 411(d)(6) merely because an employee's election to receive a portion of his nonforfeitable accrued benefit in one optional form of benefit precludes the employee from receiving that portion of his benefit in another optional form of benefit.

(*See* Def. Br. 28), that paragraph goes on to state that: "[s]uch employee retains all 411(d)(6) protected rights with respect to the entire portion of such employee's nonforfeitable accrued benefit for which no distribution election was made." Thus, the Plan's participants who have not elected to receive an immediately payable benefit,have not made a distribution election. In fact, they could not elect to waive a deferred QJSA until 180 days before the participants' annuity start date. For an annuity distribution, that date is the first day of the first period that the participant can receive a payment under his annuity contract. The Plan participants at issue here will not be eligible to receive a payment from the Annuity Contract or a lump sum until reaching age 65. *See* AR 333, 582, 264, 724, 824-34.

An example in the regulations further illustrates this point. In Example 1 of 26 C.F.R. § 1.411(d)-4, Q&A-2 (a)(2)(iv), the plan offered an annuitized early retirement to participants who terminated employment on or after reaching age 55, as well as a lump sum equivalent of the plan's normal form of benefit upon termination of employment or termination of the plan. Where participants were eligible to and did elect to receive their benefits in a lump sum upon leaving employment or termination of the plan, § 411(d)(6) was not violated because those participants, pursuant to valid distribution elections, received their full accrued benefits under the plan in a lump sum and were no longer eligible for any other form of plan benefit. However, participants who either did not make a lump sum election or had not reached age 55 upon leaving employment or plan termination

> have not selected an optional form of benefit, [and] they continue to have a 411(d)(6) protected right to the full array of section 411(d)(6) protected benefits provided under the plan, including the single sum distribution form and the subsidized early retirement benefit.

26 C.F.R. § 1.411(d)-4, Q&A-2 (a)(2)(iv) – Example 1.

And while paragraph (a)(3)(ii) of § 1.411(d)-4, Q&A-2 does, as Defendant states, provide that:

> to the extent an annuity contract constitutes payment of benefits in a particular optional form elected by the participant, the plan does not violate section 411(d)(6) merely because it provides that other optional forms are no longer available with respect to such participant.

(*See*, Def. Br. 28), the purchase of deferred annuity contracts for Plan participants who have not reached retirement does not constitute payment of benefits. Rather, those contracts, by their terms, will not be payable until the participants reach the Plan's normal retirement age of 65. Moreover, because they are not yet payable, the participants for whom these annuities were purchased are not yet eligible to waive the QJSA form of payment. As such, paragraph (a)(3)(ii) of § 1.411(d)-4, Q&A-2 further states:

> [t]he protection provided by section 411(d)(6) may not be avoided by the use of annuity contracts. Thus, section 411(d)(6) protected benefits already accrued may not be eliminated or reduced merely because a plan uses annuity contracts to provide such benefits, without regard to whether the plan, participant, or beneficiary of the participant holds the contract or whether such annuity contracts are purchased as a result of termination of the plan.

This principle is clearly illustrated in Example 2 of §1.411(d)-4(a)(3)(ii)(B), Q&A 2, which states that when a plan terminates and a participant defers commencement or election of the deferred annuity offered under the plan, "the plan will fail to satisfy section 411(d)(6) unless the optional forms of benefit provided under the plan are preserved under the annuity contract purchased on plan termination." This would be the case even if the plan elected to allow immediate annuity elections on termination. This is the exactly the case here, as the six Plan participants who did not elect a lump sum, thereby deferred their benefit distribution election because they could not yet elect their annuity which was deferred.[49] *See* AR 333, 582, 264, 724, 824-34. However, contrary to I.R.C. § 411(d)(6), Kentucky Bancshares did not preserve the optional lump sum form provided under the Plan under the Annuity Contract purchased on Plan termination.

In accordance with PBGC's Final Determination, the six Plan participants for whom Kentucky Bancshares purchased a deferred annuity have not yet made a valid benefit distribution election, and failure to amend the Annuity Contract to provide a lump sum violates I.R.C. § 411(d)(6). Accordingly, Defendant has not distributed all benefit liabilities under the Plan as required by 29 U.S.C. § 1341(b)(3).

[49] *See* 26 U.S.C. § 417(a)(1), (a)(6) & (f)(2).

CONCLUSION

For the foregoing reasons, and for the reasons stated in Plaintiff's Memorandum in Support of Summary Judgment, the Court should enter summary judgment upholding PBGC's final determination.

Respectfully submitted,

Dated: December 9, 2013
Washington, D.C.

/s/Elisabeth Fry
SARA B. EAGLE
Assistant Chief Counsel
ELISABETH FRY
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. 6863
Fax: (202) 326-4112
Emails: fry.elisabeth@pbgc.gov
and efile@pbgc.gov

CERTIFICATE OF SERVICE

On December 9, 2013, I electronically filed this document through the ECF system, which will send a notice of electronic filing to all registered users.

/s/ Elisabeth Fry
Elisabeth Fry