

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

PENSION BENEFIT GUARANTY
CORPORATION

Plaintiff,

v.

EBER BROS. WINE & LIQUOR
CORPORATION
as Plan Administrator of the
Eber Bros. Wine & Liquor Corp. Retirement Plan

Defendant.

Case No. 6:15-cv-06283-MAT-MWP

**PENSION BENEFIT GUARANTY CORPORATION'S
MOTION FOR SUMMARY JUDGMENT**

The Pension Benefit Guaranty Corporation ("PBGC") hereby moves this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment. As established in PBGC's administrative record, and as more fully set forth in the accompanying Memorandum in Support, Statement of Material Facts, and Affidavit in Support of Motion, this matter presents no genuine issue as to any material fact and PBGC is entitled to judgment as a matter of law. A redacted version of the Memorandum in Support, Statement of Material Facts, and Affidavit in Support will be filed by PBGC and unredacted versions of these documents will be sent via overnight mail to the Court and to the Defendant.

WHEREFORE, PBGC requests this Court grant its Motion for Summary Judgment and enter the relief set forth in the proposed Order and grant such other and further relief as the Court deems appropriate.

Dated: Washington, D.C.
August 17, 2015

Respectfully submitted,

/s/ Kimberly E. Neureiter

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MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Dated: Washington, D.C.
August 17, 2015

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PRELIMINARY STATEMENT

The Pension Benefit Guaranty Corporation (“PBGC”) files this memorandum in support of its motion for summary judgment. In this action, PBGC seeks a decree (i) adjudicating that the Eber Bros. Wine & Liquor Corp. Retirement Plan (“Plan”) is terminated, (ii) appointing PBGC as the Plan’s statutory trustee, and (iii) establishing April 30, 2010, as the Plan’s termination date.

The material facts are not in dispute, and PBGC is entitled to judgment as a matter of law on all three issues. First, there is no doubt that the Plan needs to be terminated to protect the interests of the PBGC insurance program and the Plan’s participants, who are former employees of the Plan’s sponsor, Eber Bros. Wine & Liquor Corporation (“Eber Bros.”). [REDACTED]

[REDACTED] and terminated all employees by May 31, 2009. [REDACTED]

[REDACTED] Moreover, the board of directors of Eber Bros., which had administered the Plan, resigned from their positions in March 2014. [REDACTED]

[REDACTED]

Second, upon termination of a pension plan, the court “shall” appoint a statutory trustee for the plan. Under express authority in 29 U.S.C. § 1342(b)-(c) that PBGC may be appointed trustee of “any” terminating pension plan, PBGC has invariably been appointed trustee of terminating plans.

Third, the April 30, 2010 termination date proposed by PBGC meets the two-part test set forth by the Second Circuit in *In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d 647, 652-53 (2d Cir. 1983). It meets the first part of the test because it is after “the earliest date when the Plan’s participants had actual or constructive notice of the Plan’s

termination,” because Eber Bros. had already ceased operations by that date.¹ Courts have repeatedly held that a cessation of business operations qualifies as constructive notice under that test. It meets the second part of the test because it “serves the interests of PBGC,” and this Court “is entitled to conclude” that the date proposed by PBGC “adequately serves the interests of PBGC.”² Eber Bros. would prefer a date that serves its own interests, but those interests are not a relevant factor for the court in setting a date. As the Second Circuit has held, once the first part of the test is met, the court “should then select whatever later date serves the interests of PBGC.”³

STATUTORY BACKGROUND

A. PBGC

PBGC is the wholly owned United States Government corporation that administers the pension insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”),⁴ and protects participants in private sector defined benefit pension plans.⁵ PBGC guarantees the pension benefits of nearly 41 million participants in approximately 24,000 pension plans,⁶ and is the statutory trustee of more than 4,600 failed pension plans.⁷ The insurance program the PBGC administers acts as a backstop for American workers, providing retirement income for more than 1.5 million retirees.⁸

¹ *Broadway Maintenance*, 707 F.2d at 652.

² *Id.* at 653.

³ *Id.*

⁴ *PBGC v. LTV Corp.*, 496 U.S. 633, 636-39 (1990); 29 U.S.C. §§ 1301-1461.

⁵ *See generally PBGC v. LTV Corp.*, 496 U.S. at 636-39.

⁶ Annual Management Report 2014, **PBGC**, at 2 (Nov. 17, 2014), *available at* <http://www.pbgc.gov/documents/2014-annual-report.pdf>.

⁷ *Id.*

⁸ *Id.*

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

(i) premiums paid by employers sponsoring ongoing plans; (ii) the assets in terminated plans; (iii) investment income; and (iv) recoveries from employers whose underfunded plans have terminated, who are liable to PBGC for the shortfall in the plans' assets.⁹ As of the end of its 2014 fiscal year, PBGC's liabilities exceeded its assets by about \$19.3 million.¹⁰ PBGC's statutory objectives are to keep premiums as low as possible, to provide for the timely and uninterrupted payment of benefits, and to encourage the maintenance of pension plans.¹¹

B. The Legal Requirements for Funding Pension Plans

Under ERISA, an employer must contribute to its pension plan to fund the pension benefits promised to its workers. The contributing sponsor of the pension plan and each member of its "controlled group" are jointly and severally liable to the pension plan for contributions necessary to satisfy the minimum funding standards under sections 412 and 430 of the Internal Revenue Code ("IRC") and sections 302 and 303 of ERISA.¹² A "controlled group" is a group of trades or businesses under common control, including, for example, a parent and its 80% owned subsidiary.¹³ When the aggregate amount of missed minimum funding contributions (including interest) exceeds \$1 million, a lien arises on behalf of the pension plan against all assets of the plan sponsor and the members of its controlled group.¹⁴ This lien is enforceable only by PBGC.¹⁵

⁹ *Id.* at 10.

¹⁰ *Id.* at 20.

¹¹ 29 U.S.C. § 1302(a).

¹² IRC §§ 412(b)(1) & (2); *see also* 29 U.S.C. §§ 1082(b)(1) & (2).

¹³ *See* 29 U.S.C. § 1301(a)(14); 26 U.S.C. § 414; 26 C.F.R. §§ 1.414(b)-1, (c)-1, (c)-2.

¹⁴ 26 U.S.C. § 430(k)(1).

¹⁵ 26 U.S.C. § 430(k)(5).

C. Pension Plan Termination

Title IV of ERISA provides the exclusive means of terminating a defined benefit pension plan.¹⁶ Pension plan termination may be initiated by the sponsoring employer or by PBGC. An employer may terminate a pension plan in a “standard termination” under 29 U.S.C. § 1341(b) if the pension plan has enough assets to cover all future benefit payments (through the purchase of private sector annuities or lump sum payments), or in a “distress termination” under 29 U.S.C. § 1341(c) if the plan is underfunded and the employer meets certain statutory financial distress tests.

In addition, PBGC has discretion to initiate the termination of a pension plan if PBGC determines that one of the four criteria set forth in 29 U.S.C. § 1342(a) has been met. Among these criteria are: (1) the plan has not met the statutory minimum funding standard; and (2) the plan “will be unable to pay benefits when due.”¹⁷

PBGC follows an established internal administrative process to determine whether an underfunded pension plan should be terminated and to select a proposed termination date.¹⁸ First, PBGC staff collects and examines relevant information and prepares a written recommendation that the pension plan has met one or more of the criteria under 29 U.S.C. § 1342(a) and should be terminated.¹⁹ The written recommendation also includes a recommended plan termination date.²⁰ The staff then submits the recommendation along with

¹⁶ 29 U.S.C. § 1341(a)(1); *see also Beck v. PACE Int’l Union*, 551 U.S. 96, 102-03 (2007); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999).

¹⁷ 29 U.S.C. §§ 1342(a)(1), (2).

¹⁸ Aff. of Stephanie Thomas in Support of PBGC’s Mot. for Summ. J. at ¶ 6 [hereinafter Thomas Aff.]; *See* Ex. 1, PBGC Directive TR 00-2, issued June 28, 2013. PBGC Directive TR 00-2 has since been updated, but has not materially changed.

¹⁹ Ex. 1, PBGC Directive TR 00-2, issued June 28, 2013 at §§ 5(g), 6(b)(1).

²⁰ *Id.* at §§ 5(g), 6(b)(5).

supporting documents for internal review.²¹ PBGC's designated deciding official reviews the recommendation and supporting documents and determines whether the plan should be terminated and PBGC appointed its statutory trustee.²² The deciding official also determines the appropriate plan termination date that should be proposed to the plan administrator.²³ The decision is documented in a Notice of Determination ("NOD") and a Termination and Trusteeship Decision Record.²⁴ PBGC notifies the plan administrator of its determination by sending the administrator a copy of the NOD.²⁵

PBGC typically effectuates the termination, trusteeship, and establishment of the termination date of an underfunded plan by a consensual agreement with the plan administrator, as authorized by 29 U.S.C. § 1342(c). If PBGC and the plan administrator cannot agree, § 1342(c) authorizes the agency to apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated "in order to protect the interests of the participants" or to protect PBGC's insurance funds. ERISA also directs the court to establish the termination date if PBGC and the plan administrator cannot agree on a date.²⁶

Upon termination of an underfunded pension plan, the plan sponsor and any entity that is a member of its controlled group *on the termination date* become liable to PBGC for various liabilities.²⁷ Usually the largest of these is for the plan's "unfunded benefit liabilities," which is essentially the shortfall in the plan's assets to cover the benefits promised by the plan.²⁸ The

²¹ *Id.* at §§ 5(i), 6(b)(1), 6(b)(7).

²² *Id.* at §§ 6(b)(7), 7(b), 8(a).

²³ *Id.* at §§ 6(b)(5), 6(b)(7), 7(b).

²⁴ *Id.* at §§ 5(f), 5(h), 8(b)(1).

²⁵ 29 U.S.C. § 1342(c).

²⁶ 29 U.S.C. § 1348(a)(4).

²⁷ 29 U.S.C. § 1362(a).

²⁸ *See* 29 U.S.C. §§ 1362(b), 1301(a)(18).

unfunded benefit liabilities are determined based on assumptions prescribed in PBGC regulations.²⁹

STATEMENT OF FACTS

A. Eber Bros. Wine & Liquor Corporation

Eber Bros., a defunct wine and liquor distributor located in Rochester, New York, is both the contributing sponsor and administrator of the Plan.³⁰ Eber Bros. issued a Worker Adjustment and Retraining Notification (“WARN Notice”) in February, 2007, stating that it had entered into an agreement to sell its inventory and some of its assets to a competitor, and would close on March 31, 2007.³¹ While the exact date on which it ceased operations is not clear, [REDACTED] [REDACTED] Eber Bros. had also terminated all employees by May 31, 2009.³³

²⁹ 29 U.S.C. § 1362(b); *see* 29 C.F.R. §§ 4044.41-4044.57.

³⁰ Answer of Eber Bros. Wine & Liquor Corp. to Compl. for Pension Plan Termination, Docket No. 11, at ¶¶ 5, 8-9 [hereinafter Answer]. *See* 29 U.S.C. §§ 1301(a)(1), (13) (the employer may be both contributing sponsor and administrator of an ERISA plan).

³¹ *See WARN Details for Eber Bros. Wine & Liquor Corp.*, N.Y. Dep’t of Labor (Feb. 20, 2007), available at, <http://www.labor.ny.gov/app/warn/details.asp?id=1509> (reports that the Layoff Date is 3/18/2007, and the Closing Date is 3/31/2007).

³² [REDACTED]

³³ PBGC SAR, at 00644-45 (Annual Return/Report of Employee Benefit Plan for the calendar plan year 2009 or fiscal plan year beginning June 1, 2009, and ending May 31, 2010, reports there are zero active participants).

³⁴ [REDACTED]

[REDACTED]

[REDACTED], Eber Bros., as plan administrator and plan sponsor,³⁸ [REDACTED]

[REDACTED]

[REDACTED] After the missed contributions owed to the Plan (including interest) exceeded \$1 million, PBGC perfected the resulting statutory lien by filing Notices of Federal Lien under IRC § 430(k) against Eber Bros. and several members of the Eber Bros.

³⁵ [REDACTED]

³⁶ [REDACTED]

³⁷ [REDACTED]

³⁸ Answer, at ¶¶ 5, 8. *See* 29 U.S.C. §§ 1301(a)(1), (a)(13) (the employer may be both contributing sponsor and administrator of an ERISA plan).

³⁹ [REDACTED]

Controlled Group, including Eber Metro, with the appropriate recordation offices (“Lien Notices”).⁴⁰ PBGC filed the Lien Notices in April 2013.⁴¹

[REDACTED]

Additionally, the board of directors of Eber Bros., which had administered the Plan, resigned from their positions as of March 31, 2014,⁴⁴ [REDACTED]

[REDACTED]

[REDACTED] To protect the interests of those participants, PBGC began paying new retirees their benefits pending termination of the Plan.⁴⁷

⁴⁰ PBGC SAR, at 00625-28.

⁴¹ PBGC SAR, at 00625-28.

⁴² [REDACTED]

⁴³ [REDACTED]

⁴⁴ Answer, at ¶ 11; [REDACTED]

⁴⁵ [REDACTED]

⁴⁶ [REDACTED]

⁴⁷ See Ex. 2, *Authorization to Place Participants into Pay Status Prior to Trusteeship*, PBGC (March 18, 2005). Normally PBGC does not pay benefits until a plan has been terminated and PBGC has been appointed trustee. But where participants would otherwise miss payments to which they are entitled and where it appears inevitable that the plan will terminate and PBGC will become trustee, PBGC policy allows PBGC to pay benefits even before a plan terminates. This is consistent with PBGC’s statutory mandate to ensure “timely and uninterrupted payment of pension benefits to participants and beneficiaries” in plans covered by the PBGC insurance program. 29 U.S.C. § 1302(a).

B. The Plan

The Plan covers 434 participants.⁴⁸ PBGC estimates that as of April 30, 2010, the proposed termination date, the Plan's unfunded benefit liabilities are approximately \$5.2 million.⁴⁹ As of April 30, 2010, Eber Bros. was both the contributing sponsor and administrator of the Plan.⁵⁰

C. PBGC's Determination

On August 6, 2014, PBGC issued an NOD setting forth its determination under 29 U.S.C. § 1342(a)(1) and (2) that the Plan has not met the minimum funding standard required under sections 412 and 430 of the IRC and will be unable to pay benefits when due.⁵¹ PBGC further determined under 29 U.S.C. § 1342(c) that the Plan must be terminated in order to protect the interests of the participants, and that the Plan should terminate effective April 30, 2010, under 29 U.S.C. § 1348.⁵² PBGC sent the NOD to Eber Bros., care of Wendy Eber, the former Chief

⁴⁸ 2009 Form 5500, Annual Return/Report of Employee Benefit Plan, filed by Eber Bros., PBGC SAR, 00644-45 at 00645, line 5.

⁴⁹ Eber Bros. Wine & Liquor Corp. Pension Information Profile, PBGC SAR 00725-27. Under ERISA, the employer and each member of its controlled group become jointly and severally liable to PBGC for amount of the unfunded benefit liabilities of the pension plan pursuant to 29 U.S.C. § 1362(a) and (b) and for any premiums owed pursuant to 29 U.S.C. §§ 1307(e)(2) and 1306(a)(7) (collectively, the "Termination Liabilities"). Using the proposed April 30, 2010 termination date, all members of the Eber Bros. Controlled Group will be jointly and severally liable to PBGC for the following Termination Liabilities: unfunded benefit liabilities in the amount of \$5,165,764.00; interest in the amount of \$937,763.00; termination premiums in the amount of \$1,627,500.00; and insurance premiums, including interest and penalties, in the amount of \$168,667.70. All members of the Eber Bros. Controlled Group also owe interest on the unfunded benefit liabilities from the termination date until the date the liability is paid in full, calculated under PBGC's regulations. *See* 29 U.S.C. § 1362(b)(1)(A); 29 C.F.R. §§ 4062.3, 4062.7.

⁵⁰ Answer, at ¶¶ 5, 8. *See* 29 U.S.C. §§ 1301(a)(1), (13) (the employer may be both contributing sponsor and administrator of an ERISA plan).

⁵¹ PBGC SAR, at 00003.

⁵² PBGC SAR, at 00003.

Financial Officer of Eber Bros.⁵³

PBGC has asked Eber Bros. to sign a termination and trusteeship agreement (“Agreement”) for the Plan, but Eber Bros. has refused.⁵⁴ Accordingly, PBGC filed this suit on May 11, 2015, seeking a decree from this Court adjudicating that the Plan must be terminated, appointing PBGC statutory trustee, and setting the Plan’s termination date as April 30, 2010.⁵⁵ The information that PBGC relied on in making the determination to terminate the Plan was submitted under seal to the Court on May 29, 2015, and a copy was provided to Eber Bros.

STANDARD OF REVIEW

Courts review PBGC’s determination that the Plan should be terminated under the Administrative Procedure Act (“APA”),⁵⁶ and may not overturn the determination unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁵⁷ The arbitrary and capricious standard of review is narrow.⁵⁸ The Court’s review is limited to consideration of the agency’s administrative record,⁵⁹ and the Court may not substitute its

⁵³ PBGC SAR, at 00001-03.

⁵⁴ Answer, at ¶ 19.

⁵⁵ 29 U.S.C. § 1342(c).

⁵⁶ See, e.g., *PBGC v. WHX Corp.*, 2003 WL 21018839 at *2 (S.D.N.Y. 2003) (rejecting application of a de novo standard for reviewing a PBGC termination decision); *PBGC v. Haberbush*, 2000 WL 33362003, at *11 (C.D. Cal. Nov. 3, 2000) (terminating a pension plan under APA review); *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, 1185 (S.D.N.Y. 1991) (granting order to show cause terminating a pension plan on APA review); but see *In re UAL Corp.*, 468 F.3d 444, 449-50 (7th Cir. 2006).

⁵⁷ 5 U.S.C. § 706(2)(A); *LTV Corp.*, 496 U.S. at 656; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971); *Hudson Transit Lines, Inc. v. United States of Am. Interstate Commerce Comm’n*, 765 F.2d 329, 336 (2d Cir. 1985); *N.Y. Dep’t of Soc. Servs. v. Sullivan*, 811 F. Supp. 964, 974 (S.D.N.Y. 1993), *aff’d sub nom.*, *N.Y. Dep’t of Soc. Servs. v. Shalala*, 21 F.3d 485 (2d Cir. 1994).

⁵⁸ *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Overton Park*, 401 U.S. at 420; *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 97 (2d Cir. 2001).

⁵⁹ *Lorion*, 470 U.S. at 743-44; *Overton Park*, 401 U.S. at 420; *Muszynski*, 268 F.3d at 97.

judgment for that of the agency.⁶⁰ Instead, the Court must “consider whether the decision was based on a consideration of relevant factors and whether there was clear error of judgment.”⁶¹ To overturn an agency decision, the Court must find “that no reasonable person could have reached the [agency’s] decision . . . on the evidence contained in the administrative record.”⁶²

Summary judgment is a particularly appropriate vehicle for resolving this 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.

Summary judgment is particularly appropriate in cases in which the court is asked to review or enforce a decision of a federal administrative agency. The explanation for this lies in the relationship between the summary-judgment standard of “no genuine issue as to any material fact” and the nature of judicial review of administrative decisions. . . . [T]he administrative agency is the ‘fact finder.’ Judicial review has the function of determining whether the administrative action is consistent with law—that and no more.⁶³

Indeed, PBGC’s decision should only be set aside if “it relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so

⁶⁰ *Overton Park*, 401 U.S. at 416; *N.Y. Dept. of Soc. Servs.*, 811 F. Supp. at 974 (citing *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983)).

⁶¹ *Overton Park*, 401 U.S. at 416.

⁶² *Pan Am.*, 777 F. Supp. at 1182.

⁶³ Charles A. Wright, *Federal Practice & Procedure: Civil 2d* § 2733 (3d ed., updated April 2012); see also *Beach Erectors, Inc. v. U.S. Dept. of Transp.*, No. 10 CV 5741, 2012 WL 3887209, at *7 (E.D.N.Y. Sept. 7, 2012) (explaining that DOT’s decision to deny DBE certification must be upheld if the decision can be sustained on any of the three determinative issues), *Fund for Animals v. Norton*, 365 F. Supp. 2d 394, 405 (S.D.N.Y. 2005) (citing Charles A. Wright, *Federal Practice & Procedure: Civil 2d* § 2733 (3d ed. 1998)).

implausible that it could not be ascribed to a difference in view or the products of expertise.”⁶⁴

Courts have granted summary judgment to PBGC in numerous administrative record cases.⁶⁵

The Court’s decision on the Plan’s termination date is a de novo decision, not deferential review under the APA; thus, summary judgment may be granted where the “admissible evidence demonstrates both the absence of a genuine issue of material fact” and the moving party’s “entitlement to judgment as a matter of law.”⁶⁶ To overcome a motion for summary judgment, the non-movant must do more than simply show there is “some metaphysical doubt as to the material facts.”⁶⁷ A “mere scintilla of evidence in support of the [non-movant’s] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant].”⁶⁸ “To survive a [summary judgment] motion . . . , [a non-movant] need[s] to create more than a metaphysical possibility that his allegations were correct; he need[s] to come forward with specific facts showing that there is a genuine issue for trial,”⁶⁹ and “cannot rely on

⁶⁴ *Beach Erectors*, 2012 WL 3887209, at *8 (citing *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 89-90 (2d Cir. 2000)) (quoting *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43); see also *NRDC, Inc. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 613 F.3d 76, 83-84 (2d Cir. 2010); *Fund for Animals*, 365 F. Supp. 2d at 415.

⁶⁵ See, e.g., *Haberbush*, 2000 WL 33362003, at *11 (terminating a pension plan); see *FEL*, 798 F. Supp. at 242 (same); *Pan Am.*, 777 F. Supp. at 1181, 1185 (granting order to show cause terminating a pension plan). See also *Flo-Con Systems, 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*, 19 Employee Ben. Cas. 1163 (N.D. Ala. 1995) (granting summary judgment to PBGC in an action concerning standard terminations); *Kauble v. PBGC*, No. IP 93-1331, 1994 WL 722966 (S.D. Ind. 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).

⁶⁶ Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Miner v. Clinton Cnty.*, 541 F.3d 464, 471 (2d Cir. 2008); *Beach Erectors, Inc.*, WL 3887209, at *7.

⁶⁷ *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

⁶⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

⁶⁹ *Wrobel v. Cnty. of Erie*, 692 F.3d 22, 30 (2d Cir. 2012) (quoting *Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87).

the mere allegations or denials contained in the pleadings.”⁷⁰

ARGUMENT

I. PBGC’s Determination That the Plan Should Be Terminated Is Reasonable And Fully Supported By PBGC’s Administrative Record

As explained above, this Court should review the decision to terminate the Plan on PBGC’s administrative record under the Administrative Procedure Act. In Title IV of ERISA, Congress specifically authorized PBGC to determine that a pension plan should be terminated if PBGC concludes that the plan meets any one of the four criteria specified in 29 U.S.C.

§ 1342(a). Here, PBGC determined that the Plan should be terminated under 29 U.S.C.

§ 1342(a)(1) and (2) because the Plan has not met the minimum funding standard and the Plan will be unable to pay benefits when due.⁷¹ PBGC also determined that the Plan should be terminated under 29 U.S.C. § 1342(c) to protect the interests of the Plan’s participants.⁷²

If the record supports PBGC’s basis for termination of the Plan under either 29 U.S.C. § 1342(a)(1) or (2), PBGC’s determination must be upheld.⁷³ This Court must enforce PBGC’s determination unless it finds “that no reasonable person could have reached the decision to terminate the plan on the evidence contained in the administrative record.”⁷⁴ Here, PBGC’s determination is well supported by its administrative record and is reasonable. Therefore, the Court should adjudicate the Plan terminated.

⁷⁰ *Baity v. Kralik*, 51 F. Supp. 3d 414, 429 (S.D.N.Y. 2014) (citing *Walker v. City of New York*, No. 11-CV-2941, 2014 U.S. Dist. LEXIS 41287, 2014 WL 1244778, at *5 (S.D.N.Y. Mar. 26, 2014) (citing, inter alia, *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009)).

⁷¹ PBGC SAR, at 00003.

⁷² PBGC SAR, at 00003.

⁷³ See e.g., *Assoc. of Flight Attendants v. PBGC*, No. Civ. A. 05-1036ESH. 2006 WL 89829, at *11 (D.D.C. Jan. 13, 2006) (“PBGC’s assessment under § 1342(a)(2) was a reasonable conclusion based on the information available to the agency at the time it made its decision, and thus, it cannot be considered as arbitrary and capricious under the APA.”).

⁷⁴ *Pan Am.*, 777 F. Supp. at 1182.

A. The record supports that the Plan has not met the minimum funding standard; therefore, the Plan should be terminated.

ERISA provides for termination of a covered pension plan whenever PBGC determines that the plan has not met the minimum funding standard under the IRC.⁷⁵ PBGC determined here that the Plan failed to meet the minimum funding standard.⁷⁶

[REDACTED] and undoubtedly prior to the proposed termination date, April 30, 2010. Eber Bros., as plan administrator and plan sponsor, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] On April 29, 2013, PBGC perfected the Lien Notices.⁸¹ Thus, PBGC's determination that the Plan has not met the minimum funding standard under the IRC is fully supported by the administrative record and should be sustained.

⁷⁵ 29 U.S.C. § 1342(a)(1).

⁷⁶ PBGC SAR, at 00003.

⁷⁷ [REDACTED]

⁷⁸ [REDACTED]

⁷⁹ [REDACTED]

⁸⁰ [REDACTED]

⁸¹ PBGC SAR, at 00625-28.

B. The record supports that the Plan will be unable to pay benefits when due; therefore, the Plan should be terminated.

ERISA allows PBGC the discretion to initiate termination of a pension plan when PBGC finds that the pension plan will be unable to pay benefits when due.⁸² ERISA does not require a finding as to when a plan will definitively become unable to pay benefits when due; it merely requires a finding that the plan will eventually be unable to pay benefits when due.⁸³

[REDACTED] and terminated its employees by May 31, 2009.⁸⁵ PBGC calculated that as of April 30, 2010, the Plan's liabilities exceed its assets by approximately \$5.2 million.⁸⁶ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁸² 29 U.S.C. § 1342(a)(2).

⁸³ *Id.*

⁸⁴ [REDACTED]

⁸⁵ PBGC SAR, at 00644-45 (Annual Return/Report of Employee Benefit Plan for the calendar plan year 2009 or fiscal plan year beginning June 1, 2009, and ending May 31, 2010, reports there are zero active participants).

⁸⁶ Eber Bros. Wine & Liquor Corp. Pension Information Profile, PBGC SAR, at 00725.

⁸⁷ [REDACTED]

⁸⁸ [REDACTED]

Additionally, the administrative record shows that the board of directors of Eber Bros that had administered the Plan, resigned from their positions as of March 31, 2014,⁸⁹ [REDACTED]

Based on this information, PBGC determined that the Plan will be unable to pay benefits when due because the Plan lacks funds to pay all the benefits in the Plan and [REDACTED]

[REDACTED] Additionally, PBGC determined that the Plan will be unable to pay benefits when due [REDACTED]

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

II. The Plan Must Be Terminated To Protect the Participants

Eber Bros. has asserted in its Answer that this Court should decide termination de novo, rather than based solely on the administrative record filed by PBGC.⁹³ This assertion is

⁸⁹ Answer, at ¶ 11; [REDACTED]

⁹⁰ [REDACTED]

⁹¹ [REDACTED]

⁹² [REDACTED]

⁹³ Answer, at ¶ 15.

erroneous —courts, including courts in the Second Circuit, have frequently reviewed such cases under the APA standard.⁹⁴ But even if the de novo standard applied, the evidence indisputably supports the need to terminate the Plan. [REDACTED]

[REDACTED] Accordingly, there can be no dispute that termination of the Plan is necessary to protect the interests of Plan participants, this Court should enter an order terminating the Plan.

[REDACTED] and terminated all employees by May 31, 2009.⁹⁸ [REDACTED]

Moreover, Eber Bros, which had administered the Plan, admits that the board of directors resigned from their positions as of March 31, 2014,¹⁰⁰ [REDACTED]

⁹⁴ See, e.g., *Haberbush*, 2000 WL 33362003, at *11 (terminating a pension plan under APA review); *FEL Corp.*, 798 F. Supp. at 242 (same); *Pan Am.*, 777 F. Supp. at 1181, 1185 (same); *WHX Corp.*, 2003 WL 21018839 at *2 (same).

⁹⁵ [REDACTED]

⁹⁶ [REDACTED]

⁹⁷ [REDACTED] See *WARN Details for Eber Bros. Wine & Liquor Corp.*, N.Y. Dep't of Labor (Feb. 20, 2007), available at, <http://www.labor.ny.gov/app/warn/details.asp?id=1509> (reports that the Layoff Date is 3/18/2007 and the Closing Date is 3/31/2007).

⁹⁸ PBGC SAR at 00644-45 (Annual Return/Report of Employee Benefit Plan for the calendar plan year 2009 or fiscal plan year beginning June 1, 2009, and ending May 31, 2010, reports there are zero active participants).

⁹⁹ [REDACTED]

¹⁰⁰ Answer, at ¶ 11; [REDACTED]

[REDACTED] PBGC is paying those new retirees pending Plan termination; if the Court does not order the Plan terminated, PBGC will cease processing those new applications.¹⁰² The admissible evidence supports that there is no genuine issue of material fact and supports that termination of the Plan is necessary to protect the interests of Plan participants. Therefore, the Court must order the Plan terminated to protect the interests of Plan Participants under 29 U.S.C. § 1342(c).

III. The Court Should Establish April 30, 2010, As the Plan's Termination Date

A. The Second Circuit has set forth a simple test for establishing a termination date.

In addition to adjudicating the Plan terminated and appointing PBGC trustee, the Court must also establish an appropriate termination date for the Plan. When, as here, PBGC and the plan administrator cannot agree on a termination date, the Court establishes the date.¹⁰³

Although the statute provides no guidance on how to set termination dates, case law has filled the gap. Courts, including the Second Circuit, have fashioned a two-step process for establishing a termination date, which addresses the interests of both plan participants and PBGC. The Second Circuit summarized the process this way in the *Broadway Maintenance* case:

[T]he District Court . . . should begin its analysis by determining the earliest date when the Plan's participants had actual or constructive notice of the Plan's termination, i.e., notice sufficient to extinguish their reliance interest. . . . Once that date is ascertained, the District Court should then select whatever later date serves the interests of PBGC.¹⁰⁴

¹⁰¹ [REDACTED]

¹⁰² See Ex. 2, *Authorization to Place Participants into Pay Status Prior to Trusteeship*, PBGC (March 18, 2005).

¹⁰³ 29 U.S.C. §§ 1348(a)(3)-(4).

¹⁰⁴ *Broadway Maint.*, 707 F.2d at 652-53 (citation omitted) (citing *PBGC v. Heppenstall Co.*, 633 F.2d 293, 301-02 (3d Cir. 1980); see also *PBGC v. Republic Techs. Int'l, LLC*, 386 F.3d 659, 666-668 (6th Cir. 2004); *Pension Comm. for Farmstead Foods Pension Plan v. PBGC*, 991 F.2d

The Second Circuit in *Broadway Maintenance* followed the Third Circuit’s test in *PBGC v. Heppenstall Co.*,¹⁰⁵ when considering the termination date in a PBGC-initiated action under 29 U.S.C. § 1342.¹⁰⁶ The employees may have an “expectation or reliance interest” in the continued accrual of benefits, which must be recognized to the extent that the reliance is “justifiable.”¹⁰⁷ But as soon as employees are put on notice that their pension plan may be terminating, that reliance is extinguished.¹⁰⁸ Accordingly, the earliest date that courts may select is “the date when the Plan’s participants had actual or constructive notice of the Plan’s termination.”¹⁰⁹ The courts have uniformly and repeatedly held that a plan sponsor’s cessation of operations constitutes constructive notice.¹¹⁰ Once the notice date is determined, the Second Circuit held in *Broadway Maintenance*, the district court “should then select whatever later date

1415, 1420 (8th Cir. 1993); *PBGC v. Mize Co.*, 987 F.2d 1059, 1062-63 (4th Cir. 1993); *United Steel Workers of Am. v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1296 (3d Cir. 1983); *Pan Am*, 777 F. Supp. at 1184; *Haberbush*, 2000 WL 33362003, at *9-10.

¹⁰⁵ 633 F.2d 293, 300-01.

¹⁰⁶ *Heppenstall*, 633 F.2d at 300-01.

¹⁰⁷ *Broadway Maintenance*, 707 F.2d at 652-53 (citing *Heppenstall*, 633 F.2d at 300-01); see *Pan Am.*, 777 F. Supp. at 1183-84.

¹⁰⁸ *Broadway Maintenance*, 707 F.2d at 652-53 (citing *Heppenstall*, 633 F.2d at 300-01); see *Pan Am.*, 777 F. Supp. at 1183-84.

¹⁰⁹ *Id.* at 652.

¹¹⁰ Ex. 3, Report & Recommendation at 5, *PBGC v. Thomas O’Rourke Gallagher, Inc.*, CV 14-6554, Docket. No. 13 (E.D.N.Y. July 21, 2015) (“the date the defendant ceases business puts the plan beneficiaries on constructive notice that the plan may be terminated”); *PBGC v. Nastasi White, Inc.*, 476 F. Supp. 2d 228, 230 (E.D. N.Y. 2007) (participants “were placed on constructive notice when the defendant ceased operations”); see also *Heppenstall*, 633 F.2d at 301 (“no employee had any justifiable expectation in a termination date later than when the employer ceased operations.”); *Pension Comm. for Farmstead Foods Pension Plan*, 991 F.2d at 1420 (“the district court found that the date each facility closed was the earliest date that it could terminate the plan[.]”); *PBGC v. Rouge Steel Co.*, No. 03-CV-75092. 2010 WL 3324921, at *6 (Aug. 23, 2010) (“All courts to address the issue have found that a cessation of operations constitutes constructive notice that the pension plan will not continue”); *Pan Am.*, 777 F. Supp. at 1185 (constructive notice is when a beneficiary “should have known there was a substantial chance that the plan on which that beneficiary had relied would be terminated”).

serves the interests of PBGC.”¹¹¹ And, the Second Circuit continued, the district court “is entitled to conclude” that the date proposed by PBGC “adequately serves the interests of PBGC.”¹¹²

As explained above, in setting a termination date the courts are to consider the interests of participants and PBGC. What they do *not* consider is the interests of the employer. The Second Circuit explicitly so held in *Broadway Maintenance*: “As the Third Circuit has repeatedly emphasized, the financial interests of the employer should play no role in setting a termination date.”¹¹³

B. PBGC’s proposed termination date satisfies the *Broadway Maintenance* standard.

Applying the two *Broadway Maintenance* tests to this case leads inescapably to the conclusion that the Plan’s termination date should be April 30, 2010. [REDACTED]

[REDACTED] Because a plan sponsor’s cessation of operations constitutes constructive notice, participants had constructive notice [REDACTED]

¹¹¹ *Broadway Maint.*, 707 F.2d at 653; *accord*, *Republic Techs. Int’l*, 386 F.3d at 666-68; *United Steelworkers of Am. v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1296 (3d Cir. 1983); *see Heppenstall*, 633 F.2d at 300-01 (Third Circuit permitted a later date only if the interests of PBGC were not adversely affected); *Nastasi White*, 476 F. Supp. 2d at 230.

¹¹² 707 F.2d at 653; *accord*, *Republic Techs.*, 386 F.3d at 667 (overturning the district court for failing “to give appropriate deference to PBGC’s conclusion that it faced an unreasonable increase in its liabilities”); *Haberbush*, 2000 WL 33362003, at *10 (“PBGC is deemed best able to determine its own interests....”); *PBGC v. Mize, Co.*, 987 F.2d 1059, 1063 (4th Cir. 1993) (“PBGC’s interests should be deemed to be best served by the date proposed by PBGC.”)

¹¹³ 707 F.2d at 652 (citing *Heppenstall*, 633 F.2d at 300-01, and *In re Syntex Fabrics, Inc. Pension Plan v. Dicenso*, 698 F.2d 199, 204 (3d Cir. 1983)).

¹¹⁴ [REDACTED] *See WARN Details for Eber Bros. Wine & Liquor Corp.*, N.Y. Dep’t of Labor (Feb. 20, 2007), available at, <http://www.labor.ny.gov/app/warn/details.asp?id=1509> (reports that the Layoff Date is 3/18/2007 and the Closing Date is 3/31/2007).

█, that the Plan would terminate.¹¹⁵ Thus, that date is the earliest date that this Court could set as the termination date.

Having identified the earliest date on which participants received actual or constructive notice of their pension plan's termination, the Court should then move to the second part of the *Broadway Maintenance* test: to select a termination date on or after that date that best serves PBGC's interests.¹¹⁶

After applying the appropriate standards, expressly accounting for the expectation interests of the Plan's participants, and carefully analyzing its own interests, PBGC is proposing a termination date of April 30, 2010.¹¹⁷ PBGC has determined that that date serves its interests. After Eber Bros. ceased operations, the Eber family took steps that may have removed Eber Metro and Eber CT from the Eber Bros. Controlled Group. PBGC reasonably concluded that termination of the Plan before any arguable breakup of the Eber Bros. Controlled Group would provide PBGC the greatest likelihood of recovery.¹¹⁸ The Court should therefore accept the agency's proposed date of April 30, 2010, as the Plan's termination date under 29 U.S.C. § 1348(a)(4) because it is the date PBGC chose as best serving its interest. As of that date, the Eber Bros. Controlled Group remained intact and all of its members were liable to PBGC.¹¹⁹

The facts establishing these two key considerations when establishing a plan's termination date – notice to participants and PBGC's best interests – are undisputed; therefore,

¹¹⁵ *Supra* note 111.

¹¹⁶ *Broadway Maintenance*, 707 F.2d at 652-53; *see Harris & Sons*, 706 F.2d at 1296; *Heppenstall*, 633 F.2d at 300-01; *Nastasi White*, 476 F. Supp. 2d at 230.

¹¹⁷ PBGC SAR, at 00004-06.

¹¹⁸ PBGC SAR, at 00004-06.

¹¹⁹ *See* 29 U.S.C. § 1362(b) (all entities that are members of the plan sponsor's controlled group "on the termination date" are jointly and severally liable for the plan's unfunded benefit liabilities).

the Court should establish April 30, 2010, as the Plan termination date and PBGC is entitled to judgment as a matter of law.¹²⁰

CONCLUSION

PBGC's determination that the Plan should be terminated under 29 U.S.C. § 1342(a)(1) and (2) is well supported by the administrative record and is neither arbitrary nor capricious. However, even if the Court reviewed that issue de novo, it is indisputable that the Plan must be terminated to protect the participants. Additionally, PBGC should be appointed statutory trustee of the Plan and, under 29 U.S.C. § 1348, April 30, 2010, should be established as the Plan's termination date.

Dated: Washington, D.C.
August 17, 2015

Respectfully submitted,

/s/ Kimberly E. Neureiter

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¹²⁰ See Fed. R. Civ. P. 56(c).

EXHIBIT 1



Order

Subject: Termination and Trusteeship of Single-Employer Pension Plans

Directive Number: TR 00-2

Effective Date: 06-28-2013

Originator: Chief of Negotiations and Restructuring

**Alice C. Maroni
Chief Management Officer**

1. **PURPOSE:** This Directive sets forth the administrative process of the Pension Benefit Guaranty Corporation (PBGC) for determining whether the statutory termination criteria are met for a single-employer pension plan to be terminated and/or trusted in either a distress termination under section 4041(c) of the Employee Retirement Income Security Act of 1974, *as amended* (“ERISA”), or a PBGC-initiated termination under section 4042 of ERISA. This Directive does not apply to “standard” terminations of fully funded pension plans under section 4041(b) of ERISA.

Nothing in this Directive overrides any statutory or regulatory provision, and in the event of inconsistencies between this Directive and ERISA or PBGC’s regulations, ERISA and the regulations control.

PBGC staff prepares a Termination Package that addresses termination issues (see **Part 6.a** of this Directive for Distress Termination Cases and **Part 6.b.** for PBGC-initiated Termination Cases). The PBGC Trusteeship Working Group (“TWG”) reviews certain Termination Packages for completeness and to recommend whether termination criteria have been met. When a case is exempt from full TWG review, the Chairperson of the TWG reviews the relevant Termination Package (**Part 7**). The Termination Package, along with the TWG recommendation, if applicable, is then forwarded to the PBGC official who has authority to approve the termination of the plan (**Part 8**). Upon such approval, PBGC typically seeks to become trustee by executing a Trusteeship Agreement with the plan sponsor or by filing an action in court (**Part 9**). Special rules may apply to unusual facts and circumstances, such as cases involving exigent circumstances or modification or withdrawal of a termination decision (**Part 10**).

2. **CANCELLATION:** Replaces **Termination and Trusteeship of Single-Employer Pension Plans TR 00-2**, dated August 30, 2011.
3. **SCOPE:** The provisions of this directive address certain aspects of the Termination and Trusteeship process of Single-Employer pension plans.
 - a. These aspects include:
 - (1) Termination process
 - (2) Termination criteria
 - (3) TWG membership
 - (4) TWG responsibilities
 - b. This Directive does not apply to “standard” terminations of fully funded plans under section 4041(b) of ERISA.
4. **AUTHORITIES:** Relevant authority is as follows:
 - a. Section 4041 of ERISA with regard to distress termination;
 - b. Section 4042 of ERISA with regard to PBGC-initiated terminations;
 - c. Section 4021 of ERISA with regard to Title IV coverage; and
 - d. Section 4048 of ERISA with regard to setting the plan termination date.
5. **DEFINITIONS:**
 - a. **Aggregate amount of PBGC’s claims** means the case staff’s best estimate of the total amount of PBGC’s claims for unfunded benefit liabilities with respect to all underfunded plans maintained by the sponsor and the sponsor’s controlled group.
 - b. **Deciding Official** means the official with authority to approve a recommendation regarding termination and/or trusteeship of a pension plan. The Deciding Official is:
 - (1) The Chairperson of the Trusteeship Working Group, or designee, for Exempt cases;
 - (2) The Chief of Negotiations and Restructuring, or designee, for Non-Exempt cases in which the aggregate amount of PBGC’s claims is \$100 million or less, and no novel or significant policy issue is involved; and
 - (3) The PBGC Director or designee for cases in which the aggregate amount of PBGC’s claims is more than \$100 million, or any case in which there is a novel or significant policy issue.

- c. **Distress Termination Letter** means the letter from PBGC notifying the applicant for a distress termination that the application has been approved or denied.
- d. **Exempt case** means a case that may be decided by the TWG Chairperson alone, without requiring a meeting of the full TWG. The criteria for an Exempt case are set forth in Part 7.b below.
- e. **Non-Exempt case** means a case that does not meet the definition of Exempt case. A Non-Exempt case must be reviewed by the TWG.
- f. **Notice of Determination (NOD)** means the determination issued by PBGC under section 4042(a) that a plan should or must be terminated.
- g. **Termination Recommendation** is the memorandum that sets forth a summary of the factual, legal, actuarial and financial record relied upon to reach a recommendation on whether or not a plan should be terminated. The memorandum should include, but is not limited to, a discussion of the plan sponsor's business and whether there is a reorganization, liquidation, asset sale, or some other corporate transaction that could affect the pension plan, the identification of the plan sponsor's controlled group, the financial condition of the plan sponsor and its controlled group, the funding status of the plan, and any relevant actuarial or benefit issues. Finally, it should confirm that the plan is covered under section 4021; discuss the grounds for termination and in the case of a distress termination, explain whether the termination complies with section 4041 and the regulations thereunder; contain a recommendation regarding the Plan Termination Date under section 4048; and recommend whether PBGC should become plan trustee.
- h. **Termination and Trusteeship Decision Record (TDR)** is the form used to document the approval of PBGC's termination decisions.
- i. **Termination Package** means the materials presented to the TWG, or in an Exempt case to the TWG Chairperson. It should include, but not be limited to: the Termination Recommendation memorandum, a draft TDR, all relevant supporting materials, including but not limited to PBGC estimates of unpaid minimum funding contributions, unfunded benefit liabilities, and unpaid premiums, a projection of estimated minimum required contributions in distress cases other than liquidations, and in appropriate 4042 cases, financial models, forecasts and projections, any Notices of Intent to Terminate (NOIT), relevant court filings, and relevant transactional documents, e.g., asset purchase agreements.
- j. **Trusteeship Agreement (TA)** is the written agreement between PBGC and the plan administrator terminating a plan, usually appointing PBGC as trustee of the plan, and usually establishing the plan termination date.

- k. **The Trusteeship Working Group (TWG)** is an intra-agency group representing the various professional disciplines involved in processing underfunded single-employer pension plans under sections 4041 and 4042 of ERISA. The TWG's responsibilities are set forth in Part 7 of this Directive.

6. **BACKGROUND**

a. **DISTRESS TERMINATION CASES UNDER SECTION 4041**

- (1) **Overview.** A plan administrator may voluntarily initiate a termination of a single-employer plan in a distress termination under section 4041(c) of ERISA. To do so, the plan administrator must comply with the requirements of section 4041(c) and the regulations thereunder. Case staff should address whether the plan is a covered plan under section 4021 of ERISA, whether the plan administrator's distress termination application is complete and complies with all of the requirements of section 4041 of ERISA and the regulations thereunder, whether one or more of the criteria under section 4041(c) is satisfied (for each member of the pension plan's controlled group), whether PBGC should seek to become trustee of the plan, and an appropriate plan termination date.

- (a) Under section 4041.41(b)(2)(i) of the regulations, PBGC may decide to waive any requirement for the Notice of Intent to Terminate (Form 600) or the Distress Termination Notice (Form 601) that must be filed with PBGC. For example, PBGC may decide to waive a requirement if PBGC believes it will be less costly or less administratively burdensome to do so. Such a waiver is effective only if granted in writing.
- (b) Even though a distress termination request may be pending, PBGC retains the authority in any case to initiate a plan termination in accordance with the provisions of section 4042 of ERISA (*see* section 4041.41(b)(2)(ii) of the regulations).

- (2) **Covered Plan.** Case staff should ensure that the record supports a finding that the plan is a covered plan under section 4021 of ERISA (e.g., the plan has received a favorable Determination Letter from the Internal Revenue Service).

- (3) **Section 4041(c)(2)(B).** Distress criteria are met when each controlled group member satisfies at least one of the distress tests set forth in this section as follows:

- (a) **Liquidation Test:** The controlled group member is in liquidation in bankruptcy or similar federal or state insolvency proceeding.

- (b) **Reorganization Test:** The controlled group member is involved in reorganization in bankruptcy or similar state proceeding; and the bankruptcy court or other appropriate court has determined that the controlled group member will be unable to reorganize unless the plan is terminated and has approved the termination of the plan with regard to that controlled group member.

- (4) **Section 4041.41(d)**, entitled “Non-duplicative efforts,” explains what PBGC will do when a debtor in a reorganization case applies for a determination from a bankruptcy court that the debtor meets the reorganization distress test. It says that in such a case, PBGC will –
 - (a) enter an appearance to ask the bankruptcy court to make specific findings as to whether the debtor meets the distress test;
 - (b) provide the court with any information it has that PBGC decides may be germane to the court’s ruling;
 - (c) defer acting on any request that the debtor may make to PBGC for a similar distress determination until the court makes its determination; and
 - (d) be bound by a final and non-appealable order of the court.

Note: “Final and non-appealable” means that PBGC would be bound by the order, as the time for appeal has run and no party has filed an appeal.

- (5) **Business Continuation Test:** Unless a distress termination occurs, the controlled group member will be unable to pay debts and continue in business.

- (6) **Pension Costs Test:** The cost of providing pension coverage has become unreasonably burdensome solely as a result of a decline in the workforce.

- (7) **Date of Plan Termination.** For distress terminations, section 4048(a)(2) provides that the date of plan termination is “the date established by the plan administrator and agreed to by PBGC . . .” The recommendation for agreeing to or rejecting the date of plan termination established by the plan administrator should be based on several factors, including whether the date is within the period described in the statute and the earliest date upon which participants’ expectations of plan continuance ceased, and then determining whether a later date would be in PBGC’s interest.

- (8) **Distress Termination Notice (Form 601) and Schedule EA-D.** The plan administrator must file a Form 601, Distress Termination Notice, with the Schedule EA-D, Distress Termination Certification of Sufficiency,

completed in accordance with the regulations and the instructions to the form.

- (a) CFRD will review the submission to ensure that it is complete and that it contains all of the information required to be filed with Form 601.
 - (b) If the only reason for PBGC's determining that the plan does not qualify for a distress termination is that the Form 601 is incomplete, or that PBGC otherwise lacks sufficient information, PBGC shall advise the plan administrator of the missing items of information. PBGC will consider the original filing complete if the missing or additional information is filed with PBGC no later than the 120th day after the proposed termination date or the 30th day after the date of PBGC's written notice, whichever is later, or if the plan administrator obtains a written waiver of the requirement from PBGC. (PBGC may waive or extend deadlines under this paragraph).
- (9) **Case Team Review.** Based on the Form 600, the Form 601, and any other relevant information, CFRD and OCC will evaluate whether the requirements for a distress termination have been satisfied, including whether each controlled group member satisfies one of the distress tests set forth in section 4041(c)(2)(B) of ERISA (*i.e.*, the Liquidation Test, the Reorganization Test, the Business Continuation Test, or the Pension Costs Test).

Note: CFRD and OCC will evaluate whether the plan is sufficient for guaranteed benefits and whether trusteeship by PBGC is appropriate.

- (10) **Prepare and forward Termination Package.** Case staff will assemble the materials for review by the TWG and/or Deciding Official, including the Termination Package. Case staff will then forward the Termination Package to the TWG Chairperson, and will make all assembled materials available for review by the Deciding Official in exempt cases, and the TWG and the Deciding Official in non-exempt cases. If the case requires review by the TWG, the TWG Chairperson will schedule a meeting of the TWG (*see* Part 7 of this Directive). After the TWG recommendation is made, the case staff should forward the Termination Package for concurrence and approval pursuant to Part 8 of this Directive.

b. **PBGC-INITIATED TERMINATION CASES UNDER SECTION 4042**

- (1) **Overview.** Section 4042 of ERISA governs PBGC's initiation of the termination and trusteeship of a single-employer pension plan. Case staff should address whether the plan is a covered plan under section 4021 of ERISA, whether one or more of the termination criteria under section 4042(a) is satisfied, whether one or more of the criteria under section

4042(c) are satisfied, and whether PBGC should seek to become trustee of the Plan. The staff should also propose a date of plan termination under section 4048. If Case staff concludes that PBGC should take action to terminate the plan, the Case staff prepares the Termination Package and forwards it to the TWG and/or Deciding Official for review.

- (2) **Covered Plan.** Case staff should ensure that the record supports a finding that the plan is a covered plan under section 4021 of ERISA (*e.g.*, the plan has received a favorable Determination Letter from the Internal Revenue Service).
- (3) **Section 4042(a).** PBGC initiates termination proceedings only if at least one of the following criteria under section 4042(a) is present:
 - (a) **Mandatory Termination.** Under the language of section 4042(a), the PBGC must terminate a plan if “the plan does not have assets available to pay benefits which are currently due under the terms of the plan.” Case staff should process mandatory termination cases on an expedited basis. In such cases, PBGC may place participants into pay status prior to becoming trustee of the plan.
 - (b) **Failure to Satisfy Minimum Funding Requirements.** Under section 4042(a)(1), PBGC has discretion to initiate termination proceedings if it determines that “the plan has not met the minimum funding standard required under section 412 of the Internal Revenue Code. . . .”
 - (c) **Unable to Pay Benefits When Due.** Under section 4042(a)(2), PBGC has discretion to initiate termination proceedings if it determines that “the plan will be unable to pay benefits when due.” In general, case staff should consider the extent of the plan’s underfunding and whether the plan will be abandoned (*e.g.*, due to liquidation of the plan sponsor).
 - (d) **Distribution to Substantial Owner.** Under section 4042(a)(3), PBGC has discretion to initiate termination proceedings if it determines that “the reportable event described in section 4043(c)(7) has occurred.” Section 4043(c)(7) involves certain distributions to substantial owners.
 - (e) **Long Run Loss.** Under section 4042(a)(4), PBGC has discretion to initiate termination proceedings if it determines that “the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.”
- (4) **Section 4042(c).** If one or more of the grounds for termination under section 4042(a) is present, section 4042(c) provides that PBGC may apply

to a federal district court for a decree adjudicating that the plan be terminated “in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of [PBGC].” The Termination Recommendation should include a discussion of which of these criteria under section 4042(c) applies.

- (5) **Date of Plan Termination.** For PBGC-initiated terminations, section 4048(a)(3) provides that the date of plan termination is “the date established by [PBGC] and agreed to by the plan administrator. . . .” CFRD and OCC staff should prepare their recommendation for the date of plan termination by ascertaining the earliest date upon which participants’ expectations of plan continuance ceased, or are expected to cease, and then determining whether a later date would be in PBGC’s interest. However, if the plan is being recommended as a mandatory termination, consideration should be given to setting the Date of Plan Termination no later than the date the plan became unable to pay benefits.
- (6) **PBGC Trusteeship.** Case staff should recommend whether, pursuant to section 4042(c) of ERISA, PBGC should take action to become trustee of the plan.
- (7) **Prepare the Administrative Record and forward the Termination Package.** Case staff will assemble the materials for review by the TWG and/or Deciding Official, including the Termination Package. Case staff will then forward the Termination Package to the TWG Chairperson, and will make all assembled materials available for review by the Deciding Official in exempt cases, and the TWG and the Deciding Official in non-exempt cases. If the case requires review by the TWG, the TWG Chairperson will schedule a meeting of the TWG (*see* Part 7 of this Directive). After the TWG makes a recommendation of termination and/or trusteeship, the case staff should forward the Termination Package for concurrence and approval pursuant to Part 8 of this Directive.

7. **TRUSTEESHIP WORKING GROUP**

- a. **The Purpose of the TWG.** The purpose of the TWG is to provide an objective review of termination recommendations to ensure that:
 - (1) the administrative record supporting the termination decision is complete;
 - (2) the various actuarial, financial, factual and legal issues in the case are appropriately developed;
 - (3) the termination criteria have been met; and

(4) the Deciding Official has sufficient information to make a termination decision based on the relevant statutory criteria.

b. **Cases Exempt From TWG Review.** Each Termination Package is reviewed by the full TWG unless a case is Exempt from TWG review. However, the TWG must review a case that otherwise meets the criteria for an Exempt case if so requested by the Chief of Negotiations and Restructuring, the General Counsel, or the TWG Chairperson. A case is Exempt if:

(1) the aggregate amount of PBGC's claims totals \$10 million or less; or

(2) the aggregate amount of PBGC's claims totals \$25 million or less providing,

(a) there are fewer than 5,000 participants in the relevant plans;

(b) no novel or significant policy issue is involved; and

(c) one or more of the following criteria is also met:

(i) the plan is recommended for mandatory termination under section 4042(a);

(ii) the plan is recommended for discretionary termination under section 4042(a)(2) and, within the next six months, the plan will not have assets available to pay benefits when due;

(iii) the plan is recommended for discretionary termination under section 4042(a)(1) or 4042(a)(2), there is no ongoing plan sponsor, and the combined projected annual gross revenues of all known ongoing controlled group members are less than 50% of the projected annual minimum funding requirements with respect to the plan; or

(iv) the plan is recommended for distress termination on the grounds that the plan's sponsor and each controlled group member, if any, meet the liquidation test under section 4041(c)(2)(B)(i), the reorganization test under 4041(c)(2)(B)(ii), or, as of the proposed termination date, are not engaged in any substantial business or commercial activity, have no assets or only nominal assets, and have no employees or a nominal number of employees.

- c. **TWG Membership.** Voting members on the TWG include the TWG Chairperson, who shall be designated by the Chief of Negotiations and Restructuring, or the Chairperson's designee. Additionally, the TWG will have at least two voting members from each of the following disciplines represented:
- (1) Actuaries
 - (2) Financial Analysts
 - (3) Auditors
 - (4) Attorneys
- d. **TWG Vacancies.** As voting member openings on the TWG become available (caused by a current member leaving PBGC, changing position/duties, or other factors determined by their supervisor), the TWG Chairperson will solicit recommendations for replacement members from the heads of the agency offices and departments listed below. Candidates for membership should have substantial professional experience with Title IV of ERISA.
- (1) Benefits Administration and Payment Department (BAPD)
 - (2) BAPD/Actuarial Services Division (ASD)
 - (3) Office of Negotiations and Restructuring (ONR)
 - (4) Corporate Finance and Restructuring (CFRD)
 - (5) Legislative Department (LD)
 - (6) Office of Chief Counsel (OCC)
 - (7) Office of the General Counsel (OGC)
 - (8) Policy, Research and Analysis Department (PRAD)
- e. **TWG Voting.** Voting membership will be based first on ensuring balanced and experienced representation from each of the four disciplines listed above and second on balanced representation from each of the offices/departments above. Because of the priority, the offices and departments listed above are not guaranteed a voting member on the TWG. Final voting membership will be determined by the TWG Chairperson with concurrence of the Chief of Negotiations and Restructuring. If an office/department does not have a voting member, at their option they may name a non-voting member. If a voting member is unable to attend a particular TWG meeting, he/she will contact the TWG Chairperson in advance of the meeting. Such voting member will designate a substitute voting member from his/her discipline. Such substitutes should have substantial professional experience with Title IV of ERISA. Nonvoting members of the TWG are representatives from the Financial Operations Department (FOD) and the Communications and Public Affairs Department (CPAD).

Note: TWG members are expected to fully review the termination package prior to the TWG meeting, even in exigent circumstances. Other interested individuals may observe the TWG proceedings as allowable by room size and meeting content. Such individuals must contact the TWG Chairperson prior to the meeting.

- f. **Recusal.** If a TWG member has done work on the recommendation being presented, that member shall recuse himself/herself from voting. In such cases, the TWG member's department will designate an acting member for the TWG meeting and will inform the TWG chairperson in advance of the meeting.

- g. **Quorum and Majority Vote.** A quorum is necessary for the TWG to make a recommendation. A minimum of the TWG Chairperson or the Chairperson's designee, and at least one member representing each of the disciplines listed in Section 7.c must be present and eligible to vote in order to constitute a quorum. The TWG recommendation must have the support of no less than four members, and two-thirds of those members present and voting. Members recused from voting on a case are not counted for purposes of determining a quorum or the two-thirds vote. Members who abstain from a vote are counted for quorum purposes, but they are not counted as part of the total vote for determining whether a two-thirds majority concurs in the recommendation.

- h. **TWG Meeting.** Upon receiving a Termination Package for a non-exempt case, the TWG Chairperson will review the Termination Package for completeness, and, if the Termination Package is complete, will schedule a meeting. As part of that review, the TWG Chairperson will review the contents of the Termination Recommendation to ensure that it is complete and includes all of the information required under Part 6. If it does not, the Chairperson may return the Termination Recommendation to the organizational unit that prepared it with an explanation of the basis for requesting that it be supplemented. Barring exigent circumstances, the Termination Package normally will be distributed to the TWG members one week prior to the TWG meeting.

Note: Case staff will present their Termination Recommendation at the TWG meeting. The TWG will discuss the recommendation and will concur in the staff's recommendation, reject the staff's recommendation, make its own recommendation, or ask the staff to prepare further analysis of the case.

Novel and/or Significant Policy Issues. Novel and/or significant policy issues identified by the TWG are forwarded by the Chairperson and the Chief of Negotiations and Restructuring, to the appropriate legal, financial, actuarial and/or policy authorities for review, including the General Counsel

- i. **TWG Meeting Minutes.** TWG minutes will include a list of all attendees at the TWG meeting. Issues discussed at the TWG meeting will be reflected in the minutes. When a vote is taken, a summary of the vote (number of individuals in favor, number opposed and number abstaining) will be given. In the event that a vote is not taken and the TWG needs more information in advance of voting, a list of information needed by TWG will be specified.

- (1) The Chairperson of TWG or the Chairperson's designee is responsible for draft minutes being prepared within one week after the TWG meeting.
 - (2) The draft minutes will then be circulated to TWG members and to case team members. Except when the Chairperson determines that exigencies require otherwise, these parties will be given at least one week to submit suggested changes before the minutes become final. A final copy of the minutes will be circulated to TWG members and case team members.
- j. **TWG Nonconcurrency In Staff Recommendation**. If the TWG does not concur in the recommendation, CFRD may develop the package further or withdraw it. Additionally, the case staff may request the Chief of Negotiations and Restructuring to review the case. In the latter event, if the Chief of Negotiations and Restructuring concurs with the staff recommendation, the case will be forwarded to the Director (or designee) for review and determination, with an informational copy sent to the General Counsel and to the TWG chairperson.

8. **CONCURRENCE AND APPROVAL**

- a. **Concurrency and Approval**. In Exempt Cases, the TWG File will have been forwarded as set forth in Parts a and b. In Non-Exempt Cases, after the TWG has made a recommendation of termination and/or trusteeship, or the denial of a distress application, case staff should assemble and forward the TWG File for concurrences and for review and decision by the Deciding Official.
- (1) **Approval of Cases Reviewed by the TWG**. The TWG File for cases that have been reviewed by the TWG should include:
 - (a) Outgoing correspondence for signature (Notice of Determination or Distress Termination letter; Trusteeship Agreement and Cover Letter);
 - (b) Termination Decision Record for signature;
 - (c) Termination Package;
 - (d) TWG meeting minutes; and
 - (e) Other additional appropriate information.
 - (2) **Approval of Exempt Cases**. The TWG File for Exempt cases should include:
 - (a) Outgoing correspondence for signature (Notice of Determination or Distress Termination letter; Trusteeship Agreement and Cover Letter);
 - (b) Termination Decision Record for signature;
 - (c) Termination Package; and

- (d) Other additional appropriate information.
 - b. **Required Signatures.** Concurrence with the Termination Recommendation is evidenced by signing the TDR, except in the case of the Deciding Official, where concurrence in 4042 cases is evidenced by signing the NOD. The following signatures are required, although additional concurring signatures may be included on the TDR:
 - (1) Where the Deciding Official is the Chairperson of the TWG;
 - (a) Director or Deputy Director, Corporate Finance and Restructuring;
 - (b) Assistant Chief Counsel in OCC; and
 - (c) Chairperson, TWG.
 - (2) Where the Deciding Official is the Chief of Negotiations and Restructuring, in addition to all the signatures specified above, also:
 - (a) Deputy Chief Counsel in OCC; and
 - (b) Chief of Negotiations and Restructuring,
 - (3) Where the Deciding Official is the PBGC Director, or designee in addition to all signatures specified above, also:
 - (a) Chief Counsel in OCC; and
 - (b) Chief of Negotiations and Restructuring; and
 - (c) General Counsel; and
 - (d) PBGC Director, or designee
 - c. **Mailing Outgoing Correspondence.** After final approval, the Deciding Official will return the TWG File to the TWG Chairperson. The TWG Chairperson is responsible for mailing outgoing correspondence (*e.g.*, the Notice of Determination or the Distress Termination Letter, the Trusteeship Agreement) to the plan administrator and other necessary parties.
 - d. **Reports and Records.** The TWG Chairperson will maintain records of all termination decisions and will distribute copies of the decisions to appropriate staff. For cases approved for trusteeship, the TWG Chairperson will also route a copy of the signed TDR to the Director, CPAD, the Director, BAPD, and the Chief, Investment Accounting Branch, COD/FOD, and the General Counsel.
9. **TRUSTEESHIP:** Mailing of Trusteeship Agreements. Two copies of the unsigned Trusteeship Agreement normally will be sent to the plan administrator or the plan administrator's duly authorized representative with instructions that the documents are to be signed and returned to the TWG office. Upon receipt of the agreements signed by the plan administrator, the TWG office will forward them to BAPD.

10. **SPECIAL PROCEDURES**

- a. **Special Circumstances Cases.** Notwithstanding anything in this Directive, when time is of the essence and facts and circumstances make it impractical to convene a meeting of the TWG with regard to a Non-Exempt case, or to involve the TWG Chairperson with regard to an Exempt case, the Chief of Negotiations and Restructuring may propose that a plan should be terminated under section 4042 by forwarding the recommendation to the PBGC Director, or designee for a determination on whether to approve the recommendation. An informational copy will be forwarded to the Chief Counsel, the Director of CFRD, the General Counsel, and the TWG Chairperson in these situations.
- b. **Modification or Withdrawal of Notices of Determination.**
- (1) If a NOD has been issued, but a plan has not yet been trustee'd, and case staff concludes that the NOD should be modified, the case staff will prepare a memorandum recommending modification of the NOD. The memorandum, along with a modified NOD, will be routed to the Deciding Official with the same concurrences as for the termination recommendation.
 - (2) If a NOD has been issued, but the plan has not yet been trustee'd, and case staff concludes that PBGC should not proceed with a PBGC-initiated termination of the plan, case staff will prepare a memorandum recommending withdrawal of the NOD. The memorandum, along with the proposed Notice of Withdrawal of Termination Decision, will be routed to the Deciding Official with the same concurrences as for the termination recommendation.
 - (3) The Deciding Official approves a recommendation to modify or withdraw an NOD by signing and issuing the modified NOD or Notice of Withdrawal. The TWG Chairperson will route a copy of the executed NOD or Notice of Withdrawal to the Office of Chief Counsel; to CFRD; to BAPD; to the Chief, Investment Accounting Branch, COD/FOD; and to other staff as appropriate.
- c. **Coordination with Other Departments.** Case staff should closely coordinate with other PBGC departments and divisions to ensure that plan termination and benefit administration tasks are accomplished efficiently. For example:
- (1) CPAD should be notified early in the process of any case in which the cut-off of participant expectations of plan continuation by published notice is anticipated, where the aggregate amount of PBGC's claims is \$25 million or more, where there are 5,000 or more participants in the relevant plans, or situations that otherwise may be newsworthy;

- (2) The Chief of Negotiations and Restructuring and the General Counsel should be notified early in the process of any case in which congressional interest has been expressed, or appears likely;
- (3) The appropriate Trusteeship Processing Division and the Large Case Working Group should be notified of large cases so they can coordinate benefit administration activities;
- (4) The TWG Chairperson should be notified early in the process of any cases that present unusual facts or circumstances or policy issues; and
- (5) The Office of the General Counsel should be notified of any novel or significant issues in any case.

EXHIBIT 2

05/20/2015 14:00:00



Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

MEMORANDUM

TO: Cathleen Kronopolus, Acting Chief of Benefits Administration and Director of the Benefits Administration and Payment Department

Thru: Wilmer Graham, Acting Deputy Chief of Benefits Administration, BAPD
Susan Strassman, TPD Operations Manager, OBA/BAPD

Wilmer Graham
Susan Strassman
8/16/15

FROM: Lisa Lee, TPD 6 Division Manager *D.L.*
Otis Long for Lisa Lee

SUBJECT: Authorization to Place Participants into Pay Status Prior to Trusteeship
Plan Name: Eber Bros. Wine & Liquor Corp. Retirement Plan
PBGC Case #: 22470300

Request:

We request your authorization to place eligible participants in the subject plan into pay status prior to PBGC trusteeship. This plan was approved for termination and trusteeship by the Trusteeship Working Chairperson or approving official on 08/06/2014 and has been transferred to the TPD for processing.

The proposed DOPT is 04/30/2010.

We are requesting a pre-trusteeship authorization date of January 01, 2015. This date was the next available pay-cycle date after BAPD and CFRD met and concurred.

The plan meets **all** of the specified conditions of PBGC Policy 3.4-1 Benefit Payments Prior to Trusteeship for pre-trusteeship authorization of funds, as follows:

- The plan is covered under ERISA §4021.
- We anticipate becoming trustee of the plan.
- We have sufficient information to estimate the benefits: *accrued calculations; plan provisions*
- The proposed DOPT is on or before the requested pre-trusteeship authorization date.
- The plan (**select at least one**):
 - Is insufficient; or
 - Has been abandoned; or
 - Lacks the administrative ability to make payments to new payees and/or to existing retirees.

CC: 08/28/2014 14:09:39


Background:

The Eber Bros. Wine & Liquor Corporation (EBWLC) board of directors resigned on March 31, 2014, after learning that its fiduciary insurance provider would no longer provide coverage due to missed plan contributions. As of that date, EBWLC had no assets or operations other than administering the plan, and with the resignations of the board of directors, the plan was abandoned. A Notice of Determination was issued by PBGC on August 6, 2014. CFRD is currently in negotiations with the plan sponsor to effect trusteeship of the plan.

There are 434 customers in this plan: 160 retirees and 274 terminated vested participants. Canandaigua National Bank & Trust, the paying agent, will continue to make benefit payments to the current payees. Unfortunately, eligible participants and beneficiaries are unable to apply for their benefits from this abandoned plan. One eligible participant has already made numerous calls to PBGC regarding his retirement benefit, but we have not been able to assist him because we lack the administrative authority. The plan is expected to be trustee'd by PBGC, and this authority could minimize financial hardship for plan participants and beneficiaries.

We will notify you immediately of any change in the assumption of the plan and coordinate the change through the Account Controller, if you have any questions, please contact Curtis Hill on extension 3397.

Approved:



3/18/15

Chief of Benefits Administration and Director of the
Benefits Administration and Payment Department

Date

- cc: David Smith, Branch Chief, Retiree Services Division, Benefit Payments Branch
- Thomas Hopkins, Team Leader, TPD - 6
- Bernice Lemaire, Manager, Management Coordination Division

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
PENSION BENEFIT GUARANTY
CORPORATION,

Plaintiff,

**REPORT AND
RECOMMENDATION**
CV 14-6554 (JS)(ARL)

-against-

THOMAS O'ROURKE GALLAGHER, INC.,
As administrator of the Thomas O'Rourke
Gallagher, Inc. Designed Benefit Pension Plan,

Defendant.

-----X
LINDSAY, Magistrate Judge:

This matter was referred to the undersigned by District Judge Seybert for the purpose of issuing a report and recommendation on whether the pending motion for a default judgment should be granted and, if so, the appropriate relief to be awarded to the plaintiff. In support of the motion for default judgment the plaintiff, Pension Benefit Guaranty Corporation ("PBGC"), relies upon the allegations set forth in the complaint and the Memorandum in Support of Motion for Default Judgment. Despite having been served with the motion, defendant Thomas O'Rourke Gallagher, Inc. ("Gallagher") has not submitted papers in opposition to the motion. Based upon the evidence submitted, the undersigned recommends that: (1) a default judgment be granted in favor of plaintiff against Gallagher, (2) the Thomas O'Rourke Gallagher, Inc. Defined Benefit Pension Plan (the "Pension Plan") be terminated, (3) PBGC be appointed the statutory trustee of the Pension Plan, (4) June 30, 2012 be established as the termination date of the Pension Plan and (5) that all records, assets or other property of the Pension Plan be transferred to PBGC as statutory trustee.

BACKGROUND

The plaintiff commenced this lawsuit on November 6, 2014 seeking to (1) terminate the Pension Plan, (2) appoint PBGC as trustee of the plan, (3) establish June 30, 2012 as the termination date of the plan and (4) require Gallagher to convey all records and assets of the plan to the plaintiff pursuant to Section 4042(d) of the Employees Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1132, et seq. Defendant Gallagher was served with the summons and complaint on November 21, 2014. Defendant failed to answer or otherwise respond to the complaint. The plaintiff filed a Request for Certificate of Default by the Clerk on December 17, 2014, and, on December 18, 2014, the Clerk of the Court certified the defendant’s default based upon failure to answer or otherwise appear in this action. On December 29, 2014, the plaintiff moved for a default judgment.

The following facts are taken from the complaint as well as the motion for default judgment. PBGC is a wholly-owned United States government corporation established under 29 U.S.C. § 1302(a). Compl. ¶ 4. When an underfunded pension plan terminates, PBGC’s role is to provide uninterrupted payment of pension benefits to plan participants and their beneficiaries. *Id.*

Defendant Gallagher was a contractor performing sand blasting and painting services for residential and commercial clients in and around Sayville, New York. Compl. ¶¶ 5, 11. The Pension Plan is a single-employer defined benefit pension plan covered by Title IV of ERISA. Compl. ¶ 6. Gallagher was the contributing sponsor and Plan Administrator of the Pension Plan, pursuant to 29 U.S.C. §§ 1002 (16), 1301(a)(1) and 1301(a)(13). Compl. ¶¶ 5, 7. As of June 30, 2012 Gallagher had ceased all operations. Compl. ¶ 13.

PBGC issued a Notice of Determination on July 12, 2013, notifying Gallagher of its

determination that the Pension Plan had not met the minimum funding requirements of section 412 of the Internal Revenue Code. Compl. ¶ 14. The Notice also advised Gallagher that PBGC intended to seek termination of the Pension Plan, to have PBGC appointed as trustee of the Pension Plan and to set June 30, 2012 as the date of termination. *Id.*

Based on the foregoing allegations, on November 6, 2014, the plaintiff commenced this action.

DISCUSSION

A. Legal Standard Governing Defaults

Federal Rule of Civil Procedure 55 establishes a two-step process regarding default judgments. Where, as here, a plaintiff moves for a default judgment under Federal Rule of Civil Procedure 55(b)(2), the plaintiff must first apply to the court for entry of default judgment. *See, e.g., Archbold v. Tristate ATM, Inc.*, Nos. 11civ 5796, 12 cv 847 (SJ)(LB), 2012 WL 3887167 (E.D.N.Y. Sept. 7, 2012). Then, a motion for a default judgment is made to the district court judge. A default constitutes an admission of all well-pleaded factual allegations in the complaint, except those relating to damages. *See Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992); *see also Joe Hand Promotions, Inc. v. El Norteno Rest. Corp.*, No. 06-CV-1878, 2007 WL 2891016, at *2 (E.D.N.Y. Sept. 28, 2007) ("[A]ll well-pleaded factual allegations in the plaintiff's complaint pertaining to liability are deemed true"). However, even if a plaintiff's claims are deemed admitted, a plaintiff must still demonstrate that the allegations set forth in the complaint state valid claims. *See City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011) (suggesting that "a district court is 'required to determine whether the plaintiff's allegations establish the defendant's liability as a matter of law'" prior to entering default judgment) (quoting *Finkel v. Romanowicz*,

577 F.3d 79, 84 (2d Cir. 2009)) (alterations omitted).

B. Liability

Title IV of ERISA establishes an termination insurance policy designed to protect employees in the event of the termination of a pension plan that lacks sufficient funds to meet its obligations. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 636-40 (1990). The role of the PBGC is to enforce and administer Title IV of ERISA. *Id.* Pursuant to ERISA Section 4042, PBGC is authorized to initiate involuntary termination proceedings in the event it determines that a plan (1) has not met minimum funding standards or (2) will be unable to pay benefits as they come due. *See Pension Benefit Guar. Corp v. Ocean Label*, No. C 14-01129 (JSW), 2015 WL 237831, at *4 (N.D. Cal. Jan. 16, 2015); *Pension Benefit Guar. Corp. v. Saint-Gobain Corp.*, No. 13-2069, 2013 WL 5525693, at *2 (E.D. Pa. Oct. 4, 2013). Once the PBGC determines that one of the conditions has been met, it is obligated to provide notice to the plan administrator of its intention to seek a court order terminating the plan. *Saint-Gobain*, 2013 WL 5525693, at *3. After providing notice, PBGC may apply to the court for an order terminating the plan and requesting that it be appointed as plan administrator. *Id.* Such requests are typically granted. *See US Airlines Pilots Assoc. v. Pension Benefit Guar. Corp.*, 1:09-CV-1675 (FJS), 2014 WL 3537827, at *2 (D.D.C. June 20, 2014); *Pinero v. Pension Benefit Guar. Corp.*, No. 96 Civ. 6392 (LAP), 1997 WL 739581, at *3 (S.D.N.Y. Nov. 26, 1997) (collecting cases).

Here, the plaintiff alleges that a determination was made that the Pension Plan had not met its minimum funding standard as required by Internal Revenue Code section 412 and that it would be unable to pay its obligations as they become due. Compl. ¶ 14. Notice of that determination was sent to Gallagher on July 12, 2013. *Id.* The plaintiff has now applied to this

Court for an order terminating the plan and requesting that it be appointed as plan administrator. *Id.* at ¶¶ 18, 27. Because the defendant has defaulted and all well-plead allegations are accepted as true, the plaintiff has adequately alleged its right to the relief requested. Accordingly, I respectfully recommend that the plaintiff's motion for default be granted, that the Pension Plan be terminated and PBGC be appointed as trustee of the Pension Plan.

C. Setting Of Pension Plan Termination Date

Section 4048 of ERISA provides that the court may establish the termination date of the plan when the parties cannot agree on the appropriate termination date. 29 U.S.C. § 1348(a)(2). The parties here have not agreed upon a date of plan termination, Compl. ¶ 23, and, thus it is incumbent upon the court to establish the termination date.

There are two factors to be considered in establishing the termination date for a pension plan; first, the expectations of the plan participants and second the financial implications for PBGC. *See Pension Benefit Guar. Corp. v. Nestai White, Inc.*, 476 F.Supp.2d 228, 229-30 (2007). The date the defendant ceases business puts the plan beneficiaries on constructive notice that the plan may be terminated. *Id.* Here, the plaintiff alleges that the defendant ceased all operations and terminated all employees as of June 30, 2012. Compl. ¶ 13. According the plaintiff, establishing this date as the Pension Plan termination date also protects the financial interests of PBGC by preventing an unreasonable increase in liability. *Id.* at ¶ 24. I therefore respectfully recommend that the termination date of the Pension Plan be set as June 30, 2012.

D. Transfer Of All Pension Plan Assets And Documents

Section 4042(d) of ERISA provides that the trustee "may require the transfer of all (or any part) of the assets and records of the plan to himself as trustee." 29 U.S.C. § 1132(g)(2)(D). Once it is determined, as I have recommended above, that PBGC may be appointed as statutory

trustee, this request is deemed appropriate. *See, e.g., Ocean Label*, 2015 WL 237831, at * 6; *Natasi*, 476 F.Supp.2d at 230; *Pension Benefit Guar. Corp. v. Allen Tool Corp.*, No. 99-CV-2050, 2000 WL 687898, at *1 (N.D.N.Y. May 24, 2000). Accordingly, I respectfully recommend that the plaintiff's request for an order directing that all records, assets or other property of the Pension Plan be transferred to the plaintiff be granted.

OBJECTIONS

A copy of this Report and Recommendation is being electronically filed on the date below. Counsel for the plaintiff shall serve a copy of this Report and Recommendation on the defendant upon receipt and shall file proof of service with the Court. Any objections to this Report and Recommendation must be filed with the Clerk of the Court with a courtesy copy to the undersigned within 14 days of service. Failure to file objections within this period waives the right to appeal the District Court's Order. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; *Beverly v. Walker*, 118 F.3d 900, 902 (2d Cir. 1997); *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996).

Dated: Central Islip, New York
July 21, 2015

S/

ARLENE R. LINDSAY
United States Magistrate Judge

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

PENSION BENEFIT GUARANTY
CORPORATION

Plaintiff,

v.

EBER BROS. WINE & LIQUOR
CORPORATION
as Plan Administrator of the
Eber Bros. Wine & Liquor Corp. Retirement Plan

Defendant.

Case No. 6:15-cv-06283-MAT-MWP

**AFFIDAVIT OF STEPHANIE THOMAS IN SUPPORT OF
PENSION BENEFIT GUARANTY CORPORATION'S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to 28 U.S.C. § 1746, I, Stephanie Thomas, make the following affirmation
under penalty of perjury:

1. I am an Assistant Chief Counsel in the Office of the Chief Counsel of the Pension
Benefit Guaranty Corporation ("PBGC"), and I am assigned to the above captioned case.

2. I am submitting this affidavit in support of PBGC's Motion for Summary
Judgment ("Affidavit"). This Affidavit is being contemporaneously submitted with a supporting
memorandum.

3. [REDACTED]

4. [REDACTED]

[REDACTED]

5. [REDACTED]


[REDACTED]

[REDACTED]

6. Attached hereto as Exhibit 1 is a true and correct copy of PBGC Directive TR-00-2, dated June 28, 2013, which was in effect as of August 6, 2014, the date the Notice of Determination was issued to Eber Bros. Exhibit 1 sets forth PBGC's administrative process to determine when an underfunded pension plan should be involuntarily terminated and to select a proposed termination date.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on this date of August 17, 2015, in Washington, DC.


Stephanie Thomas

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

PENSION BENEFIT GUARANTY
CORPORATION

Plaintiff,

v.

EBER BROS. WINE & LIQUOR
CORPORATION
as Plan Administrator of the
Eber Bros. Wine & Liquor Corp. Retirement Plan

Defendant.

Case No. 6:15-cv-06283-MAT-MWP

**LOCAL RULE 56.1 STATEMENT OF MATERIAL FACTS
ON MOTION FOR SUMMARY JUDGMENT**

The Pension Benefit Guaranty Corporation (“PBGC”) hereby submits this statement of material facts as they relate to PBGC’s Motion for Summary Judgment on its Complaint¹ against Eber Bros. Wine & Liquor Corporation (“Eber Bros.”) seeking a decree adjudicating that the Eber Bros. Wine & Liquor Corp. Retirement Plan (“Plan”) must be terminated.²

1. Eber Bros. is a corporation organized under the laws of New York, with its principal place of business in Rochester, New York, and is both the contributing sponsor and administrator of the Plan.³

2. Eber Bros. operated a wine and liquor distribution business in New York.⁴

3. Eber Bros. issued a WARN notice in February, 2007, stating that it had entered

¹ Complaint, Docket. No. 1.

² 29 U.S.C. § 1342(c).

³ Answer of Eber Bros. Wine & Liquor Corp. for Pension Plan Termination, Docket No. 11, at ¶¶ 5, 8 [hereinafter Answer].

⁴ Answer, at ¶ 9.

into an agreement to sell its inventory and some of its assets to a competitor, and would close on March 31, 2007.⁵

4. [REDACTED]

[REDACTED]

5. [REDACTED]

[REDACTED]

[REDACTED]

6. [REDACTED]

[REDACTED]

[REDACTED]

7. [REDACTED]

8. Eber Bros. terminated all employees by May 31, 2009.¹⁰

9. Accordingly, Eber Bros. had ceased all operations and had terminated all employees prior to April 30, 2010.

⁵ See *WARN Details for Eber Bros. Wine & Liquor Corp.*, N.Y. Dep't of Labor (Feb. 20, 2007), available at, <http://www.labor.ny.gov/app/warn/details.asp?id=1509> (reports that the Layoff Date is 3/18/2007, and the Closing Date is 3/31/2007).

6. [REDACTED]

[REDACTED]

7. [REDACTED]

[REDACTED]

[REDACTED]

8. [REDACTED]

[REDACTED]

9. [REDACTED]

¹⁰ PBGC SAR, at 00644-45 (Annual Return/Report of Employee Benefit Plan for the calendar plan year 2009 or fiscal plan year beginning June 1, 2009, and ending May 31, 2010, reports there are zero active participants).

10. [REDACTED]

[REDACTED]

11. [REDACTED]

12. [REDACTED]

[REDACTED]

13. [REDACTED]

[REDACTED]

14. [REDACTED]

15. After missed contributions owed to the Plan (including interest) exceeded \$1 million, PBGC perfected the resulting statutory lien by filing Notices of Federal Lien under IRC § 430(k) against Eber Bros. and several members of the Eber Bros. Controlled Group, including Eber Metro, with the appropriate recordation offices.¹⁶

16. The board of directors of Eber Bros., which had administered the Plan, resigned

¹¹ [REDACTED]

¹² [REDACTED]

¹³ [REDACTED]

¹⁴ [REDACTED]

¹⁵ [REDACTED]

¹⁶ PBGC SAR, at 00625-28.

from their positions as of March 31, 2014.¹⁷

17. [REDACTED]

18. [REDACTED]

19. As a result of the resignations of the Eber Bros. board members, PBGC began paying new retirees their benefits pending termination of the Plan, in March, 2015.²⁰

20. On August 6, 2014, PBGC issued a Notice of Determination (“NOD”) to Eber Bros. stating that PBGC had determined that the Plan should terminate effective April 30, 2010.²¹

21. PBGC sent the NOD to Eber Bros., care of Wendy Eber, former Chief Financial Officer of Eber Bros.²²

¹⁷ Answer, at ¶ 11; [REDACTED]

¹⁸ [REDACTED]

¹⁹ [REDACTED]

²⁰ Ex. 2, *Authorization to Place Participants into Pay Status Prior to Trusteeship*, PBGC (March 18, 2005).

²¹ Answer, at ¶ 15. PBGC SAR, at 00003.

²² PBGC SAR, at 00001-03.

22. PBGC has requested that Eber Bros. sign a termination and trusteeship agreement for the Plan, but Eber Bros. has not executed the Agreement.²³

Dated: Washington, D.C.
August 17, 2015

Respectfully submitted,

/s/ Kimberly E. Neureiter

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Chief Counsel

JAMES J. ARMBRUSTER

Acting Deputy Chief Counsel

STEPHANIE THOMAS

Assistant Chief Counsel

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Pension Benefit Guaranty Corporation

²³ Answer, at ¶ 19.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

PENSION BENEFIT GUARANTY
CORPORATION

Plaintiff,

v.

EBER BROS. WINE & LIQUOR
CORPORATION
as Plan Administrator of the
Eber Bros. Wine & Liquor Corp. Retirement Plan

Defendant.

NOTICE OF MOTION

Case No. 6:15-cv-06283-MAT-MWP

PLEASE TAKE NOTICE that the Pension Benefit Guaranty Corporation (“PBGC”) will move this Court on a date and time to be set by this Court, for an order granting summary judgment.

The PBGC hereby moves this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment. As established in PBGC’s administrative record, and as more fully set forth in the accompanying Memorandum in Support, and Statement of Material Facts, and Affidavit in Support of Motion, this matter presents no genuine issue as to any material fact and PBGC is entitled to judgment as a matter of law.

A redacted version of the Memorandum in Support, Statement of Material Facts, and Affidavit in Support will be filed by PBGC and unredacted versions of these documents will be

sent via overnight mail to the Court and to the Defendant. PBGC intends to file a reply brief to Defendant's response.

Dated: Washington, D.C.
August 17, 2015

Respectfully submitted,

/s/ Kimberly E. Neureiter

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Attorneys for Plaintiff

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

PENSION BENEFIT GUARANTY
CORPORATION

Plaintiff,

v.

EBER BROS. WINE & LIQUOR
CORPORATION
as Plan Administrator of the
Eber Bros. Wine & Liquor Corp. Retirement Plan

Defendant.

Case No. 6:15-cv-06283-MAT-MWP

ORDER

Upon consideration of the Motion of the Pension Benefit Guaranty Corporation (“PBGC”) for Summary Judgment, and Memorandum in Support thereof, and good cause having been shown, it is hereby:

ORDERED that Plaintiff PBGC’s Motion for Summary Judgment is GRANTED; and it is

ORDERED that the Eber Bros. Wine & Liquor Corp. Retirement Plan (the “Plan”) is terminated pursuant to 29 U.S.C. § 1342(c); and it is

ORDERED that PBGC is appointed as statutory trustee of the Plan pursuant to 29 U.S.C. § 1342(c); and it is

ORDERED that April 30, 2010, is established as the termination date of the Plan pursuant to 29 U.S.C. § 1348(a)(4); and it is

ORDERED that Eber Bros. Wine & Liquor Corp., its agents and all other persons or entities having possession, custody, or control of any records, assets, or other property regarding the Plan and any documents required to determine the benefits payable to participants of the Plan, transfer, convey, and deliver all such records, assets, property, and documents to PBGC pursuant to

29 U.S.C. § 1342(d)(1); and it is

ORDERED that Eber Bros. Wine & Liquor Corp. and its agents furnish PBGC, at PBGC's request, any information with respect to the Plan that PBGC may reasonably need in order to administer the Plan, pursuant to 29 U.S.C. § 1342(d)(1)(A)(vii) and (f).

Dated: _____

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August 2015, unredacted copies of the Pension Benefit Guaranty Corporation's Motion for Summary Judgment, Pension Benefit Guaranty Corporation's Memorandum in Support of Motion for Summary Judgment and corresponding Exhibits 1, 2 and 3, Local Rule 56.1 Statement of Material Facts on Motion for Summary Judgment, Affidavit of Stephanie Thomas in Support of Pension Benefit Guaranty Corporation's Motion for Summary Judgment, Notice of Motion, and [Proposed] Order were served on the following:

<p>Honorable Marian W. Payson United States Magistrate Judge 100 State Street Rochester, NY 14614</p> <p><i>Magistrate Judge Payson</i> via FedEx</p>	<p>Edward P. Hourihan, Jr. Ingrid S. Palermo Bond Schoeneck & King PLLC 350 Linden Oaks Suite 310 Rochester, NY 14625</p> <p><i>Defendant's Counsel</i> via FedEx</p>
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/s/ Kimberly E. Neureiter
Kimberly E. Neureiter