



UNIVERSITY of
MASSACHUSETTS
BOSTON
100 Morrissey Blvd.
Boston, MA 02125-3393

Gerontology Institute
617.287.7300
Fax: 617.287.7080

New England Pension Assistance Project
Metropolitan Boston area (617) 287-7311
Other Massachusetts Locations (800) 882-2003
Other New England Locations (617) 287-7332

March 14, 2000

David Welton
Pension Welfare Benefits
Department of Labor
JFK Building Suite 575
Cambridge St.
Boston, MA 02201

Re: [REDACTED]
SS # [REDACTED]
Brentwood Yarn Mills, Brentwood, NY and Blackston Yarn, No. Grafton, MA

Dear Mr. Welton

Mr. [REDACTED] came to us stating that he had applied for pension in 1989 when he left employment. He subsequently was told there were no funds in the plan and much later learned there had been a distribution. At our suggestion, he wrote to Mr. Kiviat, whose name appeared on the paperwork that he sent us and requested a Summary Plan Description and the funds due to him. Mr. [REDACTED] says that Mr. Kiviat called him and told him that he had lost his memory for a period of time, but would send out the paperwork. Mr. Kiviat has received nothing. There have been no replies to our requests for information as to Summary Plan Description and applications for benefits. Now we have turned this matter over to the Department of Labor.

Today I contacted the Pension Benefit Guaranty Corporation and spoke with a pension law specialist who informed me that Brentwood Yarn Mills under ID 11-2120740 had paid Pension Benefit Guarantee Corp. premiums in 1981 and 1982 and then disappeared from their files. She thought it might have been a merger, but could not tell me with whom. You will find enclosed two 1099R forms from 1983 and 1984 which were given to me by Mr. [REDACTED] as well as a letter and attachment, which seems to be signed by Jerome Kiviat of Blackstone Yarns of South Grafton, MA. Mr. [REDACTED] does not explain with any clarity what he did when he received these papers. He has told me that he believes there was a lawsuit, but has no papers.

David Welton
DOL
March 14, 2000

I regret that my file and my records are not as complete as they should be. I have tried to reach Mr. [REDACTED] today, but was unable to reach him.

Enclosed are the rest of the papers I have. Thank you for your help.

Sincerely,

A handwritten signature in cursive script, appearing to read "Renee Summers", written in dark ink.

Renee Summers

Counselor

New England Pension Assistance Project

U.S. Department of Labor

Pension and Welfare Benefits Administration
JFK Federal Building - Room 575
Boston, MA 02203
Phone: (617) 565-9600
Telefax: (617) 565-9686



SENT CERTIFIED MAIL - RETURN RECEIPT REQUESTED

April 27, 2000

Mr. Jerome Kiviat
7830 Nutmeg Court
Tamarac, FL 33321

RE: Brentwood Yarn Mills, Inc. Pension Plan and Brentwood Yarn Mills, Inc. Profit Sharing Plan

Dear Mr. Kiviat:

This letter is in regards to the Brentwood Yarn Mills, Inc. Profit Sharing Plan and the Brentwood Yarn Mills, Inc. Pension Plan and a former employee of Brentwood Yarn Mills, Inc., Henry Davie. Mr. [REDACTED] maintains that he has not been provided with pension plan information which he has requested in writing with the assistance of the New England Pension Assistance Project. Mr. [REDACTED] further maintains that he is owed pension benefits from the Brentwood Yarn Mills, Inc. Profit Sharing Plan and the Brentwood Yarn Mills, Inc. Pension Plan.

This office administers the Employee Retirement Income Security Act of 1974 (ERISA), which is intended to protect the pension benefits of workers and retirees in private-sector employee pension and welfare (medical) plans.

As we understand it, Mr. [REDACTED] worked at Brentwood Yarn Mills, Inc. from 1960-1989. We further understand that Mr. [REDACTED] participated in the Brentwood Yarn Mills, Inc. Profit Sharing Plan and the Brentwood Yarn Mills, Inc. Pension Plan. It is our understanding that you are the Plan Administrator for both of these pension plans. Mr. [REDACTED] submitted documentation to our office which indicates that as of 7/1/82 he was entitled to a monthly pension benefit of \$317 upon continued employment at Brentwood Yarn Mills, Inc. through his Normal Retirement Date of 12/1/88 under the Brentwood Yarn Mills, Inc. Pension Plan. Mr. [REDACTED] also submitted documentation to our office which indicates that as of 6/30/84 he was 100% vested in an account balance of

\$ 21,357.25 in the Brentwood Yarn Mills, Inc. Profit Sharing Plan. Mr. [REDACTED] also submitted a document to our office which is dated 4/15/92 and signed by Jerome Kiviat which indicates that as of 4/92 the Brentwood Yarn Mills, Inc. was declared bankrupt and that the Brentwood Yarn Mills, Inc. Pension and Profit Sharing Plans had no liquid assets. This document further indicates that Mr. [REDACTED] would receive \$64,262 in lieu of the pension benefits he was owed under the Brentwood Yarn Mills, Inc. Pension and Profit Sharing Plans. Mr. [REDACTED] maintains that these benefits have never been paid to him. Copies of these documents are enclosed for your review.

As we understand it, Mr. [REDACTED] has attempted, with the assistance of the New England Pension Assistance Project, to obtain pension plan information from you relative to the Brentwood Yarn Mills, Inc. Profit Sharing Plan and the Brentwood Yarn Mills, Inc. Pension Plan. Mr. [REDACTED] and the New England Pension Assistance Project maintain that they have not been provided with this pension plan information pursuant to their written requests. Copies of Mr. [REDACTED] and the New England Pension Assistance Project's written requests are enclosed for your review.

Under ERISA sec. 104(b)(4), the plan administrator must respond within 30 days to any written request for information to which the participant has a right. If the plan administrator does not comply with a participant request within that time, a court may require the plan administrator to pay the participant up to \$100 a day for every subsequent day that the information is not furnished pursuant to ERISA sec. 502(c)(1).

Further, as amended by the provision of the Taxpayer Relief Act of 1997, ERISA requires that plan administrators furnish copies of summary plan descriptions (SPDs) and other plan documents to the U.S. Department of Labor upon request. In addition, new civil penalties of up to \$100 per day (not to exceed \$1,000 per request) may be assessed against plan administrators who fail to furnish the requested information to the Department within thirty (30) days.

This letter is intended as a formal request by the Department of Labor for pension plan information for the Brentwood Yarn Mills, Inc. Profit Sharing Plan and the Brentwood Yarn Mills, Inc. Pension Plan. Specifically, we request that you forward to our office:

1. A copy of the Brentwood Yarn Mills, Inc. Profit Sharing Plan;

2. Copies of any amendments to the Brentwood Yarn Mills, Inc. Profit Sharing Plan;
3. Copies of any documents relating to the termination of the Brentwood Yarn Mills, Inc. Profit Sharing Plan;
4. An individual benefit statement for [REDACTED] under the Brentwood Yarn Mills, Inc. Profit Sharing Plan;
5. A copy of the Brentwood Yarn Mills, Inc. Pension Plan;
6. Copies of any amendments to the Brentwood Yarn Mills, Inc. Pension Plan;
7. Copies of any documents relating to the termination of the Brentwood Yarn Mills, Inc. Pension Plan;
8. An individual benefit statement for [REDACTED] under the Brentwood Yarn Mills, Inc. Pension Plan.

Furthermore, we respectfully request that you respond to our office in writing within 30 days of receipt of this letter informing us of your position with regards to Mr. [REDACTED]'s claim that he is owed pension benefits under the Brentwood Yarn Mills, Inc. Profit Sharing Plan and the Brentwood Yarn Mills, Inc. Pension Plan and what action you plan to take to resolve this matter.

If you should have any questions, please contact Pension Benefits Advisor David Whelton at (617) 565-9623.

Sincerely yours,

James M. Benages
Regional Director

BY: David F. Whelton
Pension Benefits Advisor
200031-01903

Enclosures

U.S. Department of Labor

Pension and Welfare Benefits Administration
JFK Federal Building - Room 575
Boston, MA 02203
Phone: (617) 565-8600
Telefax: (617) 565-8666



SENT CERTIFIED MAIL - RETURN RECEIPT REQUESTED

October 31, 2000

Miles J. Gopman, Esq.
2000 Towerside Terrace
Unit 1208, Quayside Tower II
Miami, FL 33138

RE: Mr. Jerome Kiviat
Brentwood Yarn Mills, Inc. Pension Plan
Brentwood Yarn Mills, Inc. Profit Sharing Plan

Dear Mr. Gopman:

This letter is to acknowledge that our office received your letter and enclosed documentation of September 4, 2000 regarding the Brentwood Yarn Mills, Inc. Profit Sharing Plan, the Brentwood Yarn Mills, Inc. Pension Plan and Mr. Jerome Kiviat, the Plan Administrator of these Plans.

This office administers the Employee Retirement Income Security Act of 1974 (ERISA), which is intended to protect the pension benefits of workers and retirees in private-sector employee pension and welfare (medical) plans. Among other provisions, the ERISA requires that a plan fiduciary must discharge his duties with respect to the plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries in accordance with the documents and instruments governing the plan.

Based upon your letter of September 4, 2000 and the enclosed documentation, there appears to be no dispute that as of June 30, 1990 Mr. [REDACTED] was 100% vested in an accrued lump sum benefit of \$32,417.00 under the Pension Plan and 100% vested in an accrued benefit of \$31,845 under the Profit Sharing Plan. There also does not appear to be any dispute that Mr. [REDACTED] has never been paid these vested pension benefits and that he is entitled to these benefits.

Our office again respectfully requests that Mr. Kiviat advise our office as to what action he plans to take to pay Mr. [REDACTED] his vested pension benefits. We request that you respond in writing to our office at the above address within 30 days of receipt of this letter.

Sincerely yours,

James M. Benages
Regional Director

BY: David F. Whelton
Pension Benefits Advisor
200031-01903

cc: Jerome Kiviat

U.S. Department of Labor

Pension and Welfare Benefits Administration
JFK Federal Building - Room 676
Boston, MA 02203
Phone: (617) 565-9600
Telefax: (617) 565-9886



November 24, 2000

Pension Benefit Guaranty Corporation
P.O. Box 19153
Washington, D.C. 20036-9153

RE: Brentwood Yarn Mills, Inc. Pension Plan
EIN: 11-2120740, Plan Identification Number: 001
[REDACTED] D.O.B. [REDACTED], SS # [REDACTED]

Dear Sirs/Madams:

This letter is in regards to the Brentwood Yarn Mills, Inc. Pension Plan (the "Plan") and the unpaid vested pension benefit of Mr. [REDACTED] under the Plan.

This office administers Title 1 of the Employee Retirement Income Security Act (ERISA), which is intended to protect the pension and welfare (health) benefits of workers and retirees in private-sector employee benefit plans.

Mr. [REDACTED] worked at Brentwood Yarn Mills, Inc. from 1960 to 1989 and participated in the defined benefit pension plan sponsored by Brentwood Yarn Mills, Inc. (the "Plan"). As of 6/30/1990, Mr. [REDACTED] was 100% vested in an accrued lump sum benefit of \$32,417.00 under the Plan. Mr. [REDACTED] complains that the Plan was terminated in approximately 1993 without him receiving payment of his vested pension benefit. Mr. [REDACTED] is now 77 years old.

Mr. [REDACTED] initially sought assistance in getting his vested pension benefit paid to him from the New England Pension Assistance Project. The New England Pension Assistance Project forwarded Mr. [REDACTED] complaint to our office after their efforts to assist Mr. [REDACTED] were unsuccessful. We understand that on 3/14/2000 Renee Summers of the New England Pension Assistance Project contacted your office and spoke with a Pension Law Specialist. We understand that the Pension Law Specialist advised Ms. Summers that Brentwood Yarn Mills, Inc., under EIN 11-2120740, paid PBGC premiums in 1981 and 1982 and then disappeared from PBGC files. A copy of Ms. Summers' letter to our office dated 3/14/2000, containing the above information, is enclosed for your review.

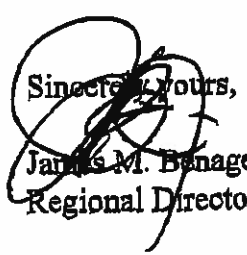
Our office contacted the Plan Trustee, Mr. Jerome Kiviat of Tamarac, FL, regarding this matter by letters dated 6/23/2000 and 10/31/2000. Copies of our letters are enclosed for your review. Mr. Kiviat, through his attorney, Miles J. Gopman, responded to our office by letters dated 9/4/2000 and 11/13/2000. Copies of these letters are also enclosed for your review. As you can

see from the enclosed letters, there is no dispute that Mr. [REDACTED] was never paid his vested pension benefit from the Plan. As you can also see, Mr. Kiviat maintains that he is not now responsible for paying Mr. [REDACTED] his vested pension benefit from the Plan.

Accordingly, we respectfully request that the PBGC review its files and archives for information on the Plan. We further respectfully request that the PBGC assess its liability for Mr. [REDACTED] unpaid vested pension benefit under the Plan. We request that you respond in writing to Pension Benefits Advisor David Whelton at the above address advising us if the PBGC is liable for Mr. [REDACTED] unpaid vested pension benefit. Please contact David Whelton at (617) 565-9623 if you should require any additional information.

Thank you for your anticipated cooperation in this matter.

Sincerely yours,


James M. Benages
Regional Director

200031-01903

Enclosures



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

JUL 05 2001

JUL -2 2001

New England Pension Assistance Project
University of Massachusetts - Boston
100 Morrissey Blvd.
Boston, MA 02125-3393
Attn: Renee Summers

EIN/PN: 11-2120740/001
PBGC Case Number: 19568800
Plan Name: Brentwood Yarn Mills, Inc.
Pension Plan (the "Plan")

Dear Ms. Summers:

We have received information from you that a Reportable Event described in the Pension Benefit Guaranty Corporation ("PBGC") regulation on Reportable Events and Certain Other Notification Requirements (29 C.F.R. Part 4043) under section 4043 of the Employee Retirement Income Security Act ("ERISA") has occurred. According to the information we have received, Brentwood Yarn Mills, Inc., Plan sponsor of the above-mentioned pension plan, is unable to pay benefits currently due to Mr. [REDACTED].

We appreciate your assistance concerning this matter. PBGC has started an investigation to determine possible action concerning the Plan. We realize that you may not have access to all the relevant information that we may need, but we ask that you continue your assistance by sending PBGC whatever documents or information you can of the list of items enclosed.

If you have any questions on this matter, please contact me at the number below. In any correspondence, please provide the PBGC Case Number (listed at the top of this letter) and a day-time telephone number.

Sincerely,

Toni Montgomery-Chase

Toni Montgomery-Chase, Auditor
Insurance Operations Department
Pre-Termination Processing Division
(202) 326-4100, ext. 3155
1-80-400-PBGC

Enclosures

To: Jack Pizer
From: Colleen Kelley
Re: ██████ PBGC Claim
Date: August 18, 2003

Issues

1. Is the Brentwood Yarn Mills Pension Plan a defined benefit plan, and if yes why is the PBGC responsible for the Plan's liabilities?
2. Assuming that the Brentwood Yarn Mills Pension Plan is a defined benefit plan, why is the PBGC responsible to Mr. ██████ for the money owed him by the Plan?

Brief Answer

1. The Brentwood Yarn Mills Pension Plan is a defined benefit plan. The PBGC is responsible for the liabilities of the Plan because it is the guarantor of defined benefit plans under Title IV of ERISA.
2. As the guarantor of the Brentwood Yarn Mills Pension Plan, the PBGC is responsible for paying Mr. ██████ his vested retirement benefit.

Facts

██████████ was employed by Brentwood Yarn Mills, Inc. (EIN 11-2120740) (hereinafter Brentwood) from 1960 through 1989, at which time he retired. Brentwood had two pension plans: a profit sharing plan, and a defined benefit plan. The Plans were administered by the owner of Brentwood, Mr. Jerome Kiviat. Mr. ██████ was a participant in both plans. Mr. ██████'s benefit statement for the Pension Plan as of July 1, 1982 indicates that he would become vested as of December 1, 1988 to receive a monthly, lifetime retirement payment of \$317.00, or an accrued benefit of \$31,700. A consolidated participant benefit statement from June 30, 1990 shows that Mr. ██████ had earned an accrued benefit under the Pension Plan of \$32,417.00 (Gopman 09-04-00).

Brentwood underwent bankruptcy proceedings in approximately 1992. (Gopman letter 9/04/00). According to a letter written by Mr. Kiviat's attorney, Miles Gopman, Esq., the plans were terminated in conjunction with the bankruptcy proceedings. (Gopman 11/13/00).

On April 15, 1992, Mr. Kiviat contacted Mr. ██████ in writing. (See Kiviat Letter). Mr. Kiviat offered Mr. ██████ compensation of \$64,262.00 to be paid over ten years. In exchange for this payment Mr. ██████ was required to sign a contract relinquishing any future claims against Brentwood, the Brentwood Plans, and Mr. Kiviat. It is undisputed that Mr. ██████ did not accept this offer, and never received his benefits from either the Profit Sharing Plan or the Defined Benefit Plan. (DOL letter, Gopman letter).

Discussion

Defined Benefit Plans

"The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant –

(A) for the purposes of section 202, shall be treated as an individual account plan

- (B) for the purposes of paragraph (23) of this section and section 204 shall be treated as an individual account plan to the extent that benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of the benefit under the plan. (ERISA §3(35)).

The Brentwood Pension Plan is a defined benefit plan as defined by ERISA §3(35). The Brentwood Plan operates like a cash balance plan, which is recognized by the Department of Labor as a form of defined benefit plan. "A cash balance plan is a defined benefit plan that defines the benefit in terms that are more characteristic of a defined contribution plan. In other words, a cash balance plan defines the promised benefit in terms of a stated account balance."¹ The Brentwood Pension Plan operated in this manner. On a yearly basis, Mr. [REDACTED] was given a statement with the new balance of his account. At the time of Mr. [REDACTED]'s retirement, he could either choose a lump sum payment, or a monthly payment for the remainder of his life. The lump sum payment or an annuity formula is a common characteristic of cash balance plans.²

PBGC

Except as provided in subsection (b), this title applies to any plan (including a successor plan) which, for a plan year

—
(1) is an employee pension benefit plan (as defined in paragraph (2) of section 3 of this Act) established or maintained —

(A) by an employer engaged in commerce or in any industry or activity affecting commerce . . . ERISA §4021(a)(1)(A).

Since the Brentwood Pension Plan is a cash balance plan and therefore a defined benefit plan the benefits promised by the plan should be insured by the PBGC.³ "The PBGC administers and enforces Title IV of ERISA. Title IV includes a mandatory government insurance program that protects the pension benefits of [tens of millions of] private-sector American workers who participate in plans covered by the Title."⁴ Title IV coverage applies to most defined benefit plans, including the Brentwood Plan. The Brentwood Plan qualifies for this status because it is a defined benefit plan, and does not have any characteristics that would subject it to exclusion under ERISA §4021(b). Reasons for exclusion are: the plan is an individual account plan, the plan is a government plan or a church plan, the plan is created by a tax exempt organization and qualifies under IRC §501, the plan has never received an employer contribution since the enactment of Title IV, the plan is a top hat plan, the plan is established and maintained outside of the U.S. primarily for individuals who are nonresident aliens, the plan violates IRC §415 because it provides benefits for certain employees in excess of the limitations on contributions and benefits imposed, the plan is established and maintained only for substantial owners, the plan is of a tax exempt international organization, the plan is maintained solely for the purpose of complying with applicable workmen's compensation, or unemployment, or disability insurance laws, the plan is established and maintained by a professional service employer which does not have more than 25 participants in the plan.⁵ In addition, plans that have both a defined benefit

¹ U.S. Department of Labor, Employee Benefits Security Administration, "Frequently Asked Questions About Cash Balance Pension Plans," at http://www.dol.gov/ebsa/faqs/faq_consumer_cashbalanceplans.html (as visited August 19, 2003). See also *Burstein v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation*, 334 F. 3d 365 (2003).

² *Id.*

³ See *Id.*

⁴ *Burstein*, 334 F. 3d 365 (2003) (quoting *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 636-37 (1990)).

⁵ ERISA §4021(b) (2003).

portion and a defined contribution portion are only included to the extent that they are a defined benefit plan.⁶ As these exclusions do not apply to the Brentwood Pension Plan, the Brentwood Plan is covered by Title IV.

ERISA §4002 (a) assigns the PBGC the purpose of “provid[ing] for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this title (Title IV) applies.”⁷ The PBGC is the congressionally created insurer of most defined benefit plans, including the Brentwood Plan. In further support of this contention, a Pension Law Specialist at the PBGC orally confirmed that Brentwood Plan was insured by the PBGC and paid premiums to the PBGC in 1981 and 1982. The PBGC, as the insurer of the plan, has a legal obligation to provide all unpaid vested retirement benefits to the Brentwood Plan participants.

██████████

Mr. ██████ is a 100% vested participant in the Brentwood Plan. Mr. Davie’s unpaid balance in the Brentwood Plan is \$32, 417.00 (Gopman letter 09/04/00). The Brentwood Plan has been terminated, and Mr. ██████ has never received compensation. The PBGC was the guarantor of the Brentwood Plan. The PBGC under Title IV of ERISA has a legal obligation, to pay Mr. ██████ a present monthly annuity for the value of his pension, as well as, retroactive payments back to the bankruptcy of Brentwood in 1992.

Conclusion

The Brentwood Plan was a defined benefit plan as defined by §3(35) of ERISA. The PBGC was the guarantor of the Brentwood Plan. As the guarantor of the Brentwood Plan, the PBGC must pay all vested participants who did not receive benefits. Mr. ██████ is a participant of the Brentwood Plan, who is 100% vested and did not receive his benefits. The PBGC is required by ERISA to provide Mr. ██████ with the monthly benefit that he was entitled to under the Brentwood Plan.

⁶ ERISA §4021(b)(12) (2003).

⁷ ERISA §4002(a)(2) (2003) (parentheses added).



UNIVERSITY of
MASSACHUSETTS
BOSTON
100 Morrissey Blvd.
Boston, MA 02125-3393

Gerontology Institute
New England Pension Assistance Project
Main number (617) 287-7307
Toll-free 1-888-425-6067
Fax (617) 287-7080

January 12, 2004

Pension Benefit Guaranty Corporation
1200 K Street NW
Washington DC 20005-4026

Re: [REDACTED]
D/O/B: [REDACTED]
SSN: [REDACTED]
EIN/PN: 11-2120740/001
PBGC Case Number: 19568800
Plan Name: Brentwood Yarn Mills, Inc. Pension Plan (the "Plan")

To Whom It May Concern:

We are writing on behalf of [REDACTED]. This letter is a claim for benefits owed to Mr. [REDACTED] by the PBGC in the PBGC's capacity as the insurer of the Brentwood Yarn Mills, Inc. Pension Plan.

Summary of the Facts

[REDACTED] was employed by Brentwood Yarn Mills, Inc. (hereinafter Brentwood) from 1960 through 1989, at which time he retired. Brentwood had two pension plans: a profit sharing plan, and a defined benefit plan. The owner of Brentwood, Mr. Jerome Kiviat, administered both plans. Mr. [REDACTED] is a participant in both plans. A statement for the defined benefit Pension Plan indicates that Mr. [REDACTED] would be entitled to receive a retirement benefit, commencing at age 65, of \$330 per month or an accrued benefit of \$32,417. (See enclosed statement.)

According to Mr. Kiviat's attorney, Miles Gopman, Esq., Brentwood underwent bankruptcy proceedings. (See enclosed Gopman letter 09/04/00.) Both pension plans were terminated in conjunction with the bankruptcy proceedings. (See enclosed Gopman letter 11/13/00.)

On April 15, 1992, Mr. Kiviat contacted Mr. [REDACTED] in writing. (See enclosed Kiviat letter.) He acknowledged that the Brentwood Pension Plan had "no liquid assets" and offered to pay Mr. [REDACTED] \$64,262 in settlement of any future claims against Brentwood, the Brentwood Plans, and Mr. Kiviat. Mr. [REDACTED] never signed the proffered settlement agreement. It is undisputed that Mr. [REDACTED] did not accept this offer, and never received his benefits from either the Profit Sharing Plan or the Defined Benefit Plan.

Argument

As the Brentwood Pension Plan is a defined benefit plan, the benefits promised by the plan should be insured by the PBGC. "The PBGC administers and enforces Title IV of ERISA. Title IV includes a mandatory government insurance program that protects the pension benefits of [tens of millions of] private-sector American workers who participate in plans covered by the Title." See *Burstein v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation*, 334 F.3d 365 (2003)(quoting *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 636-637 (1990)). Title IV coverage applies to most defined benefit plans including the Brentwood Plan. The Brentwood Plan qualifies for this status because it is a defined benefit plan, and does not have any characteristics that would subject it to exclusion under ERISA §4021(b). Reasons for exclusion are: the plan is an individual account plan, the plan is a government plan or a church plan, the plan is created by a tax exempt organization and qualifies under IRC §501, the plan has never received an employer contribution since the enactment of Title IV, the plan is a top hat plan, the plan is established and maintained outside of the U.S. primarily for individuals who are non resident aliens, the plan violates IRC §415 because it provides benefits for certain employees in excess of the limitations on contributions and benefits imposed, the plan is established and maintained only for substantial owners, the plan is of a tax exempt international organization, the plan is maintained solely for the purpose of complying with applicable workmen's compensation, or unemployment, or disability insurance laws, or the plan is established and maintained by a professional service employer which does not have more than 25 participants in the plan. ERISA §4021(b) (2003). In addition, plans that have both a defined benefit portion and a defined contribution portion are only included to the extent that they are a defined benefit plan. ERISA §4021(b)(12) (2003). As none of these exclusions applies to the Brentwood Pension Plan, the Brentwood Plan is covered by Title IV and insured by the PBGC.

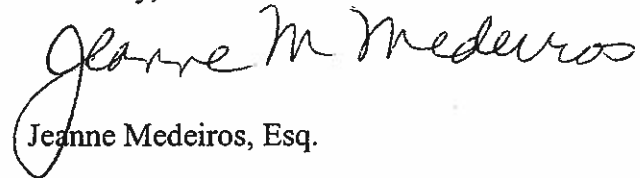
ERISA §4002(a) assigns the PBGC the purpose of "provid[ing] for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this title (Title IV) applies." ERISA §4002(a)(2) (2003) (parentheses added). The PBGC is the congressionally created insurer of most defined benefit plans, including the Brentwood Plan. In further support of this contention, a Pension Law Specialist at the PBGC orally confirmed that the Brentwood Plan was insured by the PBGC and paid premiums to the PBGC in the 1980s. The PBGC, as the insurer of the plan, has a legal obligation to provide all unpaid bested retirement benefits to the Brentwood Plan participants.

Mr. [REDACTED] is a 100% vested participant in the Brentwood Plan. Mr. [REDACTED] unpaid balance in the Brentwood Plan is approximately \$32,417. The Brentwood Plan has been terminated, and Mr. [REDACTED] has never received compensation. The PBGC was the guarantor of the Brentwood Plan. The PBGC under Title IV of ERISA has a legal obligation, to pay Mr. [REDACTED] a present monthly annuity for the value of his pension, as well as, retroactive payments back to his Normal Retirement Age under the Plan.

Conclusion

The Brentwood Plan was a defined benefit plan as defined by ERISA. The PBGC was the guarantor of the Brentwood Plan. As the guarantor of the Brentwood Plan, the PBGC must pay all vested participants who did not receive benefits. Mr. [REDACTED] is a participant of the Brentwood Plan, who is 100% vested and did not receive his benefits. The PBGC is required by ERISA to provide Mr. [REDACTED] with the monthly benefit that he was entitled to under the Brentwood Plan.

Sincerely,


Jeanne Medeiros, Esq.

Enclosures

cc: [REDACTED]



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

SEP 8 2005

Brentwood Yarn Mills, Inc
200 Candlewood Road
Brentwood, NY 11717

NOTICE OF DETERMINATION

PLEASE TAKE NOTICE that the Pension Benefit Guaranty Corporation ("PBGC") has determined, under section 4042(a) of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. § 1342 (a) that the Brentwood Yarn Mills Inc. Pension Plan ("Plan") does not have assets available to pay benefits that are currently due under the terms of the Plan. PBGC has further determined, under ERISA § 4042 (c), 29 U.S.C. § 1342 (c), that the Plan must be terminated in order to protect the interests of the Plan's participants. Accordingly, PBGC intends to proceed under ERISA § 4042, 29 U.S.C. § 1342, to have the Plan terminated and PBGC appointed as statutory trustee, and under ERISA § 4048, 29 U.S.C. § 1348, to have the Plan's termination date established as January 5, 1990. PBGC has completed its decisionmaking process in this matter, accordingly, this determination is effective on the date it is issued.

PENSION BENEFIT GUARANTY CORPORATION



WILLIAM B. HULTENG, Chairman
Trusteeship Working Group

Jeanne Medeiros

From: Jeanne Medeiros
Sent: Wednesday, April 23, 2008 12:04 PM
To: 'John Hotz'
Subject: RE: PBGC Problem

Thanks, John. The company was Brentwood Yarn Mills, Inc. and the plan name was Brentwood Yarn Mills Inc. Pension Plan. A Notice of Determination was issued Sept. 8, 2005, but there's no case number on it. The attorney who's been working on it is Lois Parks, PBGC ext. 3040. Other than our client, I don't know who the other participants are. I have a document prepared by an actuary (I think in the early 1990s) showing 12 participants entitled to benefits, including our client. As I've mentioned, our client is getting his monthly benefits but not his retro (the plan termination date according to the Notice of Determination was January 5, 1990). Thanks so much for your help – this has been really frustrating. - Jeanne

Jeanne M. Medeiros, Esq.
New England Pension Assistance Project
Gerontology Institute, U. Mass Boston
100 Morrissey Blvd
Boston, MA 02125
617-287-7332

From: John Hotz [mailto:jhotz@pensionrights.org]
Sent: Wednesday, April 23, 2008 11:51 AM
To: Jeanne Medeiros
Subject: PBGC Problem

Jeanne,

I have received word back from my contact at the PBGC. He told me:

"If you'll send me some information on the case (company name, plan name) and the name of the PBGC attorney that you spoke to, we'll find out what's happening with the case and get back to you on the timing of our action to trustee the plan. Also, do you know whether your client or any other plan participants are retirement-eligible but not receiving benefits under the plan? If so, that would increase the urgency in resolving the matter."

Could you send me this information and I will forward it on.

Thanks,

John Hotz
Deputy Director
Pension Rights Center
1350 Connecticut Ave., NW
Suite 206
Washington, DC 20036
Office: (202) 296-3776
Cell: (202) 213-7506
Fax: (202) 833-2472
jhotz@pensionrights.org
www.pensionrights.org

4/23/2008

Jeanne Medeiros

From: John Hotz [JHotz@PensionRights.org]
Sent: Friday, April 25, 2008 4:44 PM
To: Jeanne Medeiros
Subject: Brentwoods Yarns

Hi Jeanne,

I just received a phone call from PBGC Deputy Chief Counsel, Chuck Fenke (pronounced Finkey). He said that they are going to file an entry for default judgment with the court clerk on Monday or Tuesday of next week. He said that this case was placed in a strange procedural posture because the Plan administrator (or someone acting as the plan administrator) had filed a "motion to dismiss" with the court and the PBGC had to respond to that. The problem was that the document was not really a motion to dismiss and it took the court a while to come to terms with that. PBGC ultimately prevailed and the court determined that it was an impermissible document (or something). Once the entry for default judgment is filed, PBGC anticipates between 30 and 60 days getting an actual default judgment. He says there is no problem calling him to follow up. Here is the contact information:

Charles Finke
Deputy Chief Counsel, PBGC
(202) 326-4000 x3588
finke.charles@pbgc.gov

I will invite him and Renee Harris to the reception in DC, so you can meet them both in person. They have already stated that they are interested. Good luck with this case.

John Hotz
Deputy Director
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1350 Connecticut Ave., NW
Suite 206
Washington, DC
Phone: (202) 296-3776
Cell: (202) 213-7506
Fax: (202) 833-2472
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*June 25, 2008 - discussed matter at
reception w/ Chuck Fenke -
default J shd be entered
soon*

4/30/2008

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

-----X
**PENSION BENEFIT GUARANTY
CORPORATION,**

Plaintiff,

- against -

**BRENTWOOD YARN MILLS, INC.
a New York Corporation, as Plan Administrator
for the Brentwood Yarn Mills, Inc., Pension Plan,**

Defendant.
-----X

**REPORT AND
RECOMMENDATION**

CV 05-5317 (DRH) (AKT)

A. KATHLEEN TOMLINSON, Magistrate Judge:

I. PRELIMINARY STATEMENT

Following the default of Defendant Brentwood Yarn Mills, Inc. and entry of default judgment by the Clerk of the Court, District Judge Hurley referred this matter to me for an inquest on damages and attorneys' fees. *See* Electronic Order, June 17, 2008. Judge Hurley's Order further stated that "the scope of the foregoing reference shall be deemed to encompass such additional authority as reasonable or necessary to perform the foregoing duties and is not inconsistent with the Constitution of the United States." *Id.*

At the outset, it should be noted that Plaintiff Pension Benefit Guaranty Corporation ("Plaintiff" or "PBGC") is not seeking damages in this case. Rather, PBGC seeks relief in other forms. PBGC brings this action under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1301-1461 seeking, pursuant to 29 U.S.C. §§ 1342 and 1348(a)(4), (1) to terminate the Brentwood Yarn Mills, Inc. Pension Plan (the "Plan"); (2) to be appointed as statutory trustee of the Plan; (3) to establish January 5, 1990 as the termination date

of the Plan; and (4) to require Defendant Brentwood Yarn Mills, Inc. ("Defendant" or "Brentwood") "and any other person or entity having possession, custody, or control of any of the records, assets, property, or documents relating to the Plan [to] transfer, convey and deliver all such records, assets, property and documents" to Plaintiff. Compl ¶1.

Based on the information submitted by Plaintiff, and for the reasons set forth below, the Court finds that Plaintiff is entitled to each element of the relief requested in its motion. Therefore, I respectfully recommend to Judge Hurley that: (1) the Plan be terminated; (2) Plaintiff be appointed trustee of the Plan; (3) the termination date of the Plan be set at January 5, 1990; and (4) Plaintiff's request for an order requiring transfer of all records, assets, property and documents of the Plan be granted.

II. BACKGROUND

A. Procedural History

Plaintiff commenced this action on November 10, 2005 pursuant to 29 U.S.C. §§ 1342 and 1348(a)(4) seeking the relief described above. On January 12, 2006, Defendant, "by and through its alleged President, JEROME KIVIAT," filed a motion to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(2), (b)(3), (b)(4), and (b)(5) based upon improper venue, insufficient process, and insufficient service of process [DE 5]. No attorney appeared on behalf of Defendant. Rather, Mr. Kiviat, Defendant's president, filed the motion *pro se*. *Id.* By electronic Order dated January 23, 2006, Judge Hurley terminated the motion to dismiss finding that "the defendant corporation can only appear in Court with counsel and cannot be represented *pro se* by its principal. Moreover, the motion was filed in contravention of this Court's Individual Rules." Electronic Order, Jan. 23, 2006.

Subsequently, no attorney entered an appearance on behalf of Defendant and no Answer or other response to the Complaint was ever filed. On June 17, 2008, Judge Hurley entered default judgment against Defendant and referred the action to me pursuant to 28 U.S.C. § 636(b)(3) for an inquest. On June 30, 2008, Plaintiff filed a letter enclosing the certificate of default, the Complaint, and a proposed default judgment order [DE 14]. In that June 30 letter, Plaintiff clarified that it was not seeking monetary damages, but "a judgment under Title IV [of ERISA] to terminate the Plan as of January 5, 1990, to have PBGC appointed trustee of the Plan, and to require the production of all assets, records, and other property to PBGC as the Plan's trustee." *Id.* By Order dated July 28, 2008, I directed Plaintiff to file and serve all documentation in support of its request for relief and Defendant to file and serve any opposition by the dates specified in the Order [DE 15]. Plaintiff filed the necessary supporting papers. Defendant, however, did not file any opposition despite Plaintiff having presented evidence that Defendant was properly served.

B. Factual Background

A default constitutes an admission of all well-pleaded factual allegations in the Complaint and the allegations as they pertain to liability are deemed true. *Joe Hand Promotions, Inc. v. El Norteno Restaurant Corp.*, No. 06 Civ. 1878, 2007 WL 2891016, at *2 (E.D.N.Y. Sept. 28, 2007) (citing *Greyhound Exhibitgroup, Inc. v. E.I.U.I. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993)). A default judgment entered on the well-pleaded allegations in a complaint establishes a defendant's liability. *See Garden City Boxing Club, Inc. v. Morales*, No. 05 Civ. 0064, 2005 WL 2476264, at *3 (E.D.N.Y. Oct. 7, 2005) (citing *Bambu Sales, Inc. v. Ozak Trading, Inc.*, 58 F.3d 849, 854 (2d Cir. 1995)).

The Complaint in this matter contains the following factual allegations. Defendant was a New York corporation engaged in the manufacture of novelty yarns and had its principal facility located in Brentwood, New York. Compl. ¶¶ 5-6. The Plan is a "tax-qualified single-employer defined benefit pension plan and is covered by the plan termination insurance program established under Title IV of ERISA." *Id.* at ¶ 11. The Plan provides pension benefits for approximately 13 of Defendant's employees. *Id.* at ¶¶ 12-13.

On May 1, 1989, Defendant filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On January 5, 1990, the case was converted to an action under Chapter 7 of the Bankruptcy Code. *Id.* at ¶ 9. Subsequently, Defendant ceased operations and liquidated. *Id.* Although Defendant had previously administered the Plan and served as its contributing sponsor, since the time that Defendant ceased operations and liquidated, the Plan has had no administrator. *Id.* at ¶¶ 7, 8, 13. In addition, there are several Plan participants currently eligible to receive benefits under the Plan but the Plan currently lacks the assets to make such payments. *Id.* at ¶ 13.

PBGC is a United States government agency and a "wholly-owned United States government corporation established under 19 U.S.C. § 1302(a) to administer and enforce the defined benefit pension plan termination insurance program created under Title IV of ERISA." *Id.* at ¶ 4. "When an underfunded Plan terminates, [PBGC] pays statutorily granted pension benefits to plan participants." *Id.*

In 1992, an investigation conducted by the United States Department of Labor revealed that Jerome Kiviat, Defendant's president and the trustee of the Plan, had "unlawfully removed all of the assets of the Plan . . . through 'loans' and other transactions prohibited under Title I of

ERISA.” *Id.* at ¶ 15. Although Mr. Kiviat and his family reached a settlement with the Department of Labor, this settlement did not provide for the repayment of any money to the Plan. *Id.* Accordingly, Plaintiff determined that the Plan did not have available assets to pay the benefits currently due under the Plan’s terms. *Id.*

On September 8, 2005, PBGC issued a Notice of Determination to Defendant, as administrator of the Plan, stating that PBGC had determined the Plan had insufficient assets to pay benefits currently due and that the Plan must be terminated to protect the interests of the Plan participants. *Id.* at ¶ 23. Copies of the Notice of Determination were sent to the Defendant corporation’s last known address, the Office of the Secretary of State of New York, and Mr. Kiviat’s last known address. *Id.* at ¶ 23, Exs. 1(a), (b), & (c). This action followed.

III. LEGAL STANDARD

Plaintiff PBGC was created by Congress to “encourage the development of private pension plans and to ensure that plan participants receive the benefits promised by their employers.” *In re Pension Plan for Employees of Broadway Maint. Corp.*, 707 F.2d 647, 648 (2d Cir. 1983). PBGC is required by statute to “operate a mandatory insurance program that guarantees plan participants a certain minimum level of benefits if their employers terminate pension plans with inadequate funds.” *Id.*; see generally 29 U.S.C. § 1302(a). In addition, PBGC is required to institute proceedings to terminate any single-employer pension plan “as soon as practicable” whenever PBGC “determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan.” 29 U.S.C. § 1342(a). In such a situation, PBGC may “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” 29 U.S.C. § 1342(c)(1).

When PBGC is required to initiate termination proceedings, it may, upon notice to the plan at issue, “apply to the appropriate United States district court for the appointment of a trustee to administer the plan . . .” 29 U.S.C. § 1342(b)(1). PBGC may request that it be appointed as trustee of such a plan. *Id.* When a court issues a decree that a plan must be terminated in order to protect the interests of its participants, the court must authorize the appointed trustee to terminate the plan. 29 U.S.C. § 1342(c)(1). In that case, the trustee has the power to “require the transfer of all (or any part) of the assets and records of the plan to himself as trustee.” 29 U.S.C. § 1342(d)(1)(A)(ii).

IV. DISCUSSION

A. Termination of the Plan

Title IV of ERISA requires PBGC “as soon as practicable institute proceedings under this section to terminate a single-employer pension plan whenever [PBGC] determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan.” 29 U.S.C. § 1342(a). An investigation conducted by PBGC has revealed that two participants in the Plan are currently eligible to begin receiving their benefits. Compl. ¶ 13; Mem. of PBGC for Relief on Default Judgment (“Pl. Mem.”) at 7; Decl. of Susan P. Donahey in Supp. of Mem. of PBGC for Relief on Default Judgment (“Donahey Decl.”) ¶ 8, Decl. of Curtis L. Hill in Supp. of Mem. of PBGC for Relief on Default Judgment (“Hill Decl.”) ¶ 4. Moreover, PBGC has determined that the Plan does not have sufficient assets available to pay these participants their currently-owed benefits. Compl. ¶¶ 15-16; Pl. Mem. at 7; Decl. of Lois

Bruckner Parks in Supp. of Mem. of PBGC for Relief on Default Judgment ("Parks Decl.") ¶¶ 4-6, 11, 12, Exs. 2-4, 9, 10; Donahey Decl. ¶ 6.

Since the allegations as they pertain to liability are deemed true, PBGC has established that the Plan does not have sufficient assets to pay benefits currently due to Plan beneficiaries. Therefore, the Plan should be terminated "in order to protect the interests of the participants." 29 U.S.C. § 1342(c)(1); *see also Pension Benefit Guar. Corp. v. Nastasi White, Inc.*, 476 F. Supp. 2d 228, 229 (E.D.N.Y. 2007). Accordingly, I respectfully recommend to Judge Hurley that Plaintiff's motion for a decree terminating the Plan be GRANTED.

B. Appointment of a Trustee

Whenever PBGC initiates a proceeding to terminate a single-employer plan, such as the Plan at issue here, PBGC may apply to the Court "for the appointment of a trustee to administer the plan." 29 U.S.C. § 1342(b)(1). "[U]pon the petition of" PBGC, the Court "may appoint a trustee in accordance with the provisions of this section if the interests of the plan participants would be better served by the appointment of the trustee." 29 U.S.C. § 1342(b)(2).

PBGC can "request that it be appointed as trustee of a plan in any case," 29 U.S.C. § 1342(b)(1), and PBGC has made that request here. *See* Compl. ¶ 1, 22; Pl. Mem. at 7-8. PBGC states that it is "ready, willing, and able to serve as statutory trustee of the Plan." Compl. ¶ 22. Further, PBGC contends that its appointment as trustee of the Plan will serve the best interests of Plan participants because the former Plan administrator and sponsor are no longer available, the Plan cannot hire a private trustee because the Plan has no assets, and "PBGC has had almost thirty-four (34) years of experience serving as statutory trustee for terminated pension plans under Title IV of ERISA." Pl. Mem. at 7-8. PBGC asserts that it has already obtained

some Plan records and has "placed the two Plan participants who were immediately eligible to begin receiving their benefits into pay status on an estimated basis pending termination of the Plan and PBGC's trusteeship. Once the Plan has been terminated . . . and PBGC has been appointed trustee, all of the participants' guaranteed benefits . . . can be finalized and any unpaid back benefits owed . . . can be paid to them." *Id.* at 8.

The Court finds that it is in the interest of the Plan's beneficiaries to appoint PBGC as trustee of the Plan. Accordingly, I respectfully recommend to Judge Hurley that PBGC's motion to be appointed trustee of the Plan be GRANTED.

C. Establishment of a Termination Date

PBGC also seeks an Order establishing January 5, 1990 as the termination date of the Plan. Compl. ¶ 19. The termination date is normally established by an agreement between PBGC and the plan administrator. *See Nastasi White, Inc.*, 476 F. Supp. 2d at 229. However, when a plan is terminated pursuant to 29 U.S.C. § 1341(c) and no agreement as to the termination date has been reached between the plan administrator and PBGC, as is the case here, the statute provides that the termination date shall be "the date established by the court." 29 U.S.C. § 1348(a)(4).

The Second Circuit has created a framework for courts to use when establishing a single-employer pension plan's termination date. A court should consider only two factors: "the expectations of the participants and the financial implications of termination for PBGC." *In re Pension Plan for Employees of Broadway Maint. Corp.*, 707 F.2d 647, 652 (2d Cir. 1983) (adopting the test set forth in *PBGC v. Heppenstall Co.*, 633 F.2d 293, 300-01 (3d Cir. 1980)). "[T]he financial interests of the employer should play no role in setting a termination date." *Id.*

As for the first factor – the expectations of the participants – the Court must determine “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.” *Id.* at 652-53 (internal citation omitted). Because constructive notice “operates to extinguish a plan beneficiary’s reliance, simple fairness requires a definition of constructive notice that requires facts strongly suggesting actual notice exists without requiring that actual notice be proved.” *In re Pan Am World Airways, Inc. Coop. Ret. Income Plan*, 777 F. Supp. 2d 1179, 1184 (S.D.N.Y. 1991) “While constructive notice can be a slippery notion, it ‘should be the time when a potential plan beneficiary should have known there was a substantial chance that the plan on which the beneficiary had relied would be terminated.’” *Nastasi White, Inc.*, 476 F. Supp. 2d at 230 (quoting *In re Pan Am. World Airways, Inc.*, 777 F. Supp. 2d at 1184).

Plaintiff contends that the Court should set the termination date as January 5, 1990, the day on which Defendant’s Chapter 11 bankruptcy case was converted to a liquidation under Chapter 7.” Pl. Mem. at 9. Specifically, Plaintiff asserts:

On that date it was clear that Brentwood was permanently ceasing operations, and that the employee participants would no longer continue to work for Brentwood or accrue additional benefits under the Plan, giving them constructive notice that the Plan would no longer continue after that date. Establishment of a later termination date will not serve the interests of PBGC because Brentwood has already liquidated as a no-asset estate.

Id. at 9-10. The Court agrees and finds that Plan participants were placed on constructive notice as of the date that Defendant’s Chapter 11 bankruptcy case was converted to a liquidation pursuant to Chapter 7 of the Bankruptcy Code. As of that date, Plan participants received information that Defendant was ceasing its operations, and were thus placed on notice that the

Plan would be terminated. See *Nastasi White, Inc.*, 476 F. Supp. 2d at 230 (finding “the beneficiaries were placed on constructive notice when the defendant ceased operations”); accord *Pension Benefit Guar. Corp. v. Mize Co., Inc.*, 987 F.2d 1059, 1062-63 (4th Cir. 1993) (adopting test set forth by the Second Circuit in *In re Pan Am. World Airways, Inc.* and affirming lower court’s setting the termination date on day that employer closed operations); *Pension Comm. for Farmstead Foods Pension Plan for Albert Lea Hourly Employees v. Pension Benefit Guar. Corp.*, 991 F.2d 1415, 1420-21 (8th Cir. 1993) (holding that “in situations where the PBGC is interpreting provisions of Title IV of ERISA, the recommendation proffered by the PBGC [as to termination date] should be accorded deference”).

Having determined the earliest date on which Plan participants had actual or constructive notice of the Plan’s termination, the Court turns to the second factor – the financial implications of the termination for PBGC. The Court must now “select whatever later date serves the interests of PBGC.” *In re Pension Plan for Employees of Broadway Maint. Corp.*, 707 F.2d at 653. PBGC has proposed that the termination date be set at January 5, 1990. Compl. ¶ 19; Pl Mem. at 9. The Court is “entitled to conclude” that this date proposed by PBGC “adequately serves the interests of PBGC.” *Id.*; *Nastasi White, Inc.*, 476 F. Supp. 2d at 230 (noting that PBGC “has requested November 30, 2003 as the termination date, and thus this date likely represents an advantageous date from its perspective”) (internal citation omitted).

Accordingly, I respectfully recommend to Judge Hurley that Plaintiff’s motion to set January 5, 1990 as the termination date of the Plan be GRANTED.

D. Order to Transfer Plan Assets to the Trustee

Finally, Plaintiff requests an Order requiring "Defendant and any other person or entity having possession, custody, or control of any of the records, assets, property, or documents relating to the Plan transfer, convey, and deliver all such records, assets, property and documents to PBGC." Compl. ¶ 1. By statute, an entity that has been appointed trustee of a single-employer pension plan pursuant to 29 U.S.C. § 1342(b) has the power "to require the transfer of all (or any part) of the assets and records of the plan to himself as trustee." 29 U.S.C. § 1342(d)(1)(A)(ii). Plaintiff maintains that, should it be appointed as the Plan's trustee,

[this] authority is necessary to PBGC's responsibilities under § 1342(d)(1)(B) to calculate and pay Title IV guaranteed benefits, to collect for the Plan any amounts due the Plan, to commence, prosecute, or defend any suits or proceedings involving the Plan, to issue any required notices or reports, or to do any other actions necessary to comply with Title IV of ERISA, any court orders, or to protect the interests of the Plan participants and beneficiaries.

Pl. Mem. at 10. The Court finds that if PBGC is appointed trustee of the Plan, as I have respectfully recommended in Section IV B, "then it has the statutory power to require" the transfer of any Plan assets to itself as trustee. *See Nastasi*, 476 F. Supp. 2d at 230.

Accordingly, I respectfully recommend to Judge Hurley that Plaintiff's motion for an Order requiring Defendant and any other person or entity having possession, custody, or control of any of the records, assets, property, or documents relating to the Plan to transfer, convey, and deliver all such records, assets, property and documents to PBGC be GRANTED

V. CONCLUSION

For the reasons set forth above, I respectfully recommend to Judge Hurley that Plaintiff's motion (1) for a decree that the Plan be terminated; (2) to be appointed as statutory trustee of the

Plan; (3) to establish January 5, 1990 as the termination date of the Plan; and (4) to require Defendant and any other person or entity having possession, custody, or control of any of the records, assets, property, or documents relating to the Plan to transfer, convey and deliver all such records, assets, property and documents to Plaintiff be GRANTED in its entirety.

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report and Recommendation to file written objections. *See also* Fed. R. Civ. P. 6(a) and (e). Such objections shall be filed with the Clerk of the Court via ECF. A courtesy copy of any objections filed is to be sent to the chambers of the Honorable Denis R. Hurley, and to the chambers of the undersigned. Any requests for an extension of time for filing objections must be directed to Judge Hurley prior to the expiration of the (10) day period for filing objections. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Beverly v. Walker*, 118 F.3d 900, 901 (2d Cir.), *cert. denied*, 522 U.S. 883 (1997); *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996).

SO ORDERED.

Dated: Central Islip, New York
January 6, 2009

/s/ A. Kathleen Tomlinson
A. KATHLEEN TOMLINSON
U.S. Magistrate Judge



PENSION ACTION CENTER, GERONTOLOGY INSTITUTE
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March 23, 2010

RE: Brentwood Yarns Pension Plan

Dear Mr. [REDACTED]:

I am extremely pleased that we were able to assist you in obtaining the benefit due you from the Brentwood Yarns. The Pension Benefit Guaranty Corporation (PBGC) was able to provide me with the documentation relative to the lump sum benefit in the amount of \$108,527.30 and a continuing monthly benefit of \$392.49.

It has taken a number of years and we are glad the New England Pension Assistance Project has been effective in providing a financial resolution for you through the PBGC.

If you gave us any original documents we have enclosed them here. If you find need of our services in the future, please do not hesitate to contact us.

We are enclosing a questionnaire which we would ask that you fill out and return to us in the attached self-addressed envelope. Your thoughts on our project are very important to us. Your suggestions and feedback will be used to evaluate our services and make improvements for future clients.

Thank you for contacting us. Do not hesitate to call if there are any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Renee Summers'.

Renee Summers
Pension Counselor