

Nos. 06-1964 & 06-2101

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ARTEMIS COFFIN, et al.,

Plaintiffs-Appellants/Cross-Appellees,

v.

BOWATER INCORPORATED, et al.,

Defendants-Appellees/Cross-Appellants.

On Appeal from the
United States District Court
for the District of Maine

REPLY BRIEF
OF DEFENDANT-APPELLEE/CROSS-APPELLANT
BOWATER INCORPORATED

Richard G. Moon
MOON MOSS & SHAPIRO, P.A.
Ten Free Street
P.O. Box 7250
Portland, ME 04112-7250
(207) 775-6001 (phone)
(207) 775-6407 (fax)

Andrew J. Pincus
Reginald R. Goeke
Andrew E. Tauber
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000 (phone)
(202) 263-3300 (fax)

Counsel for Bowater Incorporated

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Seeking to revive welfare plans terminated years ago, Plaintiffs ask this Court to rewrite ERISA and ignore reality.

Bowater sold GNP to Inexcon in 1999. The sale was consummated in a Stock Purchase Agreement (“SPA”) signed by Bowater’s CFO, who had been specifically authorized by Bowater’s board of directors to take any action necessary to amend or terminate the welfare plans at issue here. The SPA expressly transferred all “liabilities and obligations” associated with the plans from Bowater to GNP. Accordingly, after the sale, GNP, having assumed the plans’ liabilities and obligations, issued Plaintiffs new benefit cards, received premiums from Plaintiffs, and paid Plaintiffs their benefits.

Plaintiffs, who were employees of GNP, do not dispute any of these facts. Nonetheless, they claim that they are still entitled to receive benefits from Bowater. According to Plaintiffs, the SPA did not terminate Bowater’s obligations under the plans because it did not use the magic words “amend” or “terminate.”

Plaintiffs are mistaken. ERISA does not require the use of particular words to amend or terminate a welfare plan. Under well-established law, a welfare plan sponsored by a corporate parent is terminated as to a subsidiary’s employees when, as here, a duly authorized transaction

memorialized in writing transfers the plan's funding obligation to the subsidiary's new owner.

Bowater is therefore entitled to summary judgment on Plaintiffs' ERISA claim.¹

I. A WELFARE PLAN IS TERMINATED BY OPERATION OF LAW WHEN A 'REQUISITE FEATURE' – SUCH AS THE FUNDING MECHANISM – IS ELIMINATED.

ERISA requires no specific actions to terminate a welfare plan and imposes minimal requirements for amending such a plan. Rather, the statute simply specifies the 'requisite features' that a welfare plan must have. When one of those 'requisite features' is eliminated, the plan is necessarily terminated. One of the features that each welfare plan must have is a funding mechanism. Thus, when a plan's funding mechanism is eliminated, the plan is terminated by operation of law.

If a subsidiary's welfare plan is funded by the parent corporation, the plan's funding mechanism is typically eliminated upon the parent's divestiture of the subsidiary. Accordingly, as recognized by every court to

¹ Bowater disputes many of the assertions made by Plaintiffs concerning issues raised by Plaintiffs' appeal, but in compliance with FRAP 28.1(c)(4) will not respond here.

have considered the issue (aside from the district court here), the sale of a subsidiary will automatically terminate by operation of law the subsidiary's welfare plan.

A. ERISA Imposes No Restrictions On The Termination Of Welfare Plans.

ERISA distinguishes between pension plans, which are statutorily vested, and welfare plans, which are not. *See Bradwell v. GAF Corp.*, 954 F.2d 798, 801 (2d Cir. 1992) (“Congress recognized the differences between welfare benefit plans and pension plans.”) (quoting *In re White Farm Equip. Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986)). Consistent with this fundamental distinction, ERISA takes two radically different approaches to plan termination.

For pension plans, “ERISA itself plainly spells out the circumstances under which a plan terminates.” *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999). It does so, moreover, in extraordinary detail. *See* 29 U.S.C. § 1341 (prescribing the “exclusive means of [pension] plan termination”). Thus, “ERISA provides strict obligations and procedures regarding termination of pension plans.” *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515–16 (10th Cir. 1996).

By contrast, ERISA is silent with respect to the termination of welfare plans, such as those at issue here. That silence is not accidental. For the same reasons that employers “are generally free under ERISA, for any reason at any time, to adopt, modify or terminate welfare plans,” *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995), they are also given great latitude on how to terminate those benefit plans. *See Inter-Modal Rail Employees Ass’n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 515 (1997) (“The flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident; Congress recognized that ‘requiring the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans.’”).

B. A Welfare Plan Terminates By Operation Of Law When A ‘Requisite Feature’ Is Eliminated.

Because ERISA does not prescribe particular steps that must be taken to terminate a welfare plan, courts, when determining whether a plan has been terminated, look to the set of ‘requisite features’ that the statute says each plan must have. Because those features are fundamental to the existence of a plan, when one or more of those features are terminated, so too is the plan itself. Thus, in the sale of a subsidiary, where the

subsidiary's welfare plan was sponsored and administered by the parent corporation, courts have repeatedly found that the plan terminates as a matter of law upon the sale of the subsidiary.

1. ERISA specifies the 'requisite features' of a welfare plan.

Rather than detail how or when a welfare plan is terminated, ERISA simply specifies certain "requisite features," 29 U.S.C. § 1102(b), that every welfare plan must have. In particular, ERISA requires that every welfare plan:

- (1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,
- (2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan . . . ,
- (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and
- (4) specify the basis on which payments are made to and from the plan.

Id.

Thus, courts regularly note that "[e]very ERISA plan must specify a funding mechanism, must allocate operational and administrative

responsibilities, and must state how payments are made to and from the plan. “ *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 403 (6th Cir. 1998).

Indeed, this Court, in a different context, stated that an employee benefit is a plan for purposes of ERISA “only if it involves the undertaking of continuing administrative and financial obligation by the employer.”

Belanger v. Wyman-Gordon Co., 71 F.3d 451, 454 (1st Cir. 1995).

When, as here, one or more of those elements is removed, the plan itself is terminated. Because “funding and administration are integral parts of a ‘plan’ under ERISA,” a plan does not “continue in existence regardless of changes in funding or administration.” *Myron v. Trust Co. Bank Long Term Disability Benefit Plan*, 522 F. Supp. 511, 516 (N.D. Ga. 1981).

- 2. Because the sale of a subsidiary typically eliminates one or more ‘requisite features’ of a welfare plan sponsored by the subsidiary’s former parent, the sale of the subsidiary generally terminates any such plan.**

Because the sale of a subsidiary typically eliminates at least one of the ‘requisite features’ of a welfare plan that had been sponsored by the subsidiary’s erstwhile parent, the sale of a subsidiary generally terminates any such plan by operation of law. In *Chiles*, for example, the Tenth Circuit held that a welfare plan that had been sponsored by the former parent of a

divested division was terminated upon the division's sale because the sale eliminated certain "[e]ssential features of an ERISA plan." *Chiles*, 95 F.3d at 1516.

Essential features of an ERISA plan include a procedure for establishing and carrying out a funding policy for the plan and procedures for the operation and administration of the plan. 29 U.S.C. § 1102(b). After the sale of [the division] none of these provisions remained of the [former parent's] Plan as far as plaintiffs were concerned; the responsibilities for funding and administering plaintiffs' disability benefits shifted to the [new parent's] Plan. Given the facts of this case, the [former parent's] Plan terminated with respect to [the] division employees when [the former parent] was released from its obligation to fund the plan with respect to those employees and the employees could look to the [new parent's] Plan for benefits.

*Id.*² See also *Sejman v. Warner-Lambert Co.*, 889 F.2d 1346, 1348–49 (4th Cir. 1989) (welfare plan sponsored by former parent corporation terminated

² Citing *Williams v. Wright*, 927 F.2d 1540 (11th Cir. 1991), Plaintiffs attempt to distinguish *Chiles*, arguing that it "best fits into that category of ERISA cases in which courts refuse to allow employers to avoid ERISA liability by exploiting their own failure to comply with formal requirements." Pls. Reply 58 n.24. Plaintiffs' purported distinction does not hold. First, *Williams* involves the creation of a pension plan (which is subject to strict vesting rules), not the termination of a welfare plan. Second, nothing in *Chiles* suggests that its outcome would have been different had the employer rather than the employees been advantaged by

upon sale of corporate division)³; *Conkin v. CNF Transp., Inc.*, 2004 WL 1774775, at *7 (D. Wyo. May 2, 2004) (welfare plan sponsored by parent

a finding of termination—indeed, other courts, notably *Conkin* and *Sejman*, have applied the same rationale where the result favored the employer.

³ In their effort to distinguish *Sejman*, Plaintiffs—conflating the results in *Sejman* and those in *Livernois v. Warner-Lambert Co.*, 723 F.2d 1148 (4th Cir. 1983)—mischaracterize the case as one “where the written plans of the selling company were *followed*, not deemed *automatically terminated*.” Cf. Pls. Reply 57 (emphasis in original). Plaintiffs are mistaken. In *Sejman*, a company sold a division to another company. Through the time of the sale, the seller maintained a severance plan that promised certain benefits if an employee was discharged “as a result of job elimination.” *Sejman*, 889 F.2d at 1347. Upon sale of the division, certain employees—who continued to work for the division under its new owner—sued the seller, claiming that they were entitled to benefits under the seller’s severance plan because they had, by virtue of the sale, been discharged by the seller “as a result of job elimination.” In *Livernois*, the court held that “the sale of the division did not constitute ‘job elimination’ under this severance policy.” *Id.* Several years later, certain employees sued again, after they were discharged by the division’s new owner. In the second round of litigation, which culminated in *Sejman*, the employees claimed that they were entitled to severance benefits under the seller’s severance plan, not because sale of the division constituted “job elimination” within the meaning of the severance plan, but because they had subsequently been discharged by the division’s buyer. The *Sejman* court squarely rejected the employees’ claim on the ground that “once [the buyer] took over management of the [divested] division, its severance policy, not that of [the seller], was controlling.” *Id.* at 1348.

corporation terminated as to employees of division when division spun-off).⁴

Plaintiffs muster no meaningful response to this line of authority. Plaintiffs do not dispute the logical premise underlying *Chiles*, *Sejman*, and *Conkin*—namely that welfare plans are defined by the presence of their “requisite features,” and, in the absence of any termination requirements under ERISA, plan terminations occur when one or more of those features are removed. Nor do Plaintiffs cite a *single* case that rejects the rule articulated in *Chiles*, *Sejman*, and *Conkin*. In fact, they do not cite even one case in which employees of a divested subsidiary were, as a result of events subsequent to the divestiture, found entitled to benefits under a welfare plan that had been maintained by the subsidiary’s former parent.

⁴ Plaintiffs assert that the automatic termination rule articulated in *Conkin* is mere dictum because “the sales transaction documents accompanying the corporate spinoff . . . expressly provided for the termination of the seller’s responsibilities under its plan to its former employees.” Pls. Reply 56–57 (emphasis in original). But the *Conkin* court did not rely on the terms of the sales agreement. Rather, it relied solely on *Chiles*, which held that a welfare plan terminates upon elimination of one of the ‘requisite features’ enumerated in 29 U.S.C. § 1102(b). See *Conkin*, 2004 WL 1774775, at *7 (citing *Chiles*, 95 F.3d at 1515–16).

Instead, Plaintiffs advance two arguments that are without merit. First, Plaintiffs argue that the holdings in *Chiles*, *Sejman*, and *Conkin* are inconsistent with the amendment procedures required under *Curtis-Wright* and *Bellino v. Schlumberger Techs., Inc.*, 944 F.2d 26 (1st Cir. 1991). Not so. Even assuming *arguendo* that the termination of a welfare plan must, under *Curtiss-Wright* and *Bellino*, take the form of duly authorized corporate action memorialized in writing, that minimal requirement was satisfied in *Chiles*, *Sejman*, and *Conkin*, is satisfied in this case, and presumably would be satisfied in almost every divestiture of a subsidiary.⁵

Second, Plaintiffs point to “a host of . . . severance cases in which the terms of the seller’s plan were held to *provide* ERISA welfare benefits to employees immediately reemployed by the buyer of a division.” Pls. Reply 57 (citing *Anstett v. Eagle-Pitcher Indus., Inc.*, 203 F.3d 501, 505–06 (7th Cir. 2000)). Such cases are irrelevant to the issue presented here. In *Anstett* and the cases it cites, the only question was whether, under the specific terms of the employee severance plans at issue, the sale of a subsidiary constituted

⁵ It would be highly unusual, to say the least, if a corporate subsidiary were sold on a middle-manager’s handshake.

an *employment* termination triggering severance benefits. Neither *Anstett* nor any of the cases it cites address the question whether the sale of a subsidiary constitutes an ERISA *plan* termination.⁶

Thus, *Chiles*, *Sejman*, and *Conkin* stand for the proposition that a welfare plan maintained by a parent corporation is terminated by operation of law with respect to the employees of a subsidiary when the parent sells the subsidiary by means of a duly authorized written instrument that, by transferring the corresponding obligations to the subsidiary's purchaser, eliminates one or more of the 'requisite features' of a plan enumerated in 29 U.S.C. § 1102(b). As explained further below, that is precisely what happened here.

⁶ In *Anstett* and the cases it cites, the employees claimed that they were entitled to severance benefits as a result of the subsidiary's divestiture. The issue was not whether the parent corporation's severance plan had survived the subsidiary's divestiture, but rather whether the divestiture itself was a triggering event under the terms of that plan. Thus, in *Anstett* and the cases it cites, the only issue was how to interpret the terms of a plan that unquestionable existed at the moment the plaintiffs' claims arose. By contrast, in *Sejman* and *Conkin*, as in this case, employees of a divested subsidiary claimed benefits under a former parent's welfare plan not as a result of the divestiture itself but instead based on events that took place many years after the divestiture. Thus, the issue in *Sejman*, *Conkin*, and here is *whether, at the time plaintiffs' claims arose, the relevant plans existed at all*, not how to interpret the terms of those plans.

II. THE SPA TERMINATED THE BOWATER-SPONSORED PLANS BY TRANSFERRING RESPONSIBILITY FOR THEIR FUNDING TO GNP.

According to Plaintiffs, the dispositive issue with respect to the SPA “is simply whether the SPA contains any provision that purports to terminate the plans or amend them in such a way as to relieve Bowater of its responsibilities under them.” Pls. Reply 50. In fact, the SPA contains precisely such a provision – Section 4.12, which transfers the obligation to fund the plans from Bowater to GNP, thereby amending the plans “in such a way as to relieve Bowater of its responsibilities under them.”

A. The SPA Amended The Plans By Transferring The Obligation To Fund Them From Bowater To GNP.

The sale of GNP was accomplished by a stock purchase agreement (“SPA”) through which Bowater sold all GNP shares to Inexcon. JA1134. By purchasing all shares of GNP stock, Inexcon was acquiring GNP, which had certain assets and liabilities. Identifying those assets and liabilities – and distinguishing them from those retained by Bowater – was, therefore, a core function of the SPA.

The SPA carefully distinguished between liabilities that Bowater would retain and those that GNP would assume. The liabilities that

Bowater would retain, defined in Section 2.05 of the SPA as the “Retained Liabilities,” included “any and all liabilities arising under the GNP *Pension Plans*.” JA1138 (emphasis added). By contrast, the liabilities that GNP would assume – designated the “Assumed Liabilities” in Section 4.12 – included “the liabilities and obligations disclosed in any Section of the Disclosure Schedule.” Section 4.20(a) of the Disclosure Schedule specifically listed both the plans at issue here – the Indemnity and POS-A plans – as plans to be assumed by GNP. JA1146; BSA6.⁷ Thus, under the plain terms of the SPA, GNP assumed all “liabilities and obligations” associated with the Indemnity and POS-A plans.

Those “liabilities and obligations” included the obligations to fund and administer the plans. As noted above, 29 U.S.C. § 1102(b) requires that each ERISA plan provide a procedure for establishing a funding policy and a procedure for the allocation of responsibilities for the operation and administration of the plan. As the district court found, Bowater was obligated to fund and administer the plans prior to the SPA’s execution. By its terms, the SPA makes clear that any “liabilities and obligations”

⁷ BSA__ refers to Bowater’s Supplemental Appendix.

under those plans – including the obligation to fund and administer the plans – were assumed by GNP. The clear effect of Section 4.12 of the SPA was to transfer funding and administration obligations for the plans from Bowater to GNP.

By changing the plans’ “procedure for . . . carrying out a funding policy and method,” 29 U.S.C. § 1102(b)(1), and its procedure for “the operation and administration of the plan,” 29 U.S.C. § 1102(b)(2), the SPA amended the plans. As a result of that amendment, Bowater’s obligation to fund and administer the plans ceased. The SPA effectively terminated the *Bowater*-sponsored plans and established (otherwise equivalent) *GNP*-sponsored plans in their place.⁸

⁸ Plaintiffs assert that “the SPA was not even understood by the Plan Administrator to be a plan amendment.” Pls. Reply 52. That is incorrect. In fact, the Plan Administrator testified that in his opinion “once Bowater sold Great Northern Paper to Inexcon POS A ceased to exist” because, as a result of the SPA, the funding “obligation had moved from Bowater to Inexcon.” JA973. *See also* JA978 (“To me the sale of GNP to Inexcon shifted the responsibility for Point of Service A to this new GNP that was owned by Inexcon.”); *id.* (“once the deal was done, the responsibility for the medical, active and retiree, shifted to Inexcon”). This understanding was also reflected in letters he sent to Plaintiffs. *See, e.g.*, JA1461 (denying benefit claim because, *inter alia*, “any obligations Bowater owed to GNP employees and retirees ended upon the sale of GNP to Inexcon”).

Plaintiffs disparage Section 4.12, characterizing it as “merely” a “disclosure provision[],” Pls. Reply 51, as if that characterization somehow obviates its effect. But Plaintiffs misunderstand the nature of the SPA. Under the terms of the SPA, Inexcon acquired all GNP shares, and thus all of GNP’s assets and liabilities. The SPA’s disclosure provisions play a critical role in distinguishing between the assets and liabilities assumed, and those retained by Bowater. In this respect, the disclosure provisions are much like an inventory that is prepared in connection with the sale of a home. To distinguish between fixtures that are conveyed with the home and those that are not, the parties to a home sale typically prepare an inventory disclosing the fixtures that are conveyed. Like Section 4.12 of the SPA, that inventory (or “disclosure provision”) defines, in part, what the buyer has acquired. One refers to the inventory, for example, to determine whether the dining room chandelier has been conveyed. If the chandelier is listed, it has been conveyed. The fact that the chandelier is “merely” listed in the inventory does not render its conveyance any less effective. So, too, here. The fact that the POS-A and Indemnity plans were “merely” listed in a disclosure schedule in no way diminishes the fact that the SPA

transferred from Bowater to GNP all liabilities associated with the plans, including the obligation to fund and administer them.

B. The SPA Satisfies ERISA's Minimal Amendment Requirements.

The SPA plainly satisfies ERISA's requirements for the amendment of welfare plans. Those requirements are *de minimis*. See Bowater Br. 56–57. A plan that reserves the company's right to amend the plan (as both plans do here) contains a sufficient amendment procedure. *Curtiss-Wright*, 514 U.S. at 79–80. Whether an alleged amendment complies with that minimalist procedure depends only on whether it was duly authorized by all necessary corporate formalities. *Id.*

Although Plaintiffs argue that a plan amendment must be in writing, even Plaintiffs do not dispute that the amendment can be made in any form of document, including a corporate board resolution or a merger agreement. See Bowater Br. 57–58. Plaintiffs implicitly acknowledge that a plan amendment “need not be labeled as such,” see Pls. Reply 51, and that an amendment can be found in “transaction documents accompanying [a] corporate spinoff.” Pls. Reply 56.

The SPA easily meets this threshold. Not only is the SPA in writing, but it is a highly formal, extensively negotiated document approved by Bowater's board of directors. Nor is there any doubt that the SPA was executed on Bowater's behalf by a duly authorized corporate officer. *See* Bowater Br. 57–58. Indeed, implicitly acknowledging that the district court's contrary conclusion was clearly erroneous, Plaintiffs admit that “the SPA was signed by an officer who had sufficient authority to effectuate a termination” of the POS-A and Indemnity plans. Pls. Reply 48; *see also id.* at 50 (“Bowater . . . inveighs against a straw man, as if the issue were whether the SPA was executed by a Bowater official having requisite corporate authority.”); *cf.* Add. 69 n.21.

On these facts – where Bowater's obligation to fund the plans was terminated by a written document signed by a duly authorized corporate officer – there was a properly adopted amendment, the effect of which was to terminate Bowater's sponsorship of, and thus its responsibility for, the plans.

C. Undisputed Facts Confirm That The SPA Terminated Bowater's Obligations Under The Plans.

In its opening brief, Bowater identified several facts that “demonstrate what all participants knew at the time: Bowater’s obligations under the GNP plans were terminated when Bowater sold GNP to Inexcon.” Bowater Br. 55. In particular, Bowater noted that:

- After the sale, Bowater instructed GNP to substitute “GNP” for “Bowater Incorporated” in the SPDs and removed the GNP plans from the Bowater VEBA trust. *See* JA188–89 (¶¶214–215); JA276 (¶39).
- After the sale, GNP sent Plaintiffs new benefit cards identifying GNP as the plan sponsor and repeatedly presented itself in writing as the plan sponsor. *See* JA190–94 (¶¶217–230).
- After the sale, Plaintiffs paid premiums due under the plans to GNP, not Bowater. *See* JA193 (¶228).
- After the sale, GNP, not Bowater, paid retiree health benefits to GNP retirees. *See* Add. 69 n.20; JA189 (¶216).

Notably, Plaintiffs do not dispute *any* of these facts.

Instead, Plaintiffs distort Bowater’s argument and ignore its true thrust. According to Plaintiffs, “Bowater argues that these miscellanea somehow amounted to a termination of Plaintiffs’ welfare benefit plans.” Pls. Reply 52. Not so. Bowater maintains that it was *the SPA* – not “these miscellanea” – that terminated the Bowater-sponsored plans. The various

acts identified by Bowater are simply proof that at the time of GNP's sale to Inexcon everyone concerned, including Plaintiffs, understood that *as a result of the SPA* the Bowater-sponsored plans had been terminated and replaced by GNP-sponsored plans.⁹

III. TO AVOID THE PLAIN EFFECT OF THE SPA, PLAINTIFFS SEEK TO IMPOSE AN EXTRA-STATUTORY REQUIREMENT FOR PLAN AMENDMENTS.

Plaintiffs do not dispute that the SPA was a properly authorized written document that meets the requirements of *Curtiss-Wright* and

⁹ Plaintiffs offer no alternative explanation of the undisputed facts. They spend three pages of their reply rebutting an argument that Bowater never made (namely, that "these miscellanea somehow amounted to a termination of Plaintiffs' welfare benefit plans"), but fail to devote even a single sentence to the argument that Bowater *did* make (namely, that the undisputed facts confirm everyone's contemporaneous recognition that the SPA terminated the Bowater plans). *Cf.* Pls. Reply 52-56. Query: If the SPA did not terminate the Bowater-sponsored plans, why, after the sale of GNP to Inexcon, did GNP issue new benefit cards identifying GNP as the sponsor of the POS-A and Indemnity plans? Similarly, if the SPA did not terminate the Bowater-sponsored plans, why, after the sale of GNP to Inexcon, did Plaintiffs pay premiums due under the plans to GNP rather than Bowater?

Bellino.¹⁰ Nor do Plaintiffs dispute that the SPA transferred to GNP the obligations under the POS-A and Indemnity benefit plans.¹¹

Rather, Plaintiffs advocate for a new rule governing plan amendments, beyond that already articulated by *Curtiss-Wright* – namely “that a document claimed to constitute an amendment or termination of a plan must, at a bare minimum, actually *purport* to effectuate a change to the plan.” Pls. Reply 49. It is not entirely clear what Plaintiffs mean by this. If they mean that the amending or terminating document must actually amend or terminate the plan to be effective, then Plaintiffs’ putative requirement is a meaningless tautology. If they mean that the amending or terminating document must use specific words – such as “amend” or “terminate” – to be effective, then Plaintiffs are simply wrong.

¹⁰ Plaintiffs’ contention is that automatic termination upon the sale of a subsidiary *without* a duly authorized writing would violate *Curtiss-Wright* and *Bellino*. Cf. Pls. Reply 58 n.24. Plaintiffs do not dispute that the SPA was written and duly authorized, which are the only amendment requirements established in *Curtiss-Wright* and *Bellino*.

¹¹ Although Plaintiffs argue that the SPA provisions “do not contain any language purporting to terminate or amend the plans,” Pls. Reply 50, they never dispute that liability for the welfare plans was in fact transferred to GNP by the SPA.

To the extent that Plaintiffs argue that the amending document must actually effect an amendment or termination, such a tautological standard is met in this case. Plaintiffs argue, for example, that the SPA “must purport to touch upon the plans.” Here, the SPA – by expressly identifying the POS-A and Indemnity plans as liabilities being assumed by GNP – acted directly on the plans by changing their funding and administrative mechanisms.

To the extent that Plaintiffs are arguing that the document must evidence Bowater’s intent to amend or terminate the plans, that standard is similarly met. Bowater’s board of directors adopted a specific resolution instructing its executives to do whatever was necessary to facilitate the sale, “including, without limitation . . . amending, modifying, suspending or terminating any and all retirement, compensatory or welfare benefit plans . . . maintained by the Corporation or GNP.” JA188 (¶212).

Pursuant to that instruction, Bowater’s CFO executed the SPA, which expressly transferred the liability for the POS-A and Indemnity plans to GNP. That transfer plainly evidences the intent to terminate Bowater’s obligations under those plans.

To the extent that Plaintiffs are arguing that the SPA must use certain magic words in order for that termination to be effective, Plaintiffs are simply mistaken. ERISA is, with respect to welfare plans, “ultimately indifferent to the level of detail in an amendment procedure.” *Curtiss-Wright*, 514 U.S. at 80. As reflected in 29 U.S.C. § 1102(b)(3), the statute “requires only that there *be* an amendment procedure.” *Id.* (emphasis in original). Beyond that minimal requirement, “ERISA imposes no additional formalities on plan amendment.” *Halliburton Co. Benefits Comm. v. Graves*, 463 F.3d 360, 372 (5th Cir. 2006).¹² ERISA “does not require that certain magic words be utilized.” *Clark v. Witco Corp.*, 102 F. Supp. 2d 292, 297 (W.D. Pa. 2000).

Nothing in ERISA requires that an amendment to a welfare plan take a certain form or invoke particular language. Nor is such a requirement imposed by any of the cases that Plaintiffs cite. *Cf.* Pls. Reply 50–51. In *Sprague*, for example, the court rejected the contention that the plan had

¹² Indeed, the formal requirement that there be an amendment procedure is so slight that it is satisfied by a reservation clause that “says in effect that the plan may be amended ‘by the Company.’” *Curtiss-Wright*, 514 U.S. at 79.

been amended not because the purportedly amending documents failed to use particular language but rather because “[n]one” of the documents even “suggested that the plan was being modified.” *Sprague*, 133 F.3d at 403. Indeed, “[f]ar from modifying the terms of the welfare plan,” the documents “incorporated the plan’s terms.” *Id.* In *Algie*, the plaintiffs, who had been employed by a subsidiary prior to their discharge, alleged that they were entitled to benefits under a severance plan *maintained by the subsidiary*. See *Algie v. RCA Global Commc’ns, Inc.*, 60 F.3d 956, 961 (2d Cir. 1995). The defendants argued that a resolution by the parent corporation’s board of directors terminated that severance plan and replaced it with another severance plan. The court rejected that argument, finding that the Board resolution merely “*authorize[d]* the subsidiary to apply” the new plan – the resolution did not itself apply the new plan, and there was no evidence that the subsidiary ever acted on the authority it had received under the resolution. *Algie v. RCA Global Commc’ns, Inc.*, 891 F. Supp. 875, 884 (S.D.N.Y. 1994) (emphasis added).¹³ Similarly, in *Cinelli*, the board

¹³ Far from supporting Plaintiffs’ position, *Algie* actually supports Bowater. In affirming the decision on appeal, the Second Circuit – noting that the plan was sponsored by the subsidiary itself rather than the former

resolution at issue was merely “an enabling document” that “did not undertake to amend the plan, but rather to *authorize* the creation of a new plan.” *Cinelli v. Sec. Pac. Corp.*, 61 F.3d 1437, 1442 (9th Cir. 1995) (emphasis added).¹⁴ Thus, contrary to Plaintiffs’ suggestion, nothing in *Sprague*, *Algie*, or *Cinelli* remotely suggests that an amendment to a welfare plan must take a particular form or invoke particular language to be effective.¹⁵

corporate parent—expressly distinguished the facts of *Algie* from those in *Sejman* and acknowledged that where, as in *Sejman* and here, the welfare plan was sponsored by the parent company “the sale of the operating unit for which the employees worked ended their coverage under [welfare] benefit plans sponsored by the old corporation.” *Algie*, 60 F.3d at 961.

¹⁴ Here, by contrast, the enabling resolution adopted by the Bowater board, *see* Bowater Br. 58, was in fact implemented by the SPA, which amended the POS-A and Indemnity plans.

¹⁵ The two other cases cited by Plaintiffs, *Borst* and *Allison*, are equally devoid of any such suggestion. In *Borst*, the document that was claimed to be a plan amendment was merely a conditional statement of what action the company would take *if* a certain event subsequently occurred. *See Borst v. Chevron Corp.*, 36 F.3d 1308, 1322 (5th Cir. 1994). The court held that the document was not a plan amendment because the document did not itself effectuate any change in the plan and had not been adopted in accordance with the plan’s amendment procedures. *See id.* at 1323. In *Allison*, the court held that the alleged amendment was not an amendment because it claimed to accomplish something that was specifically anticipated by the plan but attempted to do so without regard for the procedures expressly set forth in the plan. *See Allison v. Bank One-Denver*, 289 F.3d 1223, 1234 (10th Cir. 2002). Thus, *none* of the cases cited by Plaintiffs support the

Rather than requiring particular labels or language, courts have adopted a functional approach when determining whether a duly adopted document constitutes a plan amendment. Thus, *Cinelli* notes that although the board resolution at issue in *Horn* “was not titled as an amendment to the plan,” the resolution was nonetheless held to be an amendment because “*in effect* it did indeed amend the plan.” *Cinelli*, 61 F.3d at 1442 (emphasis added). The *Horn* court rejected the proposition that plan amendments must be “formally labeled as such,” finding “no reason to require an employer to comply with such a formality not imposed by law.” *Horn v. Berdon, Inc. Defined Benefit Pension Plan*, 938 F.2d 125, 127 (9th Cir. 1991).

Here, the SPA – by changing their funding mechanism – acted directly on the POS-A and Indemnity plans. That is sufficient. It would be vapid formalism to hold that such an amendment was ineffectual simply because particular words were not used. The SPA could have been entitled “Stock Purchase Agreement and Plan Amendment.” Similarly, Section 4.12, by which GNP assumed responsibility for the plans’ funding, could

assertion that a plan amendment must invoke certain magic words to be effective.

have included a concluding clause stating, “and thus the plans identified in the Disclosure Schedule are amended.” But neither the alternative title nor the concluding clause would have added anything of substance to the document. As it is, the SPA amended the plans by transferring responsibility for their funding from Bowater to GNP. That is enough.

IV. FINDING A TERMINATION OF THE BENEFIT PLANS IN 1999 IS CONSISTENT WITH ERISA’S POLICY, PURPOSE, AND TEXT.

The principle advanced here – that a welfare plan sponsored by a parent corporation is terminated with respect to the employees of a subsidiary when the subsidiary is sold by means of a duly authorized written instrument that, by transferring the corresponding obligations to the subsidiary’s purchaser, eliminates one or more of the ‘requisite features’ of a plan enumerated in 29 U.S.C. § 1102(b) – is fully consistent with ERISA’s policies and purpose. The principle is neutral *ex ante*, encourages employers to provide welfare benefits, and hews closely to the text of ERISA.

1. The rule advanced by Bowater properly balances the interests of employers and employees.

Although they do not say so outright, Plaintiffs – through clipped quotations and other devices – would have this Court believe that ERISA is an asymmetric statute designed to favor employees under all circumstances.¹⁶ In fact, ERISA, like most statutes, represents a “balancing of policies.” *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). In particular, it seeks to balance “concerns for the protection of employers, and concerns for the protection of employees.” *New England Mut. Life Ins. Co. v. Baig*, 166 F.3d 1, 3 (1st Cir. 1999). Indeed, in *Curtiss-Wright* the Supreme Court explicitly recognized that ERISA is strictly neutral when, as here, “plan beneficiaries try[] to prove that unfavorable plan amendments were not properly adopted.” *Curtiss-Wright*, 514 U.S. at 84. While “nothing in ERISA is designed to obstruct such efforts,” it is equally true that “nothing in ERISA is designed to facilitate such efforts either.” *Id.*

¹⁶ For example, when they quote *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993), as stating that ERISA “resolved innumerable disputes between powerful competing interests,” Plaintiffs conveniently omit the remainder of the sentence, which expressly notes that “not all [of those disputes were resolved] in favor of potential plaintiffs.” See Pls. Reply 56.

The principle advanced here – that a welfare plan sponsored by a parent corporation terminates, with respect to employees of a subsidiary, upon sale of the subsidiary – is itself neutral. Although it happens to cut against Plaintiffs on the facts of this case, it favored the plaintiffs in *Chiles*.

Significantly, one of ERISA’s principal goals was to encourage employers to establish welfare plans. See *Nash v. Trustees of Boston Univ.*, 946 F.2d 960, 966 (1st Cir. 1991) (noting “the important ERISA goal of ‘encouraging the formation of employee benefit plans’”) (quoting *Pilot Life*, 481 U.S. at 54). To help achieve that goal, ERISA granted employers considerable latitude with respect to welfare plans.

The flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident; Congress recognized that “requir[ing] the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans.” S. REP. No. 93-383, p. 51 (1973). Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, “they would err initially on the side of omission.” *Heath v. Varsity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995).

Inter-Modal Rail Employees Ass’n v. Atchison, Topeka & Santa Fe Ry., 520 U.S. 510, 515 (1997). Indeed, precisely because such flexibility will encourage

employers to offer welfare plans, “[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify or terminate welfare plans.” *Curtiss-Wright*, 514 U.S. at 78.

Recognizing that the sale of a subsidiary terminates, with respect to the subsidiary’s employees, welfare plans that had been sponsored by the subsidiary’s former parent encourages employers to offer welfare benefits by shielding them from counterintuitive and unforeseen liabilities. The principle that the parent’s welfare plans terminate upon the subsidiary’s sale matches the basic intuition that an employer offers welfare plans for its own employees and not those of another company. No one expects a parent corporation to sell a subsidiary and then, from charitable impulses, continue to operate a welfare plan for the former subsidiary’s employees. Allowing employees of a former subsidiary to claim benefits under the former parent’s welfare plan when opportunistic to do so would be “a significant, unforeseen, and costly liability” that might encourage parent corporations to avoid offering such benefits altogether. *Sejman*, 889 F.2d at 1349-50.

2. The rule defended here is entirely consistent with ERISA.

Plaintiffs and Bowater agree on one thing: “because ERISA is ‘a “comprehensive and reticulated statute”’ that ‘resolved innumerable disputes between powerful competing interests,’ the courts are not to imply new provisions into the statute.” Pls. Reply 56 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251, 262 (1993)). It is, however, Plaintiffs, not Bowater, who seek to imply new provisions into the statute.

Contrary to Plaintiffs’ assertion, the automatic termination rule recognized in *Chiles*, *Sejman*, and *Conkin* is not an “extra-statutory means of . . . terminating a plan.” *Id.* As discussed above, *see* pages 3–4 *supra*, ERISA prescribes no procedures for the termination of welfare plans, specifying instead only the ‘requisite features’ that a welfare plan must possess. The automatic termination rule is a direct consequence of this statutory construct: unfettered by the highly detailed procedural rules that limit the termination of pension plans, the termination of a welfare plan occurs whenever a ‘requisite feature’ is eliminated (as generally happens when a plan-sponsoring parent sells a subsidiary). *See Chiles*, 95 F.3d at 1516.

To the extent that Plaintiffs would require the use of certain magic words to amend a plan, it is Plaintiffs who seek to imply provisions not found in ERISA. *See* pages 20–26 *supra*. ERISA’s sole requirement is that “there *be* an amendment procedure.” *Curtiss-Wright*, 514 U.S. at 80. The statute “imposes no additional formalities on plan amendment.” *Halliburton*, 463 F.3d at 372. Thus, any requirement that a plan amendment must take a particular form or use particular words to be effective would be an unwarranted, extra-statutory condition.

3. The rule defended here is consistent with the policies underlying *Curtiss-Wright*.

The amendment procedure adopted in *Curtiss-Wright* was minimalistic because that best advanced the amendment goals of ERISA, namely: (1) that plan amendments be given the serious consideration they deserve; (2) that plan amendments be recognized as such by the plan administrators; and (3) that the “improbable results” that would accompany a rule requiring a more extensive procedural mechanism be avoided.

The rule outlined by Bowater here is consistent with each of those goals. First, the sale of a corporate subsidiary is a serious corporate event

accompanied by extensive negotiations and documentation. Second, a plan administrator will recognize that the sale of the subsidiary – and the resulting transfer of the funding obligation – resulted in a plan termination. Indeed, after the subsidiary’s sale, the administrator would likely no longer have access to either the funds or the employee information necessary to administer the plan.

Third, recognizing a plan termination upon the transfer of the funding obligation avoids the improbable result that a parent corporation would sell its subsidiary and transfer the obligation for its benefit plans, and then years later, as the result of post-sale events, become liable for millions in benefits under those plans. By contrast, Plaintiffs’ proposed rule – that an amending document must employ certain unspecified magic words in order to “purport to amend” a plan – would lead to precisely that result in this case and would, if applied generally, “lead to the invalidation of myriad” plan amendments “that no one would think violate § 402(b)(3).” *Curtiss-Wright*, 514 U.S. at 81. As noted by the *Curtiss-Wright* Court, the avoidance of such “improbable results” is the “strongest argument” for a textual reading of ERISA’s minimalist amendment requirement.

V. BOWATER IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' ERISA CLAIM.

Bowater is entitled to judgment as a matter of law on Plaintiffs' ERISA claim.

There is no dispute as to the material facts: The SPA was in writing. JA 1113–JA1201. The SPA was signed by Bowater's CFO, who, in connection with GNP's sale to Inexcon, was specifically authorized to "amend[], modify[], suspend[] or terminat[e] any and all . . . welfare benefit plans . . . maintained by the Corporation." JA188 (¶212); JA268–JA269 (¶¶21–22). Section 4.12 of the SPA expressly transferred all "liabilities and obligations" associated with the POS-A and Indemnity plans from Bowater to GNP. JA1146; BSA6.

This Court "review[s] *de novo* the grant or denial of summary judgment, as well as pure issues of law." *Rodriguez v. American Intern. Ins. Co. of Puerto Rico*, 402 F.3d 45, 46 (1st Cir. 2005) (citations omitted). On the undisputed facts, and under the well-established law articulated in *Curtiss-Wright*, *Bellino*, *Chiles*, *Sejman*, and *Conkin*, Bowater is entitled to summary judgment on Plaintiffs' ERISA claim.

Conclusion

The judgment of the district court should therefore be affirmed insofar as it granted Bowater summary judgment and reversed insofar as it granted Plaintiffs summary judgment.

Respectfully submitted,

Richard G. Moon
MOON MOSS & SHAPIRO, P.A.
Ten Free Street
P.O. Box 7250
Portland, ME 04112-7250
(207) 775-6001 (phone)

Andrew J. Pincus
Reginald R. Goeke
Andrew E. Tauber
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000 (phone)

Counsel for Bowater Incorporated

February 5, 2007

Certificate of Compliance

I, Andrew Tauber, hereby certify that: (1) this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(C) because it contains 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and, (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface, namely Book Antiqua 14, using Microsoft Word 2002.

Andrew Tauber (#115032)
MAYER BROWN ROWE & MAW, L.L.P.
1909 K Street, N.W.
Washington, DC 20006
Telephone: (202) 263-3000
Counsel for Bowater Incorporated

Dated: February 5, 2007

Certificate of Service

I, Andrew Tauber, hereby certify that on February 5, 2007, I caused copies of the Reply Brief of Defendant-Appellee/Cross-Appellant Bowater Incorporated in the above-captioned matter to be served by overnight delivery on the following:

Leon Dayan, Esq.
Bredhoff & Kaiser, PLLC
805 15th Street, NW, Suite 1000
Washington, DC 20008

Diane A. Khiel
Law Office of Diane A. Khiel
P.O. Box 7
Orono, ME 04473

Jonathan Beal
114 Noyes Street
P.O. Box 1400
Portland, ME 04101

Andrew Tauber (#115032)
MAYER BROWN ROWE & MAW, L.L.P.
1909 K Street, N.W.
Washington, DC 20006
Telephone: (202) 263-3000
Counsel for Bowater Incorporated