IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS BLACK, *et al.*,

Plaintiffs,

v.

PENSION BENEFIT GUARANTY CORPORATION, *et al.*,

Defendants.

Case No. 2:09-cv-13616
Hon. Arthur J. Tarnow
Magistrate Judge Mona K. Majzoub

PENSION BENEFIT GUARANTY CORPORATION'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY

Issue Presented

Plaintiffs have brought this action for judicial review of PBGC's administrative decision under 29 U.S.C. § 1342 to initiate termination of the Delphi Salaried Plan. In cases challenging an administrative decision, judicial review is limited to the administrative record provided by the agency and discovery is not allowed unless plaintiffs make a strong showing of bad faith or improper behavior by the agency or sufficiently prove that the record is so deficient as to preclude any judicial review. Plaintiffs have not attempted to make any such showing. Are plaintiffs nonetheless entitled to conduct discovery completely outside the administrative record that adequately supports PBGC's decision to terminate their pension plan?

Authority PBGC Chiefly Relies Upon

United States Supreme Court Cases

PBGC v. LTV Corp., 496 U.S. 633 (1990)

Florida Power & Light Co. v. Lorton, 470 U.S. 729 (1985)

Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc., 435 U.S. 519 (1978)

Camp v. Pitts, 411 U.S. 138 (1973)

Citizens to Preserve Overton Park, Inc., v. Volpe, 401 U.S. 413 (1971)

United States Circuit Court Cases

Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1 (D.C. Cir.1998)

San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984)

United States District Court Cases

Hickey v. Chadick, 2009 WL 3064445 (S.D. Ohio, Sept. 18, 2009)

Sara Lee Corp. v. Am. Bakers Ass'n Ret. Plan, 252 F.R.D. 31, 34 (D.D.C. 2008)

Pac. Shores Subdivision, Cal. Water Dist. v. United States Army Corps of Eng'rs, 448 F. Supp. 2d 1 (D.D.C. 2006)

Office of Foreign Assets Control v. Voices in Wilderness, 382 F. Supp. 2d 54 (D.D.C. 2005)

Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650 (D.D.C. 1978)

Factual and Procedural Background

There was nothing unusual in the circumstances that led to the termination of the Delphi Salaried Plan. Plaintiffs' former employer, Delphi Corp., suffered years of business reverses, and, following the deep recession in the U.S. economy and the collapse of the automobile industry, finally liquidated, leaving its underfunded pension plans orphaned in the wake of its business failure. One of PBGC's primary tasks is to clean up that situation, like it has done for hundreds of other failed businesses, by moving to terminate those pension plans and ensuring that the benefits that the plan participants have come to count on continue to be paid up to the limits set by law.

PBGC went about this task precisely in the manner and following the procedures set forth in the relevant statutory provision, 29 U.S.C. § 1342. PBGC began by determining that three of the four possible grounds laid out in section 1342(a) that would justify PBGC initiating termination proceedings existed with respect to the Delphi Salaried Plan. The evidence that PBGC relied upon in reaching the decision to proceed with the termination is compiled, and has been presented to plaintiffs and the court in the nearly 4,000 page Administrative Record.

PBGC's administrative process under section 1342(a) was completed by the end of April 2009, so that PBGC could ensure the best possible recovery on its claims ahead of the DIP lenders threatened foreclosure, and the resulting break-up of Delphi's controlled group of related companies. As PBGC's Administrative Record reflects, PBGC agreed to temporarily stay the termination process to accommodate the bankruptcy proceedings when Delphi's DIP lenders agreed to forbear from foreclosing on Delphi's valuable assets and to give PBGC advance notice of any such foreclosure, because an immediate termination of the Delphi pensions could disrupt

the ongoing negotiations seeking to resolve Delphi's bankruptcy. In mid-July 2009, when the DIP lenders provided the notice of foreclosure, PBGC proceeded with the termination process. As in all involuntary termination cases, PBGC gave the notices called for in section 1342(c) and gave Delphi, as plan administrator, the option of opposing the termination, thereby forcing PBGC to sue Delphi to terminate its plans, or of agreeing to the termination and signing an agreement to that effect.

Throughout this litigation, plaintiffs have effectively skipped over language from section 1342(c) in claiming that "…a pension plan may only be terminated by the PBGC pursuant to a court adjudication or decree…"[1] The language they skip is this:

> If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3).

This plain language of 29 U.S.C. § 1342(c) gave Delphi Corp. the ability to terminate the plans by agreement. Delphi agreed to termination, accordingly vetting that decision through a lengthy hearing in the New York Bankruptcy Court – a proceeding that plaintiffs herein fully participated in. The Bankruptcy Court fully approved and validated Delphi's decision to agree to termination in a final order, which plaintiffs did not appeal, electing instead to file this action.

On November 29, 2010, this Court referred the parties' disputes regarding the scheduling order to Magistrate Judge Majzoub. In her order resolving that dispute, the Magistrate Judge denied plaintiffs' request to allow discovery on the first three counts of their complaint because there are no disputed facts in those counts, only legal issues. With respect to count four, which

[1] Plaintiffs' Motion to Compel Discovery from Defendant PBGC, p.2.

alleges that PBGC's actions in seeking termination of the Salaried Plan are illegal, the Magistrate Judge concluded that this constituted a challenge to PBGC's administrative decision, based on the Administrative Record, that legal grounds existed to initiate termination of the Salaried Plan. Though the Magistrate Judge noted and reserved PBGC's argument that no discovery is appropriate in an administrative record case, she nevertheless gave plaintiffs a short time to attempt to show that one of the narrow exceptions to the "no discovery" rule might apply, based on plaintiffs' allegations that the Administrative Record was incomplete.

Circumventing the requirement, as correctly reflected in the Magistrate Judge's order, to make the necessary showing as a prerequisite to discovery beyond the Administrative Record, plaintiffs launched vast discovery demands upon PBGC. In their discovery demands, plaintiffs seek every single document and bit of information about Delphi and the Delphi pension plans that PBGC may possess from 2008 to the present. PBGC objected to this impermissible fishing expedition into PBGC's records, and plaintiffs' Motion to Compel followed.

Argument

I. Judicial Review of PBGC's Determination is Limited to the Administrative Record; Plaintiffs are not Entitled to Discovery.

Magistrate Judge Majzoub properly concluded, as have the other courts that considered the issue, that PBGC's determination to initiate termination of the Delphi Salaried Plan was an informal agency adjudication, based on an administrative record compiled by the agency. An action challenging such an agency decision, unlike other causes of action, does not allow the plaintiffs "to invoke all the benefits of the rules of civil procedure for an extensive search into the agency's decisional process."[2] In this case, the general rules of discovery do not apply

[2] *Environmental Defense Fund, Inc. v. Blum*, 458 F. Supp. 650, 663 (D.D.C. 1978). *Accord Apex Const. Co. v. United States*, 719 F. Supp. 1144, 1147 (D. Mass. 1989) ("a plaintiff cannot

because the Court's review is limited to the administrative record.[3] Magistrate Judge Majzoub correctly noted that the Court's review of an administrative agency's decision is governed by the APA, which limits a court's review "to the administrative record in existence at the time of the decision under review."[4] Materials that were not considered by agency decision makers are not included in the administrative record and cannot be considered by the Court when it reviews the agency's decision.[5] In short, the general rule is that no discovery is allowed or appropriate in administrative record cases, because the Court must base its review solely on the administrative record before the agency. The Sixth Circuit has affirmed that this is the law in this circuit in *Sierra Club v. Slater*, when it affirmed a District Court ruling that cut off discovery after the federal agency defendant objected to the discovery as being "inappropriate, on the ground that judicial review should be limited to the administrative record."[6]

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institute discovery in a case involving review of an agency's action simply in the hope of finding something wrong in what the agency did").

[3] *Ammex, Inc. v. United States*, 62 F. Supp. 2d 1148, 1170 (Ct. Int'l Trade 1999) (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking."); and *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981) ("Matters not considered by the agency [. . .] are legally irrelevant, and therefore are not discoverable under Fed. R. Civ. P. 26.")).

[4] Order Denying Mot. Sched. Order at 2, Mar. 28, 2011 (citing *Florida Power & Light Co. v. Lorton*, 470 U.S. 729, 743-44 (1985)). *See also Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 549 (1978); *Camp v. Pitts*, 411 U.S. 138, 143 (1973); *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963); *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir.1998) (discovery is not permitted for APA claims; they must be decided upon the administrative record); *Doraiswamy v. Sec'y of Labor*, 555 F.2d 832, 839-43 (D.C. Cir. 1976).

[5] *Pac. Shores Subdivision, Cal. Water Dist. v. United States Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006).

[6] 120 F.3d 623, 637 (6th Cir. 1997).

Of a piece with their intent to amend ERISA to suit their ends, Plaintiffs seek to amend or ignore the judicially established definition of administrative record to include not only the documents that the agency relied upon in reaching the decision under review, but rather every single document in the agency's possession since 2008. For example, plaintiffs selectively quote language from the D.C. District Court's decision in *Sara Lee v. Am. Bakers*, which stated in part that a complete administrative record includes "all materials that might have influenced the agency's decision."[7] In leaving the case at that, plaintiffs fail to mention that in a subsequent proceeding in the very same *Sara Lee* case, the Magistrate Judge not only denied the plaintiff's request of discovery beyond PBGC's administrative record, but clearly stated, as other courts have, that once an agency presents a certified copy of the complete administrative record to the court, courts presume that the record is complete, unless proven otherwise.[8] Courts have consistently held that an agency is entitled to a strong presumption of regularity that it properly designated the complete administrative record.[9] In this case, PBGC has provided the court with a certified copy of their complete administrative record and thus is entitled to the presumption that the record is complete.

Moreover, even the narrow exceptions to the "no discovery in administrative records cases" rule have no relevance here. The Court may turn to extra-record material when plaintiffs

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[7] Plaintiffs' Motion to Compel Discovery from Defendant PBGC, p.6 -7 (quoting *Sara Lee Corp. v. Am. Bakers Ass'n Ret. Plan*, 512 F. Supp. 2d 32, 39 (D.D.C. 2007)).

[8] *Sara Lee Corp. v. Am. Bakers Ass'n Ret. Plan*, 252 F.R.D. 31, 34 (D.D.C. 2008) (citing *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1329 (D.C. Cir. 1984), *vacated in part*, 760 F.2d 1320 (D.C. Cir. 1985), *aff'd*, 789 F.2d 26 (D.C. Cir. 1986)).

[9] *Pac. Shores Subdivision, Cal. Water Dist.*, 448 F. Supp. 2d at 5 (stating that "[C]ommon sense dictates that the agency determines what constitutes the "whole" administrative record because '[i]t is the agency that did the 'considering,' and that therefore is in a position to indicate initially which of the materials were 'before' it -- namely, were 'directly or indirectly considered.'" (citing *Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 57 (D.D.C. 2003))).

make a "strong showing of bad faith or improper behavior,"[10] when plaintiffs establish that "the record is so bare that it prevents effective judicial review,"[11] or when plaintiffs show that the agency actually relied upon documents not included in the administrative record.[12] These exceptions and the factual showings that plaintiffs must make to come with them are discussed at length in *Sokaogon Chippewa Community v. Babbitt*.[13] Plaintiffs here, arguing that such a showing is not required, have taken no steps to make one. They therefore have not established their entitlement to any discovery at all.

Plaintiffs allege that discovery is warranted because the PBGC's decision was not based on the facts in the record or because the record is incomplete. But discovery is not the proper remedy for allegations of unsupported agency decisions.[14] A court may not re-weigh the evidence or substitute its own judgment for the agency's.[15] Rather, remanding the case to the

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[10] *Citizens to Preserve Overton Park. Inc. v. Volpe*, 401 U.S. 402, 420 (1971). *See also Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978) (speculation of impropriety was not sufficient to "overcome the strong presumption of regularity").

[11] *Community for Creative Non-Violence v. Lujan* , 908 F.2d 992, 998 (D.C. Cir. 1990) ("Only in the rare case in which the record is so bare as to frustrate effective judicial review will discovery be permitted under the second exception noted in Overton Park.").

[12] *See Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978) (courts must presume that "when administrative officials purport to decide weighty issues within their domain, they have conscientiously considered the issues") (citation omitted); *Nat'l Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1145-46 (2d Cir.), cert. denied, 419 U.S. 874 (1974); *Pac. Shores Subdivision, Cal. Water Dist.*, 448 F. Supp. 2d at 5; *Commercial Drapery Contractors*, 133 F.3d at 7, (quoting *Overton Park*, 401 U.S. at 420).

[13] 929 F. Supp. 1165, 1176-78 (W.D. Wis. 1996).

[14] *See Environmental Defense Fund, Inc. v. Blum*, 458 F. Supp. at 663 ("…the mere making of that accusation though must not serve to allow those disappointed by regulatory activity to invoke all of the benefits of the rules of civil procedure for an extensive search into the agency's decisional processes.")

[15] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983*); see also* 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc. Civ. §

agency for additional investigation or explanation is the preferred course when the reviewing court cannot evaluate the challenged agency action on the basis of the record before it.[16] Therefore, even if plaintiffs successfully establish that the administrative record was inadequate to enable the court to fulfill its duties, which they clearly have not, discovery should not be granted in this case.

II. Magistrate Judge Majzoub's Scheduling Order Did Not Allow Plaintiffs to Disregard Supreme Court Precedent.

As discussed above, discovery is generally not allowed in administrative record cases. In her Scheduling Order, Magistrate Judge Majzoub recognized the narrow exceptions to this rule that the Supreme Court has created in offering plaintiffs an opportunity to satisfy one or more of those narrow exceptions. Describing the two-part process set forth by the relevant Supreme Court decisions, paragraph 1 of the Scheduling Order states as follows:

> With respect to claim 4, Plaintiffs reserve the right *to identify* and to conduct discovery directed toward the alleged deficiencies in the administrative record. Defendant PBGC reserves the right to object to any discovery outside the administrative record, as Defendant PBGC does not agree that such discovery is permissible. All parties reserve the right to seek judicial intervention on issues related to the scope of any discovery and the administrative record should that become necessary. Any discovery Plaintiffs seek on claim 4 shall be served in time to be completed by July 1, 2011. [17]

Plaintiffs, however, disregard the initial step of identifying supposed deficiencies in PBGC's Administrative Record. Plaintiffs brush aside this initial requirement by baldly asserting that they have already "made a showing of substantial deficiencies" in the

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2733 (3d ed. 1998) ("[T]he administrative agency is the fact finder. Judicial review has the function of determining whether the administrative action is consistent with the law – that and no more.") (internal quotations omitted).

[16] *PBGC v. LTV* Corp., 496 U.S. 633, 654 (citing *Overton Park*, 401 U.S. at 419-21; and *Florida Power & Light Co.*, 470 U.S. at 744).

[17] Scheduling Order at ¶ 1, Mar. 28, 2011.

Administrative Record.[18] This is simply not true. Plaintiffs have merely alleged that PBGC's Administrative Record is incomplete; they have not even attempted a factual showing of the type dictated by the law, as described in the *Sokaogon* decision. Courts have consistently held that mere allegation of an incomplete record is insufficient to overcome the rule against such discovery.[19] Moreover, in response to plaintiffs' allegations, this Court has not held that plaintiffs have proved that PBGC acted in bad faith or that PBGC omitted materials that it actually considered from the Administrative Record or that the Administrative Record is so deficient that the Court cannot review PBGC's decision. In her order, Magistrate Judge Majzoub merely acknowledged that plaintiffs had made allegations about the completeness of the Administrative Record. By requiring plaintiffs to first identify insufficiencies with the record, she ordered them to meet the higher standards that the law requires before discovery would be ordered; plaintiffs have chosen to ignore that requirement.[20]

As previously stated, unless plaintiffs present to the Court's satisfaction a strong showing to the contrary, PBGC is entitled to the presumption that it properly designated the complete administrative record.[21] This principle has been followed as recently as 2009 by a Sixth Circuit

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[18] Plaintiffs' Motion to Compel Discovery from Defendant PBGC, p.6.

[19] *See Environmental Defense Fund, Inc. v. Blum*, 458 F. Supp. at 663 ("…the mere making of that accusation though must not serve to allow those disappointed by regulatory activity to invoke all of the benefits of the rules of civil procedure for an extensive search into the agency's decisional processes."); *Hickey v. Chadick*, 2009 WL 3064445 (S.D. Ohio 2009) ("To overcome the presumption of validity of agency action . . . plaintiff must show specific facts indicating the challenged action was reached because of improper motives."); *Novartis Pharm. Corp.*, No. 99-323, 2000 U.S. Dist. LEXIS 17491 at 12-13.

[20] Scheduling Order at ¶ 1, Mar. 28, 2011.

[21] *Hercules, Inc.*¸ 598 F.2d at 123 (courts must presume that "when administrative officials purport to decide weighty issues within their domain, they have conscientiously considered the issues" (citation omitted)); *Nat'l Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1145-46 (2d

District Court.[22] Courts have established this high bar to address the ease with which charges of bad faith or an incomplete record can be leveled, combined with "the inordinate burden resolution of such claims would entail for courts," as well as the obligation of courts to respect the autonomy of administrative agencies.[23]

Plaintiffs even recognize the substantial burden they must bear in this case and succinctly summarize what they must do to meet it.[24] But having done so, they then make the almost ludicrous argument that the Magistrate Judge, *sub silentio*, overruled the innumerable Supreme Court, Court of Appeals, and District Court cases that hold without exception that discovery cannot be had in administrative record cases based solely on allegations. And they argue that she did so in the face of her express reservation of PBGC's right to assert that no discovery should be allowed in this administrative record case. Even if the Magistrate Judge had the authority to do what plaintiffs argue she did – a dubious proposition at best – the complete absence of discussion of the issue and relevant precedent, and her express reservation of PBGC's rights is compelling evidence that she intended to follow the law in this area, not overturn it.[25]

Cir. 1973), *cert. denied*, 419 U.S. 874 (1974); *Pac. Shores Subdivision, Cal. Water Dist.*, 448 F. Supp. 2d at 5.

[22] *See Hickey v. Chadick*, 2009 WL 3064445 (S.D. Ohio 2009).

[23] *San Luis Obispo Mothers for Peace*, 751 F.2d at 1327, 1329. *See also Office of Foreign Assets Control v. Voices in Wilderness*, 382 F. Supp. 2d 54, 63 (D.D.C. 2005) (noting that "[w]ere the rule otherwise, every challenge to administrative action would turn into a fishing expedition into the motives of the defendant agency").

[24] *See* Plaintiff's Brief in Support at 9.

[25] Plaintiffs' suggestion that this Court approved wide open discovery against PBGC in the face of the extensive Supreme Court rulings to the contrary is equally ridiculous. At the September 24, 2010 hearing, the Court was considering PBGC's motions to dismiss and for summary judgment – the discovery issue now being placed before the Court had not been briefed by either party nor even mentioned in their pleadings. Plaintiffs overreach in the extreme when they

In this case, plaintiffs have failed to provide *any* evidence that the administrative record is incomplete or that the agency made the challenged decisions in bad faith or improperly, and have thus failed to satisfy the requisite "strong showing" controlling precedent demands.[26] Thus, plaintiffs are not entitled to discovery.

III. Plaintiffs Allegations Concerning PBGC's Administrative Record Are Not Correct.

Plaintiffs allege over and over again that PBGC's Administrative Record is incomplete. As noted above, these allegations are entirely insufficient to justify any of the discovery plaintiffs seek. Even if plaintiffs could demonstrate to the court's satisfaction that PBGC's administrative record is so lacking that it fails to justify PBGC's finding that the grounds for initiating termination existed, the Court's remedy for that failure would be to remand the matter back to PBGC to supplement its record. Courts have repeatedly held that such bare allegations of insufficiency in the administrative record do not serve as justification for overturning the broad general rule against discovery.[27]

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suggest that the Court rejected 50 years of Supreme Court jurisprudence without even briefing or argument on the issues.

[26] *See Hercules, Inc.*, 598 F.2d at 123 (courts must presume that "when administrative officials purport to decide weighty issues within their domain, they have conscientiously considered the issues" (citation omitted)); *Nat'l Nutritional Foods Ass'n v. FDA*, 491 F.2d at 1145-46; *Pac. Shores Subdivision, Cal. Water Dist.*, 448 F. Supp. 2d at 5; *Commercial Drapery Contractors*, 133 F.3d at 7 (quoting *Overton Park*, 401 U.S. at 420).

[27] *See Environmental Defense Fund, Inc. v. Blum*, 458 F. Supp. at 663 ("…the mere making of that accusation though must not serve to allow those disappointed by regulatory activity to invoke all of the benefits of the rules of civil procedure for an extensive search into the agency's decisional processes."); *Hickey v. Chadick*, 2009 WL 3064445 (S.D. Ohio 2009) ("To overcome the presumption of validity of agency action . . . plaintiff must show specific facts indicating the challenged action was reached because of improper motives."); *Novartis Pharm. Corp.*, No. 99-323, 2000 U.S. Dist. LEXIS 17491 at 12-13.

Nonetheless, PBGC cannot allow plaintiffs' wildest allegations to go without a response. For instance, plaintiffs mistakenly argue that there is a gap in the administrative record because PBGC did not include information about events that occurred during May, June, and July 2009. PBGC made its determination to initiate termination of the Delphi Salaried Plan on April 21, 2009. This is reflected in the Executive Summary provided in the Administrative Record at AR 000019-000021, which shows that the then-Acting Executive Director, Vince Snowbarger, approved PBGC's issuance of a Notice of Determination, seeking termination of the Salaried Plan on April 21, 2009. As of this date, PBGC's decision to terminate was complete.

However, as PBGC's Administrative Record details, the timing of PBGC's decision was to ensure that the Salaried Plan was terminated and PBGC's claim against Delphi's non-debtor subsidiaries was matured before the Delphi controlled group was broken up which would cause PBGC's ability to recover millions of dollars to evaporate. When PBGC was informed that immediately issuing its Notice of Determination and moving to terminate Delphi's pension plans could throw the bankruptcy proceedings into chaos, PBGC agreed to temporarily stay the termination process to accommodate the bankruptcy proceedings. Under PBGC's agreement with Delphi's DIP lenders, PBGC would be given a five day written notice before the lenders took any action that might disrupt the controlled group. The complete details of this, including the tolling agreement and the written foreclosure notice that caused PBGC to act in July of 2009, are included in the Administrative Record (AR 000012-000018).

Plaintiffs claim that PBGC should be required to update its Administrative Record or create yet another record as of July 2009 when the forbearance period ended. That argument has been previously considered by the D.C. Circuit Court of Appeals and soundly rejected. In *Allied*

Pilots Assn. v. PBGC,[28] the D.C. Circuit addressed the delayed termination of the Trans World Airlines ("TWA") pilot pension plan. As described by the court, PBGC had made a finding in late 1992 that the grounds for termination under section 1342(a) existed with respect to that plan. However, PBGC entered into an agreement that delayed the termination of the TWA pilot plan until January 2001. The Court of Appeals rejected the notion that a second decision or finding was required before the pilots plan could be terminated, noting that PBGC had full authority to enter into an agreement that delayed termination.[29] With equal relevance in this case, there is no legal reason that the three-month delay between PBGC's finding that grounds for termination existed and its initiation of termination calls into question the validity of the termination. That is particularly true where there is no evidence that the factual support for each of the three grounds upon which PBGC based its decision had changed during the intervening three months – Delphi continued its practice of not funding its pension plans, including the Salaried Plan; Delphi in fact began the process of liquidating; and the Delphi controlled group was broken up when Delphi's foreign subsidiaries were sold – all facts that PBGC articulated in support of termination.

Plaintiffs further argue that the Administrative Record is incomplete because it does not contain information regarding PBGC's negotiations with Delphi, GM, the Auto Task Force and others that led to PBGC's settlement of its liens and claims with Delphi and GM. But the Administrative Record serves as the evidentiary basis for PBGC's decision to terminate the Salaried Plan, not to justify PBGC's decision to settle the claims that arose out of that termination. The settlement of PBGC's claims is irrelevant to the statutory grounds for termination, and there is no basis to argue that PBGC should lard its record with this irrelevant

[28] 334 F.3d 93 (D.C. Cir. 2003).

[29] *Id.* at 98.

information. Notably, plaintiffs' four causes of action against PBGC challenge PBGC's termination of the Delphi Salaried Plan, not the legality or wisdom of those settlements.

Plaintiffs also claim that PBGC's administrative record must prove that no other company was willing and able to assume the Delphi pension plans. As PBGC notes in the Administrative Record, if GM or anyone else had stepped up to assume any or all of the pension plans before Delphi's final liquidation, that opportunity remained available even though PBGC had initiated the termination process. (AR 000033) At the end of the day, no one offered to assume either the Salaried Plan or the Hourly Plan.

Finally, and most astonishingly of all, plaintiffs assert that the Administrative Record is incomplete because it did not contain information showing that Delphi could not continue to sponsor and maintain the Salaried Plan. This argument flatly ignores the fact that Delphi's business had collapsed before April 2009. Delphi liquidated, as PBGC stated was possible (AR 000037), and it is impossible for a liquidating company to continue to sponsor and fund a multi-billion dollar pension plan. Plaintiffs' allegations on this point reflect their refusal to face reality – a reality that PBGC could not ignore in 2009.

Conclusion

Although plaintiffs have peppered their Brief in Support with innumerable inaccurate and false allegations about both the law and the facts surrounding PBGC's decision to initiate termination of the Delphi Salaried Plan, this Motion presents one simple question: Have plaintiffs made the showing that the Supreme Court rulings require before they are entitled to conduct discovery in this administrative record case? As plaintiffs have made no attempt to support such a showing, the answer is "no." Therefore, this Court should deny plaintiffs' Motion to Compel Discovery

Dated: July 12, 2011

Washington, D.C.

Respectfully Submitted:

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Certificate of Service

I hereby certify that on July 12, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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