REDACTED/PUBLIC VERSION

No. 19-1419

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS BLACK, CHARLES CUNNINGHAM, KENNETH HOLLIS, AND DELPHI SALARIED RETIREE ASSOCIATION,

Plaintiffs-Appellants

v.

PENSION BENEFIT GUARANTY CORPORATION,

Defendant-Appellee

On Appeal from the United States District Court
for the Eastern District of Michigan (Judge Arthur J. Tarnow)

BRIEF OF APPELLANTS

Anthony F. Shelley
Counsel of Record
Timothy P. O'Toole
Michael N. Khalil
Miller & Chevalier Chartered
900 Sixteenth St. NW
Washington, DC 20006
Telephone: (202) 626-5800
Facsimile: (202) 626-5801
Email: ashelley@milchev.com

Counsel for Appellants

August 7, 2019

CORPORATE DISCLOSURE STATEMENT

Appellants are three individuals, Dennis Black, Charles Cunningham, Kenneth Hollis, and entity Delphi Salaried Retiree Association ("DSRA"). Pursuant to 6th Cir. R. 26.1, the DSRA states that is not a subsidiary or affiliate of a publicly-owned corporation. The DSRA further states that there is no publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome of the appeal.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution and Statutes

Other Authorities

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants request oral argument. The appeal requires resolution of weighty issues of constitutional and federal law: Can the government, consistent with the provisions of the Employee Retirement Income Security Act of 1974 and the due process clause of the Fifth Amendment of the U.S. Constitution, terminate a pension plan – and thereby cause heavy losses in benefits to the plan's participants – without a hearing or any judicial oversight and instead pursuant to an agreement with a plan administrator? These are issues of first impression in this Circuit, and oral argument may assist the Court in their resolution. Additionally, the appeal involves complicated facts concerning the government's 2009 bailout of the auto industry and the interaction between the U.S. Treasury Department, Appellee Pension Benefit Guaranty Corporation, and the automotive companies that previously sponsored Appellants' now-terminated pension plan (General Motors Corporation and Delphi Corporation). Oral argument may assist the Court in understanding those facts.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction pursuant to 29 U.S.C. § 1303(f) and 28 U.S.C. § 1331, because the case arises under the relevant jurisdictional provision in the Employee Retirement Income Security Act of 1974 ("ERISA") and raises federal questions. On September 2, 2011, the district court dismissed Count Five of the second amended complaint, which is the operative pleading. *See* Order, RE 192, PageID# 9642-9657. On March 22, 2019, the district court granted the summary-judgment motion of Appellee Pension Benefit Guaranty Corporation ("PBGC") on the remaining counts in the second amended complaint – *i.e.*, Counts One through Four (*see* Order, RE 322, PageID# 13725-13742) – and entered final judgment in favor of the PBGC. *See* Judgment, RE 323, PageID# 13743. Appellants filed a timely notice of appeal on April 17, 2019. *See* Notice of Appeal, RE 327, PageID# 13819-13820. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in holding that the PBGC did not violate ERISA by terminating Appellants' ERISA plan without a court adjudication and instead simply via an agreement with the ERISA plan's administrator?

2. Did the district court err in holding that the PBGC did not violate Appellants' rights to constitutional due process in terminating their ERISA plan without an adjudication before a neutral decision-maker prior to the termination?

3. Did the district court err in holding that the PBGC's termination of Appellants' ERISA plan was not otherwise arbitrary and capricious?

RELEVANT STATUTES AND REGULATIONS

Relevant portions of ERISA are set out in the Addendum immediately following this brief.

STATEMENT OF THE CASE

A. Introduction

As alleged by Appellants, who are referenced in this brief as the "Retirees," this case is a disheartening story of the government not just failing to protect some of its most vulnerable citizens, [redacted] More specifically, the PBGC – which is the government agency that, under ERISA, insures pension plans for the benefit of those who earned the pensions – must (in the Retirees' view) seek a judicial adjudication that a plan in distress must be terminated, before the termination can occur. Necessarily, the court-adjudication requirement ensures the safeguarding of the pensioners' hard-earned interests.

In this instance, because of pressure from more powerful political forces aiming efficiently to restructure the auto industry during a time of, admittedly,

national economic emergency, the PBGC in 2009 acquiesced to a harsh scenario to terminate the pension plan established for the Retirees by their auto-industry employer, notwithstanding that reasonable alternatives to save the plan existed. When the PBGC then went to court to accomplish the termination, the Retirees sought to intervene to protect their interests. [redacted] and, instead, utilized an extra-statutory method to terminate the plan – namely, a termination simply through an agreement with the plan's administrator. The result is that many Retirees lost from 30% to 70% of their pensions. Sadly, they became "roadkill" in the larger – even if benevolent – effort to help the auto industry.

It should not have happened this way. ERISA is supposed to prevent it; the Constitution is supposed to prevent it; the legal standards typically applicable to government agency action are supposed to prevent it. Then, when the Retirees sued in the district court to pick up the pieces, and after *nine* years of litigation (extended because of repeated, nearly-sanctioned discovery misdeeds on the PBGC's part and by other government actors), the district court appeared to become, respectfully, weary or impatient with the case and issued a perfunctory, mistake-riddled decision granting summary judgment to the PBGC. The Retirees now appeal.

In the background sections below, the Retirees first summarize the pertinent portions of ERISA that govern the PBGC. They then review the facts relating to the pension plan's termination. Last, the Retirees summarize the district court proceedings, including the district court's rejection of ERISA, constitutional, and administrative-law bases for the Retirees to obtain relief.

B. ERISA's Framework

"Congress enacted ERISA in 1974 'to promote the interests of employees and their beneficiaries in employee benefit plans and to protect contractually defined benefits.'" *Girl Scouts of Middle Tenn., Inc. v. Girl Scouts of U.S.A.*, 770 F.3d 414, 418 (6th Cir. 2014) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989)) (internal quotation marks and citation omitted). "As a predicate for this comprehensive and reticulated statute, Congress made detailed findings which recited, in part, . . . 'that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits. . . .'" *Nachman Corp. v. PBGC*, 446 U.S. 359, 361-62 (1980) (quoting 29 U.S.C. § 1001(a)).

In order to protect benefits pensioners have earned, Title IV of ERISA created "a mandatory Government insurance program that protects the pension benefits of over 30 million private-sector American workers who participate in plans covered by the Title." *PBGC v. LTV Corp.*, 496 U.S. 633, 637 (1990); *see* 29

U.S.C. §§ 1321-1322a. The insurance program does not ensure that a participant will receive the full benefit his or her employer promised; rather, it establishes a "maximum guaranteed monthly benefit" indexed to an amount established at ERISA's enactment. *See* 29 U.S.C. § 1322(b)(3)(B). In turn, the insurance program is administered by the PBGC, which is a "wholly owned Government corporation within the Department of Labor." *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984). The PBGC's Board of Directors "consists of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Commerce." 29 U.S.C. § 1302(d)(1).

Particularly relevant to this case (and therefore summarized here at length) is the Title IV provision – 29 U.S.C. § 1342 – that authorizes the PBGC to institute proceedings to terminate a plan in distress, which then triggers application of the insurance program. A plan is distressed when, for instance, it has not "met the minimum funding standard[s]" or "will be unable to pay benefits when due." 29 U.S.C. § 1342(a). In such instances, § 1342 sets forth an elaborate set of steps the PBGC must follow to accomplish termination. Subsection (a) of § 1342 provides that the PBGC "may institute proceedings to terminate" a plan if distress conditions exist, which changes to "*shall* as soon as practicable institute proceedings under this section to terminate" a plan in the event "the plan does not

have assets available to pay benefits which are currently due under the terms of the plan." *Id.* § 1342(a) (emphasis added).

Subsection (b) of § 1342 then covers the appointment of a trustee to conserve the plan's assets and administer the plan during the course of termination proceedings, where the PBGC has decided to seek (or must seek) a termination under subsection (a). When the PBGC has made a "determination" under subsection (a) that is wishes to or must terminate a plan, it "may . . . apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c)." *Id.* § 1342(b)(1). In the alternative, the PBGC and the "plan administrator may agree to the appointment of a trustee without" petitioning a federal court. *Id.* § 1342(b)(3); *see id.* § 1002(16)(A)(i)-(ii) (defining a plan's "administrator" as "the person specifically so designated by the terms of the instrument under which the plan is operated" or, if there is no such designation in the plan, "the plan sponsor"). The trustee's powers during the period when termination proceedings are pending are then laid out in subsection (d) of § 1342, particularly in sub-subsection (d)(1), which the Retirees summarize in due course below.

Subsection (c) of § 1342 is entitled "ADJUDICATION THAT PLAN MUST BE TERMINATED" and establishes the procedures and standards to consummate the

termination. Its key portion (at least for purposes of this appeal) is sub-subsection (c)(1). There, the statute provides that, where the PBGC has "determined that the plan should be terminated" under subsection (a), the PBGC "may":

> apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to [1] protect the interests of the participants or [2] to avoid any unreasonable deterioration of the financial condition of the plan or [3] any unreasonable increase in the liability of the fund.

29 U.S.C. § 1342(c)(1). In addition, the trustee appointed under subsection (b) may "intervene" in the court suit if he or she "disagrees with the [PBGC]" about the determination under subsection (a), or the trustee may "make application for such decree himself." *Id.* If the district court finds that any one of the above three conditions for termination exists, it shall "grant[] [the] decree for which the [PBGC] or the trustee has applied under this subsection" and the court "shall authorize the trustee appointed under subsection (b) . . . to terminate the plan in accordance with the provisions of this subtitle." *Id.*

Sub-subsection (c)(1) also anticipates the contingency that the PBGC seeks the termination decree, and the court enters the decree, but the PBGC neither sought the appointment of a trustee under subsection (b) nor agreed with the plan administrator on a trustee under subsection (b), thereby leaving no trustee to implement the termination. In that situation, sub-subsection (c)(1) states that the court, upon issuing the termination decree, may "appoint a trustee if one has not

been appointed under such subsection [*i.e.*, subsection (b)] and authorize him" to terminate the plan. 29 U.S.C. § 1342(c)(1). Alternatively, sub-subsection (c)(1) provides that the PBGC and the plan administrator can agree on a post-decree trustee:

> 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).

Id.[1]

Subsection (d) of § 1342 then outlines the powers and duties of a trustee. Sub-subsection (d)(1) lists seven powers a trustee "appointed under subsection (b)" shall have during the pendency of termination proceedings, including "requir[ing] the transfer of all (or any part) of the assets and records of the plan to himself as trustee," investing the assets, and "limit[ing]" or "pay[ing]" benefits owed under the plan. *Id.* § 1342(d)(1)(A) & (ii), (iv). Sub-subsection (d)(2) requires the subsection (b)(2) trustee to provide notice of pending termination proceedings

[1] To forewarn the Court, it is this lengthy sentence in sub-subsection (c)(1) about which much of the dispute between the Retirees and the PBGC revolves. The PBGC takes the position that the sentence authorizes it to terminate plans through agreements with plan administrators. Indeed, it has stated that most terminations it induces are accomplished by way of agreement pursuant to this sentence, not court decrees. *See infra* p. 8.

"[a]s soon as practicable after his appointment" to, among others, "each participant in the plan and each beneficiary of a deceased participant." *Id.* § 1342(d)(2) & (B). Sub-subsection (d)(3) provides that any "trustee *appointed* under this section shall be subject to the same duties those of a trustee under section 704, title 11, United States Code [*i.e.*, a bankruptcy trustee's duties]" and also "shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 3 of this Act." *Id.* § 1342(d)(3) (emphasis added); *see* 29 U.S.C. § 1002(21) (delineating who shall be deemed a fiduciary for an on-going private-employer plan).

Accordingly, § 1342 sets forth elaborate procedures for a PBGC-induced termination of a distressed pension plan, culminating in a judicial decree of termination and trusteeship of the plan's assets where one of three criteria exist – *i.e.*, termination is in the participants' best interest, is necessary to avoid deterioration of the plan's financial condition, or is necessary to avoid an unreasonable increase in the liability of the PBGC's insurance fund. *See supra* p. 7. Still, despite these detailed procedures for termination, Congress intended termination to be a last resort; it wanted, in the first instance, the "PBGC to 'encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants' and 'provide for timely and uninterrupted payment of pension benefits to participants and beneficiaries.'" *PBGC v. Findlay*

Indus., Inc., 902 F.3d 597, 610 (6th Cir. 2018) (quoting 29 U.S.C. § 1302(a)), *petition for cert. dismissed*, No. 18-1265 (Aug. 2, 2019).

C. Factual Background

1. Delphi's Bankruptcy

Appellants Dennis Black, Chuck Cunningham, and Ken Hollis were longtime employees of Delphi Corporation ("Delphi") and, prior to that, General Motors Corporation ("GM"). *See* Second Am. Compl. ("SAC"), RE 145, PageID# 8069. Delphi was (and, in a different corporate form, remains) an auto-parts manufacturer and supplier; it was originally a division of GM, spun-off as a separate company in 1999. *See id.* Appellants Black, Cunningham, and Hollis also are participants in the Delphi Retirement Program for Salaried Employees ("Salaried Plan" or the "Plan") and, prior to the spin-off, were participants in a pension plan that GM offered to its salaried employees. *See id.* at PageID# 8066, 8069. Delphi's (and GM's) *salaried* employees were non-unionized, in contrast to their *hourly* employees, who were unionized. *Id.* at PageID# 8069. Appellant Delphi Salaried Retiree Association ("DSRA") is an association comprising thousands of participants in the Salaried Plan or their beneficiaries. *See id.* at PageID# 8067.[2]

[2] Again, in this brief, Appellants are collectively referred to as the "Retirees."

In October 2005, Delphi filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. *See* Admin. Rec. Part 1, RE 66, PageID# 2849. Throughout Delphi's bankruptcy, Delphi remained GM's largest parts supplier, such that GM was dependent on Delphi parts. *See* R. Pappal Decl., RE 168-2, PageID#8826-8827. In fact, in order "to protect its supply base, GM spent billions during Delphi's bankruptcy to support Delphi." R. Westenberg Decl., RE 168-3, PageID#8832-8834. From the inception of the bankruptcy proceedings, the PBGC was [redacted]. During that same time, the PBGC "worked successfully with 13 [other] auto parts companies that have [since] emerged from Chapter 11 protection without terminating their pension plans." PBGC Press Release, RE 308-10, PageID# 12680.

In 2008, while it remained in bankruptcy proceedings, Delphi proposed that GM reassume the pension liabilities of GM's former employees in Delphi's pension plan for hourly employees ("Hourly Plan"). The PBGC was "cheerleading for the transfer [*i.e.*, GM's reassumption]," and, as "leverage to get it done," the PBGC utilized "statutory liens" it possessed against Delphi's non-bankrupt foreign subsidiaries for pension contributions Delphi had missed prior to and during the bankruptcy proceedings. D. Cann Dep., RE 308-15, PageID# 12692. With respect to liens, the PBGC may assert liens and claims against the assets of a pension plan

sponsor (and those companies within the sponsor's controlled group) to cover any missed contributions or even to cover the full amount of a plan's underfunding. *See* 29 U.S.C. §§ 1082, 1083, 1362, 1368; 26 U.S.C. §§ 412, 430. [redacted], GM agreed to assume over $2 billion in Delphi pension liabilities associated with Delphi's Hourly Plan. *See* PBGC Mem., RE 49-9, PageID# 1137. Overall, because the PBGC continued to be able to assert liens and claims on Delphi's assets, the resolution of Delphi's pension obligations and the associated PBGC liens and claims were a major threat to GM's supply chain and were one of the major hurdles in resolving Delphi's bankruptcy. *See, e.g.*, *Id.* at PageID# 1143; [redacted].

In November 2008, in the depths of the severe economic recession then existing, "GM was compelled to seek financial assistance from the U.S. Government." *In re GMC*, 407 B.R. 463, 476-77 (Bankr. S.D.N.Y. 2009). While the government was considering GM's request for financial assistance, [redacted] *See* [redacted]. [redacted]. The PBGC was, according to one of its consultants, engaged in a "full court press to convince GM and Government

officials" that a transfer of Delphi pensions back to GM is "in everyone's best interest [as] GM doesn't need two classes of employees [*i.e.*, salaried and hourly] and should provide pensions to all retirees." Compass Advisors Mem., RE 308-34, PageID# 12747; *see* [redacted].

2. The Involvement of the U.S. Treasury Department

On February 15, 2009, President Obama appointed an "Auto Task Force" to oversee efforts to support and stabilize the domestic automotive industry. SIGTARP Report, RE 308-4, PageID# 12625. The U.S. Department of Treasury ("Treasury") – one of the entities on the PBGC's board of directors, *see supra* p. 5 – then created an "Auto Team" within Treasury that was "delegated . . . the responsibility of evaluating the auto companies' restructuring plans and negotiating the terms of any further assistance." *Id.* at PageID# 12625-12626. "What followed was the Auto Team's direct involvement in the decisions affecting GM. Treasury's Auto Team used their financial leverage as GM's only lender to significantly influence the decisions GM made during the time period leading up to and through GM's bankruptcy," *id*. at PageID# 12629, and "specifically pressed GM to be *less generous* in relation to Delphi and pensions." *Id*. at PageID# 12634 (emphasis added).[3]

[3] Why Treasury was miserly towards Delphi's pensions is disputed among the parties and may, in fact, rest on a combination of several reasons. First of all, the notion of using government funds to rescue the auto industry was controversial,

GM and Treasury's Auto Team quickly determined that they needed to obtain the release of the PBGC's liens and claims on Delphi assets, which were a threat not only to GM's supply, but also to the potential for a speedy GM bankruptcy proceeding. *See* R. Westenberg Decl.,RE 168-3, PageID# 8837-8838; SIGTARP Report, RE 308-4, PageID# 12635-13636; Email and Chart, RE 308-56, PageID# 12784. Consequently, a communication channel developed between Treasury and the PBGC; GM perceived a benefit to Treasury's Auto Team taking the lead (rather than GM) on negotiations with the PBGC, as "Treasury would get a better deal for GM." SIGTARP Report, RE 308-4, at PageID# 12635.

---

and President Obama (and his predecessor) garnered criticism for making the Troubled Asset Relief Program ("TARP") available to the auto makers. *See, e.g.*, Mitt Romney, *Let Detroit Go Bankrupt*, New York Times A35 (Nov. 19, 2008), https://www.nytimes.com/2008/11/19/opinion/19romney.html. *Time for Plan D*, Financial Times (Nov. 13, 2008), http://www.ft.com/cms/s/0/471f2266-b1bc-11dd-b97a-0000779fd18c.html#axzz4KpUqxYGA; George F. Will, *TARP and ADD*, Newsweek (Nov. 21, 2008), http://www.newsweek.com/george-f-will-tarp-and-add-84997. Next, the Auto Team apparently believed it had an obligation to "the American taxpayer" to limit TARP outlays and, therefore, to drive hard-nosed commercial bargains. SIGTARP Report, RE 308-4, at PageID# 12634. Finally, the Auto Team was "[c]oncerned about too much debt on GM's balance sheet," which could complicate GM's operations once it emerged from bankruptcy. *Id.* at PageID# 12919. What cannot be disputed is that a PBGC termination of the Salaried Plan would accommodate *all* of those potential concerns: the Auto Team would get its wish and limit TARP outlays, a different fund unrelated to TARP and not associated with GM's balance sheet (*i.e.*, the PBGC's insurance fund) would absorb the cost of providing pension benefits (albeit at slashed levels) for the Retirees, and political actors could avoid taking responsibility for the termination by obscuring Treasury's involvement in the decisions by GM and the PBGC.

Beginning in mid-April 2009 and through August 2009, Treasury and the PBGC communicated about Delphi issues almost exclusively through two individuals, Joe House at the PBGC and the Auto Team's Matt Feldman. *See, e.g.*, V. Snowbarger Dep., RE 308-57, PageID#12793; J. House Dep., RE 320-1, PageID# 13671.

Feldman began his discussions with the PBGC seeking "to reach an agreement" where the Salaried Plan would be terminated, while GM would assume Delphi's Hourly Plan. M. Feldman Dep., RE 189-6, PageID# 9543. The Hourly Plan, from the start, enjoyed greater support from Treasury, because of its politically-powerful union constituency (particularly the United Auto Workers) and because the Hourly Plan's participants could strike in order to obtain better pension terms, bringing GM's supply chain to a halt and prolonging GM's bankruptcy. SIGTARP Report, RE 308-4, PageID# 12646. In response to Feldman's position, the PBGC abandoned its press to save the Salaried Plan and stopped treating its interactions with Treasury as a negotiation, referring to them instead as "a coordination exercise" (J. House Dep., RE 308-65, PageID# 12845) in which the PBGC was a "mouse" trying to avoid getting "stepped on" by Treasury. T. Deneen Dep., RE 308-66, PageID# 12856.

In late April 2009, the working group within the PBGC responsible for recommending plan terminations met to consider grounds for terminating "*if necessary*" the Salaried and Hourly Plans. Admin. Rec. Part 6, RE 58,

PageID#1622-1624. During the discussion, the working group [redacted], Ex. 79. However, the working group [redacted] *Id.*; *see supra* p. 7 (noting possible criteria for a district court to adjudicate that a plan shall be terminated).

By May 2009 [redacted]. Indeed, the PBGC's chief negotiator, House, testified that he could not remember ever trying to persuade Treasury to fund a GM reassumption of the Salaried Plan. *See* J. House Dep., RE 320-1, Page ID# 13670. One PBGC analyst later suggested [redacted]. Another PBGC analyst [redacted].

At the end of May 2009, Treasury's Auto Team, GM, Delphi, Delphi's bankruptcy lenders, and the PBGC all participated in mediation ordered by the Delphi bankruptcy court; Treasury noted in its mediation statement that [redacted]. House testified that the PBGC did not attempt to save the Salaried Plan during the mediation, and that the PBGC's representatives "sat in a room and read books all day." J. House Dep., RE 308-65, PageID# 12847.

Following the mediation, the parties to the mediation announced "a global resolution which included saving the Hourly Plan, but terminating the Salaried Plan." S.J. Order, RE 322, PageID# 13729. Thereafter, there were some machinations over the exact format for "saving" the Hourly Plan, with the PBGC ultimately agreeing to terminate that plan too and GM, with Treasury's approval, using TARP funds to "top-up" the lost pension benefits for Delphi's three largest unions (but not salaried workers). SIGTARP Report, RE 308-4, PageID# 12660. As the White House's Brian Deese noted, because [redacted].

3. The Termination of the Salaried Plan

Immediately following the mediation, Delphi, on June 1, 2009, filed with the bankruptcy court a modified reorganization plan noting that the PBGC would "involuntarily terminate[]" the Salaried Plan, while the Hourly Plan would be "addressed by GM." S.D.N.Y. Mot. to Suppl., RE 308-101, PageID# 12926. On that same day, GM filed its own plan for Chapter 11 reorganization, and thereafter conducted an asset sale "in which substantially all of the operating assets of the company were sold to General Motors Company, or New GM, and most of the company's debt and liabilities remained in the possession of Motors Liquidation Company, or Old GM." SIGTARP Report, RE 308-4, PageID# 12648.[4]

On July 21, 2009, the PBGC executed separate settlement agreements with Delphi and New GM resolving all of the PBGC's liens and claims with respect to the Delphi pension plans. *See* Recovery Valuation Mem., RE 308-119, PageID# 12972. The PBGC received a settlement worth approximately $717 million in exchange for releasing its liens and claims on Delphi's assets. *See id.* at PageID# 12937; *see also* GM Settlement Agreement, RE 308-120, PageID# 12980-12992.

[4] New GM emerged from GM's bankruptcy on July 10, 2009. SIGTARP Report, RE 308-4, PageID# 12648. A new Delphi entity emerged from the Delphi bankruptcy in October 2009. *See In re Auto. Parts Antitrust Litig.*, No. 12-MD-02311, 2015 U.S. Dist. LEXIS 183896, at *107 (E.D. Mich. Sept. 9, 2015).

On July 22, 2009, the PBGC filed an action asking the district court to adjudicate that the Salaried Plan be terminated pursuant to 29 U.S.C. § 1342(c). *See PBGC v. Delphi Corp.*, Case No. 2:09-cv-12876 (E.D. Mich., filed July 22, 2009). On August 6, 2009, the Retirees sought the PBGC's consent to their intervention in the termination proceedings. *See* SAC, RE 145, PageID# 8075; [redacted] Thus, on August 7, 2019 (the day after the Retirees' request for consent to intervention), the PBGC voluntarily dismissed its termination lawsuit. *See PBGC v. Delphi Corp.*, No. 2:09-cv-12876, RE 5, PageID# 16 (E.D. Mich. Aug. 7, 2009). And on August 10, 2010, the PBGC executed an agreement with Delphi – specifically, with the Salaried Plan's plan administrator – to terminate the Salaried Plan retroactively to July 31, 2009, and to appoint the PBGC as the Plan's trustee. Agreement, RE 304-7, PageID#11610-110613.[5]

[5] The Retirees also sought to protect their interests in the Delphi bankruptcy court. In July 2019, they objected to a proposed plan of reorganization because the proposed plan assumed the termination of the Salaried Plan even though a district

As a result of the Salaried Plan's termination, the Plan's participants lost, in the aggregate, approximately $521 million in vested benefits, *see* Actuarial Case Memo, RE 308-124, PageID#12997, with "many participants" losing between "30% - 70%" of their pension benefits; they suffered those losses because their vested benefits were greater than the PBGC's maximum insurance guarantee. *See* SAC, RE 145, PageID# 8076; *see* also [redacted]; *see supra* p. 5. Additionally, the PBGC determined that, as a consequence of the Plan's termination, the PBGC's insurance fund would incur a loss of roughly $1.495 billion. *See* Actuarial Case Memo, RE 308-124, PageID#12997.

D. The Retirees' Lawsuit

The Retirees initiated this action on September 14, 2009. Compl., RE 1, PageID# 1-14. A federal court in a different jurisdiction, which became embroiled in some of the discovery disputes engendered by this litigation, concisely summarized the fundamental theory of the Retirees' grievance: the lawsuit alleges that "a class of over 20,000 was sold out by the government simply to bail out the

---

court had not yet adjudicated that termination was necessary under 29 U.S.C. § 1342(c). S.J. Order, RE 322, PageID# 13731-13733. The bankruptcy court rejected the objection, stating that it was only addressing Delphi's powers and actions and that the Retirees' rights were exclusively against the PBGC in a district court in which the PBGC appropriately could be sued. *Id.* In a further effort to ensure no friction with the bankruptcy proceedings, the Retirees sought and obtained the bankruptcy court's approval of the pleadings the Retirees filed in the current action. S.D.N.Y. Stipulation, RE 308-139, PageID# 13179-13197.

corporate interests of the auto industry" and that the PBGC – which has been "tasked to ensure that the personal tragedy of pension termination is not considered lightly" – abdicated "that duty for improper reasons, and [engaged in] a conspiracy to cover up these improper actions at all costs." *Dep't of Treasury v. PBGC*, 351 F. Supp. 3d 140, 155-56 (D.D.C. 2018).

The Retirees brought their suit pursuant to 29 U.S.C. § 1303(f), which provides that

> any person who is a plan sponsor, fiduciary, employer, contributing sponsor, member of a contributing sponsor's controlled group, participant, or beneficiary, and is adversely affected by any action of the [PBGC] with respect to a plan in which such person has an interest . . . may bring an action against the [PBGC] for appropriate equitable relief in the appropriate court.

29 U.S.C. § 1303(f)(1). This provision is "the exclusive means for bringing actions against the [PBGC] under [Title IV]." *Id.* § 1303(f)(4).

The Retirees' second amended complaint, which is the operative pleading, raises three claims pursued in this appeal, all challenging and seeking to remedy the PBGC's termination of the Salaried Plan. Count 1 alleges that termination of the Salaried Plan through an agreement with the plan administrator was "null and void and illegal" because, under § 1342, "[i]n order for the PBGC to terminate a pension plan, it must obtain a court decree to that effect." SAC, RE 145, PageID# 8078-8079. Count 3 alleges that, "[i]f an agreement to terminate the Plan between the PBGC and the Plan Administrator is otherwise allowable and authorized under

ERISA, ERISA's authorization for [such] summary plan termination is unconstitutional in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution." *Id.* at PageID# 8082. In Count 4, the Retirees allege that the PBGC acted "arbitrar[ily] and capricious[ly]" in executing a termination agreement that is (among other things) "unsupported by the law," such as "the relevant statutory criteria" for termination set out in § 1342(c)(1), and "the result of the PBGC's clear error in judgment and consideration of irrelevant factors." *Id.* at PageID# 8083.[6]

In the district court below, and in the Washington, D.C. district court, the case became bogged down for many years due to discovery disputes that *both* courts found to be animated by PBGC and Treasury tactics bordering on bad faith. *See* Order, RE 282, PageID# 11176 (Magistrate Judge Majzoub, below, in dealing with a Retiree motion to compel discovery, observing that the PBGC's arguments "reasonably" could be termed "frivolous" and aimed at "delay[ing] or ultimately avoid[ing] the production of these documents"); *see also* May 16, 2017 Mot. Hr'g

[6] Count 2 in the second amended complaint averred that the PBGC had participated in an ERISA-prohibited transaction in terminating the plan (SAC, RE 145, at PageID# 8079), and the Retirees do not challenge in this appeal the district court's grant of summary judgment to the PBGC on that claim. The second amended complaint also contained a fifth count against Treasury, the Auto Task Force, and member of the Auto Team. The district court dismissed that claim early in the litigation, Order, RE 192, PageID# 9642-9657, and the Retirees have not appealed the dismissal of that claim.

Tr. at 4:9-14, *Dep't of Treasury v. Black*, No. 12-mc-100 (D.D.C. July 11, 2017), ECF No. 61 (Washington, D.C. federal court, in addressing repeated efforts by Treasury to invoke privileges to avoid producing documents, registering its "very serious concerns about whether the government's proceeding in good faith or not" and noting that Treasury had "wasted the [c]ourt's time on three prior occasions").[7]

In September 2018, emerging from discovery nine years after the case's commencement (and with many members of Appellant DSRA now deceased and acting through their heirs and estates), the Retirees and the PBGC filed competing motions for summary judgment. The Retirees' motion and supporting papers (and in opposition to the PBGC's summary-judgment motion) relied on more than 140 exhibits – the vast majority of which were produced by either the PBGC or Treasury – and put forth 114 paragraphs of material facts. *See generally* RE 308 and [redacted].

On March 22, 2019, two weeks after it held a hearing on the motions, the district court issued an eighteen-page opinion granting summary judgment to the

[7] The discovery disputes also previously made their way to this Court, after the PBGC sought mandamus to overturn the order of the district court, below, requiring the PBGC to produce all documents over which the PBGC had claimed privilege. The Court denied the mandamus petition. Order, *In re Pension Benefit Guaranty Corp.*, No. 14-2072 (6th Cir. Sept. 23, 2014), Doc. No. 10-1. Because, in the wake of that particular discovery dispute, the parties agreed to a protective order under which the PBGC would produce the documents, this brief is being filed under seal.

PBGC. The opinion was rife with factual and other basic errors, including: misspelling the PBGC's name ("Guarantee" as opposed to "Guaranty"), S.J. Order, RE 322, PageID# 13725; misunderstanding the amount of TARP funds Treasury provided to GM as being $30 million, *id*. at PageID# 13728, instead of $49.5 billion, SIGTARP Report, RE 308-4, PageID# 12639; mistaking a PBGC press release for a required administrative "notice of determination" underlying PBGC's termination decision, S.J. Order, RE 322, PageID#13730-13731; and erroneously thinking that the Retirees had asserted the PBGC was a fiduciary. *Id*. at PageID#13738-13739. Eleven of the opinion's eighteen pages were devoted to a summary of the background and procedural posture of the case, S.J. Order, RE 322, PageID# 13726-13735, and just seven to analysis of the legal issues. *Id.* at PageID# 13735-13742. The district court referenced practically none of the factual exhibits of either side, relying predominantly on a publicly-available report of the Special Inspector General for TARP. *Id.* at PageID# 13728-13729.

On Count 1, the district court held that "[s]ection 1342(c) clearly sets forth two alternative procedures for termination of a pension plan": "application to the district court for a decree" or "agreement between the corporation and the plan administrator." *Id.* at PageID# 13737. As to Count 3, the district court found due-process satisfied because the Retirees supposedly had other means than a pre-deprivation adjudication under § 1342(c) to "air[] their grievances." *Id.* at

PageID# 13740. On Count 4, the district court said "Plaintiffs have offered no evidence to support" their claim that the "PBGC acted arbitrarily and capriciously," though the district court discussed none of the evidence presented. *Id.* at PageID# 13741.

SUMMARY OF ARGUMENT

I. Title IV of ERISA, in 29 U.S.C. § 1342, requires that the PBGC obtain a judicial decree in order to terminate a distressed plan; by terminating the Salaried Plan through an agreement with the plan administrator, rather than by judicial decree, the PBGC violated the statute. Finding otherwise, the district court focused on a sentence in sub-subsection (c)(1) of § 1342. The district court altered the sentence and spliced out sentences immediately prior to it, so as to make the controversial sentence something other than it is, which is an allowance to the PBGC and a plan administrator to agree on a trustee to implement a termination after a court has entered a termination decree. In reality, the sentence cited by the district court, along with the entirety of the statutory text of § 1342, mandates that terminations require judicial proceedings and a decree.

ERISA's structure and purposes confirm that § 1342 mandates a judicial decree for termination. Congress would not put momentous exceptions to a comprehensive statute in a buried cryptic sentence; when Congress did authorize streamlined procedures for termination, it said so explicitly and still demanded

judicial decrees; and ERISA's principal purpose of protecting participants and their pensions would be undermined if the statute were read to permit terminations without court adjudications.

Though the Second Circuit's decision in *In re Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197 (2d Cir. 1987), is to the contrary, the decision is in tension with a Seventh Circuit case. *In re UAL Corp*., 468 F.3d 444 (7th Cir. 2006). Anyway, the Second Circuit used statutory-construction devices – such as creating statutory exceptions through implication – and deference principles that are, at best, outmoded.

II. If § 1342 can be read as authorizing a termination by agreement, it is unconstitutional, as violative of due process. Where government action deprives a person of a property interest, and here many Retirees lost significant vested benefits as a result of the termination, the government must provide a pre-deprivation hearing of some sort. None occurred here; [redacted]The district court's reasons for rejecting the constitutional claim – namely, because the Retirees purportedly had post-deprivation remedies and could air grievances in bankruptcy court – have no merit. Post-deprivation remedies are not a substitute for a pre-deprivation hearing, and the bankruptcy court had no jurisdiction (as it here recognized) to judge the PBGC's conduct or to adjudicate a termination under § 1342.

III. Even assuming that terminations by agreement are authorized under ERISA and the Constitution, the Retirees still had a valid claim that the PBGC's termination by agreement in this case was arbitrary and capricious. They provided voluminous evidence, establishing that the PBGC, in terminating the Plan, failed to act on the basis of relevant statutory factors, that the PBGC succumbed to Treasury's strong-arming, that the termination was avoidable, and that the termination could not be sustained on the theory put forth by the PBGC. The district court addressed none of this evidence, or really any evidence. At a minimum, there are genuine issues of material fact as to whether the PBGC acted arbitrarily and capriciously, so that summary judgment for the PBGC should not have been awarded.

STANDARD OF REVIEW

The Court reviews *de novo* a district court's grant of summary judgment. *See Tennial v. UPS, Inc.*, 840 F.3d 292, 301 (6th Cir. 2016). "Summary judgment is proper when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law." *Id*. (citing Fed. R. Civ. P. 56(a)). There is a genuine dispute of material fact where there is evidence "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Because the district court granted summary judgment," this Court should "review the facts 'in the light most favorable to the

nonmoving party,'" here the Retirees. *Harris v. Klare*, 902 F.3d 630, 633 (6th Cir. 2018) (quoting *Tennial*, 840 F.3d at 301).

ARGUMENT

As noted, Title IV of ERISA provides that "any person" who is "adversely affected by any action of the [PBGC] with respect to a plan in which such person has an interest" may "bring an action" against the PBGC for "appropriate equitable relief." 29 U.S.C. § 1303(f)(1). While limiting the type of relief the Court may award, § 1303(f)(1) does not circumscribe the legal theories that may be pursued; it, therefore, is best termed a provision that authorizes "'appropriate equitable relief' *at large*." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253 (1993); *cf.* 29 U.S.C. § 1132(a)(3) (providing for "appropriate equitable relief" only for the purpose of "redress[ing any] violations or . . . enforc[ing] any provisions" of ERISA or an ERISA plan). Here, as relevant to the appeal, the Retirees pressed three counts – based in one way or another on ERISA, the Constitution, or administrative law – against the PBGC to challenge the termination of the Plan. In ruling for the PBGC on each count, the district court got things very wrong.

I. ON COUNT ONE, THE DISTRICT COURT ERRED IN HOLDING THAT § 1342 ALLOWS FOR A PLAN TO BE TERMINATED WITHOUT A COURT DECREE

The district court erred in ruling that § 1342 does not require a court adjudication authorizing a plan's termination and instead sanctions terminations by

agreement between, as here, the PBGC and a plan administrator. The statutory text mandates a judicial decree, and the statute's structure and purposes confirm that conclusion. Nor does prior precedent compel a different result.

A. Section 1342's Text Requires a Judicial Decree That A Plan Shall Be Terminated

Starting with the statutory language, § 1342's text – as the Retirees have already reviewed at length, *see supra* pp. 5-10 – sets forth an intricate, interlocking set of procedures for the PBGC to seek to terminate a distressed plan through a judicial decree issued by a district court. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("the best evidence of Congress's intent is the statutory text"). The section allows for the PBGC to institute termination proceedings (subsection (a)); permits the PBGC to petition a district court for, or agree with a plan administrator on, the appointment of a trustee to administer the plan during termination proceedings (subsection (b)); authorizes the PBGC to seek a decree of termination from a district court, which can enter the decree only in three circumstances outlined in the section (subsection (c)); and authorizes the decreeing court to order implementation of the termination by an already-appointed trustee, by a trustee it then appoints, or by a trustee on whom the PBGC and the plan administrator then agree (subsections (c) and (d)).

In contrast to that paradigm, the district court believed that a sentence in sub-subsection (c)(1) authorized, alternatively, terminations by agreement. *See*

S.J. Order, RE 322, PageID#13736. As laid out by the district court (including with the district court's introductory preface), the controversial sentence is set forth below, in italics added by the Retirees, but with the "[however]" alteration being added by the district court:

> Section 1342(c) further provides that where a [sic: the] corporation is required under subsection (a) to commence proceedings, it 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 or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund . . . .
> >
> > *If [however] 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).*

Id. at PageID# 13736-13737 (quoting 29 U.S.C. § 1342(c)(1)) (emphasis added).

Contrary to the district court's view, the above-italicized sentence in sub-subsection (c)(1) does *not* authorize a termination via agreement. Most obviously, the district court – in order to create an alternative to the judicial-decree termination that is addressed or assumed in every other aspect of § 1342(c)(1) – had to add the word "however" that does not appear in the statute. "[R]espect for

Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own." *Murphy v. Smith*, 138 S. Ct. 784, 787-88 (2018).

Moreover, the district court, to get to its preferred reading, had to exclude the two sentences in sub-subsection (c)(1) that exist *between* the two it did cite, putting in ". . ." instead. The first of those missing sentences authorizes the trustee appointed under § 1342(b) to intervene in the termination proceedings or to "appl[y] for the decree." 29 U.S.C. § 1342(c)(1). Then the second one states:

> Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle.

29 U.S.C. § 1342(c)(1). By leaving out these sentences, the district court made it seem like the earlier-italicized sentence is a qualifier to the termination-decree requirement mentioned *three* sentences back, rather than merely a further way of putting in place and empowering a trustee *post*-decree (which is what the immediately preceding sentence too addresses). Notably, viewing (correctly) the italicized sentence as offering an opportunity for the PBGC and plan administrator to install by agreement a trustee with post-decree powers (when no trustee had yet existed) mimics exactly the blessing in § 1342(b)(3) for the PBGC and the plan

administrator to agree on the appointment of a trustee for the pre-decree period. *See supra* p. 6.

Even just looking at the italicized sentence on its own (and ignoring the surrounding text), it cannot naturally be read as authorizing terminations by agreement. The sentence has a classic if / then structure: *if* the PBGC and the plan administrator agree both that the plan should be terminated and to the appointment of a trustee, *then* the trustee is afforded the powers described in sub-subsection (d)(1) and the duties described in sub-subsection (d)(3). The "then" clause says nothing about achieving a termination of the plan, but only describes a trustee's powers and duties. Yet, the district court's view of the statute necessitates that additional terms be *implied* into the "then" clause – *i.e.*, if the PBGC and the plan administrator agree about termination and a trustee, then *a termination shall occur* and the agreed-upon trustee shall have certain powers and duties. Those are momentous terms, and they simply are not in the sentence.

To be sure, the "if" part of the earlier-italicized sentence does mention agreement between the PBGC and the plan administrator "that the plan should be terminated" (29 U.S.C. § 1342(c)(1)), but this is only in defining a condition necessary for the "then" part to occur, which, again, is the bestowing of certain powers and duties on a trustee, not terminating a plan. And even when it does mention the PBGC and the plan administrator agreeing about termination, it is

about them agreeing that a plan "should" be terminated, not that their mutual views regarding termination somehow trigger an actual termination.

The text of the controversial sentence, then, is properly read as the Retirees earlier stated – as a proviso for an agreed-upon trustee in the situation where the PBGC seeks the termination decree, the court enters the decree, but the PBGC neither sought the appointment of a trustee under subsection (b) nor agreed with the plan administrator on a trustee under subsection (b). *See supra* pp. 8-9. Adding words like "however" to the statute and creating a false rhythm among the statutory sentences by omitting intervening sentences – both of which the district court did here – cannot change what the *real* text says.

B. The Statutory Structure and Purposes Confirm That Termination Under § 1342 Requires a Judicial Decree

In at least three ways, the statutory structure and purposes confirm what § 1342's text otherwise imparts: that § 1342 authorizes terminations only by judicial decree, not through agreements between the PBGC and a plan administrator. *See Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006) (courts may "consider[] the purpose and context of the statute" to help adduce its meaning).

First, it is indisputable that § 1342 is a lengthy, elaborate provision contemplating proceedings and decrees and trustees then administering a plan during proceedings and after a decree. The very title of the section is "INSTITUTION

OF TERMINATION *PROCEEDINGS* BY THE CORPORATION." (Emphasis added.) Yet, in a cryptic, convoluted sentence that nowhere uses terms stating that a plan shall be deemed terminated (and instead addresses trustee powers), Congress supposedly through implication authorized terminations by simple agreement without any proceedings or court involvement. Essentially, Congress purportedly undid everything else in the massive section, through implicit language in a buried sentence. But when it writes statutes, "Congress does not 'hide elephants in mouseholes.'" *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1071-72 (2018) (quoting *Whitman v. American Trucking Ass'ns, Inc*., 531 U.S. 457, 468 (2001)).

Second, subsection (a) of § 1342 explicitly discusses streamlined procedures for terminating certain plans. There, Congress provided the PBGC with authority to "prescribe a simplified procedure to follow in terminating *small* plans." 29 U.S.C. § 1342(a) (emphasis added). However, even there, the authority is expressly circumscribed such that it must "include[] *substantial safeguards for the rights of the participants and beneficiaries under the plans . . . (including the requirement for a court decree under subsection (c))*." *Id.* (emphasis added). Thus, Congress knew how to write overtly and clearly exceptions to the formal procedures its was otherwise stating in § 1342, for it did so for small plans; still, even there, it did not waive the paramount obligation for a court decree. It light of

what Congress did in § 1342(a) for small plans, it is illogical to think it, in § 1342(c)(1), adopted an ultra-streamlined procedure (*i.e.*, with no court decree) for *the largest plans* that necessarily affect the rights of far more individuals – and, to boot, did it implicitly.

Third, as noted earlier (*see supra* pp. 4-5), ERISA's objectives are, first and foremost, to protect participants and beneficiaries, especially from the loss of anticipated, earned benefits. To create a loophole to decree-based terminations, thereby allowing simple agreements to accomplish terminations, without substantial participant safeguards, impermissibly "negate[s] [the statute's] own stated purposes." *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) (internal quotation marks and citation omitted).

C. *Jones & Laughlin* Is Outdated and Should Not Be Followed

In the course of concluding that there is a termination-by-agreement alternative contained in § 1342(c)(1), the district court exaggerated that "[n]early every circuit to have considered this issue has found the same." *See* S.J. Order, RE 322, PageID# 13737 (citations omitted). Of the five decisions it listed, only the Second Circuit's decision in *In re Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197 (2d Cir. 1987), addresses directly the question presented here. And that decision is in tension with a decision that the district court missed: *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006) (Easterbrook, J.), which emphasized that

§ 1342(c) "describes the *judicial* function after the PBGC files an action seeking termination." *Id.* at 450 (emphasis added). "Section 1342(c) gives the resolution of that question [*i.e.*, whether one of the three statutory criteria for termination has been satisfied] to the judiciary; the PBGC participates as a litigant, not as the decision-maker." *Id.* at 451.

Furthermore, *Jones & Laughlin* – decided more than thirty years ago – utilized techniques for interpreting the statutory language, such as implying terms into the text (here, into the controversial sentence), that this Court currently does not use, if it ever did. *See United States v. Perkins*, 887 F.3d 272, 276 (6th Cir. 2018) ("the replace-some-words canon of construction has never caught on in the courts"); *but see Jones & Laughlin*, 824 F.2d at 200 (acknowledging that the controversial sentence in § 1342(c)(1) did not actually purport to terminate a plan, but concluding that because Congress there conferred "post-termination powers and duties" to a trustee, "[t]his grant of immediate post-termination authority confirms that Congress contemplated that termination could occur without a court adjudication"). The Second Circuit also rested heavily on deference to the PBGC under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). *See Jones & Laughlin*, 824 F.2d at 201. As this Court observed in 2004, even where there is some ambiguity to interpret, the "test for obtaining *Chevron* deference" changed following the Supreme Court's decisions in *United States v. Mead Corporation*,

533 U.S. 218 (2001), and *Christensen v. Harris County*, 529 U.S. 576 (2000). *See Air Brake Sys. v. Mineta*, 357 F.3d 632, 642 (6th Cir. 2004); *see also In re UAL Corp.*, 468 F.3d at 450-51 (rejecting *Chevron* deference).

In short, *Jones & Laughlin* should not be followed; rather, the text, structure, and purposes of the statute – all of which here indicate that the exclusive vehicle for the PBGC to accomplish a distress termination is through a court decree – should control.[8]

II. ON COUNT 3, THE DISTRICT COURT ERRED IN HOLDING THAT THE PBGC'S TERMINATION OF THE PLAN WAS CONSISTENT WITH DUE PROCESS

In the event the Court holds that ERISA does authorize the PBGC's termination of the Salaried Plan by agreement, then the statute violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution, and the Retirees should have prevailed on Count 3. The law is clear: before the government may deprive someone of a significant property interest, it must provide at least some form of hearing. *Hicks v. Comm'r of Soc. Sec.*, 909 F.3d 786, 798 (6th Cir. 2018).

---

[8] In the part of its opinion interpreting § 1342(c)(1), the court also added that the PBGC should be understood to have the right to terminate the Salaried Plan because, under the circumstances, the "PBGC had no choice but to terminate." S.J. Order, RE 322, PageID# 13738. Even if that exigency existed, there is no "emergency" exception in § 1342(c)(1). In any event, the Retirees show later that there were other alternatives to termination or, at a minimum, the facts are in dispute (and therefore not appropriate for summary judgment) as to whether there were alternatives to termination. *See infra* pp. 45-47.

In violation of that due-process standard, the PBGC terminated the Salaried Plan without any hearing ([redacted]), notwithstanding that many of the Retirees indisputably lost a substantial portion of their vested, non-forfeitable pension benefits (and the rights associated with those benefits) as a result of the termination.[9]

To amplify further on the governing due-process standard, "the hallmark of due process is that a deprivation of a property interest must be preceded by notice and opportunity for hearing." *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 901 (6th Cir. 2019) (internal quotation marks and citation omitted). A hearing that comports with due process can take several forms, and whether it satisfies the Fifth Amendment depends on "the nature of the case." *Id.*; *see generally Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

> [T]he timing and content of the [required] hearing may vary. Nevertheless, however weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero – that is, the government is never relieved of its duty to provide *some*

[9] The district court did not question that the Retirees had a constitutionally protected property interest in the vested, non-forfeitable pension benefits they lost as a result of the Salaried Plan's termination. On that score, the Supreme Court has made clear that, when evaluating whether an employment benefit is a protected property interest, the key inquiry is whether there are "understandings that secure certain benefits and that support claims of entitlement." *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). The touchstone of whether a benefit is constitutionally protected is whether it has vested, s*ee Duncan v. Muzyn*, 833 F.3d 567, 570, 583 (6th Cir. 2016), and there is no dispute that the Retirees have lost vested benefits as a result of the Plan's termination. *See* PBGC Opp'n, RE 311, Page ID# 13248.

> notice and *some* opportunity to be heard prior to final deprivation of a property interest.

Hicks, 909 F.3d at 799 (internal quotation marks and citations omitted).

Notwithstanding that straightforward standard, the district court upheld the PBGC's termination of the Salaried Plan, holding that no hearing was constitutionally required. Relying exclusively on the Second Circuit's *Jones & Laughlin* decision (which, in addition to construing ERISA as noted earlier, also addressed the constitutional issue), the district court concluded that

> the administrative procedures set forth in § 1342(c) satisfy due process. The [Second Circuit, in *Jones & Laughlin*] noted that termination of a pension plan without a hearing is a possibility expressly contemplated by ERISA and further noted that the retirees were free to file claims against the plan administrator in bankruptcy court. In addition, the Court explained that the regime's post-deprivation remedies which included civil actions and restoration to pre-termination status, protected beneficiaries against the risk of erroneous deprivation.

S.J. Order, RE 322, PageID #13740 (citing *Jones & Laughlin*, 824 F.2d at 202.)

But as this Court made clear in *Hicks* (decided well after *Jones & Laughlin*), the government's failure to provide "at least some form of hearing" prior to finally depriving an individual of a property right is "dispositive." *Hicks*, 909 F.3d at 799-800 (citing *Mathews*, 424 U.S. at 333). "When it comes to due process, the 'opportunity to be heard' is the constitutional minimum." *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

As to the district court's suggestion (based on *Jones & Laughlin*) that the "administrative procedures set forth in § 1342(c)" are constitutionally sufficient because "termination of a pension plan without a hearing is a possibility expressly contemplated by ERISA," S.J. Order, RE 322 at PageID# 13740, the point is both circular and inconsistent with Supreme Court precedent. Once a property interest has been conferred, the legislature "'may not constitutionally authorize the deprivation of such an interest . . . without appropriate procedural safeguards,'" and the "'adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (quoting *Vitek v. Jones*, 445 U.S. 480, 490-91 n.6 (1980)).

With respect to the district court's reliance on post-deprivation remedies as a substitute for pre-deprivation process, that too constituted clear legal error. "Postdeprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action." *Mitchell v. Fankhauser*, 375 F.3d 477, 481 (6th Cir. 2004) (quoting *Hudson v. Palmer*, 468 U.S 517, 532 (1984)). Here, the challenge is to an established procedure that the PBGC concedes it has used in "the majority" of plan terminations. *See* PBGC MSJ Count 4, RE 45, PageID# 627-628. [redacted]

[redacted] That is constitutionally impermissible. *See, e.g., Zinermon v. Burch*, 494 U.S. 113, 132 (1990); *Mertick v. Blalock*, 983 F.2d 1353, 1365 (6th Cir. 1993).

In addition, the district court inflated the post-deprivation remedies available to participants in a terminated pension plan. *See, e.g., Paulsen v. CNF Inc.*, 559 F.3d 1061, 1074 n.14 (9th Cir. 2009) (noting that restoration is a decision within PBGC's discretion); *id*. at 1073-74, 1085-86 (holding that once a plan is terminated by the PBGC, the right to sue the plan's former sponsor shifts to PBGC, that the decision to pursue such suits is in PBGC's discretion, and that courts have no way to force PBGC to pass along to participants any funds it recovers from such suits). Nor is this some sort of "temporary deprivation" of property, as the PBGC has failed to identify any post-termination remedies (aside from this lawsuit) that could restore, in a meaningful way, the lost benefits at issue. *Mathews*, 424 U.S. at 340.

And the district court was misguided in suggesting that it is constitutionally significant the Retirees supposedly were able to "air[] their grievances concerning termination in the S.D.N.Y. Bankruptcy Court." S.J. Order, ECF No. 322, PageID# 13740. Due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333

(quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The government is, therefore, required "'to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of" a legal action that will determine their rights to property, and to afford them an opportunity to present their objections.'" *Cahoo*, 912 F.3d at 903 (quoting *United States v. Erpenbeck*, 682 F.3d 472, 476 (6th Cir. 2012), quoting *Mullan v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

While the issue of the Plan's termination was *discussed* in the bankruptcy proceedings, that court made clear that it was not, and could not, adjudicate its legality or propriety. The Retirees objected to Delphi's proposed modifications to its plan of reorganization because the modifications depended on the termination of the Plan, which the Retirees asserted was "neither assured nor imminent." *See* Objection, RE 308-117, PageID# 12947. While the bankruptcy court overruled those objections, it made clear that it had no role in reviewing the PBGC's actions, and that such a review needed to be undertaken by some other court. *See, e.g.*, Bankr. Ct. H'rg Tr., RE 313-112, PageID# 13527 (I'm not being asked to approve the PBGC's actions"); *id*. at PageID# 13529 ("to the extent the PBGC actions in entering into that agreement are subject to review, my order approving the settlement does not preclude such review as a matter of law"). Under ERISA's jurisdictional provision, it is solely a district court that has jurisdiction over claims

against the PBGC (29 U.S.C. § 1303(f)(2)), and only a district court has authority to issue a termination decree under § 1342(c)(1).

III. ON COUNT 4, THE DISTRICT COURT ERRED IN FINDING THAT, UNDER THE SUPPOSEDLY UNDISPUTED FACTS, THE PBGC'S TERMINATION OF THE SALARIED PLAN WAS NOT ARBITRARY AND CAPRICIOUS

Even if the PBGC is allowed under § 1342(c) and the Constitution to terminate a pension plan pursuant to an agreement with a plan administrator, the PBGC's termination of the Plan here was still invalid, as it was arbitrary and capricious. The district court erred in ruling otherwise.

As a threshold matter, courts have held that a claim against the PBGC under the traditional arbitrary-and-capricious criterion of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, is among those that a litigant can pursue through ERISA's exclusive remedy against the PBGC, 29 U.S.C. § 1303(f). *See United Steel Workers v. PBGC*, 707 F.3d 319, 323 (D.C. Cir. 2013). In turn, the APA allows for judicial review of all forms of agency "action, findings, and conclusions," including agreements an agency might enter. 5 U.S.C. § 706(2). On the reviewability of agency agreements, Judge, now Justice, Ginsburg writing at the time for the D.C. Circuit, cogently explained:

> A court reviewing an agency's negotiation of a contract . . . properly may demand (1) a coherent, even if post-hoc, statement of the agency's bargaining objectives and concerns, that *the court may compare against the objectives prescribed by law*, and (2) *an adequate account of the bargaining history, that allows the court to determine whether the*

> *agency reasonably pressed its own objectives and did not unreasonably accommodate those of the other party to the negotiation*.

Doe v. Devine, 703 F.2d 1319, 1326 (D.C. Cir. 1983) (Ruth B. Ginsburg, J.) (emphasis added); *accord Tackitt v. Prudential Ins. Co. of Am.*, 758 F.2d 1572, 1575 (11th Cir. 1985).

Raising a claim of that nature in Count 4, the Retirees asserted that the PBGC engaged in arbitrary-and-capricious action by terminating the Salaried Plan via an agreement: the termination was not based on "the relevant factors" for termination under ERISA; resulted from the irrelevant factor of the Treasury's strong-arming (and the Treasury sits on the PBGC's board of directors); was avoidable, which is ERISA's preference; and could not be sustained on the theory put forth by the PBGC (namely, satisfaction of the third standard under § 1342(c)(1) that a plan be terminated to avoid an unreasonable increase in the liability of the insurance fund, *see supra* p. 16). *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 ("[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . ."). To support the claim when they sought summary judgment and

opposed the PBGC cross-motion, the Retirees (as noted earlier, *see supra* p. 23) relied on 143 exhibits, the vast majority of which were produced by either the PBGC or the Treasury, and put forward 114 paragraphs of material facts. *See* [redacted]

In finding no arbitrary-and-capricious behavior, and ruling for the PBGC, the district court offered in its opinion *three paragraphs* of discussion. S.J. Order, RE 322, PageID#13741-13742. The district court concluded, in cursory fashion, that the Retirees had "offered no evidence to support this claim." *Id.* at PageID#13741. Quite to the contrary, in numerous instances, the Retirees offered evidence that directly contradicted the district court's analysis, without any acknowledgment from the district court that the issue was in dispute.

First of all, the district court reasoned that "[w]henever offered the opportunity to assume the Salaried Plan, GM repeatedly, and emphatically declined." S.J. Order, RE 322, PageID# 13738. Not so. The Retirees showed that [redacted]. *See, e.g.*, [redacted]. Indeed, that evidence showed that GM wanted to offer assistance to the Salaried Plan's participants but was forbidden to do so by Treasury. SIGTARP Report, RE 308-4, PageID# 12649.

Likewise, the district court's assertion that the Salaried Plan was "severely underfunded" is problematic. S.J. Order, RE 322, PageID# 13741. The record established that, on June 30, 2009 (*i.e.*, less than a month before the Salaried Plan's termination), Watson Wyatt (Delphi's actuary at the time) provided an AFTAP certification letter for the Plan for the then-current plan year (*i.e.*, the year that would end on September 30, 2009); the letter showed the Plan's funding level at 85.62%.[10] *See* Letter, RE 134-4, PageID#7765. Delphi's actuary testified that the Plan's funded ratio "wasn't too dissimilar to a lot of large plans at the time, given the financial crisis that was going on," that this was not an "abnormally poor[]" funding level, and that he had seen plans that were well below a 60% funding level that had not been terminated." K. House Dep, RE 303-135, PageID# 13173, 13172.

Next, the district court improperly ignored substantial material evidence when it declared: "[d]espite Plaintiffs' assertions concerning PBGC's leverage, the record establishes that GM assumption of the Salaried Plan was not a viable option." S.J. Order, RE 322, PageID# 13738. [redacted]

[10] The AFTAP (adjusted funding target attainment percentage) certification is a "measure of the funded status of [a] plan," K. House Dep., RE 308-135, PageID# 13170, mandated by the Pension Protection Act of 2006.

[redacted].[11] And the district court ignored the fact that Treasury had agreed to GM "topping up" various union plans that were terminated, which again at least suggests proper pressure being brought to bear on GM and Treasury – pressure that ERISA expects the PBGC to exert (and that it does exert in typical situations) – could have secured a different result. *See supra* p. 17.

[11] [redacted]

Still further, the district court failed to explain how the termination of the Salaried Plan, which caused a roughly $1.5 billion loss to the PBGC's insurance fund (*see supra* p. 20), was justifiable under § 1342(c), given that PBGC was able to negotiate with Treasury a settlement worth more than $660 million to release its liens and claims on Delphi's assets, and PBGC's own estimates, completed in March 2009, show that this amount would have been more than sufficient to avoid the Plan's termination and allow New GM to fund the Plan *for roughly 10 years*. *See* Pls.' MSJ, RE 308, PageID# 12510-12511 (citing PowerPoint, RE 308-125, PageID# 13082 (scenario 3c)). But more simply, Treasury and GM recognized that there was a need to remove PBGC's liens and claims on Delphi's assets, and was willing to pay the PBGC more than $660 million in stock and equity to do so. *For less than that amount, New GM could have funded a reassumption of the Salaried Plan, for at least a decade, according to PBGC's own estimates, and PBGC could have avoided, entirely, the $1.5 billion loss to its insurance fund that resulted from the Plan's termination.* Yet, the PBGC maintained that terminating the Salaried Plan was necessary "to prevent loss to" the PBGC's insurance fund. *See supra* p. 16.

Finally, the Retirees demonstrated that between 2005 and 2009, the PBGC worked successfully with thirteen auto-parts companies that emerged from bankruptcy without terminating their pension plans. *See* PBGC Press Release, RE

308-10, PageID# 12680. [redacted] Here, it is undisputed that Delphi's bankruptcy lenders (known as the "DIP Lenders") successfully bid on Delphi's assets, creating the entity known as New Delphi, that the DIP Lenders acknowledged (to the PBGC) [redacted], and that the PBGC never attempted to persuade the DIP Lenders to consider continuing the Salaried Plan. D. Cann Dep., RE 308-15, PageID# 12694.

In sum, what the Retirees put forth was a cogent presentation, based on voluminous exhibits, that the Salaried Plan was terminated because Treasury wanted it terminated (for whatever reason, *see supra* pp. 13-14 n.3), with the PBGC acquiescing in that result. The PBGC's actions violated past agency practice, undermined the statutory objectives entrusted to the PBGC to protect, and increased rather than avoided an unreasonable increase to PBGC's insurance fund. This is the definition of arbitrary and capricious behavior. At a minimum, there are material facts in dispute – disregarded in conclusory fashion by the district court – that should have prevented the PBGC from obtaining summary judgment

on the arbitrary-and-capricious allegations, which necessitates reversal of the district court's ruling on Count IV.

CONCLUSION

The district court's decision on Counts 1, 3, and 4 of the second amended complaint and its judgment for the PBGC should be reversed.

August 7, 2019

Respectfully submitted,

/s/ Anthony F. Shelley
Anthony F. Shelley
Timothy P. O'Toole
Michael N. Khalil
Miller & Chevalier Chartered
900 Sixteenth St. NW
Washington, DC 20006
Telephone: (202) 626-5800
Facsimile: (202) 626-5801
Email: ashelley@milchev.com
Email: totoole@milchev.com
Email: mkhalil@milchev.com

Counsel for Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

XX this brief contains 12,066 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

___ this brief uses a monospaced typeface and contains [state the number of lines] of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because:

XX this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font in Times New Roman, or

___ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

August 7, 2019

/s/ Anthony F. Shelley
Anthony F. Shelley

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2019, I electronically filed the foregoing **BRIEF OF APPELLANTS** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Elisabeth B. Fry, Craig T. Fessenden, C. Wayne Owen, Jr., John A. Menke
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, DC 20005
Email: fry.elisabeth@pbgc.gov
Email: Fessenden.craig@pbgc.gov
Email: owen.wayne@pbgc.gov
Email: menke.john@pbgc.gov

/s/ Anthony F. Shelley
Anthony F. Shelley

ADDENDUM

TABLE OF CONTENTS

Designation of Relevant Lower Court Documents

Docket/ Record Entry No.	Date	Description	Page ID Range
1	9/14/09	Complaint	1-14
10	11/5/09	First Amended Complaint	345-369
145	8/26/10	Second Amended Complaint	8065-8088
304	9/21/18	Pension Benefit Guaranty Corporation's Motion for Summary Judgment, with Declaration and nine exhibits	11288-11640
305	9/21/18	**SEALED** Plaintiffs' Motion for Summary Judgment with Sealed Exhibits 2, 4, 6, 7, 8, 10, 11, 12, 13,15, 17, 18, 19, 21, 27, 28, 29, 30, 31, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 44, 45, 46, 47, 4849, 50, 52, 53, 54, 5758, 60, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88	
306	9/21/18	Continuation of **Sealed** Plaintiffs' Motion for Summary Judgment Exhibits 89, 90, 91, 92, 93, 95, 96, 98, 99, 101, 102, 104, 105, 106, 107, 108, 110, 111, 112, 113, 114, 15, , 17, 120, 121, 122, 125, 133, 136, 137, 140	
307	9/21/18	Continuation of **Sealed** Plaintiffs' Motion for Summary Judgment Exhibits – Sealed Exhibit 56	
308	9/21/18	**PUBLIC VERSION** Plaintiffs' Motion for Summary Judgment with **Public** and **Public Version** Exhibits 1-142	12396-13214
311	10/19/18	Pension Benefit Guaranty Corporation's Memorandum of Law in Response [in Opposition] to Plaintiffs' Motion for Summary Judgment #305	13220-13258
312	10/19/18	**SEALED** Plaintiffs' Response to Pension Benefit Guaranty Corporation's Motion for Summary Judgment	

Docket/ Record Entry No.	Date	Description	Page ID Range
313	10/19/18	**PUBLIC VERSION** Plaintiffs' Response to Pension Benefit Guaranty Corporation's Motion for Summary Judgment and **Public** Exhibit 143	13390-13532
317	11/16/18	**SEALED** Plaintiffs' Reply in Support of Their Motion for Summary Judgment	
318	11/16/18	**PUBLIC VERSION** Plaintiffs' Reply in Support of Their Motion for Summary Judgment	13564-13588
319	11/16/18	Reply to Plaintiffs Response in Opposition to PBGCs Motion for Summary Judgment, with Exhibit 10	13589-13664
320	3/4/19	Notice of Errata regarding missing pages in Plaintiffs' Summary Judgment Exhibit 64	13665-13671
323	3/22/19	Judgment in Favor of Defendant Against Plaintiffs	13743
322	3/22/19	Order granting Pension Benefit Guaranty Corporation's Motion for Summary Judgment denying Plaintiffs' Motion for Summary Judgment	13725-13742
327	4/17/19	Notice of Appeal	13819-13821
7-4	10/23/09	Declaration of Charles Cunningham	54-58
23	11/24/09	PBGC's Motion to Dismiss Counts 1-3 of Plaintiffs' Amended Complaint	426-450
36	12/18/09	Plaintiffs' Brief in Opposition to PBGC"s Motion to Dismiss Counts 1-3	523-546
45	1/8/10	PBGC's Motion for Summary Judgment on Count 4 of Plaintiffs' Complaint	620-662
49-9	1/8/10	PBGC Memorandum regarding Delphi Corp.	1135-1214
53	1/11/10	PBGC Administrative Record Part 1, pages AR000001-09	1601-1609
58	1/11/10	PBGC Administrative Record Part 6, pages AR000022-24	1622-1624
66	1/11/10	PBGC Administrative Record Part 17, pages AR000369-667	1845-2143

Docket/ Record Entry No.	Date	Description	Page ID Range
106	1/27/10	PBGC's Reply in Support of Their Motion to Dismiss Counts 1-3	6765-6770
111	1/29/10	Plaintiffs' Brief in Opposition to PBGC's Motion for Summary Judgment on Count 4	6791-6798
134	5/26/10	Plaintiffs' Supplemental Brief in Opposition to PBGC's Motion for Summary Judgment on Count 4	7705-7768
136	6/9/10	PBGC's Response to Plaintiffs' Supplemental Opposition to PBGC's Motion for Summary Judgment on Count 4	7777-7783
147	9/27/10	Order Granting In Part And Denying In Part Defendant PBGC's Motion To Seal [51], Denying Without Prejudice PBGC's Motion To Dismiss Counts 1-3 [23], Denying Without Prejudice PBGC's Motion For Summary Judgment On Count 4 [45], And Denying Plaintiffs' Motion For An Order To Show Cause [130]	8091-8092
150	10/12/10	Answer of the Pension Benefit Guaranty Corporation to Plaintiffs' Second Amended Complaint	8100-8108
152-3	10/28/10	Sept. 24, 2010 Motions Hearing Transcript regarding PBGC's Motion to Dismiss (#23) and PBGC's MSJ (#45) and four other motions (Exhibit B to Plaintiffs' Motion for Adoption of Scheduling Order (#152))	8121-8196
168-2	2/28/11	Declaration of Randall L. Pappal	8824-8828
168-3	2/18/11	Declaration of Rick Westenberg	8830-8839
189-6	7/22/11	Deposition Transcript of Matthew Feldman (July 21, 2009)	9503-9604

Docket/ Record Entry No.	Date	Description	Page ID Range
193	9/1/11	Order Sustaining Plaintiffs' Objections [172] to Magistrate Judge's Scheduling Order, Granting Plaintiff's Motion for Adoption of Scheduling Order [152], Administratively Terminating PBGC's Motion for Protective Order [178], Administratively Terminating Plaintiffs' Motion to Compel Discovery [179], and Entering Scheduling Order	9659-9666
192	9/2/11	Order Granting Defendants United States Department of the Treasury, Presidential Task Force on the Auto Industry, Timothy F. Geithner, Steven L. Rattner, and Ron A. Bloom's Renewed Motion To Dismiss [164]	9642-9657
282	3/11/16	Opinion and Order Granting Plaintiffs' Rule 37 Motion to Enforce Court Order [275] and Denying Plaintiffs' Motion for Leave to File a Supplemental Reply Brief [280]	11170-11179
321	3/12/19	**[SEALED]** Transcript of Summary Judgment Motion Hearing held on March 6, 2019	
326	4/15/19	**REDACTED** Transcript of Summary Judgment Motion Hearing held on March 6, 2019	13767-13818

29 U.S.C.§ 1303. Operation of Corporation

a) Investigatory authority; audit of statistically significant number of terminating plans. The corporation may make such investigations as it deems necessary to enforce any provision of this title or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the corporation shall determine, as to all the facts and circumstances concerning the matter to be investigated. The corporation shall annually audit a statistically significant number of plans terminating under section 4041(b) [*29 USCS § 1341(b)*] to determine whether participants and beneficiaries have received their benefit commitments and whether section 4050(a) [*29 USCS § 1350(a)*] has been satisfied. Each audit shall include a statistically significant number of participants and beneficiaries.

(b) Discovery powers vested in board members or officers designated by the chairman. For the purpose of any such investigation, or any other proceeding under this title, the Director, any member of the board of directors of the corporation, or any officer designated by the Director or chairman, may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the corporation deems relevant or material to the inquiry.

(c) Contempt. In case of contumacy by, or refusal to obey a subpoena issued to, any person, the corporation may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. The court may issue an order requiring such person to appear before the corporation, or member or officer designated by the corporation, and to produce records or to give testimony related to the matter under investigation or in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district in which such person is an inhabitant or may be found.

(d) Cooperation with other governmental agencies. In order to avoid unnecessary expense and duplication of functions among government agencies, the corporation may make such arrangements or agreements for cooperation or mutual assistance in the performance of its functions under this title as is practicable and consistent with law. The corporation may

utilize the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment. The head of each department, agency, or establishment of the United States shall cooperate with the corporation and, to the extent permitted by law, provide such information and facilities as it may request for its assistance in the performance of its functions under this title. The Attorney General or his representative shall receive from the corporation for appropriate action such evidence developed in the performance of its functions under this title as may be found to warrant consideration for criminal prosecution under the provisions of this or any other Federal law.

(e) Civil actions by corporation; jurisdiction; process; expeditious handling of case; costs; limitation on actions.

(1) Civil actions may be brought by the corporation for appropriate relief, legal or equitable or both, to enforce (A) the provisions of this title, and (B) in the case of a plan which is covered under this title (other than a multiemployer plan) and for which the conditions for imposition of a lien described in section 303(k)(1)(A) and (B) or 306(g)(1)(A) and (B) of this Act [*29 USCS § 1083(k)(1)(A)* and (B) or 29 USCS § 1805a(g)(1)(A)] or section 430(k)(1)(A) and (B) or 433(g)(1)(A) and (B) of the Internal Revenue Code of 1986 [*26 USCS § 430(k)(1)(A)* and (B) or *26 USCS § 433(g)(1)(A)* and (B)] have been met, section 302 of this Act [*29 USCS § 1082*] and section 412 of such Code [*26 USCS § 412*].

(2) Except as otherwise provided in this title, where such an action is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the violation took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(3) The district courts of the United States shall have jurisdiction of actions brought by the corporation under this title without regard to the amount in controversy in any such action.

(4) [Repealed]

(5) In any action brought under this title, whether to collect premiums, penalties, and interest under section 4007 [*29 USCS § 1307*] or for any other purpose, the court may award to the corporation all or a portion of the costs of litigation incurred by the corporation in connection with such action.

(6)

(A) Except as provided in subparagraph (C), an action under this subsection may not be brought after the later of—

(i) 6 years after the date on which the cause of action arose, or

(ii) 3 years after the applicable date specified in subparagraph (B).

(B)

(i) Except as provided in clause (ii), the applicable date specified in this subparagraph is the earliest date on which the corporation acquired or should have acquired actual knowledge of the existence of such cause of action.

(ii) If the corporation brings the action as a trustee, the applicable date specified in this subparagraph is the date on which the corporation became a trustee with respect to the plan if such date is later than the date described in clause (i).

(C) In the case of fraud or concealment, the period described in subparagraph (A)(ii) shall be extended to 6 years after the applicable date specified in subparagraph (B).

(f) Civil actions against corporation; appropriate court; award of costs and expenses; limitation on actions; jurisdiction; removal of actions.

(1) Except with respect to withdrawal liability disputes under part 1 of subtitle E [*29 USCS §§ 1381* et seq.], any person who is a plan sponsor, fiduciary, employer, contributing sponsor, member of a contributing sponsor's controlled group, participant, or beneficiary, and is adversely affected by any action of the corporation with respect to a plan in which such person has an interest, or who is an employee organization representing such a participant or beneficiary so adversely affected for purposes of collective bargaining with respect to such plan, may bring an action against the corporation for appropriate equitable relief in the appropriate court.

(2) For purposes of this subsection, the term "appropriate court" means—

(A) the United States district court before which proceedings under section 4041 or 4042 [*29 USCS § 1341* or *1342*] are being conducted,

(B) if no such proceedings are being conducted, the United States district court for the judicial district in which the plan has its principal office, or

(C) the United States District Court for the District of Columbia.

(3) In any action brought under this subsection, the court may award all or a portion of the costs and expenses incurred in connection with such action to any party who prevails or substantially prevails in such action.

(4) This subsection shall be the exclusive means for bringing actions against the corporation under this title, including actions against the corporation in its capacity as a trustee under section 4042 [*29 USCS § 1342*] or 4049.

(5)

(A) Except as provided in subparagraph (C), an action under this subsection may not be brought after the later of—

(i) 6 years after the date on which the cause of action arose, or

(ii) 3 years after the applicable date specified in subparagraph (B).

(B)

(i) Except as provided in clause (ii), the applicable date specified in this subparagraph is the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action.

(ii) In the case of a plaintiff who is a fiduciary bringing the action in the exercise of fiduciary duties, the applicable date specified in this subparagraph is the date on which the plaintiff became a fiduciary with respect to the plan if such date is later than the date specified in clause (i).

(C) In the case of fraud or concealment, the period described in subparagraph (A)(ii) shall be extended to 6 years after the applicable date specified in subparagraph (B).

(6) The district courts of the United States have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(7) In any suit, action, or proceeding in which the corporation is a party, or intervenes under section 4301 [*29 USCS § 1451*], in any State court, the corporation may, without bond or security, remove such suit, action,

or proceeding from the State court to the United States district court for the district or division in which such suit, action, or proceeding is pending by following any procedure for removal now or hereafter in effect.

29 U.S.C. § 1342. Institution of termination proceedings by the corporation

(a) Authority to institute proceedings to terminate a plan. The corporation may institute proceedings under this section to terminate a plan whenever it determines that—

(1) the plan has not met the minimum funding standard required under *section 412 of the Internal Revenue Code of 1986* [*26 USCS § 412*], or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of such Code [*26 USCS § 6212*] has been mailed with respect to the tax imposed under section 4971(a) of such Code [*26 USCS § 4971(a)*],

(2) the plan will be unable to pay benefits when due,

(3) the reportable event described in section 4043(c)(7) [*29 USCS § 1343(c)(7)*] has occurred, or

(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

The corporation shall as soon as practicable institute proceedings under this section to terminate a single-employer plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan. The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c)). Notwithstanding any other provision of this title, the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of this title.

(b) Appointment of trustee.

(1) Whenever the corporation makes a determination under subsection (a) with respect to a plan or is required under subsection (a) to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) ordering the

termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case.

(2) Notwithstanding any other provision of this title—

(A) upon the petition of a plan administrator or the corporation, the appropriate United States district 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, and

(B) upon the petition of the corporation, the appropriate United States district court shall appoint a trustee proposed by the corporation for a multiemployer plan which is in reorganization or to which section 4041A(d) [*29 USCS § 1341a(d)*] applies, unless such appointment would be adverse to the interests of the plan participants and beneficiaries in the aggregate.

(3) The corporation and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).

(c) Adjudication that plan must be terminated.

(1) If the corporation is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund. If the trustee appointed under subsection (b) disagrees with the determination of the corporation under the preceding sentence he may intervene in the proceeding relating to the application for the decree, or make application for such decree himself. Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under

subsection (b) (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle [*29 USCS §§ 1341* et seq.]. 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). Whenever a trustee appointed under this title is operating a plan with discretion as to the date upon which final distribution of the assets is to be commenced, the trustee shall notify the corporation at least 10 days before the date on which he proposes to commence such distribution.

(2) In the case of a proceeding initiated under this section, the plan administrator shall provide the corporation, upon the request of the corporation, the information described in clauses (ii), (iii), and (iv) of section 4041(c)(2)(A) [*29 USCS § 1341(c)(2)(A)(ii)*–(iv)].

(3) Disclosure of termination information.

(A) In general.

(i) Information from plan sponsor or administrator. A plan sponsor or plan administrator of a single-employer plan that has received a notice from the corporation of a determination that the plan should be terminated under this section shall provide to an affected party any information provided to the corporation in connection with the plan termination.

(ii) Information from corporation. The corporation shall provide a copy of the administrative record, including the trusteeship decision record of a termination of a plan described under clause (i).

(B) Timing of disclosure. The plan sponsor, plan administrator, or the corporation, as applicable, shall provide the information described in subparagraph (A) not later than 15 days after—

(i) receipt of a request from an affected party for such information; or

(ii) in the case of information described under subparagraph (A)(i), the provision of any new information to the corporation relating to a previous request by an affected party.

(C) Confidentiality.

(i) In general. The plan administrator, the plan sponsor, or the corporation shall not provide information under subparagraph (A) in a form which includes any information that may directly or indirectly be associated with, or otherwise identify, an individual participant or beneficiary.

(ii) Limitation. A court may limit disclosure under this paragraph of confidential information described in *section 552(b) of title 5, United States Code* [*5 USCS § 552(b)*], to authorized representatives (within the meaning of section 4041(c)(2)(D)(iv) [*29 USCS § 1341(c)(2)(D)(iv)*]) of the participants or beneficiaries that agree to ensure the confidentiality of such information.

(D) Form and manner of information; charges.

(i) Form and manner. The corporation may prescribe the form and manner of the provision of information under this paragraph, which shall include delivery in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to individuals to whom the information is required to be provided.

(ii) Reasonable charges. A plan sponsor may charge a reasonable fee for any information provided under this paragraph in other than electronic form.

(d) Powers of trustee.

(1)

(A) A trustee appointed under subsection (b) shall have the power—

(i) to do any act authorized by the plan or this title to be done by the plan administrator or any trustee of the plan;

(ii) to require the transfer of all (or any part) of the assets and records of the plan to himself as trustee;

(iii) to invest any assets of the plan which he holds in accordance with the provisions of the plan, regulations of the corporation, and applicable rules of law;

(iv) to limit payment of benefits under the plan to basic benefits or to continue payment of some or all of the benefits which were being paid prior to his appointment;

(v) in the case of a multiemployer plan, to reduce benefits or suspend benefit payments under the plan, give appropriate notices, amend the plan, and perform other acts required or authorized by subtitle (E) [*29 USCS §§ 1381* et seq.] to be performed by the plan sponsor or administrator;

(vi) to do such other acts as he deems necessary to continue operation of the plan without increasing the potential liability of the corporation, if such acts may be done under the provisions of the plan; and

(vii) to require the plan sponsor, the plan administrator, any contributing or withdrawn employer, and any employee organization representing plan participants to furnish any information with respect to the plan which the trustee may reasonably need in order to administer the plan.

If the court to which application is made under subsection (c) dismisses the application with prejudice, or if the corporation fails to apply for a decree under subsection (c) within 30 days after the date on which the trustee is appointed under subsection (b), the trustee shall transfer all assets and records of the plan held by him to the plan administrator within 3 business days after such dismissal or the expiration of such 30-day period, and shall not be liable to the plan or any other person for his acts as trustee except for willful misconduct, or for conduct in violation of the provisions of part 4 of subtitle B of title I of this Act [*29 USCS §§ 1101* et seq.] (except as provided in subsection (d)(1)(A)(v)). The 30-day period referred to in this subparagraph may be extended as provided by agreement between the plan administrator and the corporation or by court order obtained by the corporation.

(B) If the court to which an application is made under subsection (c) issues the decree requested in such application, in addition to the powers described in subparagraph (A), the trustee shall have the power—

(i) to pay benefits under the plan in accordance with the requirements of this title;

(ii) to collect for the plan any amounts due the plan, including but not limited to the power to collect from the persons obligated to meet the requirements of section 302 [*29 USCS § 1082*] or the terms of the plan;

(iii) to receive any payment made by the corporation to the plan under this title;

(iv) to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan;

(v) to issue, publish, or file such notices, statements, and reports as may be required by the corporation or any order of the court;

(vi) to liquidate the plan assets;

(vii) to recover payments under section 4045(a) [*29 USCS § 1345(a)*]; and

(viii) to do such other acts as may be necessary to comply with this title or any order of the court and to protect the interests of plan participants and beneficiaries.

(2) As soon as practicable after his appointment, the trustee shall give notice to interested parties of the institution of proceedings under this title to determine whether the plan should be terminated or to terminate the plan, whichever is applicable. For purposes of this paragraph, the term "interested party" means—

(A) the plan administrator,

(B) each participant in the plan and each beneficiary of a deceased participant,

(C) each employer who may be subject to liability under section 4062 [*29 USCS § 1362*], 4063 [*29 USCS § 1363*], or 4064 [*29 USCS § 1364*],

(D) each employer who is or may be liable to the plan under [section] part 1 of subtitle E [*29 USCS §§ 1381* et seq.],

(E) each employer who has an obligation to contribute, within the meaning of section 4212(a) [*29 USCS § 1392(a)*], under a multiemployer plan, and

(F) each employee organization which, for purposes of collective bargaining, represents plan participants employed by an employer described in subparagraph (C), (D), or (E).

(3) Except to the extent inconsistent with the provisions of this Act, or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as those of a trustee under *section 704 of title 11, United States Code* [*11 USCS § 704*], and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 3 of this Act [*29 USCS § 1002(21)*] and under *section 4975(e) of the Internal Revenue Code of 1986* [*26 USCS § 4975(e)*] (except to the extent that the provisions of this title are inconsistent with the requirements applicable under part 4 of subtitle B of title I of this Act [*29 USCS §§ 1101* et seq.] and of such section 4975 [*26 USCS § 4975*]).

(e) Filing of application notwithstanding pendency of other proceedings. An application by the corporation under this section may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding, or any proceeding to reorganize, conserve, or liquidate such plan or its property, or any proceeding to enforce a lien against property of the plan.

(f) Exclusive jurisdiction; stay of other proceedings. Upon the filing of an application for the appointment of a trustee or the issuance of a decree under this section, the court to which an application is made shall have exclusive jurisdiction of the plan involved and its property wherever located with the powers, to the extent consistent with the purposes of this section, of a court of the United States having jurisdiction over cases under chapter 11 of title 11 of the United States Code [*11 USCS §§ 1101* et seq.]. Pending an adjudication under subsection (c) such court shall stay, and upon appointment by it of a trustee, as provided in this section such court shall continue the stay of, any pending mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the plan or its property and any other suit against any receiver, conservator, or trustee of the plan or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the plan or any other suit against the plan.

(g) Venue. An action under this subsection may be brought in the judicial district where the plan administrator resides or does business or where any asset of the plan is situated. A district court in which such action is brought may issue process with respect to such action in any other judicial district.

(h) Compensation of trustee and professional service personnel appointed or retained by trustee.

(1) The amount of compensation paid to each trustee appointed under the provisions of this title shall require the prior approval of the corporation, and, in the case of a trustee appointed by a court, the consent of that court.

(2) Trustees shall appoint, retain, and compensate accountants, actuaries, and other professional service personnel in accordance with regulations prescribed by the corporation.