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

Dennis Black, *et al.*, Plaintiffs, v. Pension Benefit Guaranty Corporation, Defendant.	Case No. 2:09-cv-13616 Hon. Arthur J. Tarnow Magistrate Judge Mona K. Majzoub

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PBGC'S MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Local Counsel:

UNITED STATES ATTORNEY'S OFFICE
Matthew J. Schneider
UNITED STATES ATTORNEY
Peter A. Caplan
Chief of the Civil Division
Eastern District of Michigan
211 West Fort Street, Suite 2001
Detroit, MI 48226

PENSION BENEFIT GUARANTY CORPORATION
Judith R. Starr, General Counsel
Kartar Khalsa, Deputy General Counsel
John A. Menke
C. Wayne Owen, Jr.
Craig T. Fesseden
Assistant General Counsels
Erin C. Kim
Elisabeth B. Fry
Attorneys
Office of the General Counsel
1200 K Street, N.W.
Washington, D.C. 20005

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For PBGC's concise statement of the issues presented, pursuant to E. D. Mich. LR 7.1(d)(2), please see PBGC's Memorandum of Law in Support of its Motion for Summary Judgment ("PBGC's Moving Brief") at 1-3,[1] which PBGC incorporates herein by reference in its entirety.

CONTROLLING AUTHORITY

For PBGC's concise statement of the controlling or most appropriate authority for the relief sought pursuant to E. D. Mich. LR 7.1(d)(2), please see PBGC's Moving Brief at 3-4.[2]

INTRODUCTION

As the Seventh Circuit stated, "[t]hrough 29 U.S.C. § 1342, Congress authorized PBGC to terminate a failing plan so that PBGC could nip a plan's increasing losses and thereby reduce PBGC's exposure to mounting liabilities."[3] In compliance with 29 U.S.C. § 1342(c), PBGC and Delphi agreed that the Salaried Plan should be terminated and agreed to appointment of PBGC as the trustee to carry out the plan termination. Plaintiffs claim that PBGC should not

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[1] ECF No. 304 at 11-13.

[2] *Id.* at 13-14.

[3] *In re UAL Corp.*, 428 F.3d 677, 681 (7th Cir. 2005).

have been allowed to nip its losses and are seeking unspecified equitable relief from this Court pursuant to 29 U.S.C. § 1303(f).[4] Plaintiffs' claims are entirely contrary to the actual language of ERISA and to more than forty years of practice and court decisions under that statute. Accordingly, this Court should deny Plaintiffs' motion and grant summary judgment to PBGC.[5]

COUNTER STATEMENT REGARDING DISCOVERY

Plaintiffs' multi-page "Statement Regarding Discovery" ("Discovery Statement") in their Moving Brief is entirely irrelevant to the matters before the Court in these Cross-Motions.[6] Plaintiffs proposed proceeding with summary judgment motions at this time; Plaintiffs agreed to the briefing schedule; and Plaintiffs recently asked that the briefing schedule be amended – all with full knowledge that their dispute with Treasury over production of a small number of

[4] *See* Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment ("Plaintiffs' Moving Brf.") at 159 (requesting that the Court order additional briefing as to the remedy and relief to be afforded).

[5] *See Ass'n of Flight Attendants-CWA, AFL-CIO v. PBGC*, 372 F. Supp. 2d 91, 103-04 (D.D.C. 2005) (denying injunction requested under 29 U.S.C. § 1303(f) to stop a plan termination under 29 U.S.C. § 1342 where Court found its role was to apply ERISA as written).

[6] *See* Plaintiffs' Moving Brf. at 6-11 (stating that Plaintiffs have not received from Treasury information that "could be critically important to their case").

documents has not been resolved.[7] Therefore, to the extent that Plaintiffs may seek to rely upon their Discovery Statement to avoid entry of judgment against them, PBGC strongly objects.

RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

The facts of this case are set forth in (i) the administrative record and (ii) the statement of undisputed facts contained in PBGC's Moving Brief. Those facts are not in dispute, and clearly support the conclusion that Plaintiffs are not entitled to any equitable relief under 29 U.S.C. § 1303(f), and the conclusion that PBGC is entitled to a judgment as a matter of law. PBGC incorporates those facts herein by reference.

PBGC disagrees that many of the facts contained in Plaintiffs' Statement of Undisputed Material Facts are material and/or admissible at trial. PBGC also disagrees with Plaintiffs' characterization of certain facts and, as stated in the following Legal Argument, how Plaintiffs interpret some of the facts. But, Plaintiffs concede a key material fact in this case -- **GM repeatedly made it clear that it would not assume the Salaried Plan**.[8]

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[7] *See* Stipulated Order dated September 12, 2018, ECF No. 301.

[8] *See* Plaintiffs' Statement of Undisputed Material Facts ("Plaintiffs' SUMF") ¶¶ 27, 39, 71, 78, 93, 95.

RESPONSE TO PLAINTIFFS' PROPOSED STANDARD OF REVIEW

Plaintiffs bear the burden of persuasion with respect to their claims that they are entitled to relief under ERISA. Plan participants who are adversely affected by any action by PBGC may seek appropriate equitable relief pursuant to 29 U.S.C. § 1303(f). That section is the exclusive means for plan participants to bring ERISA actions against PBGC relating to the termination of their pension plan.[9] Plaintiffs contend that the termination of the Salaried Plan did not comply with 29 U.S.C. § 1342.[10] But, the only possible remedy this Court could order for an alleged violation of 29 U.S.C. § 1342 is equitable relief under 29 U.S.C. § 1303(f).[11]

As Defendant on claims under 29 U.S.C. § 1303(f), PBGC does not bear the burden of persuasion. This Court has stated that in reviewing whether or not the termination complied with 29 U.S.C. § 1342, the Court will review the termination

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[9] 29 U.S.C. § 1303(f)(4).

[10] Second Amended Complaint, Counts 1 and 4.

[11] *See Ass'n of Flight Attendants-CWA*, 372 F. Supp. 2d at 97 (noting that the Court had jurisdiction pursuant to 29 U.S.C. § 1303(f), the "'exclusive means for bringing actions against [PBGC]' concerning termination decisions" and that "[o]nly equitable relief is available").

de novo rather than apply the arbitrary and capricious standard.[12] This Court also cited *In re UAL* for the proposition that when PBGC is a plaintiff under 29 U.S.C. § 1342, PBGC bears the burden of persuasion.[13] However, the Court's determination that it will not apply the arbitrary and capricious standard does not change the fact that PBGC is not the plaintiff in this case and, therefore, PBGC does not bear the burden of persuasion.

ARGUMENT

I. Assumption of the Salaried Plan by GM – or any potential bidder for Delphi's assets – was not a viable alternative to plan termination.

a. Despite Plaintiffs' insistence that PBGC should have been able to convince GM to assume the Salaried Plan and its $2 billion underfunding liability – a massive debt that bankrupt GM had no legal obligation to pay – the facts clearly show that was never a possibility.

GM had no legal obligation to assume the Salaried Plan. It is undisputed that GM's legal obligations to the Salaried Plan participants ended in 1999 when their liabilities, and the assets related to them, were spun off to the newly created Delphi Salaried Plan pursuant to 26 U.S.C. § 414(l). GM could have reassumed the liabilities for the Salaried Plan if it wished to, but it had no obligation to do so –

[12] *See* Order dated September 1, 2011, ECF No. 193, at 5 (citing *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006)).

[13] *Id.*

and Plaintiffs do not contend otherwise. At the same time, nothing in ERISA gives PBGC the authority to compel assumption of a pension plan. Again, Plaintiffs do not assert otherwise.

So long as GM had the authority to decide for itself, the answer to requests for it to voluntarily assume the Salaried Plan was uniformly "no."[14] As PBGC pointed out in its own Motion for Summary Judgment, this was the answer that Delphi heard beginning as early as August 2008, when Delphi first began asking GM to consider reassuming the Salaried Plan.[15] And Plaintiffs confirm in their own Motion that GM's answer continued to be "no." GM told Delphi in January 2009 that GM would not assume the Salaried Plan.[16] In February 2009, GM's President and CEO said at a press conference that GM would not be assuming the Salaried Plan.[17] In April 2009, GM said that it was considering assuming the Hourly Plan, but did not say that it was considering assumption of the Salaried Plan.[18]

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[14] *See* Plaintiffs' SUMF ¶¶ 27, 39, 71, 78, 93, 95.

[15] *See* PBGC's Moving Brief at 10.

[16] Plaintiffs' SUMF ¶ 27; Plaintiffs' Ex. 23 at 4 of 7.

[17] Plaintiffs' SUMF ¶ 39.

[18] Plaintiffs' SUMF ¶¶ 71, 78.

In early 2009, the power dynamic changed, and GM no longer had the authority to decide for itself whether it would agree to assume the Salaried Plan. As Plaintiffs point out in their SUMF, the loan agreement between GM and the Treasury's Auto Task Force required GM to obtain approval from the Task Force before GM could assume even one additional dollar of pension liability.[19] So, when GM's President and CEO said he wanted to do something for Delphi's salaried retirees, the Auto Task Force slammed the door on any possible assumption of the Salaried Plan by GM, "because there was nothing defensible from a commercial standpoint that could be done for the salaried retirees."[20]

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[19] Plaintiffs' SUMF ¶ 50.

[20] Plaintiffs' SUMF ¶ 93. Plaintiffs' attempts to challenge Treasury's conclusion are misleading. Plaintiffs incorrectly suggest that New GM paid $664 million to PBGC to settle PBGC's termination claims when in fact the the record clearly shows New GM actually paid PBGC $70 million plus equity in New Delphi – not $664 million in cash. (Plaintiffs' Moving Brf. at 84-86; Plaintiffs' SUMF ¶ 105.) Plaintiffs then argue that assumption of the Salaried Plan would have cost New GM $400 million for the first ten years and suggest that GM could therefore have funded the Salaried Plan for $264 million less than the $664 million GM allegedly paid. Plaintiffs' arguments fail to recognize that (1) the $70 million plus equity New GM paid PBGC does not equal $664 million in cash; (2) such value received by PBGC was for both the Hourly Plan and the Salaried Plan, and was not attributable solely to the Salaried Plan; (3) retaining the equity GM transferred to PBGC would not have provided GM with cash to make plan contributions; and (4) regardless of the amount of minimum funding contributions in the short term, GM's assumption of the Salaried Plan would have saddled GM with a long-term liability of $2 billion. None of Plaintiffs' arguments change the fact that Treasury concluded that there no was no valid commercial reason for New GM to assume a

Ultimately, Treasury informed PBGC that GM would not assume the Hourly Plan, the Salaried Plan, or any other Delphi pension plan.[21] Even pressure from the legislative branch did not sway GM to assume the Salaried Plan.[22]

b. PBGC's $195.9 million lien did not provide PBGC leverage to force GM to take over the Salaried Plan and assume a $2 billion liability.

Plaintiffs assert that PBGC had "powerful leverage to facilitate a GM assumption of the Salaried Plan," because "an interruption of Delphi parts could have a crippling effect on GM and its ability to reorganize."[23] But, PBGC did not have that kind of leverage. PBGC could not cause Delphi to stop producing parts for GM.

$2 billion liability, and therefore prohibited the assumption of the Salaried Plan. (Plaintiffs' SUMF ¶ 93.)

[21] Plaintiffs' SUMF ¶ 95. Plaintiffs dedicate eight pages of their Moving Brief to arguing that Treasury's decision that GM would not assume the Salaried Plan was politically motivated. (Plaintiffs' Moving Brf. at 100-108.) However, this Court has already dismissed those allegations for failure to state a claim and, therefore, Treasury is no longer a party to this action. *See* Docket No. 192. Accordingly, Treasury's political motivations, or lack thereof, cannot form the basis of any claim against PBGC, nor can PBGC address them on Treasury's behalf.

[22] Plaintiffs' SUMF ¶ 98.

[23] Plaintiffs' Moving Brf. at 79; *see also* id. at 83-84.

It is undisputed that PBGC perfected a statutory lien in the amount of $195.9 million.[24] That was the full extent of PBGC's lien on Delphi's assets at the time the Salaried Plan was terminated. Plaintiffs make an unsupported assertion that PBGC had a lien exceeding $1 billion, but that is not true.[25] And simply holding a $195.9 million lien did not give PBGC the power to stop production at Delphi's

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[24] *See* Plaintiffs' SUMF ¶ 105; *see also* 26 U.S.C. § 430(k); 29 U.S.C. § 1083(k) (defining liens that arise for missed minimum funding contributions to pension plans).

[25] *See* Plaintiffs' Moving Brf. at 79 (citing Plaintiffs' SUMF ¶ 105 – which states that PBGC had a statutory lien in the amount of $195.9 million – for the false proposition that PBGC had a lien exceeding $1 billion). Plaintiffs' confusion regarding the amount of PBGC's liens in 2009 may arise from the fact that PBGC did previously hold much larger liens, nearing a combined $2 billion for the Hourly and Salaried Plan. That amount was reduced considerably by 2009 because of (i) the funding waivers Delphi received in 2006 and 2007; (ii) the contribution of collateral in the amount of $122.5 million to the Hourly Plan and $50 million to the Salaried Plan that had been posted to secure the minimum funding waivers that lapsed in 2008; and (iii) the § 414(l) transfer of a portion of the Hourly Plan liabilities to the GM Hourly Plan in September 2008. *See, e.g.*, Plaintiffs' Exs. 8 and 9. Those events reduced PBGC's liens on behalf of the Hourly Plan from about $1.2 billion to zero and the liens on behalf of the Salaried Plan from about $800 million to what ultimately became the final amount of $195.9 million. Plaintiffs also repeatedly reference PBGC's purported "claims on Delphi assets" in addition to PBGC's statutory lien in the amount of $195.9 million. *See, e.g.* Plaintiffs' Moving Brief. at 77, 79, 81, 83, 84, 108-9. It is unclear to PBGC how Plaintiffs define that phrase. It implies that PBGC had a secured interest in Delphi assets beyond the undisputed $195.9 million statutory lien. That is not the case. The undisputed facts show that the only other claims PBGC had against Delphi were general unsecured claims for missed contributions and for the amount of the underfunding of the pension plans following their termination (what PBGC generally refers to as the "termination liability"). Plaintiffs' SUMF ¶ 105.

factories. Delphi's domestic U.S. plants were protected from any PBGC lien enforcement by the automatic stay in bankruptcy.[26] Further, as for PBGC's lien against the Delphi's international assets, rather than abruptly shutting Delphi's doors, PBGC's recourse would have been to bring civil actions, inevitably lengthy, to enforce its $195.9 million lien.

c. No one other than GM was willing to buy Delphi's assets.

Plaintiffs also assert that PBGC failed to work with potential bidders for Delphi's assets to assume the Salaried Plan liability, as in the Tower Automotive case.[27] While Plaintiffs have identified three *potential* buyers of Delphi's assets,[28] none of them actually bid on Delphi's assets.[29] And, there is no evidence that, even if they had bid on Delphi's assets, they would have been willing to assume the Salaried Plan and its $2 billion liability. Thus, even assuming *arguendo* that PBGC had some obligation to work with potential bidders for Delphi's assets – which it did not – there is absolutely no evidence that the outcome for the Salaried

[26] *See* 11 U.S.C. § 362.

[27] Plaintiffs' Moving Brf. at 91-95.

[28] Plaintiffs' SUMF § 81.

[29] The Tower Automotive case referenced in Plaintiffs' Moving Brf, involved an actual bid not a potential bid that never materialized.

Plan was affected in any way by PBGC's not getting involved in three *potential* bids that never materialized.

d. Delphi's years-worth of missed contributions were a valid basis to initiate termination of the Salaried Plan.

Plaintiffs argue that the termination of the Salaried Plan was unjustifiable because it was purportedly a relatively well funded plan,[30] and that PBGC should not have considered Delphi's failure to make the minimum funding contributions as a justification for the Salaried Plan's termination.[31] However, PBGC is authorized to institute proceedings to terminate a pension plan whenever the plan has not met the minimum funding standard.[32] Plaintiffs do not dispute that Delphi missed minimum funding contributions.[33] The Administrative Record shows that PBGC recommended a PBGC-initiated termination of the Salaried Plan in

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[30] Contrary to Plaintiffs' assertion, the Salaried plan was not well funded. Its funding ratio was only 46% on a termination basis. AR37.

[31] *See* Plaintiffs' Moving Brf. at 96-100.

[32] 29 U.S.C. § 1342(a)(1). To meet the technical requirements of § 1342(a)(1), Delphi had to miss at least one end-of-the-plan-year catch-up contribution, not just one or more quarterly contributions. The undisputed facts and PBGC's administrative record show that Delphi missed several years of catch-up payments and unquestionably failed to satisfy the minimum funding standard.

[33] *See* Plaintiffs' SUMF ¶¶ 12-14.

accordance with 29 U.S.C. § 1342(a)(1), for failure to meet the minimum funding standard, among other reasons.[34]

PBGC did not move to terminate the Salaried Plan based solely on the fact that it was underfunded. The percentage of underfunding alone is not the basis for determining whether the plan should be terminated under 29 U.S.C. § 1342(c). Thus, contrary to Plaintiffs' insistence that the plan's funding level contraindicated termination, the missed contributions were a valid basis for initiating termination of the Salaried Plan under 29 U.S.C. § 1342(a) and, as discussed below, the termination complied with 29 U.S.C. § 1342(c).

II. Plaintiffs are not entitled to summary judgment on Count 1, because 29 U.S.C. § 1342(c) expressly permits termination of pension plans by agreement between PBGC and a plan administrator.

29 U.S.C. § 1342(c) provides:

> [PBGC] 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 . . . . 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

[34] AR 30. As further discussed in PBGC's Moving Brief at 35-37, the Administrative Record supports PBGC's determination that the criteria under § 1342(a)(1), (3), and (4) were met because it shows that Delphi did not make all required contributions to the Salaried Plan between filing for bankruptcy in October 2005 and the termination date in 2009; that the Salaried Plan would be unable to pay benefits when due; and that the possible long-run loss to PBGC would have increased unreasonably if the Salaried Plan was not terminated before certain subsidiaries left the controlled group. Thus, it is undisputed that the § 1342(a) criteria were met, and PBGC was expressly authorized by ERISA to initiate termination proceedings.

> appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle[; or]
>
> If [PBGC] 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).

29 U.S.C. § 1342(c) does not mandate a court decree as the only way to proceed with pension plan termination but rather describes two alternative procedures depending upon whether the plan administrator opposes the termination. PBGC may either pursue a court decree appointing a trustee to effectuate termination of the plan, or PBGC may instead enter into an agreement with the plan administrator to appoint a trustee to effectuate termination.

a. Every Circuit Court that has interpreted 29 U.S.C. § 1342(c) has found that it permits termination by agreement.

The two-alternative nature of the termination process set out in § 1342(c) has been fully understood and accepted by the courts that have been called upon to review plan terminations. The D.C. Circuit expressly confirmed that the PBGC has two options under § 1342(c) – either "district court enforcement or voluntary

settlement."[35] So has the Third Circuit.[36] In addition, the Eleventh Circuit has affirmed a district court decision dismissing a challenge to a voluntary settlement of plan termination without a court order approving the termination.[37] Moreover, the Eighth Circuit affirmed a district court decision setting the date of plan termination following an agreement between PBGC and a plan administrator that the plan should be terminated.[38]

The Second Circuit explained in *In re Jones & Laughlin Hourly Pension Plan:*

> [t]he fourth sentence of subsection 1342(c) provides that where . . . PBGC and the plan administrator agree to terminate a plan, PBGC need not comply

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[35] *Allied Pilots Ass'n v. PBGC*, 334 F.3d 93, 97-98 (DC. Cir. 2003).

[36] *In re Syntex Fabrics, Inc. Pension Plan*, 698 F.2d 199, 201 (3d Cir. 1983) ("[d]espite the so-called involuntary nature of a section 1342 proceeding, PBGC and the plan administrator can still agree to terminate the plan and appoint a trustee without resort to the court"); *See also Moore v. PBGC*, 566 F. Supp. 534, 536 (E.D. Penn. 1983) (holding that district court could not set aside agreement between PBGC and plan administrator to terminate pension plan because district court was bound by Third Circuit's interpretation of 1342(c) as authorizing termination by agreement).

[37] *PBGC v. Durango Georgia Paper Co.*, 251 F. Appx. 664 (11th Cir. 2007) (affirming dismissal of complaint seeking adjudication of plan termination and setting of termination date after parties agreed upon termination and termination date, over objection of third party who challenged termination date selected by the parties).

[38] *See Pension Committee for Farmstead Foods Pension Plan for Albert Lea Hourly Employees v. PBGC*, 991 F.2d 1415 (8th Cir. 1993).

> with the other requirements of "this subsection." These requirements include a court adjudication. *See* 29 U.S.C.A. § 1342(c) (first sentence). Congress, therefore, expressly dispensed with the necessity of a court adjudication in these cases.[39]

Plaintiffs attempt to dismiss *Jones & Laughlin* in a footnote by inaccurately characterizing the Second Circuit's interpretation of § 1342(c) as mere *dicta*.[40] In fact, the interpretation of § 1342(c) was a key issue in the decision. The Court specifically held:

> [h]aving concluded that no pre-termination court adjudication is required when PBGC and the plan administrator agree to terminate, we reject the Union's claimed statutory right to pre-termination notice; and
>
> We conclude that notice and a court adjudication prior to the termination of the plans are not required . . . .[41]

This two-alternative structure for termination procedures in § 1342(c) is reflected throughout the termination process in Title IV. The language of § 1348 lays out different procedures for setting a termination date based on which path is taken: (1) for cases with a termination and trusteeship agreement, the termination date is the agreed-upon date, and (2) for cases where there is no termination and trusteeship agreement, the termination date is set by the court. This also is

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[39] 824 F.2d 197, 200-02 (2d. Cir. 1987).

[40] *See* Plaintiffs' Moving Brf. at 119, n.14.

[41] *Id.*

paralleled by the language in § 1342(b), where a trustee can be appointed by (1) a court decree, or (2) an agreement between PBGC and a plan administrator.

b. Contrary to Plaintiffs' interpretation, § 1342(c) clearly says that PBGC "may" apply for a court order, not "must".

Plaintiffs argue that "ERISA requires the PBGC to 'apply to the appropriate United States District Court for a decree adjudicating that the plan must be terminated'" and that the "statute forbids PBGC" from terminating a pension plan by agreement with the plan administrator.[42] There is no such requirement in the law. The statute only says that PBGC "*may* apply to the appropriate United States District Court for a decree adjudicating that the plan must be terminated."[43] And, "may" is defined as expressing permission, not obligation.[44] The statute further

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[42] Plaintiffs' Moving Brf. at 111-12. It is noteworthy that when it suited Plaintiffs' purpose in the proceedings before the Bankruptcy Court in July 2009, the Plaintiffs themselves agreed with and adopted in their pleadings the same plain reading of § 1342(c) which authorizes plan termination through an agreement without a court decree. *See* Plaintiffs' POR Objection at 4-5, 15 (Menke Decl. Ex. 2, Docket No. 304-2) ("[Procedures involving a hearing in a federal district court] can be bypassed in the event of an agreement between the Plan Administrator (i.e., Delphi's Excom) and the PBGC [. . .]"); *see also id.* at 16 ("[t]he PBGC can utilize so-called 'summary termination' procedures *only if* the PBGC and the plan administrator agree between themselves to terminate the plan, and only if they agree on the appointment of a trustee [. . .]").

[43] 29 U.S.C. § 1342(c) (emphasis added).

[44] Bryan Garner, *Garner's Dictionary of Legal Usage* 568 (3d ed. 2011) and *Black's Law Dictionary* 1127 (10th ed. 2014).

explicitly states that PBGC and the plan administrator may agree that a plan should be terminated and agree to an appointment of a trustee "*without proceeding in accordance with the requirements of this subsection*."[45] In other words, the express language of the statute provides that if, as in this case, there is a Termination Agreement between the plan administrator and PBGC, none of the other requirements under § 1342(c) are applicable.

Despite this clear statutory language and the consistent interpretation by the U.S. Circuit Courts that have addressed the issue, Plaintiffs persist in making the argument that the statute means something other than what it says, and that the fourth sentence in § 1342(c) somehow provides that, while PBGC and a plan administrator may agree to terminate a plan, such an agreement does not result in plan termination. Plaintiffs even cite inapplicable statutory history to make the claim that Congress meant something other than what is actually said in the statute. But, as the Supreme Court has emphasized, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[46]

But even if, as Plaintiffs seem to suggest (contrary to the plain meaning of the text), the fourth sentence of § 1342(c) deals solely with the powers of the

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[45] 29 U.S.C. § 1342(c) (emphasis added).

[46] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted).

trustee, those powers include the power to terminate the plan. As stated in the third sentence of § 1342(c), the court in its decree appoints a trustee "to terminate the plan in accordance with the provisions of this subtitle." The powers given the trustee "to terminate the plan" are those set out in § 1342(d)(1). Under the fourth sentence of § 1342(c), when PBGC and a plan administrator enter into a termination and trusteeship agreement, the trustee appointed under such agreement is granted the exact same § 1342(d)(1) powers to terminate the plan as is a trustee appointed by a court.

Indeed, Plaintiffs concede in their brief that a trustee appointed by a termination and trusteeship agreement "possesses the same powers and duties as a trustee designated by a court decree."[47] Thus, the fourth sentence of § 1342(c) plainly authorizes plan termination by agreement, even if, as Plaintiffs argue, its focus is on the powers of the trustee. Accordingly, 29 U.S.C. § 1342(c) expressly permits termination of any pension plan by agreement between PBGC and the plan administrator,[48] and Plaintiffs are not entitled to summary judgment on Count 1 of

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[47] Plaintiffs' Moving Brf. at 123.

[48] The provision in § 1342(a) mandating incorporation of the same procedural safeguards as afforded in other plan terminations, if PBGC prescribes expedited procedures for small plan termination, is consistent with the plain meaning of § 1342(c). That provision merely mandates that PBGC cannot eliminate the court order path to termination as an alternative to the termination by agreement path if PBGC promulgates expedited procedures. In any event, PBGC has not chosen to

their Second Amended Complaint.

III. Plaintiffs are not entitled to Summary Judgment on Count 2, because Delphi's agreement with PBGC to terminate the Salaried Plan was not subject to fiduciary obligations.

As an initial matter, Count 2 is misplaced in the context of a lawsuit against PBGC. In Count 2, Plaintiffs allege that Delphi violated a fiduciary duty to the Salaried Plan's participants and beneficiaries in signing the Termination Agreement and then demand that PBGC somehow be held liable for Delphi's alleged breach. But, the fiduciary breach claim against Delphi has already been adjudicated. Plaintiffs made the same allegations in the Bankruptcy Court in their opposition to Delphi's plan of reorganization.[49] And, the Bankruptcy Court rejected Plaintiffs' allegations and arguments and denied that claim in a final, non-appealable order.[50] There is no reason or basis for the Court to re-hear this issue and seek somehow to overturn the final order of the Bankruptcy Court. That is particularly the case here, where Delphi, the actual target of the allegation, is not before the Court to defend itself and, indeed, given its liquidation, cannot defend itself.

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implement a simplified path for termination of small plans. PBGC follows the procedures set forth in § 1342(a) and (c) for all terminations.

[49] *See* Plaintiffs' POR Objection at 8-10.

[50] *See* Confirmation Order.

But if this Court were to revisit the issue, then this Court must reach the same conclusion as the Bankruptcy Court, because the Supreme Court has made clear that an employer's decision to terminate a pension plan while the employer is liquidating in bankruptcy is a settlor function, not a fiduciary function.[51] This issue is discussed at length in PBGC's Moving Brief at 23-27, and those arguments are incorporated herein by reference.

IV. Plaintiffs are not entitled to Summary Judgment on Count 3, because Plan termination by agreement between PBGC and the plan administrator did not violate the due process clause.

Plaintiffs allege that termination of the Salaried Plan by agreement was a violation of their Due Process rights. But as argued at greater length in PBGC's Moving Brief, Plan termination by agreement does not violate due process, because (1) Plaintiffs do not have a protected property interest in the full amount of their vested benefits upon termination of their underfunded pension plan; and (2) even if they did, PBGC did not deprive Plaintiffs of such property interest, and no advance notice or hearing was required before PBGC and the plan administrator agreed to Plan termination.

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[51] *See Beck v. Pace Int'l Union*, 551 U.S. 96, 104 (2007); *see also* PBGC's Moving Brief at 23-27.

The Supreme Court has stated that "[a] party challenging governmental action as an unconstitutional taking bears a substantial burden."[52] Under Sixth Circuit law, to establish violation of due process, Plaintiffs must show (1) that they were deprived of a protected liberty or property interest, and (2) that such deprivation occurred without the requisite due process of law.[53] The Supreme Court has long held that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[54]

a. Plaintiffs do not have a protected property interest in the difference between their vested pension benefits and the amount due to them following plan termination.

Plaintiffs here do not have a protected property interest in the full amount of their vested benefits upon termination of their underfunded pension plan. The Supreme Court held that "[to] have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a

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[52] *See Eastern Enters. v. Apfel,* 524 U.S. 498, 523 (1998).

[53] *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby*, 470 F.3d 286, 296, (6th Cir. 2006) (citing *Thomas v. Cohen*, 304 F.3d 563, 576 (6th Cir. 2002); *Bangura v. Hansen*, 434 F.3d 487, 496 (6th Cir. 2006)). *See also Puckett v. Lexington-Fayette Urban Cnty. Gov't*, 833 F.3d 590, 604–05 (6th Cir. 2016) (hereinafter, *Puckett II*); *Jones & Laughlin*, 824 F.2d at 201 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542-43 (1985)).

[54] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[55] While Plaintiffs insist that they have a protected property interest in the full amount of their vested benefits under the Salaried Plan, the Salaried Plan does not promise that vested benefits will be paid in full in all circumstances.[56]

In the Salaried Plan document, Delphi expressly reserved the right to terminate the Plan. And in the event of termination, the Salaried Plan documents set forth how the participants' benefits will be reduced if the Plan terminates without assets sufficient to pay the full amount of vested benefits.[57] The Plan document further provided that upon termination of the Plan, the "right of all affected employees to benefits accrued to the date of such termination . . . is nonforfeitable," *but only* "*to the extent funded as of such date*."[58] Since the Salaried Plan was underfunded when it terminated, Plaintiffs do not have a

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[55] *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

[56] *See* Menke Decl., Ex. 9, Delphi Retirement Program for Salaried Employees at 118-22.

[57] *Id.*

[58] *Id.* at 121 (emphasis added).

property interest in the full amount of their vested benefits – only the portion of that benefit that was covered by the available, but insufficient, assets in the Plan.[59]

The cases Plaintiffs cite in support of their argument that they had a property interest in the full amount of their vested benefits are irrelevant to this case. Those cases relate to state or local governments that, in their capacity as an employer, promised certain benefits to their employees and then allegedly deprived their employees of such promised benefits.[60] Those cases have no application to the facts here. This is not a case where the government, as an employer, promised its employees certain benefits and allegedly deprived them of such promised benefits. Here, it was Delphi, not PBGC, who was the employer that promised Delphi employees certain amounts of pension benefits and was unable to keep its promise due to its liquidation. And, again, because of Delphi's inability to keep that promise, PBGC stepped in to cover the payment of certain amounts of

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[59] *See Jones & Laughlin*, 824 F.2d at 201 (plan participants' "reasonable expectancy affected by the termination, moreover, must to some extent reflect the possibility of termination"). Moreover, because ERISA provides that participants receive the greater of their funded benefit or their guaranteed benefit, no participant is deprived of any funded benefits when PBGC becomes trustee of a terminated pension plan.

[60] *See McDarby v. Dinkins*, 907 F.2d 1334 (2d Cir. 1990) (New York City police officer challenging denial of city accident disability pension); *Flannelly v. Bd. of Trs. Of the N.Y.C. Police Pension Fund*, 6 F. Supp. 2d 266 (S.D.N.Y. 1998) (same); *Ginaitt v. Haronian*, 806 F. Supp. 311 (D.R.I. 1992) (City of Warwick fireman challenging termination of city disability pension payments and medical benefits).

Plaintiffs' benefits that they would not otherwise have been able to receive due to Delphi's demise. Plaintiffs cannot show that PBGC deprived Plaintiffs of a protected property interest.

b. Assuming *arguendo* that Plaintiffs have a protected property interest, PBGC did not deprive Plaintiffs of such interest.

Assuming *arguendo* that Plaintiffs had a property interest in their full vested benefits, Plaintiffs must show that PBGC deprived them of such benefit. Here, far from depriving Plaintiffs of any benefits, PBGC is *giving* Plaintiffs additional benefits that they would not have received but for PBGC taking responsibility for the Salaried Plan upon Delphi's demise. To the extent that Plaintiffs do not receive the full amount of their vested benefit, it is because *Delphi* failed to ensure that the Salaried Plan pension fund was large enough to pay all the benefits promised to the participants, and because Delphi liquidated in bankruptcy and became unable to pay any additional amounts into that fund. Delphi liquidated, and if the Salaried Plan were left to pay participants' benefits solely from its own assets, it would have been short roughly two billion dollars.

c. Even assuming *arguendo* that PBGC deprived Plaintiffs of a protected property interest, due process did not require advance notice and a hearing before PBGC and the plan administrator agreed upon plan termination.

Under the Supreme Court's *Mathews* test, which sets forth how courts are to determine what process is required when a protected property interest is taken,

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[61]

Plaintiffs would lead the Court to believe that it is writing on a blank slate when applying the *Mathews* test to PBGC's pension benefit guarantee. But the Second Circuit explicitly held in *Jones & Laughlin Hourly Pension Plan* that PBGC's agreement with a plan administrator to terminate a pension plan, executed without prior notice and hearing to participants and their labor representatives, did not violate participants' due process rights for the following reasons:

(1) the affected interest, under the first prong of the *Matthews* test, was not compelling because benefits may not be reduced below the limit of ERISA's guarantee under 29 U.S.C. § 1322;

(2) for the second prong, Title IV of ERISA contains "ample post-deprivation remedies" for participants – aggrieved parties may sue PBGC under 29 U.S.C. § 1303(f), and PBGC can restore the plan if labor

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[61] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (citations omitted); *see Gunasekera v. Irvin*, 551 F.3d 461, 470 (6th Cir. 2009); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 639 (6th Cir. 2005); *Molnar v. Care House*, 574 F. Supp. 2d 772, 797 (E.D. Mich. 2008).

negotiations obviate the need to terminate it; and

(3) for the third prong, the government's countervailing interest – "sharply tips the balance" in PBGC's favor, as "[m]assive delays would result from affording court hearings to thousands of retirees. . . . The effect of the delays, moreover, would be exacerbated by the concomitant accrual of greater benefits and service as the plans continued."[62]

The *Jones & Laughlin* result is completely applicable here. PBGC's payment of benefits to Plaintiffs made in accordance with ERISA and PBGC regulations,[63] if it is a deprivation at all, is not a deprivation that requires PBGC to provide pre-deprivation due process righPts. Since the Salaried Plan has over 15,000 participants,[64] the pre-termination proceedings that Plaintiffs desire similarly would delay PBGC administration of the Salaried Plan – possibly for years if the history of this litigation is any guide – while the risks of plan abandonment, increasing benefit liabilities, and interruption of benefits to

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[62] *Jones & Laughlin*, 824 F.2d at 201-02; *see also United Steelworkers of Am., AFL-CIO, CLC v. United Eng'g, Inc*., 839 F. Supp. 1279, 1284 (N.D. Ohio 1993), aff'd, 52 F.3d 1386 (6th Cir. 1995) ("Requiring PBGC to hold hearings involving employees each time PBGC conducted termination proceedings could very likely constitute a substantial burden on PBGC.")

[63] 29 U.S.C. § 1322(a), (b); 29 C.F.R. §§ 4022.61-4022.63 (2009).

[64] Second Amended Complaint ¶ 16.

participants would continue to mount. These dangers were particularly relevant as Delphi liquidated and did not have any infrastructure to administer the Salaried Plan.[65] Therefore, neither advance notice nor a hearing was required before PBGC and the plan administrator agreed upon plan termination.

V. Plaintiffs are not entitled to Summary Judgment on Count 4 of the Second Amended Complaint, because the termination complied with 29 U.S.C §§ 1342(a) and (c).

Plaintiffs argue that PBGC's actions in terminating the pension plan were arbitrary and capricious because the plan termination was allegedly not in the best interest of participants.[66] Plaintiffs claim that PBGC's decision to agree with Delphi that the plan should be terminated should be reviewed under the criteria provided for obtaining a court decree under § 1342(c). Such argument simply disregards the plain language of 29 U.S.C. § 1342 and Sixth Circuit precedent that

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[65] *Jones & Laughlin*, 824 F.2d at 202.

[66] PBGC notes that while the Second Amended Complaint alleges that PBGC violated the requirements under § 1342(a), Plaintiff's Memo in Support of its Motion for Summary Judgment does not appear to discuss that assertion. To the extent that the Plaintiffs still allege that PBGC did not meet the requirements under § 1342(a), such allegation is not supported by the undisputed facts. *See supra* footnote 34.

recognized that the § 1342 termination procedures under ERISA exist "precisely so that PBGC can protect its own financial interests."[67]

First, as the Bankruptcy Court already held, 29 U.S.C. § 1342 "permits the PBGC and the plan administrator to agree to termination of a plan without an adjudication."[68] As discussed in section 2 of the Argument above, the language of § 1342(c) is clear that if PBGC and Delphi entered into the Termination Agreement, none of the other procedural requirements were applicable and the Termination Agreement satisfied § 1342(c). Plaintiffs' argument to the contrary is nothing more than an invitation to the Court to ignore the language of, and policy decisions by, Congress, a step that the Supreme Court has clearly held that this Court may not take.[69]

Second, although the statute expressly excuses PBGC from satisfying any of the § 1342(c) standards, PBGC actually did so in this case. 29 U.S.C. § 1342(c) states that PBGC "may [. . .] apply to the appropriate United States district court

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[67] *PBGC v. Republic Techs. Int'l, LLC*, 386 F.3d, 659, 668 (6th Cir. 2004) (citing 29 U.S.C. § 1342(c)); *see also PBGC v. Pension Comm. of Pan Am. World Airways, Inc. (In re Pan Am. World Airways Inc. Coop. Ret. Income Plan)*, 777 F. Supp. 1179, 1182-83 (S.D.N.Y. 1991).

[68] Menke Decl., Ex. 4, Confirmation Order at 81.

[69] *See Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 95 n. 34 (1981) ("once Congress addresses a subject . . ., the task of the federal courts is to interpret and apply statutory law, not to create common law").

for a decree adjudicating that the plan must be terminated" to accomplish one of the three following objectives: (1) "to protect the interests of the participants"; or (2) "to avoid any unreasonable deterioration of the financial condition of the plan"; or (3) "to avoid [. . .] any unreasonable increase in the liability of the fund."[70] Only one of those three objectives need be met to terminate a plan. Here, the undisputed facts and the Administrative Record show that the third objective was clearly met. The Administrative Record clearly shows that PBGC would have incurred an unreasonable increase in the liability of its fund if the Salaried Plan was not terminated before certain subsidiaries left the controlled group.[71] Accordingly, Plaintiffs are not entitled to summary judgment on Count 4.

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[70] 29 U.S.C. § 1342(c) (emphasis added).

[71] *See* AR 1-9.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in PBGC's Moving Brief, PBGC respectfully requests that this Court grant PBGC's Motion for Summary Judgment and deny Plaintiffs' motion.

Date: October 19, 2018

Respectfully submitted,

/s/ C. Wayne Owen, Jr.
Judith Starr, General Counsel
Kartar Khalsa, Deputy General Counsel
John A. Menke
C. Wayne Owen, Jr.
Craig T. Fessenden
Assistant General Counsels
Erin C. Kim
Elisabeth Fry
Attorneys
PENSION BENEFIT GUARANTY CORP.
Office of the General Counsel
1200 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 326-4020, ext. 3204
Fax: (202) 326-4112
E-Mail: owen.wayne@pbgc.gov
Attorneys for Defendant

Local Counsel:

Matthew J. Schneider
UNITED STATES ATTORNEY
Peter A. Caplan
Chief of the Civil Division
Eastern District of Michigan
211 West Fort Street, Suite 2001
Detroit, MI 48226
Phone: (313) 226-9784
Email: peter.caplan@usdoj.gov

Certificate of Service

I hereby certify that on October 19, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

ashelley@milchev.com (Anthony F. Shelley)
totoole@milchev.com (Timothy P. O'Toole)
mkhalil@milchev.com (Michael N. Khalil)
alan@jacobweingarten.com (Alan J. Schwartz)
david.glass@usdoj.gov (David M. Glass)

/s/ C. Wayne Owen, Jr.
C. Wayne Owen, Jr.