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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 **THIS SET OF DOCUMENTS RELATING TO SUBMISSIONS FOR SUMMARY JUDGMENT BY DSRA INC. AND PBGC ARE COMPLEX AND HEAVILY REDACTED, THESE DOCUMENTS SHOULD BE REFERENCED IN CONJUNCTION WITH THE DETAILED EXPLANATIONS PROVIDED TO REGISTERED MEMBERS OF DSRA BY CONFIDENTIAL EBLASTS OVER THE PERIOD THESE DOCUMENTS WERE FILED.**

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Dated: October 19, 2018

Respectfully submitted,

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STATEMENT OF ISSUES PRESENTED

(1) Defendant Pension Benefit Guaranty Corporation ("PBGC") terminated Plaintiffs' pension plan (the "Plan") in the summer of 2009 pursuant to an agreement between the PBGC and the pension plan's administrator. Plaintiffs' Second Amended Complaint raises important constitutional and statutory questions regarding whether a hearing before this Court was required to protect the rights and interests of the Plan's participants, including Plaintiffs, and whether, if not, the PBGC's termination of the Plan nonetheless was arbitrary and capricious. The first question presented is whether, in order to avoid reaching those constitutional and statutory questions, the record demonstrates that the PBGC would have carried its burden of proof in a hearing before this Court, conducted pursuant to 29 U.S.C. § 1342(c), by demonstrating that the Plan had to be terminated as of July 31, 2009, to avoid any unreasonable increase in the liability of the PBGC's insurance fund? Plaintiffs answer "no."

(2) Was the PBGC's termination of the Plan invalid because the PBGC failed to obtain a Court order, under 29 U.S.C. § 1342(c), adjudicating that the Plan must be terminated in order to avoid any unreasonable increase in the liability of the PBGC's insurance fund? Plaintiffs answer "yes."

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(3) The actions of plan administrators are subject to ERISA's fiduciary duty of loyalty, one of the highest duties known under the law. This duty of loyalty requires that a plan administrator act with an eye focused solely on the best interests of the plan's participants, and avoid situations where the administrator's own interests conflict with those of the participants. Is the PBGC's termination of the Plan additionally invalid under 29 U.S.C. § 1342(c), given that the PBGC relies upon a plan termination agreement entered with a plan administrator that put its own corporate interests ahead of those of the Plan's participants? Plaintiffs answer "yes."

(4) Did the PBGC's termination of the Plan also violate the U.S. Constitution because it deprived Plaintiffs of their vested pension benefits (and the rights associated with those benefits) with no pre-deprivation process at all? Plaintiffs answer "yes."

(5) Finally, given that there were viable alternatives to termination that the PBGC failed to pursue, given that the PBGC acquiesced in the Plan's termination in service to interests beyond the statutory considerations enumerated in 29 U.S.C. § 1342(c), and given that the termination otherwise rested on irrelevant factors, were the PBGC's actions in terminating the Plan arbitrary and capricious and therefore invalid under the Administrative Procedures Act? Plaintiffs answer "yes."

STATEMENT OF CONTROLLING AUTHORITIES

1. In order to terminate a pension plan under 29 U.S.C. § 1342, ERISA requires that the PBGC obtain a court decree adjudicating that a plan must be terminated. 29 U.S.C. § 1342(c).

2. "[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).

3. When a court engages in statutory construction, it "must read the words in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2492-93 (2015) (internal quotation omitted). A court "cannot interpret federal statutes to negate their own stated purposes." *Id*. at 2493.

4. The "official policy of ERISA is to protect 'the interests of participants in employee benefit plans and their beneficiaries' while 'establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans.'" *PBGC v. Findlay Indus., Inc.*, No. 17-3520, 2018 U.S. App. LEXIS 25071, at *30 (6th Cir. Sept. 4, 2018) (quoting 29 U.S.C. § 1001(b)).

5. Where an otherwise acceptable construction of a statute would raise serious constitutional problems, a court should construe the statute to

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avoid such problems unless such construction is plainly contrary to the intent of Congress. *Public Citizen v. DOJ*, 491 U.S. 440, 465-66 (1989); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

6. "[ERISA] says that a 'person is a fiduciary with respect to a plan,' and therefore subject to ERISA fiduciary duties, 'to the extent' that he or she 'exercises any discretionary authority or discretionary control respecting management' of the plan, or 'has any discretionary authority or discretionary responsibility in the administration' of the plan." *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996) (citing 29 U.S.C. § 1002(21)(A)). Where an employer has dual roles as plan sponsor and plan administrator, the employer's fiduciary duties are implicated when it acts in its capacity as plan administrator. *Id*. at 502-05.

7. Any action a plan administrator undertakes in implementing an employer's decision to terminate a plan, including the selection of a particular method of plan termination, is a fiduciary function subject to fiduciary obligations. *Beck v. PACE Int'l Union*, 551 U.S. 96, 101 (2007).

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8. The Constitution generally requires that people be provide an opportunity for a meaningful hearing before they are deprived of their property. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

9. In situations where the government feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of a post-deprivation remedy. *Zinermon v. Burch*, 494 U.S. 113, 132 (1990).

10. In it September 1, 2011 Order, this Court held that it would evaluate under Count 4 whether termination of the Salaried Plan would have been appropriate in July 2009 if, as Plaintiffs contend, Defendants were required under 29 U.S.C. § 1342(c) to file before this court for a decree adjudicating that the Salaried Plan must be terminated. *See* ECF No. 193 at 7. The Court further held that in addressing this question "and assuming that a hearing was required before termination, this Court, pursuant to *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006), w[ould] conduct a *de novo* review of the PBGC's decision to terminate the Plan." *Id*. at 5. Because "'[t]he only authority that the PBGC has under § 1342 is to ask a court for relief,'" the PBGC, "'[a]s the plaintiff,'" bears the "'burden of persuasion.'" *Id*. (quoting *UAL Corp.*, 468 F.3d at 449-50).

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EXHIBIT LIST TO PLAINTIFFS' OPPOSITION TO DEFENDANT PBGC'S MOTION FOR SUMMARY JUDGMENT

Exhibit	Description
143	Additional Excerpts of July 29, 2009 Hearing Transcript from *In re Delphi Corp.*, S.D.N.Y. ECF No. 18829

INTRODUCTION

In the summer of 2009, Defendant Pension Benefit Guaranty Corporation ("PBGC") terminated the Delphi Retirement Program for Salaried Employees ("Salaried Plan" or the "Plan"), a defined benefit pension plan covering roughly 20,000 salaried employees and retirees of Delphi Corporation ("Delphi"). Because of the Plan's termination, the Plan's participants lost more than $500 million in vested pension benefits, and the insurance fund the PBGC administers suffered a $1.5 billion loss. This lawsuit challenges the PBGC's termination of the Plan.

Plaintiffs' lawsuit presents four grounds for invalidating the PBGC's termination of their pension plan. First, 29 U.S.C. § 1342(c)(1), in the Employee Retirement Income Security Act of 1974 ("ERISA"), which governs PBGC-initiated plan terminations, requires that the PBGC obtain a court adjudication that termination is necessary under one of three statutory criteria; indeed that subsection is entitled "Adjudication That Plan Must Be Terminated." Here, however, despite initially filing an action in this Court to obtain the requisite adjudication, the PBGC purported to accomplish the termination pursuant to a "termination and trusteeship agreement" with the Plan's administrator, for the explicit purpose of evading judicial review. On this ground, the termination is procedurally defective (as with the second and third grounds described below).

Second, Delphi purported to execute the "termination and trusteeship agreement" pursuant to its powers as the Plan's administrator, meaning the act was subject to ERISA's fiduciary duty of loyalty. But instead of putting the interests of the Plan's participants first in considering whether to enter the agreement (as the duty of loyalty requires), Delphi entered into that agreement for its own corporate interests, thereby irretrievably tainting the agreement the PBGC used to consummate the termination and providing a separate and alternative basis to invalidate the termination.

Third, "due process requires that people receive meaningful hearings before the government takes away their property for good." *Hicks v. Colvin*, No. 16-154, 2016 U.S. Dist. LEXIS 176888, at *6 (E.D. Ky. Dec. 21, 2016) (citing *Mathews v. Eldridge*, 424 U.S. 319, 339-40 (1976)). "Although no two hearings are alike, all 'meaningful' hearings give people an opportunity to rebut the government's assertions about facts that affect their rights." *Id*. It is undisputed that the PBGC did not provide Plaintiffs with an opportunity to challenge its factual determinations in a meaningful way before terminating the Salaried Plan and wiping out hundreds of millions of dollars in vested pension benefits. Accordingly, the PBGC's termination of the Plan without a hearing violated the Fifth Amendment's Due Process Clause, in that it deprived Plaintiffs of a significant property interest without the requisite pre-deprivation process.

Fourth and finally, Plaintiffs allege that the PBGC's actions undertaken in connection with the Plan's termination were arbitrary and capricious, and that the termination of the Plan was invalid because it was avoidable, and thus that the PBGC could not satisfy the standards for termination under 29 U.S.C. § 1342(a) and (c).

Delphi was originally a division of General Motors Company ("GM"), and the Plan's participants spent most of their careers as GM employees, earning the bulk of their pension benefits as participants in GM's salaried pension plan. Even after Delphi was spun off from GM in 1999, it remained GM's largest parts supplier for the next decade.

In the fall of 2008, Delphi proposed that GM reassume Delphi's pension plans. The PBGC supported this effort, using statutory liens and claims it possessed against Delphi assets as leverage to promote a GM reassumption. However, the PBGC abruptly ceased its efforts to save the Salaried Plan and acquiesced in its termination, following the intervention of the United States Department of Treasury ("Treasury"), which was at that time attempting to restructure the auto industry in general, and GM in particular.

Count 4 alleges that the PBGC's termination actions resulted from the consideration of political factors rather than the relevant statutory criteria, and indeed the PBGC could have prevented the Plan's termination but for influence of these extra-statutory considerations. Because the PBGC's actions in undertaking the termination– even if procedurally sufficient – are reviewable substantively to determine whether they were arbitrary or capricious, and because those actions were arbitrary and capricious given that the termination was avoidable and contrary to the relevant statutory criteria, the termination must be set aside.

In 2010, the Court denied without prejudice the PBGC's dispositive motions as to Counts 1-4, and specifically permitted discovery to proceed as to Plaintiffs' Second Amended Complaint. Nonetheless, the PBGC resisted any discovery for approximately one year. Plaintiffs, accordingly, moved to compel, which was effectively granted by the Court's September 1, 2011 Order, ECF No. 193, (the "September 1, 2011 Order"). In the September 1, 2011 Order, the Court ordered the Parties post-discovery to submit dispositive motions addressing:

> under Count 4 whether termination of the Salaried Plan would have been appropriate in July 2009 if, as Plaintiffs contend, Defendants were required under 29 U.S.C. § 1342(c) to file before this 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.'

Id. at 7 (quoting 29 U.S.C. § 1342(c)).

The Court further held that in addressing this question "and assuming that a hearing was required before termination, this Court, pursuant to *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006), w[ould] conduct a *de novo* review of the PBGC's decision to terminate the Plan." *Id*. at 5. Because "'[t]he only authority that the PBGC has under § 1342 is to ask a court for relief,'" the PBGC, "'[a]s the plaintiff,'" bears the "'burden of persuasion.'" *Id*. (quoting *UAL Corp*., 468 F.3d at 449-50). The Court said that, if the PBGC fails to demonstrate that termination was proper under the factors set forth in § 1342(c), then the Court will consider "the remainder of the complaint pertaining to the PBGC." *Id*. The Court established this order of inquiry as a matter of judicial economy, noting that it could potentially avoid the constitutional and other procedural challenges to the PBGC's termination of the Plan if the PBGC could prove that conducting a judicial adjudication of the propriety of termination (under the standard of review applicable in such proceedings) would have nonetheless led to the Plan's termination.

For the last seven years, Plaintiffs have fought costly battles to try and obtain discovery from the PBGC and Treasury relevant to the § 1342(c) question. *See* ECF No. 305, at 6-11. While discovery is still not complete, marshalling the evidence already assembled, Plaintiffs have filed a motion for summary judgment demonstrating that the PBGC cannot satisfy its burden of persuasion on whether the Plan would have been terminated in a lawful judicial adjudication under § 1342, because there were viable alternatives to termination, the most likely (though not only) option being a reassumption of the Salaried Plan into GM's still-existing salaried plan. *See* ECF No. 305.

As described in Plaintiffs' motion for summary judgment (and also below), because the PBGC had significant liens and claims over Delphi assets essential to GM's supply-chain, the PBGC had substantial leverage to negotiate a reassumption, and in fact not only had the PBGC had been actively advocating for this result prior to Treasury's intervention, but Delphi's unions used the same sort of leverage to negotiate significant pension benefits from Treasury (funded through the Troubled Asset Relief Program), and the GM entity surviving its restructuring ("New GM"). The PBGC's decision to stop advocating for a reassumption by GM's salaried plan was unjustifiable in light of the PBGC's significant leverage and the relative affordability of a reassumption to New GM.

Additionally, the PBGC could have used its leverage, including its liens and claims on Delphi assets, to help negotiate an assumption of the Salaried Plan by the various parties that were competing to purchase Delphi's business and assets. The PBGC failed even to explore this possibility, notwithstanding the fact that it routinely does so in other cases, and it had a variety of tools available to it to make a pension assumption a competitive advantage to potential purchasers. Nonetheless, the PBGC acquiesced in the Plan's termination, not because of anything related to its statutory role under ERISA, but as a result of pressure imposed by the Treasury and the related Auto Task Force to support their chosen route to restructure the auto industry in general and GM in particular.

The PBGC's motion for summary judgment acknowledges none of these inconvenient facts, all of which are directly material to the question of whether the PBGC could have satisfied the § 1342(c) termination criteria. The PBGC does not, for example, acknowledge its interactions with Treasury, let alone try and defend them. Similarly, the PBGC makes no attempt to explain why it abandoned its efforts to advocate for GM reassumption of the Plan after Treasury's intervention, or why the PBGC's leverage was sufficient to negotiate a roughly $700 million recovery, but insufficient to save the Plan at a portion of that cost. Indeed, the PBGC glosses over the question this Court posed in its September 1, 2011 Order, and the actual facts surrounding the termination, avoiding any discussion of the question until the last 3 pages of its summary judgment brief. *See* ECF No. 304 at 37-40. The PBGC's superficial argument in these 3 pages does not come close to satisfying the PBGC's burden, which is likely why it tried to evade the question altogether.

Because the PBGC has failed to meet its burden on the § 1342(c) question, the remaining claims are ripe for resolution. As demonstrated below, the PBGC's arguments on those claims fail as a matter of law. While the PBGC's arguments suffer from a variety of flaws, there is a common thread. Even though the PBGC exists to prevent the personal tragedy associated with unnecessary pension terminations, at every turn the PBGC argues here for an interpretation of ERISA or the Constitution that would undermine that purpose. Indeed, the PBGC consistently asks the Court to interpret ERISA in a way that would eviscerate every judicial safeguard that Congress put in place to ensure participant rights, making a mockery of ERISA's principal purpose – to ensure "that 'if a worker has been promised a defined pension benefit *upon retirement*-and if he has fulfilled whatever conditions are required to obtain a vested benefit-he actually will receive it.'" *Thornton v. Graphic Commcn's Conf. of Int'l Bhd. of Teamsters Supp. Ret. & Disability Fund*, 566 F.3d 597, 607 (6th Cir. 2009) (quoting *Nachman Corp. v. PBGC*, 446 U.S. 359, 375 (1980)). Because a court "cannot interpret federal statutes to negate their own stated purposes," *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) (quotation marks and citation omitted), the PBGC's statutory interpretations must be rejected.

The need for ERISA's judicial safeguards is well demonstrated by this case, which raises serious allegations of government wrongdoing. Judge Sullivan (who has been overseeing the discovery dispute with Treasury for the last six years), recently issued a decision holding that Plaintiffs' need for roughly 60 Treasury documents outweighs Treasury's assertion of the presidential communications privilege. *See U.S. Dep't of Treasury v. PBGC*, No. 12-mc-100, 2018 U.S. Dist.

LEXIS 176338 (D.D.C. Oct. 15, 2018).[1] In that opinion, the court noted the gravity of this lawsuit, in which Plaintiffs have alleged that "a class of over 20,000 was sold out by the government simply to bail out the corporate interests of the auto industry," and that the PBGC, who 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." *Id*. at *26, *27.

In short, Plaintiffs respectfully request that the PBGC's motion for summary judgment be denied.

<u>COUNTER-STATEMENT OF UNDISPUTED MATERIAL FACTS</u>

In their brief in support of their own motion for summary judgment, ECF No. 305, Plaintiffs include a statement of undisputed material facts ("SUMF"). *Id*. at 11-73. Plaintiffs incorporate those facts here, and will refer to them throughout this brief where relevant. Plaintiffs' Statement of Undisputed Material Facts summarizes the lengthy history of the Salaried Plan's termination, and shows: (1) that the PBGC – laudably – initially sought to save the Plan; (2) that the financial

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[1] Accordingly, Judge Sullivan found that the allegations here are sufficiently "grave," and the necessity for the Treasury documents sufficiently "dire," to order the production to Plaintiffs of the relevant portion of these 60 documents once it has conducted another *in camera* review to excise irrelevant portions. *See id*. at *38-39. Treasury is to provide those documents for *in camera* review on October 24, 2018. *Id*. at *39.

crisis of 2008 and the federal government's subsequent effort to rescue the auto industry through the Auto Task Force resulted in the PBGC being frozen out of discussions regarding the Salaried Plan's future, notwithstanding the PBGC's statutory obligations under ERISA; (3) that the Auto Task Force ultimately insisted that the Salaried Plan be terminated, acting consistently with political imperatives (not with the PBGC's statutory directives or even Delphi's or GM's wishes) that as little federal money as possible be used to ensure the auto industry's survival; and (4) that the federal government – also for political reasons – ensured full pensions for union-backed workers similarly situated to Plaintiffs, leaving the Salaried Plan as essentially the only "road kill" in the Auto Task Force saga.

STANDARD OF REVIEW

Summary judgment is warranted "if the record shows that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Wenk v. O'Reilly*, 783 F.3d 585, 593 (6th Cir. 2015) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). In determining whether summary judgment is proper, the Court "'must view the facts and any inferences reasonably drawn from them in the light most favorable to the nonmoving party.'" *Griffith v. Coburn*, 473 F.3d 650, 655 (6th Cir. 2007) (citation omitted).

As noted above, *supra*, p. 4-5, pursuant to its September 1, 2011 Order, the Court, in an exercise of judicial restraint, has asked the Parties to submit dispositive motions on whether, had a hearing been held prior to termination, the PBGC could have obtained an adjudication from the Court in July 2009 that the Salaried Plan's termination was necessary under 29 U.S.C. § 1342(c). *See* ECF No. 193 at 4. In addressing this question and assuming that a hearing was required before termination, the Court, pursuant to *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006), indicated that it would conduct a *de novo* review of the PBGC's decision to terminate the Plan under 29 U.S.C. § 1342(c). *See* ECF No. 193 at 5. Having the obligation to commence litigation under § 1342, the burden of proof to justify termination in that setting rests with the PBGC, as it "'bears the same burden of persuasion'" as the Antitrust Division of the Department of Justice would when it files suit under the Sherman Act. *Id.* (quoting *In re UAL Corp.*, 468 F.3d at 450). In turn, showing that the PBGC could not under the applicable standard of review succeed in terminating the Salaried Plan via a judicial adjudication under § 1342 – or at least that the result was open to question – would ensure that the Court needed to reach the threshold procedural claims raised by Plaintiffs (*i.e.*, that a termination by agreement violated ERISA and the Constitution).

Accordingly, the first question on the PBGC's motion is whether, after viewing the facts under a standard in which the PBGC bears the burden of proof, there is no genuine issue as to any material fact or as a matter of law that the PBGC could have obtained a decree from the Court in July 2009 terminating the Plan under § 1342(c). With the first question answered in the negative, the Court then evaluates Counts 1 through 4 to determine whether the PBGC has demonstrated an entitlement to summary judgment.

ARGUMENT

I. BECAUSE THERE WERE VIABLE ALTERNATIVES TO TERMINATION THAT THE PBGC COULD HAVE PURSUED, THE PBGC COULD NOT HAVE OBTAINED AN ORDER FROM THIS COURT ADJUDICATING THAT THE PLAN'S TERMINATION WAS NECESSARY UNDER § 1342(c), AND THE COURT SHOULD PROCEED TO CONSIDER COUNTS ONE THROUGH FOUR

Under § 1342(c), after initiating termination proceedings, the PBGC may apply to a United States district court "for a decree adjudicating that a 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." 29 U.S.C. § 1342(c)(1). However, the PBGC did not obtain the § 1342(c) adjudication here, instead purporting to terminate the Plan pursuant to an agreement between it and the Plan's administrator. As Plaintiffs demonstrate below, the PBGC could not have satisfied the statutory criteria at a § 1342(c) termination hearing because the Plan's termination was avoidable.

When it did initially apply to this Court for a decree of termination, The PBGC sought to justify the Plan's termination under § 1342(c)(1)'s third criterion, *i.e.*, that the Plan "must be terminated in order to avoid any unreasonable increase in the liability of the . . . fund."[2] *See* ECF No. 53 at AR000003; *see also PBGC v. Delphi Corp*, Case No. 2:09-cv-12876 (E.D. Mich., filed July 22, 2009).[3] The "fund" in question is the insurance fund used by the PBGC as Title IV's insurance guarantor, to pay the benefits guaranteed by ERISA. *See* 29 U.S.C. §§ 1301(a)(5), 1305(a). Judged by this statutory standard, the Plan's termination was patently unjustifiable. The Plan's termination *increased* the fund's liability by nearly $1.5 billion, and as the factual record demonstrates, that liability was entirely avoidable.

The PBGC had powerful negotiating leverage (especially, but not limited to, its liens and claims on Delphi assets) that it could (and should) have exercised to

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2 [redacted]

3 The PBGC continues to rely upon this justification in its motion for summary judgment. *See* ECF No. 304 at 39-40.

ensure the Plan's continuation. Indeed, the PBGC initially sought to use its leverage to persuade GM, the Plan's original sponsor, to reassume the Plan, and it eventually did use that leverage to negotiate with Treasury a $664 million *recovery* from New GM in exchange for the PBGC's release of its liens and claims on Delphi's assets. Had the PBGC instead used that leverage to negotiate a reassumption of the Salaried Plan into the GM salaried plan, not only could the PBGC have avoided the Plan's termination in the summer of 2009, the PBGC's own estimates show that the GM salaried plan could have been funded until at least 2018, at a lower cost to New GM than what it wound up paying to the PBGC as a recovery.

Additionally, during the spring of 2009, there were a number of businesses seriously considering purchasing Delphi's business, including Platinum Equity, Federal Mogul, and Delphi's DIP Lenders (who ultimately used Delphi's DIP debt to fund a credit purchase of a substantial portion of Delphi's foreign assets). The PBGC's standard practice in similar cases is actively to negotiate with potential acquirers to convince them to assume the pension plan of the acquired company, in exchange for the PBGC's support in their bids to acquire the particular business. Here, the PBGC had substantial leverage for such a negotiation given its liens and claims on Delphi's assets, and the PBGC could have made assumption even more palatable by offering to allow the new sponsor to share in the PBGC's $717 million recovery in order to fund contributions to the Salaried Plan. However, the PBGC, again inexplicably, engaged in no such negotiations.

Given that the PBGC ignored these viable alternatives to termination, the PBGC could not have demonstrated at a § 1342(c) hearing that the Plan's termination was necessary to avoid an unreasonable increase in the PBGC's insurance fund. *See PBGC v. United Air Lines, Inc.*, 436 F. Supp. 2d 909, 924 (N.D. Ill. 2006) (under § 1342(c), reasonableness is "measured in the context of PBGC's economic position, the dollar amount of PBGC's increased liability, and *the ability of PBGC to avoid that liability*)" (emphasis added). As shown below, because the record shows that the Plan's termination was avoidable, the PBGC was not entitled to a § 1342(c) adjudication.

A. GM's Dependence on Delphi Parts Provided the PBGC With Sufficient Leverage to Avoid the Plan's Termination

[redacted]

Accordingly, in the latter part of 2008, through the beginning of 2009, PBGC advisors, staff, and leadership advocated that the PBGC use its leverage with GM to cause GM to reassume the Delphi pension liability (from both the Salaried and

Hourly Plans) that it had shed in connection with Delphi's spin-off. *See, e.g.*, *id*. ¶¶ 17-19, 23, 27, 29, 31, 33, 40-42, 48.

The primary source of the PBGC's leverage was its liens and claims on Delphi assets related to the unfunded pension liabilities for Delphi's pension plans. *See, e.g.*, *id*. ¶¶ 17-19, 42, 48. As of July 21, 2009, the PBGC had perfected more than $195 million in statutory liens against Delphi assets on behalf of the Salaried Plan, and was asserting claims against the assets of Delphi's foreign, non-debtor controlled group members for the entire unfunded liability associated with Delphi's pension plans, giving rise to a lien [redacted] against those assets. *See* SUMF ¶ 105.

These liens and claims on Delphi assets were of significant operational and strategic concern to GM. From the time of the spin-off in 1999 through the time of the Plan's termination in 2009, Delphi was GM's largest parts supplier, and an interruption of Delphi parts could have had a crippling effect on GM and its ability to reorganize, providing the PBGC with powerful leverage to facilitate a GM reassumption of the Salaried Plan. *See, e.g.*, SUMF ¶¶ 15-18, 27, 28, 39, 42, 44-46 48, 53, 54, 78, 87, 89, 97, 105.

In the fall of 2008, Delphi proposed that GM re-assume the pension liabilities of some of its former employees, and the PBGC looked for ways to help facilitate the transfer. Using its foreign liens as "leverage," the PBGC helped

Delphi convince GM to assume over $2 billion in liabilities associated with Delphi's *Hourly Plan* covering union workers, in exchange for which the PBGC released over $1.2 billion worth of liens asserted against Delphi assets. *See id.* ¶ 17.

Beginning in the latter part of 2008, and throughout the early part of 2009, GM sought and received roughly $50 billion in TARP funding from the U.S. Treasury. *See id.* ¶¶ 20-21, 25, 39, 49, 51, 91. [redacted]

Because of GM's dependence on TARP financing, the determination regarding a GM pension transfer belonged ultimately to Treasury. *See, e.g.*, *id.* ¶¶ 50-51, 61, 70, 76, 78, 79, 85. [redacted] The PBGC continued this advocacy prior to the intervention of the Auto Task Force and Treasury's Auto Team in

Delphi issues. *See, e.g.*, *id*. ¶¶ 26, 29, 31-33, 40, 41, 47, 48. [redacted]

Beginning in mid-April 2009, the PBGC's Joe House and the Auto Team's Matt Feldman began a virtually exclusive coordination with one another regarding Delphi and Chrysler pension issues. *See id*. ¶ 62. From this point forward, the PBGC entirely ceased advocating for GM reassumption of the Salaried Plan, and indeed, Mr. House has testified these interactions were not "negotiations," and that he had no "recollection of trying to persuade Treasury of anything." *See id*. ¶¶ 64, 66. In contrast, Mr. Feldman began his discussions with the PBGC hoping "to reach an agreement where the [Salaried Plan] would be terminated and General Motors would assume the [Hourly Plan]." *See id*. ¶ 63. Between that mid-April discussion, and through the time of the Salaried Plan's termination, the PBGC made no effort to persuade Treasury to undertake efforts to save the Salaried Plan, [redacted]

The PBGC's failure to use its liens and claims to advocate with Treasury for New GM to reabsorb Delphi's Salaried Plan into the GM salaried plan is statutorily indefensible. Again, termination under § 1342(c) in this instance is only justifiable if the PBGC cannot avoid the loss in question. The PBGC's refusal to use its leverage to try and convince Treasury that New GM should have assumed these liabilities is, as a result, dispositive of the termination question, especially given how strong that leverage was.

During this time period, the Treasury was making determinations about which liabilities New GM would assume. "As explained by an Auto Team official in a deposition, the [§] 363 bankruptcy sale allowed New GM and the Auto Team to assume Old GM's assets and 'cherry-pick' the liabilities that a 'commercial buyer' would want and New GM would need." *See* ECF No. 308-4 (Pls.' Ex. 3) at 19. "GM's then-CFO Young told SIGTARP that GM and the Auto Team went down GM's balance sheet (including pensions and the supplier base), going over some line items in great detail." *Id*. at 19-20.

According to Treasury, "the strength of the negotiating parties during GM's bankruptcy and throughout labor negotiations was dictated by the leverage each group held." *Id*. at 21. The UAW, for example, "had significant leverage due to the threat of a labor disruption . . . . 'All you need is one missing part and it stops production.'" *Id*. at 22 (quoting a "GM official"). Additionally, the time constraints associated with Treasury's desire for a quick-rinse bankruptcy "was well known to the UAW and helped give it a bargaining advantage." *Id*. at 23. Further, "[t]he UAW had leverage because it knew and understood from

Treasury's public statements that Treasury was committed to reorganizing GM and not letting GM fail." *Id*. at 24. Among other things, the UAW was able to persuade Treasury and New GM to assume top-ups for its members that participated in the Hourly Plan, a liability that exceeded $1 billion. *Id*. at 14.

Similarly, in September 2009, after New GM's emergence from GM's bankruptcy proceedings, New GM agreed to honor the IUE's and USW's Delphi top-up agreements, at an estimated cost of $350 million because "there was a clear inference that IUE could strike at Delphi, which would have shut down GM. GM's then-CFO Young told SIGTARP 'If Delphi shut down, we shut down.'" *Id.* at 32. According to another GM official, "the unions got the agreement because liquidation of Delphi would have been a disaster for GM." *Id*. at n.38. According to SIGTARP, "New GM agreed to top up the smaller unions because of the leverage those unions had to prolong Delphi's bankruptcy or strike, which GM believed would significantly impact its ability to survive." *Id*. at 39.

The PBGC's liens and claims on Delphi's assets provided it with the same sort of leverage that the UAW and IUE exercised to convince Treasury to authorize pension top-ups by New GM. Again, the PBGC had liens and claims over Delphi plants that were critical to New GM's supply, meaning that the commercial necessity for removing those liens and claims warranted negotiation with the PBGC. *See* SUMF ¶¶ 15-18, 27, 28, 39, 42, 44-46, 48, 53, 54, 78, 87, 89, 97, 105.

Ultimately, the UAW, IUE, and the PBGC all possessed the same leverage vis-à-vis New GM, which was a threat to supply at a time when New GM simply could not afford uncertainty.

Further proof of the PBGC's leverage is that it was ultimately able to negotiate with Treasury a $664 million recovery from New GM *in exchange for the PBGC's release of its liens and claims on Delphi's assets*. *See id*. ¶¶ 97, 105. Thus, at a minimum, Treasury agreed that the commercial necessity of removing the PBGC's liens and claims on Delphi assets was sufficient to justify a TARP-funded expenditure by New GM of $664 million. The PBGC's own contemporaneous estimates showed that this amount would have been *more than sufficient to save the Plan*. Indeed, again according to the PBGC's estimates, had New GM agreed to absorb the Salaried Plan back into the GM salaried plan, that amount would have been sufficient to fund the combined plan for roughly a decade.

In March 2009, the PBGC prepared a document projecting the necessary minimum funding contributions for the GM Hourly and Salaried Plans over the next eight years assuming a GM reassumption of the Delphi pension plans. *See* ECF No. 308-125 (Pls.' Ex. 124, hereafter, the "Funding Projections"). The Funding Projections, [redacted]

[redacted], showed that the cost to GM of a reassumption of the Salaried Plan was extremely affordable.

The Funding Projections calculated minimum contributions for GM's hourly and salaried pension plans under various scenarios, both with and without a reassumption of the two Delphi plans. Under the most optimistic of the PBGC's Funding Projections involving reassumption of Delphi's Salaried Plan, GM would have needed to make only a $300 million contribution to the combined Delphi-GM salaried plan in 2009, and then would not have needed to make another contribution until 2018, at which time a $100 million contribution would have been required. *See* ECF No. 308-124 (Pls.' Ex. 124) at 6 (scenario 3c). Hence, the total contribution required to avoid the termination of the Salaried Plan *and* maintain it (along with GM's salaried plan) for the next 10 calendar years under this scenario would have been only $400 million. Plus, again, GM itself *was open* to reassuming the Salaried Plan. *See* SUMF ¶¶ 22, 24, 28, 34, 41, 93.

To put these numbers in context, under the PBGC's own projections, a reassumption of the Salaried Plan could have cost New GM $264 million less than the amount it paid in its settlement agreement with the PBGC, while simultaneously removing the liens and claims associated with the Salaried Plan's missed contributions and underfunding. Additionally, and more importantly for the purposes of the § 1342(c) analysis, the PBGC would have been able to avoid entirely the $1.5 billion loss to the PBGC's insurance fund (not to mention the hundreds of millions of dollars the Salaried Plan's participants lost as a result of the Plan's termination).

As noted, the scenario above was the most optimistic of the PBGC's projections, and among other things, assumed that the GM salaried plan would take advantage of that plan's carry over balance and that it could amortize the additional Delphi liability over 17 years. *See* ECF No. 308-125 (Pls.' Ex. 124) at 1. While the second assumption (amortizing the Delphi liability over 17 years) would have been a departure from the standard 7-year amortization schedule, Congress had previously made an exception to this requirement for the airline industry, and the PBGC's inclusion of this scenario in its Funding Projections demonstrated its belief that GM could obtain similar exception here for the assumed Delphi liability. *See also* ECF No. 308-127 (Pls.' Ex. 126) ("If we adopt [the 17 year airline special] rule for GM with Delphi transfer, we could possibly amortize the unfunded liability for all of GM"); ECF No. 308-128 (Pls.' Ex. 127) ("I am thinking that politically they would be able to get the legislative fix of extended amortization for the added Delphi liability only.").

However, even under the *most pessimistic* of the Funding Projection's scenarios, in which neither a carry-over balance or an extended amortization were assumed, the cost to New GM was plainly affordable. Under this more conservative scenario, $400 million would have been sufficient to avoid the Salaried Plan's termination and fund the combined plan through the 2014 calendar year. *See* ECF No. 308-125 (Pls.' Ex. 124) at 6 (scenario 2). While contributions of over approximately $2.5 billion would then be due to fund the combined Delphi-GM salaried plan through 2018, the GM salaried plan even without a Delphi assumption would still have required itself a $700 million contribution for this period of time, meaning that the cost attributable to GM's assumption of the Salaried Plan's for the calendar years between 2014-2018 was estimated at $1.7 billion under the PBGC's most pessimistic assumptions. Given that this additional increment indisputably was – at least theoretically – available to Treasury from TARP, and New GM's need for Delphi's parts, reassumption of the Delphi Salaried Plan was possible – or at least not obviously impossible (with the burden of proof on the PBGC to show otherwise, *see supra* p. 4-5) – even using the most conservative of the PBGC's projections.

Moreover, this number (*i.e.*, the most pessimistic scenario) is overstated, not just because it failed to account for the possibility of the use of a carry-over balance or an extended amortization schedule, but also because all of the Funding Projection's assumptions utilized an unrealistically conservative estimate of the market return on assets of 8.5%, undervaluing the market return that the combined

Delphi-GM salaried plan's assets would generate, and therefore overestimating the amount of contributions that would be necessary.

As Plaintiffs' expert witness, Professor Noor Rajah, noted, the Salaried Plan's termination occurred at a time when "the capital markets were at an all-time low, meaning that the plan's assets were severely depressed at the time." *See* ECF No. 308-129 (Pls.' Ex. 128) at 12. "Between January 1, 2008 and March 31, 2009, the S&P 500 decreased by approximately 44%. Between March 31, 2009 and May 31, 2015 [when Dr. Rajah's report was completed], the S&P 500 increased by approximately 94%. *Id*. at n.5. Consequently, instead of the 8.5% used in the PBGC's Funding Projections, Dr. Rajah would have expected an annual return of 12.3% per year between Oct. 1, 2009 and December 31, 2014, resulting in an additional $680 million in plan assets for the combined Delphi-GM salaried plan by the time these estimated contributions came due, which would have further reduced the size of the necessary contributions, and extended the time they were due.[4] *Id*. at 18-19.

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[4] [redacted] Compass Advisors, recognized this underlying economic dynamic. *See* ECF No. 308-130 (Pls.' Ex. 129) at 1 ("[b]ecause Delphi does not have the liquidity to wait out the downturn, the company must be valued at what is believed to be the trough of the economic cycle"); [redacted]

The viability of a reassumption into the GM salaried plan is further augmented by the fact that in June 2009, GM's Fritz Henderson approached the Auto Task Force's Mr. Rattner to say that GM wanted to do something for Delphi's salaried retirees, but that Mr. Rattner told SIGTARP that while he "'could not remember the specifics of the conversation,'" he determined that GM would not be permitted to do anything for the Salaried Plan participants because he ";thought there was nothing defensible from a commercial standpoint that could be done for the Delphi salaried retirees.[5]'" *See* SUMF ¶ 93 (quoting Pls.' Exs. 3 and 28).

Mr. Rattner's contention that there was nothing commercially defensible to do in this regard is, of course, belied by GM's strong commercial need to address the PBGC's liens and claims that had arisen in connection with the Salaried Plan's underfunding, a fact that would have been evident if the PBGC had continued to prosecute its termination action in a § 1342(c) hearing, instead of withdrawing that action to bypass judicial review and terminate the Plan by agreement.

In sum, the record is clear that a reassumption of Delphi's Salaried Plan into the GM salaried plan was a viable option in the summer of 2009, that New GM had

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[5] "[A]t least one GM official told SIGTARP that GM thought there was some benefit to Treasury taking the lead on dealing with the PBGC because it was 'Government agency to Government agency' and Treasury would get a better deal for GM.'" ECF No. 308-4 (Pls.' Ex. 3) at 14.

strong commercial reasons to assume Delphi's Salaried Plan in exchange for a release of the PBGC's liens and claims, and that such an arrangement would have been the best result for all parties. For this reason alone, Plaintiffs are entitled to a finding that, if had the Court held a § 1342(c) hearing, termination of the Salaried Plan would not have been appropriate in July 2009, because the PBGC would not have been able to demonstrate the necessity of the Plan's termination.

B. Similarly, the PBGC's Liens and Claims on Delphi's Foreign Assets Provided the PBGC With Tremendous Leverage to Persuade Delphi's Purchasers to Consider Assuming the Plan

In addition to its leverage with GM, the PBGC's liens and claims provided the PBGC with leverage over Delphi's potential purchasers, which the PBGC could (and should) have used to negotiate an assumption of the Salaried Plan by the successful purchasers.

Between 2005 and 2009, the PBGC "worked successfully with 13 auto parts companies that have emerged from Chapter 11 protection without terminating their pension plans." ECF No. 308-10 (Pls.' Ex. 9). [redacted]

[redacted] As the PBGC's Dana Cann explained in his deposition, the PBGC was able to achieve this result, at least in part, because "there was competition for the assets, and [the agreement to assume the pension plan] was a way for them to improve their bid without necessarily coming out of pocket." *See* ECF No. 308-15 (Pls.' Ex. 14) at 61:15-18.

Here, there were at least three groups of businesses in competition to purchase Delphi's business or its assets: Platinum Equity, Federal Mogul, and Delphi's DIP Lenders (who ultimately used Delphi's DIP debt to fund a credit purchase of a substantial portion of Delphi's foreign assets)[redacted] Nonetheless, the PBGC has been unable to document a single instance where it spoke to these potential purchasers about their intentions regarding Delphi's pension plans. *See e.g.*, *id.* at 192:22-193:3.

Again, this failure is indefensible given the substantial leverage that the PBGC possessed to help convince one of these buyers to assume the Plan. As with GM, the existence of the PBGC's liens and claims on Delphi asset was a significant point of leverage for the potential purchasers. *See, e.g.*, ECF No. 168-3 ¶ 15 (asserting, in order to gain court approval for GM-PBGC settlement agreement, that "neither GM nor Parnassus (nor presumably any other potential purchaser) is willing to purchase the assets (or shares in the non-debtor affiliates that own the assets) while they are subject to the threat of the PBGC liens"); [redacted] ECF No. 308-131 (Pls.' Ex. 130) at 2-3 ("[t]he PBGC's purported liens are unnerving the Debtors' DIP lenders" making "both stakeholders and global suppliers very uneasy" and "overseas creditors and suppliers perceive that any fight with the PBGC is a fight with the U.S. government and that they will lose").

Nonetheless, the PBGC diverged from its normal practice and did not attempt to negotiate an assumption of the Salaried Plan with any of these potential purchasers. *See, e.g.*, ECF No. 308-15 (Pls.' Ex. 14) at 192:22-193:3; ECF No. 308-132 (Pls.' Ex. 131) at 6-7 (PBGC interrogatory responses failing to cite a single example of any efforts the PBGC "undertook to ascertain whether any entity other than Delphi, including GM, the DIP lenders, Platinum Equity, LLC, and Federal Mogul Corporation would have been willing to take over responsibility for the Salaried Plan"). The PBGC's failure to follow it standard procedures here, especially in light of this substantial leverage, would have been enough to defeat the PBGC's contention at a § 1342(c) hearing that termination was necessary.

In addition, the PBGC could have made assumption more viable by offering to allow the new sponsor to use some or all of the PBGC's $717 million settlement from New GM and Delphi to fund the Salaried Plan' contributions. In order to avoid the need for termination, the Salaried Plan's sponsor only needed to satisfy the $195 million in missed contributions, *see* ECF No. 308-15 (Pls.' Ex. 14) at 152:1-153:2 ("[m]y understanding is, for the salaried plan, they would have had to true up 200 million dollars"). Consequently, it would have required less than half of the PBGC's settlement with New GM to forestall the Plan's termination, without requiring the new sponsor to fund the pension true up at all. Moreover, while the PBGC had not completed any recent minimum funding projections for Delphi on a stand-alone basis, *see, e.g.*, ECF No. 306-27 (Pls.' Ex. 132) at 11:8-9 (testifying that the last time that the PBGC completed Delphi minimum funding projections on a stand-alone basis was in the spring of 2008), [redacted]

[redacted]

Still further, as Compass Advisors noted in the context of a potential GM reassumption, the PBGC could have offered to help the new sponsor "with waivers if equity markets don't turn around in the next two years providing an adequate return on their pension assets," ECF No. 308-34 (Pls.' Ex. 33) at 8, and indeed the Salaried Plan had a waiver request already pending, which had been put "on ice," pending any agreement by GM to assume the Plan. *See* SUMF ¶ 26.

And of course, the equity markets did turn around in the next few years. As noted above, between March 31, 2009 and May 31, 2015, the S&P 500 increased by approximately 94%. *See* ECF No. 308-129 (Pls.' Ex. 128) at 12 n.5. By looking at actual market returns, Dr. Rajah concluded that the Plan's minimum funding contributions would be even more affordable post-assumption, requiring an estimated $70 million in 2010, $300 million in 2011, and $210 million in 2012, with no further contributions required in 2013 or 2014. *Id*. at 24. Given the threat of the PBGC's liens and claims, and the availability of the $717 million in settlement funds to help fund contributions, the PBGC could have made the

Salaried Plan's assumption not only viable, but attractive, to the buyers competing for Delphi's assets, and avoided a $1.5 billion loss to the pension insurance system. That the PBGC did not even explore this possibility shows why the PBGC went to such lengths to avoid judicial scrutiny of its actions.

C. The PBGC's Termination Case Is Further Undermined by the Fact That, Compared to Other Similarly-Sized Plans, the Salaried Plan Was Relatively Well Funded

The PBGC's refusal to advocate on behalf of the Plan is even more unjustifiable given that, contrary to the PBGC's assertions, the Salaried Plan was a relatively well funded plan.

Because of the prospective nature of payments under a defined benefit pension plan, the law requires that plan sponsors "must contribute annually an amount necessary to make reasonably certain that the benefits promised will be available when employees become eligible to receive them," and these minimum contribution obligations will likely fluctuate from year to year. V. Briggs, M. Kushner, and M. Schinabeck, *Defined benefit plan/defined benefit contribution plan*, *Employee Benefits Dictionary* at 41 (1992).

When Congress passed the Pension Protection Act in 2006, it updated "the rules for determining the minimum required contributions for qualified defined benefit pension plans." ECF No. 308-135 (Pls.' Ex. 128) at 38. Pursuant to the PPA, a plan sponsor's funding obligation is based on a calculation of "the 'shortfall' between the plan's assets and the plan's 'funding target' (i.e., liabilities) plus the anticipated increase in the plan's costs for the year ('the target normal cost')." *See id.*

The PPA further requires that a plan complete annually an actuarial certification of its funded ratio under those rules, referred to as an "adjusted funding target attainment percentage, or "AFTAP," and imposes certain benefit restrictions on plans with AFTAPs of less than 80%, and even greater benefit restrictions for plans with AFTAPs of less than 60%. *See, e.g., id*. at 40-41. The AFTAP is "[o]ne measure of the funded status of [a] plan," ECF No. 308-135 (Pls.' Ex. 134) at 32:8-9, in which "the liability determination [is made] using rules spelled out [by Congress] in the Pension Protection Act," which is, "the present value of accumulated benefits for the participants in the plan as of [October 1, 2008]," using the interest rate prescribed "by the rules in the Pension Protection Act." *Id*. at 34:22-35:3.

On June 30, 2009 (*i.e.*, less than a month before the Plan's termination), Watson Wyatt (Delphi's actuary at the time) provided an AFTAP certification letter for the Delphi Salaried Plan for the then-current plan year, *i.e.*, the year that would end on September 30, 2009. *See* ECF No. 134-3 at 1. The AFTAP Certification for the current plan year was 85.62%, and the AFTAP Certification for the prior year was 86.9%. *Id.*

To put these numbers in perspective, Kevin House, one of the Watson Wyatt actuaries responsible for the Salaried Plan AFTAP certifications described above, testified that, "[f]rom a plan funding level perspective," the Salaried 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." *See* ECF No. 308-135 (Pls.' Ex. 134) at 45:21-23. Mr. House further testified that not only was this not an "abnormally poor[]" funding level, but that he had seen plans that were well below a 60% funding level that had not been terminated. *Id*. at 37:25-38:12.

To be sure, consistent with the PPA's requirements, the Salaried Plan's 2008 AFTAP measured the Plan's funded status as of the beginning of the then-current Plan year, *i.e.*, as of October 1, 2008, and as noted above, the Plan's assets lost a significant amount of value in the subsequent months. Accordingly, a snap shot of the Plan's funded status as of the summer of 2009 would have shown that the Plan was less well funded as of July 2009 than as of October 2008. But that was true for every pension plan. For example, between September 30, 2008 and December 31, 2008, on an accounting basis, the GM salaried plan went from being overfunded by $2.3 billion to being underfunded by $1.7 billion, and GM's hourly plan declined by $11 billion in funding over the same period. *See* ECF No. 308-136 (Pls.' Ex. 135) at 1. This short-term decline in the GM plans' assets did not, of course, precipitate a termination action by the PBGC. [redacted]

[redacted]

This is why "'[t]he actuary's usual horizon is many years ahead, and he is usually content to progress there by annual steps. It is therefore desirable . . . to have a stochastic model to describe the way in which appropriate investment variables have moved over the long term without being too concerned with very short term fluctuations.'" ECF No. 308-129 (Pls.' Ex. 128) at 25 (quoting A.D. Wilkie, *A Stochastic Investment Model for Actuarial Use* (1984)). [redacted] the market would recover, and when it did, the Plan's assets would have recovered from short-term market decline that all plans suffered during the bottom of the financial crisis. This was especially true given that Delphi had frozen the Salaried Plan in the fall of 2008, such that its liabilities would not continue to grow like other, unfrozen, pension plans. *See* SUMF ¶ 19.

One would, therefore, have expected, erroneously as it turns out, that the PBGC's recommendation regarding the Plan's termination would have included estimations regarding the Plan's minimum funding contributions under the scenarios described above. Yet, the PBGC's administrative record in support of termination is devoid of any discussion of the minimum funding contributions, and in fact the PBGC hadn't estimated Delphi's minimum funding contributions on a stand-alone basis since the Spring of 2008. *See generally* ECF Nos. 54-60 (AR000010-118). While, as noted above, the PBGC had recently completed minimum funding contributions in connection with a reassumption of the Delphi plans into GM's plans, there was no discussion of those projections leading up to the Plan's termination. *See id*.

In short, while the PBGC has implied that Delphi's failure to make full funding contributions to the Plan while in bankruptcy justify the Plan's termination, the numbers above demonstrate that what mattered for determining the Plan's viability was the ability of a sponsor to be able to satisfy the Plan's minimum funding contributions, and that when compared to other similarly situated pension plans (nearly all of which were underfunded during the time in question), the Plan's funding level was not an objective barrier to its continued survival.

D. Extra-Statutory Factors Undergirded the PBGC's Actions in Terminating the Plan

Given the viability of options other than termination, and particularly the PBGC's initial push for reassumption by GM of the Salaried Plan and the PBGC's typical stance in going to great lengths to protect pensioners (again, by its own estimation, *it was able to save pension plans in 13 auto parts companies that were in bankruptcy during this same period of time*), one necessarily is left to ask – why did the PBGC terminate the Salaried Plan? The record shows that the PBGC's actions were influenced by extra-statutory political factors.

Again, as described above, the record demonstrates that the PBGC dramatically altered its behavior after the intervention of Treasury's Auto Team. *See, e.g.*, *supra* p. 15-19. After its initial efforts to promote a GM reassumption of both of Delphi's large pension plans, the PBGC abruptly and inexplicably ceased all efforts to save the Plan after the PBGC's Joe House began coordinating on these issues with Treasury's Matt Feldman. *See id.* The PBGC's decision to abandon its advocacy of the Salaried Plan was objectively unreasonable in light of the substantial leverage it possessed to save the Salaried Plan, *supra* p. 15-21, its statutory goal of continuing and maintaining pension plans, 29 U.S.C. § 1302(a), and ERISA's requirement that a pension plan's termination is only appropriate under § 1342(c) where necessary under one of three statutory criteria. 29 U.S.C. § 1342(c). And while the PBGC has never offered any explanation for its change and behavior, the record demonstrates that Treasury's political wishes played a decisive role.

[redacted]

[redacted] However, in deposition testimony, the acting director of the PBGC at the time of the termination, Vince Snowbarger, acknowledged the Treasury was wearing "at least" three conflicting hats in these interactions. *Id.* ¶ 54. First, as a PBGC board member, Treasury was one of three agencies charged with providing oversight and direction to the PBGC. *Id*. Second, through its Auto Team, Treasury was charged with restructuring the auto industry. Third, Treasury, as the chief lender to GM, was as a major competing creditor in the Delphi bankruptcies that would ultimately decide whether GM would be permitted to fund a reassumption of the Delphi pension plans. *Id*. In sum, the Treasury's conflicting roles were problematic for the PBGC, in that they threatened to subvert the PBGC's interests in saving both of Delphi's pension plans, to Treasury's competing political and financial interests.

[redacted]

[redacted]

These same concerns played out in Treasury's approach to GM. [redacted] Treasury wanted to find ways to keep liabilities off New GM's balance sheet and thus not noticeably subject to TARP subsidization. By Mr. Rattner's own admission, Treasury needed to show the public that "the government wasn't going to be everybody's piggybank." *See* SUMF ¶ 38. However, Treasury knew that, again for *political* reasons, New GM would be forced to assume significant liabilities related to the labor unions, particularly the UAW. Delphi's salaried retirees, had no similar political leverage, and it was the PBGC, not the Plan's participants, that was responsible for negotiating the release of the commercial leverage associated with the Salaried Plan's survival, *i.e.*, the PBGC's liens and claims on Delphi's assets. Treasury then proceeded to use its influence with the PBGC to accomplish these political goals.

Mr. Feldman of the Auto Team has testified that he began his discussions with the PBGC in April 2009 with the express goal of achieving an agreement where the Salaried Plan was terminated, while saving Delphi's Hourly Plan. *See Id.* ¶ 63. GM perceived a benefit to Treasury taking the lead on negotiations with the PBGC "because it was 'Government agency to Government agency' and *Treasury would get a better deal for GM*." *See id.* ¶ 54 (quoting Pls.' Ex. 3 at 14) (emphasis added).

[redacted]

[redacted]

[redacted] Consequently, during the late-May 2009 bankruptcy mediation, rather than use its liens and claims as leverage to negotiate in favor of the Salaried Plan, in an attempt to save the Salaried Plan, the PBGC's representatives, according to Mr. House, "sat in a room and read books all day." *Id.* ¶ 88.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Thus, the record demonstrates that Treasury sought to have the Plan terminated, in order to keep liabilities off of New GM's balance sheet, despite the strong commercial necessity that would have argued in favor of an assumption of the Plan by New GM, and further that the PBGC acquiesced utterly with Treasury's designs, contrary to its statutory mandate and the termination requirements of § 1342. [redacted] Indeed, emphasizing the political success of his Administration's use of TARP funds in the auto situation, President Obama explained some years later (albeit when describing Chrysler's situation) that his Administration had with great care awarded funds to the auto makers and had now been paid back in full. *See* Remarks by the President to Chrysler Workers in Toledo, Ohio (June 3, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/06/03/remarks-president-chrysler-workers-toledo-ohio. The President made no mention of the $1.5 billion liability to the Title IV insurance fund to cover guaranteed benefits associated with the Salaried Plan, as those were *not* on the GM balance sheet.

The PBGC's motion for summary judgment fails to address, let alone explain, any of the deficiencies described above. Accordingly, it is clear that the PBGC cannot carry its burden of showing that the facts and the law indisputably indicate that the PBGC could have accomplished a judicial termination under § 1342(c) in July 2009, and the Court must address Counts 1 through 4.

II. BECAUSE THE SALARIED PLAN WAS TERMINATED WITHOUT THE NECESSARY COURT ADJUDICATION, THE PBGC IS NOT ENTITLED TO SUMMARY JUDGMENT AS TO COUNT ONE

A. The Plain Statutory Language of 29 U.S.C. § 1342 Requires a Court Adjudication That a Plan Must Be Terminated In Order to Terminate a Plan

Count 1 alleges that in order to termination a pension plan under 29 U.S.C. § 1342(c), the PBGC must obtain a district court adjudication that the termination is necessary under the statutory criteria. ECF No. 145 ¶ 39 (citing 29 U.S.C. § 1342(a), (c)). Critically, ERISA requires the PBGC to

> 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.

29 U.S.C. § 1342(c)(1) (emphasis added).

Because the Court's analysis of Count 1 presents a question of statutory interpretation, the Court must "start, of course, with the statutory text." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). "If the statutory language is plain, [a court] must enforce it according to its terms." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

In this case, the text of the statute is clear: a plan cannot be terminated unless "the appropriate United States district court" issues "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." 29 U.S.C. § 1342(c)(1). This remains the case, even if the PBGC and a plan administrator agree to plan termination. In support of this conclusion, a brief review of portions of § 1342 is necessary at the start.

Subsection 1342(a) describes the PBGC's authority to initiate termination proceedings. Specifically, § 1342(a) allows, but does not require, the PBGC to institute termination proceedings whenever it determines that one of four conditions is satisfied. 29 U.S.C. § 1342(a). Additionally the statute *requires* the PBGC to institute termination proceedings when the PBGC determines that a plan cannot pay benefits currently owed. *Id.*

Subsection (a) establishes a single exception to the requirement that the PBGC follow the statutory plan termination procedures. That exception, which applies only to small plans, permits the PBGC to prescribe a "simplified procedure" to terminate such plans, "*as long as that procedure includes substantial* *safeguards* for the rights of the participants and beneficiaries under the plans . . . (*including the requirement for a court decree* under subsection (c)).” 29 U.S.C. § 1342(a) (emphasis added). Thus, even in the context of the “simplified [termination] procedure” that applies to “small” plans, the PBGC must provide substantial procedural safeguards to protect plan participants, including the requirement of a court decree. *Id*.

Upon the institution of termination proceedings under § 1342(a), the PBGC (or the plan administrator) may request, pursuant to § 1342(b), that the court appoint a trustee to administer the plan for the duration of the termination proceedings. 29 U.S.C. § 1342(b). No one disputes that the PBGC and plan administrator can, by agreement, achieve appointment of a trustee without court involvement. *Id*.

If the PBGC chooses to, or is required to, initiate termination proceedings under § 1342(a), then the following procedure, set forth in § 1342(c)(1), applies:

- The *first sentence* of § 1342(c)(1) describes the circumstances in which the PBGC may apply to a district court for a decree adjudicating that the plan in question must be terminated.

- The *second sentence* permits a trustee appointed under § 1342(b) to either intervene in such proceedings or independently seek such a decree.

- The *third sentence* directs the court to authorize a trustee appointed under § 1342(b) to undertake actions to terminate the plan, but only after the court issues a decree applied for by the PBGC or the trustee.

- The *fourth sentence*, which is key to the parties' dispute, applies when two conditions are satisfied: the PBGC and plan administrator agree to (i) terminate a plan, and (ii) appoint a trustee. Then, the trustee will be subject to the powers set forth in § 1342(d)(1), as well as the duties set forth in § 1342(d)(3), which include the duties of a bankruptcy trustee and an ERISA fiduciary.

Hence, the fourth sentence of § 1342(c)(1) relates solely to the powers given to the trustee. That sentence provides as follows:

> *If* the [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), [*then*] the trustee shall have the power described in subsection (d)(1) and . . . is subject to the duties described in subsection (d)(3).

29 U.S.C. § 1342(c)(1) (emphasis added).

This sentence structure represents a classic example of a case or condition, used by Congress to "limit the generality of the statute" by establishing "circumstances or conditions that must operate or occur before the act applies to a given individual." 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 21:6 (7th ed. 2009) [hereinafter *Sutherland*]. Such conditions often begin with the words "if" or "where." *Id.* This "logical structure . . . clearly commands that a definite result . . . must follow." *United States v. Williamson*, 154 F.3d 504, 505 (3d Cir. 1998); *see also Mid-Am. Waste Sys., Inc. v. City of Gary*, 49 F.3d 286, 290 (7th Cir. 1995) ("The if-then quality of the rule sets up a legitimate claim of entitlement to a particular decision if the condition holds.”).

Put simply, if condition “X” is satisfied, then result “Y” must follow. *See Smith v. Shettle*, 946 F.2d 1250, 1253 (7th Cir. 1991) (“No magic form of words is required to make a regulation mandatory; all that is required is that it be clear that if X (the substantive predicate), then Y (the specified outcome, from which the enforcement officials are not free to depart).”). And result “Y” is limited to *only* the “definite result” set forth in the apodosis, or main clause, of the sentence. *See Sutherland* § 21:6 (explaining that the condition only serves to determine the set of facts subject to the result set forth in the statutory provision).

The fourth sentence of § 1342(c)(1) employs this very sort of “if X, then Y” structure. In this case, Congress imposed two conditions: an agreement between the PBGC and the plan administrator on termination of a plan (“X-1”), and an agreement between the PBGC and the plan administrator to appoint a trustee (“X-2”). 29 U.S.C. § 1342(c)(1). If both conditions are satisfied, then a specific consequence (“Y”) is triggered: the trustee is given the powers enumerated in (d)(1) and duties enumerated in (d)(3). *Id*. This can be considered “if X-1 and X-2, then Y.”[6] But notably absent from the “definite result” set out in the fourth

[6] Read correctly, the fourth sentence of § 1342(c) says that, if there is no dispute between the PBGC and the plan administrator over whether a plan should be terminated and over who should be the trustee (*i.e.*, they “agree” on these two

sentence is this power to terminate a plan without a court decree. In effect, the PBGC asks the Court to add an additional result to the only one specifically enumerated by Congress. If the Court were to do so, it would transform the logic of the sentence to read: "if X-1 and X-2, then Y *and Z*."

The PBGC asserts that the fourth sentence of § 1342(c)(1) allows it to bypass the court adjudication required by § 1342(c)(1), but cannot defend this interpretation by relying on the actual words of the statute. Rather, to try and get to its desired result, after quoting the actual language of the statute, it then inserts words that are not actually present, but that would be necessary to give the statute the PBGC's preferred meaning. *See* ECF No. 304 at 19-20 ("'[i]f [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

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subjects), then one set of issues before the adjudicating court – namely, the appointment of a trustee and the trustee's powers – can be quickly resolved by the PBGC and the plan administrator. This makes good sense because the result is that a trustee immediately is put in place, who is then, with full powers, singly working with an eye toward conserving the assets in the participants' and beneficiaries' interests. In other words, Congress thought the proverbial "federal case" need not be made out of every issue before the adjudicating court, if there was agreement between the PBGC and the plan administrator. And allowing a shortcut on the limited issue of trusteeship harms no participant or beneficiary interests, since they are always protected by the trustee's obligation to act as their fiduciary (irrespective of how the trustee gains appointment and powers).

described in subsection (d)(1)' *to terminate the plan.*") (quoting 29 U.S.C. § 1342(c) (emphasis added). The italicized words, crucial to the PBGC's interpretation, are *not* actually in the fourth sentence of § 1342(c).

The fact that the PBGC cannot defend its interpretation of the statute without adding additional words demonstrates the fallacy of its interpretation, as "the replace-some-words canon of construction has never caught on in the courts." *United States v. Perkins*, 887 F.3d 272, 276 (6th Cir. 2018) (internal citations omitted. *See also Murphy v. Smith*, 138 S. Ct. 784, 787-88 (2018) ("respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own"); *Briscoe v. Fine*, 444 F.3d 478, 491 (6th Cir. 2006) ("'Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)).

B. *Jones & Laughlin* Is Not Binding on This Court, and Was in Any Event Wrongly Decided, as Intervening Decisions Have Made Clear

Rather than defend its interpretation by reference to the actual statutory language, the PBGC relies principally on the Second Circuit's decision in *In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d 197 (2d Cir. 1987) ("*Jones & Laughlin*"). *See* ECF No. 304 at 20-21. In *Jones & Laughlin*, the Second Circuit concluded that Congress, through the language in the fourth sentence of subsection 1342(c), "expressly dispensed with the necessity of a court adjudication," 824 F.2d at 200, erroneously equating the power to terminate a plan with the ability of the plan administrator and the PBGC to agree to the appointment of a trustee with the powers outlined in § 1342(d)(1).[7] The Second Circuit's decision is obviously not binding on this Court, and the reasoning in its thirty-one-year-old opinion is unpersuasive, especially in light of subsequent decisions from the Supreme Court.[8]

As an initial matter, the PBGC's proffered interpretation of § 1342(c) does violence to a cardinal principle of statutory construction, that where an otherwise acceptable construction of a statute would raise serious constitutional problems, a court should construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *See, e.g., Public Citizen v. DOJ*, 491

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[7] Not only is *Jones & Laughlin* poorly reasoned, but in that case the plan administrator and PBGC actually obtained a court decree, *see id*. at 198, making the court's conclusion, that no court decree need issue, *dicta*.

[8] The PBGC, citing language from the Third Circuit's opinion in *In re Syntex Fabrics, Inc. Pension Plan*, 698 F.2d 1999, 201 (3d Cir. 1983), suggests that there has been "consistent interpretation by the U.S. Circuit Courts that have addressed the issue." ECF No. 304 at 20-21. However, the language that the PBGC relies on from *In re Syntex* was *dicta*. The *In re Syntex* court was not faced with the question of whether the PBGC can bypass § 1342(c)'s requirement for a court decree through an agreement with the plan's administrator; indeed the termination in that case was accomplished after the PBGC sought and was granted a court decree that "termination was necessary to protect the interests of the participants." *In re Syntex*, 698 F.2d at 202.

U.S. 440, 465-66 (1989); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). While the *Jones & Laughlin* court convinced itself that its interpretation of § 1342(c) was constitutionally valid, as discussed below, the Second Circuit's decision is irreconcilable with subsequent decisions from the Supreme Court and the Sixth Circuit holding that individuals are entitled under the Constitution to a meaningful hearing before the government can take their property. *See infra* p. 81-104.

Next, the *Jones & Laughlin* court explicitly noted that it was giving deference to the PBGC's interpretation of the statute. *See id*. at 200 n.3, 201. As the Supreme Court has repeatedly made clear, such "deference is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (quoting *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *see also, e.g., SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). But as described above, and articulated further below, traditional tools of statutory construction make clear that a plan may only be terminated under § 1342(c) pursuant to a court adjudication. Nonetheless, the Second Circuit's decision did not look to those tools before according the PBGC's interpretation deference, making the decision facially flawed.

Indeed, the Supreme Court has repeatedly rejected the sort of statutory construction exercised by the *Jones & Laughlin* court and urged here by the PBGC. *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers,* 414 U.S. 453 (1974), for instance, involved the Rail Passenger Service Act of 1970, 42 U.S.C. § 547, which expressly provided for (i) a public cause of action "maintainable by the Attorney General," and (ii) a private cause of action only in cases "involving . . . labor agreement[s]." 414 U.S. at 456-57. An association of railroad passengers, which brought a private suit to enjoin the announced discontinuance of certain passenger trains, argued that the statute "should *not* be read to *preclude* other private causes of action." *Id.* at 457 (first emphasis added).

Citing longstanding precedent, the Supreme Court invoked the "ancient maxim" of *expressio unius est exclusio alterius* and rejected the passengers' position. The Court explained that "'[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" *Id.* at 458 (quoting *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929)). "Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in [the statute] are the exclusive means to enforce the duties and obligations imposed by the Act." *Id.*; *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) ("Congress was . . . aware of certain instances in which exceptions to the [Endangered Species Act's] broad sweep would be necessary. Thus, [the statute] creates a number of limited 'hardship exemptions'. . . . [But] there are no exemptions in the Endangered Species Act for federal agencies, meaning that under the maxim *expressio unius est exclusio alterius*, we must presume that these were the only 'hardship cases' Congress intended to exempt."); *Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ.*, 615 F.3d 622, 630 (6th Cir. 2010) (denying an attempt to read an additional enforcement mechanism into a statute that already lists other enforcement mechanisms).

Utilizing the same principle, the fourth sentence in § 1342(c)(1) provides a specific outcome – the appointed or agreed-upon trustee is given certain powers and duties – nothing more. The power to adjudge a plan's termination is, by contrast, nowhere discussed in the fourth sentence of § 1342(c)(1), and, as made clear in the remainder of § 1342, explicitly reserved to a district court. *Jones & Laughlin*, however, ignored these rules of statutory construction, reading into this sentence a "specified outcome" that appears nowhere in the text of the sentence itself. The Court "must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (internal quotation marks omitted). Here, the text plainly states that a plan cannot be terminated unless "the appropriate United States district court" issues "a decree adjudicating that the plan must be terminated." 29 U.S.C. § 1342(c)(1). The fourth sentence of § 1342(c)(1), which relates only to the powers of a trustee, does not change that.

Additionally, "when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). At the end of the day, the Court "cannot interpret federal statutes to negate their own stated purposes." *Id*. at 2493 (internal quotation marks omitted); *see also id.* (rejecting interpretation of statute that would lead to the result "Congress designed the Act to avoid").

The "official policy of ERISA is to protect 'the interests of participants in employee benefit plans and their beneficiaries' while 'establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans.'" *PBGC v. Findlay Indus., Inc.*, No. 17-3520, 2018 U.S. App. LEXIS 25071, at *30 (6th Cir. Sept. 4, 2018) (quoting 29 U.S.C. § 1001(b)). Congress explicitly said so itself, and the Supreme Court has recognized as much numerous times. *See*, *e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 845 (1997) (finding that the "principal object of [ERISA] is to protect plan participants and beneficiaries").

Consistent with that purpose, ERISA provides an array of participant protections. These include the right to certain notices (29 U.S.C. § 1021(f)), the requirement to provide plan documents and account information to participants (29 U.S.C. § 1024), the imposition of fiduciary duties on individuals responsible for plan management (29 U.S.C. §§ 1103, 1104), claims procedure protections (29 U.S.C. § 1133), disclosure and notice rights to participants in cases where institution proceedings are initiated (29 U.S.C. § 1342(c)(3) and (d)(2)), the promise of fiduciary protections where a trustee is appointed (29 U.S.C. § 1342(d)(3)), and of course, the insurance program that the PBGC administers. Requiring a court decree ordering termination of a plan – in effect, imposing a judicial safeguard – is a crucial part of Title IV's built-in participant protections. Indeed, Congress explicitly said so, stating in § 1342(a) that while the PBGC "may prescribe a simplified procedure to follow in terminating small plans," such a procedure 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)*)." 29 U.S.C. § 1342(a) (emphasis added).

To protect those participant rights, Congress determined that the judiciary, in its role as an independent check on executive power, is best suited to decide whether particular circumstances warrant plan termination. As the Seventh Circuit has explained (and this Court alluded to in its September 1, 2011 Order), "[t]he only authority that the PBGC has under § 1342 is to ask a court for relief. That implies an independent judicial role." *In re UAL Corp.*, 468 F.3d 444, 449 (7th

Cir. 2006). ERISA's legislative history shows that Congress meant to impose that pre-termination safeguard in all cases, without exception. The Conference Report describing the final ERISA bill is telling. It provides:

> In the case of small plans, the corporation may prescribe a simplified procedure and may pool assets of small plans so long as the rights of the participants and employers (including the right to a court decree of termination) are preserved. Furthermore, the corporation may agree with any plan administrator to designate a trustee who, without court appointment, is to have the usual powers of trustees appointed by the court.

H.R. Rep. No. 93-1280, at 373 (1974) (Conf. Rep.).

Along with the statutory text, this legislative history shows that Congress knew how to clearly establish exceptions to the procedures the PBGC must follow to terminate a plan when it wanted to do so.[9] Congress unambiguously established a narrow exception allowing the PBGC to establish a "simplified procedure" for terminating small plans only. 29 U.S.C. § 1342(a). Moreover, when Congress crafted this exception, it considered the right to a court decree such a valuable participant protection that it still barred the PBGC from bypassing it, by requiring that any such "simplified procedure" for a small plan include "substantial

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[9] "Statutory purposes, including those revealed in part by legislative and regulatory history, can be similarly relevant" in determining whether a statute is ambiguous. *See City of Arlington v. FCC*, 569 U.S. 290, 309-10 (2013) (Breyer J. concurrence) (internal citations omitted).

safeguards for the rights of the participants . . . (including the requirement for a court decree)." *Id.*

Additionally, the legislative history passage (in the last quoted sentence above) confirms Plaintiffs' reading of the fourth sentence of § 1342(c), because it mentions only agreements regarding the appointment of trustees and the trustees' powers when referencing other agreements that the PBGC and "any plan administrator" may reach; nowhere in the passage (or, as far as Plaintiffs are aware, in any other part of the legislative history) did Congress suggest agreements could be reached by the PBGC and the plan administrator to terminate a plan. Straightforwardly, the Conference Report indicates that Congress intended the fourth sentence of § 1342(c)(1) merely to endow a trustee appointed by agreement with the powers enumerated in § 1342(d)(1). These powers would enable the trustee, for instance, to act to conserve plan assets while the court adjudicated the plan termination.

This explanation aligns completely with the plain text of § 1342(c)'s fourth sentence, and to the extent there is any ambiguity, only Plaintiffs' construction is sufficiently congruous with the remaining portions of § 1342(c) and ERISA to be valid. "'A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" *Burwell*, 135 S. Ct. at 2492 (quoting *United Sav. Ass'ns of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)). The *Jones & Laughlin* court made no attempt to reconcile its interpretation with the quoted language from § 1342(a) or ERISA's broader purposes, further undermining its holding.

For its part, the PBGC at least acknowledges that § 1342(a) prohibits it from terminating a "small plan[]" without a court decree via a simplified procedure. *See* ECF No. 304 at 22. But it argues that despite this prohibition, the statute does not "prescribe any particular way to terminate either large or small plans," and further suggests that its interpretation must be proper given that it has consistently terminated plans in this fashion for the last 44 years. *Id*. But "[y]ears of erroneous practice to the contrary do not excuse this Court from performing its core function – faithfully interpreting and applying the law." *Turner v. Astrue*, 764 F. Supp. 2d 864, 871 (E.D. Ky. 2010).

Given the clarity with which Congress established the small plan exception under § 1342(a), and the value it placed on the court adjudication procedure, had Congress meant to allow the PBGC to bypass that requirement, it would have carefully articulated such an exception. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, [as] one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking*

Ass'ns, Inc., 531 U.S. 457, 468 (2001) (citing *MCI Telecommc'ns Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994)).

Again, if the statutory language is clear, there is no place for *Chevron* deference in statutory interpretation. "[S]imply calling something ambiguous does not make it so," and "where, as here, one interpretation far better accounts for the language at issue, the language is not ambiguous." *Duncan v. Muzyn*, 885 F.3d 422, 425-26 (6th Cir. 2018). As described above, utilizing the standard tools of statutory construction, the language of § 1342 is not ambiguous. However, even assuming, *arguendo*, that the statutory language was ambiguous, the Supreme Court has clarified that an agency must affirmatively demonstrate that the particular interpretation at issue is one that Congress would have obviously expected the agency to provide, further undermining the PBGC's reliance on *Jones & Laughlin.*

As the Sixth Circuit observed in a 2004 decision, 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). While the PBGC's motion for summary judgment does not address either *Mead Corp.* or *Christensen*, the PBGC does assert (without analysis, in footnotes) that its interpretation of

§ 1342(c) – that pension plans can be terminated by agreement – is entitled to deference by this Court, citing a number of Supreme Court decisions, none of which actually involve construing § 1342(c), and only one of which, *Beck v. PACE International Union*, 551 U.S. 96 (2007), post-dates *Mead Corp.* and *Christensen*. *See* ECF No. 304 at 19 n.50, 21 n.54. Contrary to the PBGC's assertion, this Court need not, and indeed, should not, defer to the PBGC's statutory construction of § 1342(c), even if its language is deemed ambiguous.

In *Christensen*, the Supreme Court held that, in contrast to formal notice-and-comment rulemaking, informal agency "'interpretations contained in policy statements, agency manuals, and enforcement guidelines' [] are beyond the *Chevron* pale." *Mead Corp.*, 533 U.S. at 234 (quoting *Christensen*, 529 U.S. at 587). In *Mead Corp.*, the Supreme Court held that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230.

While Congress did provide the PBGC with the ability to "prescribe a simplified procedure to follow in terminating small plans," it explicitly cabined that power, by requiring that any such procedure "includes substantial safeguards for the rights of the participants and beneficiates under the plans . . . (including the requirement for a court decree under subsection (c))." 29 U.S.C. § 1342(a). Moreover, unlike the provisions of § 1341 (which were at issue in *Beck v. PACE International Union*), the provisions of § 1342 make clear that "[t]he only authority that the PBGC has under § 1342 is to ask a court for relief. That implies an independent judicial role." *In re UAL Corp.*, 468 F.3d 444, 449 (7th Cir. 2006).

Taken together, Congress's insistence that the PBGC apply to a district court to adjudicate whether distressed pension plans must be terminated, and its explicit designation of a district court termination decree as a substantial safeguard, make the PBGC's informal practice of bypassing adjudications "a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought" it to be "deserving the deference claimed for [] here." *Mead Corp.*, 533 U.S. at 231. Moreover, the informal nature of the PBGC's interpretation places it "beyond the *Chevron* pale." *Id*. at 234.

In sum, the PBGC's reliance on *Jones & Laughlin* is unavailing because that decision is fundamentally flawed, first because it failed to grapple with traditional tools of statutory construction before according the PBGC deference in construing § 1342(c); second because those tools show that there is no ambiguity for the PBGC to interpret; and third, because *Chevron* deference would be inappropriate in any event in light of *Mead Corp.* and *Christensen*.

Finally, the PBGC's assertion that Plaintiffs have previously "adopted" the Second Circuit's ruling, *see* ECF No. 304 at 20, is both factually incorrect and legally irrelevant. Plaintiffs Dennis Black, Charles Cunningham, and the DSRA filed in the bankruptcy court an objection to Delphi's proposed modifications to its reorganization plan because the proposed modifications depended on the termination of the Salaried Plan, which those objectors believed was "neither assured nor imminent." *See* SUMF ¶ 103 (quoting Pls.' Ex. 116 at 2). Noting the Second Circuit's decision in *Jones & Laughlin*, the objectors explained that they expected that the PBGC and Delphi would attempt to terminate the Salaried Plan under § 1342(c) outside of a formal district court adjudication, but that such a termination nevertheless would be invalid. *See* ECF No. 308-117 (Pls.' Ex. 116) at 13-14. The objection put both the court and other parties to the bankruptcy proceeding on notice that the Salaried Plan's termination was not assured, notwithstanding the imminence of such an agreement. While the bankruptcy court overruled all objections to confirmation of the modified plan, it also confirmed that:

> Nothing in this order prohibits employees . . . adversely affected by any plan termination from (a) seeking to intervene in any district court action filed by the PBGC under section 4042 of ERISA, 29 U.S.C. § 1342, to terminate the plans or (b) pursuing any independent action against the PBGC regarding the termination of the plan under section 4003(f) of ERISA, 29 U.S.C. § 1303(f).

SUMF ¶ 109 (citation omitted). Additionally, Plaintiffs provided the bankruptcy court with a copy of their draft complaint (the one later filed here) in order to ensure that the bankruptcy court had no misgivings about any of the complaint's claims for relief, and the bankruptcy court gave its approval to the initiation of the complaint on September 11, 2009. *See* ECF No. 308-139 (Pls.' Ex. 138).

C. Because It Is Undisputed That the PBGC Failed to Obtain a Court Decree Before Terminating the Plan, the PBGC Cannot Obtain Summary Judgment on Count One

While the PBGC initially took steps to comply with § 1342(c)'s requirement that it obtain a court adjudication, *see PBGC v. Delphi Corp.*No. 2:09-cv-12876 (E.D. Mich., filed July 22, 2009), the PBGC then dismissed that action, *see id*. at ECF No. 5 (Aug. 7, 2009 Notice of Voluntary Dismissal), [redacted]

[redacted]

Because the PBGC did not obtain a court decree before terminating the Plan, and ERISA requires one, the Court should deny the PBGC summary judgment as to Count 1.

III. THE PBGC'S MOTION FOR SUMMARY JUDGMENT ON COUNT 2 SHOULD BE DENIED BECAUSE DELPHI EXECUTED THE TERMINATION AGREEMENT IN A CORPORATE RATHER THAN FIDUCIARY CAPACITY

Count 2 alleges that even if a pension plan can be terminated by agreement between the PBGC and a plan administrator, the decision to select a summary method of termination can be undertaken, if at all, only by the plan administrator in a fiduciary capacity. This is the only reading of the statute – assuming terminations by agreement are at all allowable – that would make logical sense, that accords with ERISA and trust law, and that would be consistent with Congress's insistence on any plan termination process including substantial safeguards for participants and beneficiaries. If a decision to select a summary method of plan termination can be made by a plan administrator solely in a fiduciary capacity, then at the very least participants and beneficiaries (through their fiduciary) will have some protection in the process before their vested property interests (*see infra* p. 82-88) are diminished or extinguished. As demonstrated below, the PBGC's arguments to the contrary are unavailing.

A. An Employer's Decision to Enter Into a Summary Termination Agreement With the PBGC Under 29 U.S.C. § 1342(c)(1) Is Subject to ERISA's Fiduciary Standards

The PBGC's principal argument regarding Count 2 is that Delphi's agreement with the PBGC to terminate the Salaried Plan was not subject to fiduciary obligations because Delphi was acting as a plan sponsor, not as an administrator, when it terminated the Plan. *See* ECF No. 304 at 25-29. The argument plainly fails. Beginning, as one must, with the statutory language, whatever power the fourth sentence of § 1342(c)(1) provides with regard to an agreement with the PBGC, it expressly provided to the "plan administrator." This is significant because a "plan sponsor" is a distinct and separate entity from a "plan administrator" under ERISA, *compare* 29 U.S.C. § 1002(16)(A) (defining plan administrator) *with* 29 U.S.C. § 1002(16)(B) (defining plan sponsor), but the PBGC's argument depends on conflating the two.

While plan administrators (at least those with discretion) are, by definition, fiduciaries under ERISA, plan sponsors are not. *See, e.g.*, *id.* § 1002(21)(A)(iii) ("a person is a fiduciary with respect to a plan to the extent . . . he has any discretionary authority or discretionary responsibility in the *administration of such plan*") (emphasis added). Nothing in ERISA requires that the plan sponsor also be the plan administrator; consequently, plan sponsors usually do not have any fiduciary responsibilities unless they choose to retain some administrative powers. *See, e.g.*, *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996). Moreover, an employer can have dual roles with respect to a pension plan, in that the employer can serve as both plan sponsor and plan administrator. "Which hat the employer is proverbially wearing depends upon the nature of the function performed." *Beck v. PACE Int'l Union*, 551 U.S. 96, 101 (2007).

Whatever the extent of the power granted in the fourth sentence of § 1342(c)(1), it is vested in the plan administrator, not the plan sponsor. This is the beginning and the end of the inquiry. *See, e.g.*, *Sun Life Assurance Co. v. Jackson*, 877 F.3d 698, 702 (6th Cir. 2017), *cert. denied*, 128 S. Ct. 2624 (2018) ("After all, plan administrators act as fiduciaries"). While the PBGC cites a number of authorities for the proposition that an *employer's* decision to terminate a pension plan is a settlor function, *see* ECF NO. 304 at 26-27, those decision are inapposite, because the decision at issue *here* was expressly vested to the *plan administrator*, meaning Congress intended it to be a fiduciary function. Again, "[i]f the statutory language is plain, we must enforce it according to its terms." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)). Section 1342(c)(1) refers specifically to a "plan administrator," and § 1002(21)(A)(iii) establishes that "a person is a fiduciary with respect to a plan to the extent . . . he has any discretionary authority or discretionary responsibility in the administration of such plan." *See* 29 U.S.C. §§ 1342(c)(1), 1002(21)(A)(iii). Accordingly, Delphi could only have had the power to execute the termination and trusteeship agreement in its capacity as plan administrator; as such there can be no question that fiduciary obligations must attach because Delphi's decision "was not an action which could be given effect as a corporate management decision." *Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 225, 227 (3d Cir. 1989); *see also Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) ("The ordinary trust law understanding of fiduciary 'administration' of a trust is that to act as an administrator is to perform the duties imposed, or exercise the powers conferred, by the trust documents.") (internal citations omitted).

To be sure, when an employer, wearing its plan *sponsor* hat, voluntarily decides to terminate a pension plan under 29 U.S.C. § 1341, that decision is made using its non-fiduciary, settlor "hat." *See Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("[w]hen employers undertake [plan termination], they do not act as fiduciaries, but are analogous to the settlors of a trust") (internal citations omitted). In these circumstances, 29 U.S.C. § 1341 provides the plan *sponsor* with two options: it may pursue a standard termination or it may pursue a distress termination. Regardless, the decision by a plan *sponsor* to terminate a plan, whether standard or distress, does not actually terminate the plan under ERISA; it is simply a business decision indicating that the employer wishes to cease providing a pension plan benefit to its employees. *See Payonk*, 883 F.2d at 227 (explaining that electing to terminate a plan is "a corporate management decision").

After an employer unilaterally decides to terminate a plan under § 1341, it then dons the "hat" of a fiduciary if it, as opposed to a separate third-party administrator, actually implements the termination. This is because plan termination implicates various discretionary actions that could affect participants' rights and benefits, such as choosing methods of locating all participants owed a distribution upon plan termination. *See* Dep't of Labor, Field Assistance Bulletin No. 2014-01, *Fiduciary Duties and Missing Participants in Terminated Defined Contribution Plans* 2 (Aug. 14, 2014)[10] ("[T]he fiduciary responsibility provisions of ERISA govern the steps taken to implement this 'settlor' decision, including steps to locate missing participants."); *see also* 29 U.S.C. § 1002(21)(A) (making a person a fiduciary to the extent he or she exercises discretion in connection with plan administration).

Similarly, the selection of a particular method of plan termination is a fiduciary function subject to ERISA's fiduciary obligations — for example,

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[10] https://www.dol.gov/sites/default/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2014-01.pdf

terminating a plan by purchasing annuities, versus issuing lump-sum distributions. *See* 29 U.S.C. § 1341(b)(3)(A)(i) ("[T]he plan administrator shall purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan"); *Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1342 (9th Cir. 1994) (imposing fiduciary duties on plan administrator selecting annuity provider to distribute benefits under terminating plan); *see also Beck*, 551 U.S. at 102 (holding that if merger were a "*permissible* form of plan termination," then the decision not to consider merger in terminating a plan could be subject to fiduciary duties). In *Waller v. Blue Cross of California*, for instance, the defendant terminated its retirement plan by purchasing annuities from a company that later entered conservatorship. 32 F.3d at 1338-39. Participants in and beneficiaries of the plan alleged that the defendant violated its fiduciary duties by selecting a lower-cost annuity provider with an eye toward maximizing the residual plan assets, which would revert back to the company following termination. *Id.* at 1341. In response, the defendant argued that the mere act of selecting an annuity provider does not constitute a fiduciary act. *Id.* at 1342. The Ninth Circuit disagreed, finding the distinction between the "*decision* to terminate [and] the *implementation* of the decision . . . dispositive." *Id.* Citing Congress's intent in enacting ERISA, the court refused to excuse the defendant from its fiduciary duties "at such a critical moment in the life of the plan" – *i.e.*, one with significant bearing on participants' vested benefits. *Id.* at 1343.

Larson v. Northrop Corp., 21 F.3d 1164 (D.C. Cir. 1994), similarly held that fiduciary standards affix to the implementation of plan termination. In *Larson*, a participant alleged that upon plan termination Northrop Corporation purchased annuity contracts that failed to include an early retirement subsidy that had been provided by the plan. *Id.* at 1166. To resolve a statute of limitations issue, the court had to pinpoint the timing of the fiduciary breach, and it explained that because "activities undertaken to implement the termination decision are generally fiduciary in nature," a fiduciary breach, if any, "was fully completed when Northrop acquired the allegedly insufficient annuity." *Id.* at 1169-70 (internal quotation marks and citation omitted). In other words, at that point, the company had selected its method of termination under § 1341, and had therefore made a *fiduciary* decision.

This reasoning applies even more forcefully in the context of § 1342, which explicitly refers to a "plan administrator." Unlike the cases described above, where courts had to sort out which "hat" an employer was wearing in undertaking the actions at issue, here the statute provides the answer definitively, by making clear that the action in question is one undertaken by the plan administrator. Assuming, *arguendo*, that the fourth sentence of § 1342(c)(1) allows for plan terminations by agreement between the PBGC and a plan administrator, that would mean that the statute provided Delphi (in its role as *plan administrator*) with a choice: it could agree to summary termination (which, pursuant to the PBGC's reading of the statute, terminated the plan without any further procedural protections), or it could disagree (in which case the PBGC would have been required to prove to a district court that the plan meets the statutory criteria for termination). *See* 29 U.S.C. § 1342(c)(1).

A decision to use powers provided solely to a plan administrator under ERISA to agree to terms resulting in the termination of vested pension rights is not a business decision insulated from fiduciary considerations. *Cf. Payonk*, 883 F.2d at 227. To the contrary, it was an exercise of discretion assigned solely to the "plan administrator," *see* 29 U.S.C. § 1342(c)(1), who, by definition, acts subject to ERISA's fiduciary obligations. *See id.* § 1002(21)(A) ("[A] person is a fiduciary with respect to a plan to the extent . . . he has *any discretionary authority or discretionary responsibility* in the *administration* of such plan") (emphasis added); *see also Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 295 (5th Cir. 2000) ("a fiduciary's acts undertaken to implement a plan's termination may [not] deviate from ERISA's [fiduciary duties]"). To the extent that § 1342(c) authorizes the PBGC to terminate a plan via agreement, Delphi could have had the power to execute the termination agreement – and formulate its terms – only in its capacity as plan administrator. As such, there can be no question that fiduciary obligations attached.

"One of Congress' central purposes in enacting [ERISA] was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated[,] . . . by making sure that if a worker has been promised a defined pension benefit upon retirement -- and if he has fulfilled whatever conditions are required to obtain a vested benefit -- he actually will receive it." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374-75 (1980). Imposing fiduciary duties on individuals with discretion to impact participants' vested benefits was a critical element of the statutory scheme Congress created when it enacted ERISA. *See e.g., Varity Corp.*, 516 U.S. at 496 ("ERISA protects employee pensions and other benefits . . . by setting forth certain general fiduciary duties applicable to the management of both pension and nonpension benefit plans."); *see also PBGC v. Findlay Indus.*, Inc., No. 17-3520, 2018 U.S. App. LEXIS 25071, at *30 (6th Cir. Sept. 4, 2018) ("the official policy of ERISA is to protect 'the interests of participants in employee-benefit plans and their beneficiaries' while 'establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans.'") (quoting 29 U.S.C. § 1001(b)).

Consistent with this intent, ERISA permits employers to terminate pension plans, so long as any decision that might denigrate vested benefits are made according to ERISA's fiduciary duties. Because the mere act of *deciding* to terminate a fully funded pension plan does not innately affect vested benefits, Congress did not impose fiduciary duties on the business decision to terminate such a plan. But because the method and terms of termination can, and often do, affect a participant's vested benefits, Congress imposed fiduciary duties on decisions made as part of *implementing* the decision to terminate.

Even more so, assuming *arguendo* that § 1342(c) allows for termination by agreement, an agreement between the PBGC and a plan administrator to summarily terminate a plan necessarily strips participants of significant procedural protections for participants' rights and vested benefits (*e.g.*, court adjudication), leaving participants with just one final protection: a suit under § 1303(f) to undo the act where the fiduciary's agreement violated its fiduciary duties. Failing to subject summary termination decisions to fiduciary duties eliminates this one remaining safeguard and leaves plan participants wholly unprotected – a result directly in conflict with the purposes of ERISA.

B. The PBGC Can Be Sued for Its Knowing Participation in Delphi's Fiduciary Breach

"The duties charged to an ERISA fiduciary are 'the highest known to the law,'" *see Gregg v. Transportation Workers of America International*, 343 F.3d

833, 841 (6th Cir. 2003) (quoting *Chao v. Hall Holding Co.*, 285 F.3d 415, 426 (6th Cir. 2002)), and include the duty of loyalty and the duty of prudence. *See* 29 U.S.C. § 1104(a)(1)(B) (requiring ERISA fiduciaries to act "solely in the interest of the participants and beneficiaries" and "with the care, skill, prudence, and diligence . . . that a prudent man . . . would use"). The duty of loyalty requires that ""“all decisions regarding an ERISA plan must be made with an eye single to the interests of the participants and beneficiaries."'" *Gregg*, 343 F.3d at 840 (quoting *Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6th Cir. 1995) (citation omitted)).

Courts have consistently recognized that fiduciaries have an obligation under ERISA "'to avoid placing themselves in a position where their acts as directors or officers of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees.'" *McMahon v. McDowell*, 794 F.2d 100, 110 (3d Cir. 1986) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982)). "This duty may, in some circumstances, require the fiduciary to step aside in favor of a neutral referee, or at the least, to conduct an explicit inquiry into the potential for a conflict of interest." *Id.* (citing *Donovan*, 680 F.2d at 271). This is a "rigorous standard," taken from the "common-law conception of a trustee." *Id.* (citing F. Douglas Raymond, *ERISA Trusts and Tender Offers*, 13 Sec. Reg. L. Rev. 253, 257-59 (1985)).

Here, in entering an agreement summarily to terminate the Salaried Plan, the PBGC unlawfully entered into an agreement with a plan administrator who did not act as a fiduciary of the Plan. Instead, as demonstrated below, Delphi entered into the termination agreement believing it to be a "settlor" function to be undertaken in its corporate interest, rather in in the Plan participants' and beneficiaries' interests.

As noted above, in June 2009, Delphi proposed an amended plan of reorganization that contemplated the termination of the Salaried Plan in connection with a settlement that Delphi was negotiating with the PBGC. *See* First Amended Joint Plan of Reorganization of Delphi Corporation And Certain Affiliates, Debtors and Debtors-In-Possession (As Modified) § 7.17, *In re Delphi Corp.*, No. 05-44481 (Bankr. S.D.N.Y. June 19, 2009), ECF No. 17030. The PBGC and Delphi executed that settlement agreement on July 21, 2009, which in turn *required* Delphi to execute a termination and trusteeship agreement with the PBGC terminating the Salaried Plan if the PBGC issued a notice of determination pursuant to 29 U.S.C. § 1342(c). *See* Notice of Filing of Settlement Agreement Between Delphi Corporation and the Pension Benefit Guaranty Corporation, Ex. 1 § 3(a), *In re Delphi Corp.*, No. 05-44481 (Bankr. S.D.N.Y. July 21, 2009), ECF No. 18559. As a result, once it entered into that settlement agreement with the PBGC, Delphi committed itself to executing the termination agreement, subject to the discretion of the bankruptcy court (which would consider whether Delph was exercising proper business judgment to enter into it) and the PBGC (with its own institutional concerns), but without reference to *any fiduciary consideration*s.

Additionally, during a July 29, 2009 hearing on Delphi's proposed plan of reorganization, Delphi's counsel explicitly represented to the bankruptcy court that if Delphi were to execute the termination agreement with the PBGC, "in making the decision, Delphi acts in a settler or nonfiduciary capacity." *See* ECF No. 308-140 (Pls.' Ex. 139) at 193:20-21. Delphi's counsel then went further, emphasizing that "Delphi's board of directors ha[d already] directed the plan administrator, which is Delphi, to enter into the PBGC-Delphi settlement agreement, and upon [the bankruptcy court's] approval of it, to execute a termination and trusteeship agreement if that agreement is proposed by the PBGC." *Id*. at 194:7-11. Delphi's agreement with the PBGC was "necessary," according to Delphi's counsel, because "this is what will allow Delphi to reorganize and to move forward." *Id*. at 197:9-10. No documents that Delphi produced in discovery suggest that it considered the Plan participants' interests in making the determination to enter into the settlement agreement with the PBGC, or the termination agreement. And of course, the agreement turned out *not* to be in the participants' and beneficiaries' best interests, because it resulted in the substantial loss of vested benefits to them when all other similarly situated persons (such as union employees) retained their full benefits (through guaranteed benefits and top-ups). *See* SUMF ¶¶ 9, 98, 113.

Plaintiffs can sue, and seek relief against, solely the PBGC to nullify its agreement with Delphi. It is the PBGC that has been carrying out that agreement, and the PBGC is subject to suit in connection with plan terminations under 29 U.S.C. § 1303(f). And contrary to the PBGC's contention, *see* ECF No. 304 at 24 n.59, the Supreme Court has established that, under ERISA and traditional trust law, a third party *can* be sued for participating in a fiduciary's breach, with appropriate equitable relief to be awarded against the third party for the fiduciary's breach. *See Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245-53 (2000).

Notwithstanding the above, the PBGC raises a final argument as to why it should not be held accountable for its participation in this flagrant breach of fiduciary duty, wrongly asserting, that "shortly before it was signed, the Bankruptcy Court rejected Plaintiffs argument that Delphi's agreement with PBGC to terminate the Salaried Plan would be a breach of Delphi's fiduciary." ECF No. 304 at 24-25. The record shows this claim is demonstrably incorrect.

Contrary to the PBGC's assertions here, the bankruptcy court did not opine on whether Delphi would breach its fiduciary duty by signing the termination and trusteeship agreement. In fact, in discussing the objection raised by Plaintiffs Black and Cunningham, Judge Drain specifically noted that Delphi did not "ask for a determination that they are authorized to enter into the termination agreement with the PBGC under Section 3(b)(i) of the settlement agreement *for all purposes*, but only that such termination would not be a violation of the labor MOUs, the Union 1113, 1114 settlement approval orders or the local agreement between Delphi, Connection Systems, and Electronic and Space Technicians Local 1553." *See* Pls.' Ex. 143 (July 29, 2009 Hearing) at 210:2-9 (emphasis added) (attached hereto). Accordingly, Judge Drain said he was "*not determining* and not being asked to determine *whether Delphi as plan administrator would have the right to enter into the termination and trusteeship agreement . . . otherwise*." *Id*. at 210:9-13) (emphasis added). Instead, the bankruptcy court was focused on whether Delphi's proposed actions made sense as a matter of business judgment. *See, e.g., id*. at 211:14-20 ("So, again, without ultimately deciding the underlying issues . . . I conclude that the plan modification is feasible and that the agreement is not illusory and that the debtors, therefore, are exercising proper business judgment to enter into it.").

Further, the bankruptcy court made clear it was not passing judgment on the propriety of the PBGC's conduct. *See id.* at 215:18-216:03 ("I'm not being asked to approve the PBGC's actions. Rather, as the Bankruptcy Code and case law is clear, I am supposed to evaluate a settlement from the perspective of the debtors' estate and creditors. . . . my review is based on what's in the best interest of the estate and whether the settlement is fair and reasonable as far as the debtors' estate and creditors are concerned."); *id*. at 217:19-22 ("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."). Consistent with these determinations, the bankruptcy court, in overruling the objections, stated that nothing in the court's orders prohibited any employee adversely affected by any plan termination from either seeking to intervene in any district court action filed by the PBGC under § 1342 to terminate Delphi's pension plans or "pursuing any independent action against the PBGC regarding the termination of the plan under section 4003(f) of ERISA, 29 U.S.C. § 1303(f)." *See* SUMF ¶ 109. Similarly, prior to filing this action, Plaintiffs provided the bankruptcy court with a copy of Plaintiffs' proposed suit, which the bankruptcy court approved, without objection. *See* ECF No. 308-139 (Pls.' Ex. 138).

Because there are no genuine disputes of fact that Delphi failed to execute the termination agreement according to its fiduciary duty of loyalty, and as a matter of law Delphi's actions in implementing and creating the terms for termination were subject to fiduciary obligations, the PBGC is not entitled to summary judgment on Count 2.

IV. BECAUSE THE PBGC'S SUMMARY TERMINATION OF THE PLAN DEPRIVED PLAINTIFFS OF THEIR DUE PROCESS RIGHTS, THE PBGC IS NOT ENTITLED TO SUMMARY JUDGMENT AS TO COUNT 3

The Due Process Clause of the Fifth Amendment "'provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures.'" *Mitchell v. Fankhauser*, 375 F.3d 477, 479 (6th Cir. 2004) (citation omitted). The Sixth Circuit applies a two-part test to determine whether government action violates due process. First, the Court must "determine[] whether the plaintiff has a property interest entitled to due process protection." *Id.* at 480. Second, if the plaintiff has a protected property interest, then the Court "must . . . determine what process is due." *Id*. (internal quotation marks and citation omitted).

Here, the PBGC's summary termination of the Plan violated Plaintiffs' constitutional rights: Plaintiffs were stripped of their vested pension benefits (and the rights associated with those benefits) with no pre-deprivation process at all. The PBGC's actions robbed Plaintiffs of *any* opportunity to be heard before more than $520 million of vested pension benefits under the Plan were extinguished, benefits that were earned over a career of service, and were supposed to ensure their retirement security of the Plan's participants. As a result, and for the reasons discussed below, the PBGC is not entitled to summary judgment as to Count 3.

A. Plaintiffs Have a Protected Property Interest in Their Vested Pension Benefits

The PBGC concedes that where a party has a "'legitimate claim of entitlement to'" a benefit, the party has a constitutionally protected property interest, and that Plaintiffs lost vested pension benefits as a result of the termination. *See* ECF No. 304 at 30 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). However, the PBGC, remarkably, asserts that Plaintiffs nonetheless do not have a protected property interest in their lost vested pension benefits. *See id.* In a brief full of dubious claims, this one may take the cake.

First, it is well-established that the right to receive vested pension benefits is a protected property interest. *See, e.g.*, *McDarby v. Dinkins*, 907 F.2d 1334, 1336 (2d Cir. 1990) (finding that the plaintiff had a "a protectible property interest in his city pension benefit"); *Flannelly v. Bd. of Trs. of N.Y. City Police Pension Fund*, 6 F. Supp. 2d 266, 268 (S.D.N.Y. 1998) ("An individual's disability benefits or pension has been found to constitute such a property interest."); *Ginaitt v. Haronian*, 806 F. Supp. 311, 317 (D.R.I. 1992) ("There is little question that the plaintiff has a property interest in his pension."). Indeed, the PBGC cannot cite one case holding that vested pension benefits are not protected property interests; despite the PBGC's suggestion to the contrary, *see* ECF No. 304 at 31 n.81, the Second Circuit's decision in *Jones & Laughlin* acknowledged that "[w]e and other courts have suggested that pension plan members have a cognizable interest in receiving their contractually defined benefits," but found that it did not need to address the question in that case. *See Jones & Laughlin*, 824 F.2d at 201 (citing *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 850-51 (2d Cir.), *cert. denied sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionary & Tobacco Workers Int'l Union of Am., AFL-CIO*, 467 U.S. 1259 (1984); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Keystone Consol. Indus., Inc.*, 793 F.2d 810, 815-17 (7th Cir.), *cert. denied*, 479 U.S. 932 (1986)).

Nevertheless, the PBGC argues that the Salaried Plan didn't *really* promise to pay these benefits "in full in all circumstances." *See* ECF No. 304 at 30. The PBGC points to language in the Plan document in which Delphi reserved its right to terminate the Plan. *Id*. The PBGC then selectively quotes from this language, arguing that, *in the event of the Plan's termination*, benefits under the Plan were nonforfeitable "*<u>only</u>* 'to the extent funded as of [the termination] date." *Id*. at 31 (quoting Def.'s Ex. 9 at 121) (emphasis in original). The PBGC then infers that the lost vested pension benefits were not nonforfeitable because they were not funded, and thus, Plaintiffs supposedly had no legitimate expectation to them. This argument is terribly flawed.

First, the PBGC has, again, misleadingly added a word to a quotation that directly changes it meaning. The Plan document does not say that benefits are nonforfeitable "only" to the extent they are funded. *See* ECF No. 304-11 (Def.'s Ex. 9) at 121. Second, even if that were what the Plan said, it would irrelevant. Both ERISA and the Supreme Court have made clear that a vested benefit need not be funded to be nonforfeitable. *See, e.g.*, *Nachman Corp. v. PBGC*, 446 U.S. 359, 376 (1980) (throughout its history, ERISA used the terms "vested" and "nonforfeitable" "synonymously"); *id*. at 378 ("it is clear that the normal usage in the pension field was that even if the actual realization of expected benefits might depend on the sufficiency of plan assets, they were nonetheless considered vested.").

Indeed, the PBGC's argument here is particularly confounding given that the PBGC itself characterizes these lost benefits as nonforfeitable. *See* 29 U.S.C. § 1344(a) (describing six-tier benefit allocation system); *id*. § 1344(a)(5) (describing the fifth-tier, or PC5, as including "all other *nonforfeitable* benefits under the plan") (emphasis added); ECF No. 308-124 (Pls.' Ex. 123) at 56 (noting more than $350 million in unfunded PC5 benefits). Further, the PBGC's argument undermines a central purpose of ERISA, "ensur[ing] that 'if a worker has been promised a defined pension benefit *upon retirement*-and if he has fulfilled whatever conditions are required to obtain a vested benefit-he actually will receive it.'" *Thornton v. Graphic Commc'ns Conf. of Int'l Bhd. of Teamsters Suppl. Ret. & Disability Fund*, 566 F.3d 597, 607 (6th Cir. 2009) (quoting *Nachman Corp.*, 446 U.S. at 375).

It is beyond dispute that the PBGC's termination of the Salaried Plan extinguished pension benefits that were fully vested, and would, but for the PBGC's termination actions, still be owed to Plaintiffs. The PBGC's termination of the Plan deprived Plaintiffs and other Plan participants of $521 million in vested pension benefits Plan-wide. *See id*. at 1. This loss has been spread out over the Plan's 20,160 participants and beneficiaries. *Id*. The PBGC's termination of the Plan resulted in substantial pension losses to Plaintiffs, and [redacted] *See* SUMF ¶ 9; [redacted] But for the PBGC's termination of the Plan, these benefits would still be owed to Plaintiffs. The fact that the PBGC will also pay out roughly $1.5 billion in its insurance guarantee to the Plan's participants does not extinguish this loss.[11]

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[11] In its motion for summary judgment, the PBGC erroneously asserts that it will "expend more than $2 billion of the agency's own funds to pay the unfunded guaranteed benefits to Plaintiffs and other participants." *See* ECF No. 304 at 32. While this $2 billion figure was what the agency originally represented to this Court, the PBGC has subsequently revised this calculation downward, stating that

Additionally, pursuant to the termination and trusteeship agreement with the Plan's administrator, the PBGC assumed the role of statutory trustee to the Plan pursuant to § 1342. *See* SUMF ¶ 112. The statutory trustee holds the assets of a terminated plan in trust for the Plan's participants, and must allocate them as the benefits come due, according to the priority scheme laid out in 29 U.S.C. § 1344, based on the Plan's termination date. According to the PBGC's valuation, the Plan's assets were worth approximately $2.513 billion as of the termination date (July 31, 2009). *See* ECF No. 308-134 (Pls.' Ex. 123) at 1.

However, as Plaintiffs' expert Dr. Rajah observed in his report, because of the timing of the Plan's termination, the "plan's assets were severely depressed" when the Plan was terminated in July 2009. *See* ECF No. 308-129 (Pls.' Ex. 128) at 12. "Between January 1, 2008 and March 31, 2009, the S&P 500 decreased by approximately 44%" while "[b]etween March 31, 2009 and May 31, 2015 [the time when Dr. Rajah completed his report], the S&P increased by approximately 94%." *Id*. at n.5. The numbers are even more dramatic when the last three years of market results are included in the comparison. On July 31, 2009, the S&P 500 closed at 987, and on August 31, 2018 the S&P 500 closed at 2,901, an increase of

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it will only expend roughly $1.5 billion in its insurance guarantee. *See* SUMF ¶¶ 113-14.

roughly 194%.[12] Similarly, the Dow Jones Industrial Average closed at 9,171 on July 31, 2009, and 25,964 on August 31, 2018, an increase of 183%.[13]

The timing of the PBGC's termination thus deprived the Plan's participants of their right to share in the market recovery that occurred over the last eight years. Unlike a normal trust, participants in a terminated plan normally (absent PBGC wrongdoing) do not enjoy the increases to the trust's value over time. Instead, once a plan is terminated, generally "[a]ny increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, the [PBGC]." 29 U.S.C. § 1344(c). Therefore, the PBGC's decision to terminate the Plan (if sustained) as of July 31, 2009 was, at least from the point of view of the Plan's participants and the Title IV insurance fund, "made at the worst possible time, and on the basis of financial conditions that did not forecast the long-run expectation for the plan in a realistic or reasonable way." *See* ECF No. 308-129 (Pls.' Ex. 128) at 12.

By terminating the Plan at the bottom of the market, not only did the PBGC deprive the participants of the benefit of this increase, the PBGC took for itself the ability to earn hundreds of millions of dollars in investment returns. According to the PBGC's last eight annual reports, since terminating and trusteeing the Plan, the

[12] *See* https://quotes.wsj.com/index/SPX/historical-prices.

[13] *See* https://quotes.wsj.com/index/DJIA/historical-prices.

PBGC has, on average, enjoyed an 8.2% annual return on funds held in its trust account (including the $2.5 billion it took from the Salaried Plan).[14]

B. The PBGC Provided the Plaintiffs *No Process Whatsoever* Before Depriving Them of Their Protected Pension Benefits

Given the property interests at stake, the PBGC's termination of the Plan can only be upheld if it was accomplished pursuant to "'constitutionally adequate procedures.'" *Mitchell v. Fankhauser*, 375 F.3d 477, 479 (6th Cir. 2004) (citation omitted). While determining the process required under a given set of circumstances *can* be complicated, in this case it is not. The government provided Plaintiffs with no notice or pre-deprivation opportunity to be heard at all. In fact, it specifically withdrew its termination action to avoid providing Plaintiffs with any process. Because the Due Process Clause requires the government to provide some level of process *greater than zero* before stripping individuals of their protected property interests, the process here is *per se* constitutionally insufficient

1. Failing to Provide Plaintiffs a Hearing Before Depriving Them of Their Vested Pension Benefits Violated the Due Process Clause

The Constitution generally requires that "'an individual [must] be given an opportunity for a hearing before he is deprived of any significant property interest.'" *Guba v. Huron Cty.*, 600 F. App'x 374, 382 (6th Cir. 2015) (quoting

[14] *See* PBGC Annual Reports, https://www.pbgc.gov/about/annual-reports (last updated June 26, 2018).

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)). "Although 'many controversies have raged about the cryptic and abstract words of the Due Process Clause . . . there can be no doubt that *at a minimum* they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co*., 339 U.S. 306, 313 (1950)) (emphasis added).

Plaintiffs' vested property rights were taken from them without any procedural safeguards — a clear violation of the Due Process Clause. The PBGC's termination of the Plan, effectuated by nothing more than an "agreement" between the PBGC and Delphi (who, as demonstrated above, had a conflict of interest), flies in the face of even the bare "minimum" required by the Due Process Clause. *See Boddie*, 401 U.S. at 378.

To be sure, in certain "rare and extraordinary situations," a pre-deprivation hearing is not required, and due process may be satisfied through post-deprivation procedures alone. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570 (1972). This, however, is not such a situation. For example, in *Parratt v. Taylor*, the Supreme Court held that "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). The narrowness of this exception is illustrated by the facts in *Parratt*, where an inmate in a Nebraska prison alleged that prison officials violated his due process rights when they failed to deliver to him certain hobby materials that he had ordered and paid for. *Id.* at 530. The Court held that where a deprivation occurs, as it did in *Parratt*, "as a result of a random and unauthorized act by a state employee" as opposed to an "established state procedure," "it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation." *Id.* at 541. In *Zinermon v. Burch*, the Court went further, holding that "[i]n situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Zinermon v. Burch*, 494 U.S. 113, 132 (1990).

The current situation is not one of those "rare and extraordinary" circumstances, for two reasons. First, the PBGC's termination of the Plan stripped Plaintiffs of their vested property rights pursuant to a procedure that the PBGC has repeatedly used to terminate plans. Where deprivation results from an established government procedure, a pre-deprivation hearing is feasible, and required, to comply with the Due Process Clause. *See Mertik v. Blalock*, 983 F.2d 1353, 1365

(6th Cir. 1993) ("[In c]ases in which a due process challenge is made to deprivations resulting from the enforcement of an established state procedure . . . the actions at issue are not random or unauthorized, and it is both practical and feasible for the state to provide pre-deprivation process to the aggrieved party."); *see also Hudson v. Palmer*, 468 U.S. 517, 532 (1984) ("[P]ostdeprivation 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."). The challenge here is to an established procedure, namely a summary termination procedure that the PBGC claims it has used in "the majority" of plan terminations. *See, e.g.,* ECF No. 45 at 6-7. In short, there is no reasonable basis to conclude that this was some "random and unauthorized action," rendering the existence of any post-termination procedures irrelevant. *Harris v. City of Akron*, 20 F.3d 1396, 1401 (6th Cir. 1994).

Second, a pre-deprivation hearing was plainly feasible here, and failed to occur only because the PBGC wanted to evade judicial review. *See Zinermon*, 494 U.S. at 132 ("[i]n situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking"). Not only did Congress clearly contemplate that the PBGC would terminate pension plans through district court adjudications – § 1342(c) sets out a detailed procedure for doing so – but *the PBGC actually initiated those very proceedings in this case*. *See* SUMF ¶ 107. Again, on July 22, 2009, the PBGC filed an action in this Court to terminate the Plan. *Id*. [redacted] The PBGC then filed a notice of voluntarily dismissal of its termination action. *Id*. The PBGC's use of this termination procedure was driven not by any exigent circumstances that made continuing with the termination action impractical, [redacted] This is plainly not a valid justification for foregoing pre-deprivation review. Because the PBGC could have feasibly continued with its termination action in the district court, due process required the PBGC to have done so.

2. <u>The Court Need Not Consider the Government's Interest in Foregoing a Pre-Deprivation Hearing in Evaluating the Adequacy of the Process in This Case — Zero Process Is *Per Se* Insufficient</u>

The PBGC argues the Court should apply the framework set forth by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and, relying again on the Second Circuit's decision in *Jones & Laughlin*, the PBGC claim that a pre-deprivation hearing was unnecessary because the government's interest in foregoing such a hearing outweighed other pertinent factors. *See* ECF No. 304 at 32-35. Again, the PBGC's reliance on *Jones & Laughlin* is misplaced; as explained below, *Mathews* applies only when actual administrative procedures have been provided. Given that no such administrative procedures were provided here, the *Mathews* framework is inapt.

Mathews set forth several factors intended to determine whether "administrative procedures provided [were] constitutionally sufficient." 424 U.S. at 334-35. Those factors include:

> 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.

Id. at 335. As these factors make clear, the *Mathews* balancing test applies to "administrative procedures" and is, therefore, relevant *only* where there are procedures to assess.

Here, the *complete absence* of pre-deprivation procedures violated Plaintiffs' due process rights. When other courts have been tasked with evaluating the constitutional sufficiency of a complete absence of process, they have found such an absence *per se* unconstitutional and concluded that *Mathews* was irrelevant. *See Holly v. City of Ecorse*, No. 05-74238, 2006 U.S. Dist. LEXIS 68160, at *11 (E.D. Mich. Sept. 22, 2006) ("It is not necessary for the Court to decide the extent of the process that was due Plaintiff under these circumstances in order to determine if his due process rights were violated because Plaintiff was not given any due process at all. Defendant conceded during oral argument that Plaintiff did not receive notice or a hearing prior to deprivation."); *Conkey v. Reno*, 885 F. Supp. 1389, 1398 (D. Nev. 1995) ("The *Mathews v. Eldridge* analysis does not determine whether a complete absence of process is permitted, but merely what process is due. Here, there was a complete failure of process. The Court need not apply the *Mathews v. Eldridge* analysis to determine whether adequate process was given."); *see also Hicks v. Colvin*, No. 16-154, 2016 U.S. Dist. LEXIS 176888, at *6-7 (E.D. Ky. Dec. 21, 2016) ("due process requires that people receive meaningful hearings before the government takes away their property for good") (citing *Mathews v. Eldridge*, 424 U.S. at 339-40).

While the Sixth Circuit has not directly addressed whether the *Mathews* balancing test is relevant when the government provides zero process, its prior holdings strongly suggest that the answer is "no." The Sixth Circuit has refused to apply *Mathews* when the government deprives individuals of an "absolute" procedural requirement. *See e.g.*, *Doe v. Cummins*, 662 F. App'x 437, 449 n.5 (6th

Cir. 2016) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). In *Doe v. Cummins*, the Sixth Circuit observed that "the constitutional requirement of an unbiased decisionmaker is absolute," such that the *Mathews* balancing test would be inapplicable, and a violation "would automatically trigger a due-process violation, irrespective of any balancing of interests." *See id.*

Like the right to an unbiased decisionmaker, the right to notice and a hearing before being stripped of an established property interest is also "absolute." *See Henry v. City of Middletown*, 655 F. App'x 451, 463 (6th Cir. 2016). In *Henry*, the Sixth Circuit established that "however weighty the governmental interest may be," the government must *always* provide "*some* notice and *some* opportunity to be heard prior to final deprivation of a property interest." *See id.* (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982)). Because Sixth Circuit precedent precludes application of the *Mathews* balancing test to "absolute" procedural rights, and because notice and some opportunity to be heard *before* losing a property interest qualifies as one such "absolute" right, *Mathews* does not apply.

3. Assuming, Arguendo, that the PBGC's Interest in Foregoing a Pre-Deprivation Hearing is Relevant, that Interest is Still Insufficient to Justify its Failure to Hold a Pre-Deprivation Hearing

Finally, assuming, *arguendo*, that the PBGC's interest in foregoing a pre-deprivation hearing is constitutionally relevant, that interest is insufficient under *Mathews* to justify the PBGC's failure to hold a pre-deprivation hearing.

Mathews instructs that the first balancing factor is an evaluation of "the private interest that will be affected by the official action." *Mathews*, 424 U.S. at 335. The PBGC argues that Plaintiffs' interest here is not compelling because, supposedly, "Plaintiffs do not lose anything as a result of the government's role in this case, but only gain." *See* ECF No. 304 at 33. To the contrary, and as described above, the loss to the Plan's participants as a result of the termination is significant, [redacted] *See* SUMF ¶ 9. [redacted] It is an unassailable principle that a person "has an interest in keeping what has, until recently, been hers," and that "the government should not take people's things without giving them due process." *Hicks v. Colvin*, 214 F. Supp. 3d 627, 642 (E.D. Ky. 2016); *see also Hicks*, 2016 U.S. Dist. LEXIS 176888, at *18 ("Hicks's interest in keeping her benefits – without having to reapply for them unnecessarily – remains high.").

Similarly, the PBGC's suggestion that, as the result of the Title IV insurance guarantee, Plaintiffs will "only gain" from the Plan's termination, ECF No. 304 at 33, is demonstrably false. As noted above, many of the Plan's participants have suffered significant losses as a result of the Plan's termination. Moreover, because the PBGC terminated the Plan at the bottom of the market, Plaintiffs were deprived of a stock market recovery in excess of 170% on $2.5 billion in Plan assets, *supra* p. 86-87, and the PBGC, by virtue of its termination actions, took those assets and earned hundreds of millions in returns over the same period. 29 U.S.C. § 1344(c). provides that those investment returns normally inure to the PBGC's benefit, and because of the statutory limits on Title IV benefits of terminated plans, the PBGC's benefit guarantee is insufficient to make up for the losses.

Finally, the benefit deprivation in *Mathews*, which involved government funded disability benefits, was a "temporary deprivation," in that the government conceded that claimants could later receive full retroactive payments if the termination was later determined to be erroneous. *See Mathews v. Eldridge*, 424 U.S. 319, 340 (1097). Here, by contrast, the PBGC takes the opposite position.

According to the PBGC, once it terminates a pension plan by agreement with a plan administrator, its termination decision is irrevocable, and plan participants cannot receive more than their statutorily guaranteed benefits, regardless of whether § 1342(c)'s termination criteria are satisfied. Because "'the possible length of wrongful deprivation of . . . benefits [also] is an important factor in assessing the impact of official action on the private interests,'" the "degree" of such a permanent deprivation of private retirement benefits is a significant factor disfavoring "the validity" of the PBGC's "administrative decisionmaking process." *Id*. at 341 (quoting *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975)).

The second *Mathews* factor looks "the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards." *Id*. at 343. This factor similarly militates decisively against upholding the PBGC's termination action.

In *Mathews*, the claimant had an opportunity to make an administrative showing to the Social Security Administration (SSA) prior to the termination of his benefits, and the Court noted there that that agency "periodically communicates with the disabled worker" during the administrative process, providing the claimant with the opportunity to submit relevant information to the agency prior to the termination decision. *Id*. at 337. Additionally, "[w]henever the agency's tentative assessment of the beneficiary's condition differs from his own assessment, the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file. He also may respond in writing and submit additional evidence." *Id*. at 337-38. Following this interaction with the beneficiary, a state agency makes a determination that the SSA could then accept or reject. *Id*. at 338. If the SSA accepts the termination recommendation, benefits are terminated, however the recipient may seek reconsideration by the state agency and supplemental review by the SSA. *Id*. at 338-39. He then has a right to a non-adversary evidentiary hearing before an SSA administrative law judge, subsequent discretionary review by the SSA Appeals Council, and finally judicial review. *Id*. at 339. As noted above, if the recipient obtains a positive ruling at any phase of this administrative process, he is entitled to full retroactive payments. *Id*.

Here, by contrast, there was no communication *at all* with the Plan's participants during the administrative proceedings preceding the Plan's termination. The PBGC put the Plan's participants on notice of its intentions only on July 22, 2009, *after* its administrative procedures (such as they were) had already concluded. *See* SUMF ¶ 106. Plaintiffs were not permitted any administrative opportunity to challenge the PBGC's determinations, [redacted]

[redacted]

Worse still, the PBGC's administrative proceedings in this case did not follow their normal course. *See* ECF No. 54 at AR000010. While the PBGC normally convenes its Trusteeship Working Group to consider plan termination recommendations, it did not do so here, ostensibly because of "time constraints" presented by Delphi's DIP lenders communication, on July 15, 2009, that they would exercise their foreclosure rights on the stock of Delphi's foreign affiliates, which the PBGC was concerned could threaten its recovery rights. *Id.* [redacted]

[redacted]

All of these deficiencies are especially problematic in light of the erroneous conclusions underlying the PBGC's termination decision, such as its failure to account for the leverage the PBGC possessed to advocate for a GM reassumption of the Plan, *see, e.g.*, SUMF ¶¶ 17-18, 23-24, 27-29, 31-34, 39-42, 44-48, its overestimation of the Plan's liabilities, *see id*. ¶ 114, and its unjustifiable decision to acquiesce in the Plan's termination. *See, e.g., id*. ¶ ¶ 53-54, 64-68, 84-90.

In sum, instead of relying on its normal procedure, the PBGC bypassed that procedure without good cause, relying instead on an outdated record that failed to reflect the political considerations underlying the PBGC's actions, or the relevant statutory factors that would properly govern a § 1342(c) determination. The PBGC's administrative procedure provided no opportunity for Plan participants to engage administratively with the agency regarding its termination determination either *ex ante* or *ex post,* [redacted] The PBGC's pretermination procedures were neither fair nor reliable, and a § 1342(c) pretermination hearing could have remedied these problems. *See supra* p. 12-44.

For its part, the PBGC addresses none of these infirmities, but again relies on the Second Circuit's *Jones & Laughlin* decision, which held that there are supposedly "'ample post-deprivation remedies' for participants" in terminated plans that obviate the need for a pre-deprivation hearing. *See* ECF No. 304 at 33-34 (citing *Jones & Laughlin*, 824 F.2d at 201-02). This argument is unpersuasive because, whatever post-deprivation remedies Plaintiffs possess, the existence of such remedies, even where they can fully restore a person's benefits, is not sufficient to bypass the basic requirement that they get a meaningful hearing. Again, as Judge Thapar noted in the *Hicks* case:

> the SSA argues that Hicks has no interest in a better redetermination process because she has other ways to get her benefits back—like filing a new application or asking the SSA to forego reclaiming her past payments. For someone in Hicks's position, however, filing an entirely new application or defending past payments is itself a burden. And *the hope of recovering her benefits someday, of course, does not help her now. Hence why agencies must provide due process the first time around*.

Hicks v. Colvin, 214 F. Supp. 3d at 642 (emphasis added) (internal citation omitted). The problem is even more pronounced here because, as noted above, *supra* 97-98, the PBGC's position is that, when a plan is terminated pursuant to a termination agreement, the deprivation is permanent, and a participant is not entitled to even a post-deprivation hearing to ensure that § 1342(c)'s termination criteria are satisfied.

Last, "[i]n striking the appropriate due process balance," *Mathews* requires an assessment of "the public interest." *Mathews*, 424 U.S. at 347. While the PBGC suggests this is only an inquiry into "the government's countervailing interest," ECF No. 304 at 34, *Mathews* makes clear that it is the broader "public interest" that matters, a rubric that includes not only "the administrative burden" of requiring a predeprivation hearing, but also "other societal costs," *Mathews*, 424 U.S. at 347, though "[t]he ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." *Id*. at 348.

The PBGC argues that providing participants with due process is unwarranted here because, supposedly, that would require separate hearings for each plan participant that "would delay PBGC administration of the Salaried Plan – possibly for years – while the risk of plan abandonment, increasing benefit liabilities, and interruption of benefits to participant would continue to mount." *See* ECF No. 304 at 34-35. The PBGC's argument is a strawman, as multiple hearings are not required for every pension plan termination. Instead, what due process requires is that there be at least a *single* hearing before a given pension plan is terminated, which plan participants can choose to participate in or not. Indeed this is precisely the process that the PBGC initiated with regard to the Salaried Plan, but which it abandoned [redacted] when participants actually tried to actually intervene in that process. The cost of allowing a single adjudication on the propriety of a plan's termination under the § 1342(c) criteria is hardly prohibitive, especially given the complete dearth of process the PBGC usually affords plan participants. *See, e.g.*, *Hicks v. Colvin*, 214 F. Supp. 3d 627, 645 (E.D. Ky. 2016) ("Granted, such a hearing will take a little longer than the one Hicks got. But that 'burden,' if it is one, is not heavy enough to tip the *Mathews* scales.").

Moreover, contrary to the PBGC's argument, *see* ECF No. 304 at 35, there was no danger here of increasing the loss to the Title IV insurance fund or the continuity of Plan payments pending a judicial adjudication of the Plan's termination. If, after a court adjudication, the PBGC's termination decision was ultimately upheld, the Plan could be retroactively terminated as of the date that participants were put on notice (July 22, 2009), so the delay would not increase the liability of the insurance fund by a single cent. *See, e.g.*, *PBGC v. Republic Techs. Int'l, LLC*, 386 F.3d 659, 665-68 (6th Cir. 2004). As for the Plan's benefit payments, the § 1342 statutory trustee could take actions to limit temporarily benefit payments as necessary pending an adjudication; indeed, that is precisely what the language in the fourth sentence of § 1342(c) is supposed to accomplish. Providing participants with a hearing prior to terminating their pension plan would ensure that the most basic requirement of due process is satisfied: that participants are "given a meaningful opportunity to present their case." *Mathews*, 424 U.S. at 349.

V. THE PBGC IS NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT 4 BECAUSE THE PBGC'S TERMINATION OF THE SALARIED PLAN IS UNSUSTAINABLE IN LIGHT OF THE RELEVANT STATUTORY GOALS

Count 4 alleges that "[t]he PBGC cannot satisfy the standards for termination of the Salaried Plan under 29 U.S.C. § 1342(a) and (c) with the current termination terms it has negotiated and put in place." ECF No. 145 ¶ 56. Count 4 specifically alleges that the "PBGC's termination of the Plan was politically motivated," and cites as evidence of this political motivation, *inter alia*, "the PBGC's release of its liens against Delphi's foreign assets," and "its failure to obtain additional funding from Old and New GM for the Salaried Plan in exchange for the release of the liens." *Id.*

The PBGC's principal argument on Count 4 is that § 1342(c) allows for termination by agreement, and that because there is no genuine issue of material fact that such an agreement was entered into, the PBGC is entitled to summary judgment on this Count. As discussed above, the PBGC badly misreads the statute, and its practice of termination by agreement is statutorily and constitutionally flawed. However, even assuming, *arguendo*, that the Salaried Plan could be terminated simply through an agreement between the PBGC and Delphi acting as plan administrator (but supposedly not subject to a plan administrator's fiduciary duties of loyalty and prudence and with a conflict of interest) without violating either ERISA or the Constitution, the PBGC's decision to terminate the

Plan, under the prevailing circumstances, is still subject to judicial review.

Acknowledging this fact, the PBGC offers a fallback defense of the termination, asserting that "it is undisputed that the termination allowed PBGC to collect hundreds of millions of dollars more than if the plan had not been terminated. That collection reduced PBGC liabilities and protected PBGC's financial interests." ECF No. 304 at 39. This argument is wrong as a matter of fact and law.

First, the PBGC's argument fails as a matter of fact the undisputed facts show that it was the release of the PBGC's liens and claims that allowed the PBGC to secure its recovery from New GM and Delphi, not the Plan's termination. *See, e.g.*, SUMF ¶¶ 53, 87-89, 97, 105; ECF No. 308-120 (Pls' Ex. 119) at 8-9 of 17. Second, the argument fails as a matter of law because the PBGC misstates the statutory goals by which its actions are to be judged, accentuating its own financial interests over that of avoiding plan terminations and protecting participant benefits.

Judge, now Justice, Ginsburg writing at the time for the D.C. Circuit cogently emphasized that even an agency's decision to enter into a negotiated agreement is subject to arbitrary-and-capricious review under the Administrative Procedure Act, 5 U.S.C. § 706.

> 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). Put another way, even if the PBGC could circumvent the requirement for a court adjudication that termination is warranted under § 1342(c), it must still have engaged in reasoned, supportable action in agreeing to terminate the Plan, and release its liens and claims on Delphi assets, in light of the record before it.

As demonstrated above, the PBGC's actions in terminating the Plan cannot be sustained under this standard, even accounting for the deference APA review affords federal agencies. If the arbitrary-and-capricious standard is what is to apply, the starting point for determining the reasonableness of any agreement to terminate the Salaried Plan is the criteria set forth in § 1342(c), for that is the provision under which the PBGC claims authority to terminate the Plan (as opposed to authority to *initiate* termination proceedings).

Here the PBGC claims that termination was necessary under § 1342(c), in order to avoid any unreasonable increase in the liability of the PBGC's insurance fund. *See* SUMF ¶¶ 106-07; ECF No. 304 at 39-40. Further, as Justice Ginsburg indicated, the PBGC's agreement must show that it accommodated the overall objectives set forth in the relevant sections of ERISA and that the PBGC did not unreasonably accommodate the interests of other parties to its negotiations, such as Treasury, New GM, or Delphi. One overriding interest in ERISA is "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants." 29 U.S.C. § 1302(a)(1). Another is "to protect 'the interests of participants in employee-benefit plans and their beneficiaries' while 'establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." *PBGC v. Findlay Indus., Inc.*, No. 17-3520, 2018 U.S. App. LEXIS 25071, at *30 (6th Cir. Sept. 4, 2018) (quoting 29 U.S.C. § 1001(b)). "As these purposes illustrate, the PBGC is entrusted by Congress, and by the public through its representatives, with the task of 'ensur[ing] that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans.'" *U.S. Dep't of Treasury v. PBGC*, No. Case No. 12-mc-100, 2018 U.S. Dist. LEXIS 176338, at *3-4 (D.D.C. Oct. 15, 2018) (quoting *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984) (citations omitted)). However, nowhere among these statutory goals is the protection of the "PBGC's financial interests" or

"PBGC liabilities," which is what the PBGC plainly admits it accomplished in terminating the Plan here. ECF No. 304 at 39.[15]

However, the PBGC did not act consistently with these statutory purposes in terminating the Salaried Plan. The undisputed facts show that the PBGC had powerful leverage to advocate for either New GM, *supra* p. 15-27, or one of Delphi's potential purchasers, *supra* p. 27-32, to assume the Salaried Plan, thus preventing its termination. Indeed, it was precisely that leverage that allowed the PBGC to negotiate with Treasury a settlement from New GM. *Id*. But, it is also undisputed that, at least as of the middle of April 2009, the PBGC took no actions to avoid the Salaried Plan's termination, but instead acquiesced in that termination, in order to accommodate unreasonably, the objectives of Treasury. *Supra* p. 36-44. The PBGC's utter failure to press its own statutory goals, in conjunction with its passive accommodation of Treasury's objectives, demonstrates that the PBGC's termination actions are fatally arbitrary and capricious.

[15] PBGC's financial interests and liabilities are not the same as the liability of the Title IV guarantee fund (which again, is what § 1342(c) is concerned with), and the PBGC has made no showing that *any* portion of the recovery will reduce the liability of the PBGC guaranteed insurance. For example, at least $227 million in recoveries were allocated to due and unpaid employer contributions in Delphi's plans, *see* ECF No. 305-13 (Pls.' Ex. 18) at 2, which do not reduce the liability of the guarantee fund. Regardless, even if, *arguendo*, some amount of the recovery was applied to reduce the liability of the guarantee fund, that amount would be dwarfed by the $1.5 increase to the fund's liability resulting from the Salaried Plan's termination. *See* SUMF ¶ 113.

Accordingly, Plaintiffs, not the PBGC, are entitled to summary judgment on Count Four.

CONCLUSION

The Court should deny the PBGC's motion for summary judgment on Counts 1 through 4 of the Second Amended Complaint, and grant summary judgment in Plaintiffs' favor on those Counts as to the PBGC's liability, and order briefing as to the remedy and relief to be afforded.

Respectfully submitted,

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REDACTED VERSION OF SEALED DOCUMENT

CERTIFICATE OF SERVICE

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

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