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

Dennis Black, *et al.*, Plaintiffs, v. Pension Benefit Guaranty Corporation, *et al.*, Defendants.	Case No. 2:09-cv-13616 Hon. Arthur J. Tarnow Magistrate Judge Donald A. Scheer

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR PREIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs and Defendant Pension Benefit Guaranty Corporation ("PBGC") appeared before the Court on December 22, 2009 for oral argument in connection with Plaintiffs' request preliminarily to enjoin the PBGC from reducing Plaintiffs' pension benefits, which otherwise is scheduled to occur beginning on February 1, 2010. Plaintiffs contend that they have received no hearing from any government entity concerning the PBGC's imminent reductions in their pensions and thus that the reductions cannot occur consistent with the Due Process Clause of the Fifth Amendment to the United States Constitution. The Attorney General for the State of Ohio has filed an amicus brief supporting Plaintiffs' preliminary injunction motion (now also joined by the Attorney General for the State of Mississippi). Separately, Plaintiffs assert that the PBGC has, in various ways, violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and aver claims against other governmental and private parties, but those allegations are not at issue with respect to the request for a preliminary injunction.

At the oral argument, the Court requested further briefing on the propriety of the PBGC's termination of the relevant pension plan, with that termination being the impetus for the PBGC's scheduled reductions in Plaintiffs' benefits. The Court appeared ready to deem the briefing potentially to be the hearing necessary to save the PBGC's impending reductions from a breach of the Due Process Clause, assuming that such a hearing showed the necessary justification for the PBGC's actions. With respect, Plaintiffs do not believe that the briefing alone can constitute the due process to which they are entitled, before their benefits can be reduced. Because the PBGC must prove *de novo* that the termination satisfies the statutory standards for termination provided in 29 U.S.C. § 1342(c), its brief can at most be *the beginning* of any hearing to justify reductions in Plaintiffs' pension benefits. In order for these proceedings to constitute due

process, the Court must heareafter provide Plaintiffs with an opportunity to respond to the PBGC's brief, to discover any facts underlying the PBGC's presentation, and to cross-examine any affiants upon which the PBGC relies in its briefing. In any event, even if the PBGC need not prove *de novo* that it properly terminated the pension plan, and instead Plaintiffs carry the burden of proving that the PBGC's administrative record regarding the termination does not support the agency's actions, Plaintiffs can satisfy that standard, as shown in this brief. Thus, either (1) because the PBGC must prove *de novo* the justification for termination of the pension plan and cannot adequately do so absent further opportunity for Plaintiffs to contest the PBGC's presentation in the agency's brief, or (2) because the PBGC's termination decision is subject to arbitrary-and-capricious review based on the record and that record does not support the PBGC's actions, the Court must enjoin the PBGC, prior to February 1, 2010, from reducing Plaintiffs' pension benefits. Ultimately, the Court should exercise its equitable powers (as permitted by 29 U.S.C. § 1303) to mandate that the PBGC administer the pension plan as if it had never been wrongfully terminated and pay full benefits accordingly.

Before reviewing the underlying facts relevant to the PBGC's termination of the pension plan and the relevant legal arguments, one point raised by the PBGC at the oral argument on December 22 warrants immediate rebuttal. At the oral argument, the PBGC contended that it supposedly will contribute $2.1 billion to Plaintiffs' pension plan and that participants consequently can expect just a 13% reduction in benefits as a result of the actions the PBGC intends to take -- as if to say that Plaintiffs' claims are much ado about nothing. *See* Tr. of Oral Arg. at 18-19 (Exh. A to this Br.) [hereinafter "Tr."]. Plaintiffs vociferously dispute the PBGC's numbers, for the numbers have no substantiation in the administrative record provided to Plaintiffs and have never been substantiated even in materials submitted by the PBGC outside of

the record (*see* PBGC's Decl. of Neila Ranade ¶ 10 (Dkt. No. 37)). To the contrary, the PBGC has begun announcing to the pension plan's participants the reductions that will occur as of February 1, and Plaintiffs' survey of roughly 238 of those participants indicates a reduction on average of 25%, with many reporting reductions up to 40%. *See* Declaration of Paul Dobosz ¶ 15 (Ex. B to this Br.). In reality, the reductions likely are far greater than even 40% for a large number of participants, because the survey does not include early retirees who indisputably will lose the early retirement pension supplements they had earned. *See* PBGC Statement, http://www.pbgc.gov/FAQ/delphifaq.html#9 ("If you are receiving higher benefits because of this early retirement incentive, the additional benefits may not be fully guaranteed."). Accordingly, as the Ohio Attorney General has emphasized in its amicus brief to the Court, the PBGC's threatened reductions create a dire situation for the pensioners -- one that, at a minimum, cannot be accomplished without full due process.

BACKGROUND FACTS

Regrettably, the events underlying this case have unfolded like a tragic play. The pensions of hard-working individuals, with no culpability, have been sacrificed by the actions of corporate and government actors with too little regard for the consequences of their actions on ordinary persons. The tale is a lengthy one with importance for the current legal arguments, and we air it here as fully as possible, based on the current information Plaintiffs have and without any discovery.

A. Scene 1: After Plaintiffs Earn Their Pensions from Old GM and then Delphi (after Delphi Is Spun-Off), Delphi's Domestic Operations Seek Chapter 11 Protection, But Their Extremely Valuable International Operations Do Not

Plaintiffs are retirees of Delphi Corporation ("Delphi") and participants in the Delphi Retirement Program for Salaried Employees (the "Salaried Plan" or the "Plan"). Delphi consisted of a division and subsidiaries of General Motors Corporation ("Old GM") until Old

GM's divesture of Delphi in 1999. *See* Excerpts from Mot. of Debtors for Entry of Order approving Master Disposition Agreement, *In re General Motors Corp.*, No. 09-50026 (REG) (Bankr. S.D.N.Y.) (filed June 1, 2009) (Ex. C to this Br.) [hereinafter "MDA Motion"]. Thus, even though Plaintiffs retired from Delphi, the bulk of their careers were spent as employees of Old GM. After the 1999 spin off, Delphi, at least purportedly, became responsible for the pension plans of all of Delphi's employees, including the Salaried Plan and a larger, separate pension plan for hourly, unionized workers (the "Hourly Plan"), as well as a few plans for other small groups of workers. *Id.* In the years that followed, Delphi became a leading supplier of automotive, communications, and computing equipment for Old GM and other auto makers. Delphi also was a fully international operation, and, in fact, the bulk of its enterprise value can be found in its foreign businesses, which apparently were far more profitable than its domestic operations. Administrative Record at 85 (Ex. Z).[1]

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[1] We reference as the "Administrative Record" the materials that Plaintiffs obtained concerning the Plan's termination via the PBGC's information office, through much effort on their part. The PBGC at the oral argument indicated that it had shared, months earlier, an administrative record with Plaintiffs (*see* Tr. at 40), as if to create the impression that it had early in this lawsuit provided Plaintiffs with the tools necessary for them effectively to litigate their case. That is a patently false impression created by the PBGC at the oral argument. In reality, at least up until today, the PBGC has never proffered any administrative record in connection with this litigation. Indeed, it represented to the Court at the oral argument that it would file an administrative record with the Court within days of the oral argument, but did not do so. Thus, Plaintiffs are left to file this brief based solely on the materials that they *themselves* have been able to gather. The materials here referred to as the "Administrative Record" were obtained by Plaintiffs from the PBGC through a participant request under ERISA to the PBGC and then provided in due course by the PBGC's information office. *See* 29 U.S.C. § 1342(c)(3)(A)(ii). Even then, the PBGC notified Delphi that it would be sharing with Plaintiffs the agency's materials regarding the termination. Delphi then put its lawyers to work to stop Plaintiffs potentially from using PBGC-disclosed materials without Delphi's consent, under the threat of starting new proceedings with the bankruptcy court overseeing Delphi's bankruptcy. In the end, Plaintiffs agreed to redaction of certain parts of the materials, rather than fight the still-additional litigation battle that Delphi threatened. The material designated in this brief as the "Administrative Record" therefore is redacted. Excerpts of those materials are attached at Exhibits R - ZZ and cited as "AR" with the (footnote continued on next page)

1n October 2005, Delphi (along with a number of its domestic subsidiaries) announced that it was filing a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. *See In re Delphi Corp.*, Case No. 05-44481 (RDD) (Bankr. S.D.N.Y.) (filed Oct. 8, 2005). Delphi's foreign subsidiaries and affiliates did not file for bankruptcy protection. According to Delphi's contemporaneous press release, the bankruptcy filing was motivated in part by a desire to "resolve Delphi's existing legacy issues and the resulting high cost of U.S. operations." AR668. At the time, Delphi stated that it expected "to address pension plans and health and retiree benefits to align them with competitive benchmarks in the industry and our transformation plan." *Id.* This matter was of considerable importance to Plaintiffs, as they had earned vested pension benefits in return for decades of loyal employment, and were counting on their pensions to sustain them in their golden years. The bankruptcy filing did not, however, include any of Delphi's foreign subsidiaries and were an effort solely to restructure the domestic portion of Delphi. Accordingly, the foreign subsidiaries of Delphi retained substantial assets outside the bankruptcy court's jurisdiction and ultimately (as discussed in more detail below) could be reached through PBGC liens designed, if necessary, to make up any shortfalls in Delphi's pension plans. In any event, at the time, there was no indication from Delphi that it intended to upset *vested* pension benefits, as opposed simply to altering pension or health plan going forward (so as not to, for instance, accrue new benefits) to conform with the company's view of economic realities. In short, at the time of the bankruptcy, all signs suggested that Plaintiffs' pension earnings were safe.

(footnote continued from previous page)
page numbers to the PBGC pagination in its disclosure to Plaintiffs. To reiterate, the materials referenced here as the Administrative Record were gathered solely through the work of Plaintiffs, and the PBGC has never voluntarily provided any materials to Plaintiffs regarding the termination.

B. Scene 2: The PBGC Actively Participates in the Chapter 11 Proceedings, But Every Indication Points to the Reemergence of Delphi With Its Pension Plans Intact

The filing of bankruptcy and the reference to pension benefits immediately triggered the interest of the PBGC in the Delphi situation. The PBGC is a United States government corporation established under 29 U.S.C. § 1302(a) to administer the pension plan termination insurance program established by ERISA. It is an insurance program that is funded by mandatory employer contributions. The PBGC guarantees the payment of certain, but not all, pension benefits provided by defined-benefit pension plans that are covered by ERISA. The PBGC operates under the guidance of its three-member Board of Directors, of which the Secretary of the Treasury is one. *See* 29 U.S.C. § 1302(d).

The PBGC is statutorily charged to (1) encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants; (2) provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under their pension plans; and (3) maintain its premiums at the lowest level consistent with carrying out its obligations. *Id.* § 1302(a). ERISA also authorizes the PBGC to *institute* proceedings in a District Court to terminate a plan under 29 U.S.C. § 1342(a) if one several criteria are met. In the end, though, a plan may actually be *terminated* in such a proceeding and a decree to that effect shall issue only if the District Court finds that the plan must be terminated in order to (1) "protect the interests of the participants"; (2) "avoid any unreasonable deterioration of the financial condition of the plan"; or (3) avoid "any unreasonable increase in the liability of the fund [*i.e.*, the PBGC's insurance accounts]." *Id.* § 1342(c).

From the outset, the PBGC began to monitor the Delphi bankruptcy, formally appearing in the proceedings in October 2005. *See In re Delphi Corp.*, No. 05-44481 (RDD) (Bankr. S.D.N.Y.), Dkt. No. 89. Under its Chapter 11 filing, Delphi had chosen to continue to pay only a

portion of its scheduled required contributions to the Salaried Plan. AR34. As Delphi missed contributions, the PBGC, pursuant to the Internal Revenue Code, 26 U.S.C. §§ 412(n), 430(k), imposed statutory liens on Delphi's foreign assets in favor of the Salaried Plan (sometimes referred to as the "Funding Liens"), to protect the Plan against the risk that those contributions would not be made up. AR41.[2] The PBGC estimated that, by April 2009, the estimated value of its Funding Liens on behalf of the Salaried Plan at $165.5 million. *Id.*

Notably, the PBGC did not institute termination proceedings at this time. Moreover, the PBGC had every reason to believe that these liens were merely a prudent "belt and suspenders" measure, giving the agency a way to guarantee proper funding of the Plan while the domestic portion of Delphi remained in bankruptcy. Indeed, there was no objective reason to be concerned about the Plan's failure, not only because of Delphi's valuable foreign subsidiaries, but also because of the reasonably high overall level of the Salaried Plan's funding. As of October 1, 2005 (a few days before Delphi's bankruptcy filing), the actuarial value of the Salaried Plan's assets was $2,963,051, with 75.8% of its liabilities funded. *See* Delphi Retirement Program for Salaried Employees Form 5500 (2005), Schedule B Lines 1b, 12d (Ex. D). One year later, as of October 1, 2006, the Salaried Plan had assets of $3,291,177,000, and was 81.39% funded. *See* Delphi Retirement Program for Salaried Employees Form 5500 (2006), Schedule B Line 1b, 12d (Ex. E). By September 30, 2007 (near the height of the stock market), the Salaried Plan's assets value had risen to $3,882,111,000. AR326. In short, the

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[2] Under the Internal Revenue Code, the PBGC may assert Funding Liens as a consequence of a plan sponsor's failure to make mandatory or catch-up contributions for a plan. *See* 26 U.S.C. § 430(k)(3). Under ERISA, upon a pension plan's termination, the PBGC can then assert so called "Termination Liens" for potential PBGC liability for unfunded guaranteed benefits against the assets of any entity in the sponsor's "controlled group." 29 U.S.C. § 1368. The Delphi controlled group included its foreign subsidiaries that were not included in the Chapter 11 proceedings.

Plan was over 75% funded at the time of the Delphi bankruptcy and had become even better funded throughout the following two years; the PBGC also had liens against any underpayments to ensure that the Plan was protected against any failure by Delphi to keep up with its funding requirements.

There was another reason for optimism regarding the Salaried Plan. As the bankruptcy progressed, it became clear that, despite the 1999 spin-off, Old GM would stand ready to contribute to a solution of Delphi's pension issues. Hence, it was unsurprising that Delphi's January 2008 bankruptcy reorganization plan did not suggest Plan termination; instead, it merely contemplated the transfer of $1.5 billion in net pension liabilities for the Hourly Plan from Delphi to Old GM (which had been the original Plan sponsor), with the Salaried Plan otherwise intact. AR31. The January 2008 reorganization plan, however, never came to fruition, and the domestic operations of Delphi remained in bankruptcy, still looking for ways to emerge. And one of the issues related to reemergence, of course, continued to involve the liabilities associated with the various pension plans.

In September 2008, a new development occurred: Delphi and Old GM reached an agreement that contemplated the transfer of substantially all of the liability for the Hourly Plan to Old GM, with the transfer to be accomplished in two parts. AR31. On September 29, 2008, the first part of the transfer completed, resulting in slightly more than $2 billion in pension liabilities for Delphi's Hourly Plan being transferred from Delphi to Old GM's plan for its hourly workers. *Id.* The transfer of the remaining Hourly Plan liabilities was to occur upon Delphi's emergence from bankruptcy, contingent upon Delphi meeting certain financial conditions. *Id.* The PBGC apparently played a large part in the negotiations leading to this agreement (*see* PBGC Annual Report (2008) at 4-5 (Ex. F)); as a result of the agreement, the

PBGC released over $1.2 billion in liens it had placed on Delphi's foreign assets on behalf of the Hourly Plan; but the liens on behalf of the Salaried Plan remained in place. *See* PBGC Press Release (Sept. 25, 2008) (Ex. G). As a result of the transfer (and other circumstances, such as the expiration of what are known as "minimum funding waivers"), the PBGC no longer held any Funding Liens on behalf of the Hourly Plan by April 2009, and the only liens it possessed by then in any significant amounts were on behalf of the Salaried Plan. AR 34.

Also in September 2008, Delphi successfully petitioned the bankruptcy court to allow it to freeze benefits under the Salaried Plan (with a freeze being different than a termination) such that no new benefits would accrue, thus preserving the bulk of the Plan assets for retirees who had earned their benefits before the Delphi bankruptcy. AR424. In connection with all of these various events concerning the Salaried and Hourly Plans, Delphi issued a press release emphasizing that it "remained committed to fully funding our pension plans." Delphi Press Release (Sept. 12, 2008) (Ex. H).

C. Scene 3: After the Global Economic Downturn, Old GM Is Taken Over by the Treasury Department But All Signs Continue to Point to the Reemergence of Delphi with Its Pension Plans Intact

By September of 2008, then, Delphi seemed on track to meet most of its pension obligations to its Salaried Workers: (1) its foreign operations remained valuable and subject to PBGC Funding Liens to ensure that Delphi could not simply walk away from its pension obligations with respect to the Salaried Plan; (2), Old GM had agreed to assume liabilities for the Hourly Plan thereby leaving the meaning that the Salaried Plan would not need to compete with Delphi's other plans to collect on the international assets should collection become necessary; and (3) Delphi had strengthened its ability to pay vested employees by limiting any obligations going forward by freezing the Plan and incurring no new liabilities. In the fall of 2008, however, the U.S. economy entered a recession, which hit the U.S. automotive industry

particularly hard. *See* Congressional Oversight Panel September Oversight Report at 3 (Sept. 9, 2009) (excerpts attached as Ex. I) [hereinafter "Oversight Report"]. In December 2008, Old GM "faced a crippling lack of access to credit due to the global financial crisis." *Id.* at 8. Eventually, the Bush Administration announced that it would make the Troubled Asset Relief Program ("TARP") funds available to the automotive industry, with Old GM to receive $13.4 billion under a loan and security agreement. *Id.* Under the specific terms of the loan, Old GM had to meet certain conditions, one of which was to demonstrate financial viability.

Meanwhile, the PBGC continued to protect the viability of the Salaried Plan by maintaining its ability to reach Delphi's foreign assets via the Funding Liens. Thus, on March 4, 2009, when Delphi sought to enter into an agreement whereby Delphi would sell its global steering business to Old GM, *see In re Delphi Corp.*, Case No. 05-44481 (RDD) (Bankr. S.D.N.Y.), Dkt. No. 16410, the PBGC objected to any order that would approve the sale free and clear, because the steering business included assets of non-debtor foreign affiliates that were the subject of PBGC liens. *See id.*, Dkt. No. 16475 (Ex. J). "PBGC does not intend to release its liens on the assets of the Foreign Affiliates without the Debtors or GM first providing for the satisfaction of the obligations underlying the liens. Absent that, PBGC's liens will follow the foreign assets even if they are transferred to GM." *Id.* at 2.

Similarly, on March 10, 2009, the PBGC held a meeting with Greenhill Consultants, its financial advisor, where it requested Greenhill prepare an analysis refining the valuation for consolidated Delphi and its foreign operations, with a focus on estimating the relative value of Delphi's foreign businesses; the purpose of this study was to determine the assets potentially available to the PBGC to replace any shortfalls in the Salaried Plan through the imposition of Termination Liens. AR82. Internal records also show that the PBGC and Delphi continued to

act as though other measures could be taken to preserve the Salaried Plan, measures similar to those already pursued in the fall of 2008 the Hourly Plan. To that end, on March 12, 2009, Delphi gave a presentation to the Joint Statutory Creditors Committee (*i.e.*, the committee charged with representing the interests of Delphi's creditors as a whole). AR670-769. At this point, not only was Old GM's assumption of the Salaried Plan a possibility, it was in fact a key assumption of the presentation, repeated numerous times. *See, e.g*., AR52, AR680, AR700, AR702, AR706, AR710.

D. Scene 4: Although Rising Political Pressure Creates Incentives to Rush the Domestic Portion of Delphi Through Chapter 11 Proceedings at Any Cost, and Although the PBGC Shows No Inclination to Look Out for the Interests of Participants, the PBGC Acts to Protect Its Own Bottom Line By Ensuring That Liens on Delphi's Foreign Operations Remain Available to Make Up for Any Shortfall in the Salaried Plan

Delphi's presentation to the Delphi Statutory Creditor's Committees also noted that Delphi representatives had met "on several occasions" with representatives of the Auto Task Force regarding GM-Delphi matters, including the transfer of the Salaried Plan to Old GM. AR681. The Auto Task Force (officially, the interagency Presidential Task Force on the Auto Industry) had only recently been created by President Obama to oversee the Administration's efforts regarding the auto industry. The Task Force included high-level representatives from across the executive branch (including Treasury Secretary Geithner himself), and is staffed by a joint Treasury-National Economic Council team that reports to the Task Force and its co-chairs. (As noted, the Treasury Secretary also sits as one of the three directors of the PBGC, leaving him with overlapping obligations in this situation.) The President named Defendants Ron Bloom and Steven Rattner to lead the Treasury's auto team, which had responsibility for evaluating Old GM's viability plan and negotiating the terms of any further assistance. Oversight Report at 10-11 (Ex. I).

Delphi's pension plans became a major focus of the Auto Task Force because the speedy emergence from bankruptcy of both Old GM and Delphi was intrinsically linked to fundamental political purpose of restructuring and revitalizing a failing auto industry. For example, on March 20, 2009, Delphi gave a presentation entitled "Key Emergence Issues" to the Joint Statutory Creditors Committee (AR358-368), noting that the pension issue was one of only a few major issues left to resolve with Old GM (AR360), and that the "preferred" resolution remained a "consensual agreement by GM to assume Delphi's hourly and salaried pension assets and liabilities." AR366. At the same time, Delphi also set forth the option of a "negotiated termination" of the pension plans with the PBGC. According to Delphi, such negotiations were also complex as they would need to address: (1) resolution of "GM benefit guaranty" (though the available documents do not further define what precisely is meant by this guaranty); (2) resolution of GM "follow-on plan issues"; and (3) release of PBGC-asserted liens on non-U.S. assets. *Id.*; *see also infra* pp. 45-46 n.8 (describing follow-on plan issue).

With the Auto Task Force's appearance, events began to move speedily, almost certainly because of the difficult situation that would be created politically absent swift results from the unprecedented government intervention. On March 30, 2009, the Auto Task Force rejected Old GM's business plan. Oversight Report at 11 (Ex. I). Old GM was given an additional $6.36 billion from the government in loans with which to finance itself for the next 60 days. *Id.* at 12. Additionally, "as GM's largest secured creditor, the U.S. Treasury would negotiate with GM to develop and implement a more aggressive and comprehensive viability plan." *In re General Motors Corp.*, 407 B.R. 463, 479 (Bankr. S.D.N.Y. 2009).

On April 2, 2009, Delphi announced that an agreement had been reached among itself, its DIP lenders (*i.e.*, those lenders who had provided to Delphi after its Chapter 11 filing as a so-

called "Debtor in Possession"), Old GM, and the Treasury Department to allow a period of time for the parties to negotiate a global solution to the Delphi situation. AR29. On April 16, 2009, PBGC staff had a conversation with Matt Feldman, a member of the Auto Task Force for the Treasury Department regarding Old GM's position on assuming the pension plans. AR33. The Administrative Record indicates that, after discussions with the Treasury Department, the PBGC determined that "Treasury is trying to weigh the benefits of additional GM investments in Delphi against the risks if the supply of parts from Delphi is interrupted." *Id.* The PBGC concluded that the Treasury's position was that Old GM should not assume the Salaried Plan, though assumption of the hourly pension plan was still a possibility. *Id.*

Despite the rising pressure for Delphi to emerge from bankruptcy in order to aid Old GM's viability (and thus serve the Auto Task Force's political ends), the PBGC laudably continued to take steps to preserve its Funding Liens for the Salaried Plan and its ability ultimately to place Termination Liens on Delphi's foreign assets for the benefit of Plan participants. These liens (both the already asserted Funding Liens and the assertable Termination Liens) on foreign assets thus remained a significant protection for the Salaried Plan, acting as a back-stop against any urge to sacrifice the vested pension benefits of the Salaried Plan workers in order to improve Delphi's (and Old GM's) overall bottom line. And there was no question that this protection remained substantial: On April 16, 2009, Greenhill presented its views on estimating the value of Delphi's foreign businesses. AR82. It concluded that "[t]he combined collateral value potentially subject to foreign liens is currently estimated at $2.4 billion dollars." AR112 In response to this conclusion (and presumably in response to Treasury's position that Old GM assistance in continuing the Salaried Plan was no longer an

option), the PBGC's staff prepared on April 17, 2009, a memorandum addressing Delphi's pensions. AR29. This key memorandum states:

> According to Delphi's 8-K filed with the SEC on April 2, 2009, Delphi has until April 17, 2009, to deliver to the DIP lenders a detailed term sheet (the "Term Sheet"), which has been agreed to by both GM and Treasury. The Term Sheet is to set forth the terms of a global resolution of matters relating to GM's contribution to the resolution of Delphi's Chapter 11 cases. Failure to deliver a term sheet triggers a $117 million repayment obligation to the DIP lenders on April 20, 2009. Failure to deliver a term sheet and failure to repay the $117 million repayment obligations are each events of default under the DIP credit agreements and subsequent amended accommodation agreements. These agreements provide a five-business-day grace period, meaning that the accommodation period under which Delphi is continuing to use its DIP borrowings may terminate on April 24, 2009. According to OCC [*i.e.*, the PBGC's Office of the Chief Counsel], such a termination enables the DIP lenders to exercise all their remedies in the DIP credit agreements, including foreclosure on their collateral. Those agreements expressly provide that those remedies can be exercised without further notice to or order from the Bankruptcy Court. Among the collateral pledged to the DIP lenders is 100% of the stock in Delphi's foreign subsidiaries -- stock currently owned by Delphi Automotive Systems Holding, Inc. ("DASHI"), a debtor entity. The foreign subsidiaries remain outside of bankruptcy, and according to the attached report from Greenhill & Company, Inc. ("Greenhill"), PBGC's outside financial advisor, comprise substantially all of the value of the Delphi controlled group. *As such, PBGC must initiate a termination and set a date of plan termination ("DOPT") prior to April 24, 2009, or risk a controlled group break-up, whereby substantially all value available for PBGC recoveries leaves the controlled group.*

AR29-30 (emphasis added). Consequently, termination of the Salaried Plan appeared to be, according to the PBGC, a necessity to preserve its ability to assert liens on foreign assets, which otherwise might be compromised after April 24, 2009 by the DIP lenders.

The memorandum also noted that the Salaried Plan had the maximum leverage with respect to the Funding Liens currently in place as "statutory liens . . . have arisen *only* on the SRP and three Subsidiary Plans." AR34 (emphasis added). And in fact, according to the PBGC's valuations, Funding Liens asserted on behalf of the Salaried Plan accounted for $165.5 million of the total $174.7 million in liens the PBGC currently had in place. *Id.* The memo went on to note that Delphi had missed additional contributions on April 15, 2009, and once the

proper forms for these missed contributions were received on April 25, 2009, the PBGC's Division of Insurance Supervision and Compliance would calculate new lien amounts and its Office of Chief Counsel would perfect new liens against Delphi's non-debtor controlled group members (*i.e.*, the international assets). *Id.*

Citing the potential that any sale of assets by the DIP lenders might eliminate the PBGC's ability to place liens, the PBGC's Trusteeship Working Group (or "TWG") (an internal group comprising representatives from the PBGC's financial, actuarial, policy, and legal offices that typically reviews all termination recommendations developed by PBGC staff) on April 21, 2009 voted that both the Salaried Plan and the Hourly Plan should be terminated under ERISA § 4042(c), 29 U.S.C. § 1342(c). AR23-24. More specifically, the termination of the Salaried Plan was necessary, the Trusteeship Working Group determined, in order to avoid any unreasonable increase in the liability of the PBGC insurance fund, which the case team viewed as potentially occurring if the PBGC did not take action to mature its claims on Delphi's foreign assets before the DIP lenders foreclosed on the stock of the foreign subsidiaries, causing the subsidiaries to leave the controlled group. AR23-24. The PBGC's acting Director, Vincent Snowbarger, then approved the Trusteeship Decision Record and Notice of Determination that the Salaried Plan should be terminated under 29 U.S.C. § 1342(c) to avoid unreasonable increase in the liability of the PBGC's insurance fund. AR19-20. Importantly, the minutes of the TWG meeting reveal that the TWG discussed whether the grounds for termination should include the "protection of the interests of participants," and then unanimously agreed to limit the grounds for terminating the Plan under § 1342(c) to avoiding any unreasonable increase in the liability of the PBGC's insurance fund. AR23. *This suggests that the PBGC affirmatively rejected the notion that termination of the Plan would be in the best interest of the participants.*

Yet, the PBGC did not act thereafter to protect its own interests by initiating termination proceedings or otherwise pursuing termination (so as to allow it to assert and perfect additional liens). Before the PBGC published a the Notice of Determination, the DIP lenders "agreed to provide PBGC five-days written notice prior to exercising their right of foreclosure, and PBGC agreed to forebear from terminating until after it had received that notice." AR10.

E. Scene 5: Something Changes -- For Entirely Unexplained Reasons, the PBGC Irrationally Abandons Its Effort to Place Liens on Delphi's Foreign Operations, Destroying Both the Salaried Workers' Pension Rights and the PBGC's Own Stated Interests In Preserving Its Insurance Funds

Following the PBGC's failure to act on its termination decision, the bankruptcy court ordered a number of parties to engage in a "sealed" mediation, including Delphi, Old GM, and the Auto Task Force. *See In re Delphi Corp.*, Case No. 05-44481 (RDD) (Bankr. S.D.N.Y.), Dkt. No. 16628. It is unclear precisely what took place at this mediation, or whether the PBGC played a direct role, as it has not been made part of the public record; nor is it discussed in the Administrative Record. However, shortly after the mediation, Old GM filed a voluntary Chapter 11 petition, *see In re General Motors Corp.*, No. 09-50026 (Bankr. S.D.N.Y.) (filed June 1, 2009), at which time the Treasury Department committed approximately $30.1 billion of additional federal assistance from TARP to support the company's restructuring. That same day, June 1, 2009, Delphi announced a new plan to emerge from bankruptcy under which Delphi expected that the PBGC would seek to terminate the Salaried Plan and anticipated that the remainder of the Hourly Plan would be assumed by Old GM.

Little more than a month later, on July 5, 2009, an order was entered approving the sale of substantially all of Old GM's assets to a new and independent company (now known as General Motors Company) under section 363 of the Bankruptcy Code. *See Id.*, Dkt. No. 2968, at http://www. motorsliquidationdocket.com/. Five days later, General Motors Company ("New

GM") completed the purchase of Old GM's assets through the bankruptcy process. *Id*. During these proceedings, Old GM's Director of Business Development, Rick Westenberg, submitted a declaration in the Old GM bankruptcy proceeding ("Westenberg Declaration") that makes clear that the removal of the PBGC liens on Delphi's international assets was viewed by New GM, the Auto Task Force, and Treasury as imperative to the success of New GM, which would ultimately become the chief stakeholder of a Delphi that emerged from bankruptcy. *See* Westenberg Decl. at 5-9, attached as Ex. K.

On July 15, 2009, the Delphi DIP lenders provided to the PBGC notice of their "Intent to Exercise Remedies," pursuant to which they could seek to foreclose upon the stock of Delphi's foreign subsidiaries. AR12-16. Purportedly, in response to this notice, on July 20, 2009, the PBGC issued a Notice of Determination that the Salaried and Hourly Plans should be terminated, in order to "mature PBGC's claims with respect to the HRP [*i.e.*, the Hourly Plan] and SRP [*i.e.*, the Salaried Plan] in advance of any controlled group break-up." AR10; *see also* AR1, AR3. Also on July 20, 2009, the PBGC signed a settlement agreement with Delphi ("The Delphi-PBGC Settlement Agreement," attached as Ex. L). Under the terms of the Delphi-PBGC Settlement Agreement, the PBGC did *not* take any actions to protect against the very danger that it claimed warranted termination of the Plan -- that is, it took no step to protect the potential $2.4 billion in liens to ensure that Plaintiffs' pensions were fully protected. Instead, and without any discussion in the Administrative Record, the PBGC agreed to release *all* liens by the PBGC against Delphi, both asserted and assertable, as well as all causes of actions against all Delphi entities related to the Salaried Plan. *Id*. at 5. *In short, the PBGC acted to terminate the Plan for the stated purpose of preserving its ability to place liens on Delphi's foreign assets, but then, immediately and irrationally, waived its ability to assert these liens.*

On July 27, 2009, "Exhibit B" to the Delphi-PBGC Settlement Agreement was filed with the bankruptcy court. *See In re Delphi Corp.*, Case No. 05-44481 (RDD) (Bankr. S.D.N.Y.), Dkt. No. 18657. That Exhibit B is a waiver, release, and settlement agreement (the "GM-PBGC Settlement Agreement) between the PBGC, Old GM, and New GM.[3] Under the GM-PBGC Settlement Agreement, New GM agreed to pay the PBGC (not for the benefit of any particular pension plan) $70 million in cash ("Cash Consideration") and a percentage of future distributions to New GM from the new company that acquires Delphi's assets upon resolution of its bankruptcy (the "Waterfall Distributions"). In return, the PBGC agreed unconditionally to release and discharge all liens relating to Delphi's pension plans asserted or assertable by the PBGC against Delphi and Old and New GM, as well as all causes of actions against them related to the plans. The GM-PBGC Settlement Agreement is not a part of the Administrative Record.

It turned out that in fact all of Delphi's pension plans had been, or would be shortly, terminated. On July 21, 2009, New GM made a statement regarding its involvement in the resolution of Delphi's pension situation, which revealed that, while it would not actually merge the Delphi Hourly Plan with its own hourly plan, it would ensure that Delphi's hourly retirees, at least those who were part of the United Auto Workers Union, would ultimately not suffer any financial penalty from termination of the Hourly Plan. Rather than assume the Hourly Plan, the release stated: "As a result of bargaining at the time of the spin-off, General Motors Corporation did agree to top-up pension benefits for certain limited groups of hourly employees and retirees in the event that the Delphi hourly pension plan was terminated. As with other

[3] The GM-PBGC Settlement Agreement is attached to this Brief as Ex. M. And the GM-PBGC Settlement Agreement and the Delphi-PBGC Settlement Agreement are hereinafter collectively referred to as the "Settlement Agreements."

union agreements that it has assumed from the old GM, General Motors Company will honor these commitments." *See* GM Press Release at 1 (July 21, 2009) (Ex. N). The announcement also noted that "General Motors Company and PBGC have reached a preliminary agreement whereby the PBGC would receive a $70 million cash payment from GM, as well as a portion of future distributions to GM from the new company that acquires Delphi assets upon resolution of its bankruptcy." *See id.* The release of the PBGC liens, imposed and released on behalf of the Salaried Plan, is not mentioned in the statement.

In sum, whereas the PBGC issued notice of its intent to terminate the Salaried Plan purportedly in order to assert Termination Liens on Delphi's foreign assets, it never then did so. Rather, it then gave up the opportunity to assert such liens against assets conservatively estimated in excess of $2 billion and released Funding Liens valued at almost $200 million, in exchange for essentially nothing from Delphi and $70 million in cash from New GM. The result was that the Salaried Workers -- if a termination were then to occur -- would be left solely with their insurance payments from the PBGC, rather than full pensions based on a funded Plan. All of this occurred, not coincidentally, at a time when the Auto Task Force -- whose central member, the Treasury Secretary, is also a PBGC board member -- needed to have Delphi speedily emerge from bankruptcy in order to aid GM's restructuring.

F. The Current Scene: The Salaried Workers Seek An Adjudication by An Article III Court Concerning the Legality of What the PBGC and Others Did To Destroy Their Pension Rights, and the PBGC Seeks To Avoid Such An Adjudication

As these events were unfolding, the Salaried Workers made substantial efforts to secure an adjudication as to the legality of what was occurring. Simply put, Plaintiffs did not believe that the PBGC had satisfied the statutory criteria for Plan termination, particularly in light of the PBGC's unilateral abandonment of the ability to assert Termination Liens on Delphi's foreign

assets, and its release of Funding Liens for less than full value. This irrational decision abandoned both the Salaried Workers' interests and the PBGC's own interest, and Plaintiffs believed that it violated ERISA. After the Salaried Workers had filed an initial lawsuit concerning their pensions (*see Black v. Naylor*, Case No. 2:09-cv-12810-SEC (E.D. Mich.) (filed July 16, 2009)), the PBGC on July 22, 2009 filed a complaint against Delphi, initiating termination proceedings concerning the Salaried Plan and the appointment of the PBGC as its statutory trustee. *See PBGC v. Delphi Corp.*, Case No.2:09-cv-12876 (E.D. Mich.). It apparently also filed termination actions as to all of Delphi's other pension plans as well, including the Hourly Plan. The Salaried Workers dismissed their own litigation because the PBGC's initiation of termination proceedings automatically under ERISA stays all cases concerning the subject plan. *See* 29 U.S.C. § 1342(f). On August 6, 2009, the Salaried Workers contacted the PBGC and Delphi to seek their consent to the Salaried Workers' intervention in the termination action, so that they could there protect their rights. The very next day, the PBGC filed a notice of voluntary dismissal of its termination action, evading any contemporaneous adjudication into the legality of the PBGC's conduct. *PBGC v. Delphi Corp.*, Case No. 2:09-cv-12876 (E.D. Mich.), Dkt. No. 5.

Despite the fact that ERISA requires the PBGC to obtain a court adjudication in order to terminate a pension plan, the PBGC maintains that the Plan was terminated simply pursuant to an agreement with Delphi executed on August 10, 2009. *See* PBGC Br. in Supp. of Mot. to Dismiss at 5, Dkt. No. 23. No input, comment, or notice from Plan participants was sought or taken into account in executing this agreement or otherwise terminating the Plan; and the PBGC readily admits, Delphi "was not acting as a fiduciary of the Plan [but as a 'settlor'] when it decided, for business reasons, to terminate by agreement with [the] PBGC" (*id.* at 10), despite

the fact that the agreement was executed by Delphi solely pursuant to its authority to do so as "plan administrator" (29 U.S.C. § 1342(c), which by definition makes its action fiduciary in nature. *Id.* § 1002(21); *see also* AR9 (indicating that Delphi is to sign agreement as "plan administrator").

In the meantime, in early September 2009, public announcements were made concerning the new GM's agreement to "top-up" some pensions to make up for any effects of the various plans' terminations. As New GM made clear in a September 17, 2009 filing with the Securities and Exchange Commission (excerpt attached as Ex O; emphasis added below), New GM made this "top-up" despite its position that it had no obligation under any collective bargaining agreement to do so:

> The IUE-CWA and the USW assert, and GMCo and MLC deny, that GMCo and/or MLC are required to continue to provide retiree medical benefits in accordance with those collective bargaining agreements and the class settlement agreement and, further, to provide certain pension benefit guarantees in accordance with collectively bargained memorandums of understanding regarding establishment or restructuring of Delphi Corporation ("Delphi"). *GMCo maintains that it is not obligated to assume or to continue to abide by the MLC collective bargaining agreements with the IUE-CWA or the USW, the Combs Settlement or the Delphi restructuring memorandums of understanding.* MLC maintains that it is entitled to cancel or terminate all obligations arising from collective bargaining agreements between MLC and the IUE-CWA or the USW. *After due consideration of the factual and legal arguments regarding these issues, as well as the costs, risks, and delays associated with litigating these issues, GMCo, MLC and the IUE-CWA and USW have agreed to resolve all claims regarding such matters on the basis set forth in this Settlement Agreement.*

Plaintiffs filed the current lawsuit on September 14, 2009, and eight days later requested a copy of the Administrative Record from the PBGC pursuant to 29 U.S.C. § 1342(c)(3)(A)(ii). The PBGC produced materials on October 16, 2009. Plaintiffs believe that the Administrative Record provided by the PBGC is incomplete and have submitted a request to the PBGC, under the Freedom of Information Act, for additional documents related to the Salaried Plan that were

not included in the Administrative Record. *See* Ex. P. Included in the request is information relating to the both the GM-PBGC Settlement Agreement and the Delphi-PBGC Settlement Agreement, as well as a list of all meetings concerning Delphi's pensions that the PBGC conducted with Delphi, New and Old GM, the Auto Task Force and the Treasury Department. The PBGC has twice postponed its production of its response, and on December 23, 2009 (the day after the oral argument in this case), the PBGC's Disclosure Officer informed Plaintiffs' counsel that it expected to begin responding to this request by the close of business on January 8, 2009 (which, suspiciously, is the same day that this briefing is due). The PBGC has indicated that it is reviewing between 3,000 and 5,000 emails which have matched the initial search criteria used to find responsive documents.

ARGUMENT

I. THE PBGC CANNOT REDUCE PLAINTIFFS' BENEFITS TO ESTIMATED LEVELS CONSISTENT WITH DUE PROCESS, ABSENT A HEARING ESTABLISHING THE NECESSITY FOR TERMINATING THE PLAN

In the earlier preliminary injunction briefing, Plaintiffs showed that the PBGC cannot reduce their Plan benefits to estimated levels (beginning February 1, 2010) absent due process, which -- under *Zinermon v. Burch*, 494 U.S. 113 (1990), and similar Sixth Circuit precedent -- includes notice and a *pre*-deprivation hearing. Because the impending reductions follow from the PBGC's termination of the Plan, it is the propriety of the termination itself that is subject to a due-process hearing. Put differently, because the PBGC claims the reductions to estimated post-termination benefit levels derive automatically from the statutory and regulatory formulas applicable to terminated plans, Plaintiffs are entitled to due process concerning the termination of the Plan prior to losing their property (*i.e.*, their vested pension benefits). Congress recognized as much, for it required in 29 U.S.C. § 1342 that the PBGC initiate judicial proceedings in a

district court to adjudicate the necessity for termination prior to a plan actually being terminated and the attendant benefit reductions occurring.

There is no dispute that the no hearing concerning the termination has occurred. The PBGC began the process of initiating a termination proceeding in this Court, but then aborted it the day after it learned that Plaintiffs would contest any effort to terminate their Plan. Instead, the PBGC then purported to terminate the Plan via a simple agreement with Delphi, whom no one disputes does not represent the Plan's participants and did not, in signing the agreement, act in the participants' interests. Because no hearing had occurred concerning the termination, and Plaintiffs' benefits nonetheless were about to be reduced, Plaintiffs moved for the preliminary injunction in this Court to halt all reductions as violative of the Due Process Clause.

At the oral argument on December 22, the Court did not rule on Plaintiffs' preliminary injunction motion. Instead, it confirmed with the PBGC that no benefits reductions would occur prior to February 1, 2010 (*see* Tr. at 43-44), and then established a briefing date of January 8, 2010, so that the PBGC could defend, and Plaintiffs could contest, the PBGC's termination of the Plan. From that course of action, it appears that the Court's aim was, through this briefing, to provide the hearing Plaintiffs assert to be required, thereby avoiding decision on the constitutional question of whether the PBGC reductions could occur without a hearing. The important initial point is that, unless the current briefing actually does satisfy the constitutional requirement of due process (thus mooting the due process question), the Court would still need to decide whether due process requires a hearing prior to the PBGC reducing Plaintiffs' benefits.

II. BECAUSE THE PBGC CARRIES THE BURDEN OF PROOF WHEN SEEKING TO TERMINATE A PLAN AND MUST PROVE ITS CASE *DE NOVO*, THE CURRENT BRIEFING ALONE IS INSUFFICIENT TO PROVIDE PLAINTIFFS WITH THE NECESSARY DUE PROCESS

Plaintiffs again wish to thank the Court for holding the oral argument on December 22, and also are grateful for the opportunity in this briefing to begin to present their factual and legal arguments. As Plaintiffs noted at the oral argument (*see* Tr. at 3-4), no government agency -- including the PBGC -- or tribunal has previously offered them any opportunity whatsoever to air their grievances. Indeed, the PBGC has never even sought Plan participants' input on any termination issues, notwithstanding the harsh consequences of the termination for participants, notwithstanding that the PBGC's sole reason for existing as an entity is to protect the pension interests of individuals such as Plaintiffs, and notwithstanding Congress's overt concern in ERISA for safeguarding participant rights during the termination process. *See* 29 U.S.C. § 1342(a) (noting that PBGC can streamline the termination process for "small plans" but must, in so doing, "safeguard to interests of the participants and beneficiaries" and in no event could obviate the requirement of a judicial adjudication of termination).

With full respect to the Court, however, Plaintiffs believe that the current paper briefing would be insufficient to permit -- consistent with due process -- the PBGC to reduce their benefits. Because, as we will show, the PBGC has the burden of proof and must prove *de novo* its case concerning termination, its brief filed on January 8 constitutes its opening effort to justify the termination of the Plan. Plaintiffs thereafter must, at a minimum, have the opportunity to respond to the PBGC's presentation, discovering the bases for the PBGC's factual assertions, and cross-examining any affiants upon which the PBGC relies.

A. The PBGC Must -- Before Reducing Plaintiffs' Benefits -- Prove *De Novo* and by a Preponderance of the Evidence to the Court That the Plan Must Be Terminated

At the December 22 oral argument, the parties were in dispute as to whether, in order to terminate a pension plan, the PBGC carries the burden of proof and must prove *de novo* its case on termination or whether Plaintiffs instead must show, consistent with typical Administrative Procedure Act review (*see* 5 U.S.C. § 706), that the PBGC acted arbitrarily and capriciously in termination the Plan. The better view is that the PBGC carries the burden and must prove its case *de novo*.

Starting with the statute, ERISA does not leave it to the PBGC to determine if a termination should occur, and it is usually the delegation of authority to an agency for decision-making that leads to arbitrary-and-capricious review. Rather, ERISA (*see* 29 U.S.C. § 1342(a)) allows the PBGC to *initiate* a termination proceeding (so perhaps its decision to initiate a proceeding concerning termination would be subject to deferential review), but the decision actually to terminate a plan is -- under ERISA -- a decision to be made through a court "decree" from a "United States district court . . . *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.* § 1342(c) (emphasis added). That termination shall occur through a district court *adjudication* resulting in a "decree" with specific findings signals not a record review with deference to the PBGC, but standard judicial proceedings in which the party seeking relief (in such cases, the PBGC) carries the burden of proof. Congress did not use terminology simply pointing to "judicial review" or "petitions for review."

Only one Court of Appeals -- the Seventh Circuit -- has addressed the judicial framework for termination actions, and the Seventh Circuit there held that the PBGC must prove its case *de novo*. In *In re: UAL Corp.*, 468 F.3d 444 (7th Cir. 2006), the PBGC had prevailed below (in a trial to set the date of a plan's termination), but as Judge Easterbrook put it, the "PBGC's nose [was] out of joint because the court held a trial and made its own judgment about how much extra it would have cost to keep the plan in force . . . and whether that amount . . . would be an 'unreasonable increase' in federal liability." *Id.* at 449. The PBGC asked the Seventh Circuit to hold that "instead of conducting an independent inquiry, the court should have limited review to the administrative record and deferred to the PBGC's evaluation." *Id.*

The Seventh Circuit rejected the PBGC's position in a detailed and persuasive opinion, holding that the justifications that usually support a court's deferential treatment of agency action simply do not apply where the PBGC is statutorily required to seek court adjudication. The court began by noting that deference is only appropriate where an agency wields delegated interpretive or adjudicatory power, like that usually demonstrated by rulemaking or administrative adjudication. *Id.* The mere decision to implement termination proceedings clearly involves neither. Unlike notice-and-comment rulemaking or administrative adjudication, those ultimately impacted by the decision have absolutely no opportunity to submit for consideration as part of the record. Nor does the decision result from "the sort of interpretative guidelines that deserve the court's respectful consideration." *Id.* at 450.

In finding against deferential review, the court emphasized that Congress did not make the PBGC's decision to terminate a plan self-implementing; "[t]he only authority that the PBGC has under § 1342 is to ask a court for relief. That implies an independent judicial role." *Id.* at 449 (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990)). Once the PBGC files an

application for a termination decree, "[a]ll the PBGC ha[s] done is commence litigation, and its position is no more entitled to control than is the view of the Antitrust Division when the Department of Justice files suit under the Sherman Act. As the plaintiff, a federal agency bears the same burden of persuasion as any other litigant." *In re UAL*, 468 F.3d at 450 (citations omitted). Those cases where the PBGC has been afforded deference are limited, the Seventh Circuit said, to "unilateral acts."[4] *Id.* The PBGC's fact specific conclusions regarding termination are not entitled to any deference, and "like any other litigant, it must demonstrate a preponderance of the evidence in order to prevail." *Id.*

The Seventh Circuit's reasoning has been favorably cited by district courts. *See, e.g., Sara Lee Corp. v. Am. Bakers Ass'n Ret. Plan*, 512 F. Supp. 2d 32, 38 (D.D.C. 2007). In this Circuit, only one district court has confronted the issue, and that was prior to the Seventh Circuit's opinion in *UAL Corp. See PBGC v. Rouge Steel Co.*, No. 03-75092, 2006 U.S. Dist. LEXIS 2685 (E.D. Mich. Jan. 10, 2006). In that case, the district court held that it need not reach the issue of the scope and standard of judicial review, because even under a narrow arbitrary-and-capricious review based on the administrative record, the termination could not be sustained. *Id.* at *11. In light of the statutory terms focusing on the necessity for a decree in an adjudication (not judicial review on a petition for review), and given the Seventh Circuit's decision in *UAL Corp.*, the Court should hold that the PBGC carries the burden of proof and must prove its case *de novo*.

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[4] Moreover, the Seventh Circuit concluded that the Supreme Court's decisions in *United States v. Mead Corp.*, 533 U.S. 218 (2001) and *Christensen v. Harris County*, 529 U.S. 576 (2000) have shown that "the sort of opinion letters to which the Court deferred" in earlier cases (such as *PBGC v. LTV Corp.*, 496 U.S. 633 (1990)) are only entitled to "respectful consideration," not full-blown deference. *In re UAL*, 468 F.3d at 450.

In the context of *de novo* vs. deferential review in termination settings, one Sixth Circuit case warrants further comment. *PBGC v. Republic Techs. Int'l*, 386 F.3d 659 (6th Cir. 2004). Though *Republic Technologies* does not directly address the manner in which a court should approach plan termination, it is nonetheless consistent with the approach adopted by the Seventh Circuit two years later. *Republic Technologies* required the Sixth Circuit to address whether a district court was permitted to deny a plan termination date on the grounds that the PBGC failed to demonstrate that a $95 million increase in its liability was unreasonable.

The most important feature of *Republic Technologies* is that there was no dispute that a delayed plan termination would have cost the PBGC $95 million. In the case, the district court had rejected the PBGC's attempt to terminate the Plan, finding unconvincing the PBGC's assertion that such a $95 million increase in PBGC obligations would be unreasonable, on the ground that the PBGC then had budget surplus of over $7 billion. On these undisputed facts, the Sixth Circuit rejected a district court's second guessing of the agency's own view of what constituted an unreasonable increase in its own liability fund, particularly the district court's using the agency's surplus against it. "Notwithstanding the inappropriateness of the district court's assumption that a government entity can afford an additional $95 million in liabilities because it is currently running at a surplus, courts have never required PBGC to produce evidence indicating the impact of additional liabilities on its insurance fund." *Id.* at 667.

The Sixth Circuit thus suggested that the PBGC was entitled to deference in describing the effect of an undisputed multi-million increase in liabilities on its own best interests. Where it was undisputed that the PBGC would suffer nearly $100 million in liability by waiting, the Sixth Circuit would not allow district courts to scrutinize the PBGC's budget and operations to independently determine what the PBGC could afford to pay. But the Court of Appeals never

hinted that the PBGC would be entitled to any sort of deference with respect to the underlying facts provided to support a termination decision or any other decision that is required under ERISA to be the subject of a judicial "adjudication." *See, e.g., id.* at 667-68 (quoting *PBGC v. Mize Co., Inc.*, 987 F.2d 1059, 1063 (4th Cir. 1993), for the proposition that "the PBGC's expertise should be deferred to, at least to the extent of determining its own best interests."). Similarly, and consistent with *In re UAL*, *Republic Technologies* emphasizes the independent role of the judiciary in involuntary terminations. *See, e.g., Republic Techs.*, 386 F.3d at 662 ("despite the importance of termination dates, ERISA does not give PBGC unilateral authority to set them, even in involuntary proceedings. If the plan administrator does not agree with the date proposed by PBGC in an involuntary termination proceeding, a federal district court sets the date of plan termination." (citation omitted)). Thus, to the extent the PBGC seeks to rely on *Republic Technologies* in support of its deference arguments, therefore, the case is entirely unhelpful. It stands only for the very limited proposition that, where it is undisputed that the PBGC will suffer a substantial amount of additional risk by waiting to terminate a Plan, the federal courts do not then get to decide independently how much additional liability the PBGC can afford to pay.[5]

B. Because the Court Must Conduct a *De Novo* Proceeding and the PBGC Carries the Burden of Proof, Plaintiffs Are at a Minimum Entitled to Discovery, a Response, and Cross-Examination of Relevant Witnesses

To justify the Salaried Plan's termination, the PBGC must demonstrate to the Court, by a preponderance of the evidence that the Plan needed to be terminated, in light of the factors defined in 29 U.S.C. § 1342(c). Most notably, since the PBGC did terminate the Plan based on

[5] It should also be noted that the district court in *Rouge Steel* did not see *Republic Technologies* as deciding one way or the other as to whether the PBGC carries the burden of proof and must prove its termination case *de novo*. Though decided after *Republic Technologies*, *Rouge Steel* did not cite *Republic Technologies* or otherwise find any existing Sixth Circuit precedent relevant to the question of the approach a court should take to a plan's termination.

its view that termination was necessary for only one reason -- namely, to avoid any unreasonable increase in the liability of the PBGC's insurance fund -- one would expect the *de novo* proceeding to focus entirely on that PBGC proving that point. Until the filing of its brief today, however, the PBGC will have made no showing to a court this statutory requirement has been satisfied, and Plaintiffs thus cannot meaningfully address the PBGC's affirmative case concerning termination in this single brief. At a minimum, Plaintiffs must be offered an opportunity to rebut the PBGC's arguments and any evidence the PBGC puts forward in its January 8 briefing, including an opportunity to cross-examine any affiants and to discover the bases for any affiant conclusions or other PBGC factual assertions. Until then, the PBGC cannot reduce Plaintiffs benefits consistent with the constitutional guarantee of due process to Plaintiffs.

III. EVEN IF, FOR THERE TO BE DUE PROCESS, THE COURT NEED ONLY PROVIDE OPPORTUNITY FOR PLAINTIFFS TO SHOW THAT THE PBGC HAS ACTED ARBITRARILY AND CAPRICIOUSLY ON THE RECORD, PLAINTIFFS ALREADY CAN MEET THAT STANDARD

Should the Court find that the PBGC does not have to prove *de novo* and by a preponderance of the evidence that the Plan should have been terminated, and instead that Plaintiffs -- as all the process to which they are entitled -- must be given opportunity (before any benefit reductions) to show that the PBGC acted arbitrarily and capriciously, Plaintiffs can satisfy that standard here based on the "administrative record" they have so far been able to garner. The Court therefore would -- under even a narrower arbitrary and capricious review on the administrative record (just as the district court did in *Rouge Steel*) -- need to set aside the PBGC's termination of the Plan. In the subsections that follow, we show why, based on the administrative record Plaintiffs currently have, the PBGC's actions are unsupported and therefore arbitrary. However, Plaintiffs do not believe that the materials in their possession are the entire administrative record and the PBGC has yet to provide additional requested materials.

Therefore, if the Court were to hold that the presentation below were insufficient to show that the PBGC acted arbitrarily, Plaintiffs then must be given opportunity to present their case based on the "*whole* record" after that has been discovered, prior to any PBGC benefit decreases. 5 U.S.C. § 706 (emphasis added).

A. Because There is No Rational Connection Between the Facts Found and the Choice Made, the Administrative Record Provides No Basis for Adjudicating that the Termination of the Plan Was Statutorily Necessary

It is well settled that "[a]simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . ." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Accordingly, the PBGC's decision to terminate (resulting in the impending reduced benefits) must succeed or fail on the grounds invoked by it in terminating the Salaried Plan. The Administrative Record earlier produced by the PBGC to Plaintiffs clearly states that the only ground for justifying the Plan's termination under 29 U.S.C. § 1342(c) was to "avoid any unreasonable increase in the liability of the PBGC insurance fund." AR3. But that justification supplied in the Administrative Record does not comport with or otherwise support the actual action then taken by the agency. In fact, there is no discussion at all of, and thus no support for, the action that the PBGC ultimately took.

According to the Administrative Record, four months before actually moving to terminate the Salaried Plan, the PBGC's Trusteeship Working Group voted to approve termination of Delphi's plans on April 21, 2009, because there was "significant risk that Delphi's DIP lenders would foreclose on the stock of Delphi's foreign affiliates, thus causing a breakup of the Delphi controlled group." AR10. As the PBGC's April 17 termination memo spells out, a

break up of the controlled group would be significant because it would affect the PBGC's ability to reach Delphi's foreign assets (which Greenhill valued at over $2 billion) through Termination Liens.

> According to Greenhill's analysis, most (if not all) of Delphi's value is attributable to non-debtor entities. Creditors of the Delphi estate do not have claims against the *assets* of the overseas entities. While the collateral for the DIP loans includes 100% of the stock of Delphi's first-tier foreign subsidiaries, the claims associated with this collateral are arguably junior to the claims PBGC would have to the assets of the non-debtor controlled group members through PBGC's ability through ERISA to recover from all controlled group members on a joint and several basis.

AR36. Therefore, the PBGC had a documented concern that if the DIP lenders exercised their right of foreclosure, that could cause a "controlled-group break-up," the result of which would be to take away the PBGC's ability to recover from all the controlled group members on a joint and several basis through the use of liens against foreign assets. *Id.* The PBGC's third-party consultant, Greenhill, estimated that "[t]he combined collateral value potentially subject to foreign liens is currently estimated at $2.4 billion." AR112. In the Administrative Record, then, the PBGC concluded that the Salaried Plan purportedly had to be terminated to avoid an unreasonable increase in the liability of the fund, but only so that liens could be perfected against Delphi foreign assets prior to a controlled group break-up, thereby allowing the PBGC to seek recovery against the combined collateral value that Greenhill referred to in its report.

Presumably the PBGC will argue that this is sufficient evidence that the Plan needed to be terminated, because if it was not terminated, then the PBGC would not have been able to reach the $2.4 billion in assets of the foreign non-debtor entities through liens. This would theoretically justify the PBGC's actions in terminating the Salaried Plan if the PBGC then had actually used the termination as a way to reduce its potential liability through the use of new liens against non-debtor entities. However, there is simply no evidence in this record to support

the notion that that is what the PBGC did, and the available evidence affirmatively shows that that is *not* what the PBGC did. In reality, the available and indisputable evidence shows that not only did the PBGC fail to assert any Termination Liens against non-debtor members of the Delphi control group upon initiating the Plan's termination, it simultaneously released the Funding Liens it already had in place against those non-debtor entities (which the PBGC's estimates valued at $165.5 million) for well less than fifty cents on the dollar, and affirmatively waived the ability to pursue hundreds of millions more in liens after it commenced termination proceedings. AR34; *see also* Settlement Agreements (Exs. L & M)

The mechanism by which the PBGC released the liens was through a settlement agreement with Delphi, which was executed the same day that it issued the Notice of Determination concerning the Plan's termination. Specifically, the PBGC signed the Delphi-PBGC Settlement Agreement, which constituted the "recovery afforded to PBGC on account of the claims related to the Pension Plans, and [ ] also fully satisf[ied] (i) all liens asserted and/or assertable by PBGC against the Delphi Group with respect to the Pension Plans and (ii) the Contingent PBGC Adequate Protection Liens." Delphi-PBGC Settlement Agreement at 4-5 (Ex. L). Moreover, as a result of the agreement, the PBGC and Delphi agreed that "[u]pon issuance by PBGC of a notice of determination . . . that the Non-Bargaining Plans [*i.e.*, the plans for non-unionized workers such as the Salaried Plan] should terminate . . . PBGC and the plan administrator shall execute termination and trusteeship agreements . . . establishing the Termination Date as the date of plan termination, and appointing PBGC as the statutory trustee of each Non-Bargaining Plan." *Id.* at 6.

The clear linkage between the Delphi-PBGC Settlement Agreement and the termination of the Plan is reinforced in Exhibit B to the Delphi-PBGC Settlement Agreement. That Exhibit

to the Delphi-PBGC Settlement Agreement is actually the GM-PBGC Settlement Agreement, in which the PBGC:

(1) released all liens asserted and/or assertable by the PBGC against Delphi (and any entities in Delphi's controlled group) (Delphi-PBGC Settlement Agreement at 4-6) (GM-PBGC Settlement Agreement at 4-6);

(2) released all liens asserted and/or assertable by PBGC against any purchaser of securities or other assets pursuant to the Master Disposition Agreement (GM-PBGC Settlement Agreement at 4-5);

(3) released the contingent PBGC adequate protection liens (which included the Delphi non-debtor foreign assets) (Delphi-PBGC Settlement Agreement at 5) (GM-PBGC Settlement Agreement at 4);

(4) discharged Delphi (including any of its controlled group, along with any of its officers, directors, employees, heirs, agents, administrators, successor and assignees) from any and all disputes, suits, actions, causes of action, claims, assessments, demands, debts, sums of money, damages, judgments, liabilities, liens, whether known or unknown, that PBGC ever had, now has, or hereafter can have, relating to obligations to PBGC with respect to any of the Delphi pension plans, including the Salaried Plan (Delphi-PBGC Settlement Agreement at 5);

(5) discharged Old and New GM (including of its officers, directors, employees, heirs, agents, administrators, successor and assignees) from any and all disputes, suits, actions, causes of action, claims, assessments, demands, debts, sums of money, damages, judgments, liabilities, liens, whether known or unknown, that PBGC ever had, now has, or hereafter can have, relating to obligations to PBGC with respect to the Salaried Plan (GM-PBGC Settlement Agreement at 5).

The PBGC, in other words, expressly linked its decision to terminate the Salaried Workers' Plan to the provision of a number of things of value to both Delphi and GM -- including waiving its ability to assert Termination Liens on assets that were potentially valued at $2.4 billion, and releasing Funding Liens worth over $165 million. And stunningly it did this on the very day it determined that the Plan must be terminated in order to avoid an unreasonable increase in the liability of the PBGC insurance fund.

So what did the PBGC -- which was ostensibly taking emergency action to protect its own bottom line -- get for these releases? Very little, and what it did get came (oddly) not from Delphi but from New GM. Under the Settlement Agreements, New GM agreed to provide the PBGC with the Cash Consideration (worth $70 million) along with the Waterfall Distribution, which is a prospective (and highly speculative) right to a percentage of future distributions New GM is to receive. GM-PBGC Settlement Agreement at 3 (Ex. M). Additionally, the PBGC received from Delphi an aggregate $3 billion general unsecured (and likely worthless) claim against each of the Delphi Debtors (while noting that, absent the agreement, the PBGC would have been entitled to "a general unsecured claim in the approximate amount of $7 billion, plus the potential for additional recovery depending on the outcome of litigation that would have related to the Contingent PBGC Adequate Protection Liens."). Delphi-PBGC Settlement Agreement at 4 (Ex. L).

Even more strangely, despite the fact that these agreements "constituted the recovery afforded to PBGC" on account of the claims related to the Salaried Plan, and in fact Delphi became obligated to agree to the termination of the Salaried Plan as a result of its obligations under the Delphi-PBGC Settlement Agreement, there is absolutely no mention of the Settlement Agreements, or any discussion (let alone supporting analysis) about whether or how entering into these agreements would in fact avoid an unreasonable increase in the liability of the fund. The PBGC has not even included these documents within the supposed Administrative Record, even though it expressly linked them to its termination decision and signed them contemporaneously with the decision. "A complete administrative record includes all materials before the agency at the time the decision was made, [] as well as 'all materials that might have influenced the agency's decision, and not merely those on which the agency relied in its final decision.'" *Sara*

Lee Corp. v. Am. Bakers Ass'n Ret. Plan, 512 F. Supp. 2d 32, 38-39 (D.D.C. 2007) (citing *Amfac Resorts, LLC v. DOI*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001)).

While the Administrative Record indicates that the entire justification for the termination was to secure the ability to recover against the non-debtor Delphi foreign entities up to $2.4 billion, the Settlement Agreements do nothing to further that determination. Thus, while the concern of a controlled group break-up *might* have been a proper justification for initiating the termination proceedings where the PBGC was acting to reach foreign assets, because it didn't actually act on that concern in terminating the Plan pursuant to the Settlement Agreements, it is actually irrelevant to justify the termination of the plan under 29 U.S.C. § 1342(c) on the grounds the Plan needed "to be terminated in order to avoid any unreasonable increase in the liability of the PBGC insurance fund."

The Supreme Court's holding in *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962), makes abundantly clear that an administrative record so disconnected from an agency's actual exercise of discretion results in a finding of arbitrary and capricious agency action. In that case, the Court reversed an order issued by the Interstate Commerce Commission, holding that the agency's actions were not supported by findings specifically directed to the actual choice made by the agency. The Commission's order was prompted after the stockholders of a corporation, all motor carriers serving local and interchanging interstate traffic in Nebraska, resisted efforts by a union to unionize their operations. The union retaliated by initiating a secondary boycott against their traffic through the larger, unionized, trunk-line carriers upon whom the stockholder carriers were dependent for inter-changing traffic to and from points beyond Nebraska. The corporation then filed an application with the ICC for common carrier authority to transport commodities between certain Nebraska points and points in other states.

The Commission granted the application, concluding that the remedy was appropriate to the situation. The Supreme Court reversed, with instructions to set aside the order of the Commission.

The Supreme Court found that, while there was ample evidence to support the ICC's findings that the boycott caused a substantial disruption in motor service, there was insufficient evidence to support the remedy that ICC chose to utilize. The ICC did not have "unlimited discretion to apply either remedy simply because either might be effective." *Id.* at 165. The record on which the ICC relied failed because it contained, "*no finding and no analysis* here *to justify the choice made*, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice." *Id.* at 167 (emphasis added); *accord Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 758 (6th Cir. 1995) (citing *Burlington Truck* in administrative remand order).

The PBGC's Administrative Record fails for the same reason. It offers no finding or analysis to justify its choice to enter into the Settlement Agreements as a means of avoiding an unreasonable increase in the liability of the fund (how could it when the document setting forth the bottom line numbers -- the Settlement Agreement -- are not even mentioned in the Administrative Record?). In order that courts may be sure that an agency has not exceeded the bounds of discretion allotted to it by Congress, the agency must "'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.'" *Burlington Truck*, 371 U.S. at 168 (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941)). Moreover, "[t]he agency must make findings that support its decision,

and those findings must be supported by substantial evidence." *Burlington Truck*, 371 U.S. at 168 (citing *Interstate Commerce Comm'n v. J-T Transport Co.*, 368 U.S. 81, 93 (1961)).

Nevertheless, the PBGC made no findings specifically directed to the choice between two vastly different options with vastly different consequences, nor "did it articulate any rational connection between the facts found and the choice made." *Burlington Truck*, 371 U.S. at 168. The Administrative Record never purports to explain why the agency chose to enter into the Settlement Agreements, with its attendant releases and waivers, for only $70 million in cash settlement (albeit with the potential to earn a speculative additional windfall profit in the future) rather than proceed with the initiations of Termination Liens against Delphi's foreign assets, which the agency's own consultant conservatively valued in excess of $2.4 billion dollars. Similarly lacking is any explanation of why the existing Funding Liens in place on behalf of the Salaried Plan, whose value the PBGC's own internal memorandum estimated at over $165 million, were released as part of this deal. Nor is there any indication in the Administrative Record of the value of the liability releases agreed to in the Settlement Agreements, despite the fact that the PBGC considers the types of claims released to be assets of a terminated plan to be included in the valuation of the plan's assets. *See* Declaration of Rob Jones ¶ 9, attached as Ex. Q. Indeed, the termination of the Plan while at the same time releasing current Funding Liens, waiving the right to assert additional Termination Liens on the valuable foreign assets, and getting almost no additional collateral (just $70 million) only unreasonably *increases* the liability of the PBGC's fund.

The suggestion that the PBGC's termination of the Salaried Plan is justified by an Administrative Record which never addresses the actual terms of the termination turns the APA's "scheme of 'reasoned decision[-]making'" on its head. *Allentown Mack Sales & Serv.,*

Inc. v. NLRB, 522 U.S. 359, 374 (1998). As the Court noted in *Mack*, "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce." *Id.* The PBGC could only lawfully exercise its discretion to terminate the Salaried Plan pursuant to the terms of the Settlement Agreements if the Administrative Record "cogently explain[ed] why it has exercised its discretion" to do so. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Yet there is no explanation at all provided for the choice, let alone a "cogent" one.

Because there is no rational connection between the PBGC's decision to enter into the Settlement Agreements and the facts documented in the Administrative Record, the Administrative Record is, on its face, deficient. Moreover, whatever explanation PBGC offers in its supplemental filing will be insufficient to support its conclusion if it is not articulated in the record. It is well established that "[t]he courts may not accept . . . post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck*, 371 U.S. at 168-69. As the Administrative Record provides absolutely no support for the action that the PBGC actually undertook in terminating the Salaried Plan, the PBGC's actions must be set aside.

B. Because the Administrative Record Fails to Consider All Relevant Factors or Otherwise Has Gaps in It, the Termination Decision Should Be Remanded to the PBGC For Additional Investigation

Administrative action will also be set aside "if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

In such cases, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Id.* As explained above, the Administrative Record fails because its stated justification has no rational connection to the decision that the PBGC ultimately took (terminating the Salaried Plan in order supposedly to be in a position to assert liens then never asserted). But the record must also fail on the similar but distinct ground that the PBGC failed to consider all the relevant factors.

One glaring gap in the PBGC's decision-making is the PBGC's failure anywhere to address alternatives to termination -- most significantly, the alternative of New GM assuming the Salaried Plan or at least the Plan's liabilities (or, it might even be said, "re-assuming" the Salaried Plan, given that the Plan was first created by Old GM and Salaried Workers had worked long terms with GM prior to the 1999 spin-off). As described above, New GM (along with its new principal owner, the Treasury Department) considered the removal of the PBGC liens on Delphi assets to be a "condition precedent" to being able to move forward with New GM's restructuring plan. Westenberg Decl. at 9 (Ex. K). The point is clearly articulated in a number of key documents filed in connection with the reorganization of Old GM, specifically the MDA Motion, and the supporting Westenberg Declaration (relevant excerpts attached as Exs. C & K). Mr. Westenberg, who was "responsible for supporting the restructuring activities related to GM's involvement in the chapter 11 cases of Delphi Corporation," Westerberg Dec. at 2, described at length that it was imperative to New GM's success that it "immediately secure the supply of parts from Delphi in order for GM's own reorganization to succeed." *Id.* at 5. However, Mr. Westenberg noted that, "[i]n light of current circumstances, GM can only obtain confidence that its supply of Delphi's parts will not be threatened by obtaining control of certain of Delphi's assets and/or through a transfer of Delphi's assets to an entity that GM is comfortable will be a

stable and well-capitalized long-term supplier of parts to GM." *Id.* This objective was directly imperiled by the PBGC's liens: "[a]lthough Delphi has disagreed that these asserted liens are valid or enforceable, 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.[6] As a result, conditions precedent to the obligations of GM and Parnassus under the MDA are that the PBGC shall have agreed to remove its alleged liens on the assets subject to the Proposed Transaction." *Id.* at 8-9; MDA Motion at 16.

As the Westenberg Declaration makes clear, the removal of the liens was paramount to New GM. There also is no doubt that New GM was willing and able to use its assets to assume Delphi pension liabilities, as evidenced by its decision to "top-up" certain plans (such as the Hourly Plan). Moreover, the Administrative Record makes clear that at least until March 20, 2009, Delphi and Old GM were in serious negotiations the assumption of some or all of the Salaried Plan's pension liabilities. AR52, AR680, AR700, AR702, AR706, AR710. Overall, the PBGC's statutory goal should be "the continuation and maintenance of voluntary private pension plans," 29 U.S.C. § 1302(a)(1), and here it unexplained why the PBGC did not consider or prefer alternatives to termination that would have resulted in the Plan's continuation privately.

If anything, what the Administrative Record suggests is that irrelevant factors -- the Treasury's political desires and its goal to save New GM (and itself) money -- were the real reasons for no alternatives to termination being pursued. Shortly after the negotiations in March

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[6] The reference to "Parnassus" here refers to Parnassus Holdings II, LLC, an affiliate of Platinum Equity, which, under Delphi's June 1, 2009 reorganization proposal, was supposed to be the entity that would have ultimately operated Delphi's U.S. and non-U.S. businesses upon the sale of Delphi's assets.

2009 regarding OLD GM's assumption of the Plan, the Treasury Department becomes an overarching figure in Delphi-GM-PBGC negotiations.[7] By April 17, 2009, the PBGC concluded, "[b]ased on discussions with Treasury," that GM assumption of the Salaried Plan is no longer a possibility. AR33. Given the undeniable political power that the Treasury Department could exercise over the PBGC decision-making process, along with its obvious conflict of interest as New GM's benefactor, there is an even greater need for the Administrative Record to document the reasons why GM's assumption of the Salaried Plan ceased to become a viable option only after the Treasury Department became involved in negotiations.

Another hole in the Administrative Record is the PBGC's failure to explain why it could not obtain a better deal for itself and the Salaried Plan in exchange for the release of the liens. The PBGC obtained essentially $70 million as consideration for releasing all current or assertable liens that could have resulted in potentially full funding of the Plan to the benefit of the Plan's participants. And it did so only after determining that the Plan should be terminated so that the PBGC could assert liens in order to protect itself. If the PBGC is going to argue that it terminated the Plan in order to assert liens, and then it gave up the liens in exchange for an equally good or better deal, it must explain how obtaining $70 million in exchange for the rights to potentially billions is a good deal. What the omission again appears to show is that there is no

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[7] *See* Westenberg Decl. at 9 ("GM, Delphi, the PBGC and the U.S. Treasury have engaged in discussions regarding an agreement to satisfy these conditions and render saleable the assets subject to the PBGC's asserted liens (a "PBGC Agreement"). . . . as with the other aspects of the Proposed Transaction, any GM contributions under a PBGC Agreement will be subject to U.S. Treasury consent."); MDA Motion ¶ 46 (Ex. C) ("The need for GM to enter into the Proposed Transaction is also recognized by the U.S. Treasury, the part with the largest stake in GM's reorganization. The U.S. Treasury has not only consented to the Proposed Transaction, but is willing to fund it under the Debtors' postpetition financing. This willingness is indicative of the importance of the Proposed Transaction to GM's reorganization and the restructuring of the United States automotive industry.").

way to explain the deal the PBGC got, except that it was in the Treasury's and New GM's best interests (not the PBGC's or the Plan's) that the liens be released in total in exchange for a trifle. But the PBGC may only terminate a Plan for the reasons stated in § 1342(c), and specifically did so allegedly to protect itself from unreasonably increased liabilities. It must explain how those standards (and not some irrelevant consideration such as New GM's and the Treasury's bottom line) resulted in the release of the liens for $70 million.

The failure of the PBGC to consider important factors and the gaps in the Administrative Record necessitate setting aside the PBGC's termination decision. Just a few years ago, in *Rouge Steel*, Judge Steeh, vacated the PBGC's decision to terminate (in addition to denying its motion for summary judgment) on a finding that the administrative record created by the agency failed to reflect any consideration of "important" and "relevant" factors. *PBGC v. Rouge Steel Co.*, 2006 U.S. Dist. LEXIS 2685, at *14-*15 (E.D. Mich. Jan. 10, 2006). As noted earlier, Judge Steeh in that case indicated he did not need to reach the issue of *de novo* or deferential review, because under the narrowest review standard the PBGC's administrative record was "insufficient." *Id.* at *11-14. In that case, it was the PBGC's failure to document that it had considered the intentions or abilities of the company and union with regards to their responsibilities as plan administrators at the time that chapter 11 was filed, as well as its failure to consider a pending asset purchase agreement. *Id.* at *13. Such evidence, the court held, "would assist this court in ascertaining whether or not involuntary termination was proper, as it would demonstrate whether there were factors in existence that should have diminished PBGC's fears." *Id.* at *14. However, "without a fully developed administrative record, the court cannot fully ascertain whether or not it was reasonable for PBGC to anticipate that its liability would be unreasonably increased . . . ." *Id.* Similarly, without a more robust record here regarding the

PBGC's consideration of alternative options to termination and to explain the basis for the waiver of liens, it is impossible to determine whether the action was reasonable.

IV. THE COURT IS FULLY EMPOWERED THROUGH ITS EQUITY POWERS TO ORDER THE PBGC TO CONTINUE TO PAY FULL BENEFITS AND OTHERWISE PAY BENEFITS AS IF THE PLAN HAD NEVER BEEN TERMINATED

The PBGC cannot decrease Plaintiffs' benefits starting February 1, 2010, consistent with due process. First, the PBGC must prove *de novo* its case and carries the burden of proof; yet, until today, it has presented no case, and Plaintiffs have not yet had any meaningful opportunity to rebut -- or even see -- the presentation the PBGC assumedly is today making. Second, if deferential review instead were to apply, the current administrative record available to Plaintiffs already indicates that the PBGC has acted arbitrarily and capriciously in its termination of the Plan. It terminated the Plan supposedly in order to collect on and assert liens that it that same day instead released. Moreover, all evidence in the record points to the PBGC taking no action to avoid any unreasonable increase its insurance fund's liabilities (the asserted basis for the termination), but instead points suspiciously toward the PBGC simply acquiescing to the demands of superiors in the government and thereby acting *against* the best interests of its own fund and the Plan's participants. In sum, prior to any reductions in benefits, a hearing constitutionally must be given, and the termination must be sustained in that hearing; because no hearing has been completed, and at a minimum the PBGC's result is insupportable, the Court must enjoin the PBGC from reducing Plaintiffs' benefits until the constitutional requirements are satisfied, if they ever can be.[8]

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[8] Though the matter does not directly go to the question of whether the PBGC acted arbitrarily and capriciously towards Plaintiffs, it is conspicuous that the PBGC nowhere in the record addresses the legality of New GM's top up to the Hourly Plan. It has been PBGC policy for (footnote continued on next page)

Finally, at the oral argument, the PBGC suggested that the Plaintiffs had it very wrong when we assert that the Court must compel the PBGC to continue to pay full benefits and administer the Plan as if had never been terminated. *See* Tr. at 26-27. The PBGC contended that it can only pay guaranteed benefits and certainly cannot administer a plan as if the plan were ongoing. *See id.* It is the PBGC that has it very wrong. "Federal courts are courts in law and in equity," *Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840, 846 (6th Cir. 1999); furthermore, under ERISA, the PBGC can be (and here has been) sued by participants "adversely affected by any action of the corporation with respect to a plan in which such person has an interest" solely for "appropriate *equitable* relief." 29 U.S.C. § 1303(f)(1) (emphasis added). "'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs.'" *Carter-Jones Lumber*, 166 F.3d at 846 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

(footnote continued from previous page)
many years -- pressed before the U.S. Supreme Court and successfully so -- that companies may not adopt what are known as "follow-on plans." In PBGC parlance, a "follow-on plan" is "a new benefit arrangement designed to wrap around the insurance benefits provided by the PBGC in such a way as to provide both retirees and active participants substantially the same benefits as they would have received had no termination occurred." *PBGC v. LTV Corp.*, 496 U.S. 633, 642 (1990). As the Supreme Court noted in *LTV*, "[t]he PBGC's policy against follow-on plans stems from the agency's belief that such plans are 'abusive' of the insurance program and result in the PBGC's subsidizing an employer's ongoing pension program in a way not contemplated by Title IV [of ERISA]." *Id.* Notwithstanding the PBGC's policy, it appears nowhere even to have questioned New GM's decision (of necessity approved by Treasury) to top up the Hourly Plan. That the PBGC essentially was "rolling over" to superior government officials and higher government priorities on the top-up issue further strengthens our point that, in reality, the PBGC acquiesced to Treasury's interests in the overall situation.

Here, the PBGC has terminated the Plan without due process, and ultimately its termination decision cannot be upheld by the administrative record supposedly underlying it. As a result of the erroneous termination, the Salaried Workers face substantial decreases in benefits. "A situation so unique is a summons to a court of equity to mould its plastic remedies in adaptation to the instant need." *Atl. Coast Line R.R. Co. v. Fla.*, 295 U.S. 301, 316 (1935) (Cardozo, J.). Under its equity powers, the Court can and should order the PBGC to remedy the situation by treating Plaintiffs as if their Plan had never erroneously been terminated, including continuing payment of the Plan's full benefits. How the PBGC alleviates the predicament in which it has placed itself so as to supply the necessary equitable relief is up to the PBGC. Had it not simply terminated the Plan by agreement, it could have avoided the situation entirely because an earlier court adjudication would have avoided the erroneous termination; and if it had not released Delphi and New GM from all claims and released the liens, it might have additional tools at its disposal for its own benefit. But those are matters for the PBGC to resolve, so long as it complies with the Court's equitable orders. Ultimately, equity cannot allow the Salaried Workers to be left holding the bag for the PBGC's errors.

CONCLUSION

The Court should grant Plaintiffs' motion for a preliminary injunction and enjoin the PBGC from effecting reductions in Plan benefits scheduled to begin on February 1, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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