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' RESPONSE TO THE PBGC'S "SUPPLEMENTAL" BRIEF

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INTRODUCTION

Plaintiffs and Defendant Pension Benefit Guaranty Corporation ("PBGC") filed, on January 8, 2010, supplemental briefs with this Court. The briefs were in response to the Court's request at the December 22, 2009, oral argument for materials to support (in the case of the PBGC) or to show a lack of support for (in the case of Plaintiffs) the termination of the Delphi Retirement Program for Salaried Employees ("Salaried Plan" or "the Plan"). The Court's order for supplemental briefing regarding the propriety of the termination respectfully appeared to be in furtherance of the Court's effort potentially to provide the necessary due process hearing *before* the PBGC can diminish Plaintiffs' pension benefits due to the termination of the Plan. In that regard, pending before the Court is Plaintiffs' motion for a preliminary injunction to enjoin the PBGC from reducing Plan benefits without the pre-deprivation hearing necessary under the Due Process Clause. The actual provision of the hearing prior to the reduction would allow the Court to avoid decision on the constitutional due process question, either (1) because the hearing conceivably might show that the PBGC's termination decision was justified and thereby permit the impending pension reductions, or (2) because it might show the PBGC acted illegally on the merits and result in the termination being set aside, as Plaintiffs ultimately request in their Amended Complaint.

The PBGC's January 8 brief was incomplete. It rested on an administrative record that the agency did not produce for the Court until the following week (even though the PBGC had promised it within days of the December 22 oral argument). Indeed, in what was supposed to be a supplemental brief on the preliminary injunction issue, the PBGC instead filed a motion for summary judgment on Claim 4 in the Amended Complaint. Whatever its title, the PBGC's January 8 brief does not provide a basis for the Court to avoid intervening to halt the anticipated

February 1 decreases in pension benefits. First of all, the PBGC attempts only to show that its termination decision was not arbitrary and capricious on the administrative record (the one produced only after its brief was filed). Yet, if the due process hearing requirement is to be satisfied, the PBGC must prove *de novo* to this Court that its decision to terminate the Plan is supported by a preponderance of the evidence, a showing that the PBGC does not even attempt to make. In any event, even if the PBGC need only defend its termination decision as not arbitrary and capricious based on the administrative record, the PBGC's termination decision must be set aside because: (1) the PBGC has not addressed -- or even mentioned -- the reasonableness of the agreement it reached with Delphi to terminate the Plan or the relevant termination factors in 29 U.S.C. § 1342(c) against which the agreement's reasonableness must be judged; (2) with respect to the statutory factors that the PBGC does address (namely, for *initiation* of termination proceedings under 29 U.S.C. § 1342(a), as opposed to the *actual decision to terminate* under 29 U.S.C. § 1342(c)), the administrative record shows that the PBGC acted arbitrarily and capriciously; and (3) the whole administrative record has not been produced, leaving the Court unable to sustain the PBGC's decision.

Accordingly, because the PBGC has not proven its case on termination *de novo* and must do so before the PBGC can -- consistent with due process -- reduce Plaintiffs' benefits, the Court should enter a preliminary injunction enjoining the PBGC from reducing the Salaried Plan's benefits to what are known as "estimated" levels (scheduled to start February 1, 2010). Alternatively, because the briefing proves that the PBGC has acted arbitrarily and capriciously on the current administrative record and therefore cannot justify a decision to reduce Plaintiffs' benefits at this time, the Court likewise should enter an injunction enjoining the PBGC from

reducing Plaintiffs' benefits and setting aside the PBGC's termination decision, at least pending judicial review of any further proceedings on remand at the agency.

ARGUMENT

I. IF THE CURRENT BRIEFING IS TO CONSTITUTE THE PRE-DEPRIVATION HEARING NECESSARY FOR DUE PROCESS, THEN THE PBGC MUST PROVE ITS CASE *DE NOVO*, BUT HAS NOT DONE SO

Plaintiffs showed in their January 8 brief that, in order to obtain the termination of a pension plan, the PBGC must prove *de novo* that termination is required under 29 U.S.C. § 1342(c) and must do so by a preponderance of the evidence. *See* Pls.' Suppl. Br. at 23-30 (filed Jan 8, 2010) (Dkt. No. 47). The leading case holding that the PBGC must prove its case *de novo* is *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006). There, the Seventh Circuit thoroughly reviewed ERISA and particularly § 1342 and then ruled as follows:

> Deference is appropriate when agencies wield delegated interpretive or adjudicatory power -- the former usually demonstrated by rulemaking and the latter by administrative adjudication (which also may yield rules in common-law fashion). The PBGC did not use either rulemaking or adjudication to decide that United's plan should be wrapped up at the end of 2004. Its decision was made unilaterally and was not self-executing. The only authority that the PBGC has under § 1342 is to ask a court for relief. That implies an independent judicial role. . . . Nothing in 29 U.S.C. § 1342(c), which describes the judicial function after the PBGC files an action seeking termination, suggests that the court must defer to the agency's view.

UAL Corp., 468 F.3d at 449-50 (citations omitted).

The PBGC responds by suggesting that the Seventh Circuit's decision is aberrational. *See* PBGC Mot. for S.J. at 20. Contrary to the PBGC's assertions, *UAL Corp.* is the only Court of Appeals opinion to address the legal standard for sustaining a PBGC termination decision. The other decisions (Supreme Court, Court of Appeals, and District Court cases) did not directly confront the question of whether the PBGC must prove the necessity for termination. The PBGC in *UAL Corp.* likewise proffered a bevy of prior decisions to prop up an arbitrary-and-capricious

standard, including the Supreme Court's decision in *PBGC v. LTV Corp.*, 496 U.S. 633 (1990) (also cited by the PBGC here, *see* PBGC Mot. for S.J. at 12 n.53). But the Seventh Circuit noted that § 1342 is unique in the panoply of provisions applicable to the PBGC and thus that other decisions involving different PBGC situations were inapposite. As the Seventh Circuit put it:

> "Although the agency wants us to conclude . . . that *LTV* entitles all of its acts to . . . deference, that is not what the [Supreme] Court held. [Other sections of ERISA] . . . enable[] the PBGC to make self-executing orders, which is what leads to deferential review under the APA. Section 1342, by contrast, requires the PBGC to initiate litigation. Review under the APA differs substantially from the sort of position that an agency must assume when, like any other litigant, it must demonstrate a preponderance of the evidence in order to prevail.

UAL Corp., 468 F.3d at 450. Further, the Seventh Circuit even held that, in light of recent Supreme Court precedents on agency deference (decided after most of the lower court decisions noted by the PBGC here, *see* PBGC's Mot. for S.J. at 14 n.62), the cases typically cited by the PBGC advocating deference likely were no longer good law. *See UAL Corp.*, 468 F.3d at 450-51 (citing *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001)).

The PBGC next seeks to distinguish *UAL Corp.* because there was no agreement with the plan administrator in *UAL Corp.* to terminate the pension plan, therefore requiring the PBGC to seek "a decree from the district court to terminate the pension plan." PBGC Mot. for S.J. at 21. Apparently, the PBGC thinks that it must prove *de novo* that termination is warranted where the termination is contested by a plan administrator, but it can slip by with an arbitrary-and-capricious standard if a termination is not contested by the plan administrator. But the PBGC misses the whole point of the current briefing. Plaintiffs' argument all along has been that the PBGC cannot terminate a plan simply via an agreement with a plan administrator (particularly, a plan administrator acting as a settlor and not as a fiduciary) and must instead initiate the court adjudication outlined in § 1342(a) and obtain the decree detailed in § 1342(c). The Court

designed the briefing potentially to provide the hearing that Plaintiffs say due process requires, which is the adjudication mandated in § 1342 and gave the parties the opportunity to prove whether termination was, or was not, warranted. Under these circumstances, to assert that a *de novo* presentation is unnecessary because the Salaried Plan was terminated by agreement merely begs the question. This briefing will, at most, constitute the hearing that *did* occur in *UAL Corp.*, and the standard of review there applied by the Seventh Circuit -- namely, *de novo* -- should attach.[1]

The PBGC in its January 8 brief plainly has made no effort to prove *de novo* and by a preponderance of the evidence that the factors for terminating a plan as stated in § 1342(c) have been satisfied. It has decided to rest entirely on the notion that *Plaintiffs* must show that the agency acted *arbitrarily and capriciously*. Because a *de novo* presentation by the PBGC to the Court, so that the Court can determine whether a decree of termination is justified, is what due process (and, in fact, ERISA) mandates prior to any reduction in Plaintiffs' benefits, and because the PBGC makes no bones about having made no such presentation, the Court should issue the preliminary injunction barring the PBGC from its scheduled reductions in Plaintiffs' benefits.

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[1] Interestingly, the PBGC in generally addressing the standard of review says that an arbitrary-and-capricious standard is warranted "'particularly when the agency has made an *adjudicative decision* within its sphere of responsibility.'" PBGC Mot. for S.J. at 14 (quoting *PBGC v. The Pension Comm. of Pan Am. World Airways, Inc.*, 777 F. Supp. 1179, 1181-82 (S.D.N.Y. 1991), *aff'd mem.*, 970 F.2d 896 (2d Cir. 1992)) (emphasis added). Then when it tries to distinguish *UAL Corp.*, it contends that the Seventh Circuit decision is "inapplicable" because there was an adjudication of termination in *UAL Corp.* whereas in the instance of the Salaried Plan "Delphi agreed to the termination" and the agency therefore (supposedly with Congressional sanction) "'dispensed with the necessity of a court *adjudication*.'" *Id.* at 21 (quoting *In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d 197, 200 (2d Cir. 1987)). The PBGC's logic therefore dispenses with its own argument: an arbitrary-and-capricious standard follows from an adjudication, but the agency readily admits there was no adjudication here.

II. EVEN IF ARBITRARY-AND-CAPRICIOUS REVIEW APPLIES, THE PBGC'S TERMINATION OF THE SALARIED PLAN CANNOT SURVIVE THAT STANDARD

A. The PBGC Nowhere Has Addressed the Reasonableness of Its Agreement with Delphi to Terminate the Salaried Plan or the Factors for Termination Outlined in § 1342(c)

In asserting that its actions to terminate the Salaried Plan were not arbitrary and capricious, the PBGC surprisingly addresses the wrong section of the statute. It outlines why, in its view, the administrative record supports three of the four factors for *initiating* a termination proceeding under 29 U.S.C. § 1342(a). But the initiation of a termination proceeding is not what is at issue in this case; the PBGC, in fact, dismissed its own case in this Court when it did initiate a termination proceeding. Rather, it is the actual termination of the Salaried Plan that is in question. Plaintiffs assert that the termination could occur only after an adjudication in court that satisfies one of the three factors in § 1342(c), which are different than those in § 1342(a) for initiation of a termination proceeding; in turn, the PBGC asserts that it had authority to terminate the Salaried Plan via an agreement under § 1342(c). Either way, it is § 1342(c) -- not § 1342(a) -- that is dispositive.

Assuming only for purposes of argument that the PBGC is correct with its position that the Salaried Plan could be terminated simply through an agreement between the PBGC and Delphi Corporation ("Delphi") acting as plan administrator (but supposedly not subject to a plan administrator's fiduciary duties of loyalty and prudence and with a conflict of interest, *see* Am. Compl. ¶¶ 42-50), the decision to enter into such a termination agreement is subject to judicial review. Judge, now Justice, Ginsburg writing at the time for the D.C. Circuit cogently emphasized that even an agency's decision to enter into a negotiated agreement is subject to arbitrary-and-capricious review under the Administrative Procedure Act, 5 U.S.C. § 706.

> A court reviewing an agency's negotiation of a contract . . . properly may demand (1) a coherent, even if post-hoc, statement of the agency's bargaining objectives and concerns, that the court may compare against the objectives prescribed by law, and (2) an adequate account of the bargaining history, that allows the court to determine whether the agency reasonably pressed its own objectives and did not unreasonably accommodate those of the other party to the negotiation.

Doe v. Devine, 703 F.2d 1319, 1326 (D.C. Cir. 1983) (Ruth B. Ginsburg, J.); *accord Tackitt v. Prudential Ins. Co. of Am.*, 758 F.2d 1572, 1575 (11th Cir. 1985). Hence, in this case, even if the agency could circumvent the requirement for a court adjudication that termination is warranted under § 1342(c), it must still have engaged in reasoned, supportable action in entering an agreement to terminate the Salaried Plan.

If the arbitrary-and-capricious standard is what is to apply, the starting point for determining the reasonableness of any agreement to terminate the Salaried Plan is the criteria set forth in § 1342(c), for that is the provision under which the PBGC claims authority to terminate the Plan (as opposed to authority to *initiate* termination proceedings). Under § 1342(c), termination is warranted "in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund." 29 U.S.C. § 1342(c). Of course, in voting to invoke its termination powers, the relevant PBGC policy committee found *only* that termination was necessary in order to avoid any unreasonable increase in the liability of the PBGC's insurance fund. *See* Pls.' Suppl. Br. at 16 (filed Jan. 8, 2010) (Dkt. No. 47). Further, in addition, as Justice Ginsburg indicated, the PBGC's agreement must show that it accommodated the overall objectives set forth in the relevant sections of ERISA and that the PBGC did not unreasonably accommodate the interests of other parties to the negotiation, such as Delphi. One overriding interest in this part of ERISA is "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants." 29 U.S.C. § 1302(a)(1).

The PBGC's motion for summary judgment is entirely deficient in showing that the agreement reached with Delphi to terminate the Plan accommodates all of the competing factors, is consistent with § 1342(c)'s criteria, balances ERISA's overall objectives, and was not one-sided in favor of other parties. Indeed, the PBGC nowhere in its motion addresses at all the reasonableness of its agreement with Delphi and, as we note later, *see infra* pp. 15-18, does not include in the administrative record any materials associated with its negotiations with Delphi or other interested parties in the termination (such as the U.S. Treasury and General Motors Company ("New GM")) or any contemporaneous (or even later) statement of the agency's bases for reaching the termination terms that it did reach. Based on the limited record, and the PBGC's failure to explain in any manner the grounds for the actual agreement it reached with Delphi, there is no possible way to answer many relevant questions, such as:

(1) Why did the PBGC agree, in exchange for termination, to release its liens (both asserted and assertable) on Delphi's international assets rather than assert new liens? The value of the liens was great; according to the PBGC, by the date of the Plan's termination, the PBGC had over $160 million in funding liens asserted against Delphi assets, and the combined remaining collateral value potentially subject to international termination liens was estimated at $2.4 billion. *See* Pls.' Suppl. Br. at 32-33.

(2) Did the PBGC obtain a good deal either for itself or the Plan's participants in exchanging, as part of its termination deal with Delphi, its current liens and right further to assert liens or causes of action against Delphi and New GM for just minimal collateral? Despite the PBGC's estimates as to the substantial worth of Delphi's international assets, the PBGC received -- in return for releasing asserted liens of more than $160 million and assertable liens with a combined potential collateral value of $2.4 million -- nothing more than an unsecured claim from Delphi, and only $70 million in cash consideration (and a potential prospective distribution in profits from the new Delphi entity) from New GM. *See* Pls.' Suppl. Br. at 32-40. Another way to put this question is how did the PBGC supposedly avoid increasing the liability of its insurance fund unreasonably by abandoning valuable liens and the right to assert liens in exchange for so little?

(3) How did the PBGC reach the specific terms of its settlement agreements with Delphi and New GM, which are part and parcel of the termination

transaction and what is the "bargaining history" of these settlement agreements? *Doe v. Devine*, 703 F.2d at 1326.

(4) What role did the Treasury Department play in (a) the decision to terminate the Salaried Plan; (b) the conclusion that the assumption of the Plan by New GM was not a viable option; or (c) the negotiation of the and decision-making of the Delphi termination in general and the terms dealing with the release of the liens in particular? *See* Pls.' Suppl. Br. at 40-45. Were there any safeguards put in place to protect against the potential conflict of interest for the Treasury Department in these interactions? The Secretary of the Treasury Department, in addition to having responsibilities to the PBGC as one of its governing board, had competing and contrary interests to the PBGC owing to Treasury's substantial financial investment in New GM.

(5) How were the Plan participants' interests taken into account, if at all? In all of the time the relevant matters were being discussed at the PBGC, the agency never once sought comment or information from Plan participants -- the very individuals the PBGC exists to protect and the individuals who would be most harmed by termination of the Plan.

None of these questions are addressed by the PBGC in its January 8 summary judgment motion, and none can be answered based on the record currently before the Court (*see infra* pp. 15-18); therefore, the Court must set aside the PBGC's decision to terminate the Plan via an agreement with Delphi under the arbitrary-and-capricious standard. Where the relevant agency leaves a reviewing court unable to conduct judicial review, the agency's action cannot be upheld under the Administrative Procedures Act and the matter should be remanded to the agency for further consideration. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, 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, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *accord PBGC v. Rouge Steel Co.*, No. 03-75092, 2006 U.S. Dist. LEXIS 2685, at *14-15 (E.D. Mich. Jan 10, 2006) (vacating the

PBGC's termination decision and remanding to the agency upon the court's finding that the administrative record was deficient).

The PBGC may think that it has found a convenient way to avoid altogether judicial review of termination decisions by accomplishing terminations through agreements rather than through the court proceedings Congress contemplated in § 1342. But its agreement to terminate the Plan is no less reviewable agency action than any other PBGC act. Per Justice Ginsburg's reasoning in *Doe v. Devine* in an analogous contract situation, the PBGC was obligated -- in reaching a termination agreement -- to "set goals that were, by and large, consistent with [ERISA's], and conduct[] its negotiations . . . in a manner reasonably calculated to advance those goals." *Doe v. Devine*, 703 F.2d at 1334. If anything, the PBGC may be hamstringing itself to a greater extent by not seeking the court adjudications of terminations as set forth in § 1342 and instead seeking to accomplish terminations through agreements with plan administrators. In the court adjudication, the PBGC could accomplish termination by proving a single factor outlined in § 1342(c) (*i.e.*, that the termination is in the participants' best interests *or* is necessary in order to avoid an unreasonable deterioration in the plan's financial condition *or* is necessary to avoid an unreasonable increase in the liability of the insurance fund), and the PBGC then could rest behind any terms associated with termination set by the adjudicating court. Where it terminates by agreement without any court involvement, the PBGC must after-the-fact defend its termination and all of the terms it has reached as consistent with the ERISA and its objectives (including the participants' best interests) and show that its negotiations were even-handed, legitimate, and competent.

Having chosen to act through a termination agreement, but having in no manner provided the Court with the tools to review the reasonableness of that agreement, the PBGC's decision to

terminate the Salaried Plan cannot be affirmed, and, at a minimum, a remand is required. The PBGC cannot in the meantime begin to reduce Plaintiffs' benefits. Because this briefing, if it constitutes the necessary pre-deprivation hearing, has not resulted in a sanctioning of the PBGC's termination decision, the agency may not deprive Plaintiffs at this time of their property consistent with the requirement of due process of law.

B. If Only the Factors Set Forth in § 1342(a) for Initiating a Termination Proceeding Are Relevant, the PBGC's Decision to Terminate is Still Arbitrary and Capricious

The PBGC's summary judgment motion seeks only to show that the agency's termination decision satisfies one or more of the four criteria outlined in § 1342(a) for initiating a termination proceeding. Again, these criteria are irrelevant, given that it is the PBGC's decision actually to terminate the Plan that is challenged, not its decision to initiate a now-aborted judicial proceeding for termination. In fact, it stands to reason that the criteria for initiating a termination proceeding under § 1342(a) are broader than those for actually terminating a plan under § 1342(c). Section 1342(a) contemplates the initiation of a termination proceeding when it appears that a plan and its participants may be in financial or other jeopardy; it *begins* a process, but then § 1342(c) sets forth the bases for concluding the process with a decree of termination when more specific, consequential criteria are found to be present. Thus, the PBGC may initiate a termination proceeding whenever (among other factors) a plan sponsor has failed to meet minimum funding obligations or losses to the PBGC insurance fund are "possible" or "may reasonably be expected" (29 U.S.C. § 1342(a)); however, missing a funding payment or merely "possible" losses to the insurance fund are not among the bases in § 1342(c) for terminating a plan. No one would assert, for instance, that every plan participant should suffer through the

hardship of a termination and thereby obtain reduced, guaranteed PBGC benefits simply because a plan sponsor has missed a quarterly funding payment.

Nonetheless, if the criteria in § 1342(a) were the relevant factors for the PBGC to defend its decision to terminate the Salaried Plan, the PBGC's case on the § 1342(a) factors that it here invokes is suspect. The PBGC claims to have determined that the Plan should be terminated pursuant to 29 U.S.C. § 1342(a)(1), which authorizes initiation of termination proceedings when a plan has not met "minimum funding standard[s]," and § 1342(a)(2), which authorizes initiation of termination proceedings if a plan "will be unable to pay benefits when due." The PBGC's invocation of these factors here should be disregarded. In the first place, the only decision that the administrative record currently before the Court identifies was a decision to terminate the Salaried Plan to ensure that the PBGC could maximize its recovery from Delphi's controlled group by placing liens on Delphi's foreign assets before a foreclosure forced the breakup of the controlled group. That is the justification underlying, potentially, the § 1342(a)(4) factor, and is clearly the rationale underlying the internal votes and memos upon which the PBGC relies. *See, e.g.*, AR23 & AR37 (Exs. X and Z to Pls.' Suppl. Br.); *see also* Pls.' Suppl. Br. at 16. It is hornbook law that an agency decision can only be upheld, if at all, on the bases stated by the agency itself, not by its attorneys in litigation. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962).

Ultimately, any finding to terminate the Plan in July 2009 based on § 1342(a)(1) and (2) would be irrational. On § 1342(a)(1), in order to rely on the Plan's failure to meet minimum funding requirements as a grounds for initiating the Plan's termination, the PBGC should not only be required to show that the Plan was under-funded, but must explain how that fact alone could result in termination when more than 90% of the defined-benefit pension plans in this

country may be under-funded. *See* Ex. A to this Resp., at 1. Clearly, the PBGC has not initiated termination proceedings against the vast majority of plans in the country, thus begging the question of why the Salaried Plan, among all of the others, had to be terminated for under-funding. In addition, as the PBGC's summary judgment motion makes clear, Delphi had failed to make necessary funding payments starting in October 2005, yet the PBGC did not terminate the Plan until July 2009. *See* PBGC Mot. for S.J. at 17. There is nothing in the record to suggest that the Plan's under-funding suddenly became a reason to terminate the Plan. Without some reasoned basis to explain the change in position, the PBGC's reliance on this factor would have to be deemed arbitrary and capricious. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("an agency changing its course must supply a reasoned analysis") (internal quotation marks omitted).

With respect to any determination under § 1342(a)(2) that the Plan would be unable to pay benefits when due, any such finding would have no support in the record. Counsel for the PBGC at the oral argument on December 22 straightforwardly conceded that the Plan currently has no trouble paying full benefits to its participants, notwithstanding any long-term under-funding. *See* Tr. at 26 (Dec. 22, 2009) (Ex. A to Pls.' Suppl. Br.). Furthermore, the PBGC has not supplied any facts as to when the Plan would cease to be able to make payments. Given the improved performance of the stock market that had already started to occur by the time the PBGC terminated the Plan in July 2009, common sense indicates that the Plan's under-funding measured by the PBGC at the nadir of the stock market in April 2009 almost certainly was less of a problem by the time of termination; and there might be no jeopardy at all of non-payment of benefits anytime in the future if the Plan had not been terminated, given that the Plan had frozen benefits (*see* Pls.' Suppl. Br. at 10) and the stock market has rebounded to a substantial extent.

Taken as a whole, there is insufficient information in the PBGC's administrative record to support a finding that the Plan at the time of termination would in the foreseeable future be unable to pay benefits. Again, given the substantial under-funding of so many U.S. defined benefit pension plans, the PBGC has failed to explain how the Salaried Plan was in any greater jeopardy of not paying benefits than other U.S. plans (particularly when valuable liens were available as well to the Plan). *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("[A]n agency's decreed 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.").

Finally, with respect to the factor enunciated in § 1342(a)(4), arguably that is one that the administrative record does invoke. That is, the PBGC voted to terminate the Plan based on the narrower ground in § 1342(c) of an unreasonable increase in the liability of the insurance fund, which arguably is subsumed in the broader ground of § 1342(a)(1) permitting initiation of termination proceedings for "possible" long-run losses to the PBGC. For all of the reasons stated in our Supplemental Brief filed on January 8, the PBGC's decision to terminate based on a purported unreasonable increase in liability for the insurance fund is arbitrary and capricious. *See* Pls.' Suppl. Br. at 32-40.

C. The Administrative Record is Incomplete and Therefore the Court Cannot Sustain the PBGC's Termination Decision

Still another reason for setting aside the PBGC's termination determination is that the agency has failed to proffer the entire administrative record to the Court. "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)). Here, there is no dispute that the PBGC has failed to provide any documentation regarding its negotiations with Delphi, the Treasury Department, the Auto Task Force, and New GM leading to the termination of the Plan via an agreement with Delphi. It has not even included in the administrative record the settlement agreements it reached with Delphi and New GM. The Court cannot review the reasonableness of the termination agreement without the relevant documentation.

Recent events reinforce the administrative record's deficiency. On January 8 (the same day as the due date for our last filing), the PBGC deigned to respond to a long-pending Freedom of Information Act request from Plaintiffs to the agency seeking documentation surrounding the PBGC's negotiation of settlement agreement with Delphi and New GM, which were paramount to the termination transaction. *See* Ex. B to this Resp. In that FOIA response, which the PBGC described still as partial, there are more than 200 pages of emails, the majority of which have been redacted by the PBGC. These emails concern the negotiations between the PBGC, Treasury, the Auto Task Force, and New GM apparently concerning obligations associated with the Plan. None of these emails were included in the administrative record provided by the PBGC to the Court, and it is impossible to determine their content, except that the PBGC thinks they are relevant to its settlement terms with Delphi and New GM (because otherwise it would not have included them in response to the FOIA request). Yet, though it may be impossible to determine the precise content of the emails, they make plain that material events were occurring that are nowhere documented in the current administrative record.

The only PBGC document within the administrative record that purports to lay out a cogent explanation for why the PBGC reached its decision to terminate the plan is the April 17,

2009 PBGC staff memo recommending the Plan's termination. *See* Ex. Z to Pls.' Suppl. Br., at AR29-38. The justification underlying the case team's conclusion is not in dispute: "*[a]t the time*, there was a significant risk that Delphi's DIP lenders would foreclose upon and take direct ownership of the stock of Delphi's foreign affiliates. Because that stock would no longer be owned, directly or indirectly, by Delphi, the foreign entities would then no longer be part of the Delphi controlled group and would cease to be liable to PBGC, thereby removing any value available for PBGC recoveries." PBGC Mot. for S.J. at 9 (emphasis added).

On the basis of that recommendation, the PBGC's Trusteeship Working Group ("TWG") and Acting Director approved the case team's recommendation to terminate the Salaried Plan on April 21, 2009. PBGC Mot. for S.J. at 9. The PBGC did not actually initiate termination until July 20, 2009.[2] If the administrative record were complete, one could properly conclude that in between April 21, 2009 and July 20, 2009, nothing of any relevance to PBGC's determinations as to its potential liability and recovery in connection with the Salaried Plan occurred. Yet, as the PBGC's recent FOIA response demonstrates, by June 2, 2009, the PBGC and Delphi were actively engaged in negotiating a settlement agreement that would involve the PBGC initiating an involuntary termination of the Plan and releasing its liens on Delphi assets in return for some sort of financial recompense to make up for the Plan's under-funding. *See* Ex. C to this Resp. (in which John Menke, a PBGC attorney, forwards to Ron Meisler, outside counsel for Delphi, a document concerning "the proposed Delphi/PBGC settlement agreement" discussed in an earlier phone conversation). This settlement agreement is the document that ultimately determined the

[2] There is some confusion as to when this actually occurred. The PBGC's Motion states that the PBGC determined that the Plan should be terminated on July 22, 2009. *See* PBGC Mot. for S.J. at 3, 10. However, the Notice of Determination is date stamped July 20, 2009. *See* AR3, Ex. S to Pls.' Suppl. Br.

"recovery afforded to PBGC on account of the claims related to the Pension Plans." Delphi-PBGC Settlement Agreement at 4 (Ex. L to Pls.' Suppl. Br.). To reiterate, a complete administrative record must contain "all [the] materials that might have influenced the agency's decision." *Sara Lee Corp.*, 512 F. Supp. 39 (internal quotation marks omitted). By failing to include any information regarding the Delphi and New GM settlement agreements (which were the agreements that the PBGC used to accomplish the termination of the Salaried Plan and conclusively determine the PBGC's recovery for the related liability), the administrative record makes it impossible for a reviewing court to do its job; in particular, it is impossible for the Court to adjudge the reasonableness of the decision to terminate the Plan via a termination agreement with Delphi, absent review of this "bargaining history." *Doe v. Devine*, 703 F.2d 1319, 1326 (D.C. Cir. 1983).

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 19, 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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