

**PBGC'S RESPONSE TO PLAINTIFFS' SUPPLEMENT TO THEIR
OPPOSITION TO PBGC'S SUMMARY JUDGMENT MOTION**

Case 2:09-cv-13616-AJT-DAS Document 136 Filed 06/09/10

DSRA Preface to Filing

We are posting the just received PBGC response to the recent DSRA brief documenting the funding status of the Salaried Pension Plan by experienced actuarial firms.

The PBGC's response in which they first raise procedural and technical reasons why this information should not be considered by the court is their attempt to defend their method of valuation which is clearly at odds with that used in normal plan valuation. The history and precedent in the 6th Circuit concerning valuation methods for terminated pension plans is clearly on our side

Our attorneys are not surprised by this response nor do they feel it diminishes our case in any way.

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

DENNIS BLACK, <i>et al.</i> ,)	
)	
Plaintiffs,)	Case No. 2:09-cv-13616
)	Hon. Arthur J. Tarnow
v.)	Magistrate Judge Donald A. Scheer
)	
PENSION BENEFIT GUARANTY)	
CORPORATION, <i>et al.</i> ,)	
)	
Defendants.)	

**PBGC’S RESPONSE TO PLAINTIFFS’ SUPPLEMENT TO THEIR
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In their Supplement to Plaintiffs’ Opposition to the PBGC’s Summary Judgment Motion (“Supplement”), filed without leave of this Court,¹ plaintiffs claim that a crucial document is missing from PBGC’s Administrative Record supporting its decision to terminate the Delphi Retirement Program for Salaried Employees (“Salaried Plan” or “Plan”). Plaintiffs proffer the 2008 Enrolled Actuary Certification of Adjusted Funding Target Attainment Percentage for the Delphi Retirement Program for Salaried Employees (“AFTAP Certification” or “AFTAP”), which purports to show that the Salaried Plan was only about 15% underfunded as of October 1, 2008. The AFTAP Certification could not have been included in the Administrative Record

¹ As plaintiffs’ explain in their Supplement, the Court set a briefing schedule. All issues relating to plaintiffs’ claims against PBGC are fully briefed and before the Court. Local Rule 7.1(c)(3) provides that “[a] party must obtain leave of court to file more than one response to a motion for summary judgment.” Although PBGC is not seeking to strike the plaintiffs’ current filing, PBGC reserves its right to ask the Court to strike any future pleadings filed by plaintiffs that are not in compliance with the Local Rules.

because it was not created until June 30, 2009 – some two months after PBGC made its determination to seek termination of the Salaried Plan. But even if the AFTAP Certification had been in existence at the time, it would not have been germane, as it was based on stale information irrelevant to PBGC’s decision to terminate the Salaried Plan. Therefore, the document could not and should not be a part of the Administrative Record, and the Court should not consider it as part of its judicial review.

I. The AFTAP Certification is Not a Part of the Administrative Record.

Judicial review of an administrative decision is limited to the administrative record that was before the agency at the time of the decision.² Accordingly, documents or materials not before the agency cannot be a part of the administrative record and should not be considered at the judicial review stage.³ “Common sense dictates that the agency determines what constitutes the ‘whole’ administrative record because it is the agency that did the ‘considering,’ and that therefore is in a position to indicate initially which of the materials were ‘before’ it — namely, were ‘directly or indirectly considered.’”⁴

The AFTAP Certification is dated June 30, 2009. PBGC’s decision to seek termination of the Salaried Plan was made by PBGC’s Acting Director on April 21, 2009.⁵ PBGC could not

² See *Camp v. Pitts*, 411 U.S. 138, 142 (1972) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”); *Cumberland Reclamation Co. v. Secretary, U.S. Dep’t of the Interior*, 925 F.2d 164, 167 (6th Cir. 1991); *Taco Especial v. Napolitano*, 2010 WL 956001, at *3 (E.D. Mich. Mar. 15, 2010).

³ See *Cumberland*, 925 F.2d at 167 (finding that an affidavit was not part of the administrative record *before the agency* and would not be considered by the court).

⁴ *Pacific Shores Subdivision, California Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (internal citations omitted).

⁵ AR 21. PBGC agreed to forbear from terminating the Salaried Plan at that time because Delphi’s DIP lenders agreed to provide advance notice before exercising their right to foreclose on the stock of Delphi’s foreign affiliates. AR 17-18. On July 22, 2009, PBGC ultimately

possibly have relied on or been influenced by the AFTAP Certification, because it was not even in existence at the time PBGC made its decision. Therefore, the document was not included in the Administrative Record, nor should it have been.

II. The AFTAP Certification is Irrelevant to PBGC's Decision to Seek Termination of the Salaried Plan.

Even if the AFTAP Certification had existed when the agency was considering whether to seek termination of the Salaried Plan, the contents of the document would not have affected PBGC's determination that termination of the Salaried Plan was necessary.

As the AFTAP Certification itself states, the document is only a snapshot of the status of the Salaried Plan as of October 1, 2008. On October 1, 2008, Delphi fully intended to reorganize in bankruptcy and emerge as a well-capitalized, on-going business; and upon emergence, Delphi intended to fund the Salaried Plan and maintain it as an on-going pension plan.⁶ Given Delphi's consistently stated intention to maintain the Salaried Plan, as of October 1, 2008, PBGC had not expressed any intention to seek termination of the Salaried Plan, nor did the agency have any reason to do so.

Unfortunately, the events that took place between October 1, 2008 and April 21, 2009 – all of which were detrimental to Delphi and to the Salaried Plan – were neither addressed nor could have been taken into account by the AFTAP Certification. From the fourth quarter of 2008 through the first quarter of 2009, the U.S. economy plunged into one of the deepest

published the Notice of Determination for termination of the Plan, after having received such notice of foreclosure from the DIP lenders on July 15, 2009. AR 1-9, 12-16.

⁶ First Amended Joint Plan of Reorganization of Delphi Corporation and Certain Affiliates, Debtors and Debtors-in-Possession (as modified) at 43, *In re Delphi Corporation, et al.*, No. 05-44481 (Bankr. S.D.N.Y. Oct. 3, 2008).

recessions since the Great Depression of the 1930s. The auto industry followed the general economy into decline, causing two of the three largest domestic auto makers, General Motors and Chrysler, to commence their own bankruptcies.

These events were catastrophic for Delphi's efforts to reorganize. Delphi's revenue streams dried up and its sources of reorganization financing disappeared.⁷ By April 21, 2009, Delphi no longer maintained that it could reorganize itself in bankruptcy.⁸ To the contrary, by April, Delphi had stated its intention to sell any and all of its valuable assets to General Motors and other third-party buyers, to distribute the proceeds of those sales to its creditors, and then to liquidate its remaining assets.⁹ As Delphi could no longer afford to reorganize, the company acknowledged that it could not sustain its pension plans.¹⁰ Accordingly, there remained no employer obligated to assume, sponsor and/or maintain any of the Delphi pension plans, including the Salaried Plan.

The law recognizes only two possible outcomes for a defined benefit pension plan in the situation where its sponsor is liquidating and thus will be in no position to maintain the plan. The plan can be terminated in a standard termination under 29 U.S.C. § 1341(b), but only if the plan has sufficient assets to satisfy all of its benefit liabilities. If the plan lacks sufficient assets to fund a standard termination, and there is no source of funds to bridge that gap, the pension plan will be terminated under 29 U.S.C. § 1341(c) or 1342 and trustee by PBGC.

When a pension plan is about to lose its sponsor, PBGC evaluates the funded status of the plan on a termination basis, assuming that the plan will receive no further funding contributions, and that all benefit obligations of the plan must be satisfied at the time of termination. That

⁷ See AR 29-35.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

assessment of the funded status of the Delphi Salaried Plan, done as of the time PBGC was actually considering whether to seek termination of the Salaried Plan, and unchallenged by plaintiffs, is set forth in detail in PBGC's Administrative Record.¹¹ The calculations demonstrated that the Salaried Plan was underfunded by more than \$2.7 billion as of April 2009. In contrast, the AFTAP Certification looked at the Salaried Plan as of October 1, 2008 and was based on the assumption that the Plan would remain ongoing. The AFTAP Certification did not address the funding of the Salaried Plan on a termination basis as of April 2009, and as such, was completely irrelevant to the situation PBGC was faced with in April 2009 – a substantially underfunded Plan that was about to lose its sponsor.

Ultimately, any debate over the funded status of the Salaried Plan in October 2008 versus April 2009 is a red herring. The fundamental fact that drove PBGC's decision to seek termination of the Delphi pension plans was Delphi's liquidation. Delphi's pension plans, including the Salaried Plan, were underfunded by billions of dollars in April 2009, and Delphi could no longer maintain them. Termination and trusteeship by PBGC was the only remaining outcome for the Salaried Plan.

WHEREFORE, for the foregoing reasons, PBGC respectfully requests that the Court reject plaintiffs' effort to supplement PBGC's Administrative Record, review that record

¹¹ See AR 33-34, 62.

consistent with the standards of the Administrative Procedure Act, and grant PBGC's Motion for Summary Judgment.

Date: June 9, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2010 , I electronically filed the foregoing PBGC'S RESPONSE TO PLAINTIFFS' SUPPLEMENT TO THEIR OPPOSITION TO PBGC'S SUMMARY JUDGMENT MOTION on all parties using the courts ECF system.

s/Ralph L. Landy
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