

**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
)	Magistrate Judge Donald A. Scheer
)	
v.)	
)	
PENSION BENEFIT GUARANTY)	
CORPORATION, <i>et al.</i> ,)	
)	
Defendants.)	
)	

**RESPONSE OF THE PENSION BENEFIT GUARANTY CORPORATION TO
PLAINTIFFS' MOTION FOR ADOPTION OF SCHEDULING ORDER**

In their Motion for Adoption of a Scheduling Order, plaintiffs assert that the parties should devote several months to conducting discovery on “very complex issues.” PBGC objects to this expansive discovery request. Counts 1 through 3 of plaintiffs’ amended complaint do not raise complex issues at all – indeed, plaintiffs and PBGC have no dispute over the relevant facts of any of those counts. To allow discovery under such circumstances would be unwarranted. Count 4 challenges PBGC’s decision to initiate termination of the Delphi Retirement Program for Salaried Employees (“Salaried Plan”), a decision plaintiffs admit is subject to deferential review based on PBGC’s administrative record. Discovery is not appropriate in administrative record cases.

In counts 1 and 3 of the amended complaint, plaintiffs allege that the Delphi Salaried Plan was terminated by an agreement between PBGC and Delphi Corporation, the Salaried Plan

administrator (“Delphi”), rather than by a court decree. In its answer, PBGC admitted those operative facts – the Salaried Plan was terminated by agreement with Delphi and not by court decree.¹ Plaintiffs’ assertions that termination by a trusteeship agreement rather than by court decree was either illegal under ERISA (count 1) or an unconstitutional deprivation of due process (count 3) are legal issues, not factual disputes. Therefore, discovery is neither needed nor appropriate on these counts.

In count 2, plaintiffs challenge Delphi’s right to sign the trusteeship agreement terminating the Salaried Plan. Plaintiffs allege that Delphi’s fiduciary duties prevented it from signing the trusteeship agreement. As PBGC has noted in its prior filings in this case, it is well established as a matter of Supreme Court jurisprudence that fiduciary duties do not apply to a decision to terminate a pension plan.² Moreover, Delphi’s decision to sign the trusteeship agreement terminating the Salaried Plan was described in detail in its plan of reorganization and in its motion to approve the PBGC settlement, both of which Delphi filed for review and approval by the judge in charge of Delphi’s New York bankruptcy. The Bankruptcy Court held a hearing in which the plaintiffs in this case participated at length, raising the same arguments that they make in count 3 here. The Bankruptcy Court rejected their arguments and expressly ruled that Delphi had the right to sign the trusteeship agreement. Plaintiffs did not appeal that final decision. All of those facts are a matter of public record. The extent to which plaintiffs are bound by the final order of the Bankruptcy Court and whether PBGC may rely upon that

¹ The trusteeship agreement was filed with the Court as Exhibit 2 with PBGC’s Motion for Summary Judgment on count 4.

² See DOL Adv. Op. 2001–01A (January 18, 2001) and Letter to John N. Erlenborn from Dennis M. Kass (March 13, 1986) at <http://www.dol.gov/ebsa/regs/ils/il031386.html>; *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 436 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996).

decision in entering into a trusteeship agreement with Delphi may be legal issues for this Court to consider. But they are not factual disputes for which discovery would be appropriate.

Finally, in count 4, plaintiffs claim PBGC's decision to seek termination of the Salaried Plan lacked a legal and factual basis. This challenge raises a straight-forward administrative law issue under section 706 of the Administrative Procedure Act.³ The court must decide whether PBGC acted arbitrarily or capriciously based upon its review of PBGC's administrative record, not upon any *de novo* record offered by plaintiffs.⁴ In such a case, discovery beyond PBGC's administrative record is not allowed.

Plaintiffs have already admitted that this is such a case. In their Supplemental Brief in Support of their Motion for Preliminary Injunction at page 26, plaintiffs admitted that "ERISA (*see* 29 U.S.C. § 1342(a)) allows PBGC to *initiate* a termination proceeding (so perhaps its decision to initiate a proceeding concerning termination would be subject to deferential review)" In fact, in this case PBGC did decide to initiate termination of the Delphi Salaried Plan, and that is the only PBGC decision subject to review in this lawsuit.

Plaintiffs make a variety of arguments in an attempt to justify discovery not normally allowed in cases challenging federal agencies' administrative decisions. For instance, they claim that PBGC is required to establish all the grounds set forth in 29 U.S.C. § 1342(c). The grounds PBGC must establish under § 1342(c) are relevant when PBGC seeks to terminate a pension plan by decree of a federal district court. But the Salaried Plan was not terminated by court decree but rather by agreement with the plan administrator. "If the corporation and the plan

³ 5 U.S.C. § 706.

⁴ *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *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); *PBGC v. Haberbusch*, 2000 WL 33362003, *5 (C.D. Cal. Nov. 3, 2000); *PBGC v. FEL Corp.*, 798 F. Supp. 239, 241 (D.N.J. 1992).

administrator agree that a plan should be terminated and agree to the appointment of a trustee *without proceeding in accordance with the requirements of this subsection*, the trustee shall have the power described in subsection (d)(1) and . . . is subject to the duties described in subsection (d)(3).”⁵ That is precisely what happened in this case, i.e., Delphi, the Salaried Plan’s administrator, agreed the Plan should be terminated and PBGC should be appointed its statutory trustee.

In addition, plaintiffs have argued that PBGC must justify its “decision” to enter into a trusteeship agreement with Delphi rather than seeking a court decree. But PBGC made no such decision – the standing to contest a PBGC-initiated termination lies not with PBGC but with the plan administrator. Here, it was Delphi that was required to decide whether to contest PBGC’s efforts to terminate the Salaried Plan (thus triggering PBGC’s need to obtain a court decree) or to acquiesce in PBGC’s decision to initiate termination and enter into a trusteeship agreement. As described above, Delphi’s decision to sign the trusteeship agreement has already been the subject of extended Bankruptcy Court proceedings culminating in a final, non-appealable order affirming Delphi’s decision.⁶

Finally, plaintiffs’ claim they need discovery regarding PBGC’s forbearance from acting on its decision to seek termination during the period between April and July 2009. PBGC’s reasons for forbearance are fully explained in the administrative record; there is no gap in the

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

⁶ Much of plaintiffs’ argument in its various briefs and much of the discovery it apparently intends to conduct appears based on plaintiffs’ deliberate confusion between the trusteeship agreement with Delphi that terminated the Salaried Plan and PBGC’s entirely separate agreements with the various Delphi corporate entities, the Delphi debtor-in-possession lenders, and General Motors to settle PBGC’s claims that arose from the termination. Though plaintiffs spend a lot of time complaining about those latter settlement agreements, they are not challenged in plaintiffs’ amended complaint, which addresses the termination of the Salaried Plan only.

record on this point. PBGC decided to terminate the Plan in April 2009 when it became clear that Delphi's debtor-in-possession lenders would exercise their right of foreclosure, thus triggering Delphi's liquidation and threatening PBGC's ability to recover on any of its claims triggered by the inevitable termination. These lenders asked PBGC to refrain from acting to terminate the Plan in exchange for the lenders' agreement to give PBGC five days notice before initiating foreclosure on Delphi's debtor-in-possession loans. PBGC implemented its April decision to initiate termination when the lenders gave that notice to PBGC.

Certainly, plaintiffs may continue to argue that PBGC's administrative record is inadequate or incomplete, and, in the unlikely event that this Court concludes that those arguments have merit, the Court may remand the termination issue back to PBGC for further record development. But in no event are plaintiffs entitled to engage in a discovery fishing expedition on matters outside the scope, both in time and subject matter, of PBGC's decision to initiate termination of the Salaried Plan.

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WHEREFORE, PBGC respectfully requests that the Court deny plaintiffs' Motion for Adoption of Scheduling Order, and instead, enter PBGC's proposed Scheduling Order attached hereto.

Dated: November 12, 2010
Washington, D.C.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2010, I electronically filed the foregoing RESPONSE OF THE PENSION BENEFIT GUARANTY CORPORATION TO PLAINTIFFS' MOTION FOR ADOPTION OF SCHEDULING ORDER, and PROPOSED SCHEDULING ORDER on all parties using the Court's ECF system.

/s/ C. Wayne Owen
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