REDACTED VERSION OF SEALED DOCUMENT

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

Dennis Black, *et al.*,

Plaintiffs,

v.

Pension Benefit Guaranty Corporation,

Defendant.

Case No. 2:09-cv-13616
Hon. Arthur J. Tarnow
Magistrate Judge Mona K. Majzoub

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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Dated: November 16, 2018

Respectfully submitted,

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I. BECAUSE THE UNDISPUTED FACTS SHOW THAT THERE WERE VIABLE ALTERNATIVES TO TERMINATION PURSUABLE BY THE PBGC, THE PBGC HAS FAILED TO DEMONSTRATE THAT IT COULD HAVE OBTAINED AN ORDER FROM THIS COURT ADJUDICATING THAT THE PLAN'S TERMINATION WAS NECESSARY UNDER § 1342(C)

Relying on 142 exhibits, the vast majority of which were produced by either the PBGC or Treasury, Plaintiffs put forward 114 paragraphs of material facts demonstrating that the PBGC's termination of the Delphi Salaried Plan was entirely avoidable.[1] *See* Pls.' Mem. of Law in Supp. of Their Mot. for Summ. J., ECF No. 305 ("Plaintiffs' Moving Brief") at 11-73.

These undisputed facts show, among other things, that:

1) Between 2005 and 2009, the PBGC worked successfully with 13 auto parts companies that emerged from bankruptcy without terminating their pension plans. *See* Pls.' Statement of Undisputed Material Facts ("SUMF") ¶ 10.
2) The PBGC believed a GM reassumption of the Salaried Plan was a viable possibility, and was actively advocating for this result through March 2009, using its liens and claims over Delphi assets as leverage. *Id*. ¶¶ 17,18, 22-24, 26, 27, 29, 31-34, 40-42, 47, 48, 53, 57.

[1] The PBGC does not dispute the authenticity or admissibility of any of these documents.

3) In April 2009, Treasury's Auto Team began negotiating with the PBGC on GM's behalf – seeking the Salaried Plan's termination. *Id*. ¶¶ 54, 62, 63.

4) [redacted]. *Id*. ¶¶ 84, 99.

5) After Treasury's intervention, the PBGC dramatically altered its behavior, ceasing its efforts to avoid the Salaried Plan's termination and abandoning its previous advocacy for a GM reassumption. *Id*. ¶¶ 54-114.

6) The PBGC was able to negotiate with Treasury a settlement worth more than $660 million to release its liens and claims on Delphi's assets, and the PBGC's own estimates, completed in March 2009, show that this amount would have been more than sufficient to avoid the Plan's termination and allow New GM to fund the Plan for roughly than 10 years. *See* Plaintiffs' Moving Brief at 84-89.

7) The Salaried Plan's termination cost the Plan's participants roughly $520 million in lost benefits and the Title IV insurance fund roughly $1.5 billion. *See* SUMF ¶ 113.

8) Further, the PBGC initially sought to obtain a decree from the Court in order to terminate the Plan under 29 U.S.C. § 1342(c), and when Plaintiffs attempted to intervene in the termination action, the PBGC dismissed its suit

[redacted] *See* SUMF ¶¶ 107, 111; Pls.' Ex. 137 (ECF No. 306-29) at 2.

The PBGC disputes none of these facts.

Nonetheless, ignoring the evidence, the PBGC continues to insist that its actions were proper because the Plan's termination was supposedly inevitable. The PBGC's chief justification for its inaction is that, in its view, a GM reassumption of the Salaried Plan was "never a possibility." PBGC's Mem. of Law in Resp. to Pls.' Mot. for Summ. J., ECF No. 311 ("PBGC Opp.") at 5. To the contrary, the evidence shows, until the Treasury's intervention in April 2009, GM reassumption was a possibility that the PBGC not only took very seriously, but vigorously pursued. *See, e.g.*, SUMF ¶¶ 23, 26, 28, 29, 33, 40-42 42, 47, 48. The PBGC offers no explanation for its dramatic about-face. Similarly, and contrary to the PBGC's assertions, the evidence shows that beginning in late 2008, GM repeatedly stated that it was willing to consider reassuming the Salaried Plan in connection with broader negotiations with the federal government. *See id*. ¶¶ 22-24, 28, 34. Again, the PBGC cannot justify its behavior in light of this evidence.

The PBGC also argues that its decision to cease advocating for GM reassumption was justified because it supposedly lacked sufficient leverage, *see*

PBGC Opp. at 7-10, but the PBGC itself consistently acknowledged the leverage that its liens and claims afforded. *See* SUMF ¶¶ 17,42, 48. The PBGC misleadingly suggests that its leverage was limited to the $195.9 million statutory lien that it had perfected on Delphi assets. *See* PBGC Opp. at 9. However, in addition to this statutory lien, once the PBGC initiated proceedings to terminate the Plan under § 1342, it had a claim for the full amount of the Plan's underfunding, jointly and severally, against every member of Delphi's controlled group, *see* 29 U.S.C. § 1362, which liability, according to the PBGC, exceeded $2 billion.[2] Indeed, the PBGC's concern about maturing these claims (and their associated leverage) prior to a controlled group break up was the entire justification the PBGC relied upon in terminating the Salaried Plan. *See, e.g.*, SUMF ¶ 56; PBGC's Mot. for Summ. J., ECF No. 304 ("PBGC Moving Brief") at 38-40.

And regardless of how lengthy a process it might have been for the PBGC to enforce its liens and claims over Delphi assets, *see* PBGC Opp. at 10, their mere

[2] Pursuant to 29 U.S.C. § 1368, this liability under § 1362 created a lien in favor of the PBGC in the amount of that liability "upon all property" belonging to members of the Delphi controlled group, limited to 30% of their collective net worth. *See* 29 U.S.C. § 1368(a). In April 2009, the PBGC estimated that the enterprise value of the Delphi controlled group members could be as high as $3.538 billion, [redacted] Again, according to the PBGC's own assessments, any interruption in service from Delphi plants affected by these liens and claims [redacted] SUMF ¶ 16.

existence was enough of a threat to GM's supply chain to give the PBGC enormous leverage, as evidenced by, *inter alia*, the fact that the PBGC was ultimately able to negotiate with Treasury a $664 million recovery from New GM *in exchange for the PBGC's release of its liens and claims on Delphi's assets*. *See* SUMF ¶¶ 97, 105; Plaintiffs' Moving Brief at 84; *see also* SUMF ¶¶ 15-18, 27, 28, 39, 42, 44-46, 48, 53, 54, 78, 87, 89, 97, 105 (discussing GM's dependence on Delphi parts and the PBGC's associated leverage); Plaintiffs' Moving Brief at 82-84 (discussing how Delphi's unions used similar leverage in negotiations with Treasury to secure pension top-ups by New GM).

Plaintiffs have also argued that the PBGC's termination of the Salaried Plan was particularly indefensible given that, according to the PBGC's own March 2009 funding estimates, New GM could have funded a reassumption of the Salaried Plan for roughly a decade (thus eliminating the liens and claims over Delphi assets) for less than the $664 million recovery that New GM provided to the PBGC. *See* Plaintiffs' Moving Brief at 84-91. The PBGC purports to respond to this argument in a footnote by offering a simplistic argument that ignores the fungibility of money. *See* PBGC Opp. at 7 n.20. Essentially, the PBGC emphasizes the fact that, as Plaintiffs noted in their own moving brief, the $664 million recovery that the PBGC received from GM consisted of a $70 million cash payment from GM, along with an equity interest from New GM in New Delphi, which the PBGC later

sold for $594 million. *See* SUMF ¶ 105; PBGC Opp. at 7 n.20. The PBGC then argues that because New GM could not literally have used the equity in New Delphi to fund the Salaried Plan, a reassumption into the GM plan supposedly would not have been viable. *See* PBGC Opp. at 7-8 n.20. The argument fails because it ignores that the New Delphi equity had significant value that could have been used to offset any cash or stock contributions that New GM made into its salaried plan.

In authorizing New GM's settlement agreement with the PBGC, Treasury explicitly acknowledged that the removal of the PBGC's liens and claims on Delphi's assets was of sufficient commercial necessity to justify $664 million in cash and equity. Because money is fungible, New GM could have used other cash to fund the pension contributions and then reimbursed itself later, or, just like the PBGC did, sold its equity share in New Delphi to raise the necessary funds, or, given the enormous sums available to it at the time, Treasury could have loaned the funds to New GM. *See* Plaintiffs' Moving Brief at 87 n.9. Or, New GM could simply have used its own corporate stock to satisfy the necessary contribution, much as Delphi had planned to do in the fall of 2008. *See* SUMF ¶ 19. The PBGC itself could have offered to "help GM with waivers if equity markets don't turn around in the next two years providing an adequate return on their pension assets,"

just as its consultant advised in February 2009.[3] *See* Plaintiffs' Ex. 33 (ECF No. 308-34) at 8.

Plaintiffs also demonstrated that the PBGC's liens and claims on Delphi's foreign assets provided the PBGC with leverage to persuade Delphi's potential purchasers to consider assuming the plan. *See* Plaintiffs' Moving Brief at 91-95. As Plaintiffs noted there, the evidence shows that the PBGC actively worked with 13 different auto parts companies between 2005 and 2009 to avoid plan terminations for companies in Chapter 11 bankruptcy proceedings, and in the case of Tower Automotive, under remarkably similar circumstances, the PBGC [redacted] *See id*. at 91-92 (quoting Plaintiffs' Ex. 13 (ECF No. 305-10) at 30).

The PBGC argues that the Delphi case is different because, supposedly, none of the three potential buyers of Delphi's assets that Plaintiffs identified actually bid on Delphi's assets. *See* PBGC Opp. at 10. But this is simply wrong.

[3] And the PBGC's claim that assumption of the Plan would have included a long-term liability of $2 billion disregards reality. As Plaintiffs' expert witness noted, the Plan's termination occurred at a time when "the capital markets were at an all-time low, meaning that the plan's assets were severely depressed at the time." *See* Plaintiffs' Ex. 128 (ECF No. 308-129) at 12. The equity markets have drastically increased in value since then (decreasing the Plan's underfunding), a dynamic that [redacted] its economic advisor predicted in 2009. *See* Plaintiffs' Moving Brief at 89 n.10.

It is undisputed that Delphi's DIP Lenders successfully bid on Delphi's assets, *see* SUMF ¶ 108, creating the entity known as New Delphi. It is also undisputed that the PBGC never even attempted to persuade the DIP Lenders to consider assuming the Salaried Plan, despite the documented value to them of removing the PBGC's liens and claims on those assets.[4] *See* Plaintiffs' Moving Brief at 92-93. The PBGC, again, offers no explanation for its behavior.

Moreover, Platinum Equity and Federal Mogul only withdrew their interest in purchasing Delphi very late in the process, and the PBGC never investigated whether they might be willing to assume the Salaried Plan in an effort to improve their bid over the DIP Lenders. As Plaintiffs noted in their moving brief, given the substantial recovery that the PBGC had its disposal, and the likelihood of a market recovery, the PBGC could have worked with these potential buyers to make assumption of the Salaried Plan very affordable. *See id.* at 94-95. Again, the PBGC has no explanation for its refusal to explore this possibility, which is especially hard to reconcile given the active role that it has played in other cases.

[4] Indeed, the DIP Lenders communicated to the PBGC that they [redacted] because their credit bid proposal [redacted]

In sum, the undisputed evidence shows that the PBGC's liens and claims on Delphi assets provided the PBGC with significant leverage to negotiate a reassumption of the Salaried Plan into the GM plan, or an assumption of the Salaried Plan by the DIP Lenders (who purchased Delphi), or by one of Delphi's potential purchasers, whose bids might have been more competitive if they offered to maintain the Salaried Plan and had the PBGC's backing. Yet, the PBGC cannot point to *a single instance* of trying to persuade one of these entities to take on the Salaried Plan after Treasury entered the picture. Additionally, the PBGC offers *no* response to Plaintiffs' arguments about how the Salaried Plan was relatively well-funded compared to other similarly situated plans, *see id*. at 96-100, or the fact that extra-statutory factors undergirded its actions.[5] *See id*. at 100-08.

In sum, the PBGC has failed to demonstrate that it could have obtained a judicial termination decree in July 2009. *See id*. at 108-11. Accordingly, because the record does not establish that "termination of the Salaried Plan would have

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[5] The PBGC asserts that evidence showing that it acquiesced in the Plan's termination for extra-statutory political factors is supposedly irrelevant because the Court previously dismissed Plaintiffs' equal protection claim against the Treasury defendants. *See* PBGC Opp. at 8 n.21. This argument is meritless, as the Court did not dismiss Count 4, and § 1342(c) nowhere authorizes a Plan's termination for political convenience. As the PBGC and Treasury's own personnel have repeatedly acknowledged, when it came to the Salaried Plan's termination, the [redacted], *see, e.g.*, SUMF ¶¶ 65, 79, 96, 99, such that the PBGC allowed that agenda to subvert its own statutory mandates.

been appropriate in July 2009 if, as Plaintiffs contend, [The PBGC] w[as] required under 29 U.S.C. § 1342(c)" to seek a judicial decree, ECF No. 193 at 7, the Court should proceed to consider Counts 1 through 4 of the Second Amended Complaint.

II. BECAUSE THE SALARIED PLAN WAS TERMINATED WITHOUT THE NECESSARY COURT ADJUDICATION, PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT 1

> Congress passed ERISA precisely because retirees were not receiving the benefits they had been promised; the most famous such instance, often cited as a catalyst for the passage of ERISA, was the economic collapse of the Studebaker-Packard Corporation, an event that left many terminated employees without their *promised* pensions. Because ERISA polices employers' broken promises, courts interpreting ERISA must ensure that employees who relied on broken promises are not without recourse.

IUE-CWA v. Gen. Elec. Co., No. 17-3885, 2018 U.S. App. LEXIS 22813, at *46-47 (6th Cir. Aug. 16, 2018) (Stranch, J., concurring) (internal citations and quotations omitted).

The PBGC urges a different model of statutory interpretation, whereby ERISA's language is construed to deprive employees in terminated pension plans of any recourse, or basic notions of due process, even where they have demonstrated that their plan's termination was unnecessary.

29 U.S.C. § 1342(c), entitled "Adjudication That Plan Must Be Terminated," provides a single method for plan terminations initiated by the PBGC, an adjudication by a district court that a plan must be terminated pursuant to one of three statutory criteria. 29 U.S.C. § 1342(c)(1). ERISA describes "the requirement

for a court decree under subsection (c)" as one of its "substantial safeguards for the rights of the participants and beneficiaries" that cannot be eliminated by the PBGC. *Id.* § 1342(a). Nonetheless, as Plaintiffs have shown, the PBGC would have the Court interpret § 1342(c) in a way that writes this substantial safeguard out of the statute entirely, while simultaneously inserting words into the fourth sentence of § 1342(c)(1) to give it the PBGC's desired effect, in contravention of the most basic rules of statutory construction. *See, e.g.*, Pls.' Opp'n to Def.'s Mot. for Summ. J., ECF No. 312 ("Plaintiffs' Opp.") at 44-50.

Rather than respond to these arguments, the PBGC relies principally on the Second Circuit's holding in *In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d 197 (2d Cir. 1987). As Plaintiffs explained in their opposition to the PBGC's motion for summary judgment, that reliance is misplaced.[6] *See* Plaintiffs' Opp. at 50-64.

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[6] The PBGC misrepresents the holdings of the Third, Eighth, Eleventh, and D.C. Circuits to suggest a greater volume of supporting authorities. *See* PBGC Opp. at 13-14. The Third, Eighth, and Eleventh Circuits were only asked to determine the proper plan termination date under a § 1342 termination, not the underlying permissibility of a termination agreement. *See PBGC v. Durango Ga. Paper Co.*, No. CIV A CV205-153, 2006 U.S. Dist. LEXIS 92113 (S.D. Ga. Dec. 20, 2006), *aff'd*, 251 F. App'x 664, 665 (11th Cir. 2007); *Pension Comm. for Farmstead Foods Pension Plan for Albert Lea Hourly Emps.*, 991 F.2d 1415, 1420-21 (8th Cir. 1993); *In re Syntex Fabrics, Inc. Pension Plan*, 698 F.2d 199, 200-01 (3d Cir. 1983); *Moore v. PBGC*, 566 F. Supp. 534, 536 (E.D. Pa. 1983). The D.C. Circuit evaluated the permissibility of a termination agreement to which the plan participants *actually agreed*, eliminating the need for a court to safeguard participant interests. *See Allied Pilots Ass'n v. PBGC*, 334 F.3d 93, 95 (D.C. Cir.

The PBGC makes three additional statutory arguments, none of which is persuasive. First, the PBGC notes that the first sentence of § 1342(c)(1) states that the PBGC "'*may* apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated,'" PBGC Opp. at 16 (quoting 29 U.S.C. § 1342(c) (emphasis in PBGC Opp.), and then argues that the use of "may" rather than "must" expresses "permission, not obligation." *See id.* To the contrary, this sentence is stated permissively because the clause immediately preceding "may" describes the permissive circumstances in which the PBGC may initiate termination proceedings under § 1342(a); indeed, both use the word "may."[7] The parallel use of "may" here expresses that the PBGC's *institution of termination proceedings* under § 1342(a)(1)-(4) is permissive, not that Congress was implying an implicit but unspoken alternative means of plan termination. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter

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2003). In short, none of these opinions produced holdings on the issue at hand. *See also* Plaintiffs' Opp. at 51 n.8.

[7] In § 1342(a)(1)-(4), ERISA provides four circumstances under which the PBGC "*may* institute proceedings under this section to terminate a plan." 29 U.S.C. § 1342(a) (emphasis added). Section 1342(c) then states that if the PBGC "after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it *may*, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated . . . ." *Id.* § 1342(c)(1) (emphasis added).

the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, [as] one might say, hide elephants in mouseholes.").

Next, the PBGC suggests that its "two-alternative structure for termination procedures" is also reflected in § 1348, which deals with how to determine a plan's termination date. *See* PBGC Opp. at 15-16. But § 1348 does not state (or imply) that there are two ways in which to terminate a plan. Rather, it states that, "in the case of a plan terminated in accordance with the provisions of [§ 1342]," the PBGC and the plan administrator can agree to the date of a plan's termination, *see* 29 U.S.C. § 1348(a)(3), and if they cannot, then the court must establish the date. *See id.* § 1348(a)(4). In either case, § 1348 requires that § 1342(c) requirements are first satisfied.

Finally, the PBGC argues that even if one reads the statute as Plaintiffs suggest (*i.e.*, according to its terms), the powers in § 1342(d)(1) supposedly include the power to terminate a pension plan. *See* PBGC Opp. at 17-18. But that is simply not the case. 29 U.S.C. § 1342(d)(1)(A) lists seven different powers provided to a § 1342(b) trustee. 29 U.S.C. § 1342(d)(1)(B) lists an additional eight powers provided to a § 1342(c) trustee. Nowhere in this list is the power to terminate a plan. Again, the PBGC's interpretation depends upon adding into the statute words that are not there, and as the Sixth Circuit recently noted, "the replace-some-words canon of construction has never caught on in the courts."

United States v. Perkins, 887 F.3d 272, 276 (6th Cir. 2018). While a trustee requires the powers enumerated in § 1342(d)(1)(B) to carry out an authorized plan termination, none is sufficient by itself to adjudicate that termination is proper, and as Plaintiffs have previously stated, reading the statute in a way that bypasses judicial review altogether creates inexorable problems of statutory construction. *See* Plaintiffs' Opp. at 44-64. Accordingly, Plaintiffs are entitled to summary judgment on Count 1.

III. BECAUSE DELPHI EXECUTED THE TERMINATION AGREEMENT IN A CORPORATE, RATHER THAN FIDUCIARY, CAPACITY PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT 2

As Plaintiffs explained in prior briefing, decisions undertaken by a "plan administrator" under § 1342(c) are, by definition, done in his or her fiduciary capacity. *See* Plaintiffs' Moving Brief at 125; Plaintiffs' Opp. at 65. Section 1342(c) speaks only of a "plan administrator," and plan administrators are, by definition, ERISA fiduciaries under the statute's own language.[8] *See* Plaintiffs'

[8] The PBGC's claim that the Department of Labor supports its position is incorrect. *See* PBGC Moving Brief at 26-27. In fact, the DOL has adopted a consistent position in its *amicus* briefs contrary to that taken by the PBGC. Citing to its own regulations in 29 C.F.R. § 2509.75-8, D-3, the DOL has concluded that ERISA's "fiduciary duty requirement . . . mandates that plan administrators act solely in the interest of participants and beneficiaries." Brief for the United States as *Amicus Curiae* Supporting Respondents, No. 08-810, 2009 U.S. S. Ct. Briefs LEXIS 1220, at *33 (U.S. Nov. 20, 2009); *see also* Brief for the United States as *Amicus Curiae* Supporting Petitioners in Part, No. 95-809, 1998 U.S. S. Ct. Briefs LEXIS 160, at

Moving Brief at 126; Plaintiffs' Opp. at 66-67. By Delphi's own admission, it entered into the termination agreement with the PBGC because it was the best decision for the company, a plain violation of the ERISA requirement that fiduciaries act "with an eye single to the interests of the participants and beneficiaries." *See* Plaintiffs' Opp. at 75 (quotation marks and citations omitted); Plaintiffs' Moving Brief at 136. Plaintiffs have also demonstrated that they can sue the PBGC as a third-party participant in Delphi's fiduciary breach, and that a court can award appropriate equitable relief against that third party for the breach. Plaintiffs' Opp. at 78.

While the PBGC argues that this Court should not hear this issue because the Bankruptcy Court already rejected it, *see* PBGC Opp. at 19, Plaintiffs have shown this assertion is demonstrably false. *See* Plaintiffs' Opp. at 78-80. Plaintiffs have cited numerous excerpts from Judge Drain's opinion in which he clearly delineates (and limits) the scope of his opinion, and none of those excerpts show an intent to address the propriety of Delphi's conduct from an ERISA fiduciary standpoint. *See id*; Pls.' Exs. 139, 143 (ECF Nos.308-140, 313-1). Plaintiffs addressed the remainder of the PBGC's arguments in their opposition to the PBGC's motion for

*26 (U.S. Mar. 1, 1996) ("A plan administrator is a fiduciary with independent statutory responsibilities.").

summary judgment, and incorporate those arguments here. *See* Plaintiffs' Opp. at 65-80. Accordingly, Plaintiffs are entitled to summary judgment on Count 2.

IV. BECAUSE THE PBGC'S TERMINATION OF THE SALARIED PLAN DEPRIVED PLAINTIFFS OF THEIR DUE PROCESS RIGHTS, PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT 3

It is undisputed that the Fifth Amendment to the U.S. Constitution provides certain guarantees, among which is that "the government should not take people's things without giving them due process." *Hicks v. Colvin*, 214 F. Supp. 3d 627, 642 (E.D. Ky. 2016). The law is also clear that a person has a constitutionally protected property interest in his or her vested pension benefits. *See* Plaintiffs' Moving Brief at 138-39; Plaintiffs' Opp. at 82-83. The PBGC does not cite a single authority to the contrary.

Instead, the PBGC argues that Plaintiffs' cases are supposedly inapposite because they involved cases where a state or local government sponsored the pension plan in question, as opposed to the case at hand, where a private employer sponsored the pension benefits. This supposed distinction is of no moment. The Supreme Court has made clear that, when evaluating whether an employment benefit is a protected property interest, the key inquiry is not the identity of the employer but whether there are "understandings that secure certain benefits and that support claims of entitlement." *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

Here, the PBGC does not dispute that Plaintiffs have lost vested benefits as a result of the Plan's termination. *See* PBGC Opp. at 21. The Plan document created a property interest in those vested benefits to which the Plaintiffs earned a legitimate claim by doing everything required by the Plan to become entitled to those benefits, and the importance of protecting such benefits is the chief mission of ERISA, which was passed "precisely because retirees were not receiving the benefits they had been promised." *IUE-CWA v. Gen. Elec. Co.*, No. 17-3885, 2018 U.S. App. LEXIS 22813, at *46 (6th Cir. Aug. 16, 2018) (Stranch, J., concurring).

To the extent that the PBGC argues that the termination tempered the participants' expectations under the Plan, the argument does not change the calculus. The termination was government action, and but for that action more than $521 million in vested pension benefits would still be owed to the Plan's participants. *See* Plaintiffs' Opp. at 82-85. Moreover, not only did the termination deprive the Plan's participants of their vested benefits, it also allowed the PBGC to appropriate the Plan's assets at the bottom of the market, just prior to the market rebound, depriving Plaintiffs of subsequent massive gains and instead taking those gains for itself. *See* Plaintiffs' Moving Brief at 140-41; Plaintiffs' Opp. at 86-87.

It is undisputed that the PBGC has not provided any process here (indeed, [redacted], *see* Plaintiffs' Opp. at 92), and as Plaintiffs have previously demonstrated, such a complete lack of pre-

deprivation procedures almost *always* violates due process, except in "rare and extraordinary situations" not present here. *See* Plaintiffs' Moving Brief at 142-46; Plaintiffs' Opp. at 88-90. As for the PBGC's arguments regarding *Jones & Laughlin* and *Mathews v. Eldridge*, 424 U.S. 319 (1976), as explained in Plaintiffs' prior briefing, courts have consistently found the *Mathews* balancing test inapplicable when *no* procedures are provided whatsoever, and Sixth Circuit precedent shows that it would similarly refuse to apply *Mathews* to a complete absence of procedures. Plaintiffs' Moving Brief at 146-49; Plaintiffs' Opp. at 92-95. The PBGC offers no response to these constitutional infirmities.

Finally, Plaintiffs have demonstrated that even if the *Mathews* test does apply, the test would require a pre-deprivation hearing under the facts at issue, *see* Plaintiffs' Opp. at 96-104, and the PBGC has not joined these arguments. Again, one of the key questions under *Mathews* is "the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards." *Mathews*, 424 U.S. at 343. Here, in its rush to ensure New GM's successful emergence from bankruptcy, the PBGC employed termination procedures that were remarkably unfair and unreliable. As demonstrated in Plaintiffs' moving brief, the Salaried Plan's termination rested on a series of false premises (*e.g.*, that there were no potential sponsors that might be persuaded to assume the Plan, that the PBGC lacked leverage, and even as to the

basic amount of the Plan's liabilities and underfunding), and the PBGC never provided the people affected by the Plan's termination an opportunity to challenge those assertions before terminating the Plan. *Mathews* makes clear that such an unfair process is constitutionally impermissible. Plaintiffs are entitled to summary judgment on Count 3.

V. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT 4 BECAUSE THE PBGC'S TERMINATION OF THE SALARIED PLAN IS UNSUSTAINABLE IN LIGHT OF THE RELEVANT STATUTORY CRITERIA

As Plaintiffs have previously demonstrated, even if the PBGC is allowed under § 1342(c) and the Constitution to terminate a pension plan pursuant to an agreement with a conflicted plan administrator acting without regard to his fiduciary obligations, the PBGC's termination of the Salaried Plan here was still invalid, as it was arbitrary-and-capricious because it was avoidable and increased, rather than avoided an increase to, the Title IV insurance fund. *See* Plaintiffs' Moving Brief at 156-59; Plaintiffs' Opp. at 105-10. Like an ostrich that buries its head in the sand rather than deal with an oncoming threat, the PBGC's response is to ignore those inconvenient facts, and simply reassert that the Plan's termination allowed the PBGC to avoid an increase in the liability of the Title IV insurance fund, despite all the evidence to the contrary, as though simply repeating it again and again will somehow make it true. *See* PBGC Opp. at 27-29. The facts show the opposite, namely, that the Plan's termination was avoidable, and that in

effecting the termination, the PBGC ignored its own statutory mandates and unreasonably accommodated the interests of Treasury, New GM, and New Delphi. Accordingly, Plaintiffs are entitled to summary judgment on Count 4.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2018, I caused the foregoing electronically to be filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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