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

Dennis Black, *et al.*,	)	
Plaintiffs,	)	Case No. 2:09-cv-13616
	)	Hon. Arthur J. Tarnow
v.	)	Magistrate Judge Mona K. Majzoub
Pension Benefit Guaranty Corporation,	)	
Defendant.	)	

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.

PBGC'S MEMORANDUM OF LAW IN REPLY TO PLAINTIFFS' OPPOSITION TO PBGC'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs' claims ignore realities. Plaintiffs assert that even though no one was willing to assume the Salaried Plan's substantial pension liabilities – not GM, not the Auto Task Force, not Delphi's DIP lenders, not Platinum Equity, not Federal Mogul – PBGC could not justify terminating the Salaried Plan. But the opposite was and still is true. When a plan sponsor is liquidating and being dismembered by sales in bankruptcy, and buyers refuse to assume any of the plan sponsor's pension liabilities, PBGC must step in and terminate the soon-to-be-abandoned pension plans. This ensures that the central goal of Title IV of ERISA – to ensure the timely and uninterrupted payment of pension benefits – is met.

On July 29, 2009, while the Delphi asset sales and ensuing liquidation were being considered – and ultimately approved – by the Bankruptcy Court, even Plaintiffs' counsel admitted: "we very much understand the real world, and that [the Salaried P]lan has been run into the ground, and that there isn't enough money, and it's likely to be terminated in the end."[1] In the real world, there was no viable alternative to termination of the Salaried Plan. As the Bankruptcy Court observed,

> The record is clear and uncontroverted that [the Salaried Plan and the Hourly Plan] are both seriously underfunded and that the debtors have very

[1] Supp. Menke Decl., Ex. 10, July 29, 2009 Confirmation Hearing Transcript ("Confirmation Hearing Transcript"), 205:22-25.

> substantial unpaid post-petition contributions to the plan in the nature of hundreds of millions of dollars, and, more importantly, that the debtors lack the cash to continue to make post-petition contributions to these plans, given the fact that they have no source of ongoing funding except as been agreed to by GM and the DIP lenders in connection with facilitating the transactions before me, all of which are an outgrowth of a several month period where the debtor was living on week to week and sometimes day-to-day extensions of forbearance under a terminated DIP facility without any ability to obtain replacement financing. So it appears to me that it is reasonable to assume that the PBGC settlement agreement is not illusory, that, in fact, the determination by the PBGC to terminate the pension plan under 29 U.S.C. Section 1142 [sic] is appropriate . . . .[2]

The reality is that, in July 2009, the Salaried Plan was being abandoned. The Salaried Plan's plan sponsor, plan administrator, and plan fiduciaries were disappearing. PBGC had no alternative but to recognize that reality. This Court, like the Bankruptcy Court, should acknowledge the inevitability of the termination of the Salaried Plan and grant PBGC's motion for summary judgment.

ARGUMENT

I. Assumption of the Salaried Plan by GM – or any potential bidder for Delphi's assets – was not a viable alternative to plan termination.

Plaintiffs argue that termination of the Salaried Plan was improper because PBGC should have been able to convince GM to assume the Salaried Plan. Such argument is based in neither fact nor reality. Moreover, it is contrary to Mr.

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[2] *Id.* at 210:19-211:10.

Shelley's representation, as attorney for Plaintiff Black and Plaintiff Cunningham,[3] to the Bankruptcy Court on July 29, 2009, that in the real world "this plan has been run into the ground, and there isn't enough money, and it's likely to be terminated in the end."[4]

In the real world, GM had no legal obligation to assume the Salaried Plan and nothing in ERISA gave PBGC the authority to compel GM to do so. Although GM could have agreed to assume the Salaried Plan voluntarily, the undisputed facts, as conceded by Plaintiffs, show that GM refused to assume the Salaried Plan from the very beginning in August 2008, when Delphi first began asking GM to consider reassuming the Salaried Plan. This was months before the Auto Task Force was involved with GM and months before GM filed for bankruptcy. From August 2008 throughout 2009, GM consistently refused to assume the Salaried Plan, as did the Auto Task Force when they entered the scene.

Plaintiffs also assert that PBGC's liens and claims on Delphi's assets somehow gave PBGC "tremendous leverage" to force GM or any potential bidder

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[3] While the hearing transcript indicates that Mr. Shelley made an appearance at the hearing on behalf of the Delphi Salaried Retirees Association, Mr. Shelley stated on the record that he was making an appearance on behalf of Mr. Black and Mr. Cunningham, and that Mr. Black was the interim chair of the Delphi Salaried Retiree Association. Supp. Menke Decl., Ex. 10, Confirmation Hearing Transcript at 8:10-16 and 179:2-15.

[4] Supp. Menke Decl., Ex. 10, Confirmation Hearing Transcript at 205:22-25.

for Delphi's assets to assume the Salaried Plan. In making such assertion, Plaintiffs first misstate that PBGC's claims gave "rise to a lien exceeding $1 billion against [Delphi's foreign controlled group members'] assets."[5] As stated in PBGC's Response to Plaintiffs' Motion for Summary Judgment, that is simply not true. What PBGC had in the Delphi Bankruptcy before termination of the Salaried Plan was (1) PBGC's secured interest in certain foreign Delphi assets that was limited to the $195.9 million in missed minimum funding contributions; and (2) its termination claim, which was contingent upon Plan termination.[6]

Second, Plaintiffs misstate the power of PBGC's lien, claiming it gave PBGC the power to stop Delphi's production line, which could have forced GM to assume the Salaried Plan. PBGC's $195.9 million lien did not give PBGC the power to stop Delphi's production line. Delphi's domestic U.S. plants were protected from any PBGC's lien enforcement by the automatic stay in bankruptcy.[7]

Third, Plaintiffs misstate PBGC's power when they assert that because Delphi unions threatened to strike Delphi and stop production to get what they

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[5] Plaintiffs' Opp'n Brf at 16.

[6] PBGC's Opp'n Brf at n. 25.

[7] If anything, it was Delphi, not PBGC, that had the power to shut off its production. Despite Delphi's claim that it wanted GM to assume the Salaried Plan, Delphi chose not to exercise its power to cease production in an attempt to force GM to assume the Salaried Plan.

wanted, PBGC could have done the same to force GM to assume the Salaried Plan.[8] Such assertion is baseless and ascribes powers to PBGC that it did not have. Unlike Delphi's unions, PBGC did not have the power to direct Delphi's employees to withhold their labor.

PBGC does not deny that its $195.9 million lien and its termination claims gave it some leverage in Delphi's bankruptcy, leverage that PBGC vigorously asserted. Plaintiffs correctly state that PBGC's leverage allowed it to extract a $664 million settlement from the unwilling GM and Auto Task Force in exchange for PBGC's release of its lien and claims. But that leverage was a far cry from what was necessary to force GM, or anyone else,[9] to assume Delphi's full unfunded pension liability of more than $7 billion (for all pension plans, if GM wanted to eliminate all of PBGC's claims), or even to force the assumption of only the Salaried Plan's $2 billion liability.[10]

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[8] Plaintiffs' Opp'n Brf at 19-21.

[9] Plaintiffs also assert that PBGC should have pressured potential bidders for Delphi's assets to assume the Salaried Plan. Plaintiffs' Opp'n Brf at 27-31. PBGC has no obligation to work with potential bidders for Delphi's assets, and even if it did, none of the three potential bidders Plaintiffs have identified actually bid on Delphi's assets. And there is no evidence that, even if they had bid on Delphi's assets, they would have been willing to assume the Salaried Plan and its $2 billion liability. *See* PBGC's Opp'n Brief at 10-11.

[10] Plaintiffs make the absurd claim that despite the Salaried Plan's $2 billion underfunding, PBGC should have been able to persuade GM to assume the Salaried Plan because the estimated minimum funding payments in the few years

Plaintiffs also make the equally baseless assertion that Plan termination was improper because the Salaried Plan was "well-funded." This again is far from the truth. The Salaried Plan was not well-funded when it terminated. The Administrative Record shows that the Salaried Plan was less than 50% funded on a termination basis.[11] Further, as Plaintiffs concede, what was determinative of the Plan's viability was not the actual level of plan underfunding, but rather the "ability (and existence) of a sponsor to be able to satisfy the Plan's minimum funding contributions."[12] And here, the Salaried Plan was not viable because the sponsor, Delphi, was liquidating and would cease to exist in the immediate future and thus did not have the ability to satisfy the Salaried Plan's minimum funding.

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after assumption would have been less than or equal to the amount of the settlement of the termination liability. Plaintiffs' Opp'n Brf at 21-27. Under Plaintiffs' assertion, if GM assumed the Plan, GM's responsibility would have been limited to making minimum funding payments for a few years. This ignores the fact that when an entity assumes a pension plan, it takes permanent responsibility not only for the pension plan's estimated minimum funding requirements in perpetuity, but also for its underfunding, which in this case was $2 billion. And Plaintiffs assert that PBGC should have used the $664 million recovery to pay a third party to assume the Plan. Such assertion is simply incorrect. PBGC obtained that recovery only because the Delphi plans terminated and matured PBGC's termination claims. If the plans were assumed by someone else, PBGC would not have received that recovery as PBGC's termination claims would not have matured.

[11] *See* AR 34. "AR" refers to the administrative record of PBGC's determination to terminate the Salaried Plan, which has been filed with the Court, Docket Nos. 52 -91.

[12] Plaintiffs' Opp'n Brf. at 36.

While Plaintiffs continue to make baseless arguments that the Salaried Plan was somehow viable despite Delphi's liquidation, Plaintiffs have made no attempt to articulate what would have happened to the Salaried Plan if it did not terminate in August 2009.

II. PBGC is entitled to summary judgment on Count 1, because 29 U.S.C. § 1342(c) expressly permits termination of pension plans by agreement between PBGC and a plan administrator.

Plaintiffs argue that this Court should reject all of the precedents[13] interpreting section 1342(c) as permitting termination by agreement and, instead, find that section 1342(c) only authorizes appointment of a trustee by agreement.[14]

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[13] *See, e.g.*, *Allied Pilots Ass'n v. PBGC*, 334 F.3d 93, 97-98 (D.C. Cir. 2003); *In re Jones & Laughlin Hourly Pension Plan,* 824 F.2d 197, 200-02 (2d. Cir. 1987); *In re Syntex Fabrics, Inc. Pension Plan,* 698 F.2d 199, 201 (3d Cir. 1983); *Moore v. PBGC*, 566 F. Supp. 534, 536 (E.D. Penn. 1983); *see also* Congressional Research Service Report RS22624, *The Pension Benefit Guaranty Corporation and Single-Employer Plan Terminations* at 4 (2011) ("Alternatively, the PBGC and plan administrator may agree to terminate the plan without court proceedings."). Moreover, the court in *In re UAL Corp.* addressed the standard of review when PBGC seeks a court order to terminate a plan and not whether or not plans may be terminated by agreement. *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006).

[14] *See* Plaintiffs' Opp'n Brf. at 44-65. Plaintiffs also ask this Court to disregard Mr. Shelley's admission to the Bankruptcy Court that, "[t]here are two types of termination under ERISA. There are summary terminations and those that require full adjudication." *See* Plaintiffs' Opp'n Brf. at 63 and PBGC's Ex. 10 at 181:23-25.

a. Plaintiffs' interpretation of 29 U.S.C. § 1342(c) is incorrect, because it ignores the word "may."

On page 44 of their Opposition Brief, Plaintiffs selectively quote from 29 U.S.C. § 1342(c)(1) and falsely state PBGC is "required" to

> apply to the appropriate United States district court *for a decree 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.[15]

However, that selective quotation leaves out "may" − a very important word. What section 1342(c)(1) actually says is PBGC

> *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 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.[16]

PBGC agrees with Plaintiffs that the statute is clear. But, Plaintiffs' construction, ignoring the word "may," is incorrect. As PBGC has noted in its previous briefs, the word "may" denotes a permissive option, not a mandatory requirement, and necessarily implies that PBGC had options to effect termination of the Salaried Plan other than just initiating court proceedings. The correct interpretation of section 1342(c) – including all of the words therein – is that termination by court

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[15] Plaintiffs' Opp'n Brf. at 44 (emphasis added by Plaintiffs).

[16] 29 U.S.C. § 1342(c)(1) (emphasis added).

order is only one of two paths that PBGC may pursue when initiating plan termination.

b. Plaintiffs' interpretation of 29 U.S.C. § 1342(c) is also incorrect, because it violates a cardinal rule of statutory construction and misapplies another.

Plaintiffs' proposed new construction of section 1342(c) violates "a cardinal principle of statutory construction" − *i.e.* that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"[17] − in two distinct ways. First, section 1342(b)(3)[18] authorizes appointment of a trustee by agreement between PBGC and the plan administrator, if necessary to oversee the plan during termination proceedings. Therefore, the fourth sentence of section 1342(c)(1) would be

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[17] *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *see also United States v. Alaska*, 521 U.S. 1, 59 (1997) (a court should "avoid an interpretation of a statute that renders some words altogether redundant.") (internal quotation omitted).

[18] 29 U.S.C. § 1342(b) provides –

> Whenever the corporation makes a determination under subsection (a) of this section with respect to a plan or is required under subsection (a) of this section to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) of this section ordering the termination of the plan. . . . The corporation and plan administrator may agree to the appointment of a trustee . . . .

rendered superfluous and redundant if its sole meaning were to authorize appointment of a trustee by agreement, as Plaintiffs posit.

Second, Plaintiffs' interpretation of the fourth sentence of section 1342(c)(1) would render the words "agree that a plan should be terminated" doubly superfluous, because – under Plaintiffs' interpretation – the sentence would mean the same thing whether or not those words are included.[19]

Moreover, Plaintiffs' reliance on the maxim *expressio unius est exclusio alterius* is misplaced.[20] That maxim dictates that if a statute provides for only one way of doing things then other ways are prohibited. But, section 1342(c)(1) provides for two alternatives – (1) termination by agreement or (2) termination by court order. Thus, that maxim is irrelevant to the interpretations of section 1342. Accordingly, Plaintiffs' construction of section 1342(c) is incorrect.

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[19] The fourth sentence of section 1342(c)(1) provides –

> If the corporation and the plan 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 (other than this sentence) the trustee shall have the power described in subsection (d)(1) of this section and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3) of this section.

(emphasis added).

[20] Plaintiffs' Opp'n Brf. at 53-54; 60-61.

c. PBGC's interpretation of 29 U.S.C. § 1342(c)(1) is entitled to deference.

Plaintiffs argue that PBGC's interpretation of section 1342(c)(1) is not entitled to any deference, because section 1342(c)(1) is clear.[21] While PBGC agrees with Plaintiffs that section 1342(c)(1) is clear – although it disagrees with Plaintiffs' unexplained disregard of the word "may" in its construction – PBGC's interpretation is nonetheless entitled to deference by the Court. In *Beck v. PACE Int'l Union*, the Supreme Court held that the ERISA provision at issue was clear but still noted that PBGC's interpretation of the statute was entitled to deference, because attempting to interpret ERISA without the views of PBGC would be like "embark[ing] upon a voyage without a compass."[22] Thus, this Court should defer to PBGC's construction of section 1342(c)(1) and find that an agreement between PBGC and a plan administrator is one of two options for a PBGC-initiated plan termination.

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[21] Plaintiffs' Opp'n Brf. at 52.

[22] *Beck v. PACE Int'l Union*, 551 U.S. 96, 104 (2007) (citing *Mead Corp. v. Tilley*, 490 U.S. 714, 722, 725–726 (1989); and *PBGC v. LTV Corp.*, 496 U.S. 633, 648 651 (1990)).

d. Because the statute is clear, there is no need to delve into the legislative history.

Plaintiffs argue that the Court should look to Plaintiffs' interpretation of ERISA's legislative history.[23] However, an appeal to the legislative history is inappropriate here because section 1342 is clear[24] – there are two ways to achieve a PBGC-initiated termination, by agreement or by court order. Moreover, even if the legislative history were relevant, it is inconclusive – there is nothing in the report cited by Plaintiffs stating that agreement is not a valid path to termination.[25]

III. PBGC is entitled to summary judgment on Count 2, because terminating a pension plan is a settlor, not a fiduciary, function.

Plaintiffs insist that ERISA's fiduciary duty attaches to all actions by a plan administrator and, thus, Delphi breached its fiduciary duty to the Salaried Plan participants when Delphi signed the Termination Agreement in its capacity as plan administrator – even though Plaintiffs concede that a plan sponsor can decide to terminate a pension plan without breaching any fiduciary duty.[26] However, the Supreme Court has clearly, and unequivocally, held that whether or not a fiduciary

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[23] Plaintiffs' Opp'n Brf. at 57-59.

[24] *See, e.g.*, *In re Lucas*, 925 F.2d 597, 601-03 (6th Cir. 1991).

[25] *See* H.R. Rep. No. 93-1280 (1974) (Conf. Rep.).

[26] *See* Plaintiff's Opp'n Brf. at 66-74.

duty arises is dependent upon the function being performed, not on the title of the person performing the function.[27] The decision to terminate a pension plan is not a fiduciary function.[28] And, regardless of the title of the person making the decision to terminate a pension plan, a fiduciary duty simply does not attach to the decision.[29] The fact that Delphi signed the Termination Agreement in its capacity as plan administrator – and not in its capacity as plan sponsor – is of no import.

Moreover, if Plaintiffs' interpretation of fiduciary duties were correct, then no pension plan with unfunded, non-guaranteed benefits could ever be terminated in a distress termination, because – in Plaintiffs' world – the plan administrator must always refuse to take any action that could ever reduce the amount of benefits payable to plan participants.[30] But, that is not the world we live in. For instance, Congress expressly authorized the plan administrator to implement a distress

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[27] *See, e.g., Lockheed Corp. v. Spink*, 517 U.S. 882, 889-91 (1996); *Gard v. Blankenburg*, Nos. 00-1234, 00-2224, 33 F. App'x. 722, 728 (6th Cir. Feb. 21, 2002) ("it is the nature of these actions – not the status of the actor as employer or settlor – that takes the conduct outside the defined functions of an ERISA fiduciary").

[28] *See e.g.*, *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988) (noting that the case law makes clear that when an employer decides to terminate a benefits plan, "its actions are not to be judged by fiduciary standards").

[29] *See, e.g., Lockheed Corp.*, at 889-91.

[30] *See* Plaintiffs' Brf. in Opp'n at 74.

termination and only pay guaranteed benefits to participants.[31] Thus, a plan administrator's fiduciary obligations do not prevent the plan administrator from implementing a termination decision that complies with ERISA's guarantee limitations.

Plaintiffs' assertion that the Bankruptcy Court did not reject their fiduciary breach argument strains credulity. Mr. Shelley presented an objection, which he described as "procedural . . . in a sense," to the Delphi Modified Chapter 11 Plan ("POR").[32] He argued that the POR could not be confirmed, because (1) it included termination of the Salaried Plan by agreement; and (2) the plan administrator's fiduciary duty to the plan participants purportedly prohibited the plan administrator from signing a termination agreement.[33] Delphi's counsel responded to that argument, citing *Curtis Wright, Lockheed, and Hughes* for the proposition that plan termination is a settlor function.[34] In rejecting the objection, the Bankruptcy Court stated:

> the objection is somewhat coy in that it raises for the Court the issue of the PBGC not being able to terminate the plans, notwithstanding its authority under 29 U.S.C. 1342, but at the same time doesn't really provide me with a

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[31] *See* 29 U.S.C. § 1341(c)(3)(B)(ii).

[32] Supp. Menke Decl., Ex. 10, Confirmation Hearing Transcript at 180:6-10.

[33] *Id.* at 180:17-184:1.

[34] *Id.* at 193:7-197:13.

> lot of reasoning as to why that would not be the case. To the extent that there have been arguments raised by the objectors I have considered them, and I believe that for purposes of determining feasibility of the plan as modified and whether the debtors are entering into an agreement that is illusory, *I conclude that the objection should be denied*.[35]

Delphi made a business decision to terminate the Salaried Plan. The Bankruptcy Court approved that business decision. Plaintiffs have presented no reason why this Court should revisit the Bankruptcy Court's decision. Delphi did not breach any fiduciary duty by carrying out that court-approved business decision. Because Delphi did not breach any fiduciary duty, PBGC cannot be held vicariously liable for any alleged harm as a result of Delphi's business decision. Accordingly, this Court should enter judgment in favor of PBGC on Count 2.

IV. PBGC is entitled to summary judgment on Count 3, because plan termination by agreement between PBGC and the plan administrator did not violate the due process clause.

As argued at greater length in PBGC's Moving Brief and PBGC's Response Brief, PBGC is entitled to summary judgment on Count 3 because termination by agreement between PBGC and the Salaried Plan administrator did not violate the due process clause.

[35] *Id.* at 209:17-210:1 (emphasis added).

a. Plaintiffs do not have a protected property interest in the difference between their vested pension benefits and the amount due to them following plan termination.

Plaintiffs allege that they have a protected property interest in the full amount of their vested benefits upon termination of their underfunded pension plan. This is contrary to the explicit language of the Salaried Plan document. The Salaried Plan document clearly states that the "right of all affected employees to benefits accrued to the date of such termination [is . . .] nonforfeitable, . . . *to the extent funded* as of such date."[36] Therefore, when the Salaried Plan terminated, the amount of benefits that were nonforfeitable was not the full amount of vested benefits, but the amount that was funded as of the termination date, which in this case was $2 billion less than the accrued benefits of the Salaried Plan participants.

b. Plaintiffs do not have a protected property interest in any future gains in the market value of the plan assets.

Plaintiffs claim that there was an unconstitutional taking because they have been denied the right to benefit from any future gains in the market value of the plan assets. Plaintiffs, however, never had a property interest in any future gains in

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[36] *See* Menke Decl., Ex. 9, Delphi Retirement Program for Salaried Employees at 121 (emphasis added).

the market value of the plan assets.[37] Plaintiffs are participants of a defined *benefit* plan and not a defined contribution plan. Participants of the Salaried Plan simply have the right to receive a fixed benefit no matter what happens to the value of plan assets.[38] Even if Delphi had somehow survived its bankruptcy and been able to continue to sponsor the Salaried Plan, any increase in the plan assets would have benefitted Delphi in the form of reducing the required annual contributions to the Salaried Plan.[39] And if the asset values had decreased, Delphi would have also borne those losses. Moreover, 29 U.S.C. § 1344(c) prohibits plan participants from recovering any post-termination increase in the value of the Salaried Plan's assets.[40] Therefore, Plaintiffs have neither a property interest in the future gain in the market value of the plan assets, nor a property interest in the unfunded amount of their vested benefits.

c. Assuming *arguendo* that Plaintiffs have a protected property interest, PBGC did not deprive Plaintiffs of such interest.

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[37] 29 U.S.C. § 1344(c). *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 439-40 (1999). *Cf. Lewis v. PBGC*, 901 F.3d 406 (D.C. Cir. 2018) (*reh'g request pending*).

[38] *See id.*

[39] *See id.*

[40] The D.C. Circuit recently held that disgorgement of the post-termination increases in plan assets is not an equitable remedy available under 29 U.S.C. § 1303(f) because the law is clear – any increase or decrease in the value of a plan's assets post termination shall be credited to, or suffered by, PBGC. *Lewis*, 901 F.3d 406.

Assuming *arguendo* that Plaintiffs had a protected property interest, PBGC did not deprive Plaintiffs of their alleged property interest. Rather, it was Delphi that promised benefits to its employees beyond what Delphi funded or could afford. It was Delphi that decided not to fund the Salaried Plan during its long bankruptcy and then decided to liquidate while there were inadequate assets in the Salaried Plan to pay the benefits Delphi promised its employees. Plaintiffs' argument that if the Salaried Plan had not been terminated, then the unfunded, non-guaranteed benefits would still be owed to participants is nonsensical in the context of an underfunded pension plan. By definition, unfunded benefits would not be paid, because there were no assets in the Salaried Plan to pay them, and Delphi's liquidation meant that no additional assets were ever coming into the Plan.

It is because a liquidating plan sponsor will never pay the unfunded benefits that PBGC and its insurance program exists. PBGC is the insurer of benefits up to a guaranteed amount in the event an underfunded plan terminates. And, like any other insurer, PBGC has limits on the amount it covers for its insureds. Here, upon the occurrence of an insurable event, PBGC far from taking any property interest from Plaintiffs, stepped up and did what it was supposed to do – it paid participants benefits that Delphi promised but was unable to pay up to the guaranteed amount, which far exceeds the amount that would be payable just from the Salaried Plan's assets.

d. Even assuming *arguendo* that PBGC deprived Plaintiffs of a protected property interest, due process did not require advance notice and a hearing before PBGC and the plan administrator agreed upon plan termination.

Since Plaintiffs do not have a protected property interest in additional benefits beyond the statutory guarantee, this Court should end its due process inquiry. If the Court, nevertheless, wishes to evaluate whether due process requires additional procedural safeguards, this Court should follow the analysis in the *Jones & Laughlin* and *United Engineering* cases[41] and hold that no constitutional violation occurred because neither advance notice nor a hearing was required before PBGC and the plan administrator agreed upon termination of the Salaried Plan. The pre-termination proceedings that Plaintiffs desire would cause massive delays in PBGC's administration of the Salaried Plan while the risks of plan abandonment, increasing benefit liabilities, and interruption of benefits to

[41] *Jones & Laughlin*, 824 F.2d at 201-02 (holding that PBGC's agreement with a plan administrator to terminate a pension plan, executed without prior notice and hearing to participants and their labor representatives, did not violate participants' due process rights) ("[m]assive delays would result from affording court hearings to thousands of retirees. . . . The effect of the delays, moreover, would be exacerbated by the concomitant accrual of greater benefits and service as the plans continued."); *United Steelworkers of Am., AFL-CIO, CLC v. United Eng'g, Inc.*, 839 F. Supp. 1279, 1284 (N.D. Ohio 1993), *aff'd*, 52 F.3d 1386 (6th Cir. 1995) ("Requiring PBGC to hold hearings involving employees each time PBGC conducted termination proceedings could very likely constitute a substantial burden on PBGC.").

participants would continue to mount. And Plaintiffs have ample post-termination remedies available to them, as reflected by this on-going lawsuit.

V. PBGC is entitled to summary judgment on Count 4 because the termination complied with 29 U.S.C §§ 1342(a) and (c) and the statutory goals of ERISA.

Plaintiffs argue that termination of the Salaried Plan was arbitrary and capricious because plan termination was inconsistent with the statutory goals of ERISA. Such argument by Plaintiffs is simply another attempt by Plaintiffs to convince the Court to ignore the express statutory language that (1) if PBGC and a plan administrator agree to plan termination, none of the other procedural requirements in section 1342(c) are applicable; and (2) even in cases where PBGC seeks an adjudication, PBGC need only satisfy one of the three objectives listed in section 1342(c), one of which is that a plan can be terminated "to avoid . . . any unreasonable increase in the liability of the fund."[42]

Here, because, as the Bankruptcy Court already found, section 1342 "permits the PBGC and the plan administrator to agree to termination of a plan without an adjudication,"[43] the Termination Agreement between PBGC and Delphi satisfied section 1342(c) and none of the other procedural requirements were

[42] 29 U.S.C. § 1342(c).

[43] Menke Decl., Ex. 4, Confirmation Order at 81.

applicable. Further, assuming *arguendo* that PBGC was required to seek adjudication despite the Termination Agreement, PBGC satisfied section 1342(c) because the third objective "to avoid . . . any unreasonable increase in the liability of the fund" was satisfied. The Administrative Record clearly shows that PBGC would have incurred an unreasonable increase in the liability of its fund if the Salaried Plan were not terminated and PBGC's termination claims were not fixed before certain subsidiaries left the controlled group.[44]

Even if the Court were to look beyond the Termination Agreement and explicit language of section 1342(c) and evaluate whether the termination of the Plan furthered ERISA's goals, the Court should find that it does. 29 U.S.C. § 1302(a) lists three objectives that PBGC must carry out:

> (1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,
>
> (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans . . . , and
>
> (3) to maintain premiums established by [PBGC] . . . at the lowest level consistent with [statutory obligations].

The Sixth Circuit has stated that

> [t]hough Congress was concerned chiefly with protecting the employees' expectations of pension benefits, it also realized that employers would not create, maintain, or expand pension plans if ERISA imposed too much cost.

[44] *See* AR 1-9.

> Consequently, the entire statute is a finely tuned balance between protecting pension benefits for employees while limiting the cost to employers.[45]

And as several courts have recognized, given the fact that PBGC is self-financed, limiting the cost to employers necessarily means, at least in part, limiting PBGC's own liabilities; and in certain cases, "PBGC must forego encouraging the continuation and maintenance of a particular plan in order to ensure that an increase in PBGC's liability does not affect negatively the payment of benefits to all participants and beneficiaries or the premiums established by PBGC."[46] Further, the Sixth Circuit has stated that the involuntary termination procedures under ERISA exist "precisely so that PBGC can protect its own financial interests."[47]

Therefore, termination of the Salaried Plan, in addition to being fully consistent with the explicit language of section 1342(c), furthered the Title IV

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[45] *A-T-O Inc. v. PBGC*, 634 F.2d 1013, 1021 (6th Cir. 1980).

[46] *PBGC v. UAL, Inc.*, 436 F. Supp. 2d 909, 923 (N.D. Ill. 2006) (quoting *In re UAL Corp.*, 428 F.3d 677 at 681 (7th Cir. 2005) (stating that "through 29 U.S.C. § 1342, Congress authorized PBGC to terminate a failing plan so that PBGC could nip a plan's increasing losses and thereby reduce PBGC's exposure to mounting liabilities.")); see also *Ass'n of Flight Attendants-CWA v. PBGC*, No. 05-1036ESH, 2006 WL 89829. *4 (D.C. Cir. Jan. 13, 2006) (citing *Rettig v. PBGC*, 744 F.2d 133, 154 (D.C. Cir. 1984)).

[47] *PBGC v. Republic Techs. Int'l, LLC*, 386 F.3d, 659, 668 (6th Cir. 2004) (citing 29 U.S.C. § 1342(c)); *see also PBGC v. Pension Comm. of Pan Am. World Airways, Inc. (In re Pan Am. World Airways Inc. Coop. Ret. Income Plan)*, 777 F. Supp. 1179, 1182-83 (S.D.N.Y. 1991).

objectives as stated in section 1302(a) – PBGC limited its liabilities in order to mitigate negative impacts on premium rates, and on PBGC's ability to pay benefits to all participants and beneficiaries of plans covered by PBGC. Termination of the Salaried Plan was necessary to avoid unreasonable increase in the liability of PBGC's funds, as PBGC would have lost the claims that produced the bulk of its $644 million settlement if it had waited to terminate until after the Delphi controlled group had broken up. Therefore, PBGC is entitled to summary judgment on Count 4 because the termination complied with 29 U.S.C §§ 1342(a) and (c), and the statutory goals of Title IV of ERISA.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in PBGC's Moving Brief and PBGC's Opposition Brief, PBGC respectfully requests that this Court grant PBGC's Motion for Summary Judgment and deny Plaintiffs' motion.

Date: November 16, 2018

Respectfully submitted,

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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

SUPPLEMENTAL DECLARATION OF JOHN A. MENKE IN SUPPORT OF PBGC'S MOTION FOR SUMMARY JUDGMENT

I, John A. Menke, make this supplemental declaration in support of the Pension Benefit Guaranty Corporation's ("PBGC's") Motion for Summary Judgment.

1. I am an Assistant General Counsel with PBGC's Office of the General Counsel.

2. I am personally familiar with the records that PBGC maintains related to this case.

3. Attached hereto as Exhibit 10 is a true and complete copy of pages 8, and 179 to 219 of the transcript of the hearing on the confirmation of the Modified Plan of Reorganization before U.S. Bankruptcy Judge Drain on July 29, 2009 (the

portion of the hearing on the objections raised by Plaintiffs), *In re Delphi Corporation, et al*., No. 05-44481, ECF No. 18829 (August 24, 2009).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Date: November 16, 2018

/s/ John A. Menke

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EXHIBIT 10

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THE COURT: Let me hear from everyone.

MR. BUTLER: So on my list, the next party I have --

THE COURT: They're making their way up.

MR. BUTLER: Mr. Black and Mr. Cunningham?

THE COURT: Yes.

MR. MOLDOVAN: Good afternoon, Your Honor, Joseph Moldovan from Morrison Cohen. Also with me is Michael Dal Lago at the back of the court. Allow me to introduce Anthony Shelley --

MR. SHELLEY: Good afternoon, Your Honor.

MR. MOLDOVAN: -- from the firm of Miller & Chevalier, who has been admitted pro hac into this case. We are both here on behalf of Dennis Black and Charles Cunningham who are also present in the back of the court. Mr. Black is also the interim chair of the Delphi Salaried Retiree Association.

I know from our prior two experiences before Your Honor that Your Honor is somewhat familiar with our issues, but if Your Honor would permit, Mr. Shelley will continue and present our objection brief to the Court.

THE COURT: Okay. That's fine.

MR. MOLDOVAN: Thank you, Your Honor.

MR. SHELLEY: Good afternoon. Thank you, Your Honor. I'm Anthony Shelley, here on behalf of objectors Dennis Black and Charles Cunningham. They are two participants in Delphi's pension plan for salaried workers. Workers in this plan, during their careers, were not unionized. The only entities protecting their rights in the pension plan are they themselves and, in an ideal world, the fiduciaries of the plan.

They bring this objection solely because of their interests in the pension plan. The objection is a procedural one in a sense. We object to the modified reorganization plan because it assumes the lawful termination of this plan because that termination is not completed and will be challenged, in fact, by us in termination proceedings. The termination, in our view, is speculative, and a reorganization plan with a speculative provision such as this should not be approved in our view.

THE COURT: Is there any support for that? I mean, plans are conditioned on other events happening all of the time.

MR. SHELLEY: Correct, Your Honor. Yes, a couple of cases that there needs to be reasonable assurance that the plan can be effectuated. For instance, a Tenth Circuit case, Ames v. Sundance 973 F.2d 849. A case from the Eastern District of Pennsylvania, In re Lakewood Partners, 1994 Bankr. LEXIS 1291 (Bankr. E.D. Pa. 1994). A third case I'd like to mention, Crestar Bank v. Walker, 165 B.R. 994, where that Court said that the provisions must be reasonably specific, can't rely on specific and indefinite plans or they won't be approved.

Obviously, it's a matter of discretion in the Court's point of view, but our point is to just say there are proceedings that are going to be going on in the Eastern District of Michigan which affect this and make this plan termination -- our salary plan termination not a done deal, and as a result, a reorganization plan that rests on it being terminated should not be approved.

We don't seek any substantive ruling from the Court on the propriety of the termination. Obviously the Court doesn’t have jurisdiction for that. That's for the Eastern District of Michigan. It has exclusive jurisdiction. And as the Court knows, the salaried retirees intend to intervene in that action, but will certainly come to you first before doing so to make sure no stay provisions are violated.

Because our objection rests on the speculative nature of the termination, I'd like to just talk a little bit about the termination proceeding itself and why we think there are substantial arguments to challenge the termination, therefore making it an onerous and likely lengthy proceeding in the Eastern District of Michigan that this reorganization plan depends on.

There are two types of terminations under ERISA. There are summary terminations and those that require full adjudication. The summary termination, I suspect, is the type that the PBGC and Delphi are intending on pursuing because they talk about the plan administrator entering an agreement to terminate the plan.

It's our view that the plan administrator is a fiduciary in that capacity and can only sign such an agreement in the event that it's in the employee's best interest. That has to be the case because otherwise there's no one protecting the employee's interests in such a transaction.

And we believe we'll be able to convince the Eastern District of Michigan that because Delphi is actually treating this issue as a corporate decision as opposed to a fiduciary decision, that any agreement that is signed in that capacity would be null and they have to go then to the second type of plan termination which is the adjudicatory type.

In that instance, the PBGC will take on the role as a plaintiff. It has to prove its case in the District Court. It has to prove it by a preponderance of evidence. It doesn't get deference under a Chevron or an arbitrary and capricious type of standard.

It will have to prove that the termination is in the beneficiaries' best interests; that there will be unreasonable risk to the PBGC's funds without a termination; that it considered and reasonably rejected all reasonable options to termination; and that the conditions associated with the termination, including any amount kicked in by Delphi or GM or whatever, are reasonable.

Again, we don't seek to litigate any of those conditions or the propriety of termination. We don't even know what the conditions are, in a sense, because the PBGC has not yet presented the administrative record in the Eastern District of Michigan. But we suspect that there will be substantial arguments to challenge any effort to terminate.

We suspect there's discrimination against our nonunionized workers in favor of unionized plans. PBGC will have to explain that. The PBGC will have to prove that it was reasonable to release the liens on other assets. It'll have to prove that it wasn't pressured by another part of the executive branch to do this deal, instead it was only guided by the standards in ERISA Section 1342, and that the releases were reasonable.

All of those things are to be determined by the District Court. We don't think that it is clear that those will be -- that the PBGC's termination effort will be approved, and that the plan, therefore, under the terms currently as presented in the various agreements and as we've heard through the press -- because we don't get any actual information from the fiduciaries of the plan at this point -- we think that under those plans the termination will not be approved. We think it will be an arduous and long and complicated process. And because of that, we don't think that the reorganization plan that depends on it should be approved at this time.

THE COURT: Okay.

MR. SHELLEY: Thank you, Your Honor.

THE COURT: Thank you.

MS. CALOWAY: Good afternoon, Your Honor. Mary Caloway, Buchanan, Ingersoll & Rooney on behalf of Fiduciary Counselors, Inc. or FCI. FCI was appointed as the independent fiduciary for the debtors' pension plans for the purpose of pursuing, in these bankruptcy cases, claims for unpaid minimum contributions. And in that capacity, FCI has filed a number of claims in these cases, including most recently claims seeking administrative expense status for those unpaid minimum contributions. I suspect I will probably --

THE COURT: Going back to something in one of the earlier arguments, what's the amount of those claims, the priority administrative claims?

MS. CALOWAY: We have filed for the full amount of the unpaid minimum contributions, which is in excess of 250 or 60 million dollars.

THE COURT: Okay. Thank you.

MS. CALOWAY: And I think, Your Honor, my focus is a little bit more in line with the counsel who spoke just before me in that pointing to the fact that the PBGC settlement agreement reached with the debtors, while it contemplates potential -- I think Mr. Butler used that word or even Your

Honor used that word -- the potential termination of these pension plans, as of today and, you know, as of tomorrow even, if the settlement is approved, the pension plans are not yet terminated. And until the pension plans are terminated and until -- or unless and until the pension plans are terminated and the PBGC becomes the statutory trustee, FCI has a continuing fiduciary obligation and duty to pursue its claims for the minimum unpaid contributions, which I understand the debtors and even the PBGC have included as sort of a subset, I think, of that seven billion dollar claim that the PBGC has filed.

But those claims belong to the plans. They've never been addressed other than in connection with the PBGC. But the PBGC does not have those minimum contribution claims yet, except to the extent that they had the right to file for the statutory liens. And because FCI's obligation and duty continues, as I said, until and unless the plans are terminated, this reorganization plan doesn't contemplate those claims. It never treated them separately. It never identified them any separately. It doesn't anticipate that there would be any administrative expense priority for any or all of a portion of those claims.

But as I have said, and I don't want to belabor the point, as of today, those claims belong to FCI to assert on behalf of the pension plans and for the benefit of the pension plan's participants and we would suggest that a plan that does not contemplate that should not be confirmed.

THE COURT: Okay.

MS. CALOWAY: Thank you, Your Honor.

THE COURT: Can we deal with the last point first?

MR. BUTLER: Sure. Can we just -- one moment, Your Honor. I'm just going to set up something.

THE COURT: Okay.

(Pause)

MR. BUTLER: First, Your Honor, the last point raised by Fiduciary Counselors is at docket number 18282. And their objection is Joint Trial Exhibit number 244. I respect the fact that Fiduciary Counselors, Inc. appears today, and I agree with them that until the PBGC effectuates termination, they remain -- FCI remains a player here. And therefore, I respect that fact that they were here. It's one of the reasons we didn't oppose their 3018 --

THE COURT: But is the effectiveness of the plan modification not conditioned upon the PBGC settlement and termination, or --

MR. BUTLER: No, the effect of the -- the modified plan has as a condition to it that the PBGC settlement agreement -- the Delphi-PBGC settlement agreement shall become effective. All right? And that is true. And that's one of the reasons we're here seeking approval of that so that it would become effective. And what the PBGC has agreed to do is to compromise the claims -- its seven billion dollar claim for a three billion dollar claim -- as part of that agreement.

THE COURT: Okay. So as I take it, though, Fiduciary Counselors' argument is that even though the settlement may be approved and go effective, the condition under which the PBGC would take over the claims hasn't necessarily occurred on the effective date.

MR. BUTLER: Well, on the --

THE COURT: And therefore--

MR. BUTLER: It won't occur --

THE COURT: -- you need to show at least how the 100 cent dollar claims are provided for in the plan.

MR. BUTLER: It won't have occurred on the plan modification date, Your Honor, if Your Honor is to approve a plan modification today. But the fact of the matter is, this current plan, as a plan as opposed to a 363 sale, would be difficult to consummate unless the PBGC settlement agreement was implemented and unless the PBGC reached an independent determination about what it was going to do with the plans.

I think Your Honor can take notice -- it was already introduced by others here and the PBGC is present in the courtroom -- they've already -- and I'll address this in my argument in a few minutes -- they've already made their determination. That determination was made in advance of today. And I can report it and the PBGC can report to you on the determinations they've reached independently.

But as the debtors had indicated in our prior disclosures, including in the disclosure supplement, we don't have the wherewithal to fund these plans. So if these plans were not terminated, it is difficult to imagine that the effective date here would occur under a plan.

But I do recognize, Your Honor, and we really haven't been much at odds with Fiduciary Counselors, Inc. They have a role to play here at this point in time in terms of raising these issues as a fiduciary. We respect that. But we believe that their objection ought to be overruled because ultimately Your Honor, I think, can take judicial notice of the determination made by the PBGC. And I also believe that this modified plan could not become effective on a different separate track. We'd have to come back and propose something else if these plans weren't ultimately terminated.

THE COURT: Okay. So you can address the other two objections however you want to.

MR. BUTLER: Okay. Thank you, Your Honor. First, Your Honor, I just want to ground this discussion and this response in a couple of, I think, important imperatives. Your Honor knows, I think as well as anyone in this courtroom, that one of Delphi's five transformation objectives was to develop a workable solution to our pension plans, which we did in connection with the confirmed plan, and which involved, under the confirmed plan, the assumption of our defined benefit plans by Delphi. And the world that's changed since January of 2008 now prevents Delphi from being in a financial position to do that.

One of the great regrets in this case, I think, for those of us who've worked on it so hard, is that we could not have found a different solution. The fact that we were able to address some of the pension plans in the initial 414(l) transfer is some solace, but the reality is we tried very hard to be able to address these plans in a way that would have avoided the real human suffering that will go on as a result of what is, I think, inevitably at this point, based on independent actions taken by the PBGC, as a hardship on many, many people. And I deeply regret that, but it is a reality of the world that we are in now that we are not able to finance these.

Having said that, then we need to sort of look at the basic fabric of these objections. And I want to address them sort of together. I guess I'll deal with -- because many of my comments will address both.

But let me just also say, just so the record is clear, in the United case, which Ms. Mehlsack tried to distinguish because somehow in our agreement or in the GM-PBGC agreement she reads into that some waiver of restoration rights. I just want Your Honor to know that I have the settlement agreement by and between -- among UAL Corporation and its direct and indirect subsidiaries and the PBGC in my hands, the one that all of the case law is predicated on.

And at paragraph 6 of that agreement is a complete waiver by the PBGC of all of its restoration rights. I knew that. I knew it when Ms. Mehlsack was talking about it, because working with our special counsel we tried to get that same waiver in our agreements and were unable to. But the fact of the matter is that Ms. Mehlsack has it reversed. The United agreement had a full waiver or restoration rights. The PBGC-Delphi agreement does not.

The second thing I wanted to point out -- just to make sure the record is clear on some of these points -- a lot has been said about the Exhibit B to the agreement. And I am, frankly, glad that we exercised the judgment that we did to insist that this agreement be publicly disclosed in these proceedings so that it can be transparent and discussed here in the light of this case.

The reality is -- I will say what I did before -- that is, I'm not asking Your Honor to approve Exhibit B. Yes, there is benefits Delphi gets under it, but it is an independent agreement between General Motors Company, the Motors Liquidation Corporation, and PBGC that has been signed and executed between them. And we believe it ought to be disclosed, in part because -- and I acknowledge this -- the ultimate effectiveness of that agreement and the agreement we're asking you to approve is cross-conditioned on both of them becoming effective. And we believed it ought to be disclosed.

But there were a number of things said about the GM-PBGC agreement that just, frankly, I'd ask Your Honor to read the full provisions that were cited just so that the record is clear here. I don't believe that 4(b) of that agreement on page 6 in fact is a follow-on agreement, but let me just read the second sentence of 4(b). Ms. Robbins spent some time and I think Ms. Mehlsack spent some time talking about the first part of that sentence which, by the way, wasn't dealing with a whole bunch of unions, it was dealing with the UAW.

And it is true that New GM assumed and assigned from Old GM the benefit guarantee agreement between Old GM and the UAW. That is a fact. It's been publicly disclosed. It's also been publicly disclosed that New GM did not assume any other similar benefit guarantees, a decision that has made many stakeholders in this case, and perhaps even Delphi, not particularly thrilled with that decision, but that is the decision that they made.

But the provision in 4(b) says, and I quote, "Notwithstanding the provisions of paragraphs 2(a) and 2(b) and paragraph 3 hereof, none of PBGC, GMC, or any of its subsidiaries or Old GM shall release or discharge any disputes, controversies, suits, actions, causes of action, claims, assessments, demands, debts, sums of money, damages, judgments, liabilities, liens, and obligations of any kind whatsoever, upon any legal or equitable theory, whether contractual, common law, statutory, federal, state, local or otherwise, whether known or unknown, that any of them ever had, now have, or hereafter can, shall or may have, from the beginning of time, by reason of any manner, cause, whatsoever against each other relating to the calculation of the amount of or the ERISA title for coverage of the GM UAW benefit guarantee or any similar contractual guarantee by GMC or any of its subsidiaries." And it excepts out the validity and application of certain of PBGC's recovering policies.

But that was read to you and argued that in fact this was a release. I think it's exactly the opposite. I think PBGC made the determination, as I read the agreement, not to release those issues but to preserve them for whatever that may be. And I just want the record here of what's being argued to be clear.

Now, in connection with -- I want to go back now and address, if I can, first I'm going to address in substance the objection that was made by Mr. Black and Mr. Cunningham, the former DSRA objection at docket number 18277. One of the fundamental mistakes, I think, made in the premises of that objection is that continued assertion by Mr. Black and Mr. Cunningham that someone other than Delphi is the plan administrator of the salaried plan. In fact, Delphi is the plan administrator of the salaried plan. And I'm not talking about the salaried plans or the nonbargained plans. It's very important to make that distinction.

THE COURT: But I think they went further and said even if Delphi is the plan administrator and the committee is it just its agents, that Delphi can't act because it's conflicted. So I think they're extending it to Delphi as plan administrator. They may not be waiving their rights that there are these other people that should be replaced too, but they're basically saying that because of a conflict of interest Delphi can't act.

MR. BUTLER: Your Honor, I'm not sure what the conflict of interest is because I think you have to look to the salaried plan documents themselves. Article 6(a) of those documents provides that the decision to terminate the salaried plan is a decision that Delphi is entitled to make under the terms of the plan. And in making the decision, Delphi acts as in a settler or nonfiduciary capacity.

And there is case law on this and we cited the case law in our responsive papers. They include Curtiss Wright v. Schoonejongen, 514 U.S. 73, 78 (1995); Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996); and Hughes Aircraft Co. v.

Jacobson, 525 U.S.. 432, 444 (1999).

Termination of the salaried plan, Your Honor, under the case law, simply does not raise the fiduciary issues described in the objection. It's just a misreading or mis-assertion of the law. Pursuant to the authority that Delphi has -- Delphi -- under Section 6 of the salaried plan, Delphi's board of directors has directed the plan administrator, which is Delphi, to enter into the PBGC-Delphi settlement agreement, and upon Your Honor's approval of it, to execute a termination and trusteeship agreement if that agreement is proposed by the PBGC.

So with respect to the non-negotiated, the nonbargained plans, the way in which this settlement agreement that's before you is set up is to the extent Your Honor approves it and authorizes it and enters the modification order, Delphi -- and PBGC reaches its unilateral determination to terminate the plans, then in that instance Delphi will execute a termination and trusteeship agreement if the PBGC proposes it.

And I would simply say to Your Honor, as a basic, I think, Supreme Court precedent, it is inconsistent to me that their statement in their objections that somehow an independent fiduciary needs to be appointed to consider whether this should be terminated, I think it's simply inconsistent with precedent which provides that it is the settler, the nonfiduciary, the plan administrator, who makes the decisions to terminate a pension plan in these circumstances.

Now, here are the facts. Your Honor said earlier in this argument we should get into the real world. Here are the facts. The salaried plan is underfunded by almost three billion dollars and has contributions totaling more than 200 million dollars that are due and unpaid. There is no doubt, frankly, not a scintilla of doubt in my mind and I think in any reasonable person's mind, that Delphi cannot maintain the salaried plan. We do not have the financial wherewithal to do so.

PBGC made an independent assessment of this. On July 21st of this year PBGC determined, in accordance with 29 U.S.C. 1342(a)(1),(2) and (4) that the salaried plan had not met the minimum funding standard under Section 412 of the Internal Revenue Code; that the salaried plan will be unable to pay benefits when due under its terms; that the possible long run loss of the PBGC with respect to the salaried plan may reasonably be expected to increase if the plan is not terminated, and that therefore the salaried plan must be terminated and PBGC appointed statutory trustee.

Under ERISA, upon making such finding, PBGC is authorized to enter into an agreement with the plan administrator terminating the plan and appointing PBGC trustee of the plan without further procedural or substantive safeguards for plan participants. That is the law. And that is the law in LTV v. United Steelworkers of America 824 F.2d 197, 200 (2d Cir. 1987), that I know Your Honor is aware of.

The facts are that whenever PBGC makes a determination under 1342(a) that a pension plan should or must be terminated, as it has already done with the salaried plan, as we stand here today, the PBGC is authorized, as a matter of statute under Section 1342, to apply to the United States District Court in order to terminate or to enter into an agreement with the plan administrator. Again, the LTV cite.

Here they have done both. They have entered into a provisional agreement with us that says that as to the salaried plan and as to the subsidiary plans that are nonbargained, that if in fact Your Honor authorizes us as a debtor-in-possession to effectuate the agreement, that we will enter into the trusteeship agreement with PBGC and that will be the end of it. And I think it's irrefutable in these circumstances, under the case law and under the statute, that a plan may be terminated without any further court proceedings upon agreement with the plan administrator.

So when I deal with the salaried plan or the subsidiary plans, I go to 3(a) of the PBGC-Delphi agreement and I look at the terms there, and I'm asking Your Honor for permission, for your authority, based on the real facts of this case, to approve the PBGC-Delphi settlement agreement as part of the plan modification order and to allow us to implement it, and we will implement it, with respect to the five plans that are nonbargained.

And that's my response to Mr. Black and Mr. Cunningham. It's not a response I say with any degree of satisfaction. I've spent three and a half years with the team here trying to get an alternative to this, but this is what is here, this is what is necessary, and this is what will allow Delphi to reorganize and to move forward. And I wish we could have come to a different result, but the capital markets and the state of the auto industry does not permit it.

Now, talking about the bargain --

THE COURT: No, afterwards -- sorry, I'm just telling counsel for Black and Cunningham he can speak after you're done.

MR. BUTLER: Okay.

THE COURT: But finish your argument on the other objectors.

MR. BUTLER: Okay. With respect to the bargain plan, here -- and I'm not going to focus this argument on the United case. We believe it's on all points with what we're doing. We believe, in fact, that we structured this to follow carefully the requirements in United. And Your Honor, our papers address that in detail and I'm not going to make a further United argument here unless Your Honor wants me to. I'll be happy to go into it.

THE COURT: No, you don't need to.

MR. BUTLER: What I would rather do here is focus on certain aspects of the settlement, and then I'll focus on Ms. Robbins' argument that somehow we have violated the labor MOUs in violation of 1113(f).

I think Your Honor, having watched it stew in over an almost fifteen-month period, I think Your Honor is aware of how the labor MOUs came into being after an extended hearing under Sections 1113, 1114 of the Bankruptcy Code. And it's also clear under those orders that Your Honor retained jurisdiction to hear and determine all matters arising from the implementation and performance of that order in the MOUs.

So Your Honor clearly has jurisdiction expressly retained to make the findings we're asking Your Honor to make today. And we believe that the specific provision of the labor MOUs establish Delphi's right to terminate the Delphi HRP even more clearly.

And I agree, every person counts. And the reality is we need to address the IAM, IBEW, and IUOE objections with their own merits. I will note that the UAW, the IUE-CWA, and the USW no longer contest -- they had contested on this record -- no longer contest the determinations we're asking Your Honor to make in the court order -- the plan modification order today.

With respect to the IAM, IBEW, and IUOE MOUs, the facts are that they contain explicit reservation of rights to terminate the Delphi HRP. Counsel acknowledged that each of the MOUs has an agreement in it that agrees and acknowledges that Delphi reserves its right to seek termination of the Delphi HRP consistent with applicable law.

If that was all there was, we could be having a debate here about whether we're seeking termination and whether that alone was sufficient to give the Court comfort. But the fact is, Attachment C to the labor MOUs also indicates that the agreement was without prejudice to Delphi, quote, "in any pension termination proceeding under ERISA and/or under the Bankruptcy Code."

An involuntary termination by the PBGC pursuant to the Delphi-PBGC settlement agreement -- they make their unilateral determination -- has to fall within this definition. There can be no reasonable argument that there's a unilateral modification of these CBAs under Section 1113 of the Code when the agreement specifically provides that the actions complained of can be taken.

And here, in addition to the assertion that Delphi reserves it right -- or agreement that Delphi reserves its right to seek termination, there's a further agreement in Attachment C which says that the agreement is without prejudice to Delphi in any pension termination proceeding under ERISA and/or under the Bankruptcy Code. I don't think it could be any more explicit than that.

Now, the IUOE, IBEW, and IAM further argue that termination of the HRP would somehow violate the implementation agreements executed following the labor MOUs. And Ms. Robbins pointed out to Your Honor the exhibit that applied to her union was Joint Exhibit 126 was the implementation --

THE COURT: I'm sorry, before you -- could you just -- where does that appear in Attachment C?

MR. BUTLER: Let me get it. Let me get it, Your Honor.

(Pause)

MR. BUTLER: I've got to pull it, Your Honor. One second.

THE COURT: Okay.

MR. BUTLER: Your Honor, can I -- I gave you our only binder --

THE COURT: You can come back to that -- oh --

MR. BUTLER: Can I get your binder back for just one minute?

THE COURT: Sure. It had Attachment C, so --

MR. BUTLER: Your Honor, we've been at this for almost two and a half hours. Can we take a five-minute recess and I'll --

THE COURT: That's fine.

MR. BUTLER: Thank you.

(Recess from 5:36 p.m. until 5:54 p.m.)

THE COURT: Okay. We're back on the record in --

MR. BUTLER: Thanks, Judge. We've put the annotated provision on your -- provided it to Your Honor. It's paragraph 3(c), the bottom part of paragraph 3(c) of each of Attachment C. We also laid these all out in footnote 28 in our reply brief as they are described there.

(Pause)

THE COURT: Okay. Thanks.

MR. BUTLER: Moving on, Your Honor, to the implementation argument, I believe that Ms. Robbins made the argument that the IUOE, IBEW and IAM believe that termination of the HRP would violate the implementation agreements executed following the labor MOUs. I don't understand that argument because if you look at the implementation agreement, I was making the point that Ms. Robbins identified Joint Exhibit 126 as the relevant implementation agreement. All they did was accelerate certain existing rights and obligations under the MOUs. Section 7 of those agreements provided, and I quote, "other than as adjusted, conformed or modified by this implementation agreement, or as required to carry out this implementation agreement, the other terms and conditions of", end quote, the MOUs with the unions remain unchanged. So the implementation agreements didn't alter in any respects Delphi's rights with respect to termination of the HRP. More importantly, the acknowledgement of the three unions that the termination of the HRP, either through a Delphi initiated termination or through a pension termination proceeding, was contemplated by those agreements.

For those reasons, Your Honor, we believe that the Delphi PBGC Settlement Agreement should be approved, and Your Honor should overrule the union objections to the modified plan under Section 1113(f) of the Bankruptcy Code. We believe that Your Honor should make an express finding that Delphi may consent to a termination and trusteeship agreement with the PBGC without violating the labor MOUs, or the Section 1113, 1114 settlement approval orders, or Section 1113 of the Bankruptcy Code.

I should point out, Your Honor, just so the record is clear as to the UAW, USW and IUE-CWA, the record shouldn't be construed that they've consented to this relief. They have simply withdrawn their objections to the relief, and then they take no position on the relief.

THE COURT: Okay.

MR. BUTLER: And the record should be clear in that respect.

THE COURT: All right. Okay. I know that counsel for Mr. Black and Mr. Cunningham wanted to say a brief report too.

MR. SHELLEY: Thank you, Your Honor. Just a few brief points. Most of the material Mr. Butler raised about settlor functions and the administrative, the plan administrator's obligations, those are really matters for the Eastern District of Michigan to decide. Those are substantive matters. Our only point is that there are arguments being made on both sides that make the plan termination not inevitable, and, therefore, speculative. But I --

THE COURT: Well, it may not be inevitable, but, I mean, if you're raising an objection at all it's a feasibility objection. So I do have to consider feasibility --

MR. SHELLEY: Sure.

THE COURT: -- and so --

MR. SHELLEY: Yes, and I do want to get to the more substantive issue then.

THE COURT: All right.

MR. SHELLEY: The idea of a settlor function, this being a settlor function to terminate this plan that Delphi is exercising, it makes no sense. They're not even terminating it. It's an involuntary termination. It's PBGC versus Delphi. So the idea that this would be a settlor function, we don't think holds up. It also is, under the statute, a function that's given to someone called the plan administrator. And, typically, it's not given to the sponsor. ERISA talks about sponsors. It's not given to the employer. ERISA talks about those too. It's given to the plan administrator, and under ERISA it's a fiduciary function if the plan administrator is exercising any kind of discretion. The idea that the plan administrator would agree to a termination in one way, as opposed to another, is a discretionary matter, and cases hold that the method of termination, even if termination isn't -- is a settlor function, is not, is itself a fiduciary function.

THE COURT: But that didn't seem to be much of an issue for the Courts in LTV, including the Supreme Court --

MR. SHELLEY: Well, and the reason --

THE COURT: -- or the Seventh Circuit in UAL.

MR. SHELLEY: The Supreme Court cases that talk about settlor functions, they aren't involuntary terminations. There are other types of terminations when everyone's made whole --

THE COURT: No, but in LTV they agreed not to enter it. Once the PBGC had decided to terminate LTV agreed to the procedure under 1142(c), the fourth sentence of it, and --

MR. SHELLEY: Yes.

THE COURT: -- that was LTV as plan administrator. It didn't seem to bother anyone.

MR. SHELLEY: And it all makes sense if the plan administrator is acting with an eye towards what's in the best interest of the employees. You can have a summary termination, because those people who are harmed by it are being protected by the usual fiduciary function that the plan administrator is exercising. But if they're conflicted, or they're thinking about the corporate interest as opposed to the employee's interest, then there's no question that in all the papers that have been filed Delphi is saying plan administrator equals Delphi. That they're not taking it on as a fiduciary function. So these are arguments we're going to make in --

THE COURT: But why isn't 1303 the issue there? I mean isn't that the remedy --

MR. SHELLEY: To go after the PBGC --

THE COURT: -- 1303?

MR. SHELLEY: -- for instance?

THE COURT: Yes.

MR. SHELLEY: Well, the plan has to be terminated first. It has not been terminated, and so we will go through a 1303 into the Eastern District of Michigan and raise our arguments that this plan cannot be properly terminated, at least it can't be summarily terminated, and that through an adjudication we'll make all the arguments on the merits that we think are appropriate as to why the termination standard itself cannot be satisfied and a district court shouldn't approve that.

The last point I'd like to make is that we very much understand the real world, and that this plan has been run into the ground, and that there isn't enough money, and it's likely to be terminated in the end. But it being terminated based on the current terms and with the current strings attached or the current conditions is one thing, and being terminated in another way that the Eastern District of Michigan might say complies with all of the standards of termination is quite another thing. So if this plan is terminated down the road, that may happen, but that it will be terminated on the terms and conditions that are expected right now is quite another thing. So our argument is that the termination should play out before the Court should approve the modified reorganization plan.

THE COURT: Okay.

MR. SHELLEY: Thank you.

MS. ROBBINS: Your Honor, I wanted to just --

THE COURT: I think you have to come closer to a microphone.

MS. ROBBINS: Two very quick points just on interpretation of language, Your Honor. If you look at 3(c) on page 29 of the various MOUs that, first of all, only applies to the SAPT, which is that attachment. It does not apply to the entire agreement. It does not apply to the section on pension we referred to earlier. But the other point that I want to point out to the Court is this is a reservation of rights for all parties. It is not something that provides a specific right for Delphi. It's basically saying we can continue to take our positions so they can continue to take their positions as to the SAPT, which is this attachment. It's not something that provides any rights or acknowledges any rights.

The other point that I would just make is that in that section of the Attachment B to the PBGC agreement 4(b), while there is a discussion about maintaining rights to address calculations with respect to certain add-ons.

The very last reference that I made was excepting the validity in the application. Not accepting, E-X excepting the validity and application of the PBGC policies. Now, we haven't gotten the discovery materials from the PBGC to know everything about how this was negotiated or what it means, but it looks like that last provision is excluded from the reservation of rights, just looking at the language. Thank you.

THE COURT: Okay.

MS. MEHLSACK: Your Honor? Just briefly. Mr. Butler mentioned that the agreement in the United case had a broader waiver with respect to the PBGC's rights than was able to be obtained in this case.

THE COURT: Well, actually a more specific waiver.

MS. MEHLSACK: A more specific waiver. Sorry.

MS. MEHLSACK: Whatever it was, Your Honor, it was clearly not raised before the United Court, and nor were the 4047 issues or 1303 issues that we raised, so that the United case is not dispositive in this regard, because the issues simply weren't raised before the Court.

The other is, Your Honor, that, again, the provisions that Mr. Butler cites with respect to Exhibit C do nothing to derogate from the rights of the unions and the participants under the collective bargaining agreement that provide that any kind of a reduction in benefits shall be equitable when it comes to all participants in the HRP, and the effective of what, the consequences of what's happening here are there is not such an equitable reduction. I know that Mr. Butler said well, that's GM's issue, not Delhi's issue, but the overall purchase price of the assets that Delphi is transferring to GM are what this plan is all about. And so the question of how much might be allocated to what are being called to-ups for the other unions who are, yes, have withdrawn their objections and who, as Mr. Kennedy acknowledged, are in the process of negotiations, those are all issues that Delphi had the opportunity to negotiate. We haven't had that opportunity, nor does it look like we will be getting that opportunity. Thank you, Your Honor.

THE COURT: Okay. All right. We've been addressing three objections to the plan modification motion and the debtors' request for approval of an integral settlement to that motion, which is the debtors' agreement with the PBGC dated as of July 21, 2009. The objection I'll deal with first is by Messrs. Black and Cunningham, who are individuals who are covered by the Salaried Workers' Pension Plan. They contend that the agreement between the debtors and the PBGC is one that I shouldn't approve because the benefits of that agreement which flow from the ultimate termination of the pension plans and their being taken over by the PBGC, are too speculative for me to consider that the plan itself is feasible in light of that contention. It's also contended that the agreement itself is too indefinite. To the extent that objection was originally raised when it pertained to the original terms of the modification that stated that the plans would be addressed by GM, and the language in the disclosure statement that made it clear that no one really knew from the debtors' perspective what that meant, would have some real merit. But since that time the debtors entered into the PBGC settlement agreement, and I believe that those terms are clear at this point and not indefinite. So, really, the only objection that is even colorable is the feasibility objection.

On that score, the objection is somewhat coy in that it raises for the Court the issue of the PBGC not being able to terminate the plans, notwithstanding its authority under 29 U.S.C. 1342, but at the same time doesn't really provide me with a lot of reasoning as to why that would not be the case. To the extent that there have been arguments raised by the objectors I have considered them, and I believe that for purposes of determining feasibility of the plan as modified and whether the debtors are entering into an agreement that is illusory, I conclude that the objection should be denied.

The debtors do not ask for a determination that they are authorized to enter into the termination agreement with the PBGC under Section 3(b)(i) of the settlement agreement for all purposes, but only that such termination would not be a violation of the labor MOUs, the Union 1113, 1114 settlement approval orders or the local agreement between Delphi, Connection Systems, and Electronic and Space Technicians Local 1553. So I'm not determining and not being asked to determine whether Delphi as plan administrator would have the right to enter into the termination and trusteeship agreement in the form attached as Exhibit C to the settlement agreement otherwise.

But I conclude that, there's certainly a reasonable likelihood in my mind that a) that the PBGC's termination, to terminate these plans will be upheld, and, b) that Delphi will be able to enter into the termination and trusteeship agreement to expedite that termination and reduce the costs thereof.

The record is clear and uncontroverted that these plans are both seriously underfunded and that the debtors have very substantial unpaid post-petition contributions to the plan in the nature of hundreds of millions of dollars, and, more importantly, that the debtors lack the cash to continue to make post-petition contributions to these plans, given the fact that they have no source of ongoing funding except as been agreed to by GM and the DIP lenders in connection with facilitating the transactions before me, all of which are an outgrowth of a several month period where the debtor was living on week to week and sometimes day-to-day extensions of forbearance under a terminated DIP facility without any ability to obtain replacement financing.

So it appears to me that it is reasonable to assume that the PBGC settlement agreement is not illusory, that, in fact, the determination by the PBGC to terminate the pension plan under 29 U.S.C. Section 1142 is appropriate in that the debtors will be enabled to facilitate that implementation through the termination and trusteeship agreement referenced in paragraph 3(b)(i).

So, again, without ultimately deciding the underlying issues, including whether the only remedy for parties aggrieved by such a determined by the PBGC is under 29 U.S.C. Section 1303, I conclude that the plan modification is feasible and that the agreement is not illusory and that the debtors, therefore, are exercising proper business judgment to enter into it.

The objection by Fiduciary Counselors Inc. also, ultimately, in my mind, is a feasibility objection, other than simply a statement by FCI that it continues to protect the rights of the plans for unpaid contributions unless and until the PBGC takes over those rights upon a termination. The debtors candidly acknowledge that if, in fact, after approval of the PBGC settlement agreement the PBGC is somewhat stymied in terminating the pension plans, the debtors would not be able to implement the plan as modified, and, therefore, that if that condition occurred the plan would not be feasible. I am painfully aware of the consequences of confirming a plan, i.e. this plan, the one that's currently in place for the debtors, when there is an open contingency as to feasibility in that ultimately the current plan in effect was rendered infeasible by the determination of the plan investors not to close.

However, again, for the reasons that I previously stated with regard to Messrs. Black and Cunningham's objection, it appears reasonable to me to conclude that the PBGC's determination to terminate these plans which are, again, very seriously underfunded and, more importantly, cannot be funded going forward by the debtor, will stand up, and, consequently, I believe that based on that reasonable assumption this plan modification is feasible. Obviously, FCI has reserved all of its rights in the event that the plan is not terminated, and I'm sure will be back pursuing its claims if that is the case, although at that point one would wonder, and, frankly, given the FTI liquidation analysis, which is uncontroverted, one would assume that there would be no recovery on that claim at that point, which is another reason why I believe that this plan, to the extent it hinges upon the PBGC's termination of these plans is feasible, in that that liquidation scenario with no recovery beyond secured creditors is avoided. So I will overrule the FCI objection.

Finally, three of the debtors' unions have objected to the plan modification and the PBGC's settlement. The IUOE, the IBEW and the IAM, those unions contend the settlement violates their memorandums of understanding and the related agreements to those that appear in Exhibits 122 and 126 in the record. And, further, that the Court cannot make the finding sought by the debtors, which, again, appears at paragraph 3(b)(i) of the PBGC settlement, that the termination by the PBGC under 29 U.S.C. Section 1342 is not a violation of the agreements that the debtors have with them. The law I believe is clear that the PBGC may terminate a pension plan under Section 1342 notwithstanding that a collective bargaining agreement has within it as a provision that the plan be maintained. See Pension Benefit Guaranty Corporation v. LTD Corporation, 496 U.S. 633 at 639 (1990) in which the Supreme Court said, "The PBGC may terminate a plan involuntarily notwithstanding the existence of a collective bargaining agreement." See also In re Jones & Rothland Hourly Pension Plan in Pension Benefit Guaranty Corporation v. LTD Corporation 824 F.2d 197 (2d Cir. 1987). Which stands for the same proposition, and further states that -- or stands for the proposition that under the four-sentence subsection 1342(c) of 29 U.S.C. the PBGC need not comply with the other requirements of the subsection and, therefore, does not need to go through a pre-termination court adjudication that would give a union a right to notice where there has been an agreement following that determination to terminate to enter into a termination and trusteeship agreement with the plan sponsor and administrator such as is contemplated by paragraph 3(b)(I) of the PBGC settlement.

So it appears to me clear that the action of the PBGC under the PBGC settlement agreement, which is the termination that is referred to in that subparagraph of paragraph 3 does not violate the union agreements, or require determination under Section 1113 or 1114 of the Bankruptcy Code.

This very issues was addressed relatively recently by the Seventh Circuit in In re UAL Corporation, 428 F.3d 677 (7th Cir. 2005). And, frankly, based on my review of the PBGC settlement agreement and the language of the agreement between the PBGC and United Airlines quoted in the Seventh Circuit opinion I've just cited, it appears to me that the relief the debtors are seeking is on all fours with the Seventh Circuit's determination that entry into such a settlement agreement by a debtor does not violate Section 1113 or 1114 of the Bankruptcy Code. It's clear to me from reading the settlement agreement that the termination under Section 1142 of the pension plans described therein is left to the determination of the PBGC. And it is only if and when the PBGC issues a notice of determination pursuant to Section 29 U.S.C. 1342 that any obligation of the debtors kicks in. That's, I believe, on all fours with the agreement at issue in the United Airlines case. All of the language in the PBGC settlement agreement pertaining to the determination by the PBGC is expressed in terms of a condition occurring later or in precatory language, or as stated to the extent that the PBGC so acts.

So the agreement insofar it deals with termination of the pension plan hinges upon the PBGC's actions under 1142 and not the debtors.

Further, I don't believe there's anything pretextual or underhanded in the way that right of the PBGC is recognized here.

It is also argued by the two unions that the settlement agreement locks in the PBGC to actions that the PBGC should not be locked into if the PBGC were acting properly. It is not my function or jurisdiction to evaluate whether the PBGC is acting properly or not in the context of this motion. I'm not being asked to approve the PBGC's actions. Rather, as the Bankruptcy Code and case law is clear, I am supposed to evaluate a settlement from the perspective of the debtors' estate and creditors. That point was made on a jurisdictional basis in the UAL case as I previously ruled in dealing with the jurisdictional objection made earlier in this hearing.

But it's also a principle of substantive law that my review is based on what's in the best interest of the estate and whether the settlement is fair and reasonable as far as the debtors' estate and creditors are concerned. Indeed, as potential creditors of the PBGC under Section 1303, I think it's -- it would be doubly improper for me to evaluate those objections raised by the union that goes to the PBGC's determination to enter into this agreement. See generally In re Refco Inc., 505 F.3d 109 (2d Cir. 2007).

It was also suggested, I think, that by compromising the PBGC's claims which include potential secured claims as well as priority administrative claims for post-petition contributions the settlement would alter the priority rules of the Bankruptcy Code. I believe that was a backhanded reference to the Second Circuit's Iridium decision. However, that decision addressed settlements that purported to alter the rights of creditors who are not party to the settlement. The PBGC, once the plans are terminated, would have the claims, itself, and is prepared and capable under 29 U.S.C. 1367 to settle those claims which are contingent at this point conditioned upon plan termination. So I don't believe that there's any question of violation of the fair and equitable aspect of approval of a settlement as articulated by the Second Circuit in In re Iridium.

I'd also note, that the PBGC, while not pursuant to its statutory mandate, liable for paying all of the benefits that are provided for under the plan's pre-termination will be paying substantially more over time than the priority or administrative claim benefits. So under any argument, I don't believe that the debtors by entering into this settlement are somehow skewing anyone's rights to recover as a priority or administrative creditor.

Finally, it was argued that the settlement agreement would give this Court's blessing to actions by the PBGC as opposed to authorizing the debtor to perform the settlement. I've already addressed that point, I believe, including this citation to the Refco case. But I do note further that for purposes of clarity the order that the debtors have asked me to enter specifically reserves parties rights under 29 U.S.C. Section 1303.

Other than that, all I can say is that it appears reasonable to me for the PBGC to have acted in the way it did sufficient for me to find, as I said previously, the modification of the plan is feasible insofar as it depends upon the termination of the pension plan. And that to the extent the PBGC actions in entering into that agreement are subject to review, my order approving the settlement does not preclude such review as a matter of law. Although, if indeed, the debtors enter into the termination and trustee agreement, the degree of review may be significantly curtailed as set forth in the Second Circuit LTD case that I've previously cited.

The debtors have further stated that various provisions of their agreements with these unions in the -- in particular paragraph 2(b) of the MOU at page 6 of 32 and attachment C acknowledged the debtors' rights under the MOU to seek termination of the plan or the plans. But I believe that's unnecessary to rely upon, given that the undertakings to maintain the benefits under the plans are subject to applicable law and I see no basis for the debtor to be compelled to maintain an agreement that is terminatable by the PBGC without any reference to whether the agreement is in a collective bargaining agreement or not.

So for those reasons, I'll overrule the three unions' objections to the modification motion and to the PBGC settlement.

MR. BUTLER: Your Honor, I was asked by counsel for American Aikoku Alpha Inc., their objection is at docket number 17773, whether we could take up his objection next because of some travel commitments that he has.

THE COURT: Okay.

MR. BUTLER: So I will turn to that objection and then go back to some other matters.

THE COURT: Okay.

MR. VIST: Thank you, Mr. Butler. Good evening, Judge. Gary Vist for American Aikoku.

The gist of our objection -- as I said it earlier, we have three objections, two are specific to assumption -- non-assumption notices. I don't want to take up the Court's time with these today.

The third objection is the objection to the plan, itself. Basically, my client and Delphi have entered into a stipulation in May of 2008 under which my client is supposed to get approximately 414,000 dollars upon the sale of the steering and half shaft business. The stipulation that we have entered into also provides that to the extent that any order related to the sale of the steering and half shaft business alters, conflicts with, or derogates from the provision of this stipulation this stipulation shall control.

Our understanding is that the steering and half shaft business is being sold to GM as a part of this modification plan. It is the debtors' position that the plan allows them to basically not pay the stipulation amount in full but to basically make a partial payment under it. We believe that the language of the stipulation is clear and that the plan has to be modified to provide that if there's any agreement between the debtor and the creditor, that where a statutory agreement says that the agreement would supersede any future order conflicting with it, that the plan has to be modified to provide that such agreement does take precedent over any provision set forth, or any proceeding allowed by the plan.

And that is the gist of our objection.

Certificate of Service

I hereby certify that on November 16, 2018, 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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/s/ C. Wayne Owen, Jr.
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