Case No. 19-1419

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS BLACK, CHARLES CUNNINGHAM, KENNETH HOLLIS, AND DELPHI SALARIED RETIREE ASSOCIATION,

Plaintiffs-Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan (Judge Arthur J. Tarnow)

BRIEF OF APPELLEE

Judith R. Starr, General Counsel
Kartar Khalsa, Deputy General Counsel
John A. Menke
C. Wayne Owen, Jr.
Craig T. Fessenden
Assistant General Counsels
Erin C. Kim
Elisabeth B. Fry
Attorneys

PENSION BENEFIT GUARANTY CORPORATION
Office of the General Counsel
1200 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 229-3059
Facsimile: (202) 326-4112
Emails: efile@pbgc.gov *and* menke.john@pbgc.gov

Attorneys for Appellee-Defendant Pension Benefit Guaranty Corporation

CERTIFICATE AS TO CORPORATE DISCLOSURE STATEMENT

Appellee Pension Benefit Guaranty Corporation ("PBGC") certifies that it is a federal government agency established under 29 U.S.C. § 1302. *See, e.g.*, *PBGC v. Republic Techs. Int'l, LLC*, 386 F.3d 659, 661 (6th Cir. 2004). As a wholly owned government corporation, PBGC is not required to file a corporate disclosure statement. Fed. R. App. P. 26.1(a); *see* Circuit R. 26.1(a).

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

PBGC requests oral argument. The outcome of this appeal will create precedent on issues important to PBGC's mission of protecting the retirement security of nearly 40 million Americans in defined benefit pension plans, namely the process for terminating pension plans. Given the importance of this appeal, PBGC respectfully requests oral argument to address any questions the Court may have about the facts and applicable law.

STATEMENT OF JURISDICTION

The district court had jurisdiction under Title IV of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1301-1461 (2012 & Supp. V 2017) ("ERISA"). The specific jurisdictional provision is 29 U.S.C. § 1303(f). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. 29 U.S.C. § 1342(c) expressly provides PBGC with two procedural alternatives to terminate an underfunded pension plan: (i) PBGC may sue the plan administrator seeking a district court decree adjudicating that a plan must be terminated and appointing a statutory trustee to terminate the plan, *or* (ii) PBGC may enter into an agreement with the plan administrator that the plan should be terminated and that a statutory trustee be appointed to terminate the pension plan without proceeding in accordance with any other requirement of that section. Faced with no alternative to termination, PBGC and Delphi reached an agreement that the Salaried Plan should be terminated and to appoint PBGC as statutory trustee to terminate the Salaried Plan while Delphi was liquidating in bankruptcy. Did the District Court correctly find that 29 U.S.C. § 1342(c) allowed PBGC and Delphi to reach such a statutorily-approved agreement in lieu of a court adjudication?

2. When Congress established PBGC's pension insurance program, it set clear limits on the amount of benefits PBGC can pay to plan participants and their beneficiaries following plan termination, which PBGC followed in this case. Did the District Court correctly find that no taking occurred, and that, even if there were a taking, no additional process was due in light of the post-termination remedies available to the Retirees – including this case?

3. 29 U.S.C. § 1342 authorizes PBGC to terminate an underfunded plan when, *inter alia*, it misses required minimum funding contributions, the plan will be unable to pay benefits when due, or when PBGC faces the reasonable possibility of an unreasonable increase in its long-run loss. PBGC's Administrative Record showed the existence of each of these three criteria and that termination of the Salaried Plan prior to the breakup of the Delphi controlled group was necessary to avoid an unreasonable increase in the liability of PBGC's fund. Did the District Court correctly find that PBGC did not act arbitrarily and capriciously in reaching an agreement to terminate the Salaried Plan pursuant to the express authorization of 29 U.S.C. § 1342?

STATEMENT OF THE CASE

This case is a dispute over whether the PBGC-initiated termination of the Delphi Retirement Program for Salaried Employees (the "Salaried Plan" or the "Plan") was in violation of Title IV of ERISA or the due process clause of the Fifth

Amendment of the U.S. Constitution. Appellants ("Retirees") are participants of the Salaried Plan, of which Delphi Corporation ("Delphi") was the plan administrator and contributing sponsor. PBGC is the federal agency that guarantees pension benefits in qualified private-sector defined benefit pension plans and has been paying pension benefits to the Retirees for approximately 10 years.

Delphi was an automotive parts supplier that filed a voluntary petition under Chapter 11 of the Bankruptcy Code in 2005.[1] After struggling unsuccessfully for years to reorganize its business, Delphi's efforts to emerge as a reorganized company under Chapter 11 bankruptcy protection with its pension plans intact failed in the face of the 2008 economic crisis and recession. Ultimately, Delphi was forced to liquidate in bankruptcy, which would have left its pension plans, including the Salaried Plan, without a sponsor. Therefore, the Plan was terminated by agreement between PBGC and Delphi, the Plan administrator. Delphi's reorganization plan, which included termination of the Salaried Plan, was approved by the Bankruptcy Court over the Retirees' unsuccessful objections. The Retirees then filed this action in the United States District Court for the Eastern District of

[1] Voluntary Petition (Chapter 11), *In re Delphi Corporation, et al.*, No. 05-44481, ECF No. 1 (Bankr. S.D.N.Y. October 8, 2005) (such Chapter 11 proceedings, the "Delphi Bankruptcy" or the "Bankruptcy").

Michigan (the "District Court") against PBGC and certain U.S. Treasury Department parties (the "Treasury Defendants") challenging the propriety of the Salaried Plan termination and seeking unspecified equitable relief pursuant to 29 U.S.C. § 1303(f).[2] Subsequently, the District Court dismissed the Treasury Defendants which left the following remaining four counts against PBGC:

> Count 1 - PBGC failed to comply with ERISA's requirements regarding effectuation of plan terminations;[3]
>
> Count 2 - PBGC and Delphi as plan administrator failed to comply with ERISA's fiduciary requirements when they entered into an agreement terminating the Salaried Plan;[4]
>
> Count 3- PBGC's termination of the Salaried Plan violated the Due Process Clause of the Fifth Amendment;[5] and
>
> Count 4 - PBGC's termination of the Salaried Plan did not satisfy the standards set by ERISA and is unsupported by law and otherwise arbitrary and capricious.[6]

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[2] *See* Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment ("Plaintiffs' Moving Br.") at 159 (requesting that the District Court order additional briefing as to the remedy and relief to be afforded), RE 308, Page ID # 12554.

[3] Second Amended Complaint ¶¶ 39-41, RE 145, Page ID # 8078-79.

[4] *Id.* at ¶¶ 43-50, RE 145, Page ID # 8079-81.

[5] *Id.* at ¶¶ 52-53, RE 145, Page ID # 8082.

[6] *Id.* at ¶ 56, RE 145, Page ID # 8083.

Ultimately, after over seven years of discovery and the Retirees' and PBGC's submissions of their cross-motions for summary judgment, the District Court denied the Retirees' motion for summary judgment and granted PBGC's motion for summary judgment on all four counts.[7] Specifically, the District Court held that 29 U.S.C. § 1342(c) does not require court adjudication prior to termination of a pension plan and that PBGC acted in accordance with § 1342 when it executed the termination agreement. The District Court also held that PBGC owed no fiduciary duties to the Salaried Plan participants in connection with the termination. On Count 3, the District Court found that the termination of the Salaried Plan did not deprive the Retirees of due process and that the Retirees failed to meet their heavy burden of establishing that PBGC deprived them of due process. Finally, on Count 4, the District Court held that the Retirees failed to demonstrate that termination of the Salaried Plan was arbitrary and capricious. This appeal followed.[8]

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[7] Order Granting PBGC's Motion for Summary Judgment; Denying Plaintiffs' Sealed Motion for Summary Judgment; Denying Plaintiffs' Motion for Summary Judgment, RE 322, Page ID # 13725-13742.

[8] The Retirees appeal the District Court's decision on Counts 1, 3, and 4, but do not appeal the District Court's decision on Count 2. *See* Retirees' Principal Br. at 22, n.6.

BACKGROUND

I. PBGC

PBGC is the wholly owned United States government corporation created in 1974 to administer the pension insurance program established by Title IV of ERISA, 29 U.S.C. §§ 1301-1461. PBGC's termination insurance program protects the pensions of nearly 40 million workers.[9] PBGC has terminated over 5,000 plans and assumed responsibility for the benefits of nearly 1.5 million people.[10]

Whenever PBGC determines that a covered pension plan should or must be terminated, PBGC may apply to a district court for an order terminating the plan. But, PBGC and the plan administrator (usually the employer sponsoring the plan) may also voluntarily enter into an agreement terminating the plan without need of a court order.[11] The overwhelming majority of plan terminations have occurred by agreement with the plan administrator.[12]

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[9] *See Nachman Corp v. PBGC*, 446 U.S. 359, 361-62 & n.1 (1980) (describing the statutory scheme of ERISA).

[10] PBGC 2018 Annual Report, at 2, *available at*: https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2018.pdf. *See generally PBGC v. LTV Corp.*, 496 U.S. 633 (1990).

[11] 29 U.S.C. § 1342(c)(1).

[12] *See* Affidavit of Candace Campbell at ¶ 3, RE 23-3, Page ID # 450.

II. Delphi and its Pension Plans

Delphi was an automotive parts supplier and former subsidiary of General Motors Corporation ("GM") until its spin-off from GM in 1999. Delphi became the plan administrator and contributing sponsor within the meaning of 29 U.S.C. §§ 1002(16)(A), 1301(a)(1), and 1301(a)(13) of six pension plans: the Salaried Plan,[13] Delphi Hourly Rate Employees' Pension Plan (the "Hourly Plan"), and 4 other smaller pension plans. The Salaried Plan covers approximately 20,000 participants.[14]

III. Delphi's Bankruptcy Filing

On October 8, 2005, Delphi filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").[15] Upon filing the voluntary

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[13] AR 119-319, RE 61-62, Page ID # 1634-1834. "AR" refers to the administrative record of PBGC's determination to terminate the Salaried Plan, which has been filed with the District Court, Docket Nos. 52-91.

[14] AR 34, RE 52 (Sealed).

[15] Voluntary Petition (Chapter 11), *In re Delphi Corporation, et al.*, No. 05-44481, ECF No. 1 (Bankr. S.D.N.Y. October 8, 2005).

petition, Delphi ceased paying the legally required contributions to its pension plans, including the Salaried Plan.[16]

Delphi's first Plan of Reorganization (the "2008 POR"), as confirmed on January 25, 2008, provided that all six Delphi-sponsored plans, including the Salaried Plan, would be frozen[17] but would continue with the reorganized Delphi.[18] But, on April 2, 2008, Delphi's post-emergence investors declined to fund their investment agreement with Delphi, making it impossible for Delphi to reorganize under the 2008 POR and emerge from bankruptcy in 2008.[19]

IV. Termination of the Salaried Plan

As Delphi remained in bankruptcy, it suffered significant financial losses as auto sales collapsed in late 2008 and 2009.[20] In March 2009, Delphi reported that

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[16] Upon Delphi's bankruptcy filing in October of 2005, Delphi paid only a small fraction of the total required minimum funding contributions. In May of 2007, Delphi received funding waivers from the IRS, and as a result, ceased making any contributions to the Salaried Plan. AR 34, RE 52 (Sealed); AR 934, 1006-7, RE 75, Page ID # 2278, 2349-50. Delphi failed to satisfy all the requirements of those waivers, which then expired and became null and void on May 9, 2008.

[17] In a frozen plan, employees retain all benefits that they have earned prior to the "freeze date," but earn no additional benefits going forward.

[18] AR 934, 1006-8, RE 75, Page ID # 2278, 2349-51.

[19] AR 4091-95, RE 91, Page ID # 5434-38.

[20] *Id.*

it could not afford to continue the Salaried Plan and that there were only two possible outcomes for the Salaried Plan: assumption by GM or termination and trusteeship by PBGC.[21]

Delphi consistently stated throughout the spring of 2009 that of those two alternatives for the Salaried Plan – assumption by GM or termination by PBGC – Delphi strongly preferred GM assumption.[22] In fact, discovery in this case has shown that beginning as early as the fall of 2008, and continuing through the spring of 2009, Delphi repeatedly asked GM to assume the Salaried Plan.[23] While GM may have seemed receptive to the idea at some point, GM's response to each such entreaty from Delphi was a consistent and sometimes vigorous "No."[24] There is no evidence that GM ever agreed to assume the Salaried Plan; certainly GM never expressed its willingness to PBGC at any time before the termination of the Salaried Plan in July, 2009.[25]

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[21] AR 336, 710, RE 52 (Sealed).

[22] *See, e.g.*, Retirees' Principal Br. at 12.

[23] *Id.*

[24] *See, e.g.*, Confidential Testimony of John Sheehan on March 19, 2012, Declaration of John A. Menke in Support of PBGC's Motion for Summary Judgment ("Menke Decl."), Ex. 1, RE 304-3, Page ID # 11345.

[25] *See id.*

On April 17, 2009, PBGC staff forwarded a memorandum and supporting materials to PBGC's Trusteeship Working Group ("TWG"), recommending termination of the Salaried Plan as soon as practicable.[26] PBGC sought termination at the time because there was a significant risk that the lenders that were providing financing for Delphi's post-petition operations, the Debtor-in-Possession ("DIP") lenders, would foreclose upon and take direct ownership of the stock of Delphi's foreign affiliates, which Delphi had pledged as security for the DIP loan.[27] If the foreclosure had occurred, that stock would no longer have been owned, directly or indirectly, by Delphi. The foreign entities would then no longer be part of the Delphi controlled group and would cease to be liable to PBGC, thereby removing any value available for PBGC recoveries.[28]

On April 21, 2009, the TWG met to consider and voted to concur with the staff recommendation that PBGC terminate and become statutory trustee of the Salaried Plan, with a termination date as soon as practicable.[29] And that

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[26] AR 29-113, RE 52 (Sealed).

[27] AR 773, RE 68, Page ID # 2150.

[28] AR 36, RE 52 (Sealed).

[29] AR 22-24, RE 58, Page ID # 1622-24.

recommendation, with supporting materials, was transmitted to PBGC's Acting Director for review and deliberation.[30]

In addition to the possibility of an imminent controlled group breakup and the anticipated liquidation of Delphi in bankruptcy, information before the Acting Director showed that the unfunded benefit liabilities of the Salaried Plan were about $2.7 billion.[31] Further, by the time staff recommended termination of the Plan, Delphi had failed to pay over $165 million of required funding contributions to the Salaried Plan.[32] Based on those facts, the Acting Director determined that the Plan should be terminated.[33]

Delphi's DIP lenders, however, asked PBGC to forebear from initiating termination, because they feared that termination at that time would disrupt Delphi's ongoing bankruptcy reorganization efforts.[34] In exchange for PBGC's forbearance, the DIP lenders agreed to provide PBGC five days' written notice

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[30] AR 19-21, RE 57, Page ID # 1619-21.

[31] PBGC's unfunded benefit liability calculations for the Plan were based on information provided by the Plan's actuary. AR 34, RE 52 (Sealed).

[32] AR 34, RE 52 (Sealed).

[33] AR 21, RE 58, Page ID # 1621.

[34] AR 17-18, RE 56, Page ID # 1617-18.

prior to exercising their right of foreclosure.[35] The notice requirement effectively protected the integrity of Delphi's controlled group and gave PBGC five days to act if another break-up loomed in the future.[36]

V. The Retirees' Objection to Delphi's Plan of Reorganization

On June 1, 2009, Delphi filed modifications to its First Amended Plan of Reorganization (the "Modified Chapter 11 Plan"), pursuant to which Delphi intended to, and ultimately did, liquidate.[37] In short, the Modified Chapter 11 Plan contemplated that Delphi would sell its remaining U.S. domestic assets (known as the "keep sites") to GM and would sell its foreign assets to a new company formed as a joint venture between GM and a hedge fund, Platinum Equity, in two simultaneous sales under Section 363 of the Bankruptcy Code.[38] Then Delphi would liquidate what few, largely valueless, assets remained and dissolve its

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[35] *Id.*

[36] *Id.* For a discussion of controlled group liability, *see supra* Argument, section B.2.iii.

[37] First Amended Plan of Reorganization of Delphi Corporation and Certain Affiliates, Debtors and Debtors-In-Possession (As Modified), *In re Delphi Corporation, et al.*, No. 05-44481, ECF No. 17030 (Bankr. S.D.N.Y. June 1, 2009).

[38] *Id.*

corporate existence. The Modified Chapter 11 Plan assumed that the Salaried Plan would be terminated by PBGC.[39]

On July 15, 2009, the Retirees filed a 20-page objection to Delphi's Modified Chapter 11 Plan.[40] In that objection, the Retirees argued that termination of the Salaried Plan through agreement between PBGC and Delphi, as contemplated by the Modified Chapter 11 Plan, was improper and challenged the plan administrator's ability to agree to terminate the Salaried Plan due to alleged conflict of interest and fiduciary duty concerns.[41] Notably, the Retirees stated in the objection that 29 U.S.C. § 1342(c) permits PBGC and a plan administrator to enter into an agreement to terminate a pension plan "outside of a formal district court adjudication and adversarial process."[42] The Retirees' POR Objection also

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[39] *Id.*

[40] Plaintiff's Objection to Debtors' Proposed Modifications to Debtors' First Amended Plan of Reorganization (as Modified), *In re Delphi Corporation, et al.*, No. 05-44481, ECF No. 18277 (Bankr. S.D.N.Y. July 15, 2009), Menke Decl., Ex. 2, RE 304-4, Page ID # 11346-66 (hereinafter "Retirees' POR Objection"). The objection was withdrawn with respect to the Delphi Salaried Retirees Association, but it was still maintained by Charles Cunningham and Dennis Black. (No. 05-44481, ECF No. 18829 at 123.)

[41] *Id.*

[42] *Id.* at 16, RE 304-4, Page ID # 11362; *see also id.*, at 9, RE 304-4, Page ID # 11355 ("29 U.S.C. § 1342 contains a host of safeguards a plan administrator can invoke but also permits the plan administrator to negotiate and reach an agreement with the PBGC to completely bypass those protections.").

stated that "in the typical case, a plan sponsor's decision to terminate a plan is a 'settlor function,' and, as such, is unconstrained by any fiduciary duties the plan sponsor may owe in its role as plan administrator,"[43] but alleged that a fiduciary duty nonetheless applies to a plan administrator's decision to terminate a pension plan by agreement with PBGC.[44]

Also on July 15, 2009, J.P. Morgan, as agent for the DIP lenders, issued written notice to PBGC, in accordance with the previously described forbearance agreement, of the DIP lenders' intent to exercise their remedy of foreclosure; accordingly, the notice period expired on July 22, 2009.[45]

VI. Proceedings to Terminate the Salaried Plan

On July 21, 2009, PBGC again 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 required under section 412 of the Internal Revenue Code ("IRC"); that the Salaried Plan would be unable to pay benefits when due; that the possible long-run loss of the PBGC with respect to the Salaried Plan could reasonably be expected to increase unreasonably if the Salaried Plan is not terminated; and that in accordance with § 1342(c), the Salaried Plan had to be terminated and PBGC appointed

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[43] *Id.* at 8, RE 304-4, Page ID # 11354.

[44] *Id.* at 9-10, RE 304-4, Page ID # 11355-6.

[45] AR 12-16, RE 55, Page ID # 1612-16.

statutory trustee to avoid an unreasonable increase in the liability of the PBGC insurance fund. PBGC also determined that the Salaried Plan's termination date should be as soon as practicable, but in no event later than July 22, 2009. And on July 22, 2009, pursuant to 29 U.S.C. § 1342(c), PBGC issued a Notice of Determination to Delphi, as plan administrator of the Plan, notifying Delphi of the determinations described above. On that date, PBGC notified Plan participants of its decision by publication in the Detroit Free Press, the Detroit News, and USA Today, as well as by posting notice on its website.[46]

VII. Delphi Plan or Reorganization Confirmation Hearing

The Retirees' counsel appeared at the Modified Chapter 11 Plan Confirmation hearing on July 29, 2009, and presented oral argument before the Bankruptcy Court in support of its July 15 Objection.[47] On July 30, 2009, the Bankruptcy Court confirmed Delphi's Modified Chapter 11 Plan over the

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[46] *See Detroit Free Press*, July 22, 2009, at 4A; *The Detroit News*, July 22, 2009, at 5A; *USA Today*, July 22, 2009, at 6A; PBGC To Assume Delphi Pension Plans, *available at*: http://www.pbgc.gov/news/press/releases/pr09-48.html.

[47] *See* Proposed Agenda for Plan Modification Hearing, *In re Delphi Corporation, et al.*, No. 05-44481, ECF No. 18668 (Bankr. S.D.N.Y. July 30, 2009), Menke Decl., Ex. 3, RE 304-5, Page ID # 11367-427 (the "Confirmation Hearing Agenda"); *see also* Confirmation Order, *In re Delphi Corporation, et al.*, No. 05-44481, ECF No. 18707 (Bankr. S.D.N.Y. July 30, 2009), Menke Decl., Ex. 4, RE 304-6, Page ID # 11428-609 (hereinafter the "Confirmation Order").

numerous objections by various parties, including the Retirees.[48] The Bankruptcy Court rejected the Retirees' POR Objections, stating that

> clear grounds exist under Section 4042 of ERISA, 29 U.S.C. § 1342, for the PBGC to initiate involuntary terminations of the Pension Plans, for the Debtors to enter into termination and trusteeship agreements with the PBGC, and that the PBGC has determined to seek involuntary terminations to reduce the PBGC's risk of loss of recovery relating to own exposure under the Pension Plans.[49]

The Bankruptcy Court also approved Delphi's request that it be authorized to enter into termination and trusteeship agreements for all six of its terminating pension plans, including the Salaried Plan, and ruled that the PBGC and the plan administrator may agree to termination of a plan without an adjudication.[50]

On August 10, 2009, PBGC and Delphi executed a termination and trusteeship agreement, terminating the Salaried Plan effective July 31, 2009 (the "Termination Agreement").[51] On September 19, 2009, the Retirees filed this

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[48] *See* Confirmation Order, RE 304-6, Page ID # 11428-609.

[49] *Id.* at 37-38, RE 304-6, Page ID # 11566-67.

[50] *Id.*

[51] *See* Termination Agreement, Menke Decl., Ex. 5, RE 304-7, Page ID # 11610-13. Delphi also entered into termination agreements with PBGC for each of Delphi's five other pension plans.

lawsuit against PBGC challenging the propriety of the Salaried Plan termination through agreement.[52]

STANDARD OF REVIEW

This Court reviews a district court's decision on a motion for summary judgment de novo.[53] Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[54] A fact is material if it "might affect the outcome of the suit under the governing law." And, "if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted."[55] Additionally, where, as in this case, "the parties filed cross-motions for summary judgment, 'the court must evaluate each party's motion on its own merits, taking care in each instance to

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[52] Complaint, RE 1, Page ID # 1-14. The Retirees filed their Second Amended Complaint on August 26, 2010 (the "Second Amended Complaint"), RE 145, Page ID # 8065-88.

[53] *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 425 (6th Cir. 2019) (citing *McKay v. Federspiel*, 823 F.3d 862, 866 (6th Cir. 2016)).

[54] Fed. R. Civ. P. 56(a).

[55] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242-49, 290 (1986) (internal citations omitted).

draw all reasonable inferences against the party whose motion is under consideration.'"[56]

SUMMARY OF THE ARGUMENT

The District Court, finding that the Retirees' attacks on PBGC's termination of the Salaried Plan have no basis in either law or fact, correctly granted PBGC's motion for summary judgment and denied the Retirees' motion for summary judgment.

When Delphi was forced to liquidate in bankruptcy, no other entity agreed to assume sponsorship of the Delphi pension plans – neither General Motors nor the DIP lenders that purchased Delphi's foreign assets. This left PBGC and Delphi with no alternative but to terminate the severely-underfunded Delphi pension plans, including the Salaried Plan.

Congress's carefully-crafted scheme for retirement security worked exactly as intended when a company with an underfunded pension plan goes out of business – PBGC became the statutory trustee of the Salaried Plan and stepped in to ensure that the participants and their beneficiaries would continue to receive their guaranteed benefits without interruption. After unsuccessfully objecting to Delphi's plan of reorganization – a reorganization that included termination of the

[56] *Bevan & Assocs., LPA, Inc. v. Yost*, 929 F.3d 366, 373 (6th Cir. 2019) (citing *McKay*, 823 F.3d at 866 (6th Cir. 2016); and *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991)).

Salaried Plan – the Retirees filed this action alleging that PBGC's termination of the Plan by agreement was improper. As the District Court correctly found, the Retirees' claims have no merit and they are not entitled to any equitable relief.

Contrary to the Retirees' allegations, the termination of the Salaried Plan through agreement with the plan administrator is fully consistent with the express language of ERISA and well-established precedent. First, ERISA expressly authorizes, as the Retirees conceded before the Bankruptcy Court, that a pension plan may be terminated by agreement between PBGC and a plan administrator without a court decree. Second, Plan termination by agreement does not violate due process. The Retirees do not have a protected property interest in the full amount of their vested benefits upon termination of their underfunded pension plan. Even if they did, PBGC did not deprive the Retirees of such property interest. That property interest was lost as a result of the collapse of Delphi's business in the 2008-09 recession and Delphi's resulting liquidation. Finally, there is no genuine issue of material fact that the criteria under 29 U.S.C. §1342(a) and (c) were met. PBGC's determination that the Plan must be terminated is fully supported by the Administrative Record and is not arbitrary or capricious. Accordingly, this Court should deny the Retirees' appeal and affirm both the District Court's grant of summary judgment to PBGC and denial of Retirees' motion summary judgment on all claims.

ARGUMENT

I. The District Court Correctly Found that 29 U.S.C. § 1342(c) does not Require Court Adjudication Prior to Termination of a Pension Plan.

a. 29 U.S.C. § 1342(c) does not require a court decree to terminate a pension plan and expressly permits termination by agreement between PBGC and a plan administrator.

29 U.S.C. § 1342(c) provides, in pertinent part, that:

> [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 . . . . Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle [. . . .] *If [PBGC] 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) 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).* (emphasis added)

Despite the clear language of 29 U.S.C. § 1342(c), the Retirees argue that the statutory text "mandates a judicial decree" for PBGC-initiated pension plan terminations.[57] There is no such requirement. Nothing in 29 U.S.C. § 1342(c) mandates a court decree as the only way to proceed with pension plan termination. Rather, it describes a two-alternative structure depending upon whether the plan

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[57] Retirees' Principal Br. at 29.

administrator opposes the termination. The statute only says that PBGC "*may* apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated."[58] And, "may" is defined as expressing permission, not obligation.[59] Thus, 29 U.S.C. § 1342(c) permits, but does not require, PBGC to seek a court decree.

The fourth sentence of 29 U.S.C. § 1342(c) further explicitly states that "[i]f [PBGC] 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 certain powers including the power to terminate the pension plan.[60] In other words, the express language of the statute provides that if, as in this case, there is a Termination Agreement between the plan administrator and PBGC, none of the other requirements under § 1342(c), *i.e.* those in the three preceding sentences, are applicable.

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[58] 29 U.S.C. § 1342(c) (emphasis added).

[59] Bryan Garner, *Garner's Dictionary of Legal Usage* at 568 (3d ed. 2011) and *Black's Law Dictionary* at 1127 (10th ed. 2014).

[60] PBGC notes that much of the Retirees' argument is about the District Court's insertion of "[however]." Such insertion is irrelevant. It is clear from the District Court's decision that the addition of "however" was purely for demonstrative purposes and that with or without such insertion, § 1342 provides for a two-alternative structure.

Despite this clear statutory language, the Retirees persist in arguing that the fourth sentence in § 1342(c) somehow provides that, while PBGC and a plan administrator can agree (1) that a pension plan should be terminated, (2) that a trustee should be appointed, and (3) that the trustee shall have the power to terminate the plan, such an agreement does not allow the appointed trustee to terminate the plan without a court order.[61] Rather, the Retirees argue that the sole meaning of the fourth sentence of § 1342(c)(1) is to authorize appointment of a trustee by agreement.[62]

As an initial matter, that argument 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"[63] – in two distinct ways. First, § 1342(b)(3) authorizes appointment of a trustee by agreement between PBGC and the plan administrator, if necessary to oversee the plan during termination proceedings.[64] Therefore, the fourth

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[61] Retirees' Principal Br. at 29-35.

[62] *Id.*

[63] *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).

[64] 29 U.S.C. § 1342(b) provides –

sentence of § 1342(c)(1) would be rendered superfluous and redundant if its sole meaning were to authorize appointment of a trustee by agreement, as the Retirees posit. Indeed, the Retirees concede that under their interpretation, the fourth sentence in § 1342(c)(1) would exactly mimic the provisions in § 1342(b)(3).[65] Moreover, the Retirees' interpretation of the fourth sentence of § 1342(c)(1) would render the words "agree that a plan should be terminated" doubly superfluous, because – under the Retirees' interpretation – the sentence would mean the same thing whether or not those words are included.[66]

> 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 . . . .

[65] Retirees' Principal Br. at 31-32.

[66] The fourth sentence of § 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).

In addition, even if, as the Retirees seem to suggest (contrary to the plain meaning of the text), the fourth sentence of § 1342(c) deals solely with the powers of the trustee, those powers include the power to terminate the plan. As stated in the third sentence of § 1342(c), the court in its decree appoints a trustee "to terminate the plan in accordance with the provisions of this subtitle." Subsection 1342(d)(1) sets out the powers given to the trustee "to terminate the plan." Under the fourth sentence of § 1342(c), when PBGC and a plan administrator enter into a termination and trusteeship agreement, the trustee appointed under such agreement is granted the exact same § 1342(d)(1) powers to terminate the plan as a trustee appointed by a court. Thus, the fourth sentence of § 1342(c) plainly authorizes plan termination by agreement, even if, *assuming arguendo*, its focus is on the powers of the trustee.

Thus, the clear language of 29 U.S.C. § 1342(c) does not require PBGC to seek a court decree to terminate a pension plan, but rather provides a two-alternative structure where PBGC may (1) enter into an agreement with the plan administrator to terminate a pension plan, if the plan administrator agrees, or (2) pursue a court decree to effectuate termination of the plan if the plan administrator does not agree.

b. Courts have consistently interpreted 29 U.S.C. § 1342(c) to provide for termination by agreement.

The two-alternative structure of the termination process set out in § 1342(c)

has been fully understood and accepted by the courts that have been called upon to review plan terminations. The D.C. Circuit expressly confirmed that PBGC has two options under § 1342(c) – either "district court enforcement or voluntary settlement."[67] In addition, the Eleventh Circuit has affirmed a district court decision dismissing a challenge to a voluntary settlement of plan termination without a court order approving the termination.[68] Moreover, the Eighth Circuit affirmed a district court decision setting the date of plan termination following an agreement between PBGC and a plan administrator that the plan should be terminated.[69]

The Second Circuit explained in *In re Jones & Laughlin Hourly Pension Plan:*

> [t]he fourth sentence of subsection 1342(c) provides that where . . . PBGC and the plan administrator agree to terminate a plan, PBGC need not comply with the other requirements of "this subsection." These requirements include a court adjudication. *See* 29 U.S.C. § 1342(c) (first sentence). Congress, therefore, expressly dispensed with the necessity of a court adjudication in

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[67] *Allied Pilots Ass'n v. PBGC*, 334 F.3d 93, 97-98 (D.C. Cir. 2003).

[68] *PBGC v. Durango Georgia Paper Co.*, 251 F. App'x. 664 (11th Cir. 2007) (affirming dismissal of complaint seeking adjudication of plan termination and setting of termination date after parties agreed upon termination and termination date, over objection of third party who challenged termination date selected by the parties).

[69] *See Pension Comm. for Farmstead Foods Pension Plan for Albert Lea Hourly Employees v. PBGC*, 991 F.2d 1415 (8th Cir. 1993).

these cases.[70]

The Retirees attempt to dismiss *Jones & Laughlin* by inaccurately characterizing the decision in *In re UAL Corp.* as being "in tension" with the Second Circuit's *Jones & Laughlin* decision. That is simply not the case. The issue addressed by the court in *In re UAL Corp.* was not whether plans may be terminated by agreement, but rather the appropriate standard of review in a case where the plan administrator does not agree to termination and PBGC seeks a court order to terminate a plan.[71] In contrast, the interpretation of § 1342(c) was a key issue in the decision in *Jones & Laughlin*. The Second Circuit Court specifically held:

> [h]aving concluded that no pre-termination court adjudication is required when PBGC and the plan administrator agree to terminate, we reject the Union's claimed statutory right to pre-termination notice; and
>
> We conclude that notice and a court adjudication prior to the termination of the plans are not required . . . .[72]

The Retirees also assert that *Jones & Laughlin* is outdated because it pre-dates the Supreme Court's decision in *United States v. Mead Corp*[73] without offering any explanation as to why *Mead* should affect the viability of *Jones & Laughlin*. To

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[70] 824 F.2d 197, 200-02 (2d. Cir. 1987).

[71] *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006).

[72] 824 F.2d at 200-02.

[73] 533 U.S. 218 (2001).

the contrary, in *Beck v. Pace*, decided 6 years after *Mead*, the Supreme Court clearly stated that PBGC is entitled to deference when interpreting ERISA.[74]

In addition, the Third Circuit, also citing 29 U.S.C. § 1342(c), stated in *In re Syntex Fabrics, Inc. Pension Plan*, "[d]espite the so-called involuntary nature of a § 1342 proceeding, PBGC and the plan administrator can still agree to terminate the plan and appoint a trustee without resort to the court."[75] Notably, the Retirees agreed with and adopted this same plain reading of § 1342(c) in their pleadings in the proceedings before the Bankruptcy Court in July 2009.[76] Further, PBGC has consistently interpreted that language the same way for more than 40 years and has

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[74] 551 U.S. 96, 104 (2007).

[75] 698 F.2d 199, 301 (3d Cir. 1983). *See also Moore v. PBGC*, 566 F. Supp. 534, 536 (E.D. Penn. 1983) (holding that the district court could not set aside an agreement between PBGC and the plan administrator to terminate a pension plan because district court was bound by the Third Circuit's interpretation of § 1342(c) as authorizing termination by agreement); *PBGC v. Heppenstall Co.*, 633 F.2d 293, 301 (3d Cir. 1980) ("Congress determined that in the absence of agreement between PBGC and a plan administrator the court would protect participants from overly cautious use of the involuntary termination feature of the insurance scheme.").

[76] *See* POR Objection at 4, RE 304-4, Page ID # 11350 ("[Procedures involving a hearing in a federal district court] can be bypassed in the event of an agreement between the Plan Administrator (i.e. Delphi's Excom) and the PBGC […]"); *see also id.* at 16, RE 304-4, Page ID # 11362 ("[t]he PBGC can utilize so-called 'summary termination' procedures *only if* the PBGC and the plan administrator agree between themselves to terminate the plan, and only if they agree on the appointment of a trustee […]").

terminated hundreds of plans by reaching an agreement with the plan administrator, and PBGC's interpretation is entitled to deference by the Court.[77] Thus, the District Court was correct in finding, consistent with the interpretation by the U.S. Circuit Courts that have addressed the issue, that agreement between PBGC and a plan administrator is one of two alternatives for a PBGC-initiated plan termination.

c. Nothing in the plain language, the statutory structure, or the purpose of Title IV of ERISA supports the Retirees' flawed interpretation.

Despite the clear statutory language and consistent interpretation by the U.S. Circuit Courts that have addressed the issue, the Retirees assert that a pension plan may only be terminated under § 1342 with a court decree. The Retirees, however, do not – and cannot – cite any statutory language stating that a court decree is required for a termination under § 1342. No provision in Title IV of ERISA mandates a court decree for termination under § 1342. Unable to point to any such statutory language or relevant case law, the Retirees unpersuasively attempt to argue that Congress somehow created a requirement for a court decree where none

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[77] *See Beck v. Pace*, 551 U.S. at 104 (stating that the Supreme Court traditionally defers to PBGC when interpreting ERISA, to do otherwise would be "to embark upon a voyage without a compass") (quoting with approval *Mead Corp. v. Tilley*, 490 U.S. 714, 722 (1989)).

exists. But as the Supreme Court has emphasized, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[78]

The Retirees also assert that the termination of the Salaried Plan by agreement was invalid because PBGC purportedly can only terminate small plans by agreement.[79] The Retirees come to this odd conclusion relying not on any language in § 1342(c), but rather on the following language in 29 U.S.C. § 1342(a):

> The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c)).

This sentence in § 1342(a) simply does not provide what the Retirees say it does – it does not say that PBGC can terminate only small plans by agreement. To the contrary, it suggests the opposite – if PBGC were ever to exercise its discretion to create a "simplified procedure" for small plans, that procedure must include the requirement for a court decree under § 1342(c) if the plan administrator does not agree with PBGC on termination and trusteeship of the pension plan. Further, the

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[78] *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted).

[79] Retirees' Principal Br. at 34-35.

sentence that the Retirees rely upon in § 1342(a) does not prescribe any particular way to terminate either large or small plans. It simply gives PBGC discretion to develop a simplified way to terminate small plans if the agency chooses to do so. And to date, in the 45 years since ERISA was enacted, PBGC has not exercised the discretion given to it by that provision of the statute. Rather, PBGC has chosen to terminate all plans that have gone through the same § 1342 process in the manner prescribed by that section: PBGC first makes the determination required by § 1342(a); then, after giving appropriate notice of its determination, PBGC exercises one of the two alternatives: (1) entering into a termination agreement with the plan administrator, or (2) pursuing a court decree. In the case of the Delphi Salaried Plan, PBGC followed its normal procedures, resulting in termination of the plan through an agreement between Delphi and PBGC, as expressly permitted by 29 U.S.C. § 1342(c).

The Retirees also assert that the statutory structure and purpose of Title IV supports their argument that § 1342 mandates a court decree for plan termination. Retirees describe the statutory structure of § 1342 as follows:

> The section *allows for* the PBGC to institute termination proceedings (subsection (a)); *permit*s the PBGC to petition a district court for, or agree with a plan administrator on, the appointment of a trustee to administer the plan during termination proceedings (subsection (b)); *authorizes* the PBGC to seek a decree of termination from a district court, which can enter the decree only in three circumstances outlined in the section (subsection (c)); and authorizes the decreeing court to order implementation of the termination by an already- appointed trustee, by a trustee it then appoints, or

> by a trustee on whom the PBGC and the plan administrator then agree (subsections (c) and (d)).[80]

Notably, the Retirees' own description of the statutory structure shows that the plain language of the statute simply expresses a grant of permission to PBGC but does not impose an obligation. As discussed in detail above, nothing provides that a court decree is required for termination under § 1342.

In fact, the statutory structure of Title IV further reflects the two-alternative structure for termination procedures. The language of § 1348 establishes different procedures for setting a termination date based on which path is taken: (1) for cases with a termination and trusteeship agreement, the termination date is the agreed-upon date, and (2) for cases where there is no termination and trusteeship agreement, the termination date is set by the court. This also is paralleled by the language in § 1342(b), where a trustee can be appointed by (1) a court decree, or (2) an agreement between PBGC and a plan administrator. Therefore, nothing in the statutory structure of Title IV supports the Retirees' interpretation that a pension plan may only be terminated under § 1342 with a court decree.[81]

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[80] Retirees' Principal Br. at 29 (emphasis added).

[81] The Retirees also argue that the heading of § 1342, "INSTITUTION OF TERMINATION PROCEEDINGS BY THE CORPORATION" somehow supports its argument that a pension plan termination under § 1342 without a court decree is impermissible. Nothing in that heading nor the plain language of the statute that follows mandates a court decree to terminate a plan instead of administrative

Finally, the Retirees argue that termination by agreement is inconsistent with the statutory goals of ERISA, asserting that ERISA's objectives are "first and foremost, to protect participants and beneficiaries, especially from the loss of anticipated, earned benefits" and PBGC somehow violated that objective.[82] First, far from the Retirees' assertions, PBGC clearly furthered its statutory objective to protect the participants and beneficiaries from the loss of benefits. As discussed in detail below, when Delphi was liquidating through sales in bankruptcy and buyers refused to assume any of the plan sponsor's liabilities, PBGC performed its statutory duty and terminated the soon-to-be-abandoned pension plans sponsored by Delphi. PBGC did what it was supposed to do under the Title IV objectives – it paid participants benefits that Delphi promised but was unable to pay up to the guaranteed amount, an amount that far exceeds the amount that could be paid from the Salaried Plan's assets. This was in furtherance of one of the stated objectives under § 1302(a) – to ensure the timely and uninterrupted payment of pension benefits. Moreover, as also discussed in detail below, termination of the Salaried

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proceedings or a settlement after initiating judicial proceedings. And, even if the heading referred to *judicial* proceedings, a heading cannot substitute for the operative text of the statute, as the Supreme Court and this Court have repeatedly stated. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (citing *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)); *United States ex rel. Wall v. Circle C Constr., LLC*, 868 F.3d 466, 469 (6th Cir. 2017).

[82] Retirees' Principal Br. at 35.

Plan was necessary to avoid unreasonable increase in the liability of PBGC's funds. Therefore, termination of the Salaried Plan also furthered the Title IV objectives as PBGC limited its liabilities in order to mitigate negative impacts on both premium rates and PBGC's ability to pay benefits to all participants and beneficiaries of plans covered by PBGC. Accordingly, the Retirees' assertion is unsupported by the plain language, structure, or purpose of Title IV of ERISA and the District Court correctly found that 29 U.S.C. § 1342(c) does not require a court decree prior to termination of a pension plan.

II. The District Court Correctly Found that Termination of the Salaried Plan did not Deprive the Retirees of Due Process.

The Retirees argue that termination of the Salaried Plan by agreement under ERISA was a violation of the Due Process clause of the Fifth Amendment, because purportedly (1) they had a significant property interest in their unfunded pension benefits, and (2) the government must always provide at least some form of hearing before depriving someone of such a property interest.[83] The Supreme Court has stated that "[a] party challenging governmental action as an unconstitutional taking bears a substantial burden."[84] A claim of violation of due

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[83] *See* Retirees' Principal Br. at 37-38.

[84] *See Eastern Enters. v. Apfel*, 524 U.S. 498, 523 (1998).

process requires: (1) a protected property interest, and (2) deprivation of such protected property interest without adequate procedural safeguards.[85]

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

The Supreme Court held that "[to] have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[86] Here, the plan document that governs the Retirees' rights to benefits clearly establishes that the Retirees do not have such an entitlement with respect to benefits lost as a result of Delphi's demise.

The Salaried Plan document provides that upon termination of the Plan, 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."[87] Thus, there can be no mistaking that Delphi expressly reserved the right to reduce the amount of benefits if the Plan terminated without assets sufficient to pay the full amount of

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[85] *Jones & Laughlin*, 824 F.2d at 201 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542-43(1985); *see Puckett v. Lexington-Fayette Urban Cnty. Gov't*, 833 F.3d 590, 604–05 (6th Cir. 2016).

[86] *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

[87] Delphi Retirement Program for Salaried Employees at 12, Menke Decl., Ex. 9, RE 304-11, Page ID # 11638 (emphasis added).

vested benefits.[88] The Retirees' 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 going into the Plan. Accordingly, the Retirees do not have a property interest in the full amount of their vested benefits, but only the portion of that benefit that was covered by the available, but insufficient, assets in the Plan.[89] Accordingly, this Court should affirm the District Court's ruling that there was no unconstitutional taking.[90]

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[88] *See Id.* at 118-22, Menke Decl., Ex. 9, RE 304-11, Page ID # 11634-39.

[89] *See Jones & Laughlin*, 824 F.2d at 201 (plan participants' "reasonable expectancy affected by the termination, moreover, must to some extent reflect the possibility of termination").

[90] The Retirees argue, citing *Duncan v. Muzyn,* 833 F.3d 567, 583-84 (6th Cir. 2016), that *Duncan* stands for the proposition that plan participants always have a property interest in vested benefits. *See* Retirees' Principal Br. at 38, n.9. The *Duncan* court made no such holding. Rather, the *Duncan* court considered whether or not the plan sponsor had reserved the right to reduce benefits as the deciding factor in evaluating the existence of a property interest, and it found no unconstitutional taking where the pension plan sponsor was not clearly precluded from reducing certain benefits. 833 F.3d at 583-84. Here, the language of the Salaried Plan clearly indicates that even vested benefits can be reduced when the plan is underfunded. Thus, the Retirees did not have a clear entitlement to benefits that exceeded the Salaried Plan's funding.

b. Rather than depriving the Retirees of a property interest, PBGC's termination of the plan has added over $1.5 billion to the assets available to pay plan benefits.

Under ERISA, PBGC pays participants a benefit amount that is the greater of (1) guaranteed benefits under ERISA, and (2) the benefits funded by the plan's assets.[91] On top of those payments, participants receive an additional benefit amount from their share of PBGC's recoveries in connection with the terminated plan.[92] Thus, when a plan terminates without sufficient assets to pay guaranteed benefits, the amount of benefits the participants receive from PBGC in the aggregate exceeds the benefit amounts that can be paid by plan assets. Here, PBGC expects to expend at least $1.5 billion of the agency's own funds to pay the unfunded guaranteed benefits to the Retirees and other participants. Accordingly, not only has PBGC taken nothing from the Retirees, PBGC has committed to paying the Retirees in the aggregate more than the amounts that would be payable from the assets left in the Salaried Plan.

c. Assuming *arguendo* that the Retirees had a protected property interest, it was the failure of Delphi, not PBGC, that deprived the Retirees of that interest.

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[91] *See* 29 U.S.C. § 1322.

[92] 29 U.S.C. § 1322(c).

Assuming *arguendo* that the Retirees had a protected property interest in the promise from Delphi to pay them unfunded pension benefits, PBGC did not deprive the Retirees of their alleged property interest. Rather, it was Delphi that promised benefits to its employees beyond what it 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 had promised its employees.

One of the primary reasons that PBGC was created was to protect pension plan participants when a liquidating plan sponsor will never be able to pay unfunded benefits. 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. Here, upon the occurrence of an insurable event, PBGC far from taking any property interest from the Retirees, stepped in 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 could be payable from the Salaried Plan's assets.

d. Even assuming *arguendo* that PBGC deprived the Retirees 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 the Retirees do not have a protected property interest in the additional benefits that they are seeking in this case, this Court should find that due process

requirements do not apply. If the Court, nevertheless, wishes to evaluate whether due process requires additional procedural safeguards, this Court should 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.

i. The agreement to terminate the Salaried Plan was not a final deprivation of pension benefits.

In their brief, the Retirees cite numerous cases from this Circuit indicating that a hearing is necessary before a *final* deprivation of benefits.[93] And they insist that the termination of the Salaried Plan was constitutionally deficient, because they had no meaningful opportunity to voice their objections prior to the plan termination.[94] But, to the extent PBGC reduced any plan participant's benefits as a result of the plan termination, PBGC's regulations afford each an opportunity to challenge that determination.[95] Moreover, ERISA allows plan participants to bring actions in federal court seeking appropriate equitable relief when they are

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[93] *See* Retirees' Principal Br. at 37-40 (citing *Hicks v. Comm'r of Soc. Sec.*, 909 F.3d 786 (6th Cir. 2018).

[94] *Id.*

[95] *See* 29 C.F.R. § 4003.1(a)(8) (indicating that PBGC's administrative review process applies to post-termination benefits determinations under 29 U.S.C. § 4022).

adversely affected by PBGC's actions.[96] Thus, even assuming that the termination resulted in some deprivation of property, the termination of the Salaried Plan was not a "final" deprivation without any further review. In fact, the Retirees exercised their right to be heard post-termination by filing this case.[97]

ii. Under the Supreme Court's *Mathews* decision, a pre-termination hearing was not required.

The Supreme Court has long held that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[98] Under the Supreme Court's *Mathews* test, the appropriate level of due process is determined by evaluating three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[99]

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[96] 29 U.S.C. § 1303(f).

[97] PBGC's records indicate that 211 Salaried Plan participants have filed appeals of their benefits determinations.

[98] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

[99] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (citations omitted); *see Gunasekera v. Irvin*, 551 F.3d 461, 470 (6th Cir. 2009); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 639 (6th Cir. 2005); *Molnar v. Care House*, 574 F. Supp. 2d 772, 797 (E.D. Mich. 2008).

Applying the *Mathews* test, the Second Circuit explicitly held in *Jones & Laughlin* that PBGC's agreement with a plan administrator to terminate a pension plan, executed without prior notice or hearing did not violate participants' due process rights.[100]

The *Jones & Laughlin* court found that the affected interest, the first prong of the *Mathews* test, was not compelling because benefits may not be reduced below the limit of ERISA's guarantee under 29 U.S.C. § 1322.[101] This is particularly true here, where the Retirees do not lose anything as a result of the government's role in this case, but instead gain from PBGC's infusion of approximately $1.5 billion to cover the difference between the benefits that Delphi funded and the amount that PBGC guarantees.

Under the second prong of the *Mathews* test, the *Jones & Laughlin* court found that Title IV of ERISA contains "ample post-deprivation remedies" for participants – aggrieved parties may sue PBGC under 29 U.S.C. § 1303(f), and PBGC can restore the plan if labor negotiations obviate the need to terminate it.[102]

Finally, the *Jones & Laughlin* court found that the third prong of the

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[100] *Jones & Laughlin*, 824 F.2d at 201-02.

[101] *Id.*

[102] *Id.*

Mathews test – the government's countervailing interest – "sharply tips the balance" in PBGC's favor.[103] The court noted, "[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."[104]

The *Jones & Laughlin* result is entirely applicable here. PBGC's payment of benefits to the Retirees, made in accordance with ERISA and PBGC regulations,[105] if it is a deprivation at all, is not a deprivation that requires PBGC to provide pre-deprivation due process rights. The risk that PBGC's termination decision was erroneous was low, since even Retirees' counsel stated on the record, in open court, prior to the termination, "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."[106] Moreover,

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[103] *Id.*

[104] *Id.*; *see also 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.")

[105] 29 U.S.C. § 1322(a), (b); 29 C.F.R. §§ 4022.61-4022.63 (2009).

[106] Bankruptcy Confirmation Hearing Transcript 205:23-25, *In re Delphi Corporation, et al.*, No. 05-44481, RE 18829 (Bankr. S.D.N.Y. Aug. 29, 2009), Supplemental Menke Decl., Ex. 10, RE 319-2, Page ID # 13649.

since the Salaried Plan has over 15,000 participants,[107] the pre-termination proceedings that the Retirees desire similarly would delay PBGC administration of the Salaried Plan – possibly for years – while the risks of plan abandonment, increasing benefit liabilities, and interruption of benefits to participants would continue to mount. These dangers were particularly relevant as Delphi liquidated and did not have any infrastructure to administer the Salaried Plan.[108] Therefore, neither advance notice nor a hearing was required before PBGC and the plan administrator agreed upon plan termination.[109]

iii. The need for quick action along with the Retirees' right to challenge PBGC's action in this case, pursuant to 29 U.S.C. § 1303(f), satisfies the requirements of procedural due process.

The Retirees argue, notwithstanding the *Mathews* test, that a pre-termination hearing is always required when a taking occurs pursuant to an established

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[107] Second Amended Complaint ¶ 16, RE 145, Page ID # 8069.

[108] *Jones & Laughlin*, 824 F.2d at 202.

[109] PBGC notes that the Retirees assert that they were deprived their due process because there was no court decree under § 1342(c). PBGC also notes, however, that § 1342 is not a judicial proceeding for participants but for plan administrators who oppose plan termination. In fact, PBGC is not required to even provide notice to anyone other than the plan administrator. 29 U.S.C. § 1342 (c)(1) (requiring notice to plan administrator only). And here, Delphi made the decision to terminate the Salaried Plan in conjunction with liquidating in bankruptcy.

government procedure, as opposed to a random or unauthorized action.[110]

However, the Supreme Court has stated that

> the necessity of quick action . . . or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the . . . action at some time after the initial taking, can satisfy the requirements of procedural due process.[111]

Even where the government is acting pursuant to established procedures, a post-deprivation hearing can be adequate process where quick action is needed.[112]

Here, in light of the imminent risk to the Salaried Plan, PBGC could not wait until the end of a lengthy lawsuit like this one before terminating the pension plan. It is undisputed that PBGC collected $660 million in Delphi's bankruptcy because of the liens that PBGC could have enforced following the termination of Delphi's pension plans. If PBGC had waited, the property to which those liens would have attached would have long since been sold free and clear of liens.[113] And, PBGC

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[110] Retirees' Principal Br. at 40-41.

[111] *Parratt v. Taylor*, 451 U.S. 527, 539 (1981) (overruled to the extent that it held mere negligence could give rise to a taking by *Daniels v. Williams*, 474 U.S. 327, 329 (1986)).

[112] *Harris v. City of Akron*, 20 F.3d 1396, 1401 (6th Cir. 1994) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982)); *DiLuzio v. Vill. of Yorkville, Ohio*, 796 F.3d 604, 614 (6th Cir. 2015).

[113] *In re Delphi Corp.*, No. 05-44481(RDD), 2009 WL 2482146, at *22-25 (Bankr. S.D.N.Y. July 30, 2009).

would have lost $660 million. Similarly, if PBGC had not recovered that amount, then the participants would have lost any recovery percentage payable under 29 U.S.C. § 1322(c). Moreover, the Retirees exercised their right to seek meaningful review of the plan termination by filing this lawsuit pursuant to 29 U.S.C. § 1303(f).

III. The District Court Correctly Ruled that PBGC's Termination Decision was in Compliance with 29 U.S.C. § 1342 and, thus, was Neither Arbitrary nor Capricious.

a. PBGC's decision to initiate termination of the Salaried Plan was neither arbitrary nor capricious, because three of the four criteria under 29 U.S.C. § 1342(a) were met.

Under 29 U.S.C. § 1342(a), PBGC is authorized to institute pension plan termination proceedings whenever it determines that

> (1) the plan has not met the minimum funding standard . . . ;
> (2) the plan will be unable to pay benefits when due;
> (3) the reportable event described in [29 U.S.C. § 1343(c)(7)] has occurred; **or**
> (4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.[114]

Thus, only one of the four criteria under 29 U.S.C. § 1342(a) must be met for PBGC to be authorized to initiate pension plan termination proceedings. Here, it is

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[114] 29 U.S.C. § 1342(a) (*emphasis added*).

undisputed that at least one of the four criteria were met and PBGC was expressly authorized to initiate Plan termination by statute.

The Administrative Record clearly shows that § 1342(a)(1) was satisfied.[115] Delphi did not make all required contributions to the Salaried Plan between filing for bankruptcy in October 2005 and the termination date in 2009.[116] At the time of PBGC's decision to initiate termination of the Salaried Plan, Delphi had failed to make required minimum funding contributions in the amount of $165.5 million.[117] The Administrative Record also supports PBGC's other determinations under §§ 1342(a)(2) and (4). The Salaried Plan would be unable to pay benefits when due because Delphi was liquidating in bankruptcy and would have no longer been available to authorize payments to new participants or authorize distributions by the Plan's paying agent or asset manager. And, as discussed above, the possible

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[115] *See PBGC v. Haberbush,* No. 2631GHKAIJX, 2000 WL 33362003, at *8 (C.D. Cal. Nov. 3, 2000) (finding that PBGC's decision to initiate termination under 29 U.S.C. § 1342(a)(1) was not arbitrary and capricious where plan sponsor failed to meet minimum funding contributions, despite participants' objection that some would receive reduced benefits by operation of PBGC's guarantee limits). As discussed below, this undisputed failure to pay all pension plan contributions required by law was also a key factor in PBGC's other determinations that the Salaried Plan will ultimately be unable to pay benefits when due and that the Salaried Plan should be terminated to prevent its continuing financial deterioration.

[116] AR 34, RE 52, (Sealed); AR 934, 1006-7, RE 75, Page ID # 2278, 2349-50.

[117] AR 34, 41, RE 52, (Sealed).

long run loss to PBGC would have increased unreasonably if the Salaried Plan was not terminated before certain subsidiaries left the controlled group.[118] PBGC's ability to obtain a recovery on its plan termination claims would have been lost if the Plan were not terminated before the Delphi controlled group was broken up as a result of the planned asset sales at the end of Delphi's bankruptcy. Accordingly, it is undisputed that at least one of the four criteria under § 1342(a) was met and therefore PBGC was expressly authorized by ERISA to initiate termination proceedings.

In support of their argument that the termination was arbitrary and capricious, the Retirees assert that the District Court's notation "that the Salaried Plan was 'severely underfunded' is problematic."[119] The Retirees assert that, on a percentage basis, the Salaried Plan was relatively well funded and argue that PBGC's initiation of termination of the Salaried Plan was arbitrary and capricious, because PBGC did not initiate termination of other pension plans with a similar percentage of underfunding.[120] The Retirees' argument again ignores the plain language of the statute. The percentage of underfunding is not a factor under 29

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[118] *See* AR 1-9, RE 53, Page ID # 1601-09.

[119] Retirees' Principal Br. at 46.

[120] *Id*.

U.S.C. § 1342(a). Even assuming *arguendo* that the Salaried Plan was a relatively well funded plan, which it was not,[121] 29 U.S.C. § 1342(a) authorizes PBGC to institute proceedings to terminate a pension plan whenever PBGC determines that one of the four listed criteria are met. Here, the Retirees do not dispute that Delphi missed minimum funding contributions.[122] The Administrative Record clearly shows (1) that Delphi did not make all required contributions to the Salaried Plan and (2) that PBGC's determination that § 1342(a) was satisfied because, among other reasons, the Salaried Plan had not met the minimum funding standard.[123] Thus, PBGC's decision to initiate termination of the Salaried Plan was expressly authorized by statute and neither arbitrary nor capricious.

b. PBGC's termination decision was neither arbitrary nor capricious because the termination satisfied the requirements of 29 U.S.C. § 1342(c).

i. The termination satisfied the requirements of 29 U.S.C. § 1342(c), because PBGC and the plan administrator agreed to terminate the Salaried Plan.

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[121] The Salaried Plan's funding was only 46% on a termination basis. AR 37, RE 52 (Sealed). Moreover, regardless of its percentage of underfunding, the amount of underfunding was a staggering $1.5 billion.

[122] *See* Retirees' Statement of Undisputed Material Facts ¶¶ 12-14, RE 308, Page ID # 12442-43.

[123] RE 52, AR 33 (Sealed). *See PBGC v. Haberbush,* No. 2631GHKAIJX, 2000 WL 33362003, at *8 (C.D. Cal. Nov. 3, 2000) (finding that initiation of plan termination was not arbitrary and capricious).

As discussed above, 29 U.S.C. § 1342(c) permits PBGC and the plan administrator to agree to termination of a plan without a judicial adjudication. Here, it is undisputed that PBGC and the plan administrator entered into the Termination Agreement. And the language of § 1342(c) is clear that if PBGC and Delphi entered into the Termination Agreement, none of the additional procedural requirements, including the requirement of obtaining a court decree, was applicable. Accordingly, the termination by agreement satisfied 29 U.S.C. § 1342(c).

ii. The termination satisfied the criteria for a judicial adjudication under 29 U.S.C. § 1342(c), because PBGC avoided an unreasonable $660 million increase in its liabilities.

The Retirees argue that the termination was arbitrary and capricious because (1) under 29 U.S.C. § 1342(c)(1), a pension plan can be terminated to avoid an unreasonable increase in PBGC's liability; (2) the termination of the Salaried Plan resulted in an increase in PBGC's liabilities of $1.5 billion; (3) if GM had agreed to assume the Salaried Plan, PBGC would have avoided that $1.5 billion increase in its liabilities; (4) by increasing PBGC's liabilities by $1.5 billion, rather than avoiding an increase, the termination allegedly did not comply with 29 U.S.C. § 1342(c)(1); and (5) thus, the termination was arbitrary and capricious.[124]

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[124] *See* Retirees' Principal Br. at 43-50.

Where a court issues a decree adjudicating that a plan must be terminated, it should find

> 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.[125]

A court adjudication was not required here, because Delphi and PBGC agreed to sign the Termination Agreement. Nonetheless, the termination satisfied those requirements.

While in bankruptcy, Delphi used all of the stock of its first-tier foreign subsidiaries ("subsidiaries") as collateral for the financing of its post-petition operations. Because those subsidiaries were under common ownership with Delphi, they were members of Delphi's "controlled group," as that term is defined in ERISA,[126] who are jointly and severally liable to PBGC for pension liabilities on the date of plan termination.[127] If Delphi's lenders had foreclosed on the collateral, *i.e.* the stock of the subsidiaries, before the Salaried Plan was terminated, then those subsidiaries would have (a) ceased to be under common ownership with Delphi, (b) ceased to be members of Delphi's controlled group, and (c) ceased to

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[125] 29 U.S.C. § 1342(c) (emphasis added).

[126] 29 U.S.C. § 1301(a)(14).

[127] 29 U.S.C. § 1362.

be jointly and severally liable to PBGC for pension liabilities. Therefore, PBGC terminated the Salaried Plan before the subsidiaries left the controlled group to avoid an unreasonable increase in the liability of PBGC's funds. It is undisputed that the termination allowed PBGC to mature liens and to recover more than $660 million.[128] If PBGC had waited to terminate the Salaried Plan until after the Delphi controlled group hand broken up, PBGC would have lost the claims that produced hundreds of millions of dollars. Therefore, the termination was necessary to avoid an unreasonable increase in the liability of the fund.

Moreover, it is undisputed that GM would not assume the Salaried Plan.[129] The Retirees insist that PBGC should have been able to use its claims as leverage to convince GM to assume the Salaried Plan, although they acknowledge that GM did not assume "various union plans that were terminated."[130] The Retirees also insist that GM could have funded the Salaried Plan for 10 years, far less than the total lifespan of the Salaried Plan.[131] But, the fact remains that assumption of the

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[128] *See* Retirees' Principal Br. at 48 (noting that PBGC received more than $660 million in exchange for the release of its liens).

[129] Retirees' Principal Br. at 45.

[130] Retirees' Principal Br. at 47.

[131] Retirees' Principal Br. at 48.

Salaried Plan by GM was not a viable option, because GM refused to do so. In fact, Retirees' theory is that GM was forbidden to do so by the Treasury Defendants – not PBGC.[132]

Thus, PBGC's decision to terminate the Salaried Plan satisfies the requirements of 29 U.S.C. § 1342(c) because it avoided a $660 million loss to PBGC and was neither arbitrary nor capricious.

iii. It would have been an exercise in futility for PBGC to advocate that the DIP Lenders assume the Salaried Plan.

In their bid to purchase Delphi's foreign assets under section 363 of the Bankruptcy Code, the Delphi DIP lenders clearly stated that their bid did not include the assumption of any liabilities of the Delphi pension plans. The Retirees argue that PBGC acted arbitrarily and capriciously by not advocating that the DIP lenders modify their bid to assume the Salaried Plan.[133] But, that would have been an exercise in futility.

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[132] The Retirees' main bone of contention appears to be with the Treasury Defendants' decision not to bail out their pension plan. *See, e.g.* Retirees' Principal Br. at 3 (labelling themselves the "roadkill" in the auto-industry bailout). And, the Second Amended Complaint included a claim against the Treasury Defendants. *See* Second Amended Complaint, Count 5, RE 145, Page ID # 8083-86.) However, the District Court dismissed that count early in the litigation. *See* Order Granting Treasury Defendants' Renewed Motion to Dismiss, RE 192, Page ID #9642-57. Retirees chose not to appeal that decision. *See* Retirees' Principal Br. at 22, n.6 ("Retirees have not appealed the dismissal of that claim.").

[133] Retirees' Principal Br. at 49.

The bankruptcy code allows a secured creditor to "credit bid" up to the amount of its secured claim as an off-set against the purchase price without paying any cash for the asset, unless the court supervising the auction orders otherwise.[134] In order to win an auction for assets, bidders competing with a secured creditor making a credit bid need to place a bid in excess of the secured interest.[135]

Here, the Bankruptcy Court allowed the DIP lenders to place a pure credit bid for the full amount of their secured interest – approximately $3.5 billion dollars.[136] It was the highest and only bid.

Had the DIP lenders offered as part of their bid to assume just the liabilities of the Salaried Plan,[137] and not the Hourly Plan or any of the other Delphi plans that were terminated, their bid would have been *billions* of dollars more. While the parties disagree over the full amount of the underfunding, it is undisputed that the

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[134] 11 U.S.C. § 363(k).

[135] *Id.*

[136] *In re Delphi Corp.*, No. 05-44481(RDD), 2009 WL 2482146, at *8 (Bankr. S.D.N.Y. July 30, 2009).

[137] The Retirees provide no explanation for why PBGC should have advocated for the DIP lenders to assume just the Salaried Plan and not all of the Delphi pension plans. *See, e.g.* Retirees' Principal Br. at 48-49.

Salaried Plan was underfunded by $1.5 billion, after PBGC recovered $660 million in conjunction with the plan termination.[138]

The Retirees have provided no reason for their misguided belief that anyone other than PBGC would have been willing to spend billions of dollars to pay benefits to the Salaried Plan participants and their beneficiaries.[139] It is undisputed that the assets the DIP lenders purchased were foreign assets and, thus, had no connection to the domestic employees covered by the Salaried Plan.[140] Thus, PBGC and the Salaried Plan participants had absolutely no leverage to compel the DIP lenders to assume their pension plan.

c. Termination of the Salaried Plan furthered PBGC's goals under ERISA.

The Retirees also assert that the termination of the Salaried Plan was arbitrary and capricious because it purportedly "undermined the statutory

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[138] Retirees' Principal Br. at 48.

[139] *See* Redacted Version of Summary Judgment Motion Hearing Transcript at 48-51, RE 326, Page ID # 13814-17 (Court suggesting that the Retirees' belief that some entity should have been willing to pay the Retirees more than the amount guaranteed by PBGC is based in naivete about corporate governance).

[140] Retirees' Principal Br. at 11; *see also* Retirees' Moving Br. for Summary Judgment at 77, RE 308, Page ID # 12502.

objectives entrusted to PBGC to protect."[141] However, as stated above, 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. Consequently, the entire statute is a finely tuned balance between protecting pension benefits for employees while limiting the cost to employers.[142]

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

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[141] Retirees' Principal Br. at 49.

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

all participants and beneficiaries or the premiums established by PBGC."[143] Further, the Sixth Circuit has stated that the involuntary termination procedures under ERISA exist "precisely so that PBGC can protect its own financial interests."[144]

Therefore, termination of the Salaried Plan, in addition to being fully consistent with the explicit language of § 1342(c), furthered the Title IV objectives as stated in § 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 $660 million settlement if it had waited to terminate until after the Delphi controlled group had

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[143] *PBGC v. UAL, Inc.*, 436 F. Supp. 2d 909, 923 (N.D. Ill. 2006) (quoting *In re UAL Corp.*, 428 F.3d 677, 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. C. Jan. 13, 2006) (citing *Rettig v. PBGC*, 744 F.2d 133, 154 (D.C. Cir. 1984)).

[144] *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).

broken up. Therefore, the termination complied with PBGC's statutory goals and was neither arbitrary nor capricious.

CONCLUSION

For the foregoing reasons, this Court should uphold the judgment in favor of the Pension Benefit Guaranty Corporation and deny the Retirees' appeal.

Date: September 27, 2019

Respectfully submitted,

/s/ C. Wayne Owen, Jr.

Judith Starr, General Counsel
Kartar Khalsa, Deputy General Counsel
John A. Menke
C. Wayne Owen, Jr.
Craig T. Fessenden
Assistant General Counsels
Erin C. Kim
Elisabeth Fry
Attorneys
PENSION BENEFIT GUARANTY CORPORATION
Office of the General Counsel
1200 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 229-3204
Fax: (202) 326-4112
E-Mail: owen.wayne@pbgc.gov
Attorneys for Defendant

Local Counsel:

Matthew J. Schneider
UNITED STATES ATTORNEY
Peter A. Caplan
Chief of the Civil Division
Eastern District of Michigan
211 West Fort Street, Suite 2001
Detroit, MI 48226
Phone: (313) 226-9784
Email: peter.caplan@usdoj.gov

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/s/ C. Wayne Owen, Jr.
Attorney for Pension Benefit Guaranty Corporation
Dated September 27, 2019

CERTIFICATE OF SERVICE

This is to certify that a copy of the attached Brief of Appellee Pension Benefit Guaranty Corporation was filed electronically on September 27, 2019, via the Court's CM/ECF system, which sent electronic notice to all other parties designated for notice in this case.

/s/ C. Wayne Owen, Jr.
Attorney for Pension Benefit Guaranty Corporation
Dated September 27, 2019

ADDENDUM

ADDENDUM INDEX

Designation of Relevant District Court Documents

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RE 304-307	Sealed Plaintiffs' Motion for Summary Judgment with Sealed Exhibits	Sealed
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Relevant Statutes

29 U.S.C. § 1302. Pension Benefit Guaranty Corporation

(a) Establishment within Department of Labor

There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation. In carrying out its functions under this subchapter, the corporation shall be administered by a Director, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall act in accordance with the policies established by the board. The purposes of this subchapter, which are to be carried out by the corporation, are—

(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 to which this subchapter applies, and

(3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.

(b) Powers of corporation

To carry out the purposes of this subchapter, the corporation has the powers conferred on a nonprofit corporation under the District of Columbia Nonprofit Corporation Act and, in addition to any specific power granted to the corporation elsewhere in this subchapter or under that Act, the corporation has the power—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal;

(2) to adopt, alter, and use a corporate seal, which shall be judicially noticed;

(3) to adopt, amend, and repeal, by the board of directors, bylaws, rules, and regulations relating to the conduct of its business and the exercise of all other rights and powers granted to it by this chapter and such other bylaws, rules, and regulations as may be necessary to carry out the purposes of this subchapter;

(4) to conduct its business (including the carrying on of operations and the maintenance of offices) and to exercise all other rights and powers granted to it by this chapter in any State or other jurisdiction without regard to qualification, licensing, or other requirements imposed by law in such State or other jurisdiction;

(5) to lease, purchase, accept gifts or donations of, or otherwise to acquire, to own, hold, improve, use, or otherwise deal in or with, and to sell, convey, mortgage, pledge, lease, exchange, or otherwise dispose of, any property, real, personal, or mixed, or any interest therein wherever situated;

(6) to appoint and fix the compensation of such officers, attorneys, employees, and agents as may be required, to determine their qualifications, to define their duties, and, to the extent desired by the corporation, require bonds for them and fix the penalty thereof, and to appoint and fix the compensation of experts and consultants in accordance with the provisions of section 3109 of title 5;

(7) to utilize the personnel and facilities of any other agency or department of the United States Government, with or without reimbursement, with the consent of the head of such agency or department; and

(8) to enter into contracts, to execute instruments, to incur liabilities, and to do any and all other acts and things as may be necessary or incidental to the conduct of its business and the exercise of all other rights and powers granted to the corporation by this chapter.

(c) Omitted

(d) Board of directors; compensation; reimbursement for expenses

The board of directors of the corporation consists of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Commerce. Members of the Board shall serve without compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of their duties as members of the board. The Secretary of Labor is the chairman of the board of directors.

(e) Meetings

The board of directors shall meet at the call of its chairman, or as otherwise provided by the bylaws of the corporation.

(f) Adoption of bylaws; amendment, alteration; publication in the Federal Register

As soon as practicable, but not later than 180 days after September 2, 1974, the board of directors shall adopt initial bylaws and rules relating to the conduct of the business of the corporation. Thereafter, the board of directors may alter, supplement, or repeal any existing bylaw or rule, and may adopt additional bylaws and rules from time to time as may be necessary. The chairman of the board shall

cause a copy of the bylaws of the corporation to be published in the Federal Register not less often than once each year.

(g) Exemption from taxation

(1) The corporation, its property, its franchise, capital, reserves, surplus, and its income (including, but not limited to, any income of any fund established under section 1305 of this title), shall be exempt from all taxation now or hereafter imposed by the United States (other than taxes imposed under chapter 21 of title 26, relating to Federal Insurance Contributions Act [26 U.S.C. 3101 et seq.], and chapter 23 of title 26, relating to Federal Unemployment Tax Act [26 U.S.C. 3301 et seq.]), or by any State or local taxing authority, except that any real property and any tangible personal property (other than cash and securities) of the corporation shall be subject to State and local taxation to the same extent according to its value as other real and tangible personal property is taxed.

(2) The receipts and disbursements of the corporation in the discharge of its functions shall be included in the totals of the budget of the United States Government. The United States is not liable for any obligation or liability incurred by the corporation.

(3) Omitted.

(h) Advisory committee to corporation

(1) There is established an advisory committee to the corporation, for the purpose of advising the corporation as to its policies and procedures relating to (A) the appointment of trustees in termination proceedings, (B) investment of moneys, (C) whether plans being terminated should be liquidated immediately or continued in operation under a trustee, and (D) such other issues as the corporation may request from time to time. The advisory committee may also recommend persons for appointment as trustees in termination proceedings, make recommendations with respect to the investment of moneys in the funds, and advise the corporation as to whether a plan subject to being terminated should be liquidated immediately or continued in operation under a trustee.

(2) The advisory committee consists of seven members appointed, from among individuals recommended by the board of directors, by the President. Of the seven members, two shall represent the interests of employee organizations, two shall represent the interests of employers who maintain pension plans, and three shall represent the interests of the general public. The President shall designate one member as chairman at the time of the appointment of that member.

(3) Members shall serve for terms of 3 years each, except that, of the members first appointed, one of the members representing the interests of employee organizations, one of the members representing the interests of employers, and one of the members representing the interests of the general public shall be appointed for terms of 2 years each, one of the members representing the interests of the general public shall be appointed for a term of 1 year, and the other members shall be appointed to full 3–year terms. The advisory committee shall meet at least six times each year and at such other times as may be determined by the chairman or requested by any three members of the advisory committee.

(4) Members shall be chosen on the basis of their experience with employee organizations, with employers who maintain pension plans, with the administration of pension plans, or otherwise on account of outstanding demonstrated ability in related fields. Of the members serving on the advisory committee at any time, no more than four shall be affiliated with the same political party.

(5) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he succeeds. Any vacancy occurring in the office of a member of the advisory committee shall be filled in the manner in which that office was originally filled.

(6) The advisory committee shall appoint and fix the compensation of such employees as it determines necessary to discharge its duties, including experts and consultants in accordance with the provisions of section 3109 of title 5. The corporation shall furnish to the advisory committee such professional, secretarial, and other services as the committee may request.

(7) Members of the advisory committee shall, for each day (including traveltime) during which they are attending meetings or conferences of the committee or otherwise engaged in the business of the committee, be compensated at a rate fixed by the corporation which is not in excess of the daily equivalent of the annual rate of basic pay in effect for grade GS–18 of the General Schedule, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5.

(8) The Federal Advisory Committee Act does not apply to the advisory committee established by this subsection.

(i) Special rules regarding disasters, etc.

In the case of a pension or other employee benefit plan, or any sponsor, administrator, participant, beneficiary, or other person with respect to such plan, affected by a Presidentially declared disaster (as defined in section 1033(h)(3) of title 26) or a terroristic or military action (as defined in section 692(c)(2) of such title), the corporation may, notwithstanding any other provision of law, prescribe, by notice or otherwise, a period of up to 1 year which may be disregarded in determining the date by which any action is required or permitted to be completed under this chapter. No plan shall be treated as failing to be operated in accordance with the terms of the plan solely as the result of disregarding any period by reason of the preceding sentence.

29 U.S.C. § 1342. Institution of termination proceedings by the corporation

(a) Authority to institute proceedings to terminate a plan

The corporation may institute proceedings under this section to terminate a plan whenever it determines that—

(1) the plan has not met the minimum funding standard required under section 412 of title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of title 26 has been mailed with respect to the tax imposed under section 4971(a) of title 26,

(2) the plan will be unable to pay benefits when due,

(3) the reportable event described in section 1343(c)(7) of this title has occurred, or

(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

The corporation shall as soon as practicable institute proceedings under this section to terminate a single-employer plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan. The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section). Notwithstanding any other provision of this subchapter, the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of this subchapter.

(b) Appointment of trustee

(1) 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. If within 3 business days after the filing of an application under this

subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case.

(2) Notwithstanding any other provision of this subchapter—

(A) upon the petition of a plan administrator or the corporation, the appropriate United States district court may appoint a trustee in accordance with the provisions of this section if the interests of the plan participants would be better served by the appointment of the trustee, and

(B) upon the petition of the corporation, the appropriate United States district court shall appoint a trustee proposed by the corporation for a multiemployer plan which is in reorganization or to which section 1341a(d) of this title applies, unless such appointment would be adverse to the interests of the plan participants and beneficiaries in the aggregate.

(3) The corporation and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).

(c) Adjudication that plan must be terminated

(1) If the corporation is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated 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. If the trustee appointed under subsection (b) of this section disagrees with the determination of the corporation under the preceding sentence he may intervene in the proceeding relating to the application for the decree, or make application for such decree himself. Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) of this section (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the

provisions of this subtitle. 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. Whenever a trustee appointed under this subchapter is operating a plan with discretion as to the date upon which final distribution of the assets is to be commenced, the trustee shall notify the corporation at least 10 days before the date on which he proposes to commence such distribution.

(2) In the case of a proceeding initiated under this section, the plan administrator shall provide the corporation, upon the request of the corporation, the information described in clauses (ii), (iii), and (iv) of section 1341(c)(2)(A) of this title.

(3) Disclosure of termination information.—

(A) In general.—

(i) Information from plan sponsor or administrator.—A plan sponsor or plan administrator of a single-employer plan that has received a notice from the corporation of a determination that the plan should be terminated under this section shall provide to an affected party any information provided to the corporation in connection with the plan termination.

(ii) Information from corporation.—The corporation shall provide a copy of the administrative record, including the trusteeship decision record of a termination of a plan described under clause (i).

(B) Timing of disclosure.—The plan sponsor, plan administrator, or the corporation, as applicable, shall provide the information described in subparagraph (A) not later than 15 days after—

(i) receipt of a request from an affected party for such information; or

(ii) in the case of information described under subparagraph (A)(i), the provision of any new information to the corporation relating to a previous request by an affected party.

(C) Confidentiality.—

(i) In general.—The plan administrator, the plan sponsor, or the corporation shall not provide information under subparagraph (A) in a form which includes any information that may directly or indirectly be associated with, or otherwise identify, an individual participant or beneficiary.

(ii) Limitation.—A court may limit disclosure under this paragraph of confidential information described in section 552(b) of title 5 to authorized representatives (within the meaning of section 1341(c)(2)(D)(iv) of this title) of the participants or beneficiaries that agree to ensure the confidentiality of such information.

(D) Form and manner of information; charges.—

(i) Form and manner.—The corporation may prescribe the form and manner of the provision of information under this paragraph, which shall include delivery in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to individuals to whom the information is required to be provided.

(ii) Reasonable charges.—A plan sponsor may charge a reasonable fee for any information provided under this paragraph in other than electronic form.

(d) Powers of trustee

(1)(A) A trustee appointed under subsection (b) of this section shall have the power—

(i) to do any act authorized by the plan or this subchapter to be done by the plan administrator or any trustee of the plan;

(ii) to require the transfer of all (or any part) of the assets and records of the plan to himself as trustee;

(iii) to invest any assets of the plan which he holds in accordance with the provisions of the plan, regulations of the corporation, and applicable rules of law;

(iv) to limit payment of benefits under the plan to basic benefits or to continue payment of some or all of the benefits which were being paid prior to his appointment;

(v) in the case of a multiemployer plan, to reduce benefits or suspend benefit payments under the plan, give appropriate notices, amend the plan, and perform

other acts required or authorized by subtitle (E) of this subchapter to be performed by the plan sponsor or administrator;

(vi) to do such other acts as he deems necessary to continue operation of the plan without increasing the potential liability of the corporation, if such acts may be done under the provisions of the plan; and

(vii) to require the plan sponsor, the plan administrator, any contributing or withdrawn employer, and any employee organization representing plan participants to furnish any information with respect to the plan which the trustee may reasonably need in order to administer the plan.

If the court to which application is made under subsection (c) of this section dismisses the application with prejudice, or if the corporation fails to apply for a decree under subsection (c) of this section, within 30 days after the date on which the trustee is appointed under subsection (b) of this section, the trustee shall transfer all assets and records of the plan held by him to the plan administrator within 3 business days after such dismissal or the expiration of such 30-day period, and shall not be liable to the plan or any other person for his acts as trustee except for willful misconduct, or for conduct in violation of the provisions of part 4 of subtitle B of subchapter I of this chapter (except as provided in subsection (d)(1)(A)(v) of this section). The 30-day period referred to in this subparagraph may be extended as provided by agreement between the plan administrator and the corporation or by court order obtained by the corporation.

(B) If the court to which an application is made under subsection (c) of this section issues the decree requested in such application, in addition to the powers described in subparagraph (A), the trustee shall have the power—

(i) to pay benefits under the plan in accordance with the requirements of this subchapter;

(ii) to collect for the plan any amounts due the plan, including but not limited to the power to collect from the persons obligated to meet the requirements of section 1082 of this title or the terms of the plan;

(iii) to receive any payment made by the corporation to the plan under this subchapter;

(iv) to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan;

(v) to issue, publish, or file such notices, statements, and reports as may be required by the corporation or any order of the court;

(vi) to liquidate the plan assets;

(vii) to recover payments under section 1345(a) of this title; and

(viii) to do such other acts as may be necessary to comply with this subchapter or any order of the court and to protect the interests of plan participants and beneficiaries.

(2) As soon as practicable after his appointment, the trustee shall give notice to interested parties of the institution of proceedings under this subchapter to determine whether the plan should be terminated or to terminate the plan, whichever is applicable. For purposes of this paragraph, the term "interested party" means—

(A) the plan administrator,

(B) each participant in the plan and each beneficiary of a deceased participant,

(C) each employer who may be subject to liability under section 1362, 1363, or 1364 of this title,

(D) each employer who is or may be liable to the plan under section [1] part 1 of subtitle E of this subchapter,

(E) each employer who has an obligation to contribute, within the meaning of section 1392(a) of this title, under a multiemployer plan, and

(F) each employee organization which, for purposes of collective bargaining, represents plan participants employed by an employer described in subparagraph (C), (D), or (E).

(3) Except to the extent inconsistent with the provisions of this chapter, or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as those of a trustee under section 704 of title 11, and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 1002 of this title and under section 4975(e) of title 26 (except to the extent that the provisions of this subchapter are inconsistent with the requirements applicable under part 4 of subtitle B of subchapter I of this chapter and of such section 4975).

(e) Filing of application notwithstanding pendency of other proceedings

An application by the corporation under this section may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding, or any proceeding to reorganize, conserve, or liquidate such plan or its property, or any proceeding to enforce a lien against property of the plan.

(f) Exclusive jurisdiction; stay of other proceedings

Upon the filing of an application for the appointment of a trustee or the issuance of a decree under this section, the court to which an application is made shall have exclusive jurisdiction of the plan involved and its property wherever located with the powers, to the extent consistent with the purposes of this section, of a court of the United States having jurisdiction over cases under chapter 11 of title 11. Pending an adjudication under subsection (c) of this section such court shall stay, and upon appointment by it of a trustee, as provided in this section such court shall continue the stay of, any pending mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the plan or its property and any other suit against any receiver, conservator, or trustee of the plan or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the plan or any other suit against the plan.

(g) Venue

An action under this subsection may be brought in the judicial district where the plan administrator resides or does business or where any asset of the plan is situated. A district court in which such action is brought may issue process with respect to such action in any other judicial district.

(h) Compensation of trustee and professional service personnel appointed or retained by trustee

(1) The amount of compensation paid to each trustee appointed under the provisions of this subchapter shall require the prior approval of the corporation, and, in the case of a trustee appointed by a court, the consent of that court.

(2) Trustees shall appoint, retain, and compensate accountants, actuaries, and other professional service personnel in accordance with regulations prescribed by the corporation.