

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS BLACK, et al.,

Plaintiffs,

v.

**PENSION BENEFIT GUARANTY
CORPORATION, et al.,**

Defendants.

HONORABLE ARTHUR J. TARNOW

No. 09-13616

HEARING ON MOTION FOR PRELIMINARY INJUNCTION

Tuesday, December 22, 2009

Appearances:

Anthony F. Shelley
Timothy P. O'Toole
Alan J. Schwartz
On behalf of Plaintiffs

John A. Menke
C. Wayne Owen
On behalf of Defendant PBGC

David M. Glass
On behalf of Deft Treasury

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*Hearing on Motion for Preliminary Injunction
Tuesday, December 22, 2009*

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Detroit, Michigan
Tuesday, December 22, 2009
9:28 a.m.

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THE CLERK: Now calling Case Number 09-13616,
Black, et al. v. PBGC, et al.

Will counsel please identify yourselves for the
record.

MR. SHELLEY: For the plaintiffs Anthony Shelley.

MR. O'TOOLE: Timothy O'Toole.

MR. SCHWARTZ: Alan Schwartz.

MR. MENKE: Good morning, Your Honor. For the
defendant PBGC, John Menke.

MR. OWEN: For PBGC, C. Wayne Owen.

MR. GLASS: For the Treasury defendant David Glass
for the Justice Department.

THE COURT: Good morning. You may be seated.
How do you want to proceed?

MR. SHELLEY: I think, Your Honor, it's our motion
for preliminary injunction that is up, and we would like to
begin by putting in argument on it.

THE COURT: That sounds fair to me.

MR. SHELLEY: Good morning, Your Honor, and may it
please the Court. This is an important day for the Delphi
salaried retirees. It represents the first time that a

1 Court or any government agency has had a hearing of any kind
2 concerning the termination of their pension plan, a
3 termination that threatens the very livelihood of thousands
4 of individuals. About 50 of the retirees have made the trip
5 to the courthouse today and are seated behind me.

6 **THE COURT:** And are welcome to be here.

7 **MR. SHELLEY:** Many of them are from out of state,
8 and their presence alone illustrates the gravity of the
9 issues to them, so thank you for having this hearing.

10 **THE COURT:** Let me just say that I'll try and talk
11 loud enough to keep you awake, but I can't promise to be
12 interesting enough to keep you awake.

13 **MR. SHELLEY:** Your Honor, the question before the
14 Court is whether the Court should enter a preliminary
15 injunction maintaining the status quo and thereby enjoining
16 PBGC from reducing pension benefits to estimated amounts
17 while the case is pending particularly in light of our due
18 process claim.

19 **THE COURT:** What was the last payment in terms of
20 was it a full payment or not a full payment?

21 **MR. SHELLEY:** Currently full payments are being
22 made, and the estimated payments will be reduced and those
23 are scheduled to go in effect, my understanding is,
24 February 1.

25 **THE COURT:** Okay. You shouldn't have told me

1 that. Now I can delay.

2 **MR. SHELLEY:** Well, we hope that won't occur, but
3 if we can get relief before then and it is positive, we
4 think the statute quo would be maintained and we would be
5 whole at that point.

6 A little background on the controversy. The
7 controversy arises from Delphi Corp.'s bankruptcy in 2005.
8 Delphi, of course, was a division of GM and was spun off in
9 1999. Its main customer is GM as a part supplier.

10 For nearly four years in bankruptcy Delphi
11 promised its pensioners, all of them, whether hourly or
12 salaried, that it would keep the pension plans intact as it
13 emerged from bankruptcy. All of this changed in June of
14 2009 when the United States became the chief owner of GM.
15 The U.S., its our contention, then saw the way for Delphi
16 and GM to emerge from bankruptcy as rapidly and cheaply for
17 the government as possible and suddenly the pension plans
18 became expendable to be sent to the PBGC. It was an
19 ingenious plan, frankly, for the government because --

20 **THE COURT:** Hang on a second. You are referring
21 to pension plans plural.

22 **MR. SHELLEY:** Correct.

23 **THE COURT:** How many pension plans are here today?

24 **MR. SHELLEY:** One, Delphi salaried retirees.

25 **THE COURT:** And the other one is the union pension

1 plan?

2 **MR. SHELLEY:** There are several others, but the
3 main one is the union. They divide between unionized and
4 salaried.

5 **THE COURT:** And why aren't they here?

6 **MR. SHELLEY:** They are going to be made whole.

7 **THE COURT:** All of the other ones?

8 **MR. SHELLEY:** Well, it's not clear to us that
9 every one will be made whole, but the vast majority of the
10 unionized plans will be made whole and we think that we may
11 be the only plan that's not made whole.

12 **THE COURT:** Who should be talking for the other
13 side? I'm going to go back and forth, so . . .

14 **MR. SHELLEY:** Sure.

15 **MR. MENKE:** Thank you, Your Honor. John Menke for
16 the PBGC. I'll be presenting PBGC's position today.

17 **THE COURT:** Well, can you respond to that, about
18 the other pension funds?

19 **MR. MENKE:** Well, there are six Delphi pension
20 plans that PBGC terminated in July of this year, the salary
21 plan and the hourly plan, by far the two largest, and
22 four smaller plans. I believe three of those are small
23 union plans, and the fourth is a small management plan from
24 the old Packard division. PBGC is treating those plans
25 exactly the same as it treats the salaried participants. It

1 will be --

2 **THE COURT:** Including the union plan?

3 **MR. MENKE:** Including the union plan. It will be
4 reducing those folks to guaranteed payments. The difference
5 that Mr. Shelley talks to is what is referred to as the GM
6 "top up" agreement. Though they suggest that this was part
7 of the grand government conspiracy that led to the
8 termination of these plans, in fact the GM top up was
9 negotiated between GM and the three largest of its unions
10 then and now, the Auto Workers, of course, the International
11 Brotherhood of Engineers, our international union, which is
12 IUB, and I'm going to forget the third one, maybe the
13 Steelworkers.

14 When Delphi spun off from GM in 1999, of course
15 the unions had to agree to that, and part of the
16 compensation that they received for agreeing to the spin-off
17 at Delphi in 1999 was the top up agreement, and in the top
18 up agreement GM said that if anything ever happens to Delphi
19 such that their pension obligations are threatened primarily
20 by termination it would make up for losses that the union
21 people suffered. Noteworthy is that the salary people,
22 whether because they weren't able to or because they
23 received other consideration or for whatever reason, they
24 did not negotiate a top up for them. That top up has been
25 in place for ten years.

1 **THE COURT:** Wouldn't that be important to know why
2 they didn't? Especially if they got other consideration.

3 **MR. MENKE:** I don't know if it's important to or
4 not. The fact of the matter is they didn't.

5 **THE COURT:** Well, let's hear from counsel as to
6 whether they did get consideration.

7 **MR. SHELLEY:** We don't think we did, and --

8 **MR. GLASS:** Your Honor, I'm David Glass
9 representing the Treasury. It's my understanding, and I
10 haven't confirmed this, but it's my understanding that the
11 top up's just go to certain of the union plans at Delphi and
12 not all of them. So it's not a complete top up of all of
13 the union plans.

14 **THE COURT:** Okay. Well, what about the other
15 question. Do you know if there was any consideration given
16 to the salaried employees?

17 **MR. GLASS:** I do not, I do not.

18 **THE COURT:** Okay.

19 **MR. SHELLEY:** Your Honor, it's our position that
20 we didn't get any consideration for it, and it's important
21 to note that, first of all, those top up agreements were
22 void as of the bankruptcy. They had no legal effect. As a
23 result, this is basically a gift from GM to certain of the
24 pensioners, to hourly workers, to the unionized workers that
25 we didn't get. There was no obligation for GM to follow

1 those agreements --

2 **THE COURT:** Is there an obligation to gift all
3 employees alike?

4 **MR. MENKE:** We argue that in fact if the
5 government is behind it all, which we think, the government
6 doesn't --

7 **THE COURT:** The government may be behind it all in
8 an ownership capacity.

9 **MR. SHELLEY:** Correct.

10 **THE COURT:** But as an owner is there an obligation
11 on the owner of a business?

12 **MR. SHELLEY:** If it's the government, yes. If
13 it's the government acting in a policy position, which we
14 think is the case here through the Auto Task Force and the
15 Treasury, it has an obligation to treat everyone equally
16 absent a rational basis pursuant to the rational basis test
17 or a strict scrutiny of compelling state interest. We don't
18 think any of that existed here.

19 To go to the top up agreements again though, the
20 fact that even some of the entities that had top off
21 agreements didn't get top off's shows that the top off
22 agreement itself is not what was driving this. It is our
23 position that we got no consideration in 1999 for our
24 different treatment and that ultimately that these top off's
25 were basically a scheme of the government to compensate the

1 unionized workers because they were politically powerful and
2 we were not. At the end of the day it's the Delphi salaried
3 retirees who bear the burden of the bankruptcy unlike the
4 other pensioners so we brought this lawsuit as a result to
5 challenge the termination of our plan.

6 We have several claims now. We have sued PBGC,
7 various government actors, as well as GM itself. Our claim
8 on the due process issue is that, and that's the one before
9 the Court --

10 **THE COURT:** Hang on a second. When did you sue
11 GM, before or after the bankruptcy?

12 **MR. SHELLEY:** After the bankruptcy. We only sued
13 new GM. We did not sue the bankrupt entity. GM came in
14 through our amended complaint, which was filed I think in
15 early November.

16 The claim that's before the Court is the due
17 process claim, Count 3 of the complaint against the PBGC.
18 The nature of this claim is that we assert --

19 **THE COURT:** Slow down, please. Go on.

20 **MR. SHELLEY:** The nature of the claim is that PBGC
21 has violated the due process clause because it has taken
22 away our vested pension benefits without to this day any
23 process at all. Today we have full pension payments, but by
24 February 1st because of the PBGC's rules associated with the
25 termination our pensions will be reduced. There is no

1 dispute that our pensions will be reduced and markedly so.
2 There is also no dispute that we have been afforded no
3 hearing or process at all.

4 **THE COURT:** Okay. You say markedly so. The
5 defendants just filed an affidavit Friday.

6 **MR. SHELLEY:** Yesterday.

7 **THE COURT:** Well, it's dated Friday. I'm sorry,
8 you are right. Have you read it?

9 **MR. SHELLEY:** I read it this morning at the hotel.
10 I did.

11 **THE COURT:** They didn't have a USA Today for you
12 to do the crossword puzzle?

13 **MR. SHELLEY:** No paper.

14 **THE COURT:** How does that factor in? How do you
15 read it?

16 **MR. SHELLEY:** I read it as their attempt now to
17 defend the termination that occurred six months ago on the
18 grounds that supposedly the plan was underfunded. No
19 one argues that it's underfunded. No one disputes that it's
20 underfunded. In fact, most pension plans in this country
21 are underfunded at this point.

22 **THE COURT:** Except for the post office. You know
23 they are prefunded?

24 **MR. SHELLEY:** Pardon me?

25 **THE COURT:** The post office is prefunded. That's

1 why they show such a huge loss every year.

2 **MR. SHELLEY:** Well, we wish we had that situation,
3 but at this point I think that's what the affidavit states.
4 It doesn't state that our benefits are not going to be
5 reduced. I think the PBGC when Mr. Menke was standing here
6 indicated they would reduce it to guaranteed levels which
7 are going to be different than our current pension payments,
8 and they assert that even with their payments, even with the
9 amount of money that they are going to input into the plan,
10 which we dispute the amount that they have stated, it still
11 won't be fully funded and as a result about a 20 percent
12 reduction off the top would occur based on just their
13 funding statements.

14 So I don't think there's any dispute that our
15 pensions will be reduced, and there is no dispute that we
16 have received no process. We stand, therefore, before the
17 Court today asking that the Court enjoin the reductions in
18 the pension payments unless and until we get due process,
19 namely, a hearing, a termination hearing, the type that
20 ERISA calls for and that Congress set forth in Section 1342
21 of the statute.

22 **THE COURT:** Okay. Let's hear from the other side,
23 and while I'm hearing from them you can listen with one ear
24 and tell me why 29 U.S.C. 1342 doesn't allow ERISA, excuse
25 me, does ERISA allow PBGC to do this without notice? If it

1 does, is it your argument that that provision is
2 unconstitutional?

3 **MR. SHELLEY:** Yes. We don't think that ERISA
4 allows it, but it is our position that if Section 1342 can
5 be read to terminate this plan and reduce our benefits
6 without any notice to us, without any opportunity for a
7 predeprivation hearing, that it would violate the due
8 process clause.

9 **THE COURT:** Okay. Let's hear from the other side.

10 **MR. MENKE:** Thank you, Your Honor. Again,
11 John Menke for the PBGC.

12 Nobody here will argue, least of all PBGC, that
13 what happened to Delphi is not an economic tragedy. No
14 one will argue that thousands of people lost billions of
15 dollars as a result of the collapse of this business. What
16 we will argue though is that they didn't lose money because
17 PBGC took over the pension plans. They lost money because
18 Delphi's business collapsed, Delphi liquidated, Delphi is
19 gone.

20 **THE COURT:** Delphi's business didn't collapse. It
21 never was there. That's why General Motors --

22 **MR. MENKE:** Some will argue that. There is little
23 question that all proper procedures were taken when it was
24 spun off. It survived independently for ten years. It was
25 not a division of GM for that period of time. Excuse me.

1 **THE COURT:** Is it your position that all of the
2 pensioners are being treated the same, not just the
3 salaried?

4 **MR. MENKE:** By PBGC and the federal government,
5 yes, all of the pensioners are treated the same.

6 **THE COURT:** And the difference is that
7 General Motors, the new General Motors is coming in and
8 topping off?

9 **MR. MENKE:** The difference is the new
10 General Motors is coming in and topping off pursuant to its
11 collective bargaining agreements with the three unions that
12 I mentioned. Mr. Shelley noted, stated in his argument as
13 far as he was concerned any agreement that GM entered into
14 with its hourly workers was void. I think if you talk to
15 the Auto Workers or the Brotherhood of Engineers they would
16 be surprised to hear their collective bargaining agreements
17 referred to as void.

18 **THE COURT:** These collective bargaining
19 agreements, when were they negotiated, before or after the
20 creation of the new GM?

21 **MR. MENKE:** These were negotiated before the
22 creation of the new GM. It's noteworthy that in order to
23 have made those agreements void, as Mr. Shelley referred to,
24 GM would have had to proceed through what is known as a 1113
25 hearing and process in bankruptcy court.

1 They did start that process. They did negotiate
2 new collective bargaining agreements with the Auto Workers
3 and their other unions. As part of those collective
4 bargaining agreements, the unions insisted apparently that
5 GM honor its commitments to the Delphi employees and
6 retirees to top up as they had agreed to in 1999, and GM
7 agreed to do that. PBGC had nothing to do with that,
8 absolutely nothing to do with that, and rejects any
9 suggestion that that's the case.

10 **THE COURT:** So if you weren't involved in this
11 case, what would the pensioners get from Delphi, the
12 plaintiffs in this case?

13 **MR. MENKE:** If we can imagine a world without the
14 PBGC, and in fact a world out the PBGC is pretty
15 imaginable --

16 **THE COURT:** Well, you might be there but without
17 money, which would make you invisible.

18 **MR. MENKE:** We hope that's not the case,
19 Your Honor, and not to scare any of the employees, we do
20 have considerable resources to pay benefits for a very long
21 period of time. We hope that that will be forever or at
22 least as long as forever is, until our last person is no
23 more. Be that as it may, I think that's a problem we are
24 trying to deal with now, and we will be dealing with for
25 some time to come.

1 If there were no PBGC, what we would have in this
2 situation is exactly what happened in the 1960's with the
3 Studebaker case. I don't know if Your Honor is aware of
4 that. The Studebaker business collapsed in the mid 1960's.
5 They went out of the business. It liquidated.

6 **THE COURT:** Wasn't that Studebaker Packard?

7 **MR. MENKE:** Studebaker Packard, yes. They
8 liquidated. They went out of business.

9 **THE COURT:** My Accounting 101 teacher was the
10 former controller.

11 **MR. MENKE:** You may know it very well then,
12 Your Honor.

13 What happened in that case was pensioners who had
14 vested pension benefits, retirees who were counting on
15 payments every bit as much as these Delphi retirees, walked
16 away with nothing, not one thin dime.

17 **THE COURT:** Which is one of the examples that was
18 the catalyst for the formation of the --

19 **MR. MENKE:** That was the catalyst, that was the
20 catalyst for the passage of ERISA. That was the catalyst
21 for the formation of PBGC and the other guarantees that
22 exist.

23 In this case Delphi made a lot of pension promises
24 to its participants, all of its hourly and salaried
25 employees. You referred to Ms. Neela Ranade's declaration

1 that we filed yesterday. We thought it important to put
2 some facts in the record that showed exactly where people
3 stood both before and after PBGC took over this pension plan
4 since what we are being accused of is taking something from
5 these people. Where these participants in this salaried
6 plan stood before PBGC stepped in is they did have promises
7 worth \$5.2 billion. Unfortunately Delphi had set aside
8 \$2.5 billion to pay those promises, 48 percent of the money
9 that was required.

10 If this plan -- it's also, it's also I think worth
11 noting that certainly as of July when we terminated this
12 plan Delphi hadn't been paying into this pension plan for
13 the four years that it was in bankruptcy. PBGC has slammed
14 its head against that brick wall for a lot of years, but the
15 law is pretty clear now that in bankruptcy if the company
16 decides that it doesn't want to fund its pension plans there
17 is nothing that we can do to force them to.

18 **THE COURT:** Let's go back to the affidavit for a
19 minute.

20 **MR. MENKE:** Sure.

21 **THE COURT:** The number that is in the affidavit is
22 \$4.6 billion.

23 **MR. MENKE:** That's correct.

24 **THE COURT:** How certain is that?

25 **MR. MENKE:** Well, I would have Ms. Ranade up here

1 to tell you if she had been able to get a flight out of
2 snowbound D.C. yesterday, but she failed.

3 **THE COURT:** You should have asked for a court
4 order.

5 **MR. MENKE:** Well, as I was sitting on the plane
6 myself, I watched them trying to kick off a family with a
7 two-year-old child. I'm not quite sure -- due to weight
8 limitations. I don't know how far a court order would have
9 gone.

10 What she would tell you is that that \$4.6 billion
11 is not precise, won't be precise until we have had the
12 opportunity to review every single of the 20,000
13 participants in this plan and their benefits and add them
14 up, but what she can tell you is it's precise probably
15 within \$100 million. It might be 2 billion, the additional
16 amount that PBGC will put in, it might be 2.2 billion, but
17 it's a very big number.

18 **THE COURT:** It's a 13 percent gap.

19 **MR. MENKE:** That might be.

20 **THE COURT:** Assuming the number was as speculated
21 or guessed, estimated, however you want to characterize it.

22 **MR. MENKE:** It's not a speculation, Your Honor.

23 **THE COURT:** What?

24 **MR. MENKE:** It's not a speculation. It's an
25 estimate.

1 **THE COURT:** Okay.

2 **MR. MENKE:** And our history will tell you that our
3 estimate in this regard, particularly at this stage, is
4 pretty close.

5 **THE COURT:** And I'm doing this not for your
6 benefit but for the folks sitting behind you. What you are
7 telling us, telling the Court and telling the plaintiffs is
8 that the worst-case scenario is that they are going to be
9 13 percent lower.

10 **MR. MENKE:** Oh, that's right, Your Honor, yes.
11 The worst-case scenario is that PBGC will pay 87 or
12 88 percent of the promised benefits in this plan rather than
13 100 percent.

14 **THE COURT:** And that will be starting in February?

15 **MR. MENKE:** Starting in February.

16 **THE COURT:** Okay.

17 **MR. MENKE:** By the way, just to be clear,
18 Your Honor, and to protect the interests of the hundreds of
19 people who were working back in PBGC to process this and
20 other pension plans, February 1st is not the drop dead date.
21 We can't turn on a dime, as it were. We will issue
22 instructions to our paying agent to pay these benefits on or
23 about January 10th, and that's probably closer to the drop
24 dead date. Not to rush Your Honor at all, but we need to
25 protect our processes.

1 **THE COURT:** I will do this in the next week or so.

2 **MR. MENKE:** To be absolutely clear in answer to
3 your question --

4 **THE COURT:** Well, hang on a second because you
5 have answered the question enough so that I can ask
6 Mr. Shelley: In your papers somewhere you are saying that
7 you fear the damages or the reduction would be somewhere
8 between 30 and 70 percent. Does this affidavit change your
9 estimate?

10 **MR. SHELLEY:** No. We haven't seen any of the data
11 on which the affidavit is based. This case has been here
12 for weeks, months, and it came in this morning or yesterday
13 and we saw it this morning so we have no basis for
14 understanding the figures that are in there. Our own
15 analyses have suggested between 30 and 70 percent of the
16 benefits will be lost because of the special harshness on
17 early retirees, the lookback provisions of the PBGC statute
18 that allows you to wipe out provisions in the plan existing
19 five years prior to the time. COLA's wouldn't be
20 recognized. Congressional increases in the amounts of
21 benefits that are possibly payable wouldn't be recognized.

22 **THE COURT:** COLA is not a big issue. I just got a
23 letter from Social Security indicating that there is no COLA
24 this year.

25 **MR. SHELLEY:** I think under this plan there was.

1 Under the plan --

2 **THE COURT:** The cost of living is computed
3 differently for Social Security than for the pension?

4 **MR. SHELLEY:** Well, I mean for the previous
5 five years.

6 **THE COURT:** Okay. I'm sorry, yeah.

7 **MR. SHELLEY:** I have several responses to some of
8 the things Mr. Menke said.

9 **THE COURT:** You may.

10 **MR. SHELLEY:** I may, okay.

11 First of all, the idea that nothing was taken
12 here, that the PBGC is simply giving us something here, an
13 analogy might work. Let's take people who live in a house
14 and the government has decided that the house is becoming
15 unsound because termites are eating away at the house. So
16 the government has decided we are taking your house, we are
17 kicking you out of it, and we are going to give you
18 something. We are going to send to you a homeless shelter
19 that is paid for by the government. It is an inferior
20 dwelling from our perspective, but from the government's
21 perspective it's one that is sounder than the one we were
22 living in. No one argues that the house is about to fall
23 down but eventually would be falling down. The government,
24 their position would be that because the government is
25 giving you something there you are not entitled to any

1 hearing because they have not deprived you of anything.

2 In fact, what's happened here is they are arguing
3 that our plan was being eaten by termites, was going to be
4 collapsing, and they have taken our plan, they have reduced
5 our pensions and they have sent us to an inferior plan,
6 their plan with guaranteed benefits. All we ask in this
7 claim is that we get a hearing before that happens.

8 And the government has admitted that at least even
9 under their filing 13 percent of the benefits are going to
10 be lost. If that's going to happen, we are entitled to have
11 them present their evidence like that affidavit, put the
12 person on the stand and actually prove that the termination
13 should have occurred.

14 **THE COURT:** Let's assume you are right, okay, that
15 you are entitled to a hearing and I would order a hearing or
16 they would agree to a hearing.

17 **MR. SHELLEY:** I don't think they can -- oh, excuse
18 me.

19 **THE COURT:** Okay. And let's assume for a minute
20 that all they can show is that there are no funds in the
21 pension plan other than the two things you have mentioned so
22 far, which was the two-point some billion that were there
23 before and the two-point some billion that they are adding
24 to the pot, okay?

25 **MR. SHELLEY:** Uh-huh.

1 **THE COURT:** And let's say at the hearing you
2 showed that -- I'm trying to think. What would you show --
3 and, by the way, the folks in the back of the room, if you
4 want to sit in the jury box, you are more than welcome to.

5 **AUDIENCE MEMBER:** Thank you.

6 **THE COURT:** You just don't get to vote, that's
7 all.

8 **MR. SHELLEY:** I wish they could.

9 **THE COURT:** What would you show?

10 **MR. SHELLEY:** Well, I would show that they can't
11 meet, they can't meet the congressional criteria for
12 termination of the plan. Simple underfunding of the plan is
13 not a basis for terminating. It's the basis for instituting
14 termination proceedings but not for actually terminating.

15 **THE COURT:** Okay. So what you are suggesting is
16 that at some point they could terminate it, but how long
17 would it take them under the congressional plan as you
18 interpret it?

19 **MR. SHELLEY:** I don't know that they could
20 terminate it at any point. What they have to show is that
21 the termination was in the best interest of the
22 participants, that there would be an unreasonable run on the
23 PBGC funds absent the termination or that the plan
24 unreasonably -- its financial condition was about to
25 deteriorate. Now, in fact the plan might be in a better

1 position today had it not been terminated given the stock
2 market than it was six months ago. I don't think they can
3 prove that the termination conditions existed, and our
4 position would be that if they can't do that they have to
5 run this plan now that they have taken it as a nonterminated
6 plan. The Court has equity powers to fix this situation,
7 and if they wrongfully terminated the plan, they are going
8 to have to run it as if it had never been terminated.

9 **THE COURT:** All right. Let's assume for a minute,
10 and we'll come back to that, that everything you say is
11 correct, and part of your assumption that I'm hearing is
12 that the defendants have an unlimited budget, correct?
13 Unlimited funds. Let's assume that's correct.

14 **MR. SHELLEY:** Let's assume that.

15 **THE COURT:** Okay. Why then is not a normal
16 lawsuit asking for damages the appropriate way to go rather
17 than an injunction?

18 **MR. SHELLEY:** Because ERISA limits us to equitable
19 relief. We are not entitled to present a damages claim
20 against the PBGC under ERISA. Under Section 1303, 29 U.S.C.
21 1303, the only kind of lawsuit that can be brought against
22 the PBGC is a suit for equitable relief. They can bring
23 actions against us for legal or equitable relief, but we can
24 only bring an action against them for equitable relief. So
25 we have to be here to prevent things from happening because

1 after the fact we can't correct them. We can't sue them for
2 damages. We can't be made whole with money. The law under
3 ERISA, as Your Honor probably knows, is very murky about
4 equitable relief and what constitutes equitable restitution
5 versus legal restitution. Frankly, if we don't get
6 injunctive relief, I don't know that any money that we lose
7 would ever be able to come back to us.

8 **THE COURT:** Mr. Menke, what's your response?

9 **MR. MENKE:** A couple of points, Your Honor. I
10 believe your question was what we think these people would
11 show if they were given a hearing?

12 **THE COURT:** Yes.

13 **MR. MENKE:** We think that, that they have sued us.
14 One of the counts of their complaint which is not before
15 Your Honor today is Count 4 saying we terminated this plan
16 in violation of the statute. That I think is absolutely
17 false. There are four criteria, any one of which needs to
18 be satisfied to allow PBGC to terminate a pension plan and
19 proceed with termination. The first and most obvious one in
20 this case is that the plan sponsor has failed to make the
21 statutorily required minimum contribution requirements.
22 Delphi failed to do that for four years. No question that
23 that criteria has been established. No question that that
24 gives PBGC authority to move to terminate this pension plan
25 in its discretion.

1 The plan has had half the benefits it needed to
2 pay benefits. While it could pay benefits for a while,
3 sooner or later -- in fact, sooner rather than later --
4 because of the hundreds of millions of dollars that go out
5 of this plan every year in benefit payments and more and
6 more people are retiring all the time, the plan would run
7 out of money, would have been unable to pay benefits when
8 due. We think that criteria is satisfied.

9 We think the fourth criteria is satisfied. Delphi
10 was liquidating in its bankruptcy, was selling all of its
11 assets. PBGC would have lost any opportunity to assert a
12 claim either in the bankruptcy or against the foreign assets
13 had that liquidation occurred before the plan terminated.
14 We think that that would have created a substantial loss to
15 the agency, substantial loss as ultimately reflected in the
16 recovery that we got in this case. That is the criteria,
17 the fourth criteria. There is no question we could have
18 terminated this plan.

19 One other point, Your Honor. Mr. Shelley
20 suggested that our obligation in that circumstance then is
21 to take and run the plan as a nonterminated plan. He's
22 obviously mistaken. He's confusing PBGC with Delphi,
23 Your Honor. PBGC does not take over ongoing pension plans
24 and run ongoing pension plans and make contributions to
25 ongoing pension plans. PBGC is created by statute to manage

1 terminated pension plans pursuant to the limits and
2 strictures of the rights Congress gave us in ERISA. He's
3 imagining a world that doesn't exist.

4 **THE COURT:** Now, under 1342(c) --

5 **MR. MENKE:** Yes, Your Honor.

6 **THE COURT:** -- if you and the plan administrator
7 agree that it should be terminated, you then agree to the
8 appointment of the trustee; is that correct?

9 **MR. MENKE:** That's correct, Your Honor.

10 **THE COURT:** Is there a trustee in this case?

11 **MR. MENKE:** In that circumstance, Your Honor,
12 history has shown that PBGC, which by statute can be the
13 trustee, invariably does become the trustee. PBGC became
14 the trustee in that case. In this case, as it has in, I
15 don't know, 4,000 other terminated plans, round numbers,
16 there isn't a lineup of private people wanting to be trustee
17 of terminated pension plans, and candidly it doesn't make
18 sense to split the obligations between us and some third
19 party. I'm not even sure how that would work. So, yes,
20 PBGC is the trustee of this pension plan and is acting as
21 such as it applies the statutory limits and benefit --

22 **THE COURT:** You are acting at least in part under
23 1342(c)?

24 **MR. MENKE:** We terminated this plan under the
25 1342(c) procedures.

1 **THE COURT:** Are there other plans that you have
2 done the same thing with?

3 **MR. MENKE:** Oh, thousands, Your Honor.

4 **THE COURT:** With the added top up between
5 one group and another group?

6 **MR. MENKE:** I'm not quite sure of your question.

7 **THE COURT:** Well, the question is --

8 **MR. MENKE:** Happily from PBGC's point of view the
9 GM top up for its employees appears to be unique. No
10 one else has ever done that.

11 **THE COURT:** Okay.

12 **MR. MENKE:** What that means -- maybe it won't be
13 unique going forward. We think it's a pretty unique
14 situation.

15 **THE COURT:** I'm going to ask you to sit down for a
16 moment because I want Mr. Shelley to explain GM's liability
17 to you, why they are here, the new GM.

18 **MR. SHELLEY:** Well, we argue that they are a
19 government actor. That under the government actor cases
20 that an entity through which, which ends up being an agent
21 or a conduit for government policy is itself a government
22 actor even if it's a private party, and that's our claim
23 against GM.

24 **THE COURT:** Well, let's hear from GM then.

25 **MR. SHELLEY:** Well, they are not --

1 **THE COURT:** They are not a part of this?

2 **MR. SHELLEY:** They are not a part of the
3 preliminary injunction proceeding.

4 If I could just respond to a couple --

5 **THE COURT:** You can go back to sleep, counsel.

6 **MR. SHELLEY:** Mr. Menke described the criteria,
7 that he said there were four criteria for terminating a
8 plan. He's wrong on that. Those are the four criteria for
9 instituting a termination proceeding, which they even did
10 and then forthwith dropped it when they knew that we were
11 going to challenge the termination, but those are only the
12 criteria for instituting a proceeding. That's in Section
13 1342(a).

14 The criteria for actually terminating a plan are
15 different, and those are in 1342(c) and those are the ones
16 that I described to the Court before: That it is in the
17 best interest of the participants, that there would be an
18 unreasonable run on the PBGC's fund absent termination, and
19 that the plan would unreasonably terminate absent the
20 termination of the plan. Those are different criteria.
21 Simple underfunding, which is mentioned in A but not C, is
22 what they are relying on.

23 The second point --

24 **THE COURT:** Hang on a second. Do you agree,
25 Mr. Menke? Is that what you are relying on?

1 **MR. MENKE:** 1342(c) provides criteria on which a
2 Court can issue a termination decree if PBGC is required to
3 obtain a court decree to terminate a pension plan. 1342(c)
4 also provides that PBGC and the plan sponsor, plan
5 administrator, in this case Delphi, can agree to terminate
6 the pension plan, which was done here.

7 If PBGC were required to prove up the (c) factors,
8 it's noteworthy that its internal body found that present
9 here. We think it is in the best interests of the
10 participants to terminate this pension plan. In the absence
11 of termination, their sponsor was liquidating. No more
12 money was coming into this plan. There was soon going to be
13 no one to cut checks.

14 **THE COURT:** How often do you do this without a
15 hearing?

16 **MR. MENKE:** I believe we filed in the motion to
17 dismiss an affidavit from our deputy operations person,
18 Candy Camel, saying that PBGC has terminated in
19 approximately 3,900, maybe by now 4,000, pension plans.
20 90 percent of those terminations or about 3,500, 3,600 were
21 done pursuant to agreements with the plan administrator.
22 Only approximately 400 were done by obtaining a court
23 decree. I would note for the Court's interest that the
24 great majority of those 400 are pension plans where we
25 terminated where the plan administrators vanished where

1 there is nobody to sign the agreement and they are usually
2 done by a default decree at that point. So very rarely --

3 **THE COURT:** But even if you go to court in that
4 situation you are not having a hearing.

5 **MR. MENKE:** No. In effect, they essentially --

6 **THE COURT:** Have you ever had a hearing?

7 **MR. MENKE:** We have. The most recent one of
8 substance that I can think of involved termination of the
9 United Airlines pilots' plan. United had agreed with its
10 pilots' union as part of its collective bargaining agreement
11 that it would not sign an agreement terminating that plan.
12 PBGC was required to go to court, fought through 10,
13 15 months of hearings and appeals and finally that plan was
14 terminated. The other three large United Airlines plans
15 were terminated by agreement with United because there was
16 not the same collective bargaining impediment to signing a
17 trusteeship in those plans. There are others going on as
18 well.

19 **THE COURT:** In this case in July you filed the
20 case here.

21 **MR. MENKE:** We did.

22 **THE COURT:** Why?

23 **MR. MENKE:** We always -- it is our practice,
24 Your Honor, when PBGC takes steps to terminate a plan, an
25 involuntary termination by its own initiative, which was the

1 case here, to file simultaneously with providing notice to
2 the company and to all of the participants, which it did
3 here by publishing in the newspapers, to file complaints.
4 We do that because, and we have had past experience where we
5 failed to do that and have had to fight preliminary
6 injunction, temporary restraining order procedures where the
7 company says we didn't have the right to move to terminate.
8 We find that those risks to delay and that are substantial
9 and risk recoveries in many cases that the PBGC might
10 receive. So we as a matter of practice file simultaneously
11 upon seeking an involuntary termination. With this case, as
12 with many of the other cases, including the
13 three United Airlines cases that I mentioned earlier, those
14 complaints are often withdrawn if ultimately the plan
15 administrator agrees to terminate the plan without needing a
16 court order.

17 **THE COURT:** When you file that case, do you give
18 notice to the employees?

19 **MR. MENKE:** Simultaneously with filing that case
20 we gave notice -- notice is statutorily required for us to
21 give to the plan administrator, in this case Delphi. We
22 provided notice to all the affected unions with respect to
23 their pension plans. We also provide notice to all of
24 Delphi's plan participants, all of their employees,
25 constructive notice because obviously we don't have all of

1 their addresses. That's Delphi's information. We start the
2 notice by filing in the newspaper, a notice that we are
3 moving to terminate the pension plan. We filed in the
4 Detroit newspaper and the USA Today. Your Honor may be
5 aware there was ample publicity of the PBGC's actions at
6 that point in time. I don't think anyone failed to learn of
7 our termination within a very short period of time.

8 **MR. SHELLEY:** Your Honor, and we came and the
9 lawsuit was then dismissed. We don't dispute that the PBGC
10 has been getting away with this for years, that they have
11 been interpreting the statute to allow, to allow essentially
12 the adjudication that Congress called for to be superfluous
13 because they can read that one sentence in 1342(c) as
14 basically a carte blanche to agree with the plan
15 administrator, who is not in a fiduciary capacity, which
16 they assert that they are not, has no concern for the
17 employees. We are not at the table in this situation when
18 they come to an agreement. We are the ones affected, and we
19 have no opportunity anywhere to have any say in it. Even
20 the plan administrator isn't our advocate because they are
21 just a settler according to the PBGC.

22 The reason that the PBGC has been getting away
23 with this is because most of the, many of the plans that
24 they have terminated are small ones. Pensioners are almost
25 never in a position to challenge what the PBGC has done, and

1 in this situation they have banded together and they have
2 mustered the ability to come before a court and say, wait a
3 minute, this is a big plan, it is a big deal for us, and you
4 have terminated it wrongfully. That's the reason that these
5 agreements have been proliferating for years and years as
6 opposed to the termination proceedings occurring.

7 It's our position that the PBGC has read
8 1342(c) -- has turned it on its head by basically allowing
9 it to write out the rest of the statute by having these
10 agreements with biased plan administrators or sponsors. So
11 we would ask the Court to give us the hearing that we
12 deserve under the due process clause and to estop any
13 reduction in benefits until that hearing is concluded and
14 the court were to determine, if at all, that the plan was
15 rightfully terminated.

16 **THE COURT:** If the defendants were to agree, I
17 guess agree to either characterize the statute as allowing
18 money damages or agree to set aside escrow accounts with the
19 difference, would that satisfy your concerns about ERISA not
20 allowing money damages?

21 **MR. SHELLEY:** An escrow account would, the escrow
22 account could possibly do so because then we have equitable
23 restitution as opposed to legal restitution with a
24 segregated fund. However, in the meantime we would have
25 reduced benefits without access to the escrow fund without

1 ever having had a hearing.

2 **THE COURT:** But the point is that the hearing
3 could then be provided.

4 **MR. SHELLEY:** The hearing could then be provided,
5 but our benefits should not be reduced in the meantime. We
6 should suffer no reduction until the hearing occurs. There
7 is no -- the conditions for not having a hearing and
8 allowing the deprivation to occur prior to --

9 **THE COURT:** Can we do the hearing next week?

10 **MR. SHELLEY:** If the Court wants to have a
11 hearing --

12 **THE COURT:** No, I'm not going to be doing the
13 hearing. The hearing that you want would not be a court
14 hearing. It would be under ERISA, as I understand your
15 argument.

16 **MR. SHELLEY:** In a court because under 1341 they
17 have to institute proceedings in a Federal District Court,
18 that alone. They can't have a proceeding within the
19 confines of the PBGC's offices. It has to be in a court.
20 1342 doesn't allow a termination in any other respect except
21 they say by agreement and we don't agree with that. So it
22 would have to be in this court or a court.

23 **THE COURT:** Could you guys be ready to have a
24 hearing next week?

25 **MR. MENKE:** If Your Honor orders a hearing next

1 week, we will be here. I'm not quite sure what that will do
2 to my daughter's Christmas plans, but she'll get over it.

3 **THE COURT:** My calendar shows Christmas is this
4 week unless you are suggesting we do it tomorrow.

5 **MR. MENKE:** I am suggesting, Your Honor, we would
6 require a bit of preparation on our part to come to a
7 hearing. We would be ready to go next week, however. I
8 don't want to interrupt the Court --

9 **THE COURT:** Well, you just did.

10 **MR. MENKE:** I know I did. I'll let it go.

11 **THE COURT:** Oh, no. It will make it even because
12 I just interrupted you. You can finish your thought.

13 **MR. MENKE:** Sure. I just wanted to comment on
14 Mr. Shelley's suggestion that "we have been getting away
15 with this for years." We don't quite use those pejorative
16 terms. We say, of course, that this is a long-term agency
17 interpretation of the statute by the agency assigned to
18 implement it, and we find all sorts of courts suggest
19 that -- including, by the way, the Supreme Court --
20 suggested it's entirely appropriate for the agency assigned
21 by Congress to implement a statute to interpret the terms of
22 it and the considerable weight to be given to the agency's
23 interpretation. We will presumably be arguing that fairly
24 soon in connection with PBGC's motion to dismiss the bulk of
25 the complaints of these plaintiffs.

1 They also suggest that we have run up these
2 numbers, as you will, by terminating a whole bunch of little
3 plans and that this is the first big plan that PBGC has ever
4 tried this with, to paraphrase Mr. Shelley.

5 **THE COURT:** You already told me about
6 United Airlines. I understand that that's --

7 **MR. MENKE:** I was going to say I personally have
8 been involved in the termination of, sadly, more plans than
9 I would like to think of, all involving hundreds of
10 millions, if not billions, of dollars in liabilities,
11 running the gamut from steel plans to airline plans to now
12 auto plans. God help us if the rubber industry or the rest
13 of the auto industry goes the same way.

14 **THE COURT:** I didn't know we had a rubber industry
15 anymore.

16 **MR. MENKE:** Goodyear, Goodrich tires. We are not
17 concerned about their plans right now, but they are the
18 other big ones out there.

19 **THE COURT:** Okay.

20 **MR. MENKE:** The United plans, three of the
21 four plans terminated by agreement. The LTV plans, LTV
22 Steel plans terminated by agreement. The Reardon Steel
23 plan, billion dollars, terminated by agreement. TWA --

24 **THE COURT:** Hang on a second.

25 **MR. MENKE:** We could go on and on. They are big

1 plans, lots of them.

2 **THE COURT:** No, you can't go on and on.

3 **MR. MENKE:** But I won't.

4 **THE COURT:** I'm stopping you. I'm asking
5 Mr. Shelley how many days do you need for this hearing, how
6 many hours? And let me ask the question I asked at the
7 beginning. What are you going to show at this hearing?

8 **MR. SHELLEY:** Well, the PBGC has the prosecutorial
9 role. It has the burden of proof, and under Section 1342
10 the Seventh Circuit of the United States even said it has
11 the prosecutorial role. It has to come in and prove the
12 criterion in 1342 for the termination. We would challenge
13 it arguing that it's not in the best interest, that at the
14 time they terminated the plan in fact neither of the other
15 conditions for termination existed and in fact --

16 **THE COURT:** You only need one condition, right?

17 **MR. SHELLEY:** One of the three, that's right.

18 **THE COURT:** So if it's not in the best interest,
19 you win.

20 **MR. SHELLEY:** If it's not in the best interest, we
21 win. If it's not an unreasonable run on the funds, we win,
22 and if it's not -- if termination was necessary in order to
23 avoid an unreasonable deterioration in the financial
24 condition of the plan, if they can't prove that, then we
25 win. I believe the way the statute is written it's an "or

1 or" so that they can prove one of the criteria as opposed to
2 all three.

3 **THE COURT:** Okay.

4 **MR. SHELLEY:** Frankly, Your Honor, I don't know
5 exactly how much time we would need --

6 **THE COURT:** Well, I'm asking the wrong person. I
7 should be asking Mr. Menke. And I understand it's a
8 guesstimate, and it's --

9 **MR. MENKE:** We are prepared to go whenever
10 Your Honor is.

11 **THE COURT:** No, I'm asking you how much time once
12 we start.

13 **MR. MENKE:** Well, Your Honor --

14 **THE COURT:** First of all, do you agree that you
15 have the burden?

16 **MR. MENKE:** Well, what we agree that we have the
17 burden to show is that we acted in moving to terminate this
18 plan based upon the administrative record before the agency
19 at the time, PBGC did not act in an arbitrary, capricious or
20 manner contrary to law. They refer to a Seventh Circuit
21 United Airlines opinion and say this has to be tried
22 de novo. That's not the law in this circuit. On the
23 contrary, the law in this circuit says that PBGC receives
24 deference due an administrative agency doing its job. We
25 would present the administrative record, based on that.

1 This Court's review is limited to the termination, as I say,
2 under the Administrative Procedures Act, arbitrary,
3 capricious or contrary to law standard. We have prepared
4 the administrative record. We have provided the
5 administrative record to the plaintiffs in this case some
6 months ago. They have had the opportunity to review it. We
7 would be prepared to file it with the Court within a matter
8 of days. I would say tomorrow, but it's several boxes and
9 I'm not quite sure whether we could copy it that fast, and
10 we are prepared to argue on the basis of that administrative
11 record at the Court's discretion.

12 **THE COURT:** We don't copy anymore. We scan.

13 **MR. MENKE:** The mechanics of running it through
14 the machine is the same. That's true, Your Honor. I'm
15 afraid I am forever stuck in the 1970's.

16 **THE COURT:** Then we would ask for a courtesy copy
17 anyway.

18 **MR. MENKE:** I apologize, Your Honor. I'm afraid
19 I'm stuck. My nineteen-year-old computer-savvy son would
20 say I'm irretrievable.

21 **THE COURT:** All right. It sounds to me, and let
22 me ask Mr. Shelley if you agree, that this is something that
23 could probably be done on the record with -- you have
24 already given me your oral argument and you certainly would
25 be permitted to file whatever you wanted in writing in

1 response to the record, but do you agree that you have had
2 the record for this time, for a period of time?

3 **MR. SHELLEY:** We do agree that the administrative
4 record was provided to us a number of weeks ago.

5 **THE COURT:** Okay.

6 **MR. SHELLEY:** Some portions.

7 **THE COURT:** All right.

8 **MR. SHELLEY:** A couple of things. I'm not sure we
9 have the full administrative record. Second of all, it
10 seems to me we have a legal issue right off the bat of
11 whether they have the burden of proof or this is going to be
12 treated as an APA type of arbitrary and capricious type of
13 review. We would take the position and say the Sixth
14 Circuit has not addressed this. The Seventh Circuit has and
15 held it's prosecutorial and that that issue perhaps should
16 be decided I guess in conjunction with any hearing we have.

17 **THE COURT:** Well, I'm not sure we need a hearing
18 if I'm just doing it on the record other than what we are
19 doing right now because you are presenting your views as to
20 how I should review the record and --

21 **MR. SHELLEY:** Well, Your Honor, for instance, the
22 actuary who filed the affidavit yesterday, we don't have all
23 of the underpinnings of her analysis. It's a five-page
24 declaration mostly that goes over her qualification. There
25 are no attachments, at least as I could tell from the hotel

1 email, to it. The only way that I could understand what the
2 basis for that is is by her being on the witness stand or
3 them providing us the backup.

4 **THE COURT:** Counsel?

5 **MR. MENKE:** Your Honor, we provided the full and
6 complete administrative record to the plaintiffs. There is
7 no more.

8 **THE COURT:** Okay. Well --

9 **MR. MENKE:** Ms. Ranade's declaration which was
10 filed yesterday by definition is not part of the
11 administrative record. The administrative record is defined
12 as the materials that were before the agency at the time
13 that it made its decision.

14 **THE COURT:** So there is no reason for me to
15 consider that.

16 **MR. MENKE:** Not in the APA review of whether the
17 termination was not arbitrary, capricious or not according
18 to law. No, Your Honor, that would not be part of the
19 record.

20 **THE COURT:** What else do you want to say?

21 **MR. SHELLEY:** Just, Your Honor, that we again
22 think that the termination could not be proved up if they
23 had gone forward with the lawsuit that they filed.

24 **THE COURT:** Is that a legal term, proved up?

25 **MR. SHELLEY:** I have heard it sometimes, yes.

1 **THE COURT:** It sounds like his nineteen-year-old
2 son.

3 **MR. SHELLEY:** Proved. Could be proven and that we
4 would --

5 **THE COURT:** Wait a minute, wait a minute.
6 Mr. Menke, do you have any pets you haven't referred to?
7 You have got a son and a daughter.

8 **MR. MENKE:** I have a son and a daughter. I have
9 two cats. I have a wife.

10 **THE COURT:** Okay.

11 **MR. MENKE:** My cats think I'm fine so long as I
12 feed them. They don't care about computers.

13 **THE COURT:** The record should reflect the cats
14 were mentioned before your wife.

15 **MR. MENKE:** And they would say justifiably so.

16 **THE COURT:** All right. Mr. Shelley, do you want
17 to file anything else?

18 **MR. SHELLEY:** In conjunction with our request for
19 a preliminary injunction?

20 To challenge the termination, absolutely.

21 **THE COURT:** Okay. Well, how much time do you want
22 to do that? Because I'm thinking that Mr. Menke's
23 organization could wait for a decision from this Court
24 without the necessity of an injunction if I can assure him
25 that a decision will be forthcoming before the

1 February 1st date that the payments, and I understand there
2 is a January 10th instruction date, and if it's delayed a
3 couple of weeks, I think everyone can live with that.

4 **MR. MENKE:** Your Honor, we will obviously await
5 Your Honor's decision whenever it comes.

6 **THE COURT:** Well, what I'm saying is that I would
7 rather not waste time going through the four factors on a
8 preliminary injunction unless it becomes necessary if I find
9 that based on the administrative record you haven't
10 satisfied whatever burden of proof I decide is necessary
11 based on the prior cases, and as you both indicated, the
12 Sixth Circuit hasn't told me. They usually tell me after I
13 make the mistakes.

14 **MR. MENKE:** Well, Your Honor, I obviously can't do
15 the legal research as I stand here. We think that there are
16 Sixth Circuit cases that are on point here.

17 **THE COURT:** Well, that's fine.

18 **MR. MENKE:** We will, we will, obviously we will
19 get into that, as will Mr. Shelley, and we will let you
20 know.

21 **THE COURT:** Okay. With respect to your respective
22 family obligations, I would like a supplemental brief on
23 anything you want to talk about, either side, and I would
24 like that by the end of the first week of January, and I
25 will try and get a decision out by the end of the --

1 **MR. MENKE:** Addressing just the preliminary
2 injunction motion, Your Honor, or addressing the full --

3 **THE COURT:** No, I don't want to -- the preliminary
4 injunction motion you folks have pretty well briefed.

5 **MR. MENKE:** We think so. Thank you, Your Honor.

6 **THE COURT:** And I want, without deciding this, to
7 be a hearing, without deciding whether it's necessary or not
8 because I think ultimately that's the most efficient way to
9 do it is to say I don't have to deal with the preliminary
10 injunction because, other than being reasonably efficient at
11 getting my decision out and just address the issues that are
12 raised in the next week or so concerning what, what the
13 hearing showed, and then, depending on what I decide, then
14 we'll get to the motion to dismiss.

15 You have one of those mechanical Palm Pilots.

16 **MR. MENKE:** I was looking at the calendar,
17 Your Honor.

18 **THE COURT:** I understand. Do you want to show it
19 to the audience so they have seen a mechanical Palm Pilot?

20 **MR. MENKE:** I'm afraid this is as far as
21 technology has taken me here.

22 **MR. SHELLEY:** So, Your Honor, what I'm envisioning
23 then us filing would be a filing that indicates what we
24 think the standard is for determining termination, our
25 position, and evidence that the termination, the criteria

1 has not been satisfied, and to the extent we believe there
2 are facts in dispute that the Court can't determine, an
3 additional notation of what would be necessary for the
4 hearing that we think we are entitled to under due process?

5 **THE COURT:** All of this is limited to the
6 administrative record.

7 **MR. SHELLEY:** Well, Your Honor, we don't -- we
8 object to that. We contest that. We don't think that the
9 Court's review on a termination is on the administrative
10 record. It's a de novo proceeding in which the PBGC acts as
11 the prosecutor. The only circuit to address that is the
12 Seventh Circuit, and Judge Easterbrook specifically
13 addressed that.

14 **THE COURT:** You can address that in your filing.
15 I'm not going to decide that now.

16 **MR. MENKE:** Your Honor, I don't -- we are happy to
17 follow whatever procedure you lay out. Just for your
18 information it's worth noting that we have done this a lot
19 before. Mr. Shelley is not the first person to challenge
20 our termination. The way it normally goes is we file the
21 record accompanied with a motion for summary judgment based
22 on the record where we explain why what we did satisfied the
23 legal criteria. We are happy to do that. We are happy to
24 just file the record and a brief laying out the factors as a
25 basis for your decision.

1 **THE COURT:** Well, Mr. Menke, I'm here to make you
2 happy so you can do that.

3 **MR. MENKE:** We will file the record and a summary
4 judgment motion.

5 **THE COURT:** Pardon?

6 **MR. MENKE:** We will file the record and a summary
7 judgment motion. The record we can file this week for that
8 matter.

9 **THE COURT:** But you are also going to address
10 those things, and this is redundant perhaps, but in a
11 separate document you are going to discuss why the
12 termination was necessary and how it is supported by that
13 administrative record.

14 **MR. MENKE:** Absolutely that would be in our paper,
15 Your Honor.

16 **THE COURT:** Okay.

17 **MR. SHELLEY:** Your Honor, would we be --

18 **THE COURT:** And, Mr. Shelley, you can make your
19 points and your objections in your papers as well, and we
20 will address them as well. If it turns out that you are
21 right and we have to do more evidentiary hearing and so on,
22 then I'll revisit whether we need a preliminary injunction
23 or not. Okay?

24 **MR. SHELLEY:** Yes, Your Honor. Will we be limited
25 to the 20-page limit on this brief because I foresee a lot

1 of evidence being discussed?

2 **THE COURT:** I'm laughing because there are about
3 15 or 20 judges in the Eastern District depending if you
4 count their docket or, you know, some of them are seniors
5 and stuff, and that's one of the few issues that there seems
6 to be a split on. Some judges think that the 20-page limit
7 is written in stone, and if you would look at my local local
8 court rules, which are on our website, you will see that I'm
9 not one of those judges. You can do it by stipulation or I
10 can put on the record now it's got to be long enough to
11 cover the subject but short enough to keep my interest.
12 All right?

13 Now, and I'm laughing because I just got a
14 motion -- five motions for summary judgment from the same
15 party, five separate motions so they could be within the
16 20-page rule, and when I first got here one of my colleagues
17 who thinks it's real important to limit pages had the same
18 thing happen and fined the attorney \$1,000 for trying to
19 circumvent an important rule. The answer to your question
20 is there is no 20-page rule.

21 **MR. SHELLEY:** And the due date would be Friday,
22 January the 8th? You said the first week of January.

23 **THE COURT:** Yes. Does that give you enough time?

24 **MR. SHELLEY:** We'll get it done.

25 **THE COURT:** I noticed your colleagues started

1 writing as soon as I said that.

2 All right. Anything else we have to discuss?

3 **MR. SHELLEY:** I don't think so.

4 **MR. MENKE:** One very minor point, Your Honor. As
5 you know, we have filed a motion to dismiss the first
6 three counts of the complaint as legally insufficient. We
7 know that Mr. Shelley filed a response. Under the local
8 rules as we read them PBGC's reply to that would be due the
9 28th, the Monday after Christmas. I'm falling back on my
10 wife and children and cats again and suggesting that we
11 talked with Mr. Shelley and he has agreed to extend our
12 reply for that motion.

13 **THE COURT:** Let me ask you this question.

14 **MR. MENKE:** Yes.

15 **THE COURT:** Who is going to object to the extra
16 time? I mean he's already given it to you.

17 **MR. MENKE:** We were going to ask for until the
18 10th, Your Honor. Since we will be busy doing this other
19 brief right up until the 8th, I guess I would ask for the
20 17th if that's okay with Mr. Shelley.

21 **THE COURT:** Wait a minute. What about the 15th?

22 **MR. MENKE:** The 15th, that would be fine.

23 **THE COURT:** Because the 17th is a Sunday.

24 **MR. MENKE:** I thought the 17th was a Monday,
25 Your Honor.

