

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

_____)	
DENNIS BLACK, <i>et al.</i> ,)	
)	
Plaintiffs,)	Case No. 2:09-cv-13616
)	Hon. Arthur J. Tarnow
)	Magistrate Judge Donald A. Scheer
v.)	
)	
PENSION BENEFIT GUARANTY)	
CORPORATION, <i>et al.</i>)	
)	
Defendants.)	
_____)	

**PBGC's MOTION FOR SUMMARY JUDGMENT
ON COUNT FOUR OF PLAINTIFF'S COMPLAINT**

Defendant Pension Benefit Guaranty Corporation ("PBGC"), pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7.1, hereby moves for summary judgment on Count Four of Plaintiffs' Amended Complaint. As is more fully explained in the accompanying memorandum of law in support, there are no genuine issues of material fact, and PBGC is entitled to judgment as a matter of law.

Date: January 8, 2009

Respectfully submitted,

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Plaintiffs,

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PENSION BENEFIT GUARANTY
CORPORATION, *et al.*,

Defendants.

Case No. 2:09-cv-13616
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**PBGC's MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT ON COUNT FOUR**

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QUESTION PRESENTED

Under Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”), the Pension Benefit Guaranty Corporation (“PBGC”) may initiate termination of a covered pension plan if PBGC determines that any one of four statutory conditions exist with respect to that plan. Following its established administrative procedures, PBGC determined that three of those conditions existed with respect to the Delphi Retirement Program for Salaried Employees (“Salaried Plan”); therefore, PBGC initiated termination of the Salaried Plan and reached agreement with the Delphi Corporation, the plan administrator, to terminate it. Did PBGC act arbitrarily, capriciously, or in violation of law in terminating the Salaried Plan?

CONTROLLING AUTHORITY

1. The relevant provision of the Administrative Procedure Act, 5 U.S.C. § 706, supports PBGC’s position that the arbitrary and capricious standard of review applies to this motion for summary judgment.
2. The relevant provision of ERISA, 29 U.S.C. § 1342, and the Administrative Record support PBGC’s position that it complied with all statutory requirements for terminating the Plan.
3. The relevant provision of ERISA, as well as precedent established by case law, support PBGC’s position that there is no basis for the court to conduct a *de novo* review of the Plan’s termination. *See* 29 U.S.C. § 1342; *In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d 197, 201-02 (2d Cir. 1987).

INTRODUCTION

On July 22, 2009, pursuant to specific statutory authority, the Pension Benefit Guaranty Corporation (“PBGC”) determined that the Delphi Retirement Program for Salaried Employees (“Salaried Plan” or “Plan”) should be terminated. On that date, PBGC issued a Notice of Determination, which it sent to Delphi Corporation (“Delphi”) and published in newspapers. Delphi and PBGC entered into an agreement on August 10, 2009, under which the Plan was terminated and PBGC appointed trustee as of July 31, 2009. As the federal agency responsible for insuring the nation's defined benefit pension plans, PBGC has stepped in to become statutory trustee of the Salaried Plan and pay participants their guaranteed benefits.

When PBGC became statutory trustee of the Salaried Plan, the Plan’s assets totaled only \$2.5 billion, less than 50% of the amount that Delphi would have needed to satisfy the \$5.2 billion worth of pension promises it made to its employees. Termination of the Salaried Plan triggered ERISA’s guarantee, which will result in PBGC using more than \$2 billion of its own funds to pay the benefits guaranteed by law. PBGC was fully justified in its determination that the facts and circumstances of this case presented an unreasonable risk of loss to both the Plan’s participants and the pension insurance system. Accordingly, the Court should grant summary judgment in favor of PBGC, and find that PBGC acted reasonably in terminating the Salaried Plan.

STATUTORY AND REGULATORY BACKGROUND

A. PBGC

PBGC is the United States government agency that administers the nation's pension insurance program under Title IV of ERISA.¹ When a pension plan covered by Title IV terminates with insufficient assets to pay promised benefits, PBGC typically becomes statutory trustee of the terminated plan and pays participants their pension benefits, up to statutory limits.² PBGC's termination insurance program protects the pensions of nearly 44 million workers and retirees in more than 29,000 private sector defined benefit pension plans.³ As of the end of its last fiscal year, PBGC had terminated almost 4,000 plans and assumed responsibility for the benefits of about 1.34 million people.⁴

PBGC is self-financed, and obtains its revenues exclusively from four sources:

(i) premiums paid by employers sponsoring ongoing plans; (ii) investment income; (iii) the assets in terminated plans; and (iv) recoveries, if any, from employers whose underfunded plans have terminated.⁵ It has three stated statutory purposes: 1) to encourage the continuation and maintenance of voluntary private pension plans; 2) to provide for the timely and uninterrupted payment of pension benefits; and 3) to maintain premiums at the lowest level consistent with carrying out its obligations under Title IV.⁶

B. Plan Termination

¹ 29 U.S.C. §§ 1301-1461 (2006).

² *See* 29 U.S.C. §§ 1322, 1361.

³ PBGC Annual Management Report, Fiscal Year 2009, at 1, 6 (available at <http://www.pbgc.gov/docs//2009amr.pdf>). *See generally* *PBGC v. LTV Corp.*, 496 U.S. 633 (1990).

⁴ *Id.* at 82.

⁵ *Id.* at 1.

⁶ 29 U.S.C. § 1302(a).

Title IV of ERISA provides the exclusive means of terminating a defined benefit pension plan.⁷ Plan termination can be initiated by the sponsoring employer or by PBGC. An employer may terminate a plan in a standard termination under 29 U.S.C. § 1341(b) if the plan has sufficient assets to cover all future benefit payments through the purchase of private sector annuities, or in a distress termination under 29 U.S.C. § 1341(c) if the plan is underfunded and the employer meets certain statutory financial distress tests. To initiate a distress termination in a bankruptcy reorganization, the plan sponsor and members of its “controlled group”⁸ that are debtors in the bankruptcy must demonstrate to the bankruptcy court that unless the plan is terminated, they will be unable to pay all their debts pursuant to a plan of reorganization and will be unable to continue in business outside bankruptcy.⁹

PBGC may initiate termination of an underfunded plan if it determines that one of four criteria set forth in 29 U.S.C. § 1342(a) has been met, including: the plan has not met the minimum funding standard under section 412 of the Internal Revenue Code, 29 U.S.C. § 1342(a)(1); the plan will be unable to pay benefits when due, 29 U.S.C. § 1342(a)(2); or the possible long-run loss to the PBGC insurance program with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.¹⁰ PBGC must initiate termination if the plan’s assets are no longer sufficient to pay benefits that are immediately due participants.¹¹

⁷ 29 U.S.C. § 1341(a)(1); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999); *PBGC v. Mize Co., Inc.*, 987 F.2d 1059, 1063 (4th Cir. 1993).

⁸ *See* 29 U.S.C. §§ 1362(a), (b); 1301(a)(18). A “controlled group” includes a parent-subsidiary or brother-sister group of trades or businesses connected through ownership of at least 80% controlling interest by a common entity. *See* 29 U.S.C. § 1301(a)(14), (b); 26 U.S.C. § 414(b), (c); 26 C.F.R. §§ 1.414(b)-1, 1.414(c)-1, 1.414(c)-2.

⁹ 29 U.S.C. § 1341(c)(2)(B)(ii).

¹⁰ 29 U.S.C. § 1342(a)(4).

¹¹ 29 U.S.C. § 1342(a).

PBGC follows an established administrative process to determine whether an underfunded pension plan should be involuntarily terminated and to select a proposed date of termination.¹² The Trusteeship Working Group (“TWG”) — an interdisciplinary body comprised of representatives from PBGC’s financial, actuarial, policy and legal offices — reviews a written recommendation by PBGC staff that one or more of the criteria for termination under 29 U.S.C. § 1342(a) have been met, and that the pension plan should be terminated. The TWG considers the recommendation from staff, and then makes its own recommendation, which, along with supporting documents, is passed on to the “approving official.”¹³

In cases involving claims of more than \$100 million, the approving official is the PBGC Director. The Director reviews the TWG recommendations and supporting documents, and determines whether the plan should be terminated and PBGC appointed its statutory trustee. The Director also determines the appropriate plan termination date that should be proposed to the plan administrator. The Director’s decision is documented in a Notice of Determination (“NOD”) and a Termination and Trusteeship Decision Record (“TDR”).¹⁴

PBGC notifies the plan administrator of its determinations by sending the administrator a copy of the NOD in accord with 29 U.S.C. § 1342(c). PBGC typically effectuates the termination, trusteeship and establishment of a plan termination date of an underfunded plan by agreement with the plan administrator as authorized by section 1342(c). Indeed, the vast

¹² See PBGC Directive TR-00-2, issued May 8, 2001 (copy attached as Exhibit 1).

¹³ See *id.* at § 2(j); § 3(d)(3). The TWG reviews actuarial, financial and other information developed by the agency staff regarding the funding status of the pension plan and the financial condition of the employer and the employer’s “controlled group,” as that term is used in 29 U.S.C. § 1301(a)(14)(A). *Id.* at § 3(a)-(e). Depending on criteria primarily relating to the number of participants and the amount of underfunding in a plan, either the TWG Chairperson or the full TWG will review the relevant information and make a recommendation to the approving official. *Id.* at §§ 2(b), (j), and 3(b). The definition of approving official is also primarily dependent on the size of the case. *Id.* at § 2(b).

¹⁴ *Id.* at §§ 2 (b), (f), (h), 3(d)(5).

majority of the nearly 4,000 terminated pension plans have been terminated by agreement between PBGC and the relevant plan administrator. If PBGC and the plan administrator cannot agree, however, section 1342(c) authorizes the agency to apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated, and PBGC be appointed its trustee. ERISA also directs that the court establish the plan termination date if PBGC and the plan administrator cannot agree on a date.¹⁵ The establishment of a plan termination date is crucial because it fixes PBGC's liability for guaranteed benefits and serves as the date upon which participants' right to accrue additional benefits ceases.¹⁶ It also serves as the date upon which the liability of the employer and its controlled group for the plan's unfunded benefit liabilities is measured.¹⁷

In creating the pension insurance program, Congress limited the benefits that PBGC could pay. Title IV insurance was "not intended as a full replacement of a pension plan, but rather as covering the basic retirement benefits provided under it."¹⁸ Accordingly, when a pension plan terminates with insufficient funds to cover all of its benefit liabilities, ERISA limits the PBGC guarantee to the payment of "nonforfeitable" benefits as of the date of plan termination.¹⁹ A nonforfeitable benefit is a benefit for which a participant has satisfied all of the conditions for entitlement under the plan and ERISA, as of the date of plan termination.²⁰

ERISA also limits the size of the guaranteed benefit PBGC can pay to any participant; the

¹⁵ 29 U.S.C. § 1348(a)(4).

¹⁶ *Pension Comm. for Farmstead Foods Pension Plan v. PBGC*, 991 F.2d 1415, 1420 (8th Cir. 1993), *aff'd* 778 F. Supp. 1020 (D. Minn. 1991).

¹⁷ *See, e.g.*, 29 U.S.C. §§ 1301(a)(19), 1322, 1362; *PBGC v. Republic Techs. Int'l, LLC*, 386 F.3d 659, 662 (6th Cir. 2004) (hereafter cited as "RTI"); *PBGC v. Heppenstall Co.*, 633 F.2d 293, 296 (3d Cir. 1980).

¹⁸ S. Rep. No. 93-383, at 81 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889.

¹⁹ 29 U.S.C. § 1322(a); 29 C.F.R. § 4022.3(a).

²⁰ 29 U.S.C. § 1301(a)(8).

amount of that limit, which changes every year on January 1, is based on the year in which the pension plan's termination date falls.²¹ Finally, Congress mandated that benefit increases in existence for less than five years before a plan's termination date are generally phased in at a rate of 20% per year.²²

FACTUAL BACKGROUND

Delphi was the plan administrator and contributing sponsor of the Salaried Plan within the meaning of 29 U.S.C. §§ 1002(16)(A), 1301(a)(1), and 1301(a)(13).²³ The Plan covers approximately 20,000 participants.²⁴

On October 8, 2005, Delphi filed a voluntary petition under Chapter 11 of the Bankruptcy Code.²⁵ Delphi ceased paying the legally required contributions to its pension plans, including the Salaried Plan.²⁶ Delphi's first Plan of Reorganization ("POR"), as confirmed on January 25, 2008, provided that all six Delphi-sponsored plans, including the Salaried Plan, would be frozen,²⁷ but would continue with the reorganized Delphi.²⁸ On April 2, 2008, however, Delphi's post-emergence investors declined to fund their investment agreement with Delphi, effectively defeating Delphi's attempt to emerge from bankruptcy under the terms of that 2008

²¹ 29 U.S.C. § 1322(b)(3); 29 C.F.R. § 4022.22, 4022.23.

²² 29 U.S.C. § 1322(b)(1), (7); 29 C.F.R. § 4022.24.

²³ AR 119-319. "AR" refers to the administrative record of PBGC's determination to terminate the Salaried Plan, which will be filed with the Court.

²⁴ AR 34.

²⁵ AR 668.

²⁶ 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, 934. Those waivers expired on May 9, 2008.

²⁷ In a frozen plan, employees retain all benefits that they have earned prior to the "freeze date," but earn no additional benefits going forward.

²⁸ AR 934.

POR.²⁹ Delphi remained in bankruptcy and suffered huge financial losses as auto sales collapsed in late 2008 and 2009.³⁰ In March 2009, Delphi reported that there were only two possible outcomes for the Salaried Plan: assumption by General Motors Corporation (“GM”) or termination and trusteeship by PBGC; Delphi could not afford to continue the Plan.³¹

On April 17, 2009, PBGC staff forwarded a memorandum and supporting materials to the TWG, recommending termination of the Salaried Plan as soon as practicable.³² At the time, there was a significant risk that Delphi’s DIP lenders would foreclose upon and take direct ownership of the stock of Delphi’s foreign affiliates.³³ Because that stock would no longer be 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.³⁴

On April 21, 2009, the TWG met to consider the staff recommendations. The TWG voted to concur in the staff recommendation that PBGC terminate and become statutory trustee of the Salaried Plan, with a termination date as soon as practicable.³⁵ On April 21, 2009, this recommendation, with supporting materials, was transmitted to PBGC’s Acting Director for review and deliberation.³⁶

In addition to the possibility of an imminent controlled group breakup, information before the Acting Director showed that the unfunded benefit liabilities of the Plan were about

²⁹ AR 4091-4095.

³⁰ *Id.*

³¹ AR 336, 710.

³² AR 29-113

³³ AR 773.

³⁴ AR 36.

³⁵ AR 22-24.

³⁶ AR 19-21

\$2.7 billion.³⁷ And 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.³⁸ Based on those facts, the Acting Director determined that the Plan should be terminated.³⁹

Delphi's DIP lenders, however, requested that PBGC forebear from initiating termination, in exchange for the lenders' agreement to provide PBGC five days' written notice prior to exercising their right of foreclosure.⁴⁰ On July 15, 2009, J.P. Morgan, as agent for the DIP lenders, issued written notice of its intent to exercise its remedy of foreclosure; accordingly, the notice period expired on July 22, 2009.⁴¹

On July 22, 2009, PBGC's Director issued the following Notice of Determination:

[T]he Pension Benefit Guaranty Corporation ("PBGC") has determined, under section 4042(a)(1), (2) and (4) of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. § 1342(a)(1), (2) and (4), that the Delphi Retirement Program for Salaried Employees ("Plan") has not met the minimum funding standard required under section 412 of the Internal Revenue Code, will be unable to pay benefits when due, and that 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. PBGC has further determined, under ERISA § 4042(c), 29 U.S.C. § 1342(c), that the Plan must be terminated in order to avoid any unreasonable increase in the liability of the fund. Accordingly, PBGC intends to proceed under ERISA § 4042, 29 U.S.C. § 1342, to have the Plan terminated and PBGC appointed as statutory trustee, and under ERISA § 4048, 29 U.S.C. § 1348, to have July 22, 2009, established as the Plan's termination date.⁴²

PBGC sent this Notice to Delphi, and published copies of in *USA Today* and *The Detroit Free Press*. On July 30, 2009, the bankruptcy court confirmed Delphi's Modified Plan of

³⁷ PBGC's unfunded benefit liability calculations for the Plan were based on information provided by the Plan's actuary. (AR 34).

³⁸ AR 34.

³⁹ AR 21.

⁴⁰ AR 17-18

⁴¹ AR 12-16.

⁴² AR 1-9.

Reorganization, pursuant to which Delphi is liquidating.⁴³ 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.⁴⁴ On August 10, 2009, PBGC and Delphi executed a termination and trusteeship agreement, terminating the Plan effective July 31, 2009.⁴⁵ Since the termination and trusteeship of the Plan, PBGC has been directing the Plan's administration, to ensure a smooth transition in the processing of claims and payment of benefits. PBGC is in the early stages of valuing the Plan's assets and liabilities and implementing trusteeship.

On September 19, 2009, the Plaintiffs filed this lawsuit against PBGC. On November 5, 2009, the Plaintiffs' amended their original complaint to add Defendants GM, the United States Treasury Department, the Presidential Task Force on the Auto Industry, Secretary of the Treasury Timothy F. Geithner, Task Force members Steve Rattner and Ron Bloom, and 50 unnamed Does. The Plaintiffs also demanded a jury trial and added a fifth count, asserted only against the newly added Defendants.

STANDARD OF REVIEW

A. Summary Judgment

Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."⁴⁶ The party seeking summary judgment bears the initial

⁴³ See *In re Delphi Corporation, et al.*, No. 05-44481, Order (July 30, 2009).

⁴⁴ *Id.*

⁴⁵ See Exhibit 2.

⁴⁶ Fed. R. Civ. P. 56(c).

responsibility of demonstrating the absence of a genuine dispute of material fact.⁴⁷ The moving party may successfully support its motion by “‘informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.”⁴⁸

In determining whether there is a genuine issue of material fact sufficient to preclude summary judgment, the court must regard the nonmovant’s statements as true and accept all evidence and make all inferences in the nonmovant’s favor.⁴⁹ A nonmoving party, however, must establish more than the “mere existence of a scintilla of evidence” in support of its position.⁵⁰ “If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”⁵¹ Summary judgment is appropriate if the nonmovant fails to offer “evidence on which the jury could reasonably find for the [nonmovant].”⁵²

B. PBGC’s Termination of the Salaried Plan Must Be Reviewed on the Administrative Record and Should Be Resolved on Summary Judgment.

PBGC is a government agency and is therefore subject to the Administrative Procedure Act (“APA”).⁵³ When reviewing an agency’s determinations under the APA, the reviewing court must decide whether the agency’s decision was “arbitrary, capricious, an abuse of

⁴⁷ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009); *Snyder v. Ag Trucking, Inc.*, 57 F.3d 484, 488 (6th Cir. 1995).

⁴⁸ *Celotex*, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)).

⁴⁹ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Snyder*, 57 F.3d at 488.

⁵⁰ *Anderson*, 477 U.S. at 252; *Moldowan*, 578 F.3d at 374.

⁵¹ *Anderson*, 477 U.S. at 249-50 (internal citations omitted); *Livingston Care Center v. United States Dep’t of Health & Human Svcs.*, 388 F.3d 168, 173 (6th Cir. 2004).

⁵² *Anderson*, 477 U.S. at 252; *Moldowan*, 578 F.3d at 374.

⁵³ 5 U.S.C. § 551 *et seq.*; see *PBGC v. LTV Corp.*, 496 U.S. 633 (1990); *National Cotton Council of Am. v. United States Environ. Prot. Agcy.*, 553 F.3d 927, 934 (6th Cir. 2009); *PBGC v. J.D. Industries, Inc.*, 877 F. Supp. 151, 155 (W.D. Mich. 1994).

discretion, or otherwise not in accordance with law.”⁵⁴ The court’s review is generally limited to the administrative record that was before the agency at the time it rendered its decision.⁵⁵ “The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.”⁵⁶ A reviewing court generally limits its inquiry to whether the agency has “offered a rational explanation for its decision, whether its decision is based on consideration of the relevant factors, and whether the decision is adequately supported by the facts found.”⁵⁷

Moreover, cases based on an administrative record are particularly appropriate for summary judgment. “That record, unless somehow contradicted, satisfie[s] the [agency’s] initial burden of demonstrating the absence of any genuine issue of [material] fact.”⁵⁸ “[S]ummary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did.”⁵⁹ And this Court held, “[w]hen reviewing the decision of an administrative agency . . . a motion for summary judgment is merely the conduit to bring the legal question before the court; the usual tests of summary judgment, such as whether a genuine issue of material fact exists, do not apply.”⁶⁰

Here, this Court is reviewing PBGC’s determination that the Salaried Plan should be terminated. Congress explicitly delegated to PBGC the responsibility to apply its expertise and

⁵⁴ 5 U.S.C. § 706(2)(A).

⁵⁵ 5 U.S.C. § 706; *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

⁵⁶ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁵⁷ See *National Cotton Council of Am. v. United States Environ. Prot. Agcy.*, 553 F.3d 927, 934 (6th Cir. 2009); *Kentucky Waterway Alliance v. Johnson*, 540 F.3d 466, 474 (6th Cir. 2008).

⁵⁸ *Moldowan*, 578 F.3d at 374; *Snyder*, 57 F.3d at 488.

⁵⁹ *City & County of San Francisco v. United States*, 130 F.3d 873 (9th Cir. 1997); see also *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769-70 (9th Cir.1985) (“[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did”).

⁶⁰ *Anglers of the Au Sable v. United States Forest Serv.*, 565 F. Supp. 2d 812, 821 (E.D. Mich. 2008).

“determine” whether one or more statutory grounds for termination exist with respect to a pension plan. If PBGC determines that grounds exist and the plan should be terminated, and the plan administrator agrees, PBGC and the plan administrator can effectuate termination without going to court.⁶¹ PBGC’s determination is entitled to judicial deference. Courts have explicitly so held:

Such [*de novo*] review is unwarranted. There is nothing in the applicable ERISA provisions to show that the sections of the Administrative Procedure Act . . . should not apply to this [termination] decision by PBGC. To find a contrary intent in the statute would be to depart from the usually applicable judicial deference to the expertise of an administrative agency, particularly when the agency has made an adjudicative decision within its sphere of responsibility. Courts scrutinizing such decisions do not substitute their own judgments for those of administrative agencies.⁶²

A district court reviews final agency action “under the APA’s arbitrary and capricious standard.”⁶³ As the Supreme Court has noted, “a court is not to substitute its judgment for that of the agency.”⁶⁴ This is particularly true where, as here, the agency is exercising its discretion.⁶⁵ PBGC generally “may” take action to terminate a plan under section 1342(a) when statutory

⁶¹ 29 U.S.C. § 1342(c).

⁶² *PBGC v. The Pension Comm. of Pan Am. World Airways, Inc.*, 777 F. Supp. 1179, 1181-82 (S.D.N.Y. 1991), *aff’d mem.*, 970 F.2d 896 (2d Cir. 1992); *see also RTI*, 386 F.3d at 667 (review under APA applies to PBGC’s proposed termination date under 29 U.S.C. § 1348); *Association of Flight Attendants-CWA, AFL-CIO v. PBGC*, 2006 WL 89829, *5 (D.D.C. Jan. 13, 2006) (noting agreement of parties that PBGC’s decision is reviewable under the APA’s arbitrary and capricious standard); *PBGC v. WHX Corp.*, 2003 WL 21018839, *2 (S.D.N.Y. May 6, 2003) (finding that PBGC-initiated terminations are reviewed on an arbitrary and capricious standard, based on the administrative record at the time the agency made its final decision); *PBGC v. Haberbusch*, 2000 WL 33362003, *5 (C.D. Cal. Nov. 3, 2000) (rejecting employer’s claim that review under APA does not apply to PBGC’s termination decision under § 1342); *PBGC v. FEL Corp.*, 798 F. Supp. 239, 241 (D.N.J. 1992) (same).

⁶³ *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 473 (6th Cir. 2008); *see generally PBGC v. LTV Corp.*, 496 U.S. at 645-47.

⁶⁴ *Motor Vehicle Mfrs. Ass’n* 463 U.S. at 43; *see also Kentucky Waterways Alliance*, 540 F.3d at 474.

⁶⁵ *See Citizens Coal Council v. United States Environ. Prot. Agcy.*, 447 F.3d 879,890 (6th Cir. 2007) (“Where the [decision] involves review of the agency’s technical or scientific evaluations and determinations, the highest level of deference to the agency is to be applied.”)

grounds exist, but it is not required to do so.⁶⁶ Given the “traditional judicial distaste for *de novo* fact finding concerning matters properly delegated by Congress to the expertise of a regulatory agency,”⁶⁷ and the standard of review set forth in the Administrative Procedures Act, this Court’s role must be to review PBGC’s determination under the “arbitrary and capricious” standard.⁶⁸

Finally, summary judgment is a particularly appropriate vehicle for resolving this administrative record case, as it presents only a question of law: whether the administrative record supports the agency’s determination or shows that it was arbitrary and capricious:

The summary judgment procedure is particularly appropriate in cases in which the court is asked to review or enforce a decision of a federal administrative agency. The explanation for this lies in the relationship between the summary judgment standard of no genuine issue as to any material fact and the nature of judicial review of administrative decisions. . . . [T]he administrative agency is the fact finder. Judicial review has the function of determining whether the administrative action is consistent with law – that and no more.⁶⁹

Indeed, the issue in this case “is not whether there are contested *fact questions* in the underlying administrative record, but rather the *legal question* whether the agency action was arbitrary and capricious or not supported by substantial evidence.”⁷⁰ Courts have granted summary judgment

⁶⁶ The only situation when PBGC “must” take action to terminate a pension plan is when the plan does not have assets available to pay benefits that are immediately due. 29 U.S.C. § 1342(a).

⁶⁷ *United States v. Int’l Harvester Co.*, 387 F. Supp. 1338, 1341 (D.D.C. 1974).

⁶⁸ *Alliance for Community Media v. FCC*, 529 F.3d 763, 776-77 (6th Cir. 2008); *Battle Creek Health Sys. v. Leavitt*, 498 F.3d 401, 409 (6th Cir. 2007).

⁶⁹ *Girling Health Care v. Shalala*, 85 F.3d 211, 215 (5th Cir. 1996), *quoting* 10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil 2d* § 2733 (1983) (internal quotations and footnotes omitted); *see also* *Southern Utah Wilderness Alliance v. Norton*, 326 F. Supp.2d 102, 107 (D.D.C. 2004); *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp.2d 1280, 1282 (D. Hawaii 1998); *Corridor H Alternatives, Inc. v. Slater*, 982 F. Supp. 24, 28 (D.D.C. 1997); *Citizens for the Scenic Severn River Bridge, Inc. v. Skinner*, 802 F. Supp. 1325, 1332 (D. Md. 1991).

⁷⁰ *Castillo v. Army & Air Force Exchange Service*, 849 F.2d 199, 203 (5th Cir. 1988) (emphasis added).

to PBGC in numerous administrative record cases.⁷¹ Finally, should the Court find that the Administrative Record lacks sufficient information, the appropriate action is to remand to PBGC to supplement the record, not to have a full evidentiary hearing.⁷²

ARGUMENT

A. PBGC's Determinations Regarding Termination and Trusteeship of the Salaried Plan Were Not Arbitrary and Capricious and Should Be Sustained.

The Administrative Record, as filed with this Court, readily demonstrates that PBGC's conclusions rationally follow from the facts in the Administrative Record and were therefore not arbitrary and capricious. Specifically, there is undisputed evidence that the Salaried Plan failed to satisfy the minimum funding standard under 29 U.S.C. § 1342(a)(1); that the Plan would be unable to pay benefits when due under 29 U.S.C. § 1342(a)(2) because of underfunding and abandonment by Delphi; and that the possible long-run loss of PBGC with respect to the Plan may reasonably be expected to increase unreasonably if the Plan was not terminated, under 29 U.S.C. § 1342(a)(4).

1. 29 U.S.C. § 1342(a)(1)

ERISA provides that PBGC may terminate a covered pension plan whenever it determines that the plan has not met the minimum funding standard under the Internal Revenue

⁷¹ See, e.g., *PBGC v. Wilson N. Jones*, 374 F.3d 362 (5th Cir. 2004); *PBGC v. Republic Techs. Intl, LLC*, 287 F.Supp. 2d 815, 825 (N.D. Ohio 2003), *rev'd on other grounds*, 386 F.3d 659 (6th Cir. 2004) (PBGC termination decision); *Air Line Pilots Ass'n ("ALPA") v. PBGC*, 193 F. Supp. 2d 209 (D.D.C. 2002), *aff'd sub. nom. Allied Pilots Ass'n ("APA") v. PBGC*, 334 F.3d 93 (D.C. Cir. 2003); *Haberbush*, 2000 WL 33362003 at *5-7 (PBGC termination decision); *Piggly Wiggly Southern Inc. v. PBGC*, 19 Employee Ben. Cas. 1163 (N.D. Ind. April 4, 1995); *Kauble v. PBGC*, 1994 WL 722966 (S.D. Ind. 1994), *aff'd mem.*, 94 F.3d 647 (7th Cir. 1996); *PBGC v. J.D. Ind.*, 887 F. Supp. 151, 155 (W.D. Mich. 1994); *Pension Comm. of Pan Am. World Airways*, 777 F. Supp. at 1181-82 (PBGC termination decision); *but see, PBGC v. United Air Lines, Inc., et al.*, No. 02-B-48191 (Bankr. Ct. N.D. Ill. Mem. Dec. September 21, 2005).

⁷² See *PBGC v. Rouge Steel Co.*, 2006 WL 83062 (E.D. Mich. 2006).

Code (“IRC”).⁷³ PBGC determined that the Salaried Plan failed to meet the minimum funding standard. The Administrative Record clearly shows that Delphi did not make all required contributions to the Plan since filing for bankruptcy in October 2005.⁷⁴ At the time of the Plan’s termination recommendation, Delphi had missed contributions totaling \$165.5 million.⁷⁵ Thus, PBGC’s determination that the Salaried Plan has not met the minimum funding standard under the IRC is fully supported by the Administrative Record and should be sustained.⁷⁶

2. 29 U.S.C. § 1342(a)(2)

PBGC determined that the Salaried Plan would be unable to pay benefits when due. This was because the Salaried Plan was underfunded by billions of dollars and because Delphi was effectively abandoning the Salaried Plan as it liquidated. The Administrative Record documents that while benefits under the Salaried Plan were continuing to be earned and paid, Delphi was no longer funding the Plan.⁷⁷ As a result, the financial condition of the Salaried Plan continued to deteriorate.⁷⁸ Because the Salaried Plan was paying out more than it was receiving from contributions or earnings, it was being depleted and would have eventually run out of assets. Delphi itself stated that it did not plan to maintain any of its pension plans, including the Salaried Plan.⁷⁹ Accordingly, PBGC determined that the Salaried Plan would be unable to pay benefits when due because of both underfunding and abandonment.⁸⁰ This determination is well

⁷³ 29 U.S.C. § 1342(a)(1).

⁷⁴ AR 34, 934.

⁷⁵ AR 34, 41.

⁷⁶ See *Haberbush*, 2000 WL 33362003 at *8. 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.

⁷⁷ See AR 34, 934.

⁷⁸ AR 34.

⁷⁹ AR 366, 710.

⁸⁰ AR 37-38.

supported by the Administrative Record and should be sustained. Indeed, at least two district courts have held that an administrative record showing that a plan is seriously underfunded and that the employer is about to go out of business is sufficient justification for PBGC to initiate termination under § 1342(a)(2).⁸¹

Notably, the factual bases for this determination comprise not only the worsening financial condition of the Salaried Plan, but also Delphi's statements regarding (i) its refusal to fund the Salaried Plan as required by ERISA,⁸² and (ii) its admission that it could not afford to fund the Plan in the future.⁸³ Thus, there is ample support in the Administrative Record for PBGC to determine that the Salaried Plan would be unable to pay benefits when due within the meaning of 29 U.S.C. § 1342(a)(2). The Court should therefore sustain PBGC's determination.

3. 29 U.S.C. § 1342(a)(4)

In addition to its determinations under 29 U.S.C. § 1342(a)(1) and (2), PBGC also determined that the Salaried Plan should be terminated because PBGC's possible long-run loss with respect to the Plan may reasonably be expected to increase unreasonably if the Plan was not terminated prior to July 22, 2009.

According to a report prepared by PBGC's financial advisor, Greenhill, based on information provided by Delphi, most (if not all) of Delphi's value was concentrated in its non-debtor controlled group members.⁸⁴ Upon termination of the Salaried Plan, PBGC would look to those controlled group members to satisfy at least some portion of the liability to PBGC for the Salaried Plan's underfunding.⁸⁵ Collateral pledged for Delphi's bankruptcy DIP loans included

⁸¹ *Republic Techs. Int'l, LLC*, 287 F. Supp. 2d at 823-25; *Haberbush*, 2000 WL 33362003 at *8.

⁸² *See, e.g.*, AR 34, 4091-4095.

⁸³ *See* AR 366, 710.

⁸⁴ AR 80-113, 819-851

⁸⁵ *See* 29 U.S.C. § 1362(a), (b).

100% of the stock of Delphi's first-tier foreign subsidiaries. If Delphi's DIP lenders foreclosed, as was imminently threatened, Delphi would no longer own those entities. Having left the Delphi controlled group, the foreign entities would no longer be subject to joint and several liability for PBGC's claims against Delphi. Accordingly, upon foreclosure, substantially all value available for PBGC recoveries would be lost.⁸⁶

The Sixth Circuit has stated, "ERISA provides for involuntary termination procedures precisely so that PBGC can protect its own financial interests and 'avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund.'"⁸⁷ This applies whether the possible loss can arise from a controlled group breakup, the imminent declared shutdown of an employer's facility, or any other factor that could materially increase the amount of guaranteed benefits, drain the plan's assets, or decrease PBGC's possible recoveries.

Thus, PBGC's conclusion that the Salaried Plan should be terminated to avoid long-run loss to PBGC is well supported by the Administrative Record and should be sustained by this Court.

4. Appointment of PBGC as Statutory Trustee

The Administrative Record shows that appointment of PBGC as statutory trustee of the Salaried Plan under 29 U.S.C. § 1342(c) is appropriate. PBGC has terminated and trusteeed almost 4,000 pension plans and has assumed responsibility for the benefits of about 1.34 million participants and beneficiaries in those terminated plans.⁸⁸ No other party has expressed any willingness or ability to maintain and fund the Salaried Plan. Accordingly, PBGC's

⁸⁶ *Id.*

⁸⁷ *RTI*, 386 F.3d at 668 (citing 29 U.S.C. § 1342(c)); *see also Pension Comm. of Pan Am. World Airways, Inc.*, 777 F. Supp. at 1182-83.

⁸⁸ PBGC Annual Management Report, Fiscal Year 2009, at 82.

determination that it should be appointed statutory trustee of the Salaried Plan is fully supported by the Administrative Record and should be sustained.

Plaintiffs have suggested that PBGC continue the Salaried Plan as an ongoing plan. Under Title IV of ERISA, PBGC may become the statutory trustee of a terminated plan. If a plan administrator does not agree to termination, and a district court declines to grant a decree of termination, the pension plan will simply remain ongoing, but not under PBGC trusteeship.⁸⁹ Here, the Salaried Plan has been terminated by agreement with its sponsor, Delphi, and PBGC has become the statutory trustee and will administer the Plan as a terminated plan in accordance with Title IV.

B. There Is No Basis for the Court to Conduct a *de novo* Review of the Termination of the Salaried Plan.

During this Court's hearing on December 22, 2009, plaintiffs suggested that this Court should conduct a trial *de novo* to determine whether PBGC's decision to proceed with the termination of the Salaried Plan was appropriate. For this argument, the plaintiffs apparently intend to rely on the Seventh Circuit's decision in *In the Matter of UAL Corp (Pilots' Pension Plan Termination)*.⁹⁰ In that case, the Seventh Circuit held that when PBGC seeks a district court decree under 29 U.S.C. § 1342(c) terminating a pension plan, the district court is authorized and required to conduct a *de novo* trial to determine whether PBGC was correct in its determinations. In PBGC's 35 years of existence, no other court has suggested that it should redo the fact-finding work done by PBGC; on this point the Seventh Circuit stands in opposition to the numerous Court of Appeals and district court cases cited above that hold PBGC's

⁸⁹ See 29 U.S.C. § 1342(b) and (c). PBGC may become the statutory trustee of an on-going pension plan under § 1342(b), but only after it has determined that the plan should be terminated, pending issuance of a termination decree under § 1342(c). This provision is moot in cases like this one where the plan administrator agrees that the plan should be terminated.

⁹⁰ *In re UAL Corp. (Pilots' Pension Plan Termination)*, 468 F.3d 444 (7th Cir 2007).

decisions are to be reviewed under the APA's arbitrary and capricious standard, just like the decisions of other federal agencies.

But wholly apart from the infirmities of the Seventh Circuit's decision as a matter of administrative law, the decision is simply inapplicable to the situation here. In sharp contrast to Delphi's liquidation, United Airlines reorganized and remains in operation. In *In re UAL Corp.*, PBGC was unable to reach an agreement with United Airlines to terminate the pension plan because of United's collective bargaining agreement with its pilots. As a result, PBGC sought a decree from the district court to terminate the pension plan.

Here, PBGC was not required to seek a court decree to terminate and trustee the Salaried Plan, because Delphi agreed to the termination. As the Second Circuit noted in its *Jones & Laughlin* decision, "Congress . . . expressly dispensed with the necessity of a court adjudication in these cases."⁹¹

⁹¹ *In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d 197, 200 (2d Cir. 1987).

CONCLUSION

For the reasons set forth above, the Court should grant summary judgment in favor of PBGC, upholding PBGC's determination that the Plan should be terminated.

Date: January 8, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2010 , I electronically filed the foregoing
MOTION FOR SUMMARY JUDGEMENT ON COUNT FOUR OF PLAINTIFF'S
COMPLAINT with BRIEF IN SUPPORT on all parties using the courts ECF system.

s/Ralph L. Landy
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