UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS BLACK, *et al.*,	)	**No. 2:09-cv-13616-AJT-MKM**
Plaintiffs,	)	**OPPOSITION OF DEFENDANTS U.S. DEPARTMENT OF THE TREASURY, PRESIDENTIAL TASK FORCE ON THE AUTO INDUSTRY, TIMOTHY F. GEITHNER, STEVEN L. RATTNER, AND RON A. BLOOM TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY FROM DEFENDANT PENSION BENEFIT GUARANTY CORPORATION**
v.	)	
PENSION BENEFIT GUARANTY CORPORATION, *et al.*,	)	
Defendants.	)	

STATEMENT OF ISSUE PRESENTED

Should Plaintiffs' motion to compel discovery from Defendant Pension Benefit Guaranty Corporation be granted?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Amfac Resorts v. U.S. Dep't of the Interior, 143 F. Supp. 2d 7 (D.D.C. 2001)

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)

Davidson v. U.S. Dep't of Energy, 838 F.3d 850 (6th Cir. 1988)

James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085 (D.C. Cir. 1996)

Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994)

Sara Lee Corp. v. Am. Bakers Ass'n Ret. Plan, 512 F. Supp. 2d 32 (D.D.C. 2007)

Sierra Club v. Slater, 120 F.3d 638 (6th Cir. 1997)

Smith v. Cupp, 430 F.3d 766 (6th Cir. 2005)

Summers v. Earth Island Inst., 129 S. Ct. 1142 (2008)

EXHIBITS

Ex. 2H	Mem. Goldowitz to Snowbarger (Apr. 21, 2009)
Ex. 2I	Mem. Goldowitz to Barber (Aug. 04, 2009) & attached mem.
Ex. 2J	Agreement for App't of Trustee and Term. of Plan (dated as of Aug. 10, 2009)

PRELIMINARY STATEMENT

Plaintiffs Dennis Black, Charles Cunningham, Kenneth Hollis, and Delphi Salaried Retirees Association have moved to compel Defendant Pension Benefit Guaranty Corporation (PBGC) to respond to certain discovery requests that Plaintiffs have served on PBGC. The alleged purpose of Plaintiffs' discovery requests is to determine the completeness of the administrative record that PBGC has filed in response to the claim under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 - 706 *et al.*, that Plaintiffs have asserted against PBGC.

Pending adjudication of their motion to compel, Plaintiffs have withdrawn without prejudice certain discovery requests that Plaintiffs have served on Defendants U.S. Department of the Treasury, Presidential Task Force on the Auto Industry, Timothy F. Geithner, Steven L. Rattner, and Ron A. Bloom (Treasury Defendants). As is the case with the discovery requests that Plaintiffs have served on PBGC, the alleged purpose of the discovery requests that Plaintiffs have withdrawn without prejudice is to determine the completeness of the administrative record that PBGC has filed. Plaintiffs have advised Treasury Defendants that they intend to re-serve those discovery requests if their motion to compel is granted. For that reason, Treasury Defendants have a "concrete and particularized" interest in the adjudication of Plaintiffs' motion to compel that gives them standing to contest it. *See Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009).

As is shown below, Plaintiffs' motion to compel is based on a mistaken view of what an administrative record is in an action under the APA. For that reason, the motion should be denied.[1]

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[1] Treasury Defendants reserve all objections they may have to any discovery requests that Plaintiffs may serve or re-serve on them if Plaintiffs' motion to compel is granted.

STATEMENT OF FACTS

A. PBGC

"PBGC is a federal agency and wholly-owned corporation of the U.S. Government which administers the nation's pension plan insurance program established by ERISA [the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 - 1461 *et al*.]." *Sara Lee Corp. v. Am. Bakers Ass'n Ret. Plan*, 512 F. Supp. 2d 32, 34 (D.D.C. 2007). "PBGC's purpose is to ensure that retirees receive pension benefits they have earned, even if their employer has terminated their pension plan or is otherwise unwilling or unable to pay." *Id.* at 34-35.

ERISA authorizes PBGC to "institute proceedings" to terminate a pension plan if PBGC determines that "the plan has not met the minimum funding standard required under [ERISA]"; that "the plan will be unable to pay benefits when due"; or that "the possible long-run loss of [PBGC] with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." 29 U.S.C. § 1342(a). If PBGC "determine[s] that [a] plan should be terminated" it may bring an action "for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the [insurance] fund." *Id.* § 1342(c). "If [PBGC] and the plan administrator agree [without court involvement] that a plan should be terminated and agree to the appointment of a trustee," the trustee shall have certain prescribed powers and duties. *Id.*

B. The Termination of the Pension Plans

By memorandum dated April 21, 2009 (NOD Memorandum), the Acting Director of PBGC was asked to approve, and did approve, a notice of determination (NOD) under 29 U.S.C.

§ 1342(a) for two pension plans maintained by Delphi Corporation (Delphi): the Delphi Retirement Program for Salaried Employees (Delphi Salaried Plan) and the Delphi Hourly-Rate Plan (Delphi Hourly Plan). Ex. 2H at 1, 3.[2] The NOD Memorandum advised the Acting Director that Delphi had been "operating in Chapter 11 since October 8, 2005"; that the Delphi Salaried and Hourly Plans had unfunded benefit liabilities of more than $2.7 billion and more than $4 billion, respectively; that "Delphi's current position [was] that it [could not] keep the Plans"; that "Delphi's DIP [Debtor-in-Possession] lenders" would be entitled to foreclose on the stock of Delphi's foreign subsidiaries on April 24, 2009, unless certain conditions were met; and that "substantially all value available for PBGC recoveries" would be lost if Delphi's DIP lenders were permitted to foreclose on that stock. *Id.* at 1-2. Describing the proposed NOD, the NOD Memorandum said:

> The NOD states that PBGC has determined that the [Delphi Salaried Plan] meets the criteria for termination under 29 U.S.C. § 1342(a)(1), (a)(2), and (a)(4); that the [Delphi Hourly Plan] meets the criteria for termination under 29 U.S.C. § 1342(a)(2) and (a)(4); that the Plans should be terminated under 29 U.S.C. § 1342(c) to avoid unreasonable increase in the liability of the PBGC's insurance fund; and that PBGC intends that the established date of plan termination ("DOPT") be as soon as possible consistent with the foreclosure date in the DIP Agreement as it may be amended, pursuant to 29 U.S.C. § 1348.

Id.

Although approved by memorandum dated April 21, 2009, the NOD was not issued on that date. *See* Ex. 2I at 3. Instead, "Delphi's DIP lenders agreed to provide PBGC five-days written notice prior to exercising their right of foreclosure, and PBGC agreed to forebear from terminating [the Delphi Salaried and Hourly Plans] until after it had received that notice." *Id.*

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[2] References to exhibits are to the exhibits to this memorandum. A table of exhibits appears at p. iii, *supra*.

On July 15, 2009, Delphi's DIP lenders issued notice through their agent, J.P. Morgan, of their intention to exercise their right of foreclosure following a notice period "expir[ing] at the end of the day on July 22, 2009." *Id.* Responding on July 20, 2009, PBGC divided the NOD for the Delphi Salaried and Hourly Plans that the Acting Director had approved in April 2009 into separate NODs for each of those plans; issued those NODs; and issued NODs for the termination of four other Delphi pension plans. *See id.* at 1, 3. On July 22, 2009, PBGC "filed actions in district courts in Michigan, Oklahoma, and California to terminate all six plans." *Id.* at 3.

By order dated July 30, 2009, the court overseeing the Delphi bankruptcy authorized Delphi to "enter into termination and trusteeship agreements with the PBGC" for all six of its pension plans. *In re Delphi Corp.*, 2009 WL 2482146, at *19 (Bankr. S.D.N.Y.); Ex. 2I at 1. By termination and trusteeship agreement dated as of August 10, 2009, Delphi agreed to the termination of the Delphi Salaried Plan effective July 31, 2009, and to the appointment of PBGC as trustee of the plan. Ex. 2J ¶¶ 1-3.

C. This Action

This action was commenced on September 14, 2009. Plaintiffs are an organization of participants in the Delphi Salaried Plan and certain participants in that plan. The second amended complaint consists of five counts. In Count 4, Plaintiffs allege that "the termination of the [Delphi Salaried Plan] pursuant to the current termination terms" is unsustainable under 5 U.S.C. § 706, the judicial review provision of the APA, because the termination is "(i) unsupported by fact; (ii) not in accordance with 29 U.S.C. § 1342(a) and (c); (iii) unsupported by the law; (iv) the result of the PBGC's clear error in judgment and consideration of irrelevant factors; and (iv) [sic] otherwise arbitrary and capricious." 2d Am. Compl., ECF No. 145, ¶ 56.

For relief, Plaintiffs ask in accordance with § 706 that "the PBGC's termination of the Plan" be "set[] aside." *Id.*, Prayer ¶ D.

On January 8, 2010, PBGC moved for summary judgment as to Count 4. On January 11, 2010, PBGC filed the administrative record allegedly relevant to Count 4. The record filed by PBGC is 5,037 pages long. The NOD Memorandum is part of that record. *See* Admin. R., ECF No. 57, at 19.

Despite the length of record that PBGC filed, Plaintiffs allege that the record is incomplete because, "for all intents and purposes, this record stops around April 21, 2009." Br. Supp. Pl. Mot. Compel Disc. From Def. PBGC (Pl. Mem.), ECF No. 179, at 3. Based on that allegation, Plaintiffs have served PBGC with document requests and interrogatories for the alleged purpose of determining "the completeness of the PBGC's administrative record." *Id.* at 1. PBGC has objected to some or all of Plaintiffs' documents requests and interrogatories. *See id.* 5-6. For that reason, Plaintiffs have moved for an order compelling PBGC to respond to them. *See id.* at 1-2.

ARGUMENT

PLAINTIFFS' MOTION TO COMPEL SHOULD BE DENIED.

"Judicial review of both formal and informal agency action is governed by § 706 of the APA, which provides that a 'reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found' not to meet six separate standards." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1573 (10th Cir. 1994) (court's ellipsis; footnote omitted). "By the text of the [APA], a court is to evaluate agency action by 'review[ing] the whole record or those

parts of it cited by a party.'" *Amfac Resorts v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 10 (D.D.C. 2001) (quoting § 706) (footnote omitted).

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), is the "seminal opinion" of the Supreme Court on "[t]he scope of judicial review of agency action under the APA." *Olenhouse*, 42 F.3d at 1573. One of the issues addressed by *Overton Park* is the meaning of the term "administrative record." *Overton Park* addresses that issue by holding that "the basis for review required by § 706 of the [APA]" is "the 'whole record' compiled by the agency" and that "plenary review of [an official's] decision" is therefore to be based "on the full administrative record that was before the [official] at the time he made his decision." 401 U.S. at 419, 420; *accord Davidson v. U.S. Dep't of Energy*, 838 F.2d 850, 855 (6th Cir. 1988).

In this case, the Acting Director of PBGC was the official who was asked to approve, and did approve, the NOD for the Delphi Salaried Plan. Ex. 2H at 1, 3. Accordingly, the administrative record relevant to Count 4 consists of the "full administrative record that was before the [Acting Director] at the time he made his decision" to approve the NOD. *See Overton Park*, 401 U.S. 420. The Acting Director approved the NOD by memorandum dated April 21, 2009. Ex. 2H at 1, 3. For that reason, Plaintiffs are mistaken when they allege that the administrative record that PBGC has filed is incomplete because "this record stops around April 21, 2009." Pl. Mem. at 3. To the contrary, the administrative record that PBGC has filed *should* "stop[] around April 21, 2009." No justification therefore exists for the discovery requests that Plaintiffs have served on PBGC for the alleged purpose of determining "the completeness of the PBGC's administrative record." *See id.* at 1.

Ignoring *Overton Park*, Plaintiffs allege that the administrative record relevant to Count 4 consists of "all those documents and things, relating to the [Delphi] Salaried Plan (since Delphi's bankruptcy, at least), that were in the PBGC's possession at the time of the termination of the Plan." Pl. Mem. at 13. Plaintiffs base that allegation on language quoted from *Sierra Club v. Slater*, 120 F.3d 638 (6th Cir. 1997); *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085 (D.C. Cir. 1996); *Sara Lee Corp. v. American Bakers Association Retirement Plan*, 512 F. Supp. 2d 32 (D.D.C. 2007); and *Amfac Resorts v. U.S. Department of the Interior*, 143 F. Supp. 2d 7 (D.D.C. 2001). *See id.* at 7; Pl. Br. Opp'n Def. PBGC Mot Protective Order, *etc.*, ECF No. 184, at 7-8. For two reasons, the reliance that Plaintiffs place on *Sierra Club*, *James Madison*, *Sara Lee*, and *Amfac* is misplaced. First, "lower courts * * * are bound to follow the Supreme Court's reasoning and holdings." *Smith v. Cupp*, 430 F.3d 766, 773 n.3 (6th Cir. 2005). *Sierra Club*, *James Madison*, *Sara Lee*, and *Amfac* are lower-court decisions. Accordingly, none of those decisions is controlling insofar as any of them suggests that the administrative record in an action under § 706 is anything other than "the full administrative record that was before the [deciding official] at the time he made his decision." *Overton Park*, 401 U.S. at 420.

Second, *Sierra Club*, *James Madison*, *Sara Lee*, and *Amfac* do not suggest, much less hold, that the administrative record in an action under § 706 *is* anything other than "the full administrative record that was before the [deciding official] at the time he made his decision." *James Madison* is the leading case among the four. In *James Madison*, the owner of certain national banks alleged that "the district court should have reviewed whatever materials the [bank] examiners may have seen during their on-site investigation of the banks" before it adjudicated the owner's claims that the government had violated § 706 by declaring the banks to

be insolvent and appointing a receiver for them. 82 F.3d at 1095. Holding that the owner had "fail[ed] to demonstrate that the record was in any respect inadequate as a basis for district court review of the [g]overnment's determinations," the court said:

> In our view, the role of the examiners is irrelevant. Regardless of how much influence the examiners may have had in the decision to declare the banks insolvent, the administrative record included detailed memoranda describing the examiners' findings and recommendations, and [the owner] has given no reason why the district court should have looked beyond those memos.

Id. at 1095.

In the course of its opinion, the court held that the administrative record in an action under § 706 includes "all materials 'compiled' by the agency that were 'before the agency at the tune the decision was made'" and that the supplementation of an administrative record is appropriate if "the agency deliberately or negligently excluded documents that may been adverse to its decision" or if "'background information' [is needed] in order to determine whether the agency considered all of the relevant factors." 82 F.3d at 1095 (citations omitted). These holdings are quoted or paraphrased in *Sierra Club*, 120 F.3d at 638, *Sara Lee*, 512 F. Supp. 2d at 39, and *Amfac*, 143 F. Supp. 2d at 11.

In *Amfac*, the court held that "a complete administrative record" in an action under § 706 "should include all materials that 'might have influenced the agency's decisions,' and not merely those on which the agency relied in its final decision. Thus, if the agency decisionmaker based his decision on the work and recommendations of subordinates, those materials should be included as well." 143 F. Supp. 2d at 12 (citations omitted). In *Sara Lee*, the court quoted the first sentence of this holding but not the second. 512 F. Supp. 2d at 39.

Thus, *Sierra Club*, *James Madison*, *Sara Lee*, and *Amfac* provide no support for Plaintiffs' allegation that the administrative record relevant to Count 4 must include "all those documents and things, relating to the [Delphi] Salaried Plan (since Delphi's bankruptcy, at least), that were in the PBGC's possession at the time of the termination of the Plan." *See* Pl. Mem. at 13. To the contrary, *Sierra Club*, *James Madison*, *Sarah Lee*, and *Amfac* stand at most for the proposition that the administrative record relevant to Count 4 must include the NOD Memorandum because the NOD Memorandum "was before the [Acting Director] at the time he made his decision" to approve the termination of the Delphi Salaried and Hourly Plans, *see Overton Park*, 401 U.S. at 420, and because the NOD Memorandum is the "detailed memoran[dum]" in which the Acting Director's subordinates set forth their "findings and recommendations" with respect to those plans. *See James Madison*, 82 F.3d at 1095; *Amfac*, 143 F. Supp. 2d at 12. Because the NOD Memorandum is already part of the administrative record, *see* Admin. R. at 19, no justification exists for the discovery requests that Plaintiffs have served on PBGC.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to compel should be denied.

Respectfully submitted,

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Dated: July 12, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2011, I served the within memorandum and the exhibits submitted with the memorandum on all counsel of record by filing them with the Court by means of its ECF system.

s/ *David M. Glass*