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

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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL DISCOVERY FROM DEFENDANT PENSION BENEFIT GUARANTY CORPORATION

Alan J. Schwartz (P38144)
JACOB & WEINGARTEN, P.C.
777 Somerset Place
2301 Big Beaver Road
Troy, Michigan 48084
Telephone: 248-649-1900
Facsimile: 248-649-2920
E-mail: alan@jacobweingarten.com

Anthony F. Shelley
(admitted E.D. Michigan Dec. 22, 2009)
Timothy P. O'Toole
(admitted E.D. Michigan Dec. 22, 2009)
Michael N. Khalil
(admitted E.D. Michigan Sept. 24, 2010)
MILLER & CHEVALIER CHARTERED
655 15th St. NW, Suite 900
Washington, DC 20005
Telephone: 202-626-5800
Facsimile: 202-626-5801
E-mail: ashelley@milchev.com
totoole@milchev.com
mkhalil@milchev.com

Plaintiffs respectfully file this reply in support of their motion to compel discovery from Defendant Pension Benefit Guaranty Corporation ("PBGC").

I. COUNT FOUR IS NOT AN ACTION FOR REVIEW OF AN ADMINISTRATIVE RECORD

Plaintiffs, in the sections that follow, note why they are entitled to discovery under Magistrate Judge Mazjoub's Scheduling Order on Count Four (Docket No. 170, hereafter the "Scheduling Order"), which authorized Plaintiffs to conduct discovery relative to determining the completeness of the administrative record. However, Plaintiffs must again reiterate their pending objection to the Magistrate Judge's conclusion that Count Four is an action for review of an administrative record under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *See* Docket No. 172. In fact, Count Four is brought pursuant to 29 U.S.C. § 1303(f) -- an ERISA provision -- and principally challenges whether the PBGC can meet the statutory criteria for plan termination as prescribed in 29 U.S.C. § 1342(c) with the termination it has accomplished. *See* Second Am. Compl. ¶ 56 (Dkt. No. 145); *cf. infra* p. 7 (noting alternative claim that the PBGC reached an arbitrary agreement to terminate the Salaried Plan). In assessing the standard and scope of review under ERISA concerning a plan's termination, the Seventh Circuit has said: Because deferential review under the APA follows from an agency's ability to make "self-executing orders," and because "[s]ection 1342, by contrast, requires the PBGC to initiate litigation," administrative review principles under the APA are inapplicable, and the PBGC must, "like any other litigant, [] demonstrate a preponderance of the evidence in order to prevail." *In re UAL Corp.*, 468 F.3d 444, 450 (7th Cir. 2006).

Ultimately, this Court, when it considered the PBGC's motion for summary judgment on Count Four at the September 2010 hearing, declined to rule on whether Count Four is a claim limited to an administrative record review. Instead, the Court made the determination on Count

Four (as it did with Counts One through Three) that *discovery* would help to narrow and clarify the issues in dispute and potentially forestall the need for decision on legal questions. More specifically, during the hearing on the PBGC's motions for summary judgment on Count Four and to dismiss Counts One through Three, the Court noted a number of factual disputes that go directly to the question of whether holding a judicial hearing for termination, as Plaintiffs contend is required, would produce any different result than that already reached by the PBGC. If the facts bear out that it would have, then the Court will be squarely faced with the question of whether a hearing was required (and with the ERISA and constitutional questions raised in Counts One through Three). If not, the Court might avoid certain legal questions altogether.

As Plaintiffs have previously noted, the Magistrate Judge's decision to allow discovery only as to the completeness of the administrative record as to Count Four and no discovery at all on Counts One through Three is illogical and violates the Court's rulings at the September 2010 hearing. However, for purposes of the current discovery motion and this reply, Plaintiffs take the Magistrate Judge's Scheduling Order at face value and show nonetheless why all of the discovery they have requested is mandated even if discovery is limited to the completeness of the PBGC's proffered administrative record.

II. THE SCHEDULING ORDER AUTHORIZED PLAINTIFFS TO TAKE DISCOVERY, WITHOUT FURTHER LEAVE FROM COURT

In their Motion to Compel Discovery from Defendant PBGC, (Docket No. 179, hereafter the "Motion to Compel"), Plaintiffs demonstrated why the PBGC's objections to Plaintiffs' discovery are completely meritless, noting, for example, that the Scheduling Order entered by the Magistrate Judge reserved to Plaintiffs "the right to identify and conduct discovery directed toward the alleged deficiencies in the administrative record, . . . *entitled* [the parties] to serve a maximum of 25 interrogatories upon each other;" and allowed each of the parties 10 depositions

on Count Four "*without leave of Court*." Docket No. 170 at 1-2 (emphasis added). It cannot be that Plaintiffs could be "entitled" to serve interrogatories, or authorized to conduct depositions "*without leave of Court*," if the PBGC were correct that Plaintiffs need to make an additional evidentiary showing before ever being allowed to conduct discovery.

In its Response to Plaintiffs' Motion to Compel Discovery (Docket No. 187, hereafter the "PBGC Response" or "Response"), the PBGC ignores these questions, and instead simply reiterates its general objection, that when the Magistrate Judge said Plaintiffs could "identify and conduct discovery," what she really meant was that Plaintiffs could *not* conduct discovery until they had performed an "initial step of identifying supposed deficiencies in PBGC's Administrative Record." PBGC Response at 9 (quoting Docket No. 170 ¶ 1). The argument cannot withstand scrutiny. First, it unjustifiably ascribes a complicated (and unstated) four part process to the simple word "identify," whereby Plaintiffs first had to identify deficiencies in the administrative record, then seek a Court order to determine if the showing was sufficient to merit discovery, then obtain a court order on the discovery motion, and then, finally, conduct discovery. As the PBGC notes elsewhere in its Response, it would be "almost ludicrous" to assume the Court would incorporate such a broad holding "*sub silentio*." *Id.* at 11.

Second, disregarding the grammatical rules that normally govern the English language, the PBGC ignores that the Scheduling Order stated that Plaintiffs could identify *and* conduct discovery. The use of the word "and" means that Plaintiffs were authorized *both* to identify discovery *and* to conduct it. Assuming, *arguendo*, that "identify" has the *sub silentio* meaning that the PBGC asserts, the use of the word "and" means that Plaintiffs were *also authorized to conduct discovery* in addition to identifying it. In short, the PBGC has identified no reasonable

basis for its assertion that, under the Scheduling Order, Plaintiffs had to make an additional evidentiary showing prior to conducting discovery.

III. BY NOT TIMELY OBJECTING TO THE MAGISTRATE JUDGE'S SCHEDULING ORDER, THE PBGC WAIVED ITS RIGHT TO OBJECT, AND MUST NOW ABIDE BY ITS MANDATES

Unable to reconcile its actions with the Court's Scheduling Order, the PBGC attempts to reframe the argument, essentially arguing that the Magistrate Judge *should* not have allowed any discovery in this case. As Plaintiffs have previously pointed out, this argument is foreclosed. Motion to Compel at 10. Whether or not the Court should have allowed for discovery in the Scheduling Order (and as discussed again below, it absolutely should have), the PBGC chose not to object, and it may no longer do so. *See* 28 U.S.C. § 636(b)(1).

IV. THE PBGC REFUSES TO ACKNOWLEDGE THIS COURT'S FINDINGS AS TO THE NEED FOR DISCOVERY, AND DISTORTS THE HISTORY OF THE PLAN'S TERMINATION IN AN ATTEMPT TO JUSTIFY ITS SHODDY ADMINISTRATIVE RECORD

In their Motion to Compel, Plaintiffs also noted that this Court had already made findings as to both the insufficiency of the administrative record and the necessity for discovery. *See* Motion to Compel at 8 (citing Tr. of Sept. 24, 2010 Hearing at 62-64, in which the Court emphasized that the PBGC may have provided evidence seeking to substantiate April 2009 decision to initiate termination proceedings but not "second decision" in July 2009 to "liquidate or terminate the fund"; and citing *id.* at 58:14-16, in which the Court stated "I'm looking at nothing to substantiate who is right and who is wrong. And that is because you haven't had your discovery yet."). How can the PBGC reconcile these findings with its assertion that no showing had yet been made on either the administrative record's deficiency or the need for discovery?

Again, and not surprisingly, the PBGC has no response, and refuses to acknowledge the Court's findings or to offer a competing explanation for the Court's comments. In fact, despite

the Court's finding that this gap in time warrants discovery, the PBGC still insists that Plaintiffs "mistakenly argue that there is a gap in the administrative record because PBGC did not include information about events that occurred during May, June and July 2009." Response at 13. The PBGC argues that Plaintiffs (and the Court) are mistaken because, as of April 21, 2009, the "PBGC's decision to terminate was complete." *Id.* As a matter of law, as a matter of fact, and as a matter of common sense, this statement is simply wrong.

"In determining whether a particular agency action is final, 'the core question is whether the agency has completed its decision making process, *and whether the result of that process is one that will directly affect the parties*.'" *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997) (emphasis added) (quoting *Franklin v. Mass.*, 505 U.S. 788, 797 (1992)). Plaintiffs' lawsuit challenges the PBGC's termination of the Salaried Plan, which the PBGC claims to have done in accordance with 29 U.S.C. § 1342(c), and which was accomplished on August 10, 2009, and effective on July 31, 2009. The only binding decision that the PBGC had made by April 21, 2009 was to *forebear from initiating termination proceedings* under 29 U.S.C. § 1342(a), in order "to accommodate the bankruptcy proceedings." Response at 13. It is the PBGC's decision on August 10, 2009 to execute the termination agreement, not the forbearance decision on April 21, that "directly affected" Plaintiffs, and which forms the basis of Plaintiffs' Complaint. *Slater*, 120 F.3d at 631. It "defies logic," *id.*, to suggest that the PBGC's forbearance decision, which did not affect Plaintiffs, rather than the PBGC's decision actually to enter into a termination agreement with the Salaried Plan's administrator, is the final agency action at issue here.

It should be beyond dispute that relevant events and documents have been unjustifiably excluded from the supposed administrative record associated with the Salaried Plan's

termination.[1] Plaintiffs have attached to this brief a list of 92 meetings, conference calls, e-mails, and documents that are facially relevant to the termination of the Salaried Plan, but which are missing from and nowhere detailed in the PBGC's administrative record of the Salaried Plan's termination. *See* Ex. B. The list is compiled from Freedom of Information Act responses provided from the PBGC and the Treasury Department to Plaintiffs and from bankruptcy court declarations and depositions.

This list shows that, between April 21, 2009 and August 10, 2009, the PBGC engaged in at least 33 meetings, conference calls or email exchanges concerning the Salaried Plan, all of which were unacknowledged in the administrative record. In addition, during this timeframe, the PBGC signed settlement agreements with Delphi and GM, and also signed the termination and trusteeship agreement with Delphi. Moreover, even looking to the pre-April 21, 2009 timeframe (which the PBGC acknowledges it must explain), between February 5, 2009 and April 21, 2009, the PBGC directly participated in at least thirteen meetings and conference calls concerning the Salaried Plan, none of which are documented in the Administrative Record. *See* Ex. B, ¶¶ 2-9, 11-12, 16, 26-27. During the February-April 2009 time frame, Delphi and the Auto Task Force

[1] Plaintiffs also wish to draw the Court's attention to Ex. A, U.S. Dep't of Justice, Environment & Natural Res. Div., *Guidance to Federal Agencies on Compiling the Administrative Record* (Jan. 1999) ("DOJ Guidance"). As Judge Cohn recently noted in *Latin Americans for Social and Economic Development v. Administrator of the Federal Highway Admin.*, Case No. 10-10082, 2010 U.S. Dist. LEXIS 84582, *9-10 (E.D. Mich. Aug. 18, 2010), "[i]n the absence of laws, regulations, or policies that might bind the [agency], these documents may be considered 'best practices' guidelines for compiling an AR." The DOJ Guidance advises agencies that "[t]he administrative record consists of all documents and materials directly or indirectly considered by the agency decision maker in making the challenged decision. It is not limited to documents and materials relevant only to the merits of the agency's decision. It includes documents and materials relevant to the process of making the agency's decision." DOJ Guidance at 1-2. Similarly, agencies are advised to include "all documents prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, even though the final decision-maker did not actually review or know about the documents and materials." *Id.* at 3. The record should "[i]nclude communications the agency received from other agencies and from the public, and any responses to those communications." *Id.* The agency should "[i]nclude documents and materials that contain information that support *or* oppose the challenged agency decision." *Id.* (emphasis in original).

had at least six meetings, conference call or emails concerning negotiations between Auto Task Force/GM and Delphi, all of which the PBGC should have been aware of, but nonetheless failed to document in its administrative record.[2] *Id.* ¶¶ 10, 13-14, 18-19.

The PBGC offers several explanations for why all of this information was excluded and is irrelevant to the question of the completeness of the PBGC's administrative record, each more ridiculous than the last.[3] First, the PBGC argues that its negotiations with Delphi, GM, the Auto Task Force and others are irrelevant "to the statutory grounds for termination." PBGC Response at 14. However, the statutory grounds invoked by the PBGC to justify the Plan's termination under 29 U.S.C. § 1342(c) was to "avoid any unreasonable increase in the liability of the PBGC insurance fund." AR 3. It defies all logic and common sense to argue that the aforementioned negotiations, which determined whether, and to what extent the liability of the PBGC's insurance fund would increase, are irrelevant "to the statutory grounds for termination." PBGC Response at 14. Moreover, Plaintiffs alternatively challenge as arbitrary (in the event the Court finds that the PBGC could terminate the Plan by agreement) the PBGC's decision to enter into the agreement that it did enter to terminate the Plan; plainly, the negotiations leading to that agreement are part of the administrative record associated with the PBGC's decision-making. *See Doe v. Devine*, 703 F.2d 1319, 1326 (D.C. Cir. 1983) ("A court reviewing an agency's

---

[2] Delphi's former Chief Financial Officer has noted that, as of January 18, 2009, the PBGC had access to a "data room" that housed materials reviewed, matters discussed, and positions expressed by various parties during these negotiations. *See* Decl. of John D. Sheehan at 11, ¶ 3, attached hereto as Ex. C.

[3] Plaintiffs also note that the PBGC cites the length of the administrative record in question, perhaps implying that by virtue of its sheer volume it must be complete. *See* Response at 3. The PBGC has also argued that it should not have to "lard its record" with irrelevant information. *Id.* at 14-15. Plaintiffs note that the record produced consists of 5,037 pages, 4,177 of which consist of bankruptcy court filings (and in fact a December 2007 filing accounts for 2,713 pages, or over half the record). *See* Ex. D. Mindful of the PBGC's desire to not "lard" the record with irrelevant information, Plaintiffs note that in its motion for summary judgment on Count Four, Docket No. 45, the PBGC cited only 6 pages from these bankruptcy filings in support of that motion (AR 934, 4091-95).

negotiation of a contract . . . may demand . . . an adequate account of the bargaining history, that allows the court to determine whether the agency reasonably pressed its own objectives and did not unreasonably accommodate those of the other party to the negotiation.").

Similarly, the PBGC argues that it need not include any information related to whether GM, or any other company, considered taking on the Delphi pension plans, because "[a]t the end of the day, no one offered to assume either the Salaried Plan or the Hourly Plan." *Id.* at 15. But the question here is whether these companies might have taken the plans on, and whether the PBGC "deliberately or negligently exclude[d] certain documents, or [whether] the court needs certain 'background information' in order to determine whether the agency considered all of the relevant factors." *Slater*, 120 F.3d at 638 (internal quotation marks and citation omitted). By the time Delphi was liquidated, the Auto Task Force had reviewed and considered proposals from three different parties (the DIP lenders, Platinum Equity, and Federal-Mogul) to purchase Delphi and/or its assets. *See* Ex. E, Deposition of Matthew Feldman (hereafter the "Feldman Dep.") at 70, 104-05, 122, 128. While it is unclear whether any of the parties indicated a willingness to assume some or all of Delphi's pension obligations for the opportunity to purchase Delphi's business (because the administrative record does not discuss the offers at all), it is clear that it was at least a possibility.[4] Plaintiffs should not have to accept as fact -- without the Court or

[4] *See* Feldman Dep. at 202 ("Delphi could have convinced Platinum or the DIP lenders, or, you know, someone else to come in here and buy Delphi and, you know, take on the plan."); *id.* at 204-05 ("[T]here were certainly still scenarios in the beginning of July where it would have been possible that General Motors or someone else would have wound up having to take the hourly plan . . . . I don't think on July 6 it was a completely foregone conclusion . . . . If I understand, if there could not have been a consensual resolution with the PBGC, and it would have taken 3 months to terminate the pension plan, would have had -- you would have had to weigh that delay in Delphi emergence against whatever economic benefits you had against -- in not taking the liability."); *see also id.* at 210-11 ("But at that time, you know, we were still hoping and hearing that maybe there were people interested and coming forward. And if someone had been willing to come forward and take the plans on that had previously announced a willingness by the PBGC to terminate them, you know, no one would take them on.").

Plaintiffs being able to review the related agency documents -- the PBGC's assertions that there were no outcomes other than the one the PBGC ordained.

Finally, the PBGC argues that its failure to substantiate Delphi's assertion that it was unable to maintain its pension plans is irrelevant because "Delphi's business had collapsed before April 2009. Delphi liquidated, as PBGC states was possible (AR000037), and it is impossible for a liquidating company to continue to sponsor and fund a multi-billion dollar pension plan." PBGC Response at 15. These assertions, not surprisingly, misstate the facts; and, in any event, Plaintiffs again should not simply be required to accept the PBGC's rendition of factual points (here, Delphi's collapse and its implications), without the Court or Plaintiffs reviewing the relevant documents and materials leading the PBGC to its factual conclusion.

Indeed, Delphi's business had not "collapsed" in April 2009; rather it faced a liquidity crisis. Delphi was still a critical player in the automotive market whose products were greatly in demand. *See* AR 33 (noting that "Delphi is still GM's largest supplier, [and] Treasury is trying to weigh the benefits of additional GM investments in Delphi against the risks if the supply of parts from Delphi is interrupted"). Further, Delphi liquidated in July of 2009, not April, and its liquidation was by no means a foregone conclusion in April. Last, and most importantly, had the PBGC refused to cooperate with the Auto Task Force and GM and not released the liens upon Delphi assets, it is unlikely that Delphi would have liquated at all. *See* Decl. of Rick Westenberg (attached hereto as Ex. F) at 8-9, ¶ 15 ("neither GM nor Parnassus (nor presumably any other potential purchaser) is willing to purchase the assets (or shares in the non-debtor affiliates that own the assets) while they are subject to the threat of the PBGC lien."); *see also* Feldman Dep. at 204-05 ("If I understand, if there could not have been a consensual resolution with the PBGC, and it would have taken 3 months to terminate the pension plan, would have had -- you would

have had to weigh that delay in Delphi emergence against whatever economic benefits you had against -- in not taking the liability."). The PBGC then negotiated the release of those liens directly with the Auto Task Force, a settlement ultimately implemented with GM and Delphi in July 2009. *See* Ex. G, excerpts of responses by the PBGC and US Treasury Department to Freedom of Information Requests, at TREAS FOIA 116-17 (June 2, 2009 emails from GM to Auto Task Force whereby GM asks the Auto Task Force to explain "the details of the settlement with the PBGC regarding Delphi's hourly and salaried plans")[5]; *see also id.* at PBGC FOIA 623 (listing meetings the PBGC held in July 2009 to resolve the PBGC's recoveries and the final terms of the PBGC settlement agreements, which waived the liens). Only after that settlement was reached did the DIP lenders issue their foreclosure notice on July 15, 2009. AR 12.

V. THE TREASURY DEFENDANTS' OPPOSITION IS NOT PROPERLY BEFORE THE COURT

Plaintiffs also note that the Treasury Defendants have filed an opposition to Plaintiffs' motion to compel discovery from the PBGC. Docket No. 188. Leaving aside for the moment the question of whether the Treasury Defendants really do have standing sufficient to object to a motion that seeks no relief from them whatsoever, Plaintiffs note that the time to file responses to Plaintiffs' Motion to Compel expired on July 5, 2011. While Plaintiffs consented to a stipulated order allowing Defendant PBGC to extend the time pursuant to which it could file its response, Docket No. 185, the stipulation did not cover the Treasury Defendants, and consequently, their brief, filed on July 12, 2011, is untimely, and should not be considered.

[5] Ex. G contains Excerpts from FOIA responses produced by the PBGC and Treasury Defendants. After receiving these documents, Plaintiffs supplied each with a bates stamp, with those documents received from the PBGC identified as PBGC FOIA _, and those received from the Treasury as TREAS FOIA __.

Dated: July 22, 2011

Respectfully submitted,

/s/ Anthony F. Shelley

Alan J. Schwartz (P38144)
JACOB & WEINGARTEN, P.C.
777 Somerset Place
2301 Big Beaver Road
Troy, Michigan 48084
Telephone: 248-649-1900
Facsimile: 248-649-2920
E-mail: alan@jacobweingarten.com

Anthony F. Shelley
Timothy P. O'Toole
Michael N. Khalil
MILLER & CHEVALIER CHARTERED
655 15th St. NW, Suite 900
Washington, DC 20005
Telephone: 202-626-5800
Facsimile: 202-626-5801
E-mail: ashelley@milchev.com
totoole@milchev.com
mkhalil@milchev.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2011, I caused the foregoing electronically to be filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

owen.wayne@pbgc.gov (C. Wayne Owen)
david.glass@usdoj.gov (David M. Glass)

/s/ Anthony F. Shelley
Anthony F. Shelley
MILLER & CHEVALIER CHARTERED
655 15th St. NW, Suite 900
Washington, DC 20005
Telephone: 202-626-5800
Facsimile: 202-626-5801
E-mail: ashelley@milchev.com