

In response to the Court's order of January 29, 2014, permitting Respondents to file a surreply for the limited purpose of addressing new arguments raised by the U.S. Department of the Treasury (the "Treasury") in its reply brief (ECF No. 21), Respondents respectfully submit this surreply. Respondents here address three arguments raised in the Treasury's reply, two arising out of statements contained in a 2009 objection submitted in the Delphi bankruptcy court (the "Objection" submitted as Pet'r's Ex. 2D to its Reply, ECF NO. 21-2), and one involving a new argument about the relief available to Respondents under ERISA.¹

First, on page 7 of its reply brief, the Treasury asks the Court to disregard the 85.62% funding level described in Watson Wyatt's June 30, 2009 AFTAP certification of the Delphi Retirement Program for Salaried Employees (the "Salaried Plan") because the estimate is inconsistent with a statement in the bankruptcy court Objection that described the Salaried Plan as being underfunded by "approximately \$ 2 billion."² The Treasury implies that this earlier statement by the Objectors, which was made prior to any discovery (or even the initiation of the underlying lawsuit), should now be binding on the Plaintiffs in the underlying litigation (the "*Black* Plaintiffs"). As described below, the Treasury's argument completely ignores the context and history of the bankruptcy Objection and helps illustrate the necessity for discovery in this litigation.

As part of the Pension Protection Act of 2006, Congress created a new standard, the Adjusted Funding Target Attainment Percentage ("AFTAP") to measure the pension funding levels for all defined benefit pension plans. The AFTAP is the ratio of each plan's actuarial

¹ The bankruptcy court Objection was filed on behalf of some of plaintiffs in the underlying litigation who are consequently some of the Respondents to the Treasury's motion to quash (the "Objectors").

² The "AFTAP Certification" is attached to Respondents' Opposition brief at ECF No.19-5.

value of assets to the plan's liabilities or the present value of benefits. On June 30, 2009, Watson Wyatt, which served as the actuary for Delphi's pension plans, finalized its AFTAP certification for the Salaried Plan for the current plan year (which began on October 1, 2008). The AFTAP Certification estimated that the Plan was funded at 85.62%, with \$3.497 billion in liabilities as of October 1, 2008. AFTAP Certification at ECF Page 4. On July 1, 2009 the PBGC requested that Watson Wyatt provide it with a copy of the 2009 AFTAP Certification for the Salaried Plan, which Watson Wyatt forwarded to the PBGC on July 13, 2009. *See* Ex. G, attached hereto.

Despite the fact that this AFTAP certification represented the most recent actuarial funding calculation performed on the Salaried Plan in the PBGC's possession, and that PBGC actuaries requested and reviewed the document while they were making their determinations about whether to initiate termination proceedings, the PBGC did not include this document in its administrative record. Indeed, the *Black* Plaintiffs did not become aware of the possible existence of the AFTAP certification until early 2010. On March 8, 2010, the *Black* Plaintiffs wrote to the PBGC, stating their belief that in June or early July 2009 Watson Wyatt had presented an actuarial report to the PBGC regarding the Salaried Plan's funding levels and asked the PBGC to provide a copy of the report. Ex. H, attached hereto. By letter dated March 22, 2010, the PBGC denied the existence of any such report. Ex. I, attached hereto. Respondents subsequently obtained a copy of the AFTAP directly from Watson Wyatt, and later discovery from the PBGC showed that the PBGC did indeed have copies in its records. The PBGC has never provided a satisfactory explanation for its refusal to disclose the AFTAP, either in the administrative record, or in response to counsel's specific requests.

Nonetheless, the Treasury asks this Court to disregard the information contained in the Congressionally-mandated AFTAP Certification because that information is inconsistent with

the Treasury's narrative, *i.e.*, that the Salaried Plan "needed" to be terminated. The irony of the Treasury's argument is that it seeks to penalize the *Black* Plaintiffs for an earlier statement by some of them that was based on a misrepresentation by the PBGC, and does so in an effort to have the Court overlook plainly relevant information obtained through discovery in order to justify denying any discovery from the Treasury.³

The second new argument raised by Treasury goes to its so-called redressability argument on standing. In their opposition to the Treasury's motion to quash, Respondents note that: (1) Congress has expressly authorized plan participants to bring an action for "appropriate equitable relief" against the PBGC, 29 U.S.C. § 1303(f)(1); and (2) that equitable relief is a particularly flexible form of relief that can include, *inter alia*, monetary relief to make an injured party whole. *See* ECF No. 19 at 40-41 (citing *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1880 (2011); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); *Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840, 846 (6th Cir. 1999)). Ignoring *Hecht* and *Carter-Jones*, the Treasury argues that this Court should disregard Judge Tarnow's redressability ruling and find that the *Black* Plaintiffs lack a remedy because *Amara* arose under 29 U.S.C. § 1132(a)(3) (which falls under Title I of ERISA) as opposed to 29 U.S.C. § 1303(f)(1) (which falls under Title IV of ERISA). This distinction is immaterial.

³ The Treasury's other arguments on this point are similarly superficial. As an initial matter, while true that Delphi had stopped making contributions to the Salaried Plan by 2008, it is also true that the Plan had been "frozen" as of that time, meaning that no new liabilities were accruing. Similarly, the Treasury's speculation that the funding discrepancy between the AFTAP and the PBGC's funding estimates can be attributed to the drop in the market value of plan assets would only be relevant to the asset side of the funding ratio; the Treasury offers no explanation for the \$1.7 liability discrepancy. Nor does the Treasury offer any argument as to why a court would use the termination basis liability figures of the PBGC over the congressionally-mandated ongoing assumptions of the AFTAP in making a determination about whether the Salaried Plan could be maintained on an ongoing basis. In sum, the Treasury's arguments regarding the AFTAP Certification are unavailing.

While true that *Amara* occurred in the context of an action under § 1132(a)(3), the Treasury ignores that in both § 1132(a)(3) and § 1303(f), Congress authorized the exact same relief (*i.e.*, “appropriate equitable relief”); thus, it should be assumed that Congress meant to authorize the same relief in both sections. *See Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (U.S. 1986) (“The normal rule of statutory construction assumes that ‘‘identical words used in different parts of the same act are intended to have the same meaning.’’”) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (quoting *Atl. Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932))). A remedy will be considered appropriate equitable relief where it was typically available in equity, which includes, *inter alia*, various forms of restitution and make-whole relief, regardless of whether the relief includes a monetary component. *See, e.g., Amara*, 131 S. Ct. at 1879-80; *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 361-65 (2006); *Rochow v. Life Ins. Co. of N. Am.*, 737 F.3d 415, 426 (6th Cir. 2013); *Longaberger Co. v. Kolt*, 586 F.3d 459, 465 (6th Cir. 2009). The *Black* Plaintiffs’ argument all along has been that, if they succeed in showing that the PBGC unlawfully terminated the Salaried Plan, they are entitled to an order requiring the PBGC equitably to operate the Salaried Plan as if it had not been terminated or, more generally, a constructive trust over the Salaried Plan assets obtained by the PBGC upon termination (and subsequent earnings on those assets) – relief that is (as Judge Tarnow has held) entirely consistent with the case law delineating equitable remedies under ERISA.

Finally, on page 13 of its reply, the Treasury argues that this Court should disregard Judge Tarnow’s September 1, 2011 Order because, in the bankruptcy court Objection, the Objectors noted the Second Circuit’s holding in *In re Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197 (2d Cir. 1987), and stated that, if *Jones & Laughlin* were to govern, the

PBGC may terminate a plan under § 1342(c) outside of a formal district court adjudication. The Treasury asks this Court to treat the statements in the Objection as a concession by the *Black* Plaintiffs as to the propriety of the Salaried Plan's termination. The argument defies common sense.

In the first place, the point of the bankruptcy court Objection was to note the Objectors' belief that any termination of the Salaried Plan by the PBGC pursuant to an agreement with Delphi would be *invalid*, and to put both the court and the other parties to the bankruptcy proceeding on notice that the Salaried Plan's termination was not assured, notwithstanding the imminence of such an agreement, as any agreement could not be effective if made by a conflicted fiduciary. *See, e.g.*, Objection at 2 (noting that the termination of the Salaried Plan was "neither assured nor imminent."). Moreover, both the PBGC and the Treasury were active participants in the Delphi Bankruptcy who would have had notice of the Objection at the time it was filed nearly five years ago. While the *Black* Plaintiffs later included an additional legal claim in their complaint as to why the PBGC's termination of the Salaried Plan by agreement must fail (*i.e.*, that it was far from clear that either ERISA would allow for a summary termination in any instance), neither the PBGC nor the Treasury could have possibly been prejudiced by this claim. Additionally, the *Black* Plaintiffs provided the bankruptcy court with a copy of their draft complaint (the one later filed with Judge Tarnow) in order to ensure that the bankruptcy court had no misgivings about any of the complaint's claims for relief. The bankruptcy court gave its approval to the initiation of the complaint on September 11, 2009. *See* Stipulation Concerning the Automatic Stay in Connection with the Commencement of An Action Against the Pension Benefit Guaranty Corporation, *In re DPH Holdings Corp.*, ECF No. 18896, Case No. 05-44481 (S.D.N.Y., filed Sept. 11, 2011). As to the Treasury's suggestion that the

Black Plaintiffs somehow kept the Michigan Court in the dark about the PBGC's termination-by-agreement practices, Respondents note that one of the *Black* Plaintiffs' first briefs in the case included a detailed discussion of *Jones & Laughlin* (the authority that Treasury suggests has been hidden from the Michigan Court) along with argument as to why the Michigan Court should not feel bound to follow the Second Circuit's precedent. *See Black v. PBGC*, Dkt. No. 7-2 at 12-13.

CONCLUSION

The Treasury's motion to quash should be denied.

Dated: February 10, 2014

Respectfully submitted,

/s/ Anthony F. Shelley

Anthony F. Shelley (D.C. Bar No. 420043)

Timothy P. O'Toole (D.C. Bar No. 469800)

Michael N. Khalil (D.C. Bar No. 497566)

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

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

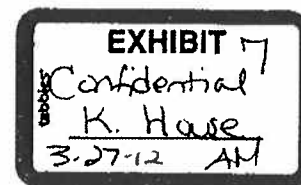
David M. Glass
U.S. Dep't of Justice - Civil Division
20 Massachusetts Avenue, NW
Washington, DC 20530
Email: david.glass@usdoj.gov

John A. Menke
Pension Benefit Guaranty Corporation
Office of the Chief Counsel
1200 K Street, NW
Washington, DC 20005-4026
Email: menke.john@pbgc.gov

/s/ Anthony F. Shelley

Exhibit G

From: House, Kevin (Detroit)
To: Hospedales, Marianna (Detroit)
CC: ML Delphi Team - DL
Sent: 7/15/2009 8:49:40 PM
Subject: RE: Delphi data requests



Can we get a timeframe for that?

From: Hospedales, Marianna (Detroit)
Sent: Wednesday, July 15, 2009 4:48 PM
To: House, Kevin (Detroit)
Cc: ML Delphi Team - DL
Subject: RE: Delphi data requests

We could send it by Friday for the latest.

We have the salaried data sitting from the MetLife request we had earlier this year. The hourly will need re-working as the retained group has changed and will need to be checked.

From: House, Kevin (Detroit)
Sent: Wednesday, July 15, 2009 4:13 PM
To: ML Delphi Team - DL
Subject: FW: Delphi data requests

Marianna (or someone), any idea on when we could send the data? I assume it's sitting there ready to go for the most part.

From: Travia Cynthia [mailto:Travia.Cynthia@pbgc.gov]
Sent: Wednesday, July 15, 2009 3:47 PM
To: House, Kevin (Detroit)
Cc: Cobb, Karen M
Subject: RE: Delphi data requests

Hi Kevin,

For item #3 below, I believe you had estimated a time frame of mid-July. Do you know when you will be able to send us the data? I will be taking some time off in July. If you can provide estimated timing, I will let you know if I need you to send it to someone else in my absence. Thanks.

Cindy

From: Travia Cynthia
Sent: Wednesday, July 01, 2009 1:43 PM
To: 'House, Kevin (Detroit)'
Cc: 'Cobb, Karen M'
Subject: Delphi data requests

Kevin,

Please provide the following information.

1. 2009 AFTAP certifications for hourly and salaried plans
2. 2009 Actuarial Valuation Reports for hourly and salaried plans (if/when complete) and any other funding information expected to be provided to the independent fiduciary.
3. Most recent seriatim census data for both hourly plan and salaried plan including information (as available) that would be needed to determine PC 3 status and determine PC liabilities.

4. Priority category liability calculations completed for both salaried plan and hourly plan (as available) including assumptions used in determining the liabilities and any other analysis/results/reports produced in connection with the PC calculations.

I understand that the first 2 items should be available very quickly and that you'll need more time on the other items. For purposes of sending large data files, please go to pbgc.leapfile.com and choose the secure upload option and follow the directions to send the files to my email address. Thanks and let me know if you have any questions.

Cindy Travia, ASA, EA

Senior Actuary
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, DC 20005
t 202-326-4000 x3511 f 202-842-2843

From: Campeau, Norm (Detroit)
To: Travia Cynthia
CC: House, Kevin (Detroit); Cobb, Karen M
Sent: 7/13/2009 8:15:16 PM
Subject: Delphi Data Requests
Attachments: AFTAP Letter and FAS35 Report for the Delphi Hourly and Salaried Pension Plans; Unpaid Delphi Pension Contributions

Cindy,

Attached is the AFTAP email sent to Delphi as well as information sent to the independent fiduciary.

Let Kevin or I know if you have any questions.

Norm Campeau, A.S.A., E.A.
Consultant

Watson Wyatt Worldwide
28411 Northwestern Highway, Suite 500, Southfield, MI, 48034
Phone: 248-936-7461 Fax: 248-936-7714
Norm.Campeau@watsonwyatt.com
www.watsonwyatt.com

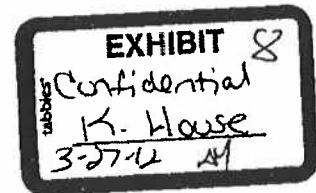


Exhibit H



Timothy P. O'Toole
(202) 626-5552
totoole@milchev.com

March 8, 2010

VIA FIRST CLASS MAIL

John A. Menke
Assistant Chief Counsel
Pension Benefit Guaranty Corporation
Office of Chief Counsel
1200 K Street, N.W.
Washington, DC 20005

Re: Black v. PBGC, Case No. 2:09-cv-13616

Dear Mr. Menke:

I write in connection with the recently held status/settlement conference (the "Conference") in the above captioned case.

At the Conference, we advised you of our belief that, prior to the PBGC's termination of the Delphi Retirement Program for Salaried Employees (the "Salaried Plan"), Delphi, in late June or early July 2009, presented to the PBGC an actuarial report prepared by Watson Wyatt regarding the Salaried Plan's funding levels (the "Watson Wyatt Report"). While you were unaware of the Watson Wyatt Report, you advised that you would look into the matter and supply us with a copy if you were able to locate it. In addition to providing us with a copy of the Watson Wyatt Report, we also request a copy of all correspondence and actuarial reports the PBGC received from Watson Wyatt in the last five years that concern the Salaried Plan, as well as all actuarial information regarding the Salaried Plan that you received from Delphi during that same time period.

We also intend to seek formal discovery (through subpoena and deposition) on these matters directly from Watson Wyatt and Delphi. Please confirm that you would not oppose such efforts.

Sincerely,

A handwritten signature in black ink, appearing to read "T. O'Toole".

Timothy P. O'Toole

Exhibit I



Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

Office of the Chief Counsel

Timothy P. O'Toole, Esq.
Miller & Chevalier Chartered
655 Fifteenth Street, N.W., Suite 900
Washington, D.C. 2005-5701

MAR 22 2010

Re: *Black v. PBGC*

Dear Mr. O'Toole:

I am writing in response to your March 8 letter regarding a June or July 2009 Watson Wyatt report regarding the funding levels of the Delphi Salaried Plan. After the February 18 status conference, I asked PBGC personnel who had worked on the Delphi case about the supposed report. To the best of our knowledge, no one at PBGC knows of such a Watson Wyatt report, if it exists, and no one here has a copy of such a report.

With respect to your request for a copy of all correspondence and actuarial reports concerning the Salaried Plan that PBGC has received from Watson Wyatt in the last five years, I note that your challenge to the termination of the Salaried Plan will be addressed under the "arbitrary and capricious" standard of the Administrative Procedure Act, and the Court's review will be limited to the PBGC's administrative record. Therefore, you are not entitled to discovery, formal or informal, from PBGC beyond the contents of the administrative record that has been filed with the Court and provided to you.

Finally, I can confirm that we do not object to your efforts to obtain discovery from Watson Wyatt and Delphi regarding the supposed Watson Wyatt report, assuming that PBGC receives notice of any such discovery and an opportunity to receive a copy of any documents that you obtain from them. PBGC reserves all other rights with respect to this and any other discovery that you may undertake.

Sincerely yours,

John A. Menke
Assistant Chief Counsel