IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PENSION BENEFIT GUARANTY CORPORATION, Plaintiff, v. SAINT-GOBAIN CORPORATION BENEFITS COMMITTEE, as Plan Administrator for the Saint-Gobain Containers, Inc. Retirement Income Plan; GLASS, MOLDERS, POTTERY, PLASTICS AND ALLIED WORKERS INTERNATIONAL UNION; UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION; and ARDAGH GROUP S.A., Defendants.	)	Civil Action No. 13-02069

MEMORANDUM IN FURTHER SUPPORT OF PENSION BENEFIT GUARANTY CORPORATION'S MOTION FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b) AND FOR A STAY PENDING APPEAL

PRELIMINARY STATEMENT

Plaintiff, Pension Benefit Guaranty Corporation ("PBGC"), respectfully submits this reply memorandum of law in further support of its motion for certification pursuant to 28 U.S.C. § 1292(b) and for a stay pending appeal. As set forth in its moving memorandum, PBGC seeks certification of the following questions addressed in this Court's October 4, 2013 Order, Docket 64, and Memorandum, Docket 63 (the "October 4 Decision"):

1. Whether PBGC's determination that the Saint-Gobain Containers, Inc., Retirement Income Plan ("Pension Plan") should be terminated, and its decision to initiate proceedings to terminate the Pension Plan is agency action subject to judicial review under the Administrative Procedure Act ("APA"); and

2. Whether the Court should review PBGC's termination determination under the arbitrary and capricious or de novo standard of review (hereafter, the "Certifiable Questions").

In their opposition briefs, Defendant Saint-Gobain Corporation Benefits Committee, Intervenor-Defendant Ardagh Group, S.A., and Intervenor-Defendant Unions (collectively, "Defendants")[1] attempt to portray PBGC's arguments as being no different "from those of any disappointed litigant," despite the fact that PBGC is an agency of the United States government, entrusted by Congress to administer the termination insurance program by, among other actions, protecting the insurance fund from unreasonable losses. Saint-Gobain Opposition, Docket 72, at 1. Moreover, Defendants disregard the text of the October 4 Decision and the singular factors that place this case in the category of exceptional cases in which certification is warranted and should be granted.

The October 4 Decision sets forth the case for certification: (1) the Third Circuit has not addressed the issue before this Court; (2) this Court has adopted the reasoning set forth by the Seventh Circuit in *In re UAL Corp*. (Pilots' Pension Plan Termination), 468 F.3d 444 (7th Cir. 2006); and (3) although several district courts, including one within the Third Circuit, confronting this very issue have found the "arbitrary and capricious" standard of review to be applicable to PBGC's termination actions, the Court is not persuaded by those decisions. *See* October 4 Decision, Memorandum at 16, 18.

[1] Intervenor-Defendant Ardagh Group, S.A., and Intervenor-Defendant Unions have submitted briefs joining in the brief of Saint-Gobain Corporation Benefits Committee. *See* Dockets 73 and 74.

Moreover, the Certifiable Questions are consistent with questions involving the standard of review of an agency's decision that have been certified for interlocutory appeal by other courts. Defendants ignore the authorities holding that questions involving the applicable standard of review of an agency's decision satisfy the section 1292(b) requirements and that the Third Circuit has granted interlocutory review on such issues.[2] Instead, Defendants rely on cases such as *Titelman v. Rite Aid Corp.*, No. 00-cv-02865, 2002 WL 32351182 at *3 (E.D. Pa. Feb. 5, 2002)—which this Court acknowledged "present[ed] a relatively ordinary dispute"—and other cases that do not involve key issues such as the review of a government agency's decision.

In addition, the Certifiable Questions set forth in the October 4 Decision go to the heart of PBGC's functions as an administrative agency of the United States, and require guidance from the Third Circuit so that PBGC is not faced with contradictory decisions about its core activities. The split of authority within and without the Third Circuit and the lack of guidance from the Third Circuit make it plain that the grounds for difference of opinion are substantial. This conflict is amplified by the fact that the decisions running counter to the October 4 Decision involve PBGC itself. Therefore, clarification by the Third Circuit is needed quickly.

Defendants have failed to seriously challenge PBGC's showing that the Certifiable Questions meet the section 1292(b) standard. Because the Certifiable Questions present controlling questions of law and a substantial ground for difference of opinion, and because an immediate appeal will materially advance the ultimate litigation, certification should be granted.

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[2] *See, e.g., E.E.O.C. v. Mach Mining LLC.*, No. 11-cv-879-JPG-PMF, 2013 WL 2177770 (S.D. Ill. May 20, 2013); *Montz v. Fed. Emps. Health Mgmt.*, Civ. A No. 90-4647, 1992 WL 46394 (E.D. La. Feb. 28, 1992). *See also*, *NVE, Inc. v. Dep't of Health and Human Servs.*, 436 F.3d 182, 185 (3d Cir. 2006).

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS DISCRETION AND GRANT CERTIFICATION OF THIS EXTRAORDINARY CASE

Defendants fail to recognize that this is an exceptional case that has a broad impact on PBGC's ability to carry out its statutory role of administering the termination insurance program under Title IV of ERISA, which covers 44 million workers in about 24,000 pension plans. PBGC is responsible for protecting the pension benefits of participants and their beneficiaries, premium payers from increasing premiums, and the insurance fund from unreasonable losses. Until this Court's October 4 Decision, only one court in the agency's 30-plus year history had held that PBGC must undergo de novo review for its determinations that pension plans must be terminated to avoid unreasonable losses to the agency, *In re UAL Corp. (Pilots' Pension Plan Termination)*, 468 F.3d 444 (7th Cir. 2006).

While Defendants rely on this Court's prior decisions in which certification has been denied, none of those cases involved conflicting standards of review for U.S. government agency actions and the broad policy questions raised here. These cases are distinguishable from the issues raised in the October 4 Decision. For example, in *Titelman v. Rite Aid Corp*., 2002 WL at *3, the Court denied interlocutory appeal of questions regarding the parole evidence rule, fraudulent inducement, and unjust enrichment, observing that the case "presents a relatively ordinary dispute." That is not the case here, where the policy implications and the effect on a federal agency's operations are far reaching and consequential.

Defendants' reliance on the other cases cited in their brief is similarly misplaced. In *Moore v. Johnson & Johnson*, 2013 WL 32351182, at *9-10 (E.D. Pa. Sept. 20, 2013), the Court denied certification for interlocutory appeal of legal and factual findings relevant to defendants' principal place of business, because, among other reasons, the plaintiffs had not cited any case

rejecting the Court's legal conclusion. *Moore* is easily distinguishable, because as this Court recognized in the October 4 Decision, other courts have reached the opposite conclusion and applied the arbitrary and capricious standard. In *Freedom Med., Inc. v. Gillespie*, No. 06-cv-03195, 2013 WL 3819366 at *5 (E.D. Pa. July 24, 2013), the Court denied certification of a question relating to elements of RICO conspiracy claims, in large part because "the question proposed by [plaintiff for certification] is not germane to the order that it seeks to appeal." There is no doubt that the Certifiable Questions are germane to the October 4 Decision; therefore, *Freedom Med., Inc.* is similarly inapposite. Finally, *Bush v. Adams*, 629 F. Supp. 2d 468 (E.D. Pa. 2009), is distinguishable not only because it involved a relatively routine question of personal jurisdiction, but also because it involved only some of the defendants and, therefore, did not impact the entire case.

But in cases involving the standard of review, courts have certified questions for appeal under section 1292(b). *See*, *e.g. E.E.O.C. v. Mach Mining LLC.*, 2013 WL 2177770, at *6 (certifying the following questions for appeal: Whether the EEOC's conciliation process is subject to judicial review and if so, is that level of review a deferential or heightened scrutiny standard of review), appeal docketed, No. 13-2456 (7th Cir. Jul. 2, 2013); *Montz v. Fed. Emps. Health Mgmt*., 1992 WL 46394, at *1 (certifying the following question for appeal: Whether non-party Office of Personal Management's finding should be afforded any deference in the litigation or, whether the merits of plaintiff's claim be considered de novo); *see also NVE, Inc. v. Dep't of Health and Human Servs.*, 436 F.3d at 185 (reviewing on interlocutory appeal questions involving the applicable standard of review to administrative rulemaking; holding that de novo review did not apply to a private action brought under the APA, and that district court review was limited to the administrative record).

Because this case meets the test for section 1292(b) certification as set forth below and because this case is unique and distinguishable from those cases in which this Court has denied certification in the past, this Court should certify the October 4 Decision.

II. THE COURT'S OCTOBER 4 DECISION INVOLVES A CONTROLLING QUESTION OF LAW

In this Circuit, a "'controlling question of law' is one in which either: (1) if decided erroneously, would lead to reversal on appeal; or (2) is 'serious to the conduct of the litigation either practically or legally.'" *Knipe v. SmithKline Beecham*, 583 F. Supp. 2d 553, 599 (E.D. Pa. 2008), *citing Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974). The Certifiable Questions, which involve the applicable standard of review that should be applied to the PBGC's determination, clearly involve a controlling issue of law that could lead to reversal on appeal. For example, the Third Circuit vacated a district court's de novo award and remanded the case for further proceedings under a more deferential standard of review in *Gambino v. Arnouk*, 232 F. Appx. 140, 146 (3d Cir. 2007). *Gambino* involved the district court's review of the denial of short-term disability benefits by the insurer, Liberty Life Insurance Company of Boston. The Third Circuit found that

> by engaging in de novo factfinding, the District Court committed clear error which infected its review of the case…[t]he District Court erred by collecting information which Liberty did not have in the record before it and by deciding the case on that expanded record. We will therefore vacate the District Court's award of [short term disability] benefits and remand this case for further proceedings-i.e., a largely deferential review of the administrative record that was before Liberty when it made its decision.

Id. A similar result would occur here if the Court of Appeals were to reverse.

Instead of simply conceding this factor, Defendants argue that the October 4 Decision does not "*necessarily* involve a controlling question of law." Saint-Gobain Opposition at 4 (emphasis added). Defendants now disingenuously suggest that the Court may use both

standards and reach a decision on alternative grounds to avoid reversible error on appeal and a new trial. *Id*. But the October 4 Decision clearly states that the "'arbitrary and capricious' standard of review under the APA does not apply" and that the "Court will make [its] determination de novo," which is precisely the relief that Defendants requested in their Motion for Partial Summary Judgment to Establish De Novo Standard of Review. October 4 Decision, Memorandum at 3, 22. Defendants' suggestion now to use both standards is a complete reversal from the position they have consistently taken in this case since the initial scheduling conference in August 2013.

Defendants unwittingly clarify why certification is proper. By conceding that it would be necessary for the Court to decide the issue under both the de novo and arbitrary and capricious standards to avoid possible reversible error, Defendants demonstrate that the October 4 Decision involves a controlling issue of law. Moreover, Defendants' proposal ignores the fact that in determining whether an order presents a controlling question of law, the "saving of time of the district court and of expense to the litigants" is "a highly relevant factor." *Knipe v. SmithKline Beecham*, 583 F. Supp. 2d at 599. Instead of saving time and expense, Defendants' proposal would only complicate the issue and require additional work on the part of the Court and the litigants. Therefore, this factor weighs in favor of certification.

III. THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION

Section 1292(b) certification is proper in cases where the order to be appealed involves an issue of law for which there is a substantial ground for difference of opinion:

> Under the second element, there is a "substantial ground for difference of opinion" about an issue when the matter involves "one or more difficult and pivotal questions of law not settled by controlling authority." In other words, "[s]ubstantial grounds for difference of opinion exist where there is genuine doubt or conflicting precedent as to the correct legal standard." Conflicting and contradictory opinions can provide substantial grounds for a

> difference of opinion. Additionally, the absence of controlling law on a particular issue can constitute substantial grounds.

Knipe v. SmithKline Beecham, 583 F. Supp. 2d at 599-600 (internal citations omitted).

A substantial ground for difference of opinion exists here because, as set forth in the October 4 Decision itself, there is a conflict within the Third Circuit, there are conflicting authorities outside the Third Circuit, and because the Third Circuit has not addressed the issue before this Court. October 4 Decision, Memorandum at 16, 18. Defendants cannot seriously dispute that a substantial ground for difference of opinion regarding the Certifiable Questions exists.

A. THE CONFLICT WITHIN THIS CIRCUIT DEMONSTRATES THAT THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION

First, a substantial ground for difference of opinion exists because there is a conflict within the Third Circuit involving the issues raised in the October 4 Decision, as was acknowledged by the Court itself in the October 4 Decision. In its memorandum, this Court stated that "a few district courts confronting this issue have applied the "arbitrary and capricious" standard of review," citing to a number of cases, including *Pension Ben. Guar. Corp. v. FEL Corp.*, 798 F. Supp. 239, 241 (D.N.J. 1992), a court within the Third Circuit. *See* October 4 Decision, Memorandum at 18, fn 7. Defendants argue in vain that *FEL* is not contrary to the opinion of this Court. (Saint-Gobain Opposition at 7). *FEL* without question conflicts with this Court's holding and is directly on point.

In *FEL*, the defendant made the same argument as Defendants in this case, namely, that 29 U.S.C. § 1342 requires de novo review of PBGC's termination determination. The *FEL* court rejected this argument, citing *Pension Benefit Guaranty Corp. v. LTV Corp.,* 496 U.S. 633, 656 (1990), and *In re Pan American World Airways, Inc. Cooperative Retirement Income Plan,* 777

F.Supp. 1179, 1181 (S.D.N.Y. 1991) (Mukasey, District Judge) ("There is nothing in the applicable ERISA provisions to show that the sections of the Administrative Procedure Act cited above should not apply to this decision by PBGC."). The *FEL* court concluded that "this court shall apply the 'arbitrary and capricious' standard to the PBGC's determination in the instant matter. To do otherwise 'would be to depart from the usually applicable judicial deference to the expertise of an administrative agency.'" *Pension Ben. Guar. Corp. v. FEL Corp.*, 798 F. Supp. at 241 (internal citations omitted).

This Court's October 4 Decision took the contrary position when it applied the de novo standard to PBGC's actions under 29 U.S.C. § 1342. *See* October 4 Decision, Order at 1. The *FEL* court and this Court interpreted the Supreme Court's holding in *Pension Benefit Guaranty Corp. v. LTV Corp.* differently. 496 U.S. at 656. In *FEL*, the court found *LTV* persuasive as to the standard of review to apply to PBGC's action to enforce plan termination under section 1342. *See Pension Ben. Guar. Corp. v. FEL Corp.*, 798 F. Supp. at 241. In contrast, this Court found that *LTV* "is not instructive as to whether the "arbitrary and capricious" standard applies to this case." October 4 Decision, Memorandum at 16.

This Court's October 4 Decision is directly contrary to *FEL* and, therefore, presents a substantial ground for difference of opinion within this Circuit. 798 F. Supp. at 241.

B. THE CONFLICT OUTSIDE THIS CIRCUIT FURTHER DEMONSTRATES THAT THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION

Second, there is conflicting authority outside this Circuit that further highlights the difference of opinion on this issue. *See*, *e.g*., *Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280, 283 (E.D. Pa. 1983) (noting a substantial ground for difference of opinion exists when the question "has been faced by other district courts [including those outside the Third Circuit] with inconsistent results") (brackets added).

This Court has acknowledged that the courts in *In re Pan Am. World Airways, Inc. Coop. Ret. Inc. Plan*, 777 F. Supp.at 1181-82, *aff'd, Pension Ben. v. Pension Comm.*, 970 F.2d 896 (2d Cir. 1992); *Pension Ben. Guar. Corp. v. Rep. Tech. Int'l, LLC*, 211 F.R.D. 307 (N.D. Ohio 2002); and *Pension Ben. Guar. Corp. v. Haberbush*, 2000 U.S. Dist. LEXIS 22818, at *16-17 (C.D. Cal. Nov. 3, 2000), have confronted this issue and have applied the "arbitrary and capricious" standard of review, contrary to this Court's holding. October 4 Decision, Memorandum at 18, fn 7.

Defendants argue that these cases cited by the Court do not represent a substantial ground for difference of opinion because they are outside this Circuit. *See* Saint-Gobain Opposition at 6. But it was Defendants themselves who persuaded this Court to rely on a decision from the 7th Circuit in deciding to apply the de novo standard of review. Moreover, this Court can and should look to cases from outside this Circuit in determining whether there is a substantial difference of opinion. "[I]t is not improper . . . to look to jurisdictions outside the one in which the Court sits when examining whether substantial grounds for disagreement on a given issue exist." *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 657 F. Supp. 2d 504, 509 (D.N.J. 2009).

Defendants also argue that substantial grounds for difference of opinion cannot be established by cases outside this Circuit because they differ from the facts here. *See* Saint-Gobain Opposition at 6. But *In re Pan Am. World Airways, Inc.* and *Haberbush* are directly on point, because, as in this case, they involve PBGC's determinations that pension plans should be terminated under 29 U.S.C. § 1342(c) to avoid an unreasonable in the liability of PBGC's insurance fund. Defendants mistakenly argue that *Pension Ben. Guar. Corp. v. Rep. Techs. Int'l*, LLC, 211 F.R.D. at 309-11, is distinguishable because it addresses when a plan would terminate.

But the district court in that case treated the applicable standard of review and selection of termination date as separate issues, applying the APA's arbitrary and capricious standard of review to PBGC's determination under 29 U.S.C. § 1342, but selecting a different termination date. 211 F.R.D. at 311. On appeal, however, the Sixth Circuit reversed the district court's selection of termination date and remanded the case, resulting in affirmance of PBGC's selection. *Pension Ben. Guar. Corp. v. Rep. Techs. Int'l*, 386 F.3d 659, 668 (6th Cir. 2004) ("ERISA provides for involuntary termination proceedings 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.'"). This Court's acknowledgement of the conflicting authority outside this Circuit militates in favor of certification because it shows that there is a substantial ground for difference of opinion as to the correct legal standard.

C. THE ABSENCE OF THIRD CIRCUIT AUTHORITY DEMONSTRATES THAT THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION

The lack of controlling Third Circuit precedent on the issues raised here is a further ground for certification. Courts have held that a substantial difference of opinion exists when the decision in question "involves a rather novel question of law, which the Third Circuit has not yet had the opportunity to address." *Knipe v. SmithKline Beecham*, 583 F. Supp. 2d at 599-600.

Defendants' attempt to discount the absence of Third Circuit authority is therefore unavailing. Defendants rely on *Moore v. Johnson & Johnson*, No. 12-cv-00490, 2013 WL 5298573 at *10 (E.D. Pa. Sept. 20, 2013), to suggest that novelty does not in and of itself demonstrate the existence of a substantial difference of opinion. In *Moore*, however, the Court noted that "plaintiffs have not cited any case . . . rejecting the Court's legal conclusion." *Id.* By contrast, the Certifiable Questions involve issues that have been considered by district courts

inside and outside the district and the Court of Appeals for the Second and Seventh Circuits, but have not been addressed by the Third Circuit.[3]

Because the Certifiable Questions are of first impression in the Third Circuit, and because numerous courts in and out of this Circuit have reached conflicting decisions, there is a substantial ground for difference of opinion, and certification is warranted under this factor of the certification test.

IV. AN IMMEDIATE APPEAL WOULD MATERIALLY ADVANCE THE LITIGATION

Despite Defendants' arguments to the contrary, an immediate appeal will materially advance this litigation. If this case proceeds under the de novo standard as set forth in the October 4 Decision, a trial will likely be necessary on a de novo record. However, if an arbitrary and capricious standard of review applies, the case may be resolved on summary judgment on the administrative record, because the material facts are all contained in the administrative record. Therefore, an immediate appeal may eliminate the need for trial or for a new trial.[4]

In addition, an immediate appeal will eliminate the need for costly and time-consuming discovery. While Defendants argue that they expect to seek little or no discovery from PBGC and state that they are drafting motions for summary judgment, they ignore the fact that it is PBGC that has the burden of proof. As a result of the October 4 Decision, PBGC is required to

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3 *See, e.g., Pension Ben. Guar. Corp. v. Haberbush*, 2000 U.S. Dist. LEXIS 22818, at *16-17 (C.D. Cal. Nov. 3, 2000) ("We find that PBGC has clearly demonstrated that its determination pursuant to 29 U.S.C. § 1342 to terminate the Plan was a final agency action.").

4 Defendants cite to *Bush v. Adams*, 629 F. Supp. 2d 468 (E.D. Pa. 2009) in arguing that this is not a case where an immediate appeal would materially advance the litigation. (Saint-Gobain Opposition at 8.) However, in that case, the issue sought to be certified was a question of personal jurisdiction that was raised by some but not all of the defendants. Therefore, regardless of the outcome on appeal, the remaining defendants would still have to litigate the claims at issue. *Id*. at 475. Here, however, the entire case hinges on the standard of review.

prove that the Pension Plan should be terminated under de novo review. To do so, PBGC needs extensive fact and expert discovery and will need to hire expert witnesses to show that the transaction creates a potential long run loss for the agency and that the Pension Plan must be terminated to avoid an unreasonable increase in liability under 29 U.S.C. § 1342. Indeed, Defendants have likely retained expert witnesses to opine on that very issue for their anticipated motions for summary judgment. It appears that what Defendants really want is to have this Court confine PBGC to the administrative record, let Defendants submit additional evidence on summary judgment, and have the Court apply the de novo standard. If this case is subject to de novo review, as the Court decided in the October 4 Decision, PBGC's administrative record cannot be the basis for the Court's de novo review.

In their opposition, Defendants for the first time state that "[d]elay, in turn, could put at risk the corporate transaction that defendants seek to close." Saint-Gobain Opposition at 9. However, at the hearing on standard of review, Defendants minimized the risk that PBGC's action would prevent the transaction from closing. In addition, Defendants' suggestion that PBGC has twice resisted to committing to a schedule for summary judgment motions and has otherwise delayed the proceeding for six months is simply incorrect. The Court ruled on the standard of review issue on October 4, 2013, and PBGC quickly convened a Rule 26 conference, as required, soliciting Defendants' cooperation in creating a discovery plan, which defendants rejected. *See* Transmittal Declaration of Elisabeth B. Fry ("Fry Declaration"), at Exs. 1-4.

Moreover, Defendants offer no support for their statement that there is a strong likelihood that the Third Circuit will not reverse the Court's decision. *See* Saint-Gobain Opposition at 9. As noted in the October 4 Decision, "the Third Circuit has not addressed the issue before this

Court," and there is no indication as to its position on these issues. October 4 Decision, Memorandum at 18.

Because an immediate appeal will save the Court and the parties considerable expense and time if the Court of Appeals were to disagree with the October 4 Decision, it will materially advance the litigation.

V. A STAY OF THIS ACTION PENDING APPEAL IS APPROPRIATE

If the Court grants the motion to certify, PBGC respectfully requests it stay proceedings unless the Third Circuit denies PBGC's petition. There would be little reason to force the parties to embark on a burdensome litigation process when resolution of the questions presented on appeal could substantially minimize or eliminate the time and efforts needed to resolve this litigation.

A stay is also warranted in light of the fact that the Federal Trade Commission ("FTC") has filed an administrative complaint against Ardagh Group, S.A. ("Ardagh"), Compagnie de Saint-Gobain, and Saint Gobain Containers, Inc. ("Containers"), alleging that Ardagh and Compagnie de Saint-Gobain's agreement and plan of merger for the sale of Containers' stock to Ardagh violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Since August 2013, defendants have claimed that the FTC's antitrust action will be resolved, and they do so again in their opposition. However, the hearing on the FTC's administrative action is scheduled to begin on December 19, 2013.[5] This additional factor also weighs in favor of granting certification and of granting a stay.

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[5] Ardagh has stipulated to the relief sought by the FTC in its motion for preliminary injunction, the hearing on which was previously scheduled to commence on November 25, 2013. *See* Stipulation and Order, *Federal Trade Commission v. Ardagh Group, S.A., et al.,* No. 13-CV-01021, Document 150, filed Nov. 8, 2013, attached to the Fry Declaration as Ex. 5. The administrative trial before the FTC will commence on December 19, 2013, unless defendants reach an agreement with FTC to permit the acquisition of Containers.

CONCLUSION

For each of the foregoing reasons, PBGC respectfully requests that the Court certify the following questions for immediate appeal pursuant to 28 U.S.C. § 1292(b):

1. Whether PBGC's determination that the Saint-Gobain Containers, Inc., Retirement Income Plan ("Pension Plan") should be terminated and its decision to initiate proceedings to terminate the Pension Plan is an agency action subject to the APA; and

2. Whether the Court should review PBGC's termination determination under the arbitrary and capricious or de novo standard of review.

In addition, PBGC respectfully requests that the Court stay the action pending the determination of the appeal.

Dated: Washington, D.C.

November 13, 2013

s/ Erika E. Barnes

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