UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

PENSION BENEFIT GUARANTY CORPORATION, Plaintiff, v. ASAHI TEC CORPORATION, Defendant.	Civil Action No. 1:10-cv-01936-ABJ

MOTION OF PLAINTIFF PBGC FOR SUMMARY JUDGMENT ON DAMAGES

Plaintiff Pension Benefit Guaranty Corporation ("PBGC") moves pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 7(h) for summary judgment on its damages in this action. The grounds for this motion are set forth in the accompanying: (1) Memorandum of Law in Support of PBGC's Motion for Summary Judgment on Damages; (2) PBGC's Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment on Damages; (3) Declarations of Eric Klieber, Romaine Nelson, James O'Neill, Paula Connelly, and Daniel Lubell, and the exhibits thereto; (4) all papers filed with the Court in this civil action; and (5) such other matters as may be brought to the Court's attention in connection with this motion.

Respectfully submitted,

Dated: January 28, 2014

HUGHES HUBBARD & REED LLP

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DISTRICT OF COLUMBIA

PENSION BENEFIT GUARANTY CORPORATION, Plaintiff, v. ASAHI TEC CORPORATION, Defendant.	)	Civil Action No. 1:10-cv-01936-ABJ

MEMORANDUM OF LAW IN SUPPORT OF PBGC'S
<u>MOTION FOR SUMMARY JUDGMENT ON DAMAGES</u>

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OTHER AUTHORITIES

Plaintiff Pension Benefit Guaranty Corporation ("PBGC") respectfully submits this Memorandum of Law in support of its Motion for Summary Judgment on Damages (the "Motion").

PRELIMINARY STATEMENT

On October 4, 2013, this Court granted PBGC's motion for partial summary judgment on jurisdiction and liability, holding that it has specific jurisdiction over defendant Asahi Tec Corporation ("Asahi Tec") and that Asahi Tec is liable for the unfunded benefit liabilities and termination premiums arising from the termination of the Metaldyne Corporation Pension Plan (the "Pension Plan").[1] The only remaining issues in the case are the *amount* of those liabilities and PBGC's entitlement to costs.

By this Motion, PBGC now seeks entry of judgment in the amount of $191,096,932 for unfunded benefit liabilities and termination premiums, including statutory interest. These amounts have been determined in accordance with Title IV of the Employee Retirement Income Security Act ("ERISA")[2] and the regulations thereunder, established PBGC procedures, and accepted actuarial standards as applied to the undisputed facts.

As set forth in the Declaration of Eric J. Klieber and his accompanying Expert Report, the unfunded benefit liabilities were computed based on an actuarial analysis of each participant's entitlement to benefits under the Pension Plan, and termination premiums were calculated by multiplying the number of participants by the statutory premium amount. As set forth in the Declaration of Romaine Nelson, the value of the Pension Plan's assets was determined pursuant to a plan asset audit conducted in accordance with the agency's BAPD

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[1] Dkt. #85, Memorandum Opinion, 2013 WL 5503191 (Oct. 4, 2013).

[2] 29 U.S.C. §§ 1301-1461 (2006 & Supp. V 2011).

Operations Manual. As set forth in the Declaration of James O'Neill, interest on unfunded benefit liabilities, which began to accrue as of the plan termination date, and interest on termination premiums, which began to accrue when the first installment payment was due, were calculated through January 31, 2014, using a computerized spreadsheet programmed to apply statutory interest rates and deductions for any payments received. As there is no genuine dispute concerning the amounts of these liabilities—Asahi Tec having submitted neither an expert report nor a rebuttal expert report—PBGC's Motion should be granted.

PBGC should also be awarded $247,088 in costs actually incurred in connection with this action under Title IV of ERISA, as detailed in the Declarations of Daniel S. Lubell and Paula Connelly. An award of costs is warranted under 29 U.S.C. § 1303(e)(5) as this action, and the costs incurred therein, were necessitated by Asahi Tec's continued refusal to pay any portion of its Pension Plan obligations, notwithstanding its known liability for such obligations since it acquired Metaldyne Corporation and the Court's award of partial summary judgment on all issues of liability.[3]

STATEMENT OF FACTS

PBGC's Statement of Undisputed Material Facts is filed with this Motion and incorporated herein by reference. PBGC's Statement of Undisputed Material Facts is supported by five accompanying declarations and the exhibits thereto, those of Eric J. Klieber, Romaine Nelson, James O'Neill, Paula Connelly, and Daniel S. Lubell.[4] PBGC also incorporates by

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[3] Dkt. #85 Memorandum Opinion at 12 (Asahi Tec "did not just know about the underfunded Pension Plan, it also knew that the Pension Plan was governed by ERISA and that ERISA provided for controlled group liability").

[4] PBGC refers to these declarations herein by the declarant's last name (e.g., "Klieber Decl.").

reference the statutory background contained in its Memorandum of Law in Support of its Motion for Partial Summary Judgment (Dkt. #58-1 at 2-6).

ARGUMENT

I. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO PBGC ON THE AMOUNT OF DAMAGES DUE.

The Court has determined that Asahi Tec is liable to PBGC on its claims for the Pension Plan's unfunded benefit liabilities and termination premiums. As set forth below, PBGC satisfies the legal standard for summary judgment on damages for each of those claims (see Section A, *infra*). There is no genuine dispute as to any material fact underlying the calculation of the amounts to which PBGC is entitled for unfunded benefit liabilities (Section B.1, *infra*), termination premiums (Section B.2, *infra*), and costs (Section C, *infra*).

A. THE LEGAL STANDARD FOR SUMMARY JUDGMENT.

Summary judgment should be granted where, as here, "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[5] The movant may show its entitlement to judgment as a matter of law by identifying the pleadings, depositions, answers to interrogatories, and admissions that, together with any affidavits, demonstrate the absence of a genuine dispute as to material fact.[6] To defeat summary judgment, the non-moving party must "designate specific facts showing there is a genuine issue for trial."[7] Affidavits or declarations in opposition must be made on personal knowledge and

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[5] Fed. R. Civ. P. 56(a).

[6] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Boehm v. FBI*, No. 09-2173 (ABJ), 2013 WL 5664934, at *1 (D.D.C. Oct. 18, 2013).

[7] *Ali v. Tolbert*, 636 F.3d 622, 629 n.7 (D.C. Cir. 2011) (quoting *Celotex*, 477 U.S. at 324).

properly supported.[8] No dispute is "genuine" unless "the evidence is such that a reasonable [fact-finder] could return a verdict for the non-moving party," and no fact is "material" unless its existence "might affect the outcome of the suit under governing law."[9]

B. **<u>THE COURT SHOULD ENTER JUDGMENT AWARDING PBGC $191,096,932 FOR THE PENSION PLAN'S UNFUNDED BENEFIT LIABILITIES AND TERMINATION PREMIUMS.</u>**

1. **<u>The Amount of the Pension Plan's Unfunded Benefit Liabilities and Interest Is $158,076,453.</u>**

When an underfunded pension plan terminates under Title IV, the contributing sponsor and each controlled group member are jointly and severally liable to PBGC for the plan's unfunded benefit liabilities. In general terms, the unfunded benefit liabilities are calculated by subtracting the value of the assets held by the plan from the plan's benefit liabilities. More specifically, ERISA defines the "amount of unfunded benefit liabilities" to mean:

> as of any date, the excess (if any) of—
>
> (A) the value of the benefit liabilities under the plan (determined as of such date on the basis of assumptions prescribed by [PBGC] for purposes of [29 U.S.C. § 1344]), over
>
> (B) the current value (as of such date) of the assets of the plan.[10]

PBGC is entitled to recover "the total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan, together with interest (at a

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[8] Fed. R. Civ. P. 56(c)(4).

[9] *Anderson v, Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *accord Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C. Cir.1987). *See also Scott v. Harris*, 550 U.S. 372, 378 (2007) (in assessing a motion for summary judgment, a court must view the facts and draw reasonable inferences in the light most favorable to the non-movant.)

[10] 29 U.S.C. § 1301(a)(18).

reasonable rate) calculated from the termination date in accordance with regulations prescribed by [PBGC]."[11]

To value the Pension Plan's unfunded benefit liabilities, PBGC engaged Eric J. Klieber, an expert with extensive experience in this exact task. Mr. Klieber, an enrolled actuary with Buck Consultants, has done extensive work on PBGC matters for more than fifteen years and has valued the benefit liabilities of more than 150 pension plans.[12] As described in Mr. Klieber's Declaration and Expert Report, such a valuation requires an actuary to complete a complex series of analyses and apply a number of prescribed assumptions to data about the participants and their benefits.

Many of those assumptions are contained in PBGC regulations, as Congress prescribed in 29 U.S.C. § 1301(a)(18). These include assumptions for benefit starting date, form of payment, expected retirement age, mortality, discount factor, and administrative expenses.[13] Other assumptions are contained in PBGC's Actuarial Technical Manual, such as how to determine a participant's marital status when unknown, a spouse's birthdate when unknown, estimates for unknown hours of work, and estimates for unknown salary data.[14] Still other assumptions are in

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[11] 29 U.S.C. § 1362(b)(1)(A). PBGC's regulation, 29 C.F.R. § 4062.3(a)(1), parallels this language, defining the liability as "the total amount (as of the termination date) of the unfunded benefit liabilities (within the meaning of [29 U.S.C. § 1301(a)(18)]) to all participants and beneficiaries under the plan, together with interest calculated from the termination date in accordance with [29 C.F.R.] § 4062.7."

[12] Klieber Decl. ¶ 2.

[13] *See* 29 C.F.R. §§ 4044.51-4044.57 and Appendices A to D of part 4044; Klieber Expert Report (Klieber Decl. Ex. A) at 15-22.

[14] *See* Klieber Expert Report (Klieber Decl. Ex. A) at 9-10, 16.

the relevant plan document itself, such as the early retirement factor, the late retirement factor, and the benefit form conversion factor.[15]

The first step in valuing a terminated plan's unfunded benefit liabilities is to determine the value of the benefit liabilities as of the termination date, *i.e.*, to place a current dollar value on the benefits the plan must pay to participants based on their employment through the termination date.[16] In performing that calculation, Mr. Klieber applied actuarial assumptions to value each individual participant's benefit. As he described in his report, the value of each participant's benefit equals the amount of each potential payment to that participant times the probability that the payment will be made, multiplied by the discount factor reflecting the time value of money, plus expenses.[17] The amount and probability of payment have a number of sub-factors that Mr. Klieber was required to include as well, such as expected retirement age and mortality.[18] Mr. Klieber used available data and applicable regulatory and actuarial principles to assess these factors and compute the Pension Plan's benefit liabilities. In his professional judgment, the data was sufficient to produce an actuarially sound calculation of the Pension Plan's unfunded benefit liabilities.[19] Mr. Klieber determined the value of the Pension Plan's benefit liabilities as of its termination date to be $329,609,412.[20]

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[15] *Id.* at 17-18.

[16] *Id.* at 14.

[17] *Id.* at 14-15.

[18] *Id.* at 14-22.

[19] Klieber Decl. ¶ 6.

[20] Klieber Expert Report (Klieber Decl. Ex. A) at 25.

The second step in valuing a terminated plan's unfunded benefit liabilities is to subtract the fair market value of the plan's assets as of its termination date from the plan's benefit liabilities. PBGC values the plan assets in every case according to established agency procedures set forth in the BAPD Operations Manual.[21] Where the plan's assets consist of marketable securities, fair market value is determined based on the published closing prices for those securities on the plan's termination date.

PBGC, with assistance from Watkins Meegan, a CPA firm contracted by PBGC, completed its evaluation of the Pension Plan's assets in accordance with the procedures in the BAPD Operations Manual and set forth the results in its plan asset audit report.[22] A subsequent modification due to interest on the Pension Plan's securities increased the assets slightly, by approximately $2,700, so the value of the Pension Plan's assets as of the termination date was $194,138,544.[23] Mr. Klieber subtracted this amount from the amount of benefit liabilities to determine the amount of the Pension Plan's unfunded benefit liabilities as of its termination date to be $135,470,868.[24]

Finally, ERISA provides that PBGC is entitled to recover "interest at a reasonable rate" on unfunded benefit liabilities, and PBGC's regulation specifies "interest calculated from the

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[21] *See* Nelson Decl. ¶ 3.

[22] Nelson Decl. ¶¶ 4, 6; Nelson Decl. Ex. 1.

[23] *Id.* ¶ 7. In addition, PBGC independently valued certain of the Pension Plan's "non-traditional" assets on November 30, 2012, and determined that the plan assets were actually slightly lower—by $75,232.00—than reported in the plan asset audit report. *Id.* ¶ 8 and Ex. 2 thereto (Addendum 2 to plan asset audit). PBGC did not reduce the asset figure because it would not have affected any participants' benefits. *Id.* Such an adjustment would have slightly *increased* unfunded benefit liabilities. *Id.* PBGC provided this information to Asahi Tec on November 5, 2013. Connelly Decl. ¶ 12.

[24] Klieber Expert Report (Klieber Decl. Ex. A) at 26.

termination date in accordance with [29 C.F.R.] § 4062.7."[25] Section 4062.7(a) provides that the amount of liability "includes interest, from the termination date, on any unpaid portion of the liability . . . [a]t the rate set forth in [section 4062.7(c)] until the liability is paid in full and is compounded daily." Section 4062.7(c), in turn, mandates use of the rate prescribed under section 6601(a) of the Internal Revenue Code. Section 6601(a) of the Internal Revenue Code provides that the "underpayment rate" under section 6621 of the Internal Revenue Code applies to amounts not paid on or before the last date prescribed for payment, until the date paid.[26] Section 6621, in turn, provides that the "underpayment rate" is "the sum of – (A) the Federal short-term rate determined under subsection (b), plus (B) 3 percentage points."[27] The Federal short-term rates are published by the IRS.

James O'Neill, a PBGC actuary, applied the statutory rates to the Pension Plan's unfunded benefit liabilities to calculate the amount of interest due.[28] He used a computerized spreadsheet programmed with these rates and determined the amount of interest due on the unfunded benefit liabilities as of January 31, 2014 to be $22,605,585, and the total amount of unfunded benefit liabilities with interest accrued as of January 31, 2014 to be $158,076,453.[29]

Asahi Tec has not submitted any evidence either to rebut the figures PBGC presented or to support any different calculation of its liabilities. Asahi Tec submitted neither its own affirmative expert report nor a report from any expert to rebut Mr. Klieber's Expert Report,

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[25] 29 U.S.C. § 1362(b)(1)(A); 29 C.F.R. § 4062.3(a)(1).

[26] 26 U.S.C. § 6601(a).

[27] 26 U.S.C. § 6621(a)(2).

[28] O'Neill Decl. ¶¶ 4-6.

[29] *Id.* ¶ 8.

though the deadlines for those reports have passed.[30] Thus, there is no genuine dispute of material fact about the amount of unfunded benefit liabilities, or the interest thereon. Accordingly, the Court should grant summary judgment to PBGC that the amount of unfunded benefit liabilities and interest as of January 31, 2014, is $158,076,453 and that statutory interest will continue to accrue after January 31, 2014, until the liability has been paid in full.

2. **<u>The Amount of the Termination Premiums and Interest Is $42,113,915.</u>**

The Court held that Asahi Tec is liable for termination premiums under the "General Rule" in 29 U.S.C. § 1306(a)(7)(A).[31] Those premiums must be paid for a three-year period at an annual rate of "$1,250 multiplied by the number of individuals who were participants in the plan immediately before the termination date."[32] PBGC's regulation provides that the number of participants used to calculate termination premiums is "the number of participants in the plan, determined as of the day before the termination date under [29 U.S.C. § 1348]."[33]

As set forth in Mr. Klieber's Expert Report, the number of participants in the Pension Plan on the day before it terminated (July 30, 2009) was 10,071.[34] Multiplying 10,071 participants by $1,250 per year, times three years, results in total termination premiums of $37,766,250.[35]

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[30] Dkt. #83, Order establishing deadlines (Jul. 26, 2013); Connelly Decl. ¶¶ 10, 14.

[31] Dkt. #85, Memorandum Opinion at 43.

[32] 29 U.S.C. § 1306(a)(7)(A).

[33] 29 C.F.R. § 4006.7(b).

[34] Klieber Decl. ¶ 10, Klieber Decl. Ex. A at 26.

[35] Klieber Decl. ¶ 11, Klieber Decl. Ex. A at 27.

The due date for the termination premiums for the first applicable 12-month period was September 30, 2009.[36] The second and third due dates were September 30, 2010, and September 30, 2011.[37] To date, Asahi Tec has not paid any portion of these termination premiums.[38] Nor did Asahi Tec file either an expert report or a rebuttal expert report contesting the amount of termination premiums due, though the deadlines for those reports have passed.[39]

Title IV of ERISA mandates interest on overdue termination premiums "at the rate imposed under section 6601(a) of Title 26."[40] Such interest is to be calculated in the same manner as interest on unfunded benefit liabilities, as described above. James O'Neill, the PBGC actuary who calculated interest on the unfunded benefit liabilities, similarly applied the statutory rates to the termination premiums in this case to calculate interest due as of January 31, 2014, in the amount of $4,347,665, for a total of $42,113,915 in termination premiums plus interest.[41]

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[36] The due date for termination premiums is the 30th day of each of the three "applicable 12-month periods." 29 C.F.R. § 4007.13(d). If a pension plan's termination date is established by agreement to be in the past, as the Pension Plan's was, the first of the three 12-month periods begins with the later of: (1) the first day of the calendar month following the month in which the plan's termination date was established by agreement; and (2) the first day of the calendar month following the month in which the termination date occurs. 29 C.F.R. § 4007.13(f). In the current case, the Pension Plan's termination date is July 31, 2009, which was established by agreement on August 31, 2009. PBGC's Statement of Undis. Mat. Facts ¶ 1. Accordingly, the first applicable 12-month period begins on the first day of the calendar month after August 31, 2009, or September 2009.

[37] The second and third 12-month periods immediately follow the first. 29 C.F.R. § 4007.13(d)(2).

[38] O'Neill Decl. ¶¶ 7, 9.

[39] Dkt. #83, Order establishing deadlines (Jul. 26, 2013); Connelly Decl. ¶¶ 10, 14.

[40] 29 U.S.C. § 1307(b)(1).

[41] O'Neill Decl. ¶¶ 5-7, 9.

Because there is no genuine issue of material fact as to the amount of termination premiums or the interest thereon, the Court should grant PBGC summary judgment that the amount of termination premiums and interest as of January 31, 2014, is $42,113,915 and that statutory interest will continue to accrue after January 31, 2014, until this liability has been paid in full.

3. PBGC Has Received Payments That Reduce Asahi Tec's Liability By $9,093,436.

PBGC received two payments of $3 million each (on October 16, 2009 and April 13, 2010), and three distributions from the estate of Metaldyne Corporation in the amount of $313,745, $980,000, and $856,503 (on December 20, 2011, September 10, 2012, and November 8, 2013, respectively).[42] Mr. O'Neill added interest at the statutory rate to the payments that PBGC received, and the total is $9,093,436 as of January 31, 2014.[43] There is no genuine dispute about this amount.

* * *

There is no genuine dispute of material fact regarding the amount, as of January 31, 2014, of unfunded benefit liabilities with interest ($158,076,453), termination premiums with interest ($42,113,915), or payments received by PBGC with interest ($9,093,436). Accordingly, the Court should enter judgment awarding PBGC the net of these amounts, $191,096,932, plus statutory interest accruing after January 31, 2014.

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[42] O'Neill Decl. ¶ 7.

[43] O'Neill Decl. ¶ 7; O'Neill Decl. Ex. A.

C. THE COURT SHOULD ENTER JUDGMENT AWARDING PBGC $247,088 IN COSTS.

Under 29 U.S.C. § 1303(e)(5), a court "may award to [PBGC] all or a portion of the costs of litigation incurred by [PBGC]" in connection with "any action brought under [Title IV of ERISA]." An award of costs is appropriate here. PBGC, an agency with a substantial deficit,[44] was forced to bring the present action in order to recover liabilities for which Asahi Tec failed to articulate any substantive defense. PBGC is the prevailing party in the action. As this Court found, Asahi Tec was aware of its liability for the Pension Plan's liabilities when it acquired Metaldyne.[45] PBGC urged Asahi Tec to assume its obligations with respect to the Pension Plan both before and after it terminated.[46] Asahi Tec neither assumed sponsorship of the Pension Plan nor paid the amounts due to PBGC.[47] After giving Asahi Tec over a year, PBGC filed its complaint.

Asahi Tec has never genuinely disputed its substantive liability to PBGC for the Pension Plan's unfunded benefit liabilities. Moreover, Asahi Tec's opposition to its liability for termination premiums rested on purely legal arguments that it neglected to raise via a motion to dismiss, instead waiting over two years before first raising those arguments in response to PBGC's motion for partial summary judgment. Asahi Tec has neither paid nor secured any portion of these liabilities, even after summary judgment on all issues of liability was granted.

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[44] *See* PBGC's 2013 Annual Report at 17 ($36 billion deficit), http://pbgc.gov/res/reports/ar2013.html.

[45] See n.3, *supra*.

[46] Connelly Decl. ¶ 4.

[47] *Id.* ¶ 5.

Under these circumstances, the Court should award PBGC the costs it has incurred pursuing collection of these liabilities over the three-plus years this action has been pending.

The costs incurred by PBGC in connection with this action and the calculation of those costs are addressed in the declarations of Ms. Connelly and Mr. Lubell. These include costs for translation, electronic research, electronic discovery hosting and production, travel, and PBGC's actuarial expert. PBGC is not seeking attorneys' fees. In accordance with ERISA, the Court should award costs to PBGC in the amount of $247,088.

CONCLUSION

For the reasons stated above, PBGC requests that the Court grant summary judgment on damages in the amounts set forth herein, together with interest accruing after January 31, 2014, until such liabilities have been paid in full.

Respectfully submitted,

Dated: January 28, 2014

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PBGC'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT ON DAMAGES

Pursuant to Local Civil Rule 7(h)(1), plaintiff Pension Benefit Guaranty Corporation ("PBGC") submits this statement of material facts about the damages in this action as to which PBGC contends there is no genuine dispute.

1. The Metaldyne Corporation Pension Plan (the "Pension Plan") terminated under 29 U.S.C. § 1342 effective July 31, 2009 (the "termination date") by agreement of the parties. (Complaint ¶ 17; Answer ¶ 17; Dkt. #11-7, Agreement for Appointment of Trustee and Termination of Plan (Aug. 31, 2009).)

2. PBGC urged Defendant Asahi Tec Corporation ("Asahi Tec") to assume its obligations with respect to the Pension Plan both before and after it terminated. On September 18, 2009, PBGC sent a letter to Masataka Matsumura, Chief Financial Officer of Asahi Tec, with a copy to Asahi Tec's U.S. counsel at O'Melveny & Myers LLP, discussing Asahi Tec's obligations for the Pension Plan. (Connelly Decl. ¶ 4; Connelly Decl. Ex. 1.)

3. Asahi Tec did not assume sponsorship of the Pension Plan and, to date, has continued to refuse to pay PBGC any amount in connection with the Pension Plan. (Connelly Decl. ¶ 5.)

4. Eric J. Klieber, PBGC's expert witness in this litigation, is an Enrolled Actuary since 1982 and has been determining the value of benefit liabilities in PBGC-trusteed plans (like the Pension Plan) for approximately 15 years. (Klieber Decl. ¶¶ 1-2.)

5. Mr. Klieber calculated the actuarial value of the Pension Plan's benefit liabilities as of its termination date according to Title IV of the Employee Retirement Income Security Act ("ERISA") and the regulations thereunder, established PBGC procedures, and actuarial standards of practice. (Klieber Decl. ¶ 7; Klieber Decl. Ex.. A at 4-6.)

6. The actuarial value of the Pension Plan's benefit liabilities as of its termination date is $329,609,412. (Klieber Decl. ¶ 7.)

7. PBGC performed the plan asset audit for the Pension Plan in the ordinary course of business according to established agency procedures in the BAPD Operations Manual, and issued its plan asset audit report dated April 30, 2010 (PBGC 42492 to 42505). (Nelson Decl. ¶¶ 4, 6; Nelson Decl. Ex. 1.)

8. In the plan asset audit, PBGC initially accepted the value of certain of the Pension Plan's "non-traditional" assets reported on the asset statement of the Plan's depository institution, Northern Trust Corporation. (Nelson Decl. ¶ 8.) But PBGC performed an independent valuation of such assets on November 30, 2012, and determined that their value was actually slightly lower—by $75,232.00—than reported in the plan asset audit report. (Nelson Decl. ¶ 8 and Nelson Decl. Ex. 2 (Addendum 2 to Plan Asset Audit Report, PBGC 69456 to 69476).) PBGC did not adjust the figures because it would not have affected any participants'

benefits. (*Id.*) Such an adjustment would have slightly increased unfunded benefit liabilities. (*Id.*)

9. PBGC slightly modified the asset value (an increase of $2,736.67) from the $194,135,807.24 reported in the plan asset audit report due to interest on the Pension Plan's securities. (Nelson Decl. ¶ 7.) The final value of the Pension Plan's assets as of its termination date is $194,138,543.91. (*Id.* at ¶¶ 7-8.)

10. The amount of the Pension Plan's unfunded benefit liabilities as of its termination date (calculated by subtracting the fair market value of its assets at the termination date from the actuarial value of its benefit liabilities at the termination date) is $135,470,868. (Klieber Decl. ¶ 9.)

11. As of January 31, 2014, the statutory interest due on the Pension Plan's unfunded benefit liabilities under 26 U.S.C. §§ 6601(a) and 6621(a)(2) is $22,605,585. (O'Neill Decl. ¶ 8.)

12. The Pension Plan's total amount of unfunded benefit liabilities plus interest as of January 31, 2014 is $158,076,453. (O'Neill Decl. ¶ 8.)

13. The number of participants in the Pension Plan on the day before it terminated (July 30, 2009) was the same as the number on the day the Pension Plan terminated (July 31, 2009), 10,071. (Klieber Decl. ¶ 10.)

14. The amount of termination premiums attributable to the Pension Plan's termination, determined by applying the statutory formula of $1,250 times the number of participants the day before the termination date (10,071) times three years, is $37,766,250. (Klieber Decl. ¶ 11.)

15. The statutory amount of interest due on the Pension Plan's termination premiums as of January 31, 2014 under 26 U.S.C. §§ 6601(a) and 6621(a)(2) is $4,347,665. (O'Neill Decl. ¶ 9.)

16. The Pension Plan's total amount of termination premiums plus interest as of January 31, 2014 is $42,113,915. (O'Neill Decl. ¶ 9.)

17. Taking into account payments that PBGC already received (with interest), the total of the Pension Plan's unfunded benefit liabilities with interest as of January 31, 2014 and termination premiums with interest as of January 31, 2014 is $191,096,932. (*Id.* ¶ 10.)

18. PBGC's costs in this litigation as of January 31, 2014 total $247,088. This sum consists of two components: (a) $184,324 in costs paid by outside counsel and reimbursed by PBGC (Lubell Decl. ¶4); and (b) $62,764 in actuarial expert expenses paid directly by PBGC (Connelly Decl. ¶ 6.)

19. The total damages in this action as of January 31, 2014 are $191,344,020. This total is the sum of the three statutory components: unfunded benefit liabilities with interest ($158,076,453); termination premiums with interest ($42,113,915); and costs ($247,088), minus payments PBGC already received (with interest), which total $9,093,436.

20. On June 27, 2013, at Asahi Tec's request, PBGC produced to Asahi Tec PBGC's Operating Policy Manual and PBGC's Actuarial Technical Manual. (Connelly Decl. ¶ 7.)

21. On August 15, 2013, PBGC produced to Asahi Tec PBGC's seven-volume Seriatim Report on the Pension Plan, including the actuarial case memoranda, as well as PBGC's final valuation database of participant data (redacted) and PBGC's v1 excel spreadsheet. (Connelly Decl. ¶ 8.)

22. Pursuant to the Court's order, the parties' expert reports on damages were due on September 30, 2013. (Dkt. #83, Order (July 26, 2013).)

23. On September 30, 2013, PBGC produced to Asahi Tec its expert report of Eric J. Klieber on the amount of unfunded benefit liabilities of the Pension Plan as of its termination date and the termination premiums attributable to the Pension Plan. (Connelly Decl. ¶ 9.)

24. Asahi Tec did not produce an expert report to PBGC on September 30, 2013 or any time thereafter. (Connelly Decl. ¶ 10.)

25. Pursuant to the Court's order, the parties' expert rebuttal reports on damages were due on October 30, 2013. (Dkt. #83, Order (July 26, 2013).)

26. On October 24, 2012, counsel for PBGC and counsel for Asahi Tec agreed to postpone from October 30, 2013 to November 8, 2013 the deadline for Asahi Tec to produce any rebuttal report to PBGC's expert report of Eric J. Klieber. (Connelly Decl. ¶ 11.)

27. On November 5, 2013, PBGC produced to Asahi Tec Addendum 2 to the Plan Asset Audit for the Pension Plan, Bates No. PBGC-069456 to 069476. (Connelly Decl. ¶ 12.)

28. On January 17, 2014, PBGC produced to Asahi Tec the Participant Data Audit for the Pension Plan, Bates No. PBGC-EXPERT 153 to 1453. (Connelly Decl. ¶ 13.)

29. Asahi Tec did not produce an expert rebuttal report to PBGC on November 8, 2013 or at any other time. (Connelly Decl. ¶ 14.)

Respectfully submitted,

Dated: January 28, 2014 HUGHES HUBBARD & REED LLP

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