UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

COX ENTERPRISES, INC., a Delaware corporation, Plaintiff, vs. NEWS-JOURNAL CORPORATION, a Florida corporation, HERBERT M. DAVIDSON, JR., MARC L. DAVIDSON, JULIA DAVIDSON TRUILO, JONATHAN KANEY, JR., DAVID KENDALL, ROBERT TRUILO, GEORGIA KANEY, and PMV, INC., a Florida corporation, Defendants.	)	CASE NO.: 6:04-CV-698-JA-DAB

THE PENSION BENEFIT GUARANTY CORPORATION'S
RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION
TO COX ENTERPRISES, INC.'S EMERGENCY MOTION FOR A STAY

On August 13, 2014, the Court issued an order pursuant to the mandate of the Eleventh Circuit, requiring Cox Enterprises, Inc. ("Cox") to deposit $13,887,822.00 into the Court's registry by no later than September 12, 2014 (the "Order"), representing the amount of the Pension Benefit Guaranty Corporation's ("PBGC") claim against News-Journal Corporation ("NJC") for the "unfunded benefit liabilities" of the Pension Plan of News-Journal Corporation (the "Pension Plan"). Cox seeks an emergency stay of the Order without posting any bond. In support, Cox references its financial condition and the merits of its intended appeal. Cox further requests a stay of the Order while it pursues relief under 29 U.S.C. § 1370 against members of

NJC's "controlled group" as defined in Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA").[1] For the reasons explained below, the Court should deny Cox's motion.

BACKGROUND

Given the complex history of this litigation, PBGC will focus on the background necessary for the Court to address Cox's motion. In April 2009, the Court appointed James Hopson as Receiver for NJC.[2] After selling NJC's assets, the Receiver conducted a claims process. PBGC timely submitted claims with the Receiver for liabilities relating to termination of the Pension Plan.[3] After the Court issued an order granting all of NJC's assets to Cox, PBGC timely filed an appeal.

In January 2012, the Eleventh Circuit vacated the award of NJC's assets to Cox. The Eleventh Circuit held that Cox was a shareholder of NJC for the purposes "of Fla. Stat. § 607.06401, which prohibits the distribution of corporate assets to a shareholder if it would render the corporation insolvent."[4] Because the Eleventh Circuit considered "any payment to Cox a distribution to a shareholder within the meaning of § 607.06401," it held that the district court must apply the statute's insolvency test.[5] The Eleventh Circuit further explained that the

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[1] Members of a controlled group for purposes of ERISA include, for example, a parent and its at least 80% owned subsidiaries. *See, e.g.*, 29 U.S.C. § 1301(a)(14)(A), (B); 26 C.F.R. §§ 1.414(b)-1, 1.414(c)-1, 1.414(c)-2.

[2] *See* Order, April 17, 2009, (Doc. No. 507).

[3] The Pension Plan was terminated by agreement between PBGC and the Receiver, with a plan termination date of March 23, 2010. *See* (Doc. No. 675 at 11-13).

[4] *Cox Enters., Inc. v. PBGC*, 666 F.3d 697, 699 (11th Cir. 2012).

[5] *Id.*

Court must apply the insolvency test "at the time of payment to Cox," and remanded for the Court to "reevaluate the claims of all of News-Journal's creditors consistent with [its] opinion.[6]

Following the remand, the Court ordered the parties to file briefs describing their claims against NJC. Thereafter, the Court scheduled an evidentiary hearing to address the amount of PBGC's claims against NJC.[7] After limited discovery, Magistrate Judge Baker held an evidentiary hearing on January 14, 2014. Thereafter, Magistrate Judge Baker issued a report and recommendation finding that the amount of PBGC's claim against NJC for the Pension Plan's unfunded benefit liabilities was $13,887,822.[8] The Court affirmed and adopted Magistrate Judge Baker's report over Cox's objection.[9] On August 13, 2014, the Court issued the Order, requiring Cox to deposit the amount of PBGC's claim against NJC with the Court's registry by September 12, 2014.[10]

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[6] *Id.* at 707-08.

[7] Order & Notice of Hearing, June 11, 2013, (Doc. No. 751).

[8] Report & Recommendation, March 21, 2014, (Doc. No. 791 at 19); *see also* 29 U.S.C. §§ 1301(a)(18), 1362(a), (b).

[9] Order, April 24, 2014, (Doc. No. 794).

[10] Order, Aug. 13, 2014, (Doc. No. 796).

ARGUMENT

I. The Court Should Condition Any Stay Pending Appeal on Cox Furnishing a Bond or Other Security in the Amount of $13,887,822.00, Plus Interest.

A. Requiring Cox to furnish a bond or other security is an appropriate exercise of the Court's discretion.

Federal Rule of Civil Procedure 62(d) allows a party to obtain the stay of a monetary judgment pending appeal by filing a supersedeas bond with the Court.[11] Although the rule does not define the required amount for such bond, courts generally require that the bond secure the amount of judgment, plus costs for the appeal, interest, and any damages resulting from delay.[12] Any party seeking a departure from this general requirement must support its request with objective evidence.[13] And if a party requests a stay without posting any bond, "whether to grant [such] a stay is a matter 'strictly within the judge's discretion.'"[14]

Cox argues that the Court should exercise its discretion and issue a stay without requiring Cox to post any bond. In support, Cox submits the Declaration of Mr. Douglas E. Franklin, Cox's Executive Vice President and Chief Financial Officer.[15] Mr. Franklin references the size of Cox's operations, Cox's current investment-grade credit rating, and the amount of Cox's

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[11] Fed. R. Civ. P. 62(d).

[12] *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979).

[13] *Id.* ("[A] supersedeas bond is a privilege extended the judgment debtor as a price of interdicting the validity of an order to pay money.").

[14] *United States v. O'Callaghan*, 805 F. Supp. 2d 1321, 1325 (M.D. Fla. 2011) (quoting *In re Combined Metals Reduction Co.*, 557 F.2d 179, 193 (9th Cir. 1977)).

[15] Cox's Emergency Motion to Stay Order Directing Payment into Registry Without Requirement of Bond Pending Appeal (hereinafter the "Motion") at Ex. 1.

annual revenues for 2010, 2013, and 2014.[16] Based on this declaration, Cox concludes that there will be no issue concerning its future ability to repay the $13,887,822 owed to PBGC's for its claim against NJC. Cox does not support this conclusion with any additional information, such as net income or assets available for use to pay the judgment.

As an initial matter, Cox has not explained why it would be entitled to a stay of the Court's Order upon posting a bond pursuant to Federal Rule 62(d). Rule 62(d) does not apply to the appeal of "an interlocutory or final judgment in . . . a receivership."[17] The Court's Order addresses the final distribution of NJC's assets in its receivership pursuant to the Eleventh Circuit's mandate.[18] The Court has entered a judgment requiring Cox to return $13,887,822 of **NJC's assets** that it should not have received to the Court's registry.[19] Therefore, in considering whether to grant a discretionary stay, the Court should consider factors including the relative harm to the parties and the merits of Cox's intended appeal.[20] As discussed below, there can be no harm to Cox in requiring it to return assets that were not its property in the first place, and the

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[16] *See generally id.*

[17] Fed. R. Civ. P. 62(a)(1), (d); *see also* 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, AND MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2902 at 667, § 2905 at 710 (2012).

[18] *See generally* Order, Aug. 13, 2014, (Doc. No. 796).

[19] *See* (*id.* at 15, 17-18).

[20] *See* 11 WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2902 at 668; *Havens Steel Co. v. Commerce Bank, N.A.* (*In re Havens Steel Co.*), 04-41574, 2005 WL 562733, *6 (W.D. Mo. Jan. 12, 2005) (discussing the likelihood of the applicant's success on the merits as a factor in evaluating whether to grant a discretionary stay pursuant to Federal Rule 62(a)); *cf. Venus Lines Agency v. CVG Industria Venezolana de Alumino, C.A.*, 210 F.3d 1309, 1313 (11th Cir. 2000) (discussing the applicant's likelihood of success on the merits as a factor in evaluating the stay of a non-monetary judgment under Federal Rule 62(d)).

arguments Cox identifies for appeal are foreclosed by the Eleventh Circuit's prior decision. Accordingly, the Court should decline to grant any stay.[21]

Furthermore, in the event that the Court decides to issue a stay, the facts of this case confirm that the Court should condition any stay of the Order on Cox's provision of a supersedeas bond or other security. Cox is seeking to retain assets of NJC, which were paid to Cox pursuant to the Court's now-vacated distribution order. Per the Eleventh Circuit's opinion, these NJC assets were not properly paid to Cox.[22] Nonetheless, Cox seeks to retain NJC's assets and continue earning interest on the $13,887,822 that is owed to PBGC for its claim.[23] As a result, the best mechanism for maintaining the status quo is for Cox to deposit the funds with the Court's registry, where they will accumulate interest.[24] Short of that, Cox should furnish a bond to the Court in the full amount of PBGC's claim against NJC plus interest.

B. Cox's proffered grounds for appeal confirm the appropriateness of requiring a bond or other security.

As further support for its request, Cox references its proposed argument for appeal. Cox claims that the Court erred in its application of the Eleventh Circuit's mandate to resolve NJC's receivership. Specifically, Cox complains that the Court should have exercised its discretion and

[21] PBGC disputes the merits of Cox's intended appeal in Section I.B.

[22] *See Cox Enters., Inc. v. PBGC*, 666 F.3d 697, 708 (11th Cir. 2012); *see also* Report & Recommendation, March 21, 2014, (Doc. No. 791 at 12-13) (explaining that the current dispute involves an "issue over the assets *of NJC* currently being held by Cox").

[23] Throughout its Motion, Cox repeatedly notes its ability to pay the $13,887,822 owed to PBGC for its claim against NJC, but does not address the payment of interest that will accrue on PBGC's claim over the course of its intended appeal.

[24] *See, e.g.*, Fed. R. Civ. P. 67(b).

adopted Cox's argument for treating its claim "at parity" with PBGC's claim.[25] Cox confusingly asserts that the Court was not barred from adopting this argument because "[t]he only issue before the Eleventh Circuit was whether this Court erred in failing to apply [Fla. Stat. § 607.0401] at all before issuing the distribution order, not whether this Court somehow failed in its substantive application."[26] This argument ignores the Eleventh Circuit's opinion.

The Eleventh Circuit plainly addressed the substantive application of Fla. Stat. §§ 607.1436 and 607.06401 in holding that "Florida's election-to-purchase statute [requires] that any payment made as a result of a corporation's share repurchase decision [must] comply with the distribution requirements of Fla. Stat. § 607.06401, which prohibits the distribution of corporate assets to a shareholder if it would render the corporation insolvent."[27] The Eleventh Circuit held "that Cox qualifies as a shareholder for purposes of the distributions-to-shareholders statute."[28] Therefore, the Eleventh Circuit further held "that any payment to Cox . . . must comply with the condition of [Fla. Stat.] § 607.1436(8) that the payment satisfy Florida's distribution-to-shareholders statute."[29] "[A]fter consider[ing] the application of [Fla. Stat. § 607.06401] to **this** case," the Eleventh Circuit determined that "on remand, the district court must consider whether a payment to Cox would comply with the insolvency test of the distribution-to-shareholders statute at the time of payment to Cox."[30]

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[25] Cox's Motion at 11-12.

[26] *Id.* at 13.

[27] *Cox Enters.*, 666 F.3d at 699.

[28] *Id.* at 706.

[29] *Id.* at 707.

[30] *Id.* at 707-08 (emphasis added).

Unhappy with the clear import of the Eleventh Circuit's decision, Cox argues that the Court should have treated its claim at parity with PBGC's claim based on Fla. Stat. § 607.06401(7).[31] But as the Court explained, Cox's "arguments are not viable under the law of the case doctrine and the mandate rule and are otherwise rejected."[32] "The law of the case doctrine and the mandate rule ban courts from revisiting matters decided expressly or by necessary implication in an earlier appeal of the same case."[33] Here, the Eleventh Circuit considered application of Fla. Stat. § 607.06401 to this case, and concluded that NJC's solvency must be measured at the time of payment to Cox.[34] If a payment to Cox would violate Fla. Stat. § 607.06401's insolvency test, then the Eleventh Circuit explicitly directed that NJC's "other creditors should receive payment before **any** distribution is made to Cox."[35] There is no dispute that payment of Cox's claim would render NJC insolvent.[36] Accordingly, the Court was "'bound

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[31] Cox's Motion at 12.

[32] Order, Aug. 13, 2014, (Doc. No. 796 at 16).

[33] *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema Inc.*, 579 F.3d 1268, 1270-71 (11th Cir. 2009) (citation omitted).

[34] *Cox Enters.*, 666 F.3d at 707 (explaining "that any payment to Cox . . . must comply with the condition of § 607.1436(8) that the payment satisfy Florida's distribution to shareholders statute. . . . . [so t]his requires that we consider the application of that statute to this case").

[35] *Id.* at 699 (emphasis added); *see also id.* at 705 ("As explained above, [Florida's distributions-to-shareholders statute] prohibits distributions to a shareholder if, after giving the distribution effect, the corporation would be insolvent.").

[36] Order, Aug. 13, 2014, (Doc. No. 796 at 15).

to follow the appellate court's holdings, both express and implied'" and order the full payment of PBGC's claim against NJC.[37]

Moreover, even if Cox's argument was not foreclosed by the law of the case doctrine and mandate rule (which it is), that argument has certainly been waived. During the last appeal, the parties submitted argument about the proper application of Fla. Stat. §§ 607.1436 and 607.06401 with respect to Cox's claim.[38] Having lost that appeal, Cox now argues that its claim should be treated at parity with PBGC's claim based on Cox's interpretation of section 607.06401(7). But Cox never raised any argument about section 607.06401(7) until remand; thus, that argument has been waived.[39]

II. Cox's Request for a Stay to Pursue NJC's Controlled-Group Members Ignores NJC's Joint and Several Liability.

In addition to seeking a stay to pursue its appeal, Cox further requests that the Court order a separate stay of unspecified duration while Cox pursues an injunction under 29 U.S.C. § 1370 against NJC's controlled-group members.[40] Cox apparently seeks to prevent PBGC from

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[37] (*Id.* at 13 (quoting *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985))); *see also Barber v. Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Dist. Lodge No. 57*, 841 F.2d 1067, 1070-71 (11th Cir. 1988) ("[W]here an appellate court remands for 'resolution of a narrow factual issue,' the lower court may not circumvent the mandate by approaching the identical legal issue under an entirely new theory." (quoting *Baumer v. United States*, 685 F.2d 1318, 1321 (11th Cir. 1982))).

[38] *See, e.g., Cox Enters.*, 666 F.3d at 707 (discussing Cox's assertions about correct application of Fla. Stat. § 607.06401).

[39] *See Marek v. Singletary*, 62 F.3d 1295, 1298 n.2 (11th Cir. 1995) ("Issues not clearly raised in the [appellate] briefs are considered abandoned." (citing *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1542 (11th Cir. 1994)); *see also Campbell v. Civil Air Patrol*, 138 Fed. App'x 201, 206 (11th Cir. 2005) ("Allowing the defendants to modify an argument clearly available to them in the earlier appeal would lead to numerous appeals as parties each time offer a new gloss on a prior argument, or an alternative basis for judgment in their favor.").

[40] Cox's Motion at 13-14.

recovering anything on its claim against NJC unless and until efforts to collect against NJC's controlled-group members have been exhausted. The Court already rejected this argument in response to Cox's motion to compel, and the Court should not entertain it again.

Title IV of ERISA provides that NJC is jointly and severally liable to PBGC for the full amount of the Pension Plan's unfunded benefit liabilities.[41] Courts have widely recognized the joint and several nature of PBGC's claim,[42] which makes NJC "individually responsible for the entire obligation."[43] PBGC's discretion in deciding whom to pursue for the liability is central to the definition of joint and several liability.[44] Therefore, when Cox sought discovery to limit the amount of PBGC's claim against NJC based on the value of NJC's controlled-group members, this Court agreed with a number of other courts that have rejected similar arguments.[45]

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[41] 29 U.S.C. § 1362(a), (b).

[42] *See, e.g.*, *PBGC v. Beverley*, 404 F.3d 243, 247 (4th Cir. 2005) (discussing PBGC's joint and several claims against the plan sponsor and members of its controlled group); *PBGC v. E. Dayton Tool & Die Co.*, 14 F.3d 1122, 1126-27 (6th Cir. 1994) (same); *PBGC v. Am. Shelter Indus., Inc.*, 821 F. Supp. 1465, 1469 (M.D. Fla. 1993) (finding members of the plan sponsor's controlled group jointly and severally liable for the unfunded benefit liabilities).

[43] *See Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1337 (11th Cir. 2012) (discussing appellants' joint and several liability for sanctions, and citing Black's Law Dictionary for the definition of "joint and several liability"); BLACK'S LAW DICTIONARY 997 (9th ed. 2009) ("Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion.").

[44] *See Martin*, 307 F.3d at 1337.

[45] Order, Sept. 18, 2013, (Doc. No. 763); Order, Dec. 12, 2013, (Doc. No. 777); *see also Cent. States, Se. & Sw. Areas Pension Fund v. Chatham Props.*, 929 F.2d 260, 263-64 (6th Cir. 1991) (rejecting appellant controlled-group members' suggestion that the court should create an exception to their joint and several liability for withdrawal from a multiemployer pension plan); *PBGC v. Reorganized CF&I Fabricators of Utah, Inc.* (*In re CF&I Fabricators of Utah, Inc.*), 179 B.R. 704, 711-12 (D. Utah 1994) (affirming bankruptcy court's determination that ERISA mandated application of joint and several liability for PBGC's claims, even if it may impact other creditors); *Cent. States, Se. & Sw. Areas Pension Fund v. Lloyd L. Sztanyo Trust*, 693 F.

Magistrate Judge Baker explained that ERISA "explicitly provides for joint and several liability and does not allocate liability among controlled group members."[46] Yet, Cox seeks a stay precisely to allow it to effectively "allocate liability among controlled group members."

Moreover, whether or not Cox's intended use of 29 U.S.C. § 1370 to seek recovery from members of NJC's controlled group is allowable under the statute.[47] Cox's efforts to constrain PBGC's rights through its proposed motion and stay are unacceptable. Section 1370 allows certain enumerated persons who are "adversely affected by an act or practice of any party (other than [PBGC]) in violation of any provision of section [1341], [1342], [1362], [1363], [1364], or [1369]" to obtain an injunction or other appropriate equitable relief.[48]

However, in addition to such relief against controlled-group members of NJC, Cox seeks to use § 1370 to bind PBGC and prevent enforcement of its judgment against Cox. PBGC has a right to collect termination liability under § 1362 from NJC, but Cox's proposed stay would prevent PBGC from collecting that liability for an unspecified amount of time.[49] While there is a

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Supp. 531, 540-41 (E.D. Mich. 1988) (striking defendant's affirmative defense that a multiemployer pension fund had waived its rights against defendants by first pursuing other jointly and severally liable entities); *In re Ne. Dairy Co-op. Fed'n, Inc.*, 88 B.R. 21, 23-24 (Bankr. N.D.N.Y. 1988) (rejecting dairy cooperative's argument that a multiemployer pension fund's withdrawal liability claim should be reduced by any amounts recovered from another member of its jointly and severally liable controlled group).

[46] Order, Sept. 18, 2013, (Doc. No. 763 at 4).

[47] PBGC will address issues relating to this question if and when the proposed motion is filed.

[48] 29 U.S.C. § 1370. The enumerated parties include, *inter alia*, a pension plan's contributing sponsor and the members of its controlled group. *Id.* § 1370(a)

[49] Cox states that NJC's liability would be reduced by any payment ordered **and made** by controlled-group members. This seems to contemplate some sort of exhaustion of collection efforts against the controlled-group members before PBGC could collect against NJC. *See* Cox's Motion at 15.

private right of action in certain circumstances, it can only be used to redress violations of or enforce certain sections of ERISA, including § 1362.[50] Instead, Cox seeks to **stop** enforcement of those same sections of ERISA by PBGC. Moreover, Cox seeks to stay or enjoin PBGC from acting based on § 1370, but § 1370 specifically disallows actions against PBGC.[51]

Congress cannot have meant for a private right of action to undo the statutory scheme established by Title IV of ERISA, as Cox proposes with its stay. Title IV endows PBGC with primary enforcement authority.[52] By granting joint and several liability, Title IV allows PBGC to pursue one or more liable entities at its discretion.[53] Cox proposes to use the private right of action in § 1370 to negate this statutory scheme. The proposed stay would strip PBGC of enforcement authority and replace that authority with Cox's decisions about who should pay the liability and when. Ordering payments of liability among creditors is a right that belongs to PBGC due to the joint and several nature of the liability, as this Court has already held,[54] but Cox

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[50] 29 U.S.C. § 1370(a)(1) and (2).

[51] *Id.* § 1370(a) (providing that an enumerated list of entities who are "adversely affected by an act or practice of any party (*other than the corporation*) in violation of" certain provisions of ERISA "may bring an action").

[52] *See* 29 U.S.C. § 1302(a); Order, Aug. 13, 2014, (Doc. No. 796 at 4 n.9).

[53] *See* Order, Sept. 18, 2013, (Doc. No. 763 at 3) (citing *Cent. States, Se. & Sw. Areas Pension Fund v. Lloyd L. Sztanyo Trust*, 693 F. Supp. 531, 541 (E.D. Mich. 1988) ("A joint and several liability is one in which the creditor may sue one or more of the parties to the liability separately or together at the creditor's option.")).

[54] Order, Sept. 18, 2013, (Doc. No. 763 at 4), and Order affirming, Dec. 12. 2013, (Doc. No. 777).

would claim that right for itself as well. And delaying payment of liability to PBGC protects no one but Cox, contrary to the purposes of the statute.[55]

Because NJC is jointly and severally liable to PBGC for the full amount of the Pension Plan's unfunded benefit liabilities, the Court should reject Cox's request for such a stay.[56] Should Cox file any motion seeking relief under 29 U.S.C. § 1370, PBGC reserves its right to respond at that time.

CONCLUSION

For the foregoing reasons, the Motion should be denied.

DATED: September 5, 2014
Washington, D.C.

Respectfully submitted,

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[55] Congress set out three purposes in enacting Title IV of ERISA, encouraging the continuation and maintenance of pension plans, providing for the timely and uninterrupted payment of pension benefits, and maintaining premiums at the lowest level consistent with carrying out Title IV. 29 U.S.C. § 1302(a).

[56] PBGC takes no position concerning any future action by NJC to obtain contribution from its controlled-group members for the Pension Plan's unfunded benefit liabilities **after** NJC has paid PBGC's claim. *See* Order, Sept. 18, 2013, (Doc. No. 763 at 5).

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September 2014, the Pension Benefit Guaranty Corporation's foregoing Response and Memorandum of Law, was served electronically through the Court's CM/ECF system on all registered users.

/s/ Colin B. Albaugh
Colin B. Albaugh
Attorney