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 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 memorandum of law in support of its motion for certification pursuant to 28 U.S.C. § 1292(b) and for a stay pending appeal.

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").

Certification is consistent with other cases that have certified for appeal questions involving the standard of review to be accorded to an agency decision. *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).

Certification is particularly appropriate because, as stated in the October 4 Decision, not only are the Certifiable Questions matters of first impression in the Third Circuit, but courts inside and outside this Circuit have reached conflicting conclusions, with the majority adopting the arbitrary and capricious standard rejected by this Court. An interlocutory appeal would allow the Third Circuit to address this controlling issue of law at once.

The Certifiable Questions meet the section 1292(b) standard. They present controlling questions of law that, if decided erroneously, would lead to reversal on appeal. There is substantial ground for difference of opinion on these questions of law. An immediate appeal will materially advance the ultimate litigation by avoiding what could be unnecessary proceedings, thereby saving the Court and the litigants time and expense. Given the nature of this litigation, an immediate appeal could avoid what will likely be expensive and protracted litigation and will not result in a piecemeal appeal.

Finally, because of the issues of judicial economy presented in the Certifiable Questions, PBGC respectfully requests that if the Court grants certification pursuant to Section 1292(b), the Court stay the proceeding pending the outcome of the appeal.

BACKGROUND

As the federal government agency that Congress entrusted to administer the termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), PBGC made the determination that the Pension Plan should be terminated to prevent the agency's long-run loss from increasing unreasonably and to avoid loss to the agency's termination insurance fund. *See* 29 U.S.C. § 1342. PBGC's determination was the result of informal adjudication, which is subject to judicial review. Accordingly, when Saint-Gobain Corporation Benefits Committee ("Benefits Committee") did not consent to termination, PBGC sought enforcement of its determination by this Court.

PBGC and Defendant Benefits Committee cross-moved for partial summary judgment on the standard of review applicable to PBGC's determination that the Pension Plan should be terminated. PBGC argued, relying on a considerable weight of authority, that its determination is agency action subject to judicial review under section 704 of the APA and that the Court should review its determination under the "arbitrary and capricious" standard under section 706 of the APA. The defendants argued, relying primarily on *In re UAL Corp*., 468 F.3d 444 (7th Cir. 2006), that PBGC has not taken "agency action" that would be subject to review under the APA.

On October 4, 2013, the Court issued its written Memorandum and an Order. The Court held that "PBGC's decision to initiate termination proceedings is not an 'agency action' for which PBGC seeks 'review,' and therefore the 'arbitrary and capricious' standard of review under the APA does not apply." October 4 Decision, Memorandum at 3. The Court ordered that it "will determine whether the pension plan at issue should be terminated under 29 U.S.C. § 1342(c) de novo and will consider evidence outside the administrative record." October 4 Decision, Order at 1.

Other courts have found that questions involving the applicable standard of review of an agency's decision satisfy the section 1292(b) requirements. *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) (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*., Civ. A No. 90-4647, 1992 WL 46394 (E.D. La. Feb. 28, 1992) (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. Department of Health and Human Services*, 436 F.3d 182, 185 (3d Cir. 2006) (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.).

ARGUMENT

I. LEGAL STANDARD

This Court "has the discretion to grant a section 1292(b) certificate if the [October 4 Decision] '(1) involve[s] a controlling question of law, (2) offer[s] substantial ground for difference of opinion as to its correctness, and (3) if appealed immediately [would] materially advance the ultimate termination of the litigation.' One of the main purposes of this statute is to prevent wasteful litigation." *Mest v. Cabot Corp*., No. Civ. A. 01–4943, 2004 WL 1058155 at *1 (E.D. Pa. May 10, 2004), *citing Katz v. Carte Blanche Corp*., 496 F. 2d 747, 755 (3d Cir. 1974).

Here, as set forth in more detail below, the Certifiable Questions addressed in the October 4 Decision meet all three prongs of this test.

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

Section 1292(b) certification is properly granted in cases where the decision sought to be appealed involves a controlling question of law. In this Circuit, a "'controlling question of law' is one in which [sic] 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), quoting *Katz v. Carte Blanche Corp*., 496 F.2d at 755. 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." *Id*., *also citing* 19 James W. Moore, et al., MOORE'S FEDERAL PRACTICE ¶ 203.31[3] (3d ed. 2003) (a controlling question of law is one that "has the potential of substantially accelerating disposition of the litigation").

Threshold legal questions such as the presence of personal jurisdiction, the tolling of the statute of limitations, and federal preemption are among the issues that courts have held to be controlling. For example, in *Max Daetwyler Corp. v. Mey*er, 575 F. Supp. 280, 282 (E.D. Pa. 1983), the court held that the existence of personal jurisdiction presented a controlling question of law, because "the determination from which defendant seeks to appeal—the existence of in personam jurisdiction—would, if incorrect, presumably necessitate dismissal."

Similarly, in *Mest v. Cabot Corp*., No. Civ.A. 01–4943, 2004 WL 1058155 at *1 (E.D. Pa. May 10, 2004), the court held that whether the discovery rule tolls the statute of limitations was a controlling question of law because a reversal of the order addressing that issue would necessitate a new trial. The court in *Knipe v. SmithKline Beecham*, 583 F. Supp. 2d 553, 599 (E.D. Pa. 2008), held that the issue of federal preemption presented a controlling question of law

because if the Court of Appeals disagreed, the summary judgment order would be reversed and Plaintiffs' remaining claims would be foreclosed.

The October 4 Decision involves a controlling question of law because the Certifiable Questions are central to the conduct of the litigation both practically and legally, and, if decided erroneously, would lead to reversal on appeal. By adopting the de novo standard, the Court has stated that it intends to look beyond the administrative record, an unsustainable position should the Court of Appeals reverse the October 4 Decision and hold that the APA's arbitrary and capricious standard is the appropriate standard of review. Moreover, as APA cases based on an administrative record are typically decided on summary judgment, certification would also serve the interests of judicial economy by avoiding unnecessary discovery and trial practice should the October 4 Decision be reversed.

Because the Certifiable Questions present controlling questions of law, the first prong of the test for certification is met.

III. THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION

Section 1292(b) certification is proper 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).

This prong of the certification test is met when the decision in question "involves a rather novel question of law, which the Third Circuit has not yet had the opportunity to address." *Id.*

In addition, this prong has been met when the issue is "frequently disputed" (*Mest v. Cabot Corp*., No. Civ.A. 01–4943, 2004 WL 1058155 at *2) or when the question "has been faced by other district courts with inconsistent results" (*Max Daetwyler Corp. v. Meyer*, 575 F. Supp. at 283).

A substantial ground for the difference of opinion exists with respect to the October 4 Decision. The Court found the Seventh Circuit's reasoning in *In re UAL Corp*., 468 F.3d 444 (7th Cir. 2006), persuasive in concluding that PBGC's action was not an agency action, and therefore, deciding to apply a de novo standard to PBGC's determination. October 4 Decision, Memorandum at 15. As this Court noted, however, "the Third Circuit has not addressed the issue before this Court." October 4 Decision, Memorandum at 16. The Certifiable Questions are therefore a matter of first impression in the Third Circuit. In fact, as a result of the October 4 Decision, district court opinions within the Circuit are now split. *See Pension Ben. Guar. Corp. v. FEL Corp*., 798 F. Supp. 239, 241 (D.N.J. 1992) (applying the arbitrary and capricious standard). This prong of the test for certification is therefore easily met.

As this Court acknowledged, there are conflicting and contradictory opinions on this issue outside the Circuit as well: "Although a few district courts confronting this issue have applied the 'arbitrary and capricious' standard of review, the Court is not persuaded by those decisions." October 4 Decision, Memorandum at 18.

In the *FEL* case, the district court for the District of New Jersey, faced with arguments similar to those raised by Defendants here, rejected the view that this Court adopted:

> FEL argues that the various subsections of 29 U.S.C. § 1342, which prescribe the procedure the PBGC is to use to terminate a plan without the consent of the administrator, contemplate a full and complete review by this court. I disagree. The Supreme Court of the United States recently applied the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A) to a determination of the PBGC. *See Pension Benefit Guaranty Corp. v. LTV Corp.,* 496 U.S. 633, 656, 110 S.Ct. 2668,

> 2681, 110 L.Ed.2d 579 (1990) (the court found "that the PBGC's failure to consider all potentially relevant areas of law did not render its restoration decision arbitrary and capricious"); *see also In re Pan American World Airways, Inc. Coop. Retirement Income Plan,* 777 F.Supp. 1179, 1181 (S.D.N.Y. 1991) (applying the "arbitrary and capricious" standard); *Saramar Aluminum Co. v. Pension Plan for Employees of Aluminum Industry & Allied Industries,* 782 F.2d 577, 583 (6th Cir.1986) (PBGC's decision that a plan was not a multiemployer plan within the meaning of ERISA is "entitled to some deference by the courts."). Therefore, 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...." *In re Pan American World Airways,* 777 F.Supp. at 1181-82.

Pension Ben. Guar. Corp. v. FEL Corp., 798 F. Supp. 239, 241 (D.N.J. 1992).

The other decisions referenced in the October 4 Decision demonstrate the breadth of the difference of opinion. *See In re Pan Am. World Airways, Inc. Coop. Ret. Inc. Plan*, 777 F. Supp. 1179, 1181-82 (S.D.N.Y. 1991), *aff"d, Pension Ben. v. Pension Comm*., 970 F.2d 896 (2d Cir. 1992); *Pension Ben. Guar. Corp. v. Rep. Tech. Int'l, LL*C, 211 F.R.D. 307 (N.D. Ohio 2002); *Pension Ben. Guar. Corp. v. Haberbush*, 2000 U.S. Dist. LEXIS 22818 at *16-17 (C.D. Cal. Nov. 3, 2000). The split of authority was brought into sharp relief at the hearing. Counsel for PBGC stated that "we have any number of determinations that we have to come into court to enforce that we have no self-executing authority, and the Courts have always treated those as determinations, agency actions that are subject to the arbitrary and capricious standard of review." The Court responded "Except the Seventh Circuit." (9-24-13 Hearing Tr. at 56:5-10).

The split of authority and the lack of guidance from the Third Circuit demonstrate that the grounds for difference of opinion are substantial. The Certifiable Questions 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 regarding its core activities. This conflict is amplified by the fact that the decisions that run counter to the October 4 Decision involve not other agencies, but PBGC itself. Therefore, the very party at issue has

been subjected to different standards. This conflict calls out for clarification by the Third Circuit.

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

IV. AN IMMEDIATE APPEAL WOULD MATERIALLY ADVANCE THE LITIGATION

Section 1292(b) certification should be granted when an appeal will advance the ultimate termination of the litigation:

> This requirement is "closely tied to the requirement that the order involve a controlling question of law." 16 Charles A. Wright, Arthur R. Miller and Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3930, 423 (2d ed. 1996). "Several factors are pertinent in determining whether an immediate appeal would materially advance the ultimate termination of the litigation, including: (1) whether the need for trial would be eliminated; (2) whether the trial would be simplified by the elimination of complex issues; and (3) whether discovery could be conducted more expeditiously and at less expense to the parties." *Patrick v. Dell Fin. Svcs.,* 366 B.R. 378, 387 (M.D. Pa. 2007). On the other hand,' "[w]here discovery is complete and the case is ready for trial an interlocutory appeal can hardly advance the ultimate termination of the litigation." *Id.* (quoting *Bradburn,* 2005 WL 1819969, at *4).

Knipe v. SmithKline Beecham, 583 F. Supp. 2d 553 (E.D. Pa. 2008). Moreover, "[w]hen analyzing the question of whether an interlocutory appeal will materially advance the litigation, district courts should focus on the efficient use of judicial resources." *Hess v. A.I. DuPont Hosp. for Children*, No. 08–0229, 2009 WL 2776606, at *2 (E.D. Pa. Aug. 28, 2009) (citation omitted).

Courts have held that this prong is met where an immediate appeal would save significant amounts of time, funds, and effort, for both the court and litigants. *See e.g.*, *Knipe v. SmithKline Beecham*, 583 F. Supp. 2d at 601 (granting certification); *Max Daetwyler Corp. v. Meyer*, 575 F. Supp. at 283 (granting certification). Courts have also sought to avoid wasted trial time and litigation expense. *See*, *e.g.*, *Mest v. Cabot Corp*., No. Civ.A. 01–4943, 2004 WL 1058155 at *2.

As set forth in the October 4 Decision, this Court intends to "consider evidence outside the administrative record." October 4 Decision, Memorandum at 22 & Order at 1. The amplification of the record will involve significant discovery and require the litigants and the Court to expend considerable time and expense. But discovery is generally not permitted in an APA case where the review is limited to the administrative record. *See e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *NVE Inc. v. Department of Health and Human Servs.*, 436 F.3d at 185; *Horizons Int'l Inc. v. Baldrige*, 811 F.2d 154, 162 (3d Cir. 1987).

Under the APA's standard of review for informal adjudications, a court may set aside agency action only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. at 414. Under this standard of review and well-established judicial precedent, a court's review of agency action is limited to the administrative record, consisting of the documents and information the agency considered in making its decision. PBGC has prepared and filed its administrative record explaining its determinations regarding termination of the Pension Plan. This record is all that this Court would need to consider if the Court of Appeals held that the PBGC's determination was an agency action to which the arbitrary and capricious standard applied, and summary judgment motions would be an appropriate way to dispose of the case. *See Sara Lee Corp. v. American Bakers Ass'n Ret. Plan*, 671 F. Supp. 2d 88, 97 (D.D.C. 2009) ("Summary judgment is the proper mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and consistent with the APA standard of review.") (internal citations omitted).

Therefore, an immediate appeal would obviate fact and expert discovery, the Court's supervision of that process and evaluation of the evidence, and a trial de novo that would be

unnecessary if the Court of Appeals determines that the arbitrary and capricious standard is appropriate.

The potential waste of litigant and judicial resources is particularly acute in this case, given that the Federal Trade Commission ("FTC") has filed both a motion for preliminary injunction in the District Court for the District of Columbia and 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 (the "Transaction") violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The FTC proceedings could moot PBGC's action and eliminate the need to terminate the Pension Plan. Therefore, the interests of judicial economy also weigh in favor of obtaining a controlling decision from the Court of Appeals, and maintaining the status quo until then.

An immediate appeal will therefore save the Court and the parties considerable expense and time if the Court of Appeals were to disagree with the October 4 Decision. Thus, the final prong of the certification test is met.

V. A STAY OF THIS ACTION PENDING APPEAL IS APPROPRIATE

Should the Court grant certification, PBGC respectfully requests that the Court use its inherent discretionary authority to grant a stay. *See, e.g., Eisai Inc. v. Sanofi-Aventis U.S., LLC*. Civil Action No. 08-4168 (MLC), 2010 WL 3636256 (D.N.J. Sept. 10, 2010) (granting section 1292(b) certification and stay of the proceedings).

The same efficiency reasons that weigh in favor of allowing an interlocutory appeal, *see* supra at 10-11, support staying the litigation pending that appeal. 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, especially in light of the pending antitrust action. The Court should therefore stay any further District Court proceedings if it certifies the Certifiable Questions for immediate appeal.

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.

October 17, 2013

s/Erika E. Barnes

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