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

PLAINTIFF PENSION BENEFIT GUARANTY CORPORATION'S OPPOSITION TO DEFENDANT SAINT-GOBAIN BENEFITS COMMITTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT TO ESTABLISH DE NOVO STANDARD OF REVIEW AND IN OPPOSITION TO DEFENDANTS' BRIEFS REGARDING STANDARD OF REVIEW AND MEMORANDUM IN SUPPORT OF CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT TO ESTABLISH SCOPE OF REVIEW UNDER SECTION 706(2)(A) OF THE ADMINISTRATIVE PROCEDURE ACT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

United States Codes Cited

Other Authorities Cited

INTRODUCTION

Pension Benefit Guaranty Corporation ("PBGC") submits this memorandum in opposition to the Saint-Gobain Benefits Committee's ("Committee") motion for partial summary judgment to establish de novo standard of review, and in opposition to the briefs of Glass, Molders, Pottery, Plastics and Allied Workers International Union ("GMP") and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW," together with GMP the "Unions") and Ardagh Group S.A. (collectively "Defendants").

PBGC is 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"). As a federal government agency, PBGC's actions are subject to review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 501 et seq., including its formal and informal rulemaking and informal adjudications. PBGC's determinations that the Saint-Gobain Containers, Inc., Retirement Income Plan ("Pension Plan") should be terminated to prevent the risk of PBGC's long-run loss from increasing unreasonably and to avoid loss to the termination insurance fund are agency actions under the APA, accomplished through informal adjudication, and subject to judicial review.

Under the applicable APA scope of review for informal adjudications under APA section 706, 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." Under this standard of review and well-established judicial precedent, a court's review of agency action is limited to the administrative record prepared by the agency, 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 Court asked the parties to submit briefs describing the applicable scope of review of PBGC's determinations. Although the Defendants' briefs are nominally devoted to what they claim to be the applicable scope of judicial review of PBGC's determinations under 29 U.S.C. §1342, Defendants actually fail to address this essential issue and instead focus primarily on the standard of deference a court must give an agency's interpretation of the statute it administers. As explained below, the scope of a court's judicial review of agency action like PBGC's determinations that the Pension Plan should be terminated in this case is distinct from the standard of deference afforded to an agency's interpretation of a statute it administers.

STATUTORY AND REGULATORY BACKGROUND

A. PBGC

PBGC is the United States government agency that administers the nation's pension insurance program under Title IV of ERISA.[1] When a pension plan covered by title IV terminates with insufficient assets to pay promised benefits, PBGC typically becomes statutory trustee of the terminated plan and pays participants their pension benefits, up to statutory limits.[2] PBGC's termination insurance program protects the pensions of nearly 43 million workers and retirees in nearly 26,000 private sector defined pension plans.[3] As of the end of last fiscal year, PBGC had terminated almost 4,500 plans and assumed responsibility for the benefits of about 1.5 million people.[4]

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[1] 29 U.S.C. §§ 1301-1461 (2006).

[2] *See* 29 U.S.C. §§ 1322, 1361.

[3] PBGC Annual Report, Fiscal Year 2012, at 1, *available at* http://www.pbgc.gov/documents/2012-annual-report.pdf. *See generally PBGC v. LTV Corp.*, 496 U.S. 633 (1990).

[4] *Id.* at 9, 22.

PBGC is self-financed, and obtains its revenues exclusively from four sources: (i) premiums paid by employers sponsoring ongoing plans; (ii) investment income; (iii) the assets in terminated plans; and (iv) recoveries, if any, from employers whose underfunded plans have terminated.[5] It has three stated statutory purposes: 1) to encourage the continuation and maintenance of voluntary private pension plans; 2) to provide for the timely and uninterrupted payment of pension benefits; and 3) to maintain premiums at the lowest level consistent with carrying out its obligations under Title IV.[6]

Congress entrusted PBGC to administer the provisions of Title IV of ERISA and gave the agency broad powers to carry out its mandate. Specifically, "in addition to any specific power granted to the corporation elsewhere in this title [IV of ERISA]," PBGC may "adopt, amend, and repeal… bylaws, rules, and regulations as may be necessary to carry out the purposes of this title."[7]

B. Plan Termination Process

Title IV of ERISA provides the exclusive means of terminating a defined benefit pension plan.[8] Plan termination can be initiated by the sponsoring employer or by PBGC. An employer may terminate a plan in a standard termination under 29 U.S.C. § 1341(b) if the plan has sufficient assets to cover all future benefit payments through the purchase of private sector annuities, or in a distress termination under 29 U.S.C. § 1341(c) if the plan is underfunded and the employer meets certain statutory financial distress tests. To initiate a distress termination in a

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[5] *Id.* at 1.

[6] 29 U.S.C. § 1302(a).

[7] 29 U.S.C. § 1302(b)(3).

[8] 29 U.S.C. § 1341(a)(1); *see Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999); *PBGC v. Mize Co., Inc.*, 987 F.2d 1059, 1063 (4th Cir. 1993).

bankruptcy reorganization, the plan sponsor and members of its "controlled group"[9] that are debtors in the bankruptcy must demonstrate to the bankruptcy court that unless the plan is terminated, they will be unable to pay all their debts pursuant to a plan of reorganization and will be unable to continue in business outside bankruptcy.[10]

PBGC may initiate termination of an underfunded plan if it determines that one of four criteria set forth in 29 U.S.C. § 1342(a) has been met, including that the possible long-run loss to the PBGC insurance program with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.[11]

PBGC follows an established administrative process to determine whether an underfunded pension plan should be terminated and to select a proposed plan termination date.[12] The Trusteeship Working Group ("TWG")—an interdisciplinary body comprised of representatives from PBGC's financial, actuarial, policy and legal offices—reviews a written recommendation by PBGC staff that one or more of the criteria for termination under 29 U.S.C. § 1342(a) have been met, and that the pension plan should be terminated. The TWG considers the recommendation from staff, and then makes its own recommendation, which, along with supporting documents, it provides to the "approving official."[13]

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[9] *See* 29 U.S.C. §§ 1362(a), (b); 1301(a)(18). A "controlled group" includes a parent-subsidiary or brother-sister group of trades or businesses connected through ownership of at least 80% controlling interest by a common entity. *See* 29 U.S.C. § 1301(a)(14), (b); 26 U.S.C. § 414(b), (c); 26 C.F.R. § 1.414(b)-1, 1.414(c)-1, 1.414(c)-2.

[10] 29 U.S.C. § 1341(c)(2)(B)(ii).

[11] 29 U.S.C. § 1342(a)(4).

[12] *See* PBGC Directive TR-00-2, issued June 28, 2013 (copy attached as Exhibit 1 to Fry Declaration, filed concurrently).

[13] *See id.* The TWG reviews actuarial, financial and other information developed by PBGC staff about the funding status of the pension plan and the financial condition of the employer and the

In cases involving claims of more than $100 million, the approving official is the PBGC Director. The Director reviews the TWG recommendations and supporting documents, and determines whether the plan should be terminated and PBGC appointed its statutory trustee. The Director also determines the appropriate plan termination date that should be proposed to the plan administrator. The Director's decision is documented in a Notice of Determination ("NOD") and a Termination and Trusteeship Decision Record ("TDR").[14]

PBGC notifies the plan administrator of its determination by sending the administrator a copy of the NOD in accordance with 29 U.S.C. § 1342(c). PBGC notifies participants of its determinations by publishing a notice in newspapers serving the localities in which participants of the pension plan reside.

PBGC typically effectuates the termination, trusteeship and establishment of a plan termination date of an underfunded plan by agreement with the plan administrator as authorized by section 1342(c). Indeed, the vast majority of the nearly 4,500 pension plans for which PBGC is the statutory trustee have been terminated by agreement between PBGC and the relevant plan administrator. If PBGC and the plan administrator cannot agree, however, section 1342(c) authorizes the agency to apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated, and PBGC be appointed its trustee. ERISA also directs that the court establish the plan termination date if PBGC and the plan administrator

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employer's "controlled group," as that term is used in 29 U.S.C. § 1301(a)(14)(A). *Id.* at § 8. Depending on the number of participants and the amount of underfunding in a plan, either the TWG Chairperson or the full TWG will review the relevant information and make a recommendation to the approving official. *Id.* The definition of approving official is also primarily dependent on the size of the case. *Id.* at § 5(d).

[14] *Id*. at § 5(f), (h).

cannot agree on a date.[15] The establishment of a plan termination date is crucial because it fixes PBGC's liability for guaranteed benefits and serves as the date upon which participants' right to accrue additional benefits ceases.[16] It also serves as the date upon which the liability of the employer and its controlled group for the plan's unfunded benefit liabilities is measured.[17]

ARGUMENT

I. Under section 706(2)(A) of the APA, the Court should apply the arbitrary and capricious standard of judicial review to PBGC's determinations under section 1342.

A. PBGC's determinations under 29 U.S.C. § 1342 are informal adjudications constituting "agency action" under the APA.

The APA applies to every agency and authority of the government of the United States, including PBGC.[18] Generally, an administrative agency's actions, with limited exceptions, are subject to judicial review. Section 704 of the APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[19] "'Agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[20] It is intended to include "every form of agency power, proceeding, action or inaction. In that

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[15] 29 U.S.C. § 1348(a)(4).

[16] *Pension Comm. for Farmstead Foods Pension Plan v. PBGC*, 991 F.2d 1415, 1420 (8th Cir. 1993), *aff'g* 778 F.Supp. 1020 (D. Minn. 1991).

[17] *See, e.g.*, 29 U.S.C. §§ 1301(a)(19), 1322, 1362; *PBGC v. Republic Techs. Int'l, LLC*, 386 F.3d 659, 662 (6th Cir. 2004); *PBGC v. Heppenstall Co.*, 633 F.2d 293, 296 (3d Cir. 1980).

[18] 5 U.S.C. § 551(1); *See PBGC v. LTV Corp.*, 496 U.S. at 655-56.

[19] 5 U.S.C. § 704.

[20] 5 U.S.C. § 551(13).

respect, the term includes the supporting procedures, findings, conclusions, or statements of reasons, or basis for the action or inaction."[21]

The APA divides agency action into rulemaking and adjudication and establishes procedural requirements and limitations on judicial review for each.[22] "Rulemaking" is the "agency process for formulating, amending, or repealing a rule," and a "rule" is generally "an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy…."[23] "Adjudication" is the "agency process for the formulation of an order," and an "order" is an agency's "final disposition" in a matter other than rulemaking.[24] Adjudication resolves disputed facts between or regarding specific parties, such as a PBGC determination to seek termination of a pension plan.

The APA sets forth procedural requirements for so-called "formal" adjudications—those that are "required by statute to be determined on the record after opportunity for an agency hearing"[25] Because title IV of ERISA contains no such requirements, making PBGC's adjudications are therefore "informal." In *PBGC v. LTV*, the Supreme Court emphasized the "minimal requirements" for informal adjudication set forth in section 555 of the APA: an agency need only "take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of the decision."[26]

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[21] H.R. Rep. No. 1980, 79th Cong., 2d Sess. at 255 (attached as Exhibit 2 to Fry Declaration).

[22] 5 U.S.C. §§ 553, 554, 706.

[23] 5 U.S.C. §§ 551(4), (5).

[24] 5 U.S.C. §§ 551(6), (7).

[25] 5 U.S.C. § 554(a).

[26] 496 U.S. 633, 654, 655 (1990). *Accord Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519 (1978) (where an agency's governing statute contains no

In cases involving claims of more than $100 million, like the instant case, PBGC's determinations under 29 U.S.C. § 1342 are effective when the agency's Director signs the NOD and TDR. PBGC immediately notifies the plan administrator of a pension plan that PBGC has made a determination that the plan should be terminated. Neither the pension plan sponsor nor the plan administrator may seek internal appeal or request reconsideration of the agency's determinations under 29 U.S.C. § 1342.[27] Thus, PBGC's determinations under 29 U.S.C. § 1342, such as those issued in this case, are final agency actions within the meaning of the APA.

B. The Court should review PBGC's determinations under the APA's arbitrary and capricious standard of review.

1. Because 29 U.S.C. § 1342(c) does not expressly provide for de novo review, the APA standards of judicial review of agency action are mandatory.

"A reviewing court must apply the APA's [standards of review] in the absence of an exception."[28] Based on the language of APA section 559, courts may not infer exceptions to the APA, nor may courts hold that subsequent statutes supersede or modify the APA's provisions on judicial review, "except to the extent that such legislation does so explicitly."[29] The APA provides a uniform approach to judicial review of administrative action and the justification for

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procedural mandates, the APA establishes the maximum procedural requirements a reviewing court may impose on agencies).

[27] *See* 29 C.F.R. § 4003.1.

[28] *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999). *Accord Marcello v. Bonds*, 349 U.S. 302, 310 (1955) ("Exemptions from the terms of the [APA] are not lightly to be presumed in view of the statement in [5 U.S.C. § 559] that modifications must be express."); 5 U.S.C. § 559 ("additional requirements [not contained in the APA must be] imposed by statute or otherwise recognized by law").

[29] *Id.*, quoting 5 U.S.C. § 559.

any departure from the APA's strict guidelines "must be clear."[30] As the Supreme Court has long recognized, "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceeding may be held."[31]

The standards for judicial review of agency action are set forth in section 706 of the APA.[32] In *Citizens to Preserve Overton Park v. Volpe*, the Supreme Court explained that "[i]n all cases, agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements."[33] Under the APA, a higher standard of review is applicable only in certain limited situations not present here. Courts are to apply the "substantial evidence test" under 5 U.S.C. § 706(2)(E) only when the action involves formal rulemaking or a formal adjudication with an agency hearing.[34] And courts may apply *de novo* review under 5 U.S.C. § 706(2)(F) only when the "the action is adjudicatory in nature and the agency factfinding procedures are inadequate" or "when issues that were not before the agency are raised in a

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[30] *Dickinson v. Zurko*, 527 U.S. at 155.

[31] *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963); *see also Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 496-97 (2004) ("Because the Act itself does not specify a standard for judicial review in this instance, we apply the familiar default standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).")

[32] 5 U.S.C. § 706.

[33] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414 (1971) (citing 5 U.S.C. §§ 706(2)(A), (B), (C) and (D)).

[34] *Id.* at 414.

proceeding to enforce nonadjudicatory agency action."[35] *De novo* review of "inadequate factfinding" applies only to formal adjudications, and not to informal adjudications.[36]

Congress expressly authorized PBGC to initiate termination of a pension plan whenever it determines that its "possible long-run loss" "may reasonably be expected to increase unreasonably if [a pension] plan is not terminated."[37] Congress also authorized PBGC, if it "has determined that a pension plan should be terminated," to "apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund."[38]

Under 29 U.S.C. § 1342(c), Congress did not specify a standard of review applicable to PBGC's determination to seek termination of a pension plan, nor did Congress exclude PBGC's determinations from the arbitrary and capricious standard of review under section 706(2)(A) of the APA. The Court should conclude that *de novo* review of PBGC's determinations is not permitted under 29 U.S.C. § 1342(c), as that provision does not even mention the standard of

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[35] *Id.* at 415. *See also NVE Inc. v. Department of Health and Human Servs.*, 436 F.3d 182, 185 (3d Cir. 2006) (recognizing *de novo* review under APA limited to those narrow exceptions and finding neither applied).

[36] *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1250, 1258-1259 (E.D. Cal. 1997) (citing *Overton Park*, 401 U.S. at 415; *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 362–363 (D.C.Cir.1981); *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1157 (9th Cir.1980)). *See also Camp v. Pitts*, 411 U.S. 138, 142-43 (1973) (holding that *de novo* review did not apply to informal adjudication by the Comptroller of the Currency).

[37] 29 U.S.C. § 1342(a)(4).

[38] 29 U.S.C. § 1342(c)(1).

review.[39] Nor do 29 U.S.C. §§ 1303(e) or (f), which authorize action by or against PBGC, specify a standard of review.

Section 706(2)(A) is therefore the only applicable standard of review for PBGC's determinations under 29 U.S.C. § 1342(c).

2. The arbitrary and capricious standard of review under APA section 706(2)(A) applies to PBGC's informal adjudications.

Under the arbitrary and capricious standard, judicial review of an agency's determination in an area within its expertise is very limited, and the court may not substitute its judgment for that of the agency.[40] A reviewing court's analysis begins with the presumption that agency action

[39] *Cf. Chandler v. Roudebush, Adm'r of Veterans' Affairs*, 425 U.S. 840, 845, 863-64 (1976) (*De novo* review of agency determination required where statute (42 U.S.C. § 2000e-5) required chief judge of district court to immediately designate a judge to hear and determine the case, required the designated judge to assign the case for hearing at the earliest practical date, and if not heard within 120 days, to appoint a special master to hear the case, and to order appropriate relief if the district court "finds" intentional discrimination; court noting "Here Congress has not 'simply provided for review' but has affirmatively chosen to grant federal employees the right to maintain a trial De novo."); another example of a statute expressly providing trial *de novo* is the district court's review of Freedom of Information Act claims. S*ee* 5 U.S.C. § 552(a)(4)(B) ("[T]he [district] court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions . . . .").

[40] *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Overton Park*, 401 U.S. at 416. *Accord FCC v. Fox Television Stations*, 556 U.S. 502, 513 (2009). *See also Iredia v. Fitzgerald*, 2010 WL 2994215, *4 (E.D. Pa. Jul. 27, 2010) ("A review under the arbitrary and capricious standard is narrow, and a court should not substitute its own judgment."), citing *State Farm*, 463 U.S. at 32.

is valid.[41] The court further presumes that the agency decision-maker conscientiously considered the issues and the materials underlying the agency's decision.[42]

As many courts—including a district court in this circuit—have held, the correct scope of review applicable to PBGC's determinations under 29 U.S.C. § 1342 is the arbitrary and capricious standard.[43] For example, in *PBGC v. Pension Comm. of Pan American World Airlines, Inc.*, the court rejected the plan administrator's and the intervenors' arguments that the court should review PBGC's determination to terminate the pension plan was not in the participants' best interests and that the court should review PBGC's determination *de novo*. The court concluded that

> 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. To find a contrary intent in the statute would be to depart from the usually applicable judicial deference to the expertise of an administrative agency, particularly when the agency has made an adjudicative decision within its sphere of responsibility.[44]

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[41] *See Overton Park*, 401 U.S. at 415; *Lockheed Martin v. Admin. Review Bd., United States Dep't of Labor*, 2013 WL 2398691, *3 (10th Cir. Jun. 4, 2013); *Almy v. Sebelius*, 679 F.3d 297, 309 (4th Cir. 2012); *Rock Creek Alliance v. United States Fish & Wildlife Svc*., 663 F.3d 439, 443 (9th Cir. 2011); *Sara Lee Corp. v. PBGC*, 512 F. Supp. 2d 32, 38 (D.D.C. 2007).

[42] *See NLRB v. County Waste of Ulster*, 455 Fed. Apx. 32, *2 (2d Cir. Jan. 6, 2012); *Allied Mechanical Svcs. v. NLRB*, 668 F.3d 758, 770-71 (D.C. Cir. 2012); *City Federal S&L Ass'n v. FHLBB*, 600 F.2d 681, 687-88 (7th Cir. 1979).

[43] *See Ass'n of Flight Attendants v. PBGC*, 2006 WL 89829, *5 (D.D.C. Jan. 13, 2006); *PBGC v. WHX Corp.*, 2003 WL 21018839, *2 (S.D.N.Y. May 6, 2003); *PBGC v. Haberbush*, 2000 WL 33362003, *5 (C.D. Cal. Nov. 3, 2000); *PBGC v. FEL Corp.*, 798 F. Supp. 239, 241 (D.N.J. 1992); *PBGC v. Pension Comm. of Pan American World Airlines, Inc.*, 777 F. Supp. 1179, 1181-82 (S.D.N.Y. 1991), *aff'd mem.*, 970 F.2d 896 (2d Cir. 1992).

[44] 777 F. Supp. at 1181-82.

Similarly, in *PBGC v. FEL Corporation*, the court rejected the pension plan sponsor's argument that it was entitled to *de novo* review of PBGC's determination under 29 U.S.C § 1342(a)(4), holding that the "arbitrary and capricious" standard applied.[45]

Numerous courts have applied the arbitrary and capricious standard of review to PBGC's determinations.[46] Defendants attempt to distinguish 29 U.S.C. § 1342 from some of the ERISA provisions on which those determinations were based. However, Defendants' comparison of the provisions—each of which involves informal adjudication—supports the contrary conclusion. As shown below, PBGC must apply to the district court to enforce its determinations of § 1347 (restoration of terminated plans), just as it must to enforce its determinations under § 1342 (plan termination). Although not mentioned by Defendants, PBGC must also apply to a district court to enforce the agency's determinations under §1362(e), involving a plan sponsor's "downsizing liability" resulting from certain cessations of operations,[47] and to enforce PBGC's standard termination audits.[48] PBGC's determinations involving calculation of participants' guaranteed benefits under §1322 are subject to judicial review after exhaustion of administrative appeals.

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[45] *PBGC v. FEL Corp.*, 798 F. Supp. at 241.

[46] *See e.g. United Steel, Paper & Forestry, Rubber, Mf'g, Energy, Allied Indus. & Svc. Workers Int'l Union v. PBGC*, 717 F.3d 319, 323-24 (D.C. Cir. 2013) (benefit determination); *PBGC v. Wilson N. Jones Mem. Hosp.*, 374 F.3d 362, 366 (5th Cir. 2004) (standard termination interest rate); *Sara Lee Corp. v. PBGC*, 671 F. Supp. 2d 88, 96 (D.D.C. 2009) (determination that plan was a multiple-employer plan); *Douglas v. PBGC*, 2008 WL 280WL2805604, *3 (E.D. Pa. July 18, 2008) (benefit determination); *Caskey v. PBGC*, 1999 U.S. Dist. LEXIS 21448, *14 (E.D. Pa. Jan. 14, 1999) (same), *aff'd mem.*, 203 F.3d 816 (3d Cir. 1999); *PBGC v. JD Indus.*, 887 F. Supp. 151, 155 (W.D. Mich. 1994) (determination of controlled group membership); *Moore v. PBGC*, 566 F. Supp. 534, 536 (E.D. Pa. 1983) (benefit determination).

[47] *See e.g.*, *PBGC v. Bendix Commercial Vehicle Sys.*, 2012 WL 629928 (N.D. Ohio Feb. 24, 2012).

[48] *See e.g.*, *PBGC v. Wilson N. Jones Mem. Hosp.*, 374 F.3d 362, 366 (5th Cir. 2004).

As with PBGC's determinations to terminate plans under §1342, PBGC's other determinations are also subject to judicial review under the APA's arbitrary and capricious standard.

3. The Court's judicial review of PBGC's determinations under 29 U.S.C. § 1342 is limited to the administrative record.

Congress mandated in section 706 of the APA that judicial review of an agency determination must be based on the agency's administrative record; courts have enforced this requirement vigorously.[49] Thus, a court may not consider evidence outside the administrative record absent extraordinary circumstances. The Supreme Court recognized early on that "to allow [an agency's] findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal."[50] Thus as long as the administrative record shows the reasons for the agency's decision, the court should not look beyond that record.[51]

The standard discovery tools of civil litigation simply "do not apply"[52] to a court's review of an agency's informal adjudication. Thus, no discovery about an agency's determination is

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[49] 5 U.S.C. § 706. *See Florida Power & Light v. Lorion*, 470 U.S. 729, 743-44 (1985) ("the task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. §706, to the agency decision based on the record the agency presents to the reviewing court"); *State Farm*, 463 U.S. at 50 ("an agency's action must be upheld, if at all, on the basis articulated by the agency itself"); *Camp v. Pitts*, 411 U.S. at 142 ("[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.") These cases are still routinely cited in every circuit. *See e.g.*, *NVE Inc. v. Department of Health and Human Servs.*, 436 F.3d at 185 (limiting review to administrative record); *Horizons Int'l Inc. v. Baldrige*, 811 F.2d 154, 162 (3d Cir. 1987) (describing review of the existing administrative record as one of "the traditional limits of judicial review applied under section 10 of the APA.").

[50] *Tagg Bros. & Moorhead v. United Stats*, 280 U.S. 420, 444 (1930). *Accord State Farm, 463 U.S. at 43; NVE Inc. v. Dep't of Health & Human Servs.*, 436 F.3d at 190; *Uddin v. Mayorkas*, 862 F.Supp.2d 391, 400 (E.D. Pa. 2012) (same).

[51] *Camp v. Pitts*, 411 U.S. at 143.

[52] *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 312 (S.D.N.Y. 2012).

permitted absent a "strong showing of bad faith or improper behavior in the decision making process."[53] In assessing the agency's behavior, courts must presume regularity on the part of the agency "absent the most powerful preliminary showing to the contrary," such as improper *ex parte* contacts or exclusion from the record of evidence adverse to the agency's position.[54]

Here, Defendants have not presented any argument or evidence that the administrative record fails to show the reasons for the agency's decisions.[55] Moreover, Defendants have not presented any argument or evidence of bad faith or improper behavior in the decision making process. Accordingly, this case presents no basis for the Court to depart from the APA's arbitrary and capricious standard of review or to permit discovery.[56]

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[53] *Overton Park*, 401 U.S. at 420. *Accord Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 2011); *Brazil Quality Stones, Inc. v. Chertoff*, 286 Fed. Appx. 963, *1 (9th Cir. Jul. 10, 2008); *Alabama-Tombigbee Rivers Coalition v Kempthorne*, 477 F.3d 1250, 1262 (11th Cir. 2007).

[54] *Nat'l Nutritional Foods Ass'n v. FDA*, 491 F.3d 1141, 1145-46 (2d Cir. 1974). *Accord Overton Park*, 401 U.S. at 420; *Sara Lee Corp. v. PBGC*, 252 F.R.D. 31, 34 (D.D.C. 2008) ("PBGC's submission and certification of [the] administrative record as filed is entitled to strong presumption of regularity." To overcome that presumption, a challenger "must put forth concrete evidence.")

[55] Moving Briefs, *passim*.

[56] *See, e.g., PBGC v. Bendix Commercial Vehicle Sys.*, 2012 WL 629928 at *6, *7 (denying discovery to test completeness of administrative record absent "clear evidence that documents have been excluded); *Sara Lee Corp. v. American Bakers Ass'n Ret. Plan*, 252 F.R.D. at 36 (denying discovery where plaintiff "failed to show that PBGC's explanation was so deficient as to frustrate judicial review or any basis to believe that there were documents that the PBGC considered other than the ones already in the administrative [record]"); *Collins v. PBGC*, No. 88-3406 (AER), slip op at 3, 4 (D.D.C. Apr. 22, 1993) (denying discovery absent "evidence that there has been an omission so serious that judicial review would be frustrated or a showing that the agency has relied on documents or materials not included in the record").

II. Defendants confuse the applicable scope of review under section 706 of the APA with the standard of deference under *Chevron* and its progeny that a court gives to an agency's interpretation of a statute it administers.

A. Defendants fail to address the primary issue before the Court: scope of judicial review under the APA.

Selecting the appropriate scope of review under the APA is a separate issue from the standard of deference for agency interpretations under *Chevron*.[57] As the Fifth Circuit has noted, "*Chevron* analysis focuses on the agency's interpretation of the relevant statutory provisions, [while] review under § 706(2)(A) [arbitrary and capricious review] focuses on the reasonableness of the agency's decision-making process pursuant to that interpretation."[58] Thus, when a court reviews the reasonableness of an agency's actions under the APA, the inquiry is governed by the arbitrary and capricious standard.[59] The Supreme Court has similarly recognized that a court's determination of the standard of review for agency action is separate and distinct from whether the court should extend *Chevron* deference to an agency's interpretation of a statutory provision. For example, in *Alaska Dept. of Environmental Conservation v. EPA*, the Court held that even where the EPA's internal guidance memoranda were not entitled to *Chevron* deference, the agency's related administrative adjudication must be reviewed under the arbitrary and capricious standard.[60]

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[57] *Chevron U.S.A. Inc v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984).

[58] *Texas Coalition of Cities for Utility Issues v. FCC*, 324 F.3d 802, 811 (5th Cir. 2003). *See also Public Citizen v. Mineta*, 340 F.3d 39, 53 (2d Cir. 2003).

[59] *Texas Coalition of Cities for Utility Issues v. FCC*, 324 F.3d at 811; *Mineta*, 340 F.3d at 53.

[60] 540 U.S. at 496-97 ("Because the Act itself does not specify a standard for judicial review in this instance, we apply the familiar default standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and ask whether the Agency's action was 'arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law.' Even when an agency explains its decision

In this case, the Court must first determine the scope of review under APA section 706 to apply to PBGC's determinations under 29 U.S.C. § 1342.[61] But Defendants' arguments entirely ignore the APA, and the principal authorities they cite, including *U.S. v. Mead* and *Sun Capital Partners III LP v. New England Teamsters & Trucking Industry Pension Fund*,[62] focus instead on whether the court should defer to an agency's interpretation of the statute it administers. For example, in *U.S. v. Mead*, the court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[63] In *Sun Capital*, the court deferred to PBGC's interpretation of the term "trades or businesses" under 29 U.S.C. § 1301(b)(1) in a PBGC Appeals Board determination. But Defendants' reliance on *U.S. v. Mead* and *Sun Capital*, as well as *Skidmore v. Swift & Co.*,[64] in determining the Court's scope of review of agency action is misplaced.[65]

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with 'less than ideal clarity,' a reviewing court will not upset the decision on that account 'if the agency's path may reasonably be discerned.'")

[61] *See Overton Park*, 401 U.S. at 414.

[62] __ F.3d __, No. 12-2312, 2013 WL 3814984 (1st Cir. 2013).

[63] *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

[64] 323 U.S. 134 (1944) (respectful consideration of agency guidance).

[65] Defendants' reliance on *PBGC v. Heppenstall Co.*, 633 F. 2d 293 (3d Cir. 1980), in deciding the applicable scope of review is similarly misplaced, as *Heppenstall* involved whether PBGC's selection of a pension plan's date of plan termination ("DOPT") under 29 U.S.C. § 1348 was entitled to deference. The Third Circuit later clarified that a court should give PBGC deference in selecting DOPT if the choice involves the interpretation of ERISA. *See United Steelworkers of America, AFL-CIO and its Local 4805 v. Harris & Sons Steel Company and Pension Ben. Guar. Corp.*, 706 F.2d 1289, 1296 (3d Cir. 1983).

B. *In re UAL Corp.* is contrary to established Supreme Court and Third Circuit precedent.

Defendants rely on the Seventh Circuit's opinion in *In re UAL Corp. (Pilots' Pension Plan Termination),* which held that a *de novo* standard of review applied to PBGC's determination to terminate a pension plan under 29 U.S.C. § 1342.[66] Like Defendants, the court in *UAL* analyzed PBGC's determination as a question of whether the agency was entitled to deference, rather than the appropriate scope of APA review to apply to PBGC's agency action. Although the court recognized, in light of the Supreme Court's decision in *PBGC v. LTV Corp.*, that PBGC's determination to restore a pension plan under 29 U.S.C. § 1347—the result of an informal adjudication—was "agency action," subject to judicial review under the APA's arbitrary and capricious standard, the court did not view PBGC's determination to terminate a pension plan under 29 U.S.C. § 1342—also an informal adjudication—to be agency action because it was not a "self-executing order."[67] In finding that all "PBGC has done is commence litigation" and that the agency should be "treated as any other litigant," the court cited *Bowen v. Georgetown University Hospital*,[68] an inapposite case involving the issue of deference to an agency's litigating position, rather than the applicable scope of review of agency action.[69]

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[66] 468 F.3d 444 (7th Cir. 2002).

[67] Rather, the Seventh Circuit incorrectly concluded that PBGC's "only authority" under 29 U.S.C. § 1342 "is to ask a court for relief," ignoring the determination Congress requires PBGC to make *before* seeking a court order terminating a plan. In support, the 7th Circuit cited two inapplicable cases—*Adams Fruit Co. v. Barrett*— a case that did not involve an administrative agency and addressed whether exclusivity provisions in state workers' compensation laws bar migrant workers from availing themselves of a private right of action, and *Greenwich Collieries*, involving formal adjudication under section 556 of the APA.

[68] 488 U.S. 204 (1988).

[69] *Id.*

In *UAL*, the Seventh Circuit emphasized that the power to make "self-executing orders" is "what leads to deferential review under the APA."[70] To the contrary, the APA's definition of "agency action" contains no such requirement.[71] As the Supreme Court held just last year, agency action reviewable under the APA does not depend on a self-executing order. In *Sackett v. EPA*, issued after *UAL*, the Supreme Court held "the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction."[72] *Sackett* involved whether EPA's decision to issue a compliance order informing a party of a violation of the Clean Water Act ("CWA") and of fines imposed was a final agency decision under the CWA. Though a party can voluntarily comply with such an EPA order—just as a plan administrator can voluntarily comply with PBGC's determination that a pension plan should be terminated—in the absence of voluntary compliance, the only way that EPA can enforce the fine is to file an enforcement action in federal court. And pursuant to the Supreme Court's remand, the EPA's action is being reviewed on its administrative record under the arbitrary and capricious standard.[73]

In an analogous case, *Allied Pilots Ass'n v. Pension Ben. Guar. Corp.*, the D.C. Circuit characterized actions under 29 U.S.C. § 1342 similarly to the CWA voluntary compliance/enforcement framework.

> ERISA, which authorizes the PBGC to terminate a plan "whenever it determines that" one of four criteria is met, 29 U.S.C. § 1342(a), imposes no procedural strictures on the PBGC other than requiring it to "issu[e] a notice ... to a plan administrator [that the PBGC] has determined that the plan should be terminated" before seeking either district court enforcement or voluntary settlement, id. § 1342(c). So when the PBGC notified TWA that, absent ratification of the CSA [Comprehensive Settlement Agreement], it

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[70] 468 F.3d at 450.

[71] 5 U.S.C. § 551(13).

[72] __ U.S. __, 132 S.Ct. 1367, 1373 (2012).

[73] No. 08-00185 (D. Ida).

> intended to terminate the plans, it made exactly the determination that ERISA requires. True, the PBGC chose not to seek district court enforcement after the parties ratified the CSA, but that in no way changes the fact that the PBGC actually determined in 1992 that ERISA authorized involuntary termination.[74]

The Supreme Court recently reiterated its caution that "'judges ought to refrain from substituting their own interstitial lawmaking' for that of an agency."[75] Nevertheless, the *UAL* court did just that. As the *UAL* court explained, "*the [trial] court held a trial and made its own judgment about how much extra it would have cost to keep the plan in force until the end of June 2005, and whether that amount… would be an 'unreasonable increase' in federal liability*."[76] In requiring a trial *de novo* on factual issues inherently within the agency's expertise, the *UAL* courts failed to comply with the APA and long-established Supreme Court precedent. In so doing, the courts ignored the authority Congress specifically gave to PBGC, thus interfering with the agency's administration of Title IV of ERISA. This court should not follow the *UAL* court's decision, especially in light of the subsequent Supreme Court opinion in *Sackett*.

III. If the Court finds PBGC's scope of authority under 29 U.S.C. § 1342 to be ambiguous, it should defer to PBGC's interpretations based on Congress's delegation of authority to make determinations regarding plan termination.

As stated above, the issue before this Court is the appropriate scope of review under the APA, and not the extent to which this Court should defer to PBGC's interpretation of Title IV of ERISA. However, if PBGC's interpretation of a statutory provision under Title IV were at issue, *Chevron U.S.A. Inc.*[77] and its progeny would supply the legal framework for determining the

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[74] 334 F.3d 93, 97 (D.C. Cir. 2003).

[75] *City of Arlington Texas v. FCC*, __ U.S. at __, 133 S. Ct. at 1873, quoting *Ford Motor Co. v. Milhollin*, 444 U.S. 555, 568 (1980).

[76] 468 F.3d at 449 (emphasis added).

[77] 467 U.S. 837 (1984).

extent to which the interpretation is subject to deference. Under *Chevron*, "[w]hen a court reviews an agency's construction the statute which it administers, it is confronted with two questions." First, "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter…. [78] But "if the statute is silent or ambiguous with respect to the specific issue," then the court must uphold the agency's interpretation if it is "based on a permissible construction of the statute."[79] In *Chevron*, the Court recognized that "'[t]he power of an administrative agency to administer a congressionally created… program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'"[80] If Congress has not spoken directly to an issue, the court "must defer to the agency's interpretation as long as it is reasonable."[81]

In *City of Arlington, Texas v. FCC*, the Supreme Court held that a court must give *Chevron* deference to an administrative agency's interpretation of a statutory ambiguity that concerns the scope of the agency's authority.[82] The Court noted that "*Chevron* is rooted in a background of congressional intent: namely, 'that Congress, when it left ambiguity in a statute' administered by the agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[83] The Court emphasized that "we have consistently

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[78] *Id.* at 842.

[79] *Id.* at 842-43; *Beck v. Pace Int'l Union*, 551 U.S. 96, 104 (2007); *LTV Corp.*, 496 U.S. at 648.

[80] *Chevron*, 467 U.S. at 843, citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

[81] *Calif. Valley Miwok Tribe v. U.S.*, 515 F.3d 1262, 1266 (D.C. Cir. 2008), citing *Chevron*, 467 U.S. at 843. *See also PBGC v. LTV Corp.*, 496 U.S. at 648.

[82] __ U.S. at __, 133 S.Ct. 1863, 1874-75 (2013).

[83] *Id.* at 1868, quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996).

held 'that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers.'"[84]

Congress conferred authority on PBGC to seek a decree from a court terminating a pension plan under 29 U.S.C. § 1342(c) "whenever it determines" that the criteria under §1342(a) and (c) have been met, and the agency has interpreted that authority to permit it to make its determinations through informal adjudications and compile a contemporaneous administrative record. In making these determinations, PBGC interpreted § 1342 to mean that its determinations would be evaluated based on the administrative record and that it would not have to duplicate its efforts in discovery under the federal rules and incur the additional expenses associated with de novo review.

The Supreme Court regularly defers to PBGC's interpretations of ERISA. For example, in *Beck v. Pace Int'l Union,* the Court noted that "[w]e have traditionally deferred to the PBGC when interpreting ERISA, for 'to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embar[k] upon a voyage without a compass.'"[85] Similarly, in *Harris & Sons Steel Company*, the Third Circuit held that PBGC is entitled to deference in interpreting Title IV of ERISA, except where the special facts of *PBGC v.*

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[84] *Id.* at 1871.

[85] 551 U.S. at 104 (quoting *Mead Corp. v. Tilley*, 490 U.S. 714, 725 (1989)); *PBGC v. LTV Corp*., 496 U.S. at 650-51 (restoration provision) ("PBGC's construction is not contrary to clear congressional intent," and is "assuredly a permissible one") (citation omitted); *Mead Corp. v. Tilley*, 490 U.S. at 725 (section 4044) (quoted above in *Beck*); *Davis v. PBGC*, 571 F.3d 1288, 1293 (D.C. Cir. 2009) (section 4044); *Bridgestone/Firestone Inc. v. PBGC*, 892 F.2d 105, 111 (D.C. Cir. 1989) (regulation requiring employer to distribute earnings on employee contributions after standard termination); *VanderKam v. PBGC*, 2013 WL 1882329, *11 (D.D.C. May 7, 2013) (Title I provision on available forms of benefits).

Heppenstall are present.[86] To the extent that the Court construes 29 U.S.C. § 1342(c) to be ambiguous, it should defer to PBGC's interpretation.

CONCLUSION

PBGC respectfully requests that the Court hold that the appropriate standard of review for PBGC's determination is the arbitrary and capricious standard under section 706 of the APA, and that review be limited to the administrative record.

Respectfully submitted,

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[86] *Harris & Sons Steel Company*, 706 F.2d at 1296 ("Where the PBGC is interpreting Title IV of ERISA, and especially where the special facts of *Heppenstall* are not present, the views of the agency are due greater deference than the court accorded in *Heppenstall."* Noting only dispute in *Heppenstall* concerned plan termination date and court found PBGC's position not based on interpretation of ERISA.)