IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Dennis Black, *et al.*, Plaintiffs, v. Pension Benefit Guaranty Corporation, Defendant.	Case No. 2:09-cv-13616 Hon. Arthur J. Tarnow Magistrate Judge Mona K. Majzoub

PENSION BENEFIT GUARANTY CORPORATION'S
MOTION FOR SUMMARY JUDGMENT

Defendant Pension Benefit Guaranty Corporation ("PBGC"), pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7.1, hereby moves for summary judgment. As is more fully explained in the accompanying memorandum of law in support, there are no genuine issues of material fact, and PBGC is entitled to judgment as a matter of law.

Date: September 21, 2018

Respectfully submitted,

/s/ C. Wayne Owen

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PBGC'S MEMORANDUM OF LAW IN SUPPORT
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ISSUES PRESENTED

1. As Plaintiffs conceded before the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), ERISA, by its express language, authorizes termination of a pension plan by agreement between PBGC and a plan administrator. But, Plaintiffs now have flipped their position and contend that a PBGC-initiated termination of the Delphi Retirement Program for Salaried Employees (the "Salaried Plan" or the "Plan") can only be accomplished via a court order and not through an agreement with a plan administrator. Was the termination of the Salaried Plan by agreement between PBGC and the plan administrator in compliance with the clear language of ERISA?

2. The Supreme Court has expressly and repeatedly held that a plan sponsor's decision to terminate a pension plan while the plan sponsor is liquidating in bankruptcy is a settlor function, not a fiduciary function. Plaintiffs made this identical argument to the Bankruptcy Court during Delphi's bankruptcy proceedings. The Bankruptcy Court rejected their argument and held that Delphi's agreement with PBGC to terminate the Salaried Plan would not breach any fiduciary duty. Despite losing on this issue before the Bankruptcy Court, plaintiffs once again allege that Delphi violated a fiduciary duty to the Salaried Plan participants when it agreed to the Salaried Plan termination. Was Delphi's

agreement with PBGC to terminate the Salaried Plan nonetheless a breach of any fiduciary duty?

3. Due process is required when the government takes away a protected property interest. ERISA and the Salaried Plan documents expressly state that Delphi reserved the right to terminate the Salaried Plan and provide that plan participants will receive reduced benefits following plan termination if the plan lacks sufficient assets to cover the vested benefits. At the time of the termination of the Salaried Plan, Plaintiffs admitted to the Bankruptcy Court that the Salaried Plan was underfunded by at least $2 billion. In light of the fact that the Salaried Plan itself only promised to pay benefits up to the amount funded by the actual plan assets at termination, do Plaintiffs have a protected property interest in the difference between their funded benefits and their vested benefits?

4. The government's interest in being able to administer ERISA sharply tips the balance in favor of no advance hearing where massive delays would result from affording thousands of retirees with advance hearings prior to plan termination. The Salaried Plan has over 15,000 participants. Even if the Court were to discount the language of the Salaried Plan document that promised to pay only funded benefits upon plan termination and assumed *arguendo* that Plaintiffs had a protected property interest, did due process require advance notice and a hearing before PBGC and Delphi agreed upon Plan termination?

5. ERISA authorizes PBGC to initiate plan termination where the plan has not met the minimum funding standard. Delphi missed over $165 million in minimum funding contributions over the course of its five years in bankruptcy. Was PBGC authorized to initiate plan termination proceedings in light of Delphi's missed minimum funding contributions?

6. Under ERISA, a Plan may be terminated by agreement with the plan administrator, or by meeting certain criteria such as avoiding an unreasonable increase in PBGC's liabilities. Here, PBGC and the plan administrator agreed to terminate the Plan and PBGC determined, based on the Administrative Record, that Plan termination prior to the breakup of the Delphi controlled group was necessary to avoid a substantial loss to PBGC. Given that PBGC and Delphi agreed to terminate the Plan and the termination was necessary to avoid a loss to PBGC, was termination of the Salaried Plan in compliance with ERISA?

CONTROLLING AUTHORITY

1. ERISA § 4042, 29 U.S.C. § 1342, supports PBGC's position that it complied with all statutory requirements for terminating the Plan.

2. ERISA §§ 4041 and 4042, 29 U.S.C. §§ 1341 and 1342, as well as the Bankruptcy Court's ruling, support the conclusion that Delphi's decision to enter into an agreement terminating the Plan was a settlor decision that is not subject to fiduciary obligations. *See* 29 U.S.C. §§ 1341 and 1342; *Beck v. Pace Int'l. Union*,

551 U.S. 96 (2007); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 436 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983); *Malia v. General Electric Co.*, 23 F.3d 828, 829-30, 833 (3d Cir. 1994); Confirmation Order, *In re Delphi Corporation, et al.*, No. 05-44481, ECF No. 18707 (July 30, 2009), attached to Declaration of John A. Menke ("Menke Decl.") as Ex. 4.

3. The Due Process Clause was not violated by PBGC's termination of the Plan because: (a) Supreme Court precedent supports PBGC's position that Participants do not have a property interest in the full amount of vested benefits; See *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); see also *In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d 197, 201 (2d Cir. 1987); and (b) participants are not entitled to advance notice and a hearing before an agreement is made to terminate a plan. See *Jones & Laughlin Hourly Pension Plan*, 824 F.2d at 201-02.

INTRODUCTION

PBGC is entitled to summary judgment because Plaintiffs' attacks on the termination of the Salaried Plan have no basis in either law or fact. After struggling unsuccessfully for years to reorganize its business under Chapter 11 bankruptcy protection, Delphi's efforts to emerge as a reorganized company with its pension plans intact failed in the face of the 2008 economic crisis and recession. Ultimately, Delphi was forced to liquidate in bankruptcy, which would have left its pension plans, including the Salaried Plan, without a sponsor. No other entity, whether it be General Motors or the newly formed company that purchased the remaining productive Delphi assets in the Delphi bankruptcy proceedings, agreed to assume Plan sponsorship. Therefore, PBGC and Delphi had no alternative but to terminate the severely-underfunded Salaried Plan.

Congress's carefully-crafted scheme for retirement security worked exactly as intended when a company with an underfunded pension plan goes out of business – PBGC became the statutory trustee of the Salaried Plan and stepped in to ensure that the participants would continue to receive their guaranteed benefits without interruption. After unsuccessfully challenging the agreement to terminate the Plan in the Bankruptcy Court, Plaintiffs filed this action alleging that PBGC's termination of the Plan by agreement was improper. Over seven years of discovery have failed to reveal any factual or legal basis to support Plaintiffs' claims.

Contrary to Plaintiffs' allegations, the termination of the Salaried Plan through agreement with the plan administrator is fully consistent with the express language of ERISA and well-established precedent. First, ERISA expressly authorizes, and Plaintiffs conceded before the Bankruptcy Court, that a pension plan may be terminated by agreement between PBGC and a plan administrator without a court decree. Second, Delphi and PBGC executed the Termination Agreement pursuant to the Bankruptcy Court's final order which authorized Delphi to enter into the agreement and overruled Plaintiffs' claims that Delphi's execution of such agreement was subject to fiduciary obligations. Under ERISA and well-established case law, a plan administrator's decision to terminate a pension plan is a settlor decision that is not subject to fiduciary obligations. Third, Plan termination by agreement does not violate due process. Plaintiffs do not have a protected property interest in the full amount of their vested benefits upon termination of their underfunded pension plan. Even if they did, advance notice and a hearing were not required before PBGC and the plan administrator agreed to Plan termination. Finally, there is no genuine issue of material fact that the criteria under 29 U.S.C. §1342(a) and (c) were met; and PBGC's determination that the Plan must be terminated is fully supported by the Administrative Record and is not arbitrary or capricious. Accordingly, PBGC asks that the Court enter summary judgment in favor of PBGC.

BACKGROUND

PBGC is the United States government agency that administers the nation's pension insurance program under Title IV of ERISA, 29 U.S.C. §§ 1301-1461. PBGC was created in large part to protect participants in the event that their pension plan terminates without enough assets to pay the promised benefits.[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 40 million workers and retirees in more than 24,000 private sector defined benefit pension plans.[3] As of November 15, 2017, PBGC had terminated a total of approximately 4,900 plans and assumed responsibility for the benefits of nearly 1.5 million people.[4]

Whenever PBGC determines that a covered pension plan should or must be terminated, PBGC can apply to a district court for an order terminating the plan. But, PBGC and the plan administrator (usually the employer sponsoring the plan) can also voluntarily enter into an agreement terminating the plan without need of a

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[1] *See Nachman Corp v. PBGC*, 446 U.S. 359, 361-62 & n.1 (1980) (describing the statutory scheme of ERISA).

[2] *See* 29 U.S.C. §§ 1322, 1361.

[3] PBGC 2017 Annual Report, at 2, *available at*: https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2017.pdf. *See generally PBGC v. LTV Corp.*, 496 U.S. 633 (1990).

[4] PBGC 2017 Annual Report, at 2, *available at*: https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2017.pdf.

court order.[5] The overwhelming majority of plan terminations have occurred by agreement with the employer.[6]

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Delphi was the plan administrator and contributing sponsor of the Salaried Plan within the meaning of 29 U.S.C. §§ 1002(16)(A), 1301(a)(1), and 1301(a)(13).[7] The Salaried Plan covers approximately 20,000 participants.[8]

2. On October 8, 2005, Delphi filed a voluntary petition under Chapter 11 of the Bankruptcy Code.[9]

3. Upon filing the voluntary petition, Delphi ceased paying the legally required contributions to its pension plans, including the Salaried Plan.[10]

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[5] 29 U.S.C. § 1342(c)(1).

[6] *See* Affidavit of Candace Campbell at ¶ 3 (Docket No. 23-3).

[7] AR 119-319. "AR" refers to the administrative record of PBGC's determination to terminate the Salaried Plan, which has been filed with the Court, Docket Nos. 52 -91.

[8] AR 34.

[9] AR 668. Voluntary Petition (Chapter 11), *In re Delphi Corporation, et al*., No. 05-44481, ECF No. 1 (October 8, 2005) (such Chapter 11 proceedings, the "Delphi Bankruptcy").

[10] Upon Delphi's bankruptcy filing in October of 2005, Delphi paid only a small fraction of the total required minimum funding contributions. In May of 2007, Delphi received funding waivers from the IRS, and as a result, ceased making any contributions to the Salaried Plan. AR 34, 934. Those waivers expired and became null and void on May 9, 2008.

4. Delphi's first Plan of Reorganization (the "2008 POR"), as confirmed on January 25, 2008, provided that all six Delphi-sponsored plans, including the Salaried Plan, would be frozen,[11] but would continue with the reorganized Delphi.[12]

5. On April 2, 2008, however, Delphi's post-emergence investors declined to fund their investment agreement with Delphi, effectively defeating Delphi's attempt to emerge from bankruptcy under the terms of that 2008 POR.[13]

6. As Delphi remained in bankruptcy, it suffered significant financial losses as auto sales collapsed in late 2008 and 2009.[14]

7. In March 2009, Delphi reported that it could not afford to continue the Salaried Plan. Delphi stated that there were only two possible outcomes for the Salaried Plan: assumption by General Motors Corporation ("GM") or termination and trusteeship by PBGC.[15]

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[11] In a frozen plan, employees retain all benefits that they have earned prior to the "freeze date," but earn no additional benefits going forward.

[12] AR 934.

[13] AR 4091-95.

[14] *Id*.

[15] AR 336, 710.

8. Delphi consistently stated throughout the spring of 2009 that of those two alternatives for the Salaried Plan – assumption by GM or termination by PBGC – Delphi strongly preferred GM assumption. In fact, discovery in this case has shown that beginning as early as the fall of 2008, and continuing through the spring of 2009, Delphi repeatedly asked GM to assume the Salaried Plan. GM's response to each such entreaty from Delphi was a consistent and sometimes vigorous "No." There is no evidence that GM was ever willing to assume the Salaried Plan; certainly GM never evidenced such willingness to PBGC at any time before the termination of the Salaried Plan in July 2009.[16]

9. On April 17, 2009, PBGC staff forwarded a memorandum and supporting materials to PBGC's Trusteeship Working Group ("TWG"), recommending termination of the Salaried Plan as soon as practicable.[17]

10. PBGC sought termination at the time because there was a significant risk that the lenders that were providing financing for Delphi's post-petition operations, the Debtor-in-Possession ("DIP") lenders, would foreclose upon and take direct ownership of the stock of Delphi's foreign affiliates, which Delphi had

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[16] *See, e.g.*, Confidential Testimony of John Sheehan on March 19, 2012, Menke Decl., Ex. 1.

[17] AR 29-113

pledged as security for the DIP loan.[18] If the foreclosure had occurred, that stock would no longer have been owned, directly or indirectly, by Delphi. The foreign entities would then no longer be part of the Delphi controlled group and would cease to be liable to PBGC, thereby removing any value available for PBGC recoveries.[19]

11. On April 21, 2009, the TWG met to consider and voted to concur in the staff recommendation that PBGC terminate and become statutory trustee of the Salaried Plan, with a termination date as soon as practicable.[20]

12. On April 21, 2009, this recommendation, with supporting materials, was transmitted to PBGC's Acting Director for review and deliberation.[21]

13. In addition to the possibility of an imminent controlled group breakup and the anticipated liquidation of Delphi in bankruptcy, information before the Acting Director showed that the unfunded benefit liabilities of the Salaried Plan were about $2.7 billion.[22]

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[18] AR 773.

[19] AR 36.

[20] AR 22-24.

[21] AR 19-21

[22] PBGC's unfunded benefit liability calculations for the Plan were based on information provided by the Plan's actuary. (AR 34).

14. Further, by the time staff recommended termination of the Plan, Delphi had failed to pay over $165 million of required funding contributions to the Salaried Plan.[23]

15. Based on those facts, the Acting Director determined that the Plan should be terminated.[24]

16. Delphi's DIP lenders, however, asked PBGC to forebear from initiating termination, because they feared that termination at that time would disrupt Delphi's ongoing bankruptcy reorganization efforts. In exchange for PBGC's forbearance, the lenders' agreed to provide PBGC five days' written notice prior to exercising their right of foreclosure.[25]

17. On June 1, 2009, Delphi filed modifications to its First Amended Plan of Reorganization (the "Modified Chapter 11 Plan"), pursuant to which Delphi intended to, and ultimately did, liquidate.[26]

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[23] AR 34.

[24] AR 21.

[25] AR 17-18

[26] First Amended Plan of Reorganization of Delphi Corporation And Certain Affiliates, Debtors and Debtors-In-Possession (As Modified), *In re Delphi Corporation, et al.*, No. 05-44481, ECF No. 17030 (June 1, 2009).

18. On July 15, 2009, Plaintiffs filed a 20-page objection to Delphi's Modified Chapter 11 Plan.[27]

19. In that objection, Plaintiffs argued that termination of the Salaried Plan through agreement between PBGC and Delphi was improper and challenged the plan administrator's ability to agree to terminate the Salaried Plan due to alleged conflict of interest and fiduciary duty concerns.[28]

20. Notably, Plaintiffs stated in the objection that 29 U.S.C. § 1342(c) permits PBGC and a plan administrator to enter into an agreement to terminate a pension plan "outside of a formal district court adjudication and adversarial process."[29]

21. Plaintiffs' POR Objection also stated that "in the typical case, a plan sponsor's decision to terminate a plan is a 'settlor function,' and, as such, is unconstrained by any fiduciary duties the plan sponsor may owe in its role as plan

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[27] Plaintiff's Objection to Debtors' Proposed Modifications to Debtors' First Amended Plan of Reorganization (as Modified), *In re Delphi Corporation, et al.*, No. 05-44481, ECF No. 18277 (July 15, 2009), Menke Decl., Ex. 2 (hereinafter "Plaintiffs' POR Objection").

[28] *Id*.

[29] Plaintiffs' POR Objection at 16; *see also id* at 9 ("29 U.S.C. § 1342 contains a host of safeguards a plan administrator can invoke but also permits the plan administrator to negotiate and reach an agreement with the PBGC to completely bypass those protections.").

administrator,"[30] but alleged that a fiduciary duty nonetheless applies to a plan administrator's decision to terminate a pension plan by agreement with PBGC.[31]

22. Also on July 15, 2009, J.P. Morgan, as agent for the DIP lenders, issued written notice to PBGC, in accord with the previously described forbearance agreement, of the DIP lenders' intent to exercise their remedy of foreclosure; accordingly, the notice period expired on July 22, 2009.[32]

23. On July 21, 2009, PBGC determined, in accordance with 29 U.S.C. § 1342(a)(1), (2) and (4), that the Salaried Plan had not met the minimum funding standard required under section 412 of the Internal Revenue Code ("IRC"); that the Salaried Plan will be unable to pay benefits when due; that the possible long-run loss of the PBGC with respect to the Salaried Plan may reasonably be expected to increase unreasonably if the Salaried Plan is not terminated; and that in accordance with § 1342(c), the Salaried Plan must be terminated and PBGC appointed statutory trustee to avoid an unreasonable increase in the liability of the PBGC insurance fund. PBGC also determined that the Salaried Plan's termination date should be as soon as practicable, but in no event later than July 22, 2009.

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[30] *Id.* at 8.

[31] *Id.* at 9-10.

[32] AR 12-16.

24. On July 22, 2009, pursuant to 29 U.S.C. § 1342(c), PBGC issued a Notice of Determination to Delphi, as plan administrator of the Plan, notifying Delphi of the determinations described above. On that date, PBGC notified Plan participants of its decision by publication in the Detroit Free Press, the Detroit News, and USA Today, as well as by posting notice on its website.[33]

25. Plaintiffs' counsel appeared at the Modified Chapter 11 Plan Confirmation hearing on July 29, 2009, and presented oral argument before the Bankruptcy Court in support of its July 15 Objection.[34]

26. On July 30, 2009, the Bankruptcy Court confirmed Delphi's Modified Chapter 11 Plan over the numerous objections by various parties, including Plaintiffs.[35]

27. The Bankruptcy Court rejected Plaintiffs' POR Objections, finding "clear grounds exist under Section 4042 of ERISA, 29 U.S.C. § 1342, for the

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[33] *See Detroit Free Press*, July 22, 2009, at 4A; *The Detroit News*, July 22, 2009, at 5A; *USA Today*, July 22, 2009, at 6A; PBGC To Assume Delphi Pension Plans, *available at*: http://www.pbgc.gov/news/press/releases/pr09-48.html.

[34] *See* Proposed Agenda for Plan Modification Hearing, *In re Delphi Corporation, et al.*, No. 05-44481, ECF No. 18668 (July 30, 2009), Menke Decl., Ex. 3 (the "Hearing Agenda"); *see also* Confirmation Order, *In re Delphi Corporation, et al.*, No. 05-44481, ECF No. 18707 (July 30, 2009), Menke Decl., Ex. 4 (hereinafter the "Confirmation Order").

[35] *See* Menke Decl., Ex. 4, Confirmation Order.

PBGC to initiate involuntary terminations of the Pension Plans, for the Debtors to enter into termination and trusteeship agreements with the PBGC, and that the PBGC has determined to seek involuntary terminations to reduce the PBGC's risk of loss of recovery relating to own exposure under the Pension Plans."[36]

28. The Bankruptcy Court also approved Delphi's request that it be authorized to enter into termination and trusteeship agreements for all six of its terminating pension plans, including the Salaried Plan, and ruled that the PBGC and the plan administrator may agree to termination of a plan without an adjudication.[37]

29. On August 10, 2009, PBGC and Delphi executed a termination and trusteeship agreement, terminating the Salaried Plan effective July 31, 2009 (the "Termination Agreement").[38]

30. On September 19, 2009, Plaintiffs filed this lawsuit against PBGC and filed its Second Amended Complaint on August 26, 2010 (the "Second Amended Complaint").

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[36] *Id.* at 37-38.

[37] *Id.*

[38] *See* Menke Decl., Ex. 5.

31. The Second Amended Complaint, alleges four Counts against PBGC which, as in Plaintiffs' POR Objection, challenge the propriety of the Salaried Plan termination through agreement:

A. PBGC failed to comply with ERISA's requirements regarding effectuation of plan terminations.[39]

B. PBGC and Delphi as plan administrator failed to comply with ERISA's fiduciary requirements when they entered into an agreement terminating the Salaried Plan.[40]

C. PBGC's termination of the Salaried Plan violated the Due Process Clause of the Fifth Amendment.[41]

D. PBGC's termination of the Salaried Plan did not satisfy the standards set by ERISA and is unsupported by law and otherwise arbitrary and capricious.[42]

32. PBGC seeks Summary Judgment in its favor on Counts 1 through 4.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine dispute as to any material fact and that the

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[39] Second Amended Complaint ¶ 39-41.

[40] Second Amended Complaint ¶ 43-50.

[41] Second Amended Complaint ¶ 52-53.

[42] Second Amended Complaint ¶ 56.

movant is entitled to judgment as a matter of law."[43] The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact.[44] In determining whether there is a genuine dispute of material fact sufficient to preclude summary judgment, the court must regard the nonmovant's statements as true and accept all evidence and make all inferences in the nonmovant's favor.[45]

When a court reviews a federal agency's determinations under the Administrative Procedure Act ("APA"),[46] the court must decide whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[47] As the Supreme Court has noted, "a court is not to

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

[44] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009); *Snyder v. Ag Trucking, Inc.*, 57 F.3d 484, 488 (6th Cir. 1995).

[45] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Snyder v. Ag Trucking, Inc.*, 57 F.3d 484, 488 (6th Cir. 1995).

[46] 5 U.S.C. § 551 *et seq.*; *see PBGC v. LTV Corp.*, 496 U.S. 633 (1990); *National Cotton Council of Am. v. United States Envlt. Prot. Agency*, 553 F.3d 927, 934 (6th Cir. 2009); *PBGC v. J.D. Industries, Inc.*, 877 F. Supp. 151, 155 (W.D. Mich. 1994).

[47] 5 U.S.C. § 706(2)(A); *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 473 (6th Cir. 2008); *see generally PBGC v. LTV Corp.,* 496 U.S. at 645-47.

substitute its judgment for that of the agency."[48] This is particularly true where, as here, the agency is exercising its discretion.[49] In addition, as an agency responsible for enforcing ERISA, deference is given to PBGC's interpretation of ERISA.[50]

ARGUMENT

I. PBGC is entitled to Summary Judgment on Count 1, because – as Plaintiffs previously conceded before the Bankruptcy Court – 29 U.S.C. § 1342 expressly permits termination of pension plans by agreement between PBGC and a plan administrator.

29 U.S.C. § 1342(c) describes two alternative paths that PBGC may follow to terminate a pension plan after the agency has made the preliminary determinations required by § 1342(a) – PBGC may either "apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated" or "[i]f [PBGC] and the plan administrator agree that a plan should be

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[48] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Kentucky Waterways Alliance*, 540 F.3d at 474.

[49] *See Citizens Coal Council v. United States Envtl. Prot. Agency.*, 447 F.3d 879, 890 (6th Cir. 2006) ("Where the [decision] involves review of the agency's technical or scientific evaluations and determinations, the highest level of deference to the agency is to be applied.")

[50] *See Beck v. Pace*, 551 U.S. 96, 104 (2007) (stating that the Supreme Court traditionally defers to PBGC when interpreting ERISA, to do otherwise would be "to embark upon a voyage without a compass") (quoting with approval *Mead Corp. v. Tilley*, 490 U.S. 714, 722 (1989)); *see also LTV Corp.*, 496 U.S. 633 at 647-51; *see also Chem. Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 125 (1985) (the agency charged with administering the statute is entitled to considerable deference).

terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence), the trustee shall have the power described in subsection (d)(1)," to terminate the plan. As the Second Circuit explained in *In re Jones & Laughlin Hourly Pension Plan,*

> [t]he fourth sentence of subsection 1342(c) provides that where . . . PBGC and the plan administrator agree to terminate a plan, PBGC need not comply with the other requirements of "this subsection." These requirements include a court adjudication. *See* 29 U.S.C.A. § 1342(c) (first sentence). Congress, therefore, expressly dispensed with the necessity of a court adjudication in these cases.[51]

In addition, the Third Circuit, also citing 29 U.S.C. § 1342(c), stated in *In re Syntex Fabrics, Inc. Pension Plan*, "[d]espite the so-called involuntary nature of a section 1342 proceeding, PBGC and the plan administrator can still agree to terminate the plan and appoint a trustee without resort to the court."[52] It is noteworthy that when it suited Plaintiffs' purpose in the proceedings before the Bankruptcy Court in July 2009, the Plaintiffs themselves agreed with and adopted in their pleadings the same

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[51] 824 F.2d 197, 200-02 (2d. Cir. 1987); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted) (directing that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there").

[52] 698 F.2d 199, 201 (3d Cir. 1983); *see also Moore v. PBGC*, 566 F. Supp. 534, 536 (E.D. Penn. 1983) (holding that district court could not set aside agreement between PBGC and plan administrator to terminate pension plan because district court was bound by Third Circuit's interpretation of 1342(c) as authorizing termination by agreement).

plain reading of subsection 1342(c) described by the *Jones & Laughlin* and *Syntex* courts.[53] PBGC has consistently interpreted that language the same way for more than 40 years and has terminated hundreds of plans by reaching an agreement with the plan administrator.[54]

Despite the clear statutory language and consistent interpretation by the U.S. Circuit Courts that have addressed the issue, Plaintiffs assert in Count 1 of the Complaint that the termination of the Salaried Plan by agreement was invalid, because PBGC purportedly can only terminate small plans by agreement.[55] Plaintiffs come to this odd and novel conclusion relying not on any language in subsection 1342(c), but rather on the following language in subsection 29 U.S.C. § 1342(a):

> The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans and for the employers who maintain such plans (including the requirement for a court decree under subsection (c)).

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[53] *See* Menke Decl., Ex. 2, Plaintiffs' POR Objection at 5 ("[Procedures involving a hearing in a federal district court] can be bypassed in the event of an agreement between the Plan Administrator (i.e. Delphi's Excom) and the PBGC […]"); *see also id.* at 16 ("[t]he PBGC can utilize so-called 'summary termination' procedures *only if* the PBGC and the plan administrator agree between themselves to terminate the plan, and only if they agree on the appointment of a trustee […]").

[54] PBGC's interpretation of 1342(c) that pension plans can be terminated by agreement is entitled to deference by this Court. *See Beck v. Pace*, 551 U.S. 96, 104 (2007), *LTV Corp.*, 496 U.S. at 647-51, *Chem. Mfrs. Ass'n*, 470 U.S. at 125.

[55] Second Amended Complaint at ¶¶ 38-41.

This sentence in subsection 1342(a) simply does not provide what Plaintiffs say it does – it does not say that PBGC can terminate only small plans by agreement. To the contrary, it suggests the opposite – if PBGC were ever to exercise its discretion to create a "simplified procedure" for small plans, that procedure must include the requirement for a court decree under subsection 1342(c).

But perhaps even more fatal for Plaintiffs assertion is the fact that the sentence they rely upon in subsection 1342(a) does not prescribe any particular way to terminate either large or small plans. Rather, it simply gives PBGC discretion to develop a simplified way to terminate small plans if the agency chooses to do so. To date, in the 44 years since ERISA was enacted, PBGC has not exercised the discretion given to it by such provision of the statute; rather, PBGC has chosen to terminate all plans that have gone through the section 4042 process in the manner prescribed by that section. First, PBGC makes the determination required by subsection 4042(a); then, after giving appropriate notice of its determination, PBGC gives the plan administrator the option of signing a termination agreement or forcing PBGC to proceed to obtain a court decree. PBGC follows this process whether the plan has five participants or whether it has 20,000 participants.

There is no dispute of fact that PBGC followed its normal procedures with respect to the Delphi Salaried Plan and that Delphi, the Salaried Plan administrator, and PBGC entered into the Termination Agreement. Because 29 U.S.C. § 1342(c) expressly permits termination of any pension plan by agreement between PBGC and the plan administrator, PBGC is entitled to summary judgment on Count 1 of the Second Amended Complaint.

II. PBGC is entitled to Summary Judgment on Count 2, because Delphi's agreement with PBGC to terminate the Salaried Plan was not subject to fiduciary obligations.

In Count 2, Plaintiffs allege that Delphi "owed a fiduciary duty to the Salaried Plan's participants and beneficiaries in deciding whether to" sign the Termination Agreement.[56] Plaintiffs further allege that "Delphi and its executives' corporate interest necessarily favored a rapid termination of the Plan" and, thus, the plan administrator had a purportedly unavoidable conflict of interest that rendered the Termination Agreement "null and void and illegal."[57] This is the same unsuccessful argument that the Bankruptcy Court rejected when it found that Delphi was authorized to sign the Termination Agreement.[58]

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[56] Second Amended Complaint ¶ 43.

[57] Second Amended Complaint ¶¶ 47-50.

[58] *See* Plaintiffs' POR Objection at 8-10.

There are no allegations whatsoever that PBGC, in the process of terminating the Salaried Plan, violated any fiduciary obligations that it owed to Plaintiffs.

a. PBGC cannot be held vicariously liable for Delphi's actions.

PBGC inarguably owed no fiduciary obligations to Plaintiffs until after the Salaried Plan was terminated and PBGC became the statutory trustee of the Plan pursuant to the Termination Agreement. So, it is unclear to PBGC what the basis of the fiduciary breach allegations against PBGC, as opposed to Delphi, in Count 2 actually are. Some courts have recognized a breach of fiduciary duty cause of action against parties that knowingly aid or abet a fiduciary breach.[59] To the extent that Plaintiffs may be alleging that PBGC aided, abetted, or was otherwise an active participant in the alleged fiduciary breach by Delphi, the undisputed facts simply do no support those allegations.

It is undisputed that, shortly before it was signed, the Bankruptcy Court rejected Plaintiffs argument that Delphi's agreement with PBGC to terminate the

[59] *See Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988) (holding nonfiduciary liable for knowingly participating in a fiduciary's breach of fiduciary duty). *But see Blevins Screw Prods. v. Prudential Bache Sec.*, 835 F. Supp. 984, 986 (E.D. Mich. 1993) (stating that "the Supreme Court has determined that the "ERISA does not authorize suit against a nonfiduciary for knowing participation in a fiduciary's breach of fiduciary duty.") (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 n.5 (1993)).

Salaried Plan would be a breach of Delphi's fiduciary duty and the Bankruptcy Court expressly authorized Delphi to sign the Termination Agreement.[60] Contrary to what Plaintiffs may now be arguing, the record is clear that PBGC entered into the agreement with the knowledge that a court had just found that Delphi would not be violating any fiduciary duty to the Salaried Plan participants by signing the agreement. Thus, there are simply no facts here that would support a claim that PBGC was aware of any alleged fiduciary breach. Accordingly, if Plaintiffs are alleging that PBGC aided and abetted a breach of fiduciary duty by Delphi, then PBGC is entitled to summary judgment in its favor on Count 2.

b. Delphi's agreement with PBGC to terminate the Salaried Plan was not subject to fiduciary obligations.

As the Bankruptcy Court already held, Delphi's agreement with PBGC to terminate the Plan is not subject to fiduciary obligations. The Supreme Court has expressly held that a plan sponsor's decision to terminate a pension plan while the plan sponsor is liquidating in bankruptcy is a settlor function, not a fiduciary function.

Under ERISA, an employer's decisions regarding an employee benefit plan fall into two categories: (1) fiduciary decisions – those decisions to which ERISA's fiduciary duties apply, and (2) settlor decisions – those decisions to which

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[60] *See* Menke Decl., Ex. 4, Confirmation Order at p. 37-38 and 82.

ERISA's fiduciary duties do not apply. On the one hand, decisions concerning the management or disposition of plan assets, or the administration of benefits in an ongoing plan, are decisions that must be made in the best interests of plan participants and subject to ERISA's fiduciary requirements.[61] On the other hand, decisions about the design, composition, and structure of a plan are settlor functions not subject to the fiduciary rules of ERISA.[62] Amending plans to comply with new laws or to streamline employer operations,[63] to encourage early retirement,[64] or to merge plans after acquiring another company,[65] are all settlor functions.

The Supreme Court has expressly held that an employer's decision to terminate a pension plan while the plan sponsor is liquidating in bankruptcy is a

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[61] 29 U.S.C. § 1104(a)(1).

[62] *See* Letter on Fiduciary Responsibility and Plan Terminations (March 13, 1986) https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/information-letters/03-13-1986 (Menke Decl., Ex. 6); and DOL Adv. Op. 2001–01A (January 18, 2001) https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2001-01a (Menke Decl., Ex. 7). The limitations on the scope of ERISA's fiduciary duties reflect the statute's basic purposes. ERISA does not require employers to create benefit plans or to provide any particular kind or level of benefits. *See also Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983).

[63] *See Lockheed Corp.,* 517 U.S. at 885.

[64] *See Hughes Aircraft Co*. v. *Jacobson*, 525 U.S. 432, 436 (1999).

[65] *See Malia* v. *Gen. Elec. Co.,* 23 F.3d 828, 829-30, 833 (3d Cir. 1994).

settlor function, not a fiduciary function.[66] So has the Department of Labor.[67] And, the Department of Labor's interpretation is entitled to deference by this Court.[68]

Some decisions by an employer that are involved in standard terminations of fully-funded pension plans are fiduciary functions. An employer's decisions with respect to distributing a plan's assets to participants post termination are fiduciary functions.[69] For example, when more than "one insurer is available to issue an annuity closing out a plan" and the plan administrator must choose among those

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[66] *See Beck v. Pace Inter. Union.*, 551 U.S. 96 (2007) (finding that plan sponsor's decision to terminate a pension plan while it was liquidating in bankruptcy was a settlor function).

[67] Anthony Provenzano & Elizabeth Drake, *Residual Liabilities Following Plan Termination: Is the Plan Really Gone?*, Tax Management Compensation Planning Journal (2014), available from Plaintiffs' Counsel's website at https://www.millerchevalier.com/sites/default/files/news_updates/portalresourceresidual-liabilities-following-plan-termination.pdf, Menke Decl., Ex. 8; *see also Beck*, 551 U.S. at 101; *Lockheed Corp.,* 517 U.S. at 890; *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

[68] *See Beck*, 551 U.S. at 104, *LTV Corp*., 496 U.S. at 647-51, *Chem. Mfrs. Ass'n*, 470 U.S. at 125.

[69] *See* Menke Decl., Ex. 6, Letter on Fiduciary Responsibility and Plan Terminations.

insurers, the plan administrator must exercise that discretion as a fiduciary of the plan participants.[70]

But when PBGC takes over a pension plan, PBGC becomes responsible for distributing the plan's assets to plan participants.[71] Thus, once an employer decides to agree to a PBGC-initiated plan termination, there are no more fiduciary decisions for the employer to make with respect to distributing plan assets to participants.

Here, Plaintiffs contend that Delphi's decision to sign the Termination Agreement was a breach of fiduciary duty.[72] But, Plaintiffs have not identified what, if any, discretion the plan administrator exercised in signing the Termination Agreement aside from the decision to terminate a pension plan in conjunction with its liquidation in bankruptcy. And, as the Supreme Court found in *Beck*, deciding to terminate a pension plan while liquidating in bankruptcy is a settlor function.

There is no dispute of fact that Delphi made the decision to terminate the Salaried Plan in conjunction with liquidating in bankruptcy. Since as a matter of

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[70] *See id; see also Waller v. Blue Cross*, 32 F.3d 1337, 1342 (9th Cir. 1994) ("Blue Cross acted in a fiduciary capacity when choosing annuity providers to satisfy plan liabilities."); *see also Beck*, 551 U.S. at 102.

[71] *See* 29 U.S.C. §§ 1342(d)(1)(A)(i) and 1344(a).

[72] *See* Second Amended Complaint ¶ 49.

law, a decision to terminate a pension plan is a settlor function – not a fiduciary function, PBGC is entitled to summary judgment on Count 2 of the Complaint.

III. PBGC is entitled to Summary Judgment on Count 3, because Plan termination by agreement between PBGC and the plan administrator did not violate the due process clause.

In Count 3, Plaintiffs allege that termination of the Salaried Plan by agreement was a violation of the Due Process clause of the Fifth Amendment, because the participants "have a cognizable interest in their vested pension benefits" and "are entitled to meaningful notice of any Plan termination and the opportunity for hearing prior to the Plan's termination."[73] The Supreme Court has stated that "[a] party challenging governmental action as an unconstitutional taking bears a substantial burden."[74] A claim of violation of due process requires: (1) a protected property interest, and (2) deprivation of such protected property interest without adequate procedural safeguards.[75] The Supreme Court has long held that

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[73] Second Amended Complaint ¶ 52.

[74] *See Eastern Enters. v. Apfel,* 524 U.S. 498, 523 (1998).

[75] *Jones & McLaughlin*, 824 F2d at 201 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542-43(1985); *see Puckett v. Lexington-Fayette Urban Cnty. Gov't*, 833 F.3d 590, 604–05 (6th Cir. 2016) (hereinafter, *Puckett II*) (internal quotations removed).

"[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[76]

a. Plaintiffs do not have a protected property interest in the difference between their vested pension benefits and the amount due to them following plan termination.

The Supreme Court held that "[to] have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[77] Plaintiffs insist that they have a protected property interest in the full amount of their vested benefits under the Salaried Plan. But, while the Salaried Plan defines vested benefits, it does not promise that vested benefits will be paid in full in all circumstances.[78]

In the Salaried Plan document, Delphi expressly reserved the right to terminate the Plan. And in the event of termination, the Salaried Plan documents set forth how the participants' benefits will be reduced if the Plan terminates without assets sufficient to pay the full amount of vested benefits.[79] The asset

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[76] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

[77] *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

[78] *See* Menke Decl., Ex. 9, Delphi Retirement Program for Salaried Employees at 118-22.

[79] *Id.*

allocation procedure followed the law set out in 29 U.S.C. § 1344(a), which is the same allocation procedure PBGC is required to follow when it becomes statutory trustee of a terminated plan. The Plan document further provided that upon termination of the Plan, the "right of all affected employees to benefits accrued to the date of such termination . . . is nonforfeitable," *but only* "*to the extent funded as of such date*."[80] Since the Salaried Plan was underfunded when it terminated, Plaintiffs therefore do not have a property interest in the full amount of their vested benefits, but only to the portion of that benefit that was covered by the available, but insufficient, assets in the Plan.[81]

Under ERISA, PBGC pays participants a benefit amount that is the greater of (i) guaranteed benefits under ERISA, and (ii) the benefits funded by the plan's assets. On top of those payments, participants receive an additional benefit amount from their share of PBGC's recoveries in connection with the terminated plan.[82] Thus, when a plan terminates without sufficient assets to pay such guaranteed benefits, the amount of benefits the participants receive from PBGC in the aggregate exceeds the benefit amounts that can be paid by plan assets. Here,

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[80] *Id.* at p. 121 (emphasis added).

[81] *See Jones & McLaughlin*, 824 F.2d at 201 (plan participants' "reasonable expectancy affected by the termination, moreover, must to some extent reflect the possibility of termination").

[82] *See id*.

PBGC expects to expend more than $2 billion of the agency's own funds to pay the unfunded guaranteed benefits to Plaintiffs and other participants. Accordingly, not only has PBGC taken nothing from Plaintiffs, PBGC has committed to paying Plaintiffs more than the amounts that would be payable under the Salaried Plan's asset allocation.

b. Assuming *arguendo* that Plaintiffs have a protected property interest, due process did not require advance notice and a hearing before PBGC and the plan administrator agreed upon plan termination.

Since Plaintiffs do not have a protected property interest in the additional benefits that they are seeking in this case, this Court should find that due process requirements do not apply. But, courts often assume – without deciding – that a protected property interest exists and then evaluate whether due process requires additional procedural safeguards.[83]

Under the Supreme Court's *Matthews* test, which sets forth how courts are to determine what process is required when a protected property interest is taken,

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and

[83] *See, e.g.*, *Jones & McLaughlin*, 824 F.2d at 201.

> administrative burdens that the additional or substitute procedural requirement would entail.[84]

Applying the *Matthews* test, the Second Circuit explicitly held in *Jones & Laughlin Hourly Penson Plan* that PBGC's agreement with a plan administrator to terminate a pension plan, executed without prior notice and hearing to participants and their labor representatives, did not violate participants' due process rights.[85]

The *Jones & Laughlin* court found that the affected interest, the first prong of the *Matthews* test, was not compelling because benefits may not be reduced below the limit of ERISA's guarantee under 29 U.S.C. § 1322.[86] This is particularly true here, where Plaintiffs do not lose anything as a result of the government's role in this case, but only gain.

Under the second prong of the *Matthews* test, the *Jones & Laughlin* court found that Title IV of ERISA contains "ample post-deprivation remedies" for participants – aggrieved parties may sue PBGC under 29 U.S.C. § 1303(f), and

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[84] *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (citations omitted); *see Gunasekera v. Irvin*, 551 F.3d 461, 470 (6th Cir. 2009); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 639 (6th Cir. 2005); *Molnar v. Care House*, 574 F. Supp. 2d 772, 797 (E.D. Mich. 2008).

[85] *Jones & Laughlin*, 824 F.2d at 201-02.

[86] *Id.*

PBGC can restore the plan if labor negotiations obviate the need to terminate it.[87]

Finally, the *Jones & Laughlin* court found that the third prong of the *Matthews* test – the government's countervailing interest – "sharply tips the balance" in PBGC's favor.[88] The court noted, "[m]assive delays would result from affording court hearings to thousands of retirees. . . . The effect of the delays, moreover, would be exacerbated by the concomitant accrual of greater benefits and service as the plans continued."[89]

The *Jones & Laughlin* result is completely applicable here. PBGC's payment of benefits to Plaintiffs made in accordance with ERISA and PBGC regulations,[90] if it is a deprivation at all, is not a deprivation that requires PBGC to provide pre-deprivation due process rights. Since the Salaried Plan has over 15,000 participants,[91] the pre-termination proceedings that Plaintiffs desire

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[87] *Id.*

[88] *Id.*

[89] *Id.*; *see also United Steelworkers of Am., AFL-CIO, CLC v. United Eng'g, Inc.*, 839 F. Supp. 1279, 1284 (N.D. Ohio 1993), aff'd, 52 F.3d 1386 (6th Cir. 1995) ("Requiring PBGC to hold hearings involving employees each time PBGC conducted termination proceedings could very likely constitute a substantial burden on PBGC.")

[90] 29 U.S.C. § 1322(a), (b); 29 C.F.R. §§ 4022.61-4022.63 (2009).

[91] Second Amended Complaint ¶ 16.

similarly would delay PBGC administration of the Salaried Plan – possibly for years – while the risks of plan abandonment, increasing benefit liabilities, and interruption of benefits to participants would continue to mount. These dangers were particularly relevant as Delphi liquidated and did not have any infrastructure to administer the Salaried Plan.[92] Therefore, neither advance notice nor a hearing was required before PBGC and the plan administrator agreed upon plan termination.

IV. PBGC is entitled to Summary Judgment on Count 4 of the Second Amended Complaint, because the termination complied with 29 U.S.C §§ 1342(a) and (c).

a. There is no genuine issue of material fact that at least one of the four criteria 29 U.S.C 1342(a) has been met and, thus, PBGC's decision to initiate termination was neither arbitrary nor capricious.

29 U.S.C § 1342(a) authorizes PBGC to

> institute proceedings . . . to terminate a plan whenever it determines that
>
> (1) the plan has not met the minimum funding standard . . . ;
> (2) the plan will be unable to pay benefits when due;
> (3) the reportable event described in [29 U.S.C. § 1343(c)(7)] has occurred; **or**
> (4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.[93]

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[92] *Jones & Laughlin*, 824 F.2d at 202.

[93] 29 U.S.C. § 1342(a) (*emphasis added*).

Thus, for PBGC to be authorized to initiate pension plan termination proceedings, only one of the four criteria under 29 U.S.C 1342(a) must be met. The Administrative Record clearly shows that Delphi did not make all required contributions to the Salaried Plan between filing for bankruptcy in October 2005 and the termination date in 2009.[94] At the time of the Salaried PBGC's decision to initiate termination, Delphi had not met the minimum funding standard to the tune of $165.5 million.[95] Thus, PBGC's determination that the Salaried Plan had not met the minimum funding standard under the Internal Revenue Code is fully supported by the Administrative Record.[96]

The Administrative Record also supports PBGC's other determinations under section 1342(a)(2) and (4). The Salaried Plan would be unable to pay benefits when due because Delphi was liquidating in bankruptcy and would have no longer been available to authorize payments to new participants or authorized distributions by the Plan's paying agent or asset manager. And the possible long

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[94] AR 34, 934.

[95] AR 34, 41.

[96] *See PBGC v. Haberbush,* No. 2631GHKAIJX, 2000 WL 33362003, at *8 (C.D. Cal. Nov. 3, 2000). As discussed below, this undisputed failure to pay all pension plan contributions required by law was also a key factor in PBGC's other determinations that the Salaried Plan will ultimately be unable to pay benefits when due and that the Salaried Plan should be terminated to prevent its continuing financial deterioration.

run loss to PBGC would have increased unreasonably if the Salaried Plan was not terminated before certain subsidiaries left the controlled group.[97] PBGC's ability to obtain a recovery on its plan termination claims would have been lost if the Plan were not terminated before the Delphi controlled group was broken up as a result of the planned asset sales at the end of Delphi's bankruptcy.

Accordingly, there can be no genuine issue of fact that at least one of the four criteria under § 1342(a) was met and therefore PBGC was expressly authorized by ERISA to initiate termination proceedings. Since it was expressly authorized by statute, PBGC's decision to initiate termination proceedings here was not arbitrary or capricious and should be sustained by this Court.

b. There is no genuine issue of material fact that the termination satisfied the requirements of 29 U.S.C. § 1342(c) because PBGC and the plan administrator agreed to terminate the Salaried Plan.

As the Bankruptcy Court already found, 29 U.S.C. § 1342 "permits the PBGC and the plan administrator to agree to termination of a plan without an adjudication."[98] There is no genuine issue of material fact that PBGC and the plan administrator entered into the Termination Agreement. As discussed in section 1 of the Argument above, the language of section 1342(c) is clear that if PBGC and

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[97] *See* AR 1-9.

[98] Menke Decl., Ex. 4, Confirmation Order at 81.

Delphi entered into the Termination Agreement, none of the additional procedural requirements, including the requirement of obtaining a court decree, were applicable. Accordingly, the termination by agreement satisfied 29 U.S.C. § 1342(c), and PBGC is entitled to summary judgment on Claim 4.

Assuming *arguendo* that 29 U.S.C. § 1342(c) requires an adjudication even where PBGC and the plan administrator agree upon plan termination, the termination of the Salaried Plan satisfied 29 U.S.C § 1342(c), which authorizes PBGC 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.[99]

And, the Sixth Circuit has recognized that the involuntary termination procedures under ERISA exist "precisely so that PBGC can protect its own financial interests."[100]

Here, Delphi used all of the stock of its first-tier foreign subsidiaries ("subsidiaries") as collateral for the financing of its post-petition operations.

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[99] 29 U.S.C. § 1342(c) (emphasis added).

[100] *PBGC v. Republic Techs. Int'l, LLC*, 386 F.3d, 659, 668 (6th Cir. 2004)(citing 29 U.S.C. § 1342(c)); *see also PBGC v. Pension Comm. of Pan Am. World Airways, Inc. (In re Pan Am. World Airways Inc. Coop. Ret. Income Plan)*, 777 F. Supp. 1179, 1182-83 (S.D.N.Y. 1991).

Because those subsidiaries were under common ownership with Delphi, they were members of Delphi's "controlled group," as that term is defined in the ERISA.[101] Under ERISA, all members of a plan sponsor's controlled group on the date of plan termination are jointly and severally liable to PBGC for pension liabilities.[102] If Delphi's lenders had foreclosed on the collateral, *i.e.* the stock in the subsidiaries, before the Salaried Plan was terminated, then those subsidiaries would have (a) ceased to be under common ownership with Delphi, (b) ceased to be members of Delphi's controlled group, and (c) ceased to be jointly and severally liable to PBGC for pension liabilities. While Plaintiffs contend that PBGC should have negotiated a higher settlement for the value of its liens against the subsidiaries' assets, it is undisputed that the termination allowed PBGC to collect hundreds of millions of dollars more than if the plan had not been terminated.[103] That collection reduced PBGC liabilities and protected PBGC's financial interests.

Thus, even if termination by agreement somehow does not satisfy 29 U.S.C. § 1342(c) – which, as discussed *supra* it clearly does, the termination satisfies the other requirements of 29 U.S.C. § 1342(c) because, as fully supported by the

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[101] 29 U.S.C. § 1301(a)(14).

[102] 29 U.S.C. § 1362.

[103] AR 80-113, 819-851.

Administrative Record, termination was necessary to avoid unreasonable increase in the liability of the fund. Accordingly, PBGC is entitled to summary judgment on Count 4.[104]

CONCLUSION

Accordingly, for the reasons stated above, PBGC respectfully requests that the Court grant summary judgment in favor of PBGC.

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[104] PBGC notes that Plaintiffs make reference to some unspecified political expediency in Count 4 as being the real reason for the termination of the Salaried Plan. *See* Second Amended Complaint ¶ 56. The only facts alleged in the complaint about political motivations appear to be alleged political motivations of the Department of Treasury. *See id* ¶¶ 23 and 37. This Court has already dismissed those allegations for failure to state a claim. *See* Docket No. 192. Since those allegations appear to be dismissed, PBGC does not address them herein.

Date: September 21, 2018

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Certificate of Service

I hereby certify that on September 21, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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