Exhibit C

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

DENNIS BLACK, *et al.*, Plaintiffs, v. Pension Benefit Guaranty Corporation, *et al.*, Defendants.	Case No. 2:09-cv-13616 Hon. Arthur J. Tarnow Magistrate Judge Donald A. Scheer

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT PENSION BENEFIT GUARANTY CORPORATION'S MOTION TO DISMISS

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STATEMENT OF ISSUES PRESENTED

I. Whether an allegation that the Pension Benefit Guaranty Corporation ("PBGC") has terminated a pension plan in a manner not authorized by ERISA states a plausible claim for relief where the facts underlying the claim are clearly alleged and undisputed?

II. Whether an allegation that a plan administrator violated ERISA by failing to adhere to the plan administrator's fiduciary duties of loyalty and prudence in choosing a method of plan termination and implementing that method states a plausible claim for relief where the facts underlying the claim are clearly alleged and undisputed?

III. Whether a claim that the PBGC's actions in terminating a pension plan violated the Due Process Clause of the Fifth Amendment states a plausible claim for relief where it is undisputed that the PBGC terminated a pension plan pursuant to established state procedures without affording the participants a pre-deprivation hearing, despite the fact that not only was a pre-deprivation hearing practical, but the PBGC had, in fact, already initiated one.

STATEMENT OF CONTROLLING AUTHORITY

I. In order to terminate a pension plan under 29 U.S.C. § 1342, ERISA requires that the PBGC obtain a court decree adjudicating that a plan be terminated. 29 U.S.C. § 1342(a) & (c).

II. Where an otherwise acceptable construction of a statute would raise serious constitutional problems, a court should construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *Public Citizen v. DOJ*, 491 U.S. 440, 465-66 (1989); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

III. Where an employer has dual roles as plan sponsor and plan administrator, the employer's fiduciary duties are implicated when it acts in its capacity as plan administrator. Any action a *plan administrator* undertakes in implementing an employer's decision to terminate a plan, including the selection of a particular *method of plan termination,* is a fiduciary function subject to fiduciary obligations. *Beck v. PACE Int'l Union*, 551 U.S. 96, 101 (2007).

IV. The root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)

V. In situations where the government feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of a post-deprivation remedy. *Zinermon v. Burch*, 494 U.S. 113, 132 (1990)

INTRODUCTION AND STANDARD OF REVIEW

The facts underlying Plaintiffs' First Amended Complaint (the "Complaint") are undisputed and clearly alleged. Plaintiffs (sometimes referred to hereafter as the "Salaried Workers") are participants in the Delphi Retirement Program for Salaried Employees (the "Plan"). In July 2009, Defendant Pension Benefit Guaranty Corporation ("PBGC") terminated the Plan without court approval, thereby extinguishing the vested pension benefits that Plaintiffs had spent years of their lives earning. Counts One through Three of the Complaint (the subject of the PBGC's Motion to Dismiss) challenge the *way* in which the Plan was terminated, arguing that either the extrajudicial termination of Plaintiffs' vested pension rights violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, or, if the termination was statutorily permitted, it violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

The manner in which these statutory and constitutional violations occurred is also clearly set forth in the Complaint. First, the PBGC initially chose a method of plan termination which would have allowed for the protection of Plaintiffs' due process rights by filing a complaint in this Court seeking an order adjudicating that the Plan should be terminated. Then, the day after Plaintiffs expressed to the PBGC their intention to exercise their due process rights to contest the necessity of the Plan's termination, the PBGC chose a different manner of plan termination -- withdrawing its suit and declaring the Plan terminated pursuant to an agreement with the Plan's administrator, Delphi Corporation ("Delphi").[1] This agreement was executed behind closed doors and without the consent of a district court and was the clear product of fiduciary breach in which the plan administrator protected its own interests, not those of the Plan's participants.

Count One alleges that this conduct violated the requirement of 29 U.S.C. § 1342 that the PBGC obtain a court decree adjudicating the Plan's termination; ERISA prohibits the termination of vested property interests outside the judicial process, particularly when it is accomplished by an agreement that excludes any consideration of the participants' best interests. Count Two alleges that because any ability to enter agreements under ERISA is expressly given to a "plan administrator," to the extent the law permits the plan administrator to agree with the PBGC on how to terminate a plan, the decision whether to enter into such an agreement is a fiduciary function that must be made in the best interests of the participants, which the decision here clearly was not. Count Three alleges that, if 29 U.S.C. § 1342(c) permits a pension plan to be terminated by agreement with a plan administrator who can summarily agree to the destruction of vested property interests without taking the interests of the plan participants into account, then 29 U.S.C. § 1342(c) violates the Due Process Clause.

The PBGC has moved to dismiss Counts One through Three of the Complaint under Fed. R. Civ. P. 12(b)(6).[2] In support of its motion, the PBGC cites the Supreme Court's holdings in

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[1] As described in n.1 of the Complaint, there has been dispute as to whether the plan administrator of the Plan is Delphi or its executive committee. As noted at n.1 of the Complaint, for present purposes, it does not make any difference which entity fulfilled the role.

[2] Plaintiffs note that while the PBGC has moved to dismiss Counts One through Three under Fed. R. Civ. P. 12(b)(6), it has introduced facts outside the pleadings in support of its motion. *See* Affidavit of Candace Campbell, attached to the PBGC's Mot. to Dismiss. Ms. Campbell's

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Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), that, in order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, acceptable as true, to 'state a claim that relief is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (citations omitted.). Under this standard, argues the PBGC, "there is no plausible basis for concluding that the Plaintiffs are entitled to relief." PBGC Mot. at 7. Despite invoking the "*Twombly* standard," the PBGC Motion does not actually challenge the Complaint's factual sufficiency -- rather it rests on arguments about the legal construction of ERISA and the Constitution. As there is no question that the Complaint contains sufficient factual matter to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" and because there can be no issue that the facts as pleaded in Counts One through Three allege violations of ERISA and the Constitution, the PBGC's Motion should be denied. *Erickson v. Pardus,* 551 U.S. 89, 93 (2007) (quoting *Twombly,* 550 U.S. at 555).

ARGUMENT

I. COUNT ONE SHOULD NOT BE DISMISSED

Count One turns entirely on the meaning of 29 U.S.C. § 1342(c), a provision of ERISA entitled "**Adjudication** that plan must be terminated." (Emphasis added). The statutory language provides that the PBGC may "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

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affidavit is not properly before the Court and should be stricken. *See Tackett v. M&G Polymers, USA, LLC*, 561 F.3d 478, 487 (6th Cir. 2009).

any unreasonable increase in the liability of the fund." 29 U.S.C. § 1342(c)(1). Alternatively, where a trustee has been appointed under § 1342(b), that trustee may make "application for such decree himself." *Id.* § 1342(c)(1). In either case, a decree must be applied for and obtained.

The requirement that the party seeking to implement termination obtain an "adjudication" exists to protect the rights of both participants and employers. Section 1342 does not allow for any exception to this requirement. While it does allow for the implementation of simplified procedures in the case of small plans, even in these cases the PBGC must ensure that the rights of participants and employers are safeguarded; especially their right that a plan cannot be terminated without a court decree. Thus, 29 U.S.C. § 1342(a), provides that:

> The [PBGC] 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)).

Despite the statute's express focus on "substantial safeguards for the rights of the participants and beneficiaries under the plans," the PBGC maintains that Section 1342 permits it to terminate a plan through a process that involves absolutely no safeguards for the rights and beneficiaries of the plans whenever the plan administrator agrees to termination. According to the PBGC, such authority is found the fourth sentence of subsection (c), which states:

> "If the corporation and the plan administrator agree that a plan should be 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)* and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is *subject to the duties described in subsection (d)(3)*."

29 U.S.C. § 1342(c) (emphasis added).

The PBGC's reading of this language as providing a blanket exception to the judicial process whenever a plan administrator agrees to termination cannot withstand scrutiny. While the PBGC contends that its reading of the statute is the "only" conceivable one (*see* PBGC Mot. at 8), it is fundamentally at odds with both the statutory focus on an "adjudication," and with the statute's requirement of participant "safeguards" even when allowing for streamlined procedures (such as for small plans). The PBGC's view is also at odds with the plain directive of § 1342(c), which states that the *only* consequence of an agreement between the PBGC and the plan administrator is that "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)* and . . . is *subject to the duties described in subsection (d)(3)*." The plain statutory language thus says nothing about permitting the PBGC and the plan administrator to agree to bypass an "adjudication" entirely whenever the plan administrator determines that it is in the plan administrator's best interest to do so, but addresses only the powers of a trustee when there is agreement between the PBGC and the plan administrator.

While the PBGC has not cited the decision in its Motion, the Second Circuit's twenty-two year old opinion in *In re Jones & Laughlin Hourly Pension Plan*, seemed to partially affirm the PBGC's view, concluding that "[o]n its face this sentence permits PBGC and the administrator to proceed . . . in summary fashion without affording plan members pretermination notice and hearings to contest the propriety of the termination decision." *In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d 197, 199 (2d Cir. 1987).[3] A fair reading of the sentence,

[3] The relevance of the Second Circuit's conclusion is also in doubt because *Jones & Laughlin* actually *did* involve a judicial "adjudication" of termination, since the PBGC and the plan

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however, allows no such interpretation. This sentence, like all conditional sentences, comprises a condition (actually two conditions), and a consequence if the conditions are fulfilled. The conditions are: (1) agreement between the plan administrator and the PBGC that the plan should be terminated; and (2) agreement between the PBGC and plan administrator on the appointment of a trustee. Where those two conditions are met, the only consequence authorized by the statute is that "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)* and . . . is *subject to the duties described in subsection (d)(3)*." There is no mention of any effect such an agreement has on *the termination of the plan* or *the requirement that a court decree be obtained*. In spite of that silence, and in spite of the fact that subsection (a) explicitly refers to "the requirement for a court decree under subsection (c)," the PBGC relies upon this sentence for the proposition that such an agreement has the legal consequence of terminating a plan.

Moreover, in the legislative history of Section 1342, Congress plainly revealed its intention that the court decree be a safeguard that could not be sacrificed for expediency's sake even in the case of "small plans" and unambiguously expressed its views on the limits of what a plan administrator and the PBGC could agree upon:

> In the case of small plans, the corporation may prescribe a simplified procedure and may pool assets of small plans *so long as the rights of the participants and employers* (*including the right to a court decree of termination*) are preserved. Furthermore, the corporation may agree with any plan administrator to designate a trustee who, without court appointment, is to have the usual powers of trustees appointed by the court.

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administrator there obtained a consent decree from the district court approving the termination. Hence, it is not clear that the Second Circuit's analysis is anything more than dicta.

H.R. Rep. No. 93-1280, at 373 (1974) (Conf. Rep.) (emphasis added).

There is no indication that Congress intended through the fourth sentence of subsection (c) to abrogate the "right to a court decree of termination" in all cases -- for plans both large and small -- by allowing for a plan to be terminated by agreement between the plan administrator and PBGC without any safeguards for plan participants. As the conference report plainly states, the only intended purpose of that sentence was to provide for a way to have a trustee *appointed by agreement* who would nevertheless have the powers of a court appointed trustee. By inserting this sentence, Congress provided for situations where it would be best to have a mutually-agreed upon trustee in place that could begin to act to conserve plan assets, while the necessary (and potentially lengthy) process of adjudicating the plan's termination takes place. Absent this sentence, the only way that a trustee could have the powers under (d)(1)(B) is through proceeding in accordance with the requirements of subsection (c) -- *i.e.*, by court appointment *after* a decree has already been entered.

This interpretation of the statutory language is the only one that conforms to Congressional intent and is the only one consistent with Section 1342 as a whole. It simply does not stand to reason that Congress would allow for the PBGC to bypass ERISA's court decree requirement entirely using this clumsy language, especially given its insistence in subsection (a) that the PBGC could, in the case of small plans, prescribe simplified procedures for plan termination, but only so long as they include substantial safeguards, including the requirement for a court decree. If that were not reason enough to reject its challenge to Count One, accepting the PBGC's interpretation would force constitutional doubt unnecessarily. As the Supreme Court has often remarked, if "'an otherwise acceptable construction of a statute would raise serious constitutional problems,'" a court should "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Public Citizen v. DOJ*, 491 U.S. 440, 466 (1989) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Construction Trades Council*, 485 U.S. 568, 575 (1988)). As discussed *infra* at 15-20, if the statute is construed as the PBGC argues, then this Court must face the serious constitutional problems raised by the deprivation of property without any opportunity for pre-deprivation hearing. Even assuming that the PBGC's rendering of the statute were as plausible as Plaintiffs' (which it is not), this principle of statutory construction would prevent its application. The Complaint plausibly alleges that in terminating the Plan, the PBGC violated the requirement of 29 U.S.C. § 1342(c) that it obtain a court decree. As such, the Court should deny the PBGC's motion to dismiss Count One of the Complaint.

II. COUNT TWO SHOULD NOT BE DISMISSED

Count Two alleges that even if a pension plan can be terminated by agreement between the PBGC and a plan administrator, the decision to select a summary method of termination can be undertaken, if at all, only by the plan administrator in a fiduciary capacity. This is the only reading of the statute that makes sense, it is the only reading of the statute consistent with ERISA and trust law, and it is the only reading of the statute that would be consistent with Congress' insistence that any plan termination process include substantial safeguards for the participants. If a decision to select a summary method of Plan termination can be made by a plan administrator solely in a fiduciary capacity, then at the very least participants (through their fiduciary) will have a real say in the process before their vested property interests are diminished or extinguished.

For its part, the PBGC does not dispute that the plan administrator (Delphi or its executive committee) acted without regard to the participants' interests when it decided to agree to summary termination for its own self-interested reasons. Indeed, that conclusion must be accepted as true at the motion to dismiss stage. The PBGC argues, however, that the plan administrator's failure to act singly in the participants' interests is irrelevant under ERISA because the decision to terminate a plan is a settlor function, not a fiduciary one. PBGC Mot. at 10-12. This argument ignores both the plain language of the statute and the obvious distinction between an employer's decision to terminate a *fully* funded plan going forward, which plainly is a settlor function, and the much different decision to select a summary method of a termination of an *underfunded* plan, thereby extinguishing vested property rights of third parties in the process.

To start with the statutory language, whatever power Section 1342(c) provides with regard to an agreement with the PBGC, it expressly provides that power to a "plan administrator." This is significant because a "plan sponsor" is an utterly distinct and separate entity from a "plan administrator" under ERISA. *See* ERISA § 3(16)(a) (defining plan administrator) and § 3(16)(b) (defining plan sponsor). While plan administrators (at least those with discretion) are, by definition, fiduciaries under ERISA, plan sponsors are not. *See, e.g.*, 29 U.S.C. 1002(21)(A) ("a person is a fiduciary with respect to a plan to the extent . . . he has any discretionary authority or discretionary responsibility in the *administration of such plan*") (emphasis added). Nothing in ERISA requires that the plan sponsor also be the plan administrator; consequently, plan sponsors usually do not have any fiduciary responsibilities unless they choose to retain some administrative powers. *See, e.g., Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996).

Thus, whatever the extent of the power granted to a plan administrator by the fourth sentence of section 1342(c), it is vested in the plan administrator, not the plan sponsor. This is the beginning and the end of the inquiry. Delphi could only have had the power to execute the summary termination agreement in its capacity as plan administrator; as such there can be no question that fiduciary obligations must attach because "the employer's decision . . . was not an action which could be given effect as a corporate management decision." *Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 225, 227 (3d Cir. 1989); *see also Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) ("The ordinary trust law understanding of fiduciary 'administration' of a trust is that to act as an administrator is to perform the duties imposed, or exercise the powers conferred, by the trust documents.") (internal citations omitted).

The PBGC ignores the express reference to the "plan administrator" in section 1342, arguing that fiduciary responsibility for a plan administrator's decision here would be inconsistent with the black-letter rule that an employer's decision to terminate a plan is a "settlor" function, PBGC Mot. at 11-12. But there is no inconsistency. While the simple decision to terminate a *funded* plan by ending it going forward is "a settlor function immune from ERISA's fiduciary obligations," any action even in that fully funded situation *to implement* the termination decision, including the selection of a particular *method of plan termination,* is a fiduciary function subject to fiduciary obligations. *Beck v. PACE Int'l Union*, 551 U.S. 96, 102 (2007) (if merger were a "permissible form of plan termination" then the decision not to consider merger in terminating pension plan could be subject to fiduciary duties); *Larson v. Northrop*

Corp., 21 F.3d 1164, 1169 (D.C. Cir. 1994) ("Although the decision to terminate a pension plan is generally not subject to the fiduciary responsibility provision of ERISA, the Department of Labor has emphasized that activities undertaken to implement the termination decision are generally fiduciary in nature.") (internal quotation omitted); *Waller v. Blue Cross*, 32 F.3d 1337, 1342 (9th Cir. 1994) ("Plaintiffs do not dispute that the decision to terminate a plan is a business decision and does not constitute a breach of fiduciary obligation . . . . By alleging that Blue Cross breached its fiduciary duty in the selection of annuity providers, plaintiffs attack not the decision to terminate, but rather the implementation of the decision. We believe that this distinction is dispositive and hold that Blue Cross acted in a fiduciary capacity when choosing annuity providers to satisfy plan liabilities.") (internal citations and quotations omitted).

Accordingly, even if the PBGC were correct that section 1342 permits it to agree with a plan administrator to summarily terminate a plan (which it is not), summary termination is at most one of a number of methods of plan termination, the implementation of which is a fiduciary function. Here, the PBGC originally chose to pursue a plenary termination under the same statutory provision, and Delphi in its role as plan sponsor also could have chosen to seek a voluntary termination under 29 U.S.C. § 1341, which would have also required Court approval. The PBGC therefore is forced to concede that the Plan's administrator had a number of available methods of Plan termination; it immediately seeks to avoid the consequences of this concession, however, by asserting that "whether the settlor initiates the termination under 29 U.S.C. § 1341 or agrees to a termination that PBGC has initiated under 29 U.S.C. § 1342, the question the settlor considers -- whether or not to terminate -- is the same." PBGC Mot. at 11. This assertion ignores the vastly different consequences to the two decisions.

Unlike a summary termination agreed to here by a plan administrator, the decision by a plan sponsor to terminate a plan does not actually terminate the plan under ERISA; it is simply a business decision that the employer wishes to cease providing a pension benefit plan to its employees. When an employer wants to terminate a plan as a settlor, its only options are to pursue either a standard or distress termination under 29 U.S.C. § 1341. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999) ("Subsections (b) and (c) [of § 1341] concern the two ways by which an employer may voluntarily terminate a plan."). Under 29 U.S.C. § 1341, when a plan sponsor unilaterally decides to terminate a plan, it is the plan *administrator* that actually implements the business decision, acting as a fiduciary, in the best interests of the participants.

Moreover, Congress mandated that employer initiated terminations include procedures that afford multiple safeguards for participants. First, the statute requires a mandatory 60-day notice requirement regardless of whether a "standard" or "distress" termination is pursued. Specifically, the plan administrator – "[n]ot less than 60 days before the proposed termination date" – must provide each "affected party . . . a written notice of intent to terminate stating that such termination is intended and the proposed termination date." 29 U.S.C. § 1341(a)(2). In standard terminations, where there are sufficient assets to pay out all benefits, the plan administrator usually accomplishes the termination through the purchase of annuities. In cases where there are insufficient assets to pay out all benefits (distress terminations), it must seek PBGC approval, and if the sponsor is undergoing Chapter 11 reorganization, the bankruptcy court must hold a contested hearing and find that, "unless the plan is terminated, [the debtor] will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the Chapter 11 reorganization process." 29 U.S.C. § 1341(c)(2)(B)(ii)(IV).

Additionally, if the PBGC cannot make a determination that the plan is able to pay "guaranteed" benefits, the PBGC must then initiate termination proceedings under section 1342. *See id.* 1341(c)(3)(B).

In contrast, plan terminations under 29 U.S.C. § 1342 are *instituted by the PBGC*. The statute does not give the plan sponsor any ability to invoke the termination procedures of 29 U.S.C. § 1342, and in fact these terminations are often referred to as "involuntary" terminations. Instead, to the extent the statute provides any discretionary power of agreement to a plan entity, section 1342(c) gives the "plan administrator" the power to agree to a summary termination under section 1342 (at least according to the PBGC). If the PBGC is correct, any such agreement terminates the plan with no procedural protections in place to safeguard the vested benefits participants have earned over their long careers other than the plan administrator's duties of prudence and loyalty. Thus, the decision a plan administrator is faced with carries enormous consequences for the participants and their vested benefits: if the plan administrator agrees to a summary termination, there is no more plan; if he refuses, then the PBGC must prove to a district court that the plan meets the statutory criteria for termination before the plan may be legally terminated. It is well established that "discretion is the benchmark for fiduciary status under ERISA." *Maniace v. Commerce Bank, N.A.*, 40 F.3d 264, 267 (8th Cir. 1994).

These different considerations and perspectives are precisely why both ERISA and general trust law reserve these sorts of "method of termination" decisions for a fiduciary, *see, e.g., Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996) ("Indeed, the primary function of the fiduciary duty is to constrain the exercise of discretionary powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime"), and why Section

1342(c) expressly delegates such a decision to the "plan administrator." These provisions wisely recognize that the decision whether or not to invoke procedural safeguards as to the termination method can only properly be made by an individual with a duty of loyalty to protect the interests of participants. In the end, the PBGC's position is that the plan sponsor is exercising a settlor function when *the PBGC* terminates a plan *involuntarily* from the plan sponsor's perspective; and further, it is the PBGC's position that the participants in a fully funded plan being terminated get more procedural protection (through, for instance, the working of section 1341) than would be the case if the plan administrator acts as a settlor as opposed to a fiduciary under section 1342(c), since the participants get no protections at all under section 1342 absent a pre-termination hearing or at least the plan administrator being forced to act as a fiduciary in the participants' best interests. The statute is being turned on its head because, in reality, the PBGC's positions have no grounding in ERISA's language, structure, or policy -- their positions simply follow from the PBGC's desire to act expediently and without pre-termination challenge.

None of the cases offered by the PBGC offer any support for its proposition that a plan administrator can agree to the termination of an underfunded pension plan without fiduciary considerations. Moreover, they also suggest that fiduciary status should attach to a plan sponsor's decision to terminate a plan where that decision would threaten vested benefits. For example, in *Curtiss-Wright Corp. v. Schoonejongen*, 514, U.S. 73 (1995), the Court noted that its ruling turned on the fact that no vested benefits were threatened by the employer's decision. It said: "ERISA does not create any substantive entitlement to employer-provided *health benefits* or any other kind of *welfare benefits*. Employers or other plan sponsors are *generally* free under ERISA, for any reason at any time, to adopt, modify, or terminate *welfare plans*. Nor does

ERISA establish any minimum participation, vesting or funding requirements for welfare plans *as it does for pension plans*. Accordingly, that Curtiss-Wright amended its plan to deprive respondents of *health benefits* is not a cognizable complaint under ERISA." *Id.* at 78 (internal citations and quotations omitted and emphasis added). While the Court has since extended the rule of *Curtiss-Wright* to pension plans in *Lockheed*, *Hughes* and *Beck*, in none of those cases were vested benefits threatened. In *Lockheed* and *Hughes*, the court simply reaffirmed that those employers were free to amend their pension plans without fiduciary considerations; no vested benefits were implicated. While *Beck* dealt with a plan termination, it was a standard termination under § 1341; all vested benefits were to be fully paid through the purchase of annuities. The implication is obvious: where a participant is deprived of vested benefits, fiduciary duties attach, even to a plan sponsor's decision to terminate a plan, and here the decision rests instead a plan administrator. The Court should deny the PBGC's motion to dismiss Count Two.

III. COUNT THREE SHOULD NOT BE DISMISSED

If the PBGC is correct that 29 U.S.C. § 1342(c) empowers it to terminate a pension plan (and with the plan the participants' rights to vested benefits thereunder) without any notice or hearing, by agreement with a non-fiduciary "plan administrator" (if there could be such a thing), then 29 U.S.C. § 1342(c) violates the U.S. Constitution as alleged in Count Three of the Complaint. The Due Process Clause of the Fifth Amendment "provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures." *Mitchell v. Fankhauser*, 375 F.3d 477, 479 (6th Cir. 2004) (internal citations and quotations omitted). There is a two-step process to determine whether a given government action violates due process: "The first step determines whether the plaintiff has a property interest entitled to due process protection. Second, if the plaintiff has such a protected property interest, this court must then determine what process is due." *Id.* at 480 (internal citations and quotations omitted). Because the Salaried Workers have a cognizable property interest in the continued receipt of their pension benefits under the terms of the Plan, and because the summary termination agreed to by the PBGC and Delphi deprived the Salaried Workers of their property interests without *any process whatsoever*, the termination violated the Salaried Workers' due process rights.

The PBGC argues that its actions were constitutionally sufficient first because it didn't actually benefit from the Plan's participants deprivation (on the contrary it is "providing" them billions of dollars) and, second, because the Second Circuit's twenty-two year old opinion in *In re Jones & Laughlin* compels the result. Its first argument tries to duck the due process analysis by changing the inquiry -- the test is whether a protected property interest is implicated, not whether a government agency benefits from the deprivation. Its second argument also fails because the Second Circuit opinion, which was never particularly persuasive to begin with, is clearly no longer good law in light of intervening case law from both the Supreme Court and the Sixth Circuit. Moreover, even that case does not go as far as the PBGC wants to take it; to reiterate, unlike the case at bar, in *Jones & Laughlin*, the PBGC sought and obtained court decree. *In re Jones & Laughlin*, 824 F.2d at 198. The PBGC followed no such procedure in the current case. Indeed, it sought to avoid the very same procedures by dismissing its action in this Court before presenting any consent agreement, apparently in order to *avoid* challenge by interested parties.

The PBGC, creatively, argues that Plaintiffs have suffered no property deprivation because "the PBGC has not taken anything from them." PBGC Mot. at 12. Yet, there is no question that the right to receive vested pension benefits is a protected property interest. In exchange for years of service to Delphi, and General Motors Corporation before that, Plaintiffs received a vested interest in retirement income. These "vested" interests constitute a property right, the deprivation of which implicates the Due Process Clause. *See, e.g., Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 749 (2004) (holding that, at the time of "vesting," a pensioner's "already accrued pension account becomes irrevocably his property"); *McDarby v. Dinkins*, 907 F.2d 1334, 1336 (2d Cir. 1990) (finding that the plaintiff had a "a protectible property interest in his city pension benefit"). Even the Second Circuit opinion on which the PBGC relies observed this much. *See In re Jones & Laughlin*, 824 F.2d at 201 ("We and other courts have suggested that pension plan members have a cognizable interest in receiving their contractually defined benefits."). The PBGC's termination of the Plan had the legal consequence of extinguishing Plaintiffs' "cognizable interest in receiving their contractually defined benefits." The fact that Plaintiffs will receive pennies on the dollar from the PBGC afterward is irrelevant, and does not change the fact that, in the absence of the termination, Plaintiffs had a vested interest in receiving a dollar on the dollar. After the PBGC's decision to terminate Plaintiffs' pension plan, and solely because of the termination, this vested interest is gone, replaced only by the PBGC's obligation to give them substantially less.

As to the second step -- determining the process due -- "the root requirement of the Due Process Clause" is that "an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542

(1985) (emphasis added, internal quotations and citations omitted). Relying on the Second Circuit's outdated opinion in *In re Jones & Laughlin*, the PBGC asserts that because due process is "flexible," its actions in terminating the Plan without a pre-deprivation hearing do not violate the Due Process Clause. However, in light of *Zinermon v. Burch*, 494 U.S. 113 (1990), and its progeny -- including the Sixth Circuit's well-developed body of due process case law -- the analysis in *In re Jones & Laughlin* is clearly wrong.

As discussed more thoroughly in the pleadings in support of Plaintiffs' Motion for Preliminary Injunction (*See* Dkt. Nos. 7 and 25), the Supreme Court in *Zinermon* distilled the rule as to when post-deprivation remedies alone can satisfy due process: "In situations where the State feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Id.* at 132; *see also Watts v. Burkhart*, 854 F.2d 839, 843-44 (6th Cir. 1988) ("the 'controlling inquiry' in determining the applicability of *Parratt* 'is solely whether the state is in a position to provide for predeprivation process.'") (quoting *Hudson v. Palmer*, 468 U.S. 517, 534 (1984)). Thus, "where state actors are following established state procedures that result in the deprivation of an individual's property, ordinarily the existence of postdeprivation remedies is irrelevant." *Harris v. City of Akron*, 20 F.3d 1396, 1401 (6th Cir. 1994).

The Salaried Workers are challenging an established procedure -- namely, a summary termination that the PBGC claims it is entitled to execute under 29 U.S.C. § 1342(c) -- not some "random, unauthorized act," thus rendering the existence of any post-termination procedures irrelevant. *Mitchell*, 375 F.3d at 484. Moreover, the PBGC surely could have "feasibly" instituted proceedings in the district court to terminate the Plan instead of doing so behind closed

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doors. *Zinermon*, 494 U.S. at 132. Indeed, not only did Congress clearly contemplate that the PBGC would terminate pension plans through district court adjudications -- § 1342(c) sets out a detailed procedure for doing so -- but the PBGC actually initiated an action in this Court to terminate the Plan, only to withdraw its complaint immediately after learning that the Salaried Workers would be asserting their rights by moving to intervene. Simply put, the notion that instituting proceedings in this Court would have been impractical or infeasible for the PBGC is belied by the fact that the PBGC initially sought to do just that.

Faced with controlling law that it cannot distinguish, the PBGC argues that this Court should analogize the standards employed by other courts in establishing a termination date for pension plans to the due process balancing in determining whether a pre-deprivation hearing is required. *See* PBGC Mot. at 17-18. The argument fails on multiple levels. First, contrary to the PBGC's basic premise, a plan administrator's decision to establish a termination date *does not* involve the same competing interests as a decision to agree to a plan termination. The termination date fixes a date beyond which participants can no longer expect to accrue new benefits. On the other hand, agreeing to a summary termination affects benefits which have already vested. While ERISA does not require an employer to offer any employee benefit plans, it does "seek to ensure that employees will not be left empty[-]handed once employers have guaranteed them certain benefits . . . . [W]hen Congress enacted ERISA it 'wanted to . . . mak[e] sure that if a worker has been promised a defined pension benefit upon retirement -- and if he has fulfilled whatever conditions are required to obtain a vested benefit -- he actually will receive it.'" *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (quoting *Nachman Corp. v. PBGC*, 446 U.S. 359, 375 (1980)). This distinction is critical, and the cases cited by the PBGC do nothing to undermine the due process requirement that where an established state procedure is used to deprive an individual or property, a pre-deprivation hearing is required (for example, the termination in *PBGC v. Heppenstall Co.*, 633 F.2d 293, 298-99 (3d Cir. 1980), occurred pursuant to a court decree despite the fact that the employer/plan administrator in that case "agreed" that the plan should be terminated).

CONCLUSION

The Court should deny the PBGC's Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2009, 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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