

Exhibit D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS BLACK, et al.,

Plaintiffs,

vs.

PENSION BENEFIT GUARANTY
CORPORATION, et al.,

Defendants.

Case No. 09-13616
Hon. A. Tarnow

TRANSCRIPT OF MOTION TO DISMISS AND MOTION TO SHOW CAUSE

BEFORE THE HONORABLE ARTHUR J. TARNOW
UNITED STATES DISTRICT COURT SENIOR JUDGE
Detroit, Michigan
Friday, September 24, 2010

APPEARANCES:

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* * *

OFFICIAL COURT REPORTER: Denise A. Mosby, CSR, RMR, CRR
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Detroit, Michigan
Friday, September 24, 2010
2:05 p.m.

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MR. SHELLEY: For the Plaintiffs, Your Honor,
Anthony Shelley, Michael Khalil and Alan Schwartz.

MR. MENKE: Thank you, Your Honor. For
Defendant PBGC, John Menke. With me is Karen Morris, Wayne
Owen and Craig Fessenden.

MR. GLASS: And I'm David Glass from the Justice
Department for the non-PBGC Defendants.

THE COURT: All right. And General Motors is
now out of the case; is that accurate?

MR. SHELLEY: Yes, Your Honor.

MR. MENKE: Yes, Your Honor.

MR. GLASS: Yes, Your Honor.

THE COURT: Okay. First of all, let me welcome
all of our visitors.

And for the benefit of the folks, there is an
overflow room. Please use the microphones. Otherwise, all
they are going to see are your lips moving or the backs of
your head, one or the other. And there are microphones at
counsel table as well as at the podium.

Who is going to begin?

I find that if you can negotiate that, you

1 usually can negotiate the whole thing.

2 MR. MENKE: If it were only that easy, Your
3 Honor.

4 THE COURT: You may begin.

5 MR. MENKE: Thank you, Your Honor.

6 According to Your Honor's agreement to the
7 stipulated order setting this hearing, I believe that there
8 are actually four motions up for consideration at the hearing
9 today, PBGC's Motion to Dismiss Counts 1 through 3 of I guess
10 now the Second Amended Complaint; the PBGC's Motion for
11 Summary Judgment on Count 4 of that complaint; and the
12 Plaintiff's Motion for Order to Show Cause regarding the
13 Court's order denying their Motion for Preliminary Injunction;
14 and, finally, PBGC's Motion to File Portions of the Agency's
15 Administrative Record Under Seal.

16 Not exactly in order of importance, but the
17 easiest first we believe is the Motion to File Under Seal.
18 Unless Your Honor has questions about that, we would just rely
19 on our papers and have no further argument on that, on that
20 point.

21 THE COURT: Well, the only question I have is
22 factually whether the administrative record was given in
23 October of 2009 not under seal.

24 MR. MENKE: The administrative record was
25 provided to the requesting Plaintiffs in their role as

1 participants in the plan not under seal, because the law
2 provides that it must be given that way.

3 The law also provides, however, that companies
4 who provide information that is included in the record may
5 negotiate their own confidentiality agreements and may seek --
6 and failing to do that, may seek court protection.

7 It is our understanding that Delphi and the
8 Plaintiffs negotiated confidentiality agreements that
9 effectively protected the confidentiality of the documents
10 which we are seeking to file under seal.

11 So, while it was given by us not under seal,
12 they are subject to confidentiality agreements similar to the
13 ones we have with the former Delphi not to give it out to the
14 public. So, we believe that that is effectively the same as
15 if it were filed under seal.

16 THE COURT: Who is going to speak for the
17 Plaintiffs?

18 MR. SHELLEY: Anthony Shelley, Your Honor.

19 THE COURT: Okay. And what's your position on
20 the sealing motion?

21 MR. SHELLEY: Only 50 pages of the documents are
22 subject to confidentiality agreement with Delphi.

23 It is our position that the remainder was given
24 to us without any strings attached to it, that it has already
25 been in the record for a year, and was in the record long

1 before the motion to seal was filed.

2 THE COURT: So, you have no objection to the 50
3 pages being under seal?

4 MR. SHELLEY: Correct.

5 We have redacted them as we have used them any
6 way with the Court, those 50 pages. But the remaining 200 it
7 doesn't seem to us would be under seal.

8 THE COURT: Your response?

9 MR. MENKE: If Delphi is happy with only 50
10 pages being under seal, we are happy with the 50 pages being
11 under seal.

12 THE COURT: Everybody happy?

13 MR. SHELLEY: Fine with us, Your Honor.

14 THE COURT: All right. Then the 50 pages will
15 be under seal. The rest will not be under seal.

16 So, one motion in five minutes. So three more,
17 we should be done in a half hour.

18 MR. MENKE: PBGC would first turn I guess at
19 that point to the motion, PBGC's Motion to Dismiss Counts 1
20 through 3 of the complaint. Where to start.

21 THE COURT: Why don't we start with -- and this
22 may be more for the benefit of the audience than for the
23 lawyers.

24 The Motion to Dismiss at this point is treated
25 in such a way that everything the Plaintiffs allege is assumed

1 to be true. Is that accurate?

2 MR. MENKE: That's absolutely correct, Your
3 Honor.

4 THE COURT: Okay. And does not indicate my
5 views on the ultimate outcome of this case. And as you will
6 listen to the discussion as it goes on, you will see that my
7 views on some of these matters are at a very basic level
8 because the case has just started.

9 Having said that, you may go on.

10 MR. MENKE: Thank you, Your Honor.

11 PBGC has moved to dismiss the first three counts
12 of the Plaintiffs' complaint.

13 Count 1 of the complaint alleges -- which is
14 deemed to be true for purposes of this, but accurately in any
15 event -- that the Delphi Salaried Pension Plan was terminated
16 not through a court-mandated procedure, but rather by
17 agreement between the plan administrator, which pursuant to
18 the terms of the plan was Delphi Corporation, and the PBGC.
19 Plaintiffs allege in their complaint that such a termination
20 by agreement rather than by court adjudication is illegal and
21 improper.

22 The difficulty of course, Your Honor, with that
23 allegation is that the law says the opposite. Section 4042(c)
24 of ERISA or 29 USC Section 1342 of the Code says -- or, it
25 lays out the procedures that PBGC and the plan administrator

1 must follow to terminate a pension plan after PBGC has reached
2 a determination that it must be terminated.

3 It provides for an alternative process. PBGC
4 may either file a lawsuit against the plan administrator
5 seeking a court order terminating the pension plan or -- and
6 this is the critical point -- or, as set forth in about the
7 fourth or fifth sentence of (c):

8 "If the corporation and the plan
9 administrator" -- in this case, Delphi --
10 "agree that the plan should be terminated and
11 agree to the appointment of a trustee without
12 proceeding in accordance with the
13 requirements of this subsection (other than
14 this sentence) the trustee shall have the
15 power," et cetera, et cetera.

16 THE COURT: Is that not just a provision that
17 describes the power of the trustee rather than -- and perhaps
18 this is Plaintiffs' argument, badly stated. It refers to a
19 provision that lists what a trustee can do.

20 MR. MENKE: That's right.

21 THE COURT: And how does that change the
22 requirement of going to court?

23 MR. MENKE: Well, Your Honor, that precise point
24 was addressed by the Second Circuit Court of Appeals more than
25 20 years ago.

1 THE COURT: In the Jones case.

2 MR. MENKE: In the Jones & Laughlin case, which
3 both parties have cited to you in their briefs.

4 THE COURT: Okay.

5 MR. MENKE: The Court correctly noted that a
6 4042(d) trustee is the trustee appointed to terminate the
7 pension plan. The statute quite clearly contemplates that
8 indeed even the court appoints a trustee. That's what the
9 court does. This allows the trustee to be appointed by
10 agreement of the parties.

11 It's important to note and I think what the
12 Court could understand and see about this section is that in
13 an action to terminate a plan, the parties to that action, as
14 set forth under law -- are PBGC as the Plaintiff in that case
15 and the plan administrator is the Defendant. If those two
16 parties are in agreement that the plan should be terminated,
17 there's no lawsuit. Like any other lawsuit, that, for all
18 practical purposes, that is settled.

19 The parties agree the plan should be terminated.
20 Those are the only two parties the statute contemplates as to
21 the action. The plan is terminated.

22 THE COURT: Somewhere in the pleadings there's a
23 reference to 89 percent of the cases are resolved without
24 going to court. Is that accurate?

25 MR. MENKE: That's correct, Your Honor.

1 THE COURT: Stop. Let me finish the second half
2 of the question.

3 MR. MENKE: I thought you were done. I'm sorry.

4 THE COURT: As soon as you say that's correct.

5 MR. MENKE: That's correct.

6 THE COURT: Then the next part of the question
7 is in those other 10 or 11 or 15 percent of the cases, what is
8 the court function?

9 MR. MENKE: Of the 4000-odd cases that PBGC --
10 4000-odd plans that PBGC has terminated, approximately 90
11 percent of them have been through agreement with the plan
12 administrator. The other 10 percent have gone through the
13 alternative path of court adjudication.

14 THE COURT: What does the court adjudicate?

15 Let me use it in the frame of reference you just
16 raised. Is the court's only function to appoint a trustee?

17 MR. MENKE: That's what the Court does, yes.
18 And there is a decree terminating the plan, appointing the
19 trustee.

20 THE COURT: And that's all?

21 MR. MENKE: That's it.

22 THE COURT: The Court doesn't look to see if
23 there is any justification or whether you have complied with
24 the statute or . . .

25 MR. MENKE: Well, no. Let me back up a minute.

1 Of those let's say 500 or so contested cases,
2 there's many different permutations. One is -- there have
3 only been a very few where we have a plan administrator who
4 actively opposes the termination of the pension plan, where
5 the plan administrator says no, I disagree with the PBGC, the
6 plan should not be terminated.

7 You could read the court decision on one of
8 those cases. One of them is the Pan Am case, a Second Circuit
9 case that has been cited in the brief. PBGC stepped up to
10 terminate the Pan Am Pilots' Plan, and the company said no, it
11 should not be terminated; the grounds don't exist. And the
12 argument in court was whether in fact PBGC's records showed
13 that there were grounds to proceed with termination in that
14 pension plan.

15 The United Airlines Plans, which the Plaintiffs
16 have cited, the pilots -- specifically, the United Airlines
17 Pilots Plan, which was a contested termination -- it was a
18 strange sort of lineup of the parties. The plan administrator
19 actually took no position. United Airlines took no position.
20 The union representing the pilots, the United Airlines Pilots
21 Association intervened in that case, and they asserted there
22 was no basis for termination. It was a collective bargaining
23 plan in that union. And the argument was whether PBGC
24 established grounds for terminating or not.

25 In a truly contested termination where the plan

1 administrator doesn't want the plan, that is where the battle
2 is fought. Has PBGC satisfied the statutory criteria laid out
3 in Section 4042(a) and parts of 4042(c) which talk about the
4 judicial process.

5 There is a split in the circuits about whether
6 that is a de novo determination or a determination based on
7 PBGC's record using the APA arbitrary and capricious standard.
8 But that's the fight.

9 Here, though, in this case the plan
10 administrator did not oppose the termination, did not contest
11 that PBGC had satisfied the statutory criteria to proceed with
12 terminating the plan. Rather, agreed that the termination was
13 necessary -- we think fairly self-evident in this case since
14 they were liquidating at that point in time, going out of
15 business -- and agreed that the plan should be terminated.

16 That's how in the 35 years of ERISA the great
17 majority of pension plans are terminated, in that fashion.

18 I would note that of the 500 or so that I
19 identified that have been terminated by court proceeding,
20 probably the majority of those are default judgments where we
21 find an abandoned pension plan where the plan administrator,
22 Plan Sponsor is long gone from the face of the earth and, you
23 know, we sue whatever remnants of that company we can find,
24 and they just don't oppose. There have been a lot of
25 terminations like that.

1 Long and short of it, with respect to Count 1 of
2 the complaint, it's PBGC's viewpoint that the law is clear.
3 This argument was made as we noted to the Second Circuit Court
4 of Appeals in the Jones & Laughlin case. It lays out a road
5 map of Section 4042(c) and notes the two alternatives, notes
6 that it explicitly provides that a plan may be terminated by
7 agreement and puts effect in that.

8 We think -- there is no other precedent we found
9 on the other side of the issue, and we think that the Court
10 would be advised to follow that decision and dismiss Count 1
11 of the complaint.

12 THE COURT: Let's hear what the Plaintiffs have
13 to say about Count 1.

14 MR. SHELLEY: Good afternoon, Your Honor.
15 Anthony Shelley, here on behalf of the Plaintiffs.

16 Just, first of all, thank you for your courtesy
17 in making the courtroom so open to the Plaintiffs in this case
18 and simulcasting it. It is much appreciated.

19 THE COURT: Just remember on April 15th. You
20 are paying for it.

21 MR. SHELLEY: Money well spent.

22 With respect to claim one, it is our position
23 that a termination can only occur through an adjudication.
24 Let's start with the purposes of ERISA.

25 The overarching purpose of ERISA is to protect

1 the pensioners. Not to protect the PBGC, but to protect the
2 pensioners. Adjudication allows a court of law to determine
3 whether a plan should be terminated for --

4 THE COURT: If they had brought to it this
5 court -- which actually they did, and for various reasons it
6 was settled or dismissed -- what would be my function?

7 MR. SHELLEY: Your function would be to
8 determine whether, consistent with Section 1342(c), the
9 standard for a termination has been met. In other words,
10 would it be in the best interest of the participants to
11 terminate; is the termination necessary in order to avoid a
12 deepening of the financial straits of the plan; or, three, is
13 a termination necessary to avoid unreasonable risk to the
14 PBGC.

15 You have to determine whether one of those three
16 standards is satisfied, and if so, then the plan could be
17 terminated and the Court could then appoint a trustee.

18 THE COURT: Okay. Now, you have had a lot of
19 time to go through these files.

20 MR. SHELLEY: Correct.

21 THE COURT: I'm not going to ask you if you read
22 every page of the 5,000 pages because I don't think anyone but
23 the authors of the various pages have.

24 What would you have done if you were at that
25 hearing that you say is required?

1 MR. SHELLEY: First of all, the PBGC would have
2 gotten it first. They would have had to prove their case by a
3 preponderance of the evidence. They would have had to show
4 the financial situation of the plan. They would have had to
5 show what the necessity was for termination in order to save
6 them from further liability, and they would have to show that
7 it was in the best interest of the participants.

8 We would have put on the fact that, basically
9 testimony that we have since provided to the Court from the
10 actuaries -- Watts & Wyatt for, instance -- that the plan was
11 85 percent funded, which was sufficient to keep it running
12 given that most plans in the country are underfunded to a
13 greater extent than that.

14 We would have also showed that, frankly, what
15 was happening in this case was not that the PBGC was
16 attempting to satisfy the standards of 1342, but instead what
17 the PBGC was doing was basically playing a part in a much
18 larger enterprise of the government's part to restructure the
19 auto industry that. In fact, it was politically expedient for
20 the PBGC to terminate these plans because it was cheaper than
21 to have the government put rescue funds into G.M. or Delphi to
22 keep the plans going. The PBGC is a separately run agency in
23 the sense it has its own budget and it doesn't cost the
24 government any money to send these plans over to the PBGC.

25 We would show that those were the motivations.

1 Those were the real reasons. In fact, we would attempt to get
2 at the record in this case to show that. We have filed FOIA
3 requests, for instance, and we have gotten a series of
4 documents from the FOIA officer from the time of the initial
5 staff decision to recommend termination in April until the
6 time of the termination in August and even after that, all of
7 which are blacked out, that say these are pre-decisional
8 memos. We have supplied them to the Court and --

9 THE COURT: So, in other words, what you are
10 saying -- one of your arguments is that these motions are
11 premature because you have not had a chance to do discovery.

12 MR. SHELLEY: Absolutely.

13 THE COURT: Somewhere there was a -- and I'm not
14 sure whether it was an affidavit or in the arguments or both.
15 There were some numbers.

16 MR. SHELLEY: Yes.

17 THE COURT: Now, you have used the number 85
18 percent.

19 Did that include the liens that were at some
20 point released?

21 MR. SHELLEY: No. The Watts & Wyatt report from
22 I think May of this year, but based on facts towards the end
23 of last year -- May of 2009 based on facts from the fall of
24 2008, show that it was 85 percent funded with respect to what
25 it had, what the plan had in its assets.

1 The foreign assets of Delphi were totally
2 separate from the plan assets. And the PBGC's point in April
3 of 2009 in saying that the plan should be terminated was that,
4 well, we have to terminate this plan because we have to be
5 able to go after those foreign assets to make the plan whole.
6 And if we don't terminate, we won't be in a position to go
7 after those foreign assets before Delphi falls apart. So,
8 supposedly that is the basis for the termination.

9 And then they terminate, but they never go after
10 the liens. They never file any liens. They never go after
11 the foreign assets.

12 But to answer your question just concisely, the
13 foreign assets of Delphi are very separate from the assets of
14 the pension plan that Watts & Wyatt, for instance, was
15 auditing.

16 THE COURT: Well, I'm still confused as to
17 whether the liens had any value to the pension funds or not.

18 MR. SHELLEY: They did because the PBGC was
19 entitled to go after the company in general for the nonfunding
20 of the plan.

21 THE COURT: Ah, okay. They weren't specific
22 monies loaned by the pension to the --

23 MR. SHELLEY: Correct.

24 Delphi had stopped contributing to -- excuse me.

25 Delphi had stopped contributing to the plan and

1 it had a shortfall of at least 15 percent according to Watts &
2 Wyatt. So, that is why the PBGC was in the position to assert
3 liens on the foreign assets of Delphi to fulfill -- to
4 basically lower the liability potentially for the PBGC.

5 So, further, with respect with respect to claim
6 one, the sentence that Mr. Menke reads in 1342(c) is
7 supposedly allowing an adjudication -- is negating an
8 adjudication and allowing a termination by agreement. It is a
9 cryptic sentence in the middle of that section, and if it is
10 read the way they want to read it, it writes out the rest of
11 the entire section.

12 1342 is a very specific lengthy section that
13 sets forth adjudicatory procedures. If you look at 1342(a),
14 it says specifically that PBGC can push aside these
15 adjudication procedures for small plans if they safeguard the
16 rights of the participants.

17 What the PBGC says, though, is that it can brush
18 aside the safeguards for participants and streamline the
19 procedure for every plan simply by doing it by agreement.

20 It doesn't seem to me that Congress expected
21 that language in Section (a) to be superfluous and, therefore,
22 allow the PBGC to by fiat and by agreement be terminating
23 these plans.

24 In addition, the sentence as it actually reads
25 as the Court noted -- you did state very well our argument --

1 it sets forth the rights of a trustee should the plan
2 administrator and the PBGC agree that the plan should be
3 terminated. And if you look at the exact language of the
4 provision, it says:

5 "If the corporation and the plan
6 administrator agree that" -- not to
7 terminate -- but "that a plan should be
8 terminated and agree to the appointment of a
9 trustee without proceeding in accordance with
10 the requirements of this subsection, the
11 trustee shall have . . ." the following
12 powers.

13 The purpose of that is to provide a way for a
14 trustee to be appointed by agreement who would nevertheless
15 have the powers of a court appointed trustee. By inserting
16 that sentence Congress provided for situations where it would
17 be best to have a mutually agreed upon trustee in place that
18 could begin to act and serve the plan's assets while the whole
19 process of termination was occurring. That's all it is
20 intended to do.

21 It is not intended to give the PBGC this power
22 that basically obviates the need for the rest of the whole
23 section. I know PBGC has been doing it this way for many,
24 many years, but just because it has been doing it wrong --

25 THE COURT: Slow down a little bit. We had a

1 pool as to what point in the argument I would have to say
2 this. And I have read the transcript from last time, and I
3 think I had to say it to both sides.

4 I know it is obviously very important and you
5 have done a lot of work on it. But we have nothing else
6 scheduled this afternoon, so you are not going to be pushed
7 out of here.

8 MR. SHELLEY: Yes, Your Honor.

9 THE COURT: Go on.

10 MR. SHELLEY: But the point is that though the
11 PBGC I know has been doing this for many, many years, just
12 because it has been doing it wrong for many years doesn't mean
13 they should continue to do it and be doing it in our case.

14 THE COURT: Are you suggesting that my best
15 argument for bureaucrats should not be given, which is, you
16 did it that way last time?

17 It always works.

18 MR. SHELLEY: Well, they've done it -- I don't
19 want them to do here what they did the last time.

20 THE COURT: All right.

21 MR. SHELLEY: The reality is that the section is
22 there for a purpose. It is there to protect the participants.

23 And the participants here were shut out. They
24 had no protection whatsoever. Two parties, Delphi and the
25 PBGC, decided to terminate this plan. The parties that are

1 hurt are the participants. They weren't even at the table.
2 They would have been had the PBGC followed ERISA, itself, and
3 done the adjudication.

4 So, that is our position with respect to claim
5 one. It should not be dismissed. In fact, it is a good
6 claim. And the Court should deny the Motion to Dismiss. In
7 fact, if the PBGC wants to terminate the plan, they have to do
8 it via adjudication in this room or some other court.

9 THE COURT: If I were to do it, all I would be
10 doing is letting the suit to continue.

11 MR. SHELLEY: Right.

12 THE COURT: But ultimately if you were
13 successful in your argument and supporting it with the facts
14 and whatever, would the hearing that you want be based on the
15 financial condition at the time the decision was made?

16 MR. SHELLEY: I don't know, Your Honor. I don't
17 want to commit to an answer on that question.

18 THE COURT: Okay.

19 MR. SHELLEY: I think the financial condition of
20 the plan --

21 THE COURT: No, no. Just stop. If you don't
22 know, that's the best answer.

23 MR. SHELLEY: I don't want to guess. I don't
24 know.

25 THE COURT: All right. And it's not something

1 you have to know at this point.

2 MR. SHELLEY: I can move to claim two, but I --

3 THE COURT: No, I don't think so.

4 MR. SHELLEY: Okay.

5 THE COURT: Do you want to have rebuttal?

6 MR. MENKE: Briefly, Your Honor, yes.

7 We think the Plaintiffs -- and, Your Honor, I
8 don't want to suggest that PBGC is not concerned about these
9 participants. We are deeply concerned about these
10 participants.

11 THE COURT: Well, I think you made the point
12 last time you were here that, but for your organization, we
13 would be in a depression situation where there would be no
14 money.

15 MR. MENKE: There would be no money.

16 We are putting -- as we've said before, our
17 analysis to this plan shows that PBGC -- Delphi left behind
18 about \$2 1/2 billion worth of assets for these participants.
19 We are adding 2 billion more out of our pocket.

20 THE COURT: What about those liens; why were
21 those released without compensation?

22 MR. MENKE: Well, your question assumes facts
23 not in evidence, Your Honor. Those liens were not released
24 without compensation.

25 THE COURT: Okay.

1 MR. MENKE: PBGC in negotiations with Delphi,
2 G.M., and all interested parties, Delphi's lenders, the
3 Treasury Department and -- I don't know -- whoever the 40-odd
4 lawyers around the table on the various conversations
5 represented, negotiated a settlement of its claims and liens
6 in order to allow bankruptcy to go forward. The liens
7 candidly gave PBGC quite a bit of leverage in that
8 negotiation, and we took advantage of that.

9 We received in settlement for our liens and
10 claims \$70 million cash payment, payable the day the
11 transaction closed. We received a large ownership interest in
12 the company that purchased the foreign Delphi assets; that if
13 all goes well, could produce recovery to PBGC of \$720 million.

14 We don't know exactly what -- we haven't seen
15 that money yet. The money hasn't come out of the new Delphi
16 yet. We don't know exactly what it's worth, but it's worth
17 several, several hundred million dollars, real money even in
18 this day and age.

19 They are wrong when they say we gave up those
20 liens. We did not give up those liens. Those liens were, for
21 all practical purposes, paid off.

22 PBGC had liens of \$196 million on Delphi's
23 foreign assets at the time. We had leaned every dime that we
24 were entitled to under law to lien.

25 The recovery PBGC takes back from this case will

1 be in excess of -- well in excess of that amount, several
2 hundred million more than the amount of the liens.

3 The liens, in fact, were paid. They weren't
4 given up.

5 THE COURT: Now, you are getting --

6 MR. MENKE: I negotiated that deal, along with
7 the people sitting at the table behind me and a whole bunch of
8 other lawyers. And it infuriates me that Plaintiffs seem to
9 not bother to read.

10 We got a lot more than that. We got our liens
11 paid off. They are getting every cent of those liens.

12 THE COURT: Okay. Well, that's important to
13 know, but I think it's also important that this --

14 Well, what else do you have to say about Count 1
15 before I say what else is important?

16 MR. MENKE: The argument that you heard
17 Mr. Shelley present was a long, detailed description of what
18 he would do if he were a party to a contested termination
19 action with respect to this plan. And that's all very
20 interesting.

21 But the first point to note is that he and his
22 clients are not parties to the termination action. The law
23 quite clearly sets out that after PBGC makes its determination
24 to proceed, it may file a court action seeking court
25 adjudication. It is the Plaintiff --

1 THE COURT: Let me ask, who was the trustee or
2 trustee for? Who is the beneficiary of that trust?

3 MR. MENKE: The trustee becomes -- he is the
4 trustee of the pension plan.

5 THE COURT: For the benefit of?

6 MR. MENKE: He is for the benefit of, and with
7 respect to terminating plans, the corporation to the extent he
8 collects the assets and turns it over to the --

9 THE COURT: Well, wait.

10 MR. MENKE: And for the participants to insure
11 that they receive their guaranteed benefits.

12 THE COURT: Does the corporation come before the
13 beneficiaries?

14 MR. MENKE: It's for entirely different purposes
15 to --

16 THE COURT: I understand that.

17 MR. MENKE: I don't think there's any ranking
18 between -- and in fact, Your Honor, the fact of the matter is
19 that in every terminated pension plan, the corporation has
20 been the trustee. There's no third-party trustees to my
21 knowledge --

22 THE COURT: No. I understand that you are
23 focusing on a different point than what my question is.

24 My question is the trustee, whoever it is,
25 whether it's the corporation or whether it's your client, is

1 the trustee, as I understood it under the policy and rationale
2 of ERISA, for the benefit of their clients, the folks sitting
3 in the courtroom.

4 MR. MENKE: Well, the trustee -- the trustee, a
5 4042(d) trustee appointed to oversee the termination of the
6 pension plan is -- has a variety of duties and powers. He has
7 fiduciary obligations to the participants.

8 THE COURT: Does he have a fiduciary duty to the
9 participants?

10 MR. MENKE: Yes.

11 THE COURT: Okay.

12 MR. MENKE: There's a lot of litigation about
13 exactly what is involved in that and what that duty is --

14 THE COURT: And who reviews that fiduciary duty?
15 Is that a court function?

16 MR. MENKE: No. It's like any other fiduciary.
17 I suppose if someone believed that he had done something
18 contrary to his fiduciary obligations, if they have an
19 interest and standing to bring that case, they could bring
20 a --

21 THE COURT: Who has the standing?

22 MR. MENKE: Anyone injured by the breach of
23 fiduciary duties.

24 THE COURT: Isn't that their claim?

25 MR. MENKE: It might be; it might not be.

1 THE COURT: Well, that's again why this might be
2 a premature discussion, because we really don't know all the
3 facts, do we?

4 You do know probably in this room as much as
5 anybody or more. I don't know if other people at your table
6 were with you when these negotiations happened and so on.

7 But the question before me today is a very basic
8 question; and that is, reading their Second Amended Complaint,
9 have they raised a claim that could be successful, that it
10 could be recognized by law.

11 MR. MENKE: They have made their --

12 THE COURT: I have emphasized the word "could"
13 because out of all of the people in the room I'm probably the
14 least informed as to the makeup of the pension fund and the
15 responsibilities and the assets and so on. I get everything
16 second and thirdhand.

17 MR. MENKE: Well, certainly I guess -- I guess
18 that's true, Your Honor.

19 But you raise interesting theoretical points
20 about who the trustee is responsible to and who gets -- but
21 the -- none of those issues are anywhere raised certainly in
22 Count 1 of their complaint.

23 Count 1 of their complaint is really quite
24 simple. They allege PBGC entered into an agreement with
25 Delphi to terminate the plan and that under law no such

1 agreement has any validity.

2 Our response is, yes, we agree with those facts.
3 Delphi and PBGC entered into an agreement to terminate the
4 pension plan.

5 Where we part company is when we start talking
6 about what the law is with respect to one of those agreements.

7 We think the law is clear. In 35 years of
8 ERISA, it has been understood by everyone that the fourth
9 sentence of Section 4042(c) says PBGC and the administrator,
10 if they agree, they can enter into an agreement terminating
11 the plan.

12 From the very first day of ERISA until today
13 that has been the parties' understanding. The Second Circuit
14 in the Jones & Laughlin decision -- apparently the only court
15 that has ever been asked to speak on the point -- parses the
16 statute word-for-word just as Mr. Shelley suggests you should
17 parse it, and comes to the conclusion, expressly stated in its
18 opinion:

19 "Congress therefore expressly dispenses
20 with the necessity of court adjudication in
21 these cases."

22 Not PBGC. It is not something PBGC did. It is
23 not something we have been doing in the dark of night for 35
24 years. Congress did it. We are not here to rewrite what
25 Congress did.

1 He says Congress couldn't possibly have done it,
2 because after all it is the participants that Congress is most
3 interested in. But as the Jones & Laughlin and other courts
4 have noted, the participants aren't parties to the lawsuit
5 terminating a pension plan.

6 PBGC and the plan administrator are the parties.
7 They agree there's no -- you, know normally in any lawsuit, if
8 the parties agree, there's no lawsuit anymore.

9 It's really as simple as that. All that the
10 statute expressly says, that if we do an agreement, we don't
11 have to address all of the various standards that Mr. Shelley
12 pointed out. They are not relevant anymore because we've all
13 agreed that the plan should be terminated.

14 I'm going to stop right there. I have nothing
15 more to say. The law is clear --

16 THE COURT: What about the language from the
17 Congressional Conference Report:

18 "In the case of small plans, PBGC may
19 prescribe a simplified procedure and may pool
20 assets of small plans so long as the rights
21 of the participants and employers, including
22 the rights of a court decree of termination,
23 are preserved"?

24 MR. MENKE: That section, which does not appear
25 in 4042(c), but is in Section 4042(a) of ERISA, which talks

1 about how PBGC decides to commence an action to terminate a
2 pension plan, talks about the fact that, as you point out, the
3 corporation may prescribe a simplified procedure for small
4 plans. The fact of the matter -- gives the corporation
5 authority to do something.

6 The corporation has never exercised that
7 authority. All 4,000 plans of PBGC in its history have been
8 terminated under the same procedures. Those procedures have
9 been changed and refined a bit over time, but at any given
10 point in time every plan that it terminates is done in the
11 same way.

12 PBGC makes the findings -- for an involuntary
13 termination makes the findings as required in (a), and then
14 either files a lawsuit or gets into an agreement with the plan
15 administrator. Whether it's, you know, Joe's Hardware Store
16 with four participants -- we have lots of those plans -- or
17 whether it's the United Airlines Flight Attendants Plan with
18 30,000 participants or the Delphi Salaried Plan with 40,000
19 participants, those plans are terminated -- both those sets of
20 plans are terminated in the same way.

21 PBGC has not exercised its authority to have a
22 simplified procedure. It follows the law the same for every
23 plan.

24 We think this provision has nothing to do with
25 the provisions of 4042(c) and (d). It speaks to the

1 requirements of 4042(a), the section it's in.

2 The language in 4042(c), however, which is
3 relevant to this, we think is clear. And it is -- the
4 procedures of (a) -- both (a) and (c) have been followed we
5 think to the letter by PBGC in each and every plan it has
6 terminated in 35 years.

7 Mr. Shelley's suggestion that we have been
8 acting in the dark of night and doing it wrong for 35 years,
9 it's amusing, interesting, possibly provocative, but doesn't
10 fit reality. We don't operate in the dark of night. Our
11 terminations, just like this one, get plenty of publicity. We
12 don't do anything in secret. It is not a secret that we have
13 terminated thousands of plans by agreement with the plan
14 administrator.

15 Certainly if we and the Jones & Laughlin court
16 were wrong and Congress did not expressly dispense with the
17 necessity of court adjudication in these cases, as the Jones &
18 Laughlin court said, Congress has had 35 years of opportunity
19 to explain to us our error. They have not done so.

20 We think our interpretation of the law is clear.
21 We think the law itself is clear and not subject really to
22 interpretation. And we've been doing it right. We think the
23 heart of the claim, the legal claim on which Count 1 is
24 based -- terminating the plan by agreement is per se illegal,
25 they say improper -- has no basis in law, and the count should

1 be dismissed.

2 THE COURT: Okay. One final response from
3 Plaintiffs.

4 MR. SHELLEY: Your Honor, I won't get into the
5 facts about the settlement with Delphi because I sense the
6 Court doesn't want to hear that, though I will comment that
7 Mr. Menke's assertion that it galls him that we won't read the
8 facts, well, it galls us that we can't get the materials to
9 read the facts. And we have not gotten them.

10 With respect to the plan participants not being
11 a party to the plan termination proceeding, it would be our
12 position that we could of course intervene. And as a party,
13 particularly if the plan administrator isn't acting as a
14 fiduciary, there is no one there to protect our rights, and we
15 would seek to intervene in any such proceeding.

16 The last point I would like to make is one that
17 we have made in our papers, which is that to interpret the
18 provision the way we say, as requiring the adjudication,
19 avoids the constitutional question that's claim three and
20 avoids the prospect of having the due process violation.

21 So, we would assert that the Court should read
22 it that way in order to avoid that constitutional question.

23 THE COURT: Well, I'm ready to rule, and I'm not
24 ready to rule who is going to win, but I am ready to rule that
25 I'm not going to agree with the Defendant that as a matter of

1 law they are correct. But rather at this early stage I'm
2 going to deny the Motion to Dismiss without prejudice to
3 bringing it back later in the proceedings if the facts don't
4 bear out the claims of the Plaintiff.

5 I am aware of the relationship of Count 1 to
6 Count 3, and I think the Plaintiff is correct that if in fact
7 they can establish their interpretation of the statute, as
8 well as any harm, there would have been no basis for the
9 termination at the time it was terminated, and whatever else
10 they can prove, we can rule on that at that time.

11 But it avoids the constitutional question, which
12 I guess if I'm wrong on this issue they can proceed on. And I
13 think we should go to number three now, because I'm on the
14 verge of ruling on that count also, if the Defense wants to
15 argue that motion -- that part of the Motion to Dismiss.

16 MR. MENKE: Certainly, Your Honor.

17 In Count 3 of the complaint Plaintiffs allege
18 that PBGC, by proceeding as it did in terminating the plan by
19 agreement without engaging in what they call a due process
20 court proceeding, violated the constitutional rights of the
21 Plaintiffs by taking from them their property.

22 Our response to Count 3 is as simple as it is to
23 Count 1. That is this; under law, no such taking occurred.

24 Number five, the U.S. Constitution speaks to
25 restrictions on, in this case, what the government can do.

1 The federal government cannot take an individual's property
2 without due process. Note who must be doing the acting,
3 however. The federal government cannot take property.

4 Plaintiffs argue that they have lost their
5 property because their pension plan benefits have been reduced
6 from the levels promised to them by Delphi to the levels
7 promised them by Title 4 of ERISA. And they say that it was
8 PBGC that took away that difference.

9 They're wrong. And they are wrong fundamentally
10 when they talk about what they had.

11 When a company like Delphi goes bankrupt, a lot
12 of people are hurt. A lot of people -- Delphi made promises
13 to a whole lot of people.

14 Delphi promised its suppliers that it would pay
15 them for the materials that they provided to Delphi. That
16 promise was broken.

17 Delphi promised to the people who loaned it
18 money, bought its bonds, that they would pay that back. That
19 promise was broken.

20 Delphi promised to PBGC that it had to take over
21 Delphi's pension plans and under law it would pay the
22 difference. That promise was broken.

23 Delphi, promised no doubt, and particularly
24 painfully to these Plaintiffs here, that it would pay them the
25 pension benefits that they had earned while working for the

1 companies -- first of all, working for G.M. as part of the
2 Delphi operation and later working for Delphi independently.
3 That's a solemn promise.

4 Sadly, when Delphi went bankrupt, the money to
5 make good on that promise wasn't there. You can't make money
6 on nothing. Delphi broke that promise.

7 The government had nothing to do with that. The
8 government did not promise these pension benefits to these
9 people.

10 What the Government promised to the participants
11 was that if Delphi broke its promise and didn't leave behind
12 enough money to pay their pension benefits, as it turned out
13 to be the case, we would make good up to the limits of the
14 guarantee set in the law. That's what we did.

15 We didn't take these people's guaranteed
16 benefits away when we terminated the pension plans. Those
17 benefits were gone. There was not enough money left behind by
18 Delphi to pay that.

19 What we did, rather than taking anything from
20 these people, is we gave to these people. We are an insurance
21 program. We have limits on our insurance, true. But we
22 brought \$2 billion to the table and are giving it every month
23 in checks to these people who, in the absence of that
24 guarantee, would get a whole lot less, if anything at all.

25 I'm not sure how far one can push the English

1 definition of the word "taking." But \$2 billion out of PBGC's
2 pocket is pushing it too far, in my view.

3 THE COURT: Well, let's hear the --

4 MR. MENKE: Well . . .

5 THE COURT: I'm sorry.

6 MR. MENKE: I just have one more point to make.

7 THE COURT: Yes, sir.

8 MR. MENKE: I know how hard it is, but I will
9 say that we have surveyed the law of federal insurance
10 programs, including programs like the bank insurance --
11 Federal Deposit Insurance Corporation, crop insurance provided
12 by the Agriculture Department, flight insurance, federal
13 savings and loans insurance. All of those insurances have
14 limits on how much the federal government insures. The
15 government does not promise to pay 100 percent dollars to the
16 people who suffered covered losses. They promise to pay
17 within the limits of their insurance and no more.

18 No court, to the best of our ability, has ruled
19 that because the government choosing to enact an insurance
20 program, choosing to insure 95 percent of the losses -- or, in
21 this case, 90 percent of the losses -- that that 10 percent
22 constituted a constitutional violation, unless if the
23 Government wanted to put in an insurance program, it had to
24 insure every penny of the losses, or else it was
25 unconstitutional, no court has ever held that.

1 That's what the Plaintiffs are asking you to do
2 here, even though you will truly make law if you do that.

3 Thank you.

4 THE COURT: Plaintiff.

5 MR. SHELLEY: Your Honor, I think what Mr. Menke
6 is asserting is that we didn't have a property interest that
7 was taken away from the government. And even the --

8 THE COURT: By the government.

9 MR. SHELLEY: Excuse me. By the government.

10 Even the Second Circuit case, on which Mr. Menke
11 relies, holds that the vested pension rights at the time of
12 termination are a property interest subject to due process
13 scrutiny. And other courts as well have held that. In our
14 briefs, we have cited the Central Laborers' Pension Fund case,
15 the McDarby case, and the In re: Jones & Laughlin case.

16 More fundamentally, Mr. Menke assumes facts that
17 have never been proven, that we would in fact be worse off if
18 the plan hadn't been terminated and if they hadn't terminated
19 it the way they did.

20 But our position, that needs to be assumed as
21 true based on the complaint, is that this plan was mis- --
22 underfunded as they say, that PBGC doesn't have to put out \$2
23 billion. The plan was underfunded. And if in fact the PBGC
24 had done its job for adjudication and negotiated the kind of
25 terms that should have been negotiated, that the plan wouldn't

1 have to be terminated and we wouldn't be in the position where
2 some people are losing 30 percent of their benefits or 40
3 percent of their benefits or 50 percent of their benefits.

4 Under the law --

5 THE COURT: Why is there a difference? Why are
6 some people losing different percentages than other people?

7 MR. SHELLEY: It depends on the rules that the
8 PBGC has set up for guaranteed benefits. Early retirees don't
9 fair as well as people who have stayed full-term and there are
10 a series of --

11 THE COURT: Okay. You have answered the
12 question. And all of that is really not in the record.

13 MR. SHELLEY: Correct.

14 THE COURT: Okay.

15 MR. SHELLEY: On the law, the fight is really
16 over whether under the due process clause individuals such as
17 my clients are entitled to a pre-deprivation hearing or a
18 post-deprivation hearing. And in our briefs we have spelled
19 out the point that we think under Zinermon a post-deprivation
20 hearing is not good enough.

21 THE COURT: You are suggesting the taking is by
22 the mistakes, whether they be negligent or purposeful or
23 whatever.

24 MR. SHELLEY: Correct.

25 THE COURT: And that you had a right -- your

1 clients had a right to be represented at a hearing where it
2 could be determined whether or not the numbers that have been
3 referred to today were based on necessity?

4 MR. SHELLEY: Yes, Your Honor, exactly.

5 THE COURT: Okay.

6 MR. SHELLEY: I don't really have anything
7 further to add.

8 THE COURT: And I think you can tell from the
9 way I just asked those questions and the way that I decided
10 the first portion of this motion, that this is also not going
11 to be dismissed.

12 But as to the first and as to this, you have a
13 very difficult road to go in terms of analyzing whatever
14 information is out there and making your case. I don't want
15 you to go out here and have a celebration with your clients,
16 because just because the lawsuit is still open does not mean
17 that it's close to closure.

18 All right. The second, Count 2. Is there much
19 difference in terms of that?

20 And it's basically another variation of a
21 violation of fiduciary duty that the trustee owes to the
22 beneficiaries.

23 MR. MENKE: Well, what Count 2 is about, Your
24 Honor, is whether Delphi had a fiduciary obligation in its
25 role as the company offering the pension plan when it . . .

1 THE COURT: Excuse me. Does Count 2 talk about
2 Delphi or does it talk about your client in terms of the
3 fiduciary duty?

4 MR. MENKE: Well, it talks about Delphi's
5 fiduciary duty and ties it into our client by saying that --
6 Count 2 assumes that PBGC and Delphi could enter into an
7 agreement to terminate the pension plan. But they say and in
8 entering into that agreement Delphi could only do it in full
9 consideration of its fiduciary obligations to act solely in
10 the interest of the participants.

11 This is certainly not a new argument. Indeed,
12 this is an argument the Supreme Court has heard four times,
13 and we cite those Supreme Court cases in our brief. Four
14 times the Supreme Court has held that certain functions with
15 respect to a pension plan, deciding whether to start one,
16 deciding whether to terminate one, deciding what level of
17 benefits to offer in a pension plan, are what they call
18 settlor functions. They are decisions; they are business
19 decisions made by the company.

20 Fiduciary obligations don't attach settlor
21 functions. It is a concept that has been throughout trust law
22 before ERISA and has been applied to ERISA ever since it was
23 passed.

24 The Supreme Court, having addressed the issue
25 four times, held that a company is fully entitled to decide to

1 terminate and to terminate its pension plan without applying
2 the fiduciary obligations that might otherwise apply to its
3 actions as a plan trustee.

4 This Court we think obviously is bound by those
5 Supreme Court decisions. The law -- as we say, it is not a
6 new argument. These Plaintiffs I suppose are entitled to
7 appeal to try to get the court for a fifth time to change its
8 mind.

9 THE COURT: Let me ask the Plaintiffs this. Are
10 you -- you are not arguing -- or, are you arguing that the
11 breach of duty was in the termination or are you arguing
12 something else?

13 MR. SHELLEY: Well, we are arguing that -- this
14 is an alternative argument in the sense that this one assumes
15 that there need not be an adjudication of the plan's
16 termination and instead it can be done by agreement.

17 If we assume that -- and of course we argue that
18 is an assumption and our other claims shouldn't be made. If
19 we assume that, it can only be done with an unconflicted plan
20 administrator who is acting in the best interest as a
21 fiduciary of the participants. And it is undisputed that
22 Delphi was acting as a corporate entity here; not as a
23 fiduciary.

24 THE COURT: All right. So, your argument is you
25 would agree -- you are not asking the Supreme Court to change

1 their position.

2 MR. SHELLEY: Not at all.

3 THE COURT: You would agree under this theory
4 that Delphi is acting as a settlor when they agreed to
5 terminate the fund?

6 MR. SHELLEY: We would say that in a normal
7 situation when you don't have a distressed termination where
8 participants will lose vested benefits, in that situation an
9 employer or a plan sponsor as a settlor can do what it deems
10 appropriate and terminate a plan. But when you have
11 individuals who have vested benefits, that is not something --
12 a settlor function for a plan sponsor.

13 I would like to just focus on two things. The
14 statute in ERISA in 1342 talks about the agreement being with
15 the plan administrator; not the employer, not the sponsor. A
16 plan administrator is always a fiduciary as long as they are
17 exercising discretion.

18 When you look at section 1341, for instance, it
19 talks about how the employer or a person can go to the
20 bankruptcy court and try to get a plan terminated. That's
21 different. Congress used different words.

22 And the use of the word "plan administrator" is
23 significant. Even in one of the cases that Mr. Menke cited,
24 which is the Curtiss-Wright case, for instance, the court said
25 it was a settlor function for the employer to terminate a

1 health benefits plan for two reasons; because there were no
2 vested rights and health benefits -- pension benefits, because
3 it was the employer, not a plan administrator. This is a
4 quote from that case.

5 "ERISA does not create any substantive
6 entitlement to" --

7 *(Interjection by court reporter.)*

8 THE COURT: What is the cite again?

9 MR. SHELLEY: Curtiss-Wright Corp. 514 U.S. 73.
10 This is at 78.

11 "ERISA does not create any substantive
12 entitlement to employer-provided health
13 benefits or any other kind of welfare
14 benefits. Employers or other plan sponsors
15 are generally free under ERISA for any reason
16 at any time to adopt, modify or terminate
17 welfare plans. Nor does ERISA establish any
18 minimum participation, vesting or funding
19 requirements for welfare plans as it does for
20 pension plans. Accordingly, that
21 Curtiss-Wright amended its plan to deprive
22 respondents of health benefits is not a
23 cognizable complaint under ERISA."

24 The difference is these are vested pension
25 benefits and it's not the employer doing the terminating.

1 It's the plan administrator agreeing -- and, frankly, these
2 are called involuntary terminations, because the PBGC goes in
3 and terminates and gets an agreement. They don't -- it is not
4 a voluntary termination of Delphi in any way, but it is a
5 PBGC-enforced termination.

6 So, we think this settlor concept is just
7 foreign to the whole idea.

8 THE COURT: But even if it were a settlor
9 function, the implementation of the decision to terminate is a
10 fiduciary function. Is that your argument?

11 MR. SHELLEY: Yes, that's our second argument.

12 THE COURT: And that is the Blue Cross case from
13 the Ninth Circuit, Waller v. Blue Cross?

14 MR. KHALIL: And also Beck v. PACE from the
15 Supreme Court.

16 THE COURT: Okay.

17 MR. SHELLEY: I don't have anything further,
18 Your Honor.

19 THE COURT: All right. Again, the Motion to
20 Dismiss is denied without prejudice. And you are allowed to
21 plead alternative theories. And, again, you have a long way
22 to go.

23 All right. What do we want to do next; the
24 summary judgment or Count 4? Is that the next logical one?

25 MR. MENKE: Certainly, Your Honor, Count 4.

1 In Count 4 of ERISA -- in Count 4 of the
2 complaint, excuse me, Plaintiffs allege that the termination
3 was unlawful and improper under the standards set forth in
4 ERISA.

5 This is a normal allegation, a normal argument
6 that parties challenging our termination make, and one that we
7 normally get resolved in the manner that we've done here by
8 producing the administrative record that PBGC looked at in
9 deciding whether or not the plan should be terminated and
10 seeing whether the statutory criteria for terminating that
11 plan as found by the agency are supported by that record.

12 PBGC provided and filed the record with Your
13 Honor, gave copies to the Plaintiffs, as we have already
14 talked about in connection with the motion to seal.

15 THE COURT: It's roughly seven volumes.

16 MR. MENKE: Right.

17 THE COURT: Of about 250 pages each.

18 MR. MENKE: It's a fairly substantial set of
19 documentation.

20 Those were the documents that were before the
21 agency and that the agency considered in addressing whether or
22 not the Delphi both salaried and hourly plans ought to be
23 terminated.

24 I know that you are leaving open Count 1 of the
25 complaint which alleges that the procedure we followed in

1 terminating the plan was illegal, that we were obliged to go
2 to court and not do it pursuant to agreement with the company.

3 I'm not sure how we deal with that in -- as it
4 impacts upon Count 4 of the complaint. Nonetheless, allow me
5 to plow ahead.

6 Termination of a pension plan like the Delphi
7 Salaried Plan is a multistep process under Section 4042(a),
8 involuntary termination by PBGC.

9 First step: PBGC, under Section 4042(a) of
10 ERISA, considers and determines whether one of the four
11 grounds listed in that Section (a)(1) through (a)(4), whether
12 one or more -- although only one need be found -- is present.

13 In the event that the agency determines that one
14 or more of those grounds is met, the agency considers whether
15 grounds exist under 4042(c), if it needs to go to court, are
16 or are not met, or whether the plan must be terminated.

17 If the agency's decision-maker, which given the
18 size of this plan was the acting director of the agency at the
19 time, concludes that -- agrees with his staff's recommendation
20 that those conditions are met, the agency issues what is known
21 as a Notice of Termination, provides notice to the employees
22 by publishing in appropriate newspapers. In this case, there
23 were two Detroit Free Press and another Detroit paper, and
24 generally in the USA Today, which has nationwide coverage. It
25 would issue a notice that it was seeking to terminate those

1 plans.

2 Then the agency may either file a complaint or,
3 in our view, seek agreement of the plan administrator to
4 terminate the plan.

5 The decision by the agencies that are implicated
6 therefore by a claim that PBGC acted improperly, in a case
7 like this where the plan was terminated by agreement with the
8 administrator and the agency thus had no necessity, in our
9 view, of going to court, are whether or not PBGC properly
10 determined the (a) grounds were present.

11 THE COURT: What ground did they determine was
12 present?

13 MR. MENKE: The agency determined that three
14 actually of the four grounds were present.

15 THE COURT: Okay.

16 MR. MENKE: The administrative record shows that
17 beginning in 2005 -- I may get the year wrong -- in 2005 with
18 Delphi's filing of bankruptcy, it ceased making its funding
19 contributions required by law to the Salaried Plan. People
20 went to court over PBGC's objection. Companies are allowed to
21 do that when they are under the protection of the bankruptcy
22 court.

23 PBGC found that Delphi had failed to satisfy its
24 funding obligations to the fund; and, therefore, grounds to
25 terminate under Section 4042(a)(1) were present.

1 There seems to be, as best we can tell, having
2 read the Plaintiffs' briefs, they don't disagree that Delphi
3 failed to fund its pension plan.

4 We could stop right there.

5 The agency however went on and found, in
6 addition to that ground, that Delphi at the time in April,
7 when it was considering this, Delphi announced that it was
8 selling all of its profitable -- well, all of the operations
9 that anybody wanted to pay for, and it was liquidating. That
10 was the plan of reorganization that it filed at that point,
11 the liquidating plan and reorganization.

12 Upon liquidation, of course, Delphi -- and none
13 of the buyers, by the way, for any of the U.S. assets were
14 interested in taking on the pension plan. Not G.M., not any
15 of the DIP lenders, not any of the independent investors
16 coming in. Nobody wanted the pension plans. They were --

17 THE COURT: But G.M. did take on the other
18 employees, the unionized employees?

19 MR. MENKE: G.M. some months previously had
20 agreed to assume part of that pension plan in exchange for
21 concessions by Delphi and in 1999 agreed to top up the
22 benefits of the remaining hourly pensioners if the plan
23 terminated, yes. But those were long, past agreements. That
24 had been done ten years ago and had nothing to do with what
25 PBGC was facing at the time it was seeking to terminate the

1 plans.

2 I know there's a lot of talk about it -- just as
3 an aside, there's a lot of talk about how the government
4 stepped up and protected the hourly workers, but didn't
5 protect the salaried workers.

6 That deal was negotiated in 1999. Had the
7 Delphi pension plans been terminated before G.M. went into
8 bankruptcy, there would have been no question that G.M. had an
9 obligation to top up the benefits and had no obligation to top
10 up the salaried benefits. G.M.'s bankruptcy changed that
11 agreement not at all. It's the same agreement that they had
12 before bankruptcy as afterwards.

13 I'm not clear what Plaintiffs are arguing about
14 when they argue about that top-up other than maybe it should
15 be taken away from the hourly workers, because there was no
16 agreement by anyone ever to top up the salaried workers. It
17 never existed and it never played a part in PBGC's
18 determination.

19 Anyway, second point. Delphi was gone out of
20 existence. Delphi was liquidated.

21 The information in PBGC's records shows that the
22 Delphi plan was woefully underfunded. Hardly surprising. For
23 four years they hadn't been funding it. The economy --

24 THE COURT: What was the percentage of funding?

25 MR. MENKE: I believe 44 percent.

1 THE COURT: Where does the 80 percent come from?

2 MR. MENKE: The 85 percent comes from a
3 different calculation by Delphi's actuaries, dated as of
4 September -- either October 1st or September 30th of 2008.
5 Looking sadly at a pension plan that didn't really exist
6 anymore eight months later. Assets had fallen. Liabilities
7 had dramatically increased. Interest rates had changed.

8 THE COURT: The assets fallen because of the
9 stock market?

10 MR. MENKE: The economy, as everyone in this
11 room is painfully aware, went into severe recession beginning
12 in the fall of 2008, and that had massive ramifications on a
13 lot of things with respect to this plan. The assets in the
14 pension plan dropped substantially by several hundred million
15 dollars.

16 THE COURT: Are the assets in the plan now or is
17 that all . . .

18 MR. MENKE: The assets in the plan now have been
19 assumed by PBGC. The plan doesn't exist anymore. It has been
20 terminated.

21 THE COURT: But they haven't been held to one
22 side?

23 MR. MENKE: No.

24 THE COURT: It's all fungible now.

25 MR. MENKE: Right.

1 THE COURT: Okay.

2 MR. MENKE: Delphi's business -- Delphi in
3 October of 2008, at the time of this AFTAP certification, had
4 filed a plan of reorganization calling for it to reorganize
5 its business and emerge as a ongoing entity and fully fund the
6 Salaried Pension Plan going forth. That means put money into
7 it.

8 By April of 2009, six months later, Delphi
9 had -- well, let me say that that proposed plan of
10 reorganization was no longer on the table. Delphi announced
11 to the world that its current plan was to sell what it could,
12 liquidate, and go out of business, leaving behind the pension
13 plans. It had no ability to fund any of its pension plans,
14 including the salaried or the hourly.

15 The funding of the plan had deteriorated to the
16 point where it was 44 percent funding at that point, with a
17 liquidating sponsor; thus, not being able to add any money to
18 the pension plan ever. And with a severely underfunded
19 pension plan, PBGC's staff concluded that the plan would at
20 some point in the future be unable to pay the benefits when
21 due. We had run out of money. It's a pretty easy math
22 calculation to do.

23 Thus, the grounds in 4042(a)(2) were present.
24 We had run out of money to pay benefits -- or, would be unable
25 to pay benefits when needed. Not that we were unable to pay

1 benefits right at that moment, but sooner or later in the
2 future there was a certainty that there would be no money and
3 it would be unable to pay benefits at some point. That's all
4 we need to show in order to satisfy the (a)(2) grounds.

5 The (a)(4) grounds were also present. The risk
6 of loss to PBGC could be unreasonably expected to increase.
7 Unreasonable. What do I mean by that language? What it means
8 is what we call our long-run loss case; where PBGC loses
9 money, it could terminate it later rather than terminating it
10 now.

11 As set forth in the administrative record --
12 again, not contested by any of the Defendants -- is the fact
13 that in April of 2009 --

14 THE COURT: You mean the Plaintiffs.

15 MR. MENKE: Excuse me, by the Plaintiffs.

16 In April of 2009, Delphi's debtor-in-possession
17 lenders, who had lent several billion dollars to Delphi, were
18 threatening to foreclose on those loans. Delphi was in
19 default. Nobody argues otherwise. Part of the collateral
20 that had been pledged in support of those, what they call DIP
21 loans in bankruptcy, was the stock in Delphi's foreign
22 entities. Everybody agrees that's where the only value in
23 this company remained at that point in time.

24 Had the DIP lenders foreclosed and taken
25 ownership of that stock, those foreign entities would no

1 longer have been in the Delphi Control Group, as that's
2 defined in ERISA, and PBGC's opportunity to recover on its
3 claims against those valuable entities would have vanished.
4 PBGC would have lost any opportunity to get a meaningful
5 recovery from the six \$6 million in underfunding -- or, \$7
6 million in underfunding it was taking on by terminating these
7 plans.

8 Clearly, giving up what ultimately turned into a
9 several hundred million dollar recovery, by the way, would
10 constitute a long-run loss to the agency, in the staff's view.
11 It is all laid out in the record. And that ground (a)(4) was
12 present as well.

13 So, three of the four statutory grounds for
14 termination are well-established in the administrative record
15 that was before PBGC's decision-maker at the time. Not
16 contested by the Plaintiffs in this case.

17 There is thus, in our view, no question that
18 PBGC has established the right to proceed to terminate the
19 pension plans.

20 It did. That decision was reached in April.

21 What the record reflects is that when PBGC
22 informed Delphi that it was moving forward, the Delphi DIP
23 lenders stepped up and said, wait a minute. Let's not be rash
24 here. We don't plan to foreclose now, even though we have
25 every right to. And, PBGC, if you will forbear from

1 terminating so we can see if anything can be worked out, we
2 will agree to give you a five-day notice before we do seek to
3 foreclose.

4 PBGC, thinking that made sense, did agree to
5 that.

6 What then happened was that in mid-July, that
7 five-day notice was issued. The DIP lender says we intend to
8 foreclose in five days. PBGC then put into effect the
9 decision it had made in April and moved to terminate the
10 pension plans. It was at risk of losing its recovery and took
11 steps to ameliorate that risk.

12 We have been taken to task here for giving away
13 our liens, as the Plaintiffs have said.

14 The administrative record in this case reflects
15 exactly the opposite.

16 PBGC acted promptly, diligently and vigorously
17 to protect its interest in this case, to protect its recovery
18 in this case and, in fact, received a substantial recovery in
19 what turned out to be a quite disastrous bankruptcy for all
20 creditors.

21 That's really all we have to establish. We had
22 the right to proceed. We proceeded. That's the last --

23 THE COURT: Well, let me hear from the
24 Plaintiffs.

25 MR. MENKE: Thank you.

1 THE COURT: Thank you. You will get a chance to
2 respond.

3 MR. SHELLEY: Your Honor, first of all, I think
4 that the Court's disposition of claims one, two and three may
5 require actually the denial of the Summary Judgment Motion
6 outright, because the point of the Summary Judgment Motion was
7 to say you don't have to adjudicate; instead, the PBGC can
8 just do by settlement, agreements, orders, a termination. And
9 they are here defending those settlements, orders, and
10 agreements.

11 With the Court not having held yet that it could
12 be done that way, it would be premature for the Court really
13 to determine whether the PBGC is entitled to summary judgment,
14 I believe.

15 THE COURT: Well, you have had access to the
16 administrative record.

17 MR. SHELLEY: Correct, we have. So, I will
18 argue -- I will go through that and argue it as well.

19 The one point to begin with is that Mr. Menke
20 said they met the standards in Section 1341(a).

21 The 1341(a) is irrelevant to the act of
22 terminating. 1341 allows the PBGC to begin and initiate a
23 termination by going to court.

24 When he says it is not disputed that those
25 standards were met, that is incorrect in saying it is not

1 disputed. They are irrelevant from our point of view because
2 we don't challenge their decision to go to court.

3 THE COURT: I think you are talking about 1342;
4 not 1341.

5 MR. SHELLEY: Excuse me. Yes. 1342(a).

6 Those are irrelevant because it only goes to
7 whether the agency can initiate a termination proceeding.

8 What really matters is 1342(c), which sets forth
9 the standards for when it actually can be terminated. And in
10 that, the PBGC just relied on only one factor, and that comes
11 at the administrative record at page three. PBGC notes that
12 to initiate a termination, it believes those factors were met
13 and it could go to court in 1342(a).

14 But then it says:

15 "PBGC has further determined under ERISA
16 Section 4042(c)" -- which is Section 1342(c)
17 -- "that the plan must be terminated in order
18 to avoid any unreasonable increase in the
19 liability of the PBGC insurance fund."

20 That is the only factor on which they rely.

21 And if you look a little further in the
22 administrative record to page 23, there is a note on the
23 bottom that says:

24 "One staff member questioned whether the
25 grounds for termination should include

1 protection of the interests of participants
2 as recommended by the case team. The TWG
3 agreed that the plan should be terminated in
4 accordance with ERISA 4042(c) in order to
5 avoid any unreasonable increase in the
6 liability of the PBGC insurance fund."

7 What they are saying is that the staff was ready
8 to cite a number of reasons, but in the end when it got signed
9 the only reason for terminating this plan was in order to
10 avoid any unreasonable increase in the liability of the PBGC
11 insurance fund.

12 So, the discussion that Mr. Menke made about all
13 of the factors in 1342(a) being met is an irrelevancy.

14 But if we are going to look at the record and we
15 are going to look at whether it's sufficient, let's look at
16 the date of the termination decision, which is July 20, 2009.
17 That's the date of the termination --

18 THE COURT: Do you agree that's five days after
19 the -- or, within five days of the Notice of Foreclosure?

20 MR. SHELLEY: I don't have the Notice of
21 Foreclosure in front of me, but I assume the PBGC was acting
22 on that day because the foreclosure at that point was, in
23 their view, upcoming.

24 THE COURT: Okay.

25 MR. SHELLEY: But what I would say is that the

1 decision-making that they cite in the administrative record
2 ends in April of 2009. So, the plan is determined to be
3 terminated on July 20, 2009. And three months pass and there
4 is no documents in the administrative record.

5 During this time, G.M. goes bankrupt. The Auto
6 Task Force comes into force, and Delphi's bankruptcy is dealt
7 with in a number of ways. But none of that appears anywhere
8 in the records.

9 So, our first argument is that if this is going
10 to be upheld -- if they want it upheld based on the
11 administrative record, there's three months of material that
12 isn't even in the administrative record.

13 And to note that it was actually material
14 relevant, I again point to our FOIA request, which we have
15 attached to one of our documents, where the FOIA officer sent
16 back a series of materials between the April date and the
17 July -- and actually September date, two months even later,
18 and they are blocked out as pre-decisional material that we
19 are not entitled to get.

20 How can it be that the record and the decision
21 were made in April if instead we are getting FOIA responses
22 that say you can't get this material that's much later because
23 it has to do with the decision?

24 So, we think the record doesn't hold up in the
25 first place.

1 The second argument we would make is that under
2 administrative law the facts found have to agree with the
3 choices made. And if the facts found were that there would be
4 an unreasonable risk to the PBGC if they didn't quickly
5 terminate the plan in order to assert liens, they should have
6 asserted the liens.

7 No liens were asserted at the time. And so --
8 THE COURT: Aren't we getting into fact
9 questions that really aren't in the record? I mean --

10 MR. SHELLEY: Yes.

11 THE COURT: -- your opponent says that the
12 liens were valuable and there was consideration for them.
13 You're saying they weren't asserted.

14 I'm looking at nothing to substantiate who is
15 right and who is wrong. And that's because you haven't had
16 your discovery yet.

17 MR. SHELLEY: That's right, Your Honor.

18 For that reason, summary judgment shouldn't be
19 granted at this point.

20 THE COURT: Well, and I agree with that. I
21 think it's just too early. But I just broke my word to
22 Mr. Menke that he had a response chance to respond.

23 Tell me how I can decide a summary judgment
24 where by definition I have to, just as in a motion to dismiss,
25 take everything the Plaintiff alleges as true, where you

1 haven't had an opportunity and he hasn't had an opportunity to
2 show that it's not true. He hasn't had an opportunity to show
3 that it's true.

4 I mean, you may be a great witness or you may
5 have other witnesses to put into evidence, what you have told
6 me, as an officer of the court. I am in a difficult position
7 of having to believe both of you since you are both officers
8 of the court --

9 MR. MENKE: Your Honor, you -- excuse me. I
10 apologize.

11 Your Honor, PBGC decided that these plans should
12 be terminated on April 16, 2009. Not in July. They agreed to
13 forbear acting on that decision because the DIP lenders agreed
14 to forbear from foreclosing without notice. It put the
15 decision into effect in July, but that doesn't change the fact
16 that, as the administrative record reflects, the date on the
17 signature of PBGC's deciding officer -- the acting director
18 reflects, the decision to terminate this plan was made -- the
19 decision by PBGC to seek termination of this plan was made
20 that year I believe it's the 16th of April.

21 Is that right?

22 The 17th of April. I'm sorry.

23 We have heard Mr. Shelley take us to task for
24 not including vast volumes of material in the administrative
25 record from the subsequent April to July time frame.

1 In their papers they take us to task for not
2 including actuarial certificates that weren't available until
3 the end of June or beginning of July, for not including
4 settlement agreements that were reached at the end of July and
5 continued to be negotiated thereafter.

6 The law is clear. The administrative record
7 that the agency is entitled to rely upon when it makes its
8 decision are the materials available to it at the time the
9 decision is made. The agency is not -- an agency is not
10 required to be questioned about the future. It is not
11 required to include a bunch of stuff that happened afterwards
12 and have its decision tested about circumstances and events
13 that occurred after the decision was made.

14 The agency is entitled to rely upon the state of
15 facts that existed at the time of the decision. That is why
16 our administrative record, as Mr. Shelley quite properly
17 points out, ends in April, because that's when the decision
18 was made.

19 THE COURT: And in April it was based on the
20 unreasonable increase in the liability of the fund?

21 MR. MENKE: It was based -- the decision to
22 proceed was based on three grounds. There also -- the three
23 grounds I pointed out --

24 THE COURT: No. You are answering a different
25 question.

1 I think everyone agrees that the initiation of
2 the process was for the three grounds.

3 MR. MENKE: Right.

4 THE COURT: But the decision, itself, as I
5 understand --

6 MR. MENKE: The decision, itself, was made for
7 those three grounds. PBGC's decision was to proceed with the
8 termination of the pension plan.

9 Had PBGC been obliged to go to court to get a
10 decree terminating the plan as set forth in its decisional
11 records, the ground it would have been relying upon at that
12 point was that termination was necessary to protect the
13 interests of the fund.

14 THE COURT: Okay.

15 MR. MENKE: Mr. Shelley is right; PBGC's
16 Trusteeship Working Group, which is the body within the agency
17 that is the official recommending and reviewing body prior to
18 the director, including that the proper ground for PBGC to
19 proceed on was to protect the fund's interest -- protect
20 PBGC's interest, not to protect the interests of the
21 participants, those standards set forth in (c), those three
22 criteria that Mr. Shelley has read, are listed quite clearly
23 in the disjunctive. PBGC is entitled to rely upon one or more
24 and need not rely on all three.

25 In fact, PBGC was protecting its interests, and

1 that's set out in the (a) (4) grounds I've talked about. It's
2 set out in that.

3 Delphi's debtor-in-possession lenders in April
4 had the right and were threatening to foreclose.

5 In July after their forbearance period ended,
6 they gave us notice that they were intending to. By the way,
7 that notice was given to us on the 16th of July, four days
8 before we acted.

9 THE COURT: Let me interrupt here, because what
10 I'm hearing is you are focusing on the decision that was made
11 in April.

12 MR. MENKE: That's correct.

13 THE COURT: Okay. Let's do an analogy to, let's
14 say, where in the labor field there is a strike vote in April.
15 That's a decision, correct?

16 MR. MENKE: I'm not a labor lawyer, Your Honor,
17 but I will assume for the hypothetical --

18 THE COURT: Well . . .

19 MR. MENKE: I assume for the hypothetical, yes.

20 THE COURT: You read the USA Today. You know.
21 And USA Today is for people who think that Fox
22 is too in depth.

23 MR. MENKE: In fact, I do not read USA Today for
24 that precise reason.

25 THE COURT: You stayed in a tent instead of a

1 hotel, did you? You have to have had the paper this morning.

2 MR. MENKE: The hotel didn't give me a
3 newspaper.

4 THE COURT: Well, I'm sorry.

5 MR. MENKE: I have been here for the last 24
6 hours.

7 THE COURT: Anyway, there's a decision made
8 authorizing a strike. That's basically what happened in
9 April.

10 What happened in July, a second decision was
11 made to go on strike. In this case, it was to liquidate or
12 terminate the fund.

13 So, there are really two decisions.

14 The Plaintiffs argue or allege that that second
15 decision was not up to the standards of fiduciary duty or
16 ERISA at least for one reason, because the liens were released
17 without compensation.

18 You indicate the liens were well compensated
19 for.

20 MR. MENKE: No doubt.

21 THE COURT: And -- but at this time, I have to
22 believe them for the Motion for Summary Judgment.

23 MR. MENKE: Well, I --

24 THE COURT: And that's why it's being denied
25 without prejudice.

1 MR. MENKE: Well, I'm -- I will say no more
2 except to note that your hypothetical about two decisions
3 didn't occur here. PBGC made one decision to terminate the
4 pension plans; that's all.

5 THE COURT: Well, I understand. Fortunately, we
6 don't have to decide that issue today here.

7 MR. MENKE: That's correct. Thank you, Your
8 Honor.

9 THE COURT: Which leads to the Plaintiffs'
10 Motion to Show Cause.

11 Have you guys worked that out?

12 MR. SHELLEY: We have not, Your Honor.

13 THE COURT: Okay.

14 MR. SHELLEY: The issue in -- and on this --
15 this motion is the terms under which the PBGC has been
16 treating the money that we think our retirees are owed.

17 But back in December of 2009, Mr. Menke told the
18 Court that he would await the Court's ruling on the
19 preliminary injunction before the PBGC would begin reducing
20 the Plaintiffs' pension benefits.

21 So, the Court then, wading through all of the
22 briefing, issued a decision in January of 2010 stating that
23 the PBGC, if it wanted to reduce those benefits immediately in
24 February, it had to do one of two things; escrow the
25 difference or agree that at the end of the case they would

1 make the Plaintiffs whole if they win.

2 PBGC didn't like that ruling and sought to amend
3 it or alter it, and fought very hard to do that. And the
4 Court denied that motion.

5 Then the PBGC simply disregarded its earlier
6 promise to the Court to keep the status quo and began reducing
7 the Plaintiffs' benefits --

8 THE COURT: No, I don't think that's a fair
9 statement of what the Defendants agreed.

10 MR. SHELLEY: Okay.

11 THE COURT: They agreed to do one of those two
12 things. They -- excuse me --

13 Well, go on with your argument.

14 MR. SHELLEY: Okay. My understanding of it was
15 that in December they agreed to hold the status quo until the
16 Court ruled.

17 The Court then ruled and said, well, you are
18 going to have to do one of two things; escrow or a promise to
19 make them whole.

20 THE COURT: Okay.

21 MR. SHELLEY: They didn't do either of those.
22 They began reducing the benefits.

23 And basically our position is that it should be
24 escrowed in the meantime so that in the end we can get that
25 money as relief. We point to some equitable principals,

1 Pomeroy on Equity and --

2 THE COURT: Well, it seems to be the promise to
3 pay would be easier for them. But let's hear from the
4 Defense.

5 It should be noted that, as Plaintiff said,
6 there was a very comprehensive, thorough Motion for
7 Reconsideration, which was denied. And I at some point,
8 either at a meeting I believe, indicated that if the
9 Defendants wanted to appeal that ruling, I would certify it;
10 so, do whatever I had to do to encourage the Sixth Circuit to
11 decide it. Because having been an appellate lawyer, I know
12 how hard it is to get an interlocutory matter reviewed by an
13 appellate court.

14 Your response, please.

15 MR. MENKE: Sir, certainly.

16 Your Honor in January issued an order that said
17 something somewhat different than how the Plaintiffs
18 paraphrase it. It said that the Motion for Preliminary
19 Injunction was denied contingent upon PBGC doing one of two
20 things.

21 Plaintiffs quite correctly note that PBGC took
22 the position that under law it cannot do either of the two
23 things that Your Honor offered us to do in order to have the
24 Preliminary Injunction Motion denied. PBGC can't escrow the
25 money, can't promise to pay it if we ultimately lose. PBGC,

1 by law, can pay guaranteed benefits to these participants and
2 no more.

3 We told that you and asked you -- because we
4 didn't like candidly the Judge's ruling, that the Preliminary
5 Injunction Motion was denied. We asked Your Honor to modify
6 the conditions into something we could do legally.

7 THE COURT: Refresh my memory. What did you
8 suggest you could do legally?

9 MR. MENKE: We suggested that we could make a
10 statement that if the termination of the plan was overturned
11 and by law, thus, the plan was not terminated and went back to
12 Delphi Corporation as an ongoing pension plan, we could
13 provide records to Delphi that would allow Delphi with what
14 remaining plan assets to pay any portion of nonguaranteed
15 benefits that the participants at that time were entitled to.

16 THE COURT: Which had a value of what?

17 MR. MENKE: I don't know.

18 THE COURT: Not very much.

19 MR. MENKE: What had a value of what?

20 The nonpaid benefits would have probably been in
21 the millions. The assets would have been -- depending on when
22 it went back, who knows. I don't know what the --

23 THE COURT: Okay.

24 MR. MENKE: If the plan were returned today --
25 for instance, if you ruled today that the plan was terminated

1 improvidently by PBGC or illegally and it had to go back to
2 Delphi -- a couple of things. One, it would take us a while
3 to figure out what assets remain, what assets we had to give
4 back; not to mention for us to try and find the Delphi to give
5 it to.

6 But those are problems, God willing, we won't
7 have to face.

8 We told the Court three times that we couldn't
9 by law do what your Court proposed that we do. We --

10 THE COURT: Well, isn't the remedy for a dumb
11 judge to go to the Sixth Circuit?

12 MR. MENKE: Well, except, Your Honor, for us to
13 go to the Sixth Circuit would have been to appeal an order we
14 won. We tried that before and haven't had much success in
15 other courts. I doubt we would have much success in the Sixth
16 Circuit.

17 Nothing -- Mr. Shelley says that your Court said
18 we couldn't reduce benefits without doing it. That's not what
19 your order said.

20 Your order said the Motion for Preliminary
21 Injunction was denied. There is no injunction order
22 precluding PBGC from doing anything in this case.

23 We parsed that order every way we could. And as
24 we laid it out in our pleadings, that we think the best and
25 only sensible reading of it is that you issued a conditional

1 order. The motion is denied, conditioned on PBGC doing A or
2 B.

3 The conditions failed. PBGC can't do A or B.

4 At worst, I think your order is invalid, a
5 nullity, whatever they call it by comparison to contract law.
6 And maybe the Motion for Preliminary Injunction isn't denied
7 anymore. But one thing is absolutely clear; it isn't granted
8 either. There's no order granting their request that PBGC be
9 required to pay full plan benefits rather than estimated
10 guaranteed benefits out there.

11 The parameters of such an order are well set
12 forth in Rule 65(d) of the Federal Rules of Civil Procedure,
13 which I know you are familiar with.

14 THE COURT: Would you agree that if the
15 Plaintiffs are successful, they would be entitled to such an
16 order?

17 MR. MENKE: If they are successful in what, Your
18 Honor?

19 THE COURT: Successful in this lawsuit on any of
20 the grounds that they have raised.

21 MR. MENKE: If the Plaintiffs win this -- our
22 view is this. If the Plaintiffs win this lawsuit and the
23 Court determines that the termination of the pension plan
24 which we believe occurred as of July 31st, 2009 is invalid,
25 and that the plan therefore is not terminated, it's an ongoing

1 pension plan, the sponsor of that ongoing pension plan is
2 Delphi Corporation --

3 THE COURT: Okay. You don't have to go on. You
4 just told me this . . .

5 MR. MENKE: And Delphi Corporation can make good
6 on any benefits that were missed; in fact, would probably have
7 a legal obligation to do so.

8 THE COURT: Well, why wouldn't you -- your
9 client?

10 MR. MENKE: Because it's not our plan. At that
11 point, it's not our plan.

12 It's either a terminated plan with PBGC, in
13 which case we pay guaranteed benefits as provided by Title 4
14 of ERISA, or it is an ongoing plan with its sponsor -- in this
15 case, Delphi Corporation -- and Delphi Corporation and the
16 plan are responsible for paying the benefits. There's nothing
17 else in the law.

18 THE COURT: It is your plan now.

19 MR. MENKE: It is a terminated plan now, yes,
20 that's correct. It is our plan now.

21 THE COURT: All right. Let's hear from the
22 Plaintiff.

23 MR. SHELLEY: Your Honor, your order was
24 entitled a Ruling on a Preliminary Injunction Request. It
25 wasn't entitled Denying Preliminary Injunction Request. And

1 we read it as an order in conjunction with what had taken
2 place and the parties had said at the December hearing, which
3 was that the status quo would be kept in place until Your
4 Honor ruled, and then Your Honor offered two conditions.

5 I want to make clear we are not seeking any
6 relief against Delphi. The bankruptcy court has foreclosed
7 it. It is no relief at all anyway to send this plan back to
8 Delphi, which barely exists.

9 But what we want is equitable relief against the
10 PBGC. We are entitled, if the PBGC made a mistake here -- if
11 they broke it, they own it. As a result, we are entitled to
12 be made whole. And it would be as if they -- it's a
13 terminated pension plan that they own, and they would have to
14 run it in an equitable way to make us whole going forward.

15 The reality is that Congress put in the statute
16 the term we are entitled to equitable relief. And what they
17 are asking to be done at the end of the day, were we to
18 succeed, is not equitable at all.

19 But the point of this motion is really just to
20 get the escrow in, completed from the period since January --

21 THE COURT: Let me ask this. And I know it was
22 in my order. But -- the ultimate source of funds for the
23 Defendant is the Treasury Department. Is that correct?

24 MR. SHELLEY: No. It's their own . . .

25 THE COURT: It's their own --

1 MR. SHELLEY: It's their own fund.

2 THE COURT: Where does that money come from?
3 Just the remains of all of the pension funds they take over?

4 MR. SHELLEY: That's part of it. But mostly
5 from dues from employers who every month -- on an annual basis
6 certainly pay into the insurance much like the banks do to the
7 FDIC.

8 THE COURT: And whose insurance fund is that?
9 Is that a government insurance fund?

10 MR. SHELLEY: I think it is owned by the PBGC,
11 yes.

12 THE COURT: Okay.

13 MR. SHELLEY: I really don't have anything to
14 add further, Your Honor, other than --

15 THE COURT: Why would not a promise from them
16 that they would follow the ruling of the Court be sufficient
17 in terms of -- as interpreted by the Court. I, again, without
18 expressing anything on the merits, because I don't know
19 anything about the merits, but I can talk to what I understand
20 you're asking.

21 If you are successful on every point -- which,
22 again, is a steep hill to climb, it would mean that you are
23 entitled to equitable relief. And I don't think the Defendant
24 gets to fashion what that equitable relief is.

25 It seems to me that what should satisfy you is

1 that if the Defendant were to represent to you that they would
2 follow the ruling of this Court as when and if -- well, as
3 modified or not modified by the higher courts, including the
4 Supreme Court, that should be sufficient.

5 MR. SHELLEY: It would be, Your Honor, if they
6 were to -- if they were willing to say, that should the Court
7 rule that we are entitled to retrospective relief, of the
8 difference between what we have been paid and what we should
9 be paid and forward looking relief of full pension benefits,
10 should you so rule -- if they were willing to say should you
11 so rule --

12 THE COURT: No, it is not should I so rule. It
13 is should I rule and be affirmed by those courts above me.

14 MR. SHELLEY: Correct. That would be --

15 THE COURT: Do you have any problem with that,
16 counsel?

17 I mean you are not waiving any arguments. You
18 can try and convince me down the road that the proper
19 relief -- well, first of all, is no relief; and, second of
20 all, you referring it back to Delphi.

21 MR. MENKE: Your Honor, I can say without fear
22 of contradiction by anyone that PBGC has always complied with
23 the final orders of the courts. A final non-appealable order
24 from this Court or whatever court this decision was appealed
25 to would be followed by PBGC.

1 THE COURT: I don't want you to waive your right
2 to appeal.

3 MR. MENKE: I am not waiving my right to appeal.

4 THE COURT: Okay.

5 MR. MENKE: What I said is a final
6 non-appealable order of this or any other court that this
7 Court's order might be appealed to will be followed by the
8 agency.

9 THE COURT: Okay. Is that satisfactory to the
10 Plaintiffs?

11 MR. SHELLEY: It is, Your Honor.

12 THE COURT: All right. Then the show cause is
13 denied.

14 Anything else anyone wants to put on the record?

15 MR. SHELLEY: Nothing further for the record,
16 Your Honor. Thank you.

17 MR. MENKE: Thank you, Your Honor.

18 THE COURT: Should we do a scheduling order or
19 should we do that at a different time?

20 MR. MENKE: We are certainly not prepared to
21 speak to that today, Your Honor. We have not thought about
22 that.

23 THE COURT: Okay.

24 MR. SHELLEY: It may be useful for us to talk
25 about the scheduling and present an order to the Court.

1 THE COURT: That's fine.

2 MR. MENKE: We will do what we can.

3 THE COURT: All right. And if you need the
4 Court's help, I will be happy to talk to you about that.

5 We are in recess. And thank you all.

6 MR. SHELLEY: Thank you, Your Honor.

7 *(Proceedings adjourned at 3:52 p.m.)*

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15 STATE OF MICHIGAN)
16) ss.
COUNTY OF WAYNE)

17

18 I, Denise A. Mosby, Federal Official Court Reporter, do
19 certify that the foregoing is a correct transcript from the
record of proceedings in the above matter.

19

20 s/ Denise A. Mosby

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25 Dated: September 29, 2010