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

DENNIS BLACK, CHARLES CUNNINGHAM, and THE DELPHI SALARIED RETIREE ASSOCIATION, EX REL. THE DELPHI RETIREMENT PROGRAM FOR SALARIED EMPLOYEES, Plaintiff, v. CRAIG G. NAYLOR, DAVID N. FARR, MARTIN E. WELCH, and JAMES P. WHITSON, IN THEIR PERSONAL CAPACITIES AND AS NAMED FIDUCIARIES OF THE DELPHI RETIREMENT PROGRAM FOR SALARIED EMPLOYEES, Defendant.	)	Case No.:

COMPLAINT FOR EQUITABLE RELIEF

Plaintiffs, Dennis Black, Charles Cunningham, and the Delphi Salaried Retiree Association, on behalf of the Delphi Retirement Program for Salaried Employees, allege the following:

1. This is an action for breach of fiduciary duty and for equitable relief arising under the Employee Retirement Income Security Act ("ERISA" or "the Act"), 29 U.S.C. §§ 1001, *et seq.*

2. The lawsuit concerns the Delphi Retirement Program for Salaried Employees ("the Plan" or "Plaintiffs' Plan"), a defined benefit retirement plan established and maintained by Delphi Corporation ("Delphi") for the benefit of its salaried employees.

3. Plaintiffs Dennis Black and Charles Cunningham are retired salaried employees of Delphi and participants in the Plan. The Delphi Salaried Retiree Association is a nonprofit organization comprising participants in the Plan and dependents of participants who are beneficiaries in the Plan.

4. The Plan covers approximately 15,000 workers and retirees.

5. This action arises from the failure of the Defendants, who are the named fiduciaries of the Plan and the individuals designated with the responsibility for administering the Plan, to act solely in the interest of the participants and beneficiaries of the Plan and from the Defendants' failure to exercise the required care, skill, prudence and diligence in administering the Plan.

6. This action is brought on behalf of the Plan and the participants and beneficiaries of the Plan, pursuant to § 502(a)(2) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(2), and seeks to enjoin the Defendants, who are Plan fiduciaries but also officers of Delphi, from continuing to undertake acts and practices in violation of ERISA and to obtain appropriate equitable relief necessary to redress those acts and practices. Because the Defendants are in a position where their responsibilities as officers of Delphi prevent their functioning with the complete loyalty to the Plan demanded of them as ERISA fiduciaries in matters of Plan administration that are pending or looming, and because the Defendants have not removed themselves as fiduciaries notwithstanding these competing

loyalties, Defendants have breached their fiduciary duties; accordingly, as their remedy, Plaintiffs seek Defendants' removal as fiduciaries and the appointment of an independent fiduciary to serve as the Plan's administrator. Specifically, Plaintiffs seek the appointment of an independent fiduciary for purposes of negotiating any intended involuntary termination of the Plan and the protection of participant and beneficiary rights in any termination proceedings.

JURISDICTION AND VENUE

7. The Plan is a defined benefit plan within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35), an employee pension benefit plan within the meaning of ERISA § 3(2), 29 U.S.C. § 1002(2), and is subject to coverage of the Act pursuant to ERISA § 4(a), 29 U.S.C. § 1003(a). Plaintiffs are "participants" within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), who are authorized pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), to bring the present action on behalf of the Plan and the participants and beneficiaries of the Plan, to obtain appropriate relief under §§ 502 and 409 of ERISA, 29 U.S.C. §§ 1132 and 1109.

8. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

9. Venue lies in the Southern Division of the Eastern District of Michigan, pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Plan is administered in this district, some or all of the fiduciary breaches for which relief is sought occurred in this district, and the Defendants may be found in this district.

PARTIES

10. Plaintiffs Dennis Black and Charles Cunningham are retirees of Delphi with a right to vested benefits under the Plan. Plaintiffs are participants of the Plan within the meaning

of ERISA § 3(7), 29 U.S.C. § 1002(7). Plaintiffs bring this action for equitable relief on behalf of the Plan pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Plaintiff Delphi Salaried Retiree Association is a nonprofit organization comprising present and future retirees in the Plan who are participants in the Plan, as well as their dependents who are beneficiaries in the Plan within the meaning of ERISA § 3(8), 29 U.S.C. § 1002(8).

11. The Defendants are the ERISA fiduciaries of the Plan, and more specifically those fiduciaries vested with the powers and responsibilities of administering the Plan, hereafter sometimes referred to as the "Plan Administrator." Plaintiffs do not bring this action against Delphi, which is currently in Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court for the Southern District of New York, Case No. 05-44481. None of the Defendants are listed among the forty-two debtor entities in the Delphi bankruptcy proceedings.

12. Under ERISA, a plan administrator is a separate entity from the plan sponsor, and performs a separate function. *See* ERISA § 3(16), 29 U.S.C. § 1002(16); *Dupree v. Prudential Ins. Co. of Am.*, No. 99-8337-CIV-JORDAN, 2007 U.S. Dist. LEXIS 57857, at *116 (S.D. Fla. Aug. 7, 2007) (while "an individual's status as officer or director of a corporate fiduciary -- without more -- cannot serve to establish fiduciary status," members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries to the extent that they have responsibility for the functions described in section 3(21)(A)) (*citing* 29 C.F.R. § 2509.75-8, D-4 (1975); *see also Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir. 1985) (once a company appoints responsibility for plan administration to another entity, that entity, and not the company, is the proper fiduciary for an ERISA suit, despite the fact that the company is named as the plan administrator in the summary plan description); *Schultz v. Texaco Inc.*, 127 F.

Supp. 2d 443, 452 (S.D.N.Y. 2000) (dismissing suit against corporation and holding that once it designated a particular individual as plan administrator, she, and not the corporation, was the proper subject of suit). Under the terms of the Plan, Delphi is designated as the Plan Administrator. *See* Delphi Retirement Program for Salaried Employees § 15 (Ex. A). Delphi, in turn, has delegated the functional responsibilities as Plan Administrator to its Executive Committee, stating that "the Executive Committee of the Corporation's Board of Directors is the Named Fiduciary with respect to this Program. The Executive Committee may delegate authority to carry out such of its responsibilities as it deems appropriate in order to carry out the proper and effective administration of this Program to the extent permitted by ERISA." *Id*. § 14. The individual members of the Executive Committee are accordingly the "persons" identified as Plan Administrator under ERISA § 3(a)(1), 29 U.S.C. § 1002(16)(a)(1), and serve as individual fiduciaries under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

13. Once Delphi delegated the function of Plan Administrator to the members of its Executive Committee, those individuals assumed the responsibilities of Plan Administrator, and became the proper subjects for this ERISA suit. This action seeks only equitable relief, and seeks no monetary relief, either from Delphi or from the fiduciary Defendants; and, furthermore, the equitable relief sought is only from the fiduciary Defendants, and not from Delphi. Because this is an action in equity against directors of a corporation in their role as ERISA fiduciaries, there is nothing in the bankruptcy stay that might prevent this suit. *See In re Nashville Album Prods., Inc.*, 33 B.R. 123, 124 (M.D. Tenn. 1983) ("A reading of § 362 [of the Bankruptcy Code] clearly reveals no support for the debtor's position that the stay prohibits entities from proceeding against officers, directors and/or stockholders of a corporation which has filed a

bankruptcy petition. Section 362 only stays actions against the debtor or actions seeking to obtain property of the estate.") (*citing Pitts v. Unarco Indus., Inc.*, 698 F.2d 313, 314-15 (7th Cir. 1983)); *accord In re Related Asbestos Cases*, 23 B.R. 523, 527-28 (Bankr. N.D. Cal. 1982); *Royal Truck & Trailer, Inc. v. Armadora Maritima Salvadorena, S.A.*, 10 Bankr. 488, 490-91 (N.D. Ill. 1981); *In re Autobahn Classics, Inc.*, 29 Bankr. 625, 10 Bankr. Ct. Dec. (LRP) 568, 569-70 (Bankr. S.D.N.Y. 1983); *In re Loughnane*, 28 Bankr. 940, 942-43 (Bankr. D. Colo. 1983); *GAF Corp. v. Johns-Manville Corp.*, 26 Bankr. 405, 409-10 (Bankr. S.D.N.Y. 1983); *Bank Center, Ltd. v. Papariella*, 15 Bankr. 64, 65-66 (Bankr. W.D. Pa. 1981)).

14. Upon information and belief, Delphi's Executive Committee is comprised of certain members of the Delphi Board of Directors, and they are the "named fiduciaries" of the Plan and exercise discretion or control over the Plan such that they are fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) and ERISA § 409(a), 29 U.S.C. § 1109(a). *See* Ex. A § 14; *see also supra* ¶ 12.

15. Upon information and belief, Defendant Craig G. Naylor is a member of the Executive Committee and the Board of Directors, as well as being the Lead Independent Director & Chair of the Compensation & Executive Development Committee, and is thus a named fiduciary of the Plan under ERISA § 3(21(A), 29 U.S.C. § 1002(21)(A), and ERISA § 409(a), 29 U.S.C. § 1109(a).

16. Upon information and belief, Defendant David N. Farr is a member of the Executive Committee and the Board of Directors, as well as being the Chair of the Corporate Governance & Public Issues Committee, and is thus a named fiduciary of the Plan under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and ERISA § 409(a), 29 U.S.C. § 1109(a).

17. Upon information and belief, Defendant Martin E. Welch is a member of the Executive Committee and the Board of Directors, as well as being Chair of the Audit Committee, and is thus a named fiduciary of the Plan under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and ERISA § 409(a), 29 U.S.C. § 1109(a).

18. In addition, upon information and belief, James P. Whitson is the Chief Tax Officer of Delphi, and has, at certain times, signed forms as "the individual signing as Plan Administrator," and is thus a fiduciary of the Plan under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and ERISA § 409(a), 29 U.S.C. § 1109(a).

FACTUAL ALLEGATIONS

A. Delphi's Bankruptcy and Intention for Involuntary Termination of the Plan

19. Delphi, a global manufacturer of automobile components, was originally an operating unit of General Motors Corporation ("GM"). GM was the original sponsor of the Plan. Delphi was incorporated in 1998 and became independent from GM in 1999. When Delphi was spun off in 1999, it assumed responsibility for maintaining the pension plans for all Delphi employees.

20. In October 2005, Delphi filed for Chapter 11 bankruptcy.

21. Delphi's pension obligations have been a consistent obstacle to its ability to emerge from bankruptcy. Because the Plan is underfunded and therefore is a potential creditor with claims against Delphi and because Defendants, as both executives for Delphi and named fiduciaries of the Plan, have duties both to their employer (on the one hand) and to act in the sole interests of the Plan participants and beneficiaries (on the other), Delphi's financial distress has placed Defendants in a conflicted situation. In 2006, this conflict prompted the Plan's named

fiduciaries partially to remove themselves in favor of a conflict-free fiduciary, who was appointed for the limited purpose of filing claims against Delphi in the bankruptcy. Upon information and belief, however, this appointment did not delegate to the independent fiduciary the Plan Administrator's obligations concerning any Plan termination proceedings or the method of any Plan termination. Indeed, at the time of the appointment of the independent fiduciary for purposes of filing bankruptcy claims in 2006, Delphi purported to have no intention of terminating the Plan.

22. In a recent bankruptcy court filing, however, Delphi has indicated it will seek to emerge from bankruptcy by relieving itself of its obligations to the Plan. The bankruptcy filing states that the Plan shall be terminated. More specifically, according to the bankruptcy filing, Delphi expects to enter into an agreement with the Pension Benefit Guaranty Corporation ("PBGC"), whereby the PBGC will initiate involuntary termination proceedings, taking over responsibility for the Plan.

23. The PBGC administers the federal government's pension termination insurance program. In this capacity, when an underfunded pension plan is terminated, the PBGC is responsible for guaranteeing the benefits of the plan, but (as the PBGC sees its charge) *only* up to certain statutory maximums and subject to various other onerous statutory limitations. Under these restrictions, if the Plan is terminated, as many as 15,000 of the Plan's participants and beneficiaries could lose between 30 to 70 percent of their pensions. While the PBGC has the ability to commence termination proceedings under ERISA § 4042, 29 U.S.C. § 1342, it does not act as a fiduciary for participants when it does so. Nothing in this Complaint should be taken as a critique of the PBGC, which, as courts have recognized, operates under conflicting priorities.

See, e.g., *In re Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 201 (2d Cir. 1987) (noting that "while PBGC acts on behalf of all pension plan beneficiaries including the members of the plans at issue here, PBGC's interest in terminating financially unsound plans as quickly as possible to minimize its losses conflicts with the participants' interest in continuing their particular plan").

B. General Mechanics of Plan Termination Under ERISA

24. As noted, Delphi has announced in the bankruptcy case an intention to terminate Plaintiffs' pension plan. Under ERISA, the Plan can be terminated "only by proceedings under 29 U.S.C. Section 1341 or 1342." *In re UAL*, 443 F.3d 565, 572 (7th Cir. 2006).

25. The majority of plan terminations occur at the behest of the *plan sponsor* and are subject to ERISA § 4041, 29 U.S.C. § 1341. These terminations take one of two forms: a "standard termination" under § 1341(b), or a "distress termination" under § 1341(c). Only a distress termination -- that is, a termination of plan under circumstances where the plan is in "distress" due to serious under-funding -- seems possible under the present facts, but both forms offer a number of procedural safeguards.

26. For example, § 1341 imposes a mandatory 60-day notice requirement regardless of whether a "standard" or "distress" termination is pursued. Specifically, the plan administrator -- "[n]ot less than 60 days before the proposed termination date" -- must provide each "affected party . . . a written notice of intent to terminate stating that such termination is intended and the proposed termination date." 29 U.S.C. § 1341(a)(2). Thus, the very earliest a § 1341 termination can occur is two months after all affected parties have received notice of the plan administrator's intent to terminate.

27. Even with satisfaction of the notice requirement and even if Delphi's executives remained as Plan Administrator, a so-called "standard termination" is unlikely to occur for a very simple reason: in order to effectuate such a termination, the Plan must be "sufficient for benefit liabilities (determined as of the termination date)," *see* 29 U.S.C. § 1341(b)(1)(D), a criteria that the Plan surely cannot satisfy.

28. A "distress termination," on the other hand, while not precluded under the facts here, is even more laden with procedural requirements, and likely would result in what is known as an involuntary termination proceeding under § 1342. Apart from notice (29 U.S.C. § 1341(a)(2)) and actuarial certification requirements (§ 1341(c)(2)(A)), the PBGC in a distress termination under § 1341 must determine that one of four "distress criteria" are met, *see* 29 U.S.C. § 1341(c)(2)(B); furthermore, in the case of a Chapter 11 reorganization, the bankruptcy court must hold a contested hearing and find that, "unless the plan is terminated, [the debtor] will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the Chapter 11 reorganization process," *see* 29 U.S.C. § 1341(c)(2)(B)(ii). And even if all of these requirements are satisfied, the PBGC must then determine that the plan is sufficient to pay guaranteed benefits; if it is unable to make such a determination – which would likely be the case here – the PBGC must initiate proceedings under § 1342. *See* 29 U.S.C. § 1341(c)(3)(B).

29. In light of the likely unavailability of termination under § 1341, the bankruptcy reorganization plan proffered by Delphi envisions a so-called "involuntary termination" under ERISA § 4042, 29 U.S.C. § 1342. Section 1342 provides for an adversarial termination process that offers a number of procedural and substantive protections to pension plan participants -- but

each rests on the Plan Administrator exercising its authority in the interests of the participants and beneficiaries.

30. The typical involuntary termination requires the PBGC to file an action in federal district court seeking to terminate a plan. In order to avail itself of this option, the PBGC, as a threshold matter, must first determine that one of the following four conditions is satisfied:

- the plan has not met the minimum funding standard required under section 412 of the Internal Revenue Code of 1986 [26 USCS § 412], or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of such Code [26 USCS § 6212] has been mailed with respect to the tax imposed under section 4971(a) of such Code [26 USCS § 4971(a)];

- the plan will be unable to pay benefits when due;

- the reportable event described in section 4043(c)(7) [29 USCS § 1343(c)(7)] has occurred; or

- the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

29 U.S.C. § 1342(a).

31. Importantly, the PBGC may not cavalierly make a § 1342(a) finding and expect it to be honored in court, but rather must develop an administrative record that reflects its careful consideration of the relevant factors. *See Pension Benefit Guaranty Corp. v. Rouge Steel Co.*, 2006 U.S. Dist. LEXIS 2685, at *14 (E.D. Mich. Jan. 10, 2006) (vacated PBGC's termination decision and remanding to agency because "the administrative record [did] not indicate that all relevant factors [had] been considered"; "without a fully developed administrative record, the court cannot fully ascertain whether or not it was reasonable for PBGC to anticipate that its

liability would be unreasonably increased, as stated in 29 U.S.C.A. § 1342 and as argued by PBGC in support of their motion").

32. Assuming the PBGC has undertaken a thorough § 1342(a) analysis and determines that termination is appropriate, the PBGC must then notify *the plan administrator* of its intent to terminate and provide to it a copy of the administrative record. 29 U.S.C. § 1342(c)(1), (3). This notification usually takes the form of a "Notice of Determination" whereby the PBGC states its justification for its termination decision, how it intends to proceed, and the proposed plan termination date. *See Association of Flight Attendants-CWA, AFL-CIO v. Pension Benefit Guaranty Corp.*, 2006 U.S. Dist. LEXIS 1318, at *13 (D.D.C. Jan. 13, 2006). At this point, either the PBGC or the *plan administrator*, if determined to be in the best interests of the plan participants, may apply to the "the appropriate United States district court" for the appointment of a plan trustee to administer the plan. *See* 29 U.S.C. § 1342(b).

33. After having satisfied the statute's notice requirement, and with a trustee in place (if appointed), only then may the PBGC "apply to the appropriate United States *district court* for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund." 29 U.S.C. § 1342(c)(1) (emphasis added). The PBGC's application to the district court, however, in no way guarantees termination. First, it is subject to challenge by the plan trustee. *See* 29 U.S.C. § 1342(c)(1) ("If the trustee . . . disagrees with the determination of the [PBGC] [to terminate the plan], he may intervene in the proceeding relating to the decree."). Second, regardless of whether the trustee mounts a challenge to the PBGC's determination, the court does not simply accord blind deference to the

PBGC's termination findings. *See In Re UAL Corp.*, 468 F.3d 444, 450 (7th Cir. 2006) (in acting under § 1342, "[a]ll the PBGC does is commence litigation, and its position is no more entitled to control than is the view of the Antitrust Division when the Department of Justice files suit under the Sherman Act").

34. In short, an involuntary termination under 29 U.S.C. § 1342 can only be effectuated by a district court, is rife with procedural hurdles for the PBGC, and contemplates the *plan administrator* acting to protect the participants and beneficiaries through notice of the termination and working to ensure appointment of a trustee who can then advocate in the termination proceedings on behalf of the participants and beneficiaries.

C. Summary Termination Procedures

35. Notwithstanding the notice and hearing safeguards normally required by § 1342, the PBGC may, in a narrow circumstance, terminate a plan under § 1342 outside of a formal district court adjudication and adversarial process. The PBGC can utilize so-called "summary termination" procedures if the PBGC and the *plan administrator* agree between themselves to terminate the plan and if they agree on the appointment of a trustee:

> If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee *without proceeding in accordance with the requirements of this subsection* (other than this sentence) the trustee shall have the power described in subsection (d)(1) and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3).

29 U.S.C. 1342(c)(1) (emphasis added)

36. Section 1342(c) thus makes the role of *plan administrator* -- not the plan sponsor -- even more critical in summary proceedings. In such proceedings, the administrator can

exercise the awesome power to negotiate and to reach an agreement with the PBGC to completely bypass the protections afforded by the district court adjudication process and summarily terminate the plan.

37. Congress would not have conferred this summary termination power, which, again, does away with the notice and hearing safeguards that apply to a typical § 1342 termination, unless it expected the plan administrator in its decision-making concerning termination procedures and the method of termination to act singly in the interests of the participants and beneficiaries.

D. Plan Administrator's Fiduciary Duties with respect to this Plan's Termination

38. As previously alleged, Defendants serve as the Plan Administrator and are fiduciaries under the Plan.

39. Defendants, in their dual roles as members of Delphi's Executive Committee and Plan fiduciaries wear "two hats." "When employers wear two hats as employers and administrators, they assume fiduciary status only when and to the extent that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA." *Sys. Council EM-3 v. AT&T Corp.*, 972 F. Supp. 21, 30 (D.D.C. 1997) (internal quotation marks and citations omitted). As such, Defendants have a fiduciary duty in any functions assigned to them as Plan Administrator, but not as employers.

40. A plan sponsor's decision to terminate a plan is a "settlor function," and, as such, is unconstrained by any fiduciary duties the plan sponsor may owe in its role as plan administrator. *See Beck v. PACE Int'l Union*, 551 U.S. 96, 101 (2007) ("It is well established in this Court's cases that an employer's decision *whether* to terminate an ERISA plan is a settlor

function immune from ERISA's fiduciary obligations.") (emphasis in original). By contrast, a plan administrator's selection of a particular *method of plan termination* is a fiduciary function. *Id.; see also Larson v. Northrop Corp.*, 21 F.3d 1164, 1169 (D.C. Cir. 1994) ("Although the decision to terminate a pension plan is generally not subject to the fiduciary responsibility provision of ERISA, the Department of Labor has emphasized that activities undertaken to implement the termination decision are generally fiduciary in nature.") (internal quotation marks omitted); *Waller v. Blue Cross*, 32 F.3d 1337, 1342 (9th Cir. 1994) ("By alleging that Blue Cross breached its fiduciary duty in the selection of annuity providers, plaintiffs attack not the decision to terminate, but rather the implementation of the decision. We believe that this distinction is dispositive and hold that Blue Cross acted in a fiduciary capacity when choosing annuity providers to satisfy plan liabilities.") (internal citations and quotations omitted).

41. Plaintiffs' lawsuit does not seek to challenge a decision by the employer to terminate a plan; in fact, Delphi's bankruptcy filing clearly states that any termination will be an "involuntary" termination under § 1342. As explained, § 1342 entrusts to the *plan administrator* -- not the employer -- the ability either to contest an involuntary termination in the district court (through the appointment of a plan trustee), or to agree with the PBGC to summarily terminate the Plan and bypass the court adjudication process. Plaintiffs' lawsuit alleges that the current fiduciaries -- given their conflict of interest -- are unfit either (a) to protect the participants' and beneficiaries' rights during any district court involuntary termination proceeding, or (b) to decide with the PBGC to pursue summary termination and thereby waive the significant procedural and substantive protections provided under ERISA to Plan participants and their beneficiaries during Plan termination proceedings.

42. Indeed, Delphi has itself recognized how a distress situation can compromise its ability to fulfill its fiduciary duties as plan administrator. In January 2006, in light of the obvious conflict of interest inherent in its Executive Committee retaining fiduciary powers and responsibilities for the Plan while Delphi pursued bankruptcy, Delphi delegated certain limited fiduciary responsibilities to Fiduciary Counselors, Inc. ("Fiduciary Counselors"). Specifically, Delphi delegated to Fiduciary Counselors the limited responsibility to act on behalf of the Plan *solely* with respect to pursuing so called "funding claims" against Delphi. The agreement between Delphi and Fiduciary Counselors states, in relevant part, as to the "Scope of Engagement": "The Company hereby retains the Independent Fiduciary to exercise authority of an independent fiduciary and 'investment manager' on behalf of the Plans solely with respect to the determination of whether and how to pursue claims, if any, against the Company that any of the Plans may have if the Company fails to make a legally required contribution to such Plan when due ('Funding Claims')." Letter Agreement between Delphi and Fiduciary Counselors, ¶ 1(A).

43. This appointment recognized that when the interests of Delphi conflict with those of the Plan participants, the remedy is to appoint an independent fiduciary to assert and protect the interests of the participants. However, Defendants expressly limited the scope to "funding claims" matters and retained the significant power to conduct negotiations and make agreements regarding any involuntary termination and the method of such termination.

E. Delphi's and the Plan Administrator's Conduct Surrounding the Threatened Termination of the Plan

44. As Delphi's bankruptcy proceedings progressed, Delphi apparently decided that it preferred to, and that there might be a path to, unburden itself of its pension obligations. On

information and belief, Delphi then began negotiations with the PBGC regarding the Plan.

45. In September 2008, Delphi announced that it had struck a deal with GM and the PBGC, under which the interests of both Delphi and a different pension plan for Delphi's hourly workers ("the Hourly Plan") were placed ahead of the interests of the Plan. The hourly workers in the Hourly Plan were, during their GM and Delphi tenures, unionized; the participants in Plaintiffs' Plan, however, were not. Under the deal concerning the Hourly Plan, Delphi could potentially transfer up to $3.4 billion in net pension liabilities from its Hourly Plan to a GM pension plan. The first part of that transfer was made on September 29, 2008, when GM assumed $1.7 billion of pension liability for the hourly workers from Delphi. The remaining amount is contingent on Delphi's emergence from bankruptcy.

46. In contrast, none of the liability for Plaintiffs' Plan was transferred or funded or in any other way alleviated through agreements or negotiations with GM and the PBGC. Upon information and belief, Defendants did not seek any funding from GM for the Plan during these negotiations.

47. In a September 12, 2008 press release, Delphi's Chief Restructuring Officer stated that Delphi "remained committed to fully funding our pension plans." Defendants have failed to explain to the Plan's participants and beneficiaries why they believe the Plan's termination now is necessary, what steps they have taken in order to try to avoid termination, and when they finally decided that Plan termination was necessary.

48. On June 1, 2009, Delphi announced, through a bankruptcy filing, that it had developed "a workable pension solution for its defined benefit plans." *See* Delphi June 1, 2009 Press Release, *Delphi Reaches Agreements to Emerge From Chapter 11 Reorganization*. While

Delphi has not revealed the precise details of this “solution,” at the center of this purported “solution” is a deal whereby the Defendants assure that Delphi emerges from bankruptcy, the PBGC gets a pre-petition claim against Delphi, and the pensions of Delphi’s unionized workers are protected through a transfer to GM. The bankruptcy filing indicates that the Plan will, through involuntary termination, devolve to the PBGC, with the attendant loss in benefits (*see supra* ¶ 23) to the Plan’s participants and beneficiaries.

49. To the extent Defendants have engaged in negotiations with the PBGC with regard to the method of any involuntary termination of the Plan or any other matters concerning the Plan’s termination, Defendants have failed to disclose to Plan participants and beneficiaries the contents and nature of its negotiations with the PBGC regarding the Plan.

CLAIM FOR RELIEF

Breach of Fiduciary Duty in Violation of ERISA, 29 U.S.C. § 1104(a)(1)(A)&(B)

50. Plaintiffs incorporate the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

51. At all relevant times, Defendants acted as fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), by exercising authority and control with respect to the administration of the Plan.

52. ERISA § 404(a)(1), 29 U.S.C.§ 1104(a)(1), states, in relevant part, that:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --
>
> (A) for the exclusive purpose of
>
> (i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims . . . .

53. "The duties charged to an ERISA fiduciary are 'the highest known to the law.'" *Gregg v. Transp. Workers of Am. Int'l*, 343 F.3d 833, 841 (6th Cir. 2003) (*quoting Chao v. Hall Holding Co.*, 285 F.3d 415, 426 (6th Cir. 2002)). Among these duties is a "'duty of loyalty' pursuant to which 'all decision regarding an ERISA plan must be made with an eye single to the interests of the participants and beneficiaries.'" *Id.* at 840 (*quoting Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6th Cir. 1995)). Also, fiduciaries are charged with the "prudent man" standard, under which they have an "'unwavering duty' to act both 'as a prudent person would act in a similar situation' and 'with single-minded devotion' to those same plan participants and beneficiaries." *Id.* at 840 (*quoting Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1162 (6th Cir. 1988)). ERISA further requires that a fiduciary " 'act for the exclusive purpose' of providing benefits to plan beneficiaries." *Id.* at 841 (*quoting Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982)).

54. Courts have consistently recognized that fiduciaries have an obligation under ERISA "to avoid placing themselves in a position where their acts as directors or officers of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees." *McMahon v. McDowell*, 794 F.2d 100, 110 (3d Cir. 1986) (*quoting Donovan*, 680 F.2d at 271). "This duty may, in some circumstances, require the fiduciary to step aside in favor of a neutral referee, or at the least, to conduct an explicit inquiry into the potential for a conflict of interest." *Id.*

55. This is a "rigorous standard," taken from the "common-law conception of a trustee." *Id.* (*citing* Raymond, ERISA Trusts and Tender Offers, 13 Sec. Reg. L. Rev. 253, 257-59 (1985)). Where a fiduciary fails to remove himself, but his conduct has caused the beneficiaries to doubt his fealty, a court should remove him. The Supreme Court has stated:

> The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed, and may properly be exercised whenever such a state of mutual ill feeling, growing out of his behavior, exists between the trustee, or between the trustee in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the co-trustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated.

May v. May, 167 U.S. 310, 320-21 (1897).

56. The duty of loyalty entails a duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a plan with single-minded devotion to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves, or the plan sponsor.

57. Defendants have breached their duty of loyalty, in particular their duty to avoid conflicts of interest, by continuing to act as fiduciaries upon Delphi's announcement of an intention to terminate the Plan and to negotiate an agreement with the PBGC to prompt an involuntary termination. In such termination proceedings, the Plan Administrator plays a critical role: it determines whether to agree with the PBGC on summary termination and the appointment of a trustee; and, if summary procedures are not invoked, it has the authority to seek the appointment of a trustee who can intervene to challenge in a district court adjudication the PBGC's determination that the Plan must be involuntarily terminated. Defendants' interests as

Delphi officers necessarily favor an agreement for summary termination and, in a non-summary adjudication, disfavor the appointment of a trustee or at least disfavor the appointment of an independent trustee who may challenge the PBGC's determination that involuntary termination is warranted. In contrast, Defendants' interests as Plan fiduciaries necessarily must disfavor an agreement for summary termination or, in a non-summary adjudication, may favor the appointment of an independent trustee who may challenge the PBGC's determination that termination is warranted. Because Defendants are inescapably conflicted in their corporate interests and Plan fiduciary interests with respect to termination issues, they needed to remove themselves as fiduciaries with respect to termination issues. Having failed to do so, they have breached their fiduciary duties and must be removed as fiduciaries in favor of an independent fiduciary.

58. That Defendants have, in fact, failed zealously to guard the participants' and fiduciaries' interests, to the benefit of corporate interests, as is evidenced as well in other conduct, including: (a) Defendants have provided no indication to the participants and beneficiaries that Defendants have sought, as with the Hourly Plan, a resolution to the Plan's underfunding through agreement with GM, as opposed to through Plan termination; (b) Defendants have provided no indication to the participants and beneficiaries that Defendants have sought to use international assets associated with Delphi to resolve the Plan's underfunding, as opposed to through Plan termination; and (c) Defendants have failed to keep participants and beneficiaries apprised of any negotiations with the PBGC concerning Plan termination or other significant events concerning the Plan's benefits.

59. In addition to breaching their fiduciary duties by failing to remove themselves as fiduciaries when they are laboring under a conflict of interest with respect to termination issues, Defendants failure to disclose to participants and beneficiaries information regarding negations with the PBGC and the Plan's possible termination constitutes, even on its own, a breach of fiduciary duties warranting Defendants removal as fiduciaries. A plan fiduciary's duties of loyalty and prudence also includes a duty not to make affirmative, material, untruthful representations to a plan participant or beneficiary and affirmatively to disclose to them significant events affecting plan benefits and its administration. *See, e.g.*, *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 548 (6th Cir. 1999) ("the 'duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.'") (*quoting Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993)); *see also* Restatement Third of Trusts § 82(1) (Tentative Draft No. 4, 2005) (a trustee has a duty to inform beneficiaries of basic information concerning the trusteeship, significant changes in their beneficiary status, and to keep beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests); *cf. Beck*, 551 U.S. at 101 (the common law of trusts "serves as ERISA's backdrop") (*citing Pegram v. Herdrich*, 530 U.S. 211, 224 (2000); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996)).

60. As a direct and proximate result of Defendants' breaches of fiduciary duty, negotiations are ongoing or imminent over the Plan's termination without any representation of

the participants' and beneficiaries' best interests. Moreover, as a result of Defendants' breaches of fiduciary duty in potentially seeking to have the PBGC involuntarily terminate the plan without the necessary procedural protections, failing to fully and completely disclose its negotiations with the PBGC, and failing to appoint an independent fiduciary for the Plan, the Plan's participants and beneficiaries face imminent harm in the potential catastrophic loss of significant pension benefits without procedural protections to which they are entitled.

61. Pursuant to ERISA § 502(a)(3)(A), 29 U.S.C. § 1132(a)(3)(A), Plaintiffs are entitled to bring this action, requesting that the Court enjoin Defendants from continuing to violate their fiduciary duties under ERISA. Pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), and ERISA § 409(a), 29 U.S.C. 1109(a), the Court is authorized to remove the current fiduciaries and appoint an independent fiduciary to function as Plan Administrator until such time as Defendants no longer face a conflict of interest.

WHEREFORE, Plaintiffs respectfully request that this Court issue:

A. A judgment enjoining Defendants from any act or practice that violates ERISA or the terms of the Plan.

B. A Temporary Restraining Order or Preliminary Injunction maintaining the status quo pending resolution of this complaint, thereby prohibiting Defendants from making any agreement to terminate the Plan under 29 U.S.C. § 1342(c); a separate motion seeking such relief likewise will be filed.

C. The appointment of an independent fiduciary for the Plan for purposes of negotiating any Plan termination and protecting participants' and beneficiaries' rights in any termination proceedings.

D. Any other equitable relief that is available and appropriate.

E. Attorneys fees and other expenses and costs pursuant to 29 U.S.C. § 1132(g).

Respectfully submitted,

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