Case No. 19-1419

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS BLACK, CHARLES CUNNINGHAM, KENNETH HOLLIS, AND DELPHI SALARIED RETIREES ASSOCIATION,

Plaintiffs-Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan (Judge Arthur J. Tarnow)

APPELLEE'S RESPONSE TO APPELLANTS' SUPPLMENTAL MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

C. Paul Chalmers, Acting General Counsel
Kartar S. Khalsa, Deputy General Counsel
John A. Menke
C. Wayne Owen, Jr.
Craig T. Fessenden
Assistant General Counsels
Erin C. Kim
Attorney

PENSION BENEFIT GUARANTY CORPORATION
Office of the General Counsel
1200 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 229-3059
Facsimile: (202) 326-4138
Emails: menke.john@pbgc.gov
and efile@pbgc.gov

Attorneys for Appellee-Defendant Pension Benefit Guaranty Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

U.S. Codes

Other Authorities

INTRODUCTION

Appellee, Pension Benefit Guaranty Corporation ("PBGC"), as requested by the Court, files this response to the Appellants' Supplemental Memorandum of Law in Support of Petition for Rehearing *En Banc* (the "Appellants' Supplemental Memo").

As argued at greater length in PBGC's response to Appellants' Petition for Panel Rehearing or Rehearing *en banc* ("PBGC's Response"), a petition for rehearing *en banc* is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent. 6th Cir. I.O.P. 35(a); Fed. R. App. P. 35. Neither the Appellants' Petition nor their Supplemental Memo satisfies the stringent standards for rehearing *en banc.*

First, Appellants claim that the Panel's decision in the original opinion and the amended opinion (collectively, the "Opinions") that there was no due process violation is inconsistent with the Supreme Court's decision in *Nachman Corp. v. PBGC*.[1] However, the *Nachman* court did not address participants' due process rights, and there is nothing in *Nachman* to support Appellants' contention that they are entitled to payment in excess of the limits established by Congress in 29 U.S.C.

[1] *See* Appellants' Supplemental Memo 1-11 (citing *Nachman Corp. v. PBGC,* 446 U.S. 359 (1980), *aff'g*, 592 F.2d 947 (7th Cir. 1979)).

§ 1322. Both the Panel and PBGC agree that, consistent with *Nachman,* the participants of the Delphi Retirement Program for Salaried Employees (the "Salaried Plan" or the "Plan") had vested, nonforfeitable benefits, as defined in ERISA. PBGC has been paying those nonforfeitable benefits up to the Congressionally-mandated guarantee limit for over ten years, using $1.5 billion of its own funds in addition to the assets that were in the Plan at the time of termination. Therefore, Appellants cannot establish that the Plan termination or PBGC's guarantee of Appellants' benefits resulted in any taking. The Panel was correct in holding that there was no due process violation.

The Appellants also assert that rehearing *en banc* is warranted because the Panel failed to review the statutory grounds under 29 U.S.C. § 1342(c)(1). That assertion is incorrect given that the Panel clearly found that the requirements of that subsection were satisfied by the agreement to terminate the plan between PBGC and Delphi, the plan administrator (the "Termination Agreement"). And Appellants have repeatedly stated that they are not seeking a rehearing on that issue. Therefore, Appellants have no remaining basis to seek the Court's review on § 1342(c)(1) grounds.

Accordingly, Appellants' petition for rehearing *en banc* should be denied.

ARGUMENT

I. Appellants fail to establish that the Panel decision, which held that no due process violation occurred, is erroneous or that it conflicts with a decision of the Supreme Court or the Sixth Circuit.

Despite the Panel's clear decision in the Opinions, Appellants continue to argue in their Supplemental Memo that the Panel erred in holding that there was no due process violation and that such holding conflicts with the Supreme Court's decision in *Nachman.* Appellants' Supplemental Memo, 2-10. Appellants' arguments remain legally and factually incorrect.

First, as the Panel made clear in both Opinions, to state even a *prima facie* case for a due process violation, Appellants must show that the government has taken something from them. Amended Opinion, 12-16. Throughout the 11-year history of this case, Appellants have been unable to make that showing. That is because PBGC did not take anything that the Plan participants had before the Salaried Plan was terminated and PBGC assumed responsibility for paying guaranteed benefits to Plan participants.

Nevertheless, Appellants appear now to be asserting that PBGC has taken vested, nonforfeitable benefits from them. Appellants' Supplemental Memo, 2-10. That assertion is unfounded. In the Amended Opinion, the Panel held that that was not the case, and that by receiving their funded benefits from the Plan and their guaranteed benefits from PBGC, the Appellants have received all that they have

any legitimate claim of entitlement to.[2] Amended Opinion 13-14, 16. Appellants, however, claim that the decision by the Panel is contrary to the Supreme Court's decision in *Nachman.* That is incorrect. The issue in *Nachman* was whether a plan provision limiting the employer's liability to funded benefits rendered those benefits forfeitable for purposes of calculating the amounts payable by PBGC. In holding that it did not, the *Nachman* court in no way suggested that those nonforfeitable benefits must be paid in full by PBGC despite the limits set by Congress. Indeed, the *Nachman* court noted that, with respect to nonforfeitable benefits, "it is the claim to the benefit, rather than the benefit itself, that must be 'unconditional' and 'legally enforceable against the plan.' It is self-evident that a

[2] Appellants, citing *Wilmington Shipping Co. v. New England Life Insurance Co*., also argue that they are entitled to benefits beyond the guarantee limit under Title IV of ERISA based on post-termination investment gains. *See* Appellants' Supplemental Memo, 11 (citing *Wilmington Shipping,* 496 F.3d 326, 336 (4th Cir. 2007)). However, the statute is clear that Appellants do not have a right to those gains. 29 U.S.C. § 1344(c). Appellants' reliance on *Wilmington Shipping* for this proposition is misplaced. Such an interpretation is inconsistent with the clear language of 29 U.S.C. §§ 1322(c) and 1344(c). Other circuits have rejected that interpretation. *See Paulsen v. CNF Inc*., 559 F.3d 1061, 1074-75 (9th Cir. 2009) (declining to follow *Wilmington Shipping,* stating that the 4th Circuit's interpretation is inconsistent with the statute); *Lewis v. PBGC*, 912 F.3d 605, 611-12 (D.C. Cir. 2018)(stating that "[b]y statute, the pilots are entitled to their guaranteed benefits, while Congress directed that any post-termination increase or decrease in the value of plan assets should go to the Corporation [. . .] Because § 1344(c) does not depend on whether the Corporation acts as statutory trustee of the terminated plan, any post-termination change in the value of plan assets must be 'credited to, or suffered by' the Corporation in its capacity as guarantor. 29 U.S.C. § 1344(c)")(emphasis omitted).

claim may remain valid and legally enforceable even though, as a practical matter, it may not be collectible from the assets of the obligor". *Nachman Corp*., 446 U.S. at 371. Both the Panel and PBGC agree that, as *Nachman* held, the Salaried Plan participants had vested, nonforfeitable benefits, as defined in ERISA. PBGC has been paying those benefits up to the guarantee limit for over ten years.

Appellants nevertheless argue that PBGC took participants' vested, nonforfeitable pension benefits. As a matter of law and fact, PBGC that is not the case. Just before, and immediately after PBGC became statutory trustee of the Plan, the Salaried Plan held some $4.5 billion of vested, nonforfeitable benefits.[3] Consistent with *Nachman,* and as required by Title IV of ERISA, PBGC took account of those vested, nonforfeitable benefits when calculating the amount of guaranteed benefits and, if higher, the amount of funded benefits payable to the Salaried Plan participants.

The fundamental question for this Court's taking analysis, which *Nachman* does not address, is not whether the Appellants lost vested, nonforfeitable benefits, but rather, whether they lost *payable* vested, nonforfeitable benefits. While Appellants may have expected to receive the full value of their vested,

[3] The precise amount is $4,530,378,845. *See* The Delphi Actuarial Case Memo and Report (September 30, 2015) for the Delphi Salaried Plan, *available at*, https://www.pbgc.gov/documents/Redacted-Delphi-Salary-Actuarial-Case-Memo.pdf.

nonforfeitable benefits in the form of monthly payments throughout their retirement, that expectation can only be a legitimate claim of entitlement if there are assets available to make those payments.[4]

In this case, on the date the Salaried Plan was terminated, it held only approximately $2.5 billion in assets[5] to pay the $4.5 billion in vested, nonforfeitable benefits that had accumulated in the Plan. Delphi, the Salaried Plan sponsor, was liquidating in bankruptcy and unable to make any further contributions to the Plan. Had the Salaried Plan terminated in the absence of the

---

[4] In addition to their due process argument, Appellants also assert incorrectly that they have a right to restoration of the Plan under 29 U.S.C. § 1347. Appellants' Supplemental Memo, 8. This is a new matter that Appellants have raised for the first time here, and it has no connection with their due process argument. In any event, Appellants do not explain how the Plan could be restored to its pre-termination status, as contemplated by § 1347, given that Delphi liquidated years ago. That provision has only been invoked to restore a plan to former sponsors who were who were continuing in business and could fund the plan going forward. *See PBGC v. LTV Corp*., 496 U.S. 633 (1990), *rev'g*, 875 F.2d 1008 (2d Cir. 1989); Press Release, PBGC, PBGC to Restore RG Steel Pension Plans to Renco Group (March 4, 2016), *available at*, https://www.pbgc.gov/news/press/releases/pr16-01. That is not the case here. Indeed, this Court noted the efforts PBGC and others took at the time to find someone to assume the Plan, all of which were unsuccessful. Amended Opinion 17-19. Appellants also mention a presidential memo directed to three Cabinet secretaries. The possibility that the executive branch or Congress might consider issues regarding the Salaried Plan in the future has no bearing on this request for rehearing *en banc*.

[5] The precise amount is $2,513,034,548. *See* the Delphi Actuarial Case Memo and Report (September 30, 2015) for the Delphi Salaried Plan, *available at*, https://www.pbgc.gov/documents/Redacted-Delphi-Salary-Actuarial-Case-Memo.pdf.

insurance program administered by PBGC, the Plan would have simply distributed its insufficient assets in the priority order set out in the Plan document, resulting in Plan participants receiving far lower benefits than they have, with some of them receiving no benefits at all.[6] It is to the benefit of Plan participants that Congress created PBGC, which injected $1.5 billion from its own funds so that, instead of only $2.5 billion being available to pay the Plan's vested, nonforfeitable benefits, more than $4 billion[7] became available to pay those benefits.[8]

---

[6] Because the allocation scheme in the Plan document is the same as the asset allocation structure that PBGC is required to follow under 29 U.S.C. § 1344, the assets would have run out in what is known as Priority Category 3 – that is, the benefits payable to those participants who had actually retired or who could have retired on or before July 31, 2006 (three years before the Plan was terminated) – and those Priority Category 3 participants would have received only a portion (about 83%) of their vested, nonforfeitable benefits. *See* The Delphi Actuarial Case Memo and Report (September 30, 2015) for the Delphi Salaried Plan, *available at*, https://www.pbgc.gov/documents/Redacted-Delphi-Salary-Actuarial-Case-Memo.pdf. All other participants in the Salaried Plan who retired, or first became eligible to retire, after August 2006, would have received nothing – notwithstanding that their benefits were vested and nonforfeitable – simply because there was no money left to pay them.

[7] The precise amount is $4,008,852,847. *See* The Delphi Actuarial Case Memo and Report (September 30, 2015) for the Delphi Salaried Plan, *available at*, https://www.pbgc.gov/documents/Redacted-Delphi-Salary-Actuarial-Case-Memo.pdf.

[8] Under Title IV of ERISA, every participant is entitled to receive the larger of his or her funded plan benefit, or the maximum guaranteed benefit, which in 2009 was $54,000 per year for a 65-year-old retiree.

In other words, the involvement of the federal government through PBGC's termination of the Plan and guarantee of Appellants' benefits did not result in a taking, but rather a distribution of benefits above and beyond what Appellants would have received absent the Title IV insurance program. Thus, there is no basis for affording them any additional process.

Accordingly, the Court should deny Appellants' petition for a rehearing *en banc* on the Panel's decision that there was no due process violation. The Appellants have neither established that such decision was erroneous nor that it conflicts with a Supreme Court or Sixth Circuit decision.

II. Appellants fail to establish that the Panel decision that PBGC's termination was not "arbitrary and capricious" is erroneous and constitutes a precedent-setting error of exceptional public importance.

Given that the Panel clearly decided that the Termination Agreement satisfied § 1342(c)(1) and that Appellants have stated that they are not seeking rehearing of the Panel's holding on that issue, there is no remaining basis for Appellants to seek a rehearing on § 1342(c)(1) grounds. *See* Amended Opinion, 5-12; Appellants' Petition 4; Appellant's Supplemental Memo, 11. After extensive analysis and discussion of the issue spanning over seven pages of the decision, the Panel concluded that the Termination Agreement satisfied 29 U.S.C. § 1342(c)(1) and that the Termination Agreement obviates the requirement for a court

adjudication. Amended Opinion, 5-12. The Panel's decision on that issue thus eliminated the need for any further review on § 1342(c)(1).[9]

Nonetheless, Appellants allege that because PBGC's Notice of Determination, in addition to stating that the grounds under 29 U.S.C. § 1342(a) grounds were satisfied, also states that the Plan must be terminated under § 1342(c), PBGC "engaged in revisionist history." Appellants' Supplemental Memo, 12. As clearly prescribed under 29 U.S.C. § 1342, for all cases involving terminations under § 1342, the PBGC decisionmaker first considers whether § 1342(a) grounds are satisfied. Then, given that it is unknown at that time whether the Plan administrator will sign the termination agreement, or whether court adjudication will be necessary, the decisionmaker considers the § 1342(c)

[9] Appellants argue that the drafters of Title IV of ERISA did not contemplate that most plan terminations would be by agreement or that PBGC would prefer to enter into a termination agreement in order to avoid the expense and delay of litigation. Appellants' Supplemental Memo at 14. To the contrary, through § 1342(c)(1), Congress laid out two alternative procedures for plan terminations and, in accordance with those procedures, most plan terminations have been by agreement since the creation of PBGC. In *PBGC v. Heppenstall Co*., one of the first appellate cases to address termination under § 1342, the Third Circuit explicitly stated that "[t]he plain language of section 1342(c) gives the employer as plan administrator the option of agreeing with PBGC on a termination date, and thereby eliminating entirely any litigation delay." *Heppenstall Co*., 633 F.2d 293, 300 (3d Cir. 1980). Further, as PBGC stated in its Appellee Brief and as the Panel discussed in its discussion of Count 1, persuasive authority from other circuits clearly supports the view that Congress dispensed with the necessity of judicial review of grounds under § 1342(c) where a plan administrator and PBGC enter into a termination agreement. *See* Appellee's Br., 24-28; Amended Opinion, 10-12.

grounds. Once the decisionmaker has determined that both § 1342(a) grounds and § 1342(c) grounds are satisfied, PBGC issues its notice of determination.

Accordingly, PBGC included grounds under § 1342(c) in its Notice of Determination in this case because PBGC had not yet reached an agreement with Delphi to terminate the Plan. Appellee's Br. 14-15 (Doc #16); RE 52, AR 33 (Sealed); AR 1-9, RE 53, Page ID # 1601-09. In addition, PBGC filed suit against Delphi under section 1342(c)(1) to terminate the Plan, in case Delphi did not agree to termination, and the Plan would instead have to be terminated through court adjudication. *See PBGC v. Delphi Corp*., Case No. 2:09-cv-12876 (E.D. Mich., filed July 22, 2009). Upon the execution of the Termination Agreement by Delphi on August 10, 2009, there was no longer a case or controversy for judicial review because the Termination Agreement between PBGC and Delphi satisfied § 1342(c).[10] So PBGC dismissed its lawsuit against Delphi, and no longer needed to demonstrate, or even consider, whether § 1342(c) grounds were present. *See PBGC v. Delphi Corp*., No. 2:09-cv-12876, RE 5, Page ID# 16 (E.D. Mich. Aug. 7, 2009). In arguing that the Panel reviewed PBGC's termination decision on the

[10] The Termination Agreement became fully executed upon PBGC's countersignature on August 10, 2009. *See* Termination Agreement, Menke Decl., Ex. 5, RE 304-7, Page ID # 11610-13. Delphi also entered into termination agreements with PBGC for each of Delphi's five other pension plans.

wrong grounds, Appellants seek to revisit the § 1342(c) grounds and ignore the Panel's clear holding that the Termination Agreement satisfied § 1342(c).[11]

Appellants fail to establish that the Panel was erroneous in deciding that PBGC's termination decision was not arbitrary and capricious or that the Panel's holding constitutes precedent-setting error of exceptional public importance. Therefore, the Court should deny the Appellants' Petition for rehearing *en banc*.

[11] As argued in PBGC's Response and correctly decided by the Panel, PBGC also notes that PBGC's decision to terminate the Plan is not arbitrary or capricious under § 1342(a) or § 1342(c) grounds because its determination is fully supported by the Administrative Record. *See* PBGC's Response, 6-10; Amended Opinion, 17-19. To the extent that the Court is interested in further discussion on that issue, PBGC refers the Court to PBGC's Appellee Br, 48-56, and PBGC's Response, 10.

CONCLUSION

For the foregoing reasons, this Court should deny the Appellants' Petition for a Rehearing *en banc*.

Date: January 28, 2021

Respectfully submitted,

/s/ John A. Menke
C. Paul Chalmers, Acting General Counsel
Kartar S. Khalsa, Deputy General Counsel
John A. Menke
C. Wayne Owen, Jr.
Craig T. Fessenden
Assistant General Counsels
Erin C. Kim
Attorney
PENSION BENEFIT GUARANTY CORPORATION
Office of the General Counsel
1200 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 229-3059
Fax: (202) 326-4138
E-Mail: menke.john@pbgc.gov and efile@pbgc.gov
Attorneys for Defendant

Local Counsel:

Matthew J. Schneider
UNITED STATES ATTORNEY
Peter A. Caplan
Chief of the Civil Division
Eastern District of Michigan
211 West Fort Street, Suite 2001Detroit, MI 48226
Phone: (313) 226-9784
Email: peter.caplan@usdoj.gov

CERTIFICATE OF COMPLIANCE

I hereby certify that the Appellee's Response to Appellants' Supplemental Memorandum of Law in Support of Petition for Rehearing *En Banc* complies with the type-volume limitation as set forth in Fed. R. App. P. 35(b)(2)(A) because this document contains 2,805 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Times New Roman in 14-point.

/s/ John A. Menke
Attorney for Pension Benefit Guaranty Corporation
Dated: January 28, 2021

CERTIFICATE OF SERVICE

I hereby certify, that, on 28th day of January, 2021, I electronically filed the foregoing **Appellee's Response to Appellants' Supplemental Memorandum of Law in Support of Petition for Rehearing *En Banc*** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Anthony F. Shelley
Timothy P. O'Toole
Dawn E. Murphy-Johnson
Miller & Chevalier Chartered
900 Sixteenth St., N.W.
Black Lives Matter Plaza
Washington, D.C. 20006

/s/ John A. Menke
John A. Menke