REDACTED/PUBLIC VERSION

No. 19-1419

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS BLACK, CHARLES CUNNINGHAM, KENNETH HOLLIS, AND DELPHI SALARIED RETIREE 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)

REPLY BRIEF OF APPELLANTS

Anthony F. Shelley
Counsel of Record
Timothy P. O'Toole
Dawn E. Murphy-Johnson
Miller & Chevalier Chartered
900 Sixteenth St. NW
Washington, DC 20006
Telephone: (202) 626-5800
Facsimile: (202) 626-5801
Email: ashelley@milchev.com

Counsel for Appellants

October 25, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ARGUMENT

I. ERISA DOES NOT AUTHORIZE A TERMINATION BY AGREEMENT (AS ASSERTED IN COUNT 1)

The PBGC repeatedly argues that its termination of the Salaried Plan was lawful because ERISA "expressly" and "clearly" authorizes terminations by agreement. *See* Appellee's Br. 1, 2, 19 (twice), 20 (twice), 21, 22, 24, 25, 28 [hereinafter "PBGC Br."]. But stating those two words over and over again cannot alter reality: there are no express and clear terms in 29 U.S.C. § 1342(c)(1), or even ambiguous ones, that allow the PBGC to terminate a plan through an agreement with a plan administrator, and the PBGC has presented no other basis to overcome the statutory text's requirement of terminations solely through court adjudications.

A. Section 1342(c), by Its Plain Terms, Requires a Court Decree for Termination

In construing the statutory text, it helps to divide § 1342(c)(1) into its five discrete sentences, with the fourth sentence being the controversial one. The PBGC, like the district court, skips over some of the sentences to better to achieve its preferred interpretation (using ellipses to fill the gaps, *see* PBGC Br. 23), robbing the key fourth sentence of context. Sentence by sentence (with sentence sequence noted in added bolded brackets), § 1342(c)(1) states in full:

> **[1]** If the corporation is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after

> issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it *may*, upon notice to the plan administrator, 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. **[2]** If the trustee appointed under subsection (b) disagrees with the determination of the corporation under the preceding sentence he may intervene in the proceeding relating to the application for the decree, or *make application for such decree himself*. **[3]** Upon granting a decree for which the corporation *or trustee* has applied under this subsection the court shall authorize the trustee appointed under subsection (b) (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle. **[4]** 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). **[5]** Whenever a trustee appointed under this title is operating a plan with discretion as to the date upon which final distribution of the assets is to be commenced, the trustee shall notify the corporation at least 10 days before the date on which he proposes to commence such distribution.

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

The first sentence of § 1342(c)(1) notes that, if the PBGC is required by § 1342(a) to *initiate* termination proceedings or otherwise has provided notice of possible termination, then it "may" seek a court adjudication under § 1342(c)(1) to consummate the termination (which it will then succeed in obtaining if certain substantive conditions are met). The PBGC seizes on Congress's use of the word

"may" in sentence **[1]**, as supposedly some indication that "§ 1342(c) permits, but does not require, PBGC to seek a court decree," leaving the door open to alternative, non-judicial routes to termination. PBGC Br. 21.

The word "may" appears in sentence **[1]**, however, only to indicate that the PBGC is not automatically required to complete a termination once it initiates proceedings under § 1342(a). If the word "shall" appeared in sentence **[1]**, then the PBGC would inexorably be required to follow termination to completion, even if – after commencing proceedings under § 1342(a) – it had changed its mind that the plan needed to be terminated. The legislative history makes this point clear: a trustee (appointed in connection with the § 1342(a) initiation of termination proceedings) "administer[s] the plan until the corporation *decides whether the plan should be terminated*." H.R. Rep. No. 93-1280, at 373 (1974) (Conf. Rep.) (emphasis added); *accord* 29 U.S.C. § 1342(d)(1)(A) (noting procedures when the PBGC "fails to apply for a decree under subsection (c)" but had initiated proceedings under subsection (a) and had obtained the appointment of a trustee under subsection (b)). Thus, rather than "may" indicating that the PBGC can use non-judicial alternatives to terminate a plan, the word "may" shows merely that the

PBGC may, or may not, seek to go further down the road of termination once it initiates the termination process.[1]

Sentence **[2]**, which the PBGC insists on skipping (as did the district court), provides that the trustee appointed for the period after termination proceedings were initiated may intervene in the court proceedings the PBGC pursues under § 1342(c)(1) to consummate termination, if the trustee "disagrees" with the PBGC on the need for continuing with the termination process. And of high importance, sentence **[2]** also provides that the trustee *alone* can pursue completion of a termination pursuant to § 1342(c)(1) in the event the PBGC chooses not to do so. Accordingly, Congress anticipated the scenario where the PBGC initiated termination proceedings under § 1342(a) but decided not to proceed further with termination, and the trustee instead could push for termination under § 1342(c)(1). Since § 1342(b)(3) allowed the PBGC and the plan administrator to, by agreement, appoint the trustee who would now be pursuing a termination that the PBGC had not sought to consummate under § 1342(c)(1), sentence **[2]** of § 1342(c)(1) contemplates a possible conflict between the PBGC and the trustee it chose.

---

[1] The relevant part of ERISA's Conference Report is included in the Addendum to this Reply Brief. The Supreme Court has regularly relied on ERISA's legislative history, especially the Conference Report, to construe ERISA's terms. *See, e.g.*, *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 23 (2004); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46, 55 (1987).

Sentence **[3]** provides that, "upon" granting the termination decree that "the corporation *or the trustee*" sought, the adjudicating court shall authorize the trustee "to terminate the plan." (Emphasis added.) The third sentence also notes that the court can appoint a trustee if no trustee had been put in place after the PBGC initiated proceedings under § 1342(a), seemingly covering the situation not where the trustee alone pursues termination (since he or she would not, in that event, yet exist), but where the PBGC sought to perfect termination in the court adjudication.

Then comes the key fourth sentence. Sentence **[4]** says nothing about actually terminating a plan (since that was covered by sentence **[3]**) and instead addresses a trustee's power in a unique circumstance. The sentence begins with the clause "[i]f 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)." Given the two prior sentences, that "if" clause logically addresses the situation where *the trustee* alone has sought to execute termination, as neither the PBGC nor the plan administrator would have been proceeding in accordance with the subsection. In that event, sentence **[4]** – in its "then" part – provides that "the trustee shall have the power described in subsection (d)(1)," which is the authority the trustee also had during the interim between initiation and completion of termination. Also, the trustee will, "*in addition to any other duties imposed on the*

trustee by law or by agreement between the corporation and the plan administrator," be "subject to the duties described in subsection (d)(3)," which are the obligations of a fiduciary. (Emphasis added.)

It makes sense for Congress to have addressed in sentence **[4]** a trustee's powers when the trustee has alone sought termination. The statute has just finished addressing (in sentence **[2]**) the trustee's right to seek termination on his or her own and then the court having (in sentence **[3]**) ordered the termination. The awkward situation would arise as to whether all of the trustee powers provided in any earlier (or even new) agreement between the PBGC and the plan administrator about trusteeship should attach in actually terminating the plan, particularly given that the PBGC and plan administrator would not have been proceeding in accordance with § 1342(c)(1) in the first place. In that circumstance, Congress provided that the trustee would have the powers "imposed on the trustee by law *or by agreement between the corporation and the plan administrator*," but only if "the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee." (Emphasis added.) It too makes sense for Congress to have conditioned the trustee's powers to effectuate the decreed termination (when the trustee alone sought termination) on the PBGC and the plan administrator agreeing both on termination being necessary and on the appointment of the trustee, because Congress understandably would not have

wanted parties who are *in argument* about termination and on the appointment of the trustee imposing (or limiting) the trustee's powers.

Consequently, far from the fourth sentence being some invitation to the PBGC to terminate plans without a court adjudication, sentence **[4]** shows that Congress took pains to cover the possible outcomes from the first three sentences of § 1342(c)(1), including (in sentence **[4]**) an outcome in which the trustee alone sought a termination decree and the PBGC itself did not pursue action in accordance with § 1342(c)(1), except in accordance with the fourth sentence. In that case, if the conditions of the fourth sentence were satisfied (*i.e.*, the PBGC and the plan administrator agreed that termination was necessary and on the appointment of a trustee), then the trustee would have the power authorized by the decree issued under sentence **[3]** to terminate the plan and, under sentence **[4]**, the powers and obligations outlined in § 1342(d)(1) and (d)(3) *and* "any other duties imposed on the trustee by law or by agreement between the corporation and the plan administrator." Nicely, the fourth sentence then correlates with the allowance in § 1342(b)(3) that the PBGC and the plan administrator can agree on the appointment of a trustee for the period right after initiation of termination proceedings under § 1342(a).

The Retirees' reading of the fourth sentence does not render it "superfluous," as the PBGC charges. PBGC Br. 23. Quite to the contrary, under

the Retirees' construction, *every* word of § 1342(c)(1) has meaning. Frankly, the PBGC's charge takes real hutzpah, given that *its* reading of § 1342(c)(1) to authorize terminations by agreement makes extraneous all of the carefully-crafted parts of § 1342 providing for a judicial decree. To boot, the PBGC even boasts that it has made those parts irrelevant because it terminates, and has terminated since 1974, just about any and all plans by way of a simple agreement with the plan administrator. *See* PBGC Br. 6.[2]

Last, sentence **[5]** notes that a trustee who has discretion in distributing a terminated plan's assets shall notify the PBGC of the final distribution at least ten days prior to the distribution. While this sentence does not directly relate to the issue of the method for terminating a plan, it does indirectly undermine further what the PBGC did here. The fifth sentence necessarily assumes that the PBGC

[2] The true bankruptcy of the PBGC's legal position shines through when the PBGC, remarkably, *admits* that it even uses the fourth sentence of § 1342(c)(1) to enter into agreements to terminate small plans, notwithstanding the proviso in § 1342(a) that it "may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain the plans (*including the requirement for a court decree under subsection (c)*)." (Emphasis added.) The PBGC touts that, "to date, in the 45 years since ERISA was enacted, PBGC has not exercised *the discretion* given to it by that provision of the statute." PBGC Br. 30 (emphasis added). It has not done so because it has deemed "*all* plans" subject to "a termination agreement with the plan administrator" under § 1342(c)(1). *Id.* (emphasis added). In short, the PBGC has turned this part of § 1342(a) into a dead letter (making it "superfluous" and "redundant," to use terms the PBGC ironically elsewhere invokes, *see id.* at 23).

will not typically be the trustee, for there would be no reason for the trustee to give notices to the PBGC if the PBGC were expected to be the trustee. *Accord* H.R. Rep. No. 93-1280, at 373 (noting foremost that "[t]he court may appoint the trustee from a list furnished to the court by the corporation" and that "[t]he compensation of the trustee is to be approved by the corporation"). Nonetheless, since 1974, the PBGC has always gotten itself appointed as trustee by agreement with the plan administrator (*i.e.*, atypical in Congress's eyes), as well as terminated plans by agreement (contrary to § 1342(c)(1)). The result is that, for decades, the PBGC has run the termination process as it has seen fit and for its convenience, rather than as the statute delineates and Congress intended.[3]

[3] ERISA's Conference Report is further confirmation that the PBGC misreads § 1342(c)(1). The Conference Report's summary of "Termination by Pension Benefit Guaranty Corporation" tracks closely the statutory terms. H.R. Rep. 93-1280, at 372 (emphasis added). But in the entirety of the summary, there is not a single mention of the PBGC being authorized to terminate a plan by agreement, even though the Conference Report does highlight that, "[i]n the case of small plans, the corporation may prescribe a simplified procedure and may pool assets of small plans so long as the rights of the participants and employers (including the right to a court decree of termination) are preserved." *Id.* at 373. The only reference to agreements between the PBGC and the plan administrator is to say that "the corporation may agree with any plan administrator to designate a trustee who, without court appointment, is to have the usual powers of trustees appointed by the court." *Id.* If the PBGC were correct that Congress authorized an alternative procedure to terminate plans, and did so "expressly" and "clearly," why is it nowhere mentioned in the legislative history, when every other aspect of § 1342 is explained there?

B. The PBGC's Other Arguments Cannot Overcome the Statute's Plain Terms

Then pursuing non-textual arguments in order to prop up its reading of the fourth sentence of § 1342(c)(1), the PBGC contends that numerous courts have sanctioned its termination-by-agreement custom. Except for *In re Jones & Laughlin Hourly Pension Plan*, 824 F.2d 197 (2d Cir. 1987), not a single one of the cases cited by the PBGC involved a challenge to the legality of terminations by agreement; rather, they merely noted that the plans at issue had been terminated by agreement and then turned to the legal issues associated with termination (including termination date and appropriate notices) that were actually raised in the case. And though the PBGC disparages the Retirees' use of *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006), as a counterpoint to *Jones & Laughlin*, it is impossible to read the Seventh Circuit's decision and conceive anything other than that the court there thought § 1342 was a provision authorizing the PBGC to become a petitioner to a court for a form of relief (*i.e.*, a termination decree) and thus empowering the PBGC to act "as a litigant, not as the decision-maker." *Id.* at 451.

As to *Jones & Laughlin*, the Retirees in their opening brief addressed why it is outmoded. *See* Appellants' Br. 35-37 [hereinafter "Retirees' Br."]. On this score, one point worth further discussion is the PBGC's emphasis on the heavy deference the Second Circuit gave to the PBGC's position that the statute authorizes terminations by agreement. Yet, even *Beck v. PACE International*

Union, 551 U.S. 96 (2007), a decision on which the PBGC relies, *see* PBGC Br. 27, and whose full-throated embrace of *Chevron* deference arguably is out of step with current administrative law, *see Burlington N. Santa Fe Ry. v. Loos*, 139 S. Ct. 893, 908-09 (2019) (Gorsuch, J., dissenting), does not sanction deference to a *litigation position* of an agency in a case in which it is a party, which is all that the PBGC's construction of § 1342(c)(1) here constitutes. *See Beck*, 551 U.S. at 104 & n.4 (deferring to PBGC position as an *amicus* and supported by prior agency opinion letters).

Next, the PBGC contends that another statutory provision – § 1348 – shows it can terminate plans by agreement. But § 1348 deals with the setting of the "termination date," not how to achieve a termination. 29 U.S.C. § 1348(a). And with respect to the PBGC's assertion that a termination by agreement fulfils ERISA's first and foremost purpose of protecting pensioners, the PBGC must assume the conclusion that the termination actually was in the Retirees' best interest. It was not, [redacted]. *See* Retirees' Br. 16.

II. THE PBGC'S TERMINATION OF THE PLAN VIOLATED DUE PROCESS (AS ASSERTED IN COUNT 3)

The PBGC terminated the Salaried Plan without any form of pre-deprivation hearing and, in fact, [redacted]. *See* Retirees' Br. 19. This governmental action, which deprived many Salaried Plan participants of 30% to 70% of their vested pension

benefits, *see id.* at 20, violated the Retirees' due process rights. Accordingly, assuming that ERISA does not require termination via a court decree and authorizes it by mere agreement between the PBGC and the plan administrator, the district court erred in holding that ERISA comports with due process.

A. The Retirees Have a Protected Property Interest in All of Their Vested Pension Benefits

The PBGC's first argument defending its actions against the due-process challenge is that the Retirees purportedly do not have a protected property interest in any pension benefits that were vested but not fully funded at the time the PBGC terminated the Salaried Plan. PBGC Br. 35. This, the PBGC argues, is because the Plan document provides that "the 'right of all affected employees to benefits accrued to the date of such termination . . . is nonforfeitable, . . . *to the extent funded* as of such date.'" *Id.* at 34 (quoting Delphi Retirement Program for Salaried Employees at 12, Menke Decl., Ex. 9, RE 304-11, Page ID# 11638) (emphasis added by PBGC). According to the PBGC, all *funded* benefits will be paid, so the Retirees were not deprived of anything. Never mind that the Salaried Plan provision upon which the PBGC relies, if construed as allowing the sponsor to take away benefits promised if not funded at the time of termination, would violate ERISA's anti-cutback rule. *See* 29 U.S.C. §§ 1053(a), 1054(g); I.R.C. § 411(d)(6).

Trying further to convince that the Retirees were deprived of nothing, the PBGC maintains that the Retirees will be paid not only "the benefits funded by the plan's assets," but also unfunded benefits guaranteed by statute, which the PBGC expects will amount to "at least $1.5 billion of the agency's own funds." PBGC Br. 36. This time, never mind that, even under this payment plan, the Retirees would nonetheless lose, in the aggregate, approximately $521 million in vested benefits. *See* Retirees' Br. 20.

At bottom, the PBGC tries to prove that its actions affected no property interest by relying on the fact of the termination that is at issue in this case – *i.e.*, it says a termination triggered cutback provisions in the Salaried Plan that limited the Retirees' expectations of vested benefits, and the termination also triggered an obligation for the PBGC to pay them something, not take something away. But "'[p]roperty' cannot be defined by the procedures provided for its deprivation." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985); *see Town of Castle Rock v. Gonzales*, 545 U.S. 748, 771 (2005) (Souter, J., concurring) (the government "cannot diminish a property right, once conferred, by attaching less than generous procedure to its deprivation"). Thus, whether the Retirees have a protected property interest in the full measure of their vested pension benefits cannot turn on the assumed legality of the challenged action (here, the Plan's termination). The Retirees allege that the Salaried Plan should *not* have been

terminated, and, if they are correct (with correctness to be adjudged at the pre-deprivation hearing), then no Salaried Plan provision allowing for (illegal) cutbacks would come into play, and their vested benefits (not just funded + PBGC-guaranteed benefits) would remain owed in full. An individual has a "property interest in benefits for which he or she *hopes* to qualify"; and here, the Retirees had not just a hope of benefits, but a vested entitlement to them, absent the termination whose legality is at issue in this case. *Flatford v. Chater*, 93 F.3d 1296, 1304 (6th Cir. 1996) (emphasis added).

B. The PBGC's Actions Deprived the Retirees of Their Vested Pension Benefits

The PBGC next claims that – even if the Retirees have a protected property interest in their vested pension benefits (which they do) – the PBGC cannot be faulted for depriving the Retirees of that interest. PBGC Br. 37. Instead, the PBGC points a finger at Delphi, which "promised benefits to its employees beyond what it funded or could afford." *Id*. According to the PBGC, "[i]t was Delphi that decided not to fund the Salaried Plan during its long bankruptcy and then decided to liquidate while there were inadequate assets in the Salaried Plan to pay the benefits Delphi had promised its employees." *Id*. The unspoken end result (in the PBGC's view) is that due process is not implicated because the government had no role in funding (or underfunding) the Plan.

The PBGC is wrong again, as it was the termination of the Plan that harmed the Retirees, not the funded status of the Plan at termination. Unquestionably, the record reflects that the timing of the PBGC's termination deprived the Retirees of their share of the market recovery in the years following the 2008 economic downturn. The PBGC took for itself the ability to earn (and has earned for itself) hundreds of millions of dollars in investment returns on the existing Salaried Plan assets.[4] As shown in the Retirees' initial brief, *see* Retirees' Br. 48, rather than unreasonably acquiescing to Treasury's solution regarding the Salaried Plan (which was not in the Retirees' best interest, [redacted] *see id.* at 16), the PBGC could have insisted that the $660 million Treasury gave to the PBGC (in exchange for the release of PBGC liens) be used by GM to assume the Salaried Plan (or used by an independent fiduciary to operate the Salaried Plan); that, in turn, would have resulted in the Salaried Plan operating at full steam *for ten years*, and by then the market predictably had recuperated robustly so as to make any funding issues after the ten-year period likely non-existent.

[4] The PBGC's most recent annual reports reflect that, since terminating the Salaried Plan, the PBGC has, on average, enjoyed an 8.2% annual return on funds held in its trust account (including the $2.5 billion transferred to it from the Salaried Plan). *See* Pls.' MSJ Opp'n, RE 313, Page ID# 13494-95 & n.14.

Given that this case was decided on summary judgment, these facts and inferences, and thus the PBGC's responsibility for the Retirees' plight, must be viewed in the light most favorable to the Retirees. *See* Retirees' Br. 27-28; PBGC Br. 17-18. At the very least, a pre-deprivation hearing would have ensured that a court – *i.e.*, an objective neutral – would have examined whether, and guaranteed that, termination *on the terms to which the PBGC acquiesced* were the best deal to be had for the Retirees.

C. Due Process Required *Some* Form of Pre-Deprivation Hearing Prior to Plan Termination

In light of the facts to be reviewed on summary judgment (not the facts as the PBGC wishes them to be), *some* sort of pre-deprivation hearing was required. *See Hicks v. Comm'r of Soc. Sec.*, 909 F.3d 786, 799 (6th Cir. 2018); *see also Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). The PBGC's failure to provide "at least some form of hearing" prior to depriving the Retirees of their vested pension benefits is "dispositive." *Hicks*, 909 F.3d at 799-800 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

It is not contested that the PBGC provided no pre-deprivation process [redacted]. Yet, the district court found that the Retirees' ability to "air[] their grievances" in bankruptcy court satisfied due process. *Id*. at S.J. Order, RE 322, Page ID# 13740. This rationale, which the PBGC does not even attempt to support, is entirely

inaccurate. *See* Retirees' Br. 19 n.5, 41-43; *see also Hicks*, 909 F.3d at 798 (holding that when the government's action depends on fact findings that "the plaintiffs have not been provided the opportunity to rebut, the government's process is constitutionally inadequate"). The PBGC does, however, echo the district court's conclusion that, pursuant to *Jones & Laughlin*, termination of the Salaried Plan without a hearing is "authorized by statute," *i.e.*, the fourth sentence of § 1342(c)(1). S.J. Order, RE 322, Page ID# 13741; *see* PBGC Br. 41.[5]

Notably, after a lengthy recitation of *Jones & Laughlin*, the PBGC's analysis is perfunctory, *see* PBGC Br. 41-42, perhaps because the Second Circuit's decision simply does not square with current, binding precedents of *this* Court and the Supreme Court: once a property interest has been conferred, the legislature may not constitutionally authorize the deprivation of such an interest without

[5] The PBGC also asserts, with no legal support, that its termination of the Salaried Plan was not a "final deprivation" of the Retirees' pension benefits and, therefore, due process scrutiny is unwarranted. PBGC Br. 38-39. The PBGC did not raise this issue on summary judgment, and it is therefore waived on appeal. *See Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 551-52 (6th Cir. 2008). Regardless, the administrative appeals of specific post-termination benefit determinations made by the PBGC that the PBGC says "211 Salaried Plan participants" have filed (PBGC Br. 39 n.97) do not, and cannot, involve a challenge to the termination itself, but to whether the PBGC has correctly computed benefits under its rules governing *post-termination* guaranteed benefit levels or *post-termination* distributions of the terminated plan's assets. *See* 29 U.S.C. § 1344. Conspicuously, the PBGC never concedes that the termination itself, as opposed to its post-termination distributions, can be challenged within its processes.

appropriate procedural safeguards (*see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982)), and post-deprivation remedies do not satisfy due process where the deprivation is caused by established government procedure. *See Mitchell v. Fankhauser*, 375 F.3d 477, 481 (6th Cir. 2004); Retirees' Br. 39-41.

Finally, the PBGC claims that "quick action" was needed, so there was no time for a pre-deprivation hearing. PBGC Br. 43. Even though an "extraordinary" situation may justify postponing a hearing "where some valid governmental interest is at stake," *Guba v. Huron Cty.*, 600 F. App'x 374, 382 (6th Cir. 2015) (internal quotation marks and citation omitted), there were no exigent circumstances here. The PBGC asserts that it "could not wait until the end of a lengthy lawsuit . . . before terminating the pension plan." PBGC Br. 43. But a pre-deprivation hearing can take many forms (not just a lawsuit). *See Loudermill*, 470 U.S. at 545 (a "pretermination 'hearing,' though necessary, need not be elaborate"). Besides, the government's sudden interest in a speedy resolution does not outweigh the significant interest the Retirees had in receiving their full pension benefits. *See id.* at 544.

In any event, no urgency made a hearing impracticable, including in a court. *Cf. Harris v. City of Akron*, 20 F.3d 1396, 1403-05 (6th Cir. 1994) (post-deprivation proceedings sufficient where city was demolishing a building, on an emergency basis, because the structure could imminently collapse onto the street

and neighboring residence). The PBGC and Delphi (and later Treasury too) spent years working together to develop the government's strategy for the Salaried Plan, and the PBGC's working group authorized termination to prevent loss to the PBGC in April 2009, more than three months before execution of the PBGC's termination agreement; still, no pre-termination hearing occurred. *See* Retirees' Br. 3-10, 15-16. This was not a situation in which it was impossible to provide a pre-deprivation hearing; the PBGC simply chose not to [redacted]. Put differently, if there was enough time to work out a termination agreement with the plan administrator (and bankruptcy proceedings about it), there was enough time for a hearing of some sort, including a court adjudication that Congress emphasized urgently could occur under compressed deadlines as short as "3 business days." 29 U.S.C. § 1342(b)(1); *see id.* §§ 1342(a), (d)(2) (actions to be done "as soon as practicable").

III. THE PBGC'S TERMINATION OF THE SALARIED PLAN WAS ARBITRARY AND CAPRICIOUS (AS ASSERTED IN COUNT 4)

Defending its decision to terminate the Salaried Plan against the Retirees' challenge that it is arbitrary and capricious, the PBGC begins with a red herring, then moves to championing its actions on grounds it is foreclosed from invoking, and ultimately rests on facts that are highly disputed and therefore improper for sustaining a summary judgment. Accordingly, as the Retirees showed in their

opening brief (*see* Retirees' Br. 43-50), the PBGC's termination of the Salaried Plan is unsustainable on its merits, even if the PBGC lawfully under ERISA and constitutionally could pursue a termination by agreement rather than through a court decree.

The red herring is the PBGC's lengthy effort to show that it had grounds for *initiating* termination proceedings under § 1342(a). *See* PBGC Br. 44-47. The legality of commencement of termination proceedings (which the PBGC later abruptly aborted) is not at issue. Furthermore, the criteria for initiating termination proceedings are, understandably, significantly broader than for actually terminating a plan. *Compare* 29 U.S.C. § 1342(a)(1) *with id.* § 1342(c)(1) (first sentence). The PBGC engages in this charade for an obvious reason: the PBGC cannot sustain the *termination* on the grounds the PBGC actually utilized to terminate the Salaried Plan, which was solely that "termination of the Salaried Plan was necessary to avoid unreasonable increase in the liability of PBGC's funds." PBGC Br. 32-33. As a result, the PBGC tries to buttress its *termination* decision with other, broader grounds that allegedly allowed it to *initiate* judicial termination proceedings.

Which leads to the next point that the PBGC relies on grounds for supporting the termination agreement that it is foreclosed from invoking. As the Retirees noted in their opening brief, it is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that

the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)); Retirees' Br. 44. Here, again, the only basis on which the PBGC determined the Salaried Plan could be terminated *at the time it terminated the Salaried Plan* was the third criterion in the first sentence of § 1342(c)(1) – *i.e.*, to avoid "any unreasonable increase in the liability of the [PBGC insurance] fund." *See* Retirees' Br. 16 [redacted] Not content to defend that basis, the PBGC obfuscates that ground by citing what it says was evidence before the relevant PBGC working group supposedly indicating that the Salaried Plan was underfunded, had missed funding dates, and potentially was to be orphaned (*i.e.*, sponsor-less). PBGC Br. 11. Then it says "[b]ased on those facts, the Acting Director determined that the Plan should be terminated." *Id.* In reality, the Acting Director, to repeat, cited as the basis for terminating the Salaried Plan singularly that the PBGC might otherwise suffer unreasonable loss, thereby positioning *only* that basis as the one on which the termination can be sustained as a matter of administrative law.

That leaves the central point, which is that the PBGC's agreement to terminate the Salaried Plan was arbitrary and capricious based on the ground the PBGC actually invoked at the time (*i.e.*, prospective loss to the PBGC), because

the PBGC (at a minimum) must – impermissibly at the summary-judgment stage – rest on highly disputed facts. In its brief, the PBGC defends its termination with two points, which, as the Retirees already explained (and will amplify further here), each depend on disputed material facts: (1) GM purportedly was unwilling to assume the Salaried Plan; and (2) the PBGC saved itself money by terminating the plan when it did, because (as the PBGC *really* emphasizes here, *see* PBGC Br. 10-11, 49-50) Delphi's bankruptcy lenders (known as the "DIP lenders") allegedly could have negated the PBGC's liens on Delphi's foreign assets by accomplishing a controlled-group breakup.

First, the Retirees showed in their opening brief that GM was willing to assume the Salaried Plan but was thwarted by a miserly Auto Task Force whom the PBGC – in violation of its statutory charge of saving pension plans – refused to challenge; a GM assumption would have freed the PBGC entirely of any loss associated with the Salaried Plan, since the Salaried Plan would not have been terminated. *See* Retirees' Br. 13, 45, 47. The PBGC *never* says that it tried to confront Treasury to allow GM to assume the Salaried Plan, and the record shows that the PBGC felt itself to be "a 'mouse' trying to avoid getting 'stepped on' by Treasury." *Id.* at 15 (quoting T. Deneen Dep., RE 308-66, PageID# 12856); *see also id.* at 17 (PBGC officials, at mediation leading to arrangement on the Salaried Plan, "'sat in a room and read books all day'") (quoting J. House Dep., RE 308-65,

PageID# 12847). Instead, the PBGC contends: "There is no evidence that GM ever agreed to assume the Salaried Plan; certainly GM never expressed its willingness to PBGC at any time before the termination of the Salaried Plan." PBGC Br. 9.

But it is immaterial to say GM never agreed to assume the Salaried Plan, as the issue is whether GM was *willing* to assume the Salaried Plan but did not because the PBGC failed to push for that alternative in deference to Treasury.

[redacted] and SIGTARP Report, RE 308-4, Page ID# 12649); *id.* at 46-47 [redacted]). The PBGC itself now concedes as much. *See* PBGC Br. 9 ("GM may have seemed receptive to the idea of [assuming the Salaried Plan] at some point"). These disputes about whether GM would have assumed the Salaried Plan had the PBGC done its job and insisted on Treasury acting to save the Salaried Plan (as the PBGC has insisted in other situations involving non-government sponsors, *see* Retirees' Br. 48-49) preclude summary judgment on Count 4.

Second, the PBGC goes all out in asserting that terminating the Salaried Plan by agreement saved the PBGC from an unreasonable increase in liability for its insurance fund because, supposedly, Delphi's DIP lenders were ready to foreclose on Delphi's foreign subsidiaries that were "collateral for the financing of [Delphi's] post-petition operations." PBGC Br. 49. The PBGC maintains that its termination agreement secured it $660 million in exchange for release of liens on the foreign assets that would have been "lost" had "the Delphi controlled group ha[d] broken up." *Id.* at 50.

The problem with this theory is that it requires it to be beyond dispute that the PBGC was powerless to hold onto its liens and their value if the DIP lenders sought foreclosure on the foreign assets. There is, however, substantial dispute. Most obviously, the PBGC had *liens* on these assets, just as the DIP lenders did as part of their financing package to Delphi. There is no indication that the PBGC's liens were inferior to the DIP lenders' claims on the assets, and the PBGC conspicuously and carefully never says they were. Plainly, if the DIP lenders had sought to foreclose on the assets, so as to threaten the PBGC's liens, the PBGC had legal bases to intervene to try to stop the foreclosure; indeed, that was the whole reason for the PBGC insisting that the DIP lenders provide it with "five days' written notice prior to exercising their right of foreclosure." PBGC. Br. 11-12. The PBGC, therefore, has failed to show "there is no genuine dispute" that its

termination decision was necessary to prevent its liens from becoming valueless (and causing loss to the PBGC) in the event the DIP lenders attempted to foreclose on Delphi's foreign assets. Fed. R. Civ. P. 56(a); [redacted].[6]

[6] A final point to address is the PBGC's effort to use the Retirees' appearance in the bankruptcy court against them here, both on the substance of whether termination was necessary or whether terminations by agreement are generally allowable. The Retirees protectively appeared in the bankruptcy court, all along seeking to preserve their right to challenge in a proper federal district court the PBGC's impending termination of the Salaried Plan. *See* 29 U.S.C. § 1342(e), (f) (giving a federal district court exclusive jurisdiction over termination proceedings). The PBGC's attempts to twist the Retirees' filings there as some sort of qualification on their efforts here is belied most notably by the bankruptcy court's express blessing of the filing of the Retirees' lawsuit in the district court. *See* Retirees' Br. 19-20 n.5, 41-43.

CONCLUSION

The district court's decision on Counts 1, 3, and 4 of the second amended complaint and its judgment for the PBGC should be reversed.

October 25, 2019

Respectfully submitted,

/s/ Anthony F. Shelley

Anthony F. Shelley
Timothy P. O'Toole
Dawn E. Murphy-Johnson
Miller & Chevalier Chartered
900 Sixteenth St. NW
Washington, DC 20006
Telephone: (202) 626-5800
Facsimile: (202) 626-5801
Email: ashelley@milchev.com
Email: totoole@milchev.com
Email: dmurphyjohnson@milchev.com

Counsel for Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

XX this brief contains 6,463 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

___ this brief uses a monospaced typeface and contains [state the number of lines] of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because:

XX this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font in Times New Roman, or

___ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

October 25, 2019

/s/ Anthony F. Shelley
Anthony F. Shelley

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2019, I electronically filed the foregoing **REPLY BRIEF OF APPELLANTS** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Craig T. Fessenden, C. Wayne Owen, Jr., John A. Menke
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, DC 20005
Email: Fessenden.craig@pbgc.gov
Email: owen.wayne@pbgc.gov
Email: menke.john@pbgc.gov

/s/ Anthony F. Shelley
Anthony F. Shelley

ADDENDUM

93D CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 93-1280

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

AUGUST 12, 1974.—Ordered to be printed

Mr. PERKINS, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 2]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2) to provide for pension reform, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

SHORT TITLE AND TABLE OF CONTENTS

SECTION 1. This Act may be cited as the "Employee Retirement Income Security Act of 1974".

TABLE OF CONTENTS

gations as they fall due. The plan administrator or the corporation is authorized to petition the court for appointment of a trustee to manage the plan under the same procedure by which a trustee may be appointed in the case of an involuntary termination, if the best interest of the participants and beneficiaries would be served by the appointment. In other respects the conferees accepted the substance of the Senate amendment.

A plan termination in the sense that benefits stop accruing (as provided in section 411(d)(3) of the Internal Revenue Code) is not to be termination under the insurance provisions so long as the employer continues to meet the funding standards provided by the substitute.

Date of termination

The termination date of a plan is to be determined by the plan administrator or the corporation, depending upon which terminates the plan and also depending upon whether this date is agreed to by the other party. If there is not agreement between the corporation and the plan administrator, the termination date is to be established by the court. However, in the case of terminations of plans which occur before the date of enactment, the date of termination is to be set by the corporation on the basis of the date on which benefits ceased to accrue or on any other appropriate basis.

Termination by Pension Benefit Guaranty Corporation

Under the House bill, the Secretary of Labor may terminate a plan, after a hearing, (a) if he determines that the plan failed to meet the minimum funding standards, the plan is unable to pay benefits when due, or failure to terminate will cause long-run loss to the corporation, or (b) if the employer or an appropriate employee organization applies to him for authority to terminate. In terminating a plan, the Secretary of Labor must distribute the plan's assets in accordance with the priority schedule contained in the bill. He is permitted to distribute the assets without ending the plan or without appointing a receiver, and also he may order the plan's continuation under a receiver until all benefit liabilities are satisfied. At any time, however, he may wind up the plan (after a hearing) with a distribution of remaining assets.

Under the Senate amendment, the corporation may institute termination proceedings for the causes listed in the House bill or if a distribution in excess of $10,000 is made to an owner-employee (other than on account of death or disability) if, after the distribution, there are unfunded vested liabilities.

Under the conference substitute, the corporation may institute termination proceedings in court if it finds that:

(1) minimum funding standards have not been met,

(2) the plan is unable to pay benefits when due,

(3) a distribution is made to an owner-employee of $10,000 in any 24-month period if not paid by reason of death and if, after the distribution, there are unfunded vested liabilities, or

(4) the possible long-run liability to the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

In seeking a termination, the corporation is to apply to the appropriate United States District Court, with notice to the plan, for

appointment of a trustee to administer the plan pending issuance of a termination decree. Unless cause is shown within three days thereafter why a trustee should not be appointed, the appointment is to be made and the trustee is to administer the plan until the corporation decides whether the plan should be terminated. The court may appoint the trustee from a list furnished to the court by the corporation, or it may appoint the existing plan administrator or the corporation itself. Even without the appointment of a trustee, however, the corporation may, with notice to the plan, apply for a termination decree.

If it grants the decree, the court is to order the trustee (after first appointing a trustee, if none has yet been appointed) to terminate the plan.

A trustee with the discretion to commence the final liquidation of the trust must first give the corporation at least 10 days' notice. If the corporation should oppose the trustee's proposal, the court is to resolve the dispute.

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

If the application for a trustee is rejected by the court, the trustee is to transfer all assets and records of the plan back to the plan administrator within three days. If the corporation fails to apply within 30 days after appointment of the trustee for a termination decree, the trustee is to transfer the assets and records back to the plan administrator. This 30-day period may be extended by agreement or court order.

The corporation may file for termination despite the pendency in any court of bankruptcy, mortgage foreclosure, or equity receivership proceeding, or any proceeding to reorganize, conserve, or liquidate such plan or its property, or any proceeding to enforce a lien against property of the plan. The court may also stay any of these proceedings. In the termination proceedings, the court is to have the exclusive jurisdiction of the plan and its assets with powers of a court in bankruptcy and of a court in a Chapter X proceeding.

The compensation of the trustee is to be approved by the corporation, and, in the case of a trustee appointed by the court, with the consent of the court. Trustees are authorized to employ professional assistance in accordance with regulations to be issued by the corporation.

Reportable events

Under the House bill, certain events indicating possible danger of plan termination must be reported by the plan administrator to the corporation. These events are:

(a) a tax disqualification;

(b) a benefit decrease by plan amendment;

(c) a decrease in active participants to 80 percent of the number at the beginning of the plan year, or 75 percent of the number at the beginning of the previous plan year;

(d) an IRS determination that there has been a plan termination or partial termination for tax purposes;