NO ORAL ARGUMENT HAS BEEN SCHEDULED

CASE NO. 13-5254

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PAUL DEPPENBROOK,

Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 11-600 (RBW)

BRIEF OF THE APPELLEE

April 7, 2014

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellee Pension Benefit Guaranty Corporation ("PBGC") certifies the following:

A. Parties and Amici

The parties who appeared before the district court were:

Plaintiffs: Paul Deppenbrook
Arthur Evans
Ronald Gossard
William Venezie

Defendant: PBGC

In this Court, the parties are:

Appellant: Paul Deppenbrook

Appellee: PBGC

PBGC is a federal government agency established under 29 U.S.C. § 1302 and thus is not required to file a corporate disclosure statement. Fed. R. App. Proc. 26.1(a).

B. Rulings Under Review

Appellant Paul Deppenbrook appeals from the June 17, 2013 Judgment and Memorandum Opinion of the Honorable Reggie B. Walton, United States District Judge for the District of Columbia, Case No. 11-600, which ruling can be found at Appendix page 160, and at 950 F. Supp. 2d 68 (D.D.C. 2013).

C. Related Cases

This case was originally brought in the United States District Court for the Western District of Pennsylvania, Case No. 10-134, where it was before Judge David S. Cercone. Upon the Motion of Defendant-Appellee PBGC to Dismiss or Transfer Venue, this case was transferred to the United States District Court for the District of Columbia, as noted above.

A related case that involved some of the same parties and similar issues is *PBGC v. Republic Technologies Int'l, LLC* ("*RTI*" or the "*RTI Case*"), 386 F.3d 659 (6th Cir. 2004). In that case, PBGC was the Appellant and the United Steelworkers of America ("USW")[1] was the Appellee on behalf of the hourly employees of Republic Technologies International ("RTI"), including Appellant in this case.

Another related case is *Nicol v. United Steelworkers of America*, 2008 WL 4138104 (W.D. Pa. Aug. 29, 2008), *aff'd*, 331 Fed. Appx. 909 (3d Cir. 2009), in which Appellant and another co-plaintiff from RTI's Beaver Falls facility, filed an action against the USW for fraud and deceit, and breach of fiduciary duty, which action was treated as one for breach of duty of fair representation under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (2000).

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[1] Now known as United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO-CLC.

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GLOSSARY

APA: Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

DB: Defined Benefit

DC: Defined Contribution

DCP: Defined Contribution Plan or Defined Contribution Pension

ERISA: The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461

FOIA: Freedom of Information Act. 5 U.S.C. § 552

IRC: Internal Revenue Code.

PBGC: Pension Benefit Guaranty Corporation

RESI: Republic Engineered Steel, Inc.

RTI: Republic Technologies Int'l, LLC

TITLE IV: Title IV of ERISA, 29 U.S.C. §§ 1301-1461

USW: United Steelworkers of America, now known as United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers Int'l Union, AFL-CIO-CLC

WARN Act: Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09

COUNTERSTATEMENT OF JURISDICTION

Appellee agrees with Appellant's Statement of Jurisdiction, except that jurisdiction in the district court was not based on either 29 U.S.C. § 1132 or 29 U.S.C. § 1024.

COUNTERSTATEMENT OF THE ISSUE

The district court reviewed PBGC's interpretations of its governing statute under the deferential *Chevron* standard. The district court also deferred to PBGC's interpretations of its own regulations and of the pension plan in question. Applying these deferential standards, the district court granted summary judgment in favor of PBGC on all claims. Was the district court correct in applying these deferential standards, and in upholding PBGC's determinations under them?

COUNTERSTATEMENT OF THE CASE

This is a dispute about certain pension benefits ("Shutdown Benefits")[2] under the Republic Technologies International, LLC – USWA Defined Benefit Plan (the "Pension Plan"). Appellant is a retired participant of the Pension Plan.

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[2] Shutdown Benefits are a form of enhanced early retirement benefits under a pension plan that are triggered by the closure of a plant or facility at a time when the pension plan is ongoing. *See RTI*, 386 F.3d at 662-63. The particular type of Shutdown Benefit that Appellant seeks under the terminated Pension Plan is a "Rule of 65" benefit, which "allows a participant who is not yet 55 and who has at least 20 years of service to retire and begin to receive a pension benefit when a shutdown occurs if the participant's combined age and service equal at least 65 but less than 80." *Id.* at 663.

Appellee Pension Benefit Guaranty Corporation ("PBGC") is the federal agency that guarantees pension benefits in private-sector defined-benefit pension plans and the statutory trustee of the Pension Plan. Much of the factual background for this appeal is set forth in the *RTI* and *Nicol* cases, cited above, and familiarity with those cases is essential to an understanding of this one.[3]

In April 2001, RTI, the Pension Plan's sponsor, filed for bankruptcy protection.[4] Unable to reorganize as a standalone company, RTI decided in April 2002 to cease operations and sell its assets.[5] On May 1, 2002, RTI issued to its employees, including Appellant, notice under the Workers Adjustment and Retraining Notification Act ("WARN Act")[6] of its intent to close its facilities, including the one where Appellant worked ("Beaver Falls Plant").[7] RTI also entered into an agreement with the USW (the "Shutdown Agreement") that declared RTI's facilities shut down as of the date of bankruptcy court approval of the Shutdown Agreement, which was July 11, 2002.[8]

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[3] *RTI* and *Nicol* are reproduced in the Addendum accompanying this brief.

[4] *RTI*, 386 F.3d at 663.

[5] *Id.* at 663-64.

[6] 29 U.S.C. §§ 2101-09 (2012).

[7] Appendix at 275-76, Administrative Record ("AR") 28-29.

[8] *RTI*, 386 F.3d at 664-65.

Meanwhile, PBGC filed an action on June 12, 2002, to terminate the Pension Plan as of June 14, 2002.[9] Although RTI was the nominal defendant in that action, the USW intervened to contest the appropriate termination date of the Pension Plan.[10] The Pension Plan termination date was critical to USW because of the aforementioned Shutdown Benefits.[11]

In the plan termination action, the district court fixed the Pension Plan's termination date as August 17, 2002, but on appeal, the Sixth Circuit reversed, agreeing with PBGC that the proper termination date for the Pension Plan was June 14, 2002.[12] Because this date preceded RTI's July 11, 2002 nominal shutdown date, as well as its August 16, 2002 actual shutdown date, no Shutdown Benefits vested for any of the Pension Plan's participants, including Appellant.[13]

After the conclusion of the plan termination action, PBGC determined each participant's guaranteed benefit amount.[14] Appellant challenged PBGC's determination of his benefit by filing an administrative appeal with PBGC's

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[9] *Id.* at 664.

[10] *Nicol*, 2008 WL 4138104, *3.

[11] *RTI*, 386 F.3d at 665

[12] *Id.* at 668.

[13] Appendix at 250, AR 3.

[14] *Id.*

Appeals Board.[15] The Appeals Board affirmed PBGC's determination.[16] Appellant then sued PBGC in district court.

The district court reviewed PBGC's determinations on the basis of the Administrative Record, which Appellant sought unsuccessfully to supplement. The district court held that PBGC's determinations were to be reviewed under the "highly deferential" arbitrary and capricious standard of the Administrative Procedure Act ("APA"). On the merits, the district court held that the Administrative Record provided a reasonable basis for PBGC's conclusions, and upheld PBGC's benefit determinations in all respects.[17] This appeal followed.

SUMMARY OF THE ARGUMENT

Appellant makes three arguments. First, he claims that he is entitled to *de novo* review rather than "arbitrary and capricious" review under the APA, because of alleged bad faith and improper conduct by PBGC. Second, he argues that he was entitled to a Shutdown Benefit under the provisions of the WARN Act and

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[15] *Id.* at 268-69.

[16] *Id.* at 250-66.

[17] Appendix at 160-78 (district court opinion).

USW-RTI labor agreements.[18] Third, he maintains that PBGC miscalculated his pension benefit. None of these arguments has merit.

PBGC is a federal agency whose determinations are entitled to deference unless they are found to be arbitrary and capricious. Appellant's argument that PBGC's determinations should be reviewed under a less deferential standard because of an inherent conflict of interest is flawed, because PBGC is not a private plan administrator. Rather, PBGC makes benefit determinations in its capacity as the federal agency that administers Title IV of ERISA, and the appropriate deferential standard is the one specified by the APA. In any event, PBGC's determinations should be upheld under any standard of review.

The PBGC Appeals Board correctly determined, after careful review, that Appellant was not entitled to a Shutdown Benefit, because he had not satisfied the Pension Plan's conditions for receiving it before the Pension Plan's termination date of June 14, 2002. Under the Pension Plan, entitlement to a Shutdown Benefit required that Appellant suffer a break in continuous service as a result of a permanent shutdown of the Beaver Falls Plant while the Pension Plan was ongoing. The record showed that Appellant continued to work for RTI for more than two months after the Pension Plan terminated.

[18] The labor agreements (collectively, "Labor Agreements") are described in *Nicol*, 2008 WL 4138104, at *1-2. These are not part of the Administrative Record, except for an excerpt from the Plant Specific Agreement between USW and some of the RTI facilities. *See* Appendix at 188-89, AR-30.

Appellant refers to provisions of the WARN Act and the Labor Agreements in an attempt to show a constructive termination of employment as of May 1, 2002, but this is unavailing. Appellant's continuous service with RTI was not broken until well after the Pension Plan terminated. Thus, PBGC concluded that he did not meet the conditions for receiving a Shutdown Benefit, and PBGC could not guarantee it under Title IV of ERISA. This was a reasonable conclusion supported by the Administrative Record and was not arbitrary and capricious.

PBGC handled the termination and trusteeship of the Pension Plan properly, and Appellant suffered no cognizable harm as a result of PBGC's actions. The Pension Plan was a hybrid plan that included a component that PBGC does not insure under Title IV of ERISA. Accordingly, the Pension Plan was functionally divided into two components, with PBGC terminating the defined benefit component and RTI terminating the defined contribution component. Appellant has identified nothing in the record to suggest that his benefit was not calculated correctly.

When the Pension Plan terminated, Appellant lost a benefit option under the Pension Plan to roll over his defined contribution benefit to the defined benefit portion of the Pension Plan. This loss of an optional form of benefit payment was not an amendment to the Pension Plan but rather a limitation imposed by Title IV of ERISA and, importantly, did *not* result in the loss of any benefits under the

Pension Plan. Appellant does not have standing to raise arguments that he did not receive certain supplemental benefits under the Pension Plan, because the record shows that he was not eligible for the types of retirement that would have given rise to those supplements.

For the foregoing reasons, the PBGC Appeals Board's decision was reasonably supported by the Administrative Record, and should be sustained by this Court.

STATEMENT OF THE STANDARD OF REVIEW

This case involves determinations of an administrative agency under the federal statute that it administers. Under the Administrative Procedure Act, such determinations are to be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[19] PBGC's permissible constructions of Title IV of ERISA are entitled to deference under *Chevron*, and its interpretations of its regulations are entitled to deference under *Auer* unless found to be plainly erroneous or inconsistent with the regulations.[20]

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[19] 5 U.S.C. § 706(2)(A).

[20] *See Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

ARGUMENT

I. PBGC'S DETERMINATION OF APPELLANT'S BENEFIT WAS REASONABLE AND ENTITLED TO REVIEW UNDER THE DEFERENTIAL STANDARDS APPLICABLE TO AGENCY ADMINISTRATIVE DETERMINATIONS.

Appellant acknowledges the above-quoted deferential standard of review that is generally applicable to an agency's administrative determinations, including those in this case. Nevertheless, Appellant urges the Court to adopt a less deferential standard of review in this case, based loosely on cases such as *Metropolitan Life v. Glenn*[21] and *Firestone Tire & Rubber Co. v. Bruch*,[22] in which the Supreme Court stated that a plan administrator's dual role as an administrator and a payer of plan benefits is a factor to be taken into account when determining whether there was an abuse of discretion in making benefit determinations under the pension plan. At the same time, *Glenn* and *Firestone* were expressly limited to actions taken by private plan administrators under 29 U.S.C. § 1132(a)(1)(B), whereas PBGC makes its benefit determinations as a federal agency under Title IV of ERISA. As one court recently recognized,

> Congress not only expressly authorized the PBGC to assume a dual role as trustee and guarantor, but also provided for involuntary termination proceedings under

[21] 554 U.S. 105 (2008).

[22] 489 U.S. 101 (1989).

> ERISA "precisely so that [the] PBGC can protect its own financial interests and 'avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund.'"[23]

Accordingly, the court reviewed PBGC's benefit determination under a deferential standard.[24] Other courts have done so as well.[25]

To support his argument against a deferential standard of review, Appellant alleges bad faith, improper behavior, and conflict of interest on the part of PBGC.[26] Not only are Appellant's accusations baseless, it is clear that PBGC's determinations should be upheld under any standard, and for that reason, the Court need not reach the question of the appropriate standard of review.[27]

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[23] *United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Svc. Union v. PBGC* ("*USW v. PBGC*"), 839 F. Supp. 2d 232, 243-44 (D.D.C. 2012) (quoting *RTI*, 386 F.3d at 668 (internal citation omitted)), *aff'd*, 707 F.3d. 319 (2013). In *USW v. PBGC*, this Court upheld PBGC's determination of whether a permanent shutdown had occurred, under a deferential standard of review. 707 F.3d at 324. Here, where the shutdown date already has been upheld under a deferential standard by a sister circuit in *RTI*, PBGC's benefit determination based on both the shutdown and appellant's layoff having occurred months after plan termination should easily qualify for deference.

[24] 839 F. Supp. 2d at 244.

[25] *See, e.g.*, *Davis v. PBGC*, 864 F. Supp. 2d 148, 163 (D.D.C. 2012), *aff'd on other grounds*, 734 F.3d 1161 (D.C. Cir. 2013); *Montgomery v. PBGC*, 601 F. Supp. 2d 139, 141-42 (D.D.C. 2009).

[26] *See* Appellant's Br. at 18-37.

[27] *See Davis*, 734 F.3d at 1167.

Appellant begins with an accusation that PBGC prevented the Pension Plan administrator from processing Appellant's pension application, and "interfered with RTI plan administrator from performing its fiduciary duties under the Plan."[28] This so-called interference appears to refer to PBGC's June 2002 action under 29 U.S.C. § 1342 to terminate the Pension Plan, appoint PBGC statutory trustee of the Pension Plan, and establish the Pension Plan's termination date.[29] The short answer to this charge is that PBGC's action against RTI was the means ERISA prescribes to terminate the Pension Plan and establish its termination date.[30] It was not bad faith or interference.

Appellant similarly suggests that PBGC's appeal to the Sixth Circuit of the *RTI* case demonstrates a conflict of interest that ought to deprive PBGC of deference in this case.[31] But, again, the district court action was prescribed by ERISA, and PBGC's appeal was the appropriate way to seek review of the district

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[28] Appellant's Br. at 19, 20 (citing Appendix at 435, AR 569). Appellant also cites to materials (Appendix at 484-85) that are not in the Administrative Record.

[29] *See* Appendix at 435, AR 569 (Settlement Agreement ¶ D). The termination and trusteeship were ordered by the district court in September 2003, *see* 287 F. Supp. 2d 815 (N.D. Ohio), after which the question of the Pension Plan's termination date was appealed to the Sixth Circuit in the *RTI* case.

[30] 29 U.S.C. §§ 1342, 1348(a)(4)

[31] Appellant's Br. at 20.

court's decision. Indeed, PBGC won its case on appeal.[32] Vindicating one's statutory rights does not constitute a conflict of interest.

Appellant's other allegations of improper conduct on PBGC's part are equally without merit. He alleges, for example, that PBGC was "deceptive" in connection with his January 2004 Freedom of Information Act ("FOIA") request, because it did not disclose the settlement agreement between PBGC and RTI ("Settlement Agreement").[33] But the Administrative Record shows that the Settlement Agreement that he claims was withheld from him was dated July 2004 and did not even exist when he made his request or when PBGC responded to it.[34]

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[32] *RTI*, 386 F.3d 659.

[33] Appellant's Br. at 20; *see* Appendix at 447, AR 587. The Settlement Agreement, among other things, provided that, because PBGC and RTI disagreed about the ability of PBGC to deal with the individual accounts in the Pension Plan (about which see Part III below), they would jointly hire a third-party administrator to terminate the individual accounts. AR 569-73.

[34] Appendix at 447-48, AR 587, 597.

Similarly, Appellant alleges bad faith in connection with the "Zabarsky Letter,"[35] by which a third-party administrator communicated to participants about terminating the portions of the Pension Plan that were not insured under Title IV of ERISA. This, too, was not disclosed to him in response to his January 2004 FOIA request, because it is a September 2004 document that did not yet exist. Importantly, both the Settlement Agreement and the Zabarsky Letter were included in the Administrative Record, and Appellant has not been deprived of the opportunity to argue their significance, if any, to his case.

Appellant also decries PBGC's handling of his FOIA request regarding Shutdown Benefits. The Record shows that Appellant requested "the contract or established terms by which the PBGC is interpreting and executing, the eligability [*sic*] requirements of the recently ruled on [Pension Plan], which is now in the scope of the PBGC, AS TO THE SHUTDOWN BENEFITS, RULE OF 65/70/80 BENEFITS."[36] PBGC's information officer responded to his request by (i)

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[35] Appellant's Br. at 26-28; *see* AR-29, Appendix at 276. This letter pertains to the fact that the Pension Plan was a "414(k) Plan," a pension plan described by that section of the Internal Revenue Code. Briefly, a 414(k) plan is a defined benefit plan that has a defined contribution component. Because PBGC does not guarantee defined contribution plans, nor defined benefit plans to the extent that they are also defined contribution plans, 29 U.S.C. § 1321(b)(1), (12), PBGC had to make special arrangements to terminate the defined contribution portion of the Pension Plan, and the Zabarsky Letter was part of those arrangements. This is discussed in more detail in Part III of this Argument.

[36] Appendix at 447, AR 587 (emphasis in original).

sending him a copy of the Pension Plan that contained the Shutdown Benefit Provisions, and (ii) referring his inquiry to a PBGC employee who dealt with benefits administration for PBGC with respect to the Pension Plan.[37] PBGC submits that its response fully met the request.

Finally, Appellant attacks certain informational meetings that PBGC voluntarily convened to explain to pension plan participants PBGC's termination of the Pension Plan and PBGC's assumption of trusteeship. PBGC set up these meetings to communicate with participants who may not have understood the federal pension insurance program, including what PBGC does and what limitations PBGC has under the law. The meetings were not required by statute or regulation; they were simply a means of assisting affected participants. In Appellant's view, the meetings were inconveniently located and not very informative. This is simply not a valid reason for departing from the APA standard of review.[38]

To summarize, Appellant has not shown any bad faith, conflict of interest, or improper behavior that would warrant departing from the deferential standards that

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[37] Appendix at 448, AR 597.

[38] Appellant cites his Administrative Appeal for the proposition that "[t]hese meetings were totally inadequate" and "offered no information other than to hire a lawyer." Appellant's Br. at 25; *see* Appendix at 274, AR 26-27.

are applicable to PBGC determinations under ERISA and its implementing regulations. PBGC is entitled to the APA standard of review in this case.

II. APPELLANT IS NOT ELIGIBLE FOR A SHUTDOWN BENEFIT, AND NEITHER THE WARN ACT NOR THE LABOR AGREEMENTS ARE RELEVANT TO APPELLANT'S ENTITLEMENT TO BENEFITS UNDER THE PENSION PLAN.

Appellant maintains that the WARN Act, read in tandem with ERISA and applied to the facts of his case, should have led PBGC to conclude that he and his peers at RTI's Beaver Falls Plant were eligible for Shutdown Benefits. This argument is unavailing, however, for the reasons stated by the District Court.

A. Appellant is not Eligible for a Shutdown Benefit Under the Terms of the Pension Plan.

PBGC's determination of Appellant's pension benefit under the Pension Plan — including its inability to guarantee Shutdown Benefits — was based on undisputed facts that are amply supported by the Administrative Record and summarized in the Statement of the Case above. Those facts include the following:

- RTI issued a WARN Act notice to its employees (including Appellant) on or about May 1, 2002. This notice stated that RTI intended to permanently close the Beaver Falls Plant, and that it expected the first termination of employees to take place between July 17 and August 1 of that year.[39]

[39] Appendix at 275, AR 28.

- Appellant continued to work for RTI until August 16, 2002.[40]

- The RTI employees were notified on or about June 14, 2002, that PBGC was taking action to terminate the Pension Plan.[41]

- RTI and USW negotiated the Shutdown Agreement, under which July 11, 2002, became the nominal "shutdown date" of RTI for purposes of the shutdown benefits provisions of RTI's pension plans.[42]

- After litigation initiated by PBGC under 29 U.S.C. § 1348(a), the Sixth Circuit Court of Appeals held that June 14, 2002, was the appropriate termination date for the Pension Plan.[43]

- The Pension Plan's June 14, 2002 termination date preceded both the July 11, 2002 nominal shutdown date agreed to by RTI and USW, and Appellant's actual termination of employment with RTI in August 2002.[44]

In light of the foregoing, it is clear that as of the Pension Plan's termination date, Appellant had not yet suffered a termination of employment as a result of a permanent shutdown of the RTI facility at which he worked. Appellant therefore did not satisfy all of the conditions for receiving a Shutdown Benefit prior to the Pension Plan's termination, and was therefore not entitled to a Shutdown Benefit

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[40] Appendix at 496, AR 671.

[41] *RTI*, 386 F.3d at 660-61.

[42] *RTI*, 386 F.3d at 579.

[43] *RTI*, 386 F.3d at 582.

[44] *Nicol*, 2008 WL 4138104, *3.

under the terms of the Pension Plan.[45] On administrative review of this determination, the PBGC Appeals Board upheld the conclusion that Appellant was not entitled to a Shutdown Benefit,[46] and the district court concluded that this determination was reasonable.[47] This Court should affirm the district court.

The district court correctly looked to the plain language of the Pension Plan itself. Under the Pension Plan, a participant who met certain age and service requirements and who "incur[red] a Break in Continuous Service by reason of a layoff" could be eligible for a Shutdown Benefit.[48] The Pension Plan also defines the circumstances that constitute a "Break in Continuous Service," which include

> Termination (if and when termination occurs pursuant to the Basic Agreement) due to permanent shutdown of a plant, department or subdivision thereof . . . .[49]

The relationship between Appellant's "break in continuous service" — *i.e.*, his termination of employment because of a permanent shutdown of the Beaver Falls Plant — and the June 14, 2002 termination date of the Pension Plan is the very heart of whether Appellant was eligible for a Shutdown Benefit from PBGC.

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[45] *See* 29 C.F.R. § 4022.4(a)(3).

[46] *See* Appendix at 250, AR 3.

[47] Appendix at 171.

[48] *See* Appendix at 49394, AR 386-87; *see also* Appendix at 168-69.

[49] Appendix at 363 (Pension Plan § 3.02(d)).

As noted above, the Administrative Record contains ample evidence that the Beaver Falls Plant did not shut down until August 2002, and that Appellant's continuous service with RTI at the Beaver Falls Plant did not end as a result of that shutdown until mid-August 2002.[50] But the Pension Plan's termination date, established by the Sixth Circuit in the *RTI* case, was June 14, 2002, more than two months *before* Appellant's break in continuous service.[51] On that Pension Plan termination date, Appellant remained employed by RTI. Thus, Appellant did not meet the Pension Plan's conditions for a Shutdown Benefit before the Pension Plan terminated.[52]

The reason that the timing of Appellant's break in continuous service is crucial is that PBGC's guarantee under Title IV of ERISA is limited to "all nonforfeitable benefits . . . under a single-employer plan which terminates at a time

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[50] Appendix at 496, AR 671.

[51] *See RTI*, 386 F.3d at 667 ("[p]rior to bankruptcy court approval of the [S]hutdown [A]greement, the cessation of RTI's operations was the only event that would trigger the vesting of shutdown benefits, and that cessation of operations had not yet occurred").

[52] Appellant had, at best, an *expectation* that his service at the Beaver Falls Plant would end sometime after June 30, 2002, consistent with the 60-day notice period under the WARN Act that the employer provided on May 1, 2002. But, as the District Court noted, an expectation does not constitute a break in continuous service under the Pension Plan. *See* Appendix at 171, District Court op. at 12 ("Notably absent from this list of circumstances constituting a break in continuous service is an *expected* shutdown") (emphasis in original).

when this title applies to it."[53] For purposes of Title IV, a "nonforfeitable" benefit is

> a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this chapter (other than submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit which returns all or a portion of a participant's accumulated mandatory employee contributions upon the participant's death), whether or not the benefit may subsequently be reduced or suspended by a plan amendment, an occurrence of any condition, or operation of this chapter or title 26[.][54]

PBGC further explains what it means to satisfy the "conditions for entitlement under the plan" in its regulations, stating that a participant is "entitled" to a benefit

> if under the provisions of a plan:
>
> * * *
>
> (3) . . . *before the termination date* . . . the participant had satisfied the conditions of the plan necessary to establish the right to receive the benefit prior to such date . . . other than application for the benefit, satisfaction of a waiting period described in the plan, or retirement . . . .[55]

Appellant's continuous service with RTI did not end "before the termination date" as required by the above-quoted regulation. He therefore did not satisfy the

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[53] 29 U.S.C. § 1322(a).

[54] *Id.* § 1301(a)(8).

[55] 29 C.F.R. § 4022.4(a) (emphasis added).

"conditions for entitlement" that would have made the Shutdown Benefit "nonforfeitable" under Title IV of ERISA. Because Appellant had not earned a nonforfeitable right to the Shutdown Benefit, PBGC concluded that it was not guaranteed.[56] The District Court appropriately held that this conclusion was not arbitrary and capricious,[57] and its conclusion should be sustained by this Court.[58]

B. The WARN Act Does Not Change the Date of Appellant's Break in Continuous Service.

Although Appellant seems to concede that his employment at the Beaver Falls Plant terminated well after the Pension Plan's termination date, he nevertheless argues, as he did in the District Court, that language in the WARN Act and Labor Agreements compels a different result. He attempts to establish that

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[56] *See* 29 U.S.C. § 1322.

[57] Appendix at 173, District Court op. at 14.

[58] Because 29 C.F.R. § 4022.4(a) effectively restates the language of 29 U.S.C. § 1301(a)(8), PBGC's conclusion should be accorded deference under *Chevron*. Even if PBGC's conclusion is deemed an interpretation of its regulation, it is plainly entitled to deference under *Auer* as a reasonable interpretation. *See Decker v. Northwest Envtl. Defense Ctr.*, 133 S. Ct. 1326, 1337 (2013).

he was constructively discharged on the date of the WARN Act notice, May 1, 2002. The PBGC Appeals Board and the District Court correctly rejected this argument.[59]

The WARN Act generally requires employers to give 60 days' written notice to employees (or their collective bargaining representative, if there is one) prior to ordering a plant closing or mass layoff.[60] As noted above, on May 1, 2002, RTI notified Appellant's collective bargaining representative of the expected closure of the Beaver Falls Plant.[61]

Appellant argues that ERISA's definition of a nonforfeitable benefit expressly refers to a benefit for which a participant has fulfilled all conditions necessary to be entitled to the benefit other than "completion of a required waiting period," and that the 60-day notice period under the WARN Act is such a waiting period. Thus, the argument runs, if Appellant had fulfilled all other conditions of entitlement to the benefit, the benefit should be deemed nonforfeitable under ERISA. But this argument fails for several reasons. First, the full definition of

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[59] Notably, the WARN Act provides that it "does not purport to alter or affect [any other contractual or statutory] rights and remedies." 29 U.S.C. § 2105. Thus, the WARN Act cannot be used to change the date of Appellant's break in continuous service with RTI.

[60] 29 U.S.C. § 2102(a).

[61] Appendix at 275, AR 28.

"nonforfeitable benefit" makes clear that the relevant "waiting period" must be one imposed by the pension plan or ERISA:

> "nonforfeitable benefit" means, with respect to a plan, a benefit for which a participant has satisfied the conditions for entitlement *under the plan* or the requirements of this Act (other than submission of a formal application, retirement, completion of a required waiting period, or death . . .)[.][62]

The plain meaning of this statutory language is that a waiting-period condition that may be disregarded is one imposed "under the plan" or ERISA. This is surely a permissible construction of the statute to which PBGC is entitled to deference.[63]

Second, the WARN Act does not refer to or create a "waiting period." It refers to a "60-day period," and there is no indication in the WARN Act that this period is coextensive with, or even relevant to, waiting periods imposed by employee benefit plans or ERISA. Indeed, under the WARN Act, it is the employer, not the employees, who must wait, so the comparison of these statutory periods is not apt. Appellant cites no case finding a relationship between these two provisions, and PBGC is aware of none.

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[62] 29 U.S.C. § 1301(a)(8) (emphasis added).

[63] *See Chevron*, 467 U.S. at 842-43. Similarly, the above-quoted Guaranteed Benefits regulation refers to "a waiting period described in the plan," 29 C.F.R. § 4022.4(a), which at the very least is a permissible interpretation entitled to *Auer* deference.

Third, even if the ERISA waiting period and the WARN Act notice period were somehow related, there is nothing to suggest that this helps Appellant satisfy the "break in continuous service" requirement of the Pension Plan. It is undisputed that Appellant worked for RTI until mid-August 2002. Thus, under the terms of the Pension Plan, none of the participants became eligible for a Shutdown Benefit, because the Pension Plan terminated as of a date prior to anyone suffering a break in continuous service as a result of a shutdown of a plant of facility. That was the result of *RTI*, applicable to *all* Pension Plan participants at RTI.

C. Appellant's Severance Provision Argument Is Without Merit.

Appellant attempts to buttress his WARN Act argument with a similar argument based on the above-quoted definition of "Break in Continuous Service" and the Severance provision of the Labor Agreements.[64] That provision requires RTI to give USW 90 days' advance written notice before permanently closing a plant.[65] As with the WARN Act argument, Appellant asserts that this 90-day advance notice period constitutes a "required waiting period" under the statute and regulation. But this argument is similarly unavailing: the employer's notice periods are not "waiting periods" under the Pension Plan, and Appellant did not, in any event, suffer a break in continuous service before the June 14, 2002

[64] Appendix at 184. This material is not part of the Administrative Record.

[65] *Id.*

termination date of the Pension Plan. Again, he continued working for RTI until August 16, 2002.[66] Thus, Appellant did not satisfy the conditions for entitlement to a Shutdown Benefit before the termination date of the Pension Plan.

III. PBGC CORRECTLY CALCULATED APPELLANT'S BENEFIT, INCLUDING ITS DEFINED CONTRIBUTION COMPONENT.

Appellant argues that PBGC miscalculated his pension benefit, including the defined contribution portion not insured by PBGC. In truth, Appellant has been paid the full value of his Defined Contribution Pension ("DCP") Account,[67] and has suffered no financial loss as a result of PBGC's benefit calculations. PBGC's calculation and treatment of Appellant's benefit, including his DCP Account, is fully supported by the Administrative Record and should be upheld by this Court.

A. The Pension Plan is a "414(k) Plan," and PBGC Dealt With It Properly Under Title IV of ERISA.

The Pension Plan had a structure that is often referred to as a hybrid or "414(k) plan," after the section of the IRC that describes it. Such plans are defined benefit plans that also have individual accounts, which in this case were intended

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[66] Appendix at 496, AR 671.

[67] Defined Contribution Pensions are those in which one's benefit is limited to the amount in one's account, as distinct from defined benefit pensions. ERISA uses "individual account plan" and "defined contribution plan" interchangeably. *See* 29 U.S.C. § 1002(35); *see, e.g.*, *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 250 n.1 (2008). The Pension Plan likewise refers to them as both DCP Accounts and Individual Accounts.

to hold transfers from other plans sponsored by RTI or related employers.[68] Thus, Appellant's benefit under the Pension Plan consisted of (i) an Individual Account Benefit based on the balance of his DCP Account, and (ii) a defined benefit pension determined in accordance with Article 5 of the Pension Plan.[69]

Article 5.03 of the Pension Plan provides the formula for calculating the benefit payable from the defined benefit portion of the Pension Plan: $35 multiplied by the number of years of service, reduced by the benefits paid from two LTV Steel pension plans and the participant's DCP Account benefit.[70] The Pension Plan permitted participants to elect to transfer monies held in the DCP portion of the Pension Plan to the defined benefit portion of the Pension Plan to "be applied thereunder to provide the annuity benefit attributable to the participant's Individual Account Benefit."[71] Throughout the Pension Plan

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[68] Appendix at 410-18, AR 451-59. The Pension Plan refers to these provisions as "Appendix A," but PBGC refers to them as "Individual Account Provisions" to avoid confusion with the Appendix in this case.

[69] Appendix at 410, AR 451.

[70] Appendix at 369-71, AR 392-95.

[71] Appendix at 416, AR 457 (Individual Account Provisions § 3.5(b)).

document, these two benefits are treated as separate components of the Pension Plan.[72]

ERISA specifically excludes individual accounts from PBGC's insurance coverage.[73] Section 1321(b)(12) of ERISA states that Title IV of ERISA does not apply to "a defined benefit plan, to the extent it is treated as an individual account plan under paragraph 35(b) of section 1002 of this title."[74] Based on this provision, PBGC has determined that none of the Title IV insurance provisions applies to "individual account" benefits under a 414(k) plan and, consequently, that PBGC is prohibited from administering such accounts or taking possession of the

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[72] See Appendix at 410, AR 451, describing the benefit under the Pension Plan as including: (a) Individual Account Benefit based on the balance of the Individual Account of the Participant maintained under [the Individual Account Provisions], and (b) a defined benefit pension determined in accordance with Article 5 of the Pension Plan. *See also* AR 457, Individual Account Provisions § 3.5(b) (requiring that the Individual Account Balance be "transferred to the defined benefit portion of the Plan in order to receive the DCP benefit in the form of an annuity").

[73] 29 U.S.C. § 1321(b)(1), (12).

[74] 29 U.S.C. § 1321(b)(12). "Paragraph 3(35)(B) of section 1002 of this title" refers to 29 U.S.C. § 1002(35)(B), which states that a 414(k) plan is, for certain purposes, to be "treated as an individual account plan to the extent benefits are based on the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan." *See* 29 U.S.C. § 1002(34) (defining "individual account plan"); *id*. § 1002(35) (contrasting "defined benefit plan" and "individual account plan").

corresponding assets to fund liabilities under the Pension Plan.[75] Accordingly, when the Pension Plan terminated, it was split into two plans — a defined benefit plan, which was terminated and administered by PBGC, and an individual account plan, which had to be terminated separately by its sponsor, RTI.[76]

Appellant argues that the DCP Accounts in the Pension Plan are covered by PBGC insurance, citing 29 U.S.C. § 1321(c)(1).[77] This argument is unavailing, however, because 29 U.S.C. § 1321(c)(1) simply does not apply to the Pension Plan. Section 1321(c)(1) creates an exception to section 1321(b)(1), which deals with pure individual account plans (and excludes them from Title IV coverage).

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[75] *See* PBGC Op. Ltr. 75-87 ("plans with both defined benefit and individual account characteristics in effect are two plans for the purposes of Title IV of [ERISA]"). *See also* PBGC Op. Ltr. 75-110 ("[t]he consequence of the bifurcated plan benefit is that the individual account portion of the benefit would not be guaranteed by [PBGC], if upon the plan's termination, the plan was unable to pay basic benefits when due," and advising the plan sponsor to exclude participants whose benefits are based solely on the defined contribution portion of the benefit when computing premiums payable to PBGC); PBGC Op. Ltrs. 74-3, 74-16, 74-17, 78-17. *See also* AR 569-73 (Settlement Agreement apportioning responsibility for the termination of the Pension Plan between PBGC and RTI).

[76] Normally, the plan sponsor would undertake the termination of the portion of the pension plan containing the individual accounts, along with the defined benefit portion of the pension plan. In this case, however, because RTI had liquidated in bankruptcy, PBGC arranged with the administrator of RTI's bankruptcy estate to have a third-party administrator complete the termination of the DCP and pay the benefits to participants. *See* AR 87-90. Department of Labor regulations permit a third party to terminate a plan when there is no responsible plan sponsor or administrator. 29 C.F.R. § 2578.1

[77] Appellant's Br. at p. 54.

Here, by contrast, the Pension Plan is a defined benefit plan that *is* covered by PBGC insurance except for its defined contribution component, and is therefore more aptly described by 29 U.S.C. § 1321(b)(12), which refers to plans with both a defined benefit component and an individual account component. PBGC of course viewed the defined benefit portion of the Pension Plan as subject to Title IV insurance coverage, as evidenced by PBGC's termination of the Pension Plan and guarantee of benefits payable from the defined benefit portion of the Pension Plan.

Appellant also argues that PBGC has improperly applied the terms of I.R.C. § 414(x) to the Pension Plan. Appellant did not raise this argument in the district court or during the review by PBGC's Appeals Board and should not be permitted to raise it here. At any rate, I.R.C. § 414(x) had not yet been enacted when the Pension Plan terminated,[78] and therefore has no application to the Pension Plan or to this case. The treatment of the DCP Accounts in this case flows from the limitations imposed on the PBGC under Title IV of ERISA, not the language of I.R.C. § 414(k) or 414(x).

Thus, PBGC applied 29 U.S.C. § 1321(b)(12) based on the explicit terms of that provision. Moreover, PBGC's interpretation is consistent with 29 U.S.C.

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[78] Section 414(x) of the code was enacted as part of the Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780. In brief, I.R.C. § 414(x) allows a plan sponsor to establish two separate plans — a defined benefit plan and a defined contribution plan — and operate them together. The Pension Plan here, by contrast, was a 414(k) plan.

§ 1002(35)(B), which is cross-referenced in the provision at issue and which uses nearly identical language to describe dual treatment of 414(k) plans under specific provisions of Title I of ERISA. PBGC's construction of these provisions is completely reasonable and is entitled to deference under *Chevron*.[79]

B. PBGC's Treatment of the DCP Accounts Did Not Constitute an Amendment to the Pension Plan

Appellant also mistakenly argues that the payments to participants from their DCP Accounts constituted an improper amendment to the Pension Plan. The benefit changes he complains of are the result of plan termination under 29 U.S.C. § 1342, not a plan amendment. When an underfunded plan terminates, benefits and options under the pension plan are fixed as of the plan termination date.[80] So,

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[79] *See, e.g.*, *Beck v. PACE Int'l Union*, 551 U.S. 96, 104 (stating that "[w]e have traditionally deferred to the PBGC when interpreting ERISA, for 'to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embar[k] upon a voyage without a compass.'") (quoting *Mead Corp. v. Tilley*, 490 U.S. 714, 722, 725-26 (1989)); *see generally PBGC v. LTV Corp*, 496 U.S. 633, 647-48 (1990).

[80] *See, e.g.*, *Fetty v. PBGC*, 915 F. Supp. 230, 235 (D. Colo. 1996), *aff'd mem.*, 104 F.3d 367 (10th Cir. 1996).

although pension plan termination may affect benefits and plan terms by operation of law, plan termination does not constitute a plan amendment.[81]

Participants in a terminated plan may be paid lower benefits than their plan promised. This is because Congress did not design the Title IV insurance program to replace all benefits and options that may be written into a plan. Rather, Congress carefully established exclusions to coverage[82] and limitations on the benefits that are guaranteed,[83] thus creating a limited universe of benefits that a plan participant can receive from PBGC.[84]

These limits, expressed in ERISA, define the extent to which PBGC may take control of assets and pay benefits. In some cases, the application of the statutory limitations will result in participants receiving guaranteed benefits that

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[81] Plan amendments are documents executed by individuals authorized by the pension plan. 29 U.S.C. § 1102(b)(3). *See also*, *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 79-80 (1995). The limits of PBGC's guarantee are mainly derived from 29 U.S.C. § 1322 and are unrelated to the plan amendment rules of 29 U.S.C. § 1102(b)(3).

[82] *See* 29 U.S.C. § 1321(b).

[83] *See generally* 29 U.S.C. § 1322.

[84] PBGC insurance was "not intended as a full replacement of a pension plan, but rather as covering the basic retirement benefits provided under it." S. Rep. No. 93-383, at 81 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965.

are less than the promised benefits under the pension plan.[85] Similarly, the limits on PBGC's guarantee may mean that participants are unable to exercise some options that had been permitted under the ongoing plan but which were not exercised before the plan termination date, such as electing lump sums.[86] In this case, the Pension Plan's provisions regarding a transfer of the DCP Account balances to the defined benefit portion of the Pension Plan were limited upon the termination of the Pension Plan.

Because PBGC could not take over the DCP Accounts, which were excluded from insurance coverage under 29 U.S.C. § 1321(b)(12), the DCP Account portion of the Pension Plan was terminated by a third-party administrator.[87] In such situations, distribution of benefits is a required part of terminating a plan that is not guaranteed by PBGC.[88] Thus, as of the Pension Plan's termination date, participants could no longer defer receipt of their DCP benefits, though they could

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[85] *See, e.g.*, 29 U.S.C. § 1322(b)(2) (limiting the maximum benefit payable by PBGC).

[86] See, for example, 29 C.F.R. § 4022.7, providing that a guaranteed benefit that could have been paid in the form of a lump sum under the terms of the plan "will not be guaranteed or paid as such." Lump sums are an optional form of benefit that would otherwise be protected from elimination by I.R.C. § 411(d)(6).

[87] *See* Appendix at 339-42, AR 87-90 (Zabarsky Letter).

[88] See 26 C.F.R. § 1.401-6, which sets forth rules for terminating a qualified plan, including the requirement that unallocated funds be distributed to plan participants.

elect to have the lump sum rolled into an IRA or to have the DCP Account amount used to purchase an annuity.

Although Appellant claims that participants were "forced" to take lump sums, participants were, in fact, offered the choice of electing to receive a lump sum or an annuity.[89] The only option no longer available was to postpone payment until retirement and transfer the DCP Account balance to the defined benefit portion of the Pension Plan at that time, for an additional annuity paid from PBGC. This change was required by the plan termination, not a plan amendment.

PBGC's treatment of the DCP Accounts was consistent with the Pension Plan document and ERISA. Moreover, all participants received the full actuarial value of the benefit provided under the Pension Plan, which provided for a set benefit, reduced by benefits received from other specified plans and the DCP Accounts.[90]

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[89] Options were offered and explained in the Zabarsky Letter. *See* Appendix at 340-41, AR 88-89.

[90] The treatment of the DCP Accounts caused no loss or harm to the participants. In fact, the treatment *benefitted* participants who received distributions of the DCP Accounts as part of the Pension Plan's termination. PBGC substituted PBGC's conversion factors for the plan's factors when calculating the offset attributable to the DCP Account payments. These factors were more favorable than the plan factors and resulted in a lower offset than that which would have been applied by the Pension Plan. *See* AR 13, where the PBGC Appeals Board explains this calculation in more detail.

C. Appellant Lacks Standing to Pursue His Additional Claims Regarding the DCP Accounts Because He Received the Full Amount of His Guaranteed Benefit Under ERISA.

Appellant claims that PBGC has not correctly applied section 5.04(c) and 5.05(g) of the Pension Plan. Section 5.04(c) provides a temporary supplement to participants who are entitled to either a "Permanent Incapacity" (disability) or a "70/80" Retirement under the Pension Plan, while section 5.05(g) does the same for a "Rule of 65" retirement under the Pension Plan.[91] However, Appellant is not entitled to any of these types of retirement benefit. Appellant is a "deferred vested" retiree, as seen on his benefit statement.[92] The PBGC Appeals Board found that Appellant was not eligible for the 70/80 benefit or disability benefit,[93] and as discussed in Part II above, neither was he entitled to a Rule of 65 benefit.[94] Thus, Appellant suffered no cognizable harm with respect to these supplemental benefits, because he was never eligible for the types of retirement on which these supplements are based.

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[91] Appellant's Br. at 75; *see* Appendix at 371-75, AR 395-99.

[92] Appendix at 495, AR 633.

[93] *See* Appendix at 253-54, AR 5. The Appeals Board provided information on how to submit evidence of his disability eligibility but no additional documentation was provided and he did not seek judicial review of this determination.

[94] Appendix at 264, AR 17.

Similarly, Appellant argues that PBGC kept a portion of the balance in his DCP Account without providing just compensation. But this argument is based on a provision in the Pension Plan that provides that amounts over $25,000 cannot be paid from the DCP Accounts in a lump sum.[95] Appellant's DCP Account was significantly below that threshold, and he was paid the full value of his DCP Account. Thus, he suffered no harm from the application of this Pension Plan term.[96]

Because Appellant suffered no harm from either of these claimed improper actions, he lacks standing under Article III of the Constitution, which is a threshold requirement before seeking judicial review.[97] This court has refused to address

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[95] Appendix at 417, AR 458, Individual Account Provisions § 4.2(a)(iii).

[96] The Administrative Record does not reflect the amount of the benefit paid to Appellant by the Zabarsky firm when it terminated the DCP Account portion of the Pension Plan. However, an estimate prepared before the Sixth Circuit set the date of plan termination as June 16, 2008, shows the calculation based on the DCP value on August 31, 2002 (the date set by the district court), and shows that the DCP Account balance as of that date was $14,475.89. Appendix at 497, AR 611. Appellant has offered no evidence that his account increased over the $25,000 threshold by the time it was paid. Because this claim was not raised before either the PBGC Appeals Board or the district court, the Administrative Record is devoid of other materials relating to this claim.

[97] "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted). The Supreme Court defines injury-in-fact as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" *Id.*

claims from participants who have not suffered an injury-in-fact from the complained-of actions, and should do so here.[98]

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed in all respects.

Date: April 7, 2014
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[98] *See Davis v. PBGC*, 734 F.3d 1161, 1173 (D.C. Cir. 2013) (citing *Lujan*).

CERTIFICATE OF SERVICE

I, Nathaniel Rayle, certify that on April 7, 2014, true and correct copies of the Appellee's Brief were served via the Overnight Courier upon the following party, *pro se*:

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CERTIFICATE OF COMPLIANCE

I, Nathaniel Rayle, hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(B), that the word count of Appellee's brief is 7792, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Appellee's brief was prepared using Microsoft Word 10, and Appellee's counsel has relied on the word count function of Microsoft Word 10 to calculate the word count.

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Dated: April 7, 2014

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