UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM L. SCHOEN, MARY J. NESBIT, ROBIN L. ROSEWICZ, GEORGE E. POOLE, JAMES E. SWARTZ, JR., JOHN SOUZA, AND KAREN SOUZA, individually and as representatives of a class of participants and beneficiaries of the Allegheny Technologies Incorporated Pension Plan;	)	
Plaintiffs	)	Case No. 2:24-cv-01109-KT
vs.	)	
ATI INC. THE ALLEGHENY TECHNOLOGIES INCORPORATED PLAN ADMINISTRATIVE COMMITTEE, STATE STREET GLOBAL ADVISORS TRUST CO., AND JOHN DOES 1-5;	)	
Defendants.	)	

BRIEF OF THE PENSION RIGHTS CENTER
AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS

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The Pension Rights Center

The Pension Rights Center (the "Center") is a Washington, D.C. nonprofit, nonpartisan consumer organization that has been working for more than 45 years to protect and promote the retirement security of American workers, retirees, and their families. The Center provides education and legal representation to retirees, workers, and their families concerning retirement plans and is the technical assistance advisor to five regional pension information and counseling centers providing free legal assistance on pension and retirement issues in 31 states. The Center also works to improve pension security and adequacy through common ground initiatives with others in the pension community and by working with the Federal agencies and Congress to improve pension outcomes.

Interest of Pension Rights Center in the Litigation

Participants in a defined benefit plan normally receive an annuity benefit commencing at retirement age and continuing until the death of the participant and, in the case of most married participants, until the death of the participant's spouse. The annuity payout period, typically beginning at age 65, can exceed three decades. A reduction of a benefit, even short term, can have a devastating impact on a participant or beneficiary. *See, e.g.,* Peter Applebome, *Mill Town Pensioners Pay for Wall Street Sins,* New York Times, July 30, 1991, Page 1, https://www.nytimes.com/1991/07/30/us/mill-town-pensioners-pay-for-wall-street-sins.html ("hereinafter "*Mill Town Pensioners Pay for Wall Street Sins*"). We also know, from working with working and retired Americans, that pension risk transfers create concern and anxiety among participants when their benefits are transferred to insurance companies that subject those benefits to higher-than-necessary levels of risk.

ERISA's structure for ensuring that a defined benefit plan meets its long-term obligations has three primary components: minimum funding standards for such plans and the sponsors of such plans; the plan sponsor's contingent liability for shortfalls in the plan's ability to pay participants their earned benefits; and ultimately the Pension Benefit Guaranty Corporation's ("PBGC") guaranty of benefits. The system has worked largely as intended for the 50-year history of ERISA, with most plans fully satisfying their liabilities and the PBGC paying benefits up to a generous guaranteed level in the rare case of plan and plan sponsor insolvency.

When a plan transfers benefit liabilities to an insurance company in a so-called risk-transfer transaction, benefit fulfillment through the end of the participant's life is, as defendants acknowledge, transferred to a system of state (and sometimes off-shore) regulation—in which the insurance company alone, rather than the plan *and* the plan sponsor, has responsibility for the benefit—and to 50 state-administered, unfunded, state guaranty funds with varying levels of guarantees for participants depending principally on the residence of the participant. The ERISA system, designed by Congress to ensure that participants in defined benefit plans will receive their benefits, is by far the more robust system for protecting participants' interests in defined benefit plans. And the Department of Labor has recognized this by requiring that in a risk-transfer transaction, the plan fiduciary responsible for selecting an annuity provider must select not simply an annuity by a licensed insurance carrier, but rather the "*safest available annuity*," which maximizes the chances that the participants will receive uninterrupted benefits throughout their retirement.

We submit this brief not only because we believe the fiduciary process that resulted in the selection of Athene falls short of a process designed to select the safest available annuity, but also because the position taken by Defendants—that the allegations that Defendants failed to prudently select an annuity in the sole interest of the participants cannot be tested in court so long as the annuity provider has not yet failed—could ultimately lead to a nationwide catastrophe for retirees.

ARGUMENT

The argument is divided into three sections: The first section provides historical context to the pension-risk transfer phenomena, focusing on how such transactions were initially sanctioned by the PBGC as the means by which a plan with sufficient assets satisfied benefit liabilities when the sponsor terminated the plan. We will show that at the time—indeed arguably until 1990—the PBGC maintained the position that its benefit guarantees continued to back benefit liabilities transferred to annuity providers in plan terminations. By 1990, however, PBGC changed its position, with its Executive Director testifying before the Senate Committee on Finance that "We believe the appropriate role of the federal government is to encourage sponsors to prudently select insurers for pension annuities and to enforce such standards. We do not believe that another large risk fraught with moral hazard should be placed upon the PBGC insurance program." The PBGC's position, and the subsequent failure of Executive Life, led the Department of Labor to issue Interpretative Bulletin 95-1, 29 CFR § 2509.95-1 ("Interpretive bulletin relating to the fiduciary standards under ERISA when selecting an annuity provider for a defined benefit pension plan") (hereinafter "I.B. 95-1"), which requires responsible plan fiduciaries to select an insurance company which provides "the safest available annuity."

The second section argues that Plaintiffs have standing under Article III of the Constitution to bring a claim against Defendant for failing to adhere to I.B. 95-1, that is to conduct a process to identify the "safest available annuity." The injury that Plaintiffs suffered was the difference in economic value between a safest available annuity and the riskier annuity the plan actually distributed to them. The third section discusses State Street's rather astonishing contentions that it is not required to have a process designed to identify the safest available annuity providers because, in its view, I.B. 95-1 is "non-binding," and thus implicitly admitting that its process was not designed to select the "safest available annuity."

I. History and Context Demonstrate the Importance of the Annuity Selection Process Outlined in Interpretative Bulletin 95-1.

An animating event for the Congress that passed ERISA in 1974 was the termination of an insolvent defined benefit pension plan sponsored by Studebaker Corporation. When the plan terminated, it had sufficient assets to pay benefits to those who were already retired or eligible to retire, but other participants received either lump sum payments worth only 15% of their benefits or, in many cases, nothing. This event was widely covered by the media and gave support to arguments that American workers could not rely on their workplace defined benefit retirement plans. *See generally,* James A. Wooten, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, A POLITICAL HISTORY 51-79 (Chapter Four, "The Most Glorious Story of Failure in the Business"/The Studebaker-Packer Corporation and the Origins of ERISA) (University of California Press 2004).

The Studebaker tragedy resulted from the intersection of three gaps in the law. First, Studebaker had not been subject to rules to ensure sound actuarial funding of the promises it made through its plan. Second, Studebaker had no obligation to make the plan whole during the plan's life or in the event of the plan's insolvency and the plan document expressly disclaimed Studebaker's liability for the plan's promises. Third, there was no governmental program to pay benefits in the event of a pension plan default.

ERISA addressed each of these problems: it created minimum funding standards for defined benefit plans; it created sponsor liability for funding shortfalls, both during the plan's life and if the plan became insolvent; and it created the Pension Benefit Guaranty Corporation to step in when both the plan and plan sponsor failed, guaranteeing benefits up to a specified level, which for plans terminating in 2025 is a monthly life annuity commencing at age 65 of up to $7,431.82 per month (or $89,182 annually). *See* PBGC, Monthly Guarantee Tables, https://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee. Although Congress has had to tweak the system several times since 1974, the system has succeeded in ensuring that the benefits of participants in defined benefit plans are paid (at least up to guarantee amounts[1]) without interruption, even in the event of plan *and* plan sponsor insolvency.

Prior to ERISA, the termination of a plan was governed by plan provisions and applicable state law. Typically, as was the case in the Studebaker plan, the plan expressly exempted the employer from any financial responsibility for benefits under the plan. And plans sometimes satisfied benefit obligations on termination through the payment of lump sums under plan valuation rules rather than through the payment of monthly annuity benefit at retirement age.

The PBGC, by regulation, changed the rules on how a terminating solvent plan must satisfy plan benefits, requiring such a plan to purchase irrevocable insurance contracts to pay plan annuity benefits to plan participants, unless the plan permitted and the participant expressly elected to receive a lump sum distribution or other form of benefit offered by the plan. See Guarantees of Retirement Annuities, Hearing Before the Committee on Finance, United States Senate, 101st Cong. 2nd Sess. at 51, 52 (1990) (prepared Statement of James B. Lockhart III)

[1] Title IV of ERISA allocates plan assets in accordance with statutory priorities. ERISA § 4044(a), 29 U.S.C. § 1334(a) The first two categories are for benefits attributable to employee contributions and the third is to the benefits of individuals already in pay status for three years as of the plan's termination date (or could have been in pay status for such period). Thus, a plan, even though without sufficient assets to pay all plan benefits to all participants, is sometimes in a position to pay full or close to full benefits to participants who are or could have been in pay status for three years even though those benefits exceed PBGC benefit guarantees.

(hereinafter "*Lockhart Statement*").[2] PBGC took this position because the normal form of statutory benefit under a defined benefit plan is an annuity benefit or, in the case of married individuals, a joint-and-survivor annuity benefit, not a lump sum. *Id.* Congress ultimately incorporated this position into the statute. ERISA § 4041(b)(3)(A), 29 U.S.C. 1341(b)(3)(A).

The PBGC position that terminating plans are required to purchase and distribute irrevocable insurance commitments to satisfy benefits raised an important issue: what would happen if the insurance company to which the benefits were transferred failed? Would the PBGC pay guaranteed benefits in the event of insurer default if the state insurance guaranty funds did not cover the loss? In a preamble to a 1981 regulation, PBGC indicated that it would. The preamble stated that "in the unlikely event that an insurance company should fail and its obligations cannot be satisfied (e.g., through a reinsurance system), the PBGC would provide the necessary benefits." 46 Fed. Reg. 9532, at 9534 (1981).

Two years later, however, PBGC became concerned about its potential liability for insurer failure and, in 1983 and again in 1985, made legislative proposals that would have provided that the PBGC did not have statutory liability for benefits once transferred from a plan to an insurance company. *Lockhart Statement* at 54. Congress never adopted the PBGC proposal. Notwithstanding Congressional inaction, the PBGC eventually announced that it would not follow the commitment it had made in the Federal Register. *Id.*

The PBGC's Executive Director James Lockhart justified the agency's position in 1990 testimony before the Senate Finance Committee. Mr. Lockhart indicated that PBGC guaranty coverage of payments under annuity contracts "would give the sponsor a perverse incentive to buy the lowest acceptable quality annuity to minimize the cost of the purchase or to maximize

[2] The hearings are accessible at https://www.google.com/books/edition/Guarantees_of_Retirement_Annuities/DBs1AAAAIAAJ?hl=en&gbpv=1.

the asset reversion. The insurance company could also be tempted to invest in higher risk assets." *Id.* at 56. Mr. Lockhart concluded his testimony by expressing the view that "the appropriate role of the federal government is to encourage sponsors to prudently select insurers for pension annuities and to enforce standards. *We do not believe that another large risk fraught with moral hazard should be placed upon the PBGC insurance program.*" *Id.* (emphasis supplied). The risk posed by this potential moral hazard was not eliminated by the PBGC's new position but transferred to the plan's participants.[3]

Not quite a year after the PBGC disclaimed its responsibility for benefits transferred to insurers, the insurance company Executive Life failed, resulting in immediate reduction of benefits for tens of thousands of individuals whose benefits had been transferred from terminating pension plans to Executive Life, with some participants seeing their benefits immediately cut by 30%. *Mill Town Pensioners Pay for Wall Street Sins*. In response to the Executive Life failure and PBGC's decision not to insure against private annuity provider insolvency, the Department of Labor ultimately promulgated Interpretative Bulletin 95-1, which provides that "fiduciaries choosing an annuity provider for the purposes of making a benefit distribution must take steps calculated to obtain the safest annuity available."

II. Plaintiffs Suffered an Injury in Fact When they Received an Annuity with Identifiably Higher Levels of Risk than Other Available Annuities.

The Defendants contend that Plaintiffs lack standing to bring this civil action because they "have received all of their pension benefits so far, and they are legally and contractually entitled to receive those same monthly benefits for the rest of their lives," and thus have not

[3] Plans did not typically purchase and distribute private annuity contracts to participants in ongoing plans as a means of satisfying benefit liabilities during the first twenty years of ERISA. The practice became attractive to employers for a number of reasons, including reduction of PBGC premiums, which are not paid on behalf of former plan participants.

suffered an injury in fact sufficient to support Article III standing to proceed with this action. Memorandum of Law in Support of ATI, Inc.'s and the Allegheny Technologies Incorporated Plan Administrative Committee's Motion to Dismiss Plaintiffs' Consolidated Complaint, at 13 ("ATI Memorandum of Law"). But plaintiffs have not received their full benefits and will not until their final annuity payments are made—which in some cases may not occur for three or more decades. Under I.B. 95-1, Plaintiffs were entitled to have their benefits transferred to an insurance company that would provide them with the safest available annuity, I.B. 95-1, but they allege that they received an annuity contract subject to much greater risk of default than other available annuity contracts. And the annuity they received has demonstrably less value than the safer annuity to which they were entitled and thus they suffered an immediate economic loss equal to the difference in value between the riskier annuity they did receive and the safer annuity that the plan was required to pay them.

The importance of the "safest available annuity" standard reflects the very real differences between the ERISA structural protections to ensure uninterrupted payment of defined benefit pension promises and the weaker protections of state insurance regulation. In ERISA, there are four assurances of benefit payment: the plan's assets at any given moment; minimum funding rules with the plan sponsor responsible for correcting funding deficiencies over time; the residual liability of the plan sponsor for plan insolvency on plan termination; and the pre-funded benefit guaranty program administered by the Pension Benefit Guaranty Corporation.

In contrast, when benefit obligations are transferred from a plan to an insurer, the benefit obligation is protected by the insurer's assets at any given moment, with no obligation on a plan sponsor or an equivalent to make up a funding shortfall. In the event of insurer insolvency, state regulators can take regulatory action, including putting the insurer in receivership; ultimately, if the state regulators are unable to rehabilitate the insurer by transferring its business to other insurers or otherwise, the state insurance guaranty funds of each participant's domicile will attempt to make up some of the losses to the policyholder, up to guarantee limits. The state guaranty funds, unlike the PBGC, are unfunded and must raise assets through future assessments on other insurers doing business in the state. The guaranty funds have not been significantly tested since the collapse of Executive Life, which resulted in substantially reduced benefits for many individuals, at least for a period of time.[4]

The guaranty limits vary from state to state and are themselves dependent on interest rate assumptions used by a guaranty fund. The majority of state guaranty funds ensure annuity contracts only up to a present value of $250,000, which would translate into a monthly annuity for a 65-year-old of approximately $1,500 to approximately $2,000 per month, depending on the underlying actuarial assumptions.[5] And in California, the guarantee is the *lesser* of a $250,000 present value or 80% of the promised benefit. *See https://www.califega.org/FAQ* (Q&A 17). (The PBGC maximum guarantee amount, in contrast, is $7,431 per month single life annuity for a 65-year-old participant in a plan terminating in 2025. *See* PBGC, Guarantee Tables, https://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee.

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[4] Daniel Hartley, *Insurance on Insurers: How State Insurance Guaranty Funds Protect Policyholders,* Federal Reserve Bank of Chicago, Economic Perspectives, No. 3, May 2024, https://www.chicagofed.org/publications/economic-perspectives/2024/3 ("In practice, as illustrated by the two largest insurer insolvencies that I discuss as examples—namely, the Penn Treaty and Executive Life insolvencies—the resolution process can involve delays that deplete assets, introduce uncertainty regarding the degree of coverage for policyholders, and cause inequity across the coverage provided to different types of policies."). *see also* Richard W. Stevens, *2 Concerns Sued Over Pensions,* New York Times, June 13, 1991, Section D, Page 1, https://www.nytimes.com/1991/06/13/business/2-concerns-sued-over-pensions.html (Executive Life, under the direction of regulators, is currently paying only 70 percent of scheduled payments to holders of its annuities, including company pension plans.)

[5] The $1,500 per month reflects an interest assumption of 3% and the $2,000 7%, with an 18-year payout period, reflecting life expectancy of 83. See Annuity Calculator, https://www.calculator.net/annuity-payout-calculator.html?cstartingprinciple=250%2C000&cinterestrate=4&cyearstopayout=20&camounttopayout=5%2C000&cpayfrequency=monthly&ctype=fixlength&x=Calculate#annuity-result.

The reduction in present value would be greatest for people close to their annuity starting date. According to a paper published by the Federal Reserve of Chicago, the state guaranty funds, when tested, have not worked as well as one would have hoped. *See* Daniel Hartley, *Insurance on Insurers: How State Insurance Guaranty Funds Protect Policyholders, supra* note 5.

Given the limits of the system of local insurance regulation, where the state generally cannot force the owners of an insurance company to increase the company's capital in a manner similar to ERISA's minimum funding rules and residual sponsor liability requirements, and where state guaranty funds are less robust, less tested, unfunded, and more complex than ERISA's PBGC program, the notion that a plan must engage in a thorough and prudently conducted process designed to select the safest available annuity is absolutely critical to protect the security of a former participant's benefits over his or her lifetime.[6]

It is hard to take seriously State Street's argument that its annuity selection process was designed to serve the best interests of the plan's participants and beneficiaries and that Plaintiffs have not sufficiently alleged that its process was deficient. The methodology by which the plan selected Athene has not been shared with the Plaintiffs—not how the request for proposals from insurers was formulated (if there was in fact such a request) nor how the responsible fiduciaries analyzed and evaluated pertinent factors in I.B. 95-1. Nor is the contract between ATI and State Street available to Plaintiffs, nor any information that State Street furnished to ATI. Other than the plan's ultimate choice of Athene, the process remains opaque, except for the fact that the cost

[6] Contrary to Defendants' assertions, Plaintiffs do not contend that the injury suffered is the loss of ERISA coverage, which include PBGC guarantees. See ATI Memorandum of Law at 14, note 32. Rather, their injury is the difference in economic value between an appropriate annuity contract selected under IB 95-1 and the annuity contract actually distributed. Plaintiffs' loss of PBGC coverage is only part of the explanation of why a plan's selection of the safest available annuity is necessary to prevent plaintiffs from suffering a reduction in the economic value of their benefits.

of the annuity was a key if not the determinative factor, in the selection of Athene over safer annuities.

And Defendants also claim that they were not obligated to conduct a process to locate a safest available annuity. Indeed, Defendant State Street argues that the standard in I.B. 95-1 is mistaken, and is “non-binding,” State Street Global Advisors Trust Company’s Memorandum in Support of It’s Motion to Dismiss Plaintiff’s Consolidated Complaint (hereinafter State Street Memorandum to Dismiss), at 14. State Street further claims that it satisfied the fiduciary duties it owed to Plaintiffs under ERISA—"the highest known to the law,” *Donovan v. Bier*wirth, 680 F. 2d 263, 272—by their naked assertion that they considered the “relevant factors.” *Id.* Defendant’s own memorandum strongly suggests that defendant eliminated some insurers from consideration simply because they were more expensive, notwithstanding that their annuity would have been safer than the Athene annuity that Defendants caused the plan to purchase. *Id.* at 15.

Defendant argues that the decision in *Thole v. U.S. Bank, N.A.,* 590 U.S. 538 (2020) “decides this case.” But Defendant misreads *Thole*. In *Thole*, the plaintiffs alleged that a fiduciary breach had resulted in a plan suffering a large investment loss. The Supreme Court wrote that the participant had no injury because the alleged breach would not have “substantially increased the risk that the *plan and the employer* would fail and be unable to pay the participant’s future benefits,” *id.* (emphasis supplied).

But here the question is not whether a fiduciary breach so impaired a plan’s funding that benefit payments are meaningfully jeopardized, but whether the plan’s final, terminal set of actions with respect to the Plaintiffs—the purchase and distribution of the Athene annuity contract—caused them an immediate injury. If a plan sponsor decides to remove plan participants from the protections of ERISA through the purchase of an annuity, I.B. 95-1 properly requires plan fiduciaries to use a prudent process designed to identify the "safest availability annuity," or, put another way, to choose an annuity that best served the interests of the participants. See *Bussian v. RJR Nabisco, Inc*. 223 F.3d 286 (5th Cir. 2000). If the fiduciaries fail to do so, the injury to the participants is the difference in economic value between the safer annuity that should have been selected and the annuity that the plan actually distributed.

A study by NISA Investment Advisers, one of the nation's largest asset management firms, concluded that Athene's portfolio had one of the highest credit risks of nine major insurance providers in the pension-risk market by comparing each insurer's bond portfolio risk to the risk reflected in United States Treasury instruments. The economic cost to beneficiaries from being saddled with Athene compared to the safest provider was 14%. *See* NISA Investment Advisors, Pension Risk Transfers May Be Transferring Risk to Beneficiaries (Oct. 22, 2022), https://www.nisa.com/perspectives/pension-risk-transfers-prt-may-be-transferring-risk-to-beneficiaries/. The market loss to a participant who received an Athene annuity rather than an annuity issued by one of the safest annuity providers has recently been between 4.2% to 14% of market value.[7] The complaint plainly and with specificity alleges an immediate injury in fact.

This is not to dismiss Athene's business model—added risk can result in a lower premium (or higher annuity payment amount), a choice a consumer in the individual annuity market can

[7] In its Memorandum at page 19, State Street notes that in a 2024 report, NISA reported that the economic loss to participants had declined to 5% from the 14% figure NISA calculated in its initial report. In fact, NISA's most recent figures show that the market loss has declined to 4.2%. But these losses relate primarily to changes in the spread between privately issued bonds and US Treasury instruments, the most secure of all fixed income securities. The current NISA figures indicate Athene currently subjects the participants to 180% additional market risk than the three safest available annuities—those issued by Massachusetts Mutual, New York Life, and Prudential. See PRT Risk Credit Monitor, https://www.nisa.com/market-updates/pension-risk-transfer-prt/ (last checked on March 3, 2025)(5.2, 5.3, and 5.4 market spread among the three leading insurance companies verses Athene's 9.4 spread). In 2022, Athene ranked ninth of nine in the NISA comparisons; in 2025, Athene ranks 9th of the 11 companies now included in the compilations.

rationally make. But the Plaintiffs here had no agency or potential reward in the choice to take a riskier annuity. Plaintiffs allege that Defendants subjected them to a higher level of risk so that ATI would reap the economic benefits of a lower premium amount. The allegations are that ATI, with the assistance of State Street, effectively pocketed what the plan shortchanged Plaintiffs. The uncompensated risk assumed by Plaintiffs is, as former PBGC Executive Director Lockhart put it, "fraught with moral hazard," and the "safest available annuity standard" is the bulwark against that moral hazard.

We also note that if Defendant prevails at this stage in the litigation, before discovery and on the basis of standing, Plaintiffs will not have meaningful recourse if Athene does default sometime in the future, something Plaintiffs allege is more likely than a default by an insurer whose annuity contract would satisfy the "safest available annuity" standard. If Athene defaults ten years from now, or a quarter century from now, could Plaintiffs then bring an action against the defendants? Assuming Defendants are still around and solvent, they would argue that the complaint now is stale and that the ERISA statute of limitations had run years earlier. See ERISA § 413, 29 U.S.C. § 1113 (generally a six-year statute of limitations from the date of breach). And this dilemma—Plaintiffs cannot seek a remedy now because scheduled payments have not yet been reduced or interrupted yet may not be able to seek a remedy in the future because it is legally (or practically) too late to seek relief—would encourage conflicted fiduciaries to consider price before risk, thereby effectively demoting I.B. 95-1 and the ERISA fiduciary standards it interprets to a dead letter rather than an enforceable legal standard. Moreover, litigation is a lengthy process and even if a civil action against defendants would be plausible if Athene is unable to meet its full benefit commitments down the road, participants could suffer significant financial loss while the civil action was pending. Far better to resolve these issues now and prevent a potential failure than having to deal with the consequences of an actual failure later. As the saying goes, a stitch in time saves nine.

III. State Street Was Obligated to Engage in a Fiduciary Process Designed to Identify Insurance Companies that Issue the Safest Available Annuity.

Except in extraordinarily limited circumstances, I.B. 95-1 requires a fiduciary to engage in a process designed to identify the safest available annuity. Defendant State Street argues, however, that a fiduciary has no obligation to follow such a process described in I.B. 95-1, citing two cases, *Bussian v. RJR Nabisco, Inc*. 223 F.3d 286 (5th Cir. 2000) and *Riley v. Murdock*, 83 F.3d 415 (1996). *See* State Street Memorandum at 13, 14. In Defendants' view, these two cases establish that I.B. 95-1 is a "non-binding bulletin." *Id.* State Street misrepresents those cases.

In one of the cases, *Bussian v. RJR Nabisco, Inc*. 223 F.3d 286 (5th Cir. 2000), the court denied *Chevron* deference to I.B. 95-1 because it was not the product of notice-and-comment rulemaking, *id.* at 296. While not endorsing the position that ERISA requires a plan to purchase the "safest available annuity, the Court wrote that "We agree with the Bulletin and the Secretary that once the decision to terminate a plan has been made, the primary interest of plan beneficiaries and participants is in the full and timely payment of their promised benefit. We agree that beneficiaries and participants whose plan is being terminated gain nothing from an annuity offered at a comparative discount by a provider that brings to the table a heightened risk of default. We would even add that the purchase of such an annuity can be considered an example of the imposition on annuitants of uncompensated risk—the risk of default is borne by the annuitants." *Id.*

And the court, while not accepting in theory the principle that a fiduciary must always select the safest available annuity, wrote that "We view the Bulletin's description of the nature of the investigation to be undertaken in the circumstances of this case as fully consistent with

ERISA's [fiduciary] provisions." *Id.* at 300. The court held that the fiduciary satisfies its fiduciary duties only if it selects an "annuity provider it 'reasonably concludes best to promote the interests of [the plan's] participants and beneficiaries.'" *Id.* Choosing an insurer that poses an identifiably higher level of risk does not meet that standard, whether or not the fiduciary is required to choose the very safest available annuity under I.B. 95-1.

The *Bussian* court in fact *reversed* the district court's grant of RJR's motion for summary judgment in favor of the defendant, writing that "viewing the evidence in the light most favorable to Appellants, a reasonable factfinder could conclude, based on the evidence, that RJR failed to structure, let alone conduct, a thorough, impartial investigation of which provider or providers best served the interests of the participants and beneficiaries. And even if the factfinder were to conclude that RJR's investigation was appropriate, it could conclude, based on the evidence, that RJR could not reasonably determine that Executive Life promoted the interest of plan participants and beneficiaries." The Fifth Circuit standard, while perhaps in some ethereal sense is not identical to the "safest available annuity" standard in I.B. 95-1, is not substantively very different.

Defendant also cites *Riley v. Murdock*, (1996), https://www.ca4.uscourts.gov/Opinions/ Unpublished/ 952414.U.pdf (1996), an unpublished *per curiam* opinion*,* 83 F.3d 415 (1996), that pointedly noted that I.B. 95-1 was not yet in effect when the defendant fiduciaries in that case choose an annuity provider and that "the circumstances of this case do not merit" its application.

Moreover, in December of 2022, Congress enacted the Secure 2.0 Act of 2022. Section 321 of that Act directed the Secretary, after consultation with the ERISA Advisory Council, "to determine whether amendments to section 2509.95-1 of Title 29 of the Federal Regulations are warranted and to report to Congress of the findings of such review consultation, including an assessment of any risk to participants." Section 321 thus reflects clear Congressional understanding that I.B. 95-1 and its safest available annuity requirement is the governing standard for assessing fiduciary responsibility when a defined benefit plan is selecting an annuity provider in a plan termination or risk transfer.

State Street also rather astoundingly contends that its selection of an annuity provider outside the group of safest available annuities was consistent with its fiduciary duty to plan participants whose liabilities were not transferred to Athene: "Athene charged less than its competitors. The resulting savings benefit those participants who remained in the plan after the PRT. The assertion that SSGA could satisfy its fiduciary duties only by choosing an arguably safer but more expensive provider for this partial PRT would be inconsistent with its fiduciary obligations to the participants remaining in the plan." State Street Memorandum at 15.

But this is false: ATI was the ultimate beneficiary of the cost savings of purchasing a "safer" annuity, not the participants who were fortunate enough to remain in the plan. Indeed, the underlying basis for the decision in *Thole*—the case on which Defendants' standing argument rests—is that participants and beneficiaries do not have an interest in the assets in a defined benefit plan. As Justice Kavanaugh wrote for a unanimous court, "[t]he *employer, not plan participants,* receives any surplus left over after all of the benefits are paid; the employer, not plan participants, is on the hook for plan shortfall." *Thole v. US Bank, N.A.,* 140 S.Ct. 1615, 1620 (2020) (emphasis supplied). It is clear that State Street acted for ATI, not the participants who remained in the plan.

Finally, at bottom, State Street contends that it was okay not to choose a safer annuity because a safer annuity would have cost more than the Athene annuity. This is a gross distortion of the principles laid out in I.B. 95-1 and would also mean that participants whose benefits are transferred to an insurer in a partial pension-risk transfer, such as in this case, are treated less favorably than participants whose benefits are transferred in a complete plan termination. Here it bears noting that I.B. 95-1 specifically notes that "The fiduciary may have to condition the purchase of annuities on additional employer contributions sufficient to purchase the safest available annuity." I.B. 95-1(d) (last sentence). State Street sacrificed the interests of the participants and beneficiaries, to whom it owed a duty, in order to benefit ATI, to whom it did not.

CONCLUSION

As we earlier noted, former PBGC Executive Director Jame Lockhart testified before Congress that PBGC was reversing its position on insuring benefits transferred to an annuity provider because "we do not believe that another large risk fraught with moral hazard should be placed on the PBGC insurance program." Lockhart feared that PBGC's former position "would give sponsors a perverse incentive to buy the lowest acceptable quality annuity to minimize the cost of purchase [and the] insurance company could also be tempted to invest in higher risk assets." See Lockhart Statement, *infra*. The individual retirees in this case depend on I.B. 95-1 to protect them from these very same risks. This Court should deny the Defendants' motions to dismiss.

Respectfully submitted,

/s/ Norman P. Stein (*pro hac vice*)

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CERTIFICATE OF SERVICE

I, Norman P. Stein, certify that a copy of the foregoing document, filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on March 20, 2025.

Dated: March 20, 2025

/s/ Norman P. Stein (*pro hac vice*)
Norman P. Stein