No. 09-356

IN THE

Supreme Court of the United States

THOMAS A. PAULSEN *et al.*,
Petitioners,

v.

CNF INC. *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

SHERWIN S. KAPLAN
NIXON PEABODY LLP
401 9th Street N.W.
Suite 900
Washington, D.C. 20004
(202) 585-8000

MICHAEL C. HALLERUD
Counsel of Record
ELLEN M. PAPADAKIS
NIXON PEABODY LLP
One Embarcadero Center,
18th Floor
San Francisco, CA 94111
(415) 984-8200

Counsel for Respondents
CNF Inc. and CNF Service Company, Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

Whether participants in a terminated spun-off pension plan, whose benefits have been fixed by the Pension Benefit Guaranty Corporation ("PBGC"), have constitutional standing to pursue fiduciary breach claims under section 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, (1) against the former employer-settlor that initially funded the spun-off plan and (2) for recoveries that would solely benefit a PBGC asset pool and not the participants personally.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

There are no parties to the proceeding whose judgment is under review other than those listed in the caption to the Petition.

Respondent CNF Inc., now known as Con-way Inc., has no corporate parent. Con-way Inc.'s stock is publicly traded (NYSE: CNW). No publicly held company owns 10% or more of the stock of Con-way Inc.

Respondent CNF Service Company, Inc., now known as Con-way Enterprise Services Company, Inc., is a wholly owned subsidiary of Con-way Inc.

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BRIEF IN OPPOSITION

INTRODUCTION

This Petition presents no "compelling reasons" why this Court should grant *certiorari*. Sup. Ct. R. 10. Only two circuits, both in the last two years, have ever considered the "redressability" prong of Article III standing (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)) under the Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. § 1001 *et seq.*) in the context of a defined benefit pension plan trusteed by the Pension Benefit Guaranty Corporation ("PBGC").

Only the Ninth Circuit in this case considered PBGC's position that ERISA's statutory allocation priorities do not make allocation to Petitioners of any recovery in this litigation likely—thereby precluding Petitioners' Article III standing.

Even as Petitioners contend they have Article III standing because they consider it likely that PBGC would allocate to them any recovery in this litigation, they withhold PBGC's express statement to the contrary. In response to Petitioners' request for rehearing in the Ninth Circuit, PBGC stated:

> 29 U.S.C. section 1342(a), quoted by the panel, clearly allows PBGC to use any recoveries from fiduciary breach actions, like all plan assets, to pay benefits in that plan, in all other terminated plans, and for any other appropriate purpose in the administration of Title IV. . . . Although a monetary recovery could increase some participants' benefits in some cases, it is not likely.[1]

Petitioners also withhold from their Petition PBGC's stated disagreement in this case with the Fourth Circuit's decision in *Wilmington Shipping Co. v. New England Life Ins. Co.*, 496 F.3d 326 (4th Cir. 2007).[2] Petitioners then feature *Wilmington* to suggest an inter-circuit conflict supporting *certiorari*.

After dropping its claims against PBGC in this case, thereby silencing PBGC, Petitioners now seek *certiorari* to compel an absent PBGC to adhere to an interpretation of ERISA and its regulations that is contrary to PBGC's stated position in the Ninth Circuit. On these bases alone, *certiorari* should be denied.

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[1] PBGC Resp. to App. Pet. for Reh'g at 7.

[2] PBGC Resp. to App. Pet. for Reh'g at 10-12.

Respondents CNF Inc. ("CNF") and CNF Service Company, Inc. ("CNFSC") (collectively, "CNF Respondents") accordingly endorse and adopt the arguments opposing *certiorari* advanced by Respondents Administrative Committee of the Consolidated Freightways Corporation Pension Plan ("CFC Administrative Committee"), Stephen D. Richards, James R. Tener, and Robert E. Wrightson (collectively, "CFC Respondents"). This Court should leave intact the Ninth Circuit's ruling that Petitioners lack constitutional standing to bring their claims for breach of fiduciary duty under ERISA section 502(a)(2) (29 U.S.C. § 1132(a)(2)).

Independently, there are compelling reasons why, as to the CNF Respondents, *certiorari* should be denied. Petitioners pled five claims against the CNF Respondents, three under ERISA section 502(a)(2) and two under section 502(a)(3).[3] Petitioners abandoned their section 502(a)(3) claims for relief by not pressing the Fifth Claim before the court of appeals (App. 29 n.15) and acquiescing in the Ninth Circuit's affirmance of judgment on the Second Claim by not petitioning for *certiorari* (App. 32).[4] Petitioners no longer contend that their Third and Fourth Claims,

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[3] The operative pleading as to the CNF Respondents is the original complaint. All subsequent iterations were filed after the district court dismissed the CNF Respondents with prejudice.

[4] By abandoning all of their claims under section 502(a)(3) (29 U.S.C. § 1132 (a)(3)), no claims remain in this case that could result in a recovery for Petitioners. Their remaining claims, under section 502(a)(2) (29 U.S.C. § 1132(a)(2)), would only allow relief under section 409 (29 U.S.C. § 1109). That section is limited to relief for the Plan. As discussed above and in Respondent CFC's brief, the Plan is now a part of PBGC and any recovery would inure solely to PBGC to be used by it for any statutory purpose.

both pled under section 502(a)(2), raise breach of ERISA fiduciary duty issues against the CNF Respondents. Therefore, Petitioners have abandoned against the CNF Respondents all but their First Claim. However, the First Claim arises from conduct—a pension plan spinoff under ERISA section 208 (29 U.S.C. § 1058)—that courts have uniformly held to be non-fiduciary.

This Court should not devote its finite resources to an empty exercise as to the CNF Respondents. The judgment in the CNF Respondents' favor should be left undisturbed and *certiorari* denied.

RELEVANT STATUTES AND REGULATIONS

The following provisions are relevant in addition to those recited in the Petition.

ERISA § 3(21), 29 U.S.C. § 1002(21), provides, in pertinent part:

> § 1002 Definitions. For purposes of this subchapter:
>
> * * * *
>
> (21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent
>
> > (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
> >
> > * * * *
> >
> > or
> >
> > (iii) he has any discretionary authority or discretionary responsibility in the administration

> of such plan. Such term includes any person designated under section 1105 (c)(1)(B) of this title.

ERISA § 409, 29 U.S.C. § 1109, provides, in pertinent part:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. . . .
>
> (b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), provides, in pertinent part:

> (a) A civil action may be brought—
>
> * * * *
>
> (3) by a participant, beneficiary, or fiduciary
>
> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
>
> (B) to obtain other appropriate equitable relief
>
> (i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan.

ERISA § 208, 29 U.S.C. § 1058, provides, in pertinent part:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after the date of the enactment of this Act, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated) . . . .

The parallel Internal Revenue Code provision, 26 U.S.C. § 414(*l*), provides, in pertinent part:

> (1) In general A trust which forms a part of a plan shall not constitute a qualified trust under section 401 and a plan shall be treated as not described in section 403 (a) unless in the case of any merger or consolidation of the plan with, or in the case of any transfer of assets or liabilities of such plan to, any other trust plan after September 2, 1974, each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence does not apply to any multiemployer plan with respect to any transaction to the extent that participants either before or after the transaction are covered under

> a multiemployer plan to which Title IV of the Employee Retirement Income Security Act of 1974 applies.

The applicable regulation, 26 C.F.R. § 1.414(*l*)-1, provides, in pertinent part:

> (b) Definitions. For purposes of this section:
>
> * * * *
>
> (5) Benefits on a termination basis.
>
> (i) The term "benefits on a termination basis" means the benefits that would be provided exclusively by the plan assets pursuant to section 4044 of the Employee Retirement Income Security Act of 1974 ("ERISA") and the regulations thereunder if the plan terminated. Thus, the term does not include benefits that are guaranteed by the Pension Benefit Guaranty Corporation, but not provided by the plan assets.
>
> (ii) For purposes of determining the benefits on a termination basis, the allocation of assets to various priority categories under section 4044 of ERISA must be made on the basis of reasonable actuarial assumptions. The assumptions used by the Pension Benefit Guaranty Corporation as of the date of the merger or spinoff are deemed reasonable for this purpose.
>
> * * * *
>
> (9) Present value of accrued benefit. For purposes of this section, the present value of an accrued benefit must be determined on the basis of reasonable actuarial assumptions. For this purpose, the assumptions used by the Pension

Benefit Guaranty Corporation as of the date of the merger or spinoff are deemed reasonable.

* * * *

(n) Spinoff of a defined benefit plan—(1) General rule. In the case of a spinoff of a defined benefit plan, the requirements of section 414(*l*) will be satisfied if—

(i) All of the accrued benefits of each participant are allocated to only one of the spun off plans, and

(ii) The value of the assets allocated to each of the spun off plans is not less than the sum of the present value of the benefits on a termination basis in the plan before spinoff for all participants in that spun off plan.

ERISA section 413 (29 U.S.C. § 1113), provides:

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) six years after

(A) the date of the last action which constituted a part of the breach or violation, or

(B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

STATEMENT OF THE CASE

A. Factual Background

1. The CFC Plan Spinoff

CNF spun off its wholly owned subsidiary, Consolidated Freightways Corporation ("CFC"), nearly 13 years ago. CNF concurrently transferred assets and liabilities from its defined benefit pension plan ("the CNF Plan") to a new defined benefit pension plan sponsored by CFC ("the CFC Plan"). Petitioners, all highly compensated former CNF and/or CFC executives, were among those participants whose pension liabilities were spun off to the CFC Plan.

CNF engaged independent enrolled actuary Towers, Perrin, Forster & Crosby, Inc. ("Towers Perrin") to determine the assets needed to fund the spun-off plan in compliance with ERISA section 208 (29 U.S.C. § 1058). In connection with CNF's filing of IRS Form 5310-A (Notice of Plan Merger or Consolidation, Spinoff, or Transfer of Plan Assets or Liabilities), Towers Perrin certified that the participants in and beneficiaries of the new CFC Plan would be as well off on a termination basis in the CFC Plan as in the CNF Plan, as statutorily required.[5] App. 8. Petitioners concede that "the assets transferred to the CFC Plan under Towers Perrin's calculations were ostensibly equal to . . . the calculated present value of the CFC Plan's liabilities." Compl. ¶ 40.

[5] A spinoff complies with section 208 so long as "each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive" immediately beforehand. 29 U.S.C. § 1058.

The CNF Respondents' fiduciary obligations to Petitioners *as CNF Plan participants* terminated with the December 1996 spinoff. Petitioners thereafter became participants in the CFC Plan and ceased to be participants in the CNF Plan because the pension obligations owed to Petitioners by the CNF Plan were transferred to the CFC Plan. App. 6-7. CNF played no fiduciary role in the ongoing management and administration of the CFC Plan and its assets. *See* Pet. Op. Br. 22. And, although CNFSC provided "[r]etirement and pension plan administration" services under contract to the CFC Plan until 1999,[6] its role was expressly non-fiduciary and ministerial. App. 7 n.3.

2. The CFC Plan's Post-Spinoff Demise

The CFC Administrative Committee administered the CFC Plan from inception until March 2003. App. 7. CFC also engaged Tower Perrin—the same actuary used by CNF in connection with the spinoff—to provide actuarial services to the CFC Plan. Compl. ¶ 48. In each year from 1997 to 2001, Towers Perrin determined that CFC had no obligation to make additional contributions to the CFC Plan because the plan was fully funded. Compl. ¶ 50. CFC accordingly contributed no additional funds to the CFC Plan, despite the ongoing accrual of benefits. Compl. ¶ 51.

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[6] The "Transition Services Agreement" between CFC and CNFSC provided, in pertinent part, "The parties agree that the Services provided by [CNFSC] shall be essentially ministerial in nature so that [CNFSC] shall, in all matters requiring the exercise of discretion, follow [CFC's] instructions . . . The parties agree that it is their intent that [CNFSC] <u>not</u> be deemed a fiduciary with respect to plans subject to [ERISA]." (Emphasis in original.) The agreement was included as part of the record below. App. 7 n.3.

In November 2001, in the economic aftermath of 9/11, and with lead Petitioner Thomas Paulsen at the helm as its President and Chief Operating Officer, CFC amended the CFC Plan to add previously unfunded Supplemental Executive Retirement Plan ("SERP") liabilities for highly compensated employees—including Petitioners—and to increase their maximum compensation limits under the Plan. Compl. ¶ 54. CFC nonetheless made no additional contribution to the CFC Plan to fund the "sweetened" benefits.[7] Compl. ¶ 55.

CFC's financial performance following the spinoff demonstrated an upward trend in profits in 1997 and 1998. CNF Resp. Br. 18. But, by 2002, CFC filed for Chapter 11 bankruptcy protection. App. 9. CFC informed the CFC Plan participants in January 2003 that the CFC Plan was underfunded and would undergo a distress termination effective March 2003. App. 9. The PBGC assumed trustee responsibility for the CFC Plan in June 2003 and estimated that the CFC Plan "had approximately $228 million in assets to cover approximately $504 million invested accrued benefits." App. 10. CFC estimated that only 8 percent of CFC Plan participants would experience pension reductions because of the termination of the CFC Plan. Compl. ¶ 60.

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[7] Petitioners thus seek to recoup from the CNF Respondents not only the pension benefits fully funded by CNF at the time of the spinoff, but also the post-spinoff benefits accruals *and* enhanced benefits that CFC never funded. A sponsor of an original defined benefit plan, however, has no duty to guarantee that the sponsor of a spun-off plan will pay spun-off employee benefits earned in the future. *Bigger v. Am. Commercial Lines, Inc.*, 862 F.2d 1341, 1345 (8th Cir. 1988).

B. Procedural Background

On August 28, 2003, Petitioners filed suit against Respondents and Towers Perrin. As to the claims implicated by this Petition, Petitioners alleged under section 502(a)(2) that Respondents breached their fiduciary duties (1) in connection with the CFC Plan spinoff (First Claim for Relief); (2) in the ongoing administration of the CFC Plan (Third Claim for Relief); and (3) in not establishing and/or following a funding policy with respect to the CFC Plan (Fourth Claim for Relief). Petitioners also pled state law claims against Towers Perrin for its alleged professional negligence in valuing the section 208 spinoff obligations and in its valuation of the CFC Plan thereafter.[8] Petitioners' original complaint did not name PBGC.

The CNF Respondents' tenure in the district court lasted only 90 days. On Respondents' Rule 12(b)(6) motions, the court first dismissed all of the ERISA claims without prejudice on the basis that Petitioners lacked statutory standing in light of PBGC's status as trustee with the power "to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan." The court reasoned that, until PBGC had failed in its fiduciary duties as trustee and Petitioners had sought relief against it under section 502(a)(2), Petitioners lacked standing under ERISA to bring claims against Respondents.

The district court then reinforced its dismissal of the claims against the CNF Respondents by addressing them *seriatim*. First, the district court reinforced the dismissal of the First through Fourth Claims on

[8] The Towers Perrin claims are not within the Petition and are proceeding in the district court.

the additional basis that the spinoff had complied with section 208, precluding a finding that the CNF Respondents breached any spinoff-associated fiduciary duties. Next, the district court held that neither CNF nor CNFSC owed any ongoing fiduciary duty to the CFC Plan, thereby also barring the Second, Third, and Fourth Claims against the CNF Respondents. Finally, the district court reinforced the dismissal of the Fifth Claim on the grounds that (a) any notice obligation owed in connection with the spinoff would have been owed by the CNF Plan administrator, who was not named as a defendant; (b) Petitioners suffered no cognizable injury from the lack of notice; and (c) the claim was barred by ERISA section 413's statute of limitations (29 U.S.C. § 1113) in any event. On the basis of all of the above, the district court dismissed the claims against the CNF Respondents with prejudice.

The Ninth Circuit affirmed on the basis that Petitioners could not demonstrate that a favorable decision on their section 502(a)(2) claims would redress their alleged injuries. App. 22. In so ruling, the court specifically held that "the PBGC's role as an independent actor" with the power to pool and disperse assets as it deems appropriate under 29 U.S.C. § 1342(a) negated redressability. App. 27. Accordingly, the court concluded that Petitioners lacked Article III standing to pursue their claims.

The court of appeals also separately affirmed the dismissal of Petitioners' various section 502(a)(3) claims. App. 27-28. The court rejected Petitioners' Second Claim for Relief against CNF for reinstatement into the CNF Plan on the basis that the decision to conduct the plan spinoff was not a fiduciary act. App. 30, citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-91, 116 S. Ct. 1783, 135 L. Ed. 2d 153 (1996). The court held further that the "make-whole monetary relief" sought by Petitioners in their Third and Fourth Claims for Relief was not "appropriate equitable relief" within the meaning of section 502(a)(3). Finally, the court concluded that Petitioners had abandoned any section 502(a)(3) relief as to their fifth claim related to alleged violations of their ERISA notification rights by not having argued the claim's merits on appeal. App. 29 n.15. The dismissal of the section 502(a)(3) claims is also not before this Court.

On June 25, 2009, the Ninth Circuit denied rehearing and rehearing *en banc* without dissent.

REASONS FOR DENYING THE PETITION

The CNF Respondents join in the arguments of the CFC Respondents that Petitioners lack constitutional standing to bring their section 502(a)(2) claims. Particularly where only two courts of appeals have only recently addressed the issue, and only one with the PBGC's participation, further study in the lower courts would benefit any eventual consideration by the Court.

Compelling additional reasons support leaving the CNF Respondents' judgment undisturbed. Contrary to their dismissive footnote (Pet. at 19 n.11), Petitioners lack constitutional standing to challenge CNF's spinoff-related conduct (First Claim) because the harm resulting from the CFC Plan's termination in 2003—preceded by Towers Perrin's certifications from 1997 to 2001 that the CFC Plan was fully funded, the addition of new benefit obligations to be paid by the CFC Plan, and CFC's failure to contribute so much as a penny to fund the Plan—was not "fairly traceable" to the 1996 spinoff of the CFC Plan. Petitioners' spinoff-based claim is also barred by ERISA's statute of limitations, as it was filed more than six years after the spinoff.

CNF's spinoff of the CFC Plan by definition also did not implicate any fiduciary duty to Petitioners. CNF's *only* duty to the CFC Plan under section 208, in the context of this litigation, was its ministerial transfer of assets sufficient to cover the present value of accrued benefits on a termination basis, as determined by the enrolled actuary, Towers Perrin. CNF's creation and initial funding of the CFC Plan was as "settlor," not as "fiduciary." Petitioners' only redress for any alleged underfunding of the CFC Plan at spinoff would have been equitable relief under section 502(a)(3) to compel CNF to fund the Plan as statutorily required. Petitioners spurned that redress.

The bases for Petitioners' post-spinoff claims against the CNF Respondents (Third and Fourth Claims), moreover, have been abandoned. Petitioners' complaint never recited anything but bare-bones legal conclusions regarding CNF's purported role in the administration of the CFC Plan; and, in their Ninth Circuit brief, Petitioners omitted CNF entirely from their recital of the post-spinoff CFC Plan fiduciaries. As to CNFSC, the "transition services agreement" pled in the Complaint as the basis for CNFSC's purported fiduciary status expressly confined CNFSC to performing ministerial duties with respect to the CFC Plan, as the court of appeals expressly so found. As Petitioners did not adequately plead and no longer contend that CNF and CNFSC were fiduciaries to the CFC Plan, their Third and Fourth Claims against the CNF Respondents are nullified.

A. Petitioners' Spinoff-Related Claims Against CNF All Fail as a Matter of Law.

The Petition as to the CNF Respondents implicates only three of Petitioners' claims for relief. Petitioners' First Claim purports to charge a breach of fiduciary duty in connection with the spinoff itself, even though the spinoff was not a fiduciary act. The Third and Fourth Claims purport to charge post-spinoff fiduciary breaches, when by law the CNF Respondents were not fiduciaries of the CFC Plan. Petitioners' claims against the CNF Respondents for breach of fiduciary duty thus lack any colorable merit as a matter of settled law.

1. Petitioners lack constitutional standing to sue CNF for alleged fiduciary breaches in connection with the 1996 spinoff not only because their claimed harm is not redressable, but also because it is not "fairly traceable" to CNF.[9] *See Lujan*, 504 U.S. at 560. Although Article III's causation requirement demands "something less than the concept of proximate cause," Petitioners must nonetheless prove "a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005) (internal quotations omitted). This they cannot do as a matter of law.

Any causal connection between CNF's alleged underfunding of the CFC Plan at spinoff in 1996 and the CFC Plan's undoing in 2003 was severed in the intervening years. CFC neither contributed funds to cover the Plan liabilities that continued to accrue during that period, nor did it fund the "sweetened"

[9] The inadequacy and ultimate abandonment of Petitioners' allegations that CNF acted as a post-spinoff fiduciary with respect to the CFC Plan are discussed *infra*.

executive retirement plan benefits it added to the CFC Plan in 2001. At the same time, Towers Perrin annually valued the CFC Plan and certified that it was fully funded for each of the *five years* following the spinoff. Petitioners do not allege, therefore, that CNF's alleged initial underfunding of the CFC Plan was unrecoverable; they plead affirmatively that the Plan in fact *recovered*. Any underfunding of the CFC Plan that occurred thereafter was not, and legally cannot be, "fairly traceable" to the spinoff.

2. Petitioners' spinoff-related claim against CNF is also out of time. ERISA section 413 (29 U.S.C. § 1113), bars claims for alleged fiduciary breaches that occurred after the earlier of

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

What triggers the three-year actual knowledge prong of the statute of limitations is the knowledge of the transaction that constituted the alleged violation. *Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir. 1985).

Here, the six-year and the three-year limitations periods each independently bar Plaintiffs' claims. CNF's last spinoff-related acts indisputably occurred more than six years before the August 2003 filing of the complaint in this action. CNF's fiduciary obligations to Petitioners—including any obligation to cure an omission arising from the spinoff—were also cut off by that point.[10] *See* ERISA § 409(b) (29 U.S.C. § 1109(b)) ("No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed . . . after he ceased to be a fiduciary.") On the face of the complaint, therefore, the six-year statute applies.

Furthermore, all of the information needed to trigger the three-year statute of limitations was a matter of public record long before this action was filed. Specifically, the IRS Form 5310-A filed by CNF in November 1996 and January 1997 disclosed the very interest rate and retirement age assumptions by Towers Perrin that Petitioners attack as unreasonable, as well as the assets transferred to the CFC Plan.[11] As a publicly traded company, CFC likewise provided detailed information regarding its financial performance to the Securities and Exchange Commission. Petitioners thus had knowledge of the underlying facts regarding the spinoff of the CFC Plan sufficient to trigger the three-year limitations period as well. *See Ziegler v. Conn. Gen. Life Ins. Co.*, 916 F.2d 548, 551-52 (9th Cir. 1990) (relevant knowledge for limitations purposes is knowledge of the underlying facts, not knowledge of the alleged harm).

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[10] As discussed *infra*, Petitioners never adequately pled, and ultimately abandoned, their contention that CNF continued to act as a fiduciary to the CFC Plan post-spinoff.

[11] Both the CNF Plan and the CFC Plan were required annually to file Forms 5500 with the federal government following the spinoff. ERISA § 103(a) (29 U.S.C. § 1023(a)). Those forms, which contained detailed financial and actuarial information on the Plans, were available to Petitioners on request from the Plans and from the Department of Labor. ERISA §§ 103-104, 106 (29 U.S.C. §§ 1023-1024, 1026).

Petitioners also cannot find refuge in the "fraud or concealment" prong of the statute. First, Petitioners do not plead that CNF defrauded or concealed anything from *them.* Nor do Petitioners plead that CNF defrauded or concealed anything from *Towers Perrin.* Admittedly, Petitioners alleged that CNF (somehow) "knew that CFC was unlikely to survive more than a few years." Yet Petitioners did not allege—and, in the five iterations of the complaint, have *never* alleged—that CNF concealed that purported knowledge or misled Towers Perrin in any way.[12] What Petitioners have always claimed is that CNF did not provide Towers Perrin with "adequate" information to enable Towers Perrin to formulate reasonable assumptions about the valuation of the CFC Plan's liabilities. Whatever the standard of "adequacy" Petitioners purport to apply by this allegation is a far cry from any specific allegation of fraud or concealment—and legally insufficient for them to escape the limitations bar.

3. Petitioners' attempt to blame CNF for alleged fiduciary failures in the course of the spinoff also collapses at its core because the conduct alleged—(1) not providing "adequate information" to enable Towers Perrin to formulate reasonable actuarial assumptions for the valuation of the spun-off plan; (2) not "supervis[ing], monitor[ing], and investigat[ing]" the basis underlying Towers Perrin's actuarial valua-

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[12] Any awareness of CFC's impending collapse in "a few years" would not have impacted Towers Perrin's valuation of the CFC Plan's liabilities at spinoff in any event. The applicable regulation required Towers Perrin to value the spun-off benefits "on a termination basis." Treas. Reg. § 1.414(*l*)-1(n) (26 C.F.R. §1.414(*l*)-1(n)). Their calculations thus necessarily, and by definition, assumed that the CFC Plan would terminate on Day 1. Treas. Reg. § 1.414(*l*)-1(b)(5)(i) (26 C.F.R. § 1.414(*l*)-1(b)(5)(i)).

tions; and (3) not ensuring that sufficient assets were transferred to fund the benefit obligation transferred to the CFC Plan—involved no fiduciary obligation.

ERISA section 208 governs the mechanics of a transfer of plan assets, as in the case of a spinoff. That section permits plan assets to be transferred to another plan so long as "each participant in the plan would (if the plan then terminated) receive a benefit immediately after the . . . transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the . . . transfer (if the plan then terminated)." 29 U.S.C. § 1058. The guiding principle of section 208 is "benefit equivalence," *i.e.,* the equal value of the benefit before and after spinoff. *Bigger v. Am. Commercial Lines, Inc.*, 862 F.2d 1341, 1344 (8th Cir. 1988), *citing* Treas. Reg. § 1.414(*l*)-1(n) (26 C.F.R. § 1.414(*l*)-1(n)).

Courts have uniformly held that an employer's allocation of pension plan assets and liabilities in a section 208 spinoff is not fiduciary conduct. *Flanigan v. Gen. Elec. Co.,* 242 F.3d 78, 87-88 (2d Cir. 2001) (because decision to spin off a division with its pension plan was, at its core, a corporate business decision, fiduciary duties were not triggered by transfer of assets to new plan); *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 719 (6th Cir. 2000) (transfer of assets from one plan to another not subject to ERISA's fiduciary obligations); *Ames v. Am. Nat'l Can Co.,* 170 F.3d 751, 757 (7th Cir. 1999) (employer's decision as to how to structure plan was not a fiduciary decision); *Sys. Council EM-3 Int'l Bhd. of Elec. Workers v. AT&T Corp.*, 159 F.3d 1376, 1379-80 (D.C. Cir. 1998) (allocation of restructured plan's excess not a fiduciary decision); *Blaw Knox Retirement Income Plan v. White Consol. Indus., Inc.*, 998 F.2d 1185, 1189 (3d

Cir. 1993) (decision to sell off a division and transfer plan assets not a fiduciary decision). ERISA's fiduciary duties extend only to the extent an actor exercises discretionary authority or control over plan management or administration. *Lockheed Corp. v. Spink,* 517 U.S. at 890-91; *Flanigan*, 242 F.3d at 87; ERISA § 3(21)(A) (29 U.S.C. § 1002(21)(A)). Because plan design, amendment, and termination are not within the defined functions outlined in section 3(21)(A), they necessarily fall outside ERISA's fiduciary obligations. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44, 119 S. Ct. 755, 142 L.Ed.2d 881 (1999); *Spink,* 517 U.S. at 890-91.

Petitioners do not dispute any of these principles. Petitioners instead hope to find a toehold in the argument that although CNF's spinoff decision was not a fiduciary one, its exercise of discretion in implementing that decision was. *See Waller v. Blue Cross of Calif.*, 32 F.3d 1337, 1342 (9th Cir. 1994) (plan sponsor's "quintessential" exercise of discretionary control in selecting an annuity provider held to constitute fiduciary conduct in the implementation of the termination decision). The problem for Petitioners is that the conduct they challenge did not involve CNF's exercise of discretion—only its legally mandated reliance on actuarial assumptions to fund the CFC Plan at spinoff. [13]

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[13] The exercise of discretion alone does not implicate fiduciary conduct under ERISA in any event; rather, it is only discretionary acts of plan management or administration, or those acts designed to carry out the very purposes of the plan, that are subject to ERISA's fiduciary duties. *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 666 (6th Cir. 1998) (ministerial application of a percentage classification in implementing business decision to

It is unsurprising that no case has imposed fiduciary liability where an employer follows its actuary's advice in conducting a section 208 spinoff. The applicable Treasury regulations expressly *require* reliance on "reasonable actuarial assumptions" to calculate the present value of accrued benefits and the value of the benefits on a termination basis.[14] Treas. Reg. § 1.414(*l*)-1(b)(5), (9) (§1.414(*l*)-1(b)(5), (9)). As this Court has recognized in considering the reasonableness of actuarial assumptions in a different context, the "nature of the beast" is such that actuarial practice may involve several "equally correct approaches." *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 635-36, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993). The regulations thus *permit,* but do not *mandate,* the use of the PBGC's assumptions for this purpose. *Sys. Council,* 159 F.3d at 1381.

Petitioners here do not dispute that CNF relied on Towers Perrin's actuarial assumptions in transferring assets to the CFC Plan that were, under Towers Perrin's calculations, "ostensibly equal to . . . the calculated present value of the CFC Plan's liabilities." Compl. ¶ 40. Rather, Petitioners contend that ERISA also required CNF, on pain of a fiduciary

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spin off pension and welfare benefits not a fiduciary exercise of discretion).

[14] For this reason, cases refusing to absolve an employer who relied on expert advice are inapposite. CNF's reliance on Towers Perrin's actuarial assumptions was not optional; under section 208, it was mandatory. ERISA has also set the standards and qualifications for professionals performing actuarial services for ERISA-covered plans by mandating that plan actuaries be enrolled by the Joint Board for the Enrollment of Actuaries. *Citrus Valley Estates, Inc. v. Comm'r,* 99 T.C. 379, 403-04 (1992), *aff'd,* 49 F.3d 1410 (9th Cir. 1995).

breach, to ensure that Towers Perrin's assumptions were actuarially reasonable.[15]

Petitioners' attempt to engraft such a fiduciary obligation onto section 208 contravenes the actuarial independence contemplated by Congress. Appellate courts have uniformly acknowledged, in an analogous context, that "by entrusting actuaries with the task of determining plan contributions . . . Congress intended to give actuaries some leeway and freedom from second-guessing." *Vinson & Elkins v. Comm'r*, 7 F.3d 1235, 1238 (5th Cir. 1993). Requiring an actuary's funding decisions to reflect *its* "best estimate" of anticipated experience under the plan "is principally designed to insure that the chosen assumptions actually represent the *actuary's own judgment* rather than the dictates of plan administrators or sponsors." *Citrus Valley Estates, Inc. v. Comm'r*, 49 F.3d 1410, 1412-13 (9th Cir. 1995) (emphasis added), *citing Wachtell, Lipton, Rosen & Katz,* 26 F.3d 291 (2d Cir. 1994).[16]

Even with Petitioners' fiduciary gloss on section 208, their first claim would remain unavailing. Section 409(a) confines fiduciary liability to the fiduciaries of

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[15] Petitioners do not challenge the selection of Towers Perrin in the first instance as falling below the standard of care. Tellingly absent from every iteration of the complaint, moreover, is any allegation that CNF (a) withheld any information that Towers Perrin requested or (b) falsified the information it did provide. Rather, in Petitioners' view, the CNF Respondents should have *volunteered* any information that Petitioners at trial would deem relevant, regardless of whether Towers Perrin asked for it.

[16] The "best estimate" language in *Vinson & Elkins, Wachtell, and Citrus Valley Estates* is also found in ERISA § 302(c)(3)(B) (29 U.S.C. § 1082(c)(3)(B)), which governs minimum funding standards.

the plan that suffered a loss. ERISA § 409(a) (29 U.S.C. § 1109(a)) ("Any person who is a fiduciary *with respect to a plan* who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good *to such plan* any losses *to the plan* resulting from each such breach . . . ") (emphasis added). At all times—and unquestionably pre-spinoff—CNF's fiduciary duties ran only to *the CNF Plan.* As Petitioners allege no loss to the CNF Plan resulting from the spinoff, no redress to Petitioners is available under section 409(a).

That CNF's spinoff of the CFC Plan did not involve fiduciary conduct does not mean that Petitioners were without a remedy to redress any purported underfunding at the time of the spinoff. Petitioners' ERISA avenue of relief was to seek redress for any CNF noncompliance with section 208's funding obligations under section 502(a)(3). Petitioners' tactical decision to pursue the allure of a fiduciary breach claim under section 502(a)(2) instead renders their spinoff-related claims against CNF legally unavailing.

B. Petitioners Have Abandoned any Claim that the CNF Respondents Breached any Post-Spinoff Fiduciary Duties to the CFC Plan.

Petitioners' Third and Fourth Claims alleged, opaquely, that the "Fiduciary Defendants" breached their fiduciary duties in the post-spinoff administration and funding of the *CFC Plan.* Petitioners no longer contend that either CNF or CNFSC acted in a fiduciary capacity with respect to the CFC Plan, and so this Petition—which concerns only the CFC Plan—would not resuscitate those claims.

1. With regard to CNF, Petitioners' Complaint merely parroted, without more, the ERISA statutory definition of a fiduciary to claim that CNF "was a fiduciary . . . of the CFC Plan and the CNF Plan, in that CNF exercised discretionary authority or discretionary control respecting management of one or both Plans, and/or exercised authority or control respecting management or disposition of the assets of one or both Plans, and/or had discretionary authority or discretionary responsibility in the administration of one or both Plans." Compl. ¶ 12. This Court's precedents in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949-50, 173 L.Ed.2d 868 (2009), make clear that courts considering a motion to dismiss need not accept a party's mere legal conclusions couched as factual assertions. Supporting factual allegations are required. *Iqbal*, 129 S. Ct. at 1950. Yet no such allegations appeared in the original (and operative) complaint against the CNF Respondents, nor in any of the complaint's four later iterations.

Petitioners' Ninth Circuit brief retreated even from this half-hearted assertion to concede that CNF was not a post-spinoff fiduciary of the CFC Plan. Under the heading, "Post Spin-off Administration of the CFC Plan," Petitioners clarified their contention that, "[d]uring this time, the CFC Plan's fiduciaries were Defendants [CFC Administrative] Committee and CNFSC, a subsidiary of CNF that undertook administration of the Plan pursuant to a 'transition services agreement' with CFC at the time of the spin-off." Pet. Op. Br. 21-22. By their admission that CNF was not a CFC Plan fiduciary, Petitioners have thus abandoned the post-spinoff claims against CNF.

2. Petitioners' allegations with respect to CNFSC have also not survived. In their complaint, Petitioners based their contention that CNFSC acted as a CFC Plan fiduciary on the "'Transition Services Agreement' between CFC and [CNFSC] dated December 2, 1996." As the Ninth Circuit recognized below, however,

> [Petitioners] have not alleged facts regarding what services [CNFSC] provided to the CFC Plan. The record contains this agreement and indicates that [CNFSC] provided, in part, "[r]etirement and pension plan administration" services, but was expressly designated a non-fiduciary with only a ministerial role.

App. 7. n.3. CNFSC's purely ministerial role necessarily forecloses as a matter of law any claim for breach of fiduciary duty against it with respect to the CFC Plan. *See Ariz. State Carpenters Pension Trust Fund v. Citibank (Ariz.),* 125 F.3d 715, 722 (9th Cir. 1997) (provider of only ministerial duties on behalf of a pension plan was not a fiduciary with respect to that plan); *Kyle Rys., Inc. v. Pac. Admin. Serv., Inc.*, 990 F.2d 513, 516-18 (9th Cir. 1993); *see also* 29 C.F.R. § 2509.75-8 (interpretive bulletin articulating the distinction between discretionary functions, which are fiduciary in nature, and ministerial functions, which are not). Petitioners' failure in this Petition to challenge the Ninth Circuit's holding on this issue establishes their abandonment of their claims against CNFSC as well.

CONCLUSION

Petitioners have established no compelling reasons for this Court to grant the Petition. The CNF Respondents therefore respectfully request that the Petition be denied in its entirety or, alternatively, as to the CNF Respondents.

Respectfully submitted,

SHERWIN S. KAPLAN
NIXON PEABODY LLP
401 9th Street N.W.
Suite 900
Washington, D.C. 20004
(202) 585-8000

MICHAEL C. HALLERUD
Counsel of Record
ELLEN M. PAPADAKIS
NIXON PEABODY LLP
One Embarcadero Center,
18th Floor
San Francisco, CA 94111
(415) 984-8200

Counsel for Respondents
CNF Inc. and CNF Service Company, Inc.

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