UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH V. FISHER, Plaintiff,	)	Case No. 1:14-cv-01275-RDM
-against-	)	
PENSION BENEFIT GUARANTY CORPORATION, Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PENSION BENEFIT GUARANTY CORPORATION'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Penn Traffic Cash Balance Pension Plan ("Plan") terminated in 2005 when its sponsor, The Penn Traffic Company ("Penn Traffic"), was in bankruptcy. On the Plan's termination date, the benefits earned by participants during their years of service with Penn Traffic exceeded the amount of the Plan's assets by $110 million. Actuarial Case Memo AR8. The Pension Benefit Guaranty Corporation ("PBGC") took over the Plan and is making up most of the shortfall. Although all eligible participants are receiving guaranteed benefit payments from PBGC, some are not receiving the full amount of their benefit because of statutory limits on PBGC's guarantee. *Id.*

Plaintiff Joseph Fisher was an executive who worked for Penn Traffic only briefly—less than 5 years. Because of that short period of service, he accrued a relatively small pension benefit. But in April 2002—only 13 months before Penn Traffic went into bankruptcy—the company amended the Plan to transfer a special "Supplemental Retirement Plan for Joseph V. Fisher," which was to be funded with corporate assets, into the Plan. The effect of the amendment was to immediately increase Mr. Fisher's Plan benefit—and the Plan's liabilities—by $318,449.

In August 2003, after Penn Traffic had filed for bankruptcy, Mr. Fisher resigned from the company and elected to take his entire benefit as a single lump sum. Penn Traffic denied his request because termination of the Plan was imminent. After the Plan terminated and PBGC became its statutory trustee, PBGC determined that Mr. Fisher is entitled to a monthly annuity and not a lump sum. PBGC relied on statutory and regulatory provisions that expressly prohibit paying lump sums once termination of a plan is initiated. These provisions prevent a "run on the

bank" and ensure that an underfunded pension plan's scarce assets are allocated in the way dictated by law.

PBGC also determined that it cannot guarantee most of Mr. Fisher's benefit that was transferred to the Plan under the amendment because of a statutory provision—29 U.S.C. § 1322(b)(1), (7)—that limits the guarantee of benefits added to a plan within five years before termination. The provision is aimed at preventing employers from taking undue advantage of PBGC's guarantee by "loading up" a plan's benefits as termination is nearing.

In 2006, Mr. Fisher sued Penn Traffic in federal court, claiming that the company breached its fiduciary duties by denying his lump sum. The court found that a fiduciary breach claim may only be brought on behalf of the plan as a whole, not by an individual seeking a benefit. Accordingly, the court dismissed the action. He now asserts in this action that PBGC has a fiduciary duty to correct Penn Traffic's alleged breach.

PBGC's Appeals Board denied Mr. Fisher's appeal of his benefit determination. As discussed below, the Court should uphold the Appeals Board's decision.

II. LEGAL BACKGROUND

PBGC is the United States government corporation that administers the mandatory federal pension insurance program established by Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[1] PBGC guarantees, up to statutory limits, benefits earned by participants in defined benefit pension plans covered under Title IV. The agency is funded by premiums paid by sponsors of ongoing defined benefit pension plans. When a covered pension plan terminates with insufficient assets to pay benefits earned by participants,

[1] Title IV of ERISA, 29 U.S.C. §§ 1301-1461 (2012), establishes the federal pension insurance program for underfunded terminated plans. Title I of ERISA, 29 U.S.C. §§ 1001-1191(c), governs employee benefit rights and the administration of ongoing pension plans.

PBGC typically becomes statutory trustee and pays vested benefits to participants and their beneficiaries.

A. Guarantee Limits

Title IV places limitations on the amount of benefits that PBGC may pay. 29 U.S.C. § 1322(a), (b). One limitation is the maximum guaranteed benefit set forth in 29 U.S.C. § 1322(b)(3), which caps the amount of the guarantee. The limitation applicable at the time the Plan terminated—for a participant retiring at age 65 under a straight-life annuity—was $3,698.86 per month.[2] But there are further limits that apply in particular situations.

One such limitation, particularly relevant here, is known as "phase-in." 29 U.S.C. § 1322(b)(1), (7). This limitation protects the PBGC insurance program from situations where a plan sponsor burdens a plan with large benefit increases in the five years just before the plan terminates. The statute "phases in" the guarantee of such new benefits at 20% per year (or $20 per month if greater) until it reaches 100% after five years.

PBGC also limits the forms in which benefits may be paid. In particular, PBGC generally pays benefits to participants and beneficiaries in the form of a life annuity. Except in very limited circumstances—generally where the total value of the participant's benefit is $5,000 or less—PBGC does not pay benefits in the form of a single lump sum. Section 4022.7 of PBGC's regulations provides:

> If a benefit that is guaranteed under this part is payable in a single installment or substantially so under the terms of the plan, or an option elected under the plan by the participant, the benefit will not be guaranteed or paid as such, but the PBGC will guarantee the alternative benefit, if any, in the plan which provides for the payment of equal periodic installments for the life of the recipient.

[2] The limitation for a similar individual in a plan terminated in 2015 is $5,011.36.

29 C.F.R. § 4022.7.

Under ERISA, an annuity and a lump sum must be actuarially equivalent— that is, they must have the same present value. *See* IRC § 417(e). Thus, an annuity will have the same economic value as the lump sum. But if the plan terminates, an annuity being paid by a plan may be reduced due to the limitations on PBGC's guarantee. A lump sum paid before termination may escape those limitations. (A portion of a lump sum may be recaptured under 29 U.S.C. § 1345, discussed in section D below, but as a practical matter this may be difficult to accomplish.)

B. Allocation of Assets

In some cases, a participant may receive more than the guaranteed benefit. This depends on the amount of assets a plan has when it terminates. Title 29 U.S.C. § 1344(a) directs that the assets of a terminated pension plan that are "available to provide benefits" be allocated among the participants and beneficiaries of the plan in the order of six priority categories, priority category 1 to priority category 6. The provision gives highest priority to benefits derived from participants' own contributions, next highest to benefits of certain long-term retirees, and then to benefits guaranteed by PBGC. Any remaining assets may be distributed to the non-guaranteed benefits of other plan participants, but only after all higher priority benefits have been satisfied in full.

When the plan has enough assets to pay benefits in a particular category, a participant in that category might receive a benefit that is higher than his guaranteed benefit. Payment of a lump sum to a participant shortly before the plan terminates reduces the amount of assets that could be allocated to the benefits of other participants who may have benefits in higher priority

categories or that could fund guaranteed benefits. Consequently, payment of such a lump sum could come at the expense of other participants or PBGC.

Section 4044.4 of PBGC's regulations further addresses this potential problem. It precludes a plan from paying lump sums "in anticipation of termination" to the extent that doing so would change the way that plan assets would otherwise be allocated under ERISA § 4044. Specifically, a plan administrator "violates ERISA" if plan assets are "allocated or distributed upon plan termination" in an order other than the one prescribed in ERISA § 4044. And the regulation provides that a distribution "made in anticipation of plan termination, is considered to be an allocation of plan assets upon termination," and is "covered by" the § 4044.4(a) prohibition against an allocation that "violates ERISA." 29 C.F.R. § 4044.4(a), (b).

C. Payment of Lump Sums by a Terminating Plan

In light of the potential distortion of the statutory asset-allocation scheme when lump sums are paid before plan termination, 29 U.S.C. § 1341(c)(3)(D) provides that beginning on the date on which the plan administrator provides a notice of distress termination to PBGC, the statutory requirements for approval of the termination will be met only if, *inter alia*, the plan administrator "pays benefits attributable to employer contributions . . . only in the form of an annuity . . . ."[3] PBGC's implementing regulations similarly provide that once the plan administrator has issued a notice of intent to terminate, a plan administrator may not "[p]ay benefits attributable to employer contributions, other than death benefits, in any form other than as an annuity . . . ." 29 C.F.R. § 4041.42.

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[3] A distress termination, as the name suggests, is a termination of an underfunded pension plan initiated by a plan sponsor when, because of financial distress, it cannot continue the plan. A distress termination may occur, for example, when the sponsor is in bankruptcy. *See* 29 U.S.C. § 1341(c)(2)(B).

Consistent with the above statutory and regulatory provisions, PBGC's operating policy on benefits under terminated, trusteed plans provides that PBGC will not honor any application for a lump sum that was pending with the plan administrator but not paid when the notice of intent to terminate was issued. The policy provides:

> If a plan terminated in a distress termination, PBGC will not accept a plan application to pay a benefit in a lump sum received by the plan administrator before DOPT - even if it was received before the date of the Notice of Intent to Terminate (the "NOIT"). The same rule applies to a plan application to pay a benefit in a lump sum if a distress termination was subsequently converted to a PBGC-initiated termination (an "involuntary termination"). PBGC will recalculate and value the benefit as of DOPT and determine if the benefit is payable in a lump sum or as annuity as provided in section C. General Policy.

Section D.1 of PBGC Operating Policy 5.4-9, Lump-Sum Benefit Payments, 1st Ed.[4] AR 53. Accordingly, once PBGC takes over a failed plan, it pays annuities, not lump sums.

D. Recovery of Lump Sums Paid Within Three Years of Plan Termination

Title 29 U.S.C. § 4045 gives PBGC another tool for protecting plan assets. Under that provision, PBGC, as trustee, "is authorized to recover for the benefit of a plan from a participant the recoverable amount (as defined in section 4045(b)) of all payments" made during the three years before termination. The formula for determining the "recoverable amount" is complex, but essentially provides that PBGC may recover that portion of a lump sum that exceeds the present

[4] This edition of the policy was in force at the time PBGC issued its benefit determination to Plaintiff.

value of the guaranteed benefit that the participant would have received if he or she had elected to receive the benefit as an annuity.[5]

Section 4045 thus protects both the PBGC insurance program and other participants in the plan by authorizing the agency to "claw back" the portion of a lump sum that exceeds the participant's guaranteed amounts.

III. FACTUAL AND PROCEDURAL BACKGROUND

The Plan was a tax-qualified, defined benefit pension plan covered under Title IV of ERISA. Penn Traffic was the Plan Administrator of the Plan. AR 53 at §§ 1.11, 1.34. Its Board of Directors ("Board") appointed an Administrative Committee ("Committee") to assist in the administration of the Plan. AR 53 at § 12.2.

Joseph Fisher began employment with the Penn Traffic Company ("Penn Traffic") on November 23, 1998, and served as a member of Penn Traffic's executive management team. As part of his duties as an executive, he also served as a member of the Administrative Committee. He remained with the company a little less than five years—until August 29, 2003. Because of his high salary, the amount of benefit he could accrue under the Plan was limited by several provisions of the Internal Revenue Code ("IRC").[6] To provide a higher benefit and to avoid nondiscrimination rules that prevent qualified plans from favoring highly compensated employees, Penn Traffic established the Supplemental Retirement Plan for Joseph V. Fisher

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[5] More precisely, the "recoverable amount" is the excess of what the participant received during the three years before plan termination over the sum of A + B, where A is the amount the participant would have received during those three years if he or she had elected a straight-life annuity, and B is the present value of the participant's "future benefits guaranteed under this subchapter" if paid as a straight-life annuity. ERISA § 4045(b)(2). The formula includes a third element that the participant may retain, but it appears to apply only in cases where the participant's benefit is quite small.

[6] These include IRC §§ 401(a)(4), (17) and 415(b).

("SERP") effective January 31, 2001. The SERP was not tax-qualified, and thus not subject to the IRC limitations.

While the SERP enabled Mr. Fisher to obtain higher benefits, it also had disadvantages compared to a tax-qualified plan. For example, Penn Traffic was not required to meet ERISA's minimum funding requirements. And benefits would be paid from Penn Traffic's corporate assets, not from a separate trust.

Further, the SERP was not covered by the PBGC insurance program under Title IV of ERISA. Thus, no part of Mr. Fisher's benefit under the SERP was guaranteed by PBGC, and he was not entitled to any distribution of assets if the SERP terminated. If Penn Traffic went into bankruptcy, as it did in 2003, Mr. Fisher would have only an unsecured claim against Penn Traffic's corporate assets.

In 2002, Penn Traffic attempted to provide Mr. Fisher the advantages held by participants in the Plan while still allowing him to receive a higher benefit. On April 26, 2002, Penn Traffic adopted an amendment to the Plan "to provide as much of the benefit to be provided to Mr. Fisher under the SERP as may be so provided while still complying . . . with the applicable requirements of the [IRC] and [ERISA]." Encl. to AR 2. At that time, the value of Mr. Fisher's benefit under the SERP was $318,449, which was immediately credited to his account balance under the Plan. This provided certain tax advantages to both Mr. Fisher and Penn Traffic. And in the event of plan termination, his benefit would be paid by PBGC up to the statutory limit.

On May 30, 2003—only a little more than a year after Mr. Fisher's SERP benefit was added to the Plan—Penn Traffic filed for Chapter 11 bankruptcy. *See* AR 3, Ex. 9. Less than three months after that, on August 15, 2003, Mr. Fisher resigned and requested that the Plan pay him his full benefit as a lump sum. AR 3, Ex. 1. During a meeting on September 29, 2003, the

Board resolved that Penn Traffic would seek termination of the Plan. In light of the decision to terminate the Plan, the Board directed the Committee to deny Mr. Fisher's request for a lump sum. AR 3, Ex. 4. The Committee concurred and notified him that his request for a lump sum was denied in a letter dated October 17, 2003, explaining that:

> [a]t its September 29, 2003 meeting, the Board of Directors of the Penn Traffic Company resolved to terminate the Plan. Because applicable law prohibits the payment of lump sum distributions in anticipation of the termination of the Plan, your benefit request is being denied. We can, however, begin pension distributions to you in the form of a monthly annuity (the only distribution form permitted under a terminating plan): payout will ultimately be subject to the Pension Benefit Guaranty Corporation's maximum guaranteed benefit limitations.
>
> AR 3, Ex. 2.

Mr. Fisher appealed the denial of his request for a lump sum on November 3, 2003. AR 3, Ex. 6, 7. He was never formally notified by the Plan of its decision on the appeal. Compl. ¶ 18.

Penn Traffic filed a PBGC Form 600 Notice of Intent to Terminate the Plan, dated November 19, 2003, with a proposed termination date of January 21, 2004, and a PBGC Form 601 Distress Termination Notice. AR 13 and 11, respectively. The Form 601 certified that notices of intent to terminate ("NOIT") were issued to participants on November 11, 2003. AR 11.

Penn Traffic continued to administer the Plan until February 23, 2005. On that date, Penn Traffic and PBGC executed an agreement appointing PBGC as the statutory trustee of the Plan and establishing the date of Plan termination ("DOPT") as January 21, 2004. AR 10.

On July 31, 2006, Mr. Fisher brought an action against Penn Traffic, the Board of Directors, and the Administrative Committee in the United States District Court for the Southern District of New York. *Fisher v. Penn Traffic Co.,* No. 06 Civ. 5848, 2007 U.S. Dist. Lexis

10708 (S.D.N.Y. Feb. 16, 2007). AR 14. Mr. Fisher asserted that the defendants breached their fiduciary duties by not paying his benefit as a lump sum and sought relief under 29 U.S.C. §§ 1132(a)(2) and (3). On February 16, 2007, the court dismissed the action, finding that Mr. Fisher could not maintain a fiduciary breach claim to remedy the denial of his individual benefit because a fiduciary breach claim can only be brought on behalf of the Plan as a whole. The decision was later affirmed by the Second Circuit. *Fisher v. Penn Traffic Co.,* No. 07-1100-CV, 2009 U.S. App. Lexis 6806 (2d Cir. Apr. 2, 2009), c*ert. denied*, 558 U.S. 1007 (2009); AR 15, AR 16.

Mr. Fisher submitted a benefit application to PBGC on April 15, 2007. AR 39. On June 1, 2007, PBGC began paying him an estimated monthly pension benefit of $275.90. PBGC then finished its review of the Plan and sent Mr. Fisher a benefit determination dated December 16, 2009, increasing his monthly benefit to $452.77. AR 32. The letter informed him that because his benefit entitlement was larger than what PBGC had been paying him on an estimated basis, PBGC would send him a back-payment, with interest, to make up the shortfall. PBGC's benefit calculation disregarded the increase in Mr. Fisher's accrued benefit under the Plan resulting from the Second Amendment, finding that the amendment was not properly executed. The December 16, 2009 letter explained his right to appeal the determination.

Mr. Fisher filed an appeal on January 28, 2010 ("Appeal"). AR 3. The Appeal raised two issues: (1) whether he is entitled to a lump sum, and (2) whether PBGC miscalculated the amount of his benefit as an annuity by disregarding the Second Amendment. *Id.* PBGC's Appeals Board issued a decision dated September 29, 2011 ("Appeals Board Decision"), denying Mr. Fisher's request for a lump sum. AR 2. The Appeals Board also decided that the Second Amendment was properly executed and PBGC's guarantee covered a portion of the benefit

increase. *Id.* Because the Second Amendment was added to the Plan less than two years before the Plan terminated, only 20% of the increase was "phased in" pursuant to 29 U.S.C. § 1322(b)(7). The remainder of the benefit is not guaranteed.

Mr. Fisher filed the complaint in this action ("Complaint") on July 25, 2014. Civ. Doc. 1. He is seeking judicial review of PBGC's denial of a lump sum. He asks the Court for the same remedy he sought in the dismissed 2007 action, here in the form of an order that PBGC pay him a lump sum to remedy the prior plan administrator's alleged breach of fiduciary duty. PBGC filed its answer ("Answer") to the Complaint on September 26, 2014. Civ. Doc. 10. On March 19, 2015, Mr. Fisher filed a Motion for Summary Judgment ("Plaintiff's MSJ"). Civ. Doc. 16.

IV. LEGAL STANDARD

Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This District recognized in *Sara Lee Corp. v. American Bakers' Association Retirement Plan*, 671 F. Supp. 2d 88, 97 (D.D.C. 2009) that when review of final agency action supported by an administrative record is involved, "[c]ourts are not to apply typical summary judgment standards." Id. at 97. Rather, on summary judgment, the Court decides, "as a matter of law, whether an agency action is supported by the administrative record and consistent with the Administrative Procedure Act (the "APA") standard of review. In such cases:

> [u]nder the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did."

Id. (quoting *Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007)).

Courts routinely apply the arbitrary and capricious standard of the APA in reviewing PBGC's benefit determinations, for both legal interpretations and application of specific plan terms. *See, e.g., Davis v. PBGC,* 571 F.3d 1288, 1293 (D.C. Cir. 2009) (PBGC receives the "usual deference we give to an agency interpreting its organic statute."); *Burmeister v. PBGC*, 943 F. Supp. 2d 83, 87-88, (D.D.C. 2013) (deferring to PBGC's interpretation of plan terms). And as the D.C. Circuit has held, the deference applied under the arbitrary and capricious standard is closely akin to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). *See , e.g., Shays v. FEC*, 528 F.3d 914, 924-25 (D.C. Cir. 2008); *Gen. Instrument Corp. v. FCC*, 213 F.3d 724, 732 (D.C. Cir. 2000) (both opinions reference the analysis set forth in *Chevron*).

The scope of judicial deference to agency action is well-established. A court "is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). The court's role is to determine whether the agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The D.C. Circuit has made clear that during this review, "the test is "only reasonableness, not perfection." *Kennecott Greens Creek Mining Co. v. MSHA*, 476 F.3d 946, 954 (D.C. Cir. 2007). Accordingly, even if a court disagrees with an agency's decision, it must uphold that decision if the agency engaged in reasoned decision- making and its determination is sufficiently explained and supported by the administrative record. *See Clark County, Nevada v. FAA*, 522 F.3d 437, 441 (D.C. Cir. 2008).

V. ARGUMENT

As discussed above, 29 U.S.C. § 1341(c)(3)(D) prohibits a plan from paying benefits in the form of a lump sum after it issues a NOIT. In this case, Penn Traffic denied Mr. Fisher's application for a lump sum at a time when it was contemplating termination of the Plan but before an NOIT was issued. After the plan terminated, PBGC determined, in accordance with 29 C.F.R. §§ 4041.42 and 4022.7 and its implementing policy, that it would pay Mr. Fisher's benefit in the form of an annuity and denied his request for a lump sum. Mr. Fisher argued to the Appeals Board, and again in this action, that Penn Traffic was wrong to deny him a lump sum because he applied for his benefit before a NOIT was issued, and, consequently, PBGC must now pay him a lump sum.

The issue in this case is not, as Mr. Fisher argues, whether Penn Traffic should have paid the lump sum.[7] Rather, it is whether PBGC must pay Mr. Fisher a benefit in the form of a lump sum, effectively allowing his benefit to get paid without regard to the guarantee limitations and asset-allocation rules described above. Mr. Fisher believes that PBGC should do so, because he applied for the lump sum before the plan administrator issued a NOIT. The Appeals Board did not agree, reasonably interpreting the statute and PBGC's regulations to preclude payment of a lump sum in that situation. The Court should defer to the Appeals Board's reasonable interpretation.

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[7] In any event, it is clear that Penn Traffic reasonably determined not to pay Mr. Fisher his benefit as a lump sum. As explained above (page 8), the company was in bankruptcy at the time Mr. Fisher applied for the lump sum. Bankruptcy of the plan sponsor is often a reason that a pension plan terminates. *See* 29 U.S.C. § 1341(b)(2)(B) (a liquidation or reorganization in bankruptcy may constitute grounds for a distress termination of a plan). And PBGC's regulations prohibit distributions "made in anticipation of plan termination." 29 C.F.R. § 4044.4. Moreover, only six weeks after Mr. Fisher filed his lump-sum application, the company in fact determined to seek a distress termination of the plan (see above at 9), and ERISA prohibits paying lump sums once a distress termination is initiated, as explained below.

A. PBGC's Determination is Entitled to Deference.

An agency's interpretation of its governing statute is analyzed under the two-part analysis the Supreme Court established in *Chevron*. Under *Chevron,* if Congress has "directly spoken to the precise question at issue," Congress's mandate applies regardless of any agency interpretation. *Chevron,* 467 U.S. at 842. But if a statute is "silent or ambiguous" on the issue, the court must uphold the agency's interpretation if it is "based on a permissible construction of the statute." *Id*. at 843.

As the Supreme Court has emphasized, an agency construction need not be "the only one it permissibly could have adopted . . ., or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. And the Court has specifically accorded deference to PBGC's interpretation of ERISA's provisions. *See, e.g., Beck v. Pace Int'l Union*, 551 U.S. 96, 104 (2007) ("We 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, 726 (1989)); *PBGC v. LTV Corp.*, 496 U.S. 633, 647-48 (1990).

Agencies also receive deference for interpretations of their own regulations. A reviewing court should defer to an agency's interpretation of its own regulation unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quote omitted); *accord Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011).

B. The Appeals Board's Decision was Reasonable

Title IV of ERISA does not explicitly address whether PBGC must pay a lump sum to a participant who elected that form of benefit before an NOIT was issued. Because the statute is ambiguous on this issue, PBGC is entitled to deference under *Chevron*.

As explained above, 29 U.S.C. § 1341(c)(3)(D) provides that once an NOIT is issued, the plan administrator must "pay[ ]" benefits only in the form of an annuity. Similarly, PBGC's regulation provides that the administrator must "[p]ay" benefits only as annuities after the NOIT is issued. 29 C.F.R. § 4041.42. These provisions contain no exception for cases where a participant has filed an application for a lump sum that has not been paid when the NOIT is issued. The Appeals Board reasonably interpreted these provisions to "provide a black-line rule in the case of distress terminations [that] if the plan administrator did not make a lump-sum distribution of a participant's benefit before the NOIT date, the plan administrator cannot thereafter make a lump-sum distribution." AR 2. In other words, once the NOIT is issued, a plan administrator is prohibited from paying a lump sum regardless of when the participant applied for the benefit.

As the Appeals Board explained, because Mr. Fisher's benefit was no longer payable as a lump sum when the Plan terminated, PBGC could not pay the benefit as a lump sum. The fact that Mr. Fisher applied for the benefit before the Plan issued an NOIT does not change this reasoning.

The Appeals Board determined that this rationale supports the result mandated by PBGC Policy 5.4-9. The Policy provides that "PBGC will not accept a plan application to pay a benefit in a lump sum received by the plan administrator before [the plan termination date] even if it was received before the date of the [NOIT]." AR 51. Because the Appeals Board's application of

the statute, regulations, and PBGC's policy in the circumstances of this case was reasonable, the Court should uphold the determination.

C. Other Provisions of ERISA and the Regulations Support the Appeals Board's Determination

1. Another PBGC regulation prohibits paying Mr. Fisher a lump sum.

In addition to 29 U.S.C. § 1341(c)(3)(D) and 29 C.F.R. § 4041.42, another PBGC regulation strongly supports the Appeals Board's decision. Section 4022.7 of PBGC's regulations states that where a benefit is payable in a lump sum "under . . . an option *elected under the plan by the participant*, the benefit will not be guaranteed or paid as such." 29 C.F.R. § 4022.7(a) (emphasis added). This unequivocal language prohibits PBGC's payment of a lump sum to a participant who elected one before plan termination. The prohibition applies to precisely the situation PBGC faces in this case, where during the weeks or months immediately before initiation of plan termination a participant sought to receive a lump sum, and that lump sum was not paid before termination of the plan.

The same regulation states that PBGC will treat a participant as entitled to a life-annuity form of benefit if the participant "elected [the benefit] on or before the termination date . . . ." 29 C.F.R. § 4022.4(a)(2). Thus, the regulation draws a sharp distinction between annuity forms, which PBGC would provide if elected before termination, and lump sums, which would "not be guaranteed or paid as such" even if "elected . . . by the participant." 29 C.F.R. § 4022.7(a).

The preamble to the proposed regulation, explains these provisions and confirms this straightforward reading:

> [I]t is proposed that, *except in the case of lump-sum options*, an option which *has been elected* under the provisions of the plan in lieu of an otherwise normal form retirement benefit, and which is nonforfeitable on the date of termination, be guaranteed up to the insurance limits . . . In the case of an option providing for a lump-sum payment to the participant, the PBGC would guarantee the alternative life annuity provided in the plan.

40 Fed. Reg. 24206, 24207 (June 5, 1975) (codified at 29 C.F.R. pt. 2605) (emphasis added). The preamble makes clear that PBGC generally would not pay lump sums, and the reference to an option that "has been elected" confirms that the prohibition applies even if the participant elected the lump-sum option before plan termination.

2. PBGC has authority to recover lump sums.

Lump sums paid before a plan terminates may distort the asset-allocation scheme under section 4044 of ERISA. This is because paying lump sums—especially ones like Mr. Fisher's that include nonguaranteed benefits and are lower in priority under the asset-allocation rules—may potentially exhaust plan assets that would otherwise at termination serve to fund other, higher priority benefits. One of the tools ERISA provides to avoid this result is authority to recover the portion of a pre-termination lump sum exceeding the amount PBGC would have guaranteed. Section 4045 of ERISA provides that PBGC, as the statutory trustee, "is authorized to recover for the benefit of a plan from a participant the recoverable amount (as defined in subsection (b)) of all payments from the plan to him which commenced within the 3-year period immediately preceding the time the plan is terminated." This provision essentially allows PBGC to recover the portion of lump sums that exceed guaranteed levels.

Given that PBGC is authorized to recover nonguaranteed amounts from a participant who actually received a lump sum during the three years before plan termination, it would be anomalous to require PBGC to *pay* such amounts simply because a participant elected a lump sum (but did not receive it) in the months immediately before termination. Moreover, in light of section 4045, a participant cannot assert a right to benefits promised under the plan but not guaranteed by PBGC, even if he completed the steps necessary under the plan for those benefits. Section 4045 provides that a participant who elects to receive a lump sum during the three years

before termination has a right only to guaranteed benefits, which PBGC will pay, but in the form of an annuity.

When section 4045 is read in conjunction with 29 C.F.R. §§ 4022.7(a) and 4022.4(a)(2), it is clear that PBGC's only obligation is to pay guaranteed benefits as an annuity.

3. PBGC's regulations also prohibit paying lump sums in anticipation of termination.

Another PBGC regulation provides further support for not paying Mr. Fisher a lump sum. Even before a plan terminates or any action is taken to initiate termination, a plan administrator may not distribute plan assets other than in strict accord with ERISA § 4044 when termination is merely "anticipated." 29 C.F.R. § 4044.4.

In this case, Penn Traffic's Board—which had resolved to seek termination of the Plan while Plaintiff's benefit application was pending—concluded that Plaintiff's request for a lump sum should be denied. The Committee adopted that determination. The Committee, in its October 17, 2003 letter to Plaintiff, informed him that the Plan could not pay Plaintiff's benefit in a lump sum, because of the rule against payments in anticipation of termination.

It would be anomalous, to say the least, to require PBGC to pay a lump sum *after* termination when PBGC's regulation forbids paying a lump sum merely in anticipation of termination.

D. Mr. Fisher may not Maintain an Action for Fiduciary Breach

Mr. Fisher attempts to characterize this action as one for fiduciary breach. He argues that (1) Penn Traffic breached its fiduciary duties by not paying him a lump sum; and (2) PBGC has a duty to remedy Penn Traffic's alleged fiduciary breaches. Plaintiff's MSJ at 16. But a court has already determined that Mr. Fisher has no claim for fiduciary breach against Penn Traffic.

In *Fisher v. Penn Traffic Co.,* 2007 U.S. Dist. Lexis 10708 (S.D.N.Y. Feb. 16, 2007), AR 14, the court ruled that Mr. Fisher could not bring a fiduciary breach claim to remedy the denial of his lump-sum because a fiduciary breach claim may only be brought on behalf of a plan as a whole. The court further ruled that he did not have a remedy under 29 U.S.C. § 1132(a)(3) because he was seeking legal relief—payment of a lump sum—not equitable relief.[8] The Second Circuit affirmed the decision. 2009 U.S. App. Lexis 6806 (2d Cir. Apr. 2, 2009), c*ert. denied*, 558 U.S. 1007 (2009); AR 15, AR 16.

If Mr. Fisher brought another action against Penn Traffic, he would be precluded from again litigating whether Penn Traffic breached its fiduciary duties.[9] He is now attempting to revive that claim through the back door, by asserting that PBGC must provide the remedy the court ruled he could not get from Penn Traffic. Although PBGC was not a party in the prior case, the Court should not allow Mr. Fisher to effectively relitigate the claim that was dismissed in that action.

In addition, Mr. Fisher is seeking payment of a lump-sum benefit. He has an adequate remedy through his challenge of PBGC's benefit denial. It is well established that a plaintiff who has a remedy through a benefits claim cannot recharacterize the claim as one for fiduciary breach. *See, e.g., Wright v. Metro. Life Ins. Co.*, 618 F. Supp. 2d 43, 55-56 (D.D.C. 2009) ("the majority of circuits that have decided this issue have held that a breach of fiduciary duty claim

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[9] "The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry,* 449 U.S. 90, 94 (1980) (internal citations omitted).

cannot stand where a plaintiff has an adequate remedy through a claim for benefits.") (quoting *Clark v. Feder Semo & Bard, P.C.*, 527 F. Supp. 2d 112, 116 (D.D.C. 2007)); *Stephens v. US Airways Grp.*, 555 F. Supp. 2d 112, 120-21 (D.D.C. 2008) ("Plaintiffs have adequate potential remedies if in fact they were denied benefits through a delayed payment, and, accordingly, their fiduciary breach claims will be dismissed").

Finally, as noted, the issue in this case is whether PBGC was correct in not paying a lump sum benefit that was applied for prior to plan termination, not whether Penn Traffic should have paid the lump sum.[10] As discussed above, the Appeals Board's decision that Mr. Fisher is not entitled to a lump sum from PBGC is reasonable and consistent with the statute and regulations.

E. The Plan was Properly Terminated.

Mr. Fisher speculates that the NOIT issued by the Plan Administrator was defective and thereby renders the termination null and void. The conjecture is "[b]ased on the contents of the Administrative Record . . . ." Plaintiff's MSJ at p. 17.

A NOIT is prepared and served by a plan administrator, not by PBGC. Although PBGC reviews and approves its form, the plan administrator is not required to serve PBGC with the NOIT. Furthermore, Mr. Fisher did not contest the termination of the Plan in the Appeal. *See* AR 3. Accordingly, the Appeals Board did not consider this issue. *See* AR 2. Therefore, the NOIT was not included in the Administrative Record, nor should it have been.

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[10] As discussed more fully *supra,* note 7, Penn Traffic acted reasonably when it denied Mr. Fisher's application for a lump sum benefit in accordance with the prohibition on paying lump sums "in anticipation of termination." And contrary to Mr. Fisher's assertion that the Plan's Administrative Committee improperly delegated its authority to determine Mr. Fisher's benefit to the Board of Directors, the Board fulfilled its duty to monitor and supervise the Committee by providing direction during a critical time period.

Courts have held that a challenger may not pursue in court a specific claim or argument that he did not assert to PBGC during the administrative appeal. *See, e.g., VanderKam v. PBGC*, 2013 WL 1882329, at *8 n.9 (D.D.C. May 7, 2013) (plaintiffs "never advanced this particular line of attack before the Appeals Board, which means that they may well have waived the argument altogether"); *Caskey v. PBGC*, No. 97-CV-4240, 1999 U.S. Dist. LEXIS 21448, at *10-12 (E.D. Pa. Jan. 14, 1999) (court "will not consider" argument that the plaintiff did not raise in administrative appeal); *accord Coburn v. McHugh*, 679 F.3d 924, 929 (D.C. Cir. 2012) (it is a "hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review") (citation omitted). Mr. Fisher should thus be found to have waived the issue by failing to raise it in his administrative appeal and thereby exhausting his administrative remedies. Nevertheless, we will address the merits of the claim in the event that the Court exercises its discretion to consider this new contention.

PBGC, when it reviewed Penn Traffic's application for a distress termination of the Plan, reasonably concluded that the NOIT was properly drafted and served. The PBGC Form 601 filed with PBGC states that both the earliest and the latest date that the NOIT was served on affected parties (other than PBGC) was November 11, 2003. Bernadette Barber signed the Form 601 on behalf of the Plan Administrator with the following certification:

> I, the Plan Administrator, certify that, to the best of my knowledge and belief: (1) I am implementing the termination of the plan in accordance with all applicable laws and regulations; and (2) the information contained in this filing and made available to the enrolled actuary is true, correct, and completed. In making this certification, I recognize that knowingly and willfully making false, fictitious, or fraudulent statements to the PBGC is punishable under 18 U.S.C. § 1001.

AR 11.

Violation of 18 U.S.C. § 1001 is a felony. PBGC relies on the representation in the Form 601 that the NOIT was properly issued and is not required to further verify the service. Thus, PBGC had authority to terminate the Plan and did so. *See* 29 U.S.C. §§ 1341 and 1342; AR 10.

The APA's "arbitrary and capricious" standard discussed above governs judicial review of PBGC's application of law to facts. 5 U.S.C. § 706(2)(A). PBGC reasonably relied on the representation that the NOIT was issued and terminated the Plan in accordance with the requirements of ERISA.

F. PBGC Asserted Proper Affirmative Defenses.

In its Answer, PBGC pled its affirmative defenses, giving Plaintiff and his counsel notice of them and precluding a contention that a defense was waived by failure to comply with Fed. R. Civ. P. 8(c). That rule states, in pertinent part, that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense . . . ." The failure to plead an affirmative defense generally results in a waiver of that defense and its exclusion from the case. *See, e.g., Harris v. Secretary, U.S, Dept. of Veterans Affairs*, 126 F.3d 339, 343 (D.C. Cir. 1997).

Mr. Fisher asks the Court to dismiss all of PBGC's affirmative defenses. Plaintiff's MSJ at p. 22-23. As a preliminary matter, a motion to dismiss is not a procedurally proper response to an affirmative defense. Rather, he should have moved to strike under Fed. R. Civ. Proc. 12(f). Nevertheless, the motions are substantially the same and striking (or dismissing) the defenses is strongly disfavored. *See, e.g.*, *Gates v. District of Columbia*, No. 11-40 (RWR), 2014 WL 7330945, at *17 (D.D.C. Aug. 29, 2014).

Some affirmative defenses are specifically listed in Rule 8(c), but the list is not exhaustive. *See, e.g., Sony/ATV Music Publ'g LLC v. D.J. Miller Music Distribs., Inc.*, No. 3:09-cv-01098, 2011 WL 4729807 (M.D. Tenn. Oct. 7, 2011) (court refused to strike certain defenses

that were not explicitly enumerated in Rule 8(c)(1) because the list of affirmative defenses under that Rule is not an exclusive list and the defenses met the "fair notice" standard). Numerous federal courts have held that an affirmative defense only needs to be stated in general terms and will be held to be sufficient as long as it gives the plaintiff fair notice of the nature of the defense. *See, e.g.*, *Paleteria La Michoacana v. Productos Lacteos*, 905 F. Supp. 2d 189 (DDC 2012) (notice pleading rule's plausibility standard governing claims does not apply to affirmative defenses); *CI Int'l Fuels, LTDA v. Helm Bank, S.A.*, No. 10-20347-CIV, 2010 WL 3368658, at *3 (S.D. Fla. Aug. 24, 2010) (affirmative defenses must be set forth only in sufficient detail to give fair notice and thereby prevent surprise). By asserting the affirmative defenses, PBGC apprised Mr. Fisher of them and thus gave him the opportunity to take any action necessary to contest them. *See, e.g., Short v. Mando Am. Corp.*, 805 F. Supp. 2d 1246, 1262 (M.D. Ala. 2011).

The First Affirmative Defense concerns a plan administrator's discretion to interpret and apply the language of the plan, subject to the requirements of ERISA. Mr. Fisher admits that "[t]his is true as a general statement." Plaintiff's MSJ at 22. He then goes on to argue the merits of the defense asserting that "neither the Committee nor Penn Traffic interpreted the terms of the Plan." *Id*. But the defense is valid and constitutes one of the grounds for finding that the Plan Administrator did not breach any fiduciary duties.

The Second Affirmative Defense refers to PBGC's statutory authority to determine and pay benefits. PBGC declined to pay a lump sum to Mr. Fisher in accordance with this authority. He was notified in the Answer that this defense is being asserted, and he disputes it in his Motion for Summary Judgment.

The Third Affirmative Defense gives notice to Mr. Fisher that the case is reviewable on the administrative record pursuant to the APA. This is a defense to a claim that the case is subject to a standard of review other than that under the APA. Here, he recognizes that judicial review is governed by the APA. *See* Plaintiff's MSJ at p. 4.

The Fourth Affirmative Defense informs Mr. Fisher of PBGC's defense to his request for attorneys' fees. *See* Complaint at p. 8. In his Motion for Summary Judgment, he "concedes that attorney's fees may not be awarded against the PBGC pursuant to Title IV of ERISA but reserves his right to argue that fees may otherwise be awarded." Plaintiff's MSJ at 23. Given that he reserves his right to request attorneys' fees, PBGC should be allowed to preserve its defense to any such request.

The Fifth Affirmative Defense is for failure to state a claim as to which relief may be granted. Mr. Fisher concedes that "[t]his is an affirmative defense" but contends that "it has no merit." *Id*. He bases his claim, in part, on an alleged fiduciary breach by PennTraffic. But as discussed above, Mr. Fisher has an adequate remedy for benefits and he cannot recharacterize that claim as a fiduciary breach claim. Accordingly, it is not a claim as to which relief may be granted. Furthermore, he bases his claim for relief on an allegation that PBGC policy and regulations are "*ultra vires*." Complaint at ¶¶ 23 n.1, 34. Here, again, the Complaint fails to state a claim upon which relief can be granted; PBGC had authority to enact the subject regulations and policy.

In sum, all of PBGC's affirmative defenses are bona fide. Mr. Fisher was duly notified that PBGC is asserting the defenses, and although he can challenge them on their merits, he may not simply dispose of them through a request for dismissal.

G. Mr. Fisher is not Entitled to Attorneys' Fees.

Mr. Fisher requests an award of attorneys' fees. Complaint at p. 8. But the Court of Appeals for this Circuit has already held that attorneys' fees are not recoverable from PBGC in actions authorized against it under ERISA. *Stephens v. US Airways Grp.*, 644 F.3d 437, 441-42 (D.C. Cir. 2011); cert. denied 132 S. Ct. 1857 (2012). And because no authority provides for the recovery of attorneys' fees from PBGC in this action, the Court should grant summary judgment to PBGC on Mr. Fisher's request for attorneys' fees.

VI. CONCLUSION

The Appeals Board Decision was reasonable and is in accordance with ERISA and PBGC regulations. The Court should grant PBGC's Motion for Summary Judgment and deny Mr. Fisher's Motion for Summary Judgment, by finding that Mr. Fisher is not entitled to a lump sum benefit. The Court should also deny Mr. Fisher's request for attorneys' fees.

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Respectfully submitted,

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