IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

In re:	)	Chapter 11
SEA ISLAND COMPANY, *et al.*,	)	Case No. 10-21034 (Jointly Administered)
Debtors.	)	Judge John S. Dalis

PENSION BENEFIT GUARANTY CORPORATION'S REQUEST FOR HEARING AND RESPONSE TO LIQUIDATION TRUSTEE'S OBJECTION TO CLAIMS

Pension Benefit Guaranty Corporation ("PBGC") responds to the Liquidation Trustee's ("Trustee") Objection to the Claims of the Pension Benefit Guaranty Corporation ("Objection").[1] The Trustee fails to meet his burden, misapplies the law, or both, in every argument. The Court should therefore deny the Trustee's Objection and deem PBGC's claims allowed as filed.

INTRODUCTION

The claims process is intended to be a simple process for determining the entitlements of creditors in a bankruptcy case. The law is clear that those entitlements arise in the first instance from the substantive underlying law. The Trustee's Objection ignores both of these points. He argues in the main that the Court should simply ignore the underlying law that gives rise to PBGC's claims. Most of his remaining arguments violate the precept that the claims process is supposed to be simple and substantive by, at best, elevating form over substance, and worse, inventing complex requirements that are contrary to the Bankruptcy Code and Rules. Worst of all, the Trustee argues that the statutory scheme that protects the financial health of millions of Americans is invalid based on a constitutional theory that involves no analysis and is erroneous

[1] PBGC filed a motion to extend the page limit of this response to 35 pages on August 28, 2016. ECF No. 1634. Should the Court deny the motion, PBGC will amend the response to 26 pages.

in almost every legal and factual assertion. The Court need only recognize that the statutory scheme governing the nation's pension-plan insurance system prescribes the calculation of PBGC's claims, and deny the Trustee's objections.

STATUTORY BACKGROUND

I. PBGC's Governance

PBGC is the U.S. government agency that administers the nation's pension insurance program under Title IV of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA").[2] PBGC guarantees the payment, up to statutory limits, of the benefits promised to American workers and retirees participating in nearly 24,000 private-sector defined benefit pension plans, and is the statutory trustee of more than 4,700 failed plans.[3] PBGC is a self-financed agency and obtains revenue exclusively from four sources: (1) insurance premiums set by Congress and paid by pension plan sponsors; (2) investment income; (3) assets from plans trusteed by PBGC; and (4) recoveries from sponsors formerly responsible for the plans.[4]

Congress established PBGC in 1974 as a corporation within the Department of Labor.[5] Before PBGC's governance structure was changed in 2006,[6] PBGC was administered by the Secretary of Labor, as the Chairman of the Board of Directors, consistent with policies established by the Board of Directors.[7] The Board consists of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Commerce, all of whom are appointed by the President.[8]

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[2] 29 U.S.C. §§ 1301-1461 (2012 & Supp. II 2014).
[3] 2015 PBGC Annual Report at 2, http://www.pbgc.gov/Documents/2015-annual-report.pdf.
[4] *Id.* at 10.
[5] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974).
[6] *See* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780, 935 (2006).
[7] *See* 29 U.S.C. § 1302(d) (as effective in 1993), App. 1.
[8] *Id.*

The statute did not establish the offices of the Executive Director or the General Counsel. Rather, the Chairman was responsible for the administration of the Corporation.[9] His authority included the power to "appoint and fix the compensation of" officers, attorneys, employees, and agents and to "define their duties."[10] As one of his first acts, the Chairman issued an order that created the office of the Executive Director of PBGC, and delegated certain duties to that office.[11] Until 2006, when Congress amended ERISA to create the statutory position of PBGC Director, the Secretary of Labor appointed the Executive Directors of PBGC.[12]

This structure—where the office of the Executive Director existed solely by virtue of the Chairman's order, and could similarly have been revoked at the discretion of the Chairman—stayed in place until 2006. Thus, as a result of the Chairman's Order, the governance of PBGC was divided between the Board of Directors and the Executive Director. ERISA provided specific authorities to the Board of Directors, such as the authority to adopt regulations related to Title IV.[13] PBGC's bylaws also reserved solely to the Board of Directors the power to approve all final substantive regulations.[14] The bylaws authorized the Executive Director to approve

[9] *Id.* at § 1302(a).
[10] *Id.* at § 1302(b)(6).
[11] *See* Chairman's Order No. 2, dated March 14, 1975, Ex. 1.
[12] *History of PBGC*, available at http://www.pbgc.gov/about/who-we-are/pg/history-of-pbgc.html (explaining that the first Executive Director was appointed by the Chairman); 152 Cong. Rec. S4893-01 (2006) (statement of Sen. Baucus) (explaining that then-current practice was that "the Secretary of Labor, the Chairman of the PBGC" appointed the executive director).
[13] 29 U.S.C. § 1302(b)(3) (as effective in 1993), App. 1.
[14] Bylaws of the PBGC, 29 C.F.R. §§ 2601.3(b)(1) and (5) (as effective in 1993), App. 2. That provision contains an exception for "amendments to the regulation on Valuation of Plan Benefits in Single-Employer Plans and Valuation of Plan Assets and Plan Benefits Following Mass Withdrawal establishing new interest rates and factors," which may be approved by the Executive Director. That exception does not apply here.

proposed regulations and final nonsubstantive regulations.[15] The bylaws also provided that the General Counsel of PBGC served as Secretary to the Board of Directors and kept its minutes.[16]

Congress changed PBGC's governance structure in the Pension Protection Act of 2006.[17] Under the new structure, Congress provided that PBGC is administered by a Director, rather than the Secretary of Labor, and provided for his appointment by the President with the advice and consent of the Senate.[18] In 2012, Congress changed the law to expressly provide for the office of the General Counsel and to define its duties.[19]

II. PBGC's Pension Plan Guaranty Program under Title IV

Title IV of ERISA provides a backstop—a guarantee that participants in covered plans will not suffer the "great personal tragedy" of losing all of their promised retirement income.[20] Accordingly, Title IV establishes the exclusive means of terminating a pension plan.[21] If a pension plan has sufficient assets to cover its liabilities, the sponsor can terminate it in a standard termination under 29 U.S.C. § 1341(b). Under a standard termination, the sponsor typically purchases annuities from a private insurer to pay participants' benefits.[22] If a plan does not have the assets to pay those benefits, the sponsor can apply for a distress termination under 29 U.S.C. § 1341(b) if it and its controlled group members meet certain distress tests. Additionally, PBGC

[15] Bylaws of the PBGC, 29 C.F.R. § 2601.3(c) (as effective in 1993), App. 2.
[16] *Id.* at § 2601.6.
[17] Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780, 935 (2006) (codified in applicable part at 29 U.S.C. § 1302).
[18] 29 U.S.C. § 1302(a).
[19] 29 U.S.C. § 1302(d)(5); Moving Ahead for Progress in the 21st Century (MAP-21), Pub, L. No. 112-141, 126 Stat. 406, 853 (2012).
[20] *See Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980).
[21] 29 U.S.C. §§ 1341, 1342. There are a few exemptions to Title IV coverage set forth in 29 U.S.C. § 1321(b); these are not applicable here.
[22] *See* 29 U.S.C. § 1341(b)(3)(A)(i).

can initiate termination of a pension plan under certain circumstances.[23] If a pension plan terminates with insufficient assets to pay promised benefits, PBGC assumes an unconditional obligation to pay participants their lifetime Title IV benefits.[24]

The sponsor is not relieved of liability, however. Instead, it becomes liable to PBGC for the pension plan's unfunded benefit liabilities,[25] the aggregate benefits owed to participants under the plan less the value of plan's assets on the date of plan termination.[26] The sponsor also generally becomes liable for termination premiums,[27] a series of three annual premiums due to PBGC, calculated using a statutory formula: $1,250 per year per pension plan participant.[28]

Finally, when a pension plan is ongoing, the sponsor funds it in accordance with standards set by ERISA and the Internal Revenue Code.[29] After the pension plan terminates, the statutory trustee of a failed plan collects—on behalf of the plan[30]—any unpaid minimum contributions.[31] While PBGC is not required by law to act as the statutory trustee of a terminated pension plan, it is in practice always appointed trustee.

In calculating the unfunded benefit liabilities, ERISA mandates that the value of a terminated pension plan's liabilities be determined "on the basis of assumptions prescribed by

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[23] 29 U.S.C. § 1342.
[24] 29 U.S.C. §§ 1322, 1361.
[25] 29 U.S.C. §§ 1362, 1368.
[26] 29 U.S.C. § 1362(b)(1)(A).
[27] 29 U.S.C. §§ 1306(a)(7), 1307; 29 C.F.R. §§ 4006.7, 4007.
[28] *Id.*
[29] *See* 29 U.S.C. § 1082(b); 26 U.S.C. § 412(b).
[30] *See* 29 U.S.C. § 1342(d)(1)(B)(ii) (a trustee appointed under § 1342(b) has the power "to collect for the plan any amounts due the plan, including but not limited to the power to collect from the persons obligated to meet the requirements of § 302 or the terms of the plan"); 29 U.S.C. § 1362(c).
[31] *See* 29 U.S.C. § 1362(c).

[PBGC]."[32] In 1975, PBGC proposed a valuation regulation that prescribed these assumptions.[33] The regulation—issued in compliance with the notice and comment requirements of the Administrative Procedures Act ("APA")[34]—was adopted on an interim basis in 1976,[35] and finalized in 1981.[36] It was then amended in 1993[37] and in 2005,[38] again in compliance with the APA, to modernize and clarify certain assumptions without any change in the overall approach.[39] That regulation is codified at 29 C.F.R. § 4044 (the "Regulation").

When the Regulation was amended in 1993, it was approved in proposed form by James B. Lockhart, III, who was the Executive Director of PBGC.[40] After a notice and comment period, the regulation was published in final form on September 28, 1993.[41] The final regulation was issued pursuant to a resolution of the Board of Directors, in conformance with PBGC Bylaws and ERISA Section 4002(b)(3), 29 U.S.C. § 1302(b)(3).[42]

The actuarial assumptions in the Regulation are used to calculate PBGC's claims. When a plan sponsor files for bankruptcy, actuaries in PBGC's Negotiations and Restructuring Actuarial Division[43] calculate PBGC's claims, using aggregate actuarial information provided by

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[32] 29 U.S.C. § 1301(a)(18)(A).
[33] 40 Fed. Reg. 57,982 (Dec. 12, 1975) (proposed rule).
[34] 5 U.S.C. § 553.
[35] 41 Fed. Reg. 48,484 (Nov. 3, 1976) (interim rule).
[36] 46 Fed. Reg. 9492 (Jan. 28, 1981) (final rule).
[37] 58 Fed. Reg. 5128 (Jan. 19, 1993) (proposed rule); 58 Fed. Reg. 50,812 (Sept. 28, 1993) (final rule).
[38] 70 Fed. Reg. 12,429 (Mar. 14, 2005) (proposed rule); 70 Fed. Reg. 72,205 (Dec. 2, 2005) (final rule).
[39] The 1993 amendment continued the regulation's historical approach of assigning values to annuity benefits that are in line with private-sector group annuity price; it did not significantly affect the valuations produced for most plans.
[40] Valuation of Plan Benefits, 58 Fed. Reg. 5128, 5147 (Jan. 19, 1993) (proposed rule).
[41] Valuation of Plan Benefits, 58 Fed. Reg. 50,812 (Sept. 28, 1993) (final rule).
[42] *Id.* at 50,830. *See also* Board Resolution 89-6, dated July 19, 1989, Ex. 2.
[43] At the time PBGC calculated its claims for this case, the actuaries were in a department called the Division of Insurance Supervision and Compliance.

the plan sponsor and applying actuarial assumptions prescribed by PBGC's Regulation.[44] This information is reflected in a Pension Information Profile.

After the plan is terminated and PBGC is appointed trustee, PBGC continues to pay participants' benefits without interruption.[45] These payments, however, are only estimates of what the participants are ultimately entitled to receive.[46] To calculate each participant's benefit, PBGC's Office of Benefits Administration[47] collects and verifies participant and plan information, and then calculates benefits on an individual-by-individual basis, using actuarial assumptions provided in PBGC's Regulation.[48]

The resulting total plan liability is then deducted from the plan assets to yield a final amount of unfunded benefit liabilities that is reported, along with a final participant count, in the "Actuarial Case Report."[49] The Actuarial Case Report often takes three years or more to complete,[50] and thus rarely affects PBGC's bankruptcy claims. PBGC's claims are typically based on the Pension Information Profile, but if the Report is finished first and the final underfunding is lower, then PBGC usually reduces its claims to reflect the new information.[51]

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[44] *Cox Enterprises, Inc. v. News-Journal Corp.*, No. 6:04-CV-698-ORL-28, 2014 WL 3511228, at *6 (M.D. Fla. Apr. 24, 2014)

[45] *Plan Status – Trusteeship*, available at http://www.pbgc.gov/wr/trusteed/plans/Status/Trusteeship.html ("If you are already receiving pension benefits from your plan, we will continue paying you without interruption. These payments will be an estimate of the benefits that PBGC can pay. Your benefit may be adjusted for the limits set by law."). *See also* 29 U.S.C. § 1302(a)(2).

[46] *Id.*

[47] Formerly called the Benefits Administration and Payments Department.

[48] *Cox Enterprises, Inc.*, 2014 WL 3511228, at *6 (describing the process that occurs after trusteeship to gather documents and information before starting the valuation of individual liabilities and plan asset audit).

[49] *Id.*

[50] *Id.*

[51] *Id.* at *8 (noting that PBGC reduced its unfunded benefit liability claim from $15,102,100 to $13,887,822 upon completion of the Actuarial Case Report).

FACTUAL BACKGROUND

Sea Island Company ("Sea Island") sponsored the Sea Island Company Retirement Plan ("Pension Plan"). In August 2010, Sea Island and six of its subsidiaries (collectively, the "Debtors") filed for chapter 11 bankruptcy.[52] After Sea Island sold all of its assets at auction, PBGC determined that the Pension Plan must be terminated under 29 U.S.C. § 1342(c) to protect the interests of participants because the Pension Plan will be unable to pay benefits when due.

On October 28, 2010, PBGC filed its proofs of claim with respect to the Pension Plan, each accompanied by a statement in support: (1) a $39,861,900.00 claim for unfunded benefit liabilities; (2) a $2,265,102.00 claim for unpaid minimum funding contributions, with a portion entitled to priority; (3) a $7,290.000.00 claim for termination premiums; and (4) a $17,779,154.00 claim for "shortfall and waiver amortization" charges.[53] The statement in support of the unfunded benefit liabilities claim and the termination premiums claim indicated those claims were contingent on termination of the Pension Plan.[54]

On October 28, 2010, PBGC also voted in favor of the Debtors' Plan of Liquidation (the "Plan"), using a ballot prepared by the Debtors pursuant to procedures approved by the Court.[55] Sea Island and PBGC then terminated the Pension Plan by agreement dated October 29, 2010.[56]

After the Plan was confirmed on November 8, 2010,[57] Debtors and PBGC filed a joint stipulation ("Stipulation") on December 15, 2010, settling certain claims issues.[58] Under the

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[52] *See* ECF No. 1; 11 U.S.C. §§ 101 *et seq*.
[53] *See* Epiq Claim Nos. 560-63.
[54] *See* Epiq Claim Nos. 561-62.
[55] *See* Disclosure Statement Order, ECF No. 220, ¶ 11(b); *See also* PBGC Ballot, Ex. 3.
[56] Indeed, the Debtors and the Trustee have all acknowledged that the Pension Plan has terminated. *See* ECF No. 1255, ¶ 10 and ECF No. 1580, ¶ 21.
[57] ECF No. 372.
[58] ECF No. 443.

Stipulation, which the Court approved ("Order"),[59] the Debtors agreed to pay PBGC's priority claim, in the amount of $240,841.[60] The Stipulation deemed PBGC's remaining claims to be general unsecured claims, and provided that it did not limit the Trustee "from objecting to or otherwise challenging the amounts of the general unsecured claims asserted by the PBGC."[61]

In December 2015, PBGC's Office of the Chief Counsel ("OCC"), anticipating claims settlement discussions, asked internally about the status of the Plan's Actuarial Case Report ("Actuarial Report"). OCC was told that it had not yet been completed.[62]

Substantive discussions to resolve PBGC's claims began in February 2016. Initially, the Trustee sought only to settle PBGC's class 4 claims, but PBGC sought a global settlement of its class 4 and class 5 claims. Negotiations regarding class 5 ended in April 2016. The parties nevertheless reached an agreement in principle regarding class 4 no later than May 18, 2016;[63] the settlement agreement was signed on June 21, 2016. The Trustee has yet to file a motion seeking Court approval of the settlement.

In its first offer to settle class 5 in February, 2016, PBGC told the Trustee that it would withdraw its shortfall and amortization claim.[64] PBGC also informed the Court that it would withdraw that claim in the hearing regarding the Trustee's Rule 2004 motion against PBGC.[65]

On May 25, 2016, now anticipating a claims objection, OCC asked again about the Actuarial Report, and learned that the first, unreviewed draft report listed the Plan's

[59] ECF No. 466.
[60] ECF No. 443 at ¶ 11(a).
[61] ECF No. 443 at ¶ 11(c).
[62] *See* Email from Scott Young to Stephanie Thomas (Dec. 9, 2015, 2:46 p.m.) (in string), Ex. 4.
[63] *See* Email from Stephanie Thomas to Robert Mercer (May 18, 2016, 3:21 p.m.), Ex. 5.
[64] *See* Email from Kimberly Neureiter to Robert Mercer (Feb. 17, 2016, 8:05 p.m.), Ex. 6.
[65] *See* Hearing Transcript, 45:6-45:9 (June 9, 2016) ("And we've already raised in our negotiations with him that we will withdraw our shortfall and amortization claim, which lowers our claims to $49 million.").

underfunding at about $28,300,000.[66] In its brief regarding the Trustee's Rule 2004 motion, PBGC disclosed that it expected the final Actuarial Report in early July.[67]

Completion of the report took longer than expected. On July 15, 2016, given the impending claims objection deadline, PBGC called Trustee's counsel to tell him that based on a draft of the report, PBGC's unfunded benefit liability claim was expected to shrink to about $28,300,000 and the termination premium claim to $5,700,000, for a total reduction in claims of about $13,000,000.[68] PBGC also reiterated that it would withdraw the shortfall and amortization claim. PBGC suggested that the parties seek a short extension of the claims objection deadline, to give the Trustee an opportunity to see the report and possibly reopen settlement talks. After the extension motion was denied, PBGC filed a notice withdrawing the shortfall and amortization claim.[69] On July 19, PBGC amended two of its claims based on information in a newer draft of the Actuarial Report: (1) the claim for unfunded benefit liabilities to $28,081,304, and (2) the claim for pension insurance premiums to $5,662,500, and notified the Trustee.

The Actuarial Report was completed on July 29, 2016, and provided to OCC on August 1, 2016; PBGC sent the Trustee a redacted copy[70] of the Actuarial Report's summary memo, along with other actuarial information, on August 3, 2016.

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[66] *See* Email string of May 25, 2016 among Bob Snyder, Kimberly Neureiter, *et al.*, Ex. 4.
[67] ECF No. 1553, at 9 (". . . PBGC typically reduces its claims if the value is lower than the estimate. PBGC anticipates that [the Actuarial Report] will be completed by the beginning of July 2016. PBGC will share that information with the Trustee as soon as it is available.").
[68] *See* Email from Stephanie Thomas to Robert Mercer (July 15, 2016, 2:56 p.m.), Ex. 7; Email from Robert to Stephanie (July 16, 2016, 3:37 p.m.), Ex. 8.
[69] ECF No. 1577.
[70] PBGC informed the Trustee on July 15 that it cannot provide Privacy Act-protected information without a court order or other applicable exception to the Privacy Act. Should the Trustee obtain such an order, PBGC will provide the full report to the Trustee. *See* ECF No. 1574 at n. 3 ("the Liquidation Trustee intends to move the Court for an order, so the PBGC will disclose such information to the Liquidation Trustee.").

ARGUMENT

Bankruptcy Rule 1001 provides that the Rules "shall be construed to secure the just, speedy, and inexpensive resolution of every case and proceeding." Accordingly, "[t]he claims process is intended to be a simple, manageable process—not one full of pitfalls that prevent legitimate claims from being paid. The harder courts make it for legitimate creditors to get paid, the farther they get from the goals of bankruptcy and the pursuit of justice."[71]

A properly filed proof of claim is *prima facie* evidence of the validity and amount of the claim.[72] A claim is properly filed if it conforms substantially to the official bankruptcy form that generally sets forth the basis and amount of the debtor's liability.[73] There are no requirements beyond those found in the Bankruptcy Rules and on the claim form itself.[74]

The Trustee argues that PBGC has not alleged facts sufficient to support its unfunded benefit liability claim[75] and, as a result, PBGC's claim is not *prima facie* valid.[76] But the Trustee does not identify any way in which PBGC's claim failed to address any requirement in the Bankruptcy Rules or to conform substantially to the official form.[77] PBGC filed its proofs of

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[71] *In re Crutchfield,* 492 B.R. 60, 68 (M.D. Ga. 2013).
[72] Fed. R. Bankr. P. 3001(f) ("A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.").
[73] *In re Bareford*, 2010 WL 3528604, at *1 (S.D. Ga. Aug. 3, 2010) (a proof of claim executed in accordance with Rule 3001 and Official Form 10 is prima facie evidence of the validity and amount of the claim). *Accord In re Bertelt*, 206 B.R. 587, 594 (Bankr. M.D. Fla. 1996) (Claim was valid because it conformed substantially with Form 10 and identified (1) the kind of tax, (2) the tax period, (3) the date of assessment, and (4) the specific amount of each tax, plus the penalties and interest).
[74] *See Walston v. PYOD, LLC (In re Walston)*, 606 Fed. Appx. 543, 547 (11th Cir. 2015) (rejecting an argument that evidence submitted needed to meet criteria not set forth in the Rules).
[75] The Trustee identifies only a single alleged shortcoming for PBGC's claims, the unfunded benefit liability claim; accordingly, any arguments relating to other claims are time-barred.
[76] Objection at ¶ 19.
[77] In its instructions, the official proof of claim form requires a creditor to provide the 1) amount and 2) basis of the claim. It includes examples, such as, "goods sold, money loaned, services performed, personal injury or wrongful death, and… credit card."

claim using the official bankruptcy form and a statement of support was attached to each claim, providing additional information about its nature, amount, and relevant statutory authority. Thus, PBGC has alleged sufficient facts to entitle its claims to prima facie validity.

Accordingly, the burden shifts to the Trustee to "produce evidence equivalent in probative value to that of the creditor to rebut the prima facie effect of the proof of claim."[78] "He cannot overcome the prima facie validity of the claims simply by objecting," but "must support his objections with *evidence* to negate a fact set forth in the proof of claim."[79] *If* the Trustee comes forward with enough evidence to rebut the prima facie case, the remaining burden is determined under applicable law.[80]

I. PBGC's claim for unfunded benefit liabilities must be calculated in accordance with the substantive underlying law.

The Trustee argues that PBGC's unfunded benefit liability claim should be disallowed or estimated using the "prudent investor rate,"[81] but does not show how the rate would be derived, what rate should apply, or how it would affect the amount of the Pension Plan's underfunding.[82] The Trustee cannot overcome the prima facie validity of PBGC's claims "simply by

[78] *In re Jordan*, 2000 WL 33943202 at *1 (Bankr. S.D. Ga. Sept. 27, 2000) (noting that claim objector must produce evidence equivalent in probative value to that of the creditor to rebut the *prima facie* effect of the proof of claim); *see also In re Chambliss*, 315 B.R. 166, 169 (Bankr. S.D. Ga. 2004) ("Affirmative proof must be offered to overcome the presumed validity of the claim."); *Beasley v. Moore (In re Hampton County Warehouses, Inc.)*, 2000 WL 33943205 at *3 (Bankr. S.D. Ga. Mar. 24, 2000) ("Upon objection to the claim, the burden is on the objector, here Trustee, to come forth with sufficient evidence to place the claim in issue.").
[79] *In re Walston*, 606 Fed. Appx. at 548 (emphasis in original).
[80] *Id.*
[81] "Prudent investor rate" is not an actuarially accepted term. *In re U.S. Airways Group, Inc.*, 303 B.R. 784, 794 (E.D. Va. 2003).
[82] If the "prudent investor rate" is lower than the PBGC rate, PBGC's claims would increase. Higher rates reduce PBGC's claims, but the extent of such reduction depends on the rate used.

objecting."[83] Instead, he "must support his objections with *evidence* to negate a fact set forth in the proof of claim."[84] Having failed to provide such evidence, he has failed to meet his burden.

A. The underlying law controlling the unfunded benefit liabilities claim is prescribed by ERISA and the PBGC Regulation.

The Trustee's argument is contrary to overwhelming precedent. A bankruptcy claim is a function of the nonbankruptcy law under which it arises.[85] Bankruptcy law does not displace that substantive law, it provides a forum for the resolution of claims under such law. The substantive law that controls the calculation of PBGC's claim is the Regulation, which has the force of law and is entitled to deference.

In *Raleigh*, the Supreme Court confirmed the principle that "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation."[86] Additionally, the Court held that "[b]ankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditor's entitlements."[87] The Supreme Court later applied *Raleigh* in holding that a creditor could receive attorneys' fees incurred in defending its claims in bankruptcy under a contract that provided for the payment of such fees.[88] In doing so, the Court held that claims that arise under the substantive law are to be allowed under § 502(b), *unless* one of the nine enumerated exceptions applies.[89]

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[83] *In re Walston*, 606 Fed. Appx. at 548.
[84] *Id.*
[85] *Butner v. United States*, 440 U.S. 48, 55 (1979); *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161-62 (1946).
[86] *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000).
[87] *Id.* at 24-25.
[88] *Travelers Cas. & Sur. Co. v. Pac. Gas & Elec.*, 549 U.S. 443, 450-51 (2007).
[89] *Id.*

Here, the underlying substantive law includes the PBGC Regulation. Congress provides that upon termination of a pension plan, liability arises for, *inter alia*, the amount of the unfunded benefit liabilities of the plan.[90] That amount is determined by subtracting the value of the plan's assets from the value of its benefit liabilities as of the termination date.[91]

Courts, including the Eleventh Circuit, have without exception accepted PBGC's regulations as valid.[92] The Eleventh Circuit has held:

> [W]e owe great deference to the interpretations and regulations of the Pension Benefit Guaranty Corporation… the Internal Revenue Service…and the Department of Labor, which are the administrative agencies responsible for enforcing and interpreting ERISA. As the Supreme Court stated, "a court that tries to chart a true course to the Act's purpose embarks on a voyage without a compass when it disregards the agency's views." The Supreme Court has consistently advised that courts must adhere to the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong…[93]

PBGC's Regulation prescribes interest factors "derived from annuity price data obtained by PBGC from the private insurance industry," which, when coupled with the mortality assumptions found in the regulation, yield benefit values "in line with industry annuity prices."[94]

Additionally, the valuation Regulation has the force of law. ERISA requires that the value of the benefit liabilities be determined "on the basis of assumptions prescribed by [PBGC]."[95] It is well settled that administrative regulations adopted pursuant to an express

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[90] 29 U.S.C. § 1301(a)(18).
[91] *Id.*
[92] *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1167-68 (11th Cir. 1988), *cf. Durango–Georgia Paper Co. v. H.G. Estate, LLC*, 739 F.3d 1263, 1273 n.25 (11th Cir. 2014) (PBGC's interpretations of ERISA deference are entitled to deference).
[93] *Blessitt*, 848 F.2d at 1167-68, *accord Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan*, 221 F.3d 1235, 1245 (11th Cir. 2000); *see also Cox Enterprises, Inc.*, 2014 WL 3511228 at *12-13 (holding that the Court must give PBGC's Regulation deference and that it controls the formulation of the PBGC's claim for unfunded benefit liabilities).
[94] *See* Interim Regulation on Valuation of Plan Benefits, 41 Fed. Reg. 48,484, 48485 (1976).
[95] *Id.* Section 1301(a)(18) states, "'amount of unfunded liabilities' means, as of any date, the excess (if any) of – (A) the value of the benefit liabilities under the plan (determined as of such

delegation give rise to legislative rules that have the "force and effect of law."[96] "In a situation of this kind, Congress entrusts to the [agency], rather than to the courts, the primary responsibility for interpreting the statutory term."[97]

Congress has also ratified the Regulation. PBGC's Regulation was first proposed in 1975, adopted on an interim basis in 1976, and finalized in 1981, in a notice-and-comment rulemaking under the Administrative Procedures Act. When Congress amended ERISA in 1987 to add the provision in 29 U.S.C. § 1301(a)(18) explicitly referring to "assumptions prescribed by [PBGC]" for valuing benefit liabilities, Congress endorsed the applicability of a specific, preexisting regulation.[98]

The Trustee asks the Court to ignore the substantive nonbankruptcy law under which the liability arose, relying on the 1998 decision of the Tenth Circuit in *In re CF&I Fabricators* and the 2000 decision of the Sixth Circuit in *In re CSC Industries, Inc*.[99]

Since the Sixth Circuit's decision, every court to have considered the issue has applied PBGC's Regulation and rejected the reasoning of the Sixth and Tenth Circuits. In 2003, in *In re US Airways Group, Inc.*,[100] the bankruptcy court, in a carefully reasoned opinion citing *Raleigh*,

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date on the basis of assumptions prescribed by the corporation for purposes of section 1344 of this title), over (B) the current value (as of such date) of the assets of the plan."

[96] *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

[97] *Batterton*, 432 U.S. at 425.

[98] Pension Protection Act of 1987, Subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9313(a)(2)(F), 1987 U.S.C.C.A.N. (101. Stat.) 1330-365 (1987); *US Airways*, 303 B.R. at 796 ("[PBGC's] regulation was already in effect when [§ 1301(a)(18)] was amended to its present form, and the court must therefore presume that Congress knew and approved of the PBGC's general methodology.").

[99] *See* Objection at ¶ 45, *citing Pension Benefit Guaranty Corp. v. Belfance (In re CSC Indust., Inc.)*, 232 F.3d 505, 509-10 (6th Cir. 2000); *PBGC v. CF&I Fabricators of Utah, Inc.* (*In re CF&I Fabricators of Utah, Inc.)*, 150 F.3d 1293, 1300-01 (10th Cir. 1998), *cert. den.* 526 U.S. 1145 (1999).

[100] 303 B.R. at 792-93 (citing *Raleigh* 530 U.S. at 20).

agreed that PBGC's Regulation, not the "prudent investor rate," should apply in calculating unfunded benefit liabilities. The court rejected the decisions of the Sixth and Tenth Circuit.[101]

The *Airways* court found that "*Raleigh* is very clear that a creditor's claim 'in the first instance' is a function of the nonbankruptcy law giving rise to the claim,"[102] and went on to hold:

> the PBGC's claim for unfunded benefit liabilities should be determined using the PBGC valuation regulation, since Congress has chosen to define the claim by reference to that regulation. Although the amount calculated under the regulation may exceed the amount a hypothetical 'prudent investor' would have to set aside to pay the promised benefits as they became due, the use of a 'prudent investor' rate impermissibly shifts the risk of loss from adverse stock-market performance . . . to the retirees. Because the PBGC's valuation regulation . . . gives proper weight to Congress's goal of protecting the health of the nation's private pension system, it is to be preferred over the use of a discount rate premised on uncertain projections of future stock market returns.[103]

The *Airways* court's reasoning has been followed unanimously by various courts, including in *In re UAL Corp.*;[104] *In re Wolverine, Proctor & Schwartz, LLC*;[105] *In re High Voltage Eng'g Corp.*;[106] and in a well-reasoned decision by a bankruptcy judge in Georgia in *Dugan v. PBGC (In re Rhodes, Inc.)*, holding that PBGC's determination of its claim consistent with the Regulation is binding on both debtors and bankruptcy courts.[107]

The Trustee argues that the *Rhodes* court failed to apply the "plain language" of § 502(b) of the Bankruptcy Code.[108] Section 502(b) provides that, if objection is made to a claim, the Court "shall determine the amount of such claim . . . and shall allow such claim in such amount,"

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[101] *Id.* at 792-93.
[102] *Id.* at 792.
[103] *Id.* at 798.
[104] *See In re UAL Corp.*, No. 02 B 48191 at 4 (Bankr. N.D. Ill. Dec. 30, 2005) (Order and Trans. of Hearing, Dec. 16, 2005, at 32-33), App. 3.
[105] 436 B.R. 253, 262-63 (D. Mass. 2010).
[106] *See In re High Voltage Eng'g Corp.*, No. 05–10787–JNF, slip op. at 2 (Bankr. D. Mass. July 26, 2006) (holding that PBGC's Regulations applies in calculating unfunded benefit liabilities), App. 4.
[107] 382 B.R. 550, 559-60.
[108] Objection ¶ 48.

unless one of nine exceptions applies. The *Travelers* case confirms that courts may not create additional exceptions beyond the nine provided for in the Code. The Trustee identifies no exception in § 502(b) that applies here.

Moreover, the Trustee argues that his "plain reading" of § 502(b) means that *Raleigh* governs only the validity of a claim, not its allowability or amount.[109] But "it is simply not a correct reading of *Raleigh* to say that nonbankruptcy law determines only the abstract validity of the claim—that is, whether the debtor has *some* liability to the creditor—as divorced from the *amount* of the claim."[110] It is impossible to separate *Raleigh's* holding on the burden of proof from its reading of the applicability of substantive law generally. The Court's analysis starts with that critical point: "*Creditor's entitlements in bankruptcy* arise in the first instance from the underlying law creating the debtor's obligation, subject to any qualifying or contrary provision of the Bankruptcy Code."[111] It is inarguable that the amount of the underfunding is an aspect of the "underlying substantive law creating the debtor's obligation."

The Trustee's assertion that federal law can be supplanted by the concept of "equality of distribution" is similarly flawed.[112] Under *Raleigh*, the underlying law is only "subject to qualifying or contrary provisions of the Bankruptcy Code."[113] It renders *Raleigh* meaningless to say that a court can use any general bankruptcy principle to override the substantive law.

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[109] Objection at ¶ 49, *citing CSC Indus.*, 232 F.3d at 509.
[110] *Airways*, 303 B.R. at 793 (emphasis in original)
[111] *Raleigh*, 530 U.S. at 20 (emphasis added).
[112] Objection at ¶ 47. None of the cases cited in that paragraph apply. One case predates *Raleigh* and the other two cases involve conflicts between state law and specific Bankruptcy Code provisions.
[113] *Raleigh*, 530 U.S. at 15, 20; *Travelers*, 549 U.S. at 450-51.

Moreover, as the *Airways* court held, equality of distribution is satisfied if claims are calculated in accordance with the underlying law.[114]

Therefore, the Court should reject the Trustee's argument that a "prudent investor rate" should be used in PBGC's calculation of the unfunded benefit liabilities. Instead, the Court should accept PBGC's calculation of its claim in accordance with ERISA and its regulations.

B. Circumventing the substantive law by estimating PBGC's claims pursuant to 11 U.S.C. § 502(c) would be inappropriate.

The Trustee asks the Court to estimate PBGC's claims under 11 U.S.C. § 502(c), which he asserts would allow the Court to ignore PBGC's Regulation as the applicable substantive law.[115] Contrary to the Trustee's argument, a court is not free to disregard governing law in an estimation hearing, but is "bound by the legal rules which may govern the ultimate value of the claim."[116] Therefore, even in an estimation hearing, the court must apply PBGC's Regulation.

Moreover, "in cases where a claim is neither contingent nor unliquidated, estimation is simply inappropriate."[117] PBGC's Claims are neither contingent nor unliquidated, but became fixed upon the termination of the Pension Plan on October 29, 2010.[118]

The Trustee does not argue that PBGC's unfunded benefit liability claim is in fact contingent, but instead argues that the claim should nevertheless be treated *as if* it were contingent. His invocation of a legal fiction to apply § 502(c) to a noncontingent claim turns that

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[114] 303 B.R. at 793-94.
[115] Objection at ¶¶ 34-36.
[116] *Bittner v. Borne Chem. Co., Inc.*, 691 F.2d 134, 135 (3rd Cir. 1982); *see also* 4 Collier on Bankruptcy ¶ 502.04[2] (16th ed. 2016) ("the bankruptcy court is bound by the legal rules that govern the ultimate value of the claim …").
[117] *In re Southern Cinemas, Inc.*, 265 B.R. 520, 533 (Bankr. M.D. Fla. 2000) citing *O'Neill v. Continental Airlines, Inc. (In re Continental Airlines)*, 981 F.2d 1450, 1461 (5th Cir. 1993).
[118] ECF No. 443 (Joint Motion Seeking to Approve Stipulation) at ¶ 9 ("Effective October 29, 2010, the Pension Plan was terminated under 29 U.S.C. § 1342(a) and (c).").

section on its head. Under that provision, estimation is a last resort to be used only if "awaiting final resolution would unduly delay the administration of the case."[119]

The Trustee bases his effort to impose an unnecessary estimation process on his idea that res judicata bars PBGC from asserting noncontingent claims because PBGC did not amend its claim to reflect the change from contingent to noncontingent prior to confirmation or the Effective Date of the Plan.[120] This approach conflicts with the purpose of the claims process, which, as stated above, "is intended to be a simple, manageable process—not one full of pitfalls that prevent legitimate claims from being paid."[121] The Trustee cites cases with no similarity to the facts here to create just such a "pitfall." For example, he relies on *Winn Dixie*, where the appellants' amendment (1) attempted to significantly increase their claims, (2) after they were reduced by the court without objection or appeal, (3) after confirmation, and (4) after their claims had been satisfied in full.[122] The Court disallowed the amendment, reasoning that such amendments can render a plan infeasible or alter the distribution to creditors.[123]

In contrast, here, the Disclosure Statement indicates PBGC's intention to hold the estate liable if the Pension Plan terminated.[124] The Plan expressly provides for post-confirmation

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[119] *Swift v. Bellucci (In re Bellucci)*, 119 B.R. 763, 778 (Bankr. E.D. Cal.1990) (quoting 11 U.S.C. § 502(c)(1)). *See also Continental*, 981 F.2d at 1461 (for estimation to apply, "fixing the claim must entail undue delay in the administration of justice"); *In re Bison Res., Inc.*, 230 B.R. 611, 618 (Bankr. N.D. Okla. 1999); *Apex Oil Co. v. Stinnes Interoil, Inc. (In re Apex Oil Co.)*, 107 B.R.189, 191-92 (Bankr. E.D. Mo. 1989).
[120] *See* Objection at ¶ 27.
[121] *In re Crutchfield*, 492 B.R. at 68.
[122] *IRT Partners, L.P. v. Winn-Dixie Stores, Inc. (In re Winn-Dixie Stores, Inc.)*, 639 F.3d 1053 (11th Cir. 2011).
[123] *Id.* at 1056-57.
[124] *See* ECF No. 216 at § F.4(b).

treatment of contingent claims.[125] No amendment was necessary given that the Debtors knew the Pension Plan terminated and conceded that PBGC's claims were no longer contingent when, *after confirmation*, Debtors entered into, and the Court approved, the Stipulation that established the payment of PBGC's priority claims and deemed the remainder of PBGC's claims to be general unsecured claims. Because the Stipulation expressly left open the amount of PBGC's general unsecured claims, confirmation cannot be res judicata to PBGC amending its claims to *reduced* amounts.[126] Furthermore, the Trustee has cited no precedent in which res judicata was applied to bar a creditor from amending its claim from contingent to noncontingent.

II. The Trustee's Appointments Clause argument is frivolous.

The Trustee argues that Martin Slate, PBGC's Executive Director, and Carol Connor Flowe, PBGC's General Counsel at the time the Regulation was reissued in 1993,[127] were "inferior officers" for purposes of the Appointments Clause in Article II of the Constitution,[128] which requires that inferior officers must be appointed by the President, the Courts, or "Heads of Departments."[129] He contends that Mr. Slate and Ms. Flowe were required to be, but were not, appointed in accordance with the Appointments Clause.[130] He argues that this purported

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[125] *See* ECF No. 217 at § 11.01(a) (providing that the Court would retain exclusive jurisdiction to classify claims when filed before or after the Effective Date and whether or not the claims where contingent, disputed or unliquidated).

[126] ECF No. 216 at § F.4(b). PBGC's claims have reduced from $66 million to about $36 million. *See In re Matthews*, 313 B.R. 489, 493-94 (Bankr. M.D. Fla. 2004) (holding that post bar-date amendments acceptable where the original claims provided notice to the court of the existence, nature, and amount of the claims and the creditor's intent to hold the estate liable); *In re Waterscape Resort LLC*, 520 B.R. 424, 434-35 (Bankr. S.D.N.Y. 2014) (confirmation of debtor's plan did not prevent creditor from amending proof of claim where the plan did not discharge creditor's claims and the debtor did not contend that the claim amendment would disrupt the plan or threaten its ultimate consummation).

[127] Valuation of Plan Benefits, 58 F.R. 50812 (Sept. 28, 1993) (final rule).

[128] Objection at ¶ 51.

[129] U.S Const., art. II, § 2, cl. 2.

[130] Objection at ¶ 51.

constitutional infirmity renders the PBGC Regulation void because PBGC's bylaws instruct the Executive Director to approve all proposed regulations.[131] He concludes that PBGC's unfunded benefit liabilities claim should be disallowed.

As an initial matter, this argument is precluded. The Trustee contends that the Court should disallow PBGC's claims due to the purported constitutional issue, but the estate is precluded from attacking the validity of PBGC's claims. The Stipulation, which the Court approved,[132] deemed PBGC's remaining claims to be general unsecured claims, and specifically provided that it did not limit the Trustee "from objecting to or otherwise challenging the *amounts* of the general unsecured claims asserted by the PBGC."[133] Thus, the Stipulation admitted the validity of PBGC's claims, but reserved the right to object to the amount. The estate is precluded "from re-litigating the defenses waived in [a] settlement agreement and considered at the appropriate time by the bankruptcy court."[134]

Moreover, the Trustee has not shown that the Regulation is invalid or that the appointments violated the Appointments Clause of the U.S. Constitution. That Clause provides:

> [the President] shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Councils, Judges of the Supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the appointment of such inferior Officers as they think proper in the President alone, in the Courts of Law, or in the Heads of Departments.[135]

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[131] Objection at ¶ 51. He makes a similar argument regarding the General Counsel. *Id.*
[132] ECF No. 466.
[133] ECF No. 443, Ex. A of Motion at ¶ 3 (emphasis added).
[134] *In re Martin*, 490 F.3d 1272, 1277 (11th Cir. 2007).
[135] U.S Const., art. II, § 2, cl. 2.

In determining whether a role qualifies as an officer under the Appointments Clause, the Supreme Court examines whether it includes the exercise of "significant authority."[136] "Significant authority" involves three criteria: the significance of the matters resolved by the official, the discretion exercised in reaching their decisions, and the finality of those decisions.[137]

Authority means power,[138] and the case law examines whether a role involves wielding the power of the government. For example, "significant authority" includes the power to issue regulations, set general policy, and institute civil enforcement actions.[139] Similarly, the "expansive powers to govern an entire industry" through regulations and enforcement, is significant authority under the Appointments Clause.[140] In contrast, mere "ministerial action" that lacks discretion does not qualify as significant authority.[141] Similarly, collecting and disseminating information was held not to be an exercise of "significant authority" in *Buckley,* in contrast to the "more substantial powers" of regulation and enforcement.[142]

While a principal officer must be appointed by the President with the advice and consent of the Senate, Congress may vest appointment of an "inferior officer" of the United States in the

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[136] *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (holding that any appointee exercising significant authority is an officer of the United States); *Freytag v. Comm'r*, 501 U.S. 868, 881 (1991) (same).
[137] *Tucker v. C.I.R.*, 676 F.3d 1129, 1133 (D.C. Cir. 2012); *see also Buckley*, 424 U.S. at 139, 141 (describing enforcement power as discretionary); *see id.* at 141 (rulemaking described a significant); *see also Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 821 F.3d 19, 37-38 (D.C. Cir. 2016) (ability to render a final decision regarding metrics and standards applicable to an entire agency was an exercise of significant authority) (*"Amtrak")*.
[138] *Webster's Third New Int'l Dict.* (authority means "a power to require and receive submission; the right to expect obedience …").
[139] *Buckley*, 424 U.S. at 139-142.
[140] *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 485 (2010); *accord*, 821 F.3d 19, *Amtrak*, 821 F.3d at 37-38 (holding that power to make final decisions regarding the railroad industry's metrics and standards was "significant authority" under the Appointments Clause).
[141] *Tucker*, 676 F.3d at 197 (*citing Freytag*, 501 U.S. at 880-82).
[142] *Buckley*, 424 U.S. at 137-139 (1976).

President, the courts, or the "Heads of Departments."[143] An inferior officer is one whose work is directed and supervised by a superior.[144] For example, in *Edmond v. United States,*[145] the Supreme Court held that the appointment of judges in the Coast Guard Court of Criminal Appeals by the Secretary of Transportation, the head of a department, satisfied the Constitution. The Coast Guard is part of the Department of Transportation, and the Secretary of Transportation may by law "appoint and fix the pay of officers and employees of the Department of Transportation."[146]

A. The PBGC Regulation is constitutionally sound because it was issued by presidential appointees.

The Trustee has not met his burden of providing evidence to support his argument that the Regulation is invalid.[147] Under title 5 of the U.S. Code, a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."[148] Agency action includes regulations, but only *final* regulations.[149] While courts may set aside agency action "found to be . . . contrary to constitutional right, power,

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[143] U.S Const., art. II, § 2, cl. 2.
[144] *Edmond v. United States,* 520 U.S. 651, 658 (1997) (holding that people whose work is directed and supervised by a superior are inferior, not principal, officers); *see also Free Enter. Fund,* 561 U.S. at 510 (holding that members of the Public Accounting Oversight Board were not principal officers because they were under the oversight of the Securities and Exchange Commission).
[145] 520 U.S. 651 (1997).
[146] *Id.* at 656.
[147] *In re Walston,* 606 Fed. Appx. at 546 (objecting party must come forward with enough evidence to overcome the *prima facie* validity of a claim). The Trustee alleges that Mr. Slate never approved the proposed regulation, Objection at ¶ 51 & n. 26, but the Federal Register notice for the proposed regulation shows that it was approved by the Executive Director at the time, James B. Lockhart III. Valuation of Plan Benefits, 58 Fed. Reg. 5128, 5147 (Jan. 19, 1993) (proposed rule).
[148] 5 U.S.C. § 702.
[149] *See Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) (holding that agency action is not final if it is only the ruling of a subordinate official or tentative, or where the agency has not completed its decision-making process).

privilege, or immunity,"[150] the Trustee fails to identify how agency action in issuing the Regulation *was* contrary to the Constitution.[151]

Congress gave PBGC the authority to issue regulations through its Board of Directors, which consists of the Secretaries of the Treasury, Commerce and Labor, all of whom are principal officers of the United States appointed by the President. The Board voted to approve the final PBGC Regulation.[152] Thus, presidential appointees promulgated the final Regulation, and it is constitutionally sound.[153]

In contrast, the Executive Director and General Counsel did not issue the final Regulation and, thus, took no agency action subject to judicial review, much less contrary to the Constitution. PBGC's bylaws, not any statute or the Constitution, prescribed the Executive Director's role, which was to approve *proposed* substantive regulations after they were circulated to the Board of Directors.[154] The General Counsel acted as the Secretary of the Board and kept its minutes.[155] In that capacity, she reported that the Board of Directors had authorized the issuance of the final Regulation.[156]

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[150] 5 U.S.C. § 706(2)(B).
[151] The Trustee's arguments turn on its head the precept that the Court should avoid interpreting a statute in a manner that renders it unconstitutional if there is another reasonable interpretation available. *See Edmond*, 520 U.S. at 658.
[152] Board Resolution 93-11, Ex. 9; Valuation of Plan Benefits, 58 Fed. Reg. 50,812, 50,830 (Sept. 28, 1993) (final rule) (issued by Robert Reich, Chairman of PBGC Board of Directors, pursuant to a Board resolution).
[153] *See Amtrak*, 821 F.3d at 37-38 (citing *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1238 (2015) ("nothing *final* should appear in the Federal Register unless a Presidential appointee has at least signed off on it.") (emphasis added) (Alito, J. concurring).
[154] Bylaws of the PBGC, 29 C.F.R. § 2601.3(c) (as effective in 1993), App. 2.
[155] *Id.* at § 2601.6.
[156] Valuation of Plan Benefits, 58 Fed. Reg. 50,812, 50,830 (Sept. 28, 1993).

B. There was no violation of the Appointments Clause.

The Trustee provides no legal analysis to support his contention that Mr. Lockhart, the Executive Director who approved the PBGC Regulation pursuant to the bylaws,[157] or Ms. Flowe, the general counsel, was an officer under the Appointments Clause.[158]

1. The Appointments Clause does not apply to positions that were not established by law.

The Appointments Clause applies only to offices "established by Law."[159] It is a "threshold requirement that the relevant position was established by Law and the position's duties, salary, and means of appointment are specified by statute . . . ."[160] Prior to 2006, section 1302 did not establish the office of the Executive Director, or of the General Counsel, and did not specify the "position's duties, salary, and means of appointment."[161] Therefore, the Appointments Clause did not apply to those positions.[162]

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[157] The only purported error that the Trustee identifies is the Executive Director's approval of the Regulation. The Trustee mistakenly argues that Mr. Slate was responsible for approving the proposed regulation, but the Executive Director at the time was Mr. Lockhart.

[158] The Liquidation Trustee seems to acknowledge that the Executive Director could not have been a principal officer. *See* Objection at 18, n. 29 (acknowledging that "heads of departments" can appoint inferior officers).

[159] U.S Const., art. II, § 2, cl. 2.

[160] *Raymond J. Lucia Cos., Inc. v. SEC*, 2016 WL 4191191 at *4 (D.C. Cir. 2016) (internal quotation marks omitted); *see also Freytag*, 501 U.S. at 881 (distinguishing the positions under review from those which "are not established by law, and whose duties and functions are not delineated in a statute").

[161] *Raymond J. Lucia*, 2016 WL 4191191 at *4 (internal quotation marks omitted).

[162] Additionally, a position is not an inferior officer where its occupant lacks final decisional power. *Raymond J. Lucia*, 2016 WL 4191191 at *4. Here, the Executive Director lacked the power to promulgate regulations and set policy. *Cf. Buckley*, 424 U.S. at 139. Those functions were reserved to PBGC's board of directors. 29 U.S.C. § 1302(a) (1993), App. 1 (PBGC was "administered by the chairman of the board of directors in accordance with policies established by the Board"); 29 C.F.R. §§ 2601.3(a) (the board established policies for PBGC) & (b) (reserving for the board the power to promulgate final substantive regulations and to make significant policy decisions) (1993), App. 2. Initiating suits was also subject to the direction of the Chairman and the Board. *See* Chairman's Order 84-1, dated March 2, 1984, Ex. 10.

2. Even assuming the Executive Director of PBGC was an officer of the United States, he was properly appointed.

Even if the Executive Director were an inferior officer of the United States, he was appointed by a "Head of Department," and his appointment would thus satisfy the Appointments Clause. The Trustee argues that, because PBGC is not a "Department," its Board cannot be a "Head of Department."[163] But the Board did not appoint the Executive Director; instead, the Secretary of Labor, who *is* a head of department, appointed the Executive Director.[164]

PBGC was established within the Department of Labor, the Secretary of which is the Chairman of PBGC's Board of Directors.[165] By law, the Chairman administered PBGC.[166] Thus, as Chairman, the Secretary of Labor was authorized to create and fix the pay for officers[167]

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[163] Objection at ¶ 51, n. 29 (*citing Amtrak*, 135 S. Ct. at 1239). The board members are individually heads of departments. The Trustee cites only to *dicta* in a concurring opinion by Justice Alito to support his implication that heads of departments somehow lose their status as heads of departments when serving as members of a board of an agency. Objection at 18-19 n. 20, *citing Amtrak*, 135 U.S. at 1239. Such result is contrary to the purpose of the Appointments Clause, which is to keep clear lines of accountability to the President. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 500-01 (2010) (noting that purpose of Clause is to keep for the President control over appointments through direct or indirect removal power). Finally, the concurring opinion the Trustee cites to merely speculates whether an appointment by a board consisting of heads of departments is constitutional under the Appointments Clause but does not identify "constitutional concerns arising from the Secretary of Transportation serving on the board of Amtrak," as the Trustee asserts.

[164] *See* 152 Cong. Rec. S4893-01 (2006) (statement of Sen. Baucus) (explaining that then-current practice was that "the Secretary of Labor, the Chairman of the PBGC" appointed the executive director). *See also* U.S. Senate Committee on Finance, *Bill Would Require PBGC Director Confirmation in Senate* (May 22, 2006) available at http://www.finance.senate.gov/ranking-members-news/bill-would-require-pbgc-director-confirmation-in-senate (noting that PBGC's Executive Director is appointed by the Chairman); *History of PBGC*, available at http://www.pbgc.gov/about/who-we-are/pg/history-of-pbgc.html (describing how the first Executive Director was appointed by the Chairman).

[165] 29 U.S.C. §§ 1302(a), (d) (as effective in 1993), App. 1.

[166] *Id.*

[167] *Id.* at § 1302(b)(6). *Cf. Edmond*, 520 U.S. at 656 (Secretary of Transportation had authority to appoint and fix the pay of officers and employees of the Department of Transportation).

and employees, and did so in establishing the office of Executive Director.[168] The Supreme Court has held that the appointment of an inferior officer under similar circumstances satisfies the Appointments Clause.[169]

3. The General Counsel of PBGC in 1993 was not an inferior officer.

As stated above, the Appointments Clause did not apply to the General Counsel, whose office was not established by law in 1993. Additionally, the Trustee provides little analysis as to why he claims that Carol Connor Flowe, PBGC's General Counsel at the time the Regulation was promulgated, was an inferior officer of the United States.[170] He fails to meet his burden because he does not provide evidence[171] of any "substantial powers" that the General Counsel supposedly wielded.[172] Similarly, the Trustee does not cite a single case in which the typical general counsel of a government agency, or anyone with similar duties, was found to be an inferior officer within the meaning of the Appointments Clause.[173]

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[168] *See* Chairman's Order No. 2, dated March 14, 1975, Ex. 1. This was an Order of the Chairman, not of the Board.

[169] *Edmond*, 520 U.S. at 656, 666 (holding that appointment by the Secretary of Transportation of an inferior officer in an agency within the Department of Transportation pursuant to statutory authority to "appoint and fix the pay of officers and employees" of the department was constitutional under the Appointments Clause).

[170] The Trustee's argument alleging that Mr. Bacon, the acting director of the Department of Insurance Supervision and Compliance in 2010, was also an inferior officer, is frivolous. *Cf. Tucker*, 676 F.3d at 1135 (holding that actions taken as a creditor do not qualify as "significant authority"). He does not and cannot cite any support for the idea that the amount of budget delegated to a role has any bearing on its constitutional status.

[171] *In re Walston*, 606 Fed. Appx. at 546.

[172] *See Buckley*, 424 U.S. at 138.

[173] The only cases in which a general counsel has been held to require appointment under the Appointments Clause involved the general counsel of the National Labor Relations Board, who is mandated by statute to be appointed by the President. *See Hooks v. Kitsap Tenant Support Serv., Inc.*, 816 F.3d 550, 556 (9th Cir. 2016); *SW General, Inc. v. NLRB*, 796 F.3d 67, 71 (D.C. Cir. 2015). The General Counsel of the NLRB is charged with bringing civil enforcement actions, *See SW General*, 796 F.3d at 71, which is an exercise of significant authority under the Appointments clause. *See Buckley*, 424 U.S. at 138. There is no similar statutory requirement in Title IV of ERISA, and PBGC's General Counsel lacks the final authority to initiate legal action.

Instead, the Trustee cites to § 1302(d)(5), which provides, *inter alia*, that "the General Counsel of the corporation shall have overall responsibility for all legal matters affecting the corporation and provide the corporation with legal advice and opinions on all matters of law affecting the corporation . . . ." This provision did not exist in 1993.[174] Instead, legal decisions rested with the Executive Director and the Board.[175] The Trustee also cites Ms. Flowe's role as secretary to the board,[176] but taking and reporting minutes of board meetings[177] are ministerial actions that do not involve wielding the power of the government.[178] Accordingly, the Trustee cannot show that the General Counsel was an inferior officer within the meaning of the Appointments Clause.

III. PBGC is entitled to recovery on its three separate claims.

The Trustee argues that PBGC must prove "standing" under the Constitution by showing a "particularized and concrete" injury for each claim.[179] The case he relies on, *Spokeo, Inc. v. Robins*,[180] is part of a long line of cases that address the standing of *individuals* to bring suit under Article III of the Constitution. Those cases do not apply to government agencies.[181] The

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See Chairman's Order 84-1, dated March 2, 1984, Ex. 10 (Executive Director had final decision-making authority for the bringing of legal action, subject to the direction of the board).

[174] *Compare* 29 U.S.C. § 1302 (as effective in 1993), App. 1 (lacking provision regarding General Counsel) *with* 29 U.S.C. § 1302(d)(5) (current).

[175] *See* Chairman's Order 84-1, dated March 2, 1984, Ex. 10. *Cf. Buckley*, 424 U.S. at 138 (power to institute civil enforcement action is an exercise of significant authority).

[176] *See* Objection at ¶ 51, n. 27 (arguing that given the General Counsel's role as secretary to the board, there was "no serious question" that she was an officer under the Appointments Clause).

[177] Bylaws of the PBGC, 29 C.F.R. § 2601.3(c) (as effective in 1993), App. 2

[178] *Tucker*, 676 F.3d at 1134 (*citing Freytag*, 501 U.S. at 881) (ministerial tasks that do not involve choice are not significant authority). *Cf. Buckley*, 424 U.S. at 137-138 (holding that information gathering was not a "substantial power" that warranted appointment under the Appointments Clause).

[179] Objection at ¶ 39.

[180] 136 S. Ct. 1540 (2016).

[181] Indeed, *Spokeo* relies on the principle that the purpose of the individual standing requirement is to "prevent the judicial process from being used to usurp the powers of the political

Trustee does not and cannot support his assertion that a government agency needs to prove standing to enforce the statute that Congress created it to enforce.[182]

Moreover, the Trustee fails to meet his burden to show that PBGC's claims should be disallowed. As described above, bankruptcy claims are determined in accordance with the substantive nonbankruptcy law that gave rise to them.[183] Congress designed ERISA to provide for three independent claims for PBGC. The Trustee points to no specific Bankruptcy Code provision that contradicts that substantive law.[184]

ERISA provides that every plan sponsor of a defined benefit plan must pay statutory insurance premiums, including termination premiums, to PBGC in its capacity as a guarantor of pension benefits.[185] This statutory scheme ensures that PBGC's pension guaranty program is funded, especially since the agency receives no taxpayer monies.[186] The Trustee cites no case law, and PBGC knows of none, that invalidates PBGC's premiums claims as duplicative.

As an additional and distinct obligation, ERISA makes each plan sponsor and its controlled group liable for a terminated plan's underfunding as part of the statutory scheme to limit plan sponsors' ability to dump pension liabilities on PBGC.[187] In this case, when the

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branches . . . ." *Spokeo,* 136 S. Ct. at 1547 (internal citations omitted). The Trustee's argument suggests that the courts should apply that same requirement in a way that *would* "usurp the powers of the political branches."

[182] PBGC was created to administer and enforce Title IV of ERISA, which was designed to protect American workers. *PBGC v. LTV Corp.*, 496 U.S. 633, 637 (1990). PBGC found no cases that apply the traditional "injury in fact" standing test to a government agency.

[183] *See Raleigh v. Ill. Dep't of Revenue,* 530 U.S. 15, 20 (2000).

[184] *In re Crutchfield,* 492 B.R. at 69 ("If the presumption of allowance [of a properly filed proof of claim] is rebutted, the burden to prove the claim is determined by applicable nonbankruptcy law.") (internal citations omitted).

[185] 29 U.S.C. § 1307.

[186] PBGC 2015 Annual Report, p. 10, http://www.pbgc.gov/Documents/2015-annual-report.pdf.

[187] 29 U.S.C. § 1362(b); *In re UAL Corp. (Pilots' Pension Plan Termination),* 468 F.3d 444, 452 (7th Cir. 2006) (noting that "moral hazard" can create situations in which insured parties abuse PBGC's pension insurance).

underfunded Pension Plan terminated, the Debtors incurred a separate, one-time charge for the full amount by which its liabilities exceed its assets. The Debtors owe this statutory liability to PBGC in its capacity as a government agency.[188]

ERISA also separately requires an employer and its controlled group members to make periodic minimum funding contributions to a pension plan while it is ongoing.[189] If these required contributions are not made, and the pension plan terminates, this liability is owed to PBGC as the statutory trustee of a terminated plan.[190]

To state that PBGC is seeking "multiple recoveries" renders these statutory provisions superfluous and rewrites the carefully crafted statutory scheme in which (a) PBGC builds its insurance funds through the payment of premiums, (b) pension plans are funded through minimum funding contributions, and (c) pension benefits are calculated and paid from a portion of PBGC's recoveries of unfunded benefit liabilities.[191]

The two cases that the Trustee cites in his support were decided before *Raleigh*, and identify no specific Bankruptcy Code provision that conflicts with ERISA's liability scheme. Indeed, the *Simetco* court acknowledged the "merit and logic" of PBGC's position before going on to make its decision based on a *principle* of bankruptcy law, rather than any specific provision.[192] Such result is contrary to *Raleigh*. Thus, because the governing substantive

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[188] 29 U.S.C. § 1362(b).
[189] 29 U.S.C. § 1082(a); 26 U.S.C. § 412(a).
[190] 29 U.S.C. § 1362(c).
[191] *See U.S.A. v Ballinger*, 395 F. 3d 1218, 1236 (11th Cir. 2005) (*quoting TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("[A] cardinal principle of statutory construction [is] that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.")).
[192] *In re Simetco, Inc.*, No. 93-61772, 1996 WV 651001 at *1 (Bankr. N.D. Ohio Feb. 15, 1996) (cited in Objection ¶ 41).

nonbankruptcy law is unambiguous and does not conflict with any Bankruptcy Code provision, the Trustee cannot provide any basis for his Objection.

IV. The Pension Plan contribution is exempted from avoidance under the Bankruptcy Code.

The Trustee asserts that under § 502(d), PBGC's claims of more than $30 million should be disallowed because the Debtors made a payment to the Pension Plan of $283,552 on July 14, 2010, that would be avoidable as a preference under 11 U.S.C. § 547(b).[193] Again, to the extent that the Trustee requests *disallowance* of PBGC's claims, his arguments are precluded by the Stipulation, which allows PBGC's claims as general unsecured claims and waives all objections not related to the amount of the claims.[194]

The payment in question was made to satisfy a minimum funding contribution for the 2010 plan year, as mandated by ERISA and the Internal Revenue Code, and is not avoidable because it was an ordinary course payment, excepted under 11 U.S.C. § 547(c)(2), and a contemporaneous exchange excepted under 11 U.S.C. § 547(c)(1).[195]

Under § 547(c)(2), a transfer is not avoidable if it is "made in the ordinary course of business or financial affairs," or "made according to ordinary business terms." The Pension Plan contribution meets both criteria. Minimum funding contributions were made in the ordinary course of business between Debtors and the Pension Plan. These contributions were owed to the Pension Plan—a recurring quarterly obligation imposed on the Debtors by ERISA, 29 U.S.C. § 1082, the I.R.C., 26 U.S.C. § 412, and the Pension Plan documents. The timing for making minimum funding contributions is set by statute. A statutorily required Actuarial Valuation

[193] Objection at ¶¶ 43-44.
[194] *See* ECF No. 443, Ex. A of Motion at ¶¶ 2-3.
[195] Should the Court determine that the Pension Plan contribution is an avoidable transfer, PBGC will pay the estate the $283,552.

Report prepared by a pension plan's actuary calculates the required contributions amounts in advance. The Debtors paid all quarterly contributions for the 2009 and 2010 plan year through July 15, 2010. The July 2010 payment, was thus made in accordance with Sea Island's practice for making contributions.

The contribution was also made according to ordinary business terms.[196] The "business terms" for contributions are in the Pension Plan documents, and in ERISA and the Internal Revenue Code. Because all sponsors of defined benefit pension plans must comply with the minimum funding requirements established by ERISA and the Internal Revenue Code, the terms of the payments are not merely ordinary, they are uniform.

The contribution is also not avoidable because the transfer was a contemporaneous exchange for new value.[197] In *Jones Trucking Lines*, the Eighth Circuit held that prepetition contributions to a pension plan were intended to be and were in fact substantially contemporaneous.[198] The Court decided that in situations where an employer pays employee benefits when due, either to the employee directly or to an employee benefit fund, and the employee keeps working, "the current payments are contemporaneous exchanges for 'new value,' the employee's continuing services."[199]

Finally, the Trustee argues that the purportedly avoidable transfer invalidates *all* of PBGC's claims under § 502(d). However, the Trustee acknowledges that, because the actual payment went to the Pension Plan, PBGC is only the "transferee" to the extent that it is "standing

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[196] *See* 11 U.S.C. § 547(c)(2)(B).
[197] *See* 11 U.S.C. § 547(c)(1)(B).
[198] *Jones Trucking Lines, Inc. v. Cent. States, Se. and Sw. Areas Pension Fund*, 130 F.3d 323, 327-28 (8th Cir. 1997).
[199] *Id.*

in the shoes of the Pension Plan."[200] PBGC's claim for missed minimum-funding contributions indicates that it is brought "on behalf of" the Pension Plan and that, upon termination, it will be owed to PBGC "as the Trustee" of the Pension Plan.[201] However, the underfunding and premiums claims do not have the same language.[202] PBGC does *not* stand in the shoes of the Pension Plan with respect to those claims. Instead, those claims indicate that the Debtors are "jointly and severally liable to PBGC" directly, as provided in Title IV or ERISA, which makes clear that premiums and underfunding are payable to PBGC in its corporate capacity,[203] while missed minimum funding contributions are owed to the trustee of the pension plan.[204] Thus, even if the payment of minimum funding contributions was avoidable, PBGC in its corporate capacity is not the "transferee" of those payments.

V. PBGC's claims belong in class 4.

The Trustee asserts, with no analysis, that PBGC's class 4 claims should be disallowed because PBGC voted a single ballot for $1.00.[205] First, this argument is unripe because the Trustee signed a settlement agreement with PBGC, effective June 21, 2016. He has not notified PBGC that he is repudiating that settlement agreement, but he also has not filed a motion under Fed. R. Bankr. P. 9019 to approve it. Until the Court has an opportunity to approve the settlement agreement, this argument is unripe.

[200] Objection at ¶ 44 & n.18.
[201] Epiq Claim No. 560 at intro & ¶ 5.
[202] *See* Epiq Claim Nos. 561-62 (as originally filed); Epiq Claim Nos. 950-51 (as amended).
[203] *See* 29 U.S.C. §§ 1306, 1307 and 1362(b).
[204] *See* 29 U.S.C. § 1362(c).
[205] Objection at ¶ 52.

Second, the Trustee has not met his burden in objecting to the classification of PBGC's claims as class 4 claims.[206] He argues that "a mistake of law cannot relieve the PBGC from the terms of the Disclosure Statement Order," but fails to identify any provision of the Disclosure Statement Order that applies.[207] Accordingly, the Court should deny the Objection.

In fact, PBGC's ballot was prepared consistent with the terms of the voting scheme created by the Debtors.[208] The Disclosure Statement Order, approved by the Court, which provides the method for voting, states that, "if a Claim for which a proof of claim has been timely filed is contingent, unliquidated or disputed . . . such Claim shall be temporarily allowed for voting purposes only, and not for purposes of allowance or distribution, at $1.00 . . . ."[209] This provision applies to two of PBGC's claims, which were filed as contingent at the time PBGC voted, and, accordingly, at least those two claims are class 4 claims.

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[206] *See, e.g.*, *In re Chambliss*, 315 B.R. 166, 169 (Bankr. S.D. Ga. 2004); *In re Hampton Cty. Warehouses, Inc.*, 2000 WL 33943205 at *3 (Bankr. S.D. Ga. Mar. 24, 2000).
[207] Objection at ¶ 52.
[208] *See* PBGC Ballot, Ex. 3, Item 3 ("If the Claim Holder votes to accept the plan, the Claim will be treated as a Class 4 Accepting Unsecured Claim.").
[209] *See* ECF No. 220 at ¶ 11(b). The Trustee cites to ¶ 11(e), which he argues does not apply, but does not identify the provision of the Disclosure Statement Order that does apply.

CONCLUSION

WHEREFORE, PBGC respectfully requests that the Court enter an order substantially in the form attached as Exhibit 11 to PBGC's Response: (i) setting a hearing on October 6, 2016, at 1:00 p.m.; (ii) setting a response deadline for no later than September 15, 2016, at 4:00 p.m., and (iii) denying the Trustee's objections to PBGC's claims and deeming them allowed general unsecured claims in the amounts filed.

Dated: September 1, 2016
Washington, D.C.

Respectfully submitted,

Local Counsel:

EDWARD J. TARVER
United States Attorney

/s/ J. Thomas Clarkson
Assistant United States Attorney
Georgia Bar No. 656069
Post Office Box 8970
Savannah, Georgia 31412
Telephone: (912) 652-4422
usagas.ecfbankruptcysav@usdoj.gov

/s/ Kimberly Neureiter
ISRAEL GOLDOWITZ
Chief Counsel
ANDREA WONG
Acting Deputy Chief Counsel
STEPHANIE THOMAS
Assistant Chief Counsel
KIMBERLY E. NEUREITER
ADRIAN ZAREBA
ADITI KUMAR
Attorneys
PENSION BENEFIT GUARANTY CORPORATION
Office of the Chief Counsel
1200 K Street, N.W.
Washington, D.C. 20005-4026
Telephone: (202) 326-4020, ext. 3581
Facsimile: (202) 326-4112
Email: neureiter.kimberly@pbgc.gov
and efile@pbgc.gov