UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

COX ENTERPRISES, INC., a Delaware corporation,	)	
Plaintiff,	)	
vs.	)	CASE NO.: 6:04-CV-698-JA-DAB
NEWS-JOURNAL CORPORATION, a Florida corporation, HERBERT M. DAVIDSON, JR., MARC L. DAVIDSON, JULIA DAVIDSON TRUILO, JONATHAN KANEY, JR., DAVID KENDALL, ROBERT TRUILO, GEORGIA KANEY, and PMV, INC., a Florida corporation,	)	
Defendants.	)	

PRE-TRIAL BRIEF OF THE
PENSION BENEFIT GUARANTY CORPORATION

At the evidentiary hearing scheduled for January 14 and 15, 2014, PBGC will prove that the amount of its claim against News-Journal Corporation ("NJC") for the "unfunded benefit liabilities" of the Pension Plan of News-Journal Corporation (the "Pension Plan") is $13,887,822. In calculating that liability, PBGC relied on the actuarial assumptions required by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") and PBGC's regulations thereunder. Those regulations were adopted pursuant to an express delegation by Congress and have the force and effect of law. Cox Enterprises, Inc. ("Cox") does not seriously dispute PBGC's calculations, as its own expert witness calculated a similar liability using those assumptions. Instead, Cox urges the Court to deny PBGC any recovery by ignoring the law and instead applying actuarial assumptions that lack any basis in ERISA or PBGC's regulations.

Because PBGC's regulations are controlling, the Court must reject Cox's attempt to depart from the law and should find that the amount of PBGC's claim for the Pension Plan's unfunded benefit liabilities is $13,887,822.

BACKGROUND

A. PBGC and Title IV of ERISA.

PBGC is the United States government agency that administers the pension insurance program under Title IV of ERISA.[1] When a pension plan covered by Title IV terminates without sufficient assets to pay all of its promised benefits, PBGC typically becomes the plan's trustee and pays benefits up to statutory limits.[2] This insurance program acts as a backstop for American workers, providing retirement income for approximately 1.5 million workers whose underfunded plans have been terminated.[3] Currently, PBGC guarantees the pension benefits of more than 32 million participants in about 23,000 pension plans.[4]

Title IV of ERISA provides the exclusive means for terminating a covered pension plan.[5] A plan sponsor can terminate a pension plan in a standard termination if the plan has sufficient assets to pay all of its promised benefits,[6] or in a distress termination if the statutory financial

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[1] *See* 29 U.S.C. §§ 1301-1461.

[2] *See* 29 U.S.C. §§ 1321, 1322, 1361.

[3] PBGC, 2013 Annual Report 13, *available at* https://www.pbgc.gov/documents/2013-annual-report.pdf (last visited Jan. 2, 2014).

[4] *See id.* at 4.

[5] 29 U.S.C. § 1341(a)(1); *Hughes Aircraft Co. v. Jacobsen*, 525 U.S. 432, 446 (1999).

[6] *See generally* 29 U.S.C. § 1341(b).

distress criteria are met.[7] Additionally, PBGC can initiate termination of a pension plan if certain statutory criteria are met.[8]

Upon termination of a covered pension plan, certain liabilities arise. The plan sponsor becomes liable to PBGC for the plan's unfunded benefit liabilities as of its termination date, plus interest.[9] Additionally, the plan sponsor is liable to PBGC for contributions owed to the plan pursuant to statutory minimum funding standards.[10] A plan sponsor is also liable to PBGC for any unpaid statutory premiums.[11]

ERISA not only provides PBGC with a claim for the pension plan's unfunded benefit liabilities, but also mandates that the value of the plan's benefit liabilities be determined "on the basis of assumptions prescribed by [PBGC]."[12] The value of the plan's assets is then subtracted from the benefit liabilities to determine the amount of unfunded benefit liabilities.[13] PBGC first prescribed assumptions for valuing a plan's benefit liabilities in an interim regulation in 1976,[14] which was published in final form in 1981 (the "Valuation Regulation").[15] For more than thirty-

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7 *See generally* 29 U.S.C. § 1341(c).

8 29 U.S.C. § 1342.

9 *See* 29 U.S.C. § 1362(a), (b)(1)(A).

10 *See* 29 U.S.C. § 1082(b); 26 U.S.C. § 412(b). The contributions are due to the statutory trustee of the terminated plan, which is invariably PBGC. 29 U.S.C. §§ 1342(d), 1362(c).

11 *See* 29 U.S.C. §§ 1306, 1307(e).

12 29 U.S.C. § 1301(a)(18)(A).

13 29 U.S.C. § 1301(a)(18).

14 PBGC, *Interim Regulation on Valuation of Plan Benefits*, 41 Fed. Reg. 48,484 (Nov. 3, 1976) (Interim Rule).

15 PBGC, *Valuation of Plan Benefits in Non-Multi-Employer Plans*, 46 Fed. Reg. 9492 (Jan. 28, 1981) (Final Rule). Although PBGC revised the Valuation Regulation in 1993, see 58 Fed. Reg.

five years, the Valuation Regulation has been applied to determine the underfunding in every pension plan that has terminated and been trusteed by PBGC.

The methodology in the Valuation Regulation reflects the fact that a terminated pension plan will receive no further funding contributions, and that all benefit obligations must therefore be satisfied at the time of termination.[16] To measure the liabilities, the Valuation Regulation prescribes assumptions about mortality and interest that are designed to approximate the market price of insurance company annuity contracts.[17] The interest and mortality factors, in combination, "will accurately approximate the cost of private sector group annuity contracts."[18] This methodology results in a value of benefit liabilities equivalent to what an employer would be required to pay for purchasing annuities in the marketplace to complete a standard termination. The interest factor is periodically adjusted to reflect changes in annuity prices.[19]

The Valuation Regulation also prescribes assumptions for an employee's expected retirement age ("XRA") for plans that permit early retirement.[20] The XRA assumptions are intended to produce early retirement costs "that are intermediate between the extremes that would be obtained if it were assumed either that all participants retire at their normal retirement

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50,812, 50,812 (Sept. 28, 1993) (Final Rule), it retained the basic methodology for determining the amount of benefit liabilities. *See also* 29 C.F.R. §§ 4044.41-75 (current codification).

[16] *In re US Airways Group, Inc.*, 303 B.R. 784, 795-96 (Bankr. E.D. Va. 2003).

[17] *See, e.g.*, PBGC, *Valuation of Plan Benefits in Single-Employer Plans; Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal*, 58 Fed. Reg. 5128, 5128 (Jan. 19, 1993) (Proposed Rule); *US Airways*, 303 B.R. at 788.

[18] 58 Fed. Reg. at 5128; *see* 41 Fed. Reg. at 48,485 ("PBGC's interest assumptions have been designed so that, when coupled with the mortality assumptions found in the regulation, the benefit values . . . are in line with industry annuity prices.").

[19] 58 Fed. Reg. at 50,815.

[20] 29 C.F.R. §§ 4044.55-.57; *see* 46 Fed. Reg. at 9495.

age or that all participants retire at the earliest retirement age possible."[21] The rules for choosing XRA assumptions take into account the age of the employee, the adequacy of retirement income, provisions of the plan, and the circumstances surrounding the plan's termination.[22]

B. NJC's Receivership and PBGC's Claims.

On April 17, 2009, the Court appointed James Hopson as Receiver for NJC, with the power to operate NJC's business and sell its assets.[23] In September 2009, the Receiver filed a Notice of Reportable Event with PBGC, stating that NJC was liquidating. Thereafter, PBGC worked closely with the Receiver to obtain information about NJC and the Pension Plan.[24]

In January 2010, the Receiver and Cox filed a joint motion to sell NJC's publishing assets to Halifax Media Acquisition LLC ("Halifax"). Halifax did not assume the Pension Plan, which remained with the liquidating NJC. On March 23, 2010, the Court authorized the sale.[25]

PBGC issued a notice to the Receiver on May 14, 2010, that the Pension Plan should be terminated, along with an Agreement for Appointment of Trustee and Termination of Plan and a request for the Receiver to sign that agreement to terminate the Pension Plan.[26]

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[21] *Id.* at 9496.

[22] *Id.*

[23] *See* Order, April 17, 2009, (Doc. No. 507).

[24] *See* Trans. of Proceedings, Hearing on Motion for Approval of Sale, Feb. 1, 2010, (Doc. No. 594 at 100 (Testimony of William G. Beyer, Receiver's pension counsel)).

[25] Order Authorizing and Directing the Receiver's Sale of the Publishing Operations of NJC, March 23, 2010, (Doc. No. 625).

[26] *See* Letter from Marie-Christine Fogt (PBGC) to James W. Hopson, dated May 14, 2010, enclosing PBGC's Notice of Determination and Agreement for Appointment of Trustee and Termination of Plan (Attached as Exhibit 1); *see also* PBGC's Letter Brief, Feb. 25, 2010, (Doc. No. 611) (describing PBGC's administrative process for initiating termination of a pension plan).

On April 5, 2010, the Receiver published notice of a fourteen-day deadline for making any claims against the sale proceeds or any other assets of NJC.[27] On April 16, 2010, PBGC timely filed claims with the Receiver for, *inter alia*, the (1) unfunded benefit liabilities of the Pension Plan under 29 U.S.C. §§ 1362 and 1368 in the estimated amount of $15,102,012.00,[28] and (2) unpaid minimum funding contributions due to the Pension Plan under 26 U.S.C. §§ 412, 430, and 29 U.S.C. § 1082 in the estimated amount of $650,142.00.[29] PBGC calculated these estimated claims in accordance with Title IV of ERISA and PBGC's regulations, following the process that PBGC routinely uses to calculate its claims for insolvency proceedings.[30]

On June 10, 2010, the Receiver filed a Report and Recommendation for the Disposition of All Remaining NJC Assets and the Wind-up and Discharge of His Receivership and Request for Hearing ("Report"). (Doc. No. 652). The Receiver described PBGC's four claims as follows:

> One is for (a) the [pension] plan's unfunded benefit liability, which as noted was estimated at the time of the February 1, 2010 sale approval hearing at $14 million. The other three claims are for (b) unpaid premiums due, "if any," to the PBGC; (c) unpaid minimum funding contributions, "if any," due the plan; and (d) statutory liability, "if any," for the shortfall and waiver amortization charge.[31]

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[27] Notice of 14 Day Deadline to Submit Claims, April 5, 2010, (Doc. No. 630).

[28] PBGC calculated this estimate based on a potential plan termination date of March 31, 2010.

[29] *See* Exhs. to Receiver's Report & Recommendation (Doc. No. 652-5 at 96-112) (containing PBGC's claims).

[30] *See, e.g., In re Wolverine, Proctor & Schwartz, LLC*, 436 B.R. 253, 255-56 (D. Mass. 2010) (noting that PBGC filed estimated claims, contingent on plan termination).

[31] Receiver's Report & Recommendation, June 10, 2010, (Doc. No. 652 at 17-18). Two of these claims were protective in nature and PBGC has dropped them.

The Receiver challenged PBGC's assertion of administrative priority for certain of its claims, concluding that each was a general unsecured claim.[32] Cox did not challenge PBGC's claims.[33]

PBGC and the Receiver thereafter negotiated a settlement of PBGC's claims. PBGC's and the Receiver's respective estimated claims formed the basis for these extensive negotiations,[34] leading to a settlement of PBGC's unfunded benefit liabilities claim ($14,272,500) and unpaid funding contributions claim ($455,000).[35] Those estimates were based on information about the Pension Plan obtained from its actuarial documents.[36]

After the Pension Plan terminated and PBGC became its statutory trustee, PBGC began its required process of valuing the Pension Plan's benefit liabilities. As with every terminated plan, PBGC calculated the final benefit amounts for each participant and beneficiary in accordance with Title IV of ERISA and PBGC's regulations.[37] PBGC's actuaries calculated the Pension Plan's benefit liabilities on a participant-by-participant (seriatim) basis. For a plan like

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[32] *Id.* at 19 ("[T]he PBGC appears to contend that it may be entitled to administrative expense priority for portions of certain of its "if any" claims. However, PBGC neglected, contrary to the Receiver's April 5, 2010 notice, to provide with its claims adequate documentation substantiating any claimed amount.") (citations omitted)).

[33] *See generally* Cox's Resp. to Objs. to Receiver's Report & Recommendation, Aug. 2, 2010, (Doc. No. 665) (challenging other creditors' claims, but not PBGC's). Cox likewise never requested any information from PBGC relating to the calculation of PBGC's claims.

[34] During these negotiations, PBGC continued to refine its estimated claim amounts to account for additional information from the Receiver. PBGC further revised its claim for the Pension Plan's unfunded benefit liabilities to reflect the proposed termination date of March 23, 2010.

[35] *See* Receiver's Resp. to Objs. to Receiver's Report & Recommendation, Aug. 5, 2010, (Doc. No. 669 at 2-4). As part of this settlement, PBGC agreed to withdraw its claims for statutory premiums and the 29 U.S.C. § 1362(c) shortfall and waiver amortization charge.

[36] PBGC will offer the testimony of Cynthia Travia about how PBGC prepares claim estimates.

[37] *See* 29 C.F.R. § 4044.1 (discussing purpose and scope of valuation regulations); *Davis v. PBGC*, 571 F.3d 1288, 1291 (D.C. Cir. 2009); *see also* Trans. of Proceedings, Hearing on Motion for Approval of Sale, (Doc. No. 594 at 104, lines 7-16).

the Pension Plan, covering 1,104 participants, it typically takes PBGC between two and three years to make the final determination of benefits for each participant.[38] On August 22, 2013, PBGC finalized its valuation of benefits and resulting calculation of the Pension Plan's unfunded benefit liabilities in the amount of $13,887,822. That valuation is close in value to the estimate provided in PBGC's claims.

C. Remand and the Evidentiary Hearing.

After PBGC and the Receiver settled PBGC's claims, the district court awarded virtually all of NJC's assets to Cox, and PBGC appealed. In January 2012, the Eleventh Circuit vacated that award. The Court held that Cox was a shareholder of NJC for the purposes of Fla. Stat. § 607.06401, which "prohibits the distribution of corporate assets to a shareholder if it would render the corporation insolvent."[39] Because the Eleventh Circuit considered "any payment to Cox a distribution to a shareholder within the meaning of § 607.06401," it held that the district court must determine whether any payment to Cox would comply with the statute's insolvency test.[40] The Eleventh Circuit remanded the case to this Court to "reevaluate the claims of all of News-Journal's creditors consistent with [its] opinion."[41] After the remand, the Court set a briefing schedule concerning the claims against NJC and subsequently scheduled the upcoming evidentiary hearing.

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[38] *See* PBGC, 2013 Annual Report 16, *available at* https://www.pbgc.gov/documents/2013-annual-report.pdf (last visited Jan. 2, 2014) (noting that in 2013, the average time for providing final benefit determinations was four years); *Davis*, 571 F.3d at 1291.

[39] *Cox Enters., Inc. v. PBGC*, 666 F.3d 697, 699 (11th Cir. 2012).

[40] *Id.*

[41] *Id.* at 708.

ARGUMENT

I. Title IV of ERISA and PBGC's Regulations Govern the Calculation of PBGC's Claim for the Pension Plan's Unfunded Benefit Liabilities.

A. PBGC's regulations are a source of substantive law, and carry a presumption of reasonableness.

In Title IV of ERISA, Congress granted PBGC a claim for a terminated pension plan's unfunded benefit liabilities.[42] Congress defined the "amount of unfunded benefit liabilities," as (for a given date):

> [T]he excess (if any) of–
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> (A) the value of the benefit liabilities under the plan (*determined as of such date on the basis of assumptions prescribed by [PBGC]* for purposes of [29 U.S.C. § 1344]), over
>
> (B) the current value (as of such date) of the assets of the plan . . . .[43]

Pursuant to Congress's express delegation, PBGC promulgated the Valuation Regulation and prescribed assumptions for valuing a pension plan's benefit liabilities.[44]

It is well settled that administrative regulations adopted pursuant to an express delegation of authority give rise to legislative rules with the "force and effect of law."[45] "In a situation of

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[42] 29 U.S.C. § 1362(b)(1)(A).

[43] 29 U.S.C. § 1301(a)(18) (emphasis added); *see also United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001) ("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute."); *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1238 (11th Cir. 2005) ("This rationale . . . ignores the vital principle that '[c]ourts are not authorized to rewrite a statute because they might deem its effects susceptible to improvement.'" (quoting *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1552 (11th Cir. 1996))).

[44] *See generally* 29 C.F.R. §§ 4044.41-.75.

[45] *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979); *Batterton v. Francis*, 432 U.S. 416, 425 & n.9 (1977) ("A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner." (citation omitted)).

this kind, Congress entrusts to the [agency], rather than to the courts, the primary responsibility for interpreting the statutory term."[46] Moreover, Congress has effectively codified the Valuation Regulation. PBGC finalized the Valuation Regulation in a notice-and-comment rulemaking pursuant to the requirements of the Administrative Procedure Act ("APA").[47] When Congress amended ERISA in 1987 to add the provisions in 29 U.S.C. § 1301(a)(18), Congress explicitly referred to "assumptions prescribed by [PBGC]" for valuing benefit liabilities.[48]

Courts cannot second-guess an agency's policy choices, particularly when, like here, those choices are embodied in a rule of general applicability, adopted pursuant to an express delegation.[49] And PBGC should not be forced "continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding."[50] By publishing governing principles through rulemaking, PBGC has promoted uniformity in measuring termination liability.[51] PBGC's regulation seeks to replicate the price that an employer would pay to close

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

[47] *See, e.g.*, PBGC, *Valuation of Plan Benefits in Non-Multi-Employer Plans*, 46 Fed. Reg. 9492 (Jan. 28, 1981) (Final Rule).

[48] 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); *In re US Airways Group, Inc.*, 303 B.R. 784, 796 (Bankr. E.D. Va. 2003) ("[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."); *see also Cottage Savs. Ass'n v. Comm'r*, 499 U.S. 554, 561 (1991); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381-82 (1969) ("Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation").

[49] *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984).

[50] *Heckler v. Campbell*, 461 U.S. 458, 467 (1983) (citation omitted); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the . . . agency.").

[51] *See Heckler*, 461 U.S. at 468.

out a pension plan in a standard termination through the purchase of annuities, thereby ensuring that pension termination liability will be measured in a fair, objective, and consistent manner.

Cox, as it has done throughout the case, ignores statutory law in favor of "equitable" arguments, even after the Eleventh Circuit rejected such arguments in the appeal.[52] The Supreme Court has made it similarly clear, in the context of bankruptcy, that substantive law, not the equitable power of the bankruptcy courts, controls the determination of claims.[53] In so holding, the Court noted the desirability of consistent treatment for claims inside and outside of bankruptcy.[54] In fact, every court to have considered the issue since 2003 has rejected efforts to depart from the Valuation Regulation, recognizing that "Congress, by statute, has expressly given the PBGC a *present* right to recover an amount determined in accordance with the valuation regulation."[55]

The only means for departing from the Valuation Regulation is to challenge the regulation under the exacting standard of the APA, requiring proof that the regulation is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;'" and

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[52] *See Cox Enters., Inc. v. PBGC*, 666 F.3d 697, 705 (11th Cir. 2012) ("It is unnecessary for us to resolve whether the September 2006 repurchase order gave Cox an equitable lien on [NJC's] assets because no distribution to Cox can violate subsection (8), irrespective of security or of an equitable lien.").

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

[54] *Id.* at 25-26.

[55] *US Airways*, 303 B.R. at 793; *see also Dugan v. PBGC* (*In re Rhodes, Inc.*), 382 B.R. 550, 559-60 (Bankr. N.D. Ga. 2008); *In re High Voltage Eng'g Corp.*, No. 05-10787 (Bankr. Mass. July 26, 2006) (Order) (Attached as Exhibit 2); *In re UAL Corp.*, Case No. 02 B 48191 (Bankr. N.D. Ill. Dec. 30, 2005) (Trans. of Hearing, Dec. 16, 2005, at 32-33) (Attached as Exhibit 3); *accord In re Wolverine, Proctor & Schwartz, LLC*, 436 B.R. 253, 262-63 (D. Mass. 2010) (finding the reasoning of *US Airways* persuasive in affirming the bankruptcy trustee's settlement of PBGC's claim for unfunded benefit liabilities).

overcoming the presumption of regularity afforded PBGC.[56] Cox has made no such challenge, merely offering alternative actuarial assumptions that it claims are more "appropriate." Even if those assumptions were reasonable (which they are not), the mere fact that other reasonable assumptions might exist is insufficient to meet the APA's stringent standard. Because PBGC's regulation provides "a rational way for the PBGC to implement the stated goal of determining a value that approximates the cost of a commercial annuity,"[57] it controls.

B. Cox's remaining arguments for reducing PBGC's claims are likewise contrary to law.

Cox ignores the statute and regulations in its other arguments, as well. PBGC's claim for unpaid minimum funding contributions owed to the Pension Plan is $455,000.[58] Cox argues that this claim is duplicative of PBGC's unfunded benefit liabilities claim. But Congress provided PBGC with *independent* claims for unfunded benefit liabilities[59] and for any unpaid funding contributions owed to the Pension Plan.[60] To hold these claims duplicative would render

[56] *See US Airways*, 303 B.R. at 797-98 (quoting 5 U.S.C. § 706(2)(A)); *see also Lyons v. Georgia-Pacific Corp. Salaried Emps. Ret. Plan*, 221 F.3d 1235, 1244-45 (11th Cir. 2000).

[57] *US Airways*, 303 B.R. at 797; *see also Rhodes, Inc.*, 382 B.R. at 559 (expressing a high degree of doubt that a successful challenge could be made to PBGC's Valuation Regulation).

[58] *See* Receiver's Resp. to Objs. to Receiver's Report & Recommendation, Aug. 5, 2010, (Doc. No. 669 at 2-3); PBGC's Amended Claims, dated Aug. 6, 2010, (Doc. No. 675 at 7-10); *see also* Excerpt from spreadsheet with PBGC's unpaid minimum funding contribution calculation, dated July 27, 2009, (Attached as Exhibit 4).

[59] *See* 29 U.S.C. § 1362(a), (b)(1)(A).

[60] *See* 29 U.S.C. §§ 1082(b), 1342(d)(1)(B)(ii), 1362(c); 26 U.S.C. § 412(b); *In re CF&I Fabricators of Utah, Inc.*, 90B-6721, 1992 Bankr. LEXIS 2585, at *27-*28 (Bankr. D. Utah Dec. 31, 1992) (limiting PBGC's unfunded benefit liabilities claim, but only by the probable recovery on its claim for unpaid contributions). PBGC agrees that any *actual* recovery on contributions may be credited to the Pension Plan, and reduce the underfunding by a corresponding amount.

ERISA's statutory provisions superfluous, thereby rewriting ERISA's carefully-crafted statutory scheme.[61] Accordingly, PBGC is entitled to assert the full amount of each claim against NJC.[62]

Cox's argument that the Pension Plan's unfunded benefit liabilities should be reduced by any statutory premiums that NJC previously paid to PBGC fails for similar reasons. Again, Cox ignores the plain language of ERISA, which does not factor the payment (or nonpayment) of statutory premiums into the amount of unfunded benefit liabilities.[63]

Finally, Cox argues that information about PBGC's historical *recoveries* on its claims is somehow relevant to the *amount* of PBGC's claims. But any such recoveries came *after* the calculation of PBGC's claims in accordance with the statute and thus depended solely on the amount of assets and priority schemes in the given cases. Cox does not explain how those facts bear on the available assets and priority scheme here. None of Cox's arguments raise any legitimate objection to the amount of PBGC's claims, and the Court should reject them.

II. Cox's Proposed Actuarial Assumptions Are Not Appropriate and Would Thwart ERISA's Statutory Scheme.

At the evidentiary hearing, Scott Young, PBGC's Chief Valuation Actuary, will opine that PBGC's claim for the Pension Plan's unfunded benefit liabilities calculated pursuant to the requirements of Title IV of ERISA and PBGC's regulations is $13,887,822. Even Cox's expert witness concedes that, applying the actuarial assumptions prescribed in Title IV of ERISA and

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[61] *See, e.g.*, *United States v. Ballinger*, 395 F.3d 1218, 1236 (11th Cir 2005) ("'[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.'") (quoting *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

[62] To the extent that PBGC fully collects on its claim for the Pension Plan's unfunded benefit liabilities, PBGC will not separately collect on its claim for unpaid funding contributions.

[63] *See* 29 U.S.C. § 1301(a)(18) (defining the amount of unfunded benefit liabilities); *see also* 29 U.S.C. § 1307 (providing a separate liability for statutory premiums owed to PBGC).

PBGC's regulations, he calculates the benefit liabilities to be $42,218,066; yielding unfunded benefit liabilities of $13,573,827.[64]

Cox urges the Court to adopt an approach outside the applicable law. Cox tenders the opinion of Adam Reese, an actuary, as its expert witness. Mr. Reese developed a valuation interest rate of 7.99% based on his review of historical PBGC investment returns and an expected retirement age assumption based on plan experience. Cox's approach, which essentially seeks to treat the Pension Plan as ongoing rather than terminated, departs from the requirements of ERISA and the Valuation Regulation. As explained above, Cox's approach is contrary to law, and this Court should not even consider it as a matter of law. However, even if the Court were to consider it, it should reject Cox's proposed approach as unreasonable.

Mr. Reese relies on the Actuarial Standards Board's Actuarial Standard of Practice No. 27, "Selection of Economic Assumptions for Measuring Pension Obligations" ("ASOP 27").[65] But ASOP 27 requires the application of the Valuation Regulation, as it expressly "does not apply to the selection of an assumption where the actuary is precluded from exercising independent judgment by an applicable law, regulation, or other binding authority."[66]

Moreover, Mr. Reese's approach is entirely at odds with the standard he purports to rely on. ASOP 27 specifically provides that "*an actuary measuring a plan's termination liability may use an investment return rate reflecting interest rates implicit in current or anticipated*

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[64] Cox's expert witness used a different data set, likely accounting for the slight difference.

[65] ACTUARIAL STANDARDS BOARD, ACTUARIAL STANDARD OF PRACTICE NO. 27, *Selection of Economic Assumptions for Measuring Pension Obligations* (Sept. 2007), *available at* http://www.actuarialstandardsboard.org/pdf/asops/asop027_145.pdf (last visited Jan. 2, 2014).

[66] *Id.* § 1.2, at 1; *see also id.* § 2.6, at 3 (defining prescribed assumptions), and § 3.11, at 13 ("When an assumption is prescribed, the actuary is obligated to use it.").

future annuity purchase rates."[67] It further specifies that "[t]his investment return assumption may differ from an investment return assumption used to measure the same plan's present value of accumulated benefits *on an ongoing basis*[,]. . . [the latter of which] may reflect a longer time horizon and a diversified investment portfolio."[68]

Further, Mr. Reese's selection of the 7.99% investment return rate ignores the very factors he cites as important. Mr. Reese prepared his investment return assumption using a future asset allocation of 70% fixed income securities and 30% equities. He then recites multiple factors that ASOP 27 directs an actuary to review in selecting an investment return assumption, including "current yields to maturity of fixed income securities" and forecasts "of total returns for each asset class."[69] Nonetheless, Mr. Reese considered neither factor in selecting his assumption.[70] Instead, Mr. Reese based his selection on PBGC's historical investment returns, without sufficient consideration of whether that assumption was reasonable.

Similarly, Mr. Reese's application of past plan experience to develop expected retirement age assumptions fails to account for changed circumstances occasioned by the termination of the Pension Plan. Mr. Reese based his assumptions solely on employment experience at NJC prior to the sale to Halifax. Mr. Reese did not examine whether there were any changes in circumstances after the asset sale, including lay-offs or other reductions. Most importantly, prior to the sale, participants had to retire from their employment with NJC—they had to give up their paycheck to begin drawing their retirement benefit. Mr. Reese did not revise his assumptions to

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[67] *Id.* § 3.6.3.a, at 7 (emphasis added).

[68] *Id.* (emphasis added).

[69] Expert Report of Adam J. Reese, Nov. 15, 2013, at 14.

[70] Mr. Reese avers that he did not have the specific breakdown of PBGC's fixed income and equity holdings.

reflect that Pension Plan participants could begin drawing their benefits from PBGC even while working for Halifax, which changes the participants' decision-making process entirely.

Mr. Reese argues that the Valuation Regulations' prescription of actuarial assumptions replicating the cost of annuities is "inappropriate." He opines that "PBGC is not purchasing annuities, nor does it pay taxes, earn a profit, or conform to state investment regulations like an insurance company."[71] Mr. Reese's opinion overlooks the difference between ongoing plans and terminated plans. In an ongoing pension plan, if future returns fall short of expectations, the plan sponsor can contribute more funds to the plan.[72] Upon termination, the plan will receive no further contributions to cover the plan's benefit liabilities. Accordingly, replicating annuity prices is a reasonable way for PBGC to proceed.[73] "Given the strong societal interest in protecting pension benefits, a risk-free or nearly risk-free rate to value the pension liability is more appropriate than a rate based on optimistic projections (even if those projections are widely shared by fund managers) as to the stock market's future long-term performance."[74] Indeed, the Pension Committee of the American Academy of Actuaries recently concluded that "the

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[71] Expert Report of Adam J. Reese, Nov. 15, 2013, at 35.

[72] The fallacy of Mr. Reese's approach is underscored by his reliance on studies about the investment returns of ongoing pension plans. Because the plan sponsor is available to fund any shortfall resulting from poor returns, such plans do not provide an appropriate basis for comparison to the terminated Pension Plan trusteed by PBGC. And Mr. Reese's suggestion that PBGC fund any future shortfall in the Pension Plan's benefit liabilities using premiums paid by other plan sponsors ignores PBGC's statutory mandate "to maintain premiums . . . at the lowest level consistent with carrying out [PBGC's] obligations under this title." 29 U.S.C. § 1302(a)(3).

[73] *See Blessitt v. Ret. Plan for Emps. of Dixie Engine Co.*, 848 F.2d 1164, 1168 (11th Cir. 1988) ("[W]e 'need not conclude that the agency construction was the only one it permissibly could have adopted to uphold construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.'") (quoting *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 843 n.11 & 844 (1984)).

[74] *In re US Airways Group, Inc.*, 303 B.R. 784, 796 (Bankr. E.D. Va. 2003).

approach used by PBGC [in measuring its financial statement liabilities by using annuity assumptions] produces a reasonable representation of the PBGC's current obligation and deficit."[75]

Congress has defined PBGC's mission to include the continuation and maintenance of pension plans, as well as maintaining premiums "at the lowest level consistent with carrying out its obligations under" Title IV.[76] Consistent with these goals, PBGC's Valuation Regulation has the purpose of approximating the cost of purchasing annuities to close out the plan in a standard termination.[77] If the cost of terminating a plan in a distress or PBGC-initiated termination were less than the cost of purchasing annuities in a standard termination, an incentive would be created for sponsors to dump their plans on PBGC and burden other premium payers with the costs of supporting those plans.[78]

For the foregoing reasons, the Court should apply the Valuation Regulation to determine the amount of PBGC's claim for the Pension Plan's unfunded benefit liabilities.

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[75] PENSION COMMITTEE, AMERICAN ACADEMY OF ACTUARIES, ISSUE BRIEF, *Perspectives on PBGC Single-Employer Deficit* 3 (Aug. 2013), available at http://www.actuary.org/files/PC_PBGC-Deficit-IB_082113.pdf (last visited Jan. 2, 2014) (noting that the "credit risk premium" factored into annuity prices would be partially offset by the "margin for profit and marketing expense").

[76] 29 U.S.C. § 1302(a).

[77] *E.g.*, 58 Fed. Reg. 5128, 5128 (Jan. 19, 1993) (Proposed Rule) (the interest and mortality factors, in combination, "will accurately approximate the cost of private sector group annuity contracts").

[78] *Cf. In re UAL Corp.*, 468 F.3d 444, 452 (7th Cir. 2006) (allowing PBGC to take into consideration the "moral hazard" that results when the availability of a third party payor such as PBGC affects the behavior of insured parties).

III. PBGC Timely Filed Adequate Proofs of Claim with the Receiver.

A. The adequacy of PBGC's claims is demonstrated by the Receiver's actions.

Contrary to Cox's argument that PBGC's claim filings with the Receiver were inadequate, PBGC timely filed claims that allowed the Receiver to sufficiently understand the basis for and amount of PBGC's claims against NJC.[79] And the sufficiency of PBGC's proof of claims is demonstrated by the Receiver's own actions.

On April 16, 2010, less than two weeks after the Receiver filed his notice of claims deadline, PBGC submitted its proofs of claim for, *inter alia*, the Pension Plan's unfunded benefit liabilities and unpaid minimum funding contributions owed to the Pension Plan. PBGC calculated these claims using the same process that PBGC routinely uses to calculate its claims for bankruptcy and other insolvency proceedings.[80] Each claim explained the basis for NJC's liability and referenced the documents in the Receiver's possession that supported the claim.

In his Report, the Receiver acknowledged NJC's liability for the Pension Plan's unfunded benefit liabilities. Although the Receiver compared his estimate of the unfunded benefit liabilities at about $14 million to PBGC's estimate at about $15.1 million, he did not dispute the validity of the liability or adequacy of the claim.[81] And while the Receiver raised an issue with

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[79] *See* Exhs. to Receiver's Report & Recommendation (Doc. No. 652-5 at 96-112).

[80] *See, e.g., U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("Although the fairness of the Board's own procedure is not before us, we note that a presumption of regularity attaches to the actions of Government agencies . . . .").

[81] *See* Resp. to Objs. to Receiver's Report & Recommendation, Aug. 5, 2010, (Doc. No. 669 at 2 ("The Receiver has rejected PBGC's entitlement to recover the last three of [its] claims, irrespective of priority.")).

PBGC's claim for unpaid minimum funding contributions, the Receiver clarified that he was challenging only PBGC's assertion of priority.[82]

After filing its claims, PBGC continued to refine its calculations through discussions with the Receiver, who was represented by knowledgeable ERISA counsel.[83] After considerable negotiations, including discussions between PBGC's actuary and NJC's actuary, PBGC and the Receiver settled PBGC's claims.[84] Now that PBGC has completed its final valuation of the Pension Plan's unfunded benefit liabilities, that valuation will serve as the basis for expert actuarial testimony presented by both parties. The nature of the documentation submitted with the claims is therefore irrelevant, as it has no bearing whatsoever on the current issue.[85]

Additionally, Cox has waived any challenge to the timeliness or sufficiency of PBGC's proofs of claim against NJC by failing to raise it below or on appeal.[86] Although Cox's counsel made a vague statement that "'[w]e do not accept or concur in [PBGC's] claim, the amount of the claims that [PBGC and the Receiver] worked out'" at the hearing on the Receiver's report,

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[82] Receiver's Report & Recommendation, June 10, 2010, (Doc. No. 652 at 19).

[83] William Beyer, a former Deputy General Counsel at PBGC. Trans. of Proceedings, Hearing on Motion for Approval of Sale, Feb. 1, 2010, (Doc. No. 594 at 96).

[84] Cox has disingenuously asserted that PBGC somehow "extorted" the Receiver into a settlement, but the Receiver acknowledged NJC's liability for the Pension Plan's unfunded benefit liabilities, estimated at about $14 million as of the February 1, 2010 sales hearing. Receiver's Report & Recommendation, June 10, 2010, (Doc. No. 652 at 16).

[85] Cox's only argument about the timeliness of PBGC's claims relates to the adequacy of the documentation. But Cox can show no prejudice to itself even in the context of the claims settlement, let alone at a *de novo* hearing after discovery. *Cf. In re Parsons,* 135 B.R. 283, 285 (Bankr. S.D. Oh. 1991) (in allowing claims amendments, the court must examine whether prejudice to the creditors results).

[86] *See generally* Cox's Resp. to Objs. to Receiver's Report & Recommendation, Aug. 2, 2010, (Doc. No. 665). In fact, before the Court scheduled the evidentiary hearing, Cox never requested any information from PBGC about its claims.

Cox never articulated any specific objection to the timeliness or sufficiency of PBGC's claims.[87] To the contrary, Cox's counsel stated very clearly that "[w]e haven't sought to go into that [the amount of PBGC's claims] and don't today."[88]

B. PBGC's estimated proofs of claim were sufficient.

PBGC filed estimated claims with the Receiver. As in every case where the plan has not yet terminated and a final valuation has not been prepared, PBGC prepared the estimates using the best available information. The use of estimates was reasonable, as PBGC's process for completing a plan's final valuation takes several years from when PBGC becomes the plan's statutory trustee.

Moreover, there is no requirement that PBGC establish the amount of its estimated claims to a certainty. PBGC should not be denied recovery because it lacks "clairvoyant powers" to see with mathematical certainty the amount of its claims against NJC. As the Supreme Court held in the context of determining rejection damages for a 999-year lease under the former Bankruptcy Act, "[t]he injured party is not to be barred from a fair recovery by impossible requirements."[89]

All that is required as to the amount of damages in this context is "a basis for a reasoned conclusion."[90] PBGC's estimated unfunded benefit liabilities claim, which was based on a total

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[87] Trans. of Hearing on Receiver's Report, Aug. 9, 2010, (Doc. No. 681, at 49-50); *see also Hamilton v. Southland Christian Sch.*, 680 F.3d 1316, 1319 (11th Cir. 2012) ("A passing reference to an issue in a brief is not enough, and the failure to make arguments and cite authorities in support of an issue waives it.") (citations omitted)).

[88] Trans. of Hearing on Receiver's Report, Aug. 9, 2010, (Doc. No. 681, at 50).

[89] *Palmer v. Conn. Ry. & Lighting Co.*, 311 U.S. 544, 559-60 (1941) ("To require proof of rental value approaching mathematical certitude would bar a recovery for an actual injury suffered.").

[90] *Id.* at 561; *cf. Amcor, Inc. v. Brock*, 780 F.2d 897, 900-01 (11th Cir. 1986).

benefit liabilities amount that was only 1.2% greater than PBGC's final benefit liabilities calculation,[91] satisfied this standard.

CONCLUSION

For the foregoing reasons, the Court should find that PBGC has a valid claim against NJC for the Pension Plan's unfunded benefit liabilities in the amount of $13,887,822. Should PBGC not receive full payment on its unfunded benefit liabilities claim, the Court should further find that PBGC has a valid claim for missed contributions owed by NJC to the Pension Plan in the amount of $455,000.

DATED: January 8, 2014
Washington, D.C.

Respectfully submitted,

/s/ Colin B. Albaugh
Colin B. Albaugh (CA 3283)
M. Katherine Burgess (MD 17810)
Attorneys
Pension Benefit Guaranty Corporation
Office of the Chief Counsel
1200 K Street, N.W., Suite 340
Washington, D.C. 20005-4026
Ph: 202-326-4020, ext. 3176
Fax: 202-326-4112
E-mails: albaugh.colin@pbgc.gov *and*
efile@pbgc.gov

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[91] PBGC's proof of claim for the Pension Plan's unfunded benefit liabilities was based on a total estimated benefit liabilities amount of $43,051,525, while final calculation totaled $42,532,061.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January 2014, the Pension Benefit Guaranty Corporation's foregoing Pre-Trial Brief, was served electronically through the Court's CM/ECF system on all registered users.

/s/ Colin B. Albaugh
Colin B. Albaugh
Attorney