ORAL ARGUMENT NOT SCHEDULED
No. 13-5129

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES C. STEPHENS and RICHARD MAHONEY,
Appellants
v.
PENSION BENEFIT GUARANTY CORPORATION,
Appellee

On Appeal from the United States District Court For the District of Columbia in Case No. 07-1264 (Hon. Rosemary Collyer, U.S. District Judge)

APPELLEE'S BRIEF

Date: October 29, 2013

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellee respectfully certifies the following:

A. Parties

All parties appearing before the U.S. District Court in Civil Action 07-1264 are listed in the Corrected Appellants' Brief. Appellee Pension Benefit Guaranty Corporation is a federal government agency established under 29 U.S.C. § 1302 and thus is not required to file a corporate disclosure statement. Fed. R. App. P. 26.1(a).

B. Rulings Under Review and Decisions From Which Appeal Arises

References to the rulings at issue appear in the Corrected Appellants' Brief.

C. Related Cases

Stephens v. US Airways Group, Inc. was previously before this Court as Case No. 10-7100, 644 F.3d 437 (D.C. Cir. 2011). There are no related cases currently pending before any court.

D. Procedural Motions

None.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

***Authorities upon which we chiefly rely are marked with asterisks.**

United States Codes Cited

Other Authorities Cited

COUNTER-STATEMENT OF JURISDICTION

Appellants, James C. Stephens and Richard Mahoney (the "Pilots") sued Appellee, the Pension Benefit Guaranty Corporation ("PBGC"), as statutory trustee of the terminated Retirement Income Plan for Pilots of U.S. Air, Inc. (the "Plan"). Jurisdiction lay under 29 U.S.C. § 1303(f)(6), which provides the exclusive means for the Pilots to sue PBGC as statutory trustee of the terminated Plan. 29 U.S.C. § 1303(f)(4). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

COUNTER-STATEMENT OF THE ISSUES

1. Did the district court correctly decide that the Pilots were required to exhaust the Plan's administrative remedies where the Pilots alleged claims for benefits relating to administration of the Plan under the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA")?

2. Did the district court correctly decide that the Pilots had not demonstrated that exhaustion was futile where the Pilots failed to establish how the board responsible for hearing Plan appeals would treat future claimants, let alone establish the certainty of an adverse decision for such claimants?

3. Did the district court correctly decline to certify a class under Federal Rule of Civil Procedure 23 where the proposed class lacked typicality because only James C. Stephens had exhausted administrative remedies?

COUNTER-STATEMENT OF FACTS

The Parties

Plaintiffs-Appellants are retired pilots of US Airways, Inc. ("US Airways") who participated in the Plan. Upon retirement, each Pilot elected to receive his pension benefit in a lump sum payment. US Airways typically paid lump sums approximately 45 days after a participant's annuity starting date, and would include interest if the payment took any longer. Each Pilot received his lump sum approximately 45 days after his respective annuity starting date.[1]

PBGC is a federal agency established under Title IV of ERISA to administer the nation's defined-benefit pension insurance program.[2] When a pension plan covered by Title IV terminates with insufficient assets to pay promised benefits, PBGC typically becomes statutory trustee of the terminated plan.[3] PBGC guarantees the payment of certain benefits, subject to statutory limits, to plan participants and their surviving beneficiaries.[4]

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[1] Pls'. Fourth Amended Class Action Complaint ("Fourth Amended Complaint"), J.A. 227, 229, ¶¶ 30, 43.

[2] 29 U.S.C. § 1302; *see PBGC v. LTV Corp.*, 496 U.S. 633, 636-37 (1990).

[3] 29 U.S.C. § 1342(b), (d).

[4] *See* 29 U.S.C. §§ 1322, 1361.

The Plan

Before 2003, US Airways was the contributing sponsor and plan administrator of the Plan, which provided US Airways' pilots with a traditional retirement benefit based on income and years of service.[5] On August 11, 2002, US Airways filed reorganization proceedings in the United States Bankruptcy Court for the Eastern District of Virginia.[6] Effective March 31, 2003, the Plan was terminated pursuant to Title IV of ERISA, and PBGC became statutory trustee of the terminated Plan.[7]

The Plan's Administrative Procedures

Mr. Stephens is a retired pilot who received a lump sum benefit under the Plan. On February 28, 1997, Mr. Stephens filed a claim with US Airways for interest on his lump sum.[8] Specifically, Mr. Stephens sought interest for the period between his annuity starting date and the date he received his lump sum. After US Airways denied his claim, Mr. Stephens appealed to a joint labor-management

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[5] *In re US Airways Group, Inc.*, 296 B.R. 734, 737 (Bankr. E.D. Va. 2003).

[6] *Id.*

[7] Fourth Amended Complaint, J.A. 224, ¶ 9. The Pilots incorrectly state in their Brief that PBGC is a successor-in-interest to US Airways, rather than a statutory trustee. Corrected Appellants' Brief at p. 2.

[8] J.A. 328-29.

retirement board (the "Retirement Board").[9] The Retirement Board was established by US Airways and the Air Line Pilots Association ("ALPA") pursuant to the Railway Labor Act, and was composed of two members appointed by U.S. Airways and two members appointed by ALPA.[10] The Retirement Board deadlocked on Mr. Stephens's claim, and an impartial arbitrator was appointed.[11]

The impartial arbitrator scheduled an evidentiary hearing for September 21, 1998.[12] Despite having advance notice of that hearing, neither Mr. Stephens nor his representative attended to present Mr. Stephens's position.[13] On March 8, 1999, the Retirement Board denied the claim.[14] No other pilot has ever filed a claim with US Airways for interest on a lump sum payment from the Plan.[15]

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[9] J.A. 330-33.

[10] *See* Letter of Agreement No. 9 between USAir, Inc. and ALPA (Feb. 9, 1990), J.A. 63-64.

[11] J.A. 313, 327; Letter of Agreement No. 9 between USAir, Inc. and ALPA (Feb. 9, 1990), J.A. 65, § 2.1.

[12] Award, *In the Matter of the Arbitration Between Captain James C. Stephens and US Airways, Inc.* (Mar. 8, 1999), J.A. 203.

[13] J.A. 314-15, 327.

[14] Award, *In the Matter of the Arbitration Between Captain James C. Stephens and US Airways, Inc.* (Mar. 8, 1999), J.A. 202, 209.

[15] Corrected Appellants' Brief at p. 5.

The Pilots' Complaint

On January 19, 2000, the Pilots filed their original complaint against the Plan and US Airways in Ohio federal district court. That court dismissed the complaint for lack of subject matter jurisdiction under the Railway Labor Act, and the Pilots appealed. The Sixth Circuit addressed whether the Pilots' claims constituted "minor disputes" subject to the exclusive jurisdiction of the Retirement Board under the Railway Labor Act, or whether their allegations of the existence of an illegal oral agreement constituted a "major dispute" subject to the jurisdiction of the courts.[16] Without reaching the merits of the alleged claims, the Sixth Circuit ruled that the court had subject matter jurisdiction over four of the six counts in the Pilots' complaint. Those four claims alleged either an illegal oral amendment to the Plan, fiduciary breach by U.S. Airways in administering the Plan, or a violation of the actuarial equivalency requirement in 29 U.S.C. § 1054.[17]

[16] *See Stephens v. Ret. Income Plan for Pilots of US Air, Inc.*, 464 F.3d 606, 610, 613 (6th Cir. 2006) ("*Stephens I*").

[17] *Id.* at 613-14.

The Sixth Circuit's reasoning did not apply to two of the Pilots' claims, which "appear[ed] to argue that the Retirement Board's final result was inconsistent with the [Plan] documents."[18] In so finding, the court rebuffed the Pilots' attempt to characterize those two claims as also alleging an oral agreement.

After the Plan terminated, the Pilots substituted PBGC as defendant, seeking monetary damages, restitution, or disgorgement from PBGC for certain acts and omissions by US Airways. Count I of the Complaint alleges that the Plan required the payment of lump sums on the annuity starting date, and that US Airways violated the Plan by paying lump sums up to 45 days later, without interest.[19] Count II of the Complaint alleges that US Airways' payment practice violated the Plan and the actuarial equivalence requirement in ERISA, 29 U.S.C. § 1054(c).[20] Count III of the Complaint alleges a breach of fiduciary duty relating to US Airways' failure to pay interest.[21]

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[18] *Id.* at 613.

[19] *See* Fourth Amended Complaint, J.A. 229-30.

[20] *Id.* at 230-31.

[21] *Id.* at 231.

In 2007, the Ohio district court transferred the case to the United States District Court for the District of Columbia. PBGC moved to dismiss Count III of the Complaint, which alleged fiduciary breach, on the basis that it was simply a repackaging of the Pilots' benefits claim as a fiduciary breach claim. On May 20, 2008, the district court agreed and dismissed the Pilots' fiduciary breach claim. The district court also dismissed the Pilots' request for attorney fees.[22]

On March 17, 2010, the district court granted summary judgment in PBGC's favor, holding that a reasonable delay in payment did not violate the actuarial equivalence requirement.[23]

The Pilots' First Appeal to this Court

The Pilots appealed, and this Court affirmed in part and reversed in part.[24] Each of the panel's three judges wrote a separate opinion.[25] The controlling opinion rejected the Pilots' argument that US Airways violated ERISA's actuarial

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[22] Mem. Opinion, May 20, 2008, J.A. 12, 16.

[23] *Stephens v. US Airways Group*, 696 F. Supp. 2d 84 (D.D.C. 2010), *rev'd in part*, 644 F.3d 437 (D.C. Cir. 2011).

[24] *Stephens v. US Airways Group, Inc.*, 644 F.3d 437 (D.C. Cir. 2011) ("*Stephens III*").

[25] Judge Brown's opinion is controlling "because it presents the narrowest grounds of the opinions forming a majority." *Id.* at 442 n.1 (Kavanaugh, J., concurring) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

equivalence requirement.[26] The Court cited to the pertinent Treasury Regulation as guidance that ERISA permits a reasonable delay in payment "'for calculation of the benefit amount,'" and remanded for the district court to calculate the appropriate amount due to the Pilots.[27] Thus, the sole remaining issue under this Court's decision was the reasonableness of the 45-day delay in payment.[28] The Court also affirmed the dismissal of the Pilots' claim for attorney fees.[29]

The District Court's Denial of Class Certification

On remand, the parties moved for summary judgment on the appropriate amount of interest. On July 18, 2012, the district court denied summary judgment, finding "that the determination of reasonable delay is a disputed factual question that cannot be resolved on summary judgment."[30]

On February 21, 2012, the Pilots filed their first motion to certify a class. The Pilots' proposed class consisted of all Plan participants and beneficiaries who retired between January 1, 1990, and December 31, 2003, and elected to receive all

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[26] *Id.* at 440, 441.

[27] *Id.* at 440 (quoting 26 C.F.R. § 1.401(a)–20, Q&A 10(b)(3)), 442.

[28] *Id.* at 440-42; *see also* Corrected Appellants' Brief at p. 12.

[29] *Stephens III*, 644 F.3d at 441-42.

[30] Order, July 18, 2012, J.A. 212.

or part of their Plan benefit as a lump sum.[31] PBGC opposed class certification, because none of the proposed class members had exhausted the Plan's administrative remedies.[32] On July 18, 2012, the district court denied the Pilots' motion without prejudice.[33]

On October 2, 2012, the Pilots filed a second motion for class certification. The Pilots sought certification for a smaller class consisting of Plan participants and beneficiaries who retired between February 28, 1997,[34] and December 31, 2003, and elected to receive all or part of their Plan benefit as a lump sum.[35] PBGC opposed the motion, again because none of the proposed class members had

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[31] Pls'. Mem. of Points & Authorities in Supp. of Their Motion for Class Certification, J.A. 178.

[32] *See generally* Opp'n of PBGC to Pls'. Mot. For Class Certification, J.A. 181.

[33] Order on Mot. For Class Certification, July 18, 2012, J.A. 214.

[34] This is the date Mr. Stephens filed his claim for interest with US Airways. The Fourth Amended Complaint, filed after the district court's first denial of class certification, alleges the same class. Accordingly, the Pilots' appeal encompasses only individuals who retired after February 28, 1997. Fourth Amended Complaint, J.A. 224.

[35] Pls'. Mem. of Points & Authorities in Supp. of Their Second Motion for Class Certification, J.A. 240.

exhausted the Plan's administrative remedies.[36] On December 7, 2012, the district court denied the Pilots' second motion for class certification.[37]

In denying the Pilots' second motion for class certification, the district court held that James C. Stephens's claim was not typical of the proposed class members' claims, because only Mr. Stephens had exhausted the Plan's administrative remedies.[38] The district court rejected the Pilots' argument that they were asserting "statutory violations" of ERISA for which exhaustion was not required, explaining that "the issue now before this Court poses a question of plan administration and not a question of statutory interpretation or application."[39] The district court also rejected the Pilots' argument that exhaustion was futile because the Retirement Board would have treated every future claimant the same based on the result in Mr. Stephens's arbitration. The court concluded that the Pilots' evidence amounted to speculation about what the Retirement Board might have done, far short of establishing the certainty of an adverse decision necessary for futility.[40]

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[36] Opp'n of PBGC to Pls'. Second Mot. For Class Certification, J.A. 260.

[37] Opinion on Class Certification, Dec. 7, 2012, J.A. 370.

[38] *Id.* at 374-75.

[39] *Id.* at 379.

[40] *Id.* at 380-81.

After the district court denied the Pilots' second motion for class certification, Mr. Stephens settled his individual claim with PBGC. Mr. Stephens's basis for standing in this case is not clear.[41] The other named plaintiff, Mr. Mahoney, did not exhaust the Plan's administrative remedies, and he agreed to the dismissal of his claim without prejudice. This appeal followed.

SUMMARY OF THE ARGUMENT

The sole issue for this Court is whether the members of the proposed class were required to exhaust the Plan's administrative remedies. None of the proposed class members filed a claim with US Airways or took any other step toward exhausting the Plan's administrative remedies. The Pilots ask this Court to ignore that the entire proposed class sat on its rights. But this Court has repeatedly held that exhaustion is required in all but the most exceptional circumstances. Because the Pilots failed to establish that they fit within an exception, the district court properly declined to certify a class.

The Pilots argue that exhaustion was unnecessary because they are asserting a "statutory violation" of ERISA. They tether this argument to the prior decisions

[41] The Pilots assert that Mr. Stephens has standing under the reasoning applied in *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 529 (D.C. Cir. 2006) (determining that plaintiff's settlement of her individual claims did not extinguish the Court's jurisdiction because plaintiff retained her class claim and "interest in shifting attorney fees and other litigation costs"). It is unclear, however, whether *Richards* applies, because the Court has held that the Pilots cannot recover their attorney fees from PBGC. *See Stephens III*, 644 F.3d at 441-42.

in this case by the Sixth Circuit and this Court. But the Sixth Circuit merely addressed the nature of the Pilots' claim for purposes of assessing subject matter jurisdiction, not exhaustion. And the Sixth Circuit did not address the issue of reasonableness.

Because this Court explicitly decided that the Pilots' lump sums did not violate ERISA's actuarial equivalence requirement, the Pilots' sole remaining claim is for interest owed on their benefits under the Plan as a result of any unreasonable delay in payment. The narrow exception to exhaustion that the Pilots rely on applies where participants allege a statutory violation, such as a plan amendment that is contrary to explicit statutory requirements, rather than raising questions related to benefit calculations. So even if this Court were inclined to excuse exhaustion for statutory violations of ERISA, the Pilots have not presented such a claim. The Pilots assert a claim for benefits, and the district court correctly determined that exhaustion was required.

The Pilots next argue that, even if exhaustion was required, the proposed class members' failure to act should be excused because exhaustion was futile. Futility in ERISA cases requires an exceptional showing, a demonstration that any resort to the Plan's administrative procedures was clearly useless. It is undisputed that any claim denials by US Airways could be appealed to the Retirement Board. It is also undisputed that any deadlock by the Retirement Board would be decided

by an impartial arbitrator. The Pilots attempt to counter this clear evidence with blanket assertions that the Retirement Board would have been bound in other cases by its decision on Mr. Stephens's claim. But the record before the district court established that the result of any future claims by other lump sum recipients was far from decided. Based on this evidence, the district court was well within its discretion to find that the Pilots had failed to meet the strict standard required for futility.

Because exhaustion was required and none of the proposed class members have exhausted, the district court correctly found that Mr. Stephens's claim was not typical of the proposed class. For the foregoing reasons, this Court should affirm.

ARGUMENT

STANDARD OF REVIEW

Because "the district court is 'uniquely well situated' to rule on class certification matters," this Court reviews a class certification decision "'conservatively only to ensure against abuse of discretion or erroneous application

of legal criteria.'"[42] Accordingly, the Court "will affirm the district court even if [the Court] would have ruled differently in the first instance."[43]

Appellate courts review questions of law *de novo*.[44] And this Court reviews the district court's findings on exhaustion for an abuse of discretion.[45]

I. The Pilots Were Required to Exhaust the Plan's Administrative Remedies for Their Benefit Claims, and Failed to Establish That Exhaustion Was Futile.

In this Circuit, "barring exceptional circumstances, parties aggrieved by decisions of pension plan administrators must exhaust the administrative remedies available to them under their pension plans before challenging those decisions in court."[46] It is undisputed that **none** of the proposed class members, aside from Mr. Stephens, exhausted the Plan's administrative procedures. Facing a clear exhaustion requirement, the Pilots argue that exhaustion was excused because they allege a "statutory violation" of ERISA. Alternatively, the Pilots argue that

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[42] *Garcia v. Johanns*, 444 F.3d 625, 631 (D.C. Cir. 2006) (quoting *Wagner v. Taylor*, 836 F.2d 578, 586 (D.C. Cir. 1987)).

[43] *Id.* (citing *McCarthy v. Kleindienst*, 741 F.2d 1406, 1410 (D.C. Cir. 1984)).

[44] *See, e.g.*, *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011) (stating that the Court reviews legal issues *de novo*).

[45] *See Commc'ns Workers of Am. v. Am. Tel. & Tel. Co.*, 40 F.3d 426, 433-34 (D.C. Cir. 1994).

[46] *Id.* at 428.

exhaustion would have been futile. But neither of these narrow exceptions to the exhaustion requirement applies here, and thus, the district court properly rejected both arguments. This Court should affirm.

A. Because the Pilots Are Pursuing Claims for Benefits, They Were Required to Exhaust Administrative Remedies.

Some courts allow a limited exception to the exhaustion requirement where a participant alleges a statutory violation of ERISA.[47] This Circuit has not recognized such an exception, but the Court need not address the issue here, because the Pilots do not present such a claim. As the district court noted, the Pilots present "a question of plan administration and not a question of statutory interpretation or application."[48] The "statutory violation" exception simply does not encompass garden-variety benefits claims.

The Complaint characterizes the Pilots' request for interest as an "entitle[ment] to the enforcement of the Plan, as written."[49] The Pilots challenge the necessity and timing of the steps US Airways took in calculating their lump

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[47] *See* Corrected Appellants' Brief at p. 14.

[48] Opinion on Class Certification, Dec. 7, 2012, J.A. 379; *see also* Order on Mot. for Class Certification, July 18, 2012, J.A. 220 ("Because the Plaintiffs challenge the administration of the Plan and not just the legality of the Plan, they cannot rely on any 'statutory violation' exception to the exhaustion requirement.").

[49] Fourth Amended Complaint, J.A. 229-30. While the Pilots also allege in that Count and Count II that the delay violated the requirement for actuarial equivalency, this Court's holding in *Stephens III* disposed of that claim.

sum benefits and the resulting delay in paying those benefits, and argue that they are therefore entitled to interest.[50] This is exactly the type of benefits claim that requires exhaustion.

Unable to mask the plain nature of their claims, the Pilots assert a law of the case argument to support their statutory violation theory.[51] The Pilots cite prior decisions in this case by the Sixth Circuit and this Court, but neither decision supports their argument.

The law of the case doctrine applies only to "'the *same* issue presented a second time in the *same case* in the *same court*.'"[52] The issue in this appeal, however, was not presented in the appeal to the Sixth Circuit. The sole remaining claim is the reasonableness of the delay in paying benefits and the attendant interest due.[53] In contrast, the Sixth Circuit's holding on subject matter jurisdiction centered on the Pilots' allegations about the alleged oral amendment to the Plan and the actuarial equivalency argument, not on the reasonableness of the delay.

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[50] *See* Corrected Appellants' Brief at p. 12 (discussing the basis for interest as any *unreasonable* delay by US Airways).

[51] Corrected Appellants' Brief at p. 10.

[52] *Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc)).

[53] *Stephens III*, 644 F.3d at 440-41; *see also* Corrected Appellants' Brief at p. 12.

Nor did the Sixth Circuit address or decide whether the Pilots' claims under Counts I and II of their Complaint alleged "statutory violations" of ERISA for purposes of the exhaustion requirement. Instead, the Sixth Circuit addressed the preliminary question whether the district court had subject matter jurisdiction over the claims.

The Pilots quote the Sixth Circuit's opinion that: "[i]n this case, the pilots contend that the [] Plan violates ERISA due to its delay in payment of the lump-sum and failure to pay interest,"[54] and that "it is within the federal subject matter jurisdiction to hear a claim questioning whether that final [lump sum] amount is permissible under Section 1054(c)(3)."[55] These passages merely confirm that the Sixth Circuit was assessing whether the claims fell within the compulsory arbitration provisions of the Railway Labor Act.[56] The Sixth Circuit even clarified that it "need not and [could not] decide the merits of the pilots' claims."[57] While the court ultimately concluded that subject matter jurisdiction existed for four of

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[54] Corrected Appellants' Brief at p. 11 (quoting *Stephens v. Ret. Income Plan for Pilots of US Air, Inc.*, 464 F.3d 606, 613 (6th Cir. 2006) ("*Stephens I*")) (emphasis omitted).

[55] Corrected Appellants' Brief at p. 11 (quoting *Stephens I*, 464 F.3d at 614) (emphasis omitted).

[56] *Stephens I*, 464 F.3d at 607, 609.

[57] *Id.* at 613 n.3; *see also* Opinion on Class Certification, Dec. 7, 2012, J.A. 377.

the claims,[58] it never addressed whether those claims presented a statutory violation of ERISA that was exempt from exhaustion.[59]

The Pilots' argument conflates the concept of a claim brought under ERISA with a claim alleging a statutory violation of ERISA. Indeed, as every claim for benefits from an ERISA-covered plan is brought under ERISA,[60] the Pilots' analysis would vitiate the exhaustion requirement entirely.[61]

Similarly, this Court never decided that the Pilots are asserting a statutory violation of ERISA. The Pilots acknowledge that the Court rejected their claim that the lump sum payments violated ERISA's actuarial equivalence requirement. They also recognize that they are entitled to interest only to the extent of any unreasonable period of delay by US Airways. They nevertheless assert that "[t]he

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[58] Rather than merely presenting a "minor dispute" subject to the exclusive jurisdiction of the Retirement Board under the Railway Labor Act. *See Stephens I*, 464 F.3d at 613-14.

[59] *See Id.* at 609, 612-614.

[60] *See* 29 U.S.C. § 1132(a)(1)(B) (providing a civil action to, *inter alia*, "recover benefits due to [a participant or beneficiary] under the terms of [the] plan"); *see also Drinkwater v. Metro. Life Ins. Co.*, 846 F.2d 821, 826 (1st Cir. 1988) (rejecting plaintiff's attempt to characterize a benefit claim as a statutory violation claim).

[61] *See, e.g., Kifafi v. Hilton Hotel Ret. Plan*, Civ.A.98-1517-CKK, 2004 WL 3619156, *3 n.8 (D.D.C. Sep. 27, 2004) ("While it may be a violation of ERISA to improperly apply the terms of a plan to one of its participants, that does not in fact mean that any claim implicating an ERISA-governed retirement plan is in fact a statutory claim for exhaustion purposes.").

reasonableness claim can only be grounded in ERISA and its regulations," noting that the Court relied on a Treasury regulation in addressing the reasonableness question.[62] This argument again confuses a claim brought under ERISA with a claim alleging a statutory violation of ERISA.

The regulation referenced by the Court had nothing to do with lump sums. Instead, that regulation provided guidance about the meaning of "annuity starting date" in the context of certain benefits provided in the form of annuities.[63] In that context, the guidance provided that "[a] payment shall not be considered to occur after the annuity starting date merely because actual payment is reasonably delayed for calculation of the benefit amount if all payments are actually made."[64]

While the Court found this definition useful in providing context to the meaning of annuity starting date for purposes of the Pilots' lump sum payments under the Plan, the regulation does not provide the Pilots with any cause of action for an unreasonable delay in payment because it does not provide any prescriptions related to the payment of lump sums. Rather, as reflected in Count I of the Pilots'

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[62] Corrected Appellants Brief at p. 12; *see also Stephens III*, 644 F.3d at 440 (noting that the Pilots' "lump sum payment does not violate [29 U.S.C.] § 1054(c)(3)).

[63] The regulation's questions and answers were directed toward qualified joint and survivor annuities and qualified preretirement survivor annuities. 26 C.F.R. § 1.401(a)-20 Q&A 10(b)(3).

[64] 26 C.F.R. § 1.401(a)-20 Q&A 10(b)(3).

complaint, the Pilots' claim for interest remains grounded in the terms of the Plan and US Airways' administration thereof.[65] This inherently fact-based inquiry into the Plan's administration is the opposite of a statutory violation claim, and presents the type of plan application issue that is properly before the plan administrator in the first instance.

The cases that the Pilots cite[66] demonstrate the contrast between their benefits claim and the kind of statutory violation claim that would excuse exhaustion. In both *Coleman v. PBGC* and *Greer v. Graphic Communications International Union*, the plaintiffs challenged the legality of a pension plan amendment.[67] *Coleman* concerned the legality of a plan amendment that suspended layoff pension benefits, *Greer* concerned the legality of a plan amendment that reduced pension benefits, and both alleged a violation of ERISA's anti-cutback provision, 29 U.S.C. § 1054(g).[68] In *Rauh v. Coyne*, the plaintiffs

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[65] *See* Fourth Amended Complaint, J.A. 229-30 (seeking enforcement of the Plan's terms under 29 U.S.C. § 1132(a)(1)(B)); *Stephens III*, 644 F.3d at 440-41 (analyzing U.S. Airways' administrative process for calculating and paying lump sum benefits).

[66] Corrected Appellants' Brief at p. 15.

[67] *Coleman v. PBGC*, 94 F. Supp. 2d 18, 23 (D.D.C. 2000); *Greer v. Graphic Commc'ns Int'l Union Officers, Reps. & Organizers Ret. Fund and Plan*, 941 F. Supp. 1, 3 (D.D.C. 1996).

[68] *Coleman*, 94 F. Supp. 2d at 23 ("[T]he crux of plaintiffs' claim does not concern eligibility for [layoff benefits] under the terms of the Products Plan, but rather

alleged that their employer failed to provide them with notice of their right to continue healthcare coverage, in violation of 29 U.S.C. § 1166(a)(4).[69] Finally, in *Garvin v. American Association of Retired Persons* and *Zipf v. American Telephone & Telegraph Co.*, the plaintiffs alleged that they were terminated to prevent their qualification for plan benefits, in violation of 29 U.S.C. § 1140.[70]

In stark contrast, the Pilots do not argue that the Plan or any of its amendments violated ERISA or that US Airways interfered with their statutory rights under ERISA. The Pilots acknowledge that they are merely seeking interest under the Plan for US Airways' unreasonable delay in paying their lump sum benefits, but nonetheless attempt to characterize the delay as a statutory violation.[71]

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challenges the legality of the amendment."); *Greer*, 941 F. Supp. at 3 (explaining that Greer was not seeking a determination of rights or benefits from the plan, but was alleging that the trustee's re-writing of a plan provision improperly reduced benefits and violated several ERISA provisions).

[69] 744 F. Supp. 1186, 1191-92 (D.D.C. 1990).

[70] *Zipf v. Am. Tel. & Tel. Co.*, 799 F.2d 889, 891-92 (3d Cir. 1986); *Garvin v. Am. Ass'n of Retired Persons*, 89-3348 (JHG), 1992 U.S. Dist. LEXIS 2013, *10-11 (D.D.C. Feb. 27, 1992). The other cases cited by the Pilots do not address exhaustion for statutory violations of ERISA at all, but rather, whether exhaustion is jurisdictional. *See Edwards v. Briggs & Stratton Ret. Plan*, 639 F.3d 355, 365 n.5 (7th Cir. 2011); *Mack v. Kuckenmeister*, 619 F.3d 1010, 1020 (9th Cir. 2010); *Crowell v. Shell Oil Co.*, 541 F.3d 295, 308-09 & n.56 (5th Cir. 2008).

[71] Fourth Amended Complaint, J.A. 229-30; *see Grand Union Co. v. Food Employers Labor Relations Ass'n*, 808 F.2d 66, 71 (D.C. Cir. 1987) (rejecting appellant's attempt to restyle its fiduciary breach claims under Title I of ERISA as claims for relief under Title IV of ERISA); *see also Kifafi v. Hilton Hotel Ret.*

However, "the argument that a 'claim for past due benefits is based . . . on the violation of . . . statutory rights under ERISA and is thus not subject to the exhaustion requirement . . . is a simple contract claim artfully dressed in statutory clothing.'"[72] Many other courts have also recognized that these types of benefits claims are best addressed by plan administrators in the first instance.[73] Accordingly, courts have cautioned against expanding the scope of "statutory violation claims" to cover benefit claims in disguise.[74]

In sum, the Pilots assert claims for benefits under the Plan. Both this Court and the district court have analyzed the Pilots' claims in that way, focusing on US Airways' payment practices.[75] As the district court stated, "the remanded issue

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Plan, Civ.A.98-1517-CKK, 2004 WL 3619156, *3 n.8 (D.D.C. Sep. 27, 2004) (not every claim implicating an ERISA-governed retirement plan is a statutory claim for exhaustion purposes).

[72] *Madera v. Marsh USA, Inc.*, 426 F.3d 56, 63 (1st Cir. 2005) (quoting *Drinkwater v. Metro. Life Ins. Co.*, 846 F.2d 821, 826 (1st Cir. 1988)).

[73] *See Coleman*, 94 F. Supp. 2d at 23 (distinguishing between eligibility for plan benefits and the legality of a plan amendment); *Rauh*, 744 F. Supp. at 1191-92 (distinguishing between the denial of a claim for benefits and the right to notice about continuation of benefits); *see also Zipf*, 799 F.2d at 893 (distinguishing a claim for benefits from the interpretation of statutory rights in 29 U.S.C. § 1140).

[74] *See, e.g.*, *Madera*, 426 F.3d at 63 (rejecting claimant's characterization of his claim for benefits as a statutory violation under ERISA) (citation omitted); *Harrow v. Prudential Ins. Co. of Am.*, 279 F.3d 244, 253 (3d Cir. 2002) (refusing to apply statutory violation to the exhaustion requirement for a recast benefits claim).

[75] *See, e.g.*, *Stephens III*, 644 F.3d at 440-41 (analyzing U.S. Airways'

pertains only to the practices of the plan administrator, not the statutory requirements of ERISA."[76] That assertion reiterates the district court's finding in dismissing the Pilots' fiduciary breach claims that the Pilots' suit asserted claims for benefits.[77] Because the Pilots assert a claim for benefits, exhaustion was required.

B. The District Court Correctly Determined that the Pilots Failed to Establish that Exhaustion Was Futile.

No pilot other than Mr. Stephens filed a claim with US Airways for interest on a lump sum payment. Indeed, no other pilot took a single step toward exhausting the Plan's administrative remedies. Nonetheless, the Pilots ask this Court to ignore that the proposed class members sat on their rights, and to excuse their failure to exhaust as "futile." Futility, however, requires an exceptional showing. Because the Pilots' evidence was conclusory and contradicted by other evidence in the record, the district court did not abuse its discretion in finding that they fell short of meeting the exacting futility standard.

This Court has repeatedly affirmed "the familiar principle that, barring exceptional circumstances, parties aggrieved by decisions of pension plan

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administrative process for calculating and paying lump sum benefits).

[76] Opinion on Class Certification, Dec. 7, 2012, J.A. 378 (citing *Air Line Pilots Ass'n v. Nw. Airlines, Inc.*, 627 F.2d 272, 276-77 (D.C. Cir. 1980)).

[77] Order, May 20, 2008, J.A. 12.

administrators must exhaust the administrative remedies available to them under their pension plans before challenging those decisions in court."[78] Exceptional circumstances means just that – even a high likelihood of an adverse decision "does not satisfy [the] strict futility standard."[79] Accordingly, futility is not established where a plan's review committee includes members of management, "where the company has expressed a view as to the meaning of the terms of the plan," or even where a plan administrator has "consistently interpreted the Plan to deny . . . initial claims."[80] Instead, futility is established only where the completion of the administrative process is "clearly useless," because of the **certainty** that a participant's "claim will be denied on appeal."[81]

Applying this strict standard of futility, courts in this Circuit routinely dismiss ERISA claims for benefits where the plaintiff has failed to plead and prove exhaustion of the plan's administrative remedies.[82] By requiring exhaustion, courts

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[78] *Commc'ns Workers of Am. v. Am. Tel. & Tel. Co.*, 40 F.3d 426, 428 (D.C. Cir. 1994); *accord Boivin v. US Airways, Inc.*, 446 F.3d 148, 157 (D.C. Cir. 2006).

[79] *Commc'ns Workers*, 40 F.3d at 433.

[80] *Id.* at 432-33.

[81] *Id.* at 432 (citations and internal quotations omitted); *see also Teitel v. Deloitte & Touche Pension Plan*, 420 Fed. Appx. 116, *1 (2d Cir. 2011) (rejecting the application of futility where two previous appellants had received an unfavorable decision on the exact same issue).

[82] *See, e.g., Zalduondo v. Aetna Life Ins. Co.*, 845 F. Supp. 2d 146, 153-54 (D.D.C.

prevent "premature or unnecessary judicial interference with plan administrators,"[83] and enable "plan administrators to manage plans efficiently, correct their errors outside of court, interpret applicable plan provisions, and assemble a factual record that would assist a reviewing court in evaluating their actions."[84] Courts outside of this Circuit also apply strict standards for futility, even where it will preclude a suit altogether because exhaustion is unavailable or untimely.[85]

2012); *Dorsey v. Jacobson Holman, PLLC*, 707 F. Supp. 2d 21, 27-28 (D.D.C. 2010) (involving administrative remedies under the American Recovery and Reinvestment Act of 2009); *Becker v. Weinberg Group, Inc. Pension Trust*, 473 F. Supp. 2d 48, 60 (D.D.C. 2007) (rejecting claims that were not exhausted with the plan administrator).

[83] *Cox v. Graphic Commc'ns Conf. of Int'l Bhd. of Teamsters*, 603 F. Supp. 2d 23, 29 (D.D.C. 2009) (citing *Commc'ns Workers of Am.*, 40 F.3d at 432).

[84] *Zalduondo*, 845 F. Supp. 2d at 152-53 (citation omitted); *Zalduondo v. Aetna Life Ins. Co.*, 10-1685 (RCL), 2013 WL 3462572, *5 (D.D.C. July 10, 2013) (same); *see also Commc'ns Workers of Am.*, 40 F.3d at 433-34.

[85] *See, e.g., Gayle v. United Parcel Serv., Inc.*, 401 F.3d 222, 230 (4th Cir. 2005) ("[S]ince the pursuit and exhaustion of internal Plan remedies is an essential prerequisite to judicial review of an ERISA claim for denial of benefits, and since this is impossible here, [plaintiff]'s claims are barred. In such situations dismissal with prejudice is required.") (internal citations omitted); *D'Amico v. CBS Corp.*, 297 F.3d 287, 293 (3d Cir. 2002) ("Thus, Plaintiffs' decision to bring a federal suit rather than pursuing administrative remedies plainly included the possibility of summary judgment based on failure to exhaust."); *Harris v. Pepsi Bottling Group, Inc.*, 438 F. Supp. 2d 728, 733 (E.D. Ky. 2006) ("[B]ecause Harris's opportunity to administratively appeal has expired, dismissal with prejudice is appropriate.").

The Pilots make broad assertions to support their position on futility. They declare that "[t]he only evidence regarding the Board's policies and practices before the [district] court established that those appeals, if filed, would have been rejected by application of the Board's decision rejecting Stephens's appeal."[86] But contrary to these blanket assertions, the record before the district court did not establish any certainty of an adverse decision, or even that an adverse decision was highly likely.

The Plan contained explicit procedures for challenging a benefit denial. A participant had 60 days to request reconsideration by US Airways (the plan administrator).[87] If US Airways denied the claim on reconsideration, the participant could appeal to the Retirement Board.[88] The Retirement Board consisted of two representatives of US Airways and two representatives of the Pilots' union, ALPA; if those four members reached a deadlock, they designated a neutral arbitrator to decide the issue.[89] The resulting determination could then be challenged in court.

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[86] Corrected Appellants' Brief at p. 16.

[87] Plan § 14.4, J.A. 117-18.

[88] Plan §§ 14.1, 14.3, 14.4, J.A. 116-18; Letter of Agreement No. 9 between USAir, Inc. and ALPA (Feb. 9, 1990), §§ 2.2 to 2.3, J.A. 65.

[89] Letter of Agreement No. 9 between USAir, Inc. and ALPA (Feb. 9, 1990) §§ 1.2, 2.1, J.A. 63, 65.

The district court accordingly found that the use of an independent, neutral arbitrator as a tie-breaker made it impossible to establish the result of any future appeal, much less multiple appeals.[90] And the decision in Mr. Stephens's arbitration is even less dispositive of future arbitrations because neither Mr. Stephens nor his representative even attended the Retirement Board hearing to argue his claim, even though they had been advised that the Retirement Board would hear the case *de novo*; that US Airways' counsel would be presenting US Airways' position on the issue; and that "your failure to appear and present evidence will likely hinder your chances of succeeding."[91]

The Pilots base their futility argument on two declarations by John Davis,[92] who was Mr. Stephens's union representative on his claim.[93] Mr. Davis was not a member of the Retirement Board, and he relied entirely on his experience as Chairman of the Pittsburgh Local Executive Council of ALPA.[94] Mr. Davis broadly declared that the Retirement Board would have treated the decision in

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[90] Opinion on Class Certification, Dec. 7, 2012, J.A. 381.

[91] J.A. 314-15, 317.

[92] Corrected Appellants' Brief at pp. 17-18 (citing DE 62 at Exhibits D & E, Decls. of John Davis).

[93] *See* J.A. 159-61.

[94] J.A. 254-55 ¶¶ 3, 4, 7; J.A. 256-57.

Mr. Stephens's appeal as precedential, but he cited to no supporting authority.[95] Such "[a] blanket assertion, unsupported by any facts, is insufficient to call th[e futility] exception into play."[96]

The Pilots attempt to strengthen their argument by citing the minutes of a September 21, 2001 meeting of the Retirement Board, discussing the "Everett" case. The Pilots state that the Retirement Board "decided the Everett Case in the same way it had treated an earlier case because, as memorialized in the minutes 'an issue couldn't be reconsidered once the Board has decided it.'"[97] A closer examination of the record, however, reveals that the Retirement Board did not decide the Everett case at that meeting, or even agree that there was any proscription against the Retirement Board reconsidering an issue. A separate

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[95] Mr. Davis' second declaration notes that the basis for the Retirement Board's precedential treatment of a prior decision is from the Section 1.6 of the letter of agreement establishing the Retirement Board, but that provision merely states that the Retirement Board's decision in a given dispute will be final and binding on US Airways, ALPA, and any "person having an interest in such decision." *See* J.A. 257 ¶ 5; Letter of Agreement No. 9 between USAir, Inc. and ALPA (Feb. 9, 1990) § 1.6, J.A. 64.

[96] *Drinkwater v. Metro. Life Ins. Co.*, 846 F.2d 821, 826 (1st Cir. 1988); *see also Commc'ns Workers of Am. v. Am. Tel. & Tel. Co.*, 40 F.3d 426, 433 (D.C. Cir. 1994) (noting that a high likelihood of rejection does not establish the certainty necessary for futility); *Cox v. Graphic Commc'ns Conf. of Int'l Bhd. of Teamsters*, 603 F. Supp. 2d 23, 31 (D.D.C. 2009) (plaintiff failed "to meet her burden of showing that filing an appeal would be 'clearly useless'").

[97] Corrected Appellants' Brief at p. 18 (citing DE 62-6).

version of those same meeting minutes clarified that the Retirement Board reached a deadlock on the Everett case because the two ALPA representatives "disagree[d] with the Company's restriction or limiting issues before the Board in light that a claim was brought before the Board" previously.[98]

Based on the record, the district court rightfully concluded that, "taken as a whole, [the Pilots'] evidence essentially amounts to speculation as to how the Board would have decided other appeals; it shows neither that the Board viewed its denial of Mr. Stephens's claim as unconditionally prohibiting future claims nor that it absolutely refused to reconsider its decisions in subsequent cases."[99] Relying on that evidence alone would have been within the district court's discretion, but its conclusion is bolstered by other evidence from the record. For example, on July 19, 2001, the Retirement Board considered and reached a

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[98] J.A. 301, 305. As PBGC noted in the district court, there are at least three versions of these meeting minutes. *See* J.A. 293-96, 297-300, and 301-307. The "deadlock" in the Everett case is confirmed by a declaration that another group of US Airways pilots filed in a different lawsuit against PBGC. *See* J.A. 342 ¶¶ 20-24 (stating that "the *Everett* plaintiffs submitted their claims before the US Airways Retirement Board . . . [and] [i]n 2000, the Board deadlocked on [those claims], with the two Company members voting against the pilots and the two ALPA members voting for them. . . . The four-person Board had not yet submitted the matter to the five-person Board, when the pension [plan] was terminated and PBGC became trustee."). The district court subsequently granted summary judgment on the "Everett" issue, *Davis v. PBGC*, 2012 WL 1943678 (D.D.C. May 30, 2012), *appeal pending*, No. 12-5274 (D.C. Cir.).

[99] Opinion on Class Certification, Dec. 7, 2012, J.A. 381.

deadlock on the case of Richard [last name redacted], even though the minutes specifically stated that "[h]is claim is the same as the [Jones], [Smith], [Baker] claims."[100]

Moreover, the district court noted that the Retirement Board even expected "that 'the 45-day issue would again be addressed outside of the Stephens case, which will probably result in an additional arbitration.'"[101] The Pilots' dismiss this statement as "speculation" based on "one Board member's inaccurate prediction that other pilots may appeal."[102] But the Pilots fail to explain how exhaustion was clearly useless, when a member of the Retirement Board himself expected that the "45 day issue" would probably result in a second arbitration – an arbitration conducted by an impartial arbitrator pursuant to the Retirement Board's procedures.[103]

The result in Mr. Stephens's case hardly determined what might have happened if another pilot, or indeed many other pilots, had sought interest from US

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[100] J.A. 284, 289. PBGC has used substitute names to eliminate privacy concerns.

[101] Opinion on Class Certification, Dec. 7, 2012, J.A. 381 (quoting Dkt. No. 64-1 at pp. 26-28 ¶ 14 (ALPA-5184 to ALPA-5186)).

[102] Corrected Appellants' Brief at p. 19.

[103] J.A. 308-10 ("Ed Hill stated that the 45 day issue would again be addressed outside of the Stephens case which will probably result in an additional arbitration."); *see Commc'n Workers of Am. v. Am. Tel. & Tel. Co.*, 40 F.3d 426, 433 (D.C. Cir. 1994) (rejecting futility absent the certainty of an adverse decision).

Airways, much less if such claims had been initially denied and then appealed to the Retirement Board. In fact, the record reflects that US Airways continued to consider the lump sum payment issue well after February 1997, when Mr. Stephens filed his claim.[104]

The Pilots failed to establish the *certain* futility that is required to excuse the exhaustion requirement.[105] Accordingly, the district court was well within its discretion in rejecting the application of futility, and this Court should affirm.

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[104] *See, e.g.*, J.A. 318-19 (summary of an ALPA meeting with US Airways on April 23, 1998, where they addressed ways to resolve the "Stephens issue"); J.A. 291-92 ("At this same August 2nd meeting, the company stated that they are unwilling to perform more than one calculation. Therefore, more talks should be scheduled to resolve the 45 day issue."); J.A. 316 ("Company is not ready to discuss 45-day payout for retirees.") (emphasis removed).

[105] *See Commc'ns Workers*, 40 F.3d at 433; *see also Cox v. Graphic Commc'ns Conf. of Int'l Bhd. of Teamsters*, 603 F. Supp. 2d 23, 31 (D.D.C. 2009) (rejecting plaintiff's speculation and requiring a certainty that her claim would be denied).

II. Because the Pilots Failed to Establish That the Proposed Class Members' Claims Are Typical, the District Court Correctly Denied Class Certification.

This Court reviews the district court's denial of class certification conservatively, subject to change for only an "'abuse of discretion or erroneous application of legal criteria.'"[106] The district court found that the Pilots meet most of the class certification requirements in Federal Rule of Civil Procedure 23, but noted that "most is not all."[107] Because Mr. Stephens was the only pilot to exhaust the Plan's administrative procedures, the district court concluded that he was in a markedly different position from every other proposed class member, and that the proposed class therefore lacked typicality.[108]

The Pilots attempt to cure the typicality deficiency by asserting that exhaustion was not required. But as previously discussed, each proposed class member was required to exhaust administrative remedies, and the Pilots have not

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[106] *Garcia v. Johanns*, 444 F.3d 625, 631 (D.C. Cir. 2006) (quoting *Wagner v. Taylor*, 836 F.2d 578, 586 (D.C. Cir. 1987)).

[107] Opinion on Class Certification, Dec. 7, 2012, J.A. 375.

[108] *Id.* (finding that the proposed class members were in a drastically different position with respect "to a potentially dispositive affirmative defense asserted by the PBGC."); *see also Garcia*, 444 F.3d at 631 ("Failure to adequately demonstrate any of the four [criteria in Rule 23] is fatal to class certification.").

established that exhaustion would have been futile.[109] Accordingly, this Court should affirm the district court's denial of class certification.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's orders dated July 18, 2012, December 7, 2012, and April 3, 2013.

Date: October 29, 2013
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[109] *Garcia*, 444 F.3d at 631 ("[W]e will affirm the district court even if we would have ruled differently in the first instance.") (citing *McCarthy v. Kleindienst*, 741 F.2d 1406, 1410 (D.C. Cir. 1984)).

CERTIFICATE OF SERVICE

I, Colin B. Albaugh, certify that on October 29, 2013, true and correct copies of the Appellee's Brief were served via the Court's ECF filing system upon the following counsel:

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CERTIFICATE OF COMPLIANCE

I, Colin B. Albaugh, hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(B), that the word count of Appellee's brief is 7,517, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Appellee's brief was prepared using Microsoft Word 10, and Appellee's counsel has relied on the word count function of Microsoft Word 10 to calculate the word count.

Appellee's brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman font.

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