ORAL ARGUMENT NOT YET SCHEDULED
No. 14-5181

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

US AIRLINE PILOTS ASSOCIATION,
Plaintiff - Appellant
v.
PENSION BENEFIT GUARANTY CORPORATION,
Defendant – Appellee.

On Appeal from the United States District Court for the District of Columbia
Civil Action No. 1:09-cv-01675 (Frederick J. Scullin, Jr., J.)

INITIAL BRIEF OF APPELLEE PENSION BENEFIT
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December 29, 2014

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

All parties appearing before the district court and in this Court are listed in the Initial Brief of Appellant. 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

Reference to the ruling at issue appears in the Initial Brief of Appellant.

C. Related Cases

This case has not previously been before this Court or any other court of appeals. Prior to his appeal, this case was before the United States District Court for the District of Columbia (Scullin, J.), No. 1:09-cv-1675. Counsel is unaware of any related case pending in this Court or in any other court.

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Counter-Statement of the Issue

After holding a bench trial, the district court found that the Pension Benefit Guaranty Corporation ("PBGC") did not breach any fiduciary duty under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") in investigating and valuing potential claims that the terminated Retirement Income Plan for Pilots of US Airways (the "Plan") may have against its former sponsor, fiduciaries, or actuaries. Appellant US Airline Pilots Association ("USAPA") asserts that the district court's findings of fact are clearly erroneous. Should the district court judgment be affirmed?

Counter-Statement of the Case

Appellant USAPA is an employee organization that represents about 5,200 active US Airways pilots. Initial Brief of the Appellant US Airline Pilots Association ("Brief") at i. Appellee PBGC is the federal agency that guarantees pension benefits in private-sector defined-benefit pension plans. The Plan terminated in 2003, and PBGC became its trustee, responsible for paying $1.7 billion in benefits under Title IV of ERISA to its nearly 7,000 participants, including USAPA members.[1]

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[1] Dkt. #6-3 at page 9 of 27, Ranade Decl. Ex. 1 (actuarial case memo). The Plan had liabilities valued at $3.4 billion and assets valued at $1.2 billion, for a total underfunding (called unfunded benefit liabilities) of $2.2 billion (*id.*); under Title IV, PBGC pays all guaranteed benefits, plus some non-guaranteed benefits, as described below.

USAPA brought this suit in 2009, alleging that PBGC failed to investigate and pursue potential misconduct by the Plan's former fiduciaries that occurred before PBGC became trustee. USAPA spent nearly 15 months in discovery, convinced that the former fiduciaries must have committed a breach for the Plan to have become as underfunded as it did. But USAPA could identify no actual claim that PBGC could have pursued. As the trial court found, none of the "red flags" that USAPA ultimately identified constituted red flags at all, and the Plan's decline is explained by unfortunate but ordinary factors. Accordingly, the district court refused to take the unprecedented step of appointing an outside trustee to look again for wrongdoing at the expense of the federal pension insurance program. That decision was fully supported by the trial record, and was not clearly erroneous.

Two independent grounds also require affirmance of the decision below, though not adopted by the district court: (i) PBGC's investigative and enforcement decisions are presumptively unreviewable, and (ii) the remedy USAPA seeks, appointment of a replacement trustee, is not "appropriate equitable relief."

Statutory Background

PBGC is the wholly owned United States government corporation that administers the nation's pension termination insurance program established by

Title IV of ERISA.[2] PBGC is funded by insurance premiums paid by employers that sponsor PBGC-insured plans, earnings from investments, assets from terminated plans, and recoveries from companies formerly responsible for the plans.[3] PBGC receives no funds from general tax revenues, and the United States is not responsible for the agency's obligations.[4] Since 1974, PBGC has become responsible for more than 1.5 million people in more than 4,600 terminated plans, making payments of $5.5 billion to retirees in fiscal year 2014.[5] PBGC took responsibility for 97 additional plans in fiscal year 2014 alone, and its total deficit as of September 2014 was $61.8 billion.[6]

When a pension plan covered by Title IV terminates without enough assets to pay all of its promised benefits, PBGC typically becomes responsible for, among other things, collecting amounts due to the plan and to PBGC, and paying plan participants and beneficiaries their pension benefits as determined in

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

[3] *See* PBGC Ann. Rep. (2014) at 10, http://www.pbgc.gov/documents/2014-annual-report.pdf.

[4] *Id.*; 29 U.S.C. § 1302(g)(2).

[5] PBGC Ann. Rep. (2014) at 2.

[6] *Id.* at 2, 20.

accordance with Title IV.[7] PBGC combines the assets of terminated plans with the agency's insurance funds to pay benefits to current and future retirees.

PBGC serves its mission with respect to a terminated plan as federal guarantor of the benefits payable, up to statutory limits, and as statutory trustee of the plan.[8] Except to the extent inconsistent with the provisions of Title IV, the statutory trustee is subject to the same duties as a Chapter 7 bankruptcy trustee.[9] The primary function of the trustee, like that of a Chapter 7 trustee, is to marshal the terminated plan's assets,[10] a function that is substantially complete when the

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[7] *See, e.g.*, 29 U.S.C. §§ 1321, 1322, 1342, 1344, 1361, 1362.

[8] *See Caskey v. PBGC*, No. 97-4240, 1999 U.S. DIST. LEXIS 21448, at *14 (E.D. Pa. Jan. 14, 1999), *aff'd mem.*, 203 F.3d 816 (3d Cir. 1999).

[9] 29 U.S.C. § 1342(d)(3) provides:

> Except to the extent inconsistent with the provisions of this chapter [ERISA], or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as those of a trustee under section 704 of title 11, and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 1002 of this title and under section 4975(e) of title 26 (except to the extent that the provisions of this subchapter [Title IV of ERISA] are inconsistent with the requirements applicable under part 4 of subtitle B of subchapter I of this chapter [Title I of ERISA] and of such section 4975).

[10] 29 U.S.C. § 1342(d); *see* 11 U.S.C. § 704(a)(1).

assets are collected and pooled with the assets of other terminated plans.[11] PBGC as guarantor is responsible, *inter alia*, for determining and paying benefits due to plan participants and beneficiaries, according to the rules in Title IV.[12]

Upon plan termination, the plan's sponsor and its controlled group members become liable to PBGC for the amount of the plan's unfunded benefit liabilities.[13] This liability is for the shortfall between a plan's assets and its liabilities, measured according to actuarial assumptions set forth in PBGC's regulations.[14] The plan sponsor and its controlled group members also become liable to PBGC for the total amount of due and unpaid minimum funding contributions owed to the plan.[15] PBGC may take actions that the plan administrator could have taken, such as collecting for the plan any amounts due the plan, and prosecuting any suit on behalf of the plan.[16]

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[11] *See* 29 U.S.C. § 1342(d); 11 U.S.C. § 704(a)(1); 29 U.S.C. § 1342(a) (authorizing PBGC to pool the assets of terminated plans).

[12] 29 U.S.C. §§ 1321, 1322, 1344, 1361.

[13] 29 U.S.C. § 1362(b).

[14] *See* 29 U.S.C. § 1301(a)(18); 29 C.F.R. §§ 4044.41 - 4044.57.

[15] 29 U.S.C. § 1362(c).

[16] 29 U.S.C. § 1342(d)(1)(B).

The actuarial assumptions applied to determine the amount of funding required for an ongoing plan are different from those used to determine liability for a terminated plan. The former incorporate the actuary's "best estimate of anticipated experience under the plan."[17] The latter are established in PBGC's regulations, selected to approximate the market price of annuity contracts to pay the benefits promised under the terminated plan.[18]

PBGC pays three types of benefits under a terminated plan: (1) guaranteed benefits; (2) asset-funded benefits; and (3) section 1322(c) benefits. PBGC pays guaranteed benefits regardless of the plan's funded level. Subject to statutory limitations, this includes payment of all nonforfeitable benefits under the plan's terms at the time it terminated.[19] Limitations include a cap on the amount of PBGC's guarantee and a phase-in of its guarantee of benefit increases made during

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[17] 26 U.S.C. § 430(h)(1) (current law). The provision that applied during the years before the Plan's termination, 26 U.S.C. § 412(c)(3) (repealed 2006), permitted more discretion over certain assumptions.

[18] 29 C.F.R. §§ 4044.41-.75. As the bankruptcy court explained in the US Airways bankruptcy: "When an ongoing plan experiences investment losses in a particular year, the shortfall can be made up by increased contributions in subsequent years. With a terminated plan, by contrast, there are no future contributions, and thus, only one chance to get it right." *In re US Airways Group, Inc.*, 303 B.R. 784, 795 (Bankr. E.D. Va.) (describing PBGC assertion with approval).

[19] 29 U.S.C. §§ 1301(a)(8); 1322.

the five years before termination.[20] Generally, participants whose plan benefit is fully guaranteed will not receive either asset-funded benefits or section 1322(c) benefits.

Asset-funded benefits are additional benefits (beyond guaranteed benefits) that may be payable from a terminated plan's assets.[21] The amount of a participant's asset-funded benefits depends on how well funded the plan was and whether some or all of the participant's benefit is entitled to priority in the six-tier hierarchy in 29 U.S.C. § 1344(a). PBGC determines the total amount of a terminated plan's assets based on their fair market value as of the plan's termination date.[22]

Once PBGC values a plan's assets as of the termination date, that valuation is not changed by subsequent events, with rare exceptions. This is because the statute requires that "[a]ny increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, the corporation" (*i.e.*, PBGC).[23] Thus, although

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[20] 29 U.S.C. § 1322(b)(1), (b)(3), (b)(7); *see* 29 C.F.R. §§ 4022.24-.25.

[21] 29 U.S.C. § 1344(a). PBGC's regulations describe the sum of guaranteed benefits and asset-funded benefits as "Title IV benefits." 29 C.F.R. § 4001.2.

[22] 29 C.F.R. § 4044.41(b); *see* 29 U.S.C. § 1344(c).

[23] 29 U.S.C. § 1344(c); *see* 29 C.F.R. § 4044.3. In rare cases, PBGC may change the valuation of a plan's assets – "only if there has been a material mistake of fact

post-termination variables such as PBGC's returns on its investment portfolio may affect the agency's financial position, they do not affect the amount of a plan's underfunding or participants' statutory benefits.[24]

A terminated plan's assets are allocated to benefits provided by the plan according to the six "priority categories" in section 1344, starting with priority category 1 ("PC1"), and then moving to priority category 2 ("PC2"), and so on, until all assets are exhausted.[25] As specified in section 1344, benefits in PC1 and PC2 are those derived from a participant's own contributions to the plan. Benefits in PC3 (of which a portion may be non-guaranteed) are those benefits that a retiree was receiving as of three years before the plan's termination date, or that a non-retired participant could have received if he or she had retired then (but excluding benefit increases made during the five years before termination). Benefits in PC4 are all PBGC-guaranteed benefits that are not in PC1 through PC3. Benefits in PC5 and PC6 are not guaranteed by PBGC: PC5 consists of all other nonforfeitable (*i.e.*, vested) benefits under the plan, and PC6 of all other (non-

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or if there has been an extraordinary change of circumstances such as a substantial unexpected recovery in a legal action involving the plan." Dkt. #6-2, Jones Decl. at ¶ 11.

[24] *See* 29 U.S.C. § 1362(b)(1) (liability to PBGC is the amount of unfunded benefit liabilities "as of the termination date"); 29 U.S.C. § 1344(c) (quoted above).

[25] 29 U.S.C. § 1344(a); 29 C.F.R. § 4044.10(d).

vested) benefits under the plan. Thus, under section 1344, plan assets are allocated to guaranteed benefits in PC4 before they may be allocated to pay additional, non-guaranteed benefits in PC5 or PC6. As the Supreme Court has explained, "the allocation scheme 'protect[s] against evasion of the . . . limits on the [PBGC's] insurance benefits by use of pension fund assets to first pay uninsured benefits.'"[26]

Lastly, PBGC pays section 1322(c) benefits. Section 1322(c) provides that a plan's participants and beneficiaries will generally share a portion of PBGC's recoveries for its statutory claim relating to a plan's unfunded benefit liabilities.[27] These benefits are intended to cover a portion of participants' unfunded non-guaranteed benefits—*i.e.*, those benefits that are neither guaranteed by PBGC nor funded by the plan's assets.[28]

Counter-Statement of the Facts

1. Plan Termination

US Airways was the sponsor of the Plan. Dkt. #1, Compl. at ¶ 7. US Airways filed for Chapter 11 protection in August 2002. *Id.* at ¶ 10. The Plan

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[26] *Mead Corp. v. Tilley*, 490 U.S. 714, 718 n.2 (1989), quoting S. Rep. No. 93-383 at 84 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4968.

[27] 29 U.S.C. § 1322(c); *see also* 29 U.S.C. § 1362(b).

[28] See 29 U.S.C. § 1301(a)(19), which defines the term "outstanding amount of benefit liabilities." PBGC usually uses "unfunded non-guaranteed benefits" because it is more descriptive.

terminated as of March 31, 2003, and PBGC became its statutory trustee. *Id.* at ¶ 17. PBGC reviewed and valued the Plan's assets, then allocated them to Plan benefits as provided in ERISA and PBGC's regulations, determining the resulting amount of participants' statutory benefits and adding PBGC funds to ensure payment of all guaranteed benefits.[29]

PBGC determined that as of its termination date, the Plan had unfunded benefit liabilities of $2.2 billion.[30] The Plan's assets were sufficient to fund all benefits through statutory priority category 3 ("PC3"), but only $40 million of the more than $500 million of guaranteed benefits in priority category 4 ("PC4").[31] PBGC must use its insurance funds to pay the remainder of those guaranteed benefits. *Id*.

2. The "Related" Lawsuits

Various groups of US Airways pilots filed three lawsuits against PBGC regarding the Plan. They were designated "related cases" in the district court, and in each one the pilots unsuccessfully sought a preliminary injunction against PBGC. In the first suit, *Boivin,* a group of retired pilots sought immediate

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[29] Dkt. #58-4, Plan asset audit (Jan. 11, 2006); Dkt. #6-2, Jones Decl. at ¶¶ 12-15.

[30] Dkt. #6-3, Ranade Decl. at ¶ 5.

[31] 29 U.S.C. §§ 1344(a)(3), (a)(4); Dkt. #6-2, Jones Decl. at ¶¶ 12-15.

adjustments to their estimated benefits (i.e., after PBGC began paying estimated benefits to Plan retirees, but before it issued benefit determinations). The district court denied the motion for preliminary injunction, and ultimately ruled in PBGC's favor. This Court ordered the case dismissed for failure to exhaust administrative remedies.[32]

Once PBGC issued benefit determinations, a second, larger group, the *Davis* pilots, filed an administrative appeal with PBGC's Appeals Board. One of their allegations was that the Plan's prior fiduciaries had impermissibly transferred Plan assets to another US Airways benefit plan. In a February 29, 2008 decision, the PBGC Appeals Board stated that it had referred the pilots' asset-transfer allegation to PBGC's Office of General Counsel. After the Appeals Board ruled, the *Davis* pilots filed suit (which USAPA designated as a related case to the instant suit), challenging the Appeals Board's decision on a variety of issues.[33] The *Davis* pilots

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[32] *Boivin v. US Airways, Inc.*, 297 F. Supp. 2d 110 (D.D.C. 2003) (denying preliminary injunction); No. 1:03-cv-02373, 2005 WL 713622 (D.D.C. Mar. 17, 2005) (granting partial summary judgment on one claim and dismissing remaining claim), *vacated and remanded*, 446 F.3d 148 (D.C. Cir. 2006) (ordering dismissal of pilots' claims without prejudice).

[33] *Davis v. PBGC*, No. 1:08-cv-01064 (JR) (filed June 20, 2008). The pilots' appeal letter is Dkt. #36-4, Exhibit C to the Second Amended Complaint in that action; the PBGC Appeals Board's decision of Feb. 29, 2008, is Dkt. #36-1 & 36-2, Exhibit A to the Second Amended Complaint.

also moved for a preliminary injunction, seeking to stop PBGC from collecting benefit overpayments. The court denied that motion, and this Court affirmed.[34]

3. Procedural History

While the *Davis* case was pending, on June 18, 2009, USAPA counsel wrote to PBGC, alleging that "USAPA and its members suspect that, before the [2002-03 US Airways] bankruptcy proceeding and ensuing termination, the Plan's fiduciaries breached their duties by transferring assets out of the Plan and by making improper investments." Dkt. #1, Compl. Ex. 1. At that time PBGC had not yet completed its investigation of the similar asset-transfer allegations made in *Davis*. Responding to the June 18 letter, PBGC's General Counsel wrote on July 9, 2009, to request more specific information, promising to review the allegations if USAPA provided specifics. Compl. Ex. 2. On July 17, 2009, USAPA counsel wrote a second letter, identifying six "suspicious occurrences, investments and transactions." Compl. Ex. 3 at 3.

On September 2, 2009—seven weeks after its initial letter—USAPA sued PBGC. USAPA asked the court to either: (a) direct PBGC to investigate and pursue potential claims for fiduciary breach against the Plan's former fiduciaries; (b) appoint a "permanent supplemental trustee" to do so; or (c) remove PBGC and appoint a replacement trustee to do so. Compl. at 13. USAPA also sought

[34] 596 F. Supp. 2d 1 (D.D.C. 2008), *aff'd*, 571 F.3d 1288 (D.C. Cir. 2009).

attorneys' fees and other costs and expenses, citing 29 U.S.C. § 1303(f). *Id.* With its complaint, USAPA filed a motion for preliminary injunction. The district court denied that motion, as well as USAPA's subsequent "renewed" motion for preliminary injunction. Dkt. ##22, 47. In its second opinion, the district court held that USAPA had not clearly established that PBGC's investigative decisions are subject to judicial review, or that its members would be irreparably harmed absent an injunction. Dkt. #47 (Mar. 14, 2011). The case subsequently was transferred to a different district judge. Dkt. #71.

PBGC's Office of General Counsel investigated the allegations of both the *Davis* and the *USAPA* plaintiffs. On the asset-transfer allegation, the investigators issued a report concluding that there was no evidence of any improper transfers of assets between plans; the General Counsel concurred in the investigators' recommendation to take no further action in the matter.[35] On January 28, 2013, the district court in the *Davis* case granted the parties' joint motion to dismiss the asset-transfer allegation, after entering summary judgment in PBGC's favor on all other claims asserted in the complaint.[36] This Court affirmed.[37]

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[35] *See* Dkt. #58-6, First investigative report (Oct. 14, 2009), with concurrence memorandum (Oct. 20, 2009).

[36] *Davis v. PBGC*, No. 1:08-CV-1064 (FJS), Dkt. #125.

[37] *Davis*, 734 F.3d 1161 (D.C. Cir. 2013).

Concerning the assertions of wrongdoing unique to USAPA, the PBGC investigator issued a report concluding that there was no evidence of fiduciary breach related to those allegations; the General Counsel concurred.[38] Discovery ran from March 2010 until June 2011. USAPA identified 27 topics of examination under Fed. R. Civ. P. 30(b)(6), and PBGC produced eight deposition fact witnesses and more than 200,000 pages of documents. USAPA also deposed three non-PBGC fact witnesses, and served four third-party document subpoenas.

PBGC moved for judgment on the pleadings, or in the alternative, for summary judgment, and USAPA moved for summary judgment. The district court denied both motions, finding that there were "issues of fact regarding whether [PBGC] had breached its fiduciary duties."[39]

4. *The Trial and the District Court Decision*

The court held a bench trial from February 26-28, 2013, and issued its decision on June 20, 2014.[40] The court held that PBGC did not breach its statutory and fiduciary duties as Title IV trustee of the Plan. It noted the US Airways bankruptcy court's finding in 2003 that essentially two factors caused the funding shortfall for the Plan: "poor performance by the stock market" and "the decline in

[38] Dkt. #58-7, Second investigative report (Nov. 24, 2010), with concurrence.

[39] Dkt. #77, Order (Mar. 19, 2012) at 1.

[40] Dkt. #127, Mem. Dec. & Order (hereafter "Op.").

long-term interest rates to a 40-year historic low." Op. at 8. It observed that PBGC has invariably been appointed statutory trustee for every terminated plan that had insufficient assets to cover guaranteed benefits. *Id.* at 9 n.4. The court also found that having two separate entities serve as guarantor and trustee "would greatly add to the cost and time necessary to administer the termination insurance program." *Id.*

The court discussed each of the nine "red flags" that USAPA had identified as warranting PBGC investigation, concluding that "the evidence adduced at trial clearly explained why none of these purported 'red flags' were, in fact, 'red flags' under the circumstances of this case." *Id.* at 5. Finally, the court found that PBGC had prudently conducted two plan asset audits of the Plan, as well as its investigation of USAPA's allegations. *Id.* at 17. The court concluded that PBGC "made all reasonable attempts to investigate the financial affairs of the Plan to identify any possible fiduciary breaches and thoroughly investigated any claims that were brought to its attention." *Id.* Accordingly, the court rejected USAPA's allegation that PBGC breached a fiduciary duty, and entered judgment for PBGC.

Summary of the Argument

After a bench trial, the district court held that USAPA had "failed to prove, by a preponderance of the evidence, that PBGC breached any of its fiduciary duties with respect to the Plan." Op. at 17. Accordingly, the court declined to appoint a trustee to replace PBGC and investigate the potential claims that USAPA urges might exist. Notwithstanding the extraordinary deference due to the trial court, USAPA argues that the district court clearly erred. It did not.

The district court's findings of fact are not clearly erroneous. The court correctly found that on the facts of this case, PBGC committed no breach by performing the investigations and analyses that it did. It was USAPA's burden to prove its case, and it failed. PBGC need not investigate every mere assertion of a potential fiduciary breach unless a red flag strongly suggests that there is a colorable claim and a reason to believe that pursuing it would achieve a meaningful recovery. The district court found from evidence adduced at trial that none of USAPA's purported "red flags" were in fact red flags.

On appeal, USAPA has narrowed its purported red flags to two: "risky" investment decisions and "inaccurate" actuarial assumptions by the Plan's former fiduciaries and actuaries. But as the district court found, USAPA did not identify a single such decision or assumption that was actionable or even outside the norm for large pension plans. PBGC's argument to the bankruptcy court in a different context did not assert otherwise—the mere fact that something may have "contributed to the Plan's failure" (Brief at 18) does not make it actionable. This Court should affirm.

In addition, the Court may affirm the holding below on either of two independent alternative grounds. First, PBGC's investigative and enforcement decisions at issue here are unreviewable. Second, replacing PBGC as trustee is not appropriate equitable relief because (i) it would not benefit plan participants, (ii) it would be futile, because any claims against former plan officials or actuaries are time-barred, and (iii) it would injure other parties and the public interest.

Standard of Review

During appellate review, a trial court's findings of fact are virtually sacrosanct. As this Court has declared, "an appellant seeking reversal of a trial court's findings of fact in a bench trial faces a daunting task."[41] The "clearly erroneous" standard applies to such findings, whether based on live testimony or documentary evidence, and whether or not based on credibility determinations.[42] And the clearly erroneous standard applies to "the inferences drawn from findings of fact as well as to the findings themselves."[43]

[41] *Overby v. NALC*, 595 F.3d 1290, 1293 (D.C. Cir. 2010).

[42] *Id.; Barhoumi v. Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010).

[43] *Overby*, 595 F.3d at 1294 (*quoting Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983)); *accord Al-Madhwani v. Obama*, 642 F.3d 1071, 1074 (D.C. Cir. 2011); *Awad v. Obama*, 608 F.3d 1, 7 (D.C. Cir. 2010).

In its review, the court of appeals does not "weigh each piece of evidence in isolation, but consider[s] all of the evidence taken as a whole."[44] Thus, "where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[45] Moreover, when reviewing for clear error, the court of appeals may not reverse "even though convinced that had [it] been sitting as the trier of fact, [it] would have weighed the evidence differently."[46] Instead, the court may reverse only if, "on the entire evidence," it is "left with the definite and firm conviction that a mistake has been committed."[47]

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[44] *Awad*, 608 F.3d at 7.

[45] *Overby*, 595 F.3d at 1294 (*quoting Anderson v. City of Bessamer*, 470 U.S. 564, 572 (1985)).

[46] *Barhoumi*, 609 F.3d at 423 (*quoting Anderson*, 470 U.S. at 574).

[47] *Anderson*, 470 U.S. at 573 (*quoting United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). A similar standard applies in determining whether the evidence is sufficient to support the trial court's findings: the evidence is sufficient if a reasonable fact finder could have reached the conclusion adopted by the trial court. *Overby*, 595 F.3d at 1294.

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS OF FACT ARE NOT CLEARLY ERRONEOUS.

A. USAPA DOES NOT CHALLENGE MOST OF THE DISTRICT COURT'S FINDINGS.

USAPA devotes most of its argument to a question of law that the district court never addressed, and this Court need not reach, unless it chooses to affirm on alternative grounds: whether PBGC's investigative decisions are reviewable. Brief at 23-31. Plainly, the district court reviewed PBGC's investigative decisions, so there is no adverse ruling on this issue for USAPA to appeal.

The remainder of USAPA's argument challenges only a few of the district court's findings. The first challenge is set forth in the section of USAPA' brief called "Factual Background" (Brief at 9-17), which despite its label is highly argumentative. But that disputed finding, in one of the court's footnotes, is at most harmless error.[48] USAPA focuses the brunt of its attack on the district court's

[48] USAPA disputes the finding that PBGC's first plan asset audit *looked for* misappropriation of assets by former fiduciaries. Brief at 15 (citing Op. at 10 n. 5). USAPA argues that the court cited only testimony that the auditor was *instructed* to look for such misappropriation, not that it actually *looked*. *Id.* But USAPA does not allege, even now, that any misappropriation took place; thus even if that finding were error, it is clearly harmless. Moreover, PBGC investigated USAPA's allegation of an improper asset transfer between the Plan and another US Airways plan and found no factual basis behind it. *See* Dkt. #58-6. USAPA similarly cites two PBGC Inspector General Reports criticizing the contractor (IMRG) that performed this plan asset audit – the first of two for the Plan. Brief at 3, 4, 13, 14, 15, 19, 36. But those Inspector General reports addressed two *other* sets of plans

findings in two areas—investment strategy and actuarial assumptions. Brief at 15, 22, 35, 36. In particular, USAPA challenges the factual inferences that the court drew from undisputed evidence when it found that there were no red flags indicating a colorable claim that PBGC failed to investigate.

USAPA nevertheless extensively discusses the duties that it asserts PBGC has, in its view including three "overlapping" and "mandatory" duties of investigation: the "general" fiduciary duties in Title I; the Title I duty to investigate an earlier fiduciary's breach; and the duties of a Chapter 7 bankruptcy trustee. Brief at 8, 21, 27. These duties, USAPA argues, require PBGC to search for claims or causes of action that a terminated pension plan "may" have or "could assert" against a "potentially liable" entity or "someone" who "might be liable for negligence, breach of duty, or fraud." *Id.* at 2, 5, 11, 12, 20, 23, 24. The district court correctly declined to impose such an obligation under the facts of this case.

PBGC's primary duty as statutory trustee, like that of a Chapter 7 trustee, is to collect and marshal the assets of a terminated plan.[49] Without credible evidence of potential wrongdoing, PBGC does not─and need not─conduct a forensic audit of the kind USAPA envisions. Although most plans that PBGC takes over have

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(United Airlines and National Steel) – not the Plan – and there were no such reports about the second contractor (Crowe Horwath) or its work.

[49] 29 U.S.C. § 1342(d); *see* 11 U.S.C. § 704(a)(1).

suffered substantial losses, this does not equate to misconduct by a former fiduciary. In fact, PBGC's ERISA expert testified that it is not unusual for a plan to have a significant increase in underfunding before termination.[50]

USAPA nevertheless insists that PBGC should have determined "the cause of the Pilots' Plan's underfunding and eventual failure," as well as "why" certain investments were made. Brief at 15, 17. But such an audit—looking behind thousands of transactions going back several years, complete with interviews of former plan trustees, fund managers, and other advisors, and analysis of the prior fiduciaries' investment choices—would consume vast quantities of agency resources and is rarely justified. Instead, the parameters of any duty to investigate must be determined by the facts of the particular case.[51]

Courts have recognized this in the bankruptcy context that USAPA cites (Brief at 8) as well. A Chapter 7 trustee has a duty to "investigate the financial affairs of the debtor" under 11 U.S.C. § 704(a)(4). This duty is incorporated in 29 U.S.C. § 1342(d)(3), "except to the extent inconsistent with the provisions of" Title IV of ERISA. But a Chapter 7 trustee exercises great discretion in carrying

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[50] Feb 28 AM Tr. 17:21 to 18:9 (Cohen).

[51] *See Harris v. Koenig*, 815 F. Supp. 2d 26, 32 (D.D.C. 2011) (a fiduciary should take into account the cost of enforcing a claim, the chance of success, and the likelihood of collecting a judgment); *Castaneda v. Baldan*, 961 F. Supp. 1350, 1354 (S.D. Cal. 1997) (ERISA trustee acted reasonably in not pursuing legal action where "it may have been a waste of Plan assets to have brought suit").

out this duty, which is defined by the facts of the case. In *In re Dec*, the bankruptcy court addressed a contention strikingly similar to USAPA's: that a trustee has "a duty to investigate all matters that might put him on inquiry of potential causes of action against a debtor."[52] Rejecting that proposition outright, the court declared that "[t]he case law does not support the existence of such a broad obligation of investigation." *Id.* While "due diligence requires a trustee to conduct searches that are realistic in the ordinary course of the trustee's performance of his duties," a trustee does not have an "obligation to reconstruct a debtor's financial affairs." *Id.* at 231. Thus, contrary to USAPA's suggestion (Brief at 8, 21, 27), PBGC as trustee has discretion in carrying out any duty to investigate.[53]

USAPA also cites the duty under 29 U.S.C. § 1105(a)(3) to "investigate and rectify an earlier fiduciary's breach of duty." Brief at 8. But by its express terms, section 1105(a)(3) applies only when a party "has knowledge of a breach by such

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[52] 272 B.R. 218, 230 (Bankr. N.D. Ill. 2001).

[53] *See also In re Mailman Steam Carpet Cleaning Corp.*, 212 F.3d 632, 635 (1st Cir. 2000) ("When augmentation of an asset involves protracted investigation or potentially costly litigation, with no guarantee as to the outcome, the [bankruptcy] trustee must tread cautiously – and an inquiring court must accord him wide latitude should he conclude that the game is not worth the candle."); *In re Healthco Int'l, Inc.*, 136 F.3d 45, 51 (1st Cir. 1998) ("mere evidence that the Healthco collateral might have returned more than $50 million in some exquisitely orchestrated liquidation did not offset the substantial burdens and risks which the [t]rustee would have encountered in litigating the UCC claim").

[other] fiduciary," and even then, requires only "reasonable efforts under the circumstances to remedy the breach."[54] So there must actually be a breach for this provision to apply at all.[55] USAPA showed no actual breach by the former fiduciaries, and therefore – by definition – no knowledge of a breach by PBGC,[56] not to mention no showing that PBGC's efforts under the circumstances were not reasonable.

In short, USAPA's reliance on its view of PBGC's extensive duties is unavailing, and its failure to challenge the district court's findings is telling. Those findings plainly are not clearly erroneous.

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[54] Section 1105(a)(3) provides: (a) Circumstances giving rise to liability – In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary, with respect to the same plan in the following circumstances: . . . (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

[55] *See, e.g., In re Coca-Cola Enters., Inc. ERISA Litig.*, No. 06-0953, 2007 WL 1810211, at *16 (N.D. Ga. Jun. 20, 2007) ("[a] primary breach must exist, however, in order for there to be any liability under this provision"); *In re Sprint Corp. ERISA Litig.*, No. 03-2202, 2004 WL 2182186, at *4 (D. Kan. Sep. 24, 2004) (same).

[56] Section 1105 "does not impose vicarious liability – it requires *actual knowledge* by the co-fiduciary." *Donovan v. Cunningham*, 716 F.2d 1455, 1474-75 (5th Cir. 1983) (emphasis added). *Accord Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 103-04 (2d Cir. 1998) (cited in USAPA's Brief at 8); *Harris v. Koenig*, 602 F. Supp. 2d 39, 62 (D.D.C. 2009)

B. THE DISTRICT COURT'S FINDING THAT PBGC DID NOT BREACH ANY DUTY TO INVESTIGATE THE PLAN'S INVESTMENTS IS NOT CLEARLY ERRONEOUS.

USAPA has narrowed the "red flags" it asserted in the district court about investments to one: the prior fiduciaries' "investment strategy." Brief at 15, 22, 35, 36. USAPA asserts that PBGC should have investigated whether the Plan had claims against prior fiduciaries by obtaining quarterly reports and minutes of investment committee meetings and interviewing committee members, investment managers, and former fiduciaries about the Plan's investments. *Id.* at 20. According to USAPA, PBGC should have determined "why" certain investments were made and "undertake[n] a systematic investigation of the level of risk." *Id.* at 17, 35. But USAPA nowhere explains how such steps could possibly be helpful, when PBGC's investigation already established – and USAPA does not dispute – that not a single Plan investment violated the Plan's investment policy and the portfolio was managed within the policy and was well-diversified.[57] Indeed, USAPA's expert did not conclude that any of the Plan's investments were unreasonable – in fact, he had never in his career been called upon to render an

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[57] *See* Op. at 12, citing Feb. 26 PM Tr. 18 (Hagan) (the Plan's investment policy does not prohibit any particular type of investment); Feb. 27 AM Tr. 85 (Stanton) (same); Feb. 26 PM Tr. 19 (Hagan) (the portfolio of the Plan's assets was well-diversified); *Id.* at 18-19 (the Plan's investment portfolio was managed within the guidelines in the investment policy). *See also* Feb. 27 AM Tr. 86 (Stanton) (USAPA's expert did not conclude that a single investment decision was inconsistent with the Plan's investment policy).

opinion about whether such investments were reasonable.[58] He did not conclude that any inappropriate actions were taken in this case. *Id.* at 80-81. And he did not know whether the Plan took on greater risk with its investments than similar plans. *Id.* at 87.

And the Plan's investments performed at least as well as the market in the relevant years. As the district court noted, the Department of Labor conducted an investigation and concluded that "[t]here appears to be no significant difference between the performance of the Plan's investments for the period 2000-2001 and the experience of comparable market investments during the same timeframe."[59] The Department of Labor used benchmarks for its analysis that were contained in the Plan's investment policy. *Id.* at PBGC-026454. Moreover, from December 31, 1999 to March 31, 2003 (the period USAPA cites), the S&P 500 stock index declined by 34%, while during the same period, the worst annual investment return for the Plan was negative 10.5%.[60] The Plan's cumulative return on assets, negative 19.1%, was within 0.4% of the cumulative return for the benchmark large

58 Feb. 27 AM Tr. 86-87 (Stanton).

59 Op. at 12-13 n.7; Def. Ex. D-2, DOL Report of Investigation.

60 Dkt. #6-3, Ranade Decl. ¶ 14; *see* Dkt. #38-10, p.13 of 13, Excerpts of the Plan's Actuarial Valuation Reports.

plans, negative 18.7%.[61] Although USAPA's counsel recognized that the investment performance of other similar plans is an important factor to consider, USAPA's expert did not compare the Plan with any other airline plan.[62]

As the Department of Labor has made clear, no particular investment or investment course of action is per se imprudent under ERISA.[63] "Within the framework of ERISA's prudence, exclusive purpose and diversification requirements, the Department believes that plan fiduciaries have *broad discretion in developing investment strategies appropriate to their plans*."[64] Hindsight

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[61] Feb. 27 PM Tr. (Ranade) 68:17-69:1.

[62] Feb. 28 AM Tr. 59:1-4 (Butler); Feb. 27 PM Tr. 15:14-17:5 (Stanton).

[63] *See* Preamble to Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets under the "Prudence Rule":

> The Department is of the opinion that (1) generally, the relative riskiness of a specific investment or investment course of action does not render such investment or investment course of action either *per se* prudent or *per se* imprudent, and (2) the prudence of an investment decision should not be judged without regard to the role that the proposed investment or investment course of action plays within the overall plan portfolio. Thus, although securities issued by a small or new company may be a riskier investment than securities issued by a "blue chip" company, the investment in the former company may be entirely proper under the Act's "prudence" rule.

44 Fed. Reg. 37221, 37222 (June 26, 1979) (codified at 29 C.F.R. pt. 2550).

[64] DOL Adv. Op. 2006-08A (Oct. 3, 2006) (emphasis added).

cannot be used to second-guess specific investments; the relevant measure is the information available at the time.[65]

Thus, even assuming that PBGC could assign value to claims a pension plan "might" have for "investment decisions" (Brief at 12), the district court's conclusion that PBGC need not do so here was not clearly erroneous.

C. THE DISTRICT COURT'S FINDING THAT PBGC DID NOT BREACH ANY DUTY TO INVESTIGATE THE PLAN'S ACTUARIAL ASSUMPTIONS IS NOT CLEARLY ERRONEOUS.

1. USAPA failed to establish a "red flag" regarding the Plan's expected rate of return.

At trial, USAPA relied on a witness who was not an actuary, Steven Stanton, to assert that the Plan actuary's assumption for expected rate of return—9.5% from 2000 to 2002 and 8% in 2003—was a "red flag" warranting further investigation.[66] USAPA did not raise this purported "red flag" in its counsel's letters to PBGC

[65] *See Metzler v. Graham*, 112 F.3d 207, 209 (5th Cir. 1997) ("[p]rudence is evaluated at the time of the investment without the benefit of hindsight."); *De Bruyne v. Equitable Life Assurance Soc'y*, 720 F. Supp. 1342, 1349 (N.D. Ill. 1989), *aff'd*, 920 F.2d 457 (7th Cir. 1990) ("fiduciary duty of care requires prudence, not prescience"); *Donovan v. Walton*, 609 F. Supp. 1221, 1228 (S.D. Fla. 1985) ("[a] court's task is to inquire whether the trustees, at the time they engaged in the challenged transaction, employed the appropriate methods . . . . The analysis considers the trustees' conduct and not . . . success or failure of the investment") (citations omitted), *aff'd sub nom.*, 794 F.2d 586 (11th Cir. 1986).

[66] Op. at 15 (item (7)); Feb. 27 AM Tr. 48:18-50:11 (Stanton); 76:9-10.

before filing suit in 2009,[67] nor mention it in its complaint, but identified it only years later during the litigation. In any event, for the reasons below, the trial court's rejection of this purported "red flag" was reasonable, and certainly not clearly erroneous.[68]

First, Stanton was unqualified to give expert testimony on actuarial assumptions in funding pension plans. Stanton admitted that he had no actuarial training, did not consult with an actuary in this case, and did not have an actuary review any of his work or conclusions.[69] While PBGC counsel agreed that Mr. Stanton could render an expert opinion on accounting issues, he objected that the witness was not qualified to testify about the underfunding of pension plans. *Id.* at 10:1-5. Although the court reserved its determination, *id.* at 10:6-9, it ultimately rejected Stanton's views on actuarial assumptions, and thus either determined him to be unqualified or gave his testimony little weight. Either course was fully justified.

Second, Stanton acknowledged that actuaries may use only actuarial assumptions that they conclude are reasonable.[70] He further conceded that the

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67 *See* Dkt. #1, Compl. Ex. 1 (pp. 15-17); Compl. Ex. 3 (pp. 23-27).

68 Op. at 16-17 (item (7)).

69 Feb. 27 AM Tr. 76:11-20.

70 Feb. 27 PM Tr. 18:22-19:5 (citing actuarial standards of practice).

Plan's actuaries must have concluded that their assumptions were reasonable. *Id.* at 19:6-10. And Stanton himself did not conclude that the Plan actuary's assumptions were unreasonable. *Id.* at 19:11-12.

Third, Stanton acknowledged that it was reasonable to compare the Plan actuary's assumptions to those used by similarly situated plans during the same time. *Id.* at 20:10-15. For example, although Stanton questioned the Plan actuary's use of a 9.5% rate of return for the year 2000, he did not dispute that 25 of the top 50 pension plans during that year used a rate of return of 9.5% or higher. *Id.* at 23:3-20. Thus, the trial court was justified in considering the evidence from the Milliman actuarial firm's surveys for 2000, 2001, 2002, 2003, and 2004. These surveys showed that the Plan actuary's expected rate of return of 9.5% in 2000 to 2002 and 8% in 2003 was in line with the assumptions used by other large pension plans during that period. Op. at 16-17.

Finally, USAPA cites out of context materials from US Airways' bankruptcy proceedings, such as Jeremy Bulow's statement in a 2003 rebuttal report that 8% was a "significantly exaggerated" rate of return. Brief at 11 (citing Pl. Ex. P-75 at 1). The issue in the 2003 proceeding was the amount of PBGC's bankruptcy claim for the terminated Plan's unfunded benefit liabilities.[71] When an underfunded

[71] 29 U.S.C. § 1362(b)(1)(A).

pension plan terminates, PBGC has a claim for the plan's unfunded benefit liabilities against the plan sponsor.[72] As the bankruptcy court explained:

> The central point of dispute is whether the value of the unfunded future benefits should be determined by applying the PBGC's own valuation regulation, or whether the court instead should independently discount those benefits to present value using a hypothetical "prudent investor" rate of return and an expected retirement age ("XRA") reflecting the financial disincentives for pilots to retire early.

In re US Airways Group, Inc., 303 B.R. 784, 786 (Bankr. E.D. Va. 2003). As ERISA requires, the bankruptcy court applied the assumptions in PBGC's valuation regulation to calculate its claim. *Id.* at 796-98.

The valuation regulation approximates the market price of single-premium group annuity contracts to pay the benefits promised under the terminated plan. *Id.* The regulation uses three interrelated assumptions—an interest factor (sometimes called a discount rate), a mortality table, and a table of expected retirement age for participants. *Id.* at 788. Applied to the terminated Plan, the regulation prescribed rates of 5.1% for the first 20 years and 5.25% thereafter. *Id.* at 787. It was in this context that Bulow criticized use of an 8% rate as part of what the bankruptcy court termed "a hypothetical 'prudent investor' rate of return" advocated by the reorganized debtors. *Id.* at 786. The issue was the proper methodology for calculating PBGC's bankruptcy claim arising from a terminated pension plan, not

[72] *Id.*; 29 U.S.C. § 1362(a).

the reasonableness of the Plan actuary's rate-of-return assumptions while it was ongoing. The bankruptcy court plainly grasped that distinction: "Even the PBGC witnesses admitted that the administrator of an ongoing pension plan would breach no duty of care by investing in such an asset pool and assuming an 8% long-term rate of return." *Id.* at 795.

Bulow was an economist, not an actuary. Pl. Ex. P-75 at 20. He did not offer, nor would he have been qualified to give, an opinion on the reasonableness of actuarial assumptions for funding an ongoing plan. Bulow's criticism of the reorganized debtors' expected rate of return did not amount to an allegation—then or now—that use of that assumption for funding purposes constituted fiduciary breach or professional negligence. PBGC never so asserted, and the bankruptcy court never so found.

2. USAPA failed to establish a "red flag" regarding the Plan's assumption for average retirement age.

USAPA argues that the Plan's retirement-age assumption of 60 is a "red flag." Again, USAPA did not raise this purported "red flag" with PBGC in 2009, but only years later during the litigation.

First, USAPA relies on PBGC's criticism of an age-60 retirement assumption in the US Airways bankruptcy proceeding to assert that the average retirement age "was actually 56." Brief at 11. Again, the issue in the bankruptcy court was the proper method of calculating a claim arising from a terminated plan, not an ongoing plan. Although PBGC argued in the bankruptcy court for use of age 56 as the expected retirement age, its primary argument was based on its valuation regulation. 303 B.R. at 788, 790. As a fallback argument, PBGC pointed to certain data from the actual experience of the Plan.[73] Such data were at most hindsight evidence for a relatively short span of years.

By contrast, during the years before the Plan's termination, the standard for assessing the reasonableness of actuarial assumptions for funding purposes included not only the "experience of the plan" (past looking), but "reasonable expectations" and "the actuary's best estimate of anticipated experience under the plan" (future looking).[74] Thus, USAPA's contention that pension actuaries are liable for using "inaccurate" assumptions (Brief at 3) is simply wrong. The standard required of pension actuaries in setting assumptions for funding an ongoing plan is much more nuanced.

[73] Pl. Ex. P-58 at 36; 303 B.R. at 790-91.

[74] 26 U.S.C. § 412(c)(3) (repealed 2006). The current standard, codified at 26 U.S.C. § 430(h)(1), permits less discretion over certain assumptions.

The Supreme Court has made clear that "actuaries are trained professionals subject to regulatory standards."[75] The "reasonableness" of an actuary's methodology should be evaluated "by reference to what the actuarial profession considers to be within the scope of professional acceptability," because "the methodology is a subject of technical judgment within a recognized professional discipline. . . ." *Id.* at 634-35.

Again, the issue litigated in 2003 was the amount of PBGC's claim in bankruptcy for the terminated Plan's unfunded benefit liabilities.[76] To the extent PBGC argued in the bankruptcy proceeding that the Plan actuary's retirement-age assumption was "unreasonable," Pl. Ex. P-58 at 35-37, it was directed to its inappropriateness in calculating PBGC's statutorily defined claim. It was not a suggestion that use of that assumption for funding purposes was a fiduciary breach or professional negligence.

Second, USAPA asserts that the age-60 assumption "cost the Plan $413 million in forgone contributions." Brief at 37. In support, USAPA again cites page 36 of the 2003 PBGC pre-trial brief. Pl. Ex. P-58. Although the brief mentioned the figure of $413 million, PBGC never suggested that these were

[75] *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers*, 508 U.S. 602, 603 (1993). The Actuarial Standards of Practice are issued by the Actuarial Standards Board, http://www.actuarialstandardsboard.org/aboutasb.asp.

[76] 29 U.S.C. § 1362(b)(1)(A).

forgone contributions. PBGC stated: "Reorganized Debtors' expert Mark Dungan estimated that his use of the higher retirement age assumption [i.e., age 60] reduces the value of the unfunded benefit liabilities $413 million below that produced under the PBGC's expected retirement age assumptions." Brief at 36. That is, according to PBGC's opponents (not PBGC), use of their proposed assumption for retirement age (rather than the assumption prescribed by PBGC's regulation) would reduce PBGC's bankruptcy claim against the reorganized debtors by an estimated $413 million. USAPA leaps to the conclusion that the Plan's retirement-age assumption "cost the Plan $413 million in forgone contributions." *Id.* at 37. This conclusion conflates two unrelated concepts. The dispute was about the amount of PBGC's bankruptcy claim when calculated using different assumptions; Mr. Dungan opined that using an earlier retirement age to calculate that claim would produce a higher liability value. The amount of contributions – "forgone" or otherwise – was not at issue at all.

Not even Stanton's testimony on the retirement-age assumption supports USAPA's inference. When asked what the impact was of the age-60 assumption, Stanton answered: "I don't have the information or the technical expertise to quantify what the dollar consequences are . . . ." Feb. 27 AM Tr. 55:6-16. Addressing the Plan actuary's assumptions, Stanton stated: "I don't think I said they were unreasonable." Feb. 27 PM Tr. 19:6-12.

To summarize, after hearing the evidence, the trial court reasonably rejected the assumption for average retirement age as a "red flag." There is no basis for this Court to reverse.

3. USAPA distorts the congressional testimony of former PBGC Director Belt.

To prove PBGC's "knowledge" of the red flag of "excessive discretion over actuarial assumptions," USAPA cites the 2004 testimony of former PBGC Director Bradley Belt. Brief at 10. The purpose of Belt's testimony, however, was to highlight "structural flaws" in the pension insurance program, and propose legislative reforms, not to accuse sponsors and fiduciaries of flouting current law. Pl. Ex. P-59 at 3. Furthermore, Belt made the critical distinction between a plan's funding on a "current liability," or ongoing, basis, and on a "termination" basis. *Id.* As Belt explained, "US Airways said its pilots' plan was 94 percent funded on a current liability basis, but the plan was only 33 percent funded on a termination basis . . . ." *Id.* Belt's point was that "the funding targets are set too low," *id.,* not that US Airways or other companies he mentioned improperly "concealed" facts or unlawfully "dodged" a duty to make required contributions, as USAPA suggests. Brief at 10.

4. USAPA's case law is unhelpful to the pilots.

USAPA cites several decisions to support its argument that PBGC failed to investigate and pursue potential claims against the Plan actuaries. Brief at 33. These cases establish, as USAPA asserts, that under some circumstances a cause of action exists for actuarial malpractice -- which PBGC does not dispute. But the facts in those cases were very different.

The actuary in *Gerosa v. Savasta & Co.* blamed a dramatic decline in an ongoing pension plan's funded status on what it called a "data correction," and could offer no better explanation because all its records on which it based its earlier calculations were missing.[77] By contrast, the only actuary to testify in the instant case concluded that there were "many ordinary and plausible explanations" for the substantial decline in the Plan's funded status from the end of 2000 to the Plan's termination date of March 31, 2003: for example, the change in interest rates, the accrual of benefits by active employees, and investment losses consistent with general market trends.[78] In addition, it was undisputed below that "it's pretty

[77] 329 F.3d 317, 320 (2d Cir. 2003).

[78] Dkt. #6-3, Ranade Decl. ¶ 8; Feb. 27 PM Tr. 61:16-71:14 (Ranade); Def. Ex. D-20. Pension liabilities are highly sensitive to changes in interest rates, and move inversely from those rates, that is, a decrease in interest rates increases pension liabilities (and vice versa). This is because lower interest rates mean that a pension plan will not earn as much on its investments, which means that the plan needs more money to ensure that it will be able to pay promised benefits. Interest rates

normal for a plan that terminates in an underfunded status to have had an increase in the underfunding shortly before termination."[79]

USAPA also cites *Clark v. Feder Semo & Bard,*[80] but *Clark* helps PBGC more than it helps USAPA. The court there entered judgment for the defendant fiduciaries, not the plaintiff, finding that the plan's interest-rate assumption of 8% was "within the range of reasonableness" and "a common assumption at the time." *Id.* at *45. The court further held that the plaintiff relied on hindsight that the plan's prior investment earnings would not continue, and that the sponsor's business would fail. *Id.* at *45-46.

In *Toussaint v. James*, the plaintiffs simply survived a motion for summary judgment because there were genuine issues of material fact as to whether the actuary's assumptions were reasonable.[81] By contrast, after a three-day trial, the court here determined there to be no "red flags" in the Plan's actuarial

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decreased significantly between December 31, 2000, and March 31, 2003, when the Plan terminated.

[79] Feb. 28 AM Tr. 17:21-18:7 (Cohen).

[80] Brief at 33, citing No. 07-470, 2012 WL 3340745 (D.D.C. Aug. 15, 2012).

[81] No. 01 Civ. 10048 (SHS), 2003 WL 21738974, at *6-7 (S.D.N.Y. July 25, 2003).

assumptions, and even USAPA's expert did not testify that they were unreasonable.[82]

This case is more like *Cress v. Wilson*.[83] There, the plaintiffs asserted that plan officials had "knowledge of the financial health of the company and therefore knew or should have known that the Plans would be 'radically underfunded,'" and a "reasonably prudent fiduciary in the circumstances would have acted to protect the participants against losses that could have been avoided." *Id.* at *8. The plaintiffs asserted that the defendants "had a possible duty to investigate possible claims arising from a funding delinquency." *Id.* at *10. The court concluded that "[d]espite the extensive discovery provided to the plaintiffs and the availability of that discovery for review by any expert for the plaintiffs, the plaintiffs have not come forward with any reason to believe that the assumptions and methods used by the enrolled actuary were faulty." *Id.* at *12. The trial court here came to the same conclusion, and USAPA has not shown that it was clearly erroneous.

II. ALTERNATIVE GROUNDS MANDATE AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT.

An appellate court may affirm a judgment on any ground properly raised below that is legally sufficient to sustain it and the opposing party had a fair

[82] Op. at 15-17; Feb. 27 PM Tr. 19:11-12 (Stanton).

[83] No. 06-2717, 2008 WL 5397580 (S.D.N.Y. Dec. 29, 2008).

opportunity to address.[84] There are two alternate grounds for affirmance here. First, PBGC's investigative and enforcement decisions are presumptively unreviewable. Second, the remedy USAPA seeks—appointing a new trustee or directing PBGC to conduct further investigation—is not "appropriate equitable relief" in the circumstances of this case. While USAPA has established no basis for setting aside the district court's decision, should this Court reach either of these alternative grounds, each requires affirmance of the judgment in PBGC's favor.

A. PBGC'S INVESTIGATIVE AND ENFORCEMENT DECISIONS ARE PRESUMPTIVELY UNREVIEWABLE.

PBGC argued repeatedly below, over USAPA's objections,[85] that PBGC is entitled to judgment because PBGC's investigative and enforcement decisions are presumptively unreviewable.[86] While the district court denied PBGC's motion for

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[84] *Whitley v. Albers,* 475 U.S. 312, 326 (1986) ("the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted") (citation omitted); *Jones v. Bernanke*, 557 F.3d 670, 676 (D.C. Cir. 2009); *Briggs v. WMATA*, 481 F.3d 839, 843 (D.C. Cir. 2007) (appellate court "'may affirm . . . on a ground not relied upon by the lower court, provided that the opposing party has had a fair opportunity to [address] that ground'") (citation omitted).

[85] Dkt. #10 (reply supporting preliminary injunction) at 11-12; Dkt. #60 (opposition to judgment on the pleadings or summary judgment) at 7-13; Dkt. #111 (trial brief) at 10-12.

[86] Dkt. #6 (opposition to motion for preliminary injunction) at 23-24; Dkt. #38 (opposition to renewed motion for preliminary injunction) at 30-31; Dkt. #58

summary judgment on this ground, this Court may, and should, affirm the judgment on that basis.

Heckler v. Chaney and *Paulsen v. CNF Inc*. held that an agency's enforcement decisions are presumptively unreviewable.[87] In *Heckler*, respondents asked an agency "to take various investigatory and enforcement actions" to prevent perceived violations of federal law, and when the agency declined, they sued. 470 U.S. at 823-24. The *Heckler* Court specifically applied this principle to agencies' investigative decisions, holding that "agency refusals to institute *investigative* or enforcement proceedings" are presumptively unreviewable.[88] In circumstances very similar to the instant case, *Paulsen* held that PBGC's discretionary decision not to pursue claims against a terminated plan's fiduciaries and actuary "comes within the *Heckler* presumption against judicial review."[89] USAPA devotes significant effort to rebutting this alternative ground for affirming the district court's decision.

(motion for judgment on the pleadings or summary judgment) at 14-16; Dkt. #106 (trial brief) at 1-2.

[87] 470 U.S. 821, 831-32 (1985); 559 F.3d 1061, 1085-87 (9th Cir. 2009).

[88] 470 U.S. at 838 (emphasis added).

[89] 559 F.3d at 1087.

USAPA argues that the statutory trustee's duties are "mandatory." Brief at 23-25, 27. But PBGC does not argue otherwise; PBGC argues that the district court correctly found that on the facts of *this case*, PBGC committed no breach by performing the investigations and analyses that it did. PBGC did not have to investigate further than it did or conduct a forensic audit of every mere assertion of a potential fiduciary breach unless a red flag strongly suggested that there was a colorable claim and a reason to believe that pursuing it would achieve a meaningful recovery.[90]

USAPA argues that *Heckler* "applies only to agencies whose discretionary decisions not to enforce a law are challenged under the Administrative Procedures [sic] Act." Brief at 21. But the Administrative Procedure Act is not the only

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[90] *See Pugh v. Tribune Co.*, 521 F.3d 686, 700 (7th Cir. 2008) ("there must be something akin to a 'red flag' of misconduct"); *Sec'y of Labor v. Doyle*, 675 F.3d 187, 202 (3d Cir. 2012) ("when confronted with suspicious circumstances, a trustee may be required to investigate potential risks to a plan"); *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) ("If a fiduciary was aware of a risk to the fund, he may be held liable for failing to investigate fully the means of protecting the fund from that risk"); *Morse v. Adams*, 857 F.2d 339, 344 (6th Cir. 1988) (ERISA trustee reasonably decided not to pursue collection action where there was no evidence that legal action would have benefited plan participants); *Harris v. Koenig*, 815 F. Supp. 2d at 32 (fiduciary should take into account the cost of enforcing a claim, the chance of success, and the likelihood of collecting a judgment); *Castaneda v. Baldan*, 961 F. Supp. at 1354 (ERISA trustee acted reasonably in not pursuing legal action where "it may have been a waste of Plan assets to have brought suit"); Feb. 28 AM Tr. 8:20-9:8 (Cohen).

vehicle for such challenges, nor the only one in which *Heckler* applies."[91] USAPA argues that "PBGC may resemble an administrative agency," but its investigative decisions here were not "agency action," but "decisions PBGC made as statutory trustee." Brief at 25, 26. This Court rejected a similar argument in *Davis v. PBGC*: that in certain contexts, PBGC is "acting as trustee rather than guarantor," and thus its actions warrant a different level of review.[92]

PBGC does not cease being an administrative agency regardless of what tasks it performs. PBGC's functions, particularly in the enforcement arena, cannot be neatly separated and pigeonholed as USAPA attempts to do. PBGC's roles as guarantor (which USAPA labels "agency") and statutory trustee are intertwined. For example, PBGC brings lawsuits asserting both a claim for fiduciary breach on behalf of a terminated plan, and termination liability under 29 U.S.C. § 1362 owing

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[91] *See Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003) (rejecting argument that "*Heckler* dealt only with review of agency enforcement actions under the Administrative Procedure Act"); *Sutherland v. Leonart*, No. 13-1016, 2013 WL 1908905, at *1 (7th Cir. May 9, 2013) (applying *Heckler* to petition for mandamus to compel officials to investigate and prosecute "systemic health care fraud"); *Nat'l Roofing Contractors v. DOL*, 639 F.3d 339, 341-42 (7th Cir. 2011) (applying *Heckler* in suit brought under the Occupational Safety and Health Act, 29 U.S.C. 655(f), to challenge agency directive regarding enforcement policy); *Leland v. Moran*, 80 Fed. Appx. 133, 135-36 (2d Cir. 2003) (applying *Heckler* to due process claim for failure to enforce zoning and environmental laws).

[92] 571 F.3d 1288, 1293 (D.C. Cir. 2009).

to the agency.[93] The many overlapping functions of guarantor and statutory trustee are among the practical reasons why PBGC generally serves as both, and why drawing too sharp a distinction here makes no sense.[94]

USAPA tries to distinguish *Paulsen* by arguing that an agency's purported failure to *investigate* is reviewable, even if a failure to *litigate* is not. Brief at 29. But as the district court explained in denying a preliminary injunction: "in deciding how to investigate potential claims, PBGC must juggle many of the same considerations that influence its decisions whether to file suit: the likelihood that a violation has actually occurred, the allocation of scarce agency resources among

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[93] *See, e.g.*, Dkt. #62-6, Complaint in *PBGC v. Lewis*, No. 98-CV-0564 (W.D.N.Y.). Recognizing PBGC's subpoena power, USAPA asserts that *any* statutory trustee can "investigate terminated plans," citing 29 U.S.C. § 1342(d)(1)(A)(vii). Brief at 17, 28. But that provision only authorizes a trustee to obtain "information with respect to the plan which the trustee may reasonably need in order to administer the plan," not to issue administrative subpoenas, an inherently governmental function.

[94] USAPA's assertion that PBGC's investigative decisions do not constitute "enforcement" because its suits are brought "on behalf of a terminated plan" (Brief at 28) is equally unavailing. PBGC regularly enforces Title I with respect to terminated pension plans, and has brought many lawsuits for that purpose. *See, e.g.*, Dkt. #62-9, Compl. in *PBGC v. Johnston* and *Chao v. Johnston*, No. 1:06-CV-227 (E.D. Tenn.) (PBGC and Department of Labor each brought suit on the same day, seeking similar relief for a fiduciary breach; PBGC sued "under Titles I and IV" of ERISA, and sought "equitable remedies against the Defendant to redress the violations of ERISA alleged herein." And the court recognized throughout its decision the two agencies' concurrent authority to redress the fiduciary violations. 2007 WL 2847548, at *7 (E.D. Tenn. July 9, 2007)).

claims and plans, the odds that its efforts will be fruitful, and the agency's overall goals and budget.[95]

Finally, USAPA argues that there are "meaningful standards" for a court to apply in reviewing PBGC's conduct as an ERISA trustee, suggesting that "[c]ourts enforce those duties all the time in suits against private fiduciaries."[96] Although PBGC is in some ways similar to a private fiduciary, the differences between the two defeat USAPA's argument. Title IV of ERISA expressly provides that a statutory trustee is a fiduciary under Title I "except to the extent inconsistent with the provisions of this chapter [Title IV]."[97] Title I contains a parallel carve-out.[98] A Title I fiduciary of an ongoing plan must "discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries." *Id.* In contrast, PBGC, as trustee of thousands of terminated plans, must take into account

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[95] Dkt. #47, Mem. Op. and Order at 7. (The case was subsequently transferred to another judge due to a retirement.) USAPA asserts that "[t]he investigation and valuation of a terminated plan's causes of action are what matter to a beneficiary" (Brief at 30). But USAPA does not explain how they could matter to a beneficiary in *this* case. Realistically they cannot. As explained below, a recovery of nearly $500 million would be necessary before any beneficiary could receive increased benefits.

[96] *Heckler*, 470 U.S. at 830; Brief at 26-27.

[97] 29 U.S.C. § 1342(d)(3).

[98] 29 U.S.C. § 1104(a)(1) ("Subject to Sections…1342, and 1344…, a fiduciary shall . . . ."); 29 U.S.C. § 1342.

many competing interests. PBGC is currently paying lifetime benefits to more than 800,000 participants, while at the same time must keep its premiums as low as possible.[99] It cannot always act solely in the interest of participants of a particular plan, but must consider the competing interests of many stakeholders.

Rather than substitute its judgment for PBGC's, this Court should apply the well-established presumption that an agency's enforcement decisions—whether relating to investigation or litigation—are committed to the agency's discretion.

B. REPLACING PBGC AS STATUTORY TRUSTEE IS NOT "APPROPRIATE EQUITABLE RELIEF" IN THE CIRCUMSTANCES OF THIS CASE.

USAPA seeks to replace PBGC as the Plan's statutory trustee pursuant to 29 U.S.C. § 1303(f), which authorizes "appropriate equitable relief." As shown below, replacing PBGC would not be appropriate equitable relief in the circumstances of this case. Because PBGC sought judgment on this basis in the district court, and USAPA responded, this too is an alternative ground for this Court to affirm.[100]

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[99] 29 U.S.C. § 1302(a); PBGC Ann. Rep. at 2.

[100] Dkt. #58 (PBGC motion for judgment on the pleadings or summary judgment) at 12-14, 16-18; Dkt. #106 (PBGC trial brief) at 7-9; Dkt. #60 (USAPA opposition to judgment on the pleadings or summary judgment) at 4-7); Dkt. #111 (USAPA trial brief) at 15-16; Dkt. #121 (USAPA post-trial brief) at 21-24.

1. Plan participants would not benefit from the proposed relief.

The gist of USAPA's case is that PBGC improperly failed to investigate and value all claims the Plan may have had against its former sponsor, fiduciaries, or actuaries. Brief at 2-3, 23-25. Although USAPA could never identify a single *actual* claim against these purported wrongdoers, it argues that potential claims it suspects may exist are "no small matter" and "can be a significant portion of a plan's assets." *Id.* at 2. But as shown below, the potential claims USAPA posits—even if meritorious—would *not* realistically increase pilots' pension benefits.

Even if PBGC or a new trustee investigated, pursued, and recovered funds based on USAPA's allegations, the pilots' statutory benefits would not increase. After a plan terminates, PBGC values and allocates the plan's assets as of its termination date to determine participants' statutory benefits. Any gains or losses on plan assets after plan termination accrue to, or are suffered by, PBGC on behalf of all stakeholders in the pension insurance system.[101] Even if an unusual and unexpected recovery for a fiduciary breach led PBGC to redo its valuation and allocation in this case,[102] the pilots' statutory benefits could increase only if the

[101] 29 U.S.C. § 1344(c) provides, in relevant part: "Any increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, the corporation [PBGC]."

[102] *See* Dkt. #6-2, Jones Decl. at ¶ 11 (PBGC may revise the valuation of plan assets in rare cases involving a material mistake of fact or an extraordinary change of circumstances).

value of such a claim were nearly *half a billion dollars*. This is because there are assets in the Plan sufficient to pay all benefits through statutory priority category 3, but not through priority category 4 (PBGC-guaranteed benefits). *Id.* at ¶¶ 14, 15. Thus, if PBGC or another trustee found any additional assets, including an actual claim, they would go first to PBGC to pay the guaranteed benefits in priority category 4 that PBGC otherwise must pay from its insurance funds. Participants could benefit only if the additional assets were sufficient to pay all priority category 4 benefits and some or all of the benefits in priority category 5.

In denying USAPA's second motion for preliminary injunction, the district court noted that "the first $510 million of any litigation recovery would accrue to PBGC rather than the Plan . . . ."[103] It found further that "there is little support for the proposition that PBGC's conduct, even if improper, has resulted in any significant loss to the Plan rather than to PBGC itself." *Id.*

The court's conclusion referred to the six-tier asset allocation scheme under 29 U.S.C. § 1344(a). A terminated plan's assets are allocated to benefits provided by the plan according to the six "priority categories" in section 1344, starting with

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[103] Dkt. #47, Mem. Op. at 12.

priority category 1 ("PC1"), and then moving to priority category 2 ("PC2"), and so on, until all assets are exhausted.[104]

Based on the 2006 plan asset evaluation, a PBGC declarant explained:

> After satisfying the benefits in PC3, the Pilots Plan thus had remaining assets of about $40 million to allocate to all remaining benefits. PBGC determined that the Pilots Plan had guaranteed benefits of about $550 million in PC4 that were not included in PC3. Thus, the Pilots Plan would have needed an additional $510 million of assets before any assets could have been allocated to the nonguaranteed benefits in PC5 or PC6.[105]

PBGC's second plan asset evaluation increased the Plan's asset value by about $28 million from the initial audit, a difference of about 2% on a total asset value of roughly $1.2 billion.[106] There was no effect on the benefits of Plan participants. *Id.* at 2. The change in asset value, all allocated to PC4, simply brought plan assets to within about $482 million of reaching the nonguaranteed benefits in PC5 or PC6—still a vast distance. This point was supported by trial testimony:

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[104] This statutory scheme is discussed in more detail at Dkt. #58 at 4-6. The Supreme Court explained: "[T]he allocation scheme 'protect[s] against evasion of the . . . limits on the [PBGC's] insurance benefits by use of pension fund assets to first pay uninsured benefits.'" *Mead Corp. v. Tilley*, 490 U.S. 714, 718 n.2 (1989), quoting S. Rep. No. 93-383 at 84 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4968.

[105] Dkt. #6-2, Jones Decl. at ¶ 15. *See also* Dkt. #108, Joint Pretrial Stipulations at 4, Undisputed Facts ¶ 24.

[106] Dkt. #92 (notice of filing report of plan asset evaluation) at 1.

> Now, I do understand that PBGC has a policy that in certain extraordinary circumstances it will reevaluate the assets of the plan…. But even then, when those assets are revalued, assuming it adds more to the asset pool, those assets still have to flow through the priority categories in Section 4044 of ERISA, which means that none of it will go to participants for nonguaranteed benefits until the guaranteed benefit category is filled up.[107]

USAPA counsel argued during trial that "the benefits calculation that PBGC does is supposed to be based upon a proper valuation of all assets, including potential claims."[108] "And that's the key, Your Honor: The benefit calculation is based upon valuation, not collection." *Id*. at 18:7-8. But even assuming that a potential claim exists, USAPA confuses the *amount* of a claim with its *value*, which must take into account collectibility. If the expected cost of collecting a claim exceeds the expected recovery, its value is zero. PBGC's regulations require assets to be valued at their fair market value at the plan termination date.[109] USAPA never identified a single actual claim against former Plan officials, much less one with collectible *value* in 2003 approaching half a billion dollars. PBGC's expert actuary determined the Plan's investment losses in the pre-termination period to be $325 million.[110] Thus, even if the entire investment loss were caused

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[107] Feb. 28 AM Tr. 14:5-14 (Cohen).

[108] Feb. 26 AM Tr. at 18:12-14.

[109] 29 C.F.R. § 4044.41(b).

[110] Feb. 27 PM Tr. 66:17-67:12 (Ranade).

by a fiduciary breach—a fantastic supposition in light of market conditions (*see* p. 25, above)—USAPA still could not reach the nearly half-billion-dollar threshold. Because finding a potential claim worth almost $500 million dollars is unimaginable under these circumstances, granting USAPA's requested relief could not materially benefit Plan participants.

2. The proposed relief is futile because any claims a new trustee could bring against former plan officials or actuaries are time-barred.

The district court noted repeatedly that the statute of limitations was problematic for USAPA's suit. During the hearing on USAPA's first motion for preliminary injunction in 2010, the court identified the statute of limitations as one of the "threshold questions" for USAPA.[111] In denying USAPA's second motion for preliminary injunction in 2011, when the Plan had been terminated for eight years, the court declared "there is reason to believe that whatever window for recovery exists is not about to close, but has already done so." Dkt. #47 at 11. If no recovery is possible, as a matter of law there is no basis to replace or supplement PBGC as trustee.

The statute of limitations for PBGC-initiated civil actions (including fiduciary breach actions) is set forth in 29 U.S.C. § 1303(e)(6). Under each of its

[111] Dkt. #58-8, Transcript of first preliminary injunction hearing (Mar. 25, 2010) at 3, 46.

provisions, the statute of limitations has run. Generally, PBGC may bring suit within the later of:

1. six years after the date a cause of action arose; or
2. three years after the later of:
   - the date PBGC acquired or should have acquired actual knowledge of the cause of action; or
   - the date PBGC became trustee, if PBGC is suing as trustee.[112]

Under each of these provisions, the statute of limitations has run.

First, by definition, any cause of action for fiduciary breach committed before Plan termination – which is what USAPA alleges – "arose" before the termination date of March 31, 2003. Thus, the limitations period expired, at the latest, six years later, on March 31, 2009. Second, USAPA alleges that "red flags" suggesting misconduct by the former fiduciaries have been in "plain sight" since PBGC became the Plan's statutory trustee.[113] Thus, assuming the truth of USAPA's allegations, PBGC should have acquired knowledge of any such breach upon becoming trustee on March 31, 2003. Accordingly, the limitations period expired three years later, on March 31, 2006. And third, PBGC became trustee of

[112] 29 U.S.C. § 1303(e)(6).

[113] Dkt. #35 at 7.

the Plan on March 31, 2003, so the last date it could have brought an action on that basis was March 31, 2006.

Finally, USAPA began suggesting late in the proceedings below that PBGC could bring suit against the Plan's former actuaries for professional malpractice for allegedly "inaccurate" assumptions with respect to rate of return on investments and average retirement age. The period during which these allegedly inaccurate assumptions were applied to the Plan ended in 2003, when the Plan terminated. USAPA never identifies which state such a suit might be brought in, but it would be time-barred in every state researched.[114]

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[114] Depending on the state, suit for actuarial malpractice may be considered a contract claim, a tort claim, or a professional malpractice claim. In *Virginia,* where US Airways headquarters were, the statute of limitations for written contracts is 5 years (Va. Code Ann. § 8.01-246 (West 2014)); for oral contracts is 3 years (Va. Code Ann. § 8.01-246 (West 2014)); for injury to person is 2 years (Va. Code Ann. § 8.01-243(A) (West 2014)); and for injury to personal property is 5 years (Va. Code Ann. § 8.01-243(B) (West 2014)). In *Pennsylvania*, where the actuarial firm (Towers Perrin) was headquartered, the statute of limitations for contracts is 4 years (42 Pa. Cons. Stat. Ann. § 5525 (West 2014)); and for negligence, injury to person/property, and professional malpractice is 2 years (42 Pa. Cons. Stat. Ann. § 5524 (West 2014)). In *Delaware*, where many corporations are headquartered, the statute of limitations for contract is 3 years (Del. Code Ann. tit. 10, § 8106 (West 2014)); for personal injury is 2 years (Del. Code Ann. title 10, § 8119 (West 2014)); for negligence and action for damages resulting indirectly from the act is 3 years (Del. Code Ann. tit. 10, § 8106 (West 2014)). In *California*, the statute of limitations for written contracts is 4 years (Cal. Civ. Proc. Code § 337 (West 2014)); for wrongful act or negligence of others is 2 years (Cal. Civ. Proc. Code § 335.1 (West 2014)); for legal malpractice is 1 year (Cal. Civ. Proc. Code § 340.6 (West 2014)); for injury to personal property is 3 years (Cal. Civ. Proc. Code § 338 (West 2014)); with a catchall provision of 4 years (Cal. Civ. Proc. Code § 343 (West 2014)). And in *New York*, the statute of limitations for contracts is 6 years

USAPA argued below that PBGC waived any "affirmative defense" based on the statute of limitations by not asserting it in a responsive pleading.[115] But PBGC does not argue that USAPA's suit against the *agency* is time-barred. Section 1303(e)—the provision PBGC cites—governs civil actions "*by* the corporation [PBGC]," not civil actions *against* the corporation.[116] What PBGC argues is that any claim that PBGC (or a replacement trustee) might bring against the former fiduciaries or actuaries would be time-barred. PBGC had no duty under Rule 8(c) to plead such a defense in its answer.

In sum, because the statute of limitations within which any trustee could bring a cause of action on any of the grounds USAPA suggests has run, appointing a new trustee would be futile, and cannot be "appropriate equitable relief."

3. The proposed relief would injure other parties and the public interest.

USAPA's proposed relief of appointing a special trustee to investigate and pursue its allegations would harm PBGC, its stakeholders, and the public interest.

(N.Y. C.P.L.R. Law § 213 (McKinney 2014)); for malpractice based on contract or tort is 3 years (N.Y. C.P.L.R. Law § 214 (6) (McKinney 2014)); for Injury to personal property is 3 years (N.Y. C.P.L.R. Law § 214 (McKinney 2014)); with a catchall provision of 6 years (N.Y. C.P.L.R. Law § 213 (McKinney 2014)).

[115] Dkt. #60, USAPA opp. to summary judgment at 5, *citing* Fed. R. Civ. P. 8(c).

[116] *Compare* 29 U.S.C. § 1303(e)(1) (emphasis added) *with* 29 U.S.C. § 1303(f).

Even for an ongoing plan, "[t]he appointment of a receiver [*i.e.*, special trustee] is a harsh remedy, not to be imposed without a showing of necessity."[117] This remedy is "drastic," and certainly "not the usual course," because it necessarily involves "disruption and expense."[118] Disturbing the operations of an agency that in fiscal year 2014 paid $5.5 billion in benefits to 813,000 retirees under more than 4,600 failed single-employer plans should not be undertaken lightly.[119]

USAPA is silent on the "significant costs" involved in appointing a special trustee to delve into vague and unsupported allegations.[120] As one witness testified at trial regarding ERISA fiduciary-breach matters: "The cases are extraordinarily fact intensive, and it usually involves a lot of detailed discovery."[121] Thus, courts generally have imposed the "drastic remedy" of removing a private-sector trustee or appointing a special trustee or receiver only after evidence established that the

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[117] *Donovan v. Bierwirth*, 680 F.2d 263, 276 (2d Cir. 1982).

[118] *Chao v. Malkani*, 452 F.3d 290, 294 (4th Cir. 2006) ("[R]emoval can be detrimental for plan participants and employers alike. It imposes significant costs on plans, which must undergo an inevitable period of transition as a new fiduciary familiarizes itself with the plan's provisions. Constant turnover can also disrupt plan administration, and might cause delay in participants receiving vital benefits"); *Bierwirth*, 680 F.2d at 277.

[119] PBGC Ann. Rep. (2014) at 2.

[120] *Malkani*, 452 F.3d at 294.

[121] Feb. 28 AM Tr. 13:1-11 (Cohen).

supplanted fiduciaries engaged in "egregious" malfeasance, usually involving self-dealing or prohibited transactions.[122] USAPA has made no such showing here.

Finally, appointing a special trustee would injure the public interest, as the district court recognized in denying USAPA's two motions for preliminary injunction. As one judge cautioned: "The risk of establishing a precedent that could lead to disruption of PBGC's operations is substantial and not one I am willing to undertake."[123] After transfer of the case to a different judge due to a retirement, the district court reached a similar conclusion: "[I]t is naïve to suggest that the apparently unprecedented measure of appointing a special trustee would cause no disruption to PBGC's operations. . . . Allowing plan beneficiaries to seek PBGC's ouster in these cases could have wide-ranging consequences."[124]

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[122] *See Chao v. Malkani*, 452 F.3d at 294 ("repeated efforts to plunder the Plan's assets"); *Reich v. Lancaster*, 55 F.3d 1034 (5th Cir. 1995) (significant prohibited transactions established after two-week bench trial); *Beck v. Levering*, 947 F.2d 639, 641 (2d Cir.1991) ("massive" and "egregious self-dealing"); *Katsaros v. Cody*, 744 F.2d 270 (2d Cir. 1984) (former trustees invested 60% of plan's assets, $20 million, via a personal loan).

[123] Dkt. #22, Order denying prelim. inj. (Apr. 16, 2010) at 8.

[124] Dkt. #47, Mem. Op. & Order denying renewed motion for prelim. inj. (Mar. 14, 2011) at 13.

In short, the proposed remedy is not "appropriate equitable relief" because it risks serious damage to the pension insurance system and the public interest. The Court may affirm the decision below on this alternative ground.

CONCLUSION

The Court should affirm the decision below, based either on the lower court's findings or either of the alternative grounds asserted herein.

Date: December 29, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Paula J. Connelly, hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(B), that the word count of the Initial Brief of Appellee Pension Benefit Guaranty Corp. is 13,325, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The 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. The 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.

Dated: December 29, 2014

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CERTIFICATE OF SERVICE

I, Paula J. Connelly, certify that on December 29, 2014, true and correct copies of the Initial Brief of Appellee Pension Benefit Guaranty Corporation were served via the Court's ECF filing system upon the following counsel:

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STATUTORY ADDENDUM

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Effective: April 7, 2014
29 U.S.C.A. § 1303
§ 1303. Operation of corporation

(a) Investigatory authority; audit of statistically significant number of terminating plans

The corporation may make such investigations as it deems necessary to enforce any provision of this subchapter or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the corporation shall determine, as to all the facts and circumstances concerning the matter to be investigated. The corporation shall annually audit a statistically significant number of plans terminating under section 1341(b) of this title to determine whether participants and beneficiaries have received their benefit commitments and whether section 1350(a) of this title has been satisfied. Each audit shall include a statistically significant number of participants and beneficiaries.

(b) Discovery powers vested in board members or officers designated by the chairman

For the purpose of any such investigation, or any other proceeding under this subchapter, the Director, any member of the board of directors of the corporation, or any officer designated by the Director or chairman, may administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the corporation deems relevant or material to the inquiry.

(c) Contempt

In the case of contumacy by, or refusal to obey a subpena issued to, any person, the corporation may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. The court may issue an order requiring such person to appear before the corporation, or member or officer designated by the corporation, and to produce records or to give testimony related to the matter under investigation or in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district in which such person is an inhabitant or may be found.

(d) Cooperation with other governmental agencies

In order to avoid unnecessary expense and duplication of functions among government agencies, the corporation may make such arrangements or agreements for cooperation or mutual assistance in the performance of its functions under this subchapter as is practicable and consistent with law. The corporation may utilize the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment. The head of each department, agency, or establishment of the United States shall cooperate with the corporation and, to the extent permitted by law, provide such information and facilities as it may request for its assistance in the performance of its functions under this subchapter. The Attorney General or his representative shall receive from the corporation for appropriate action such evidence developed in the performance of its functions under this subchapter as may be found to warrant consideration for criminal prosecution under the provisions of this or any other Federal law.

(e) Civil actions by corporation; jurisdiction; process; expeditious handling of cases; costs; limitation on actions

(1) Civil actions may be brought by the corporation for appropriate relief, legal or equitable or both, to enforce (A) the provisions of this subchapter, and (B) in the case of a plan which is covered under this subchapter (other than a multiemployer plan) and for which the conditions for imposition of a lien described in section 1083(k)(1)(A) and (B) or 1085a(g)(1)(A) and (B) of this title or section 430(k)(1)(A) and (B) or 433(g)(1)(A) and (B) of Title 26 have been met, section 1082 of this title and section 412 of Title 26.

(2) Except as otherwise provided in this subchapter, where such an action is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the violation took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(3) The district courts of the United States shall have jurisdiction of actions brought by the corporation under this subchapter without regard to the amount in controversy in any such action.

(4) Repealed. Pub.L. 98-620, Title IV, § 402(33), Nov. 8, 1984, 98 Stat. 3360

(5) In any action brought under this subchapter, whether to collect premiums, penalties, and interest under section 1307 of this title or for any other purpose, the court may award to the corporation all or a portion of the costs of litigation incurred by the corporation in connection with such action.

(6)(A) Except as provided in subparagraph (C), an action under this subsection may not be brought after the later of--

(i) 6 years after the date on which the cause of action arose, or

(ii) 3 years after the applicable date specified in subparagraph (B).

(B)(i) Except as provided in clause (ii), the applicable date specified in this subparagraph is the earliest date on which the corporation acquired or should have acquired actual knowledge of the existence of such cause of action.

(ii) If the corporation brings the action as a trustee, the applicable date specified in this subparagraph is the date on which the corporation became a trustee with respect to the plan if such date is later than the date described in clause (i).

(C) In the case of fraud or concealment, the period described in subparagraph (A)(ii) shall be extended to 6 years after the applicable date specified in subparagraph (B).

(f) Civil actions against corporation; appropriate court; award of costs and expenses; limitation on actions; jurisdiction; removal of actions

(1) Except with respect to withdrawal liability disputes under part 1 of subtitle E of this subchapter, any person who is a fiduciary, employer, contributing sponsor, member of a contributing sponsor's controlled group, participant, or beneficiary, and is adversely affected by any action of the corporation with respect to a plan in which such person has an interest, or who is an employee organization representing such a participant or beneficiary so adversely affected for purposes of collective bargaining with respect to such plan, may bring an action against the corporation for appropriate equitable relief in the appropriate court.

(2) For purposes of this subsection, the term “appropriate court” means--

(A) the United States district court before which proceedings under section 1341 or 1342 of this title are being conducted,

(B) if no such proceedings are being conducted, the United States district court for the judicial district in which the plan has its principal office, or

(C) the United States District Court for the District of Columbia.

(3) In any action brought under this subsection, the court may award all or a portion of the costs and expenses incurred in connection with such action to any party who prevails or substantially prevails in such action.

(4) This subsection shall be the exclusive means for bringing actions against the corporation under this subchapter, including actions against the corporation in its capacity as a trustee under section 1342 or 1349 of this title.

(5)(A) Except as provided in subparagraph (C), an action under this subsection may not be brought after the later of--

(i) 6 years after the date on which the cause of action arose, or

(ii) 3 years after the applicable date specified in subparagraph (B).

(B)(i) Except as provided in clause (ii), the applicable date specified in this subparagraph is the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action.

(ii) In the case of a plaintiff who is a fiduciary bringing the action in the exercise of fiduciary duties, the applicable date specified in this subparagraph is the date on which the plaintiff became a fiduciary with respect to the plan if such date is later than the date specified in clause (i).

(C) In the case of fraud or concealment, the period described in subparagraph (A)(ii) shall be extended to 6 years after the applicable date specified in subparagraph (B).

(6) The district courts of the United States have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(7) In any suit, action, or proceeding in which the corporation is a party, or intervenes under section 1451 of this title, in any State court, the corporation may, without bond or security, remove such suit, action, or proceeding from the State court to the United States district court for the district or division in which such suit, action, or proceeding is pending by following any procedure for removal now or hereafter in effect.

29 U.S.C.A. § 1344
§ 1344. Allocation of assets

(a) Order of priority of participants and beneficiaries

In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity--

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.
For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(4) Fourth--

(A) to all other benefits (if any) of individuals under the plan guaranteed under this subchapter (determined without regard to section 1322b(a) of this title), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 1322(b)(5)(B) of this title did not apply.
For purposes of this paragraph, section 1321 of this title shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

(b) Adjustment of allocations; reallocations; mandatory contributions; establishment of subclasses and categories

For purposes of subsection (a) of this section—

(1) The amount allocated under any paragraph of subsection (a) of this section with respect to any benefit shall be properly adjusted for any allocation of assets with respect to that benefit under a prior paragraph of subsection (a) of this section.

(2) If the assets available for allocation under any paragraph of subsection (a) of this section (other than paragraphs (4), (5), and (6)) are insufficient to satisfy in full the benefits of all individuals which are described in that paragraph, the assets shall be allocated pro rata among such individuals on the basis of the present value (as of the termination date) of their respective benefits described in that paragraph.

(3) If assets available for allocation under paragraph (4) of subsection (a) of this section are insufficient to satisfy in full the benefits of all individuals who are described in that paragraph, the assets shall be allocated first to benefits described in subparagraph (A) of that paragraph. Any remaining assets shall then be allocated to benefits described in subparagraph (B) of that paragraph. If assets allocated to such subparagraph (B) are insufficient to satisfy in full the benefits described in that subparagraph, the assets shall be allocated pro rata among individuals on the basis of the present value (as of the termination date) of their respective benefits described in that subparagraph.

(4) This paragraph applies if the assets available for allocation under paragraph (5) of subsection (a) of this section are not sufficient to satisfy in full the benefits of individuals described in that paragraph.

(A) If this paragraph applies, except as provided in subparagraph (B), the assets shall be allocated to the benefits of individuals described in such paragraph (5) on the basis of the benefits of individuals which would have been described in such paragraph (5) under the plan as in effect at the beginning of the 5-year period ending on the date of plan termination.

(B) If the assets available for allocation under subparagraph (A) are sufficient to satisfy in full the benefits described in such subparagraph (without regard to this subparagraph), then for purposes of subparagraph (A), benefits of individuals described in such subparagraph shall be determined on the basis of the plan as amended by the most recent plan amendment effective during such 5-year period under which the assets available for allocation are sufficient to satisfy in full the benefits of individuals described in subparagraph (A) and any assets remaining to be allocated under such subparagraph shall be allocated under subparagraph (A) on the basis of the plan as amended by the next succeeding plan amendment effective during such period.

(5) If the Secretary of the Treasury determines that the allocation made pursuant to this section (without regard to this paragraph) results in discrimination prohibited by section 401(a)(4) of Title 26 then, if required to prevent the disqualification of the plan (or any trust under the plan) under section 401(a) or 403(a) of Title 26, the assets allocated under subsections (a)(4)(B), (a)(5), and (a)(6) of this section shall be reallocated to the extent necessary to avoid such discrimination.

(6) The term "mandatory contributions" means amounts contributed to the plan by a participant which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions. For this purpose, the total amount of mandatory contributions of a participant is the amount of such contributions reduced (but not below zero) by the sum of the amounts paid or distributed to him under the plan before its termination.

(7) A plan may establish subclasses and categories within the classes described in paragraphs (1) through (6) of subsection (a) of this section in accordance with regulations prescribed by the corporation.

(c) Increase or decrease in value of assets

Any increase or decrease in the value of the assets of a single-employer plan occurring during the period beginning on the later of (1) the date a trustee is appointed under section 1342(b) of this title or (2) the date on which the plan is terminated is to be allocated between the plan and the corporation in the manner determined by the court (in the case of a court-appointed trustee) or as agreed upon by the corporation and the plan administrator in any other case. Any increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, the corporation.

(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if--

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

(2)(A) In determining the extent to which a plan provides for the distribution of plan assets to the employer for purposes of paragraph (1)(C), any such provision, and any amendment increasing the amount which may be distributed to the employer, shall not be treated as effective before the end of the fifth calendar year following the date of the adoption of such provision or amendment.

(B) A distribution to the employer from a plan shall not be treated as failing to satisfy the requirements of this paragraph if the plan has been in effect for fewer than 5 years and the plan has provided for such a distribution since the effective date of the plan.

(C) Except as otherwise provided in regulations of the Secretary of the Treasury, in any case in which a transaction described in section 1058 of this title occurs, subparagraph (A) shall continue to apply separately with respect to the amount of any assets transferred in such transaction.

(D) For purposes of this subsection, the term "employer" includes any member of the controlled group of which the employer is a member. For purposes of the preceding sentence, the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m) or (o) of section 414 of Title 26.

(3)(A) Before any distribution from a plan pursuant to paragraph (1), if any assets of the plan attributable to employee contributions remain after satisfaction of all liabilities described in subsection (a) of this section, such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries (including alternate payees, within the meaning of section 1056(d)(3)(K) of this title).

(B) For purposes of subparagraph (A), the portion of the remaining assets which are attributable to employee contributions shall be an amount equal to the product derived by multiplying--

(i) the market value of the total remaining assets, by

(ii) a fraction—

(I) the numerator of which is the present value of all portions of the accrued benefits with respect to participants which are derived from participants' mandatory contributions (referred to in subsection (a)(2) of this section), and

(II) the denominator of which is the present value of all benefits with respect to which assets are allocated under paragraphs (2) through (6) of subsection (a) of this section.

(C) For purposes of this paragraph, each person who is, as of the termination date--

(i) a participant under the plan, or

(ii) an individual who has received, during the 3-year period ending with the termination date, a distribution from the plan of such individual's entire nonforfeitable benefit in the form of a single sum distribution in accordance with section 1053(e) of this title or in the form of irrevocable commitments purchased by the plan from an insurer to provide such nonforfeitable benefit,
shall be treated as a participant with respect to the termination, if all or part of the nonforfeitable benefit with respect to such person is or was attributable to participants' mandatory contributions (referred to in subsection (a)(2) of this section).

(4) Nothing in this subsection shall be construed to limit the requirements of section 4980(d) of Title 26 (as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990) or section 1104(d) of this title with respect to any distribution of residual assets of a single-employer plan to the employer.

(e) Bankruptcy filing substituted for termination date
If a contributing sponsor of a plan has filed or has had filed against such person a petition seeking liquidation or reorganization in a case under Title 11 or under any similar Federal law or law of a State or political subdivision, and the case has not been dismissed as of the termination date of the plan, then subsection (a)(3) of this section shall be applied by treating the date such petition was filed as the termination date of the plan.

(f) Valuation of section 1362(c) liability for determining amounts payable by corporation to participants and beneficiaries

(1) In general

In the case of a terminated plan, the value of the recovery of liability under section 1362(c) of this title allocable as a plan asset under this section for purposes of determining the amount of benefits payable by the corporation shall be determined by multiplying--

(A) the amount of liability under section 1362(c) of this title as of the termination date of the plan, by

(B) the applicable section 1362(c) recovery ratio.

(2) Section 1362(c) recovery ratio

For purposes of this subsection--

(A) In general

Except as provided in subparagraph (C), the term “section 1362(c) recovery ratio” means the ratio which--

(i) the sum of the values of all recoveries under section 1362(c) of this title determined by the corporation in connection with plan terminations described under subparagraph (B), bears to

(ii) the sum of all the amounts of liability under section 1362(c) of this title with respect to such plans as of the termination date in connection with any such prior termination.

(B) Prior terminations

A plan termination described in this subparagraph is a termination with respect to which--

(i) the value of recoveries under section 1362(c) of this title have been determined by the corporation, and

(ii) notices of intent to terminate were provided (or in the case of a termination by the corporation, a notice of determination under section 1342 of this title was issued) during the 5-Federal fiscal year period ending with the third fiscal year preceding the fiscal year in which occurs the date of the notice of intent to terminate (or the notice of determination under section 1342 of this title) with respect to the plan termination for which the recovery ratio is being determined.

(C) Exception

In the case of a terminated plan with respect to which the outstanding amount of benefit liabilities exceeds $20,000,000, the term "section 1362(c) recovery ratio" means, with respect to the termination of such plan, the ratio of--

(i) the value of the recoveries on behalf of the plan under section 1362(c) of this title, to

(ii) the amount of the liability owed under section 1362(c) of this title as of the date of plan termination to the trustee appointed under section 1342(b) or (c) of this title.

(3) Subsection not to apply

This subsection shall not apply with respect to the determination of--

(A) whether the amount of outstanding benefit liabilities exceeds $20,000,000, or

(B) the amount of any liability under section 1362 of this title to the corporation or the trustee appointed under section 1342(b) or (c) of this title.

(4) Determinations

Determinations under this subsection shall be made by the corporation. Such determinations shall be binding unless shown by clear and convincing evidence to be unreasonable.

29 U.S.C.A. § 1362

§ 1362. Liability for termination of single-employer plans under a distress termination or a termination by corporation

(a) In general

In any case in which a single-employer plan is terminated in a distress termination under section 1341(c) of this title or a termination otherwise instituted by the corporation under section 1342 of this title, any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's controlled group shall incur liability under this section. The liability under this section of all such persons shall be joint and several. The liability under this section consists of--

(1) liability to the corporation, to the extent provided in subsection (b) of this section, and

(2) liability to the trustee appointed under subsection (b) or (c) of section 1342 of this title, to the extent provided in subsection (c) of this section.

(b) Liability to corporation

(1) Amount of liability

(A) In general
Except as provided in subparagraph (B), the liability to the corporation of a person described in subsection (a) of this section shall be the total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan, together with interest (at a reasonable rate) calculated from the termination date in accordance with regulations prescribed by the corporation.

(B) Special rule in case of subsequent insufficiency

For purposes of subparagraph (A), in any case described in section 1341(c)(3)(C)(ii) of this title, actuarial present values shall be determined as of the date of the notice to the corporation (or the finding by the corporation) described in such section.

(2) Payment of liability

(A) In general

Except as provided in subparagraph (B), the liability to the corporation under this subsection shall be due and payable to the corporation as of the termination date, in cash or securities acceptable to the corporation.

(B) Special rule

Payment of so much of the liability under paragraph (1)(A) as exceeds 30 percent of the collective net worth of all persons described in subsection (a) of this section (including interest) shall be made under commercially reasonable terms prescribed by the corporation. The parties involved shall make a reasonable effort to reach agreement on such commercially reasonable terms. Any such terms prescribed by the corporation shall provide for deferral of 50 percent of any amount of liability otherwise payable for any year under this subparagraph if a person subject to such liability demonstrates to the satisfaction of the corporation that no person subject to such liability has any individual pre-tax profits for such person's fiscal year ending during such year.

(3) Alternative arrangements

The corporation and any person liable under this section may agree to alternative arrangements for the satisfaction of liability to the corporation under this subsection.

(c) Liability to section 1342 trustee

A person described in subsection (a) of this section shall be subject to liability under this subsection to the trustee appointed under subsection (b) or (c) of section 1342 of this title. The liability of such person under this subsection shall consist of-

(1) the sum of the shortfall amortization charge (within the meaning of section 1083(c)(1) of this title and 430(d)(1) of Title 26) with respect to the plan (if any) for the plan year in which the termination date occurs, plus the aggregate total of shortfall amortization installments (if any) determined for succeeding plan years under section 1083(c)(2) of this title and section 430(d)(2) of such Title 26 (which, for purposes of this subparagraph, shall include any increase in such sum which would result if all applications for waivers of the minimum funding standard under section 1082(c) of this title and section 412(c) of such Title 26 which are pending with respect to such plan were denied and if no additional contributions (other than those already made by the termination date) were made for the plan year in which the termination date occurs or for any previous plan year), and

(2) the sum of the waiver amortization charge (within the meaning of section 1083(e)(1) of this title and 430(e)(1) of Title 26) with respect to the plan (if any) for the plan year in which the termination date occurs, plus the aggregate total of waiver amortization installments (if any) determined for succeeding plan years under section 1083(e)(2) of this title and section 430(e)(2) of such Title 26, together with interest (at a reasonable rate) calculated from the termination date in accordance with regulations prescribed by the corporation. The liability under this subsection shall be due and payable to such trustee as of the termination date, in cash or securities acceptable to such trustee.

(d) Definitions

(1) Collective net worth of persons subject to liability

(A) In general

The collective net worth of persons subject to liability in connection with a plan termination consists of the sum of the individual net worths of all persons who--

(i) have individual net worths which are greater than zero, and

(ii) are (as of the termination date) contributing sponsors of the terminated plan or members of their controlled groups.

(B) Determination of net worth

For purposes of this paragraph, the net worth of a person is--

(i) determined on whatever basis best reflects, in the determination of the corporation, the current status of the person's operations and prospects at the time chosen for determining the net worth of the person, and

(ii) increased by the amount of any transfers of assets made by the person which are determined by the corporation to be improper under the circumstances, including any such transfers which would be inappropriate under Title 11 if the person were a debtor in a case under chapter 7 of such title.

(C) Timing of determination

For purposes of this paragraph, determinations of net worth shall be made as of a day chosen by the corporation (during the 120-day period ending with the termination date) and shall be computed without regard to any liability under this section.

(2) Pre-tax profits

The term “pre-tax profits” means--

(A) except as provided in subparagraph (B), for any fiscal year of any person, such person's consolidated net income (excluding any extraordinary charges to income and including any extraordinary credits to income) for such fiscal year, as shown on audited financial statements prepared in accordance with generally accepted accounting principles, or

(B) for any fiscal year of an organization described in section 501(c) of Title 26, the excess of income over expenses (as such terms are defined for such organizations under generally accepted accounting principles),
before provision for or deduction of Federal or other income tax, any contribution to any single-employer plan of which such person is a contributing sponsor at any

time during the period beginning on the termination date and ending with the end of such fiscal year, and any amounts required to be paid for such fiscal year under this section. The corporation may by regulation require such information to be filed on such forms as may be necessary to determine the existence and amount of such pre-tax profits.

(e) Treatment of substantial cessation of operations

If an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections 1363, 1364, and 1365 of this title shall apply.