IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

US AIRLINE PILOTS ASSOCIATION, *Plaintiff,* v. PENSION BENEFIT GUARANTY CORPORATION, *Defendant.*	)	Civil Action No. 1:09-cv-01675 (HHK)

PENSION BENEFIT GUARANTY CORPORATION'S
REPLY IN SUPPORT OF ITS
MOTION FOR JUDGMENT ON THE PLEADINGS,
OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

August 31, 2011

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INTRODUCTION

USAPA sued PBGC, alleging that the agency failed to investigate and pursue misconduct by the former fiduciaries of the terminated US Airways pilots plan ("Plan"). In opposing PBGC's motion for judgment on the pleadings, or in the alternative, for summary judgment, USAPA argues that PBGC seeks to defeat its claims "on procedural grounds." USAPA opp. at 1. Although the statute of limitations certainly is a procedural ground ─ and one that mandates judgment in PBGC's favor ─ PBGC assuredly *does* also address the merits of USAPA's allegations.

USAPA has spent nearly two years searching for misdeeds to justify the unprecedented relief it seeks. Convinced that the former Plan fiduciaries *must* have committed some breach for the Plan to have become so underfunded, USAPA faults PBGC for not finding that breach or proving that none occurred. But PBGC cannot possibly prove such a negative, and nothing in the law requires it to do so. Although USAPA has identified no meritorious claim that PBGC could have pursued, it nevertheless asks this Court to take the unprecedented step of appointing an outside permanent trustee to look again, at the expense of the federal pension insurance program.

Desperate to avoid judgment on the pleadings, USAPA asserts that PBGC has waived the statute of limitations as an affirmative defense. This is a red herring. PBGC argues that the statute of limitations bars any claim that could be brought against the Plan's former fiduciaries, *not* that the statute bars USAPA's claim against PBGC. USAPA also suggests that the statute is tolled because a "critical" missing document "suggest[s] the possibility of fraud or concealment in this case." USAPA opp. at 6. But USAPA cannot even specify which document it means, or

what it would show. To the contrary, the documents the parties *do* have give no indication of fraud or concealment.

As this Court has already intimated, PBGC's investigative and enforcement decisions are presumptively unreviewable. In response, USAPA contends that *Heckler v. Chaney* applies only to "enforcement" decisions, defined as decisions to prosecute lawsuits, and not to investigation. *Heckler's* holding is not so limited, however, and expressly applies to agency investigative proceedings.

USAPA further insists that purported deficiencies in PBGC's 2006 plan asset audit justify the Court's intervention. But USAPA's assertion blithely ignores the testimony of the agency's designated witness on that subject. Contrary to USAPA's characterization, the agency made no "decision *not* to investigate potential claims at all." USAPA opp. at 9. Not only did PBGC perform the initial plan asset audit, but after USAPA leveled its allegations in 2009, PBGC assigned a senior actuary to review the Plan's history of underfunding, *and* its Office of General Counsel performed a special investigation of USAPA's charges. Again, PBGC found no credible evidence of fiduciary breach. And even after fifteen months of discovery, USAPA *still* has identified no meritorious claim that PBGC could pursue.

Finally, whether or not the requested equitable relief is construed to be an injunction, USAPA fails to meet the strict standards for removing the trustee of a pension plan. Once again, as has happened so often in this case, USAPA is left grasping at straws.

In sum, because USAPA can prove no set of facts that would entitle it to relief under any reasonable reading of its complaint, the Court should enter judgment on the pleadings in favor of PBGC. Alternatively, because there are no material disputed facts and PBGC is entitled to judgment as a matter of law, the Court should enter summary judgment for PBGC.

ARGUMENT

I. BECAUSE THE STATUTE OF LIMITATIONS FOR CLAIMS AGAINST THE PLAN'S FORMER FIDUCIARIES HAS RUN, GRANTING USAPA'S REQUEST FOR A REPLACEMENT TRUSTEE WOULD BE FUTILE.

In denying USAPA's renewed motion for preliminary injunction, this Court held that "there is reason to believe that whatever window for recovery exists is not about to close, but has already done so."[1] And in a detailed analysis of the relevant statutory provision, 29 U.S.C. § 1303(e)(6), PBGC showed that absent evidence of fraud or concealment, any claim against the Plan's former fiduciaries had to be brought by March 31, 2009.[2] In its opposition, USAPA never even mentions this provision. Instead, USAPA offers several new arguments, none of which has merit.

First, USAPA insists that its claim is against PBGC, not the Plan's former fiduciaries. Thus, in USAPA's thinking, its cause of action survives even if the limitations period has run for claims against those former fiduciaries. USAPA opp. at 4. But USAPA's complaint asks the Court to direct PBGC or a replacement trustee to perform an investigation, evaluation, and "*pursuit of claims and recovery* as appropriate, arising from the performance of the Plan's former trustees."[3] If claims against the former fiduciaries are already time-barred, such an order would be futile, and surely cannot constitute the "appropriate" equitable relief that USAPA

[1] Dkt. #47 Mem. Opinion at 11.

[2] Dkt. #58, PBGC opening brief at 12-14.

[3] Dkt. #1, Compl. at p. 13 (emphasis added).

ostensibly seeks.[4] In short, the statute of limitations precludes USAPA from proving any set of facts that would entitle it to relief under any reasonable reading of its complaint.

USAPA nevertheless contends that PBGC has waived any "affirmative defense" based on the statute of limitations by not asserting it in a responsive pleading.[5] This argument misses the mark. 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.[6] What PBGC argues is that any claim that PBGC (or a replacement trustee) might bring against the former fiduciaries would be time-barred. PBGC had no duty under Rule 8(c) to plead such a defense in its answer. Thus, *Harris v. Sec'y, Dep't of Veterans Affairs*, cited by USAPA, is inapposite.[7] The issue there was whether the complaint against the agency was time-barred where the agency did not raise the defense of untimeliness in its answers. *Id.* at 341. The case had nothing to do with the timeliness of a claim by the defendant against a third party.

Finally, USAPA declares: "It is *not* the duty of the Plan's beneficiaries to uncover evidence of fraud and concealment." USAPA opp. at 5-6. But USAPA has sued PBGC, alleging "willful failure to fulfill its duties as trustee." *Id.* at 5. USAPA cannot then shift to PBGC its burden of persuasion, forcing the agency to prove a negative ─ that there was *no* fraud or concealment. Faced with this obstacle, USAPA announces for the first time that it has identified evidence "suggesting the possibility of fraud or concealment in this case." *Id*. at 6. USAPA's

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[4] *See* USAPA opp. at 4, 14, 23. Both 29 U.S.C. § 1303(f)(1), cited in the complaint, and 29 U.S.C. § 1109(a), USAPA's newly cited provision, authorize "appropriate" equitable relief.

[5] USAPA opp. at 5, *citing* Fed. R. Civ. P. 8(c).

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

[7] 126 F.3d 339 (D.C. Cir. 1997).

"evidence" is the apparent absence of what it terms "the critical Form 5500 for the Master Trust for the year 2001." *Id.* USAPA asserts that the year 2001 is crucial because that was "the year in which the Plan began to sustain significant losses." *Id.* USAPA's argument fails for a host of reasons.

The Plan's assets were held in a master trust, divided into six "master trust investment accounts."[8] Form 5500 is an annual report filed with the Department of Labor, both for pension plans themselves *and* for certain of their master trust investment accounts. Complex rules govern whether a Form 5500 must be filed for each master trust investment account.[9]

USAPA never specifies which "critical" Form 5500 for the US Airways master trust investment accounts it feels is missing, or what that document would show. Although USAPA obtained a certificate attesting that the Department of Labor did not find a 2001 Form 5500 for the *Plan itself* (Dkt. #60-4, Ex. C to USAPA opp.), both PBGC and USAPA already *have* that Form 5500.[10] PBGC's plan asset audit, in accordance with established agency procedures, focused on the Forms 5500 filed for the Plan itself, not any Forms 5500 that might have been filed for the master trust investment accounts. Thus, it is unremarkable that PBGC "doesn't have it" (USAPA opp. at 6), whichever "it" USAPA means.

As to the allegedly crucial timing of the year 2001, when "the Plan began to sustain significant losses" (USAPA opp. at 6), one could just as well argue that the year 2000, when the Plan *started* incurring investment losses, or the year 2002, when the Plan suffered its *heaviest*

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[8] *See* Ex. 33, PBGC-9274 to 9275 (the Plan's Form 5500 for 2001, Schedule D, listing the master trust investment accounts).

[9] *See* http://www.dol.gov/ebsa/pdf/2010-5500inst.pdf at pp. 9-10; *see also generally* 29 C.F.R. § 2520.103-1.

[10] Ex. 34, 2001 Form 5500.

losses, was equally or more "critical."[11] In any event, the Form 5500 for the Plan itself shows that the value of the master trust investment accounts declined by relatively modest amounts in 2001.[12] More importantly, documents, especially ones nine or ten years old, may not be readily locatable for many reasons. USAPA's argument that a "missing" document is evidence suggesting "fraud and concealment" piles supposition upon supposition.

USAPA also attempts to insert at this late stage an allegation about "verification of the allocation percentages for the Plan within the Master Trust." USAPA opp. at 6. But the complaint does not mention or even hint at such an allegation. The Court should finally put a stop to USAPA's endlessly evolving theories.

To conclude, USAPA's waiver argument on the limitations period is off base. And USAPA's newly discovered "evidence" of fraud and concealment ─ a "missing" document from among tens of thousands of pages related to the US Airways pension plans ─ amounts to sheer speculation. Because the statute of limitations has run on any claim that PBGC could bring against the former fiduciaries, USAPA can prove no set of facts that would entitle it to relief, and PBGC is entitled to judgment on the pleadings.

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[11] *See* chart at Dkt. #62, PBGC opp. at 28.

[12] The Forms 5500 for the Plan itself show the value of each of the master trust investment accounts, including the "domestic equity pool" and the "international equity pool." These are presumably most relevant to USAPA, since most of its allegations revolve around the former Plan fiduciaries' stock choices. The Forms 5500 show that the value of the master trust domestic equity pool declined less than 15% during 2001, and the value of the master trust international equity pool declined less than 17% during that period. *See* Ex. 35, PBGC-9361 (2000 Schedule D); Ex. 33, PBGC-9275 (2001 Schedule D). Thus, the performance of these master trust investment accounts is not an unknown requiring further investigation.

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

In opposing PBGC's contention that its investigative and enforcement decisions are presumptively unreviewable under *Heckler v. Chaney*,[13] USAPA offers several arguments, some old, some new. None is persuasive.

First, USAPA attempts to draw a sharp distinction between "investigation" and "enforcement" decisions, implicitly defining the latter to mean only decisions to litigate. USAPA suggests that at most, *Heckler* precludes judicial review only of decisions about "enforcement," narrowly defined. *See* USAPA opp. at 7-9. This is incorrect. The respondents in *Heckler* asked the courts to compel the Food and Drug Administration to perform a whole range of administrative actions, including investigation.[14] And the *Heckle*r opinion uses the terms "enforcement actions" and "enforcement steps" broadly to encompass not only prosecuting lawsuits, but various other kinds of regulatory "proceedings" that include investigations. The Court's holding on unreviewability *expressly* applies to investigative decisions:

> We therefore conclude that the presumption that agency decisions not to institute proceedings are unreviewable under 5 U.S.C. § 701(a)(2) is not overcome by the enforcement provisions of the [Federal Food, Drug, and Cosmetic Act]. The FDA's decision not to take the enforcement actions requested by respondents is therefore not subject to judicial review under the APA. The general exception to reviewability provided by § 701(a)(2) for action "committed to agency discretion" remains a narrow one . . . but within that

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[13] 470 U.S. 821 (1985).

[14] "[Respondents] therefore requested the FDA to take various *investigatory* and enforcement actions to prevent these perceived violations . . . ." 470 U.S. at 824 (emphasis added). The Supreme Court further clarified this point in its discussion of the district court decision, which it ultimately affirmed: "The District Court granted summary judgment for petitioner. It began with the proposition that that 'decisions of executive departments and agencies to *refrain* from instituting *investigative* and enforcement proceedings are essentially unreviewable by the courts.'" *Id.* at 825 (quoting *Chaney v. Schweiker*, Civ. No. 81-2265 (D.D.C. Aug. 30, 1982)) (emphasis added).

> exception are included *agency refusals to institute investigative or enforcement proceedings*, unless Congress has indicated otherwise.[15]

Thus, USAPA's effort to limit *Heckler* (and *Paulsen*) to decisions about "enforcement," narrowly defined to mean only litigation, is misplaced.[16]

Next, USAPA asserts that PBGC has refused to perform a "non-discretionary duty to investigate," which USAPA equates with conducting a costly forensic audit to determine the reasons for the Plan's failure.[17] In support of this contention, USAPA repeats three arguments that PBGC already has addressed.[18] USAPA goes on to argue: "If PBGC's resources are inadequate to allow it to fulfill those duties, the appropriate choice is quite simple: do not volunteer to serve as statutory trustee." USAPA opp. at 11. But USAPA's "simple" solution does not address the problem of scarce resources. USAPA does not explain where the money would come from to pay for all the new forensic audits that it insists must be performed. If the money were to come from the pooled assets of terminated plans,[19] there would be even less money available to pay participants' benefits. PBGC administers a self-financing insurance

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[15] *Id.* at 837-38 (emphasis added) (citation omitted).

[16] *Paulsen v. CNF, Inc.*, 559 F.3d 1061 (9th Cir. 2009). Furthermore, USAPA's suggestion that *Paulsen* "conflicts directly" with *Wilmington Shipping Co. v. New Eng. Life Ins. Co.*, 496 F.3d 326 (4th Cir. 2007), USAPA opp. at 8 n.5, is wrong. The *Wilmington* court never mentioned the issue of judicial review of PBGC decisions; PBGC was not even a party.

[17] USAPA opp. at 7; *see* Dkt. #62, PBGC opp. at 18 n.47 (cataloging USAPA's repeated requests for a "forensic audit" or "forensic analysis").

[18] As in its summary judgment brief (Dkt. #57), USAPA claims that this supposedly "non-discretionary duty to investigate" arises under 11 U.S.C. § 704(a)(4) and 29 U.S.C. § 1342(d)(3). USAPA opp. at 7-8. Second, it asserts that "PBGC is not even the agency authorized to enforce and pursue claims against a plan's fiduciaries for violations of ERISA." *Id.* at 10. Finally, USAPA asserts that the Inspector General's report on the National Steel plans is somehow relevant. *Id.* at 9. PBGC refers the Court to its opposition, which addressed these arguments at length. Dkt. #62, PBGC opp. at 17-20, 24-25, 33.

[19] *See* 29 U.S.C. § 1342(a).

system, not funded out of general federal revenues.[20] For this and other reasons discussed below, *infra* at 11-13, USAPA's requested relief would disrupt the agency's operations.

Lastly, USAPA argues that PBGC's decisions are not entitled to a presumption of unreviewability because, in USAPA's view, the plan asset audit was "deeply and materially flawed" for failing to follow "PBGC's own guidelines." USAPA opp. at 12. PBGC has already rebutted this contention.[21] In particular, John Graul, the PBGC official who served as team leader for the plan asset audit, testified unequivocally that during that audit, all steps to test for the existence of an issue with respect to fiduciaries were taken.[22] Moreover, PBGC's Office of General Counsel investigated USAPA's specific allegations, and found no evidence of fiduciary breach.[23] Finally, Neela Ranade, a PBGC senior actuary, reviewed USAPA's contentions about

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[20] *See* Dkt. #58, PBGC brief at 2.

[21] *See* Dkt. #62, PBGC opp. at 29-32.

[22] Dkt. #62-8, Ex. 24 to PBGC opp., Graul dep. at 78:

> Q: So it's your testimony that those items that you just identified are items that are supposed to be done with respect to testing for the existence of an issue with respect to fiduciaries?
>
> A: Those are items that are performed, yes.
>
> *Q: Were those done in this case with respect to fiduciaries?*
>
> *A: Yes.*

(Emphasis added). Mr. Graul was PBGC's designated Rule 30(b)(6) witness regarding the plan asset audit. PBGC addresses in its opposition brief USAPA's improper reliance ─ repeated here ─ on the testimony of Michelle Gray, a witness who was produced for a *different* subject, to which PBGC objected. *See* Dkt. #62, PBGC opp. at 29-30. And despite USAPA's attempt to suggest otherwise, Ms. Gray's testimony on this point does not at all contradict that of Mr. Graul. *Id.*

[23] Dkt. #58-7, Ex. 5 to PBGC's opening brief, Second investigative report. Although USAPA repeats here its criticisms of the Office of General Counsel investigation (USAPA opp. at 19), PBGC rebutted those points in is opposition brief. Dkt. #62, PBGC opp. at 33.

Plan underfunding and concluded that "there are many ordinary and plausible explanations for the apparent substantial decline in the funded status of the Plan from the end of 2000 to the Plan's termination date of March 31, 2003."[24] Although USAPA continues to tout purported "potential claims" against former Plan fiduciaries, it *never* has identified ─ and still does not identify ─ a single *actual* meritorious claim that PBGC could have pursued.

To conclude, PBGC's investigative and enforcement decisions are presumptively unreviewable. USAPA has not overcome that presumption.

III. USAPA HAS NOT MADE THE NECESSARY SHOWING TO REMOVE PBGC AS STATUTORY TRUSTEE, WHETHER BY PERMANENT INJUNCTION OR UNDER SECTIONS 1303 OR 1109.

USAPA asserts that it never requested a permanent injunction in seeking a replacement trustee for the Plan, and therefore it need not even address irreparable harm, the balance of harms, or the public interest. USAPA opp. at 13-14, 20. Yet USAPA's complaint requests "permanent relief" consisting of appointing a "permanent supplemental trustee" or "another trustee in [PBGC's] place" to perform an "investigation," "evaluation," "pursuit of claims," and "recovery" arising from the conduct of the Plan's former trustees. Dkt. #1, Compl. at 13. This "permanent relief" is substantially identical to the "interim relief" that USAPA previously requested by preliminary injunction, except for the duration of the remedy and the additional request that the Court "[r]emove PBGC."[25] Thus, it is difficult to construe USAPA's "permanent relief" as anything other than a permanent injunction.

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[24] Dkt. #58, Ex. 3 to PBGC's opening brief, First Ranade Decl. at ¶ 8. Ms. Ranade's analysis is discussed in detail at Dkt. #62, PBGC opp. at 25-28.

[25] *Id.* at 12-13; Dkt. #4, USAPA mot. for prelim. inj.; Dkt #35, USAPA renewed mot. for prelim. inj.

But even if the Court were to hold that irreparable harm, balance of harms, and the public interest are not required showings, in a case where recovery is time-barred, and participants' benefits could increase only by collecting half a billion dollars, appointing a replacement trustee surely would not be the "appropriate" equitable relief that USAPA ostensibly seeks.[26] As this Court explained, "because the first $510 million of any litigation recovery would accrue to PBGC rather than the Plan, 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."[27] USAPA disputes the $510 million number (USAPA opp. at 14-17), but relies on several arguments the agency has already addressed.[28] And although USAPA flippantly dismisses the significant disruption to PBGC's operations that could result from the relief it seeks ("So what?") (USAPA opp. at 20), the Court ought to consider the risk of harm to thousands of retirees who depend on PBGC benefits and premium payers who support the system. Those concerns were serious enough to lead this Court to warn: "[I]t is naïve to suggest that the apparently unprecedented measure of appointing a special trustee would cause no disruption to PBGC's

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[26] *See* Dkt. #1, Compl. at p. 11, citing 29 U.S.C. § 1303(f)(1) (providing for "appropriate equitable relief") and 29 U.S.C. § 1303(f)(4) (providing that § 1303(f) is "the exclusive means for bringing actions against [PBGC] under this title, including actions against the corporation in its capacity as a trustee under section 1342 or 1349").

[27] Dkt. #47, Mem. Opinion at 12.

[28] As in its motion for summary judgment, Dkt. # 57, USAPA argues that PBGC used an "artificially low rate of return" and "artificially low average retirement age" to calculate the value of the Plan's unfunded benefit liabilities. USAPA opp. at 14-15. USAPA also asserts that the "questionable losses and transactions" are "quite significant," contending that "PBGC . . . cannot rule out the possibility that all of the losses and the massive underfunding were due to breaches by the Plan's sponsor and other fiduciaries . . . ." *Id*. at 15. Finally, USAPA complains that the agency's argument about the $510 million threshold "relies entirely on section 1344(c)," and that PBGC overlooks the significance of 29 U.S.C. §§ 1342(d)(1)(A)(ii) and 1322(c). *Id.* at 15-16. The agency refers the Court to its opposition, which addresses each of these arguments at length. Dkt. #62, PBGC opp. at 9-17.

operations. . . . Allowing plan beneficiaries to seek PBGC's ouster in these cases could have wide-ranging consequences."[29]

USAPA asserts that the relief it seeks ─ to replace PBGC as trustee ─ "is explicitly provided for by statute in the event that an ERISA fiduciary fails to fulfill its duties," relying on 29 U.S.C. §§ 1109(a) and 1303(f). USAPA opp. at 4-5, 13. But section 1303(f) never mentions the remedy of removing PBGC (or anyone else) as trustee. And USAPA did not even cite section 1109(a) in its complaint, perhaps recognizing that section 1109(a) applies only to a fiduciary who breaches a duty "imposed upon fiduciaries by this subchapter [Title I of ERISA]." As PBGC has demonstrated, because of the express exceptions in 29 U.S.C. § 1342(d)(3) and 29 U.S.C. § 1104(a), PBGC is no ordinary Title I fiduciary.[30]

Even if USAPA could be excused for not pleading section 1109(a) in its complaint, and even if section 1109(a) could be applied to PBGC, USAPA nevertheless falls far short of meeting the standards under that provision to replace a trustee. In ERISA Title I cases, displacing a plan trustee is considered "drastic" relief, and "a harsh remedy, not to be imposed without a showing of necessity."[31] "The removal of ERISA fiduciaries is warranted only when the fiduciaries have 'engaged in repeated or substantial violations of their responsibility.'"[32] Even when courts have removed a private-sector trustee or appointed a receiver, they have

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[29] Dkt. #47, Mem. Opinion at 13.

[30] Dkt. #62, PBGC opp. at 19-20.

[31] *Marshall v. Snyder*, 572 F.2d 894, 897 (2d Cir. 1978) (first quotation); *Donovan v. Bierwirth*, 680 F.2d 263, 276 (2d Cir. 1982) (second quotation).

[32] *Birdsell v. United Parcel Serv. of Am., Inc.*, 94 F.3d 1131, 1134 (8th Cir. 1996) (quoting *Holcomb v. United Automotive Ass'n of St. Louis*, 658 F. Supp. 84, 86-87 (E.D. Mo. 1987), *aff'd*, 852 F.2d 330 (8th Cir. 1988)).

generally done so only after finding the supplanted fiduciaries to have engaged in "egregious" malfeasance.[33] Here, we have only USAPA's unsubstantiated assertion of PBGC's purported nonfeasance. USAPA must show far more to justify the unprecedented remedy sought here: removing a federal agency from trusteeship and appointing an outside trustee to chase down vague allegations against third parties ─ charges that have already been investigated by the agency.

Finally, on the subject of attorneys' fees, USAPA asks the Court to disregard the statutory language, and to ignore the D.C. Circuit's recent holding that attorneys' fees are not available against PBGC.[34] USAPA does not cite a single authority for its request for attorneys' fees, but refers vaguely only to "this Court's equitable power . . . ." USAPA opp. at 22. Again, USAPA simply is not entitled to the requested relief.

[33] *See Chao v. Malkani*, 452 F.3d 290, 294 (4th Cir. 2006) ("repeated efforts to plunder the Plan's assets"); *Reich v. Lancaster*, 55 F.3d 1034, 1041-42 (5th Cir. 1995) (significant prohibited transactions found 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, 274-76, 281 (2d Cir. 1984) (approving loan of $20 million (60% of plan's assets) to individual borrower and separate $2 million loan to undercapitalized bank); *Marshall v. Snyder*, 572 F.2d at 901 ("continuing conduct violative both of [a] consent order and of the provisions of ERISA" that "threatened dissipation of the assets" of plans).

[34] *Stephens v. US Airways Group, Inc.*, 644 F.3d 437, 441-42 (D.C. Cir. 2011).

CONCLUSION

For all the foregoing reasons, the Court should grant PBGC's motion for judgment on the pleadings, or in the alternative, grant summary judgment to PBGC.

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