UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

K. WENDELL LEWIS, *et al*., **Plaintiffs,** **v.** **PENSION BENEFIT GUARANTY CORPORATION,** **Defendant.**	))))))))))))	**Case No. 1:15-cv-01328-RBW**

PENSION BENEFIT GUARANTY CORPORATION'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant Pension Benefit Guaranty Corporation ("PBGC") opposes Plaintiffs' Motion for Summary Judgment and moves for summary judgment on Counts Two through Six of the First Amended Complaint pursuant to Fed. R. Civ. P. 56 and Local Civil Rule 7(h)(2). There are no genuine issues of material fact and PBGC is entitled to judgment as a matter of law on these five Counts. In support of this cross-motion, PBGC relies on the grounds set forth in its Memorandum in Support filed herewith.

PBGC respectfully asks this Court to deny Plaintiff's Motion for Summary Judgment and to grant PBGC's Cross-Motion for Summary Judgment.

Dated: June 26, 2017

Respectfully submitted,

/s/ Mark R. Snyder

JUDITH R. STARR, General Counsel
CHARLES L. FINKE, Deputy Chief Counsel
KENNETH J. COOPER, Asst. General Counsel
PAULA J. CONNELLY, Asst. Chief Counsel
JOSEPH M. KRETTEK, Asst. Chief Counsel
MARK R. SNYDER, Attorney

PENSION BENEFIT GUARANTY CORP.
1200 K Street, N.W.
Washington, DC 20005
Tel: (202) 326-4400 ext. 3423
Facsimile: (202) 326-4112
efile@pbgc.gov & snyder.mark@pbgc.gov

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PENSION BENEFIT GUARANTY CORPORATION'S MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

JUDITH R. STARR, General Counsel
CHARLES L. FINKE, Deputy Chief Counsel
KENNETH J. COOPER, Asst. General Counsel
PAULA J. CONNELLY, Asst. Chief Counsel
JOSEPH M. KRETTEK, Asst. Chief Counsel
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PENSION BENEFIT GUARANTY CORP.
1200 K Street, N.W.
Washington, DC 20005
Tel: (202) 326-4400 ext. 3423
Facsimile: (202) 326-4112
efile@pbgc.gov & snyder.mark@pbgc.gov

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INTRODUCTION

In 2006, the Delta Pilots Retirement Plan (the "Plan") terminated, with $2.5 billion more in promised benefits than assets. The Pension Benefit Guaranty Corporation ("PBGC") became responsible to pay statutory benefits under the Plan, which is one of the more than 4,800 underfunded plans that PBGC has backstopped since 1974. *See* PBGC 2016 Annual Report, http://www.pbgc.gov/sites/files/legacy/docs/2016-annual-report.pdf, at 2.

This lawsuit was brought by 1,700 retired Plan participants and their beneficiaries (the "Pilots"), seeking to overturn PBGC's determination of their benefits. Most of the issues involve PBGC's interpretation of the statute it administers, Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and PBGC's own regulations. 29 U.S.C. §§ 1301-1461 (2006 & Supp. III 2009); 29 C.F.R. pts. 4000-4907 (2010).

As demonstrated below, Title IV of ERISA, PBGC's regulations, and the agency's determination in this case have all the qualities of the legal landscape the Court considered in *Chevron USA Inc. v. NRDC*: "[T]he regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." 467 U.S. 837, 865 (1984) (footnotes omitted). And the D.C. Circuit has afforded *Chevron* deference to PBGC's interpretations of Title IV. *See Davis v. PBGC*, 571 F.3d 1288, 1293 (D.C. Cir. 2009). Moreover, one of the statutory provisions at issue deems PBGC's determination to be binding unless shown by clear and convincing evidence to be unreasonable.

The Pilots have moved for summary judgment on five of the six claims in their First Amended Complaint: Claims Two, Three, Four, Five, and Six. PBGC opposes the Pilots' motion, and files together with this memorandum a cross-motion for summary judgment on each of these five claims. The Pilots essentially complain about the way Congress designed the

pension insurance system. These arguments, if accepted, would upset statutory interpretations that PBGC has applied to trusteed plans for four decades. To succeed, the Pilots must meet a very heavy burden. They have fallen far short. And PBGC is entitled to judgment as a matter of law upholding its reasonable interpretations of its governing statute. Even if the Court accords minimal deference, or no deference at all, it should uphold PBGC's determination as a valid application of these complex statutory provisions. Accordingly, the Court should grant PBGC's cross-motion for summary judgment and deny the Pilots' motion.

STATUTORY BACKGROUND

A. PBGC and Title IV of ERISA

PBGC is a wholly owned United States government corporation. It was created in 1974 as part of the landmark reform of the nation's pension laws known as ERISA. *See* 29 U.S.C. § 1302; *see also PBGC v. LTV Corp.*, 496 U.S. 633, 636-37 (1990). Title IV of ERISA created PBGC to protect participants in the event that their pension plan terminates without enough assets to pay the promised benefits. *See Nachman Corp. v. PBGC*, 446 U.S. 359, 361-62 & n.1 (1980) (describing ERISA statutory scheme). Title IV provides that PBGC guarantees nonforfeitable (vested) benefits, but subject to certain limitations discussed below. Employers that sponsor plans are required to pay insurance premiums to PBGC. 29 U.S.C. §§ 1306, 1307.

When an underfunded plan terminates—usually because the employer is in bankruptcy or otherwise winding down and unable to continue the plan—a statutory trustee is appointed to marshal the plan's assets. 29 U.S.C. §§ 1342(b), (d). Although ERISA provides that PBGC "may" become the trustee, 29 U.S.C. § 1342(b)(1), in practice PBGC has become trustee of virtually every one of the 4,800 underfunded plans that have terminated since 1974. *See* PBGC 2016 Annual Report, http://www.pbgc.gov/documents/2016-annual-report.pdf, at 2; *Davis v.*

PBGC, 571 F.3d at 1291. PBGC thus serves both as statutory trustee of a terminated plan and as federal guarantor of the benefits payable under the plan. *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). PBGC combines the assets of the terminated plan with the agency's insurance funds to pay benefits to current and future retirees and their beneficiaries. As statutory trustee, PBGC is subject to fiduciary duties only to the extent they are not inconsistent with the provisions of Title IV. 29 U.S.C. § 1342(d)(3). And the task of statutory trustee is generally limited to marshalling plan assets. PBGC as guarantor is responsible for determining and paying benefits due to plan participants and beneficiaries under the rules in Title IV. 29 U.S.C. §§ 1321, 1322, 1344, 1361.

B. Title IV pension benefits

The amount of benefits payable to participants in a terminated plan is determined by the terms of the plan and the detailed provisions of Title IV and PBGC's regulations. PBGC pays three types of benefits:

(1) guaranteed benefits under 29 U.S.C. §§ 1322(a) and (b);

(2) asset-funded benefits under 29 U.S.C. § 1344; and

(3) recovery-funded benefits under 29 U.S.C. § 1322(c).

A participant always receives at least his or her guaranteed benefit amount, and in most cases PBGC guarantees a participant's entire plan benefit.[1] A participant may receive an asset-funded benefit larger than the guaranteed benefit, depending on the level of plan assets and whether part

[1] For pension plans terminating in 2006, the year the plan at issue in this case terminated, the maximum guarantee is $47,659 per year for a participant who starts receiving a benefit at age 65 under a straight-life annuity. The maximum guarantee is reduced for participants who begin receiving benefits before age 65 or receive a joint and survivor annuity.

or all of the participant's benefit is entitled to priority under the asset-allocation rules in 29 U.S.C. § 1344. In addition, benefits that are neither guaranteed nor funded by plan assets may nevertheless be payable, in whole or in part, depending on the amount that PBGC recovers from the sponsor of a terminated plan (recovery-funded benefits). Because it is important to this case to understand the statutory structure for guaranteed benefits, asset-funded benefits, and recovery-funded benefits, we describe them in some detail below.

1. Guaranteed benefits

As the words suggest, guaranteed benefits are those guaranteed to be paid by PBGC regardless of the amount of the terminated plan's assets. Indeed, PBGC pays guaranteed benefits under some plans that had no assets at all at termination. The statutory provisions governing the guarantee are in 29 U.S.C. §§ 1322(a) and (b). Section 1322(a) provides that PBGC guarantees "all nonforfeitable benefits," but "[s]ubject to the limitations contained in subsection (b)."

A "nonforfeitable benefit" is one for which a participant has "satisfied the conditions for entitlement under the plan or the requirements of [ERISA]" as of the plan's termination date. 29 U.S.C. § 1301(a)(8); 29 C.F.R. § 4022.3(a). For example, if a condition for an early-retirement benefit is that the participant complete 30 years of service for the employer, that 30-year requirement must have been met no later than the plan's termination date. The early-retirement benefit is not guaranteed even if the participant had 29 years and 11 months of service on the termination date.[2] But the participant's accrued, normal retirement benefit is guaranteed, even though the early retirement benefit is not.

[2] A plan's termination date is established under 29 U.S.C. § 1348, usually by agreement between PBGC and the plan administrator, as occurred here. *See Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 150 (D.C. Cir. 2006).

The two principal limitations on PBGC's guarantee are set forth in 29 U.S.C. § 1322(b). The first is a cap, or ceiling, on the amount of a participant's benefit that PBGC may guarantee. 29 U.S.C. § 1322(b)(3). It is referred to in PBGC's regulations as the "maximum guaranteeable benefit," sometimes called the maximum guarantee limit. 29 C.F.R. §§ 4022.22-4022.23. The limit is applied based on the "actuarial value of a monthly benefit in the form of a life annuity commencing at age 65." 29 U.S.C. § 1322(b)(3). The reference to "actuarial value" means that, for example, the maximum guarantee is reduced for those who begin to receive benefits from PBGC *before* age 65, because they will receive benefits for a longer time than if their benefits began *at* age 65. 29 C.F.R. § 4022.23(c).

The second principal limitation on PBGC's guarantee is known as the "phase-in limit," established in 29 U.S.C. §§ 1322(b)(1) and (7). It provides for a phase-in of PBGC's guarantee of any benefit increase adopted or effective (whichever is later) during the five-year period before a plan terminates. The guarantee is phased in at the rate of 20% of the amount of the increase (or $20 per month, if greater) for each year the increase has been in effect. For example, if a participant's monthly benefit was increased by $200 by a plan amendment effective two years before termination, PBGC guarantees $80 of that increase (40% of $200). *See* 29 C.F.R. §§ 4022.24-4022.25.

2. Asset-funded benefits; Priority Category 3

The PBGC guarantee, as explained above, provides a minimum benefit for each participant, regardless of how well-funded the plan was at termination. But some participants receive more than their guaranteed amount, depending on two things: the level of the plan's assets, and whether part or all of the participant's plan benefit is entitled to priority under the six-tier hierarchy in 29 U.S.C. § 1344(a). PBGC values the plan's assets, then "allocates" those

assets to each category of benefit in the order specified in section 1344(a). This valuation and allocation determines participants' entitlement to amounts in excess of guaranteed benefits.

ERISA and PBGC's regulations describe this asset-allocation process in detail. 29 U.S.C. § 1344(a); 29 C.F.R. pt. 4044, subpart A (§§ 4044.1– 4044.17); *see generally Mead Corp. v. Tilley*, 490 U.S. 714, 717-18 (1989). The total amount of a plan's assets is determined based on their fair market value as of the plan's termination date. 29 C.F.R. § 4044.41(b). The assets are allocated to the benefits provided by the plan, in order, starting with benefits in priority category 1 ("PC1"). If the assets are sufficient to provide all benefits in PC1, then they are allocated to benefits in priority category 2 ("PC2"), and so on until either all benefits in PC1 through PC6 have been provided, or the assets run out. In the category in which the assets are exhausted, they are allocated among the benefits in that category based on rules that vary by category. *See* 29 U.S.C. §§ 1344(b)(2)-(4); 29 C.F.R. § 4044.10(e).

Benefits in PC1 and PC2 are those benefits derived from participants' own contributions to the plan. Most plans, including the Plan, have no benefits in PC1 or PC2, so these benefits are not relevant here.

Priority category 3 ("PC3") is typically the most important category for participants, as it is in this case. Benefits in PC3 are: (1) the benefits that retirees were receiving as of three years before the plan's termination date; and (2) the benefits that eligible non-retired participants could have received if they had retired three years before the termination date and had begun receiving benefits at that time. 29 U.S.C. § 1344(a)(3); 29 C.F.R. § 4044.13. For example, if three years before termination a retiree was receiving $4,000 per month, then $4,000 per month is the largest benefit that person could have in PC3. (It could be less if benefits were recently increased, as explained below.)

Similarly, if an active participant (one who is still working and earning benefits) could have retired three years before the termination date (e.g., under the plan's early-retirement provisions) and, had he or she done so, would have begun receiving a benefit of $4,000 per month, then $4,000 per month is the largest benefit that person could have in PC3. This is so even if, by the termination date, the participant had earned a benefit of more than $4,000 per month. (Any benefit above $4,000 would be in a lower priority category.)

Congress placed an important limitation on PC3 benefits. For both retirees and those who could have retired three years before termination, the benefit in PC3 is limited to the "lowest annuity benefit payable" under the plan provisions that were in effect during the five years before the termination date. 29 U.S.C. § 1344(a)(3); 29 C.F.R. § 4044.13(b)(3). This five-year lookback means that benefit increases during the last five years before termination are not included in PC3. It corresponds generally to the five-year phase-in of PBGC's guarantee of benefit increases. But, unlike the gradual phasing in of the guarantee, the PC3 five-year limitation is a "cliff": if the benefit increase was adopted or effective, whichever is later, just one day less than five years before the termination date, none of it is included in PC3. 29 C.F.R. § 4044.13(b)(6).[3]

Benefits are included in PC3 regardless of whether they are guaranteed by PBGC. Thus, a participant who retired more than three years before termination with no benefit increase during the five years before termination will have his or her entire benefit in PC3. And if the

[3] Under a 2006 amendment not applicable in this case, the three-year and five-year lookbacks are now determined by reference to the date the employer entered bankruptcy rather than the termination date if the plan terminated during the bankruptcy. Pub. L. No. 109-280, § 404(b), 120 Stat. 780, 928 (2006)(codified at 29 U.S.C. § 1344(e)).

plan's assets are sufficient to cover all benefits in PC3, the participant will receive that entire benefit from PBGC, even if it exceeds his or her guaranteed amount.

PC4 includes primarily "all other benefits" guaranteed by PBGC—i.e., guaranteed benefits that are not in PC1 through PC3. 29 U.S.C. § 1344(a)(4). Since PC4 has lower priority than PC3, plan assets must be sufficient to provide all guaranteed and nonguaranteed benefits in PC3 before any assets are allocated to pay the remaining PBGC-guaranteed benefits in PC4. If there are insufficient assets to pay all guaranteed benefits, PBGC uses its insurance funds to make up the shortfall.

PC5 includes "all other nonforfeitable benefits" under the terminated plan (i.e., those not in PC1 through PC4). 29 U.S.C. § 1344(a)(5). It includes, for example, vested benefits that exceed the maximum guarantee limit or that are not guaranteed due to the phase-in rule (and that are not in PC3).

PC6 includes all other (non-vested) benefits under the plan. 29 U.S.C. § 1344(a)(6). It includes, for example, benefits of recently hired employees who had not met the plan's vesting requirement by the time the plan terminated.

To allocate a terminated plan's assets to the benefits in the priority categories, the benefits—which are usually defined as the amount of a monthly benefit for the life of the participant—must be converted to present value. PBGC's regulations, adopted in 1981 under notice-and-comment rulemaking, provide a detailed methodology for doing so. *See* 29 C.F.R. §§ 4044.52-4044.53

3. Recovery-funded benefits

Recovery-funded benefits can provide participants in a terminated plan with a portion of their unfunded nonguaranteed benefits— i.e., those benefits that are neither guaranteed by PBGC

nor funded by the plan's assets. 29 U.S.C. § 1322(c).[4] Whether and to what extent PBGC pays recovery-funded benefits depends on PBGC's recoveries for terminated pension plans' underfunding. PBGC shares a portion of its recoveries with participants under the statutory formula in 29 U.S.C. § 1322(c). Recovery-funded benefits are allocated according to the priority categories in section 1344(a)—starting where plan assets ran out—except that they "skip" over guaranteed benefits in PC4.

4. Final determination of benefits

PBGC's regulations provide standards under which PBGC issues benefit determinations. The agency issues to each participant an "initial determination," which the participant may challenge before PBGC's Appeals Board, an independent body composed of officials appointed by the PBGC Director. *See* 29 C.F.R. §§ 4003.1(a), 4003.1(b)(7)-(8), 4003.2, 4003.51. An initial determination does not become effective until either the time to appeal has expired, or if an appeal was filed, the Appeals Board has issued a decision. 29 C.F.R. § 4003.22(a). In reaching its decision, the Appeals Board must consider the file relating to the initial determination, all materials submitted by the appellant and any third parties, and any additional information submitted by PBGC staff. 29 C.F.R. § 4003.59(a). The Appeals Board's decision is final agency action that may be challenged in court under 29 U.S.C. § 1303(f). 29 C.F.R. § 4003.59(b).

[4] ERISA uses the term "outstanding amount of benefit liabilities," s*ee* 29 U.S.C. § 1301(a)(19), but PBGC usually uses "unfunded nonguaranteed benefits" because it is more descriptive.

STATEMENT OF FACTS[5]

Delta Air Lines, Inc. ("Delta') was the contributing sponsor of the Plan. AR-5436. In 2005, Delta filed for Chapter 11 bankruptcy protection, and the Plan was subsequently terminated by agreement with PBGC, effective September 2, 2006. *Id.*; *see also* 29 U.S.C. §§ 1341(c)(3)(B)(iii); 1342; 1348. PBGC became the statutory trustee of the Plan, which had $2.5 billion more in promised benefits than assets as of its termination date. AR-848. Nearly $800 million of these unfunded benefits—for which there are no plan assets—are guaranteed and will be paid by PBGC out of its insurance funds. *Id.*

The Pilots are approximately 1,700 retired participants of the Plan (and their beneficiaries). After the Plan terminated, PBGC issued benefit determinations, which informed participants of the amount of their Title IV pension benefits. Some of the Pilots appealed these benefit determinations to PBGC's Appeals Board. AR-2569. On September 27, 2013, the Appeals Board rendered the final agency decision. AR-1.

The Pilots then filed a six-count complaint under 29 U.S.C. § 1303(f) in the Northern District of Georgia challenging the agency's calculation of their benefits and including a claim for fiduciary breach. Doc. 1.[6] PBGC moved to transfer the case for improper venue and moved to dismiss the Pilots' fiduciary breach claim. Doc. 13. The Georgia court granted PBGC's motion to transfer the case to the District of Columbia, but did not rule on its motion to dismiss the fiduciary breach claim. *See* Doc. 31.

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[5] In this Statement of Facts, PBGC cites the administrative record of its determination (hereafter "AR-__"), as required by Local Rule 7(h)(2), rather than filing a separate statement of undisputed facts in support of its cross-motion. PBGC filed the administrative record with the Court on February 23, 2017.

[6] "Doc." numbers refer to the document numbers on the docket sheet in this Court.

After transfer to this Court, the Pilots filed their First Amended Complaint—the current version. PBGC moved again to dismiss the Pilots' fiduciary breach claim (Claim One). Doc. 46. On July 6, 2016, the Court denied PBGC's motion to dismiss Claim One, but granted PBGC's motion to strike the Pilots' jury demand and their request for attorneys' fees. Doc. 53. The Court subsequently certified its July 6 decision regarding Claim One for interlocutory appeal, but ordered the parties to proceed with Claims Two to Six. Doc. 61. On February 23, 2017, PBGC filed the administrative record (Docs. 70-95), and on April 25, 2017, the Pilots filed their current motion for summary judgment on Claims Two to Six (Doc. 99).

Claim Two alleges that in determining the Pilots' benefits, PBGC should have reduced the Title IV benefits of Plan participants represented by the Airline Pilots Association ("ALPA") who received distributions in Delta's bankruptcy case. Claim Three alleges that PBGC should have included in PC3 certain increases in the Plan's compensation limit. Claim Four alleges that PBGC should have included in PC3 certain increases to the limit on the benefits the Plan could pay. Claim Five asserts that (i) PBGC should not have discounted its bankruptcy recovery to the Plan's termination date in paying recovery-funded benefits, and (ii) PBGC should have included in the highest subcategory of PC5 any benefits not includable in PC3. Claim Six alleges that PBGC violated the Administrative Procedure Act, 5 U.S.C. § 706. The Pilots' request for relief seeks an award of benefits, an injunction against PBGC, the setting aside of certain PBGC regulations, an accounting for insurance premiums, a constructive trust for premiums paid, disgorgement and surcharge pertaining to investment income, attorneys' fees (which the Court ruled out), and other expenses and costs.

ARGUMENT

I. PBGC'S BENEFIT DETERMINATION IS ENTITLED TO DEFERENCE.

The Pilots make several confusing assertions about the standard of review that the Court should apply in reviewing PBGC's determination of their statutory pension benefits. They assert that PBGC is not entitled to *Chevron* deference for a variety of reasons, and that *de novo* review applies. Plaintiffs' Memorandum in Support of Motion for Summary Judgment ("Mem") at 12-15. Then, curiously, they also assert that their claims can "proceed under the [Administrative Procedure Act] instead of ERISA," receiving the "arbitrary and capricious" standard of review. *Id.* at 40. The Court need not be distracted by this jumble of non-sequiturs. It should apply *Chevron* deference to PBGC's interpretations of ERISA, *Auer* deference to PBGC's interpretations of its own regulations, and "arbitrary and capricious" review to PBGC's application of the law to the facts of this case.

A. *Chevron* deference applies to PBGC's interpretations of ERISA.

Both the Supreme Court and the D.C. Circuit have made clear that PBGC is entitled to *Chevron* deference in interpreting ERISA. In *Mead v. Tilley*, the Supreme Court applied *Chevron* to PBGC's interpretation of 29 U.S.C. § 1344(a)—*the same provision at issue in this case in Claims Two through Five*. 490 U.S. 714, 722, 726 (1989). The Court admonished the court of appeals to "consider the views of the PBGC and the IRS" rather than embark on a "voyage without a compass." *Id.* at 726 (citation omitted). Similarly, in *PBGC v. LTV Corp.*, the Court upheld PBGC's interpretation of ERISA under *Chevron*, holding that "PBGC's construction is not contrary to clear congressional intent," and PBGC's construction was "assuredly a permissible one." 496 U.S. 633, 650, 651 (1990) (citation omitted). More recently,

in *Beck v. Pace International Union*, the Supreme Court unanimously deferred to PBGC's interpretation. 551 U.S. 96, 104 (2007).

The D.C. Circuit has applied this mandate to PBGC as well. In *Davis v. PBGC*, the court declared "we defer to the PBGC's authoritative and reasonable interpretations of ambiguous provisions of ERISA." 571 F.3d 1288, 1293 (D.C. Cir. 2009) ("*Davis I*").[7] Similarly, this Court has reiterated that "[w]here agency action turns on questions of statutory interpretation, courts must utilize the two-step process established in *Chevron*." *Louisiana v. Salazar*, 170 F. Supp. 3d 75, 83 (D.D.C. 2016) (Walton, J.). Thus, the aspects of PBGC's determination that involve statutory interpretation—the Pilots' Claims Two through Five—receive *Chevron* deference.

The Pilots seek to sidestep this overwhelming authority by arguing that deference should not apply here for four reasons. As shown below, none of them has merit.

1. The Pilots' benefit determination is not a "policy matter" that must be approved by the agency's Board of Directors.

First, the Pilots assert that their benefit determination is a "policy matter" that must be approved by PBGC's Board of Directors, which consists of the Secretaries of Treasury, Labor, and Commerce. Mem. at 12-13; 29 U.S.C. § 1302(d)(1). By the Pilots' logic, PBGC's regulation—reserving to three cabinet secretaries approval of "any policy matter that would have a significant impact on the pension insurance program or its stakeholders" (29 C.F.R.

[7] Although the D.C. Circuit held in its second *Davis* opinion that it "need not" resolve the level of deference to apply, it did not reject or modify the earlier holding in the first opinion. *See Davis v. PBGC*, 734 F.3d 1161, 1167 (D.C. Cir. 2013) ("*Davis II*"). Instead, the court held that it "need not decide whether the decision in [*Davis I*] is law of the case on the standard of review." *Id.* The *Davis II* court cited *Sherley v. Sebelius*, a case in which the D.C. Circuit applied as law of the case its earlier holding issued at the preliminary injunction stage, stating "[l]aw of the case has established that *Chevron* deference applies." *Sherley*, 689 F.3d 776, 783 (D.C. Cir. 2012); 734 F.3d at 1167.

§ 4002.3(a)(3)(viii))—applies to their benefit determination. This is simply not the case, nor could it be.

PBGC must interpret and apply Title IV in determining the benefits of tens of thousands of participants every year. Characterizing these statutory interpretations as "policy matters" that require the approval of the agency's Board of Directors would bring to a halt both PBGC's operations and those of the Cabinet secretaries. This is not mandated by PBGC's regulation.

The case the Pilots cite to support this result, *Page v. PBGC* (Mem. at 13), is drastically different from this one. *Page* involved PBGC's broad interpretation of the scope of the agency's guarantee, which undisputedly applied to "*thousands of plans*." 968 F.2d 1310, 1316 (D.C. Cir. 1992) (emphasis added). At issue there was not PBGC's determination under one plan—like the determination here—but rather, whether PBGC's insurance program applied to *all* pension plans that had not been amended to reflect certain vesting provisions. *Id.* at 1311.

2. PBGC's interpretations are within the scope of its delegated authority.

The Pilots' second argument against *Chevron* deference is that a congressional delegation of authority is required, and the agency must be exercising that authority. Mem. at 13. But that is exactly the case here. Congress explicitly authorized PBGC to issue "such other bylaws, rules and regulations as may be necessary to carry out the purposes of [Title IV]." 29 U.S.C. § 1302(b)(3). As the Supreme Court clarified in *Mayo Foundation v. United States*, the delegation requirement is met where Congress expressly delegates general rulemaking authority to the agency, as Congress did here to PBGC. 562 U.S. 44, 57 (2011).

The Pilots accept that certain PBGC actions—valuing Plan recoveries and calculating certain payable non-guaranteed benefits—are taken "pursuant to its guarantor functions," warranting deference. Mem. at 13, 13 n.7, 35. But they assert that *other* PBGC interpretations—

concerning the statutory asset-allocation process—were "undertaken by [PBGC] in its fiduciary role as statutory trustee," somehow negating deference. *Id.* at 13. Even if PBGC's tasks could be neatly divided into "roles," the D.C. Circuit expressly rejected that argument in *Davis I*. The court held that no matter what its role, PBGC—"[u]nlike a private trustee"— still has "unique experience and 'practical agency expertise' in interpreting ERISA," and thus there is "no reason to depart from the usual deference we give to an agency interpreting its organic statute." 571 F.3d at 1293 (quoting *LTV*, 496 U.S. at 651). The D.C. Circuit's holding in *Davis I*, contrary to the Pilots' suggestion (Mem. at 13 n.7), was issued after full briefing on the subject.

There is good reason for that holding. Title IV pension benefits are a creature of statute, and ERISA provides that PBGC shall guarantee and pay them. 29 U.S.C. §§ 1322(a), 1361. While an ongoing plan's administrator must look to the plan's terms—with "an eye single to the interests of the participants and beneficiaries" (*Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982))—PBGC must also apply the complex benefit limitations in Title IV, including the asset-allocation rules at issue in this case. *See* 29 U.S.C. § 1344(a); 29 C.F.R. § 4044.13. When PBGC interprets ERISA, it does so as the federal agency responsible for administering the statutory guarantee program, even if it is also serving as trustee.

3. "Formal" proceedings are not required for deference to apply.

The Pilots' third argument against *Chevron* deference is that their benefit determination was reached through informal adjudication. Mem. at 14. But under the Administrative Procedure Act, *all* of PBGC's determinations are reached through informal adjudication, since no provision of Title IV requires an agency hearing. *See* 5 U.S.C. § 554. By the Pilots' logic, PBGC would *never* be entitled to *Chevron* deference.

The Supreme Court applied *Chevron* deference to PBGC's informal adjudication in the *LTV* case, rejecting just such arguments as the Pilots make here. 496 U.S. at 654. And the D.C. Circuit held that *Chevron* deference applies to PBGC in *Boivin* and *Davis I.* A string of other courts have similarly applied *Chevron* deference to PBGC's statutory interpretations, even though they were issued through informal adjudication.[8]

Although the Pilots rely on *GCIU-Emp'r Ret. Fund v. Quad/Graphics, Inc.* (Mem. at 14), that case involved a one-page, 1985 agency opinion letter—not a binding adjudication of benefits—and one that addressed the applicable statutory language in a "very curt fashion," without addressing the arguments against the agency's interpretation. No. 16-cv-03391, 2017 U.S. Dist. LEXIS 59892, at *30-31 (C.D. Cal. Apr. 19, 2017) (citing PBGC Op. Ltr. 85-4, https://www.pbgc.gov/sites/default/files/legacy/docs/oplet/85-4.pdf).

The other case the Pilots cite, *Sun Capital Partners III v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 140 (1st Cir. 2013), is no more helpful. There, PBGC did not seek *Chevron* deference, but rather *Auer* deference for its interpretation of its regulation (discussed below at 19). *See id.* ("The PBGC does not assert that its 2007 letter is entitled to deference under *Chevron*"). And the court found that the regulation at issue simply parroted the language of the statute. *Id.* at 140-41, which is not the case here.

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[8] *See, e.g., Royal Oak Enterprises v. PBGC*, 78 F. Supp. 3d 431, 439-40 (D.D.C. 2015); *PBGC v. Kentucky Bancshares, Inc.*, 7 F. Supp. 3d 689, 697-98 (E.D. Ky. 2014); *PBGC v. Asahi Tec Corp.*, 979 F. Supp. 2d 46, 66-67 (D.D.C. 2013); *Quality Automotive Services v. PBGC*, 960 F. Supp. 2d 211, 215-16 (D.D.C. 2013); *Vanderkam v. PBGC*, 943 F. Supp. 2d 130, 145 (D.D.C. 2013); *PBGC v. Bendix Commercial Vehicle Sys.*, No. 1:11cv1961, 2012 WL 629928, at * 6 (N.D. Ohio Feb. 24, 2012).

4. PBGC's determination does not rely on a "facially flawed" administrative record.

The Pilots' fourth argument against *Chevron* deference is that PBGC relied on a "facially flawed" administrative record because the agency's initial evaluation of the Plan's assets is "outdated and discredited." Mem. at 14-15. The Pilots assert that PBGC's "continued reliance" on the initial asset evaluation to determine their benefits proves that the agency did not employ the requisite "careful consideration" to warrant *Chevron* deference. *Id.* at 15. This argument has numerous flaws.

First, PBGC did not, as the Pilots assert, "acknowledg[e] that its initial valuation efforts were flawed." Mem. at 8 n.5. The Pilots' authority for that assertion states only that PBGC "has hired a public accounting firm to perform a Plan asset re-evaluation." AR-1. That much is true; PBGC initiated a re-evaluation of the Plan's assets. But this was not because of any known flaw in the initial valuation for this Plan, but rather, in an abundance of caution due to certain flaws identified in *other* cases in which the initial valuation was performed by the same contractor.[9] And the Pilots identified no flaw, but rather, sought to "*verify the results* of [the contractor's] audit, and *to the extent that any discrepancies are discovered*, immediately recalculate [their] benefit determinations." AR-607 (emphasis added).

Noting the pendency of the asset re-evaluation, PBGC issued its determination of the Pilots' statutory benefits on September 27, 2013 (AR-1, 6, 69). In this way, PBGC avoided delaying the Pilots' benefit determinations, while preserving their right to challenge any later

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[9] *See, e.g.*, Press Release, PBGC, PBGC Responds to Issue Raised by Inspector General (Nov. 30, 2011), https://www.pbgc.gov/news/press/releases/pr12-09 (after discovering shortcomings in the work of the contractor at issue here in valuing United Airlines' pension plan assets, "we contracted with independent CPA firms to redo the earlier plan asset evaluations for various plans").

adjustment to their benefits. The value of Plan's assets after re-evaluation increased by less than one percent. *See* https://www.pbgc.gov/about/faq/delta-asset-re-eval-qa. Some participants will receive small increases in their benefits, an average of less than $4.00 per month, and they will be able to appeal their revised benefit determination. *Id.*

In short, the procedure that PBGC used to issue the Pilot's benefit determination is entirely valid and fully supported by the administrative record. The agency based its determination on the materials that were before it, and included all of those materials in the administrative record. Moreover, even in the unlikely event that PBGC's determination cannot be sustained on the administrative record, the remedy certainly is not to eliminate the applicable deference. Instead, "[a]s the Supreme Court has instructed . . . where 'the record before the agency does not support the agency action, . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 1999) (citation omitted). And that is not necessary here, as the administrative record fully supports PBGC's determination, and any adjustment to participants' benefits will be accompanied by further appeal rights.

The Pilots' reliance on *Fogo de Chao Inc. v. DHS*, 769 F.3d 1127, 1136-137 (D.C. Cir. 2014) (Mem. at 14-15) is misplaced. PBGC's determination here is marked by precisely the qualities justifying *Chevron* deference that the court described there. The interstitial nature of the legal questions at issue here is undisputable. Valuing the Pilots' benefits and allocating the Plan's assets required PBGC to flesh out and interpret numerous spaces in the statutory and regulatory language. The agency's actuarial case memorandum alone constitutes 67 pages of detailed analysis of the Plan, participants' benefits, and statutory and regulatory issues. AR-848 to 914.

In sum, the Pilots fail to identify any ground for this Court to ignore the bedrock deference principles that apply to PBGC's permissible constructions of its governing statute, and there is none. Under the familiar *Chevron* analysis, if Congress has "directly spoken to the precise question at issue," Congress's mandate applies regardless of any agency interpretation. 467 U.S. at 842. But if not, *Chevron* step two applies: when a statute is "silent or ambiguous" on the issue, the court must uphold the agency's interpretation if it is "based on a permissible construction of the statute." *Id.* at 843. The statutory silence or ambiguity may appear either as an explicit or implicit "gap for the agency to fill." *Id.* at 843-44. And to be upheld, an agency construction need not be "the only one it permissibly could have adopted . . ., or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11; *accord Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 158 (2013); *Holder v. Martinez-Gutierrez*, 566 U.S. 583, 591 (2012). The agency's construction need only be "reasonable." *Mayo*, 562 U.S. at 58. As this Court emphasized in *Louisiana v. Salazar*, "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." 170 F. Supp. 3d at 84 (citation omitted).

B. *Auer* deference applies to PBGC's interpretations of its regulations.

Several of the Pilots' claims challenge not only PBGC's interpretations of ERISA, but also the agency's interpretations of its own regulations. The D.C. Circuit made clear in *Boivin* that courts "owe substantial deference" to PBGC's interpretation of its own regulations. 446 F.3d at 154. Indeed, the Supreme Court has held repeatedly that an agency's interpretation of its own regulation is "controlling" unless "plainly erroneous or inconsistent with the

regulation." *E.g., Decker v. Nw. Envtl. Def. Ctr.,* 133 S. Ct. 1326, 1337 (2013); *Auer v. Robbins,* 519 U.S. 452, 461 (1997).

This Court has carried out that mandate, reiterating that "an agency's interpretation of one of its own regulations commands substantial judicial deference." *Epsilon Electronics, Inc. v. Dep't of Treasury*, 168 F. Supp. 3d 131, 142 (D.D.C. 2016) (Walton, J.) (citation omitted), *aff'd in relevant part*, 2017 WL 2294768, at *4 & n.3 (D.C. Cir. May 26, 2017) (holding it unnecessary to decide whether *Auer* deference was appropriate, but noting that "*Auer* may require a court to defer to a regulatory reading it would never have independently reached"). And courts repeatedly have applied this deferential standard to PBGC's interpretations of its regulations. *See, e.g., Cent. States Se. & Sw. Areas Pension Fund v. O'Neill Bros. Transfer & Storage Co.*, 620 F.3d 766, 774 (7th Cir. 2010); *Royal Oak v. PBGC*, 78 F. Supp. 3d at 440; *PBGC v. Town & Country Bank & Trust Co.*, No. 3:11-cv-602, 2012 WL 4753352, at *2 (W.D. Ky. Oct. 4, 2012); *PBGC v. J.D. Indus.*, 887 F. Supp. 151, 156 (W.D. Mich. 1994). The Court should do so here as well.

C. The "arbitrary and capricious" standard applies to PBGC's application of the law to the facts.

Finally, the aspects of PBGC's determination that involve application of the law to the facts—including the Pilots' challenge to PBGC's use of the initial plan asset evaluation in Claim Six—are reviewed under the "arbitrary and capricious" standard of the Administrative Procedure Act. 5 U.S.C. § 706 (the "APA"). The arbitrary and capricious standard is "functionally equivalent" to the *Chevron* "reasonableness" standard. *Zero Zone Inc. v. DOE*, 832 F.3d 654, 668 (7th Cir. 2016); *accord Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011).

Every court to review a PBGC benefit determination (like the Pilots' here) has applied *Chevron*, *Auer*, the arbitrary and capricious standard, or a combination of the three.[10] No court has applied the *de novo* standard the Pilots request, and the Court should not do so here. As the D.C. Circuit observed in *Zevallos v. Obama*, 793 F.3d 106, 112 (D.C. Cir. 2015), "[w]e have never applied de novo review in an APA case," and this case presents no reason to be the first.

II. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO PBGC ON CLAIM TWO, REGARDING THE ALPA PAYMENTS.

The Pilots assert that in performing the Plan's asset allocation under 29 U.S.C. § 1344, PBGC should have taken into account monies that were not held by the Plan, not used by the Plan to pay Plan benefits, and not recovered by PBGC for the Plan's underfunding. This argument is illogical and inconsistent with the statute.

Companies reorganizing in bankruptcy often renegotiate labor contracts, along with other obligations. The monies at issue here are payments that Delta made to ALPA in a bankruptcy settlement. Those payments (the "ALPA Payments") consisted of $650 million in notes (the "ALPA Notes") and a $2.1 billion unsecured bankruptcy claim (the "ALPA Claim"). The ALPA

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[10] *See*, *e.g.*, *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. PBGC*, 707 F.3d 319, 324-25 (D.C. Cir. 2013) (applying arbitrary and capricious standard); *Fetty v. PBGC*, 104 F.3d 367 (10th Cir. 1996) ("substantial deference" to PBGC's interpretation of regulation); *Senick v. PBGC*, No. 15-cv-0037, 2016 WL 4734330, at *3 (D.D.C. Sep. 9, 2016) (applying arbitrary and capricious standard); *Lewis v. PBGC*, 40 F. Supp. 3d 147, 151 (D.D.C. 2014) (same); *DeLeon v. US Airways*, No. 12-0503, 2014 WL 341570, at *2 (D.D.C. Jan. 31, 2014) (same); *Vanderkam v. PBGC*, 943 F. Supp. 2d 130, 137, 145 (D.D.C. 2013) (applying *Chevron* and arbitrary and capricious standard); *Burmeister v. PBGC*, 943 F. Supp. 2d 83, 87-88 (D.D.C. 2013) (applying arbitrary and capricious standard); *Adey v. PBGC*, No. 5:07cv18, 2010 WL 892229, at *4-6 (N.D. W. Va. Mar. 9, 2010) (same); *Montgomery v. PBGC*, 601 F. Supp. 2d 139, 145 (D.D.C. 2009) (same); *Douglas v. PBGC*, No. 06-cv-3170, 2008 WL 2805604, at *3 (E.D. Pa. Jul. 18, 2008) (same); *Dumas v. PBGC*, No. 2:05-cv-100, 2007 WL 1099542, at *3 (N.D. Ind. Apr. 9, 2007) (same); *Waters v. PBGC*, No. 1:01-cv-270, 2002 WL 1775262 (E.D. Tenn. Jun. 10, 2002) (same); *Caskey v. PBGC*, No. 97-4240, 1999 U.S. Dist. LEXIS 21448, *13 (E.D. Pa. Jan. 14, 1999) (same), *aff'd mem.*, 203 F.3d 816 (3d Cir. 1999); *Brown v. PBGC*, 821 F. Supp. 26, 29 (D.D.C. 1993) (applying *Chevron*).

Payments were part of an amendment to the pilots' collective bargaining agreement, titled the Pilots Working Agreement ("PWA") and known as Letter of Agreement #51 ("LOA #51").

The bankruptcy court approved the settlement that allowed Delta to make the ALPA Payments. All interested parties were represented in that proceeding, including an organization representing retired pilots, which withdrew its initial objection.[11] Delta did not make the ALPA Payments from Plan assets, nor could the bankruptcy court have authorized such use of Plan assets. And the ALPA Payments were an obligation of Delta under the amendment to the pilots' collective bargaining agreement. They were not Plan benefits. *See* Actuarial Case Memo for: Delta Pilots Retirement Plan, AR-847. Accordingly, PBGC's construction of ERISA and PBGC regulations to exclude these payments is entirely reasonable.

A. PBGC reasonably interpreted Title IV's asset allocation provision to exclude assets or benefits that are not part of a plan.

The Pilots challenge PBGC's determination that the ALPA Payments should not be included in the statutory asset allocation, asserting that it is not "a correct reading of the statute." Mem. at 16. But as this Court has made clear, "[w]here agency action turns on questions of statutory interpretation, courts must utilize the two-step process established in *Chevron.*" *Louisiana v. Salazar*, 170 F. Supp. 3d at 83. Applying that process here, the question is not whether PBGC's interpretation is subjectively "correct," but whether it is reasonable. *See Chevron*, 467 U.S. at 843; *Mayo*, 562 U.S. at 58; *Davis I*, 571 F.3d at 1293.

PBGC's interpretation of 29 U.S.C. § 1344(a) is eminently reasonable. The statute states that "the plan administrator shall allocate assets of *the plan* (available to provide *benefits*) among

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[11] The Delta Pilot's Pension Preservation Organization ("DP3") was formed to represent the interests of retired Delta pilots. *See* DP3, Inc. newsletter, AR-5359. Although DP3 initially objected to LOA #51, it subsequently withdrew the objection. Order Authorizing Debtors to Enter Into Amendments to Pilot Working Agreement, AR-1091, 1092.

the participants and beneficiaries of the plan." *Id.* (emphasis added). In this case, it is reasonable to conclude that only assets held by the Plan are allocated to participants' benefits, and that the ALPA Payments were an obligation of Delta under the collective bargaining agreement, not a liability of the Plan for participants' benefits.

Although the Pilots make much of PBGC's initial objection to the ALPA Payments, labelling it a "contemporaneous determin[ation]" (Mem. at 16), it was no such thing. PBGC has long held concerns about abusive "follow-on" plans under which a company provides "wrap around" benefits to participants in a terminated plan. Such benefits were involved in the landmark *LTV* litigation. *See PBGC v. LTV Corp.*, 496 U.S. 633 (1990). In *LTV*, PBGC used its discretionary authority in 29.U.S.C. § 1347 to restore the sponsor's pension plans based on such an abusive plan. Nothing in Title IV, however, directs PBGC's determination whether an arrangement constitutes a follow-on plan, or requires PBGC to re-determine benefits or take any other action based on follow-on concerns. In this case, the bankruptcy court found that the ALPA Payments did not constitute abusive follow-on plans, and PBGC ultimately did not pursue that issue. That was totally within PBGC's discretion under 29 U.S.C. § 1347, and has no effect on the allocation of the Plan's assets or the reasonableness of PBGC's statutory construction.

B. The ALPA Payments were not made from Plan assets and did not constitute Plan benefits.

Addressing what is now Claim Two, the Appeals Board concluded:

> The ALPA Payments are not funds that were paid under pension plan provisions. Rather, the ALPA Payments are funds that were transferred directly from Delta to ALPA pursuant to a court-approved collective bargaining agreement. Furthermore, the ALPA Payments did not change the pension liabilities owed by the Pilots Plan to its participants and beneficiaries as of the Pilots Plan's termination date.

AR-41. This conclusion is completely reasonable and fully supported by the administrative record.[12]

The ALPA Payments were not obligations of the Plan, and no Plan assets were used to make them. The ALPA Claim was an obligation of Delta as a debtor in bankruptcy. Order Authorizing Debtors to Enter Into Amendments to Pilot Working Agreement, AR-1091, 1094-95. The ALPA Notes were an obligation of reorganized Delta. LOA #51, AR-931, 971. Delta agreed to make the ALPA Payments in exchange for ALPA's agreement to various terms. AR-931; 2001 Pilots Working Agreement, AR-3411.

The Pilots characterize the ALPA Payments as compensation to active pilots for benefits lost upon plan termination. *See* Mem. at 15-17. Although PBGC initially took a similar position, the bankruptcy court found that the ALPA Payments were made in exchange for a variety of concessions. In addition to not opposing termination of the Plan, ALPA agreed, among other things, to maintain a prior 14% reduction in wages, adjust life insurance and disability benefits, and increase medical cost sharing. *See* LOA #51, AR-932; Debtors' Motion Pursuant to Section 363 of the Bankruptcy Code for Authority to Enter Into Amendments of the Pilot Working Agreement, AR-978, 982-85.

Although the bankruptcy court made no specific factual findings, it did opine about the nature of the settlement:

> What we have here, quite clearly, was a heavily negotiated deal involving *many issues*. One concern, undoubtedly . . . was a concern on the part of members of the union with regard to what happens when the defined benefit plan is terminated at some point in the future. I have no doubt that the six-hundred-and-fifty-

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[12] The Pilots characterize as a concession the Appeals Board's observation that "PBGC is not *required* to take the ALPA Payments into account." AR-36 (emphasis added); Mem. at 20. This is hair-splitting; the Board certainly did not "concede" that the statute would allow PBGC to take these payments into account.

> million-dollar notes comprehended simply a horse trade at the end of the day under which, as [Delta's counsel] put it, they got as much as they could get and we gave as little as we could give.

Transcript of Motions, U.S. Bankruptcy Court, AR-351, 453-54 (emphasis added).

This is consistent with how ALPA and Delta viewed the settlement: "The ALPA Notes and ALPA Claim are part of a package which together address concessions under Letter of Agreement (LOA) 51, now incorporated into the Pilot Working Agreement and its related documents. . . . " Delta MEC Allocation Distribution Committee, ADC Dispatch dated August 9, 2007, AR-5263, 5265. Although they "address[ed] retirement-related issues and other items," the ALPA Payments were "not a mirror of or a replacement for the terminated Delta Pilots Retirement Plan (DPRP) or associated plans." *Id.* at AR-5263. And Delta's Chief Financial Officer, Edward Bastian, testified that the ALPA Notes were given in return for the concessions as a whole, and not specifically for the loss of Plan benefits. *See* Transcript of Motions, U.S. Bankruptcy Court, AR-351, 383-84.

The Pilots nevertheless attempt to bolster their argument by analogizing the ALPA Payments to other situations in which pension benefits are funded by outside sources. Specifically, they liken the ALPA Payments to irrevocable insurance contracts. Mem. at 20. But as explained in PBGC's regulations, insurance contracts are a "commitment by an insurer to pay a [pension plan] benefit." 29 C.F.R. § 4044.3. The "benefit payable under such a commitment is excluded from the allocation process" because the benefit has been or will be paid by the insurer. *Id.* In other words, the pension benefit becomes an obligation of the insurance company when it issues a contract; it is no longer an obligation of the plan. Here, the Plan's obligations to pay benefits were never reduced by the ALPA Payments. And, as discussed, the amount of the ALPA Payments was not calculated based on the value of Plan benefits.

In short, PBGC's construction of the statutory asset-allocation provision is entirely reasonable, and its application of that construction to the Plan should be upheld.

III. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO PBGC ON CLAIMS THREE, FOUR, AND FIVE, REGARDING THE STATUTORY PRIORITY CATEGORIES.

The Pilots challenge PBGC's interpretation of the statutory and regulatory provisions governing which benefits belong in priority categories 3 and 5. Claims Three and Four allege that PBGC improperly excluded certain benefit increases from PC3. The allegations of statutory misinterpretation here are similar to those made by the plaintiffs in *Davis I and II*, where the D.C. Circuit affirmed PBGC's reading of the PC3 provisions. 571 F.3d at 1293; 734 F.3d at 1167-68. Claim Five alleges that: (i) PBGC should not have discounted its bankruptcy recovery to the Plan's termination date in paying recovery-funded benefits; and (ii) PBGC should have included any benefits not includable in PC3 in the highest subcategory of PC5. The Pilots' arguments in Claim Five also have no merit. PBGC's interpretations of the statute and PBGC's implementing regulations are eminently reasonable and thus must be upheld.

A. CLAIM THREE – PBGC properly determined that increases to the compensation limit are not in PC3.

There are two requirements for a benefit to be in PC3. The first is that the participant must have either retired or been eligible to retire at least three years before the plan's termination date. 29 U.S.C. § 1344(a)(3). The second requirement—and the one fatal to Claim Three—is that PC3 does not include any benefit increase that became effective less than five years before the plan's termination date. *Id.* PBGC determined that the Plan's increase in the amount of compensation used in calculating benefits—allowed pursuant to statutory amendment to the compensation limitation in Internal Revenue Code § 401(a)(17)—was a benefit increase that

became effective less than five years before the Plan's termination date, and therefore was not included in PC3. AR-7 to 14.

The PC3 provision, 29 U.S.C. § 1344(a)(3), provides that for a participant who was retired (or could have retired) more than three years before a plan's termination date, the benefit in PC3 is the "benefit, based on the provisions of the plan (as *in effect* during the 5-year period ending on [the termination date]) under which such benefit would be the least." 29 U.S.C. § 1344(a)(3) (emphasis added). PBGC's implementing regulations elucidate this statutory provision in three ways. First, the regulations provide that, for PC3 purposes, "a plan or amendment is 'in effect' on the later of the date on which it is adopted or the date it becomes effective." 29 C.F.R. § 4044.13(b)(6). Second, "[b]enefit increases that were effective throughout the 5-year period" are included in PC3. 29 C.F.R. § 4044.13(a). Third, the amount in PC3 is limited to "the lowest annuity benefit *payable* under the plan provisions *at any time* during the 5-year period ending on the termination date." 29 C.F.R. § 4044.13(b)(3)(i) (emphasis added).

Under these clear standards, the Appeals Board concluded that the Plan's increase to the compensation limit used in calculating a participant's benefit could not be included in PC3. Compensation was a critical component in the Plan's primary formula for calculating participants' benefits, because like many pension plans, the Plan based a participant's accruals and final benefit on his final average earnings. AR-14; AR-127, 140 (Plan §§ 1.18 and 5.01). The Plan, as required by the Internal Revenue Code ("IRC"), capped the amount of compensation that could be taken into account. *See* IRC § 401(a)(17) (added to the IRC by the Tax Reform Act of 1986, Pub. L. No. 99-514, to cap the tax-advantaged retirement savings of highly compensated individuals). As of the beginning of 2001, the Plan provided that it would

take into account compensation up "to $150,000, as adjusted for the cost-of-living in accordance with Section 401(a)(17)(B) of the Code." AR-15; Plan § 1.12.

On June 7, 2001, Congress enacted the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), increasing the IRC § 401(a)(17) compensation cap to $200,000 per year and providing for cost-of-living adjustments ("COLAs") to the $200,000. AR-12; Pub. L. No. 107-16, § 611(c)(1), 115 Stat. 38, 96-97 (2001). EGTRRA provided that the amended IRC § 401(a)(17) limit "shall apply to [plan] years beginning after December 31, 2001."[13]

Two weeks after EGTRRA's enactment, on June 21, 2001, Delta entered into the PWA, a contract between Delta and its active pilots. AR-15, 3411. The PWA provided that the Plan's compensation limit would increase as soon as the § 401(a)(17) limit increased. AR-3697. Because the plan year for the Plan began on July 1, and ended on June 30, EGTRRA's $200,000 limit went into effect on July 1, 2002—i.e., the first day of the plan year beginning after December 31, 2001. On July 27, 2003, Delta adopted the Fourth Amendment, which formally incorporated EGTRRA's increase to the IRC § 401(a)(l7) limit into the Plan document. AR-245.

As the Appeals Board explained, Delta applied the $200,000 EGTRRA limit only to participants who retired after July 1, 2002. AR-20. Delta did not apply the $200,000 limit if a participant's benefit accruals ended before July 1, 2002, due to his or her retirement or separation from Delta employment before that date. AR-18.

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[13] EGTRRA uses the term "limitation year" instead of plan year or calendar year. The Plan document does not define "limitation year" but, based on Delta's practice, the limitation year was deemed to be coextensive with the Plan year.

1. PBGC reasonably determined that the amended compensation limit went into effect less than five years before the Plan terminated.

The Plan's increase to its compensation limit (by adopting the EGTRRA amendment to the IRC § 401(a)(l7) limit) does not meet the second statutory requirement of PC3—i.e., that the benefit be based on the plan provisions "in effect" during the five years before the plan's termination date "under which such benefit would be the least." 29 U.S.C. § 1344(a)(3). As the Appeals Board explained, PBGC interprets this second requirement as providing that a benefit increase cannot be "in effect" for purposes of PC3 before the date on which the increase becomes operative. AR-16.

The Appeals Board further explained that PBGC's regulations require that only benefit increases that "were effective *throughout* the 5-year period ending on the termination date . . . shall be included in determining the priority category 3 benefit." AR-17; 29 C.F.R. § 4044.13(a) (emphasis added). Thus, (i) if a benefit increase does not go into effect (i.e., is not payable) until after the beginning of the 5-year period immediately preceding the termination date, and (ii) if a participant's payable PC3 benefit amount during that 5-year period would be lower based on the plan's provisions that were in effect before the increase, then the increase is not included in the participant's PC3 benefit.

In this case, Delta incorporated EGTRRA's $200,000 limit for purposes of "determining benefit accruals of an Employee in any Plan Year beginning after June 30, 2002." AR-245. The operative date of the increase, therefore, was July 1, 2002; so PBGC concluded that the Plan's increase went into effect *after* September 3, 2001, the beginning of the 5-year period immediately preceding the Plan's termination date (September 2, 2006).

PBGC's conclusion that the Plan's incorporation of the EGTRRA increase is not in PC3 is based on the date, under the Plan's provisions, that the increase first could be applied in

determining a participant's benefit. That date, July 1, 2002, also was the statutory effective date under EGTRRA. Accordingly, PBGC appropriately based its PC3 determination on the date when the IRC § 401(a)(17) limit increase went into effect under the Plan's provisions, which coincided with EGTRRA's effective date for the increase.

2. The "lowest annuity benefit payable" during the 5-year period before the Plan's termination does not include the EGTRRA compensation increase.

Both the statute and PBGC's implementing regulation provide that the PC3 benefit is limited to the lowest annuity benefit payable under plan provisions at any time during the 5-year period ending on the termination date. 29 U.S.C. § 1344(a)(3); 29 C.F.R. § 4044.13(b)(3). The Appeals Board found that the "lowest annuity benefit payable" for PC3 purposes under the Plan was the benefit payable from the beginning of the 5-year period immediately preceding the Plan's termination date to June 30, 2002, after which Delta began applying the increased EGTRRA compensation limit to a participant's accruals and final benefit. AR-18 to 19.

The Fourth Amendment to the Plan made clear that Delta incorporated EGTRRA's $200,000 compensation limit for "determining benefit accruals of an Employee in any Plan Year beginning after June 30, 2002." AR-245. Delta, in accordance with this Plan provision, applied EGTRRA's $200,000 limit if the participant retired or separated from service after July 1, 2002. Delta did not apply the $200,000 limit, however, if the participant's benefit accruals ended before July 1, 2002, due to the pilot's retirement or separation from employment with Delta.

The Appeals Board explained in detail Delta's practice in applying the increased EGTRRA compensation limit in Appendix A of its decision. AR-81 to 86. The examples show that if a Plan participant retired on or before July 1, 2002, Delta determined benefits using the lower "OBRA '93" compensation limit in the 1996 Plan Restatement. Only for retirements after July 1, 2002, did Delta apply the higher EGTRRA limit. *Id*. Thus, the Plan provisions in effect

from the *beginning* of the 5-year period to June 30, 2002, provide the lowest annuity benefit payable for participants who were actively employed at that time and whose earnings were later affected by the EGTRRA increase.

The Pilots argue that IRS Notice 2001-56, which gave guidance to plan administrators on the EGTRRA increases, also provided for what they characterize as a retroactive effective date. Mem. at 28-31. The IRS's guidance did provide plans with flexibility, allowing them, for example, to apply the higher compensation limit to earnings in years before 2002, to the extent those earlier years' earnings are used to determine accruals for plan years beginning on or after January 1, 2002. As the Appeals Board explained in its decision, the Plan did apply the $200,000 EGTRRA limit to pre-2002 compensation, but only for determining benefits payable to Pilots who retired after July 1, 2002. AR-19 at n.50. Based on Delta's incorporation of the EGTRAA increase only for benefits payable under the Plan after July 1, 2002, the Board correctly concluded that that the EGTRRA increase is not in PC3.

3. PBGC's example in the *Davis* case is easily distinguished.

The Pilots attempt to sow doubt by suggesting that the Appeal Board's conclusion in this case contradicts an example that PBGC offered in the *Davis* litigation, about how the agency would determine the "in effect" date for a benefit increase with a retroactive effective date. Mem. at 29-30. PBGC provided the example to counter the *Davis* plaintiffs' allegation that PBGC's interpretation renders superfluous a portion of the PC3 regulation—i.e., that a benefit increase may have an effective date earlier than its adoption date. The *Davis* plaintiffs argued that PBGC's reading treats a benefit as "payable" (and "in effect") only after the plan adopts it and the benefit is actually paid.

PBGC's example in the *Davis* case proposed a different set of facts from those present here. The example assumed that the plan adopted a benefit increase on March 25, 1998, made it retroactive to January 1, 1998, and began paying the increased benefits (with the delay due to the time it takes to implement increased payments) on May 1, 1998. In such a case, PBGC said that it would find the date as of which the benefit increase was "in effect" to be March 25, 1998, the later of the adoption date and the (retroactive) effective date. 734 F.3d at 1168. This is because even though the increase was first *paid* on May 1, 1998, the increase was *payable* before that, because the higher rate would have applied to payments starting on January 1, 1998, with a back payment owed for four months. *Id.*

That is not the case here. The EGTRRA increase was neither paid, nor payable, for any period before July 1, 2002—no back payment was due to any participant for any period before that date. In calculating benefit accruals after July 1, 2002, Delta applied the EGTRRA increase to the amount of compensation used. But it did not increase benefit amounts payable *before* July 1, 2002.

The example PBGC offered in *Davis* also did not involve a key fact present in this case—that the benefit increase is dependent on a statutory change that became effective *in the future*. Under the Plan, the EGTRRA increase to the compensation limit could be applied in determining a participant's benefit only beginning on July 1, 2002. Accordingly, PBGC appropriately made its PC3 determination that the benefit increase became effective under the Plan as of EGTRRA's effective date for the increase.

B. CLAIM FOUR – PBGC properly determined that the EGTRRA increase to the benefit limit is not in PC3 for participants who retired before July 1, 2001.

Claim Four, like Claim Three, asserts that PBGC excluded from PC3 certain benefits that the Pilots believe should have been included. Although the Pilots provide several strained arguments (Mem. at 31-33), the issue is straightforward. The primary provisions at issue here are the same as those in Claim Three: 29 U.S.C. § 1344(a)(3) and PBGC regulations, 29 C.F.R. § 4044.13. These provisions, as discussed above, grant priority to the benefits of participants who were retired or could have retired three years before plan termination, but exclude benefit increases that were not "in effect" more than five years before termination.

The benefit increase at issue in Claim Four relates to EGTRRA's increase (to $160,000) of the IRC § 415(b)(1)(A) limit on annual benefits payable under defined benefit plans (the "EGTRRA benefit-limit increase"). The Appeals Board concluded that the EGTRRA benefit-limit increase applied to the PC3 benefits of only those Plan participants who were in active service when the PWA was signed and who retired on or after July 1, 2001. AR-26 to 28. This group was covered by the PWA, and the EGTRRA increase was fully incorporated into the Plan for them as of July 1, 2001, which is more than five years prior to the Plan's termination date of September 2, 2006. For participants who retired before July 1, 2001 (or who had separated from service before adoption of the PWA), however, the EGTRRA increase was not "in effect" until June 2003, when Delta adopted the Fourth Amendment extending the EGTRRA increase to participants not covered by the PWA. AR-29 to 30.

IRC § 415(b), added to the IRC by the original ERISA legislation of 1974, limits the annual benefit payments that a tax-qualified pension plan can make to a participant. EGTRRA increased that limit to $160,000. AR-24. Before EGTRRA, the limit was $90,000, increased by COLAs made pursuant to Treasury Department regulations. Those COLAs had already

increased the limit to $140,000 as of January 1, 2001. *See* I.R.S. News Release IR 2000-82 (Nov. 20, 2000). EGTRRA provided that the increase to the IRC § 415(b)(1)(A) limit to $160,000 was to apply to limitation years ending *after* December 31, 2001—a year earlier than the EGTRRA increase to IRC § 401(a)(17). *See* EGTRRA § 611(i)(2). Because the Plan had a plan year of July 1 to June 30, this meant the increase could apply as early as July 1, 2001—i.e. the plan year July 1, 2001 to June 30, 2002 ended *after* December 31, 2001.

As explained above, on June 21, 2001, Delta and its active pilots, represented by ALPA, agreed to the PWA. Section 26(G) of the PWA provided that "[i]f Internal Revenue Code Section . . . [is] amended to increase the limitations therein, then any such increase will be effective for the Retirement Plan . . . as of the earliest date that the increased [limits] could have become legally effective for that Plan . . . ." The Fourth Amendment later incorporated the EGTRRA benefit-limit increase into the Plan. In accordance with the PWA, it provided that, for active pilots, the IRC § 415(b) increase was effective as of July 1, 2001 (the earliest effective date under EGTRRA). AR-248. For retired participants, however, the Fourth Amendment provided that the IRC § 415(b) limit increase did not go into effect until July 1, 2002 (one year after the earliest effective date under EGTRRA), stating, in relevant part, as follows:

> Benefit increases resulting from the increase in the limit of Section 415(b) of the Code under EGTRRA shall be provided to all current and former participants . . . provided, however, that such increase shall only be applied to the annuity payments made from this Plan to former participants on or after July 1, 2002.

Fourth Amendment § 5; AR-248.

As the Appeals Board explained, Delta's practice followed the PWA and the Fourth Amendment. AR-26. Thus, for a participant who was active on June 30, 2001, and subsequently decided to retire (i.e., had an annuity starting date on or after July 1, 2001), Delta increased Plan payments starting on the retirement date capped by EGTRRA's $160,000 limit. However, for a

participant who was already retired, Delta's increase to payments made after July 1, 2001, were based only on the COLA increase for 2001, to the pre-EGTRRA IRC § 415(b) annual limit. *Id.*

1. The PWA amended the Plan for active participants but not for retired participants.

PBGC's regulations provide that, for purposes of PC3, a plan provision is "in effect" on the later of the date on which it is adopted or the date it becomes effective. 29 C.F.R. § 4044.13(b)(6). The PWA's incorporation of the EGTRRA benefit-limit increase was adopted in June 2001, and effective on July 1, 2001, both of which are more than five years before the Plan's September 2, 2006 termination date. Therefore, for participants covered by the PWA, the EGTRRA benefit-limit increase was "in effect" for the Plan more than five years before the termination date.

Although section 26(G) of the PWA was an amendment to the Plan, that section applied only to active participants with annuity starting dates on or after July 1, 2001. This is so for two reasons. First, the PWA was an agreement between Delta and its actively employed pilots. Nowhere does the PWA state that retirees are covered by the agreement. *See* AR-3411 to 3797; PWA §§ 1-28. As the Appeals Board explained, case law makes clear that retirees are not members of the bargaining unit, and that a union, while not precluded from representing the interests of retirees, has no duty to do so. AR-29; *see, e.g., Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n. 20 (1971). Thus, a union may seek larger benefits for active workers than those provided under a plan for retirees. *United Mine Workers of Am. Health & Ret. Funds v. Robinson*, 455 U.S. 562, 574-75 (1982). The Appeals Board noted that the PWA stated that it "cover[s] the pilots in the employ of the Company." AR-28; PWA § 1(a)(1).

Second, there is no presumption that a collective bargaining agent represents retirees in negotiations or that a collective bargaining agreement covers them with respect to retirement benefits. AR-29. Therefore, the Appeals Board found insufficient evidence to establish that ALPA was representing the interests of retired pilots when it negotiated § 26(G) of the PWA. *Id*. The Pilots nevertheless argue that the structure of the PWA, if "construed by a fiduciary with an eye toward the beneficiaries' interests," would show that it covered all Plan participants. Mem. at 33. The Pilots offer little to bolster this assertion, and their argument that PBGC should have presumed that ALPA represented the retirees' interests is especially odd here, given the Pilots' contention in Claim Two that ALPA represented the interests of active pilots to the disadvantage of the Pilots when negotiating LOA #51. Mem. at 15; First Am. Comp. ¶¶ 9, 80.

2. Interpreting the PWA to cover retired participants would conflict with the Fourth Amendment and Plan practice.

Another ground supports PBGC's conclusion that the PWA did not apply to participants who were retired when the PWA was adopted on June 21, 2001. If the PWA were read to cover such participants, it would conflict with the Fourth Amendment, which does not make the EGTRRA benefit-limit increase effective until July 1, 2002 for this group.

As the Appeals Board explained, the Fourth Amendment explicitly provides for different effective dates for the EGTRRA benefit-limit increase depending upon the participant's annuity starting date. AR-29. For a participant who retired before July 1, 2001, the increase to $160,000 was not effective until July 1, 2002. Thus, the Fourth Amendment and the Plan's practice are consistent with the PWA only under the assumption that the PWA did not amend the Plan's IRC § 415(b) benefit limit for retired pilots. Nothing prohibited Delta from adopting a delayed effective date for retired pilots in the Fourth Amendment, and all of the evidence suggests that this is what Delta intended.

C. CLAIM FIVE – PBGC properly determined the recovery amount in calculating recovery-funded benefits, and properly assigned the Pilots' PC5 benefits to the second subcategory.

The Pilots' Claim Five contains two separate allegations. First, the Pilots assert that PBGC should not have discounted the recovery on its bankruptcy claims to the Plan's termination date, notwithstanding that the claims were calculated as of the termination date. Second, the Pilots assert that in assigning their non-PC3 benefits to PC5, PBGC should have assigned them to the first subcategory, reserved for benefits under the Plan that were effective within five years of the termination date, rather than to the second subcategory. Mem. at 33-40.

When a pension plan terminates, PBGC asserts several claims against the plan sponsor and its controlled group of affiliated employers. Due and unpaid employee contributions ("DUEC") are the liabilities under 29 U.S.C. § 1362(c) for the accumulated "minimum funding contributions" (including interest) that the plan sponsor and its controlled group were required to make to the pension plan, less the amounts actually contributed. Unfunded benefit liabilities ("UBL") are the liabilities under 29 U.S.C. § 1362(b) that a sponsor and its controlled group owe to PBGC as of the plan's termination date, which consist of the difference between the present value of the plan's total benefit liabilities and the value of the plan's assets.

Between May 3, 2007, and December 31, 2009, PBGC collected a total of $1,285,159,164 in recoveries on its claims against Delta and its controlled group. AR-45. PBGC, in accordance with its policy on valuing and allocating recoveries, initially discounted that amount to the Plan's recovery "valuation date" of May 3, 2007—the date when PBGC received over $1 billion worth of Delta stock, and all significant uncertainties as to the value of the recoveries was removed. AR-45 at n.126; 1160. PBGC determined the recovery amount as of the valuation date to be $1,279,506,423.

PBGC then further discounted the recoveries to the Plan's termination date of September 2, 2006. AR-45. Thus, PBGC determined the total recovery amount as of the Plan's termination date to be $1,229,004,740. *Id.* This amount reflects PBGC's combined recovery on its DUEC and UBL claims in Delta's bankruptcy. PBGC, again in accordance with policy, allocated $240,263,310 of the recovery as of the termination date to the Plan's DUEC claim, and $988,741,430 to PBGC's UBL claim. AR-46. The $240,263,310 that PBGC allocated to DUEC significantly increased the Plan's funded PC3 benefits payable to PC3-eligible participants, like the Pilots, resulting in a 93.03847% funding level for PC3. *Id.*

As explained above in the statutory background section at page 8, *supra,* 29 U.S.C. § 1322(c) establishes a mechanism by which PBGC shares a portion of its recoveries for UBL with participants. These are called recovery-funded benefits. For a pension plan like the Plan, in which the outstanding amount of unfunded nonguaranteed benefit liabilities ("UNGBs") exceeds $20 million, the section 1322(c) amount is based on PBGC's actual UBL recovery against the plan sponsor. 29 U.S.C. § 1322(c)(3)(C).[14] Thus, section 1322(c) requires PBGC to use its UBL recovery value to calculate the Plan's section 1322(c) amount.

The first step in determining the section 1322(c) amount is to calculate the "recovery ratio." The recovery ratio represents the percentage of a plan's otherwise unfunded benefits that become funded due to PBGC's UBL recovery. For the Plan, the recovery ratio equals the UBL recovery as of the termination date ($988,741,430) divided by the value of the Plan's UBL claim as of the termination date ($2,567,680,000), which is 38.51%. AR-47. The second step in determining the section 1322(c) amount is to multiply the value of the Plan's UNGBs as of the

[14] UNGBs are benefits that are neither guaranteed by PBGC nor funded by the section 1344 asset allocation.

termination date ($1,769,046,686) by the recovery ratio of 38.51%. *Id.* The result is that PBGC allocated $681,259,882 to pay otherwise unfunded nonguaranteed benefits.

PBGC allocates recovery-funded benefits under section 1322(c) according to the priority categories in section 1344(a), starting where plan assets ran out, except that they "skip" over guaranteed benefits in PC4. 29 U.S.C. § 1322(c)(1). For the Plan, the $681,259,882 available under section 1322(c) funded the remainder of PC3 benefits and funded a significant portion of the benefits assigned to the first subcategory of PC5. AR- 49.

PC5 includes nonforfeitable benefits under a terminated plan that are not in any of the higher priority categories. 29 U.S.C. § 1344(a)(5). It includes, for example, vested benefits that exceed the maximum guarantee limit or that are not guaranteed due to the phase-in rule (and that are not in PC3). PC5 has subcategories: first the "5-year old plan," then the next oldest amendment, and so on. *See* 29 U.S.C. § 1344(b)(4); 29 C.F.R. § 4044.10(e). PBGC determined that the EGTRRA increases that could not be included in the Pilots' PC3 benefits belonged in the second subcategory of PC5, because those increase were not "in effect" for the full 5-year period immediately preceding the Plan's termination date.

The Appeals Board concluded that PBGC had correctly determined benefits under section 1322(c), including discounting the recovery amount to the termination date, and had correctly assigned the EGTRRA increases that could not be included in the Pilots' PC3 benefits to the second subcategory of PC5.

1. PBGC properly determined the amount of its recovery for calculating recovery-funded benefits.

Section 1322(c) provides that "[d]eterminations under this subsection shall be made by [PBGC]. Such determinations shall be binding unless shown by clear and convincing evidence to be unreasonable." 29 U.S.C. § 1322(c)(4). The Appeals Board's conclusion that, in

determining monies allocable to participants' benefits, PBGC must discount its recoveries to the Plan's termination date is entirely reasonable, and easily passes the "clear and convincing" standard under the statute.

The Appeals Board rejected the Pilots' argument that PBGC must apply the amounts of its recovery, as of the date(s) those recoveries are received, without discounting the recoveries to the Plan's termination date. AR-43. To the contrary, the Appeals Board concluded that to reflect interest, PBGC had to discount the value of its recovery to September 2, 2006. AR-43. This is because:

- ERISA defines both the DUEC and the UBL in terms of their value at the termination date;
- The DUEC, which is treated as a plan asset, is valued as of the termination date for purposes of the section 1344 allocation; and
- PBGC's UBL recoveries are valued at the termination date for purposes of determining the section 1322(c) amounts that PBGC pays to participants and beneficiaries.

AR-44. The point is that, in the case of a terminated plan, the date for calculating, comparing, and applying all of these values is the termination date. Because ERISA nowhere suggests comparing "apples with oranges," PBGC calculates the value of recoveries as of the termination date, too. *See, e.g., Audio Fid. Corp. v. PBGC*, 624 F.2d 513, 517 (4th Cir. 1980) (holding that rights and claims under a terminated plan "became fixed" as of the plan's termination date).

The Pilots stress that section 1322(c) mentions "as of the termination date" only with respect to the UBL amount, and not the recovery amount, when describing the recovery ratio. Mem. at 36. Their conclusion, based on this, is that the recovery amount in the recovery ratio should be based on recovery amount(s) as of their date(s) of receipt by PBGC, even though the statute does not say this.

Not only does section 1322(c) not say what the Pilots would like it to say, but their preferred interpretation makes little sense. As happened in the case of Delta, PBGC often

receives multiple recoveries with respect to a terminated plan. Sometimes this is because bankruptcy estates make distributions to creditors over time. In other cases, PBGC settles its claims against the liable parties at different points in time. No uniform interest (or any specified interest, necessarily) applies to recoveries paid to PBGC later in time. For this reason, comparing a plan's UBL claim, determined as of the termination date, with a combination of recoveries received as various points in time and with no uniform interest factor for the delay in payment, would render the section 1322(c) recovery ratio an odd "apples to oranges" mixture.

2. PBGC properly determined that the Pilots' PC5 benefits belong in the second subcategory.

The Pilots argue that the EGTRRA increases that PBGC determined are not includable in PC3 belong to the first subcategory of PC5 (i.e., PC5(a)). The Appeals Board concluded that these increases instead are correctly assigned to the second subcategory of PC5 (PC5(b)), because the increases were not "in effect" for the full 5-year period preceding the Plan's termination date. The Board's conclusion is an eminently reasonable interpretation of ERISA and PBGC's implementing regulations.

PC5(a) covers PC5 amounts "under the Plan as in effect at the beginning of the 5-year period ending on the date of plan termination." 29 U.S.C. § 1344(b)(4)(A). If funds satisfy all of PC5(a), the allocation of remaining funds to PC5(b) benefits is determined "on the basis of the plan as amended by the next succeeding plan amendment effective during such period." 29 U.S.C. § 1344(b)(4)(B). PBGC interpreted these statutory provisions to mean that a plan provision is in effect for PC5(a) purposes on the date that it is operative. Thus, PBGC did not assign a benefit increase to PC5(a) if the Plan provision was not "in effect" (i.e., was not operative) until after the beginning of the 5-year period immediately preceding the termination date.

The Appeals Board reasonably concluded that the same rules governing when a plan provision or amendment is "in effect" for purposes of determining the PC3 benefit and applying the phase-in limit under 29 U.S.C. § 1322(b) should be applied to the PC5 subcategories. The Board cited the similar language in these statutory provisions:

- 29 U.S.C. § 1344(a)(3) states that PC3 benefits are "based on the provisions of the plan (as in effect during the 5-year period ending on [the termination] date) under which such benefit would be the least";
- 29 U.S.C. § 1322(b)(l) states that the phase-in limit applies to: (i) "benefits provided by a plan which has been in effect for less than 60 months at the time the plan terminates;" and (ii) "any increase in the amount of benefits under a plan resulting from a plan amendment which was made, or became effective, whichever is later, within 60 months before the date on which the plan terminates . . ."; and
- 29 U.S.C. § 1344(b)(4)(A) provides that benefits in subcategory PC5(a) are determined "under the plan as in effect at the beginning of the 5-year period ending on the date of plan termination."

AR-51 to 52.

The Pilots offer several arguments why these provisions are distinguishable and should not apply for PC5 purposes. First, they note that the PC5 provision does not include the phrase "under which such benefit would be the least," as does the PC3 provision. Mem. at 38. The Board found this to be irrelevant, however, as PC5 covers the portion of a participant's nonforfeitable benefit that is not already assigned to the higher priority categories. AR-54. And the language in PC3 ensures that, notwithstanding the 5-year lookback, benefit decreases after the beginning of the 5-year period are taken into account, too. AR-53.

Second, the Pilots argue that the Appeals Board's conclusion in Claim Three that a benefit increase is not "in effect" for PC3 purposes until it is "operative" has no basis for purposes of PC5(a). They further argue that, if "operative" does apply to PC5, then the benefits of non-PC3 eligible active pilots cannot belong in the first subcategory, because none of them could have

retired and received a benefit during the 5-year period immediately preceding the termination date. Mem. at 38-39. These arguments are without merit. There is no reason to define "in effect" differently for PC5. And the PC5 statute has no requirement that the participant be in pay status or be eligible to enter pay status for the amendment be "in effect." AR-53.

Last, the Pilots note that ERISA's asset allocation scheme favors the benefits of retirees. Mem. at 40. This is certainly true for PC3, and is the reason why it comes before PC4. But nothing in the statute suggests that within *other* priority categories, the benefits of retirees have a higher status than those of active participants.

IV. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO PBGC ON CLAIM SIX, REGARDING THE ADMINISTRATIVE PROCEDURE ACT.

In Claim Six, the Pilots allege "violation of the APA." Doc. 45, First Amended Complaint at p. 123. They assert that PBGC was arbitrary and capricious in a variety of ways: the agency's purported failure to provide them with benefits authorized by ERISA and the Plan; its calculation of their benefits; its construction of statutes and regulations in the process of categorizing benefits, administering its appeal process, and determining what information the Pilots were entitled to; its enforcement of the regulatory appeal deadline; and its reliance on purportedly invalid regulations. *Id.* at ¶¶ 152-156.

In seeking summary judgment on Claim Six, the Pilots now confusingly suggest that the Court should "determin[e]" whether their claims "should proceed under the [APA] instead of ERISA." Mem. at 40. But these are not alternatives. It is black-letter law that the APA sets forth the standard of review for agency determinations; it does not create a separate claim to challenge such determinations when the agency's governing statute provides a remedy, as PBGC's does. As the Supreme Court made clear in *Bowen v. Massachusetts*, "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of

agency action . . . . § 704 'does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures.'"[15] Just such review procedures exist here, and the Pilots are already using them.

Section 4003(f) of ERISA expressly provides a claim to any participant who is "adversely affected by any action of [PBGC]" with respect to his or her pension plan. 29 U.S.C. § 1303(f). As the Pilots recognize, this includes an adverse benefit determination. They followed PBGC's regulatory process for challenging their benefit determination to PBGC's Appeals Board, 29 C.F.R. part 4003, then brought this action under 29 U.S.C. § 1303(f) challenging the final agency action in this Court. Doc. 45, First Amended Complaint at ¶ 14.

Thus, although the APA provides the standard governing judicial review of PBGC's determinations, it does not create an independent avenue for the Pilots to challenge those determinations. As this Court held in *Westcott v. McHugh*:

> Review under the APA is limited to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Section 704 "makes it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts,* 487 U.S. 879, 903 (1988). Thus, a plaintiff cannot bring an APA claim to obtain relief for an alleged Privacy Act violation. [Citations omitted.] A review of the plaintiff's APA claim reveals that it is "simply a restatement of [his] Privacy Act claims," *Mittleman,* 773 F. Supp. at 449, and therefore must be dismissed.

39 F. Supp. 3d 21, 33 (D.D.C. 2014) (Walton, J.) (footnote omitted).[16]

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[15] 487 U.S. 879, 903 (1988) (citation omitted); *accord Garcia v. Vilsack*, 563 F.3d 519, 522-23 (D.C. Cir. 2009). Section 704 provides that "[a]gency action made reviewable by statute and final agency action *for which there is no other adequate remedy in a court* are subject to judicial review." 5 U.S.C. § 704 (emphasis added).

[16] *Accord Conservation Force v. Salazar*, 715 F. Supp. 2d 99, 104 n.6 (D.D.C. 2010) ("Therefore, because 'review of [plaintiffs'] claim is available under the [Endangered Species Act], it is not subject to review under the APA.") (citation omitted).

Exactly like the APA claim that this Court dismissed in *Westcott*, the Pilots' APA Claim—Claim 6—is simply a restatement of their ERISA claims—Claims 2 to 5. In Claim 6, the Pilots challenge PBGC's alleged failure to provide them with the benefits authorized by ERISA and the terms of the Plan; its calculation of benefits; its construction of statutes and regulations in the process of categorizing benefits, administering its appeals process, and determining what information the Pilots were entitled to; its enforcement of the regulatory appeal deadline; and its reliance on purportedly invalid regulations. Doc. 45, First Amended Complaint at ¶¶ 152-56. The APA does not provide the Pilots with a duplicate avenue to assert those claims. Even if it did, the Pilots' arguments fail under ERISA for all of the reasons set forth above, and thus there can be no valid claim under the APA either.

The Pilots' newfound focus on PBGC's purportedly "facially deficient administrative record" (Mem. at 40) does not change this analysis at all. PBGC's determination, reached through extensive and longstanding procedures, is fully supported by its administrative record, and is not arbitrary and capricious. As shown above at 17, the agency's subsequent plan asset re-evaluation does not render its determination of the Pilots' statutory benefits arbitrary and capricious. PBGC based the determination that is before the Court on the materials that were before the agency, and included all of those materials in the administrative record. Its subsequent re-evaluation did not affect the validity of the determination, and as explained above, changed the asset valuation by less than one percent. Accordingly, the Court should grant summary judgment to PBGC on Claim Six.

CONCLUSION

For all the reasons herein, the Court should deny the Pilots' motion for summary judgment, and grant summary judgment to PBGC on Claims Two, Three, Four, Five, and Six.

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/s/ Mark R. Snyder

JUDITH R. STARR, General Counsel
CHARLES L. FINKE, Deputy Chief Counsel
KENNETH J. COOPER, Asst. General Counsel
PAULA J. CONNELLY, Asst. Chief Counsel
JOSEPH M. KRETTEK, Asst. Chief Counsel
MARK R. SNYDER, Attorney

PENSION BENEFIT GUARANTY CORP.
1200 K Street, N.W.
Washington, DC 20005
Tel: (202) 326-4400 ext. 3423
Facsimile: (202) 326-4112
efile@pbgc.gov & snyder.mark@pbgc.gov