**ORAL ARGUMENT NOT YET SCHEDULED**

**No. 17-5068**

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

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**K. WENDELL LEWIS, et al.,**
***Plaintiffs/Appellees***

**v.**

**PENSION BENEFIT GUARANTY CORPORATION,**
***Defendant-Appellant.***

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**On Interlocutory Appeal from the United States District Court**
**for the District of Columbia, No. 1:15-cv-01328-RBW**

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# BRIEF OF APPELLANT PENSION BENEFIT GUARANTY CORPORATION

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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

June 5, 2017

## CERTIFICATE AS TO CORPORATE DISCLOSURE STATEMENT AND AS TO PARTIES, RULINGS, AND RELATED CASES

Appellant Pension Benefit Guaranty Corporation ("PBGC") respectfully certifies the following:

### A. Disclosure statement

PBGC is a federal government agency established under 29 U.S.C. § 1302. As a wholly owned government corporation, PBGC is not required to file a corporate disclosure statement. Fed. R. App. P. 26.1(a); *see* Circuit R. 26.1(a).

### B. Parties and amici

The following is a list of all parties, amici, and intervenors who appeared in the district court: Plaintiffs K. Wendell Lewis and approximately 1,700 other individuals listed in the Joint Appendix to this Brief ("JA") at JA654; and Defendant PBGC. The following is a list of all persons who are parties, intervenors, or amici in this Court: Appellees K. Wendell Lewis and approximately 1,700 other individuals listed at JA654, as amended by court-approved substitution/addition shown at JA691; and Appellant PBGC.

### C. Rulings Under Review

The rulings of the United States District Court for the District of Columbia at issue in this Court are the Memorandum Opinion of Judge Reggie B. Walton entered on July 6, 2016, in Civil Action No. 1:15-cv-01328 (RBW), denying PBGC's Motion to Dismiss Claim One of Plaintiffs' First Amended Complaint (JA333), and the accompanying Order dated July 6, 2016 (JA332). The official citation for the Memorandum Opinion is 197 F. Supp. 3d 16 (D.D.C. 2016).

### D. Related Cases

There are no related cases to the instant case.

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## JURISDICTION

The district court has jurisdiction of this case under Title IV of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1301-1461 (2012 & Supp. II 2014) ("ERISA" or "Title IV"). The specific jurisdictional provision is 29 U.S.C. § 1303(f). This Court has jurisdiction of this appeal under 28 U.S.C. § 1292(b). The district court certified its Memorandum Opinion and Order dated July 6, 2016, on January 23, 2017, JA384. This Court granted PBGC's petition for permission to appeal on April 4, 2017, Doc. # 1669324, JA653.

## STATUTORY BACKGROUND[1]

### 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, in large part to protect participants in the event that their defined benefit pension plan terminates without enough assets to pay promised benefits. *See Nachman Corp. v. PBGC*, 446 U.S.

[1] The pertinent statutory and regulatory provisions are reprinted in the statutory addendum to this brief.

359, 361-62 & n.1 (1980) (describing ERISA statutory scheme); *accord Davis v. PBGC*, 734 F.3d 1161, 1164-65 (D.C. Cir. 2013).

Title IV provides that PBGC guarantees nonforfeitable (vested) benefits, subject to certain limitations. 29 U.S.C. § 1322. Employers that sponsor single-employer plans are required to pay insurance premiums to PBGC. 29 U.S.C. §§ 1306, 1307. PBGC paid benefits of $5.7 billion to nearly 840,000 retirees in terminated plans in fiscal year 2016. PBGC 2016 Annual Report, http://www.pbgc.gov/sites/default/files/legacy/docs/2016-Annual-Report.pdf, at 7. PBGC's current deficit for single-employer plans (including the plan at issue here) is $20.6 billion. *Id.* at 10.

When an underfunded pension plan terminates—usually because the employer is in bankruptcy 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 been appointed trustee of virtually every one of the more than 4,800 underfunded plans that have terminated since 1974. *See Davis v. PBGC*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). 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 a terminated plan with the agency's insurance funds to pay benefits to current and future retirees and their beneficiaries. ERISA expressly authorizes PBGC to "pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of [Title IV]." 29 U.S.C. § 1342(a). And the statute further mandates that "[a]ny increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, [PBGC]." 29 U.S.C. § 1344(c).

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). Title I similarly provides that fiduciary duties are "subject to" Title IV provisions governing PBGC. 29 U.S.C. § 1104(a)(1). PBGC's role as statutory trustee is generally limited to marshalling plan assets. PBGC in its role 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.

After an underfunded plan is terminated, PBGC values plan assets and participants' benefits, and issues to each participant a determination of his or her statutory benefit. A participant may challenge PBGC's determination of benefits by filing an appeal with PBGC's Appeals Board. 29 C.F.R. pt. 4003, subparts A and D (§§ 4003.1-4003.10 and 4003.51-4003.61). If the Appeals Board denies the appeal, the participant may bring an action in federal district court against PBGC under 29 U.S.C. § 1303(f), like the instant suit.

**B. Title IV pension benefits**

The amount of benefits payable to participants in a terminated plan is dictated 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(a); 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 many cases PBGC guarantees a participant's entire plan benefit.[2] A participant

[2] 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.

may receive a larger asset-funded benefit depending on the level of plan assets and whether part 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, depending on the amount that PBGC recovers from the sponsor of a terminated plan (recovery-funded benefits).

**C. Participant suits regarding pension plans**

Title I of ERISA, 29 U.S.C. §§ 1001-1191, governs ongoing pension plans. Title IV of ERISA, 29 U.S.C. §§ 1301-1461, governs terminated pension plans. Participants wishing to challenge a determination by the plan or by PBGC have different but parallel avenues for relief under Title I and Title IV.

Under Title I, participants in ongoing plans can sue plan officials and other parties under ERISA § 502(a), 29 U.S.C. § 1132(a), which states, in relevant part, that suit may be brought:

> **(1)** by a participant or beneficiary—
>
> * * *
>
> **(B)** to recover benefits due to him under the terms of his plan . . .
>
> **(2)** . . . for appropriate relief under section 1109 [ERISA section 409, which addresses fiduciary breach] . . . [or]
>
> **(3)** . . . to obtain other appropriate equitable relief . . . .

Title I imposes on fiduciaries of ongoing plans the duties of loyalty, prudence, and fidelity to governing documents, and prohibits related-party transactions and self-dealing. 29 U.S.C. §§ 1104, 1106. The statute subjects a breaching fiduciary to liability to the plan, not to individual plan participants. 29 U.S.C. § 1109 (breaching fiduciary must "make good to such plan any losses to the plan resulting from each such breach . . . ."). A participant in an ongoing plan may bring suit under 29 U.S.C. § 1132(a) against a fiduciary for relief to the plan under section 1109.

Upon plan termination, Title IV remedies displace Title I remedies. Participants in *terminated* plans can sue PBGC only under 29 U.S.C. § 1303(f),[3] which states, in pertinent part:

> **(1)** . . . any person who is . . . adversely affected by any action of [PBGC] with respect to a plan in which such person has an interest . . . may bring an action against [PBGC] for appropriate equitable relief in the appropriate court.
>
> * * *
>
> **(4)** This subsection shall be the exclusive means for bringing actions against [PBGC] under this subchapter, including actions against [PBGC] in its capacity as a trustee under section 1342 or 1349 of this title.

[3] *See Fontaine v. Guth*, No. 3:02-CV-067-JTC, 2009 WL 10665747, at *7 (N.D. Ga. Mar. 17, 2009); *Garland v. US Airways*, No. 05-140, 2006 WL 3762047, at *5 (W.D. Pa. Dec. 21, 2006).

Title IV does not specifically impose liability against PBGC for fiduciary breach. Rather, it provides that the statutory trustee of a terminated plan "shall be, with respect to the plan, a fiduciary within the meaning of [Title I] . . . except to the extent that the provisions of [Title IV] are inconsistent with the requirements applicable under [Title I] . . . ." 29 U.S.C. § 1342(d)(3).

Thus, PBGC can be subject to a fiduciary breach claim in a Title IV suit under section 1303(f), as the Appellees brought here. But unlike a Title I fiduciary, who must act with "an eye single to the interests of the participants and beneficiaries" in a plan (*Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982)), PBGC's fiduciary duties are limited by its Title IV mandate to implement the insurance program for participants in all terminated plans, as well as the companies that maintain those plans. As the court explained in *Paulsen v. CNF Inc.*, "PBGC must balance its statutory duties to all stakeholders, including premium payers, participants and beneficiaries in ongoing plans, and those in all of its terminated plans." 559 F.3d 1061, 1086-87 (9th Cir. 2009).

PBGC is expressly charged in the statute with encouraging the continuation and maintenance of private pension plans, providing for the uninterrupted payment of pension benefits, and maintaining the mandatory insurance premiums at the lowest level consistent with carrying out the agency's duties. 29 U.S.C. § 1302(a).

And, unlike a Title I fiduciary, PBGC is authorized to pool the assets of terminated pension plans for purposes of administration, investment, payment of liabilities, and such other purposes as it determines to be appropriate. 29 U.S.C. § 1342(a).

For these reasons, PBGC is not an ordinary fiduciary. As one district court explained, "[section] 1342(d) limits [PBGC's] fiduciary responsibilities insofar as they interfere with the implementation of other ERISA provisions." *US Airline Pilots Ass'n v. PBGC*, No. 09-1675, 2014 WL 3537827, at *2 (D.D.C. Jun. 20, 2014).

## STATEMENT OF THE ISSUES

The district court's holding—the first of its kind—would allow participants in terminated pension plans to bring expanded, duplicative "fiduciary breach" claims against PBGC (in addition to their benefit claims), seeking individual relief well beyond their statutory benefits. Did the district court err in rejecting all four of the statutory barriers to the Appellees' Claim 1, namely that:

(i) participants cannot recover more from PBGC than the amount of their Title IV benefits;

(ii) participants cannot bring claims for fiduciary breach that duplicate their claims for benefits;

(iii) participants cannot seek relief from PBGC for fiduciary breach on an individual, rather than plan-wide, basis; and

(iv) participants cannot seek disgorgement of PBGC's post-plan-termination investment gains, as it is expressly precluded by 29 U.S.C. § 1344(c)?

## STATEMENT OF THE CASE

Delta Air Lines, Inc. was the contributing sponsor of a defined benefit pension plan for its pilots, the Delta Pilots Retirement Plan (the "Plan"). First Amended Complaint at ¶ 3, JA280. After Delta Air Lines filed for Chapter 11 bankruptcy protection, the Plan was terminated in 2006, and PBGC became its statutory trustee. *See* 29 U.S.C. §§ 1341(c)(3)(B)(iii); 1342; 1348; Declaration of Nicole Williams at ¶ 4, JA202. PBGC became responsible to pay statutory benefits under the Plan, which promised $2.5 billion more in benefits than it had in assets as of the termination date. *Id.* at ¶ 5 and Exh. 1 thereto, JA203. Nearly $800 million of these unfunded benefits are guaranteed and will be paid by PBGC out of its insurance funds. *Id.*

The Appellees (the "Pilots") are nearly 1,700 participants of the Plan and their beneficiaries. First Amended Complaint at ¶ 1, JA279. After the Plan terminated, PBGC issued benefit determinations informing participants of the amount of their Title IV pension benefits. Some of the Pilots appealed these benefit determinations to PBGC's Appeals Board, and on September 27, 2013, the Appeals Board rendered the final agency decision. Corrected Appeal Brief of

Participants and Beneficiaries in the Delta Retirement Plan, JA535; PBGC Appeals Board Decision, JA393.

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. Complaint in N.D. Ga., JA027. PBGC moved to transfer the case for improper venue and moved to dismiss the Pilots' fiduciary breach claim, which was then Claim 5. PBGC's Georgia Motion to Dismiss, Doc. 13.[4] 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. Order of Georgia district court (Aug. 11, 2015), JA189.

After transfer to the District of Columbia, the Pilots moved for leave to file an amended complaint, which included an expansion of their fiduciary breach claim. Motion to amend, Doc. 40. PBGC opposed, but the district court granted the motion to amend. PBGC Opposition, Doc. 41; D.D.C. Order granting motion to amend, JA204. The Pilots filed their First Amended Complaint—the current version—seeking relief that includes an award of benefits; an injunction against PBGC; the setting aside of all PBGC regulations applied in circumstances that

[4] "Doc." numbers refer to the document numbers on the docket sheet in the D.C. district court, which is included at JA001.

violate ERISA; an accounting of statutory insurance premiums; a constructive trust for premiums paid to remedy fiduciary breach; monetary relief to redress fiduciary breach; disgorgement and surcharge to redress unjust enrichment from investment income; attorneys' fees; other expenses; and costs. First Amended Complaint at pp. 124-126, JA329-331.

On December 7, 2015, PBGC moved again to dismiss the Pilots' fiduciary breach claim, which the Pilots had renumbered from Claim 5 to Claim 1. PBGC's D.C. motion to dismiss, Doc. 46. The Pilots opposed. Opposition, Doc. 47. On July 6, 2016, the district court issued the Memorandum Opinion and Order at issue in this appeal (the "Opinion"), denying PBGC's motion to dismiss Claim 1. Opinion, JA333; Order, JA332.[5]

PBGC moved the district court to reconsider or certify the Opinion for interlocutory appeal. Doc. 54. On January 23, 2017, the district court denied the motion to reconsider, but granted the motion to certify, finding that the Opinion meets the requirements of 29 U.S.C. § 1292(b). Order granting motion for certification, JA376; Order certifying interlocutory appeal, JA384. On April 4,

[5] The Opinion granted PBGC's motion to strike the Pilots' jury demand and their request for attorneys' fees, which are not authorized by statute (*see Stephens v. US Airways Grp., Inc.*, 644 F.3d 437, 442 (D.C. Cir. 2011)). Opinion at 2, 20, JA334, 352; Order, JA332.

2017, this Court granted PBGC's petition for permission to appeal. Order granting petition, JA653. Pursuant to the district court's order, the Pilots' remaining benefit claims are proceeding in the district court. PBGC has filed the administrative record, and the parties are currently briefing summary judgment motions.

## STANDARD OF REVIEW

This Court "review[s] denials of motions to dismiss *de novo*." *Bombardier Corp. v. Nat'l R.R. Passenger Corp.*, 333 F.3d 250, 252 (D.C. Cir. 2003); *accord Z Street v. Koskinen*, 791 F.3d 24, 28 (D.C. Cir. 2015); *de Csepel v. Republic of Hungary*, 714 F.3d 591, 597 (D.C. Cir. 2013). The Court assumes the truth of the non-movant's factual allegations, but "make[s] legal determinations *de novo*." *Z Street*, 791 F.3d at 28; *accord United States v. Bookhardt*, 277 F.3d 558, 564 (D.C. Cir. 2002).

## SUMMARY OF ARGUMENT

No decision in PBGC's forty-three year history has subjected the agency to participant recoveries in excess of their Title IV benefits. As the district court noted, there is a "dearth of controlling precedent," and PBGC has a "credible contention that the ERISA does not permit the plaintiffs to pursue this claim." Order granting motion for certification at 6-7, JA381-82. And ERISA does not.

To be sure, the Pilots also asserted five *cognizable* benefit claims, and those claims are proceeding in the district court.

But the Pilots' separate claim of fiduciary breach against PBGC—Claim 1—alleges that in calculating their benefits, PBGC committed fiduciary breach by intentionally misinterpreting the law in order to reduce retirees' benefits and maximize PBGC's funds. Asserting that PBGC "has strong incentives to minimize and delay" pensioners' benefits in order to "further [PBGC's] own financial wellbeing," the Pilots allege that PBGC "manipulated" the Plan's asset allocation "to create hundreds of millions of dollars of investment returns to itself [PBGC], at Plaintiffs' expense, in contravention of its fiduciary duties." First Amended Complaint at ¶¶ 23, 71, JA288, 303. Accordingly, the Pilots seek to recover, in addition to the statutory benefits they are pursuing in their other five claims, "disgorgement and surcharge" of PBGC's "hundreds of millions of dollars" of investment returns, an accounting for insurance premiums, and a constructive trust for premiums paid. *Id.* at ¶ 71 and p. 125, JA288 and 330.[6]

[6] Although the Pilots allege that there were investment gains of $400 million on the assets of the Plan (First Amended Complaint ¶ 26, JA289), PBGC will pay nearly $800 million in unfunded guaranteed benefits out of its insurance funds to Plan participants. Declaration of Nicole Williams at ¶ 5 and Exh. 1 thereto, JA202.

There are four separate, equally powerful, statutory barriers to Claim 1: (i) participants cannot recover more from PBGC than the amount of their Title IV benefits; (ii) participants cannot bring claims for fiduciary breach that duplicate their claims for benefits; (iii) participants cannot seek relief from PBGC for fiduciary breach on an individual, rather than plan-wide, basis; and (iv) participants cannot seek disgorgement of PBGC's post-plan-termination investment gains, as it is expressly precluded by 29 U.S.C. § 1344(c). In rejecting each of these barriers, the district court misconstrued the law.

Left uncorrected, the district court's erroneous holdings would create a new genre of lawsuit that challenges the correctness of PBGC's benefit determinations, but permits recoveries beyond statutory benefits. If left standing, this would distort and endanger PBGC's mandate to pay benefits under the statutory insurance program that Congress created. PBGC becomes trustee of more than 100 plans per year, on average.[7] Under the district court's ruling, even participants pursuing routine benefit challenges would be encouraged to assert duplicative fiduciary breach claims for greater amounts, including "investment gains." And such claims, unlike typical benefit challenges reviewed on the administrative record,

[7] PBGC's Annual Reports for fiscal years 2007 to 2016 (available on www.pbgc.gov) reflect termination of 110, 67, 144, 147, 152, 155, 111, 97, 65, and 76 underfunded plans.

could be the subject of discovery and trial, subjecting the agency and the courts to vast new burdens. For all of these reasons, the Court should dismiss Claim 1.

## ARGUMENT

### I. PARTICIPANTS CANNOT RECOVER MORE FROM PBGC THAN THEIR TITLE IV BENEFITS.

Until the district court issued this Opinion, no court had ever held that participants can recover more from PBGC than their statutory benefits, or even suggested that it could be allowed. Indeed, the Opinion conflicts with the plain language of Title IV. The benefits that PBGC may pay to participants in terminated plans are explicitly "subject to the limitations and requirements" in the statute, which are numerous and complex. 29 U.S.C. § 1361; *see Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980) (ERISA is "comprehensive and reticulated"). As this Court recognized in *Davis v. PBGC*, "[w]hen a plan is underfunded, the PBGC's benefit payments are subject to statutory and regulatory limits." 571 F.3d at 1290-91. Sections 1322 and 1344 clearly prescribe the benefits that PBGC may pay. 29 U.S.C. §§ 1322, 1344.

Notwithstanding this clear statutory language, the Opinion would allow the Pilots to seek more than their Title IV benefits, violating a core principle of defined benefit pension plans—that the participant has a right only to his or her full benefit,

not a right to plan assets or earnings on assets. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999) ("plan members generally have a nonforfeitable right only to their 'accrued benefit,' so that a plan's actual investment experience does not affect their statutory entitlement"). In the other counts of the First Amended Complaint, the Pilots challenge PBGC's determination of the amount of their Title IV benefits, and if they prevail, they will receive a higher amount of statutory benefits. But if they do not prevail, they cannot receive benefits above the statutory limit through the back door of a fiduciary breach claim.

Congress imposed these limitations because PBGC has limited funds.[8] Payments that exceed the statutory limits would divert funds reserved to pay benefits for participants in the same or other plans. The Pilots erroneously assert that "[i]nvestment returns on the assets the PBGC holds in trust inure solely to the PBGC's benefit," First Amended Complaint ¶ 12, JA283, and that even if they were awarded millions of dollars of those proceeds in this lawsuit, benefit payments to other participants could not be affected. This is patently wrong.

[8] Despite the Pilots' allegations of "massive investment returns" (First Amended Complaint ¶ 72, JA303), PBGC's current deficit is over $20 billion for single-employer plans alone. PBGC 2016 Annual Report at 10. The current deficit for the multiemployer program is even higher. *Id*.

PBGC has two funds for its single-employer program, a "revolving fund" containing companies' premium payments, and a "trust fund" containing the assets of terminated plans, recoveries related to those plans, and investment gains on those amounts. *See* PBGC 2016 Annual Report at 60-61; 29 U.S.C. § 1305(f). Title IV expressly authorizes PBGC to pool the assets of terminated plans in its trust fund, and PBGC does so, commingling the terminated plans' assets and any investment proceeds on those assets. 29 U.S.C. § 1342(a). PBGC makes benefit payments from the revolving fund, and the single-employer trust fund "is charged its portion of the benefits paid each year." 2016 Annual Report at 60. The trust fund's portion of benefit payments is determined by the ratio of trust fund assets to the value of PBGC's liability for future benefits. Accordingly, investment income on terminated plans' assets is certainly used to fund participants' benefits, and giving that investment income to the Pilots to pay benefits above the Title IV limits would leave less money to fund other participants' benefits.

The idea that participants alleging fiduciary breach can recover more from PBGC than their statutory benefits is a dramatic reversal of established legal principles that would disrupt the administration of the insurance program. The district court's basis for allowing this—that the cited cases did not specifically

forbid it (Opinion at 19, JA351)—simply fails. No court has expressly rejected this allegation simply because no court has faced it.

The Supreme Court explained the purpose of Title IV in *PBGC v. LTV Corp.*: "In enacting Title IV, Congress sought to ensure that employees and their beneficiaries would not be completely 'deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans.'" 496 U.S. 633, 637 (1990) (quoting *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984)). The Court further explained the limitations of Title IV:

> When a plan covered under Title IV terminates with insufficient assets to satisfy its pension obligations to the employees, the PBGC becomes trustee of the plan, taking over the plan's assets and liabilities. The PBGC then uses the plan's assets to cover what it can of the benefit obligations. The PBGC then must add its own funds to ensure payment of most of the remaining "nonforfeitable" benefits, i.e., those benefits to which participants have earned entitlement under the plan terms as of the date of termination. *ERISA does place limits on the benefits PBGC may guarantee upon plan termination, however, even if an employee is entitled to greater benefits under the terms of the plan.*

496 U.S. at 637-38 (citations omitted) (emphasis added).

Thus, Title IV is a backstop, a guarantee that participants will receive at least a certain amount of their anticipated pension benefits—not a vehicle to recover more than their statutory benefits. Courts routinely recite the well-understood limitations on the amounts that PBGC may pay. *See, e.g., Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) ("Title IV, which contains § 4044(a), simply provides for

insurance for benefits created elsewhere. It is inconceivable that this section was designed to modify the carefully crafted provisions of Title I [governing rights to benefits]."). *See also Belland v. PBGC*, 726 F.2d 839, 843 (D.C. Cir. 1984) ("the entire statute [ERISA] is a finely tuned balance between protecting pension benefits for employees while limiting the cost to employers") (citation omitted).

To be sure, the "equitable relief" that Title IV authorizes in section 1303(f) allows for certain remedies, if warranted. For example, parties have sought to compel PBGC to investigate a plan sponsor, challenged the transfer of assets from one plan to another, and sought to remove PBGC as statutory trustee.[9] But the availability of equitable relief does not override the express statutory limits on benefit payments. The Pilots may not seek recovery of more than their statutory benefits.

## II. PARTICIPANTS CANNOT BRING CLAIMS FOR FIDUCIARY BREACH THAT DUPLICATE THEIR CLAIMS FOR BENEFITS.

The Opinion also allows the Pilots to pursue a claim for fiduciary breach against PBGC that duplicates their benefit claims. A long line of cases expressly

[9] *See, e.g., US Airline Pilots Ass'n v. PBGC*, No. 09-1675, 2014 WL 3537827 (D.D.C. Jun. 20, 2014) (denying relief), *aff'd*, 603 F. App'x 6 (D.C. Cir. 2015); *Coleman v. PBGC*, No. 99-278, 2005 WL 5534139 (D.D.C. Nov. 28, 2005) (denying relief).

rejects such repackaged benefit claims under Title I.[10] There is no basis to allow duplicate remedies against PBGC under a terminated plan that are impermissible against the fiduciaries of an ongoing plan.

The district court noted that no court in this Circuit has allowed a fiduciary breach claim to proceed when a benefit claim provides an adequate remedy. Opinion at 8, JA340. The court concluded, however, that due to "textual differences between § 1303(f) and § 1132(a) [the Title I provision]," the prohibition against duplicative claims does not apply to claims under Title IV. Opinion at 12, JA344.

But those textual differences do not authorize duplicative claims or negate the prohibition against them. To be sure, as the district court noted, section 1303(f) authorizes suit against PBGC for equitable relief for all claims found in Title IV, including claims for benefits and claims for breach of fiduciary duty, without dividing them into subsections. Opinion at 11, JA343. Section 1132(a) has separate subsections authorizing claims for benefits and claims for fiduciary

[10] *See, e.g.*, *Korotynska v. Metro. Life Ins. Co.*, 474 F.3d 101, 102-03 (4th Cir. 2006); *Ogden v. Blue Bell Creameries U.S.A., Inc.*, 348 F.3d 1284, 1287 (11th Cir. 2003); *Mauser v. Raytheon Co. Pension Plan for Salaried Emps.*, 239 F.3d 51, 58 (1st Cir. 2001); *Boster v. Reliance Standard Life Ins. Co.*, 959 F. Supp. 2d 9, 29-31 (D.D.C. 2013); *Zalduondo v. Aetna Life Ins. Co.*, 845 F. Supp. 2d 146, 155 (D.D.C. 2012).

breach. But this is a distinction without a difference. The rationale for prohibiting the Pilots' claim for fiduciary breach under § 1303(f) is identical to the longstanding rationale under § 1132(a): the Pilots have an adequate remedy if they prevail on their benefit claims. *See, e.g.*, *Boster v. Reliance Standard Life Ins. Co.*, 959 F. Supp. 2d at 29-31; *Zalduondo v. Aetna Life Ins. Co.*, 845 F. Supp. 2d at 155. Participants are entitled to benefits under the terms of their plan and Title IV, but not more.

Nor does the fact that section 1303(f) authorizes "appropriate equitable relief" against PBGC establish a substantive fiduciary breach claim. Instead, the only basis for a fiduciary breach claim against PBGC is section 1342(d)(3), which provides that the trustee of a terminated plan is a fiduciary under Title I *except to the extent inconsistent with Title IV*. Thus, fiduciary duties under Title IV are a *subset* of those under Title I, not a larger set. As the Ninth Circuit held in *Paulsen v. CNF Inc.*:

> PBGC's role as a fiduciary to plan participants is expressly limited by 29 U.S.C. § 1342(d)(3), which indicates that a trustee is not a fiduciary to the extent that the requirements of Title IV, in which the trustee's discretionary power to sue is found, are inconsistent with the requirements of Title I. Further, the fiduciary duty standard stated in 29 U.S.C. § 1104(a) is expressly subject to the provisions of 29 U.S.C. § 1342, which defines the trustee's powers. Therefore, although PBGC might be sued for an alleged breach of a fiduciary duty owed to a plan participant, the relevant duties are limited by Title IV of ERISA . . . .

559 F.3d 1061, 1087 (9th Cir. 2009). And as the court noted in *US Airline Pilots Ass'n v. PBGC*, "§ 1342(d) limits these fiduciary responsibilities insofar as they interfere with the implementation of other ERISA provisions. Therefore, if a fiduciary responsibility imposed by Title I is inconsistent with any provision of Title IV, a trustee must adhere to the Title IV requirements." No. 1:09-cv-1675, 2014 WL 3537827, at *2 (D.D.C. June 20, 2014) (citations omitted).[11]

The existence of an equitable remedy cannot be used to expand these expressly limited fiduciary duties. In *Mertens v. Hewitt Associates*, 508 U.S. 248, 254 (1993), the Supreme Court addressed whether the relief sought was equitable only after it (and the parties) expressly assumed that the complained-of actions violated a provision of ERISA. 508 U.S. at 258-61. Similarly, in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), the Court laid out the two-step analysis for allowing a fiduciary breach claim: first identifying the substantive violation under 29 U.S.C. § 1104(a) (516 U.S. at 498-507), and only then proceeding to the second step of what constitutes appropriate equitable relief under ERISA (516 U.S. at 507-515). By skipping the first step and proceeding solely on the second, the district court

[11] For example, Title IV authorizes PBGC to pool assets of all terminated plans and use those assets for appropriate purposes in the administration of Title IV, which would not be permitted under Title I. 29 U.S.C. § 1342(a). And Title IV requires PBGC to limit coverage of benefits that the plan otherwise would pay. 29 U.S.C. § 1322(b).

erred. *See Cigna Corp. v. Amara*, 563 U.S. 421, 444 (2011) ("a fiduciary can be surcharged under [29 U.S.C. § 1132(a)(3)], only upon a showing of actual harm").

It is undisputed that individuals can bring both a benefit claim and a fiduciary breach claim against PBGC, as long as the latter is not a benefit claim in disguise. The Pilots have pointed to their pursuit of expanded relief as a reason that Claim 1 is not a duplicative benefit claim. They assert a separate claim demanding impermissible remedies, then point to those remedies as the reason the claim is not duplicative. That is bootstrapping, pure and simple.

And Claim 1 is indeed a benefit claim "masquerading as" a fiduciary claim. *Stephens v. US Airways Group*, 555 F. Supp. 2d 112, 119 (D.D.C. 2008). The Pilots allege that PBGC "created procedural obstacles" to keep them from filing timely appeals, withheld benefit information, and improperly chose and monitored contractors, all in an effort to "obscure" PBGC's manipulation of the asset allocation to favor younger active participants and reduce the Pilots' benefits. First Amended Complaint at ¶¶ 66-71, JA300-303. But PBGC's implementation of the statutory insurance program, including providing information, issuing benefit determinations, and processing administrative appeals, is a federal agency function subject to review under the Administrative Procedure Act, 5 U.S.C. §§ 500-706. If PBGC created procedural obstacles or improperly withheld information, its

determination might be arbitrary and capricious, or the agency might be subject to suit under the Freedom of Information Act, 5 U.S.C. § 552, but PBGC is not subject to discovery and trial for these allegations as "fiduciary breaches."[12]

## III. PARTICIPANTS CANNOT SEEK RELIEF FROM PBGC FOR FIDUCIARY BREACH ON AN INDIVIDUAL, RATHER THAN PLAN-WIDE, BASIS.

The third statutory barrier to the Pilots' Claim 1 is that an ERISA plaintiff may not recover individually for a breach of fiduciary duty, but only on behalf of the plan. *See, e.g., Murchison v. Murchison*, 180 F. App'x 163, 164 (D.C. Cir. 2006), *Walker v. Pharm. Research & Mfrs. of Am.*, 827 F. Supp. 2d 8, 16 (D.D.C. 2011); *Zalduondo v. Aetna Life Ins. Co.*, 845 F. Supp. 2d at 154; *Harris v. Koenig*, 602 F. Supp. 2d 39, 50 (D.D.C. 2009). Liability for fiduciary breach under ERISA, including liability against PBGC, is governed by 29 U.S.C. § 1109. *See Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1073 (9th Cir. 2009); *Stephens v. US*

[12] As the Pilots noted in their First Amended Complaint, they pursued a successful administrative appeal challenging PBGC's FOIA response. First Amended Complaint at ¶ 66, JA300. This is the sole method to appeal FOIA responses, i.e., first to PBGC's General Counsel, and then, if necessary, in court. 29 C.F.R. §§ 4901.15; 5 U.S.C. § 552(a)(4)(B). Similarly, denial of a Privacy Act information request is challenged in district court. 5 U.S.C. § 552a(g)(1)(B). Accordingly, if the Pilots were not satisfied with the handling of their FOIA and Privacy Act requests, their remedy was to pursue a challenge under those statutes, which they pursued with PBGC, but no further. They may not now seek another, parallel bite of the apple by recasting these allegations as fiduciary breach.

*Airways Group*, 555 F. Supp. 2d at 117-19. Both the Supreme Court and the D.C. Circuit have made clear that this provision "subjects a fiduciary to liability only to an ERISA *plan*—not to a plan *participant.*" *Murchison*, 180 F. App'x at 164 (emphasis in original); *accord Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985).

The district court held that this plan-wide requirement does not apply in suits against PBGC, noting that the previous cases so holding arose under Title I. Opinion at 17, JA349. But this is because the principle is so well accepted that it has not been litigated under Title IV, and for good reason. PBGC's limited fiduciary duties as statutory trustee arise from the same source as those of trustees of ongoing plans. But under the district court's reasoning, the black-letter law that a participant can sue a trustee only on behalf of the plan disappears when PBGC is the trustee. Congress neither adopted nor intended such a strange result.

Nor does the Supreme Court's holding in *Varity Corp. v. Howe*, 516 U.S. at 501-15, affect this analysis. There, the Supreme Court recognized that in limited circumstances, a participant in an ongoing plan may pursue individual relief for fiduciary breach under 29 U.S.C. § 1132(a)(3), which authorizes "appropriate equitable relief" for violations of Title I. The Court found that the plaintiffs in that case would "have no remedy at all" absent section 1132(a)(3), and deemed it "hard

to imagine" that Congress would want to "den[y] injured beneficiaries a remedy." 516 U.S. at 490, 513-515. But the Court emphasized that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief [under § 1132(a)(3)], in which case such relief normally would not be 'appropriate.'" *Id*. at 515 (citation omitted).

The instant case bears no resemblance to *Varity*. In *Varity*, an employer, concededly acting as a fiduciary, misled employees into going to work for a shaky affiliate, which ultimately cost them their health benefits. In contrast, the Pilots are participants in a terminated, PBGC-trusteed plan, and have a complete remedy for any cognizable injury through their other, ongoing benefit claims. As explained in *Varity*, there is "no need for further equitable relief" on an individual basis, and thus "such relief normally would not be 'appropriate.'" 516 U.S. at 515. The district court's holding is contrary to existing law and the first such ruling ever applied to PBGC.

## IV. PARTICIPANTS CANNOT SEEK DISGORGEMENT OF PBGC'S POST-TERMINATION INVESTMENT GAINS, AS IT IS EXPRESSLY PRECLUDED BY 29 U.S.C. § 1344(c).

Finally, in perhaps the furthest departure from the statutory language, the Opinion allows the Pilots to pursue a claim for disgorgement of purportedly "unjust enrichment" by PBGC based on the agency's post-plan-termination

investment gains on Plan assets. But the statute expressly forbids this, providing that "[a]ny increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, [PBGC]." 29 U.S.C. § 1344(c). As the Ninth Circuit declared in *Paulsen*, "ERISA § 4044(c) also mandates that a post-termination increase or decrease in [the plan]'s assets be credited or suffered by PBGC. 29 U.S.C. § 1344(c)." 559 F.3d at 1073.

The district court based its contrary holding on the availability of "appropriate equitable relief" under Title IV. Opinion at 14, JA346. But equitable remedies do not exist in a vacuum, and require a cognizable right before they can be exercised.[13] For fiduciary breach, Title IV refers solely to Title I. And Title IV

[13] *See, e.g.*, *In re Oak Knoll Assocs.*, 835 F.3d 24, 34 (1st Cir. 2016) (court may dispense equitable remedy under Bankruptcy Code § 105 only where "necessary to preserve an identifiable right conferred elsewhere in the Bankruptcy Code"); *In re Kalikow*, 602 F.3d 82, 97 (2d Cir. 2010) (same); *In re Southmark Corp.*, 49 F.3d 1111, 1116 (5th Cir. 1995) (bankruptcy court exceeded its equitable powers by "creating substantive rights that otherwise would not have existed"); *Mocek v. City of Albuquerque*, 3 F. Supp. 3d 1002, 1086 (D.N.M. 2014) ("[h]aving concluded that Mocek has not suffered a violation of any legally cognizable right, the Court will dismiss his claim for declaratory and equitable relief"); *Fairfield County Med. Ass'n v. United Healthcare*, 985 F. Supp. 2d 262, 269 (D. Conn. 2013) ("the Associations have raised cognizable legal rights and issues both under the regulations of the Medicare Act and under contract law for which equitable and legal remedies are available"); *Taylor Assocs. v. Diamant (In re Advent Mgmt.*

does not authorize unlimited equitable remedies unmoored to its statutory terms, context, and structure. Indeed, Congress showed its contrary intent by placing explicit limits on PBGC's payment of benefits, and mandating that PBGC both provide for the uninterrupted payment of benefits and maintain premiums at the lowest level necessary to carry out its mission. 29 U.S.C. §§ 1302(a), 1322(b).

Thus, while disgorgement surely can be a form of "appropriate equitable relief,"[14] it cannot be appropriate equitable relief *against PBGC*, because section 1344(c) expressly forbids it. The Supreme Court has made clear the "basic principle of statutory construction that a specific statute . . . controls over a general provision . . ., particularly when the two are interrelated and closely positioned . . . ." *HCSC–Laundry v. United States*, 450 U.S. 1, 6 (1981) (citation omitted). Here, the specific statutory provision in Title IV, section 1344(c), controls over the general provision regarding equitable relief, section 1303(f). The district court's unprecedented ruling contradicts the express statutory provision.

The district court also made two confusing statements about section 1344(c), neither of which is consistent with the statute. First, the court stated that the Pilots'

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*Corp.*), 178 B.R. 480, 488 (9th Cir. BAP 1995) (holding that remedy of constructive trust is available only where there is an established right to property as a matter of law).

[14] *See generally Cigna Corp. v. Amara*, 563 U.S. 421, 439-44 (2011).

fiduciary breach claim permissibly "seeks to recoup the ill-gotten investment returns on Plan benefits that the plaintiffs claim should have been distributed to them, Am. Compl. ¶ 72, not, as [PBGC] characterizes the claim, to divert from [PBGC] any gains (or losses) from assets *properly* held in the Plan." Opinion at 15, JA347 (emphasis in original). Accordingly, "[c]onstruing the allegations in the Amended Complaint in the light most favorable to the non-moving party," the court rejected PBGC's argument that section 1344(c) precludes the Pilots' claim for disgorgement. *Id.* Second, in granting PBGC's motion to certify, the district court stated that it had permitted the Pilots to seek disgorgement "as a remedy for [PBGC's] alleged unjust enrichment based on funds that would otherwise have been remitted to the plaintiffs and not retained in the Plan had [PBGC] not committed the alleged fiduciary breaches." Order granting motion to certify at 6, JA381. Neither characterization of the Pilots' fiduciary breach allegations states a cognizable claim.

As to the first, the statutory mandate that investment gains and losses are borne solely by PBGC does not depend on any determination of whether assets are "properly held," whatever that may mean. The language of section 1344(c) precludes any notion of "ill-gotten" gains by PBGC. Congress expressly prohibited claims by anyone to investment gains and losses. There is no statutory

exception. Nor does Title IV anywhere provide a claim for anyone based on PBGC's use of plan assets. The district court's implication of such an exception undermines the express statutory language and the policy choice Congress made. *See, e.g.*, *Bennett v. Arkansas*, 485 U.S. 395, 397-98 (1988) ("given the express language of [the statute] and the clear intent of Congress," the Court rejected an "implied exception" allowing attachment of federal benefits).

As to the second, if PBGC is ultimately adjudged to have underpaid the benefits of *any* participant in any case, it pays the additional amounts *plus interest,* pursuant to the agency's longstanding regulation, even if there were investment losses. 29 C.F.R. §§ 4022.81(c)(4), 4022.83. There is no need and no place for "disgorgement" of alleged "investment gains" in that calculation. And allowing such an analysis to proceed could open the floodgates to claims for "disgorgement" on a routine basis.

## CONCLUSION

The district court's holdings contradict the law. Additionally, they would allow a new genre of lawsuits against PBGC, threatening the agency's funds and both the agency's and the courts' resources. Because there are four separate statutory barriers to such suits, the Court should reverse the decision below and

allow the Pilots to continue pursuing their benefit claims that are already proceeding in the district court.

Date: June 5, 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

## CERTIFICATE OF COMPLIANCE

I, Mark R. Snyder, hereby certify, that the Brief of Appellant Pension Benefit Guaranty Corporation complies with the type-volume limitation as set forth in Fed. R. App. P. 32(a)(7)(A), Fed. R. App. P. 32(a)(7)(B)(i), and Circuit Rule 32 and contains 6,988 words. The Brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman font.

Dated: June 5, 2017

/s/ Mark R. Snyder
Mark R. Snyder

## CERTIFICATE OF SERVICE

I, Mark R. Snyder, certify that on June 5, 2017, a true and correct copy of the Brief of Appellant Pension Benefit Guaranty Corporation and the Statutory Addendum were served via the Court's ECF system on:

Anthony F. Shelley
Michael N. Khalil
Timothy P. O'Toole
Miller & Chevalier Chartered
900 Sixteenth Street, N.W.
Washington, DC 20006

/s/Mark R. Snyder
Mark R. Snyder