

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

COX ENTERPRISES, INC., a )  
Delaware corporation, )  
 )  
Plaintiff, )

vs. )

CASE NO.: 6:04-CV-698-JA-DAB

NEWS-JOURNAL CORPORATION, a )  
Florida corporation, HERBERT )  
M. DAVIDSON, JR., MARC L. )  
DAVIDSON, JULIA DAVIDSON )  
TRUILO, JONATHAN KANEY, JR., )  
DAVID KENDALL, ROBERT TRUILO, )  
GEORGIA KANEY, and PMV, INC., )  
a Florida corporation, )  
 )  
Defendants. )

**THE PENSION BENEFIT GUARANTY CORPORATION'S  
RESPONSE TO COX ENTERPRISES, INC.'S  
OBJECTION TO REPORT AND RECOMMENDATION**

The Pension Benefit Guaranty Corporation (“PBGC”) responds to Cox Enterprises, Inc.’s (“Cox”) Objection to Magistrate Judge Baker’s Report and Recommendation (the “Report”). In June 2013, Magistrate Judge Baker scheduled an evidentiary hearing to address the amount of PBGC’s claims against News-Journal Corporation (“NJC”). To that end, Cox and PBGC engaged in limited discovery, and presented evidence at a hearing on January 14, 2014. After reviewing the resulting record and applicable law, Magistrate Judge Baker determined that the amount of PBGC’s claim against NJC for the “unfunded benefit liabilities” of the Pension Plan of News-Journal Corporation (the “Pension Plan”) is \$13,887,822.00. Cox, unable to make any substantive arguments against the Magistrate’s findings, instead presents this Court with nothing more than contrived procedural deficiencies. The Court should ignore Cox’s baseless accusations

and adopt the Report's determination that the amount of PBGC's claim against NJC for the Pension Plan's unfunded benefit liabilities is \$13,887,822.00.

## **BACKGROUND**

### **A. Procedural Background of this Case.**

In January 2012, the Eleventh Circuit remanded this case for the Court's reevaluation of "the claims of all of [NJC's] creditors consistent with this opinion."<sup>1</sup> In its opinion, the Eleventh Circuit stated that Cox was a shareholder of NJC for the purposes of Fla. Stat. § 607.06401.<sup>2</sup> And because the Eleventh Circuit considered "any payment to Cox a distribution to a shareholder within the meaning of § 607.06401," it held that the district court must determine whether any payment to Cox would comply with that statute's insolvency test.<sup>3</sup> The Eleventh Circuit directed that "the district court must consider whether a payment to Cox would comply with the insolvency test of the distributions-to-shareholders statute at the time of payment to Cox."<sup>4</sup> If a distribution to Cox would violate § 607.06401, then the Eleventh Circuit instructed that NJC's "other creditors should receive payment before any distribution is made to Cox."<sup>5</sup>

Following remand, the Court set a briefing schedule to address the parties' claims against NJC, and heard argument on August 2, 2012. Thereafter, the Court scheduled an evidentiary

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<sup>1</sup> *Cox Enters., Inc. v. PBGC*, 666 F.3d 697, 708 (11th Cir. 2012).

<sup>2</sup> *Id.* at 699, 706 ("We hold that Cox qualifies as a shareholder for purposes of the distributions-to-shareholders statute.").

<sup>3</sup> *Id.* at 699; *see id.* at 707.

<sup>4</sup> *Id.* at 707-08.

<sup>5</sup> *Id.* at 699.

hearing to address the amount of PBGC's claims against NJC.<sup>6</sup> After engaging in limited fact and expert discovery, the parties presented evidence at a hearing on January 14, 2014. On March 21, 2014, Magistrate Judge Baker issued the Report, finding that PBGC has a claim against NJC for the Pension Plan's unfunded benefit liabilities in the amount of \$13,887,822.00.<sup>7</sup>

**B. The Pension Plan's Termination and Title IV of ERISA.**

NJC sponsored the Pension Plan, a defined-benefit pension plan covered by PBGC's termination insurance program, established by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"). On April 17, 2009, the Court appointed James W. Hopson as Receiver for NJC.<sup>8</sup> In March 2010, the Court approved the sale of NJC's publishing assets to Halifax Media Acquisition LLC ("Halifax"),<sup>9</sup> which did not assume the Pension Plan.

On May 14, 2010, PBGC issued a Notice of Determination that the Pension Plan should be terminated under 29 U.S.C. § 1342.<sup>10</sup> On August 6, 2010, the Pension Plan was terminated by agreement between PBGC and the Receiver, with a plan-termination date of March 23, 2010.<sup>11</sup>

Certain statutory liabilities matured upon termination of the Pension Plan.<sup>12</sup> As plan sponsor, NJC became liable to PBGC for, *inter alia*, the Pension Plan's "unfunded benefit

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<sup>6</sup> See Order & Notice of Hearing, June 12, 2013, (Doc. No. 751).

<sup>7</sup> Because this represents full recovery on PBGC's unfunded benefit liabilities claim, Magistrate Judge Baker found it unnecessary to determine PBGC's separate claim for unpaid minimum funding contributions owed by NJC to the Pension Plan. See Report & Recommendation, March 21, 2014, (Doc. No. 791 at 19).

<sup>8</sup> See Order, April 17, 2009, (Doc. No. 507).

<sup>9</sup> Order Authorizing and Directing the Receiver's Sale of the Publishing Operations of NJC, March 23, 2010, (Doc. No. 625).

<sup>10</sup> Joint Pretrial Statement, Uncontested Fact 20 (Doc. No. 778); see also (Doc. No. 783-24 – PBGC Exhibit 32).

<sup>11</sup> Joint Pretrial Statement, Uncontested Fact 26 (Doc. No. 778); (Doc. No. 675 at 11-13).

liabilities” as of its termination date, plus interest.<sup>13</sup> Title IV of ERISA defines the amount of a pension plan’s unfunded benefit liabilities, directing that the value of the plan’s benefit liabilities must be determined “on the basis of assumptions prescribed by [PBGC].”<sup>14</sup> The value of the plan’s assets is then subtracted from those benefit liabilities to determine the amount of unfunded benefit liabilities.<sup>15</sup>

PBGC has promulgated a regulation prescribing the assumptions for valuing a plan’s benefit liabilities (the “Valuation Regulation”).<sup>16</sup> The Valuation Regulation’s methodology reflects the fact that a terminated pension plan will receive no further funding contributions, and that all benefit obligations must therefore be satisfied at the time of termination.<sup>17</sup> To measure the benefit liabilities, the Valuation Regulation prescribes assumptions about mortality and interest designed to approximate the market price of insurance company annuity contracts.<sup>18</sup> These factors will, in combination, “accurately approximate the cost of private sector group annuity contracts.”<sup>19</sup> This resulting liability value is equivalent to what an employer would be

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<sup>12</sup> See, e.g., 29 U.S.C. § 1362; *Durango-Georgia Paper Co. v. H.G. Estate, LLC*, No. 11-15079, 2014 WL 46700, \*1 (11th Cir. Jan. 7, 2014) (discussing plan-termination liabilities).

<sup>13</sup> 29 U.S.C. § 1362(a), (b)(1)(A).

<sup>14</sup> 29 U.S.C. § 1301(a)(18)(A).

<sup>15</sup> 29 U.S.C. § 1301(a)(18).

<sup>16</sup> See, e.g., PBGC, *Valuation of Plan Benefits in Non-Multi-Employer Plans*, 46 Fed. Reg. 9492 (Jan. 28, 1981) (Final Rule); see also 29 C.F.R. §§ 4044.41-75 (current codification).

<sup>17</sup> See *In re US Airways Grp., Inc.*, 303 B.R. 784, 795-96 (Bankr. E.D. Va. 2003).

<sup>18</sup> See, e.g., PBGC, *Valuation of Plan Benefits in Single-Employer Plans; Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal*, 58 Fed. Reg. 5128, 5128 (Jan. 19, 1993) (Proposed Rule); *US Airways*, 303 B.R. at 788.

<sup>19</sup> 58 Fed. Reg. at 5128.

required to pay for purchasing annuities to pay for all benefit liabilities owed to participants and beneficiaries in a standard termination. PBGC periodically adjusts the interest factor to reflect changes in annuity prices.<sup>20</sup>

For more than thirty-five years, PBGC has applied the Valuation Regulation to determine the underfunding in every pension plan that has terminated and been trusted by PBGC.

### **C. PBGC's Claims against NJC.**

On April 5, 2010, the Receiver published notice of a fourteen-day deadline for making any claims against the sale proceeds or any other assets of NJC.<sup>21</sup> On April 16, 2010, PBGC timely filed proofs of claim with the Receiver for, *inter alia*, the unfunded benefit liabilities of the Pension Plan under 29 U.S.C. §§ 1362 and 1368 in the estimated amount of \$15,102,012.00.<sup>22</sup> PBGC calculated its estimated claims in accordance with ERISA and PBGC's regulations, following the process that PBGC routinely uses to calculate its claims.<sup>23</sup> Each claim explained the basis for NJC's liability and referenced the documents in the Receiver's possession that supported the claim.<sup>24</sup>

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<sup>20</sup> *E.g.*, PBGC, *Valuation of Plan Benefits in Single-Employer Plans; Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal*, 58 Fed. Reg. 50,812, 50,815 (Sept. 28, 1993) (Final Rule).

<sup>21</sup> Notice of 14 Day Deadline to Submit Claims, April 5, 2010, (Doc. No. 630).

<sup>22</sup> (Doc. No. 652-5 at 96-112); Joint Pretrial Statement, Uncontested Fact 19, (Doc. No. 778). The Pension Plan was not yet terminated, and PBGC calculated its estimated claims using a potential termination date of March 31, 2010.

<sup>23</sup> *See* Trans. of Evidentiary Hr'g, Jan. 14, 2014, (Doc. No. 786 at 23:16 to 25:13, 28:22 to 30:1) (Testimony of Cynthia Travia); *see also In re Wolverine, Proctor & Schwartz, LLC*, 436 B.R. 253, 255-56 (D. Mass. 2010) (noting that PBGC filed estimated claims).

<sup>24</sup> (Doc. No. 652-5 at 100, 104, 108, 111-12).

After reviewing the submitted claims, the Receiver issued a report and recommendation on June 10, 2010.<sup>25</sup> In his report, the Receiver expressly acknowledged NJC's liability to PBGC for the Pension Plan's unfunded benefit liabilities.<sup>26</sup> Cox did not object to or otherwise challenge PBGC's proofs of claim.<sup>27</sup>

Before the hearing on the Receiver's report and recommendation, PBGC and the Receiver negotiated a settlement of PBGC's claims. PBGC's and the Receiver's respective estimates of PBGC's claims formed the basis for these negotiations, leading to a settlement of PBGC's unfunded benefit liabilities claim (\$14,272,500.00) and unpaid minimum funding contributions claim (\$455,000.00).<sup>28</sup> Cox's counsel stated at the August 9, 2010 hearing that Cox did not agree with the settlement, but counsel did not raise any specific objection to the amount or sufficiency of PBGC's claims.<sup>29</sup>

After the Pension Plan was terminated, PBGC gathered the information necessary to calculate the final benefit amounts for each participant and beneficiary on a participant-by-

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<sup>25</sup> Receiver's Report & Recommendation, June 10, 2010, (Doc. No. 652).

<sup>26</sup> *Id.* at 16-18 (noting that the Receiver estimated PBGC's claim for the Pension Plan's unfunded benefit liabilities to be about \$14 million as of the February 1, 2010 sale hearing). The Receiver challenged PBGC's assertion of administrative priority for its other claims. *See id.* at 18-19.

<sup>27</sup> *See generally* Cox's Resp. to Objections to Receiver's Report & Recommendation, Aug. 2, 2010, (Doc. No. 665). Cox's failure to assert objections at that time or on appeal waived its right to do so on remand.

<sup>28</sup> *See* Receiver's Resp. to Objections to Receiver's Report & Recommendation, Aug. 5, 2010, (Doc. No. 669 at 2-4); *see also* PBGC's Proposed Findings of Fact, Feb. 12, 2014, (Doc. No. 789 at ¶¶ 33-35, 38-40).

<sup>29</sup> Tr. of Hr'g on Receiver's Report, Aug. 9, 2010, (Doc. No. 681, at 49-50).

participant (seriatim) basis in accordance with Title IV of ERISA and PBGC's regulations.<sup>30</sup> In due course, on August 22, 2013, PBGC completed that seriatim valuation, and determined that the final amount of the Pension Plan's unfunded benefit liabilities was \$13,887,822.00.<sup>31</sup> This represents PBGC's final calculation of the Pension Plan's unfunded benefit liabilities, and is consistent with PBGC's earlier claim estimates.<sup>32</sup>

## ARGUMENT

### I. **Title IV of ERISA and the Valuation Regulation Prescribe the Actuarial Assumptions for Calculating the Pension Plan's Unfunded Benefit Liabilities.**

As a threshold matter, the Court must consider the applicable law governing calculation of PBGC's claim for the Pension Plan's unfunded benefit liabilities. In the Report, Magistrate Judge Baker concluded that PBGC's claim must be calculated using the actuarial assumptions prescribed in Title IV of ERISA and the Valuation Regulation.<sup>33</sup> While Cox does not challenge PBGC's Valuation Regulation, Cox incongruously states that the Court may find its proposed actuarial assumptions "highly relevant to this Court's ultimate exercise of its equitable discretion."<sup>34</sup> As explained below, Cox is wrong.

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<sup>30</sup> See Trans. of Evidentiary Hr'g, Jan. 14, 2014, (Doc. No. 786 at 71:7 to 72:15) (Testimony of Scott Young).

<sup>31</sup> Joint Pretrial Statement, Uncontested Fact 37 (Doc. No. 778); (Doc. No. 782-3 – Joint Exhibit 3 at PBGC-NJC-005307); see also Trans. of Evidentiary Hr'g, Jan. 14, 2014, (Doc. No. 786 at 59:17 to 59:24, 60:15 to 61:18) (Testimony of Scott Young).

<sup>32</sup> PBGC's proof of claim for the Pension Plan's unfunded benefit liabilities was based on estimated total benefit liabilities of \$43,051,525. See (Doc. No. 783-17 – PBGC Exhibit 26 at PBGC-NJC-001828). PBGC's final, seriatim calculation of the benefit liabilities was \$42,532,061, representing only a 1.2% difference.

<sup>33</sup> Report & Recommendation, March 21, 2014, (Doc. No. 791 at 17) (citing 29 U.S.C. § 1301(a)(18)(A)).

<sup>34</sup> Objection at 9 n.4.

In Title IV of ERISA, Congress defined the “amount of unfunded benefit liabilities,” as the excess of a pension plan’s benefit liabilities “determined as of [the plan’s termination date] *on the basis of assumptions prescribed by [PBGC]* for purposes of [29 U.S.C. § 1344],” over the plan’s assets.<sup>35</sup> In accordance with the Administrative Procedure Act, PBGC promulgated the Valuation Regulation, which prescribes the required assumptions for calculating a plan’s benefit liabilities for purposes of 29 U.S.C. § 1344.<sup>36</sup> After PBGC first promulgated the Valuation Regulation, Congress effectively ratified it by amending “29 U.S.C. § 1301(a)(18) to explicitly refer to the ‘assumptions prescribed by [PBGC]’ for valuing benefit liabilities.”<sup>37</sup> And as Magistrate Judge Baker noted in the Report, “PBGC’s interpretation of ERISA and its own regulations is entitled to deference.”<sup>38</sup>

Cox appears to acknowledge that the Valuation Regulation provides the required assumptions for calculating PBGC’s unfunded benefit liabilities claim.<sup>39</sup> Nonetheless, Cox

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<sup>35</sup> 29 U.S.C. § 1301(a)(18) (emphasis added).

<sup>36</sup> *See, e.g.*, 46 Fed. Reg. 9492 (Jan. 28, 1981) (Final Rule); 58 Fed. Reg. 50,812 (Sept. 28, 1993) (Final Rule).

<sup>37</sup> Report & Recommendation, March 21, 2014, (Doc. No. 791 at 17); *see also In re US Airways Grp., Inc.*, 303 B.R. 784, 796 (Bankr. E.D. Va. 2003).

<sup>38</sup> Report & Recommendation, March 21, 2014, (Doc. No. 791 at 17) (citations omitted).

<sup>39</sup> *See* Objection at 4 n.2 (indicating that Cox does not challenge the Valuation Regulation’s validity under the Administrative Procedure Act). Still, the Objection is replete with disparaging comments about the Valuation Regulation. These comments are misguided, as even the Pension Committee of the American Academy of Actuaries has concluded that PBGC’s approach of using actuarial assumptions meant to replicate the cost of annuities “produces a reasonable representation of the PBGC’s current obligation and deficit.” (Doc. No. 783-2 – PBGC Exhibit 9 at 3); *see* Trans. of Evidentiary Hr’g, Jan. 14, 2014, (Doc. No. 786 at 158:21 to 159:9) (Testimony of Adam Reese) (conceding that PBGC acts as an annuity provider for terminated plans, assuming the investment, longevity, and retirement risks).

suggests that its alternative assumptions<sup>40</sup> are relevant to the Court’s equitable discretion in determining the treatment of PBGC’s claim.<sup>41</sup> Cox’s suggestion ignores the bedrock principle that “[c]ourts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute.”<sup>42</sup> “Congress, by statute, has expressly given the PBGC a *present* right to recover an [unfunded benefit liabilities] amount determined in accordance with the valuation regulation.”<sup>43</sup> Because ERISA mandates the actuarial assumptions for calculating the Pension Plan’s unfunded benefit liabilities, the Court should adopt Magistrate Judge Baker’s Report.

**II. The Record Supports Magistrate Judge Baker’s Finding that PBGC’s Claim for the Pension Plan’s Unfunded Benefit Liabilities is \$13,887,822.00.**

**A. PBGC fully supported its unfunded benefit liabilities claim of \$13,887,822.00.**

After reviewing the record, Magistrate Judge Baker determined that the amount of PBGC’s claim against NJC for the Pension Plan’s unfunded benefit liabilities is \$13,887,822.00. Cox’s main contention is that PBGC did not adequately support the amount of its claim because PBGC’s expert witness did not personally calculate the Pension Plan’s unfunded benefit

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<sup>40</sup> Cox’s expert acknowledged that his assumptions conflict with ERISA and PBGC’s regulations. Trans. of Evidentiary Hr’g, Jan. 14, 2014, (Doc. No. 786 at 132:6 to 132:18, 141:6 to 141:9) (Testimony of Adam Reese).

<sup>41</sup> See Objection at 9 n.4, 16. Any challenge to the Valuation Regulation must demonstrate that it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See 5 U.S.C. § 706; see also *Blessitt v. Ret. Plan for Emps. of Dixie Engine Co.*, 848 F.2d 1164, 1168 (11th Cir. 1988) (en banc) (“Furthermore, we only must determine whether the agency’s interpretation is reasonable . . . we ‘need not conclude that the agency construction was the only one it permissibly could have adopted . . .’” (citation omitted)).

<sup>42</sup> *United States v. Oakland Cannabis Buyers’ Co-op.*, 532 U.S. 483, 497 (2001); see also *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1238 (11th Cir. 2005) (“[C]ourts are not authorized to rewrite a statute because they might deem its effects susceptible to improvement.” (quoting *Jove Eng’g, Inc. v. IRS*, 92 F.3d 1539, 1552 (11th Cir. 1996))).

<sup>43</sup> *In re US Airways Grp., Inc.*, 303 B.R. 784, 793 (Bankr. E.D. Va. 2003); see also *Dugan v. PBGC (In re Rhodes, Inc.)*, 382 B.R. 550, 559-60 (Bankr. N.D. Ga. 2008).

liabilities. Cox cites no precedent in support of its startling assertion that experts may not rely on their associates and staff to assist in analyzing data, and it is clear from the Federal Rules of Evidence that experts do not need to have personal knowledge.<sup>44</sup> PBGC's expert was entitled to rely on the work performed by PBGC's staff and its actuarial contractors, which he reviewed and considered in preparing his opinion. Moreover, the amount of PBGC's unfunded benefit liabilities claim is fully supported by the record.

The record reflects that PBGC applied its standard process to calculate the Pension Plan's unfunded benefit liabilities. As in every case where a pension plan terminates and PBGC becomes its statutory trustee, PBGC collected the necessary records and calculated the Pension Plan's benefit liabilities on a seriatim basis.<sup>45</sup> As in the typical case, this process took about three years after PBGC became statutory trustee of the Pension Plan.<sup>46</sup>

PBGC's seriatim calculation of the Pension Plan's benefit liabilities is documented in the actuarial case memorandum and the three-volume actuarial case report prepared by PBGC's staff and its actuarial contractors at Milliman, Inc.<sup>47</sup> The actuarial case report for the Pension Plan, with its underlying actuarial calculations, was certified under penalty of perjury by Althea Schwartz, an enrolled actuary at Milliman.<sup>48</sup> Both Milliman and PBGC also reviewed the actuarial case report to assess the accuracy of twenty-two separate actuarial issues.<sup>49</sup>

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<sup>44</sup> Fed. R. Evid. 602, 702, 703.

<sup>45</sup> Trans. of Evidentiary Hr'g, Jan. 14, 2014, (Doc. No. 786 at 71:7 to 72:15) (Testimony of Scott Young).

<sup>46</sup> *See id.* at 71:23 to 72:2.

<sup>47</sup> *See generally* (Doc. No. 782-4 to 782-12 – Joint Exhibits 4-6).

<sup>48</sup> (Doc. No. 782-4 – Joint Exhibit 4 at PBGC-NJC-006915); *see also* Trans. of Evidentiary Hr'g, Jan. 14, 2014, (Doc. No. 786 at 72:16 to 73:4) (Testimony of Scott Young).

At the evidentiary hearing, PBGC presented the expert testimony of Scott Young, PBGC's Chief Valuation Actuary.<sup>50</sup> In preparing his expert opinion, Mr. Young reviewed the actuarial case memo and three-volume actuarial case report for the Pension Plan.<sup>51</sup> Mr. Young also reviewed the relevant provisions in Title IV of ERISA, PBGC's regulations, and PBGC's policies.<sup>52</sup> Based on that review, Mr. Young opined that PBGC had calculated the Pension Plan's benefit liabilities in the amount of \$42,532,061.00 using the actuarial assumptions prescribed by Title IV of ERISA and PBGC's regulations.<sup>53</sup> By subtracting the Pension Plan's assets of \$28,644,239.00 from the Pension Plan's benefit liabilities,<sup>54</sup> PBGC calculated unfunded benefit liabilities of \$13,887,822.00.

Although this evidence alone supports Magistrate Judge Baker's finding, the Report is bolstered by other evidence. For example, before the Pension Plan was terminated and as part of

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<sup>49</sup> (Doc. No. 782-4 – Joint Exhibit 4 at PBGC-NJC-006913); *see also* Trans. of Evidentiary Hr'g, Jan. 14, 2014, (Doc. No. 786 at 73:6 to 73:14) (Testimony of Scott Young).

<sup>50</sup> PBGC also presented the testimony of Cynthia Travia, a senior actuary in PBGC's Corporate Finance & Restructuring Department. Ms. Travia testified about PBGC's process for calculating claims for bankruptcy and other cases, and confirmed that PBGC followed its standard process in calculating the claims against NJC. *See, e.g.*, Report & Recommendation, March 21, 2014, (Doc. 791 at 14).

<sup>51</sup> Cox improperly conflates PBGC's preparation of the actuarial valuation report for the Pension Plan with Mr. Young's expert report. *See* Objection at 10, 14 n.7. While the expert report relied on the actuarial valuation report, the record is clear that Mr. Young reviewed and considered the three-volume actuarial valuation report in developing his expert opinion. Thus, his involvement in preparing or overseeing the actuarial valuation report is irrelevant. Trans. of Evidentiary Hr'g, Jan. 14, 2014, (Doc. No. 786 at 61:6 to 61:18, 69:13 to 72:15) (Testimony of Scott Young).

<sup>52</sup> Trans. of Evidentiary Hr'g, Jan. 14, 2014, (Doc. No. 786 at 61:13 to 61:18) (Testimony of Scott Young).

<sup>53</sup> *Id.* at 59:2 to 59:24; (Doc. No. 783-1 – PBGC Exhibit 1 at 2).

<sup>54</sup> The parties stipulated to the amount of the Pension Plan's assets as of its March 23, 2010 termination date. Joint Pretrial Statement, Uncontested Fact 38 (Doc. No. 778).

PBGC's negotiations with the Receiver, NJC's actuary calculated that the Pension Plan's benefit liabilities totaled \$42,465,742.00.<sup>55</sup> This is very similar to the estimate PBGC calculated for its proof of claim, as well as PBGC's final calculation of the Pension Plan's benefit liabilities. Even Cox's expert witness confirmed the validity of PBGC's calculation. Using a slightly different participant database, Mr. Reese "calculated total benefit liabilities of \$42,218,066.00, compared with PBGC's calculation of \$42,532,061.00, [when] using the assumptions prescribed in Title IV of ERISA and PBGC's regulations."<sup>56</sup> As Magistrate Judge Baker noted, "[t]he fact that all of the professionals who calculated or estimated the liability arrived at similar figures (with the differences explained by differing data sets) supports a finding that the PBGC did, in fact, prepare its claim consistent with the assumptions prescribed in Title IV of ERISA and PBGC's regulations."<sup>57</sup>

Based on the record, the Court should agree with the conclusions of the Report and find that PBGC's claim against NJC for the Pension Plan's unfunded benefit liabilities is \$13,887,822.00.

**B. Cox's remaining attempts to undermine PBGC's unfunded benefit liabilities calculation are unavailing.**

Because the sufficiency of PBGC's unfunded benefit liabilities calculation is fully supported by the record, Cox is left with accusations and faulty inferences in an attempt to

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<sup>55</sup> Report & Recommendation, March 21, 2014, (Doc. No. 791 at 10, 15) (citing Doc. No. 782-22 – Joint Exhibit 14). NJC's actuary's estimate did not include the required expense-load assumption. *See* (Doc. No. 782-22 – Joint Exhibit 14 at PBGC-NJC-000424).

<sup>56</sup> Report & Recommendation, March 21, 2014, (Doc. No. 791 at 16) (*comparing* Joint Exhibit 2 at 3 (Mr. Reese's calculation), *with* PBGC Exhibit 1 at 2; Joint Exhibit 3 at PBGC-NJC-005307 (PBGC's calculation)).

<sup>57</sup> *Id.*

undermine PBGC's calculation process. As an initial matter, PBGC's administrative actions are entitled to a presumption of regularity,<sup>58</sup> which Cox has failed to rebut. More importantly, the adequacy and accuracy of PBGC's calculation are fully supported by the record, as affirmed by the Magistrate Judge.

Cox's expert witness calculated a very similar amount of benefit liabilities when he used the assumptions prescribed by Title IV of ERISA and the Valuation Regulation.<sup>59</sup> Seeking to deflect this fact, Cox argues that PBGC did not calculate its claim "in accordance with PBGC regulations and procedure."<sup>60</sup> Cox attempts to support this statement by arguing that PBGC improperly included twenty-two individuals who were compensated by NJC while working for non-profit cultural entities associated with the Davidsons. Indeed in April 2007, these individuals were terminated after the Court issued a contempt order against NJC.

Congress has mandated that PBGC "provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries,"<sup>61</sup> and PBGC takes that mandate very seriously. While NJC acted inappropriately by violating a contempt order issued against it, it does not follow that these individuals should be denied pension benefits. In lieu of supporting facts and legal analysis, Cox baldly asserts that they were "plainly ineligible." But these

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<sup>58</sup> See, e.g., *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("Although the fairness of the Board's own procedure is not before us, we note that a presumption of regularity attaches to the actions of Government agencies . . .").

<sup>59</sup> Cox's expert also noted that "the accrued benefit amount that's payable to each [Pension Plan participant was] pretty accurate," Trans. of Evidentiary Hr'g, Jan. 14, 2014, (Doc. No. 786 at 109:10 to 109:23) (Testimony of Adam Reese), and that, in the context of PBGC's application of a marital status assumption to certain Pension Plan participants, he believed PBGC had correctly performed those calculations. *Id.* at 119:17 to 120:11.

<sup>60</sup> Objection at 11.

<sup>61</sup> 29 U.S.C. § 1302(a)(2).

individuals were on NJC's payroll, their benefits were clearly reflected in the Pension Plan's records,<sup>62</sup> and PBGC had no reason to exclude them. Moreover, there is simply no evidence in the record that these individuals did not accrue service under the Pension Plan during the period in which they were compensated by NJC, much less that their inclusion in the unfunded benefit liabilities calculation violated any PBGC regulation or policy.

In a last ditch attempt to challenge PBGC's calculation, Cox cites audit opinions that were included in PBGC's Annual Reports for 2012 and 2013.<sup>63</sup> Cox draws absolutely no connection between these opinions and PBGC's calculation of the Pension Plan's unfunded benefit liabilities.<sup>64</sup> Cox does not make, and the record does not reflect, any connection between the issues raised in the audits and PBGC's calculation of the Pension Plan's unfunded benefit liabilities. In fact, all of the parties' actuaries and experts reached essentially the same conclusion about the amount of the benefit liabilities: the Receiver, PBGC, and Cox's own expert all calculated total benefit liabilities with less than a one percent difference among them.<sup>65</sup> Those liabilities are subtracted from the Pension Plan's assets to determine the unfunded benefit liabilities. Cox expressly stipulated to PBGC's valuation of the Pension Plan's assets in the

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<sup>62</sup> See, e.g., Trans. of Evidentiary Hr'g, Jan. 14, 2014, (Doc. No. 786 at 110:23 to 111:2) (Testimony of Adam Reese) (noting that these twenty-two participants were included in the Pension Plan's 2008 census data).

<sup>63</sup> Objection at 12-13.

<sup>64</sup> Cox incorrectly states that it tried to question Scott Young, PBGC's expert about these audit opinions. Actually, Cox attempted to question Cynthia Travia, a senior actuary in PBGC's Corporate Finance and Restructuring Department. Trans. of Evidentiary Hr'g, Jan. 14, 2014, (Doc. No. 786 at 43:8 to 45:1) (Testimony of Cynthia Travia). Cox did not establish any foundation to question Mrs. Travia about these opinions, and Magistrate Judge Baker appropriately sustained PBGC's objection. *Id.*

<sup>65</sup> PBGC calculated the benefit liabilities at \$42,532,061.00; NJC's actuary calculated them at \$42,465,742.00; and Cox's expert calculated them at \$42,218,066.00.

amount of \$28,644,239.00 as of the plan termination date.<sup>66</sup> This Court should disregard Cox's baseless accusations.

In sum, the record reflects that PBGC correctly applied Title IV of ERISA and PBGC's regulations to calculate the Pension Plan's unfunded benefit liabilities of \$13,887,822.00.

### **III. Cox's Request for Additional Briefing and Oral Argument.**

In closing its Objection, Cox requests that the Court set a briefing schedule to address any remaining issues and schedule a final oral argument. Cox cites remaining issues of “the priority of the PBGC claims, ‘waiver’ of the claims due to alleged insufficiency of presentation to the Receiver and the District Judge, the application of ‘equitable’ considerations governing receiverships which might prohibit payment of the claims, and the question posed by the Eleventh Circuit (whether a distribution to Cox would violate Fla. Stat. § 607.06401).”<sup>67</sup> Cox further references “the ultimate issue for decision – whether and how the Court should exercise its equitable power and discretion to require disgorgement of any NJC assets from Cox.”<sup>68</sup>

These issues have been addressed by the Eleventh Circuit's opinion and by the parties' respective briefs submitted during the summer of 2012, and argued before the Court on August 2, 2012. Indeed, the Eleventh Circuit stated that “the district court must consider whether a payment to Cox would comply with the insolvency test of the distributions-to-shareholders statute at the time of payment to Cox,”<sup>69</sup> and that if the distribution to Cox would violate Fla. Stat. § 607.06401, then NJC's “other creditors should receive payment before **any** distribution is

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<sup>66</sup> Joint Pretrial Statement, Uncontested Fact 38 (Doc. No. 778).

<sup>67</sup> Objection at 6 (quoting Report & Recommendation, March 21, 2014, (Doc. 791 at 7)).

<sup>68</sup> *Id.* at 15.

<sup>69</sup> *Cox Enters., Inc. v. PBGC*, 666 F.3d 697, 707-08 (11th Cir. 2012).

made to Cox.”<sup>70</sup> And while Cox questions the fairness of having to return money it was never entitled to,<sup>71</sup> Magistrate Judge Baker found that there is nothing unfair or inequitable about PBGC recovering on its claim against NJC for the Pension Plan’s unfunded benefit liabilities.<sup>72</sup> Indeed, he recognized that “the mandate of the Eleventh Circuit forecloses” discussions of the “fairness” of Cox returning assets to the estate.<sup>73</sup>

Accordingly, these issues have been fully addressed and no further briefing or argument is necessary.

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<sup>70</sup> *Id.* at 699 (emphasis added).

<sup>71</sup> Cox mistakenly characterizes PBGC’s claim against NJC as seeking equitable disgorgement from Cox. This is simply a situation requiring Cox to return assets that it improperly received under the now-reversed August 13, 2010 order in accordance with the Eleventh Circuit’s mandate. As Magistrate Judge Baker noted, “the parties are at issue over the assets *of NJC* currently being held by Cox; there is no independent claim by PBGC against Cox and the NJC assets paid to Cox are no longer its own.” Report & Recommendation, March 21, 2014, (Doc. 791 at 13).

<sup>72</sup> Report & Recommendation, March 21, 2014, (Doc. 791 at 13).

<sup>73</sup> *Id.*

**CONCLUSION**

Based on the record developed at the evidentiary hearing, PBGC has a claim against NJC for the Pension Plan's unfunded benefit liabilities in the amount of \$13,887,822.00.

Accordingly, the Court should adopt Magistrate Judge Baker's Report.

DATED: April 17, 2014  
Washington, D.C.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 17<sup>th</sup> day of April 2014, the Pension Benefit Guaranty Corporation's foregoing Response to Objection, was served electronically through the Court's CM/ECF system on all registered users.

/s/ Colin B. Albaugh  
Colin B. Albaugh  
Attorney