

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION1

ARGUMENT2

I. THERE IS NO DISPUTE ABOUT \$86.4 MILLION OF THE \$191 MILLION
IN DAMAGES PBGC ASSERTS2

II. THERE IS NO GENUINE DISPUTE OF MATERIAL FACT ABOUT THE
REMAINING \$104.7 MILLION IN DAMAGES3

 A. PBGC Used Entirely Sufficient Data to Test and Calculate
 Unfunded Benefit Liabilities.....6

 1. Asahi Tec Overstates Immaterial and Irrelevant Data Issues7

 2. PBGC’s Comprehensive Testing Confirmed that the Data Was
 Sufficient and Reliable.....8

 B. The ITT Offset Does Not Present A Disputed Issue of Fact12

III. THE COURT SHOULD AWARD PBGC’S COSTS13

CONCLUSION.....15

TABLE OF AUTHORITIES

Cases Cited

Boyar v. Korean Air Lines Co.,
954 F. Supp. 4 (D.D.C. 1996).....11

**Daubert v. Merrell Dow Pharmaceuticals, Inc.*,
509 U.S. 579 (1993).....4, 5

Dean v. Chrysler Corp.,
38 F.3d 568, 1994 WL 574188 (5th Cir. 1994) 5-6

Farmer v. DirectSat USA,
No. 08 CV 3962, 2013 WL 1195651 (N.D. Ill. Mar. 22, 2013)9

Freeland v. Iridium World Communications,
545 F. Supp. 2d 59 (D.D.C. 2008).....11

Godfrey v. Iverson,
559 F.3d 569 (D.C. Cir. 2009).....5

Heller v. District of Columbia,
952 F. Supp. 2d 133 (D.D.C. 2013).....4, 5

**Johnson v. Manitowoc Boom Trucks, Inc.*,
484 F.3d 426 (6th Cir. 2007)4

Kaempe v. Myers,
No. 01-2636 (ESH), 2003 U.S. Dist. LEXIS 25969 (D.D.C. March 5, 2003)4

Khairkhwa v. Obama,
793 F.Supp.2d 1 (D.D.C.2011).....5

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999).....4, 5

Patteson v. Maloney,
No. 10-1760 (JEB), 2013 WL 5133495 (D.D.C. Sep. 16, 2013).....5

Reiver v. District of Columbia,
925 F. Supp. 2d 1 (D.D.C. 2013).....5

Samra v. Shaheen Business & Inv. Group,
355 F. Supp. 2d 483 (D.D.C. 2005).....4

| | |
|---|---|
| <i>SEC v. Johnson</i> , 525 F. Supp. 2d 66 (D.D.C. 2007)..... | 5 |
| <i>United States v. Day</i> , 524 F.3d 1361 (D.C. Cir. 2008)..... | 5 |
| <i>United States v. O’Keefe</i> , 573 F. Supp. 2d 14 (D.D.C. 2008)..... | 5 |
| <i>U.S. Info. Systems v. IBEW Local No. 3</i> , 313 F. Supp. 2d 213 (S.D.N.Y. 2004)..... | 9 |
| <i>Watson v. Allstate Texas Lloyd’s</i> , 2007 WL 1026420 (5th Cir. Mar. 29, 2007)..... | 5 |
| <i>Wood v. Day</i> , 859 F.2d 1490 (D.C. Cir. 1988)..... | 4 |

United States Code Cited

| | |
|----------------------------|----|
| Title 29 | |
| Section 1303(e)(5) | 13 |
| Section 1393(a), (b) | 11 |
| Section 1401(a)(3) | 11 |

Other Authorities Cited

| | |
|---|-----|
| 29 C.F.R. | |
| Section 2619.49(a)(3), (b)-(k)..... | 10 |
| Section 4044.52(a)(3) | 10 |
| Section 4044.52(c) | 10 |
| 61 Fed. Reg. 34002 (Jul. 1, 1996)..... | 10 |
| *Fed. R. Civ. P. 56(e)(2)..... | 2 |
| Fed. R. Evid. 702 | 5 |
| Fed. R. Evid. 703 | 11 |
| 10A C. Wright, A. Miller & M. Kane, <i>Federal Practice & Procedure</i> § 2738 at 503-04 & n.50 (2d ed. 1983)..... | 5-6 |
| 10B C. Wright, A. Miller & M. Kane, <i>Federal Practice & Procedure</i> § 2738 at 367-69 & n.46 (3d ed. 1998 & Supp. 2013) | 5-6 |

*Authorities chiefly relied upon are marked with an asterisk.

INTRODUCTION

PBGC seeks summary judgment on damages for the terminated Metaldyne Corporation Pension Plan (the “Pension Plan”) in the amount of approximately \$191 million. This sum consists of \$158 million in unfunded benefit liabilities with interest, \$42 million in termination premiums with interest, and \$250,000 in costs, less \$9 million in payments with interest that PBGC received from third parties. PBGC’s claim for each of these amounts is supported by an un rebutted expert report and other compelling evidence.

In its Opposition (“Opp.”), Asahi Tec challenges only a limited portion of the unfunded benefit liabilities and \$250,000 in costs, a total of \$104.7 million. Asahi Tec *does not challenge* the remaining \$86.4 million in damages, which consists of \$53.4 million in unfunded benefit liabilities with interest and \$42 million in termination premiums with interest, less the \$9 million payments. As there is no dispute concerning these amounts, the Court should enter summary judgment for PBGC for the uncontested \$86.4 million.

The Court should also grant summary judgment to PBGC for the remaining \$104.7 million because Asahi Tec has not raised a genuine dispute of material fact for trial. PBGC has established the amount of unfunded benefit liabilities, presenting a detailed analysis by an undisputedly expert actuary with decades of experience performing this exact task. Asahi Tec, in contrast, has presented no evidence or expert analysis to contradict that amount, resorting instead to uninformed criticism of the unavailability of certain historical data. PBGC’s expert testified that, in fact, the historical data was “quite remarkable,” given the many mergers and closures that ultimately resulted in the Pension Plan.¹ He explained that “it is not unusual

¹ Dep. of Eric J. Klieber, Dkt. #96-4 at 67:21-68:10.

that participant data should be incomplete to this extent.”² He applied uncontroverted, bedrock actuarial principles and tested the data for every participant for whom information was available. And when additional information became available, he confirmed his conclusions.

Under Rule 56, Asahi Tec can avoid summary judgment only by “properly addressing” PBGC’s calculation of the unfunded benefit liabilities.³ By introducing neither contrary evidence nor expert testimony to contradict that of PBGC’s actuarial expert, Asahi Tec has failed to do so, leaving PBGC’s calculation undisputed. Accordingly, the Court should enter summary judgment for the full \$191 million amount of PBGC’s damages.

ARGUMENT

I. THERE IS NO DISPUTE ABOUT \$86.4 MILLION OF THE \$191 MILLION IN DAMAGES PBGC ASSERTS.

Asahi Tec does not challenge: (i) PBGC’s calculation of termination premiums;⁴ (ii) PBGC’s calculation of unfunded benefit liabilities tested by PBGC’s actuary against work history data;⁵ (iii) PBGC’s valuation of Pension Plan assets as of the date of plan termination;⁶ and (iv) PBGC’s calculation of interest on unfunded benefit liabilities and termination premiums.⁷ In other words, Asahi Tec asserts no challenge with respect to \$86.4 million in

² Expert Report of Eric J. Klieber, Dkt. #92-1 at 11.

³ *See* Fed. R. Civ. P. 56(e)(2).

⁴ Asahi Tec’s Statement of Genuine Issues of Material Fact, Dkt. #96-1 at 5 (Response to No. 14). PBGC has also compiled both parties’ statements of facts and responses in a chart that is being filed with this brief.

⁵ Opp. at 15-19.

⁶ Asahi Tec’s Statement of Genuine Issues of Material Fact at 4 (Response to No. 9).

⁷ *Id.* at 4 (Response to No. 11, challenging only the principal amount, not the method of calculation); *id.* at 5 (Response to No. 15).

damages: \$53.4 million in unfunded benefit liabilities with interest and \$42 million in termination premiums with interest, less \$9 million in payments PBGC received from third parties.⁸ As Asahi Tec makes clear in its Opposition, it challenges a *maximum* of \$89.7 million: \$78.9 million due to lack of testing and \$10.8 million due to purportedly inaccurate offsets.⁹ Because Asahi Tec does not contest the other elements of PBGC’s damages, the Court should grant summary judgment to PBGC for a minimum of \$86.4 million. As demonstrated below, there is no genuine dispute about the remaining \$104.7 million, either.

II. THERE IS NO GENUINE DISPUTE OF MATERIAL FACT ABOUT THE REMAINING \$104.7 MILLION IN DAMAGES.

As Mr. Klieber described in his expert report, the Pension Plan’s unfunded benefit liabilities were calculated using rigorous analysis and bedrock actuarial standards, in full compliance with the governing statute and regulations. These calculations were performed for PBGC to carry out its core function of paying benefits to participants in terminated pension

⁸ The amount of uncontested liabilities is set forth in the chart below. The interest on the uncontested amount is documented in the Supplemental Declaration of James E. O’Neill and Exhibit A thereto, submitted herewith.

| | PBGC Claims | Disputed Amounts | Uncontested Amounts |
|------------------------------------|----------------------|--------------------|---------------------|
| Benefit liabilities | 329,609,412 | Minus 89.7 million | 239,909,412 |
| Assets | <u>- 194,138,544</u> | | <u>-194,138,544</u> |
| Unfunded benefit liabilities (UBL) | 135,470,868 | | 45,770,868 |
| Interest on UBL | <u>+ 22,605,585</u> | | <u>+7,637,637</u> |
| UBL with interest | 158,076,453 | | 53,408,505 |
| Term. Premiums (TP) with interest | <u>+42,113,915</u> | | <u>+42,113,915</u> |
| UBL/interest plus TP/interest | 200,190,368 | | 95,522,420 |
| Third party payments with interest | <u>-9,093,436</u> | | <u>-9,093,436</u> |
| TOTAL | 191,096,932 | | 86,428,984 |

⁹ Opp. at 15, 16.

plans.¹⁰ PBGC must ensure that benefit amounts are accurate, and the calculations Mr. Klieber described demonstrate the lengths to which PBGC goes to do so. This more than meets the “reasonable certainty” threshold for proving damages,¹¹ and Asahi Tec raises no genuine dispute of material fact suggesting otherwise.

Asahi Tec does not argue that PBGC’s expert testimony is inadmissible. It does not challenge Mr. Klieber’s experience or expertise,¹² and does not question whether he applied “the same level of intellectual rigor that characterizes the practice of an expert in the [actuarial] field.”¹³ Asahi Tec makes no mention of *Daubert*, *Kumho*, or any of the established precedent governing the admissibility of expert testimony.

Instead, Asahi Tec repeatedly refers to “reliability,” but fails to raise a genuine dispute about the sufficiency of the data Mr. Klieber used or suggest a viable alternative for determining

¹⁰ See *Daubert v. Merrell Dow Pharms.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (the fact that an expert’s testimony is based on work conducted independent of the litigation provides “important, objective proof” that the work is reliable). *Accord Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 434-35 (6th Cir. 2007).

¹¹ See Opp. at 14, 18 (citing *Kaempe v. Myers*, No. 01-2636 (ESH), 2003 U.S. Dist. LEXIS 25969, *17 (D.D.C. March 5, 2003)); see also *Wood v. Day*, 859 F.2d 1490, 1493 (D.C. Cir. 1988) (damages need not be proven to a “mathematical certainty”); *Samra v. Shaheen Business & Inv. Group*, 355 F. Supp. 2d 483, 494 (D.D.C. 2005) (“reasonable certainty” is not the same as “absolute certainty”).

¹² See Asahi Tec’s Statement of Genuine Issues of Material Fact at 2 (Response to No. 4).

¹³ *Heller v. District of Columbia*, 952 F. Supp. 2d 133, 141 (D.D.C. 2013), quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

damages.”¹⁴ More to the point, Asahi Tec has not attempted to rebut Mr. Klieber’s report or to offer any expert testimony at all, even though the calculation of unfunded benefit liabilities is “beyond the ken of the average layperson.”¹⁵ Its bald assertions that PBGC’s expert “did not properly calculate” the Pension Plan’s benefit liabilities, and that Asahi Tec “has not been able to calculate the exact dollar amount” of any discrepancy¹⁶ are wholly unsupported. Asahi Tec gives no indication of what additional information could be proven at trial or why the Pension Plan administrators’ benefit calculations that Mr. Klieber used are not reliable, so there are no competing inferences to raise a genuine dispute as to any material fact. Accordingly, summary judgment in PBGC’s favor for the full \$191 million is appropriate.¹⁷

¹⁴ Even if reliability were at issue, the Court has “considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” *Kumho Tire*, 526 U.S. at 152; accord *United States v. Day*, 524 F.3d 1361, 1367, 1369 (D.C. Cir. 2008); *Patteson v. Maloney*, No. 10-1760 (JEB), 2013 WL 5133495 (D.D.C. Sep. 16, 2013), *3; *SEC v. Johnson*, 525 F. Supp. 2d 66, 68 (D.D.C. 2007). A court’s gatekeeping role is “directed at excluding expert testimony that is based upon ‘subjective belief’ or ‘unsupported speculation,’” but nothing of the sort is suggested here. *Heller*, 952 F. Supp. 2d at 140 (citations omitted). And “[i]n general, Rule 702 has been interpreted to favor admissibility.” *Khairkhwa v. Obama*, 793 F.Supp. 2d 1, 10 (D.D.C. 2011), citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 587 (1993); 2000 Advisory Committee note to Fed. R. Evid. 702 (“A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.”).

¹⁵ *Reiver v. District of Columbia*, 925 F. Supp. 2d 1, 10 (D.D.C. 2013), quoting *Godfrey v. Iverson*, 559 F.3d 569, 572 (D.C. Cir. 2009). Accord *United States v. O’Keefe*, 573 F. Supp. 2d 14, 24 (D.D.C. 2008).

¹⁶ Asahi Tec’s Statement of Genuine Issues of Material Fact at 3 (Response to No. 5); Opp. at 15. In numerous other responses, Asahi Tec refers the Court to its Response to Undisputed Fact No. 5. See *id.*, Response to Nos. 6, 10, 11, 12, 16, 17, and 19.

¹⁷ See *Watson v. Allstate Texas Lloyd’s*, No. 05-20592, 2007 WL 1026420, *6 (5th Cir. Mar. 29, 2007) (“when a party opposing summary judgment fails to present evidence sufficient to make an issue of an expert’s conclusion – such as contrary opinion evidence or evidence tending to undermine the expert’s credibility or qualifications – and when ‘the trier of fact would not be at liberty to disregard arbitrarily the unequivocal, uncontradicted, and unimpeached testimony of an expert witness,’ expert testimony may form the basis of summary judgment”) (citation omitted);

A. PBGC Used Entirely Sufficient Data to Test and Calculate Unfunded Benefit Liabilities.

Asahi Tec’s limited challenge to PBGC’s calculation of unfunded benefit liabilities is a lawyer’s conclusion that Mr. Klieber had limited “ability to test the accuracy of the Plan administrator’s accrued benefit calculations” due to “lack of data.”¹⁸ That conclusion is unsupported by any competent opinion. Rather, the expert in this case qualified to opine on the data sufficiency—Mr. Klieber—concluded that “the amount of data was quite remarkable,” and in “my professional judgment,” “was sufficient for me to produce an actuarially sound calculation of the Pension Plan’s unfunded benefit liabilities”¹⁹

According to Mr. Klieber’s uncontradicted expert report, Mass Mutual, the Pension Plan’s last plan administrator, provided accrued benefit determinations for nearly all non-retired participants.²⁰ PBGC also obtained accrued benefit amounts and work history from another former plan administrator, Hewitt Associates.²¹ And PBGC obtained additional data from Watson Wyatt, Aon Consulting, and participants in the Pension Plan, who were required to

Dean v. Chrysler Corp., 38 F.3d 568, 1994 WL 574188, *5 (5th Cir. 1994) (“if the only issue is one of the kind on which expert testimony must be presented, and nothing is presented to challenge the affidavit of the expert, summary judgment may be proper”), quoting 10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 2738 at 503-04 & n.50 (2d ed. 1983) (same language is in current edition, volume 10B, § 2738 at 367-69 & n.46 (3d ed. 1998 & Supp. 2013)).

¹⁸ Opp. at 7.

¹⁹ Klieber Dep. at 67:21-23; Klieber Decl., Dkt. #92-1 at ¶ 6.

²⁰ Klieber Expert Report at 10-11.

²¹ Klieber Dep. at 36:2-6; 49:11-20; 54:11-15.

submit data in order to receive their benefits.²² In sum, PBGC had entirely sufficient and reliable information to calculate the unfunded benefit liabilities. Asahi Tec's arguments to the contrary fail to raise a material disputed fact.

1. Asahi Tec Overstates Immaterial and Irrelevant Data Issues.

Asahi Tec cobbles together snippets about PBGC's data collection process, but none of them raises a genuine issue or detracts from the reliability of Mr. Klieber's calculations:

- Asahi Tec cites a letter from April 2010 for the proposition that PBGC and Buck initially "had trouble locating the data they needed." Opp. at 5. As set forth in the accompanying declaration of Claudette Voglezon, PBGC subsequently located and filled in the missing data elements.²³
- Asahi Tec cites memoranda noting that Metaldyne did not have a "central location" for personnel files (Opp. at 6), but fails to show why this fact is significant, and it is not. PBGC collected data from no less than four sources, including three previous plan administrators.²⁴
- Asahi Tec asserts that certain data was provided in electronic form by previous plan administrators without hard copy source documents (Opp. at 6-7), but fails to show why this fact is significant. PBGC obtained a calculated accrued benefit completed by a previous plan administrator for nearly all non-retired participants.²⁵
- Asahi Tec notes that certain data that PBGC obtained from plan administrators contained errors about a small portion of beneficiaries of deceased retirees (Opp. at 7). The entire population of beneficiaries constitutes only a small fraction of the relevant population, so this would be an immaterial issue if it was an issue at all.²⁶ Moreover, most of the errors related to items, such as social security

²² Voglezon Decl. (submitted herewith) ¶¶ 4-10.

²³ Voglezon Decl. ¶ 8.

²⁴ Voglezon Decl. ¶ 7.

²⁵ Klieber Expert Report at 10-11.

²⁶ See Actuarial Case Memo, Truppman Decl. Exh. A, Dkt. #96-3 at 1 (showing that beneficiaries constitute 4% of the population (411 of 10,071) and 3% of the benefit liabilities (\$12,064,880 of \$329,609,412).

numbers, that have no bearing on actuarial analysis.²⁷ In completing its valuation, PBGC obtained accurate and necessary data from other sources.²⁸

Asahi Tec's ultimate conclusion, that Mr. Klieber's "calculations are based upon unreliable or non-existent data"²⁹ is therefore misleading and unsupported. And none of the issues it identifies raises a genuine dispute as to any material fact.

2. PBGC's Comprehensive Testing Confirmed that the Data Was Sufficient and Reliable.

Asahi Tec also asserts that, having allegedly "failed to obtain critical work history data," "Mr. Klieber had no ability – and no business – accepting" calculated accrued benefit data. *Id.* This argument rests on a fundamental misunderstanding of the Pension Plan and the work that Mr. Klieber did to ensure that the data was sufficient.

As Mr. Klieber explains in his expert report, many of the 107 component plans that ultimately merged into the Pension Plan had been in existence for decades.³⁰ Some participants retired and began receiving pension benefits long before the Pension Plan terminated in 2009. Others had their benefits frozen as of their component plan's benefit freeze date, the earliest of which occurred a quarter of a century ago, in 1989.³¹ As is often the case, PBGC was not able to get work history data for every individual, but did get accrued benefit calculations from the Pension Plan's administrators for nearly all non-retired individuals based on that data. The

²⁷ Truppman Decl. Exh. G, Dkt. #96-9 at 5, PBGC-EXPERT-000924.

²⁸ Voglezon Decl. ¶ 10.

²⁹ Opp. at 1.

³⁰ *See* Klieber Expert Report, App. 2 at pp. 1-2 (describing mergers); *id.* at p. 7 (discussing Simpson plan provisions in 1976).

³¹ *Id.*, Attachment 2-E (MASX Energy Services Group - Lindsey Completion Systems component plan of the MascoTech Hourly and Union sub-plan).

difference is academic, not material, since both are forms of data from which a pension plan's benefit liabilities can be accurately and reliably calculated.

Moreover, the testing of the accrued benefits was extensive and entirely sufficient. Mr. Klieber systematically tested the benefits of every single participant for whom there was sufficient data available.³² Mr. Klieber thought “the amount of data [for performing testing] was quite remarkable” — that it was a “good amount” of data.³³ Contrary to Asahi Tec's suggestion, Mr. Klieber did not select a “sample” of participants from a larger pool to test; thus Asahi Tec's cited cases in which an expert used only a tiny or biased sample are inapposite.³⁴

Mr. Klieber's testing of the accrued benefit calculations showed that they were correct to the penny for 75% of participants, correct within \$5/5% for 94% of participants, and correct within \$25 for 100% of participants.³⁵ Accordingly, when underlying historical data was not available for some participants, Mr. Klieber applied sound actuarial judgment in adopting the plan administrator's calculation because of the high level of accuracy for the tested amounts.³⁶

³² Klieber Dep. at 62:4-5.

³³ *Id.* at 67:19-23, 69:4-7.

³⁴ Opp. at 14-15 (citing *Farmer v. DirectSat USA*, No. 08 CV 3962, 2013 WL 1195651, *4, 2013 U.S. Dist. LEXIS 39912 (N.D. Ill. Mar. 22, 2013) (data on 6% of employees – 30 of 500 – was applied to entire group) and *U.S. Info. Systems v. IBEW Local No. 3*, 313 F. Supp. 2d 213, 233 (S.D.N.Y. 2004) (data sample the expert analyzed was “taint[ed]” in that it “necessarily contain[ed] projects where the plaintiffs believed they had either been unfairly kept out of the bidding process or wrongfully denied the award”).

³⁵ Klieber Expert Report at 12.

³⁶ Thus, Mr. Klieber did not “make assumptions” about “unknown data,” and the GAO report that Asahi Tec cites (Opp. at 15-16) is inapposite.

Based on his testing, Mr. Klieber determined that the available data allowed him to perform the desired analysis, as required by Actuarial Standard of Practice 23.³⁷

Late in the process, PBGC obtained additional data from Hewitt Associates, from which Mr. Klieber verified more participants' accrued benefits and eliminated certain discrepancies.³⁸ Mr. Klieber testified that he did additional testing, and the Hewitt data validated the data provided by Mass Mutual, as "there was no conflict between them."³⁹ It was unnecessary to create work papers or statistical analysis with this confirmatory information because the plan administrators' accrued benefit data was already input, except in noted instances where

³⁷ Actuarial Standard of Practice 23 provides:

Data that are completely accurate, appropriate, and comprehensive are frequently not available. The actuary should use available data that, in the actuary's professional judgment, allow the actuary to perform the desired analysis. However, if material data limitations are known to the actuary, the actuary should disclose those limitations and their implications.

Asahi Tec argues that ASOP 23, which is directly on point, does not apply because the only reference in PBGC's regulation to generally accepted actuarial principles and practices is in connection with selecting valuation formulas. *Opp.* at 18-19, citing 29 C.F.R. § 4044.52(c). As Mr. Klieber's expert report makes clear – and common sense dictates – actuaries apply the actuarial standards of practice in performing a variety of tasks, not just selecting valuation formulas. The regulatory language is permissive, not restrictive, and was added in place of the prior version of the regulation, which dictated specific formulas. *Compare* § 4044.52(a)(3) (1996) *with* 29 C.F.R. § 2619.49(a)(3), (b)-(k) (1995) (1995 and 1996 CFR databases available on Westlaw); *see also* 61 Fed. Reg. 34002 (Jul. 1, 1996) (explaining that the change was "limited to nonsubstantive corrections and clarifications," and that "[n]one of the amendments . . . affects applicable substantive legal requirements"). Taken to its ultimate conclusion, Asahi Tec's argument would leave actuaries without any standards to apply outside the context of selecting valuation formulas.

³⁸ Klieber Dep. at 54:11-19, 55:23-56:11.

³⁹ *Id.* at 49:11-20; 54:11-22; 55:23-56:11.

Mr. Klieber had detected errors in the plan administrators' data.⁴⁰ Asahi Tec suggests that because Mr. Klieber did not update his analysis with the Hewitt data, this justifies disregarding all of Mr. Klieber's testing and his determination that the data was sufficient.⁴¹ But as Mr. Klieber's uncontradicted testimony establishes, the additional data supported the plan administrator's accrued benefit calculations and confirmed its reliability.⁴²

In sum, PBGC compiled extensive data and performed extensive testing of that data, which dictates the benefits that PBGC pays to Pension Plan participants every month.

Mr. Klieber adhered to actuarial standards and testified that, in his professional judgment as an enrolled actuary, the available data was entirely sufficient to perform the required calculations.⁴³ He calculated the Pension Plan's benefit liabilities by determining the current value of each participant's pension benefit.⁴⁴ The testimony of the only expert in this case fully supports every

⁴⁰ *Id.* at 35:9-37:15; 51:19-52:3; 54:11-56:11.

⁴¹ *Opp.* at 11-12, 16.

⁴² Mr. Klieber's opinion about the underlying accrued benefit calculations is admissible because experts in the actuarial field would reasonably rely on those kinds of facts or data in forming an opinion on the subject. Fed. R. Evid. 703; *Suppl. Klieber Decl.* ¶ 2. Even if Mr. Klieber's opinion was deemed to have included assumptions of fact – such as that the Pension Plan's administrators based their accrued benefit calculations on work history data that is no longer available – the Court “has discretion under Federal Rule of Evidence 703 to determine whether the expert acted reasonably in making assumptions of fact upon which he would base his testimony.” *Boyar v. Korean Air Lines Co.*, 954 F. Supp. 4, 7 (D.D.C. 1996) (citation omitted); *accord Freeland v. Iridium World Communications*, 545 F. Supp. 2d 59, 88 (D.D.C. 2008).

⁴³ *Klieber Dep.* at 57:21-23; *Klieber Decl.*, Dkt. #92-1 at ¶ 6.

⁴⁴ For this reason, Asahi Tec's reference to the separate statutory scheme for multiemployer pension plans (*Opp.* at 16-17) is a red herring. Withdrawal liability in multiemployer plans is calculated without determining each participant's pension benefit, with rules about presumptions, aggregate actuarial assumptions, and representative data. *See* 29 U.S.C. §§ 1393(a), (b); 1401(a)(3). In this case, PBGC did not use representative data, but rather, determined a pension benefit for each individual using the best available data.

aspect of the calculation. Without introducing any contrary evidence or expertise, Asahi Tec fails to create a genuine dispute as to any material fact.

B. The ITT Offset Does Not Present A Disputed Issue of Fact.

Asahi Tec's other challenge to PBGC's calculation of unfunded benefit liabilities involves the offset ("the ITT offset") that PBGC applied to certain benefits in the Lester Plan, one of the sub-plans that ultimately merged into the Pension Plan. The offset reflects the fact that a portion of the Lester Plan's benefits was paid by another pension plan – the ITT Plan.⁴⁵ Asahi Tec asserts that PBGC's benefit figures for the Lester Plan are too high because the benefits should have been reduced by a larger offset from the ITT Plan to account for compensation at ITT after December 31, 2000.⁴⁶ Although Asahi Tec points out that the *total* liability associated with the Lester Plan is \$10.8 million, the liability would be reduced by *only* \$617,460 if the larger ITT offset Asahi Tec urges were used.⁴⁷

Contrary to Asahi Tec's characterizations (Opp. at 12-13), Mr. Klieber did not acknowledge that he mistakenly calculated the ITT offset. He merely agreed that the available ITT Plan documents supported an offset that included participants' post-2000 compensation, noting that such ITT Plan documents may have been amended.⁴⁸ However, as Mr. Klieber testified, he calculated the ITT offset consistent with the ITT benefit statements, which excluded

⁴⁵ Klieber Dep. at 70:18-72:11.

⁴⁶ Opp. at 12-13, 16.

⁴⁷ Suppl. Declaration of Eric J. Klieber ¶ 3 and Exh. A.

⁴⁸ Klieber Dep. at 75:21-76:6.

post-2000 compensation.⁴⁹ In other words, it was not appropriate to short-change Lester Plan participants where ITT did not include post-2000 compensation in its benefits.

Asahi Tec has not introduced any evidence to create a genuine dispute of material fact about either ITT's or the Lester Plan administrator's practices regarding the ITT offset. Nor has Asahi Tec produced any evidence or expertise to challenge PBGC's construction of the ITT offset or Mr. Klieber's calculation effectuating that construction, which PBGC itself currently implements in paying Pension Plan participants their monthly benefits. Summary judgment is therefore appropriate as to the full amount of the Lester Plan's unfunded benefit liabilities, including the \$617,460 ITT offset amount that Asahi Tec challenges.⁵⁰

III. THE COURT SHOULD AWARD PBGC'S COSTS.

Asahi Tec does not dispute the amount or necessity of PBGC's costs, only whether PBGC is entitled to an award of those costs under ERISA.⁵¹ It would have the Court hold PBGC to the "more exacting" standard for awards of attorneys' fees under Title I of ERISA,⁵² notwithstanding that PBGC seeks only costs – not attorneys' fees – and under Title IV of ERISA, not Title I. The Court should exercise its discretion under 29 U.S.C. § 1303(e)(5) to award PBGC its costs.

⁴⁹ *Id.* at 77:6-9.

⁵⁰ If, notwithstanding these uncontroverted material facts, the Court were to determine that there is an issue for trial, it should be limited to the \$617,460 attributable to post-2000 ITT compensation that Asahi Tec might be said to genuinely dispute. Under no reading of Asahi Tec's argument has it created a dispute, much less a genuine dispute, as to the entire \$10.8 million liability associated with the Lester plan.

⁵¹ Asahi Tec's Statement of Genuine Issues of Material Fact at 6 (Response to No. 18).

⁵² *Opp.* at 19-20.

As Asahi Tec acknowledges, it did not assume sponsorship of the Pension Plan or pay any amount toward the Plan even though it is liable as the 100% owner of Metaldyne.⁵³ On the contrary, it litigated its known obligations for three years, even though, as the Court found, it was fully aware of its liability at least as early as its acquisition of Metaldyne.⁵⁴ Even after summary judgment on liability, Asahi Tec continues to tax PBGC's resources with claims about Mr. Klieber's work and the calculation of damages that are unsupported by any evidence. This is precisely the type of situation in which costs should be awarded.

Contrary to Asahi Tec's suggestion,⁵⁵ PBGC would not have incurred these costs absent this litigation. The principal costs, electronic research and the hosting services for electronic management of the extensive discovery documents, were incurred solely as a result of this litigation.⁵⁶ None of those costs or the others PBGC claims would have been incurred in the normal course of business. Accordingly, the Court should award PBGC the full amount of its costs.

Remaining portion of this page intentionally left blank.

⁵³ Asahi Tec's Statement of Genuine Issues of Material Fact at 2 (Response to No. 3).

⁵⁴ Dkt. #85, Memorandum Opinion (Oct. 4, 2013) at 12 (Asahi Tec "did not just know about the underfunded Pension Plan, it also knew that the Pension Plan was governed by ERISA and that ERISA provided for controlled group liability").

⁵⁵ Opp. at 20-21.

⁵⁶ Suppl. Decl. of Paula Connelly ¶ 4.

CONCLUSION

Asahi Tec does not dispute \$86.4 million in damages, and raises no genuine dispute of material fact regarding the other \$104.7 million PBGC asserts. It also does not contest the amount of PBGC's modest costs of \$250,000 over the past three years. As there is no genuine dispute as to any material fact for trial, the Court should enter judgment for PBGC awarding it damages and costs in the full amount of \$191 million.

Respectfully submitted,

Dated: April 14, 2014

HUGHES HUBBARD & REED LLP

By: /s/ JAMES H. BOYKIN
JAMES H. BOYKIN (D.C. Bar No. 490298)
DENNIS S. KLEIN (D.C. Bar No. 361457)
1775 I Street, N.W.
Washington, DC 20006-2401
Phone: (202) 721-4600
Fax: (202) 721-4646
e-mail: boykin@hugheshubbard.com

By: /s/ RALPH L. LANDY
ISRAEL GOLDOWITZ (D.C. Bar No. 291120)
Chief Counsel
KAREN L. MORRIS (D.C. Bar No. 419786)
Deputy Chief Counsel
PAULA J. CONNELLY (D.C. Bar No. 389055)
Assistant Chief Counsel
RALPH L. LANDY
SHARI D. WILLIAMS
Attorneys
PENSION BENEFIT GUARANTY CORP.
Office of the Chief Counsel
1200 K Street, N.W.
Washington, D.C. 20005-4026
Phone: (202) 326-4020, ext. 3090
Fax: (202) 326-4112
e-mail: landy.ralph@pbgc.gov

Of Counsel:

HUGHES HUBBARD & REED LLP
DEREK J.T. ADLER, Esq.
DANIEL S. LUBELL, Esq.
JORDAN E. PACE, Esq.
One Battery Park Plaza
New York, NY 10004
Phone: (212) 837-6000
Fax: (212) 422-4726
e-mail: lubell@hugheshubbard.com

*Attorneys for Plaintiff Pension Benefit
Guaranty Corporation*