UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK DIVISION

PENSION BENEFIT GUARANTY CORPORATION,	)	
Plaintiff,	)	Civil Action No. 2:17-CV-03972-WJM-MF
v.	)	
UNITED TOOL & STAMPING COMPANY OF NORTH CAROLINA, INC.,	)	Motion Day: May 21, 2018
Defendant.	)	**Oral Argument Requested**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF PENSION BENEFIT GUARANTY CORPORATION'S MOTION TO STRIKE AFFIRMATIVE DEFENSES FROM THE DEFENDANT'S ANSWER AND AMENDED AFFIRMATIVE DEFENSES

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Plaintiff Pension Benefit Guaranty Corporation ("PBGC") respectfully submits this Memorandum of Law in Support of its Motion to Strike Affirmative Defenses asserted in the Answer and Amended Affirmative Defenses (ECF 42) ("Amended Answer") filed by Defendant United Tool & Stamping Company of North Carolina, Inc. ("UTS-NC") on February 26, 2018. As explained below, each affirmative defense asserted by UTS-NC is legally insufficient and should be stricken under Rule 12(f) of the Federal Rules of Civil Procedure.

I. IDENTIFICATION OF PARTIES (Local Rule 10.1)

The names and addresses of the named parties in this action are as follows: (i) Plaintiff PBGC, 1200 K Street N.W., Washington, D.C. 20005; and (ii) Defendant UTS-NC, 2817 Enterprise Avenue, Fayetteville, NC 28306.

II. PRELIMINARY STATEMENT

PBGC is the United States government agency that guarantees pension plan benefits under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"). *See* 29 U.S.C. §§ 1301-1461 (2012 & Supp. IV 2016).

Pursuant to a 1996 Agreement and Reorganization ("Agreement"), United Tool & Stamping Company, Inc. ("United Tool") split into two companies, United Tool & Stamping Company, Inc. of New Jersey ("UTS-NJ") and UTS-NC. Although UTS-NJ remained the sponsor of the United Tool & Stamping Company Pension Plan ("Plan" or "Pension Plan"), the Agreement explicitly set forth UTS-

NC's and UTS-NJ's intent for each to pay annually one-half of the Plan's future expenses. *See* Agreement, ECF 1-1 ¶¶ 2, 6. UTS-NC conceded that its last payment to the Pension Plan was in 2008. *See* Def.'s Am. Answer, ECF 26 ¶ 35; Def.'s Motion to Dismiss, ECF 16 at 22.

Because both UTS-NJ and UTS-NC stopped contributing to the Pension Plan, the Plan had insufficient assets to pay benefits due in May 2014. As a result, retirees did not receive their pension benefits in May 2014. Therefore, on June 6, 2014, pursuant to ERISA § 4042(c), PBGC and UTS-NJ, as the Plan's sponsor, entered into an agreement that terminated the Pension Plan and appointed PBGC as statutory trustee of the Plan.

On June 2, 2017, as the Plan's statutory trustee, PBGC filed a complaint ("Complaint") against UTS-NC to collect amounts UTS-NC owed to the Pension Plan under the Agreement. ECF 1. On July 27, 2017, UTS-NC moved to dismiss PBGC's Complaint ("Motion to Dismiss"), arguing that (i) neither the Plan nor PBGC is an intended third-party beneficiary of the Agreement, and (ii) UTS-NC did not breach the Agreement because it was not required to continue paying the Plan once UTS-NJ stopped paying. ECF 16. On August 22, 2017, PBGC filed its Opposition to UTS-NC's Motion to Dismiss. ECF 18.

On December 4, 2017, this Court issued an Order and accompanying Opinion ("Opinion"), denying UTS-NC's Motion to Dismiss and finding that (i)

PBGC is an intended third-party beneficiary of the Agreement, and (ii) UTS-NC breached the Agreement when it stopped paying the Pension Plan, regardless of UTS-NJ's nonperformance. ECF 24.

On December 18, 2017, UTS-NC filed its Answer to PBGC's Complaint ("Original Answer") in which it raised thirteen affirmative defenses. ECF 26. On January 8, 2018, PBGC filed its Motion to Strike all of UTS-NC's affirmative defenses pursuant to Federal Rule of Civil Procedure 12(f) (ECF 30) ("Originally Filed Motion to Strike"). On February 26, 2018, UTS-NC filed the Amended Answer, in which it withdrew five and abandoned two of the affirmative defenses it raised in its Original Answer. ECF 42. Specifically, UTS-NC withdrew the following affirmative defenses:

- Second Affirmative Defense (No Third Party Beneficiaries): "PBGC's claims are barred in whole or in part on the basis that the parties to the Reorganization Agreement did not intend to create third party beneficiaries."
- Third Affirmative Defense (Incidental Beneficiary): "Alternatively, PBGC's claims are barred in whole or in part because PBGC is an incidental beneficiary of the parties to the Reorganization Agreement's provisions."
- Fourth Affirmative Defense (Accord and Satisfaction): "PBGC's claims are barred in whole or in part by the doctrine of accord and satisfaction."
- Tenth Affirmative Defense (Good Faith): "PBGC's claims are barred in whole or in part by UTS-NC's good faith compliance with each of its obligations under the Reorganization."
- Thirteenth Affirmative Defense (Contribution and Indemnification): "PBGC's claims are barred in whole or in part by the doctrines of

contribution and indemnification."[1]

In addition, in its Amended Answer, UTS-NC effectively abandoned two affirmative defenses that it raised in its Original Answer, stating the following:

- Ninth Affirmative Defense (Laches): "By this amendment, UTS-NC clarifies that, except as more specifically described through its other affirmative defenses, it does not contend that PBGC's claim as presented are barred in whole or in part by the doctrine of laches. However, UTS-NC reserves the right to assert this affirmative defense against any future revisions, amendments, or supplements by PBGC as the result of discovery in this matter."
- Twelfth Affirmative Defense (Statute of Limitations): "By this amendment, UTS-NC clarifies that, except as more specifically described through its other affirmative defenses, it does not contend that PBGC's claim as presented are barred in whole or in part by the statute of limitations. However, UTS-NC reserves the right to assert this affirmative defense against any future revisions, amendments, or supplements by PBGC as the result of discovery in this matter."[2]

On March 7, 2018, PBGC filed a Motion for Extension of Time to respond to UTS-NC's Amended Answer. ECF 43. On March 16, 2018, after conferring with the Court's chambers, PBGC filed a letter withdrawing its Originally Filed Motion to Strike. ECF 44. On March 19, 2018, the Court entered an Order extending the time for PBGC to respond to UTS-NC's Amended Answer to April

[1] Because UTS-NC voluntarily withdrew the second, third, fourth, tenth, and thirteenth affirmative defenses in its Amended Answer, PBGC will not address those affirmative defenses in this Motion to Strike.

[2] Because UTS-NC effectively abandoned the ninth and twelfth affirmative defenses in its Amended Answer, PBGC will not address those affirmative defenses in this Motion to Strike.

27, 2018. ECF 45, 46. Pursuant to Federal Rule of Civil Procedure 12(f), PBGC now files this Motion to Strike UTS-NC's remaining affirmative defenses.

UTS-NC's first affirmative defense should be stricken because it has already been raised in UTS-NC's Motion to Dismiss and rejected by this Court. The fifth, sixth, seventh, eighth, and eleventh affirmative defenses are legally insufficient because they (i) are not recognized as defenses to a breach of contract action or (ii) could not possibly prevent recovery under any pleaded or inferable set of facts. Therefore, PBGC respectfully requests that the Court strike all of UTS-NC's remaining affirmative defenses.

III. ARGUMENT

A. Standard of Review under Rule 12(f)

Federal Rule of Civil Procedure 12(f) provides that a court may strike an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). While motions to strike are generally viewed with disfavor, motions to strike will be granted "where the insufficiency of the defense is clearly apparent." *United States v. Sensient Colors, Inc.*, 580 F. Supp. 2d 369, 374-75 (D.N.J. 2008); *Tr. Of Local 464A United Food & Commercial Workers Union Pension Fund v. Wachovia Bank, N.A.*, No. 09-668, 2009 WL 4138516 (WJM), at *1 (D.N.J. Nov. 24, 2009); *Newborn Bros. Co., Inc. v. Albion Eng'g Co.*, 299 F.R.D. 90, 97 (D.N.J. 2014). Under such circumstances, motions to strike

"serve a useful purpose by eliminating insufficient defenses and saving the time and expense which would otherwise be spent in litigating issues which would not affect the outcome of the case." *Sensient Colors*, 580 F. Supp. 2d at 375.

An affirmative defense is legally insufficient and can be stricken "if it is not recognized as a defense to the cause of action" or "if the defense asserted could not possibly prevent recovery under any pleaded or inferable set of facts." *Newborn Bros.*, 299 F.R.D. at 93, 97-98 (citations omitted). An affirmative defense is also legally insufficient and can be stricken if the court previously rejected it at the motion to dismiss stage.[3] And an affirmative defense may be stricken where it merely denies allegations set forth in the complaint and thus is not a proper affirmative defense at all. *See Modern Creative Servs.*, 2008 WL 305747 at *2.

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[3] *See, e.g.*, *Wachovia Bank*, 2009 WL 4138516, at *2-4 (holding that a defendant is not permitted to reassert the same arguments that "the Court has already deemed insufficient, in the guise of an affirmative defense"); *see also Modern Creative Servs., Inc. v. Dell Inc.*, No. 05-3891, 2008 WL 305747, at *2 (D.N.J. Jan. 28, 2008) (striking affirmative defenses that were already considered and rejected by the court on the defendant's motion to dismiss); *Disability Rights New Jersey, Inc. v. Velez*, No. 10-3950, 2011 WL 4436550, at *3 (D.N.J. Sept. 23, 2011) (finding it appropriate to "grant a motion to strike where defenses have been eliminated through prior motion practice"); *In re Merck & Co., Inc. Vytorin ERISA Litig.*, No. 08-1973, 2010 WL 2557564, at *2 (D.N.J. June 23, 2010) (striking affirmative defenses that were rejected at the motion to dismiss stage); *AMEC Civil, LLC v. DMJM Harris, Inc.*, No. 06-64, 2007 WL 433328, at *5 (D.N.J. Feb. 6, 2007) (striking affirmative defenses "in light of the fact that" such defenses "were already decided by this Court").

To prevail on a motion to strike, the moving party must show that it will be prejudiced by the "presence of the surplusage." *Newborn Bros.*, 299 F.R.D. at 94. One way the movant may establish prejudice is by showing that the defense "will 'substantially complicate the discovery proceedings and the issues at trial.'" *Id.* at 99 (citations omitted).

Here, UTS-NC's first affirmative defense is legally insufficient because it pertains to issues previously considered and rejected by this Court when it ruled on UTS-NC's Motion to Dismiss. The fifth, sixth, seventh, eighth, and eleventh affirmative defenses raised by UTS-NC are legally insufficient because they (i) are not recognized as defenses to a breach of contract action or (ii) could not possibly prevent recovery under any pleaded or inferable set of facts. Therefore, striking each of these affirmative defenses will avoid the unnecessary expenditure of time and money that will arise from litigating them.

B. UTS-NC's First Affirmative Defense is Redundant and Was Already Rejected as Legally Insufficient by This Court.

In denying UTS-NC's Motion to Dismiss, this Court already ruled that the parties' intent in the Agreement does not bar PBGC's claims. Yet, in its first affirmative defense, UTS-NC re-raises the parties' intent as a bar to PBGC's claims. It argues that the Agreement "only contemplated contributions to certain pension obligations and, therefore, PBGC's claims are barred in whole or in part by the intent of the parties to the Reorganization Agreement to the extent that

PBGC seeks recovery for pension obligations beyond those contemplated by the parties at the time they entered into the Reorganization Agreement."[4] UTS-NC made the same argument in its Motion to Dismiss:

- The express intent of the Reorganization Agreement was to effectuate a business divorce and normalize the values of UTS-NC and UTS-NJ and not to confer a benefit to the Pension Plan;[5]
- UTS-NC's agreement was to pay UTS-NJ for half of the annual payments that UTS-NJ made to the Pension Plan;[6]
- UTS-NC's obligation under the Agreement was to make its Pension Plan payments only when UTS-NJ made its payments.[7]

The Court rejected, as legally insufficient, UTS-NC's argument that the parties to the Agreement did not intend to confer a benefit to the Pension Plan. 12/4/17 Opinion, ECF 24 at 3-4; *see also In re Frescati Shipping Co., Ltd.*, 718 F.3d 184, 197 (3d Cir. 2013) ("[W]hether the contract itself established a third-party beneficiary relationship [is] a question of law"). Rather, this Court found that "UTS-NJ and UTS-NC intended to make PBGC (as trustee for the Plan participants) a beneficiary of the Reorganization Agreement." *See* 12/4/17 Opinion, ECF 24 at 3-4.

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[4] *See* Def.'s Am. Answer, ECF 42 at 10.
[5] *See* Def.'s Motion to Dismiss, ECF 16 at 2, 13-16.
[6] *See id.* at 2, 20.
[7] *See id.* at 2-3, 21-23.

This Court also rejected UTS-NC's argument "that the Agreement did not require [UTS-NC] to continue paying contributions to the Plan once UTS-NJ stopped paying." In the Agreement, UTS-NC explicitly promised to pay "one-half of the annual amount *payable* by [UTS-NJ]." *See* Agreement, ECF 1-1 ¶ 6 (emphasis added). This Court reasoned that "[h]ad the parties intended to make UTS-NC's duty to perform contingent on UTS-NJ's continued payments, Paragraph 6 [of the Agreement] would read 'one-half of the annual amount *paid* by UTS-NJ.'" *See* 12/4/17 Opinion, ECF 24 at 5. Therefore, "[n]onperformance by one did not excuse performance by the other," and "PBGC—while having no duty to perform of its own—accrued a right of action for breach of contract against both UTS-NJ and UTS-NC." *Id.* at 5.

In rejecting the arguments that UTS-NC re-raises in the first affirmative defense, the Court relied on the four corners of the Agreement. *See id.* at 3-5. Consequently, if the Court does not strike the first affirmative defense, PBGC will be significantly prejudiced because the discovery proceedings[8] and issues at trial will be extraneous and substantially complicated by the surplusage. Therefore, the first affirmative defense should be stricken.

[8] Fact discovery is not scheduled to end until June 29, 2018. *See* Scheduling Order, ECF 36 ¶ 2. If the Court does not strike these affirmative defenses, the scope of discovery may be substantially altered, and PBGC may need to complete additional discovery propounded by UTS-NC related to affirmative defenses that have no relation to or effect on this cause of action.

C. UTS-NC's Fifth, Sixth, Seventh, and Eighth Affirmative Defenses Could Not Possibly Prevent Recovery Under Any Pleaded or Inferable Set of Facts.

UTS-NC's fifth, sixth, seventh, and eighth affirmative defenses – asserting estoppel, settlement of claims, waiver, and failure to mitigate damages – are either inapplicable to the federal government, inapplicable to the facts of this case, or have no possible relation to this case. If they are not stricken, PBGC will be prejudiced because the discovery proceedings and issues at trial will be substantially complicated by the surplusage. *See Newborn Bros.*, 299 F.R.D. at 93 (citations omitted). Therefore, striking these affirmative defenses will save the time and expense that would be spent litigating issues that are immaterial to this action, and would not affect the outcome of this case.

1. Because PBGC's Settlement of UTS-NJ's Pension Plan Liability in UTS-NJ's Bankruptcy Proceeding Provides No Relief to UTS-NC, Which Was Not a Debtor in the Bankruptcy Proceeding, UTS-NC's Fifth, Sixth, Seventh, and Eighth Affirmative Defenses Should Be Stricken

UTS-NC premises its defenses of estoppel, settlement of claims, waiver, and failure to mitigate damages on the argument that PBGC's settlement of its statutory claims in UTS-NJ's bankruptcy case somehow bars PBGC's contractual claims against UTS-NC. To the contrary, UTS-NJ's bankruptcy proceeding did not include any settlement of PBGC's contractual claims against UTS-NC, impose any obligations to seek relief from UTS-NC, or provide to UTS-NC any discharge of

its debts. Therefore, the Court should strike UTS-NC's fifth, sixth, seventh, and eighth affirmative defenses as legally insufficient.

On February 27, 2014, UTS-NJ filed a Chapter 7 bankruptcy petition ("Bankruptcy Proceeding"). *See* Compl., ECF 1 ¶ 25. In UTS-NJ's Bankruptcy Proceeding, PBGC filed proofs of claims for the following statutory liabilities against UTS-NJ as the Plan's sponsor: (1) unpaid minimum funding contributions owed to the Pension Plan (claim no. 9-1); (2) unpaid statutory premiums owed to PBGC (claim no. 10-1); and (3) the Pension Plan's unfunded benefits liabilities (claim no. 11-1) (each a "Bankruptcy Claim," and collectively, the "Bankruptcy Claims"). *Id.* ¶¶ 14, 28. For each Bankruptcy Claim, PBGC asserted an unliquidated amount as administrative priority under 11 U.S.C § 507(a) and any amount not entitled priority as a general unsecured claim. PBGC Opp., ECF 18 at 10.

On December 9, 2014, the Chapter 7 Trustee ("Trustee") in the Bankruptcy Proceeding filed an objection to PBGC's Bankruptcy Claims. PBGC Opp., ECF 18 at 11. Regarding PBGC's claim for unpaid minimum funding contributions, the Trustee did not object to the amount but only to PBGC's assertion that the claim was entitled to administrative priority under 11 U.S.C. § 507(a)(2) and (a)(5). *Id.* As a resolution of all of the Trustee's objections to PBGC's Bankruptcy Claims, PBGC and the Trustee entered into a consent order ("Consent Order") providing

that PBGC would have a single, allowed, general unsecured claim against UTS-NJ in the amount of $2,090,099. *Id.* On that claim, PBGC received $198,072.59, which represents its pro rata share of the distribution from UTS-NJ's bankruptcy estate to the general unsecured creditors. The Consent Order only settled PBGC's Bankruptcy Claims against UTS-NJ and did not settle or resolve any liability that any other party had with respect to the Pension Plan.

Therefore, UTS-NC's argument that PBGC "did not pursue or reserve any purported rights or remedies [under the Agreement] when it settled its claims on behalf of the Pension Plan through the Consent Order" is simply baseless and reflects a complete misunderstanding of bankruptcy law.[9] It would have been inappropriate for PBGC to include a claim or seek a recovery against UTS-NC in the Consent Order or in UTS-NJ's Bankruptcy Proceeding as a whole because a bankruptcy court does not have jurisdiction over a non-debtor. *See* 11 U.S.C. § 524(e); *see also Mellon Bank v. Siegel*, 96 B.R. 505, 506 (E.D. Pa. 1989) ("[A] Bankruptcy Court has no power to discharge the liabilities of a bankrupt's guarantor who is not party to the Chapter 11 proceedings"). Section 524(e) of the Bankruptcy Code provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). "This section assures creditors that the discharge

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[9] Def.'s Am. Answer, ECF 42 at 13-14.

of a debtor will not preclude them from collecting the full amount of a debt from co-debtors or other liable [non-debtor] parties." *See Copelin v. Spirco, Inc.*, 182 F.3d 174, 182 (3d Cir. 1999) (quoting *First Fidelity Bank v. McAteer*, 985 F.2d 114, 118 (3d Cir. 1993)). Thus, a creditor's "receipt of payment under [a debtor's bankruptcy plan] does not operate to release non-debtor parties from their obligations to the extent of non-payment." *First Fidelity Bank*, 985 F.2d at 118. Therefore, PBGC's settlement of statutory claims in UTS-NJ's Bankruptcy Proceeding does not preclude its action to recover from UTS-NC its contractual liability to the Pension Plan.

Also, this Court already determined that UTS-NC's obligations to the Pension Plan under the Agreement are entirely independent of UTS-NJ's obligations. *See* 12/4/17 Opinion, ECF 24 at 5. Specifically, this Court held that UTS-NJ and UTS-NC's "obligations were made independent and freestanding" such that "[n]onperformance by one did not excuse performance by the other." *Id.* Therefore, any actions that PBGC took to pursue its Bankruptcy Claims in the Bankruptcy Proceeding does not relieve UTS-NC of its contractual obligations to pay the Pension Plan. Accordingly, the Court should strike UTS-NC's fifth, sixth, seventh, and eighth affirmative defenses as legally insufficient because they could not possibly prevent any recovery under any pleaded or inferable set of facts. Striking these affirmative defenses will allow the parties and the Court to avoid the

time and expense of litigating issues that are immaterial to this action, and therefore, could not affect the outcome of this case.

2. <u>UTS-NC's Fifth Affirmative Defense of Estoppel and Seventh Affirmative Defense of Waiver Should Be Stricken Because Public Policy Militates Against the Assertion of Equitable Defenses Against PBGC, and Because Estoppel is Unavailable Against PBGC as a Governmental Entity Absent a Showing of Affirmative Misconduct (of Which There is None)</u>

In addition, UTS-NC's fifth and seventh affirmative defenses – estoppel and waiver – should also be stricken by the Court because (i) they are legally insufficient and (ii) public policy militates against the assertion of equitable defenses against PBGC, as a governmental agency. If these affirmative defenses are not stricken, the discovery proceedings and the issues at trial will be substantially complicated by the surplusage.

UTS-NC's defenses of waiver and estoppel are legally insufficient. To succeed on its waiver defense, UTS-NC must prove that PBGC waived its right to recover any contributions owed to the Pension Plan. To succeed on its estoppel defense, UTS-NC must prove: (1) a misrepresentation by PBGC; (2) upon which UTS-NC reasonably relied; (3) to its detriment. *United States v. Asmar*, 827 F.2d 907, 912 (3d Cir. 1987); *see also United States v. St. John's Gen. Hosp.*, 875 F.2d 1064, 1069 (3d Cir. 1989). And, because PBGC is the federal government, UTS-NC must also prove "affirmative misconduct" by PBGC. *St. John's*, 875 F.2d at 1069; *see also Heckler v. Cmty. Health Servs. Of Crawford Cnty., Inc.,* 467 U.S.

51, 60 (1984); *Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.*, 72 F. Supp. 2d 547, 559 (W.D. Pa. 1999).

But UTS-NC has not alleged, nor can it allege, any facts that PBGC waived its right to recover monies owed to the Pension Plan because, as argued above, (i) PBGC had no obligation to seek any relief from UTS-NC in UTS-NJ's Bankruptcy Proceeding, and (ii) the Bankruptcy Proceeding did not alter UTS-NC's contractual obligations or provide to UTS-NC a discharge of its debts. *See, e.g.*, *Copelin*, 182 F.3d at 182; *First Fidelity Bank*, 985 F.2d at 118. Further, UTS-NC cannot show that PBGC made a misrepresentation upon which UTS-NC reasonably relied to its detriment. And, UTS-NC has not alleged, nor can it allege, any set of facts that would prove "affirmative misconduct" on the part of PBGC.

In addition, "public policy clearly militates against the assertion" of equitable defenses such as estoppel and waiver against a government entity. *See Fed. Deposit Ins. Corp. v. White*, 828 F. Supp. 304, 311 (D.N.J. 1993) (public policy clearly militates against the assertion of the equitable defenses of estoppel, waiver or unclean hands against the FDIC when it is seeking to relieve taxpayers of financial losses allegedly caused by the actions of former officers and directors of an insolvent bank); *see also Heckler,* 467 U.S. at 60; *Pan Am. Petroleum & Transport Co. v. United States,* 273 U.S. 456, 506 (1927) ("The general principles of equity . . . will not be applied to frustrate the purpose of [federal] laws or to

thwart public policy.”).

In this case, public policy militates against asserting the equitable defenses of estoppel and waiver against PBGC when it is seeking to relieve other pension premium payers and to fund its insurance program to continue paying retirees – including those of UTS-NC – their pension benefits. To do so would allow UTS-NC to absolve itself of its pension liability, which could potentially be a guide for others to follow. PBGC was created by Congress to: (1) encourage the continuation and maintenance of private pension plans for the benefit of plan participants; (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries in the event of termination; and (3) to maintain premiums, which are mandatory for any sponsor of a defined benefit plan, at the lowest level consistent with carrying out its obligations under the statute. *See* 29 U.S.C. § 1302(a). “[T]o estop PBGC from attempting to recoup the funds at issue in the instant case . . . would thwart Congress’ intended purpose of providing protection to plan participants at the lowest possible cost.” *See White Consol. Indus. Inc.*, 72 F. Supp. 2d at 557 (“Any recovery obtained by the PBGC reduces the burden on the insurance funds and in turn reduces the likelihood of increased premiums.”).

Thus, the defenses of estoppel and waiver should be stricken as legally insufficient because they could not possibly prevent any recovery under any

pleaded or inferable set of facts and because public policy militates against them.

3. Because ERISA Does Not Impose a Duty to Mitigate Upon PBGC, UTS-NC's Eighth Affirmative Defense of Failure to Mitigate Should Be Stricken

Where there is no duty to mitigate – which is the case here, an affirmative defense of mitigation failure must be stricken. *See United States v. Kramer*, 757 F. Supp. 397, 420–21 (D.N.J. 1991) (because there is no duty to mitigate in CERCLA, the defense of failure to mitigate "must be stricken"); *see also White*, 828 F. Supp. at 310 (striking the failure to mitigate defense because the FDIC owed no duty to mitigate any damages arising out of defendants' alleged negligence and breach of fiduciary duties).

ERISA imposes no duty upon PBGC to mitigate its damages. *See* 29 U.S.C. § 1342(d)(1)(B)(ii), (iv) (authorizing PBGC "to collect for the plan any amounts due the plan" and "to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan"). In fact, ERISA generally provides the opposite of a duty to mitigate by imposing joint and several liability on the sponsor of a pension plan and all members of the sponsor's controlled group. *See* 29 U.S.C. §§ 1082(b)(2), 1301(a)(14), 1307(e)(2), 1362(a)(2); *see also* 26 U.S.C. § 412(c)(2). Consequently, PBGC may pursue all or a portion of its pension claims against any one of the controlled group members without any requirement to seek recovery against each one. And, PBGC's discretionary decision not to pursue a

claim against an entity is presumed immune from judicial review.[10]

UTS-NC, however, argues that PBGC failed to mitigate its damages because PBGC entered into a Consent Order in UTS-NJ's Bankruptcy Proceeding to resolve the Bankruptcy Trustee's objections to PBGC's Bankruptcy Claims. UTS-NC claims that by entering into the Consent Order, PBGC abandoned its assertion of priority with respect to its claims, which could have resulted in a greater recovery, and reduced the total amount of its claims. *See* Def.'s Am. Answer, ECF 42 at 14.

PBGC routinely asserts priority of its bankruptcy claims in unliquidated amounts because the deadline to file bankruptcy claims often occurs before PBGC's investigation and determination of the priority and amounts of its claims are complete. Sometimes, after PBGC completes its investigation and calculation of its claims, it may determine that the priority amount of its claims is zero. Accordingly, based on the information that PBGC had at the time of UTS-NJ's Bankruptcy Proceeding, it determined that the priority amount of its claims was

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[10] The presumption that a federal government agency's discretionary decision is immune from judicial review applies to PBGC because (i) nothing in ERISA expressly compels PBGC to pursue claims on a pension plan's behalf and (ii) there is no meaningful standard against which to judge PBGC's decision not to act. *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1086 (9th Cir. 2009) (applying *Heckler v. Chaney,* 470 U.S. 821, 832 (1985) (government agency's discretionary decision not to pursue an enforcement action should be presumed immune from judicial review under the Administrative Procedures Act)).

zero.

In any case, as stated above, PBGC's discretionary decision whether to pursue a claim – and, thus, whether to settle that claim – is immune from judicial review. *Paulsen*, 559 F.3d at 1085. "PBGC's unique role in the ERISA statutory scheme further justifies application of the presumption against judicial review." *Id*. PBGC's decision not to enforce involves a complicated balancing of a number of factors which are peculiarly within its expertise: (i) whether PBGC's limited resources are best spent on pursuing this claim or another; (ii) whether PBGC is likely to succeed; (iii) whether the particular enforcement action best fits PBGC's overall policies; and (iv) whether PBGC has enough resources to undertake the action at all. *Id*. at 1085-86 (applying *Heckler*, 470 U.S. at 831-32). "The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id*. at 1085 (citing *Heckler*, 470 U.S. at 831-32).

Despite UTS-NC's argument and despite the lack of any duty to do so, PBGC did mitigate its damages because it received $198,072.59 in distributions from UTS-NJ's liquidating bankruptcy estate. *Id.* ¶ 28. Accordingly, UTS-NC's affirmative defense of failure to mitigate is legally insufficient and should be stricken because PBGC has no duty to mitigate its damages. If the affirmative defense of failure to mitigate is not stricken, the discovery proceedings and the

issues at trial will be substantially complicated by the surplusage.

4. UTS-NC's Eleventh Affirmative Defense of Frustration of Purpose Should Be Stricken Because the Common Object of the Agreement Has Not Been Frustrated

UTS-NC has repeatedly asserted that the Agreement's principal purpose was to effectuate a split of United Tool into two separate companies. *See* Def.'s Motion to Dismiss, ECF 16 at 4-5, 14. UTS-NJ's bankruptcy and the deaths of the two individual guarantors, John Giarrusso, Sr., and Anthony Moschella, have not frustrated that principal purpose so as to discharge UTS-NC's obligation under the Agreement to pay the Pension Plan. Therefore, UTS-NC's eleventh affirmative defense, frustration of purpose, is legally insufficient and should be stricken.

Frustration of purpose "exists where an unforeseen event does not make performance truly impossible, but does fundamentally change the nature of the bargain." *Private Sols. Inc. v. SCMC, LLC*, No. 15-3241, 2017 WL 253981, at *3 (D.N.J. Jan. 20, 2017) (quoting *JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass'n, Inc.*, 67 A.3d 702, 710 (N.J. Super. App. Div. 2013)). New Jersey courts have looked to the Restatement (Second) of Contracts § 265 for the concept of frustration of purpose:

> Where, after a contract is made, a party's principal purpose is *substantially frustrated without his fault* by the occurrence of an event the non-occurrence of which was a *basic assumption* on which the contract was made, his remaining duties to render performance are discharged, *unless the language or the circumstances indicate the contrary.*

JB Pool Mgmt., LLC, 67 A.3d at 709 (quoting the Restatement (Second) of Contracts § 265). "A key facet of the frustration of purpose doctrine, as it is applied in this state [New Jersey], is that 'relief from performance of contractual obligations on this theory will not be lightly granted[.]'" *Id.* at 710 (quoting *A-Leet Leasing Corp. v. Kingshead Corp.*, 375 A.2d 1208, 1214 (N.J. Super. App. Div. 1977)). Moreover, "the evidence satisfying the doctrine's requirements must be clear, convincing and adequate." *Id.* (internal quotations omitted).

To sustain the frustration of purpose defense in a contract action, "it is not sufficient that the desired object of but one of the contracting parties has been frustrated." *A-Leet Leasing Corp.*, 375 A.2d at 1214. Rather, it is "their common object that has to be frustrated, not merely the individual advantage which one party or the other might have achieved from the contract." *Id.* (quoting *Edwards v. Leopoldi*, 89 A.2d 264, 271 (N.J. Super. App. Div. 1952)).

UTS-NC's describes the Agreement's purpose or "common object" as follows:

> The stated purpose of the Reorganization Agreement focused upon the dispute between the two founders of UTS-NJ. To that end, the Reorganization Agreement, included covenants by and between UTS-NJ and UTS-NC, and certain owners, to contribute to certain expenses of either UTS-NJ or UTS-NC following the tax-free corporate reorganization and split-off contemplated therein. The expense sharing and remedies provided under the Reorganization Agreement, was the product of negotiations by and between the parties and relied upon the continuation of both businesses. When UTS-NJ filed for bankruptcy

> and the two individual guarantors, Giarrusso and Moschella, passed away, UTS-NC lost all sources of potential future contributions, indemnification, or other consideration provided by the Reorganization Agreement. This includes risks for significant liabilities, such as environmental cleanup costs, for which UTS-NC will now be solely responsible. Accordingly, the purpose of the Reorganization Agreement has been frustrated and PBGC's demand for further performance thereunder is barred.

Def.'s Am. Answer, ECF 42 at 16-17.

UTS-NC's above characterization cannot support a frustration of purpose defense. It is not enough that only UTS-NC's desired object – contribution, indemnification, and consideration – has been allegedly frustrated.[11] Rather, it must be UTS-NC and UTS-NJ's "common object" that has to have been frustrated, not merely the individual advantage which UTS-NC might have achieved from the contract. *See A-Leet Leasing Corp.*, 375 A.2d at 1214.

Here, the "common object" of the Agreement and the "vital and fundamental purpose of the contracting parties" are not UTS-NC's payment of certain of UTS-

[11] PBGC notes that UTS-NC has voluntarily withdrawn an affirmative defense of contribution and indemnification. *See* Def.'s Am. Answer, ECF 42 at 17. To the extent that contribution and indemnification are used to support the affirmative defense of frustration of purpose, they are unavailing. Neither contribution nor indemnification are proper defenses to a breach of contract action. *See Touristic Enters. Co. v. Trane, Inc.*, No. 09-2732, 2011 WL 1127221, at *1 (D.N.J. Mar. 29, 2011); *see also Mobile Dredging & Pumping Co. v. City of Gloucester*, N.J., No. 04-4624, 2005 WL 1876080, at *4-5 (D.N.J. Aug. 4., 2005); *Tino v. Stout*, 49 N.J. 289, 298 n.2 (N.J. 1967).

NJ's expenses.[12] The Agreement's common purpose as reflected throughout its preamble and provisions was to separate United Tool's two unincorporated divisions through a "reorganization and spinoff." *See* Agreement, ECF 1-1 at 2. In fact, UTS-NC repeatedly states in its Motion to Dismiss and Amended Answer that the Agreement's "express intent . . . was to effectuate a tax-free corporate reorganization and split-off of the North Carolina Division and New Jersey Division of UTS-NJ in light of the irreconcilable differences between the owners of UTS-NJ." Def.'s Am. Answer, ECF 42 at ¶ 38; Def.'s Motion to Dismiss, ECF 16 at 4-5, 13-14, 16.

That UTS-NC may have lost its source of contributions, indemnification, and consideration does not frustrate this division of United Tool into two separate companies. And, this loss of contributions, indemnification, and consideration is not an "event the non-occurrence of which was a *basic assumption* on which the contract was made." *JB Pool Mgmt., LLC*, 67 A.3d at 709 (quoting the Restatement (Second) of Contracts § 265). Personal inability to perform due to financing problems should not fall within the frustration of purpose defense. *See*

[12] To the extent UTS-NC's reference to "certain expenses" of UTC-NJ in its Amended Answer (ECF 42 at 16) is intended to mean Pension Plan expenses, pensions are only addressed in three of the Agreement's twenty-two numbered sections, ECF 1-1 at 2-10, and thus cannot reasonably be the Agreement's "common object" or "vital and fundamental purpose."

Connell v. Parlavecchio, 604 A.2d 625, 627 (N.J. Super. App. Div. 1992) (real estate buyer's financing problems did not fall within the impossibility of performance defense).[13]

UTS-NC's frustration of purpose argument is strikingly similar to the one already rejected by this Court – *i.e.*, UTS-NJ's nonperformance excused performance by UTS-NC. *See* 12/4/17 Opinion, ECF 24 at 4-5. As the Court has already held, UTS-NC's obligations are independent and freestanding. *See* 12/4/17 Opinion, ECF 24 at 3-4. Thus, neither UTS-NJ's nonperformance under the Agreement and subsequent bankruptcy filing, nor the deaths of the companies' founders, eliminated those obligations.

And, UTS-NC's frustration of purpose defense is incongruous with the pleaded facts. UTS-NC admitted that its last payment to the Pension Plan pursuant to the Agreement was in 2008, but UTS-NJ did not file for bankruptcy until 2014.[14] These facts fail to account for approximately six years of UTS-NC's nonperformance under the Agreement.

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[13] "[I]mpossibility of performance and frustration of purpose are, in essence, doctrinal siblings within the law of contracts. Both doctrines may apply to certain situations in which a party's obligations under a contract can be excused or mitigated because of the occurrence of a supervening event." *JB Pool Mgmt., LLC*, 67 A.3d at 708-709.

[14] *See* Complaint, ECF 1 ¶ 35, and Def.'s Am. Answer, ECF 42 ¶ 35 (regarding UTS-NC's last payment to the Pension Plan being in 2008); *see also* Complaint, ECF 1 ¶ 25, and Def.'s Am. Answer, ECF 42 ¶ 25 (regarding UTS-NJ's 2014 bankruptcy petition).

UTS-NC's affirmative defense of frustration of purpose should be stricken as legally insufficient because this defense could not possibly prevent recovery under any pleaded or inferable set of facts. If this affirmative defense is not stricken, the discovery proceedings and the issues at trial will be substantially complicated by the surplusage.

CONCLUSION

For the reasons stated above, PBGC respectfully requests that this Court enter an Order striking the First, Fifth, Sixth, Seventh, Eighth, and Eleventh Amended Affirmative Defenses raised by UTS-NC in its Answer and Amended Affirmative Defenses (ECF 42) pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.

Dated: April 27, 2018
Washington, D.C.

Respectfully submitted,

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