IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

US AIRLINE PILOTS ASSOCIATION,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:09-cv-01675 (HHK)
PENSION BENEFIT GUARANTY CORPORATION,	)	
Defendant.	)	

PENSION BENEFIT GUARANTY CORPORATION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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INTRODUCTION

In this action, USAPA condemns PBGC for not pursuing former fiduciaries of a pension plan for wrongs they allegedly committed before the plan terminated ─ a date more than six years before USAPA brought its lawsuit, and now more than eight years ago. USAPA's complaint seeks a permanent injunction directing PBGC to "investigate" and "pursue" USAPA's amorphous allegations, or appointing a "supplemental" or replacement trustee to do so.

USAPA's request must be rejected. First, because USAPA has neither alleged nor uncovered fraud or concealment, the statute of limitations for pursuing any supposed breach by the former fiduciaries already had run when USAPA filed its complaint on September 2, 2009. Second, as the Court intimated in its recent decision denying a preliminary injunction, PBGC's decisions about whether and how to investigate potential claims are presumptively unreviewable. Accordingly, because USAPA can prove no set of facts that would entitle it to relief under any reasonable reading of its complaint, the Court should grant judgment on the pleadings to PBGC.

In the alternative, if the Court finds that judgment on the pleadings is not warranted, it should grant summary judgment to PBGC. USAPA has not only failed to uncover any fiduciary breach committed before plan termination, but has also failed to show that any PBGC effort to redress such a violation could have benefitted the plan or USAPA members, since the first $510 million of any recovery would go to PBGC.

Either analysis leads to the same result: USAPA's groundless charges, and its request that the Court grant a permanent injunction, must be rejected.

STATUTORY BACKGROUND

PBGC is the wholly owned United States government corporation that administers the nation's pension termination insurance program established by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA").[1] PBGC is funded by insurance premiums paid by employers that sponsor PBGC-insured plans, earnings from investments, assets from terminated plans, and recoveries from companies formerly responsible for the plans.[2] PBGC receives no funds from general tax revenues, and the United States is not responsible for the agency's obligations.[3] Almost 1.5 million people in 4,200 terminated plans rely on PBGC for current and future pension benefits, with PBGC taking responsibility for 172 additional plans in fiscal year 2010 alone.[4] PBGC's deficit as of September 2010 was $21.6 billion.[5]

When a pension plan covered by Title IV terminates without enough assets to pay all of its promised benefits, PBGC typically becomes responsible for, among other things, collecting amounts due to the plan and to PBGC, and paying plan participants and beneficiaries their pension benefits as determined in accordance with Title IV.[6] PBGC combines the assets of terminated plans with the agency's insurance funds to pay benefits to current and future retirees.

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[1] *See* 29 U.S.C. § 1302; *see also PBGC v. LTV Corp.*, 496 U.S. 633, 636-37 (1990).

[2] *See* PBGC Ann. Rep. (2010) at 1, http://www.pbgc.gov/Documents/ 2010_annual_report.pdf.

[3] *Id.*; 29 U.S.C. § 1302(g)(2).

[4] PBGC Ann. Rep. (2010) at ii, 2 (801,000 current retirees, 669,000 additional future retirees).

[5] *Id.* at iv.

[6] *See, e.g.,* 29 U.S.C. §§ 1321, 1322, 1342, 1344, 1361, 1362.

PBGC serves its mission with respect to a terminated plan as federal guarantor of the benefits payable, up to statutory limits, and as statutory trustee of the plan.[7] Except to the extent inconsistent with the provisions of Title IV, the statutory trustee is subject to the same duties as a Chapter 7 bankruptcy trustee.[8] The primary function of the trustee, like that of a Chapter 7 trustee, is to marshal the terminated plan's assets,[9] a function that is substantially complete when the assets are collected and pooled with the assets of other terminated plans.[10] PBGC as guarantor is responsible, *inter alia*, for determining and paying benefits due to a plan's participants and beneficiaries, according to the rules in Title IV.[11]

Upon plan termination, the plan's sponsor and its controlled group members become liable to PBGC for the amount of the plan's unfunded benefit liabilities.[12] This liability is for the shortfall between a plan's assets and its liabilities, measured according to actuarial assumptions

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[7] *See Caskey v. PBGC*, No. 97-4240, 1999 U.S. DIST. LEXIS 21448, at *14 (E.D. Pa. Jan. 14, 1999), *aff'd mem.*, 203 F.3d 816 (3d Cir. 1999).

[8] 29 U.S.C. § 1342(d)(3) provides:

> Except to the extent inconsistent with the provisions of this chapter [ERISA], or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as those of a trustee under section 704 of title 11, and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 1002 of this title and under section 4975(e) of title 26 (except to the extent that the provisions of this subchapter [Title IV of ERISA] are inconsistent with the requirements applicable under part 4 of subtitle B of subchapter I of this chapter [Title I of ERISA] and of such section 4975).

[9] 29 U.S.C. § 1342(d); *see* 11 U.S.C. § 704(a)(1).

[10] *See* 29 U.S.C. § 1342(d); 11 U.S.C. § 704(a)(1); 29 U.S.C. § 1342(a) (authorizing PBGC to pool the assets of terminated plans).

[11] 29 U.S.C. §§ 1321, 1322, 1344, 1361.

[12] 29 U.S.C. § 1362(b).

set forth in PBGC's regulations.[13] The plan sponsor and its controlled group members also become liable to PBGC for the total amount of due and unpaid minimum funding contributions owed to the plan.[14] PBGC may take actions that the plan administrator could have taken, such as collecting for the plan any amounts due the plan, and prosecuting any suit on behalf of the plan.[15]

PBGC pays three types of benefits under a terminated plan: (1) guaranteed benefits; (2) asset-funded benefits; and (3) section 1322(c) benefits. PBGC pays guaranteed benefits regardless of the plan's funded level. Subject to statutory limitations, this includes payment of all nonforfeitable benefits under the plan's terms at the time it terminated.[16] Limitations include a cap on the amount of PBGC's guarantee and a phase-in of its guarantee of benefit increases made during the five years before termination.[17] Generally, participants whose plan benefit is fully guaranteed will not receive either asset-funded benefits or section 1322(c) benefits.

Asset-funded benefits are additional benefits (beyond guaranteed benefits) that may be payable from a terminated plan's assets.[18] The amount of a participant's asset-funded benefits depends on how well funded the plan was and whether some or all of the participant's benefit is entitled to priority in the six-tier hierarchy in 29 U.S.C. § 1344(a). PBGC determines the total amount of a terminated plan's assets based on their fair market value as of the plan's termination

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[13] *See* 29 U.S.C. § 1301(a)(18); 29 C.F.R. §§ 4044.41 - 4044.57.

[14] 29 U.S.C. § 1362(c).

[15] 29 U.S.C. § 1342(d)(1)(B).

[16] 29 U.S.C. §§ 1301(a)(8); 1322.

[17] 29 U.S.C. § 1322(b)(1), (b)(3), (b)(7); *see* 29 C.F.R. §§ 4022.24-.25.

[18] 29 U.S.C. § 1344(a). PBGC's regulations describe the sum of guaranteed benefits and asset-funded benefits as "Title IV benefits." 29 C.F.R. § 4001.2.

date.[19] Once PBGC values a plan's assets as of the termination date, that valuation is not changed by subsequent events, with rare exceptions. This is because the statute requires that "[a]ny increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, the corporation" (*i.e.*, PBGC).[20] Thus, although post-termination variables such as PBGC's returns on its investment portfolio may affect the agency's financial position, they do not affect the amount of a plan's underfunding or participants' statutory benefits.[21]

A terminated plan's assets are allocated to benefits provided by the plan according to the six "priority categories" in section 1344, starting with priority category 1 ("PC1"), and then moving to priority category 2 ("PC2"), and so on, until all assets are exhausted.[22] As specified in section 1344, benefits in PC1 and PC2 are those derived from a participant's own contributions to the plan. Benefits in PC3 (of which a portion may be non-guaranteed) are those benefits that a retiree was receiving as of three years before the plan's termination date, or that a non-retired participant could have received if he or she had retired then (but excluding benefit increases made during the five years before termination). Benefits in PC4 are all PBGC-guaranteed benefits that are not in PC1 through PC3. Benefits in PC5 and PC6 are not guaranteed by PBGC: PC5 consists of all other nonforfeitable (*i.e.*, vested) benefits under the plan, and PC6 of

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[19] 29 C.F.R. § 4044.41(b); *see* 29 U.S.C. § 1344(c).

[20] 29 U.S.C. § 1344(c); *see* 29 C.F.R. § 4044.3. In rare cases, PBGC may change the valuation of a plan's assets – "only if there has been a material mistake of fact or if there has been an extraordinary change of circumstances such as a substantial unexpected recovery in a legal action involving the plan." Ex. 1, Dkt. #6-3, Declaration of Rob Jones in support of PBGC's opposition to USAPA's first motion for preliminary injunction, at ¶¶ 11.

[21] *See* 29 U.S.C. § 1362(b)(1) (liability to PBGC is the amount of unfunded benefit liabilities "as of the termination date"); 29 U.S.C. § 1344(c) (quoted above).

[22] 29 U.S.C. § 1344(a); 29 C.F.R. § 4044.10(d).

all other (non-vested) benefits under the plan. Thus, under section 1344, plan assets are allocated to guaranteed benefits in PC4 before they may be allocated to pay additional, non-guaranteed benefits in PC5 or PC6. As the Supreme Court has explained, "the allocation scheme 'protects against evasion of the . . . limits on the [PBGC's] insurance benefits by use of pension fund assets to first pay uninsured benefits.'"[23]

Lastly, PBGC pays section 1322(c) benefits. Section 1322(c) provides that a plan's participants and beneficiaries will generally share a portion of PBGC's recoveries for its statutory claim relating to a plan's unfunded benefit liabilities.[24] These benefits are intended to cover a portion of participants' unfunded non-guaranteed benefits ─ *i.e.*, those benefits that are neither guaranteed by PBGC nor funded by the plan's assets. [25]

STATEMENT OF FACTS[26]

US Airways was the sponsor of the Retirement Income Plan for Pilots of US Airways, Inc. (the "Plan"). Compl. ¶ 7. US Airways filed for Chapter 11 protection in August 2002. *Id.* at ¶ 10. The Plan terminated as of March 31, 2003, and PBGC became its statutory trustee. *Id.* at ¶ 17. PBGC reviewed and valued the Plan's assets, then allocated them to Plan benefits as

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[23] *Mead Corp. v. Tilley*, 490 U.S. 714, 718 n.2 (1989), quoting S. Rep. No. 93-383 at 76 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4968.

[24] 29 U.S.C. § 1322(c); *see also* 29 U.S.C. § 1362(b).

[25] See 29 U.S.C. § 1301(a)(19), which defines the term "outstanding amount of benefit liabilities." PBGC usually uses "unfunded non-guaranteed benefits" because it is more descriptive.

[26] For purposes of its motion for summary judgment, PBGC is submitting a separate statement of undisputed material facts and also attaching exhibits to this brief. The Court need not refer to them at all in order to rule on PBGC's alternative motion for judgment on the pleadings, which is based purely on legal arguments.

provided in ERISA and PBGC's regulations, determining the resulting amount of participants' statutory benefits and adding PBGC funds to ensure payment of all guaranteed benefits.[27]

PBGC determined that as of its termination date, the Plan had unfunded benefit liabilities of $2.2 billion.[28] The Plan's assets were sufficient to fund all benefits through statutory priority category 3 ("PC3"), but only $40 million of the more than $500 million of guaranteed benefits in priority category 4 ("PC4").[29] PBGC must use its insurance funds to pay the remainder of those guaranteed benefits. *Id.*

Various groups of US Airways pilots brought three lawsuits regarding the Plan, each time seeking a preliminary injunction. After PBGC began paying estimated benefits to Plan retirees, but before it issued benefit determinations, a group of retired pilots filed the *Boivin* suit, seeking immediate adjustments to the estimated benefits. The court denied the motion for preliminary injunction, and ultimately dismissed the suit for failure to exhaust administrative remedies. The D.C. Circuit affirmed the dismissal.[30]

Once PBGC issued benefit determinations, a group of pilots filed an administrative appeal with PBGC's Appeals Board. One of their allegations was that the Plan's prior fiduciaries had impermissibly transferred Plan assets to another US Airways benefit plan. In a February 29, 2008 decision, the PBGC Appeals Board stated that it had referred the pilots' asset-transfer allegation to PBGC's Office of General Counsel. A group of 1,700 pilots then filed the

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[27] Ex. 2, Plan asset audit (Jan. 11, 2006); Ex. 1, Jones Decl. at ¶¶ 12-15.

[28] Ex. 3, First Declaration of Neela Ranade (Sep. 11, 2009) at ¶ 5.

[29] 29 U.S.C. §§ 1344(a)(3), (a)(4); Ex. 1, Jones Decl. at ¶¶ 12-15.

[30] *Boivin v. US Airways, Inc.*, 297 F. Supp. 2d 110 (D.D.C. 2003) (denying preliminary injunction); No. 1:03-cv-02373, 2005 WL 713622 (D.D.C. Mar. 17, 2005) (dismissing for failure to exhaust), *aff'd*, 446 F.3d 148 (D.C. Cir. 2006).

Davis suit (which USAPA designated as a related case to the instant suit), challenging the Appeals Board's decision on a variety of issues.[31] The *Davis* plaintiffs also moved for a preliminary injunction, seeking to stop PBGC from collecting benefit overpayments. The court denied that motion, and the D.C. Circuit affirmed.[32]

On June 18, 2009, USAPA counsel wrote to PBGC, alleging that "USAPA and its members suspect that, before the [2002-03 US Airways] bankruptcy proceeding and ensuing termination, the Plan's fiduciaries breached their duties by transferring assets out of the Plan and by making improper investments." Compl. Ex. 1. At that time PBGC had not yet completed its investigation of the similar asset-transfer allegations made in *Davis*. Responding to the June 18 letter, PBGC's General Counsel wrote on July 9, 2009, to request more specific information, promising to review the allegations if USAPA provided specifics. Compl. Ex. 2. On July 17, 2009, USAPA counsel wrote a second letter, identifying six "suspicious occurrences, investments and transactions." Compl. Ex. 3 at 3.

On September 2, 2009 ─ seven weeks later ─ USAPA sued PBGC. In its prayers for relief, USAPA asked the Court to either: (a) direct PBGC to investigate and pursue potential claims for fiduciary breach against the Plan's former fiduciaries; (b) appoint a "permanent supplemental trustee" to do so; or (c) remove PBGC and appoint a replacement trustee to do so. Compl. at p. 13. USAPA also sought attorneys fees and other costs and expenses, citing 29 U.S.C. § 1303(f). *Id.* With its complaint, USAPA filed a motion for preliminary injunction. On April 16, 2010, Judge Robertson denied that motion. Dkt. #22. USAPA subsequently filed a

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[31] *Davis v. PBGC*, No. 1:08-cv-01064 (HHK) (filed June 20, 2008). The pilots' appeal letter is Exhibit C to the Second Amended Complaint; the PBGC Appeals Board's decision of Feb. 29, 2008, is Exhibit A to the Second Amended Complaint.

[32] 596 F. Supp. 2d 1 (D.D.C. 2008), *aff'd*, 571 F.3d 1288 (D.C. Cir. 2009).

"renewed" motion for preliminary injunction. Dkt. #35. This Court denied that motion on March 14, 2011, holding that USAPA had not clearly established that PBGC's investigative decisions are subject to judicial review, or that its members would be irreparably harmed absent an injunction. Dkt. #47.

PBGC's Office of General Counsel investigated the allegations of both the *Davis* and the *USAPA* plaintiffs. On the asset-transfer allegation, the investigators issued a report concluding that there was no evidence of any improper transfers of assets between plans; the General Counsel concurred in the investigators' recommendation to take no further action in the matter.[33] On USAPA's other allegations, the investigator issued a report concluding that there was no evidence of fiduciary breach related to those allegations; the General Counsel concurred.[34]

The discovery period in this litigation ran from March 2010 until June 15, 2011, including two extensions to which PBGC consented, after objecting to an initial motion for extension. Dkt. #24, 41, 48. Among other discovery requests, USAPA identified a total of 27 topics of examination under Fed. R. Civ. P. 30(b)(6). In response to USAPA's various demands, PBGC produced eight deposition witnesses (one twice), and more than 25,000 pages of documents in 21 productions.

STANDARDS FOR JUDGMENT ON THE PLEADINGS, SUMMARY JUDGMENT, AND ENTRY OF A PERMANENT INJUNCTION

Under Fed. R. Civ. P. 12(c), judgment on the pleadings is warranted when, under any reasonable reading of the complaint, the plaintiff will be unable to prove any set of facts that

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[33] *See* Ex. 4, First investigative report (Oct. 14, 2009), with concurrence memorandum (Oct. 20, 2009).

[34] Ex. 5, Second investigative report (Nov. 24, 2010), with concurrence.

would justify relief.[35] The standard for reviewing a motion for judgment on the pleadings is the same as that under Rule 12(b)(6).[36] That is, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ."[37] The Court must construe the complaint liberally, giving the plaintiff the benefit of all favorable inferences that can be drawn from the alleged facts.[38] But the Court "need not accept inferences drawn by the plaintif[f] if such inferences are unsupported by the facts set out in the complaint."[39] Moreover, the Court may consider "only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [it] may take judicial notice,"[40] including records and reports of administrative bodies.[41]

Under Fed. R. Civ. P. 56, summary judgment is warranted when the pleadings, discovery materials, and affidavits show that there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law.[42] In making that determination, the Court "must view the evidence in a light most favorable to [the non-movant], draw all reasonable inferences in [its]

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[35] Fed. R. Civ. P. 12(c); *Kramer v. Sec'y of Defense*, 39 F. Supp. 2d 54, 56 (D.D.C. 1999).

[36] *Havens v. Patton Boggs, LLP*, No. 05-01454 (HHK), 2006 WL 1773473, *1 n.1 (D.D.C. Jun. 26, 2006).

[37] *Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 33, 47 (D.D.C. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

[38] *See Does I through III v. Dist. of Columbia*, 238 F. Supp. 2d 212, 216 (D.D.C. 2002); *In re United Mine Workers of Am. Emp. Benefit Plans Litig.,* 854 F. Supp. 914, 915 (D.D.C. 1994).

[39] *Nat'l Ass'n of Mfrs.*, 549 F.Supp.2d at 48 (quoting *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)).

[40] *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997).

[41] *Havens*, 2006 WL 1773473 at *1 n.1.

[42] Fed. R. Civ. P. 56(c); *Abate v. Dist. of Columbia*, 659 F. Supp. 2d 156, 158 (D.D.C. 2009).

favor, and eschew making credibility determinations or weighing the evidence."[43] A material fact is one that might "affect the outcome of the suit under the governing law."[44]

Because USAPA seeks the equivalent of a permanent injunction, it first must succeed on the merits: "A permanent injunction is only appropriate . . . after a plaintiff has prevailed on the merits of his claim."[45] In addition, USAPA must show irreparable injury absent an injunction; that the balance of hardships tips in its favor; and that the public interest supports entering an injunction.[46] Actual success on the merits is required to obtain permanent injunctive relief; if the movant does not succeed on the merits, inquiry into the remaining factors is unnecessary, for the injunctive relief must be denied on that ground alone.[47] In ERISA cases, removal of a plan trustee is an extraordinary remedy, requiring a showing of necessity.[48]

ARGUMENT

I. THE COURT SHOULD GRANT JUDGMENT ON THE PLEADINGS TO PBGC.

USAPA can prove no set of facts that would justify relief, for two reasons. First, the statute of limitations has run on any pre-termination fiduciary breach claim involving the Plan, except one involving fraud or concealment, and USAPA has not alleged fraud or concealment. Second, as the Court intimated in its opinion denying USAPA's renewed motion for preliminary

[43] *Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003).

[44] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

[45] *Renoir v. Governor of Virginia*, 755 F. Supp. 2d 82, 87 (D.D.C. 2010).

[46] *See NBC-USA Housing, Inc. v. Donovan*, 09-2245 (CKK), 2011 WL 1204759, *28 (D.D.C. Mar. 31, 2011); *Nichols v. Truscott*, 424 F. Supp. 2d 124, 143 (D.D.C. 2006).

[47] *See Hi-Tech Pharmacal Co. v. FDA*, 587 F. Supp. 2d 13, 17 (D.D.C. 2008); *Nichols*, 424 F. Supp. 2d at 143.

[48] *See Donovan v. Bierworth*, 680 F.2d 263, 276 (2d. Cir. 1982).

injunction, PBGC's decisions about whether and how to investigate potential claims are presumptively unreviewable. Accordingly, the Court should grant judgment on the pleadings to PBGC.

A. The statute of limitations has run.

Judge Robertson identified the statute of limitations as one of the "threshold questions" for USAPA.[49] When pressed at oral argument on USAPA's initial motion for preliminary injunction, USAPA counsel dodged the issue:

> THE COURT: And why, it's already six, seven years since the plan went bust -- and seven years, you're complaining about statute of limitations. What statute has not already run?
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> MR. BUTLER: Well, there are statutes that govern PBGC's activity. I don't know. But if there was fraud, if this was somehow hidden, maybe hidden, maybe there is a claim. I don't know that, Your Honor. All I know is that time is passing, and --[50]

As this Court held in denying USAPA's renewed motion for preliminary injunction, given that the Plan terminated *eight years ago*, "there is reason to believe that whatever window for recovery exists is not about to close, but has already done so." Dkt. #47 at 11.

The statute of limitations for PBGC-initiated civil actions (including fiduciary breach actions) is set forth in 29 U.S.C. § 1303(e)(6). Under each of its provisions, the statute of limitations has run. Generally, PBGC may bring suit within the later of:

1. six years after the date a cause of action arose; or
2. three years after the later of:

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[49] Ex. 6, Transcript of first preliminary injunction hearing (Mar. 25, 2010) at 3.

[50] *Id.*, Ex. 6, Transcript at 46.

- the date PBGC acquired or should have acquired actual knowledge of the cause of action; or

- the date PBGC became trustee, if PBGC is suing as trustee.

In the case of "fraud or concealment," however, PBGC may bring actions within six years of the later of:

1. the date PBGC acquired or should have acquired actual knowledge of the cause of action; or

2. the date PBGC became trustee, if PBGC is suing as trustee.[51]

Under each of these provisions, the statute of limitations has run.

First, by definition, any cause of action for fiduciary breach committed before Plan termination – which is what USAPA alleges – "arose" before the termination date of March 31, 2003. Thus, under paragraph (A)(i), the limitations period expired six years later, on March 31, 2009, at the latest. Second, USAPA alleges that "red flags" suggesting misconduct by the former

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[51] 29 U.S.C. § 1303(e)(6) provides:

(A) Except as provided in subparagraph (C), an action under this subsection may not be brought after the later of—

(i) 6 years after the date on which the cause of action arose, or

(ii) 3 years after the applicable date specified in subparagraph (B).

(B) (i) Except as provided in clause (ii), the applicable date specified in this subparagraph is the earliest date on which [PBGC] acquired or should have acquired actual knowledge of the existence of such cause of action.

(ii) If [PBGC] brings the action as a trustee, the applicable date specified in this subparagraph is the date on which [PBGC] became a trustee with respect to the plan if such date is later than the date described in clause (i).

(C) In the case of fraud or concealment, the period described in subparagraph (A)(ii) shall be extended to 6 years after the applicable date specified in subparagraph (B).

fiduciaries have been in "plain sight" since PBGC became the Plan's statutory trustee.[52] Thus, assuming for the sake of argument the truth of USAPA's allegations, PBGC should have acquired knowledge of any such breach upon becoming trustee on March 31, 2003. Accordingly, under paragraphs (A)(ii) and (B)(i), the limitations period expired three years later, on March 31, 2006. And third, PBGC became trustee of the Plan on March 31, 2003, so the last date it could have brought an action under paragraph (B)(ii) was March 31, 2006. Because USAPA has neither alleged nor uncovered any fraud or concealment, the limitations period in paragraph (C) does not come into play.

Because the statute of limitations within which PBGC could bring a cause of action on any of the grounds USAPA suggests has run, USAPA can prove no set of facts under its complaint that would justify relief.

B. PBGC's investigative and enforcement decisions are presumptively unreviewable.

In *Paulsen v. CNF Inc.*, the Ninth Circuit held that PBGC's discretionary decision not to pursue fiduciary breach claims is not subject to judicial review. In explaining the rationale for unreviewability, the court quoted *Heckler v. Chaney*, 470 U.S. 821 (1985):

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far

[52] Dkt. #35, USAPA's Mem. Supp. Renewed Mot. for Prelim. Inj. at 7 ("Numerous red flags suggesting possible breaches of fiduciary duties . . . have been in plain sight since the time the Plan was terminated, and have been evident continuously throughout the past seven years. Had PBGC been paying attention, . . . any one of these red flags should have been more than sufficient to prompt PBGC to conduct an appropriate investigation.").

> better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.[53]

Addressing the argument that *Heckler* should not apply when PBGC acts in its statutory trustee role – which USAPA has made here – the *Paulsen* court rejected it:

> When PBGC is acting as trustee to a distress terminated plan, it "has the power . . . to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan." 29 U.S.C. § 1342(d)(1)(B)(iv). Nothing in ERISA expressly compels PBGC to pursue claims on the terminated plan's behalf.
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> * * *
>
> PBGC's decision regarding whether to sue on behalf of a plan involves the "complicated balancing" of all five factors identified in *Heckler*. PBGC must evaluate whether an ERISA violation has occurred, whether its limited resources are best spent on pursuing claims based on one violation or another, whether it is likely to succeed if it acts, whether the particular lawsuit best fits the agency's overall policies, and whether it has enough resources to undertake the action at all.

559 F.3d at 1086. The court concluded that nothing in ERISA rebuts the presumption of unreviewability. *Id.* at 1087.

This logic applies seamlessly to the instant case. As this Court noted in denying USAPA's renewed motion for preliminary injunction, the *Paulsen* court "addressed a claim very similar to the Association's current claim." Dkt. #47 at 6. And the Court concluded that "*Paulsen*'s reasoning would appear to reach PBGC's investigative decisions," such as those involved in this case. *Id.* at 7. This is because, "in deciding how to investigate potential claims, PBGC must juggle many of the same considerations that influence its decisions whether to file suit: the likelihood that a violation has actually occurred, the allocation of scarce agency resources among claims and plans, the odds that its efforts will be fruitful, and the agency's overall goals and budget." *Id.* This approach reflects common sense. PBGC is trustee of 4,200

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[53] 559 F.3d 1061, 1085 (9th Cir. 2009) (quoting *Heckler*, 470 U.S. at 831-32).

terminated plans. PBGC Ann. Rep. (2010) at ii. Each year, on average, the agency becomes responsible for more than one hundred additional terminated plans. Given its limited resources, PBGC cannot afford to scrutinize each underfunded plan it takes over with what USAPA demands here, a "forensic analysis."[54]

As this Court observed:

> Indeed, the decision of whether *and how* to investigate a potential claim may be *more* nebulous than the decision of whether to sue, since the latter involves a binary choice (to sue or not) whereas the former could result in a wide range of outcomes. In such situations, courts are reluctant to disturb an agency's balancing of "considerations that are within the ambit of its peculiar expertise." *Id*. [citing *Paulsen*.] Further, it is unclear what standard the Court would use in assessing the sufficiency of PBGC's investigative efforts. The Association appears to assume that PBGC's conduct should be judged in the same manner as that of a private trustee, but the same could have been said in *Paulsen*, where the Ninth Circuit concluded that there was "no 'meaningful standard' against which to judge PBGC's decision" not to file suit.

Id. at 7-8 (emphasis in original).

Rather than substituting its judgment for PBGC's, the Court should apply the well-established presumption that an agency's enforcement decisions, including its investigative choices, are committed to the agency's discretion.[55]

II. ALTERNATIVELY, THE COURT SHOULD GRANT SUMMARY JUDGMENT TO PBGC.

A. USAPA has not demonstrated irreparable harm absent an injunction.

Even if PBGC (or an appointed trustee) investigated, pursued, and recovered funds based on USAPA's allegations, the pilots' statutory pension benefits would not increase. Accordingly,

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[54] Dkt. #40, USAPA's Reply Brief in Support of Plaintiff's Renewed Motion for Preliminary Injunction at 8.

[55] *See also Davis v. PBGC*, 571 F.3d 1288, 1293 (D.C. Cir. 2009) (applying agency-deference principles to reject notion that PBGC's status as statutory trustee diminishes deference due to agency in interpreting its organic statute).

USAPA will suffer no harm, much less irreparable harm, if its amorphous allegations are not pursued.

First, as explained above at 4-5, ERISA provides that any gains or losses on plan assets after termination accrue to, or are suffered by, PBGC on behalf of all stakeholders in the national pension insurance system.[56] Thus, an unexpected post-termination recovery on a fiduciary breach claim would be a gain in the value of the Plan's assets that would be credited to PBGC, not used to pay additional benefits.

Second, even if there were an unexpected recovery and it was substantial enough to cause PBGC to redo the Plan's valuation,[57] the pilots would not benefit. This is because, when the Plan terminated, it had enough assets to pay all benefits through PC3, but not through PC4 (PBGC-guaranteed benefits).[58] Therefore, any additional assets would be allocated to PC4 to reduce the loss that PBGC would otherwise suffer from using its insurance funds to pay those guaranteed benefits.[59] And because PC4 was underfunded by $510 million, any recovery less than that *could not* increase the pilots' benefits. *Id.*

Both this Court and Judge Robertson have noted this fatal flaw in USAPA's case. In denying USAPA's renewed motion for preliminary injunction, this Court observed that USAPA "does not dispute that PBGC would be entitled to the first $510 million of any litigation

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[56] 29 U.S.C. § 1344(c).

[57] *See supra* at 5 n.20 (describing the rare circumstances in which PBGC may change its valuation of a plan's assets).

[58] *See supra* at 7; Ex. 1, Jones Decl. at ¶¶ 14-15.

[59] *See supra* at 5 (describing statutory allocation under 29 U.S.C. § 1344(a)); Ex. 1, Jones Decl. at ¶¶ 14-15.

proceeds . . . ."[60] Likewise, in denying USAPA's first motion for preliminary injunction, Judge Robertson noted that "USAPA does not dispute the proposition that the first $510 million of any litigation recovery would belong to PBGC."[61]

USAPA has offered no rebuttal of PBGC's legal analysis of the allocation of plan assets under 29 U.S.C. § 1344. Nor has USAPA made any showing that there could conceivably be a claim – much less *a recovery* – remotely approaching half a billion dollars, even if there were a meritorious claim. Accordingly, USAPA has not shown – and cannot show – that it will suffer irreparable harm absent an injunction.[62]

B. Because USAPA has failed on the merits, it cannot obtain an injunction.

USAPA's complaint alleged a series of "suspicious and potentially improper activities" involving the Plan, and faulted PBGC for not pursuing them. Compl. at ¶ 27. But while USAPA obtained tens of thousands of pages of documents and questioned nearly a dozen deposition witnesses, it failed to uncover *any* viable claim against the Plan's former fiduciaries that PBGC might have pursued. Thus, USAPA has failed on the merits.

USAPA's complaint and its responses to PBGC's discovery requests focused primarily on the investment choices the Plan's prior fiduciaries made and the fact that the Plan's assets diminished between 2000 and 2003.[63] But many investors saw individual stocks decline a great deal during that time. As the Department of Labor has made clear, no particular investment or

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[60] Dkt. #47, Mem. Op. and Order at 9.

[61] Dkt. #22, Mem. Order at 5.

[62] Although USAPA also argued in both of its preliminary injunction motions that the loss of a "statutory entitlement" to a fuller investigation also constituted irreparable harm, both Judge Robertson and this Court rejected that argument. Dkt. #22 at 6; Dkt. #47 at 9-10.

[63] Compl. at ¶¶ 22-23, 27; Ex. 7, USAPA's Responses to PBGC's First Set of Interrogatories.

investment course of action is *per se* imprudent under ERISA.[64] Thus, even if, as USAPA alleges, certain individual stocks "lost most if not all of their value" or certain investment managers "lost significant portions of the investment dollars they were managing," Compl. at ¶¶ 27(c), (d), this does not, in and of itself, constitute a violation of ERISA's fiduciary provisions.

Even if investment performance *were* the relevant measure, it is undisputed that the Plan's assets performed better than the market during the years in question.[65] And a senior PBGC actuary set forth in a sworn declaration the "many ordinary and plausible explanations for

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[64] *See* Preamble to Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets under the "Prudence Rule," Dkt. 38-7, 44 Fed. Reg. 37221, 37222 (June 26, 1979):

> The Department is of the opinion that (1) generally, the relative riskiness of a specific investment or investment course of action does not render such investment or investment course of action either *per se* prudent or *per se* imprudent, and (2) the prudence of an investment decision should not be judged without regard to the role that the proposed investment or investment course of action plays within the overall plan portfolio. Thus, although securities issued by a small or new company may be a riskier investment than securities issued by a "blue chip" company, the investment in the former company may be entirely proper under the Act's "prudence" rule.

See also DOL Adv. Op. 2006-08A (Oct. 3, 2006), http://www.dol.gov/ebsa/regs/aos/ao2006-08a.html ("[w]ithin the framework of ERISA's prudence, exclusive purpose and diversification requirements, the Department believes that plan fiduciaries have broad discretion in developing investment strategies appropriate to their plans").

[65] As a PBGC investigator testified, the Plan "did better than the market" in 2002, with a better investment return than the S&P 500 Index. Ex. 8, Hagan dep. transcript at 138-39, citing PBGC-9038, Ex. 9, AVR excerpts. The same was true in 2000 and 2001. *See* Ex. 9, AVR excerpts, PBGC-8977, -9021. And as a former member of the US Airways pension investment committee testified, "I don't think that when the market crashed post 9/11 that the performance of the pilots' fund was worse than benchmark. * * * [I]f the rest of the world is losing 30% and you lose 10%, well, then you're doing really well."). Ex. 10, Bryan dep. transcript at 91-93.

the apparent substantial decline in the funded status of the Plan from the end of 2000 to the Plan's termination date of March 31, 2003."[66]

In arguing otherwise, USAPA has relied principally on the testimony of Robert Lee Whitt, a pilot member of USAPA with no professional experience in securities or pension investments.[67] Mr. Whitt testified that he, in turn, relied on Mark Butler, another pilot member of USAPA, on the subject of securities. *Id.* at 12. As Mr. Whitt stated, "I and another pilot, Mark Butler, have been primarily responsible for conducting the pilots' independent investigation of the distress termination of the Pilots' Plan."[68] Mr. Butler testified that he is a licensed broker and owns a securities broker/dealer firm, but lacks any professional experience or credentials in advising employer-sponsored defined benefit pension plans.[69]

Mr. Whitt's declaration identified losses in Plan assets of approximately $72 million, "including some transactions that investment managers permitted to lose more than 90% of their value."[70] Given that the Plan had assets of $1.19 billion at termination,[71] that loss represents about 5.9% of the value of the Plan's investment portfolio. Moreover, even if some of the Plan's investments yielded poor returns, the Plan's overall performance was quite moderate for that period, as noted above. And PBGC's investigator concluded that "the Plan's investment

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[66] Ex. 3, First Ranade Decl. at ¶ 8.

[67] Ex. 11, Whitt. dep. transcript at 14-15.

[68] Ex. 12, Declaration of Robert Lee Whitt at ¶ 4 (Nov. 19, 2010).

[69] Ex. 13, Butler dep. transcript at 12-14; 80-81; 83.

[70] Ex. 12, Whitt Decl. at ¶ 4.

[71] Ex. 1, Jones Decl. at ¶ 12.

portfolio was managed within the guidelines provided by the Investment Policy," and that it was "well diversified."[72]

USAPA may not rely on hindsight to second-guess decisions to make specific investments.[73] A list of individual investment losses, singled out from a billion-dollar portfolio during a major economic downturn, is not evidence of fiduciary breach. And PBGC investigated USAPA's other vague allegations about Tiger Management Fund and Alchemy Partners, and found no impropriety.[74]

USAPA also pointed to a "disparity" between the performance of the Plan and that of the US Airways management pension plan, given that both plans' assets were invested in the same master trust.[75] But PBGC's actuary explained in a sworn declaration that the investment vehicles used for the assets of the Plan and those of the management plan were not identical; moreover, the percentage of assets allocated to each vehicle in one plan was not identical to that in the other plan.[76] These differences in investment vehicles and asset allocation to each vehicle would lead to differences in performance between the two plans. *Id.* at ¶ 9. And there is nothing in the law that prohibits an employer that sponsors two pension plans from pursuing different investment strategies for each. "Plan fiduciaries have broad discretion in developing investment strategies

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[72] Ex. 5, Second investigative report at 5.

[73] *See Metzler v. Graham*, 112 F.3d 207, 209 (5th Cir. 1997) ("[p]rudence is evaluated at the time of the investment without the benefit of hindsight"); *DeBruyne v. Equitable Life Assur. Soc'y*, 720 F. Supp. 1342, 1349 (N.D. Ill. 1989), *aff'd*, 920 F.2d 457 (7th Cir. 1990) (inability to predict stock market crash not imprudent; "fiduciary duty of care requires prudence, not prescience").

[74] Ex. 5, Second investigative report at 6-8.

[75] Ex. 12, Whitt Decl. at ¶¶ 7-9.

[76] Ex. 14, Second Declaration of Neela Ranade (Dec. 13, 2010) at ¶¶ 6-7 and Ex. A thereto (Attach. 64 to Plan asset audit).

appropriate to their plans."[77] Moreover, the reason US Airways pursued a different investment strategy for its management plan is no mystery: the Pilots Plan was ongoing, with pilots continuing to accrue benefits, until it terminated in 2003, whereas the management plan was frozen in 1991, with no additional benefits being accrued for US Airways to fund.[78]

Finally, USAPA has focused on findings of PBGC's Inspector General about the agency's plan asset audits of the United Airlines and National Steel pension plans,[79] and the fact that PBGC subsequently hired a contractor to undertake a new plan asset evaluation for the US Airways pension plans.[80] These developments bear only on the margins of this case, and provide no evidence of wrongdoing by the former Plan fiduciaries.

The plan asset audit for the Plan valued its assets at the termination date at about $1.2 billion.[81] There has been no finding by PBGC or anyone else that this conclusion is in error. Nor has there been a finding by PBGC or anyone else that any Plan participant's benefits were wrongly reduced as a result of the plan asset audit. Nevertheless, in an abundance of caution, PBGC has hired a CPA firm to conduct a new plan asset evaluation for the four US Airways pension plans, including the Pilots Plan. The new plan asset evaluation is scheduled to

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[77] DOL Adv. Op. 2006-08A, http://www.dol.gov/ebsa/regs/aos/ao2006-08a.html.

[78] *See* Ex. 10, Bryan dep. transcript at 85, 90 (former member of US Airways pension investment committee explained that management plan was frozen, and therefore: "Our objective for the pilots' plan was to maximize returns. The objective for the management plan was to have no volatility at all, just maintain. Make sure that your assets matched the liability stream, nothing more, nothing less. Because the liabilities weren't increasing.").

[79] *See, e.g.,* Dkt. #50, Plaintiff's Unopposed Mot. Requesting Status Conf. at 2-4.

[80] Ex. 15, Crowe Horwath LLC call order.

[81] Ex. 2 at 5.

be completed in summer 2011.[82] PBGC has made the same promise to participants in the US Airways plans that it did to those of National Steel: "*if any participant[s] in the US Airways Plans are found to have lost even a dime, their benefits will be corrected and they will be paid back with interest.*"[83] The agency's hiring of a new contractor in connection with the US Airways plans shows that PBGC takes its obligations seriously. These developments in no way constitute evidence that the Plan has a claim against the former Plan fiduciaries for misconduct. Without such evidence, USAPA's case collapses.

Even assuming for the sake of argument that there were a claim against the Plan's former fiduciaries, USAPA presented absolutely no evidence on the likelihood of collection. USAPA never identified specific individuals or corporations that may be liable, and certainly provided no evidence of their ability to pay a judgment. In addition to ignoring the fact that any claims of the Plan are time-barred, USAPA did not furnish any evidence that recovery of half a billion dollars is more than theoretically possible. For all these reasons, USAPA has failed on the merits and cannot obtain the permanent injunction it seeks.

C. The balance of harms and public interest do not support an injunction.

The disruption to PBGC's operations of directing the agency to perform the list of duties demanded by USAPA, or of appointing a supplemental trustee to accomplish them, would be considerable. Judge Robertson recognized this danger in denying USAPA's first preliminary injunction: "The risk of establishing a precedent that could lead to disruptions of PBGC's operations is substantial and not one I am willing to undertake."[84]

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[82] *See* Ex. 16, Gray dep. transcript at 140.

[83] Ex. 17, Transcript of status conference (May 19, 2011) at 11 (emphasis added).

[84] Dkt #22, Mem. Order at 8.

Even for an ongoing plan, "the appointment of a receiver [*i.e.*, special or temporary trustee] is a harsh remedy, not to be imposed without a showing of necessity."[85] This remedy is "drastic," and certainly "not the usual course," because it necessarily involves "disruption and expense."[86] USAPA completely ignores this harm to PBGC's operations. Disturbing the operations of an agency that in 2010 paid nearly $5.6 billion in benefits to more than 800,000 retirees in 4,200 terminated pension plans should not be undertaken lightly.[87] And USAPA has admitted, upon questioning from the Court, that it is asking PBGC to be required to pay the fees of any supplemental trustee.[88] As case law suggests, becoming familiar with the complex background of this case and investigating USAPA's vague allegations is likely to involve "significant" costs.[89]

Not surprisingly, courts have traditionally imposed the "drastic remedy" of removing a private-sector trustee or appointing a supplemental trustee or receiver only after evidence established that the supplanted fiduciaries engaged in "egregious" malfeasance, usually involving self-dealing or prohibited transactions.[90] In this case, there are only USAPA's

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[85] *Bierwirth*, 680 F.2d at 276.

[86] *Chao v. Malkani*, 452 F.3d 290, 294 (4th Cir. 2006) ("removal can be detrimental for plan participants and employers alike. It imposes significant costs on plans, which must undergo an inevitable period of transition as a new fiduciary familiarizes itself with the plan's provisions. Constant turnover can also disrupt plan administration, and might cause delay in participants receiving vital benefits"); *Bierwirth*, 680 F.2d at 277.

[87] *See* PBGC Ann. Report (2010) at 2, http://www.pbgc.gov/Documents/2010_annual_report.pdf.

[88] *See* Ex. 6, Transcript of first preliminary injunction hearing (Mar. 25, 2010) at 18-19; Ex. 18, Transcript of renewed preliminary injunction hearing (Jan. 26, 2011) at 34.

[89] *See Malkani,* 452 F.3d at 294.

[90] *See id.* (affirming removal of fiduciaries upon finding of "repeated efforts to plunder the Plan's assets"); *Reich v. Lancaster*, 55 F.3d 1034 (5th Cir. 1995) (affirming removal of

assertions of PBGC's purported nonfeasance. USAPA would have to demonstrate much more to justify the unprecedented remedy sought here.

Nor is the public interest served by either appointing an outside trustee to perform the list of duties demanded by USAPA, or directing PBGC to perform them. Such a ruling could expose the pension insurance program to widespread second-guessing. Participants of underfunded plans are often understandably anxious in the wake of a termination. Those worries may be fed by fears and rumors circulating during an employer's bankruptcy. Because PBGC is invariably appointed statutory trustee of terminated plans, granting relief on such a weak showing could lead to copycat allegations in many cases. Lawsuits to "investigate the investigators" would proliferate, and the agency's work, and therefore the public interest, would be seriously hampered.

For these reasons, both the balance of equities and the public interest also militate against the injunction that USAPA seeks.

D. USAPA is not entitled to attorneys' fees, regardless of the outcome of this case.

USAPA seeks an award of attorneys' fees against PBGC, citing 29 U.S.C. § 1303(f)(3). Compl. ¶ D, p. 13. Because neither that provision nor any other authorizes attorneys' fees against PBGC, the Court should grant summary judgment to PBGC on this request as well.

Under the well established "American Rule," litigants are required to pay their own

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fiduciaries for significant prohibited transactions, after two-week bench trial); *Beck v. Levering*, 947 F.2d 639, 641 (2d Cir. 1991) (affirming removal of trustee because of "massive" and "egregious self-dealing"); *Katsaros v. Cody*, 744 F.2d 270 (2d Cir. 1984) (affirming appointment of temporary investment manager after lower court found that former trustees invested 60% of plan's assets, $20 million, via a personal loan); *Marshall v. Snyder*, 572 F.2d 894, 897, 899, 901 (2d Cir. 1978) (affirming appointment of temporary receiver after district court found "inescapable evidence" that fiduciaries violated consent order by engaging in continued self-dealing with plan assets).

attorneys' fees, except where fee-shifting is specifically authorized by statute.[91] Section 1303(f) is the "exclusive means" for bringing action against PBGC with respect to a plan, and although that provision specifically authorizes recovery of "costs and expenses," it does not authorize attorneys' fees.[92] In contrast, the two provisions of Title IV that authorize suit against defendants *other* than PBGC specifically authorize attorneys' fees. Section 1370(e)(1) authorizes attorneys' fees in suits against parties other than PBGC for violation of certain Title IV provisions.[93] And section 1451(e) authorizes attorneys' fees in suits against parties other than PBGC, the Secretary of Treasury, or the Secretary of Labor involving multiemployer plans.[94]

By expressly including attorneys' fees in these provisions and omitting any mention of them in the provision authorizing actions against PBGC, Congress left no doubt about its intent to preclude an award of attorneys' fees against the agency.[95] Quite simply, as another judge in this district held in another action involving US Airways pilots and the Plan, "[a]n award of

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[91] *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

[92] *See* 29 U.S. C. § 1303(f)(4) (exclusive means); 29 U.S.C. § 1303(f)(3) (costs and expenses).

[93] 29 U.S.C. § 1370(e)(1).

[94] 29 U.S.C. § 1451(e). Moreover, Title I of ERISA expressly provides for attorneys' fees, 29 U.S.C. § 1132(g), in contrast to 29 U.S.C. § 1303(f)(3), which does not.

[95] *See Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 452 (2002) ("when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1248 (D.C. Cir. 2008) (same).

attorney's fees is not available to Plaintiffs in this suit against PBGC."[96] There, the court dismissed the attorneys' fee request against PBGC as a matter of law:

> Because Plaintiffs can sue [PBGC] only under § 1303(f), and § 1303(f) does not provide for attorneys' fees, Plaintiffs have not stated a claim for such fees. . . . Defendants' motion to dismiss Plaintiffs' request for attorneys' fees as a matter of law will be granted.[97]

The Court should do the same here.

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[96] *Stephens v. US Airways Group*, 555 F. Supp. 2d 112, 122 (D.D.C. 2008) (Collyer, J.).

[97] *Id.* at 122-23.

CONCLUSION

The Court should grant judgment on the pleadings to PBGC because USAPA can prove no set of facts that would entitle it to relief under any reasonable reading of its complaint. If the Court finds that judgment on the pleadings is not warranted, it should grant summary judgment to PBGC because there is no genuine issue of material fact, and PBGC is entitled to judgment as a matter of law.

July 8, 2011

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

US AIRLINE PILOTS ASSOCIATION, *Plaintiff,*	)	
v.	)	Civil Action No. 1:09-cv-01675 (HHK)
PENSION BENEFIT GUARANTY CORPORATION, *Defendant.*	)	

PBGC'S STATEMENT OF UNDISPUTED MATERIAL FACTS
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

1. US Airways was the sponsor of the Retirement Income Plan for Pilots of US Airways, Inc. (the "Plan"). Compl. ¶ 7.

2. US Airways filed for Chapter 11 protection in August 2002. Compl. ¶ 10.

3. The Plan terminated with a termination date of March 31, 2003, and PBGC became its statutory trustee. Compl. ¶ 17.

4. PBGC reviewed and valued the Plan's assets, then allocated them to Plan benefits as provided in ERISA and PBGC's regulations, determining the resulting amount of participants' statutory benefits and adding PBGC funds to ensure payment of guaranteed benefits. Ex. 1 to PBGC's brief, Dkt. #6-3, Declaration of Rob Jones (Sept. 11, 2009) at ¶¶ 12-15; Ex. 2 to PBGC's brief, Dkt #4-1 at 107, Plan asset audit (Jan. 11, 2006).

5. PBGC determined that as of the Plan's termination date, it had unfunded benefit liabilities of $2.2 billion. Ex. 3 to PBGC's brief, Dkt. #6-4, First Declaration of Neela Ranade (Sept. 11, 2009) at ¶ 5. The Plan's assets were sufficient to fund all benefits through statutory

priority category 3, 29 U.S.C. § 1344(a)(3), but only $40 million of the more than $500 million of guaranteed benefits in priority category 4, 29 U.S.C. § 1344(a)(4). Ex. 1 to PBGC's brief, Dkt. #6-3, Jones Decl. at ¶¶ 14-15.

6. Once PBGC issued benefit determinations to participants, a group of pilots (who later became plaintiffs in *Davis v. PBGC*, a case related to this one) filed an administrative appeal with PBGC's Appeals Board, alleging, *inter alia*, that the Plan's prior fiduciaries had impermissibly transferred Plan assets to another US Airways benefit plan. *Davis v. PBGC*, No. 1:08-cv-01064 (HHK) (filed June 20, 2008), Dkt. #36-4, Ex. C to Second Amended Complaint (pilots' appeal letter to PBGC). In a February 29, 2008 decision, the PBGC Appeals Board stated that it had referred the asset-transfer allegation to PBGC's Office of General Counsel. *Davis v. PBGC*, No. 1:08-cv-01064 (HHK) (filed June 20, 2008), Dkt. #36-1, Ex. A to Second Amended Complaint (PBGC Appeals Board decision dated Feb. 29, 2008). A group of 1,700 pilots then filed the related *Davis* suit, which challenged the Appeals Board's decision of February 29, 2008, and contained the asset-transfer allegation. *Davis v. PBGC*, No. 1:08-cv-01064 (HHK) (filed June 20, 2008), Dkt. #1, 36, Complaint, Claim 5.

7. On June 18, 2009, USAPA counsel wrote to PBGC, alleging that "USAPA and its members suspect that before the [2002-03 US Airways] bankruptcy proceeding and ensuing termination, the Plan's fiduciaries breached their duties by transferring assets out of the Plan and by making improper investments." Dkt. #1, Ex. 1 to Complaint. At that time PBGC had not yet completed its investigation of the similar asset-transfer allegations made in *Davis*.

8. In response to the June 18 letter, PBGC's General Counsel wrote on July 9, 2009, to request more specific information, promising to review the allegations if USAPA provided specifics. Dkt. #1, Ex. 2 to Complaint.

9. On July 17, 2009, USAPA counsel wrote a second letter, identifying six "suspicious occurrences, investments and transactions." Dkt. #1, Ex. 3 to Complaint at 3.

10. On September 2, 2009, USAPA brought the instant suit against PBGC. In its prayers for relief, USAPA asked the Court to either: (a) direct PBGC to investigate and pursue potential claims for fiduciary breach against the Plan's former fiduciaries; (b) appoint a "permanent supplemental trustee" to do so; or (c) remove PBGC and appoint a replacement trustee to do so. Compl. at pp. 13-14. USAPA also sought attorneys' fees and other costs and expenses, citing 29 U.S.C. § 1303(f). *Id.*

11. PBGC's Office of General Counsel investigated the asset-transfer allegation, and issued a report on October 14, 2009, concluding that there was no evidence of any improper transfers of assets between plans; the General Counsel concurred in the investigators' recommendation to take no further action in the matter. Ex. 4 to PBGC's brief, Dkt. #38-4, Memorandum from Nicole C. Hagan to Judith R. Starr (Oct. 14, 2009), with concurrence memorandum (Oct. 20, 2009).

12. PBGC's Office of General Counsel then investigated USAPA's other allegations, and issued a report on November 24, 2010, concluding that there was no evidence of fiduciary breach related to those allegations; the General Counsel concurred. Ex. 5 to PBGC's brief, Dkt. #42-6, Memorandum from Nicole C. Hagan to Judith R. Starr (Nov. 24. 2010).

13. The discovery period in this litigation ran from March 2010 until June 15, 2011. PBGC consented to two USAPA motions to extend the discovery period, after objecting to an initial motion for extension. Dkt # 24, 41, 48. In response to USAPA's demands, PBGC produced eight witnesses (one twice), and more than 25,000 pages of documents in 21 productions.

14. USAPA has neither alleged nor uncovered any incident or evidence of fraud or concealment by the Plan's former fiduciaries. Dkt. #1 (Complaint), Dkt. #4 (Mot. for Prelim. Inj.); Dkt #35 (Renewed Mot. for Prelim. Inj.); Dkt. #50 (Mot. for Status Conf.).

15. Priority category 4 for the Plan is underfunded by $510 million, and the first $510 million of any recovery hypothetically obtained on behalf of the Plan would go to PBGC. Dkt. #1 (Complaint), Dkt. #4 (Mot. for Prelim. Inj.); Dkt #35 (Renewed Mot. for Prelim. Inj.); Dkt. #50 (Mot. for Status Conf.).

16. USAPA has not identified any meritorious fiduciary breach claim against the Plan's former fiduciaries, much less one whose value would even approach $510 million. Dkt. #1 (Complaint), Dkt. #4 (Mot. for Prelim. Inj.); Dkt #35 (Renewed Mot. for Prelim. Inj.); Dkt. #50 (Mot. for Status Conf.).

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17. USAPA has not identified a source from whom any judgment of over $510 million related to this litigation could be collected. Dkt. #1 (Complaint), Dkt. #4 (Mot. for Prelim. Inj.); Dkt #35 (Renewed Mot. for Prelim. Inj.); Dkt. #50 (Mot. for Status Conf.).

July 8, 2011

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