

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

THOMAS G. DAVIS, <i>ET AL.</i> ,	)	
	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:08-cv-01064 (HHK)
	)	
PENSION BENEFIT GUARANTY	)	
CORPORATION,	)	
	)	
Defendant.	)	
	)	

**PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT ON CLAIMS ONE, TWO,  
THREE, SIX, SEVEN, NINE, TEN, ELEVEN AND TWELVE OF THE SECOND  
AMENDED COMPLAINT**

Pursuant to Federal Rule of Civil Procedure 56(c) and LCvR 7(h) and 56.1, Plaintiffs, a group of Retired US Airways Pilots (sometimes referred to in the memorandum as “The Retired Pilots”), hereby move for summary judgment on Claims One, Two, Three, Six, Seven, Nine, Ten, Eleven and Twelve of the Second Amended Complaint. There are no genuine issues of material fact and Plaintiffs are entitled to judgment as a matter of law on these claims, as set forth in more detail in the accompanying Memorandum of Points and Authorities.

Dated: November 15, 2010

Respectfully submitted,

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November 15, 2010

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Pursuant to Federal Rule of Civil Procedure 56(c) and LCvR 7(h) and 56.1, Plaintiffs, a group of retired and retirement-eligible US Airways pilots (sometimes “the Pilots”), respectfully submit this memorandum of points and authorities in support of their Motion for Summary Judgment on Claims One, Two, Three, Six, Seven, Nine, Ten, Eleven and Twelve of the Second Amended Complaint.

**INTRODUCTION**

Plaintiffs are approximately 1,700 participants in the now-terminated Retirement Income Plan for Pilots of US Airways, Inc. (“the Plan”). The vast majority are retired US Airways pilots (or their survivors); the remainder are current US Airways pilots eligible to retire. They range in age from their 50’s to their 90’s.

Since 2003, when US Airways went bankrupt and a Bankruptcy Court agreed to the “distress termination” of the Plan, the Pension Benefit Guaranty Corporation (“PBGC”) -- a government corporation under the Department of Labor -- has been trustee and insurer of the

Plan. But the PBGC's takeover and subsequent administration of the Plan has not been a pleasing tale of "government to the rescue"; instead, it is a sad story of harsh and even cruel treatment by the government of pensioners who rely on benefits from the terminated Plan as their main financial resource. For seven years (since 2003), the Pilots have waited patiently, and excruciatingly, to challenge the PBGC's actions, in compliance with administrative exhaustion requirements and as a result of years of delay on the PBGC's part in completing its administrative tasks. The time finally has now arrived for the Pilots to have their day in court, as they present in this summary judgment motion the bulk of their claims for resolution on the merits by this Court.<sup>1</sup> Regrettably, more than 100 of the affected Pilots have passed away during the seven years of wait, and their survivors -- rather than they themselves -- will enjoy the fruits of a victory in this Court.

In the sections below, the Pilots describe the manner in which the PBGC took a number of unprecedented and indefensible positions in the course of whittling the Pilots' benefits down to a fraction of the amount to which they are entitled under the Plan. The particular errors committed by the PBGC share a single unifying theme: Whenever faced with a question about how to calculate benefits, the PBGC consistently adopted whatever position was best for its own economic bottom line. Indeed, at the outset of this litigation, the PBGC acknowledged that concern for its own fisc was front and center when assessing issues arising under the Plan. Def.'s Opp'n to Pls.' Mot. for Prelim. Inj. at 2, 30-31 (Sept. 8, 2008) [DE 12] (asserting that its operating deficit was important factor to consider in Plaintiffs' preliminary injunction motion).

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<sup>1</sup>The only claims not at issue in this motion are Claim Eight (which is already the subject of a pending summary judgment motion (DE 45)), and Claim Five (which is a breach of fiduciary duty claim that requires additional discovery). See DE's 67 & 70 (scheduling orders staying fact discovery on Claim Five pending completion of briefing).

This is precisely the opposite of what is required by the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1001 *et seq.*, the statute that governs the PBGC’s actions with respect to the Pilots. As the Supreme Court has made clear, the principal purpose underlying ERISA’s sections relating to the PBGC is “to prevent the ‘great personal tragedy’ suffered by employees whose vested benefits are not paid when pension plans are terminated.” *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980) (quoting Senator Bentsen, Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare, 94th Cong., *Legislative History of the Employee Retirement Income Security Act of 1974*, Pub. L. No. 93-406, Vol. III, 4793 (Comm. Print Apr. 1976)). While the PBGC’s refusal to heed this mandate alone calls its determinations into question, there is another aspect of its decision-making that is equally troubling: In resolving the bulk of the issues raised by this motion, the PBGC was acting not as an agency tasked with regulatory or insurance functions under ERISA, but rather as the voluntary trustee of the terminated Plan. In that capacity, the PBGC -- as a fiduciary of the Plan, *see* 29 U.S.C. §1342(d)(3) -- was required to act solely in the interest of the Plan’s participants, including by ensuring they receive as much of their vested, non-forfeitable pension benefits as possible. *See Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 616 (1993) (“[Title 29 U.S.C. § 1104(a)(1)] requires a trustee to ‘discharge his duties . . . solely in the interest of the participants [i.e., covered employees] and beneficiaries’”) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-32 (1981)).

As the Court navigates Plaintiffs’ presentation here, it will become increasingly apparent that the PBGC did not endeavor at all to maximize the Pilots’ recovery of their vested pension benefits. Quite to the contrary, the PBGC’s resolution of the issues raised in Plaintiffs’ various claims reflects an agency doing everything it could to minimize its own exposure, including by

manipulating the plain language of ERISA, the agency's own regulations, and the Plan to fit its desired result. As a matter of law, the PBGC's decisions were incompatible with ERISA, and this Court should accordingly grant summary judgment in favor of the Pilots on the Claims addressed in Plaintiffs' motion.

### **STATEMENT OF FACTS**<sup>2</sup>

Some of the procedural events associated with this litigation have already been described in a number of published and unpublished decisions, both in this case and in an earlier related case that was dismissed for lack of complete administrative exhaustion. *See Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288 (D.C. Cir. 2009); *Davis v. Pension Benefit Guar. Corp.*, 596 F. Supp. 2d 1 (D.D.C. 2008); Mem. Order (Mar. 17, 2009) [DE 33]; *Boivin v. US Airways, Inc.*, 297 F. Supp. 2d 110 (D.D.C. 2003) ("*Boivin I*"); *Boivin v. US Airways, Inc.*, No. 03-2373 (JR), 2005 U.S. Dist. LEXIS 4546 (D.D.C. Mar. 24, 2005) ("*Boivin II*"); *Boivin v. U.S. Airways, Inc.*, 446 F.3d 148 (D.C. Cir. 2006) ("*Boivin III*"). In the sections below, we provide some brief background on the PBGC's role with respect to terminated plans and then on the dispute that underlies this litigation, as necessary for resolution of this motion.

#### **A. Title IV of ERISA and the PBGC's Role**

The Pilots' Second Amended Complaint is brought pursuant to ERISA, as well as the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Title IV of ERISA, 29 U.S.C. §§ 1301-71, establishes a number of measures -- including robust funding requirements imposed on plan sponsors, vesting rights granted to plan participants, and a mandatory insurance program that

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<sup>2</sup> In accordance with LCvR 7(h), the Pilots do not include with their motion a separate statement of undisputed material facts. The Pilots note, however, that by complying with LCvR 7(h) applicable to cases involving agency action, they are not thereby conceding any arguments regarding the extent of any deference owed to the PBGC or regarding the applicable standard of review.

undergirds it all -- designed to protect pension plan participants against the loss of anticipated retirement benefits upon the termination of plans that have insufficient funds to cover vested benefits. *See Page v. Pension Benefit Guar. Corp.*, 968 F.2d 1310, 1316 (D.C. Cir. 1992); *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 155 (D.C. Cir. 1984). In the interlocking scheme Congress enacted to protect plan participants, the PBGC wears a variety of hats, and, indeed, Plaintiffs challenge the PBGC's actions in three different contexts: (1) as the Plan's administrator (trustee); (2) as the Plan's insurer; and (3) as an administrative agency. In analyzing the PBGC's actions, it is crucial to pay attention to which hat the PBGC is wearing at a particular time.

When a pension plan terminates, ERISA first requires that the plan's administrator distribute the plan assets in accordance with the six-tier allocation scheme set forth in [ERISA] § 4044(a). *Mead Corp. v. Tilley*, 490 U.S. 714, 717-718 (1989) (citing 29 U. S. C. § 1344(a)). Pursuant to another provision in Title IV, the PBGC can request to serve as the terminated plan's administrator or trustee, though it is not required to do so. 29 U.S.C. § 1342(b). When the PBGC chooses to become the plan's trustee, the PBGC must then distribute any remaining assets of the terminated plan to the plan's participants and beneficiaries, according to the plan's terms and rules established in ERISA. *See* 29 U.S.C. § 1344. In allocating a plan's assets as trustee, the PBGC acts a fiduciary, and must therefore be guided by the same fiduciary standards applicable to private trustees, which, if breached, are subject to remedy under ERISA. *See* 29 U.S.C. § 1342(d)(3) ("a trustee appointed under this section . . . shall be, with respect to the plan, a fiduciary"); *Pineiro v. Pension Benefit Guar. Corp.*, 318 F. Supp. 2d 67, 87 (S.D.N.Y. 2003); Mem. Order (Mar. 3, 2009) [DE 33] (Judge Robertson denying PBGC's motion to dismiss Claim

Five and finding that the PBGC, as the Plan's trustee, was a fiduciary subject to breach of fiduciary duty actions).

Also pursuant to Title IV, Congress, which created the PBGC as “a wholly owned United States Government corporation, modeled after the Federal Deposit Insurance Corporation,” tasked the PBGC with administering a program of pension insurance. *PBGC v. LTV Corp.*, 496 U.S. 633, 636-37 (1990). The insurance program is funded primarily through the PBGC's collection of insurance premiums from employers that maintain ongoing pension plans. *See id. at 638*; 29 U.S.C. § 1322. Where a plan's assets are insufficient to cover all of a participant's non-forfeitable benefits under the plan, the PBGC, in its role as insurer, is required to “make up the difference,” up to a statutory maximum. *Mead Corp.*, 490 U.S. at 718 (citing 29 U.S.C. § 1361); *LTV Corp.*, 496 U.S. at 637; 29 U.S.C. § 1322(b)(3) (setting forth statutory maximum).

Finally, Title IV empowers the PBGC to adopt such rules and regulations “as may be necessary to carry out the purposes” of Title IV. 29 U.S.C. § 1301(b)(3).

#### **B. The Underlying Dispute and Procedural History**

The dispute underlying this litigation has its genesis in 2002, when US Airways filed a petition for bankruptcy in the U.S. Bankruptcy Court for the Eastern District of Virginia. During those proceedings, US Airways asked the Bankruptcy Court to terminate the Plan pursuant to the “distress termination” provision of ERISA, which required US Airways to demonstrate that it was in financial distress as defined in 29 U.S.C. § 1341(c). Ultimately, over the opposition of the Pilots and others, the Bankruptcy Court agreed to a distress termination of the Plan. *See In re US Airways Group, Inc.*, 296 B.R. 734 (Bankr. E.D. Va. 2003).

After the Plan was terminated on March 31, 2003, the PBGC sought to and did become the trustee for the Plan. *See Boivin III*, 446 F.3d at 151. In that capacity, the PBGC began paying what are termed “estimated” benefits to the Plan's participants -- *i.e.*, the benefits likely

to be allowed upon allocation of the Plans' remaining assets and payment of the PBGC insurance guarantee. Because the benefits were -- when preliminarily fixed by the PBGC -- significantly less than the vested pension benefits the Pilots believed they were entitled to receive under the Plan and ERISA, certain of the Pilots challenged the PBGC's estimated benefits determinations before this Court. The federal court challenge was ultimately dismissed (in *Boivin III*) without prejudice because of the failure at the time to await final benefit determinations and then fully to exhaust administrative appeal remedies with the PBGC. *Id.* at 158-59. The Pilots went on to persevere, through years of administrative proceedings, to complete their cases (after issuance of final benefits determinations) within the PBGC's administrative process.

On February 29, 2008, the PBGC Appeals Board resolved many of the Pilots' administrative claims and decreed that it had taken final agency action with respect to them, *see* Decision of the PBGC Appeals Board (Feb. 29, 2008) (hereinafter "PBGC Decision") (AR-000002-221), but left for resolution a group of claims brought by Plaintiffs involving disability retirement benefits under the terminated Plan, *see id.* at 1 (AR 2). In its decision, the PBGC Appeals Board rejected *all* significant grounds for appeal raised by the Pilots.

On June 20, 2008, the Pilots commenced this action for injunctive and other equitable and declaratory relief sufficient to redress violations of and to enforce ERISA and the APA. *See* Pls.' Original Compl. [DE 1]. On August 15, 2008, Plaintiffs filed a First Amended Complaint. *See* Pls.' First Am. Compl. [DE 9]. The PBGC moved to dismiss the First Amended Complaint on August 29, 2008. *See* Def.'s Mot. to Dismiss [DE 10]. On March 17, 2009, Judge Robertson denied the motion in a Memorandum Opinion permitting the bulk of Plaintiffs' claims to move forward. *See* Mem. Order (Mar. 17, 2009) [DE 33].

On September 11, 2008, the PBGC issued a decision resolving the still-pending claims involving disability retirement benefits. *See* Decision of PBGC Appeals Board on Disability Issues (Sept. 11, 2008) (“Disability Decision”) (attached hereto Ex. 1) (DAR 1-20). On June 23, 2009, the Pilots filed a Second Amended Complaint, now the operative pleading, which added a claim -- denominated Claim Eleven -- for judicial review of the PBGC’s September 11, 2008 decision on disability issues, rendered after the filing of the First Amended Complaint. *See* Pls.’ Second Am. Compl. [DE 36].

In the meantime, the PBGC had singled out about 110 of the Pilots for “recoupment” or “recovery” (collectively “recoupment”) of earlier-received benefits, asserting that, in the time since the bankruptcy, even just the amounts these Pilots had been paid were too much and that they must immediately pay back a portion to the PBGC. The Pilots challenged that action, seeking a preliminary injunction maintaining the status quo pending resolution of this litigation. *See Davis v. Pension Benefit Guar. Corp.*, 596 F. Supp. 2d 1 (D.D.C. 2008). The district court denied the motion. *Id.* On appeal, the Court of Appeals affirmed, thus permitting the recoupment and recovery actions to go forward. *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288 (D.C. Cir. 2009).<sup>3</sup>

Following the Court of Appeals decision, an initial scheduling order was issued, and an initial period of discovery occurred. *See* Scheduling Order (Aug. 11, 2009) [DE 40]. On March 12, 2010, the Pilots moved for partial summary judgment on Claim Eight of the Second Amended Complaint [DE 45], after which Judge Robertson stayed discovery and all further proceedings in order to focus on that motion. *See* Order (Mar. 24, 2010) [DE 47].

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<sup>3</sup> We discuss below the precedential value (or lack thereof) of the Court of Appeals’ decision for purposes of this motion.

On May 24, 2010, around the time that the motion for partial summary judgment was fully briefed, Judge Robertson announced during a status conference that he would be retiring from the bench effective June 1, 2010 and the case would be transferred. *See* Minute Entry of May 24, 2010. Judge Robertson also lifted the discovery stay, acknowledged at the hearing that a new scheduling order would need to be entered upon transfer, and suggested that he would include this information in a transfer memo to the next judge. Status Conf. Tr. at 6, 7 (May 24, 2010) [DE 60].

On June 3, 2010, the matter was reassigned to this Court. [DE 58]. After reassignment, the Court granted the parties' joint motion to modify the scheduling order. *See* Order (Aug. 9, 2010) [DE 67]. Under the terms of the modified scheduling order, the Plaintiffs were to file an additional partial summary judgment motion on all claims in the case except for Claim 5, which is a breach of fiduciary duty claim on which additional discovery is necessary and will be completed after briefing of this motion. DE's 67, 70. This motion followed.<sup>4</sup>

### **PRELIMINARY MATTERS**

#### **A. The Summary Judgment Standard**

Rule 56(c)(2) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.” When ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). The Court must also draw “all justifiable inferences” in the non-

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<sup>4</sup> Additional facts will be discussed below when relevant to particular claims.

moving party's favor and accept the non-moving party's evidence as true. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

**B. The Level of Deference to Be Accorded**

As it did at the preliminary injunction stage, the PBGC will no doubt argue that the Court should evaluate all of the PBGC's actions in this case through a deferential lens, since the PBGC is a government agency, and since ERISA is the statute it is charged with administering. The Court should reject any plea by the PBGC for blanket deference: A number of the claims in this case do not even involve the PBGC's interpretation of a statute or regulation, and as to those that do, the Supreme Court has made clear that deference to an agency is due only where Congress delegated to the agency the authority to fill any alleged statutory gaps, which, in most cases, Congress did not do here. And this is before even stating the obvious point that deference is irrelevant if a statute or regulation is clear on its face. As a result, the Court must determine whether deference is due to the PBGC based on the unique facts and circumstances of each of the claims at issue. The PBGC does not get deference simply because it is the PBGC. Instead, the PBGC's entitlement to deference will turn directly on the function it is performing, whether its authority in performing that function was delegated to it by Congress, and any other limitations placed by the Supreme Court or the Court of Appeals on judicial deference to agency decisions.

First of all, two of the claims in this case -- Claims Eight (on which the Pilots have already moved for summary judgment previously) and Eleven -- challenge the PBGC's interpretation of the terms of the US Airways Plan in its role as the Plan's voluntary trustee. *Chevron* deference, of course, is accorded only to an agency's interpretation of a *statute* it is charged with administering. See *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). In evaluating the PBGC's interpretation of the Plan, therefore, the

Court should treat the PBGC no differently than it would a private trustee sued by a plan's participants under ERISA. In the usual ERISA context, a trustee is entitled to some deference on its decisions concerning plan interpretation and factual matters (though not *legal* matters), so long as the relevant document gives it discretion to construe ambiguous plan terms and determine eligibility for benefits. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Nonetheless, even in that context, the Supreme Court has held that, where the same entity both evaluates and pays claims, it presents a "conflict that judges must take into account when they review the discretionary acts of a trustee of a common-law trust." *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 111 (2008). As the Pilots explained in their Motion for Partial Summary Judgment on Claim Eight, the PBGC (as US Airways' successor) would under the Plan have discretion to interpret Plan terms and therefore does get some deference under *Firestone*; yet, because of its dual role as the Plan's trustee (in which it must allocate the assets of the Plan) and the Plan's guarantor (in which it must pay vested benefits not covered by the Plan's assets) -- the PBGC has a clear financial conflict of interest that must temper any deference it may get with respect to its interpretation of the Plan. *See* Pls.' Mot. for Partial Summ. J. at 22-24 (Mar. 12, 2010) [DE 45].

In addition, six other claims at issue in this motion -- Claims One, Two, Three, Six, Seven, and Nine -- involve the PBGC's interpretation of ERISA while acting not in its statutorily mandated role as the guarantor of pension plans, but rather as the Plan's voluntary trustee. In *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001), the Supreme Court clarified that the *Chevron* rubric is triggered only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and that the agency interpretation claiming deference was promulgated in the exercise of that authority.*" (Emphasis added). As

the D.C. Circuit has put it, deference is “due only when the agency acts pursuant to delegated authority.” *Nat’l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 856 (D.C. Cir. 2006). Claims One, Two, Three, Six, Seven, and Nine, however, all concern the PBGC’s interpretation of Section 4044 of ERISA, 29 U.S.C. § 1344(a), in allocating the Plan’s assets. But in § 1344(a), Congress did not delegate the duty to distribute a terminated plan’s assets to the PBGC, but rather to a “plan administrator,” which just so happens in this case to be the PBGC because it volunteered to be the Plan’s trustee. Because the PBGC -- in allocating the Plan’s assets under § 1344(a) -- was not acting pursuant to Congressionally delegated authority, it is not entitled to deference on claims involving the PBGC’s actions as the Plan’s trustee.<sup>5</sup>

Next, unlike the aforementioned claims, Claim Ten involves the PBGC’s actions in its statutorily delegated role as insurer, or guarantor, of the Plan. In 29 U.S.C. § 1322, Congress empowered the PBGC -- and only the PBGC -- to guarantee the non-forfeitable benefits in terminated pension plans. But even here, deference is not automatic: While “[d]eference under *Chevron* to an agency’s construction of a statute that it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps,” the Supreme Court has explained that “[i]n extraordinary cases, however, there

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<sup>5</sup> To be sure, the Court of Appeals’ decision affirming the denial of the Pilots’ motion for preliminary injunction (the effect of which we discuss further below) did address a deference issue -- namely, whether the PBGC is deprived of deference simply because it is wearing its trustee hat. *See Davis*, 571 F. 3d at 1293. But the Court of Appeals never considered the argument -- which was not raised at that preliminary stage of the proceedings -- of whether Congress delegated to the PBGC, when acting as trustee, the authority to fill statutory gaps. Rather, the sole issue before the Court of Appeals was whether PBGC as trustee should be accorded deference even though a private trustee would not be, with an eye toward those cases in which courts declined to defer to the government when acting in other contexts as a trustee, such as settings involving Native Americans. Because delegation, after *Mead*, is the touchstone of the deference inquiry, and because the Court of Appeals did not opine on that question, the Court of Appeals’ decision should not affect this Court’s evaluation of whether Congress has delegated the PBGC, when acting as a trustee, the authority to fill statutory gaps. In any event, Plaintiffs also preserve arguments raised and actually addressed earlier by the Court of Appeals, in the event of further appellate review.

may be reason to hesitate before concluding that Congress has intended such an implicit delegation.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). An example of such an “extraordinary case” where deference is inappropriate is one that involves a “major question,” as Congress is more likely to have focused upon and answered such questions rather than those questions that are merely “interstitial” in nature, and which Congress thus intended to leave with the agencies to answer. *See id.* (citing S. Breyer, *Judicial Review of Questions of Law and Policy*, 38 *Admin. L. Rev.* 363, 370 (1986); *see also id.* at 160 (refusing to defer to the FDA’s interpretation of a statute that had the effect of conferring upon it the authority to regulate tobacco because “Congress could not have intended to delegate a decision of such economic and political significance to an agency.”). As explained in the Argument section below, Claim Ten involves a quintessential “major question” about the very nature of the PBGC’s mission that Congress could not possibly have delegated to the PBGC. Even on Claim Ten, therefore, the PBGC should not be accorded any deference.

Finally, a number of the claims -- in addition to challenging the PBGC’s interpretation of the Plan or ERISA -- also concern PBGC regulations. In some instances, the Pilots assert that a regulation itself is arbitrary and capricious on the grounds that it is contrary to ERISA (Claims Two, Three, Six, and Eleven). Concededly, because the PBGC promulgated its regulations in its role not as trustee, but as agency, and because it did so pursuant to notice-and-comment rulemaking, the PBGC would be entitled to *Chevron* deference on these challenges. *See Mead Corp.*, 533 U.S. at 226-27. But where the Pilots argue not that a given regulation is invalid, but

rather that the PBGC has misinterpreted it in the course of allocating the Plan's assets *as the Plan's trustee*, the PBGC is not entitled to any deference. *See id.*<sup>6</sup>

### **C. The Effect of the Preliminary Injunction Decisions**

Three of the claims at issue in this summary judgment motion -- Claims One, Two, and Ten -- were relevant to a motion for preliminary injunction filed by the Pilots at the outset of this case. *See* Pls.' Mot. for Prelim. Inj. (Aug. 29, 2008) [DE 11]. There, the Pilots sought to halt the PBGC's efforts to recoup amounts already paid to the Pilots (with the PBGC saying those earlier payments were too high even at the low levels the PBGC had been paying); the Pilots asserted that they would win the litigation (asserting, at the time the strength of some of the arguments on Claims One, Two and Ten) and then be entitled to keep the money that the PBGC sought to recoup. Although Judge Robertson denied the motion, and although the D.C. Circuit, on appeal, affirmed Judge Robertson's denial, neither decision affects the Court's consideration of the instant summary judgment motion. The Court must instead evaluate the Pilots' arguments on Claims One, Two, and Ten -- many of which were not even raised in the earlier proceedings -- with a fresh eye, and on their own merits.

It is well-established that "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Va. Petroleum Jobbers Ass'n. v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (holding that its analysis of the plaintiff's likelihood of

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<sup>6</sup> In challenging a PBGC regulation as inconsistent with ERISA, we sometimes use the language of the APA -- namely, that the regulation is arbitrary and capricious or not in accordance with law. *Cf.* 5 U.S.C. § 706. In other words, a PBGC regulation can be arbitrary and capricious under ERISA because it, for instance, violates ERISA's text, just as much as it can -- for the same reasons -- be invalid and arbitrary and capricious under the APA. In any case, Claim Twelve raises all of the prior ERISA claims, but pursuant to the APA, in case there were some different legal standards for challenging a PBGC regulation under ERISA and the APA.

success on a motion for preliminary injunction was “[w]ithout prejudice to a contrary showing at the time the court hears this case on the merits”). As the D.C. Circuit has explained, “[t]he decision of a trial or appellate court whether to grant or deny a preliminary injunction does not constitute the law of the case for the purposes of further proceedings and does not limit or preclude the parties from litigating the merits.” *Berrigan v. Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974); *NOW Wash., D.C. Chapter v. Social Sec. Admin.*, 736 F.2d 727, 744 n.154 (D.C. Cir. 1984) (same); *see also Young v. Motion Picture Ass’n*, 299 F.2d 119, 121 (D.C. Cir. 1962) (“nor would any determination of those questions (presented by motion for preliminary injunction) by this court on appeal be binding on the trial court nor upon either of the parties in considering and determining the merits of the controversy.”).

A court’s freedom to consider anew the merits of a case, uninhibited by any previous preliminary injunction decision rendered at the trial or appellate level, flows from the speculative and incomplete nature of the preliminary injunction inquiry. A district court considering a preliminary injunction motion “is called upon to exercise its discretion upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally.” *Indus. Bank of Wash. v. Tobriner*, 405 F.2d 1321, 1324 (D.C. Cir. 1968). Appellate review of a district court’s preliminary injunction decision is equally limited, as the court of appeals “will not consider the merits of the case further than necessary to determine ‘whether the District Court abused its discretion.’” *Id.* (citing *Young*, 299 F.2d at 121.) Moreover, the relief sought by a preliminary injunction “is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or

conclusive, characterized by its for-the-time-beingness.” *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953). In light of this inherent impermanence, “[t]he judge’s legal conclusions, like his fact-findings, are subject to change after a full hearing and the opportunity for more mature deliberation.” *Id.*

It is particularly essential that, with respect to this summary judgment motion, the Court evaluate for itself the parties’ competing arguments, unbound by any decision by Judge Robertson or the D.C. Circuit. As explained further below, many of the arguments the Pilots now advance with respect to Claims One, Two, and Ten were not even asserted at the preliminary injunction stage. Much of the earlier briefing and argument was taken up not with the merits of the Pilots’ claims, but with discussion regarding whether the Pilots’ interim loss of money could constitute irreparable harm. Additionally, at the Court of Appeals, the case was decided based on abbreviated presentations associated with PBGC’s motion to dismiss the appeal, rather than on full briefing. The motion currently before the Court, by contrast, presents a fully developed version of the Pilots’ arguments on the merits of all of their claims. The Court should of course accord these arguments its full scrutiny, and that scrutiny should be informed solely by this Court’s evaluation of the arguments here advanced.<sup>7</sup>

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<sup>7</sup> It should be noted that the Court of Appeals affirmed the denial of the preliminary injunction on alternative grounds, one being lack at the time of the necessary demonstration of likelihood of success on the merits and the other being insufficient showing of irreparable harm. In light of the irreparable harm ruling, any discussion of the likelihood of success on the merits (which was itself abbreviated, just as the parties’ presentations were) could be treated as dicta. Even on irreparable harm, the Court of Appeals’ conclusion that the loss of money cannot constitute irreparable harm has since been, in a different context, discredited by Justice Scalia. See *Philip Morris USA Inc. v. Scott*, 177 L. Ed. 2d 1040, 1043 (2010) (Scalia, J., in-Chambers).

## ARGUMENT

### **I. THE PILOTS ARE ENTITLED TO SUMMARY JUDGMENT ON CLAIM ONE BECAUSE THE PBGC'S *AD HOC* INTERPRETATION OF A PLAN PROVISION'S EFFECTIVE DATE IS IRRECONCILABLE WITH ITS OWN REGULATION AND ERISA**

Claim One of the Second Amended Complaint involves a dispute over the date a Plan amendment was first “in effect.” The amendment at issue created an Early Retirement Incentive Program (“ERIP”) that offered an enhancement to the normal retirement benefit for those eligible pilots who elected to participate in the program. Although the ERIP was expressly made effective on January 1, 1998, the PBGC -- based on an *ad hoc* definition of a plan amendment’s “effective date” that is inherently incompatible with the PBGC’s own regulation -- ascribed to the ERIP an effective date later than the one specified in the amendment that created it. Conveniently, the PBGC’s novel interpretation allowed it to disregard the ERIP in paying a certain category of benefits, thereby saving itself multi-millions of dollars.

For the reasons set out below, the PBGC’s interpretation of the ERIP’s effective date must be set aside. Additionally, because the PBGC here is acting as a trustee who is applying *the law*, as opposed to Plan terms or deciding factual disputes, its decision under ERISA’s standard-of-review framework is entitled to no deference. *See Smith v. Sydnor*, 184 F.3d 356, 365 (4th Cir. 1999).

#### **A. Background on the ERIP and the PBGC’s Decision to Disregard its Specified Effective Date**

The PBGC’s interpretation of the ERIP that the Pilots challenge in Claim One was made, as noted, by the PBGC in its role as the Plan’s voluntary trustee in allocating the Plan’s assets. Section 4044(a) of ERISA, 29 U.S.C. § 1344(a), creates various priority categories setting out the order in which the plan trustee is to allocate a terminated plan’s remaining assets, with the assets to be used first to pay benefits in Priority Category One, second to pay benefits in Priority

Category Two, and so on through Priority Category Six. *See* 29 U.S.C. § 1344(a). The Pilots contend that the ERIP benefit falls within Priority Category Three (“PC3”). PC3 is limited to benefits “based on the provisions of the plan (*as in effect during the 5 year period ending on [the] date [of termination]*), under which such benefit would be the least.” *Id.* § 1344(a)(3) (emphasis added). Accordingly, if a plan provision was “in effect” during the entirety of the five-year period prior to the date of plan termination and was not amended during that time to reduce its value, then that provision must be used to calculate PC3 benefits. As applied to this case, this means that, if a Plan provision was “in effect” prior to March 31, 1998 -- five years before the March 31, 2003 Plan termination date -- and remained unchanged during the ensuing five-year period, then it must be included in PC3. The PBGC, by regulation, defines a plan provision as being “in effect” “on the later of the date on which it is adopted or the date it becomes effective.” 29 C.F.R. § 4044.13(b)(6).

Taking either the date on which it was adopted or became effective, there is no question that the ERIP benefit was “in effect” prior to March 31, 1998 (*i.e.*, the date five years prior to the Plan’s termination). The ERIP was adopted on December 4, 1997, when US Airways and the Airline Pilots Association (“ALPA”) entered into Letter of Agreement 46 (“LOA 46”), making December 4, 1997 the “adoption date.” *See* LOA 46 (AR 96-111). As to the effective date, LOA 46 explicitly provided that the ERIP would be “effective as of the effective date of the new Collective Bargaining Agreement between the Company and the [Air Line Pilots] Association (the “Effective Date”).” *Id.* at AR 96. Because January 1, 1998 was the effective date of the collective bargaining agreement, *see* Agreement with the Air Line Pilots Association International (Dec. 4, 1997) (AR 1188), the ERIP’s effective date was thus also January 1, 1998.

Functionally, the ERIP allowed eligible pilots who retired early to have their benefits calculated by adding (1) five years to the pilot's age, or (2) five years to the pilot's credited service, or (3) whichever combination of additional age and service (up to a total of 5 years) produced the highest benefit. *Id.* at AR 99-100. Only those pilots who were on the Pilot System Seniority List and who turned 45 on or before May 1, 2000 were eligible for the ERIP. *Id.* at AR 96. To participate in the ERIP, an eligible pilot was required to make a formal election to do so during a specified two-month "Window Period" that ran from March 1, 1998, through April 30, 1998. *Id.* Retirement dates were to be assigned by the company pursuant to its operational needs "as soon as possible after the close of the Window Period." *Id.* at AR 97.

Even though the ERIP, by the plain terms of LOA 46, was both adopted and effective prior to March 31, 1998 -- the first day of the five-year pre-termination period -- the PBGC concluded that the ERIP was not "in effect" prior to March 31, 1998, and thus was not entitled to PC3 status. Supposedly, "[i]n deciding this issue, PBGC applied the rule in its regulations which states that, for PC3 benefit purposes, a plan amendment is 'in effect' on the later of the adoption or effective date." PBGC Decision at 8 (AR 9) (citing 29 C.F.R. § 4044.13(b)(6)). The PBGC then explained that a plan amendment's "effective date" is not the effective date specified in the amendment, but rather the date it "becomes operative." *Id.* The PBGC reasoned that the ERIP became operative on May 1, 1998 -- the day after the Window Period closed -- "since that is the earliest date a participant could retire and receive the ERIP benefit increase." *Id.* at 10 (AR 11). Conveniently for the PBGC's purposes, May 1, 1998 is 4 years and 11 months from the March 31, 2003 termination date -- a mere one month shy of the PC3 cut-off -- thus making the ERIP excludable from PC3. The PBGC cited not a single statute, regulation, court decision, or even any previous PBGC decision that supported its conclusion that the effective date of a plan

amendment is the date when benefits are first payable under the amendment, and not the effective date specified in the amendment itself. *See id.* at 6-13 (AR 7-14).

**B. The PBGC’s Interpretation of the Date a Plan Amendment “Becomes Effective” as the Date When Benefits Are First Payable Under the Amendment Is Inherently Inconsistent with the Regulation Upon Which the PBGC Relied**

The PBGC’s approach is unsupportable for a number of reasons, the most glaring of which is that it is irreconcilable with the very regulation the PBGC claimed to have been interpreting, 29 C.F.R. § 4044.13(b)(6). That regulation states that “a plan or amendment is ‘in effect’ on the *later of* the date on which it is adopted or the date it becomes effective.” 29 C.F.R. § 4044.13(b)(6) (emphasis added). By defining “in effect” as the “later of” the adoption date or effective date, § 4044.13(b)(6) necessarily contemplates that a plan amendment’s adoption date can conceivably be later than its effective date.

But under the PBGC’s *ad hoc* interpretation of when a plan amendment “becomes effective,” a plan amendment can *never* have an adoption date later than its effective date. As explained, the PBGC determined that the effective date of a plan amendment is not the date specified in the amendment itself, but rather the “operative” date of the amendment -- that is, “the earliest date a participant could retire and receive” benefits under that amendment. PBGC Decision at 10 (AR 11). The date that a plan participant can retire and begin receiving benefits under a given plan amendment, however, will *always* come after the amendment’s date of adoption. How could a participant ever retire and begin receiving benefits under a plan amendment that has yet to be adopted? As a result, if the PBGC’s interpretation of when a plan amendment “becomes effective” were correct, there would have been no need for § 4044.13(b)(6) to define “in effect” as the “later of” its adoption or effective date; the regulation could simply have defined a plan amendment as being “in effect” on its effective date without

any reference to the adoption date, since, under the PBGC's interpretation, an amendment's effective date always comes after its adoption date.

Even if the PBGC here were acting as a government agency owed some deference, as opposed to a trustee whose legal constructions are not entitled to deference, its interpretation of its own regulation in a manner inconsistent with that regulation would necessitate the interpretation being set aside as arbitrary and capricious. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) (“an agency’s interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted.”) (internal citation and quotations omitted). One way for such an inconsistency to arise is when an interpretation renders a statutory or regulatory term superfluous: “It is a court’s duty to give effect, if possible, to every clause and word of a statute. The same is true for regulations.” *Sierra Club v. EPA*, 536 F.3d 673, 680 (D.C. Cir. 2008) (internal citations and quotations omitted). Indeed, the Supreme Court has explained that it is “thus reluctant to treat statutory terms as surplusage in any setting.” *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal citation and quotations omitted). Accordingly, the D.C. Circuit has repeatedly set aside an agency’s interpretation of a statute that renders a statutory term ‘mere surplusage.’” *See, e.g., Natural Res. Def. Council v. EPA* (“NRDC”), 489 F.3d 1364, 1373 (D.C. Cir. 2007) (explaining that because “EPA’s interpretation would make the words redundant and one of them ‘mere surplusage,’ the “EPA’s interpretation of Section 112(c)(9) . . . is contrary to the plain language of the statute”); *Ass’n of Am. R.R. v. Interstate Commerce Comm’n.*, 564 F.2d 486, 495 (D.C. Cir. 1977) (holding that a regulation promulgated by the Interstate Commerce Commission was arbitrary and capricious, because, *inter alia*, the regulation “renders the parenthetical limitation surplusage.”); *see also Novelty, Inc. v. DEA*, 571 F.3d 1176, 1188 (D.C. Cir.) (Tatel, J., concurring) (“Given that the word ‘stored’

fails to avoid surplusage, the Deputy Administrator’s interpretation is thus unreasonable under *Chevron* and cannot support her conclusion that Novelty failed to comply with applicable law.”).

Because the PBGC’s interpretation of when the ERIP became effective renders 29 C.F.R. § 4044.13(b)(6)’s “later of” clause “mere surplusage,” *NRDC*, 489 F.3d at 1373, the PBGC’s interpretation should be set aside (certainly under the *de novo* review applicable for a trustee applying the law, and even under a more lenient deference standard applicable to agencies interpreting their own regulations). The only interpretation of when a plan amendment “becomes effective” that gives meaning to the “later of” clause is the effective date specified in the amendment itself, since an amendment’s adoption date could conceivably be later than the specified effective date, such as in the common case of an amendment having a retroactive effective date. In contrast, if, as the PBGC believes, an amendment “becomes effective” only on its “operative date” (*i.e.*, when benefits are first payable under the amendment), an amendment’s adoption date could never, under any set of circumstances, be later than the date it “becomes effective.” By determining that the ERIP became effective on the date it became “operative,” therefore, the PBGC has impermissibly rendered a key provision of the regulation “mere surplusage.” *NRDC*, 489 F.3d at 1373.

In addition to violating the rule against surplusage, the PBGC’s interpretation of when a plan amendment “becomes effective” for purposes of § 4044.13(b)(6) also violates the “rule of construction to adopt the simplest, most obvious interpretation of statutory language.” *Baker v. Se. Mich. Shippers Co-operative Ass’n.*, 376 F. Supp. 149, 156 ( E.D. Mich. 1973). To reiterate, the PBGC’s regulation defines “in effect” as “the later of the date on which it is adopted or the date it becomes effective.” 29 C.F.R. § 4044.13(b)(6). Virtually every amendment to every pension plan specifies the date upon which the amendment is to become effective. Given the

prevalence of plan amendments containing specified effective dates, it is certainly simpler, and more obvious, to deem that an amendment “becomes effective” for purposes of § 4044.13(b)(6) on the specified effective date rather than on the “operative date” (as that term is defined by the PBGC), as the latter approach would inject significant uncertainty into the determination of PC3 benefits and would produce absurd results. To illustrate, imagine a company located in Silicon Valley -- whose entire workforce is under the age of 30 and where no participant could begin receiving benefits until age 60 -- adopted an amendment to its pension plan. Instead of simply looking to the effective date specified in the amendment itself to discern when it became effective, the PBGC would instead have to determine when the first participant could retire and begin receiving benefits under the amendment, which, in this hypothetical, would not be until 30 years in the future.

The widespread industry practice of including specified effective dates in plan amendments makes the specified effective date the “most obvious” interpretation of when a plan amendment “becomes effective” for still another reason: The PBGC’s regulation does not say otherwise. The sole purpose of the PBGC is to insure and administer pension plans; as a result, it is surely aware of the prevalence of plan amendments containing specified effective dates. Yet somehow the PBGC did not see fit to make clear in its regulation that a plan amendment “becomes effective” not on its specified effective date, but only on its “operative date.” Had the PBGC truly intended § 4044.13(b)(6) to mean that an amendment “becomes effective” on “the earliest date a participant could retire and receive [the benefit],” PBGC Decision at 10 (AR 11) -- one would think the PBGC would have said so in its regulation to avoid any confusion. Having utterly failed to do so, the “simplest, most obvious interpretation” of the date an amendment “becomes effective” under 29 C.F.R. § 4044.13(b)(6) -- whether for the PBGC as trustee or as an

agency interpreting its regulation -- is the effective date specified in the amendment. *See Baker*, 376 F. Supp. at 156.

The PBGC's decision to equate the ERIP's effective date with its "operative date" also cannot be squared with the D.C. Circuit's distinction between *effective* dates of legal provisions and the *operative* dates of legal provisions. *See Am. Fed'n of Gov't Employees v. Campbell*, 659 F.2d 157, 162 (D.C. Cir. 1980). They are not, as the D.C. Circuit has expressly held, synonymous. The "operative date" is the date when activity anticipated under a legal provision "actually" occurs (*id.* at 162, 163), whereas the "effective date" for the legal provision is a date chosen by the provision's drafters as the time when legal coverage under the provision shall commence (even if this is to be a "retroactive" period). *Id.* at 158; *accord id.* at 163. The PBGC's construction that the ERIP went into effect on the day the first benefits were paid mistakes the ERIP's operative date for its effective date.

Nor is there any policy rationale for the PBGC's position. Section 4044.13(b)(6)'s definition of "in effect" as the later of an amendment's adoption and effective date serves the obvious purpose of preventing companies administering soon-to-be-terminated pension plans from circumventing the PBGC's look-back rules by adopting amendments on the eve of plan termination and according them retroactive effect. *See infra*, p. 32 (discussing the policy rationale for five-year lookback). If a company attempts such a gambit, § 4044.13(b)(6) deems the amendment as being "in effect" not on the retroactive effective date specified by the amendment, but rather on the date it was adopted (the later of the two dates), thus taking the amendment outside the scope of PC3. But where, as here, a company adopts an amendment well before plan termination (and indeed, before the PBGC's five-year look-back period for purposes of PC3 benefits) and accords it an effective date that also falls before any look-back period, there

is little threat the company is doing it for manipulative purposes. For the PBGC to nevertheless disregard such an amendment by ignoring its specified effective date, and instead deeming the amendment's effective date to be its "operative date," serves no articulable policy purpose.

Finally, the PBGC's decision to equate the ERIP's effective date with its "operative date" is at odds with ERISA's PC3 provision. Again, the PBGC deemed the ERIP excludable from PC3 because the "benefit increase" under the ERIP was first payable 4 years and 11 months prior to the Plan's termination date. PBGC Decision at 10 (AR 11). ERISA, however, defines PC3 benefits as those "based on *the provisions of the plan* (as in effect during the 5 year period ending on [the] date [of termination]), under which such benefit would be the least." 29 U.S.C. § 1344(a)(3)(A) (emphasis added). By its plain language, the statute focuses squarely on when the *provisions of the plan* are in effect -- not on when the *benefit itself* was first operative or receivable. If the PBGC's construction of when a benefit "becomes effective" were correct, therefore, 29 C.F.R. § 4044.13(b)(6) would "operate[] to create a rule out of harmony with the statute," making it "a mere nullity." *Dixon v. United States*, 381 U.S. 68, 74 (1965).<sup>8</sup>

In short, the PBGC's self-serving, *ad hoc* interpretation of when the ERIP became effective cannot be harmonized either with its own regulation or with ERISA. The only interpretation of the date a plan amendment "becomes effective" that gives meaning to the PBGC's regulation at 29 C.F.R. § 4044.13(b)(6), and that comports with ERISA's PC3

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<sup>8</sup> Although Claim One was one of the three claims at issue at the preliminary injunction stage, the Pilots did not at that time detail the argument that the PBGC's decision to equate the ERIP's effective date with its operative date renders superfluous the "later of" clause in 29 C.F.R. § 4044.13(b)(6), and for that reason makes the PBGC's decision arbitrary and capricious. Of course, even if this argument had been raised earlier, that would still not make this Court's or the Court of Appeal's decisions binding on this Court for purposes of deciding the instant motion. *See* pp. 13-16, *supra*. But the fact that it is being raised for the first time here only makes it more imperative that this Court consider the Pilots' arguments afresh.

provision, is the effective date specified in the amendment itself. Here, there is no dispute that the ERIP's specified effective date (as set out in LOA 46) was January 1, 1998. Because that date was more than five years prior to the Plan's March 31, 2003 termination date, the ERIP was thus "in effect" more than five years prior to Plan termination, and must be accorded PC3 status. *See* 29 U.S.C. § 1344(a)(3)(A). The Court should set aside the PBGC's decision and instruct the PBGC to include the ERIP in its calculation of PC3 benefits.

## **II. THE PILOTS ARE ENTITLED TO SUMMARY JUDGMENT ON CLAIM TWO BECAUSE THE PBGC IMPERMISSIBLY APPLIED AN OUTDATED 415(B) LIMIT TO RESTRICT PC3 BENEFITS**

Claim Two of the Second Amended Complaint challenges the PBGC's misapplication of a longstanding Plan provision, once again in its role as the Plan's trustee allocating PC3 benefits, that caps the amount of Plan benefits to be paid in a given year at the amount specified in § 415(b) of the Internal Revenue Code, 26 U.S.C. § 415(b). The PBGC construed this provision, embodied in section 7.1 of the Plan, as conferring an "automatic benefit increase," reasoning that whenever *Congress* increased the § 415(b) limit, benefits paid to some participants also increased. And because the PBGC, by regulation, disregards automatic benefit increases that occur within three years of plan termination for purposes of allocating PC3 benefits, the PBGC limited PC3 benefits to the § 415(b) cap that was in effect as of three years prior to Plan termination, a decision that severely restricted the amount of PC3 benefits payable to eligible pilots.

The PBGC's determinations with respect to Claims Two, as with Claims One, must be set aside. Section 7.1 is assuredly not an automatic-benefit-increase provision. To the contrary, it actually reduces the amount of benefits to which a participant would otherwise be entitled under the Plan's benefit formula. Moreover, section 7.1 is an entirely neutral provision, for any "increase" in benefits stemming from changes to the § 415(b) limit are related not to any intent

by the Plan sponsor to confer a benefit increase, but rather to the completely exogenous circumstance of Congressional amendment of the Internal Revenue Code. Hence, the PBGC thus should apply the § 415(b) limit in place at the time it pays benefits, as the plain language of Plan section 7.1 requires. In deciding to apply an outdated limit in place three years prior to Plan termination, the PBGC mischaracterized section 7.1 of the Plan, ignored ERISA's plain statutory language, and misapplied its own regulation.

**A. The PBGC Applied an Outdated § 415(b) Limit, Thereby Reducing the Pilots' PC3 Benefits Significantly**

To understand why the PBGC erred in construing section 7.1 as a benefit-increase provision, it is necessary first to clarify the relationship between section 7.1 and the payment of benefits under the Plan. The Plan's benefits formula, like that of most pension plans, is based largely on a participant's final average earnings with the company and number of years of credited service. *See* Plan § 4.1 (Jan. 1, 2001) (AR 386-87). That formula is set out in section 4.1 of the Plan, entitled "Basic Formula."

Entirely separate from the Plan's basic benefits formula is Section 7.1, which operates to *restrict* the amount of benefits a participant may be paid in a given year regardless of whether that participant is entitled to a higher benefit under the Plan's benefits formula. The restriction in section 7.1 stems from § 415(b) of the Internal Revenue Code, which creates a statutory limit on the amount of benefits a pension plan can pay in a given year to an individual participant or beneficiary while still allowing the plan to qualify for favorable tax treatment. *See* 26 U.S.C. § 415(b). Internal Revenue Service ("IRS") regulations require that, in order for a plan to obtain favorable tax treatment, the plan's provisions must "preclude the possibility that the limitations imposed by section 415 will be exceeded." 26 C.F.R. § 1.415(a)-1(d)(1). Consequently, section 7.1 of the Plan provides that benefits paid to a participant or beneficiary in a given year "may not

exceed the limitations contained in Section 415(b) of the Code.” *See* Plan § 7.1 (AR 392). Thus, if the Plan’s benefit formula yields an annual pension for a particular Pilot in excess of the existing § 415(b) limit, section 7.1 instructs that the pilot may not receive that portion of his Plan benefit over and above the § 415(b) limit.

During the five-year period prior to the Plan’s termination, Congress changed the amount of the § 415(b) statutory cap. Specifically, in 2001, Congress “prospectively increased the [then-existing] \$90,000 [§ 415(b)] limit to \$160,000, with the \$160,000 amount reflecting a ‘base period’ of the calendar quarter beginning July 1, 2001, and with adjustments based on COLAs to occur thereafter.” PBGC Decision at 19-20 (AR 20-21); *see also* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 611(a)(1), (4), 115 Stat. 38, 96-97; 26 U.S.C. § 415(d)(3)(A) (explaining that the “base period” for purposes of the \$160,000 amount is the calendar quarter beginning July 1, 2001). In addition to the increase resulting from the 2001 amendment, the § 415(b) limits also increased year-to-year throughout the five-year pre-termination period by virtue of yearly, congressionally-mandated cost-of-living adjustments. *See* 26 U.S.C. § 415(d)(1). But while the § 415(b) limits changed during the five years prior to Plan termination, the provision of the Plan cutting off benefits in excess of the § 415(b) cap -- Section 7.1 -- remained exactly the same. *Compare* US Airways Plan (2001 version), Section 7.1 (AR 392) *with* US Airways Plan (1994 version), Section 7.1, (AR 449).

The question at issue in Claim Two is the proper affect of Plan section 7.1 on the PBGC’s allocation of PC3 benefits. ERISA instructs the trustee, here the PBGC, to accord PC3 status to those benefits owed to participants who either did retire, or who could have retired, as of three years prior to Plan termination and, as noted earlier, “based on *provisions of the plan* (as in effect during the 5-year period ending on [the date of plan termination]) under which such benefit

would be the least.” 29 U.S.C. § 1344(a)(3)(A) (emphasis added). There is no dispute that section 7.1 is a “provision of the plan” that remained textually unchanged for the five years preceding Plan termination, and that it is thus among the Plan provisions that the PBGC must use to calculate PC3 benefits. What is in dispute, however, is whether the PBGC, in applying the § 415(b) limit as mandated by section 7.1, should apply the § 415(b) limit in place at the time it pays benefits (as the Pilots contend), or whether it should apply the limit in place three years before the Plan was terminated.

The PBGC took the latter course, deciding to apply an outdated § 415(b) limit that was in effect as of April 1, 2000 -- three years prior to Plan termination. The PBGC arrived at this conclusion by first determining that Congressionally imposed increases to the § 415(b) limits “would be treated as benefit increases that are effective -- both for PC3 and phase-in purposes -- from the date the statutory increase takes effect.” PBGC Decision at 20 (AR 21). Once it construed changes to the § 415(b) limit as conferring a benefit increase, the PBGC then applied its regulation governing automatic benefit increases, 29 C.F.R. § 4044.13(b)(5). *See id.* at 21 (AR 22). That regulation states that, to the extent that a plan provision in effect for five years prior to Plan termination provides for “automatic increases in the benefit formula,” the PBGC will honor such increases only to the extent they occur in the fourth and fifth years prior to Plan termination; increases occurring at any point thereafter will be disregarded. *See* 29 C.F.R. § 4044.13(b)(5). The PBGC therefore paid PC3 benefits based on the § 415(b) limit in effect as of April 1, 2000, three years prior to Plan termination.

The PBGC’s interpretation of ERISA and its own regulation, the effect of which was to freeze the § 415(b) cap for PC3 benefits as of April 1, 2000, had significant negative repercussions for the Pilots’ benefits. That is because, as mentioned, Congress in 2001 increased

the baseline § 415(b) limit from \$90,000 to \$160,000. Thus, the § 415(b) limit in 2000 (taking into account cost-of-living increases) was \$135,000, whereas in 2002 and 2003 the limit jumped to \$160,000. PBGC Decision at 20 (AR 21). By freezing the § 415(b) limit as of 2000, therefore, the PBGC ratcheted down to \$135,000 from a potential high of \$160,000 the annual pension benefit for Pilots to be paid as Priority Category 3 benefits from remaining Plan assets.

Compounding matters, for those Pilots who had not yet reached the mandatory retirement age of 60 as of April 1, 2000, but who could have taken early retirement as of that date -- thus making them eligible for PC3 benefits -- the PBGC used an even lower § 415(b) limit. Thus, for example, a pilot who actually retired in 2006 at the mandatory retirement age of 60 but who was eligible to retire in April 2000, would not only be deemed by the PBGC to have been retired as of April 1, 2000 -- when the § 415(b) limit was \$135,000 -- but because the pilot was only 54 as of that date, this already-too-low \$135,000 limit would be actuarially reduced even further to reflect his fictional early benefit commencement date. There is absolutely no authority or justification for actuarially reducing a benefit that commences in 2006 (or any other date) as though it commenced in 2000. The governing portion of 415(b) dealing with actuarial adjustments for early retirement makes clear that it is when the benefit "begins" that determines what is required to make it equivalent," and furthermore states that the benefit itself must be "equivalent" to "an annual benefit beginning at age 60." 26 U.S.C. Sections 415(b)(2)(C) & (b)(9). Artificially using April 1, 2000, where no early retirement occurred, no retirement benefit "began" as of that date as of that date, and the participant's benefit was not adjusted to one

beginning at age 60, serves no legitimate actuarial purpose and itself violates of ERISA and 415(b).<sup>9</sup>

The PBGC's decision to pay PC3 benefits based on an outdated § 415(b) limit cannot withstand scrutiny. As noted below, not only does the PBGC's decision find no support either in the text or legislative purpose of the PC3 provision, 29 U.S.C. § 1344(a)(3), but its regulation governing automatic benefit increases plainly does not apply to Plan section 7.1.<sup>10</sup>

**B. Nothing in ERISA's PC3 Provision Instructs the PBGC to Apply the § 415(b) Limit in Effect Three Years before Plan Termination**

As a threshold matter, the plain language of ERISA's PC3 provision in no way dictates the conclusion arrived at by the PBGC; indeed, the PBGC did not in fact rely upon the PC3 provision itself for its decision. Again, that provision instructs that, in allocating the Plan's assets, the Plan's trustee -- here the PBGC -- must accord PC3 status to the following benefits:

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to

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<sup>9</sup> The PBGC's actions in this regard further illustrate its misapplication of principles of actuarial equivalence to calculate benefits for those Pilots who were retirement eligible on April 1, 2000, but who continued to work after that date. Those failings are discussed in detail in Claim Seven, *infra*.

<sup>10</sup> Because the PBGC again is acting as a trustee applying ERISA and PBGC regulations to make PC3 determinations, its actions -- as with any ERISA trustee applying the law (as opposed to construing a plan or facts) -- are not subject to deference. Later the Pilots alternatively challenge in the context of Claim Two the legality of PBGC's automatic-benefit-increase regulation, if it did apply here (which it does not). *See* Part II(D), *infra*. The Pilots concede that, for that very last argument concerning the lawfulness of the regulation, the *Chevron* standard would apply; but even under *Chevron*, no deference is owed the PBGC with respect to the Pilots' legal challenge to the regulation, because the relevant statutory terms are not ambiguous, meaning that *Chevron* requires no deference to the PBGC as an agency on the regulation.

each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

29 U.S.C. § 1344(a)(3). As is evident from the statutory language, ERISA's PC3 provision instructs the PBGC to pay benefits in accordance with two separate "lookbacks": (1) a three-year lookback that tells the PBGC *who* is entitled to PC3 benefits -- *i.e.*, those participants who either were retired, or who could have retired, as of three years prior to plan termination (and their beneficiaries); and (2) a separate five-year lookback that tells the PBGC *which plan provisions* to use in calculating benefits for such PC3-eligible individuals -- *i.e.*, those that were in effect during the five-year period prior to plan termination and under which benefits would be the least.

While the two lookbacks identify *which* individuals and plan provisions are relevant to allocating PC3 benefits, neither lookback tells the PBGC *how* to interpret the applicable Plan provisions. The three-year lookback clearly has no relevance to plan interpretation issues: it merely tells the PBGC to whom it must pay PC3 benefits (those pilots who either were retired or could have retired as of three years prior to plan termination). And the five-year lookback is similarly irrelevant on matters of interpretation, as it simply identifies which provisions the PBGC must use to calculate PC3 benefits (the provisions in effect during the five-year pre-termination period under which benefits would be the least). It is the Pilots' position, therefore, that when the PBGC applies section 7.1 to calculate PC3 benefits, it must apply that provision as it is written (and as it has always read), which requires that benefits be capped at the § 415(b) limit in place at the time benefits are paid. Neither lookback compels the application of the § 415(b) limit that was in existence at some earlier point in time.

Nor does anything in the PC3 provision's purpose or legislative history warrant application of an outdated § 415(b) limit for purposes of paying PC3 benefits. Congress's purpose in restricting the pool of PC3 plan provisions to those in effect during the five years prior to plan termination "under which such benefit would be the least" was to avoid having to honor generous plan amendments adopted by companies when plan termination was imminent or inevitable. *See* S. Rep. No. 93-383, at 84 (1973) ("To protect against evasion of the above-described limits on insurance benefits by use of pension fund assets to first pay uninsured benefits (e.g., those resulting from recent amendment[] . . . ), the committee bill . . . sets forth an order of priorities for allocation of plan assets on failure of the plan."). Here, section 7.1 is a longstanding Plan provision that had been in effect long before termination was on the horizon; it was not a recent Plan amendment adopted by the company to increase benefits when it knew that the PBGC would soon be on the hook. Moreover, Congress intended to protect the PBGC from actions of companies (or companies and unions for collectively-bargained plans); there is no evidence that Congress intended to protect the PBGC from the actions of Congress itself in amending the Internal Revenue Code. Applying the current § 415(b) limits to pay PC3 benefits, consequently, would not run afoul of the Congressional purpose behind the PC3 statutory provision's "least" benefit clause.

It is not surprising, then, that the PBGC, in applying the § 415(b) limit in effect as of three years prior to plan termination, did not rely on the text of ERISA's PC3 provision itself. In fact, the PBGC's actuaries -- whose calculations of Plan benefits served as the basis for the Pilots' appeal to the PBGC -- explicitly based their decision to apply the § 415(b) limit in effect in 2000 not on the PC3 provision, but rather on "PBGC policy." Actuarial Case Memorandum for Retirement Income Plan for Pilots US Airways, Inc. at 22, ¶ g (AR 1230) (*In accordance*

*with PBGC policy*, the COLA adjustments under IRC 415 through 3/31/2000 are recognized because they were automatically reflected as increased benefits for retired members as they became effective.”) (emphasis added). The PBGC’s Actuarial Case Memo nowhere cites the PC3 provision for its decision to apply an outdated § 415(b) limit.

As for the PBGC’s Appeals Board, to be sure, the Appeals Board indicated in its opinion that it viewed the § 415(b) limits as “provisions of the plan” for purposes of 29 U.S.C. § 1344(a)(3), a term evocative of the PC3 provision. *See* PBGC Decision at 21 (AR 22) (“US Airways’ adoption of provisions that incorporated the limits into its formal pension plan documents made the incorporated limits ‘provisions of the plan’ within the meaning of the PC3 definition in section 4044(a)(3) of ERISA”). But if the various § 415(b) limits were indeed “provisions of the plan” as the PBGC suggested, then the PBGC would have been statutorily obligated to apply the § 415(b) limit in effect during the five-year period ending on the date of plan termination “*under which such benefit would be least.*” *See* 29 U.S.C. § 1344(a)(3). The § 415(b) limit in effect during this 5-year period that would yield the “least” benefit, of course, would be the limit in place as of five years prior to plan termination -- *i.e.*, as of April 1, 1998. Yet, the PBGC did not apply that limit, but rather applied the one in place as of April 1, 2000 -- three years prior to plan termination. The PBGC’s own decision, therefore, belies the notion that it applied the § 415(b) limit as if it were a provision of the plan.

That the § 415(b) limit is not a “provision of the plan” -- and that the PBGC did not pay PC3 benefits as it were such -- is further evidenced by the fact that the PBGC found that its regulation governing so-called “automatic benefit increases” applied to Plan section 7.1. The PBGC explained that its “PC3 regulation has a specific provision for ‘automatic benefit’ increases, *which PBGC has applied to the Plan with respect to the section 415(b) limits.*” PBGC

Decision at 22 (AR 23) (emphasis added). That regulation provides that “[i]f plan provisions adopted and effective on or before the first day of the 5-year period ending on the termination date provided for automatic increases in the benefit formula,” the PBGC, in allocating PC3 benefits, will only honor increases that occur in the fourth and fifth years prior to plan termination. 29 C.F.R. § 4044.13(b)(5) (emphasis added). As the PBGC explained, “based on its regulation, PBGC is paying PC3 benefits that include the increases in the section 415(b) limits that went into effect before DOPT-3 [*i.e.*, date of Plan termination, minus three years].” PBGC Decision at 22 (AR 23). The PBGC’s application of its automatic-benefit-increase regulation is, for several reasons, irreconcilable with the notion that § 415(b) of the Internal Revenue Code is a “provision of the plan.”

In the first place, 29 C.F.R. § 4044.13(b)(5), by its plain terms, applies to “plan provisions” that provide for automatic increases in the benefit formula. Assuming the PBGC is correct that 29 C.F.R. § 4044.13(b)(5) is the appropriate rubric through which to interpret section 7.1 (which, as explained in Part C, *infra*, the Pilots’ contest), then the relevant “plan provision” is of course section 7.1, with successive changes to the § 415(b) limits simply conferring “automatic increases” in Plan benefits, not constituting new plan provisions. Indeed, if the § 415(b) limits themselves were in fact “provisions of the plan” -- with each passing year and each increase constituting a new provision -- then the PBGC would have been required, under the terms of its own regulation, to ignore the limit in place as of April 1, 2000 (and, indeed, any limit taking effect at any point after date of Plan termination minus five years), because that limit was not “adopted and effective on or before the first day of the 5-year period ending on the termination date.” *See* 29 C.F.R. § 4044.13(b)(5). But it did not, and instead applied the limit in effect as of DOPT-3. In short, the fact that the PBGC applied its automatic-benefit-increase

regulation establishes that the only relevant plan “provision” here is section 7.1, not § 415(b) of the Internal Revenue Code, and that if the PBGC’s decision is to stand, it must do so on the applicability of the regulation that it unambiguously invoked.

Although the Court of Appeals affirmed this Court’s denial of the Pilots’ motion for a preliminary injunction with respect to Claim Two, it did not consider whether the PBGC properly applied its automatic-benefit-increase regulation. Rather, the Court determined, based on the text of the PC3 provision itself, that the Pilots were not yet able sufficiently to show that they were likely to succeed on the merits of Claim Two. *See Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1294 (D.C. Cir. 2009). Emphasizing that PC3 benefits are those that are “‘based on the provisions of the plan (as in effect during the 5-year period ending on [the plan’s termination] date) *under which such benefit would be the least*,” the Court reasoned that “[t]he question here is not when the maximum-cap provision came into effect, but for which value ‘such benefit would be the least.’” *Id.* (quoting 29 U.S.C. § 1344(a)(3)(A)) (Court’s emphasis). The Court of Appeals concluded that, “[b]ecause the benefit ‘would be the least’ based on the figure applied during the first three years, the PBGC appropriately applied the lower value.” *Id.* But as explained, this was not the rationale relied upon by the PBGC in its decision -- which instead rested on its automatic-benefit-increase regulation -- and must therefore be disregarded. *See Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 709-10 (D.C. Cir. 1977) (an administrator’s “action cannot be sustained on post hoc rationalizations supplied during judicial review”).<sup>11</sup>

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<sup>11</sup> Even assuming the Court of Appeals’ analysis was relevant here (which it is not, for the reasons explained at pp. 13-16, *supra*), it is based on a misreading of ERISA’s PC3 provision, 29 U.S.C. § 1344(a)(3)(A). The “least” benefit to which the PC3 provision refers is the least benefit based on the “provisions of the plan . . . as in effect during the 5-year period ending on [the date of plan termination].” 29 U.S.C. § 1344(a)(3)(A). The PC3 provision, therefore, would require application of the “lowest [§

(footnote continued on next page)

**C. The PBGC's Regulation Governing Automatic Benefit Increases Does Not Apply to Section 7.1 of the Plan**

Having relied (as trustee) upon the automatic-benefit-increase regulation, 29 CFR § 4044.13(b)(5), to apply an outdated § 415(b) limit, the PBGC's decision must necessarily stand or fall on the applicability of that regulation. The PBGC of course thought it applied, explaining in a footnote that “[w]hile ‘automatic increases’ is not defined in the regulation, we concluded that benefit increases that occur when the section 415 limits change . . . clearly are ‘automatic increases’ within the general meaning of those words.” PBGC Decision at 22 n.28 (AR 23). Although the PBGC, in light of this conclusory statement, apparently deemed its automatic-benefit-increase regulation self evidently applicable, a closer analysis reveals that it does not apply to section 7.1. The regulation reads in its entirety:

(5) *Automatic benefit increases.* If plan provisions adopted and effective on or before the first day of the 5-year period ending on the termination date provided for automatic increases in the benefit formula for both active participants and those in pay status or for participants in pay status only, the lowest annuity benefit payable during the 5-year period ending on the termination date determined under paragraph (b)(3) of this section includes the automatic increases scheduled during the fourth and fifth years preceding termination, subject to the restriction that benefit increases for active participants in excess of the increases for retirees shall not be taken into account.

29 C.F.R. § 4044.13(b)(5).

There are thus two prerequisites that trigger § 4044.13(b)(5): (1) the plan provision in question must have been “adopted and effective on or before the first day of the five-year period

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415(b)] value” *only* if § 415(b) were a “provision[] of the plan . . . as in effect during the 5-year period ending on [the date of plan termination].” *Id.* But as explained, the § 415(b) limit is not a “provision of the plan” and the PBGC did not apply it as if were such. Instead, only section 7.1 constitutes a “provision of the plan.” And that provision requires that Plan benefits be capped based on the § 415(b) limits in existence at the time benefits are paid, not the limit that was in place at some earlier point in time.

ending on the termination date;” and (2) the plan provision must provide for “automatic increases in the benefit formula.” *Id.* There is no doubt that section 7.1 was adopted and effective before the first day of the five year period ending on the date of the Plan’s termination. The dispositive question, therefore, is whether section 7.1 provides for an “automatic increase” in the Plan’s “benefit formula.” Because it does not, the PBGC erroneously applied § 4044.13(b)(5) to reduce PC3 benefits.

First, section 7.1 has nothing to do with the Plan’s “benefit formula.” That formula is based on final average earnings and years of service, and is set out in section 4.1 of the Plan, entitled “Basic Formula.” *See* Plan § 4.1 (AR 386). Section 7.1, of course, is an entirely separate provision that does not enhance the Plan’s benefit formula, but rather imposes a cap on benefits, irrespective of the amount payable under the formula. For this reason alone, § 4044.13(b)(5) does not apply to section 7.1.

Second, far from providing for an “automatic increase” in plan benefits, section 7.1 does not provide for any increase in benefits whatsoever. To the contrary, it is a *limitation* on Plan benefits, capping the amount that would otherwise be payable under the Plan’s benefit formula. *See* Plan § 7.1(A) (AR 392) (“the maximum amount of yearly retirement income which may be paid to a Participant under this Plan *may not exceed* the limitations contained in Section 415(b) of the Code”) (emphasis added). The PBGC thus decided to treat a provision of the Plan that is detrimental to the Plan’s participants by reducing their benefits as one that somehow confers an automatic benefit increase.

Third, though the term “benefit increases” is not defined by 29 C.F.R. § 4044.13(b)(5) (as the PBGC admits), it *is* defined elsewhere in the PBGC’s regulations, *see* 29 § C.F.R. 4022.2, and that definition plainly does not encompass increases resulting from adjustments to the §

415(b) limit. Rather, it defines “benefit increase” as including things “such as a cost-of-living increase, and any change in plan provisions which advances a participant’s or beneficiary’s entitlement to a benefit, such as liberalized participation requirements or vesting schedules, reductions in the normal or early retirement age under a plan, and changes in the form of benefit payments.” *Id.* Section 7.1 did not confer a cost-of-living increase, nor did it “change” at any point to advance a participant’s entitlement to a benefit. It should also be noted that the regulatory definition squarely focuses on changes to matters affecting the benefits *formula*, rather than far afield issues such as adjustments to the § 415(b) limit.

Fourth, the notion that exogenous, Congressionally imposed adjustments to the § 415(b) limit should be treated as conferring “benefit increases” that are to be disregarded for purposes of paying PC3 benefits collides directly with the D.C. Circuit’s decision in *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133 (D.C. Cir. 1984). *Rettig* concerned whether benefits that vested pursuant to plan provisions added within twelve months of a plan’s termination “result[ed] from a plan amendment which was made, or became effective . . . within 60 months before the date on which the plan terminates,” so that they were disqualified for inclusion in the PBGC’s insurance guarantee. 29 U.S.C. § 1322(b)(1)(B). Though the vesting provisions plainly were added within the disqualifying five-year period, the catch was that their addition to the ERISA plan was necessitated by mandatory vesting rules enacted by Congress in ERISA. Nonetheless, the PBGC ultimately held that the vested benefits, even if prompted by ERISA, resulted from recent plan amendments and therefore were not insured. Challenging the PBGC’s decision, participants in the plan contended “that their entitlement to benefits result[ed] from ERISA, not from a plan amendment.” 744 F.2d at 143.

The D.C. Circuit sided with the participants. The plan amendment there did not, the Court said, have the character of simply a “recent plan amendment that increased the amount of monthly benefits to which vested participants were entitled.” *Id.* at 146. Rather, the plan amendment creating vested benefits was one that “result[ed] directly from ERISA,” where Congress -- not the plan’s sponsor -- was the primary actor in enhancing the benefits. *Id.* at 150. In other words, the vested benefits, while technically resulting from new plan provisions, were more closely tied to Congressional action. In reaching its conclusion, the D.C. Circuit emphasized that any doubts had to be resolved in the participants’ favor, because of the “overwhelming [ERISA] purpose of protecting the legitimate expectations harbored by millions of employees of a measure of retirement security at the end of many years of dedicated service.” *Id.* at 155. The Court also emphasized that “remedial statutes are to be liberally construed to effectuate their purposes” and that “[t]he PBGC itself has successfully argued in other [ERISA] cases that ‘coverage under [ERISA] should be liberally construed to provide the *maximum degree of protection* to working men and women . . . [while] exemptions should be confined to their narrow purpose.’” *Id.* at 155 n.54 (quoting *Connolly v. Pension Benefit Guar. Corp.*, 581 F.2d 729, 732 (9th Cir. 1978) (emphasis added)).

Just as in *Rettig*, where the D.C. Circuit found that newly created benefits tied to Congressional action were not the result of recent plan amendments for purposes of the PBGC’s insurance obligations (under 29 U.S.C. § 1322), so too the benefits that result from Congressionally-imposed increases in the § 415(b) limit are not “benefit increases” that are to be disregarded for purposes of paying PC3 benefits. This conclusion is only further bolstered by the D.C. Circuit’s instructions in *Rettig* that ERISA must be construed in the participants’ favor and

that exceptions limiting benefits (such as the five-year limit in § 1344(a)(3)) are to be narrowly construed.

Lastly, the fact that section 7.1 does not confer an “automatic benefit increase” is made even clearer by the PBGC’s reliance not on section 7.1, but rather on a separate provision of the Plan -- section 7.2. As the PBGC explained: “While ‘automatic increases’ is not defined in the regulation, we concluded that benefit increases that occur when the section 415 limits change (*as provided in Section 7.2 of the Plan*) clearly are ‘automatic increases’ within the general meaning of those words.” PBGC Decision at 22 n.28 (AR 23) (emphasis added). Section 7.2 states that, to the extent the § 415(b) cap increases, “the yearly retirement income otherwise payable following [] retirement shall be increased for each limitation year following [a participant’s] retirement to reflect, as appropriate with respect to him, any increase in such limitation.” Plan § 7.2 (AR 392). Section 7.2, however, is not at issue here -- section 7.1 is. And section 7.1 simply provides that benefits shall not exceed the § 415(b) limit. In order properly to apply section 7.1 -- which the PBGC *must* apply -- the PBGC must look to the existing § 415(b) limit.

Even if section 7.2 were at all relevant to the PBGC’s obligation to apply section 7.1, it too does not provide for a benefit increase, but simply makes explicit what is implicit in section 7.1 -- that benefits are capped at the § 415(b) limit in effect at the time benefits are paid. To this end, section 7.2 makes clear that if, for example, the § 415(b) limit increases from year one of retirement to year two, the benefits payable in year two will be capped at the increased § 415(b) limit. *See id.* This does not confer an “automatic increase in the benefit formula,” *see* 29 C.F.R. § 4044.13(b)(5), but simply changes the cap on benefits payable under the plan, *regardless* of what the formula yields. Even if an increase in the § 415(b) cap could be construed as effecting a benefit increase, such an increase would certainly not be “automatic,” as a participant’s

benefits would increase with the § 415(b) cap only if their benefit under the formula exceeded the § 415(b) cap, and only then if Congress decided to increase the § 415(b) cap. If a participant's benefits are less than the § 415(b) cap, a subsequent increase in the § 415(b) cap would not affect his or her benefits whatsoever. Likewise, if Congress decided to keep the § 415(b) cap constant, no participant would receive a benefit increase.

In sum, because neither section 7.1 nor section 7.2 is an automatic-benefit-increase provision, the PBGC's invocation of its automatic-benefit-increase regulation to restrict PC3 benefits based on an outdated § 415(b) limit was arbitrary and capricious. The PBGC should instead apply the § 415(b) limit in place at the time it pays benefits to a PC3-eligible Pilot, as required by section 7.1, which is a long-standing, constant Plan provision.

**D. Even if the PBGC's Regulation Governing Automatic Benefit Increases Did Apply to Section 7.1 or 7.2 of the Plan, it is Arbitrary and Capricious and Should Be Set Aside**

Subsection C established that the PBGC's automatic-benefit-increase regulation, 29 CFR § 4044.13(b)(5), does not apply to section 7.1 or 7.2 of the Plan. But even if it did, it would make no difference, since regulation § 4044.13(b)(5) is an arbitrary and capricious implementation of ERISA's PC3 provision that must be set aside.

The validity of a regulation (and thus the PBGC's actions as regulator) is reviewed under the two-step rubric set out in *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, (1984). Step one simply asks whether the statute is clear on its face; if it is, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* It is only if the statute is ambiguous that the court proceeds to step two, which asks "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Under step one, the fact that a statute does not expressly prohibit a particular regulatory action does not mean that the statute is ambiguous and that *Chevron* step

two is thereby implicated. *See ABA v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) (“to suggest . . . that Chevron step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power . . . is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent”). In the same vein, “[a] regulation . . . may not serve to amend a statute, . . . or to add to the statute ‘something which is not there.’” *Iglesias v. United States*, 848 F.2d 362, 366 (2d Cir. 1988) (quoting *United States v. Calamaro*, 354 U.S. 351, 359, (1957)).<sup>12</sup>

Here, the PBGC’s automatic-benefit-increase regulation has no basis in ERISA’s PC3 provision, which is clear and unambiguous. The PC3 provision requires that PC3 benefits be calculated based on the plan provisions in effect during the five years prior to plan termination under which the benefit would be the least. *See* 29 U.S.C. § 1344(a)(3) (requiring that benefits be paid “based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least”). This means that if a plan provision affecting benefits is amended during the five year-period prior to termination, the PBGC, in calculating PC3 benefits, is to use the version of that provision that would yield the lowest benefit. By contrast, if a provision has been static throughout the five-year period and has not been made more valuable through an amendment, then that provision must be applied.

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<sup>12</sup> Though *Chevron* controls the Court’s review of the legality of the PBGC’s regulation governing automatic benefit increases, which the PBGC promulgated through notice-and-comment rulemaking in its *agency* hat, the PBGC’s overall determination *as trustee* to limit PC3 benefits as a result of using an outdated § 415(b) limit is subject only to the deference that an ERISA trustee would enjoy. As explained earlier, because a trustee gets no deference on construction of the law (as opposed to Plan terms or the facts), the PBGC should receive no deference on its application of 29 C.F.R. § 4044.13(b)(5), even assuming it is legal. Rather, the Court should apply the presumption that the statute should be construed in the manner most favorable to the participants, as noted in *Rettig*. In any event, even if some deference is to be afforded to the PBGC as trustee applying an outdated § 415(b) limit to compute PC3 benefits, its decision still must be set aside under ERISA for the reasons noted in Subsections A through C.

In promulgating 29 C.F.R. § 4044.13(b)(5), the PBGC crafted what it has termed a “special rule” for how it will apply provisions that confer an automatic benefit increase, deciding that even if an automatic benefit increase provision has been in existence since before the five-year pre-termination period, it will only credit benefit increases in the fourth and fifth years prior to termination. *See* 29 C.F.R. § 4044.13(b)(5); PBGC Decision at 11 n.14 (AR 12) (explaining that “PBGC’s regulations also contain a special rule for ‘automatic benefit increases’”). In effect, the PBGC decided to apply automatic benefit increases based on a three-year lookback -- any increases that occur in the third, second, and first years prior to plan termination are to be disregarded. The PBGC explained the rationale behind this decision in its preamble to its automatic-benefit-increase regulation: “automatic increases in the benefit formula during the 3-year period preceding termination are not taken into consideration *since priority category 3 benefit rights are fixed no later than the beginning of the 3-year period.*” 46 Fed. Reg. 9480, 9484 (Jan. 28, 1981) (emphasis added).

The PGBC’s decision to restrict automatic benefit increases in such a fashion, based on its view that “priority category 3 benefit rights are fixed no later than the beginning of the 3-year period,” *id.*, is completely arbitrary and has no basis in ERISA’s PC3 provision. While the PC3 provision does contain a three-year lookback, that lookback merely identifies which individual participants are entitled to PC3 benefits (those that either were retired, or who could have retired, as of three years prior to plan termination). *See* 29 U.S.C. § 1344(a)(3). Nothing in the ERISA PC3 provision’s three-year lookback compels, or even suggests, the conclusion that automatic benefit increases must be disregarded to the extent they occur three years prior to plan termination.

The only other possible textual source for the PBGC's automatic-benefit-increase regulation is the portion of the PC3 provision instructing that, with respect to participants who were receiving benefits prior to the beginning of the three-year pre-termination period, as opposed to participants who could have retired and begun receiving benefits but who chose to continue working, "the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period." 29 U.S.C. § 1344(a)(3). But this portion of the PC3 provision also does not "fix" the operation of plan provisions as of three years prior to plan termination; rather, at most, it means that PC3 benefits for participants who were retired three years prior to plan termination -- where the benefits that *actually were paid* (and thus that were "in pay status") were greater than the benefits produced by choosing the plan provision generating the lowest possible benefit -- shall be computed based on the plan provisions leading to the *actually paid* benefits, not the provisions that produce a lower benefit. In other words, the benefits actually in pay status shall be deemed the plan provisions producing the least benefit, *even if* a plan provision producing a lower benefit exists. For instance, if a plan's terms (existing five years prior to termination) offered alternative benefit formulas from which a participant could elect benefits, as many plans do, the PBGC would be required to treat the higher benefit actually chosen (and therefore "in pay status") as the guide for PC3 calculations, despite an existing alternative, less generous provision available for election.

That this is the only viable interpretation is confirmed by Congress's inclusion of the language "the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period" solely as a limit on subparagraph A of 29 U.S.C. § 1344(a)(3), which relates to retirees who already were in pay status three years prior to a plan's termination. Since subsection B relates, in contrast, to those able to retire, but not yet retired, three years prior

to termination, there is no individual election to consider (and honor, in order to protect, as ERISA requires, the participants' rights) when computing benefits going forward. It was enough for Congress simply to state there that the trustee must compute PC3 benefits for the retirement-eligible "based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least." *Id.* § 1344(a)(3)(B). Again, this means that the retirement-eligible are entitled to PC3 benefits computed under the plan terms in effect five years before termination, using the alternative available under those provisions that would produce the lowest benefit going forward.

In short, the PBGC promulgated its automatic-benefit-increase regulation out of whole cloth. The PC3 provision is unambiguous: If a plan provision has been in effect, unamended, for the five-year pre-termination period, it should be applied as it reads, regardless of whether that provision is one conferring an automatic benefit increase or not. There is nothing in ERISA's PC3 provision that compels a rule disregarding automatic benefit increases that occur in the three years prior to plan termination, where the increases stem from a plan provision that has been in effect prior to the five-year pre-termination period and was clearly not adopted with an eye toward plan termination. For the PBGC to craft a "special rule" for automatic-benefit-increase plan provisions that has no textual basis in the PC3 statutory provision effectively, and impermissibly, amends ERISA by "add[ing] to the statute something which is not there." *Iglesias v. United States*, 848 F.2d at 366. Additionally, it directly violates the maxim that "coverage under [ERISA] should be liberally construed to provide the *maximum degree of protection* to working men and women." *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 155 n.54 (D.C. Cir. 1984) (emphasis added). As such, 29 C.F.R. § 4044.13(b)(5) is arbitrary and capricious and should be set aside.

**III. THE PILOTS ARE ENTITLED TO SUMMARY JUDGMENT ON CLAIM THREE BECAUSE THE PBGC'S RELIANCE ON GENERIC TABLES TO CALCULATE THE EXPECTED RETIREMENT AGE OF COMMERCIAL AIRLINE PILOTS RESULTED IN A SYSTEMATIC UNDERESTIMATE OF THE AVERAGE RETIREMENT AGE**

Claim Three of the Second Amended Complaint challenges the PBGC's use of a generic grid to calculate the expected retirement age of commercial airline pilots, as well as the PBGC Appeals Board's refusal even to consider potential flaws in its approach. To understand this claim, it is important quickly to review the asset allocation process when a pension plan is terminated in distress. When such a termination occurs, the plan administrator (*i.e.*, trustee) must calculate (1) the benefit liabilities of the terminated plan (that is, the value of all outstanding benefit obligations), and (2) the assets available to the Plan as of the termination date. *See* 29 U.S.C. § 1344 (directing trustee to allocate assets pursuant to certain formulas, and directing valuation to occur as of date of Plan termination); *Id.* § 1322(c) (discussing obligation of PBGC to determine outstanding benefit liabilities); 29 C.F.R. § 4044.41 (setting forth general rules on valuation of benefit obligations and assets). These calculations are then used to determine how much each participant will receive from remaining Plan assets, using the priority scheme (including PC3) established by Congress in 29 U.S.C. § 1344.

One important factor in estimating the Plan's benefit obligations for some participants is the *average expected retirement age* of Plan participants. As part of determining expected benefit liabilities for those pilots who are not yet retired or retirement-eligible,<sup>13</sup> the Plan's

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<sup>13</sup> The two claims already addressed (Claims One and Two), as well as a number of the claims that follow (Claims Six, Seven, and Eleven), involve the PBGC's calculation of PC3 benefits, which consist of benefits payable to Plan participants who either were retired as of three years prior to Plan termination, or who were retirement eligible at that time. *See* 29 U.S.C. § 1344(a)(3). This claim, because it deals only with expected retirement ages, is relevant only to those individuals in lower priority categories who have not yet retired and are not yet retirement eligible.

actuaries must estimate an average age at which individuals are expected to retire and an average life expectancy for Plan participants. The difference between the two is the average length of time each participant is expected to receive pension benefits, and that average is used by the Plan's actuaries to determine the Plan's benefit liabilities to participants who are not yet retired or retirement-eligible. Thus, a lower expected retirement age produces a longer stream of pension benefits, while a higher expected retirement age produces a shorter stream of benefits. This means, all other factors being equal, that an inaccurately low average expected retirement age will result in the Plan's actuaries systematically overestimating the amount of benefits that will be needed to pay to those participants who are not yet retired or retirement-eligible. And as a plan's estimated benefit liability increases, the benefits payable to plan participants decreases.

In general, the PBGC uses generic tables set forth in 29 C.F.R. § 4044.55 to calculate expected retirement age.<sup>14</sup> The Pilots have never disputed that those tables may well prove adequate in the great bulk of cases that come before the PBGC. The Pilots believe, however, that these tables are incapable of accurately estimating the average expected retirement age of commercial airline pilots, who have a number of unique incentives to continue working until the mandatory retirement age that has long been established by federal law.

At the time of Plan termination (and indeed, until late 2007), the mandatory retirement age for pilots was age sixty.<sup>15</sup> This mandatory provision, the Pilots have asserted, significantly

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<sup>14</sup> Table I is used to determine whether the probability of early retirement is high, medium, or low, based on the amount of the expected retirement benefit -- a higher expected benefit is presumed to result in an earlier expected retirement age and a longer stream of expected benefits. Tables II A, B, and C are then used to determine the precise retirement age in the low, medium, and high categories respectively.

<sup>15</sup> In 2007, Congress raised the mandatory retirement age to 65. *See Fair Treatment for Experienced Pilots Act*, Pub. L. No. 110-135, 121 Stat. 1450 (2007), codified at 49 U.S.C. § 44729(a); *see also* 14 C.F.R. § 121.383(e)(1) ("No pilot may: (1) Serve as a pilot in operations under this part if that person has reached his or her 65th birthday."). This change -- the culmination of commercial airline pilots' hard-

(footnote continued on next page)

constrains the post-retirement employment options for airline pilots, a reality that most other workers do not face. Likewise, the Pilots argued, the post-September 11 turmoil in the airline industry generally, exemplified by numerous bankruptcies and pension plan terminations, greatly increased the incentives on Pilots to continue working through their mandatory retirement age. The Pilots have accordingly argued that the PBGC should use an alternate measure of average expected retirement age here by simply obtaining data from the Plan's former sponsor and administrator, US Airways, and calculating a historical average expected retirement age for commercial airline pilots. *See* Pls.' Appeal of Final Benefits Determinations (AR 234).

The PBGC Appeals Board did not dispute any of the Pilots' contentions about the unique circumstances faced by commercial airline pilots with regard to expected retirement age. Instead, it assumed that all of these things were true but determined it had no authority to deviate from the regulations under any circumstances. PBGC Decision at 41 (AR 42). Hence, the Appeals Board upheld the expected retirement age calculation of its actuaries, which had been performed using only the generic tables set forth in 29 C.F.R. § 4044.55, and which had resulted in a determination that the average expected retirement age for active vested pilots of US Airways was 55.9. Actuarial Case Memorandum at 17 (Aug. 3, 2006) (AR 1225).

The PBGC's, and specifically the Appeals Board's, refusal to do anything but rigidly apply the regulation constitutes arbitrary and capricious agency action.<sup>16</sup> "It is well established

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(footnote continued from previous page)

fought battle to persuade the FAA to *raise* the retirement age to sixty-five -- itself demonstrates the faulty nature of the PBGC's assumption that pilots will choose to retire at an earlier age than most workers..

<sup>16</sup> On this claim, the Pilots challenge the PBGC's refusal to adopt or use realistic and accurate tables reflecting the unique factors associated with commercial airline pilots. The Pilots do not dispute that the agency's actions here are closer to classic challenges to regulatory action and are subject to deferential review; nevertheless, even with deference, the PBGC's actions must be set aside.

that an agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.” *Farmers Union Cent. Exchange, Inc. v. Fed. Energy Regulatory Comm’n*, 734 F.2d 1486, 1511 (D.C. Cir. 1984). Likewise, an agency's decision will normally be found “arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *AEP Tex. N. Co. v. Surface Transp. Bd.*, 609 F.3d 432, 438 (D.C. Cir. 2010) (“This court must vacate the Board's denial of AEPT’s petition if the Board . . . entirely failed to consider an important aspect of the problem.”). A court must review agency action to “ensure[] that the agency has ‘taken a hard look at the salient problems,’ and has ‘engaged in reasoned decision-making’ essential to the informed and even-handed implementation of public policy.” *Cross-Sound Ferry Servs., Inc., v. Interstate Commerce Comm’n*, 738 F.2d 481, 484 (D.C. Cir. 1984) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)).

The PBGC’s approach cannot be squared with these standards. The Pilots’ appeal presented the PBGC with significant reasons to believe its expected retirement age rules were inaccurate when applied to commercial airline pilots, and proposed a much more reliable measure, using retirement data that could be found in the files of US Airways. “[I]t goes without saying that the agency cannot sidestep a re-examination of particular regulations when abnormal circumstances make that course imperative.” *Geller v. FCC*, 610 F.2d 973, 979 (D.C. Cir. 1979) (internal citation omitted). By refusing to even consider the Pilots’ contentions, the PBGC disregarded the “keystone” of its administrative responsibility -- that it engage in “reasoned

decision-making.” *See Int’l Ladies’ Garment Workers Union v. Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983).

The PBGC’s refusal even to consider using a more accurate measure of expected retirement age was clearly contrary to Congress’ stated purpose of “protect[ing] . . . the interests of participants in employee benefit plans and their beneficiaries,” *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 6 (2004) (quoting 29 U.S.C. § 1001(b)), as well as Title IV of ERISA’s stated purpose of “protect[ing] employees against the loss of ‘nonforfeitable’ benefits upon termination of pension plans that lack sufficient funds to pay such benefits in full.” *Id.* at 7 (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 n.1 (1980)). Because the PBGC’s rulemaking power is statutorily constrained such that it may only adopt rules and regulations as may be necessary to carry out the purposes of Title IV, *see* 29 U.S.C. § 1302(b)(3), the PBGC has an ongoing duty to determine whether its regulations still serve those purposes. *Geller*, 610 F.2d at 980 (“It can hardly be supposed that the vitality of conditions forging the vital link between Commission regulations and the public interest is any less essential to their continuing operation. We hold that the Commission is statutorily bound to determine whether that linkage now exists.”). Faced with the Plaintiffs’ concerns, the PBGC had a duty to at least reexamine whether its use of the tables under the circumstances presented by commercial airline pilots still had that necessary “vital link” to ERISA. The PBGC’s “stubborn refusal to expand the evidentiary base” of the record before it “undermines the rationality” of its decision. *Cross-Sound Ferry Servs.*, 738 F.2d at 484.

The PBGC Appeals Board’s decision also conflicts with Congress’s demonstrated sensitivity to the special concerns created by the FAA mandatory retirement. In provisions that govern when an ERISA plan will receive preferable tax status, Congress has made clear that

early retirement rules apply differently for Pilots, particularly for those pilots (like virtually all of the Plaintiffs) governed by the previous mandatory retirement age of 60. For such pilots, Congress has passed a “[s]pecial rule for commercial airline pilots” that prohibits application of the normal rules for early retirement to airline pilots who were required to retire by age 60. *See* 26 U.S.C. § 415(b)(9). Indeed, the PBGC’s own regulations themselves recognize the unique considerations that can apply to the retirement age of commercial airline pilots, observing that most pilot pension plans have a normal retirement age of sixty, and then explaining that, at least in some circumstances, PBGC will calculate commercial airline pilot retirement dates by “consider[ing] all the facts and circumstances (including the plan’s normal retirement age and the age at which employees customarily retire in the airline industry).” 29 C.F.R. § 4022.10(d)(6).

The PBGC, by contrast, refused to consider making the same sort of fact-specific determination with respect to the average expected retirement age of pilots who had not yet retired and were not retirement-eligible -- even in the face of reasons those regulations were likely to systematically underestimate the expected retirement age of commercial airline pilots. An agency charged with protecting pension benefits of Plan participants cannot, when confronted with the irrefutable fact that its regulations are creating systemic errors in important factors used to determine the pension benefits of workers whose Plan’s have been terminated, simply bury its head in the sand. Because that is what the PBGC Appeals Board did, its decision is a classic example of arbitrary and capricious agency action.

**IV. THE PILOTS ARE ENTITLED TO SUMMARY JUDGMENT ON CLAIM SIX BECAUSE THE PBGC SUBSTANTIALLY LIMITED THE COST-OF-LIVING ADJUSTMENTS PAYABLE TO FORMER PIEDMONT PILOTS IN VIOLATION OF ERISA AND BASED ON ILLEGAL REGULATIONS**

Claim Six of the Second Amended Complaint challenges the PBGC's application of a Plan provision, also in the context of allocating PC3 benefits as the Plan's trustee, specific to Pilots formerly employed by Piedmont Aviation Inc. ("Piedmont"), before its merger with US Airways. Effective May 1, 1990, the Piedmont Aviation Inc. Pilot Retirement Plan ("the Piedmont Plan") was merged into the Plan, and all liabilities and assets of the Piedmont Plan inured to the Plan. Section 17.5 of the Plan, in turn, sets forth various benefits for pilots employed by Piedmont prior to the merger. One such benefit, contained in section 17.5(C) of the Plan, provides former Piedmont Pilots with a cost of living adjustment ("COLA") as of January 1st of every year following retirement. *See* US Airways Plan (2001 version), § 17.5(C) (AR 417)

The PBGC limited the effect of the COLA payable under section 17.5(C) in two respects. First, the PBGC applied its automatic-benefit-increase regulation, 29 C.F.R. § 4044.13(b)(5), to the Piedmont COLA. *See* PBGC Decision at 27 (AR 28). Under that regulation, which the PBGC also applied with respect to increases resulting from Congressional changes to the IRC § 415(b) limits (at issue in Claim Two, *supra*), the PBGC, in its calculation of PC3 benefits, disregards benefit increases occurring in the three years prior to plan termination. *See* 29 C.F.R. § 4044.13(b)(5). Accordingly, the PBGC included the Piedmont COLAs for 1999 (DOPT-5) and 2000 (DOPT-4) in its PC3 calculations, but excluded the COLAs from 2001-2003. *See* PBGC Decision at 27 (AR 28).

Second, the PBGC -- even as to the COLAs it did credit -- applied its "phase-in" regulation, 29 C.F.R. § 4022.25(b). *Id.* at 27, n.38 (AR 28). That regulation purportedly

implements ERISA's phase-in formula for benefit increases resulting from plan amendments adopted within five years of plan termination, 29 U.S.C. § 1322(b)(7), under which the proportion of the benefit increase guaranteed by the PBGC diminishes the closer the benefit increase is to plan termination. But unlike ERISA, which instructs the PBGC to apply the phase-in formula only to benefit increases resulting from plan amendments adopted or effective within the five-year period prior to plan termination, *see* 29 U.S.C. § 1322(b)(1)(B), the PBGC's regulation applies the phase-in formula to *all* benefit increases *occurring* in the five-year pre-termination period, regardless of whether they resulted from recent plan amendments, *see* 29 C.F.R. § 4022.25(b).

The PBGC should have included each Piedmont COLA for all five years prior to Plan termination in paying PC3 benefits, and it should not have applied its phase-in regulation at all. As the Pilots explained with respect to Claim Two, the PBGC's automatic-benefit-increase regulation, under which the PBGC only recognizes increases that occur in the fifth and fourth years prior to plan termination, has no basis in ERISA's PC3 provision and should be set aside. As to the PBGC's decision to phase-in the Piedmont COLA for the fifth and fourth years prior to Plan termination, in the first place, ERISA's phase-in rules apply only to benefits paid by the PBGC as insurer, not to benefits allocated from the Plan's assets by the Plan's trustee. But even if ERISA's phase-in formula did apply, the PBGC's regulation implementing ERISA's phase-in formula is arbitrary and capricious, as it is significantly more restrictive than ERISA's phase-in provision and finds no support in the text of ERISA itself.

**A. The PBGC's Automatic-Benefit-Increase Regulation is Unlawful**

In calculating PC3 benefits, the PBGC disregarded the Piedmont COLA for the three years prior to plan termination, citing its automatic-benefit-increase regulation, 29 C.F.R. § 4044.13(b)(5). *See* PBGC Decision at 27 (AR 28). For the reasons set out in the Pilots' brief

with respect to Claim Two, *see* Part II, *supra*, that regulation should be set aside as arbitrary and capricious on the grounds that it has no basis in the text of ERISA’s PC3 provision, which requires the Plan trustee to fully honor plan provisions that have been in place, unchanged, for the entirety of the five-year pre-termination period. Because section 17.5(C) is a plan provision that remained in effect, unchanged, for all five years prior to Plan termination, the PBGC should have instead credited the Piedmont COLA in its PC3 calculations for all years prior to plan termination.

**B. ERISA’s Phase-In Rules Apply Only to Benefits Paid by the PBGC in its Role as Insurer, Not to Benefits Paid from the Plan’s Assets by the Plan’s Trustee**

The PBGC’s decision to apply ERISA’s phase-in rules to the Piedmont COLA in allocating PC3 benefits as the Plan’s trustee was improper for a simple reason: The phase-in rule adopted by Congress applies only to benefits paid by the PBGC as insurer out of its insurance fund, not to benefits allocated out of a plan’s assets by the plan’s trustee. As explained, the standards established by ERISA governing the plan administrator/trustee’s allocation of a plan’s remaining assets, and those governing the PBGC’s payment of insurance in the event a plan’s assets are insufficient to cover all nonforfeitable benefits, are set out in separate sections of ERISA: The administrator’s plan-asset-allocation function is detailed in Section 4044(a) of ERISA, 29 U.S.C. § 1344(a) of ERISA, while the PBGC’s insurance function is contained in Section 4022(a) of ERISA, 29 U.S.C. § 1322(a).

ERISA’s phase-in rule is found in the section of ERISA governing the PBGC’s insurance function, Section 4022(a). That provision states that, “[s]ubject to the limitations contained in subsection (b), the [PBGC] shall guarantee in accordance with this section the payment of all nonforfeitable benefits . . . under a single employer plan which terminates at a time when this title applies to it.” 29 U.S.C. § 1322(a). One of the limitations on the PBGC’s benefit guarantee

in subsection (b) provides that, “[e]xcept to the extent provided in paragraph (7) . . . any increase in the amount of benefits under a plan resulting from a plan amendment which was made, or became effective, whichever is later, within 60 months before the date on which the plan terminates shall be disregarded.” *Id.* § 1322(b)(1)(B). The statute goes on to make clear, however, that such benefits are not disregarded entirely, but instead are subject to a “phase-in” formula set out in § 1322(b)(7) that provides as follow:

(7) Benefits described in paragraph (1) are guaranteed only to the extent of the greater of --

(A) 20 percent of the amount which, but for the fact that the plan or amendment has not been in effect for 60 months or more, would be guaranteed under this section, or

(B) \$ 20 per month, multiplied by the number of years (but not more than 5) the plan or amendment, as the case may be, has been in effect.

29 U.S.C. § 1322(b)(7).

In contrast, the section of ERISA governing the administrator’s allocation of a terminated plan’s assets, Section 4044(a), does not contain any phase-in provision at all. The PC3 provision, 29 U.S.C. § 1344(a)(3), simply instructs the plan administrator to pay benefits “based on the provisions of the plan (as in effect during the 5-year period ending on [the date of plan termination]) under which such benefit would be the least.” It does not provide any further phase-in instructions. Nevertheless, the PBGC, in allocating the Plan’s assets as the Plan’s trustee, applied ERISA’s phase-in formula to benefit increases resulting from the Piedmont COLAs. Indeed, the PBGC’s Actuarial Case Memorandum stated explicitly that “[t]he [Piedmont] COLA adjustments during each of [the] last five years prior to DOPT are subject [to] \$0/0%, \$20/20%, \$40/40%, \$60/60% and \$80/80% phase-ins respectively.” Actuarial Case Memorandum at 13, ¶ b (Aug. 3, 2006) (AR001221). And then in the Appeals Board’s Decision, the PBGC confirmed that “each of the Piedmont COLA benefit increases that occurred in the

five years before plan termination (*i.e.*, in the period between April 1, 1998 and March 31, 2003) is subject to phase-in.” PBGC Decision at 27 n.38 (AR 28).

When the PBGC, as here, acts as a pension plan’s voluntary trustee, and when it performs functions in that trustee role, it must therefore be guided by the rules applicable to trustees, not to those applicable to the PBGC as guarantor. If the Plan’s administrator were a private party, and not the PBGC, it would certainly be improper for that private administrator to graft a rule applicable only to the PBGC’s insurance obligations and apply it in the entirely separate context of allocating the Plan’s assets. It is no less improper when the PBGC does it. For this reason alone, the PBGC’s decision to apply ERISA’s phase-in rule in allocating the Plan’s assets as trustee was arbitrary and capricious.

**C. Even if ERISA’s Phase-in Rules Do Apply to the Piedmont COLA, the PBGC’s Phase-In Regulation is Illegal As Applied to a Benefit Increase Provision that Has Been In Effect for More than Five Years Prior to Plan Termination**

Even if ERISA § 4022’s phase-in rule did somehow apply in the § 4044 asset-allocation context, the PBGC’s decision to phase in the Piedmont COLA would still be improper. As explained, ERISA’s phase-in provision applies to “increase[s] in the amount of benefits under a plan resulting from a plan amendment which was made, or became effective, whichever is later, within 60 months before the date on which the plan terminates.” *See* 29 U.S.C. §1322(b)(1), (7). By contrast, benefit increases that result from plan amendments adopted or effective *more* than five years prior to plan termination are thus fully guaranteed and may not be disregarded by the PBGC. Nowhere does ERISA suggest that the phase-in formula is applied to benefits resulting from plan amendments adopted or effective *prior* to this five-year period, which are thus fully guaranteed by ERISA.

In this case, Section 17.5(C) of the Plan (the Piedmont COLA provision) took effect long before the five-year pre-termination period and did not change at all during that time. *Compare* US Airways Plan (2001 version), § 17.5(C) (AR 417) *with* US Airways Plan (1994 version), § 17.5(C), (AR 478). Yet, the PBGC phased in the Piedmont COLA, citing its regulation implementing ERISA’s phase-in requirement, 29 C.F.R. § 4022.25(b). *See id.* (explaining that “[y]our position concerning phase-in is contrary to PBGC’s long-standing interpretation of ERISA, which is reflected in its regulations,” and proceeding to discuss 29 C.F.R. § 4022.25(b)). That regulation applies ERISA’s phase-in formula to all “benefit increases that have been in effect for less than five years.” 29 C.F.R. § 4022.25(a). And because the PBGC defines “benefit increase” as including a cost-of-living increase, *see* 29 C.F.R. § 4022.2, the PBGC concluded that, “based on these provisions, each COLA increase in a pension plan is phased-in as of the date it takes effect.” PBGC Decision at 27 n.38 (AR 28).

The PBGC’s phase-in regulation, upon which it grounded its decision to phase-in the Piedmont COLA, is significantly broader than ERISA’s phase-in provision. Whereas the benefit increases that are not guaranteed under ERISA -- and hence subject to phase-in -- are only those increases “resulting from a plan amendment which was made, or became effective, whichever is later, within 60 months before the date on which the plan terminates,” *see* 29 U.S.C. § 1322(b)(1)(B), the PBGC’s regulation goes well beyond that. It applies the phase-in formula to *all* benefit increases *that occur* during the five-year pre-termination period, regardless of whether or not they stem from a plan amendment whose adoption or effective date falls within the five-year period. *See* 29 C.F.R. § 4022.25(a)-(b). But ERISA’s phase-in provision is clear and unequivocal: Phase-in only applies to increases stemming from recent plan amendments (those

occurring within five years of plan termination), not to increases stemming from plan provisions that have been in effect since well before plan termination. *See* 29 U.S.C. § 1322(b)(1)(B).

The PBGC's decision voluntarily to extend ERISA's phase-in formula to a far broader class of benefit increases than the narrow category of increases identified by ERISA was arbitrary and capricious. The unmistakable specificity and narrowness of ERISA's phase-in provision -- applying the phase-in formula only to benefit increases resulting from plan amendments adopted or effective within the five-year pre-termination period -- leaves no room for the PBGC to expand vastly its reach. The PBGC exists to protect pensioners, not to diminish their pensions by interpreting ERISA in an arbitrarily draconian fashion. As mentioned already, the D.C. Circuit has explained: “[t]he PBGC itself has successfully argued in other [ERISA] cases that ‘coverage under [ERISA] should be liberally construed to provide the *maximum degree of protection* to working men and women . . . [while] exemptions should be confined to their narrow purpose.’” *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 155 n.54 (D.C. Cir. 1984) (quoting *Connolly v. Pension Benefit Guar. Corp.*, 581 F.2d 729, 732 (9th Cir. 1978) (emphasis added)). The PBGC's restrictive phase-in regulation implementing ERISA's clear, and significantly less-restrictive phase-in provision, directly violates this maxim of ERISA, and should now be set aside. The PBGC must re-calculate the benefits for the former Piedmont Pilots by including the full value of their COLAs, without any phase-in.

**V. THE PILOTS ARE ENTITLED TO SUMMARY JUDGMENT ON CLAIM SEVEN BECAUSE THE PBGC FAILED TO APPLY PRINCIPLES OF ACTUARIAL EQUIVALENCE IN PAYING PC3 BENEFITS TO RETIREMENT-ELIGIBLE PILOTS WHO CONTINUED WORKING PAST APRIL 1, 2000**

Claim Seven of the Second Amended Complaint challenges the unreasonable manner in which the PBGC, when allocating the Plan's assets in its trustee role, calculated the benefits of those Pilots who were eligible to retire three years before Plan termination (April 1, 2000) but

chose to continue working past that date. Both before the PBGC and here, the Pilots have argued that the plain statutory language of ERISA requires the PBGC to provide these retirement-eligible pilots with a benefit that is the actuarial equivalent of what he or she would have received if the Pilot had retired on April 1, 2000. The PBGC impermissibly refused, violating the bedrock ERISA principle of actuarial equivalence. This Court must overturn the decision.

**A. The PBGC’s Construction of 29 U.S.C. § 1344(a)(3)(B) Was Arbitrary and Capricious As It Ignored Bedrock Principles of Actuarial Equivalence, Mandated Both By ERISA and by The PBGC’s Own Regulations**

The statutory predicate for Claim Seven is 29 U.S.C. § 1344(a)(3)(B). Again, the PC3 provision instructs the voluntary Plan trustee (here the PBGC) that, after allocating Plan assets to the extent of participants’ voluntary and mandatory contributions (priority categories 1 and 2), the Plan’s assets shall be allocated in pertinent part as follows:

“Third, in the case of benefits payable as an annuity --”

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(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

29 U.S.C. § 1344(a)(3)(B) (emphasis added).

As the statutory text makes clear, the PBGC must pay PC3 benefits to those who “would have” been receiving benefits as of the beginning of three years prior to plan termination “if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period.”

*Id.* The question raised by this claim is how to calculate the benefits of such a participant -- that is, as applied to this case, how to calculate the PC3 benefit of someone who was eligible to retire as of an April 1, 2000, but chose to continue working beyond that date.

The Pilots' position is that the PBGC must calculate the benefit by applying principles of actuarial equivalence. Although the PBGC Appeals Board labeled this position "radical," PBGC Decision at 15, it is nothing of the sort. Actuarial equivalence is a fundamental principle of ERISA law, a corollary to the statutory command that once an employee reaches normal retirement age, pension benefits become non-forfeitable. 29 U.S.C. § 1053(a) ("an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age"). To guard against forfeitures of vested benefits, ERISA provides that where "an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, . . . the employee's accrued benefit . . . shall be the actuarial equivalent of such benefit or amount." 29 U.S.C. § 1054(c)(3).

The law is clear that the principle of actuarial equivalence applies to precisely the situation contemplated by § 1344(a)(3)(B) -- one where a participant is deemed "retired" as of a particular date, but does not begin receiving benefits until later. For example, in *Contilli v. Local 705 Int'l Bhd. of Teamsters Pension Fund*, 559 F.3d 720, 721 (7th Cir. 2009), the plaintiff retired in October 1997 but did not begin receiving benefits until February 1998. The plan administrator asserted that it did not need to pay the participant for this lapse in benefits by actuarially adjusting his monthly amount to reflect a February 1998 commencement date -- that is, the administrator argued that the plan was not required to adjust the benefit to make up for the delay. *Id.* at 721-22. The participant argued that the failure to include such an adjustment violated ERISA's non-forfeiture rule, 29 U.S.C. § 1053(a), *see Contilli*, 559 F.3d at 722, by depriving

him of the benefits he should have received as of his retirement/benefit commencement date. The Seventh Circuit agreed, finding that “payments skipped as a result of the deferral must be made up, either by payment (with interest) once the deferral ends, or by a suitable actuarial adjustment to the ongoing benefits; otherwise the value of the pension is lower than one that begins on the normal retirement date, and a reduction in the total value of all monthly benefits is a kind of forfeiture.” *Id.*

The decision in *Contilli* is not an anomaly, but is instead well within the ERISA heartland. Indeed, as the United States Department of Labor -- whose Secretary is one of three officials on the PBGC’s Board of Directors -- stated in a brief supporting the Petitioner in *Contilli* that, *whenever* benefits are calculated as of a particular historical date, “a vested participant in a defined benefit plan must receive a benefit that is the actuarial equivalent of her normal retirement benefit.” Br. of the United States as Amicus Curiae at 16 (Sept. 3, 2008), *Contilli v. Local 705 Int’l Bhd. of Teamsters Pension Fund* (7th Cir., No. 07-2673) (quoting *Esden v. Bank of Boston*, 229 F.3d 154, 163 (2d Cir. 2000) (collecting cases)). The DOL further explained that, “[i]n various contexts where the payment of benefits is delayed or suspended, the Code requires an actuarial adjustment to be made when payments commence.” *Id.* Not surprisingly, the PBGC’s own regulations recognize this fundamental principle of ERISA law. 29 C.F.R. § 4044.52(c) (“The plan administrator shall value all benefits as of the valuation date by . . . [u]sing valuation formulas that accord with generally accepted actuarial principles and practices”).

Just as the plan administrator in *Contilli* was required to actuarially adjust the participant’s benefits to reflect the three months of missed payments, so too here the PBGC must

actuarially adjust the benefits of those pilots who, despite having their benefits calculated as if they had retired as of DOPT-3, did not actually receive benefits at that time.

**B. The PBGC's Finding that PC3 Benefits Are "Fixed" Finds No Support in ERISA or its Regulations**

The PBGC reached a contrary result by relying on its pronouncement that benefits payable under 29 U.S.C. § 1344(a)(3), are "fixed" at the monthly amount the Pilot would have received if he or she had retired three years before the Plan terminated. According to the PBGC, the statute requires that it "fix" everything in place as of April 1, 2000, and make no further adjustments. *See* PBGC Decision at 15-17 (AR 16-18). Thus, the PBGC calculated a pilot's benefit using his *age* in 2000, which often meant that the pilot would be labeled an "early retiree" and assessed a corresponding reduction in pension, even though he did not retire early. The PBGC assumed a pilots' length of service and average earnings as of April 1, 2000 and, as noted, the PBGC also looked at the IRS limit for qualified pension income in 2000 and used that to cap a working pilots' PC3 benefit as well.<sup>17</sup>

In the PBGC's view, however, it could not implement the "assumed" retirement date in the standard way by making an actuarial adjustment that remedied the failure to begin paying benefits as of the April 1, 2000 retirement date. Doing so, the PBGC claimed, would violate the requirement that benefits in PC3 be "fixed" as of three years before Plan termination, which the PBGC found in the language of the PC3 statute, § 1344(a)(3)(B). Consequently, the PBGC chose to ignore the statutory command of 29 U.S.C. § 1054(c)(3), and its own regulations, 29 C.F.R. § 4044.52(c), by refusing to make the otherwise required actuarial adjustments.

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<sup>17</sup> This adjustment was itself impermissible for the reasons discussed in Claim Two.

The PBGC's construction cannot be upheld. The PBGC based its decision largely on the "preamble" to one of its regulations and an interim regulation adopted in 1976. *See* PBGC Decision at 14-15 (AR 15-16). That the PBGC would seek refuge for its position in these non-authoritative sources speaks volumes about the weakness of its position. On the merits, moreover, neither its own preamble nor the interim regulation provides any support for the refusal to actuarially adjust the pensions of pilots who chose to keep working beyond the statutorily assumed retirement and commencement dates. Both sources referenced by the PBGC merely state that "priority category 3 benefits are fixed no later than the beginning of the 3-year period before plan termination." *Id.* at 14 (AR 15) (quotation marks and citation omitted). But to say that the benefit is "fixed" as of three years before the plan termination date begs the question. Even assuming, *arguendo*, that it were true that benefits are "fixed" as of three years prior to plan termination -- and it is not -- the fact that the amount of the benefit is "fixed" as of the April 1, 2000 date says nothing about whether retirement-eligible pilots who did not retire as of that date were entitled to an actuarial adjustment to account for the fact that their "fixed" PC3 benefit did not begin on that date.

The only other support cited by the PBGC for its position was a selected portion of § 1344(a)(3)(B), which the PBGC claimed directed the trustee to calculate a benefit "as if [a participant's] benefits had commenced" three years prior to Plan termination. PBGC Decision at 16 (AR 17) (emphasis added). But the word "as" does not appear in the statute, *see* 29 U.S.C. § 1344(a)(3); it was interpolated by the PBGC. As written, the statute contains a much more specific command to include within PC3 the benefits of those participants who "would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity

under the plan<sup>[18]</sup>) as of the beginning of such period.” 29 U.S.C. § 1344(a)(3)(B). This language says nothing about calculating a benefit “as if” the participant had already been paid as of April 1, 2000, especially given that those benefits definitively had not been paid. Nor does the statute suggest that the Plan trustee can ignore other standard ERISA principles, such as the fundamental requirement of actuarial equivalence.

The PBGC’s interpretation, then, depends on language that is not present in the statute; it also improperly ignores the statutory language as a whole.<sup>19</sup> The PBGC’s construction placed dispositive weight on the “if his benefits had commenced” language, but that language, read in context, actually supports the Pilots’ position. Despite the PBGC’s attempts to do so, the “if his benefits commenced” language cannot be read in a vacuum. Read in its entirety, the statute concretely identifies those individuals who are eligible for PC3 status: participants whose benefits “would have been in pay status” *if* they had retired three years before Plan termination and *if* their benefits had commenced at that time. The obvious purpose of specifying a category of participants who “would have been in pay status” both if they had retired and if their benefits had commenced as of a particular date is that many plans, including this one (Plan § 4.3 (AR 388)), differentiate between a retirement date and a benefit commencement date. Without the statutory “commencement” language equating the two, the participants who fell within this category would have been unclear in situations where the retirement date and the benefit

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<sup>18</sup> The “normal form of [annuity]” under the Pilots’ Plan may be a bit different than others; unlike most plans, the 50% Joint and Survivor benefit is the “normal form of [annuity]” under the Plan when the retiree has a spouse on his benefit commencement date. *See* Plan § 9.1(a) (AR000395).

<sup>19</sup> It is a “cardinal rule that a statute is to be read as a whole, *see Massachusetts v. Morash*, 490 U.S. 107, 115 (1989), since the meaning of statutory language, plain or not, depends on context.” *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991). As the Supreme Court has explained, “[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.” *Id.* (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d. Cir. 1941) (Hand, J.)).

commencement date differed. This ambiguity, moreover, would have made it more difficult to determine whether and how an actuarial adjustment should be calculated. The “commencement” language eliminates that uncertainty -- the PC3 group includes all individuals who would have been in pay status if they had retired early and their benefits had commenced by April 1, 2000 -- making an actuarial adjustment simple.

The PBGC’s construction also is infected by a significant internal inconsistency. When determining what assets would be needed to *pay* PC3 benefits -- that is, the Plan liabilities -- the PBGC assumed that all PC3 participants -- those Pilots who were retirement-eligible as of April 1, 2000 -- actually received benefits starting on the date three years prior to Plan termination. *See* PBGC Actuarial Case Memorandum (Aug. 3, 2006) (AR 1209) (PBGC using actuarial equivalence principles, *i.e.*, “present value,” to calculate Plan liabilities). But in actually *paying* those same benefits, the PBGC used a different method, refusing to provide retirement-eligible participants with the pension they would have received if they had retired and had their benefits commence on April 1, 2000. It is worth noting that this inconsistency worked in the PBGC’s favor.<sup>20</sup>

The PBGC’s other purported justifications fare no better. The PBGC mistakenly asserted that the Pilots sought to inject the term “present value” into the statutory language, PBGC Decision at 16 (AR 17), but the Pilots did no such thing. Rather, the Pilots’ merely asserted that

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<sup>20</sup>The inconsistency between the method the PBGC used to calculate benefits paid to retirement-eligible Pilots and the method the PBGC used to calculate Plan liabilities to Pilots created a systemic surplus in PC3; this surplus occurs because the PBGC assumes Plan liabilities based on three years of payments to *all* PC3-eligible pilots (*i.e.*, those that retired at DOPT-3 and those that continued working), but then never actually makes the payments to the retirement-eligible Pilots. This surplus is not, however, put back into the Plan in order to pay Pilots whose benefits fall within the lower priority categories. Instead, the excess funds escheat to the PBGC -- which can use those funds to pay pensioners in entirely different plans -- clearly violating Congress’ intent to ensure that all remaining assets of the Plan are used for Plan participants, until exhausted.

where statutory provisions call for the calculation of the benefit based on a historical date, the amount of that benefit should be calculated using principles of actuarial equivalence. While the actuarial equivalence principles codified by ERISA sometimes require calculation of “present values,” applying ERISA as written, including provisions on actuarial equivalence, is hardly the “radical” proposition that PBGC made it out to be.

Likewise, the PBGC’s contention that the Pilots’ construction of the statute violates IRS provisions can be given short shrift. To support this proposition, the PBGC cited only to 26 C.F.R. § 1.401-1, which is the generic “qualified pension” plan regulation governing what a qualified plan can and cannot do. PBGC Decision at 16-17 (AR 17-18). But this regulation is completely beside the point; it has nothing to do with how the trustee of a terminated plan should prioritize remaining assets under ERISA’s Title IV, as it merely prohibits employers from setting up tax-qualified pension plans that *pay* benefits to participants *while* they are still working. That is decidedly *not* what the Pilots are seeking here. Rather, the Pilots contend merely that, when ERISA commands the trustee of a terminated plan to assume a retirement date three years before plan termination for participants who were not then receiving benefits, principles of actuarial equivalence should be used to ensure that the participant actually receives a benefit that reflects what he “would have received” if his benefits had commenced three years before the plan terminated. Nothing in the IRS regulations prohibits such a result and, indeed, the Plan here expressly provided such “late retirement benefits” upon retirement to participants who continued to work beyond their retirement eligibility date. Plan §§ 5.3, 5.4 (AR 389). The fact that the Plan itself provides the same sort of actuarial adjustment that the Pilots are seeking refutes any contention that such an adjustment violates the tax laws. The PBGC’s construction of the PC3

statute is unsustainable (under any level of deference), as the PBGC reads unfavorable terms in isolation and ignores any statutory language unfavorable to the PBGC's position.

**VI. THE PILOTS ARE ENTITLED TO SUMMARY JUDGMENT ON CLAIM NINE BECAUSE THE PBGC'S RECOUPMENT AND RECOVERY POLICIES ARE NOT AUTHORIZED BY ERISA**

Claim Nine challenges the practices the PBGC uses to recoup and recover alleged overpayments made to plan participants on the grounds that they are not authorized by, and in conflict with, ERISA. Pursuant to its regulations, in cases where the PBGC determines that it has erred by overpaying a participant who is entitled to receive future payments, the PBGC reduces the participant's monthly benefit payments to recoup that overpayment. 29 C.F.R. § 4022.81(a). In cases where the PBGC determines that it has erred by overpaying a participant who is no longer receiving payments, the PBGC seeks to recover that amount directly from the participant, usually by asking the participant to enter into a five-year installment plan. *See* Def.'s Opp.'n. to Pls'. Mot. for Prelim. Inj. at 5 (Sept. 8, 2008) (DE 12). The PBGC has not promulgated any regulation specifically authorizing its recovery practices, although its recoupment regulation states that "the PBGC may, in its discretion, recover overpayments by methods other than recouping in accordance with the rules in this subpart." 29 C.F.R. § 4022.81(a). Plaintiffs challenge these practices because they have no basis in ERISA. Moreover, to the extent that the PBGC can be considered to have the authority to recover (or recoup) overpayments from participants at all, its practices in exercising that authority are invalid to the extent that they: (1) allow recoupment and recovery against the deceased and disabled in some instances; and (2) do not include provisions allowing for waivers in cases of financial hardship.

To be clear, these are cases in which the participant did nothing wrong and has received an amount less than the pension benefits he or she actually earned. Instead, it is the PBGC itself

that has made what it determines was an error in performing its calculations. Because the PBGC took years to complete the Pilots' final benefit determinations, the supposed errors have in some cases resulted in determinations such that a retiree, living on a fixed income that has already been reduced dramatically from what was promised, is now being told that he or she owes the PBGC substantial amounts of money, sometimes tens of thousands of dollars. While these amounts may seem insubstantial compared to the operating budget of the PBGC, a \$70,000 discrepancy (as requested of some Pilots) can be a crippling amount for a retiree living on a fixed income, especially one who is disabled. Nowhere in ERISA did Congress authorize the PBGC to penalize a participant by recollecting past benefit payments in a case where the PBGC has made an error in the calculation, and it has no other authority on which it can rest a recoupment or recovery power. Even in the limited circumstance where recoupment is authorized under ERISA (in cases of pre-termination errors by the previous Plan administrator), the PBGC is constrained by statutory limitations prohibiting recoupment against the deceased and disabled, and in cases where there is financial hardship. Yet, the PBGC, in the current situation where it has *no* statutory authority in the first place to recoup or recover, does so with impunity -- that is, without any exception for those Congress has singled out as deserving special protection. Accordingly, the PBGC has once again acted arbitrarily and capriciously.

**A. To the Extent the PBGC Has the Authority to Recoup or Recover Funds, It May Only Do So in a Manner Consistent with Congress' Intent That Such Authority Not Be Exercised Against the Deceased or Disabled, and Waivers Be Made Available to Those Who Would Suffer Financial Hardship**

Below Plaintiffs will demonstrate why the PBGC lacks the authority to execute recoupment or recovery against Plan participants, under any circumstances. *See infra*, B and C. However, assuming *arguendo*, that the PBGC does have a right to engage in recovery and recoupment, the PBGC has ignored statutory limitations elsewhere placed on its express

recapture powers that prohibit seeking recapture of overpayments from the deceased or disabled, and that allow the PBGC to grant waivers in cases of demonstrated financial hardship.

In ERISA, Congress expressly gave the PBGC limited recoupment powers. Those powers, set forth in 29 U.S.C. § 1345, authorize the PBGC to recapture excess payments made to participants by a plan’s administrator *prior to a plan’s termination*.<sup>21</sup> However, § 1345(c) limits this general recoupment right, such that no recovery may be had from a participant who is disabled, or after a participant is deceased, and further authorizes the PBGC to waive a recovery where it might cause a participant substantial economic hardship. 29 U.S.C. § 1345(c). With the limitations of section 1345(c), Congress expressed a clear congressional intent to minimize the hardships that might be inflicted upon the most vulnerable of participants. The PBGC dismisses this Congressional direction out of hand, and administers its recoupment efforts regardless of the hardship it might inflict upon a particular participant. *See, e.g.*, PBGC Letter denying Captain Milliman’s Waiver Request at 1 (Feb. 19, 2010) (attached hereto as Ex. 2, and hereafter referred to as “Denial Letter”) (“PBGC’s recoupment methodology is already designed to minimize hardship on the affected participant; thus hardship waivers are unavailable in such cases.”); *id.* at 3 (Section 1345 “applies only to payments made before a plan terminated . . . PBGC’s subsequent recoupment regulation chose different mechanisms to ameliorate hardship regarding recoupment of post-termination overpayments -- mechanisms that apply to all participants, not just disable participants.”).

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<sup>21</sup> 29 U.S.C. § 1345, entitled “[r]ecapture of payments,” authorizes the “trustee” of a terminated pension plan to recover from plan participants certain overpayments made “within the 3-year period immediately preceding the time the plan is terminated.” *Id.* § 1345(a). Because it is the PBGC’s practice to always seek appointment as the plan trustee, we use the terms PBGC and trustee interchangeably here.

This is blatant administrative over-reaching. The Supreme Court has made clear that “[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is ‘the power to adopt regulations to carry into effect *the will of Congress as expressed by the statute.*’” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) (emphasis added) (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965); see also *Manhattan Gen. Equip. Co. v. Comm’r*, 297 U.S. 129, 134-35 (1936) (“The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law -- for no such power can be delegated by Congress -- but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. *A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.*”) (emphasis added); accord *Chem. Mfrs. Ass’n v. EPA*, 217 F.3d 861, 867 (D.C. Cir. 2000) (an agency’s actions “must ‘not deviate from or ignore the ascertainable legislative intent.’”) (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520 (D.C. Cir. 1983)).

The PBGC’s recoupment policies are completely out of harmony with ERISA. The inconsistency is best demonstrated by way of an actual example. The following facts are taken from the November 19, 2009 Request for Waiver of Overpayment on Behalf of James G. Milliman (attached hereto as Ex. 3, and hereafter referred to as “Waiver Request”), and the Denial Letter (attached hereto as Ex. 2). Captain James G. Milliman, a Plan participant, worked as a commercial airline pilot for 27 years. Waiver Request at 1. His career ended in 1993 when he suffered a severe stroke. *Id.* He suffered another stroke in August 1994, a year after the first. *Id.* Captain Milliman was found to be fully disabled and began receiving Social Security disability benefits in 1994. *Id.* US Airways similarly determined that he was totally and

permanently disabled and began paying him disability benefits after he exhausted his accrued leave. *Id.* He received benefits from the US Airways Pilot Disability Plan until he retired on April 1, 2000, at age 60. *Id.*

After the Plan's termination, the PBGC made its initial benefit determination, concluding that Captain Milliman was entitled to monthly payments of \$4,050.26. Denial Letter at 1. Subsequently, and without explanation, the PBGC increased his monthly benefit to \$5,058.40. *Id.* In 2007, the PBGC revised Captain Milliman's benefit determination, concluding that its two earlier determinations were in error. *Id.* According to the PBGC, it miscalculated the lump sum payout amounts Captain Milliman had received. *Id.* Under this revised benefit determination, the PBGC concluded that Captain Milliman was entitled to a monthly benefit of \$3,704.56. *Id.* He was also notified that he had been overpaid by over \$90,000 and that his monthly benefit payment would be further reduced by \$370.00 to account for the overpayment. *Id.*

In November 2009, Captain Milliman made a waiver request to the PBGC, asking that the agency agree to forgo any recoupment actions against him on financial hardship and public policy grounds. Waiver Request at 1. In the request, Captain Milliman described his severe disability in great detail. He also noted that, to accommodate his disability, he had been required to make significant modifications to his home. *Id.* at 2. Captain Milliman further noted that the PBGC's recoupment efforts had "significantly impaired his ability to maintain his home and cover the costs associated with his medical conditions" and pleaded that, "[w]ithout a waiver of the [recoupment], [he] face[d] the loss of his specially equipped home." *Id.* at 4.

On February 19, 2010, the PBGC denied Captain Milliman's waiver request. (Ex. 2). In its denial, the PBGC stated that 29 U.S.C. § 1345(c)(2)'s provisions prohibiting PBGC recovery against the disabled was inapposite, and that the "PBGC's subsequent recoupment regulation

chose different mechanisms to ameliorate hardship regarding recoupment of post-termination overpayments -- mechanisms that apply to all participants, not just disabled participants.” *Id.* at 3. The PBGC also declined to grant Captain Milliman an economic hardship waiver, stating that waiver are available only in “cases of recovery -- *i.e.*, cases where there are no future annuity benefits payable and direct repayment is sought from the participant.” *Id.* at 1. On March 24, 2010, Captain Milliman passed away.

The inconsistency of the PBGC’s position is clear. If the overpayments made to Captain Milliman had been made by U.S. Airways, prior to the Plan’s termination, the PBGC would concede it had no right to recoup the funds, as Captain Milliman was clearly disabled, and the statute plainly prohibits recoupment from the disabled. But, according to the PBGC, because this calculation error was made by the PBGC itself after the Plan’s termination, the PBGC had not only a right, but a *duty* to recover the funds. The proposition is unsupportable. There is no principled reason why Congress would not expect the same protection to be afforded to a disabled participant in cases occurring after plan termination, where the error resulting in overpayment is attributable to the PBGC itself, rather than a prior plan administrator. In both cases, the funds ultimately go the PBGC’s insurance fund. In both cases a plan participant received an overpayment as a result of a third party’s calculation error. Section 1345(c)(2) clearly is aimed at preventing disabled participants from having to bear an unnecessary and unexpected burden in cases where a third party has made a mistake in his payment determination. The PBGC ignores this Congressional choice, but presents no logical reason for doing so.

The unreasonableness of the PBGC’s recoupment and recovery practices is further evidenced in its entirely arbitrary position on hardship waivers. Section 1345 expressly indicates

Congress' intent to make waivers available to participants in cases of economic hardship. 29 U.S.C. § 1345(c)(3). In cases where the PBGC will *recoup* funds from a participant (like Captain Milliman), the PBGC refuses to make hardship waivers available. *See* Denial Letter at 1. However, in cases where it seeks to *recover* funds, the PBGC apparently will offer hardship waivers. *Id.* As discussed earlier, whatever authority it has to exercise recovery and recoupment derive from the same regulatory provision, 29 C.F.R. 4022.81(a). The PBGC has not offered any sort of justification for why hardship waivers should be offered to one group and not the other, and the disparate treatment flies in the face of Congress's expressed intent to offer such waivers "in *any* case in which it determines that substantial economic hardship would result to the participant." 29 U.S.C. § 1345(c)(3) (emphasis added). Because the PBGC cannot offer any principled reason why Congress might have intended the two situations to be treated differently, it should not be allowed to recoup or recover funds from participants in a manner inconsistent with section 1345's protections.

Not only are the PBGC's recoupment and recovery policies at odds with section 1345, but they are also incompatible with the principal purpose underlying ERISA, "to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374, (1980) (quoting Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare, 94th Cong., *Legislative History of the Employee Retirement Income Security Act of 1974*, Pub. L. No. 93-406, Vol. III, 4793 (Comm. Print Apr. 1976) (statement of Sen. Bentsen)). To protect against this potential tragedy, Congress created an insurance program that would guarantee a participant the right to certain payments. Inherent in this guarantee is a participant's expectation that the PBGC will not seek to alter the prescribed formula, or punish the retiree by instituting a benefit payment

made artificially lower by the agencies' own error or mistake. For a retiree living on a fixed income, any new and unexpected reduction has the potential for catastrophic consequences. The PBGC argues that it has a "duty" to recoup these benefit payments because one of ERISA's goals is to maintain premiums at the lowest possible levels. *See* 50 Fed. Reg. 3892, 3896 (Jan. 29, 1985). But by focusing on the potential (and in all likelihood negligible) effect that overpayments might have on the insurance fund as a whole, the PBGC has again failed to take into account that such a goal is "important but necessarily secondary: those purposes have meaning only in light of the need for a fair and reliable system of retirement income security for employees." *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 155 (D.C. Cir. 1984).

**B. More Fundamentally, the PBGC's Recoupment and Recovery Practices Cannot Survive Recent Developments in ERISA Jurisprudence**

More fundamentally, as alleged in the Second Amended Complaint, the PBGC's recoupment and recovery practices (even if they applied the proper exception relief) are without legal authority. To be sure, the Court of Appeals has previously held that the PBGC, as a government agency, enjoys an inherent right to recoup funds paid out in error. *See Bechtel v. Pension Benefit Guar. Corp.*, 781 F.2d 906, 907 (D.C. Cir. 1985). While the Plaintiffs understand that this Court is bound by *Bechtel* at this stage of the proceedings, it is important to note that *Bechtel* was wrongly decided. In a nutshell, the *Bechtel* court held, based on *United States, v. Wurts*, 303 U.S. 414, 416 (1938), the PBGC has an "inherent power" to recoup governmental funds "erroneously paid *from the public treasury*." *Id.* at 416 (emphasis added). Because the PBGC does not operate from general treasury appropriations, but from employer premiums and investment income, *Wurts* has no application, and *Bechtel* was decided in error. The Pilots preserve this point for argument, if necessary, to the Court of Appeals *en banc* or the Supreme Court.

In any event, the Supreme Court’s supervening ERISA jurisprudence makes clear that *Bechtel* -- if it ever were correct -- is no longer good law.. Beginning with *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), the Supreme Court issued a series of decisions noting that, owing to ERISA’s unique “interlocking, interrelated, and interdependent remedial scheme,” *id.* at 146, courts should avoid reading remedies into ERISA that are not actually contained within the statutory text. For example, in *Russell*, the Supreme Court categorically rejected the contention that ERISA contains within it an “implied” cause of action for punitive damages, holding that “[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.” *Id.* at 147. The Supreme Court employed the same reasoning in *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825 (1988), in concluding that ERISA provided for different garnishment rules for pension and welfare plans:

[T]here is no ignoring the fact that, when Congress was adopting ERISA, it had before it a provision to bar the alienation or garnishment of ERISA plan benefits, and chose to impose that limitation only with respect to ERISA pension benefit plans, and not ERISA welfare benefit plans. *In a comprehensive regulatory scheme like ERISA, such omissions are significant ones.*

*Id.* at 837-38 (emphasis added and internal citations omitted); *accord Gov’t of Guam v. Am. President Lines*, 28 F.3d 142, 145-46 (D.C. Cir. 1994) (citing *Russell* for the proposition that “[w]here Congress has provided an express remedy, . . . ‘the presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement’”) (quoting *Russell*, 473 U.S. at 147.).

*Bechtel's* suggestion that the PBGC enjoys an extra-statutory remedy against participants whom it has overpaid subsequent to a plan's termination is completely undermined by the Court's reasoning that courts should not "tamper with an enforcement scheme [that] is crafted with such evident care as the one in ERISA." *Russell*, 473 U.S. at 147. ERISA is a "comprehensive and reticulated statute." *Piech v. Pension Benefit Guar. Corp.*, 744 F.2d 156, 157 (D.C. Cir. 1984) (citing *Nachman*, 446 U.S. at 361). The fact that Congress did not include provisions within ERISA authorizing recovery in *post-termination* cases (as opposed to pre-termination cases under § 1345) suggests that Congress did not intend such recoveries to be allowable *at all*, especially given that in these post termination cases, the PBGC is the only party with the power to affect the accuracy of the initial benefit determinations, as well as the time it takes to correct any errors in those determinations. In this case, the PBGC took in excess of three years to complete the benefit determinations. *See Boivin v. U.S. Airways Inc.*, 446 F.3d 148, 158 (2006) (noting that the PBGC had not met its "stated goal [] to issue benefit determinations within three years of a plan's termination date," and holding that the participants would have a right to compel the agency to act if the determinations did not issue soon thereafter). It stands to reason that Congress would have sought to provide the PBGC with an incentive to provide accurate and timely benefit determinations by precluding it from seeking to recover from those participants it overpaid, while allowing the PBGC a limited right to seek recovery in instances where a calculation error was made by the prior plan administrator, a situation in which the PBGC clearly has no control. Because the Supreme Court since *Bechtel* has made clear that courts should avoid tampering with ERISA's delicately balanced scheme by inferring recovery rights into ERISA, this Court should hold that the PBGC has no extra-ERISA authority to recoup benefits, and it should grant Plaintiffs' summary judgment as to Claim Nine.

**VII. THE PILOTS ARE ENTITLED TO SUMMARY JUDGMENT ON CLAIM TEN BECAUSE THE PBGC HAS MISCONSTRUED ITS OBLIGATION TO GUARANTEE PENSION BENEFITS**

Whereas many of the other claims in this case relate to the PBGC's actions, in its voluntary role as the Plan's trustee, in allocating the Plan's remaining assets under 29 U.S.C. § 1344, Claim Ten relates to the PBGC's statutorily mandated role as insurer under a separate provision of ERISA, 29 U.S.C. § 1322. That provision states that the PBGC "shall guarantee . . . the payment of all non-forfeitable benefits" subject to a statutorily-prescribed maximum guaranteeable benefit. *Id.* § 1322(a), (b)(3). In this case, because the Plan was underfunded at the time of termination, the Plan's assets (as allocated under § 1344) did not come close to covering all of the Pilots' non-forfeitable benefits. The PBGC was thus required to "guarantee the payment" of the remaining non-forfeitable benefits not covered by the Plan's assets, up to ERISA's maximum guaranteeable benefit. But the PBGC found that if a Pilot had already been allocated from the Plan's assets more than ERISA's maximum guaranteeable benefit -- even if that amount was substantially less than the total amount of the Pilot's non-forfeitable benefits to which he is entitled under the Plan -- it owed not a penny of insurance.

The PBGC's grudging interpretation of its insurance obligation finds no support in ERISA and its legislative history, which make clear that the PBGC must pay insurance *whenever* the assets of a plan are insufficient to cover a participant's non-forfeitable benefits. The PBGC is not absolved of its insurance obligation when a participant receives from the plan's assets more than the maximum guaranteeable benefit. To the contrary, regardless of how much a participant receives from the plan's assets, if that amount is less than the full amount of his or her non-forfeitable benefits, the PBGC must pay the difference. The maximum guaranteeable benefit is simply a cap on how much of this difference the PBGC is required to pay. The PBGC should thus be ordered to pay the difference between the amount the Pilots were allocated from

the Plan's assets under § 1344 and the total amount of non-forfeitable benefits to which they are entitled under the Plan, not to exceed the maximum amount set out in 29 U.S.C. § 1322(b).

**A. Given the Implications for the PBGC Should the Pilots Succeed on Claim Ten, the PBGC Should Not Be Accorded Any Deference in its Interpretation of the Relevant ERISA Provision**

As an initial matter, and as the Pilots explained on pp. 13-16, *supra*, deference is not automatically accorded to an agency whenever it undertakes to construe a statute it is charged with administering. While “[d]eference under *Chevron* to an agency’s construction of a statute that it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps,” the Supreme Court has explained that “[i]n extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.” *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). An example of such an “extraordinary case” where deference is inappropriate is one that involves a “major question,” as Congress is more likely to have focused upon and answered such questions rather than those questions that are merely “interstitial” in nature, which are better left to the agencies. *See id.* (citing S. Breyer, *Judicial Review of Questions of Law and Policy*, 38 *Admin. L. Rev.* 363, 370 (1986); *see also id.* at 160 (refusing to defer to the FDA’s interpretation of a statute that had the effect of conferring upon it the authority to regulate tobacco because “Congress could not have intended to delegate a decision of such economic and political significance to an agency.”).

Here, Congress could not possibly have intended to delegate to the PBGC the authority to determine so fundamental and consequential a question as the very nature of the PBGC’s mission: that is, whether the PBGC is an insurer of all pension benefits, or is instead akin to a welfare agency that need only provide insurance benefits to those who have received less than some specified amount from the plan’s assets. As the PBGC has itself conceded, should the

Pilots prevail on Claim Ten, it “would turn upside down the PBGC’s entire way of calculating benefits.” Def.’s Opp’n to Pls.’ Mot. for Prelim. Inj. at 27 (Sept. 8, 2008) [DE 12]. Accordingly, although the Pilots contend that the Court need not even reach the question of whether to accord deference to the PBGC because the relevant statute -- 29 U.S.C. § 1322 -- clearly requires the PBGC to insure *all* non-forfeitable benefits, should the Court find § 1322 ambiguous, deference would be inappropriate in any event.

**B. ERISA Is Clear that the PBGC’s Obligation to Pay a Participant’s Non-forfeitable Benefits Not Covered by the Plan’s Assets Is Not Discharged Simply Because a Participant is Allocated More than the Maximum Guaranteeable Benefit from the Plan’s Assets**

The PBGC’s insurance obligation is rooted in 29 U.S.C. § 1322(a), which provides that, “[s]ubject to the limitations contained in subsection (b), the [PBGC] shall guarantee . . . the payment of *all* non-forfeitable benefits.” 29 U.S.C. § 1322(a) (emphasis added). One of “the limitations contained in subsection (b),” in turn, states that the amount of monthly benefits “which are guaranteed under this section with respect to a participant, shall not have an actuarial value which exceeds the actuarial value” of the lesser of two specified amounts, *id.* § 1322(b)(3), which the PBGC refers to as the “maximum guaranteeable benefit,” or “MGB.” Read together, § 1322(a) tells the PBGC *what* it must guarantee -- “all non-forfeitable benefits;” with § 1322(b)(3) simply telling the PBGC *how much* it can be made to pay -- no more than the MGB. But the PBGC found that even where the Plan’s assets were insufficient to cover in full a Pilot’s non-forfeitable benefits, it had no obligation to pay any insurance benefits at all if the benefits received by the Pilot from the Plan’s assets “exceeded the limitations in 29 U.S.C. § 1322(b)(3).” *See* Def.’s Opp’n. to Pls.’ Mot. for Inj. at 28 (Sept. 8, 2008) [DE 12]. The PBGC thus interpreted the MGB not as a cap on how much insurance it can be made to pay, but rather as a condition that determines *whether* it can even be made to pay insurance in the first instance.

The distinction between the position of the Pilots and that of the PBGC is best illustrated by way of example. Assume that a retiree is entitled to a monthly pension of \$5,000 under a plan. The plan terminates with insufficient assets to pay fully the pension. The trustee then distributes the remaining assets, with the result being a monthly payment to the retiree of \$3,500. Then assume that the PBGC's MGB is equivalent to \$3,000 per month. Under these facts, the Pilots allege that ERISA requires the PBGC to pay insurance (up to the limit of the MGB) for the difference between the amount allocated out of the plan's assets and the total amount of all non-forfeitable benefits. Hence, in the example, the PBGC must pay \$1,500 per month in insurance, since that is the difference between the \$5,000 pension the plan provides and the \$3,500 resulting from the trustee's distribution of the remaining plan assets, and since this \$1,500 is also less than the \$3,000 MGB that the PBGC can be made to pay. In contrast, the PBGC would conclude that it owes nothing to the retiree in insurance, because the trustee (who may or may not be the PBGC) has already distributed assets permitting a \$3,500 pension, which is more than the \$3,000 MGB. The PBGC, in other words, believes that § 1322(b)'s MGB amount means that it is obligated, in this example, to insure only *the first* \$3,000 in pension benefits, and that if this amount has already been allocated out of the plan's assets, the PBGC is completely off the hook.

Nothing in ERISA supports the PBGC's view that it need not pay insurance under § 1322 when the Plan assets allocated to a participant under 29 U.S.C. § 1344 exceed the MGB. In the first place, the provisions of ERISA outlining the PBGC's obligation to guarantee all non-forfeitable benefits -- § 1322(a)-(b) -- do not even refer to § 1344. If ERISA's explicit instruction to the PBGC that it "*shall* guarantee" the payment of "*all* non-forfeitable benefits" was in fact conditioned upon the outcome of the § 1344 asset allocation process -- with the PBGC's obligation triggered only where the assets distributed under § 1344 do not exceed the

MGB amount -- one would imagine that § 1344 would appear somewhere in § 1322(a) or (b). But it does not.

When § 1344 does make an appearance in another provision of § 1322 -- § 1322(c) -- it supports the Pilots' position that the PBGC's insurance obligation, far from being conditioned upon the assets allocated from the plan not exceeding some specified threshold, exists independently of the § 1344 asset-allocation process. Section 1322(c)(1) provides that, "[i]n addition to benefits paid under the preceding provisions of this section with respect to a terminated plan" -- *i.e.*, PBGC insurance payments under § 1322(a) -- "the corporation shall pay the portion of the amount determined under paragraph (2) which is allocated with respect to each participant under section 4044(a) [29 U.S.C. § 1344(a)]." (Emphasis added). The "amount determined under paragraph (2)" that the PBGC must allocate is the amount the PBGC recovers from the plan sponsor pursuant to the sponsor's liability to the PBGC for the plan's unfunded liabilities. 29 U.S.C. § 1322(c)(2)-(3); *see also* 29 U.S.C. § 1362 (setting out the plan sponsor's liability to the PBGC to the extent of the plan's unfunded liabilities). If the PBGC must pay its insurance guarantee "in addition" to its obligation to allocate the amounts recovered of the plan's unfunded liabilities, *a fortiori*, it must pay its insurance guarantee "in addition" to the amounts allocated by the plan administrator of the plan's funded liabilities. As a result, § 1322(c) makes plain that the PBGC's obligation to pay insurance, far from being contingent upon the amount allocated under the § 1344 process, exists independently of that process.

That the PBGC is not relieved of its insurance obligation simply because a participant receives from the plan's assets more than the MGB amount follows from the distinction between the PBGC's role as insurer under § 1322, and the allocation of the Plan's assets under § 1344. The responsibility for allocating the assets of a terminated pension plan is entrusted to the plan's

administrator, which is not necessarily the PBGC, with the funds allocated obviously coming from the assets of the plan. *See* 29 U.S.C. § 1344(a) (“In the case of a single-employer plan, *the plan administrator* shall allocate the assets of the plan . . . among the participants and beneficiaries”) (emphasis added). In contrast, pursuant to 29 U.S.C. § 1322(a), the PBGC is alone responsible for guaranteeing the payment of “all non-forfeitable benefits,” with another provision of ERISA making clear that any guarantee payments made by the PBGC are to come from the *PBGC’s* insurance fund, not from plan assets, *see* 29 U.S.C. § 1361 (the “amounts guaranteed by the corporation . . . shall be paid by the corporation *only out of the appropriate fund*”) (emphasis added). The notion that Congress intended, *sub silentio*, that the *PBGC’s* duty to pay insurance benefits under § 1322 out of *its funds* can be discharged by the *plan administrator’s* allocation of the *plan’s assets* under § 1344 is hard to fathom.

It is not surprising, therefore, that when the Supreme Court has had occasion to describe the PBGC’s insurance obligation under ERISA, it has described it exactly as the Pilots do here: As an obligation to pay the difference between the amount allocated from the plan’s assets and the total non-forfeitable benefits to which a participant is entitled, with no mention of any condition on the participant having first received less than the MGB amount from the plan’s assets. First, in *Mead Corp. v. Tilley*, 490 U.S. 714, 718 (1989), the Court explained that “[i]f the plan assets are not sufficient to cover the benefits in categories 1-4, the PBGC *will* make up the difference.” (Emphasis added). And then a year later, in *Pension Benefit Guaranty Corp. v. LTV Corp.*, the Court was even clearer, stating unequivocally that after a plan’s assets have been allocated under § 1344, the PBGC “*must*” then add its own funds to cover the difference between the allocated assets and the outstanding non-forfeitable benefits:

When a plan covered under Title IV terminates with insufficient assets to satisfy its pension obligations to the employees, the PBGC becomes trustee of

the plan, taking over the plan's assets and liabilities. The PBGC then uses the plan's assets to cover what it can of the benefit obligations. See 29 U.S.C. § 1344 (1982 ed. and Supp. IV). *The PBGC then must add its own funds to ensure payment of the most of the remaining 'non-forfeitable' benefits, i.e., those benefits to which participants have earned entitlement under the plan terms as of the date of termination.* § 1301(a)(8) and §§ 1322(a) and (b) (1982 ed. and Supp. IV). ERISA does place limits on the benefits PBGC may guarantee upon plan termination, however, even if an employee is entitled to greater benefits under the terms of the plan.

496 U.S. 633, 637-38 (1990) (emphasis added).

The Supreme Court in *LTV* did not say, as the PBGC contends here, that the PBGC is required to add its own funds where a plan's assets are insufficient to cover non-forfeitable benefits *only if* a participant has received less than the MGB amount from the plan's assets. Rather, where non-forfeitable benefits remain unpaid, the PBGC's obligation to add its own funds is absolute -- it "must" do so -- subject only to the caveat that it need not add more than the MGB amount.

**C. ERISA's Legislative History Makes Clear that the PBGC Must Pay the Difference Between the Assets Allocated from a Plan and the Total Amount of Non-forfeitable Benefits**

As explained, the plain language of ERISA and the Supreme Court's decisions in *Tilley* and *LTV* all compel the conclusion that the PBGC, as insurer, is required to pay the difference between the amount allocated from the plan's assets and the *total amount of non-forfeitable plan benefits*, with the MGB simply a cap on how much of this difference the PBGC can be made to pay. The PBGC, however, believes that even if plan assets are insufficient to pay all non-forfeitable benefits, it need not pay a single cent of insurance if a participant received from the plan's assets more than the MGB amount. Should ERISA itself leave any question as to the error of the PBGC's interpretation, ERISA's legislative history settles the matter definitively.

The report of the Senate's Committee on Labor and the Public Welfare, in the section of labeled "Payment of Insurance," states unequivocally that "[t]he insurance to be paid *shall be* the

difference between the plan's assets and unfunded vested benefits owed at the time of plan termination." S. Rep. No. 93-127, at 44 (1973) (emphasis added). A clearer endorsement of the Pilots' position would be difficult to find. A second Senate report, this one by the Senate Finance Committee, reflects just as certainly Congress's intent that the PBGC must pay insurance benefits any time a plan's assets are insufficient to cover the non-forfeitable benefits -- not just in those narrow instances where the plan assets allocated to a participant do not exceed the MGB amount:

Plan assets are to be allocated, in order, to voluntary contributions of employees, mandatory contributions of employees, benefits "in pay status" for at least three years, and insured benefits (other than those falling into any of the prior categories). *Where all these categories could be paid in full from plan assets, there would be no insurance corporation losses.*

S. Rep. No. 93-383, at 84 (1973) (emphasis added). The necessary corollary to the notion that the PBGC would suffer no losses when guaranteed benefits can be paid in full from plan assets, of course, is that when guaranteed benefits *cannot* be paid in full from plan assets, there *would* be PBGC losses.

The fact that Congress foresaw that the PBGC would suffer losses whenever a plan's assets could not cover in full a participant's non-forfeitable benefits follows from its clear vision of the PBGC as an insurer, not a welfare provider. In describing the purposes of ERISA's pension benefit insurance provision (now embodied in 29 U.S.C. § 1322), the Senate Finance Committee Report explained first that "[w]ith a strengthening of funding requirements, plan participants would be more assured of receiving their full vested benefits upon the termination of a plan." *Id.* at 80. The Committee recognized, however, that even with the new funding standards, it was still possible that "plan participants will be endangered by premature plan terminations." *Id.* It was "[t]o deal with these problems" -- *i.e.*, the problem of participants not

receiving their “full vested benefits” notwithstanding the added funding requirements -- that the Senate Finance Committee bill “require[d] that pension plan benefits be insured up to specified limits.” *Id.* ERISA’s benefit guarantee, therefore, was designed to ensure that participants receive their “full vested benefits,” not some bare-bones minimum.<sup>22</sup>

Still further, Congress envisioned that the PBGC’s insurance obligation would “provide the same kind of guarantee that a bank depositor has in the Federal Deposit Insurance Corporation.” 119 Cong. Rec. S16912 (daily ed. Sept. 19, 1973) (statement of Sen. Kennedy); *see also* Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare, 94th Cong., *Legislative History of the Employee Retirement Income Security Act of 1974*, Pub. L. No. 93-406, Vol. III, 4794 (Comm. Print Apr. 1976) (statement of Sen. Bentsen) (“This bill establishes a program of pension insurance -- modeled after the Federal Deposit Insurance Corporation for banks -- which will insure that after this law goes into effect all employees will be protected in the event that their plan does terminate before becoming fully funded.”); *id.* at 4833 (“A new Federal agency, the Pension Benefit Guaranty Corp. -- similar to the Federal Deposit Insurance Corp., which protects bank depositors in the event of bank failure -- is to be set up to protect you against abrupt cancellation of your pension benefits if your plan goes bankrupt.”); H.R. Comm. on Ways and Means, *Written Statements Submitted by Interested Organizations and Individuals on H.R. 10470, Retirement Income Security for Employees Act 1045* (Oct. 1, 1973) (statement of Rep. Waldie) (“Should a firm close down or lack enough funds to meet its pension obligations, these bills provide for required insurance against that contingency to be taken out by the employer.

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<sup>22</sup> Other legislative history materials similarly show that Congress thought the PBGC’s role would be that of insurer, not a welfare provider. S. 4, 93d Cong., §§ 402(a), (b), 404(a), (b) (1973); H.R. 12781, 93d Cong., § 409(b) & (d) (1974). (referring to PBGC obligation as a form of insurance, not a limitation on benefits).

This insurance would be similar to the guarantee a bank depositor has with the Federal Deposit Insurance Corporation.”); *Id.* at 934 (Oct. 1, 1973) (statement of Rep. Roush) (“In debate on the Senate floor this insurance proposal was suggested as the same kind of guarantee for an employee that a bank depositor has in the Federal Deposit Insurance Corporation. The same kind of certainty should accompany pension promises . . . When you look at it this way, you wonder how we could have taken so long in coming up with this kind of proposal.”); 120 Cong. Rec. H1341 (daily ed. Feb. 26, 1974) (statement of Mr. Fascell) (“There may occur, however, unexpected business failures, bankruptcy, or fund mismanagement which inadvertently lead to plan termination in spite of the safeguards provided in this bill. For these unusual cases, the bill establishes termination insurance similar in operation to the Federal Deposit Insurance Corporation which will require a contribution from pension benefit plans which in turn will be paid out to those which are terminated.”).

With the FDIC as a model, it becomes even clearer that Congress did not intend the PBGC to be relieved of its insurance obligation if the amount allocated from the plan’s assets exceeds the MGB amount. The FDIC pays its insurance obligation of \$250,000 *in addition to* any amounts otherwise received by a depositor from a defaulting bank’s assets. More specifically, during a single bank failure, the FDIC often acts as both insurer and receiver. *Golden Pac. Bancorp v. FDIC*, 375 F.3d 196, 198 (2d Cir. 2004). One transaction the FDIC employs in executing its role is a deposit payoff, in which it quickly pays insured depositors up to the insurance maximum of \$250,000. *See* 12 U.S.C. § 1821(f); 12 C.F.R. § 330.3(i). Acting as receiver, the FDIC then liquidates the assets of the failed institution in a manner that maximizes the net present value return from the sale while minimizing losses. *See* 12 U.S.C. § 1821(d)(13)(E). Creditors, including uninsured depositors, are paid dividends from the funds

realized from the liquidation. Thus, in the FDIC model, an individual receives FDIC insurance *even if* his losses do not exceed the FDIC's \$250,000 insurance maximum. So too here, a plan participant is entitled to PBGC insurance benefits *even if* the amount of benefits allocated from the plan's assets is more than the MGB amount.

Section 1322(a) of ERISA requires the PBGC to guarantee "all" non-forfeitable benefits not covered by a plan. The MGB amount set out in § 1322(b)(3) is merely a limitation on how much of these non-forfeitable benefits the PBGC can be made to pay; it is not a condition that determines whether the PBGC will pay any non-forfeitable benefits at all. Consistent with the FDIC model Congress intended, the plain language of ERISA, its legislative history, and the Supreme Court's jurisprudence, the PBGC must pay the Pilots their non-forfeitable benefits not covered by the remaining plan assets, subject to the statutory maximum.

**VIII. THE PILOTS ARE ENTITLED TO SUMMARY JUDGMENT ON CLAIM ELEVEN BECAUSE THE PBGC'S INTERPRETATION OF THE PLAN'S DISABILITY RETIREMENT BENEFIT PROVISION CONTRAVENES BOTH ITS LETTER AND PURPOSE**

Claim Eleven in the Second Amended Complaint arises under the Plan's disability retirement provision, which is found in Section 4.1(E).<sup>23</sup> In pertinent part, that provision provides:

The yearly amount of basic retirement income payable under the Plan to a Participant who begins receiving disability benefits under the Additional Benefit Programs on or after December 1, 1974, and who is determined to be totally and permanently disabled shall not be less than (A) minus (B):

(A) The amount of disability benefits that the Participant was entitled to receive under the Additional Benefit Programs<sup>24</sup> adjusted annually

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<sup>23</sup> The Plan's other disability retirement provision was the one that was incorporated by reference in the Minimum Benefit Guaranty, which is also contained in Plan Provision 4.1(E) and which is the subject of the motion for partial summary judgment on Claim Eight. DE 45 at 29-33 (discussing disability retirement benefit incorporated by minimum benefit provision.).

on each March 1 to reflect increases in the Cost of Living as follows:  
Whenever the United States Average Consumer Price Index for Urban Wage Earners and Clerical Workers or any index substituted therefore by the United States Department of Labor, increases by one percent (1%) or more in any calendar year, such amount shall be increased correspondingly, provided that such increase shall be limited to 3% of the amount determined by the preceding calendar year and that the maximum aggregate adjustment of such amount shall not exceed 33% of the initial disability benefit being paid under the Additional Benefits Programs;

(B) the yearly amount of retirement income payable in the Life No-Death Benefit form described in Section 9.1(B) of the Plan to the Participant under the Target Benefit Plan<sup>25</sup> and any other tax-qualified defined benefit or defined contribution plan maintained by the Employer that is attributable to Employer contributions (other than any elective deferrals made to such plan(s) in accordance with the provisions of Section 401(k) of the Code or any contributions to the US Airways, Inc. Employee Stock Ownership Plan) for employment with the Employer for the which the Participant was credited with Credited Service under the Plan while the Participant was on a leave or furlough status as a pilot and employed by the Employer in a non-pilot position.

Plan § 4.1(E). AR 387.

In a nutshell, this is the Plan's standard disability retirement provision,<sup>26</sup> which guarantees supplemental retirement income (beyond the normal retirement benefit) to Plan Participants who are "totally and permanently disabled" ("T & P Disabled") The Pension Plan does not itself define the term "totally and permanently disabled" but instead adopts that definition from the Long Term Disability Plan, which was amended in 1980 to state that T & P

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(footnote continued from previous page)

<sup>24</sup> "Additional Benefits Programs" is a defined plan term, which means "programs of disability benefits and survivor benefits to be provided to members of the Association by the employer pursuant to the [Collective Bargaining] Agreement" between US Airways and the Pilots' union. Plan § 2.1(B). AR 377.

<sup>25</sup> Section 9.1(B) describes the "Life-No Death Benefit form" as "provid[ing] that payments will be made to the Participant in a level amount during his lifetime and that, after his death, no further payment will be made." AR 395.

<sup>26</sup>The term "standard" is used to distinguish this disability retirement benefit from the disability retirement provision contained in the Prior Plan, which is the subject of Claim Eight in the Second Amended Complaint. See n.21 and DE 45 at 29-33.

Disabled individuals are those who suffer from a “disability which wholly and continuously disables or prevents such person from engaging in any occupation or employment for wage and profit for which he is qualified by reason of education, training or experience, for the remainder of his life.” First Amendment to US Air, Inc. Pilot Disability Benefit Monthly Income Plan (Formerly: Allegheny Airlines, Inc. Pilot Disability Benefit Monthly Income Plan) § 1.10 (June 4, 1982) (attached hereto as Ex. 3 at 11).<sup>27</sup>

Prior to this amendment, the Plan had defined “total and permanent” disability solely by reference to the federal Social Security laws, stating that “a Pilot will be considered permanently and totally disabled if his condition qualifies the disabled pilot for disability benefits under the Federal Social Security Act.” Pilot’s Long-Term Disability & Loss of License Program (“1975 LTD Plan”), § 1.10 (Jan. 1, 1975) (attached hereto as Ex. 4 at 2). This linkage was not uncommon; the rules and procedures that govern disability retirement benefits under private pension plans often overlap extensively with the rules and procedures that govern disability awards under the Social Security Act. *See Calvert v. Firststar Fin., Inc.*, 409 F.3d 286, 295 (6th Cir. 2005). Under the Social Security Act, disability benefits can be secured based on a showing that the claimant is “unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. § 1382c(a)(3)(A). The Social Security Administration (SSA) has promulgated a series of extensive regulations clarifying how this definition applies in a variety of contexts. *See, e.g.*, 20 C.F.R. §§ 404.1501 (general terms) 404.1505 (expanding on basic definition of disability); 404.1520 (evaluation of

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<sup>27</sup> This definition of “total and permanent disability” comes from the US Airways Disability Plan.

disability in general); 404.1563 (age as a vocational factor); 404.1565 your experience as a vocational factor); 404.1572 (“What we mean by substantial gainful activity”).

As a comparison reveals, the definition of T & P disability adopted by the 1980 amendment is *substantively* identical to the one contained in the Social Security laws -- both require an inability, due to disability, to engage in gainful employment for the remainder of an individual’s working years. The difference in the current and superseded provisions is, therefore, entirely procedural: The 1980 amendment permits a participant to satisfy the same substantive T & P standard in several ways (discussed below), thus overriding the previous requirement that a Pilot secure an actual disability award from the Social Security Administration. The reason for this change was simple: SSA total and permanent disability awards take a very long time to obtain because there are multiple levels of process that begin with a determination by the state and culminate in federal de novo review. 20 C.F.R. §§ 404.1503(a) (“State agencies make disability and blindness determinations for the Commissioner for most persons living in the State. State agencies make these disability and blindness determinations under regulations containing performance standards and other administrative requirements relating to the disability and blindness determination function.”); 404.1503(d) (providing for federal de novo review of state determinations). Thus, while the participants and US Airways were in agreement that the total and permanent disability *standards* adopted by the Social Security Administration were generally reasonable, they decided in 1980 to bypass the cumbersome SSA *process* by providing an easily available forum for demonstrating their entitlement to the disability retirement benefit.

The need for a less cumbersome forum was particularly appropriate for Pilots, whose T & P status was often simple to discern, as it could be determined solely by looking to their ability or inability to maintain an FAA first class medical certificate. Indeed, the importance of an FAA

first class medical certificate is referenced not only in the *title* of the Long Term Disability *and Loss of License* Plan itself, but also in many of its provisions. *See, e.g.*, 1975 LTD Plan, art. II (Ex. 4 at 3) (noting the failure to pass FAA physical examination can be ground for invoking disability benefits); § 5.2 (Ex. 4 at 6) (FAA form regarding failure to pass exam “should accompany” claim for disability, if possible); § 5.4 (Ex. 4 at 7) (legal action must be brought within 3 years of “proof of loss of FAA first class medical certificate”).

This importance stems from the fact that the FAA has adopted rigorous physical and mental standards to govern licenses for pilots who fly an aircraft in scheduled airline service; those strict standards make it relatively easy for long-time pilots to find themselves no longer able to engage in gainful employment before they reach full retirement age. *See* 14 C.F.R. §§ 61.23; 67.101. The FAA’s criteria for maintaining the first class medical certificate include detailed vision, hearing, smell, equilibrium, mental, neurological, cardio-vascular and general medical requirements. *See* 14 C.F.R. § § 67.103 (vision); 67.105 (ear, nose, throat and equilibrium); 67.107 (mental); 67.109 (neurologic); 67.111 (cardiovascular); 67.113 (general medical condition). A pilot who cannot satisfy these criteria cannot get a first class medical certificate, and without such a certificate, the pilot cannot fly an aircraft in scheduled airline service -- that is, the pilot cannot do his or her job. 14 C.F.R. § § 61.23; 67.101. And if the pilot is over age 55, cannot obtain a first class medical certificate due to disability or otherwise meets the definition of total and permanent disability, and has not performed any other work besides flying an aircraft in scheduled airline service for the past 15 years (which was almost always the case for retirement-eligible pilots) -- that pilot almost always meets the Social Security criteria for total and permanent disability and is entitled to a disability retirement income under Section 4.1(E). *See generally* 20 C.F.R. §§ 404.1563(e) (“at advanced age (age 55 or older), age

significantly affects a person's ability to adjust to other work.”); 404.1565(a) (“We consider that your work experience applies when it was done within the last 15 years, lasted long enough for you to learn to do it, and was substantial gainful activity. We do not usually consider that work you did 15 years or more before the time we are deciding whether you are disabled (or when the disability insured status requirement was last met, if earlier) applies. A gradual change occurs in most jobs so that after 15 years it is no longer realistic to expect that skills and abilities acquired in a job done then continue to apply. The 15-year guide is intended to insure that remote work experience is not currently applied.”).

In short, then, Plan Section 4.1(E) provides a long-standing disability retirement provision, which is particularly important because of the rigorous licensing regulations applied by the FAA to pilots who fly aircraft in scheduled airline service. The FAA standards -- and the corresponding need for Pilots to satisfy them in order to obtain their first class medical certificate -- made claims of T & P disability status relatively easy to determine. Likewise, the difficulty of meeting the FAA standards, particularly as pilots who fly aircraft in scheduled airline service approached retirement age, made T & P disability claims relatively common. The Plan recognized these realities, providing several ways pilots could have their T & P disability claims resolved without involving the Social Security Administration.

After Plan termination, the Pilots sought to have the PBGC apply the disability retirement provision in a similarly flexible and reasonable manner. When the PBGC declined, the Pilots filed an administrative appeal to the PBGC Appeals Board. On September 11, 2008, the PBGC resolved an administrative appeal by the Pilots related to application of the disability retirement provision. In Claim Eleven, the Pilots have identified a host of fundamental errors committed by the PBGC in its decision, in which the PBGC applied the disability retirement provision of

Section 4.1(E), in its capacity as Plan trustee. As discussed more fully below, the PBGC improperly restricted the procedures set forth under the Plan for demonstrating entitlement to disability retirement benefits, it added unwarranted substantive hurdles to securing those benefits, it ignored the failure of the previous plan administrator to properly apply the retirement benefit provision, and it made errors in allocating priority to disability retirement benefits when dividing up the remaining assets of the Plan. All of these errors provide a sound basis for overturning the PBGC's disability retirement decision.

**A. The PBGC Construed Plan Provisions In an Arbitrary and Capricious Fashion When It Denied Plaintiffs' Claims For Retirement Benefits**

In reviewing the Pilots' contention that the PBGC erred in its construction of the disability retirement provision, this Court's analysis is governed by *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), which held that such decisions should be reviewed "under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."

Here, the Plan provided U.S. Airways, as Plan Administrator, with authority to construe its terms. Plan § 14.1 (AR 407). The PBGC will likely argue that it inherited this authority when it became Plan trustee and thus, under *Firestone*, its construction of Plan terms should be reviewed for an abuse of discretion. It is questionable whether the PBGC should be entitled to deferential review, however, with respect to Section 4.1(E). In its order resolving the Pilots' claims regarding the disability retirement provision, the PBGC specifically disclaimed any knowledge and expertise with regard to the disability retirement provision and its application to claims of total and permanent disability, Decision of PBGC Appeals Board ("Disability Decision") at 12 (Sept. 11, 2008) (DAR 12) ("PBGC has no experience in applying the Disability Plan's standards . . . accepting medical records [as proof of total and permanent

disability] would require PBGC to discern and apply medical standards of a Plan PBGC does not trustee or even insure.”). In light of the PBGC’s description of its own lack of expertise in this area, affording it any deference on these issues would be unwarranted.

But even if the PBGC were theoretically entitled to some level of deference when interpreting Section 4.1(E), any deference would be limited by *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 111 (2008), which held that a reviewing court must take conflicts of interest into account in reviewing whether a Plan Administrator has abused its discretion in resolving benefits claims and construing Plan terms. *Id.* at 112. Here, the PBGC labored under precisely the sort of conflict of interest -- a financial conflict of interest that provided an incentive to deny benefits claims brought by plan participants -- described in *Glenn*. On the one hand, the PBGC acts as statutory trustee of the Plan, a position that requires the PBGC -- as a fiduciary of the Plan, *see* 29 U.S.C. § 1342(d)(3) -- to act solely in the interest of the Plan’s participants, including by ensuring they receive the full amount of benefits to which they are legally entitled. *See Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 616 (1993) (“[Title 29 U.S.C. § 1104(a)(1)] requires a trustee to ‘discharge his duties . . . solely in the interest of the participants [i.e., covered employees] and beneficiaries’”) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-32 (1981)). On the other hand, though, the PBGC also serves as the Plan’s guarantor or insurer, a role that requires the PBGC to cover -- out of its own funds -- any benefit shortfalls (subject to a statutory maximum) not paid out of the Plan’s assets. 29 U.S.C. § 1322(a); *see Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 637 (1990) (explaining that after “[t]he PBGC . . . uses the plan's assets to cover what it can of the benefit obligations,” “[t]he PBGC then must add its own funds to ensure payment the of most of the remaining ‘nonforfeitable’ benefits.”). In its role as guarantor, therefore, the PBGC has every interest in minimizing the

benefits due under the Plan, an interest that is antithetical to its duties as the Plan's trustee. *Pineiro v. Pension Benefit Guar. Corp.*, 318 F. Supp. 2d 67, 88 (S.D.N.Y. 2003) ("PBGC does act under an inherent conflict of interest, since PBGC-as-trustee, acting with participants' interests in mind, presumably seeks the highest allowed benefits for each, while PBGC-as-guarantor must closely scrutinize the plan in light of the statute in order to determine which benefits are guaranteed, and to what extent."). This conflict was unquestionably present here: Had the PBGC found for the Pilots and applied the disability retirement provision as written, it would have substantially increased Plan liabilities.

There is ample evidence that this conflict of interest very much affected the PBGC's interpretation of the Plan's disability retirement provision. Indeed, at the outset of this litigation, the PBGC acknowledged that its own bottom line was front and center when assessing issues arising under the Plan. DE 12 at 2-3, 30-31. (PBGC asserting that its operating deficit was important factor to consider in Plaintiffs' preliminary injunction motion). With respect to the disability retirement claim, this conflict of interest figured most prominently in the PBGC's abject refusal to consider the disability retirement claims of Pilots who had not obtained a total and permanent disability determination by the Social Security Administration (SSA). As discussed in more detail below, the PBGC not only makes such determinations routinely and is authorized to do so by its own regulations, but such determinations are simplified greatly by the FAA's numerous, concrete criteria for assessing whether a pilot who flies aircraft in commercial airline service can secure a first class medical certificate. Since a pilot who cannot secure such a certificate cannot, by definition, perform his job, these concrete standards make a determination of total and permanent disability relatively easy. But the PBGC ignored them, and also ignored the fact that the very purpose of the disability plan's provision providing for multiple ways of

securing a T & P finding was to ensure that participants would not need to pursue the arduous process of securing a SSA award in order to invoke Section 4.1(E).

Despite this clear intent, the PBGC construed the Plan as containing such a requirement - in other words, it construed the Plan as containing a requirement that had expressly been eliminated by a Plan amendment. The PBGC's construction, without any evidence to support it, suggests that the significant financial repercussions to the PBGC had it found for the Pilots was a substantial factor in its construction of Section 4.1(E). The PBGC's conflict of interest should deprive it of any deference its construction of the plan decision would otherwise be due.

1. *The PBGC Abused Any Discretion It Had By Construing Plan Section 4.1(E) As Requiring Participants to Secure A Social Security Administration Determination of Total and Permanent Disability In Order To Invoke Its Provisions*

The most basic error committed by the PBGC arises from its determination about the procedures that could be used after Plan termination to demonstrate entitlement to disability retirement benefits. After Plan termination, a number of pilots sought to present their disability retirement benefit claims directly to the PBGC or to a qualified party of the PBGC's choosing. *See Appeal of Final Benefit Determinations on Behalf of US Airways Pilots* ("Appeal") at 18-19 (Mar. 23, 2007) (AR 238-39). But the PBGC refused to hear them, and refused to authorize anyone else to hear them. According to the PBGC, while it would honor total and permanent disability awards obtained from SSA, the only other procedural mechanism for obtaining such a determination was to present a claim to the Administrator of US Airways Disability Plan. In the PBGC's view, this meant the Section 4.1(E) of the Pension Plan *required* that *only* "Disability Plan officials examine the particular facts and circumstances of [each] case." Disability Decision at 9 (DAR 9). The PBGC reached this result even though its own regulations permit it to make such determinations, 29 C.F.R. § 4022.6(c), and even though it would inevitably have had to

review any determinations by the Disability Plan Administrator as part of its obligation to resolve disability retirement benefit claims under the terminated Plan. It also reached this result even though the Plan itself provided for a number of other ways of securing a total and permanent disability determination, including precisely the sort of independent medical examination requested by the Pilots.

The PBGC's determination was arbitrary and capricious, as it ignored both the pertinent language and history of the disability retirement benefit provisions. As noted, the Plan language was amended in 1980 to eliminate any requirement that a disability retirement claimant actually secure an SSA determination of total and permanent disability; instead, after 1980, the Plan required only that a participant satisfy the *substantive* definition of total and permanent disability under the Social Security laws in one of several potential forums. These new available forums continued to include the cumbersome SSA process, but now a claimant could also seek an "initial" determination of total and permanent disability from the Disability Plan Administrator, US Airways, which also served as Pension Plan Administrator. USAIR, Inc. Pilot Disability Plan ("Disability Plan") § 4.2(a) (Feb. 1997) (DAR 402). The Disability Plan Administrator was not, however, the *exclusive* forum for obtaining a T & P determination. While all "initial" claims needed to be brought there, the Disability Plan Administrator was not even empowered to *deny* a disability claim. If, for example, the Plan Administrator did not find sufficient evidence to grant a claim, a new determination was made by either a medical examiner or the US Airways Retirement Board. *Id.* § 4.2(b), (c) (DAR 402-03). Moreover, in the event of a deadlock by the Retirement Board, the Disability Claim was submitted to a neutral arbiter for final resolution. *Id.* § 4.2(c) (DAR 403). Thus, there were a number of different ways to secure a T & P determination under the Disability Plan, and the failure of the Disability Plan administrator to

grant a claim was not dispositive; an initial failure merely meant that a claimant could then be heard by one of two other independent bodies.

When it addressed the Pilots' contention that they were entitled under the Plan to demonstrate T & P status in a number of ways, the PBGC ignored this history, committing a number of discernable errors along with the way. First, it improperly engaged in the fiction that the Disability Administrator was a separate entity from the Pension Plan Administrator prior to Plan termination -- announcing that it knew of no instance in which the Pension Plan Administrator had made total and permanent disability determinations prior to Plan termination. Disability Decision at 12 (DAR 12). But as the PBGC undoubtedly knew, this was mere sophistry since the Disability Plan Administrator (US Airways) was the *same entity* as the Pension Plan Administrator (US Airways) up until the date that the pension plan was terminated and the PBGC was appointed as its new administrator. Plan § 14.1 ("The Employer, which shall be the administrator for the purposes of ERISA and the Plan Administrator for purposes of the Code"); 1975 LTD Plan, art. IV (Ex. 4 at 5) ("The general responsibility for administration of this plan shall be vested in the company.") Thus, there was in fact a long history of total and permanent disability determinations being made by precisely the same entity that served as the Pension Plan Administrator.

That overlap was logical because the two plans were intertwined when it came to total and permanent disability determinations and it was precisely the reason there was never any formal need to include the Pension Plan Administrator in these determinations. When these entities separated after the pension was terminated, however, there was no rational basis to keep the new Pension Plan Administrator (the PBGC) walled off from critical decisions about disability *retirement* benefits in a way the previous plan administrator had not been, particularly

given the PBGC's own regulations allowing it to participate in such decisions, and the ease with which it could be determined whether a pilot's disability prevented him or her from meeting the objective criteria necessary to obtaining an FAA first class medical certificate.

Second, even if the functions of the pension plan administrator and the disability plan administrator had historically been performed by separate entities, the PBGC was simply wrong to suggest that, prior to Plan termination, the Disability Plan administrator was the sole alternative forum to the SSA. Disability Decision at 12 (DAR 12). As noted, the plain language of the Long Term Disability Plan did not reserve all total and permanent disability decisions for the Disability Plan administrator; rather, it set forth a multi-tiered process in which pilots whose claims were not granted by the Disability Plan Administrator could secure review from an independent medical examiner or the Retirement Board. Disability Plan § 4.2 (DAR 402-03).<sup>28</sup> The PBGC cited absolutely no evidence to the contrary, and ignored the plain plan language setting forth this multi-tiered process.

Third, and most importantly, the PBGC provided no principled reason why total and permanent disability claims could not be heard by an independent medical examiner, just as the Plan provided in the event of a failure to grant by the Disability Plan administrator. To be sure, the Claims could no longer be heard by the Retirement Board, which had lost jurisdiction over Disability Plan claims as part of a concessionary agreement reached during the US Airways bankruptcy. But the PBGC ignored the remaining option, review by an independent medical examiner that continue to exist, thereby leaving the Pilots worse off than they would have been under an assumption that the Disability Plan Administrator *automatically denied* every claim. If

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<sup>28</sup> The Retirement Board option no longer remained available with the elimination of its jurisdiction over the Disability Plan as part of a concessionary agreement reached during the bankruptcy.

the PBGC had made such an assumption, every participant would have still been entitled to review by review by an independent medical examiner or the equivalent.

No rational basis exists for the PBGC to have placed the Pilots in a worse position than they would have been if the PBGC had assumed an initial denial of their claims by the Disability Plan administrator. The Plan required a full and fair process in which T & P determinations could be made through a variety of methods, and did not provide a scheme in which such decisions were uniquely within the jurisdiction of the Disability Plan Administrator. Indeed, the whole point of providing for these alternative methods of resolving total and permanent disability determinations was to ensure that participants were not left with the cumbersome SSA as their only potential forum for obtaining a T & P determination. But that is the upshot of the PBGC's decision, in which an SSA total and permanent disability determination is the only practical manner to secure a disability retirement benefit. This is precisely what the Plan tried to *eliminate* in 1980. Interpreting the Plan in the manner it was amended to avoid is a quintessential example of arbitrary and capricious agency action, *see, e.g., Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Butte County v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010); *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009), and this Court must overturn it.

2. *The PBGC Abused Any Discretion It Had By Construing Plan Section 4.1(E) As Being Limited Exclusively To Those "Totally and Permanently Disabled" Participants Who Retired While Receiving Benefits Under The US Airways Long-Term Disability Plan*

The PBGC also arbitrarily and capriciously interpreted the Plan provisions related to how a Pilot could become eligible for the disability retirement benefit of Section 4.1(E). As noted, that provision provides a disability retirement benefit "to a Participant who begins receiving

disability benefits under the Additional Benefit Programs on or after December 1, 1974, and who is determined to be totally and permanently disabled.”

By its plain language, the eligibility provision affords a disability retirement benefit to all “totally and permanently disabled” Pilots whose disability benefits commenced after December 1, 1974 -- the period when Section 4.1(E) was created. The obvious reason for the language regarding the need for benefits to “begin” receiving disability benefits after the December 1974 date is not to create a separate and irrational requirement of receipt of additional benefits prior to becoming “totally and permanently” disabled. Rather, that provision is merely a “timing” mechanism that ensured individuals who were already receiving disability or disability retirement payments before that date would instead be governed by earlier Plan provisions regarding disability retirement benefits.

While this meaning is apparent from the language itself, to the extent there is any ambiguity, the history of this provision is dispositive, as its proper construction can be understood only in the context of this history. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (“a page of history is worth a volume of logic”). The disability retirement provision was negotiated in 1974, and was part of a new long term disability plan that became effective on January 1, 1975. At the time of its adoption, those drafting the provision naturally needed to answer the question of when it would first take effect. They chose to apply it to anyone who had become disabled in the previous month, making the December 1, 1974 date, simply an “effective date” provision, designed to make the new Long Term Disability policy applicable prospectively to participants who became disabled after that date. That date, in fact, is the same timing provision incorporated directly into the 1975 LTD Plan, section 5.11 (Ex. 4 at 7) (making disability benefits “payable to pilots who become totally and permanently disabled after

December 1, 1974”). Nothing from the history suggests that the language in Plan provision 4.1(E) was intended to create a new *substantive* requirement for obtaining a disability retirement benefit beyond a showing of total and permanent disability.

Ignoring this history entirely, the PBGC read this provision to mean that a Retired Pilot who met the definition for “total and permanent” disability would nonetheless be ineligible for the disability retirement benefit if he or she had not received disability payments prior to the on-set of the “total and permanent” disability. Under the PBGC’s interpretation, therefore, a Pilot who became “totally and permanently” disabled in a plane, automobile or other crash, or in some other sudden fashion, would be ineligible for the disability retirement benefit because he would not have received disability payments prior to the on-set of “total and permanent” disability. Moreover, the PBGC has never explained why the parties would adopt a provision that forced such totally and permanently disabled participants to unnecessarily go onto the Disability Plan -- a plan that had no preferred tax treatment and was paid directly by the employer -- even though their T & P status by definition meant that they would ultimately secure their disability retirement benefits. Plan provisions should be construed whenever possible to avoid absurd results, *see In re Kaiser Aluminum Corp.*, 456 F.3d 328, 330 (3d Cir. 2006) (rejecting PBGC proposal because it led to “absurd results” and was unworkable), *Hurlic v. S. Cal. Gas Op. Co.*, 539 F.3d 1024, 1032 (9th Cir. 2008) (citing “well-accepted rules of statutory construction caution us that 'statutory interpretations which would produce absurd results are to be avoided'”) (citation omitted), but the PBGC’s interpretation guaranteed such absurdities. Such an irrational interpretation violates ERISA, and adversely affected Plaintiffs by unlawfully lowering the benefits to which they were entitled.

3. *The PBGC Abused Any Discretion It Had By Refusing To Rectify The Erroneous Benefit Determinations Of The Previous Plan Administrator,*

*Who Failed To Honor Claims Of “Totally And Permanently Disabled”  
Pilots Who Retired Before Plan Termination Without Receiving Benefits  
Due To Them Under Plan Section 4.1(E)*

The PBGC also unlawfully refused to take reasonable efforts, as Plan trustee, to ensure that those Pilots entitled to receive a disability retirement benefit actually received that benefit. This failing was directed specifically toward those pilots who had been found to be “totally and permanently” disabled prior to Plan termination, and began receiving pension benefits -- often lump-sum payments, but also partial lump-sum or straight annuity payments -- before the PBGC’s appointment as voluntary Plan trustee. For all of these pre-termination totally and permanently disabled retirees, US Airways had provided erroneous information about the manner in which it would be calculating disability retirement benefits, including a failure to disclose that a total and permanent disability determination by SSA would not suffice unless a participant also was receiving disability benefits at the time of his retirement. While Plaintiffs disagree with any suggestion that that was a proper interpretation of the Plan, if they are incorrect, US Airways at the very least had a duty to inform them of this policy at a time when they could have chosen to invoke their rights under the long-term disability plan rather than retire immediately. There is no question that such information would be “material,” and “[t]he duty to disclose material information is the core of a fiduciary’s responsibility” under both the common law of trusts and under ERISA. *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750-51 (D.C. Cir. 1990); *and see Jordan v. Fed. Express Corp.*, 116 F.3d 1005, 1016 (3d Cir. 1997) (because of the disparity of training and knowledge that exists between lay persons and fiduciaries, a fiduciary’s obligations to disclose material facts will not be excused merely because the beneficiary failed to comprehend or ask about a technical aspect of the plan); *Hughes Salaried Retirees Action Comm. v. Adm’r of Hughes Non-Bargaining Ret. Plan*, 72 F.3d 686, 694 (9th Cir. 1995) (similar).

After Plan termination, those Pilots adversely affected by the refusal of the previous Plan Administrator to honor their vested disability retirement benefits raised objections concerning the inadequacy of their disability retirement benefits, arguing that their payments had been improperly calculated. These pilots also informed the PBGC that, if it truly was US Airways' policy to force a totally and permanently disabled participant to claim long term disability benefits before being eligible for disability retirement benefits, their previous Plan administrator had breached its fiduciary duty by failing to disclose such material information. Despite the requirements of 29 U.S.C. §§ 1105(a)(3) & 1342(d)(3), the PBGC determined that it would not address such claims. This refusal breached its fiduciary obligation, as Plan trustee, to make reasonable efforts to remedy known errors of the previous Plan Administrator. Mem. Order at 3-8 (Mar. 17, 2009) [DE 33]; *id.* at 6-7 (confirming that PBGC has a fiduciary duty, as trustee, to make reasonable efforts to remedy known errors of previous Plan Administrator). This Court must remedy the breach by requiring the PBGC to permit all eligible Pilots who were totally and permanently disabled prior to Plan termination to make an informed election of whether, if they had realized they needed to first claim long-term disability in order to secure disability retirement benefits under Section 4.1(E), they would have elected to seek long term disability benefits before retiring. Once that election is made, the Court should direct the PBGC to begin paying disability retirement benefits as if they had commenced as of that date.

**B. The PBGC Construed ERISA and Its Own Regulations In An Arbitrary and Capricious Fashion When Allocating Remaining Plan Assets**

In addition to misconstruing Plan section 4.1(E) in determining PC3 benefits in its role as the Plan's trustee, the PBGC also acted arbitrarily and capriciously in construing ERISA and related regulatory enactments. The Plan provisions providing for a disability retirement benefit had been in effect for at least twenty years prior to Plan termination, which meant that those

benefits, in their entirety, were entitled to PC3 status under the terms of 29 U.S.C. § 1344(a)(3). Nonetheless, the PBGC whittled away at the benefits provided by these long-standing plan provisions in at least two impermissible ways.

1. *The PBGC Improperly Refused To Afford PC3 Status to The Disability Retirement Benefits Of Those Pilots Who Became Totally and Permanently Disabled After March 31, 2000*

First, the PBGC improperly refused to afford Priority Category 3 status to the disability retirement benefits of those Pilots who became totally and permanently disabled on or after March 31, 2000. In reaching this conclusion, the PBGC erroneously determined that the dispositive question was whether a participant's claim for disability retirement benefits had occurred in the three years prior to Plan termination. The PBGC then took the position that the condition creating the disability must also have occurred three years prior to Plan termination for a benefit to be afforded Priority Category 3 status.

This requirement violated the plain language of ERISA, and has no rational basis whatsoever. Nothing in the plain language of 29 U.S.C. § 1344(a)(3) forecloses the PBGC from giving PC3 status to benefits arising out of a total and permanent disability that occurs in the three years before Plan termination, and there is no conceivable reason Congress would have wanted to deny priority status to disability retirement benefits arising under a longstanding Plan provision, simply because the individual entitled to those benefits became "totally and permanently" disabled less than three years prior to Plan termination. Indeed, when Congress expressly considered the question of disability reductions in the years prior to Plan termination -- in connection with 29 U.S.C. § 1322(b)(1)(3) -- it directed the PBGC not to make any reductions in the maximum disability benefit guarantee for any "benefit payable *by reason of disability that occurred on or before the termination date.*" (Emphasis added). Likewise, the PBGC's own regulations and publications make clear the pertinent time period for assessing a participant's

entitlement to disability retirement benefits is “on or before the termination date” -- not three years before the termination date. 29 C.F.R. § 4022.6(a). (“the total and permanent disability [benefit] of a participant which is expected to last for the life of the participant and which began on or before the termination date is considered to be a pension benefit.”); Pension Benefit Guaranty Corp. Pamphlet, *Your Guaranteed Pension* at 2 (2002) (attached hereto as Ex. 5) (“PBGC guarantees ‘basic benefits’ earned before your plan ended, which include . . . (3) disability benefits for *disabilities that occurred before the plan was terminated*”); Pension Benefit Guaranty Corporation, *You May Be Due Increased Benefits If You are Disabled*, Pension Newsletter at 3 (Fall 2003) (attached hereto as Ex. 6) (“If you were a member of a pension plan for which PBGC became responsible on or after December 8, 1994, you may be entitled to higher benefits if: (1) you retired under a nondisability provision in your plan, (2) you received a Social Security Disability Award due to a disability that occurred before the earlier of your date of retirement or the *date your plan [was] ended*”).

The PBGC acted arbitrarily and capriciously when it adopted an unsupportable construction of the Priority Categories created by Congress simply to deprive Pilots who were indisputably “totally and permanently” disabled at the time of Plan termination of vested benefits that they had long since earned. The PBGC’s improper categorization of these disability retirement benefits violates ERISA, and adversely affected Plaintiffs by unlawfully lowering the benefits to which they were entitled.

2. *The PBGC improperly refused to afford Priority Category 3 status to integral components of the Disability Retirement Benefit*

Second, the PBGC improperly refused to afford Priority Category 3 status to the 3% per year increases guaranteed after March 31, 2000. The continued provision of these 3% increases, which were unique to disabled Pilots, was an inherent feature of the long-standing disability

retirement benefit, not a benefit increase. The PBGC excluded these increases from PC3 by once again applying its regulation governing “automatic benefit increases,” 29 C.F.R. § 4044.13(b)(5). Disability Decision at 14 (DAR at 14). But as explained in Part II(D), *supra*, that regulation has no basis in ERISA and should be set aside. Because the 3% increases were provided pursuant to a Plan provision that had been in existence for twenty years prior to Plan termination, the plain terms of the ERISA required inclusion of these benefits within Priority Category 3. The PBGC’s improper categorization of these disability retirement benefits violates ERISA, and adversely affected Plaintiffs by unlawfully lowering the benefits to which they were entitled.

**IX. THE PILOTS ARE ENTITLED TO SUMMARY JUDGMENT ON CLAIM TWELVE FOR THE SAME REASONS THEY ARE ENTITLED TO SUMMARY JUDGMENT ON THE OTHER CLAIMS IN THIS MOTION**

All of the aforementioned claims on which the Pilots move for summary judgment in this motion, as well as Claim Eight on which the Pilots have previously moved for summary judgment, involve violations of ERISA. The Pilots, however, protectively asserted in their Second Amended Complaint a claim under the APA -- Claim Twelve -- alleging that since all of the actions of the PBGC in misconstruing the terms of the Plan, the provisions of ERISA, or its own regulations are either arbitrary and capricious, contrary to law, or both, the PBGC has also violated the APA. *See* 5 U.S.C. § 706. Accordingly, for the reasons set forth with respect to the other claims in this motion, as well as in the Pilots’ Motion for Partial Summary Judgment on Claim Eight, the Pilots are also entitled to summary judgment on Claim Twelve.

**X. THE PILOTS RESPECTFULLY RESERVE THE RIGHT TO MOVE FOR SUMMARY JUDGMENT ON CLAIM FOUR IN THE FUTURE SHOULD RELEVANT EVIDENCE COME TO LIGHT**

Claim Four challenges the PBGC’s use of benefits received by certain Pilots under the “Target Plan” -- an additional benefit plan set up by US Airways to alleviate the effect of the benefit limitations imposed by § 415(b) of the Internal Revenue Code -- to reduce benefits paid

by the PBGC. The PBGC denies that it has made any improper reductions as alleged by the Pilots. *See* PBGC Decision at 38 (AR 39). Nonetheless, the PBGC's opinion also appeared to reserve the right to make reductions based on Target Plan benefits that would diminish benefits paid to Pilots from the Plan. *See* PBGC Decision at 35-40 (AR 36-41). Such reductions are completely improper but do not, at the current time, appear to diminish any of the Pilots' PBGC benefits. That could change, however, depending upon the resolution of the other claims raised in this motion and if it does, the Pilots respectfully reserve the right to move for summary judgment on Claim Four at a future date.

**CONCLUSION**

For the foregoing reasons, the Pilots' Motion for Summary Judgment on Claims One, Two, Three, Six, Seven, Nine, Ten, Eleven, and Twelve should be granted.

Respectfully submitted,

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