UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

K. WENDELL LEWIS, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:14-cv-03838-SCJ**
PENSION BENEFIT GUARANTYCORPORATION,	)	
Defendant.	)	

PENSION BENEFIT GUARANTY CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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INTRODUCTION

Defendant Pension Benefit Guaranty Corporation ("PBGC") moves to dismiss the Plaintiffs' Complaint ("Complaint") pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure because the Complaint alleges a defective basis for venue, or, alternatively, to transfer this action pursuant to 28 U.S.C. § 1406(a) to the jurisdiction in which venue is proper. PBGC also moves to dismiss Claim Five (Breach of Fiduciary Duty/Violations of ERISA/Disgorgement) of the Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. For the reasons set forth fully below, the Motion should be granted.

BACKGROUND

Parties

PBGC is the federal agency that administers the mandatory pension insurance program established by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended*, 29 U.S.C. §§ 1301-1461 (2012).[1] PBGC guarantees benefits in pension plans covered by Title IV, subject to statutory limits. When a pension plan covered by Title IV terminates with insufficient assets to pay all benefits earned by participants, PBGC typically becomes statutory trustee of the terminated plan. PBGC then pays benefits, within

[1] PBGC is a wholly owned Government corporation. 31 U.S.C. § 9101(3)(J); *see also*, 5 U.S.C. § 105.

the limits of Title IV, to participants or their beneficiaries as of the plan termination date. *See Davis v. PBGC*, 734 F.3d 1161, 1164-65 (D.C. Cir. 2013); *cert. denied*, 134 S. Ct. 2878 (2014).

Delta Air Lines, Inc. ("Delta") was the contributing sponsor and plan administrator of the Delta Pilots Retirement Plan ("Plan"). In 2005, Delta filed for relief under Chapter 11 of the United States Bankruptcy Code. By agreement effective December 31, 2006, and pursuant to 29 U.S.C. §§ 1341(c)(3)(B)(iii), 1342, and 1348, PBGC and the Plan administrator: (1) terminated the Plan, (2) established September 2, 2006, as the date of Plan termination, and (3) appointed PBGC as the statutory trustee of the Plan under 29 U.S.C. § 1342(c). *See* Agreement for Appointment of Trustee and Termination of Plan, attached hereto as Exhibit A. The Plan terminated with insufficient assets to pay all of its promised benefits.

The Plaintiffs are nearly 1,700 participants of the Plan and their beneficiaries. After the Plan was terminated, PBGC sent benefit determination letters to the Plan's participants, describing the benefits payable to them by PBGC. Some of the Plaintiffs appealed their benefit determinations, and on September 27, 2013, the PBGC Appeals Board rendered the final agency decision that is attached as Exhibit H of the Complaint.

The Complaint

On December 2, 2014, Plaintiffs filed the Complaint, which contains six claims for relief. Claims One through Four allege that in determining their benefits, PBGC failed to comply with various provisions of ERISA. Claim Five alleges that PBGC breached fiduciary duties. Claim Six alleges a violation of the Administrative Procedure Act, 5 U.S.C. § 706. Plaintiffs' request for relief includes an award of benefits, an injunction against PBGC, the setting aside of certain PBGC regulations, an accounting for insurance premiums, a constructive trust for premiums paid, disgorgement and surcharge pertaining to investment income, attorneys' fees, other expenses, and costs.

Statutory Framework

PBGC serves as the federal guarantor for pension benefits and the statutory trustee of terminated plans. *See Davis*, 734 F.3d at 1164-65. Except to the extent inconsistent with the provisions of Title IV, the statutory trustee is subject to the same duties as a Chapter 7 bankruptcy trustee. 29 U.S.C. § 1342(d)(3). The primary function of the trustee, like that of a Chapter 7 trustee, is to marshal the terminated plan's assets, a function that is substantially complete when the assets are collected and pooled with the assets of other terminated plans. *See* 29 U.S.C. § 1342(d); 11 U.S.C. § 704(a)(1); 29 U.S.C. § 1342(a) (authorizing PBGC to pool the assets of terminated plans). PBGC as guarantor is responsible for determining

and paying benefits due to plan participants and beneficiaries, according to the rules in Title IV. 29 U.S.C. §§ 1321, 1322, 1344, 1361.

Any participant or beneficiary who is adversely affected by an action of PBGC with respect to a plan in which the participant has an interest may bring an action against PBGC under 29 U.S.C. § 1303(f). That subsection is "the exclusive means for bringing actions against [PBGC] under [Title IV], including actions against [PBGC] in its capacity as a trustee under [29 U.S.C. §§ 1342 or 1349]." 29 U.S.C. § 1303(f)(4).

The venue for an action brought under 29 U.S.C. § 1303(f)(1) is: (1) the United States district court before which plan termination proceedings under 29 U.S.C. §§ 1342 or 1349 are pending; (2) the district court where the plan has its principal office; or (3) the United States District Court for the District of Columbia. 29 U.S.C. § 1303(f)(2).

ARGUMENT

I. This Case Should be Dismissed or Transferred Because Venue Does Not Lie in This Court.

A person adversely affected by an action of PBGC "may bring an action against [PBGC] for appropriate equitable relief," but the action may be filed only in the "appropriate court." 29 U.S.C. § 1303(f)(1). As noted, the term "appropriate court" is defined in 29 U.S.C. § 1303(f)(2) to mean:

> (A) the United States district court before which proceedings under section 1341 or 1342 are being conducted,
>
> (B) if no such proceedings are being conducted, the United States district court for the judicial district in which the [pension] plan has its principal office, or
>
> (C) the United States District Court for the District of Columbia.

Accordingly, there are only three potential venues in which a person may challenge an action by PBGC. In this case, because the Plan is terminated and PBGC is the statutory trustee, the only "appropriate court" for the Plaintiffs' action is the United States District Court for the District of Columbia.

The "appropriate court" depends on the present status of the pension plan. For an ongoing plan, venue options include where court proceedings *are* being conducted, or where the plan *has* its principal office.[2] But if a plan has terminated, the first two options for venue are no longer available. Here, the Plan terminated in 2006, by agreement between PBGC and the Plan administrator. No pension plan termination proceedings are currently being conducted under 29 U.S.C §§ 1341 or 1342, and venue is not available under 29 U.S.C. § 1303(f)(2)(A).

[2] For example, an ongoing plan might have a dispute with PBGC with respect to premium underpayments, or interest or penalties thereon. *See* 29 U.S.C. § 1307; 29 C.F.R. 4007. Such plans would be able to take advantage of the venue provision permitting them to file in the venue where their principal office is located. An ongoing plan has operations in such a venue, unlike a terminated plan.

Similarly, after a pension plan terminates and PBGC takes over as statutory trustee, the plan no longer has a principal office. From that point forward, PBGC is responsible for making benefit determinations and paying benefits under the plan. Consequently, after PBGC takes over responsibility for a terminated plan, "the statute commands venue in the U.S. District Court for the District of Columbia." *United Steel, Paper, & Forestry Rubber Mfg. Energy Allied Indus. and Serv. Workers Int'l Union v. PBGC,* 602 F. Supp. 2d 1115, 1119 (D. Minn. 2009)

Here, as noted, the Plan terminated and PBGC became its trustee more than eight years before this case was filed. Accordingly, even if the Plan had its principal office in this district before it terminated, it no longer does, so venue is not available in this Court under 29 U.S.C. § 1303(f)(2)(B). As the court in *United Steel* concluded when it transferred the case to the District of Columbia, "Congress understood that terminated, case-concluded ERISA plans would have their issued[sic] aired in the District of Columbia" regardless of where "the plan had been based." *Id*.

In actions filed against PBGC in the district where a plan formerly had its principal office, federal courts consistently have transferred the case to the District of Columbia. *See, e.g., Senick v. PBGC*, 2014 WL 6891360 (E.D. PA 2014) *(*"[b]ecause the Plan has been terminated and transferred to PBGC as statutory

trustee, the Plan no longer has a principal office in this [district]" and venue is only appropriate in the District of Columbia); *Carstens v. Michigan Dept. of Treasury*, 2009 WL 2581504 at *2 (W.D. Mich. July 7, 2009) ("where there are no current proceedings under §§ 1341 or 1342, and the plan's principal office has closed, the statute compels venue in the District of Columbia"); *Stephens v. US Airways Group*, 2007 U.S. Dist. LEXIS 98665 (N.D. Ohio June 28, 2007) (case transferred to the District of Columbia when plaintiffs sued PBGC after the plaintiffs' pension plan had been terminated and the plan's principal office closed). As in those cases, only the third venue option under 29 U.S.C. § 1301(f)(2)(C)—the United States District Court for the District of Columbia—is available here.

In this Complaint, however, Plaintiffs allege that the Plan, though terminated, continues to have its principal office in Atlanta. Plaintiffs allege that PBGC "has maintained the Plan's principal office in Atlanta since becoming the Plan's trustee in 2006." Complaint ¶ 15. They allege that "PBGC continues to administer the Plan in Atlanta through its Field Benefit Administration office ("FBA") . . . maintained by a PBGC contractor, Hammerman & Gainer, Inc." *Id*.

Plaintiffs' allegation is wrong both legally and factually. Their logic is contrary to the consistent holdings that a plan no longer has a principal office (or a plan administrator, a role defined under Title I of ERISA relating to the operation of an ongoing plan) after it terminates and PBGC becomes statutory trustee.

Moreover, the allegations are not accurate. PBGC had a contract with a company that maintained a field benefit administration office in Atlanta, but that contract office closed in August 2014. Declaration of Jeffrey Donahue, attached hereto as Exhibit B. Plaintiffs' assertion that "Plan documents and records remain in this District and PBGC personnel knowledgeable about the Plan's administration … are based in this District" is simply wrong.

Further, to the extent that PBGC's role as statutory trustee of a terminated plan can be analogized to the role a plan administrator plays under an ongoing plan, the "principal office" from which PBGC operates has always been its headquarters in the District of Columbia.[3] Although Plaintiffs reference a letter from PBGC dated June 17, 2010 (Complaint Exhibit B and ¶ 15) to support their contention that the Plan's principal office is in Atlanta, there is no reference to Atlanta anywhere in that letter. Plaintiffs also refer to a letter from the manager of PBGC's Appeals Division dated December 21, 2011 (Exhibit H of the Complaint, enclosure 19 of the Appeals Board Decision). Complaint ¶ 15. Again, there is no reference to Atlanta – and the Appeals Division, like every other PBGC division, is located in Washington, D.C. *See* PBGC website at http://www.pbgc.gov/.

In addition to citing 29 U.S.C. § 1303(f)(2) in support of filing in this District, Plaintiffs assert that venue is proper pursuant to 5 U.S.C. § 703.

[3] The Atlanta Field Benefit Administration office was, as its name indicates, a "field office" maintained by a contractor, not PBGC's principal office.

Complaint ¶ 15. But that provision explicitly requires a proceeding to be brought "in a court specified by statute." The venue provision in 29 U.S.C. § 1303(f)(2) does exactly that — it is specific to a single defendant, PBGC, and designates the appropriate forum for cases brought against it by participants in terminated plans. Because 29 U.S.C. § 1303(f) is the narrow and specific venue provision that addresses actions against PBGC with respect to a plan, it must be applied in this case. *See, e.g., Green v. Bock Laundry Mach. Co*., 490 U.S. 504 (1989) (a general statutory rule usually does not govern unless there is no more specific rule); *Crawford Fitting Co. v. J. T. Gibbons, Inc*. 482 U.S. 437 (1987) (where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one).

Therefore, venue does not lie in this District and the Court should dismiss this case, or in the alternative, transfer the case to the United States District Court for the District of Columbia.

II. Claim Five Is a Repackaged Claim for Benefits and Should be Dismissed Because it Fails to State a Claim for Fiduciary Breach.

Claim Five should be dismissed as a disguised claim for benefits. Participants who do not prevail in PBGC's administrative appeal process can seek judicial review of their benefit determinations. But participants may not pursue a claim for benefits disguised as a claim for fiduciary breach. Courts regularly dismiss counts for fiduciary breach that are in substance claims for benefits under

Title I of ERISA. *See, e.g., Ogden v. Blue Bell Creameries U.S.A., Inc.*, 348 F.3d 1284, 1286-87 (11th Cir. 2003) (participant could not seek equitable relief for fiduciary breach where participant had adequate remedy available under ERISA to recover plan benefits due); *Moore v. Lafayette Life Ins. Co*., 458 F.3d 416, 428 (6th Cir.2006) (same); *Korotynska v. Metro. Life Ins. Co*., 474 F.3d 101, 105 (4th Cir. 2006) (same); *Wright v. Metropolitan Life Ins. Co*. 618 F. Supp. 2d 43, 55-56 (D.D.C. 2009) (a breach of fiduciary duty claim cannot stand where a plaintiff has an adequate remedy through a claim for benefits); *Stephens v. US Airways Group*, 555 F. Supp. 2d 112, 119-121 (D.D.C. 2008) (same). The same rationale mandates dismissal of Plaintiffs' claim for fiduciary breach against PBGC, as it is simply a repackaged Title IV benefit claim.

The relief sought in Claims One through Four overlaps with that sought under Claim Five. Plaintiffs contend in Claims One and Two that benefits attributable to certain statutory changes should be in a higher priority category.[4] If Plaintiffs were to ultimately succeed on these claims, more of their plan benefits would be assigned to higher priority categories and PBGC would likely pay higher benefits to Plaintiffs.[5] In Claim Three, Plaintiffs contend that PBGC's acts resulted

[4] The arguments made in support of claims by retired U.S. Airways pilots involving analogous issues were rejected by the Court of Appeals, District of Columbia Circuit, in *Davis*.

[5] The gist of Claim One is stated in the heading of that Claim: "Improper Categorization of Priority of Plan Provisions Adopting 401(a)(17) Limit Approved

in "an allocation of Plan assets that violated Congress's statutory scheme . . . ." Complaint ¶ 113. Likewise, Plaintiffs assert in Claim Four that PBGC misallocated assets and thereby undervalued their guaranteed benefits. They request that the Court "order the PBGC to correct Plan asset allocations accordingly and make any necessary adjustments to individual benefit determinations." Complaint ¶ 140.

Claim Five is an additional claim for the same benefit increases based on the same misallocations alleged in Claims One through Four, but this time in the form of a claim for fiduciary breach. As discussed above, it is well-established that a benefit claim under Title I of ERISA cannot be repackaged as a fiduciary breach claim. The same reasoning applies to a claim for benefits under Title IV of ERISA. Plaintiffs have adequate remedies under Claims One through Four if in fact they were denied benefits based on an improper allocation of assets.

Moreover, Plaintiffs' repackaging of Claims One through Four as a purported fiduciary breach claim is based only on speculation and conclusory statements. Plaintiffs allege that "PBGC has manipulated the asset allocation

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by Congress." IRC § 401(a)(17) limits the amount of compensation that may be taken into account. Similarly, in Claim Two Plaintiffs assert an improper determination by PBGC of statutory limits on benefits and a resulting error in determining the benefits in the priority categories, but this time under IRC § 415(b). "Closely related to IRC § 401(a)(17) limit (again, the Compensation Limit) is the limit imposed by IRC § 415(b) – *i.e.*, the Qualified Benefit Limit." Complaint ¶ 94.

process in such a manner as to create hundreds of millions of dollars of investment returns to itself, at Plaintiffs' expense, in contravention of its fiduciary duties." Complaint ¶145. But such "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, the factual allegations in a complaint "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation omitted).

Here, Plaintiffs support their purported fiduciary breach claim with an allegation that PBGC "has strong incentives to minimize and delay payments to participants . . . and to allocate assets away from retirement eligible participants . . . towards younger participants, all in an effort to manipulate the asset allocation scheme in order to maximize investment returns on the trust funds and further its own financial well being." Complaint ¶ 23. They then assert that PBGC earned substantial investment returns on assets that should have been allocated to pay their benefits.[6] Complaint ¶ 25. These allegations lead Plaintiffs to speculate, as noted above, that because of its purported general incentives, PBGC must have

[6] Plaintiffs' assertion of PBGC's return on allegedly misallocated assets is based solely on their own calculations of what the correct allocation should be and PBGC's reported return on the pooled assets of all plans it trustees.

"manipulated" the asset allocation in this case for its own benefit in violation of its fiduciary duties.

This speculation is not enough to state a plausible claim for relief based on fiduciary breach. A plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Here, Plaintiffs have not pled facts that support a viable claim for fiduciary breach.

Moreover, even the speculation itself is not plausible. PBGC is a federal agency, not a for-profit insurance company. It does not have stockholders, policyholders, or members to whom it can pay dividends. PBGC's investment earnings are used, along with other funds, to pay benefits earned by participants in the terminated plans it has taken over. And the amount of funds PBGC can use for administrative expenses is limited each year by Congress.[7] *See* Consolidated and Further Continuing Appropriations Act of 2015, Division G, Title I, Pension Benefit Guaranty Corporation. Investment returns thus cannot benefit PBGC in the manner speculated by Plaintiffs.

Any relief Plaintiffs are allegedly entitled to in this case must be based on their assertions in Claims One through Four that PBGC's benefit determinations were incorrect. In addition, the Complaint alleges that some Plaintiffs failed to file

[7] These facts are all matters of public record that are judicially noticeable.

a timely administrative appeal because "PBGC had not provided adequate information regarding their benefit determinations within the PBGC's forty-five day appeal deadline, so that these Plaintiffs could determine whether to appeal, or exercise a meaningful right to appeal. The PBGC, as a result, may not assert that these Plaintiffs have failed timely to exhaust." Complaint ¶ 62. Plaintiffs make this same contention again, this time as an alleged fiduciary breach, in Claim Five: "[T]he PBGC has sought to withhold or delay the production of information critical to understanding the PBGC's benefit determinations and asset allocation choices." Complaint ¶ 143. "PBGC's enforcement of the deadline to [the 300] Appellants is arbitrary and capricious in violation of ERISA and the PBGC's fiduciary obligations." Complaint ¶ 144.

If PBGC raises the defense of failure to exhaust administrative remedies, the Plaintiffs who missed the deadline can argue that their failure should be excused because PBGC (allegedly) refused to provide them with adequate information. *See, e.g., Robyns v. Reliance Standard Life Ins. Co.*, 130 F.3d 1231, 1236 (7th Cir. 1997) (a court may excuse a plaintiff's failure to exhaust administrative remedies if there has been a lack of meaningful access to the review procedures); *Spivey v. Southern Co.*, 427 F. Supp. 2d 1144, 1148 (N.D. Ga. 2006) (same). But a plaintiff cannot repackage a denial of benefits claim as a breach of fiduciary duty to avoid the exhaustion requirement. *See, e.g., Hill v. Blue Cross and Blue Shield of Mich.*

409 F.3d 710, 717 (6th Cir. 2005). For this reason and the reasons stated above, Claim Five should be dismissed.

CONCLUSION

For the foregoing reasons, PBGC requests that the Court grant its motion and dismiss the Complaint for improper venue. If the Court declines to dismiss this action for improper venue, the case should be transferred to the U.S. District Court for the District of Columbia.

As detailed above, PBGC also moves to dismiss Claim Five of the Complaint pursuant to Rule 12(b)(6). If the Court finds that it is not an "appropriate court" to decide this case and transfers the action to the U.S. District Court for the District of Columbia, then that court should rule on whether Claim Five should be dismissed. If this Court neither dismisses nor transfers the case for improper venue, it should dismiss Claim Five for failure to state a claim upon which relief can be granted.

Dated: February 20, 2015

Respectfully submitted,

/s/_Mark R. Snyder_____

Office of the Chief Counsel
ISRAEL GOLDOWITZ
Chief Counsel
CHARLES L. FINKE
Deputy Chief Counsel
JOSEPH M. KRETTEK
PAULA J. CONNELLY
ANDREA WONG
Assistant Chief Counsels
FRANK ANDERSON
Attorney

Office of the General Counsel
JUDITH R. STARR
General Counsel
PHILIP R. HERTZ
Deputy General Counsel
KENNETH J. COOPER
Assistant General Counsel
MARK R. SNYDER
Attorney

PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 326-4400 ext. 3423
Facsimile: (202) 326-4112
snyder.mark@pbgc.gov

Attorneys for Defendant Pension Benefit Guaranty Corporation

Local Counsel:
LORI M. BERANEK
Assistant U.S. Attorney
600 U.S. Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303
Tel: (404) 581-6050
Lori.beranek@usdoj.gov

Certification pursuant to LR 7.1 D

Counsel certifies that this brief has been prepared with one of the font and point selections approved by the court in LR 5.1C.

CERTIFICATE OF SERVICE

I, Mark R. Snyder, certify that on February 20, 2015, Pension Benefit Guaranty Corporation's Motion and Memorandum of Law in Support of Motion to Dismiss Plaintiff's Complaint was electronically served by the Court's CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Roy E. Barnes John Raymond Bevis James Cameron Tribble The Barnes Law Group, LLC 31 Atlanta Street Marietta, GA 30060	Michael N. Khalil Timothy P. O'Toole Miller & Chevalier Chartered Suite 900 655 Fifteenth Street, NW Washington, DC 20005

/s/ Mark R. Snyder
Mark R. Snyder