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

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| K. WENDELL LEWIS, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>PENSION BENEFIT GUARANTY CORPORATION,<br><br>Defendant. | ) ) ) ) ) ) ) ) ) ) ) ) | **Case No. 1:15-cv-01328-RBW** |

# PENSION BENEFIT GUARANTY CORPORATION'S LIMITED OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

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## INTRODUCTION

In December 2014, Plaintiffs, a large group of Delta Air Lines retirees and their beneficiaries, sued the Pension Benefit Guaranty Corporation ("PBGC") in Georgia, seeking additional benefits under their terminated pension plan. PBGC is the federal agency that administers the pension insurance program established by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §§ 1301-1461 (2012, Supp. I 2013). PBGC moved to transfer venue to this Court, and to dismiss one count of the complaint (then labeled Claim 5), which alleged that PBGC had committed fiduciary breach. In August 2015, the Georgia district court transferred the suit to this Court, but did not rule on PBGC's motion to dismiss.

In the current motion, the Plaintiffs seek to amend their complaint, mostly to expand and emphasize that count for fiduciary breach (now labeled Claim 1). PBGC opposes amendment of new Claim 1 because it would be futile, in that the claim would not survive a motion to dismiss. PBGC does not oppose granting leave to amend Claims 2-6.

## STATUTORY BACKGROUND

### A. PBGC and Title IV

PBGC is a wholly owned United States government corporation. It was created in 1974 as part of the landmark reform of the nation's pension laws known as ERISA. *See* 29 U.S.C. § 1302; *see also PBGC v. LTV Corp.*, 496 U.S. 633, 636-37 (1990). Title IV of ERISA created PBGC, in large part to protect participants in the event that their pension plan terminates without enough assets to pay the promised benefits. *See Nachman Corp. v. PBGC*, 446 U.S. 359, 361-62 & n.1 (1980) (describing ERISA statutory scheme). *Accord Davis v. PBGC*, 734 F.3d 1161, 1164-65 (D.C. Cir. 2013).

Title IV provides that PBGC guarantees nonforfeitable (vested) benefits, subject to certain limitations. Employers that sponsor plans are required to pay insurance premiums to PBGC. 29 U. S. C. §§ 1306, 1307. PBGC paid benefits of $5.5 billion to nearly 813,000 retirees in fiscal year 2014. PBGC 2014 Annual Report, http://www.pbgc.gov/documents/2014-annual-report.pdf, at 2, 20.

When a plan terminates – usually because the employer is in bankruptcy and unable to continue the plan – a statutory trustee is appointed to marshal the plan's assets. 29 U.S.C. § 1342(b), (d). Although ERISA provides only that PBGC "may" become the trustee, 29 U.S.C. § 1342(b)(1), in practice PBGC has been appointed trustee of virtually every one of the nearly 4,700 underfunded plans that have terminated since 1974. *See* PBGC 2014 Annual Report, http://www.pbgc.gov/documents/2014-annual-report.pdf, at 2. PBGC thus serves both as statutory trustee of a terminated plan and as federal guarantor of the benefits payable under the plan. *See Caskey v. PBGC*, No. 97-4240, 1999 U.S. DIST. LEXIS 21448, at *14 (E.D. Pa. Jan. 14, 1999), *aff'd mem.*, 203 F.3d 816 (3d Cir. 1999).

PBGC combines the assets of the terminated plan with the agency's insurance funds to pay benefits to current and future retirees and their beneficiaries. 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). But PBGC's role as trustee is generally limited to marshalling a plan's assets. PBGC in its role as guarantor is responsible for determining and paying benefits due to plan participants and beneficiaries under the rules in Title IV. 29 U.S.C. §§ 1321, 1322, 1344, 1361.

The amount of benefits payable to participants in a terminated plan is determined by the provisions of the plan and the detailed provisions of Title IV and PBGC's regulations. PBGC

pays three types of benefits:

(1) guaranteed benefits under 29 U.S.C. § 1322(a) and (b);

(2) asset-funded benefits under 29 U.S.C. § 1344; and

(3) recovery-funded benefits under 29 U.S.C. § 1322(c).

A participant always receives at least his or her guaranteed benefit amount, and in many cases a participant's plan benefit is fully guaranteed by PBGC. If a participant's benefit is not fully guaranteed, and if the plan's assets are sufficient to fund more than the guaranteed benefit, the participant receives the asset-funded benefit instead of the guaranteed benefit. Benefits that are neither guaranteed nor funded by plan assets may be payable depending on the amount of PBGC's recoveries from the sponsor of a terminated plan (recovery-funded benefits). Because it is important in this case to understand the statutory structure for guaranteed benefits, asset-funded benefits, and recovery-funded benefits, we describe them in some detail below.

Any participant or beneficiary who wishes to challenge PBGC's determination of benefits may file an appeal with PBGC's Appeals Board. 29 C.F.R. pt. 4003, subparts A and D (§§ 4003.1-4003.10 and 4003.51-4003.61). If the Appeals Board denies the appeal, the participant or beneficiary may bring an action in federal district court against PBGC under 29 U.S.C. § 1303(f).

**B. Guaranteed benefits**

As the words suggest, guaranteed benefits are those guaranteed to be paid by PBGC regardless of the amount of the terminated plan's assets. Indeed, PBGC pays guaranteed benefits under some plans that had no assets at all at termination. The statutory provisions governing the guarantee are in 29 U.S.C. § 1322(a) and (b). Section 1322(a) provides that PBGC guarantees "all nonforfeitable benefits."

A "nonforfeitable benefit" is one for which a participant has "satisfied the conditions for entitlement under the plan or the requirements of [ERISA]" as of the plan's termination date. 29 U.S.C. § 1301(a)(8); 29 C.F.R. § 4022.3(a). A plan's termination date is established under 29 U.S.C. § 1348, usually by agreement between PBGC and the plan administrator, as occurred here. *See, e.g., Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 150 (D.C. Cir. 2006).

The nonforfeitable benefits that PBGC guarantees are "[s]ubject to the limitations contained in [29 U.S.C. 1322(b)]." The principal limitation is the maximum amount that PBGC can guarantee. 29 U.S.C. § 1322(b)(3). The statute also limits the amount of benefits PBGC can guarantee under plans, or amendments to existing plans, which have been in effect for less than five years ("Phase-in Rule"). 29 U.S.C. § 1322(b)(1), (7).

**C. Asset-funded benefits; Priority Category 3**

The PBGC guarantee, as explained above, provides a minimum benefit for each participant, regardless of how well-funded the plan was at termination. But some participants who have benefits in excess of PBGC's guarantee receive more than their guaranteed amount, depending on two things: (1) the level of the plan's assets, and (2) whether part or all of the participant's plan benefit is entitled to priority under the six-tier hierarchy in 29 U.S.C. § 1344(a). The agency values benefits and the plan's assets, then distributes or "allocates" those assets to each category of benefit in the order specified in section 1344(a). This valuation and allocation determines participants' entitlement to amounts in excess of guaranteed benefits.

Title IV of ERISA and PBGC's regulations thereunder describe this asset-allocation process in detail. 29 U.S.C. § 1344(a); 29 C.F.R. pt. 4044, subpart A (§§ 4044.1-4044.17); *see generally Mead Corp. v. Tilley*, 490 U.S. 714, 717-18 (1989).

The total amount of a plan's assets is determined based on the fair market value of those

assets as of the plan's termination date. 29 C.F.R. § 4044.41(b). The assets are allocated to the benefits provided by the plan, in order, starting with benefits in priority category 1 ("PC1"). If the assets are sufficient to provide all benefits in PC1, then they are allocated to benefits in priority category 2 ("PC2"), and so on until either all benefits in PC1 through PC6 have been provided or the assets run out. In the category in which the assets are exhausted, they are allocated among the benefits in that category based on rules that vary by category. *See* 29 U.S.C. § 1344(b)(2)-(4); 29 C.F.R. § 4044.10(e).

Benefits in PC1 and PC2 are those benefits derived from participants' own contributions to the plan. Most plans, including this Plan, have few or no benefits in PC1 or PC2, so these benefits are not relevant here.

Priority category 3 ("PC3") is typically the most important category in cases in which participants have a significant amount of nonguaranteed benefits, as is the case here. Benefits in PC3 are: (1) the benefits that retirees were receiving as of three years before the plan's termination date; and (2) the benefits that eligible non-retired participants could have received if they had retired three years before the termination date and had begun receiving benefits at that time. 29 U.S.C. § 1344(a)(3); 29 C.F.R. § 4044.13. In either case, however, the PC3 benefit is limited to the *lowest* benefit payable under the plan provisions in effect during the five years before the plan terminated. *See* 29 U.S.C. § 1344(a)(3); 29 C.F.R. § 4044.13(b)(3). In other words, benefits increased during the five years before termination are generally excluded from PC3.

For example, if three years before termination a retiree was receiving $4,000 per month, then $4,000 per month is the largest benefit that person could have in PC3. It could be less if benefits were recently increased.

Similarly, if an active participant (one who is still working and earning benefits) could have retired three years before the termination date (e.g., under the plan's early-retirement provisions) and, had he or she done so, would have begun receiving a benefit of $4,000 per month, then $4,000 per month is the largest benefit that person could have in PC3. This is so even if, by the termination date, the participant had earned a benefit of more than $4,000 per month. (Any benefit above $4,000 would be in a lower priority category.)

Benefits are included in PC3 regardless of whether they are guaranteed by PBGC. Thus, a participant who retired more than three years before termination with no benefit increase during the five years before termination will have his or her entire benefit in PC3. And if the plan's assets are sufficient to cover all benefits in PC3, the participant will receive that entire benefit from PBGC, even if it exceeds his or her guaranteed amount.

PC4 includes primarily "all other benefits" guaranteed by PBGC, *i.e.*, guaranteed benefits that are not in PC1 through PC3. 29 U.S.C. § 1344(a)(4). Since PC4 has lower priority than PC3, this means that plan assets must be sufficient to provide all guaranteed and nonguaranteed benefits in PC3 before any assets are allocated to pay the remaining PBGC-guaranteed benefits in PC4.

PC5 includes "all other nonforfeitable benefits" under the terminated plan (i.e., those not in PC1 through PC4). 29 U.S.C. § 1344(a)(5). It includes, for example, vested benefits that exceed the maximum guarantee limit or that are not guaranteed due to the Phase-in Rule (and that are not in PC3). PC5 includes sub-categories of benefits, hierarchically arranged. The sub-category with highest priority (PC5-a) is for benefits based on the plan provisions as they stood five years before plan termination. The next highest priority (PC5-b) goes to benefits based on the oldest plan amendment during the five-year period, and so on.

PC6 includes all other (non-vested) benefits under the plan. 29 U.S.C. § 1344(a)(6). It includes, for example, benefits of recently hired employees who had not met the plan's vesting requirement by the time the plan terminated.

**D. Recovery-funded benefits**

Recovery-funded benefits provide participants in a terminated plan with a portion of their unfunded nonguaranteed benefits – *i.e.*, those benefits that are neither guaranteed by PBGC nor funded by the plan's assets. 29 U.S.C. § 1322(c).[1] Whether and to what extent PBGC pays recovery-funded benefits depends on PBGC's recoveries for terminated pension plans' underfunding. PBGC shares a part of its recoveries with participants under the statutory formula in 29 U.S.C. § 1322(c). Recovery-funded benefits are allocated according to the priority categories in section 1344(a) – starting where plan assets ran out – except that they "skip" over guaranteed benefits in PC4.

## FACTUAL BACKGROUND

Delta Air Lines, Inc. ("Delta") was the contributing sponsor and plan administrator of the Delta Pilots Retirement Plan ("Plan"). In 2005, Delta filed for Chapter 11 protection, and the Plan was subsequently terminated by agreement effective September 2, 2006. *See* 29 U.S.C. §§ 1341(c)(3)(B)(iii); 1342; 1348.

PBGC became the statutory trustee of the Plan, which had over $2.5 billion more in promised benefits than assets as of the date that the Plan terminated. *See* Declaration of Nicole Williams, a copy of which is attached hereto as Exhibit A. Nearly $800 million of these unfunded benefits – for which there are no plan assets – are guaranteed and will be paid by PBGC out of its insurance funds. *Id.*

[1] ERISA uses the term "outstanding amount of benefit liabilities," s*ee* 29 U.S.C. § 1301(a)(19), but PBGC usually uses "unfunded nonguaranteed benefits" because it is more descriptive.

The Plaintiffs are nearly 1,700 participants of the Plan and their beneficiaries. After the Plan terminated, PBGC issued benefit determinations, which informed participants of the amount of their Title IV pension benefits. Some of the Plaintiffs appealed these benefit determinations to PBGC's Appeals Board, and on September 27, 2013, the Appeals Board rendered the final agency decision.

The Plaintiffs then filed this action under 29 U.S.C. § 1303(f) in the Northern District of Georgia, challenging the Appeals Board's decision and seeking, in substance, increased pension benefits. The Plaintiffs' original complaint (now Doc. 1 in this Court) contained six claims for relief. Claims 1 through 4 alleged that, in determining their benefits, PBGC failed to comply with various provisions of ERISA. Claim 5 alleged that PBGC breached fiduciary duties. Claim 6 alleged a violation of the Administrative Procedure Act, 5 U.S.C. § 706. Plaintiffs' request for relief included 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.

PBGC moved to transfer the case for improper venue and moved to dismiss Claim 5, which alleged that PBGC had committed fiduciary breach. PBGC's Motion to Dismiss, Doc. 13 in this Court. Plaintiffs opposed, and the Georgia court heard oral argument addressing both venue and dismissal of the fiduciary breach claim. A copy of the transcript of the oral argument is attached hereto as Exhibit B.

The parties filed supplemental briefs addressing both venue and dismissal of the fiduciary breach claim (Docs. 21 and 22 in this Court), and completed court-ordered discovery on the location of the Plan's principal office. After discovery and briefing, the Georgia court

transferred the case to this Court on August 12, 2015, without ruling on PBGC's motion to dismiss Claim 5. Doc. 31 in this Court.

Plaintiffs now move to amend the complaint, including expanding their claim for fiduciary breach (Claim 5 of the original complaint, Claim 1 of the proposed First Amended Complaint ("PAC")). The PAC is Doc. 40-1 in this Court.

## ARGUMENT

## PLAINTIFFS' MOTION TO AMEND CLAIM 1 SHOULD BE DENIED BECAUSE AMENDMENT WOULD BE FUTILE.

### A. A proposed amendment should be denied if it would be futile, and an amendment is futile if the revised claim would not survive a motion to dismiss.

Under Fed. R. Civ. P. 15(a)(2), courts are to "freely give leave [to amend] when justice so requires," but they should not do so when the proposed amendment would be futile. It is well-established that "futility of amendment" warrants denial. *Foman v. Davis*, 371 U.S. 178, 182 (1962). *Accord Araya v. Schwartz*, No. 15-7022, 2015 WL 5210465, at *1 (D.C. Cir. Jul. 21, 2015); *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012). In other words, "if the proposed amendment would still render the complaint deficient, courts need not grant leave." *S.K. Innovation v. Finpol*, 854 F. Supp. 2d 99, 106 (D.D.C. 2012).

An amendment is futile – and properly disallowed – if it "merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss." *Robinson v. Detroit News*, 211 F. Supp. 2d 101, 114 (D.D.C. 2002). *See In re InterBank Funding Corp. Securities Litig.*, 629 F.3d 213, 215, 218 (D.C. Cir. 2010) ("a district court may properly deny a motion to amend if the amended pleading would not survive a motion to dismiss"). Many cases in this Circuit have so held. *See*, *e.g.*, *Landrith v. Roberts*, No. 13-5365, 2014 WL 3014730, at *1

(D.C. Cir. Jun. 19, 2014); *Truesdale v. Dep't of Justice*, No. 12-5012, 2012 WL 3791281, at *1 (D.C. Cir. Aug. 15, 2012); *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 945 (D.C. Cir. 2004); *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996). And this Court has applied this principle repeatedly. *See Tunica-Biloxi Tribe of Louisiana v. United States*, 655 F. Supp. 2d 62, 65-66 (D.D.C. 2009) (Walton, J.); *Lightfoot v. District of Columbia*, No. 04-1280, 2006 WL 54430, at *1 n.2 (D.D.C. Jan. 10, 2006) (Walton, J.). Many other judges in this district also routinely apply this principle. *See*, *e.g.*, *Moldauer v. Constellation Brands, Inc.,* 87 F. Supp. 3d 148, 155-56 (D.D.C. 2015) (Cooper, J.) (granting defendants' motion to dismiss and denying plaintiff's motion to amend)*; Council on American-Islamic Relations Action Network, Inc. v. Gaubatz*, 891 F. Supp. 2d 13, 22 (D.D.C. 2012) (Kollar-Kotelly, J.) (denying motion to amend as to claims that were not viable); *S.K. Innovation*, 854 F. Supp. 2d at 106 (Boasberg, J.); *Ross v. DynCorp.*, 362 F. Supp. 2d 344, 364 n.11 (D.D.C. 2005) (Lamberth, J.); *Bestor v. Lieberman*, No. 03-1470, 2005 WL 681460, at *3 (D.D.C. Mar. 11, 2005) (Roberts, J.); *Murphy v. Pricewaterhousecoopers*, 813 F. Supp. 2d 45, 54 n.17 (D.D.C. 2011) (Leon, J.).

This is because granting a motion to amend would "waste time and judicial resources" if the complaint "must fail, as a matter of law." *Ross*, 362 F. Supp. 2d at 364 n.11. In such circumstances, "justice does not require permitting amendment." *Boykin v. Gray*, 895 F. Supp. 2d 199, 204 (D.D.C. 2012). "Determining whether a proposed amended complaint would survive a motion to dismiss is equivalent to review under such a motion." *Moldauer*, 87 F. Supp. 3d at 155.

In this case, the Court should deny Plaintiffs' motion to amend Claim 1 as futile because the amended claim would not survive a motion to dismiss. In addition, for the reasons stated below, the fiduciary breach claim in the original complaint (Claim 5, Doc. 1 in this Court, pp.

155-157) should be dismissed.

### B. Claim 1 would not survive a motion to dismiss because it is a disguised claim for benefits.

As this Court noted in *Wright v. Metropolitan Life Insurance Co.*, the majority of circuits that have decided the issue have held that an ERISA plaintiff may not pursue a claim for fiduciary breach when he or she has an adequate remedy through a claim for benefits. 618 F. Supp. 2d 43, 55 (D.D.C. 2009) (Walton, J.) (quoting *Clark v. Feder, Semo & Bard, P.C.*, 527 F. Supp. 2d 112, 116 (D.D.C. 2007)). This Court so held in *Wright*. *Id.* And numerous district courts in this Circuit have agreed. *See*, *e.g.*, *Boster v. Reliance Standard Life Ins. Co.*, 959 F. Supp. 2d 9, 29-31 (D.D.C. 2013); *Zalduondo v. Aetna Life Ins. Co.*, 845 F. Supp. 2d 146, 155 (D.D.C. 2012); *Clark v. Feder, Semo & Bard, P.C.*, 808 F. Supp. 2d 219, 225 (DD.C. 2011); *Kifafi v. Hilton Hotels Ret. Plan,* 616 F. Supp. 2d 7, 39 (D.D.C. 2009); *Stephens v. US Airways Group*, 555 F. Supp. 2d 112, 119-20 (D.D.C. 2008); *Crummett v. Metro. Life Ins. Co.,* No. 06–01450(HHK), 2007 WL 2071704, at *3 (D.D.C. Jul. 16, 2007); *Hurley v. Life Ins. Co. of N. Am.*, No. 04-0252, 2005 U.S. DIST. LEXIS 43038, at *32 (D.D.C. Jul. 7, 2005). The D.C. Circuit has not addressed this question.

Courts routinely dismiss duplicative claims for fiduciary breach based on the allegations in the complaint. *See, e.g., Zalduondo*, 845 F. Supp. 2d at 155 ("the determination of adequacy [of the relief under the claim for benefits] must be made based upon the allegations in the complaint, and not upon the merits outcome of particular claims"); *Stephens*, 555 F. Supp. 2d at 119-121 (dismissing fiduciary breach claim based on allegations in the complaint).

Plaintiffs' fiduciary breach claim – Claim 1 in the PAC and Claim 5 in the original complaint – must be dismissed because they have an adequate remedy for their alleged injury through the other *five claims for benefits* in their amended complaint, Claims 2-6. The parties

fully briefed and argued this issue in Georgia, and another round of briefing and argument – not to mention litigation on the merits – would be wasteful and cause unnecessary delay for all parties and the Court.

As shown in PBGC's briefs filed in Georgia, Plaintiffs' claim for fiduciary breach is just a benefit claim "masquerading as [a] fiduciary claim[]." *Stephens*, 555 F. Supp. 2d at 119. Those briefs are docketed in this Court. *See* Doc. 13 at pp. 9-11; Doc. 16 at pp. 6-10. Here, as in *Crummett v. Metropolitan Life Insurance Co.*, "the gravamen of [Plaintiffs'] complaint is that [they] [were] improperly denied benefits, and the remedies [they] see[k] are wholly directed at recovering for that denial." 2007 WL 2071704, at *3. None of Plaintiffs' proposed amendments changes the character of their fiduciary breach claim (Claim 1); it still asserts that Plaintiffs' benefits were determined improperly and seeks increased benefits, as do Claims 2-6. An examination of the specifics of Claims 2-6 makes this clear:

● In Claim 2, Plaintiffs contend that PBGC's acts resulted in "an allocation of Plan assets that violated Congress's statutory scheme," and that PBGC should take action to "make Plaintiffs whole" and "place Plaintiffs where they would have been monetarily...." PAC ¶¶ 76, 81.

● In Claims 3 and 4, Plaintiffs contend that benefits attributable to certain statutory changes should be in a higher priority category under Title IV of ERISA.[2] (The statutory priority categories are discussed above at pp. 5-7.) If Plaintiffs were to succeed on those claims, more of their Plan benefits would be assigned to higher priority categories and PBGC would pay them higher benefits using reallocated assets and recoveries.

● In Claim 5, Plaintiffs again allege misallocation of assets, but this time of funds PBGC recovered from Delta rather than Plan assets. PAC ¶ 130. They assert that the purported misallocation "unfairly reduced Plaintiffs' share of these funds." *Id.*

● In Claim 6, Plaintiffs assert that PBGC failed to provide them with their proper benefits.

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[2] The heart of Claim 3 is stated in its heading: "Improper Categorization of Priority of Plan Provisions Adopting 401(a)(17) Limit Approved by Congress." Similarly, in Claim 4, Plaintiffs assert that PBGC improperly determined the statutory limits on benefits, and thus erred in assigning priority categories, but this time under Internal Revenue Code § 415(b).

In short, all of these claims assert various ways in which PBGC improperly determined their benefits; Plaintiffs cannot repackage and repeat those claims as a fiduciary breach in Claim 1.

Plaintiffs also allege in Claim 1 that some individuals failed to file timely administrative appeals because PBGC withheld or delayed the production of information and created procedural obstacles. PAC ¶¶ 66, 67. Plaintiffs contend that "PBGC's enforcement of the deadline to [the 300 Plaintiffs who failed to file timely appeals] is arbitrary and capricious in violation of ERISA and the PBGC's fiduciary obligations." PAC ¶ 67. The reason the Plaintiffs are arguing about the untimely appeals is because they are seeking additional benefits (which is the only thing the Appeals Board could grant them).[3]

The only new factual allegations in the PAC are in paragraphs 69 and 70, involving PBGC's use of contractors. But these allegations still assert that Plaintiffs did not receive timely information (addressed above), and that their benefits were determined improperly, which is addressed in their other claims. The most that PBGC can pay any participant is his or her full plan benefit. That is exactly what Plaintiffs seek in Claims 2-6. To the extent that Claim 1 seeks the same thing, it is impermissibly duplicative.[4]

Moreover, allowing Plaintiffs to maintain a fiduciary breach claim that is duplicative of their benefit claims would be an end run around the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500-706. Judicial review of a final agency determination is limited to the

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[3] If PBGC raises the defense of failure to exhaust administrative remedies, the Plaintiffs who missed the deadline will likely argue that their failure should be excused because PBGC (allegedly) did not provide them with adequate information. But a plaintiff cannot repackage a denial of benefits claim as a breach of fiduciary duty to avoid the exhaustion requirement. *See, e.g.*, *Weiner v. Klais & Co.*, 108 F.3d 86, 91 (6th Cir. 1997) ("Plaintiff cannot get around the exhaustion requirement by simply disguising his claim as a breach of fiduciary duty.").

[4] To the extent that Claim 1 seeks more than the full amount of Plaintiffs' benefits, it must be dismissed for failure to state a claim on which relief can be granted, discussed in the next section.

administrative record that was before the agency. *See, e.g., Camp v. Pitts*, 411 U.S. 138,142 (1973) ("[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"); *Davis v. Pension Benefit Guaranty Corporation*, 734 F. 3d 1161, 1171-72 (D.C. Cir. 2013) (judicial review confined to the administrative record).

Courts have applied this bedrock principle in numerous benefit challenges brought against PBGC by participants just like the Plaintiffs. *See, e.g.*, *Burmeister v. PBGC*, 943 F. Supp. 2d 83, 87 (D.D.C. 2013) ("the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.") (quoting *Sierra Club v. Mainella,* 459 F. Supp. 2d 76, 90 (D.D.C. 2006)); *Montgomery v. PBGC*, 601 F. Supp. 2d 139, 142 (D.D.C. 2009) ("The Court's review, however, is limited to the administrative record that was before the agency at the time that its decision was made"). This Court so held in *Deppenbrook v. PBGC*, 950 F. Supp. 2d 68, 74 (D.D.C. 2013), *aff'd*, 778 F.3d 166 (D.C. Cir. 2015): "[u]nder the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas 'the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did'" (quoting *Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007) and *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir.1985)). Even on appeal, as the D.C. Circuit held in upholding this Court's ruling in *Deppenbrook*, the court of appeals must "review the administrative record to determine whether the agency's decision was arbitrary and capricious, and whether its findings were based on substantial evidence." 778 F.3d at 171 (citation omitted).

By restating their benefit claims as a fiduciary breach claim, Plaintiffs would undoubtedly seek discovery in an attempt to divert attention from the administrative record. Such discovery is not only impermissible under the APA, but would be an enormous waste of resources because the Court's ultimate decision on Plaintiffs' benefit claims will be based solely on the administrative record.

**C. Claim 1 would not survive a motion to dismiss because it fails to state a claim upon which relief can be granted.**

Claim 1 would be dismissed because it is not plausible on its face and seeks a remedy that is unavailable as a matter of law. Furthermore, it would be dismissed because it seeks relief for the individual Plaintiffs rather than for the Plan.

This Court recently set forth the standards for dismissal for failure to state a claim in *Western Organization of Resource Councils v. Jewell*, No. 14-1993, 2015 WL 5076976 (D.D.C. Aug. 27, 2015) (Walton, J.). As your honor explained, "to survive a motion to dismiss for 'failure to state a claim upon which relief may be granted,' Fed. R. Civ. P. 12(b)(6), the complaint 'must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."' *Id.*, at *2 (citing *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)).

This Court further noted that "[t]he claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly,* 550 U.S. at 556). Although the Court must accept the facts pleaded as true, legal allegations devoid of factual support are not entitled to this assumption. *See, e.g., Kowal v. MCI Commc'ns Corp.,* 16 F.3d 1271, 1276 (D.C. Cir. 1994).

In the current case, as in *Ashcroft v. Iqbal*, even if the Court assumes that the Plaintiffs have asserted "well-pleaded fact[s]," and the Court accepts them as true, those facts do not

"plausibly suggest" a cognizable cause of action in Claim 1. 556 U.S. at 680. Accordingly, that claim should be dismissed.

Claim 1 asserts that PBGC "breached its fiduciary duty" in three ways: (1) by taking or not taking certain steps before and during the agency's benefits appeal process (PAC ¶¶ 66-68); (2) by "outsourcing" benefit-administration and asset-valuation work to certain contractors (*id.* ¶¶ 69-70); and (3) by "manipulating" the asset-allocation process (*id.* ¶ 71). The "consequence" of these alleged fiduciary breaches, Plaintiffs assert, is that "PBGC has unjustly earned massive investment returns off of assets that should have been timely allocated to Plaintiffs . . . ." PAC ¶ 72. But even if all of these allegations are accepted as true, they do not state a claim on which relief can be granted, for four reasons.

*First*, Plaintiffs cannot, as a matter of law, obtain the "disgorgement" they seek in Claim 1. Plaintiffs assert that PBGC "should be required to disgorge itself" of "unjustly earned massive investment returns," and thus seek "disgorgement and surcharge" of "investment income *earned on the Plan's assets held by the PBGC as trustee*." PAC ¶ 72; *id.* at p. 125 ¶ I (emphasis added).

But this directly contradicts the statute. Title IV specifically provides that "[a]ny increase or decrease in the value of assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, [PBGC]." 29 U.S.C. § 1344(c). Plaintiffs explicitly seek the purported increase in value of the Plan's assets after termination. This they may not recover.

Plaintiffs sought to avoid this conclusion in Georgia by asserting that their fiduciary breach claim sought "an entirely different form of relief" than their other claims, namely PBGC's "profit." Plaintiffs' Opposition to Motion to Dismiss, Doc. 14 in this Court, at 23. But

in *Rochow v. Life Insurance Co. of North America*, the court rejected just such an approach to circumvent the prohibition against claims for equitable remedies duplicative of benefit claims. 780 F.3d 364, 370 (6th Cir. 2015). In that case, as in this one, the plaintiff sought both benefits and disgorgement of profits based on an alleged fiduciary breach. The court found that:

> [the plaintiff] is made whole under § 502(a)(1)(B) through recovery of his disability benefits and attorney's fees, and potential recovery of prejudgment interest . . . . Allowing Rochow to recover disgorged profits under § 502(a)(3), in addition to his recovery under § 502(a)(1)(B), based on the claim that the wrongful denial of benefits also constituted a breach of fiduciary duty, would—absent a showing that the § 502(a)(1)(B) remedy is inadequate—result in an impermissible duplicative recovery, contrary to clear Supreme Court and Sixth Circuit precedent.

*Id.* at 371. *Accord Talbot v. Reliance Standard Life Ins. Co.*, No. 14-231, 2015 WL 4134548, at *15 (D. Ariz. Jun. 18, 2015).[5] The court held that "ERISA remedies are concerned with the adequacy of relief to redress the claimant's injury, not the nature of the defendant's wrongdoing." *Id.* (citing *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996)).

<u>*Second*</u>, PBGC can pay to participants in its trusteed pension plans – like the Plaintiffs – no more than their statutory benefits. *See* 29 U.S.C. §§ 1322(a) and 1361 (PBGC's duty to pay nonforfeitable benefits is "subject to the limitations" in 29 U.S.C. § 1322(b)); *Bechtel v. PBGC*, 781 F.2d 906 (D.C. Cir. 1985); *Dumas v. PBGC*, 253 F. App'x 602, 604-05 (7th Cir. 2007).

To the extent that Claim 1 seeks to recover those benefits, it is an impermissible repackaging of the benefits claims in Claims 2-6, as discussed above. To the extent that Claim 1 seeks relief *beyond* those statutory benefits, it cannot state a claim and must be dismissed. Even if, *arguendo*, PBGC committed all the wrongs alleged in paragraphs 66 to 71, Plaintiffs could

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[5] Sections 502(a)(1)(B) and 502(a)(3) are the provisions in Title I of ERISA under which participants bring suit in an ongoing pension plan. *See* 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(3). Participants seeking benefits in a terminated, PBGC-trusteed plan must sue under Title IV, as the Plaintiffs have done. But the legal reasoning is identical.

recover no more than their Title IV benefits, which they already seek in Claims 2-6. Thus, in either event, Claim 1 would be dismissed.

Third, Claim 1 fails to state a cognizable claim because it does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" *Ashcroft,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 570). Plaintiffs allege that PBGC, a federal agency, "has strong incentives" to "minimize and delay" pensioners' benefits in order to "further [PBGC's] own financial wellbeing." PAC ¶ 23. Because of these purported general incentives, Plaintiffs speculate that PBGC "manipulated" the asset allocation in this particular case "to create hundreds of millions of dollars of investment returns to [PBGC] itself, at Plaintiffs' expense, in contravention of its fiduciary duties." PAC ¶ 71.

These speculative allegations do not set forth "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a claim. *Iqbal*, 556 U.S. at 678. And Plaintiffs' speculation itself is implausible. 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, only to pay benefits earned by participants in the terminated plans it has taken over and PBGC's administrative expenses. And the amount of funds PBGC can use for administrative expenses is limited each year by Congress.[6] Investment returns simply cannot benefit PBGC in the manner that Plaintiffs speculate.

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[6] *See* Consolidated and Further Continuing Appropriations Act of 2015, Division G, Title I, Pension Benefit Guaranty Corporation, H.R. 83, 113th Cong. (2013-2014), *available at* http://congress.gov/bill/113th-congress/house-bill/83/text. These facts are all matters of public record of which the Court can take judicial notice.

<u>*Fourth*</u>, a fiduciary breach claim "must be premised upon harm to the entire Plan, rather than harm to a particular individual." *Repass v. AT&T Pension Benefit Plan*, No. 14-2686, 2015 WL 5021405, at *4 n.2 (N.D. Tex. Aug. 25, 2015). *Accord Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985); *Murchison v. Murchison*, 180 F. App'x 163 (D.C. Cir. 2006); *Zalduondo v. Aetna Life Ins. Co.*, 845 F. Supp. 2d 146, 154 (D.D.C. 2012). Thus, a fiduciary breach allegation fails to state a cognizable claim for relief "when a plan participant or beneficiary seeks damages under ERISA for losses that she, as an individual – rather than the plan – allegedly suffered." *Gallagher v. Makowski*, No. 13-1103, 2014 WL 1296431, at *6 (D.N.J. Mar. 28, 2014). The fiduciary breach provision simply "does not provide a remedy for individual beneficiaries." *Zalduondo*, 845 F. Supp. 2d at154 (quoting *Varity*, 516 U.S. at 515). *Accord Harris v. Koenig*, 602 F. Supp. 2d 39, 50 (D.D.C. 2009) (fiduciary breach provision does not permit an action in which the sought-after recovery benefits an individual beneficiary (citing *Massachusetts Mutual*, 473 U.S. at 140). Thus, when plaintiffs "seek to recover for their personal losses, not losses to the Plan," they cannot state a claim for breach of fiduciary duty. *Wallace v. Blue Cross & Blue Shield of Alabama*, No. 14-119, 2014 WL 5335823, at *5 (S.D. Ala. Oct. 20, 2014). This is precisely the case here.

The "Plaintiffs" are defined in the PAC as the participants or beneficiaries named in the caption and listed in Exhibit C to the PAC. PAC ¶ 16; Doc. 40-7 (PAC Exh. C). Plaintiffs explicitly state that this lawsuit "is an action for equitable and associated declaratory relief by nearly 1,700 pensioners *to obtain their rightful share of assets from their terminated pension plan*." PAC ¶ 1 (emphasis added). Thus, by its terms, this suit seeks to recover the Plaintiffs' personal losses – their "rightful share of assets" (*id.*) – not losses to the Plan. Such personal

losses cannot state a claim for fiduciary breach. Although Plaintiffs seek to add to Paragraph 66 the words "to all of the Plan's participants," and to Paragraph 71 the words "participants in the Pilots' Plan," those paragraphs still allege no harm to the Plan and seek no relief other than for the Plaintiffs themselves.[7]

Because Claim 1 does not state a claim for fiduciary breach upon which relief can be granted, the amended claim, if allowed, would have to be dismissed.

**D. Claim 5 of the original complaint should be dismissed for the same reasons that the Court should deny leave to amend Claim 1.**

PBGC presented arguments as to why Claim 5 should be dismissed in the original motion to dismiss filed in Georgia, and Plaintiffs responded to those arguments in their briefs. The same issues are addressed again in this opposition, and Plaintiffs will have an additional opportunity to discuss cases decided in the D.C. Circuit in their reply. Thus there would be no unfairness to the Plaintiffs in deciding the pending motion to dismiss Claim 5 at this time, and it would be more efficient to consider the two motions together.

If the Court prefers to rule on the motion to amend the complaint prior to ruling on the motion to dismiss Claim 5, PBGC will, of course, be happy to renew or refile the motion to dismiss Claim 5 at a later time.

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[7] Paragraph 66 asserts that PBGC "needlessly prolonged the appeals process," and does not purport to seek any relief on behalf of the Plan. Paragraphs 67 to 72 suffer the same defect. Paragraph 67 asserts that PBGC "created procedural obstacles" and rendered PBGC's enforcement of its deadline to certain Plaintiffs "arbitrary and capricious." Paragraph 68 asserts that PBGC "may have infected the appeals process." Paragraph 69 asserts that PBGC's "outsourcing" of certain benefit-administration tasks impeded participants from receiving information. Paragraph 70 asserts that PBGC's "outsourcing" of asset valuation delayed final valuation of Plan assets. And Paragraphs 71 and 72 assert that PBGC manipulated the allocation process to earn investment returns "at Plaintiffs' expense." None of these allegations asserts harm to – or seeks relief for – the Plan.

## CONCLUSION

Allowing the Plaintiffs to amend their claim for fiduciary breach (new Claim 1) would be futile because it is an impermissibly repackaged benefit claim, and it does not state a claim upon which relief may be granted. Accordingly, the Court should deny Plaintiffs' motion to amend as to Claim 1 of the PAC and dismiss Claim 5 of the original complaint. The Court should grant the motion to amend as to the other claims.

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Respectfully submitted,

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