IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

In re:	)	Chapter 11
SEA ISLAND COMPANY, *et al.*,	)	Case No. 10-21034 (Jointly Administered)
	)	Judge John S. Dalis
Debtors.	)	

OBJECTION OF PENSION BENEFIT GUARANTY CORPORATION TO LIQUIDATION TRUSTEE'S MOTION FOR A RULE 2004 EXAMINATION OF AND DOCUMENT PRODUCTION BY THE PENSION BENEFIT GUARANTY CORPORATION

The Pension Benefit Guaranty Corporation ("PBGC"), a United States government corporation, hereby files this brief in further support of its objection (the "Objection") [Docket No. 1545] to the Liquidation Trustee's *Motion for a Rule 2004 Examination of and Document Production by the Pension Benefit Guaranty Corporation* (the "Motion") [Docket No. 1543], filed by Robert H. Barnett, Liquidation Trustee (the "Trustee"). The Trustee has not shown cause for this Court to allow a Rule 2004 examination.

A. The Trustee lacks cause for a Rule 2004 examination against PBGC.

1. The Trustee is not seeking information relating to the acts, conduct, property or financial condition of the estate.

Rule 2004 provides for examinations of the Debtor and nondebtor entities as they relate "only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge." Fed. R. Bankr. P. 2004(b). When the target of a proposed Rule 2004

examination objects, the court "must *first* [] determine[] that the examination is proper."[1] The Motion fails to establish that the Trustee seeks examination of PBGC for any allowed purpose, and therefore should be denied.

Rule 2004 allows examination of the scope of the debtor's affairs and assets, and the estate as a whole. While it refers to "liabilities," the context indicates that that term relates only to the *collective* liabilities of the estate as they pertain to the financial condition of the debtor, not individual claims.[2] The rule does not identify individual claims as being subject to inquiry.[3] *See* Fed. R. Bankr. P. 2004(b). Courts have agreed that the rule is intended to provide "a clear picture of the condition and whereabouts of the bankrupt's estate,"[4] from "persons closely connected with the bankrupt in business dealings."[5] "The purpose of the examination is to enable the trustee to discover the nature and extent of the bankruptcy estate. Legitimate goals of

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[1] *In re Enron Corp.*, 281 B.R. 836, 842 (Bankr. S.D.N.Y. 2002).

[2] PBGC is aware that the Court allowed the Trustee a Rule 2004 examination of Dennie McCrary in part to examine the nature of his claims against the estate. Docket No. 880. However, the fundamental nature of the inquiry was into possible causes of action by the estate against Mr. McCrary, and Mr. McCrary's claims were subject to recharacterization or equitable subordination based on the estate's causes of action. Liquidation Trustee's Motion for a Rule 2004 Examination of and Document Production by Dennie McCrary, Docket No. 867, at 7.

[3] Rule 2004(b) explicitly limits the scope of Rule 2004 to the topics listed, which do not include creditors and claims. Conversely, Part III of the Bankruptcy Rules relate to claims, and none of the rules in that part provide for such an examination. *Cf., In re Vann,* 67 F.3d 277, 281-82 (11th Cir. 1995) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

[4] *In re Johns-Manville Corp.*, 42 B.R. 362, 364 (S.D.N.Y. 1984); *In re Drexel Burnham Lambert Grp., Inc.*, 123 B.R. 702, 708 (Bankr. S.D.N.Y. 1991); *In re Coffee Cupboard, Inc.*, 128 B.R. 509, 514 (Bankr. E.D.N.Y. 1991)

[5] *In re GHR Energy Corp.*, 33 B.R. 451, 453 (Bankr. D. Mass 1983).

examinations include discovering assets, examining transactions, and determining whether wrongdoing has occurred."[6]

Application of Rule 2004 has been consistent with this idea that Rule 2004 "allows the trustee to determine if the estate can be augmented by asserting claims against others."[7] Every case cited by the Trustee in his brief involved an inquiry into potential causes of action belonging to the estate.[8] For example, in *Bazemore*, the trustee sought an examination regarding a potential cause of action for malpractice and bad faith against a former attorney of the debtor;[9] *Friedman* involved 15 counts of wrongdoing against former directors, officers, a controlling shareholder,

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[6] *In re Washington Mut., Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2009) (citing *In re Drexel*, 123 B.R. at 709 and *In re Enron Corp*., 281 B.R. at 840 (internal quotes omitted)).

[7] *Moore v. Eason (In re Bazemore)*, 216 B.R. 1020, 1023 (Bankr. S.D. Ga. 1998) (Dalis, C.J.).

[8] Cases cited in the Motion at 15-16, ¶¶ 53, 54 and Motion at 16 n.21 are as follows: *In re Bazemore*, 216 B.R. 1020 (Chapter 7 trustee sought to examine attorney who had represented debtors to determine whether the estate had claim against him for bad faith or malpractice); *In re Friedman's Inc.*, 385 B.R. 381 (S.D. Ga. 2008) (The trustee of creditor trust … brought adversary proceeding against debtor's insiders, against investment banking firm that had performed services for debtor prepetition, and against law firm that had acted as debtor's outside counsel); *In re Sea Island Co.*, Case No. 10-21034-JSD, Bankr. Docket No. 880, at *2 (Bankr. S.D. GA 2012) (Trustee filed a Rule 2004 motion against Dennie McCrary who served as vice president, president, and a board member for the Debtors over a span of ten years); *In re Washington Mut., Inc.*, 408 B.R. 45 (Bankr. D. Del. 2009) (Debtors filed motion for an order directing the Rule 2004 examination of the entity that had purchased [its] assets); *In re Bennett Funding Grp., Inc.*, 203 B.R. 24, 29 (Bankr. N.D.N.Y. 1996) (Trustee filed a Rule 2004 motion against a nondebtor third party which, as per the court, had created a "financial superweb," and had documents relating to debtor's net worth, brokerage accounts, tax returns, bank accounts and ownership of real property); *In re Whitley*, No. 10-10426C-7G, 2011 WL 6202895, at *1 (Bankr. M.D.N.C. Dec. 13, 2011) (Trustee filed a Rule 2004 motion against the bank in which a debtor who ran a Ponzi scheme maintained his bank account).

[9] *In re Bazemore*, 216 B.R. at 1023, *cited in* Motion at 15, ¶53.

and attorneys of the debtor;[10] *Washington Mutual* involved investigation of possible business tort and fraudulent transfer claims resulting from pre-petition transactions.[11]

Thus, Courts can deny motions for Rule 2004 examinations that seek to elicit information unrelated to debtor's financial affairs or the administration of the debtor's estate,[12] or to examine an individual with no knowledge of the debtor's affairs.[13] The Trustee does not and cannot allege that PBGC had knowledge of the Debtors' acts, conduct or financial affairs.

2. A Rule 2004 examination would be a waste of resources.

The Trustee notes PBGC's oft-repeated concern about delay and waste of estate assets in this case and argues that PBGC's opposition to the Motion is inconsistent with such concern.[14] PBGC disagrees. The vastly more cost-effective approach would be for the Trustee to file his objections to PBGC's claims and later seek discovery, if any. PBGC believes that most, if not all, of the objections that the Trustee has identified for the Court are subject to being decided on the law, which could eliminate or significantly reduce the need for any discovery and related disputes. For example, PBGC believes that the ballot issue related to PBGC's Class 4 claims can be resolved by reference to the Amended and Restated Disclosure Statement, the Disclosure

[10] *In re Friedman's*, 385 B.R. at 398.

[11] *Washington Mut., Inc.*, 408 B.R. at 49.

[12] *In re Kelton*, 389 B.R. at 820 (citing *In re Enron Corp.*, 281 B.R. at 840; *In re Wilcher*, 56 B.R. 428, 433-44 (Bankr. N.D. Ill. 1985)).

[13] *In re Kelton*, 389 B.R. at 820; *In re Wilcher*, 56 B.R. 428, 434.

[14] Motion at 1, ¶ 1.

Statement Order, and related court documents.[15] The Trustee has consistently argued that PBGC should be limited to a $1 claim because its ballot is marked $1. But because PBGC's claims were contingent at the time of balloting, the Disclosure Statement Order explicitly prohibits such a result, stating:

> If a claim for which a proof of claim has been timely filed is contingent, unliquidated or disputed . . . such claim shall be temporarily allowed for voting purposes only, and not for purposes of allowance or distribution, at $1, and the Ballot mailed to the Holder of such Claim shall be marked at voting as $1.[16]

Similarly, the Constitutional and "injury-in-fact" issues raised by the Trustee are unlikely to survive a survey of the applicable law.[17] This course of action is especially appropriate because courts are wary of attempts to utilize Rule 2004 to avoid the restrictions of the Federal Rules of Civil Procedure.[18] As such, discovery is a more appropriate vehicle here.

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[15] For example, *see* PBGC's Objection to Debtor's Disclosure Statement, Docket No. 195 (Debtor's amended and restated disclosure statement reflected that PBGC asserted multiple claims); Amended and Restated Disclosure Statement, Docket No. 216, § F.4.(b) (setting forth that "PBGC contends that in the event of termination the Debtors will be jointly and severally liable for the unpaid minimum funding contributions, statutory premiums, and unfunded benefit liabilities of the Pension Plan."); and Disclosure Statement Order, Docket No. 220, § 11(b) (Order provided that contingent, unliquidated or disputed claims "will be temporarily allowed for voting purposes only, and not for purposes of allowance and distribution, at $1.").

[16] Disclosure Statement Order, Docket No. 220, § 11(b).

[17] The Trustee has previously identified the defunct "prudent investor" doctrine as a possible basis for objection, also, but multiple cases, including a well-reasoned decision by a bankruptcy judge in Georgia, have dismissed that issue on the legal merits. *E.g.*, *Dugan v. PBGC (In re Rhodes, Inc.)*, 382 B.R. 550, 559-60 (Bankr. N.D. Ga. 2008); Ex. 1, *In re UAL Corp.* Case No. 02 B 48191 (Bankr. N.D. Ill. Dec. 20, 2005) (Trans. of Hearing, Dec. 16, 2005, at 32-33); Ex. 2, *In re High Voltage Eng'g Corp.*, No. 05-10787-JNF (Bankr. D. Mass. 2006).

[18] *In re Valley Forge Plaza Assocs.*, 109 B.R. 669, 675 (Bankr. E.D. Pa. 1990); *GHR Energy II*, 35 B.R. at 538 (denying Rule 2004 examination because "it seems that the debtors are now in a position to file an action against certain of the individuals and entities if they so choose").

B. The Trustee's specifically-identified issues do not create cause.

As stated above, the Trustee has failed to show cause, because Rule 2004 is simply not intended to encompass specific claims. However, the Trustee also included several arguments that go to the scope of particular requests. These arguments are not relevant to whether or not cause exists for Rule 2004 examination. Accordingly, PBGC does not address these arguments, but reserves its right to do so in a later, in a timely motion to quash or modify. However, PBGC wanted to briefly address and clarify two of the issues the Trustee raised.

1. The Inspector General Report has no impact on PBGC's claims.

As explained below, the Inspector General ("IG") report relates to a different procedure from the one used to estimate PBGC's claims, done by a different department. It is not practicable or realistic for the Trustee to ask that PBGC prove that it made no mistakes in the calculation of its claims. Instead, the Trustee should engage an actuary to examine the claims for errors. But, to our knowledge, the Trustee has not hired an actuary. Typically in a bankruptcy case, the debtor's or trustee's actuary work together with PBGC's actuary to limit the scope of issues before the parties resort to the court.

The 2011 evaluation report from the PBGC Office of Inspector General made findings and corrections to the plan asset audit of the National Steel pension plans.[19] That process was performed by the Benefits Administration and Payments Department and occurs after a plan is

[19] Pension Benefit Guaranty Corporation *Office of Inspector General* Evaluation Report – PBGC's Plan Asset Audit of National Steel Pension Plans Was Seriously Flawed, OIG Eval-2011-10/PA-09-66-1, March 30, 2011, available at http://oig.pbgc.gov/pdfs/PA-09-66-1.pdf ("IG Report").

terminated and trusteed and once plan-related documents have been collected.[20] The IG's corrective actions do not relate to the estimation process that PBGC used to calculate its claims in this case. The actuaries who calculated the estimated liabilities for PBGC's claims, which are calculated **pre**-termination, worked in a different department.[21]

Additionally, the Sea Island Company Retirement Plan ("Pension Plan") was trusteed on October 29, 2010, and thus was subject to the corrective actions undertaken in response to the report.[22] Those actions were implemented starting prior to the issuance of the final report, in March, 2010.[23] Thus, this Pension Plan's asset audit, which is near completion, has been subject to those corrections. Since the IG Report does not apply to either the estimated claims calculation or the post-termination asset audit in this case, the Trustee has shown no cause why the IG report has any impact on PBGC's claims in this case.[24]

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[20] IG Report, Executive Summary at 2, 7 ("**when PBGC becomes the trustee of a terminated pension plan,** it must determine the value of the plan's assets") (emphasis added).

[21] *See* Ex. 3, Sea Island Company Pension Information Profile, Part 1, line reading "Date Calculation Completed by DISC actuaries." DISC is the Department of Insurance Supervision and Compliance, who at the time contained the actuaries responsible for estimating claims. PBGC filed claims on October 28, 2010. The Plan was trusteed on October 29, 2010.

[22] *See* Ex. 4, *Cox Enters., Inc. v. News-Journal Corp.*, No. 6:04-cv-00698, 2014 U.S. Dist. LEXIS 57209, at *16-19 (M.D. Fla. Mar. 21, 2014) (describing the process that occurs after trusteeship to gather documents and information prior to starting the plan asset audit) ("Cox Report and Recommendation"). *Id.*, at 8-9.

[23] IG Report, at 22.

[24] Even if the plan asset audit had been performed prior to the IG report in this case, any relationship between the findings of that report and an actual discrepancy in plan assets would be attenuated. The IG Report disclaims that users should not assume that the report would result in benefit increases (i.e., resulting from increases in plan assets). IG Report at 1.

The asset audit is undertaken post-termination and yields a final plan asset valuation.[25] In addition, after trusteeship, PBGC actuaries calculate the benefit of every participant in the plan, individually, and the corresponding liability of the plan. Once those items are completed, the total plan liability is deducted from the plan assets to yield a final unfunded benefit liability that is reported in the Actuarial Case Report.[26] It is rare that administration of a bankruptcy case takes so long that the Actuarial Case Report is complete prior to the resolution of PBGC's claims, but when it is, PBGC typically reduces its claims if the value is lower than the estimate. PBGC anticipates that this process will be completed by the beginning of July 2016.[27] PBGC will share that information with the Trustee as soon as it is available.

The Trustee also alleges that PBGC has refused to tell him who calculated the claims and whether those people were subject to any IG investigations. Both of those assertions are wrong. The Pension Information Profile, which PBGC first provided to him on February 6, 2014, identifies the people who calculated the claims. The Trustee could have searched the contractor's firm name on the PBGC IG website and discovered that it yields no results.[28]

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[25] *See* Ex. 4, Cox Report and Recommendation at *16-19.

[26] *Id.*

[27] *See* Ex. 4, Cox Report and Recommendation, at *10-11 (PBGC reduced its unfunded benefit liability claim from $15,102,100 to $13,887,822 upon completion of the seriatim. The District Court adopted the Magistrate's Report and Recommendation); *See* Ex. 5, *Cox Enters., Inc. v. News-Journal Corp.*, No. 6:04-cv-00698, 2014 U.S. Dist. LEXIS 57534 (M.D. Fla. Apr. 24, 2014) ("Cox Enters., Inc. Order").

[28] *See* http://oig.pbgc.gov. Search does not match any documents.

The Trustee could have also searched the IG website for PBGC's actuary's name and the name of the department he was in at the time (DISC) and he would have found no reports regarding the quality of the actuarial work in DISC.[29]

2. PBGC has given the Trustee all of the documents he has requested.

The Trustee claims that there are documents that he has requested that PBGC has not provided. That is simply not true. Additionally, PBGC believes that it has resolved the extended misunderstanding between PBGC and the Trustee, thus mooting the Trustee's argument.

The Trustee asked PBGC for the documents identified in paragraph 8 of its statements in support,[30] filed with its claims. That paragraph refers to "Documents supporting this claim" and then goes on to list the types of documents on which PBGC may have relied to calculate the claim. Paragraph 8 is explicitly limited to documents "supporting our claim." PBGC previously provided the Trustee all documents that PBGC relied upon in its calculation of its claims. Thus, by definition, if PBGC has given him all documents supporting its claim, it has given him all documents identified in paragraph 8.

PBGC informed him of this on several occasions.[31] Most recently, on May 20, 2016, PBGC said "we have provided to you all the 'documents supporting this claim' referred to in

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[29] *Id.*

[30] The paragraph number is different in some statements in support of PBGC's Claims, but PBGC will refer to it as paragraph 8 for ease of reference.

[31] For instance, on March 15, 2016, PBGC informed the Trustee that "[we] believe we have provided you all with the documentation PBGC relied on to calculated our claims." Motion at 113, PBGC response of 3/15/16. Also, in PBGC's objection to the Trustee's motion to seeking approval for the sixteenth extension of the claims objection deadline ("PBGC Objection") [Docket No. 519], PBGC stated that it "has given the Liquidation Trustee documents in excess of what PBGC relied on to calculate our claims." PBGC Objection at 10, ¶ 28.

paragraph 8 of our statements in support that we found in a reasonable search of our records."[32] The Trustee's Motion omits this email from his recitation of the parties' exchanges.[33]

The Trustee says that he is "entitled to obtain and review documents, which the PBGC states in the PBGC Proofs—signed under penalty of perjury—'support' the PBGC's claims."[34] Despite the fact that he claims to seek "supporting" documents, when PBGC refers to such documents as "supporting" documents, he complains that PBGC is qualifying its response. But he asked for documents in paragraph 8, and paragraph 8 refers to documents "supporting" PBGC's claim. Thus, any qualification is in his request, not PBGC's response.

Paragraph 8 identifies by type certain actuarial documents, like form 5500s and actuarial valuation reports. PBGC offered to provide the Trustee all the actuarial documents of the same sort that were in its possession, including those on which PBGC did not rely.[35] PBGC thought that maybe he was misinterpreting paragraph 8 to say that PBGC relied on *all* actuarial valuation reports, *all* 5500s, etc., and that offering to send him all of those documents, whether or not they supported the claims, might solve the problem. Because he did not respond to this offer and omitted it from his brief, PBGC contacted him again to reiterate the offer on June 1, 2016, and told him it has "certain plan amendments, United States Internal Revenue Service From 5500s,

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[32] Ex. 6, Email from Stephanie Thomas to Robert Mercer, May 20, 2016, 2:06 p.m.

[33] Motion at 60. Despite the multiple emails and two briefs in which he describes this issue, PBGC still does not understand what the Trustee is asking for. PBGC thought it was actuarial documents that it did not rely on that are of the type described in paragraph 8, but PBGC offered him those and he did not respond.

[34] Motion at 11, ¶ 36.

[35] *See* Ex. 6.

and annual actuarial valuation reports for the Pension Plan that have not been provided to you because we did not use them to calculate our claims. If you would like these documents, please let us know."[36] PBGC has provided most of these documents and is assembling the rest.

Because "a Rule 2004 subpoena is not appropriate when the requested information is already well-known or within the would-be examiner's possession,"[37] the Trustee's argument is now moot.

C. A motion to quash, modify, or enforce the Trustee's Rule 2004 subpoena against PBGC must be filed in the District of Columbia.

Should the Rule 2004 examination be granted, PBGC is entitled to bring any motion to modify or quash any resulting subpoena in its local federal court, in the District of Columbia, under F. R. Civ. P. 45, which clearly applies. The Trustee argues that this Court should preemptively transfer any subpoena-related motions to this Court. But F. R. Civ. P. 45(f) provides that such a transfer is only allowed in "exceptional circumstances." The Trustee has made no such showing, and instead attempts to shift the burden to *PBGC* to show prejudice resulting from the exercise of this Court's jurisdiction.[38]

[36] Ex. 7, Email from Stephanie Thomas to Robert Mercer, June 1, 2016, 10:48 a.m.

[37] *In re Symington*, 209 B.R. 678, 688 (Bankr. D. Md. 1997).

[38] Motion at 21, ¶ 60.

Either PBGC or the Trustee will have to bear the burden and expense of travelling to deal with these issues.[39] Given that the intended beneficiaries of these activities are the non-PBGC class 5 creditors, it is more equitable for the estate to bear those costs than PBGC.[40]

1. The subpoena is enforceable only in the District of Columbia, where PBGC resides and regularly transacts business.

F. R. Civ. P. 45, which explicitly applies to Rule 2004 examinations, requires that the enforcement of a subpoena or any motion to quash or modify the subpoena must be brought in the "court in the district where compliance is required." F. R. Civ. P. 45(e) & (g). The "district where compliance is required" is within 100 miles of or within the state where the person subject to the subpoena "resides, is employed, or regularly transacts business." F. R. Civ. P. 45(c)(1). Because PBGC resides and regularly transacts business in the District of Columbia, but not in Georgia, PBGC can bring a motion to quash in the District of Columbia.

PBGC is a wholly owned government agency with, "the powers conferred on a nonprofit corporation under the District of Columbia Nonprofit Corporation Act."[41] Its principle

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[39] The Trustee takes the position that PBGC will not be prejudiced from the cost of travel because PBGC is a "federal agency with nationwide jurisdiction," Motion at 21, ¶ 60, and that "it had a combined net income of $4.350 billion for fiscal year 2015", Motion at 4, ¶ 10. PBGC receives no federal tax revenues, and instead is funded through premium payments and recoveries from the sponsors of terminated pension plans. *See* 2015 Pension Benefit Guaranty Corporation Annual Report ("2015 PBGC Annual Report") at 10, http://www.pbgc.gov/Documents/2015-annual-report.pdf. PBGC's deficit for fiscal year 2015 was $24.1 billion, up 25% from fiscal year 2014, while the multiemployer insurance program deficit was $52.3 billion, up 23% from the previous fiscal year. *Id.* at 9.

[40] *Cf.* 11 U.S.C. § 503(b)(3), allowing reimbursement from the estate to a creditor who provides a benefit for the estate.

[41] 29 U.S.C. § 1302(b), *see also* 31 U.S.C § 9101(3)(J) (providing that PBGC is a wholly owned government corporation).

headquarters are in the District of Columbia.[42] That is where all PBGC employees are located, where all critical activities take place, and where all substantive determinations for PBGC-trusteed plans are made.[43]

District of Columbia jurisdiction over compliance with a subpoena against PBGC is in line with Congress's carefully crafted statutory scheme for Title IV or ERISA. When a participant of a terminated plan seeks to challenge PBGC as statutory trustee, for example, he too needs to file it in the District of Columbia. This is because Congress provided that a person adversely affected by an action of PBGC "may bring an action against [PBGC] for appropriate relief," but the action may be filed only in the "appropriate court."[44] And when the plan is terminated and PBGC is the statutory trustee, the only "appropriate court" for an action is, "the United States District Court for the District of Columbia."[45] Jurisdiction of the D.C. courts is

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[42] PBGC's headquarters are located at 1200 K Street, Washington, D.C. 20005, http://www.pbgc.gov/about/pg/other/pbgc-office-locations.html.

[43] *See Cf. Lewis v. PBGC*, No. 1:14-CV-03838-SCJ, 2015 WL 5577377, at *3 (N.D. Ga. Aug. 11, 2015) ("Assuming *arguendo* that a terminated plan can have a principal office, the Court still concludes that the plan's principal office was located in Washington, D.C. at all relevant times. . . . all the major decisions regarding the plan, and its administration, were made by [PBGC] in Washington, D.C.").

[44] 29 U.S.C. § 1303(f)(1).

[45] 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 proceeding are being conducted, the United State district court for the judicial district in which the [pension] plan has it principal office, or
> (C) the United State District Court for the District of Columbia.

The "appropriate court" therefore depends on the 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. But if a plan has terminated, like it has here, the first two options are no longer available.

particularly apt here, where the Trustee has raised Constitutional, regulatory, and administrative law issues.

As the District of Columbia is more than 100 miles away from Georgia, a motion to quash, modify, or enforce a Rule 2004 subpoena issued in Georgia must be filed in the District of Columbia. The Trustee implies that PBGC's role as a creditor in this case affects the jurisdictional analysis.[46] It does not. As the advisory committee's notes to the rule's 2013 amendments explain, "Rule 45(c)(1)(A) does not authorize a subpoena . . . to require a party or party officer to travel more than 100 miles unless the party or party officer resides, is employed, or regularly transacts business in person in the state."[47] As such, even if the Trustee is correct in his assertion that PBGC is a party that is actively involved in this bankruptcy, F. R. Civ. P. 45's geographical limitations nonetheless apply.

2. The District of Columbia has exclusive jurisdiction to decide whether a motion to quash, modify, or enforce the Trustee's Rule 2004 subpoena against PBGC should be transferred to Georgia.

As support for his contention that the District of Columbia has no jurisdiction, the Trustee cites to a case decided by the U.S. District Court for the District of Columbia, holding that transfer of subpoena-related motions against a federal housing agency "from the court where production [was] required to the court where the underlying action [was] pending" was

[46] For example, the Trustee mentions that, "four [attorneys of record for PBGC] are Assistant United States Attorneys for the Southern District of Georgia." But local rules require government attorneys to be, "accompanied at hearings and trials by an Assistant United States Attorney of this district who shall also review and sign pleadings." L.R. 83.4; Permission to Practice in a Particular Case (as made applicable by LBR 2090-1). The Trustee does not explain how PBGC's compliance with a local rule is a waiver of jurisdiction.

[47] F. R. Civ. P. 45, Committee Notes on 2013 Amendment.

appropriate under F. R. Civ. P. 45(f).[48] But as the Trustee's own case illustrates, a motion to transfer a subpoena-related enforcement matter against a federal agency is heard in the court where the federal agency resides.[49] The Trustee must make his argument in the District of Columbia.

In any event, a court can transfer a subpoena-related motion only if the person subject to the subpoena consents, or if there are exceptional circumstances.[50] But PBGC does not consent: the Trustee has repeatedly asked PBGC to agree to an unqualified waiver of the D.C. court's jurisdiction, and PBGC has repeatedly declined.[51] And the Trustee's own delay in filing a Rule 2004 motion against PBGC is not an "exceptional circumstance" warranting transfer, particularly since the Trustee can still seek appropriate discovery against PBGC after he files his objection.[52]

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[48] *Fed. Home Loan Mortgage Corp. v. Deloitte & Touche LLP*, 309 F.R.D. 41, 42 (D.D.C. 2015).

[49] F. R. Civ. P. 45(f) ("TRANSFERRING A SUBPOENA-RELATED MOTION. When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances.")

[50] *Id.*

[51] *See* Ex. 1 to Objection (Email string between Robert Mercer and Stephanie Thomas, May 24–25, 2016. PBGC has offered to create an agreed subpoena, but the Trustee did not accept such a compromise.

[52] In *Fed. Home Loan Mortgage Corp.*, 309 F.R.D. at 43, transfer avoided interference with the time-sensitive discovery schedule set by the Florida court in which all discovery was scheduled to close in a short while. Because the Trustee has not yet objected to PBGC's claims, however, there is no time-sensitive, court-ordered discovery schedule warranting transfer here.

The Trustee cites to a 2005 case from a bankruptcy court in Texas,[53] where the court held that a Rule 2004 subpoena is *issued* by the court in which the bankruptcy proceeding is pending.[54] But that case addressed only *issuance* of a subpoena, not *enforcement*. Under F. R. Civ. P. 45,[55] as amended in 2013, a Rule 2004 subpoena is issued by the court where the action is pending.[56] The place of compliance against a nonlocal entity,[57] is in the district in which the party resides or regularly transacts business.[58]

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[53] *In re Mirant Corp.*, 326 B.R. 354, 357 (Bankr. N.D. Tex. 2005). That case is in no way similar to the facts here. There, the creditors' committee was investigating a potential cause of action belonging to the estate. It sought information relating to a corporate transaction from the firms that acted as investment bankers to the transaction.

[54] *See Mirant*, 326 B.R. at 357 (". . . while a true third party target of a subpoena may be entitled to require subpoenas *from* local courts, Respondents are parties in interest in these cases.") (emphasis added). The court also held that it had the power to order compliance with its orders. *Id.* And because respondents agreed to comply with the court orders *in lieu* of subpoenas, the court did not need to decide whether it had jurisdiction to enforce a Rule 2004 subpoena. *Id.* at fn. 6 ("The court, however, did not understand counsel to dispute this court's order as serving the same functions as a subpoena issued on behalf of the court where the production will occur.").

[55] The applicable rule is F. R. Civ. P. 45. Bankruptcy Rule 2004(c) provides that an examinee's attendance and document production is compelled in the manner provided in Bankruptcy Rule 9016, which, in turn, incorporates F. R. Civ. P. 45.

[56] F. R. Civ. P. 45(2).

[57] A nonlocal entity is one that resides in a different state, and more than 100 miles from where the action is pending. Fed. R. Civ. P. 45.

[58] F. R. Civ. P. 45(c). *See also* Charles A. Wright, et al. *Federal Practice and Procedure* (3d ed.—April 2016 Update) § 2451 Purpose and History of the Rule, 9A Fed. Prac. & Proc. Civ. § 2451 ("The final change brought about by the 2013 amendments sought to correct mistaken interpretations of Rule 45(c)(3)(A)(ii), which involved some courts holding that distant parties and their officers were not to be protected by previous Rule 45(b)(2)'s 100-mile provision. Although the text of the 1991 amendment was ambiguous, the Committee concluded that it was not intended to exclude distant parties and parties' officers from the 100-mile protection. The 2013 amendments sought to make it clear that all subpoenas are subject to the geographical limitations of the new Rule 45(c), which are modeled on those of former Rule 45(b)(2).").

3. PBGC has not waived the District of Columbia's jurisdiction to hear a Rule 2004 motion against PBGC to quash, modify, or enforce a subpoena.

The Trustee's argument that PBGC consented to the Court's jurisdiction over enforcement of a Rule 2004 subpoena because of Section 10.7 of the Liquidating Trust Agreement is to no avail. PBGC is not a party to or a Beneficiary under the Trust Agreement, and Section 10.7, by its terms, applies only to parties of the Agreement and Beneficiaries:

> **10.7 Consent to Jurisdiction.** Each of the parties hereto (and each Beneficiary by its acceptance of the benefits of the Trust created hereunder) consents and submits to the exclusive jurisdiction of the Bankruptcy Court for any action or proceeding instituted for the enforcement or construction of any right, remedy, obligation, or liability under or by reason of this Trust Agreement or the Plan.[59]

And Section 1.1(c) of the Liquidation Trust Agreement defines "Beneficiaries" as "the holders of Allowed Claims under Classes 4, 5, and 6."[60] PBGC is not the holder of any allowed

[59] Liquidation Trust Agreement, § 10.7, pg. 27 of Docket No. 294.

[60] Liquidation Trust Agreement, § 1.1(c), pg. 3 of Docket No. 294.

claims under these classes, and thus not a "Beneficiary"[61] under the Liquidation Trust Agreement.[62] Accordingly, PBGC has not consented to jurisdiction under section 10.7.[63]

D. PBGC's Reservation of Rights.

In the event that this Court authorizes Trustee's proposed Rule 2004 examination, and in the event that the Trustee serves PBGC with an authorized subpoena, PBGC reserves the right to file a motion to quash (in the appropriate federal court) in accordance with Bankruptcy Rule 9016 and F. R. Civ. P. 45(c).

[61] The Trustee alleges that "[a]s a result of the PBGC Claims, the PBGC asserts that it is a Beneficiary of the Liquidation Trust with claims that 'dwarf' the other claims in these cases. *See* Bankr. Docket No. 1519 ¶ 13." Docket No. 1519 is PBGC's 16th Extension motion, which never refers to PBGC as a "beneficiary" of the Liquidation Trust. Paragraph 13 states: "PBGC's Claims of $66 million dwarf the approximately $495,000 in non-PBGC Class 4 claims and the approximately $13.5 million in remaining Non-PBGC Class 5 Claims."

[62] PBGC has been paid $240,841 in satisfaction of its priority claim under 11 U.S.C. §§ 507(a)(2), (5) asserted in proof of claim number 560 for unpaid minimum funding contributions. *See Motion for Entry of an Order Pursuant to Rule 9019(a) of the Federal Rules of Bankruptcy Procedure Authorizing and Approving the Stipulation by and between the Debtors and the Pension Benefit Guaranty Corporation*, Docket No. 443 (2010). As this was a priority claim that PBGC asserted under section 507(a) of the Bankruptcy Code, it was a Class 3 Priority Claim. *See* Plan of Liquidation § 3.08; Docket No. 217, at 22. As such, PBGC does not now have, nor has it ever had, any allowed Class 4, 5, or 6 claims.

[63] In addition, a Rule 2004 examination is not a "right, remedy, obligation or liability" under the Trust Agreement or the Plan of Liquidation.

CONCLUSION

For these reasons, PBGC respectfully requests that the Court enter an order denying the Trustee's Rule 2004 Motion for failure to show cause. Alternatively, PBGC respectfully requests that the Court deny the Motion to the extent that it seeks to deprive the D.C. federal court of jurisdiction.

Dated: June 7, 2016
Washington, D.C.

Respectfully submitted,

/s/ Kimberly E. Neureiter
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Chief Counsel
ANDREA WONG
Acting Deputy Chief Counsel
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EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable Eugene R. Wedoff Hearing Date December 30, 2005

Bankruptcy Case No. 02 B 48191 Adversary No.

Title of Case UAL Corporation, et al.

Brief Statement of Motion Motion of PBGC for partial summary judgment (Docket entry no. 13442)

Names and Addresses of moving counsel

Representing

ORDER

It is hereby ordered that the above-stated motion, being treated as a motion in limine, is granted for the reasons stated on the record on December 16, 2005.

Eugene R. Wedoff

THE COURT: Well, if you can give ten days notice, you would do it electronically, pursuant to the case management order.
MR. LIPKE: We will.
THE COURT: I would expect that would

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probably be enough. If someone opposes the diminution of the time, I will hear the objection. But I would expect that won't be objected to and we'll be able to go ahead.
MR. LIPKE: Understood, Your Honor.
THE COURT: Okay.
MR. LIPKE: Thank you. Have a good day.
MR. CIMINO: Your Honor, can I hand these up?
THE COURT: If you'd like.
(Document tendered.)
THE COURT: Okay. The next items on the agenda are items 22 through 24, having to do with the creditors committee's objection to the PBGC claim.
MR. ABBOTT: Your Honor, David Abbott from General Foods Credit Corp. I'd just like to interrupt for a moment. You had skipped item number 18.
THE COURT: Oh, excuse me.
MR. ABBOTT: And we can certainly come back to it after you continue with where you are. But the --
THE COURT: Oh, I didn't skip it. That's the omnibus objection.

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MR. ABBOTT: No, the -- that was item number 17, the duplicative issue. General Foods Credit Corp. does not have that duplicative issue. And we're prepared to proceed on that argument.
THE COURT: Okay. Well, I'm not prepared. We're going to continue that for status until the 30th of December.
MR. ABBOTT: Okay. Thank you, Your Honor.
THE COURT: Okay. Again then, items 22 through 24 dealing with the creditors committee's objection to the PBGC claim.
MR. SELIGMAN: Good morning, Your Honor. David Seligman on behalf of the debtors.
MR. PRINCE: Good morning, Your Honor. Christopher Prince of Sonnenschein Nath & Rosenthal for the committee.
MR. BOYLE: Good morning, Your Honor. Joe Boyle from Kelley Drye & Warren on behalf of PBGC.
MS. CECCOTTI: Good morning, Your Honor. Babette Ceccotti for the Air Line Pilots Association.
MS. HEERMANS: And, Your Honor, Nancy Heermans and Shannon Novey here for PBGC on the phone.
THE COURT: Okay. Thank you, Ms. Heermans.

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Anyone else want to enter an appearance?
(No response.)
THE COURT: All right. This matter, as I said, is before the court on the creditors committee's objection to the claim of the PBGC, but

this claim is subject to a motion for what's called partial summary judgment. I think it's more properly considered as a motion in limine. There is some authority for the proposition that summary judgment is inappropriate unless it completely disposes of a claim, and this does not completely dispose of a claim. But, either way, as we had discussed at the last omnibus, this motion is part of an effort to potentially narrow the issues that would have to be determined at a trial. And so it is of real significance in advancing the resolution of the dispute and the reorganization in general.

There is a number 24, a motion of the creditors committee to exceed the page limit, and that will be granted.

As to the motion for summary judgment, the PBGC seeks a determination that its claim should be valued according to a regulation that it has adopted for such valuation. The applicable

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bankruptcy law is found in Section 502(b) of the Bankruptcy Code which states --

The parties may want to sit down. This isn't as long as some of the other ones I've had to read, but still long enough that you might be more comfortable sitting.

Section 502(b) states that claims are to be allowed, quote, "as of the date of the filing of the petition," close quote, and then quoting again, "except to the extent," close quote, that they are subject to disallowance under one of the grounds specified in the nine paragraphs set out in Section 502(b).

Allowance under Section 502(b) necessarily involves the amount of the claim in addition to its validity, since many of the grounds set out in Section 502(b) deal only with the amount of the claim. For example, see Section 502(b)(4) which disallows a claim for services of an insider or an attorney of the debtor to the extent that the claim exceeds the reasonable value of the services rendered. Thus -- or I should say the question of payment is distinct from allowance. Allowed claims may be separately classified by the debtor or they may be subject to equitable subordination. But

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allowance under 502(b) is in the amount that would be applicable under nonbankruptcy law except to the extent that one of the provisions of Section 502(b) applies. There is no general equitable power in bankruptcy courts to disallow claims since that would conflict with Section 502(b). See Raleigh versus Illinois Department of Revenue, 503 U.S. 15, a 2000 decision of the United States Supreme Court.

The amount of a valid claim must therefore be determined as of the petition date according to applicable nonbankruptcy law unless one of the grounds in the nine paragraphs of Section 502(b) applies.

Now, the governing nonbankruptcy law here provides that upon an involuntary termination of a pension plan covered by ERISA, the sponsoring employer and each member of its control group are liable to the PBGC in the amount of, quote,

"unfunded benefit liabilities," close quote, 29 U.S.C. Section 1362(a) and (b).

Under Section 1362(b)(1)(A), the amount of the unfunded benefit liabilities is to be, quote, "calculated from the termination date in accordance with regulations proscribed by the PBGC." Under Section 1301(a)(18), the, quote, "amount of

unfunded benefit liabilities," close quote, means the excess of the benefit liabilities under the plan determined on the basis of assumptions prescribed by the PBGC for purposes of Section 1344 of this title over the current value of the assets of the plan.

The PBGC has adopted regulations under Section 1334 for calculating the amount of unfunded benefit liabilities, 29 CFR 4044.52 to 4044.75, and neither the committee nor ALPA have argued that the regulations are inapplicable or would not be used to determine the amount of United's unfunded benefit liabilities under applicable nonbankruptcy law. Thus, they are binding here in determining PBGC's claim.

In reviewing the precedent on this question, the reasoning that I've outlined is consistent with the decision in In re US Airways Group, Inc., 303 BR 784, Bankruptcy Court for the Eastern District of Virginia, 2003. The contrary decisions in In re CF&I Fabricators of Utah, Inc., 150 F.3d 1293, 10th Circuit, 1998, and In re CSC Industries, Inc., 232 F.3d 505, Sixth Circuit, 2000, are based on holdings that bankruptcy courts do have an equitable power to determine the amount of claims in a manner different than what applicable

nonbankruptcy law would require. Those holdings do not accurately reflect the provisions of the code that I outlined earlier and so cannot be followed.

On that basis then, the PBGC's motion, treated as a motion in limine, would be granted. And we need to discuss what remaining steps should take place to determine the amount of that claim, including the need to determine the claim as of the petition date.

MR. SELIGMAN: Your Honor, if I could perhaps just make a suggestion on behalf of the debtors? Obviously this narrows the issues. I think we had said before that we thought that the relative -- you know, the relevant actuaries with this ruling could probably get together and figure out the amounts. So I would suggest that perhaps we continue this for a short period of time. I don't even think next -- maybe we can do it in two weeks when there is going to be already the hearing on --

THE COURT: Well, I was going to say as long as the parties are going -- some of the parties are going to be present on the 30th. If that works, I would be happy to have you come in on the 30th and tell me where things stand.

MR. PRINCE: Your Honor, I think you've

properly characterized it as a motion in limine. And in that connection, I'm not sure that it narrows the issues as much as is presented. And this was an issue raised in our opposition, the 1362(b)(2)(B),

EXHIBIT 2

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MASSACHUSETTS

In re
HIGH VOLTAGE ENGINEERING
CORPORATION, et al.,
Debtors

Chapter 11
Case No. 05-10787-JNF

ORDER

Upon consideration of 1) the Preliminary Objection of the Chapter 11 Trustee to Claims Asserted by Pension Benefit Guaranty Corporation against Debtors High Voltage Engineering Corporation, et al. (the "Preliminary Objection); 2) the PBGC's Response to the Preliminary Objection; 3) the representations and arguments made at the June 21, 2006 hearing on the Preliminary Objection, at which hearing the parties agreed to narrow the initial issue for determination to whether this Court should utilize the underlying substantive law, namely the PBGC's regulations, to determine the amount of its claim or whether the Court should utilize a prudent investor approach advocated by the Chapter 11 Trustee ; 4) the Joint Statement of Facts of the Chapter 11 Trustee and Pension Benefit Guaranty Corporation; 5) the Supplemental Brief in Support of the Preliminary Objection of the Chapter 11 Trustee; 6) the PBGC's Response to the Supplemental Brief; 7) the decisions cited by the parties including, *inter alia*, Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15 (2002); In re US Airways Group, Inc., 303 B.R. 784 (Bankr. E.D. Va. 2003); and In re UAL,

Corp., No. 02 B 48191 (Bankr. N.D. Ill. December 30, 2005), the Court hereby overrules the Chapter 11 Trustee's Preliminary Objection. For the reasons stated by Judge Wedoff in UAL Corp., the Court finds that ERISA and the regulations found in 29 C.F. R. § 4044 control the calculation of the PBGC's claim in these solvent Chapter 11 cases.

By the Court,

Joan N. Feeney

Joan N. Feeney
United States Bankruptcy Judge

Dated: July 26, 2006
cc: Jeffrey B. Cohen, Esq., Stephanie Thomas, Esq., John F. Ventola, Esq.

EXHIBIT 3

Sea Island Company

Pension Information Profile

	Sea Island Company Retirement Plan	Total of Underfunded Plans
EIN/PN	580420310/001	
Plan Frozen?	31-Dec-08	
Plan Terminated?	No	
Cash Balance Plan?	No	
Part I -- Actuarial Information		
Date of Bankruptcy Filing	10-Aug-10	10-Aug-10
PBGC Valuation Date	29-Oct-10	29-Oct-10
PBGC Interest Factors		
First Period	4.48%	4.48%
Thereafter	4.51%	4.51%
Date Calculation Completed by DISC Actuaries	26-Aug-10	26-Aug-10
Part II -- Underfunding Details (in dollars)		
Assets as of July 31, 2010 Projected to October 29, 2010	$37,305,431	$37,305,431
Estimated Unfunded Guaranteed Liability - UGL		
Retired	$19,318,454	$19,318,454
Terminated Vested	$23,985,285	$23,985,285
Active	$29,318,207	$29,318,207
Expenses	$882,646	$882,646
Total	$73,504,592	$73,504,592
UGL	**$36,199,161**	**$36,199,161**
Funded GL Ratio [Assets/Guaranteed Liabilities]	51%	51%
Estimated Unfunded Benefit Liability - UBL		
Retired	$19,318,454	$19,318,454
Terminated Vested	$23,985,285	$23,985,285
Active	$32,936,964	$32,936,964
Expenses	$926,628	$926,628
Total	$77,167,331	$77,167,331
UBL	**$39,861,900**	**$39,861,900**
Funded BL Ratio [Assets/Benefit Liabilities]	48%	48%
Part III -- Number of Participants at Plan Valuation Date		
Retired	319	319
Terminated Vested	412	412
Active	1,213	1,213
Total	1,944	1,944
Part IV -- Unpaid Minimum Required Contributions (in dollars)		
§1362(c) Amount	$17,779,154	$17,779,154
Total Unpaid Minimum Required Contributions (DUEC)	$2,265,102	$2,265,102
Date of Cessation of Business	29-Oct-10	29-Oct-10
Bankruptcy Claims		
- General Unsecured Claim	$2,024,261	$2,024,261
- 180 Day Normal Cost Claim	$159,900	$159,900
- (a)(2) Administrative Normal Cost Claim	$80,941	$80,941

Sea Island Company

Pension Information Profile

	Sea Island Company Retirement Plan
EIN/PN	580420310/001

Part V -- Funding Information (in dollars)

Plan Year Beginning (PYB)	1-Jan-09
Plan Valuation Date (PVD)	1-Jan-09
Is the Plan At-Risk? (for PYB)	No
Monthly Annuities In Payment (on PYB)	$156,629
Funding Target Attainment Percentage (FTAP) on PVD	90.27%
Adjusted FTAP (AFTAP) on PVD	90.27%
Carry-Over Balance (COB) as of PYB	$60,908
Pre-Funding Balance (PFB) as of PYB	$0
Minimum Required Contribution (MRC) as of PVD	$1,132,206
Can COB and PFB be used to reduce MRC?	Yes
Maximum Deductible Contribution as of PVD	$25,773,991
Actual 2009 PY Contribution	$1,192,066

Part VI -- Comments

Benefit accruals have ceased for the plan.

Part VII -- Sources & Methods

AVR/AFTAP Date	2009 AVR
5500 Year	N/A
Asset Date	31-Jul-10

Assets provided by SunTrust as of July 31, 2010 and were assumed to earn -4.83% per year (based on an investment allocation of 60% equity and 40% bonds; and investment indices known through August 2010).

Calculations assume employer shuts down.

Liabilities provided by the plan actuary have been converted to estimated Benefit Liabilities. Adjustments were made for interest, mortality, benefit accruals, benefit payments, and retirement age to reflect PBGC assumptions.

Estimated Guaranteed Liability is derived from vested liability and reflects PBGC assumptions. This estimate does not take into account benefits in excess of guaranteed benefits which may be payable as a result of §4044 asset allocation. Since the bankruptcy filing date of 8/10/2010 is after 9/16/2006, adjustments to the calculations of the guaranteed liabilities due to the changes enacted by PPA 2006 in ERISA 4022(g) are recognized as applicable (e.g. limiting the benefit accruals, the phase-in period for plan improvements, and the grow-ins for guaranteed benefits as of the bankruptcy filing date).

Completed by Milliman: Hassan Ghazi, FSA, EA — Date: 10/6/10

Reviewed by PBGC: Armando P. Saavedra, ASA, EA — Date: 10/6/10

The signatures above attest to the validity of all calculations on the PIP, the UBL spreadsheet, and the DUEC spreadsheet.

EXHIBIT 4

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

COX ENTERPRISES, INC.,

Plaintiff,

-vs- **Case No. 6:04-cv-698-Orl-28DAB**

NEWS-JOURNAL CORPORATION, HERBERT M. DAVIDSON, JR., MARC L. DAVIDSON, JULIA DAVIDSON TRUILO, JONATHAN KANEY, JR., DAVID KENDALL, ROBERT TRUILO, GEORGIA KANEY, and PMV, INC.,

Defendants.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

I. Introduction

This cause came on for consideration upon referral from the District Judge. By way of pertinent background,[1] in 2006, following extensive litigation between Plaintiff ("Cox"), Defendant News-Journal Corporation ("NJC"), and others, the District Court entered judgment, stating:

> IT IS ORDERED AND ADJUDGED that Plaintiff, Cox Enterprises, Inc., shall recover from the Defendant, News-Journal Corporation, the sum of $129.2 million, plus interest, in accordance with the terms of the order dated September 27, 2006. Plaintiff, Cox Enterprises, Inc., shall take nothing from the other defendants, Herbert M. Davidson, Jr., Marc L. Davidson, Julia Davidson Truilo, Jonathan Kaney, Jr., David Kendall, Robert Truilo, Georgia Kaney, PMV, Inc., and Lively Arts Center, Inc.

(Doc. 263). The judgment was affirmed in December 2007. *Cox Enterprises, Inc. v. News-Journal Corporation*, 510 F.3d 1350 (11th Cir. 2007).

Contrary to the usual course of events, significant post-judgment litigation continued and, in April 2009, the District Court appointed a Receiver to "administer and manage the business affairs,

---

[1]The case has an exceptionally long and complex history. For present purposes, the Court highlights only those matters material to the instant controversy.

funds, assets, choses in action and any other property of NJC; marshal and safeguard all of the assets of NJC; prepare NJC for sale; and take whatever actions are necessary for the protection of the creditors" (Doc. 507). Cox, the holder of the unpaid judgment, was actively involved in the litigation regarding the Receivership. In January 2010, the Receiver and Cox jointly moved the District Court to permit the Receiver to sell NJC's publishing operations (Doc. 576). The District Court conducted hearings on the motion, and, in March 2010, the motion was granted and the Receiver was authorized to proceed with the sale (Doc. 625). The sale did not include assumption of the NJC Pension Plan (Doc. 652).

In April 2010, the Receiver tendered administration and control of the Pension Plan to the Pension Benefit Guaranty Corporation ("PBGC"). PBGC submitted claims to the Receiver for: (1) the estimated unfunded benefit liabilities ("UBL") of the Pension Plan pursuant to 29 U.S.C. §§ 1362 and 1368, in the amount of $15,102,012.00; (2) unpaid premiums due to the PBGC under 29 U.S.C. § 1307, in the amount of $4,203,750.00; (3) unpaid minimum funding contributions due to the Pension Plan under 26 U.S.C. §§ 412, 430 and 29 U.S.C. § 1082, in the amount of $650,142.00, and (4) statutory liability for the shortfall and waiver amortization charge under 29 U.S.C. § 1362(c), in the amount of $6,504,080.00 (Doc. No. 652-5, Pages 96-112.). According to PBGC: "On August 5, 2010, following 'extensive consultation' and negotiations between PBGC, NJC's counsel and its actuary [footnote omitted], the Receiver and PBGC entered into a settlement with respect to PBGC's claims whereby PBGC would withdraw its claims for the shortfall and waiver amortization charges and pension insurance premiums; settle its unfunded benefit liabilities claim for $14,500,000.00; and settle its minimum contribution claim for $455,000.00." (Doc. No. 709, citing Doc. 669, p. 3).[2] As noted by the Receiver in its report to the Court:

[2]Note that the Receiver's Report quoted by PBGC asserts that the agreed value of PBGC's UBL claim was $14,272,500 (Doc. 669, p. 3).

> The Receiver's agreement with PBGC should not be viewed by the Court as a recommendation that PBGC receive a distribution in the amount of these two claims, or a comment on PBGC's priority relative to Cox; only that the Receiver agrees that these two claims are properly before the Court and that $14,272,500.00 is the agreed-upon amount of the plan's unfunded benefit liability and $455,000.00 is the agreed-upon amount of the required minimum funding contribution.

(Doc. 669, p. 4). The Receiver took the position that the PBGC claims were general unsecured claims (Doc. 669). Noting that "the amount of the legitimate claims against NJC's assets far exceeds the value of those assets – indeed, . . . the amount of the Cox judgment alone far exceeds the value of those assets . . ." (Doc. 652, p. 28), the Receiver recommended disposition of the NJC assets, wind-up of the company, and discharge of the receivership. *Id.*

Following hearing on the Recommendations of the Receiver and objections thereto, the District Court entered an Order providing for distribution of all of NJC's assets to Cox, in partial satisfaction of the judgment (Doc. 674). PBGC appealed (Doc. 684), but the Distribution Order was not stayed pending appeal. Thus, the Receiver distributed to Cox "real estate nominally valued at $8.29 million, an art poster collection nominally valued at $591,875.90 and funds totaling $33,094,192.56" (Doc. 765, citing Docs. 690, 692 and 694).

On January 4, 2012, the Eleventh Circuit vacated the August 13, 2010 Distribution Order and remanded the case to the District Court for further proceedings (Doc. 698, *Cox Enterprises, Inc. v. Pension Benefit Guaranty Corp. et al.*, 666 F.3d 697 (11th Cir. 2012).) In essence, the Court of Appeals concluded that Cox could not collect on its claim if a distribution to Cox rendered NJC insolvent, and remanded the case to this Court to apply the insolvency test contained in Fla. Stat. § 607.06401, noting: "If on remand the district court finds a distribution to Cox would violate this section, News–Journal's other creditors should receive payment before any distribution is made to Cox." 666 F.3d at 699.

Upon receipt of the mandate, the District Court issued an Order (Doc. 708) which provided for a procedure to "reevaluate the claims of all of News-Journal's creditors. . ." *Cox,* 666 F. 3d at 708. In pertinent part, the District Court stated:

> 1. The Court will reevaluate the claims of all of the News-Journal Corporation's (the "NJC") creditors consistent with the Eleventh Circuit's opinion. For that purpose, the Court directs each person or entity that filed a timely response to the Receiver's Notice of Claim Deadline (Doc. No. 630) and desires to have its claim or claims considered by the Court, to submit a memorandum that addresses how the claimant believes the Court should rule consistent with the Eleventh Circuit's opinion and that sets forth (I) the amount of the claim(s) and the bases for its claim(s), or that (ii) identifies previously-filed documents that set forth the amount and the bases for its claim(s).
>
> 2. Each party and each person or entity submitting a memorandum as set forth above may submit a response to any claim within forty (40) days after entry of this Order. If any party, person, or entity contends that an evidentiary hearing is necessary, the party, person, or entity should so state and identify, at least in general terms, the factual issues to be determined. Responses should identify objections to the validity and amount of claims.

(Doc. 708).

In its papers, Cox took the position that "as a matter of law no cause exists for the Court to order Cox to relinquish any previously-distributed NJC assets." (Doc. 714, 711). Cox also took the position that, "even were the Court to conclude at or after the argument scheduled for August 2 that there may be cause to order Cox to relinquish any previously-distributed NJC assets, no distribution to either the Davidsons[3] or PBGC would be appropriate on this record absent an evidentiary hearing, in preparation for which Cox would be entitled to discovery." (Doc. 714). Cox disputes the "validity and amount" of any claim of PBGC.

For its part, the PBGC stated:

> PBGC settled its claims after long and vigorous negotiations with the Receiver. The Receiver was represented by special pension counsel and an actuary, and negotiated only after requesting and receiving all the information he sought to reach a settlement. As support for its claims, PBGC relies on the information submitted to the Receiver, NJC, NJC's actuary and special counsel hired by the Receiver, as well as information

[3]The potential claim of the Davidsons has been completely resolved by action of the state court, and is not before this Court.

> PBGC conveyed in numerous telephone and email conversations that occurred between these parties. Any objections to the settlement of PBGC's claims are waived, as the time for objecting to that settlement expired long ago. To the extent that this Court now allows objections, however, PBGC reserves the right to fully respond and to reassert the full amount of its originally filed claims.

(Doc. 709, p.5).

The District Court held oral argument on August 2, 2013, and took the matter under advisement. As Cox had taken the position that certain factual issues required development and resolution, the District Court referred the matter to the undersigned Magistrate Judge, for the limited purpose of determining whether an evidentiary hearing was appropriate, and, if so, to hold such a hearing. The undersigned held a status conference (Doc. 750), and issued a subsequent Order which noted, in part:

> As discussed at conference, there are several issues remaining for resolution in the wake of the mandate issued by the Eleventh Circuit. Although certain of those issues are purely legal and will be resolved by the District Judge, there are limited factual disputes which, if reached [fn omitted] and not resolved through agreement, would require development and resolution. In view of the history of this dispute, the Court finds that an appropriate course is to allow the parties to develop the record through limited discovery, and then resolve the factual disputes through an evidentiary hearing. The District Judge may then determine all of the remaining issues with the benefit of a complete record.

(Doc. 751).

The parties commenced discovery, the parties conferred and submitted a Joint Pretrial Statement (Doc. 778), and the undersigned held an evidentiary hearing (Doc. 781, 786). At the January 14, 2014 hearing, PBGC called two witnesses: (1) a fact witness and (2) an expert witness to provide testimony on PBGC's regular practices in calculating its claims in bankruptcy and receivership cases and the amount of PBGC's claim against NJC for the Pension Plan's unfunded benefit liabilities (Transcript - Doc. 786). Cox called one witness, an expert who challenged the formulation of the claims. *Id.* Numerous exhibits were admitted into evidence (Docs. 782-784). The parties have since filed briefs and Proposed Findings of Fact and Conclusions of Law (Doc. 785, 788-

790). Having heard evidence and reviewed the briefs, the record and the applicable law, the Court identifies the issues and makes the limited findings of fact and conclusions of law set forth herein.

II. The Issues Presented

As set forth in the Joint Pretrial Statement (Doc. 778), several issues remain with respect to the claim(s) asserted by PBGC. The issues are summarized as follows:

- Whether PBGC's claims were timely asserted to the Receiver
- Whether PBGC's claims were adequately asserted
- The appropriate amount of PBGC's claims for unfunded benefit liabilities, if any
- The appropriate amount of PBGC's claim for missed minimum funding contributions, if any
- Whether Cox has waived any objections to the claims

Including in these issues are various sub-issues regarding the appropriateness and adequacy of the calculation of the claims, and equitable arguments regarding the assertion of the claims at this point in the litigation. Some of these issues, such as the extent of discretion the Court may exercise in carrying out the mandate of the Eleventh Circuit, are beyond the scope of the current referral. Cox has identified several issues which it contends remain pending for the District Judge's sole determination. These issues include:

1. Whether the PBGC's claims are "legally in parity with or have priority over" the claim of Cox (Doc. 778, p. 22).

2. Whether the PBGC's claims may and should be rejected as a result of the PBGC's "failure to comply with the Court's orders in timely [sic] submitting and adequately supporting its claims to be [sic] Receiver and the Court" *Id*.

3. Whether in a federal receivership proceeding claims of the PBGC may and should be rejected if the PBGC fails to demonstrate that its calculations of its claims are accurate and reliable and do not overstate the pension plan's liabilities. *Id.*

4. Whether in a federal receivership proceeding claims of the PBGC may and should be rejected or discounted if on the factual record the district court believes that doing so is consistent with treating the PBGC and other claimants fairly. (Doc. 778, p. 23).

The matters addressed herein are limited to ascertaining the amount of the claims asserted by PBGC. Matters with respect to the priority of the PBGC claims, "waiver" of the claims due to alleged insufficiency of presentation to the Receiver and the District Judge, the application of "equitable" considerations governing receiverships which might prohibit the payment of the claims, and the question posed by the Eleventh Circuit (whether a distribution to Cox would violate Fla. Stat. § 607.06401), are all properly before the District Judge.

Against this background, the Court makes the following findings of fact and conclusions of law, with respect to the issues properly before it.

III. Findings

The Role of the PBGC

PBGC is a wholly owned United States government corporation that administers the nation's pension insurance program established by Title IV of ERISA. (Joint Pretrial Statement, Statement of Uncontested Facts) (Doc. 778). PBGC is funded by insurance premiums paid by employers that sponsor PBGC-insured plans, earnings from investments, assets from terminated pension plans, and recoveries from companies formerly responsible for terminated pension plans. *Id.* When a pension plan covered by Title IV terminates without enough assets to pay all of its promised benefits, PBGC is both the guarantor of the plan benefits payable, up to statutory limits, and in virtually every case, becomes the statutory trustee of the plan. *Id.*

PBGC is responsible for determining and paying benefits due to a terminated plan's participants and beneficiaries according to the rules in Title IV of ERISA. *See* 29 U.S.C. §§ 1322, 1344; *see also* Joint Exhibit 15 at COX-PBGC 2179-81 (Doc. 782-23). If a pension plan terminates

in a distress or PBGC-initiated termination, certain liabilities arise pursuant to Title IV of ERISA. Among other liabilities, the pension plan's contributing sponsor becomes liable to PBGC for "the total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan" with interest. 29 U.S.C. § 1362(a), (b). Title IV of ERISA defines "the amount of unfunded benefit liabilities" as:

> as of any given date, the excess (if any) of–
>
> (A) the value of the benefit liabilities under the plan (determined as of the termination date on the basis of assumptions provided by [PBGC] for purposes of [29 U.S.C. § 1344]), over
>
> (B) the current value (as of such date) of the assets of the plan.

29 U.S.C. § 1301(a)(18). The "assumptions provided" by PBGC for these purposes are contained in the Valuation Regulation, promulgated by PBGC. 29 C.F.R. § 4044.41-.75. Thus, "the statute defines "unfunded benefit liabilities" as being the amount determined by reference to the PBGC valuation regulation." *In re U.S. Airways Group, Inc.*, 303 B.R. 784, 796-797 (Bankr. E.D. Va. 2003).

The pension plan's contributing sponsor is also liable for unpaid minimum funding contributions owed to a pension plan. 29 U.S.C. §§ 1082(b); 26 U.S.C. § 412(b). Upon plan termination, that liability is owed to PBGC as the statutory trustee of a pension plan. *See* 29 U.S.C. §§ 1342(d), 1362(c).

PBGC's standard procedures in evaluation of a Plan

When PBGC becomes trustee of a terminated plan, as part of the agency's standard procedures, PBGC sends to the plan sponsor an initial standard request letter in order to obtain various information, data, and documents related to that plan. When this information and data is returned to the agency, the benefits administration and payment department develops both a participant data review and a plan asset evaluation and when those two items are completed, then the actuaries will develop the Actuarial Case Report for the plan (Travia testimony, Doc. 786, pp. 19-25, 71).

PBGC's Corporate Finance & Restructuring Department ("CFRD") has a standard process for calculating estimates of PBGC's claim for a pension plan's unfunded benefit liabilities and PBGC's claim for unpaid minimum funding contributions owed to a pension plan. In that process, CFRD applies the actuarial assumptions prescribed by ERISA and PBGC's regulations. (*Id.*).

PBGC compiles a final valuation of the Pension Plan's benefit liabilities, using the actuarial assumptions provided in Title IV of ERISA and PBGC's regulations. This evaluation is based on a participant-by-participant (seriatim) valuation of benefit liabilities. Generally, it takes from three to four years to prepare the final Actuarial Case Report (Doc. 786, pp. 71-72).

The NJC Plan

Effective July 1, 1960, NJC established the Pension Plan, a defined benefit pension plan covered by Title IV of ERISA (Joint Pretrial Statement, Statement of Uncontested Facts) (Doc. 778). Until the Pension Plan's termination, NJC was the contributing sponsor of the Pension Plan. *Id.* As noted above, on April 17, 2009, the Court appointed James W. Hopson as Receiver for NJC (Doc. 507). On or about September 17, 2009, PBGC received the Post-Event Notice of Reportable Events (PBGC Form 10) from the attorney for the Receiver (Joint Pretrial Statement, Statement of Uncontested Facts) (Doc. 778).

PBGC becomes statutory trustee of the NJC Pension Plan

On May 14, 2010, PBGC issued its Notice of Determination to NJC that the Pension Plan should be terminated under 29 U.S.C. § 1342. In that notice, PBGC stated that the Pension Plan's termination date should be March 23, 2010. Along with the Notice of Determination, PBGC sent an Agreement for Appointment of Trustee and Termination of Plan, and requested that the Receiver sign the Agreement. *Id.* As detailed above, the Receiver and the PBGC initially disagreed as to the claims asserted by PBGC. In the summer 2010, PBGC and the Receiver conferred regarding resolution of PBGC's claims against NJC. This process included correspondence between PBGC's actuary and

NJC's actuary about the data and actuarial assumptions used to calculate PBGC's claims (Doc. 782-19 to 782-21 - Joint Exhibit 11; Joint Exhibit 12; Joint Exhibit 13; Doc. 783-33). On August 5, 2010, NJC's actuary completed an estimate of the Pension Plan's benefit liabilities using the assumptions prescribed in Title IV of ERISA and PBGC's regulations. NJC's actuary estimated that the Pension Plan's benefit liability was $42,465,742, although that figure did not include the required expense load assumption (Doc. 782-22 - Joint Exhibit 14).

On August 6, 2010, PBGC and the Receiver executed an Agreement for Appointment of Trustee and Termination of Plan that, *inter alia*, terminated the Pension Plan under 29 U.S.C. § 1342, established March 23, 2010 as the Pension Plan's termination date, and appointed PBGC as statutory trustee of the Pension Plan. Joint Pretrial Statement, Uncontested Fact 26 (Doc. No. 778). As of the Pension Plan's March 23, 2010 termination date, the Pension Plan had assets of $28,644,239. *Id.*

PBGC calculates the estimated amounts

On March 26, 2010, the CFRD completed its calculation of PBGC's claim for unpaid minimum funding contributions owed to the Pension Plan in the estimated amount of $650,142 (Doc. 786, pp. 28-29, citing PBGC Exhibit 29). CFRD prepared this calculation of the estimated amount of unpaid minimum funding contributions owed to the Pension Plan in accordance with its standard procedures. *Id.* Travia testimony pp. 29-30. On March 31, 2010, CFRD completed its calculation of the Pension Plan's unfunded benefit liabilities in the estimated amount of $15,102,012. (PBGC Exhibit 26; Doc. 786, pp. 23 to 24). CFRD prepared this calculation of the Pension Plan's estimated unfunded benefit liabilities in accordance with its standard procedures. *Id.* Travia testimony pp. 23-25.

On July 27, 2010, PBGC revised its calculation of the unpaid minimum funding contributions owed to the Pension Plan to reflect additional contributions that the Receiver had paid to the Pension Plan. The revised amount of PBGC's claim was calculated as $455,430. (PBGC Exhibit 40, *Id.*, Travia testimony pp. 30 to 31; Joint Exhibit 11). As noted above, the Receiver and PBGC negotiated

and the Receiver ultimately agreed that "[PBGC's unfunded benefit liabilities claim and unpaid minimum funding contribution claim] are properly before the Court and that $14,272,500.00 is the agreed-upon amount of the plan's unfunded benefit liability and $455,000.00 is the agreed-upon amount of the required minimum funding contribution" (Doc. No. 669 at 2-4).

PBGC conducts a seriatim valuation

After the Pension Plan was terminated and PBGC became the Pension Plan's statutory trustee, PBGC's Benefits Administration and Payments Department began the process of collecting all of the Pension Plan's records and calculating the Pension Plan's benefit liabilities on a participant-by-participant (seriatim) basis pursuant to the provisions of Title IV of ERISA and PBGC's regulations (Doc. 786, p.71; Joint Exhibit 15 at COX-PBGC 2179-80). On August 22, 2013, PBGC completed that seriatim valuation, and determined that the final amount of the Pension Plan's unfunded benefit liabilities was **$13,887,822** (Joint Pretrial Statement, Uncontested Fact 37, Doc. No. 778; PBGC Exhibit 1 at 2; Joint Exhibit 3 at PBGC-NJC-005307). This reflects PBGC's calculation of the Pension Plan's benefit liabilities on a seriatim basis using the actuarial assumptions prescribed in Title IV of ERISA and PBGC's regulations thereunder (Doc. 786, Young testimony at pp. 69-71; Doc. 782-5 to 782-12; Joint Exhibits 4-6). The actuarial case memorandum containing the seriatim valuation was certified by Althea Schwartz, an enrolled actuary at Milliman, Inc. (Joint Exhibit 4 at PBGC-NJC-006915; *Id.*, Young testimony p. 72).

In its papers and at hearing, PBGC has stipulated: "If PBGC fully recovers on its claim against NJC for the Pension Plan's unfunded benefit liabilities, then PBGC is not seeking any separate payment on its claim for the missed minimum funding contributions owed by NJC to the Pension Plan. To the extent that PBGC does not fully recovery on its claim for the Pension Plan's unfunded benefit liabilities, it intends to pursue recovery on both of its claims." (Doc. 778, n. 1).

The Court calculates the claim

As noted above, questions regarding the sufficiency of the presentation of the claim to the Receiver and the priority of the claims are to be resolved by the District Judge. With respect to the amount of the claim, the Court finds that the amount of PBGC's claim against NJC for the Pension Plan's unfunded benefit liabilities is **$13,887,822.00.** As this amount is consistent with full recovery, the Court finds PBGC's claim for unpaid minimum funding contributions in the amount of $455,000.00 is incorporated in the unfunded benefit liabilities claim, and no separate payment is owed.

IV. Discussion

In reaching this conclusion, the Court has considered the foregoing findings of fact, the legal framework and applicable case law, and the contentions of the parties. In its papers and at hearing, Cox raises several objections to the "merit, priority, and amount" of the claim of PBGC. The majority of these objections and arguments are, as noted, reserved for the District Judge. Three of the objections, however, are properly before the undersigned and are discussed herein: 1) whether the assertion of any claim by PBGC is "fair;" 2) whether there is competent evidence supporting the claim; and 3) whether the greater weight of the evidence supports a conclusion that no award should be made.

"Fairness"

Cox frames the overriding issue before the Court as whether the District Court has discretion to approve a "fair" distribution of assets, or is required to "rubber stamp" PBGC's calculations of its claim. Claiming that it is the "wholly innocent" party, Cox urges the Court to find that "PBGC is due to receive nothing from Cox" (Doc. 790-2). This characterization is unpersuasive.

As set forth above, PBGC asserted its claims *against the assets of NJC.* Although the District Court determined that the assets of NJC were to be paid to Cox in partial satisfaction of its Judgment, that decision has been overturned. While Cox no doubt disagrees with the Eleventh Circuit, the effect

of the appellate decision is, in effect, to *return* those assets to the NJC estate. As such, the parties are at issue over the assets *of NJC* currently being held by Cox; there is no independent claim by PBGC against Cox and the NJC assets paid to Cox are no longer its own. To the extent Cox deems that to be unfair, the mandate of the Eleventh Circuit forecloses such discussion. Another way of looking at the circumstances is simply to note that Cox found itself as a shareholder/creditor of an entity that was subject to another large liability (unfunded pension obligations) and that therefore was worth even less than Cox thought.

Nor is it unfair that PBGC did not post a bond to stay the Court's Distribution Order, pending appeal. PBGC did not hide its disagreement with the Court's Distribution Order, and promptly appealed (Doc. 684). Cox took its distribution *after* the Notice of Appeal was filed; with full knowledge of the pending appeal and the risks involved (Docs. 690-692). In the interim, Cox enjoyed the benefit of the use of the funds and assets, and any interest on the NJC assets that were held by Cox has accrued to Cox's benefit. The Court does not find any unfairness to Cox in PBGC's conduct here.

Finally, the Court finds the concept of "innocence" to be irrelevant to the issues at hand. While there is no doubt that Cox did nothing "wrong" to warrant the unfortunate situation it finds itself in, neither did the beneficiaries of the NJC Pension Plan. Moreover, Cox cannot lay blame at the door of the PBGC, which must act in accordance with its statutory obligations to the Plan and its participants. The fact remains that none of the present players is any more or less deserving based on their relative "innocence." The moral high ground here is crowded, indeed.

Whether there is sufficient competent evidence supporting the claim

On the merits, Cox contends that the PBGC failed to demonstrate that it followed its own rules and procedures, in that 1) its fact witness, Ms. Travia, testified that she did not actually perform or supervise the performance of any of the calculations for the claims in this case; and 2) Mr. Young,

the expert witness, testified that he did not do anything personally to calculate the amount of the NJC's unfunded benefit liabilities, but relied on the work of others. The Court is unpersuaded.

As noted by Cox, Cynthia Travia has been employed by PBGC for ten years and currently holds the title of senior actuary in PBGC's Corporate Finance & Restructuring Department. (Trial Tr. Doc. 786, p. 13). She provided testimony on behalf of PBGC regarding PBGC's regular practices in calculating its claims in bankruptcy and receivership cases, noting that her department:

> perform[s] any of the actuarial calculations that a case team would need to analyze a certain event. So that can include doing the unfunded benefits liability calculations, determining the unfunded pension plan, also determining the amount of minimum required contributions that were supposed to be paid to a plan and haven't been paid, which we call the due and unpaid employer contributions.

(Doc 786, p. 15). Ms. Travia testified regarding pension information profiles ("the summary of the results of our calculations when we do an unfunded benefit liability calculation") and stated that she had prepared "at least 600" of these reports, and personally had calculated pension plan unfunded benefit liabilities "easily 600 [times] in the course of my career" *Id.*, pp. 16, 19. Ms. Tavia testified that she was familiar with the process used to calculate the amount of unpaid minimum funding contributions, as well, and had calculated due and unpaid employer contribution claims "approximately 100 times." *Id.*, pp. 25, 26-7.

Although Cox points out (correctly) that Ms. Tavia did not *personally* prepare or supervise the preparation of the calculations for PBGC's unfunded benefit liability claim (*Id.*, p. 32), the Court does not agree that this means "she was not able [to] confirm that PBGC calculated its claims against News-Journal in accordance with PBGC's normal practice" (Doc. 790-1, para. 82). In fact, Ms. Tavia testified that she was well familiar with the normal procedures for the calculations prepared by PBGC and, *from her review of the documents*, she concluded that the normal procedures were followed. *See* Doc. 786, pp. 24-25, 29, 30. This is credible evidence to support a finding that PBGC followed its usual and customary procedures in formulating the claims.

PBGC also called Scott Young, the Chief Valuation Actuary in PBGC's Benefits Administration and Payment Department, and tendered him as an expert in the field of actuarial science. *Id.*, pp. 48, 52. Mr. Young developed an expert opinion concerning the amount of the Pension Plan's unfunded benefit liabilities after reviewing PBGC's actuarial case memorandum and actuarial case report for the Pension Plan. *Id.*, pp. 55, 59-62. He testified that PBGC had properly applied the actuarial assumptions prescribed in Title IV of ERISA and PBGC's regulations to calculate the Pension Plan's total benefit liabilities in the amount of $42,532,061. *Id., also* pp. 62-69, 73-74; Doc. 782-3 - Joint Exhibit 3 at PBGC-NJC-005307. As the parties have stipulated that at termination, the Pension Plan had assets of $28,644,239.39, subtracting the Pension Plan's assets from its total benefit liabilities yields unfunded benefit liabilities of $13,887,822.

Cox contends that the expert witness did not offer competent evidence that the claims were calculated in accordance with PBGC's regulations and procedures because "Mr. Young did not do anything personally to calculate the amount of the NJC's unfunded benefit liabilities" (Doc. 786, pp. 52-53), but relied on the work of other individuals who are not employed by PBGC, but who are actuarial contractors hired by PBGC to calculate the NJC plan's unfunded benefits liability (*Id.*, p. 53). As the Court noted at hearing, however, Mr. Young is routinely called upon to give opinions based on the review of the work of other people, as an ordinary part of the performance of his professional duties (Doc. 786, pp. 57-58). Based upon his qualifications, his familiarity with the PBGC and its regulations, and his review of the documents, the Court finds his testimony to be competent evidence.

Moreover, the testimony of these witnesses is not the only evidence before the Court. In fact, several others also estimated the benefit liability. As noted above, NJC's actuary, using the assumptions prescribed in Title IV of ERISA and PBGC's regulations, estimated that the Pension Plan's benefit liability (Doc. 782-22 - Joint Exhibit 14). The Receiver also participated in extensive

negotiations with PBGC, and the Receiver eventually acknowledged that the claims were "properly before the Court and that $14,272,500.00 is the agreed-upon amount of the plan's unfunded benefit liability and $455,000.00 is the agreed-upon amount of the required minimum funding contribution" (Doc. No. 669 at 2-4). Importantly, *Cox's* expert witness, Adam Reese, Principal and Managing Director of Actuarial Services at PRM Consulting Group, calculated total benefit liabilities of $42,218,066, compared with PBGC's calculation of $42,532,061, using the assumptions prescribed in Title IV of ERISA and PBGC's regulations. Doc. 786, p. 150*; Compare* Joint Exhibit 2 at 3 (Mr. Reese's calculation), with PBGC Exhibit 1 at 2; Joint Exhibit 3 at PBGC-NJC-005307 (PBGC's calculation). Mr. Reese's calculations using these assumptions yields an UBL claim of approx. $13,573,827 ($42,218,066 minus $28,644,239).[4] The fact that all of the professionals who calculated or estimated the liability arrived at similar figures (with the differences explained by differing data sets) supports a finding that the PBGC did, in fact, prepare its claim consistent with the assumptions prescribed in Title IV of ERISA and PBGC's regulations. Coupled with the certification of the claim by the enrolled actuary at Milliman, Inc., all of the foregoing lead the Court to conclude that PBGC presented sufficient supporting evidence of its claim. The Court **finds** that the PBGC followed its own procedures in calculating its claim.

The larger issue raised by Cox is not whether the PBGC did, in fact, follow its own regulations, but whether they should have done so. This leads to Cox's next contention.

Whether the greater weight of the evidence supports disallowance of the claim

Cox's cross examination of the PBGC witnesses and direct examination of its own expert witness served to establish that calculating the UBL by using assumptions which are not contained in the valuation regulation renders a much different (and more favorable to Cox) result. The Court accepts the unremarkable proposition that using different assumptions yields a different result. It may

[4]Mr. Resse testified that he used an updated data set in calculating the liability. *See* generally, Doc. 786, pp. 150, 113-115.

well be that, in some situations, Cox's assumptions may be more "realistic" and may "make more sense." Ultimately, however, this contention is of no moment. ERISA mandates that the value of the plan's benefit liabilities be determined "on the basis of assumptions prescribed by [PBGC]." 29 U.S.C. § 1301(a)(18)(A). As Cox's calculation is not determined on the basis of these assumptions, it is not appropriate in determining the amount of the UBL claim.

In accordance with the Administrative Procedure Act, PBGC promulgated the Valuation Regulation, which prescribes the required assumptions for calculating a pension plan's benefit liabilities for purposes of 29 U.S.C. § 1344. *See, e.g.*, 46 Fed. Reg. 9492 (Jan. 28, 1981) (Final Rule); 58 Fed. Reg. 50,812 (Sept. 28, 1993) (Final Rule). After PBGC promulgated the Valuation Regulation, Congress amended 29 U.S.C. § 1301(a)(18) to explicitly refer to the "assumptions prescribed by [PBGC]" for valuing benefit liabilities. *Id.* Thus, "Congress, by statute, has expressly given the PBGC a present right to recover an amount determined in accordance with the valuation regulation." *In re U.S. Airways Group, Inc*., supra, 303 B.R. at 793; *see also In re Rhodes, Inc*., Nos. 04–78434, 04–78435, 04–78436, 2008 WL 7842106, *8 (Bankr. N.D. Ga. Jan. 25, 2008) ("PBGC is authorized by law to make a determination of the amount of its claim that is binding on Debtors and therefore on this Court.").

Although Cox and its expert actuary offer alternative interest rate assumptions, mortality rates, annuity pricing, and retirement age assumptions than those set forth pursuant to the Valuation Regulation, and contend that this results in "a more reasonable value of the benefit liabilities to be funded" (Doc. 790-1, para. 99), PBGC's interpretation of ERISA and its own regulation is entitled to deference. *Durango-Georgia Paper Co. v. H.G. Estate, LLC,* 739 F.3d 1263, 1273 (11th Cir. 2014) ("We give deference to PBGC's interpretation of ERISA"); *Lyons v. Georgia–Pacific Corp. Salaried Employees Retirement Plan*, 221 F.3d 1235, 1244–1245 (11th Cir. 2000)("... agency regulations, like the one at issue here, are to be given deference 'unless they are arbitrary, capricious,

or manifestly contrary to the statute'"). Whether the Valuation Regulation may or may not be susceptible to improvement and whether Cox's interpretation is "more reasonable" are not determinative. As the Eleventh Circuit has explained:

> As a preliminary matter, we note that we owe great deference to the interpretations and regulations of the Pension Benefit Guaranty Corporation ("PBGC"), the Internal Revenue Service ("IRS") and the Department of Labor, which are the administrative agencies responsible for enforcing and interpreting ERISA. As the Supreme Court stated, "a court that tries to chart a true course to the Act's purpose embarks on a voyage without a compass when it disregards the agency's views." *Ford Motor Co. v. Milhollin*, 444 U.S. 555, 568, 100 S.Ct. 790, 798, 63 L.Ed.2d 22 (1980). The Supreme Court has consistently advised that courts must adhere to the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong...." *Red Lion Broadcasting Co., Inc. v. F.C.C.*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969). Furthermore, we only must determine whether the agency's interpretation is reasonable. In making this determination, we "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding ... [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 843 n. 11 and 844, 104 S.Ct. 2778, 2782 n. 11 and 2782, 81 L.Ed.2d 694 (1984).[FN omitted] Finally, we must defer not only to the regulations promulgated by administrative agencies charged with the enforcement and interpretation of ERISA and the Internal Revenue Code but also, when a regulation can be interpreted in more than one plausible way, we must recognize and defer to the agencies' interpretation of the regulation. *Ford Motor Co.*, 444 U.S. at 560, 100 S.Ct. at 794 (where statute and regulations in consumer credit area were susceptible to divergent interpretations, the court deferred to opinion letters and consumer advice publications which set forth the interpretation of the regulation by the appropriate administrative agency); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219, 101 S.Ct. 2266, 2274, 68 L.Ed.2d 783 (1981) ("absent some obvious repugnance to the statute, the [agencies'] regulation implementing this legislation should be accepted by the courts, as should the [agencies'] interpretation of its own regulation.").

Blessitt v. Retirement Plan For Employees of Dixie Engine Co., 848 F.2d 1164, 1167 -1168 (11th Cir. 1988) (en banc).

The PBGC represents that the Valuation Regulation has been applied to determine the underfunding in every pension plan that has terminated and been trusteed by PBGC, for more than thirty five years (Doc. 788, p. 6). Moreover, PBGC represents that "every court that has considered

the issue since 2003 has rejected efforts to depart from the Valuation Regulation." (Doc. 779, *citing US Airways*, 303 B.R. at 793; *Dugan v. PBGC (In re Rhodes, Inc.)*, 382 B.R. 550, 559-60 (Bankr. N.D. Ga. 2008); *In re High Voltage Eng'g Corp*., No. 05-10787 (Bankr. Mass. July 26, 2006) (Order) (Doc. 779-2); *In re UAL Corp*., Case No. 02 B 48191 (Bankr. N.D. Ill. Dec. 30, 2005) (Trans. of Hearing, Dec. 16, 2005, at 32-33) (Doc. 779-3); *accord In re Wolverine, Proctor & Schwartz, LLC*, 436 B.R. 253, 262-63 (D. Mass. 2010) (finding the reasoning of US Airways persuasive in affirming the bankruptcy trustee's settlement of PBGC's claim for unfunded benefit liabilities). While these authorities are not binding on the Court, and there is earlier, contrary authority in the context of bankruptcy,[5] the Court finds the great weight of authority supports application of the Valuation Regulation, consistent with the letter of the law.

As the showing made by Cox is not sufficient to find the Valuation Regulation to be arbitrary and capricious, and it is not contrary to ERISA, the Court must give it deference and must find that it controls the formulation of the claim at issue.

Conclusion

For the reasons stated, the Court concludes that the PBGC has followed its procedures and has calculated its UBL claim in accordance with the applicable regulation. As stated above, the Court finds that the amount of PBGC's claim against NJC for the Pension Plan's unfunded benefit liabilities is **$13,887,822.00.** As this amount is consistent with full recovery, the Court finds PBGC's claim for unpaid minimum funding contributions in the amount of $455,000.00 is incorporated in the unfunded benefit liabilities claim, and no separate payment is owed.

[5]*See In re CF & I Fabricators of Utah, Inc.*, 150 F. 3d 1293, 1301 (10th Cir. 1998) (PBGC was to apply prudent investor discount provided in the Bankruptcy Code, rather than its own valuation methodology); *In re CSC Indus., Inc.*, 232 F. 3d 505 (6th Cir. 2000) (same).

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen (14) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Recommended in Orlando, Florida on March 21, 2014.

David A. Baker

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Presiding District Judge
Counsel of Record
Unrepresented Party
Courtroom Deputy

EXHIBIT 5

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

COX ENTERPRISES, INC.,

Plaintiff,

-vs- **Case No. 6:04-cv-698-Orl-28DAB**

NEWS-JOURNAL CORPORATION, HERBERT M. DAVIDSON, JR., MARC L. DAVIDSON, JULIA DAVIDSON TRUILO, JONATHAN KANEY, JR., DAVID KENDALL, ROBERT TRUILO, GEORGIA KANEY, and PMV, INC.,

Defendants.

ORDER

This case is before the Court following remand from the United States Court of Appeals for the Eleventh Circuit. (See Doc. 698). In its January 4, 2012 opinion, the appellate court stated in part that "the district court must reevaluate the claims of all of [News-Journal Corporation's] creditors consistent with this opinion." (Id.).

Pursuant to a referral by this Court, the assigned United States Magistrate Judge has, after holding an evidentiary hearing, issued a Report and Recommendation (Doc. 791) regarding the amount and propriety of the claim of the Pension Guaranty Benefit Corporation ("PBGC") against News-Journal Corporation—the only remaining creditor claim. In his Report, the magistrate judge found that the amount of PBGC's claim against News-Journal Corporation for the News-Journal Corporation's Pension Plan's unfunded benefit liabilities is $13,887,822.00 and that no separate payment for unpaid minimum funding

contributions is owed.

After an independent review of the record in this matter, including the Objection filed by Plaintiff Cox Enterprises, Inc. (Doc. 792) and the Response (Doc. 793) filed by PBGC to that Objection, the Court agrees with the findings and conclusions in the Report and Recommendation. Therefore, it is **ORDERED** as follows:

1. The Report and Recommendation (Doc. 791) is **ADOPTED** and **CONFIRMED** and made a part of this Order.

2. The Court finds that the amount of PBGC's claim against News-Journal Corporation for the News-Journal Corporation's Pension Plan's unfunded benefit liabilities is $13,887,822.00 and that no separate payment for unpaid minimum funding contributions is owed.

3. In its Objection, Cox included a Motion to Schedule Final Briefing and Oral Argument. (See Doc. 792). That motion is **DENIED**. However, a **status conference** will be held in this case before the undersigned United States District Judge on **Wednesday, May 21, 2014, at 10:00 a.m.** in Courtroom #6B, George C. Young United States Courthouse and Federal Building, 401 W. Central Boulevard, Orlando, Florida. Thirty minutes have been set aside for this status conference.

DONE and **ORDERED** in Orlando, Florida this 24 day of April, 2014.

JOHN ANTOON II
United States District Judge

Copies furnished to:
United States Magistrate Judge
Counsel of Record
Unrepresented Party

PLEASE NOTE: Photo I.D. is required to enter the United States Courthouse. Also, cellular telephones and laptop computers are prohibited in the Courthouse.

EXHIBIT 6

From:	Thomas Stephanie
To:	"Robert D. Mercer"
Cc:	Neureiter Kimberly; Zareba Adrian; Kumar Aditi
Subject:	SIC documentation
Date:	Friday, May 20, 2016 2:06:03 PM
Attachments:	RE_ Sea Island Company Retirement Plan request for information (002).txt

Robert,

I write in response to your letter of May 18, 2016, to try to clear up your misunderstanding of the documents we have provided. In your March 10, 2016 email, you specified that, "we only requested the documents upon which PBGC asserts in its proofs it is relying." I responded by email dated March 15 that we "believe we have provided you with all the documents PBGC relied upon to calculate our claim." Given the symmetrical language, I believe this answered your question. You, however, seem to believe otherwise. It may be that you question whether paragraph 8 of our statement in support of our proofs of claim may include documents beyond "all the documents PBGC relied upon to calculate our claim." It does not. Paragraph 8 of our statement clearly refers to "documents supporting this claim." By definition, if PBGC relied on a document, it is a document "supporting this claim." Accordingly, we have provided to you all the "documents supporting this claim" referred to in paragraph 8 of our statements in support that we found in a reasonable search of our records. In an abundance of caution, we met with our actuary to review the file contents. We found one additional document that he may have relied on for confirmation of an aspect of his calculations, attached.

If your question is whether we have additional actuarial documents in our possession that we did not rely on in calculating our claims, we do. However, you have never requested these documents—because you only requested documents that PBGC asserts that it relied on (*see* your email of March 10 at 3:05 p.m.). We do not believe these documents are relevant, but if you would like to see the actuarial documents that we did not rely on, we can send them to you next week. Please let us know if you wish to request these additional documents.

Also, we did not provide PBGC Annual Premium Payment Forms to support the portion of Epiq Claim No. 561, which applies to the unliquidated flat rate and variable rate premiums (See Statement in Support, ¶ 6 and 29 U.S.C. § 1306 and 1307), because this portion of the Premiums claim is zero.

We will respond to the remaining issues in your letter early next week.

Stephanie Thomas, Assistant Chief Counsel
Pension Benefit Guaranty Corporation | Office of the Chief Counsel
1200 K Street, N.W., Suite 340 | Washington, D.C. 20005
TEL: (202) 326-4020, ext. 3457 | CELL: (202) 391-4590

EXHIBIT 7

From:	Thomas Stephanie
To:	"Robert D. Mercer"
Cc:	Robert H. Barnett; Neureiter Kimberly; Zareba Adrian; Kumar Aditi; James L. Drake, JR; Eric J. Silva
Subject:	RE: sic
Date:	Wednesday, June 01, 2016 10:48:28 AM

Robert,

We do not agree to your draft proposed order. If, as you say, you would like to submit an agreed order that is similar in form and substance to PBGC's proposed order, we would agree to using PBGC's proposed order (included with its objection to the Rule 2004 Motion) with a hearing date no earlier than June 9.

We are not willing to address "scope" issues at the first hearing or include it in any proposed order. We do not believe that this Court has jurisdiction over those issues. We also believe that a Rule 2004 examination is not warranted here, at all. We are nonetheless willing to provide you with documents and information, if your requests can be reasonably limited in breadth and relevance. Should the Court grant your motion, we believe having time prior to return date of the subpoena would allow the parties to engage in a cooperative process to narrow your requests. Such a process could eliminate or at least limit the issues that the applicable court would have to consider. We sent you an edited version of your draft subpoena more than a week ago and are available to discuss its contents once we finish briefing our objection to your Rule 2004 Motion.

I also wanted to reiterate the offer I made in my May 20, 2016, 2:06 pm email. As I said then, we have in our possession actuarial documents that we have not provided to you, because they were not responsive to your request. Specifically, we have certain plan amendments, United States Internal Revenue Service Form 5500s, and annual actuarial valuation reports for the Pension Plan that have not been provided to you because we did not use them to calculate our claims. If you would like these documents, please let us know. (I suspect that we also have PBGC Annual Premium Payment Forms, but, as we have informed you, these relate to flat-rate and variable-rate premiums, which are zero in this case and thus not relevant.)
Additionally, we provided you the names of the actuaries who calculated our claims in February, 2014 and again in February, 2016.

Regards,

Stephanie Thomas, Assistant Chief Counsel
Pension Benefit Guaranty Corporation | Office of the Chief Counsel
1200 K Street, N.W., Suite 340 | Washington, D.C. 20005
TEL: (202) 326-4020, ext. 3457 | CELL: (202) 391-4590

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

In re:	)	Chapter 11
SEA ISLAND COMPANY, *et al.*,	)	Case No. 10-21034 (Jointly Administered)
	)	Judge John S. Dalis
Debtors.	)	

PROPOSED ORDER

This matter is before the Court on the *Liquidation Trustee's Motion for a Rule 2004 Examination of and Document Production by Pension Benefit Guaranty Corporation* (the "Motion") [Docket No. 1543], the *Objection of Pension Benefit Guaranty Corporation to Liquidation Trustee's Motion for a Rule 2004 Examination of and Document Production by the Pension Benefit Guaranty Corporation and Request for Opportunity to Object and be Heard on Motion* (the "Objection") [Docket No. 1545], and the *Objection of Pension Benefit Guaranty Corporation to Liquidation Trustee's Motion for a Rule 2004 Examination of and Document Production by the Pension Benefit Guaranty Corporation*.

Upon review of the filed Motion, the Court hereby ORDERS that:

The Liquidation Trustee's Rule 2004 Examination is denied for failure to show cause.

SO ORDERED, this _____ of ___, 2016.

_____
John S. Dalis
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June 2016, the foregoing Objection of Pension Benefit Guaranty Corporation to Liquidation Trustee's Motion for a Rule 2004 Examination of and Document Production by the Pension Benefit Guaranty Corporation was filed using the Court's ECF system and served on the following parties in the matter via CM/ECF:

Sarah R. Borders King & Spalding, LLP 1180 Peachtree Street Atlanta, GA 30309-3521 ***Debtors' Counsel***	**Robert M. Cunningham** Hunter Maclean Bank of America Plaza 777 Gloucester Street, Suite 400 Brunswick, GA 31520 ***Debtors' Counsel***
Harris Winsberg Troutman Sanders, LLP 600 Peachtree Street Suite 5200 Atlanta, GA 30308 ***Debtors' Counsel***	**Matthew E. Mills** Office of the U.S. Trustee Johnson Square Business Center 2 East Bryan Street, Suite 725 Savannah, GA 31401 ***United States Trustee***
David W. Adams Ellis, Painter, Ratterree & Adams 2 E Bryan Street, 10th Fl. P.O. Box 9946 Savannah, GA 31412 ***Counsel for the Official Committee of Unsecured Creditors***	**Paul Steven Singerman** Berger Singerman LLC 1450 Brickell Avenue Suite 1900 Miami, FL 33131 ***Counsel for the Official Committee of Unsecured Creditors***
Robert M.D. Mercer Schulten Ward & Turner, LLP 260 Peachtree Street, N.W., Suite 2700 Atlanta, GA 30303 ***Counsel for Robert H. Barnett as the Liquidation Trustee under the Sea Island Company Liquidation Trust***	

The following parties were served by FedEx:

Robert H. Barnett Managing Director Conway MacKenzie, Inc. 7000 Central Parkway, NE, Suite 1325 Atlanta, GA 30328 ***Liquidation Trustee***	**Sea Island Company, et al.** 100 Salt Marsh Lane St. Simons Island, GA 31522 ***Debtors***

/s/ Kimberly E. Neureiter
Kimberly E. Neureiter