14-14115-F

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COX ENTERPRISES, INC.,
Plaintiff-Appellant,

v.

NEWS-JOURNAL CORPORATION, *et al*.,
Defendants,

PENSION BENEFIT GUARANTY CORPORATION,
Claimant-Appellee.

On Appeal From The United States District Court
For The Middle District Of Florida
Case No. 6:04-cv-00698-JA-DAB

BRIEF OF APPELLEE PENSION BENEFIT GUARANTY CORPORATION

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January 14, 2015

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Claimant-Appellee Pension Benefit Guaranty Corporation provides the following Certificate of Interested Persons and Corporate Disclosure Statement:

1. Albaugh, Colin B., Esq.

2. Antoon, John II, United States District Judge, Middle District of Florida

3. Arent Fox, LLP

4. Baker, David. A, United States District Magistrate Judge, Middle District of Florida

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36. News-Journal Corporation, now known as NJWU Corporation, an inactive privately held Florida corporation

37. Pension Benefit Guaranty Corporation

38. PMV, Inc., a privately held Florida corporation

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43. Volusia Pennysaver, Inc., now known as PSWU Corporation, an inactive privately held Florida corporation

Pension Benefit Guaranty Corporation certifies that no associations of persons, and no other firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellee Pension Benefit Guaranty Corporation ("PBGC") respectfully submits that no oral argument is necessary in this case. Appellant Cox Enterprises, Inc. ("Cox") attempts in this appeal to relitigate issues that were authoritatively decided by this Court's reasoned decision in *Cox Enterprises, Inc. v. PBGC*, 666 F.3d 697 (11th Cir. 2012). Cox's arguments on these issues are therefore foreclosed by the law-of-the-case doctrine and should not be considered. The remaining issue in this appeal, whether a court can use its general equitable authority to override Congress's will as expressed in federal statutes (and related regulations), is well established in the case law, both generally and specifically with regard to PBGC's claims. This issue is adequately presented in the parties' briefs and the underlying record; accordingly, the Court's decision-making will not be significantly aided by oral argument.

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COUNTER-STATEMENT OF THE ISSUES

I. Appellant Cox Enterprises, Inc. ("Cox") was a minority shareholder of News-Journal Corporation ("NJC"). This Court previously held that payment to Cox of nearly all of NJC's assets would violate Florida's distributions-to-shareholders statute if, at the time of payment, it would render NJC insolvent. On remand, the district court found that the payment would render NJC insolvent. It therefore held that the payment could not be made until the claim of NJC creditor Pension Benefit Guaranty Corporation ("PBGC") was satisfied. Was the district court correct that this holding was required by the law-of-the case doctrine and the mandate rule?

II. In its earlier decision, this Court held that Florida's distributions-to-shareholders statute forbids *any* payment to shareholder Cox ahead of creditor PBGC if it would render NJC insolvent. Was the district correct in holding that this Court's decision also precluded Cox's argument – which it failed to raise in that earlier appeal – that it should be paid "at parity" with PBGC?

III. Title IV of the Employee Retirement Income Security Act of 1974 and PBGC's implementing regulations dictate the actuarial assumptions used to calculate PBGC's claim against NJC for pension underfunding. Did the district court err in rejecting Cox's request to disregard controlling federal law based on purported equitable principles?

COUNTER-STATEMENT OF THE CASE

Cox is a disappointed shareholder of NJC, a failed newspaper company, which liquidated in a federal receivership in 2010. Although Cox failed to realize on its shares before that liquidation, it now seeks to be paid ahead of the company's sole remaining creditor, PBGC.

Payment to Cox is precluded by this Court's prior decision in this case, *Cox Enterprises, Inc. v. PBGC*, 666 F.3d 697 (11th Cir. 2012) ("*Cox II*"). This Court previously held, after thoroughly examining Florida law, that PBGC, as a creditor of NJC, had a priority right to NJC's assets under Florida's distributions-to-shareholders statute, Fla. Stat. § 607.06401. As this Court unambiguously held, that statute "forbids" payment to Cox, a shareholder, if it rendered NJC insolvent at the time of payment. 666 F.3d at 707. The Court denied Cox's petition for rehearing and rehearing *en banc*.

On remand, the district court reexamined the claims of NJC's creditors consistent with this Court's opinion. PBGC's claims arose because it assumed payment of the pension benefits of NJC's former employees and their survivors, and the assets in NJC's pension plan were insufficient to cover those benefits. Magistrate Judge Baker conducted an evidentiary hearing to determine the amount of that shortfall, and found that PBGC's claim for NJC's underfunded pension plan was about $13.9 million. Applying the solvency test, as directed by this Court, the

district court then determined that a payment to Cox would render NJC insolvent. Therefore, the district court concluded that PBGC's claim against NJC must be paid first.

In this appeal, Cox attempts to relitigate issues previously decided by this Court in *Cox II*. As stated, this Court decided in that case that Florida's distributions-to-shareholders statute required payment of creditors before any payment to Cox, a minority shareholder of NJC. Rather than abiding by the Court's decision, Cox raises new arguments about the distributions-to-shareholders statute, arguments that it could have raised four years ago but chose not to.

Finally, Cox argues that, even though PBGC's claim was based on explicit statutory law and regulations with the force of law, the district court should have used its equitable power to override federal statutory law. But it is axiomatic that no court may use equity to override the explicit will of Congress. This Court should affirm.

FACTUAL BACKGROUND

PBGC is a wholly owned U.S. government corporation that administers the federal pension insurance program established under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1301-1461 (2012). When a pension plan covered by Title IV terminates with insufficient assets to pay promised benefits, PBGC generally becomes statutory trustee of the

terminated plan and guarantees payment of vested benefits, subject to statutory limits, to plan participants and their surviving beneficiaries.[1]

PBGC does not receive funds from general tax revenues.[2] Instead, PBGC is funded through collection of premiums, assets from terminated plans and income on those assets, and recoveries from sponsors of terminated plans.[3]

NJC was a Florida corporation that published a daily newspaper in the Daytona Beach, Florida area.[4] NJC had two shareholders: PMV, Inc. ("PMV"), a closely held Florida corporation, owned 52.5% of NJC's stock, and Plaintiff-Appellee Cox held the remaining 47.5%.[5] NJC was the contributing sponsor of the Pension Plan of News-Journal Corporation (the "Pension Plan"). The Pension Plan is a defined benefit pension plan covered by Title IV of ERISA.

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[1] *See* 29 U.S.C. §§ 1322, 1361.

[2] PBGC 2014 Annual Report at 10, *available at* http://www.pbgc.gov/documents/2014-annual-report.pdf (last visited Jan. 9, 2015).

[3] *Id.*

[4] Cox's Verified Complaint, Request for Injunctive Relief and Demand for Jury Trial ("Complaint"), Doc. 1, at 2.

[5] *Id*. at 1, 3-4.

On May 11, 2004, Cox filed a lawsuit against NJC, its board members,[6] PMV, and Lively Arts Center, Inc. Cox alleged various acts of fraud, waste, and mismanagement against the defendants and sought NJC's dissolution pursuant to Fla. Stat. §§ 607.1430(2) and 607.1434. NJC elected to purchase Cox's shares "at their fair value" pursuant to Fla. Stat. § 607.1436.[7]

Because the parties were unable to agree on the proper valuation of Cox's stock, the district court held a trial to determine the value of that stock. On September 27, 2006, the district court entered an order setting the terms of NJC's repurchase of Cox's stock (the "Repurchase Order").[8] NJC was ordered to pay Cox $129.2 million, plus interest, in installments. At Cox's request, Cox was not required to return its NJC stock until *after* NJC paid the first installment of $29.2 million.[9] Specifically, the Repurchase Order provided that:

> Upon receipt by Cox of the first payment [of $29.2 million], Cox shall tender all of its shares of NJC

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[6] The board members included individuals who were also appellants in *Cox II*, see *Cox II*, 666 F.3d at 699, but later withdrew their claims. *See* Aug. 13, 2014 Order, Doc. 796, at 8.

[7] NJC's Election and Notice of Election, Pursuant to Florida Statute § 607.1436 To Purchase Cox's Shares in NJC, Doc. 51, at 1.

[8] September 27, 2006 Order, Doc. 262, at 5-8.

[9] *Id.* at 6; Cox's Proposal Regarding Security and Return of Stock, Doc. 261, at 3 (proposing that Cox surrender its stock "for cancellation by NJC concurrently with the first payment therefor by NJC").

> common stock to NJC, and NJC shall issue to Cox $100 million in face value preferred stock with first priority in dividends. . . . Each payment by NJC of an installment (with accrued interest thereon) shall constitute a redemption of that portion of Cox's preferred stock with a face value equal to the principal amount of that payment.[10]

The Repurchase Order was affirmed by a panel of this Court.[11] Thereafter, the district court ordered NJC to pay the first installment or file notice of its intention to dissolve by April 21, 2008.[12]

Because NJC was unable to pay the first installment, NJC, PMV, and Cox entered into a Joint Sale Agreement providing for a sale of NJC to satisfy its liability to Cox.[13] Upon execution of the Joint Sale Agreement, NJC and Cox sought an extension of the district court's April 21, 2008 deadline.[14]

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[10] September 27, 2006 Order, Doc. 262, at 6.

[11] *Cox Enters., Inc. v. News-Journal Corp.*, 510 F.3d 1350 (11th Cir. 2007) ("*Cox I*").

[12] April 15, 2008 Order, Doc. 321.

[13] *See* Cox's Motion to Terminate Joint Sale Process, Commence Statutory Ten Day Period and Appoint Receiver, Mar. 18, 2009, Doc. 495, at 4; *see also* Doc. No. 497-1, at 1, 5 (reciting that "Cox and PMV are all of the holders of the capital stock of [NJC]").

[14] Motion to Appoint Receiver, Doc. 495, at 5.

NJC's Receivership

NJC never paid the first installment. The joint sale effort was unsuccessful, and Cox moved the district court to appoint a receiver for NJC.[15] On April 17, 2009, the district court appointed James Hopson as receiver for NJC (the "Receiver").[16] The Receiver later notified PBGC of the receivership.

On January 6, 2010, the Receiver and Cox filed a joint motion to sell NJC's principal assets, its publishing operations and related real estate, to Halifax Media Acquisition LLC ("Halifax").[17] Halifax did not assume the Pension Plan, which remained with the liquidating NJC. On March 23, 2010, the Court authorized the Halifax sale and directed the Receiver to conduct a claims process.[18] On April 5, 2010, the Receiver published notice of a 14-day deadline for making claims against NJC.[19]

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[15] *Id*. at 1-2.

[16] April 17, 2009 Order, Doc. 507, at 2.

[17] Joint Motion of Receiver and Cox for Hearing and Approval of and Direction to Complete Sale of Publishing Operations To Halifax, an Affiliate of Stephens Capital Partners LLC and Stephens Investment Holdings LLC, Doc. 576, at 1-2.

[18] Order Authorizing and Directing the Receiver's Sale of the Publishing Operations of NJC, March 23, 2010, Doc. 625.

[19] Notice of 14 Day Deadline to Submit Claims, April 5, 2010, Doc. 630.

PBGC's Claims against NJC; Plan Termination

PBGC timely filed claims with the Receiver for NJC's liabilities relating to the Pension Plan.[20] Pursuant to Title IV of ERISA, certain statutory liabilities mature upon the termination of a covered pension plan.[21] As the Pension Plan's contributing sponsor, NJC was liable to PBGC for, *inter alia*, the Pension Plan's "unfunded benefit liabilities" as of its termination date, plus interest.[22]

Title IV of ERISA defines the amount of a terminated pension plan's unfunded benefit liabilities. 29 U.S.C. § 1301(a)(18)(A). Congress, in enacting that section, directed that the value of the plan's benefit liabilities must be determined "on the basis of assumptions prescribed by [PBGC]."[23] The value of

[20] *See* Exhs. to Receiver's Report, Doc. 652-5, at 96-112. Some of the claims were contingent on the Pension Plan's termination, which happened shortly thereafter.

[21] *See, e.g.*, 29 U.S.C. § 1362; *Durango-Ga. Paper Co. v. H.G. Estate, LLC*, 739 F.3d 1263, 1264-65 (11th Cir. 2014).

[22] *See* 29 U.S.C. § 1362(a), (b)(1)(A). The sponsor is also liable for unpaid minimum funding contributions. 29 U.S.C. § 1082(b); 26 U.S.C. § 412(b). These contributions are due to the plan's statutory trustee, which is invariably PBGC. 29 U.S.C. §§ 1342(d), 1362(c). The sponsor is also liable for unpaid statutory premiums, including termination premiums. *See* 29 U.S.C. §§ 1306, 1307(e).

[23] 29 U.S.C. § 1301(a)(18)(A).

the plan's assets is then subtracted from those benefit liabilities to determine the amount of unfunded benefit liabilities.[24]

PBGC first prescribed assumptions for valuing a plan's benefit liabilities in an interim regulation in 1976,[25] which was published in final form in 1981 (the "Valuation Regulation").[26] For more than 35 years, the Valuation Regulation has been applied to determine the underfunding in every pension plan that has terminated and been trusteed by PBGC.[27]

The Valuation Regulation's methodology reflects that a terminated plan will receive no further funding contributions and that all benefit obligations must therefore be satisfied at the time of termination.[28] To measure the benefit liabilities, the Valuation Regulation prescribes assumptions about mortality and

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[24] 29 U.S.C. § 1301(a)(18).

[25] Interim Regulation on Valuation of Plan Benefits, 41 Fed. Reg. 48,484 (Nov. 3, 1976) (Interim Rule).

[26] Valuation of Plan Benefits in Non-Multi-Employer Plans, 46 Fed. Reg. 9492 (Jan. 28, 1981) (Final Rule). PBGC revised the Valuation Regulation in 1993, see 58 Fed. Reg. 50,812 (Sept. 28, 1993) (Final Rule), but retained the basic methodology for calculating benefit liabilities. *See also* 29 C.F.R. §§ 4044.41-75 (current codification).

[27] The assumptions used are applied for every terminated pension plan, regardless of claims or recoveries. Cox cites two cases in which courts overrode that calculation in calculating PBGC's claims. Those cases are anomalous and have been largely discredited, as explained below.

[28] *In re US Airways Grp., Inc.*, 303 B.R. 784, 795-96 (Bankr. E.D. Va. 2003).

interest that are designed to approximate the market price of insurance company annuity contracts.[29] These factors will, in combination, "accurately approximate the cost of private sector group annuity contracts."[30] The liability is thus equivalent to what an employer would be required to pay to purchase annuities in the marketplace to close out the plan in a standard termination.[31]

At the time of filing, PBGC estimated that its claim against NJC for the Pension Plan's unfunded benefit liabilities was $15,102,012.00.[32] PBGC calculated this claim in accordance with Title IV of ERISA and the Valuation

[29] *See, e.g.*, Valuation of Plan Benefits in Single-Employer Plans; Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal, 58 Fed. Reg. 5128, 5128 (Jan. 19, 1993) (Proposed Rule); *US Airways*, 303 B.R. at 788.

[30] 58 Fed. Reg. at 5128; *see* 41 Fed. Reg. at 48,485 ("PBGC's interest assumptions have been designed so that, when coupled with the mortality assumptions found in the regulation, the benefit values . . . are in line with industry annuity prices.").

[31] A plan sponsor that wishes to terminate its plan may do so in a standard termination, 29 U.S.C. § 1341(b)(1), by providing for payment of all benefits through the purchase of irrevocable commitments (annuities) from an insurer, 29 U.S.C. § 1341(b)(3). *See also* 29 C.F.R. § 4041.28.

[32] PBGC calculated this estimate based on a plan termination date of March 31, 2010. PBGC also filed claims for, *inter alia*, unpaid minimum funding contributions and termination premiums. *See generally* Exs. to Receiver's Report, Doc. 652-5, at 96-112.

Regulation, using the process that PBGC routinely uses to estimate its claims for insolvency proceedings.[33]

Additionally, because the Pension Plan was left with the liquidating NJC, PBGC prepared to terminate the Pension Plan. On May 14, 2010, PBGC issued a Notice of Determination under 29 U.S.C. § 1342 that the Pension Plan would be unable to pay benefits when due and should be terminated to protect the interests of participants.[34] The notice proposed a plan termination date of March 23, 2010. PBGC sent the Notice of Determination, along with an agreement to terminate the Pension Plan and appoint PBGC as statutory trustee (the "Trusteeship Agreement"), to the Receiver on May 14, 2010.

The August 2010 Distribution Order

After considering all submitted claims, the Receiver issued a Report and Recommendation for the Disposition of All Remaining NJC Assets and the Wind-up and Discharge of His Receivership and Request for Hearing (the "Report"). The Report recommended payment of NJC's assets to Cox and certain other

[33] Report & Recommendation, March 21, 2014, Doc. 791, at 10-11; *see In re Wolverine, Proctor & Schwartz, LLC*, 436 B.R. 253, 255-56 (D. Mass. 2010) (noting that PBGC filed estimated claims, contingent on plan termination).

[34] Doc. 783-24, at PBGC-NJC-001681.

claims.[35] This would result in the payment of all claimants except PBGC and certain insiders.[36] Although the Report challenged the priority of certain of PBGC's claims, the Receiver did not dispute NJC's liability for the Pension Plan's unfunded benefit liabilities.[37]

On June 24, 2010, PBGC filed its Objection to the Receiver's Report.[38] PBGC argued that, *inter alia*, Cox was not entitled to payment because Fla. Stat. §§ 607.1436 and 607.06401 prohibited payment to shareholders if such payment would render the corporation insolvent.

PBGC worked diligently with the Receiver to terminate the Pension Plan by agreement. In furtherance of that goal, PBGC settled its claims for $14,727,500.[39] Thereafter, the Pension Plan administrator and PBGC executed the Trusteeship

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[35] The Report provided for full satisfaction of certain claims totaling about $350,000, with Cox's approval, including a "top hat" retirement plan, retiree medical claims, and PMV's claim for appraisal reimbursement.

[36] Receiver's Report, Doc. 652, at 29-30.

[37] *Id.* at 17-20. The Receiver estimated the unfunded benefit liabilities claim at about $14 million, using a plan-termination date in February 2010.

[38] Objection of PBGC to the Receiver's Report, Doc. 660.

[39] Receiver's Response to Objections to Receiver's Report, Doc. 669, at 2-4. The settlement included PBGC's claim for the Pension Plan's unfunded benefit liabilities and the unpaid minimum funding contributions, but PBGC waived its claim for termination premiums. *See id.*

Agreement on August 6, 2010, and PBGC filed amended claims reflecting the terminated status of the Pension Plan and the settled amount of its claims.[40]

On August 9, 2010, the district court held a hearing to consider the Receiver's Report and the objections thereto. On August 13, 2010, the district court entered an order providing for the distribution of NJC's assets to Cox.

The 2012 Appeal

PBGC timely appealed the district court's August 13, 2010 order to this Court.[41] PBGC argued that, *inter alia*, the district court's award of NJC's assets to Cox violated the provisions of Fla. Stat. §§ 607.1436 and 607.06401. PBGC argued that any payment of NJC's assets to Cox was subject to the insolvency test in Fla. Stat. § 607.06401. PBGC further argued that Fla. Stat. § 607.06401(8) required that NJC's solvency be measured at the time of payment to Cox.

Cox disputed that its claim was subject to the restrictions in § 607.06401 and argued that it had a priority claim on NJC's assets. Cox argued that, even if its claim was subject to § 607.06401, NJC's solvency should be measured as of the September 2006 Repurchase Order pursuant to Fla. Stat. § 607.06401(6)(a)(1). Specifically, Cox argued that on the order date, it ceased to be a shareholder and it

[40] PBGC's Amended Claims, Doc. 675, at 11-13.

[41] PBGC's Notice of Appeal, Doc. 684.

received a transfer of property from NJC in the form of an equitable lien against NJC's assets.[42]

In January 2012, this Court vacated the district court's award of NJC's assets to Cox. The Court held that Cox was a shareholder of NJC for purposes of Fla. Stat. § 607.06401, "which prohibits the distribution of corporate assets to a shareholder if it would render the corporation insolvent."[43] Because the Court considered "any payment to Cox a distribution to a shareholder within the meaning of § 607.06401," it held that the district court must apply that statute's solvency test.[44] The Court further agreed with PBGC that "the district court must consider whether a payment to Cox would comply with the insolvency test of the distributions-to-shareholders statute *at the time of payment to Cox*."[45] The Court remanded the case for the district court to "reevaluate the claims of all of News-Journal's creditors consistent with [its] opinion."[46]

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[42] Brief of Plaintiff-Appellee Cox, Case Nos. 10-14240-H & 10-14305-H, Jan. 21, 2011, at 39-40 (arguing that the equitable "lien constituted the requisite 'transfer' under Florida Statute 607.06401(6)(a)(1)").

[43] *Cox II*, 666 F.3d at 699.

[44] *Id.*

[45] *Id.* at 707-08 (emphasis added).

[46] *Id.* at 708.

Cox filed a petition for rehearing and rehearing *en banc*.[47] Cox argued for the first time that Fla. Stat. § 607.06401(8) did not apply because it is limited to "a particular type of contingent debt security" that contains restrictions on payment. Cox also reasserted that its claim was not subject to Fla. Stat. § 607.06401 at all. This Court denied Cox's petition for rehearing and issued its mandate.

Remand; Evidentiary Hearing on PBGC's Claims

After this Court remanded the case and some initial briefing by the parties, the district court ordered an evidentiary hearing to address the amount of PBGC's claims.[48] The district court ordered limited discovery, and Magistrate Judge Baker conducted an evidentiary hearing on January 14, 2014.

At the hearing, PBGC presented expert testimony that the amount of the Pension Plan's unfunded benefit liabilities was $13,887,822.[49] PBGC's expert opined that PBGC had calculated its claim using the actuarial assumptions prescribed by Title IV of ERISA and the Valuation Regulation.[50] PBGC argued

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[47] Cox's Petition for Rehearing & Rehearing En Banc, Case Nos. 10-14240-H and 10-14305-H, Feb. 21, 2012, attached at Doc. 701-2.

[48] June 11, 2013 Order & Notice of Hearing, Doc. 751.

[49] Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc 786, at 59-62, 69-74; Doc. 783-1, at 2; Doc. 782-3, at PBGC-NJC-005307; *see also* Report & Recommendation, March 21, 2014, Doc. 791, at 16-17.

[50] Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc 786, at 59-69, 73; Doc. 783-1, at 2; *see also* Doc. 782-3, at PBGC-NJC-005307.

that application of its regulation was explicitly required under ERISA and that the regulation had the force of law.

Cox also presented an expert at the evidentiary hearing, but its expert did not submit a calculation of the Pension Plan's unfunded benefit liabilities. Rather, Cox's expert offered alternative actuarial assumptions that he argued would be reasonable for calculating PBGC's claim.[51] Unlike the Valuation Regulation, these proposed assumptions did not replicate the cost of buying an annuity.[52]

After considering the evidence, Magistrate Judge Baker issued a report and recommendation finding that PBGC's claim against NJC for the Pension Plan's unfunded benefit liabilities was $13,887,822.[53] Judge Baker found that PBGC had fully supported its calculation using the assumptions provided under ERISA and the Valuation Regulation.[54] Judge Baker held that Cox's proposed assumptions were not relevant to the calculation of the Pension Plan's unfunded benefit

[51] Report & Recommendation, March 21, 2014, Doc. 791, at 16-17.

[52] Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc. 786, at 143.

[53] Report & Recommendation, March 21, 2014, Doc. 791, at 19.

[54] *Id.* at 16, 19.

liabilities[55] and that Cox had not established a basis to overturn PBGC's Valuation Regulation.[56] The district court adopted that report over Cox's objection.[57]

On August 13, 2014, the district court issued an order "pursuant to the appellate court's mandate,"[58] finding that a distribution to Cox would violate the Fla. Stat. § 607.06401 solvency test when measured at the time of payment to Cox.[59] The district court also rejected Cox's request for treatment of its claim at parity with PBGC's claim, holding that Cox's "arguments are not viable under the law of the case doctrine and the mandate rule and are otherwise rejected."[60] The district court ordered Cox to deposit $13,887,822 of NJC's assets with the court for distribution on PBGC's claim against NJC.[61] Thereafter, Cox filed this appeal.

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[55] *Id.* at 16-17.

[56] *Id.* at 17-19.

[57] April 24, 2014 Order, Doc. 794.

[58] Aug. 13, 2014 Order, Doc. 796, at 1.

[59] *Id.* at 11-15.

[60] *Id.* at 16.

[61] *Id.* at 18.

APPLICABLE STANDARD OF REVIEW

This case is on appeal following the district court's application of this Court's mandate from *Cox II*. The district court's compliance with this Court's mandate is a question of law, which this Court reviews *de novo*.[62]

The Court reviews the district court's findings of fact concerning the amount of PBGC's claim against NJC for clear error.[63] The Court reviews the weight accorded to an agency regulation *de novo*.[64]

SUMMARY OF THE ARGUMENT

This appeal is largely an improper attempt by Cox to present new arguments attacking this Court's reasoned decision in *Cox II*. In that decision, after a thorough examination of the relevant Florida statutes, the Court held that Cox's claim against NJC was subject to the restrictions contained in the Florida distributions-to-shareholders statute, Fla. Stat. § 607.06401.[65] The Court further held that NJC's solvency must be measured at the time of payment to Cox.[66] The

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[62] *United States v. Amedeo*, 487 F.3d 823, 830 (11th Cir. 2007).

[63] *See, e.g., Knight v. Thompson*, 723 F.3d 1275, 1281 (11th Cir. 2013).

[64] *See Buckner v. Fla. Habitation Network, Inc.*, 489 F.3d 1151, 1154 (11th Cir. 2007).

[65] *Cox II*, 666 F.3d at 707.

[66] *Id.* at 707-08.

district court easily concluded that a payment on Cox's claim would render NJC insolvent and ordered the payment on PBGC's claim in full.[67]

Despite recognizing that this Court's decision in *Cox II* is the law of the case, Cox argues that the Court should revisit its prior decision under the clear error exception.[68] That exception is limited to extraordinary circumstances – Cox must establish both that this Court's decision was outside the scope of reasonable debate and that implementing the decision would cause manifest injustice. Cox and the amici curiae utterly fail to establish that the Court's prior decision "exceeded the scope of reasonable debate," because the prior decision was well supported by the statute. Instead, they merely argue for a different interpretation of the statute. Cox has likewise failed to show any manifest injustice.

Cox's request for the treatment of its claim "at parity" with PBGC's claim suffers from similar deficiencies. Cox's request for parity is foreclosed by this Court's decision that no payment can violate the solvency test in § 607.06401.[69] Moreover, Cox waived this argument by failing to raise it in the prior appeal. And Cox has not established that parity is appropriate here under the plain language of the statute.

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[67] Aug. 13, 2014 Order, Doc. 796.

[68] Cox's Brief at 46.

[69] *Cox II*, 666 F.3d at 699, 707.

Finally, Cox asserts that the district court erred in refusing to exercise its "equitable discretion" to deny PBGC's claim.[70] But each of Cox's equitable arguments sought to override federal law, and it is axiomatic that equity cannot override the will of Congress. Accordingly, the district court correctly calculated PBGC's claim under ERISA and PBGC's regulations and declined to adopt Cox's arguments.[71]

For the foregoing reasons, the district court's order should be affirmed and PBGC should be paid in full.

ARGUMENT

I. THE DISTRICT COURT PROPERLY APPLIED THE MANDATE, WHICH REQUIRED THAT PBGC'S CLAIM BE PAID IN FULL.

Cox, a former shareholder of NJC, argues that it should be allowed to retain all or almost all of the assets generated by NJC's liquidation, while PBGC, a creditor of NJC, receives little or nothing. Cox's arguments are foreclosed by this Court's decision in *Cox II*. Cox nonetheless argues that this Court should disregard the prior ruling on the meaning of the distributions-to-shareholders statute. Cox provides no compelling reason to ignore the important considerations

[70] Cox's Brief at 32-42.

[71] Report & Recommendation, March 21, 2014, Doc. 791, adopted by the district court in its April 24, 2014 Order, Doc. 794.

of efficiency and finality inherent in the law-of-the-case doctrine, merely to allow it a second chance to raise arguments it could have raised four years ago.

A. Pursuant to this Court's Decision in *Cox II*, NJC's Solvency Must Be Measured at the Time of Payment to Cox.

In *Cox II*, this Court interpreted Florida's election-to-purchase statute, Fla. Stat. § 607.1436, to "require that any payment made as a result of a corporation's share repurchase decision comply with the distribution requirements of Fla. Stat. § 607.06401, which prohibits the distribution of corporate assets to a shareholder if it would render the corporation insolvent."[72] The Court also held "that Cox qualifies as a shareholder for purposes of the distributions-to-shareholders statute."[73] Then "after consider[ing] the application of [Fla. Stat. § 607.06401] to this case," the Court held that "on remand, the district court must consider whether a payment to Cox would comply with the insolvency test of the distributions-to-shareholders statute at the time of payment to Cox."[74]

As an initial matter, Cox's request that this Court reverse itself disregards the principle that when a prior panel has issued a decision, that decision "'[cannot]

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[72] *Cox II*, 666 F.3d at 699; *id* at 707. The Court held "that any payment to Cox . . . must comply with the condition of [Fla. Stat.] § 607.1436(8) that the payment satisfy Florida's distributions-to-shareholders statute." *Id.* at 707.

[73] *Id.* at 706.

[74] *Id.* at 707-08.

be overruled by a panel but only by the court sitting en banc.'"[75] Indeed, "'[t]he law of this circuit is emphatic that only the Supreme Court or this court sitting *en banc* can judicially overrule a prior panel decision.'"[76]

Moreover, Cox's request is contrary to the law-of-the-case doctrine.[77] "'[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'"[78] The law-of-the-case doctrine "operates to create efficiency, finality, and obedience within the judicial system, so that an appellate decision binds all subsequent proceedings in the same case."[79] It furthers "goals vital to just and efficient judicial process,

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[75] *McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004) (per curiam) (quoting *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)); *see also Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1292 (11th Cir. 2005) (per curiam) (applying the prior-panel rule to a holding reached in an earlier appeal of the same case).

[76] *United States v. Nicoll*, 400 Fed. App'x 468, 471 (11th Cir. 2010) (quoting *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997)).

[77] *See United States v. Burns*, 662 F.2d 1378, 1383-84 (11th Cir. 1981) (noting that defendants' attempt to reargue an issue conflicted with both the binding effect of the Court's prior decision on the panel and the law-of-the-case doctrine).

[78] *Klay v. All Defendants*, 389 F.3d 1191, 1197 (11th Cir. 2004) (quoting *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 816, 108 S.Ct. 2166, 2177 (1988)); *see also Litman v. Mass. Mut. Life Ins. Co.*, 825 F.2d 1506, 1510 (11th Cir. 1987) (en banc).

[79] *United States v. Amedeo*, 487 F.3d 823, 829 (11th Cir. 2007) (internal citations and alterations omitted).

including the provision of an end to litigation, the discouragement of 'panel shopping,' and the promotion of consistency in rulings between courts."[80] To effect these goals, "[t]he law of the case doctrine should guide a court in its discretion to hear subsequent appeals on a particular issue."[81]

While Cox now asserts that its current interpretation of the insolvency-measurement provisions of Fla. Stat. § 607.06401 is compelled by that statute's plain language, Cox failed to present this "clear interpretation" during the briefing of *Cox II*. Instead, Cox argued that the Repurchase Order was the proper date for measuring NJC's solvency because on that date the district court transferred an equitable lien to Cox.[82] Unhappy with the outcome, Cox seeks a second chance to litigate *Cox II*. But a court "'cannot try cases piecemeal simply because after a [remand] and in writing a brief on a second appeal, the attorneys generate an idea

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[80] *Klay*, 389 F.3d at 1197-1198 (citing *Burger King Corp. v. Pilgrim's Pride Corp.,* 15 F.3d 166, 169 (11th Cir.1994)); *see also Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984) (per curiam) (explaining that "the doctrine's purpose is to bring an end to litigation" (citation omitted)).

[81] *Klay*, 389 F.3d at 1197 (citing *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391 (1983)); *see also Litman*, 825 F.2d at 1511 (courts should consider finality and stability to be important institutional values in dispute resolution).

[82] Cox also argued that it ceased to be a shareholder on the date of the Repurchase Order.

they should have advanced . . . on the first appeal.'"[83] Because Cox's challenge to the district court's order is foreclosed by the law-of-the-case doctrine, this Court should affirm.

B. Cox has not Established an Exception to the Law-of-the-Case Doctrine.

Cox urges the Court to revisit its decision from *Cox II* based on the clear error exception to the law-of-the-case doctrine.[84] That exception requires Cox to establish both that the prior "decision is clearly erroneous *and*, if implemented, would work a manifest injustice."[85] Because Cox has not established either criterion, the district court's August 13, 2014 order should be affirmed.

i. The Court's interpretation of Fla. Stat. §§ 607.1436 and 607.06401 was not clearly erroneous.

Cox argues that the *Cox II* Court clearly erred in its application of Fla. Stat. §§ 607.1436 and 607.06401.[86] As Cox acknowledges, the threshold for

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[83] *United States v. Fiallo-Jacome*, 874 F.2d 1479, 1482 (11th Cir. 1989)) (quoting *Martin v. Atl. Coast Line R.R. Co.*, 289 F.2d 414, 416 (5th Cir. 1961)); *see also United States v. Curtis*, 380 F.3d 1308, 1310 (11th Cir. 2004) (reiterating that the Court will not consider arguments raised for the first time in a petition for rehearing).

[84] Cox's Brief at 46.

[85] *See, e.g.*, *Litman*, 825 F.2d at 1510 (citations omitted) (emphasis added); *see also Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985) (collecting cases). Cox does not suggest that any other exception applies to this issue.

[86] Cox's Brief at 48.

establishing that the Court's decision was clearly erroneous is high.[87] Clear error involves more than a close question; the legal error must be "beyond the scope of reasonable debate."[88] Therefore, it is insufficient that the current panel might have decided the case differently.[89] Instead the exception is limited to extraordinary circumstances, lest it swallow the rule.[90]

Cox alleges two errors by the prior panel. First, Cox argues that this Court erred in determining that Cox's claim was subject to Fla. Stat. § 607.06401 at all.[91] Second, Cox argues that the Court erred in its substantive application of the insolvency test in § 607.06401. Specifically, Cox argues that the Court should have ordered that NJC's solvency be measured at the time of the Repurchase Order pursuant to Fla. Stat. § 607.06401(6)(a)(1) because that order purportedly constituted a distribution of debt under Fla. Stat. § 607.01401(8), and because Cox

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[87] *Id.*

[88] *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1370-71 (11th Cir. 2003); *see also City Pub. Serv. Bd. v. Gen. Elec. Co.*, 935 F.2d 78, 82 (5th Cir. 1991) ("To be 'clearly erroneous,' a decision 'must strike us as more than just maybe or probably wrong; it must . . . be dead wrong.'" (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)) (alteration in original)).

[89] *See United States v. Burns*, 662 F.2d 1378, 1384 (11th Cir. 1981).

[90] *Jenkins Brick Co.*, 321 F.3d at 1370-71; *City Pub. Serv. Bd.*, 935 F.2d at 82.

[91] Cox's Brief at 51-52; *see also* Cox's Petition for Rehearing & Rehearing En Banc, Case Nos. 10-14240-H and 10-14305-H, Feb. 21, 2012, at 14-15, attached at Doc. 701-2.

lost its rights as a NJC shareholder at that time.[92] These arguments are legally and factually unpersuasive.

First, this Court correctly determined that Cox's claim was subject to Fla. Stat. § 607.06401. After NJC timely elected to repurchase Cox's shares, the district court issued the Repurchase Order pursuant to Fla. Stat. § 607.1436(5), setting the terms of NJC's repurchase.[93]

Section 607.1436(8) states that "[a]ny payment by *the corporation* pursuant to an order under subsection (3) or subsection (5) . . . is subject to the provisions of [§] 607.06401."[94] That statute's plain language must govern.[95] "'[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning . . . the statute must be given its plain and obvious meaning.'"[96]

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[92] Cox's Brief at 48-49. *See generally* Cox's Petition for Rehearing & Rehearing En Banc, Case Nos. 10-14240-H and 10-14305-H, Feb. 21, 2012, at 9-12, attached at Doc. 701-2.

[93] September 27, 2006 Order, Doc. 262, at 1.

[94] Fla. Stat. § 607.1436(8) (emphasis added).

[95] *United States v. One 1990 Beechcraft, 1900 C Twin Engine Turbo-prop Aircraft*, 619 F.3d 1275, 1278 (11th Cir. 2010) ("'[T]he first rule in statutory construction [] is to determine whether the language at issue has a plain and unambiguous meaning.'" (citation omitted)); *see also Cox II*, 666 F.3d at 704; *Gomez v. Village of Pinecrest*, 41 So. 3d 180, 185 (Fla. 2010).

[96] *Gomez*, 41 So. 3d at 185 ("'[W]e are without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms, or its reasonable and obvious implications.'") (citation omitted).

Cox does not dispute the plain language of § 607.1436(8). Instead, Cox argues that this plain language does not comport with the statute's other subsections, authorizing the court to provide security for installment payments and allowing enforcement of the repurchase order like any other judgment.[97] But as this Court explained, Cox's interpretation would mean that Fla. Stat. § 607.1436(8) never applied to any case, rendering that subsection meaningless.[98]

Second, the Court did not clearly err in its application of Fla. Stat. § 607.06401. Both Cox and the amici curiae[99] assert that the district court should have measured NJC's solvency as of the Repurchase Order in 2006. But Cox and the amici curiae fail to meet the high burden of showing that the Court's prior decision exceeded the scope of reasonable debate. In fact, the prior decision reflects the better interpretation of Fla. Stat. § 607.06401, the distributions-to-shareholders statute.

Section 607.06401(3) provides that a corporation cannot make any distribution "if, *after giving it effect*: (a) [t]he corporation would not be able to pay

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[97] Cox's Brief at 51-52.

[98] *Cox II*, 666 F.3d at 706 (citing *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 456 (Fla. 1992)).

[99] Amici curiae are two private attorneys who were involved in developing revisions to the Model Business Corporation Act. Mr. Ames also co-chaired the section of the Florida Bar that drafted the Florida Business Corporation Act. Brief of Amici Curiae at 1-3.

its debts as they become due in the usual course of business; or (b) [t]he corporation's total assets would be less than the sum of its total liabilities [plus the amount needed to satisfy preferred stockholders]."[100] Subsections 6 and 8 address when such a distribution must be given effect. Section 607.06401(6) provides that:

> *Except as provided in subsection (8)*, the effect of a distribution under subsection (3) is measured:
>
> (a) In the case of distribution by purchase, redemption, or other acquisition of the corporation's shares, as of the earlier of:
>
> 1. The date money or other property is transferred or debt incurred by the corporation, or
>
> 2. The date the shareholder ceases to be a shareholder with respect to the acquired shares . . . .[101]

Section 607.06401(8) provides, in turn, that:

> Indebtedness of a corporation, including indebtedness issued as a distribution, is not considered a liability for purposes of determinations under subsection (3) if its terms provide that payment of principal and interest are made only if and to the extent that payment of a distribution to shareholders could then be made under this section. *If the indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is actually made*.[102]

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[100] Fla. Stat. § 607.06401(3) (emphasis added).

[101] Fla. Stat. § 607.06401(6) (emphasis added).

[102] Fla. Stat. § 607.06401(8) (emphasis added).

These statutory elements provide a sound framework for the Court's decision in *Cox II*. The statute starts with a presumption that shareholders should not be paid when such payment would render the company insolvent. Subsection 6, on which Cox relied (and continues to rely), is explicitly subject to subsection 8, which dictates that the effect of a payment of principal or interest be measured on the date of payment. Based on these elements, both the district court, in its original order awarding all of NJC's assets to Cox,[103] and this Court in *Cox II*, agreed that the plain language of the distributions-to-shareholders statute would prohibit payment of Cox if it rendered NJC insolvent.

Cox now offers an alternative argument—that the Repurchase Order constituted a distribution subject to the timing provision of Fla. Stat. § 607.06401(6)(a)(1), and that Cox was stripped of its rights as a shareholder at that same time. But the mere existence of an alternative interpretation does not meet the stringent clear error test.[104]

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[103] Aug. 13, 2010 Order, Doc. 674, at 5 (holding that PBGC's interpretation of the statute is the "literal" one).

[104] *See, e.g., City Pub. Serv. Bd. v. Gen. Elec. Co.*, 935 F.2d 78, 82 (5th Cir. 1991) (mere doubts or disagreement about a prior decision will not suffice; the 'clearly erroneous,' standard requires that a decision be more than just maybe or probably wrong).

Moreover, the arguments presented by Cox and amici curiae do not apply under the specific facts of this case. Although Cox maintains that it was stripped of all rights as a NJC shareholder at the time of the Repurchase Order, that position is inconsistent with the record.[105] Before the district court issued the Repurchase Order, Cox requested that it be allowed to retain its stock in NJC until NJC paid the first installment.[106] The district court complied and included such a provision in the Repurchase Order.[107] But NJC never paid the first installment to Cox, and Cox continued to refer to itself as a shareholder of NJC after the Repurchase Order was issued.[108] "The purpose of the [Florida] law governing distributions is to protect the relative priority status of creditors and senior equity holders.

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[105] Amici curiae similarly state that the relevant distribution for purposes of § 607.06401 was a "purchase by [NJC] . . . of shares of its stock owned by Cox Enterprises, Inc. in September 2006," when the district court entered the Repurchase Order. Brief of Amici Curiae at 6.

[106] Cox's Proposal Regarding Security and Return of Stock, Doc. 261, at 3.

[107] September 27, 2006 Order, Doc. 262, at 6.

[108] In the Joint Sale Agreement dated April 18, 2008, Cox referred to itself as a "holder[] of the capital stock of [NJC]." Joint Sale Agreement, April 18, 2008, Doc. 497-1, at 1; *see id.* at 5, 6.

Shareholders are subordinate to these persons with respect to their claim to the corporation's assets in liquidation."[109]

Both Cox and amici curiae reference the identical provisions of the Model Business Corporation Act in their construction of the Florida distributions-to-shareholders statute. The Model Business Corporation Act's commentary explains that "[i]n an acquisition of its shares, a corporation may transfer property or *incur debt* to *the former holder of the shares*."[110] This confirms that the corporation's incurrence of debt for purposes of § 607.06401(a)(1) presupposes that the recipient ceases to be a shareholder and becomes a creditor.[111] Here, Cox retained its stock in NJC after the Repurchase Order. And even after Cox was to receive its first installment and tender its stock, NJC was to issue preferred stock to Cox that would be partially redeemed *each time* NJC made an installment payment.[112]

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[109] David S. Felman, *The Financial Provisions of Florida's New Business Corporation Act – The Model Act with Anti-Takeover Twists*, 15 NOVA L. REV. 1319, 1346 (1991).

[110] Model Business Corporation Act § 6.40, Comment 8.B.

[111] For example, amici curiae state that "the only proper interpretation of [§ 607.06401(a)(1)] is that in the case of an acquisition by a corporation of shares of its own stock from a shareholder by incurrence of debt . . . the only applicable words are 'debt incurred by the corporation.'" Brief of Amici Curiae at 7. NJC did not acquire Cox's stock pursuant to the Repurchase Order.

[112] September 27, 2006 Order, Doc. 262, at 6. NJC's future payments to redeem that preferred stock would also be subject to § 607.06401.

Subsection 6 applies only to a "purchase, redemption or acquisition of the corporation's shares." No shares were purchased, redeemed, or acquired by NJC because Cox specifically retained those shares under the Repurchase Order.[113] Thus, Cox's own argument would not apply in this case, and the Court's prior decision must stand.

ii. Implementing *Cox II* will not result in any manifest injustice.

In addition to establishing clear error, Cox must also establish that implementing the Court's decision would cause manifest injustice.[114] Manifest injustice requires more than a contention that *Cox II*'s interpretation of the solvency test was wrong.

"[W]hatever 'manifest injustice' means, it surely does not simply mean that the prior panel's decision was incorrect; rather, the doctrine stands for the proposition that, absent extraordinary circumstances, a panel of this court should adhere to a previous panel's decision in the same case *even if that decision is erroneous*."[115] For example, manifest injustice resulted from a decision that would

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[113] *Id.*

[114] *See, e.g., Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir 1984) (per curiam).

[115] *Riley v. Camp*, 130 F.3d 958, 989 (11th Cir. 1997) (per curiam) (Order Denying Rehearing *En Banc*) (Birch J. concurring).

violate a state's fundamental public policy. In *Jenkins Brick Co. v. Bremer*, the Court determined that upholding a district court's clearly erroneous determination that venue was proper in Alabama would result in manifest injustice where "Alabama law w[ould] likely be used to uphold a non-compete agreement that is contrary to the fundamental public policy of Georgia."[116] In contrast, this case merely affects Cox's private interest and not any public policy.

Cox argues that implementing *Cox II* would create a manifest injustice because, under its ideal scenario, Cox will retain all of NJC's assets and PBGC will receive nothing.[117] Cox suggests that PBGC should not recover anything because ERISA provides for joint-and-several liability, and PBGC should be required to pursue other liable entities before NJC.[118] Finally, Cox notes its continued involvement in NJC's affairs after the Repurchase Order, including its role in the sale of NJC's assets.[119]

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[116] *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1371 (11th Cir. 2003).

[117] Cox's Brief at 53.

[118] *Id.* at 54-55 (confusingly describing itself as a convenient target, despite PBGC's pursuing a claim against NJC).

[119] *Id.*

Contrary to Cox's assertions, there is no basis of "sound policy and fundamental fairness" for denying PBGC's recovery against NJC.[120] NJC was the Pension Plan's sponsor and is jointly and severally liable to PBGC for the full amount of the Pension Plan's unfunded benefit liabilities.[121] There is absolutely nothing improper about PBGC's seeking to recover its statutory claim for pension underfunding from the plan's sponsor.[122] Indeed, this claim is one of the key tools Congress gave PBGC to accomplish its mission of keeping premiums at the lowest level consistent with performing its obligations under Title IV of ERISA.[123] In seeking to undermine the public policy behind ERISA's statutory liability provisions, Cox is seeking to impede, not further, public policy. Finally, Cox's regrets regarding its own legal strategies cannot give rise to manifest injustice. Having chosen to minimize its argument about the effect of Fla. Stat. § 607.06401

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[120] Amici curiae speculate that *Cox II* "could have a chilling effect on various capital raising transactions." Brief of Amici Curiae at 11. But manifest injustice "'is apparent to the point of being almost indisputable,'" *Shirlington Limousine & Transp., Inc. v. United States*, 78 Fed. Cl. 27, 30 (Fed. Cl. 2007) (citation omitted), not merely speculative, see *United States v. Palmer*, 956 F.2d 3, 7 (1st Cir. 1992).

[121] 29 U.S.C. § 1362(a), (b); *see also Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1336 (11th Cir. 2002) (discussing joint-and-several liability).

[122] *See infra* Section III.D.

[123] 29 U.S.C. § 1302(a)(1)-(3).

in favor of relying on § 607.1436 and its "equitable lien," Cox cannot now argue that it is disadvantaged by its own choices.[124]

The Pension Plan has been terminated for more than four years. It has been three years since the Court reversed the district court's distribution of NJC's assets to Cox. To date, PBGC has not received any payment on its claim against NJC. The law-of-the-case doctrine is meant to eliminate uncertainty and preserve finality.[125] The Court should affirm the decision requiring payment of PBGC's claim.

II. COX WAS NOT ENTITLED TO HAVE ITS CLAIM PAID AT PARITY WITH PBGC'S CLAIM.

A. The District Court Correctly Applied the Court's Mandate by Rejecting Cox's Request for Parity.

Cox next argues that the district court should have treated its claim at parity with PBGC's claim pursuant to Fla. Stat. § 607.06401(7). Cox maintains that even "if full payment of a debt is barred by operation of [that] statute's solvency test, the debt is nevertheless entitled to be accorded at least 'parity with the corporation's

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[124] *See Walker v. Anderson Elec. Connectors*, 944 F.2d 841 (11th Cir. 1991) (plaintiff, having abandoned equitable allegations in favor of a jury trial, could not reopen her equitable claims by arguing that "manifest injustice" resulted from her own strategic choices).

[125] *Litman v. Mass. Mut. Life Ins. Co.*, 825 F.2d 1506, 1511 (11th Cir. 1987) (en banc).

indebtedness to its general unsecured creditors.'"[126] The district court correctly rejected this request pursuant to the mandate rule and the law of the case.

The mandate rule is "'a specific application of the law of the case doctrine.'"[127] After a remand, the district court cannot "alter, amend, or examine the mandate, or give any further relief or review, but must enter an order in strict compliance with the mandate . . . taking into account the appellate court's opinion, and the circumstances it embraces."[128] Although the mandate will "'not bar consideration of matters that could have been, but were not, resolved in earlier proceedings,'"[129] the Court's "binding precedent makes clear that the law of the case encompasses all things 'decided by necessary implication as well as those decided explicitly.'"[130]

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[126] Cox's Brief at 15 (quoting Fla. Stat. § 607.06401(7)).

[127] *Id.* at 23 (quoting *Transamerica Leasing, Inc. v. Inst. of London Underwriters*, 430 F.3d 1326, 1331 (11th Cir. 2005)).

[128] *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985) (internal citations omitted).

[129] *United States v. Crape*, 603 F.3d 1237, 1241 (11th Cir. 2010) (quoting *Luckey v. Miller*, 929 F.2d 618, 621 (11th Cir. 1991)).

[130] *Burger King Corp. v. Pilgrim's Pride Corp.*, 15 F.3d 166, 169 (11th Cir.1994) (emphasis omitted) (quoting *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984) (per curiam)); *see also AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema Inc.*, 579 F.3d 1268, 1270-71 (11th Cir. 2009) ("The law of the case doctrine and the mandate rule ban courts from revisiting matters decided

Cox argues that the mandate rule does not apply here because this Court did not interpret the effect of Fla. Stat. § 607.06401 in *Cox II*, it merely held that the statute applied.[131] That assertion strains credulity. This is not a case where "the issue in question was outside the scope of the prior appeal."[132] The prior appeal directly addressed whether Cox could receive *any* payment in compliance with Fla. Stat. § 607.06401. This Court prohibited *any* payment to Cox that would violate the solvency provisions of § 607.06401, measured at the time of payment to Cox.[133] The Court explained that "[i]f enforcing Cox's repurchase order would require a payment by [NJC] in violation of the distributions-to-shareholders statute, the statute forbids the payment."[134]

Cox attempts to circumvent the mandate rule by making baseless statements about dicta. Cox asserts that the district court rejected its parity argument by

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expressly or by necessary implication in an earlier appeal of the same case." (citation omitted)); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19 (5th Cir. 1974) (prior panel's affirmation of liability contained implicit finding on causation element).

[131] Cox's Brief at 24-25.

[132] *Transamerica Leasing, Inc.*, 430 F.3d at1332.

[133] *Cox II*, 666 F.3d at 699 and 707-08; *see id.* at 707 ("Florida's distributions-to-shareholders statute forbids distributions by the corporation to shareholders if those distributions would render the corporation insolvent.").

[134] *Id.* at 707.

improperly relying on the Court's statement that "[i]f on remand the district court finds a distribution to Cox would violate [Fla. Stat. § 607.06401], News-Journal's other creditors should" be paid first,[135] and that that statement was dictum. But the *Cox II* Court explicitly held that *no* distribution could be made to Cox if it violated the solvency test in § 607.06401 measured at the time of payment.[136] It repeated several times that § 607.06401 "forbids" payments to Cox if such payment rendered NJC insolvent.[137] The repetition of this point indicates that it was holding, not dicta. Cox also argues that, if either party raised the issue in its briefs, the Court's statements should not be considered dicta.[138] PBGC agrees. PBGC's brief in *Cox II* was replete with arguments that PBGC should be paid in full before any payment to Cox because of the language of Fla. Stat. § 607.06401.[139]

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[135] *Id.* at 699.

[136] *Id.*at 707-08.

[137] The Court also stated that "if enforcing Cox's repurchase order would require a payment by News–Journal in violation of the distributions-to-shareholders statute, the statute forbids the payment" and that "Florida's distributions-to-shareholders statute forbids distributions by the corporation to shareholders if those distributions would render the corporation insolvent." *Id.* at 707.

[138] Cox's Brief at 25.

[139] PBGC argued that the statute "preserves the superior rights of creditors to a company's assets *before* those shareholders receive distributions," Brief of Appellant PBGC, Case Nos. 10-14240-H & 10-14305-H, Nov. 19, 2010, at 19; that "[t]aken together, §§ 607.1436 and 607.06401 prevent shareholders from jumping ahead of creditors," *id.* at 20; that any payment to Cox "is prohibited" because it

Therefore, the district court properly rejected Cox's parity argument, holding that it was "foreclosed by the clear mandate of the Eleventh Circuit and application of the insolvency test of section 607.06401."[140]

B. Cox Waived its Request for Parity by Failing to Raise that Argument on Appeal.

In addition, Cox waived any parity argument by failing to raise it in *Cox II*. During the appeal of *Cox II*, PBGC argued that no payment could be made to Cox if it rendered NJC insolvent at the time of payment.[141] Cox argued that its claim was entitled to priority over PBGC's claim, even after applying Fla. Stat. § 607.06401.[142] Cox did not assert that it was entitled to receive a payment on its claim pursuant to § 607.06401(7).

On this appeal, Cox presents for the first time an alternative argument for receiving payment on its claim based on Fla. Stat. § 607.06401(7). Generally, an

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would render NJC insolvent, *id.*; and that PBGC "should have been paid in full first." *Id.* Thus, Cox's contention that neither party raised this issue is clearly wrong.

[140] Aug. 13, 2014 Order, Doc. 796, at 16.

[141] Brief of Appellant PBGC, Case Nos. 10-14240-H & 10-14305-H, Nov. 19, 2010, at 19-20.

[142] Brief of Plaintiff-Appellee Cox, Case Nos. 10-14240 & 10-14305-H, Jan. 21, 2011, at 39-41.

argument that was not raised at the trial court or on appeal is deemed waived.[143] Cox asserts that it could not have foreseen "every potential adverse ruling and ma[d]e any conceivable argument on pain of forfeiture."[144] Cox does not cite any case law that suggests that an appellee "cannot foresee" an outcome that the appellant specifically advocated for in its brief.[145] Both PBGC and Cox made claims-priority arguments in their briefs.[146] As relative priority was obviously an issue, it would not have required the prognostication that Cox suggests to have raised an argument based on parity.

Moreover, the *Cox II* appeal concerned whether Cox was entitled to receive payment on its claim against NJC in compliance with § 607.06401. The parties

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[143] *Marek v. Singletary*, 62 F.3d 1295, 1298 n.2 (11th Cir. 1995) ("Issues not clearly raised in the briefs are considered abandoned." (citation omitted)); *see also United States v. Fiallo-Jacome*, 874 F.2d 1479, 1482 (11th Cir. 1989). Cox makes the entirely circular claim that it did not waive parity treatment under § 607.06401(7) because that subsection was not before this Court in *Cox II*. But the argument was not before the Court only because Cox failed to raise it.

[144] Cox's Brief at 31.

[145] PBGC specifically argued in its brief that payment to Cox was prohibited under Fla. Stat. § 607.06401 because it would render NJC insolvent, and that PBGC "should have been paid in full first." Brief of Appellant PBGC, Case Nos. 10-14240-H & 10-14305-H, Nov. 19, 2010, at 19-20.

[146] Brief of Appellant PBGC, Case Nos. 10-14240-H & 10-14305-H, Nov. 19, 2010, at 19-20; Brief of Plaintiff-Appellee Cox, Case Nos. 10-14240 & 10-14305-H, Jan. 21, 2011, at 38-41.

relied heavily on subsections 6 and 8 in their briefs.[147] But Cox failed to cite subsection 7 at any point in the appeal. An argument based on a subsection of a statute that is sandwiched between the two subsections that the parties are relying upon can hardly be considered "inconceivable," as Cox suggests. Because Cox failed to raise any argument seeking the payment of its claim at parity before the Court decided *Cox II*, that argument has been waived.

C. The District Court Properly Declined to Treat Cox's Claim at Parity with PBGC's Claim.

Even if Cox's request for parity under Fla. Stat. § 607.06401(7) was not barred by the law-of-the-case doctrine and waiver, it does not comport with the plain language of the statute. Subsection 607.06401(7) provides that "[a] corporation's indebtedness to a shareholder incurred *by reason of a distribution* made in accordance with this section is at parity with the corporation's indebtedness to its general, unsecured creditors except to the extent subordinated by agreement."[148]

By its terms, subsection 7 applies where a corporation has incurred indebtedness to a shareholder by making a distribution in accordance with

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[147] Brief of Appellant PBGC, Case Nos. 10-14240-H & 10-14305-H, Nov. 19, 2010, at 19-20; Brief of Plaintiff-Appellee Cox, Case Nos. 10-14240 & 10-14305-H, Jan. 21, 2011, at 38-41.

[148] Fla. Stat. § 607.06401(7) (emphasis added).

§ 607.06401. Cox suggests that the Repurchase Order constituted a distribution made in accordance with § 607.06401. But as discussed above, Cox *retained* its stock in NJC until after it received the first installment.[149] Cox did not tender its stock at the time of the Repurchase Order in exchange for future payment by NJC.[150] And while Cox asserts that subsection 7 would be meaningless if it were not applied to the Repurchase Order, Cox overlooks that the Florida distributions-to-shareholders statute allows for many types of distributions to shareholders, including through the corporation's issuance of a promissory note in exchange for stock.[151] In that situation, the stockholder has tendered its shares at the time of the note's issuance and become a creditor of the corporation.[152]

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[149] Cox's Proposal Regarding Security and Return of Stock, Doc. 261, at 3.

[150] *Accord* Cox's Brief at 22-23 (citing an article for the proposition that a corporation's insolvency "after a shareholder exchanges its shares for debt" should not affect the treatment of such debt at parity with creditors) (citing Dennis F. Dunne, *Stock Repurchase Agreements in Bankruptcy: A Tale of State Law Rights Discarded*, 12 EMORY BANKR. DEV. J. 355, 364 & n.38 (1996)).

[151] Fla. Stat. § 607.01401(8) (defining distribution to include "a distribution of indebtedness"); *see also* Model Business Corporation Act § 1.40 Comment 3 (noting that a corporation may incur indebtedness in the distribution of a debt instrument or an installment purchase of shares).

[152] *Cf.* Dunne, *supra* note 150, at 364 n.37 (noting that Delaware General Corporate Law §160, which measures solvency at the time a corporation issues indebtedness to a shareholder for shares, "does not apply if the shares are not tendered and accepted at the time the note is granted"); *Williams v. Nevelow*, 513 S.W.2d 535, 536-37 (Tex. 1974) (discussing treatment where shareholder received a note in exchange for stock).

Based on the specific facts of this situation, the district court did not err in declining to treat Cox's claim at parity with PBGC's claim.

III. THE DISTRICT COURT PROPERLY DECLINED TO USE ITS EQUITABLE DISCRETION TO OVERRIDE FEDERAL LAW.

In an attempt to bolster its argument for retaining NJC's assets, Cox faults the district court for not using undefined principles of equity to reject PBGC's claim. Cox suggests that the district court had essentially unfettered discretion to ignore federal law and instead make an "equitable" distribution of NJC's assets—to Cox. This argument fails.

Title IV of ERISA establishes PBGC's claim against NJC for the Pension Plan's unfunded benefit liabilities. The district court could not use its equitable discretion to override controlling federal law. Accordingly, the district court correctly ordered the payment of PBGC's claim against NJC in full.

A. Equity Cannot Override an Act of Congress.

Cox touts the equitable nature of NJC's receivership proceeding. Cox discusses the district court's retention of equitable discretion after the Court's remand,[153] and argues that a court conducting a receivership has discretion to

[153] Specifically, Cox discusses whether the Court's decision in *Cox I*, 510 F.3d 1350 (11th Cir. 2007), confirmed the district court's equitable discretion "to balance the equities in structuring a fair and just distribution of NJC's assets." Cox's Brief at 39. Cox also notes that NJC's receivership was an equitable proceeding. *Id.* at 36.

structure equitable relief and suspend equitable remedies.[154] None of the cases it cites, however, authorized the use of equity to override an Act of Congress.

It is axiomatic that "a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation."[155] The Supreme Court has repeatedly affirmed the principle that a court operating in equity cannot take away statutory rights or change the meaning of a statute. "Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute."[156] As a result, the district court was obligated to evaluate PBGC's claim against NJC in accordance with the provisions of ERISA.

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[154] *See, e.g., SEC v. Elliott*, 953 F.2d 1560, 1569-70 (11th Cir. 1992) (determining that the district court did not abuse its equitable discretion in declining to allow rescission or restitution based on equitable tracing); *see also United States v. Durham*, 86 F.3d 70, 73 (5th Cir. 1996) (same with respect to imposing a constructive trust); *United States v. Vanguard Inv. Co.*, 6 F.3d 222, 226 (4th Cir. 1993) (same).

[155] *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497, 121 S. Ct. 1711, 1721 (2001) (citation omitted); *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1238 (11th Cir. 2005) ("'[C]ourts are not authorized to rewrite a statute because they might deem its effects susceptible to improvement.'" (quoting *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1552 (11th Cir. 1996))).

[156] *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 497, 121 S. Ct. at 1721 ("'Once Congress . . . has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought.'" (quoting *TVA v. Hill*, 437 U.S. 153, 194, 98 S. Ct. 2279, 2302 (1978))).

B. ERISA Establishes PBGC's Claim against NJC for the Pension Plan's Unfunded Benefit Liabilities.

Title IV of ERISA gives PBGC a claim against NJC for the Pension Plan's unfunded benefit liabilities.[157] Congress has defined the "amount of unfunded benefit liabilities," as (for a given date):

> [T]he excess (if any) of–
>
> (A) the value of the benefit liabilities under the plan (*determined as of such date on the basis of assumptions prescribed 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 . . . .[158]

In accordance with the Administrative Procedure Act, 5 U.S.C. § 553, PBGC promulgated the Valuation Regulation through notice-and-comment rulemaking.[159] The Valuation Regulation prescribes the required assumptions for calculating a pension plan's benefit liabilities for purposes of 29 U.S.C. § 1344.[160]

PBGC's regulations are part of the substantive law that the Court must implement here. It is well settled that administrative regulations adopted pursuant

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[157] 29 U.S.C. § 1362(b)(1)(A).

[158] 29 U.S.C. § 1301(a)(18) (emphasis added).

[159] *See, e.g.*, 46 Fed. Reg. 9492 (Jan. 28, 1981) (Final Rule); 58 Fed. Reg. 50,812 (Sept. 28, 1993) (Final Rule).

[160] *See* 29 C.F.R. §§ 4044.41-4044.75.

to an express delegation of authority give rise to legislative rules that have the "force and effect of law."[161] Cox asks this Court to ignore precisely such a regulation. There is no legal basis for the Court to do that.[162]

Moreover, Congress effectively ratified PBGC's Valuation Regulation. After PBGC promulgated the regulation, Congress amended 29 U.S.C. § 1301(a)(18) to explicitly refer to the "assumptions prescribed by [PBGC]" for valuing benefit liabilities.[163] In this situation, "Congress entrusts to the [agency], rather than to the courts, the primary responsibility for interpreting the statutory term."[164] Thus, any challenge to the Valuation Regulation must meet the exacting

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[161] *Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 99 S.Ct.1705, 1714 (1979); *Batterton v. Francis*, 432 U.S. 416, 425 & n.9, 97 S.Ct. 2399, 2406 & n.9 (1977).

[162] And PBGC's interpretation of ERISA and its regulations is entitled to deference. *Blessitt v. Ret. Plan for Emps. of Dixie Engine Co.*, 848 F.2d 1164, 1167 (11th Cir. 1988) (en banc) ("[W]e owe great deference to the interpretations and regulations of [PBGC] . . . ."); *see also Durango-Ga. Paper Co. v. H.G. Estate, LLC*, 739 F.3d 1263, 1273 n.25 (11th Cir. 2014) ("We give deference to PBGC's interpretation of ERISA.").

[163] Pension Protection Act of 1987, Subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9313(a)(2)(F), 101. Stat. 1330-365 (1987); *In re US Airways Grp., Inc.*, 303 B.R. 784, 796 (Bankr. E.D. Va. 2003); *see also Cottage Savs. Ass'n v. Comm'r*, 499 U.S. 554, 561, 111 S.Ct. 1503, 1508 (1991); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381-82, 89 S.Ct. 1794, 1802 (1969) ("Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.").

[164] *Batterton*, 432 U.S. at 425, 97 S.Ct. at 2405; *accord United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219, 121 S.Ct. 1433, 1444 (2001).

standards of the Administrative Procedure Act, demonstrating that the regulation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[165]

Cox suggests that PBGC's calculation using the required assumptions is not subject to any deference, but bases its argument on cases that did not involve the calculation of unfunded benefit liabilities or the application of any regulation promulgated by PBGC.[166] Thus, these cases are wholly inapposite.

Cox further argues that PBGC's Valuation Regulation has not been accorded deference in two older bankruptcy cases, *In re CF&I Fabricators of Utah, Inc.*[167] and *In re CSC Indus., Inc.*[168] However, every court to have considered the issue since 2003 has rejected efforts to depart from the Valuation Regulation,

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[165] *See* 5 U.S.C. § 706; *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 2781-82 (1984).

[166] Cox cites *Kinek v. Paramount Communications, Inc.*, 22 F.3d 503, 514 (2d Cir. 1994), for the proposition that the district court had discretion to reject the assumptions mandated for calculating PBGC's unfunded benefit liabilities claim. But *Kinek* did not involve a plan's unfunded benefit liabilities. Rather it concerned the appropriate prejudgment interest after PBGC sued to recover assets owed to a terminated pension plan. *Kinek*, 22 F.3d at 507, 513-14. Cox also cites *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 742 (9th Cir. 2005), but mischaracterizes that case. Contrary to Cox's implication, the Court in *Capital Consultants* specifically held that the proposed distribution did *not* violate ERISA. *Id.*

[167] 150 F.3d 1293 (10th Cir. 1998).

[168] 232 F.3d 505, 509 (6th Cir. 2000).

recognizing that "Congress, by statute, has expressly given the PBGC a *present* right to recover an amount determined *in accordance with the valuation regulation*."[169] Most of those decisions rely on a Supreme Court decision that made it clear that substantive law, not the equitable power of the bankruptcy courts, controls the determination of claims.[170] In so holding, the Supreme Court noted the desirability of consistent treatment for claims inside and outside of bankruptcy.[171]

A bankruptcy court within this Circuit has joined this line of prevailing cases. That court rejected a liquidating bankruptcy trustee's reliance on the cases

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[169] *US Airways*, 303 B.R. at 793 (second emphasis added); *see also 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) (Attached as Exhibit 1); *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) (Attached as Exhibit 2); *accord In re Wolverine, Proctor & Schwartz, LLC*, 436 B.R. 253, 262-63 (D. Mass. 2010) (finding the reasoning of US Airways persuasive). Cox attempts to distinguish *US Airways*, implying that courts that have applied the PBGC regulations have done so only where there was a separate finding that it would not create a genuine issue of disparate treatment of creditors. Cox Brief at 36. What the *US Airways* court actually said was that using PBGC's Valuation Regulation could *not* result in disparate treatment: "So long as all claims are determined in accordance with applicable nonbankruptcy law, there cannot be any genuine issue of disparate treatment." *US Airways*, 303 B.R. at 794.

[170] *Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15, 20, 120 S.Ct. 1951, 1955 (2000); *see also Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 444, 127 S.Ct. 1199, 1201 (2007).

[171] *Raleigh*, 530 U.S. at 25-26, 120 S.Ct. at 1955.

cited by Cox and upheld PBGC's use of its Valuation Regulation in a bankruptcy case, noting:

> [T]he Liquidating Agent has not contended that outside of bankruptcy and without obtaining a judgment invalidating PBGC's regulations, Debtors could successfully challenge the amount of PBGC's claim solely on the ground that the claim is excessive due to PBGC's use of an inappropriate discount rate. It is highly doubtful such a challenge could be successfully made.[172]

The court thus recognized that any attack on PBGC's claims could be made only by challenging PBGC's regulations. As previously stated, to mount such a challenge, Cox would have to meet the exacting standard of the Administrative Procedure Act. Cox has not even attempted to make such a showing.

Cox also argues that ERISA must yield to other, unspecified federal law. As support, Cox references 29 U.S.C. § 1144(d), a provision from Title I of ERISA. ERISA has four separate titles. Title I sets standards for participation and vesting, funding, reporting and disclosure, and fiduciary conduct, pertaining to ongoing plans. Title IV establishes the PBGC insurance program. In § 1144(a), Congress provided that "the provisions of *this subchapter [Title I] and subchapter III of this chapter [Title IV]* shall supersede" state laws relating to employee benefit plans.[173]

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[172] *Rhodes*, 382 B.R. at 559 (citations omitted).

[173] 29 U.S.C. § 1144(a) (emphasis added).

By contrast, § 1144(d) provides that "[n]othing in *this subchapter* shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States."[174] Not only does Cox fail to cite any provision of federal law that could supplant 29 U.S.C. §§ 1301(a)(18) and 1362, but § 1144(d) does not apply to Title IV of ERISA at all.[175]

C. The District Court Correctly Found that PBGC's Claim against NJC for the Pension Plan's Unfunded Benefit Liabilities was $13,887,822.

In its August 13, 2014 Order, the district court directed Cox to return $13,887,822 of NJC's assets to pay PBGC's claim. The district court's

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[174] 29 U.S.C. § 1144(d) (emphasis added). "'[W]here 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.'" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, 107 S.Ct. 1207, 1213 (1987) (citation omitted).

[175] Cox cites *PBGC v. CF&I Fabricators of Utah, Inc.* (*In re CF&1 Fabricators of Utah, Inc.*), 150 F.3d 1293, 1301 (10th Cir. 1998), which applied 29 U.S.C. § 1144(d) to subordinate §§ 1301(a)(18) and 1362 to a provision of the Bankruptcy Code. That decision was erroneous. *See PBGC v. Belfance* (*In re CSC Indus., Inc.*), 232 F.3d 505, 509 (6th Cir. 2000) (noting that § 1144(d) applies only to Title I of ERISA). The other cases cited by Cox have nothing to do with the calculation of PBGC's claim for unfunded benefit liabilities. *See In re Falcon Prods, Inc.* No. 05-41109-399, 2005 WL 3416130, at *10-11 (Bankr. E.D. Mo. Oct. 26, 2005) (discussing application of ERISA's "distress test" for plan termination where a debtor is reorganizing in bankruptcy and sponsors multiple pension plans); *PBGC v. LTV Corp.*, 496 U.S. 633, 636, 110 S. Ct. 2668, 2671 (1990) (affirming PBGC's restoration of a terminated plan under 29 U.S.C. § 1347).

determination of PBGC's claim was fully supported by the record, and Cox does not establish otherwise.

Cox does not dispute that PBGC calculated its claim for the Pension Plan's unfunded benefit liabilities in accordance with Title IV of ERISA and the Valuation Regulation.[176] As in every case where a pension plan terminates and PBGC becomes its statutory trustee, PBGC collected the necessary records and calculated the Pension Plan's benefit liabilities on a seriatim (participant-by-participant basis) basis.[177] This process took about three years after PBGC became the Pension Plan's statutory trustee, and is documented in the actuarial case memorandum and a three-volume actuarial case report prepared by PBGC's staff and its actuarial contractors.[178]

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[176] Cox's Brief at 43, 44; *see also* Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc. 786, at 59-61.

[177] Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc. 786, at 71-72; Report & Recommendation, March 21, 2014, Doc. 791, at 14-15.

[178] Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc. 786, at 71-72; Report & Recommendation, March 21, 2014, Doc. 791, at 14-15. PBGC's actuarial case report for the Pension Plan, with its underlying calculations, was certified under penalty of perjury by an enrolled actuary at PBGC's actuarial contractor, Milliman Inc. Doc. 782-4, at PBGC-NJC-006915; *see also* Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc. 786, at 72-73. The actuarial case report was also reviewed to assess the accuracy of 22 separate actuarial issues. Doc. 782-4, at PBGC-NJC-006913; *see also* Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc. 786, at 73.

Using the actuarial assumptions required by the Valuation Regulation, PBGC calculated that the Pension Plan's benefit liabilities totaled $42,532,061.[179] This calculation was consistent with the calculations prepared by other parties in this case. As the district court noted, "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."[180] After subtracting the Pension Plan's assets of $28,644,239,[181] PBGC's calculation yielded unfunded benefit liabilities of $13,887,822.[182]

[179] Doc. 783-1, at 2; Doc. 782-3, at PBGC-NJC-005307; *see also* Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc. 786, at 59-61. Cox's expert witness "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." Report & Recommendation, March 21, 2014, Doc. 791, at 16; *see* Doc. 782-2, at 3.

[180] Report & Recommendation, March 21, 2014, Doc. 791, at 16.

[181] Cox stipulated to the Pension Plan's assets as of the March 23, 2010 termination date. Joint Pretrial Statement, Doc. 778, at 18.

[182] Doc. 783-1, at 2; Doc. 782-3, at PBGC-NJC-005307; *see also* Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc. 786, at 59-61.

Despite conceding that PBGC calculated its claim in accordance with Title IV of ERISA and the Valuation Regulation, Cox argues that PBGC's use of the required assumptions resulted in a "vast overstatement."[183]

As stated above, PBGC's Valuation Regulation has the force and effect of law. Courts cannot second-guess an agency's policy choices, particularly when, as here, such choices are embodied in a rule of general applicability, adopted pursuant to an express delegation.[184] Nor should an agency be forced "continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding."[185] By publishing governing principles through rulemaking, an agency promotes uniformity.[186] PBGC's regulation for measuring termination liability does just that. It promotes uniformity by replicating the price

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[183] Cox also argues that PBGC improperly included 22 ineligible participants in its calculation. Here, as in the district court, Cox does not offer any support for its statement. These individuals were on NJC's payroll, their benefits were clearly reflected in the Pension Plan's records, and PBGC had no reason to exclude them. *See, e.g.*, Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc. 786 at 110-111 (noting that these participants were included in the Pension Plan's 2008 census data).

[184] *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-2782 (1984).

[185] *Heckler v. Campbell*, 461 U.S. 458, 467, 103 S.Ct. 1952, 1957 (1983); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency").

[186] *See Campbell*, 461 U.S. at 468, 103 S.Ct. at 1958.

that an employer would have to pay to close out a pension plan in a standard termination through the purchase of annuities in the marketplace. This in turn assures that termination liability will be measured in a fair, objective, and consistent manner.

Cox's proposed assumptions only serve to highlight the wisdom of PBGC's Valuation Regulation.[187] PBGC's Valuation Regulation prescribes actuarial assumptions about mortality and interest that, when combined, "will accurately approximate the cost of private sector group annuity contracts."[188]

In contrast, Cox's proposed assumptions were not tied to the cost of purchasing an annuity. Cox's expert conceded that PBGC is essentially acting as an *annuity provider* for the Pension Plan's participants.[189] Indeed, PBGC retains all of the risk of the transaction—the investment risk, the longevity risk, and the retirement risk, as would an annuity provider.[190]

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[187] *See* Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc. 786, at 102-03 (PBGC's expert explaining why PBGC's actuarial assumptions in the Valuation Regulation are more appropriate than Cox's proposed assumptions).

[188] *See, e.g.*, 58 Fed. Reg. 5128, 5128 (Jan. 19, 1993) (Proposed Rule).

[189] Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc. 786, at 158-59. Cox's expert had initially opined that "PBGC is not purchasing annuities, nor does it pay taxes, earn a profit, or conform to state investment regulations like an insurance company." Doc. 782-1, at 35.

[190] Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc. 786, at 159.

Cox prepared its proposed assumptions without accounting for those risks. For example, it used an investment return assumption of 7.99%, similar to the interest rate used for an ongoing pension plan.[191] But if an investment return falls short in a given year for an ongoing plan, the plan sponsor can cover that shortfall by increasing contributions. A terminated plan will not receive any further contributions regardless of PBGC's investment performance.[192] "Given the strong societal interest in protecting pension benefits, a risk-free or nearly risk-free rate to value the pension liability is more appropriate than a rate based on optimistic projections (even if . . . widely-shared by fund managers) as to the stock market's future long-term performance."[193]

Finally, Cox's proposed assumptions could result in a cost for terminating a pension plan in a distress or PBGC-initiated termination that would be less than the cost of purchasing annuities to close out the plan in a standard termination, thereby incentivizing sponsors to dump their plans on PBGC and burden other premium

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[191] Doc. 782-1, at 7, 18-20 (comparing 7.99% investment return assumption with studies of investment returns for ongoing pension plans); *see also* Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc. 786, at 146-47.

[192] Trans. of Jan. 14, 2014 Evidentiary Hr'g, Doc. 786, at 147.

[193] *In re US Airways Grp., Inc.*, 303 B.R. 784, 796 (Bankr. E.D. Va. 2003).

payers with the costs of discharging their obligations.[194] For all these reasons, this Court should affirm.

D. There is Nothing Inequitable about PBGC's Recovering on its Claim against NJC.

Cox's remaining arguments also failed to provide the district court with any basis for rejecting PBGC's claim. Cox asserts that PBGC acted improperly by seeking to recover on its claim against NJC rather than against any members of NJC's controlled group.[195] Cox ignores that ERISA makes NJC jointly and severally liable for the full amount of PBGC's claim.[196]

Joint and several liability means that every liable entity, including NJC, is "individually responsible for the entire obligation," and can be pursued directly at

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[194] *Cf. In re UAL Corp.*, 468 F.3d 444, 452 (7th Cir. 2006) (allowing PBGC to consider the "moral hazard" resulting from the availability of a third party payor such as PBGC); *see also* 29 U.S.C. § 1302(a)(3).

[195] Cox provides no evidence or analysis to support its arguments about the controlled-group members, merely stating its assumptions as facts. It provides no legal or factual analysis of the entities' status as controlled-group members, no evidence that such entities have assets sufficient to satisfy the liability, and no evidence of what actions, if any, PBGC has taken.

[196] 29 U.S.C. § 1362(a); *see also PBGC v. Beverley*, 404 F.3d 243, 247 (4th Cir. 2005) (discussing PBGC's joint-and-several claims); *PBGC v. E. Dayton Tool & Die Co.*, 14 F.3d 1122, 1126-27 (6th Cir. 1994) (same); *Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. LTV Corp.* (*In re Chateaugay Corp.*), 973 F.2d 141, 142 (2d Cir. 1992) (same).

PBGC's option.[197] The creditor's discretion about whom to pursue is central to the definition of joint and several liability.[198] Accordingly, the district court properly rejected Cox's attempts to require PBGC to pursue any other entity.[199]

The district court also properly rejected Cox's contention that PBGC's claim is equitably moot. Equitable mootness is an equitable doctrine that applies where the relief sought by the appellant, typically after a bankruptcy, has become

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[197] *See Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1337 (11th Cir. 2002); BLACK'S LAW DICTIONARY 1054 (10th ed. 2014) ("Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion."); *see also SEC v. J.W. Barclay & Co.*, 442 F.3d 834, 843 (3d Cir. 2006) (same); *Tavery v. United States*, 897 F.2d 1032, 1034 (10th Cir. 1990) (same).

[198] *See, e.g.*, *Martin*, 307 F.3d at 1337.

[199] Sept. 18, 2013 Order, Doc. 763, at 3-4; Dec. 12, 2013 Order, Doc. 777; *see also Cent. States, Se. & Sw. Areas Pension Fund v. Chatham Props.*, 929 F.2d 260, 263-64 (6th Cir. 1991) (rejecting controlled-group members' request to create an exception to their joint-and-several liability for withdrawal from a multiemployer plan); *PBGC v. Reorganized CF&I Fabricators of Utah, Inc.*(*In re CF&I Fabricators of Utah, Inc.*), 179 B.R. 704, 711-12 (D. Utah 1994) (affirming bankruptcy court's determination that ERISA mandated joint-and-several liability for PBGC's claims, even if it may impact other creditors); *Cent. States, Se. & Sw. Areas Pension Fund v. Lloyd L. Sztanyo Trust*, 693 F. Supp. 531, 540-41 (E.D. Mich. 1988) (striking affirmative defense that a multiemployer plan waived its rights against defendants by first pursuing other jointly and severally liable entities); *In re Ne. Dairy Coop. Fed'n, Inc.*, 88 B.R. 21, 23-24 (Bankr. N.D.N.Y. 1988) (rejecting dairy cooperative's argument that a multiemployer plan's claim should be reduced by amounts recovered from another controlled-group member).

impractical or imprudent to implement.[200] Cox waived this argument by failing to raise it during *Cox II.*

Additionally, Cox cannot show that the test for equitable mootness has been met. This Court has held that the key consideration is "whether it can grant effective relief."[201] Effective relief is possible if the distributions in question are not "legally and practically impossible to unwind."[202] The doctrine "turns in part on whether the transactions at issue are complex and would be difficult to unwind."[203] The district court here simply ordered Cox to return the disbursed funds to the court's registry. It is far from "legally and practically impossible to unwind" a payment of a fixed amount of money to a single payee—Cox. In fact, Cox itself, in a motion seeking waiver of a bond, assured the district court that it could easily repay the amounts transferred to it from NJC.[204]

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[200] *In re United Producers, Inc.*, 526 F.3d 942, 947 (6th Cir. 2008).

[201] *Ala. Dept. of Econ. & Cmty. Affairs v. Ball Healthcare-Dallas, Inc.* (*In re Lett*), 632 F.3d 1216, 1225 (11th Cir. 2011).

[202] *Id.* at 1226.

[203] *SEC v. Capital Consultants, LLC,* 397 F.3d 733, 745-46 (9th Cir. 2005), *cited in* Cox's Brief at 45.

[204] Cox's Emergency Motion to Stay Order Directing Payment into Registry Without Requirement of Bond Pending Appeal, Doc. 797, at 7.

Cox makes much of the precedent that examines the effect of an order on "innocent" third parties—those not before the court[205]—but Cox is before the Court, and received NJC's assets during the pendency of the *Cox II* appeal, so it was certainly aware of PBGC's claim at that time. Accordingly, Cox has not met its burden to show equitable mootness.

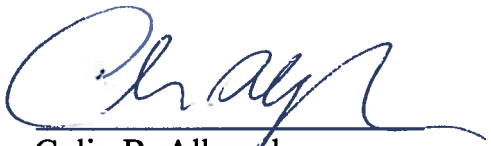
CONCLUSION

The Court should affirm the district court's August 13, 2014 order requiring the payment of PBGC's claim against NJC for the Pension Plan's unfunded benefit liabilities.

[205] *United Producers*, 526 F.3d at 945 (referring to "third parties not before the court"); *First Union Real Estate Equity & Mortg. Inv. v. Club Assocs.* (*In re Club Assocs.*), 956 F.2d 1065, 1069 n.11 (11th Cir. 1992).

Dated: January 14, 2015

Respectfully submitted,



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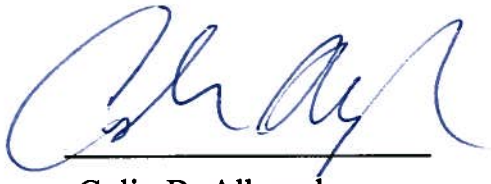
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation as set forth in F.R.A.P. 32(a)(7)(A), F.R.A.P. 32(a)(7)(B)(I) and 11 Cir. R. 32-4 and contains 13,997 words. This brief was written in 14 point Times New Roman.



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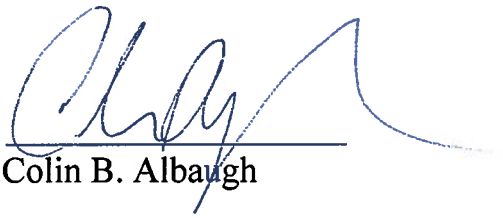
CERTIFICATE OF SERVICE

I hereby certify that, on January 14, 2015, I filed the foregoing Brief of Claimant-Appellee Pension Benefit Guaranty Corporation on paper as well as electronically using the Court's CM/ECF system, which will send an electronic notification to all registered users.



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EXHIBITS

Exhibit 1

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 2

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),