UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

US AIRLINE PILOTS ASSOCIATION,

Plaintiff,

v. **1:09-CV-1675 (FJS)**

PENSION BENEFIT GUARANTY CORPORATION,

Defendant.

APPEARANCES	OF COUNSEL
BINGHAM MCCUTCHEN LLP 2020 K Street, NW Washington, D.C. 20006 Attorneys for Plaintiff	**DAVID J. BUTLER, ESQ.** **THOMAS R. LOTTERMAN, ESQ.** **WILLIAM S. D. CRAVENS, ESQ.**
PENSION BENEFIT GUARANTY CORPORATION 1200 K Street, NW Suite 340 Washington, D.C. 20005 Attorneys for Defendant	**JOSEPH M. KRETTECK, ESQ.** **GARTH D. WILSON, ESQ.** **PAULA J. CONNELLY, ESQ.**

SCULLIN, Senior Judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff US Airline Pilots Association brought this suit for declaratory and injunctive relief against the Pension Benefit Guaranty Corporation ("PBGC"), alleging that PBGC had breached its statutory and fiduciary duties by failing to investigate the financial affairs of the Plan and to seek to remedy, as appropriate, any breaches of the former trustees of the Plan. Specifically, Plaintiff sought (1) an Order directing PBGC to investigate, evaluate, and pursue claims and appropriate recovery arising from the performance of the Plan's former trustees, or (2) an Order appointing a permanent supplemental trustee to perform the necessary investigation, evaluation, and recovery, or (3) an Order removing PBGC as statutory trustee and fiduciary of the Plan and appointing another trustee in its place to perform the statutory and fiduciary duties required of a trustee under the Employee Retirement Income Security Act of 1974 ("ERISA") and other federal law.

The Court held a bench trial on February 26-28, 2013, to resolve the issue of whether PBGC had breached its legal and fiduciary duties. Subsequently, the parties filed post-trial briefs and proposed findings of fact and conclusions of law. *See* Dkt. Nos. 118-121.

II. DISCUSSION

A. Legal principles

ERISA regulates the nation's employee benefit plans. "In enacting ERISA, Congress sought both to (1) provide minimum standards to assure the 'equitable character' and 'financial soundness' of ongoing private employee benefit plans and (2) guarantee payment of benefits to individuals whose plans are terminated." *Pineiro v. Pension Benefit Guaranty Corporation*, No. 96 Civ. 7392, 1997 WL 739581, *1 (S.D.N.Y. Nov. 26, 1997) (citing 29 U.S.C. § 1001(a)) (other citation omitted). Title IV of ERISA, 29 U.S.C. §§ 1301-1461, which is the title at issue in this case, establishes a plan termination insurance program. *See id.* (citations omitted). In Title IV, Congress sought to address the problem of pension plans being terminated without adequate funds to cover employees' vested interests. *See id.* (citation omitted). To this end, "Title IV creates a termination insurance program 'to protect employees against the loss of "nonforfeitable" benefits upon termination of pension plans that lack sufficient funds to pay such benefits in full.'" *Id.* at *2 (quotation and other citations omitted). To administer this plan, Congress created the PBGC, "an independently funded government corporation that exists 'to encourage the development of private pension plans and to ensure that plan participants receive the benefits promised by their employers.'" *Id.* (quotation and other citation omitted).

When a plan is terminated, "existing plan assets are used to pay benefits in six categories of priority." *Pineiro*, 1997 WL 739581, at *3 (citing [29 U.S.C.] § 1344(a)). If the plan does not have the funds to cover all benefits, the PBGC uses assets from the termination insurance fund to pay certain "guaranteed," nonforfeitable benefits in accord with Title IV's provisions and limitations. *See id.* (citing [29 U.S.C.] § 1322(b)) (other citation omitted).

ERISA also provides for the appointment of a trustee with regard to underfunded, terminated plans. *See* 29 U.S.C. § 1342(b)(1). PBGC may request that a court appoint it as trustee "in any case"; PBGC customarily makes such requests and courts generally grant them. *See id.* (quotation and other citations omitted). In general, a Title IV trustee must (1) "have plan records and assets transferred to itself as trustee;" (2)"limit payment of benefits under the plan to basic benefits as defined under ERISA;" (3) "require the plan sponsor, plan administrator, contributing or withdrawn employer, or employee organization representing plan participants to furnish any information reasonably needed to administer the plan;" and (4) undertake "any other acts necessary 'to continue operations of the plan without increasing the potential liability of the [PBGC], if such acts may be done under the provisions of the plan.'" *Id.* (quoting 29 U.S.C. § 1342(d)(1)(A)) (footnotes omitted). Furthermore, if the termination is effected by PBGC-instituted court order, "the trustee is given the additional power to liquidate plan assets, collect for the plan any amounts due to the plan, receive any payments made by the PBGC to the plan under Title IV, and commence, prosecute or defend on behalf of the plan any suit or proceeding involving the plan." *Id.* (citing [29 U.S.C.] § 1342(d)(1)(B)).

Section 1342(d)(3) also attaches fiduciary duties to the statutorily-appointed trustee under Title IV. Specifically, § 1342(d)(3) provides that,

> except to the extent inconsistent with the provisions of this chapter, or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as a trustee appointed under section 704 of Title 11, and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 102 of this title and under section 4975(e) of Title 26 (except to the extent that the provisions of this subchapter are inconsistent with the requirements applicable under part 4 of subtitle B of subchapter 1 of this chapter and of such section 4975).

29 U.S.C. § 1342(d)(3).

Thus, a Title IV trustee is subject to the fiduciary duties contained in Title I of ERISA as well as the duties ascribed to a trustee under section 704 of Title 11of the Bankruptcy Code, including the duty "to investigate the financial affairs of the debtor[,]" 11 U.S.C. § 704(a)(4).

Under Title I of ERISA, a fiduciary has several responsibilities, which are set forth in § 1104. Specifically, § 1104 provides that

> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and
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> (A) for the exclusive purpose of:
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> (i) providing benefits to participants and their beneficiaries; and
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> (ii) defraying reasonable expenses of administering the plan;
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> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct

> of an enterprise of a like character and with like aims;
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> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
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> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1104(a)(1).

However, § 1342(d) limits these fiduciary responsibilities insofar as they interfere with the implementation of other ERISA provisions. *See Pineiro*, 1997 WL 739581, *4. Therefore, if a fiduciary responsibility imposed by Title I is inconsistent with any provision of Title IV, a trustee must adhere to the Title IV requirements. *See id.*[1]

As the courts in this Circuit have held "[t]he duties of loyalty and prudence mandated in Section 404(a) [29 U.S.C. § 1104(a)] of ERISA include the 'duty to take reasonable steps to realize on claims held in trust.'" *Harris v. Koenig*, 815 F. Supp. 26, 31 (D.D.C. 2011) (quoting *Donovan v. Bryans*, 566 F. Supp. 1258 (E.D. Pa. 1983)). Furthermore, "[w]hen . . . a plan has potential claims against a third party, the 'trustees have a duty to investigate the relevant facts, to explore alternative courses of action and, if in the best interests of the plan participants, to bring suit. . . .'" *Id.* (quoting *McMahon v. McDowell*, 794 F.2d 100, 112 (3d Cir. 1986)).

As part of its duties as a Title IV trustee, PBGC determines the total amount of the terminated plan's assets of the date of plan termination. Once that value is set, it is not changed

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[1] In this case, Plaintiff asserts that Defendant breached its fiduciary duties by failing to "investigate the financial affairs" of the Plan and pursuing any claims the Plan had for the benefit of the Plan's former participants. There is no conflict between Defendant's Title I and Title IV duties in this regard.

by subsequent events, with rare exceptions, because any increase or decrease in the value of the assets occurring after the date of the plan's termination is credited to or suffered by PBGC. *See* Trial Transcript, February 28, 2013, Testimony of Carol Cohen ("Cohen Testimony") at 13:21-14:18; 39:8-25.

In addition, PBGC undertakes a duty of inquiry concerning the financial affairs of the terminated plan. *See id.* at 24:18-20. This duty of inquiry extends to the investigation and identification of potential claims on behalf of the plan, at least to the extent that there are red flags indicating that such claims may exist. *See id.* at 26:21-22. The extent of the trustee's duty of inquiry is determined by what the trustee knew or reasonably could be expected to know at the time of plan termination. *See id.* at 30:19-23. To the extent that the trustee identifies claims, those claims must be valued as of the date of plan termination. *See id.* at 38:24-39:4. The value of those claims must then be counted as plan assets for purposes of benefit calculations. *See id.* at 39:5-7. Finally, as "'long as the "prudent person" standard is met, ERISA does not impose a "duty to take any particular course of action if another approach seems preferable."'" *Id.* at 32 (quoting *Merino*, 452 F.3d at 182 (quoting *Diduck v. Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912, 917 (2d Cir. 1989)).

With these legal principles in mind, based on the credible evidence adduced at trial as well as the parties' stipulated undisputed facts, the Court finds the following facts and conclusions of law regarding the issue of whether PBGC breached its statutory and fiduciary duties as a Title IV trustee of the Plan as Rule 52 of the Federal Rules of Civil Procedure requires.

B. Findings of Fact

In 1958, US Airways, then known as Allegheny Airlines, established a defined benefit pension plan (the "Plan" or "Pilots' Plan") to compensate its pilots for their years of service and to provide them with security in their retirement years. *See* Stipulated Undisputed Facts at ¶ 10. The assets of the Pilots' Plan were held in a master trust (the "Master Trust") together with the assets of the three other defined benefit pension plans that US Airways sponsored – the Flight Attendants' Plan, the Maintenance Workers' Plan and the Certain Employees' Plan. *See* Stipulated Undisputed Facts at ¶ 12. From January 1, 1997, to December 31, 1999, the Pilots' Plan had investment gains of approximately $945 million. *See* Stipulated Undisputed Facts at ¶ 13. As of January 1, 2000, US Airways claimed in its ERISA filings with the Department of Labor that the Plan was 104% funded on an ongoing basis, and US Airways was not legally required to and did not make any contributions to the Plan during the next three years leading up to plan termination. *See* Stipulated Undisputed Facts at ¶¶ 15, 22; Trial Transcript dated February 27, 2013, Testimony of Steven Stanton ("Stanton Testimony") at 45:22-45:24; Trial Transcript dated February 27, 2013, Testimony of Neela Ranade ("Ranade Testimony") at 85:2-85:8. From December 31, 2000, to March 31, 2003, the Pilots' Plan had investment losses of approximately $325 million. *See* Stipulated Undisputed Facts at ¶ 14.

In August 2002, US Airways, along with its parent holding company and five affiliates, filed for bankruptcy under Chapter 11 of the Bankruptcy Code. *See* Stipulated Undisputed Facts at ¶ 16. On January 30, 2003, US Airways filed a notice of intent to terminate the Pilots' Plan under 29 U.S.C. § 1341. At that time, US Airways' actuaries estimated that US Airways would have to make an estimated $1.650 billion in contributions to the Pilots' Plan between 2003 and

2009 if the Plan was not terminated.[2] *See* Stipulated Undisputed Facts at ¶ 18. The pilots and their then-Union, the Air Line Pilots Association ("ALPA"), as well as the Retired Pilots Association of US Airways and a number of other pilot groups, opposed US Airways' motion to terminate the Plan. *See* Stipulated Undisputed Facts at ¶ 17; Trial Exhibit D-32, *In re US Airways Group, Inc.*, 296 B.R. 734, 744 (Bankr. E.D. Va. 2003).

On March 3, 2003, the United States Bankruptcy Court found that two factors caused the funding shortfall for all of the US Airways defined benefits plans: "First, protracted poor performance by the stock market had resulted in a significant decline in the value of the plan assets. Second, the decline in long-term interest rates to a 40-year historic low had increased the amount of the current liabilities for the plans, since current liabilities are determined based on the cost of an annuity to pay the specified benefit, and that cost, in turn, rises as long-term interest rates fall." *See* Trial Exhibit D-32, *In re US Airways Group, Inc.*, 296 B.R. 734, 738 (Bankr. E.D. Va. 2003). On March 7, 2003, the Bankruptcy Court ruled that US Airways had met the standards for a distress termination of the Pilots' Plan under 29 U.S.C. § 1341(c). *See* Stipulated Undisputed Facts at ¶ 19. The Plan terminated with a termination date of March 31, 2003. *See* Stipulated Undisputed Facts at ¶ 20.[3]

When a pension plan covered by Title IV terminates without sufficient assets to pay all of its promised benefits, PBGC is the guarantor of plan benefits payable up to statutory limits. *See* Stipulated Undisputed Facts at ¶ 4. When the Plan was terminated in 2003, PBGC was

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[2] This included an estimated $51 million contribution in 2003 and an estimated $525 million contribution in 2004. *See* Stipulated Undisputed Facts at ¶ 18.

[3] When US Airways emerged from bankruptcy in 2003, the only plan in the Master Trust that was terminated was the Pilots' Plan. *See* Stipulated Undisputed Facts at ¶ 21.

appointed statutory trustee of the Plan. *See* Stipulated Undisputed Facts at ¶ 20.[4]

PBGC concluded that the amount of underfunding of the Plan was approximately $2.2 billion on a termination basis. *See* Stipulated Undisputed Facts at ¶ 23. PBGC further determined the following: (1) the Plan's unfunded benefit liability on a PBGC termination basis increased from $586 million as of December 31, 2000, to $2.2 billion on March 31, 2003, the Plan's termination date, *see* Trial Exhibit D-20; (2) the change in PBGC interest rates from 7% on December 31, 2000, to 5.1% on March 31, 2003, accounted for $628 million of the increase in the Plan's unfunded benefit liability on a PBGC termination basis, *see* Trial Exhibit D-20, Ranade Testimony at 63:1-63:23; (3) the change in discounting period from December 31, 2000, to March 31, 2003, accounted for $346 million of the increase in the Plan's unfunded benefit liability on a PBGC termination basis, *see* Trial Exhibit D-20, Ranade Testimony at 64:4-64:20; (4) accrual of benefits from December 31, 2000, to March 31, 2003, accounted for $575 million of the increase in the Plan's unfunded benefit liability on a PBGC termination basis, *see* Trial Exhibit D-20, Ranade Testimony at 64:21-66:4; and (5) investment loss from December 31, 2000, to March 31, 2003, accounted for $325 million of the increase in the Plan's unfunded liability on a PBGC termination basis, *see* Trial Exhibit D-20, Ranade Testimony at 66:15-67:12.

Based on PBGC's valuations and calculations as of the termination date, the Plan's assets

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[4] Section 1342(b)(1) provides that "[PBGC] may request that it be appointed as trustee of a plan in any case." 29 U.S.C. § 1342(b)(1). There has not been any case in which PBGC has not been appointed trustee for a terminated pension plan that had insufficient assets to cover guaranteed benefits. *See* Trial Transcript, February 28, 2013, Testimony of Carol Cohen ("Cohen Testimony") at 9:13-9:23. Nor has any court ever replaced PBGC as trustee for a terminated pension plan. *See id.* at 9:25-10:2. A practical reason why PBGC would be appointed trustee of a terminated pension plan is that having two separate entities serve as guarantor and trustee would greatly add to the cost and time necessary to administer the termination insurance program. *See id.* at 10:3-11:5.

were sufficient to fund all benefits through statutory priority category 3, but only $40 million of the more than $500 million of guaranteed benefits in statutory priority category 4 calculated by PBGC. *See* Stipulated Undisputed Facts at ¶ 24.

PBGC engaged an independent contractor, IMRG, to conduct a plan asset audit of the Plan. *See* Stipulated Undisputed Facts at ¶ 26. The purpose of the plan asset audit was to determine the fair market value of the Plan's assets and liabilities as of March 31, 2003, the plan termination date. *See* Trial Transcript dated February 26, 2013, Testimony of Michelle Gray ("Gray Testimony") at 65:16-65:19.[5]

As part of the plan asset audit, IMRG analyzed the Plan's trust document and determined that the Plan's previous trustee had had a great deal of authority regarding investment and sales. *See* Trial Transcript, February 26, 2013, Testimony of Richard Holbrook ("Holbrook Testimony") at 80:25-81:9. The trustee had responsibility and authority to make the determination of investments and types of investments. *See id.* at 81:23-82:1. IMRG also looked for breaches of fiduciary duty, such as a trustee misappropriating pension assets. *See id.* at 86:11-87:22. IMRG did not identify any potential claims that existed on behalf of the Plan as of the date of termination and, therefore, did not value any such claims as Plan assets.[5] *See*

[5] In performing a plan asset audit, PBGC contractors, such as IMRG, are expected to follow PBGC's written procedures and also to exercise their judgment as to what additional steps they might need to take to satisfy an objective. *See* Gray Testimony at 33:4-33:16. PBGC's Process 15, *see* Trial Exhibit P-4, sets forth the procedures for a plan asset audit and includes procedures to identify potential instances of fiduciary breach, fraud, or conflict of interest. *See* Gray Testimony at 33:7-35:4. PBGC does not review pre-termination actuarial assumptions or investment strategies to analyze whether they constitute a fiduciary breach claim. *See id.* at 66:9-67:4.

[5] In order for PBGC to assign any value to be assessed and included as a plan asset for an (continued...)

Stipulated Undisputed Facts at ¶ 26. As a result of its plan asset audit of the Plan, which it concluded in January 2006, IMRG determined that the Plan had net assets of $1,197,374,604 as of the date of termination. *See* Trial Exhibit D-23, Plan Asset Audit at 5; Stipulated Undisputed Facts at ¶ 26.

On June 18, 2009, Plaintiff's counsel wrote to PBGC, stating that Plaintiff "suspect[ed] that, before the [US Airways] bankruptcy proceeding and ensuing termination, the Plan's fiduciaries breached their duties by transferring assets out of the Plan and by making improper investments." *See* Trial Exhibit P-24. In response to the June 18, 2009 letter, PBGC's General Counsel wrote to Plaintiff's counsel on July 9, 2009, to request more specific information. *See* Trial Exhibit P-24. On July 17, 2009, Plaintiff's counsel wrote a second letter, identifying six issues. *See* Trial Exhibit P-24. In 2009-2010, Ms. Hagan, an employee of PBGC, conducted an investigation of the allegations in Plaintiff's counsel's June 18, 2009, and July 17, 2009 letters. *See* Trial Transcript dated February 26, 2013, Testimony of Nicole Hagan ("Hagan Testimony") at 92:11-92:17. She did not issue a subpoena to US Airways for documents because US Airways representatives had provided documents already and had searched at length for other documents. *See id.* at 15:2-16:20.[6]

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[5](...continued)
alleged fiduciary breach, there must exist an actual claim. *See* Gray Testimony at 65:20-66:21.

[6] In 2009, Nicole Hagan had completed an investigation into the allegations that Plan assets had been improperly transferred to a different US Airways benefit plan ("the Davis claim"). *See* Hagan Testimony at 12-14. During that investigation, she obtained documents from US Airways and State Street and spoke to the Plan's former actuary. *See* Hagan Testimony at 13-14. Ms. Hagan issued a report on October 14, 2009, concluding that there was no evidence of any improper transfers of assets between the plans; the General Counsel concurred in the investigator's recommendations to take no further action in this matter. *See* Trial Exhibit D-1.

(continued...)

The Plan's investment policy did not prohibit any specific type of investment. *See* Hagan Testimony at 18:4-18:14; Stanton Testimony at 85:5-85:14 (stating that the Plan's investment policy did not prohibit investments in any specific stocks, bonds, private equity or futures). Ms. Hagan concluded, with assistance from PBGC's Chief Investment Officer, that the Plan's investment portfolio was managed within the guidelines provided in the Plan's investment policy. *See* Hagan Testimony at 18:15-19:5. Ms. Hagan also concluded that the portfolio of the Plan's assets was well-diversified and that the Plan's investment policy permitted the specific investments that Plaintiff's counsel had identified in his July 17, 2009 letter. *See id.* at 19:6-19:12. Ms. Hagan concluded that the investment in Alchemy Partners, which Plaintiff's counsel identified in his July 17, 2009 letter, was within the parameters of the investment policy and the private equity investment policy. *See id.* at 19:13-19:20. Ms. Hagan found no improper relationship between US Airways and Tiger Management and no evidence of a relationship between Tiger Management and the Plan. *See id.* at 19:21-19:24. She found no evidence of impropriety with the Plan involving a September 17, 2001 equity swap because the Master Trust held no shares of US Airways stock. *See id.* at 19:25-20:3.

Ms. Hagan issued a report on November 24, 2010, concluding that there was no evidence of fiduciary breach related to the allegations in Plaintiff's counsel's letters dated June 18, 2009, and July 17, 2009.[7] The General Counsel concurred. *See* Trial Exhibit P-26.

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[6](...continued)
On January 28, 2013, in the related case of *Davis v. PBGC*, this Court granted the parties' joint motion to dismiss the Davis claim. *See Davis v. PBGC*, No. 1:08-CV-1064, Dkt. No. 125.

[7] Prior to issuing her report, Ms. Hagan learned about a Department of Labor investigation of the Plan. *See* Hagan Testimony at 20:8-22:12. In a report dated March 23,
(continued...)

Thereafter, PBGC engaged an independent contractor, Crowe Horwath, to conduct a second asset valuation of the Plan, which Crowe Horwath completed on September 7, 2012. *See* Dkt. No. 92-1. PBGC had arranged for the Crowe Horwath asset valuation only because another US Airways pension plan, whose assets were held in the same Master Trust as the Pilots' Plan, was less well-funded than the Pilots' Plan so its participants potentially could have received increased benefits if its assets had a higher value. *See* Gray Testimony at 67:20-68:10. Crowe Horwath concluded that the Plan had net assets of $1,221,396,506 as of the date of the Plan termination and, like IMRG, did not identify any potential claims that existed on behalf of the Plan as of the date of termination and, therefore, there were no such claims to value as Plan assets. *See* Stipulated Undisputed Facts at ¶ 34.

In conformance with Crowe Horwath's asset valuation procedures, its staff looked for any indicators of fiduciary breach, conflict of interest and fraud as they performed the asset valuation. *See* Trial Transcript, February 26, 2013, Testimony of James Rasmussen ("Rasmussen Testimony") at 34:3-34:23, 46:11-46:18; Gray Testimony at 49:15-18. Furthermore, if Crowe Horwath became aware of any fiduciary breach or conflict of interest, its staff was instructed to identify any indicators of problems, report them, and bring them to the attention of PBGC's staff, who would report them to PBGC's Office of General Counsel. *See*

[7](...continued)
2004, the Department of Labor's Employee Benefits Security Administration analyzed the Plan's investments and determined that there "appear[ed] to be no significant difference in the performance of the [Pilots'] Plan's investments for the period 2000-2001, and the experience of comparable market investments during the same timeframe." *See* Trial Exhibit D-2 at PBGC-026454. In its report, the Department of Labor used benchmarks for its analysis that were contained in the Plan's investment policy. *See* Trial Exhibit D-2 at PBGC-026453- to 26454; Trial Exhibit P-27 at PBGC-025436; Stanton Testimony at 9:6-9:25. Ms. Hagan did not obtain a copy of thsi report until December 2012. *See* Hagan Testimony at 21:16-21:17.

Gray Testimony at 52:20-53:7. Staff were also instructed to document any fiduciary breach or conflict of interest in the fiduciary breach checklist. *See id.* at 46:1-46:10. Crowe Horwath submitted to PBGC a preliminary version of a fiduciary breach checklist, *see* Trial Exhibit P-8, and a final version, *see* Trial Exhibit P-15. *See* Gray Testimony at 53:11-55:2. Neither of the checklists indicated any instances of fiduciary breach or conflict of interest. *See* Gray's Testimony at 46:1-10.

Finally, the only material difference in asset value between the 2012 Crowe Horwath asset valuation and the 2006 IMRG valuation was due to IMRG's use of data for about 40 limited partnerships that was three to six months old in contrast to Crowe Horwath's obtaining more current information as of the date of plan termination. *See* Gray Testimony at 68:22-70:5. Crowe Horwath's final valuation was an increase of 2.33% over IMRG's 2006 valuation. *See* Dkt. No. 92-2 at p.3 at 11.

C. Conclusions of Law

In its post-trial brief, Plaintiff argues, as it has throughout this litigation, that Defendant PBGC did not fulfill its fiduciary duties because it failed to investigate and value potential claims against the Plan's former sponsor, other fiduciaries and service providers for possible misconduct that caused the Plan to fail with $2.2 billion in unfunded benefit liabilities. *See* Dkt. No. 121 at 6. In support of this contention, Plaintiff's expert, Mr. Stanton, testified that he had identified nine "red flags," which he asserted, warranted investigation:

> (1) the funded status of the Plan declined, *see* Stanton Testimony at 14:3-17:9;
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> (2) the Plan sponsor did not make contributions, *see id.* at 17:12-

17:17, 18:19-18:21, 19:1-19:7;

(3) the Plan had investment losses, *see id.* at 24:12-24:18, 26:14-28:16, 33:10-34:2;

(4) the investments in equities declined, *see id.* at 28:20-30:17;

(5) the Pilots' Plan's percentage in the Master Trust declined, *see id.* at 38:20-39:10;

(6) the investments in hard-to-value assets increased, *see id.* at 40:6-41:24;

(7) the Plan used an actuarial assumption for expected rate of return of 9.5% in 2000 to 2002, and reduced that to 8% in 2003, *see id.* at 48:18-50:11;

(8) the Plan used an actuarial assumption for retirement age of 60, *see id.* at 53:21, and used actuarial smoothing techniques, *see id.* at 56:18-58:2; and

(9) there was a change in the Plan's trustee before termination, *see id.* at 73:3-74:2.

The evidence adduced at trial clearly explained why none of these purported "red flags" were, in fact, "red flags" under the circumstances of this case. Specifically, the credible evidence showed that

(1) it was normal for a significant increase in underfunding to occur in the years leading up to a plan's termination, *see* Cohen Testimony at 17:21-18:9;

(2) US Airways was not legally required to make contributions to the Plan from 2000-2003 because the Plan had a credit balance of $56 million in 2000 and $61 million in 2001, and a plan sponsor may use a credit balance instead of making a contribution that is otherwise required, *see* Stanton Testimony at 45:22-45:24, 41:23-43:9; Ranade Testimony at 85:2-85:8;

(3) "protracted poor performance by the stock market had resulted in a significant decline in the value of the plan assets [and] the decline in long-term interest rates to a 40-year historic low had

increased the amount of the current liabilities for the plans, since current liabilities are determined based on the cost of an annuity to pay the specified benefit, and that cost, in turn, rises as long-term interest rates fall[,]" *see* Trial Exhibit D-32, *In re US Airways Group, Inc.*, 296 B.R. 734, 738 (Bankr. E.D. Va. 2003);

(4) the Plan's investment policy did not prohibit any specific type of investment, *see* Hagan Testimony at 18:4-18:14; Stanton Testimony at 85:5-85:14; the Plan's investment portfolio was managed within the guidelines provided in the Plan's investment policy, *see* Hagan Testimony at 18:15-19:5; and the portfolio of the Plan's assets were well-diversified, *see* Hagan Testimony at 19:6-19:12;

(5) the decline in the Plan's share of the Master Trust from 66% to 44% resulted from the merger into the Master Trust of another US Airways pension plan, the Certain Employees Plan, with assets of $1 billion; this merger enlarged the total Master Trust assets and explained the resulting smaller portion owned by each of the component plans, *see* Trial Exhibit D-25 at 11; Stanton Testimony at 67:1-73:2;

(6) the increase in the Plan's proportion of hard-to-value assets between December 31, 1999, and December 31, 2000, was explained by the August 2000 merger into the Master Trust of the Certain Employees Plan with assets of $1 billion, some of which may have been invested in hard-to-value assets, *see* Stanton Testimony at 38:15-38:24;

(7) in 2000, 25 of the top 50 plans analyzed in the Milliman 2001 report used an actuarial assumption for expected rate of return of 9.5% or higher, *see* Trial Exhibit D-28; Stanton Testimony at 23:16-23:20; 13 of the top 50 plans used 10%, *see* Stanton Testimony at 23:21-23:25; in 2001, 29 of the top 50 plans analyzed in the Milliman 2002 report used an actuarial assumption for expected rate of return of 9.5% or higher, *see* Trial Exhibit D-29; Stanton Testimony at 24:1-24:24; in 2001, United Airlines used an actuarial assumption for expected rate of return of 9.75%, *see* Trial Exhibit D-29; Stanton Testimony at 24:25-25:4; in the Milliman 2001 report, the average rate of return for 2000 was stated to be 9.36%, while in the Milliman 2002 report, the average rate of return for 2000 was stated to be 9.38%, *see* Trial Exhibit D-28; Trial Exhibit D-29; Stanton Testimony at 25:5-26:2; in 2002, 28 of the 100 largest plans analyzed in the Milliman 2003 report used an

actuarial assumption for expected rate of return of 9.5% or higher, *see* Trial Exhibit D-30; Stanton Testimony at 26:18-27:11; and the Milliman 2004 report stated that more than 75% of the companies lowered their expected rate of return of plan assets during 2003, for a median of 8.55%, *see* Trial Exhibit D-31; Stanton Testimony at 29:24-30:9;

(8) Plan sponsors do not establish actuarial assumptions; actuaries do; and these assumptions are required to reflect the actuary's professional judgment and best estimate, *see* Cohen Testimony at 43:20-44:5, 44:23-45:2; retirement age is an actuarial assumption, *see* Stanton Testimony at 38:25-39:9; and smoothing is an accepted and established actuarial method to reduce volatility in pension plan funding, and in 2000 and 2001 almost half of the top plans used smoothing techniques in their actuarial analysis, *see* Stanton Testimony at 56:18-57:4, 44:4-44:11; and

(9) the change in the Plan's trustee from Wachovia to State Street resulted from State Street's acquisition of Wachovia's trust business, *see* Trial Exhibit D-27; Stanton Testimony at 73:3-76:2.

In addition, as discussed, PBGC prudently conducted two plan asset audits of the Plan, one in 2006 and the second in 2012. In both of these audits, the auditors looked for breaches of fiduciary duty and found none. *See* Holbrook Testimony at 86:11-87:22; Gray Testimony at 49:15-49:18. Moreover, in response to letters from Plaintiff's counsel in 2009, PBGC conducted an investigation of Plaintiff's allegations and concluded that there was no evidence of any fiduciary breaches. Despite Plaintiff's assertions to the contrary, the Court concludes that PBGC made all reasonable attempts to investigate the financial affairs of the Plan to identify any possible fiduciary breaches and thoroughly investigated any claims that were brought to its attention.

Thus, based on the facts and circumstances of this case, the Court finds that PBGC has met the prudent person standard required of Title IV trustees. Therefore, the Court concludes that Plaintiff has failed to prove, by a preponderance of the evidence, that PBGC breached any of its fiduciary duties with respect to the Plan.

III. CONCLUSION

After thoroughly reviewing the entire record in this matter, the Court hereby

ORDERS that the Clerk of the Court shall enter **JUDGMENT** in favor of Defendant and close this case.

IT IS SO ORDERED.

Dated: June 20, 2014
Syracuse, New York

Frederick J. Scullin, Jr.
Senior U.S. District Judge