IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| US AIRLINE PILOTS ASSOCIATION,<br><br>Plaintiff,<br><br>v.<br><br>PENSION BENEFIT GUARANTY CORPORATION,<br><br>Defendant. | ) | Civil Action No. 1:09-cv-01675 (FJS/JMF) |

**OPPOSITION OF PENSION BENEFIT GUARANTY CORPORATION TO PLAINTIFF'S MOTION TO EXCLUDE THE TESTIMONY OF CAROL CONNOR COHEN**

## INTRODUCTION

Plaintiff US Airline Pilots Association ("USAPA") seeks to have the expert testimony of Carol Connor Cohen excluded in advance of trial because Ms. Cohen's report offers legal opinions about whether PBGC had an obligation to investigate and pursue potential breaches by prior fiduciaries, and if so, whether PBGC met any such obligation.[1] Ms. Cohen's report addresses the precise issues framed by the Court, the need for expert testimony about "what was appropriate, and what should have been done . . ." by PBGC. These are inescapably mixed questions of law and fact. Because in this bench trial the Court has complete discretion to admit expert testimony and accord it the weight it is due, a pretrial ruling striking the proposed testimony is not required by law, and indeed would be wholly inappropriate.

[1] *See* Dkt. #101-1, Mem. in Support of Plaintiffs' Mot. To Exclude Testimony of Carol Connor Cohen ("Mem.").

## ARGUMENT

### A. MS. COHEN'S TESTIMONY ADDRESSES THE ISSUE FRAMED BY THE COURT.

In the status conference on November 2, 2012, the Court stated: "I need to have some testimony on this, expert testimony, to tell me what was done, what was appropriate, and what should have been done, maybe shouldn't have been done."[2] The issue the Court identified was whether there was "a proper investigation by the PBGC." *Id.* at 6:10.

Because PBGC is a United States government agency charged with enforcing Title IV of ERISA, 29 U.S.C. §§ 1301-1461, its duties must be understood within that statutory context. And when the agency serves as statutory trustee of a terminated pension plan – which it has done here – determining its duties is a legal question requiring consideration of both Title I, 29 U.S.C. §§ 1001-1191c, and Title IV of ERISA.

Thus, while USAPA discusses PBGC's "legal and fiduciary duty" (Mem. at 1) as if they were separate concepts, PBGC's duties can be understood only in the context of the law that establishes its obligations. And while USAPA complains that Ms. Cohen addresses "the standards governing PBGC's conduct" (Mem. at 2), the Court asked about what was appropriate for PBGC to do, and that is inextricably intertwined with the question of what PBGC was obligated to do.[3]

[2] Dkt. #101-3, Plaintiff's Exhibit A, Transcript of status conf. (Nov. 2, 2012) at 8:17-20.

[3] In contrast, the expert USAPA retained, a Certified Public Accountant, testified at his deposition that he has no knowledge about PBGC's obligations or internal procedures, and instead offered his admittedly "subjective" opinions about auditing steps that PBGC "could have taken." *See* Stanton dep. at 83, 88 (excerpts attached hereto as Exhibit 1).

## B. THE COURT HAS COMPLETE DISCRETION TO ADMIT EXPERT LEGAL TESTIMONY AND ACCORD IT THE WEIGHT IT IS DUE.

A court has wide latitude in admitting expert testimony, and this latitude is "at its zenith" when the court is conducting a bench trial.[4] This Court recognized its broad discretion with respect to expert legal opinions in *LRC Electronics, Inc. v. John Mezzalingua Associates, Inc*., holding that it "has complete discretion to adopt [an] expert legal opinion as its own, to find guidance from it, or to ignore it entirely, or even to exclude it."[5]

In ignoring this Court's prior precedent, and arguing otherwise, USAPA cites *Burkhart v. WMATA*.[6] But *Burkhart* was a jury trial, not a bench trial. USAPA also cites to *Convertino v. U.S. Dep't of Justice* (Mem. at 3), a district court decision that is distinguishable because in that case, the expert's report "offer[ed] no contents of standards, customs, or procedures to be applied"; in any event, the *Convertino* decision acknowledged that "the line between an inadmissible legal conclusion and admissible assistance to the trier of fact in understanding the evidence . . . is not always bright."[7] Finally, USAPA's citations to *Iacangelo v. Georgetown Univ*., 560 F. Supp. 2d 53 (D.D.C. 2008), and *United States v. Caputo*, 517 F.3d 935 (7th Cir. 2008), are inapposite. Both involved jury trials where the risk of jury confusion was great.

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[4] *United States v. Kalymon*, 541 F.3d 624, 636 (6th Cir. 2008). *Accord Bank of New York Mellon Trust Co. v. Solstice ABS CBO II*, No. 09-civ-9415, 2012 WL 6634138, at *7 (S.D.N.Y. Dec. 20, 2012); *Francis v. AT&T Mobility LLC*, No. 07-cv-14921, 2008 WL 5212171, at *1 (E.D. Mich. Dec. 12, 2008).

[5] 974 F. Supp. 171, 183 n.17 (N.D.N.Y. 1997), quoting *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 983 (Fed. Cir. 1995).

[6] Mem. at 2-3, citing 112 F.3d 1207 (D.C. Cir. 1997).

[7] 772 F. Supp. 2d 10, 12, 13 (D.D.C. 2010), citing *Burkhart v. WMATA*, 112 F.3d at 1212. To the extent USAPA complains that Ms. Cohen's opinions represent "legal" conclusions because they refer to the statutory language upon which her conclusions are based, Mem. at 4, PBGC believes the Court is well-equipped to accord her testimony the appropriate weight. If necessary to avoid any confusion, however, Ms. Cohen's testimony at trial can be expressed as "standards" applicable to PBGC rather than "legal" assertions.

### C. EXPERT TESTIMONY ADDRESSING THE OBLIGATIONS OF AN ERISA FIDUCIARY GENERALLY, AND PBGC SPECIFICALLY, IS APPROPRIATE.

USAPA's main argument is that an expert may not address "questions of law" or render "legal conclusions." However, experts are "routinely allowed to render opinions on the standard of care applicable to a fiduciary in a particular situation, [and] how a fiduciary's actions deviated from the applicable standard of care."[8] Indeed, as a court in this district recently recognized in another ERISA fiduciary breach case, "expert witnesses, in all types of litigation, render an opinion as to what the applicable standard of care is and whether it has been complied with."[9] In such cases, "*the expert has to explain what the law is, because the standard of care is defined in part by the law*."[10]

The specialized nature of a legal regime and the complexity of its concepts can make expert legal testimony necessary. In *United States v. Offill*, the Fourth Circuit found it "difficult to imagine how the government could have presented its case without the assistance of expert testimony to explain the intricate regulatory landscape and how [practitioners] function within it."[11] The Supreme Court long ago recognized ERISA as a "comprehensive and reticulated statute."[12] Like the insurance law that the First Circuit addressed in *Peckham v. Continental Casualty Insurance Co.*, ERISA is "a complicated subject" that "has developed a patina of

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[8] *Hans v. Tharaldson*, No. 3:05-cv-115, 2011 WL 6937598, at *1 (D.N.D. Dec. 23, 2011) (challenge to ERISA fiduciary's investment strategy).

[9] *Harris v. Koenig*, No. 02-618 (GC), 2011 WL 1838483, at *1 (D.D.C. May 16, 2011).

[10] *Waco Int'l v. KHK Scaffolding Houston Inc*., 278 F.3d 523, 533 (5th Cir. 2002) (emphasis added).

[11] 666 F.3d 168, 175 (4th Cir. 2011).

[12] *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980).

custom and usage."[13] Experts, such as "attorneys versed in the nuances of [applicable] law," "could reasonably be expected to shed some light in a shadowy domain."[14]

### D. USAPA HAS NOT ESTABLISHED THAT MS. COHEN'S TESTIMONY IS INADMISSIBLE.

As the D.C. Circuit has stated, under Fed. R. Evid. 702, "we apply a two-part test for determining the admissibility of expert testimony: the witness (1) must be qualified, and (2) must be capable of assisting the trier of fact."[15] And an expert opinion "is not objectionable just because it embraces an ultimate issue," provided that it is otherwise admissible. Fed. R. Evid. 704(a).

USAPA has not challenged Ms. Cohen's qualifications.[16] Nor has USAPA asserted that Ms. Cohen cannot assist the Court in addressing the proper scope of PBGC's investigation in these unique circumstances. USAPA is left with the assertion that Ms. Cohen will "offer a legal conclusion on the ultimate issue in this case." Mem. at 2. Whether she does or not, this is explicitly permitted by the Rules.

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[13] 895 F.2d 830, 837 (1st Cir. 1990).

[14] *Id. Accord* 29 Wright & Gold, Fed. Prac. & Proc. Evid. § 6264 (1st ed. 1997 & Supp. 2012) at n.36 ("[W]here the subject is the application of some complex regulatory or legal standard to a specific factual background," courts "seem more open to the admission of expert legal opinions." In that context, "the opinions often involve questions of law and fact that overlap to the extent they are virtually indistinguishable.").

[15] Fed. R. Evid. 702; *Burkhart v. WMATA*, 112 F.3d 1207, 1211 (D.C. Cir. 1997).

[16] USAPA does assert that Ms. Cohen is biased in favor of PBGC. *See* Mem. at 2, 6 n.2. In fact, Ms. Cohen is an attorney who has specialized in ERISA law for more than thirty-six years, resigned her position with PBGC eighteen years ago, and currently has legal matters pending for clients which are in opposition to PBGC. *See* Dkt. #101-4, Plaintiffs' Exhibit B, Cohen Report at 3-5; Cohen deposition at 10-14 (excerpts attached hereto as Exhibit 2).

## CONCLUSION

For the reasons detailed herein, USAPA's motion to exclude the testimony of Carol Connor Cohen should be denied.

Date: February 8, 2013

Respectfully submitted,

/s/ Joseph M. Krettek


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