

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

United Pilots for Justice, Inc., et al.,)	
)	
)	
Plaintiffs,)	
vs.)	Civil Action No.1:10-CV-02324-JEB
)	
United Airlines Corporation, et al.,)	The Honorable James E. Boasberg
)	
Defendants.)	ORAL ARGUMENT REQUESTED

**PLAINTIFFS’ MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

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INTRODUCTION

Plaintiffs are participants or beneficiaries in the United Air Lines Pilots Defined Benefits Plan (“Plan” or “Pension Plan”). This Pension Plan was terminated as an involuntary termination under 29 U.S.C. §1342(c)¹ (“Plan Termination” or “Pension Plan Termination”).² Plaintiffs bring this action, as individual plan participants, to challenge the net worth information presented by United during Plan Termination proceedings. 29 C.F.R. §4062.4 requires that the net worth of United and each of its controlled group be disclosed to PBGC at Fair Market Value. 29 C.F.R. §4062.4(c) states, in part: “A person’s *net worth is equal to its fair market value* and fair market value shall be determined *on the basis of the factors set forth below*, to the extent relevant; different factors may be considered with respect to different portions of the person's operations.” This section goes on to specify various factors for determining fair market value, all of which are the traditional valuation standards typically encountered in valuation of assets.³

It turns out that a member of United’s controlled group, United Loyalty Services, LLC, held an asset whose value was misrepresented by United—the United frequent flyer Mileage Plus program (hereinafter, the “Mileage Plus Asset”). United failed to disclose the Mileage Plus Asset at its Fair Market Value, opting instead to disclose only its “book value”—an internal value assigned by United for its own accounting purposes. While the evidence in this case shows that United Loyalty Services (and the Mileage Plus Asset) was

¹ 29 U.S.C. §1342 is also referred to as ERISA §4042, a part of ERISA Title IV. The provisions of ERISA Title IV are found within 29 U.S.C. Subchapter III. Hereinafter, Plaintiffs will restrict all ERISA citations to the relevant section of United States Code (29 U.S.C. §1301 et seq.) unless ERISA Title IV is referred to generally.

² The termination order was entered by the U.S. District Court for the Northern District of Illinois, (Lefkow, J.), on June 13, 2006. See discussion *infra* pp. 10-12.

³ See discussion, *infra* pp. 10-11 regarding fair marker value factors under 29 C.F.R. §4062.4(c).

worth upwards of \$7.5 billion at fair market value, United said it had a *negative* \$397 million net worth, at “book value.” This is the information originally filed by United in its bankruptcy proceedings, and it never bothered to correct the value standard as required by ERISA statute and regulations when it disclosed asset values to PBGC in connection with Pension Plan Termination. This violation of ERISA disclosure law is the core of Plaintiffs’ case before this Court.

Plaintiffs first made informal inquiries, and then followed with written discovery to PBGC regarding the documents filed by United concerning the value of United Loyalty Services. On February 11, 2011, Plaintiffs received back written responses from PBGC that revealed, for the first time to Plaintiffs’ knowledge, that United had failed to disclose the Mileage Plus Asset at fair market value to the PBGC and, instead, had disclosed only “book value.” At the bottom of page 108 of a bankruptcy court document filed with PBGC by United regarding the value of Mileage Plus Asset is the following boilerplate disclaimer language:

Current Market Value. It would be prohibitively expensive, unduly burdensome and an inefficient use of estate assets for the Debtors to obtain current market valuations of all of their assets. Accordingly, unless otherwise indicated, *net book values* are reflected on the Debtors' Schedules and Statements. *For this reason, amounts ultimately realized will vary from net book value and such variance may be material.*

Emphasis added.

Plaintiffs allege, based on this document, that United misrepresented the value of United Loyalty Services (including the Mileage Plus Asset) to PBGC at book value instead of fair market value, and thereby violated 29 U.S.C. §1362 and other ERISA provisions.

In its Motion to Dismiss arguments, United tries to excuse its failure to disclose

complete and accurate net worth information by relying on a PBGC regulation (29 C.F.R. §4062.6(c)) that says PBGC *may* make net worth determinations based on partial information in the event the plan sponsor does not timely provide complete information for all members of the controlled group. But this is not a correct reading of the full regulation. *See* 29 C.F.R. §4062.6(d). Just because PBGC *may* proceed with plan termination based on partial information provided by a plan sponsor, this does not excuse the plan sponsor from providing full and accurate information in the first instance. United’s argument, that this PBGC regulation excused its duty to provide fair market values for United Loyalty Services, also undermines its res judicata and bankruptcy defenses by showing that United lacks “clean hands” to raise these equitable defenses. In rejecting a res judicata defense in a closely analogous ERISA case, *Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522, 527 (7th Cir. 1985), the Seventh Circuit Court of Appeals held: “[t]he failure of one legal safeguard (the trustee’s duty to investigate) is not a very good reason to extinguish another legal safeguard (the seller’s duty to tell the whole truth).” *Id.* United’s res judicata arguments suffer the same defect. “The lack of one legal safeguard” (a regulation allowing PBGC to make net worth determinations based on partial information) “is not a very good reason to extinguish another legal safeguard ([United’s] duty to tell the whole truth.)” *Id.* Beyond this legal issue, numerous disputed issues of fact and law exist in this case.⁴ Also, where legal or factual disputes exist with respect to the scope of a release or res judicata effect of a prior court order, dismissal of a complaint on a motion to dismiss is improper. *Harris v. Koenig*, 722 F. Supp. 2d 44, 54-55, (D.D.C. 2010) (Kessler, J.).⁵ Numerous such

⁴ *See* discussion *infra* pp. 35-36.

⁵ Also see an earlier opinion by Judge Kessler in the same case: *Harris v. Koenig*, 602 F. Supp. 2d 39, 54 (D.D.C. 2009)(“[t]here are at the very least factual disputes as to whether Plaintiffs and other Plan

issues exist in this case. For these reasons, the Court should deny Defendants' Motion to Dismiss.

FACTS

1. In 1941, United Airlines first offered a retirement benefit plan for its pilots. Upon passage of ERISA in 1974, the retirement plan became defined and governed under ERISA. UAL Corp. was the ERISA-defined sponsor of the Plan. Fiduciaries of the Plan were UAL Corp, its Board of Directors and other Plan-identified fiduciaries.⁶ The Plan continued in force, uninterrupted, until its termination in 2005.⁷ (Defendants are collectively referred to as "United.")
2. Plaintiffs are participants or beneficiaries under the Plan (hereinafter, "Plan Participants").⁸
3. United remained the Plan sponsor until the Plan was terminated under 29 U.S.C. §1342 by order of the U.S. District Court, Northern District of Illinois on June 13, 2006 ("Plan Termination").⁹
4. Prior to Plan Termination, each retired Plaintiff received Plan-guaranteed benefits, as amended, under the Plan according to the options and features selected upon retirement, and based upon various other factors, such as years of service and pay scale upon retirement.¹⁰
5. In connection with Plan Termination, United, the Plan sponsor, was required under 29 U.S.C. §1362 and PBGC Regulation 29 C.F.R. §4062.4 to disclose the fair market value

participants were represented adequately...Moreover, there are factual and legal disputes 'as to whether the release even applies to Plaintiffs' ERISA claims.'")

⁶ 2nd Amd. Compl., ¶¶28-31; *see also* 2nd Amd. Compl., Ex. D, Doc. # 9-05, ¶12-1.

⁷ 2nd Amd. Compl., ¶35.

⁸ 2nd Amd. Compl., ¶25.

⁹ 2nd Amd. Compl., ¶39.

¹⁰ 2nd Amd. Compl., ¶38.

of its assets, and the assets of its “controlled group.”¹¹

6. United Loyalty Services, LLC was a member of United’s “controlled group” for the purposes of 29 U.S.C. §1362. United Loyalty Services owned an asset related to UAL Corp’s frequent flyer program known as Mileage Plus (the “Mileage Plus Asset”).¹²
7. During or about Plan Termination, United filed documents with PBGC disclosing the value of the United Loyalty Services (and the Mileage Plus Asset) as a \$397 million liability. This was the “book value” of Mileage Plus assigned by United.¹³ However, 29 C.F.R. §4062.4(c) requires disclosure of assets at fair market value, defined more precisely in §4062.4(c)(1-8)(“Fair Market Value”).¹⁴
8. During or about Plan Termination the Fair Market Value of the Mileage Plus Asset was very substantial—approximately \$7.5 billion. United knew or should have known the approximate Fair Market Value of the Mileage Plus Asset.¹⁵
9. As part of Plan Termination proceedings, United and PBGC entered a settlement agreement fixing United’s obligation to PBGC under the Plan (“the PBGC Settlement Agreement”).¹⁶ The PBGC Settlement Agreement was based on the defective Mileage Plus disclosure by United—disclosing “book value” rather than Fair Market Value.¹⁷
10. With the Fair Market Value of the Mileage Plus Asset remaining hidden and apparently not known or understood by any party to the Plan Termination proceedings, the administrative process of Plan Termination went forward. Under this process, the PBGC

¹¹ See discussion *infra* p. 10-11 re: Fair Market Value factors under 29 C.F.R. §4062.4(c)(1-8); see also 2nd Amd. Compl., ¶74.

¹² 2nd Amd. Compl., ¶29.

¹³ See discussion *infra* p. 31.

¹⁴ See discussion *infra* pp. 10-11.

¹⁵ 2nd Amd. Compl., ¶82.

¹⁶ See Def. Mot. to Transfer, Ex. A, Doc. # 14-2.

¹⁷ See discussion *infra*, p. 32-33; also see 2nd Amd. Compl., ¶81.

Settlement Agreement was entered between PBGC and United. Assets held by United, the Plan sponsor, were also delivered to PBGC as part of the administrative hand-over, whereby PBGC would become the administrator and guarantor of the Plan.¹⁸

11. As the new Plan administrator, the PBGC set about to fulfill its obligations under ERISA Title IV with respect to the terminated plan: to value the assets, allocate assets among the various plans previously sponsored by United,¹⁹ determine the benefits payable under 29 U.S.C. §1344 to each individual Plan Participant,²⁰ and to issue a PBGC “Board Determination Letter” to each Plan Participant setting forth the pension benefits payable to that Plan Participant under the Plan, as modified by ERISA law.
12. Only during or about the past 18 months, the vast majority of Board Determination Letters have been issued to Plan Participants, including the Plaintiffs herein, setting out the benefits payable to each individual Plan Participant according to ERISA allocation formulae.²¹
13. Plaintiffs sought, and were granted, discovery of PBGC books and records. FOIA Request 2011-0361 was served on PBGC on December 7, 2010, seeking information submitted to PBGC by United or any other entity associated with or representing United or the Pilot Plan in connection with Plan Termination, and regarding:
 - a. Value or estimates of value (or Net Worth) of United Loyalty Services, a subsidiary of UAL Corp, submitted by UAL Corp;

¹⁸ 2nd Amd. Compl., ¶9.

¹⁹ In addition to the Pilot Plan, United also sponsored pension plans for its flight attendants, machinists and management employees.

²⁰ See discussion, *infra*, pp. 20-21.

²¹ 2nd Amd. Compl., ¶12.

- b. The status of United Loyalty Services as a controlled entity of UAL Corp for the purposes of 29 U.S.C. §1362 and §1369 and applicable regulations; and
- c. Any portion of the PBGC's administrative record regarding Plan Termination that addresses (a) and/or (b) of this paragraph.²²

14. In response to the FOIA Request 2011-0361, and after committing at least 25.5 hours searching for documents in response to this FOIA request, PBGC delivered to Plaintiffs' counsel on February 11, 2011 a total of 164 pages of documents, filed with PBGC by United and/or ULS that relate in part to United Loyalty Services, all of which are copies of documents filed in bankruptcy court by United Air Lines Corporation.²³ The most relevant portion of the 164 pages of documents produced by PBGC in response to FOIA 2011-0361 are the 114 pages of documents attached to the 2nd Amd. Compl. as Exhibit A.²⁴ Buried at page 110 of this document contained the following "boilerplate" disclaimer language:

Current Market Value. It would be prohibitively expensive, unduly burdensome and an inefficient use of estate assets for the Debtors to obtain current market valuations of all of their assets. Accordingly, unless otherwise indicated, *net book values* are reflected on the Debtors' Schedules and Statements. *For this reason, amounts ultimately realized will vary from net book value and such variance may be material.*

Emphasis added. So, clearly, United represented the value of United Loyalty Services (including the Mileage Plus Asset) to PBGC at book value instead of Fair Market Value.

15. Plaintiffs filed this action on December 28, 2010. After receiving a response to the Second Request for Discovery to PBGC, Plaintiffs amended this action in the Amended Complaint to specifically refer to the documentation produced by PBGC. The Amended

²² 2nd Amd. Compl., ¶74; *see also* 2nd Amd. Compl., Ex. B, Doc. # 9-3.

²³ 2nd Amd. Compl., Ex. C, Doc. # 9-4.

²⁴ 2nd Amd. Compl., ¶77; *see also* 2nd Amd. Compl., Ex. A, Doc. # 9-2.

Complaint was filed on April 5, 2011 and entered by this Court on April 6, 2011. A Second Amended Complaint was also filed on May 9, 2011. The only changes in the Second Amended Complaint were to add 172 additional Plaintiffs and delete 9 Plaintiffs, for a total of 705 Plaintiffs.

16. 29 U.S.C. §1344 defines six different priority categories, which are funded by PBGC depending, in great part, on funds transferred from a plan sponsor on plan termination.²⁵ Currently, according to Board Determination Letters issued by PBGC to Plan Participants (Plaintiffs herein), priority category three has only been partially funded, and priority categories four, five and six remain entirely unfunded.²⁶ Plaintiffs seek equitable relief in this case to require United to fully fund the unfunded benefits with respect only to these individual Plaintiffs, not the entire Plan.

ARGUMENT

A. PENSION PLAN PARTICIPANTS HAVE ERISA CLAIMS AGAINST A PENSION PLAN SPONSOR WHO MISREPRESENTS ITS NET WORTH IN CONNECTION WITH PLAN TERMINATION.

29 U.S.C. §1362 establishes financial liability of a plan sponsor to PBGC on termination of a pension plan and governs the process by which the amount of that liability is determined.²⁷ Section 1362(a) provides, in part:

In any case in which a single-employer plan is terminated in a distress termination under section 1341(c) of this title or a termination otherwise instituted by the corporation under section 1342 of this title, any person who is, on the termination date, a *contributing sponsor of the plan or a member of such a contributing sponsor's controlled group shall incur liability under this section*. The liability under this section of all such persons shall be joint and several.

²⁵ See discussion *infra*, pp. 20-21.

²⁶ 2nd Amd. Compl., ¶93.

²⁷ §1362 also provides liability to an appointed trustee in certain cases not applicable here.

Id., (emphasis added). This language establishes joint and several liability of the plan sponsor and members of its controlled group under §1362. Plaintiffs have alleged in their Second Amended Complaint, (hereinafter “2nd Amd. Compl.”), First Cause of Action, that United violated §1362 in connection with misrepresentations to PBGC in its asset valuation filings in connection with Plan Termination.

1. United Has Committed an Act or Practice in Violation of 29 U.S.C. §1362

United argues that “most of Section 1362’s requirements apply only to PBGC and the only portions of Section 1362 that impose obligations on the plan do not apply here.” (Def. Mem. at 23).²⁸ This construction urged by United does not make sense in the legislative scheme of §1362, and should be rejected.

In 1987, Congress passed the Pension Protection Act of 1987 (“PPA”) to restrict pension plan terminations. “PPA made employers liable, for the first time, to the PBGC *for the full amount of unfunded benefit liabilities to all participants and beneficiaries under the plan*. See 29 U.S.C. § 1362. It also applied the reorganization test to “[t]he plan sponsor or any member of its controlled group . . .”. 29 U.S.C. § 1341(c)(2)(B) [citation omitted]. Both changes increased the burden on employers seeking to terminate pension plans.” *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 343 (3rd Cir. 2006). Under a plain reading of §1362 United is liable for the full amount of all unfunded benefit liabilities to all participants under the Plan. *Id.* Construction of this statute is not to be parsed or artificially restricted where a plain reading provided clear liability. See *Schindler Elevator Corp. v. United States*, __U.S.__,

²⁸ United also argues that §1362(b)(2)(B) is the only part of §1362 that imposes obligations on the plan, and that these don’t apply here. §1362(b)(2)(B) allows liability under paragraph (1)(A) as exceeds 30 percent of the collective net worth of all persons described in subsection (a) of this section to be made under commercially reasonable terms prescribed by PBGC. Therefore, a plain reading of the entire statute does not support United’s argument that a plan is only subject to §1362(b)(2)(B).

131 S. Ct. 1885, 1893 (2011)²⁹ (“In interpreting a statute, ‘[o]ur inquiry must cease if the statutory language is unambiguous,’ as we have found, and ‘the statutory scheme is coherent and consistent.’”) *See also Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) (“In determining whether statutes create private rights of action, as in interpreting statutes generally, [citation omitted] legal context matters only to the extent it clarifies text. We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI.”)

Against the standards of interpreting statutes according to plain meaning set out in *Schindler Elevator Corp.* and *Sandoval*, and the clear Congressional intent expressed in adoption of the Pension Protection Act of 1987, United’s argument that most of §1362 does not apply to it, should be rejected by this Court. In actuality, it appears that *all* of §1362’s provisions relate to the relationship between PBGC (or a trustee) and a plan sponsor on plan termination. Importantly, the liability amount of a plan sponsor to PBGC on plan termination is defined under §1362(d)(1)(A) as “[t]he sum of the individual net worths of all persons who (i) have *individual net worths which are greater than zero*, and (ii) are (as of the termination date) contributing sponsors of the terminated plan or members of their controlled groups” (emphasis added). 29 U.S.C. §1362(d)(1)(B) empowers PBGC to establish the basis for determining that the plan sponsor’s net worth on plan termination, and PBGC has adopted regulations that establish Fair Market Value as the basis for determining net worth. 29 C.F.R. §4062.4(c) sets forth the Fair Market Value standard:

(c) Factors for determining net worth. A person’s *net worth is equal to its fair market value* and fair market value shall be determined *on the basis of the factors set forth below*, to the extent relevant; different factors may be considered with respect to different portions of the person's operations.

²⁹ Decided May 16, 2011.

- (1) A bona fide sale of, agreement to sell, or offer to purchase or sell the business of the person made on or about the net worth record date.
- (2) A bona fide sale of, agreement to sell, or offer to purchase or sell stock or a partnership interest in the person, made on or about the net worth record date.
- (3) If stock in the person is publicly traded, the price of such stock on or about the net worth record date.
- (4) The price/earnings ratios and prices of stocks of similar trades or businesses on or about the net worth record date.
- (5) The person's economic outlook, as reflected by its earnings and dividend projections, current financial condition, and business history.
- (6) The economic outlook for the person's industry and the market it serves.
- (7) The appraised value, including the liquidating value, of the person's tangible and intangible assets.
- (8) The value of the equity assumed in a plan of reorganization of a person in a case under title 11, United States Code, or any similar law of a state or political subdivision thereof.

The fair market value requirement of this provision is unmistakable and unambiguous. Nevertheless, in connection with Pension Plan Termination, United provided a 114 page document to PBGC representing the value of United Loyalty Services, which included the Mileage Plus Asset, as having a net worth of negative \$397 million (less than zero). (2nd Amd. Compl., Ex. A, p. 1; Doc. # 9-2) This document appears to be a bankruptcy schedule, delivered to PBGC with its original format unchanged. The last page of the actual valuation document itself is the signature page, page 108, signed under oath by a United Senior Vice President. Following the signature page are eight additional pages of notes that explain the basis for the valuation (for a total of 114 pages). At the bottom of page 110 and continuing to the next page, is the following boilerplate disclaimer language:

Current Market Value. It would be prohibitively expensive, unduly burdensome and an inefficient use of estate assets for the Debtors to obtain current market valuations of all of their assets. Accordingly, unless otherwise indicated, ***net book values*** are reflected on the Debtors' Schedules and Statements. *For this reason, amounts ultimately realized will vary from net book value and such variance may be material.*

Emphasis added. Plaintiffs allege, based on this document, that United misrepresented the value of United Loyalty Services (including the Mileage Plus Asset) to PBGC at book value instead of Fair Market Value, and thereby violated 29 U.S.C. §1362. In response, United argues that since PBGC has authority to enter a settlement agreement based on information provided by the plan sponsor, this excuses United's failure to provide correct information to PBGC in the first instance regarding the value of its assets.³⁰ This argument is both an error in logic and evidence of unclean hands for the purposes of equity. Just because PBGC *may* base determinations of net worth on information on partial information, if necessary, does not mean that United is thereby *excused* from providing full and complete information in the first place. As Judge Easterbrook wrote for a Seventh Circuit Court panel in the *Teamster Local 282* case discussed below, “[t]he parties have cited no case—and we have found none—in which the failure of a trustee to investigate on behalf of the beneficiaries excused some other party with a legal obligation to tell the truth.” 762 F.2d at 526.³¹ That is about as simple as one can state the matter. United had an obligation to tell the truth about the value of its assets. It failed to do so, and no PBGC regulation excuses that failure.

³⁰ 29 C.F.R. §4062.6(c) provides: “If a contributing sponsor and/or members of the contributing sponsor's controlled group do not submit all of the information required pursuant to paragraph (a) of this section (other than the estimate described in paragraph (b)(1) of this section) with respect to each person subject to liability, the PBGC *may* base determinations of net worth and the collective net worth of persons subject to liability in connection with a plan termination on any such information that such person(s) did submit, as well as any other pertinent information that the PBGC *may* have (emphasis added).

³¹ See discussion of *Teamsters Local 282 Pension Trust Fund*, *supra*, p. 3 and *infra*, pp. 37-38.

United also argues that “the Fair Market Value disclosure regulations enacted under ERISA §4062 was not in play because PBGC had settled with the plan sponsor.” (Def. Mem. at 24). However, it is apparent from a plain reading of the statutory language of §1362(b)(2)(A) and §1362(b)(3) that a settlement agreement between PBGC and a plan sponsor is actually *envisioned* under the statutory scheme—settlement agreements are an approved vehicle through which §1362 liability can be agreed to under 29 U.S.C. §1342. 29 U.S.C. §1362(b)(2)(A) authorizes PBGC to collect payment of the plan sponsor’s financial liability by accepting cash and/or securities acceptable to PBGC. Section 1362(b)(3) also allows PBGC to “agree to alternative arrangements for the satisfaction of liability to [PBGC] under this subsection.” This statutory interpretation was explained by this Court in an earlier decision, *Adams v. PBGC*, 332 F. Supp. 2d 231 (D.D.C. 2004) (“It is not by mistake that Congress issued an express grant of settlement authority in ERISA section 4062(b)(3), 29 U.S.C. § 1362(b)(3). Section 4062(b)(3) provides that “[t]he corporation and any person liable under this section may agree to *alternative arrangements* for the satisfaction of [section 4062] liability to the corporation . . .”). United’s argument that it is forgiven from complying with Fair Market Value disclosure regulations just because it entered the PBGC Settlement Agreement is not a fair reading of this statutory language and should be rejected. The Fair Market Value disclosure regulations are in place to fulfill core Congressional policies: “to *increase the likelihood that full benefits will be paid to participants and beneficiaries* of [pension] plans” and “to *increase the likelihood* that participants and beneficiaries under single-employer defined benefit pension plans will receive their *full benefits*.” 29 U.S.C. §1001b(b)(c). Allowing a plan sponsor to ignore Fair Market Value of the assets of its controlled group prior to entering a settlement agreement with PBGC would

allow a plan sponsor to unfairly distort the value of its assets, and thereby its §1362 financial liability, undermining clear Congressional policy that plan participants should receive full benefits when a plan is terminated, if possible. *Id.*

United has challenged Plaintiffs' allegations in its pending Rule 12(b)(6) motion. As this Court ruled in *Gibson v. Liberty Mutual Group, Inc.*, 10–2269, 2011 WL 1518196 at *2 (D.D.C. April 21, 2011):

When the sufficiency of a complaint is challenged under Rule 12(b)(6), the factual allegations presented in it must be presumed true and should be liberally construed in plaintiff's favor." *Leatherman v. Tarrant Cty. Narcotics & Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L.Ed.2d 517 (1993). The notice pleading rules are "not meant to impose a great burden on a plaintiff," *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347, 125 S. Ct. 1627, 161 L.Ed.2d 577 (2005), and he or she must thus be given every favorable inference that may be drawn from the allegations of fact. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 584, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, —U.S. —, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal quotation omitted). Plaintiff must put forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Though a plaintiff may survive a 12(b)(6) motion even if "recovery is very remote and unlikely," *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L.Ed.2d 90 (1974)), the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." *Id.* at 555, 127 S.Ct. 1955.

Under this standard, while "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, *Twombly*, 550 U.S. at 555, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 129 S.

Ct. at 1949. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

Plaintiffs have put forth more than enough detailed “factual content” to allow this Court “to draw the reasonable inference that the defendant is liable for the misconduct alleged” under ERISA. *Id.* Plaintiffs have shown how United avoided §1362 Liability by improperly disclosing United Loyalty Services (and the Mileage Plus Asset) at its “book value,” having a net worth less than zero, when its Fair Market Value was substantially greater than zero, in a 114 page document filed by United with PBGC at the time of Plan Termination proceedings.³² This critical misrepresentation of value was a violation of 29 U.S.C. §1362 and 29 C.F.R. §4062.4,6. Plaintiffs have therefore met the “plausibility” threshold of *Twombly* and *Iqbal* on their §1362 claims under the First Cause of Action.

2. United Has Committed Acts or Practices in Violation of 29 U.S.C. §1369

29 U.S.C. §1369 provides liability for transactions designed to evade liability under ERISA Title IV, as follows:

If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date of the termination on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date.

Plaintiffs allege in the Second Amended Complaint, Third Cause of Action, that United violated §1369 by engaging in certain transactions, a principal purpose of which was to evade liability under 29 U.S.C. §1362. These acts include:

³² See discussion, *supra*, pp. 11-12.

- On March 21, 2005, 13 months before the Order Date of Plan Termination, Defendants changed the structure of United Loyalty Services from a corporation to a limited liability company and caused it to become a subsidiary of United Airlines, instead of a direct subsidiary of UAL Corp. On information and belief, this reorganization was done, in part, to obfuscate value of ULS and its Mileage Plus program and to impose an additional layer of corporate ownership in an effort to further conceal ULS and its assets.
- On information and belief, UAL Corp and/or ULS entered engagements with outside professional firms designed to conceal, obfuscate and present in a false light the accounting records of United Loyalty Services and hide the asset value of Mileage Plus, in the lead-up to Plan Termination.
- On information and belief, UAL Corp and ULS undertook other acts or practices designed to understate, conceal and or obfuscate the fair market value or Net Worth of ULS in order to evade liability for Plan funding in violation of 29 U.S.C. §1369(a).

While general in nature, these allegations nevertheless fall within the scope of 29 U.S.C. §1369 since the reach of this statute applies to *any* transaction. *See Adams v. PBGC*, 332 F. Supp. 2d at 237 (“The Court agrees that the clear and unambiguous language in section 1369 applies to persons entering *any transaction* with a *principal purpose of evading liability*”).

In the case before this Court, Plaintiffs’ claims in the Third Cause of Action (under 29 U.S.C. §1369) arise in the same context and the same set of transactions as the claims in the First Cause of Action (under 29 U.S.C. §1362). In showing a violation by United of §1362, Plaintiffs have shown that documents provided by United to PBGC *actually* disclosed United Loyalty Services (and the Mileage Plus Asset) at an internal “book value” instead of at Fair

Market Value.³³ United has defended, in part, by claiming it was excused from complete disclosure because of a PBGC regulation, 29 C.F.R. §4062.6(c). Based on this *demonstrated* misrepresentation of fact by United to PBGC, and United’s argument that it was somehow excused from completely disclosing the net worth of its assets, it is certainly *plausible* that United was also involved in related transactions designed to cover up this massive valuation difference. The facts in this case show that about 18 months following the Bankruptcy Court’s Chapter 11 Confirmation Order, United’s investment bankers began discussing publicly that the Mileage Plus Asset was worth, approximately, \$7.5 billion.³⁴ This valuation was apparently based, in part, on a valuation of Air Canada’s Aeroplan mileage program that occurred during or about the period of Plan Termination.³⁵ And because United is in the business of knowing such things, it is at least “plausible” that United was aware of the Air Canada valuation of the Aeroplan mileage program at the time of Plan Termination. United’s books and records will foreseeably reflect transactions and engagements designed to keep this important information from PBGC during the Plan Termination process. Under a Rule 12(b)(6) motion, “the factual allegations presented in it must be presumed true and should be liberally construed in plaintiff’s favor.” *Gibson v. Liberty Mutual, Inc.*, *supra*. “[H]e or she must thus be given every favorable inference that may be drawn from the allegations of fact.” *Twombly*, 550 U.S. at 584. Plaintiffs have therefore met the “plausibility” threshold of *Twombly* and *Iqbal* on their §1369 claims under the Third Cause of Action, and this Court should deny United’s Rule 12(b)(6) Motion to Dismiss as to the claims related to 29 U.S.C. §1369.

³³ 2nd Amd. Compl., Ex. A, Doc. # 9-2, p. 110.

³⁴ 2nd Amd. Compl., ¶¶82-85.

³⁵ 2nd Amd. Compl. ¶82.

3. Congress Provided Direct Redress to Plaintiffs Under 29 U.S.C. §1370(a)

The next matter to address is whether United's violations of 29 U.S.C. §§1362 and §1369 are violations for which Plaintiffs may obtain redress under §1370(a). Again, this is a question of the plain language of the statute and, if necessary, a review of Congressional intent.

The plain language of §1370 "is unambiguous" and the "the statutory scheme is coherent and consistent" and therefore must be enforced according to its plain terms.

Schindler Elevator, 131 S. Ct. at 1939. 29 U.S.C. §1370(a) states:

Any person who is with respect to a single-employer plan a... participant, or beneficiary, and is *adversely affected* by an *act or practice of any party* (other than the corporation [PBGC]) in violation of *any* provision of section 1341, 1342, **1362**, 1363, 1364, or **1369** of this title...may bring an action--(1) to enjoin such act or practice, or (2) to obtain other appropriate equitable relief (A) to redress such violation or (B) to enforce such provision.

Emphasis added.

The statutory language of ERISA §1370 is easily interpreted by its plain meaning: any participant or beneficiary adversely affected by an act or practice of any party (other than PBGC) in violation of any provision of 29 U.S.C. §1362 (ERISA §4062), may bring an action to obtain appropriate equitable relief to redress such violation. In short, Congress directed that a plan participant affected by an act or practice of a plan sponsor, or plan fiduciaries, in violation of §1362 or §1369 may bring an action for appropriate equitable relief. No other conditions or limitations are imposed under the statutory language, and no other conditions or limitations should be read into §1370 by this Court. *Schindler Elevator*, 131 S. Ct. at 1893.

Further, Congressional intent supports this plain reading. Congress added §1370 to

ERISA Title IV as part of 1986 amendments covering single-employer plans.³⁶ The statement of Congressional findings and policy adopted in 1986 *in connection with the adoption of §1370*, included the following:

The Congress finds that--

(2) the *continued well-being and retirement income security* of millions of workers, retirees, and their dependents are directly affected by such plans; and

(4) the current termination insurance system in some instances *encourages employers to terminate pension plans, evade their obligations* to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and the other premium-payers.

29 U.S.C. §1001b(a)(emphasis added). In response to these findings, Congress adopted the following policies with respect to the 1986 ERISA amendments (which, again, included the addition of 29 U.S.C. §1370):

It is hereby declared to be the policy of this title—

(3) to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full benefits; [and]

(4) to provide for the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system only in cases of severe hardship.

29 U.S.C. §1101b(c).

According to §1001b(a), the 1986 amendments were adopted to cure the old ERISA system which “in some instances *encourage[d] employers to terminate pension plans [and] evade their obligations* to pay benefits.” United, the Pension Plan sponsor, completely

³⁶ The Single Employer Pension Plan Amendments Act of 1986 (“SEPPAA”).

ignored (or possibly did not read) the ERISA requirements that §1362 Plan Termination Liability must be based on the Fair Market Value of all its assets. Instead it disclosed one of its most valuable assets, the Mileage Plus Asset at “book value”—an arbitrary value established by United for its own accounting purposes. This was a violation of Congressional intent expressed under 29 U.S.C. §1001b, as well as a violation of statutory disclosure requirements under 29 U.S.C. §1362 for which Plaintiffs have a private cause of action. Violation of a federal regulation is a violation of the underlying statute for which a private right of action is authorized, in effect creating a right of action to remedy a violation of the regulation itself. *APCC Services v. Sprint Communications*, 489 F.3d 1249 (D.C. Cir. 2007) (“The Supreme Court...held in [*Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, ___ US ___, 127 S. Ct. 1513, 167 L.Ed.2d 422 (2007)] that a violation of the regulation at issue is a violation of § 201(b) of the Act, for which a private right of action is authorized by § 207 of the Act, in effect creating a right of action to remedy a violation of the regulation itself. 127 S. Ct. at 1516. It is now clear, therefore, that APCC et al. may pursue their case in district court...”). *See also Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (“In determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute.”).

4. Plaintiffs Were Adversely Affected by United’s Violations of 29 U.S.C. §§1362 and 1369

Under ERISA, the PBGC guarantees certain nonforfeitable benefits provided by qualified defined benefit pension plans. When an employer voluntarily terminates a single-employer defined benefit plan, all accrued benefits automatically vest, notwithstanding the plan’s particular vesting provisions. Plan assets are then distributed to participants in accordance with a six-category allocation scheme set forth in §4044(a), which requires that

plan administrators first distribute nonforfeitable benefits guaranteed by the PBGC, §§4044(a)(1-4); then “all other nonforfeitable benefits under the plan,” §4044(a)(5); and finally “all other benefits under the plan.” §4044(a)(6). *Mead Corp. v. Tilley*, 490 U.S. 714, 718 (1989). Each priority category must be funded in full (if applicable) before any plan assets are allocated to the next category. *See* 29 U.S.C. § 1344(a); 29 C.F.R. § 4044.10(d). If money provided by the plan sponsor runs out before full allocation by PBGC (“Unfunded Benefits”) participants receive a lower benefit from PBGC than is otherwise provided under terms of the pension plan, based on §1344’s allocation formula.

In the present action, United’s §1362 Liability was only enough for PBGC to allocate Unfunded Benefits *partially* through Priority Category 3. The adverse effect on Plaintiffs, the Plan Participants, with respect to United’s §1362 violation is therefore straightforward: Plaintiffs’ pension benefits payable by PBGC have been reduced below those guaranteed under the Plan because United improperly avoided paying its full §1362 Liability to PBGC in connection with Plan Termination. Plaintiffs seek equitable restitution under ERISA §1370(a) in their individual capacities to equitably restore the portion of Unfunded Benefits with respect to his or her pension account under the Plan that remains unallocated under 29 U.S.C. §1344.³⁷ This relief is well within the types of relief “traditionally available in equity,” recognized by the Supreme Court under ERISA and represents the “adverse effect” suffered by Plaintiffs resulting from United’s act or practice in violation of ERISA, as required under 29 U.S.C. §1370(a).

5. Plaintiffs are Entitled to Appropriate Equitable Relief Under 29 U.S.C. §1370(a)

A recent United States Supreme Court case sets out the proper standard for

³⁷ Plaintiffs have additional distribution rights under 29 U.S.C. §1322 which will be addressed at an appropriate time in the future if and when the Court considers available remedies.

“appropriate equitable relief under ERISA.” *CIGNA Corp. v. Amara*, __ U.S. __, 131 S. Ct. 1866, 1879 (2011).³⁸ In *CIGNA Corp.* a pension plan sponsor distributed plan summary documents that misrepresented the scope of pension benefits payable under the plan documents. The U.S. District Court for the District of Connecticut, found that the plan sponsor had intentionally misled its employees.³⁹ The primary focus of the Supreme Court’s opinion was to outline relief appropriate under ERISA to remedy the plan sponsor’s misrepresentations—which the Court determined was best found under ERISA §502(a)(3). Such equitable relief might include, e.g., reformation of contract⁴⁰ or an award of make whole relief.⁴¹ The Supreme Court further explained the following guiding principle in issuing appropriate equitable relief under ERISA:

The case before us concerns a suit by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust). See *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U. S. 248, 253, n. 4 (2008); *Varity Corp.*, 516 U. S., at 496–497. It is the kind of lawsuit that, before the merger of law and equity, respondents could have only brought in a court of equity, not a court of law. [Citations omitted.] The District Court’s affirmative and *negative injunctions obviously fall within this category...And other relief ordered by the District Court resembles* forms of traditional equitable relief. That is because equity chancellors developed a host of other “distinctively equitable” remedies—remedies that were “fitted to the nature of the primary right” they were intended to protect. 1 S. Symons, Pomeroy’s Equity Jurisprudence §108, pp. 139–140 (5th ed. 1941) (hereinafter Pomeroy). See generally 1 J. Story, Commentaries on Equity Jurisprudence §692 (12th ed. 1877) (hereinafter Story). ***Indeed, a maxim of equity states that “[e]quity suffers not a right to be without a remedy.”*** R. Francis, Maxims of Equity 29 (1st Am. ed. 1823).

Id. at 1879 (emphasis added). *CIGNA Corp.* is controlling authority for interpreting the

³⁸ Also decided May 16, 2011.

³⁹ *Id.* at 1870-71.

⁴⁰ *Id.* at 1880-81.

⁴¹ *Id.*

proper scope of “appropriate equitable relief” under 29 U.S.C. §1132(a)(3) and, by extension, under 29 U.S.C. §1370, because the relief provisions of §1132(a)(3) are substantially identical to the relief provisions of §1370(a).⁴² The term “appropriate equitable relief” under ERISA broadly refers to those categories of relief that, traditionally speaking (i.e., prior to the merger of law and equity) were typically available in equity.” *CIGNA Corp.*, 131 S. Ct. at 1878 (internal citations omitted).

6. Plaintiffs Are Entitled to Appropriate Equitable Relief Under 29 U.S.C. §1132(a)(3)

In addition to its role as Pension Plan sponsor or under ERISA Title IV, United was also a fiduciary under ERISA Title I with respect to its execution of any settlement agreements that affected the Plan.⁴³ As the Supreme Court has made clear on at least two occasions, plan participants have claims against a plan fiduciary for breach of fiduciary duties when the plan sponsor has misrepresented events material to the pension plan. *Varity v. Howe*, 516 U.S. 489 (1996) (“Varity was acting as an ERISA ‘fiduciary’ when it significantly and deliberately misled respondents.”); *CIGNA Corp.*, 131 S. Ct. at 1872 (relief allowed under 29 U.S.C. §1132(a)(3) where plan sponsor’s summary description of pension plan was “significantly incomplete and misled its employees.”).

Plaintiffs allege in this case that United and the individual fiduciary defendants violated fiduciary obligations by deceiving and misleading Plaintiffs, and other fiduciaries with obligations to Plaintiffs as Plan Participants and otherwise, as to the fair market value of United Loyalty Services (and the Mileage Plus Asset) in order to save UAL Corp and ULS

⁴² 29 U.S.C. §1132(a) provides: A civil action may be brought-- (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

⁴³ 2nd Amd. Compl., ¶ 105.

money at the expense of Plaintiffs, and/or by concealing, manipulating or misrepresenting the fair market value of ULS, or undertaking other deceptive acts or practices. These are the very type of violations for which the Supreme Court has provided redress under 29 U.S.C. §1132(a)(3). Plaintiffs have also showed that later revelations by United’s representatives in a PBS Frontline documentary and in Congressional testimony, taken together, imply an “undisclosed and calculated plan to jettison employees’ defined benefit pension plans, including the rights of Plaintiffs in the Plan, while giving the appearance and cloak of propriety, designed to mislead the public and United’s pension beneficiaries, including Plaintiffs, about UAL’s true intentions to terminate the pension plan, avoid any liability.” Second Amended Complaint ¶¶ 48-51. This shows an intent to mislead and commit the ERISA violations complained of by Plaintiffs. Considering this evidence of intent, as well as the showing that United actually misrepresented the value of its Mileage Plus Asset in filings made with the PBGC, Plaintiffs have more than met the “plausibility” threshold of *Twombly* and *Iqbal* on their claims under the Fifth Cause of Action, that United’s misrepresentations also misled individual Plaintiffs in violation of 29 U.S.C. §1132(a)(3).

B. THE BANKRUPTCY COURT’S CHAPTER 11 CONFIRMATION ORDER DOES NOT BAR PLAINTIFFS’ CLAIMS

United argues that the Bankruptcy Court Chapter 11 Confirmation Order entered on January 20, 2006 (effective as of February 1, 2006) bars Plaintiffs’ individual claims under 29 U.S.C. §1370(a). But this argument is not correct under a proper reading of bankruptcy law, in the context of ERISA.

As a foundational matter, United has already argued that the Bankruptcy Court had jurisdiction under 29 U.S.C. §1342 to hear Plan Termination proceedings—and it lost that argument. Jurisdiction for an involuntary pension plan termination is established under 29

U.S.C. §1342(c)(1), as follows:

If [PBGC] is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may, upon notice to the plan administrator, ***apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated...***

Emphasis added.

This statute authorizes only *PBGC* to apply to the appropriate United States *District Court* for a decree adjudicating that a pension plan must be terminated. Notwithstanding this clear mechanism for involuntary termination of a pension plan outlined by Congress, *United*—not PBGC—applied to the *Bankruptcy Court*—not the District Court—seeking a decree of Plan Termination under §1342, over PBGC’s procedural objection. The Northern District of Illinois Bankruptcy Court agreed with *United* and exercised core jurisdiction over Plan Termination, and entered a final order terminating the Pension Plan on October 26, 2005.

The Bankruptcy Court’s Plan Termination order went on appeal to the U.S. District Court and was reversed. *In re United Air Lines, Inc.*, 337 B.R. 904, 910 (N.D. Ill. 2006). Reading the plain language of 29 U.S.C. §1342(c)(1), the District Court ruled that “[t]he termination proceeding filed by PBGC pursuant to Title IV of ERISA was a non-core proceeding. Because the proceeding was a non-core proceeding and the parties did not consent to the Bankruptcy Court’s issuing a final judgment, the Bankruptcy Court exceeded its limited jurisdiction by issuing a final judgment.” The District Court opinion continues:

In the plan termination proceedings involved in this case, PBGC brought the proceeding ***against United as the plan administrator, not*** as the debtor in the pending bankruptcy.” *Id.* (emphasis added). “PBGC’s right to initiate the termination proceedings of the Pilot Plan ***arises exclusively from Title IV of***

ERISA, not the Bankruptcy Code. *See* 29 U.S.C. §1342(a). The right to bring the termination proceeding exists outside the Bankruptcy Code and can arise outside the context of a bankruptcy case. *See*, 29 U.S.C. §1342(a). Accordingly, ***the termination proceeding neither invokes a substantive right provided by Title 11*** [Bankruptcy Code] nor, by its nature, could it arise only in the context of a bankruptcy case. *Id.*

Id. at 910; emphasis added.⁴⁴ Judge Darrah thereupon sent the matter of Plan Termination to Judge Lefkow, U.S. District Judge, for de novo proceedings under §1342(c)(1) to properly adjudicate Plan Termination. Judge Lefkow’s Plan Termination Order was entered on June 13, 2006.⁴⁵ The District Court reversed the Bankruptcy Court’s October 26, 2005 Plan Termination order even though the appeal had timeliness issues. But because the Bankruptcy Court’s termination order lacked subject matter jurisdiction, the District Court overlooked the appeal timeliness issues and reversed. *Id.* at 908-09. And so this foundational subject matter jurisdictional issue has been decided against United and collateral estoppel precludes the subject matter jurisdictional issue from being relitigated. *See, e.g., Arizona v. California*, 530 U.S. 392, 414 (2000) (issue preclusion attaches “when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.”).

But United doesn’t actually *ask* to relitigate the subject matter jurisdiction issue; rather, it looks right past this foundational defect and just *assumes* that Judge Darrah’s reversal order never happened. In fact, a recurring error throughout United’s brief is its continued refusal to squarely address the limits of bankruptcy jurisdiction in an ERISA setting. To United, bankruptcy has no limits. In the world United offers for this Court’s

⁴⁴ *See also Stern v. Marshall*, No. 10-179, decided June 23, 2011 (U.S.) (“Although we conclude that §157(b)(2)(C) permits the Bankruptcy Court to enter final judgment...Article III of the Constitution does not.”). *Id.* Slip Op. at 22.

⁴⁵ *PBGC v. United Air Lines, Inc.*, 436 F. Supp. 2d 909 (N.D. Ill. 2006).

consideration, “even if United committed fraud by failing to inform PBGC of the alleged value of Mileage Plus®...any such claims are clearly discharged by United’s [Chapter 11 reorganization] plan and by 11 U.S.C. §1141(d).” Def. Mem. at 21. But United fails to account for very specific Congressional findings and policy declarations that favor Plaintiffs’ claims in this case, and limit the context of the Bankruptcy Court’s Chapter 11 Confirmation Order, in equity.

It is true that discharge of a debtor under bankruptcy law is generally very broad. But because a bankruptcy court is a court of equity, its jurisdiction is always constrained by competing federal statutes and Congressional policies. For example, in *National Labor Relations Board v. Bildisco and Bildisco*, 465 U.S. 513, 526 (1984),⁴⁶ the Supreme Court held that “[b]efore acting on a petition to modify or reject a collective-bargaining agreement, the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. *The NLRA requires no less.*” (Emphasis added). So the bankruptcy court in *Bildisco*, as a court in equity, was required to consider competing federal statutes and policies. *Id.* at 527. But the Supreme Court’s limiting directive to the bankruptcy court in *Bildisco* contrasts starkly with its sweeping grant of authority to PBGC under ERISA Title IV in *PBGC v. LTV Corp.*, 496 U.S. 633, 645 (1990). In *LTV Corp.*, a pension plan sponsor terminated its plan under ERISA Title IV in connection with bankruptcy proceedings. Later, PBGC restored the pension plan to the plan sponsor after bankruptcy was concluded and a Chapter 11 confirmation order was entered. The plan sponsor (bankruptcy debtor) argued that PBGC could not restore the plan without proper consideration of competing bankruptcy policies. The Supreme Court rejected the plan sponsor’s argument, ruling that the PBGC’s

⁴⁶ The *Bildisco* opinion led to Congressional adoption of 11 U.S.C. §1113.

right to restore the pension plan exists notwithstanding bankruptcy; and can be exercised even after bankruptcy—even *if restoration would conflict with the bankruptcy*. *Id.* at 645-46. The Supreme Court further ruled that PBGC, in making its assessment, was *not* required to consider bankruptcy “policy or goals.” *Id.*

The case presently before this Court falls somewhere between *Bildisco* and *LTV Corp.* Of course, the absolute discretion given to the PBGC in *LTV Corp.* under 29 U.S.C. §1347 does not fully carry over to Plaintiffs’ ERISA Title IV claims under 29 U.S.C. §1370(a) or their ERISA Title I claims under 29 U.S.C. §1132(a)(3) because PBGC is a federal agency with a broad grant of authority, while Plaintiffs are individual plan participants who must rely on federal courts for redress. But *LTV Corp.*, combined with the clear jurisdiction grants to U.S. District Courts under 29 U.S.C. §§1342, 1370(a), 1132(a) and strong supporting Congressional policies, indicate a strong preference for ERISA laws to be resolved in equitable proceedings that squarely address ERISA issues on the merits.

And so a suggested middle ground between *Bildisco* and *LTV Corp.* is as follows: Congress authorized Plaintiffs’ individual ERISA claims to be presented to this Court under ERISA as a court in equity. As a court in equity, this Court may enter “appropriate equitable relief” to consider and harmonize *all* federal policies and goals in equity—something the Bankruptcy Court was unable to fully consider in entering its Chapter 11 Confirmation Order because it lacked jurisdiction over Plan Termination proceedings and because important events related to Plan Termination occurred after the Chapter 11 Confirmation Order.⁴⁷ This

⁴⁷ While the Bankruptcy Court did not have jurisdiction over Plan Termination issues, it is true that the Judge Lefkow referred certain Plan Termination issues to the Bankruptcy Court for a report and recommendations. The Bankruptcy Court did not re-open proceedings after this referral, opting instead to modify its earlier purported “final” order into a report and recommendation, which was ultimately adopted by Judge Lefkow. Did this mean that the Bankruptcy Court, by extension, also

middle ground position is squarely in line with the Supreme Court’s recent ruling in *CIGNA Corp. v. Amara, supra*, finding that “appropriate equitable relief” under ERISA includes “those categories of relief” that, traditionally speaking (i.e., prior to the merger of law and equity) ‘were typically available in equity.’ *Id.*, 131 S. Ct. at 1878.

This statutory interpretation is also fully supported by Congressional policy that favors Plaintiffs’ claims in this case. Congress added §1370 to ERISA Title IV as part of the 1986 amendments covering single-employer plans. *See* discussion, *supra*, pp.19-20. To summarize 29 U.S.C. §1001b, Congress found, *inter alia*, that—“the ***continued well-being and retirement income security*** of millions of workers, retirees, and their dependents are directly affected by such plans; and...the current termination insurance system in some instances ***encourages employers to terminate pension plans, evade their obligations*** to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and the other premium-payers. 29 U.S.C. §1001b(a); emphasis added. Congress then declared its policy—“(3) ***to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full benefits***; [and] (4) to provide for the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system only in cases of severe hardship. 29 U.S.C. §1101b(c)

sufficiently considered “ERISA policy and goals” as related to Plaintiffs’ claims under 29 U.S.C. §§1370(a) or 1132(a)(3) for the purposes of the January 20, 2006 Confirmation Order? Such a conclusion would stretch the notion of equity beyond any fair meaning. As the Supreme Court reminded in *CIGNA Corp.*, a maxim of equity states that “[e]quity suffers not a right to be without a remedy.” 131 S. Ct. at 1879. United committed a wrong under ERISA, and United argues that that this Court should use bankruptcy law to leave Plaintiffs without a remedy in equity—hardly a fair application of equitable principles espoused by the Supreme Court. Further, United lacks the “clean hands” required to benefit from such an argument because of its deception in providing information about the net worth of the Mileage Plus Asset under the facts alleged in this case. *See* discussion, *infra*, pp. 37-38.

(emphasis added).

Congress has therefore spoken on this issue, adopting statutes and declaring a broad policy in favor of full payment of unfunded pension liabilities by a plan sponsor who otherwise declares bankruptcy. In this overall context, it is evident that Plaintiffs have never had their day in “equity court” to determine limits of the Chapter 11 Confirmation Order as against their rights under 29 U.S.C. §1370. The core ERISA violation complained of by Plaintiffs in this case was that United, allegedly for economic reasons (it would be “prohibitively expensive” to obtain current market valuations)⁴⁸ failed to live up to its disclosure duty under 29 U.S.C. §1362 by disclosing to PBGC “book values” for its Mileage Plus Asset rather than the required Fair Market Value values—a difference equating to over a *seven billion* dollar difference. Congress has statutorily authorized Plaintiffs’ claims and has adopted clear policy in favor of such claims going forward. 29 U.S.C. §1001b, *supra*. Therefore, in the balance of bankruptcy and ERISA law, ERISA controls and the confirmation bar of Bankruptcy Code §1141 must give way to Plaintiffs’ rights under 29 U.S.C. §1370. But in any event, it is this Court that must make that determination under ERISA, not the Bankruptcy Court.

As a consideration in equity, it is difficult to overstate how seriously United’s offense violated the spirit and the letter of Congressional findings set out in 29 U.S.C. §1101b. According to §1001b(a), the 1986 amendments were adopted to cure the old ERISA system which “in some instances *encourage[d] employers to terminate pension plans [and] evade their obligations* to pay benefits.” *Id.* United, the Pension Plan sponsor, completely ignored (or possibly did not read) the ERISA requirements that §1362 Plan Termination Liability must be based on the Fair Market Value. Instead it disclosed one of its most

⁴⁸ See discussion, *supra*, pp. 10-13.

valuable assets, the Mileage Plus Asset at “book value”—an arbitrary value established by United for its own accounting purposes. And why did United do this? In boilerplate disclaimer language obscurely placed at pp. 110-11 of a 114 page document filed with PBGC regarding the value of United Loyalty Services (which included the Mileage Plus Asset United),⁴⁹ United explained the reason *why* it valued its assets at “book value” instead of Fair Market Value: because it would be “prohibitively expensive” to obtain a current market valuations.⁵⁰ Such an excuse for not meeting the required Fair Market Value standard of ERISA should be rejected by this Court, out of hand. United apparently paid in excess of \$325 million in legal and professional fees in bankruptcy and pension termination proceedings, and yet explained that it was “prohibitively expensive” to obtain Fair Market Value valuations for the Mileage Plus Asset. A value opinion for Mileage Plus might have been obtainable at a cost of anywhere from \$30,000 to \$300,000. Even at the high end, this cost would have been .1% (one-tenth of one percent) of the overall legal and professional fees paid by United—hardly a rounding error. It is very difficult to see how United can be excused from spending a little extra to obtain Fair Market Value assessments—particularly where ERISA so requires.

Pension issues will occupy the courts and Congress in this decade—and beyond. Undoubtedly, Congress has many difficult pension decisions to make in coming years. But it is the job of the United States district courts to give full effect to pension law and policies when Congress *has* spoken—such as in this case. If United is allowed to misrepresent its

⁴⁹ See *supra*, pp. 10-11.

⁵⁰ United’s boilerplate language also cautioned that “*amounts ultimately realized [from this asset] will vary from net book value and such variance may be material.*” This cautionary disclaimer seems to have been prophetic—about 18 months after United exited bankruptcy, its investment banks began publicly discussing, for the first time, that the fair market value of the Mileage Plus Asset is approximately \$7.5 billion.

assets to PBGC, and then, when caught, claim immunity for its violations under bankruptcy law, Congress's clear and unmistakable efforts to protect pension benefits would be cast aside to favor a corporation that has ignored Congressional directives. This Court should not let that happen, and should deny United's Motion to Dismiss on its bankruptcy arguments.⁵¹ For all these reasons, this Court should rule that the Bankruptcy Court's Chapter 11 Confirmation Order does not bar Plaintiffs' claims in this case.

C. ERISA TITLE IV CLAIMS ARE NOT BARRED BY ANY OTHER COURT RULING UNDER THE PRINCIPLES OF WAIVER, RELEASE, OR RES JUDICATA

1. Plaintiffs' ERISA Title IV Claims Have Not Been Released or Waived.

United argues that Plaintiffs' claims are released or waived under the PBGC Settlement Agreement and/or a union settlement (the "ALPA Settlement Agreement"). This is incorrect for at least three reasons.

First, in addition to its role as Pension Plan sponsor or under ERISA Title IV, United was also a fiduciary under ERISA Title I with respect to its execution of any settlement agreements that affected the Plan. *See Varity v. Howe*, 516 U.S. 489 (1996) ("Varity was acting as an ERISA 'fiduciary' when it significantly and deliberately misled respondents.").

⁵¹ In addition, the Pension Plan at issue in this case was not actually terminated until the June 13, 2006 order of the US District Court, under 29 U.S.C. §1342, was entered over five months *after* the Bankruptcy Court's Chapter 11 Confirmation Order.⁵¹ Until Pension Plan Termination was actually adjudicated, United had a continuing statutory and regulatory duty to properly comply with its disclosure obligations under §1362. Therefore, under any interpretation of 11 U.S.C. §1141, where conduct of United related to Plan Termination disclosures occurred *after* the date of the Bankruptcy Court's Chapter 11 Confirmation Order, this conduct was not protected by the Confirmation Order. Until the Pension Plan was actually terminated, the Plan Participants had no legal right "contingent or otherwise" to sue for plan termination irregularities. (Indeed, had the U.S. District Court refused to terminate the Pension Plan under 29 U.S.C. §1342, Plaintiffs' claims under 29 U.S.C. §1370(a) would have never come into existence.) *See Fogel, Trustee v. Zell*, 221 F.3d 955, 906 (7th Cir. 2000) ("A claim implies a legal right, however, and before a tort occurs the potential victim has no legal right, 'contingent' or otherwise..."). Therefore, under any reading of 11 U.S.C. §1141, Plaintiffs' claims encompass United's breach of its continuing statutory and regulatory duty to properly comply with its disclosure obligations under §1362, and therefore postdate the Chapter 11 Confirmation Order.

See also CIGNA Corp. v. Amara, 131 S. Ct. at 1879 (“The case before us concerns a suit by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust).” While under 29 U.S.C. §1323 a plan fiduciary does not violate its fiduciary duties “as a result of any act or withholding of action *required* by [ERISA Title IV],” the act of entering a settlement agreement is *authorized*, but *not required* under 29 U.S.C. §1342. Therefore, United is not protected by the language of 29 U.S.C. §1323. The exculpation clauses relied on by United expressly violate 29 U.S.C. §1110 (part of ERISA Title I) which provides that: “[e]xcept as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.” *Id.* Because entering the PBGC and ALPA Settlement Agreements was discretionary, i.e., not required under 29 U.S.C. §1342; and because United was otherwise a fiduciary with respect to the Pension Plan, a plain reading of 29 U.S.C. §1110 controls here, and the exculpation clauses asserted by United are void as against public policy. *See Holt v. Winpisinger*, 811 F.2d 1532, 1541 (D.C. Cir. 1987) (“To allow employees to contract away ERISA's vesting provisions would frustrate the purpose of the statute, which was enacted to protect employees from just such unfair deprivations of pension benefits.”)

Second, The PBGC Settlement Agreement purports to waive claims “in its own behalf or on behalf of the Pension Plans against United arising from or related to any minimum funding obligations....” *See* PBGC Settlement Agreement, attached as Ex. H to UAL Mot. Dismiss, Doc. 13-15, pp. 7-32, ¶7(b). The PBGC Settlement Agreement also purports to waive other claims by PBGC “on its own behalf or on behalf of the Pension Plans

relating in any way to United's Pension Plans, as well as any claims against any other entity, based on 'controlled group' liability or any other theory....” *Id.* at ¶7(d). As can be seen from a plain reading of the release language, individual claims of individual plan participants are not waived. Specifically, there is no reference to waiver of individual claims under 29 U.S.C. §§1370(a) or 1132(a)(3). The language of the release does not apply to individuals not specifically named. *See, e.g., FDIC v. Interdonato*, 988 F. Supp. 1, 12 (D.D.C. 1997) (“This court ... finds that a release settling one lawsuit should not be construed to end all lawsuits arising out of similar factual situations unless the release so indicates...the language of the release indicates that it was intended to apply to the claims of UNB against VSC, not claims by its directors or officers.”) *Cf., Ricke v. Armco, Inc.*, 92 F.3d 720 (8th Cir. 1996) (“We hold that under the law of trusts the releases executed by the trust beneficiaries do not bar the §4049 trustee’s action.”). In short, since the individual plan participants are not named in the release, they are not released.

Third, where legal and factual disputes exist with respect to the scope of a release or *res judicata* effect of a prior court order, dismissal of a complaint on a motion to dismiss is improper. *Harris v. Koenig*, 722 F. Supp. 2d 44, 54-55, (D.D.C. 2010) (Kessler, J.).⁵² Because the PBGC Settlement Agreement does not specifically waive individual claims, issues of fact and law prevent dismissal of Plaintiffs’ claims against United at the pleading stage of these proceedings—first among these is whether PBGC could actually waive or

⁵² In a prior decision in *Harris*, the court acknowledged “[t]here are at the very least factual disputes as to whether Plaintiffs and other Plan participants were represented adequately...Moreover, there are factual and legal disputes ‘as to whether the release even applies to Plaintiffs’ ERISA claims.’” *Harris v. Koenig*, 602 F. Supp. 2d 39, 54 (D.D.C. 2009).

release claims of individual plan participants under 29 U.S.C. §1370(a).⁵³ *See Holt v. Winpisinger*, 811 F.2d 1532, 1541 (D.C. Cir. 1987) (ERISA claims cannot be waived by contract.)

The **issues of fact** with respect to the PBGC Settlement Agreement are, at least, these:

- To what extent did United take steps to affirmatively shield PBGC and Plaintiffs' representatives from knowledge of the Fair Market Value of United Loyalty Services and the Mileage Plus Asset?
- In addition to disclosing United Loyalty Services (and the Mileage Plus asset) at "book value" instead of Fair Market Value, did United engage in other acts to shield or hide the true value of Mileage Plus so that its actual Fair Market Value would not be used for the purposes of the PBGC Settlement Agreement?
- Did United intentionally misstate the reason for disclosing United Loyalty Service (and the Mileage Plus Asset) at book value: that it would be "prohibitively expensive" to obtain a current market valuation" for Mileage Plus?⁵⁴
- Did PBGC have independent knowledge of the actual value of Mileage Plus, and if so, how and to what extent was this disclosed?
- To what extent were Plaintiffs represented during negotiation of the PBGC Settlement Agreement and related plan termination proceedings?⁵⁵

These are all issues of fact which - depending on the answer - go to the very foundational integrity of the PBGC Settlement Agreement and the basis upon which it was entered.

The **issues of law** with respect to the PBGC Settlement Agreement are, at least, these:

- Do the purported waivers in behalf of the Plan also extend to claims of individual plan participants, or only the plan itself?⁵⁶

⁵³ Plaintiffs do not specifically address the impact of the ALPA Settlement Agreement raised by United because these defendants were deemed to not have standing under that agreement. *See* discussion, *infra*, pp. 39-40.

⁵⁴ 2nd Amd. Compl., Ex. A, Doc. # 9-2, p.110.

⁵⁵ Retired plan participants were denied standing to seek replacement benefits under Bankruptcy Code §1113. *See* discussion, *infra*, pp. 39-40.

- Can PBGC and the plan sponsor waive individual ERISA Title IV claims of plan participants under 29 U.S.C. §1370(a)?
- Can PBGC and the plan sponsor waive ERISA fiduciary duties under 29 U.S.C. §1110 or other provisions of ERISA?

These are issues of law that again, depending on the answer, go to the very foundational integrity of the PBGC Settlement Agreement and the basis upon which it was entered. *See Harris*, 722 F. Supp. 2d at 54-55. However, at this early stage of these proceedings, dismissal of claims based on equitable or contractual arguments of waiver or release is premature. *Id.* Therefore, United's reliance on the exculpation clauses of the PBGC Settlement Agreement and the ALPA Settlement agreement do not properly support its motion to dismiss, because the exculpation clauses are void as against public policy under ERISA, and because unresolved issues of fact and law prevent dismissal of claims on a motion to dismiss.

2. Plaintiffs' ERISA Title IV Claims are Not Barred by Res Judicata or Issue Preclusion.

United also argues that certain nonbankruptcy court rulings bar Plaintiffs' ERISA Title IV claims under principles of res judicata. But the issues raised by Plaintiffs in this action have not been actually litigated or determined by a valid and final judgment, nor could these claims have been raised in earlier proceedings. In *Novak v. World Bank*, 703 F.2d 1305, 1308-09 (D.C. Cir. 1983), the court observed: "The doctrines of res judicata and collateral estoppel are easily confused because the term 'res judicata' is often used to embrace both doctrines. [citation omitted]. However, it is important to distinguish the two concepts because res judicata and collateral estoppel apply in different circumstances with

⁵⁶ *See Holt*, 811 F.2d at 1541 (ERISA rights cannot be waived by contract.)

different consequences to litigants.” In *Allen v. McCurry*, 449 U.S. 90, 94 (1980), the Supreme Court clarified:

Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

Also, case context and underlying policy issues may inform a court’s analysis of res judicata arguments in appropriate cases. For example, in *Teamsters Local 282*, *supra*, the Seventh Circuit determined that res judicata did not bar claims overlooked by an ERISA trustee in exercising its fiduciary obligations. The court framed the issue this way:

The principal question in this case is whether a trustee's imprudent failure to investigate before investing relieves the other party of liability for securities fraud. We hold that it does not.

762 F.2d at 522. In that case, litigation had been originally filed in the Southern District of New York by the Teamsters Local 282 Pension Trust Fund to collect on a loan. *Id.* Later, a related third party complaint was filed in the Northern District of Illinois, and wound its way to the Seventh Circuit on appeal. The Seventh Circuit held that the New York cases did not preclude litigation in the Northern District of Illinois on the the issue of the trustee’s failure to evaluate the soundness of the proposed loan. *Id.* at 526. In denying preclusive effect to the earlier court ruling, Judge Easterbrook explained:

If the trustee carries out the investigations required of him, there will be fewer losses. In this case the New York courts found that an adequate investigation would have averted the loss altogether. It is a separate legal question, though, whether a trustee's failure to protect the beneficiaries from harm should let the primary offender off the hook. We think not. ***The parties have cited no case--and we have found none--in***

which the failure of a trustee to investigate on behalf of the beneficiaries excused some other party from complying with a legal obligation to tell the truth. This is not surprising. Disclosure by seller of securities and investigation by the buyer are cumulative ways to get at the truth. The Congress in enacting ERISA, and the courts developing the common law of trusts, wanted to encourage self-help by trustees who otherwise might not have the appropriate incentives to take care. This hardly means that if the trustee defaults, thereby increasing the chance of injury to the beneficiaries, the court should wink at the falsehoods or omissions of the sellers of the securities, thereby further increasing the chance of injury to the beneficiaries. *The failure of one legal safeguard* (the trustee's duty to investigate) *is not a very good reason to extinguish another legal safeguard* (the seller's duty to tell the whole truth).

Id. at 527 (emphasis added).

Judge Easterbrook's logic applies with equal force here. As in *Teamsters Local 282*, investigation by PBGC into the assets of United would likely have likely resulted in a full, or at least higher, funding of the unfunded pension benefits lost by Plaintiffs. But here, as in *Teamsters Local 282*, it is a "separate question" whether this should let United "off the hook" through a res judicata defense. *Id.* at 527. As the Seventh Circuit Court did in *Teamsters Local 282*, this Court should reject United's res judicata arguments in favor of a sound, underlying policy that the lack of one legal safeguard (a regulation allowing PBGC to make net worth determinations based on partial information) "is not a very good reason to extinguish another legal safeguard [United's] duty to tell the whole truth," i.e., provide complete and accurate information under 29 U.S.C. §1362 and 29 C.F.R. §4062.4,6. *Id.*

In addition, and as a separate legal basis for denying United's Motion to Dismiss, significant legal and factual disputes exist with respect to the scope of a release or res judicata effect of prior court orders. Therefore, dismissal of a complaint on a motion to dismiss is improper. *Harris*, 722 F. Supp. 2d at 54-55.

For example, Defendants assert that Plaintiffs' claims are subject to res judicata by virtue of the prior litigation in *United Retired Pilots Benefit Protection Ass'n v. United Air Lines*, 443 F.3d 565, 572 (7th Cir. 2006) ("*URPBPA I*"). In that case, United retired pilots (including many of the Plaintiffs in this action) sought *standing* under Bankruptcy Code §1113 to negotiate for replacement benefits that were paid to the Airline Pilots Association ("ALPA") in exchange for an agreement to terminate collective bargaining agreement for active pilots. When ALPA made clear that it would not represent the interests of the retired pilots in the negotiations, the retired pilots moved the bankruptcy court to appoint a representative to participate in the negotiations on their behalf. *Id.* The district court denied the retired pilot's motion, "and as a result the retired pilots did not participate in the negotiations." *Id.* On appeal, the Seventh Circuit affirmed the decision below that the retired pilots did not have *standing* to negotiate for replacement benefits in bankruptcy. The court reasoned that because the retired pilots were not parties to the collective bargaining agreement between ALPA and United, they had no "legally protected interests" sufficient to confer standing. *Id.* Thus in *URPBPA I*, the Seventh Circuit Court ruled that the retired pilots did not have a right to negotiate for replacement benefits under Bankruptcy Code §1113. Having been found to lack standing to negotiate for bankruptcy replacement benefits (claims not covered under ERISA Title IV) the retired pilots' counsel next argued that the retired pilots were entitled to replacement benefits as a matter of law under the Bankruptcy Code. This claim was also rejected by the Bankruptcy Court, the District Court, and the Seventh Circuit Court of Appeals. *URPBPA II*, 468 F.3d 456 (7th Cir. 2006).

In a nutshell, under *URPBPA I* the retired pilots were denied standing to negotiate for replacement benefits under Bankruptcy Code §1113, while under *URPBPA II*, the retired

pilots were denied standing to argue for replacement benefits under Bankruptcy Code §1113 as a matter of law. Therefore, no part of *URPBPA I* and *URPBPA II* (or the lower court rulings in those matters) could have been litigated or decided on the merits.

Finally, Defendants' issue preclusion arguments fail because issue preclusion does not apply to Plaintiffs' ERISA claims in this case. As the Supreme Court has ruled: "[i]t is the general rule that issue preclusion attaches only 'when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.' Restatement (Second) of Judgments §27, p. 250 (1982)." *Arizona v. California*, 530 U.S. 392 (2000).

Clearly, the issues raised by Plaintiffs in this action have *not* been "actually litigated" or "determined by a valid and final judgment." In *URPBPA I* and *URPBPA II*, retired pilots, (including many of the Plaintiffs in this action), were denied standing to negotiate or argue for replacement benefits under Bankruptcy Code §1113. Similarly, in Judge Lefkow's Order for Plan Termination,⁵⁷ the court did not address, nor did any of the parties litigate, the sufficiency of United's ERISA disclosures in the administrative process that was used to justify Plan Termination. In fact, no party has ever litigated and no court has decided the issues central to the present case: that United represented to PBGC during plan termination proceedings that United Loyalty Services⁵⁸ had a "book value" of negative \$397 million, while the Fair Market Value of this asset was very substantially higher—and this higher value should have been disclosed for the purposes of setting United's §1362 Pension Liability amount. Therefore, this Court should find that Plaintiffs' claims are not barred by the "issue preclusion" prong of res judicata.

⁵⁷ *PBGC v. United Air Lines, Inc.*, 436 F. Supp. 2d 909 (N.D. Ill. 2006).

⁵⁸ A member of United's controlled group under ERISA Title IV.

3. Claim Preclusion Does Not Apply to Plaintiffs' ERISA Claims in this Case.

The bankruptcy claims addressed in *URPBPA I* and *URPBPA II* do not preclude Plaintiffs' claims in this action because: neither case addressed Plaintiffs' rights under ERISA and the Bankruptcy Court did not have jurisdiction over the ERISA Title IV issues of Plan Termination, *In re United Airlines, Inc.*, 337 B.R. 904, 909 (N.D. Ill. 2006) ("Title IV of ERISA is the exclusive means for terminating a defined benefit pension plan. 29 U.S.C. §1342(a)(4)"), and so could not have entertained ERISA Title IV claims. The Plan Termination rulings addressed in Judge Lefkow's Order⁵⁹ and the follow-on Seventh Circuit opinion⁶⁰ also do not preclude Plaintiffs' claims in this action because the claims in this case were not raised, and could not have been raised, in the proceedings before Judge Lefkow in connection with PBGC's action for Plan Termination. Additional reasons are these: First, under 29 U.S.C. §1370(a), Plaintiffs could not show the "adverse effect" they suffered as a result of United's acts and practices in violation of 29 U.S.C. §§1362 and 1369 until PBGC issued final determination letters informing each individual plaintiff the actual amount of their ERISA Title IV pension benefit. It is not enough to show "suspected" damage—a showing of actual harm is required for standing under ERISA. PBGC started issuing the bulk of its final determination letters to Plaintiffs within, approximately, the past eighteen months, and Plaintiffs' "actual harm" was not known until receipt of the determination letters. Until the pension Plan was actually terminated, the Plan Participants had no legal right, contingent or otherwise, to sue for Plan Termination irregularities. *See Fogel, Trustee v. Zell*, 221 F.3d 955, 906 (7th Cir. 2000) ("A claim implies a legal right, however, and before a tort occurs the potential victim has no legal right, 'contingent' or otherwise...")

⁵⁹ *Id.*

⁶⁰ *In re UAL Corp. (Pilots' Pension Plan Termination)*, 468 F.3d 444 (7th Cir. 2006)

Second, in a companion administrative proceeding currently pending before PBGC, Plaintiffs sought, and were granted, discovery of PBGC books and records related to United's valuation of United Loyalty Services and the Mileage Plus asset during Plan Termination. The Second Request for Discovery was served on PBGC on Dec. 7, 2010. On February 11, 2011 PBGC responded to the Second Request for Discovery with a production of 164 pages of documents that identified United's disclosure to PBGC, at or about the time of Plan Termination, of the value of United Loyalty Services, LLC and the Mileage Plus Asset.⁶¹ This information has never before been disclosed in any court proceeding by any party, and has never been in the possession of any of the Plaintiffs or their representatives.

Third, during or about Plan Termination proceedings, it was not reasonable for Plaintiffs to know or suspect that United had misrepresented the valuation standard in its filings with PBGC since the date for disclosing such information was provided under PBGC Regulations and the actual date that filings were to have been received, and were received, was not public information.

Fourth, during or about Plan Termination proceedings, it was not reasonable for Plaintiffs to know or suspect that United Loyalty Services (and the Mileage Plus Asset) had substantial current value because United hid that fact from PBGC, and everyone else. Plaintiffs are not in the business of valuing airlines or airline assets—but United is. To argue that Plaintiffs somehow should have done a better job catching United in its false disclosure, in a matter as technical as asset valuation, is an issue of fact that should not be given weight on a motion to dismiss.

⁶¹ See 2nd Amd. Compl., Ex. C, Doc. # 9-4.

Finally, equitable considerations favor Plaintiffs' claims going forward on the merits. As the Supreme Court reminded in *CIGNA Corp.*, a maxim of equity states that "[e]quity suffers not a right to be without a remedy." 131 S. Ct. at 1879. United committed a wrong under ERISA, and United argues that that this Court should use bankruptcy law and res judicata equitable principles to leave Plaintiffs without a remedy—hardly a fair application of equitable principles espoused by the Supreme Court. A bankruptcy court is a court in equity. This Court also sits in equity. United lacks the "clean hands" required for equitable application of res judicata because of its deception in providing information about the net worth of the Mileage Plus Asset under the facts alleged in this case.

For at least these reasons, the Plan Termination rulings addressed in Judge Lefkow's Order and the follow-on Seventh Circuit opinion do not preclude Plaintiffs' claims in this action because the claims in this case were not raised, and could not have been raised, in the proceedings before Judge Lefkow in connection with PBGC's action for Plan Termination. *See Abbey v. Modern Africa One, LLC*, 205 B.R. 594 (D.D.C. 2004) (motion to dismiss denied on claims of res judicata related to bankruptcy proceedings).

CONCLUSION

Plaintiffs state a claim under 29 U.S.C. §1370(a) because they have shown violations by United of 29 U.S.C. §§1362 and 1369 that adversely affected them. The Chapter 11 Confirmation Order does not bar Plaintiffs' claims because the Bankruptcy Court lacks jurisdiction over Plaintiffs' Title IV claims because the claims arose after the Chapter 11 Confirmation Order and because ERISA is the exclusive statutory mechanism for resolving such claims. Neither release nor res judicata bar Plaintiffs' claims because, at the very least, substantial issues of fact and law make dismissal of these claims on a motion to dismiss

improper. This Court should therefore deny United's Motion to Dismiss.

Washington, D.C.
Dated: July 15, 2011

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I certify that the foregoing document was served through the Court's electronic filing system and by overnight mail on July 15, 2011, upon:

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