

**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 TRANSFER VENUE TO THE U.S. DISTRICT
COURT FOR THE NORTHERN DISTRICT OF ILLINOIS**

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Plaintiffs respectfully submit this memorandum of points and authorities in opposition to the motion by Defendants to transfer venue in this case from this Court to the United States District Court for the Northern District of Illinois.

INTRODUCTION

Plaintiffs' Second Amended Complaint (2nd Amd. Compl.) seeks "appropriate equitable relief" under ERISA for violations of 29 U.S.C. §§1362 and 1369 by Defendants (hereinafter collectively referred to as "United") in connection with termination of the pension plan in which Plaintiffs were participants or beneficiaries, as well as related claims under 29 U.S.C. §1132(a)(3). In connection with plan termination, ERISA requires that the net worth of a plan sponsor and each of its controlled group be disclosed to PBGC at "fair market value." United violated this requirement by disclosing one of its valuable assets at "book value," an internal value assigned by United for its own accounting purposes, instead of at fair market value. United Loyalty Services, LLC (including United's "Mileage Plus" frequent flyer program) was worth upwards of \$7.5 billion at fair market value at the time of pension plan termination. Instead of disclosing the net worth of this asset at fair market value, United disclosed a *negative* \$397 million net worth, based on "book value." This "book value" valuation was originally filed by United in its bankruptcy proceedings.¹ United apparently never bothered to correct the value standard when it disclosed the net worth of its controlled entities in filings made with Pension Benefit Guaranty Corporation ("PBGC") in connection with pension plan termination, as required under ERISA. Therefore, United committed ERISA violations in its net worth filings with PBGC—filings that were made in the District of Columbia.² As this Court has repeatedly held in ERISA cases, "a defendant seeking a transfer of venue has the additional burden of

¹ Plaintiffs do not contest that book value may have been proper for bankruptcy court filings.

² Congress has provided a private cause of action to plaintiffs under 29 U.S.C. §1370(a) and 29 U.S.C. §1132(a)(3) to redress these violations.

surmounting ERISA's special venue provision.” See *Int’l Painters and Allied Trades Indus. Pension Fund v. The Painting Co.*, 569 F. Supp. 2d 113, 118 (D.D.C. 2008). “The moving party can overcome this presumption only by demonstrating that private and public factors clearly favor a trial in an alternative forum.” *Id.* at 117. United’s Motion to Transfer fails to overcome this strong ERISA presumption. United cannot show that venue factors “clearly favor a trial” in the forum of United’s choosing. In fact, the opposite is true. As shown in the analysis below, applicable venue factors clearly favor trial in *this* District—the forum of Plaintiffs’ choosing.

United also argues that it should have a bankruptcy “home court” presumption in this case. But United fails to fairly acknowledge that this case arises under ERISA law, not bankruptcy law. The case is pending before this Court, as a court in equity, not before a bankruptcy court. This Court may enter all “appropriate equitable relief,” including ““those categories of relief” that, traditionally speaking (i.e., prior to the merger of law and equity) ‘were typically available in equity.’” *CIGNA Corp. v. Amara*, __ U.S. __, 131 S. Ct. 1866, 1879 (2011). Therefore, this Court, acting as a court in equity, may properly consider and harmonize *all* federal policies and goals—something the bankruptcy court cannot do because of its limited jurisdiction. Therefore United’s “home court” bankruptcy arguments are inapplicable to this case.

In addition, United argues for a venue change alleging that Plaintiffs’ claims attack previous rulings of Northern District of Illinois courts. But Plaintiffs are not seeking to set aside or overturn these rulings. Rather, Plaintiffs ask this Court to *interpret* the earlier rulings. United also argues that the Northern District of Illinois courts should first be allowed to interpret their own rulings. But United’s argument overlooks principles of comity practiced by its home federal circuit, the Seventh Circuit Court of Appeals, in *res judicata* determinations, that require

a reviewing court to make res judicata determinations based on its own independent review of the previous rulings, not the court that originally issued the rulings in question.

Finally, the “balance of convenience” argued by United does not favor transfer. Many key witnesses in this case are current and former federal government employees, witnesses who live in or near this District. Further, United, a large company with major airline and operational hubs that serve this District, is hard-pressed to claim that litigating this case here would somehow be inconvenient.

For these reasons and the additional reasons set out below, venue is properly before this Court. This Court should therefore deny United’s Motion to Transfer.

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 (hereinafter, the “Plan”). 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.³ The Plan continued in force, uninterrupted, until its termination in 2005.⁴
2. Plaintiffs are participants or beneficiaries under the Plan (hereafter, “Plan Participants”).⁵
3. UAL Corp remained the Plan sponsor until the Plan was terminated on the petition filed by PBGC under 29 U.S.C. §1342 as an involuntary termination, on June 13, 2006 (“Plan Termination”).⁶

³ 2nd Amd. Compl., ¶¶ 28-31.

⁴ 2nd Amd. Compl., ¶ 35.

⁵ 2nd Amd. Compl., ¶ 25.

⁶ 2nd Amd. Compl., ¶ 39.

4. Prior to termination of the Plan, 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.⁷
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 of its assets, and the assets of its “controlled group.”⁸
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 United’s frequent flyer program known as Mileage Plus (the “Mileage Plus Asset”).⁹
7. During or about Plan Termination, United filed documents with PBGC disclosing the value of the Mileage Plus Asset as a \$397 million liability. This was the “book value” of Mileage Plus assigned by United.¹⁰
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.¹¹
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”). The PBGC Settlement Agreement was based on the valuation of Mileage Plus disclosed by United at “book value” rather than at fair market value.¹²

⁷ 2nd Amd. Compl., ¶ 38.

⁸ 2nd Amd. Compl., ¶¶ 18, 19, 74.

⁹ 2nd Amd. Compl., ¶ 29.

¹⁰ 2nd Amd. Compl., ¶ 81.

¹¹ 2nd Amd. Compl., ¶ 82.

¹² 2nd Amd. Compl., ¶ 87.

10. With 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, a settlement agreement was entered between PBGC and United on or about April 22, 2005 (the "PBGC Settlement Agreement"). 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.¹³
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,¹⁴ determine the benefits payable under 29 U.S.C. § 1344 to each individual Plan Participant,¹⁵ 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.¹⁶
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:

¹³ 2nd Amd. Compl., ¶ 9.

¹⁴ In addition to the Pilots Plan, United also sponsored pension plans for its flight attendants, machinists and management employees.

¹⁵ 2nd Amd. Compl., ¶ 44.

¹⁶ *Id.*

- a. Value or estimates of value (or Net Worth) of United Loyalty Services, a subsidiary of UAL Corp, submitted by UAL Corp;
 - 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.¹⁷
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 that relate in part to United Loyalty Services, all of which are copies of documents earlier filed in bankruptcy court by United Air Lines Corporation.¹⁸ 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.¹⁹ 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

¹⁷ 2nd Amd. Compl., ¶ 77; *see also* 2nd Amd. Compl., Ex. B, Doc. #9-3.

¹⁸ 2nd Amd. Compl., Ex. C, Doc. # 9-4.

¹⁹ 2nd Amd. Compl., ¶77; *see also* 2nd Amd. Compl., Ex. A, Doc. # 9-2.

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 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.

ARGUMENT

A. VENUE IS PROPER IN THIS COURT

Venue in an ERISA action is proper in either: (1) the district where the plan is administered; (2) the district where the breach took place; or (3) the district where the defendant resides or may be found. 29 U.S.C. §1132(e)(2).

In this case, venue is proper in this District under predicate (1) because the pension plan in question is currently administered here. United also concedes that since 2005, the plan has been administered by PBGC in the District of Columbia.

Venue is proper in this District under predicate (2) because this is the District where documents that violated ERISA valuation standards were filed (i.e., the breach took place). Other meetings and representations also occurred in this District.

Venue is proper in this District under predicate (3) because United maintains significant hubs of operations at Dulles International Airport and Reagan National Airport that both serve this District; and United may be found within this District in connection with those operations.

Thus, while venue would be proper in this District if only one of the venue predicates existed, in this case all three exist, lending strong support to Plaintiffs' choice of venue in this District.

In evaluating a venue transfer request, this Court also considers “the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to [the] private concerns [of the parties], come under the heading of ‘the interest of justice.’” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988). None of these factors support transferring venue in this case.

B. THE “INTERESTS OF JUSTICE” DO NOT FAVOR TRANSFER

United argues that the “interests of justice” favor transfer because “the NDIL has invested substantial resources [in] managing and resolving cases” that purportedly involved the same issues present in this case. Def. Mem. at 10. United makes two arguments under the rubric of “interests of justice.” First, it argues that this lawsuit is a “collateral attack” on prior proceedings in the Northern District of Illinois. Second, it asserts that the Bankruptcy Court of the Northern District of Illinois is entitled to the “home court” presumption generally given to the bankruptcy court in which the debtor’s case is pending. These arguments are not correct under the facts of this case.

1. It Is the Responsibility of This Court to Determine Whether the Prior Judgments Entered by the Northern District of Illinois Have Any Preclusive Effect.

Under precedent of United’s home circuit, the Seventh Circuit Court of Appeals, the preclusive effects of prior judgments in a first case, if any, are evaluated by a court hearing the second case, not by the court that heard the first case. According to the Seventh Circuit Court, “the first court does not decide the preclusive effect of its judgments. The second court must decide for itself what matters were settled in the first case.” *Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522, 525 (7th Cir. 1985). United should be held to the standard that its home federal circuit has established on this question. Other federal courts have said the same

thing. In *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1339 (M.D. Fla. 2008) the court addressed the proper way to evaluate res judicata arguments, holding: “It is the duty of the second trial court – which knows both what the earlier finding was and how it relates to a later case – to independently determine what preclusive effect a prior judgment may be given.” *See also Midway Motor Lodge v. Innkeepers’ Telemangement & Equip. Corp.*, 54 F.3d 406, 409 (7th Cir. 1995) (“In the law of preclusion . . . the court rendering the first judgment does not get to determine that judgment’s effect; the second court is entitled to make its own decision.”). Applying this principle of law to this case, it is the duty of this Court to determine what preclusive effect, if any, the judgments of the courts of the Northern District of Illinois have on Plaintiffs’ action. As a result, the interests of justice do not favor transfer of this case for res judicata reasons.

2. Plaintiffs’ Suit Does Not Collaterally Attack Prior Proceedings in the Northern District of Illinois

United also argues that “this lawsuit is a collateral attack on prior proceedings in the NDIL.” Def. Mem. at 11. In reality, *none* of Plaintiffs’ claims could have been decided in the prior litigation. 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. . .”) Indeed, had the U.S. District Court for the Northern District of Illinois refused to terminate the pension plan under 29 U.S.C. §1342, Plaintiffs’ claims under 29 U.S.C. §1370(a) would never have come into existence. Further, pension Plan Termination was not adjudicated by the district court until

June 13, 2006, five months *after* the Bankruptcy Court’s Chapter 11 confirmation order.²⁰ From the time of the Chapter 11 confirmation order to the date of pension Plan Termination, United had a continuing statutory and regulatory duty under ERISA to accurately disclose the net worth of its assets and those of its controlled group—a duty it violated, at least in part, after the confirmation order. 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; the claims therefore postdate the chapter 11 confirmation order and therefore are not covered under the confirmation order.

3. The Bankruptcy Court’s “Home Court” Presumption is Inapplicable in this Case Because the Bankruptcy Court Lacks Subject Matter Jurisdiction Over Plaintiffs’ ERISA Claims

United asserts that the Bankruptcy Court of the Northern District of Illinois is entitled to the “home court” presumption generally given to the bankruptcy court in which the debtor’s case is pending. But United’s reliance on the “home court” presumption is misplaced under the facts of this case.

The “home court” presumption “was created in the case law based on a conclusion . . . that the most important factor to consider in deciding whether to transfer the proceeding is the impact that transfer would have on the economic and efficient administration of the [debtor’s] estate.” *In re Harnischfeger Indus., Inc.*, 246 B.R. 421, 439 (Bankr. N.D. Ala. 2000).

In this case, United’s argument for the “home court” presumption is belied by the fact that a bankruptcy court has no subject matter jurisdiction over Plaintiffs’ ERISA claims. In fact, United previously argued that the Bankruptcy Court had jurisdiction under 29 U.S.C. § 1342 over Plan Termination proceedings – and lost that argument on appeal to the district court.

²⁰ The Bankruptcy Court’s Chapter 11 confirmation order was entered January 20, 2006, effective February 1, 2006.

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 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 applied to the *bankruptcy 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 purported to exercise core jurisdiction over Plan Termination, entering a final order terminating the pension Plan on October 26, 2005. This order went on appeal to the 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 reasoned:

PBGC brought the proceeding ***against United as the plan administrator, not*** as the debtor in the pending bankruptcy. 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. (emphasis added). Thus, the subject matter jurisdiction of the Bankruptcy Court has already been decided against United and *res judicata* precludes any further need for litigating this issue.

While extolling the long procedural history of United's bankruptcy proceeding in its Motion to Dismiss, United completely ignores the fact that the Bankruptcy Court's subject matter jurisdiction over ERISA plan termination was explicitly rejected in earlier proceedings. Not surprisingly, United has failed to address how the Bankruptcy Court could reacquire subject matter jurisdiction to release Plaintiffs' claims under 29 U.S.C. §1370 related to Plan Termination, when the Bankruptcy Court lacked Plan Termination jurisdiction in the first instance.

By contrast, this Court has a strong ERISA interest in this case that exceeds the jurisdictional limits of the bankruptcy court—and this Court has the full range of jurisdictional options to enter an appropriate order in equity. The Supreme Court has recent ruled 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.’” *CIGNA Corp. v. Amara*, 131 S. Ct. at 1879 (internal quotations omitted). Under the broad reach of ERISA equity jurisdiction, this Court can properly consider and harmonize *all* federal policies and goals—something the bankruptcy court cannot do because of its limited jurisdiction.

In this context, United's argument for a home court bankruptcy presumption is not persuasive. This Court should deny United's Motion to Transfer under 28 U.S.C. §§1404(a) or

1412.

C. THE PRIVATE FACTORS DO NOT FAVOR TRANSFER

1. The Court Should Give Plaintiffs' Choice of Forum Substantial Deference Because the Plan is Administered in the District of Columbia

In an ERISA case, “a defendant seeking a transfer of venue has the additional burden of surmounting ERISA's special venue provision.” *Int'l Painters and Allied Trades Indus. Pension Fund v. The Painting Co.*, 569 F. Supp. 2d 113, 118 (D.D.C. 2008). “As this Court reasoned, “plaintiff's choice of forum is due substantial deference and, unless the balance of convenience is strongly in favor of the defendants, should rarely be disturbed.” *Int'l Bhd. of Painters & Allied Trade Union v. Best Painting & Sandblasting Co.*, 621 F. Supp. 906, 907 (D.D.C. 1985), (citing *Gross v. Owen*, 221 F.2d 94, 95 (D.C. Cir. 1955)). While a strong presumption exists in favor of the plaintiff's choice of forum, “[t]he moving party can overcome this presumption only by demonstrating that private and public factors clearly favor a trial in an alternative forum.” *The Painting Co.*, 569 F. Supp. 2d at 117. The moving party carries the burden of showing that a transfer is appropriate. *Montgomery v. STG Int'l, Inc.*, 532 F. Supp. 2d 29, 32 (D.D.C. 2008); *Onyeneho v. Allstate Ins. Co.*, 466 F. Supp. 2d 1, 3 (D.D.C. 2006).

In this case, Plaintiffs have brought this action in the district where the Plan is currently administered. PBGC has administered the Plan since June 2006. As Plan administrator, PBGC has engaged in a variety of actions to fulfill its obligations under ERISA, including: (1) valuing the assets; (2) allocating the assets among the various plans previously sponsored by United; (3) determining the benefits payable to each individual plan participant; and, (4) determining the benefits payable to each plan participant. PBGC performs all of the functions relating to the administration of the Plan in the District of Columbia.

Where, as in this case, the plan is administered in the District of Columbia, this Court has given special weight to plaintiff's choice of forum. *See e.g. Fanning v. Trotter Site Preparation, LLC*, 668 F. Supp. 2d 60, 63 (D.D.C. 2009) ("The plaintiff's choice of forum is typically given special weight in ERISA cases, particularly when, as here, the plan is administered in the district in which the suit is filed."); *Flynn v. Thibodeaux Masonry, Inc.*, 02-0710, 2002 WL 31520354, *2 (D.D.C. Oct. 28, 2002) (refusing to transfer case where "the funds are administered in the District of Columbia."); *Joyce v. Eastern Concrete Paving Co.*, 96-1343, 1996 WL 762323, *1 (D.D.C. Sept. 4, 1996) (denying motion to change venue where the plan was administered in the District of Columbia).

"By allowing the action to occur in the district where the plan is administered, the special venue provision makes collection efforts efficient, economical and inexpensive for ERISA funds, fulfilling Congress's intent to protect the financial integrity of such funds." *Flynn v. Veazey Const. Corp.*, 310 F. Supp. 2d 186, 193 (D.D.C. 2004). "On the other hand, "[f]orcing ERISA plaintiffs to litigate claims where each employer resides . . . would undermine the financial integrity of the funds, defeating the goal of efficient administration of ERISA plans." *Veazey Const. Corp.*, 310 F. Supp. 2d at 193.

This Court has warned that "[a] defendant requesting a transfer of venue in an ERISA case filed in the pension fund's home district faces an uphill battle . . ." *Int'l Painters & Allied Trades Indus. Pension Fund v. Tri-State Interiors, Inc.*, 357 F. Supp. 2d 54, 58 (D.D.C. 2010). In fact, this Court recently noted in *Fanning v. Capco Contractors Inc.*, 711 F. Supp. 2d 65, 72 (D.D.C. 2010), that "[i]n other ERISA cases where transfers have been made under 28 U.S.C. §1404(a) due to lack of a significant nexus with this district, the District of Columbia was not the site of plan administration but rather the location of the defendant." The Court concluded that

“[i]n light of the deference given by courts to an ERISA plaintiff’s right to bring an action where the plan is administered, the Court finds that District of Columbia has a significant connection to this action.” *Id.*

As a result, the Court should give considerable weight to Plaintiffs’ choice of forum, the U.S. District Court for the District of Columbia. “Because of the special weight ERISA accords a plaintiff’s choice of forum, the court need not engage in a lengthy analysis to determine that transfer is not warranted.” *Veazey Const. Corp.*, 310 F. Supp. 2d at 193.

2. This District Has Significant Contacts to the Facts Underlying This Case

“The locus of operative facts is traditionally an important consideration in the transfer analysis.” *In re Principal U.S. Property Acc’t Litig.*, 09-9889, 2010 WL 1645042, *5 (S.D.N.Y. April 22, 2010). United claims that this District has no meaningful contacts to this case. United, however, ignores the significant actions that took place in the District of Columbia that are critical to this case. Many of the key facts alleged in the Second Amended Complaint, including United’s filing of misleading disclosure statements with PBGC, occurred in this District. And where conduct that gives rise to the federal claim is a false filing in the District of Columbia, this Court has refused to grant transfer. *See United States v. Second Chance Body Armor, Inc.*, 04-280, 2011 WL 1048183, *3 (D.D.C. March 24, 2011). In *Second Chance*, plaintiffs sued defendants under the False Claims Act, alleging that defendants sold the federal government defective bullet-proof vests. Defendants moved to transfer the case to Michigan where, according to defendants, it developed and tested the vests. *Id.* The Court, however, noted some aspects of the fraud took place outside of Michigan, including this District, where vests were shipped to federal agencies, resulting in approximately \$1 million in claims for payment. The Court found that “the conduct that gives rise to an FCA claim is filing a false claim for payment,

and this district was the locus for many such filings in this case. This factor does not weigh in favor of transfer.” *Id.* Similarly, in cases where the false filing of a document is the key issue, the courts have held that venue is proper where the false statement was prepared by defendant as well as where it was received by a government agency. *See United States v. Stephenson*, 895 F.2d 867, 875 (2d Cir. 1990) (venue proper in place where false statement is made by defendant as well as where it is received by government official.); *United States v. Natalli*, 527 F.2d 311, 326 (2d Cir. 1975) (venue proper where false statement is prepared as well as the location where filed.).

Here, United filed documents with the PBGC in Washington, D.C. claiming that the value of the Mileage Plus program was a liability, when in reality the asset was worth billions of dollars. While the document may have been prepared in Chicago, it was filed in the District of Columbia where it was relied upon, to the detriment of the Plan Participants. Given these facts, there is no question that the District of Columbia has significant contacts to the key facts in this case.

3. The Convenience of the Parties Does Not Favor Transfer

The convenience of the parties would not be served by transferring this case to the Northern District of Illinois. While a court may consider whether litigating in a particular forum would cause a party to suffer hardship, including financial distress, the party requesting the transfer must provide documented proof of the financial hardship. *See SEC v. Daly*, 05-55, 2006 WL 6190699, at *5 (D.D.C. Feb. 11, 2006). United claims that the Northern District of Illinois would be a more convenient forum for the parties because two of the Defendants, United Airlines and United Loyalty Services, are headquartered in that District. United submits no proof, much less documentation, to substantiate any claim that these corporate defendants would

suffer any hardship if required to litigate this case in this District. United's argument also lacks weight because it maintains large hubs of operation at Reagan National Airport and Dulles International Airport, both of which serve this District. A "hardship" problem seems unlikely in the context of United's large corporate presence in and near this District.

4. This District Is Convenient For Witnesses and In the Ease to Access of Sources of Proof

To support its request for transfer under section 28 U.S.C. §1404(a), "a moving party must demonstrate (through affidavits or otherwise) what a non-resident witness will testify to, the importance of the testimony to the issues in the case, and whether that witness is willing to travel to a foreign jurisdiction." *Thayer/Patricof Educ. Funding, L.L.C. v. Pryor Resources, Inc.*, 196 F. Supp. 2d 21, 32 (D.D.C. 2002). Here, United has completely failed to disclose what its non-resident witnesses will testify to, the importance of their testimony, and whether these witnesses are willing to travel to Washington, D.C. Thus, United has failed to meet its burden of proof on this issue.

Other important witnesses, current and former PBGC employees, either reside in or around the District of Columbia. Moreover, the location of documents and witnesses is increasingly irrelevant in this age of electronic discovery. According to this Court in *Capco Contractors*, "the physical location of witnesses is less important when testimony may be taken by deposition (including by deposition *de bene esse*) and presented to the Court at either the summary judgment stage or a bench trial." *Capco Contractors*, 711 F. Supp. 2d at 70. Similarly, "thousands of pages of documents can be easily digitized and transported to any appropriate forum." *Id.* Neither the convenience of witnesses nor the location of documents justifies transfer.

D. THE PUBLIC INTEREST FACTORS DO NOT FAVOR TRANSFER

1. This Case is Not a Local Dispute

United has not argued that this dispute is a “local” dispute—nor could it under the facts of this case. Courts typically consider the local interest in a dispute an important factor in diversity cases, where local, state or foreign law are at issue. *See e.g. Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608, 615 (6th Cir. 1984). None of those factors apply here. Furthermore, given that the Plaintiffs reside in every state in the Union, this case is not a local dispute in which the community in one district has a particular interest in the resolution of the case.

2. The Potential Transferee Court’s Familiarity with Applicable Law Does Not Favor Transfer

Plaintiffs’ claims are exclusively federal claims under ERISA. While the U.S District Court for the Northern District of Illinois may be familiar with the background of this case, familiarity with legal issues is not a strong factor in a § 1404(a) analysis. *See In re Principal U.S. Property Acc’t Litig.*, 2010 WL 1645042 at *6. Accordingly, this public interest factor does not support transfer. Further, ERISA is a particular area of interest and focus in this District, a factor that weights in favor of this Court retaining venue.

3. Congestion of the Transferee Court Compared to the Transferor Court Does Not Favor Transfer

The relative congestion of the transferee and transferor courts is also a consideration in whether to grant transfer under section 1404. “According to the December 2010 statistics published by the Administrative Office of the United States Courts, the District of Columbia has 267 cases pending per judge, a median time of 8 months from filing to disposition in civil cases, and a median time of 39.7 months from filing to trial.” *United States v. H & R Block, Inc.*, 11-00948, 2011 WL 2182544, at *8 (D.D.C. June 6, 2011). For the Northern District of Illinois, the

statistics show 471 cases pending per judge, a median time of 6.2 months from filing to disposition in a civil case, and 26.1 months from filing to trial.²¹ These statistics do not indicate any substantial differences in disposition time and, if anything, demonstrate that judges in the Northern District of Illinois carry a significantly larger number of pending cases per judge than does this District. This factor does not favor transfer.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully ask this Court to deny United's Motion to Transfer.

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

Respectfully submitted,

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²¹ These statistics are derived from the Federal Court Management Statistics for December 2010, available at <http://www.uscourts.gov>.

CERTIFICATE OF SERVICE

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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