IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KENNETH ENGLAND, and on behalf of himself and all others similarly situated,	)	
Plaintiff,	)	Case No. 1:20-cv-02877
v.	)	Judge Martha M. Pacold
UNITED AIRLINES, INC,	)	
Defendant.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

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I. Introduction

Defendant United Airlines ("United") accepted billions of dollars from the federal government for air carrier worker support. In exchange for these funds, United promised it would not force workers to take furlough days and would not cut employee pay before September 30, 2020. United memorialized these promises in a contract with the Department of Treasury (the "PSP Agreement"). But shortly after signing the PSP Agreement, United broke its promise by imposing mandatory furloughs and pay cuts on its employees. Plaintiff Kenneth England ("England"), a United employee, filed this suit to enforce United's promise set forth in the PSP Agreement.

United argues in its Motion to Dismiss, ECF No. 13, ("Motion"), that even if it broke its promise, England has no claim. United is mistaken. First, while it is true that third party beneficiary claims are more closely scrutinized when they involve government contracts, England belongs to the specific group of beneficiaries that the PSP Agreement defines, and the CARES Act identifies. And because the PSP Agreement is not a run-of-the-mill government contract sought to be enforced by the general public, it is the precisely the kind of government contract that England may enforce as a third-party beneficiary.

Second, the Supreme Court's decision in *Astra USA, Inc. v. Santa Clara Cty., Cal.*, 563 U.S. 110 (2011) does not foreclose England's claim. Unlike the claims in *Astra* and its progeny, England's claim does not compete with an alternative administrative enforcement framework set up by Congress. Absent such a framework regulating the airline industry on an ongoing basis, complete with an independent adjudicatory framework for disputes, England's claim falls outside the bar to certain third-party beneficiary claims suggested by *Astra*.

Finally, there is no merit to United's argument that England's claim is foreclosed by a

single line in the PSP Agreement specifying who is bound by the contract. Isolated provisions do not determine contractual intent. Rather, intent is determined from the entire PSP Agreement, and the context leading up to it – including the lengthy negotiations and the CARES Act itself. In light of the full context, and as discovery will later confirm, England and United's other employees are the intended beneficiaries of the PSP Agreement and can enforce it as an intended third-party beneficiary. United's Motion should be denied.

II. Applicable Standard

In considering a Rule 12(b)(6) motion to dismiss, a court must "construe the complaint in the light most favorable to plaintiff, accept all well-pleaded facts as true, and draw reasonable inferences in plaintiff's favor." *Taha v. Int'l Bhd. of Teamsters, Local 781*, 947 F.3d 464, 469 (7th Cir. 2020). "[A] party opposing a Rule 12(b)(6) motion may submit materials outside the pleadings to illustrate the facts the party expects to be able to prove." *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012).[1]

III. Factual Background

A. The CARES Act

The Coronavirus Aid, Response, and Economic Security Act ("CARES Act") was signed into law on March 27, 2020. Pub. L. 116-136. The law includes provisions targeted at a group hit particularly hard by the pandemic: airline employees. *See* CARES Act, Title IV, Subtitle B ("Air Carrier Worker Support").

The Air Carrier Worker Support provisions authorize the Department of Treasury ("Treasury") to provide financial assistance to air carriers "to preserve aviation jobs and

[1] *See also Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992) ("a plaintiff is free, in defending against a motion to dismiss, to allege without evidentiary support any facts he pleases that are consistent with the complaint").

compensate air carrier industry workers." CARES Act, § 4112 ("Pandemic Relief for Aviation Workers"). The financial assistance transferred pursuant to this provision in the Act "shall exclusively be used for the continuation of payment of employee wages, salaries, and benefits." *Id*. The CARES Act specifies that the Secretary of Treasury has discretion as to the terms or conditions of any assistance and the form of the assistance. CARES Act, § 4113(b).

B. Negotiations with the Treasury[2]

The same day President Trump signed the CARES Act, March 27, 2020, the head of the airline trade organization, which includes United, announced, "We remain hopeful that the federal government will expeditiously release these funds with as few restrictions as possible to ensure airlines are able to utilize these provisions and meet our payroll."[3] Secretary of the Treasury Steve Mnuchin stated his opposing view, maintaining that the airline support "is not a bailout" and airlines may be required to provide the government with something in return for the transfer of funds.[4] Treasury hired investment bank PJT Partners and the law firm Cleary Gottlieb Steen & Hamilton LLP to represent the government in the employee assistance negotiations with the airlines.[5] At a March 27, 2020, press conference, President Trump specifically addressed the government's negotiations with United, stating "[W]e will be able to handle United . . . Now, will we end up owning large chunks, depending on what these great geniuses decide, along with the executives of the different companies? You know, it's possible."[6]

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[2] The sources referenced in this section are cited to illustrate the facts England will show after discovery. A plaintiff may cite such sources for illustrative purposes, without converting the motion to one for summary judgment. *Geinosky*, 675 F.3d at 745 n.1. Plaintiff does not seek to convert the pending motion to summary judgment absent any discovery. If the Court prefers, Plaintiff can amend his Complaint to include the factual allegations described in the sources referenced herein.

[3] https://www.airlines.org/news/statement-from-a4a-president-and-ceo-nicholas-e-calio-after-the-signing-of-the-cares-act/. (last accessed July 23, 2020).

[4] https://www.reuters.com/article/us-health-coronavirus-usa-airlines/u-s-treasury-taps-wall-street-firms-for-aid-advice-sources-idUSKBN21K01P. (last accessed July 23, 2020).

[5] *Id*.

[6] Remarks at a White House Coronavirus Task Force Press Briefing, March 27, 2020, 2020 WLNR 11451000.

United submitted its application for CARES Act funding on April 3, 2020, after which United and other carriers had to "work with the Treasury Department to negotiate the terms of a possible deal."[7] These negotiations extended beyond the deadlines the CARES Act imposed for funding, as NPR reported, "The major sticking point in negotiations involved whether airlines would be required to reimburse the government for the funds released pursuant to the CARES Act. Secretary Mnuchin proposed that some of the funds would be delivered as low-interest loans, while others would be transferred in exchange for a small share of equity in the company."[8] The financial press reported, "Negotiations between airlines and the department over payroll grants have dragged on longer than expected after the Treasury Department requested more information and proposed additional conditions for the aid."[9]

Ultimately, on April 14, 2020, eleven days after United submitted its application to participate in the payroll support program, the airlines and the Treasury announced an agreement in principle.[10] On April 15, 2020, United issued a press release announcing it was "completing the final agreements with the Treasury Department in the next few days." Complaint, ECF No. 1, ¶ 16. The negotiations resulted in three documents signed on April 20, 2020, the PSP Agreement, a Promissory Note, and a Warranty Agreement. *See* Ex. A hereto, United Airlines Form 8-K. The final PSP Agreement includes both provisions required by the CARES Act as well as additional contract terms. Complaint, ECF No. 1, Ex. A.

[7] https://www.washingtonpost.com/local/trafficandcommuting/us-airlines-begin-negotiations-on-bailout-aid-focused-on-front-line-workers/2020/04/06/42b8d910-7834-11ea-b6ff-597f170df8f8_story.html. (last accessed July 23, 2020).
[8] https://www.npr.org/sections/coronavirus-live-updates/2020/04/14/834596139/airlines-reach-agreement-with-treasury-department-on-share-of-coronavirus-aid. (last accessed July 23, 2020).
[9] https://www.cnbc.com/2020/04/13/coronavirus-aid-mnuchin-flexes-muscles-over-airline-grants-a-taste-of-what-other-companies-face.html. (last accessed July 23, 2020).
[10] *Id.*

C. United Requires Unpaid Leave

Among the terms of the PSP Agreement were the conditions required by the CARES Act: United could not "conduct an Involuntary Termination or Furlough of any Employee" until September 30, 2020, and United shall not "reduce, without the Employee's Consent, the pay rate of any Employee earning a Salary" until September 30, 2020. Complaint, ECF No. 1, ¶¶ 18-19.

Only weeks after making this promise, United informed England and other management and administrative employees that they would be required to participate in an "unpaid time off program." *Id*., ¶ 24. This program forces England and his coworkers to take unpaid leave and a reduced salary. *Id*., ¶¶ 25-28.

One of the participants in the negotiations between the airlines and Treasury, the CEO of American Airlines Doug Parker, stated that United's policy violated the intent of both the law and the subsequent agreements. Parker reportedly stated "Some airlines think it is OK to go and cut employees' hours…One [airline] is cutting full-time from 40 hours to 30, a 25% cut in pay. I was there when we were working on CARES and that wasn't the intent or meaning of it. And that is not just for union employees – it is for non-union, too."[11]

England filed this suit to enforce the terms of the PSP Agreement as one of its intended beneficiaries. ECF No. 1. England seeks to represent a class of all United non-union employees subject to the Unpaid Time Off Program. *Id*., ¶ 30.

IV. Argument

A. England is an Intended Beneficiary of the PSP Agreement

"Under settled principles of federal common law, a third party may have enforceable rights under a contract if the contract was made for his direct benefit." *Holbrook v. Pitt*, 643 F.2d

[11] https://www.forbes.com/sites/tedreed/2020/05/05/american-airlines-ceo-says-united-cannot-legally-shift-workers-from-fulltime-to-parttime-sources-say/#466173df6efd. (last accessed July 23, 2020).

1261, 1270 (7th Cir. 1981). "The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefitted thereby." *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997). To determine whether a plaintiff has third-party rights to enforce a government contract, the court "must analyze the purposes underlying [the contract's] formation." *Holbrook*, 643 F.2d. at 1271.

The Seventh Circuit follows the Second Restatement of Contracts, recognizing "intended" beneficiaries can enforce a government contract as a third party, while "incidental" beneficiaries cannot. *Id*. at 1270 n. 17. Intent to benefit a third party may exist where the plaintiff would be reasonable in relying on the promise as manifesting an intention to confer a right on him or her. *See* Second Restatement of Contracts § 302(1)(b) cmt. d (1981). As the Seventh Circuit has explained, "permitting third-party-beneficiary suits is consistent with freedom of contract, and also reduces transaction costs by conferring rights (though of course not liabilities) on persons without requiring the persons to become involved in the contractual negotiations." *A.E.I. Music Network, Inc. v. Bus. Computers, Inc.*, 290 F.3d 952, 955 (7th Cir. 2002).

On a motion to dismiss a third-party beneficiary claim, the court determines whether it is "plausible" that a plaintiff "would be reasonable in relying on the promise as manifesting an intention to confer a right on him or her." *McDowell v. CGI Fed. Inc.*, No. CV 15-1157 (GK), 2017 WL 2392423, at *7 (D.D.C. June 1, 2017) (finding the question of intent on a third-party beneficiary claim to a government contract was a "merits question" that should not be resolved at the motion to dismiss stage).

In *Holbrook*, the Seventh Circuit held that tenants in government-subsidized housing were third-party beneficiaries to contracts between the property owners and the Department of Housing and Urban Development. The Court analyzed the issue with reference to the statutory

language and purpose of the underlying legislation, Section 8 of the United States Housing Act of 1937. *Id*. at 1271. The Court reasoned, "If the tenants are not the primary beneficiaries of a program designed to provide housing assistance payments to low income families, the legitimacy of the multi-billion dollar Section 8 program is placed in grave doubt." *Id*.; *see also A.E.I. Music*, 290 F.3d at 955–56 (where "… the legislature interpolates a contractual term that the parties are not free to vary, the relevant intentions are no longer those of the parties but those of the legislature.").

Under these principles, the Complaint sufficiently alleges England is an intended beneficiary of the PSP Agreement. He and his fellow employees are the *only individuals* who may benefit from the funds transferred pursuant to the contract. The PSP Agreement states in clear terms that the transferred funds are "Payroll Support" to be used exclusively for "Employee Salaries, Wages, and Benefits." Ex. 1 to Complaint at 3. The sole purpose of the funds is for employee compensation: "The Recipient shall use the Payroll Support ***exclusively*** for the continuation of payment of Wages, Salaries, and Benefits to the Employees of the Recipient." *Id*. at 4 (emphasis added). The PSP Agreement defines employee as "an individual who is employed by the Recipient and whose principal place of employment is in the United States." *Id*. at 3. Thus, England is a member of the only group identified in the PSP Agreement who can receive payroll support funds. England can enforce the contract as an intended beneficiary. His right to do so *reduced* transaction costs because adding employees to the PSP negotiations would have extended the process when time was of the essence. *A.E.I. Music Network*, 290 F.3d at 955.

The intent to benefit employees is also apparent from the language of the CARES Act, which is relevant to determining the intended beneficiary of a government contract. *Holbrook*, 643 F.2d. at 1271; *A.E.I. Music*, 290 F.3d at 955–56. Treasury's contracting power flows from

the "Air Carrier Worker Support" provision of the CARES Act. The law authorizes Treasury to provide financial assistance to airlines *exclusively* for employee wages, salaries, and benefits. CARES Act, § 4112 ("Pandemic Relief for Airline Workers"). As with the language of the PSP Agreement, employees are not only a direct beneficiary of the payroll support provisions – they are the *only group* permitted to benefit.[12]

United cites cases holding that third-party beneficiaries to government contracts face a particularly high bar. This is true, for the good reasons articulated by Judge Cardozo in *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 164 (1928) (expanding the third-party beneficiary doctrine broadly would create "an indefinite number of potential beneficiaries."). But the prohibition against general, undifferentiated, and incidental recipients of public services racing to court does not apply here, where the language of the contract, the text of the statute, and lawmaker explanations show the *sole purpose* of the transfer of funds was to benefit a defined group of individuals: airline employees.

United also suggests that absent specific language expressly authorizing England to maintain a suit in federal court to enforce the contract, England cannot be a third-party

[12] Beyond the text of the PSP Agreement and the authorizing legislation, individual lawmakers have expressly stated that the CARES Act worker support provisions were intended to benefit airline employees. The statements came in the wake of United's announcements regarding furloughs and pay cuts: Comments by Senator Josh Hawley, Missouri, Exhibit B ("The taxpayers of this country have offered a generous bailout to your company and you should, in turn, honor this trust by keeping the promises you made to those you employ."); Comments by Congresswoman Shelia Lee Jackson, Texas, Exhibit C ("[T]he CARES Act and the Paycheck Protection Program was intended to make employees whole during this devastating time due to COVID-19. I realize that the airline industry along with most businesses have been severely impacted, but it was not the intent of Congress for this program to be used as an economic bail-out, but to support the hard-working men and women who are the faces of United Airlines."); Comments by Congressman Kevin Brady, Texas, see Exhibit D ("The CARES Act is focused on protecting workers and prevent rewarding executives. In doing so, the CARES Act prevents furloughs through September 30th, 2020."); Comments by Senator Bob Casey, Pennsylvania, Exhibit E ("Congress recognized the extent to which the current COVID-19 pandemic has negatively affected the airline industry and provided assistance in the CARES Act specifically to air carriers to protect the jobs and livelihoods of workers in the airline industry."); Congressman Albio Sires, New Jersey, Exhibit F ("The financial assistance provided to airlines by [the CARES Act] – $5 billion of which was accepted by United – is intended to help keep employees on payroll and ensure that they receive the benefits they earned in years of service to you.")

beneficiary. But the law does not require such magic words. *Montana*, 124 F.3d at 1273 ("[t]he intended beneficiary need not be specifically or individually identified in the contract."); *see also Carter v. United States*, 102 Fed. Cl. 61, 70 (2011) (same); *Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1066 (D.C. 2008) ("intent [to benefit a third party] may be adduced if it is not expressly stated in the contract. . .") (internal quotations omitted). Here, where all inferences are drawn in England's favor, the agreement's plain language – identifying United employees as the exclusive beneficiaries of payroll funding – and the authorizing legislation show England is a direct, intended beneficiary of the deal.

B. *Astra* Does Not Foreclose England's Claim

1. *Astra* is Distinguishable Because the CARES Act did not Create a Regulatory Enforcement Program

The Supreme Court's decision in *Astra USA, Inc. v. Santa Clara Cty., Cal*., 563 U.S. 110, 117-18 (2011) stands for the principle that when Congress creates a robust regulatory enforcement program, the scheme's opt-in form cannot be the basis of a third-party contract claim. However, where a government contract is not a component of any comprehensive federal program, *Astra* does not control. *Olsen v. Nelnet, Inc.*, 392 F. Supp. 3d 1006 (D. Neb. 2019).

Astra involved Section 340B of the Public Health Services Act. That section sets up Medicaid's regulatory scheme governing the price of drugs sold to certain health care facilities. *Id*. at 113. To ensure drug company compliance with those regulations, Congress directed the Department of Health and Human Services to create an independent adjudication system. *Id*. at 121. This enforcement architecture included "a formal dispute resolution procedure" and "refund and civil penalty systems." *Id*. The Court concluded Congress did not intend for third-party enforcement to compete with this "new adjudicative framework." *Id*. at 122.

The "Air Carrier Worker Support" section of the CARES Act did not create a new

adjudicative framework to govern the airline industry or any other sector of the economy. It did not build an administrative apparatus for general application of a government program. Rather, it was an isolated injection of funds to benefit a particular class of people.

Nor does the CARES Act contain a dispute resolution procedure for workers with noncompliant employers. The sole CARES Act enforcement provision identified by United is the provision that allows Treasury to "clawback" funding in the event the contract is breached. Motion at 4 (citing CARES Act, § 4113(b)(1)(A)). But the clawback provision simply provides one party to the contract with a traditional contract remedy. The Act contains no civil penalty with which England's claim would compete.[13] As a result, a third-party contract claim to enforce United's promise to avoid pay cuts and furloughs is entirely consistent with both the language and purpose of the Act. *Astra* does not apply to England's claim because the CARES Act did not set up the sort of administrative apparatus at issue in that case.

The court in *Olsen* reached this exact conclusion when a statutory scheme similarly lacked a robust enforcement framework. That case involved student loan borrowers seeking to enforce contracts between loan servicers and the federal government. 392 F. Supp. 3d at 1013. Those contracts incorporated regulations from the Higher Education Act, which lacked a private right of action. *Id*. Defendants argued that *Astra* foreclosed a third-party contract claim, relying on the same broad reading of the case offered by United.

The *Olsen* court rejected defendants' argument, explaining that *Astra* is a "field preemption" case and only applies where Congress had shown an "intent to occupy the

[13] Nowhere in its brief does United explain, who, if anyone, should compensate airline employees if they suffer involuntary furloughs or pay reduction, in violation of the PSP Agreement. Their implicit argument is that employees must suffer a loss, given the economic distress of the industry. But while this argument could have been made to Congress prior to passing the CARES Act, or to Treasury during contract negotiations, having made assurances to employees, United cannot simply plead those assurances cannot be met.

regulatory field." *Id*. at 1015-16. Unlike in *Astra*, Congress did not provide a remedy for a student loan borrower's loss. While some regulations addressed loan servicer misconduct, the regulations "specifically [did] not address some of the damages the plaintiffs allege." *Id*. There was simply no evidence of congressional intent to preempt third-party claims. The comparisons to the Medicaid-pricing framework in *Astra* were "more hyperbole than accurate." *Id*.

The same is true here. There is no mechanism in the CARES Act for England to seek a remedy for his harm. While the CARES Act provides for general government oversight, and the PSP provides contract remedies to Treasury, no provision specifically addresses the damages England alleges. The post-*Astra* cases cited by United also involved a level of regulatory oversight or alternative remedies that are lacking here. *See Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1047 (Fed. Cir. 2012) (applying *Astra* because "both cases involve complex statutory schemes that offer the plaintiffs the potential of obtaining a financial benefit").[14] Unlike *Astra* and its progeny, the PSP Agreement contains no detailed regulatory directives nor any alternative framework through which England can seek redress. There is simply no comparable evidence that Congress sought to preempt his third-party contract claim.

2. *Astra* is Distinguishable Because the PSP Agreement Resulted from Protracted Negotiations

Where a government contract resembles a "commercial arrangement," rather than a participation form for the provision of general services, *Astra* does not control. *Carter v. U.S.*, 102 Fed. Cl. 61, 71 (2011). Unlike the participation form in *Astra*, the PSP Agreement closely

[14] The HAMP cases cited by United are likewise not applicable, as HAMP was a component of a comprehensive plan to stabilize the U.S. housing market, not short-term funding in response to an exogenous threat to private industry. *See, e.g.*, *Hamus v. Bank of New York Mellon*, No. 10-CV-682-SLC, 2011 WL 13266806, at *7 (W.D. Wis. May 13, 2011) ("HAMP is just one program among many established by the Treasury in a comprehensive effort to restore stability to the United States' financial system, as directed by the EESA. Allowing private borrowers to enforce HAMP by suing under an SPA would undermine the Treasury Department's efforts to oversee and implement what is an enormously complex, ever-evolving approach to a nationwide problem.").

resembles a commercial transaction. The PSP Agreement was the product of weeks of public negotiations, complete with airline executives and legal and banking professionals at the bargaining table and memorializes bargained-for emergency financing.

In *Astra*, the at-issue agreement was not a traditional contract – it was merely "a form contract as an opt-in mechanism." *Astra*, 563 U.S. at 115. Thus, the agreements were "not transactional, bargained-for contracts." *Id*. at 113. This was further evidence that Congress had built a regulatory mechanism to govern Medicaid pricing, of which the document was only a small component. *Id.* The same is true of *Astra*'s progeny.[15]

Unlike participation forms that will not support a third-party claim, the PSP Agreement resulted from weeks of negotiating over the terms of the airlines' deal with the federal government. The PSP negotiations extended almost two weeks after United initially filed an application for funding. United cannot sincerely argue that the PSP Agreement was merely a participation form. If it were a mere opt-in document, the parties would not have negotiated *past* the statutorily imposed deadline for reaching an agreement. *See supra* Section III.B.

The PSP Agreement here closely resembles a "commercial" contract, like the one at issue in *Carter*. That case, like this one, involved the federal government's temporary infusion of additional resources into the economy following a crisis. *Carter* dealt with the federal government's "NDM Program" – a program to provide nondairy milk to livestock producers and feed dealers after severe droughts in the early 2000s. 98 Fed. Cl. at 633. The program provided broad authority to a government body – the Commodity Credit Corporation ("CCC") – to sell commodities at a price determined by the government. *Id*. at 63 n. 3. The PSP Agreement was

[15] See, e.g., *Moodie v. Kiawah Island Inn Co.*, LLC, 124 F. Supp. 3d 711, 728 (D.S.C. 2015) (alleged contracts were "form applications act[ing] as an opt-in mechanism"); *Turbeville v. JPMorgan Chase Bank*, No. SA CV 10-01464 DOC, 2011 WL 7163111, at *5 (C.D. Cal. Apr. 4, 2011) (SPA serves as an "opt-in to the TARP and HAMP statutory scheme").

also signed under similarly broad administrative discretion. The CARES Act grants the Secretary of Treasury the authority to provide financial assistance "on such terms and conditions… as the Secretary determines appropriate." CARES Act, § 4133.

The court in *Carter* concluded *Astra*'s rule against third-party enforcement of a regulatory form contract did not apply in such circumstances. *Carter*, 102 Fed. Cl. at 71. The commercial nature of the NDM Program, with direct government infusions of resources into the private market, "has much more of the appearance of a commercial arrangement than a contract facilitating the government's provision of utilities or other general services." *Id*. The Court explained, "The concerns presented in *Astra* thus are not present." *Id*. Those concerns are also absent here. The PSP Agreement does not pertain to the government's provision of utilities or other general services. The only question, then, is whether this agreement was entered into with the intent to benefit employees. It was. *See supra* Section IV.A.

Perhaps recognizing that *Astra* turned on the rote nature of the contract, United points out in the Motion that the "pertinent terms" of the PSP Agreement were dictated by statute. But the presence of *some statutory terms* does not trigger the application of *Astra*. The court rejected this argument in *Olsen*, where some of the agreement terms came from regulatory standards. 392 F. Supp. 3d 1006, 1016. The PSP Agreement contains numerous provisions not dictated by the CARES Act, including, but not limited to, requirements that the airlines submit reports to Treasury, requirements regarding United's recordkeeping and internal controls, and the categorization of certain funds as debts to the federal government. See Ex. A to Complaint at ¶¶ 12, 17, 29-31. The signers of the PSP Agreement spent weeks negotiating prior to agreeing to these terms. The context surrounding the negotiation and signing of the PSP Agreement show a commercial transaction, subject to the traditional third-party beneficiary analysis, rather than

regulatory paperwork, exempt from the traditional rule.

3. *Astra* Did Not Declare a Bright-Line Rule against Contract Claims in the Absence of a Private Right of Action

United treats *Astra* as a universal rule against third-party contract claims where Congress has not created a private right of action. But as United concedes (Mt. at 9), the Seventh Circuit has recognized such a rule applies under only a particular circumstance: "a government contract that involves ***no negotiable terms*** but merely brings the other party to the contract under a statute (or, we can assume, a regulation) does not confer third-party beneficiary status on anyone." *Thomas v. UBS AG*, 706 F.3d 846, 852 (7th Cir. 2013) (emphasis added). Here, the terms of the United's agreement with Treasury were heavily negotiated by the parties over a period of weeks.

Furthermore, multiple courts, post-*Astra* have recognized third-party status in the absence of a private right of action. *Olsen*, 392 F. Supp. 3d at 1015; *Carter*, 102 Fed. Cl. at 72; *see also In re: Premera Blue Cross Customer Data Sec. Breach Litig.*, No. 3:15-MD-2633-SI, 2017 WL 539578, at *15 (D. Or. Feb. 9, 2017) ("HIPAA's lack of a private right of action does not foreclose Plaintiffs' state law breach of contract claim.").

C. The Language of the PSP Agreement Does not Foreclose England's Claim

United argues that the phrase "shall bind and inure to the benefit of the parties and their respective heirs, executors, administrators, successors, and assigns" automatically excludes enforcement by a third party. To support this argument, United cites a case involving benefits to the *general public* from a government contract. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1212 (9th Cir. 1999). *Klamath* involved the question whether irrigators in Oregon and California could claim a contract right to an agreement between the United States and certain power companies. *Id*. at 1209. Courts within the Ninth Circuit have declined to follow *Klamath Water* when the contract and context surrounding the contract show a

more specifically identifiable class of intended beneficiaries to a government contract. *See Anchorage v. Integrated Concepts & Research Corp.*, 1 F. Supp. 3d 1001, 1019 (D. Alaska 2014) ("But *Klamath*, like the other water rights cases, is distinguishable from this case because there, the plaintiffs were members of the general public, while here, MOA is the owner of the Project."). Unlike *Klamath Water*, there is no risk of dispersed and uncoordinated lawsuits by allowing the identified recipient of the funds at issue in the contract enforce its terms.

Furthermore, courts in the Seventh Circuit and elsewhere likewise reject the approach to contract interpretation United proposes – formalistic reading of a single contract term, at the rejection of a common sense reading of the contract as a whole. *Minn. Life Ins. Co. v. Kagan*, 724 F.3d 843, 849 (7th Cir. 2013) ("The intent of the parties is not to be gathered from detached portions of a contract or from any clause or provision standing by itself").[16]

The PSP Agreement leaves no ambiguity about who falls into the class of individuals who benefit from the contract: United's employees. In the context of United's Motion to Dismiss, where all inferences must be drawn in England's favor, a common sense reading of the contract is employees are intended beneficiaries, who may enforce the contract's terms.

V. Conclusion

For the reasons stated above, United's Motion should be denied.

Dated: July 28, 2020

Respectfully submitted,

/s/ Douglas M. Werman
One of Plaintiff's Attorneys

[16] *See also Elorac, Inc. v. Sanofi-Aventis Canada, Inc.*, 343 F. Supp. 3d 789, 804 (N.D. Ill. 2018) ("contract terms must be interpreted not in isolation, but in their full context, viewing the contract as a whole"); *RCJV Holdings, Inc. v. Collado Ryerson, S.A. de C.V.*, 18 F. Supp. 3d 534, 545 (S.D.N.Y. 2014) ("Because contract interpretation is an exercise in common sense rather than formalistic literalism, words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby."); *Marques v. Wells Fargo Home Mortg., Inc.*, No. 09-CV-1985-L RBB, 2010 WL 3212131, at *4 (S.D. Cal. Aug. 12, 2010) ("the analysis of intended beneficiary status is not conditioned on such formalistic recitals.") (internal quotation omitted).