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

KENNETH ENGLAND, Plaintiff, V. UNITED AIRLINES, INC., Defendant.	Civil Action No. 1:20-cv-02877 Judge Martha M. Pacold Magistrate Sheila M. Finnegan

DEFENDANT UNITED AIRLINES, INC.'S MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant United Airlines, Inc. ("United") moves to dismiss the Complaint filed against it by Plaintiff Kenneth England.

The U.S. passenger airline industry—including United—suffered an unprecedented blow to its business due to the COVID-19 pandemic. In recognition of that fact, when Congress enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, it included programs designed to help the industry weather the storm, including an aviation payroll support program ("PSP"). The PSP provides temporary support for airlines and airline workers in the form of funding to be used exclusively towards continuing employee salaries, wages and benefits. In return, the CARES Act requires an airline that wishes to participate in the program to enter into a "PSP Agreement" with U.S. Department of the Treasury in which the airline must agree, *inter alia*, to refrain from furloughs or reductions in employee pay rates or benefits.

The plaintiff in this case is a salaried management employee of United. He alleges that United breached its PSP Agreement by implementing an unpaid time off policy for management employees. Mr. England does not assert any statutory right under the CARES Act to enforce the PSP, nor does he allege that United breached any direct contractual obligation to him or any

other employee. Rather, he claims he can sue as an "intended third-party beneficiary" of the PSP Agreement between United and the U.S. government. Complaint ¶¶ 41-43.

United emphatically denies that it is in breach of any of its obligations under the CARES Act or its PSP Agreement with Treasury. United has not furloughed any employees, nor has it reduced pay rates or benefits. And it is using every penny of the PSP funding to cover salaries, wages and benefits of its employees.

But there is no need to reach the merits of this case, because controlling legal authority forecloses the notion that Mr. England can sue under a "third-party beneficiary" theory. In *Astra USA, Inc. v. Santa Clara Cty.*, 563 U.S. 110 (2011), the Supreme Court rejected—in circumstances virtually identical to those here—a third-party beneficiary claim to enforce an agreement with the federal government. There, like here, Congress passed a law that required participating entities to enter into a form agreement with a federal agency. There, like here, the pertinent terms of that form agreement were not negotiated, but merely incorporated the statutory obligations and the participants' agreement to abide by them. There, like here, the underlying statute had no private right to action. The Supreme Court concluded in *Astra* that the "absence of a private right to enforce the statutory . . . obligations would be rendered meaningless if . . . entities could overcome that obstacle by suing to enforce the contract's . . . obligations instead. The statutory and contractual obligations, in short, are one and the same." *Id.* at 118. Thus, *Astra* stands for the proposition that a "government contract that involves no negotiable terms but merely brings the other party to the contract under a statute . . . ***does not confer third-party beneficiary status on anyone***." *Thomas v. UBS AG*, 706 F.3d 846, 852 (7th Cir. 2013) (emphasis added). The same reasoning applies here. Moreover, Treasury has broad discretion to determine whether a recipient has violated its PSP Agreement and, if so, what remedy to seek.

Permitting third-party beneficiary claims thus would undermine Treasury's ability to administer the PSP "harmoniously and on a uniform, nationwide basis." *Astra*, 563 U.S. at 120.

As a matter of law, Plaintiff cannot bring a third-party beneficiary claim to enforce the PSP Agreement between United and Treasury. Plaintiff's Complaint, therefore, should be dismissed with prejudice.

BACKGROUND

The CARES Act was signed into law on March 27, 2020. Its purpose is to mitigate the public health and economic impacts of COVID-19 through an economic relief package that totaled over $2 billion. Among other measures, the CARES Act provides avenues by which employers could seek financial assistance, in the form of loans, loan guarantees and grants, to support employees and be prepared to get back to business as soon as possible.[1]

The impact on business and leisure travel resulting from the COVID-19 pandemic has devastated the airline industry. Passenger loads and revenue have dropped at rates never before seen, forcing airlines to cancel tens of thousands of flights and to ground hundreds of aircraft.[2] It is unclear when passenger flying will rebound, and the situation facing the industry has been described as a fight for its very survival.[3] United alone reported a $1.7 billion net loss for the

[1] *See generally President Donald J. Trump Is Providing Economic Relief to American Workers, Families, and Businesses Impacted by the Coronavirus*, WHITE HOUSE FACT SHEETS (March 27, 2020), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-providing-economic-relief-american-workers-families-businesses-impacted-coronavirus/.

[2] *See, e.g.*, *Tracking the Impacts of COVID-19*, AIRLINES FOR AMERICA, https://www.airlines.org/dataset/impact-of-covid19-data-updates/# (last updated July 2, 2020).

[3] *See, e.g.*, Courtenay Brown, *Airline Industry Braces for a Forever-Changed World*, AXIOS (Apr. 7, 2020), https://www.axios.com/airline-industry-coronavirus-5bf000aa-e915-4340-b960-c4ca37f47511.html ("Airlines are fighting for survival, and an uncertain environment awaits them on the other side of the pandemic.").

first quarter of 2020, due to the impact of the COVID-19 pandemic.[4]

In response, Congress created programs as part of the CARES Act to provide financial support specifically to the airlines. One of those is the PSP, which provided passenger airlines, as a group, with up to $25 billion, to be used exclusively to continue employee salaries, wages and benefits. Complaint ¶¶ 10-13. The CARES Act established a number of conditions that were effective on the receipt of PSP funding, including that the recipient must "refrain from conducting involuntarily furloughs or reducing pay rates and benefits until September 30, 2020." CARES Act, § 4114(a)(1); Complaint ¶ 14. If Treasury finds that a recipient of PSP funding has violated this condition, it may seek to "clawback" such funding. CARES Act, § 4113(b)(1)(A).

To participate in the PSP, an airline must enter into a form agreement with the Treasury Department. The form agreement includes, among other things, the statutory prohibition against involuntary furloughs or reductions in pay rates and benefits. CARES Act, § 4114(a). The form agreement also states that if Treasury finds the recipient has failed to comply with the conditions in Section 4114, it has the "sole discretion" to take such action as it deems appropriate, including seeking repayment of PSP funding. United entered into such a PSP Agreement with Treasury and received approximately $5 billion in the form of grants and loans under the PSP. Complaint ¶¶ 16-17. Consistent with the form terms, United's PSP Agreement contains, in paragraph 4, the "required CARES Act assurance[s]" regarding furloughs, pay rates, and benefits. *Id.* ¶¶ 18-20 (citing PSP Agreement, ¶ 4(a)-(b)).

The funding that United received under the PSP covered only a portion of its payroll costs. Thus, and in light of a reduced flying schedule, resulting in fewer working hours for

[4] *United Airlines Announces First Quarter 2020 Financial Results*, UNITED (Apr. 30, 2020), https://hub.united.com/united-announces-first-quarter-2020-financial-results-2645886449.html.

United's frontline employees, the Company also implemented an unpaid time off program for its salaried management and administrative ("M&A") employees. *Id.* ¶ 24. Under that program, M&A employees are required to take 20 unpaid days off between May 16, 2020 and September 30, 2020. *Id.* Plaintiff, an M&A employee, claims this program violates paragraph 4 of United's PSP Agreement and sues as a purported intended beneficiary of that agreement. *Id.* ¶¶ 41-43.

LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). If the complaint fails to state a claim upon which relief can be granted, Rule 12(b)(6) requires its dismissal. Dismissal is appropriate when the law is clear that, even assuming the accuracy of the alleged facts, Plaintiff "could not raise a claim of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

In deciding a Rule 12(b)(6) motion, the Court may consider documents attached to the Complaint (or referred to therein) without converting the motion into one for summary judgment. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556 (7th Cir. 2012) (citing Fed. R. Civ. P. 10(c)). "The [C]ourt may also consider public documents and reports of administrative bodies that are proper subjects for judicial notice . . . ." *Id.*

ARGUMENT

Plaintiff does not argue that he has a private right of action to enforce the PSP provisions of the CARES Act. And with good reason—that position certainly would fail, given the absence of any congressional intent to create such a right. *See, e.g.*, *Astra*, 563 U.S. at 117 ("'[R]ecognition of any private right of action for violating a federal statute,' currently governing decisions instruct, 'must ultimately rest on congressional intent to provide a private remedy.'")

(quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991)); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."); *see also Profiles, Inc. v. Bank of America Corp.*, No. 20-0894, --- F. Supp. 3d ---, 2020 WL 1849710, *7 (D. Md. Apr. 13, 2020) (finding no private right of action under Title I of CARES Act because the statute does not "evidence[] the requisite congressional intent to create a private right of action").

Plaintiff attempts to avoid this line of cases—and Congress's decision not to create a private right of action—by arguing that he can sue as a third-party beneficiary to the PSP Agreement. Complaint ¶¶ 41-43. *Astra* and the subsequent decisions adopting its reasoning foreclose this argument and require dismissal of the Complaint.

A. A Third-Party Bears The Steep Burden Of Showing "Clear Intent" That It Has Legally Enforceable Rights Under A Government Contract In Order To Bring An "Intended Beneficiary" Claim.

A "nonparty becomes legally entitled to a benefit promised in a contract . . . only if the contracting parties so intend." *Astra*, 563 U.S. at 117 (citing Restatement (Second) of Contracts § 302(1)(b) (1979)). Third-party beneficiary status is an "exceptional privilege" and should not be liberally granted. *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912). *Accord Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1056 (Fed. Cir. 2012).

Where the government is a party to the contract, the burden of establishing the right to sue as an "intended beneficiary" is particularly high, as the government regularly acts for the "benefit" of third-parties. *See, e.g.*, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 332 (2015) (the "modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government"); *H.R. Moch Co. v. Rensselaer*

Water Co., 247 N.Y. 160, 164, 159 N.E. 896 (1928) ("In a broad sense it is true that every city contract, not improvident or wasteful, is for the benefit of the public. More than this, however, must be shown to give a right of action to a member of the public, not formally a party.") (Cardozo, J.).

Accordingly, there must be "clear intent" that the parties intended that the putative third-party have the right to ***enforce*** the government contract, a high hurdle that is not cleared merely because the party falls within one of the constituencies identified in the contract, or even if the contract operates to the party's benefit and was entered into with it in mind. *GECCMC 2005-C1 Plummer St. Office Ltd. Partnership v. JPMorgan Chase Bank, N.A.,* 671 F.3d 1027, 1033-34 (9th Cir. 2012); 9 Corbin on Contracts, § 45.6 ("The distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention is emphasized where the promisee is a governmental entity.") (quoted approvingly in *Astra*, 563 U.S. at 118); *see also Thomas*, 706 F.3d at 852 ("A third-party beneficiary is someone whom the contracting parties wanted to have the right to ***enforce*** the contract." (emphasis altered)); *Sioux Honey Ass'n*, 672 F.3d at 1056 ("A party does not obtain third-party beneficiary status . . . 'merely because the contract would benefit them.'") (quoting *FDIC v. U.S.*, 342 F.3d 1313, 1319 (Fed. Cir. 2003)); *Klamath Water Users Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999) ("Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary."), *opinion amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000); *Ak-Chin Indian Community v. Central Ariz. Water Conservation Dist.*, 378 F. Supp. 3d 797, 804 (D. Ariz. 2019) (plaintiffs were not "intended beneficiaries with enforceable rights" even though agreement was created with them in mind).

B. *Astra* Forecloses Plaintiff's Theory That He Is An "Intended Beneficiary" With Legally Enforceable Rights Under The PSP Agreement.

Astra and its progeny hold that the "clear intent" required to establish "intended beneficiary" status is lacking where Congress declined to establish a private right of action, and the government contract is merely the basis by which the defendant opts in to the statutory scheme—i.e., where the "statutory and contractual obligations, in short, are one and the same." *Astra*, 563 U.S. at 118. *Astra* involved Section 340B of the Public Health Services Act, which imposed ceilings on the prices drug manufacturers could charge for medications sold to specified health-care facilities. Manufacturers who wished to participate in the 340B program had to sign a form Pharmaceutical Pricing Agreement ("PPA") with the Department of Health and Human Services ("HHS"). Those agreements were not "transactional, bargained-for contracts [but] uniform agreements that recite the responsibilities § 340B imposes, respectively, on drug manufacturers and the Secretary of HHS." *Astra*, 563 U.S. at 113. In *Astra*, a health-care facility that purchased medications under the 340B program alleged that it was charged more than was permitted under the PPAs, and sued as an intended beneficiary of those agreements. *Id.* at 117.

The Supreme Court held that the plaintiff's argument "overlooks that the PPAs simply incorporate statutory obligations and record the manufacturers' agreement to abide by them," and that the form agreements contained no negotiable terms, but merely served as "the means by which drug manufacturers opt into the statutory scheme." *Id.* at 118. Thus, "[a] third-party suit to enforce an HHS-drug manufacturer agreement . . . is in essence a suit to enforce the statute itself." *Id.* The Court found that the "absence of a private right to enforce the statutory ceiling-price obligations would be rendered meaningless if 340B entities could overcome that obstacle by suing to enforce the contract's ceiling-price obligations instead. The statutory and contractual

obligations, in short, are one and the same." *Id.* (citing *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003) (when a government contract confirms a statutory obligation, "a third-party private contract action [to enforce that obligation] would be inconsistent with . . . the legislative scheme . . . to the same extent as would a cause of action directly under the statute" (internal citations and quotation marks omitted))). The Court therefore concluded that plaintiffs could not sue as a third-party beneficiary to the PPAs. *Astra*, 563 U.S. at 118-19.

As the Seventh Circuit has observed, *Astra* holds that a "government contract that involves no negotiable terms but merely brings the other party to the contract under a statute . . . does not confer third-party beneficiary status ***on anyone***." *Thomas*, 706 F.3d at 852 (emphasis added). This court reached the same conclusion in *Baginski v. JPMorgan Chase Bank NA*, No. 11 C 6999, 2012 WL 5989295, *3 (N.D. Ill. Nov. 29, 2012), holding that a borrower could not bring a third-party beneficiary claim against a bank for breaching the Servicer Participation Agreement ("SPA") it entered into with Treasury to participate in the Home Affordable Mortgage Program ("HAMP") "because Congress did not create a private right of action under HAMP." *See also Wigod*, 673 F.3d at 559 n.4 (noting, in *dicta*, that "Congress did not create a private right of action to enforce the HAMP guidelines, and since *Astra*, district courts have correctly applied the Court's decision to foreclose claims by homeowners seeking HAMP modifications as third-party beneficiaries of SPAs"); *Turbeville v. JPMorgan Chase Bank*, No. 10-01464, 2011 WL 7163111, *5 (C.D. Cal. Apr. 4, 2011) ("Allowing the Plaintiffs to enforce the SPA under a third-party beneficiary theory would open a 'backdoor' to a private right of action to enforce HAMP, in contravention of Congress' wishes. As the Supreme Court held in *Astra*, this kind of third party beneficiary theory is 'incompatible with the statutory

regime.'") (quoting *Astra*).[5]

Courts have found that *Astra* prohibits third-party beneficiary claims based on government contracts intertwined with other statutory schemes as well. *Sioux Honey Ass'n*, for example, involved the Continued Dumping and Subsidy Offset Act ("CDSOA"), which directed the government to distribute collected duties to domestic producers harmed by the dumping of products by foreign manufacturers. 672 F.3d at 1048. The plaintiffs, domestic producers, sued the federal government and various sureties, alleging that the government had failed to collect assessed antidumping duties, and that most of those uncollected duties were owed by the sureties who posted Customs bonds on behalf of shippers. *Id.* at 1048-49. The plaintiffs sought to enforce the shipper bond contracts as intended beneficiaries, arguing that the contracts were essential to achieving the antidumping statute's purpose of collecting duties to be redistributed to domestic producers like themselves. *Id.* at 1057. Finding the case before it factually similar to *Astra*, the Federal Circuit rejected that contention:

> [B]oth cases involve complex statutory schemes that offer the plaintiffs the potential of obtaining a financial benefit. Moreover, like the plaintiffs in *Astra,* Plaintiffs in this case attempt to recover under a contract intertwined with that statutory scheme, claiming intended third-party beneficiary status. Additionally, the contracts at issue in both cases are governed by federal laws. Perhaps most importantly, the statutes governing the contracts at issue in both cases do not grant the plaintiffs the right to bring a private lawsuit to recover the fees allegedly owed to them. Indeed, in the present matter, Congress vested the Government with the authority to enforce the Customs bond contracts, not the domestic producers. In a situation such as this, where no statutory private right to enforce the Customs bonds exists, permitting a party to sue as an intended third-party beneficiary would improperly render "[t]he absence of

[5] Examples of the many other decisions reaching the same conclusion in the HAMP context include: *Voss v. Bank of America*, No. 5:15-cv-232, 2016 WL 3746575, *2 (N.D.N.Y. July 8, 2016); *Fed. Home Loan Mortg. Corp. v. Kama*, No. 14-00137, 2014 WL 4980967, *11-12 (D. Haw. Oct. 3, 2014); *Castillo v. Bank of America*, No. 12-cv-1833, 2012 WL 4793240, *6-7 (S.D. Cal. Oct. 9, 2012); and *Hamus v. Bank of New York Mellon*, No. 10-cv-682, 2011 WL 13266806, *7 (E.D. Wis. May 13, 2011).

[that] private right . . . meaningless."

672 F.3d at 1058-59 (quoting *Astra*, 563 U.S. at 118; other internal citations omitted).

In *Moodie v. Kiawah Island Inn Co., LLC*, 124 F. Supp. 3d 711 (D.S.C. 2015), the plaintiffs were foreign workers employed by the defendant under the H-2B temporary worker program, pursuant to which the defendant was required to enter into an agreement with the U.S. Department of Labor ("DOL"). Plaintiffs alleged that the defendant failed to pay the H-2B prevailing wage, and that they could sue as third-party beneficiaries of the defendant's contract with the DOL. Finding *Astra* controlling, the court disagreed, noting that the contract was a form agreement that contained no negotiable terms and was the mechanism by which the participants opted in to the H-2B program. *Id.* at 728. "Because Defendant's regulatory and contractual obligations are 'one and the same,' a third-party beneficiary claim is essentially a private right to enforce the regulatory scheme. Thus, such a claim is not cognizable." *Id.* (quoting *Astra*); *see also United/Xcel-RX, LLC v. Express Scripts, Inc.*, No. 4:19-cv-00221-SRC, 2019 WL 5536806, *5 (E.D. Mo. Oct. 25, 2019) (rejecting third-party beneficiary claim as an attempted "end-run around the absence of a private right of action"); *Sherkat v. New England Village, Inc.*, No. 15-cv-11074, 2015 WL 8215983, *7 (D. Mass. Dec. 8, 2015) ("[A] contract with a government agency that merely incorporates legal obligations imposed by a statute or a government program is not enforceable by a contract beneficiary who has no private right of action to enforce the underlying statute or program.").

In this case, the same analysis applies. Like in *Astra* and the decisions following it, Congress did not create a private right of action to enforce the PSP in the CARES Act. And like the PPA in *Astra*, the SPAs in the HAMP decisions, and the agreements at issue in the other cases, United did not "negotiate" the relevant provisions of its PSP Agreement. Rather, it was a

form agreement that simply incorporated the statutory requirements regarding involuntary furloughs and reductions in pay rates or benefits, and which United had to execute in order to participate in the PSP. Thus, United's statutory and contractual obligations, which Plaintiff seeks to enforce, are "one and the same," *Astra*, 563 U.S. at 118, and allowing Plaintiff to sue under an "intended beneficiary" theory would "render[] meaningless" Congress's decision not to create a private right of action. *Id.* Plaintiff's complaint, therefore, must be dismissed for failure to state a claim.

C. The PSP Agreement Language Further Demonstrates The Lack Of Clear Intent To Give Third-Parties Legally Enforceable Rights.

If *Astra* were not enough to dispose of Plaintiff's "intended beneficiary" argument, the language of the PSP Agreement itself further demonstrates that the parties did not intend to make Plaintiff an "intended beneficiary" thereof.

The PSP Agreement states that it "shall bind and inure to the benefit of the parties and their respective heirs, executors, administrators, successors, and assigns." PSP Agreement, ¶ 48. Courts have cited identical language to conclude that a contract with the government does not confer enforceable rights on third-parties, even when the contract had those third-parties in mind as incidental beneficiaries.

Klamath Water Users Protective Ass'n, for example, involved a suit brought by irrigators as putative "intended beneficiaries" of a contract between the federal government and a power company governing the management of a dam. 204 F.3d at 1210-12. The contract included a clause stating that it "binds and inures to the benefit of the parties hereto, their successors and assigns, including without limitation any water users' organization or similar group which may succeed either by assignment or by operation of law to the rights of the United States hereunder." *Id.* at 1212. The Ninth Circuit held that "[t]his language clearly evinces the intent of the parties

to limit intended beneficiaries to the contracting parties," which excluded the plaintiffs. *Id.*; *see also Castillo*, 2012 WL 4793240, at *6 (plaintiff was not intended beneficiary to SPA where contract stated it "shall inure to the benefit of . . . the parties to the Agreement . . . ."). The same is true here.

Moreover, the PSP Agreement expressly vests Treasury with the authority to decide whether an airline has violated paragraph 4, and the right "to take any … action as Treasury, in its sole discretion, deems appropriate" as a result of such violation, subject to limited judicial review. PSP Agreement, ¶¶ 22-25. This is powerful evidence that Treasury and United did not intend to permit third-parties to enforce the PSP Agreement. On the contrary, permitting employees to sue for alleged violations of the PSP Agreement "could spawn a multitude of dispersed and uncoordinated lawsuits," thus undermining Treasury's ability to administer the PSP "harmoniously and on a uniform, nationwide basis." *Astra*, 563 U.S. at 120; *see also Sioux Honey Ass'n*, 672 F.3d at 1058-59 (affirming dismissal of third-party beneficiary claim where "Congress vested the Government with the authority to enforce the Customs bond contracts, not the domestic producers").

CONCLUSION

Congress chose not to create a private right of action to enforce the PSP. Plaintiff cannot render that choice meaningless by challenging United's compliance with its statutory obligations through the PSP Agreement. Plaintiff is not an "intended beneficiary" of that agreement, and thus his Complaint must be dismissed.

Dated: July 2, 2020

Respectfully submitted,

s/Douglas W. Hall

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2020, I electronically filed the foregoing *Defendant United Airlines, Inc.'s Motion to Dismiss* with the Clerk of Court using the CM/ECF filing system, which will send notification of such filing to the attorneys of record at their email addresses on file with the Court.

s/ Douglas W. Hall
One of the Attorneys for Defendant United Airlines, Inc.