INTEREST OF THE SECRETARY OF LABOR

As the federal agency with the primary responsibility for interpreting and enforcing Title I of ERISA, 29 U.S.C. §§ 1001-1194, the Department of Labor has a significant interest in ensuring that courts correctly construe ERISA. This case presents three important questions. One concerns the statute's definition of a party in interest to include "a person providing services to such plan," ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B), and the ability of such a service provider to contractually avoid party in interest status and thus evade the statutory prohibitions in ERISA § 406, 29 U.S.C. § 1106. The second concerns the definition of "plan assets" under the applicable statutory and regulatory provisions. The third concerns whether a party in interest who participates with a fiduciary in a prohibited transaction may defend on the basis of estoppel. Because these issues are both important and novel, the Ninth Circuit's decision in this case likely will significantly affect the development of the law under these sections of ERISA.

STATEMENT OF THE ISSUES[1]

1. Whether appellant, a real estate consultant who provided services developing and marketing a parcel of real estate for an ERISA-covered employee

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[1] The amicus curiae brief for the Secretary of Labor addresses three of the issues raised in the principal brief for appellant/cross-appellee. The Secretary does not address three other, more fact-bound issues raised by appellant/cross-appellee relating to the applicable statute of limitations, judicial estoppel, and laches.

benefit plan, was a party in interest with respect to that transaction (as "a person providing services to such plan," ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B)), despite a contractual agreement stating that appellant was not a party in interest.

2. Whether the transfer to appellant of an interest in the real estate parcel constitutes the transfer of a plan asset from a plan to a party in interest within the meaning of the prohibited transaction rules in ERISA § 406, 29 U.S.C. § 1106.

3. Whether a party in interest who participates with a fiduciary in a prohibited transaction may defend on an estoppel theory by arguing that the fault lies with the breaching fiduciary.

STATEMENT OF THE CASE

The Southern California, Arizona, Colorado, and Southern Nevada Glaziers, Architectural Metal, and Glass Workers Pension Plan ("Plan"), an employee pension plan, and CB Richard Ellis, which manages certain real estate investments as a fiduciary for the Plan, filed suit against Peter Sardagna and several entities that he created and controlled (collectively "Sardagna").[2] As relevant here, CB Richard Ellis alleged that Sardagna violated ERISA by participating as a party in the

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[2] With the Plan, plaintiff CB Richard Ellis also brought breach of contract claims against the defendants. None of these contract claims is at issue in this appeal, which concerns only ERISA claims against Sardagna. See ER 43 and 47-49. "ER" denotes Sardagna's excerpt of record filed with his principal brief.

August 16, 1995 L.A. MetroMall L.L.C. Operating Agreement ("L.A. MetroMall Transaction").[3]

Following a trial, the district court held that ERISA § 406(a), 29 U.S.C. § 1106(a), prohibited the transfer of certain assets from the Plan to Sardagna in the L.A. MetroMall Transaction. ER 47-49, 68-69, and 71-73. As equitable relief, the district court cancelled Sardagna's interest in the L.A. MetroMall Transaction. ER 73 and 75 n.7. Sardagna appeals from the order for equitable relief. ER 127.[4]

STATEMENT OF FACTS

From 1989 through 1995, the Plan periodically advanced funds to Carson Realty Partners 1989, L.L.P. ("Carson Realty Partners"), to finance development of a real estate parcel near Carson, California (the "Carson Property"). SER 465, 5/15 Tr. 60-62.[5] Sardagna owned 25% of any profits earned by Carson Realty Partners and also was an employee of this firm. 5/15 Tr. 121-22.

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[3] CB Richard Ellis settled its ERISA claims against the other ERISA defendants.

[4] In its order of December 4, 2001, the district court ruled against plaintiff CB Richard Ellis on all of the ERISA claims except the ERISA § 406(a) prohibited transaction claim. ER 57-65. The district court deferred judgment on the § 406 claims in order to receive briefs solely on the issue of whether Sardagna was a party in interest with respect to the Plan. Id. at 62-63 and 65.

[5] "SER" denotes the supplemental excerpt of record filed by CB Richard Ellis with its first brief. "Tr." denotes trial transcript identified by date and page number.

During this same period and continuing through 1996, Sardagna did consulting work for the Plan on the financing and multiple government approvals necessary to develop the Carson Property into a shopping center. 5/15 Tr. 122-26. Sardagna reported directly to the Plan's administrator (William Seay) "on an almost a daily basis throughout that whole time." SER 1029 and 1068. Sardagna met with the Plan's trustees once a year or more to review and explain his consulting work and his progress on government approvals, financing, and development plans for the Carson Property. ER 84-85, Exh. 312 at 8-10, Exh. 304 at 5-6, Exh. 191 at 7, Exh. 192 at 4-5, and SER 636-40, 665, 677-78, and 685-88.[6] Through July 31, 1995, the Plan paid Sardagna for this consulting work through checks made out only to him. Exh. 451 at 11-13.

By October 1994, the Plan owned 100% of Carson Realty Project, Inc. ("CRP, Inc."). ER 6. In October 1994, acting through CRP, Inc., the Plan purchased all outstanding first trust deed notes on the Carson Property, which secured defaulted loans underlying those notes. ER 6. Through CRP, Inc., the Plan thus acquired the right to obtain full title on the property through foreclosure.

In July 1995 in a document entitled Termination and Settlement Agreement, the Plan, Sardagna, and other parties declared that they were "terminat[ing] any

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[6] "Exh." denotes trial exhibits.

and all relationships . . . that would or might cause Sardagna presently to be or be deemed to be a 'party in interest' . . . under [ERISA] § 3(14)." SER 969-70 at §§ B and 1. Notwithstanding the Agreement, Sardagna's working relationship with the Plan did not terminate. He continued his previous consulting work for the Plan on development of the Carson Property, including reporting "on an almost daily basis" to the plan administrator. 5/15 Tr. 125, SER 1068.

A month later, in August 1995, the Plan and Sardagna agreed to the L.A. MetroMall Transaction in a contract termed the Operating Agreement (SER 522), executed by the Plan and LAMM Employees, L.P. ("LAMME"), which was a limited partnership owned by Sardagna. Exh. 262. In the Operating Agreement, the Plan and LAMME formed L.A. MetroMall, L.L.C. (the "Company"), and the Plan agreed to transfer the Carson Property to the Company when the Plan obtained title. SER 526 at § 3.2.A. See SER 522-23 §§ 1.2 and 1.19.

The Operating Agreement also specified the distribution of any profits from the Company. Until the Plan recovers its prior expenditures on the property, plus a 15% return on those prior expenditures, plus $6,000,000, any profits are divided such that 99% goes to the Plan and 1% goes to LAMME (the Sardagna-owned partnership). SER 527-28 at §§ 4.3-4.5. After the Plan recovers its expenses and the requisite profits, these distribution percentages flip, so that 1% goes to the Plan and 99% goes to LAMME. SER 527 at § 4.4. The Plan also agreed, as the

Company's sole manager, to sell the Carson Property only with reasonable consent from LAMME, i.e., Sardagna. SER 532-33 at §§ 7.2 and 7.4.B (viii).

Following the L.A. MetroMall Transaction, Sardagna continued his prior work for the Plan on obtaining government approvals and financing for development of the Carson Property as a shopping center. 5/15 Tr. 107-08, 113-14, and 125; 6/01 Tr. 120. Starting in September 1995, the Plan ceased paying Sardagna directly for his work. Instead, the Company paid Sardagna $20,000 each month for this work, using cash advanced to it by the Plan. Exh. 450 at 1. This was the same amount of compensation that the Plan had paid to Sardagna through July 31, 1995. Exh. 451 at 12-13.

On October 2, 1995, the Plan -- acting through CRP, Inc., which it wholly owned -- sold the defaulted first trust deed notes on the Carson Property to the Company. ER 6, 5/15 Tr. 117-18. Through the first trust deeds, the Company then acquired full title to the property. ER 6, 5/15 Tr. 117-18.

After trial, the district court held that ERISA § 406(a), 29 U.S.C. § 1106(a), prohibited the transfer of Plan assets to Sardagna in the L.A. MetroMall Transaction. ER 69 and 73. The district court found that "the L.A. MetroMall Transaction – required the Glaziers Plan to transfer its contractual rights in the Carson Property to Defendants," including Sardagna. ER 48 and 63. The district then concluded that "Sardagna was a service provider to the Plan at the time of the

L.A. MetroMall Transaction." ER 73. Underlying this conclusion, the district court found as fact "that the nature of Sardagna's relationship to the Plan did not change following the execution of [the Termination and Settlement Agreement]." Id. Rejecting Sardagna's argument that the Termination and Settlement Agreement contractually ended his party in interest status before executing the L.A. MetroMall Transaction, the district court reasoned that only the statutory definition in ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B), and not contract, controls party in interest status under ERISA. ER 71 n.4.

The district court then ordered equitable relief against Sardagna. The district court granted the "limited equitable remedy of rescission and cancellation of Sardagna's interest in [the Operating Agreement]." ER 73-75 n.7.

ARGUMENT

I. Because Sardagna's consulting work constituted "services to [a] plan" within the meaning of 29 U.S.C. § 1002(14)(B), he was a party in interest with respect to the Plan, notwithstanding any contractual declarations to the contrary

To protect the assets of employee benefit plans, Congress enacted in ERISA § 404(a) general fiduciary standards of loyalty and prudence (29 U.S.C. § 1104(a)(1)(A) and (B)) for employee benefit plans. Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 571-73 (1985). To supplement these fiduciary standards, ERISA § 406 sets forth a number of transactions between plan fiduciaries and related parties that, because of the

inherent potential for self-dealing and abuse, are flatly prohibited unless exempted by § 408, 29 U.S.C. § 1108. See Comm'r of Internal Revenue v. Keystone Consol. Indus., Inc., 508 U.S. 152, 160-161 (1993) (in construing 26 U.S.C. § 4975(a)(1)(A), the tax code analog to § 406, the Court noted that "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan"). In § 406, each specified "transaction with a party in interest is prohibited under the presumption that it is not arm's-length." M & R Investment Co. v. Fitzsimmons, 685 F.2d 283, 287 (9th Cir. 1982). The prohibitions set forth in § 406 do not merely impose a duty on fiduciaries, but render unlawful the entire transaction. Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 245-47, 251 (2000).

A. Sardagna was providing services to the Plan at the time of the L.A. MetroMall Transaction

As relevant here, ERISA § 406(a)(1)(A) and (D) prohibit the following transactions between a plan and its parties in interest:

> (1) . . . a direct or indirect --
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest; [or]
>
> * * *
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan;

29 U.S.C. § 1106(a)(1)(A) and (D).

ERISA § 3(14) defines party in interest to include "a person providing services to [an employee benefit] plan." 29 U.S.C. § 1002(14)(B). ERISA § 3(14)(H) further provides that such a service provider includes "an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B)." 29 U.S.C. § 1002(14)(H). Similarly, ERISA § 3(14)(I) defines another type of service provider as "a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B)." 29 U.S.C. § 1002(14)(I).

Sardagna challenges the district court's decision on the § 406 prohibited transaction claim by arguing that, at the time of the L.A. MetroMall Transaction, he was not a party in interest of the Plan and, therefore, not subject to the § 406 prohibitions. There is no merit to this argument.

During the period from 1989 until just before the L.A. MetroMall Transaction in 1995, Sardagna rendered his consulting services directly to the Plan. He thus was indisputably a service provider to the plan and therefore was a party in interest within the meaning of § 3(14)(B). He reported almost daily to the Plan's salaried administrator, periodically reported on the status of his work and the development project to the Plan's trustees at their meetings, and received payment from the Plan via checks made out only to him. Although Sardagna argues on that

these checks were not payments for his consulting work but instead were a loan to Carson Realty Partners, the district court correctly rejected this view of the evidence. The court concluded that Carson Realty Partners lacked any assets with which to repay "any purported loan" and instead provided the Plan with Sardagna's consulting services. Id.

Sardagna next argues that he worked only for Carson Realty Partners and not for the Plan. Appellant's Br. at 39-43. Even under this view, however, he nonetheless was a party in interest under 29 U.S.C. § 3(14)(H). As an admitted employee of Carson Realty Partners (see ER 70), Sardagna would qualify as a party in interest under § 3(14)(H) if Carson Realty Partners provided the consulting services. ER 70 & n.3. Furthermore, as a 25% partner in Carson Realty Partners, Sardagna also was a party in interest under § 3(14)(I), which reaches 10% owners in companies that are parties in interest (such as service providers) to a plan. ER 70 & n.3. Although Sardagna argues that the subordinated status of his partnership interest made him less than a 10% partner, the district court rejected this contention as a factual matter, finding that Sardagna offered no evidence on this point. ER 70 & n.3.

Following the L.A. MetroMall Transaction, Sardagna continued his prior consulting work for the Plan but did so as an admitted employee of L.A. MetroMall L.L.C. at the same monthly compensation that the Plan had paid

directly to him f or exactly the same type of real estate consulting work on the Carson Property. Appellant's Br. at 42. As such a service provider to the Plan, he continued his party in interest status under § 3(14)(B) and (H), 29 U.S.C. § 1002(14)(B) and (H).[7]

B. Sardagna's and the Plan's contractual declaration that Sardagna was no longer a party in interest had no effect on his party in interest status under ERISA

Alternatively, Sardagna argues that, whatever his status prior to executing the Termination and Settlement Agreement, this agreement contractually ended his party in interest status in the month preceding the L.A. MetroMall Transaction. Appellant's Br. at 43-52. But as the court below correctly held, party in interest status is not a matter of contractual label, but is defined by ERISA in terms of function and relationship, so that the reality of the situation controls. For example,

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[7] Even if Sardagna's work for the Plan can be described as periodic or episodic, this would not undercut the district court's conclusion that he was a service provider. The district court correctly rejected Sardagna's arguments below (renewed on appeal, Appellant's Br. at 37-38 and 43) that the § 3(14)(B) definition applies only to providers of "continuing or ongoing" services. See ER 68-69. This Court and others repeatedly have held that § 3(14)(B) applies to providers whose services to a plan are episodic, discontinuous, or limited to single plan asset or transaction. See Call v. Sumitomo Bank, 881 F.2d 626, 630, 634-35 (9th Cir. 1989) (escrow holder for a single real estate transaction); Reich v. Rowe, 20 F.3d 25, 27-28 n.2 (1st Cir. 1994) (consultant who advised the plan only during one five-month interval on single plan insurance contract); New York State Teamsters Council Health & Hosp. Fund v. Estate of DePerno, 816 F. Supp. 138, 145-46 (N.D.N.Y. 1993), aff'd, 18 F.3d 179 (2d Cir. 1994) (cooks hired by a plan only seasonally were § 3(14)(B) parties in interest).

§ 3(14)(B) defines a party in interest to include "a person providing services to such plan," 29 U.S.C. § 1002(14)(B), whether under contract or otherwise. Similarly, so long as a person is an employee of a service provider or a 10% owner of such a provider, § 3(14)(H) and (I), 29 U.S.C. § 1002(14)(H) and (I), make such a person a party in interest, without the need for further inquiry.

In the Termination and Settlement Agreement, its signatories merely expressed their own legal conclusion concerning Sardagna's party in interest status. Their legal conclusion did not change Sardagna's conduct as a service provider to the Plan, and it did not change his economic and service relationship with the Plan, Carson Realty Partners, or L.A. MetroMall L.L.C. Consequently, the district court correctly found "that the nature of Sardagna's relationship to the Plan did not change following the execution of [the Termination and Settlement Agreement]." ER 71. Sardagna does not dispute this finding of fact. See Appellant's Br. at 43-52.

In the statute, the § 406(a) prohibitions depend critically upon the party in interest definitions in § 3(14). Here, Sardagna and the Plan's trustees sought to avoid the § 406(a) prohibitions merely by reciting that Sardagna was no longer a party in interest, without interrupting or in any way altering Sardagna's work for the Plan on financing and developing the Carson Property. "Congress [did not]

intend[ ] the prohibitions of § 1106 to be so easily circumvented." McDougall v. Donovan, 552 F. Supp. 1206, 1216 (N.D. Ill. 1982).

Without a corresponding change in the underlying conduct or relationships described in § 3(14), which did not occur here, the parties' intent or agreement cannot end a statutorily-defined party in interest relationship. Cf. Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3d 1114, 1119 (9th Cir. 1994) ("that [the breaching fiduciary] did not believe that he was a fiduciary to the Trust is of no consequence" to his fiduciary status), cert. denied, 520 U.S. 1116 (1995); Acosta v. Pacific Enters., 950 F.2d 611, 617-18 (9th Cir. 1991) ("a person's actions, not the official designation of his role, determine whether he enjoys fiduciary status"); Donovan v. Mercer, 747 F.2d 304, 308-09 n.4 (5th Cir. 1984) (because "a person's state of mind does not determine his or her fiduciary status under ERISA," defendant's "argument that she did not intend to sign these papers as a [plan] trustee . . . is unavailing"). Therefore, the Termination and Agreement did not control Sardagna's statutory status as a party in interest. Cf. NLRB v. Labor Ready, Inc., 253 F.3d 195, 201 (4th Cir. 2001) (contractual provision does not control employment status where "realities of the workplace in question are more compelling than the contractual terms"); Schwiegher v. Farm Bureau Ins. Co. of Nebraska, 207 F.3d 480, 483 (8th Cir. 2000) (employer may not avoid Title VII by contractually labeling a party as an independent contractor where that label does

not "capture the substance of the employment relationship"); Real v. Driscoll Strawberry Assoc., Inc., 603 F.2d 748, 755 (9th Cir. 1979) (under the Fair Labor Standards Act, "[e]conomic realities, not contractual labels, determine employment status," and "the subjective intent of the parties to a labor contract cannot override the economic realities").

II. In the L.A. MetroMall Transaction, Sardagna received rights that were plan assets within the meaning of 29 U.S.C. § 1106(a)

As a predicate to finding § 406(a) violations (ER 73), the district court held that the "L.A. MetroMall Transaction involved the transfer of plan assets as defined under the ERISA statute." ER 63. These plan assets were the right Sardagna obtained to share in any profits generated by the Carson Property, which otherwise would have belonged solely to the Plan, and the right to veto the sale of the property. Sardagna argues that this holding was in error because the Plan did not own the Carson Property at that time and therefore could not have conveyed any rights in it. Appellant's Br. at 38-42.

The Plan, however, acquired the foreclosure rights on the full title to the Carson Property in October 1994 when CRP, Inc., purchased the defaulted notes that were secured by first trust deeds on the property. CRP, Inc., was the purchaser of record, and the Plan owned 100% of the stock of CRP, Inc.

As the Department of Labor's plan asset regulation makes clear, the Plan's assets in this situation included not only its CRP, Inc. stock, but also these first trust deeds:

> (h) Specific rules relating to plan investments. Notwithstanding any other provision of this section --
>
> * * *
>
> (3) When a plan or a related group of plans owns all of the outstanding equity interests (other than director's qualifying shares) in an entity, its assets include those equity interests and all of the underlying assets of the entity.

29 C.F.R. § 2510.3-101(h)(3). In adopting this regulation, which was designed to "define and establish rules" regarding plan assets, Acosta, 950 F.2d at 619 n.7, the Department of Labor noted that, "as a general matter, where all of the outstanding equity interests in an entity are owned by a plan, there is no practical difference between the assets of the plan and the assets of the entity which is owned by the plan." 51 Fed. Reg. 41,276 (Nov. 13, 1986).

In Mason Tenders District Council Pension Fund v. Messera, No. 95 Civ. 9341 (RWS), 1996 WL 351250 (S.D.N.Y. June 26, 1996), aff'd, 131 F.3d 131 (2d Cir. 1997), the court correctly applied this regulation to conclude that a pension plan's assets included a parcel of real estate where the pension fund wholly owned a corporation that in turn held record title to that real estate parcel. The Mason Tenders court held that, "[w]hile the Pension Fund is not the title holder of record of the [real estate owned by the plan-owned corporation], this property is a

nevertheless considered an asset of the Pension Plan under 29 C.F.R. § 2510.3-101(h)(3)." Id. at *3. Under this regulation, therefore, the Plan's assets included the first trust deed notes purchased in the name of CRP, Inc.

Before entering into the Operating Agreement, then, the Plan owned the right to acquire full title to the property (i.e., all its potential profits and sole power over its alienation). Under the Operating Agreement, the Plan was required to transfer the Carson Property to the Company, L.A. MetroMall, L.L.C., which was formed by the Plan as a vehicle for developing the Carson Property. Through this Agreement, the Plan also gave to Sardagna the right to a percentage of the Company's profits generated by the Carson Property, and power to veto the Company's sale of the property. Although the Plan thus transferred these assets indirectly to Sardagna through his rights under the Operating Agreement to share in the Company's profits and control alienation of the property, § 406(a) prohibited this transaction no less than it would have prohibited the same transfer of assets directly between the Plan and Sardagna. In terms, § 406(a) prohibits specified transactions between a plan and its parties in interest whether "such transaction constitutes a direct or indirect" sale between the two or a transfer of plan assets to or for the benefit of a party in interest. 29 U.S.C. § 1106(a)(1)(A) and (D) (emphasis added). In McDougall, 552 F. Supp. at 1216, the court interpreted § 406(a) to prohibit a pension plan's sponsoring union (a type of party in interest)

from selling a jet plane to the pension plan indirectly by first trading it in to the plane's manufacturer, who immediately sold it to the pension fund for essentially the value of the union's trade-in. As the McDougall court explained, if "the 'indirect transaction' prohibition of § 1106" were to permit this transaction, "virtually any transaction prohibited directly could be legitimized by the insertion of a third party." Id.

Taking a somewhat different tack, Sardagna argues that, under other provisions of the Department's plan asset regulation, 29 C.F.R. §§ 2510.3-101(a)-(f), the Company qualified as a "real estate operating company" ("REOC") and that, as a result, the Plan's assets included the Plan's interest in the Company but not the Carson Property as one of the Company's underlying assets. Appellant's Br. at 53-58. Under this regulation, if a plan owns an equity interest in a company that qualifies a REOC, the plan's assets include its interest in the REOC but not any of the REOC's underlying assets. 29 C.F.R. §§ 2510.3-101(a)-(f).

The district court found that "Sardagna has not presented adequate evidence indicating that L.A. MetroMall L.L.C. met the initial and annual tests [necessary for REOC status] under 29 C.F.R. § 2510.3-101(d)(5)." ER 63. See ER 71-72. However, whether the Company was a REOC is irrelevant to the § 406 violations here. The Plan (acting through CRP, Inc.) did not transfer the Carson Property title to the Company until October 1995, two months after execution of the Operating

Agreement on August 16, 1995. Accordingly, the prohibited transfers of Plan assets happened before the Company acquired the Carson Property. Thus, even assuming (as Sardagna urges) that, under the REOC provision, the Carson Property ceased to be a Plan asset after the Plan conveyed it to the Company in October 1995, this does not change the fact that a prohibited transfer of plan assets to Sardagna occurred two months earlier in the L.A. MetroMall Transaction.[8]

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[8] Because Sardagna received Plan assets in a transaction prohibited by § 406(a), this Court can affirm the judgment for CB Richard Ellis (ER 66 and 73-75) without ruling on Ellis's cross-appeal from the district court's denial (ER 63-65) of Ellis's claim that Sardagna knowingly participated in a fiduciary breach (imprudence) of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). We note briefly that, as the district court appears to have correctly recognized (ER 73-75 & nn. 6 & 7), § 502(a)(3) authorizes appropriate equitable relief against a nonfiduciary party interest that knowingly participates in a fiduciary's breach of a duty, such as prudence or loyalty, imposed by § 404. In Harris Trust, 530 U.S. at 248, 251, the Supreme Court expressly held that a nonfiduciary party in interest who has actual or constructive knowledge of the circumstances that made the fiduciary's actions a breach of duty and participates in that breach can be liable for appropriate equitable relief under § 502(a)(3). Although Harris Trust, as a factual matter, concerned a prohibited transaction claim under § 406, the Supreme Court broadly reasoned that "§ 502(a)(3) admits of no limit . . . on the universe of possible defendants . . . [and that] the focus [of § 502(a)(3), instead, is on redressing the 'act or practice which violates any provision of [ERISA Title I].'" Harris Trust, 530 U.S. at 246 (emphasis added). The plain meaning and logic of this language are that § 502(a)(3) applies with equal force to violations of § 404 as to § 406 violations, since Title I contains both provisions.

III. In a suit to undo a prohibited transaction, a party in interest may not defend on grounds of equitable estoppel by arguing that the fault lies with the breaching fiduciary

Sardagna argues (as he did below) that by designing the L.A. MetroMall Transaction as they did and entering into the Termination and Settlement Agreement that stated that Sardagna was not a party in interest, the Glaziers and its lawyers "intentionally and deliberately led Sardagna to believe that the facts were such that the transaction was lawful and not a prohibited transaction." Appellant's Br. at 63-64. On this premise, Sardagna argues that the Plan and CB Richard Ellis are equitably estopped from asserting ERISA violations against him based on the L.A. MetroMall Transaction. Id. The court below correctly rejected this argument for two related reasons.

First, as the district court recognized, the per se character of the § 406 prohibitions "seems to belie any notion that the equities are to be considered in determining whether an ERISA transaction is prohibited" or may be undone. ER 72. The § 406 prohibitions are "broadly construed" to impose liability even where there is "no taint of scandal, no hint of self-dealing, no trace of bad faith." Cutaiar v. Marshall, 590 F.2d 523, 528 (3d Cir. 1979). Sardagna cites cases from the Ninth Circuit and elsewhere recognizing the availability under ERISA of equitable defenses such as estoppel (Appellant's Br. at 59-62), but these cases did not involve prohibited transactions under § 406 and thus have no applicability in this context.

Second, the court correctly rejected Sardagna's attempt to associate the current fiduciary and ERISA plaintiff in the case, CB Richard Ellis, with the predecessor breaching fiduciaries for purposes of estoppel. ER 72-73. Perhaps more fundamentally, because a violation of § 406 by definition requires a transaction between a fiduciary and another party (usually a party in interest), it is thus premised on a breach of fiduciary duty. To permit the party in interest to defend by arguing that there is (greater) wrongdoing on the part of the plan's fiduciary would be to create a very large loophole. Indeed, allowing a party in interest to keep plan assets based on a theory that he is less culpable would, quite simply, defeat the prophylactic purposes of § 406 in many cases. See Keystone, 508 U.S. at 160 (§ 406 acts as a prophylactic by flatly prohibiting transactions that inherently hold a high potential for abuse). Cf. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361 (1995) (refusing to apply equitable doctrine of unclean hands where a federal statute authorizes broad equitable relief to serve important national policies). There is simply no practical or logical reason to do this. As the Supreme Court recognized in Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993), ERISA accounts for the fiduciary's greater responsibility to the plan (and presumably greater culpability with regard to a prohibited transaction or other breach) by making a breaching fiduciary personally liable for resulting

damages to the plan, while limiting liability of parties in interest to "appropriate equitable relief."

Similarly, in holding that a nonfiduciary party in interest may be required to return Plan assets gained in a prohibited transaction, the Supreme Court explained that the fact "that a transferee was not 'the original wrongdoer' does not insulate him from liability for" appropriate equitable relief under § 502(a)(3). Harris Trust, 530 U.S. at 251 (citations omitted). Noting that, where it is consistent with ERISA, the common law of trusts offers "a starting point for analysis [of ERISA]," the Supreme Court in Harris Trust observed that "the common law sees no incongruity" in a rule that allows "the culpable fiduciary to seek restitution from the arguably less culpable counterparty-transferee." Id. at 250, 252. Trust law permits the breaching fiduciary to bring such an action because its purpose is to recover property for the trust, not for the wrongdoer. Id.; Cannon v. J.C. Bradford & Co., 277 F.3d 838, 854-55 (6th Cir. 2002) (same, quoting Harris Trust). See Bogert and Bogert, The Law of Trusts and Trustees § 868 at 107 n.8 (rev. 2d ed. 1995); Restatement (Second) of Trusts § 294 cmt. c (1959). If a breaching trustee may bring such an action, certainly CB Richard Ellis, as the successor trustee, may do so. For these reasons, equitable estoppel of the sort asserted by Sardagna here simply has no place in the § 406 prohibited transaction analysis.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's rulings on the issues addressed in this brief for the Secretary of Labor as amicus curiae.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on December 10, 2002, I sent two copies of the foregoing brief for the Secretary of Labor as amicus curiae by first class mail, with postage or delivery charges prepaid, to the following counsel of record:

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