No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELAINE L. CHAO, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

PLAINTIFF-PETITIONER,

v.

MARC MEIXNER, et. al.,

DEFENDANTS-RESPONDENTS.

On APPEAL from the UNITED STATES DISTRICT COURT
for the Northern District of Georgia

PETITION FROM THE SECRETARY OF LABOR

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Chao v. Meixner, et al., Nos. 1:07-cv-0595-WSD and 3:08-cv-0013-JTC

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOUSRE STATEMENT

Counsel for the Secretary of Labor for the U.S. Department of Labor certifies that the following persons and entities have or may have an interest in the outcome of this case:

1. Ron Anderson, Defendant
2. Bradford P. Campbell, Assistant Secretary for Employee Benefits Security Administration
3. Elaine L. Chao, Secretary of Labor, United States Department of Labor
4. Employers Onesource, Inc., Defendant
5. Michael Scott Evans, Counsel for GPTA Health Plan, GPTA for Continuing Education, Inc., Ron Anderson, and Windell Peters
6. Dana L. Ferguson, Esq., Counsel for DOL
7. Georgia Plumbers Trade Association, Defendant
8. Georgia Plumbers Trade Association for Continuing Education, Inc., Defendant
9. Georgia Plumbers Trade Association Health Plan, Defendant
10. Timothy D. Hauser, Esq., Counsel for DOL
11. Elizabeth Hopkins, Esq., Counsel for DOL
12. Stanley E. Keen, Esq., Counsel for DOL

13. Lynda Womack Kenney, Esq., Counsel for Leslie E. Smith and Employers Onesource, Inc.

14. Robert M. Lewis, Jr., Esq., Counsel for DOL

15. Marc Meixner, Defendant

16. Windell Peters, Defendant

17. David Sherman, Defendant

18. Leslie E. Smith, Defendant

19. Rush S. Smith, Jr., Esq., Counsel for Leslie E. Smith and Employers Onesource, Inc.

20. Nickole C. Winnett, Esq., Counsel for DOL

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No. _____

IN THE UNITED STATES COURT OF APPEALS
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ELAINE L. CHAO, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

PLAINTIFF-APPELLANT,

v.

MARC MEIXNER, GPTA BENEFITS GROUP, INC.,
LESLIE E. SMITH, EMPLOYERS ONESOURCE, INC.,
DAVID SHERMAN, AND GEORGIA PLUMBERS
TRADE ASSOCIATION HEALTH PLAN, et al.,

DEFENDANTS-APPELLEES.

PETITION UNDER 28 U.S.C. § 1292(b) TO REVIEW
CERTIFIED ORDER FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GRANTING DEMAND FOR JURY TRIAL

Elaine L. Chao, Secretary of Labor for the United States Department of Labor ("Secretary"), through counsel, hereby petitions this Court pursuant to Fed. R. App. P. 5 and 28 U.S.C. § 1292(b) for permission to appeal from the interlocutory order of the U.S. District Court for the Northern District of Georgia in Chao v. Meixner, et al., 1:07-cv-0595-WSD and 3:08-cv-0013-JTC, entered on November 27, 2007, concluding that Defendants OneSource ("EOS") and Leslie E.

Smith (collectively, "Defendants") are entitled to a jury trial on the Secretary's breach of fiduciary duty claim, which the district court certified for interlocutory appeal on July 3, 2008.

In accordance with Rule 5(b)(1)(E) of the Federal Rules of Appellate Procedure, the Secretary has attached as Exhibits "A" and "B" copies of the district court's Opinion and Orders issued on November 27, 2007 and July 3, 2008 from which this petition seeks to appeal.

QUESTION PRESENTED

The controlling question of law as certified by the district court is whether the fiduciaries of the Georgia Plumber's Trade Association Health Benefit Plan (The "Plan") are entitled to a jury trial in the Secretary's lawsuit under section 502(a)(2) of ERISA in which she seeks to recover the Plan's monetary losses caused by the Defendants' alleged fiduciary misconduct.

RELIEF REQUESTED

The Secretary requests that this Court grant this petition for interlocutory appeal and reverse the order of the district court issued on November 27, 2007, which denied the Secretary's Motions to Strike Jury Trial Demand.

STATEMENT OF THE FACTS

This case concerns the application of the Seventh Amendment's right to a jury trial to a civil enforcement provisions in Title 1 of the Employee Retirement

Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. The Secretary has primary authority for enforcing and administering Title 1 of ERISA, which establishes standards governing the operation of employee benefit plans. ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), provides that the Secretary may bring suit for "appropriate relief under [section] 409" against plan fiduciaries. Section 409(a), in turn, authorizes the court to order defendants to repay any "losses to the plan," "to restore" "any profits" resulting from the use of plan assets, and to grant "such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. § 1109(a). Additionally, ERISA section 502(a)(5), 29 U.S.C. § 1132(a)(5), authorizes the Secretary to obtain injunctive and other "equitable" relief to redress any violations of ERISA or to enforce any provision of the statute.

Pursuant to this enforcement authority, the Secretary filed a complaint against the administrators and fiduciaries of the Georgia Plumber's Trade Association Health Benefit Plan (the "Plan") on March 14, 2007. Compl. [1].[1] The Secretary filed a second complaint against additional plan administrators and fiduciaries on February 8, 2008, asserting fiduciary breach claims against Defendants Georgia Plumbers Trade Association for Continuing Education, Inc.,

[1] References to the documents in the district court docket are indicated by brackets and the number designated to that document.

Ron Anderson, Windell Peters, and the Georgia Plumbers Trade Association Health Plan. Compl. [89].[2]

The Secretary asserts, among other things, that Defendants Smith and EOS, along with the other named Defendants, breached their fiduciary duties to the Plan by allowing or receiving improper payments, which "caused the Plan to suffer financial losses for which they are personally and otherwise liable pursuant to ERISA section 409(a), 29 U.S.C. § 1109(a)." Compl. [1] ¶¶ 47, 49, 50, 54; Compl. [89] ¶¶ 41, 45. More specifically, the Secretary alleges that the Defendants caused the Plan to suffer a loss of $275,598.67 due to improper payments made to Smith and others, Compl. [1] ¶¶ 42, 43, 44, and she seeks to hold the Defendants personally liable for the losses to the Plan pursuant to sections 409(a) and 502(a)(2) of ERISA. Compl. [1] ¶¶ 47, 54, 58, 61; Compl. [89] ¶¶ 41, 45, 48. The Secretary also alleges that Defendants, while serving in their fiduciary roles, dealt with the assets of the Plan in their own account, transferred Plan assets to

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[2] The district court consolidated Chao v. Mexiner, et al., No. 1:07-cv-0595-WSD with Chao v. Georgia Plumbers Trade Association for Continuing Education, Inc., et. al., No. 3:08-cv-0013-JTC on June 20, 2008. Consol. [88]. On June 27, 2008, the Secretary moved to strike the jury trial request of Defendants Georgia Plumbers Trade Association for Continuing Education, Inc., Ron Anderson, Windell Peters, and the Georgia Plumbers Trade Association Health Plan. Motion [92]. On July 3, 2008, in the same order in which the court certified for interlocutory appeal its earlier ruling on the jury trial issue in Meixner, the district court also denied the Secretary's motion to strike the jury trial request in Georgia Plumbers. Opinion [93]. The district court recognized in the June 3, 2008 order that any decision ultimately rendered by this Court on the jury trial issue will bind all parties to the consolidated civil action. Id. at 15-16

themselves, and acted on behalf of other parties in transactions with the Plan. Compl. [1] ¶¶ 51, 52. The Secretary further alleges that the Defendants "knowingly aided and abetted in, participated in, or otherwise assisted in ... fiduciary breaches," Compl. [1] ¶ 63, and likewise claims that the Defendants named in the second complaint breached their duties through their failure to evaluate, review, monitor or attempt to rectify the acts and omissions of Meixner, GPTA Benefits Group, Smith, EOS, and one another with respect to the management and administration of the Plan. Compl. [89] ¶¶ 37, 40, 41, 45. Essentially, this case is about two plan fiduciaries that set their own commission rates, which they paid from Plan assets, without the consent or knowledge of the responsible Plan fiduciaries, and without assuring that their payments to themselves were reasonable.

Pursuant to section 502(a)(5) of ERISA, the Secretary also seeks "to enjoin any acts and practices" which violate ERISA, "to obtain appropriate equitable relief" for the breaches of fiduciary duty, and to obtain any further relief as may be appropriate to redress violations and enforce the provisions of ERISA. Compl. [1] ¶ 1; Compl. [89] ¶ 1. For instance, the Secretary seeks the appointment of an independent fiduciary to manage and administer the Plan, and seeks an order permanently enjoining all the Defendants from acting directly or indirectly in any fiduciary capacity. Compl. [1], at 22-23; Compl. [89], at 18-19. She also requests,

as other appropriate equitable relief under section 502(a)(2) of ERISA, that Defendants Smith and EOS, along with the other named Defendants disgorge the improper payments they received from the Plan. Compl. [1] ¶ 64.

Defendants Smith and EOS filed an Answer on May 21, 2007 in which they demanded a jury trial. Answer [12]. The Secretary moved to strike the Defendants' jury trial demand on June 4, 2007. Motion [17]. Defendants Smith and EOS filed a response to the Secretary's Motion to Strike on June 14, 2007. Resp. [22].

On November 27, 2007, the district court denied the Secretary's motion to strike the jury demand. The court reasoned that while the Secretary's claims under section 502(a)(5) are clearly equitable, and thus not subject to trial by jury under the Seventh Amendment, section 409 of ERISA does not limit the available remedies to merely equitable remedies. Exhibit A, at 11-12. Because, however, the court further reasoned that the Secretary was seeking remedies under section 409 that were compensatory in nature, the court concluded that the Secretary's claim brought pursuant to section 502(a)(2) of ERISA is a "suit at common law" within the meaning of the Seventh Amendment, and that the Defendants were accordingly entitled to a jury trial on these claims. Exhibit A, at 13-14.

On January 3, 2008, the Secretary filed a motion under 28 U.S.C. § 1292(b) to certify for immediate appeal to this Court the district court's interlocutory ruling

on the jury trial issue. Defendants Smith and EOS filed an opposition to this motion on January 8, 2008. The district court granted the Secretary's motion on July 3, 2008. Exhibit B.

ARGUMENT

THE DISTRICT COURT'S ORDER GRANTING THE DEFENDANTS A JURY TRIAL MEETS ALL OF THE REQUIREMENTS FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

Although a district court ruling is generally not reviewable by a federal court of appeals until after entry of a final judgment, 28 U.S.C. § 1292(b) gives district courts discretion to certify their orders for immediate appeal if the court concludes "that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." See 28 U.S.C. § 1291; Coopers & Lybrand v. Livesay, 437 U.S. 463, 474 (1978). If the district court certifies an order in this manner, the statute provides that "[t]he Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order." 28 U.S.C. § 1291. The party seeking certification of an interlocutory appeal has the burden to show that the specified exceptional circumstances exist to justify departing from

the normal procedure of only appealing a district judge's ruling after final judgment. Coopers & Lybrand, 437 U.S. at 474-75.

The district court's order granting the Defendants' request for a jury trial meets all three criteria for certification under 28 U.S.C. § 1292(b) because, as discussed more fully below, the jury trial issue involves: (1) a "controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." See McFarlin v. Conseco Servs, LLC, 381 F.3d 1251, 1257 (11th Cir. 2004).[3]

A. The Jury Trial Question Involves a Controlling Issue of Law

On the first factor, the Eleventh Circuit has noted that it must deny certification where resolution of the issue would be too fact-intensive, and may grant it where the petition raises "pure" questions of law that the court of appeals can decide without having to study the record. Id. at 1258 (citing Ahrenholz v. Bd. of Trs. of the Univ. of Ill., 219 F.3d 674, 677 (7th Cir. 2000)). The jury trial issue certified by the district court presents just such a "pure" question of law.

The Seventh Amendment secures the right to a jury trial "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." U.S.

[3] The court properly rejected the Defendants' argument that they are entitled to a jury trial on the Secretary's claims under section 502(a)(5) because that section of ERISA provides only for equitable relief.

Const., amend. VII; see generally Waldrop v. S. Co. Servs., Inc., 24 F.3d 152, 155 (11th Cir. 1994). To determine whether the Seventh Amendment gives the right to trial by jury in a particular action, the court must consider whether, given the nature of the action, and the nature of the remedy sought, the action would have been brought in a court of law, rather than a court of equity, prior to the amendment's adoption in 1791. See, e.g., Tull v.United States, 481 U.S. 412, 417-18 (1987); Stewart v. KHD Deutz of Am. Corp., 75 F.3d 1522, 1525 (11th Cir. 1996). In making this determination, the court gives more weight to the nature of the remedy. Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 565 (1990). If the action and the remedy were historically legal, rather than equitable, the constitutional provision guarantees the right to a trial by jury. See Tull, 481 U.S. at 417. See also In re Evangelist, 760 F.2d 27 (1st Cir. 1985); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989).

Thus, as the district court correctly recognized, Exhibit A, at 8-9, the jury trial issue it certified for appeal is a purely legal issue that requires resolution of two related legal issues: whether the nature of the claim and whether the nature of the remedy would have been characterized as legal or equitable in the 18th century. Both of these issues require the court to look at the statute and the common law, but do not require resolution of any of the factual allegations in the case.

Both the nature of the claim and the nature of the remedy sought here are equitable. In seeking to impose personal liability on Defendants Smith and EOS to make good on losses they caused to the Plan when they breached their fiduciary duties, the Secretary's claim is precisely analogous to a traditional action by a beneficiary of a trust to compel the trustee to redress a breach of trust. See Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp. Inc., 472 U.S. 559, 570 (1985) (citing S. Rep. No. 93-127, at 29 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4865) ("'The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts.'"). Under the common law of trusts, such claims were "exclusively equitable." Restatement (Second) of Trusts, § 197, at 433 (1959); see Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993) ("at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust"); Borst v. Chevron Corp., 36 F.3d 1308, 1323-24 (5th Cir. 1994) ("ERISA law is closely analogous to the law of trusts, an area within the exclusive jurisdiction of the courts of equity."); G. Bogert, The Law of Trusts and Trustees, § 870, at 123 (rev. 2d ed. 1995); III. A. Scott, The Law of Trusts, § 197, at 188 (4th ed. 1988).

Moreover, the remedy sought here – "[t]he imposition of personal liability on a fiduciary" for breach of fiduciary duty, as provided for in sections 409(a) and

502(a)(2) – is the venerable and exclusively equitable remedy of "surcharge." See LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.), 196 F.3d 1, 7 (1st Cir. 1999) (citing Black's Law Dictionary 1441 (6th ed. 1990) and discussing the remedy in a non-ERISA case). This remedy, historically available only in courts of equity against fiduciaries, seeks to restore the beneficiary to the "position in which he would have been if the trustee had not committed the breach of trust." Restatement, supra, § 205 cmt. a, at 458; see also id. § 205, at 458; Scott, supra, § 199.3, at 206 ("If the trustee has committed a breach of trust the beneficiaries can maintain a suit in equity to compel him to redress the breach of trust, either by making specific reparation or by the payment of money or otherwise."); id. § 199, at 203-04 & 206 (listing money payment designed to redress fiduciary breach as one of the "equitable remedies" available to a beneficiary). Although surcharge was a form of monetary redress, it was an equitable remedy distinct from legal damages that was available only in equity for a claim over which the court of equity had exclusive jurisdiction. Thus, a suit against an ERISA fiduciary to recover monetary losses caused by a breach of duty is an action that would have been brought solely in a court of equity and which sought a wholly equitable remedy.

Whether or not one agrees with this analysis, however, the resolution of the Seventh Amendment issue does not depend on factual inquiries or disputes, but

instead requires the interpretation and application of constitutional and statutory provisions. The jury trial issue thus presents exactly the sort of pure legal issue for which interlocutory appeals are intended. For this reason, this Court and others have routinely certified for review questions involving the availability of jury trial rights, and appellate courts routinely exercise their discretion to hear such appeals, under ERISA and other statutes. See, e.g., Stewart, 75 F.3d at 1524-25 (interlocutory review to determine jury trial right in case brought under ERISA and the LMRA); Lehman v. Nakshian, 453 U.S. 156 (1981) (interlocutory appeal granted to consider denial of government's motion to strike employee's jury trial demand in age discrimination case); Lorillard v. Pons, 434 U.S. 575 (1978) (same); Swofford v. B.W., Inc., 336 F.2d 406 (5th Cir. 1964) (interlocutory appeal granted to consider jury trial rights in patent infringement case); Adams v. Cyprus Amax Minerals Co., 149 F.3d 1156 (10th Cir. 1998) (granting interlocutory appeal and finding that the no right to jury trial exists under ERISA section 502(a)(1)(B) because such claims and related remedies are equitable in nature for purposes of Seventh Amendment).

B. Substantial Ground for Differences of Opinion Exists as to the Nature of Monetary Relief under Sections 502(a)(2) and 409(a) of ERISA

To meet the second factor, there must be a "substantial dispute about the correctness" of the district court's original ruling on the issue. McFarlin, 381 F.3d at 1259. As the district court found, there is such a dispute concerning the right to

a jury trial in a case seeking to recover plan losses under ERISA section 502(a)(2). Exhibit A, at 9-10.

The overwhelming majority of courts applying the Seventh Amendment analysis conclude that section 502(a)(2) claims are always equitable in nature because pre-merger courts of equity had exclusive jurisdiction over analogous 18th century actions, which involved claims for equitable remedies against fiduciaries for breach of trust, and have long denied requests for jury trials in such cases.[4] In its Opinion and Order, the district court joins a small number of courts that have

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[4] See, e.g., Borst v. Chevron Corp., 36 F.3d 1308, 1323-24 (5th Cir. 1994); Flanagan v. General Motors Corp., 2006 WL 2792678, *13 (N.D. Ga. 2006) (noting simply that "[a]n ERISA case receives a bench trial"); Broadnax Mills, Inc. v. Blue Cross & Blue Shield, 876 F. Supp. 809, 816 (E.D. Va. 1995); Camp v. Pac. Fin. Group, 956 F. Supp. 1541, 1552 (C.D. Cal. 1997); Devine v. Combustion Eng'g, Inc., 760 F. Supp. 989, 994 (D. Conn. 1991); Goodman v. S & A Rest. Corp., 756 F. Supp. 966, 970-71 (S.D. Miss. 1990); Motor Carriers Labor Advisory Council v. Trucking Mgmt., Inc., 731 F. Supp. 701, 702-03 (E.D. Pa. 1990); Baker v. Universal Die Casting, Inc., 725 F. Supp. 416, 418-19 (W.D. Ark. 1989); Berlo v. McCoy, 710 F. Supp. 873, 874 (D.N.H. 1989); Brock v. Group Legal Adm'rs, Inc., 702 F. Supp. 475, 476 (S.D.N.Y. 1989); Browning v. Grote Meat Co., 703 F. Supp. 790, 794-95 (E.D. Mo. 1988); Trs. of Cent. States, Se. & Sw. Areas Pension Fund v. Golden Nugget, Inc., 697 F. Supp. 1538, 1549 (C.D. Cal. 1988); Dasler v. E.F. Hutton & Co., 694 F. Supp. 624, 627 n.4 (D. Minn. 1988); Unitis v. JFC Acquisition Co., 643 F. Supp. 454, 461-62 (N.D. Ill. 1986); Bigger v. Am. Commercial Lines, Inc., 652 F. Supp. 123, 127-28 (W.D. Mo. 1986); Smith v. ABS Indus., Inc., 653 F. Supp. 94, 97-99 (N.D. Ohio 1986); Burud v. Acme Elec. Co., 591 F. Supp. 238, 248 n.9 (D. Alaska 1984). Cf. In re Evangelist, 760 F.2d at 29 (Breyer, J.) (denying a request for jury trial in a corporate fiduciary breach case because "[a]ctions for breach of fiduciary duty, historically speaking, are almost uniformly actions 'in equity' - carrying with them no right to trial by jury").

held that jury trials are available under the Seventh Amendment in breach of fiduciary duty cases such as this one to the extent that they seek monetary losses. See In re Oakwood Homes Corp., 2007 WL 4031606 (D. Del. 2007); Lamberty v. Premier Millwork Lumber Co., 329 F. Supp. 2d 737 (E.D. Va. 2004); Bona v. Barasch, 30 Empl. Benefits Cas. (BNA) 1874, 2003 WL 1395932, *33-*35 (S.D.N.Y. 2003); Pereira v. Farace, 413 F.3d 330 (2d Cir. 2005) (applying this reasoning to a jury trial request in a case for breach of fiduciary duty brought under state corporate law); but see White v. Martin, 2002 WL 598432, 27 Empl. Benefits Cas. (BNA) 2583 (D. Minn. 2002) (rejecting argument that recent Supreme Court decisions required abandonment of precedent holding that suits under § 502(a)(2) of ERISA are equitable). These courts have relied on the Supreme Court's decisions in a line of cases beginning with Mertens v. Hewitt Assocs., 508 U.S. 248 (1993), which a number of courts have read to mandate the conclusion that monetary relief to remedy fiduciary breaches does not constitute "equitable relief" under another, closely related statutory provision, ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). Compare Coan v. Kaufman, 457 F.3d 250, 262-64 (2d Cir. 2066) (section 502(a)(3) does not authorize suit to recover losses caused by fiduciary breach because the recovery of such losses do not constitute equitable relief), with Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 592 (7th Cir. 2000)

(monetary relief is equitable "when sought as a remedy for breach of fiduciary duty").

Although the Eleventh Circuit has not addressed the jury trial issue in a case seeking to recover plan losses stemming from alleged fiduciary breaches under section 502(a)(2) of ERISA, this Court has held that no jury trial is available in benefit cases brought under section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Blake v. Unionmutual Stock Life Ins. Co., 906 F.2d 1525, 1526 (11th Cir. 1990) (holding that ERISA has been interpreted as an equitable statute where no Seventh Amendment right to a jury trial exists); Chilton v. Savannah Foods & Indus., Inc., 814 F.2d 620 (11th Cir. 1987) (same). Indeed, in a case decided on interlocutory review of a district court order denying a jury trial, this Court held broadly that "because ERISA has been interpreted as an equitable statute," "no Seventh Amendment right to a jury trial exists in actions brought pursuant to ERISA." Stewart, 75 F.3d at 1527.[5] Although the Stewart case, like Blake and Chilton, involved an ERISA section 502(a)(1)(B) claim for benefits, and not a claim for plan losses, id. at 1527-28, it strongly underscores the substantial ground for

[5] The Stewart case was brought under both ERISA and the Labor Management Relations Act (LMRA). As set forth above, although this Court held that the defendants in that case did not have the right to a jury trial on their ERISA claim, but that they did have a right to a jury trial under section 301 of the LMRA, and that joinder of the ERISA section 502(a)(1)(B) claim for benefits did not defeat that right. 75 F.3d at 1527-28.

difference of opinion on this controlling issue of law and warrants granting the petition for interlocutory review 28 U.S.C. § 1292(b).

C. Immediate Appeal of the Jury Trial Issue Will Materially Advance the Ultimate Termination of the Litigation

The third requirement is met if resolution of the "controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." McFarlin, 381 F.3d at 1259. As the district court found, resolution of the jury trial issue is likely to do so. Exhibit A, at 10. A jury trial requires considerably more time and expense to the parties and the court than a bench trial, and is unprecedented for the Secretary of Labor in ERISA cases. A bench trial, the primary form of trial for ERISA cases, would provide a quicker, less burdensome resolution to the parties and the Court.

Moreover, an immediate appeal of the district court's order granting of Defendants' demand for a jury trial would advance the ultimate termination of the litigation by providing for a less cumbersome process should this Court agree with the Secretary that a jury trial is not required. The appeal process would not unreasonably delay the litigation because the case has not yet been set for trial, and the Secretary has no plans to move the court to stay the proceedings unless trial appears imminent. However, should the case proceed to trial by jury, the Secretary may well appeal any adverse decision on the grounds that the jury trial was not appropriate under the statute. Such appeal would further prolong resolution of the

matter - perhaps even resulting in a remand to the district court for another trial, as the district court recognized. Exhibit A, at 10 (citing Olympia Express, Inc. v. Linee Aeree Italiane, S.P.A., 509 F.3d 347, 352 (7th Cir. 2007)). The third requirement is therefore met and this Court should grant the petition for immediate appeal pursuant to 28 U.S.C. § 1292(b).

CONCLUSION

For the foregoing reasons, the Secretary requests that this Court grant the petition for permission to appeal the interlocutory order of the U.S. District Court for the Northern District of Georgia in Chao v. Meixner, et al., 1:07-cv-0595-WSD and 3:08-cv-0013-JTC, entered on November 27, 2007 and certified on July 3, 2008, which concluded that the Defendants are entitled to a jury trial on the Secretary's breach of fiduciary duty claim under section 502(a)(2) of ERISA.

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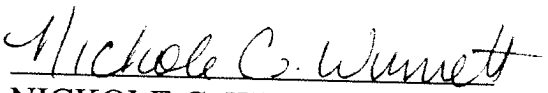

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July 2008, copies of the foregoing petition were served by Federal Express, postage prepaid, on the following:

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ELAINE L. CHAO, Secretary of Labor **Plaintiff,** **v.** **MARC MEIXNER, GPTA BENEFITS GROUP, LESLIE E. SMITH, EMPLOYERS ONESOURCE, INC., DAVID SHERMAN, and GEORGIA PLUMBERS TRADE ASSOCIATION HEALTH PLAN,** **Defendants.**	**1:07-cv-0595-WSD**

OPINION AND ORDER

This matter is before the Court on Plaintiff Elaine L. Chao's Motion to Strike Answer [17],[1] Defendant David Sherman's ("Sherman") Motion to Dismiss [18], Defendants Employers Onsesource, Inc. ("EOS") and Leslie E. Smith's ("Smith") (collectively, "EOS Defendants") Motion to Amend Answer [30], and Plaintiff's Motion for Relief from Judgment, [32]. Also before the Court is

[1] Plaintiff is admonished to format future filings with this Court in accordance with the Court's Local Rules. See, L.R. 5.1.

Plaintiff's Motion to Supplement Motion to Strike Answer [50] and the EOS Defendants Motion for Leave to Reply [52].[2]

I. BACKGROUND

On March 14, 2007, Plaintiff Elaine L. Chao, Secretary of the Department of Labor, (the "DOL") filed a complaint asserting claims under ERISA §§ 502(a)(2), 502(a)(5), and 409 against the administrators and fiduciaries of the Georgia Plumber's Trade Association ("GPTA") Health Benefits Plan (the "Plan"). In the complaint, the DOL seeks "to enjoin acts and practices which violated . . . ERISA, to obtain appropriate relief for breaches of fiduciary duty under ERISA . . . and to obtain other such further relief as may be appropriate to redress violations and enforce the provisions of that Title." The DOL specifically claims that the EOS Defendants, along with other defendants, breached fiduciary duties to the Plan by allowing or receiving improper payments, which "caused the Plan to suffer financial losses for which they are personally and otherwise liable. . ." (Compl. ¶¶ 47, 54.) The Complaint demands that the EOS Defendants "disgorge the profit made through their fiduciary breach." (Id.) The complaint

[2] Having considered the submissions, Chao' Motion to Supplement Motion to Strike Answer [50] and the EOS Defendants Motion for Leave to Reply to Chao's Motion to Supplement [52] are GRANTED.

also alleges that the EOS Defendants "knowingly aided and abetted in, participated in, or otherwise assisted in . . . fiduciary breaches," and demands that they "disgorge the funds they received from the Plan." (Id. at ¶¶ 63-64.) In addition to disgorgement, the complaint seeks to hold the EOS defendants "personally . . . liable." (Id. at ¶¶ 47, 54, 58). The complaint specifically alleges that the EOS Defendants caused or allowed the Plan to lose $151,248.82 in improper payments to Smith or others. The complaint does not identify who has custody of these funds, and does not seek to impose a constructive trust or equitable lien on them. The complaint demands only that the EOS and other Defendants "restore all losses, with interest, caused by their fiduciary misconduct as alleged in this Complaint. . . ." The complaint also seeks an injunction and other equitable relief.

On May 21, 2007, the EOS Defendants filed an answer, demanding a jury trial. The principal motion before the Court is the DOL's request to strike the EOS Defendant's jury trial demand.

II. DISCUSSION

A. Motion to Strike

The DOL argues that the causes of action pled in its complaint arise in equity, and, thus the EOS Defendants are not entitled to a jury trial. The Seventh

Amendment provides: "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury shall otherwise be reexamined in any Court of the United States, than according to the rules of common law." U.S. Const., Amd. 7. Courts consider a suit to arise "at common law" when "legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized and equitable remedies [are] administered." Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41 (1989). "When legal and equitable actions are tried together, the right to a jury in the legal action encompasses the issues common to both." Lincoln v. Board of Regents of Univ. System of Ga., 697 F.2d 928, 934 (11th Cir. 1983). Thus, if any of the DOL's causes of action arise at law, the EOS Defendants are entitled to a jury trial at least on the issues relevant to that cause. Id.

1. *The Availability of a Jury Trial Under ERISA*

The Supreme Court has stated, "ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002) (quotation

and citation omitted). Where a provision of ERISA allows only equitable relief, legal relief is not available. Id. at 210. If the ERISA provisions asserted by the DOL permit only equitable relief, the EOS Defendants' request for jury trial is foreclosed.

The DOL asserts claims under ERISA §§ 502(a)(2) and 502(a)(5). Section 502(a)(5) permits suit by the Secretary of the Department of Labor:

> (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter . . . .

29 U.S.C. § 1132(a)(5).

This language permits a plaintiff to seek only equitable remedies. See, Great-West Life & Annuity Inso Co. v. Knudson, 534 U.S. 204, 220-21 (2002) (finding that identical language in § 502(a)(3), "by its terms, allows only equitable relief," and that a suit seeking legal relief under that provision was not authorized by the statute). The EOS Defendants are thus not entitled to a jury trial on the DOL's claim under § 502(a)(5).

Section 502(a)(2) authorizes the Secretary of the Department of Labor to bring a suit on behalf of the Plan "for appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2). Section 1109 sets forth the parameters for liability

for breach of fiduciary duty, stating that any fiduciary found in breach of their fiduciary duty "shall be personally liable to *make good to such plan any losses* . . . and shall be subject to such other equitable *or remedial* relief as the court may deem appropriate . . . ." Id. § 1109(a) (emphasis added). This provision, unlike § 502(a)(5), does not expressly limit the available remedies to equitable remedies, and expressly authorizes remedies *compensatory* in nature, which traditionally arise at law.[3] Section 502(a)(2), on its face, thus permits legal remedies in addition to equitable remedies. The Supreme Court has noted that distinctions in ERISA between "equitable" and "remedial" remedies must be given effect. Mertens v. Hewitt Assoc., 508 U.S. 248, 258 n.8 (1993). The DOL's cause of action under § 502(a)(2) thus may arise at law. The EOS Defendants' jury demand therefore is not foreclosed.

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[3] Although actions against a fiduciary on behalf of a trust are traditionally equitable in nature, ERISA's language clearly authorizes legal remedies in connection with § 502(a)(2). "When the statute's language is plain, the sole function of the courts–at least where the disposition required by the text is not absurd–is to enforce it according to its terms. United States v. Mount Sinai Medical Center of Florida, Inc., 486 F.3d 1248, 1252 (11th Cir. 2007). This Court noted in Nolte v. BellSouth Telecommunications, Inc., 2007 WL 317110 (N.D. Ga., October 24, 2007), that ERISA § 502(a)(2) only permits recovery on behalf of the Plan. This observation does not alter the Court's conclusion that the section permits legal remedies.

2. *Whether the DOL's Claim Arises in Law or Equity*

The mere fact that ERISA § 502(a)(2) permits legal remedies to be asserted on behalf of the Plan does not compel the conclusion that the DOL's cause of action here arises at law. The Court must examine the specific relief sought to determine whether the suit arises at law or in equity, and thus whether the EOS Defendants are entitled to demand a jury.

To determine whether relief is legal or equitable, the Court engages in a two step process: "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." Granfinaciera, 492 U.S. at 42 (quotation and citation omitted). "The second stage of this analysis is more important than the first." Id.

a. *Historical Characterization of the DOL's Claims*

The DOL asserts a cause of action for breach of fiduciary duty on behalf of the Plan. In 18th-century actions in England, claims for breach of fiduciary duty were commonly characterized as arising in equity. Restatement (Second) of Trusts §§ 197, 199 (1959). As a general rule, "breach of fiduciary duty claims were historically within the jurisdiction of the equity courts." Pereira v. Farace, 413

F.3d 330, 338 (2d Cir. 2005). This prong of the analysis suggests that the DOL's cause of action arises in equity.

b. *Nature of the Remedy*

The DOL seeks relief for losses–that is, a traditional form of money damages–to compensate the Plan for the EOS Defendants' alleged breaches of fiduciary duty. Money damages are "the classic form of legal relief." Mertens, 508 U.S. at 255. "Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money . . . are suits for 'money damages' as that phrase has traditionally been applied, since they seek no more than *compensation for loss resulting from the defendant's breach of legal duty*." Bowen v. Massachusetts, 487 U.S. 879, 918-19 (1988) (emphasis added).

The DOL, relying heavily on the common law of trusts, characterizes its cause as a fundamentally equitable claim on behalf of a trust for breaches of fiduciary duty. The Eleventh Circuit directs the Court to "reject the unselective incorporation of trust law rules into ERISA. Rather, a court should only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute." Moore v. American Fed's

of Television & Radio Artists, 216 F.3d 1236, 1244 n.17 (11th Cir. 2000). The statutory language in § 502(a)(2) expressly permits legal and equitable remedies to be sought from fiduciaries on behalf of qualified plans. Although the common law of trusts suggests that suits for breach of fiduciary actions on behalf of a trust are fundamentally equitable, the express language of § 502(a)(2) permits legal and equitable remedies. See also, McLeod v. Oregon Lithoprin, Inc., 102 F.3d 376, 378 (9th Cir. 1996) (holding 'the status of the defendant, whether fiduciary or non-fiduciary, does not affect the question of whether damages constitute appropriate equitable relief. . . ."). The Court therefore cannot construe the DOL's claim as arising in equity based on the common law of trusts alone. The Court must look to the specific nature of the remedy sought to determine if it is equitable or legal.

The DOL characterizes its claims as equitable demands for restitution or surcharge. Restitution, however, is not an exclusively legal remedy, and historically could be awarded both at law and in equity. Great-West, 534 U.S. at 212. "[R]estitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case." Reich v. Continental Cas. Co., 33 F.3d 754, 756 (7th Cir. 1994) (Posner, J.). Whether restitution is legal or equitable "depends on the basis for the plaintiff's claim, and the nature of the

underlying remedies sought." Great-West, 534 U.S. at 213 (quotation and citation omitted).

> [A] plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where the property sought to be recovered or its proceeds have been dissipated so that no product remains, the plaintiff's claim is only that of a general creditor, and the plaintiff cannot enforce a constructive trust of or an equitable lien upon other property of the defendant. Thus, for restitution to lie in equity, the action *generally must seek not to impose personal liability on the defendant*, but to restore to the plaintiff particular funds or property in the defendant's possession.

Id. at 213-214 (citations and quotations omitted) (second emphasis added).

The Supreme Court has emphasized that the principal question is whether the money sought is an identifiable *res* subject to constructive trust or equitable lien. Sereboff v. Mid Atlanta Medical Servs., Inc., 126 S.Ct 1869, 1870-72 (2006). See also, Bona v. Barasch, 2003 WL 1395932, *12 (S.D.N.Y., Mar. 20, 2003) ("restitution is appropriate as an equitable remedy only where the specific property being sought is identifiable and in the hands of the defendant."). Courts

interpreting Great-West have recognized that "a defendant must possess the funds at issue for the remedy of equitable restitution to lie against him." Periera, 413 F.3d at 340. See also, Amschwand v. Spherion Corp., --F.3d--, 2007 WL 3027072, *3 (5th Cir., October 18, 2007) ("Obtaining the lost policy proceeds [from a fiduciary], as Amschwand requests, is simply a form of make-whole damages. This demand is not equitable in derivation, but is akin to the legal remedies of extracontractual or compensatory damages").

The complaint alleges the EOS Defendants "caused the Plan to suffer financial losses for which they are personally and otherwise liable" and demands that they "restore all losses . . . ." That is, the DOL seeks to hold Defendant individually liable for any losses which Plaintiff can prove are connected to Defendants alleged wrongful conduct. The DOL does not identify any specific *res* in the EOS Defendants' possession traceable to their alleged wrongdoing that could be the subject of a subject of a constructive trust or equitable lien, nor does it identify any specific profit that could be the subject of an accounting. The DOL also does not ask that the EOS Defendants merely disgorge an amount by which they were improperly enriched. It instead demands that the EOS Defendants, as a matter of personal liability, compensate the Plan for any losses incurred as a result

of their conduct. This form of make-whole relief is traditionally legal in nature. To the extent that the DOL seeks restitution, it seeks *legal* restitution, and its claim under § 502(a)(2) seeks a legal, not equitable, remedy.

The DOL next characterizes its action as seeking the equitable remedy of "surcharge." "It may once have been technically correct to say that damages were exclusively a common law remedy, but only because damages in equity were called surcharge. The terms are now synonyms for monetary relief." John H. Langbein, What Erisa Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West, 103 Colum. L. Rev. 1317, 1353 (2003). Surcharge is "[t]he imposition of personal liability on a fiduciary for willful or negligent misconduct in the administration of his fiduciary duties." Black's Law Dictionary 1441 (8th ed. 2001). The DOL argues that ERISA incorporates the concept of surcharge and that surcharge is authorized by § 502(a)(2).

This Court is bound to read Supreme Court precedent "as broadly as it is written." Pereira, 413 F.3d at 338. In the context of ERISA § 502(a)(3), which only permits "appropriate equitable" remedies, the Supreme Court plainly distinguished between equitable and legal remedies based solely on the type of relief, particularly whether, in the case of money damages, funds were traceable

according to the rules of equity. Great West, 534 U.S. at 234. The only forms of compensatory damage recognized by the Supreme Court as "equitable" for the purposes of § 502(a)(3) were equitable restitution and accounting for profits, neither of which are claimed by the DOL here. Great-West, in other words, defines "equitable relief" in ERISA as "categories of relief *typically* available in equity (such as injunction, mandamus, and restitution, *but not compensatory damages*)." Aetna Health Inc. v. Davila, 542 U.S. 200, 222-23 (2004) (Ginsberg, J., concurring) (emphasis added).[4] The DOL does not present any authority for the proposition that compensatory damages titled as "surcharge" were *typically* available in equity.[5] The Court concludes that the DOL seeks a legal remedy, and

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[4] In her concurrence in Aetna, Justice Ginsberg noted the possibility that, given the historically equitable nature of actions against trust fiduciaries, make-whole relief might be available as equitable relief in an action against a fiduciary. 542 U.S. at 222-23. The Supreme Court has not ruled on this issue. The Court finds no basis in this case to follow-up on Justice Ginsberg's suggestion in Aetna.

Further, the "surcharge" analysis suggested by the DOL is inconsistent with the simple, bright-line rule laid down by the Supreme Court in Great-West and Sereboff. The DOL's reasoning, while possibly historically correct, is impractical. Incorporating the concept of "surcharge" into the present analysis would nullify the "nature of the relief sought" prong of the test for distinguishing legal from equitable actions.

[5] The Eleventh Circuit has stated that the holding Great-West is limited to § 502(a)(3). Green v. Holland, 480 F.3d 1216, 1224 n.5 (11th Cir. 2007). While the holding is limited, the Supreme Court's reasoning, particularly its method of distinguishing equitable from legal remedies under ERISA, applies in this case.

its cause of action under § 502(a)(2) arises at law at least in part. Accordingly, the EOS Defendants are entitled to a jury trial.

B. Sherman's Motion to Dismiss

Defendant David Sherman ("Sherman") moves for the DOL's claims against him to be dismissed. Sherman's motion to dismiss states, in its entirety:

> This cause should be dismissed against the Defendant, David Sherman, as there is no legal claim against David Sherman individually. David Sherman was the individual who started the Corporation and then resigned shortly after its inception. David Sherman had no part in any of the actions alleged in the Complaint.

(Sherman's Mot. To Dismiss at 1.)

Dismissal is appropriate only when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action. Marshall County Bd. of Educ. v. Marshall County Gas Dist., 992 F.2d 1171, 1174

Section 502(a)(3) permits injunction or "other appropriate equitable relief," which the Supreme Court interpreted to mean relief typically available at equity. Section 502(a)(2) permits "appropriate relief under § 1109," which allows compensatory damages, disgorgement, and other "equitable or remedial relief as the court may deem appropriate." Although the language of §§ 502(a)(2) and 409 is not identical to § 502(a)(3), it is similar, taking care to specify the type of relief with particularity. See, Great-West, 534 U.S. at 209-210 "equitable relief must mean something less than all relief." (quoting Mertens v. Hewitt Assoc., 508 U.S. 248, 258 n.8 (1993). The Court finds there is no basis to hold, as the DOL implicitly requests, that Great-West's reasoning regarding how to distinguish equitable from legal actions in ERISA should be abandoned here.

(11th Cir. 1993). "Although a plaintiff is not held to a very high standard in a motion to dismiss for failure to state a claim, some minimal pleading standard does exist." Wagner v. Daewoo Heavy Indus. Am. Corp., 289 F.3d 1268, 1270 (11th Cir. 2002), *rev'd on other grounds*, 314 F.3d 541 (11th Cir. 2002) (en banc). "To survive a motion to dismiss, plaintiffs must do more than merely state legal conclusions; they are required to allege some specific factual bases for those conclusions or face dismissal of their claims." Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1263 (11th Cir. 2004). The Court must accept as true the facts pleaded in the complaint. Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Cop., S.A., 711 F.2d 989, 994-95 (11th Cir. 1984).

The DOL argues its complaint against Sherman is sufficient because it alleges causes of action under ERISA for breaches of fiduciary duty, and Sherman was a fiduciary who breached his duties to the Plan. ERISA imposes strict standards of loyalty and care on plan fiduciaries. Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 427 U.S. 559, 570 (1985). Fiduciary duties under ERISA are "the highest known to law." Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982). ERISA § 409 specifically provides, "Any person who is a fiduciary with respect to a plan who breaches any

of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . ." 29 U.S.C. § 1109.

Sherman contests the sufficiency of the complaint only to the extent that it fails to assert a valid basis to sue him individually or to allege his participation in wrongdoing. The complaint here alleges that "Sherman is a 'fiduciary' to the Plan within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A). . . ." (Compl. ¶ 9.) The complaint also alleges that Sherman breached his fiduciary duty to the Plan, stating, for example, "During the period between December 1, 2001 and April 1, 2004, Meixner and Sherman transferred approximately $128,485 by check from the SunTrust bank accounts to Meixner. All of the transfers were for non-plan expenses." (Id. ¶ 38.) The complaint alleges other improper transfers were executed by Sherman. (Id. ¶ 41) and that improper funds were transferred to Sherman. (Id. ¶ 40.) The complaint alleges that these transactions violated Sherman's fiduciary duties under ERISA. (Id. ¶¶ 46, 52, 56, 63.) Taking the facts asserted by the complaint as true, the DOL has asserted sufficient claims against Sherman to survive Sherman's motion to dismiss.

C. Motion to Amend Answer

The EOS Defendants move to amend their answer to assert affirmative defenses that the DOL's claims are barred by an applicable statute of limitations or laches. The DOL has not responded to the motion. Pursuant to Local Rule 7.1B, "[f]ailure to file a response shall indicate that there is no opposition to the motion."

Under Federal Rule of Civil Procedure 15, leave to amend should be "freely given when justice so requires." Fed. R. Civ. P. 15(a). "Unless a substantial reason exists to deny leave to amend, the discretion of the District Court is not broad enough to permit denial." Florida Evergreen Foliage v. E.I. DuPont De Nemours & Co., 470 F.3d 1036, 1041 (11th Cir. 2006) (quotation omitted). Defendants' motion for leave to amend is allowed.

D. DOL's Motion for Relief from Judgment

On July 6, 2007, the DOL filed a Motion for Clerk's Entry of Default as to defendant Georgia Plumber's Trade Association Benefits Group, Inc. ("GPTA Benefits"). On July 12, 2007, the Clerk of Court entered default against the Georgia Plumbers Trade Association Health Plan" ("GPTA Health Plan"). The DOL moves to correct the docket to reflect that default has been entered only against GPTA Benefits.

Federal Rule of Civil Procedure 60(a) provides, "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." Having reviewed the record, the Court finds that the clerk's entry of default as to GPTA Health Plan is a clerical error and orders it corrected.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that the DOL's Motion to Strike [17] is **DENIED**. The DOL's Motion to File Supplemental Authority [50] and the EOS Defendants' Motion for Leave to File Reply [52] are **GRANTED**.

IT IS FURTHER ORDERED that Defendant Sherman's Motion to Dismiss [18] is **DENIED**.

IT IS FURTHER ORDERED that the EOS Defendants' Motion to Amend Answer [30] is **GRANTED**.

IT IS FURTHER ORDERED that the DOL's Motion for Relief from Judgment [32] is **GRANTED**. The Clerk is **DIRECTED** to correct the docket to

reflect that default has only been entered against the Georgia Plumber's Trade Association Benefits Group, Inc.

SO ORDERED this 27th day of November, 2007.

William S. Duffey

WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ELAINE L. CHAO, **Plaintiff,** **v.** **MARC MEIXNER, et al.,** **Defendants.**	**1:07-cv-0595-WSD** **(Consolidated)**
ELAINE L. CHAO, **Plaintiff,** **v.** **GEORGIA PLUMBERS TRADE ASSOCIATION FOR CONTINUING EDUCATION, INC., et al.,** **Defendants.**	**3:08-cv-0013-JTC** **(Closed After Consolidation)**

OPINION AND ORDER

The matter is before the Court on the plaintiff Elaine L. Chao's ("Plaintiff") Motion to Certify Jury Trial Issue for Interlocutory Appeal [58], Plaintiff's Motion for Default Judgment [55], defendants Leslie E. Smith's and Employers OneSource, Inc.'s (the "EOS Defendants") Motion to Modify Consent Judgment [64], and the Plaintiff's Motion to Strike Jury Trial Demand [92].

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 14, 2007, Plaintiff Elaine L. Chao, Secretary of the Department of Labor, ("Secretary" of the "DOL") filed a complaint asserting claims under ERISA §§ 502(a)(2), 502(a)(5), and 409 against the administrators and fiduciaries of the Georgia Plumber's Trade Association ("GPTA") Health Benefits Plan (the "Plan"). In the complaint, the DOL seeks "to enjoin acts and practices which violated . . . ERISA, to obtain appropriate relief for breaches of fiduciary duty under ERISA . . . and to obtain other such further relief as may be appropriate to redress violations and enforce the provisions of that Title." The DOL specifically claims that the EOS Defendants, along with other defendants, breached fiduciary duties to the Plan by allowing or receiving improper payments, which "caused the Plan to suffer financial losses for which they are personally and otherwise liable. . ." Compl. [1] ¶¶ 47, 54.

The Complaint demands that the EOS Defendants "disgorge the profit made through their fiduciary breach." Id. The complaint also alleges that the EOS Defendants "knowingly aided and abetted in, participated in, or otherwise assisted in . . . fiduciary breaches," and demands that they "disgorge the funds they received from the Plan." Id. at ¶¶ 63-64. In addition to disgorgement, the

complaint seeks to hold the EOS defendants "personally . . . liable." Id. at ¶¶ 47, 54, 58. The Complaint specifically alleges that the EOS Defendants caused or allowed the Plan to lose $151,248.82 in improper payments to Smith or others. The Complaint does not identify who has custody of these funds, and does not seek to impose a constructive trust or equitable lien on them. The Complaint demands only that the EOS and other Defendants "restore all losses, with interest, caused by their fiduciary misconduct as alleged in this Complaint. . . . ." The Complaint also seeks an injunction and other equitable relief.

On May 21, 2007, the EOS Defendants filed an answer, demanding a jury trial [12].

On June 4, 2007, Plaintiff moved to strike the EOS Defendants' jury trial demand [17].

On July 6, 2007, Plaintiff moved for entry of default against defendant GPTA Benefits Group, Inc., who has not appeared [26]. The Clerk's Office entered default against GPTA Benefits Group, Inc. on July 12, 2007. On December 13, 2007, Plaintiff moved for default judgment against GPTA Benefits Group, Inc. [55].

On November 27, 2007, the Court denied Plaintiff's motion to strike the jury trial demand [54]. The Court found that Section 502(a)(2) of ERISA authorizes the Secretary to bring a suit on behalf of the Plan "for appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2). The Court concluded that Plaintiff was seeking a legal remedy and that its cause of action under Section 502(a)(2) arises at law at least in part.

On January 3, 2008, Plaintiff moved to certify the jury trial issue to the Eleventh Circuit pursuant to 28 U.S.C. § 1292(b) [58].

On January 15, 2008, the Court entered a consent judgment against defendant Meixner [62]. On January 17, 2008, the EOS Defendants moved to modify the consent judgment in part [64].

On May 25, 2008, the EOS Defendants moved for summary judgment on the claims remaining against them [83]. On May 26, 2008, the EOS Defendants moved to stay discovery in this action pending resolution of their summary judgment motion [84].

On June 20, 2008, the Court consolidated civil action number 1:07-cv-0595-WSD with civil action number 3:08-cv-0013-JTC, then pending before Judge Camp [88].

On June 27, 2008, Plaintiff moved to strike the jury trial demand of defendants Georgia Plumbers Trade Association for Continuing Education, Inc., Ron Anderson, Windell Peters, and the Georgia Plumbers Trade Association Health Plan, the defendants in the action previously pending before Judge Camp [92].

II. DISCUSSION

A. Motion to Certify for Interlocutory Appeal

A district court's rulings generally are not reviewable by the court of appeals until after entry of final judgment in the action. 28 U.S.C. § 1291; Coopers & Lybrand v. Livesay, 437 U.S. 463, 474 (1978). A district court is empowered, however, to certify its orders for immediate interlocutory appeal. 28 U.S.C. § 1292(b). The statute provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the

> entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b). By its terms, the statute requires that the legal issue involve a controlling question of law, as to which there is substantial ground for difference of opinion, and of which an immediate appeal would materially advance the ultimate termination of the action. McFarlin v. Conseco Servs., LLC, 381 F.3d 1251, 1257 (11th Cir. 2004).

The Eleventh Circuit has held that it should deny certification for appeal if resolution of an issue is too fact-intensive, but grant certification if the appeal would present a pure question of law. Id. at 1258. There must also be a "substantial dispute about the correctness" of district court's original ruling on the issue. Id. at 1259. "The legal question [also] must be stated at a high enough level of abstraction to lift the question out of the details of the evidence or facts of a particular case and give it general relevance to other cases in the same area of law. And the answer to that question must substantially reduce the amount of litigation left in the case." Id. The party seeking appeal must also persuade the appellate court that exceptional circumstances exist sufficient to justify departing from the

normal procedure of only appealing a district judge's rulings once the action proceeds to final judgment. Coopers, 437 U.S. at 475.

Plaintiff brought claims in this action pursuant to Section 502(a)(2) and 502(a)(5) of ERISA for alleged breaches of duties by the GPTA Plan's fiduciaries. Plaintiff's Section 502(a)(2) claims seek substantial restitution of funds allegedly improperly held or transferred by the Defendants. Plaintiff also seeks equitable remedies under Section 502(a)(5) which would tend to put into place ongoing restrictions against the Defendants' future conduct. The parties appear to accept that Section 502(a)(5) provides only equitable remedies and thus the EOS Defendants are not entitled to a jury trial on those claims. Section 502(a)(2), however, provides for civil actions brought by the Secretary of the DOL "for appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2). 29 U.S.C. § 1109 provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable *to make good to such plan any losses to the plan resulting from each such breach*, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate,

> including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. § 1109(a) (emphasis added).

The Court's prior ruling held that the Plaintiff's claim brought pursuant to Section 502(a)(2) of ERISA is a "suit at common law" within the meaning of the Seventh Amendment; thus, the EOS Defendants are entitled to a trial by jury on at least the Plaintiff's Section 502(a)(2) claim. The Court based its reasoning on its construction of § 1109 not to limit available remedies to equitable remedies, and specifically to provide for monetary remedies which are compensatory in nature. Plaintiff continues to characterize those remedies as equitable remedies of restitution for breach of fiduciary duties. The Court finds that this is an appropriate issue for certification to the Eleventh Circuit.

First, this is a purely legal issue that does not depend on resolution of the facts underlying this dispute. The legal issue as stated by the Court in its prior Order is a two-fold inquiry of (1) whether a Section 502(a)(2) action is comparable to 18th-century actions brought in the English courts of law prior to the merger of the courts of law and equity, and (2) whether the specific remedy sought by the

Plaintiff under Section 502(a)(2) is legal or equitable in nature. See Granfinaciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989).

Second, there is a substantial difference of opinion between the federal courts as to whether litigants are entitled to a jury trial for violations of Section 502(a)(2) of ERISA. Earlier cases consistently held that the remedies available pursuant to Section 502(a)(2) were traditionally equitable in nature and thus not entitled to trial by jury. E.g., Broadnax Mills, Inc. v. Blue Cross & Blue Shield of Va., 876 F. Supp. 809, 817 (E.D. Va. 1995) (collecting cases); Spano v. Boeing Co., No. 06-cv-743-DRH, 2007 WL 1149192, at *7-8 (S.D. Ill. April 18, 2007) (collecting cases); Abbott v. Lockheed Martin Corp., No. 06-cv-0701-MJR, 2007 WL 2316481 (S.D. Ill. Aug. 13, 2007). Recently, some courts have held that ERISA breach of fiduciary duty claims seeking monetary relief, like Section 502(a)(2), are legal in nature. E.g., Bona v. Barasch, No. 01 Civ. 2289 (MBM), 2003 WL 1395932, at *33-35 (S.D.N.Y. Mar. 20, 2003); Lamberty v. Premier Millwork & Lumber Co., Inc., 329 F. Supp. 2d 737, 744-45 (E.D. Va. 2004). The

Eleventh Circuit has not ruled on the issue.[1] Thus, a substantial ground for difference of opinion exists in this case.

Third, an immediate interlocutory appeal will preserve the parties resources and accelerate the ultimate termination of the action. Preparing for and conducting a jury trial will cause the parties to spend extra time and expense beyond those that would be expended in a bench trial. Further, if the case proceeds to a jury trial without appeal, and then it is later determined that the defendants' jury trial demand should have been stricken, then the Court would be required to try the action again without a jury. E.g., Olympia Express, Inc. v. Linee Aeree Italiane, S.P.A., 509 F.3d 347, 352 (7th Cir. 2007). There is a substantial difference of

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[1] The Plaintiff repeatedly asserts that caselaw construing Section 502(a)(3) of ERISA should guide the Court in determining whether a jury trial right applies for causes of action brought under Section 502(a)(2). Section 502(a)(3) authorizes suits "to obtain other appropriate equitable relief . . . ." 29 U.S.C. § 1132(a)(3). In Mertens v. Hewitt Assocs., 508 U.S. 248 (1993), the Supreme Court noted that distinctions between "equitable" and "remedial" remedies in ERISA must be given effect. Id. at 258 n.8. Some courts have used this reasoning to hold that monetary relief for remedies of breach of fiduciary duties does not constitute "equitable relief" under Section 502(a)(3). E.g., Coan v. Kaufman, 457 F.3d 250, 262-64 (2d Cir. 2006). Although the Eleventh Circuit may find the reasoning in Mertens (and other similar Supreme Court cases) instructive, this action does not present any questions concerning the nature of remedies pursuant to Section 502(a)(3). This action concerns only the legal or equitable nature of remedies pursuant to Section 502(a)(2).

opinion on this issue, and the possibility of conducting an unnecessary jury trial warrants certification of this issue to the Eleventh Circuit.

The Court hereby certifies for immediate appeal the following issue: Whether the Defendants in this action are entitled to a jury trial on the Secretary's claims pursuant to Section 502(a)(2) of ERISA.

B. Motion to Modify Consent Judgment

The Court has entered a consent judgment against defendant Meixner requiring Meixner to make restitution to the Plan of $509,624.16 in losses Meixner allegedly caused during his time as one of the Plan's fiduciaries. The EOS Defendants now seek inclusion of language into the consent judgment and order to clarify that the consent order is a judgment binding only Meixner and the Plaintiff. The Plaintiff does not object in substance to this motion, stating only that the consent order as originally drafted was clear as to its scope.

The EOS Defendants' motion being essentially unopposed, the motion is granted. The January 15, 2008 Consent Order and Judgment [62] is hereby amended to add the following new language appended to the end of paragraph 4: "This Order is not binding upon defendants Leslie E. Smith or Employers OneSource, Inc."

C. Motion for Default Judgment

Federal Rule of Civil Procedure 55 provides for the entry of default judgment by the Court where a party is entitled to judgment by default. Rule 55 provides:

> In all other cases, the party must apply to the court for a default judgment . . . . The court may conduct hearings or make referrals – preserving any federal statutory right to a jury trial – when, to enter or effectuate judgment, it needs to:
>
> (A) conduct an accounting;
>
> (B) determine the amount of damages;
>
> (C) establish the truth of any allegation by evidence; or
>
> (D) investigate any other matter.

Fed. R. Civ. P. 55(b)(2). "The entry of a default judgment is committed to the discretion of the district court . . . ." Hamm v. DeKalb County, 774 F.2d 1567, 1576 (11th Cir. 1985), cert. denied, 475 U.S. 1096 (1986) (citing 10A Charles Alan Wright, et al., Federal Practice & Procedure § 2685 (1983)). It is within a district court's discretion to deny default judgment where proper service of the complaint on the defaulting defendant is in doubt, Hamm, 774 F.2d at 1576, and where the court is reluctant to resolve disposition on substantial financial controversies

through default judgment. Hutton v. Fisher, 359 F.2d 913, 916 (3d Cir. 1966). A party "is not entitled to a default judgment as of right, even when defendant is technically in default and that fact has been noted under Rule 55(a)." Federal Practice & Procedure § 2685.

The Plaintiff alleges that Meixner, with the assistance of the EOS Defendants, marketed and developed a health care plan for the Georgia Plumbers Trade Association for Continuing Education ("GPTA"). Meixner allegedly established the GPTA Benefits Group, Inc. to assist him in managing and administering the GPTA Plan. He allegedly opened two bank accounts in the name of GPTA Benefits Group, Inc. to hold GPTA Plan contributions and expenses. The Plaintiff alleges that GPTA Benefits Group, Inc. transferred $415,380.00 in GPTA Plan assets from the bank accounts improperly and converted those funds for personal and business use. Plaintiff seeks default judgment against the GPTA Benefits Group, Inc. in the amount of $415,380.00, with post-judgment interest, as restitution for the allegedly improper transfers.[2]

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[2] The EOS Defendants nominally object to the Plaintiff's motion for default judgment to the extent any portion of the default judgment could be construed as a finding of fact or otherwise preclusive against the EOS Defendants as to the amount or nature of damages in this case [57]. Because the Court determines in its discretion to deny the motion for default judgment at this stage in the case, the

The Court has concerns over two aspects of the Plaintiff's allegations for default judgment. First, the Plaintiff asserts that the GPTA Benefits Group, Inc. acknowledged service of the Complaint on April 17, 2007 and thereafter failed to appear. The Court's review of the Notice of Filing Waiver of Service of Process for Defendant GPTA Benefits Group, Inc. [3] reveals that it was signed by defendant Meixner on April 17, 2007 (it appears Meixner erroneously dated it as of 2006). Meixner does not indicate that he is signing on behalf of the GPTA Benefits Group, Inc. Plaintiff alleges that because Meixner was the sole shareholder and employee of the GPTA Benefits Group, Inc., his signature on the waiver form acts as a waiver for GPTA Benefits Group as well as for him personally. The Court is hesitant to enter default judgment against the GPTA Benefits Group when it is not entirely clear that its sole employee was intending to waive service for it, and thus that it knowingly failed to appear.

Second, the Court has reviewed the Complaint in detail and has attempted to calculate, based solely on the Complaint's allegations, the amount of restitution allegedly due from GPTA Benefits Group, Inc. The Court's calculations add to approximately $385,000.00, over $30,000.00 less than what the Plaintiff now seeks

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Court is not required to address the EOS Defendants' objections.

in default judgment. The disparity between these two sums illustrates why the Court is reluctant to enter a substantial monetary judgment through default before any party has had the opportunity to precisely determine the amounts at issue in this action. It would be more appropriate to wait for the facts of this action to be determined at trial before entering default judgment against GPTA Benefits Group, Inc.

Accordingly, the Court determines in its discretion to deny the motion for default judgment against GPTA Benefits Group, Inc., specifically without prejudice to the Plaintiff's ability to move again for default judgment after the facts underlying this action have been determined at trial.

D. Motion to Strike Jury Trial Demand

Plaintiff moved to strike the jury trial demand of defendants Georgia Plumbers Trade Association for Continuing Education, Inc., Anderson, Peters, and the GPTA Health Plan for the same reasons it moved to strike the jury trial demand of the EOS Defendants. For the same reasons the Court explained in its initial Order on the jury trial issue [54], the remedies Plaintiff seeks pursuant to Section 502(a)(2) of ERISA arise at least partly under law and thus the right to jury trial is preserved as to those claims. This Order certifies the jury trial issue to the

Eleventh Circuit for appeal. The certification, and any decision ultimately rendered by the Eleventh Circuit, will bind all parties to this consolidated action. Plaintiff's Motion to Strike [92] is denied.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that the Plaintiff's Motion to Certify Jury Trial Issue [58] is **GRANTED**. The following issue is hereby certified for appeal: Whether the Defendants in this action are entitled to a jury trial on the Secretary's claims pursuant to Section 502(a)(2) of ERISA.

IT IS HEREBY FURTHER ORDERED that Plaintiff's Motion for Default Judgment Against GPTA Benefits Group, Inc. [55] is **DENIED WITHOUT PREJUDICE**.

IT IS HEREBY FURTHER ORDERED that the EOS Defendants' Motion to Modify Consent Judgment [64] is **GRANTED**.

IT IS HEREBY FURTHER ORDERED that Plaintiff's Motion to Strike Jury Trial Demand [92] is **DENIED**.

SO ORDERED this 3rd day of July 2008.

William S. Duffey

WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE