IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHN C. MCLEMORE, Plaintiff v. REGIONS BANK, as Successor in Interest By Merger to AmSouth Bank, and MID-ATLANTIC CAPITAL CORPORATION, Defendants.	))))))))))	Civil No. 3:08-0021 Judge Trauger Magistrate Judge Bryant

BRIEF OF THE SECRETARY OF LABOR, ELAINE L. CHAO, AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF

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STATEMENT OF THE ISSUES[1]

1. Whether a bankruptcy trustee who is also an ERISA fiduciary has standing to bring an ERISA action on behalf of plan participants against fiduciaries of employee benefit plans.

2. Whether the defense of in pari delicto can be asserted against an ERISA successor trustee.

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of ERISA. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-93 (7th Cir. 1986) (Secretary's interests include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets) (en banc). Therefore, the Secretary has a strong interest, both with regard to her own litigation and private litigation, in ensuring that the full range of ERISA remedies intended by Congress are afforded to ERISA plaintiffs.

This case presents a particularly compelling reason for the Secretary's amicus participation because it concerns significant issues involving the intersection of ERISA and bankruptcy law. The defendants have moved to dismiss the Bankruptcy Trustee's complaint on a number of grounds, including but not limited to, the Bankruptcy Trustee's standing to bring an ERISA action against them, and have asserted the defense of in pari delicto.

The Secretary has a substantial interest in ensuring that all ERISA fiduciaries are held to the same strict standards for fulfilling their duties to plan participants and beneficiaries – duties that are the highest known to law. Donovan v. Bierwirth, 680 F.2d

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[1] The Secretary responds to only two of the issues raised in the Motions to Dismiss and does not take a position on the other issues raised therein.

263, 272 n.8 (2d Cir.), cert. denied, 459 U.S. 1069 (1982). To exclude certain ERISA fiduciaries from their duties based solely upon their status as appointed bankruptcy trustees, would defeat the intent of Congress to protect the interests of participants in employee benefit plans. Further, to permit the defense of in pari delicto to defeat a suit for breach of ERISA fiduciary duties brought by a successor ERISA fiduciary who is also an appointed bankruptcy trustee would be contrary to ERISA section 409(b), 29 U.S.C. § 1109(b), which generally absolves a fiduciary of liability for breaches caused by a predecessor fiduciary, and would eliminate a remedy otherwise intended by Congress for the protection of plan participants.

STATEMENT OF THE CASE

A. Statement of the Facts[2]

On September 26, 2006, an involuntary petition for relief under chapter 11 of the Bankruptcy Code was filed against 1 Point Solutions, LLC ("1 Point"). (Motion to Withdraw the Reference ("Withdrawal Motion."), ¶ 1) The Bankruptcy Court entered an Order for Relief on September 27, 2006. (Bankr. Docket #14.) Plaintiff John C. McLemore ("McLemore" or "Bankruptcy Trustee") was appointed as the chapter 11 trustee on September 28, 2006 and the Bankruptcy Court approved his appointment by order dated September 29, 2006. (Bankr. Docket #s 18, 24.) On October 10, 2006, the Bankruptcy Trustee commenced an adversary proceeding against Barry R. Stokes ("Stokes"), who was the sole owner of 1 Point. (Bankruptcy Trustee's Complaint ¶ 8.),

[2] For purposes of this document only, the Secretary's Statement of Facts is based upon her review of the documents that have been filed with this Court or the Bankruptcy Court and is not based upon any independent investigation by the Department of Labor ("DOL"). For purposes of the motions to dismiss and in accordance with the legal standard for deciding a motion to dismiss a complaint, see infra, the Secretary accepts the allegations of the complaint as true.

for the purpose of consolidating the bankruptcy proceedings of 1 Point and Stokes. (Bankr. Docket #60.) By agreed judgment dated October 13, 2006, the Court entered judgment against Stokes and consolidated the proceedings. (Bankr. Docket #80.) On October 26, 2006, the Clerk of the Bankruptcy Court entered a Notice of Joint Administration. (Bankr. Docket #122.) McLemore was appointed as trustee of the Stokes' estate on October 13, 2006 (Bankr. Docket #81) and his appointment was approved by order dated October 16, 2006. (Bankr. Docket #85.)

From the time that 1 Point began operations until just prior to the filing of the involuntary petitions in 2006, 1 Point was a third party administrator ("TPA") for a variety of employee benefit plans. (Bankruptcy Trustee's Complaint ¶ 9.) At the close of operations, 1 Point was the TPA for 52 401(k) Plans[3] (Id. ¶ 15) and 751 Cafeteria Plans.[4] (Id. ¶ 19.) Most of these plans were subject to the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended. (Id. ¶ 5.)

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[3] A section 401(k) plan is a type of tax-qualified deferred compensation plan in which an employee can elect to have the employer contribute a portion of his or her cash wages to the plan on a pre-tax basis. These deferred wages (commonly referred to as elective deferrals) are not subject to income tax withholding at the time of deferral, and they are not reflected on an employee's Form 1040 (PDF) since they are not included in the taxable wages on the Form W-2 statement. http://www.irs.gov/taxtopics/tc424.html.

[4] Under Internal Revenue Code section 125, a cafeteria plan functions as a mechanism for delivering a tax-favored choice or menu of certain benefits to employees. The provision of this tax-favored treatment, however, is not the equivalent of the provision of a benefit enumerated under section 3(1) of ERISA. If a cafeteria plan itself does not provide any ERISA enumerated welfare benefit, it would not constitute, in itself, a separate employee welfare benefit plan within the meaning of section 3(1) of ERISA, but rather, it could be part of an employee welfare benefit plan to the extent constitutes a mechanism by which that ERISA plan (or plans) is funded with employee contributions. See ERISA Advisory Opinion 96-12A (July 17, 1996). 1 Point acted as a TPA for the following: flexible spending accounts (FSAs), health spending accounts (HSAs), health reimbursement arrangements (HRAs), dependent care accounts (DCAs), as well as several dental plans and transportation plans. (Compl. ¶ 16) Some, but not all, of these are ERISA-covered welfare plans.

1 Point and Stokes acted as fiduciaries with respect to those plans subject to the provisions of ERISA. (Id. ¶ 5.) 1 Point and Stokes commingled contributions from employers and employees that did not belong to Stokes or 1 Point and should have been held separately as property of the various individual ERISA plans. (Compl. ¶¶ 63, 64, 72, 73.) Stokes withdrew substantial funds from the commingled 1 Point 401(k) account at Am South Bank, to which defendant Regions Bank ("Regions") is the Successor in Interest by Merger, and used the proceeds for his own personal use. (Compl. ¶ 78.) 1 Point and Stokes also converted assets of both the 401(k) plans and the cafeteria plans for their own use and benefit. (Compl. ¶ ¶ 133, 163.)

The Bankruptcy Trustee has taken control over the commingled assets of the various ERISA-covered employee benefit plans. (Joint Pretrial Statement p. 2 ¶ 5) As a result, he has succeeded 1 Point as a fiduciary under ERISA and is also a functional fiduciary under ERISA. (Compl. ¶ 5.1); see 29 U.S.C. §§ 1002(21)(A), 1102(a)(2), infra at 9-10.

Bringing this case in his capacity as an ERISA fiduciary, the Bankruptcy Trustee alleges that during the time that 1 Point and Stokes were ERISA fiduciaries for over 800 ERISA-covered plans, Regions and Mid-Atlantic Capital Corporation ("MACC") were also fiduciaries who administered or controlled plan assets and breached ERISA fiduciary duties to those ERISA-covered employee benefit plans. Among other things, the Bankruptcy Trustee alleges that Regions and MACC helped set up the systems that facilitated the commingling and theft of millions of dollars of fiduciary funds by 1 Point and Stokes. (Joint Pretrial Statement p. 2 ¶ 9.)

The Bankruptcy Trustee further alleges that both Regions and MACC were either ERISA fiduciaries or non-fiduciary knowing participants in the fiduciary breaches committed by 1 Point and Stokes under ERISA sections 404(a)(1), 405(a)(1), (2), and (3), 406(a), and 406(b)(1), (2), and (3), 29 U.S.C. §§ 1104(a)(1), 1105(a)(1), (2), and (3), 1106(a), and 1106(b)(1),(2) and (3). Therefore, the Bankruptcy Trustee is entitled to judgment pursuant to ERISA §§ 409, 502(a)(2) and 502(a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and 1132(a)(3). (Compl. ¶¶ 37-173.) Both Regions and MACC have denied that they are ERISA fiduciaries or non-fiduciary knowing participants in the acts of Stokes and 1 Point (Joint Pretrial Statement pp. 3-7) and both contend that they are thus not liable for the fiduciary breaches of Stokes and 1 Point.

B. Procedural History of Motions to Dismiss

The Bankruptcy Trustee filed his Complaint against Regions and MACC on August 20, 2007, as an adversary proceeding in the administratively consolidated bankruptcy proceedings of 1 Point and Stokes, Adv. Pro. No. 3:07-ap-00283. (Bankr. Docket #437.)

Both Regions and MACC filed their Motions to Dismiss the Bankruptcy Trustee's Complaint on October 15, 2007. (Adv. Pro. Docket #s 18, 19, 20, 21.) A joint pretrial statement was filed on November 15, 2007. (Adv. Pro. Docket #23.) Seeking removal to district court, MACC filed a Motion to Withdraw the Reference to this Court on January 2, 2008. (Adv. Pro. Docket # 27.) On January 8, 2008, the Motion was docketed in this Court. (D. Ct. Docket #1.)

On January 14, 2008, MACC moved to have the case reassigned as a related case to the prior-pending case of Heritage Equity Group 401(k) Sav. Plan v. Mid Atlantic

Capital Corp., M.D. Tenn. No. 3:07-cv-841 (J. Wiseman/M.J. Bryant) (the "Heritage Case"). (D. Ct. Docket # 2.) After initially assigning the matter as a related case, Judge Wiseman reassigned the case to this Court by order dated Jan 31, 2008. (D. Ct. Docket #6.) By order dated February 11, 2008, the Motion to Withdraw the Reference was granted and referred to Magistrate Bryant. (D. Ct. Docket #7.) Thereafter, MACC moved to consolidate this case with the Heritage Case. (D. Ct. Docket #8.)

By order dated March 14, 2008, this Court vacated the referral order to the Magistrate, set a deadline for the Bankruptcy Trustee to respond to the Motion to Dismiss of April 4, 2008, and a deadline for Defendants to file a reply of April 11, 2008, and denied the Motion to Consolidate. (D. Ct. Docket #17.)

LEGAL STANDARD FOR MOTION TO DISMISS

In deciding a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., the Court must determine whether the "factual allegations [are] enough to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007); see As You Sow v. AIG Financial Advisors, Inc., No. 3:06-cv-01171 (M.D. Tenn. March 26, 2008).[5] However, "the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The Court must accept well-pleaded facts as true, even if it believes that actual proof of the facts is improbable and that recovery is very remote and unlikely. Bell Atlantic, 127 S. Ct. at 1965; Miree v. Dekalb County, Ga., 433 U.S. 25, 27 n.2 (1977).

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[5] As You Sow v. AIG Financial Advisors, Inc., No. 3:06-01171 is one of several pending cases alleging wrongdoing by 1 Point and Stokes. Plaintiffs assert claims under Tennessee Securities Act, Tenn. Code Ann. §§ 48-1-101 et seq. as well as various state common law claims for negligent and grossly negligent supervision and fraud.

ARGUMENT

A. AN ERISA FIDUCIARY WHO IS ALSO THE BANKRUPTCY TRUSTEE HAS STANDING TO BRING AN ERISA ACTION.

1. Purpose of ERISA

ERISA was enacted "to protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation[s] for fiduciaries of [such] plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). See Varity Corp. v. Howe, 516 U.S. 489, 513 (1996) (quoting 29 U.S.C. § 1001(b)); Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 374–75 & n.22 (1980); see also H.R. Rep. No. 533, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4647 (Congress in enacting ERISA "recognize[d] the absolute need that safeguards for plan participants be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which have resulted in tragic hardship to so many.").

ERISA provides, in pertinent part, that a person is a fiduciary "to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(i) and (iii), 29 U.S.C. § 1002(21)(A)(i).[6] Fiduciary status extends only to those aspects of the plan over which the fiduciary exercises authority or control. An ERISA fiduciary, however, is defined "not in terms of formal trusteeship, but in functional terms of control and authority."

[6] ERISA section 3(21)(B), 29 U.S.C. § 1002(21)(B) excludes certain investment companies from this definition.

Mertens v. Hewitt Assocs., 508 U.S. 248, 260-62 (1993); Smith v. Provident Bank, 170 F.3d 609 (6th Cir. 1999) (custodian bank held to be a fiduciary where it exercised control over funds); Brock v. Hendershott, 840 F.2d 339, 342 (6th Cir. 1988) (describing the breadth of fiduciary status under ERISA). The term "fiduciary," however, is liberally construed in keeping with the remedial purpose of ERISA. American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the U.S., 841 F.2d 658, 662 (5th Cir. 1988).

Thus, fiduciary status is defined not only by reference to particular titles, but also by the authority that a particular person has or exercises over an employee benefit plan. Bannistor v. Ullman, 287 F.3d 394, 401 (5th Cir. 2002). For instance, when third party administrators exercise the requisite authority under ERISA's functional test, they are fiduciaries regardless of whether their contracts limited their duties to ministerial duties. See IT Corp. v. General Am. Life Ins. Co., 107 F.3d 1415 (9th Cir. 1997) (third party administrator of health plan may be a fiduciary despite contract limiting it to "ministerial" duties), cert. denied, 522 U.S. 1068 (1998); Harold Ives Trucking Co. v. Spradley & Coker, Inc., 178 F.3d 523 (8th Cir. 1999) (although contract of third party administrator specified that it would have no discretionary authority, and would provide only ministerial services, it nonetheless acted as a fiduciary when it assumed discretionary authority).

ERISA fiduciaries are held to the highest standards of prudence and loyalty known to law. Donovan v. Bierwirth, 680 F.2d at 272 n.8. In addition, ERISA provides that a fiduciary of a plan may be liable for a breach of fiduciary responsibility committed by another fiduciary of the plan: (1) if he knowingly participates in, or knowingly

undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (2) if, by his failure to comply with section 404(a)(1) of ERISA in the exercise of his fiduciary obligations, he has enabled such other fiduciary to commit a breach; or (3) if he has knowledge of the breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach. ERISA § 405(a), 29 U.S.C. § 1105(a).

ERISA empowers fiduciaries to bring civil actions under the Act to remedy fiduciary misconduct committed by predecessor or co-fiduciaries. ERISA's comprehensive civil enforcement scheme provides, in section 502(a)(2), 29 U.S.C. § 1132(a)(2), that "[a] civil action may be brought" by a plan "fiduciary" to obtain "appropriate relief " under the section of ERISA (section 409, 29 U.S.C. § 1109) that makes a breaching plan fiduciary personally liable to the plan for any losses stemming from its breaches of any of the responsibilities, obligations, or duties imposed upon fiduciaries. It similarly provides that a plan "fiduciary" may also bring a civil action "to enjoin any act or practice which violates any provision" of ERISA, or "to obtain other appropriate equitable relief." Id. § 1132(a)(3).

2. Status and Standing of the Bankruptcy Trustee as an ERISA Fiduciary

A bankruptcy trustee may have ERISA fiduciary responsibilities at the same time that the bankruptcy trustee has fiduciary duties to the bankruptcy estate. ERISA fiduciary duties can include bringing suit for recovery of losses due to another fiduciary's breach.

It appears that neither Regions nor MACC dispute that third party administrators Stokes and 1 Point were fiduciaries of ERISA-covered employee benefit plans, as they

had control over the assets of those ERISA plans.[7] It also appears that there is no dispute that the Bankruptcy Trustee here is an ERISA functional fiduciary as he exercises control over the funds of ERISA-covered employee benefit plans. As such, section 502(a) of ERISA, 29 U.S.C. § 1132(a), empowers him to bring a civil action for appropriate relief for a fiduciary breach under section 409, 29 U.S.C. § 1109,[8] see id. § 502(a)(2), or "to obtain other appropriate equitable relief" to redress fiduciary violations or enforce any

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[7] A person who holds no position with the plan may also become a fiduciary if he exercises de facto control over a fiduciary function. See Concha v. London, 62 F.3d 1493 (9th Cir. 1995) ("there need not be an express delegation of fiduciary [authority] for persons performing duties of a fiduciary nature to be considered fiduciaries"), cert. dismissed, 517 U.S. 1183 (1996); see also Phelps v. C.T. Enterprises, Inc., 394 F.3d 213 (4th Cir. 2005) (company and officers became fiduciaries by failing to forward employee contributions to medical plan); LoPresti v. Terwilliger, 126 F.3d 34 (2d Cir. 1997) (officer and owner of closely held corporation was a fiduciary because he exercised control and authority over plan funds by commingling plan assets with corporate assets and using plan assets to pay creditors of corporation); Brock v. Hendershott, 840 F.2d 339, 342 (6th Cir. 1998) (union official became plan fiduciary by exercising control over plan administration); Stanton v. Shearson Lehman/Am. Express Inc., 631 F. Supp. 100 (N.D. Ga. 1986) (stock broker had de facto control over plan investments); Eaton v. D'Amato, 581 F. Supp. 743, 745-46 (D.D.C. 1980) (de facto control over plan administration). Mut. Life Ins. Co. v. Yampol, 840 F.2d 421, 425-26 (7th Cir. 1988) (state-appointed liquidator of plan sponsor is a fiduciary of plan).

[8] ERISA section 409 provides that:

> (a) 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, 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 the removal of the fiduciary. A fiduciary may also be removed for a violation of § 411 of this Act.
>
> (b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.
>
> 29 U.S.C. § 1109.

provisions of ERISA or the terms of the plan. Id. § 1132(a)(3). Indeed, insofar as the Bankruptcy Trustee is alleging that he is a fiduciary of ERISA covered plans with knowledge of breaches of fiduciary duties by other alleged fiduciaries of those plans, Regions and MACC during the time that One Point and Stokes were fiduciaries, section 405(a)(3) of ERISA provides further statutory support for his claim to have standing to bring this case. Although it would not be a necessary or even appropriate step in every case, the Department has acknowledged that litigation is among the range of actions that a fiduciary could consider under section 405(a)(3) as a reasonable and legal step to remedy a known breach by a co-fiduciary. *See* Interpretive Bulletin 75-5, FR-10.[9]

In the non-bankruptcy context, therefore, there would be no question that McLemore, who has stepped into the shoes of the 1 Point and who is currently controlling plan assets, is a fiduciary for ERISA purposes, including for the purpose of bringing civil actions under the ERISA enforcement scheme. The fact that McLemore is also the appointed chapter 11 trustee does not alter his status as an ERISA fiduciary nor alter his standing to bring an action based upon violations of ERISA.

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[9] In supporting the Bankruptcy Trustee's standing to bring suit in this case, the Secretary expresses no opinion on whether, and under what circumstances, it may be appropriate for a co-fiduciary to decide to initiate a lawsuit to satisfy section 405(a)(3) of ERISA. For example, there may be certain types of claims, such as suing on a contract the plan entered into, where functional fiduciary status would not provide a fiduciary with the necessary authority to sue on the plan's behalf. Further, in this case, it does not appear that an independent trustee has been appointed from whom the Bankruptcy Trustee could seek separate approval of a decision to use plan assets. In the Secretary's view, the Bankruptcy Trustee does not have the authority in this case as a functional fiduciary to make unilateral decisions to use any plan assets, including paying for fees, costs and expenses of this litigation. Even a duly appointed trustee of the plan is prohibited pursuant to ERISA § 406, 29 U.S.C. §1106 from setting his own compensation for services rendered to the plans. If the Bankruptcy Trustee sought to expend plan assets for any purpose, the Department would expect the Bankruptcy Trustee, at a minimum, to seek the approval of this court after due notice to the affected ERISA plans.

The Seventh Circuit, in the case of Mutual Life Insurance Co v. Yampol, 840 F.2d 421 (7th Cir. 1988), considered an analogous situation involving the Illinois Director of Insurance, who was appointed to liquidate an employee benefit plan under state law. The Director appointed Mutual Life Insurance Company of New York ("MONY") to carry out the liquidation. MONY filed suit against the administrators of the employee benefit plan for breach of their fiduciary duties under ERISA. The Seventh Circuit held that both the Director of Insurance and MONY were fiduciaries under ERISA and had standing to sue.

Defendants fail to recognize McLemore's separate role as an ERISA fiduciary distinct from his statutory role as bankruptcy trustee of the 1 Point and Stokes' estates. The cases cited by Defendants in support of their challenge to the Bankruptcy Trustee's standing, which concern the ability of a trustee to bring an action involving property of the debtor's estate as defined in section 541 of the Bankruptcy Code, are inapposite to the situation here. See In re Cannon, 277 F.3d 838, 856 (6th Cir. 2002) (trustee had no standing to bring suit where the bankruptcy estate had no interest in the property converted by an attorney from his escrow account and the people who had money in the escrow account, not the general creditors of the estate, would be entitled to recover the funds); In re Motorwerks, 371 B.R. 281 (Bankr. S.D. Ohio 2007) (Bankruptcy strong-arm statute does not give trustee authority to collect money not owned by estate or to pursue state law claims on behalf of injured creditors); In re D.H. Overmeyer Telecasting Co., 56 B.R. 657 (Bankr. N.D. Ohio 1986) (trustee could not bring suit against the attorneys for the unsecured creditors committee, where the cause of action belonged to the creditors.

Because McLemore is an ERISA fiduciary, he has standing to bring an ERISA action against Regions and MACC. Indeed, as an ERISA fiduciary, McLemore may have a duty to review the actions of the prior third party administrator and take reasonable steps within the scope of his authority to remedy any breaches. See Buccino v. Continental Assurance Co., 578 F. Supp. 1518, 1520-22 (S.D.N.Y. 1983). [10]

Defendants' argument that the Bankruptcy Trustee lacks standing under ERISA presumes that Congress intended to preclude bankruptcy trustees who act as ERISA fiduciaries from bringing suit in accordance with those duties on the basis that their bankruptcy-based duties to protect and recover estate assets somehow deprives them of the standing conferred on any plan fiduciary to bring such ERISA actions. The argument makes no sense from either an ERISA or Bankruptcy Code perspective. In fact, Congress imposed no such limitations on bankruptcy trustees when they are acting in their ERISA fiduciary capacities. Without any support, Defendants' argument amounts to a contention

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[12] The conclusion that McLemore is a fiduciary through his control of commingled plan assets in the bankruptcy estate is not dependent on his being an "administrator" within the meaning of Congress' recent amendments to Title 11 of the United States Code (the "Bankruptcy Code"), which require a trustee to "continue to perform the obligations required of the [ERISA plan] administrator" "if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan." 11 U.S.C. §§ 704(a)(11), 1106(a); see H.R. Rep. No. 31, 109th Cong., 1st Sess. 446 (2005). While the scope of that provision has yet to be tested or determined through litigation, it appears that Congress had in mind the situation where the debtor was the plan sponsor and administrator to its own plan. That is not the situation presented by this case, and, even if the amendments also cover the situation where a debtor was a third-party administrator, the Secretary lacks knowledge whether 1 Point was designated to act in that capacity for any of the plans for which it held assets. The amendments are relevant in any event, however, insofar as they show Congress's understanding that a bankruptcy trustee may have fiduciary status under ERISA at the same time that he is trustee to the debtor's estate under the Bankruptcy Code.

that the Bankruptcy Code effects a partial repeal by implication of ERISA's "highly reticulated" civil enforcement scheme. See, e.g., Doe v. Blue Cross Blue Shield of Maryland, Inc., 173 F. Supp.2d. 398 n.4 (D. Md. 2001) ("The highly 'reticulated' ERISA statute and its attendant administrative regulations provide a comprehensive framework governing disclosure, . . . and the right to sue.") . But repeals by implication are disfavored, see Beckert v. Our Lady of Angels Apartments, Inc., 192 F.3d 601, 606 (6th Cir. 1999) ("repeals by implication are . . . permitted only when the earlier and later statutes are irreconcilable."), and neither ERISA nor the Bankruptcy Code carves out fiduciaries who are also bankruptcy trustees from ERISA fiduciary duties or standing. Therefore, the Bankruptcy Trustee here has standing to bring an ERISA action against Regions and MACC.

B. THE DOCTRINE OF IN PARI DELICTO IS UNAVAILABLE HERE

ERISA section 409(b) establishes that a fiduciary is not liable for a breach of fiduciary duty committed either before he came, or after he ceased being, a fiduciary. 29 U.S.C. § 1109(b). The fiduciary duties begin when fiduciary status is assumed. See Free v. Briody, 732 F.2d 1331, 1334-35 (7th Cir. 1984); Donovan v. Mercer, 747 F.2d 304, 308 n.4 (5th Cir. 1984); Pension Benefit Guaranty Corp. v. Solmsen, 671 F. Supp. 938, 943-44 (E.D.N.Y. 1987); Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 635 (W.D. Wis. 1979). Since McLemore became a functional fiduciary through his control of plan assets after the alleged fiduciary breaches committed by 1 Point and Stokes had already taken place, and he is not responsible for any fiduciary misconduct himself, Defendants Regions and MACC cannot seek to escape their own alleged liability as fiduciaries who

enabled 1 Point and Stokes to commit their breaches by invoking the doctrine of in pari delicto.[11]

Where applicable, that doctrine "derives from the Latin, in pari delicto potior est condition defendentis: 'In a case of equal or mutual fault . . . the position of the [defending] party . . . is the better one'. The defense is grounded on two premises: first, that courts should not lend their good offices to mediating disputes among wrongdoers, and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306 (1985). It is not applicable here for two reasons. First, the Bankruptcy Trustee has not been accused of complicity in the ERISA violations that are alleged against Regions and MACC. Second, the recovery sought under ERISA is for losses suffered by the victimized plans. Any recovery will go to the victimized plans, not the wrongdoers, Stokes and 1 Point. This is consistent with the stated purpose of ERISA: "to protect the interests of participants in employee benefit plans and their beneficiaries . . .by providing for appropriate remedies, sanctions and ready access to the Federal courts." 29 U.S.C. § 1001(b).

Accordingly, in Donovan v. Schmoutey, 592 F. Supp. 1361, 1402 (D. Nev. 1984), the court held that the in pari delicto doctrine was inapplicable in the context of ERISA, where the plaintiff (in that case the Secretary) was not alleged to have participated in the transactions which violated ERISA:

> In pari delicto refers to a plaintiff's participation in the same alleged wrongdoing as the defendant, Memorex Corp. v. Int'l Business Machines Corp., 555 F.2d 1379, 1382 (9th Cir. 1977). Defendants failed to plead that

[11] The Secretary takes no position at this time on whether the Defendants were in fact ERISA fiduciaries and, if so, whether they committed fiduciary breaches.

the Secretary participated in any way in the transactions that violated ERISA. Moreover, an in pari delicto defense is inappropriate where, as here, its application would harm the persons-participants and beneficiaries protected by the law claimed to have been violated. See Memorex Corp., 555 F.2d, at 1382-83; Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 138, 88 S. Ct. 1981, 1984, 20 L.Ed. 2d 982 (1968) [overruled on other grounds, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 766 (1984)] .

The same reasoning applies equally to this case, since there is no argument that McLemore "participated in any way in the transactions that violated ERISA" and "its application would harm the persons-participants and beneficiaries protected by the law claimed to have been violated." Id.[12]

Similarly, in the context of federal securities statutes, the Supreme Court has considered the application of the in pari delicto doctrine and declined to apply it. Pinter v. Dahl, 486 U.S. 622, 632-33 (1988). The Supreme Court stated:

> [t]he in pari delicto defense is available "only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public." . . . The first prong of this test captures the essential elements of the classic in pari delicto doctrine. . . . The second prong, which embodies the doctrine's traditional requirement that public policy implications be carefully considered before the defense is allowed, . . ., ensures that the broad judge-made law does not undermine the congressional policy favoring private suits as an important mode of enforcing federal securities statutes.

Id. at 633 (citing Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310-11 (1985)); see also Perma Life Mufflers, 392 U.S. at 138 (same for antitrust laws).

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[12] Even if it were applicable in ERISA, in pari delicto is an affirmative defense, not a form of immunity. Therefore, it cannot be the basis for dismissal at the pleadings stage, but must be proved by the party-defendant asserting it. In re Adelphia Commc'ns Corp., 365 B.R. 24, 46 (Bankr. S.D.N.Y. 2007); Marwil v. Ent & Imler CPA Group PC, 2004 WL 2750255 at *9 (S.D. Ind. Nov. 24, 2004).

Further, the cases cited by the Defendants are distinguishable from this case because they consider the doctrine of in pari delicto in the context of a bankruptcy trustee stepping into the shoes of the debtor with respect to property of the estate. In those cases, bankruptcy trustees have been precluded from proceeding because the trustee, as representative of the bankruptcy estate, succeeds to the rights of the debtor in bankruptcy and has standing to bring any suit that the debtor could have brought but is subject to the same defenses that could have been asserted against the debtor. Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1150 (11th Cir. 2006).

McLemore, however, is bringing suit under ERISA as an ERISA fiduciary, not with respect to his duties as the representative of the debtor in bankruptcy. Under ERISA, the doctrine of in pari delicto would be inapplicable to a successor fiduciary not alleged to have been involved in the transaction that gave rise to the ERISA violation.[13] The fact that McLemore is also the chapter 11 trustee for the bankruptcy estates of 1 Point and Stokes does not permit importing the doctrine, which may be applicable in the purely bankruptcy context, into a case presenting an ERISA cause of action. Bankruptcy does not bar plan participants or the Secretary from bringing suit under these circumstances and it should not, under the guise of a supposed in pari delicto defense, be a bar to the Bankruptcy Trustee, in his capacity as fiduciary for the victimized plans, from doing so either.

[13] There may be circumstances, not apparently present here, where a successor fiduciary bears fiduciary responsibility for breaches cased by a predecessor fiduciary. For instance, a transaction may involve a continuing or ongoing breach of fiduciary duty and thus create a present duty to remedy the transaction. See Freund v. Marshall & Ilsley Bank, 485 F.Supp. 629, 635 (W.D. Wis. 1979); Marshall v. Kelly, 465 F. Supp. 341, 345 (W.D.Okla. 1978). A fiduciary duty may also exist to review existing investments, and to take reasonable steps to remedy any breaches. See Buccino v. Continental Assurance Co., 578 F.Supp. 1518, 1520-22 (S.D.N.Y. 1983).

CONCLUSION

For these reasons, the Secretary respectfully requests that the Defendants' Motions to Dismiss the Bankruptcy Trustee's Complaint be denied with respect to the issue of standing and the applicability of the defense of in pari delicto.

Respectfully submitted,

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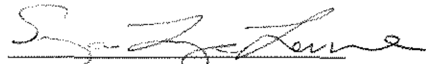

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