Nos. 11-15472; 11-16024
Nos. 11-16081; 11-16082

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID BARBOZA,
Plaintiff-Appellant

v.

CALIFORNIA ASSOCIATION OF FIREFIGHTERS, et al.,
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of California
Case No. S:08-CV-02569-FCD-GGH

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFF-APPELLANT

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor,
Plan Benefits Security Division

ELIZABETH HOPKINS
Counsel for Appellate
and Special Litigation

MARCIA BOVE
Senior Trial Attorney
U.S. Department of Labor
Office of the Solicitor
P.O. Box 1914
Washington, D.C. 20013
(202) 693-5598

ALEK FELSTINER
Attorney
U. S. Department of Labor
Office of the Solicitor, Rm. N-2700
200 Constitution Ave. NW.
Washington, DC 20010
(202) 693-5793

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STATEMENT OF THE ISSUES

The Secretary's brief addresses the following issues:[1]

1. Whether the district court erred in excusing defendants from the statutory requirement in section 403 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 403, to hold plan assets in trust based on its conclusion that defendants acted prudently when they relied on undocumented advice allegedly given by an unidentified Department of Labor employee in 1987.

2. Whether the district court correctly held that defendants breached their ERISA duties by failing to undertake annual actuarial reviews of the Plan's reserves.

3. Whether the district court should be instructed to more fully consider whether to appoint an independent fiduciary to hold plan assets in trust and perform other necessary administrative functions such as implementing an appropriate funding policy that the defendants failed to perform.

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[1] The Secretary's brief does not address the other issues raised by plaintiff-appellant, which concern alleged prohibited transactions under ERISA, and the district court's decision denying Barboza's request for attorney's fees and costs. Both issues appear to be fact-bound and unlikely to have significant impact beyond this case. The former issue primarily turns on whether CAISI in fact determined the timing and amounts of administrative fee expenses to itself without any prior approval by the Directors, as the plaintiff alleges, see Appellant's Opening Brief at 32-33, while the latter turns on whether the court gave sufficient consideration to factors previously set forth by this Court. Id. at 46-47.

STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

The Secretary has primary enforcement and interpretive authority for Title I of ERISA. The Secretary's interests include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plans. Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-93 (7th Cir. 1986) (en banc). The Secretary has a substantial interest in ensuring that fiduciaries hold all plan assets in trust as required by statute and in addressing allegations that the Department of Labor advised fiduciaries to do otherwise. The Secretary also has a substantial interest in ensuring that fiduciaries implement appropriate funding policies and undertake financial analyses to ensure the plan's ability to pay benefit claims, as required by the governing Plan documents and ERISA. Finally, the Secretary has an interest in ensuring that, given the significant problems with the management of this plan and its assets, the district court gives appropriate consideration to appointing an independent fiduciary.

The Secretary files this brief as amicus curiae under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

1. Factual Background

The California Association of Professional Firefighters (CAPF) is a non-profit mutual benefit corporation that sponsors the California Association of Professional Firefighters Long-Term Disability Plan (Plan). 5 Excerpts of Record, "ER," 976; 1 ER 15. It is undisputed that the Plan is a welfare plan governed by ERISA. The individual defendants are CAPF directors and are named fiduciaries in the Plan documents. 4 ER 746; 1 ER 16. California Administrative Insurance Services, Inc. (CAISI), a for profit corporation, administers the Plan and has discretion to make benefit determinations for the Plan. 5 ER 967, 970; 1 ER 15.

Plaintiff-Appellant David Barboza (Barboza) is a disabled firefighter and a Plan participant. 1 ER 18. The Plan is a welfare plan funded exclusively by participant contributions. 1 ER 16. Plan contributions are deposited into a single account, and the signatories on the account are CAISI officers. 1 ER 16; 3 ER 458. CAPF and CAISI have an administrative services agreement, under which CAISI pays benefit claims and Plan expenses by writing checks from the account. 1 ER 16. CAISI also withdraws its own administrative fees and expenses from the account. Id.

Defendants admit that the Plan has no trust or trust document. 1 ER 30. They argue, however, that they relied on experts in making plan administration

decisions. 1 ER 17. Defendants claim that in 1987 an unidentified Department of Labor (Department or DOL) representative advised CAPF that a corporation can satisfy the requirement in ERISA section 403, 29 U.S.C. § 1103, that plan assets be held in trust by depositing those assets into a corporate account. 1 ER 30-31; 3 ER 495-498. Their evidence of the Department's purported 1987 statement consists of a declaration by Plan counsel, Chris Chediak. 3 ER 495-498. There is no other documentation of this alleged statement, and Chediak's declaration consists of one conclusory sentence that does not give the name or qualifications of the alleged advisor, the date of the purported advice, the information defendants gave the alleged advisor, or even the precise question that was asked. Id. Likewise, the record contains no evidence of any investigation into the purported advisor's qualifications or any deliberations among the fiduciaries about whether to follow the alleged advice.

The governing Plan document requires CAPF directors to undertake an annual actuarial review of the Plan's "reserves maintained for the payment of Benefits." 3 ER 463. CAPF's bylaws also require its directors to "establish a dedicated separate fund or trust for the payment of disability claims under the Plan anticipated to continue more than twenty-four (24) months." 3 ER 464. Although it is undisputed that the Plan has 82 disabled participants in pay status who may receive benefits for more than 24 months, the defendants never implemented a

funding policy or created a separate reserve to fund these claims. 3 ER 464-465. Between 2006 and 2009, defendants did not undertake an annual actuarial review of the Plan's reserves. 1 ER 41. Barboza's actuarial expert testified that the Plan would require at least $12.5 million in reserve to fund the 82 claims. 3 ER 408. The Plan's financial statement for the period ending June 30, 2008, however, listed benefit liabilities at only $1.2 million. 3 ER 468.

2. Procedural History and Rulings

In 2008, Barboza filed a fiduciary breach action in the District Court for the Eastern District of California. 5 ER 975-981. He claimed that defendants breached their fiduciary duties by, among other things, failing to hold plan assets in trust and by failing to implement a funding policy, create actuarially sound reserves for long-term claims, and annually undertake actuarial reviews of the reserves. Id. Barboza and defendants both moved for summary judgment. On January 25, 2011, the district court granted summary judgment for defendants on the failure to hold in trust claim, and for Barboza on the annual actuarial review claim. 1 ER 30-32, 41-42.

On the claim that the defendants violated section 403 by failing to hold plan assets in trust, the court treated Chediak's declaration as undisputed evidence that defendants prudently relied on advice from DOL in deciding whether CAPF's corporate structure satisfies ERISA section 403. 1 ER 31, n. 12; 31-32. The court

addressed only the fiduciaries' duty of prudence, however, and did not address whether CAPF's corporate structure actually met the requirements of section 403 of ERISA, which generally requires fiduciaries to hold plan assets in trust pursuant to an express trust instrument.

On the actuarial review claim, the court found that defendants failed to perform annual actuarial reviews and thus breached section 404(a)(1)(D)'s duty to comply with plan documents, which required such reviews. 1 ER 41-42. The court ordered defendants to perform actuarial reviews (id. at 42) and, finding that the Plan was not exempt from the 29 C.F.R. § 2520.104b-10 requirement to distribute a Summary Annual Report (SAR) to participants, ordered defendants to distribute these reports. 1 ER 26-27. The court did not separately address Barboza's request to appoint an independent fiduciary.

Defendants moved to alter the judgment, and the district court denied the motion. Dkt. 107; 1 ER 1-13. Both sides appealed, and defendants then sought a stay pending appeal of the order (Dkt. 140), which the district court partially granted. Dkt. 146.

SUMMARY OF ARGUMENT

Defendants clearly violated ERISA's requirement to hold plan assets in trust. Their purported reliance on advice from an unidentified person at the Department in 1987 is irrelevant to whether they violated this unambiguous statutory

requirement. Moreover, any such reliance would be unreasonable since defendants presented no evidence of the information provided or the precise question posed to the unnamed source, the purported advice conflicts directly with the statutory text and enabling regulations, and subsequent regulations would have alerted a prudent fiduciary to the need to reevaluate undocumented advice defendants purportedly received from an unknown in 1987. Thus, the district court erred in excusing defendants from ERISA's plainly stated requirement that plan assets be held in trust.

The district court correctly ruled that the defendants violated ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), by failing to undertake annual actuarial reviews of the Plan's reserves as required by Plan documents. This failure resulted in the fiduciaries' failure to monitor the Plan's solvency and to adopt an adequate funding policy, and was a violation of their fiduciary duties regardless of whether Barboza also proved that the Plan was underfunded. But, in fact, Barboza's evidence established significant underfunding and, far from contradicting that evidence, defendants' evidence confirmed that the Plan's assets were inadequate to cover its long-term claims liability, and that defendants never established a separate reserve for long-term claims as required by the Plan documents.

Given these significant and pervasive failures, the district court should be instructed to more adequately address Barboza's request for appointment of an independent fiduciary to perform an accounting and to undertake the numerous administrative functions the fiduciaries failed to perform. This remedy is appropriate where, as here, the undisputed facts show a pattern of serious fiduciary violations. This case should be remanded with instructions for the district court, at a minimum, to consider the appropriateness of appointing an independent fiduciary.

ARGUMENT

I. THE DISTRICT COURT ERRED IN EXCUSING DEFENDANTS FROM THEIR STATUTORY DUTY TO HOLD PLAN ASSETS IN TRUST

A. Holding Assets In CAPF's Corporate Account Did Not Satisfy Section 403's Held-in-Trust Requirements

Section 403(a) provides that "all assets of an employee benefit plan shall be held in trust by one or more trustees." 29 U.S.C. § 1103(a). Id. Under the Act, the trustee must be designated in a trust instrument or in the governing plan instrument and, subject to exceptions that do not apply here, the trustee must be granted "exclusive authority and discretion to manage and control the assets of the plan." 29 U.S.C. § 1103(a). The statute clearly contemplates the formal execution of a trust instrument and the appointment of trustees, as the Secretary's regulations reflect. See 29 C.F.R. § 2550.403a-1 ("all assets of an employee benefit plan shall

be held in trust by one or more trustees pursuant to a written trust instrument"). The Secretary's regulatory interpretation is entitled to controlling deference. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

Defendants initially argued that the Plan was unfunded, and thus not subject to section 403, but the district court correctly disagreed.[2] 1 ER 26. The Plan is funded entirely with employee contributions, and all such contributions are plan assets as provided by a controlling DOL regulation. 29 C.F.R. § 2510.3-102. Citing a DOL Advisory Opinion, AO 94-31A (Sept. 9, 1994), the district court accordingly found that the Plan has a "beneficial interest" in the funds held in the "corporate [Wells Fargo] account," making those funds "plan assets" subject to section 403. 1 ER 26.

Having made this finding, the district court should have concluded that the fiduciaries breached their obligation to hold plan assets in trust as required by section 403. It was undisputed that the Plan does not hold the assets in an account pursuant to a trust or plan instrument that designates a trustee responsible for management of the plan's assets. Instead, the money is simply deposited in a Wells

[2] ERISA imposes minimum funding standards on defined benefit pension plans, 29 U.S.C. §§ 1080-1086, and requires all pension plans to be funded by trusts holding plan assets. Id. §§ 1002(34), 1103. ERISA does not impose these same funding standards on unfunded welfare plans, but it does still require funded welfare plans to comply with section 403's held-in-trust requirement.

Fargo account subject to the signature authority of two CAISI officers, neither of whom are plan trustees. 3 ER 456. CAISI did not enter into an agreement to act as trustee for the Plan or its assets; there was no trust instrument; and the Wells Fargo account was not a trust account.[3] 3 ER 456.

Although the defendants admitted that the Plan does not have a trust or a trust document, they nevertheless argued that CAPF effectively served the function of a trust in its capacity as a non-profit mutual benefit corporation that sponsored the Plan. 3 ER 456. In support of their argument, they cited a Treasury regulation concerning voluntary employee beneficiary associations (VEBAs). They argued that the Treasury regulation permitted VEBAs to operate either as a trust or as a corporation. Nothing in the regulation, however, alters ERISA's trust requirement. Instead, Treasury Regulation § 1.501(c)(9)-2(c)(1) merely states that to qualify as a VEBA, "there must be an entity, such as a corporation or trust established under applicable local law, having an existence independent of the member-employees or their employer." 26 C.F.R. § 1.501(c)(9)-2(c)(1). The same regulation also requires that the organization must be "controlled by independent trustees," if it is not controlled by its members or by trustees or other fiduciaries designated by or on behalf of its members. 26 C.F.R. § 1.501(c)(9)-2(c)(3). An "organization will

[3] Although CAISI is not a trustee, it is a fiduciary because it controls plan assets. 1 ER 16. See 29 U.S.C. § 1002(21)(A) (defining fiduciary to include anyone who "exercises any authority or control" over plan assets).

be considered to be controlled by independent trustees if it is an *employee welfare benefit plan* as defined in section 3(1) of [ERISA], and, as such, is subject to the requirements of Parts 1 and 4 of Subtitle B, Title 1 of ERISA." Treas. Reg. § 1.501(c)(9)-2(c)(3)(iii) (emphasis in original). Thus, the Treasury regulation explicitly recognizes that, with respect to welfare plans like this Plan, ERISA's trust requirement continues to apply.[4]

B. The District Court Failed To Address Whether Defendants Acted In Compliance with Section 403

The district court did not address whether defendants met the trust requirement of section 403. Instead, it appeared to consider the trust requirement solely in the context of ERISA's obligation to manage plan assets prudently. Certainly, ERISA section 404(a)(1)(B) requires fiduciaries to act prudently, and it would generally be imprudent for a plan fiduciary not to hold plan assets in trust. However, there is no prudence exception to the requirements of ERISA section

[4] The defendants also argued that CAPF's bylaws might somehow satisfy ERISA's trust requirement. Those bylaws, however, do not create a trust or designate anyone to serve as plan trustee. 3 ER 456. Moreover, the bylaws are contrary to ERISA in several respects. First, they require CAPF's directors, who are the Plan's named fiduciaries, to act "in the best interests of the corporation." 4 ER 738. This obligation to put the corporation first conflicts with ERISA's fiduciary duty of undivided loyalty to the plan, its participants, and beneficiaries. 29 U.S.C. § 1104(a)(1). Similarly, CAPF's bylaws provide that its directors "shall not be responsible for the adequacy of the fund or other funds to meet and discharge liabilities under the Plan or other plans." 4 ER 738. To the extent that this clause is meant to excuse fiduciaries from their obligation to prudently manage plan funding, it is an exculpatory clause prohibited by section 410 of ERISA. See 29 U.S.C. § 1110(a).

403. The court erred by conflating Barboza's section 403 claim that the defendants had failed to comply with ERISA's trust requirements with his prudence claim under section 404. Rather than address Barboza's separate claim that defendants violated section 403 by failing to hold plan assets in trust, the court simply ruled that defendants acted prudently in purportedly relying on advice provided by someone at the DOL. See 1 ER 31, n. 12, 32.

Reasonable reliance on experts is not a factor in the analysis of section 403 violations, and proving reliance does not allow fiduciaries to avoid their affirmative statutory duty to hold plan assets in trust. That explicit statutory duty exists independently of the duty to act prudently. Cf. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 (1989) ("[t]he extent of the duties and powers of a trustee is determined by the rules of law that are applicable to the situation, and not the rules that the trustee or his attorney believe to be applicable") (internal quotations omitted); Leigh v. Engle, 727 F.2d 113, 124 (7th Cir. 1984) (good faith reliance is not a defense to a breach of duty of loyalty). Moreover, participants are entitled to assert claims and request relief based on section 403 alone, without any allegation of imprudent conduct. See 29 U.S.C. § 1109 (holding fiduciaries personally liable for their violations of "[any of] the responsibilities, obligations, or duties imposed upon fiduciaries by [Title I]"); id. § 1132(a)(2) (providing appropriate relief for violation of those obligations). Because the district court

failed to separately consider the defendants' compliance with section 403, the issue comes before the Ninth Circuit without the benefit of the district court's legal conclusions. However, as discussed above, the factual findings made below are sufficient to resolve this straightforward issue.

C. Defendants' Purported Reliance On DOL Advice Was Unreasonable

In any event, Barboza should have prevailed even were there a prudence defense to ERISA's trust requirement. Section 404(a)(1)(B) requires fiduciaries to act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). The Ninth Circuit test for evaluating compliance with section 404(a)(1)(B) is derived from "the prudent person test as developed in the common law of trusts," but is made "more exacting" and must be applied in light of "the special nature and purpose of [ERISA] plans." Donovan v. Mazzola, 716 F.2d 1226, 1231 (9th Cir. 1983). ERISA fiduciary duties are the "highest known to the law." Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996) (quoting Donovan v. Bierwirth, 680 F.2d 263, 272 n. 8 (2d Cir. 1982).

Defendants claimed that they reasonably relied on advice from DOL in deciding that the plain language of section 403 did not apply to the Plan. Defendants' only evidence of reliance, however, was CAPF counsel Chediak's

statement that "[i]n 1987, CAPF was informed by the U.S. Department of Labor that a corporation can satisfy the hold-in-trust requirements under ERISA section 403(a)." 3 ER 497. The district court based its ruling entirely on this one conclusory sentence, holding that "reliance upon DOL advice regarding ERISA requirements is reasonable because DOL regulates Title I." 1 ER 31, n. 12.

Chediak's conclusory statement cannot bear the weight the court placed on it. It does not identify any CAPF or DOL officials, their titles, what CAPF told the DOL about the Plan, or whether CAPF disclosed that the Plan was funded solely with employee contributions. Chediak does not state what, if any, information, qualifications, experience, or authority the alleged advisor possessed, or even what his or her position was. Nor does Chediak state who initiated the communication, or whether it was in person, telephonic, electronic or written. Chediak does not claim that he (or anyone else) communicated the alleged advice to the Plan's fiduciaries, or that he had personal knowledge of whether the fiduciaries considered the advice in deciding not to hold plan assets in trust. Finally, Chediak does not state whether the purported advisor addressed CAPF specifically, or merely made a general statement that "a corporation can satisfy" ERISA's requirement in certain circumstances (e.g., where there is a formal trust instrument properly designating a corporate trustee who exercises exclusive authority over the

plan assets and holds the assets in trust). Thus, it is impossible to know what question the DOL employee was asked, if any, and based on what asserted facts.

Further, if a DOL employee was, in fact, informed of the relevant facts and asked the relevant question, it is extremely improbable that the employee would have given the alleged advice, which is inconsistent with the plain language of section 403, regulatory text in effect then and now, and the Department's long-standing enforcement position. The final regulations requiring a written trust agreement were effective June 17, 1982. 29 C.F.R. § 2550.403a-1(a); 47 Fed. Reg. 21, 241, 21, 247 (May 18, 1982).

Moreover, the Department has a formal procedure for obtaining advice on legal issues arising with respect to ERISA plans. ERISA Procedure 76-1. To obtain an advisory opinion, parties may submit signed requests to the Employee Benefits Security Administration (EBSA). The opinions expressly apply only to the facts stated by the requestor, and they are reviewed by authorized agency officials and made a matter of public record. The care and formality of this process stands in marked contrast to the anonymous undocumented non-public communication that the defendants seek to rely upon here.[5]

Thus, even assuming a DOL employee gave such advice, defendants' reliance on it would not have been reasonable. Heckler v. Community Health

[5] The Advisory Opinion procedure and EBSA's AOs can be found on its public website at http://www.dol.gov/ebsa/regs/AOs/main.html.

Services, 467 U.S. 51, 59 (1984); cf. Schweicker v. Hansen, 450 U.S. 785, 788 (1981) (recognizing that courts have consistently refused "to estop the Government where an eligible applicant has lost Social Security benefits because of possibly erroneous replies to oral inquiries"). The Ninth Circuit's prudence test is whether, "at the time they engaged in the challenged transactions, [the fiduciaries] employed the appropriate methods to investigate" and "structure" the transaction. Mazzola, 716 F.2d at 1232. Moreover, "reliance on counsel's advice, without more, cannot be a complete defense to an imprudence charge" such "reliance … is, at most, a single factor to be weighed in determining whether a trustee has breached his or her duty." Id. at 1234.

In Shay, this Court identified three elements relevant to whether a fiduciary exercised "reasonable prudence in seeking expert advice." 100 F.3d at 1489. A fiduciary must "(1) investigate the expert's qualifications, (2) provide the expert with complete and accurate information, and (3) make certain that reliance on the expert's advice is reasonably justified under the circumstances." Id. The district court did not apply the Ninth Circuit's prudence test to defendants' conduct, and it ignored the insufficiency of defendants' conclusory evidence. Instead, it simply concluded that reliance on alleged DOL advice is necessarily reasonable because DOL administers Title I of ERISA. 1 ER 31, n. 12. This ruling is contrary to controlling Ninth Circuit precedent. Had the district court applied the test

articulated in Shay and Mazzola, it would have been compelled to conclude that defendants acted imprudently. Defendants offered no evidence that they knew who the DOL employee was, much less what his or her qualifications or position were. They presented no evidence that they gave the alleged advisor any information about the Plan, or that they undertook any affirmative investigation of the advisor's qualifications or basis for his opinion in 1987 or at any subsequent time. In short, there is no evidence that defendants took any action to ensure the alleged advice was reliable. This conduct falls far short of the prudence standard required by Shay and Mazzola. Even taking Chediak's conclusory assertion as true, therefore, defendants' conduct was plainly imprudent.

In addition, as Barboza argued, ERISA's plan asset regulation at 29 C.F.R. § 2510.3-102, which was promulgated after the establishment of the Plan should have put a prudent fiduciary on notice of the need to reexamine section 403's trust requirement even if defendants had been justified in relying on the advice at the time it was allegedly given. This regulation specifically provides that employee contributions – the sole source of the Plan's funds – are plan assets subject to ERISA's trust requirement. When the Department promulgated the plan asset regulation, it expressly stated that "employers who fail to transmit promptly such amounts, and plan fiduciaries who fail to collect those amounts in a timely manner, will violate the requirement that plan assets be held in trust." 53 Fed. Reg. 17,628,

17,629 (May 17, 1988). Moreover, as Barboza noted, section 2510.3-102 was amended in 1997, when DOL again explained that "[o]nce participant contributions become plan assets, they become subject to the trust requirements of ERISA section 403." See 61 Fed. Reg. 41,220, 41,227 (Aug. 7, 1996). The preamble to the final amended regulation explicitly states that "contributions generally must be held in trust by one or more trustees once they become plan assets." Id. A prudent fiduciary, faced with these regulatory changes clearly aimed at giving effect to ERISA's trust requirement, would not have continued to rely on undocumented advice allegedly received from an unknown DOL source in 1987.

II. THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANTS VIOLATED ERISA SECTION 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), BY FAILING TO UNDERTAKE ANNUAL ACTUARIAL REVIEWS AS REQUIRED BY THE PLAN DOCUMENTS

Barboza made two claims about the Plan's actuarial soundness. First, he claimed defendants breached their section 404(a)(1)(B) duty of prudence by failing to implement a sound funding policy, create actuarially adequate reserves for long-term claims, or annually review the Plan's reserves. See, e.g., Local Union 2134, United Mine Workers of Am. v. Powhatan Fuel, Inc., 828 F.2d 710, 713 (11th Cir. 1987) (fiduciaries have "an obligation to attempt to maintain sufficient funds with which to properly administer the plan"); GIW Industries, Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc., 895 F.2d 729, 730 (11th Cir. 1990) (same); cf. In re

Palombo, 456 B.R. 48, 62-63 (Bankr. C.D. Cal. 2011) (failure to set contribution rates using prudent actuarial standards and failure to ensure that the fund had sufficient assets to pay benefits is a fiduciary defalcation). Second, he claimed that the CAFP directors' failure to annually undertake actuarial reviews of the Plan's reserves as required by plan documents violated section 404(a)(1)(D). See 29 U.S.C. § 1104(a)(1)(D) (requiring fiduciaries to discharge their duties "in accordance with the documents and instruments governing the plan" unless inconsistent with ERISA). The Plan document required CAPF's directors to undertake an annual actuarial review of the Plan's "reserves maintained for the payment of benefits" (3 ER 463) and to "establish a dedicated separate fund or trust for the payment of disability claims … anticipated to continue more than twenty-four (24) months." 3 ER 464. Although the district court did not separately address Barboza's prudence claims with regard to funding, it correctly found that the failure to comply with the Plan documents was undisputed. 1 ER 41-42.

CAPF's directors were required to establish and implement a "funding policy" under section 402(b)(1), 29 U.S.C. §1102(b)(1).[6] The Plan's terms also required the fiduciaries to conduct an annual actuarial review of the Plan's reserves and to establish a reserve for payment of long-term claims. It is undisputed that

[6] Section 402(b) provides that "[e]very employee benefit plan shall – (1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this title." 29 U.S.C. §1102(b)(1).

defendants never established a funding policy or a reserve for long-term claims. It is also undisputed that in 2007 and 2008, defendants conducted no review of the Plan, and in 2009, performed only a "truncated" review that defendants admitted was not an actuarial valuation. See 1 ER 41 (citing "undisputed evidence defendants failed to comply with the Plan's" annual actuarial review requirement). Indeed, defendants retained only a retired actuary, J. Paul Dorris, who admitted during his April 14, 2010 deposition that he had retired 20 years earlier and characterized his work for the Plan as "dabbling." 3 ER 338-339.

Without a funding policy or actuarially determined reserves, defendants could not monitor the Plan's solvency because they could not determine, let alone fund, its claims liability. During his deposition, Dorris admitted that he had originally recommended a $3.6 million reserve in 2006, but dropped that recommendation because the Plan was not able to meet it and had been running a loss (including that reserve) since 1994. Dorris also admitted that actuarial calculations were necessary to determine the Plan's long-term claims liabilities, that he simply had relied on the estimated claims duration prepared by CAISI (3 ER 342-346), and that he did not know if Plan reserves were adequate to pay claims. 3 ER 361-362. Apart from this evidence, defendants presented no evidence from any actuarial expert addressing the Plan's actuarial soundness. Instead, they argued only that they reasonably relied on Dorris (3 ER 492-493),

and that his advice showed that the Plan's assets were adequate to fund the Plan's claims liabilities. 3 ER 361-362.

On the contrary, Dorris' contemporaneous recommendation showed that in 2006, he had recommended that the Plan establish a $3,639,744 reserve to cover its long-term claims then in pay status. 3 ER 363-364. His June 21, 2006 written recommendation did not specify the number of participants in pay status (i.e., long-term claims), or the expected duration of their claims; Dorris noted only that "[i]t is our understanding that the Plan has several claims that are of long-term nature. The reserving goal is for that purpose." Id. Dorris admitted that his $3.6 million reserve recommendation was not an actuarial calculation, only one-year's contributions. 3 ER 361-362, and 369 columns 10,11.

Barboza disputed that Dorris was qualified to offer an actuarial opinion. 2 ER 182-183. However, even assuming he was qualified, the fact remains that he had advised defendants in 2006 that the Plan needed a $3.6 million reserve for its long-term liabilities, and the Defendants simply ignored his advice. By contrast, Barboza's actuarial expert, whose qualifications were undisputed, concluded that as of April 2009, the Plan had 82 disabled firefighters in pay status, and their claims alone represented, minimally, $12.5 million in claims liability. 3 ER 408. He also concluded that the Plan needed additional reserves for its over 20,000 active

firefighter participants, some of whom could become disabled in the future. 3 ER 409; 3 ER 417-436.

Despite their own actuary's 2006 recommendation, defendants never funded any reserve for long-term claims. 3 ER 464-465. Defendants inexplicably stated in the Plan's Form 5500 that, as of June 30, 2008, the Plan's claims liabilities were only $1,271,064 and that its net assets were under $2.5 million. 4 ER 776; 3 ER 468. This $2.5 million amount was well below even defendants' own retired actuary's 2006 $3.6 million rough estimate of the required reserve for claims then in pay status. Even accepting Dorris' 2006 estimate, the Plan had insufficient assets to pay its long-term disability claims by at least 2006. Alternatively, accepting Barboza's actuarial expert, the evidence showed that the Plan needed at least $12.5 million just for the 82 claims in pay status. Accepting either expert, the only arguably disputed factual question was the amount by which this Plan was underfunded.

While the district court did not reach the prudence or underfunding issue, it correctly ruled that "defendants breached their fiduciary duty by failing to comply with the Plan's annual actuarial review requirement" and ordered them to undertake annual actuarial reviews. 1 ER 41. This relief was certainly justified. Whether it was also sufficient given the nature and extent of the fiduciaries' failings is discussed in the next section.

III. THE DISTRICT COURT SHOULD BE INSTRUCTED TO MORE FULLY CONSIDER WHETHER DEFENDANTS' PERVASIVE FIDUCIARY VIOLATIONS WARRANTED APPOINTMENT OF AN INDEPENDENT FIDUCIARY

The district court's findings show that CAPF, CAISI, and the individual defendants failed to establish and enforce the minimal procedures necessary to ensure the Plan's integrity and its ability to properly fund and pay promised benefits. For example, in addition to the funding issues discussed above, defendants repeatedly failed to distribute the Summary Annual Report (SAR) to participants or file the statutorily required Form 990. 1 ER 17; 1 ER 26. The undisputed facts also show that defendants failed to hold plan assets in trust. It is also undisputed that defendants failed to establish a funding policy and failed to establish actuarially sound reserves for current or future claims liability or annually review the reserves. Defendants even failed to retain qualified personnel capable of providing the expertise necessary to administer the Plan. The defendants' numerous ERISA violations have exposed the Plan to unnecessary and costly administrative and litigation expenses and threaten to leave the participating firefighters without the benefits they have been promised.[7]

[7] See, e.g., Barboza v. California Ass'n of Professional Firefighters, 651 F.3d 1073, 1079 (9th Cir. 2011) (ruling that the Plan's fiduciaries misinterpreted the claims regulation (29 C.F.R. § 2560.503-1) to extend improperly the time limits within which they could determine disability claims).

Defendants' failure to distribute the SARs is particularly egregious because this Plan's solvency is in question. If appropriate preventive measures are not taken now, the Plan soon may default on benefit payments due to disabled participants in pay status. These disabled participants and the over 20,000 active firefighters who may become disabled have a statutory right to know the Plan's true financial status, particularly if they may face a loss of benefits. Peralta v. Hispanic Business, Inc., 419 F.3d 1064, 1070-72 (9th Cir. 2005) (recognizing fiduciary duty under section 404(a)(1)(A) to provide timely notice of disability policy termination to participant unaware of its cancellation); Hope Center, Inc. v. Well America Group, Inc., 196 F. Supp. 2d 1243, 1248-49 (S.D. Fla. 2002) ("a fiduciary's failure to notify participants … of a plan's financial problems, where they are apparent to the fiduciary, is a breach of fiduciary duty"); McNeese v. Health Plan Marketing, Inc., 647 F. Supp. 981, 985-86 (N.D. Ala. 1986) (same).

The SAR summarizes financial information disclosed on the Plan's annual Form 5500, which it is required to file with the Department. 29 C.F.R. § 2520.104b-10. Not only have defendants turned a blind eye to the Plan's solvency, they have denied participants since 2002 access to material facts that might have enabled them to assess its solvency for themselves. 1 ER 26-27. This violated their fiduciary duty of loyalty (see section 404(a)(1)(A), 29 U.S.C. §

1104(a)(1)(A); Peralta, 419 F.3d at 1070-72), and it violated the Department's regulation (29 C.F.R. § 2520.104b-10), as the district court found. 1 ER 27.

Appointment of an independent fiduciary to ensure the Plan's solvency and to perform critical functions the defendants have failed to perform is appropriate when, as here, defendants engage in a general pattern of fiduciary violations. Mazzola, 716 F.2d at 1236-37 (fiduciaries' "general pattern of failure" to properly manage plan showed need for "immediate and continuing supervision" of plan "by a competent, impartial and independent administrator"). As in Mazzola, these fiduciaries have demonstrated a pattern of violations that is itself evidence that their violations will continue "absent effective remedial measures." 716 F.2d at 1236-37.

While the Plan has not yet defaulted on monthly payments, this inchoate aspect of any underfunding does not preclude relief. In Mazzola, the Ninth Circuit rejected defendants' challenge to a $1 million bond, notwithstanding the defendants' argument that it was improper to impose a remedy for a breach where the plan had not yet incurred a loss. The Ninth Circuit ruled that "the district court properly exercised its broad discretion under § 1109 in requiring appellants to post a $1 million bond" as a security to protect the plan "in the event of losses from" the fiduciaries' breaches. 716 F.2d at 1236-37 (citing G. Bogert, The Law of Trusts and Trustees § 861, at 11-12 (1982) (footnote omitted) ("[i]f breaches of trust have

been committed, or are threatened, the court may order the giving of a bond to secure faithful performance in the future, or may increase the amount of the existing bond, or may require new sureties")). ERISA provides broad discretion to impose a remedy when it is necessary "not to compensate for past losses, [but]to safeguard the beneficiaries' interests and to protect the fund against future losses." 716 F.2d at 1236-37.

Barboza sought appointment of an independent fiduciary to perform an accounting as well as other essential functions needed to ensure that the Plan can meet its commitments, such as establishing a trust and appropriate funding policy, determining the reserves required for existing and prospective disability claims, preparing and distributing the reporting and disclosure documents required by ERISA, and determining any underfunding and monetary losses the defendants' fiduciary violations have imposed on the Plan.

The district court failed to address Barboza's request for appointment of an independent fiduciary except to note that it had not granted the remedy when justifying its denial of his attorney's fees request. 1 ER 12 (defendants' had "some degree of success on the merits by virtue of their victory on the majority of Barboza's claims, including … appointment of an independent trustee"). Defendants' conduct certainly justified this remedy, and the district court should have more fully considered it. The remedies it instead ordered – distribution of

SARs and performance of actuarial reviews – do not protect participants from defendants' ongoing pattern of fiduciary violations or ensure the Plan's solvency and prudent administration. Especially in light of the district court's error in failing to address the defendants' trust violations, it is appropriate for this Court to remand with instructions for the district court to consider whether appointment of an independent fiduciary is warranted.

CONCLUSION

For the foregoing reasons, the Secretary respectfully asks this Court to reverse the district court's section 403 ruling, affirm its section 404(a)(1)(D) ruling directing CAPF's directors to undertake annual actuarial reviews of the Plan's reserves, and remand this case with instructions to consider appointment of an independent fiduciary to perform an accounting and implement all critical administrative functions the Plan's fiduciaries have failed to perform including, among other things, establishing a trust for plan assets, an appropriate funding policy, a reserve for the Plan's long-term liabilities, and determining the sufficiency of the Plan's funding.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor
Plan Benefits Security Division

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation

/s/ Marcia E. Bove
MARCIA E. BOVE
Senior Regulation Attorney
U.S. Department of Labor
Room N-4611
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5598

CERTIFICATE OF COMPLIANCE OF BRIEFS AND VIRUS CHECK

Pursuant to Rules 32(a)(7)(B) and (C), Fed. R. App. P., I certify that this amicus brief uses a mono-spaced typeface of 14 characters per inch and contains six thousand eight hundred and eight (6,799) words.

I further certify that a virus scan was performed on the Brief using McAfee, and that no viruses were detected.

Dated: February 7, 2012

/s/ Marcia Bove
MARCIA BOVE
Senior Trial Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of February, 2012, true and correct copy of the foregoing - THE SECRETARY OF LABOR'S AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT-was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system and served electronically via email to the following counsel at the addresses set forth below:

Louis A. Gonzalez
Weintraub Genshlea Chediak
400 Capital Mall, 11th Floor
Sacramento, CA 95814
(916) 558-6105 [voice]
lgonzalez@weintraub.com

Geoffrey V. White
351 California St., Suite 1500
San Francisco, CA. 94104
(415) 362-5658 [voice]
(415) 362-4115 [fax]
gvwhite@sprynet.com

Dated: February 7, 2012

/s/ Marcia Bove
Marcia Bove
Senior Trial Attorney