Nos. 05-1440, 05-1946, 05-2673

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ELAINE L. CHAO, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner-Appellee,

v.

JOHN J. KORESKO, V; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE; PENN-MONT BENEFIT SERVICES, INC. and KORESKO & ASSOCIATES, P.C.,
Respondents-Appellants.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF FOR THE SECRETARY OF LABOR AS PETITIONER-APPELLEE

HOWARD M. RADZELY
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor for
Plan Benefits Security

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation

ELLEN L. BEARD
Senior Appellate Attorney
U.S. Department of Labor
Room N-4611
Washington, D.C. 20210
(202) 693-5767

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v.

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BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF RELATED CASES AND PROCEEDINGS

Two related cases are currently pending in this Court. Secretary of Labor v. Koresko, No. 04-3614 ("Koresko I") is an appeal from earlier orders in the same proceeding, issued May 11, August 2, and August 23, 2004, enforcing the Secretary of Labor's administrative subpoenas and ordering Koresko and related parties to produce documents sought by the Secretary. On August 15, 2005, this Court issued an order consolidating all the pending Koresko appeals for argument or submission on September 29, 2005, and staying the contempt proceedings in

district court, in Chao v. Koresko, et al., No. 2:04-mc-74 (MAM), until the appeals are decided.

Secretary of Labor v. Community Trust Co., No. 05-2785, is an appeal from an order of the same district court in a separate proceeding, issued May 5, 2005, enforcing another administrative subpoena and ordering Community Trust Company to produce documents sought by the Secretary as part of the Koresko investigation. Both the district court and this Court have denied motions to stay that order, and civil contempt proceedings are continuing in the district court against Community Trust Company, in Chao v. Community Trust Co., No. 2:05-mc-18 (MAM).

STATEMENT OF JURISDICTION

The district court had jurisdiction of this subpoena enforcement proceeding under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1132(e), 1134(c), which incorporates by reference the enforcement provisions in the Federal Trade Commission Act, 15 U.S.C. § 49. Koresko and related parties do business in Bridgeport, Pennsylvania, within the jurisdiction of the United States District Court for the Eastern District of Pennsylvania. See 29 U.S.C. § 1132(e)(2).

This Court has jurisdiction of the appeal under 28 U.S.C. § 1291. The district court issued two final orders on March 17, 2005, holding John J. Koresko,

V ("Koresko"), Koresko & Associates, P.C. ("KAPC"), and Penn-Mont Benefit Services, Inc. ("Penn-Mont") in civil contempt and directing them to pay a coercive fine of $250 per day until they comply with the court's orders. Joint Appendix ("JA") 6a-8a. Koresko, KAPC, Penn-Mont and two related entities (collectively "appellants") filed a timely appeal from those orders on March 23, 2005 (No. 05-1946), within the 60 days permitted by Fed. R. App. P. 4(a)(1)(B). JA 5a.[1] The district court also issued a final order on April 25, 2005, directing the three parties held in contempt to pay the Secretary a compensatory fine of $5312.50 to cover certain costs and attorneys' fees. JA 11a-12a. Appellants filed a timely appeal from that order on May 23, 2005 (No. 05-2673). JA 10a. See Fed. R. App. P. 4(a)(1)(B).[2]

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[1] The two other parties listed on the notice of appeal are the Regional Employers' Assurance Leagues and the Delaware Valley League. Although both of those entities received subpoenas from the Secretary of Labor, they were not held in contempt (JA 6a-8a), so they have no standing to appeal from the contempt orders.

[2] The first of these three consolidated appeals (No. 05-1440) is from an order issued on January 10, 2005, giving appellants a deadline within which to produce documents or be held in contempt and suffer specified sanctions. JA 1a-4a. The January 10 order, however, was neither final nor appealable under 28 U.S.C. § 1291. Apex Fountain Sales, Inc. v. Kleinfeld, 27 F.3d 931, 934-35 (3d Cir. 1994) (civil contempt order is not final under 28 U.S.C. § 1291 until both liability and amount of fine are determined).

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in holding Koresko, KAPC and Penn-Mont in civil contempt for disobeying a court order to produce documents.

2. Whether the district court abused its discretion in imposing a coercive fine of $250 per day and a compensatory fine of $5312.50 on the parties in contempt.

3. Whether the district court had jurisdiction over the contempt proceedings in this case after appellants filed their notice of appeal from the January 10, 2005 order.

4. Whether the proceedings below satisfied the requirements of procedural due process.

5. Whether appellants may relitigate the validity of the underlying order to produce documents in the contempt proceedings.

STATEMENT OF THE CASE

A. Nature of the case, course of proceedings and disposition below

This is an appeal from orders of the United States District Court for the Eastern District of Pennsylvania (McLaughlin, J.) holding Koresko, KAPC and Penn-Mont in civil contempt for disobeying a court order to produce documents subpoenaed by the Secretary of Labor in a civil investigation under the Employee

Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1001 et seq. The Secretary filed a petition to enforce the administrative subpoenas on April 19, 2004. After two hearings and careful consideration of appellants' privilege claims, the district court issued an order on August 23, 2004, requiring appellants to produce the subpoenaed documents (with specified redactions) on or before September 20, 2004. JA 1073a. Later, both the district court and this Court denied appellants' motions to stay the production order pending appeal. See generally JA No. 04-3614 (Koresko I).

On November 12, 2004, the Secretary filed a motion for adjudication of civil contempt. JA 273a-349a. On December 6, 2004, the district court denied the motion without prejudice, awaiting this Court's ruling on appellants' motion for stay pending appeal. JA 757a. After this Court denied the stay, on December 22, 2004, JA 1093a, the Secretary filed a renewed motion for civil contempt. JA 758a-759a. The district court held a hearing on that motion on January 7, 2005. JA 981a-1001a.

On January 10, 2005, the district court issued an order again denying the Secretary's contempt motion without prejudice, but directing appellants to comply with the court's August 23, 2004 production order within 24 hours of this Court's denial of a stay on rehearing. JA 790a. The January 10 order also put appellants on notice that, if they failed to comply within that time, they would be adjudged in

civil contempt, required to pay a fine of $250 for each day they failed to comply, and required to pay the Secretary the fees and costs incurred in filing her renewed motion for contempt. Id. On January 24, 2005, this Court denied the motion for stay on rehearing. JA 792a-793a. On February 25, 2005, the Secretary filed a motion to incarcerate Koresko. JA 794a-808a. Appellants, however, still did not produce the documents. Instead, on February 9, 2005, they filed a premature notice of appeal from the January 10, 2005 order (No. 05-1440). JA 1a-4a.

On March 16, 2005, the district court held another hearing on the contempt matter and the motion for incarceration. JA 1002a-1066a. On March 17, 2005, the district court issued two orders holding Koresko, KAPC and Penn-Mont in civil contempt, ordering them collectively to pay $250 per day beginning January 26, 2005 (24 hours after this Court's denial of the stay on rehearing) until they obey the court's previous order and produce the subpoenaed documents, and taking the motion for incarceration under advisement. JA 931a-933a. On March 23, 2005, appellants filed a notice of appeal from the March 17, 2005 orders (No. 05-1946). JA 5a-9a.

On April 25, 2005, the district court issued two additional orders, denying appellants' motion for stay of the earlier contempt orders pending appeal, and directing appellants to pay the Secretary a fine of $5312.50 to reimburse her costs in filing the renewed motion for civil contempt. JA 978a-980a. On May 23, 2005,

appellants filed another notice of appeal (No. 05-2673) from the April 25 order imposing the compensatory fine. JA 10a-13a.

The three contempt appeals (Nos. 05-1440, 05-1946, and 05-2673) were consolidated for briefing in this Court. On August 15, 2005, this Court issued an order staying the contempt proceedings in the district court pending resolution of the four pending appeals. The Court also consolidated the three contempt appeals with the earlier appeal in the subpoena enforcement proceeding (No. 04-3614) for argument or submission on September 29, 2005, to the same panel.

B. Statement of the facts

1. The parties and the documents

The Secretary of Labor subpoenaed documents from five related parties, all of whom are now appellants. JA 293a-336a (five subpoenas). Those parties include Koresko, a practicing attorney in the Commonwealth of Pennsylvania, the law firm, KAPC, of which he is the sole shareholder, and Penn-Mont, an affiliated company that does business on the same premises. JA 93a-94a (Koresko affidavit). They also include the Delaware Valley League ("DVL") and the Regional Employers Assurance League ("REAL"), which Koresko describes as "unincorporated, loose associations of . . . employers" that participate in voluntary employees beneficiary associations ("VEBAs") organized by Koresko, KAPC, and/or Penn-Mont. JA 94a; see also 26 U.S.C. § 501(c)(9) (Internal Revenue Code

provision on VEBAs). The five identical subpoenas sought documents concerning the "organization, structure, operation and purpose" of Penn-Mont, DVL and REAL, including documents identifying the employee benefits they market or provide, documents identifying the names and addresses of the employers that participate in their plans or programs, agreements with service providers, employers, and labor organizations, and various plan documents, insurance contracts, bank records, and billing documents describing their business and operations. JA 293a-336a.

On August 23, 2004, the district court ordered all five appellants to comply with the subpoenas previously issued by the Secretary. JA 1073a. It is undisputed that appellants had knowledge of that order. It is also undisputed that Koresko and KAPC possess numerous documents responsive to the subpoenas that they refuse to produce. JA 93a-96a (Koresko affidavit). Koresko admitted that "[t]here are over 500 files involved with REAL VEBA and the DVL VEBA, and the files contain thousands of documents." JA 95a. Another KAPC attorney, Jeanne Bonney, prepared a so-called "privilege log" attaching redacted samples of 30 types of documents in appellants' files. JA 350a-724a (Bonney affidavit and attachments). In addition, appellants' brief in this appeal asserts that their "privilege log" covers over 125,000 documents. Appellants' Br. 10.

Koresko and KAPC actually produced, however, only a small subset of documents concerning a single employer, Sidney Charles Markets, Inc. ("SCM"), which had already been disclosed in previous litigation with that employer. Appellants' Br. 9; JA 105a-106a, 151a-196a (Miller affidavit and attachments). SCM was the only remaining member of DVL, which has been defunct since 1996 or 1997. JA 1017a (testimony of Bonney). According to Koresko, "DVL and DVL VEBA no longer function, as all eligible employers joined REAL VEBA; and the only one who did not, SCM, was involuntarily terminated for reasons described in various court documents involving litigation with them." JA 95a (Koresko affidavit). Since the subpoenas covered the time period from January 1, 2000, to the date of production (except for documents created earlier but still in use), JA 296a, 304a, 313a, 322a, 331a, this means that appellants produced almost nothing responsive to the subpoenas.

Appellants claimed (and still claim, see Br. 42) that Penn-Mont did not possess any documents responsive to the subpoenas. JA 94a (Koresko affidavit). According to Koresko, Penn-Mont was "set up so that my brother could have an equity participation, since he is not a lawyer," and both he and his brother "have signed documents or taken actions on behalf of DVL and REAL." Id. Although Penn-Mont produced a few documents at the March 16, 2005 hearing (evidence of incorporation and marketing materials), JA 1023a, 1039a, Bonney testified that it

has no employees and no assets and no other documents responsive to the subpoena, insisting that only the law firm, KAPC, controlled responsive documents. JA 1019a-1031a, 1038a-1040a; see also JA 94a (Koresko affidavit).

The district court, however, admitted as evidence at the March hearing two exhibits introduced by the Labor Department which were printed from Penn-Mont's web site. JA 1032a-1033a, 1035a, 1047a (hearing transcript). The first exhibit describes Penn-Mont as "a pioneer in WELFARE and RETIREMENT plan management and implementation," whose "Principals and Associates" are "dedicated to provide tactical financial solutions designed to add value to your organization and enhance personal wealth." Pet. Ex. 1.[3] The second exhibit describes "Penn-Mont Benefit Services, Inc." as "a certified benefits administrator and educator comprised of attorneys, accountants and financial professionals" that provides "plan design, proposal generation, plan documents and plan administration." Pet. Ex. 2, p. 1; JA 1035a. The website lists Penn-Mont as a "Plan Administrator" and "Individual Employers" as "Plan Sponsors," and describes its "Products" as "Whole Life, Universal Life, Fixed Annuity, Variable Annuity with Guaranteed Retirement Income Rider." Pet. Ex. 2, pp. 1, 2. Bonney

[3] The two exhibits (which were inadvertently omitted from the joint appendix), are attached in full as addenda to this brief.

also admitted at the March hearing that checks and other documents are routinely sent to Penn-Mont. JA 1042a.

Based on this evidence, the district court made a finding of fact that Penn-Mont possessed documents responsive to the subpoena that it had not produced. JA 1057a ("Koresko and Associates and Penn-Mont have been judged in civil contempt. They both have documents. Penn-Mont has some documents, even though most of them appear to be with Koresko and Associates.").

2. The district court hearings

a. The January 7, 2005 hearing. At the first contempt hearing, on January 7, 2005, the district court asked both parties to report on the status of compliance with its August 23, 2004 order. JA 981a-985a, 989a. Koresko was present in the courtroom but chose not to testify. JA 982a. The court warned appellants:

> [I]t sounds as if up to this point, you have not complied with my order. And, obviously, you can't do that unless you want to risk contempt. So, talk to me about that. In other words, one always has an obligation either to comply with an order or take some legal action to request that it be stayed.

JA 985a.

The judge then asked, "if I said, within twenty-four hours of a decision on your two pending motions, you are to produce every document . . . are you prepared to do that?" JA 992a-993a, 994a. Receiving no direct answer to her question, the judge proposed issuing an order giving appellants twenty-four hours

after a denial of the stay motions by this Court to produce the documents; if the documents were not produced, the parties in custody of the documents would be held in contempt, fined $250 per day, and assessed costs. JA 997a-998a. The judge asked counsel for appellants: "is there any reason why that wouldn't be reasonable, if you don't comply as I've just stated?" JA 998a.

After appellants argued that the only "record-holder" is "the law firm," the judge said that she would have a hearing on which parties possess documents, if needed, although first she would review the previous affidavits. Id.; see also JA 1000a-1001a ("if we get to the point – and I hope we don't – where I am having to – you know – hold somebody in contempt, of course, people can have whatever hearing they want, absolutely"). The court then said: "I will issue an order along the lines of what I've just said and we'll see where we go," and asked the parties to inform the court when the Third Circuit ruled on the pending motions. JA 1001a.

b. The March 16, 2005 hearing. The district court described the second contempt hearing, on March 16, 2005, as a "continuation of the hearing that we had earlier." JA 1004a. Appellants admitted that they had produced no documents since the last hearing. JA 1008a. The district court again asked the appellants who had documents responsive to the subpoena. JA 1011a. Appellants' counsel said that only the law firm had documents, and that Bonney and Koresko were both present to testify to that effect. JA 1011a-1012a. The court advised counsel to put

on her witnesses, JA 1012a, but only Bonney testified, not Koresko. JA 1014a-1048a. The judge had to remind appellants several times that she would not reconsider any of the arguments that they had made at the subpoena enforcement stage of this proceeding. JA 1009a, 1014a, 1027a, 1047a, 1059a. The court also rejected appellants' offer "to produce these documents to the Court, under seal, to be kept until the appeal is exhausted" (an offer that apparently did not include showing any of the documents to the Secretary). JA 1058a-1059a.

After listening to the testimony of Bonney, including cross-examination based on the exhibits from Penn-Mont's website, the court found that both KAPC and Penn-Mont had documents responsive to the subpoenas and were in civil contempt. JA 1051a, 1057a. The court took the motion to incarcerate Koresko under advisement and asked the Labor Department to submit a detailed fee request to which appellants could object. JA 1062a. The court held that Koresko would also be liable for contempt and subject to incarceration as the owner of the corporation who controlled production of the subpoenaed documents. JA 1062a-1063a.

Finally, after conferring with Koresko, his counsel informed the court that "We will produce the documents after the exhaustion of the 3rd Circuit appeal in this case." JA 1063a. Expressing displeasure that appellants had not even sought to expedite their subpoena enforcement appeal, the judge said that she would write

an order holding Koresko, KAPC and Penn-Mont in contempt, and informed them that they already owed the court $12,500 in coercive fines. JA 1064a-1065a.

C. The district court orders

1. The January 10, 2005 order

The January 10, 2005, order provided as follows:

> [I]f the Court of Appeals denies the Respondents' Petition for Rehearing and Rehearing En Banc [on the motion for stay], the Respondents must comply with the Court's August 23, 2004 Order within 24 hours of receipt of notice of such denial. If Respondents fail to comply with the Court's Order within this time, those Respondents in possession of documents responsive to the subpoenas will be:
>
> (1) Adjudged in Civil Contempt for failing to comply with the Court's August 23, 2004 Order requiring Respondents to comply with the subpoenas duces tecum issued by the Petitioner on January 28, 2004;
>
> (2) Required to pay a coercive fine of $250.00 per day for each day Respondents fail to comply with the Court's August 23, 2004 Order; and
>
> (3) Required to pay the Petitioner a compensatory fine equal to the fees and costs of filing the Renewed Motion for Civil Contempt.

JA 3a-4a.

2. The March 17, 2005 orders

The March 17, 2005 orders declared that "Respondents John J. Koresko, V[,] Penn-Mont Benefit Services, Inc., and Koresko & Associates, P.C., are adjudged in Civil Contempt for failing to comply with the Court's August 23, 2004 Order requiring Respondents to comply with the subpoenas duces tecum issued by the Petitioner." JA 6a. The same parties were ordered to "pay a coercive fine of

$250.00 per day beginning on January 26, 2005, and continuing until such time as they comply with the directives of this Court." JA 8a. The Court also ordered that respondents would be "required to pay the Petitioner a compensatory fine equal to the fees and costs associated with filing the Renewed Motion for Civil Contempt" in an amount to be determined after Petitioner "files supplemental documents in support of the fees and costs and the Respondents have an opportunity to object to the amount of fees and costs." JA 7a.

3. The April 25, 2005 orders

On April 25, 2005, the district found that the Secretary is "entitled to $5,312.50 as reasonable payment for the fees and costs incurred in filing the Renewed Motion for Civil Contempt" and ordered respondents to pay that amount to the Department of Labor on or before May 14, 2005. JA 11a-12a. In a separate order on the same date, the court denied respondents' motion to stay the contempt proceedings pending appeal. JA 978a. As the court explained: "Although the respondents seek a stay of contempt proceedings, all of their arguments relate to the underlying subpoena enforcement action." Id. The court noted that it had previously stayed its production order long enough to give respondents time to seek a stay from the Third Circuit, which was denied. Id. The Court further found: "There is no question that the respondents have not complied with the Court's order

that they must produce documents responsive to the subpoenas. They are, therefore, in contempt of the Court's order." Id.

SUMMARY OF ARGUMENT

I. The district court did not abuse its discretion when it held Koresko, KAPC, and Penn-Mont in civil contempt for disobeying the court's order to produce documents subpoenaed by the Secretary. The Secretary met her burden of proving that (1) a valid court order existed, (2) the three contemnors had knowledge of the order, and (3) the three contemnors disobeyed the order. It was undisputed that Koresko and KAPC were in contempt. The district court also found, after a hearing, that Penn-Mont possessed responsive documents that it had not produced, and that finding is not clearly erroneous.

Nor have appellants demonstrated substantial compliance with the order. They certainly have not taken all reasonable steps to comply with the order, as they produced only a group of documents relating to one employer, the sole remaining member of a plan (DVL) that has been defunct since 1996 or 1997. They did not produce any documents relating to employers that belong to the successor plan (REAL), although they admitted they possess some 500 files containing some 125,000 documents responsive to the subpoena. Furthermore, appellants have never offered to produce original documents to the Secretary under conditions

(such as a temporary protective order) that would allow her to proceed with her investigation pending appeal.

II. The district court did not abuse its discretion when it imposed a coercive fine of $250 per day and a compensatory fine of $5312.50 for attorney's fees incurred by the Secretary on her renewed contempt motion. Both coercive and compensatory fines are typically available for civil contempt, and the amounts assessed are well within the dollar range for similar fines imposed within this Circuit. The provision of ERISA relied on by appellants, 29 U.S.C. § 1132(c)(6), has no bearing on a district court's power to impose sanctions for civil contempt of a court order. In addition, the law of this Circuit permits government counsel to request attorney's fees at a market rate.

III. The district court retained jurisdiction to hold appellants in contempt and impose appropriate sanctions, even after they appealed the underlying subpoena enforcement order (No. 04-3614) and filed a premature notice of appeal from the district court's January 10, 2005 order (No. 05-1440). Although a timely notice of appeal generally transfers authority from the district court to the circuit court over matters related to the appeal, that rule contains several exceptions that apply to this case.

First, a district court may use its contempt power to enforce a judgment that has not been stayed or superseded, and both the district court and this Court denied

appellants' motions to stay the underlying order to produce the subpoenaed documents. Second, a district court retains jurisdiction despite an appeal from a non-appealable order, such as appellants' premature appeal of the January 10, 2005 order in this case. Third, despite an appeal, a district court retains jurisdiction to award attorney's fees and impose sanctions, as the district court did in its April 25, 2005 order. Thus, the district court had jurisdiction to enter all the orders now on appeal.

IV. The proceedings below satisfied the requirements of procedural due process, as appellants had notice and an opportunity to be heard before they were held in civil contempt and sanctions were imposed. The district court held two hearings, on January 7 and March 16, 2005, before it held appellants in civil contempt on March 17, 2005. Although the March 17 order made the coercive fine retroactive to January 26, 2005, the judge had warned appellants of that consequence at the first hearing. Moreover, the factual predicate for holding Koresko and KAPC in contempt was undisputed at the January hearing. While some of the evidence concerning Penn-Mont was not introduced until the second hearing, the retrospective fine was, at most, harmless error because it was imposed jointly on all three contemnors and thus imposed no separate financial burden on Penn-Mont.

V. Appellants' remaining arguments (whether the district court properly considered their "interests" or their "defenses") all go to the validity of the underlying order to produce the subpoenaed documents. Therefore, under the collateral bar rule applicable in both civil and criminal contempt proceedings, those defenses were not subject to relitigation in the contempt proceedings below and are not properly before this Court in the contempt appeals.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING KORESKO, KAPC AND PENN-MONT IN CIVIL CONTEMPT

A. Standard of review

This Court reviews the imposition of civil contempt under an abuse of discretion standard and reverses only if there is an error of law or a clearly erroneous finding of fact. The Court reviews on a plenary basis whether the district court committed an error of law. John T. ex rel. Paul T. v. Del. County Intermediate Unit, 318 F.3d 545, 551 (3d Cir. 2003); Harris v. City of Philadelphia, 47 F.3d 1333, 1340 n.5 (3d Cir. 1995).

B. The Secretary met her burden of proving civil contempt

A party seeking to hold another in civil contempt must prove by "clear and convincing evidence" that "(1) a valid court order existed, (2) the defendant had knowledge of the order, and (3) the defendant disobeyed the order." John T. ex rel.

Paul T., 318 F.3d at 552. It is well-established that government agencies may ask a court to impose civil contempt if necessary to enforce administrative subpoenas to obtain documents pertinent to an investigation authorized by statute. See, e.g., United States v. Rylander, 460 U.S. 752 (1983) (IRS); Penfield Co. v. SEC, 330 U.S. 585 (1947). ERISA authorizes the Secretary of Labor to pursue contempt sanctions by incorporating the enforcement provisions of the Federal Trade Commission Act, 15 U.S.C. § 49. 29 U.S.C. § 1134(c).

In this case, it is undisputed that (1) a valid court order has existed since August 23, 2004, directing appellants to produce the documents subpoenaed by the Secretary; (2) appellants had knowledge of that order; and (3) Koresko and KAPC disobeyed the order by refusing to turn over documents in their possession and control. The only factual dispute regarding compliance concerns Penn-Mont.

Appellants claim that Penn-Mont is not in contempt because it did not possess any documents responsive to the subpoena (Br. 42), that the Labor Department submitted no evidence to prove that it did possess such documents (id.), and that the district court improperly shifted the burden to appellants to prove that they did not possess documents (id. at 34-35). None of those claims is correct.

The district court made a finding of fact that Penn-Mont possessed documents responsive to the subpoena that it had not produced, and that finding is not clearly erroneous. See supra pp. 9-11. At the March contempt hearing, the

Secretary introduced printouts from Penn-Mont's own website describing its business as "a certified benefits administrator and educator comprised of attorneys, accountants and financial professionals." JA 1035a (March 16, 2005 hearing); Pet. Ex. 2, p. 1. In addition, Koresko admitted that his brother, a non-lawyer, had an equity participation in Penn-Mont and that both he and his brother acted on behalf of DVL and REAL; and Bonney admitted that checks and other documents were routinely sent to Penn-Mont. See supra pp. 9-11. This evidence fully supports an inference that Koresko is running two businesses at the same location, a law firm (KAPC) and a plan administration firm (Penn-Mont) that sells and administers employee benefit products (life insurance and annuities) for employers. The district court did not shift the burden of proof to Penn-Mont, and its finding that Penn-Mont possesses documents responsive to the subpoena is not clearly erroneous.

C. Appellants have not demonstrated substantial compliance with the order

Appellants also argue (Br. 44-46) that they have produced (or tried to produce) enough documents to be in substantial compliance with the district court's production order. That assertion is without merit. This Court has never decided whether substantial compliance is a defense to civil contempt. See Robin Woods Inc. v. Woods, 28 F.3d 396, 399 (3d Cir. 1994). But even if it is, the substantial compliance standard is a demanding one that appellants do not come close to

meeting. "If a violating party has taken 'all reasonable steps' to comply with the court order, technical or inadvertent violations of the order will not support a finding of civil contempt." Id. (quoting General Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1379 (9th Cir. 1986)); accord Food Lion, Inc. v. United Food & Commercial Workers Union, 103 F.3d 1007, 1017 (D.C. Cir. 1997). In addition, because willfulness is not a necessary element of civil contempt, good faith is not a defense. John T. ex rel. Paul T., 318 F.3d at 552; Harley-Davidson, Inc. v. Morris, 19 F.3d 142, 148-49 (3d Cir. 1994).

In this case, appellants have by no means taken "all reasonable steps to comply with the court order." Robin Woods, 28 F.3d at 399 (internal quotation marks and citation omitted). Appellants argue (Br. 45) that "the request encompasses two Plans and the relevant documents as to one Plan have been provided." This argument is apparently based on the production of documents concerning SCM, the only employer remaining in DVL, which has been defunct since 1996 or 1997. See supra p. 9. Since all other employers now belong to REAL, and appellants admitted they possess some 500 files containing some 125,000 documents responsive to the subpoenas, it is obvious that they have produced only a minuscule percentage of the documents requested. Id., p. 8.

Appellants argue, without citation to the record below (Br. 44, 45), that they "offered redacted documents and DOL would not accept them." However, they

fail to explain precisely what information they sought to redact or how the Labor Department could possibly conduct an investigation without names and addresses of participating employers and employees, other plan service providers, or even the financial institutions where plan money was deposited.

Appellants also argue (Br. 44, 46) that the district court erred by rejecting their offer to produce allegedly privileged documents to the court to be retained under seal until all avenues of appellate relief are exhausted, as they argue is required by Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir. 1992). Haines, however, requires no such thing.

In Haines, a plaintiff in a wrongful death action against the tobacco industry sought to compel production of 1500 responsive documents that the defendants claimed were privileged as attorney-client communications or work product. 975 F.2d at 85. The district court appointed a special master, who determined that the documents were subject to the asserted privileges while, in the meantime, a magistrate judge determined that the plaintiffs had not made a sufficient showing that the crime-fraud exception to those privileges was applicable. Id. at 86-87. The district court adopted the special master's finding that all but six of the documents were privileged but, after conducting an in camera review of the evidence before the magistrate, as well as additional evidence, reversed the magistrate's findings, and found instead that the crime-fraud exception applied to at

least some of the documents under consideration and ordered their production. Id. at 88. The defendant tobacco companies then filed a writ of mandamus. Id.

This Court granted the writ, holding that because the district court's "critical conclusion that a crime-fraud exception to the attorney-client privilege exists was based on improper consideration of evidence that was not before the magistrate judge, the writ will direct that the district court's order and accompanying opinion be vacated insofar as it held that the crime-fraud exception precludes the application of the privilege." Haines, 975 F.2d at 93-94. The Court also addressed the fact that the district court failed to keep the materials that were indisputably subject to the attorney-client privilege under seal or to impose appropriate privacy procedures until the appeals were exhausted. The Court noted, with regret, that "[m]atters deemed to be excepted were spread forth in [the district court's] opinion and released to the general public." Id. at 97. Thus, although the district court had granted a stay of its order pending resolution of the mandamus action, by the time the Court issued its order "an unfortunate situation exist[ed] that matters still under the cloak of privilege have already been divulged." Id.

None of this has much to do with a situation like this case, where the district court held, in a subpoena enforcement/contempt proceeding by a federal agency, that the attorney-client privilege does not apply at all. Furthermore, what offended this Court in Haines was that arguably privileged material was "spread forth in [the

district court] opinion and released to the general public." 975 F.2d at 97. Nothing of that sort has occurred here, as no one (including the district judge) has seen the unredacted documents still being withheld by appellants, and this Court has now granted a stay pending resolution of the appeals in both the underlying subpoena enforcement action and the contempt proceedings.

Moreover, this Court later clarified, in Glenmede Trust Co. v. Thompson, 56 F.3d 476, 485 (3d Cir. 1995), that Haines was concerned only with public disclosure of arguably privileged information pending appeal, not with its disclosure to opposing parties and counsel. In Glenmede, the parties had already produced the disputed documents in discovery, but later sought a protective order to enforce a confidentiality agreement and prevent their public dissemination. Id. at 481, 482. This Court stated as follows:

> We did not intend, however, to establish a steadfast rule [in Haines] that protective orders must always issue to protect the privileged character of the materials sought in discovery until all avenues of appeal, including appeal from a final judgment, are exhausted. Requiring the issuance of a protective order in all circumstances where a district court has determined that an exception to the attorney-client privilege applies thwarts our policy of open proceedings absent a showing of good cause to close them.

Glenmede, 56 F.3d at 485.

Thus, if Haines and Glenmede are relevant to this proceeding at all, at most they stand for the proposition that appellants could have turned over the documents to the Labor Department (which they did not do), could have sought a protective

order limiting public disclosure pending appeal (which they did not do), and a court might have granted such a protective order (but likely would not have, as both the district court and this Court denied appellants' motions to stay the production order pending appeal).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING THE COERCIVE AND COMPENSATORY FINES

A. Standard of review

The standard of review of a district court sanction for civil contempt is "whether the district court abused its wide discretion in fashioning a remedy." Robin Woods, 28 F.3d at 399; Del. Valley Citizens' Council for Clean Air v. Pa., 678 F.2d 470, 478 (3d Cir. 1982). Compensatory sanctions should not exceed the actual loss suffered by the party that was wronged, United States v. United Mine Workers, 330 U.S. 258, 304 (1947), and should be tailored so that they do not unduly harm broader public interests. Elkin v. Fauver, 969 F.2d 48, 52 (3d Cir. 1992).

B. A coercive fine of $250 per day was not an abuse of discretion

In civil contempt proceedings, the classic example of a coercive fine is "a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order." Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 829 (1994). The amount of such a daily fine is within the discretion of the

trial court, and depends in part on the nature of and resources available to the party whose compliance is sought. For example, courts have assessed fines ranging from $100 a day for individuals, Donovan v. Mazzola, 716 F.2d 1226, 1239 (9th Cir. 1983) (ERISA plan trustees); Loftus v. Southeastern Pa. Transp. Auth., 8 F. Supp. 2d 464, 466 (E.D. Pa. 1998) (attorney), aff'd, 187 F.3d 626 (3d Cir. 1999), to $1000 a day for a public relations firm, Food Lion, 103 F.3d at 1016, to $10,000 a day for a state agency. Halderman v. Pennhurst State Sch. & Hosp., 673 F.2d 628, 635 (3d Cir. 1982).

The coercive fine assessed in this case is at the lower end of that range, and well within the discretion of the trial court. See JA 1057a (where the district court states, at the March 16 hearing: "I could do $1000 a day – which did cross my mind"). The three contemnors include an attorney, his law firm, and another firm that provides administrative services for a number of employee benefit plans. They have never asserted that they are individually or collectively unable to pay a fine of $250 per day, and apparently they have paid the fines accrued to date.

Appellants' only contention regarding the amount of the coercive fine is that ERISA caps it at $100 per day. Br. 49-50. This argument is based on a provision of ERISA allowing the Secretary of Labor to assess a civil penalty of $100 a day on a plan administrator who fails to provide certain documents in response to a request by the Secretary. 29 U.S.C. § 1132(c)(6). That provision, however, has

nothing to do with a district court's power to impose sanctions for civil contempt of a court order.

C. The $5312.50 compensatory fine was not an abuse of discretion

The prototypical compensatory fine, like the one in this case, reimburses the injured party for attorneys' fees and similar costs incurred as a result of the other party's contempt of court. For example, in Robin Woods, 28 F.3d at 399-400, this Court affirmed a compensatory fine of $68,505.72 in attorneys' fees payable by two individuals who were in civil contempt of a prior court order. In other cases, the amount levied has been only a few thousand dollars, as it was in this case. See, e.g., Loftus, 8 F. Supp. 2d at 466 ($4000 in attorneys' fees); United States v. Fesman, 781 F. Supp. 511, 516 (S.D. Ohio 1991) ($3175 payable to U.S. Marshal's Service); cf. Jones v. Clinton, 36 F. Supp. 2d 1118, 1132 (E.D. Ark. 1999) ($1202 in court's travel expenses plus attorneys' fees to be determined).

The district court ordered the Department of Labor to submit an itemized request for fees, and awarded only the portion of the amount requested that represented the costs of preparing and presenting the Department's renewed motion for civil contempt, not the fees related to its motion for incarceration. See JA 11a-12a (April 25, 2005 order). Appellants did not object to the amount sought, despite an opportunity to do so, and are apparently willing to expend a large amount of

resources to pay their own counsel to resist the subpoena and the court's orders. Therefore, this modest compensatory fine was not an abuse of discretion.

Appellants now contend (Br. 48) that the district court erroneously awarded fees on January 10, when the Secretary was not yet a prevailing party on the motion to hold appellants in contempt, and erroneously awarded fees for the motion to incarcerate Koresko, which still has not been granted. Both of those contentions are factually incorrect, as the court did not award the fees until April 25, and awarded only the portion of the fee request that pertained to the contempt motion. JA 11a-12a.

Finally, appellants contend (Br. 49), without any citation to legal authority, that the fee award was excessive because government attorneys cannot claim an hourly rate equivalent to an attorney with similar experience in private practice. That is not the law in this circuit, which permits government counsel to request a market rate. Napier v. Thirty or More Unidentified Fed. Agents, Employees, or Officers, 855 F.2d 1080, 1092-93 (3d Cir. 1988) (Rule 11 sanctions); cf. Blum v. Stenson, 465 U.S. 886, 895 (1984) (public interest lawyers may receive attorney's fees at market rates).

III. THE DISTRICT COURT HAD JURISDICTION OVER THE CONTEMPT PROCEEDINGS IN THIS CASE

A. Standard of review

Whether the district court had jurisdiction to hold appellants in contempt is a question of law subject to plenary review in this Court. John T. ex rel. Paul T., 318 F.3d at 551.

B. The district court retained jurisdiction to hold appellants in contempt and impose contempt sanctions despite their previous appeals

Appellants argue that the district court lost jurisdiction to take any further action in the contempt proceedings, either after they filed their first appeal (Br. 36) or after they filed their notice of appeal from the court's January 10, 2005 order (Br. 35). Appellants are wrong. While "[i]t is often said that filing a timely notice of appeal immediately transfers jurisdiction to the circuit court and divests the district court of jurisdiction over all matters relating to the appeal," that principle is a rule of thumb, not a limitation on the jurisdiction of the district courts, and is subject to many exceptions, several of which apply here. See generally 20 James Wm. Moore et al., Moore's Federal Practice § 303.32[1] (3d ed. 2005). The cases cited by appellants (Br. 36) are not on point because they recite only the general rule and fail to address the exceptions to this rule, including the exception for contempt proceedings.

Thus, appellants fail to acknowledge that a district court may act to enforce a judgment that has not been stayed or superseded. 20 Moore, supra, § 303.32[2][c][vi]. This exception plainly empowers district courts to use their contempt power to enforce a judgment or order that has not been stayed pending appeal. See, e.g., United States v. Campbell, 761 F.2d 1181, 1186 (6th Cir. 1985) (approving bench warrant to arrest appellant); Farmhand, Inc. v. Anel Engrg. Indus., 693 F.2d 1140, 1145-46 (5th Cir. 1982) (approving contempt proceedings to enforce unstayed injunction); Brown v. Braddick, 595 F.2d 961, 964-65 (5th Cir. 1979) (approving contempt proceedings to enforce discovery order); see generally 16A Charles Alan Wright et al., Federal Practice and Procedure § 3949.1 & n. 28 (3d ed. 1999). Thus, appellants' subsequent notices of appeal did not deprive the district court of jurisdiction over the contempt proceedings, as appellants recognized when they finally asked this Court to stay those proceedings in August of 2005. "If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal." Maness v. Meyers, 419 U.S. 449, 458 (1975); United States v. Stine, 646 F.2d 839, 845 (3d Cir. 1981).

Moreover, a district court may act when there has been an appeal from a non-appealable order. Sheet Metal Workers' Int'l Ass'n Local 19 v. Herre Bros., Inc., 198 F.3d 391, 394 (3d Cir. 1999); 20 Moore, supra, § 303.32[2][b][iv][B]. In

this case, appellants' notice of appeal from the January 10, 2005 order (No. 05-1440) was premature because that order neither held them in contempt nor imposed any sanctions. See supra p. 14 (text of order); Apex Fountain Sales, Inc. v. Kleinfeld, 27 F.3d 931, 934-35 (3d Cir. 1994) (civil contempt order is not final and appealable until both liability and sanction are determined). The January 10, 2005 order was simply a warning; if appellants had obeyed the underlying order to produce documents after this Court declined to stay that order, they would not have been held in contempt or subjected to any sanctions. Therefore, appellants' first notice of appeal had no effect on the district court's continuing jurisdiction.

In short, the district court had jurisdiction to hold appellants in contempt and impose a coercive fine on March 17, 2005, because neither the prior substantive appeal (No. 04-3614) nor the premature appeal of the January 10, 2005 order (No. 05-1440) deprived it of jurisdiction, and none of its prior orders had been stayed.

Finally, despite an appeal, a district court has jurisdiction to award attorney's fees and impose sanctions. Sheet Metal Workers, 198 F.3d at 394; 20 Moore supra, § 303.32[2][b][iii]. Thus, the district court had jurisdiction to impose a compensatory fine on April 25, 2005, because its prior orders had not been stayed and because the fine related only to attorney's fees as an additional compensatory sanction.

IV. THE PROCEEDINGS SATISFIED DUE PROCESS STANDARDS

By erroneously treating the January 7 and March 16 hearings as two separate proceedings, and by mischaracterizing the January 10 order as a final adjudication of contempt, appellants make a convoluted argument (Br. 29-35) that they were somehow deprived of an opportunity to introduce relevant evidence before they were held in contempt. That argument is completely unsupported by the record.

Civil contempt sanctions "may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard." Bagwell, 512 U.S. at 827; Newton v. A.C. & S., Inc., 918 F.2d 1121, 1127 (3d Cir. 1990). "These customary procedural safeguards ensure that the parties or their attorneys have an opportunity to explain the conduct deemed deficient before the fine is imposed and that a record will be available to facilitate appellate review." Id. However, an evidentiary hearing is unnecessary if "the relevant facts are undisputed" and "the only question remaining is whether those facts justified a finding of contempt." Harris, 47 F.3d at 1340.

In this case, the district court held not just one but two hearings (on January 7 and March 16, 2005) before it held Koresko, KAPC and Penn-Mont in civil contempt and imposed a $250 per day coercive fine. See supra pp. 11-14 (describing the hearings). Both Koresko (an attorney) and his counsel were present at the January 7 hearing, and Koresko was free to testify at that time had he chosen to do so. At that hearing, the judge described exactly what she planned to include

in her next order, and invited appellants to comment before she did so. She then issued the January 10 order containing the provisions she described at the hearing. Furthermore, as of January 7, all the facts relevant to a finding of civil contempt were undisputed except whether Penn-Mont possessed documents responsive to the subpoena. See supra pp. 8, 11-12.

However, the January 10 order did not hold anyone in civil contempt. It was worded in the future tense: "If Respondents fail to comply with the Court's Order [within 24 hours after this Court denies a stay pending appeal], those Respondents in possession of documents responsive to the subpoenas will be . . . Adjudged in Civil Contempt" and required to pay specified fines. JA 3a-4a.

The district court opened the second hearing, on March 16, 2005, by describing it as a "continuation of the hearing that we had earlier." JA 1004a. The court invited counsel for appellants to put on her witnesses, and one such witness, Bonney, testified at some length, although again Koresko was present but chose not to testify. See supra pp. 12-14. Most of the evidence concerned whether Penn-Mont possessed responsive documents, and the court eventually made a finding that it did. She then issued an order on March 17 holding Koresko, KAPC and Penn-Mont in contempt, and imposing a $250 per day coercive fine beginning on January 26, 2005 (two days after this Court denied the stay on rehearing). JA 6a-7a.

Appellants argue, citing Newton, supra, that this procedure amounted to an impermissible "post-deprivation" hearing, and that somehow they were "prospectively" held in contempt on January 10 (before they were allowed to present evidence), not on March 17 (after Bonney had testified). See Br. 29-35. But that is not an accurate description of what happened in the proceedings below. A review of the complete transcripts of the two hearings shows that the district court gave appellants every opportunity to comply with its order or explain why they could not, but was frustrated at every turn by their lack of cooperation. Due process requires no more.

Moreover, it is clear that the district court did not hold anyone in civil contempt until after the March 16 evidentiary hearing. It is true that the coercive fine she imposed on March 17 was retrospective to January 26, 2005. However, that fine was levied as a single daily sum on all three parties held in contempt, and it was undisputed in January that Koresko and KAPC were in contempt of the court's August 2004 order. At most, then, the district court could be faulted for imposing retrospective liability on Penn-Mont, although that decision was likely harmless error because of the close relationship among the three parties held in contempt and the fact that the fine was assessed jointly against all three. If this Court disagrees, it need only reverse Penn-Mont's joint liability for the coercive fine (which has already been paid) between January 26 and March 16, 2005.

V. APPELLANTS CANNOT CHALLENGE THE VALIDITY OF THE DISTRICT COURT'S ORDER TO PRODUCE DOCUMENTS IN THIS CONTEMPT APPEAL

A. Standard of review

The Court conducts plenary review over conclusions of law underlying a finding of contempt. Harris, 47 F.3d at 1340 n.5.

B. The validity of the district court's underlying order to produce documents is not subject to collateral attack in this contempt appeal

The remaining arguments made by appellants in this appeal (and in the contempt proceedings below) actually concern the validity of the district court's underlying August 23, 2004 order to produce documents, not the contempt proceedings. For instance, appellants argue that the district court failed to consider their "interests" and their "defenses" by refusing to reconsider their claims of attorney-client privilege, or their contention that DVL and REAL are not ERISA-covered plans. Br. 3, 9-10 n.5, 17, 35, 37-42. Of course, as the district court repeatedly reminded appellants, see supra p. 13, those issues are not open to reconsideration in a contempt proceeding.

The Supreme Court has long held that "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." Rylander, 460 U.S. at 756; Maggio v. Zeitz, 333 U.S. 56, 69 (1948); Oriel v. Russell, 278 U.S. 358, 363 (1929). This collateral bar rule applies to both civil and criminal

contempt, regardless of the nature of the underlying dispute. See, e.g., Rylander, 460 U.S. at 752 (civil contempt for disobeying IRS summons); Walker v. City of Birmingham, 388 U.S. 307 (1967) (criminal contempt for disobeying injunction that raised serious constitutional questions); Harris, 47 F.3d at 1337 (civil contempt for violating consent decree); Northeast Women's Ctr., Inc. v. McMonagle, 939 F.2d 57, 68 (3d Cir. 1991) (civil contempt for violating injunction); Halderman, 673 F.2d at 637 (same).

Accordingly, the district court was fully justified in refusing to permit appellants to reargue defenses they had already raised and the court had already rejected in the subpoena enforcement proceeding.

CONCLUSION

This Court should affirm the March 17 and April 25, 2005 orders of the district court, and should lift its August 15, 2005 stay of the contempt proceedings in the district court.

Respectfully submitted,

HOWARD M. RADZELY
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor for
Plan Benefits Security

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation

Ellen L. Beard

ELLEN L. BEARD
Senior Appellate Attorney
U.S. Department of Labor
Room N-4611
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5767

SEPTEMBER 2005

CERTIFICATES OF COMPLIANCE

Certificate of Bar Admission

No certification is required for attorneys representing the federal government.

Certificate of Compliance with Type-Volume Limitations, Virus Scan and PDF Duplication

Pursuant to Fed. R. App. P. 32(a)(5), (6), and (7), I hereby certify that the brief for the petitioner-appellee, Elaine L. Chao, Secretary of Labor, complies with the typeface, style and volume requirements because it was prepared using Microsoft Office Word 2003 utilizing the Times New Roman 14 point font and contains 8,616 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

Furthermore, I certify that the text of the brief transmitted to the Court as a PDF file is identical to the text of the paper copies mailed to the Court and counsel of record. In addition, I certify that the PDF file was scanned for viruses using VirusScan Enterprise 7.1 by McAfee Security. The scan indicated there were no viruses present.

Ellen L. Beard

ELLEN L. BEARD
Senior Appellate Attorney

CERTIFICATE OF SERVICE

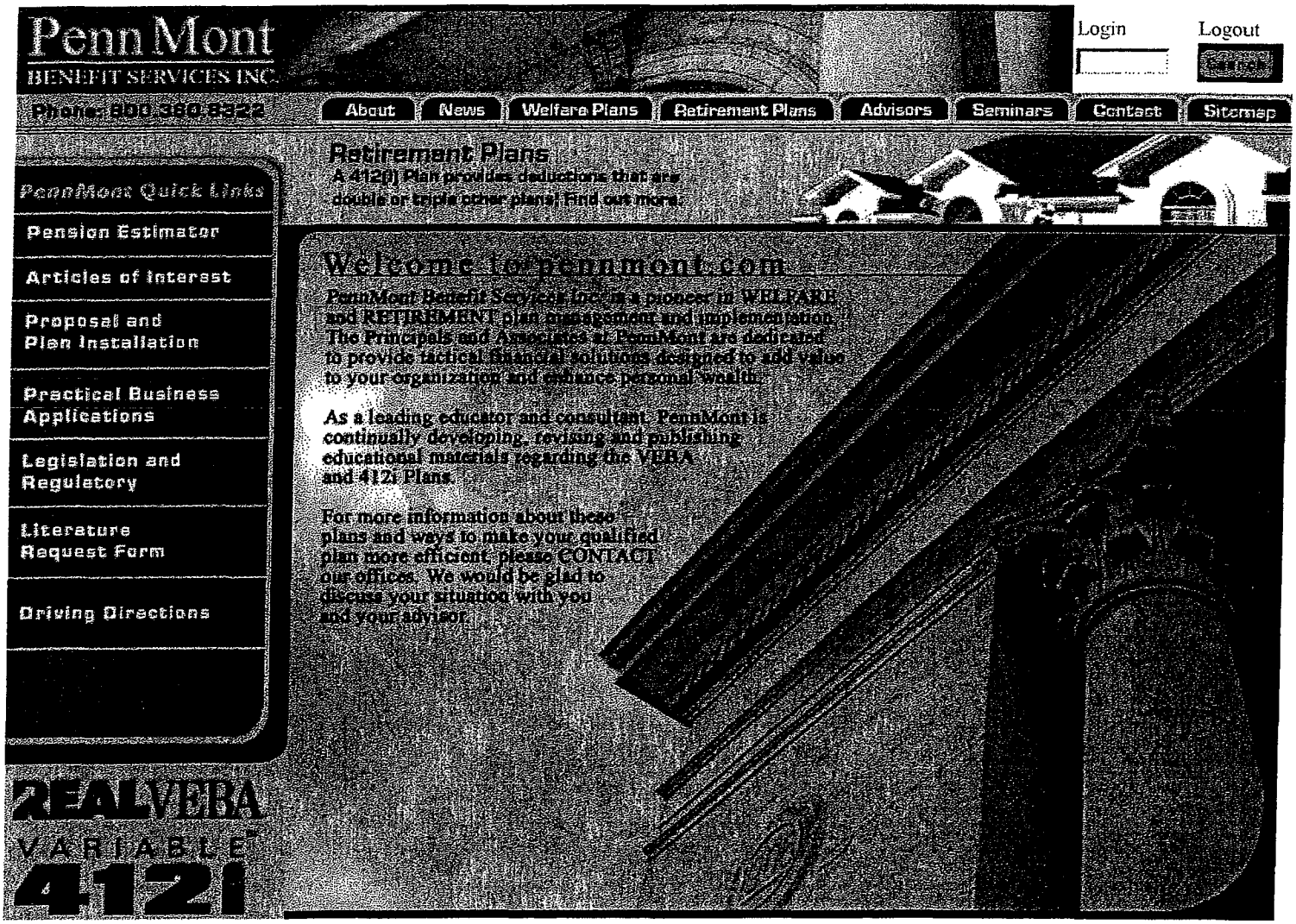
I hereby certify that on September 2, 2005, two paper copies of the brief for the appellee, Elaine L. Chao, Secretary of Labor, United States Department of Labor, were served using Federal Express, postage prepaid, upon the following counsel of record:

Virginia I. Miller, Esq.
Anderson Kill & Olick, P.C.
1600 Market Street
Suite 2500
Philadelphia, PA 19103
215-568-4202

Ellen L. Beard

ELLEN L. BEARD
Senior Appellate Attorney

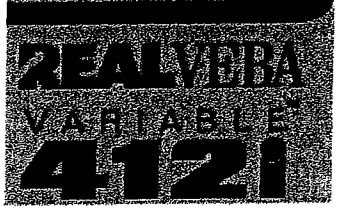
ADDENDUM A



Pehtners Ex 1

ADDENDUM B

PennMont Quick Links
Pension Estimator
Articles of Interest
Proposal and Plan Installation
Practical Business Applications
Legislation and Regulatory
Literature Request Form
Driving Directions



Advisors

PennMont Benefit Services, Inc.

PennMont Benefit Services ("PM") is a certified benefits administrator and educator comprised of attorneys, accountants and financial professionals. We provide plan design, proposal generation, plan documents, and plan administration in numerous venues. This guide is intended to assist you when doing 412(i) business with us.

What is a 412(i) Plan?
412(i) is a method of funding a pension plan that guarantees payment at retirement. The plan is funded entirely with insurance contracts, rather than stocks or bonds. Put simply, these plans are "private social security." Just as the government guarantees a monthly check at retirement, 412(i) requires an insurance company to do the same. The benefit is based on guaranteed rates which are filed and approved by each state. This has a powerful advantage over other types of pension plans. A plan funded solely with insurance contracts is exempt from some of the complicated regulations governing other pension plans. As a result, your client avoids certain tax filings, actuarial costs and fees for IRS approval. There is less regulation because benefits are fully guaranteed by the insurance carrier. As only enough money can be paid into the plan for premium which provides guaranteed benefits, there can be no overfunding or underfunding problems. PennMont's plan design and turnkey documents already have IRS approval, so the plan is less expensive to administer. While inside the plan, assets grow income tax deferred and are protected from creditors.

Section I. General Information

Plan Sponsor: Individual Employers

Plan Administrator:
Penn-Mont Benefit Services, Inc.
200 W. Fourth Street
Bridgeport PA 19405
Tel 610 992 0833
Fax 610 992 1091

Plan Trustee
Community Trust Company
200 W. Fourth Street
Bridgeport PA 19405
Tel 610 992 0833
Fax 610 992 1091
Email Jbonney@pennmont.com
Contact Jeanne D. Bonney, Esquire

Principal Marketer - Insurance Agent of Record
Penn-Mont Benefit Services, Inc.

Section II. Pennsylvania Insurance Licensing and the Application Process

Petitioner's Exhibit 2

Pennsylvania applications are to be used for all insurance contracts because it is the situs of the Defined Benefit Trust. You must be Pennsylvania non-resident licensed to be on the application. Do NOT complete the applicant/owner/beneficiary information. The applications are sent to PM for processing, and PM will forward them to the carrier. No applications will be processed until the adoption documents are executed and the $2,500 nonrefundable installation fee paid. All policies come to PM for delivery.

Section III. Products
Whole Life, Universal Life, Fixed Annuity, Variable Annuity with Guaranteed Retirement Income Rider

Section IV. Compensation and Fees
Compensation: Penn-Mont/Agent
You engage PennMont for the valuable services set out below with the agreement and understanding that you will split any commissions earned on concepts presented to you by PennMont, based on the following servicing schedule. Agent is also bound to use PennMont as the third plan administrator (TPA). The basic split is 10% PM; 90% Agent. For enhanced services, including cross testing, the split is 20% PM; 80% Agent.

Fees:
$2500 Adoption and Installation (1st year only)
$2500 Annual base administration
$35 Annual charge for each participant
$500 Annual Trustee fee
$250 Plan Amendment
$5000 Plan Termination

Section V. Administration & Support Services
Penn-Mont Benefit Services ("PM") will provide you with the following services:

- Plan Design
- Online Defined Benefit Estimator
- Proposal Generation upon receipt of proposal request
- Installation upon receipt of request for documents
- Plan Administration
- Sales Material and Field Support

Plan Design
PM staff is available to speak with sales representatives who have questions about 412(i) plans. We will help them develop an acceptable design that fits their client's goals. For example, having too many employees may make a 412(i) plan cost-prohibitive. That employer may benefit by a cross-tested plan.

- Larger percentage of case to HCE group
- Larger potential target market
- Cross-Tested Plan makes a case more acceptable to owners and thus saleable!

OnLine Defined Benefit Estimator
For a quick look at the maximum benefit your client may receive and the maximum deductible contribution that can be taken, go to THE ESTIMATOR for a free proposal system

Proposal Generation upon Receipt of Proposal Request Form
Upon receipt of a completed and signed proposal request form, a copy of which is reproduced at the end of this text, PM will provide a proposal for agents. PM will prepare and email the proposal back to you in adobe format. PM targets a turn-around period of five business days for proposal creation. IT IS VERY IMPORTANT

THAT THE REQUEST BE COMPLETED IN FULL. Partially completed requests will not be processed. CLICK HERE to complete the proposal request form

Installation upon receipt of request for documents
PM will provide 412(i) documents and supporting paperwork necessary to install the plan.

Plan Administration
PM plan administration services include the preparation and audit of the installation document; Summary Plan Description, IRS/DOL reports & forms, participant benefit statements, calculations for contributions, benefits, 5500 preparation, eligibility, plan amendment and/or termination.

Sales Material and Field Support
PM's staff is able to assist agents with questions regarding 412(i), qualified retirement plans and employee welfare benefit plans. PM provides more detailed assistance in the event the agent requires additional help. PM also offers accredited regional continuing education seminars on this and other topics. We suggest agents attend our meetings with their support staff in order to familiarize themselves with our staff. PM also recommends using www.pennmont.com as an important resource.

PM also has available client brochures, advanced agent manuals, third party articles, generic power point presentations, downloadable web-based conference calls and education seminars. PM specializes in advanced business applications and estate planning ideas in the design of your client's plan, including the use of cross testing to reduce the cost of providing numerous employees with a defined benefit.

Section VI. Plan Design & Operation
The actuarial calculation relating to a 412(i) plan is based upon low insurance company guarantees. This generates significant deductions for an employer. Following are some examples of initial tax-deductions 412(i) can provide:

Age	Years to retirement			
	10	12	15	20
55	$265,475	$214,784		
53	$267,103	$214,462	$166,906	
50	265,605	213,806	165,238	
48	297,091	231,885	170,616	
45	309,663	241,343	177,764	116,984
43		248,216	185,630	120,229
40			190,828	125,697

How are such large deductions achieved?
The Plan uses conservative interest rates that are guaranteed by an insurance company. These rates are significantly less than a traditional defined benefit plan. As a result, the 412(i) deductions are much larger. The lower the plan assumptions are, the greater the required contribution. The inverse relationship between interest rates and deductions is the key. It's that simple.

Requirements
In order to provide these valuable benefits, the plan must meet certain requirements:

- Plan may only be funded with insurance company products
- The insurance company must guarantee the benefits
- All premiums must be paid
- The policies may not be pledged as a security interest
- Policy loans are prohibited
- Insurance must have a level premium which are part of the same series. Any earnings will be used to reduce future premium payments

Plan Options
As a plan evolves, an employer may require changes. 412(i) has several options, limited to GATT amounts:

1. The Plan may continue unchanged. The plan will continue to provide the retirement benefit. Employer contributions will decrease over time.

2. Restate the plan to a traditional defined benefit plan that also provides life insurance. These plans are often referred to as "split-funded". This offers an employer the flexibility to provide a death benefit. It also results in lower future employer contributions since the actuarial rate will increase by more than 50%. The result may be little or no further required contributions by the employer.

3. Restate the plan to a traditional defined benefit plan with no life insurance. This is similar to option 2 except contributions may decrease even further any future employer contributions

4. Terminate the plan and distribute the annuity and life insurance cash value to the employees IRA.

What is a GATT limit?
The Retirement Protection Act (RPA) of 1994 (a provision with the General Agreement on Tariffs and Trade "GATT" legislation) affects the maximum lump sum that may be paid from the 412(i) plan at retirement or termination of employment. The maximum lump sum payable is limited to that provided under GATT-specified interest rate and mortality. Any amount in excess of Point A is a reversion and excise taxable if the plan is terminated prior to its completion. Your GATT limited amount is shown below as Point A. In most cases, this will reduce the maximum amount that can be paid from the defined benefit plan in the form of a lump sum. To avoid accumulating more assets in the contract that can be paid out, the benefits to be funded should be reduced. Although this decreases the deduction compared to pre-GATT provisions, the deduction is still significantly higher in 412(i) plans than could be generated in any other qualified plan type. This provision affects only those benefits at or close to the Section 415 dollar limit and only if taken as a lump sum.

What type of business can adopt the plan?

Virtually any business can adopt 412(i). Benefits are based on years of service & compensation but exclude unearned K-1 income.

- Sole proprietorship
- Partnership
- LLC
- C-corporation
- Sub Chapter S Corporation

The Variable 412(i)™ Advantages

- Maximum current tax deduction
- The deduction potential for variable 412(i) is substantially higher than a non-fully insured defined benefit plan or traditional 412(i) plan funded with whole life and fixed annuities.
- No complex "funding" limitations
- Can't be over or under funded

- Investment flexibility
- Variable life insurance and/or varibale annuity contracts reduce the compromises of long-term economics one normally sees in a pension plan funded with fixed insurance products.
- Investors will not have to forgo upside investment performance. Traditional 412(i) Plans use whole life and fixed annuity policies. Variable insurance products offer investment selections for unlimited upside performance.

- Accrued benefit easy to understand
- Equal to contract cash value
- Variable 412(i)™ Plans may be funded faster due to greater investment return.
- Reduces future employer obligations.
- No quarterly contribution requirement
- Normally funded annually
- Lower Administrative Costs
- No expensive actuarial certification required

Plan 831TM

Your client may also benefit by combining 412(i) with a 419 Plan. The 412(i) would have annuitiesy only, and the single employer plan would have a guaranteed death benefit and a guaranteed premium to retirement age.

- Maximum sale potential
- Larger possible target market
- Largest percentage of case to HCE group
- Least exposure to allegations of unsuitable investment and ERISA violations
- NO impediments to using Variable Products