UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

ELAINE L. CHAO, Secretary of the United States Department of Labor,	:	
Plaintiff,	:	
	:	CIV. ACTION NO.
v.		07-11474-DPW
	:	
PLAN BENEFIT SERVICES, INC.	:	
Defendant.		

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Elaine L. Chao, Secretary of Labor, United States Department of Labor (the "Secretary" or "DOL"), submits the following Memorandum in support of her Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The DOL is entitled to summary judgment as a matter of law because the undisputed facts show defendant Plan Benefit Services, Inc. ("Plan Benefit"), in its capacity as the Master Plan Sponsor of the Contractors and Employees Retirement Plan and Trust (the "Master Plan"), has been violating the provisions of Title I of the Employee Retirement Income Security Act ("ERISA" or the "Act"), 29 U.S.C. §1001 et. seq., from January 1, 2005 through the present.

SUMMARY OF ARGUMENT

The Master Plan provides a means for employers who adopt it to provide pension benefits to employees performing work on prevailing wage projects. The pension benefits are funded through the deposit of employer contributions into the Contractors and Employees Retirement Plan Master Trust (the "Master Trust"). Each plan's contractual right to receive those employer contributions is a plan asset.

Under Section 403 of ERISA, 29 U.S.C. § 1103, absent another permissible delegation, the Trustee for the Master Trust has exclusive authority and discretion to manage and control all assets belonging to the Master Trust.[1] The Trustee's authority includes the obligation to protect plan participants by monitoring and collecting contributions owed by each employer to the Master Trust for the benefit of its employees. Further, Section 410 of ERISA, 209 U.S.C. § 1110, provides that any provision in an agreement or instrument that purports to relieve a fiduciary, including a trustee, from responsibility or liability for fulfilling its statutory obligations under ERISA is void as against public policy.[2]

Plan Benefit, in its capacity as the Master Plan Sponsor from January 2005 through the present, has had a duty to ensure the Trustee complies with its responsibility to monitor and collect employer contributions. Instead of fulfilling its fiduciary duties, Plan Benefit has

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[1] 29 U.S.C. § 1103(a) provides as follows:

> . . . all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 402(a) or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that – (1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this Act, or (2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 402(c)(3).

[2] 29 U.S.C. § 1110(a) provides as follows:

> (a) Except as provided in section 405(b)(1) and 405(d) [these sections refer to situations that involve two or more trustees or an investment manager], any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation or duty under this part shall be void as against public policy.

expressly undermined ERISA's statutory protections by drafting and implementing the Master Plan, and the Contractors and Employees Retirement Plan Master Trust Agreement (the "Master Trust Agreement") in a manner that explicitly absolves the Trustee of responsibility for monitoring and collecting employer contributions. Under these documents, as currently drafted, no party bears these responsibilities. Plan Benefit's implementation of the Master Plan and the Master Trust Agreement contravenes both Sections 403 and 410 of ERISA.

By engaging in the foregoing conduct, Plan Benefit has breached its duties of loyalty and prudence under Section 404 of ERISA, 29 U.S.C. § 1104, to the participants whose employers have adopted the Master Plan.[3] The DOL therefore seeks an Order from this Court enjoining Plan Benefit from violating ERISA and requiring Plan Benefit to modify the Master Plan and/or Master Trust Agreement to ensure that a fiduciary authorized pursuant to Section 403 of ERISA, and independent of the individual employers that have adopted the Master Plan, becomes responsible for the monitoring and collection of currently outstanding and future delinquent employer contributions.

[3] 29 U.S.C. § 1104(a)(1)(A) and (B) provide as follows:

> . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) 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; . . .

UNDISPUTED FACTS

The Master Plan is a master plan that has been adopted by numerous employers (the "Participating Plans"). (Secretary of Labor's Statement Of Undisputed Material Facts Pursuant to Local Rule 56.1 ("Rule 56.1") at ¶1-2.) The Participating Plans are also governed by the Master Trust Agreement. (Rule 56.1 at ¶8.) The Participating Plans are employee benefit plans within the meaning of Section 3(2) of ERISA, 29 U.S.C. §1002(2)[4] and are subject to coverage of the Act pursuant to Section 4(a) of ERISA, 29 U.S.C. §1003(a).[5] (Rule 56.1 at ¶¶3-4.)

One of the purposes of the Master Plan is to allow employers who adopt the Master Plan to provide retirement benefits to employees who work under public contracts subject to the Davis-Bacon Act, Service Contract Act or any other federal, state or municipal prevailing wage laws. (Rule 56.1 at ¶12.) Employer contributions to the Participating Plans are required to be deposited into the Master Trust. (Rule 56.1 at ¶14.)

Linskey Construction, Inc. ("Linskey") adopted the Master Plan in approximately 1991. (Rule 56.1 at ¶10.) Linskey is a corporation with an office and place of business in Salem,

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[4] 29 U.S.C. § 1002(2) provides as follows:

> . . . the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program;
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, . . .

[5] 29 U.S.C. § 1003(a) provides as follows:

> . . . this title shall apply to any employee benefit plan if it is established or maintained – (1) by any employer engaged in commerce or in any industry or activity affecting commerce; . . .

Massachusetts. (Rule 56.1 at ¶9.) The Master Plan adopted by Linskey is currently being administered in Salem, Massachusetts. (Rule 56.1 at ¶11.)

Plan Benefit has been the Master Plan Sponsor from January 1, 2005 through the present. (Rule 56.1 at ¶7.) From January 2005 through the present, Plan Benefit, in its role as the Master Plan Sponsor, has (i) had the authority to appoint and remove the Trustee for the Master Trust (the "Trustee"); (ii) had the right and power to amend the Master Plan, the Master Trust Agreement and the form of the Adoption Agreement without the consent of the employers who adopted the Master Plan; and (iii) been responsible for approving "reasonable compensation" to the entity serving as the Trustee, which reasonable compensation may be paid out of the Master Trust. (Rule 56.1 at ¶¶15-16, 18-19.)

From January 2005 through the present, Plan Benefit has also been the "Recordkeeper" for the Participating Plans. (Rule 56.1 at ¶20.) In its capacity as the Recordkeeper, Plan Benefit has, from January 2005 through the present, had (i) the power and responsibility for computing, certifying and directing the Trustee with respect to the amount and form of benefits to which a participant may be entitled under the Master Plan; (ii) the power and responsibility for authorizing and directing the Trustee with respect to disbursements from the Master Trust; (iii) the power and responsibility for interpreting the provisions of the Master Plan and preparing and publishing rules and regulations for the Master Plan which are not inconsistent with its terms and provisions; and (iv) all powers necessary or appropriate to accomplish its duties and responsibilities, including the power to determine all questions arising in connection with the administration, interpretation, and application of the Master Plan. (Rule 56.1 at ¶¶21-24.)

The Master Plan and the Master Trust Agreement do not authorize either (1) a named fiduciary to direct the Trustee, or (2) appointment of an investment manager. (Rule 56.1 at ¶¶28-

30.) The Trustee has the sole discretion to invest, manage, hold and control the assets of the Master Trust. (Rule 56.1 at ¶31.) The Master Plan and the Master Trust Agreement explicitly state that the Trustee is not responsible for collecting and monitoring employer contributions. (Rule 56.1 at ¶32).

ARGUMENT

I. THE COURT SHOULD GRANT THE DOL'S MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate where "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Coffin v. Bowater, Inc., 501 F.3d 80, 85 (1st Cir. 2007); see also Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (stating that the summary judgment procedure is "an integral part of the Federal rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action'").

ERISA, the culmination of a decade of legislative effort, is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983); Henkin v. Northrop Corp., 921 F.2d 864, 867 (9th Cir. 1990). Sections 403 and 404 of ERISA are integral parts of that statutory framework. Indeed, the Second Circuit has stated that the fiduciary obligations imposed under § 404 of ERISA, known as the "duty of loyalty" and the "duty of care," are the "highest known to the law." Donovan v. Bierwirth, 680 F.2d 263, 272, n. 8 (2d Cir. 1982). The Court should grant the DOL's motion for summary judgment because the undisputed facts show that Plan Benefit violated its duties of loyalty and care by failing to ensure compliance with Section 403 of ERISA.

A. Plan Benefit Is A Fiduciary To The Participating Plans Under ERISA

Plan Benefit has broad responsibilities under the Master Plan and the Master Trust Agreement. Those responsibilities include, among other things, the right to appoint and remove the Trustee. (Rule 56.1 at ¶¶ 15-16.) It is well established in the case law that having and invoking the power to appoint and remove plan fiduciaries constitutes "discretionary authority" over the management or administration of a plan within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1003(21)(A).[6] Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1465 (4th Cir. 1996); Batchelor v. Oak Hill Med. Group, 870 F.2d 1446, 1449 (9th Cir. 1989); Hickman v. Tosco Corp., 840 F.2d 564, 566 (8th Cir. 1988); Kling v. Fidelity Management Trust Co., 323 F. Supp.2d 132, 142-43 (D. Mass. 2004); In re Enron, 284 F. Supp.2d 511, 552-553 (S.D. Tex. 2003); Mehling v. New York Life Ins. Co., 163 F. Supp.2d 502, 509-510 (E.D. Pa. 2001); Liss v. Smith, 991 F. Supp. 278, 310-311 (S.D.N.Y. 1998); see also ERISA Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8 at D-4 (stating that board of directors with power to select and retain plan fiduciaries is a fiduciary). Plan Benefit has been a fiduciary to the Participating Plans, from January 2005 through the present, under Section 3(21)(A)(i) and (iii) of ERISA, 29 U.S.C. § 1003(21)(i) and (iii).

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[6] 29 U.S.C. § 1003(21)(A) provides as follows:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, … or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. . . .

B. Plan Benefit Has Violated Section 404 (a)(1)(A) and (B) of ERISA

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), imposes broad obligations on fiduciaries for the protection of participants and beneficiaries. The "duty of loyalty" set forth in ERISA § 404(a)(1)(A) requires fiduciaries to act with "complete and undivided loyalty to the beneficiaries of the trust" and with an "eye single to the interests of the participants and beneficiaries." See, e.g., Leigh v. Engle, 727 F. 2d 113, 123 (7th Cir. 1984) (citing Freund v. Marshall & Ilsley Bank, 485 F.Supp. 629, 639 (W.D. Wis. 1979) and Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir.), cert. denied, 459 U.S. 1069 (1982)).

Additionally, the "duty of care" set forth in ERISA § 404(a)(1)(B) requires each fiduciary to act with the care, skill, prudence, and diligence that a prudent person in a like capacity and familiar with such matters would employ. Further, the test as to whether appropriate care was exercised is objective and imposes a high standard of conduct. See Katsaros v. Cody, 744 F.2d 270, 279 (2nd Cir. 1984); Donovan v. Bierwirth, 680 F.2d at 272, n.8; see also Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983) (stating that "a pure heart and an empty head are not enough").

1. Plan Benefit's Implementation of The Master Plan And Master Trust Agreement Violates Section 403 of ERISA

Section 403(a) of ERISA provides that a trustee to a pension plan is solely responsible for the management and control of plan assets, except to the extent that: (1) the plan expressly provides that the trustee is subject to the proper directions of a non-trustee named fiduciary, or (2) a named fiduciary with responsibility for management and control of plan assets is authorized by the plan to delegate such responsibility to an investment manager. 29 U.S.C. § 1103(a). The Master Plan and Master Trust Agreement do not authorize either a named fiduciary to direct the

Trustee or appointment of an investment manager. (Rule 56.1 at ¶¶28-30.) Therefore, under § 403 of ERISA, the Trustee has at all relevant times retained sole responsibility for the management and control of plan assets.

The Participating Plans' contractual right to receive employer contributions to which they are entitled is a plan asset. In Re Luna, 406 F.3d 1192, 1200 (10th Cir. 2005); Employee Benefits Security Administration Field Assistance Bulletin No. 2008-01 at *2 (February 1, 2008) ("EBSA FAB No. 2008-01"), www.dol.gov/ebsa/pdf/fab2008-1.pdf (stating that "when an employer fails to make a required contribution to a plan in accordance with the plan documents, the plan has a claim against the employer for the contribution, and that claim is an asset of the plan"); United States Department of Labor Advisory Opinion No. 93-14A (May 5, 1993), www.dol.gov/ebsa/programs/ori/advisory93/93-14a.htm (stating that the assets of a welfare plan would include any property, tangible or intangible, in which the plan has a beneficial ownership interest); cf. ITPE Pension Fund v. Hall, 334 F.3d 1011, 1014, n.4 (11th Cir. 2003) (discussing difference between employer contributions that are plan assets because they are defined by the plan as "receivable property," and employer contributions that are not plan assets where they are defined as "receivables," in which case the plan asset is the contractual or legal claim for payment of employer contributions); United States v. LaBarbara, 129 F.3d 81, 88 (2d Cir. 1997) (stating that, "[o]nce wages were paid to Local 66 members, [the employer] had contractual obligations to the Funds that constituted 'assets' of the Funds by any common definition").

The Trustee has the sole and non-delegable duty to properly manage the plan asset that is the Participating Plans' right to receive all employer contributions to which they are entitled. That duty includes being responsible for taking all necessary and appropriate action to collect employer contributions to which the Participating Plans are entitled. See Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 571, 573 (1985) ("ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled…" and "section 1106(a)(1)(B) … would certainly create a trustee responsibility for assuring full and prompt collection of contributions owed to the plan"); Wilkins v. Mason Tenders District Council Pension Fund, 445 F.3d 572, 580 (2d Cir. 2006) ("…if trustees took no effective action to ensure that the Fund received the contributions it was due, such a failure might well constitute a dereliction of fiduciary duty…"); In Re Luna, 406 F.3d at 1205-06 (trustees, not employer, exercise control over the plan asset which is the contractual right to unpaid contributions); Best v. Cyrus, 310 F.3d 932, 935 (6th Cir. 2002) (trustee has duty to seek collection beyond those specified in the trust documents, which cannot excuse him from his responsibilities); Diduck v. Kaszycki & Sons Contractors, Inc., 874 F.2d 912, 916 (2d Cir. 1989) (stating that "[u]nder ERISA, trustees have a fiduciary duty to act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries"); Katzenberg v. Lazzari, 2007 WL 1017645 at *9 (E.D.N.Y. March 30, 2007) (same); Liss v. Smith, 991 F.Supp. at 290 (same); EBSA FAB No. 2008-01 at *4 (February 1, 2008) (stating that "it is the view of the Department that a named or functional fiduciary who has authority to appoint the plan's trustee(s) must ensure that the obligation to collect contributions is appropriately assigned to a trustee" unless the plan provides for (1) a named fiduciary to direct the Trustee, or (2) appointment of an investment manager); see also IIA Austin W. Scott & William E. Fratcher, The Law of Trusts, § 177 (4^{th} Ed. 1989); Restatement (Third) on Trusts, § 76 (2007) (stating that the duty to enforce valid claims held by a trust was considered a trustee responsibility at common law).

As illustrated by the case law detailed above, Plan Benefit has a fiduciary duty to ensure the appointment of a trustee with responsibility for collecting employer contributions due to the Participating Plans. Plan Benefit also has a duty to monitor that trustee to ensure it complies with its obligations under ERISA. See Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1465 (4th Cir. 1996) (holding that the power to appoint, retain and remove plan fiduciaries carries with it a duty "'to monitor appropriately'" those subject to removal) (citations omitted); Leigh v. Engle, 727 F.2d at 134-35 (same); Kling v. Fidelity Management Trust Co., 323 F. Supp.2d at 142-43 (same); In re: ADC Telecommunications, Inc., 2004 WL 1683144, at * 7 (D.Minn. July 26, 2004) (same); In re Enron, 284 F. Supp.2d at 552-553 (same); Mehling v. New York Life Ins. Co., 163 F. Supp.2d at 510 (same); Liss v. Smith, 991 F. Supp. at 311 (same); 29 C.F.R. §2509.75-8 at FR-17 (stating that the performance of trustees should be reviewed by the appointing fiduciary "to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan").

Instead of complying with its duty to ensure the Trustee was monitoring and collecting employer contributions, Plan Benefit has drafted and implemented a Master Plan and Master Trust Agreement that explicitly absolves the Trustee of any such duty. (Rule 56.1 at ¶32.) The language in the Master Plan and Master Trust purporting to release the Trustee from fulfilling its statutory duties under ERISA is void as a matter of public policy under Section 410 of ERISA, 29 U.S.C. § 1110, and therefore cannot be followed under Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D).[7] IT Corp. v. General American Life Insurance Co., 107 F.3d 1415,

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[7] 29 U.S.C. § 1104(a)(1)(D) provides as follows:

> . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and Title IV. . . .

1419 (9th Cir. 1997) (stating that, if General American was a fiduciary, any interpretation of the Plan that would prevent it from being held liable while acting in that capacity would be void under Section 410 of ERISA); In re Enron, 284 F. Supp.2d at 549 (stating that "'provisions of the ERISA policies as set forth in the statute and regulations prevail over those of the Fund guidelines'") (citations omitted).

By allowing the Trustee to abdicate its responsibility for ensuring the Participating Plans receive all funds to which they are entitled, Plan Benefit has seriously impaired the rights of participants and beneficiaries in the Participating Plans by expressly undermining the statutory protections set forth in ERISA. By engaging in the foregoing conduct from January 1, 2005 through the present, Plan Benefit, as a matter of law, has been breaching its fiduciary duty to the Participating Plans under § 404(a)(1)(A) and (B) of ERISA. See Liss v. Smith, 991 F. Supp. at 311 (holding individual with power to appoint and remove trustees liable under ERISA § 404(a)(1) for trustees' failure to diligently investigate and pursue delinquent employer contributions); see also Diduck v. Kaszycki & Sons Contractors, Inc., 874 F.2d at 916-918 (holding that trustees acted imprudently by failing to take appropriate action to ensure pension plan received all funds to which it was entitled); Martin v. NationsBank of Georgia, N.A., 1993 WL 345606, at *2 (N.D. Ga. April 6, 1993) (granting partial summary judgment for DOL and holding that common law of trusts governing ERISA fiduciaries forbids agreements which "tend to induce a breach of trust").

C. Plan Benefit's Affirmative Defenses Lack Merit

In its Answer to the Amended Complaint, Plan Benefit asserts as affirmative defenses that DOL has "failed to state a claim upon which relief can be granted" and that DOL's claim is "barred by the statute of limitations." In order to defeat the DOL's summary judgment motion, Plan Benefit must be able to point to specific, competent evidence to support its claims. August v. Offices Unlimited, Inc., 981 F.2d 576, 580 (1st Cir. 1992); Mesnick v. General Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991). Plan Benefit cannot point to any specific, competent evidence to support its affirmative defenses. To the contrary, the affirmative defenses are directly contradicted by the undisputed facts and are unavailing as a matter of law.

1. DOL Has Stated A Claim For Relief

As an initial matter, Plan Benefit's affirmative defense for "failure to state a claim" lacks merit because it is merely a recitation of the legal standard provided in Rule 12(b)(6). See Fleet Bus Credit Corp. v. Nat'l City Leasing Corp., 191 F.R.D. 568, 569 (N.D. Ill. 1999) (striking affirmative defense of failure to state a claim where defendant merely recited the legal standard); Renalds v. S.R.G. Restaurant Group, 119 F.Supp. 2d 800, 803-04 (N.D. Ill. 2000) (same).

Moreover, this defense is also defective because, as detailed above, the DOL has not only plead the elements and facts necessary to state a claim for relief under § 404(a)(1) of ERISA, it has also proven that it is entitled to summary judgment on those claims. See Reich v. Valley National Bank of Arizona, 837 F.Supp. 1259, 1308 (S.D.N.Y. 1993) (granting DOL's motion for summary judgment and rejecting, among others, defendant's estoppel defense where case involved "discretionary governmental conduct not bound within the confines of mandatory regulations"); Cf. SEC v. Nothern, 400 F. Supp.2d 362, 366-67 (D. Mass. 2005) (striking estoppel defense where defendant failed to make out even a colorable argument on traditional principles of estoppel); Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc., 989 F. Supp. 1237, 1249 (N.D. Cal. 1997) (striking affirmative defense of failure to state a claim where the complaint alleged the necessary elements of plaintiff's patent infringement claim).

2. DOL's Claim Is Timely

Under Section 413 of ERISA, 29 U.S.C. § 1113, the DOL's claims for breach of fiduciary duty must be brought within the earlier of (1) six years from the date of the last action constituting part of the breach or (2) three years from the earliest date on which the DOL had actual knowledge of the breach.[8] This lawsuit alleges that Plan Benefit has been violating ERISA, in its capacity as the Master Plan Sponsor, since January 2005. Prior to January 2005, Associated Prevailing Wage Contractors, Inc. ("Associated"), not Plan Benefit, was the Master Plan Sponsor. (Rule 56.1 at ¶6.) By definition, the DOL's claim that Plan Benefit violated ERISA from January 2005 through the present is within both the six year "action" requirement and the three year "actual knowledge" requirement of Section 413.[9]

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[8] 29 U.S.C. § 1113 provides as follows:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty or obligation under this part, or with respect to a violation of this part, after the earlier of –
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation. . . .

[9] In prior discussions between the parties and with the Court, Plan Benefit has argued that, notwithstanding the foregoing facts, DOL's claim is nonetheless time barred under Section 413 because it allegedly knew about the Master Plan structure, and conducted at least two detailed investigations about whether that structure violated ERISA, in the early 1990s and in 1999-2000. Even assuming, *arguendo*, that DOL conducted such investigations, those investigations have no bearing on the DOL's claim in this case.

The decision as to whether to bring, or not to bring, an ERISA enforcement action is committed to the Secretary's discretion. Dillon v. Dole, 1989 WL 162389, at *2 (E.D. Ark. Oct. 25, 1989); cf. Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980) (stating that "our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process . . . and similar considerations have been found applicable to administrative prosecutors as well . . .").

D. **The DOL Is Entitled To The Relief Requested**

The DOL is authorized to bring suit under Sections 502(a)(2) and 502(a)(5) of ERISA, 29 U.S.C. §1132(a)(2) and (a)(5) in order to enjoin acts and practices which violate the provisions of Title I and to obtain appropriate relief in order to redress violations and enforce the provisions of

Title I.[10] See also 29 U.S.C. § 1109(a) (stating that all breaching fiduciaries are subject to "such other equitable or remedial relief as the court may deem appropriate . . ."); Varity Corp. v. Howe, 516 U.S. 489, 512 (1996) (acknowledging that 502(a)(3) and (5) create "two 'catchalls,' providing 'appropriate equitable relief' for 'any' statutory violation" and stating that those "'catchall' provisions act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy").

The DOL, pursuant to its rights and obligations under ERISA, is requesting an Order from this Court imposing the type of equitable relief expressly authorized by ERISA.

The exercise of prosecutorial discretion is not equivalent to a decision to waive enforcement of future violations of the law. Moreover, Plan Benefit was not the Master Plan Sponsor until January 2005. (Rule 56.1 at ¶¶6-7.) *A fortiori*, any action DOL may have taken, or not taken, with regard to Associated's actions in its capacity as the Master Plan Sponsor are irrelevant to the DOL's claims against Plan Benefit for actions it has taken from January 2005 through the present. See Brock v. Nellis, 809 F.2d 753, 754-55 (11th Cir. 1987) (finding DOL's claim not time barred where DOL knew of transaction but not of defendants' involvement in transaction more than three years before filing suit).

[10] 29 U.S.C. § 1132(a)(2) and (a)(5) provide as follows:

(a) A civil action may be brought –

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409; . . .

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; . . .

Specifically, DOL is seeking, among other things, an Order requiring Plan Benefit to modify the Master Plan and/or Master Trust Agreement in a manner that will ensure a fiduciary authorized by § 403 of ERISA is responsible for monitoring and collecting currently outstanding and future employer contributions. Further, because this violation has been ongoing for several years, and because there is an inherent conflict involved in charging an employer who has failed to properly make contributions with responsibility for monitoring and collecting contributions from itself, the DOL is also requesting that the fiduciary authorized under § 403 of ERISA be independent of the employers who have adopted the Master Plan. Cf. Donovan v. Bryans, 566 F.Supp. 1258, 1268 (E.D. Pa 1983) (removing trustees who breached their duties under ERISA because "[t]heir failures in the past to faithfully discharge similar duties to the Plan furnish ample reason why they should not now be entrusted with this responsibility").

CONCLUSION

For the reasons set forth herein, the DOL submits that there is no genuine issue of any material fact and that the DOL, as a matter of law, is entitled to summary judgment. In order to provide appropriate and equitable relief for Plan Benefit's violations of § 404 of ERISA, the

DOL respectfully requests that this Court enter an Order:

(a) finding that Plan Benefit, as the Master Plan Sponsor of the Master Plan, violated the provisions of Title I of ERISA;

(b) permanently enjoining Plan Benefit from violating, or knowingly participating in any violation of, the provisions of Title I of ERISA;

(c) enjoining Plan Benefit, pursuant to Section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5), from continuing to implement the Master Plan and the Master Trust Agreement as written; and

(d) requiring Plan Benefit to modify the Master Plan and/or Master Trust Agreement in such a manner as to ensure that a fiduciary authorized pursuant to Section 403 of ERISA, 29 U.S.C. § 403, and independent of the individual employers that sponsor the Participating Plans, becomes responsible for the monitoring and collection of currently outstanding and future delinquent employer contributions due to the Participating Plans.

Dated: Boston, MA
March 3, 2008

Respectfully submitted,

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