UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

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ELAINE L. CHAO,
Secretary of the United
States Department of Labor, :

:
Plaintiff,
: CIV. ACTION NO.
v. 07-11474-DPW
:
PLAN BENEFIT SERVICES, INC.
:
Defendant.
--x

MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Secretary,[1] by her attorneys, submits the following Memorandum in Further Support of her Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and in Opposition to Plan Benefit's Cross-Motion for Summary Judgment.

SUMMARY OF ARGUMENT

Simply put, key provisions in the Master Plan and Master Trust Agreement at issue in this matter have had the effect of depriving thousands of plan participants of protections mandated by ERISA. This is because the Participating Plans are funded, in whole or in part, by mandatory employer contributions. What these plans hold, and what retirement benefits their participants can expect, depends significantly on whether employers pay what they owe.

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[1] Abbreviated terms herein have the meaning ascribed to them in the Secretary's Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, dated March 3, 2008 (Docket No. 18-1).

The Participating Plans' right to require employers to contribute what they owe is a "plan asset," and a very consequential one at that. Under § 403 of ERISA, the trustee (with exceptions not applicable here) is the only entity with "exclusive authority and control to manage and control" all plan assets. Yet in this matter, Plan Benefit, in its fiduciary capacity, appointed and retained a Master Trustee who -- presumably in reliance on critically flawed exculpatory language in the governing plan documents -- specifically disclaimed all responsibility for managing and controlling the crucial plan asset that is the right to collect employer contributions owed. Plan Benefit has therefore violated §§ 403 and 404(a)(1)(A) and (B) as a matter of law. The DOL respectfully requests that the Court protect the pensions of thousands of participants whose employers have adopted the Master Plan by granting the relief requested by DOL.

ARGUMENT

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

Summary judgment is appropriate where, as here, "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'") (citation omitted).

Plan Benefit failed, as required by Local Rule 56.1, to submit a statement contesting any material facts set forth in the DOL's Rule 56.1 Statement. Those facts are therefore deemed admitted as a matter of law. Local Rule 56.1. Plan Benefit attempts to create factual issues, and support its Cross-Motion for Summary Judgment, with an accompanying Rule 56.1 Statement that is riddled with errors, immaterial and unsubstantiated conclusory statements and legal arguments. DOL submits, for the reasons set forth in its accompanying Motion to Strike, that significant portions of Plan Benefit's Rule 56.1 should be stricken as a matter of law. The remaining factual assertions in Plan Benefit's Rule 56.1 have no bearing on the critical issues before the Court.

Plan Benefit's attempt to avoid summary judgment in favor of the DOL by raising numerous legal arguments is also unavailing. Those arguments do not withstand scrutiny. DOL therefore respectfully submits that, as a matter of law, the Court should find that Plan Benefit violated §§ 403 and 404(a)(1)(A) and (B) of ERISA and grant summary judgment in favor of the DOL.

II. THE LEGAL RIGHT TO COLLECT EMPLOYER CONTRIBUTIONS IS A PLAN ASSET

The central issue in this case is whether the legal right to collect employer contributions is a plan asset. In 1976, the DOL first addressed the issue of whether a right to collect employer contributions was a plan asset in Prohibited Transaction Exemption ("PTE") 76-1, which grants an exemption with regard to certain transactions that might otherwise violate §§ 406(a) and 407 of ERISA. See Preamble to PTE 76-1, 41 FR 12740 at 12741 (March 26, 1976). Section 406(a)(1) prohibits, in pertinent part, the "lending of money or other extension of credit between the plan and a party in interest" and the "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(B) and (D). An employer that has employees who are covered by a pension plan is, by definition, a party in interest with respect to that pension plan. 29 U.S.C. § 1003(14)(C).

PTE 76-1 states that the restrictions of § 406(a) and 407(a) of ERISA will not apply to:

> (1) Any arrangement, agreement or understanding between a multiple employer plan and any employer any of whose employees are covered by such plan, whereby the time is extended for the making of a contribution by such employer to such plan, if the following conditions are met . . .
>
> (2) Any arrangement, agreement or understanding between a multiple employer plan and any employer any of whose employees are covered by such plan, whereby the plan agrees to accept less than the entire amount of a contribution owed by such employer in satisfaction of such employer's obligation to pay the entire amount of such contribution, if the following conditions are met . . .
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> (3) A determination by a multiple employer plan to consider a contribution due the plan from any employer any of whose employees are covered by the plan as uncollectible, in whole or in part, and to terminate efforts to collect such contribution, if the following contributions are met . . .

PTE 76-1, 41 FR 12740 at 12742 (March 26, 1976).[2] By definition, if the right to collect

[2] After publishing a draft of the regulation for notice and comment, DOL received a comment from an employer association that sponsored a master plan which was not collectively bargained and had a significant number of unaffiliated employers contributing to the plan. The letter of comment stated that the employer association plan had "many of the same problems regarding delinquent employer contributions that are encountered by multiemployer plans and, therefore, that the class exemption for transactions involving delinquent employer contributions should be made applicable to plans which are not collectively bargained." PTE 76-1, 41 FR at 12742.

After considering the foregoing comment, the DOL determined that PTE 76-1 should only apply to collectively bargained multiemployer plans. The reason for the limitation was that, at the time PTE 76-1 was issued, DOL lacked sufficient information to determine whether there were adequate safeguards in place regarding the collection of delinquent employer contributions in non-collectively bargained situations. However, from at least 1976, DOL has considered a plan's right to collect employer contributions, in collectively-bargained and non-collectively bargained plans, to be plan assets. This fact is illustrated by the language in the Preamble stating that the DOL is "prepared to consider applications for an exemption for transactions involving the collection of delinquent employer contributions by employee benefit plans which are not collectively employer contributions was not considered a plan asset by both DOL and the community at large, there would have been no need for an exemption to allow a plan to compromise and/or write-off debts owed to a plan. See also EBSA FAB No. 2008-01, pp. 1-2, n.2; United States Department of Labor Advisory Opinion No. 78-28A (Dec. 5, 1978) ("AO 78-28A"), p. 3 (summarizing PTE 76-1 as stating that "arrangements, agreements or understandings whereby a multiple employer plan agrees to the late or delayed payment of employer contributions or payment of less than the full amount of a delinquent contribution, or writes off such a contribution as uncollectable, may also constitute prohibited transactions under [sections 406 and 407(a) of ERISA]"). The actions taken by DOL after the adoption of PTE 76-1 demonstrate that DOL has consistently maintained that the right to collect delinquent employer contributions is a plan asset.

The myriad circumstances in which a "plan asset" comes into existence are far too numerous, and involve an analysis of complicated legal and factual analyses unique to every situation, to be defined by regulation. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (stating that adjudication is "especially appropriate" where it is "doubtful whether any generalized standard could be framed which would have more than marginal utility"). The DOL has therefore relied on ordinary notions of property rights to define what constitutes a "plan asset" under ERISA. Under ordinary notions of property rights, when a plan has a beneficial ownership interest in something of value, tangible or intangible, that interest becomes a plan asset. United States Department of Labor Advisory Opinion No. 92-22A (Oct. 27, 1992) ("AO 92-22A"), p. 3; United States

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bargained." PTE 76-1, 41 FR at 12742. If DOL did not view the right to collect employer contributions in non-collectively bargained plans as a plan asset, the foregoing language would have been nonsensical.

Department of Labor Advisory Opinion No. 93-14A (May 5, 1993) ("AO 93-14A"), p. 4; United States Department of Labor Advisory Opinion No. 94-31a (Sept. 9, 1994) ("AO 94-31a"), p. 2; United States Department of Labor Advisory Opinion No. 2005-08A (May 11, 2005) ("AO 05-8A"), p. 2, n.4.

Thus, the critical inquiry in this case is whether the right to collect employer contributions is something of value that is owned by the Participating Plans. The Participating Plans' interest in the right to collect employer contributions derives from the contractual language detailing the employer's obligation to make those contributions. As detailed below, the undisputed facts show that the governing Plan documents require employers to make contributions to the Participating Plans. The Plans, on behalf of their participants, therefore "own" something of value -- the right to collect on the employers' obligation to make contributions -- and that right is a plan asset as a matter of law.

A. Participating Plans Own the Right To Collect Prevailing Wage Employer Contributions

Employers who adopt the Master Plan to provide pension benefits to employees performing work on prevailing wage projects are required, under the governing documents, to make contributions to the Master Trust for the benefit of their employees. See Docket No. 18-12, pp. 3-4 (Linskey Adoption Agreement stating that "the Employer Prevailing Wage Contributions shall be the hourly rate for that Employee's employment category . . . under the project at which the work was performed, as specified on the Schedule A of this Adoption Agreement") (emphasis added); Docket No. 23-9 (sample Schedule A stating that "For each hour a Participant works in the following category, the amount contributed to the Plan by the Employer shall be the amount designated in the following schedule, . . .") (emphasis added).

The DOL is not asserting that the unpaid prevailing wage contributions themselves are plan assets because it is the employer, not the Participating Plans, which retains ownership over the cash or other assets that will be used to pay the prevailing wage contribution as long as those contributions remain in its possession. See EBSA FAB No. 2008-01, p. 1. However, from the moment the employer becomes obligated by the governing documents to make the prevailing wage contributions, the plan which is the intended recipient of those contributions has the legal right to enforce that obligation; that right is known as a "chose in action." 73 C.J.S. Property § 6 (stating that the right of a creditor to be paid on a debt, including the right to money due under a contract, is a chose in action); 63C Am. Jur. 2d Property § 23 (same); Black's Law Dictionary 258 (8th ed. 2004) (same).

As recognized by the Supreme Court, a "chose in action" constitutes "property." Standard Oil Co. v. State of New Jersey, 341 U.S. 428, 439 (1951); see also In re Luna, 406 F.3d 1192, 1200 (10th Cir. 2005) (stating that the term "asset" includes a chose in action to collect contractually-owed contributions); 63C Am. Jur. 2d Property § 23; Restatement (First) of Property § 163 cmt. b (1936). Thus, under ordinary notions of property rights, the Participating Plans' own property that has value – the chose in action that is the right to collect employer contributions – and that property is a plan asset. See supra, pp. 3-6; Docket No. 18-2, p. 9; Black's Law Dictionary 125 (8th ed. 2004) (stating that the basic definition of "asset" is an item that is owned and has value).

B. DOL's Position Is Supported By The Case Law

The DOL's position that a right to collect employer contributions is a plan asset is strongly supported by the Second Circuit, the Fourth Circuit and the Tenth Circuit. In Re

Luna, 406 F.3d 1192, 1200 (10th Cir. 2005) (explicitly so holding); United States v. Jackson, 2008 WL 1903485, at *10 (4th Cir. May 1, 2008)) (upholding criminal convictions under 18 U.S.C. § 664 on the basis that a contractual obligation to make contributions to an ERISA plan constitutes an "asset" of the ERISA plan); United States v. LaBarbara, 129 F.3d 81, 88 (2d Cir. 1997) (same); see also ITPE Pension Fund v. Hall, 334 F.3d 1011, 1014, n.4 (11th Cir. 2003) (discussing, in dicta, the fact that, where employer contributions are "receivables," the plan asset is the contractual or legal claim for payment of employer contributions); cf. Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 573, n.16 (1985) (stating, in reference to trustee's duty to assure full and prompt collection of contributions owed to a plan, that 29 U.S.C. §1103(c)(1) provides that "'the assets of a plan shall never inure to the benefit of any employer'") (emphasis added).

The DOL's analysis is also supported by the Eighth Circuit's reasoning in Kalda v. Sioux Valley Physician Partners, 481 F.3d 639 (8th Cir. 2007), which was cited by Plan Benefit. (Docket No. 21, p. 14.) The plaintiffs in Kalda were former employees of a medical clinic. They alleged, among other things, that their former employer and its officers and directors violated ERISA by failing to properly manage "plan assets." The "plan assets" in question consisted of balance sheets that tracked the amounts the employer would have paid to the plans if not for a zero-funding amendment it adopted due to financial hardship. The Eighth Circuit held that balance sheets were not "'plan assets'" because there was no vesting language in any plan document and the employer described the "*potential* for *future* funding of the plans as a *possibility* or a *hope*." Id. at 648 (emphasis in original).

The contingent language used in Kalda stands in stark contrast to the governing plan documents in this case, which state an Employer "shall" make prevailing wage contributions to the Master Trust. Whereas the alleged unpaid contributions in Kalda were simply "ledger entries with the possibility of future repayment," the contributions in this case are contractual obligations the employer is required to fulfill. Id. Accordingly, for all the reasons stated above, the Participating Plans' right to require fulfillment of those obligations is a plan asset.

C. The Trustee's Contractual Responsibilities Have No Bearing on What Constitutes a Plan Asset

Plan Benefit asserts that, under ordinary notions of property rights, the right to collect employer contributions is not a plan asset because the governing plan documents specify that the Trustee has no duty to collect those contributions. (Docket No. 21, pp. 16-19.) This argument is fundamentally flawed because it assumes that the contractual responsibilities a trustee has or has not agreed to accept are relevant in determining what constitutes a plan asset. That assumption is erroneous.[3] Further, if Plan Benefit's argument were accepted, it would mean contractual provisions could nullify the statutory

[3] Plan Benefit relies on Justice v. Bankers Trust Co., 607 F. Supp. 527 (N.D. Ala. 1985) to support its position that a trustee's responsibilities should govern whether something is a plan asset. However, there is absolutely no analysis or discussion in the Justice case about whether a right to collect employer contributions is a plan asset. The main issue in the Justice case was the scope of a trustee's liability under ERISA for failing to collect employer contributions where the trust agreement states that it has no responsibility for collecting those contributions. Compare Best v. Cyrus, 310 F.3d 932, 933, 935-36 (6th Cir. 2002) (holding that ERISA imposed additional duties on trustee, above and beyond those specified in trust documents, to seek collection of employer contributions); AO 78-28A, p. 3 (stating that contractual exculpatory language could not release plan trustees of duty to collect employer contributions to a welfare and benefit plan and their failure to do so could result in a violation of section 404(a) of ERISA). That issue is not before this Court.

mandate in § 403 of ERISA. Specifically, while it is true that the scope of a given trustee's responsibilities can be limited by contractual provisions, those limitations cannot divest a plan of its ownership interest in plan assets. In this matter, Plan Benefit, as the appointing authority, could not permissibly render § 403's protections meaningless by deciding to appoint a single trustee which disclaimed all responsibility to manage and control the plan asset that is the right to collect employer contributions.

D. EBSA FAB No. 2008-01 Is Entitled To Deference

As detailed above, virtually from the inception of ERISA through the present, DOL has consistently taken the position that, once a plan owns something of value, it is a plan asset.[4] The DOL's position in this case is simply a logical extension of policies dating back over thirty years. It is therefore entitled to deference. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that ruling, interpretations and opinions of the Administrator under the Fair Labor Standards Act, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); Kalda, 481 F.3d at 647 (finding "the Secretary's reasoning in its rulings regarding "plan assets" thorough, valid, and particularly consistent").

[4] Plan Benefit asserts that DOL has never before taken the position that a legal right to collect employer contributions is a plan asset. (Docket No. 21, p. 11.) Plan Benefit's statement is a mischaracterization of comments made by DOL's counsel during oral argument on December 21, 2007. DOL's counsel stated that this case can fairly be characterized as a new initiative the DOL is pursuing with respect to provisions like those in the Master Plan that are inappropriate and illegal under ERISA. (Docket No. 15, pp. 3-4.) The fact that DOL has not previously filed an enforcement action against a master plan sponsor of a master plan with provisions like those at issue in this case in no way indicates that DOL has not consistently maintained that the right to collect employer contributions is a plan asset. See discussion supra, pp. 3-6.

Plan Benefit's assertion that EBSA FAB No. 2008-01 is entitled to no weight because it was allegedly issued in response to this litigation is spurious. EBSA does not issue Field Assistance Bulletins to support litigation positions in individual cases. To the contrary, EBSA issues Field Assistance Bulletins to provide interpretive guidance on behalf of the DOL, which helps employers, plan officials, service providers and others comply with Title I of ERISA. (Local Rule 56.1 Concise Statement Disputing Certain "Material Facts" Asserted by Plan Benefit in Support of its Cross-Motion for Summary Judgment ("Concise Statement"), annexed hereto as Exhibit A, Attachment 1 (Declaration of Robert J. Doyle, dated May 7, 2008 ("Doyle Dec.")), at ¶¶2, 4.) EBSA FAB No. 2008-01 is no exception to this general rule. It was issued to provide general guidance for, among others, the general public, including employers, plan officials and service providers, after a number of pension plan investigations revealed situations where no party was delegated responsibility under governing plan documents to monitor and collect employer and employee contributions owed to ERISA-covered pension plans. (Concise Statement, Doyle Dec. at ¶2.)

EBSA FAB No. 2008-01 reflects the agency's fair and considered judgment on the matter in question and is therefore entitled to deference. See Caremark, Inc. v. Goetz, 480 F.3d 779, 787, 790 (6th Cir. 2007) (holding that "the [Department of Labor's] interpretation of the ERISA statute is highly persuasive [and thus the] advisory opinion warrants deference"); Anderson v. Cagle's, Inc., 488 F.3d 945, 956-57 (11th Cir. 2007) (recognizing that a more recent agency opinion with a "detailed rationale for its conclusion" is persuasive, even if it conflicts with previous opinions); Sommer v. The Vanguard Group, 461 F.3d 397, 400 n.3 (3d Cir. 2006) (noting that, although the

Department of Labor's opinion letters are not entitled to Chevron-deference, they are still "persuasive in guiding [the Court's] analysis"); In re WorldCom Inc. ERISA Litigation, 354 F. Supp. 2d 423, 445-46 (S.D.N.Y. 2005) (finding that a FAB on ERISA "reflects persuasive authority to which this Court should give at least substantial weight"); DiFelice v. U.S. Airways, Inc., 397 F. Supp. 2d 735, 752 n.25 (E.D. Va. 2005) (finding that the Department's interpretation of ERISA in a FAB "is especially worthy of deference"); Nichols v. Southeast Health Plan of Alabama, 859 F. Supp. 553, 558 (S.D. Ala. 1993) (granting considerable deference to DOL advisory opinions where the "complexity of the ERISA statutory and regulatory scheme" "'called into play'" the "'distinctive institutional capacities'" of the DOL); cf. Long Island Care at Home, Ltd. v. Coke, 127 S.Ct. 2339, 2349 (2007) (stating that agency's interpretation of regulations, which was issued internally and in response to the litigation, "falls well within the principle than an agency's interpretation of its own regulations is 'controlling' unless "'plainly erroneous or inconsistent with'" the regulations being interpreted"); Auer v. Robbins, 519 U.S. 452, 462 (1997) (rejecting defendant's argument that Secretary's interpretation of its regulation was not entitled to deference where it arises in the form of a legal brief because there was no reason to suspect that the interpretation did not reflect the agency's fair and considered judgment on the matter in question).

III. PLAN BENEFIT IS VIOLATING ERISA BY FAILING TO ENSURE COMPLIANCE WITH SECTIONS 403 AND 404 OF ERISA

Plan Benefit argues that it is not liable under ERISA because failing to ensure compliance with § 403 of ERISA is a settlor, rather than a fiduciary, function. This argument must be rejected because, as illustrated by the case law, it is contrary to ERISA's statutory requirements. See Docket No. 18-1, pp. 8-12; 29 U.S.C. § 1103.

It is a well-settled proposition that the act of appointing and removing a trustee is a fiduciary function. See Docket No. 18-1, p. 7. Indeed, Plan Benefit concedes that the act of appointing a trustee makes it a fiduciary. (Docket No. 21, p. 6.) The Court's reasoning in Liss v. Smith, 991 F. Supp. 278 (S.D.N.Y. 1998) is particularly instructive regarding the ERISA duties of a fiduciary like Plan Benefit.

The Court in Liss held that the Trustees for Teamster Local 966's Health and Pension Funds (the "Funds") breached their fiduciary duties under ERISA by, among other things, failing to diligently investigate and pursue delinquent employer contributions. Id. at 291. Defendant Vincent Sombrotto was the President of Teamster Local 966 and a fiduciary to the Funds because he had the power to appoint and remove the Trustees. Id. at 310-11. The Court found that, because Sombrotto had the ability to appoint and remove the Trustees, he also had the obligation to ensure that the appointees were performing their fiduciary functions. Id. at 311.

The Master Plan and Master Trust Agreement do not authorize either a named fiduciary to direct the Master Trustee or appointment of an investment manager. (Rule 56.1 (Docket No. 18-2) at ¶¶28-31.) Therefore, Plan Benefit, like Sombrotto, is required to ensure that the Master Trustee is properly performing its statutory obligations. These obligations include, pursuant to § 403 of ERISA, managing and controlling all plan assets, including the plan's right to collect delinquent employer contributions, and acting prudently in connection therewith. Liss at 311; 29 U.S.C. § 1103(a). It is undisputed that the only trustee appointed by Plan Benefit has specifically disclaimed all responsibility for collecting employer contributions. (Docket No. 18-2 at ¶32.) Plan Benefit's decision to appoint a trustee who has specifically disclaimed all responsibility for collecting employer contributions -- whether on account of an impermissible exculpatory provision in the governing plan documents or not -- results in a clear violation of § 403 of ERISA and itself constitutes a violation of Plan Benefit's duties under § 404(a)(1)(A) and (B) of ERISA. See infra, pp. 15-17.

As an initial matter, the provisions in the Master Plan and Master Trust Agreement releasing the Master Trustee from its statutory duties under ERISA are 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), which requires plan documents to be followed to the extent consistent with ERISA. Plan Benefit first contends that there can be no contravention of § 410's anti-exculpation provision because the Master Trustee is fully empowered under the Master Trust Agreement to pursue debts on behalf of a plan. This argument is specious. As Plan Benefit readily admits, "the Master Trust Agreement expressly provides that the Trustee shall have no duty to collect employer contributions." (Docket No. 21, p. 15.) Section 410 of ERISA unambiguously bars "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. . ." The Master Trust Agreement unequivocally purports to relieve the Master Trustee from its responsibility to collect employer contributions; in this regard, it patently runs afoul of § 410 of ERISA. See also AO 78-28A, p. 3 (stating that, to the extent 404(a) imposes a duty upon trustees to collect delinquent contributions, any provision in the plan instruments purporting to relieve the trustees of that duty, or of the power to carry it out, is void under section 410(a)).

Plan Benefit next maintains that, even if the provision exculpating the Master Trustee does contravene §§ 403 and 410 of ERISA, it is still not liable for violating ERISA because (i) the contractual exculpation provisions are unenforceable and invalid as a matter of law; (ii) the Master Trustee retains the obligation to monitor and collect employer contributions; and (iii) the individual employers, in their capacity as Administrators for the Participating Plans, are responsible for monitoring and collecting the employer contributions. (Docket No. 21, pp. 8, 33.) These arguments demonstrate a fundamental misunderstanding of ERISA and Plan Benefit's obligations thereunder.

The fact that the exculpatory provisions relating to the Master Trustee are unenforceable, and that the Master Trustee may be liable for violating ERISA despite the attempt to exculpate it contractually, does not negate Plan Benefit's violation of § 403 of ERISA. Plan Benefit, in its fiduciary capacity, had an obligation to ensure a trustee fulfilled the statutory mandates of § 403 of ERISA by implementing a reasonable system for monitoring and collecting the plan asset that is the legal right to collect employer contributions. See discussion supra, pp. 9-14; Docket No. 18-1, pp. 8-12. Instead, Plan Benefit appointed, and continued to retain, a Master Trustee who declined to fulfill its statutory duties with regard to delinquent employer contributions, leaving those responsibilities unmet.

Plan Benefit also asserts that it had no responsibility to ensure a trustee was responsible for instituting a system for monitoring and collecting employer contributions under § 403 of ERISA because each individual employer is named in the Master Plan as a Plan Administrator and is therefore required to monitor and collect employer contributions.[5] (Docket No. 21, p. 8.) Plan Benefit's assertion is fatally flawed. As set forth above, employers are contractually obligated to make prevailing wage contributions. According to Plan Benefit's flawed reasoning, because employers, in their settlor capacity, have a duty to make employer contributions, *a fortiori*, they are also responsible, in their capacity as Plan Administrators, for monitoring and collecting those contributions. (Docket No. 22 at ¶48.) This argument is fallacious. As a factual matter, the governing documents say only that the employer has to make prevailing wage contributions; there is no language in those documents appointing each employer as a trustee with a trustee's duty to enforce the Participating Plans' right to receive those contributions. See supra, p. 6 and Docket No. 18-9, § 8.02(a), p. 65. As a legal matter, Plan Benefit's argument is contrary to the plain language of § 403 of ERISA, which states that "the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan . . . " 29 U.S.C. § 1103 (emphasis added). As noted above, the right to collect delinquent employer contributions is a plan asset. Thus, under § 403 of ERISA, it is the Trustee, not the Plan Administrator, that is responsible for monitoring and collecting those contributions. 29 U.S.C. § 1103; EBSA FAB No. 2008-01.

As set forth above, Plan Benefit, in its fiduciary capacity as the trustee appointing authority, deliberately selected a trustee that declined to assume its statutory responsibility to manage and control the plan asset that is the right to collect contributions owed. As the party responsible for trustee appointment and retention, Plan Benefit was

[5] As detailed infra, pp. 24-26, the Master Plan language shows that each employer has delegated virtually all of its authority as a "Plan Administrator" to Plan Benefit. DOL therefore contends that, in reality, it is Plan Benefit, not the adopting employers, that is the Plan Administrator for each of the Participating Plans.

obligated to ensure that a trustee would undertake that duty. By permitting the sole appointed trustee to avoid this obligation, Plan Benefit facilitated harm to thousands of participants by depriving them of their right to ensure they would receive the contributions to which they were entitled. By engaging in the foregoing conduct, Plan Benefit undermined ERISA's statutory protections and violated §§ 403 and 404(a)(1)(A) and (B) of ERISA.

IV. PLAN BENEFIT'S DEFENSES LACK MERIT

Plan Benefit relies on several theories to explain why it has not violated ERISA. As discussed in detail, when reviewed as a matter of law, and under a common sense analysis, each of these theories must be rejected. See United States v. Rodriguez-Pacheco, 475 F.3d 434, 439 (1st Cir. 2007) (stating that a court may make "reasonable inferences derived from experience and common sense"); Island View Residential Treatment Center, Inc. v. BlueCross BlueShield of Massachusetts, 2008 WL 313781, at *1 (D. Mass. January 31, 2008) (same).

A. DOL Can Maintain this Action Without Having First Issued a Regulation that Defines a Plan's Assets to Include the Plan's Right to Unpaid Contributions Owed

As an element of its claims for relief, the DOL pleads that a plan owns – as it owns the right to collect on any other unpaid debt owed to it – a right to unpaid contributions owed to the plan. The DOL has not issued a regulation that defines an ERISA-covered plan's assets to include its right to collect on debts, generally, or to collect unpaid contributions owed to the plan, specifically. Plan Benefit apparently contends that this fact constitutes a failure of duty that bars this action. (Docket No. 21, pp. 9, 11, 29-30.)

Contrary to Plan Benefit's suggestion, ERISA does not compel issuance of such a regulation and therefore the absence of any such regulation cannot bar this suit. ERISA nowhere requires that DOL issue a regulation to define ownership of the right to unpaid contributions owed to a plan. Plan Benefit stakes its argument entirely on ERISA § 3(42), 29 U.S.C. § 1002(42), which, with exceptions not relevant here, states: "(42) the term 'plan assets' means plan assets as defined by such regulations as the Secretary may prescribe, . . ." (emphasis added). (Docket No. 21 at 9.)

However, the statutory text, "may prescribe," creates only discretionary authority, not a legal compulsion. As applied to an agency's issuance of regulations, "'[m]ay' is a permissive word, and . . . vest[s] discretionary power absent a clear indication from the context that Congress used the word in a mandatory sense." Fernandez v. Brock, 840 F.2d 622, 632 (9th Cir. 1988) (rejecting argument that, in ERISA § 202(a)(3)(B), 29 U.S.C. § 1052(a)(3)(B), the text, "as may be determined under regulations prescribed by the Secretary," required regulations). In Fernandez, the Ninth Circuit confirmed this statutory meaning by contrasting § 202(a)(3)(B) with other ERISA sections in which Congress wrote the word "shall" to mandate regulations. Id. at 632-33. Compare ERISA § 3(31), 29 U.S.C. § 1002(31) ("[t]he Secretary of the Treasury shall issue regulations to further define acceptable actuarial cost methods"); ERISA § 3042(a), 29 U.S.C. § 1242(a) ("[t]he Joint Board shall, by regulations, establish reasonable standards"); ERISA § 408(a), 29 U.S.C. § 1108(a) ("[t]he Secretary shall establish an exemption procedure").

Similarly, ERISA § 505, 29 U.S.C. § 1135, which creates the DOL's general authority to issue ERISA regulations, does not require regulations. With exceptions not relevant here, § 505 states: "the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter" (emphasis added). 29 U.S.C. § 1135. The underlined words make the DOL's § 505 authority "completely discretionary." Reich v. Valley Nat'l Bank, 837 F. Supp. 1259, 1292 (S.D.N.Y. 1993) (absent relevant language of compulsion in ERISA § 505 and elsewhere, "the Government has no duty to promulgate an adequate consideration regulation").

Instead of issuing a discretionary regulation, the DOL may seek to enforce ERISA by litigating the issue in question – as she does in the instant suit. Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983), confirmed this prosecutorial discretion. The Fifth Circuit there pointedly suggested that "the appropriate means of implementing [the] legislative intent is by way of an orderly regulatory proceeding" to "flesh out" the definition of adequate consideration in ERISA § 3(18), 29 U.S.C. 1002(18). Id. at 1466 and n.22. Nonetheless, in the absence of such a regulation, the Fifth Circuit decided the appeal in part by resolving a lengthy issue of statutory construction presented by the § 3(18) definition. Id. at 1466-68. See Valley Nat'l Bank, 837 F. Supp. at 1292 (holding that discretionary issuance of a regulation is not a prerequisite for an ERISA enforcement suit).

B. The Disputed Conduct in this Case has Not Been Approved by the Internal Revenue Service

Plan Benefit contends that the governing language divesting the Master Trustee from any responsibility for monitoring or collecting employer contributions complies with ERISA because the United States Internal Revenue Service ("IRS") has "approved" that language. (Docket No. 21, pp. 19-22.) That allegation is false. The plain language in the IRS letter to Plan Benefit's counsel, dated March 31, 2008 (the "IRS Letter") states as follows:

> In our opinion, the form of the plan identified above is acceptable under section 401 of the Internal Revenue Code for use by employers for the benefit of their employees. **This opinion relates only to the acceptability of the form of the plan under the Internal Revenue Code. It is not an opinion of the effect of other Federal or local statutes.**

(Docket No. 23-6, p. 1 (emphasis added).)

The plain language of the IRS letter makes it clear that the IRS' analysis of the Master Plan was limited to the question of determining whether it qualified for approval under § 401 of ERISA such that it would be exempt from income tax under § 501(a) of the Internal Revenue Service Code (the "Code"). The IRS did not conduct any analysis as to whether the governing documents violated any provisions of Title I of ERISA. (Docket No. 23-6, p.1; Concise Statement, Doyle Dec., Attachment 1 (May 6, 2008 letter from Michael D. Julianelle, at the IRS to Robert J. Doyle at EBSA), p. 1.) Further, current IRS guidance (Rev. Proc. 2005-16 and Rev. Proc. 2007-44) makes clear that an order by this Court requiring Plan Benefit to amend the Master Plan or Master Trust Agreement to ensure compliance with § 403 of ERISA, and EBSA FAB No. 2008-01, will not cause the Master Plan to lose its pre-approved, qualified status or cause the plans of any adopting employers to be treated as individually designed plans. (Concise Statement, Doyle Dec., Attachment 1, p. 2.)

C. Plan Benefit's Alleged Compliance With Industry Practice Does Not Excuse its Violation of ERISA

As detailed above, in its fiduciary capacity as the trustee-appointing authority, Plan Benefit is obligated to ensure that the trustee it appoints fulfills its statutory duty of monitoring and collecting delinquent employer contributions. This Plan Benefit has failed to do. Defendant asserts that it did not violate ERISA because it was allegedly acting in accordance with industry practice and therefore could not have known it was violating ERISA. (Docket No. 21, pp. 19-23, 34.) This assertion lacks merit for several reasons.

First, it is well-established that ignorance of the law is no defense to an enforcement action. United States v. Meyer, 864 F.2d 214, 218 (1st Cir. 1988) (holding "maxim that ignorance of the law is no excuse" fully applicable where penalty was assessed against attorney for violating anti-boycott regulations even though he "never consciously intend[ed] to violate the law"); see also O'Connor v. DeBolt Transfer, Inc., 737 F. Supp. 1430, 1438 (W.D. Pa. 1990) (rejecting employer's equitable claim that imposition of liability for pension fund's withdrawal liability assessment would be unfair because employer was unaware of the ramifications of failure to comply with statute).

Second, Plan Benefit's reliance on DiFelice v. U.S. Airways, Inc., 397 F. Supp. 2d 758 (E.D.Va. 2005) to support its argument is inapposite. The DiFelice Court held that investment industry standards were relevant in determining whether the employer violated § 404(a)(1)(B) of ERISA by imprudently continuing to offer employer stock as a pension plan investment during a period of financial instability. Id. at 772 (emphasis added). ERISA claims alleging imprudence based on investment actions, or inactions, typically involve expert testimony and an analysis of the prevailing practice in the relevant industry. While investment industry practice may be relevant in determining whether a violation of § 404(a)(1)(B) of ERISA has been committed under the factual circumstances present in DiFelice, industry practice has no bearing on whether a fiduciary violated ERISA by failing to comply with the clear and unambiguous statutory mandate in § 403 of ERISA.

In this case, unlike in DiFelice, there is a statute, § 403 of ERISA, which sets forth specific responsibilities that ERISA fiduciaries must fulfill. See 29 U.S.C. § 1103, discussion supra, pp. 9-17. Given this statutory mandate, even if Plan Benefit's actions were consistent with comparable industry players, that fact would be irrelevant as a matter of law. See Brock v. L.R. Willson & Sons, Inc., 773 F.2d 1377, 1387-88 (D.C. Cir. 1985) (rejecting argument that widespread industry practice, or Secretary's failure to enforce regulation in effect, barred enforcement of regulation against the company) ; United States v. Standefer, 452 F. Supp. 1178, 1188 (W.D. Pa. 1978) (stating that "[i]t cannot be doubted that widespread violation of the law by others can furnish no excuse for a particular defendant ignoring the law since otherwise the law would be considered repealed by failure or inability of the government to enforce it in a large number of cases").

Lastly, it is disingenuous for Plan Benefit to claim it had no knowledge that ERISA requires that it ensure an entity identified in § 403 of ERISA is responsible for monitoring and collecting delinquent employer contributions. As far back as 1976, at least one employer association sponsoring a non-collectively bargained master plan was concerned that its actions in connection with delinquent employer contributions could violate ERISA and sought to be included within the conditional exemptive relief provided by PTE 76-1. 41 Fed. Reg. at 12742. Further, as noted above, since 1997, three Circuit courts have supported the proposition that the right to collect employer contributions is a plan asset. See supra, pp. 7-8. For the reasons stated above, Plan Benefit's assertion that it did not know or understand its statutory obligations under ERISA is not a valid defense to this action.

D. It is Feasible for Plan Benefit to Comply with ERISA

Plan Benefit asserts that, unlike the situation for multi-employer Taft-Hartley Funds, it is impossible for the Master Trustee to monitor and collect delinquent employer contributions to the Participating Plans. (Docket No. 21, pp. 23-28.) As detailed below, this assertion is not supported by the facts or the law.

The fact that the pension plan involved in Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559 (1985), was a Taft-Hartley plan, and included contractual terms different from those present in this case, was not a factor in the Supreme Court's holding that a trustee has a duty to "act to ensure that a plan receives all funds to which it is entitled." Id. at 571. Plan Benefit quotes extensively from a section of the Supreme Court's analysis concerning specific language in the plan documents giving the trustees broad powers. (Docket No. 21, p. 24.) That language, taken out of context, is misleading. The Supreme Court found that language significant because it supported its decision that the trustees were entitled to conduct a comprehensive audit, which was the primary issue in that case.

The Court's determination that a trustee has a duty to collect delinquent employer contributions relied on ERISA's statutory language and the common law of trusts, not on whether an ERISA-covered plan is or is not a Taft-Hartley plan. Specifically, the Supreme Court held as follows:

> An examination of the structure of ERISA in light of the particular duties and powers of trustees under the common law leaves no doubt as to the validity and weight of the audit goals on which Central States relies. ERISA clearly assumes that trustees will 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, and that trustees will take steps to identify all participants and beneficiaries, so that the trustees can make them aware of their status and rights under the trust's terms.

> One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets . . . The trustee is thus expected to "'use reasonable diligence to discover the location of the trust property and to take control of it without unnecessary delay.' . . . (citation omitted)
>
> The provisions of ERISA make clear that a benefit plan trustee is similarly subject to these responsibilities, not only as a result of the general fiduciary standards of loyalty and care, borrowed as they are from common law, but also as a result of more specific trustee duties itemized in the Act.

Id. at 571-73 (emphasis added). Because the Supreme Court's analysis concerning a trustee's duties applies to trustees of all ERISA-covered plans, the Central States case, and its progeny, are directly applicable to the facts of this case. See Docket No. 18-1, pp. 9-12.

Plan Benefit's allegation that the only entity capable of monitoring and collecting employer contributions is each individual employer, in its capacity as a "Plan Administrator," is equally unavailing. (Docket No. 21, pp. 23-28.) First, as noted above, Plan Benefit's position is contrary to § 403 of ERISA because the employers are not trustees. Further, as a factual matter, Plan Benefit's argument that the adopting employers are the true "Plan Administrators" is plainly belied by the Master Plan language, which shows that each employer has delegated virtually all of its authority as a "Plan Administrator" to Plan Benefit.[6] Compare Docket No. 18-9, § 8.01 and § 8.03; pp.

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[6] The Master Plan provides that each Plan Administrator delegates to Plan Benefit, among many other things, the following rights, powers and responsibilities:

(a)(2) computing, certifying and directing the Trustee with respect to the amount and form of benefits to which a Participant may be entitled hereunder, and prescribing procedures to be followed by Participants or Beneficiaries filing applications for benefits;

(a)(4) maintaining all records necessary for administration of the plan;

(a)(5) interpreting the provisions of the Plan and preparing and publishing rules and regulations for the Plan which are not inconsistent with its terms and provisions; provided, however, the Recordkeeper shall have no duty to require any contribution to be made to the Plan, to determine such amounts as may be payable to the Plan under its

64-67. The vast majority of "Plan Administrator" functions for which each adopting employer is responsible concern providing extensive information to Plan Benefit [7] and

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terms, to determine that the amounts received by the Trust comply with the terms of the Plan, or to take any steps to determine if contributions may be delinquent;

(a)(9) demanding and receiving from the Beneficiary or other person or persons entitled to receive a distribution of any beneficial interest, a complete statement, accounting, release and discharge of all liabilities of the Recordkeeper before the Recordkeeper shall direct the Trustee to pay, distribute or make available any part thereof to such Beneficiary or to such person or persons [this provision appears to violate § 410 of ERISA].; . . .

(d) <u>In order to fulfill its duties and responsibilities under this section, the Recordkeeper shall have 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 Plan. Any such determination shall be conclusive and binding upon all persons.</u> However, <u>all discretionary acts, interpretations and constructions</u> shall be done in a nondiscriminatory manner based upon uniform principles consistently applied. No action shall be taken which would be inconsistent with the intent that the Plan remain qualified under section 401(a) of the Code.

(e) In order to fulfill its duties and responsibilities hereunder, the Recordkeeper shall be specifically authorized to employ such agents, attorneys, actuaries, or accountants, or contract for such assistance, as the Recordkeeper may from time to time deem necessary or advisable in connection with its responsibilities hereunder and to instruct the Trustee to pay from the trust Fund the fees, expenses, or salaries incurred on account thereof as an expense of the Trust.

(f) <u>The Recordkeeper shall discharge its duty with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man, acting in a like capacity and familiar with like matters, would use in the conduct in an enterprise of a like character and with like aims</u> [tracking the <u>fiduciary duty</u> language of § 404(a)(1)(B) of ERISA]. . . .

(Docket No. 18-9, § 8.03(a)(2), (a)(4), (a)(5), (a)(9), (d), (e), and (f) pp. 65-67 (emphasis added).)

[7] Section 8.02 of the Master Plan requires each employer to provide the following information to Plan Benefit:

(b) . . . a copy of any initial, revised or amended Schedule(s) A to the Adoption Agreement.

(c) . . . <u>all requested documents, records or other information necessary for the Recordkeeper and the Trustee to fulfill their respective responsibilities under the Plan</u>.

(d) . . . certif[ication] [of] such information as the Recordkeeper may require, including lists of all eligible Employees, a list of all Employees for whom contributions are made, pertinent Employee information (including the birthday, date of employment, "delegating" a litany of plan administrative functions to Plan Benefit in its capacity as the "Recordkeeper." See n.6 above. Although Plan Benefit contends that these duties are merely "ministerial" rather than fiduciary in nature, the scope and nature of those duties show that they are far more than "ministerial" and are, indeed, clearly fiduciary in nature. (Docket No. 21, p. 5; n.6 above). In short, the plain language of the Master Plan indicates that, as a practical matter, it is Plan Benefit, not the adopting employers, which serves as the *de facto* Administrator. See Harold Ives Trucking Co. v. Spradley & Coker, Inc., 178 F.3d 52, 525-26 (8th Cir. 1999) (holding that third party administrator who played a critical role in interpreting plan provisions functioned as an ERISA fiduciary to a plan); IT Corporation v. General American Life Insurance Co., 107 F.3d 1415, 1420 (9th Cir. 1997) (stating that "calling interpretation and judgment 'purely ministerial' does not make it so").

Plan Benefit's last argument as to why it is "impossible" for the Master Trustee to monitor and collect employer contributions is also flawed. Plan Benefit asserts that, in order for the Master Trustee to prudently discharge the duty to monitor and collect

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date of termination, Compensation, address and social security number) and such other information as the Recordkeeper or Trustee shall reasonably request from time to time.

(f) . . . certif[ication] to the Recordkeeper whether any Employees receiving contributions under the Plan are Highly Compensated Employees or Key Employees and shall be responsible for the identification of the Employer's Highly Compensated Employees and Key Employees.

(g) . . . certif[ication] to the Recordkeeper that all Employees receiving contributions under the Plan do not exceed the limitations of sections 6.07, 6.08, and 6.09.

(h) . . . for any Plan Year in which Top-Heavy Minimum Benefits, as defined in Section 7.03, are required to be contributed to the Plan, certify to the Recordkeeper that all such Top-Heavy Minimum Benefits have been made to the Plan by the Employer.

(i) . . . notify the Recordkeeper of any Excess Elective Deferrals of Participants in compliance with section 6.03(c); . . .

(Docket No. 18-9, § 8.02(b), (c), (d), (f), (g), (h), and (i), p. 65 (emphasis added).)

employer contributions, it would have to conduct weekly on-site audits of every employer's payroll, which would essentially require that the Master Trustee "oversee" how adopting employers conduct their business. (Docket No. 23 at ¶¶ 29-32.) However, DOL nowhere suggests that a reasonable system for monitoring and collecting employer contributions would require the Master Trustee to perform weekly audits of the payrolls of all 1,100 adopting employers. Rather, DOL asserts that Plan Benefit and/or the Master Trustee must adopt reasonable, practicable procedures that are designed to effectively, if not perfectly, address the responsibility to monitor required employer contributions, and to collect those that remain unpaid. See Concise Statement, Attachment 2 (Declaration of Robert Surette, dated May 9, 2008 ("Surette Dec.")) at ¶ 6.

By way of example, given the extensive information each adopting employer is already required to provide to Plan Benefit, each employer could reasonably be required to submit additional information concerning employer contributions owed, such as monthly sworn certified spreadsheets showing contributions owed on each employee's account. (Concise Statement, Surette Dec. at ¶7.) The Master Trustee could then match the monthly sworn statements, or other appropriate documentation, with contributions actually paid, on a quarterly or other basis. (Concise Statement, Surette Dec. at ¶8.) The Master Trustee would supplement its review of the foregoing information with random or periodic audits, putting employers on notice that their records and their statements will be subject to such scrutiny.[8] (Concise Statement, Surette Dec. at ¶9.) In the event that any

[8] The Master Plan already contains a provision obligating adopting employers to pay for any audit required to be filed with a Form 5500 in connection with the employer's records as they relate to its pension plan. (Docket No. 18-9, § 8.02(j), p. 65.) The Master Plan also already allows Plan Benefit to engage accountants for any purpose it deems necessary. (Docket No. 18-9, § 8.03(e), p. 67.)

given employer was found to have failed to make contributions that it owed to its participating plan, the Master Trustee could take such steps as are reasonable and appropriate, under the circumstances presented, with regard to collection of such contributions due.[9] (Concise Statement, Surette Dec. at ¶10)

While it is undisputed that the procedures described above have not been effectuated, Plan Benefit's conclusory assertion that implementing these additional requirements in a multiple employer context that does not involve a Taft-Hartley fund is "impossible," defies common sense. Boiled down to its essence, Plan Benefit seems to be saying that, while Taft-Hartley multi-employer plans can and do implement systems to monitor and collect employer contributions, non-collectively bargained multiple employer trusts cannot. No facts are offered in support of this claim because it is insupportable. Clearly, a reasonable, if imperfect, system can be implemented so as to enable compliance with §§ 403 and 404 of ERISA. Plan Benefit has attempted, by contract, to eliminate the need for such a system. Its attempt fails, however, because implementation of a reasonable system is both possible and mandated by the prudence requirements set forth at § 404 of ERISA.

D. <u>DOL's Claim Is Timely</u>

For the reasons set forth in its Memorandum of Law in Support of its Summary Judgment Motion, DOL maintains that its claim is timely as a matter of law. (Docket No 18-1, pp. 14-15.) Plan Benefit attempts to rebut DOL's arguments by making the

[9] The foregoing procedures are just one example of methods a Master Trustee could consider in determining what procedure it should use to fulfill its statutory duty to monitor and collect employer contributions. The issues before the Court do not require it to determine what specific procedures a Master Trustee should adopt to fulfill its statutory duty to monitor and collect employer contributions.

unsupported and conclusory assertion that DOL's claims are nonetheless time-barred because it was the "successor in interest" to Associated. (Docket No. 21, p. 35.) Plan Benefit's assertion fails because, as a matter of law, Plan Benefit is not a "successor in interest," as that term is defined in both general corporate law and federal tax law.

Plan Benefit assumed Plan Sponsorship by an *Agreement to Transfer Plan Sponsorship by and between Associated Prevailing Wage Contractors, Inc. and Plan Benefit Services, Inc.* (executed December 17, 2004). (Docket No. 23-4.) It is well established that, under general corporate and tax law, "a party simply acquiring property of a firm in an arm's length transaction, and taking up its business activity, does not become the selling firm's 'successor in interest.'" Holland v. Williams Mountain Coal Co., 496 F.3d 670, 672 (D.C. Cir. 2007), citing Holland v. Williams Mountain Coal Co., 256 F.3d 819, 822 (D.C. Cir. 2001), for proposition that "a transferee is not a 'successor in interest'" (citation omitted). Further, under corporate law, the term "'successor in interest" "'ordinarily indicates statutory succession as, for instance, when corporation changes its name but retains same property." Id. (citation omitted). In this matter, needless to say, Associated, a Texas non-profit corporation, did not simply change its name and become Plan Benefit, the profit-making corporation which is the defendant in this action. Accordingly, Plan Benefit, as the transferee to Associated, cannot be its "successor in interest."

In any event, Plan Benefit cites no authority whatsoever -- nor can it -- for the proposition that, for purposes of § 413 of ERISA, the Secretary's knowledge of the activities of a predecessor company bars her action against a subsequent owner that has engaged in comparable activities, where that subsequent owner's allegedly violative activities began fewer than three years prior to the filing of the lawsuit. Cf. Brock v. Nellis, 809 F.2d 753, 755 (11th Cir. 1987).[10]

CONCLUSION

For the foregoing reasons, the DOL respectfully submits that (i) there is no genuine issue as to any material fact; (ii) the DOL is entitled to summary judgment granting the relief it has requested; and (iii) Plan Benefit's Motion for Summary Judgment should be denied.

Dated: Boston, MA
May 12, 2008

Respectfully submitted,

For the Plaintiff:

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[10] While, for the reasons set forth above, the Court need not reach this issue, the Secretary submits that § 413 should also not bar this action because the violations asserted here against Plan Benefit are in the nature of repeated breaches. Plan Benefit commits new breaches each time Plan Benefit renews the Master Trustee's contract, and each time Plan Benefit improperly assesses, or fails on a reasonable periodic basis to assess, whether the continued retention of the Master Trustee -- in the face of its declination to take responsibility for monitoring and collection of employer contributions – is prudent in light of the mandate of § 403 of ERISA. See Martin v. Consultants and Administrators, Inc., 966 F.2d 1078, 1082, 1088 (7th Cir. 1992); Meagher v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan, 856 F.2d 1418, 1423 (9th Cir. 1988); Bona v. Barasch, 30 Empl.Benefits Cas. (BNA) 1874, 1888 (S.D.N.Y 2003)

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Memorandum of Law in Further Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Cross-Motion for Summary Judgment, and annexed Exhibit A, by electronic mail.

/s/ Kelly M. Lawson
Attorney