

401(k) plans and other employee benefit plans (“Cafeteria Plans”). Before the appointment of the Trustee, 1Point acted as fiduciary for these plans within the meaning of the Employee Retirement Security Act 1974 as Amended, 29 U.S.C.A. § 1001 et seq. (“ERISA”).

That status did not change when the bankruptcy case was commenced. Mr. McLemore filed his complaint (No. 3:08-cv-21, the “Trustee Complaint”) in his capacity as a successor fiduciary for these plans. In addition, as alleged in the Trustee Complaint, Mr. McLemore, as Trustee, is a fiduciary for the plans. The Trustee Complaint was filed by Mr. McLemore in his official capacity and in his capacity as fiduciary for the benefit of the plans for which he acts as fiduciary.

The Trustee alleged that MACC was a fiduciary as well based upon the facts contained in the Trustee Complaint. In addition, the Trustee alleged that Regions Bank, the successor by merger to AmSouth Bank, was a fiduciary based upon the facts contained in the Trustee Complaint.

DISCUSSION

The Complaint filed by Heritage Equity Group 401(k) Savings Plan (No. 3:07-cv-841, the “Heritage Complaint”) has been amended and now asserts a variety of allegations against MACC and an additional Defendant, SunGard Institutional Brokerage, Inc. Heritage and the other plaintiffs in that lawsuit sought a jury trial.

The Trustee did not name SunGard Institutional Brokerage, Inc., as a defendant in No. 3:08-cv-21. The Trustee also named Regions Bank as a defendant. The Trustee did not ask for a jury.

The Trustee believed that the activities of MACC and Regions Bank were so intertwined that the complaint should be filed against the two jointly. In the same way, the Heritage Plaintiffs believe that the cases against MACC and SunGard should be tried together.

The Trustee agrees that the Heritage case and the Trustee's case contain overlapping factual allegations as to the handling of certain of the accounts at MACC. But MACC counsel has indicated to the Trustee's counsel that MACC may be filing counterclaims against Heritage and other plans in the Heritage case plus possible third-party suits against financial advisors. MACC may also file third-party actions in the Trustee's lawsuit.

CONCLUSION

For the foregoing reasons, the Trustee believes that it would be appropriate to consolidate these matters for discovery only with regard to MACC. With different additional parties in each case and a jury in one case and not the other, the potential for confusion at trial is of paramount concern.

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CERTIFICATE OF SERVICE

On February 29, 2008, this document was filed electronically with the Clerk's office by using the CM/ECF system and was simultaneously served upon the following using that same system:

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