

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

In re:	:	Case No. 06-05400-KL3-11
	:	Case No. 06-05898-KL3-11
1Point Solutions, LLC	:	Chapter 11
Barry R. Stokes,	:	Judge Keith M. Lundin
	:	Administratively Consolidated
Debtors.	:	Under Case No. 06-05400-KL3-1
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	:	
John C. McLemore, Trustee	:	
	:	Adv. Pro. No. 307-0283A
Plaintiff,	:	
	:	
v.	:	
	:	
Regions Bank, as Successor in Interest	:	
by Merger to AmSouth Bank, and	:	
Mid-Atlantic Capital Corporation	:	
	:	
Defendants.	:	

**DEFENDANT REGIONS BANK’S MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS**

Defendant, Regions Bank, as successor by merger to AmSouth Bank (hereafter “Regions”), through its undersigned counsel, Frost Brown Todd LLC, respectfully submits this Memorandum of Law in Support of its Motion for entry of an Order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, as incorporated into the Federal Rules of Bankruptcy Procedure by Bankruptcy Rule 7012, dismissing with prejudice the Complaint filed by John C. McLemore as Chapter 11 Trustee (“Plaintiff” or “Trustee”) against Regions (the “Motion”). Regions respectfully states as follows:

A. Introduction

1. Plaintiff filed the Complaint against Regions and Mid-Atlantic Capital Corporation (“MACC”) on August 20, 2007, seeking the recovery of an undetermined amount of money on

behalf of various unnamed and unspecified “401(k) plans” and other employee benefit plans and cafeteria plans. Plaintiff refers generally to such plans as the “Victim Plans”.

2. The basis for Plaintiff’s claims is a confusing combination of theories pursuant to which 1Point Solutions, LLC (“1Point”) and Regions are each alleged to be fiduciaries under the Employment Retirement Income Security Act, as amended, at 29 U.S.C. § 101, et seq (“ERISA”). Plaintiff claims that he, in his capacity as a chapter 11 trustee and successor to 1Point, is also an ERISA fiduciary of the Victim Plans with the right to bring claims against other alleged fiduciaries of the Victim Plans, including Regions.¹ The damages sought by the Complaint are related to losses incurred by the Victim Plans and appear to be at least \$18 million, which amount appears to be the amount that 1Point and Barry R. Stokes (“Stokes”) apparently stole from the Victim Plans for which 1Point was a third party provider of services. 1Point and Stokes are referred to collectively herein as the “Debtors”.

3. While the purported purpose of the Complaint is to “transfer the losses from [Victim Plans] to those charged with the responsibility of protecting the assets,” Plaintiff’s efforts (including his 26-page Complaint) are wasted because Plaintiff is a representative of the estates of the Debtors, not a representative of certain specific creditors of the Debtors, the Victim Plans. See Complaint, Introduction. The Victim Plans and their own real representatives have in many cases instituted their own actions for recovery against the Debtors and others. Plaintiff’s efforts by the Complaint serve only to add an unnecessary third-party (the Plaintiff) to the mix, complicate an

¹ Pursuant to section 502(h) of ERISA (29 U.S.C. § 1132(h)), any complaint brought by a fiduciary under section 502 of ERISA must be served upon the Secretary of Labor and the Secretary of the Treasury, which parties have the right to intervene in such action. Both the Secretary of the Treasury and the Secretary of Labor have interests in assuring the proper administration and enforcement of ERISA. There is no evidence that the Plaintiff served either the Secretary of Labor or the Secretary of the Treasury with the Complaint. See Eslava v. Gulf Telephone Co., 418 F. Supp. 2d 1314, 1329 (S.D. Ala. 2006).

already complex matter, and place the Defendants at risk for multiple and/or inconsistent judgments related to the same underlying claims. Moreover, any recovery by Plaintiff in this action places Plaintiff in an unfortunate conflict since his assumed recovery for the Victim Plans would appropriately be made to certain unsecured creditors of the estates, i.e. the Victim Plans, while other unsecured creditors of the estates receive smaller or no distributions at all.

4. The foregoing issues, along with numerous other defects in the purported claims stated in the Complaint, bar any recovery by Plaintiff in this action. Accordingly, because Plaintiff's claims are without legal merit, and because they fail to state a legally cognizable cause of action, the Motion should be granted and the Complaint should be dismissed.

B. Allegations of the Complaint

5. Plaintiff is the duly appointed Chapter 11 Trustee for each of 1Point and its principal Stokes. See Complaint, Introduction, ¶ 1.

6. Plaintiff alleges that, at the close of its operations, 1Point was a third party administrator for 52 separate "401(k) plans." Id. ¶ 15. Plaintiff does not allege the date 1Point "closed" operations or whether that date is the same as the bankruptcy filing date. Plaintiff also alleges that "at the commencement of the case," 1Point was the third party administrator for 751 separate plans which he refers to as "cafeteria plans." Id. ¶ 19. None of the so called "Victim Plans" are identified in the Complaint. Plaintiff alleges that "most" of the Victim Plans that 1Point provided services for were subject to ERISA. Id. ¶ 5.

7. Plaintiff alleges that it has taken possession of various assets of 1Point, including cash from certain bank accounts and real and personal property, all of which are alleged either to have been property of plans subject to ERISA or to have been purchased for the benefit of Stokes or 1Point with assets of plans subject to ERISA. Id. ¶ 5.1. The specific plans that allegedly owned

the various properties held by Plaintiff are not identified. Id. Nonetheless, Plaintiff alleges that, apparently due to its possession of this cash and real and personal property, it currently “exercises discretionary control” over assets of plans subject to ERISA. Id. ¶ 5.1. Plaintiff alleges that it is “functionally” a current fiduciary within the meaning of ERISA, or is the “successor fiduciary to the position of 1Point and/or Stokes as fiduciary for each of the plans.” Id. ¶¶ 5, 5.3.

8. Plaintiff alleges that 1Point, as part of its business as a third party administrator of employee benefit plans, opened and established 58 separate accounts for itself at Regions. Id. ¶¶ 70-72, 82. Plaintiff does not allege that the 1Point accounts at Regions were anything other than ordinary depository accounts owned by 1Point, but rather alleges that funds deposited into 1Point’s accounts did not belong to 1Point and were instead held in trust for the participants and beneficiaries of unspecified ERISA plans. Id. ¶¶ 72, 83. While Plaintiff does not allege that 1Point had any trust powers to act as a corporate trustee under either state or federal law, he alleges that Regions was aware that the funds deposited in the 1Point accounts did not belong to 1Point, but were held in trust by 1Point. Id.

9. Plaintiff alleges that between 2002 and September, 2006, Stokes withdrew, transferred or wired substantial sums of money from the 1Point account at Regions (the “Stolen Funds”) for his personal use and benefit or to pay 1Point business expenses and transferred money among these accounts. Id. ¶¶ 75, 76, 77-96. The allegations of Stokes’ personal use of the Stolen Funds are specific and clearly identify Stokes as the primary cause of the losses of the Victim Plans. For example, Plaintiff details one transaction whereby Stokes obtained a cashier’s check from a 1Point account in the amount of \$155,286.81 made payable to himself, which check was used to purchase real estate in his own name in Dickson, Tennessee. Id. ¶ 78.

10. Plaintiff alleges that Regions knew that 1Point was a third party administrator, knew that 1Point was holding funds for the benefit of “401(k) plans” and “cafeteria plans” and knew that 1Point was a trustee for those funds. Id. ¶ 83. While Plaintiff alleges that Regions exercised authority and control over the management or disposition of the Plan funds, Plaintiff does not allege any facts that indicate that Regions exercised any control over the assets in the accounts other than to maintain custody of such funds, to follow the directions of Stokes as the principal of 1Point with regard to the assets of such accounts. Id. Plaintiff concludes that Regions was a fiduciary with respect to some or all of the unidentified Plans whose assets were allegedly in Region’s custody. Id. ¶ 142.

11. Plaintiff further alleges that Regions breached its alleged fiduciary duty owed to each of the unspecified Victim Plans. Id. ¶ 143. The foregoing allegations lead Plaintiff to the conclusion that he, as a representative of the estates, holds a claim against Regions and that he is entitled to recover from Regions for the benefit of the Victim Plans. Specifically, he asserts that Regions has *liability to the Victim Plans*. Id. ¶ 145, 152, 159, 168, 173, 177, 180, 183. While Regions disputes that it has liability to any Victim Plan, it is nonetheless clear, that even if it did, Plaintiff, as a representative of the estates, does not have a legally cognizable cause of action against Regions and therefore the Complaint should be dismissed.

12. In ruling on the Motion, well-pleaded facts are to be accepted as true by this Court. Riestenberg v. Broadview Federal Savings and Loan, 843 F.2d 1392 (6th Cir. 1988); Elliot v. Caribbean Utilities Co., Ltd., 513 F.2d 1176 (6th Cir. 1975); Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987). However, any conclusions, deductions, or opinions masked as factual allegations may not be presumed to be true. Morgan, 829 F.2d at 12. In addition, the Complaint must charge every essential element necessary to recover on some legally cognizable

claim, and set forth a sufficient basis from which a defendant may form a responsive pleading. Long v. Illinois Central Gulf Railroad Co., 660 F. Supp. 469, 471 (W.D. Ky. 1986).

13. In applying this standard, courts in this Circuit have repeatedly granted motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Long, 660 F. Supp. at 474; Collins v. Nagle, 892 F.2d 489, 498 (6th Cir. 1989); Hammond v. Baldwin, 866 F.2d 172, 179 (6th Cir. 1989). This Court should adhere to the standard applied by the Sixth Circuit with respect to motions to dismiss and dismiss the Complaint pursuant to Rule 12(b)(6) because it fails to state a claim upon which relief can be granted for the reasons set forth below.

C. The Complaint should be dismissed because Plaintiff, as a representative of the estates, does not have standing to prosecute his purported claims.

14. Plaintiff alleges in the Complaint that the funds deposited in 1Point's accounts at Regions related to the Victim Plans *did not belong to 1Point*, but were held *in trust* solely for the benefit of the participants and beneficiaries of the Victim Plans. See Complaint, ¶¶ 72, 73, 83. Therefore, assuming that the allegations of the Complaint are true, neither the Debtors, nor Plaintiff, who has succeeded to all the rights and powers of the Debtors, have an interest in the Stolen Funds such that the Stolen Funds, or the claims related thereto, are property of 1Point's estate.

15. Plaintiff, as a representative of the estates and successor to 1Point, holds only those claims and causes of action which were property of 1Point as of the date of the 1Point bankruptcy filing. See 11 U.S.C. §541; Terlecky v. Abels, 260 B.R. 446, 453 (S.D. Ohio 2001) (when a trustee brings an action as the successor to the debtor's interest, the trustee stands in the shoes of the debtor and may only assert those causes of action possessed by the debtor). Therefore, Plaintiff must establish at the outset that 1Point actually held a claim against Regions. Plaintiff is the successor to 1Point with respect to any claim against Regions and thus has merely stepped into the

shoes of 1Point for the purpose of prosecuting that claim. In re Metropolitan Environmental, Inc., 293 B.R. 896, 898 (Bankr. N.D. Ohio 2003) (“Upon a debtor filing for bankruptcy, the trustee succeeds to those interests held by the debtor as of the commencement of the case. Thus, stepping into the shoes of the debtor, the trustee may assert those prepetition causes of action possessed by the debtor. However, the converse is also true: absent specific authority to the contrary, the trustee is subject to the same defenses that could otherwise have been asserted by the defendant had the action been instituted by the debtor”).

16. It is well settled that the Bankruptcy Code does not authorize a trustee to prosecute a cause of action to collect money not owed to the debtor’s estate. In re Cannon, 277 F.3d 838 (6th Cir. 2002); see also In re Van Dresser Corporation, 128 F.3d 945 (6th Cir. 1997) (if the “cause of action does not explicitly or implicitly allege harm to the debtor,” then it “could not have been asserted by the debtor at the commencement of the case, and thus is not property of the estate.”). In the instant case, Plaintiff has alleged that the Stolen Funds taken by Stokes and 1Point are not owed to 1Point; rather they are owed to the participants and beneficiaries of the Victim Plans. See Complaint, ¶¶ 145, 152, 159, 168, 173, 177, 180, 183.

17. Courts have found that where a debtor holds funds in escrow or in trust for another party, the money and related right of recovery is not property of the estate. In Cannon, the chapter 7 debtor was an attorney who abused escrow accounts holding his client’s funds. The trustee filed suit against a brokerage firm to whom the escrowed funds were transferred for breach of fiduciary duties and fraud, among other claims. The brokerage firm argued that the funds transferred from the Debtor’s escrow account were not “an interest of the debtor in property” and the trustee lacked standing to seek recovery of the funds because the victims of the debtor’s misappropriations were either not creditors of the estate and had received compensation through their insurance companies

or brought separate actions to recover their losses. The Sixth Circuit Court of Appeals found that because the debtor held the funds in escrow in trust for his clients, the money was not property of the estate and therefore not subject to the trustee's avoidance power under section 548 of the Bankruptcy Code. The Court reasoned that, "[b]ecause any recovery that the trustee might obtain in this adversary proceeding would benefit the clients [debtor] defrauded, not the general creditors of the estate, the trustee lacks standing to proceed." Id. at 856. In making its determination, the Court found that if a cause of action belongs solely to the estate's creditors, then the trustee has no standing to pursue the claim, stating "[b]ecause the code precludes a recovery that benefits anyone other than the estate, the trustee lacks standing to maintain an adversary proceeding seeking such a recovery." Id. at 856.

18. Much like in the Cannon case, the Stolen Funds were, according to the allegations of the Complaint, held in trust for the benefit of the Victim Plans. Plaintiff does not even attempt to allege otherwise. In fact, each of the Counts against Regions *only assert liability of Regions to the Victim Plans*, not to the estates. See Complaint, ¶¶ 145, 152, 159, 168, 173, 177, 180, 183. Moreover, the entire premise of the Complaint, as stated in the first paragraph of the Complaint, is "to transfer the losses from innocent [plan] participants" to Regions. Id., Introduction. Given that the Complaint is nothing more than an attempt by Plaintiff to put liability on Regions for the Stolen Funds, the Complaint falls squarely within the holding of the Cannon case and Plaintiff cannot prosecute the Complaint.

19. In addition to the Plaintiff's lack of standing under Cannon based on the fact that the Stolen Funds were held in trust and are not owed to the estates, Plaintiff generally has no standing to bring claims on behalf of specific creditors of the estates. "It is well settled that a trustee in bankruptcy lacks standing to assert the claims of creditors against third parties who are alleged to

bear responsibility for a debtor's losses." In re D.H. Overmyer Telecasting Co., Inc., 56 B.R. 657 (Bankr. N.D. Ohio 1986). In Overmyer, the chapter 11 trustee brought several claims against the attorneys for the unsecured creditors' committee, one count alleging that the attorneys aided and abetted Daniel Overmyer, the controlling officer, in defrauding the debtor. The court found after examination of the count that the claim belonged to the unsecured creditors and the creditors' committee, not to the debtor. "Allegations that a representative of a class of creditors knowingly breached a duty to them and to the debtor, by aiding a debtor corporation's fraudulent transfers, are insufficient to give a bankruptcy trustee standing to sue on behalf of the allegedly defrauded creditors." Id. at 659. In further confirming that the trustee lacked standing, the court recognized an inherent conflict of interest among the interests of the debtor, the defendant and the unsecured creditors, citing the Supreme Court's finding in Caplin v. Marine Midland Grace Trust Co. of New York, 406 U.S. 416, 431-432 (1972) that "suit by [the debtor-in-possession] on behalf of debenture holders may be inconsistent with any independent actions they might bring themselves ... it is extremely doubtful that the trustee and all debenture holders would agree on the amount of damages to seek, or even on the theory on which to sue."

20. The Supreme Court held in Caplin that a bankruptcy trustee lacks standing to assert the claims of creditors for losses to the debtor corporation. See also DSQ Prop. Co., Ltd. v. DeLorean, 891 F.2d 128, 131 (6th Cir. 1989). The claims asserted against the defendant (an indenture trustee) in Caplin are essentially identical to those asserted in Overmyer – that the defendant permitted the debtor to engage in transactions which caused its assets to be squandered and which operated as a fraud on creditors. Numerous cases decided in the wake of Caplin hold that allegations of misconduct and damage to the debtor corporation are insufficient to give the trustee standing to sue third parties on behalf of creditors. Overmyer, 56 B.R. at 660. See In re

Bennett Funding Group, Inc., 336 F.3d 94 (2d. Cir. 2003) (defrauded investors, not the trustee, had standing to sue third parties in a Ponzi scheme); Rochelle v. Marine Midland Grace Trust Company of New York, 535 F.2d 523 (9th Cir. 1976) (the trustee lacked standing to assert a claim on behalf of allegedly defrauded debenture-holders and other creditors); King v. Sharp, 63 F.R.D. 60 (N.D. Tex. 1974) (“It is clear from Caplin that a [trustee] under the Bankruptcy Act has no statutory authority to collect money on behalf of third parties. His authority is simply to collect and reduce to money the ‘property’ of the bankrupt estate for which he is trustee.”); Matter of Washington Group, Inc., 476 F. Supp. 246, 252 (M.D.N.C. 1979) (“The rationale of the Court’s holding in Caplin is unmistakable. The Trustee may only act for the direct benefit of the estate.”).

21. Following this line of reasoning, the Bankruptcy Court for the Southern District of Ohio recently found that a bankruptcy trustee has no standing generally to sue third parties on behalf of the estate’s creditors, but may only assert claims held by the bankrupt corporation itself. In re Motorwerks, Inc., 371 B.R. 281, 289 (Bankr. S.D. Ohio 2007). In Motorwerks, the trustee asserted that a bank did not act prudently by failing to monitor the debtor and perform appropriate due diligence in the debtor’s check kiting scheme and misuse of “floor plan” financing. The trustee asserted that the bank’s continued advances to the debtor enabled the debtor to continue its fraudulent activities, which in turn led creditors to continue to extend loans and funding to the debtor at a time when the debtor was unable to pay its debts as they became due. The court found that the trustee did not assert standing as a successor in interest to the debtor, but instead as a creditor. The trustee cited section 544(a) of the Bankruptcy Code as his source of standing, but the court determined that the Bankruptcy Code does not give a trustee the right to bring creditor causes of action for damages relating to aiding and abetting actions. The court found that the trustee’s assertion “conflicts with the recognition by the Sixth Circuit and other courts of the ongoing

vitality of Caplin and its holding that the trustee has no standing to pursue claims arising from injuries to others.” Id. at 290. The court went on to state that “nowhere in sections 544(a) or (b), nor in any other relevant provisions of the Code, is there any suggestion that the trustee has been given the authority to collect money not owed to the estate. ... Consequently, section 544(a) does not confer standing on a trustee to bring creditors’ tort actions under state law such as the Trustee’s aiding and abetting claims in this case.” Id. at 291. See also In re Southwest Equipment Rental, Inc., 102 B.R. 132 (E.D. Tenn. 1989) (where remedy sought was limited by FLSA as a personal right of action for the benefit of unpaid employees, the claim was not property of the bankruptcy estate and therefore beyond the reach of the trustee’s powers under §541 to collect and reduce to money the legal and equitable interests of the debtor); In re Ozark Restaurant Equipment Co., Inc., 816 F.2d 1222, 1126 (8th Cir. 1987) (a trustee’s rights and powers do not encompass the ability to litigate claims, such as an alter ego cause of action, on behalf of the debtor corporation’s creditors); In re Dublin Securities, Inc., 197 B.R. 66 (S.D. Ohio 1996) (a trustee in bankruptcy lacks standing to pursue the general claims of creditors against third parties; whatever claims the debtor entities may have for malpractice are strictly vis-à-vis the injury suffered by the defrauded investors).

22. As in the Overmyer and Caplin cases, Plaintiff asserts that Regions permitted 1Point and Stokes to engage in transactions which caused assets of the Victim Plans to be squandered and that Regions knew or should have known of the misuse of the Stolen Funds. See Complaint, ¶¶ 83-96. As in Motorwerks, Plaintiff here asserts that Regions failed to monitor the actions of 1Point and Stokes, and as a result the Victim Plans and their participants were harmed. Id. ¶¶ 143, 144, 151, 158, 167. Plaintiff further asserts that Regions’ “failure to act” constituted aiding and abetting the conversion of assets of the Victim Plans by 1Point and Stokes. Id. ¶ 180. In sum, the allegations of the Complaint are all based on loss or damage to the Victim Plans due to the inaction

of Regions. There are no independent claims asserted for harm or damage to the Debtors for the inaction of Regions. This is appropriate since, as detailed below and as alleged in the Complaint, the harm or damage resulted primarily from the actions of the Debtors, rather than Regions. Accordingly, it is abundantly clear from the cases cited above and the allegations of the Complaint that Plaintiff has no statutory authority to collect money on behalf of third parties, such as the Victim Plans.

23. Notwithstanding the mandate of Caplin, courts have in limited circumstances permitted a trustee to prosecute fiduciary duty claims on behalf of a debtor corporation. In fact, this Court issued a recent decision in In re Del-Met Corp., 322 B.R. 781 (Bankr. M.D. Tenn. 2005) regarding a trustee's standing to bring an action for breach of fiduciary duty. For the reasons set forth below, the Del-Met case is distinguishable from the instant case.

24. In Del-Met, this Court addressed a complaint filed by the trustee of an auto industry supplier which filed a chapter 7. The trustee's complaint was against, among others, the principal of Del-Met, and certain customers and financial consultants to the debtor. In general, the trustee alleged that the customers and consultants had essentially taken over the debtor and operated it for their own benefit, to the detriment of the debtor's other creditors. In connection with this, the trustee asserted that the customers and consultants had aided and abetted the principal of Del-Met in the breach of his fiduciary duties to Del-Met. This Court held that the trustee *did* have standing to bring claims for breach of fiduciary duty to the debtor. The defendants challenged the trustee's standing on the ground that the actions belong to creditors and could not be pursued by the trustee on behalf of the corporations. This Court held that "actions for breach of fiduciary duties and for aiding and abetting breach of fiduciary duties – in contrast to an action to disregard corporate

identity – accrue to the corporation itself because fiduciary duties are owed to the corporation and it is the corporation that suffers injury when fiduciary duties are breached.” Id. at 818.

25. The Del-Met decision is distinguishable at the outset as the Del-Met case dealt with a breach of fiduciary duty *to the debtor*. The Complaint does not allege breaches of fiduciary duties of Regions to the Debtors. Plaintiff alleges merely that Regions violated fiduciary duties with respect to the Victim Plans and/or participants. The decision in Del-Met was based in part on the damage done to a corporation and the injuries suffered as a result of a breach of fiduciary duties owed to the corporation. In the instant case, even assuming Regions did have such a fiduciary duty, it was not a duty to the Debtor, 1Point, and as such is not an action that accrued to 1Point and Plaintiff. Moreover, even if there were somehow a fiduciary duty of Regions to 1Point and even if Plaintiff had alleged such a duty, the fact that the fraud of 1Point and Stokes caused the alleged loss in the present case precludes the granting of any relief to Plaintiff based on the doctrines of *in pari delicto* and unclean hands as detailed below.

26. Accordingly, Plaintiff, as a representative of the estates, does not have standing to prosecute the claims asserted in the Complaint. The Sixth Circuit in the Cannon decision held that claims such as those asserted in the Complaint cannot be prosecuted by Plaintiff. Moreover, the Supreme Court in the Caplin decision and numerous courts following Caplin have held that a trustee cannot prosecute claims of specific creditors such as the purported claims set forth in the Complaint. Therefore, the Complaint should be dismissed with prejudice.

D. Even if Plaintiff, as a representative of the estates, has standing to prosecute the Complaint, the Complaint should be dismissed because the doctrines of *in pari delicto* and unclean hands preclude the granting of any relief to Plaintiff.

27. Plaintiff alleges in the Complaint that he is the successor to the Debtors and is vested with “the power of 1Point to file suits to the same extent that 1Point had such rights and

powers on the date of the petition in the bankruptcy case.” See, Complaint ¶ 4. Regions does not dispute that Plaintiff has stepped into the shoes of 1Point for the purpose of prosecuting claims of 1Point. Unfortunately for Plaintiff, those shoes are very muddy. So muddy, in fact, that Plaintiff’s allegations in the Complaint with respect to the bad acts of the Debtors establish that *in pari delicto* bars the granting of relief to the Plaintiff.

28. “The defense of *in pari delicto* is short for ‘*in pari delicto potior est conditio defendentis*,’ which means: ‘In the case of equal or mutual fault [between two parties] the condition of the party . . . [defending] is the better one.’ . . . In essence, it ‘provides that wrongdoers ought each to bear out the consequences of their wrongdoing without legal recourse against each other.’ . . . ‘The doctrine is based on two premises: courts should not mediate between two wrongdoers, and denying judicial relief to a wrongdoer deters illegal conduct.’” In re KDI Holdings, Inc., 277 B.R. 493, 517-18 (Bankr. S.D.N.Y. 1999) (citations omitted); Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306 (1985). Although in the present case, Regions did not commit any wrongdoing, if this Court were ultimately to find otherwise, the wrongdoing of Stokes and 1Point alleged in the Complaint precludes any relief for Plaintiff.

29. The Sixth Circuit Court of Appeals and lower courts in the Sixth Circuit have applied the doctrine of *in pari delicto* to claims prosecuted by a trustee as successor to a corporate debtor to dismiss the claims asserted by such a trustee against a third-party, such as Regions, that is alleged to have engaged in some negligent or wrongful act participated in by the corporate debtor. In re Dublin Securities, et al., 133 F.3d 377, 380 (6th Cir. 1997) (applying the *in pari delicto* defense to a motion to dismiss primarily based on the fact that the “[trustee’s] pleading conceded, for example, that the debtors intentionally defrauded their investors”) (citing Bubis v. Blanton, 885 F.2d 317, 321 (6th Cir. 1989), citing Memorex Corp. v. International Business Machines Corp., 555

F.2d 1379, 1382 (9th Cir. 1977)); In re Donahue Securities, Inc. and S.G. Donahue & Company, Inc., 2003 Bankr. LEXIS 964, *7 (Bankr. S.D. Ohio 2003) (granting motion to dismiss based on *in pari delicto*) (unreported decision attached hereto as Exhibit A).

30. In addition to the Sixth Circuit cases cited above, other courts have applied *in pari delicto* under circumstances similar to those in the instant case.² In the recent case of Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards, et al., 437 F.3d 1145 (11th Cir. 2006), the Eleventh Circuit Court of Appeals applied *in pari delicto* to bar recovery by a trustee from a group of IRA custodians based on RICO claims. In Edwards, the debtor ran a ponzi scheme which was disguised as a payphone investment business. Reliance Trust Co., PENSCO, Inc., and Community National Bank (collectively, the “IRA Custodians”) were large holders of individual retirement accounts. The trustee alleged that the IRA Custodians aided the debtor in defrauding investors by funneling investor IRA funds into the debtor’s payphone investments. The trustee alleged that “[b]y failing to conduct appropriate due diligence and/or ignoring the facts altogether,” “[t]he IRA Custodians enabled thousands of investors to partake of the debtor’s scheme and caused

² Significantly, courts applying ERISA implicitly recognize *in pari delicto* by prohibiting a wrongdoer shifting its liability to another party. The 9th Circuit has held that a party sued for breach of its fiduciary duties under ERISA may not seek contribution from other ERISA fiduciaries for their alleged breaches. Kim v. Fujikawa, 871 F.2d 1427 (9th Cir. 1989). While the 2nd Circuit has recognized the right of contribution, see Chemung Canal Trust Company v. Sovran Bank/Maryland, 939 F.2d 12 (2nd Cir. 1991), district courts in this Circuit have rejected the right of fiduciaries to seek contribution for their own fiduciary liability. Toledo Blade Newspaper Unions –Blade Pension Plan v. Inv. Performance Servs., 373 F. Supp. 2d 735 (N.D. Ohio) (refusing to establish right of contribution by co-fiduciaries); Kloots v. American Express Tax and Bus. Servs., 2006 U.S. Dist. LEXIS 38792 (N.D. Ohio 2006) (following Ninth Circuit Kim rationale and citing other district courts within the Sixth Circuit to conclude that “ERISA does not provide for a right of contributions among fiduciaries and that it is not appropriate to create such a right using federal common law”); May v. Nat’l Bank of Commerce, 390 F. Supp. 2d 674 (W.D. Tenn. 2004) (recognizing that the Sixth Circuit has not yet issued an opinion on the question and deciding that the better view is that adopted by the Ninth Circuit “which is designed to protect beneficiaries and participants of employee benefit plans, and is likely to provide more expeditious litigation for these parties”).

the debtor to incur millions of dollars in additional debt." The Court affirmed the lower court's finding that the debtor was an active participant in the alleged scheme and therefore the doctrine of *in pari delicto* would bar recovery from the IRA Custodians.

31. One requirement with respect to establishing *in pari delicto* is that the wrongful conduct of the individual associated with the corporate debtor must be imputed to the corporate debtor. Imputation to a corporate debtor is found where the applicable individual acted in the course of his or her employment with the debtor and where the wrongful conduct was perpetrated for the benefit of the corporate debtor. Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 359 (3rd Cir. 2001). One exception to such imputation is the "adverse interest" exception, where the individual's acts were not for the benefit of the debtor. See In re Sender, 423 F. Supp. 2d 1155, 1174 (D. Colo. 2006). This exception to imputation is itself subject to a "sole actor" exception, whereby imputation is still found even in cases where the applicable individual was acting in a manner adverse to the corporation if the individual "dominated" or was the sole shareholder or principal of the debtor corporation. Lafferty, 267 F.3d at 360; Grassmueck v. The American Shorthorn Assoc., 402 F.3d 833 (8th Cir. 2005); In re Sharp International Corp., 278 B.R. 28, 37 (Bankr. E.D.N.Y. 2002); Donahue Securities, 2003 Bankr. LEXIS 964, *14-17; In re Mediators Inc., 190 B.R. 515, 528 (S.D.N.Y. 1996).

32. In the present case, Plaintiff is suing in his capacity as trustee of both 1Point and Stokes, therefore, imputation is not necessary. However, even if imputation were required, Plaintiff's allegations establish the facts necessary to impute the wrongdoing of Stokes to 1Point, as Stokes was undisputedly the individual that dominated 1Point. In particular, Plaintiff has alleged that Stokes was the principal and, at all relevant times, the sole owner of 1Point. See Complaint, Introduction, ¶ 8. Acting in this capacity, it is alleged that Stokes himself withdrew

substantial sums of money from the 1Point accounts, transferring money among the accounts and obtaining cashier checks from the accounts. Id. ¶¶ 76-79. Stokes used the cashier checks, wire transfers and other forms of transactions for his own personal benefit. Id. ¶¶ 84-87. Stokes, acting in his capacity as principal and sole owner of 1Point, converted the assets of the Victim Plans for his own use and benefit and for the use and benefit of 1Point. Id. ¶ 176, 180. Plaintiff does not allege any similar wrongdoing by any other employee or representative of 1Point, nor does Plaintiff allege any participation by any other employees or representatives of 1Point in the bad acts of Stokes. Moreover, the allegations of the Complaint, if true, establish that 1Point and Stokes were much more culpable for the losses of the Victim Plans than Regions, especially since the alleged failure of Regions described in the Complaint, even if true, could only be the result of Stokes stealing approximately \$18 million from the Victim Plans.

33. This Court's recent decision in the Del-Met case, declining to apply the *in pari delicto* defense, is again distinguishable from the instant case. As set forth above, in Del-Met, this Court addressed a complaint filed by the trustee of an auto industry supplier against, among others, the principal of Del-Met, and certain customers and financial consultants to the debtor. In a motion to dismiss the complaint, the defendants asserted *in pari delicto* as a defense to the claim of aiding and abetting the principal of Del-Met in the breach of his fiduciary duties to Del-Met, alleging that since the principal of the debtor participated in the wrongful conduct, the trustee could not recover from the defendants.

34. In determining whether to apply the defense, this Court considered whether the complaint itself established that the debtor entity was "at least as culpable" as the defendants in the wrongful conduct described in the complaint. In declining to apply the defense, this Court found that the complaint alone did not place fault on the debtor for the wrongful conduct sufficient to

justify a finding of *in pari delicto*. To the contrary, the complaint alleged more fault by the customer and consultant defendants, than by the debtor and its principal. On this basis, this Court held that it could not apply the defense in the context of a motion to dismiss, but the defendants would not be precluded from asserting the defense at trial where this Court could conduct a factual inquiry about what role each of the specific defendants played in the alleged wrongful conduct. Here, the Complaint is clear. Plaintiff has made detailed allegations about the theft by and wrongful conduct of the Debtors. Conduct which is undeniably fraudulent and illegal on many levels. Plaintiff's primary allegation against Regions is that it should have known that the Debtors were stealing from the Victim Plans and that it should have done something about it. Even assuming that the allegations against Regions are true (which they are not), they do not demonstrate fraudulent or wrongful conduct on the part of Regions, but instead, a failure to detect the fraudulent acts of the Debtors. Clearly, the Debtors are more culpable for their fraudulent acts than Regions is for its alleged inaction. Moreover, if Plaintiff is now the successor to the Debtors, he cannot possibly recover from Regions for his own fraud.

35. Much like *in pari delicto*, the doctrine of unclean hands would also prevent Plaintiff from prevailing on its claims against Regions. Plaintiff is the successor to the Debtors and remains burdened with the unclean hands of 1Point and Stokes. The unclean hands of a debtor in a transaction necessarily precludes a plaintiff/trustee from prevailing on a claim of the debtor related to the transaction. For example, in the case of In re Smith, 100 B.R. 330 (Bankr. S.D. Ohio 1989), the trustee succeeded to certain claims of the debtor against a third-party, O'Mara Enterprises, and sought judgment against O'Mara with respect to those claims. The court properly observed that the trustee was subject to all of the defenses which could be asserted by O'Mara vis-à-vis the debtor. Those defenses included the equitable defense of unclean hands of the Debtor under Ohio

law. Id. at 337. The court in Smith recognized that “he who comes into equity must come with clean hands” and that a party who lacks clean hands cannot obtain relief from the court. Id. at 338. The court also observed that the unclean hands of the debtor must be imputed to the trustee, as the legal successor to the debtor’s interest in the claim. Id. (citing In re Wilson, 90 B.R. 208 (Bankr. E.D. Va. 1988)). Similarly, the Supreme Court of Tennessee has recognized “[w]here the parties to a suit have been guilty of fraud in connection with the subject matter of litigation and are in *pari delicto*, the court of equity, in the application of the principal of unclean hands, will leave them as it finds them, refusing its aid to either.” Knox-Tenn Rental Co. v. Jenkins Insurance, Inc., 755 S.W.2d 33, 39 (Tenn. 1988). Based on the allegations of the Complaint, Plaintiff has unclean hands with respect to the claims asserted therein. Accordingly, he cannot obtain any relief here.

36. Applying the foregoing to the present case, the doctrines of *in pari delicto* and unclean hands preclude the granting of any relief to Plaintiff, even assuming that all of the facts alleged in the Complaint are true. As alleged by Plaintiff, at all relevant times Stokes was the sole owner of 1Point. See Complaint, ¶ 8. Stokes, acting as the principal of 1Point, stole approximately \$18 million from the Victim Plans. Id., Introduction. Assuming Plaintiff’s allegations are true, Plaintiff has effectively established that Plaintiff cannot obtain any relief from this Court. Therefore, under the facts alleged, the Complaint fails to state a claim upon which relief can be granted by this Court and should be dismissed with prejudice.

E. Even if the Plaintiff has standing, as a representative of the estates, to prosecute the Complaint and relief is not barred by *in pari delicto* or unclean hands, each of the Counts in the Complaint should be dismissed because Plaintiff’s claims are defective and/or barred under ERISA and/or applicable law.

37. The Complaint purports to assert eight (8) counts against Regions, each based on ERISA or state law. Five of the Counts are based on allegations that Regions *was a fiduciary* with respect to the “Victim Plans”. In particular, Counts 9 - 12 purport to be brought under § 409 and §

502(a)(2) of ERISA (29 U.S.C. §§ 1109 and 1132(a)(2)). Count 16 purports to be brought under state law.

38. Count 9 alleges, without reference to any specific plan, that Regions breached the duties of an ERISA fiduciary to act in the sole interests and for the exclusive benefit of plan participants and beneficiaries of each Victim Plan, to act prudently, to act in accordance with the Victim Plan documents and to diversify the investment of Victim Plan assets. Counts 10 and 11 allege that Regions violated a fiduciary duty by “causing” “the Plan” to engage in prohibited transactions under ERISA involving assets of the Victim Plans. Count 12 alleges that Regions violated the co-fiduciary liability rules of ERISA by allowing the Debtors to breach their fiduciary duties under ERISA with respect to the Victim Plans. Count 16 alleges that Regions is liable under state law for participating in and aiding and abetting the breaches of fiduciary duties of Debtors to the Victim Plans.

39. The remaining three (3) counts, Counts 13 - 15 are based on allegations that Regions is liable for the acts of Debtors even though it *was not a fiduciary* to the Victim Plans. In particular, Count 13 purports to be brought under § 502(a)(3) of ERISA (29 U.S.C. § 1132(a)(3)) and seeks restitution from Regions as a non-fiduciary based upon its alleged “participation” in the Debtors’ own fiduciary breaches. Counts 14 and 15 allege that Regions had knowledge related to the activities of Debtors with respect to the Victim Plans and is liable under state law. Count 14 alleges that Regions is liable in negligence for failing to prevent Debtors from converting the assets of the Victim Plans. Count 15 alleges that Regions aided and abetted the conversion of assets of the Victim Plans by Debtors.

(i) **Plaintiff does not have standing to sue under ERISA and therefore Counts 9 - 13 should be dismissed.**

40. Section 502(a) of ERISA provides that suits may be brought only by a participant, beneficiary, fiduciary or by the Secretary of Labor. Plaintiff makes vague and rambling allegations throughout the Complaint that, prior to the filing of the chapter 11 cases, the Debtors were in possession of assets of various ERISA plans – presumably all the unidentified Victim Plans. Plaintiff also alleges that, after the filing, it has taken possession of assets of 1Point including assets belonging to the Victim Plans. Complaint, ¶ 5. Finally, Plaintiff alleges that it possesses whatever fiduciary rights the Debtor had as of the date of the filings. None of these allegations are sufficient for Plaintiff to have standing to bring this action as a fiduciary under § 502(a) of ERISA.

41. In fact, Plaintiff does not allege with specificity that it is currently an ERISA fiduciary with respect to any particular Victim Plan. Plaintiff states that “[m]ost of the plans for which 1Point provided services” are subject to ERISA and that the assets of 1Point “were either directly property of *plans* subject to ERISA, or were purchased for the benefit of Stokes or 1Point with assets of *plans* subject to ERISA.” (emphasis added). *Id.*

42. In order to have standing to sue under ERISA as a fiduciary, a party must be a *current* fiduciary of the *particular* plan victimized by the alleged breach of fiduciary duty. See Ruppert v. Principal Life Insurance Co, 2007 U.S. Dist. LEXIS 49294 (D.C. S. Ill. 2007) (unreported decision attached hereto as Exhibit B).

43. The case law is clear that a *former* fiduciary does not have standing to sue under § 502 of ERISA. Blackmar v. Lichtenstein, 603 F.2d 1306, 1309 (8th Cir. 1979) (practicing attorney serving as trustee of plans who contemplated suing plan sponsor but was first removed by plan sponsor ceased to be a fiduciary and no longer had the capacity to sue for violations of ERISA); Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 14 (2d Cir. 1991) cert. den., 505

U.S. 1212 (1992) (dismissal of counterclaim and third-party complaint of plan's former trustee (who had been sued by successor trustee) against a plan sponsor, its officers and certain members of investment committee alleging that it knew or should have known of the fiduciary breaches, based on court's holding that, as a former fiduciary, third party complainant had no standing to sue on behalf of the plan); Gilbert v. National Employment Benefit Cos., 466 F. Supp. 2d 928, 931 (N.D. Ohio, 2006) (defendant plan administrators, as former fiduciaries, had no standing to bring claims for breach of fiduciary duty on behalf of a plan against others who it alleged were also fiduciaries); Miller v. Retirement Funding Corp., 953 F. Supp. 180, 182 (W.D. Mich. 1996) (former trustee of terminated plan lacked standing to assert ERISA claims for breaches of fiduciary duties); Williams v. Provident Inv. Counsel, Inc., 279 F. Supp. 2d 894, 904-905 (N.D. Ohio, 2003) ("a former fiduciary has no right to sue on behalf of the plan to recover for the plan's losses" because "[t]he former fiduciary 'no longer has an interest in protecting a plan to which it is now a stranger'", quoting Chemung, 939 F.2d at 15).³

44. While Plaintiff alleges that it is "the successor fiduciary to the position of 1Point and/or Stokes as fiduciary for each of the plans", it has not identified a single Victim Plan for which another entity has not been named as successor to 1Point in performing the services that 1Point previously provided. Complaint, ¶ 5.3. There is also no allegation that Plaintiff is currently functioning as a fiduciary with respect to any particular Victim Plan. In fact, Plaintiff alleges in

³ Plaintiff's suit is distinguishable from the situation of a new trustee being named to replace a plaintiff trustee who resigns during while a case is pending. See Smith v. Provident Bank, 170 F.3d 609 (6th Cir. 1999) (bank that had been removed as trustee continued to be a fiduciary with respect to transferring its assets to its successor and thus state law claims against bank were preempted). See also Corbin v. Blankenburg, 39 F.3d 650 (6th Cir. 1994) (case not dismissed due to loss of standing where trustee that brought a lawsuit resigned from office and a substitute trustee was appointed as plaintiff pursuant to a motion to substitute a successor trustee filed three working days after motion to dismiss). The fact that an entity is a fiduciary based on its residual responsibilities to transfer plan assets does not make it the proper party to sue other fiduciaries or non-fiduciaries with respect to the plan.

the Introduction to its Complaint that “1Point Solutions, LLC *was* a third party provider of services to employee benefit plans” Complaint, Introduction (emphasis added).⁴

45. Plaintiff alleges that it “currently exercises discretionary control over assets of [401(k)] plans subject to ERISA” and that it “is functionally a fiduciary within the meaning of ERISA”. Complaint, ¶ 5.1. However, this is inconsistent with Plaintiff’s representation to this Court in its Motion for Approval of Trustee’s Demand for Turnover of Funds Held by Bank in which it requested the turnover of funds held by Regions in 1Point accounts. [D.E. #287, Filed Feb. 2, 2007]. In that Motion, the Trustee stated that the accounts owned by 1Point at Regions were “property of the Estate of 1Point Solutions, LLC.” *Id.* ¶ 8. The Motion requested that the Court order that “all of the funds held in the Frozen Accounts shall be transferred to the Trustee *as property of the estate of 1Point*”. *Id.* Prayer for Relief ¶ 1 (emphasis added). An Order granting the Motion and transferring the contents of the Regions accounts to the Trustee as “property of the estate of 1Point Solutions, LLC” was subsequently entered. [D.E. #336, Entered March 12, 2007].

46. Even if the assets of the bankruptcy estate were to be considered to consist partially of plan assets, Plaintiff does not have control over these assets but must seek approval of this Court for any disposition thereof. This limitation precludes Plaintiff from being considered a fiduciary under the functional definition under ERISA. Hibernia Bank v. International Brotherhood of Teamsters, etc. 411 F. Supp. 478, 487 (N.D. Cal. 1976) (bank custodian had no standing to sue because its allegation that it was a fiduciary was “purely conclusory” since it had no discretionary authority or discretionary control with respect to the plan assets). Moreover, to the extent that any

⁴ Plaintiff is admittedly not a successor trustee of any plan entitled to intervene as a fiduciary. See Department of Labor v. King, 775 F.2d 666, 668 (6th Cir. 1985) (successor trustee of pension plans could intervene in lawsuit brought by Department of Labor against former trustees for breach of fiduciary duty because the successor trustee qualified as a fiduciary that could have maintained a separate cause of action under ERISA).

assets over which Plaintiff has “discretionary control” actually constitute assets of any Victim Plan, they are subject to the direction and control of the respective plan administrator or trustees of such plan.

47. Plaintiff alleges that it “has the rights and powers 1Point and/or Stokes held on the date of the filing of the petitions in their respective cases”. Complaint, ¶ 5.2. While ERISA does not preempt the Bankruptcy Code, neither does the Bankruptcy Code preempt ERISA or expand the rights and powers of a fiduciary beyond what is granted by ERISA. Under ERISA, Plaintiff is the successor only of the rights that 1Point would have if 1Point were actually still functioning as a fiduciary.⁵ Since 1Point or Stokes, as former fiduciaries, have no standing to sue under ERISA, Plaintiff has no standing to sue Regions under ERISA. Accordingly, each of Counts 9 - 13 should be dismissed.

(ii) Counts 9 - 12 do not state a cause of action against Regions under ERISA § 502(a)(2) because Regions was never a fiduciary with respect to any ERISA Plan and those counts should therefore be dismissed.

48. Counts 9 through 12 of the Complaint are brought under ERISA §§ 409 and 502(a)(2) (29 U.S.C. §§ 1109 and 1132(a)(2)). Suits under § 502(a)(2) may be brought “for appropriate relief under section 409 [of ERISA]”. Section 409 provides for the personal liability of a “person who is a fiduciary with respect to a plan.” While Plaintiff makes the conclusory allegation that Regions was a fiduciary with respect to the “Victim Plans,” the Complaint contains

⁵ In Mutual Life Insurance Co. of New York v. Yampol, 840 F.2d 421 (7th Cir. 1988) the Seventh Circuit found that an insurance company had standing, as assignee of Illinois Director of Insurance, to sue former fiduciaries of liquidated benefit trust for alleged ERISA violations in connection with trust administration, since as liquidator of the trust, the insurance director had significant authority and control over management and disposition of its assets and, therefore, was an ERISA fiduciary who could sue other fiduciaries for breaches of duty under ERISA Section 502(a)(2). Contrast this case in which Plaintiff is not a liquidator of plan(s) but of the estate of a former fiduciary of plan(s) admitted to have breached its own fiduciary duties with respect to those plans.

no allegation that Regions had any relationship with any Victim Plan for which 1Point served as a third party administrator other than as the depository institution for accounts owned by 1Point. That fact alone is insufficient to create a fiduciary relationship under ERISA and each of Counts 9 – 12, which are based on a such a fiduciary relationship, should be dismissed.

49. ERISA Section 3(21)(A) (29 U.S.C § 1002(21)(A)) provides that “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, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.”

50. Plaintiff does not allege that Regions rendered investment advice to or had discretionary authority or responsibility over the administration of the Victim Plans. Rather, the basis of Plaintiff’s claims is that that Regions exercised “authority or control” over assets of the Victim Plans and is therefore an ERISA fiduciary. Complaint, ¶ 83. These claims are conclusory allegations of law, as no facts are alleged that Regions served as anything more than a depository institution or custodian of ERISA plan assets.

51. The case law is absolutely clear that a bank serving as a mere depository or custodian of plan assets is not a fiduciary under ERISA because it does not have control over plan assets as contemplated by § 3(21)(A) of ERISA. Briscoe v. Fine, 444 F.3d 478, 493-94 (6th Cir. 2006) (“our reading of ERISA’s statutory definition will not ‘extend fiduciary status to every person who exercises ‘mere possession, or custody’ over the plans’ assets, *quoting* Chao v. Day, 436 F.3d 234, 237 (D.C. Cir 2006), and recognizing that “entities are not ERISA fiduciaries when

they do ‘no more than receive deposits from a benefit fund on which the fund can draw checks’”, *quoting Srein*, *infra* at 222); Arizona State Carpenters Pension Trust Fund v. Citibank, 125 F.3d 715, 720 (9th Cir. 1997) (bank that contracted to serve as custodian and depository of multi-employer pension trust funds was not a fiduciary under ERISA because it had no independent authority or managerial responsibility over operation or administration of funds and had no implied duty to report delinquencies simply because it had devised and controlled its own internal reporting system and reported pursuant to that system); O’Toole v. Arlington Trust, 681 F.2d 94, 96 (1st Cir. 1982) (“responsibilities as the depository for the [plan] funds do not include the discretionary, advisory activities described by [ERISA]”); Hibernia Bank, 411 F. Supp. at 489 (bank did not have fiduciary status as a result of an agency relationship under commercial account pursuant to which it served as custodian with no discretionary authority or control); Srein v. Frankford Trust, 323 F.3d 214, 222 (3rd Cir. 2003) (“ERISA does not consider as a fiduciary an entity such as a bank when it does no more than receive deposits from a benefit fund on which it can draw checks,” *quoting Bd. of Trs. Of Bricklayers and Allied Craftsmen Local 6 or New Jersey Welfare Fund v. Wettlin Assocs.*, 237 F.3d 270, 275 (3rd Cir. 2001)); City Nat’l Bank v. Chase Manhattan Bank, 714 F. Supp. 927, 930 (N.D. Ill. 1989) (while bank that merely paid out on forged instruments may have had various obligations and duties pursuant to the Uniform Commercial Code, it had no discretionary control with respect to the plan and was, therefore, not a fiduciary); Reichling v. Continental Bank, 813 F. Supp. 197, 198 (E.D. N.Y. 1993) (depository bank that held plan assets and turned over such assets to sheriff in response to an execution was not liable as a fiduciary because the relationship between a bank and its depositor is the contractual relationship of debtor and creditor, which is not changed by the fact that the funds deposited are those of a fiduciary and the bank’s lack of discretion in this relationship precludes it from being deemed a fiduciary);

Brandt v. Grounds, 687 F.2d 895, 898 (7th Cir. 1982) (non-trustee investment advisor bank was not a fiduciary when it performed depository functions and, therefore, was not liable for failing to prevent plan embezzlement by plan trustee with the court noting that “while the Bank was under a duty to honor the withdrawal slips, appellants would impose upon it the additional duty of analyzing the transaction, determining its prudence, and refusing the withdrawal if it appeared imprudent” and concluding that “these duties are not reconcilable”); IT Corp. v. General American Life Ins. Co., 107 F.3d 1415, 1422 (9th Cir. 1997) (authority over plan’s money is not the same as being a fiduciary and depositing a plan’s money in a bank did not ipso facto make the bank a fiduciary since bank cannot pay anyone but payees or endorsees and has no authority to write checks or pay out money to persons of the bank’s choosing); Bradshaw v. Jenkins, 1984 U.S. Dist. LEXIS 20013 (W.D. Wash. 1984) (unreported decision attached hereto as Exhibit C) (trustee serving as a mere custodian of plan assets who follows the instructions of another fiduciary was not a fiduciary); Wood v. CNA Ins. Cos., 837 F.2d 1402, 1403 (5th Cir 1988) (issuance of certificates of deposit did not make savings and loan association an ERISA fiduciary); Beddall v. State Street Bank & Trust Co., 137 F.3d 12, 18 (1st. Cir. 1998) (mere exercise of physical control or performance of mechanical administrative tasks such as checking whether the manager’s instructions were in writing signed by an authorized person did not make bank a fiduciary with respect to plan’s real estate holdings); Wilson v. Pye, 1988 WL 1404 (N.D. Ill. 1998) (unreported decision attached hereto as Exhibit D) (bank being the depository institution for the plan’s assets was an insufficient basis on which to claim that the bank was an ERISA fiduciary); Assocs. in Adolescent Psychiatry v. Home Life Insurance Company, 941 F.2d 561, 568 (7th Cir 1991) cert dismissed 502 U.S. 1099 (1992) (bank with ministerial authority as holder of paper does not create a fiduciary duty under ERISA where all authority over the disposition of the assets rested with the

trustee); Useden v. Acker, 947 F.2d 1563, 1576 (11th Cir. 1991) (bank did not become a fiduciary with respect to plan that borrowed from bank by selling stock owned by plan and used as collateral for a loan from the bank); State Street Bank & Trust Company v. Mutual Life Ins. Co. of New York, 811 F. Supp. 915, 922 (S.D.N.Y. 1993) (insurance company serving as a servicing agent for guaranteed investment contracts was not a fiduciary because it had no right unilaterally to change the contracts to lessen their value to the plan (dictum)); In re Mushroom Transportation Co., 382 F.3d 325, 347 (3rd Cir. 2004) (bank as secured creditor was not fiduciary where bank “did nothing more than serve as the holder of assets placed there”).

52. Plaintiff alleges that Regions was a fiduciary because assets of the Victim Plans were deposited with it by 1Point. However, as the cases cited above make clear, a bank has no fiduciary duty to an ERISA plan simply because it holds plan assets on deposit. Regions can only be deemed a fiduciary under ERISA if it exercised actual “control” of the assets contained in 1Point’s accounts. Plaintiff makes no allegations of such control. Indeed, the essence of Plaintiff’s allegations are to the contrary, as Plaintiff accuses Regions of unquestioningly following the directions of 1Point (and Stokes) as the owner of the accounts. Complaint ¶¶ 76-82.

53. Plaintiff further attempts to confuse this issue by citing and referring to various regulatory schemes including, among others, the Bank Secrecy Act and the Patriot Act. See Complaint ¶¶ 29-36. At no time does Plaintiff assert that Regions is liable for some violation of these regulatory schemes, nor can it since none of them allow for private causes of action. Rather, Plaintiff alleges that Regions was or should have been aware of 1Point’s improper actions because of the bank’s oversight obligations under the cited regulations. Once again, “control” of the assets determines whether Regions was an ERISA fiduciary under § 1002(21)(A). Allegations that

Regions was or should have been aware of 1Point's actions is not relevant to whether Regions was actually in control of any Victim Plan asset.

54. Because Regions served only as a depository institution, and because there are no factual allegations that Regions exercised control of the funds in question, Regions was not a fiduciary under ERISA and each of Counts 9 - 12 based on alleged breaches of fiduciary duties should be dismissed.

(iii) Count 13 should be dismissed because Regions is not liable for monetary damages under ERISA as a non-fiduciary.

55. Count 13 of the Complaint purports to assert a claim against Regions as a non-fiduciary pursuant to § 502(a)(3) of ERISA (29 U.S.C. § 1132(a)(3)) for the bank's "participation" in the Debtors' breaches of their fiduciary duties and seeks "restitution for the losses of the Victim Plans".

56. Section 502(a)(3) authorizes an action by a participant, beneficiary or fiduciary "to enjoin any act or practice which violates any provision of [Title II of ERISA] or the terms of the plan" or to obtain other appropriate equitable relief . . .".

57. Even if the allegations of the Complaint were true and Regions were to be charged with constructive knowledge of Debtors' violations of ERISA – a fact necessary in order to obtain relief under § 502(a)(3) of ERISA⁶ – Plaintiff's remedy is limited to "appropriate equitable relief" and Plaintiff may not recover monetary damages. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002); Sereboff v. Mid Atl. Med. Servs., 126 S. Ct. 1869, 1873 (2006). In Great West, the Supreme Court held that recovery under § 502(a)(3) of ERISA is limited to equitable relief previously awarded by a court of equity and held that the equitable remedy of restitution is available only to restore to the plaintiff *specific funds or property in the defendant's*

⁶ Harris Trust & Sav. Bank, etc. et al., v. Salomon Smith Barney Inc., et al., 530 U.S. 238 (2000).

possession and not to impose personal liability. Sereboth, clarified Great West to find that equitable relief includes an asserted right to recover “specifically identifiable” funds and the enforcement of a contractually created equitable lien. Under Great West and Sereboff, there can be no recovery under § 502(a)(3) for restitution unless the funds in question can be traced or otherwise identified so that they can be recovered by equitable means. The Sixth Circuit has recognized the effect of Great West and the distinction between law and equity in ruling that a participant in a retirement plan claiming an error in the calculation of his lump sum benefit was not a claim for equitable relief and that his request for recognition of a constructive trust could not “transmogrify” his claim for money damages into an equitable claim that could be brought under ERISA § 502(a)(3). Crosby v. Bowater, 382 F.3d 587, 595 (6th Cir. 2004). The Crosby court went on to state that the plaintiff in that case was seeking “an imposition of a constructive trust over sufficient assets to assure that his claim [would] be paid, thereby putting him in a better position than he would occupy as a general creditor” and concluded that the plaintiff “has no basis for obtaining such a priority”. Id. at note 8. Following Crosby, the District Court for the Southern District of Ohio dismissed a plaintiff’s claim under § 502(a)(3) seeking to recover losses arising out of the investment in a plan sponsor’s stock and an alleged series of illegitimate accounting strategies in order to hide its losses and inflate its revenues. The prohibition of the recovery of money damages under § 502(a)(3) was again recognized in In re Cardinal Health, Inc. ERISA Litig., 424 F. Supp. 2d 1002, 1026 (S.D. Ohio 2006). The Cardinal court, quoting Crosby, found that “though Plaintiffs try to mask their requested relief as equitable, in truth, it is nothing more than “compensatory damages”: monetary relief for the losses their plan sustained as a result of the alleged breach of fiduciary duties”.

58. In the Sixth Circuit, it is clear that Plaintiff may not recover monetary damages from Regions as a non-fiduciary under ERISA § 502(a)(3). Count 13, which specifically seeks recovery for the “losses of the Victim Plans” must, therefore, be dismissed.

(iv) The state law claims asserted in Counts 14, 15 and 16 are preempted by ERISA and should therefore be dismissed.

59. Counts 14 and 15 of the Complaint purport to state a claim under state law for recovery “in negligence for losses of the Victim Plans” and “for failure to act on [the Bank’s alleged] knowledge” and “aiding and abetting the conversion of the assets of the ‘Victim Plans’ by 1Point and Stokes.” Count 16 of the Complaint alleges that Regions “participated” in a breach of Debtors’ breach of their fiduciary obligations with respect to the “Victim Plans,” apparently under state law.

60. Section 514 (a) provides that Title II of ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan”. This preemption provision has been read very broadly. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 104 (1983). The law is also clear that any state law claims are displaced by ERISA’s civil enforcement provisions. Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987). The Supreme Court more recently stated that “any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and the therefore preempted.” Aetna Health, Inc. v. Davila, 542 U.S. 200, 216 (2004). The Sixth Circuit addressed the application of the doctrine of preemption in the context of a complaint alleging violations of various fiduciary duties imposed by ERISA as well as state-law claims of fraud, misrepresentation, concealment, and conversion in Briscoe v. Fine, 444 F.3d 478 (6th Cir. 2006). Relying on Metropolitan Life Insurance Co. v. Taylor, supra, and Aetna Health, Inc. v. Davila, supra, the Sixth Circuit in Briscoe found that “the plaintiffs have captioned what is

essentially a breach-of-fiduciary duty claim as a suit for fraud, misrepresentation, and concealment does not alter the fact their state-law cause of action mirrors their federal claim under ERISA”. Id. at 499. See also Smith v. Provident Bank, 173 F.3d 609, 613 (6th Cir. 1999) (“common law breach of fiduciary duty claims are clearly preempted by ERISA”) The purported causes of action stated in Counts 14 through 16 clearly “relate to” an employee benefit plan as the Counts seek to recover assets of the Victim Plans. They therefore interfere with the enforcement scheme of ERISA and are preempted and should be dismissed.

F. Conclusion

61. The Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) because it does not state a claim upon which relief can be granted. Even assuming that the facts as pled are true, Plaintiff has failed to state any legally cognizable claim and/or cannot be granted relief by this Court. Plaintiff clearly does not have standing to prosecute the Complaint under the Bankruptcy Code since he is seeking to recover funds that are not owed to the estates and he is also pursuing claims that are held by the Victim Plans and/or their participants, rather than the estates. Moreover, his claims are barred by *in pari delicto* and unclean hands due to the fraud and wrongful actions of the Debtors. Finally, each of the Counts in the Complaint is defective under ERISA and/or applicable law for the reasons discussed in detail above. Accordingly, the Complaint should be dismissed with prejudice.

WHEREFORE, Regions respectfully requests that this Court enter an Order:

- (a) granting the Motion;
- (b) dismissing the Complaint with prejudice as to Regions;
- (c) awarding Regions all attorneys’ fees, costs and expenses incurred by Regions in this matter; and

(d) granting Regions such other and further relief as this Court deems just and appropriate under the circumstances.

Dated: October 15, 2007

Respectfully submitted,

FROST BROWN TODD LLC

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served on October 15, 2007, by ECF and/or U.S. Mail, first class, postage prepaid upon:

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