

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE – NASHVILLE DIVISION**

<b>IN RE:</b>	)	
	)	
<b>1Point Solutions, LLC</b>	)	<b>Case No. 06-05400-KL3-11</b>
<b>Barry R. Stokes</b>	)	<b>Case No. 06-05898-KL3-11</b>
	)	<b>Chapter 11</b>
<b>Debtors.</b>	)	<b>Judge Keith M. Lundin</b>
	)	<b>Administratively Consolidated</b>
	)	<b>Under Case No. 06-05400-KL3-11</b>
_____	)	
	)	
<b>John C. McLemore, Trustee</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Ad. Pro No. 07-00283</b>
	)	
	)	
<b>Regions Bank, as Successor in Interest by</b>	)	
<b>Merger to AmSouth Bank, and</b>	)	
<b>Mid-Atlantic Capital Corporation,</b>	)	
	)	
<b>Defendants.</b>	)	
	)	

**PRETRIAL STATEMENT**

Come now the parties and submit this joint pretrial statement pursuant to the Pretrial Order in this case.

**I. FOR PLAINTIFF**

**A. Plaintiff’s Theory of Case**

1. John C. McLemore is the Trustee for 1Point Solutions, LLC, and Barry R. Stokes. 1Point Solutions, LLC (“1Point”), was a third-party administrator for 401(k) plans and various cafeteria plans, such as Health Savings Accounts and Health Reimbursement Accounts.

2. Customers with existing 401(k) plans were instructed to liquidate their securities holdings and send the proceeds to Mid-Atlantic Capital Corporation (“MACC”). Most 401(k) customers were told to send their regular monthly contributions by employees and company matching contributions to accounts at AmSouth Bank, to which Regions Bank is the successor bank (“Regions/AmSouth”). A few customers were instructed to send monthly 401(k) contributions to MACC.

3. All cafeteria plan customers were instructed to send monthly contributions by employees and company matching funds to accounts at Regions/AmSouth. The accounts at Regions/AmSouth belonged to 1Point, although many accounts bore the name of a customer as well as the name of 1Point. All of the customers' 401(k) money sent to MACC went into a 1Point account. Some of the money was transferred to accounts that bore the name of a customer, but all of it was controlled by 1Point and Stokes. Movement of money resulted in its commingling. Barry Stokes used this control over all of the accounts to steal large sums of money, currently estimated at between 20 million and 25 million dollars.

4. The Trustee has taken control over substantial assets of 1Point, including personal property, real estate, an art collection, money owed by customers on FSA accounts, and cash in the bank at Regions/AmSouth. The cash in the bank is money from 401(k) plans and cafeteria plan customers. The Trustee has returned the small amount of cash that could be identified to a specific plan. The Trustee is unable to identify any remaining funds or assets to any specific plan.

5. Before the filing of the Chapter 11 case, 1Point acted as fiduciary within the meaning of the Employee Retirement Income Security Act of 1974 as Amended ("ERISA"). The Trustee succeeds to the position of 1Point as fiduciary. The Trustee's discretionary control over the commingled assets also makes him a functional fiduciary under ERISA.

6. Regions/AmSouth was fully aware of the business activities of 1Point and Barry R. Stokes. It was required to have such knowledge by various provisions of the Bank Secrecy Act, the U.S.A. Patriot Act, and the Anti-Money Laundering Act. These statutes combine to require Regions/AmSouth to know its customers and to monitor their accounts for transactions that are suspicious. The Trustee asserts that Regions/AmSouth did such monitoring, and was aware of the defalcations in the accounts it held while collecting over \$500,000 in fees out of the accounts.

7. MACC is also subject to the statutes mentioned above. It had an Institutional Brokerage Agreement with 1Point, which specifically stated that 1Point was a third party administrator for 401(k) plans, and that MACC would be handling money that belonged to the plans. Funds were transferred to MACC by electronic means, and the wire advices in each case showed that the funds MACC held were coming from plans for which 1Point acted as TPA. MACC watched the disbursement of the funds to third parties unrelated to the 401(k) plans.

8. Both defendants knew they were holding funds for the benefit of fiduciary plans. Both defendants exercised authority or control over the management or disposition of the funds, making them fiduciaries with respect to the plans.

9. Both MACC and Regions/AmSouth helped set up systems that facilitated the commingling and theft of millions of dollars of fiduciary funds by 1Point and Stokes. Both defendants knew or should have known it was taking place over a period of five (5) years. ERISA provides relief for the plaintiff fiduciary. The Trustee has also asserted certain state law claims for relief.

**B. Status of Case**

By agreement, the Defendants were allowed additional time in which to file responsive pleadings. Both Defendants have filed motions to dismiss. The Trustee has reviewed those motions and, by agreement, has not yet filed responses. The parties have agreed to ask the Court at the pretrial conference to establish a briefing schedule and a hearing date on the motions to dismiss.

**C. Disputed Facts and Legal Issues**

The motions to dismiss by MACC and Regions/AmSouth assert that the Trustee has no standing to raise these issues, and that the Trustee is in pari delicto with 1Point and Stokes because of his status as Trustee. MACC and Regions/AmSouth assert that the Trustee is not a fiduciary within the meaning of ERISA. They also assert, directly or indirectly, that they were “directed trustees,” which exempts them from liability under ERISA. The Trustee expects to address these issues in his responses to the motion to dismiss.

**II. FOR DEFENDANT REGIONS/AMSOUTH**

**A. Facts**

Discovery in this action has not yet begun. Regions reserves the right to supplement and modify its statement and legal positions based on information obtained through the discovery process. Notwithstanding the foregoing, Regions admits that 1Point opened various accounts at Regions. The listed owner for each of those accounts was 1Point and the funds in them were controlled and directed by 1Point. Regions contends that the Trustee’s various claims are without merit because (1) Regions is not and was not a fiduciary to any of the “Victim Plans,” (2) the Trustee has no standing to sue on behalf of these Victim Plans, (3) the Trustee is barred by the doctrine of *in pari delicto* from asserting its claims against Regions, (4) the Trustee’s claims brought under ERISA are defective or barred, (5) the Trustee is limited to equitable relief and not entitled to money damages, and (6) the Trustee’s claims are preempted by ERISA. In support of these contentions, the Defendant asserts the following factual and affirmative defenses:

1. As a matter of law, Regions was not a fiduciary to the Victim Plans. Regions served only as a depository institution for the accounts opened and owned by 1Point. At no time did Regions exercise authority or control over the funds of the Victim Plans or over the administration of the Victim Plans. Further, Regions provided no investment advice to the Victim Plans.

2. The Trustee has failed to identify any specific Victim Plans whose funds were deposited into 1Point’s accounts with Regions.

3. The Trustee only has authority to assert claims over “property of the estate” as defined by 11 U.S.C. § 541, and the Trustee therefore lacks standing to pursue claims on behalf of third party creditors.

4. The Trustee does not have standing to bring an ERISA claim because neither he nor the Debtors are current fiduciaries of the Victim Plans or their beneficiaries.

5. The Trustee steps into the shoes of the Debtor, and as such, is subject to all defenses Regions might have against the Debtor and all claims asserted in this matter by the Trustee are barred by the doctrines of *in pari delicto* and unclean hands. Regions denies that it has any culpability for the alleged losses. However, to the extent that Regions is found to have any culpability, 1Point and its sole principal, Barry Stokes, are more culpable than Regions for the losses alleged in the Complaint.

6. Regions denies that it is liable as a non-fiduciary under ERISA. To the extent that any such liability exists, recovery is limited to equitable relief and the Trustee is not entitled to money damages.

7. The Trustee's state law claims against Regions are pre-empted by ERISA.

8. Plaintiff has failed to assert facts entitling it to recovery from Regions.

9. Regions was not negligent.

10. Regions neither owed nor breached any duties to 1Point.

11. The Trustee's claims may be barred by the applicable statutes of limitation.

12. Some or all of the claims asserted may be barred by the doctrine of waiver, estoppel and laches.

**B. Status of Case**

Regions agrees with the status of the case as set forth by the Plaintiff.

**C. Disputed Facts and Legal Issues**

In addition to the factual and legal disputes set forth by Regions in sub-section A, above, Regions adopts the disputed contentions of fact presented by Defendant MACC. Regions reserves the right to supplement the facts and legal issues in dispute if necessary based upon information obtained through discovery.

**III. FOR DEFENDANT MID-ATLANTIC CAPITAL CORPORATION**

**A. Mid Atlantic Capital Corporation's Defenses**

Discovery in this action has not yet begun. Defendant Mid Atlantic Capital Corporation ("MACC") reserves the right to supplement and modify this statement of defenses based on information obtained during discovery. At present, MACC raises the following defenses, several

of which have already been asserted in the pending motion to dismiss, with respect to Plaintiff's claims:

1. Plaintiff has failed to state a claim upon which relief can be granted.
2. Plaintiff lacks standing to sue to recover money for the 401(k) plans on whose behalf he is purportedly bringing this action (the "Plans").
3. A number of the Plans have already brought their own claims against MACC, thus subjecting MACC to potentially inconsistent verdicts.
4. Plaintiff's claims are barred by the doctrine of *in pari delicto* and by the doctrine of unclean hands.
5. Plaintiff's claims are barred to the extent he is not a fiduciary with respect to each of the 401(k) plans at issue.
6. MACC was not an ERISA fiduciary. In the alternative, any fiduciary duties were limited and did not apply to the conduct alleged in the Complaint.
7. ERISA preempts Plaintiff's state law causes of action.
8. MACC did not substantially assist Debtors' misconduct.
9. MACC neither knew nor should have known of the Debtors' misconduct.
10. MACC did not aid or abet any misconduct by the Debtors.
11. MACC was not negligent.
12. MACC did not owe, or if owed did not breach, any duties.
13. MACC did not convert the assets of the 401(k) plans.
14. MACC was authorized to take the actions at issue.
15. Some or all of Plaintiff's claims may be barred by the applicable statutes of limitations.
16. Some or all of Plaintiff's claims may be precluded by laches, waiver or estoppel.
17. Other parties, including Debtors and other fiduciaries of the 401(k) plans at issue, may bear responsibility for the losses at issue.

**B. Mid Atlantic Capital Corporation's Summary of Contentions of Fact**

Discovery in this action has not yet begun. Defendant MACC reserves the right to supplement and modify this summary based on information obtained during discovery. MACC expects the following facts to be proven through the testimony of Plaintiff; the sponsors, trustees and other fiduciaries of the 401(k) plans at issue (the "Plans"); MACC officers and employees; and Debtors; and through documents in the custody of those individuals and entities. MACC understands that Plaintiff contests some or all of these contentions:

1. Each of the Plans retained 1Point/Stokes to invest and manage their plan assets and entrusted plan assets to 1Point/Stokes.
2. In September 2001, another 1Point/Stokes entity, 1Point Administrative Services ("Administrative Services"), and MACC entered the Institutional Brokerage Agreement attached as Exhibit A to the Complaint (the "IBA"). Pursuant to that agreement, Administrative Services opened an omnibus administrative services account with MACC in the name of 1Point Administrative Services. Administrative Services subsequently opened three other accounts with MACC.
3. Pursuant to the IBA, MACC was to take directions from 1Point/Stokes with respect to the assets deposited in any accounts established pursuant to the IBA.
4. MACC did not require any additional authorization to process transactions in the accounts at the direction of Stokes/1Point.
5. MACC did not form contractual relationships with any of the Plans.
6. In October 2002, with the consent of 1Point/Stokes, a third party assumed all of MACC's rights and obligations pursuant to the IBA.
7. All of MACC's actions with respect to 1Point/Stokes, Administrative Services and the Plans were taken in the normal course of business. MACC did not provide substantial assistance to 1Point/Stokes in connection with the alleged misconduct of 1Point/Stokes.
8. MACC did not exercise control or authority over the management or disposition of any assets of the Plans.
9. MACC did not have any knowledge of the alleged misconduct engaged in by 1Point/Stokes nor did it provide substantial assistance in connection with that alleged misconduct. MACC's obligations with respect to the various laws cited by the Plaintiff are irrelevant to the issues in this adversary proceeding.
10. Although MACC did not owe or breach any fiduciary duties to the Plans, other parties, including the Plan trustees and other fiduciaries, did owe and/or breach such duties. Those individuals and entities may have failed to properly investigate the fitness, or supervise and monitor the conduct, of Stokes and 1Point and may have liability resulting therefrom.

MACC does not have sufficient knowledge regarding the truth or falsity of the Plaintiff's allegations with respect to certain of its factual allegations and, therefore, contests such allegations and demands proof thereof. This includes Plaintiff's allegations concerning:

11. The nature and extent of the relationship and communications between 1Point/Stokes and the Plans and their fiduciaries.
12. The handling, management and movement of Plan assets by the Plans, their fiduciaries and 1Point/Stokes.
13. The extent and impact of Debtors' alleged misconduct with respect to each Plan.
14. The existence and, if any, extent of damages.
15. The Plaintiff's alleged possession of Plan assets.
16. 1Point/Stokes' alleged status as a fiduciary at the time of the respective petitions for bankruptcy.

This 15<sup>th</sup> day of November, 2007.

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