



plan administrator and lacks standing to sue under ERISA. Moreover, his claims are barred by *in pari delicto* due to the admitted fraud and wrongful actions of the Debtor – whose shoes Plaintiff stands in. Further, given the facts as alleged, the uncontroverted case law shows Regions’ actions as a depository institution do not make it a fiduciary under ERISA. Finally, each of the common law Counts in the Complaint is preempted by ERISA and Plaintiff is not entitled to equitable relief. For all of these reasons, the Complaint should be dismissed with prejudice.

**II. Plaintiff’s argument that he has standing to sue as a fiduciary under ERISA is based on a flawed analysis of ERISA and the case law.**

A. Plaintiff Is Not A Fiduciary With Standing to Sue Under ERISA.

In a misguided attempt to bolster his argument that he has standing to sue under ERISA, Plaintiff misinterprets several cases and a section of the Bankruptcy Code that govern the authority and obligations of a “plan administrator”, a “successor” fiduciary or a holder of assets belonging to an ERISA plan. Section 3(16) of ERISA defines a plan “administrator” as “the person specifically so designated by the terms of the instrument under which the plan is operated” (or the plan sponsor if an administrator is not so designated), 29 U.S.C. 1103(16). As further discussed below, neither 1Point nor the Plaintiff is, or ever has been, the “plan administrator” of any of the plans involved. While 1Point was apparently a third party administrator of a number of plans, Plaintiff has not succeeded to these duties and is merely the holder of certain assets of these plans. Plaintiff is not in a position analogous to any “plan administrator” or other “successor” fiduciary permitted under the cited authority to sue on for the benefit of a plan.

Plaintiff claims that the decision in Mutual Life Ins. Co. of New York v. Yampol, 840 F.2d 421 (7<sup>th</sup> Cir. 1988) provides him with standing to sue because he allegedly, like the

plaintiff in Yampol, is a “successor fiduciary” under ERISA. This is incorrect, as a simple analysis of the Yampol decision shows. That suit was brought by a liquidator of a company who was, in effect, the plan administrator of a terminating single plan. In contrast, Plaintiff has not been appointed as a liquidator of any plan. He is merely the trustee of the estate of a former fiduciary of various plans, a former fiduciary that admittedly breached its duties with respect to those plans.

Nor is Plaintiff a “plan administrator” like the plaintiff in Yampol. Indeed, there is no allegation that 1Point was the “plan administrator” of any of the plans at issue. Plaintiff does not even allege that he is providing the third party administration services that 1Point once provided to the plans in question. Unlike the plan in Yampol, each underlying plan that Plaintiff purports to represent has its own “plan administrator” and has found someone new to provide the services previously rendered by 1Point. Those fiduciaries are responsible for carrying out the duties that Plaintiff is attempting to usurp. Those fiduciaries – not Plaintiff - are the individuals who, in the words of the Yampol court are “most keenly aware of the breaches of duty by past fiduciaries” (like 1Point) and who can take any appropriate action to obtain the benefit of ERISA’s remedial provisions.

Plaintiff also attempts to support his position by arguing that the ruling in SEC v. Capital Consultants, LLC, WL 32502450 (D.Or. 2002) grants any ERISA fiduciary controlling plan assets standing to sue any other ERISA fiduciary. Nothing in that case supports such a conclusion. In Capital Consultants, the bankruptcy court had appointed a permanent receiver for Capital Consultants and its controlled entities. Some investment accounts held at Capital Consultants coincidentally included ERISA investors along with non-ERISA investors. Once the receiver marshaled assets available for distribution, it was undisputed that the receiver was an ERISA fiduciary with respect to the investors that were ERISA plans because he had

authority and control of assets attributable to the ERISA investor's deposits. Accordingly, the distribution of those assets needed to be undertaken in such a way so as not to breach the fiduciary duty owed by the receiver to the ERISA investors. The court found that the receiver's proposed distribution plan did not violate his ERISA fiduciary duties and thus allowed the distributions. In no way does the case or the decision support Plaintiff's position that possession of plan assets also gives him the right to file suit to collect other assets for the benefit of the plans.

The fact that a person is a fiduciary for one purpose does not make that person a fiduciary for all purposes. An ERISA fiduciary's obligations and authority are generally limited to the extent of its fiduciary functions with respect to the plan. See 29 C.F.R. § 2509.75-8, Q: FR-16; Briscoe v. Fine p. 486-87; Brandt v. Grounds, 687 F.2d 895 (7<sup>th</sup> Cir. 1982). Thus, the fact that an individual may become subject to ERISA fiduciary duties with respect to certain assets of an ERISA plan (because it, like Plaintiff or the receiver in SEC v. Capital Consultants, happens to come into possession of such assets) neither requires nor authorizes him to sue other fiduciaries to in an attempt to recover other plan assets.

The court in In re Esco Manufacturing Co., 33 F.3d 509 (5<sup>th</sup> Cir 1994) held exactly the opposite of what Plaintiff suggests in his Response and illustrates that certain actions with respect to a plan may be performed only by the ERISA plan administrator. The district court in Esco ordered the trustee in bankruptcy to terminate a pension plan maintained by the debtor. Although in this opinion, the Fifth Circuit upheld the order of the district court, the Fifth Circuit subsequently withdrew its original opinion and issued a subsequent opinion finding that the plan could only be terminated by the "plan administrator" as defined in ERISA, 29 U.S.C. § 1002(16)(A)(i) and not by the debtor. The court noted that the term "plan administrator" is "a well-defined term to describe the fiduciary charged with administering the plan" (in that

case, a committee appointed by the plan sponsor and the union). As already stated, there is no suggestion in the Complaint that Plaintiff is the “plan administrator” of any of the plans at issue, regardless of whether he may hold some of their assets. Plaintiff is not doing so. Plaintiff alleges only that 1Point *was* a “third party administrator” (not the “plan administrator”) for the plans prior to its bankruptcy. Plaintiff has no authority as a “plan administrator” to bring the claims set forth in the Complaint.

Plaintiff further stretches the boundaries of ERISA in his reference to new Section 704(11) of the Bankruptcy Code. 11 U.S.C. § 704(11). Section 704(11) requires a debtor (or any entity designated by the debtor) serving, at the time of the commencement of the case, as the “plan administrator” (as defined in Section 3(16) of ERISA) of an employee benefit plan to continue to perform the obligations required of the administrator. Section 704(11) has absolutely no application here.

As previously stated, 1Point was not serving as the ERISA “plan administrator” of any plan at issue at the time of the bankruptcy. Section 704(11) addresses situations where the debtor is the “plan administrator” of its own plans. The rule ensures that those plans will continue to be administered on behalf of their participants despite the bankruptcy. In no way does Section 704(11) provide or mandate that all fiduciaries of an ERISA plan continue to serve in that role nor does it vest them with the right to sue on behalf of the plan. Plaintiff is not and does not allege that he is a “plan administrator” as defined in Section 3(16) of ERISA and Section 704(11) is therefore inapplicable to this case.

**B. Plaintiff Has No Standing to Pursue His claims as a Bankruptcy Trustee.**

Although Plaintiff asserts standing due to his alleged status as an ERISA fiduciary, Plaintiff also hasn’t completely abandoned the idea that his status as bankruptcy trustee gives him some special standing as well. See Response, p. 6 (“The Trustee does not rely solely on the

Bankruptcy Code, or common law, in support of his standing.”). In addition to his lack of standing under ERISA, however, Plaintiff also lacks standing to bring his claims under the Bankruptcy Code.

It is long settled law that a bankruptcy trustee has no standing to recover on behalf of third parties other than the debtor’s estate. Caplin v. Marine Midland Grace Trust Co. of New York, 406 U.S. 416 (1972). Plaintiff argues that the Caplin decision is no longer good law because the Bankruptcy Act under which it was decided has been replaced with the Bankruptcy Code. This argument flies in the face of the holding in In re Cannon, 277 F.3d 838 (6<sup>th</sup> Cir. 2002) in which the Sixth Circuit again recognized that a bankruptcy trustee has no standing to bring claims on behalf of third parties. Cannon, 277 F. 3d at 853. Further, undermining Plaintiff’s position is the decision rendered in In re Motorwerks, Inc., 371 B.R. 281, 290 (Bankr. S.D. Ohio 2007), in which the Court stated that “[a]lthough Caplin was decided under the former Bankruptcy Act, a number circuits, including the Sixth Circuit, recognize its continuing vitality under the Bankruptcy Code” (citing cases from the Third Circuit and the Eighth Circuit).

Plaintiff’s own characterization of his status as a fiduciary of commingled funds further demonstrates why he does not have standing. In the context of arguing that he is a fiduciary, either as a result of his control over ERISA plan assets or his alleged succession to the fiduciary status of 1Point and Stokes, Plaintiff attempts to defend his holding of plan assets as “property of the estate”. This issue arises from the transfer of funds held in deposit accounts at Regions in the name of 1Point. After the bankruptcy was filed, Plaintiff filed a Motion in the Bankruptcy Court seeking to take possession of those funds. An Agreed Order was entered in which the funds were turned over to Plaintiff as “assets of the estate.” Plaintiff now claims that those funds are owned by the various plans he purports to represent. Plaintiff states that the

funds must be held in the estate because “there is no other way for the Trustee to hold money which cannot be traced to a specific Plan.” Plaintiff acknowledges that, while these funds are allegedly “the property of some plan”, “no one can determine which plan at this juncture.” The fact that Plaintiff has no way to hold money that cannot be traced to a specific plan other than as “property of the estate” demonstrates clearly that he is not the proper party to be bringing this suit. Plaintiff’s acknowledgment of this fact supports Region’s argument that Plaintiff has no standing to sue and that the Complaint must be dismissed.

### **III. The doctrine of *in pari delicto* does apply in this case.**

The Plaintiff argues that the long established doctrine of *in pari delicto* does not apply to this case despite the uncontroverted fact that the debtor, 1Point, engaged in the fraudulent conduct that resulted in the very losses sought now by the Plaintiff. In support of this novel claim Plaintiff relies on Donovan v. Schmoutey, 592 F. Supp 1361 (D. Nev. 1984). The Donovan court admittedly declined to apply the doctrine of *in par delicto* to the facts of that case. However, this was in part because the Donovan plaintiff was the Secretary of Labor, “a governmental officer authorized by statute to sue on behalf of a pension trust pursuant to ERISA, 29 U.S.C. sec. 1132(a)(2).” The Secretary of Labor (against whom there was no allegation of any wrongdoing) did not derive the right to bring the suit by stepping into some prior party’s shoes, but from a specific, independent statutory right. The Plaintiff here has no such statutory authority to bring claims on behalf of the plans. To the contrary, Plaintiff admits that his authority comes from his status as a bankruptcy trustee in possession of the rights once held by 1Point, the ultimate wrongdoer. The doctrine of *in pari delicto*, therefore, does apply to Plaintiff, and he cites no law showing otherwise.

Plaintiff also notes that the Court in Donovan was also concerned that the application of *in pari delicto* would harm the participant and beneficiaries protected by ERISA. There is no

cause for this concern in the case at bar, however. Unlike Donovan, which involved a settlement with the other plan fiduciaries and an involuntary plaintiff, the plans at issue here have plan administrators fully capable of bringing claims against the parties they deem responsible for any losses. Indeed, as noted by Plaintiff, a number have already done so. As such, the harm the court feared might occur in Donovan is not present here.

Plaintiff further attempts to avoid the application of the doctrine of *in pari delicto* by relying on Corbin v. Blankenburg and Duval as authority. This reliance is also misplaced. Corbin and Duval involved successor fiduciaries. As noted above, Plaintiff is not a “successor fiduciary” to IPoint with respect to any plan. Plaintiff has not alleged any current involvement with any of the plans. Instead, each of the plans has an ERISA “plan administrator” responsible for directing the administration of the plan (including retaining any third-party administrator) and authorized to bring suit in the name of the plan. Plaintiff, on the other hand, merely stands in the shoes of a former fiduciary and may himself be a fiduciary only to the extent that he allegedly holds assets of the plans. Plaintiff’s duties and authority as a fiduciary in this regard are limited to returning all plan assets to the respective plans. They do not extend to attempting to obtain custody and control of other assets for the benefit of those plans. Any decision as to whether a plan should or will sue other fiduciaries or non-fiduciaries should be made by the “plan administrator” of that plan or possibly the successor third party administrator to IPoint with respect to that plan, not by the bankruptcy trustee stepping into the shoes of the original wrongdoer.

#### **IV. Plaintiff’s argument that Regions was a fiduciary is incorrect as a matter of law.**

Plaintiff alleges that Regions is an ERISA fiduciary and thus subject to suit by Plaintiff. This argument ignores the specific facts alleged in the Complaint as well as the overwhelming case law in which depository institutions like Regions are held not to be ERISA fiduciaries.

One of Plaintiff's arguments is that Regions is an ERISA trustee. This claim is based on a flawed reading of the fiduciary provisions of ERISA. Plaintiff turns ERISA's requirement that "all assets of an employee benefit plan shall be held in trust by one or more trustees" on its head to argue that, because Regions allegedly "held" plan assets, it is a trustee. The ERISA language quoted by Plaintiff is not a definition, but a requirement. The ERISA trust provision makes it clear that a trustee of a plan "shall be either named in the trust instrument . . . or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee . . shall have exclusive authority and discretion to manage and control the assets of the plan [except in the case of directed trustees or the delegation of investment authority to an investment manager]", Section 403(a) of ERISA, 29 U.S.C. § 1103(a). In contrast to the functional definition of "fiduciary" in ERISA, an individual or entity can become a trustee only if it accepts such appointment. There is no allegation that Regions accepted appointment as a trustee of any plan.

Undaunted, Plaintiff argues that, if not an ERISA trustee, Regions is nonetheless a fiduciary because it "purposefully took control over funds in its possession and disbursed them on the instructions of Stokes and 1Point" (emphasis added). See Response, p. 14. If transferring money in a depository account at the direction of the owner of that account were to constitute "control" within the context of ERISA, then any and every bank holding plan assets would have control and be a fiduciary. See Section 3(21) of ERISA, 29 U.S.C. 1002(21)(A). However, countless courts have examined this issue and found that depository institutions are not fiduciaries. See Regions' Memorandum of Law, pp. 25-28.

The allegations in the Complaint are that Regions distributed funds from accounts titled in 1Point's name upon instructions from 1Point's agents and employees. Such action simply

does not constitute “control” as that term is used in the ERISA definition of fiduciary. This is fatal to the Plaintiff’s claim that Regions was a fiduciary under the ERISA.

The cases cited by Plaintiff for the proposition that Regions exercised sufficient control to be considered a fiduciary are clearly distinguishable on their facts and do not support Plaintiff’s position. The Smith v. Provident Bank, 170 F.3d 609 (6<sup>th</sup> Cir. 1999) case did not involve a custodian of funds as Plaintiff asserts, but rather a directed trustee who exercised control over plan assets by taking actions other than as directed. Regions was never a trustee of the plans in question. Similarly, Srein v. Frankford Trust Co., 323 F.3d 214 (3<sup>rd</sup> Cir. 2003) involved a directed trustee of a qualified plan who erroneously distributed policies held by the trustee to another customer without instructions from the fiduciary directing the trustee. Once again, Regions was not a trustee. Further, Regions transferred money held in accounts owned by 1Point only upon the direction of 1Point and had no discretion as to who to pay from the accounts. Plaintiff’s attempt to distinguish the uniform authority that a mere depository is not a fiduciary is untenable. Regions was not a fiduciary as alleged in the Complaint and all claims relying on this argument should be dismissed.

In a last effort to maintain his claims, Plaintiff argues that the decision as to whether a party is a fiduciary should not be decided on a motion to dismiss, citing, Moeckel v. Caremark, Inc., 385 F.Supp.2d 668 (M.D. Tenn. 2005). The Moeckel Court merely found that dismissal was premature *in that case* because the court had insufficient facts to make a determination as to whether the conduct of defendant Caremark, a pharmacy benefits manager providing drug processing services to plan participants, rose to the level of control to make it a fiduciary under ERISA. Id. at 683. In the case at bar, Plaintiff alleges that Regions is a fiduciary solely due to the fact that it followed the banking directions of 1Point, the owner of the accounts held at

Regions. Assuming these alleged facts are true, the law is clear that Regions is not a fiduciary under ERISA. This entitles Regions to a dismissal.

Moreover, the case law is replete with examples of courts deciding motions to dismiss on the basis that such institutions are not fiduciaries. See, e.g. Brandt v. Grounds, 687 F.2d 895, 898-90 (7<sup>th</sup> Cir. 1982) (Seventh Circuit affirmed the dismissal of an ERISA claim against a depository for failure to state a claim based on a finding that the depository was not a fiduciary under ERISA); O'Toole v. Arlington Trust, 681 F.2d 94 (1<sup>st</sup> Cir. 1982) (First Circuit upheld the dismissal of a claim against a depository on the ground that it was not a fiduciary); Bradshaw v. Jenkins, 1984 U.S. Dist. LEXIS 20013 (W.D. Wash. 1984) (dismissing the portion of a complaint relating to a bank custodian on the ground that the bank was not a fiduciary).

#### **V. Plaintiff is not entitled to equitable relief.**

Plaintiff argues that he is entitled to the equitable remedy of disgorgement even if Regions is not a fiduciary. However, and as spelled out more fully in Regions' Memorandum of Law, the "appropriate equitable relief" referenced by Plaintiff does not include the recovery of monetary damages. See Regions' Memorandum of Law, pp. 29-30. It is available only to restore to the plaintiff specific funds or property in a defendant's possession and not to impose personal liability. Under Sereboff v. Mid Atl. Med. Servs., 126 S. Ct. 1869, 1873 (2006) and Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002), there can be no recovery unless the funds in question can be traced or otherwise identified so that they can be recovered by equitable means. Plaintiff cannot do so and is therefore not entitled to equitable relief.

## **VI. Plaintiff's common law causes of action are preempted.**

Finally, Plaintiff argues that his common law causes of action are not preempted by ERISA. While Plaintiff's argument is difficult to follow, the Briscoe v. Fine, 444 F.3d 478 (6<sup>th</sup> Cir. 2006) case cited by Plaintiff clearly states that the issue in this analysis is whether there is any violation of a legal duty independent of ERISA. In addressing the issues before it, the Briscoe court found all but one of the state law claims (fraud, misrepresentation and concealment) to be preempted by ERISA, explaining in one instance that the plaintiff had "merely attached new, state-law labels to the ERISA claims for breach of fiduciary duty and recovery of benefits, for the apparent purpose of obtaining remedies that Congress has chosen not to make available under ERISA." The single state law claim that was not preempted was for a failure to disclose the overall financial condition of the company, which would have applied even if the company had never sponsored an ERISA plan. Every cause of action brought by Plaintiff against Regions involves the alleged mishandling of ERISA funds. Accordingly, the claims in this matter are governed exclusively by ERISA and all state law claims are preempted.

Kloots v. American Express Tax and Bus. Servs., Inc., 233 Fed. Appx. 485 (6<sup>th</sup> Cir. 2007) and the other cases cited by Plaintiff to support his argument that his state law claims are not preempted involve actions brought by employee benefit plans themselves through their respective trustees or plan administrators. Plaintiff is neither a trustee nor a plan administrator, and these cases do not support his position. Further, these cases involved allegations against nonfiduciaries arising from contractual or other rights of the plan against service providers or other parties under laws of general application that do not apply only to employee benefit plans.

Finally, Plaintiff relies on As You Sow v. AIG Financial Advisors, Inc., 3:06-cv-1171 (M.D. Tenn. 2008) in which a number of employee benefit plans filed claims for violations of the Tennessee Securities Act. Again, these claims were made by the plans themselves. Furthermore, as noted in that opinion, ERISA has a specific exception from its otherwise broad preemption provision for securities laws. No such exemption exists in this case.

## **VII. Conclusion**

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.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel via electronic filing and/or facsimile/U. S. Mail, postage prepaid, on this 11th day of April, 2008:

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