

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

JOHN C. MCLEMORE,	)	
Plaintiff	)	
	)	
	)	Civil No. 3:08-0021
v.	)	Judge Trauger
	)	Magistrate Judge Bryant
REGIONS BANK, as Successor in Interest	)	
By Merger to AmSouth Bank, and MID-	)	
ATLANTIC CAPITAL CORPORATION,	)	
Defendants.	)	

MOTION OF THE SECRETARY OF LABOR TO PARTICIPATE AS AMICUS  
CURIAE IN SUPPORT OF PLAINTIFF’S OPPOSITION TO DEFENDANTS’  
MOTIONS TO DISMISS

Elaine L. Chao, Secretary of the United States Department of Labor ( the  
“Secretary”) hereby moves this Court for permission to participate as amicus curiae in  
support of Plaintiff’s, John C. McLemore (“McLemore” or the “Trustee”), opposition to  
Defendants’ Motions to Dismiss and states:

1. The Secretary seeks permission to participate as amicus curiae in the above  
referenced case with respect to the pending motions to dismiss the Trustee’s complaint  
against Regions Bank, as Successor in Interest by Merger to AmSouth Bank (“Regions”)  
and Mid-Atlantic Capital Corporation (“MACC”). The Secretary has primary authority to  
interpret and enforce the provisions of Title I of ERISA. See Secretary of Labor v.  
Fitzsimmons, 805 F. 2d 682, 692-93 (7<sup>th</sup> Cir. 1986) (Secretary’s interests include  
promoting the uniform application of the Act, protecting plan participants and  
beneficiaries, and ensuring the financial stability of plan assets)(en banc). Therefore, the  
Secretary has a strong interest, both with regard to her own litigation and private

litigation, in ensuring that ERISA is not interpreted to eliminate remedies intended by Congress.

2. Further, the Secretary has a substantial interest in ensuring that participants in individual account plans, such as the 401(k) plans involved here, as well as other ERISA qualified employee benefit plans, have recourse against fiduciary misconduct.

McLemore, chapter 11 Trustee of the estates of 1 Point Solutions, LLC (1 Point”) and Barry R. Stokes (“Stokes”), has alleged that during the time that 1 Point and Stokes were ERISA fiduciaries for over numerous ERISA covered plans, 1 Point and Stokes breached their fiduciary duties to the participants and beneficiaries of those ERISA covered plans. McLemore has also alleged that Regions and MACC had and breached ERISA fiduciary duties to those same ERISA qualified employee benefit plans.

3. The Secretary also has a substantial interest in ensuring that all ERISA fiduciaries are held to the same strict standards for fulfilling their duties to plan participants and beneficiaries which are the highest known to law. Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2<sup>nd</sup> Cir.), cert. denied, 459 U.S. 1069 (1982).

4. Attached as Exhibit A is a copy of the amicus brief that the Secretary would file, if she were granted permission to do so. Attached as Exhibit B are two unreported decisions and an advisory opinion cited in the amicus brief. The Secretary’s brief addresses two of the grounds asserted by the Defendants and would argue that to exclude certain ERISA fiduciaries from their ERISA duties based solely upon their status as an appointed bankruptcy trustee, would defeat the intent of Congress to protect the interests of participants in ERISA covered employee benefit plans. Further, to permit the defense of *in pari delicto* to defeat a suit for breach of ERISA fiduciary duties brought by a

successor ERISA fiduciary who is also an appointed bankruptcy trustee, is contrary to ERISA section 409(b), 29 U.S.C. § 1109(b), and would eliminate a remedy otherwise intended by Congress for the protection of plan participants.

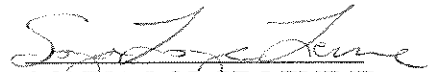
WHEREFORE, the Secretary respectfully requests that she be permitted to submit an amicus brief in support of the Trustee's opposition to the Motions to Dismiss.

Respectfully submitted,

GREGORY JACOB  
Solicitor of Labor

TIMOTHY D. HAUSER  
Associate Solicitor for Plan  
Benefits Security Division

NATHANIEL SPILLER  
Counsel for Appellate and Special  
Litigation



SONYA LORGE LEVINE  
Senior Trial Attorney  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Room N-4611  
Washington, D.C. 20210  
Tel. (202) 693-5600  
Fax. (202) 693-5610

CERTIFICATE OF SERVICE

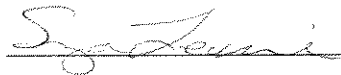
On May 5, 2008, this document was filed electronically with the Clerk's office by using the CM/ECF system and was simultaneously served upon the following using that same system:

John R. Wingo  
Jonathan Frederick Teitenberg  
Frost, Brown & Todd, LLC.  
424 Church Street, Suite 1600  
Nashville, Tennessee 37219

Craig V. Gabbert, Jr.  
Barbara D. Holmes  
D. Alexander Fardon  
Harwell Howard Hyne Gabbert & Manner P.C.  
315 Deaderick Street, Suite 1800  
Nashville, Tennessee 37238

David L. McClenahan  
Matthew J. Fader  
Ryan DeMotte  
Kirkpatrick & Lockhart Preston Gates Ellis, LLP  
535 Smithfield Street  
Pittsburgh, Pennsylvania 15222

Robert M. Garfinkle  
Edwin M. Walker  
2000 Richard Jones Road Suite 250  
Nashville, Tennessee 37215-8249

A handwritten signature in cursive script, appearing to read "Suzanne", is written over a horizontal line.