

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

Heritage Equity Group 401(k) Savings Plan,)
et al.,)
)
 Plaintiffs,)
)
v.)
)
Mid Atlantic Capital Corporation and)
SunGard Institutional Brokerage, Inc.,)
)
 Defendants.)

**No. 3:07-cv-841
Judge Trauger
Magistrate Judge Bryant**

John C. McLemore, Trustee,)
)
 Plaintiff,)
)
v.)
)
)
Regions Bank, as Successor in Interest by)
Merger to AmSouth Bank, and)
Mid Atlantic Capital Corporation,)
)
 Defendants.)

**No. 3:08-cv-21
Judge Trauger
Magistrate Judge Bryant**

MEMORANDUM IN SUPPORT OF MACC’S MOTION TO CONSOLIDATE

Mid Atlantic Capital Corporation (“MACC”) has moved the Court to consolidate these related actions pursuant to Federal Rule of Civil Procedure 42(a). The pleadings show that these two actions involve common issues of fact, common issues of law, and common parties. Consolidation will greatly lower costs and increase efficiency by avoiding duplicative discovery, pre-trial proceedings, and trial. MACC therefore respectfully requests that the Court consolidate these actions.

Background Applicable to Both Cases¹

Various 401(k) plans and their trustees retained Barry Stokes and his company, 1Point Solutions, LLC (“1Point”), to manage and invest the plans’ assets. MACC is a clearing brokerage firm. In 2001, Stokes opened an omnibus administrative account in the name of a 1Point affiliate pursuant to an Institutional Brokerage Agreement (“IBA”) between the 1Point affiliate and MACC. MACC thereafter accepted deposits into and transferred funds out of that account as Stokes directed. In 2002, MACC assigned the IBA to SunGard Institutional Brokerage, Inc. (“SunGard”) but, under a contract with SunGard, continued to process transactions in the 1Point account controlled by Stokes.

Stokes allegedly stole money from the plans. Stokes has been indicted. Stokes and 1Point have filed for bankruptcy. John C. McLemore is the Chapter 11 Trustee (the “Trustee”) for the consolidated bankruptcy estates.

The Heritage Case

Ten 401(k) plans and their trustees filed the Heritage Case (No. 3:07-cv-841) against MACC and SunGard on August 16, 2007. The Heritage Case plaintiffs assert that MACC and SunGard knew, or should have known, of Stokes’s theft of plan assets and are liable to the plans for that theft under the Employee Retirement Income Security Act (“ERISA”) and Tennessee law (see Heritage Case Doc. No. 27 & No. 48 at pp. 1-3).²

¹ This background summary is based on the First Amended Complaint and Case Management Order in the Heritage Case (Heritage Case Doc. Nos. 27, 48) and on the Complaint and Pretrial Statement in the Trustee Case (Trustee Case Doc. No. 1 at Ex. 2; Trustee Bkrcty. Case Doc. No. 23).

² MACC and SunGard have filed motions to dismiss in the Heritage Case (see Heritage Case Doc. Nos. 30, 33, 53-54). The Heritage Case plaintiffs have responded to both motions (Heritage Case Doc. Nos. 45, 60).

The Trustee Case

The Trustee filed his case (No. 3:08-cv-21) as an adversary proceeding against MACC and Regions Bank (“Regions”) on August 20, 2007 (Trustee Case Doc. No. 1 at Ex. 2).³ The Trustee asserts that MACC and Regions knew, or should have known, of Stokes’s theft of plan assets and therefore are liable for the theft (see id. at ¶¶ 37-183; Trustee Bkrtcy. Case Doc. No. 23 at pp. 1-2). The Trustee seeks recovery not on behalf of the bankruptcy estate but for the plans themselves, including all of the same plans that are plaintiffs in the Heritage Case (see Trustee Case Doc. No. 1 at Ex. 2 ¶¶ 101, 108, 115, 124, 134, 137, 140). Like the plaintiffs in the Heritage Case, the Trustee purports to state claims under ERISA and Tennessee law (see id. at ¶¶ 97-183).⁴ In addition to the 401(k) plans that are the focus of all of the claims against MACC in both actions, the Trustee also asserts claims against Regions for recovery of assets Stokes allegedly stole from various cafeteria plans (see id. at ¶¶ 70-96, 141-83).

Authority for Consolidating the Heritage Case and the Trustee Case

The Heritage Case and the Trustee Case contain largely overlapping factual allegations that center on Stokes and transactions he conducted through various 1Point accounts. The two cases involve common plaintiffs (in that the Trustee seeks recovery on behalf of various plans, including those plans that are plaintiffs in the Heritage Case) and a common defendant (MACC). The two cases also share many identical legal theories and issues. Both cases, for example, involve counts for breach of ERISA-based fiduciary duties (Trustee Case Doc. No. 1 at Ex. 2 Counts I-V ¶¶ 97-129; Heritage Case Doc. No. 27 Count “E” ¶¶ 76-83); for negligence (Trustee Case

³ This Court withdrew the reference with respect to the Trustee Case by Order entered February 11, 2008 (Trustee Case Doc. No. 7).

⁴ MACC and Regions have filed motions to dismiss in the Trustee Case (see Trustee Case Bkrtcy. Doc. Nos. 18-20, 22). The Trustee has not yet responded to either motion.

Doc. No. 1 at Ex. 2 Count VI ¶¶ 130-34; Heritage Case Doc. No. 27 Count V ¶¶ 67-70); for aiding and abetting Stokes's fraud and conversion (Trustee Case Doc. No. 1 at Ex. 2 Count VII ¶¶ 135-37; Heritage Case Doc. No. 27 Counts II-III ¶¶ 42-58); and for aiding and abetting Stokes's breaches of fiduciary duty (Trustee Case Doc. No. 1 at Ex. 2 Count VIII ¶¶ 138-40; Heritage Case Doc. 27 Count IV ¶¶ 59-66).⁵

Federal Rule of Civil Procedure 42(a) permits a Court to consolidate cases that involve a common question of law or fact. See Fed. R. Civ. P. 42(a) (“If actions before the court involve a common question of law or fact, the court may...consolidate the actions...”); In re: Cannonsburg Environmental Assoc., Ltd., 72 F.3d 1260, 1269 (6th Cir. 1996) (Rule 42(a) gives courts “broad authority” to consolidate related cases). Consolidating these two cases, which involve multiple common parties and factual and legal issues, will avoid substantial duplication of effort by the Court and the parties. See Cantrell v. GAF Corp., 999 F.2d 1007, 1011 (6th Cir. 1993) (factors to consider before ordering consolidation). In addition, consolidation for both pre-trial proceedings and trial does not pose a risk of prejudice or confusion. See id. See also, e.g., In re: PRI Automation, Inc. Sec. Litig., 145 F. Supp. 2d 138, 140 (D. Mass. 2001) (consolidating cases involving common parties and questions of fact and law); Hanes Companies, Inc. v. Ronson, 712 F. Supp. 1223, 1230 (M.D.N.C. 1988) (same).

⁵ The Trustee's counsel has already acknowledged that the two cases are entwined by entering an appearance as an interested party in the Heritage Case (see Heritage Case Doc. No. 56).

Conclusion

MACC respectfully requests that the Court consolidate these cases pursuant to Rule 42(a).

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CERTIFICATE OF SERVICE

On February 21, 2008, this document was filed electronically with the Clerk's office by using the CM/ECF system and was simultaneously served upon the following using that same system:

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