No. 15-2470

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN J. KORESKO, V,

Appellant

v.

THOMAS E. PEREZ, UNITED STATES SECRETARY OF LABOR

Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

Brief of Appellee Secretary of Labor

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Federal Cases –(continued):

Federal Cases –(continued):

Federal Cases –(continued):

Federal Statutes:

Federal Statutes –(continued):

Federal Regulations:

Federal Regulations –(continued):

Miscellaneous:

Miscellaneous –(continued):

STATEMENT OF THE ISSUES

This matter arises out of a suit by the Secretary of Labor alleging fiduciary violations under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., in connection with a multiple employer death benefit arrangement. After over a decade of investigation and litigation by the Secretary, the district court held a bench trial and subsequently issued a decision and order granting the Secretary a permanent injunction against appellant John J. Koresko, the operator of the two multiple employer trusts through which the benefits were paid, and ordering him to repay over $18,000,000 in plan assets he improperly diverted from hundreds of participating ERISA plans. The questions presented on appeal are:

1. Whether the district court correctly determined that the express terms of the governing plan documents gave the plans that participated in the death benefit arrangement a beneficial interest in the trust assets that were held, by their terms, "for the exclusive benefit" of plan participants.

2. Whether the district court correctly held that a 2009 plan amendment that purported to eliminate ERISA coverage was invalid.

3. Whether the district court correctly held that the fiduciary defendants were not entitled to have their defense expenses advanced from the trusts in a suit by the Secretary for mismanaging and misappropriating plan assets.

4. Whether the district court, on the basis of "voluminous evidence" presented at a bench trial, properly found that Koresko must repay $18,350,178.73 in plan assets he misappropriated from the trusts.

STATEMENT OF RELATED CASES AND PROCEEDINGS

The Secretary agrees with the appellant's statement of related cases and proceedings except that the Secretary disagrees that the August 4, 2015 order of the district court, which has also been appealed to this Court (No. 15-3141), was issued after the district court "was divested of jurisdiction" as a result of this appeal. See Appellant's Br. at 8. In fact, the district court retained jurisdiction to enforce compliance with the decision and order on appeal in this case, and to supervise the fiduciaries and processes described therein. Moreover, in response to the September 9, 2015 order of this Court, the Secretary filed a response on September 23, 2015, arguing that the district court's August 4, 2015 order was not a final or otherwise appealable appeal and that appeal should therefore be dismissed.

JURISDICTIONAL STATEMENT

The Secretary of Labor brought this action under sections 502(a)(2) and (a)(5) of ERISA, 29 U.S.C. § § 1132(a)(2), (a)(5). The district court had jurisdiction under 29 U.S.C. § 1132(e)(1). The district court orders on appeal were entered on March 13, 2015 and May 13, 2015. The appeal was timely filed on June 17, 2015.

This court has jurisdiction of the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). It does this primarily by imposing a number of stringent duties on plan fiduciaries, including a duty of loyalty, a duty to act for the exclusive purpose of providing plan benefits and defraying reasonable expenses, and a duty of care and prudence. ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A), (B). The statute also flatly prohibits fiduciaries from engaging in certain transactions that are likely to harm the plans they serve. ERISA section 406, 29 U.S.C. § 1106. ERISA gives plan participants and beneficiaries, fiduciaries and, as relevant here, the Secretary of Labor, the right to sue to recover all plan losses and illegitimate gains to plan fiduciaries stemming from fiduciary breaches, and to obtain other remedial and equitable relief. See 29 U.S.C. §§ 1132(a)(2), 1132(a)(5).

The Secretary of Labor brought this enforcement action against defendant John J. Koresko and related entities in 2009. As explained in greater detail below, after a long and convoluted path, this case was finally heard by the district court and decided in February 2015 following a three-day bench trial. In its decision on the merits, the district court noted the "voluminous evidence" presented by the Secretary of numerous ERISA violations, including:

> (1) the diversion of tens of millions of dollars of plan assets through more than 21 accounts in the names of more than 18 different entities (all the creation of Mr. Koresko) at 8 or more different banks; (2) the transfer of millions of dollars of plan assets into accounts which only Mr. Koresko controlled and which were out of the reach of the Trustee; (3) the taking out of over $35 million in loans on the Trusts' insurance policies, and the transfer of the resulting monies to accounts which only Mr. Koresko controlled and which were out of the reach of the Trustee; (4) the creation and subsequent depositing of plan assets into various IOLTA accounts and accounts in Mr. Koresko's personal name; (5) the transfer of millions of dollars of plan assets to law firms and consulting firms, from which neither the plans nor the beneficiaries benefitted, and only the defendants benefitted; (6) the use of death benefit proceeds to purchase property in the Caribbean island of Nevis and in South Carolina in Mr. Koresko's personal name; (7) the use of plan assets to pay Mr. Koresko's expenses, including utility bills and boat rentals; and (8) the use of plan assets to pay the defendants directly.

Perez v. Koresko, 86 F. Supp. 3d 293, 300 (E.D. Pa. 2015). On this basis, the court issued an order "remov[ing] the defendants from any position of fiduciary authority and permanently bar[ring them] from ever serving as fiduciaries or service providers to ERISA-covered plans," and holding Koresko and related entities liable for over $18,000,000 "in restitution for losses and disgorgement of profits." Id.

A. Koresko's Death Benefits Operation

Appellant John Koresko, an attorney (now disbarred in Pennsylvania),[1] marketed and ran a complicated death benefit arrangement through a number of entities he controlled. Solis v. Koresko, 2013 WL 4594847, *1 (E.D. Pa. 2013). These entities include PennMont Benefit Services, Inc., Penn Public Trust, two Koresko law firms, and two trusts called the Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Association Trust ("REAL VEBA") and Single Employer Welfare Benefit Plan Trust ("SEWBPT"). Id. at *1 n.1; Solis v. Koresko, 884 F. Supp. 2d 261, 266 (E.D. Pa. 2012)). As part of this arrangement, Koresko developed a prototype death benefit plan and the corresponding trusts, which his corporation, PennMont, marketed to numerous employers. Sec'y of Labor v. Koresko, 377 F. App'x 238, 239 (3d Cir. 2010).

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[1] See http://www.pacourts.us/assets/opinions/DisciplinaryBoard/out/119DB2013-Koresko.pdf (Pa. Sep. 4, 2015) (also noting that Koresko is admitted in Florida but administratively suspended in that jurisdiction). The Eastern District of Pennsylvania had previously suspended Koresko's license in that court, in response to the Supreme Court of Pennsylvania suspending his license. Order in No. 13-mc-0294 (E.D. Pa. Dec. 19, 2013), appeal dismissed, Order in No. 14-3393 (3d Cir. Feb. 27, 2015), motion to reopen denied (3d Cir. Apr. 29, 2015). Koresko brought an action in district court against the disciplinary board of the Supreme Court of Pennsylvania, claiming violations of his constitutional rights in the decision that suspended his license, but the district court dismissed the case with prejudice under the abstention doctrine. Koresko v. Office of Disciplinary Counsel, 2015 WL 131269, *1 (E.D. Pa. March 24, 2015). After Koresko's disbarment, the district court referred the matter to a committee of judges to recommend whether the same discipline should be imposed upon him. Order in No. 13-mc-0294 (E.D. Pa. October 28, 2015). This matter is still pending.

PennMont had no employees of its own and operated through the Koresko law firms. Perez v. Koresko, 86 F. Supp. 3d 293, 315 (E.D. Pa. 2015).

In order to participate in this arrangement, these employers were required to become members of an unincorporated association of employers, adopt the prototype plan, and pay money into one of the trusts. Koresko, 884 F. Supp. 2d at 266. Employers who adopted the prototype plan could select the type and amount of benefits offered and set eligibility requirements for their employees. Id. at 268; see Doc. 268-17 (GX 14, prototype plan for REAL VEBA). Eligible employees of these adopting employers then signed agreements to participate in the arrangement. Id.; see, e.g., Doc. 268-48 (GX 44, Castellano Adoption Agreement); Doc. 268-50 (GX 46, Castellano Participation Agreement).

Employers paid contributions into one of the trusts, which purchased insurance policies on the lives of participating employees to fund benefits. Doc. 268-14 (GX 11, Master Trust Agreement Whereas Cl., § 4.2); Doc. 268-17 (GX 14, § 7.05(a)); GX 49 (Master Trust Agreement Whereas Cl., § 4.2). Under the governing plan documents, the assets and earnings of the trust were to be used only for the benefit of persons designated as employees (or their beneficiaries) of participating employers. Doc. 268-14 (GX 11, §§ 2.1, 2.3); see also Doc. 268-17 (GX 14, §§ 2.01, 2.03); GX 49, §§ 2.1, 2.3.

B. The Secretary's Suit Against the Koresko Defendants

In March 2009, the Secretary brought suit against Appellant Koresko, several companies he controlled, PennMont, Koresko & Associates, P.C., Koresko Law Firm, P.C., Penn Public Trust (collectively, the "Koresko defendants"), Jeanne Bonney, an attorney and employee of Koresko, the two trusts at issue (REAL VEBA and SEWBPT),[2] and the trustees for these trusts, first Community Trust Company, and then its replacement Penn Public Trust. Solis v. Koresko, 2009 WL 2776630, at *4 (E.D. Pa. Aug. 31, 2009).[3] As relevant here, the Secretary alleged that the Koresko defendants were ERISA fiduciaries with respect to at least 126 employer-sponsored plans that participated in this death benefit arrangement. Doc. 1 (Complaint), ¶¶ 9-13. Koresko violated his fiduciary duties, the Secretary alleged, by failing to hold ERISA plan assets in trust and by using millions of dollars in plan assets for purposes other than to provide benefits and defray reasonable expenses under the terms of the plans. Id. ¶¶ 29-39. PennMont, as plan

[2] The Trusts were named as defendants solely to ensure that complete relief could be granted. Fed. R. Civ. P. 19(a).

[3] Only Koresko is a party to this appeal. The court did not hold Bonney liable for restitution or disgorgement. Perez v. Koresko, 86 F. Supp. 3d at 393. The remaining defendants, PennMont, Koresko & Associates, P.C, the Koresko Law Firm, P.C., and Penn Public Trust, are all alter egos of Koresko, id., and were held liable for restitution along with Koresko. Id. at 394. Those entities and Bonney were all, like Koresko, permanently barred from serving as fiduciaries and service providers, id. at 391-92. Farmers & Merchants Trust Co., successor by merger to Community Trust, entered into a consent judgment with the Secretary. Perez v. Koresko, 86 F. Supp. 3d at 299 n.3.

administrator, also set its own fees without approval by an independent fiduciary and directed the payment of these fees from plan assets. Id. ¶ 34. The Secretary further alleged that, contrary to plan terms requiring full payments of death benefits, eligible beneficiaries under at least three of the employer-sponsored plans did not receive full payment of these benefits. Id. ¶¶ 25-28. Among other things, the Secretary sought an order removing the Koresko defendants from their positions as fiduciaries in charge of the plans, and appointing in their place an independent fiduciary. Id. at 19-20 (Prayer for Relief).

C. The Secretary's 2012 Motion for Partial Summary Judgment

In February 2012, the Secretary moved for partial summary judgment on the Secretary's claims that defendants violated ERISA with regard to the three plans whose beneficiaries had not been paid the full death benefits owed under the plans' terms. Doc. 267. In August 2012, the district court (McLaughlin, J.) granted the Secretary's motion in part, concluding that although the Koresko-run trust that held employer contributions was not itself an ERISA plan, the three employer-sponsored plans at issue were ERISA welfare benefit plans.[4] Solis v. Koresko, 884 F. Supp. 2d at 274-79.

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[4] An "employee welfare benefit plan" is defined by ERISA as "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or

The court rejected the Koresko defendants' argument that the REAL VEBA trust held no ERISA plan assets. 884 F. Supp. 2d at 285-290. Applying the test established by this Court in Secretary of Labor v. Doyle, 675 F.3d 187 (3d Cir. 2012), the district court concluded that the trust held ERISA plan assets because the ERISA plans contributing funds to the trust had an undivided beneficial interest in the trust's assets, which were expressly held under the governing trust documents exclusively for the purpose of providing benefits to participants and beneficiaries. Id. at 285-88. The court also found support for its conclusion in a Department of Labor regulation defining plan assets to include an undivided interest in the underlying assets of an entity, other than an insurance company, that is established and maintained to provide benefits, 29 C.F.R. § 2510.3-101(h)(2), although the court did not resolve whether the regulation directly applied. 884 F. Supp. 2d at 290. Based on these determinations and the conduct at issue, the district court concluded, in relevant part, that Koresko, PennMont, and Bonney were ERISA fiduciaries and that they violated ERISA by failing to keep the assets of the three employer-sponsored plans in trust, and by diverting plan assets into accounts subject to their sole control. Id. at 290-95. The court concluded that there was insufficient evidence at that time to show that the diverted plan assets were used for non-trust purposes, however. Id. at 296. Accordingly, the court denied

otherwise, . . . (A) . . . benefits in the event of sickness, accident, disability, death." 29 U.S.C. § 1002(1).

summary judgment on the Secretary's claim of self-dealing and deferred a decision on relief, stating that ongoing discovery might reveal additional facts that could bear on the issues. Id. at 297-98.

The court also gave three reasons for rejecting the Koresko defendants' argument that a purported July 29, 2009 amendment to the plan documents (Doc. 285-2 at 4-5) eliminated ERISA coverage by eliminating benefits for non-owner employees. Id. at 279-81. First, the court concluded that the entity executing the amendment (PennMont, the plan administrator) did not have authority under the governing plan document to amend the plans. Id. at 280. Second, the court concluded that the amendment violated a provision in the governing plan documents necessary for the plans to receive favorable tax treatment, which prohibited discrimination in favor of highly compensated employees. Id. at 281. Finally, the court reasoned that it would be contrary to ERISA's purposes to allow a plan to avoid enforcement of otherwise applicable ERISA requirements simply by an amendment that eliminates ERISA coverage. Id. at 281.

D. The Secretary's 2013 Motion for a TRO and Preliminary Injunction

After the district court's August 2012 decision, the Secretary discovered that the Koresko defendants had diverted more than $2,500,000 in death benefit proceeds for their own use and benefit, taken out approximately $35,000,000 in loans on insurance policies owned by the REAL VEBA and SEWBPT trusts, the proceeds of which were diverted to accounts not owned by the trusts, and misappropriated at least $3,500,000 of these loan proceeds for non-trust purposes to purchase, among other things, Caribbean condominiums for Koresko and to pay his law firm and personal expenses. Doc. 377-2 at 2-3 (Pls. Mem. in Support of Application for Temporary Restraining Order and Preliminary Injunction). See also Perez v. Koresko, 86 F. Supp. 3d at 338-72, 388, 393. Based on this newly discovered evidence, on June 19, 2013, the Secretary sought a temporary restraining order and preliminary injunction and an order removing the Koresko defendants from their fiduciary positions and appointing an independent fiduciary to administer the plans and hold plan assets. Perez v. Koresko, 86 F. Supp. 3d at 304; Doc. 377.

With the consent of the parties, including counsel for Koresko, the court froze money in certain Koresko-controlled bank accounts pending a hearing and enjoined the Koresko defendants from taking actions affecting the accounts except as ordered by the court. Id. at 305; Doc. 392, at 2. On July 8, 2013, neither Koresko nor any of the other defendants appeared at the hearing, and their counsel moved to withdraw. Perez v. Koresko, 86 F. Supp. 3d at 305; Doc. 407 at 2 n.1. The district court contacted Koresko by telephone and granted the defendants' request for a continuance. Perez v. Koresko, 86 F. Supp. 3d at 305; Doc. 407 at 2-3, 6-7. Although the court found that a substantial likelihood of success on the merits, and irreparable injury to the public, the plans, and their participants and beneficiaries without relief to preserve plan assets were established, the court declined to appoint an independent fiduciary without first holding an evidentiary hearing. Perez v. Koresko, 86 F. Supp. 3d at 306; Doc. 407 at 4-7.

E. Koresko's Actions After the District Court's Freeze Orders

Koresko responded to the district court's orders by filing a series of appeals in this Court that have since been dismissed. See Nos. 13-3102, 13-3103, 13-3104, 13-3130, 13-3358, 13-3359. While these appeals were pending and the district court's freeze orders were in effect, Koresko tried to withdraw funds from five insurance policies insuring the lives of individuals who had participated in litigation against him. Doc. 458 at 28, 35-37 (transcript of July 22, 2013 telephone hearing). He also requested withdrawals from 50 insurance products owned by the trusts and deposited the resulting cash into his "vault." Id. at 28-29. The district court responded by prohibiting Koresko from taking any further action to remove cash from the trust-owned insurance policies and ordering him to return the money he had received. Perez v. Koresko, 86 F. Supp. 3d at 306; Doc. 436 (July 23, 2013 Interim Order). Less than 24 hours after the district court ordered him not to take further money from the insurance policies and to return the money he had taken, Mr. Koresko filed bankruptcy petitions on behalf of the trusts, his law firms, PennMont, and Penn Public Trust in the Bankruptcy Court for the Eastern District of Pennsylvania. Koresko then attempted to remove assets from an account frozen by the district court's July 8, 2013 order, citing the bankruptcy filings as authority for doing so. See Doc. 491-5. Koresko also sent letters to plan sponsor employers stating that if they did not send him a cash "special assessment" to fund the bankruptcies by September 3, 2013, he would cancel the benefits of their employees "forever." Doc. 489, at 2; Doc. 472-2 to 472-8.

The district court held that the Secretary's action was exempt from the automatic stay resulting from this bankruptcy filing, Perez v. Koresko, 86 F. Supp. 3d at 306, Docs. 446, 474, and this Court dismissed the Koresko defendants' appeal from that decision after the Pennsylvania bankruptcy court dismissed the Koresko-filed bankruptcy petitions. Order, Secretary of Labor v. Koresko, No. 13-3358 (3d Cir. Dec. 3, 2013). The court also ordered Koresko not to withhold benefits or deny services based on anyone's response to his letters to plan sponsors or their failure to forward money to Koresko. Doc. 489, at 1. Koresko also repeatedly resisted attempts by the Secretary and district court to hold an evidentiary hearing on the Secretary's application for a temporary restraining order and preliminary injunction.

Accordingly, on September 16, 2013, the district court removed Koresko from his positions of authority over the plans and the two trusts that held plan assets, the SEWBPT and REAL VEBA. Solis v. Koresko, No. 09-988, 2013 WL

5272815, at *7 (E.D. Pa. Sept. 17, 2013), appeal dismissed, No. 13-3827 (3d Cir. May 4, 2015). The court's order also appointed the Wagner Law Group as an independent fiduciary to administer the plans and trusts temporarily and ordered Koresko to turn over to the independent fiduciary all assets he had removed from the trusts as well as property purchased with trust assets and loans taken against insurance policies held by the trusts for the benefit of the plans and their participants and beneficiaries. Id.

F. The Merits Decision

The district court conducted a three-day bench trial in June 2014. When trial was due to begin, Koresko sent the court a letter stating that he would not appear at trial. See Perez v. Koresko, 86 F. Supp. 3d at 312. Neither Koresko nor any representative on his behalf appeared at trial. Id. After the trial, the court granted Koresko's request to submit information to be included in the trial record. Id. at 313. The court also permitted the law firm that was representing Koresko in contempt proceedings and whose fees were being paid with trust assets pursuant to court order to assist Koresko in making his post-trial evidentiary submissions to the court. Id.

The district court issued a Memorandum Opinion in February 2015, with findings of fact and conclusions of law detailing the extent of Koresko's violations of ERISA. Perez v. Koresko, 86 F. Supp. 3d 293 (E.D. Pa. Feb. 6, 2015). As relevant to this appeal, the court held that at least 419 plans that participated in the death benefit arrangement were ERISA-covered welfare plans, id. at 372,[5] and reiterated its summary judgment holding that each of these participating plans had an undivided beneficial interest in the corpus of the corresponding trust, id. at 378. The court held that all of the trusts' assets were plan assets, and that the plans had undivided beneficial interests in the assets of one of the underlying trusts, including the assets that remained in trust accounts, those that had been removed from trust accounts, and those that defendants had failed to deposit in plan accounts. Id. The court rejected Koresko's argument that the plans had only a contractual right to payment from the trusts, reasoning that simply because a relationship could be described as contractual did not mean it was not also a trust relationship governed by ERISA. Id. at 379. Because the Koresko defendants had control over plan assets, the court concluded that they were fiduciaries within the meaning of ERISA. Id. at 379-80.

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[5] In this regard, the court noted that ERISA does not cover employee benefit plans in which no employees are participants. 86 F. Supp. 3d at 374. Moreover, under regulations promulgated by the Department of Labor, an owner-operator of a corporation is considered an employee unless the owner and his or her spouse own 100% of the company. Id. (citing 29 C.F.R. § 2510.3-3(c)). Applying this exclusion, the court determined that at least 419 of the 533 plans listed in records kept by Koresko had employee participants and were thus covered by ERISA. Id. The court also rejected Koresko's argument that any of the plans were exempt "top hat" plans, reasoning that the statutory top hat exemption was applicable only to unfunded pension plans. Id. at 376 (citing 29 C.F.R. § 2520.104-23(d)).

The court further held that by diverting millions of dollars of assets from the trusts for the benefit of themselves and not the plans, the Koresko defendants violated ERISA's hold-in-trust requirement, 29 U.S.C. § 1103, 86 F. Supp. 3d at 390-91, breached their fiduciary duties under ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A), (B), id. at 382-85, and engaged in transactions prohibited by ERISA sections 406(b)(1), 406(a)(1)(D), 29 U.S.C. § 1106(b)(1), 1106(a)(1)(D), id. at 385-90. As a remedy, the court removed the defendants from any position of fiduciary authority over the plans and permanently barred them from ever serving as fiduciaries or service providers to ERISA-covered plans. Id. at 391-92. Finally, the court held the Koresko defendants liable for $19,852,114.88 in restitution for losses and disgorgement of profits, which represented the remaining balance of the total assets diverted from the trusts (which the court calculated as $39,839,477.04) that were not in frozen accounts already under control of the independent fiduciary. Id.

In March 2015, the court entered judgment in accordance with its February decision. It thus ordered the removal of the fiduciaries, imposed permanent injunctions against them, and ordered the Koresko defendants to pay restitution and disgorgement of the remaining diverted assets, Perez v. Koresko, No. 09-988, 2015 WL 1182846, at *1-*2 (E.D. Pa. Mar. 13, 2015), which the court ultimately recalculated as $18,350,178.73. Perez v. Koresko, 2015 WL 2236692, *5 (E.D.

Pa. May 13, 2015) (decreasing the total liability because two invoices had been counted that should not have been).

SUMMARY OF THE ARGUMENT

1. The language in the governing plan documents gave the plans an undivided beneficial interest in the assets of the trusts, as the district court properly held both on summary judgment and in its decision on the merits following trial. The governing trust documents gave legal title to the trust assets to the trustee to hold in trust for the exclusive benefit of the employees of participating employers and their beneficiaries, and expressly forbade their use for any other purpose. Koresko's contention that the trustee's legal title to the assets prohibited the plans from having any interest in the assets is just plain wrong and is contrary to trust law. Indeed, the very purpose of a trust is to split the legal title from the equitable interest, and these trusts were designed to do precisely that. The Department's plan assets regulation, 29 C.F.R. § 2510.3-101(h)(2), further demonstrates that plans have a beneficial interest in assets held in trust for their benefit; the regulation states that when a plan acquires or holds an interest in an entity which is established or maintained for the purposes of providing benefits to the participants and beneficiaries of the investing plan, its assets will include its investment and an undivided interest in the underlying assets of that entity.

2. Likewise, the district court correctly held that the 2009 amendment, which purported to eliminate participation in the plans by non-owner employees and thus to put the plans beyond the reach of ERISA, was invalid. Neither Koresko nor PennMont had authority to execute the 2009 amendment under the governing plan documents. Moreover, such an amendment was forbidden by language in the REAL VEBA plan document, which prohibited discrimination in favor of highly compensated participants, and language in the SEWBP plan document, which prohibited amendments that would retroactively deprive participants of accrued benefits. Even if otherwise effective, the amendment could not excuse fiduciary breaches retroactively, so no breaches that took place before July 2009 would have been covered at any rate. Finally, since Koresko's operation continued to include and charge fees to employers that sponsored plans that included non-owner employees after the amendment, the fiduciaries were required by ERISA to continue covering those non-employer employees.

3. The district court also correctly concluded that Koresko was prohibited from receiving indemnification for his defense costs from plan assets in the trusts. First, the plans themselves did not purport to require the trusts to advance Koresko his defense costs. While the plan documents contain indemnification clauses, those clauses require indemnification from the plan administrator and adopting employers, not from the plans themselves or their

assets in the trusts. Furthermore, even if the indemnification clauses could be read to require the plans to indemnify the fiduciaries, such as Koresko, those clauses would have violated ERISA section 410(a), which renders void any arrangements that purport to relieve fiduciaries of their liability for breaches of ERISA.

4. Finally, Koresko cannot escape liability for the full amount of funds that he misappropriated by now claiming that the plans can only recover some undetermined amount that would keep them fully funded and able to purchase sufficient insurance policies to provide death benefits. The equitable remedy of disgorgement exists to prevent fiduciaries from profiting in any way from their breaches. Indeed, ERISA expressly provides for a disgorgement remedy to ensure that fiduciaries are not incentivized to misuse plan assets. For these reasons, the district court properly required Koresko to repay the full amount that he misappropriated.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE PLANS HAVE AN UNDIVIDED BENEFICIAL INTEREST IN ALL ASSETS HELD IN THE REAL VEBA AND SEWBP TRUSTS

In both its ruling on the Secretary's Motion for Partial Summary Judgment and its merits decision, the district court correctly held that the "covered plans have an undivided beneficial interest . . . in all of the assets of the REAL VEBA or SEWBT Trust." Perez v. Koresko, 86 F. Supp. 3d at 378; Solis v. Koresko, 884 F.

Supp. 2d at 288-89 ("the Plans have an undivided beneficial interest in the employer contributions, the insurance policy proceeds, and income thereon," and "an undivided beneficial interest in the corpus of the REAL VEBA Trust (including employer contributions, insurance policy proceeds, and income therefrom) under the governing plan documents and are, therefore, plan assets to which fiduciary duties attach").

ERISA does not supply a general definition of "plan assets," although the Department's regulations provide a definition in some specific areas.[6] In general, "the term 'plan assets' should be given its ordinary meaning, and therefore should be construed to refer to property owned by an ERISA plan." Sec'y of Labor v. Doyle, 675 F.3d 187, 203 (3d Cir. 2012). As this Court noted, "[t]his approach is . . . consistent with guidance provided by the Secretary on the meaning of 'plan assets, which states that 'the assets of an employee benefit plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law. In general, the assets of a welfare plan would include any property, tangible or intangible, in which the plan has a beneficial ownership interest." Id. (quoting AO 93-14A, 1993 WL 188473, *4, and citing Kalda v. Sioux Valley Physician Partners

[6] The Department has promulgated regulations defining plan assets in only two specific contexts: (1) when a participant pays or has amounts withheld by an employer for contribution to a plan, 29 C.F.R. § 2510.3-102; and (2) when a plan invests in another entity, 29 C.F.R. § 2510.3-101. See AO 92-24A at *2. We discuss the applicability of the second regulation below, supra at 25-28.

Inc., 481 F.3d 639, 647 (8th Cir. 2007)); see also AO 92-24A, 1992 WL 337539, *2.

Under Doyle's framework, a court determining whether assets are 'plan assets' should review the plan's establishing and governing documents. Doyle, 675 F.3d at 204. Here, the language of the governing plan documents makes perfectly clear that the assets of the trusts are intended to be held in trust for the benefit of the plan participants and beneficiaries. The trust document that each of the participating employers adopted provides that the trustee of the REAL VEBA trust or the SEWBP Trust must hold "in trust" all the assets of the trust "for the exclusive benefit of" the employees and their beneficiaries. GX 48, Intro. ("Whereas, the Trustee will hold the funds contributed to it by the League in a fiduciary capacity for the benefit of all Employees covered under the Plan . . . the Trustee hereby declares that it will hold all money and property received or purchased by it hereunder, IN TRUST") (emphasis added); id., Art. II, § 2.1 ("All contributions, and all assets and earnings of the Trust are solely the net earnings of the Trust and shall not in any manner whatsoever inure to the benefit of any person other than a Person designated as an employee or beneficiary of an Adopting Employer under the terms of the Plan."); id., Art. II, § 2.3 ("[A]t no time prior to the satisfaction of all liabilities with respect to employees of the Adopting Employer and its beneficiaries under the Plan shall any part of the Trust be used for, or diverted to, any purpose other than for defraying the reasonable expenses of administering such Plan."); GX-49, Intro. ("Whereas, the Trustee will hold the funds contributed to it by the Employer in a fiduciary capacity for the benefit of all Employees covered under the Plan . . . the Trustee hereby declares that it will hold all money and property received or purchased by it hereunder, IN TRUST"); id., Art. II, § 2.1 ("All contributions, and all assets and earnings of the Trust are solely the net earnings of the Trust and shall not in any manner whatsoever inure to the benefit of any person other than a Person designated as an employee or beneficiary of an Adopting Employer under the terms of the Plan."); id., Art. II, § 2.3 ("[A]t no time prior to the satisfaction of all liabilities with respect to employees of the Adopting Employer and its beneficiaries under the Plan shall any part of the Trust be used for, or diverted to, any purpose other than for the exclusive benefit of such employees and their beneficiaries, and for defraying reasonable expenses of administering such Plan.").

The trust document also expressly requires the trustee to hold the assets of the REAL VEBA in trust for the benefit of participants and beneficiaries:

> § 2.01 "The Exclusive Benefit of Employees":
>
> The Plan and Trust shall be created … for the exclusive Benefit of Employees and their Beneficiaries.

GX 14.

Other provisions in the trust document reinforce these points:

§ 2.03 "Standard of Conduct":

> The Trustee, Plan Administrator and all the other Fiduciaries with respect to the Trust shall discharge their duties solely with the interest of all Participants and Beneficiaries and for the exclusive purpose of providing Benefit to Participants and Beneficiaries and defraying any reasonable expenses of administration

GX 14.

§ 9.02 "Fund Recovery":

> It shall be impossible for any part of the contributions under this Plan to be used for, or diverted to, purposes other than the exclusive Benefit of the Participants or their Beneficiaries.

Id.

Each of these statements in the governing plan documents manifests an express intent to hold the trust property in trust for the benefit of the plan or its participants and beneficiaries, and therefore demonstrate that the plans owned a beneficial interest in the trust property. See AO 99-08A, 1999 WL 343509 at *3 (May 20, 1999) (whether arrangement gives rise to plan-held beneficial interest depends on whether plan sponsor expresses intent to grant such beneficial interest or has acted or made representations sufficient to lead participants and beneficiaries of the plan to reasonably believe "that such funds separately secure the promised benefits or are otherwise plan assets"); AO 94-31A, 1994 WL 501646 at *2 (Sept. 9, 1994); AO 92-24A, 1992 WL 337539 at *2 (Nov. 6, 1992). The documents thus could hardly be clearer that the trusts' assets are plan assets to be used not by Koresko and others for their own purposes but solely for the benefit of the plan participants.

Koresko's argument that the plans do not have a beneficial interest in the assets held by the trusts because they did not have legal title to these assets reflects a fundamental misunderstanding of ERISA and basic trust law principles. Appellant's Br. at 13-21. It is well-settled law that a trust is created only when an owner of property manifests an intent to separate legal and equitable title to that property. Austin W. Scott & William F. Fratcher, Scott & Ascher on Trusts § 11.2, at 619 (5th ed. 2006). If the interests are not separated, and "one individual has the entire legal interest and the entire beneficial interest, there is no trust." Id.; Restatement (Second) of Trusts § 98 (1959); Restatement (Third) of Trusts § 33 cmt. g (2003). Koresko's nonsensical argument that because Community Trust or Penn Public Trust, the trustees, held legal title to the assets in the trusts, they therefore must have held the entire interest, including the beneficial interests, in the trust assets cannot be squared with these fundamental trust principles.[7] If no party

[7] Koresko relies on section 4.6 of the REAL VEBA trust document, which provides:

> Title to the Trust Fund shall be vested in and remain exclusively in the Trustee and neither the Adopting Employer, Advisory Committee, Plan Administrator, nor any employee or his or her decedents shall have any right, title or interest therein or thereto. Participation in the Plan and this Trust shall not give any employee, beneficiary or any

other than Community Trust or Penn Public Trust had an interest in the assets of the REAL VEBA and the SEWBPT, these funds would not be trusts. But, in fact, a trust exists "where a trustee holds property subject to an equitable obligation to another who has an equitable property interest." Bogert, The Law of Trusts & Trustees § 161. Accord In re Columbia Gas Sys. Inc., 997 F.2d 1039, 1059 (3d Cir. 1993) ("the classic definition of a trust [is that] the beneficiary has an equitable interest in the trust property while legal title is vested in the trustee"); see also Lewis v. Alexander, Med & Med GD, 685 F.3d 325, 332 (3d Cir. 2012); Sherwin v. Oil City Nat. Bank, 229 F.2d 835, 838 (3d Cir. 1956). That is precisely and expressly what the REAL VEBA and the SEWBP trusts were set up to do.

Moreover, in concluding that each of the participating plans therefore had an undivided interest in all of the assets held in the corresponding trust, the district court considered the Department's plan assets regulation governing investments in other entities, which states that "[w]hen a plan acquires or holds an interest in any entity (other than an insurance company licensed to do business in a State) which is established or maintained for the purposes of offering or providing any benefit . .

> other person, any right or interest in the Plan or this Trust other than as herein provided.

GX 48, § 4.6 (emphasis added). Koresko's argument ignores the language "other than as herein provided," and his brief omits all of the language in the trust document and the plan documents that does provide otherwise, as cited supra, expressly stating that the assets in the trust are for the exclusive benefit of the participants and beneficiaries and may not be diverted to any other purpose.

. to the participants or beneficiaries of the investing plan, its assets will include its investment and an undivided interest in the underlying assets of that entity." 29 C.F.R. § 2510.3-101(h)(2). The court noted that the comments to the regulation indicate that the regulation was primarily directed at multiple employer trusts. Solis v. Koresko, 884 F. Supp. 2d at 290 (citing 51 Fed. Reg. 41262-01, 41263 (Nov. 13, 1986)); see also 50 Fed. Reg. 961, 967 (1985) (preamble to proposed rule, explaining that rule applies to participation in multiple employer trusts, including trusts that are not ERISA plans). In particular, the court cited the following example in the regulation as "significant":

> A medical benefit plan, P, acquires a beneficial interest in a trust, Z, that is not an insurance company licensed to do business in a State. Under this arrangement, Z will provide the benefits to the participants and beneficiaries of P that are promised under the terms of the plan. Under paragraph (h)(2), P's assets include its beneficial interest in Z and an undivided interest in each of its underlying assets.

29 C.F.R. § 2510.3-101(j).

Despite Koresko's arguments to the contrary, the regulation applies here because each of the ERISA plans that participate in the Koresko arrangement acquire or hold an interest in the trusts that are to provide the death benefits to their employees, a form of benefits described in ERISA's definition of "welfare plan," 29 U.S.C. § 1002(1). See also 29 C.F.R. § 2510.3-101(j)(12) (when a medical benefit plan acquires a beneficial interest in a trust that will provide the benefits, its assets include this beneficial interest "and an undivided interest in each of [the trust's] underlying assets"); 50 Fed. Reg. 961, 967 (1985) (preamble to proposed rule, explaining that rule applies to participation in multiple employer trusts, including trusts that are not ERISA plans). Indeed, the example in section 2510.3-101(j) that the district court cites is quite similar to the facts of this case, with the only difference being that the example involves a different type of welfare benefits, medical benefits rather than death benefits.

Because the Secretary's regulation is an exercise of delegated rulemaking authority, it is entitled to controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute. Chevron, USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984); see, e.g., Nat'l Sec. Sys., Inc. v. Iola, 700 F.3d 65, 96 (3d Cir. 2012). The Secretary's regulation easily satisfies this test. First, the Secretary's rule is entirely consistent with background principles of property law, under which tenants in common, the most common form of joint ownership, each have an undivided right in the property. See Stoebuck & Whitman, The Law of Property § 5.2 (3d ed. 2000); Black's Law Dictionary 1604 (9th ed. 2009) (definition of tenancy in common). It also promotes ERISA's overriding purpose of protecting the interests of ERISA plan participants and beneficiaries, 29 U.S.C. § 1002(b), by ensuring that even when a plan has placed its assets in a common trust fund that holds both plan and non-plan assets, those who manage the fund remain plan fiduciaries subject to ERISA. 50 Fed. Reg. 961, 967 (1985). The alternative would allow ERISA plans to "put all their assets beyond the protection of ERISA by the simple act of placing the assets in a common trust fund." Martin v. Nat'l Bank of Alaska, 828 F. Supp. 1427, 1432 (D. Alaska 1992).

Koresko claims that the regulation is inapplicable under this Court's decision in Doyle, but this is not so. This Court's unembellished statement in Doyle that the regulation was "not relevant" in analyzing whether moneys collected from employers were plan assets from the moment of collection, 675 F.3d at 203, does not preclude the clear applicability of the regulation here in determining whether the assets actually in the trusts in this case were plan assets.

Koresko also claims that the Seventh Circuit's decision in RLJCS Enter., Inc. v. Prof'l Benefit Trust Multiple Employer Welfare Benefit Plan & Trust, 487 F.3d 494 (7th Cir. 2007), supports his argument that the plans have no beneficial interest in the assets in the Trust. Appellant's Br. at 14-16. In its summary judgment decision, the district court correctly determined that RLJCS involved a different legal issue: whether former participants or their employers were entitled to distributions of demutualized stock of insurers that had issued policies on the lives of participating employees to fund and in effect reinsure a number of benefits provided by the plan. Solis v. Koresko, 884 F. Supp. 2d at 288. The Seventh Circuit concluded that, under the facts of that case, the trust and not the individual participants or their employers owned the policies, and therefore the trust was entitled to any demutualization proceeds. RLJCS, 487 F. 3d at 498-99. Furthermore, the Seventh Circuit in RLJCS never suggested that trust assets could be used for any purpose other than paying benefits due under the plan terms. Rather, the court held that trust assets could not be paid to some former participants because they belonged to the trust for the benefit of the current participants. Thus, the district court correctly concluded that "RLJCS is distinguishable in addition to not being binding on this Court." Solis v. Koresko, 884 F. Supp. 2d at 289.

For all these reasons, Koresko clearly errs in arguing that the plans (and their participants and beneficiaries) have no beneficial interest in the assets held in trust for their exclusive benefit. And for similar reasons, Koresko also errs in arguing that the plans have merely a contractual right to the promised benefits, rather than a beneficial interest under the trusts. As the district court recognized, the Third Circuit has held that "[a]ll trusts can be described as contractual relationships insofar as the obligations of all the parties are set forth in an agreement . . . . However, describing them as such does not mean they are not trusts." Perez v. Koresko, 86 F. Supp. 3d at 378-79 (quoting In re Laher, 496 F.3d 279, 289 (3d Cir. 2007)). As the district court correctly concluded, "[t]he same can be said here . . .

[and t]he contractual relationship is therefore irrelevant to the applicability of ERISA." 86 F. Supp. 3d at 379.

Therefore, the district court correctly held here that the funds forwarded by employers and deposited in the trust accounts, and interest and earnings on these funds, were property in which the plans have a beneficial ownership interest, and therefore were plan assets. Perez v. Koresko, 86 F. Supp. 3d at 339-40, 377-79; Solis v. Koresko, 884 F. Supp. 2d at 287-90. Likewise, the life insurance policies purchased with these funds for the benefit of the plans, and any death benefits paid on those life insurance policies, were also property in which the plans had a beneficial interest until paid out to the beneficiaries, because the policies were paid for with plan assets and held by the corresponding trusts for the benefit of the plans and their participants and beneficiaries. Perez v. Koresko, 86 F. Supp. 3d at 377-79; Solis v. Koresko, 884 F. Supp. 2d at 287-90; AO 2005-08A (May 11, 2005) ("a distribution such as the [death benefit payment] will be a plan asset if the plan has a beneficial interest in the distribution under ordinary notions of property rights . . . . In the case where any type of plan or trust is the policyholder, or where the premium is paid entirely out of trust assets, it is the view of the Department that the entire distribution amount received by such policyholder constitutes plan assets.").

II. THE 2009 AMENDMENT PURPORTING TO ELIMINATE ERISA COVERAGE WAS INVALID UNDER THE TERMS OF THE PLANS

On July 29, 2009, PennMont, through Koresko's brother, executed an amendment to the plans that purported to exclude non-owner employees from participating in the REAL VEBA plans. 884 F. Supp. 2d at 280. Koresko himself also signed the amendment "AS ATTORNEY IN FACT FOR ALL PARTICIPATING EMPLOYERS." Id. Although there was a line for the trustee to sign the amendment, it was left unsigned. Id. The 2009 amendment stated, "No benefits shall be paid to or on account of any claimant, person, participant, or former participant . . . classified as a non-owner-employee, or to any beneficiary of any such [non-owner-employee]." Doc. 285-2 at 4–5. Koresko argues on appeal, as he did below, that "by the plain terms of the 2009 Amendment, benefits under the employer-level plans could not be paid to non-owner-employees, and therefore, [the Plans] are not covered by ERISA" pursuant to 29 C.F.R. § 2510.3-3(b). Appellant's Br. at 22.

The district court correctly rejected this argument in its decision on summary judgment, concluding the 2009 amendment lacked validity for three reasons. First, the court held that neither PennMont nor Koresko had authority to amend the plans. Solis v. Koresko, 884 F. Supp. 2d at 280-81. Second, the court held the amendment was improper because the governing "Plan Document specifically prohibits amendments that create discrimination in favor of highly compensated employees, or officers or stockholders," meaning that the amendment "flatly violates the Plan Document." Id. at 281. Third, the court held that it would be wholly contrary to the purposes of ERISA if plans could avoid subsequent enforcement of ERISA provisions that once applied by eliminating ERISA coverage by amendment.

On appeal, Koresko again argues that he had authority to amend the plans. In fact, the plan document for the rather imaginatively-named REAL VEBA[8] grants "the League" authority to amend the plan, which "is used elsewhere in the Plan Document to refer to the REAL (the unincorporated association of employers run by John Koresko and his brother)." 884 F. Supp. 2d at 280. Although Koresko claims to have signed the amendment of behalf of the REAL, he points to no evidence showing that he was authorized to act as the attorney-in-fact for the employers regarding plan amendments, and the fact that he signed as such appears to be a self-serving assessment at best. Thus, appellant's argument is unsupported by the record, and must fail.[9]

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[8] The district court held that the Regional Employers' Assurance League ("REAL") was a "fictitious business association" that "does not exist 'as an entity'" but instead "consisted of John Koresko and Lawrence Koresko." 86 F. Supp. 3d at 315.

[9] In another portion of his brief, Appellant's Br. at 23, Koresko cites section 10.21 of the REAL VEBA plan document, which states, "By Adopting this Plan, the Employer hereby appoints the Administrator, Trustee, or their delegate its attorney in fact with respect to all questions, controversies, and issues relating to the Plan

Second, Koresko argues that PennMont had authority to amend the plans, because the REAL VEBA plan document delegated the League's plan-amendment authority to PennMont.[10] In support, appellant cites REAL VEBA provisions appointing PennMont as plan administrator and vesting it with "responsibility for administering the Plan and the claims made thereunder," as well as the provision stating that "notice or direction from the Plan Administrator shall be deemed to be notice or direction from the League." Appellant's Br. at 23–24 (citing GX-48 § 11.3). Appellant argues that these provisions made "clear" that "PennMont had broad authority to administer the Plan, and take any and all actions related to the Plan on behalf of the League, including by amending the governing documents." Id. at 24.

None of the cited provisions mention amendment authority. While it is true that the provisions show the League delegated to PennMont the authority to

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before the Internal Revenue Service and Department of Labor." Doc. 78-4 § 10.21. This provision does not save appellant's argument, however, as amending the plan documents did not involve any question, controversy, or issue before the IRS or the Department.

[10] Koresko makes no separate argument about the amendment procedures governing the SEWBP. To the extent PennMont may have had authority to amend the SEWBP, see GX-49 at § 10.1 ("[PennMont] may at anytime, and from time to time amend, in whole or in part, any or all of the provisions of [SEWBP]"), Koresko has waived that argument by not raising it below or in his opening brief. United States v. Dupree, 617 F.3d 724, 728 (3d Cir. 2010) (arguments not raised in district court are waived on appeal); Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp., 26 F.3d 375, 398 (3d Cir. 1994) (arguments not raised in opening brief are waived).

administer REAL VEBA, this does not mean the League delegated all its authority to PennMont. Importantly, a grant of administrative authority over an ERISA plan does not include a grant of amendment authority. Indeed, as the Supreme Court has suggested (and lower courts have subsequently held), a "decision to amend or terminate a[n ERISA] plan . . . is not an act of plan administration." Varity Corp. v. Howe, 516 U.S. 489, 505 (1996); Bins v. Exxon Co., 220 F.3d 1042, 1053 (9th Cir. 2000); In re Ullico Inc. Litig., 605 F. Supp. 2d 210, 218 (D.D.C. 2009). Thus, although the REAL VEBA plan document granted PennMont administrative authority over the Plans, it did not grant PennMont amendment authority, as the district court correctly held. 884 F. Supp. 2d at 280.

Moreover, even if Koresko and/or PennMont had authority to amend the Plans, the amendment is nonetheless invalid because it was prohibited by other plan provisions, as the district court held. 884 F. Supp. 2d at 281. For instance, section 9.03(c)(3) of the REAL VEBA plan document prohibits amendments that would "[c]reate or effect any discrimination in favor of Participants who are highly compensated, who are officers or [sic] the employer, or who are stockholders of the employer." Doc. 78-4 § 9.03(c)(3). Koresko argues that this provision did not bar the 2009 amendment, as the provision was intended "to demonstrate compliance with I.R.C. § 501(c)(9)" only, and "a plan sponsor can choose to amend or terminate that tax-exempt status at any time and become a taxable organization." Appellant's Br. at 25. However, in order for Koresko's argument to succeed, he must show that he amended the plan document to remove section 9.03(c)(3) prior to executing the 2009 amendment; otherwise, the discrimination provision remains in conflict with it. Neither the appellant's arguments nor the record evidence suggest this occurred.

Finally, even if otherwise applicable, the 2009 amendment would not excuse Koresko from his fiduciary duties in this case for two additional reasons. First, many of the fiduciary breaches occurred before the amendment, and any retroactive application of the amendment would run afoul of ERISA section 410, 29 U.S.C. § 1110, which prohibits, as against public policy, any provision that purports to relieve a fiduciary of his or her obligations. See Confer v. Custom Eng'g Co., 952 F.2d 41, 43 (3d Cir. 1991) (plan amendment to eliminate plan coverage of motorcycle accidents after a participant suffered a motorcycle accident "could operate only prospectively"). Second, despite the amendment, Koresko's operation, in fact, continued to include and charge fees to employers sponsoring ERISA-covered plans that included non-employer employees. See Docs. 377-58, 377-64, 377-70, 377-71, 377-72, 377-74 to 75, 377-76 to 78, 377-80 to 81, 377-82. As discussed above, these plans were ERISA plans. ERISA's requirements applied to these plans, despite any contrary language in trust documents. See 29 U.S.C. § 1104(a)(1)(D) (fiduciaries may follow plan documents only to the extent they are consistent with ERISA's requirements); Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2469 (2014) ("'trust documents cannot excuse trustees from their duties under ERISA.'") (citation omitted).

III. KORESKO WAS NOT ENTITLED TO HAVE THE PLANS PAY HIS LITIGATION COSTS BECAUSE THE INDEMNIFICATION CLAUSES DID NOT PROVIDE FOR INDEMNIFICATION BY THE PLANS AND, IF THEY HAD, THEY WOULD HAVE VIOLATED ERISA SECTION 410

Both the REAL VEBA and SEWBP plan documents contain indemnification clauses requiring the "Plan administrator and Adopting Employer[s]" "to indemnify and hold harmless the Trustee . . . from and against all amounts, including . . . expenses (including reasonable counsel fees) . . . incurred by or assessed against each Indemnified Party . . . , in advance, unless it is conclusively determined that such Claims arise from the Trustee's own negligence or willful breach of its obligations." GX-48 at § 7.5; GX-49 at § 8.5 (identifying "the League, the Plan Administrator and Adopting Employers" as those who must indemnify Trustee). In a September 16, 2013 order, the district court barred the plans from using plan assets to cover Koresko's litigation costs in this matter. Doc. 496. On appeal, Koresko argues that this order "deprived [him] of his contractual indemnity right to the advancement of defense costs, which prevented him from defending the claims asserted by the Secretary against him." Appellant's Br. at 27.[11]

First and foremost, Koresko misreads the indemnification clauses, which require the plan administrator and adopting employers to indemnify the trustee's defense costs, and <u>not</u> the plans themselves. They do not allow the trustee or any other party to seek indemnification from the trusts or the plans. Nor was Koresko ever the trustee to the plans. Thus, by the plain terms of the plan documents, Koresko never had a right to receive plan assets for the purpose of paying his litigation costs.

Furthermore, as the district court noted below, Koresko's argument fails even if the indemnification clauses had applied to him, because the court had already determined he had violated his ERISA fiduciary duties prior to issuing the September 16, 2013 order. Doc. 1197 at 10–11 (citing <u>Solis v. Koresko</u>, 884 F. Supp. 2d 261, 290 (E.D. Pa 2012)). Moreover, whatever was the case in 2013, the district court in its decision on the merits and final order in 2015 has now "conclusively determined that [the claims in this case] arise from [Koresko's] own

[11] Prior to the September 16, 2013 order, Koresko used trust assets to pay at least $1,179,855.59 in legal costs to an outside law firm for representation in this matter. Doc. 997-1 at ¶¶ 179, 222, 227, 233, 241, 248, 249, 251. Koresko also used trust assets to pay over $840,000 in legal costs to an outside law firm to defend him in contempt proceedings in this case. Docs. 858 at 2, 7; 1010 at 1-2; 1021 at 2; 1079 at 2; 1090 at 2; 1120 at 2; 1150 at 2; 1156 at 2; 1203 at 2; 1204 at 2; and 1246 at 2.

negligence or willful breach of [his] obligations." GX-48 at § 7.5; GX-49 at § 8.5.[12]

IV. ERISA DOES NOT PERMIT KORESKO TO RETAIN FUNDS HE MISAPPROPRIATED FROM THE PLANS

When a fiduciary's violations of ERISA have caused a plan to lose assets, the fiduciary is required to make the plan whole. Section 409(a) of ERISA provides that any fiduciary who breaches its duties under ERISA "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." 29 U.S.C.

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[12] In addition, ERISA section 410(a), 29 U.S.C. § 1110(a), renders void all provisions that purport to relieve fiduciaries from liability or responsibility for violations of ERISA. Johnson v. Couturier, 572 F.3d 1067, 1079–80 (9th Cir. 2009) (clause requiring indemnification for all acts not involving "deliberate wrongful acts or gross negligence" violated ERISA section 410(a) because it allowed for indemnification "even if Defendants breached their fiduciary duties"); State Street Bank & Trust Co. v. Salovaara, 326 F.3d 130, 137-39 (2d Cir. 2007) (410 imposes flat bar on fiduciary that has been found to have violated its duty to the plan from recouping its expenses from the very plan it injured); see also 29 C.F.R. § 2509.75-4. The clauses at issue here require indemnification unless the trustee is "conclusively determined" to have acted negligently or willfully in breach of his duties. GX 48 §7.5; GX 49, § 8.5. A fiduciary may breach his duties under ERISA without being negligent or willful. See U.S. v. Mason Tenders Dist. Council of Greater N.Y., 909 F. Supp. 882, 886 (S.D.N.Y. 1995) ("ERISA's prudence standard is not that of a prudent law person but rather that of a prudent fiduciary with experience dealing with a similar enterprise") (internal quotations and citation omitted). Because, if read in the way Koresko proposes, the indemnification clauses would relieve Koresko of responsibility for conduct that violated ERISA, the clauses would violate ERISA section 410, as the district court found. R. Doc. 1197 at 9 (citing Couturier, 572 F.3d at 1079-80).

§1109(a) (emphasis added). ERISA thus requires a fiduciary such as Koresko who breaches his duties by transferring plan monies to himself to return all misappropriated funds to the plan and restore all losses. See, e.g., Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock, 861 F.2d 1406, 1411-19 (9th Cir. 1988) (breaching fiduciary must return ill-gotten profits); Chao v. Constable, 2006 WL 3759749 at *9 (W.D. Pa. 2006) (breaching fiduciaries ordered to restore losses from monies taken from death benefit fund to pay for fiduciary's personal expenses); Pension Benefit Guar. Corp. v. Morin, 2000 WL 760737, *5 (D. Maine 2000).

But despite the court's exhaustive findings regarding his pervasive fiduciary misconduct, 86 F. Supp. 3d at 338-72, Koresko argues that he should only have to restore to the plans some undetermined and unspecified amount sufficient to make sure that death benefits to beneficiaries are fully funded. Appellant's Br. at 33-37. He thus is asking the court to allow him to retain his ill-gotten goods, and profit personally from his unilateral diversion of millions of dollars in plan assets to accounts he controlled, which he then used for his own purposes such as purchasing property in the Caribbean. Such a result is inconsistent with ERISA's remedial scheme, which expressly allows for both the recovery of losses and disgorgement of profits in fiduciary breach cases such as this one. See 29 U.S.C. §§ 1132(a)(2), 1109(a).

Because "[o]ne of the overriding goals of ERISA is to prevent the misuse and mismanagement of plan assets by fiduciaries … ERISA § 409(a) … requires a fiduciary to disgorge to an employee benefit plan any profits he makes through improper use of the plan's assets." Amalgamated, 861 F.2d at 1411. See also 29 U.S.C. § 1109(a) (fiduciary who breaches its duties under ERISA "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary"). Thus, both restoration of plan losses and disgorgement of a fiduciary's illegitimate profits are available under the express terms of section 409 in a suit brought, as here, under section 502(a)(2). Doc. 1 (Complaint) at ¶ 1. Moreover, disgorgement is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs, Edmonson v. Lincoln Nat. Life Ins. Co., 725 F.3d 406, 415 (3d Cir. 2013), which is available as appropriate equitable relief against breaching fiduciaries and knowing participants under ERISA sections 502(a)(3) and 502(a)(5). See generally Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 248 (2000); Skretvedt v. E.I. DuPont De Nemours, 372 F.3d 193, 213-14 (3d Cir. 2004) (discussing equitable principles of disgorgement, constructive trust, and unjust enrichment in ERISA claims).

ERISA's duty of loyalty bars a fiduciary from profiting even if no loss to the plan occurs, and under section 409(a), ERISA provides that plans can recover that profit whether or not the plan suffered a financial loss. Edmonson, 725 F.3d at 415. This provision reflects ERISA's adoption of well-established common law trust principles, which protect beneficiaries by allowing them to bring suit to recover any profits made by a breaching fiduciary through his breach. Id., citing Restatement of Trusts (Second) §205(b) comment (h), § 206 comment (j). Similarly, when "ERISA fiduciaries breach their duties by risking trust assets for their own purposes, beneficiaries may recover the fiduciaries' profits made by misuse of the plan's assets." Id., citing Leigh v. Engle, 727 F.2d 113, 122 (7th Cir. 1984). The purpose of this rule is to deter the fiduciary from engaging in disloyal conduct by denying him the profits of his breach. Edmonson, 725 F.3d at 417, citing Amalgamated, 861 F.2d at 1411, and G. Bogert and G. Bogert, The Law of Trusts and Trustees § 543, at 218 (2d ed. 1978) (without financial incentive to breach, fiduciary will be less tempted to engage in disloyal transactions; objective is to make disloyalty so prejudicial to him that he and all other trustees will be induced to avoid disloyal transactions in future). See also Chao v. Merino, 452 F.3d 174, 184-85 (2d Cir. 2006) (fiduciary who permitted embezzler to have access to fund to embezzle a second time was liable for full amount of losses to fund, and could not escape liability by claiming Fund had sufficient money to pay claims;

breaching fiduciary is liable for all losses he caused to plan, not just for losses he caused to individual beneficiaries).

Koresko claims that he is permitted to keep some of his misappropriated funds on the grounds that individual beneficiaries will have sufficient funds from the life insurance policies purchased by the trusts, even if he does not pay back all of the money he pocketed and dissipated. Not only is this proposition wholly unproven and unsupported by the record in this case, the cases he cites – LaRue v. DeWolff, Boberg & Assoc., 552 U.S. 248, 255 (2008) and Harley v. Minn. Min. & Mfg. Co., 284 F.3d 901, 908 (8th Cir. 2002) – say no such thing. Neither LaRue nor Harley was about the availability of a remedy in a suit brought by the Secretary under ERISA section 502(a)(2). LaRue involved the ability of the pension plan participant to sue on behalf of a plan to recover losses to his own defined contribution account, and Harley involved the standing of a participant to sue to recover losses to a fully-funded defined benefit plan.

Koresko likewise erroneously attempts to liken this case to Malia v. General Elec., 23 F.3d 828, 830-35 (3d Cir. 1994), another case involving a defined benefit pension plan. But Malia does not hold, as Koresko implies, that there is no remedy for loss of plan assets if participants' individual benefits may be fully funded. Rather, this Court's conclusion in Malia, that the participants could not bring a suit challenging the termination and merger of a defined benefit pension plan without alleging that the termination or merger resulted in a reduction or injury to their pension benefits, has no relevance to the issue in this case: whether in a suit by the Secretary for fiduciary misconduct involving misappropriations from a welfare plan, the Secretary can recover the misappropriated assets. As this Circuit has recently reaffirmed, the Secretary has standing to seek appropriate "monetary equitable relief" for fiduciary misconduct under section 502(a)(2), so that such misconduct will not "go unpunished," with no need to show injury to individual participants and beneficiaries. Perelman v. Perelman, 793 F.3d 368, n. 7 (2015).

The essence of this case is that Koresko took millions of dollars from trusts that held assets on behalf of hundreds of employee benefit plans. He used and retained these moneys for his own benefit. Because of his unlawful conduct, the plans lost millions intended to provide death benefits. Neither ERISA nor trust law permit him to retain his ill-gotten goods.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court affirm the decisions and order of the district court in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Robin Springberg Parry, hereby certify that this brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B). This brief contains 11, 132 words, exclusive of the exempted portions pursuant to Fed.R.App.P. 32(a)(7)(B)(iii). This word count was provided by the Microsoft Word 2010 software program with which the brief was produced.

Date: November 9, 2015

/s/ Robin Springberg Parry
ROBIN SPRINGBERG PARRY

CERTIFICATION PURSUANT TO LAR 31.1

I, Robin Springberg Parry, hereby certify that the electronic version of this brief was scanned with McAfee VirusScan Enterprise ver. 8.8 virus scanning software and was found to be free of any currently known viruses.

I further certify that pursuant to Clerk Order filed September 16, 2015, the court granted leave to file a joint deferred appendix, which must be filed and served within 21 days of the date of service of this brief. Pursuant to that Order, the parties must file and serve at this time only the electronic version of the briefs containing references to the record, and only within 14 days of the date the appendix is filed are the parties required to re-file and re-serve the electronic version of the briefs and file all required paper copies containing references to the appendix. Therefore, I do not certify at this time that the text of the electronic version of this brief is identical to the paper copies to be filed, as there are no paper copies to be filed at this time, but I will make such certification when I re-file the electronic version of the briefs and file the paper copies containing references to the appendix, 14 days after the deferred appendix is filed.

Date: November 9, 2015

/s/ Robin Springberg Parry
ROBIN SPRINGBERG PARRY

CERTIFICATE OF SERVICE

I, Robin Springberg Parry, hereby certify that on this 9th day of November, I caused a true and correct copy of the foregoing written response in Perez v. Koresko (No. 15-2470) to be filed electronically with the court using the CM/ECF system, which will then send a notification of such filing to the following:

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