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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

R. ALEXANDER ACOSTA,[1] U.S. Secretary of Labor, Plaintiff, v. JAMES DEWALT; ROBERT G. BAKIE; JACK L. FALLIS, JR.; JEFFREY A. BARTON; ASSOCIATED INDUSTRIES MANAGEMENT SERVICES, INC.; THE ASSOCIATED INDUSTRIES OF THE INLAND NORTHWEST; AND THE ASSOCIATED EMPLOYERS HEALTH AND WELFARE TRUST, Defendants.	Case Number 2:17-cv-00082-TOR The Honorable Thomas O. Rice Secretary of Labor's Opposition to Defendants' Motions to Dismiss for Lack of Jurisdiction and Failure to State a Claim

Secretary of Labor's Opposition to Defendants' Motions to Dismiss

[1] Secretary Acosta replaces Acting Secretary of Labor, Edward C. Hugler, as the named party in this action. Fed. R. Civ. P. 25(d).

1 The Secretary of Labor (Secretary) filed this action on February 24, 2017,
2 against defendants James DeWalt, Robert G. Bakie, Jack L. Fallis, and Jeffrey A.
3 Barton (Trustees); Associated Industries Management Services, Inc. (AIMS);
4 Associated Industries of the Inland Northwest (Association); and Associated
5 Employers Health and Welfare Trust (Trust). (ECF No. 1.) The Secretary's
6 complaint alleges that defendants, except the Trust, violated the Employee
7 Retirement Income Security Act of 1974 (ERISA). (Id.)

8 COMPLAINT ALLEGATIONS

9 The Secretary's complaint alleges that three hundred or so small employers
10 and their employees contributed to the Trust to fund their ERISA-covered
11 employee health and welfare benefit plans (Plans) and pay administrative costs for
12 the Plans. (Id. ¶ 19.) Each participating employer provided medical and other
13 health and welfare benefits through insurance policies purchased with their
14 contributions to the Trust (id. ¶¶ 19–20); and each Participating Employer thereby
15 established its own ERISA-covered plan, (id. ¶ 21). Each Participating Employer
16 made contributions to the Trust on the Plan's behalf to pay (1) insurance premiums
17 to an insurance company to provide insured medical benefits for its employees, and
18 (2) the Plan's administrative expenses (id. ¶¶ 26–28).

19 Beginning in 1992, the Trust contracted with AIMS to provide the Plans
20 with certain administrative services. (Id. ¶ 34.) The Trust paid AIMS a fee for

1 those services using contributions made by the Participating Employers. In 2009,
2 AIMS's fee equaled 2% of the total insurance premiums paid through the Trust.
3 (Id. ¶ 38.)

4 From December, 31 2009, through February 2014, the Trustees purported to
5 approve a series of increases in AIMS's fees from 2% to 7% of insurance
6 premiums paid, and then caused the Trust to pay those increased fees. (Id. ¶¶ 39–
7 58.) The Trustees did not investigate whether those fee increases were reasonable,
8 nor whether the Trust could obtain similar services for less money. (Id. ¶¶ 43, 50,
9 56.) They increased the percentage of the fees paid to AIMS even as the Trust saw
10 a sharp decrease in the number of employers and participants serviced by AIMS.
11 (Id. ¶ 3.) The Trustees never informed the Participating Employers or their
12 employees about the fee increases. (Id. ¶¶ 44–45, 51–52, 61–62.) Instead, the
13 monthly bills sent to Participating Employers for their contributions continued to
14 include only a 2% fee for AIMS, and Trustees DeWalt and Bakie caused the Trust
15 to pay AIMS the difference between 2% and the increased amount by using reserve
16 funds held by the Trust, which had accumulated from prior contributions made by
17 the Participating Employers. (Id.) The Trustees did not tell the employers or their
18 employees that they were taking money from the Trust's reserves to pay for those
19 fee increases to AIMS. (Id.) These increased payments resulted in over $3 million
20 in losses to the Plans and the unjust enrichment of AIMS. (Id. ¶ 59.)

1 Based on the facts alleged, the Secretary's complaint asserts that the
2 Trustees were ERISA fiduciaries under ERISA sections 3(21)(i) and (iii), 29
3 U.S.C. § 1002(21)(i), (iii), because they (1) exercised discretionary authority or
4 control respecting management of the Plans; (2) exercised authority or control
5 respecting management or disposition of the Plans' assets; and/or (3) had
6 discretionary authority or discretionary responsibility for administration of the
7 Plans. (Id. ¶ 33.) The Association, the sole owner of AIMS, is alleged to be a
8 fiduciary under 29 U.S.C. § 1002(21)(i), (iii), because it appointed and had the
9 authority to remove Trustees.

10 The complaint alleges that the Trustees violated ERISA's fiduciary duties of
11 prudence and loyalty to the Plans, 29 U.S.C. § 1104(a)(1)(A), (B), and caused the
12 Plans to engage in prohibited transactions in violation of ERISA sections
13 406(a)(1)(C) and (D), 29 U.S.C. § 1106(a)(1)(C), (D), when the Trustees retained
14 and paid AIMS as a service provider for the Plans, repeatedly increased AIMS's
15 fees, and caused the Trust to pay those increased fees with plan assets. (Id. ¶¶ 63–
16 68.) The complaint further alleges that the Association failed to properly monitor
17 the Trustees' actions, in violation of its fiduciary duties of prudence and loyalty
18 under ERISA sections 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A), (B), (id. ¶
19 67), and that the Trustees and the Association are liable as co-fiduciaries for each
20

other's violations under ERISA section 405(a), 29 U.S.C. § 1105(a), (id. ¶¶ 66, 67(c), 72–73).

The Secretary's complaint next alleges that Trustees DeWalt and Bakie, who were also officers and employees of AIMS, (id. ¶¶ 29–30), committed prohibited transactions by retaining and paying AIMS as a service provider to the Plans, approving the increases in AIMS's fees, authorizing the Trust's fee payments to AIMS, and causing the Trust to pay AIMS from the reserve funds held by the Trust, (id. ¶¶ 69–71). In doing so, DeWalt and Bakie (1) violated ERISA section 406(b)(1), 29 U.S.C. § 1106(b)(1), by dealing with Plan assets in their own interest or for their own account; and (2) violated ERISA section 406(b)(2), 29 U.S.C. § 406(b)(2), by acting in transactions involving the Plans on behalf of a party—AIMS—which had interests adverse to the Plans or the interests of participants or beneficiaries of the Plans. (Id.) Finally, the Secretary alleges that AIMS is liable under ERISA section 502(a)(5), 29 U.S.C. § 1132(a)(5), for disgorgement of its unjust enrichment because it knowingly participated in these fiduciary breaches.

DEFENDANTS' MOTIONS TO DISMISS

On May 16, 2017, defendants filed two motions to dismiss. (ECF Nos. 12, 15.) The first motion seeks dismissal of the Secretary's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. (ECF No. 12.) The motion argues that the Trust did not hold ERISA-covered plan

1 assets, and that the Trustees therefore were not ERISA fiduciaries because they did
2 not exercise control over plan assets. (Id. at 10–11.) Thus, according to
3 defendants, this Court lacks subject matter jurisdiction, because the complaint does
4 not "present a federal question on [its] face." (ECF No. 12 at 5.)
5 The second motion seeks dismissal of the Secretary's complaint pursuant to
6 Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. (ECF No. 15.)
7 This motion once again argues that the Secretary's complaint does not state a claim
8 on its face because the assets held by the Trust were not plan assets, and therefore
9 the Trustees were not ERISA fiduciaries. (Id. at 8–14.) The second motion also
10 argues that (1) the Secretary failed to state any prohibited-transaction and knowing
11 participation claims because the Trust assets were not ERISA-covered plan assets;
12 (2) all claims arising before May 27, 2010, are time-barred by ERISA's statute of
13 limitations; and (3) the Secretary failed to allege facts to support his failure-to-
14 monitor claim against the Association. (Id. at 14–19.) Because the fundamental
15 grounds for both motions are the same, the Secretary files a single opposition to
16 them.[2]

17 [2] According to this Court's Local Rule 7.1(e), a "response relating to a dispositive
18 motion shall not exceed 20 pages." Because the Secretary's Response in
19 Opposition opposes two separate dispositive motions filed by defendants, the total
20 page limit for this Response is 40 pages.

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ARGUMENT

Defendants' arguments hinge upon a basic misunderstanding of ERISA. First, when employers and/or employees contribute assets to a multiple-employer trust, the assets held by the trust are plan assets where the ERISA plans, and their participants and beneficiaries, have a beneficial interest in those assets under the terms of the trust, even though the trustee has legal title to them. And someone with authority or control over plan assets, like defendants here, is a fiduciary under ERISA. Defendants' motions to dismiss the Secretary's complaint for lack of subject-matter jurisdiction and to dismiss the prohibited-transaction and knowing participation claims for failure to state a claim are based on the same argument—i.e., that assets in the Trust were not plan assets and that defendants therefore were not fiduciaries. Defendants arguments fail because the complaint properly alleges that (1) the Trust's assets were plan assets, and (2) defendants were fiduciaries because of their control over those assets. Also of note, as alleged in the complaint and discussed *infra*, defendants were ERISA fiduciaries for reasons in addition to their authority and control over plan assets.

Second, because all the ERISA violations pled by the Secretary were completed *after* May 27, 2010, none of the Secretary's claims are time-barred. Additionally, the Secretary's complaint alleges a factual basis sufficient to come under ERISA section 413's fraud or concealment provision. See 29 U.S.C. § 1113.

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Third, the Secretary's complaint properly sets out a plausible claim against the Association for its failure to monitor the Trustees, as the Association had authority to remove the Trustees, knew certain Trustees had committed ERISA violations, and yet did nothing to prevent or remedy those violations.

I. The Secretary's Complaint Adequately Alleges that the Trust Held ERISA-Covered Plan Assets Over Which Defendants Exercised Authority or Control, and that Defendant Trustees Are Therefore Fiduciaries Under ERISA

Defendants' motions do not dispute the Secretary's properly pled allegations that the employers who participated in the Trust (Participating Employers) each established and maintained an employee welfare benefit plan covered by ERISA.[3] (ECF No. 1 ¶¶ 18–22.) Nor do defendants dispute that, pursuant to the terms of each Plan, the Participating Employers paid contributions to the Trust, and that the Trust then used those contributions to pay (1) insurance carriers that insured the

[3]The Secretary pled in the alternative that the Trust itself was an ERISA plan because defendants took that position in a separate litigation. See AIMS v. Moda Health Plan, Inc., No. 3:14-cv-01711-AA, 2015 WL 4426241 (D. Or. July 16, 2015) (in which AIMS and DeWalt argued that the Association was an "employer" capable of sponsoring an ERISA-covered multiple-employer welfare arrangement plan and the Trust's successor was an ERISA plan).

1 medical benefits provided by the Plans' insurance coverage, and (2) entities
2 providing the Plans with administrative services, including AIMS. (Id. ¶¶ 28, 38.)
3 Instead, defendants argue that the Secretary failed to allege facts supporting
4 the conclusion that they were ERISA fiduciaries with respect to the Plans. In fact,
5 the complaint's allegations provide multiple bases for defendants' status as ERISA
6 fiduciaries. The Secretary's complaint alleges that the Trustees were ERISA
7 fiduciaries under ERISA sections 3(21)(i) and (iii), 29 U.S.C. § 1002(21)(i), (iii),
8 because they (1) exercised discretionary authority or control respecting
9 management of the Plans; (2) exercised authority or control respecting
10 management or disposition of the Plans' assets; and/or (3) had discretionary
11 authority or discretionary responsibility for administration of the Plans. (ECF No.
12 1 ¶ 33.) Each of those factual allegations constitutes a basis for defendants'
13 fiduciary status with respect to conduct alleged in the complaint. Some of the
14 specific actions alleged demonstrate the Trustees' exercise of authority or control
15 over management or disposition of Plan assets, such as: "determining how Trust
16 assets should be used to pay for the Plans' benefits and expenses," and "investing
17 the Plans' assets held in the Trust." (Id.) Others concerned the Trustees having
18 and exercising discretionary authority or control over the Plans' management
19 and/or administration, such as "selecting service providers for the Plans." (Id.)
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1 Defendants' motions challenge only one basis for the Trustees' fiduciary
2 status—their authority or control over the Plans' assets—by arguing "that none of
3 the Trust's assets were assets of the individual plans," and that as a result the
4 Trustees were not ERISA fiduciaries because they exercised control over *Trust*
5 *assets*, not *plan assets*. This argument is simply wrong.

6 ERISA does not supply a general definition of "plan assets." However, the
7 Department of Labor (DOL) has provided interpretive guidance on the meaning of
8 that phrase in opinion letters and regulations. As one DOL opinion letter states,

9 > the assets of a plan generally are to be identified on the basis of
10 > ordinary notions of property rights under non-ERISA law. In general,
> the assets of a welfare plan would include any property, tangible or
11 > intangible, in which the plan has a beneficial ownership interest. The
> identification of plan assets would therefore include consideration of
12 > any contract or other legal instrument involving the plan, as well as
> the actions and representations of the parties involved.

13 U.S. Dep't of Labor, Off. Pension & Welfare Benefit Programs, Advisory Opinion,
14 93-14A, 1993 WL 188473, at *4 (May 5, 1993) (emphasis added); see U.S. Dep't
15 of Labor, Off. Pension & Welfare Benefit Programs, Advisory Opinion, 92-24A,
16 1992 WL 337539, at *2 (Nov. 6, 1992); Raymond B. Yates, M.D., P.C. Profit
17 Sharing Plan v. Hendon, 541 U.S. 1, 17–18 (2004) (affording Skidmore deference
18 to DOL's interpretation of ERISA contained in opinion letters); see also Acosta v.
19 Pac. Enters., 950 F.2d 611, 620 (9th Cir. 1991) (holding that the phrase "assets of
20 the plan" as used in ERISA should be broadly construed and is not confined to

1 "only financial contributions received by the plan administrators"); cf. Bos v. Bd.
2 of Trs., 795 F.3d 1006, 1010 (9th Cir. 2015) (implicitly agreeing with DOL's
3 opinion-letter guidance on meaning of plan assets).

4 In this case, the governing Trust document makes clear that the Trust assets
5 are intended to benefit the Plans' participants and beneficiaries. The Trust
6 document, which each participating employer adopted, states that "the assets of the
7 Trust Fund . . . shall be held for the exclusive purposes of providing benefits to
8 participating employees and for the exclusive purposes of providing benefits to
9 participating employees and their beneficiaries and defraying expenses of
10 administering the plan." (ECF No. 15-1, Art. V, § 4.) It also states, "[T]he
11 Trustees shall . . . administer the Trust Fund solely in the interest of the
12 participating employees and their beneficiaries and for the exclusive purpose of (a)
13 providing benefits to participating employees and their beneficiaries and (b)
14 defraying reasonable expenses of benefit plan administration." (Id. § 5.)

15 These statements manifest an express intent to hold the Trust property in
16 trust for the benefit of the Plans and their participants and beneficiaries, thereby
17 demonstrating that the Plans had a beneficial interest in the trust property. See U.S.
18 Dep't of Labor, Off. Pension & Welfare Benefit Programs, Advisory Opinion, 99-
19 08A, 1999 WL 343509, at *3 (May 20, 1999) (whether arrangement gives rise to
20 plan-held beneficial interest depends on whether plan sponsor expresses intent to

1 grant such beneficial interest or has acted or made representations sufficient to lead
2 participants and beneficiaries of the plan to reasonably believe "that such funds
3 separately secure the promised benefits or are otherwise plan assets"); U.S. Dep't
4 of Labor, Off. Pension & Welfare Benefit Programs, Advisory Opinion, 94-31A,
5 1994 WL 501646, at *2 (Sept. 9, 1994); Ad. Op., 92-24A, 1992 WL 337539, at *2
6 (Nov. 6, 1992). In other words, just because the Trust collected and held Plan
7 assets does not mean the Plans lacked a beneficial interest in those assets held by
8 the Trust; instead, the Plans and their participants and beneficiaries had a beneficial
9 interest in the assets, which were held by the Trust for the exclusive purpose of
10 providing benefits to the Plans' participants and beneficiaries and defraying the
11 Plans' expenses, making them plan assets under ERISA.
12 Defendants argue, in essence, that the Plans have no ownership interest in
13 the Trust assets because the Trustees, and not the Plans, had legal title to them.
14 This argument demonstrates a fundamental misunderstanding of ERISA and basic
15 trust-law principles. It is well-settled law that a trust is created only when an
16 owner of property manifests an intent to separate legal and equitable title to that
17 property. Austin W. Scott & William F. Fratcher, Scott & Ascher on Trusts § 11.2,
18 at 619 (5th ed. 2006). If the interests are not separated, and "one individual has the
19 entire legal interest and the entire beneficial interest, there is no trust." Id.;
20 Restatement (Second) of Trusts § 98 (1959); Restatement (Third) of Trusts § 33

1 cmt. g (2003). Defendants' misguided argument that, because the Trustees held
2 legal title to the Plans' assets, it therefore must have held the entire ownership
3 interest—including the beneficial interests—cannot be squared with these
4 fundamental trust principles.

5 If the Trust had a complete ownership interest in the assets it held, it was not
6 a trust at all. This is because a trust exists only "where a trustee holds property
7 subject to an equitable obligation to another who has an equitable property
8 interest." Bogert, The Law of Trusts & Trustees § 161; Gordon v. Sec'y of Health
9 & Human Servs., 803 F.2d 1071, 1073 (9th Cir. 1989) (no valid trust existed
10 because "there was no separation of legal and equitable title to those funds" held in
11 account); Woxberg v. United States, 329 F.2d 284, 291 (9th Cir. 1964) ("Where a
12 trust is valid, legal title is held by the trustee, and the cestui que holds a beneficial
13 interest, or equitable estate."). By the Trust document's plain terms, such is
14 precisely how it was intended to operate—the Trustees held legal title to the funds
15 contributed by the Plans, and the Plans, as well as their participants and
16 beneficiaries, retained a beneficial interest in those funds. This remained true
17 whether the Trust used the contributions to pay insurance premiums, to pay for
18 administrative services, or to hold in reserve for the proverbial rainy day.

19 DOL's plan-asset regulation, 29 C.F.R. § 2510.3-101 (issued in 1986), also
20 counsels this result. See 29 U.S.C. § 1002(42) ("the term 'plan assets' means plan

1 assets as defined by such regulations as the Secretary may prescribe"). The
2 regulation states,

3 [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
4 established or maintained for the purposes of offering or providing any benefit . . . to the participants or beneficiaries of the investing
5 plan, its assets will include its investment and an undivided interest in the underlying assets of that entity.

6 29 C.F.R. § 2510.3-101(h)(2); see also In re Watson, 161 F.3d 593, 597–99 (9th
7 Cir. 1998) (affording DOL regulations interpreting ERISA Chevron deference).
8 The regulation's preamble, as proposed, makes clear that it applies to participation
9 in multiple-employer trusts, like the Trust here, when those trusts aggregate
10 contributions from more than one ERISA plan. Proposed Regulation Relating to
11 the Definition of Plan Assets, 50 Fed. Reg. 961, 967 (Jan. 8, 1985). "The
12 Department has included this provision because it has concluded that in cases
13 where a plan has effectively delegated responsibility for the activity which causes
14 it to be a plan—i.e. providing benefits—by participating in a separate entity that is
15 neither a plan nor an insurance company, the persons who manage that entity
16 should be subject to the provisions of Title I of ERISA, including the fiduciary
17 responsibility provisions of the Act. Thus, for example, the assets of a multiple-
18 employer trust in which a plan participates would include 'plan assets.'" Id.; see
19 also Final Regulation Relating to the Definition of Plan Assets, 51 Fed. Reg.
20 41,262-01 (Nov. 13, 1986) ("[T]he Department has adopted the provisions relating

to group trusts, bank common and collective trust funds and insurance company pooled separate accounts as they were proposed," except the final rule does not apply "if the trust is registered as an investment company under the Investment Company Act of 1940.").

An example provided by the regulation is of particular relevance here: "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).

The plan-asset regulation and the example it provides further support the Secretary's argument. Like the regulation's example, the Plans all participated in the Trust and each thereby acquired a beneficial interest in the assets they contributed to it. The Trust's assets, therefore, were plan assets throughout the relevant period.

Case law universally supports this conclusion. In Trustees of Southern California Bakery Drivers Security Fund v. Middleton, the U.S. Court of Appeals for the Ninth Circuit relied on DOL's plan-asset regulation when it reversed the district court's grant of defendants' summary judgment motion. 474 F.3d 642 (9th

1 Cir. 2007). Middleton involved a 1987 agreement between two ERISA plans, the
2 Southern California Bakery Drivers Security Fund (Drivers Fund) and the South
3 Bay Teamsters and Employers Health and Welfare and Related Benefits Trust
4 Fund (Trust Fund). Id. at 643. The Drivers Fund agreed to pay the Trust Fund a
5 per-participant monthly fee in exchange for certain death, accidental death, and
6 dismemberment benefits. Id. When the parties terminated the agreement in 2001,
7 plan participants had paid $2,753,642 to the Trust Fund, but the Trust Fund had
8 paid out only $770,768.19 in claims. Id. When the Trust Fund refused to remit the
9 remaining plan assets not paid in claims to the plan participants, the Drivers Fund
10 sued, alleging the Trust Fund had violated its ERISA duty of loyalty. Id. at 644.
11 The Ninth Circuit agreed. First, the Court rejected the Trust Fund's
12 argument that it was an ERISA-exempt insurer under 29 U.S.C. § 1101(b)(2), as "it
13 [wa]s not 'an insurance company, insurance service, or insurance organization,
14 qualified to do business in a State,'" id. at 645 (quoting 29 U.S.C. § 1101(b)(2)),
15 and indeed, never "purported to constitute such an organization," id. Next, the
16 Court concluded that the Trust Fund and its trustees were fiduciaries to the Drivers
17 Fund, as the Trust Fund "exercised 'control respecting management or disposition
18 of [the Drivers Fund] assets,' by receiving payment or assets from the Drivers
19 Fund that were contributed on behalf of plan participants and then placing those
20 assets into its fund over which it had authority." Id. at 646 (citation omitted)

1 (quoting 29 U.S.C. § 1002(21)(A)). Thus the Trust Fund "breached its duties
2 under ERISA by failing to apply the surplus funds for the benefit of Bakery
3 Drivers Security Fund participants." Id.

4 Middleton's holding is directly applicable here. When employers and/or
5 employees remit funds for benefits to a trust, those funds are plan assets under
6 ERISA when held for the benefit of the participants and beneficiaries of an
7 ERISA-covered plan, and anyone who exercises control over those assets is an
8 ERISA fiduciary.

9 In Martin v. National Bank of Alaska, the U.S. District Court for the District
10 of Alaska rejected defendant's argument that certain "common trust funds, which
11 contain investments by employee benefit plans, should not be treated as employee
12 benefit plans subject to ERISA." 828 F. Supp. 1427, 1433 (D. Alaska 1992).
13 Citing DOL's plan-asset regulation, the district court reasoned, "If defendant's
14 position were the law, then all such plans could put all of their assets beyond the
15 protection of ERISA by the simple act of placing the assets in a common trust
16 fund. Clearly Congress did not intend this. ERISA does not expressly remove
17 common trust funds from its protection." Id.

18 Most recently, the U.S. Court of Appeals for the Third Circuit expressly
19 rejected the argument defendants now advance. In Secretary of Labor v. Koresko
20 (Koresko II), defendants argued they did not violate ERISA when they siphoned

1 funds from two trusts they established and administered. 646 F. App'x 230, 234
2 (3d Cir. 2016). The trusts offered employers a way to provide death benefits to
3 their employees. Perez v. Koresko (Koresko I), 86 F. Supp. 3d 293, 299 (E.D.
4 Penn. 2015). To participate, an employer would establish an employee welfare
5 benefit plan by signing an adoption agreement. Id. at 316–17. Participating
6 employers made contributions to the trusts, and the trusts purchased "life insurance
7 policies taken out on the lives of participating employees to fund the benefits."
8 Koresko II, 646 F. App'x at 233. Importantly, adoption agreements signed by the
9 plans named a business owned by the lead defendant as the plans' administrator.
10 Koresko I, 86 F. Supp. 3d at 319, 340. From 2002 through 2010, defendants
11 instructed the trustee on numerous occasions to issue payments from the trusts to
12 themselves, entities they controlled, and other businesses. Id. at 338–71. The
13 trustee approved these payments, in many cases without documentation for the
14 expenses, id. at 339, which were unrelated to providing benefits for the plans'
15 participants and beneficiaries, id. at 383–85.

16 The Secretary brought suit, alleging, among other things, that defendants
17 violated their ERISA duty of loyalty and committed prohibited transactions when
18 they paid themselves and others using the trusts' assets. Id. at 299. After a bench
19 trial, the district court held in the Secretary's favor. Id. Defendants appealed to
20 the Third Circuit, arguing that the trust assets were not plan assets under ERISA,

1 and that as a result they were not ERISA fiduciaries. Koresko II, 646 F. App'x at
2 234.

3 The Third Circuit roundly rejected defendants' argument. First, the court
4 noted language from the trusts' master trust agreements, which expressly stated
5 that all trust assets would be held for the exclusive benefit of the participating
6 employees and beneficiaries of the participating employers. Id. at 236–39. Based
7 on this language and basic trust-law principles, the court held that while the trustee
8 of the trusts held legal title to the trust assets, the plans, and their participants and
9 beneficiaries, nonetheless held "an equitable or beneficial interest" in those same
10 trust assets, rendering them plan assets for ERISA purposes. Id. at 238–39.
11 Second, the court buttressed its conclusion by citing the relevant portions of DOL's
12 plan-asset regulation, 29 C.F.R. § 2510.3-101(h)(2) and (j)(12), which are
13 discussed above. Id. at 239–40. As a result, the court held, "the individual
14 employer-level employee welfare benefit plans have a beneficial interest in the
15 trusts, and therefore the assets of the trusts are 'plan assets' within the meaning of
16 ERISA." Id. at 240.

17 The case at bar is nearly identical to Koresko. In both, (1) defendants
18 established a multiple-employer trust in which employers could participate to
19 provide benefits to their employees; (2) the trust required participating employers
20 to establish their own ERISA plan; (3) the trust agreement required participating

1 employers, on behalf of the ERISA plans, to fund the trust by contributing assets to
2 it; (4) the multiple-employer trust provided welfare benefits to participants and
3 beneficiaries through insurance policies purchased from third-party insurers; and
4 (5) the master trust agreements made clear that the assets contributed to the trust
5 could be used only for the exclusive benefit of the plans' participants and
6 beneficiaries. In such situations, the law is clear: the trust's assets are plan assets
7 under ERISA. Id. at 315–39.

8 Defendants' motions seem to suggest that ERISA should not apply here
9 because the Trust is "an insurer" that issued "a guaranteed benefit policy." (ECF
10 No. 15 at 9–10.) This contention contradicts the plain allegations of the
11 Secretary's complaint, which alleges, "Those benefits were insured by insurance
12 policies purchased by the Participating Employers. Under the terms of these
13 insurance policies and through procedures adopted by these Participating
14 Employers, the employees submitted claims for the insured benefits *to the insurers*
15 and received payments on allowed claims." (ECF No. 1 ¶ 19 (emphasis added).)
16 Further, "The *insurer's* acceptance of the Participating Employer's application for
17 those terms created the insurance policy for those employee benefits." (Id. ¶ 20
18 (emphasis added).) And as the Supreme Court has long held, "to determine
19 whether a contract qualifies as a guaranteed benefit policy, each component of the
20 contract bears examination. A component fits within the guaranteed benefit policy

exclusion only if it allocates investment risk to the insurer." John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 106 (1993); see, e.g., Middleton, 474 F.3d at 645–47 (citing Harris to conclude defendant trust was not an insurer and did not issue plan a "guaranteed benefit policy"). In this case, the Trust assumed no risk as to whether plan-participant claims would exceed the premiums each Plan paid through it to the actual insurer. Instead, such risks rested with the insurers themselves. Thus defendants' apparent contention is incorrect as a matter of law.

In conclusion, this Court should deny both motions to dismiss because the assets held by the Trust were ERISA-covered plan assets and the Trustees exercised authority or control over them, which made them ERISA fiduciaries.

II. The Secretary Adequately Alleged Defendants Violated ERISA by Engaging in Prohibited Transactions and Knowingly Participating in Fiduciary Breaches

Defendants assert that the Secretary failed to state claims for engaging in prohibited transactions and for knowing participation in fiduciary breaches because the Trustees did not have authority or control over plan assets. (ECF No. 15 at 16–18.) Specifically, defendants argue that (1) the complaint's prohibited-transactions claims "are . . . doomed by its failure to allege fiduciary status," (id. at 15); and (2) the complaint's knowing-participation claims fail because, given that the Trust

1 held no plan assets and the Trustees were not ERISA fiduciaries, no fiduciary
2 violation occurred for which those claims could attach, (id. at 17).
3 However, as explained above, the Trust's assets were Plan assets, and the
4 Trustees' exercise of control over them made them ERISA fiduciaries. 29 U.S.C.
5 1002(21)(A)(i), (iii). Thus, the Secretary's complaint does allege that (1) the
6 Trustees were ERISA fiduciaries, and (2) the Trustees engaged in prohibited
7 transactions and committed violations of their fiduciary duties under ERISA to
8 which the alleged knowing-participation claims could attach.
9 In addition, the Secretary also alleged other ways *besides* the Trustees'
10 control over Plan assets that establish defendants' fiduciary status with respect to
11 conduct alleged in the complaint (ECF No. 1 ¶ 33),[4] including their discretionary
12 authority and control over the Plans' management and administration, none of
13 which defendants challenge in their motions to dismiss. Thus defendants'

14 [4]For example, he Secretary's complaint also alleged that the Trustees acted as
15 fiduciaries because they "(1) determin[ed] the amount of Participating Employers'
16 contributions to the Trust; (2) authoriz[ed] the Trust's payment of insurance
17 premiums for the Plans; (3) select[ed] service providers for the Plans, including
18 AIMS; (4) determin[ed] the amounts that the Trust paid to AIMS for
19 administrative services; and (5) determin[ed] that the Trust obtained contributions
20 for and maintained reserves for future contingencies. (ECF No. 1 ¶ 33.)

1 arguments are not only wrong, but their motions also fail to address the other bases
2 supporting their fiduciary status with respect to the complaint's alleged conduct.

3 **III. The Secretary's Claim Regarding the First Fee Increase Is Timely Because the First Payment Occurred after May 27, 2010**

4 Defendants argue that ERISA's statute of limitations "bars claims arising
5 before" May 27, 2010, which includes "claims arising from the alleged December
6 31, 2009 fee increase." (ECF No. 15 at 19.) This argument regarding the
7 December 31, 2009 approval of a fee increase, however, conflicts with ERISA's
8 plain language.

9 ERISA's statute of limitations, as relevant here, runs "six years after . . . *the*
10 *date of the last action* which constituted a part of the breach or violation." 29
11 U.S.C. §1113(1) (emphasis added). The Secretary's complaint makes clear that,
12 although the Trustees *voted* to increase the fees the Trust paid AIMS on December
13 31, 2009, they in fact "caused the Trust to pay" AIMS the fee increase "via lump
14 sum payments . . . commencing June 28, 2010." (ECF No. 1 ¶ 39.) Thus while the
15 initial act leading to the fiduciary breach may have begun on December 31, 2009,
16 the date of the last action that constituted a part of the breach or violation did not
17 occur until the Trust began paying AIMS the increased fees starting June 28, 2010,
18 see, e.g., Tussey v. ABB, Inc., 746 F.3d 327, 337 (8th Cir. 2014) ("last action" of
19 fiduciary breach under ERISA section 413(1)(A), 29 U.S.C. § 1113(1)(A),
20 occurred *not* when fiduciaries *decided* to alter investment fund options, but instead

1 occurred when those decisions were *implemented*), with each separate payment of
2 increased fees being a separate fiduciary breach and prohibited transaction.

3 Indeed, the U.S. District Court for the Central District of California recently
4 came to a similar conclusion. In In re Northrop Grumman Corp. ERISA
5 Litigation, two ERISA plans entered into administrative service agreements
6 (ASAs) with their plan sponsor, Northrop Grumman Corporation (Northrop). No.
7 CV-06-06213 MMM (JCX), 2015 WL 10433713, at *5 (C.D. Cal. Nov. 24, 2015).
8 Plaintiffs brought suit, alleging the fees Northrop charged pursuant to the ASAs
9 were unreasonable. Id. at *14. Specifically, plaintiffs alleged that defendants
10 violated ERISA by causing the plans to pay unreasonable fees to Northrop, and by
11 causing the plans to engage in prohibited transactions. Id. Defendants argued that
12 plaintiffs' claims were untimely under ERISA section 413(1), 29 U.S.C. § 1113(1),
13 as the plans and Northrop had signed the ASAs more than six years prior to the
14 date plaintiffs filed their complaint. *Id.* at *24. Relying heavily on the U.S.
15 Supreme Court's decision in Tibble v. Edison International, 135 S. Ct. 1823
16 (2015), and the common law of trusts, the district court rejected defendants'
17 argument, explaining "that the fact the Plans entered into the ASAs outside the
18 limitations period does not render breach of fiduciary duty and prohibited
19 transactions claims *challenging payments under the ASAs during the limitations*
20 *period* time-barred." In re Northrop, 2015 WL 10433713, at *26 (emphasis

1 added). Therefore, "[g]iven the fiduciaries' continuing duty to avoid transactions
2 violating the duty of loyalty, plaintiffs can argue that each payment . . . during the
3 limitations period constituted a breach of fiduciary duty and a prohibited
4 transaction." Id.

5 Because the unlawful payments did not begin until June 28, 2010, which is
6 after May 27, 2010, the agreed cut-off date for timeliness in this action, the
7 Secretary properly pleaded a timely ERISA claim for the first fee increase. The
8 Secretary's complaint does not allege any breaches of fiduciary duty outside the
9 limitations period.[5]

10 **IV. The Secretary Alleged a Failure-to-Monitor Claim Against the Association**

11

12

13 [5]In addition, ERISA section 413 provides that "in the case of fraud or
14 concealment" an action "may be commenced not later than six years after the date
15 of discovery of such breach or violation." The Secretary has alleged that
16 defendants engaged in fraud or concealment when they failed to disclose the
17 AIMS' fee increases to employers and their employees, and when they concealed
18 the increases in AIMS's fees and by taking money from the Trust's reserves to pay
19 for those increases without telling the Participating Employers or their employees
20 that it was doing so. (ECF No. 1 ¶¶ 17, 61.)

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Finally, defendants take issue with the Secretary's failure-to-monitor claim, arguing that the complaint "fails to provide the necessary specifics regarding *how* [the Association] allegedly failed to" monitor the trustees it appointed. The U.S. Court of Appeals for the Ninth Circuit has long held that those with "responsibility for the appointment and removal of ERISA trustees . . . are themselves subject to ERISA fiduciary duties [under ERISA section 404(a)], albeit only with respect to trustee selection and retention." Johnson v. Couturier, 572 F.3d 1067, 1076 (9th Cir. 2009); see also 29 C.F.R. § 2509.75-8(D-4). "Implicit within the duty to select and retain fiduciaries is a duty to monitor their performance." Solis v. Webb, 931 F. Supp. 2d 936, 953 (N.D. Cal. 2012); see also Tibble v. Edison Int'l, 843 F.3d 1187, 1197 (9th Cir. 2016) (acknowledging that ERISA fiduciary duties include a continuing duty to monitor). The Secretary alleges that the Association knew about the Trustees' ERISA violations, that the Association had authority to remove the Trustees it appointed, and that the Association failed to undertake reasonable actions to remedy those known violations. (ECF No. 1 ¶ 67.) Such allegations are sufficient to withstand a motion to dismiss. Webb, 931 F. Supp. 2d at 955–56 (plaintiff sufficiently pled duty-to-monitor ERISA claims when defendants had authority to remove fiduciaries and knew about their fiduciary breaches but did nothing to prevent or remedy them).

1
CONCLUSION

2 For the foregoing reasons, defendants' motions to dismiss this case should
3 be dismissed in their entirety.

4 Dated: June 6, 2017

5 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send electronic notification of such filing to the following:

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