ReedSmith

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October 7, 2002

The Honorable Michael N. Milby
Clerk of the Court
United States District Court
For the Southern District of Texas
Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002

Re: Pamela Tittle, et al.. v. Enron Corp., et al.
Civil Action No. H-01-3913

Dear Clerk:

Enclosed for filing in the above-referenced action are the following:

1. Motion For Admission Pro Hac Vice And Designation Of Attorney-In-Charge On Behalf Of The American Bankers Association As *Amicus Curiae* with proposed order.

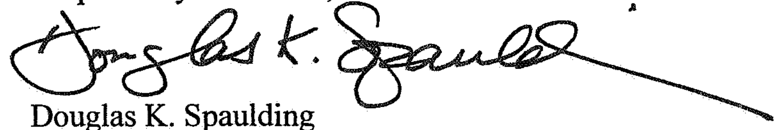
2. Motion Of The American Bankers Association For Leave To File As *Amicus Curiae* A Brief In Response To The Amended Brief Of The Secretary Of Labor As Amicus Curiae Opposing The Motion To Dismiss with proposed order and brief attached.

I have also enclosed an additional copy of these papers together with a self-addressed prepaid overnight mail envelope which may be used in returning a file stamped copy of this filing to me.

We have arranged for these papers to be posted on the website dedicated to this matter and for service by electronic mail.

Thank you for your courtesy in connection with this filing. If you have any questions, please do not hesitate to contact me.

Respectfully submitted,



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reedsmith.com

"Reed Smith" refers to Reed Smith LLP and related entities.

DCLIB-0309649.01-DKSPAULD
October 7, 2002 3:34 PM

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October 7, 2002

Ms. Helen Tippen
Case Manager
Post Office Box 61010
Houston, Texas 77208

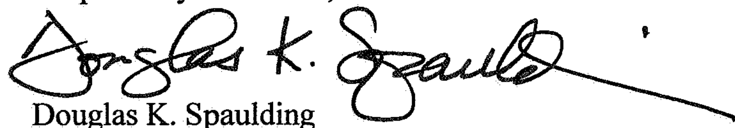
Re: Pamela Tittle, et al.. v. Enron Corp., et al.
Civil Action No. H-01-3913

Dear Ms. Tippen:

Enclosed is a courtesy copy of the motion for admission pro hac vice and the motion for leave to file *amicus* brief which we filed today in the above-referenced civil action.

Thank you for your courtesy in connection with this matter. Please do not hesitate to contact me if you have any questions.

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAMELA TITTLE, on behalf of herself and a class of persons similarly situated, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. H-01-3913 and Consolidated Cases
ENRON CORP., an Oregon Corporation, et al.,	)	
Defendants.	)	

MOTION FOR ADMISSION PRO HAC VICE AND DESIGNATION OF ATTORNEY-IN-CHARGE ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE*

Pursuant to Local Rule 83.1K the following lawyers move the Court for leave to appear as counsel for the American Bankers Association as *amicus curiae* in the above-captioned actions:

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- U.S. Court of Appeals - 4th Cir.
- State - D.C. Court of Appeals, New York Court of Appeals

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- U.S. District Courts - D.C., E.D. of Va., Md., E.D. Mi.
- State - Virginia Supreme court, D.C. Court of Appeals

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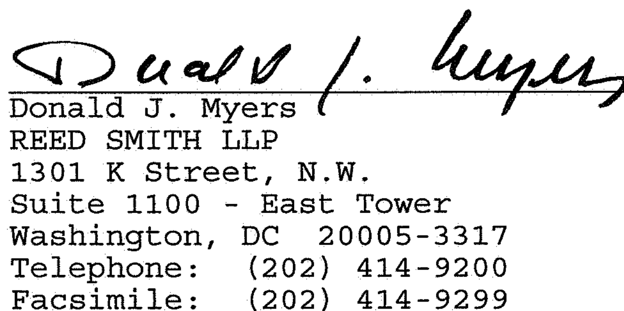
Bar Admissions:

- U.S. District Court - Md.
- State - D.C. Court of Appeals, Maryland Supreme Court

The American Bankers Association as *amicus curiae* designates Donald J. Myers as its attorney-in-charge pursuant to Local Rule 11.

Respectfully submitted,



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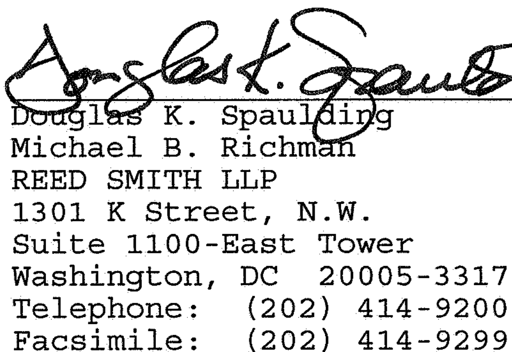
OF COUNSEL:



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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Motion For Admission Pro Hac Vice and Designation Of Attorney-In-Charge On Behalf Of The American Bankers Association As *Amicus Curiae* was: (1) served on all parties on the attached service list via the www.esl.3624.com web site pursuant to the Court's Orders of June 6, 2002 and August 7, 2002; (2) sent via facsimile to:

Ms. Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street
Twenty-First Floor
New York, NY 10004
(212) 510-0500
(212) 688-2255 facsimile;

and (3) mailed by first class mail, postage prepaid to:

Dr. Bonnee Linden, Pro Se
Linden Collins Associates
1223 West Broadway, P.O. Box 114
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The 8th day of October, 2002.

Douglas K. Spaulding

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAMELA TITTLE, on behalf of herself and a class of persons similarly situated, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. H-01-3913 and Consolidated Cases
ENRON CORP., an Oregon Corporation, et al.,	)	
Defendants.	)	

ORDER GRANTING MOTION FOR ADMISSION PRO HAC VICE ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE*

Upon consideration of the Motion for Admission Pro Hac Vice and Designation of Attorney-In-Charge on Behalf of the American Bankers Association as *Amicus Curiae*, and any opposition thereto, it is by the Court

ORDERED that the motion be, and it is hereby, granted and that the following attorneys are admitted pro hac vice as counsel for the American Bankers Association as *amicus curiae*:

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Entered this ______ day of October, 2002.

____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAMELA TITTLE, on behalf of herself and a class of persons similarly situated, et al., Plaintiffs, v. ENRON CORP., an Oregon Corporation, et al., Defendants.	Civil Action No. H-01-3913 and Consolidated Cases

MOTION OF THE AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE AS *AMICUS CURIAE* A BRIEF IN RESPONSE TO THE AMENDED BRIEF OF THE SECRETARY OF LABOR AS *AMICUS CURIAE* OPPOSING THE MOTION TO DISMISS

The American Bankers Association respectfully moves this Court for leave to file as *amicus curiae* a brief in response to the Amended Brief Of The Secretary Of Labor As *Amicus Curiae* Opposing The Motions To Dismiss. A copy of the brief which the American Bankers Association seeks leave to file is attached hereto and hereby lodged with the Court pending disposition of this motion for leave to file.

The American Bankers Association is the principal national trade association of the banking industry in the United States. Its members are banks of all sizes and types, including

national and state chartered banks; community, regional and money center banks and holding companies; savings banks and associations; and trust companies. Member banks of the American Bankers Association are located in each of the fifty states and the District of Columbia, and collectively they account for approximately 90 percent of the domestic assets of the banking industry in the United States.

Because many of its members serve as trustees of pension plans subject to the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"), the American Bankers Association has a special interest in issues faced by ERISA trustees. The Amended Brief Of The Secretary Of Labor As *Amicus Curiae* Opposing Motions To Dismiss (the "DOL Brief") raises such issues particularly with respect to the appropriate legal standard to impose upon entities which serve as "directed trustees" for ERISA plans.

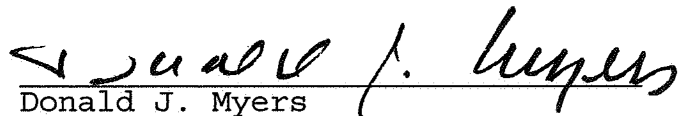
In light of its extensive experience and background in assisting the industry with respect to such issues, the American Bankers Association is uniquely qualified to assist the Court in its task of interpreting ERISA and to bring to the Court's attention an industry perspective and some of the practical implications which are affected by the issues in these cases. The brief of the American Bankers Association on these issues

will provide further guidance to the Court and will help to ensure that the Court's decision will be well-informed as to its impact on an industry which holds millions of employee benefit trust accounts with an aggregate value of several trillion dollars.

Based upon the forgoing, the American Bankers Association respectfully requests the Court to grant it leave to file the *amicus curiae* brief lodged herewith.

Respectfully submitted,

AMERICAN BANKERS ASSOCIATION



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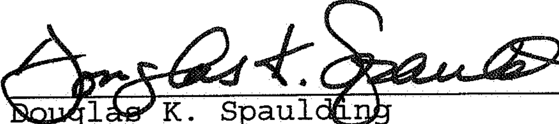

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A true and correct copy of the foregoing Motion Of The American Bankers Association For Leave To File As *Amicus Curiae* A Brief In Response To The Amended Brief Of The Secretary Of Labor As *Amicus Curiae* Opposing The Motion To Dismiss was: (1) served on all parties on the attached service list via the www.esl.3624.com web site pursuant to the Court's Orders of June 6, 2002 and August 7, 2002; (2) sent via facsimile to:

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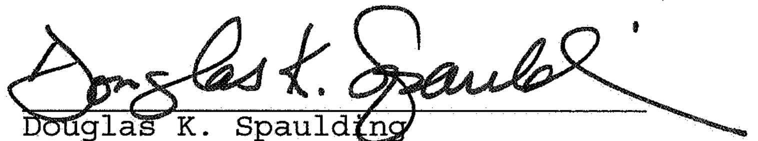

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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Plaintiffs,	)	
v.	)	Civil Action No. H-01-3913 and Consolidated Cases
ENRON CORP., an Oregon Corporation, et al.,	)	
Defendants.	)	

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN RESPONSE TO THE AMENDED BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE OPPOSING THE MOTIONS TO DISMISS

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Davidson v. Cook, 567 F. Supp. 225 (E.D. Va. 1983) 18

Demby v. Schweiker, 671 F.2d 507 (D.C. Cir. 1981) 9

Donovan v. Cunningham, 541 F. Supp. 276 (S.D. Tex. 1982), *modified on other grounds*, 716 F.3d 1455 (5th Cir. 1983), *cert. denied,* 467 U.S. 1251 (1984) 13, 21

Ershick v. United Missouri Bank of Kansas City, N.A., 12 Employee Benefits Cas. (BNA) 2323 (D. Kan. 1990), *aff'd*, 948 F.2d 660 (10th Cir. 1991) 12

Firestone v. Bruch, 489 U.S. 101 (1989) 15

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Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629 (W.D. Wis. 1979) 19

GIW Indus., Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc., 10 Employee Benefits Cas. (BNA) 2290 (S.D. Ga. 1989), *aff'd*, 895 F.2d 729 (11th Cir. 1990) 21

Grindstaff v. Green, 133 F.3d 416 (6th Cir. 1998) 12

Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995) 17

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Koch v. Dwyer, No. 98 CIV. 5519 (RPP), 1999 WL 528181 (S.D.N.Y. July 22, 1999), *clarified on other grounds by* 2000 WL 174945 (S.D.N.Y. Feb. 15, 2000) 14

Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc., 173 F.3d 313 (5th Cir. 1999), *cert. denied sub nom. Laborers Nat'l Pension Fund v. Am. Nat'l Bank & Trust Co. of Chicago*, 528 U.S. 967 (1999) 21

Lanka v. O'Higgins, 810 F. Supp. 379 (N.D.N.Y. 1992). 21

Leisnoi, Inc. v. Stratman, 154 F.3d 1062 (9th Cir. 1998) 17

Maniace v. Commerce Bank of Kansas City, N.A., 40 F.3d 264 (8th Cir. 1994), *cert. denied*, 514 U.S. 1111 (1995) 11, 12, 20

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Srein v. Frankford Trust Co., 26 Employee Benefits Cas. (BNA) 1917 (E.D. Pa. 2001) 12

United States v. Capobianco, 836 F.2d 808 (3d Cir. 1988) 18

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2A Norman J. Singer, *Statutes and Statutory Construction (Sutherland on Statutory Construction)* (6th ed. 2000) 9, 10, 17

IIA *Scott on Trusts* § 185 (4th ed. 1987) 14, 15, 16

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN RESPONSE TO THE AMENDED BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE OPPOSING THE MOTIONS TO DISMISS

The American Bankers Association, by undersigned counsel, hereby respectfully submits this brief as amicus curiae in response to the amicus brief submitted by the U.S. Department of Labor ("DOL").

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the principal national trade association of the banking industry in the United States, having as members banks of all sizes and types including national and state chartered banks, community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks. Its member banks are located in each of the fifty states and the District of Columbia and collectively control approximately 90 percent of the domestic assets of the banking industry in the United States. Because many of its members serve as trustees of pension plans subject to the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1461 (2000) ("ERISA"), it has a special interest in issues faced by ERISA trustees.

Certain of these issues appear in the allegations made against Northern Trust Company ("Northern Trust") in its role as trustee of the Enron Corp. Savings Plan (the "Savings Plan"). DOL, as amicus curiae, has filed a brief in opposition to, among other things, the motion to dismiss filed by Northern Trust. *See* Amended Brief of the Secretary of Labor as Amicus Curiae Opposing the Motions to Dismiss ("DOL Brief"). The DOL Brief argues that assuming the allegations by plaintiffs to be true, Northern Trust was a fiduciary to the Savings Plan, had

discretionary control with respect to the so-called "lockdown" of the Savings Plan, and had fiduciary responsibilities as a "directed" trustee even if it were given written instructions concerning the lockdown. DOL Brief at 39-50.

In making its argument, DOL suggests that the Court should adopt a broad "know or should know" standard for a "directed trustee" under ERISA, which is inconsistent with existing law and long-established trust industry practice. DOL fails to cite any legal basis grounded in ERISA in summarily rejecting the more limited "clear on their face" standard found in the ERISA legislative history that has been relied on by the banking and trust industry since ERISA was enacted in 1974. DOL suggests instead what would be an unworkable alternative. The "know or should know" standard would disrupt the carefully structured ERISA framework governing the allocation of fiduciary responsibility for plan management and administration, leaving in its place a confusing system of overlapping responsibilities with unclear standards that would be detrimental to plan participants.

Because of the magnitude of the directed trust business – 6.5 million employee benefit trust accounts at 2,291 banks and trust companies with an aggregate value of $3.9 trillion (as of the end of 1999) – a change in the standard for directed trustees would have a significant impact on employee benefit plans and the trust industry. Therefore, the American Bankers Association respectfully submits its views to the Court on this issue, to avoid the imposition of a new legal standard that would disrupt prevailing law and long-settled industry practice.[1]

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1 This amicus brief is limited to this narrow issue. By not addressing the other issues raised in the DOL Brief or by the parties in their legal memoranda regarding the pending motions to dismiss, the American Bankers Association should not be assumed to be taking any position on those other issues.

BACKGROUND

I. ENRON LITIGATION AND ISSUES RELATING TO NORTHERN TRUST'S ROLE AS TRUSTEE

In this litigation, the plaintiffs, on behalf of themselves and other participants and beneficiaries of certain qualified retirement plans of Enron Corp., have alleged breaches of fiduciary duty under ERISA by persons with various relationships to those plans in connection with the plans' investments in Enron stock, the value of which declined substantially following disclosure of accounting irregularities. Among the many parties named as defendants is Northern Trust, which served as trustee to the Savings Plan.

One of the issues raised in the litigation is whether the defendants breached their fiduciary duties under ERISA in connection with the "lockdown" of the Savings Plan. The lockdown suspended the ability of Savings Plan participants and beneficiaries to make investment changes, including sales of Enron stock, during a transition from Northern Trust and its affiliated recordkeeper (whose contracts had been terminated) to a new trustee and recordkeeper. See First Consolidated and Amended Complaint, Section XII(G) (¶¶ 713-28). The plaintiffs allege that Northern Trust knew or should have known that the lockdown would harm the participants and beneficiaries of the Savings Plan, and that it had the power to stop the lockdown from going forward as scheduled. *Id.* ¶ 726. Therefore, the plaintiffs allege that Northern Trust had a duty to postpone the lockdown, and breached its fiduciary duties under ERISA by failing to do so. *Id.* ¶ 758. Plaintiffs have requested that Northern Trust and the other defendants be ordered to restore the losses to the Savings Plan caused by their alleged breaches. *Id.* ¶ 763.

Northern Trust has moved for dismissal of the lawsuit against it, arguing that it was a "directed trustee" with respect to the Savings Plan and as such had no discretion over plan administrative decisions and investment-related activities. DOL filed its amicus brief in opposition to Northern Trust's motion to dismiss (and several other unrelated issues).

In support of its motion to dismiss, Northern Trust asserts, based on the ERISA legislative history, that as a "directed trustee" with respect to the Savings Plan, it has no liability "unless it is clear on their face that the actions to be taken under the directions (of the named fiduciary) would be prohibited by ERISA's fiduciary responsibility rules." Mem. of Def. Northern Trust in Supp. of Mot. to Dismiss at 22. In response, DOL argues that this standard is "wrong and contrary to the language of § 403(a)(1)." DOL Brief at 47-48. DOL submits that Northern Trust, even if it had no discretionary role under the Savings Plan, could not follow directions that it "knew or should have known were imprudent or disloyal in violation of ERISA §§ 404(a)(1)(A) and (B)." *Id.* at 48.

II. ROLES AND RESPONSIBILITIES OF A DIRECTED TRUSTEE

Under a typical institutional trust agreement for a 401(k) plan, the trustee serves without discretion, principally as a custodian for the assets of the plan. These assets generally consist of stocks, bonds, mutual fund shares, and other securities and financial instruments.

The trustee's role is to hold these assets in trust. This means that the assets are held in its own name as trustee for the plan or the name of its designated nominee(s), as reflected on such documents and records as stock certificates, bookkeeping entries of transfer agents, and annuity contracts with insurance companies. As the custodian of those assets, the trustee also is responsible for their safekeeping, usually maintaining in its possession key original documents and records pertaining to other forms of ownership such as electronic bookkeeping entries.

The trustee is responsible for processing investments, investment changes and distributions in accordance with directions from the plan participants, from a recordkeeper that receives and relays the instructions of the plan participants, from the plan sponsor or a committee designated by the plan sponsor as a named fiduciary for the plan, or from an "investment manager" (as defined in section 3(38) of ERISA, 29 U.S.C. § 1002(38)). The trustee routinely receives employer and employee contributions along with instructions from the named fiduciary or recordkeeper concerning how to allocate those contributions among the investment options under the plan. The trustee or recordkeeper will typically tally directions on investment changes, net out the results, and then, based on such directions, the trustee will make a net purchase or sale of the affected investment funds. Distributions are handled in a similar manner – the named fiduciary or recordkeeper processes the distribution request, and then instructs the trustee on which assets to liquidate and where to send the check. In addition, the trustee collects income on plan investments, such as dividends and interest, and reinvests the resulting cash in accordance with standing investment instructions.

Where the trustee receives a direction from a named fiduciary, that named fiduciary is responsible for determining whether the transaction satisfies the prudence and other fiduciary responsibility rules of ERISA. The directed trustee follows the direction unless it is clear on its face that doing so would violate ERISA or the plan or trust document. The trustee takes steps to ensure that the direction is proper – *i.e.,* given by a person or committee authorized to make the direction, that the direction is within the scope of that person's or committee's authority, that the direction can be implemented consistent with the trustee's procedures for holding the plan assets in trust, and that the terms of the direction would not – on their face – lead to a clear violation of ERISA. In making these determinations, the directed trustee will not go beyond an examination

of the "face" of the direction itself. For example, a directed trustee will not request and review background information concerning the investment, nor in any way "second guess" a direction by attempting to ascertain the prudence of the underlying decision.

In view of the number of accounts and amount of assets held by institutions in a directed trustee capacity, millions of transactions are processed each year in this manner. These procedures and standards are generally incorporated into the governing trust instruments, which reflect the negotiated expectations of the plan sponsor or named fiduciary and the plan trustee concerning the trustee's obligations to the plan.

ARGUMENT

The American Bankers Association, on behalf of its members who serve as directed trustees for millions of benefit plans holding trillions of dollars of plan assets, files this amicus brief to explain why the "know or should know" standard espoused by DOL in its amicus brief is not supported by ERISA, is unworkable and should not be adopted by this Court. This amicus brief further explains why the proper standard is for the trustee to follow the directions of a named fiduciary unless it is clear on the face of those directions that they violate the plan or trust document or ERISA.

I. ERISA'S STATUTORY FRAMEWORK AND LEGISLATIVE HISTORY PROVIDE CLEAR GUIDANCE THAT THE "CLEAR ON THEIR FACE" STANDARD APPLIES

One of the goals of Congress in enacting ERISA was to "establish[] standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." ERISA § 2(b), 29 U.S.C. § 1001(b). Consistent with this goal, the fiduciary responsibility provisions of the statute, found in Part 4 of Subtitle B of Title I (sections 401 through 414), create a comprehensive

structure for affixing fiduciary responsibility and liability to protect plan participants and beneficiaries while allowing for a workable allocation of management and administrative functions. As the United States Supreme Court has observed, ERISA, as enacted by Congress, is a "'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system." *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 251 (1993) (citing *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)). As such, the ERISA fiduciary provisions should be construed as part of the overall framework of those provisions and not in isolation.

In the first instance, every employee benefit plan subject to ERISA's fiduciary responsibility provisions[2] is required to be established and maintained pursuant to a written instrument (generally referred to as the "plan document"), which is required to name or otherwise provide a procedure for identifying a "named fiduciary." ERISA §§ 402(a)(1)-(2), 29 U.S.C. §§ 1102(a)(1)-(2). The named fiduciary has overall authority for the control and management of the operation and administration of the plan. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

ERISA provides for the allocation of "trustee responsibilities," which are the fiduciary responsibilities set forth in the trust agreement to manage and control the assets of the plan. ERISA § 405(c)(3), 29 U.S.C. § 1105(c)(3). Section 403(a) of ERISA requires, with limited exceptions, that "all assets of an employee benefit plan shall be held in trust by one or more

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2 Certain types of plans are not subject to the Part 4 provisions. *See* ERISA § 401(a), 29 U.S.C. § 1101(a). Because the Savings Plan was clearly subject to Part 4, those exceptions are not relevant here.

trustees," who are to be named in the trust instrument or appointed by a named fiduciary. ERISA § 403(a), 29 U.S.C. § 1103(a). Under this provision, the trustee is responsible for the discretionary management of those assets it holds in trust for the plan and is subject to the full range of ERISA fiduciary duties in managing those assets, including the duty to act in a prudent manner,[3] unless an exception from trustee responsibility applies.

One such exception is where the trustee is a so-called "directed trustee" subject to the direction of a named fiduciary. ERISA § 403(a)(1), 29 U.S.C. § 1103(a)(1).[4] The specific language of the section 403(a)(1) exception states that a plan may expressly provide

> that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this Act [*i.e.*, ERISA] . . . .

The statute provides only that the direction must be "proper" and that it must be "in accordance with the terms of the plan and . . . not contrary to" ERISA. It does not expressly define (1) what it means for a direction to be "proper"; or (2) the level of analysis that a directed trustee must undertake to determine whether the direction is consistent with the plan terms and

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3 This provision requires a fiduciary to discharge its duties with respect to the plan "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

4 The second exception in section 403(a), not applicable in this case, is where authority to manage, acquire or dispose of plan assets is delegated to one or more "investment managers" (a term defined in ERISA) that have been duly appointed by a named fiduciary of the plan. ERISA § 403(a)(2), 29 U.S.C. § 1103(a)(2). There also is a special rule for participant-directed individual accounts plans under section 404(c), but a discussion of that rule is outside the scope of this brief. ERISA § 404(c), 29 U.S.C. § 1104(c).

ERISA. Under these circumstances, a court should look to the legislative history of the statute in order to determine the proper standard. *See, e.g., Burlington N. R.R. Co. v. Oklahoma Tax. Comm'n,* 481 U.S. 454, 461 (1987) (where a statute is silent or ambiguous, a court should look to legislative history to ascertain the intent of Congress); *United States v. Donruss Co.*, 393 U.S. 297, 303 (1969) (when a statute is ambiguous or unclear, extrinsic aids may be considered).[5] A statute's history includes background information regarding the enactment of the statute, events surrounding the statute's enactment, and post-enactment developments. Singer, *Statutes and Statutory Construction, supra,* § 48:01, at 408-10.

Here, ERISA's legislative history, which specifically addresses the limited role of a directed trustee, should control. The ERISA conference report states that "[i]f the plan so provides, the trustee who is directed by an investment committee [*i.e.,* a named fiduciary] is to follow that committee's directions *unless it is clear on their face* that the actions to be taken under those directions would be prohibited by the fiduciary responsibility rules of the bill [*i.e.,* ERISA] or would be contrary to the terms of the plan or trust." H.R. Conf. Rep. No. 93-1280 298 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5079 (emphasis added).[6] "Because the conference report represents the final statement of terms agreed to by both houses," many courts have held it to be "the most persuasive evidence of congressional intent" next to the statute itself. *See, e.g., Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981); *Payne v. Fed. Land Bank,*

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5 A statute is ambiguous "when it is capable of being understood by reasonably well-informed persons in either of two or more senses." 2A Norman J. Singer, *Statutes and Statutory Construction (Sutherland on Statutory Construction)* § 45:02, at 14 (6th ed. 2000).

6 The Conference Report describes the provisions of H.R. 2 as they were subsequently enacted into law as ERISA.

916 F.2d 179, 182 (4th Cir. 1990); *Ry. Labor Executives' Ass'n v. Interstate Commerce Comm.*, 735 F.2d 691, 701 (2d Cir. 1984); *City of New York v. United States Dep't of Transp.*, 700 F. Supp. 1294, 1303 (S.D.N.Y. 1988); *see also* Singer, *Statutes and Statutory Construction, supra,* § 48:06, at 443.

The standard described in the ERISA legislative history means that a directed trustee is required to look solely at the terms of the direction itself, not to conduct an analysis of the merits of the underlying decision. To do otherwise would require a directed trustee to second guess each direction it receives from the named fiduciary, duplicating the named fiduciary's role in the decisionmaking process. DOL's position would be inconsistent with the purpose of section 403(a)(1) within ERISA's statutory structure for allocating fiduciary responsibility. This section provides an exception from the basic rule of trustee responsibility by permitting a plan's named fiduciary to retain for itself the authority to make plan decisions.

II. THE OVERWHELMING MAJORITY OF COURT DECISIONS CONCERNING DIRECTED TRUSTEES ARE CONSISTENT WITH THE "CLEAR ON THEIR FACE" STANDARD IN THE ERISA LEGISLATIVE HISTORY

The standard for directed trustees set forth in the ERISA legislative history, describing a limited role, is consistent with the court interpretations of section 403(a)(1).[7]

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[7] Many of these decisions deal with a directed trustee's responsibility for a plan's investment in company stock, often in connection with an employee stock ownership plan (an "ESOP").

The cases that provide the most detailed analysis of section 403(a)(1) acknowledge that a directed trustee is not required to review the prudence of the directed transaction. As stated by the Eleventh Circuit, "insofar as a trustee acts at the direction of a named fiduciary in accordance with the terms of the plan and ERISA's requirements, he is not subject to the fiduciary requirement in [section 404(a)(1)] to act prudently." *Herman v. NationsBank Trust Co. (Georgia)*, 126 F.3d 1354, 1361-62 (11th Cir. 1997), *cert. denied*, 525 U.S. 816 (1998), citing *Maniace v. Commerce Bank of Kansas City, N.A.*, 40 F.3d 264, 267 (8th Cir. 1994), *cert. denied,* 514 U.S. 1111 (1995), in support, but citing *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907, 911 (8th Cir.), *cert. denied,* 513 U.S. 781 (1994), to the contrary).[8] Thus, where section 403(a)(1) applied, the Eleventh Circuit said, the trustee's conduct was not governed by section 404(a)(1), "and [the trustee] was not required to exercise its independent judgment in deciding how and whether to tender those shares [in response to a pending tender offer]. It only had to make sure the [named fiduciaries'] directions were proper, in accordance with the terms of the plan, and not contrary to ERISA." *NationsBank*, 126 F.3d at 1362.

Similarly, the Eighth Circuit, in dealing with a trustee that was directed to invest in employer stock, found that "[t]he obligations of a directed trustee are something less than that

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8 The court in *FirsTier* found that a trustee did not violate its fiduciary duties by making loans to plan participants pursuant to a written direction from the plan administrator in accordance with the terms of the plan, where the participant loans ultimately were used to pay off a company loan from the trustee's commercial banking department. *FirsTier*, 16 F.3d at 910-11. In the course of its analysis, the court said that a directed trustee is not relieved of its fiduciary duties to conform to the ERISA fiduciary standards, including the prudence standard under ERISA § 404(a). *Id.* at 911. Because *Maniace*, decided by the same circuit later the same year, took the opposite approach, and in light of the Eleventh Circuit's apparent rejection of *FirsTier* in *NationsBank*, no weight should be given to that
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owed by typical fiduciaries." As such, the trustee "was not required to weigh the merits of an investment in [company stock] against all other investment options every time it was directed to purchase said stock." *Maniace v. Commerce Bank of Kansas City, N.A.*, 40 F.3d 264, 268 (8th Cir. 1994), *cert. denied*, 514 U.S. 1111 (1995); *accord Ershick v. United Missouri Bank of Kansas City, N.A.*, 12 Employee Benefits Cas. (BNA) 2323, 2327 (D. Kan. 1990), *aff'd*, 948 F.2d 660 (10th Cir. 1991) ("We further conclude that as a directed trustee of an ESOP, the [trustee] was not required to weigh the merits of an investment in employer stock against all other available investment vehicles each time the Plan Administrator directed the acquisition or retention of employer stock").

Apart from the *NationsBank* and *Maniace* cases, there is little detailed discussion in the case law on what precisely is required of a directed trustee under section 403(a)(1). Some courts reach the same result of limiting the directed trustee's fiduciary obligations by holding that a directed trustee is not a fiduciary under ERISA, at least to the extent of not having responsibility for the management of plan assets. *See Grindstaff v. Green*, 133 F.3d 416, 426 (6th Cir. 1998) (a "directed" trustee is not a fiduciary to the extent it does not control the "management or disposition" of plan assets); *Srein v. Frankford Trust Co.,* 26 Employee Benefits Cas. (BNA) 1917, 1920 (E.D. Pa. 2001) (because the trust company acted within its "limited function" to "faithfully follow and execute the directions of the employer or plan administrator with regard to the purchase of investments," it was not an ERISA fiduciary); *see also Maniace*, 40 F.3d at 267

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case. Notably, it is not relied upon in the DOL Brief, being cited only in passing as part of the citation to *NationsBank. See* DOL Brief at 49.

(a directed trustee could not be a fiduciary, nor breach fiduciary duties, when having no discretion or control with respect to the asset in question and acting within the scope of its directed trustee role).

Another court merely emphasizes the "limited role" of a plan trustee in finding no liability, with little discussion of what that limited role entails. *See Donovan v. Cunningham*, 541 F. Supp. 276, 290 (S.D. Tex. 1982), *modified on other grounds*, 716 F.3d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (a "directed trustee" under section 403(a)(1) could not be liable for breach of fiduciary duty where its activities "at all times remained within the limited role of a directed trustee," which is more limited than the responsibilities of "primary fiduciaries"). Despite the differences in approach, all of these cases stand squarely for the proposition that the directed trustee is not required to analyze the prudence of the directed transaction so long as it remains within its directed trustee role.[9] It is in the context of these legal decisions that banks have established their policies and practices for providing directed trustee services.

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9 An additional case that supports this general rule is the Ninth Circuit case of *Voluntary Employees Beneficiary Ass'n v. Ross,* 191 F.3d 462, Nos. 97-17343, 98-15087, 98-15328, 98-15562, 1999 WL 701892 (9th Cir. Sept. 9, 1999) (unpublished table decision). In affirming the lower court decision with little discussion of the facts of the case, the Ninth Circuit held that the defendant was a directed trustee, and that because "[t]he investment directive appears proper on its face," the trustee "fulfilled its statutory obligation by following the investment directives of" the named fiduciary. *Id.* at **1. The court added that it would not require a directed trustee to act in accordance with the ERISA "prudent man" standard of care, "given the clear directive of section 1103 [section 403 of ERISA] that a directed trustee is subject only to the 'proper directions' of the named fiduciary." *Id.* at **1 n.1 (quoting section 403(a)(1)).

III. THERE IS NO BASIS FOR THE DOL POSITION THAT A "KNOW OR SHOULD KNOW" STANDARD SHOULD BE USED IN SECTION 403(a)

A. DOL's Rejection of the Legislative History and Adoption of a Knowledge Standard Is Not Supported by the Cited Authorities

In an effort to argue that a directed trustee should not follow directions that it "knew or should have known" violated the ERISA duty of prudence (DOL Brief at 48), DOL makes two legal arguments. First, it says that the "clear on its face" standard is wrong and contrary to the language of section 403(a)(1). For this view, DOL cites no authority other than a 1999 district court decision, *Koch v. Dwyer*, No. 98 CIV. 5519 (RPP), 1999 WL 528181 (S.D.N.Y. July 22, 1999), *clarified on other grounds by* 2000 WL 174945 (S.D.N.Y. Feb. 15, 2000). DOL Brief at 47-48. Second, DOL declares that the appropriate legal standard is the "know or should know" standard. That language, however, is not used in any of the cases interpreting section 403(a)(1). Thus, DOL cites instead a standard treatise on the common law of trusts, IIA *Scott on Trusts* § 185, at 574 (4th ed. 1987), which describes a "know or ought to know" standard for a trustee receiving direction from another fiduciary. Both of these arguments are misplaced.

The court in *Koch v. Dwyer* rejected the application of the "clear on their face" standard in the ERISA legislative history without any explanation or analysis, merely finding that the standard was used neither in the statute nor the case law. *Koch v. Dwyer,* 1999 WL 528181, at *9. This decision suffers from the same infirmity as the DOL approach, baldly rejecting the legislative history and not giving sufficient weight to the prior case law (which is cited only in passing, without discussion). Indeed, the cases cited in the *Koch* decision to describe the prudence standard that would apply to a directed trustee in fact dealt with discretionary trustees. *Id.* at *10 (citing *Fink v. Nat'l Sav. Bank & Trust Co.,* 772 F.2d 951 (D.C. Cir. 1985), and *Reich v. Valley Nat'l Bank of Arizona,* 837 F. Supp. 1259 (S.D.N.Y. 1993)). They do not describe the

standard that would apply to directed trustees, who under the case law clearly have a more limited level of responsibility.

None of the cases cited in the DOL Brief uses the "know or should know" language that DOL uses to describe the legal standard under section 403(a)(1). Consequently, DOL is forced to look outside ERISA and claims that the "know or should know" standard is consistent with the common law of trusts. This is based on citation to a passage from *Scott on Trusts*, a leading treatise on non-ERISA trust law, to the effect that a trustee is not justified in complying with the directions of a fiduciary "if the trustee knows or ought to know that the [fiduciary] is violating his duty to the beneficiaries as a fiduciary in giving the directions." *Scott on Trusts* § 185, at 574 (footnote omitted).

Based on the language of ERISA and its legislative history, courts have found that interpretations of ERISA generally are to be guided by the principles of trust law. *See, e.g.*, *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 110 (1989) (citing legislative history and prior Supreme Court cases). However, the United States Supreme Court has recognized that "trust law does not tell the entire story," so that trust law "often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Trust law may "offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements." *Id.* In conducting this inquiry, the courts therefore are expected to interpret the ERISA fiduciary standards "bearing in mind the special nature and purpose of employee benefit plans." *Id.*

These limitations on the use of trust law to interpret ERISA are particularly applicable here. The cited section of *Scott on Trusts*, § 185, deals with the duty of a trustee with respect to a

person holding a "power of control" over the trust. That person may be a co-trustee, beneficiary, settlor, or person otherwise unconnected with the trust. *Scott on Trusts* § 185, at 562-63. The section describes different rules for determining the trustee's level of responsibility depending on where the holder of the power falls among these different categories. *Id.* at 563-68.

The allocation of responsibility described in this section of *Scott on Trusts* is foreign to ERISA. As described *supra,* ERISA establishes a detailed framework for the allocation of fiduciary responsibility with respect to an ERISA-covered employee benefit plan, using terms such as "named fiduciary" and "investment manager" that are not part of traditional trust law and specifically defining their respective roles and responsibilities. Because ERISA defines the named fiduciary-directed trustee relationship by statute, it leaves no gap for the common law of trusts to fill. To the extent the statute nevertheless may require interpretation, a court should consider the "special nature and purpose of employee benefit plans" and look first to the legislative history before turning to extra-statutory sources. A court may not resort to trust law to effectively re-write the statutory provisions of ERISA. *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 259 (1993) ("The authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute.") (internal citation omitted).

B. Statutory Construction Does Not Support the DOL Position

DOL's suggested standard would impose responsibility on a directed trustee under section 403(a)(1) if the trustee "knows or should know" of an ERISA violation. That language does not appear in section 403(a)(1) or the relevant legislative history.

In determining whether a "know or should know" standard is appropriate under section 403(a)(1), a court should consider not just the statute's legislative history but the statute as a whole. *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (acts of Congress "should

not be read as a series of unrelated and isolated provisions"). There is a presumption that the statute has a definite purpose and that all subsidiary provisions of the statute are formulated "to function as parts of an integrated whole." *Markham v. Cabell,* 326 U.S. 404, 411 (1945). It follows from this general rule that "where the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded." Singer, *Statutes and Statutory Construction, supra,* § 46:06, at 180; *accord Leisnoi, Inc. v. Stratman,* 154 F.3d 1062, 1067 (9th Cir. 1998) (construing that two different meanings were intended when Congress used certain language in one part of the statute and different language in another).

The "knowledge" language that DOL seeks to overlay on section 403(a)(1) does appear in another ERISA provision. Section 406(a) defines a series of prohibited transactions with reference to whether the fiduciary "knows or should know" that the transaction falls into one of five enumerated categories. *See* ERISA § 406(a), 29 U.S.C. § 1106(a). In addition, forms of a "knowledge" standard are found in other ERISA provisions. The co-fiduciary liability rules of section 405(a) impose liability on a fiduciary who "participates knowingly in, or knowingly undertakes to conceal," another fiduciary's breach, or has "knowledge" of another fiduciary's breach without making reasonable efforts to remedy that breach. ERISA § 405(a), 29 U.S.C. § 1105(a). Section 413 limits the period for bringing an action for fiduciary breach to, as one alternative, three years after the earliest date on which the plaintiff had "actual knowledge" of the breach or violation. ERISA § 413, 29 U.S.C. § 1113 .

Congress included a knowledge standard where it had determined that such a standard was to be applied. The absence of any such standard in section 403(a), and the articulation of a different standard in the legislative history, is strong evidence that both the broad "should know" standard and the narrower "actual knowledge" standard were not to be applied to directed trustee

relationships. *See, e.g., United States v. Capobianco*, 836 F.2d 808 (3d Cir. 1988) (generally, where there is an omission in a statute, it can be inferred that the omission was intentional).

IV. A KNOWLEDGE STANDARD UNDER SECTION 403(a)(1) IS UNNECESSARY BECAUSE A DIRECTED TRUSTEE IS SUBJECT TO CO-FIDUCIARY LIABILITY UNDER SECTION 405(a)

In support of imposing a "know or should know" standard on directed trustees under section 403(a)(1), DOL argues that to do otherwise would undermine the intent of Congress. According to DOL, "Congress could not have intended directed trustees to disobey directions that on their face violate ERISA or the plan but to obey directions that they otherwise know violate ERISA." DOL Brief at 48. DOL fails to acknowledge that Congress has already addressed this situation elsewhere in the statute.

The applicable provision is section 405(a), which governs co-fiduciary liability. ERISA § 405(a), 29 U.S.C. § 1105(a). Section 405(a)(3) imposes liability where one fiduciary "has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach." ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3).[10] The courts have interpreted these provisions to impose an "actual knowledge" standard, specifically not adopting a more expansive "should know" standard. *See Davidson v. Cook,* 567 F. Supp. 225, 237 (E.D. Va. 1983), *aff'd* 734 F.2d 10 (4th Cir. 1984) (unpublished table decision) (while some of the defendants "should have known" of the fiduciary breaches at issue, that does not

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10 In addition, while not directly relevant in this case, section 405(a)(1) imposes liability on a fiduciary for the breach of fiduciary responsibility of a co-fiduciary if the first fiduciary "participates knowingly in, or knowingly undertakes to conceal, an act or omission of

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adequately establish the required knowledge for purposes of co-fiduciary liability under section 405(a)(3)); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 641 (W.D. Wis. 1979) (fiduciary found liable for a co-fiduciary's breaches where he was "aware" of the breaches).

Congress did not intend a directed trustee to follow directions that it otherwise "knows" violate ERISA. The fact that Congress provided for this contingency in section 405(a) makes it unnecessary to re-state such a requirement (or impose a different, more expansive "should know" requirement) under section 403(a)(1). For this reason, interpreting section 403(a)(1) in the manner put forth by the American Bankers Association would be fully protective of plan participants and beneficiaries.

V. THE DOL STANDARD WOULD DISRUPT INDUSTRY PRACTICE AND CREATE A STANDARD THAT WOULD BE DIFFICULT TO ADMINISTER

The American Bankers Association is concerned about the ramifications of DOL's suggested standard on the manner in which its members provide directed trustee services. The standard on which banks have relied for the past twenty-eight years based on the statute and legislative history clearly defines the level of scrutiny they need to provide when receiving directions, and limits the extent to which a directed trustee is required to undertake a prudence or other fiduciary analysis. DOL would substitute a "know or should know" standard, presenting serious administrative problems.

Continued from previous page

such other fiduciary, knowing such act or omission is a breach." ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1). No such claims have been made against Northern Trust.

Directed trustees of ERISA plans receive directions for millions of transactions each year. Under DOL's standard, they would need to decide whether they "know or should know" that any particular one of these millions of generally routine directions would be imprudent.

DOL denies in its brief that it is saying that "a directed trustee has an independent obligation to verify the prudence of every transaction or to duplicate the work of the plan fiduciaries that have discretionary authority over the management of plan assets." DOL Brief at 49 (citing the *NationsBank* and *Maniace* cases discussed *supra*). However, that would be precisely the result of DOL's proposal to impose a "know or should know" standard. A directed trustee *would* be obligated to independently verify prudence and duplicate the work of other plan fiduciaries to determine whether it "should" know facts beyond the face of the direction. DOL does not attempt to reconcile these diametrically opposed positions. Even if DOL were saying that the obligation to verify the prudence of transactions and duplicate the work of other plan fiduciaries applies only to *some* transactions, the trustee must still determine which transactions require such scrutiny. Under a "should know" standard, that would require the trustee to conduct some examination of the prudence of each direction.

DOL's emphasis on the need for the directed trustee to evaluate the prudence of the directed transaction highlights the burdens it would impose on directed trustees, because whether a transaction is prudent is rarely clear to the directed trustee. Under the ERISA prudence standard, if a fiduciary acts in a procedurally proper manner, the fiduciary should satisfy the duty to act prudently and should not be responsible (absent another fiduciary breach) in the event the plan suffers a loss on the investment. As noted by one court, "even the most carefully evaluated investments can fail while unpromising investments may succeed." *GIW Indus., Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 10 Employee Benefits Cas. (BNA) 2290, 2300 (S.D. Ga.

1989), *aff'd*, 895 F.2d 729 (11th Cir. 1990); *see also Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 317 (5th Cir. 1999), *cert. denied sub nom. Laborers Nat'l Pension Fund v. Am. Nat'l Bank & Trust Co. of Chicago*, 528 U.S. 967 (1999) (proper inquiry under the ERISA prudence rule is how the fiduciary acted in selecting the investment, not whether the investment succeeded or failed) (quoting *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984)). Thus, for example, where a manager used a relatively high-risk "contrarian" investment strategy with the full awareness of the plan fiduciaries who selected him, employing proper methods and judgment in light of that strategy, and the strategy resulted in a loss when the plan decided to abandon it, the manager did not act imprudently. *Lanka v. O'Higgins*, 810 F. Supp. 379, 389 (N.D.N.Y. 1992); *see also Laborers Nat'l Pension Fund,* 173 F.3d at 323 (manager not liable for a $4.2 million loss on an investment where no evidence showed the manager to have acted imprudently)

Given these interpretations of the ERISA prudence standard, it would be difficult for a directed trustee to determine how to evaluate the prudence of any particular directed transaction. A high-risk or seemingly undiversified investment may very well be prudent, depending on the process used to arrive at the investment decision. In fact, DOL has acknowledged "that in many situations more than one result may be prudent." Letter from E. Olena Berg, Assistant Secretary of Labor to Ian D. Lanoff (Sept. 28, 1995), *reprinted in* 22 Pens. & Ben. Rep. (BNA) 2249 (Oct. 9, 1995).

The direction also may be part of the implementation of a broader administrative decision. For example, the named fiduciary may instruct the trustee to suspend transactions under the plan in connection with a decision to change the trustee or recordkeeper, which can be a routine occurrence for a large institution. The directed trustee's role in implementing the

suspension is only one aspect of the overall process. The implication of DOL's position is that the directed trustee may have responsibility for, but no information about, the basis for the named fiduciary's decision, such as the thoroughness of the selection process and the evaluation of such factors as quality of service and levels of fees. These are matters that are uniquely within the purview of the named fiduciary.

To require the trustee to examine the named fiduciary's decisionmaking process each time the trustee receives a direction would be burdensome and inconsistent with the objective of vesting control in the named fiduciary. One effect would be to delay implementation of the named fiduciary's investment decisions, during which time the market conditions that prompted the original investment decision may have changed. Depending on the nature of the particular market, a transaction that was originally determined by the named fiduciary to be prudent may have ceased to be so by the time the directed trustee agrees to carry out the instruction. A broader effect would be to dilute the effectiveness of the named fiduciary's authority and control over the plan. The statute and legislative history make clear that the named fiduciary should be able to reserve to itself the primary authority to make certain types of decisions on behalf of the plan. Requiring the trustee to evaluate each of those decisions for prudence and other factors would elevate the trustee to the role of a co-decisionmaker, interfering with the named fiduciary's ability to exercise its full authority and considered judgment.

These issues are well-illustrated by the very arguments DOL makes in its brief. In reviewing Northern Trust's conduct, DOL says that the plaintiffs adequately alleged that Northern Trust "knew or should have known that it was imprudent to proceed with the lockdowns," on the basis that Northern Trust was "aware of numerous red flags" that should have alerted it that the lockdown would place participants at risk. DOL Brief at 49. According

to DOL, these "red flags" included "publicly known facts" that "as matters of public knowledge . . . should have been known to Northern Trust." *Id.* at 45. In view of the nature of the ERISA prudence standard, however, this would be an overly simplistic approach that invites an extensive amount of second-guessing, because it would not be clear in any particular circumstance whether something is a "red flag." Adverse reports about a company in the media do not mean necessarily that the company is no longer viable and could even, depending on the facts and circumstances, signal that the company's stock is now undervalued and would be a good investment. DOL's position, taken to its logical conclusion, suggests that a directed trustee should be conducting a prudence analysis each time adverse information about a plan investment appears in the media, because it will be on notice that it "should know" any negative implications the information may have for the continued holding of the investment. This is an unreasonable burden that would be difficult for any trustee to satisfy.

The statute does not contemplate that the directed trustee should conduct this type of prudence analysis, and there is no need for the trustee to do so. In the relationship between a named fiduciary and a directed trustee, as contemplated by the statute and legislative history, the named fiduciary is the party who analyzes the proposed transaction and then decides that it is prudent to proceed. The directed trustee should not be required to duplicate this difficult and fact-intensive analysis, which would only serve to disrupt long-standing and well-established industry practice by adding unnecessary burdens and costs to the role of the directed trustee.

CONCLUSION

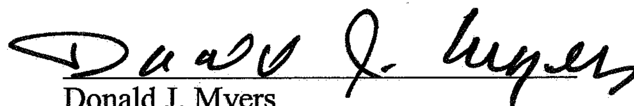
The fiduciary provisions of ERISA present a comprehensive and carefully thought-out structure for the allocation of fiduciary responsibility among those charged with the management and administration of an ERISA plan. As the legislative history and case law show, directed trustees have been given a limited fiduciary role, which is an important concept within that structure. These provisions permit the named fiduciaries, as "primary" fiduciaries, to exercise the authority they have retained pursuant to the plan and trust documents, so long as their directions do not "clearly on their face" violate the terms of such documents and ERISA. To hold otherwise would undermine this structure, be contrary to legislative intent, and disrupt the smooth operation of the directed trustee relationship with plans.

For these reasons, the ABA respectfully requests that the court reject the "know or should know" standard for directed trustees advanced by DOL in its Brief. Instead, the court should, consistent with prevailing legal authority and practice, reaffirm the "clear on their face" standard. Doing so would be protective of plan participants and beneficiaries, would avoid disrupting industry practices, and would be consistent with the ERISA statutory framework and the express intent of Congress.

Dated: October 7, 2002

Respectfully submitted,

AMERICAN BANKERS ASSOCIATION



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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAMELA TITTLE, on behalf of herself and a class of persons similarly situated, et al., Plaintiffs,	
v.	Civil Action No. H-01-3913 and Consolidated Cases
ENRON CORP., an Oregon Corporation, et al., Defendants.	

ORDER GRANTING THE AMERICAN BANKERS ASSOCIATION'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Upon consideration of the Motion of the American Bankers Association for leave to file as *amicus curiae* a brief in Response to the Amended Brief of the Secretary of Labor as *Amicus Curiae* Opposing the Motion to Dismiss, and any opposition thereto, it is by the Court

ORDERED that the motion be, and it is hereby, granted and the *amicus curiae* brief of the American Bankers Association which was lodged with the motion is hereby deemed filed; and it is

FURTHER ORDERED that any party wishing to respond to the American Bankers Association brief shall file and serve such

response on or before the ______ day of _____________, 2002;
with any reply by the American Bankers Association to be filed
and served on or before the _____ day of ____________, 2002.

Entered this _____ day of October, 2002.

____
United States District Judge