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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

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| HILDA L. SOLIS, Secretary of the United States Department of Labor,<br><br>Plaintiff,<br><br>v.<br><br>MATTHEW D. HUTCHESON, HUTCHESON WALKER ADVISORS LLC, GREEN VALLEY HOLDINGS LLC, and the RETIREMENT SECURITY PLAN AND TRUST, f/k/a PENSION LIQUIDITY PLAN AND TRUST.<br><br>Defendants. | Civil Action No. 12-236 |

**SECRETARY OF LABOR'S MEMORANDUM IN SUPPORT OF APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND FOR AN ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED**

Plaintiff Hilda L. Solis, Secretary of the United States Department of Labor ("the Secretary"), respectfully submits this Memorandum in Support of her application for a temporary restraining order (1) prohibiting Matthew D. Hutcheson and Hutcheson Walker Advisors, LLC from exercising authority or control over the Retirement Security Plan & Trust ("RSPT), the assets it holds for ERISA-covered plans (the "Plans"), and the Plans and (2) appointing an

independent fiduciary with exclusive authority and control over RSPT, the assets it holds for ERISA-covered plans and the Plans. The Secretary also seeks an order to show cause why a preliminary injunction should not be granted.

## INTRODUCTION

In December of 2010, Defendant Matthew D. Hutcheson ("Hutcheson") took $3,276,000 from employee retirement plans for which he was the trusted fiduciary and used the assets for his own benefit. He took this money to try to buy the Tamarack Resort, a failed golf and ski resort in Idaho ("Tamarack"), for a business that Hutcheson controlled called Green Valley Holdings, LLC ("GVH"). When Monty W. Walker – Hutcheson's business partner – learned of this transaction, Hutcheson concocted a $3.276 million tale: reporting to Walker that the money taken from the plans was merely a loan and that it would be repaid with interest to the retirement plans. Defendant Hutcheson maintained this story for several months, even fabricating a loan document and coaching others to lie to Walker.

Defendant Hutcheson, by and through Defendant Hutcheson Walker Advisors ("HWA") – an entity Defendant Hutcheson co-owned with Walker – was used by Defendant Hutcheson to disloyally and imprudently manage the assets of retirement plans subject to protection under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. Defendant Hutcheson took funds that belonged to the Plans to try to buy a failed golf and ski resort, in violation of his ERISA duties of loyalty and prudence, as well as ERISA's stringent prohibited transaction rules. Defendant Hutcheson abused his fiduciary duties to the Plans – duties that are the "highest known to the law" – because he wanted to buy an interest in the resort for his own benefit. Johnson v. Couturier, 573 F.3d 1067, 1077 (9th Cir. 2009) (citing, Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996), cert. denied, 520 U.S. 1237 (1997) (quoting

Donovan v. Bierwirth, 680 F.2d 263, 272 n. 8 (2d Cir. 1982), cert. denied, 459 U.S. 1069 (1982)).

For these reasons, the relief sought herein is necessary because Defendant Hutcheson, who has been separately indicted by the United States, in part, for his criminal activity in connection with his improper acts, remains to this day a fiduciary with control over the Plans. Thus, the Secretary respectfully requests that this Court immediately appoint an independent fiduciary with exclusive authority and control over RSPT, the Plans, and their assets and remove Defendants Hutcheson and HWA from all authority and control over RSPT, the Plans, and their assets.[1]

## RELIEF SOUGHT

In this application, the Secretary, consistent with her congressional mandate and authority under ERISA, seeks judicial intervention to immediately enjoin Defendants Hutcheson and HWA from exercising any authority or control with respect to RSPT, the Plans, and their assets. The Secretary also requests that the Court appoint an independent fiduciary to assume control of the management and administration of RSPT and the Plans. Among other things, the Secretary requests that a temporary freeze be placed on the plan assets held within RSPT and on the actual Plans in order to preserve the assets from being improperly dissipated and to enable the independent fiduciary to conduct an accounting of all available assets, make distributions in accordance with that accounting, and take steps to terminate the RSPT arrangement, if to do so is in the best interests of the plans and their participants and beneficiaries. Only this Court, in the

[1] Monty W. Walker, the only other individual with authority or control over RSPT and Defendant HWA, has agreed, upon appointment of the independent fiduciary, to resign immediately from any positions he holds with respect to RSPT and the Plans, to support the appointment of the independent fiduciary, and to transfer to the independent fiduciary any authority respecting HWA which Mr. Walker may have. Mr. Walker is neither a defendant in this action nor is he charged in the criminal indictment.

exercise of its equity power, can provide the urgently necessary relief sought here. For these reasons and upon the authority more fully discussed below, the Secretary's application should be granted.

The Secretary's application is supported by the Declaration of J. Michael Ebbesen, Senior Investigator with the Dallas Regional Office of the Employee Benefits Security Administration ("EBSA") of the Department of Labor, and the exhibits attached thereto ("Ebbesen Dec."). The Declaration is based on the documents and interview statements obtained by EBSA during its investigation of RSPT and Defendant Hutcheson.

## FACTUAL BACKGROUND

Defendant Hutcheson purports to be the sole named trustee of RSPT and the Plans and is responsible for directing and controlling assets of RSPT and the Plans. Ebbesen Dec.; Exs. 2, 7. Monty W. Walker is the only other co-owner of HWA and HWA Management, LLC ("HWAM"). Ebbesen Dec.; Ex. 7, p. 2, #23. Walker is also the President, a Director, and the Registered Agent for HWAM – an entity that controls 2% of HWA. Ebbesen Dec.; Ex. 5. Defendant Hutcheson serves as the Vice President, and the other Director for HWAM. Id. HWA purports to be the plan sponsor and plan administrator for RSPT.[2] Ebbesen Dec.; Ex. 2.

In fact, RSPT was not a single "multiple employer plan" pursuant to ERISA. This is because there was no commonality of employment-based interest among the participating employer sponsors of the plans apart from the provision of retirement benefits, and there was no control of the program by the participating employers such that RSPT qualified as a "group" or

[2] HWA, LLC is a Texas limited liability company. Ebbesen Dec.; Ex. 5. Hutcheson and Walker each own 49% of HWA, and HWA Management Inc. ("HWAM") owns the final 2% of HWA. Id. p. 1, item 3. HWAM is also a Texas-based corporation. Id. p. 1. Walker and Hutcheson each own 50% of HWAM, and as noted *supra*, HWAM owns 2% of HWA. Id. Thus, effectively, Hutcheson and Walker each hold a 50% interest in HWA.

"association" of employers as required to be a single plan covering multiple employers for purposes of ERISA § 3(5), 29 U.S.C. § 1002(5). Thus, RSPT failed to qualify as a single "pension plan" for purposes of ERISA § 3(2), 29 U.S.C. § 1002(2), since it was not established or maintained by an “employer” for purposes of that section.

Instead, each of the employers that signed up with RSPT individually established a separate plan subject to Title I of ERISA for the purpose of providing pension benefits to its own employees. Each separate plan independently satisfies the requirements of ERISA § 3(2), 29 U.S.C. § 1002(2) and, thereby, qualifies as an employee benefit plan pursuant to ERISA § 3(3), 29 U.S.C. § 1002(3). Each of these plans entrusted the management of its assets to RSPT, Hutcheson, and HWA and entrusted RSPT, Hutcheson, and HWA to provide administrative services and, thus, RSPT's, Hutcheson's, and HWA’s actions are covered by Title I of ERISA.

Indeed, as a consequence of this arrangement, Defendants Hutcheson and HWA exercised authority and control over the assets of each of the ERISA-covered plans that entrusted their assets to RSPT and over the management of the plans for which RSPT held assets. Defendants Hutcheson and HWA also had discretionary authority and responsibility in the administration of those plans. Thus Defendants Hutcheson and HWA were each a fiduciary of each of the plans to which those assets belong pursuant to ERISA § 3(21), 29 U.S.C. § 1002(21).

RSPT reported that the Plans for which it was providing services had 384 active participants as of December 31, 2010. Ebbesen Dec.; Ex. 14. As of that same date, RSPT had responsibility for plan assets totaling $22,210,838 and consisting of:

| | |
|---|---|
| Employer Securities | $14,932,641 |
| Loans (other than to Participants) | $3,276,000 |
| Loans to Participants | $446,689 |
| Mutual Funds | $3,555,458 |
| Cash | $50 |

Ebbesen Dec., Ex. 14, Schedule H.

Defendant HWA is named in RSPT's documents as the Plan Administrator and acted as an administrator for the Plans. Ebbesen Dec.: Ex. 2. HWA was also given, and exercised, total and complete discretionary authority to determine questions of eligibility of employees and the rights of participants and beneficiaries. Id. At all times relevant herein, ASPire Financial Services ("Aspire") served as the third party administrator and record keeper, MG Trust Company, LLC ("MG Trust") served as the custodian for RSPT's assets, and Interlake Capital Management ("Interlake") was the investment fiduciary and investment advisor. Ebbesen Dec.; Exs. 7, 8, 13.

Hutcheson and his wife, Annette Hutcheson, are majority shareholders in Green Valley Holdings, LLC ("GVH"), an Idaho limited liability company organized on August 5, 2010. Ebbesen Dec.; Exs. 9, 10, 12.

**a. The Prohibited Transaction**

In late December 2010, Defendant Hutcheson instructed Interlake – RSPT's investment advisor –to transfer ERISA-covered plan assets to purchase a note issued by the Pacific Continental Bank ("PCB Note"). Ebbesen Dec.; Ex. 8. Defendant Hutcheson did not disclose that the PCB Note was secured by a golf course at Tamarack. Id. Interlake refused, indicating that Interlake would not purchase outside private illiquid notes on behalf of the Plans. Id. Hutcheson never spoke to Interlake again about transferring assets held by RSPT. Id.

Subsequently, on December 21, 2010, Defendant Hutcheson emailed Aspire and instructed Aspire to transfer $275,000 in plan assets to an account controlled by Defendant Hutcheson:

> As Trustee/Named Fiduciary of the Retirement Security Plan and Trust ("RSPT"), I am following up on the liquidation instruction provided to you last week. Of the $3 million in money market, please transfer $275,000 to the account below. This amount is purchasing a guaranteed bank note (an investment in Pacific Continental Bank) out of Oregon.

Ebbesen Dec.; Ex. 15. The funds were to be wired to:

> West Coast Bank
> Pension Liquidity Fund and Trust
> Attn Matthew D. Hutcheson, Trustee
> A/C XXXXXX434
> ABA XXXXXX088

Id. On December 23, 2010, Defendant Hutcheson sent a second email to Aspire, instructing it to transfer an additional $3,001,000 in plan assets out of RSPT. Ebbesen Dec.; Ex. 16. This time, Hutcheson failed to disclose that the account receiving the funds belonged to GVH (an entity owned by Hutcheson and his wife):

> We are purchasing a fixed-income bank note from Pacific Continental Bank. This is a short term transaction (with a buy-back to occur in one month or less). We are capturing for our participants a $6 million dollar asset in foreclosure, and need to get this done by Monday, December 27.
>
> Please proceed as follows:
>
> Liquidate from RSPT pro-rata $3,001,000 (Three Million One Thousand US Dollars). Most of that is held in Money Market now.
>
> Wire the proceeds to:
>
> . . .
>
> An Account in Aspire's system should be created in participant accounts titled "Pacific Continental Bank Fixed Income…"

Id. Aspire forwarded the directives to MG Trust, RSPT's custodian, which then implemented a $275,000 redemption of RSPT's account with the Vanguard Prime Money Market fund on December 23, 2010. Ebbesen Dec.; Ex. 17 On the same day, MG Trust records listed a $275,000 wire disbursement. Id. On December 27, 2010, fifteen (15) redemptions were listed along with a wire disbursement of $3,001,000. Id. The $3,001,000 was transferred directly to an account controlled by GVH, and the $275,000 was transferred to a West Coast Bank account personally controlled by Hutcheson. Ebbesen Dec.; Exs. 15, 16. Defendant Hutcheson then used this money to purchase the PCB Note for the benefit of Defendant GVH (again, an entity owned and controlled by Defendant Hutcheson and his wife). Ebbesen Dec.; Ex. 14, 18.

Thereafter, Defendant Hutcheson actively concealed the true nature of the transaction from Monty W. Walker. Ebbesen Dec.; Ex. 19. In January of 2011, Walker discovered that the PCB Note was listed in Aspire's records as an asset for RSPT. Id. Unfamiliar with the transaction, Walker first contacted Interlake about the investment. Ebbesen Dec.; Ex. 20. Interlake indicated that it had not made the investment and instructed Walker to contact Defendant Hutcheson. Id. When Walker contacted Defendant Hutcheson, Hutcheson (without telling Walker about the PCB Note's relationship to Tamarack) responded that the PCB Note was a short-term real estate investment for RSPT that would yield a great return for the Plans, and that he was in the process of selling the note in order to repay the alleged loan. Ebbesen Dec.; Ex. 19. However, Defendant Hutcheson never sold the PCB Note. Id.

Then, in March of 2011, Hutcheson borrowed $425,000 from William Fletcher, III ("Fletcher"), a Virginia businessman, purportedly to pay legal bills. Ebbesen Dec.; Ex. 21. Hutcheson pledged the PCB Note to Fletcher as collateral. Id. In July of 2011, Hutcheson defaulted on the Fletcher Loan, and he lost title to the PCB Note. Id.

Meanwhile, Hutcheson was coaching others to lie to Walker, and to conceal pertinent details about the transaction. Ebbesen Dec.; Exs. 19, 22. Hutcheson instructed them:

> During the 3 PM Mountain, 5 PM Eastern conference call, the discussion needs to be short and sweet. One of my partners, Monty Walker, is very angry that the golf course capital is still inaccessible. I never thought in a million years it would take so long to fund Tamarack, and that funding is what I had budgeted to return that capital. While I had 100% authority and discretion to do it, I only did it because I thought it was going to be a short term deal. Now that it has taken longer, Monty is getting antsy and angry and beyond impatient with me.
>
> It is imperative that the following approach be taken.
>
> We acknowledge the golf course capital should was expected to be returned in January or Feb.
> We won't go into all of the details why it didn't happen. It's not Matt's fault, and it should have happened then.
> We do acknowledge that it is happening now and we believe we have worked out the final details, and capital should be returned before the end of the month.
> Because things have gone differently than we expected, we are somewhat fearful to give you a specific date. We are certain it will be closed and finalized soon.
> Augment with Monty that I have gone to heroic lengths (we all have) to get this done. Explain that I have had many sleepless weeks over it. It's almost behind us.
> **If he asks detailed questions, explain that details will only serve to box us further into a corner. We're not trying to avoid them, but we want to be prudent.**
> **Also explain there are many confidentiality agreements in place that prevent you from discussing information about the investor.**
> **Whatever you do, do not mention Tamarack, and explain that this deal is not part of Tamarack; it's separate (true), and bring him back on topic.**
>
> I regret bringing you into this, but the last thing I need is a partner that loses trust in me and ultimately sues me because things have taken longer than expected. Just don't want that, and this call can calm him down.

Ebbesen Dec.; Ex. 22 (emphasis added).

**b. HWA Reports the Prohibited Transaction on its Form 5500 in October of 2011 But Defendants Hutcheson and HWA Fail Thereafter to Redress the Prohibited Transaction or Act to Protect Participants:**

Towards the end of 2011, in an annual information return that ERISA requires to be submitted to the United States (a document called a "Form 5500"), Defendant HWA reported the transaction as a "prohibited transaction" in violation of ERISA § 406, 29 U.S.C. § 1106. Ebbesen Dec., Ex. 14. RSPT's 2010 audited financial statement, included by Defendant HWA with the Form 5500, states that "Green Valley Holdings LLC is an entity owned by the Plan Trustee which causes the actions of the Plan Trustee to result in a prohibited transaction." The Form 5500 also describes the transaction as a "Related Party Transaction[]" and states:

> On October 10, 2010, the Plan executed a promissory note receivable from Green Valley Holdings LLC in the amount of $3,500,000. Under the terms of the agreement, during December 2010, the Plan Trustee [Hutcheson] directed the advance and transfer of $3,276,000. The balance of the note receivable at December 31, 2010 is $3,276,000. Green Valley Holdings LLC is an entity owned by the Plan Trustee [Hutcheson]. The primary use of the funds was the purchase of a promissory note from Pacific Continental Bank located in Eugene, Oregon.

Ebbesen Dec., Ex. 14. The audited financial statement, included by Defendant HWA with the Form 5500 also states that "Green Valley Holdings LLC is an entity owned [by] the Plan Trustee [Hutcheson] which causes the actions of the Plan Trustee [Hutcheson] to result in a prohibited transaction." Id. Schedule "H" of the Form 5500 identifies the transaction as a "nonexempt transactions with [a] party in interest." Id. Schedule "G" of the Form 5500 also identifies the transaction as a "nonexempt transaction" with a "party in interest." Id.

Even after the prohibited transaction was disclosed in the Form 5500 filed by Defendant HWA in October 2011 -- and, thus, at a time when Defendants Hutcheson and HWA were well aware of the ERISA violations – neither of them took action to (a) effectively remove Defendant Hutcheson from all responsibility and control over the ERISA-covered assets held by RSPT, (b)

effectively gain control of the wrongfully transferred ERISA-covered assets, (c) effectively undo the prohibited transaction, (d) effectively remedy the harm caused to the ERISA-covered assets for which they have fiduciary responsibility, (e) effectively seek disgorgement of GVH's unjust profits and ill-gotten gains it obtained as a result of the prohibited transaction, or (f) carry out other actions required by them as fiduciaries under ERISA in light of their knowledge of the prohibited transaction (particularly after it was disclosed by them in the Form 5500).

As a result of the prohibited transaction, there are insufficient plan assets in RSPT to provide all of the benefits due to all of the participants and beneficiaries of ERISA-covered plans whose assets are held by RSPT. Although Defendant Hutcheson appears to have taken the misappropriated assets from specific investment funds offered by RSPT, no analysis has been done by Defendant Hutcheson or Defendant HWA to determine whether those investment funds and the participants who invested in them should ultimately bear the full brunt of Defendant Hutcheson's misdeeds. Even if those investments should ultimately bear the brunt of Defendant Hutcheson's misdeeds, neither Defendant Hutcheson nor Defendant HWA has considered and determined whether all of the participants of ERISA-covered plans with balances in those investment funds are being treated fairly and impartially as some participants seek to extract their retirement savings from RSPT. In sum, neither Defendant Hutcheson nor Defendant HWA appears to have considered the possibility of a "run on the bank" as to the ERISA-covered funds managed by RSPT. Again, an independent fiduciary needs to be put in place immediately who can address these matters as well.

## ARGUMENT

### I. THE SECRETARY IS ENTITLED TO INJUNCTIVE RELIEF

ERISA is a comprehensive and remedial statute designed to promote and protect the interests of participants and their beneficiaries in employee benefit plans. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983); Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S 359, 361-62 (1980). Courts have repeatedly found that, under ERISA's broad remedial provisions, injunctive relief, such as that sought in this action, is appropriate. See, e.g., Donovan v. Mazzola, 716 F.2d 1226, 1238-39 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984).

In passing ERISA, Congress declared a national public interest in protecting "the continued well-being and security of millions of employees and their dependents . . . directly affected by these plans." ERISA § 2(a), 29 U.S.C. § 1001(a); Johnson v. Couturier, 573 F.3d 1067, 1082 (9th Cir. 2009); Herman v. South Carolina Nat'l Bank, 140 F.3d 1413, 1423 (11th Cir. 1998). In furtherance of this goal, "Congress intended to make available the full range of legal and equitable remedies in cases of ERISA violations." Whitfield v. Tomasso, 682 F. Supp. 1287, 1306 (E.D.N.Y. 1988) (citing HS.Rep. No. 93-127H, reprinted in 3 U.S. Code Cong. & Admin.News 4639, 4838, 4871 (1974)); accord South Carolina Nat'l Bank, 140 F.3d at 1423 ("It remains the intent of Congress that the courts use their power to fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well"). The Secretary's enforcement action under ERISA is aimed not only at recovering losses on behalf of plan participants, but also at "deterring future losses by ERISA plans, assuring uniform compliance with fiduciary obligations, and maintaining public confidence and integrity in the financial wellbeing of the pension system." Chao v. Chermak, No. 1:05CV1935, 2006 WL 3751191, at *2 (N.D. Ohio Dec. 18, 2006).

The instant action and motion for a Temporary Restraining Order fall squarely within ERISA's statutory charge to the Secretary and are in furtherance of the Secretary's goal of protecting the participants and beneficiaries of the employee benefit plans subject to this action. In addition to providing for the removal of existing plan fiduciaries, such relief also includes the appointment of an independent fiduciary to carry out the proper administration and management of benefit plans. Mazzola, 716 F.2d at 1238-39; Solis v. Vigilance, Inc., No. C-08-05083, 2009 WL 2031767, at *3 (N.D. Cal. July 9, 2009); Chao v. Azon Employees Ret. Plan, No. 3:06-CV-1006, 2007 WL 4287784, at *4 (N.D.N.Y. Dec. 7, 2007); Chao v. Zoltrix, No. C-07-00610, 2007 WL 2990429, at *3 (N.D. Cal. Oct. 11, 2007).

**a. The Court Has the Authority Under ERISA to Grant the Relief Sought by the Secretary.**

One of the remedies expressly enumerated in ERISA is removal of a breaching fiduciary. ERISA § 409(a), 29 U.S.C. § 1109(a); see Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) (fiduciary subject to such other equitable or remedial relief as the court may deem appropriate including removal of the fiduciary). A permanent injunction against serving as a fiduciary is also an appropriate remedy under ERISA. Martin v. Feilen, 965 F.2d 660, 672 (8th Cir. 1992), cert. denied, 506 U.S. 1054 (1993) (permanent injunction imposed on fiduciary who demonstrated a "fundamental misunderstanding" of ERISA). In an action brought to enforce a remedial federal statute that provides a Court with broad jurisdiction to fashion relief, an injunction freezing assets, appointing an independent fiduciary, and allowing her to administer the plan is particularly appropriate to ensure that participants suffer no additional losses due to ongoing Hutcheson misconduct. Commodity Futures Trading Comm'n v. Muller, 570 F.2d 1296, 1300 (5th Cir. 1978). Thus, this Court should order not only a freeze, but this Court should order an

independent fiduciary the authority to conduct an accounting, make distributions, and terminate the plan, if in the best interest of the plan.

The Secretary is entitled to preliminary injunctive relief because, as set forth more fully below, she can establish all of the grounds necessary for the imposition of such relief here, including: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of the equities tips in favor of injunctive relief; and (4) that an injunction is in the public interest. Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust, 636 F.3d 1150, 1155 (9th Cir. 2011) (citing Cal. Pharmacists Ass'n v. Maxwell-Jolly, 596 F.3d 1098, 1104 (9th Cir. 2010)); Couturier, 572 F.2d at 1078; see also Morgan Keegan & Co., v. Drzayick, No. 1:11-CV-126-EJL, 2011 WL 5403031, *2 (D. Idaho Nov. 8, 2011) (explaining that the tests for a temporary restraining order and for a preliminary injunction are basically the same);

**i. The Secretary Will Likely Succeed on the Merits**

It is likely that the Secretary will be successful on the merits because, although there has been no formal discovery, the factual record in this matter is already filled with documents and testimony which clearly display an ongoing pattern of disloyalty, self-dealing, and imprudence that has caused and, if not stopped, will continue to cause devastating losses to the Plans. Hutcheson's ongoing attempts to retain control over plan assets and to sell the PCB note show that allowing him to access and control over plan assets would further jeopardize the retirement savings of hundreds of participants and their beneficiaries.

ERISA requires that plan assets, funds set aside solely for the benefit of participants in and beneficiaries of employee benefit plans (such as employer-sponsored pension plans), be managed by fiduciaries solely and exclusively in the interest of the plans' participants and

beneficiaries, ERISA § 404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A), and exclusively for the purpose of providing benefits to participants and beneficiaries and paying the reasonable expenses of administering the plans. ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1). The fiduciary obligations imposed by ERISA are "the highest known to the law." Couturier, 572 F.3d at 1077 (citing, Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996), cert. denied, 520 U.S. 1237 (1997) (quoting Donovan v. Bierwirth, 680 F.2d 263, 272 n. 8 (2d Cir. 1982), cert. denied, 459 U.S. 1069 (1982)); Donovan v. Mazzola, 716 F.2d 1226, 1231 (9th Cir. 1983) ("in enacting ERISA, Congress made more exacting the requirements of the common law of trusts"). ERISA also forbids fiduciaries from using plan assets for their own benefit, ERISA § 406(b), 29 U.S.C. § 1106(b), or in transactions with or for the benefit of "parties in interest" (individuals and entities who Congress feared might exercise undo influence over plan assets),[3] ERISA § 406(a), 29 U.S.C. § 1106(a), unless those transactions meet the strict requirements of statutory, class or individual exemptions. ERISA § 408, 29 U.S.C. § 1108.

The Secretary has independent authority to seek relief from breaching fiduciaries and those who knowingly participate in their breaches under ERISA §§ 409(a) and 502(a)(2) & (5), 29 U.S.C. §§ 1109(a) and 1132(a)(2) & (5), to restore plan losses, to recover unjust profits and to obtain other remedial and equitable relief as the court may deem appropriate. See South Carolina Nat'l Bank, 140 F.3d at 1425-26; Solis v. Couturier, No. 08-2732, 2009 WL 1748724 (E.D. Cal. June 19, 2009).

[3] Parties in interest are defined at ERISA § 3(14), 29 U.S.C. § 1002(14).

### 1. The Individual Plans and the Assets Held By RSPT Are Covered by Title I of ERISA

As noted above, RSPT was not a single "multiple employer plan" pursuant to ERISA because there was no commonality of employment-based interest among the participating employer sponsors of the plans apart from the provision of retirement benefits, and there was no control of the program by the participating employers such that RSPT qualified as a "group" or "association" of employers as required to be a single plan covering multiple employers for purposes of ERISA § 3(5), 29 U.S.C. § 1002(5).[4] Thus, RSPT failed to qualify as a single "pension plan" for purposes of ERISA § 3(2), 29 U.S.C. § 1002(2) since it was not established or maintained by an “employer” for purposes of that section.

Instead, each of the employers that signed up with RSPT individually established an individual plan subject to Title I of ERISA for the purpose of providing pension benefits to its own employees. Each such plan independently satisfies the requirements of ERISA § 3(2), 29 U.S.C. § 1002(2) and, thereby, qualifies as an employee benefit plan pursuant to ERISA § 3(3), 29 U.S.C. § 1002(3). Each of these plans entrusted the management of its assets to RSPT, Hutcheson and HWA and entrusted RSPT, Hutcheson and HWA to provide administrative services and, thus, RSPT, Hutcheson and HWA’s actions are covered by Title I of ERISA.

### 2. Defendants Hutcheson and HWA Are Fiduciaries

ERISA § 3(21) defines "fiduciary" in broad functional terms which encompass Defendants Hutcheson and HWA:

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[4] See, e.g., MDPhysicians & Associates, Inc. v. State Bd., Ins., 957 F.2d 178, 186 (5th Cir.), cert. denied 506 U.S. 861 (1992) ("the entity that maintains the plan and the individuals that benefit from the plan [must be] tied by a common economic or representation interest, unrelated to the provision of benefits") (quoting Wisconsin Educ. Assoc. Ins. Trust v. Iowa State Bd., 804 F.2d 1059, 1063 (8th Cir. 1986)).

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets … or (iii) he has any discretionary authority or discretionary responsibility in the administration of the plan.

29 U.S.C. § 1002(21)(A); see Kayes v. Pacific Lumber, 51 F.3d 1449, 1459 (9th Cir. 1995). The Ninth Circuit construes ERISA fiduciary status "liberally, consistent with ERISA's policies and objectives." Couturier, 572 F.3d at 1076.

Defendant HWA represented to employers that it was the Plan Sponsor and Plan Administrator of RSPT. Ebbesen Dec.; Ex. 2. The ownership structure of HWA is as follows:

| | |
|---|---|
| Hutcheson: | 49% |
| Walker: | 49% |
| HWA Management, Inc.: | 2% |

Ebbesen Dec.; Ex. 4. For his part, Defendant Hutcheson held himself out as a "trustee" and acted on behalf of HWA (for example, by signing the Form 5500 as "plan sponsor"). Ebbesen Dec.; Ex. 14. Pursuant to these arrangements, Defendants Hutcheson and HWA exercised authority and control over the assets of each of the ERISA-covered plans that had entrusted its assets to RSPT and over the management of the plans for which RSPT held assets and each had discretionary authority and responsibility in the administration of those plans. Thus Defendants Hutcheson and HWA were each a fiduciary of each of the plans to which those assets belong pursuant to ERISA § 3(21), 29 U.S.C. § 1002(21):

> We construe ERISA fiduciary status "liberally, consistent with ERISA's policies and objectives." Ariz. State Carpenters Pension Trust Fund v. Citibank, (Ariz.), 125 F.3d 715, 720 (9th Cir.1997). ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan." Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993). Thus, ERISA-and ESOP-fiduciaries include not only those specifically named in the employee benefit plan, 29 U.S.C. § 1102(a), but also any individual who "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any

> authority or control respecting management or disposition of its assets," 29 U.S.C. § 1002(21)(A)(i).

Couturier, 573 F.3d at 1076. As Defendants Hutcheson and HWA had discretionary authority and discretionary control respecting management of the plans and the plans' assets and because they actually exercised discretionary authority and control respecting management of the plans and the disposition of ERISA-covered assets, they are thus clearly fiduciaries under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

**3. Hutcheson Breached His Fiduciary Duties by Taking Plan Assets for His Own Benefit:**

Defendant Hutcheson disloyally and imprudently misappropriated ERISA-covered retirement assets from RSPT when he transferred the assets to Defendant GVH, an entity which he owned and controlled. Hutcheson did not engage in any of these activities for the benefit of participants and beneficiaries of the plans that actually owned the funds that were intended to provide retirement security. Rather, Defendant Hutcheson took this money for his personal benefit.

As fiduciaries of ERISA-covered plans, Defendants Hutcheson and HWA were required to comport their actions and conduct to the strict fiduciary standards enunciated in ERISA § 404(a), 29 U.S.C. § 1104(a). Among ERISA's fiduciary duties are: the duty of loyalty, which is the duty to act solely in the interest of the plan's participants and for the exclusive purpose of providing benefits to them, ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A); the duty of prudence, which requires a fiduciary to discharge his duties with the "care, skill, prudence and diligence" that a prudent person acting in a like capacity and familiar with such matters would use in similar circumstances, ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B); and the duty to adhere to plan documents, which requires fiduciaries to administer the plan "in accordance with

the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV." ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

ERISA's fiduciary duties are the "highest known to law." Couturier, 572 F.3d at 1077. Fiduciary decisions must be made with an eye single to the interest of the participants and beneficiaries. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A); Pegram v. Herdrich, 530 U.S. 211, 235 (2000). Under ERISA § 409(a), 29 U.S.C. § 1109(a), fiduciaries shall be personally liable for losses to the plan, and may be removed as fiduciaries over plan assets when they breach their fiduciary duties. 29 U.S.C. § 1109(a).

In addition to ERISA's fiduciary standards, ERISA § 406 enumerates several prohibited transactions between the plan and a party-in-interest. 29 U.S.C. § 1106. Howard, 100 F.3d at 1488 (prohibited transaction provisions are in addition to duties of loyalty and prudence). A party in interest to an employee benefit plan is defined to include fiduciaries (such as Defendants Hutcheson and HWA), a person providing services to a plan (again, such as Defendants Hutcheson and HWA) relatives of fiduciaries (such as Defendant Hutcheson's wife), and corporations (such as Defendant GVH) in which 50% or more of the combined voting power for all classes of stock is owned by, among others, fiduciaries, service providers, or an employer with employees covered by the plan. See ERISA §§ 3(14)(A), (B), (F) & (G), 29 U.S.C. §§ 1002(14)(A), (B), (F) & (G).

In pertinent part, ERISA § 406(a), 29 U.S.C. § 1106(a) reads:

> (a) Except as provided in §408 (29 U.S.C. § 1108):
>
> > (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect –
> >
> > > (B) lending of money or other extension of credit between the plan and a party in interest;
> > >
> > > (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

In addition to the conflict of interest prohibited transactions listed in ERISA § 406(a), 29 U.S.C. § 1106(a), ERISA § 406(b), 29 U.S.C. § 1106(b), flatly prohibits self-dealing. It reads, in pertinent part:

> (b) A fiduciary with respect to a plan shall not --
>
> > (1) deal with the assets of the plan in his own interest or for his own account,
> >
> > (2) in his individual or any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interest are adverse to the interest of the plan or the interest of its participants or beneficiaries.

A fiduciary, therefore, is forbidden from placing himself in a position where he is acting in his own interests. By forbidding self-dealing, ERISA avoids the obvious danger that a fiduciary will sacrifice the plan's interest for his own personal gain. In this case, Hutcheson abused his fiduciary authority by directing a distribution of $3.276 million from ERISA-covered assets held by RSPT to accounts that he controlled. Hutcheson did not use these plan assets for plan investments, but instead deposited them with Defendant GVH – an entity owned and controlled by Defendant Hutcheson and his wife. Defendant Hutcheson then wrongfully used these retirement assets to buy the PCB Note. Defendant Hutcheson then pledged the PCB Note

as collateral for a personal loan from Fletcher, and then, after using the loan proceeds to pay Defendant Hutcheson's personal expenses, defaulted on the loan, losing control of the PCB Note.

**4. Hutcheson and HWA Have Breached Their Fiduciary Duties by Failing to Protect the Plan from Further Harm Resulting from the Loss of Plan Assets:**

Defendants Hutcheson and HWA have also violated their obligations in connection with the aftermath of the prohibited transaction and the loss of $3,276,000 in plan assets. By the end of 2011, the prohibited transaction and transfer of plan assets to Defendant Hutcheson was known by Defendant HWA (and, of course, by Defendant Hutcheson) and reported by Defendants Hutcheson and HWA in the Form 5500. Even so, Defendants Hutcheson and HWA took no action to (a) effectively remove Defendant Hutcheson from all responsibility and control over the ERISA-covered assets held by RSPT, (b) effectively gain control of the wrongfully transferred ERISA-covered assets, (c) effectively undo the prohibited transaction, (d) effectively remedy the harm caused to the ERISA-covered assets for which they have fiduciary responsibility, (e) effectively seek disgorgement of GVH's unjust profits and ill-gotten gains as a result of the prohibited transaction, or (f) carry out other actions required by them as fiduciaries under ERISA in light of their knowledge of the prohibited transaction (particularly after it was disclosed by them in the Form 5500).

As a result of the prohibited transaction, there are insufficient assets in RSPT to provide all of the benefits due to participants and beneficiaries of ERISA-covered plans whose assets are held by RSPT. Although Defendant Hutcheson appears to have taken the misappropriated assets from specific investment funds offered by RSPT, no analysis has been done by Defendant Hutcheson or Defendant HWA to determine whether those investment funds should ultimately bear the full brunt of Defendant Hutcheson's misdeeds. Even if those investments should

ultimately bear the brunt of Defendant Hutcheson's misdeeds, neither Defendant Hutcheson nor Defendant HWA has considered and determined whether all of the participants of ERISA-covered plans with balances in those investment funds are being treated fairly and impartially as some participants seek to extract their money from RSPT.

The Supreme Court has consistently held that an ERISA fiduciary owes a duty of impartiality to plan participants. See Howe v. Varity, 516 U.S. 489, 514 (1996) (describing duty of "trustee[s] to take impartial account of the interest of all beneficiaries"). Other courts have also noted that fiduciaries owe a duty to treat all participants and beneficiaries impartially. Summer v. State Street, 104 F.3d 105, 108 (7th Cir. 1997) ("picking and choosing among beneficiaries [would be] in violation of the traditional duty imposed by trust law of impartiality among beneficiaries"); see also Restatment of Trusts (Second), § 183 (1959) ("When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them").

Here, it does not appear that Defendants Hutcheson and HWA have even considered their duty of impartiality or how to comply with that duty in light of the significant amount of plan assets that Defendant Hutcheson has taken for his own benefit. In fact, neither Defendant Hutcheson nor Defendant HWA appears to have considered the possibility of a "run on the bank" as to the ERISA-covered funds managed by RSPT or other ramifications of the missing funds. Thus, it is likely that the Secretary will succeed on the merits.

**ii. Irreparable Harm Is Likely in the Absence of Immediate Relief**

Injunctive relief is available "if plaintiffs demonstrate that irreparable injury is likely in the absence of an injunction." Couturier, 572 F.3d at 1081 (internal citation omitted). Here, it is clear that such injury is likely absent injunctive relief.

Defendants Hutcheson and HWA are the embodiment of fiduciaries subject to removal under ERISA. Not only did Defendant Hutcheson take $3.276 million from retirement accounts that did not belong to him for his own benefit, but he concealed the prohibited transaction from others and lied to participants about the nature of an investment fund reported in their account statements. This behavior is the epitome of what Congress sought to avoid in enacting ERISA. It was disloyal, imprudent, in violation of plan documents, and involved a self-dealing transaction in violation of ERISA's core duties. Defendant Hutcheson – a self-proclaimed ERISA expert – was undoubtedly aware that it was unlawful to remove money from participant retirement accounts for personal use, yet he converted the money for just that purpose. In the absence of preliminary relief, it is likely that the Defendants Hutcheson and HWA will continue to mismanage, and misappropriate, retirement account assets. Defendant Hutcheson has proven that he is capable of embezzling from this very corpus; indeed, he has been indicted for such conduct. Thus, if this Court does not grant preliminary relief, irreparable harm is likely.

**iii. The Balance of the Equities Tips in Favor of Injunctive Relief**

The balance of equities favors an award of injunctive relief for the Secretary in this matter. Recognizing the public interest in protecting against future harm to ERISA plans, courts have rejected arguments that "ERISA fiduciaries and their associates must be allowed to loot a second pension plan before an injunction may be issued." Beck v. Levering, 947 F.2d 639, 641 (2d Cir. 1991); Solis v. Couturier, 2009 WL 1748724 at *7. "Accordingly, injunctive relief is available including an injunction to prohibit a party from having further dealings with ERISA-covered plans." Tomasso, 682 F. Supp. at 1306; accord Beck, 947 F.2d at 641.

Here, the harm that would likely occur without an injunction "would leave . . . participants without the benefits whose security ERISA strives above all else to protect."

Couturier, 572 F.3d at 1081. The participants' interests in the loyal and prudent management of their pension assets far outweighs any legitimate interest that Hutcheson may assert to continued access to the funds. In light of not only the conduct in which Hutcheson is alleged to have engaged, but the source of the funds that he is alleged to have abused, participants' assets are at significant risk of further harm. Thus, the balance of the equities favors preliminary relief.

**iv. An Injunction Is in the Public Interest**

Defendants Hutcheson and HWA have violated ERISA § 404, and Hutcheson has further violated the prohibited transaction and self-dealing rules in ERISA §§ 406(a) & (b). Defendant Hutcheson intentionally converted ERISA plan assets from RSPT to benefit Defendant GVH, a party in interest to the Plans and an entity owned and controlled by Defendant Hutcheson and his wife. It is thus in the public interest for Defendants Hutcheson and HWA to be prohibited from exercising any further authority or control over any ERISA-covered assets. Any public concern that might extend to somebody who has already admitted in the Form 5500 that the transaction violated ERISA (and who has been indicted for alleged criminal behavior in connection with the same transaction) "is far outweighed by the interests that ERISA protects." Couturier, 572 F.3d at 1081.

In enacting ERISA, Congress noted:

> [T]hat the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; ... that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore

> desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

29 U.S.C. § 1001(a). In order for ERISA "to promote the interests of employees and their beneficiaries in employee benefit plans," Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 77 L.Ed.2d 490 (1983), Congress chose to hold plan fiduciaries to a high standard -- in fact, "the highest known to the law." Couturier, 572 F.3d 1077 (citing Howard, 100 F.3d at 1488, (quotation omitted)).

Accordingly, the public interest here favors preliminary relief.

**WHEREFORE**, the Secretary requests that this court grants relief set forth in the Order submitted herewith.

Respectfully Submitted,

Dated: May 15, 2012

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