Nos. 15-1380 and 15-1574

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THOMAS E. PEREZ, Secretary of Labor, U.S. Department of Labor,
Plaintiff-Appellee,

v.

CYNTHIA HOLLOWAY and JAMES DOYLE,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of New Jersey

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT REGARDING ORAL ARGUMENT

The Secretary requests oral argument. The procedural and factual background is extensive, this matter having proceeded through trial, a prior appeal, and a remand. The Secretary believes that oral discussion of the facts and applicable precedent will benefit the Court's consideration of this case.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has been before this Court previously, Case No. 10-3598. A decision to remand the case was issued on March 27, 2012, Sec'y of Labor v. Doyle, 675 F.3d 187 (3d Cir. 2012). The Secretary is not aware of any cases or proceedings related to this appeal.

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This is an action brought by the Secretary of Labor under 29 U.S.C. §§ 1132(a)(2) and 1132(a)(5). The United States District Court for the District of New Jersey had federal question jurisdiction under 28 U.S.C. § 1331, and exclusive subject matter jurisdiction under 29 U.S.C. § 1132(e)(2).

The Court of Appeals for the Third Circuit has jurisdiction under 28 U.S.C. § 1291 because this is an appeal from a final judgment in favor of the Secretary of Labor and against two defendants (James Doyle and Cynthia Holloway). The judgment was entered on December 1, 2014. J.A.10. Holloway and Doyle filed their appeals respectively on February 9 and March 6, 2015. Br. of Appellant

Cynthia Holloway at 1, Sec'y of Labor v. Doyle, No. 15-1380 (3d Cir. July 16, 2015) (hereinafter Holloway Br.); Br. of Appellant James Doyle at 1, Sec'y of Labor v. Doyle, No. 15-1574 (3d Cir. July 17, 2015) (hereinafter Doyle Br.).

STATEMENT OF THE ISSUES

As restated by the Secretary, the issues raised by Cynthia Holloway and James Doyle are:

1. Whether the district court erred in holding that employer contributions payable to the ERISA healthcare plan were plan assets.

2. Whether the district court erred in holding that James Doyle was a functional fiduciary with control over plan assets.

3. Whether the district court erred in holding that Cynthia Holloway and James Doyle breached their fiduciary duties by enabling a diversion of plan assets for non-plan purposes.

STATEMENT OF THE FACTS

1. On May 1, 2001, Defendant Cynthia Holloway and three other individuals created the Professional Industrial Trade Workers Union Fund (Fund), a multiple employer welfare arrangement (MEWA),[1] governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq.

[1] A MEWA is an ERISA plan that provides benefits to the employees of two or more employers for, among other things, medical, surgical, or hospital care. 29 U.S.C. § 1002(40).

J.A.1251-52; 12-13. The Fund was supposed to provide health insurance to numerous small employers through supposed collective bargaining agreements between a supposed union, the Professional Industrial Trade Workers Union (PITWU), created to be the Fund sponsor, and the participating employers. Id. When it closed two years later in 2003, however, it left $7.6 million in unpaid health claims. J.A.1256, 1264; 23.

Defendants Holloway and Michael Garnett were named trustees to the Fund during relevant periods in 2001 and 2002. J.A.12 (Holloway), 14 (Garnett). During the time that Holloway was a Fund trustee from May 1, 2001 to September 27, 2002, she had authority to manage the Fund, including the authority to sign checks drawn on the Fund's claim and general accounts. J.A.95-97. In addition, Garnett and Defendant Mark Maccariella (who are not parties to this appeal) were owners of two companies – Privilege Care, Inc. (PCI) and North Point PEO Solutions, Inc. (essentially operated as one enterprise, PCI/NP) – that entered into contracts with the participating employers, ostensibly to provide human resource services and access to health insurance provided by the Fund as Professional Employer Organizations (PEOs).[2] J.A.1249; 13 n.3, 14 n.5. Defendant James Doyle was the owner of Privilege Care Marketing Group, Inc. (PCMG), an entity

[2] Legitimate PEOs would provide administrative and human resource services to their clients. J.A.1251 n.2; 12.

that was created to provide billing services to PCI/NP, and to market the Fund to and enroll small employers to purchase health insurance coverage under the Fund. J.A.1249; 129-30.

To obtain medical benefits from the Fund for its employees, an employer was required initially to pay the first month's fee, usually as a single check, from which PCMG would deduct a marketing and billing fee. J.A.29-30. Thereafter, employers were required to pay monthly fees through two checks. J.A.30. One check (Check 1) was payable to PCI/NP (although Doyle's company, PCMG, sometimes took a cut). J.A.37. PCI/NP would, in turn, forward a portion to a third-party administrator for processing and paying health claims and retain the rest for fees denominated "union dues" and for other expenses. Id. The other check (Check 2) was made out to and retained by PCMG (and Defendant Doyle) for marketing services and administrative expenses. J.A.37-38.[3]

During 2002 and 2003, seven states took enforcement actions against Doyle, PCMG, PCI/NP, Garnett, Maccariella, and Holloway, as trustee, for violating state insurance law through this scheme that resulted in cease-and-desist orders. J.A.20-

[3] Doyle now argues that he "did not market the Fund." Doyle Br. at 19. However, he stated below that he marketed "the PEO, its services, and the availability of joining the union and participating in the [Fund]." Joint Final Pretrial Order, Part IV.A., J.A.666 (emphasis added). Consistent with Doyle's own admission, state regulators found that he marketed the Fund. J.A.212 (Texas insurance commissioner finding that PCMG marketed the Fund); J.A.224 (Massachusetts insurance commissioner made similar finding).

21. Despite these state enforcement actions, Holloway took no action to end the Fund's relationship or service agreements with Doyle, Garnett, Maccariella, or the entities they controlled, PCMG and PCI/NP. Moreover, Doyle was later convicted of a felony in Texas for the unauthorized sale of insurance. J.A.24 n16.

Although Holloway was not named personally in these orders, she knew of the orders; indeed, as the district court noted, the orders were one of the concerns she identified as a reason for her resignation as a trustee. J.A.23-24, 40-41. Likewise, Doyle was aware of these orders during the relevant time period. J.A.22-24.

During the two years the Fund operated, it had four claims administrators: (1) its original administrator, Union Privilege Care, a company operated by an architect of the scheme, David Weinstein; (2) Oak Tree Administrators (Oak Tree) (March 2002 through June 2002); (3) Brokerage Concepts, Inc. (July 1, 2002 through November 2002); and (4) Southern Plan Administrators (December 2002 through May 2003). J.A.8, 15, 17 n.12.

Holloway knew from at least April 23, 2002, that the Fund was plagued by systemic administrative deficiencies. Before abandoning the Fund, she attended at least three meetings during which two different Fund administrators informed her that the Fund could not pay claims and did not have adequate financial or claim records. J.A.16-17, 20. On April 23, 2002, Oak Tree informed Holloway that the

Fund had "many" unpaid claims and that Union Privilege Care might not have paid any benefit claims since November 2001. J.A.16-17. After learning that Union Privilege Care likely had not paid benefit claims for at least six months, Holloway did not initiate any action against Union Privilege Care. J.A.40-41. Instead, on May 1, 2002, "Holloway and another trustee appointed David Weinstein (the owner/operator of Union Privilege Care) as a trustee of the Fund, although Holloway admitted she had general concerns about Weinstein." J.A.16. Holloway did not investigate Weinstein's qualifications to be a trustee. Id.

Again during a May 30, 2002 meeting, Oak Tree informed Holloway that it "still was not able to obtain necessary financial information and documents from Union Privilege Care relating to prior claims and expenses; therefore, the accountant was unable to provide the trustees with a financial report, and no actuary could have performed a study." J.A.16-17. By at least September 20, 2002, PCI/ NP had stopped making contributions to the Fund (J.A.17), and the Fund's third administrator, Brokerage Concepts, informed Holloway of that fact during a September 20, 2002 meeting with her.[4] Id. Holloway admitted at trial that the Fund's accountant was unable to give her a financial report, could not determine the amount of contributions paid into the Fund, could not determine the

[4] Holloway resigned before Southern Plan Administrators, the fourth of the claims administrators, took over in December 2002.

amount of claims paid, and probably did not even have a complete list of Fund participants. J.A.1005-7, 1016.

At no time did Holloway instruct the Fund's counsel to initiate legal action against Union Privilege Care, PCI/NP, PCMG, or the other trustees. J.A.42. Nor did she seek mediation "of her dispute with the other trustees regarding administration of the Fund," contact the Department of Labor about the lack of funding or the Fund's chaotic condition, or seek removal of any trustee. Id. Instead, Holloway simply resigned on September 27, 2002. J.A.43. In her resignation letter, she summarized her reasons: "the lack of financial accountability for contributions to the Fund and resultant lack of funding to pay claims" and the "issuance of cease and desist orders by multiple states." Id.

2. On April 28, 2005, the Secretary sued the Fund fiduciaries, alleging that they breached their statutory duties of loyalty and prudence by mismanaging the Fund, which resulted in the illegal diversion of over 60% of the Fund's plan assets by fiduciaries for their own gain, and left over $7.6 million in unpaid health claims. J.A.1228-31; 15. As relevant to this appeal, the Secretary argued that Doyle, as a functional fiduciary, and Holloway, as a Fund trustee, breached their duties as ERISA fiduciaries by diverting or allowing the diversion of $4.7 million out of a total of $7.4 million in contributions from participating employers to pay improper marketing fees to PCMG, improper service fees to PCI/NP, which

provided no services, union dues to PITWU, a sham union that did not engage in collective bargaining, and other unnecessary expenses. J.A.1250; 10-12. Thus, the Secretary argued that the marketing and "union dues" were improper, and that the other fees were not legitimate because they were not for any discernible services. Id. Moreover, the Secretary argued that Defendant Holloway, despite her acknowledgment of serious mismanagement of the Fund, did little or nothing to try to ensure that the Fund to which she was a trustee was properly administered. Id.

3. After a bench trial in October 2009, the district court entered judgment for Defendants Holloway and Doyle on June 30, 2010. Without addressing the argument that all amounts submitted by the participating employees to Doyle constituted plans assets, the court concluded that the evidence was insufficient to prove that either Holloway or Doyle had breached any fiduciary duties. J.A.1258. The court had already entered a consent judgment against one of the other co-fiduciaries, Maccariella. J.A.12. And the court entered a default judgment against Garnett because he failed to appear at trial. Id.

4. The Secretary appealed, and this Court issued a decision on March 27, 2012, concluding that the district court erred by failing to address whether the funds Doyle collected were plan assets, as well as a number of other key issues. J.A.1276. The Court thus vacated the decision and remanded to the district court to further consider three inter-related issues: (1) whether diverted funds from the

contributions that Doyle collected from participating employers constituted plan assets; (2) whether Doyle was a fiduciary to the Plan because he controlled these funds; and (3) whether Doyle and Holloway breached their fiduciary duties. J.A. 1246, 1276, 1280.

More specifically, this Court directed the district court to determine if all or part of the employer contributions that Doyle collected were plan assets and, if so, if he exercised "sufficient control" over them to qualify as a functional fiduciary under ERISA. J.A.1276. If the district court answered yes to both these questions, this Court also directed the district court to "consider whether Doyle breached his fiduciary duties to the Fund." Id.

Likewise, if the district court found on remand that any of the diverted funds were plan assets, this Court instructed the district court to determine "what Holloway knew and could reasonably be expected to know" about the diversion of these assets and whether she took "prudent precautions" to protect plan assets when she resigned as a trustee, such as by ensuring she would be replaced by a "suitable and trustworthy replacement." J.A.1279.

If, on the basis of these determinations, the district court found that Holloway and/or Doyle breached their fiduciary duties, this Court instructed the district court to determine any resulting plan losses. Id.

Importantly, this Court noted that the "record shows" that the relationship between the Professional Industrial Trade Workers Union (PITWU or Union), the union backing the Fund, and PCI/NP was governed by "bogus" collective bargaining agreements that "were not the result of bona fide collective bargaining," and that the employees PCI/NP enrolled in the Union and the Fund under the collective bargaining agreements "were not genuine union members." J.A.1266 n.23; see also J.A.27–28 (district court confirmed finding). This Court pointed to the record evidence that the PCI/NP and PCMG had falsely marketed the Fund as exempt from state insurance regulation by relying on PCI/NP's "bogus" relationship with the Union. J.A.1266.[5] It also concluded that the record showed that "the only service consistently offered by PCI/NP was health benefits through the PITWU Fund." J.A.1253 & n.5. This Court also credited the findings of numerous insurance commissioners who issued cease-and-desist orders against these entities and their false marketing practices. J.A.1264. Noting that "Doyle and Holloway were not the principal architects of this scheme," this Court

[5] As a MEWA, the Fund was subject both to ERISA standards and to state insurance regulation. J.A.20, 23; J.A.1260 and 1263 (citing 29 U.S.C. § 1144(b)(6)). Despite this, employers were required to sign a disclosure form that "falsely represented that the PITWU Fund was 'exempt from state regulation'" pursuant to ERISA. Id.; J.A.21; J.A.1261 (quoting "[PITWU] Health & Welfare Fund Plan 'B' Disclosure Form" which represented that the Fund was a union sponsored, "self-funded and exempt from state regulation, as outlined in [ERISA]", "under the jurisdiction of the United States Secretary of Labor," and "not regulated by any state department of insurance"). Thus, PCI/NP and PCMG used "the Fund's relationship with PITWU to claim that" ERISA exempted it from state regulation and the solvency controls designed to protect insureds. Id.

remanded for the district court to determine "the extent of their awareness of the scheme and liability for its consequences," instructing that "it is important to keep the nature of the scheme firmly in mind." J.A.1267.

4. In its December 1, 2014 decision on remand, the district court agreed with the Secretary that the diverted contributions were plan assets, and that both Doyle and Holloway were ERISA fiduciaries who breached their statutory duties with regard to these assets. J.A.39, 43-44. Because the court determined that Doyle was a functional fiduciary who exercised "discretionary control" over these plan assets (J.A.38), it concluded that he was liable to restore to the plan over $3,882,000 in plan assets that he diverted to himself and others. J.A.4, 45. It also ruled that Holloway, as a trustee, failed to protect plan assets from diversion, failed to maintain financial records, resigned without prudent precautions, and was thus liable to restore to the plan over $4,698,000 in losses, exclusive of costs and interest. Id.[6]

STANDARD OF REVIEW

"To the extent that the district court predicated its decision on findings of fact," the standard of review is clearly erroneous. Lloyd v. HOVENSA, LLC., 369 F.3d 263, 273 (3d Cir. 2004). Nearly all of the challenges here fall into this

[6] The court determined that Holloway had greater liability than Doyle because, as a trustee, Holloway was liable for amounts diverted by other persons in addition to amounts diverted by Doyle. J.A.15.

category. When an appellant challenges a district court's legal conclusions, the standard of review is de novo. In re PWS Holding Corp., 228 F.3d 224, 235 (3d Cir. 2000). Neither de novo nor clearly erroneous review, however, extend to any factual or legal matter expressly or necessarily resolved in the previous appeal in this case in Sec'y of Labor v. Doyle, 675 F.3d 187 (3d Cir. 2012), J.A.1246-83; the law-of-the-case doctrine governs the same issues of fact or law at all subsequent stages of this case. See, e.g., Arizona v. California, 460 U.S. 605, 618 (1983).

SUMMARY OF THE ARGUMENT

This Court correctly recognized in the prior appeal in this case that the scheme here bore the hallmarks of "the type of scheme that ERISA's MEWA provisions were specifically designed to prevent: an aggressively marketed, but inadequately funded health benefit plan masquerading as an ERISA-exempt plan in order to evade the solvency controls imposed by state insurance regulation." J.A.1266 n.23 (citing legislative history). The detailed and well-supported factual findings of the district court corroborate that "the ultimate result" of this arrangement "was that which Congress feared: the Fund was ultimately unable to pay all employee claims, and thus employees participating in the Fund were not provided promised health benefits." J.A.1267. In its decision on remand, the district court then properly concluded, based on the extensive record, that the contributions from the participating employers were plan assets, that Doyle's control over these assets rendered him a fiduciary, that he breached his duties as a fiduciary in diverting millions of dollars of these assets, and that Holloway failed utterly in her role as trustee to stop this diversion of assets by failing to restore order to the plan's opaque and chaotic operations. As the result of these breaches, employees who were participants in this ERISA healthcare plan were left with millions of dollars in unpaid claims, and the district court correctly concluded that Doyle and Holloway were each responsible for millions of dollars in plan losses that resulted from their breaches.

First, based on the record and this Court's recognition of the governing law, the district court correctly determined that because the governing Trust Agreement gives the Fund an ownership interest in all contributions paid from the participating employers enrolled in the Fund, these contributions were plan assets.

Second, the court also correctly concluded that Holloway breached her fiduciary duties as trustee to the Fund. Holloway did not create any meaningful procedures or standards for the Fund's management or administration. Holloway failed to hold the plan assets in trust, failed to exercise exclusive control over the Fund's plan assets, and failed to maintain basic financial management of plan assets. These failures, as well as her failure to investigate red flags concerning the operation of the Fund, permitted the diversion of plan assets to happen. While acknowledging the numerous problems that put the Fund at risk, she resigned without confronting or resolving any of them. This administrative void that Holloway created allowed Doyle and others to divert over 60% of the plan assets he collected.

Third, the district court concluded that Doyle had control over these assets and therefore was a functional fiduciary with regard to the assets. Moreover, based on essentially uncontroverted evidence, the court concluded that Doyle diverted over 60% of these plan assets for non-Plan purposes in order to benefit himself and his company and to benefit PCI/NP.

Finally, the district court correctly held Doyle and Holloway liable for the losses to the Funds resulting from their fiduciary breaches.

ARGUMENT

I. The District Court Correctly Ruled That All of the Amounts Employers Paid Were Plan Assets

ERISA is a remedial statute and should be construed in favor of protecting participants in employee benefit plans. Einhorn v. M.L. Ruberton Const. Co., 632 F.3d 89, 98 (3d Cir. 2011).

This Court identifies plan assets using ordinary notions of property law where, as here, no statutory or regulatory definition directly applies. J.A.1282. Under this approach, plan assets generally include "any property, tangible or intangible, in which the plan has a beneficial ownership interest." Id. (quoting

Dep't of Labor, Advisory Op. No. 93–14A, 1993 WL 188473, at *4 (May 5, 1993)).

A plan obtains a beneficial interest in specific property if "the property is held in trust for the benefit of the plan or its participants and beneficiaries." Dep't of Labor Advisory Op. No. 94-31A, 1994 WL 501646, at *2 (Sept. 9, 1994); see also Black's Law Dictionary 885 (9th ed. 2009) ("beneficial interest" means "[a] right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing"). Whether a plan has beneficial interests in specific property largely turns on the facts and circumstances of a given case. See Edmonson v. Lincoln Nat'l Life Ins. Co., 725 F.3d 406, 427 (3d Cir. 2013). This Court has stated that documents governing the plan may establish such beneficial interests. J.A.1282-83 (citing Metzler v. Solidarity of Labor Organizations Health & Welfare Fund, No. 95-7247, 1998 WL 477964, *6 (S.D.N.Y. Aug. 14, 1998), aff'd 224 F.3d 128 (2d Cir. 2000) (per curiam); Galgay v. Gangloff, 677 F. Supp. 295, 301-02 (M.D. Pa. 1987), aff'd 932 F.2d 959 (3d Cir. 1991); Dep't. of Labor, Advisory Op. No. 94–31A at *7).

Based on this framework, this Court asked the district court to determine whether Check 1 and 2 monies were plan assets. The district court ruled that:

> [T]he relevant documents, when read together, establish the Fund's property interest in all of the money which employers forwarded to PCMG ("Check 1" and "Check 2"). The Declaration of Trust created the Fund. The forms which the employer executed established their relationship with the Fund,

> and showed the payments which they were required to make to participate in the Fund. As such, the combined amount will be considered plan assets under ordinary notions of property rights.

J.A. 30-31.

A. The district court correctly found that the governing plan documents – the Trust Agreement and related enrollment documents – gave the Fund a beneficial ownership interest in the participating employers' contributions

The governing plan document that formed the Fund is the Trust Agreement, which states that:

> There is hereby established a Trust Fund into which shall be paid on or after May 1, 2001 any and all contributions payable by EMPLOYERS or any other eligible EMPLOYER who agreed, in writing, to be bound by the terms of this Agreement.

J.A.28 (emphasis added). Moreover, the Trust Agreement made clear that the "Trustees shall … consider as assets of the Trust Estate contributions owing from any EMPLOYER required to make to the Fund." J.A.98 (emphasis added). Similar language in numerous cases created a beneficial interest in unpaid employer contributions. See, e.g., Hawkeye Nat. Life Ins. Co. v. AVIS Indus. Corp., 122 F.3d 490, 498 (8th Cir. 1997); Trustees of the Bricklayers & Allied Craftworkers Local 13 Defined Contribution Pension Trust for S. Nevada v. Granite Works, Inc., No. 2:10-CV-00767-HDM, 2011 WL 3159099, at *3 (D. Nev. July 26, 2011) (unpublished) (listing authorities); Trustees of the Nat'l Elevator Indus. Pension v. Lutyk, 140 F. Supp. 2d 407, 411 (E.D. Pa. 2001); NYSA-ILA Med. & Clinical Servs. Fund v. Catucci, 60 F. Supp. 2d 194, 200-01 (S.D.N.Y.

1999) (listing authorities). Accordingly, all employer contributions actually paid by employers are plan assets and, therefore, the employer contributions retained or diverted by PCMG and PCI/NP were also all plan assets. Metzler, 1998 WL 477964, at *7; 224 F.3d at 128 (Second Circuit and the district court finding employer contributions paid to an intermediary based on analogous trust language constituted plan assets); J.A.35 (citing Metzler).

Defendants raise two formalistic arguments to escape the consequences of this clear language in the governing plan document. First, defendants argue that the "employer" in the Trust Agreement only refers to the handful of employers who signed the trust agreement, such as PCI/NP, and not to the many participating employers at whom the Fund was aimed. Holloway Br. at 26. Second, defendants argue that "contributions" in the Trust Agreement only refers to those contributions required under the collective bargaining agreement. Id.

B. The district court correctly considered all the participating employers to be "co-employers" within the meaning of the Trust Agreement

Defendants contend the Trust Agreement never applied to the employers that defendants signed up and enrolled into the Fund because those employers were never the "employers contributing to the Fund." Holloway Br. at 25 n.9. This sophistry is easily belied by the governing contracts between PCI/NP and PCMG, and the participating employers' understanding of their relationship. The contract between PCI/NP and PCMG clearly stated that PCMG would enroll "co-employers" and described the contributions from these employers as "co-employer contributions." J.A.130. The enrollment forms that these employers signed likewise contemplated the participating employers would be "co-employers" for "[c]ompliance with [ERISA]." J.A.132. Thus, the district court correctly found that both PCI/NP and the participating employers whom Doyle signed up for coverage were "co-employers" within the meaning of the Trust Agreement. J.A.12 n.1, 13 n.3 (finding that PCI/NP and PCMG clients are "co-employers").

Likewise, the Secretary's long-standing guidance states that such clients or co-employers are "employers" under ERISA because they, in fact, exercise control over the employee-participants, the actual owners of the Trust and its beneficial interests. See Dep't of Labor Advisory Op. No. 2005-12A, 2005 WL 1208699, at *2 (May 16, 2005); Dep't of Labor Advisory Op. 93-29A, 1993 WL 433783, at *3 (Oct. 22, 1993) ("[a]ny Client that in fact exercises employer control and authority over employees covered under . . . Program would be an 'employer' with respect to such employees for purposes of ERISA section 3(6)"). Because the Trust was intended to protect the contributions made on behalf of employees, J.A.93, employers making contributions on their employees' behalf should be considered the actual "employer" for the purposes of the Trust. J.A.91 (covering members who are actually "employed" by "employers"); see also J.A.212 (Texas insurance commissioner noting that PEOs "do not exercise any control over its client employers or the client employer's employees").

Moreover, defendants' reading of "employer" in the Trust Agreement to exclude the actual employer-clients because PCI/NP was the "co-employer" only serves to perpetuate the fraud and hurt the actual employees and their employers who contributed to the Fund. <u>See</u> J.A.1263; 22 (Louisiana insurance commissioner noting PCI/NP's fraudulent use of "co-employer" relationship to shield plan from state regulation); <u>see generally</u> <u>Alman v. Danin</u>, 801 F.2d 1, 3 (1st Cir. 1986) (ruling that "the doctrine of corporate entity . . . will not be regarded when to do so would work fraud or injustice" in ERISA).

Finally, the Trust Agreement also contemplated that "employers" would "agree[] in writing" in related documents to be bound by the terms of the Trust Agreement, such as the enrollment packet. J.A.1298. The enrollment packet included six forms that consistently reflect the co-employer's intent to participate in the Fund. <u>Id.</u> By checking specific boxes in the "Client Services Agreement," employers agreed in writing to participate in the Fund. J.A.28–29. This form did not identify the Fund by name, but another page of the form stated that "[t]his health and welfare plan is sponsored by [PITWU]." J.A.29. The enrollment forms confirm the enrolled co-employers' intent to abide by the terms of the Trust Agreement, which established and governed the PITWU Fund.[7]

C. <u>The district court correctly disregarded the "bogus" collective bargaining agreements in considering the definition of plan assets</u>

Defendants continue to argue that this Court should refer to the collective bargaining agreements in determining what assets belonged to the plan. Holloway Br. at 11; Doyle Br. at 12. Defendants contend that these agreements, which the participating employers never saw, established the amount of employer contributions payable, and that contributions paid beyond that amount were not plan assets. Holloway Br. at 22. This ignores this Court's determination that the collective bargaining agreements were, in fact, "bogus" and that consideration of the case on remand should be undertaken with the nature of deceptive scheme "firmly in mind." J.A.1267 n.24. On remand, the district court confirmed the collective bargaining agreements between PITWU and PCI/NP were bogus and designed to further an illegal scheme. J.A.27-28.

[7] Defendants' argument that contributions are plan assets only if they are payable to the Fund in accordance with language in the Trust Agreement, Holloway Br. at 23-25, is similarly flawed. Under the fraudulent scheme, defendant Doyle gained the discretion and control over the billing system, infra pp. 46-54; he instructed the participating employers to send their contributions via checks payable to non-Fund entities in contravention of the Trust Agreement requirement. If Holloway and Doyle had enforced this requirement, a diversion of assets might have been averted.

Defendants do not dispute this. Instead, they argue that notwithstanding this illegality, courts should read the agreements as a limitation on the definition of plan assets here so as to relieve defendants of their liability. Reliance on the collective bargaining agreements for this purpose is untenable. As the cease-and-desist orders repeatedly state, and the district court agreed, the enrollment of co-employers' employees into the Union was designed to support the fraudulent marketing of the scheme to avoid state insurance regulation. See supra pp. 48-53 (describing the cease-and-desist orders finding fraud in the marketing of the Fund such as the assertion that the Fund was not subject to state regulations). The participating employers and their employees who were the victims of this fraudulent scheme should not be bound by bogus collective bargaining agreements that govern a Union they and their employees were fraudulently induced to join, particularly considering that participating employers and their employees did not even see these agreements before enrolling. See Nash v. Trustees of Boston Univ., 946 F.2d 960, 967 (1st Cir. 1991) (rendering voidable ERISA-related agreements "induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying"). Defendants' reading would, again, endorse the fraudulent scheme by accepting the collective bargaining agreements' contribution rates set by the schemers themselves without any "bona fide" collective bargaining, J.A.1266 n.23, or any acknowledgment from the co-employers or their employees. J.A.28.

Defendants offer no justification for this Court to rely on a "bogus" document. Instead, defendants recite the unremarkable proposition that collective bargaining agreements may be governing plan documents and may define plan assets in some cases. Holloway Br. at 15; Doyle Br. at 12. None of the four decisions Holloway cites establish a per se rule, untethered to the facts and circumstances of the case, that a collective bargaining agreement is always a governing plan document. Holloway Br. at 19-27. The four cases cited by defendants are inapposite because none of them involved any question about the legality of the collective bargaining agreements at issue, nor was there any question about whether the employers had seen the documents. Id.

Defendants' repeated reference to the language of ERISA section 515, 29 U.S.C. § 1145, demonstrates the hollowness of their argument. Section 515 states that every employer obligated to make payments "under the terms of a collectively bargained agreement shall . . . make such contributions in accordance with . . . such agreement." 29 U.S.C. § 1145 (emphasis added). This Court specifically found that the sham contracts created by PCI/NP and the Fund trustees "were not the result of bona fide collective bargaining"—i.e., they were not collectively bargained. J.A.1266 n.23. Moreover, section 515's purpose is to empower participants to compel employers to pay their "'promised contributions' on a regular and timely basis," not to create a shield to protect fiduciaries from liability. Laborers Health & Welfare Trust Fund For N. California v. Advanced Lightweight Concrete Co., 484 U.S. 539, 546 (1988).

D. It was not clear error for the district court to rely on the enrollment packet in its analysis of plan assets

The Trust Agreement clearly states that "any and all" contributions payable by employers must be held in trust. J.A.92. It further provides "[t]hat the Trustees shall jointly have custody of all monies and other property belonging the Trust Estate. . ." J.A.98.

The enrollment forms, which include the "New Business Turn-in Form," plainly define the monthly contributions per employee as a "total" and a lump sum. J.A.29-30. The district court thus concluded that, "[f]rom the employers' point of view, this combined amount [was] the cost of the insurance for each employee." J.A.30. Relying on the Trust Agreement, as well as the enrollment forms, the district court found that "a clear reading of the [enrollment packet] is that the total amount of the employer's contribution is the property of the Fund." Id. This includes both "Check 1" and "Check 2." Id.[8]

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[8] Holloway argues the district court had improperly relied on the "hypothetical example of an internal document" that she alleges the Department of Labor had "created solely for demonstration at trial" using Disney names as applicants. Holloway Br. at 19 n.7; see also J.A.152–57. That document, however, was not

Defendants argue against using the enrollment forms in an analysis of plan assets because the forms do not constitute the actions and representations of "the plan sponsor." Advisory Op. No. 94-31A, 1994 WL 501646, at *3; accord Kalda v. Sioux Valley Physician Partners, Inc., 481 F.3d 639, 647 (8th Cir. 2007). Defendants contend the enrollment forms were not "created or controlled by the PITWU Fund in any way," and, are, therefore, irrelevant to plan asset analysis. Doyle Br. at 19. The record, however, supports the district court's decision to rely on the enrollment forms.

Given the clear language of the governing documents, it is unnecessary to find that the enrollment forms are attributable to the Fund. The Trust Agreement plainly states "any and all" contributions by employers must be held in trust; if the employers, after reading the enrollment forms, intended to submit a certain total amount of employer contribution as payment for their employees' participation in the Fund, then that total contribution amount becomes a plan asset. J.A.92.

Regardless, it was not clear error for the district court to infer, as state regulators did, that PCMG and PCI/NP's enrollment forms and related representations were attributable to the Fund. J.A.179-80 (insurance commissioner found that PCI/NP and PCMG were acting as an insurance agent for the Fund);

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created by the Secretary. It was created jointly by Doyle and PCI/NP to train sales consultants, J.A.763–64; 1173–74, and Doyle testified that this hypothetical accurately represented sign up forms. See J.A.765, 768.

J.A.212 (Texas insurance commissioner finding that PCMG marketed the Fund); J.A.224 (Massachusetts insurance commissioner made a similar finding).

The enrollment forms referred to the Fund and the co-employers viewed these forms as "applications" to the Fund. J.A.793-94. Though PCMG may not have been a formally authorized agent of the Fund, PCMG operated for over a year with the Fund's apparent authority. See Pell v. E.I. DuPont de Nemours & Co. Inc., 539 F.3d 292, 301 (3d Cir. 2008) (applying apparent authority in the ERISA context). PCMG and Doyle conducted the billing, the receipt, and remittance for employer contributions to the Fund. PCMG served as the conduit to enroll employees into the Fund and changed coverage for existing participants. J.A.763-65; 800; see also J.A.133 (PCMG processed forms related to changes to the existing client's coverage, such as a dependent add-on). PCMG communicated to employers about their employees' entitlement to benefits. Id. (PCMG representatives are responsible to ensure the employer understands its membership in the Union and his employees' entitlement to the Health Benefit Plan). Because the enrollment packet was the only method to secure health benefits from the Fund, it was more than reasonable for the target small businesses to believe that the statements in the enrollment packet were authorized by the PITWU Fund. See J.A.29.[9]

Moreover, these enrollment forms were also sent to the plan administrator who reviewed and accepted them. J.A.162. Accordingly, key Fund actors knew about Doyle's and PCMG's representations and permitted him to keep making them for over a year. In re Mushroom Transp. Co., Inc., 382 F.3d 325, 345 (3d Cir. 2004) (noting apparent authority may be the "authority which, although not actually granted, the principal knowingly permits the agent to exercise") (emphasis added). All of the Fund trustees (Holloway included) unquestionably acquiesced or ratified Doyle's representations by continuing to accept millions of dollars accruing from Doyle's enrollment activities, even after being made aware of his role in the scheme through the various cease-and-desist orders. "[T]he concept of ratification in agency law binds a principal to an unauthorized agent's acts if the principal knows of the acts but fails to take affirmative steps to disavow them." Residential Reroofers Local 30-B Health & Welfare Fund of Philadelphia & Vicinity v. A & B Metal & Roofing, Inc., 976 F. Supp. 341, 346 (E.D. Pa. 1997) (citing United States v. One 1973 Rolls Royce, 43 F.3d 794, 818 n.26 (3d Cir.

[9] Defendants' statement that the district court "acknowledged that no PCI or NP client signed any document that specifically named the PITWU Fund" is correct only insofar as the term "PITWU Fund" was not used. The district court, however, found that employers "executed" a page of the form stating that "[t]his health and welfare plan is sponsored by [PITWU]." J.A.29.

1994)); see also Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 85 (1995) (acknowledging the plan sponsor's possible ratification of an unauthorized act).

Finally, the agreement between Doyle and PCI/NP makes clear that he and others acting under the agreement were collecting employer "contributions." J.A.129 ("PCMG shall be responsible for all contributions received"); id. ("All fees due to PCMG shall be payable monthly following receipt of applicable contributions from co-employers by [PCI/NP]."). Indeed, Doyle stipulated that he received "[t]he employer contributions to the PITWU Fund" which "were deposited in the PCI operating checking account from which normal business expenses were paid . . .". J.A.640.

This is not a situation where Doyle made a single representation and there is a question whether that representation was later affirmed by the Fund. Doyle, for more than a year, made this representation thousands of times, resulting in millions of dollars in contributions being collected in the Fund's name. J.A.23; 1265. Under these circumstances, it is not clear error to infer that Doyle's statements were attributable to the Fund. See Restatement of Law of Agency § 83 comment c. (2007) (noting ratification through conduct is appropriate where the principal "receives or retains property to which he is entitled only if the earlier transaction is validated").[10] The district court did not err in examining these enrollment forms to determine plan assets.

II. The District Court Correctly Ruled that Holloway Breached Her Fiduciary Duties as Trustee When She Failed to Prudently Manage The Fund and Did Nothing to Prevent the Diversion of its Assets

This Court asked the district court to determine whether Holloway breached her duties. The district court found that she failed to protect plan assets from diversion by her co-fiduciaries, failed to maintain financial records, resigned without prudent precautions, and was thus liable to restore to Fund the diverted monies. J.A.45.

A. Holloway's Fiduciary Duties

Holloway acknowledges "[she] was a named fiduciary, and thus was obligated to discharge her duties to the Fund '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.'" Holloway Br. at 28 (quoting J.A.1277 (citing 29 U.S.C. § 1104(a)(1)(B))). As a fiduciary, Holloway also had to discharge her duties "solely in the interest of the [ERISA plan] participants and

[10] Defendants' footnote argument, Holloway Br. at 26 n.10, about the Fund's inability to sue PCI or PCMG for unpaid employer contributions is irrelevant because the claims here do not concern liability for employer contributions but rather the illegal diversion of employer contributions already paid and collected by a fiduciary.

beneficiaries." 29 U.S.C. § 1104(a)(1). ERISA requires a plan trustee to hold plan assets in trust and maintain them in the trustee's exclusive control. See ERISA § 403(a), 29 U.S.C. § 1103(a). "The fiduciary obligations of the trustees to the participants and beneficiaries of [an ERISA] plan are those of trustees of an express trust—the highest known to the law." Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

Holloway suggests that the district court's ruling judged her performance by hindsight. Holloway Br. at 29. As in Chao v. Merino, 452 F.3d 174, 183 (2d Cir. 2006), this contention is "belied by the record," which supports the district court's finding that Holloway had failed to protect the fund from the risk of harm – a potential diversion of plan assets – apparent to her at the time of the events in question. "If a fiduciary was aware of a risk to the fund, he may be held liable for failing to investigate fully the means of protecting the fund from that risk." Merino, 452 F.3d at 182 (finding fiduciary imprudent for failing to take "precautionary steps" before hiring a firm to collect contributions when the fiduciary knew it had previously misappropriated contributions); see also Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir. 1984) (finding fiduciary failed to conduct a reasonable investigation for an investment that was "a loser from its inception").

B. Holloway's Knowledge about the Scheme

The record provides substantial evidence that Holloway knew or should have known about the "scheme" and the attendant risks to the Fund, including the diversion of plan assets. The district court had found that Holloway's knowledge or risks to the Fund began virtually at the inception of the Fund. J.A.41.

> From nearly the inception of her trusteeship, Holloway was aware that: there were 'boxes' of claims that had not been processed; that there were large numbers of unpaid health claims; financial reports could not be prepared because of the lack of financial data; the TPA reported insufficient funding to pay adjudicated and valid claims; and a number of states had issued cease-and-desist orders forbidding the PITWU Fund from operating within their borders, three of which named her as a party.

J.A.41 (emphasis added).

Specifically, Holloway's brief ignores the cease-and-desist orders as putting Holloway clearly on notice about the scheme. Starting in January 2002, state insurance commissioners issued cease-and-desist orders against members of this scheme. J.A.21. In June 2002, Louisiana issued an order to the PITWU Fund, for which Holloway was the named trustee, noting clearly that employees "do not directly join the union, and receive no representation or benefit from PITWU other than access to the union sponsored health plan" and that "[o]ne 'employer' from Louisiana who contracted with PCI and enrolled in the health and welfare fund did not include any employees or activate any PEO services other than the health benefits." J.A.180.

This order also put her on notice that, despite the lack of PEO services, "[m]onthly premiums for insurance, PEO charges and other fees [were] collected by PCMG [and] PCMG also pays compensation to its marketing force on a multi-level basis that includes levels for consultant, sales manager, district manager, regional manager, area manager and national manager." J.A.181. These additional fees should have alarmed a fiduciary, as Holloway testified that she "knew that the Union performed no representation or collective bargaining function apart from collecting dues." J.A.40.

Not surprisingly, by October 2002, a month after Holloway resigned, the Fund had incurred over $7.6 million in unpaid claims. J.A.23; 1265. In her resignation letter, she listed the Fund's structural problems as one of several reasons for her resignation, including: "[n]o financial accountability for contributions to the [Fund] by other membership," and the "[v]ulnerability of the fund due to actions taken by membership that has created insolvency of the fund." J.A.19; 196-97. Holloway recognized the "chaotic state of affairs of the Fund." J.A.196.

Holloway's arrangements with Oak Tree, the Fund's claims administrator during March to June 2002, reinforce the district court's finding that she knew about these risks to the Fund well before her resignation. J.A.15-16. To protect her own company, EDI, another purported PEO in this scheme, she used her authority as the Fund trustee to direct that any contributions forwarded by EDI would only pay the claims of participants enrolled through her company but not the claims of participants enrolled through PCI/NP. J.A.1046; Holloway Br. at 22. Accordingly, the record confirms that Holloway knew well before she resigned that: (1) there was no "financial accountability" for the Fund's collection of contributions; (2) significant fees were taken out of the contributions; and (3) contributions could not cover the claims for benefits, leading to inevitable insolvency. Holloway's arguments that she did not know about PCI/NP and PCMG's fees or their enrollment practices, Holloway Br. at 24, are particularly incredible given that she was the head of a PEO also marketing the Fund to clients and she had discussed the PCI/NP enrollment forms in trustee meetings with the plan administrator. See Holloway Br. at 22; J.A.162 (Enrollments), 164. The district court did not clearly err in concluding that Holloway knew of significant risks to the Fund well before her resignation.

C. Holloway Failed to Protect the Fund

As the district court recognized, many red flags should have alerted Holloway to protect the Fund and, particularly, its flawed collection of employer contributions. The district court rightfully concluded that Holloway failed to prudently manage plan assets and investigate signs of a diversion of plan assets, two duties paramount to ERISA fiduciaries. See J.A.39-41. Consequently, the district court correctly held Holloway liable for any diversion of the employer contributions. J.A.44-45. "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a) (emphasis added).

As an initial matter, Holloway contests the judgment because these failures, even if they did occur, did not actually cause the monetary loss imposed in the judgment, i.e., the diverted amounts from Checks 1 and 2. Holloway Br. at 31; 45-48. Holloway argues that her failures could not cause the monetary loss because she "had no knowledge," id. at 47, of the diversion of contributions, and, therefore, could not have stopped it. This is an improper and unduly narrow reading of 29 U.S.C. § 1109(a)'s "resulting from" language. This Court has read "resulting directly from" as "proximate causation." Resolution Trust Corp. v. Fid. & Deposit Co. of Maryland, 205 F.3d 615, 655-656 (3d Cir. 2000). Under this causation standard, a violation need "not be the sole cause of harm. It suffices if it is a substantial contributing factor to the harm suffered." Id. at 656 (internal quotation marks and citation omitted). The district court correctly concluded, as described in the following sections, that Holloway's failures, at the very least, were a "substantial contributing factor" to the diversion of plan assets.

1. *Holloway Failed to Establish Administrative Procedures*

Holloway's failure to establish the basic administrative procedures and financial controls not only violated her statutory obligations to the Fund but enabled the scheme. Both ERISA and the Trust Agreement required Holloway, as the Fund's trustee, to hold the Fund's assets in trust and maintain them in the trustee's exclusive control. See ERISA §§ 403(a), 404(a)(1), 29 U.S.C. §§ 1103(a), 1104(a)(4); Trust Agreement (requiring "[b]oth the principal and the income of the Trust Fund shall be held in trust"), J.A.93. In addition, creating financial control mechanisms is one of the "principal statutory duties imposed on trustees" like Holloway. See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142-43 (1985); Varity Corp. v. Howe, 516 U.S. 489, 511-12 (1996); Trust Agreement, J.A.98-99 (requiring Trustees to "keep separate books of account of their financial transactions").

As this Court has long recognized, "[t]here is no more fundamental duty imposed on those who hold property for others than that of rendering an account of its management." In re Pittsburgh Rys. Co., 117 F.2d 1007, 1008 (3d Cir. 1941) (debtor in possession); see also Landis v. Scott, 32 Pa. (8 Casey) 495, 502-03 (Pa. 1859) ("The duty of a trustee . . . to keep regular and correct accounts, is imperative. If he does not, every presumption of fact is against him. He cannot impose upon his principal . . . the obligation to prove [w]hat he has actually received. . . . By failing to keep and submit accounts, he assumes the burden of repelling the presumption and disproving negligence and faithlessness."). "A trustee has a duty to account to beneficiaries of the trust." Libbey-Owens-Ford Co. v. Blue Cross & Blue Shield Mut. of Ohio, 982 F.2d 1031, 1036 (6th Cir. 1993) (quoting Restatement (Second) of Trusts § 172 comment c (1959)); cf. In re Lemington Home for Aged, 659 F.3d 282, 291 (3d Cir. 2011) (recognizing a breach of fiduciary duty of care because of poor financial record-keeping and management). The prudence in the financial management and reporting of the plan is the necessary foundation for the fiduciary's required monitoring of the plan and its fiduciaries. Cf. Merino, 452 F.3d at 182; Ream v. Frey, 107 F.3d 147, 156 (3d Cir.1997) (finding fiduciary liable for failing to prudently monitor service providers).

Holloway and her co-trustees created the Fund without establishing adequate financial management and financial record-keeping, thus violating these fundamental duties as ERISA trustees. E.g., J.A.16 (describing Oak Tree's report of deficiencies in the Fund's financial management); J.A.170 (minutes of trustee meeting noting lack of financial reporting); J.A.1016 (testifying that the accountant did not have the necessary information). To perform these most basic duties as a trustee, Holloway should have established financial controls and records that would have deterred Doyle and others from diverting plan assets. As the record shows, the Fund had no mechanism for the trustees or anyone else administering it to know whom Doyle or others had enrolled in the Fund or what monies they collected from employers they enrolled. See Holloway Br. at 40 (admitting a lack of knowledge). Holloway in her resignation letter emphasized the "chaotic" nature of the operation, a "lack of structure, accountability, and communication," "no financial accountability for contributions," and lack of "financial records" required by the accountants and actuary. J.A.196-97. Had Holloway, for example, established even a rudimentary financial control mechanism, such as a spreadsheet, the diversion would have been immediately apparent when the amounts collected did not match the amounts deposited. The employer contributions also should have been collected under a trustee's supervision and immediately deposited into a trust account exclusively controlled by a Fund trustee, as required by ERISA §§ 403(a), 404(a)(1)(B), and the Trust Agreement itself, J.A.93. This requirement would have deterred any diversion, let alone 60% of contributions paid, along the way. The scheme was able to continue precisely because Holloway and the other trustees could not discern the diversion of money from the contributions. E.g., J.A.212 (insurance commissioner noting that the lack of proper records hid the fraud associated with the contributions). Her admitted lack of awareness of PCMG and the various amounts it took in fees is merely a symptom of her overall failure to institute proper financial management. Holloway Br. at 40. This failure is a substantial contributing factor to the diversion of plan assets.

The district court's findings establish that Holloway violated her most basic duties as a trustee by failing to establish basic administrative procedures and financial controls that could have deterred the diversion of plan assets; Holloway has not demonstrated the district court's findings are clearly erroneous. J.A.39-41 (citing Restatement (Third) of Trusts §§ 76(2)(b)), 83; Ream, 107 F.3d at 156.

2. *Holloway Failed to Investigate the "Scheme's" Red Flags*

This Court has recognized that a basic ERISA fiduciary duty is the duty to conduct an independent investigation. In Re Unisys Savings Plan Litig., 74 F.3d 420, 435 (3d Cir. 2005). "Not to investigate suspicions that one has with respect to the funding and maintenance of the plan constitutes a breach of that duty." Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1403 (9th Cir. 1995). Consistent with this settled precedent, the district court found that Holloway breached her duty of prudence by ignoring evidence that the Fund was being mismanaged "[f]rom nearly the inception of her trusteeship." J.A.41. In light of these findings, the district court concluded that Holloway breached her duty to "more fully" investigate, which "would have revealed the Fund's potential insolvency and/or the diversion of assets." J.A.41 (emphasis added). It is not, as Holloway suggests, the discovery of actual misconduct that triggers liability, Holloway Br. at 36-41, but rather the risk that plan assets could be diverted, a risk she could have guarded the Fund against. Merino, 452 F.3d at 182; Ream, 107 F.3d at 156 ("[W]e think that ordinary common sense should have warned [the fiduciary] of this possibility").

"[T]he thoroughness of a fiduciary's investigation is measured not only by the actions it took in performing it, but by the facts that an adequate evaluation would have uncovered." In re Unisys Sav. Plan Litig., 74 F.3d at 436. According to the court, the evidence of mismanagement and inexplicable lack of financial data from her co-fiduciaries should have prompted Holloway to ask for the financial records of PCI/NP and PCMG, which would have shown "how much of the employer contributions PCMG was keeping as sales commissions, how much the [Union] was taking in dues, or how much PCI/NP was paying to itself as salaries and business expenses." J.A.41. A review of "PCMG's and PCI/NP's bank records for the months of January through August 2002," for example, "would have [revealed] that PCMG received a total of $4.48 million from participating employers during that time period, and that only $1.3 million of that money was paid" to the Fund's administrators or to pay benefit claims. J.A.41. Holloway could have also investigated the reasons ECI, one of the two original PEOs, left the Fund before it sued her for fiduciary breach. Holloway would have obtained evidence about the diversion of plan assets. She would have had an opportunity to secure protection to the Fund by stopping the diversion, cooperating with regulators, or alerting beneficiaries. <u>See</u> <u>Ream</u>, 107 F.3d at 156; <u>see also</u> <u>Barker</u>, 64 F.3d at 1404 ("Had [the fiduciary] investigated his suspicions and notified the participants of his concerns about the Plan's mismanagement, the participants could have taken steps to have the Plan suitably perform its obligations."). But she did not investigate. And her now admitted lack of awareness that PCMG diverted 60% of the contributions is another sign of her failure to do so. Holloway Br. at 40.

The district court ruled that Holloway violated her duty to investigate based on detailed findings of fact, and Holloway has not addressed these findings much less shown that they are clearly erroneous. J.A.41-42.

3. *Holloway Resigned without Protecting the Plan from Known Harm*

A resigning ERISA plan trustee must "satisfy ERISA's fiduciary standard of care, in addition to whatever contractual duties may be set forth in the plan documentation." <u>Ream</u>, 107 F.3d at 154; Restatement of the Law (Second) Trusts § 106. "Courts that have considered the issue have held that an ERISA fiduciary's obligations to a plan are extinguished only when adequate provision has been made for the continued prudent management of plan assets." <u>Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Secs., Inc.</u>, 93 F.3d 1171, 1183 (3d Cir. 1996). A resigning fiduciary must, therefore, make an effort "to ensure the continued viability of the plan after its resignation." <u>Ream</u>, 107 F.3d at 156.

Holloway cannot deny she knew the dire straits the Fund was in before she resigned. As her own brief admits, Holloway "learned the extent of problems related to the lack of funding claims at a meeting on September 20, 2002, shortly before she resigned (but continued to remain actively involved)." Holloway Br., at 33. "When the extent of the underfunding became apparent, combined with cease-and-desist orders being issued due to PCI/NP and PCMG's questionable actions, she resigned." Id. at 34. Ream and Glaziers reiterate the undisputed principle that a trustee cannot escape her responsibilities and liabilities just by resigning; she must ensure the plan is prudently managed after her resignation. As Ream suggests, the Secretary as plaintiff need not "rerun the course" and hypothesize what she should have done to do so. 107 F.3d at 156. Holloway had many options, but pursued none.

Holloway clearly knew the Fund was systematically flawed and believed the remaining trustees and professionals had put the Fund in peril.[11] J.A.196-97. At a minimum, Holloway could have urged the appointment of an independent, "suitable[,] and trustworthy" successor. J.A.34. Trustees are authorized to and

[11] Extensive concerns Holloway detailed in her resignation letter directly contradict her current argument that she left the Fund with "adequate and qualified trustees." Holloway Br. at 42. Holloway complained specifically about the other trustees. J.A.197.

have selected their successors when they resign. J.A.16, 379-80.[12] Alternatively, she could have given notice of the Fund's risks to its beneficiaries or hired a competent auditor. Holloway has presented no evidence that she attempted any meaningful action to protect the Fund before or after resigning. See Holloway Br. at 44. The burden to establish a prudent resignation lies with the fiduciary. See Ledbetter v. First State Bank & Trust Co., 85 F.3d 1537, 1546 (11th Cir. 1996). Holloway's references to specific actions are inapposite. Holloway refers to her request to Fund counsel Goldstein a week before her resignation to "bring some accountability" to the Fund. J.A.18. Holloway does not mention that Goldstein told her to "talk to the trustees about that." Id. Rather than replace Goldstein or take meaningful action herself, Holloway resigned days later. Id.

Holloway also highlights another specific action: her "cross-claims [filed] against Mr. Weinstein and one of the Fund's [claims administrators], on behalf of the Fund, in an action brought in Illinois." Holloway's Br. at 44 (citing J.A.1080). Holloway neglects to mention that her cross-claims were filed only after she was

[12] Contrary to Holloway's claim, the Trust Agreement did not prevent her from appointing her replacement (Holloway Br. 45). In fact, it authorized employers, like EDI, to "designat[e] a successor" trustee. JA 92-93. Thus, as EDI's owner, Holloway could have appointed a replacement trustee. In relevant part, the Trust Agreement provided that "[t]he Trustee representing the EMPLOYER and the other EMPLOYERS governed by this Agreement shall be appointed by [ECI] and [EDI]…and a written certification by the Secretary of each appointing Employer shall be satisfactory evidence of such appointment." Id.

sued by a co-employer, ECI, for fiduciary breach for failing to pay ECI employees' health claims. J.A.1043-44, 1046. If such an action would protect the Fund, as Holloway suggests, this raises the question of why Holloway did not sue the other trustees on her own initiative for fiduciary breaches before or after her resignation. Indeed, the district court correctly concluded that Holloway could have asked for an accounting of the Fund. J.A. 41-42.

Holloway has not shown any error in the district court's conclusions or satisfied her burden to identify any action she took to ensure that the Fund's admittedly systemic problems would be addressed. Plainly, she chose to escape liability by resigning and then excused her failure to prudently resign by suggesting that she could not have prevented the eventual damage to the Fund. <u>See</u> Holloway Br. at 46-47. "Courts do not take kindly to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same." <u>In re Beck Indus., Inc.</u>, 605 F.2d 624, 636 (2d Cir. 1979). "'[A]s between innocent beneficiaries and a defaulting fiduciary, the latter should bear the risk of uncertainty as to the consequences of its breach of duty." <u>Id.</u> (quoting <u>Estate of Stetson</u>, 345 A.2d 679, 690 (Pa. 1975)).

4. *Holloway is Liable as a Co-fiduciary*

In addition to her breach of her own duties, "fiduciaries may be liable under **§** 1105(a) even if their co-fiduciary breach is beyond the scope of their own discretionary authority." In re Polaroid ERISA Litig., 362 F. Supp. 2d 461, 481 (S.D.N.Y. 2005); see also In re Worldcom, Inc. ERISA Litig., 354 F. Supp. 2d 423, 445 (S.D.N.Y. 2005) ("[E]very ERISA fiduciary, regardless of the parameters of its duties, is subject to the co-fiduciary liability provision[.]").

The district court ruled that Holloway was liable under section 405 of ERISA, 29 U.S.C. § 1105. J.A.43-44. Holloway argues that she cannot be liable for the breaches of any other fiduciary because she did not know what they were doing. Holloway Br. at 45-47. This argument ignores the terms of section 405(a)(2), which provide that a co-fiduciary can be held liable when "by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, a fiduciary has enabled such other fiduciary to commit a breach." 29 U.S.C. §1105(a)(2).

Holloway not only breached her own duties as trustee by failing to establish and enforce a basic administrative structure to account for and hold the Fund's assets in trust, her failures in this regard enabled Doyle and other plan fiduciaries and providers to divert plan assets. Her breaches created an administrative no-man's land in which Doyle and PCI/NP were able to exercise control over the Fund's assets, and do with them what they chose with little or no accountability. See Free v. Briody, 732 F.2d 1331, 1335-36 (7th Cir. 1984) (finding trustee's failure to take any action to identify or control plan assets or ensure they would be protected from loss contributed to plan losses caused by co-fiduciary's breach).

D. Holloway's Other Legal Arguments Are Without Merit

In light of these findings, Holloway's other arguments are inapposite. Holloway points to her adherence to the plan documents, including a "bogus" CBA. Holloway Brief at 35-36. Following plan documents, even assuming their legitimacy, however, is no defense to breaches of fiduciary duty. See 29 U.S.C. § 1104(a)(1)(D); Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2468 (2014) ("This provision makes clear that the duty of prudence trumps the instructions of a plan document[.]").

Holloway also argues that because the fees were not "excessive," Holloway had no obligation to prevent the diversion of employee contributions to non-plan entities. Holloway Br. at 34-35. The "[b]asic principles of the law of fiduciaries . . . place the burden to render an accounting on the fiduciary once the principal has shown that funds have been entrusted to the fiduciary and not paid over or otherwise accounted for." In re Niles, 106 F.3d 1456, 1462 (9th Cir. 1997). The district court correctly ruled that the plan assets diverted from both Checks 1 and 2 were paid for services that were unnecessary, non-existent, in violation of state law, and did not serve Fund purposes. J.A.37-38. Diversion of plan assets for these reasons necessarily violates ERISA's prudence and loyalty requirements, as well as its requirement that plan assets be used solely to pay benefits and to defray reasonable expenses. See 29 U.S.C. § 1104(a)(1)(A). Holloway's brief has failed to identify why or how the diversion of contributions served the Fund's interest; the only purpose was to compensate entities Holloway describes as "***not*** providing service to the Fund," Holloway Br. at 35. Holloway has not shown the district court's findings to be clearly erroneous.

Ultimately, Holloway's first and most critical fiduciary breach was her failure to perform a trustee's duty to establish administrative procedures adequate to protect plan assets, including the creation and maintenance of claims and financial records. This threshold breach allowed the diversion of plan assets and set the stage for the Fund's chaotic collapse. Every administrator and professional that served the Fund after Union Privilege Care told Holloway that they could not do their jobs, including an assessment of the Fund's financial condition, due to the lack of records. Having set the Fund on a certain course for failure, which she recognized, Holloway cannot now simply allege that the clearly foreseeable results of her initial breach are only obvious in hindsight.

III. The District Court Correctly Ruled that Doyle Was a Functional Fiduciary and Breached His Fiduciary Duties by Diverting Plan Assets

This Court asked the district court to determine whether Doyle was a functional fiduciary because he exercised control over plan assets. The district court found that he exercised discretionary control over Check 1 and 2 monies and breached his fiduciary duties by diverting those funds. J.A.45.

A. Doyle's Fiduciary Status

ERISA defines a fiduciary "in functional terms of control and authority." Srein v. Frankford Trust Co., 323 F.3d 214, 220 (3d Cir. 2003) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993)). "[A] person is a fiduciary with respect to a plan to the extent he [(a)] exercises any discretionary authority or discretionary control respecting management of such plan or [(b)] exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i). This Court emphasized the "significant difference between the two clauses" because "discretion is specified as a prerequisite to fiduciary status for a person managing an ERISA plan, but the word 'discretionary' is conspicuously absent when the text refers to assets." Bd. of Trustees of Bricklayers & Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Assocs., Inc., 237 F.3d 270, 272-74 (3d Cir. 2001). "This distinction is not accidental – it reflects the high standard of care trust law imposes upon those who handle money or other assets on behalf of another." Id. at 273 (citation omitted). Accordingly, "Congress established a lower threshold for fiduciary status where control of assets is at stake." Id. at 274.

Although Doyle focuses on the difference between Checks 1 and 2, Doyle Br. at 19-24, the district court found, with ample support from the record, the employer's enrollment packages contemplated a lump sum, a single amount payable for the Fund's health coverage. J.A.29-31. "The forms signed by the employer to adopt the Fund as a health plan for his employees did not parcel the premium into Fund assets and other monies." Id. Doyle provides no basis to suggest that these findings were clearly erroneous. And he admitted at trial that he deposited lump sum enrollment checks in PCMG's account and then "abstracted" funds from that account to forward to PCI/NP for the Fund. J.A.765-67.

This single lump sum contribution constitutes the employer contribution paid and a plan asset. Doyle argues that he did not have discretion over plan assets because neither check was payable to the Fund and he executed the checks accordingly. Doyle Br. at 14. The district court rejected this argument. J.A.30 (finding that "[f]rom the employer's point of view, the combined amount was the cost of the insurance for each of his employees"). "That the cost … was later broken apart by invoice into two checks does not defeat the conclusion that the employer payments constituted Fund assets within the meaning of ERISA." Id.

Consistent with the district court's conclusion, Doyle clearly exercised control over plan assets by both managing the billing system on behalf of PCI/NP and the Fund and then by collecting plan assets based on his invoices. See J.A.15, 36, 195, 198-99, 345, 645, 780-81, 1178. Doyle, who was neither a trustee nor a named fiduciary, instituted the two-check arrangement after enrollment even though this procedure was not contemplated in the enrollment forms or any other plan document. See J.A.29, 1116, 1176-77. He instructed the employers of the recipient and the amounts for these checks. J.A.30, 1120, 1168, 1188-90; 1199.

Doyle's diversion of employer contributions by invoicing and billing the employers for fees that he set in concert with PCI/NP through his two-check system (see J.A.30; 1168) demonstrated his control over plan assets (paid employer contributions) and is analogous to control over check-writing from plan accounts, which is a well-established basis for fiduciary status under ERISA. See Bd. of Trustees of Bricklayers, 237 F.3d at 274 (citing numerous cases, including Yeseta v. Baima, 837 F.2d 380, 386 (9th Cir. 1988)). Whether Doyle had authorization from the trustees or PCI/NP (a non-trustee) is of no relevance as Doyle had sufficient "control" over these employer contributions. See Yeseta, 837 F.2d at 386.

Moreover, should this Court focus on Doyle's post-collection control over the separate Check 1 and Check 2 funds, Doyle still exercised fiduciary control over these two funds. It is undisputed that Doyle exercised sufficient control over the Check 2 funds to make him a fiduciary as to those funds. Doyle argues only as to Check 2 that those funds were not plan assets. Doyle Br. at 18–20. He does not argue that he lacked the requisite control. See United States v. Pelullo, 399 F.3d 197, 222 (3d Cir. 2005) (noting that "an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal"). Regardless, Doyle's control is clear for Check 2 funds as Check 2 was payable directly to Doyle's company in amounts he dictated. See J.A.771; 36 (noting that "Doyle conceded at trial that he set the commissions and billing fees for PCMG and its marketing agents, virtually unilaterally.").

Doyle also exercised sufficient control over the Check 1 funds. He effectively concedes Check 1 funds are plan assets because they contain employer contributions paid to the Fund. Doyle Br. at 15. Doyle's billing, collection, possession, remittance, and accounting for these employer contributions constitute sufficient control over plan assets. See Yeseta, 837 F.2d at 386; David P. Coldesina, D.D.S. v. Estate of Simper, 407 F.3d 1126, 1133 (10th Cir. 2005); Patelco Credit Union v. Sahni, 262 F.3d 897, 909 (9th Cir. 2001).

Doyle was also compensated for performing these multiple roles and took "responsib[ility] for all contributions received," J.A.129; Doyle was no mere custodian. Compare Srien, 323 F.3d at 220 (finding fiduciary status for defendant who controlled assets, charged a fee for responsibility over the assets, and indicated a willingness to undertake control of the assets).

Despite this evidence of control, Doyle argues that he did not have any real control over these funds because all he did was follow instructions from PCI/NP based on the collective bargaining agreements. Doyle Br. at 15. Doyle's argument first conflates "authority" with "control." Doyle claims he had "no input into, let alone authority over, the total amounts required of PCI/NP clients through Check 1." Doyle Br. at 15 (emphasis added). But ERISA defines "fiduciary" disjunctively to include a person who "exercises any authority or control respecting management or disposition of its assets[.]" 29 U.S.C. § 1002(21)(A)(i) (emphasis added). As this Court has held, an entity may be a fiduciary where it exercises sufficient actual control of plan assets—regardless of whether it has the authority to do so. See Srein, 323 F.3d at 220; Bd. of Trustees of Bricklayers, 237 F.3d at 274.

Doyle also ignores this Court's distinction between fiduciary status triggered by discretionary control over plan management versus control, whether discretionary or not, over plan assets. Bd. of Trustees of Bricklayers, 237 F.3d at 273. Control over plan assets is sufficient; whether he had discretion and whether that discretion was limited by instructions or governing plan documents is inconsequential. See Coldesina, 407 F.3d at 1133 (citing Srein, 323 F.3d at 220–21) ("In Congress's judgment, and consistent with general trust law, parties controlling plan assets are automatically in a position of confidence by virtue of that control, and as such they are obligated to act accordingly"); Chao v. Day, 436 F.3d 234, 238 & n.1 (D.C. Cir. 2006).

In any event, the record also undermines Doyle's contention that he lacked discretion. The district court found that $755,000 in Check 1 funds Doyle received was never forwarded on to PCI/NP or the Fund administrators. JA1274–75. Doyle made no effort on remand to explain the $755,000 in Check 1 funds that this Court found to be unaccounted for. J.A.1274.

In the briefing on remand, the Secretary drew the only reasonable inference, i.e., that Doyle retained those funds for his own use. J.A.1344. Despite being told by this Court that he needed to account for those funds, Doyle wholly ignored the question and failed to account for the funds in his proposed findings of fact and conclusions of law. See J.A.1381-89. Doyle now foists his responsibility on the district court, arguing that it failed to reconcile the $755,000 discrepancy. But once the Secretary showed that the discrepancy existed, it was Doyle's responsibility to explain what happened to those funds, and he did not. See In re Niles, 106 F.3d at 1462. Given Doyle's failure to provide any explanation, the district court did not clearly err in concluding that the money had been retained by Doyle or otherwise not used for the purpose of providing benefits or necessary services. J.A.37 (finding $755,000 "unaccounted for"). This Court should not now consider unsupported factual arguments that Doyle did not raise below. See Luria

Bros. & Co. v. Allen, 672 F.2d 347, 355 (3d Cir. 1982) ("Our recognition of the division of competencies between trial and appellate courts compels us to forego consideration of a theory on which the trial court was not given a meaningful opportunity to develop a factual record.").

The diversion of these assets conclusively establishes functional fiduciary status. Srein, 323 F. 3d at 221; Day, 436 F.3d at 237–38.

B. Doyle's Breach of Fiduciary Duties

Doyle's appeal focuses on the issues of plan assets and his fiduciary status. Because, as we have shown, the district court correctly concluded that Doyle was a functional fiduciary based on his control over plan assets, a conclusion that Doyle breached his fiduciary duties is unavoidable.

As a fiduciary, Doyle was subject to the stringent standards ERISA imposes upon fiduciaries. By diverting plan assets, Doyle violated the "exclusive benefit" rule of 29 U.S.C. § 1104(a)(A)(1). Misappropriation of plan assets for purposes other than the Fund's benefit violates ERISA. See, e.g., Prudential Ins. Co. of Am. v. Doe, 76 F.3d 206, 208 (8th Cir. 1996) (noting that ERISA's trust and fiduciary requirements intend to prevent "misappropriation of plan funds") (citation omitted); Resolution Trust Corp. v. Fin. Institutions Ret. Fund, 71 F.3d 1553, 1557 (10th Cir. 1995) (finding the removal of plan assets a fiduciary violation because "employees themselves do not benefit directly" from the removal and it reduces the corpus of the Fund); Patelco, 262 F.3d at 911.

Doyle's repeated reliance on the collective bargaining agreements as a defense is undermined by several facts: (1) this agreement was never presented to the employers, J.A.28 ("employers that participated in the Fund were not given copies of the [collective bargaining agreements]"); (2) Doyle was aware of numerous cease-and-desist orders that concluded that the collective bargaining agreements were not genuine, J.A.21–22; and (3) Doyle admittedly agreed to follow instructions directly from PCI/NP, which was not a trustee, in directing plan assets and conducting his other plan-related activities. Doyle Br. at 6. Moreover, Doyle never had formal arrangements with the trust or trustees concerning his billing practices or specific fee arrangements as directed under the Trust Agreement, Doyle Br. at 19; J.A.93-95. And, he had every reason to suspect PCI/NP's instructions to bill for costs for services after receiving the cease-and-desist orders. Yet, he continued to divert plan funds to benefit PCI/NP and his own company, PCMG, without any established benefit to the Fund and its participants. The district court's conclusion that this behavior by a plan fiduciary with control over plan assets violated ERISA's strict duties of prudence and loyalty is unassailable.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

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Dated: September 3, 2015

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