Case Nos. 23-2758 and 23-03290

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JULIE A. SU, ACTING SECRETARY OF LABOR,

Plaintiff-Appellee,

v.

JOHN FERNANDEZ AND GARY MEYERS,

Defendants-Appellants.

On Appeal from the United States District Court
For the Northern District of Illinois
Docket No. 1:22-CV-01030
The Honorable Nancy L. Maldonado

BRIEF FOR APPELLEE THE ACTING SECRETARY OF LABOR

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STATEMENT OF JURISDICTION

Appellants' amended jurisdictional statement is complete but partially incorrect. Specifically, Appellants are incorrect in their assertion that the district court lacked federal subject matter jurisdiction, as the district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e). The amended jurisdictional statement is correct in all other respects.

STATEMENT OF THE ISSUES

After finding that the Acting Secretary of the United States Department of Labor, Julie Su ("the Secretary") was likely to succeed on her claims that Appellants violated the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001, *et seq*., and that ERISA-governed plans were likely to suffer irreparable harm absent a preliminary injunction, the district court entered a preliminary injunction removing Appellants from their positions as Trustees of the United Employee Benefit Fund ("the Fund") and appointing an Independent Fiduciary to replace them. Among the responsibilities the district court assigned to the Independent Fiduciary was to share with the Secretary "documents, information and persons under the Independent Fiduciary's control as the Secretary from time to time may request." Appellants raise the following issues on appeal:

1. Do employers that subscribe to the Fund to provide death benefits to their employees create ERISA-governed plans such that the district court had subject matter jurisdiction over this action?
2. Did the district court abuse its discretion in finding that ERISA plans were likely to suffer irreparable harm absent a preliminary injunction?
3. Does the district court's order that the Independent Fiduciary share documents with the Secretary as requested violate Appellants' joint defense or common interest privileges?

STATEMENT OF THE CASE

A. The United Employee Benefit Fund

The Fund was established on December 1, 1991, pursuant to a Trust Agreement between the Office and Professional Workers Division 2411, which was a Local of the Chicago and Central States Joint Board of the Amalgamated Clothing and Textile Workers Union ("Local 2411"), and an employer group known as the Professional Workers Master Contract Group ("Master Contract Group"). Dkt. 67 at 27. The purpose of the Fund is to provide death benefits paid to "an eligible employee's designated beneficiary (or beneficiaries) if the eligible employee dies while employed by a Member Employer" or in retirement. Dkt. 67 at 64. Employers subscribe to the Fund through a Subscription Agreement in which they pledge to make contributions to the Fund for the purpose of providing welfare

benefits to their own employees. Dkt. 67 at 13. The Subscription Agreement includes an incorporated "plan of benefits," also referred to as a "Benefit Description," specific to that employer, through which the participating employers select the formula for the death benefits provided for their employees and eligibility criteria for participation, among other employer-specific features. Dkt. 67 at 17. The Benefit Description describes the "type of plan" as "Death Benefit Only." *Id*.

Per the Trust Agreement, the Fund is managed by two Trustees, one representing the employers ("Employer Trustee") and one representing the Union ("Employee Trustee"). Dkt. 67 at 31. The Trust Agreement specifies that the Employer and Employee Trustees are named fiduciaries under ERISA. *Id.* The Trustees have the authority to decide "[a]ll questions or controversies of any kind arising between any parties or persons in connection with the Trust or its operation." *Id.* at 43. The Trustees may employ a Fund Manager, who is authorized to "administer the day-to-day business operations" of the Fund and disburse payments only under the direction of the Trustees. *Id*. at 38. The Trust holds assets contributed by the participating employers. *Id*. at 41–42.

B. Appellants Funnel ERISA Plan Assets to Themselves and Fund Insiders Over a Multi-Year Period

From 2015 through at least September of 2018, Appellants systematically funneled ERISA plan assets to themselves and/or other Fund insiders, in some

cases for personal purposes disconnected from the operation of the Fund or the plans, and in other cases for unnecessary services or to compensate the recipient far beyond the bounds of reasonableness. While Appellants concede that "the Fund fell victim to fraud by both its prior management and prior legal counsel" who "orchestrated a series of self-dealing transactions with Fund assets," Appellants' Brief ("Appellants' Br.") at 3, the facts of that wrongdoing are nevertheless summarized below.

1. McDowell and Fensler approve the transfer of plan assets to McDowell's son to resolve McDowell's business dispute

Defendant[1] Herbert McDowell III solely owned and operated United Preferred Companies, Ltd. ("UPC"), a service provider to the Fund that marketed the Fund to employers and insurance agents, and which was paid commissions from insurance carriers that sold life insurance policies to the Fund. Dkt. 77 at ¶ 21. In March 2015, McDowell requested that the Fund reimburse him $42,456to compensate him for unpaid commissions he thought he was owed from one such insurance company. Dkt. 123-24 at 2–3; Dkt. 118-3 at 136–38. Appellant John Fernandez, who was the Employee Trustee at the time, and Defendant David Fensler, who was the Employer Trustee at the time, denied McDowell's request.

[1] Individuals identified as Defendants are the Defendants in the district court action who are not party to this appeal. Fernandez and Meyers, the two Defendants who have appealed the district court's decision, are identified as Appellants.

Dkt. 118-8 at 6. At a meeting of the Trustees in May 2015, McDowell then appointed himself as Employer Trustee, removed Fensler as Employer Trustee, and fired the Fund's previous attorney, replacing him with Defendant Steven Platt, of Robbins, Salomon, and Patt, Ltd ("RSP"). *Id.* at 8-9. The minutes stated that Fensler would continue to "do what he did before for the Fund" as an employee without a vote. *Id.* Fernandez and McDowell then approved a payment from the Fund of $42,000 (rather than the initially requested $42,456) to PRM on May 28, 2015. *Id*. at 10. In October of 2015, the Fund issued another check for $2,440.42 to PRM. *Id*. at 12.

2. Fernandez approves a personal loan to McDowell out of plan assets that was never repaid

On August 7, 2015, Fernandez, as Employee Trustee, approved a $5,000 personal loan from the Fund to Employer Trustee McDowell. Dkt. 118-6 at 45; Dkt. 118-8 at 13. This loan was never repaid. Dkt. 123-4 at 2 ¶ 4.

3. McDowell becomes the Fund's Executive Director and enters into lucrative compensation arrangements for himself and his company

In November of 2015, Fernandez and McDowell, the Employee and Employer Trustees at the time (respectively), determined that McDowell would "serve as the Executive Director of the Fund." Dkt. 123-39 at 2. He continued to serve as Employer Trustee until July 2016 (when Appellant Gary Meyers was appointed successor Employer Trustee). Dkt. 123-5 at 1. For his role as Executive

Director, the Fund would pay McDowell $300,000 a year, plus a signing bonus of $25,000. Dkt. 123-39 at 2. On January 12, 2017, Fernandez and Meyers entered into a Consulting Agreement with UPC (McDowell's company) on behalf of the Fund, backdated to be effective as of November 14, 2016. Dkt. 118-7 at 3–6. From November 2015 through September 2018, the Fund paid a total of at least $895,000 to McDowell, through UPC. Dkt. 118-4 at 107–08. Beginning in April of 2017, until August of 2018, McDowell was paid an additional $3,500 a month to research health plans for the Fund. Dkt. 118-3 at 126; Dkt. 118-6 at 58–61. McDowell did not produce any documentation on his "research." Dkt. 118-3 at 128. Meyers stated that he did not recall whether he authorized the $3,500 payments to McDowell, but he was aware of them. Dkt. 118-6 at 58, 78–79. Fernandez approved the $3,500 monthly fee. *Id.* at 42.

4. Fensler, Fernandez, and Meyers approve the transfer of plan assets to McDowell's foreclosure attorney

On August 24, 2016—when McDowell was still the Fund's Executive Director—Fensler (who was serving as Fund Manager) approved a $100,000 transfer from the Fund to McDowell's attorney Matthew Gurvey, who was representing McDowell in foreclosure proceedings on McDowell's personal residence. Dkt. 118-7 at 10; Dkt. 123-59 at 2; Dkt. 77 at 23. Gurvey provided no services to the Fund. Dkt. 118-3 at 135. Fernandez, who was the Employee Trustee at the time, did nothing to prevent or rectify the transaction. On January 13, 2017,

McDowell directed the Fund's attorney, RSP, to transfer $50,000 of Fund assets from an Interest on Lawyers' Trust Account ("IOLTA") maintained by RSP to an IOLTA account maintained by Gurvey. Dkt. 118-7 at 14; Dkt. 123-55 at 2-3. Fernandez testified that he and Appellant Meyers (who was Employer Trustee at the time) approved this transfer. Dkt. 118-6 at 39–41. On January 25, 2017, at McDowell's instruction, RSP transferred another $250,000 from the RSP IOLTA account to Gurvey's IOLTA account to satisfy a settlement between McDowell and his bank relating to the foreclosure on his home. Dkt. 118-7 at 12-14. Appellants Meyers and Fernandez did not take any action as Trustees to prevent or rectify these transactions.

5. Fernandez and Meyers approve the use of $1,125,000 in plan assets to purchase McDowell's home out of foreclosure

In November 2016, the Fund loaned $1,125,000 to an entity called Husker Properties, LLC ("Husker Properties"). Dkt. 118-6 at 3. Husker Properties was owned by Defendant David Schwalb, who owned a 95% stake, and his wife, who owned the remaining 5%. Dkt. 118-6 at 3, Dkt. 129-17 at ¶ 2. On November 28, 2016, Husker Properties entered into a mortgage agreement with another entity owned by Schwalb, Mount Rinderhorn, under which Mount Rinderhorn issued a loan for $1,125,000 to Husker Properties with the McDowell residence as collateral. Dkt. 118-6 at 15. McDowell was then able to continue living in his residence until November 2021. Dkt. 77 at ¶ 131. Appellants Fernandez and

Meyers approved the loan to Husker Properties and did nothing to reverse or rectify it. Dkt. 123-4 at ¶ 12; Dkt. 118-6 at 75–76.

6. McDowell directs the transfer of $84,000 in plan assets to himself

In August of 2017, McDowell directed that a $52,000 check be made out to himself from the Fund's RSP IOLTA account. Dkt. 118-7 at 15. In October of 2017, McDowell directed a $32,000 check from the Fund's RSP IOLTA account to himself. *Id.* at 17. Fernandez and Meyers failed to prevent these transactions, which totaled $84,000, and did not take any actions to rectify them.

7. Meyers and Fernandez approve a $260,000 transfer of plan assets for the benefit of Meyers

In December 2017, $260,000 in plan assets held in the Fund's RSP IOLTA account were transferred to Mount Rinderhorn for the benefit of Gilman Opco, LLC, a company in which Meyers and Schwalb each owned a one-third stake. Dkt. 118-6 at 7, 54, 90–91. Schwalb, acting for Mount Rinderhorn, provided a promissory note to the Fund promising to repay the $260,000. *Id.* at 93. Schwalb intended this to be a loan from Mount Rinderhorn to Gilman Opco. *Id.* at 90. At the time of transfer, the Fund's loan had yet to be approved by the Trustees on behalf of the Fund. It was not until January of 2018, approximately one month after the funds were transferred, that Meyers conditionally approved the loan (due to the absence of Fernandez at the meeting). *Id.* at 96–97. Fernandez later approved the loan on February 28, 2018. *Id*. at 100.

C. The Government's Investigation of the Fund Prompts Fernandez and Meyers to Add an Indemnification Provision to the Trust Agreement

After the Department of Labor and Department of Justice began investigating the administration of the Fund, Fernandez and Meyers amended the Trust Agreement in October 2020 to add an indemnification provision. Dkt. 118-4 at 2–3. Specifically, the Trust Agreement was amended to state that "[t]o the fullest extent provided by law, the Trust shall indemnify Trustees, Trust employees, including, but not limited to, the Trust Administrator and Trust service providers . . . from any and all liabilities arising from an investigation, threatened litigation or litigation or litigation (sic) arising from their duties as Trustees, employees or services provider to the Trust." *Id*. at 2. The indemnification amendment included "advancement of legal fees" to Trustees, Trust employees, and Trust service providers, with the indemnified parties responsible for repaying the advancements should they be "found liable for breach of fiduciary duty." *Id*. The indemnification amendment authorized the Trustees to enter into indemnification agreements to document their indemnity rights, and to approve in their discretion indemnification agreements with Fund service providers. *Id.* at 3. Before this amendment, the Trust Agreement had stated since at least 1991 that the Trustees would only be reimbursed after the fact for the fees they incurred, rather than advanced funds

beforehand, and there were no indemnification rights accorded to other Fund employees or service providers. Dkt. 67 at 40.

D. The Fund Accumulates Massive Legal Fees as its Assets Rapidly Deplete

The Fund hired Baker Botts as its counsel to respond to the Department of Justice inquiry and conduct an internal investigation. Appellants' Br. at 12. The Fund, through Baker Botts, filed suit against McDowell, Fensler, Platt, and Platt's law firm. Appellants' Br. at 13; *Sledz v. McDowell et al.*, No. 21-cv-05238 (N.D. Ill.); *Sledz v. Platt et al.*, No. 22-cv-00952 (N.D. Ill.). Baker Botts also represented the Fund in several matters brought by plan participants seeking unpaid benefits. Appellants' Br. at 13–14; *see also Futterman v. United Emp. Benefit Fund, et al.*, No. 1:20-cv-06722 (N.D. Ill.); *Riskus v. United Emp. Benefit Fund, et al.*, No. 1:23-cv-00060 (N.D. Ill.); *Fulton v. United Emp. Benefit Fund, et al.*, No. 1:23-cv-02468 (N.D. Ill.). Baker Botts represented the Fund along with Appellants in the present matter until the district court removed Appellants as Trustees. Appendix ("App'x") at 1. As of May 2023, the Fund had accumulated $6.2 million in legal fees—including to defend the Trustees in this action—averaging $200,000 per month since Baker Botts was retained. App'x at 8. Current Fund Manager Henry Sledz testified in a related proceeding that he barely reviewed the legal fees charged by Baker Botts. Dkt. 118-2 at 7–8. The Fund also advanced legal fees to

indemnified individuals as a result of the 2020 indemnity amendment. The Fund has advanced at least $200,000 to Platt, who the Fund itself is suing. App'x at 18.

Based in part on the Fund's escalating fees, the Fund's assets diminished from $21 million reported to the Department of Labor in 2018 to $6.3 million as of June 29, 2023. Dkt. 123-6 at 1–2. The lion's share of those remaining assets—approximately $5.6 million—consists of the cash-surrender values of the death benefit policies as determined by the Fund's accountant, who noted that, due to poor records, "[i]t is probable that the cash surrender value may be significantly lower." *Id.* at 2-3. The Fund also owed at least $3.1 million in outstanding legal fees to Baker Botts as of May 2023. App'x at 9. Further, after the Secretary helped facilitate a $1.4 million payment to the Fund from Schwalb, the Fund's subsequent accounting in June of 2023 showed that only approximately $650,000 of this payment remained in the Fund. Dkt. 123-6 at 17. Counsel for Appellants conceded at oral argument to the district court that the missing amount was likely paid out to service providers. Dkt. 149 at 67:5–14. By August of 2023, the Fund's sole bank account had dwindled to $258,892.46, largely due to continued payments to Baker Botts. *See* App'x at 35; *see also* Dkt. 164-1 at 3.

E. The Secretary Sues Appellants for Breaching Their Fiduciary Duties and the District Court Enters a Preliminary Injunction

The Secretary filed a Complaint against Defendants David Fensler, John Fernandez, Gary Meyers, Steven Platt, Herbert McDowell III, David Schwalb,

Robbins, Salomon & Patt, Ltd., Robbins Dimonte, Ltd., United Preferred Companies, Ltd., and the Fund (as a Rule 19 defendant) on February 28, 2022, in the United States District Court for the Northern District of Illinois, Eastern Division. Dkt. 1. The Complaint alleged that the Defendants engaged in numerous prohibited transactions and violated their ERISA duties of loyalty and prudence. 29 U.S.C. § 1106(a) and (b); 29 U.S.C. § 1104(a)(1)(A) and (B). *See generally* Dkt. 1. The Complaint asserted that, while the Fund itself was not an ERISA plan, the employers that subscribed to the Fund created single-employer plans subject to ERISA. *Id.* at 3–4.

Defendants filed three separate Motions to Dismiss. Dkt. 30; Dkt. 41; Dkt. 44. Appellants, along with the Fund, moved to dismiss the matter for lack of subject matter jurisdiction. Dkt. 41. Appellants initially argued that the Fund was not subject to ERISA. *Id.* at 12. The district court denied the Motions to Dismiss on August 8, 2022, and found that the Secretary had adequately alleged the existence of the separate ERISA-covered plans. Dkt. 87 at 9. The Secretary and Defendants jointly moved to stay the proceedings to allow for discovery and mediation on September 15, 2022, and that motion was granted on September 21, 2022. Dkt. 99; Dkt. 101. The matter was reassigned to a new district court judge, the Honorable Nancy Maldonado. Dkt. 102. At mediation, an agreement was only reached between the Secretary and Defendant David Schwalb. Dkt. 114 at 2.

On June 15, 2023, the Secretary sought a temporary restraining order and preliminary injunction to remove Fernandez and Meyers as Trustees and replace them with an Independent Fiduciary. Dkt. 117. The district court granted the motion on August 10, 2023, finding that the Secretary had a likelihood of success on the merits, and that the balance of harms weighed in favor of removing the Appellants as Trustees and replacing them with an Independent Fiduciary. App'x at 15, 19. Notably, the district court found that "the issue before the Court [was] primarily one of math," and that "the math currently playing out under the Trustee Defendants [was] not working in the best interests of the Fund, and [ran] the risk of depleting all Fund assets and leaving the participants with nothing and the Secretary with no relief." App'x at 17. The district court found the approval of the 2020 indemnification amendment to be "deeply troubling" and noted that the Fund had already advanced hundreds of thousands of dollars in legal fees to indemnified individuals and had been billed at least $6.2 million in legal fees. *Id.* at 17–18, 8. The district court also expressed concern that the interests of the Appellants, their attorneys, and the Fund were not "squarely aligned," as the attorneys representing the Fund were also representing the Appellants who had been accused of misusing the Fund's assets. *Id*. at 17.

The district court entered a preliminary injunction appointing Receivership Management, Inc. as the Independent Fiduciary for the Fund. Preliminary

Injunction Order ("Order"), App'x at 21 ¶ 4. The Order gave the independent fiduciary the authority to exercise all fiduciary responsibilities regarding the Fund, including to amend Fund documents, conduct an accounting of the Fund's assets and attorney's fees, and terminate the Fund. *Id*. at 23–24 ¶ 12(a), (c), (e), and (f). The Order instructed the Independent Fiduciary to promptly provide "such documents, information and persons under the Independent Fiduciary's control as the Secretary from time to time may request." *Id*. at 27–28 ¶ 15.

Appellants filed their Notice of Appeal as well as a Motion for Reconsideration on September 1, 2023. Dkt. 156; Dkt. 155. Appellants moved to stay the proceedings below pending appeal. Dkt. 169. The district court granted in part and denied in part Appellants' Motion for Reconsideration, modifying the preliminary injunction to require the Independent Fiduciary to file a notice with the court before amending Fund documents or terminating the Fund. App'x at 36. The Order was also amended so that Appellants would not be required to reimburse the Fund for the expenses of the Independent Fiduciary as there had yet to be a final finding on liability. *Id.* at 38. Appellants filed an Amended Notice of Appeal on November 29, 2023. Dkt. 176. The next day the district court denied Appellants' motion to stay pending appeal. Dkt. 177.

SUMMARY OF THE ARGUMENT

The district court's preliminary injunction was proper and should be upheld. First, the district court had subject matter jurisdiction over this action because the participating employers created single-employer ERISA-covered employee welfare benefit plans upon subscribing to the Fund. Employers subscribed to the Fund for the express purpose of providing death benefits to their employees, committed to making contributions to the Fund for that very purpose, and selected an assortment of criteria—including the level of benefits provided and eligibility rules—specific to their plans. In so doing, these employers established single-employer welfare benefit plans. In their opening brief, Appellants contend that these employer-sponsored employee welfare benefit plans are not in fact governed by the federal statute that regulates employer-sponsored employee welfare benefit plans. Contrary to Appellants' arguments, up is not down, and the plans here plainly are governed by ERISA.

Second, the district court correctly exercised its equitable powers to order a preliminary injunction because the plans are likely to suffer irreparable harm absent an injunction. Irreparable harm can be monetary in nature where losses that the injunction is designed to prevent would otherwise be unrecoverable or difficult to calculate. Because of the indemnification provision the Trustees added permitting the Fund to advance their legal fees, and because of Appellants'

apparent inability to repay the Fund should they be found liable, any money paid from the Fund's assets towards Appellants' legal fees would likely be unrecoverable. Additionally, due to the Fund's complex finances and the inadequacy of Appellants' recordkeeping, damages would be very difficult to calculate. The district court did not abuse its discretion when it weighed the competing considerations to mold the appropriate injunctive relief.

Finally, the preliminary injunction did not violate Appellants' joint defense and common interest privileges by instructing the Independent Fiduciary to cooperate fully with the Secretary and provide such documents, information, and persons as the Secretary may request. The joint defense and common interest privileges stem from the attorney-client privilege, and ERISA fiduciaries are subject to the fiduciary exception to attorney-client privilege except when seeking legal advice as to their own liability. The joint defense and common interest privileges protect communications shared between parties only to the extent they share common legal interests. If Appellants were seeking advice as to their own liability, this advice could not have been sought in the common legal interest of the Fund. As such, the joint defense and common interest privileges cannot apply to documents within the Independent Fiduciary's control.

STANDARD OF REVIEW

A district court's decision to issue a preliminary injunction is reviewed for abuse of discretion. *United States v. NCR Corp.*, 688 F.3d 833, 837 (7th Cir. 2012). "Abuse of discretion means a serious error of judgment, such as reliance on a forbidden factor or failure to consider an essential factor." *In re Veluchamy*, 879 F.3d 808, 823 (7th Cir. 2018) (quoting *Powell v. AT & T Commc'ns, Inc.*, 938 F.2d 823, 825 (7th Cir. 1991) (internal quotation marks omitted). The "abuse of discretion" standard "means something more than [this Court's] belief that [it] would have acted differently if placed in the circumstances confronting the district judge . . . . For an abuse of discretion to occur, the district court's decision must strike [this Court] as fundamentally wrong." *Johnson v. J.B. Hunt Transp., Inc.*, 280 F.3d 1125, 1131 (7th Cir. 2002) (internal citation omitted). In short, this Court "will affirm unless no reasonable person could agree with the district court." *Nelson v. Apfel*, 210 F.3d 799, 802 (7th Cir. 2000). Where an appellant's argument for reversing a preliminary injunction is dependent on a disputed factual finding, "the appellant must meet the demanding clear-error standard." *DM Trans, LLC v. Scott*, 38 F.4th 608, 618 (7th Cir. 2022). Questions of law are reviewed de novo. *Id*. at 617.

ARGUMENT

I. The District Court Properly Exercised Subject Matter Jurisdiction Over This Action

Tellingly, Appellants do not dispute that, to the extent ERISA governs their actions in pilfering Fund assets for years, the Secretary is likely to prevail on her claims that they breached their fiduciary duties. Instead, they contend that the district court did not have subject matter jurisdiction over this action—and thus lacked the authority to issue a preliminary injunction altogether (or accord any other relief)—because, in their telling, there is no ERISA plan anywhere in sight. Appellants argue both that the Fund is not itself an ERISA plan and that the individual employers subscribing to the Fund did not create their own, separate ERISA-covered plans. As explained below, the record amply demonstrates that the individual employers that subscribed to the Fund specifically to provide death benefits to their own employees established ERISA-covered plans in doing so.

A. Each Employer Established a Single-Employer ERISA Plan When It Subscribed to the Fund

ERISA defines an "employee welfare benefit plan" as "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise," a host of listed benefits, including

death benefits. 29 U.S.C. § 1002(1). "A welfare plan," therefore, "requires five elements: (1) a plan, fund or program, (2) established or maintained, (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services or severance benefits, (5) to participants or their beneficiaries." *Ed Miniat, Inc. v. Globe Life Ins. Grp., Inc.*, 805 F.2d 732, 738 (7th Cir. 1986). "An employer . . . can establish an ERISA plan rather easily." *Credit Managers Ass'n of Southern California v. Kennesaw Life and Accident Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987).

Among the ways employers can easily establish a plan is by subscribing to a collective trust that pools the assets of multiple employers, also referred to as a Multiple Employer Welfare Arrangement ("MEWA"). ERISA defines a MEWA as an arrangement "established or maintained for the purpose of offering or providing" certain benefits, including death benefits, "to the employees of two or more employers … or to their beneficiaries." 29 U.S.C. § 1002(40)(A). Even if a MEWA is not itself an ERISA plan—and the Secretary does not contend that the Fund here so qualifies—this Court has previously found that employers subscribing to a MEWA can establish their own single-employer ERISA plan. *See Ed Miniat, Inc.*, 805 F.2d at 738–39. Other circuit courts have held the same. *See,*

e.g., *Donovan v. Dillingham*, 688 F.2d 1367, 1375 (11th Cir. 1982) ("[I]t appears that numerous subscribers to [a group insurance trust] established employee welfare benefit plans . . . ."); *Patelco Credit Union v. Sahni*, 262 F.3d 897, 907–08 (9th Cir. 2001) (holding that an employer that subscribed to a MEWA "is an ERISA employee welfare benefit plan"); *Crull v. GEM Ins. Co.*, 58 F.3d 1386, 1389 (9th Cir. 1995) (same); *Gruber v. Hubbard Bert Karle Weber, Inc.*, 159 F.3d 780, 789 (3d Cir. 1998) (explaining that an employer can establish an ERISA plan "by subscribing to a multi-employer trust.") (internal citation omitted).

Applying these principles here, when employers subscribed to the Fund—which Appellants concede is a MEWA, *see* Appellants' Br. at 30—to provide death benefits to their own employees, they established ERISA plans. As to the first element for ERISA plan status (a "plan, fund, or program"), 29 U.S.C. § 1002(1), this Court has said that a "plan, fund or program" exists if "a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." *Diak v. Dwyer, Costello & Knox, P.C.*, 33 F.3d 809, 812 (7th Cir. 1994) (quoting *Dillingham*, 688 F.2d at 1373). A reasonable person could ascertain that the plans here clearly were intended to provide death benefits. *See* Dkt. 67 at 17 ("Benefit Description for Futterman & Howard, CHTD" stating "Type of Plan: Death Benefit Only"), 64 (Summary Plan Description describing the plan as a "death benefit only . . . welfare benefits plan."). The

beneficiaries also are readily apparent: the employees of the sponsoring employer. *See* Dkt. 67 at 17 (employer's plan of benefits confining eligibility to "Full-time Employees" who completed at least a year of continuous service), 41 (Trust Agreement stating that benefits are to be provided to "eligible employees of Employers"), 63 (Summary Plan Description ("SPD") stating same). It is also clear that the plans are financed by the subscribing employers' contributions. *Id.* at 12 (employer Subscription Agreement stating that participating employers agree to pay the Fund "100% of the cost of providing death benefits for all participating employees according to the schedule and/or formula specified in [the incorporated plan of benefits] . . ."). Finally, the procedures for receiving benefits also are reasonably ascertainable. *See* Dkt. 67 at 65–66 (SPD listing detailed instructions on submitting claims for benefits and appealing any benefit denials).

The plans also meet the remaining elements of ERISA's employee welfare benefit plan definition, as they were "established or maintained . . . by an employer" (elements 2 and 3) "for the purpose of providing . . . benefits" (element 4) specifically "to participants or their beneficiaries" (element 5). Taking the latter two elements first, and for the reasons discussed above, there can be no dispute that the plans were established to provide death benefits to plan participants (i.e., the employer's employees).

And the record equally supports that the plans were "established or maintained" by the subscribing employers. In *Ed Miniat*, this Court considered whether a complaint was properly dismissed on the ground that a plan formed through an employer's subscription to a MEWA "was not established and maintained by an employer[.]" 805 F.2d at 735. This Court held that dismissal was improper because "the [subscribing] corporation has, via a written agreement, established its intent potentially to provide benefits to all salaried employees." *Id.* at 741; *see also Wickman v. Northwestern Nat. Ins. Co.*, 908 F.2d 1077, 1083 (1st Cir. 1990) ("The crucial factor in determining if a 'plan' has been established is whether the purchase of the insurance policy constituted an expressed intention by the employer to provide benefits on a regular and long term basis.") (citing *Ed Miniat*, 805 F.2d at 739–41). So too here, each employer subscribed to the Fund through a Subscription Agreement under which it agreed to make contributions to the Fund for the express "purpose of providing health and welfare benefits" to its own employees, in accordance with its own incorporated "plan of benefits." *See* Dkt. 67 at 13–14. That "plan of benefits" included a variety of features chosen by the subscribing employer and applicable only to its own employer-sponsored plan, including eligibility criteria, the death-benefit formula, the minimum benefit, and whether employees would remain eligible for benefits after retirement. *Id.* at 17.

In sum, the employers unambiguously formed ERISA plans when they subscribed to the Fund to provide death benefits to their employees. Indeed, the SPDs even provide participants a description of their "ERISA Rights." Dkt. 67 at 69. The district court thus properly exercised subject-matter jurisdiction.

B. Appellants' Contrary Arguments Lack Merit

Appellants make three primary arguments for why the subscribing employers did not establish ERISA plans. First, they contend that there is no evidence that the employer plans are separate from the Fund itself, such as employer-specific written plan documents. Second, they note that benefits are administered by the Fund, not the employers. And third, they point out that the Fund, not the employers, holds all of the assets. The first point is incorrect, and the latter two are irrelevant.

1. Though unnecessary, the record contains ample evidence of written plan documents

Appellants first contend that there is "no evidence of separate bona fide plans established by any of the employers participating in the Fund," highlighting that "the record contains no *written plan* by any of the participating employers." Appellants' Br. at 33 (emphasis added). For starters, while ERISA requires plans to have a "written instrument," 29 U.S.C. § 1102(a)(1), that does not mean that the absence of a plan document means a plan does not exist, as Appellants themselves concede. *James v. Nat'l Bus. Sys., Inc.*, 924 F.2d 718, 720 (7th Cir. 1991);

Appellants' Br. at 31. Thus, even if it were true, as Appellants suggest, that the record contained no written plan, it still would not be determinative of whether individual employer plans existed.

In any case, Appellants are plainly wrong. The record is replete with evidence that each employer established their own Death Benefit Only Plan upon subscribing to the Fund. First, an employer's Benefit Description lists the "Plan Formula," which the employers complete by selecting the multiple of earnings as to which their employees would be eligible. Dkt. 67 at 17. Each employer could select their own multiple; there was not one universal "Plan Formula" for all employees whose employers subscribed to the Fund. *Id.* Eligibility parameters are also decided by the employers. *Id.* Additionally, the Employer's Acknowledgement states that "the undersigned Employer fully understands and agrees that life insurance coverage, as a means of funding a *proposed* Death Benefit Only Plan, will begin . . ." Dkt. 67 at 16. (emphasis added). This indicates that, until the signing of the Acknowledgment by the employer, there was only a *proposed* plan—the Acknowledgement did not say the employer would be joining or enrolled in an existing plan.

Appellants attempt to minimize these employer-specific features as merely products of an employer's Subscription Agreement, which they say is not a "core plan document." Appellants' Br. at 34. For starters, Appellants' novel terminology

has no basis in ERISA or this Court's precedent, which makes clear that a variety of documents can constitute a plan even if not formally labeled as such. *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 712 (7th Cir. 1999) ("[O]ften the terms of an ERISA plan must be inferred from a series of documents none clearly labeled as 'the plan.'"). But Appellants are also wrong on the facts: the employer-specific Benefit Description is incorporated not only in the employer's Subscription Agreement, Dkt. 67 at 13, but also in the SPD, *id.* at 64 (Chapter 4), and thus is very much a "core plan document" even under Appellants' made-up rubric.

On a similar note, Appellants seek to distinguish the Fund's participating employers' plans from the plan in *Ed Miniat*—which this Court said could be established upon the employer's subscription to a multiple employer trust—by asserting that in that case "there was a full-fledged separate plan complete with all the relevant plan documents." Appellants' Br. at 33. But this Court did not hold that every plan must consist only of employer-specific plan documents. Rather, the Court made clear that other materials could be considered, including "the insurance policies that provide the Plan's funding." *Ed Miniat*, 805 F.2d at 739. In short, Appellants' contrived requirement that ERISA plans exist only where there is a self-contained universe of exclusively employer-specific plan documents is a formalistic fantasy that has no basis in ERISA or the case law.

2. The employers need not administer benefits themselves to establish an ERISA plan

Appellants next argue that the employers did not establish plans because the Fund—and not the employers themselves—administered benefits. Appellants' Br. at 34–35. They attempt to distinguish the facts here from those in *Brundage-Peterson v. Compcare Health Servs. Ins. Corp.*, 877 F.2d 509 (7th Cir. 1989), arguing that the employer established an ERISA plan in that case because it contracted for benefits directly with an insurer, and not through a separate entity (like the Fund here). *Id.* at 33–34. But the specific vehicle through which the employer contracted was not at all dispositive in *Brundage-Peterson*. Rather, the distinction that mattered to this Court was between employers offering their employees a "finite" choice of benefits (evidence of a plan), as opposed to "leaving the procuring of insurance entirely to the employee" (not a plan), concluding that the employer's contracts with the insurance providers "established a plan for specified employees." *Id.* at 511 (internal quotations omitted). This precisely describes the plans here: by subscribing to the Fund, the employers established a finite death-benefit-only plan, with pre-set parameters selected by the employers, exclusively for their employees. Just as a plan's delegation of administration to an insurance company does not impact ERISA plan status, so too is plan status unaffected by the delegation to a MEWA.

Appellants also argue that there is no "ongoing administrative program for processing claims and paying benefits" regarding the individual employer plans, akin to the non-ERISA plan at issue in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Appellants' Br. at 34–35. The severance plan in *Fort Halifax* had no "ongoing administrative program" because severance benefits for all employees could be triggered only by a single, one-time event: the closing of the plant. *Fort Halifax,* 482 U.S. at 11-12. As this Court explained in *Cvelbar v. CBI Illinois, Inc*., the "lump-sum nature . . . weighed heavily in [the Supreme Court's] analysis because an ongoing administrative program typically is required in instances in which there are ongoing benefits to be paid . . . and if there is a regularity of payment." *Cvelbar v. CBI Illinois, Inc.*, 106 F.3d 1368, 1374 (7th Cir. 1997) (*abrogated on other grounds by Int'l Union of Operating Engineers, Loc. 150, AFL-CIO v. Rabine*, 161 F.3d 427 (7th Cir 1998)) (internal quotation marks omitted).

The facts in this case are far afield from the one-off nature of the benefits at issue in *Fort Halifax.* The employer plans here provide death benefits to the beneficiaries of plan participants on a periodic, ongoing basis as claims arise. The administrative program thus more resembles the programs in *Bowles v. Quantum Chem. Co.*, 266 F.3d 622 (7th Cir. 2001) and *Collins v. Ralston Purina Co.*, 147 F.3d 592 (7th Cir. 1998), as the employers "could not satisfy [their] obligation[s]

by cutting a single check and making a single set of payments to all of [their] managers [covered by the plans] at once." *Bowles*, 266 F.3d at 631 (quoting *Collins*, 147 F.3d at 595). Appellants' argument that the individual employer plans do not have ongoing administrative programs is simply incorrect.

3. The fact that employers do not themselves hold plan assets is irrelevant

Equally irrelevant is Appellants' contention that because the Fund, and not the employers, held plan assets, and because the Fund, not the employers, owned the death benefit policies, the employers did not establish ERISA plans. For starters, this would mean that employers could never establish single-employer ERISA plans by subscribing to a trust that holds assets contributed by multiple employers, a proposition that is flatly inconsistent with this Court's precedent. *See Ed Miniat*, 805 F.2d at 738–39. It would also suggest that employers could never establish ERISA plans *at all* if plan assets are held in a trust separate from the employer's own coffers, which is completely nonsensical given that ERISA *requires* that plan assets be held in trust. 29 U.S.C. § 1103(a) ("[A]ll assets of an employee benefit plan shall be held in trust by one or more trustees."). And the fact that the Fund owns the benefit policies is similarly irrelevant, as the very purpose of a trust is to hold assets for the benefit of others.

Also unavailing is Appellants' attempt to analogize the employers here to an employer the Fifth Circuit found did not establish an ERISA plan when

subscribing to a MEWA. Appellants' Br. at 35 (citing *Taggart Corp. v. Life & Health Benefits Admin., Inc.*, 617 F.2d 1208, 1211 (5th Cir. 1980)). Appellants point to the Fifth Circuit's statement in *Taggart* that the employer had "no assets and is liable for no benefits," and instead merely purchased insurance. Appellants' Br. at 35 (citing *Taggart*, 617 F.2d at 1211). But the employer in *Taggart* had a single employee and "did no more than make payments to a purveyor of insurance, patently for tax reasons." *Id.* That is why this Court said that "[a]t most," *Taggart* "suggest[s] that, when the sole employee of a corporation, for that employee's own benefit or for that of his or her family, subscribes to a trust, the necessary intent on the part of the corporation to provide benefits for its employees may be lacking." *Ed Miniat*, 805 F.2d at 741. There is no evidence here that the employers that subscribed to the Fund were single-employee corporations looking to take advantage of the tax code.

Finally, Appellants oddly point to an Internal Revenue Service ("IRS") regulation governing the merger and consolidation of plan assets as supporting their argument, when in fact it does the opposite. Appellants' Br. at 36. They cite the portion of this regulation that defines a "single plan" as existing only when "on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries," arguing that because the employers' contributions to the Fund here are not segregated by participating

employer, that somehow means the employers do not establish ERISA plans. Appellants' Br. at 36 (quoting 26 C.F.R. § 1.414(l)-1(b)(1)). First, 26 C.F.R. § 1.414(l)-1 is not relevant here, as it applies only to "plans to which section 411 [26 C.F.R. § 1.411] applies," 26 C.F.R. § 1.414(l)-1(a), and that section applies only to certain qualified retirement plans, not welfare plans (which are at issue here). 26 C.F.R. § 1.411(a)-1. But even if the regulation were applicable to welfare plans, it is not delineating between single-employer ERISA plans and non-ERISA plans, but between a single ERISA plan and multiple ERISA plans. Indeed, it goes on to state that "more than one plan will exist if a portion of the plan assets is not available to pay some of the benefits. This will be so even if each plan has the same benefit structure or plan document, or if all or part of the assets are invested in one trust with separate accounting with respect to each plan." 26 C.F.R. § 1.414(l)-b(1).

II. The District Court Did Not Abuse its Discretion in Finding that the Fund Would Suffer Irreparable Harm Absent a Preliminary Injunction

A preliminary injunction is appropriate where irreparable harm is likely absent the injunction. *See Bevis v. City of Naperville, Ill.*, 85 F.4th 1175, 1188 (7th Cir. 2023). Injunctive relief, as a form of equitable relief, "requires the result to be a 'just' or 'fair' result rather than a 'correct' result." *Lawson Prod., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1435 (7th Cir. 1986) (citation omitted). This means that the district court "endeavors to achieve a rough justice between the parties that will

maintain the status quo pending trial." *Id*. Here, the district court found that the Fund's "dwindling assets due to substantial legal and administrative costs" was "likely to continue" if Appellants were not removed and replaced with an Independent Fiduciary. App'x at 17. Appellants contend that these dwindling assets do not qualify as irreparable harm, which they say cannot be monetary in nature. Appellants are incorrect, as this Court's precedent makes clear. Because the record amply supports the district court's irreparable harm finding, the district court did not abuse its discretion in issuing the preliminary injunction.

A. Irreparable Harm Can Be Monetary in Nature Where Recovery is Unlikely or Damages Would be Difficult to Calculate

The potential harm that the preliminary injunction sought to stave off—further dissipation of the Fund's assets to pay service providers and indemnify individuals, as well as further mismanagement of the Fund such as losing or improperly maintaining Fund records—is monetary in nature. But this Court has made clear that monetary damages can be "seriously deficient as a remedy for the harm suffered" where "[d]amages may be unobtainable from the defendant because he becomes insolvent before a final judgment can be entered and collected" and where "[t]he nature of the plaintiff's loss may make damages very

difficult to calculate." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984).[2] These circumstances are present here.

First, damages would likely be unobtainable from Defendants should they be found liable in this matter. Most concerning for the likelihood of recovery, in 2020—in the midst of the Secretary's investigation of the Fund—Appellants amended the Trust Agreement to allow the Fund to enter into indemnification agreements. Per the amendment, the Fund would advance all legal fees to "Trustees, Trust employees and Trust service providers" in relation to any investigation, threatened litigation, or litigation arising from their duties to the Fund. Dkt. 118-4 at 3. The advanced fees were to be repaid by the indemnified party "if [the party is] found liable for breach of fiduciary duty." *Id.* The amendment authorized the Trustees to enter into indemnification agreements to

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[2] Other circuits have reached the same conclusion. *See, e.g.*, *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986) (finding that "[d]ifficulty in collecting a damage judgment may support a claim of irreparable injury"); *Federal Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 560–62 (5th Cir. 1987) (finding that the court had the authority to enjoin dissipation of assets in order to secure equitable remedies such as restitution); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 97–98 (6th Cir. 1982) (explaining that courts have the power to issue a preliminary injunction freezing defendants' assets to protect the right to restitution); *Johnson v. Couturier*, 572 F.3d 1067, 1081 (9th Cir. 2009) (discussing the likelihood that defendants would not have the resources to reimburse costs as irreparable harm); *Reebok Int'l, Ltd. v. Marnatech Enterprises, Inc.*, 970 F.2d 552, 559 (9th Cir. 1992) (noting that courts may issue a preliminary injunction to prevent the dissipation of assets in order to preserve access to equitable remedies in the future).

document their indemnity rights, and to approve in their discretion indemnification agreements with Fund service providers. *Id.*

Appellants have caused the Fund to advance funds for legal fees for fiduciaries and service providers implicated in this case. In fact, Appellants caused at least $200,000 to be advanced to Platt, the Fund's former counsel, who is a defendant in this case and is currently being sued by the Fund. App'x at 18. It appears that Appellants have also caused the Fund to expend assets for their own litigation interests. Counsel for Appellants represented Appellants jointly with the Fund in the present matter, including filing a motion to dismiss in the present proceedings—representing Appellants and the Fund where their interests were effectively adverse. Dkt. 41. Appellants have an interest in quickly terminating these proceedings as their personal liability is being investigated. The Fund, on the other hand, has an interest in letting these proceedings play out, as it is a Rule 19(a) defendant joined only so that relief may be granted to it. Dkt. 1 at ¶ 25. Appellants used Fund assets to pay those litigation costs. App'x at 8, 35. To the extent that the Fund paid for Baker Botts' representation of Appellants jointly in a matter not aligned with the Fund's own interests, the fees were effectively advanced to Appellants. If Appellants are found liable for their breaches of fiduciary duty (which the district court found was likely), these fees paid to Baker

Botts would need to be repaid by Appellants in conformity with the 2020 indemnification amendment. Dkt. 118-4 at 2.

There is no indication that Appellants investigated the indemnified individuals' ability to repay the Fund for the advanced fees should they be found liable, including their own ability to repay.[3] If they had, it is likely that the conclusion would be that Appellants did not have the ability to repay the Fund for their advanced attorney's fees. Notably, Appellants' objection to the initial preliminary injunction stemmed in part from their inability to pay the fees of the Independent Fiduciary—fees that the district court found likely to be "significantly less than the current monthly legal and administrative expenses being incurred by Fund counsel and the Fund managers." App'x at 17. Appellants Meyers and Fernandez have both stated that they do not have the ability to pay the fees of the Independent Fiduciary. Dkt. 123-5 at ¶ 20; Dkt. 123-4 at ¶ 18. It is therefore exceedingly unlikely that Appellants would have the ability to make the Fund whole again should they later be found liable for breach of their fiduciary duties and be required to repay the fees charged by Baker Botts for representation in this matter. The preliminary injunction was necessary to protect against this harm.

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[3] While the record does not contain the indemnification agreements between the Fund and Appellants, the Indemnification Agreement between the Fund and Platt took Platt at his word that he had the ability to repay the Fund and did not include any indication that Appellants had conducted their own, independent analysis of Platt's ability to repay. Dkt. 118-8 at 17.

Appellants' counsel says the district court should not have worried about the Fund's expenditure of plan assets on their legal fees because, should the district court later find their legal fees to be "unreasonable," they would repay the fees, and that any other "unreasonable or unlawful" fees could be recovered directly from service providers. Appellants' Br. at 43-44. Appellants' argument does not address the harm to the Fund from advancing legal fees to Appellants if Appellants are unable to repay the Fund after a finding of liability. That harm exists regardless of whether the fees are reasonable. It also does not address that additional litigation would be required to recover these costs, and the costs of that litigation would be borne by the Fund. In any event, the ability of the Fund (or the Independent Fiduciary) to recover unreasonable fees from plan service providers is entirely speculative.

Second, the nature of the losses here would make damages very difficult to calculate. The accountant hired by the Fund in 2022 was unable to calculate the value of the Fund's assets with certainty. Dkt. 123-6 at ¶ 7. After the Independent Fiduciary's appointment, he noted that the preceding Fund Manager referred to the records as "abysmal," and the Independent Fiduciary "discovered mountains of individual files." Dkt. 170-1 at ¶ 17. This shoddy record-keeping is reflective of Appellants' failure to appropriately manage the Fund; this mismanagement would likely continue, costs to rectify the continued mismanagement would escalate, and

the likelihood of records being lost completely would increase if Appellants were permitted to return as Trustees. Simply put, Appellants cannot be trusted to responsibly maintain the Fund to protect the status quo.

B. Participants Are Not Insulated from the Reduction of Fund Assets

Appellants alternatively argue that the participants face no irreparable harm because "participants' benefits are insulated from the effects of any reduction in Fund assets." Appellants' Br. at 44. While a participant's prescribed benefit in the Fund is indeed their life insurance policy, participants are entitled to additional benefits upon termination of the Fund. Specifically, the assets of the Fund are to be distributed as follows:

> Upon termination of this Trust, the Trustees shall first pay any obligations of the Trust; any remaining assets shall be used at the discretion of the Trustees to provide benefits for Participants covered at the time of termination of the Agreement consistent with the purposes of the Trust.

Dkt. 67 at 48. As the Independent Fiduciary is presently in the process of terminating the Fund, it is especially important that the Fund's assets be protected from unnecessary service provider expenses for the benefit of the participants. But even if participants were not threatened at all, the assets of the ERISA plans themselves—which are separate legal entities, *see* 29 U.S.C. § 1132(d)—are very much at risk.

The district court reviewed these facts in finding that the Secretary had shown that there was a likelihood of irreparable harm absent a preliminary

injunction. The "final, and most important, decision as to whether to grant or deny [a preliminary injunction] motion is discretionary," *Lawson Prod., Inc.*, 782 F.2d at 1436, and the district court did not abuse its discretion in entering the preliminary injunction to protect the Fund's participants and beneficiaries and the assets of the ERISA plans.

III. The Preliminary Injunction Does Not Violate Appellants' Joint Defense or Common Interest Privileges

Appellants argue that even if a preliminary injunction was appropriate, Paragraph 15 of the preliminary injunction went too far in instructing the Independent Fiduciary to provide documents to the Secretary (upon her request) that could be privileged. Appellants' Br. at 46–47. Specifically, Appellants assert that this provision violates the joint defense and common interest privileges between the Appellants and the Fund stemming from the DOJ investigation and private lawsuits against Appellants and the Fund. *Id.* Appellants' argument should be rejected: Appellants do not have joint defense or common interest privileges with the Fund because the fiduciary exception to attorney-client privilege applies and because their interests have become adversarial.

The joint defense and common interest privileges are not privileges in their own right, but rather stem directly from the attorney-client privilege. *Monco v. Zoltek Corp.*, 317 F. Supp. 3d 995, 1002 (N.D. Ill. 2018). Often referred to collectively, this privilege "generally allows a defendant to assert the attorney-

client privilege to protect his statements made in confidence not to his own lawyer, but to an attorney for a co-defendant for a *common purpose* related to the defense of both." *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997) (citation omitted) (emphasis added). It is not actually a privilege itself but "really an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person." *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007). Because the joint defense and common interest privileges are rooted in the attorney-client privilege, they only protect documents otherwise covered by the attorney-client privilege.

However, fiduciaries under ERISA are subject to the fiduciary exception to attorney-client privilege, meaning they "must make available to the beneficiary, upon request, any communications with an attorney that are intended to assist in the administration of the plan." *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 787 (7th Cir. 2005) (quoting *In re Long Island Lighting Co.*, 129 F.3d 268, 272 (2d Cir. 1997) (internal quotation marks omitted). "Rooted in the common law of trusts, the fiduciary exception is based on the rationale that the benefit of any legal advice obtained by a trustee regarding matters of trust administration runs to the beneficiaries. Consequently, trustees ... cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege." *Solis v. Food Employers Labor Relations Ass'n*, 644

F.3d 221, 226–27 (4th Cir. 2011) (internal citation omitted). The Secretary stands in the shoes of the participants and beneficiaries as she is acting on their behalf; therefore, the fiduciary exception extends to her. *See Donovan v. Fitzsimmons*, 90 F.R.D. 583, 586–87 (N.D. Ill. 1981); *Solis*, 644 F.3d at 231 ("Accordingly, the district court properly applied the fiduciary exception to the documents requested by the Secretary that related to fund administration."). The only privileged information not impacted by the fiduciary exception is legal advice sought to determine the fiduciary's own liability. *See, e.g.*, *United States v. Mett*, 178 F.3d 1058, 1064 (9th Cir. 1999); *Solis*, 644 F.3d at 228.

Putting these concepts together, Appellants are in a bind. To the extent their communications with the Fund and its attorneys concern the administration of the Plans, the fiduciary exception applies and the Secretary may obtain them. To the extent their communications relate to Appellants' own personal liability, the only way they can be protected by the joint defense and common interest privileges is if the Fund and Appellants share "a common legal interest, and the doctrine is limited strictly to those communications made to further an ongoing enterprise." *BDO Seidman, LLP*, 492 F.3d at 815–16. It is difficult to imagine a context where Appellants would be seeking advice about their own personal liability in administering the Fund where the Fund would not have entirely adverse interests. The Fund's interest is solely in providing benefits to participants and their

beneficiaries and defraying reasonable plan expenses. 29 U.S.C. § 1104. Communications concerning Appellants' own potential fiduciary breaches could not be part of an "ongoing common enterprise" aligned with the Fund. If Appellants sought legal advice concerning their potential breaches and the Fund has these communications in its records, this information is not protected by the joint defense and common interest privileges.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order granting the preliminary injunction.

Respectfully submitted,

Date: February 29, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(5)–(6) and 32(a)(7)(B) and Seventh Circuit Rule 32(c), I certify that this brief uses a 14-point proportionally spaced typeface font (Times New Roman) and contains 9,534 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, February 29, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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