No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

JOHN J. KORESKO, V,
PETITIONER

v.

SECRETARY, UNITED STATES DEPARTMENT OF LABOR

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S APPENDIX
TO PETITION FOR A WRIT OF CERTIORARI

John J. Koresko, V
1159 Seaton Ross Rd.
Radnor, PA 19087-2838
(484) 202-007
jjkoresko@gmail.com
Pro se

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16-3806 & 17-1140

SECRETARY UNITED STATES DEPARTMENT OF LABOR

v.

JOHN J. KORESKO; JEANNE D. BONNEY;
PENN MONT BENEFIT SERVICES INC;
KORESKO & ASSOCIATES, P.C.; KORESKO LAW FIRM, P.C.;
PENN PUBLIC TRUST; REGIONAL EMPLOYERS ASSURANCE LEAGUES
VOLUNTARY EMPLOYEES BENEFICIARY ASSOCIATION TRUST;
SINGLE EMPLOYER WELFARE BENEFIT PLAN TRUST

John J. Koresko, V,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 2-09-cv-00988)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and BIBAS, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Thomas I. Vanaskie
Circuit Judge

Dated: June 12, 2018
PDB/cc: John J. Koresko, Esq.
Stephanie B. Bitto, Esq.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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John J. Koresko, V,
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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 2-09-cv-00988)
District Judge: Honorable Wendy Beetlestone

Submitted Under Third Circuit L.A.R. 34.1(a)
January 23, 2018

Before: HARDIMAN, VANASKIE and SHWARTZ, *Circuit Judges*

(Filed: March 23, 2018)

OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

VANASKIE, *Circuit Judge.*

Appellant John J. Koresko, V, proceeding *pro se*, appeals the District Court's August 31, 2016, Order denying his motion for reconsideration of its April 26, 2016, order of contempt. The Court held Koresko in civil contempt after finding that he failed to comply with Court orders compelling him to turn over assets he had misappropriated from employee welfare benefit plans protected by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001, *et seq*. Koresko also appeals the District Court's December 5, 2016, Order denying his motion to quash a writ of garnishment issued in aid of collecting the sizeable judgment entered against Koresko. Discerning no abuse of discretion in the District Court's decisions, we will affirm both orders.

I.[1]

In 2009, at the time this litigation began, Koresko was a licensed attorney and certified public accountant, and was also the President of PennMont Benefit Services Inc., a Pennsylvania corporation that conducts administrative services for trusts. The United States Department of Labor ("DOL") filed suit against Koresko, another named individual, and related entities for alleged violations of ERISA related to their administration of the Regional Employers Assurance Leagues Voluntary Employees'

[1] Our factual recitation is limited to the matters that are relevant to this appeal.

Beneficiary Association ("REAL VEBA") and the Single Employer Welfare Benefit Plan Trust ("SEWBPT") (collectively, the "Plans"). Koresko entered his appearance as counsel for himself and all named defendants.

In 2013, the DOL sought preliminary injunctive relief to remove Koresko from positions of authority over the Plans, to require him to restore Plan assets, and to prevent him from further depleting the assets. The DOL also sought the appointment of an interim Independent Fiduciary to administer the Plans. In support of its motion, the DOL asserted that Koresko had diverted Plan assets for improper purposes, such as buying condominiums on the Caribbean Island of Nevis and transferring $1.68 million from Plan accounts in the United States to a Nevis-based account named the "John Koresko Client Escrow." (Supp. App. at 3.) During a hearing on the motion, Koresko admitted to transferring the $1.68 million and purchasing the Nevis real estate with Plan assets. By Order dated September 16, 2013, the District Court granted the DOL's motion. Specifically, the District Court enjoined Koresko from serving the Plans and their participants in any capacity, appointed an interim Independent Fiduciary to administer the Plans, and directed Koresko to return the $1.68 million deposited in a Nevisian bank and transfer all rights in the Nevis real estate properties to the Independent Fiduciary. Additionally, Koresko was required to provide both the District Court and the Independent Fiduciary with the "name, account number, and location of any accounts containing [P]lan assets and to identify and provide the location and deeds . . . of all real or personal property purchased with [P]lan assets" within five business days. (Supp. App. at 21-22.)

Koresko failed to comply with the September 16, 2013, Order, leading the DOL to file its first motion for civil contempt on September 27, 2013. The Court issued an order to show cause as to why Koresko should not be held in civil contempt, and a hearing was scheduled. Counsel then entered his appearance on behalf of Koresko.

Koresko was deposed while the contempt motion was pending. He testified that he had originally purchased real estate in Nevis as a "trust investment," (Supp. App. at 107, 109), and that he transferred $1.68 million into the Nevis-based "John Koresko Client Escrow" account to fund the construction of condominium properties. Koresko also admitted that, after the District Court's September 16, 2013, Order requiring him to return the Plan funds to the Independent Fiduciary, he traveled to Nevis for the purpose of transferring the funds to the Royal Bank of Trinidad and Tobago.

There ensued a number of court proceedings concerning Koresko's failure to return the misappropriated funds and to transfer title to the Nevis condominiums to the Court-appointed Independent Fiduciary. On June 27, 2014, the District Court entered an order requiring Koresko to wire transfer funds from the Nevis account to the Independent Fiduciary by July 14, 2014. Three days before the deadline, Koresko filed a declaration with the Court stating that the Nevis bank would not wire the funds to the United States as ordered. The District Court then granted leave for Koresko to travel to Nevis to personally arrange for the transfer of funds, but Koresko was involved in a car accident and could not complete the transfer.

On September 10, 2014, the District Court denied the DOL's first motion for contempt, "except with respect to Mr. Koresko's failure to transfer to the United States

the accounts held in the Nevis branch of the Royal Bank of Trinidad and Tobago." (Supp. App. at 54.) The order gave Koresko until October 3, 2014, to effectuate the transfer. The Court thereafter extended its deadline to October 31, 2014, but required Koresko to sign a power of attorney authorizing the Independent Fiduciary to gain control of the accounts in the event that Koresko could not transfer the funds in time. Koresko eventually executed a power of attorney approved by the Independent Fiduciary's Nevisian lawyer, but the power of attorney did not enable the Independent Fiduciary to effectuate the transfer of funds or real property.

On February 6, 2015, following a bench trial, the District Court issued a comprehensive opinion on the merits of the DOL's claims. The District Court concluded that Koresko and the other defendants had breached their fiduciary duties of loyalty and prudence by misappropriating and diverting Plan assets, as well as engaging in prohibited self-dealing. On March 13, 2015, the District Court entered judgment against Koresko and his co-defendants in the amount of $38,417,109.63.[2] This amount did not include the funds that Koresko wrongfully transferred to the Royal Bank of Trinidad and Tobago and that were the subject of the pending contempt motion.

Unable to secure the return of the Plan assets held in Nevis, the DOL filed its second contempt motion on February 9, 2016. On March 31, 2016, the District Court

[2] We affirmed the District Court's judgment. *See Sec'y U.S. Dep't of Labor v. Koresko*, 646 F. App'x 230 (3d Cir. 2016). We also affirmed the September 16, 2013, Order to the extent that Koresko challenged the appointment of an Independent Fiduciary.

entered an order requiring Koresko to file a response to the DOL's contempt motion by April 14, 2016, and scheduled a hearing for April 26, 2016.

Koresko failed to respond to the contempt motion, and neither Koresko nor his attorney appeared at the April 26 contempt hearing. Accordingly, the District Court held Koresko in contempt. As summarized by the District Court in denying Koresko's motion to reconsider the contempt order, the Court made the following findings at the conclusion of the April 26 hearing:

> 1. On September 16, 2013, the Court issued an Order directing Defendant Koresko to turn over all trust assets and assign all rights in the Nevis condominiums to the Independent Fiduciary.
>
> 2. Koresko was present at the September 16, 2013 hearing that preceded the Court's Order and he took part in the argument between the parties regarding the language of the Court's Order.
>
> 3. Koresko submitted a declaration acknowledging his knowledge of the Court's September 16, 2013 Order, and he appealed the Court's September 16, 2013 Order. . . .
>
> 4. Koresko was represented by counsel from the law firm of Dilworth Paxson, who responded on his behalf to the DOL's first motion for contempt and related supplemental briefings arising from the Court's September 16, 2013, Order.
>
> 5. On June 27, 2014, the Court issued an Order directing Koresko to complete a wire transfer of the funds in Nevis to the Independent Fiduciary.
>
> 6. On September 10, 2014, the Court issued an Order directing Koresko to transfer the Nevis accounts to the United States no later than October 3, 2014.

> 7. On October 15, 2014, the Court issued an Order directing Koresko to transfer the accounts from Nevis to the United States no later than October 31, 2014.
>
> 8. On March 13, 2015, the Court issued an Order directing Koresko to immediately turn over all REAL VEBA or SEWBPT assets remaining in his custody or control to the Independent Fiduciary.
>
> 9. Koresko participated in the Court's Case Management/Electronic Case Filing system, by which he was served at his email account . . . pursuant to Local Rule 5.1.2.(4)(c).
>
> 10. Koresko used trust assets in the amount of $3.372 million to purchase real property in Nevis at the Nelson Springs resort and moved $1.68 million from bank accounts in the United States containing trust assets to an account in Nevis in the name of "John J. Koresko Client Escrow."
>
> 11. Koresko failed to surrender to the Independent Fiduciary the trust assets that were transferred first to the Scotia Bank and then to the Royal Bank of Trinidad and Tobago. Koresko retained custody and control over these funds throughout the pendency of this case, up to and including the Court's final judgment and Order in March 2015. Koresko has the present ability to transfer these funds, but has refused to do so.
>
> 12. Koresko failed to assign all rights to the real property in Nevis to the Independent Fiduciary. Koresko has the present ability to assign whatever rights he has in the properties to the Independent Fiduciary, but has refused to do so.

(App. at 36-37) (internal citations omitted).

Based on these findings, the Court determined that the DOL proved, through clear and convincing evidence, that: (1) Koresko had knowledge of the Court's September 16, 2013, Order; (2) Koresko had knowledge of four subsequent orders directing Koresko to comply with the original order; and (3) Koresko had a present ability to comply with the

Court's orders, but failed to do so. The Court directed Koresko to surrender to the United States Marshals Service on May 4, 2016. Koresko was ordered to remain in custody until such time as he had transferred the money and title to the real estate held in his name in Nevis to the Independent Fiduciary. Koresko, however, failed to self-surrender by the required date, and the Court issued a warrant for his arrest. Koresko was subsequently arrested and placed in custody, where he remains.

On May 17, 2016, Koresko's attorney moved for relief from the contempt order, which the Court denied.[3] The Court then held four status conferences regarding Koresko's civil contempt, which he refused to purge. In the meantime, Koresko filed seven documents that the District Court collectively construed as Koresko's motion for reconsideration of the Court's order of civil contempt. In the documents, Koresko appeared to challenge the Court's general authority to impose civil contempt orders, an argument the Court deemed meritless. Koresko also argued that there was improper notice of the contempt proceedings, which the Court rejected on the ground that the DOL properly served Koresko's attorney pursuant to the Federal Rules of Civil Procedure with a copy of the second contempt motion, and that Koresko also received electronic service of all documents. Accordingly, on August 31, 2016, the District Court denied Koresko's motion for reconsideration. Koresko timely appealed.

[3] Koresko's attorney withdrew his appearance on May 26, 2016, and Koresko has since proceeded *pro se*.

After final judgment was entered, the DOL represented to the District Court that Koresko had deposited funds with Jetstream Escrow & Title Services, Inc., in Oklahoma ("Jetstream Escrow"). On September 23, 2016, the Court issued a writ of continuing garnishment to retrieve funds from the Jetstream Escrow. In response to the garnishment order, Jetstream Escrow informed the Court that Koresko held a $50,000 non-exempt interest in the escrow account. Koresko moved to quash the writ, which the Court denied on December 5, 2016. Koresko also timely appealed this order.

II.

The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e), and, nd we have jurisdiction under 28 U.S.C. § 1291. We review the denial of a motion for reconsideration for abuse of discretion, *N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1203 (3d Cir. 1995), and we review the District Court's factual conclusions for clear error. *Id.* (citing *Ram Constr. Co., Inc. v. Am. States Ins. Co.*, 749 F.2d 1049, 1053 (3d Cir. 1984)). We review the District Court's garnishment order for abuse of discretion. *United States v. Clayton*, 613 F.3d 592, 595 (5th Cir. 2010).

III.

A.

A defendant may move for reconsideration of a court's order, but "[t]he standard for granting such a motion is strict . . . ." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *see also Velazquez v. UPMC Bedford Mem'l Hosp.*, 338 F. Supp. 2d 609, 611 (W.D. Pa. 2004) ("District Courts grant motions for reconsideration sparingly as

there is an interest in finality."). Motions for reconsideration may be granted only "to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985).

The crux of Koresko's argument is that the District Court wrongfully imprisoned him for civil contempt because, according to Koresko, he "did not disobey" the Court's orders. (Appellant's Br. at 4.) Accordingly, Koresko argues for his immediate release from prison.

"There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966) (citations omitted). A civil contempt order may issue upon a court finding: "(1) that a valid order of the court existed; (2) that the defendants had knowledge of the order; and (3) that the defendants disobeyed the order." *Marshak v. Treadwell*, 595 F.3d 478, 485 (3d Cir. 2009) (citation and internal quotation marks omitted). The movant must prove these elements by "clear and convincing evidence, and ambiguities must be resolved in favor of the party charged with contempt." *John T. ex rel. Paul T. v. Del. Cty. Intermediate Unit*, 318 F.3d 545, 552 (3d Cir. 2003) (citations and internal quotation marks omitted). All three conditions for issuance of a contempt order were satisfied by evidence that is indeed clear and convincing.

First, the District Court's orders requiring the return of Plan assets were valid. The DOL is authorized by 29 U.S.C. §§ 1132(a)(2) and (a)(5) to obtain appropriate equitable relief to redress a breach of fiduciary duty by a person in Koresko's position in relation to the Plans. And, "[a] federal court enforcing fiduciary obligations under

ERISA is . . . given broad equitable powers to implement its remedial decrees." *Delgrosso v. Spang & Co.*, 769 F.2d 928, 937 (3d Cir. 1985). Return of Plan assets was well within the District Court's remedial authority.

Koresko challenges the validity of the contempt order by arguing that it unlawfully imprisoned him for collection of a money judgment. *See* 28 U.S.C. § 2007(a) ("A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished."); *see also Colburn v. Colburn*, 123 A. 775, 775-76 (Pa. 1924) (noting Pennsylvania's prohibition on imprisonment for recovery of a money judgment stemming from a contract). There is a difference, however, between imprisonment for debt, and imprisonment for failure to comply with a court order, the latter being permissible. *See United States v. Harris*, 582 F.3d 512, 515 (3d Cir. 2009) ("With civil contempt, the contemnor will be released [from prison] subject to compliance with some condition. He is thus understood, in a by-now familiar observation, to carr[y] the keys of his prison in his own pocket." (citation and internal quotation marks omitted)); *see also Santibanez v. Wier McMahon & Co.*, 105 F.3d 234 (5th Cir. 1997); *Ne. Women's Ctr., Inc. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991); *Usery v. Fisher*, 565 F.2d 137 (10th Cir. 1977). The District Court made clear that Koresko was imprisoned for failure to comply with its orders which, among other things, required him to turn over Plan assets to the Independent Fiduciary. We thus reject Koresko's argument that his imprisonment for civil contempt was for collection of a money judgment. In this regard, it bears emphasizing that the final judgment entered against him did not include the money he

wrongfully transferred to the Royal Bank of Trinidad and Tobago or transfer of title to the Nevisian real estate, both of which were covered by the September 16, 2013, Order and subsequent confirming orders.

Second, the District Court had an ample basis for concluding that Koresko had knowledge of the orders at issue. Koresko represented himself when the September 16, 2013, Order was issued, he received notice via the Court's Electronic Case Filing System, and he participated in multiple proceedings after the September 16, 2013, Order that concerned enforcement of the directives that he return Plan assets from Nevis.

And finally, Koresko cannot dispute that he has not complied with the orders. He has not transferred the funds from the Royal Bank of Trinidad and Tobago, and he has not transferred to the Independent Fiduciary title to the Nevis condominiums. Accordingly, the District Court did not abuse its discretion in holding Koresko in contempt.

Aside from attacking the underlying contempt order, Koresko raises other arguments, which we similarly find to be meritless. Koresko argues that the District Court should have held a "turnover proceeding" to determine whether the Nevis property was in Koresko's possession and control, but we have reserved this principle for bankruptcy proceedings, a context that requires us to determine "whether the bankrupt had property within his possession or control at the date of bankruptcy which he had not delivered to his trustee." *Toplitz v. Walser*, 27 F.2d 196, 197 (3d Cir. 1928); *see also In re Contemporary Apparel, Inc.*, 488 F.2d 794, 798 (3d Cir. 1973); *Price v. Kosmin*, 149

F.2d 102, 104 (3d Cir. 1945). As such, we deem this type of hearing inapplicable to Koresko's case.

Koresko also argues that he was denied due process during the contempt proceedings. We have observed that due process mandates "notice and a hearing before a finding of contempt is made and before the imposition of contempt sanctions so that the parties 'have an opportunity to explain the conduct deemed deficient . . . and that a record will be available to facilitate appellate review.'" *Harris v. City of Philadelphia*, 47 F.3d 1311, 1322 (3d Cir. 1995) (quoting *Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1127 (3d Cir. 1990)). As reflected in the record, Koresko received adequate notice of the District Court's scheduled contempt hearing and resulting order. The contempt hearing afforded Koresko an opportunity to be heard, but he chose not to attend, and he also chose not to object in writing. Significantly, Koresko was still represented by counsel when the 2016 contempt proceedings were conducted.

Finally, Koresko argues that the District Court's March 13, 2015, final decision on the merits, where the Court found him and other defendants liable for $38.4 million stemming from ERISA violations, "swallowed up" the September 16, 2013, Order. (Appellant's Br. at 38) (citation omitted). But the District Court was careful to note that the money and property in Nevis were not subsumed within the judgment on the merits. The September 16, 2013, Order remained in effect and was not rendered moot by the judgment on the merits.

In sum, we hold that the District Court did not abuse its discretion in denying Koresko's motion for reconsideration, as Koresko has not demonstrated a manifest error

of law or fact in the Court's contempt order, and has not presented any newly discovered evidence that is relevant to his appeal.[4]

B.

We next address the District Court's denial of Koresko's motion to quash the writ of garnishment. A breaching fiduciary "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). "A court may issue a writ of garnishment against property . . . in which the debtor has a substantial nonexempt interest and which is in the possession, custody, or control of a person other than the debtor, in order to satisfy the judgment against the debtor." 28 U.S.C. § 3205(a). Moreover, nationwide execution of a garnishment order in favor of the United States is appropriate because "[a] writ of execution on a judgment obtained for the use of the United States in any court thereof shall be issued from and made returnable to the court which rendered the judgment, but may be executed in any other State . . . ." 28 U.S.C. § 2413. "In garnishment proceedings, the Defendant bears the burden of establishing that his property is exempt." *United States v. King*, No. 08-66-01, 2012 WL 1080297, at *3 (E.D. Pa. Apr. 2, 2012) (citing 28 U.S.C. § 3014(b)(2)).

[4] In his reply brief, Koresko cites two recent Supreme Court decisions, *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), and *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), for the proposition that the DOL lacked standing to seek relief against him because, he contends, the Plans did not sustain a pecuniary loss. While instructive in the areas of immigration (*Ziglar*) and the Fair Credit Reporting Act (*Spokeo, Inc.*), these cases have nothing to do with standing to obtain redress for an ERISA fiduciary's breach of duties. As we explained in *Edmonson v. Lincoln National Life Insurance*, 725 F.3d 406, 417 (3d Cir. 2013), "a financial loss is not a prerequisite for standing to bring a disgorgement claim under ERISA." Nothing in *Ziglar* or *Spokeo* alters that conclusion.

Koresko argues that a final monetary judgment in favor of the DOL never existed, and that the District Court "never directed [him] to pay a dime to the [DOL]." (Appellant's Br. at 52.) Moreover, Koresko argues that the DOL had no authority under ERISA to collect a monetary judgment for the Plan participants.

Koresko is mistaken. The District Court found, and we affirmed, that Koresko committed breaches of his fiduciary duties, which resulted in losses to the Plans and their participants and beneficiaries. Pursuant to ERISA, the DOL has authority to seek "appropriate relief" under 29 U.S.C. § 1132(a)(2), including removal of a fiduciary and restoration of plan assets. *Id.* § 1109. The DOL demanded payment of the outstanding judgment on behalf of Plan participants, and representatives from the Jetstream Escrow in Oklahoma asserted that Koresko held a $50,000 non-exempt interest in the account. We do not find any procedural defects in the DOL's method of collecting the judgment on behalf of the Plans. And the DOL properly sought to execute the garnishment order in Oklahoma because nationwide execution is appropriate. We thus find that the District Court did not abuse its discretion by entering the writ of continuing garnishment.

IV.

Accordingly, we will affirm the orders of the District Court entered on August 31, 2016, and December 6, 2016.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HILDA L. SOLIS, **Plaintiff,** **v.** **JOHN J. KORESKO, V, JEANNE BONNEY, PENN-MONT BENEFIT SERVICES, INC., KORESKO & ASSOCIATES, P.C., REGIONAL EMPLOYERS ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION TRUST, SINGLE EMPLOYER WELFARE BENEFIT PLAN TRUST** **Defendants.** **v.** **NATIONWIDE LIFE INSURANCE COMPANY** **Movant**	**CIVIL ACTION** **NO. 09-988**

OPINION

This case arises out of an action by Plaintiff, the Secretary of Labor of the United States Department of Labor ("DOL"), brought against two multiple-employer trusts and others, alleging breach of their fiduciary duties under the Employee Retirement Income Security Act for failure to maintain employee welfare benefit plan assets in trust and transferring plan assets into non-trust accounts they controlled. Before the Court is Defendant John J. Koresko's ("Koresko") Motion for Reconsideration[1] of the Court's Order of Contempt issued April 26, 2016 (ECF No. 1307).

[1] As discussed *infra*, although Koresko styles his papers as a motion pursuant to the All Writs Act, *habeas corpus*, and other provisions, the numerous letters and other correspondence sent to the Court are more appropriately considered together as one motion for reconsideration.

I. FACTS

A. Background

This case has a long and difficult history stretching back more than seven years, during which time the Court has overseen numerous motions, requests for injunctions, hearings, and an eventual trial. In the interest of clarity of the events preceding the instant Motion, and because the Court writes primarily for the parties, the Court assumes the reader had familiarity with the underlying facts and previous decisions in this case: *Solis v. Koresko*, 884 F.Supp.2d 261 (E.D. Pa. 2012) and *Perez v. Koresko*, 86 F.Supp.3d 293 (E.D. Pa. 2015), *aff'd sub. nom. Sec'y of Labor v. Koresko*, Nos. 15-2470, 15-3141, -- Fed. Appx. -- , 2016 WL 1358101 (3d Cir. Apr. 5, 2016).

B. Relevant Procedural History

On March 6, 2009, the DOL brought suit against Koresko and others pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") in connection with the Defendants' oversight and administration of the Regional Employers Assurance Leagues Voluntary Employees' Beneficiary Association ("REAL VEBA"), and the Single Employer Welfare Benefit Plan Trusts ("SEWBPT") (collectively, "the Trusts"). On August 3, 2012, the Court found that Koresko, and entities under Koresko's control, committed fiduciary breaches and other ERISA violations in administering the REAL VEBA Trust and by mishandling and misappropriating related plan assets. *See Solis*, 884 F.Supp.2d at 261.

On June 19, 2013, the DOL moved for preliminary injunctive relief to prevent Koresko from further misappropriating and depleting the Trusts' assets. The DOL supported the motion with evidence that Koresko used Trust assets to purchase real estate properties in the Caribbean island of Nevis, and that he moved an additional $1.68 million from bank accounts in the United

States containing Trust assets to an account in Nevis in the name of "John J. Koresko Client Escrow."

On July 8, 2013, Koresko appeared at a hearing to oppose the DOL's motion, whereupon he admitted that he had used trust assets to purchase six condominium units in Nevis and had transferred the $1.68 million for the purpose of further investing in the condominium units. Pending a further hearing on the DOL's motion, the Court issued interim orders freezing several bank accounts containing trust assets that were under Koresko's control. On September 16, 2013, the Court held another hearing at which Koresko provided testimony and additional arguments in response to the DOL's motion. Koresko testified that he made investments for the Trusts by using Trust assets to purchase real estate property at the Nelson Springs Resort in Nevis. *See* ECF No. 1283, Ex. B at 90-94.

At the conclusion of the hearing, the Court found that the DOL was likely to succeed on the merits of the ERISA claims against Koresko and that the plan participants and beneficiaries would likely suffer immediate irreparable harm in the absence of an injunction. In an Order dated September 16, 2013, the Court removed Koresko and others from any positions they held with regard to the Trusts and appointed the Wagner Law Group as the Independent Fiduciary for the trusts. *See* ECF No. 496. The Court enjoined Koresko and others from serving the Trusts, their plans, and participants in any capacity and further ordered that "Defendants John J. Koresko, PennMont Benefit Services, Inc., Koresko and Associates, P.C., and Koresko Law Firm, P.C., their agents, employees service providers, accountants, attorneys, and any other party acting in concert with or at their direction shall turn over all assets of the plans and employer arrangements," and "all documentation related to the plans and employer arrangements to the Independent Fiduciary." The Defendants were also specifically ordered to assign "all rights in

the Nelson Springs condominiums" to the Independent Fiduciary. *Id.* In addition to his personal presence at the hearings, Koresko – then a licensed attorney – received notification of the Court's Order through the Court's Case Management/Electronic Case Filing system at his email account "jjkoresko@gmail.com" pursuant to Local Rule 5.1.2.(4)(c).

Koresko failed to provide the Independent Fiduciary with documentation relating to the plans, the location of plan assets, and other relevant information concerning plan finances as directed to by the Order. On September 27, 2013, the DOL filed its first motion for contempt. On September 30, 2013, the Court issued an Order to Show Cause why the Defendants should not be held in civil contempt and subject to sanctions for their failure to comply with the September 16th Order. *See* ECF No. 522. On October 2, 2013, the Court held a contempt hearing at which much of the discussion focused on retention of counsel for Koresko; Lawrence G. McMichael, Esq. ("McMichael"), of Dilworth Paxson, appeared on Korekso's behalf, but did not formally enter an appearance for another two weeks. *See* ECF Nos. 534, 538.

With the contempt motion pending, Koresko gave deposition testimony on December 17 and 18, 2013, and January 7 and 8, 2014, while represented by counsel. During these sessions, Koresko testified under oath that with regard to the purchase of the condominiums, "[t]he original intention was that this was going to be a trust investment." ECF No. 1283, Exh. D at 189. Koresko also testified that he transferred $1.68 million in trust assets to the Scotia Bank in Nevis under an account titled "John Koresko Client Escrow Account," to facilitate the transfer of funds for construction on condominium properties in Nevis. *See* ECF No. 1283, Exh. D at 152-53, 176, 189-92. Koresko admitted that he traveled to Nevis to transfer the funds held in the Scotia Bank to the Royal Bank of Trinidad and Tobago after the Court had ordered the transfer

of funds in Nevis to the Independent Fiduciary. *See* ECF No. 1283, Exh. E at 152-53, 171-76, 236.

Several weeks after the depositions were taken, on February 27, 2014, the Court directed the DOL to inform the Court of any outstanding contempt issues. The DOL filed a supplemental memorandum regarding Koresko's refusal to turn over certain Trust assets, particularly with regard to the condominiums and funds in Nevis. *See* Docket No. 726. The Court held a second contempt hearing on April 1, 2014 at which, rather than holding Koresko in contempt, the parties agreed on language to be included in a court order directing Koresko to sign letters authorizing the banks in Nevis to give information to the Independent Fiduciary about the accounts held there.

On June 27, 2014, the Court ordered Koresko to wire transfer the funds in Nevis account number -3337 to an account used for the administration of the Trusts by July 14, 2014. *See* ECF No. 898. Koresko filed a declaration with the Court on July 11, 2014 stating that the Royal Bank of Trinidad and Tobago would not wire the Nevis funds into the United States as requested. *See* ECF No. 912. Based on this declaration, the Court granted leave for Koresko to travel to Nevis for the purpose of arranging the transfer of funds to the Independent Fiduciary in person; unfortunately, Koresko subsequently was involved in a car accident and was unable to complete the transaction.

On September 10, 2014, the Court denied the DOL's motion for contempt "except with respect to Mr. Koresko's failure to transfer to the United States the accounts held in the Nevis branch of the Royal Bank of Trinidad and Tobago." ECF No. 990. The Court further ordered that Koresko had until October 3, 2014, to transfer the funds in the Nevis account to the United States or face contempt. The Court extended the deadline based on Koresko's representations

about his ill health, but ordered that if Koresko could not effectuate the transfer of funds, he would be required to "sign a power-of-attorney, providing the Independent Fiduciary control of the accounts" by October 31, 2014. ECF No. 1033.

Koresko chose to draft his own power of attorney that was later deemed deficient under Nevisian law. On December 4, 2014, the Court ordered Koresko to sign a power of attorney already approved by Nevisian counsel no later than December 8th, or face contempt. *See* ECF No. 1087. Koresko failed to sign the document but, nevertheless, the Court delayed in holding Koresko in contempt until December 15, 2014 (ECF No. 1098), at which point he was given three days to purge himself of contempt before being required to turn himself in to the Office of the U.S. Marshal. On the morning of the day Koresko was required to surrender himself, his attorney informed the Court that he had executed the revised power of attorney. *See* ECF No. 1102. On December 30, 2014, the Independent Fiduciary confirmed that it had received the signed power of attorney. *See* ECF No. 1115.

On February 6, 2015, the Court entered judgment in favor of the DOL on all ERISA claims and found that, *inter alia*, the funds Koresko transferred to the Royal Bank of Trinidad and Tobago were the Trusts' assets, and Koresko was the sole signatory on that account. The Court also made a finding of fact that Koresko transferred the funds from the Scotia Bank to the Royal Bank of Trinidad and Tobago after the appointment of the Independent Fiduciary and the Court's September 16, 2013 Order. *See Perez*, 86 F.Supp.3d at 350-52. In addition to other assets misappropriated by Koresko, the Court held that Koresko was required to disgorge and surrender all Trust assets and funds that he had transferred into the Royal Bank of Trinidad and Tobago.

On March 13, 2015, the Court entered a final judgment and order that provided, in part, "[t]o the extent that notwithstanding the September 16, 2013 Order, any assets of the REAL VEBA or SEWBPT remain in the custody or control of any of the Koresko Defendants or third parties, the Koresko Defendants and third parties *shall immediately turn over such assets* to the [Independent Fiduciary] and *such assets shall be permanently retitled* to the [Independent Fiduciary]". ECF No. 1149 (emphasis added).

C. Contempt Motion

On February 9, 2016, the DOL filed its Second Motion for Contempt. The Court held a status conference between the parties on March 8, 2016 at which Koresko was again represented by McMichael. In an Order dated March 31, 2016, the Court determined that Koresko was not entitled to indemnification of the cost of legal representation from the Trusts.[2] *See* ECF No. 1300. The Court's Order required Koresko to file a response to the Motion no later than April 14, 2016 and scheduled the hearing for April 26, 2016.

Neither Koresko nor his attorneys appeared for the hearing at which the Court read an oral opinion from the bench (ECF No. 1321) and found:

1. On September 16, 2013, the Court issued an Order (ECF No. 496) directing Defendant Koresko to turn over all trust assets and assign all rights in the Nevis condominiums to the Independent Fiduciary.

2. Koresko was present at the September 16, 2013 hearing that preceded the Court's Order and he took part in the argument between the parties regarding the language of the Court's Order. *See* ECF No. 1283, Exh. B at 87-111.

3. Koresko submitted a declaration acknowledging his knowledge of the Court's September 16, 2013 Order (ECF No. 912), and he appealed the Court's September 16, 2013 Order, although the Third Circuit eventually dismissed that appeal as moot.

[2] "The Supreme Court has not recognized nor has the Court of Appeals found a constitutional right to counsel for civil litigants." *Parham v. Johnson*, 126 F.3d 454, 456 (3d Cir. 1997); *see also Turner v. Rogers*, 564 U.S. 431 (2011).

4. Koresko was represented by counsel from the law firm of Dilworth Paxson, who responded on his behalf to the DOL's first motion for contempt and related supplemental briefings arising from the Court's September 16, 2013, Order.

5. On June 27, 2014, the Court issued an Order (ECF No. 898) directing Koresko to complete a wire transfer of the funds in Nevis to the Independent Fiduciary.

6. On September 10, 2014, the Court issued an Order (ECF No. 990) directing Koresko to transfer the Nevis accounts to the United States no later than October 3, 2014.

7. On October 15, 2014, the Court issued an Order (ECF No. 1033) directing Koresko to transfer the accounts from Nevis to the United States no later than October 31, 2014.

8. On March 13, 2015, the Court issued an Order (ECF No. 1149) directing Koresko to immediately turn over all REAL VEBA or SEWBPT assets remaining in his custody or control to the Independent Fiduciary.

9. Koresko participated in the Court's Case Management/Electronic Case Filing system, by which he was served at his email account "jjkoresko@gmail.com" pursuant to Local Rule 5.1.2.(4)(c).

10. Koresko used trust assets in the amount of $3.372 million to purchase real property in Nevis at the Nelson Springs resort and moved $1.68 million from bank accounts in the United States containing trust assets to an account in Nevis in the name of "John J. Koresko Client Escrow."

11. Koresko failed to surrender to the Independent Fiduciary the trust assets that were transferred first to the Scotia Bank and then to the Royal Bank of Trinidad and Tobago. Koresko retained custody and control over these funds throughout the pendency of this case, up to and including the Court's final judgment and Order in March 2015. Koresko has the present ability to transfer these funds, but has refused to do so.

12. Koresko failed to assign all rights to the real property in Nevis to the Independent Fiduciary. Koresko has the present ability to assign whatever rights he has in the properties to the Independent Fiduciary, but has refused to do so.

Accordingly, the Court determined that the DOL produced clear and convincing evidence that: Koresko had knowledge of the Order directing him to turn over the assets in the bank account in Nevis along with the assignment of rights, deeds, and indicia of ownership of the real properties in the Nelson Springs Resort condominiums; Koresko had knowledge of the Court's four subsequent Orders reaffirming that directive; Koresko disobeyed the Court's September 16, 2013, Order, as well as the four subsequent Court orders directing Koresko to turn over the

aforementioned assets to the Independent Fiduciary; and Koresko has a present ability to comply with the Order. Accordingly, the Court found Koresko in contempt and directed Koresko to surrender himself to the United States Marshals Service on May 4, 2016, until such time as he complied with the terms of the April 26, 2016 Order ("the Contempt Order"). *See* ECF No. 1307. The terms of the Contempt Order were, specifically, that Koresko: (1) cause the transfer of $1.68 million to Wilmington Trust, the Court appointed Independent Fiduciary; (2) cause the transfer of title for each real property located at Nelson Springs Resort in Nevis, *i.e.* Condo United 3A, Condo Unit 5B, Condo Unit 5C, Condo Unit 6A, and Condo Unit 6B, to Wilmington Trust; and (3) transfer title of any lot of land held in the name of John Koresko at Cliff Dwellers in Nevis to Wilmington Trust. *Id.*

On May 2, 2016, Koresko provided a thirty-one page document to the undersigned's chambers (ECF No. 1310), that detailed Koresko's familial difficulties, his objections to ERISA generally and its application in this matter, his conviction that the Court lacks jurisdiction over this matter, and constitutional violations that he alleges he has suffered. He did not, however, self-surrender as required by the Contempt Order. On May 5, 2016, the Court issued a bench warrant for his arrest. *See* ECF No. 1311. At the request of the United States Marshals Service, Koresko presented himself to the Marshals on May 6, 2016 and was confined to custody. On May 17, 2016, Koresko's counsel, Lawrence McMichael of Dilworth Paxson, filed a Motion for Relief from Contempt Order on his behalf (ECF No. 1316), which was subsequently denied. ECF No. 1333.

At a status conference held on May 18, 2016, McMichael was asked to clarify the extent of his firm's representation of Koresko. Koresko himself made an oral motion for this Court to recuse itself due to an alleged conflict of interest. *See* ECF No. 1350. McMichael withdrew his

appearance on May 26, 2016 (ECF No. 1328), and the Court denied Koresko's oral motion for recusal on May 27, 2016. ECF No. 1330.

The Court held status conferences on June 1, June 16, July 5, and August 24, 2016, regarding Koresko's willingness to comply with the Court's Contempt Order and the Department of Labor's suggested path forward. Koresko, meanwhile, filed various letters, memoranda, and miscellaneous motions on June 20 (ECF No. 1346), July 21 (ECF No. 1362), July 25 (ECF No. 1363), August 9 (ECF No. 1375), August 15 (ECF No. 1379), August 16 (ECF No. 1380), and August 23, 2016 (ECF No. 1385), totaling well in excess of three hundred (300) pages of single-spaced, largely handwritten text.[3]

II. DISCUSSION

A. Current Procedural Posture

1. Validity and Authority of the Order

The Court rejects Koresko's arguments challenging the general authority of a district court to compel confinement in a civil[4] contempt matter and the validity of the underlying orders in this case. *See* ECF No. 1346 at 10, 14, 35, 40-41, 45; 1346-1 at 19, 21; 1346-2 at 5. It has long been recognized that courts possess the inherent authority to hold persons in contempt, and may utilize a number of methods to secure obedience, including "an indeterminate period of confinement which may be brought to an end only by the contemnor's ultimate adherence to the court order." *Latrobe Steel Co. v. United Steelworkers of America*, 545 F.2d 1336, 1344 (3d Cir. 1976); *see also United States v. Hudson*, 7 Cranch 32, 34 (1812); *Shillitani v. United States*, 384

[3] Although one of Koresko's many complaints is that it is difficult to write motions by hand while confined, it does not appear to have impacted his ability to regularly bombard the Court with hundreds of pages of argument.

[4] Throughout his filings, Koresko frequently – and incorrectly – refers to his predicament as a result of criminal, rather than civil, contempt proceedings. There is a notable difference between the two: "In civil contempt the punishment is remedial, to secure an end; while in criminal the punishment is punitive, to vindicate the authority and dignity of the court. It is not the fact of punishment but the purpose and character of it which distinguishes contempts." *In re Fox*, 96 F.2d 23, 25 (3d Cir. 1938).

U.S. 364, 370 (1966) ("There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt"); *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827-28 (1994) ("*Bagwell*"). A defendant incarcerated for civil contempt "carries the keys of his prison in his own pocket." *Harris v. City of Philadelphia*, 47 F.3d 1311, 1328 (3d Cir. 1995). As outlined in the Contempt Order, Koresko need only cause the transfer of the $1.68 million, his property interest in the Nevis condos, and the title to the Cliff Dwellers plot, to the Independent Fiduciary to be released from his current confinement.

While Koresko spends much energy in his many filings arguing that the September 2013 Order is invalid, the substantive validity of an order cannot be challenged in a collateral proceeding such as contempt. *See Roe v. Operation Rescue*, 919 F.2d 857, 871 (3d Cir. 1990) (citing *United States v. Stine*, 636 F.2d 839, 845 (3d Cir. 1981)).[5] A fundamental principle of the legal system is that "all orders and judgments of courts must be complied with promptly. If a person to whom a judge directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal." *Maness v. Meyers*, 419 U.S. 449, 458 (1975). A private determination that an order is incorrect, or even unconstitutional, may still result in contempt "even if [that person's] private determination is

[5] Koresko repeatedly cites *Montanile v. Board of Trustees of Nat. Elevator Indus. Health Benefit Plan*, -- U.S. --, 136 S.Ct. 651 (2016) and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) in support of his argument that the Department of Labor is not entitled to assets outlined in the Contempt Order. *See* ECF No. 1369 at 1, 4; ECF No. 1379 at 9-12; ECF No. 1385 at 2. Even if they were applicable here – which they are not, these cases are easily distinguishable. *Montanile* concerned an administrator of a health plan who sought reimbursement of medical expenses from a participant who had reached a settlement with the drunk driver that injured him. In that case, the Court held that the plan could only seek equitable relief from specifically identifiable funds in the beneficiary's possession, not from the beneficiary's general assets. *Id.* at 657-58. Further, because the defendant had dissipated "the entire fund on nontraceable items, that complete dissipation eliminated the lien." *Id.* at 659. Similarly, *Great-West* was an action for specific performance of a reimbursement provision of an ERISA plan seeking to compel the plan beneficiary to provide restitution to the plan. As the Department of Labor points out, however, the funds and properties in this case are not Koresko's general assets; the Court has already found that these are Trust assets, and Koresko has not offered any evidence that the properties or funds have "dissipate[d]" as they did in *Montanile*. 136 S.Ct. at 659. *See* ECF No. 496, *Koresko*, 86 F.Supp.3d at 351-52.

later proven correct in the courts." *Walker v. City of Birmingham*, 388 U.S. 307 (1967); *see also Howat v. Kansas*, 258 U.S. 181 (1922).

Koresko's related contention that equity provides no basis for coercive contempt (ECF No. 1346 at 39-40) is also misplaced. A court in equity acts *in personam* on the parties before it, which has always included the power to issue decrees, in terms of a personal command, to the defendant to return property under pain of imprisonment. *See Bagwell*, 512 U.S. at 841 (Scalia, J., concurring); John Norton Pomeroy, 1 *Treatise on Equity Jurisprudence* § 428 at 469 (Bancroft-Whitney Co. 1886). The Seventh Circuit recently addressed a very similar case in which the defendant "lodge[d] a host of procedural objections to the contempt proceedings . . . for example, that [the plaintiffs] lacked standing to pursue contempt sanctions. This argument is frivolous. The judgment requires [the defendant] to restore money to the [plaintiff], and [the plaintiff] is the administrator of the plan . . . It's well established that an equitable decree of restitution in an ERISA case may be enforced by contempt." *Chesemore v. Fenkell*, No. 14-3181, 2016 WL 3924308, at *11 (7th Cir. July 21, 2016).

2. *Habeas Corpus* Relief

Although a person incarcerated for civil contempt meets the "in custody" requirement for purposes of invoking *habeas corpus* jurisdiction (*see e.g.*, *Fernos-Lopez v. Figarella Lopez*, 929 F.2d 20, 23 (1st Cir. 1991); *Duncan v. Walker*, 533 U.S. 167, 176 (2001)), *habeas corpus* review generally "will not be allowed to do service for an appeal." *Bousley v. United States*, 523 U.S. 614, 621 (1998) (internal quotation omitted); *see also Matin-Trigona v. Shiff*, 702 F.2d 380, 388 (2d Cir. 1983) (holding that absent extraordinary circumstances, "all available routes of appeal must be exhausted before a person imprisoned for civil contempt . . . can avail himself of *habeas corpus* relief"); *Timms v. Johns*, 627 F.3d 525 (4th Cir. 2010) (same). Here, Koresko's petition

for *habeas corpus* is deficient on several levels: Koresko has not used the standard form provided by the court as required by Local Rule 9.3(a); he has not identified the correct respondent, the warden of his correctional institution; and, most importantly, he did not avail himself of the avenues of appeal available to him. Thus, Koresko is not entitled to *habeas* relief.

3. All Writs Act

Koresko also purports to submit a petition for relief under the All Writs Act, a catch-all statute that permits "all courts established by Act of Congress" to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651; *see* ECF No. 1369 at 6. A request for a writ pursuant to the All Writs Act is widely recognized as an extraordinary measure that should be rarely, "if ever," granted. *In re United States*, 273 F.3d 380, 385 (3d Cir. 2001) (citing *Solomon v. Continental Am. Life Ins. Co.*, 472 F.2d 1043, 1045 (3d Cir. 1973)); *see also In re Balsimo*, 68 F.3d 185, 186 (7th Cir. 1995); *Will v. United States*, 389 U.S. 90 (1967). The "exceptional nature" of the statute has naturally resulted in a dearth of case law, and Koresko has not identified any precedent in which the statute was applied in a civil contempt matter or any real analysis as to why this is the rare instance where the Court should reach for such an extraordinary measure; therefore, Koresko has failed to demonstrate that he is entitled to relief under the All Writs Act. *In re United States*, 273 F.3d at 385.

4. Service

Koresko also claims that he was not served with notice of the contempt proceedings, arguing that email is insufficient to complete service pursuant to the Rules Enabling Act. *See* ECF No. 1362 at 2, 14; ECF No. 1385 at 3-4; ECF No. 1379 at 26. From October of 2013 through May 26, 2016, Koresko was represented by counsel. *See* ECF No. 538 (Notice of

Appearance by Lawrence G. McMichael); ECF No. 1328 (Notice of Withdrawal by Lawrence G. McMichael). If a party is represented by an attorney, service "must be made on the attorney unless the court orders service on the party." Fed. R. Civ. P. 5(b)(1). The Department of Labor served Koresko's attorney, McMichael, with a copy of the Second Motion for Contempt, in accordance with the Federal Rules. *See* ECF No. 1283 at 20. Beyond serving his attorney, Koresko himself received electronic service and copies of all filings. The United States District Court for the Eastern District of Pennsylvania has created a Case Management/ Electronic Case Filling ("ECF") system, and adopted Local Rule 5.1.2.(4)(c), which reads:

> Registration as an ECF Filing User constitutes agreement to receive and consent to make electronic service of all documents as provided in these ECF Procedures in accordance with Rule 5(b) (2) (D) of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, as referenced in Rule 49(b) of the Federal Rules of Criminal Procedure. This agreement and consent is applicable to all future cases until revoked by the ECF Filing User.

See also Fed. R. Civ. P. 83 ("a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice"). Koresko's subsequent disbarment notwithstanding, he did enter an appearance on his own behalf in this case in April 2009 and has since received ECF notifications at his email address "jjkoresko@gmail.com." *See* ECF No. 44 (Notice of Appearance by John J. Koresko, V). Thus, Koresko's complaint that he has never been properly served is meritless.

5. Frivolous Filings

Koresko's filings alternate between letter and motion formats, and are variously titled a motion for relief, a motion to set aside the order of contempt, a motion under the All Writs Act, and a petition for a writ of *habeas corpus*. While it is apparent that, at core, Koresko seeks reconsideration of the contempt order, his remaining complaints – ranging in topic from

government propaganda to personal medical issues – are patently frivolous, and the Court cannot discern any other legitimate claims from his submissions. The inclusion of these lengthy, unfocused passages has both strained the Court's resources and obfuscated Koresko's arguments. Where a party repeatedly submits frivolous motions and petitions that result in an undue burden on a district court's time, he may be prohibited from filing any other actions in that case without leave of the district court. *See Matter of Packer Ave Assoc.*, 884 F.2d 745, 748-49 (3d Cir. 1989) ("*Packer Ave.*"); *see also Thrower v. Beacon Journal Pub. Co.*, 985 F.2d 561 (6th Cir. 1993); *Hurt v. Social Security Admin.* 544 F.3d 308, (D.C. Cir. 2008). This restriction "strikes a good balance between the right of the litigant to access to the courts . . . and the right of taxpayers not to have a frivolous litigant become an unwarranted drain on their resources." *Packer Ave.*, 884 F.2d at 748-49. Accordingly, Koresko, whose profuse and frivolous filings have already taken up disproportionate amounts of the Court's time and resources, shall be prohibited from filing any further motions (however the document is styled) without leave of court.

B. Standards

As stated at the outset, the Court's best interpretations of the remaining contents of Koresko's letters, motions, and memoranda, is that he is seeking reconsideration of the Contempt Order. The purpose of a motion for reconsideration "is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985); *see also Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). Motions for reconsideration should only be granted "sparingly" and are to be "strictly reviewed" by district courts. *Velazquez v. UPMC Bedford Memorial Hosp.*, 338 F.Supp.2d 609, 611 (W.D. Pa. 2004).

In entering the Contempt Order, the Court concluded that the DOL had proved by clear and convincing evidence that: (1) a valid order of the court existed; (2) the defendant had knowledge of the order; and (3) the defendant disobeyed the order. *See FTC v. Lane Labs-USA, Inc.*, 624 F.3d 575, 591 (3d Cir. 2010). The Court's rationale was set forth in its oral opinion from the bench at the conclusion of the hearing on the Motion for Contempt. *See* ECF No. 1321.

Beyond the frivolous and meritless objections discussed *supra*, Koresko has not offered any newly-discovered evidence or asserted any manifest errors of law or fact that would warrant reconsideration. A motion for reconsideration should generally be denied "unless the moving party can point to controlling decisions or data that the court overlooked." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). Koresko having failed to do so, the motion is denied.

BY THE COURT:

/S/WENDY BEETLESTONE, J.

WENDY BEETLESTONE, J.

CERTIFICATE OF SERVICE

Under penalty of perjury, I HEREBY CERTIFY that a true and correct copy of the foregoing Petition For A Writ Of Certiorari has been served upon the following person by U.S. First Class Mail, postage prepaid:

Mr. Noel J. Francisco
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

November 9, 2018

JOHN J. KORESKO, V
Petitioner, Pro Se

CERTIFICATE OF COMPLIANCE

Under penalty of perjury, in accordance with U.S. Supreme Court Rules 33.2 and 39, I certify that the foregoing Petition for a Writ of Certiorari was prepared on 8 1/2 x 11-inch paper, double-spaced, using Century Schoolbook 12-point typeface, and does not exceed 40 pages (accounting for permitted exclusions).

November 9, 2018

JOHN J. KORESKO, V
Petitioner, Pro Se

Additional material from this filing is available in the Clerk's Office.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16-3806 & 17-1140

SECRETARY UNITED STATES DEPARTMENT OF LABOR

v.

JOHN J. KORESKO; JEANNE D. BONNEY; PENN MONT BENEFIT SERVICES INC; KORESKO & ASSOCIATES, P.C.; KORESKO LAW FIRM, P.C.; PENN PUBLIC TRUST; REGIONAL EMPLOYERS ASSURANCE LEAGUES VOLUNTARY EMPLOYEES BENEFICIARY ASSOCIATION TRUST; SINGLE EMPLOYER WELFARE BENEFIT PLAN TRUST

John J. Koresko, V,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 2-09-cv-00988)
District Judge: Honorable Wendy Beetlestone

Submitted Under Third Circuit L.A.R. 34.1(a)
January 23, 2018

Before: HARDIMAN, VANASKIE and SHWARTZ, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on January 23, 2018. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the August 31, 2016 and December 6, 2016 orders of the District Court are hereby AFFIRMED. Costs shall be taxed against Appellant. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

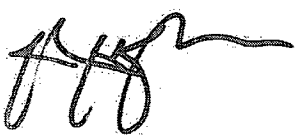
Dated: March 23, 2018

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, by mailing a copy to the person listed below, by U.S. First Class mail, postage prepaid:

Mr. Noel J. Francisco
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

November 8, 2018



JOHN J. KORESKO, V

646 Fed.Appx. 230
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.
United States Court of Appeals,
Third Circuit.

SECRETARY UNITED STATES DEPARTMENT OF LABOR
v.
John J. **KORESKO**, V.; Jeanne D. Bonney; Penn–Mont Benefit Services, Inc.; **Koresko** & Associates, P.C.; **Koresko** Law Firm, P.C.; Penn Public Trust; Regional Employers Assurance Leagues Voluntary Employees Beneficiary Association Trust; Single Employer Welfare Benefit Plan Trust
John J. **Koresko**, V, Appellant.

Nos. 15–2470, 15–3141.
|
Submitted Pursuant to Third Circuit L.A.R. 34.1(a) March 18, 2016.
|
Filed: April 5, 2016.

Synopsis

Background: Secretary of Labor brought action alleging that employers breached their fiduciary duties under Employee Retirement Income Security Act (**ERISA**) by failing to maintain assets of employee welfare benefit plans in trust and by transferring assets into non-trust accounts that they controlled. The United States District Court for the Eastern District of Pennsylvania, 884 F.Supp.2d 261, Mary A. McLaughlin, granted Secretary of Labor partial summary judgment, and following bench trial, entered judgment against remaining employers, at 86 F.Supp.3d 293. Employers appealed.

Holdings: The Court of Appeals, Van Antwerpen, Circuit Judge, held that:
[1] trust had plan assets to which **ERISA** fiduciary responsibilities attached;
[2] proposed amendment to benefit plan was invalid;
[3] indemnification agreement was void;
[4] disgorgement of profits was proper; and
[5] orders concerning appointment of independent fiduciary and requiring trustee to pay future costs were not "final" as would permit appellate review.

Affirmed.

*232 On Appeal from the United States District Court for the Eastern District of Pennsylvania, (D.C. Civil No. 2–09–cv–00988) District Judge: Honorable Mary A. McLaughlin.

Attorneys and Law Firms

Andrea J. Appel, Esq., Joanne Roskey, Esq., United States Department of Labor Office of the Solicitor, Region II, Philadelphia, PA, Marcia E. Bove, Esq., Eirik J. Cheverud, Esq., Robin S. Parry, Esq., Ashton Phillips, Esq., United States Department of Labor Office of the Solicitor, Washington, DC, for Secretary United States Department of Labor.

Lawrence G. McMichael, Esq., Dilworth Paxson, Philadelphia, PA, for Appellant.

Before: CHAGARES, RESTREPO, and VAN ANTWERPEN, Circuit Judges.

OPINION*

VAN ANTWERPEN, Circuit Judge.

John J. **Koresko**, V ("**Koresko**") appeals several rulings from the U.S. District Court for the Eastern District of Pennsylvania regarding Appellee Secretary of Labor's ("Secretary") enforcement action against **Koresko** and related entities for breach of fiduciary duties under the Employee Retirement Income Security Act of 1974 ("**ERISA**"). The District Court found that **Koresko** breached fiduciary duties he owed to employee welfare benefit plans under **ERISA**. We will affirm the following District Court rulings: (1) the August 3, 2012 order granting partial summary judgment in favor of the Secretary; (2) the September 16, 2013 order appointing a temporary independent fiduciary; (3) the February 6, 2015 opinion imposing liability on **Koresko** for breach of fiduciary duty; (4) the March 13, 2015 order imposing final judgment on **Koresko**; and (5) the May 13, 2015 order denying **Koresko's** motion for a new trial.[1] We will also dismiss ***233 Koresko's** appeal of the Court's August 4, 2015 order appointing a permanent independent fiduciary because we lack jurisdiction to review it.

I. INTRODUCTION

Since we write only for the benefit of the parties, we set forth only those facts necessary to inform our analysis.[2] This appeal arises out of a suit brought in March 2009 by the Secretary against **Koresko** and several entities he controls in connection with a multi-employer employee death benefit program. (App.1184–88). **Koresko** and his brother Lawrence **Koresko** ran an "unincorporated association of unrelated employers called the Regional Employers Assurance Leagues" ("REAL," "League"), which offered employee welfare benefit plans, including death benefit plans, to employers through the REAL Voluntary Employees' Beneficiary Association ("REAL VEBA") Trust. (*Id.* at 8).[3] Participating employers executed an

adoption agreement in order to join the League and subscribe to the trusts. (*Id.* at 9); *see, e.g.*, (*id.* at 465).[4] In joining the League, employers agreed to be bound by the governing documents including the Master Trust Agreement, Plan Document, and their individual adoption agreement. (*Id.* at 9–10). PennMont Benefit Services, Inc. ("PennMont") was the administrator of the plans; **Koresko** is the president and CEO of PennMont. (*Id.* at 11, 138). Employers who joined the League could select the type and amount of benefits to offer and set eligibility requirements for employees. (*Id.* at 9). Eligible employees of adopting employers could then participate in the benefit program. (*Id.*). The trusts consisted of employer contributions, which the adoption agreements require, and life insurance policies taken out on the lives of participating employees to fund the benefits. (*Id.*). Benefits were then paid according the adopting employers' individual adoption agreement and the governing documents for the trust. (*Id.* at 9–10).

The suit brought by the Secretary was against **Koresko**, several companies he owned, the trusts, an employee of **Koresko**, and the trustees. (*Id.* at 1185–88). The Secretary alleged a breach of fiduciary duties with respect to many individual employee welfare benefit plans. (*Id.* at 1195–202). In August 2012, the U.S. District Court for the Eastern District of Pennsylvania (McLaughlin, J.), granted the Secretary partial summary judgment with respect to three specific plans. (*Id.* at 81–82). The Court proceeded to remove **Koresko** from his positions of authority with respect to the trusts, and appointed a temporary independent fiduciary to administer the plans and trusts in September 2013. (*Id.* at 1448–455). The District Court then conducted a three-day bench trial that concerned ***234** additional employee welfare benefit plans. This resulted in a memorandum opinion in February 2015 that detailed **Koresko's** violations of **ERISA**. (*Id.* at 97–322).[5] The Court found that at least 419 employee welfare benefit plans were **ERISA**-covered plans. (*Id.* at 156, 257).[6] The Court entered judgment in accordance with this opinion in March 2015, ordering the permanent removal of the fiduciaries. (*Id.* at 323–28). The Court also ordered **Koresko** to pay restitution and disgorgement of the remaining diverted assets. (*Id.* at 323). **Koresko's** motion for a new trial was denied by the Court in May 2015. (*Id.* at 329). **Koresko** timely appealed. (*Id.* at 1).[7]

After **Koresko** appealed the Court's March 2015 order, the Court issued an order on August 4, 2015 appointing a permanent independent fiduciary. (*Id.* at 1621–22). In addition to appointing a permanent independent fiduciary, the Court required that **Koresko** bear the costs of the fiduciary's appointment. (*Id.* at 1631). The Court stated: "[h]ad the **Koresko** Defendants complied with their fiduciary duties, there would be no need to appoint an Independent Trustee in this case." (*Id.*). The costs of the appointment would initially be paid from trust assets. (*Id.*). The Court retained jurisdiction in order to enforce the order and explained that it would "issue a separate order specifying the total amount the **Koresko** Defendants are liable to the Plans to restore on account of this appointment." (*Id.*). Appellant also appeals this order. (*Id.* at 1616).

II. AFFIRMANCE DISCUSSION [8]

Appellant argues on appeal that the District Court erred by finding that: (A) trust assets are plan assets for purposes of **ERISA** application; (B) a 2009 amendment to the Plan Document eliminating non-owner employees was invalid; (C) **Koresko** was not entitled to an

advancement of defense costs; and (D) **Koresko** must restore the alleged depletion of assets of the trusts. We reject all of these arguments for the following reasons.

*A. Trust assets are **ERISA** plan assets*

"**ERISA** is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217, 220 (3d Cir.2010) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)) (internal quotation marks omitted). **ERISA** applies to "employee benefit plans," which may be either employee pension benefit plans or employee welfare benefit plans. 29 U.S.C. § 1002(3). This case involves employee ***235** welfare benefit plans, which the statute defines as:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, 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 ... benefits in the event of ... death....

Id. § 1002(1). The District Court concluded that the master REAL VEBA plan, a multi-employer program, is not a "plan" under **ERISA**. (App.26). However, the Court found that individual employer-level plans joining the master REAL VEBA plan are **ERISA** plans. (*Id.* at 27).[9]

We must decide whether the employer-level plans are **ERISA** plans in order to determine whether or not **Koresko** owed fiduciary duties to these plans. **ERISA** "defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan." Mertens v. Hewitt Assocs., 508 U.S. 248, 262, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). The statute provides that "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i). In other words, a person may be a fiduciary with respect to a plan even if the person is not named as a fiduciary in plan documents, "to the extent ... he ... exercises any authority or control respecting management or disposition of its assets." Sec'y of Labor v. Doyle, 675 F.3d 187, 200 (3d Cir.2012) (alterations in original) (quoting 29 U.S.C. § 1002(21)(A)(i)) (internal quotation marks omitted). We recognize the difference between the two clauses set forth above in 29 U.S.C. § 1002(21)(A)(i), "that 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." Srein v. Frankford Trust Co., 323 F.3d 214, 221 (3d Cir.2003) (quoting Bd. of Trs. of Bricklayers & Allied Craftsmen Local 6 of N.J. Welfare Fund v. Wettlin Assocs., Inc., 237 F.3d 270, 273 (3d Cir.2001)) (hereinafter *Bricklayers*). We have emphasized this distinction, "[n]oting that the 'statute treats control over the cash differently from control over administration' ... [and] that 'any control over disposition of plan money makes the person who has the control a fiduciary.' " Bricklayers, 237 F.3d at 273 (quoting IT Corp. v. Gen. Am. Life Ins. Co., 107 F.3d 1415, 1421 (9th Cir.1997)).

[1] The Secretary has primarily relied on the second clause of § 1002(21)(A)(i) to argue that **Koresko** is a fiduciary, even though he lacked discretionary authority or control over management of the plans and he was not named a fiduciary in the plan documents. The District Court found, and the parties do not dispute, that **Koresko** exercised control over the disposition of the assets of the individual employer-level plans. (App.61–67, 269–70). As explained above, this basis for attaching fiduciary status is authority or control over "plan assets," therefore, fiduciary status attaches to **Koresko** to the extent of the employer-level **ERISA** plans' assets. *See Doyle*, 675 F.3d at 200. In order to find that **Koresko** violated his fiduciary duties ***236** in this case, we must determine that the plans' assets include the assets in the master trusts.

1. Determination of plan assets

"The term 'plan assets' is not comprehensively defined in **ERISA** or in the Secretary's regulations." *Id.* at 203. **ERISA** provides that " 'plan assets' means plan assets as defined by such regulations as the Secretary may prescribe." 29 U.S.C. § 1002(42). These regulations "define the scope of 'plan assets' in two specific contexts: (1) where an employee benefit plan invests assets by purchasing shares in a company, 29 C.F.R. § 2510.3–101, and (2) where contributions to a plan are withheld by an employer from employees' wages, 29 C.F.R. § 2510.3–102." *Doyle*, 675 F.3d at 203. The second regulation does not apply in this case, and while the District Court relied primarily on property rights in its analysis, the Court's conclusion "found support" in the first regulation, discussed *infra*. (App.59–60, 264–65).

The District Court relied on "ordinary notions of property rights under non-**ERISA** law" to determine plan assets, an approach we set forth in *Secretary of Labor v. Doyle*, 675 F.3d at 203; (App.50, 263); *see In Re Luna*, 406 F.3d 1192, 1199 (10th Cir.2005) (approving this approach by explaining that "the definition of 'asset,' ... is that the person or entity holding the asset has an ownership interest in a given thing, whether tangible or intangible"). We explained that this approach is consistent with guidance provided by the Secretary that "the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-**ERISA** law. In general, the assets of a welfare plan would include any property, tangible or intangible, in which the plan has a beneficial ownership interest." *Doyle*, 675 F.3d at 203 (quoting Department of Labor, Advisory Op. No. 93–14A, 1993 WL 188473, at *4 (May 5, 1993)) (internal quotation marks omitted). The Eighth Circuit has expanded on the term "beneficial interest" by approving the Secretary's explanation set forth in a Department of Labor opinion letter:

> Whether a plan has acquired a beneficial interest in particular funds depends on "whether the plan sponsor expresses an intent to grant such a beneficial interest or has acted or made representations sufficient to lead participants and beneficiaries of the plan to reasonably believe that such funds separately secure the promised benefits or are otherwise plan assets."

Kalda v. Sioux Valley Physician Partners, Inc., 481 F.3d 639, 647 (8th Cir.2007) (quoting Department of Labor, Advisory Op. No. 94–31A, 1994 WL 501646, at *3 (Sept. 9, 1994)). We

agree with the Eighth Circuit that this agency interpretation is entitled to some deference. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

In relying on ordinary notions of property rights to determine whether the plan has acquired a beneficial interest in particular funds, we begin by "consult[ing] the documents establishing and governing the plan." Doyle, 675 F.3d at 204. "[T]hen, in light of these documents, [we] consult contracts to which the plan is a party or other documents establishing the rights of the plan." *Id.* The District Court properly considered the Plan Document, the Master Trust Agreement, and applicable adoption agreements, which established and governed the individual employer-level plans when they joined the trusts. (App.51–52, 264). These documents make clear that legal title to the trust is vested in the trustee only. For example, the Master Trust Agreement to the REAL VEBA trust provides:

> *237 Title to the Trust Fund shall be vested in and remain exclusively in the Trustee and neither the Adopting Employer, Advisory Committee Plan Administrator, nor any employee, or his or her decedents or beneficiaries shall have any right, title or interest therein or thereto. Participation in the Plan and this Trust shall not give any employee, beneficiary or any other Person, any right or interest in the Plan or this Trust other than as herein provided.

(*Id.* at 1117). Neither the plans, the employers, nor the beneficiaries may claim legal title over the trust property, which consists of the employer contributions and life insurance contract proceeds.

This is where Appellant disagrees with the District Court's approach, as Appellant contends "the question was—or should have been—answered: the Trustee owns the assets in the Trust and the employer-level plans have *no interest* therein." (Appellant's Br. 16). The Court, however, found that "the inquiry does not end there," and continued to find that "[a]lthough the documents do not confer legal title to the REAL VEBA trust assets on the Plans, they manifest an intent to confer a beneficial interest on participating plans." (App.52). As explained above, welfare plan assets include property in which the plan has a beneficial ownership interest. Doyle, 675 F.3d at 203. The District Court found that "the assets in the REAL VEBA Trust are held in trust for the exclusive benefit of the participating employees and beneficiaries of employers that adopt the REAL VEBA benefit arrangement." (App.53–54); *see also* (*id.* at 265) ("Because the 419 covered plans have an undivided beneficial interest, that means they have an interest in all of the assets in the REAL VEBA or SEWBP Trust....").

We agree with the District Court and rely on ordinary notions of property and trust law. While trustees have legal title and a non-beneficial interest in trust assets, beneficiaries of a trust have an equitable or beneficial interest. "A *trust* may be defined as a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another." Amy Morris Hess, George Gleason Bogert & George Taylor Bogert, Bogert's Trusts and Trustees, The Law Of Trusts and Trustees § 1 (2015); *see* In re Columbia Gas Sys. Inc., 997 F.2d 1039, 1059 (3d Cir.1993) ("[T]he classic definition of a trust [is that] the beneficiary has an equitable interest in the trust property while legal title is vested

in the trustee."); Restatement (Third) of Trusts § 42 (explaining that the trustee has a "non-beneficial interest" in the trust assets). The governing documents make clear that employees as plan participants are to be considered beneficiaries under the master plan. The Master Trust Agreement for the REAL VEBA trust provides that "[t]he Trustee will hold the funds contributed to it by the League in a fiduciary capacity for the benefit of all Employees covered under the Plan." (App.1113); *see* (*id.* at 1127) (similar language in the Master Trust Agreement for the SEWBPT). The Master Trust Agreement continues:

> This trust is established ... for the purpose of receiving contributions of the Adopting Employers and their employees to provide ... benefits to the employees and beneficiaries hereunder or payment of insurance premiums or making such other similar payments pursuant to the terms of the Plan. All contributions, and all assets and earnings of the Trust are solely the net earnings of the Trust and shall not in any manner whatsoever inure to the benefit of any person other than a Person designated ***238** as an employee or beneficiary of an Adopting Employer under the terms of the Plan.

(*Id.* at 1115); *see* (*id.* at 1128) (similar language in the Master Trust Agreement of the SEWBPT); *see also* (*id.* at 54) (providing other examples in the plan documents "that the trust corpus and income shall be used for the exclusive benefit of participating employees and their beneficiaries"). Furthermore, the qualification in the Master Trust Agreement for the REAL VEBA Trust, that "[p]articipation in the Plan ... shall not give any employee, beneficiary or any other Person, any right or interest in the Plan ... *other than as herein provided* " allows these interests to exist. (*Id.* at 1117) (emphasis added). Therefore, we agree that the employees and plan participants have a beneficial interest in the trusts.

Appellant argues that while employer-plan participants may be beneficiaries under the trust, the employer-level plans themselves are distinct from plan participants and have no interest, beneficial or otherwise, in the trust. (Appellant's Br. 17–18); (quoting *Merrimon v. Unum Life Ins. Co. of Am.*, 758 F.3d 46, 56 (1st Cir.2014)) ("It is the beneficiary, not the plan itself, who has acquired an ownership interest in the assets...."). Appellant's argument that employer-level plans do not have a beneficial interest in the trusts' assets directly contradicts guidance from the Department of Labor. The Secretary has issued opinion letters discussing the extent to which trust assets may be considered **ERISA** plan assets:

> In the Department's view, a plan obtains a beneficial interest in particular property if, under common law principles, the property is held in trust for the benefit of the plan or its participants and beneficiaries, or if the plan otherwise has an interest in such property on the basis of ordinary notions of property rights. Further, whether a plan has acquired a beneficial interest in definable assets depends, largely, on whether the plan sponsor has expressed the intent to grant such a beneficial interest or has acted or made representations sufficient to lead participants and beneficiaries of the plan reasonably to believe that such funds separately secure the promised benefits or are otherwise plan assets. The identification of plan assets therefore requires consideration of any contract or other legal instrument involving the

plan, as well as the actions and representations of the parties involved.

Department of Labor, Advisory Op. No. 99–08A, 1999 WL 343509, at *3 (May 20, 1999) (footnote omitted). The first sentence in the paragraph above from this opinion letter is particularly applicable: "a plan obtains a beneficial interest in particular property"—that is, the employer-level employee welfare plans obtain a beneficial interest in the trust property—"if, under common law principles, the property is held in trust for the benefit of the plan *or its participants and beneficiaries.*" *Id.* (emphasis added). It is clear based on the governing documents that the property in the trusts is for the benefit of the plans' participants and beneficiaries. Therefore, the plans have a beneficial interest in trust property. The Secretary did not distinguish property held in trust for the benefit of the plan itself from property held in trust for the plans' participants and beneficiaries. Appellant's proffered distinction reads as a rather transparent attempt to evade **ERISA** liability. Such liability would also seem applicable here considering Appellant has previously represented that **ERISA** governs the trust.[10] Because ***239** the employees have a beneficial interest in the trust, we believe the employer-level plans, in which employees are plan participants, also have a beneficial interest in the trust property.

2. 29 C.F.R. § 2510.3–101(h)(2)

We agree with the District Court's analysis that this regulation supports the conclusion that the employer-level plans include trust assets. The regulation provides:

> When a plan acquires or holds an interest in any entity (other than an insurance company licensed to do business in a State) which is established or maintained for the purpose of offering or providing any benefit described in section 3(1) or section 3(2) of the Act to participants or beneficiaries of the investing plan, its assets will include its investment and an undivided interest in the underlying assets of that entity.

29 C.F.R. § 2510.3–101(h)(2). Comments to this regulation state that "assets of entities ... that are established for the purpose of providing benefits to participants of investing plans would include plan assets. This provision was intended to apply primarily to so-called 'multiple employer trusts.' " Final Regulation Relating to the Definition of Plan Assets, 51 Fed.Reg. 41262–01, 41263 (Nov. 13, 1986). This regulation is not directly on point, as there is no indication that employers joined the trust or established employer-level plans for the purpose of investing assets. *See Doyle*, 675 F.3d at 203 (describing this regulation as "where an employee benefit plan invests assets by purchasing shares in a company") (citing 29 C.F.R. § 2510.3–101).

The purpose behind the regulation and the provided example of its application, discussed below, are relevant and insightful to our analysis. The regulation appears concerned with complex arrangements, usually investments, in which the manager of a welfare plan would no longer owe fiduciary duties to the plan because the investment structure positions him to be in an indirect relationship to the plan. Final Regulation Relating to the Definition of Plan Assets,

51 Fed.Reg. at 41263. It would frustrate the "broad functional definition of 'fiduciary' in **ERISA** if persons who provide services that would cause them to be fiduciaries if the services were provided directly to plans are able to circumvent the fiduciary responsibility rules of the Act by the interposition of a separate legal entity between themselves and the plans." *Id.* The regulation itself provides the following example:

> A medical benefit plan, P, acquires a beneficial interest in a trust, Z, that is not an insurance company licensed to do business in a State. Under this arrangement, Z will provide the benefits to the participants and beneficiaries of P that are promised under the terms of *240 the plan. Under paragraph (h)(2), P's assets include its beneficial interest in Z and an undivided interest in each of its underlying assets. Thus, persons with discretionary authority or control over the assets of Z would be fiduciaries of P.

29 C.F.R. § 2510.3–101(j)(12). Despite the fact that this example presupposes that the plan acquires a beneficial interest in a trust, the explanation is unmistakably clear that where a trust provides benefits to participants and beneficiaries of a plan, "persons with discretionary authority or control over the assets of [the trust] would be fiduciaries of [the plan]." *Id.* **Koresko** had control over the disposition of plan assets, and undoubtedly the trust provides benefits to participants and beneficiaries of the employer-level plans. The interposition of a multi-employer trust, in which legal title is held by the trustee, does not serve to divest **Koresko** of his fiduciary responsibilities to beneficiaries of the trust.

This Court has established that if an **ERISA** plan has a beneficial interest in property, this interest is sufficient to render the property "plan assets" under **ERISA**. *Doyle*, 675 F.3d at 200. The distinction **Koresko** advances between the plan itself and its beneficiaries contradicts persuasive authority from the Secretary and frustrates the broad functional definition of "fiduciary." *See Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 413 (3d Cir.2013) ("The definition of a fiduciary under **ERISA** is to be broadly construed."). For the foregoing reasons we agree with the District Court that the individual employer-level employee welfare benefit plans have a beneficial interest in the trusts, and therefore the assets of the trusts are "plan assets" within the meaning of **ERISA**.

B. The 2009 Amendment

The governing documents of the plans allow the League, "in its sole discretion," to amend the Plan Document. (App.454).[11] The League in turn is REAL, the fictitious entity consisting of **Koresko** and Lawrence **Koresko**, which adopting employers join in adopting the plan. (*Id.* at 139, 1114). Appellant argues that the 2009 REAL VEBA and SEWBPT Amendment of Trust and Incorporated Plan Documents ("2009 Amendment") eliminated benefits to non-owner employees, and therefore the employer-level plans were no longer covered by **ERISA**. (Appellant's Br. 21–22); *see* (App.1216–17). We agree with the District Court and hold that the 2009 Amendment was invalid.

As previously noted, federal regulations provide that an "employee benefit plan" under **ERISA** does not include "any plan, fund or program ... under which no employees are participants

covered under the plan." 29 C.F.R. § 2510.3–3(b); *see also* *Yates v. Hendon*, 541 U.S. 1, 21, 124 S.Ct. 1330, 158 L.Ed.2d 40 (2004) ("Plans that cover only sole owners or partners and their spouses, the regulation instructs, fall outside [**ERISA's**] domain.").[12] The 2009 Amendment provides: "No benefits shall be paid to or on account of any claimant, person, participant, or former participant ... classified as a non-owner-employee, or to any beneficiary of any such [non-owner *241 employee]." (App.1216). Appellant argues that because the plans no longer have any non-owner employees, they cannot be governed by **ERISA**. Nevertheless, the District Court found "undisputed record evidence" that each of the plans at issue originally included at least one non-owner employee. (*Id.* at 36).

[2] The District Court provided two reasons why the 2009 Amendment was invalid. First, the Court found that **Koresko**, Lawrence **Koresko**, and PennMont lacked authority to amend the plan under its governing documents. (*Id.* at 37–39). Second, the Plan Document prohibited the 2009 Amendment by disallowing amendments that create discrimination in favor of highly compensated employees, officers, or stockholders. (*Id.* at 39). The Court supported its conclusion with a policy argument, that it would be inconsistent with the purposes of the statute to allow an **ERISA**-covered employee welfare benefit plan to avoid enforcement of **ERISA** provisions by issuing a subsequent amendment. (*Id.* at 40).

Appellant rebuts the District Court's findings and argues that the 2009 Amendment was properly executed. We agree with both of the District Court's findings and therefore determine that the 2009 Amendment was invalid.

ERISA requires that employee welfare benefit plans "be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). The written employee benefit plan must "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." *Id.* § 1102(b)(3). "Employers or other plan sponsors are generally free under **ERISA**, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss–Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78, 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995). However, "whatever level of specificity a company ultimately chooses, in an amendment procedure or elsewhere, it is bound to that level." *Id.* at 85, 115 S.Ct. 1223. "[A]n amendment is ineffective if it is inconsistent with the governing documents." *Depenbrock v. Cigna Corp.*, 389 F.3d 78, 82 (3d Cir.2004) (citing *Delgrosso v. Spang & Co.*, 769 F.2d 928, 935–36 (3d Cir.1985)); *see also* *Confer v. Custom Eng'g Co.*, 952 F.2d 41, 43 (3d Cir.1991) ("Only a formal written amendment, executed in accordance with the Plan's own procedure for amendment, could change the Plan.").

1. Lack of Authority

Regarding the District Court's first finding, we agree that **Koresko**, his brother Lawrence, and PennMont lacked authority to amend the plans. Appellant acknowledges that the governing documents allow the League to amend the plans. (Appellant's Br. 22) (citing App. 454). Appellant continues that the Master Trust Agreement defines "League" as "REAL" and he signed the amendment "as Attorney in Fact for all Participating Employers." (*Id.*); (App.1114,

1221). The argument follows that because **Koresko** signed on behalf of the participant employers, the participant employers are collectively REAL, and the Master Trust Agreement defines "League" as "REAL"—**Koresko** was authorized to sign the 2009 Amendment. Our rejection of this convoluted argument does not "elevate[ ] form over substance." (Appellant's Br. 23). Rather, **Koresko's** argument ignores the unambiguous language of the governing documents. The League "in its sole discretion" may amend the Plan Document. (App.37, 454). The 2009 Amendment was an amendment to the benefit structure in the Plan Document. (*Id.* at 1216–17). With the number of related entities and organizations in this case and under the governing documents, ***242** it is essential that amendments to the plan be executed specifically as authorized under the governing documents. The governing documents simply do not authorize **Koresko** as attorney in fact for all participating employers to amend the plan.[13]

Similarly, the governing documents do not allow PennMont or Lawrence **Koresko** to amend the Plan Document.[14] Appellant argues that provisions in the governing documents delegate League authority to PennMont as Plan Administrator, "for administering the Plan" and "for plan administrative services." (Appellant's Br. 23–24) (citing App. 460, 1122); (App.1131). This argument fails as none of the provisions delegating authority to PennMont include authorization to amend the plan. The role of plan administrator or the delegation of plan administrative services does not automatically entail the authority to amend the plan. *See* Varity Corp. v. Howe, 516 U.S. 489, 505, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) (stating "it may be true that amending or terminating a plan (or a common-law trust) is beyond the power of a plan administrator (or trustee)—and, therefore, cannot be an act of plan 'management' or 'administration' "); *accord* Bins v. Exxon Co. U.S.A., 220 F.3d 1042, 1053 (9th Cir.2000) ("The act of amending, or considering the amendment of, a plan is beyond the power of a plan administrator and thus is not an act of plan management or administration."). The governing documents, both in describing the Plan Administrator's duties and in specifying amendment procedures, do not provide PennMont with the authority to amend the plans. Further, Appellant's argument that his brother Lawrence was authorized to amend the plan because he was "the League" is insufficient. (Appellant's Reply Br. 4). Lawrence **Koresko** did not sign on behalf of the League and did not mention the League in executing the amendment, therefore he also lacked authority to amend the Plan Document.

2. Discriminatory Amendment

We also agree with the District Court's second finding that the Plan Document prohibits this type of amendment. The Plan Document provides: "no amendment shall ... [c]reate or effect any discrimination in favor of Participants who are highly compensated, who are officers or [sic] the Employer, or who are stockholders of the Employer." (App.454–56). The District Court found that eliminating non-owner employees from benefits violates this prohibition. (*Id.* at 39–40). Appellant does not dispute that the 2009 Amendment violates this provision. Rather, Appellant argues that this provision was intended to exempt the arrangement from federal income tax, and that the plan sponsor may choose at any time to terminate tax-exempt ***243** status and become a taxable organization. (Appellant's Br. 24–25).

Appellant's argument ignores the importance of adhering to procedures for amending a plan. The Secretary is correct that in order for **Koresko's** argument to succeed, he would have had to show that he amended the plan to remove this provision *before* executing the 2009 Amendment, "otherwise, the discrimination provision remains in conflict with [the 2009 Amendment]." (Appellee's Br. 35). The 2009 Amendment did not specifically eliminate the original provision or mention the original plan provision, but it directly conflicts with the original provision. In adhering to the governing documents and the amendment procedure set forth, the 2009 Amendment is invalid because it is inconsistent with the anti-discrimination clauses for future amendments.

We need not delve into the District Court's public policy arguments having found two reasons why the 2009 Amendment was invalid. We do note that the Supreme Court has articulated a purpose behind having written procedures govern making amendments to an **ERISA** plan: "such a requirement increases the likelihood that proposed plan amendments, which are fairly serious events, are recognized as such and given the special consideration they deserve." *Curtiss–Wright Corp.*, 514 U.S. at 82, 115 S.Ct. 1223. Given the seriousness of plan amendments and the explicit directions in the applicable governing documents, we have little difficulty in holding that the 2009 Amendment is invalid because it was executed without proper authority and is in conflict with existing plan provisions.[15]

C. Denial of defense costs

Appellant next contends that the District Court fundamentally erred and violated indemnification provisions set forth in the governing documents by denying him the advancement of defense costs. (Appellant's Br. 27–28). On September 16, 2013, the Court ordered that the trusts were barred from advancing defense costs to **Koresko**. (App.1455). **Koresko** maintains this violates indemnification provisions in the governing documents. The Master Trust Agreements for the REAL VEBA Trust and SEWBPT provide indemnification for legal fees and expenses, "in advance, unless it is alleged and until it is conclusively determined that such Claims arise from the Trustee's own negligence or willful breach of its obligations specifically undertaken pursuant to this Agreement." (*Id.* at 1120, 1136). Although the Secretary argues that the partial grant of summary judgment and subsequent bench trial "conclusively determined" that the claims arose from **Koresko's** breach of fiduciary duties, we do not rely on this basis to ***244** affirm this part of the District Court's order. (Appellee's Br. 37); (App.1120, 1136).

[3] We agree with the District Court that this indemnification provision, or **Koresko's** reliance on this provision to seek plan assets for advancement costs, is in violation of **ERISA**. The statute provides that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a). The Department of Labor has interpreted this statute to

> render[ ] void any arrangement for indemnification of a fiduciary of an employee benefit plan by the plan. Such an arrangement would have the same

> result as an exculpatory clause, in that it would, in effect, relieve the fiduciary of responsibility and liability to the plan by abrogating the plan's right to recovery from the fiduciary for breaches of fiduciary obligations.

29 C.F.R. § 2509.75–4 (interpretive bulletin). Indemnification provisions are allowed if they "merely permit another party to satisfy any liability incurred by the fiduciary," such as liability insurance. *Id.* Plan indemnification provisions that allow the plan to indemnify a fiduciary are considered void. *See Johnson v. Couturier*, 572 F.3d 1067, 1079–80 (9th Cir.2009) ("Thus, '[i]f an **ERISA** fiduciary writes words in an instrument exonerating itself of fiduciary responsibility, the words, even if agreed upon, are generally without effect.' ") (alteration in original) (quoting *IT Corp.*, 107 F.3d at 1418); *Perelman v. Perelman*, 919 F.Supp.2d 512, 523 (E.D.Pa.2013) (explaining that the indemnification provision does not violate **ERISA** because "it permits the Trustee to seek indemnification only from the employer and does not permit indemnification by the Plan").

Appellant urges this Court to follow *Harris v. GreatBanc Trust Co.*, No. EDCV12–1648–R (DTBx), 2013 WL 1136558 (C.D.Cal. Mar. 15, 2013). In *Harris,* the court found an indemnification agreement valid under **ERISA** because it expressly prohibited indemnification if a court entered a final judgment from which no appeal could be taken finding breach of fiduciary duties. *Id.* at *3. Appellant argues the same result as in *Harris* should apply here, because the Master Trust Agreement provides for indemnification "unless it is alleged and until it is conclusively determined that such Claims arise from the Trustee's own negligence or willful breach of its obligations specifically undertaken pursuant to this Agreement." (Appellant's Br. 29–30) (citing App. 1120, 1136). Thus, Appellant argues that the indemnification provision complies with **ERISA** because it similarly does not allow for indemnification if Appellant is found to have violated fiduciary duties.

In addition to not being binding authority, the indemnification provision in *Harris* is distinguishable. In *Harris,* the provision required Sierra Aluminum, the sponsor of an employee stock ownership plan, to indemnify GreatBanc, the trustee of the plan. 2013 WL 1136558, at *1. This did not violate **ERISA** because, as discussed above, per guidance from the Department of Labor, indemnification provisions that "merely permit another party to satisfy any liability incurred by the fiduciary" are permissible. 29 C.F.R. § 2509.75–4. The Department of Labor allows a trustee to seek indemnification from another party, as long as the indemnification does not come from the plan itself. Unlike in *Harris,* in this case, **Koresko** was seeking advancement costs from the plans themselves, not another ***245** party. This would effectively "abrogate[e] the plan's right to recovery from the fiduciary for breaches of fiduciary obligations." *Id.* Although **Koresko** could have relied on liability insurance or indemnification through another party, he could not rely on plan assets to front his legal costs. We agree with the District Court order denying **Koresko** from relying on plan assets to cover his litigation costs as a proper interpretation of 29 U.S.C. § 1110 and 29 C.F.R. § 2509.75–4.

D. Damages analysis

[4] **Koresko** contends that the District Court's damages analysis was "legally unsupportable."

(Appellant's Br. 32). He argues that he should only be required "to restor[e] plan participants to the position in which they would have occupied but for the breach of trust." (*Id.* at 33) (alteration in original) (quoting *Perelman*, 919 F.Supp.2d at 519) (internal quotation marks omitted). **Koresko** argues that the plans at issue entitled beneficiaries to receive certain benefits, and that the District Court's order that he restore the depletion of assets of the trusts would be unnecessary for the plans to pay beneficiaries their entitled benefits. (Appellant's Reply Br. 5–6). **ERISA** provides that a fiduciary who breaches duties owed to a plan

> shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a).

Appellant's arguments fail for two reasons. **First, as established above, the plans have a beneficial interest in trust assets. Koresko's argument that the Court "confuse[d] purported losses incurred by the Trusts with that of the employer-level plans" ignores the Court's finding, which we affirm, that the plans have a beneficial ownership interest in the trust assets.** (Appellant's Br. 33). **Koresko** is not entitled to retain his ill-gotten gains .because he depleted assets from the trusts and not from the individual plans. As the statute requires the fiduciary to return profits to the plan, the District Court properly required **Koresko** to return profits to the trust, property that the plans have an ownership interest in. *See* 29 U.S.C. § 1109(a).

Second, disgorgement of profits is an equitable remedy and therefore allowable under the statute. *Id.; see S.E.C. v. Huffman*, 996 F.2d 800, 802 (5th Cir.1993) (stating that disgorgement of profits "is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs"); *Leigh v. Engle*, 727 F.2d 113, 122 n. 17 (7th Cir.1984) (explaining that legislative history indicates Congress intended disgorgement of profits to be an available remedy for breach of fiduciary duties under **ERISA**). We have explained that "**ERISA's** duty of loyalty bars a fiduciary from profiting even if no loss to the plan occurs." *Edmonson*, 725 F.3d at 415–16; *see also Leigh*, 727 F.2d at 122 ("**ERISA** clearly contemplates actions against fiduciaries who profit by using trust assets, even where the plan beneficiaries do not suffer direct financial loss."). The purpose of disgorgement of profits is deterrence, which is undermined if the fiduciary is able to retain proceeds from his own wrongdoing. **Koresko's** argument that the plans have suffered no damages is without merit. The District Court properly ordered **Koresko** to disgorge his profits, and the Court's damages analysis is supported *246 by the statute. *See* 29 U.S.C. § 1109(a).

III. DISMISSAL DISCUSSION

[5] **Koresko** additionally appeals the District Court's August 4, 2015 order appointing an

independent fiduciary and requiring **Koresko** to pay future costs. We lack jurisdiction to review this appeal because the August 4, 2015 order was not a final decision of the District Court. *See* 28 U.S.C. § 1291 ("The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts....").

A "final decision" is defined as a decision of a district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945). An order that "finds liability and imposes a monetary remedy, but does not reduce that award to a specific figure" will usually be considered interlocutory and not a final decision. *Century Glove, Inc. v. First Am. Bank of N.Y.*, 860 F.2d 94, 98 (3d Cir.1988); *see also Pennsylvania v. Flaherty*, 983 F.2d 1267, 1276 (3d Cir.1993) (stating that "the norm is that an award ... which does not fix the amount of the award or specify a formula allowing the amount to be computed mechanically is not a final decision") (quoting *John v. Barron*, 897 F.2d 1387, 1390 (7th Cir.1990)) (internal quotation marks omitted). We have elaborated on an exception to the rule that if a judgment does not fix the amount of damages, it is not a final decision:

> However, "even when a judgment fails to fix the amount of damages, if the determination of damages will be mechanical and uncontroversial, so that the issues the defendant wants to appeal before that determination is made are very unlikely to be mooted or altered by it—in legal jargon, if only a 'ministerial' task remains for the district court to perform—then immediate appeal is allowed."

Skretvedt v. E.I. DuPont de Nemours, 372 F.3d 193, 200 n. 8 (3d Cir.2004) (quoting *Prod. & Maint. Emps. Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1401 (7th Cir.1992)). Appellant contends that only ministerial tasks remain, rendering the District Court order a final decision. We do not agree.

We believe the District Court order requiring **Koresko** to pay future costs incurred by the independent fiduciary is not a final decision at this point because the order imposed an unquantified and uncertain monetary award without a mechanical computation to ascertain these damages. The Court ordered that "[t]he costs of the Trustee's appointment ordered herein will be borne by the **Koresko** Defendants." (App.1631). The Court did not define "[t]he costs of the Trustee's appointment" or provide a method to calculate these costs. Instead the Court specified that the trustee's services would initially be paid out of trust assets to be later reimbursed by Appellant. (*Id.*). The District Court retained jurisdiction over this case in order to enforce compliance with the order and to calculate the costs Appellant will owe to reimburse the plans for paying the trustee. (*Id.*) ("At the close of its appointment, the Court shall issue a separate order specifying the total amount the **Koresko** Defendants are liable to the Plans to restore on account of this appointment."). The Court recognized the complexity of these damages and the importance of determining exactly what costs were incurred by the appointment of the independent fiduciary. The Court's contemplation that a subsequent order would be necessary to calculate these costs does not evince that "the determination of damages will be mechanical and uncontroversial." *247 *Skretvedt*, 372 F.3d at 200 n. 8 (quoting *Prod. & Maint. Emps. Local 504*, 954 F.2d at 1401) (internal quotation marks omitted).

Appellant relies on *Vitale v. Latrobe Area Hospital* as an example of a case in which we determined that a district court order was a final decision even though it did not specifically fix damages. 420 F.3d 278, 281 (3d Cir.2005). *Vitale* is distinguishable because in that case we determined "that the benefits calculation required by the District Court would be entirely mechanical" as set forth by a "precise mathematical formula for calculating the monthly retirement benefit." *Id.* In this case, the calculation of costs is far from mechanical or ascertainable, which is why the District Court explained that it would issue a separate order specifying the amount **Koresko** owes. The August 4, 2015 order is not a final decision because it did not specify fixed damages or a mechanical method to calculate damages. *See Dir., Office of Workers' Comp. Programs v. Brodka*, 643 F.2d 159, 161 (3d Cir.1981) ("It is a well-established rule of appellate jurisdiction 'that where liability has been decided but the extent of damage remains undetermined, there is no final order.' ") (quoting *Sun Shipbuilding & Dry Dock Co. v. Benefit Review Bd., U.S. Dept. of Labor*, 535 F.2d 758, 760 (3d Cir.1976)).

We also agree with Appellee that we lack jurisdiction under 28 U.S.C. § 1292(a)(1) and 28 U.S.C. § 1292(a)(2) for appeals from interlocutory orders pertaining to injunctions and receiverships. Further, the District Court order does not fall within the collateral order doctrine, which would allow it to be appealed.

Although 28 U.S.C. § 1292(a)(1) allows appeals from certain interlocutory orders pertaining to injunctions, the District Court order is not an injunction because it was not "directed to a party" or "enforceable by contempt." *In re Pressman–Gutman Co., Inc.*, 459 F.3d 383, 392 (3d Cir.2006) (quoting *Cohen v. Bd. of Trs. of the Univ. of Med. & Dentistry of N.J.*, 867 F.2d 1455, 1465 n. 9 (3d Cir.1989)) (internal quotation marks omitted). The order is directed at the newly appointed independent fiduciary, which is not a party in this case. Further, because the order does not direct **Koresko** to pay a specified amount, it is not enforceable by contempt. *See Santana Prods., Inc. v. Compression Polymers, Inc.*, 8 F.3d 152, 155 (3d Cir.1993) (explaining that an order is not injunctive because "the order does not compel [a party] to take any action nor does the order restrain [the party] from doing anything"). **Koresko** is not compelled to take any action at this point where the court has not yet calculated damages **Koresko** owes to the plans.

Under 28 U.S.C. § 1292(a)(2), we have jurisdiction to review "[i]nterlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property." The purpose of § 1292(a)(2) is "to relieve the parties from interlocutory orders affecting control over property." *Martin v. Partridge*, 64 F.2d 591, 592 (8th Cir.1933); *see also* 16 Charles Alan Wright et al., *Fed. Prac. & Proc. Juris.* § 3925 (3d ed.2015) (explaining the purpose behind the statute that "[a] receivership can drastically curtail existing property rights, foreclosing independent action and decision in irreparable ways"). The concern over property rights, which justifies taking appeals from interlocutory orders involving receiverships, does not apply in this case. The August 4, 2015 order did not affect the parties' control over trust property. **Koresko** lost control over the trusts through the Court's September 16, 2013 and March 13, 2015 orders. (App.325–27, 1448–52). **Koresko** timely appealed the ***248** final judgment in this case, which removed him from his position as a fiduciary. (*Id.* at 1, 325–326). Therefore, the August 4, 2015 order is not a receivership order under 28 U.S.C. § 1292(a)(2) because the order did not

affect **Koresko's** control over trust property assets.

The collateral order doctrine allows appeals from district court orders that meet a "stringent" standard. *In re Pressman–Gutman Co., Inc.*, 459 F.3d at 396; (quoting *Will v. Hallock*, 546 U.S. 345, 349, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006)) (internal quotation marks omitted). The order must: "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Id.* at 395–96 (quoting *Will*, 546 U.S. at 349, 126 S.Ct. 952) (internal quotation marks omitted). Failure to meet any one of the three requirements renders the doctrine inapplicable. *Id.* By its own terms, the August 4, 2015 order does not conclusively determine the disputed question because the order states that "the Court shall issue a separate order specifying the total amount the **Koresko** Defendants are liable to the Plans." (App.1631). The order did not conclusively determine the issue of damages in this case and accordingly the collateral order doctrine does not apply.

Because we lack jurisdiction to review the District Court's August 4, 2015 order, we will dismiss the appeal of that order.

IV. CONCLUSION

For the foregoing reasons, we will affirm the August 3, 2012; September 16, 2013; February 6, 2015; March 13, 2015; and May 13, 2015 rulings of the District Court on appeal before us and dismiss **Koresko's** appeal of the Court's August 4, 2015 order for lack of jurisdiction.

All Citations

646 Fed.Appx. 230, 61 Employee Benefits Cas. 2125

Footnotes

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1 **Koresko's** arguments on appeal do not discuss each of these rulings. To the extent **Koresko** has not discussed why a particular ruling was improper, we deem him to have abandoned and waived the issue on appeal. *See* *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir.1993).

2 The District Court conducted an extensive review of this case in granting the Secretary partial summary judgment and in its opinion following a bench trial against **Koresko**. (App.8–22, 97–251).

3 This case also involves the Single Employer Welfare Benefit Plan Trust ("SEWBPT"),

which Appellant acknowledges is essentially identical to the REAL VEBA Trust. (App.139); (Appellant's Br. 7 n. 1) ("The operative documents of the Trusts are essentially identical, as are their structural arrangements."). Our explanation of the REAL VEBA Trust applies to the SEWBPT as well. The REAL VEBA Trust and SEWBPT are referred to collectively as "trusts."

4 The participating employers' individual employee welfare benefit plans are referred to herein as "plans." The employers who joined the League and executed adoption agreements are referred to as "adopting employers."

5 The nature of **Koresko's** breach of fiduciary duties is not at issue on appeal, therefore we will not discuss the extent of his **ERISA** violations.

6 As discussed *infra,* under federal regulations, employee welfare benefit plans in which there are no non-owner employees are exempt from **ERISA** coverage. 29 C.F.R. § 2510.3–3(b). Therefore, this calculation is based on the number of plans the District Court found that included at least one non-owner employee. (App.156). The Court concluded that the plans at issue in this case are employee welfare benefit plans governed by **ERISA** and that **Koresko** was a fiduciary with respect to these plans. (*Id.* at 99–100).

7 **Koresko** is the only party appealing.

8 The District Court had jurisdiction under 29 U.S.C. § 1132(e)(1). We have jurisdiction pursuant to 28 U.S.C. § 1291. "Our review of the district court's interpretation of **ERISA** is plenary, while the district court's findings of fact are reviewed for clear error." *Mack Boring & Parts v. Meeker Sharkey Moffitt, Actuarial Consultants of N.J.,* 930 F.2d 267, 270 (3d Cir.1991) (citations omitted).

9 The Court also found that the plans of adopting employers who joined the SEWBPT were **ERISA** plans. (App.252).

10 The District Court noted that while it did not base its decision on judicial estoppel, **Koresko** has successfully argued before the U.S. District Court for the Eastern District of Pennsylvania that a "similar or identical employee benefit arrangement" was a welfare benefit plan governed by **ERISA**. (App. 35 n. 15); *see REAL VEBA Trust v. Sidney Charles Mkts., Inc.,* No. 01–4693, 2006 WL 2086761, at *1–3, *6 (E.D.Pa. July 21, 2006). Although **Koresko** argued in this case to the District Court that the REAL VEBA trust is distinguishable, the Court did "not see how the issue of **ERISA** coverage differs between the two cases." (App. 35 n.15). In addition, the record includes a summary plan description which a participating employer gave to employee participants that states: "This Plan is covered by the Employee Retirement Income Security Act of 1974 ("**ERISA**") which was designed to protect employees' rights under benefit plans." (App.1157). These representations suggest that **Koresko** originally understood that these plans were properly governed by **ERISA**.

11 The Plan Document "governs the benefit arrangement" and is incorporated by each

adopting employer. (App.9, 141).

12 This regulation also provides "[a]n individual and his or her spouse shall not be deemed to be employees with respect to a trade or business ... which is wholly owned by the individual or by the individual and his or her spouse." 29 C.F.R. § 2510.3–3(c)(1). Some of the plans at issue in this case were determined by the District Court to not be governed by **ERISA** because of this regulation. (App.153–56).

13 The Plan Document also allows employers "the right to amend the [b]enefit structures in [the plans] from time to time, and to amend or cancel any such amendments." (App.454). **Koresko** does not argue that his authority to amend the plan stems from this provision despite the fact that he signed "as attorney in fact for all participating employers." (*Id.* at 1221). Therefore, we deem him to have waived reliance on this provision. *See Kost*, 1 F.3d at 182. Even if he had properly raised this argument, however, the Plan Document allows employers, and not the attorney in fact for all participating employers, the right to amend the benefit structures in the plans. (*Id.* at 454, 1221); *see Curtiss–Wright Corp.*, 514 U.S. at 85, 115 S.Ct. 1223 ("[W]hatever level of specificity a company ultimately chooses, in an amendment procedure or elsewhere, it is bound to that level.").

14 Although PennMont is authorized to amend the Master Trust Agreement for the SEWBPT, the 2009 Amendment eliminating non-owner employees is specifically an amendment to the Plan Document. (App.1137, 1216). The Plan Document does not allow PennMont to amend its terms.

15 We agree with the District Court that it is troubling that **Koresko** sought to avoid application of **ERISA** through this amendment. (App. 40 n. 18) ("John **Koresko** admitted at oral argument that one purpose of the [2009] [A]mendment, which he authored, was to avoid application of **ERISA**."). While we acknowledge that a plan sponsor may amend or terminate an **ERISA**-covered plan, the termination of a plan through an amendment must follow the plan's amendment procedures. *See Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir.1990) (explaining that employers do not have "unfettered discretion to amend or terminate plans at will"). In distinguishing *Delgrosso v. Spang & Co.*, 769 F.2d at 935–36, a case in which we held that a company breached its fiduciary duty by failing to administer a plan pursuant to the governing documents, we noted in *Hozier* that "the particular amendment at issue in *Delgrosso* was invalid under the terms of the unamended plan's governing documents." *Hozier*, 908 F.2d at 1161 n. 6. Appellant's reliance on *Hozier* for the proposition that he could decide at any time to terminate an **ERISA** plan is therefore unwarranted.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR	:	CIVIL ACTION
v.	:	
JOHN J. KORESKO, V, et al.	:	No. 09-988

JUDGMENT AND ORDER

AND NOW, this 13th day of March, 2015, upon consideration of the pleadings, filings, hearings, trial, and evidence referenced in this Court's February 6, 2015, Memorandum Opinion (Docket No. 1134, "the Memorandum Opinion") and for the reasons articulated therein, IT IS HEREBY ORDERED that:

1. John J. Koresko, V, PennMont Benefit Services, Inc., Koresko and Associates, P.C., Koresko Law Firm, P.C., and Penn Public Trust ("the Koresko Defendants") are jointly and severally liable for restitution for losses and disgorgement of profits to the Single Employer Welfare Benefit Plan Trust ("SEWBPT"), the Regional Employers Assurance League Voluntary Employees' Beneficiary Association Trust ("REAL VEBA Trust"), and the constituent employer-level employee benefit plans of the

SEWBPT and the REAL VEBA ("the Plans"),[1] in the amount of $38,417,109.63.[2] This liability shall be satisfied as follows:

a. $19,987,362.16 of the $38,417,109.63 due is currently held in ten (10) bank accounts, identified in Appendix A to the Memorandum Opinion, that have been frozen by Orders of this Court and are currently under the control of the Independent Fiduciary, the Wagner Law Group ("WLG"), ("the frozen funds"). The Koresko Defendants are permanently divested of any ownership interest in the frozen funds. Title to and ownership of the frozen funds is hereby vested in WLG as "Independent Fiduciary on behalf of the Single Employer Welfare Benefit Plan Trust and the Regional Employers Assurance League Voluntary Employees' Beneficiary Association Trust";

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[1] These employer-level plans include the 533 individual, ERISA-covered plans identified in ¶¶ 47-50 of the Memorandum Opinion.

[2] After the Court filed its Memorandum Opinion, Mr. Koresko's counsel brought to the Court's attention that Appendix A of the Memorandum Opinion double-counts the amount of plan assets that Mr. Koresko had transferred to the Caribbean island of Nevis by $1,422,367.41 -- the "Last Known Balance" of the "RBTT Koresko Law Firm Account" (line 246). The Court agrees. The Court therefore reduces the total liability from $39,839,477.04 to $38,417,109.63. If and when the Court retains authority over the bank account at the Royal Bank of Trinidad & Tobago -- by the Power of Attorney that Mr. Koresko had signed transferring authority of that account to the Independent Fiduciary -- the Court will further reduce the total liability of the Koresko Defendants by that account's remaining balance.

b. The Koresko Defendants are jointly and severally liable to the SEWBPT, the REAL VEBA Trust, and the Plans in the amount of $18,429,747.47. This amount represents the remaining balance due after applying the $19,987,362.16 in frozen funds discussed above to satisfy part of the Koresko Defendants' $38,417,109.63 liability. The Koresko Defendants shall pay $18,429,747.47 to WLG as "Independent Fiduciary on behalf of the Single Employer Welfare Benefit Plan Trust and the Regional Employers Assurance League Voluntary Employees' Beneficiary Association Trust." WLG is hereby directed to take custody of these funds, deposit them into an account titled to the "Independent Fiduciary on behalf of the Single Employer Welfare Benefit Plan Trust and the Regional Employers Assurance League Voluntary Employees' Beneficiary Association Trust," and manage these funds as assets of the Plans in accordance with ERISA and all current Orders of the Court until further Order of the Court.

2. The Koresko Defendants and Defendant Jeanne Bonney are hereby permanently removed from any position they may currently hold or may have held with regard to the SEWBPT, the REAL VEBA Trust, or any of the Plans and are hereby permanently enjoined from serving either directly or indirectly as administrator, fiduciary, officer, trustee, custodian, counsel,

agent, service provider, representative in any capacity (including acting as attorney in fact), consultant or adviser to the SEWBPT, the REAL VEBA Trust, or any of the Plans.

3. All assets of the REAL VEBA Trust and SEWBPT that have already been turned over or retitled to the IF on an interim basis in accordance with this Court's September 16, 2013, Appointment Order (Docket No. 496), including insurance policies owned by or for the benefit of the REAL VEBA or SEWBPT, are hereby permanently turned over and retitled to the IF as IF for the REAL VEBA and SEWBPT. To the extent that notwithstanding the September 16, 2013, Order, any assets of the REAL VEBA or SEWBPT remain in the custody or control of any of the Koresko Defendants or third parties, the Koresko Defendants and third parties shall immediately turn over such assets to the IF and such assets shall be permanently retitled to the IF.

4. The Koresko Defendants and Defendant Jeanne Bonney are hereby permanently enjoined from serving as administrator, fiduciary, officer, trustee, custodian, counsel, agent, service provider, representative in any capacity (including acting as attorney in fact), consultant or adviser to any employee benefit plan, as that term is defined at Section 3(3) of ERISA, 29 U.S.C. § 1002(3). The Koresko Defendants and Defendant Jeanne Bonney are hereby permanently enjoined from serving in any capacity that involves decision-making authority

or custody or control of the moneys, funds, assets, or property of any employee benefit plan.

5. The Koresko Defendants and Defendant Jeanne Bonney are hereby permanently enjoined from violating any provisions of ERISA in the future.

6. WLG shall continue to serve as the Independent Fiduciary for the SEWBPT, the REAL VEBA Trust, and the Plans in accordance with the current Orders of the Court until further Order of the Court. As such, until further Order of this Court, WLG shall continue to have and exercise the same full authority and control with respect to the management and disposition of the assets of the SEWBPT, the REAL VEBA, and the Plans, as well as all related employer arrangements, currently granted to WLG by Orders of this Court.

6. This Court retains jurisdiction over this action for purposes of enforcing compliance with the terms of this Order; addressing the appointment of a permanent Independent Fiduciary to administer and oversee the SEWBPT, the REAL VEBA Trust, and the Plans; securing an equitable accounting of the assets of the SEWBPT, the REAL VEBA Trust, and the Plans; and overseeing any other outstanding issues requiring resolution in relation to the Memorandum Opinion and the satisfaction of this Judgment and Order.

JUDGMENT IS ENTERED against the Koresko Defendants and Ms. Bonney, and in favor of the SEWBPT, the REAL VEBA Trust, and the Plans.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SETH D. HARRIS, ACTING SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR	:	CIVIL ACTION
v.	:	
JOHN J. KORESKO, V, et al.	:	NO. 09-988

ORDER

AND NOW, this 16th day of September, 2013, upon consideration of Plaintiff's Application for Temporary Restraining Order and Preliminary Injunction (Docket #377), and the myriad filings and hearings that will be described in a Memorandum to be issued at a later time, IT IS HEREBY ORDERED that the Court finds that the Secretary has shown a likelihood of success on the merits of the Secretary's ERISA claims and the probability of irreparable injury to the public and to the Plans and their participants and beneficiaries absent the relief requested.

IT IS FURTHER ORDERED that:

1. Defendants John J. Koresko, V, PennMont Benefit Services, Inc., Penn Public Trust, Koresko and Associates, P.C., and Koresko Law Firm, P.C., their agents, employees, service providers, accountants, attorneys, and any other party acting in concert with or at their direction, are removed from any position they may currently hold with regard to the Single Employer

Welfare Benefit Plan Trust ("SEWBPT") and/or the Regional Employers Assurance League Voluntary Employees' Beneficiary Association Trust ("REAL VEBA") and are enjoined until further order of the Court from serving as administrator, fiduciary, officer, trustee, custodian, counsel, agent, representative (including acting as attorney in fact), or consultant or adviser of the plans or employer arrangements participating in the SEWBPT and/or the REAL VEBA;

2. The Wagner Law Group ("Wagner") is hereby appointed as the Independent Fiduciary by the Court to administer the plans, employer arrangements, SEWBPT and REAL VEBA;

3. The Independent Fiduciary shall have and shall exercise full authority and control with respect to the management or disposition of the assets of the plans, employer arrangements and the SEWBPT and REAL VEBA as set forth in paragraph 4. The Independent Fiduciary shall have the authority to enter into agreements with one or more trustees to serve as directed trustees and hold the assets of the plans, employer arrangements, SEWBPT and REAL VEBA;

4. a. The period over which Wagner will exercise the duties of independent fiduciary is anticipated to be from four to six weeks. The independent fiduciary shall file a report with the Court on or before October 28, 2013, with respect to the status of its work. The initial step of this engagement will be

to obtain an inventory of all assets of REAL VEBA, SEWBPT, and its constituent employer-level plans or arrangements ("the Trusts") as well as a listing of diverted assets to which the Trusts have an entitlement but as to which they may not have legal title. This will entail contacting financial institutions and determining where and how trust assets are being held. A particular emphasis will be placed on securing liquid assets that may be at greater risk of potential misappropriation;

b. If and to the extent directed by the Court, Wagner will develop a timeline and process for collecting and allocating the Trusts' assets. This will include (i) obtaining control over diverted death benefit proceeds owed to participants and beneficiaries of the Trusts and (ii) securing the repayment of the proceeds of loans on insurance policies that have been allegedly misappropriated by or diverted to parties other than the Trusts. To the extent directed by the Court, Wagner will work with the DOL to obtain title on behalf of the Trusts to real property acquired by Koresko or others with the Trusts' assets;

c. Develop a process for administering the day-to-day operations of the Trusts that includes the payment of benefits to the Trusts' beneficiaries and payment of insurance premiums with respect to insurance policies or contracts held by or for the benefit of the Trusts. If directed by the Court, oversight will be accorded to restorative payments to the Trusts'

beneficiaries who did not receive the full amount of benefits to which they were entitled.

5. Defendants John J. Koresko, V, PennMont Benefit Services, Inc., Koresko and Associates, P.C., and Koresko Law Firm, P.C., their agents, employees, service providers, accountants, attorneys, and any other party acting in concert with or at their direction shall turn over all assets of the plans and employer arrangements other than assets referenced in paragraph 7, and all documentation related to the plans and employer arrangements to the Independent Fiduciary.

6. In particular, defendants John J. Koresko, V, PennMont Benefit Services, Inc., Penn Public Trust, Koresko and Associates, P.C., and Koresko Law Firm, P.C., their agents, employees, service providers, accountants, attorneys, and any other party acting in concert with or at their direction shall immediately upon entry of this Order turn over to the Independent Fiduciary the following assets:

a. All assets of the plans, employer arrangements, SEWBPT and/or REAL VEBA currently held in accounts other than those set forth in paragraph 7;

b. Assignments of all rights in the Nelson Springs condominiums and the deeds and all other indicia of ownership to the Anderson, South Carolina, property referenced in

Plaintiff's Memorandum in Support of Application for Temporary Restraining Order and Preliminary Injunction;

c. All other personal and real property purchased, in whole or in part, with assets of the plans, employer arrangements, SEWBPT and/or REAL VEBA, including (i) any funds payable to or deposited into the SEWBPT or REAL VEBA; (ii) any proceeds from loans taken out against the cash value of insurance policies owned by the SEWBPT, REAL VEBA or the trustees thereof for the benefit of the plans or employer arrangements participating in the SEWBPT or REAL VEBA; (iii) any death benefit payments from insurance companies; or (iv) any income or interest generated by any of the foregoing.

7. The Independent Fiduciary shall assume and is hereby granted full authority and control over the accounts, policies, contracts or other financial instruments frozen or subject to the Court's interim orders of July 9 and July 23, 2013.

8. Within five (5) business days of the entry of this Order, defendants John J. Koresko, V, PennMont Benefit Services, Inc., Penn Public Trust, Koresko and Associates, P.C., and Koresko Law Firm, P.C., are ordered to provide this Court and the Independent Fiduciary with the name, account number, and location of any accounts containing plan assets and to identify and provide the location and deeds, if applicable, of all real or

personal property purchased with plan assets, other than those accounts and property already described in this Order.

9. The Continental Bank, Bank of America, N.A., Citizens Bank, Pershing LLC, and all insurance companies issuing policies, contracts or other instruments owned by or for the benefit of the SEWBPT, REAL VEBA, and/or its constituent employer-level plans or arrangements are ordered to accept further instructions regarding the accounts listed above and insurance contracts from the Independent Fiduciary and are enjoined from accepting further instructions regarding the accounts named in the July 9, 2013, order and insurance contracts, policies and/or instruments described herein from John J. Koresko, V, PennMont Benefit Services, Inc., Penn Public Trust, Koresko and Associates, P.C., and Koresko Law Firm, P.C., their agents, employees, service providers, accountants, attorneys, and any other party acting in concert with them or at their direction. The Independent Fiduciary shall be responsible for notifying all relevant banks, financial institutions and insurance companies of the existence and contents of this Order.

10. All defendants, their agents, employees, service providers, bank, accountants, and attorneys are enjoined from coercing, intimidating, interfering with or attempting to coerce, intimidate, or interfere with the Independent Fiduciary or with the agents, employees or representatives of the Independent

Fiduciary and are ordered to cooperate fully with the Independent Fiduciary or its successors, agents, employees or representatives, and shall cooperate with the Independent Fiduciary in the transfer of the administration of the plans, employer, arrangements, SEWBPT and REAL VEBA to the Independent Fiduciary; shall provide the Independent Fiduciary with all of the books, documents, and records relating to the finances and administration of the plans, employer arrangements, SEWBPT and REAL VEBA; and shall make an accounting to the Independent Fiduciary of all transfers, payments, or expenses incurred or paid in connection with the plans, employer arrangements, SEWBPT and REAL VEBA. The Secretary of Labor shall be permitted to provide to the Independent Fiduciary any and all records of the defendants or third parties in the Secretary's possession necessary for the administration of the plans, employer arrangements, SEWBPT and/or REAL VEBA.

11. The fees and expenses of the Independent Fiduciary shall be paid from funds in the SEWBPT and REAL VEBA; however, the Independent Fiduciary shall submit invoices on a monthly basis for such compensation to the Court for approval. The parties shall have 15 days from the date that such invoices are filed with the Court for filing of any objections. The Independent Fiduciary shall not be paid until such time as the Court approves the invoice.

12. The Independent Fiduciary shall not be held responsible for any claims against the plans, employer arrangements, SEWBPT or REAL VEBA or the related entities which existed, arose, matured or vested prior to the appointment of the Independent Fiduciary. During the pendency of this Order, the Independent Fiduciary shall not be required to honor requests for the termination of any plans or employer arrangements participating in the SEWBPT or REAL VEBA or for the transfer of any assets to other trustees, plan sponsors, or other parties requesting such transfers, including the trustees' or plan sponsors' agents, employees, service providers, banks, accountants, and attorneys, unless ordered otherwise by the Court.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.

Appendix A

	Transcaction Description	Date of Breach	Amount
1	5455 Account, Bank of Nova Scotia (Nevis property)	5/19/2010	$500,000.00
2	5455 Account, Bank of Nova Scotia (Nevis property)	1/31/2011	$180,000.00
3	5455 Account, Bank of Nova Scotia (Nevis property)	4/21/2011	$1,000,000.00
4	5455 Account, Deon Daniel (Nevis property)	4/6/2010	$400,000.00
5	5455 Account, Deon Daniel (Nevis property)	4/6/2010	$320,000.00
6	5455 Account, KLF (1112 Acount)	8/11/2010	$155,089.50
7	5455 Account, KLF (1112 Acount)	11/4/2011	$50,000.00
8	5455 Account, KLF (1112 Acount)	3/9/2012	$50,000.00
9	**5455 Account, Last Known Balance**	**5/31/2013**	**$4,906,617.42**
10	5455 Account, Leo C. Salzman	12/23/2011	$1,200.00
11	5455 Account, Lincoln Financial: Annuity	7/1/2010	$1,900,000.00
12	5455 Account, Gilbert, Harrell, Sumerford & Martin, P.C.	10/5/2011	$10,000.00
13	5455 Account, Locke Lord	12/13/2011	$150,000.00
14	5455 Account, Montgomery McCracken	3/25/2012	$25,000.00
15	5455 Account, SYK	4/10/2012	$11,754.99
16	5455 Account, Locke Lord	5/24/2012	$50,000.00
17	5455 Account, SYK	6/25/2012	$67,813.75
18	5455 Account, 1302 Account	12/2/2011	$1,974,017.04
19	5455 Account, South Carolina Property	8/2/2011	$25,000.00
20	5455 Account, South Carolina Property	9/1/2011	$203,769.70
21	5455 Account, South Carolina Property	9/2/2011	$10,000.00
22	4872 Account, Deon Daniel (Nevis property)	5/14/2010	$70,000.00
23	4872 Account, John and Bonnie Koresko (3380 Account)	2/2/2010	$10,000.00
24	4872 Account, John and Bonnie Koresko (3380 Account)	2/9/2011	$10,000.00
25	4872 Account, John and Bonnie Koresko (3380 Account)	4/18/2011	$5,000.00
26	4872 Account, John and Bonnie Koresko (4511 Account)	4/18/2011	$10,000.00
27	4872 Account, John J. Koresko (7301 Acount)	2/10/2011	$2,000.00
28	4872 Account, John J. Koresko (7301 Acount)	4/18/2011	$2,000.00
29	4872 Account, KLF (1112 Account)	11/5/2010	$9,000.00
30	**4872 Account, Last Known Balance**	**9/25/2013**	**$460,879.90**
31	4872 Account, Nancy Bonner	5/24/2013	$5,000.00
32	**5154 Account, Last Known Balance**	**4/30/2014**	**$425,640.34**

* Accounts in bold represent frozen accounts.

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33	5154 Account, Withdrawal	9/13/2013	$40,000.00
34	5154 Account, Withdrawal	9/13/2013	$10,000.00
35	6018 Account, Firestone (PennMont Attorneys)	9/25/2013	$4,000.00
36	**6018 Account, Last Known Balance**	**9/30/2013**	**$910,103.19**
37	6018 Account, U.S. Bankruptcy Court	9/19/2013	$1,788.00
38	8384 Account, Barclay's	8/19/2013	$3,317.78
39	8384 Account, ATM Withdrawal	9/9/2013	$300.00
40	8384 Account, Debit Purchase (The Paradies Shops)	9/12/2013	$103.15
41	**8384 Account, Last Known Balance**	**9/30/2013**	**$148,117.07**
42	1146 Account, Firestone (PennMont Attorneys)	4/24/2013	$10,000.00
43	1146 Account, John J. Koresko	1/22/2013	$17,943.62
44	**1146 Account, Last Known Balance**	**6/28/2013**	**$1,588,660.01**
45	1146 Account, GLF IOLTA Account (Wilhite v. REAL VEBA)	11/18/2011	$15,000.00
46	1146 Account, GLF IOLTA Account (Wilhite v. REAL VEBA)	11/23/2011	$15,000.00
47	1146 Account, Locke Lord	4/23/2012	$50,000.00
48	1187 Account, Jeffrey Neiman	8/10/2012	$50,000.00
49	1187 Account, Jeffrey Neiman	12/13/2012	$115,800.00
50	1187 Account, KLF: Legal Service Fee (1112 Account)	3/2/2010	$85,494.75
51	1187 Account, KLF: Legal Service Fee (1112 Account)	3/2/2010	$1,565.00
52	1187 Account, KLF: Legal Service Fee (1112 Account)	3/2/2010	$5,000.00
53	1187 Account, KLF: Legal Service Fee (1112 Account)	3/9/2010	$5,000.00
54	1187 Account, KLF: Legal Service Fee (1112 Account)	3/9/2010	$10,000.00
55	1187 Account, KLF: Legal Service Fee (1112 Account)	3/9/2010	$10,000.00
56	1187 Account, KLF: Legal Service Fee (1112 Account)	3/29/2010	$5,000.00
57	1187 Account, KLF Admin fees for Sheffield Case (1112 Account)	6/24/2011	$27,762.50
58	**1187 Account, Last Known Balance**	**6/28/2013**	**$477,421.51**
59	1187 Account, PennMont (1112 Account)	12/30/2010	$100,000.00
60	1187 Account, Locke Lord	2/7/2012	$50,000.00
61	1187 Account, Locke Lord	9/13/2012	$22,000.00
62	1187 Account, Locke Lord	10/26/2012	$25,000.00
63	1187 Account, Locke Lord	11/20/2012	$38,297.62
64	1187 Account, Locke Lord	6/17/2013	$25,000.00
65	1187 Account, Montgomery McCracken	2/26/2013	$322,368.58
66	1187 Account, Montgomery McCracken	2/17/2011	$5,000.00

* Accounts in bold represent frozen accounts.

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67	1187 Account, Montgomery McCracken	12/19/2011	$13,000.00
68	1187 Account, Montgomery McCracken	7/27/2012	$60,000.00
69	1187 Account, Montgomery McCracken	10/5/2012	$85,483.04
70	1187 Account, Montgomery McCracken	11/2/2012	$100,000.00
71	1187 Account, Montgomery McCracken	1/9/2013	$191,328.26
72	1187 Account, Montgomery McCracken	6/18/2013	$463,158.75
73	1187 Account, KLF Admin fees for Sheffield Case (1112 Account)	6/24/2011	$462,443.56
74	1187 Account, PennMont (1112 Account)	10/21/2011	$40,391.65
75	1187 Account, PennMont Admin fees per Trust Doc (1112 Account)	7/24/2012	$161,562.29
76	1187 Account, PennMont Admin fees per Trust Doc (1112 Account)	7/19/2012	$117,400.00
77	1195 Account, 1161 Account	12/17/2010	$50,000.00
78	1195 Account, PennMont Admin Fees (1112 Account)	4/15/2011	$50,000.00
79	1195 Account, Montgomery McCracken	4/25/2012	$20,000.00
80	1195 Account, Montgomery McCracken	6/13/2012	$20,000.00
81	1195 Account, First Anguilla Trust	3/8/2010	$15,000.00
82	1195 Account, Investors Insurance Corporation	6/2/2010	$200,000.00
83	**1195 Account, Last Known Balance**	**6/30/2013**	**$3,278,445.37**
84	1195 Account, Octagon Consultants	3/8/2010	$30,000.00
85	1195 Account, Law Offices of Scott A. Orth	9/14/2010	$5,000.00
86	**2185 Account, Last Known Balance**	**6/28/2013**	**$4,022,222.21**
87	From Trustee Transfer to Anderson Kill	8/29/2005	$51,344.49
88	From Trustee Transfer to Anderson Kill	5/8/2006	$50,000.00
89	From Trustee Transfer to C&D	3/14/2008	$9,210.50
90	From Trustee Transfer to C&D	6/23/2008	$30,000.00
91	From Trustee Transfer to C&D	9/8/2008	$16,983.60
92	From Trustee Transfer to C&D	10/6/2008	$8,297.35
93	From Trustee Transfer to C&D	11/3/2008	$5,640.67
94	From Trustee Transfer to C&D	1/12/2009	$23,887.68
95	From Trustee Transfer to C&D	2/27/2009	$2,599.60
96	From Trustee Transfer to C&D	4/3/2009	$11,032.50
97	From Trustee Transfer to GHH	3/20/2009	$10,253.68
98	From Trustee Transfer to GHH	3/20/2009	$13,297.12
99	From Trustee Transfer to GHH	4/9/2009	$13,248.79
100	From Trustee Transfer to GHH	4/9/2009	$4,791.17

* Accounts in bold represent frozen accounts.

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101	From Trustee Transfer to Gilbert, Harrell, Sumerford & Martin, P.C.	9/22/2008	$1,485.00
102	From Trustee Transfer to JGR	5/21/2002	$10,167.88
103	From Trustee Transfer to JGR	6/10/2002	$15,263.55
104	From Trustee Transfer to JGR	7/15/2002	$11,198.57
105	From Trustee Transfer to JGR	8/12/2002	$12,248.57
106	From Trustee Transfer to JGR	8/26/2002	$10,876.65
107	From Trustee Transfer to JGR	9/30/2002	$10,241.47
108	From Trustee Transfer to JGR	11/12/2002	$10,430.81
109	From Trustee Transfer to JGR	12/9/2002	$10,430.81
110	From Trustee Transfer to JGR	12/30/2002	$9,963.62
111	From Trustee Transfer to JGR	2/3/2003	$10,221.51
112	From Trustee Transfer to JGR	2/24/2003	$10,287.11
113	From Trustee Transfer to JGR	3/24/2003	$10,368.13
114	From Trustee Transfer to JGR	5/5/2003	$10,476.33
115	From Trustee Transfer to JGR	6/2/2003	$10,179.15
116	From Trustee Transfer to JGR	6/23/2003	$10,588.09
117	From Trustee Transfer to JGR	8/11/2003	$10,265.88
118	From Trustee Transfer to JGR	8/25/2003	$10,268.38
119	From Trustee Transfer to JGR	9/29/2003	$10,176.79
120	From Trustee Transfer to JGR	10/27/2003	$10,299.46
121	From Trustee Transfer to JGR	1/20/2004	$10,277.41
122	From Trustee Transfer to JGR	3/8/2004	$10,898.94
123	From Trustee Transfer to JGR	3/29/2004	$5,106.77
124	From Trustee Transfer to JGR	4/26/2004	$5,384.28
125	From Trustee Transfer to JGR	6/14/2004	$5,144.25
126	From Trustee Transfer to JGR	6/28/2004	$5,131.33
127	From Trustee Transfer to JGR	7/26/2004	$5,090.47
128	From Trustee Transfer to JGR	8/23/2004	$5,281.57
129	From Trustee Transfer to JGR	9/27/2004	$5,282.37
130	From Trustee Transfer to JGR	10/25/2004	$5,194.37
131	From Trustee Transfer to JGR	11/29/2004	$5,085.16
132	From Trustee Transfer to JGR	2/7/2005	$1,233.21
133	From Trustee Transfer to JGR	3/7/2005	$987.25
134	From Trustee Transfer to JGR	3/28/2005	$520.77

* Accounts in bold represent frozen accounts.

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135	From Trustee Transfer to JGR	6/27/2005	$1,577.02
136	From Trustee Transfer to KAPC	7/22/2002	$2,545.11
137	From Trustee Transfer to KAPC	1/13/2003	$66,072.41
138	From Trustee Transfer to KAPC	11/17/2003	$90,356.86
139	From Trustee Transfer to KAPC	5/3/2004	$47,860.00
140	From Trustee Transfer to KAPC	6/1/2004	$11,124.99
141	From Trustee Transfer to KAPC	7/12/2004	$5,375.00
142	From Trustee Transfer to KAPC	12/6/2004	$166,446.25
143	From Trustee Transfer to KLF	4/25/2005	$8,064.78
144	From Trustee Transfer to KLF	9/19/2005	$36,641.16
145	From Trustee Transfer to KLF	10/31/2005	$25,000.00
146	From Trustee Transfer to KLF	3/13/2006	$36,763.75
147	From Trustee Transfer to KLF	7/17/2006	$27,081.74
148	From Trustee Transfer to KLF	7/30/2007	$50,221.07
149	From Trustee Transfer to KLF	8/6/2007	$51,178.96
150	From Trustee Transfer to KLF	8/13/2007	$46,955.76
151	From Trustee Transfer to KLF	8/20/2007	$52,447.77
152	From Trustee Transfer to KLF	8/27/2007	$21,399.13
153	From Trustee Transfer to KLF	12/10/2007	$85,038.71
154	From Trustee Transfer to KLF	12/17/2007	$86,654.56
155	From Trustee Transfer to KLF	12/31/2007	$122,170.50
156	From Trustee Transfer to KLF	3/14/2008	$115,326.50
157	From Trustee Transfer to KLF	6/9/2008	$94,000.00
158	From Trustee Transfer to KLF	6/12/2008	$93,000.00
159	From Trustee Transfer to KLF	8/25/2008	$36,196.00
160	From Trustee Transfer to PennMont	7/22/2002	$8,820.00
161	From Trustee Transfer to PennMont	8/19/2002	$764.38
162	From Trustee Transfer to PennMont	9/3/2002	$33,845.00
163	From Trustee Transfer to PennMont	10/7/2002	$19,180.86
164	From Trustee Transfer to PennMont	10/15/2002	$47,030.83
165	From Trustee Transfer to PennMont	11/12/2002	$38,994.66
166	From Trustee Transfer to PennMont	12/30/2002	$40,504.98
167	From Trustee Transfer to PennMont	2/3/2003	$70,393.47
168	From Trustee Transfer to PennMont	3/24/2003	$587.50

* Accounts in bold represent frozen accounts.

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169	From Trustee Transfer to PennMont	3/24/2003	$30,996.43
170	From Trustee Transfer to PennMont	5/12/2003	$25,641.83
171	From Trustee Transfer to PennMont	6/16/2003	$34,056.69
172	From Trustee Transfer to PennMont	7/21/2003	$34,374.96
173	From Trustee Transfer to PennMont	9/15/2003	$30,900.32
174	From Trustee Transfer to PennMont	11/3/2003	$59,059.00
175	From Trustee Transfer to PennMont	2/2/2004	$60,187.37
176	From Trustee Transfer to PennMont	3/29/2004	$30,637.50
177	From Trustee Transfer to PennMont	6/1/2004	$51,876.67
178	From Trustee Transfer to PennMont	7/12/2004	$33,867.00
179	From Trustee Transfer to PennMont	8/2/2004	$19,385.00
180	From Trustee Transfer to PennMont	8/16/2004	$25,595.00
181	From Trustee Transfer to PennMont	8/30/2004	$13,700.00
182	From Trustee Transfer to PennMont	9/20/2004	$28,265.00
183	From Trustee Transfer to PennMont	11/1/2004	$20,445.00
184	From Trustee Transfer to PennMont	12/30/2004	$62,638.07
185	From Trustee Transfer to PennMont	12/30/2004	$12,920.00
186	From Trustee Transfer to PennMont	8/16/2004	$6,705.00
187	From Trustee Transfer to PennMont	3/7/2005	$61,594.66
188	From Trustee Transfer to PennMont	3/7/2005	$5,038.35
189	From Trustee Transfer to PennMont	3/21/2005	$56,915.32
190	From Trustee Transfer to PennMont	4/11/2005	$32,503.82
191	From Trustee Transfer to PennMont	4/25/2005	$37,956.40
192	From Trustee Transfer to PennMont	5/16/2005	$23,634.55
193	From Trustee Transfer to PennMont	5/31/2005	$21,647.21
194	From Trustee Transfer to PennMont	6/13/2005	$24,950.00
195	From Trustee Transfer to PennMont	6/27/2005	$12,965.00
196	From Trustee Transfer to PennMont	10/31/2005	$25,000.00
197	From Trustee Transfer to PennMont	11/28/2005	$75,000.00
198	From Trustee Transfer to PennMont	2/24/2006	$200,000.00
199	From Trustee Transfer to PennMont	3/13/2006	$133,906.66
200	From Trustee Transfer to PennMont	5/8/2006	$76,632.23
201	From Trustee Transfer to PennMont	8/21/2006	$150,000.00
202	From Trustee Transfer to PennMont	10/30/2006	$126,450.61

* Accounts in bold represent frozen accounts.

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203	From Trustee Transfer to PennMont	12/4/2006	$140,068.30
204	From Trustee Transfer to PennMont	4/9/2007	$202,947.00
205	From Trustee Transfer to PennMont	7/9/2007	$134,959.04
206	From Trustee Transfer to PennMont	11/5/2007	$111,003.22
207	From Trustee Transfer to PennMont	11/9/2007	$101,656.26
208	From Trustee Transfer to PennMont	3/14/2008	$208,388.78
209	From Trustee Transfer to PennMont	5/27/2008	$112,242.78
210	From Trustee Transfer to PPT	4/16/2002	$414,517.88
211	From Trustee Transfer to PPT	6/2/2002	$9,037.04
212	From Trustee Transfer to PPT	6/4/2002	$17,119.83
213	From Trustee Transfer to PPT	7/2/2002	$19,811.19
214	From Trustee Transfer to PPT	8/2/2002	$18,833.14
215	From Trustee Transfer to PPT	9/4/2002	$13,570.24
216	From Trustee Transfer to PPT	10/2/2002	$12,101.09
217	From Trustee Transfer to PPT	11/5/2002	$12,071.80
218	From Trustee Transfer to PPT	12/4/2002	$8,251.17
219	From Trustee Transfer to PPT	1/3/2003	$6,501.91
220	From Trustee Transfer to PPT	2/11/2003	$10,712.96
221	From Trustee Transfer to PPT	3/6/2003	$7,792.94
222	From Trustee Transfer to PPT	4/4/2003	$6,766.23
223	From Trustee Transfer to PPT	5/6/2003	$5,216.34
224	From Trustee Transfer to PPT	6/4/2003	$4,291.68
225	From Trustee Transfer to PPT	7/10/2003	$3,696.64
226	From Trustee Transfer to PPT	8/6/2003	$3,102.23
227	From Trustee Transfer to PPT	9/4/2003	$2,990.68
228	From Trustee Transfer to PPT	10/10/2003	$2,770.96
229	From Trustee Transfer to PPT	11/5/2003	$2,779.59
230	From Trustee Transfer to PPT	12/4/2003	$2,276.03
231	From Trustee Transfer to PPT	1/8/2004	$2,707.68
232	From Trustee Transfer to PPT	2/4/2004	$4,591.60
233	From Trustee Transfer to PPT	3/3/2004	$3,702.31
234	From Trustee Transfer to PPT	4/5/2004	$3,402.81
235	From Trustee Transfer to PPT	5/6/2004	$3,047.70
236	From Trustee Transfer to PPT	6/3/2004	$2,669.06

* Accounts in bold represent frozen accounts.

Appendix A

237	From Trustee Transfer to PPT	7/2/2004	$2,216.13
238	From Trustee Transfer to PPT	8/3/2004	$3,272.16
239	From Trustee Transfer to PPT	9/2/2004	$2,728.59
240	From Trustee Transfer to PPT	10/4/2004	$2,924.12
241	From Trustee Transfer to PPT	11/2/2004	$3,367.59
242	From Trustee Transfer to PPT	12/2/2004	$3,355.17
243	From Trustee Transfer to PPT	1/4/2005	$3,897.01
244	From Trustee Transfer to Richard L. Coffman	3/20/2006	$10,000.00
245	**Pershing Account, Last Known Balance**	**5/31/2013**	**$3,769,255.14**
246	RBTT Koresko Law Firm Account, Last Known Balance	1/13/2014	$1,422,367.41
247	0175 Account, First Carribean International Bank, Theodore Hobson	5/12/2008	$250,000.00
248	0175 Account, First Carribean International Bank, Theodore Hobson	7/1/2008	$450,000.00
249	0175 Account, First Carribean International Bank, Theodore Hobson	8/5/2008	$152,000.00
250	0175 Account, First Carribean International Bank, Theodore Hobson	9/15/2008	$750,000.00
251	0175 Account, First Carribean International Bank, Theodore Hobson	10/15/2008	$540,000.00
252	0175 Account, First Carribean International Bank, Webster Dyrud Mitchell	10/14/2008	$15,000.00
253	0175 Account, Transfer to 1112 Account	9/22/2005	$2,500.00
254	0175 Account, Transfer to 1112 Account	9/21/2005	$2,500.00
255	0175 Account, Transfer to 6523 Account	5/10/2005	$6,526.64
256	0175 Account, Transfer to 7801 Account (Nevis property)	9/5/2008	$240,000.00
257	7801 Account, Deon Daniel (Nevis property)	10/1/2009	$200,000.00
		Total	**$39,839,477.04**
		Total Balance of Frozen Accounts	**$19,987,362.16**
		Without Balance of Frozen Accounts	**$19,852,114.88**

* Accounts in bold represent frozen accounts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, Article III, section 2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States, and * * * to Controversies to which the United States shall be a Party * * *.

UNITED STATES CODE:

29 U.S. Code § 1109 - Liability for breach of fiduciary duty

[ERISA sec. 409]

(a) 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, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

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29 U.S. Code § 1132 - Civil enforcement

[ERISA sec. 502]

(a) Persons empowered to bring a civil action. A civil action may be brought—

* * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

* * *

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) or under subsection (i) or (l). * * *