RICHARD SHOFER
VS.
THE STUART HACK CO., ET AL.
CASE NO: 88102069/CL-79993
Volume 2 Of 4
EXHIBITS --- NO
TRANSCRIPTS --- YES

one Cross APPEALS/one Record

209-98
402

IN THE CIRCUIT COURT
FOR BALTIMORE CITY

RICHARD SHOFER, *

Plaintiff *

v. * Case No. 88102069/
CL79993

THE STUART HACK COMPANY, et al *

Defendants *

FILED
MAR 12 1990
CIRCUIT COURT FOR
BALTIMORE CITY

* * * * * * * * * *

THIRD-PARTY DEFENDANT'S INTERROGATORIES TO PLAINTIFF

TO: THE STUART HACK COMPANY, Defendant

FROM: GRABUSH, NEWMAN & CO., P.A., Third-Party Defendant

Pursuant to Rule 2-421, Third-Party Defendant, Grabush Newman & Co., P.A. ("Grabush"), propounds the following Interrogatories on Defendant, The Stuart Hack Company.

DEFINITIONS AND INSTRUCTIONS

A. These Interrogatories are continuing in character so as to require you to file Supplemental Answers if you obtain further or different information before trial.

B. Unless otherwise indicated, these Interrogatories refer to the time, place, and circumstances of the transaction or occurrence mentioned or complained of in the pleadings.

C. When knowledge or information in possession of a party is requested, such request includes knowledge of the party's employees, agents, representatives, members, accountants, or other firms or business entities directly or indirectly subject to the control in any way whatsoever of any party, and unless privileged, its attorneys.

D. The pronoun "you" or "your" refers to the party to whom these Interrogatories are addressed and to the persons mentioned in Paragraph C.

E. "Identify" or "identification," when used in reference to an individual person, means to state, if known, the person's full name, age, present or last known home or residence address and telephone number, and present or last

known business address, telephone number, and title or occupation. "Identify" or "identification," when used in reference to a document or writing, means to state the type of document or writing (e.g., letter, memorandum, telegram, chart, etc.) and information sufficient to enable Plaintiff to identify the document (e.g., its date, the names of addressee and signee, the letter or heading and approximate number of pages, its present location, and the name and address of its custodian). If any such document was, but is no longer, in your possession or subject to your control, state what disposition was made of it, the reason for such disposition, and who, if anyone, has possession or control of the document.

F. Provide the following information in chronological order with respect to each communication, whether oral or written, which is the subject matter in whole or in part of any of these Interrogatories or Answers to Interrogatories:

(1) an identification of the persons involved;

(2) the dates;

(3) where the communication occurred, e.g., if in person to person conversation, the place from which each person involved actually participated;

(4) what was communicated by each person involved, to whom, and the order in which the communication was made, identifying what was communicated by each person; and

(5) the manner in which each communication was made, e.g., whether oral or written or otherwise.

G. The term "person" means the plural as well as the singular, any natural person, firm, association, partnership, corporation, or other form of legal entity, unless the context indicates otherwise.

H. The term "document" or "writing" means any written, recorded, or graphic matter, however produced or reproduced, and whether or not now in existence and includes the original, all file copies, all other copies no matter how prepared, and all drafts prepared in connection with the document, whether used or not, and further includes but is not limited to papers, books, records, catalogs, price lists, pamphlets, periodicals, letters, correspondence, scrap books, notebooks, bulletins, circulars, forms, notices, postcards, telegrams, deposition transcripts, contracts, agreements, leases, reports, studies, working papers, charts, proposals, graphs, sketches, diagrams, indexes, maps, analyses, statistical reports, reports, results of investigations, reviews, ledgers, journals, balance sheets, accounts, books of accounts, invoices,

vouchers, purchase orders, expense accounts, cancelled checks, bank checks, statements, sound and tape recordings, video tapes, audio tapes, memoranda (including any type or form of notes, memoranda, or sound recordings of personal thoughts, recollections, or reminders, or of telephone or other conversations or of acts, activities, agreements, meetings, or conferences), photostats, microfilm, instruction lists or forms, computer printouts or other computer data, minutes of directors or committee meetings, interoffice or intraoffice communications, documents, diaries, calendar or desk pads, stenographers' notebooks, appointment books, and other papers or matters similar to any of the foregoing, however denominated, whether received by you or prepared by you for your own use or transmittal. If a document has been prepared in several copies, or additional copies have been made and the copies are not identical (or which by reason of subsequent modification or notation are no longer identical), each non-identical copy is a separate document.

I. If you claim a privilege about any communication as to which information is requested by these Interrogatories, specify the privilege claimed, the communication and Answer as to which the claim is made, the topic discussed in the communication, and the basis on which you assert the claim of privilege.

J. If information used to answer any of these Interrogatories is obtained from a person or persons other than the person or persons signing the Answers to these Interrogatories, include in each Answer the name and present address of the person or persons contributing information used in the Answer and the nature of the information contributed by each such person or persons.

INTERROGATORIES

1. Identify in accordance with Instruction E the person or persons signing the Answers to these Interrogatories and in accordance with Instructions E and J any person or persons aiding in the answering of these Interrogatories.

2. Identify in accordance with Instruction E all persons known to you to have personal knowledge of any allegation, fact, event, transaction, or occurrence on which you rely or which forms a basis for your Answers to these Interrogatories or which is in any other manner relevant to this case, including

in your Answer an identification of the particular subject matter or areas of their knowledge.

3. Identify in accordance with Instruction E any experts whom you propose to call as witnesses with regard to any matter or issue relating to this action, including in your Answer the nature of each expert's specialty, the subject matter of each expert's testimony, the substance of the findings and opinions to which each expert is expected to testify, the facts upon which each expert's opinions are based, and a summary of the grounds for each opinion. Attach to your Answers a copy of any and all expert reports.

4. Identify in accordance with Instruction E all documents and other sources of information that you have used or consulted to answer these Interrogatories, whether or not information was actually obtained from those sources.

5. Identify in accordance with Instruction E all persons who have given written or recorded statements concerning the subject matter of this action, including in your Answer the date of each such statement, the identity of the person taking the statement, and the identity of its present custodian.

6. If you have any knowledge about or are aware of any written or oral statements concerning the subject matter of this action made by Grabush or any agent, representative, or employee of Grabush, describe the substance of each such statement, the place and date that the statement was made, the identity of the person making the statement, the identity of

the person to whom it was made, and an identification in accordance with Instruction E of all documents concerning the statement.

7. Describe in detail your policy with respect to retention and destruction of documents and business records, including in your Answer an identification in accordance with Instruction E of each document that sets forth any such policy or change in policy.

8. Identify in accordance with Instruction E any documents that refer or in any way relate to the subject matter of this action that are known to you to be missing, destroyed, or otherwise disposed of, including in your Answer the disposition made of each document, the date of disposition, whether such disposition was consistent with any policy you may have for the retention or destruction of documents, the identity of the person last known to have the document in his or her possession or subject to his or her control, and the identity of each person you have reason to believe had knowledge of its contents or who received a copy of any such document.

9. Describe in detail the factual basis for your Third-Party Claim against Grabush.

10. Describe in detail the factual basis for the allegations in paragraphs 4 and 5 of the Third-Party Claim that Plaintiff's damages were caused entirely or solely by the negligence of Grabush.

11. Describe in detail the factual basis for the allegations in paragraph 4 of the Third-Party Claim that Grabush failed to properly prepare the Plaintiff's personal federal and state income tax returns for the years in question.

12. Describe in detail the factual basis for your claim in paragraph 6 of the Third-Party Claim for counsel fees, expenses, and interest, including in your Answer an itemization of the counsel fees, expenses, and interest sought.

13. Itemize in detail all damages you claim in this action against Grabush.

14. State your belief as to whether Barry Berman is responsible for all or any part of Plaintiff's damages, including in your Answer the basis for that belief.

15. Describe in detail any agreements between you and Barry Berman and/or his law firm that refer or in any way relate to the subject matter of this suit, including but not limited to any agreements relating to the damages sought in this case.

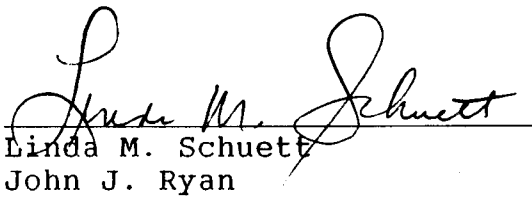
16. State whether it was your responsibility to issue Forms W-2P and Forms 1099, including but not limited to Forms 1099-R and 1099-MISC, upon the happening of taxable events relating to the Catalina Enterprises, Inc. Pension Plan, including in your Answer all reasons for the response given.

17. State whether you have ever advised a client not to amend a tax return on the ground that the statute of limitations had run, including in your Answer a detailed description of the circumstances surrounding any such advice.

18. State whether you have ever advised a client to amend a tax return even though the statute of limitations had run, including in your Answer a detailed description of the circumstances surrounding any such advice.

19. State whether you have ever advised a client to amend a tax return prior to the running of the statute of limitations, including in your Answer a detailed description of the circumstances surrounding any such advice.

20. State your understanding as to the length of the statute of limitations applicable to the loans taken by Shofer in 1984, 1985, and 1986.



Linda M. Schuett
John J. Ryan

Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202
(301) 625-3500

Attorneys for Third-Party Defendant, Grabush, Newman & Co., P.A.

CERTIFICATE OF SERVICE

I CERTIFY on this 9th day of March, 1990, that a copy of Third-Party Defendant's Interrogatories to Plaintiff was mailed, postage prepaid, to Daniel W. Whitney and Janet M. Truhe, Semmes, Bowen and Semmes, 250 W. Pratt Street, Baltimore, Maryland 21201, and to Lloyd S. Mailman and Thomas A. Bowden, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank & Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201.

Linda M. Schuett

Linda M. Schuett

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RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	
	*	

FILED
MAR 15 1990
CIRCUIT COURT FOR BALTIMORE CITY

* * * * * * * * *

ENTRY OF APPEARANCE

The undersigned hereby enters his appearance for the Defendants in the above-entitled case.

3/15/90
Date

Lee B. Zaben
Lee B. Zaben, Esquire
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, MD 21201
(301) 576-4717

Counsel for Defendants

I HEREBY CERTIFY that on this 15th day of March, 1990, a copy of the foregoing Entry of Appearance was mailed to Thomas A. Bowden, Esquire, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201; and Linda Schuett, Esquire, Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

Lee B. Zaben
Lee B. Zaben

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

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MAR 16 1990

CIRCUIT COURT FOR
BALTIMORE CITY

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	

* * * * * * * * *

THIRD PARTY PLAINTIFF'S
REQUEST FOR PRODUCTION OF DOCUMENTS

TO: Grabush, Newman & Co., P.A.

FROM: Stuart Hack

Pursuant to Rule 2-422 of the Maryland Rules of Procedure, Stuart Hack by his attorneys, Daniel W. Whitney, Janet M. Truhe and Semmes, Bowen & Semmes, requests that Grabush, Newman & Co., P.A. produce for inspection and copying the documents requested below within 30 days of service at the offices of Semmes, Bowen & Semmes, 250 W. Pratt Street, Baltimore, Maryland 21201.

DOCUMENTS REQUESTED

1. The complete file maintained by Grabush, Newman & Co., P.A. for Richard D. Shofer.

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

2. The complete file maintained by Grabush, Newman & Co., P.A. for Catalina Enterprises, Inc. t/a Crown Motors.

Daniel W. Whitney

Daniel W. Whitney

Janet M. Truhe

Janet M. Truhe

Semmes, Bowen & Semmes

Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201
(301) 539-5040

Attorneys for Defendants

I HEREBY CERTIFY that on this 16th day of March, 1990, a copy of the foregoing Third Party Plaintiff's Request for Production of Records was mailed to Thomas A. Bowden, Esquire, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201; and Linda Schuett, Esquire, Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

Janet M. Truhe

Janet M. Truhe

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

FILED

MAR 20 1990

CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	

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THIRD PARTY DEFENDANT'S RESPONSE TO
THIRD PARTY PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS

Third Party Defendant, Grabush, Newman & Co., by its attorneys, Linda M. Schuett and John J. Ryan, responds to the Request for Production of Documents filed by Third Party Plaintiff, Stuart Hack, by stating that it will produce all non-privileged documents responsive to Request Nos. 1 and 2 at a mutually agreed upon time and place. By agreement of counsel, production shall be limited to the period from 1983 through the present time.

Linda M. Schuett
John J. Ryan
Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202

Attorneys for Third Party Defendant

CERTIFICATE OF SERVICE

I CERTIFY on this 20th day of March, 1990, that a copy of Third Party Defendant's Response to Third Party Plaintiff's Request for Production of Documents was mailed, postage prepaid, to Daniel W. Whitney and Janet M. Truhe, Semmes, Bowen and Semmes, 250 W. Pratt Street, Baltimore, Maryland 21201 and to Lloyd S. Mailman and Thomas A. Bowden, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank & Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201.

Linda M. Schuett

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	

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* * * * * * * *

PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

Richard Shofer, Plaintiff ("Shofer"), by Lloyd S. Mailman, Thomas A. Bowden, and Blum, Yumkas, Mailman, Gutman & Denick, P.A., his attorneys, files this Response to Defendants' Motion To Dismiss for Lack of Subject Matter Jurisdiction filed by Stuart Hack and The Stuart Hack Company, Defendants.

A. Factual background and procedural posture.

The Amended Complaint alleges that Stuart Hack and The Stuart Hack Company (collectively referred to herein as "Hack") were professional pension consultants, hired by Catalina Enterprises, Inc. ("Catalina") to administer Catalina's pension plan (the "Plan").

Shofer was a participant in the Plan. Desiring to borrow some of the money that had accumulated in his voluntary account in the Plan, Shofer asked Hack whether that could be done. Hack replied with a letter dated August 9, 1984 (the "Letter") in which he told Shofer that such loans could be made.

The Letter mentioned no adverse tax consequences of such

loan transactions. In fact, however, the loans were taxable as ordinary income. When Shofer took out several loans in reliance on Hack's advice, Shofer suffered serious adverse tax consequences, including tax, penalties, interest, and liens on his property.

Based upon Hack's previous performance under the contract and on Hack's professed expertise, Shofer reasonably relied upon Hack to alert Shofer as to any negative tax consequences of such transactions. Hack's failure to advise Shofer of these tax consequences constituted professional malpractice (Count I), breach of contract (Count II), breach of common law fiduciary duty (Count III), and a denial of Shofer's rights under the terms of the Plan (Count IV).

Such are the basic allegations of the Amended Complaint. Count IV of the Complaint states a cause of action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.A. § 1001 et seq.

Throughout the following discussion, it should be noted that Count IV incorporates by reference all the preceding paragraphs of the Amended Complaint.

B. Concurrent jurisdiction under ERISA

"State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section." 29 U.S.C.A. § 1132(e)(1).

Section 1132(a)(1)(B) states: "A civil action may be

brought (1) by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." (Emphasis added).

Thus, if Count IV constitutes a civil action to enforce Shofer's rights under the terms of the Plan, then this Court has subject matter jurisdiction, and the Motion to Dismiss should be denied.

C. Count IV's cause of action under the terms of the Plan.

The Plan is attached to this Response as Exhibit A. The Plan is a complicated document, setting out many rights and obligations. Hack drafted the Plan.

1. Shofer's right to loans from the Plan.

It is undisputed that Shofer was a Participant in the Plan pursuant to the definition on Page 2-3 of the Plan. See also Defendants' Motion at p. 2, n.2.

As a Participant in the Plan, Shofer had the right to the benefit of loans from the Plan pursuant to Paragraph 10.16, beginning on Page 10-12 of the Plan. "Notwithstanding any other provision in the Plan to the contrary, the Trustees, upon direction of the Company, shall make loans to Participants." Page 10-12, Paragraph 10.16. (Emphasis added).

In order to carry out his duty to make such loans, the Trustee is empowered under the terms of the Plan to "appoint any persons or firms (including but not limited to . . . consultants,

professional plan administrators and other specialists) . . . to secure specialized advice or assistance, as they deem necessary or desirable in connection with the management of the Trust . . . ." Page 10-3, Paragraph 10.2(n) of the Plan.

Hack was one such consultant and professional plan administrator hired by the Trustee for specialized advice and assistance in the area of tax implications of pension transactions.

The Trustee relied upon Hack to give specialized aid and assistance inter alia with regard to the tax aspects of such loan transactions.

Thus, under the terms of the Plan, Shofer had the right to expect and rely upon the efforts of the Trustee of the Plan and all those appointed by said Trustee to give specialized advice and assistance in making such loans.

The Amended Complaint alleges that Shofer did, in fact, reasonably rely upon Hack's advice when Shofer was deciding whether to borrow money from the Plan under the terms of the Plan. The tax consequences, unforeseen to Shofer, were serious. Amended Complaint, Paragraphs 10-13. Under the terms of the Plan, Shofer had a right to competent professional advice from Hack. Because of Hack's erroneous advice, Shofer was required to sue Hack to enforce that right.

For these reasons, Count IV is an action by Shofer to enforce his rights under the Plan. Amended Complaint, Paragraph 38. Thus, this Court has concurrent jurisdiction over the claim pursuant to 29 U.S.C.A. § 1132(e)(1).

2. Shofer's right to the administrator's services.

Under the terms of the plan, the administrator of the Plan was permitted, under the terms of the Plan to delegate "all or any part of its duties, powers or responsibilities under the Plan, both ministerial and discretionary, as it deems appropriate, to any person . . . ." Paragraph 11.2(b), Page 11-2 of the Plan.

The administrator was also permitted, under the terms of the Plan, to "appoint any persons or firms, or otherwise act to secure specialized advice or assistance, as it deems necessary . . . ; the Administrator shall be entitled to rely conclusively upon, and shall be fully protected in any action or omission taken by it in good faith reliance upon, the advice or opinion of such firms or persons." Paragraph 11.2(b), Page 11-2 of the Plan.

Pursuant to these powers of delegation and appointment, the administrator hired Hack to be the administrator of the Plan, and Hack accepted the responsibilities so delegated.

One of the Plan administrator's duties to Participants, assumed by Hack under the terms of the Plan, is to "resolve and determine all disputes or questions arising under the Plan, including the power to determine the rights of . . . Participants . . . ." Page 11-1, Paragraph 11.1.

Shofer's uncertainty about his ability to borrow money from his accounts in the Plan was a dispute or question arising under the Plan within the meaning of Paragraph 11.1 of the Plan.

Hack's erroneous advice to Shofer regarding Shofer's ability to borrow from the Plan constituted a breach of Hack's duty to Shofer under the terms of the Plan.

Shofer brought the instant suit to enforce his rights under the Plan against Hack. Therefore, this Court has jurisdiction over Count IV pursuant to 29 U.S.C.A. § 1132(e)(1).

D. Defendants' arguments.

Defendants argue that Count IV may be construed only as a pure claim for breach of ERISA-imposed fiduciary duty, over which the federal courts concededly have exclusive jurisdiction. As has been explained above, however, Count IV rests on Shofer's ERISA cause of action to enforce his rights under the terms of the Plan, over which this Court has concurrent jurisdiction with the federal courts pursuant to 29 U.S.C.A. § 1132(e)(1).

In deciding whether state courts have concurrent jurisdiction over an ERISA claim, courts often focus on the principles of law that will figure in the court's decision making.

> Congress's choice to grant the state courts concurrent jurisdiction over . . . cases [brought under § 1132(a)(1)(B)] squares with its overall legislative goals. Actions to recover benefits or enforce rights under the terms of a plan will typically involve the application of those general principles of contract law with which the state courts have had substantial experience before ERISA; their expertise qualifies them to evaluate these rules in light of ERISA's policies . . . .

Lembo v. Texaco, Inc., 227 Cal Rptr. 289, 293 (Cal. App. 2 Dist. 1986) (quoting Menhorn v. Firestone Tire & Rubber Co., 738 F.2d

1496, 1500 n.2 (9th Cir. 1984)). In the instant case, this Court is being asked to apply general principles of contract law to determine inter alia (1) Shofer's rights under the terms of the Plan, (2) Hack's obligations under the terms of the Plan, (3) whether Hack breached his obligations under the terms of the Plan, and (4) the measure of damages. Therefore, Shofer's claim falls squarely within the area as to which Congress intended to imbue state and federal courts with concurrent jurisdiction.

None of the cases cited by Defendants involve the fact pattern present in the instant case, namely, a state court action by a pension plan participant to enforce his rights, under the terms of a plan, to accurate advice from professionals hired under the terms of the Plan. Nor has Plaintiff discovered any cases involving such facts. Therefore, this is a case of first impression.

E. Conclusion.

For the reasons above stated, Plaintiff respectfully requests this Honorable Court to deny Defendants' Motion To Dismiss for Lack of Subject Matter Jurisdiction.

In the alternative, if this Court concludes that Count IV as drafted does not state a cause of action under ERISA by Shofer to enforce his rights under the Plan, Plaintiff respectfully requests that this Court grant Plaintiff leave to amend its Complaint. See G & H Clearing and Landscaping v. Whitworth, 66 Md. App. 332, 353-55 (1986). Trial is scheduled for October 22, 1990, which would give all parties sufficient time to file

amended answers and proceed with trial preparation.

Lloyd S. Mailman

Lloyd S. Mailman

Thomas A. Bowden

Thomas A. Bowden
1200 Mercantile Bank &
Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 385-4000
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I CERTIFY that on this 23rd day of March, 1990, a copy of this document was mailed, postage prepaid, to each person listed below:

Janet M. Truhe, Esquire
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201

Attorneys for Defendants

Linda M. Schuett, Esq.
Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202

Attorneys for Third-Party Defendant

Thomas A. Bowden

Thomas A. Bowden

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	
	*	

* * * * * * * *

AFFIDAVIT OF RICHARD SHOFER

I, Richard Shofer, state as follows:

1. I am over 18 years of age and competent to testify in this case.

2. I am the Plaintiff in this case.

3. I have read the Plaintiff's Response to Motion to Dismiss, to which this Affidavit is attached.

4. The matters and facts alleged in said Plaintiff's Response to Motion to Dismiss are true and correct.

I SOLEMNLY AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true.

Richard Shofer

THE STUART HACK COMPANY

CATALINA ENTERPRISES, INC. PENSION PLAN
1984 AMENDING RESTATEMENT

Consultants & Actuaries

4623 Falls Road
Baltimore, Maryland 21209
(301) 366-8700

Washington, D.C. 621-4064

A

CATALINA ENTERPRISES, INC.

PENSION PLAN

1984 AMENDING RESTATEMENT

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CATALINA ENTERPRISES, INC.

PENSION PLAN

AMENDING RESTATEMENT

THIS AMENDING RESTATEMENT is made by and between Catalina Enterprises, Inc. (hereinafter referred to as the "Company"), and Richard Shofer, (hereinafter referred to as the "Trustee").

R E C I T A L S

The Company, on December 28, 1971 established a money purchase pension plan and trust (including certain accident and health plan benefits). The Company amended and restated said plan and trust in its entirety effective January 1, 1976. The Company wishes to now amend and restate the said plan and trust.

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained, the parties hereto hereby amend and restate The Catalina Enterprises, Inc. Pension Plan under the terms and conditions herein set forth and agree as follows:

ARTICLE I

General

1.1 Name - This Amending Restatement may be referred to as "The 1984 Restatement of The Catalina Enterprises, Inc. Pension Plan."

1.2 Applicability - The provisions of this Amending Restatement shall apply only to an individual who meets the definition of Employee set forth herein and whose employment terminates on or after the Effective Date. The rights and benefits, if any, of an individual whose employment terminated prior thereto shall be determined in accordance with the prior provisions of the Plan in effect on the date his employment terminated (subject to any modification set forth herein which may affect the holding and/or distribution of previously accrued but unpaid benefits).

1.3 Continuation of Existing Plan - The adoption of this Plan by the Company constitutes the continuation of the existing plan (the "Original Plan"). Notwithstanding any other Plan provisions to the contrary, the following shall be applicable:

(a) Subject to the conditions and limitations of this Plan, each person who is a participant under the Original Plan immediately prior to the Effective Date will continue as a Participant under this Plan.

(b) The amounts, if any, credited to a Participant's Accrued Benefit immediately prior to the Effective Date shall constitute the opening balance of his Accrued Benefit under this Plan.

(c) Amounts being paid to a former participant or beneficiary in accordance with the provisions of the Original Plan shall continue to be paid in accordance with such provisions.

(d) Any beneficiary designation in effect under the Original Plan immediately before its amendment and continuation in the form of this Plan shall be deemed to be a valid designation filed with the Company under this Plan, to the extent consistent with the provisions of this Plan, unless and until the Participant revokes such designation or makes a new designation under this Plan.

1.4 Transition Rules - Notwithstanding the effective date generally applicable to any provision of this Amending Restatement, the following special transition rules shall apply:

(a) The following provisions of this Plan as in effect immediately prior to this Amending Restatement shall continue to apply until January 1, 1985: the provisions regarding the minimum age for purposes of eligibility, the provisions regarding the minimum age for purposes of computing vesting, the provisions regarding any maternity/paternity absences which began prior to January 1, 1985, the minimum amount of any cash-out of a Participant's Accrued Benefit without the Participant's consent, and (subject to (f) below) the provisions regarding distributions to married Participants.

(b) The dates for the distribution of benefits, the provisions regarding Breaks in Service for purposes of computing vesting and the provisions regarding forfeitures, as in effect immediately prior to this Amending Restatement shall continue to apply to any Participant who incurred a Break in Service prior to January 1, 1985 (but only with respect to that Break in Service).

(c) Every individual who would have become a Participant pursuant to Section 3.1 on or before January 1, 1985 but for the Plan's minimum age requirement of 25, and who is a Covered Employee on that date, shall become a Participant on that date.

(d) The provisions of Section 3.2(b)(ii) as in effect immediately prior to this Amending Restatement shall continue to apply to any series of consecutive Breaks in Service which, prior to January 1, 1985, was at least equal to the number of Years of Service credited to the Participant prior thereto.

(e) The provisions of regarding distribution of death benefits to the surviving spouse as in effect prior to this Amending Restatement shall continue to apply to any Participant who has no Hours of Service on or after August 23, 1984.

(f) Section 8.6 shall be subject to the following:

(i) The provisions regarding distributions to married Participants as in effect prior to this Amending Restatement shall continue to apply to any Participant who has no Hours of Service on or after August 23, 1984.

(ii) The provisions of Sections 8.6(c) through (g) as set forth by this Amending Restatement shall apply effective August 23, 1984 to any Participant who has at least one Hour of Service on or after August 23, 1984 and who dies before his benefit commencement date (as defined in Section 8.6(g)) and before January 1, 1985.

(iii) No election not to take a joint and survivor annuity, if made on or after January 1, 1985 shall be effective unless the spousal consent requirements of Section 8.6(b) have been met.

(iv) A Participant may elect to provide for the payment of death benefits in the form described in Section 8.6(c) of this Amending Restatement, if such Participant: (A) completed at least one Hour of Service on or after the first day of the first Plan Year beginning after 1975, (B) did not complete any Hours of Service on or after August 23, 1984, (C) completed at least ten Years of Service, (D) has a vested interest in an Accrued Benefit attributable to Company contributions, and (E) affirmatively elects coverage by Sections 8.6(c) through (g) prior to his benefit commencement date (as defined in Section 8.6(g)).

(f) A Participant may elect to receive benefits in the form provided in Section 8.6(a), of this Amending Restatement, if such Participant: (A) completed at least one Hour of Service after September 1, 1974, (B) did not complete any Hours of Service on or after the first day of the first Plan Year beginning after 1975, and (C) affirmatively elects the joint and survivor annuity benefit form prior to his benefit commencement date (as defined in Section 8.6(g)).

END OF ARTICLE I

ARTICLE II

Definitions and Top Heavy Provisions

2.1 Definitions - The following terms, as used herein, unless a different meaning is implied by the context, shall have the following meanings:

Accrued Benefit - The balance in a Participant's or Beneficiary's account, including contributions, forfeitures, income, expenses, gains and losses (whether or not realized) allocated or attributable thereto, which account shall consist of its pro rata proportion of all commingled Trust assets plus the value or proceeds of any Policies, or other Trust assets, separately earmarked therefor. Said account balance shall be determined as of the most recent valuation date but adjusted for any additions or distributions subsequent thereto.

Administrator - The person, group or entity designated in accordance with the provisions of ARTICLE XI to administer and operate the Plan.

Anniversary Date - The first day of each Plan Year.

Beneficiary - Any person or persons so designated in accordance with the provisions of ARTICLE IX.

Break in Service - A twelve month period during which an individual has not completed more than 500 Hours of Service. The aforesaid twelve month period shall be the Plan Year in all cases except that, for purposes of Section 3.1, it shall be the twelve consecutive month period beginning with the date on which the individual first performed an Hour of Service and succeeding twelve consecutive month periods beginning on the anniversary of said date.

C/L Increase - An automatic increase (without necessity of Plan amendment) in a dollar value set forth or described in the Plan, for the purpose of reflecting increases in the cost of living to the extent prescribed in or pursuant to regulations under Section 415(d) of the Internal Revenue Code.

Company - Catalina Enterprises, Inc. a corporation duly organized and existing under the laws of the State of Maryland, and its successors and assigns, unless otherwise herein provided, or any other business organization which, as hereinafter provided, shall assume the obligations hereunder, or which shall agree to become a party to the Plan.

Compensation - The basic current remuneration paid by the Company to or for an individual with respect to his service as a Covered Employee, including overtime, but excluding contributions, credits or benefits under this Plan or under any other retirement, stock-related, deferred compensation, fringe benefit or employee welfare benefit plan, and excluding direc reimbursement for expenses. For purposes of the foregoing, ompensation shall include only Compensation paid while the Participant participated in the Plan.

For any Plan Year with respect to which the Plan is a Top Heavy Plan, Compensation shall not take into account, for any purpose under the Plan, any amount in excess of $200,000.00 (as adjusted by C/L Increases) for such Plan Year; provided, however, that this paragraph shall not be construed so as to reduce any benefits accrued for Plan Years with respect to which the Plan is not a Top Heavy Plan.

Covered Employee - Any Employee except that, where retirement benefits were the subject of good faith bargaining between the appropriate parties, the term Covered Employee shall not include any individual whose employment is subject to a collective bargaining agreement which does not by its terms provide that such individual is eligible for participation in this Plan.

Notwithstanding the foregoing, an individual who performed services as a sole proprietor, partner, or independent contractor shall not be considered to have been a Covered Employee during that period of time when he rendered such services to the Company.

Distribution Date - The date on which a Participant: (i) reaches retirement, (ii) dies while in the active employ of the Company, (iii) is determined by the Company to have become totally and permanently disabled, or (iv) otherwise terminates his employment with the Company at a time when he is 100% vested in his Accrued Benefit. If the employment of a Participant terminates, for reasons other than retirement, death or disability, at a time when he is less than 100% vested in his Accrued Benefit, his Distribution Date shall be the first to occur of his death following such termination or the last day of the Plan Year in which he incurs the last of five consecutive Breaks in Service.

Effective Date - The effective date of this Amending Restatement, which shall be January 1, 1984, except as otherwise set forth in Section 1.4, and except that the following shall be effective January 1, 1985: the last sentence in the definition of Top Heavy Ratio in Section 2.2(a), the text of Limitation I in Section 8.2, Section 8.4(c), and the first paragraph of Section 8.7.

Employee - Any person employed by the Company.

Employer Group - Defined in Section 2.2.

Entry Date - The first day in each Plan Year, and the first day of the seventh month in each Plan Year.

Hour of Service - Each hour for which an individual, in his capacity as an Employee, is directly or indirectly paid, or entitled to payment, by the Company for the performance of duties (to be credited for the period in which the duties were performed), plus (except as otherwise set forth in Section 4.2) each hour during which the Employee is on a Leave of Absence, plus each additional hour, not otherwise credited, for which back pay, irrespective of mitigation of damages, has been awarded or agreed to by the Company (to be credited for the period for which the award or agreement pertains). Credit for Hours of Service on account of periods during which no duties are performed, and determination of the periods to which Hours of Service are to be credited, shall be in accordance with Department of Labor Regulations Sec. 2530.200b-2(b) and (c).

Internal Revenue Code - The Internal Revenue Code of 1954, or any provision or section thereof herein specifically referred to, as such Code, provision or section may from time to time be amended or replaced.

Key Employee - Defined in Section 2.2.

Leave of Absence - An authorized absence from active service, under conditions described in Section 4.2, which does not constitute a termination of employment.

Non-Key Employee - Defined in Section 2.2.

Participant - Any person so designated in accordance with the provisions of ARTICLE III, including, where appropriate according to the context of the Plan, any former Employee who is or may become (or whose Beneficiaries may become) eligible to receive a benefit under the Plan.

Participation Date - The last day of the Company's regular accounting year. As of the Effective Date, the Company's fiscal year ends on the last day of December 31.

Plan - The plan set forth herein, as amended from time to time.

Plan Year - The twelve month period ending on a Participation Date.

Policy - Any insurance or annuity contract issued by an insurance company under the Plan.

Remuneration - The Participant's wages, salaries, professional service fees and other amounts received for personal services actually rendered in the course of employment with the Company, but not including: (i) non-taxable Company contributions under, or distributions (whether or not taxable) from, a deferred compensation plan, other than taxable payments received under an unfunded, non-qualified plan, and (ii) other amounts which receive special tax benefits.

Required Aggregation Group - Defined in Section 2.2.

Retirement Plan - Defined in Section 2.2.

Retirement Security Act - The Employee Retirement Income Security Act of 1974, or any provision or section thereof herein specifically referred to, as such Act, provision or section may from time to time be amended or replaced.

Segregated Account - That portion, or all, of an Accrued Benefit which, pending distribution, is segregated from the remainder of the Trust (and excluded from any allocation of net earnings or losses of the Trust) and placed in one or more interest bearing accounts, certificates of deposit or other savings or time deposit instruments of any federally or state supervised bank or similar financial institution and/or invested in obligations of the United States government, as determined by the Trustees. All income earned by the Segregated Account shall be deemed to be part thereof and distributable therewith, and there may be charged thereto, in addition to any directly attributable fees and expenses, a pro-rata portion of total Trust fees and expenses.

Special Valuation Date - Any date, other than a Participation Date, designated by the Company as an accounting or valuation date.

Super Top Heavy Plan - Defined in Section 2.2.

Top Heavy Compensation - Defined in Section 2.2

Top Heavy Plan - Defined in Section 2.2.

Trust - The trust fund established pursuant to the Plan.

Trustees - Collectively, the trustee or trustees named in the Plan and such successor and/or additional trustees as may be named pursuant to the terms of the Plan.

Year of Service - A twelve month period during which an individual has completed not less than 1,000 Hours of Service. The aforesaid twelve month period shall be the Plan Year in all case except that, for purposes of Section 3.1, it shall be the twelve consecutive month period beginning with the date on which the individual first performed an Hour of Service and succeeding twelve consecutive month periods beginning on the anniversary of said date.

Notwithstanding the foregoing, for Plan Years which began prior to January 1, 1976, 12 months of service during a Plan Year shall give a Participant a Year of Service for purposes of vesting.

2.2 Top Heavy Status - To the extent necessary to prevent disqualification under Section 401(a)(10)(B) of the Internal Revenue Code, the following provisions shall apply if the Plan is or becomes a Top Heavy Plan:

(a) Definitions - The following terms shall have the following meanings in the determination of whether or not the Plan is a Top Heavy Plan:

Cumulative Benefit - The value of the account of a participant in a defined contribution Retirement Plan, or the present value of the cumulative accrued benefit of a participant in a defined benefit Retirement Plan, as such account or benefit is defined and determined under Section 416(g) of the Internal Revenue Code. The value of the account or cumulative accrued benefit, as the case may be, with respect to any Determination Date, shall be based upon the most recent plan valuation date occurring within the twelve months ending on the Determination Date, after adding back distributions made during the Determination Period, and otherwise

subject to adjustment as required under Section 416(g). Amounts attributable to a participant's own contributions (whether mandatory or voluntary, but not including deductible employee contributions) shall be considered part of his Cumulative Benefit, but rollovers and direct plan-to-plan transfers shall only be considered to the extent required under Section 416(g).

Determination Date - Except as otherwise provided in regulations issued by the Internal Revenue Service, the last day of the plan year preceding the plan year for which Top Heavy Plan status is being determined (or, if the determination is being made with respect to the first plan year of a plan, the last day of such plan year).

Determination Period- A five year period consisting of the plan year containing the Determination Date and the four preceding plan years.

Employer - The Company and any other employer some or all of whose employees participate in this Plan or in a Retirement Plan which is aggregated with this Plan as part of a Permissive or Required Aggregation Group.

Employer Group - A group of Employers who, for purposes of Section 416 of the Internal Revenue Code, are treated as a single employer under Section 414(b), (c) or (m) of the Internal Revenue Code.

Former Key Employee - Any employee or former employee of an Employer who was, but is no longer, a Key Employee, and the beneficiaries of any such individual.

Key Employee - Any employee or former employee (whether or not deceased) of an Employer who, at any time during the Determination Period, was: (i) an officer of the Employer if his Top Heavy Compensation exceeded 150% of the 415 Dollar Limit, (ii) the owner of an ownership interest in the Employer which is at least 1/2% and one of the ten largest ownership interests if his Top Heavy Compensation exceeded the 415 Dollar Limit, (iii) a 5% owner of the Employer, or (iv) a 1% owner of the Employer if his Top Heavy Compensation exceeded $150,000, and the beneficiaries of any such employee or former employee, all as defined and determined under Section 416(i) of the Internal Revenue Code. For purposes of the foregoing: (i) ownership shall include constructive ownership within the meaning of Section 318 of the Internal Revenue Code (applied by substituting 5% for 50% in Section 318(a)(2)(C)) and similar principles in connection with non-corporate Employers, (ii) Top Heavy

Compensation shall include Compensation for the relevant plan year from the Employer and any other members of an Employer Group including the Employer, and (iii) the 415 Dollar Limit shall mean the dollar limit under Section 415(c)(1)(A) of the Internal Revenue Code for the calendar year in which the relevant plan year ends.

Non-Key Employee - Any employee or former employee of an Employer who is not a Key Employee, and the beneficiaries of any such individual.

Permissive Aggregation Group - A group of Retirement Plans of an Employer Group consisting of: (i) each plan which is a part of a Required Aggregation Group, plus (ii) each plan voluntarily included by the Employer Group, provided that, with such inclusion, the group (as a group) meets the requirements of Sections 401(a)(4) and 410 of the Internal Revenue Code.

Required Aggregation Group - A group of one or more Retirement Plans of an Employer Group consisting of: (i) each plan in which a Key Employee participates at any time during the Determination Period, and (ii) each plan in which no Key Employee participates, but which, at any time during the Determination Period, enables a plan in which a Key Employee participates to meet the requirements of Section 401(a)(4) or 410 of the Internal Revenue Code.

Retirement Plan - This Plan and any other defined benefit or defined contribution retirement plan, annuity contract, or simplified employee pension plan, as those terms are defined for purposes of Sections 401, 403(a) and 408(k) of the Internal Revenue Code.

Super Top Heavy Plan - A Retirement Plan which would be a Top Heavy Plan if 90% were substituted for 60% in each place it appears in the definition thereof.

Top Heavy Compensation - Remuneration for the relevant plan year.

Top Heavy Plan - A Retirement Plan which, as of a Determination Date: (i) is a plan in which the Top Heavy Ratio exceeds 60%, or (ii) is a plan which (even though its own Top Heavy Ratio may not exceed 60%) is a member of a Required Aggregation Group in which the Top Heavy Ratio exceeds 60%, but (iii) is not a plan which (even though its own Top Heavy Ratio may exceed 60%) is a member of a Required or Permissive Aggregation Group in which the Top Heavy Ratio does not exceed 60%; provided, however, that in no event shall a Retirement Plan be deemed to be a Top Heavy Plan with respect to any plan year beginning before 1984.

Top Heavy Ratio - The ratio of the aggregate amount of the Cumulative Benefits of the Key Employees to the aggregate amount of the Cumulative Benefits of the Key Employees and the Non-Key Employees other than Former Key Employees. The ratio shall be computed without regard to the Cumulative Benefit of any individual who has not received any compensation (other than benefits under a Retirement Plan), from the Employer or any member of an Employer Group which includes the Employer, at any time during the five year period ending on the Determination Date.

(b) Operative Provisions - The following Plan provisions shall become operative in the event the Plan is or becomes a Top Heavy Plan:

(i) Annual Addition Limits - Section 6.8(c)(ii).

(ii) Compensation Maximum - Section 2.1 (Compensation).

(iii) Minimum Vesting - Section 7.4 (second paragraph).

(iv) Minimum Contributions - Section 5.1(b).

END OF ARTICLE II

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ARTICLE III

Eligibility and Participation

3.1 Requirements - Subject to Section 1.3, every individual included under the prior provisions of the Plan as of the Effective Date shall continue to participate in accordance with the provisions of this Amending Restatement. On or after the Effective Date, every other Covered Employee shall become a Participant on the first Entry Date occurring on or after the date he has completed one Year of Service and attained the age of 21. No individual shall become a Participant, however, if he is not a Covered Employee on the date his participation is to begin.

An Employee shall receive credit for all Years of Service for eligibility purposes, except that, if the Employee was a Participant prior to incurring a Break in Service, but he had no vested interest in the portion of his Accrued Benefit attributable to Company contributions at the time he incurred such Break in Service, and if he incurs a number of consecutive Breaks in Service at least equal to the greater of five or the number of his Years of Service prior thereto, then his participation in the Plan shall cease (except that any Accrued Benefit to his credit shall continue to be subject to the provisions of the Plan other than this Section 3.1), and, thereafter, he shall be treated as a new Employee and his eligibility for any subsequent participation will be determined without regard to his prior Years of Service.

3.2 Re-employment - If an Employee or Participant whose employment is terminated is subsequently re-employed, his status with respect to the Plan shall be governed by the following:

(a) Eligibility - If the re-employed Employee was not a Participant prior to his termination of employment, he shall become a Participant in accordance with the provisions of Section 3.1. If he was a Participant prior to such termination, or if (but for his absence) he would have become a Participant pursuant to Section 3.1 during his absence, then, subject to the second paragraph of Section 3.1, his participation shall commence immediately upon the resumption of his status as a Covered Employee.

(b) Vesting - The re-employed Employee shall receive credit for all Years of Service for purposes of determining the vested percentage in his Accrued Benefit, except as otherwise provided in Section 4.1, and except that:

(i) If the termination of employment included five consecutive Breaks in Service, then any Years of Service completed after the Breaks in Service shall be disregarded for purposes of determining the vested percentage of any Accrued Benefit to which the Participant may have been entitled with respect to the period before the Breaks in Service.

(ii) If the re-employed Employee was a Participant prior to his termination, but he had no vested interest in the portion of his Accrued Benefit attributable to Company contributions at the time of his termination, and if he incurs a number of consecutive Breaks in Service at least equal to the greater of five or the number of his Years of Service prior thereto, his prior Years of Service will be disregarded for purposes of determining the vested percentage of his Accrued Benefit (with respect to the periods before and after the Breaks in Service).

(c) Separate Accounting - If a re-employed Participant has an undistributed Accrued Benefit with respect to the period both before and after the termination of employment, separate accounting shall be maintained for each such portion of his Accrued Benefit if, and so long as, the Participant is not fully vested, and (i) the termination of employment amounted to five consecutive Breaks in Service, or (ii) separate accounting is required by Section 8.5(c).

(d) Benefit Payments - If, at the time of his re-employment, the Participant is eligible to receive or is receiving benefits under the Plan, then it shall be in the sole discretion of the Company to determine whether such benefits shall continue or shall cease until such time as they may be paid in conjunction with the benefits accrued with respect to the Participant's subsequent employment.

(e) Restoration of Forfeiture - If the re-employed Participant: (i) was less than 100% vested in his Accrued Benefit when he terminated employment, (ii) received a lump sum distribution of the vested portion, if any, of his Accrued Benefit pursuant to Section 8.5(b) not later than the end of the second Plan Year following the Plan Year of his termination of employment, (iii) resumed his status as a Covered Employee before having reached his Distribution Date, and (iv) repays to the Plan the full amount of the lump sum distribution, if any, before having reached his Distribution Date, then, as of the date of such repayment, the full amount of the forfeiture which occurred pursuant to Section 8.5(c) (unadjusted for gains or losses in the interim) shall be restored to his Accrued Benefit. If the Participant had no vested interest in the portion of his Accrued Benefit attributable to Company contributions, the restoration shall be made as of the date of resumption of status as a

Covered Employee. Notwithstanding any other Plan provisions regarding utilization of forfeitures and allocation of Trust earnings, the restored forfeiture shall be derived, first, from forfeitures arising in the Plan Year in which the restoration occurs, and, second, from Trust income and gains (whether or not realized) arising in the Plan Year in which the restoration occurs. However, the Company may, and in the absence of available forfeitures and/or income or gains as aforesaid shall, make a separate contribution to the Plan for the purpose of restoring the forfeiture, which separate contribution shall be made not later than the end of the Plan Year following the Plan Year in which the repayment or resumption (as the case may be) by the Participant occurred. Neither the repayment nor the restoration shall be deemed to be Annual Additions for purposes of Section 6.8.

3.3 Change of Employment Category - During any period in which a Participant remains in the employ of the Company but ceases to be a Covered Employee, he will continue his Plan participation and shall continue to accrue credit for Years of Service for purposes of vesting and eligibility for contributions, but he shall not receive any allocation of contributions or forfeitures based upon remuneration earned during such period.

3.4 Waiver of Participation - The Company may grant a waiver of participation to any Employee who so requests. Whether or not such waiver shall be granted, and the terms and conditions (including duration) thereof, shall be in the sole discretion of the Company.

END OF ARTICLE III

ARTICLE IV

Hours and Years of Service

4.1 Credit for Years of Service - A Participant will receive credit for all Years of Service, except as otherwise provided in ARTICLE III, and except that, for purposes of determining the vested percentage of his Accrued Benefit, the following Years of Service shall be disregarded:

(1) Years of Service completed prior to the Participant attaining age 18.

(2) Years of Service completed prior to December 28, 1977, the original effective date of the Plan.

4.2 Leaves of Absence -

(a) General - Employment shall not be deemed to have terminated though it is interrupted by a temporary absence from active service by reason of: (i) a Leave of Absence granted by the Company on account of vacation, holiday, illness, incapacity (including disability), layoff or jury duty, (ii) a Leave of Absence required by law or granted by the Company on account of service in the Armed Forces of the United States, (iii) any other Leave of Absence during which the individual remains in active pay status (irrespective of whether the employment relationship has terminated), or (iv) any other Leave of Absence, extending for not more than two years, under conditions which are not treated by the Company as a termination of employment. If any Participant on Leave of Absence fails to answer an inquiry by the Company as to the status of the Leave of Absence, or if the Company is not notified of the death or disability of such Participant, and the Company has no actual knowledge thereof, the Company may determine that the Leave of Absence had or has expired.

Hours of Service with respect to a Leave of Absence will be credited pursuant to the following:

(i) Unless excluded by ARTICLE III or Section 4.1, Hours of Service will be credited for the customary period of work during a Leave of Absence, whether paid or unpaid.

(ii) Notwithstanding the foregoing, no Hours of Service will be credited during an unpaid Leave of Absence for military service, except to the extent required by law.

iii) Notwithstanding the foregoing, not more than 501 Hours of Service shall be credited on account of any single continuous period during which an individual performs no duties, except that he shall be credited with an Hour of Service without regard to this limit for each hour: (A) during a paid Leave of Absence, provided that he returns to active service upon the expiration thereof, or (B) of paid sick leave (regardless of whether he is paid directly by the Company or through Company-financed wage continuation insurance), other than where payments are made solely for the purpose of complying with workmen's compensation, unemployment insurance or disability insurance laws.

(b) Maternity/Paternity Absences - Without regard to whether an absence described herein is treated as a Leave of Absence pursuant to Section 4.2(a), the hours occurring during an absence, whether paid or unpaid, by reason of the pregnancy of a Participant, the birth to or adoption by a Participant of a child, or the care of such child immediately following such birth or adoption, shall, to the extent set forth herein, be utilized toward prevention of a Break in Service. Said hours (whether or not they would have been, and notwithstanding any contrary crediting provisions in the definition of, Hours of Service) shall: (i) be credited for the sole purpose of preventing a Break in Service; (ii) be credited at the rate per normal working day of eight hours or such other number of hours as would normally have been credited to the Participant but for such absence, but in no event to exceed 501 hours with respect to any such absence; and (iii) be credited for (and only for) the twelve month Break in Service computation period following that in which the absence began, or, if to do so would prevent a Break in Service, instead be credited for (and only for) the twelve month computation period during which the absence began.

4.3 Related Employers - To the extent required by the Internal Revenue Code or the Retirement Security Act, Employees shall receive credit for Years of Service and Hours of Service (for purposes of eligibility and vesting, but not benefit accrual) accrued in connection with employment with related employers, as defined in Section 414(b), (c) or (m) of the Internal Revenue Code.

4.4 Credit for Hours of Service - Hours of Service will be credited based upon the relevant payroll records maintained by the Company. However, any Employee for whom records of actual hours worked are not maintained shall be deemed to have worked, and will receive credit for, ten Hours of Service for any day on which he would be credited with any Hours of Service if his hours were directly recorded.

END OF ARTICLE IV

ARTICLE V

Contributions

5.1 Company Contributions: Amount - As of each Participation Date:

(a) Standard Contribution Formula - The Company shall contribute to the Plan, on behalf of each eligible Participant, an amount equal to 11.63% of the Participant's Compensation, plus 7% of the Participant's Compensation in excess of $10,800, for the Plan Year ending on such Participation Date. Subject to Sections 3.3 and 3.4, eligible Participants entitled to a contribution as of the Participation Date, as aforesaid, shall consist of all Participants who completed a Year of Service with respect to the Plan Year, but excluding any Participant who was not in the employ of the Company on the Participation Date, unless he was on leave of absence or his employment terminated during the Plan Year by reason of retirement, disability or death.

(b) Minimum Top Heavy Contributions - For any Plan Year with respect to which the Plan is a Top Heavy Plan, the Company contribution made pursuant to Section 5.1(a) on behalf of any Minimum Contribution Participant for the Plan Year shall not be less than the Minimum Contribution Percentage multiplied by his Minimum Contribution Earnings for the Plan Year. For this purpose:

(i) "Minimum Contribution Participant" means any Participant, other than a Key Employee, who was employed on the Participation Date occurring on the last day of the Plan Year, regardless of whether or not he completed a Year of Service with respect to the Plan Year.

(ii) "Minimum Contribution Percentage" means 3%, or (unless this Plan enables a defined benefit plan, which is a member of a Required Aggregation Group including this Plan, to meet the requirements of Section 401(a)(4) or 410 of the Internal Revenue Code) such lesser percentage as is determined by dividing the Company contribution credited to the Accrued Benefit of the Key Employee who receives the highest such credit (as a percentage of his Minimum Contribution Earnings) for the Plan Year by his Minimum Contribution Earnings for the Plan Year, considering for this purpose all Key Employees participating in this Plan and in any other defined contribution plan in a Required Aggregation Group which includes this Plan.

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(iii) "Minimum Contribution Earnings" means the lesser of: (i) $200,000.00 (as adjusted by C/L Increases), or (ii) the Participant's Top Heavy Compensation.

This Section 5.1(b) shall not apply to any Participant for a Plan Year to the extent that such Participant is credited with contributions and/or benefits which meet the minimum requirements of Section 416(c), (e) and (f) of the Internal Revenue Code under one or more Retirement Plans of the Company or any other member of an Employer Group which includes the Company.

5.2 Company Contributions: Payment - All contributions of the Company for any Plan Year shall become due on the last day in such Plan Year, unless actually paid prior thereto, and shall be paid to the Trustees not later than the due date (including extensions) of the Company's federal income tax return for the taxable year within which the Plan Year ends.

5.3 Participant Contributions: General - No Participant shall be required to make any contributions to the Plan, but, subject to such limitations or procedures as may be imposed by the Company or the Trustees, each Participant shall have the right to make voluntary contributions to the Plan, not exceeding in the aggregate an amount which, when added to all previous voluntary contributions made by the Participant to all tax-qualified pension, profit sharing or stock bonus plans adopted by the Company, is equal to 10% of the aggregate cash remuneration received by the Participant, such contributions and remuneration to be measured cumulatively since the commencement of his participation in this Plan. All contributions by Participants for any Plan Year shall be due and payable to the Company, for transmittal to the Trustee in one lump sum on the last day of the Plan Year. Alternatively, the Company may institute a payroll deduction system (for those Participants desirous of making contributions) and transfer to the Trustee such sums as the Participant, by written authorization, may specify. All contributions by Participants shall be paid to or withheld by the Company, which shall transmit said contributions to the Trustees. All contributions by Participants shall be credited as of the date received by the Trustees. However, unless the limitations set forth in this Section 5.3 or in Section 6.8 have been exceeded for a Plan Year, contributions shall be deemed to have been made, and shall be credited, as of the last day of such Plan Year, if made no later than 30 days after the end of such Plan Year.

There shall be separate accounting for the portion of a Participant's Accrued Benefit attributable to his voluntary contributions, as distinguished from the portion of his Accrued Benefit attributable to Company contributions. In addition, the Company, in its discretion, may, but shall not be required to, direct the Trustees to invest such voluntary contributions separately or in

a different manner from the investment of the balance of the Trust, in which case the provisions of Section 6.2 shall apply separately to each part of the Trust. Notwithstanding any provisions to the contrary which may be set forth in Section 6.2 or 6.4, the Trustees shall have the discretion to allocate income, expenses, gains or losses of the Trust among the voluntary contribution accounts pursuant to such allocation rules as the Trustees deem to be reasonable and administratively practicable.

5.4 Participant Contributions: Withdrawal and Distribution - A Participant may withdraw from the portion of his Accrued Benefit attributable to his voluntary contributions any amount not in excess of the value of that portion of his account. Any withdrawal which is not in excess of the total contributions previously made by him less the aggregate of his previous withdrawals shall be deemed to be a withdrawal of amounts previously contributed, rather than earnings thereon. Distribution on account of withdrawals may be made in cash or property, or partly in each, provided that property shall be distributed at its fair market value as determined by the Trustees.

Upon the death of a Participant, his Beneficiary shall be entitled to receive payment thereof in one lump sum within 60 days after the end of the Plan Year in which the Participant dies. The cost of administering a Participant's contributions account shall be paid by the Company.

5.5 Reserved.

END OF ARTICLE V

ARTICLE VI

Allocation of Funds

6.1 Separate Accounts - A separate account shall be established and maintained for each Participant which shall separately show the portion of his Accrued Benefit attributable to Company contributions and the portion of his Accrued Benefit attributable to his voluntary contributions.

6.2 Allocation of Earnings or Losses of Trust - Except as otherwise provided in Section 6.10, as of each Participation Date and Special Valuation Date, the net earnings or losses of the Trust (including capital gains and losses, whether or not realized) since the preceding Participation Date or Special Valuation Date, whichever last occurred, shall be allocated among all Participants in accordance with the ratio which the account of each Participant, determined as provided herein, bears to the aggregate of all such accounts so determined. For purposes of this allocation, the account of each Participant will consist of the balance contained therein as of the preceding Participation Date or Special Valuation Date, whichever last occurred, adjusted by excluding therefrom the value of any Policies purchased for such Participant, and the value of any asset transferred to a Segregated Account, and adjusted pursuant to Section 6.4; provided, however, that the allocation of earnings and losses, as herein provided, need not be made if the method used to account for the respective interest of each Participant is such that, in an equitable manner, it includes a revaluation at current market values of each such interest as of each valuation date, including, but not limited to, the Unit Method of accounting.

Subject to Section 5.3, Participant contributions received by the Trustees subsequent to the last Participation Date or Special Valuation Date, whichever last occurred, shall not be included in determining the contributing Participant's account balance for purposes of the aforesaid allocation.

In the event that the Company contributes all or any part of its contribution for a Plan Year prior to the Participation Date which is the last day of such Plan Year, the Trustees shall establish, as part of the Trust, a separate suspense account to which such advance contribution will be credited when received by the Trustees until it may be allocated among the Accrued Benefits of the eligible Participants as of the Participation Date. The suspense

account may be held in cash or it may be invested by the Trustees as if it were a Segregated Account, in which case any suspense account earnings between the date or dates of contribution and the Participation Date shall be allocated, as of the Participation Date, in the same manner as the total Company contribution for the Plan Year.

6.3 Valuations - In determining the earnings or losses of the Trust, the Trust (excluding Policies and amounts transferred to Segregated Accounts) shall be valued at fair market value, as of each Participation Date and Special Valuation Date.

6.4 Accounting for Distributions - As of the preceding Participation Date or Special Valuation Date, whichever last occurred, all withdrawals of Participant contributions, all distributions made to a Participant or his Beneficiary, all transfers to Segregated Accounts, and all disbursements for Policy premiums, shall be charged to such Participant's Accrued Benefit.

6.5 Allocation Not Equivalent of Vesting - The fact that an allocation has been made, as hereinabove provided, will not operate to vest in a Participant any right, title or interest in and to any assets of the Trust. Vesting of such assets shall be accomplished at the times and on the contingencies hereinafter set forth.

6.6 Accountant's Certificate - The certificate of any accountant or Plan administrator selected by the Company, or of any bank or trust company serving as Trustee, as to the correctness of any amount, valuation or calculation under the Plan will be conclusive and binding upon all persons, subject to the provisions of Section 11.9.

6.7 Interim Valuations - In the event it is determined that the value of the Trust as of any date on which distributions are to be made differs materially from the value of the Trust on the Participation Date or prior Special Valuation Date upon which the distribution is to be based, the Company, in its discretion, shall have the right to designate any date in the interim as a Special Valuation Date for the purpose of revaluing the Trust so that the account from which the distribution is being made will, prior to the distribution, reflect its share of such material difference in value. Similarly, the Company may adopt a policy of providing for regular interim valuations (e.g. designation of the last day of each fiscal quarter as a Special Valuation Date) without regard to the materiality of changes in the value of the Trust.

6.8 Maximum Limitation on Annual Additions - Notwithstanding any Plan provisions to the contrary:

(a) To the extent necessary to prevent disqualification under Section 415 of the Internal Revenue Code, the maximum Annual Additions which may be credited to the Accrued Benefit of any Participant in any Plan Year (hereafter referred to as the "Maximum Addition") shall be equal to the lesser of $30,000.00 (such amount, as adjusted by C/L Increases, hereafter referred to as the "Dollar Limit") or 25% of his Remuneration for the Plan Year (hereafter referred to as the "Remuneration Limit"). For this purpose, Annual Additions shall be defined as the Company contributions and forfeitures allocable to the Participant's Accrued Benefit for the Plan Year, plus the lesser of: (i) one-half of his own contributions (other than rollovers and interplan transfers) for the Plan Year, or (ii) the amount of his own such contributions in excess of 6% of his Remuneration for the Plan Year.

(b) Except as provided in the remainder of this Section 6.8(b), contributions for and/or allocations to the Accrued Benefit of any Participant, otherwise provided for or permitted by the Plan, shall be reduced or eliminated to the extent necessary to implement the limitations described in Section 6.8(a). If, for any Plan Year, the Maximum Addition is exceeded by reason of a reasonable error in estimating a Participant's Remuneration, or other circumstances approved by the Internal Revenue Service, any Participant contributions which constitute part of the Annual Addition for the Plan Year, plus or minus any investment gains or losses or other income attributable thereto, shall be returned to the Participant, to the extent of such excess. If, after returning such contributions, an excess still exists, then, subject to the right of the Company to reallocate the excess to the remaining Participants in the Plan Year in which the excess was generated (but only to the extent that such reallocation does not cause the limits set forth in this Section 6.8 to be exceeded with respect to any such Participant), such excess shall be held in a suspense account and (subject to the restrictions set forth in this Section 6.8) applied as soon as possible to reduce Company contributions attributable to subsequent Plan Years, through allocations to be made prior to any Company contributions or Participant contributions which would constitute Annual Additions for such subsequent Plan Years. No investment gains or losses or other income shall be allocated to the suspense acccunt, and funds in the account may not be distributed to Participants or Beneficiaries, but any balance which may be in the account upon termination of the Plan will revert to the Company.

(c) Except as otherwise provided by Section 415 of the Internal Revenue Code, in any case in which an individual has at any time participated in a defined benefit plan and a defined contribution plan maintained by the Company, the sum of the defined benefit plan fraction and the defined contribution plan fraction for any year may not exceed 1.0. For this purpose:

(i) The defined benefit plan fraction for any year is a fraction, the numerator of which is the projected annual benefit (assuming continued employment until normal retirement date and constancy of all relevant factors) of the individual under the plan (determined as of the close of the year), and the denominator of which is the lesser of (A) or (B), where (A) is 1.25 times the dollar limit for such year under Section 415(b)(1)(A) of the Internal Revenue Code, and (B) is 1.4 times the remuneration limit for such year under Section 415(b)(1)(B) of the Internal Revenue Code. The defined contribution plan fraction for any year is a fraction, the numerator of which is the sum of the Annual Additions to the individual's Accrued Benefit as of the close of the year, and the denominator of which (unless the Company elects otherwise pursuant to Section 415(e)(6) of the Internal Revenue Code) is the sum of the lesser of (A) or (B), determined separately for such year and for each prior Year of Service with the Company, where (A) is 1.25 times the Dollar Limit for the applicable year, and (B) is 1.4 times the Remuneration Limit for such individual for the applicable year.

(ii) Except as otherwise provided in Section 416(h)(3) of the Internal Revenue Code, for any Plan Year with respect to which the Plan is a Top Heavy Plan, Section 6.8(c)(i) shall be applied by reducing the 1.25 factor to 1.0 in each of the two places it appears; provided, however, that this Section 6.8(c)(ii) may be disregarded for any Plan Year for which the Plan is not a Super Top Heavy Plan if, with respect to such Plan Year: (i) the requirements of Section 5.1(b) would be met if the 3% minimum contribution percentage set forth therein were one percentage point higher, and (ii) similar one percentage point additional minimum contribution or benefit accrual requirements are met by any other Retirement Plan in a Required Aggregation Group which includes this Plan, except to the extent that (iii) such requirements are eliminated by rules under Section 416(f) of the Internal Revenue Code which preclude duplication of required minimum contributions or benefit accruals.

(d) In addition to the foregoing, the Maximum Addition shall be reduced, to the extent necessary to prevent disqualification of the Plan under Section 415 of the Internal Revenue Code, with respect to any Participant who is also a participant in: (i) any other tax-qualified defined contribution plan maintained by the Company; (ii) any tax-qualified defined benefit plan maintained by the Company in which an individual medical benefit account (as described in Section 415(l) of the Internal Revenue Code) has been established for him; (iii) any welfare plan maintained by the Company in which a separate account (as described in Section

419A(d) of the Internal Revenue Code) has been established to provide post-retirement medical benefits for him; and/or (iv) any retirement or welfare plan, as aforesaid, maintained by a related employer (as described in Section 414(b), (c) or (m) of the Internal Revenue Code).

6.9 Social Security Increases - Notwithstanding any Plan provisions to the contrary, no benefit payable to any Participant (or his Beneficiary) hereunder shall be decreased because of any increase in the wage base or the benefit levels payable under Title II of the Social Security Act subsequent to the earlier of his termination of employment or commencement of benefits.

6.10 Directed Investments - Notwithstanding any other provision in the Plan, an actively employed Participant, or, to the extent permitted by the Company, a Participant whose employment has terminated for any reason, may elect, in lieu of having his Accrued Benefit invested in common with the Accrued Benefits of the other Participants, as otherwise herein set forth, to direct the Trustees to segregate and thereafter hold in a separate account (the "Directed Account") for the benefit of the Participant, the amount allocable to the Participant as of the date of segregation, in accordance with the following terms and conditions:

(a) The funds contained in the Directed Account shall be accounted for and invested separately from the remainder of the Trust, but shall be governed by the provisions of ARTICLE X, where relevant and not inconsistent with this Section 6.10. The Directed Account shall be credited or charged only with increases or decreases resulting from the administration and investment of the Directed Account as a separate entity, except that the Trustees may charge against the Directed Account, in addition to the fees and expenses directly attributable thereto (including the fees of any investment manager retained by the Participant as described herein), a pro rata portion of the Trust fees and expenses properly chargeable thereto. Thereafter, the electing Participant's Accrued Benefit shall be measured by, and his benefits (or his distribution in the event of termination of the Plan) shall be based upon, the value of the Directed Account as of the date or dates of distribution; the method of benefit payment shall be selected in accordance with Section 8.2.

(b) The power to direct the Trustees as to the investment and reinvestment of the Directed Account shall be vested in the electing Participant. In connection therewith, Section 10.3 shall be construed by substituting the Participant for the Company, and the Participant shall have the right to retain the services of an investment manager pursuant to Section 10.2(o). The Participant, or his investment manager, as the case may be, shall notify the Trustees in writing, in such form as shall be prescribed by the Trustees, of the investments, reinvestments, disposals and exchanges to be made

with respect to the Directed Account, and the Trustees shall forthwith implement such written instructions, except that the Trustees shall not be required to make any investment, or otherwise follow any direction of the Participant or his investment manager, that is contrary to the terms of the Plan or which cannot, under reasonable circumstances, be administered or followed, as the case may be, by the Trustees. Any such investment direction, or any investment direction which is, in the judgment of the Trustees, incomplete or unclear, will be ineffective and may be treated by the Trustees as if no such investment direction had been given. Within a reasonable time after the Trustees receive an investment direction which they deem ineffective, the Trustees shall so inform the Participant or investment manager in writing.

(c) Notwithstanding any other provision of the Plan, neither the Trustees nor the Company nor any other person who may be a fiduciary with respect to the Plan shall have any liability, fiduciary or otherwise, for any loss arising from or as a result of the Participant's election pursuant to this Section 6.10, or any investment decision or other exercise of control by the Participant, or his investment manager, or the Trustees' inability to carry out any aspect of the Participant's or investment manager's instructions or its treatment of any investment direction as ineffective, as aforesaid. The Trustees are specifically absolved of any statutory, judicial, legal or other responsibility with respect to the investments and reinvestments directed by the Participant or his investment manager under this reserved power, and the Trustees shall not be obliged to manage or review the investments and reinvestments so acquired; provided, however, that the Trustees shall remain fully responsible for the purely ministerial duties of safekeeping, collecting and crediting the income and other similar routine and non-discretionary duties.

(d) Except as otherwise permitted by the Trustees all directed investments shall be limited to securities listed on a recognized exchange or "over the counter," mutual fund shares, corporate and governmental obligations, money market securities, savings investment media and endowment or annuity contracts; provided, however, that such investments shall not threaten the qualification of the Plan under Section 401 of the Internal Revenue Code or constitute a "prohibited transaction" under Section 4975 of the Internal Revenue Code, and in no event may the Trustees invest in "collectibles" as defined in Section 408(m)(2) of the Internal Revenue Code.

(e) The election by the Participant to segregate his Accrued Benefit, or to return to common investment with the remainder of the Trust, shall become effective as of the next succeeding Participation Date which occurs at least 15 days following receipt by the Company of written notice of election from the Participant. If

the Participant or his investment manager fails to effectively direct the Trustees as to the investment of the Directed Account, the remainder shall be held by the Trustees, in cash or as then invested, until such time as the Trustees receive an effective investment direction, or shall be invested by the Trustees, in their discretion, as provided in ARTICLE X.

(f) The Company, at any time and in its sole discretion, may suspend the operation of this Section 6.10. With the consent of the Company, the provisions of this Section 6.10 may be elected with respect to a portion of the Participant's Accrued Benefit.

END OF ARTICLE VI

ARTICLE VII

Terminations of Service

7.1 Retirement - Every Participant who is not disentitled by reason of the prior termination of his employment with the Company shall be deemed to have reached retirement upon the first to occur of the following events:

(a) Normal Retirement or Deferred Retirement - The later of the Anniversary Date following the date upon which a Participant attains age 65 or the 10th anniversay of the date the Participant commenced participation in the Plan. If the Participant remains in the employ of the Company after such date, the effective date of his actual retirement; or

(b) Early Retirement - Any Anniversary Date following the Participant's attainment of age 55 with 10 Years of Service with the Company.

As of his Distribution Date, such retired Participant shall be entitled to the full value of his Accrued Benefit (which shall be deemed to be 100% vested upon the first to occur of the Participant's 65th birthday, whether or not he remains in the employ of the Company thereafter, or his actual retirement as aforesaid), payable according to the provisions of Article VIII.

7.2 Disability - If a Participant, at any time prior to his retirement or other termination of employment with the Company, shall become totally and permanently disabled, and if proof of such disability satisfactory to the Company shall be furnished (which proof shall include a written statement of a licensed physician appointed or approved by the Company), such Participant, as of his Distribution Date, shall be entitled to the full value of his Accrued Benefit (which shall be deemed to be 100% vested), payable according to the provisions of ARTICLE VIII. A Participant shall be considered to be totally and permanently disabled if he is eligible for and receives permanent disability benefits under Section 223 of the Social Security Act. A Participant who has applied for disability benefits under the Social Security Act is not eligible for disability benefits under the Plan pending the disposition of such application by the Social Security Administration.

7.3 Death - In the event of the death of a Participant prior to his retirement, disability or other termination of employment, then, as of his Distribution Date, the amounts payable under the Policies on his life plus the full value of his Accrued

Benefit (which shall be deemed to be 100% vested) shall become payable, according to the provisions of ARTICLE VIII, to his designated Beneficiary, upon submission of proof of death satisfactory to the Company.

Notwithstanding anything to the contrary, if a person who was a Participant dies, but at the time of his death did not meet the Plan's eligibility requirements, except by reason of early or normal retirement or disability, then such person's death benefits under the Plan shall be the value of hs Accrued benefit as of the last previous Participation Date multiplied by his vested percentage determined as of the day prior to his death plus the face amount of the Policies, if any, payable by reason of the death.

7.4 Other Terminations - In the event of a termination of employment by a Participant for any reason other than retirement, disability or death, then, as of his Distribution Date, he shall become entitled to the vested portion of his Accrued Benefit, determined according to the provisions of this Section and payable according to the provisions of ARTICLE VIII. Each Participant shall acquire a vested interest in his Accrued Benefit equal to the entire portion thereof attributable to his own contributions, plus a percentage of the remaining portion, determined on the basis of the number of his Years of Service (other than those disregarded pursuant to Section 3.2(b) or 4.1), according to the following schedule:

Years of Service	Percentage Vested
Less than 1	0%
1	10%
2	20%
3	30%
4	40%
5	50%
6	60%
7	70%
8	80%
9	90%
10 or more	100%

In addition, all Participants who were Participants on December 31, 1973, shall be 100% vested in their Accrued Benefit as of that date.

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For any Plan Year with respect to which the Plan is a Top Heavy Plan, the following vesting schedule shall be substituted for the vesting described in the preceding paragraph with respect to any Participant who completes at least one Hour of Service after the Plan becomes a Top Heavy Plan:

Years of Service	Percentage Vested
Less than 2	0%
2	20%
3	40%
4	60%
5	80%
6 or more	100%

Once effective, the vesting schedule set forth herein shall not revert to the vesting described in the preceding paragraph in the absence of a Plan amendment which meets the requirements of the last paragraph of this Section 7.4.

In the event of a termination of employment described in this Section 7.4 at a time when a Participant's Accrued Benefit shall not yet be 100% vested, then, as of the forfeiture date set forth in Section 8.5(c), that portion which shall not have vested shall be forfeited by him. The aggregate of such forfeitures occurring in any Plan Year shall be used to reduce the Company's contribution to the Plan attributable to the Plan Year in which the forfeitures occurred; any excess of said forfeitures over the said contribution shall be held in a suspense account and applied as soon as possible to reduce Company contributions attributable to subsequent Plan Years.

No Plan amendment changing the Plan's vesting schedule may reduce the vested percentage of a Participant's Accrued Benefit determined as of the later of the date the amendment is adopted or it becomes effective. In the event of the adoption of any Plan amendment which changes the vesting schedule, each Participant shall have the right to elect (irrevocably, except as the Company shall otherwise permit) to have the vested percentage of his Accrued Benefit determined under the vesting schedule in effect prior to the amendment, which right shall be exercised, if at all, by the filing of written notice with the Company during the period beginning with the date of adoption of the amendment and ending 60 days after the

latest of the said adoption date, the effective date of the amendment, or the date the Participant receives written notice of the amendment; provided, however, that the right to elect applies only to individuals: (i) who are Participants when the election is made, (ii) who have completed five Years of Service on or before the later of the adoption or the effective date of the amendment, and (iii) other than any individual whose vested percentage under the amended vesting schedule cannot at any time be less than his vested percentage under the prior vesting schedule.

END OF ARTICLE VII

ARTICLE VIII

Distribution of Benefits

8.1 Amount - Upon reaching his Distribution Date, a Participant (or his Beneficiary) shall become entitled to receive his Accrued Benefit, to the extent then vested; provided, however, that any benefits shall be distributed only as provided by Section 8.2. Determination of the amount to be distributed shall be based upon the evaluation of the Trust made as of the Participation Date or Special Valuation Date, whichever last occurred, coincident with or otherwise immediately preceding the Distribution Date. However, if a Participant who has reached his Distribution Date during a Plan Year would be entitled, pursuant to Section 5.1, to a share of any contribution made by the Company with respect to the Plan Year, determination of the amount to be distributed shall be based upon the evaluation of the Trust made as of the Participation Date coincident with or otherwise next following the Distribution Date.

8.2 Method of Payment - Except as otherwise set forth in Sections 5.4, 8.4 and 8.6, the Company shall determine, in its discretion, whether the amount to which a Participant who has reached his Distribution Date (or his Beneficiary) is entitled shall be distributed in cash or in property valued at its fair market value, or partly in each, and shall determine whether the distribution shall be made in a lump sum (subject to the consent of the Participant if the distribution exceeds $3,500.00), in a fixed number of installments, or by the purchase of a paid-up annuity contract for the Participant and/or his Beneficiary, or whether a combination of such methods of distribution shall be used, and the Company shall give to the Trustees such directions and information as may be necessary for the Trustees to carry out the decision of the Company. The Company shall have the right at any time to change or modify its decision or decisions in respect to the method or methods of distribution.

Distribution of the Accrued Benefit of a Participant shall be subject to the following:

(a) Installment Payments - If all or any part of the distribution by the Trustees is to be in installments, the Company shall determine the period over which such installments are to be paid, and whether payments shall be made monthly, quarterly, semi-annually, annually or otherwise. In the discretion of the Company, the total to be so distributed shall either: (i) continue to be invested in those assets currently retained in the Trust, in which case any income, gain or loss attributable thereto (but not Company

contributions or forfeitures) shall be reflected in the installment distributions, in such equitable manner as the Trustees shall determine, or (ii) transferred to a Segregated Account.

(b) Annuity Options - If all or any part of the amount to be distributed shall be used to purchase a paid-up annuity contract, the Company shall select such form of contract (including a variable annuity) to be so purchased and such payment option thereunder as the Company shall deem best for the Participant, and the Company shall direct the Trustees to pay the premium of such contract to the issuing company. The Company shall direct that all right, title and interest in such contract shall remain in the Trustees under the terms of the Plan and the Participant shall have no right, title or interest therein except to receive the payments therefrom as provided therein, and to change the Beneficiary from time to time; alternatively, the Company may direct that the contract shall be purchased in the name of the Participant and distributed to him free and clear of the Trust, in which case the contract shall be issued so as to be nontransferable, and it shall not contain a death benefit in excess of the greater of the reserve or the total premiums paid for annuity benefits.

(c) Limitations - Distribution in the form of installment payments or the purchase of an annuity Policy shall be made only in accordance with regulations prescribed by the Internal Revenue Service and shall comply with both of Limitations I and II, as follows:

(i) Limitation I - Distribution shall begin not later than the April 1 immediately following the calendar year (hereinafter referred to as the "Commencement Year") in which the Participant reaches age 70-1/2 or (except as otherwise provided in Section 8.7) in which he subsequently retires, and shall be made over: (A) the life of the Participant; (B) the lives of the Participant and his designated Beneficiary; (C) a period certain not extending beyond the life expectancy of the Participant; (D) a period certain not extending beyond the joint life and last survivor expectancy of the Participant and his designated Beneficiary; or (E) any combination thereof. For purposes of Limitation I:

(A) Life expectancies shall be determined, using the appropriate expected return multiples in Treasury Regulation Section 1.72-9 (or any regulation or other Internal Revenue Service-approved source substituted therefor), based upon the Participant's age (in whole years) as of the date on which the Participant attains age 70-1/2 or, if later, the first to occur of the Participant's actual retirement or his benefit commencement by reason of Section 8.7.

(B) The amount to be distributed during each calendar year (hereinafter referred to as a "Payment Year") beginning with the Commencement Year, shall be at least equal to the lesser of:

(1) the Participant's total undistributed Accrued Benefit;

(2) an amount equal to the quotient obtained by dividing the Participant's Accrued Benefit as of the beginning of the Payment Year by the applicable life expectancy (determined pursuant to (A) above) reduced by one for each Payment Year which has begun since the Commencement Year, except that, in the discretion of the Company, the life expectancy of the Participant, or the joint life and last survivor expectancy of the Participant and his spouse, may be redetermined pursuant to (A) above at any time (but not more frequently than annually); or

(3) an amount which, when added to the payments made in all prior Payment Years, equals the cumulative amount required to be paid pursuant to Limitation I for the current and all prior Payment Years.

(C) A required distribution shall be deemed to have been made during a Payment Year if actually made by the following April 1.

(D) Benefits may be paid prior to the Commencement Year without regard to, and any such payments shall reduce the aggregate amount subject to, Limitation I.

(E) Nothing contained in Limitation I shall prevent the purchase of, or distribution under, an annuity Policy which provides for substantially non-increasing payments beginning in the Commencement Year and payable over a period permitted by Limitation I (for which purpose life expectancies may be determined by reference to the insurance company's mortality tables rather than pursuant to (A) above).

(ii) Limitation II - The mode of payment shall either be: (A) one in which the present value of the payments to be made to the Participant is more than 50% of the present value of the payments to be made to the Participant and his Beneficiaries (based on actual lives or on life expectancies as of the date of commencement of benefits); or (B) one in which annual, or more frequent, installments are paid to the Participant (or, in the event of death, his Beneficiary, who need not be his spouse) over a period certain not exceeding the joint life and last survivor expectancy of the Participant and his spouse (such installments to be substantially

equal in amount, subject to fluctuations in value of the Accrued Benefit during the payment period, except that installments payable after the termination of the Participant's life expectancy or life may be smaller than those payable prior thereto); or (C) one in which annual, or more frequent, annuity payments are paid to the Participant for life and thereafter annuity payments not more than 100% of those made to the Participant continue to his Beneficiary (who need not be his spouse) for as long as the spouse shall survive the Participant.

Notwithstanding the foregoing, benefits payable to or on behalf of any Participant who, on or before December 31, 1983 (or such later date as may be permitted by law), made a valid designation of method of distribution (as described in Section 242(b)(2) of the Tax Equity and Fiscal Responsibility Act of 1982) which complies with Limitation II, shall (if such designation has not been revoked by the Participant) be paid in accordance with such designation without regard to whether or not such designation complies with Limitation I; provided, however, that the Company may disregard, accelerate the payments under, or otherwise modify, such designation to the extent that it believes that distribution in accordance with such designation will adversely affect the Plan's tax-qualified status.

8.3 Benefit Commencement Deadline - Except as otherwise provided in Section 8.7, the payment of benefits under the Plan to each Participant will commence within a reasonable period of time after the later of his Distribution Date or the date set forth in Section 8.1 as of which his distribution is to be evaluated, or such other date as may be determined pursuant to Section 8.5, but in no event (unless the Participant otherwise elects pursuant to any elective provision which may be then present in the Plan), shall benefits begin later than the 60th day after the close of the Plan Year in which occurs the latest of: (i) the date on which the Participant attains age 65 (or any earlier normal retirement age which may be then specified in the Plan); (ii) the tenth anniversary of the year in which the Participant commenced Plan participation; or (iii) the termination of the Participant's service with the Company.

8.4 Special Provisions - Death Benefits - Subject to Section 8.6(c), the following provisions govern the payment of death benefits following the death of a Participant:

(a) Upon the death of a Participant while in the active employ of the Company, or after termination of employment but before commencement of his benefits, or before he has received all of the amount to which he is entitled pursuant to the option under which his benefits are being paid, the entire (or remaining) value of his Accrued Benefit (including insurance proceeds) shall be paid to the person or persons designated in accordance with ARTICLE IX.

(b) All death benefits payable pursuant to this Section 8.4 shall be paid in a single lump sum: (i) unless the Participant shall have elected another method of distribution, or (ii) if the Participant has neither elected another method of settlement nor affirmatively elected a lump sum, unless his Beneficiary or Beneficiaries shall have elected another method of payment; provided, however, that payment in other than a lump sum shall be subject to the consent of, and to acceleration at any time at the direction of, the Company.

(c) All death benefits payable pursuant to this Section 8.4 shall be distributed in full within five years after the death of the Participant, except as follows:

(i) Benefits payable to or for the benefit of a Beneficiary designated by the Participant, and which begin not later than one year after the Participant's death (except as otherwise permitted under Internal Revenue Service regulations), may be distributed over the life of the Beneficiary or a period certain not extending beyond the life expectancy of the Beneficiary, under a method of distribution which meets the requirements of Limitation I of Section 8.2 (except that no redeterminations of the Beneficiary's life expectancy may be made after the initial determination).

(ii) If the Participant has designated his surviving spouse as a Beneficiary, benefits payable to or for the benefit of the spouse, and which begin not later than the later of one year after the Participant's death (except as otherwise permitted under Internal Revenue Service regulations) or the date on which the Participant would have reached age 70-1/2, may be distributed over the life of the spouse or a period certain not extending beyond the life expectancy of the spouse, under a method of distribution which meets the requirements of Limitation I of Section 8.2. For this purpose, benefits paid to or for the benefit of a child of the Participant, with provision that they become payable to the Participant's surviving spouse when the child reaches majority or in any other event described in Internal Revenue Service regulations, shall be treated as if they had been paid to the spouse.

(iii) If benefits are payable in accordance with Section 8.4(c)(ii), and the surviving spouse dies prior to benefit commencement, the aforesaid five year limit shall be measured from the death of the spouse.

(iv) If distribution of benefits to the Participant had commenced pursuant to Section 8.2 prior to his death, the death benefits payable pursuant to this Section 8.4 may be distributed without regard to the aforesaid five year limit, but must be distributed at least as rapidly as they would have been under the pre-death method of distribution.

(v) Nothing contained in this Section 8.4(c) shall prevent the purchase of, or distribution under, an annuity Policy which meets the requirements of Limitation I of Section 8.2.

Notwithstanding the foregoing, death benefits payable on behalf of any Participant who, on or before December 31, 1983 (or such later date as may be permitted by law), made a valid designation of method of distribution (as described in Section 242(b)(2) of the Tax Equity and Fiscal Responsibility Act of 1982), may be paid in accordance with such designation without regard to whether or not such designation complies with this Section 8.4(c); provided, however, that the Company may disregard, accelerate payments under, or otherwise modify, such designation to the extent that it believes that distribution in accordance with such designation will adversely affect the Plan's tax-qualified status.

(d) If a deceased Participant was receiving benefits under an annuity option, and such annuity contains provisions for survivorship payments, such survivorship payments shall be made in accordance with the annuity contract. If a deceased Participant was to have received his benefits under an annuity option, and his death occurs prior to the completed purchase of an annuity by the Trustees, the entire amount which would have been utilized for such purchase shall be paid to the person or persons designated in accordance with Section 8.4(a).

8.5 Special Provisions - Termination Benefits -

(a) Deferral Beyond Distribution Date - Payment of benefits to a Participant who has reached his Distribution Date by reason of a termination of employment other than retirement, disability or death, pursuant to Section 7.4, shall be deferred until the Participant's 65th birthday, or, if the Participant has met the Years of Service requirement of Section 7.1(b) as of his Distribution Date, his attainment of the age requirement set forth therein (at which time said benefits will be payable as provided in this ARTICLE

VIII), unless the Company, in its discretion, elects to commence distribution of such Participant's benefits at an earlier date; prior to the commencement of benefits, the deferred benefits shall, in the discretion of the Company, remain invested in the commingled Trust assets, or be used to purchase an annuity Policy (limited as provided in Section 8.2(b)) providing for deferred benefits, or be transferred to a Segregated Account.

(b) Interim Before Distribution Date - If the vested portion of the Accrued Benefit of a Participant who terminates employment for reasons other than retirement, disability or death, as described in Section 7.4, is less than 100%, so that his Distribution Date does not coincide with the date on which he ceases to be an Employee, the Company shall have the right to determine whether the Accrued Benefit shall remain invested in the commingled Trust assets during the interim period, or be transferred (in whole or in part) to a Segregated Account. Additionally, the Company, subject to the consent of the Participant if the distribution is $3,500.00 or more, and subject to Sections 8.6(b) and (f) if applicable, may in its discretion direct the Trustees to make a lump sum distribution to the Participant of the vested portion of his Accrued Benefit at any time before the Distribution Date, based upon the most recent valuation thereof.

(c) Forfeiture and Special Vesting Formula - If a Participant receives a lump sum distribution as described in Section 8.5(b) not later than the end of the second Plan Year following the Plan Year in which his termination of employment occurred, forfeiture of the non-vested portion of his Accrued Benefit shall occur (subject to restoration pursuant to Section 3.2(e)) as of the date on which the distribution is made. If, upon termination of employment, a Participant has no vested interest in his Accrued Benefit, forfeiture of his entire Accrued Benefit shall occur (subject to restoration pursuant to Section 3.2(e)) as of the date of termination of employment. In any other case involving a termination described in Section 8.5(b): (i) forfeiture of the non-vested portion of the terminated Participant's Accrued Benefit shall occur on the Participant's Distribution Date, (ii) a separate account shall be established for the Participant's Accrued Benefit as of the time of the distribution, and (iii) at any relevant time the vested portion of the separate account shall be equal to an amount determined by the formula: $P(AB + (R \times D)) - (R \times D)$, where P is the vested percentage at the relevant time, AB is the separate account balance at the relevant time, D is the amount of the distribution, R is the ratio of the separate account balance at the relevant time to the separate account balance after distribution, and the relevant time is the Participant's Distribution Date. This Section 8.5(c) shall be construed without regard to any portion of the Participant's Accrued Benefit attributable to his own contributions.

8.6 Special Provisions - Married Participants - Notwithstanding any other provisions of this ARTICLE VIII to the contrary, but subject to the provisions of any relevant qualified domestic relations order (as defined in Section 414(p) of the Internal Revenue Code):

(a) Lifetime Benefits - If all of the following conditions are met, the benefits to which a Participant is entitled shall be distributed through the purchase, pursuant to Section 8.2(b), of an annuity contract providing for monthly payments to the Participant for life and for the continuance, after the Participant's death, of monthly payments to the Participant's surviving spouse for the remainder of the spouse's life in an amount equal to 50% of the monthly amount payable during their joint lives:

(i) The Participant is married on his benefit commencement date;

(ii) The distribution is not being made by reason of the Participant's death;

(iii) A waiver of the joint and survivor benefit form pursuant to Section 8.6(b) is not in effect on the benefit commencement date; and

(iv) The Company does not implement a cash-out pursuant to Section 8.6(f).

(b) Waiver of Lifetime Benefits - Section 8.6(a) shall have no application if the Participant elects in writing not to receive his benefits in the joint and survivor annuity form described therein. To be effective, such election: (i) must be made during the 90 day period ending on the Participant's benefit commencement date, and (ii) must be consented to by the Participant's spouse in a written consent which is executed by the spouse in the presence of a notary public or a Plan representative and which acknowledges the effect of the election (unless it is established to the satisfaction of a Plan representative that the consent cannot be obtained because there is no spouse, or the spouse cannot be located, or by reason of other circumstances described in regulations issued by the Internal Revenue Service). The election may be revoked (and re-elected) at any time during the election period described above, provided that each such election (but not any revocation) is consented to by the Participant's spouse as aforesaid. The consent of a spouse, or a determination that the consent of a spouse cannot be obtained, is not effective as to any subsequent spouse of the Participant.

(c) Death Benefits - If all of the following conditions are met, the Accrued Benefit of a deceased Participant shall be distributed (regardless of any contrary Beneficiary designation pursuant to Section 9.1) through the purchase, pursuant to Section 8.2(b), of an annuity contract providing for monthly payments to his spouse for life:

(i) The Participant has been continuously married throughout the one year period ending on the date of his death;

(ii) On the date of, but without regard to, his death, the Participant had a vested interest in the portion of his Accrued Benefit attributable to Company contributions;

(iii) The Participant's death occurs before his benefit commencement date;

(iv) A waiver of the survivor annuity benefit form pursuant to Section 8.6(d) is not in effect at the date of death; and

(v) The Company does not implement a cash-out pursuant to Section 8.6(f).

Any annuity contract purchased hereunder shall provide for immediate commencement of benefits unless the spouse, by written notice to the Plan prior to the purchase of the contract, elects a deferred benefit commencement date (within the limits set forth in Section 8.4(c)).

(d) Waiver of Death Benefits - Section 8.6(c) shall have no application if the Participant elects in writing not to have his death benefits distributed to his spouse in the survivor annuity form described therein. To be effective, such election: (i) must be made by the Participant during his lifetime, but not earlier than the first to occur of his separation from service or the first day of the Plan Year in which he reaches his 35th birthday, and (ii) must be consented to by the Participant's spouse in a written consent which is executed by the spouse in the presence of a notary public or a Plan representative and which acknowledges the effect of the election (unless it is established to the satisfaction of a Plan representative that the consent cannot be obtained because there is no spouse, or the spouse cannot be located, or by reason of other circumstances described in regulations issued by the Internal Revenue Service). The election may be revoked (and re-elected) at any time during the election period described above, provided that: (i) each such election (but not any revocation) is consented to by the Participant's spouse as aforesaid, and (ii) an election made by a Participant following a separation from service but prior to the Plan

Year in which he reaches his 35th birthday shall not be effective with respect to any portion of his Accrued Benefit attributable to service following a return to the Company's employ. The consent of a spouse, or a determination that the consent of a spouse cannot be obtained, is not effective as to any subsequent spouse of the Participant.

(e) Notice Requirements - Subject to, and in accordance with, regulations issued by the Internal Revenue Service, explanatory notices shall be provided to each applicable Participant as follows:

(i) Lifetime Benefits - Within a reasonable period of time prior to the Participant's benefit commencement date, the Company will provide the Participant with a written explanation of the joint and survivor annuity and the Participant's and spouse's waiver, revocation and consent rights with respect thereto.

(ii) Death Benefits - During the period beginning on the first day of the Plan Year in which the Participant reaches his 32nd birthday and ending on the last day of the Plan Year preceding the Plan Year in which he reaches his 35th birthday (or during such other period as may be provided in regulations issued by the Internal Revenue Service with respect to any individual who is not a Participant during part or all of such period), the Company will provide the Participant with a written explanation of the survivor annuity and the Participant's and spouse's waiver, revocation and consent rights with respect thereto.

(f) Cash-Out - Notwithstanding the provisions of Sections 8.6(a) and (c), the Company shall have the right, in its discretion, to cause the benefit described therein to be distributed (in lieu of the purchase of an annuity contract) in an immediate lump sum payment to the Participant, if living, otherwise to his surviving spouse; provided, however, that, unless the distribution is less than $3,500.00, it may not be made without the written consent of the Participant, if living, and the Participant's spouse (including compliance with Section 8.6(b) if Section 8.6(a) would otherwise be applicable).

(g) Benefit Commencement Date - For purposes of this Section 8.6, the first day of the first period for which a periodic benefit payment is due shall be deemed to be a benefit commencement date.

8.7 Special Provisions - 5% Owner Distributions at 70-1/2 - Notwithstanding any other Plan provisions to the contrary, if an actively-employed Participant is a 5% Owner at any time during the Plan Year ending in the calendar year in which he reaches age 70-1/2, the payment of his Accrued Benefit shall be made or

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commenced, in accordance with this ARTICLE VIII (which shall be construed as if the Participant had reached his Distribution Date by reason of retirement), even though the Participant has not actually retired. Distribution pursuant hereto shall be made or commenced not later than the April 1 immediately following said calendar year, and shall be based upon the evaluation of the Trust made as of the Participation Date or Special Valuation Date, whichever last occurred, immediately preceding the date of payment or commencement. However, notwithstanding the payment or commencement of benefits pursuant to this Section 8.7, all other aspects of the Participant's Plan participation, including the crediting of additional contributions to his Accrued Benefit, shall continue in accordance with the remaining provisions of the Plan. A 5% Owner is an individual who owns more than 5% of the Company (as determined under Section 416(i)(1) of the Internal Revenue Code), for which purpose ownership shall include constructive ownership within the meaning of Section 318 of the Internal Revenue Code (applied by substituting 5% for 50% in Section 318(a)(2)(C)) and similar principles in any regulations issued by the Internal Revenue Service in connection with non-corporate employers.

This Section 8.7 shall not apply to any Participant who, on or before December 31, 1983 (or such later date as may be permitted by law), made a valid designation of method of distribution (as described in Section 242(b)(2) of the Tax Equity and Fiscal Responsibility Act of 1982) negating its effect; provided, however, that the Company may disregard any such designation to the extent that it believes that failure to make payment pursuant to this Section 8.7 will adversely affect the Plan's tax-qualified status.

END OF ARTICLE VIII

ARTICLE IX

Beneficiaries; Participant Data

9.1 Designation of Beneficiaries - Each Participant from time to time may designate any person or persons (who may be named contingently or successively) to receive such benefits as may be payable under the Plan upon or after his death, and such designation may be changed from time to time by the Participant by filing a new designation. Each designation will revoke all prior designations by the same Participant, shall be in form prescribed by the Company, and will be effective only when filed in writing with the Company during his lifetime. Further, each Participant may similarly name the person or persons who are to receive the death benefits payable under any Policies held by the Trustees for the benefit of the Participant; the Company shall direct the Trustees to effectuate any such naming or changing of Policy beneficiary designations. The provisions of this Section 9.1 shall be subject to the applicable provisions of any such Policy and the applicable rules of the issuing company.

In the absence of a valid Beneficiary designation (except in conjunction with the election of a form of benefit payment which does not require the designation of a specific Beneficiary), or if, at the time any benefit payment is due to a Beneficiary, there is no living Beneficiary validly named by the Participant, the Company shall direct the Trustees to distribute any such benefit payment to the Participant's spouse, if then living, otherwise to the Participant's then living descendants, if any, per stirpes, otherwise to the Participant's then living parent or parents, equally, otherwise to the Participant's estate. In determining the existence or identity of anyone entitled to a benefit payment, the Company and the Trustees may rely conclusively upon information supplied by the Participant's Personal Representative. In the event of a lack of adequate information having been supplied to the Company, or in the event that any question arises as to the existence or identity of anyone entitled to receive a benefit payment as aforesaid, or in the event that a dispute arises with respect to any such payment, then, notwithstanding the foregoing, the Company, in its sole discretion, may direct the Trustees to distribute such payment to the Participant's estate without liability for any tax or other consequences which might flow therefrom.

9.2 Information to be Furnished by Participants and Beneficiaries - Any communication, statement or notice addressed to a Participant or Beneficiary at his last post office address filed with the Company, or if no such address was filed with the Company then at his last post office address as shown on the Company's records, shall be binding on the Participant or Beneficiary for all

purposes of the Plan. Except for the Company's sending of a registered letter to the last known address, neither the Trustees nor the Company shall be obliged to search for any Participant or Beneficiary. If the Company notifies any Participant or Beneficiary of a deceased Participant that he is entitled to an amount under the Plan and the Participant or Beneficiary fails to claim such amount or make his location known to the Company within three years thereafter, then, except as otherwise required by law, if the location of one or more of the next of kin of the Participant, including his surviving spouse, is known to the Company, it may direct distribution of such amount to any one or more or all of such next of kin, and in such proportions as the Company determines. If the location of none of the foregoing persons can be determined, the Company shall have the right to direct that the amount payable shall be deemed to be a forfeiture and treated in accordance with Section 7.4, except that the dollar amount of the forfeiture, unadjusted for gains or losses in the interim, shall be reinstated if a claim for the benefit is made by the Participant or Beneficiary to whom it was payable. If a benefit payable to an unlocated Participant or Beneficiary is subject to escheat pursuant to applicable state law, neither the Trustees nor the Company shall be liable to any person for any payment made in accordance with such law.

END OF ARTICLE IX

ARTICLE X

The Trust Fund

10.1 Establishment and Acceptance of Trust - The Trust will consist of all funds held by the Trustees under the Plan, including contributions made pursuant to the provisions hereof and the investments, reinvestments and proceeds thereof. The Trust shall be held, managed, invested and administered in trust pursuant to the terms of the Plan. The Trustees hereby accept the Trust created hereunder and agree to perform the duties under the Plan on their part to be performed. Except as otherwise expressly provided for in the Plan, the Trustees shall have exclusive authority and discretion to manage and control the Trust assets. The duties, powers and responsibilities reserved to the Trustees may be allocated among the Trustees (if there be more than one) so long as such allocation is pursuant to action of the Company, or by written agreement executed by the Trustees and approved by the Company, in which case, except as may be required by the Retirement Security Act, no Trustee shall have any liability, with respect to any duties, powers or responsibilities not allocated to him, for the acts or omissions of any other Trustee.

10.2 Powers of Trustees - With respect to the Trust, the Trustees shall have the following powers, in addition to those vested in them elsewhere in the Plan or by law:

(a) To retain in cash so much of the Trust as they deem advisable and to deposit any cash so retained in any bank or similar financial institution (including any such institution which is a Trustee hereunder) without liability for interest.

(b) To invest the balance of the Trust in any shares of stock, bonds, securities, mortgages, notes, partnership or joint venture interests, choses in action, options, deposits bearing a reasonable rate of interest in any federally or state supervised bank or similar financial institution (including any such institution which is a Trustee hereunder), leaseholds, real estate, other evidences of indebtedness or ownership, and other property of any kind, real, personal or mixed, wherever located, as in the opinion of the Trustees offer possibilities for investment return through income and/or capital appreciation; in making such investments, the Trustees shall not be restricted to securities or other property of the character authorized or required by applicable law, custom or rules of court from time to time for trust investments.

(c) To manage, sell, contract to sell, deal in options with respect to, create holding companies to own, convey, dispose of, mortgage, exchange, transfer, abandon, improve, develop, preserve, repair, insure, lease for any term even though commencing in the future or extending beyond the term of the Trust, make contracts for, bid for, acquire, and otherwise deal with (alone or with others, and utilizing other Trust assets where appropriate), all property, real or personal, in such manner, for such considerations, and on such terms and conditions as the Trustees shall decide.

(d) To invest the assets of the Trust in any collective or commingled trust fund maintained by a bank or trust company, including any bank or trust company which may act as a Trustee hereunder. In this connection, the commingling of the assets of the Trust with assets of other eligible, participating trusts through such a medium is hereby specifically authorized. Any assets of the Trust which may be so added to such collective trusts shall be subject to all of the provisions of the applicable declaration of trust, as amended from time to time, which declaration, if required by its terms or by applicable regulations under the Internal Revenue Code or the Retirement Security Act, is hereby adopted as part of the Plan, to the extent of the participation in such collective or commingled trust fund by the Trust.

(e) To make any payment or distribution directed by the Company or otherwise required or advisable to carry out the provisions of the Plan.

(f) With the approval of the Company, to borrow money from others upon such terms and conditions as they may deem proper, and, for the sum so borrowed, to issue promissory notes and secure the repayment thereof by the pledging of any Trust assets.

(g) To compromise, contest, arbitrate, enforce or abandon claims and demands.

(h) To have with respect to the Trust all of the rights of an individual owner, including the power to vote or give proxies, to join in, dissent from or oppose any voting trusts, mergers, consolidations, foreclosures, reorganizations, or liquidations, and to exercise or sell stock subscription rights or, if the Plan receives adequate consideration, conversion rights.

(i) To hold any securities or other property in the names of the Trustees or their nominees, or in such other form as they deem best, with or without disclosing the trust relationship, and to cause or permit any Trust property to be held for safekeeping or custodial purposes by any authorized person or entity; provided, however, that, except as may be authorized pursuant to the Retirement

Security Act, the indicia of ownership of any Trust property may not be maintained outside the jurisdiction of the district courts of the United States.

(j) To retain any funds or property subject to any dispute without liability for the payment of interest, and to decline to make payment or delivery thereof until final adjudication is made by a court of competent jurisdiction, or the Trustees are indemnified against loss to their satisfaction.

(k) After advance notice to the Company, to pay, and to deduct from and charge against the Trust, any taxes which may be imposed upon the Trust, the income, property or transfer thereof, or upon or with respect to the interest of any person therein, which the Trustees are required to pay; to contest, in their discretion, the validity or amount of any tax, assessment, claim or demand which may be levied or made against or in respect of the Trust, the income, property or transfer thereof, or in any matter or thing connected therewith, provided they are indemnified to their satisfaction.

(l) After advance notice to the Company, to begin, maintain or defend any litigation necessary in connection with the administration of the Trust, except that the Trustees shall not be obliged or required to do so unless indemnified to their satisfaction.

(m) To make, execute and deliver, as Trustees, any and all deeds, leases, mortgages, conveyances, contracts, waivers, releases or other instruments in writing necessary or proper for the accomplishment of any of the foregoing powers; in the event that there be more than one Trustee under the Plan, any single Trustee shall have the power to execute, on behalf of all of the Trustees, any document or return to be filed with any governmental agency or insurance company; all of the Trustees at any time acting hereunder may, by a written instrument, designate each or any of such Trustees, severally or any two or more of them, jointly, and/or any one or more other persons, severally or jointly, to make, execute, acknowledge or deliver on behalf of all of the Trustees any instrument to be executed by the Trustees, and all of the Trustees at any time acting hereunder may, by a written instrument, revoke and/or change any such designation.

(n) To appoint any persons or firms (including but not limited to, accountants, investment advisors, counsel, actuaries, physicians, appraisers, consultants, professional plan administrators and other specialists) and to pay their reasonable compensation and expenses, or otherwise act to secure specialized advice or assistance, as they deem necessary or desirable in connection with the management of the Trust; to the extent not prohibited by the Retirement Security Act, the Trustees shall be entitled to rely

conclusively upon, and shall be fully protected in any action taken or omission made by them in good faith reliance upon, the advice or opinion of such persons or firms, provided such persons or firms were prudently chosen by the Trustees, taking into account the interests of the Participants and Beneficiaries and with due regard to the ability of the persons or firms to perform their assigned functions.

(o) With the approval of the Company, to retain the services of one or more persons or firms for the management of (including the power to acquire and dispose of) all or any part of the Trust assets, provided that each of such persons or firms is registered as an investment advisor under the Investment Advisors Act of 1940, is a bank (as defined in that Act), or is an insurance company qualified to manage, acquire or dispose of Trust assets under the laws of more than one state, and provided that each of such persons or firms has acknowledged in writing that he is a fiduciary with respect to the Plan; in such event, the investment manager or managers shall have the same investment powers and duties as are set forth herein with respect to the Trustees (except as limited by the terms of the applicable asset management arrangement or agreement), and the Trustees shall follow the directions of such investment manager or managers with respect to the acquisition and disposition of Trust assets, but shall not be liable for the acts or omissions of such investment manager or managers, nor shall they be under any obligation to review, invest or otherwise manage any Trust assets which are subject to the management of such investment manager or managers.

(p) With the approval of the Company, to apply for, and to invest the monies of the Trust in, insurance company investment contracts, and, in connection therewith, to hold such contracts in trust pursuant hereto and exercise all of the rights and privileges of ownership of such contracts as they deem advisable.

(q) Upon the order of the Company, to invest part of the Accrued Benefit of a Participant in life insurance contracts issued by a legal reserve life insurance company; provided that, at any time, less than the following percentages of the contributions and forfeitures which have been allocated to the Participant's Accrued Benefit shall in the aggregate have been used to purchase and pay premiums on such life insurance contracts: ordinary life contracts - 50%; term, universal and all other life contracts - 25%; both ordinary and other life contracts with respect to a Participant - 25% (taking into account one-half of the ordinary life premiums plus all of the other premiums). The Trustees shall be the owner of each Policy purchased hereunder, and any and all rights provided under the Policy or permitted by the insurance company shall be reserved to the Trustees. Each insurable Participant shall have the right to have a portion of his Accrued Benefit invested in life insurance contracts, within the limits herein stated or imposed by

the Company on all Participants, and any exercise of Policy loan provisions by the Trustees shall be proportionate with respect to each insured Participant. The Trustees shall normally pay premiums on any Policy subject hereto as each premium falls due. Dividends may be used in reduction of any such premium, may be applied in any other manner permitted by the insurance company or may be taken in cash by the Trustees, as they may determine from time to time. Upon the death of a Participant on whose life the Trustees hold a Policy hereunder and if the proceeds shall be payable to the Trustees, the Trustees may collect the proceeds, in which case such proceeds shall be turned over to the Participant's Beneficiary, or the Trustees may assign to such Beneficiary the Policy and all rights thereunder, or the Trustees may direct the insurance company to make payment to such Beneficiary in such manner as may be permitted by the insurance company, as the Company shall direct. When any Participant whose Policy is held hereunder shall reach his retirement date, or if the employment of any such Participant should terminate, or if the Plan should terminate, the Trustees shall dispose of the Policy in order that the provisions of the Plan covering disposition of the Accrued Benefit of the Participant in the happening of any such event may be effected. The Trustees, in such event, shall have the right to (1) surrender the Policy for its cash value, (2) convert the entire value of the Policy into a contract providing periodic income, or (3) distribute the Policy to the Participant. In no case shall any portion of the Participant's Accrued Benefit be used to continue life insurance protection beyond the date of a Participant's retirement.

(r) To perform any and all other acts, take all other proceedings, and exercise all other rights and privileges, although not mentioned herein, in their judgment necessary or appropriate for the proper and advantageous management, administration, investment, and distribution of the Trust, and to carry out the purposes of the Plan.

10.3 Management Authority - Except as otherwise provided in Section 10.2, the powers granted the Trustees thereunder shall be exercised in the discretion of the Trustees; however, the Company may at any time affirmatively direct the Trustees with regard to investment of the Trust, or direct the Trustees to obtain the Company's approval before exercising any of the powers granted the Trustees. Any such direction may be of a continuing nature or otherwise, may be revoked at any time, and shall be complied with as promptly as possible by the Trustees. To the extent not inconsistent with the fiduciary responsibility provisions of the Retirement Security Act, the Trustees shall not be liable for any loss or depreciation in value of the Trust, or any adverse effect upon the exempt status of the Trust under the Internal Revenue Code, resulting from actions taken in accordance with the Company's affirmative direction or from the failure or refusal of the Company to give any required approval, nor shall the Trustees be obliged to review the

assets of the Trust acquired on the direction of the Company. If the Company exercises its discretion under this Section: (i) the Company shall have the power to retain an investment manager as set forth in Section 10.2(o), and its fiduciary liability, as well as that of the Trustees, with respect thereto shall be limited to the extent set forth therein; and (ii) the Company agrees to indemnify the Trustees and hold them harmless from and against any claim or liability which may be asserted against the Trustees by reason of their acting or not acting pursuant to any such direction or failing to act in the absence of any such direction.

10.4 Tenure of Trustees - Any Trustee may resign at any time by giving 30 days' prior written notice to the Company. The Company may remove any Trustee at any time by written notice to such Trustee. The Company may fill any vacancy in the office of Trustee, howsoever caused, or may determine to leave such vacancy unfilled so long as at least one Trustee shall remain; the Company shall also have the right, at any time, to add additional Trustees. Pending the appointment of any successor Trustee and the acceptance of such appointment, the existing Trustee or Trustees shall have full power to take any actions hereunder. Each successor or additional Trustee shall have all the rights and powers, as well as duties and liabilities, vested in the original Trustees without the signing or filing of any further instrument, but any resigning or removed Trustee shall execute all documents and do all acts necessary to transfer possession of and vest title of record to any assets of the Trust in any successor Trustee, or in the remaining Trustee or Trustees. With the approval of the Company, a successor Trustee may accept the accounting rendered pursuant to Section 10.10 and the property delivered to it by a predecessor Trustee as a full and complete discharge of the predecessor Trustee, without incurring any liability or responsibility for so doing.

10.5 Common Investments - Except as otherwise expressly set forth in the Plan, the Trustees shall not be required to make separate investments for individual Participants or to maintain separate investments for each Participant's Accrued Benefit, but may invest contributions and any profits or gains therefrom in common investments.

10.6 Compensation and Expenses of Trustees - The Trustees shall be entitled to such reasonable compensation as shall from time to time be agreed upon by the Company and the Trustees. Such compensation, and all expenses reasonably incurred by the Trustees in carrying out their functions, shall constitute a charge upon the Trust assets unless and until they shall be paid or discharged by the Company; the Company shall be under no obligation to pay such costs and expenses, and in the event of its failure to do so, the Trustees shall be entitled to pay the same, or to reimburse themselves for the payment thereof, from the Trust.

10.7 Immunity and Liability of Trustees - Except to the extent inconsistent with Title I, Subtitle B, Part 4 of the Retirement Security Act:

(a) The Trustees shall be fully protected in acting upon any instrument, certificate or paper believed by them to be genuine and to be signed or presented by the proper person or persons, and the Trustees shall be under no duty to make any investigation or any inquiry as to any statement contained in any such writing, but may accept the same as conclusive evidence of the truth and accuracy of the statements therein contained.

(b) In the absence of actual knowledge that a direction by the Company is in violation of the terms of the Plan, the Trustees shall not be liable for the proper application of any part of the Trust if payments are made in accordance with the directions of the Company as herein provided, and the Trustees shall not be obliged to inquire as to whether any payee is entitled to any payment or distribution, pursuant to such directions, or as to whether any payment or distribution, pursuant to such directions, is proper or within the terms of the Plan. The Trustees shall not be required to make any investigation to determine the identity or mailing address of any person entitled to benefits under the Plan and shall be entitled to withhold making any payments or deliveries upon instructions from the Company.

(c) The Trustees shall not be responsible for the administration of the Plan or for the adequacy of the Trust to meet and discharge any and all payments and liabilities under the Plan. The Trustees shall be responsible only for such sums as shall actually be received by them as Trustees hereunder, and it shall not be the duty of the Trustees to collect, or to ascertain the correctness of the amount of, any sum receivable or received from the Company.

(d) All persons dealing with the Trustees are released from inquiry as to the decision or authority of the Trustees and from seeing to the application of any property paid or delivered to the Trustees.

(e) No single Trustee shall be personally liable for the acts or omissions of any other single Trustee, and no successor Trustee shall be in any way liable or responsible for anything done or omitted in the administration of the Trust prior to the date he became a Trustee.

(f) In the absence of knowledge to the contrary, the Trustees may assume that the Trust is entitled to exemption from federal and state income taxes.

(g) The Trustees shall act only in accordance with the provisions of Sections 11.5 and 11.6.

(h) The Trustees shall have the right to obtain a judicial settlement of their accounts at any time (the only necessary parties thereto being the Trustees and the Company), and such judicial settlement shall be binding on all parties claiming any interest under the Plan or Trust.

10.8 Vote of Trustees - Whenever any action is required or permitted by the Plan to be taken by the Trustees, such action shall be determined by vote of a majority of the Trustees then acting.

10.9 Financial Records - The Trustees shall maintain records and accounts reflecting all receipts and disbursements made by them under the Plan and showing such other items and information as the Company from time to time may specify. The Trustees' records and accounts shall be open to the inspection of the Company at all reasonable times, and may be audited from time to time by such person or persons as the Company may specify.

10.10 Periodic Accounting - The Trust will be evaluated annually, or more often if requested by the Company, by the Trustees and a written accounting rendered as of each fiscal year end of the Trust, and as of the effective date of any removal or resignation of the Trustees, and such additional dates as requested by the Company, showing the condition of the Trust and all receipts, disbursements and other transactions effected by the Trustees during the period covered by the accounting, and showing the value as of such date of each Participant's Accrued Benefit, based on fair market values prevailing as of such date. Any such accounting shall be due within 90 days after the date thereof; to the extent permitted by law, upon the expiration of 180 days from the filing of such accounting, the Trustees shall be forever released, remised and discharged from all liability and accountability to anyone with respect to the propriety of their accounts and transactions shown in such accounts except with respect to any such accounts or transactions as to which the Company shall within such 180 day period file written exception. All determinations as to the value of the assets of the Trust, and as to the amount of the liabilities thereof, shall be made by the Trustees, whose decision shall be final and conclusive and binding on all parties hereto, the Participants and Beneficiaries and their estates. In making any such determination, the Trustees shall be entitled to seek and rely upon the opinion of or any information furnished by brokers, appraisers and other experts, and the Trustees shall also be entitled to rely upon reports as to sales and quotations, both on security exchanges and otherwise as contained in newspapers and in financial publications.

10.11 Prohibition Against Diversion of Funds - It shall be impossible by operation of the Plan or Trust, by natural termination of either, by power of revocation or amendment, by the happening of any contingency, by collateral arrangement or by other means, for any part of the corpus or income of the Trust, or any funds contributed thereto, to inure to the benefit of the Company or otherwise be used for or diverted to purposes other than providing benefits to Participants and Beneficiaries and defraying reasonable expenses of administering the Plan, except as otherwise provided in Section 6.8(b) or 10.12, and except that:

(a) Except as the Company shall otherwise expressly determine all contributions made by the Company to the Trust are and shall be conditioned on the qualification of the Plan under Section 401 of the Internal Revenue Code and the deductibility of the contributions under Section 404 of the Internal Revenue Code, so that: (i) in the event of a denial of qualification at any date subsequent to the initial qualification of the Plan and/or Trust, the Trustees, within one year of the denial of qualification, shall return to the Company all contributions made after the effective date of the denial (less any Trust losses attributable thereto), but only to the extent that such return does not cause the Accrued Benefit of any Participant to be less than it would have been had the contributions not been made; and (ii) to the extent that the aforesaid deduction is disallowed by the Internal Revenue Service, the Trustees shall return to the Company the disallowed portion of the contribution within one year after disallowance (less any Trust losses attributable thereto), but only to the extent that such return does not cause the Accrued Benefit of any Participant to be less than it would have been had the disallowed amount not been contributed. An unfavorable determination or a disallowance of deduction shall be deemed to have occurred when appeal rights with respect thereto shall have expired or been waived or exhausted.

(b) The amount of any contribution made by the Company by reason of a mistake of fact (less any Trust losses attributable thereto) shall be returned by the Trustees to the Company within one year after the payment of the contribution, but only to the extent that such return does not cause the Accrued Benefit of any Participant to be reduced to less than it would have been had the mistaken amount not been contributed.

(c) The provisions of Section 10.11(a)(i) shall not have any effect unless and until the Internal Revenue Service publishes rulings or regulations to the effect that said provisions will not adversely affect the qualified status of the Plan and Trust pursuant to Section 401(a) of the Internal Revenue Code, in which case said provisions will have effect to the extent permitted under such rulings or regulations.

10.12 Spendthrift Provision - No amount payable under the Plan will, except as otherwise specifically provided by law, be subject in any manner to anticipation, alienation, attachment, garnishment, sale, transfer, assignment (either at law or in equity), levy, execution, pledge, encumbrance, charge or any other legal or equitable process, and any attempt to do so will be void; nor will any benefit be in any manner liable for or subject to the debts, contracts, liabilities, engagements or torts of the person entitled thereto. The foregoing shall not preclude, and the Trustees (at the direction of the Company or to the extent necessary to comply with a directive of a court or other governmental agency of competent jurisdiction) shall honor: (i) the enforcement of a federal tax levy made pursuant to Section 6331 of the Internal Revenue Code, (ii) the collection by the United States on a judgment resulting from an unpaid tax assessment, or (iii) the creation, assignment or recognition of a right to any benefit payable with respect to a Participant pursuant to a qualified domestic relations order (as defined in Section 414(p) of the Internal Revenue Code). Further, the foregoing events shall not include any arrangement for: (i) the withholding of taxes from Plan benefit payments, (ii) the recovery by the Plan of overpayments of benefits previously made to a Participant, (iii) the transfer of benefit rights from the Plan to another plan, or (iv) the direct deposit of benefit payments to an account in a banking institution (if not part of an arrangement constituting an assignment or alienation).

Notwithstanding the foregoing, any Participant or Beneficiary may make, and the Trustees shall honor, any arrangement (so long as it is revocable at any time by the Participant or Beneficiary) whereby the Participant or Beneficiary assigns to the Company (i) all or any portion of a presently due benefit payment, or (ii), once the Participant or Beneficiary begins receiving benefits, the right to up to 10% of any future benefit payment. The Company acknowledges to the Administrator that, as to (i), it has no enforceable right in or to any Plan benefit payment or portion thereof under any such arrangement, except to the extent of payments actually received pursuant to the terms of the arrangement.

In the event that any Participant's benefits are garnished or attached by order of any court, the Trustees may bring an action for a declaratory judgment in a court of competent jurisdiction to determine the proper recipient of the benefits to be paid by the Plan. During the pendency of said action, any benefits that become payable shall be paid into the court as they become payable, to be distributed by the court to the recipient it deems proper at the close of said action.

10.13 Commingling with Related Trusts - The Trust may be held by the Trustees in trust in common with the trust funds under any other qualified profit sharing or pension plan of the Company or its subsidiaries or affiliates. In such case, the Trustees shall be under no duty to earmark or keep separate the assets of the Trust, but may commingle them with the assets of the trust funds under the other plans. The Trustees shall, however, maintain a separate accounting reflecting the equitable share of each plan in such assets. The Company may at any time direct the Trustees to segregate and withdraw the equitable share of the Trust in such assets in such manner as may be agreed upon between the Company and the Trustees. The Trustees' valuation of the assets for the purpose of such withdrawal shall be conclusive. The Trustees shall thereafter hold the assets so withdrawn as a separate Trust in accordance with the provisions of the Plan.

10.14 Payment on Behalf of Infant or Incompetent - If any person to whom a benefit is payable hereunder is an infant, or is incompetent by reason of physical or mental disability, the Company or the Trustees shall have the power to cause the payments becoming due to such person to be made to another for his benefit without responsibility of the Company or the Trustees to see to the application of such payments.

10.15 Relationship of Insurers to Trust - In no event shall any insurance company issuing any policy or other contract to the Trustees under the Plan be considered a party to, or be required to examine, the Plan, nor shall it have any obligation to determine whether its actions are proper under, or in accordance with, the provisions of the Plan. Nothing in the Plan shall in any way be construed to enlarge, change, vary or in any way affect the obligations of an insurer as expressly provided in a policy or contract issued by it. No insurer shall be responsible for the failure of the Company or the Trustees to perform their duties as such or for the application or disposition of any money paid or to be paid to the Trust, and such payment shall fully discharge the insurer for the amount so paid.

Neither the Company nor the Trustees shall be responsible: (i) for the validity of any policy or contract issued by an insurer, (ii) for the failure on the part of any insurer to make any payments or provide any benefits thereunder, (iii) for the action or inaction of any person or persons which may render the policy or contract invalid or unenforceable, or (iv) for any restrictions or provisions contained therein or imposed by the insurer or by any other person.

10.16 Loans to Participants - Notwithstanding any other provision in the Plan to the contrary, the Trustees, upon direction of the Company, shall make loans to Participants. Each such loan shall be deemed to be, and shall be accounted for as, a specific investment of the borrowing Participant's Accrued Benefit. Each loan shall be based upon a written application made to the Company by the Participant setting forth the desired loan amount and such other information as may be deemed pertinent by the Company. The Company shall have the final and exclusive right to determine the propriety, amount and terms of any loan to be made.

In addition to such rules and regulations as the Company may from time to time adopt, all loans shall comply with the following terms and conditions:

(a) Except as otherwise permitted by the Company and permitted on a non-distributive basis under the Internal Revenue Code, the amount of any loan, when added to the outstanding balance of all other loans to the Participant from the Plan or any other qualified retirement plan of the Company or any related employer (as defined in Section 414(b), (c) or (m) of the Internal Revenue Code), shall not exceed the lesser of: (i) $50,000, or (ii) the greater of $10,000 or 50% of, but not to exceed 75% of, the vested portion of the Participant's Accrued Benefit, valued as of the Participation Date or Special Valuation Date, whichever last occurred, preceding the date on which the loan is approved (adjusted for subsequent contributions and/or distributions).

(b) Loans shall be permitted only for extraordinary or emergency expenditures and shall not exceed the actual amount needed therefor.

(c) The period of repayment for any loan shall be arrived at by mutual agreement between the Company and the Participant, but, except for home loans (as defined in Section 72(p)(2)(B)(ii) of the Internal Revenue Code), shall in no event exceed five years.

(d) Each loan shall be secured by the Participant's promissory note for the amount of the loan, including interest, payable to the order of the Trustees, and, in the sole discretion of the Company, by an assignment (notwithstanding the provisions of Section 10.12) of all or any portion of the Participant's right, title and interest in and to his Accrued Benefit; provided, however, that, in the absence of a Private Letter Ruling or a public position of the Internal Revenue Service to the effect that the qualified status of the Plan will not be adversely affected, the terms of the assignment may not permit the Trustees, prior to the

Participant's death or other termination of employment or the termination of the Plan, to charge the Participant's Accrued Benefit for any amount of principal or interest which may be in default under the terms of the loan. The loan shall also be secured with such other collateral, if any, as the Company, in its sole discretion, may deem necessary to adequately secure the repayment of the loan and interest.

(e) Each loan shall bear interest at a reasonable rate to be fixed by the Company, but not to exceed the maximum rate permitted under all applicable usury laws. The Company shall not discriminate among Participants in the matter of interest rates, but loans granted at different times may bear different interest rates if, in the opinion of the Company, the difference in rates is justified by a change in general economic conditions.

(f) The Company shall provide each loan applicant with a written disclosure statement meeting the requirements of all applicable credit laws.

(g) No distribution shall be made to any Participant or Beneficiary unless and until all unpaid loans made to the Participant, including accrued interest thereon, have been liquidated.

In the event of default the Company will direct the Trustees to take such action as may be necessary to protect the interests of the Trust and best secure maximum repayment of the outstanding debt, but the Trustees shall not be required to act, and shall not be liable for failure to act, in the absence of instructions from the Company. The Participant shall be liable for all costs incurred by the Trustees in connection with the default, including reasonable attorney's fees. In no event shall the fact that a loan is secured by a Participant's interest in his Accrued Benefit be construed as limiting the Participant's personal obligation to repay the loan in full in accordance with its terms.

Notwithstanding any other provisions of this Article X to the contrary, the Trustees shall not have any liability, fiduciary or otherwise, for any loss, or by reason of any breach of fiduciary responsibility, arising from or as a result of a loan to a Participant made, or any action with respect thereto taken, at the direction of the Company.

The Company, at any time and in its sole discretion, may suspend the operation of this Section 10.16; provided, however, that such suspension shall not affect any loan then outstanding. Further, the Company shall have the right from time to time to adopt such rules, limitations and procedures as it may deem appropriate with respect to Participant loans.

END OF ARTICLE X

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ARTICLE XI

Administration

11.1 Administrative Authority - Except as otherwise specifically provided herein, the Company shall have the sole responsibility for and the sole control of the operation and administration of the Plan, and shall have the power and authority to take all action and to make all decisions and interpretations which may be necessary or appropriate in order to administer and operate the Plan, including, without limiting the generality of the foregoing, the power, duty and responsibility to: (i) resolve and determine all disputes or questions arising under the Plan, including the power to determine the rights of Employees, Participants and Beneficiaries, and their respective benefits, and to remedy any ambiguities, inconsistencies or omissions; (ii) adopt such rules of procedure and regulations as in its opinion may be necessary for the proper and efficient administration of the Plan and as are consistent with the Plan; (iii) implement the Plan in accordance with its terms and such rules and regulations; (iv) direct the Trustees with respect to the eligibility of any Employee as a Participant and the crediting and distribution of the Trust, which are to be made only upon the basis of instructions from the Company pursuant to the terms of the Plan; and (v) establish and carry out a funding policy and method consistent with the objectives of the Plan and the Retirement Security Act, pursuant to which the Company shall determine the Plan's liquidity and financial needs and communicate them to the Trustees (or other fiduciaries who are charged with determining investment policy). Subject to the power to delegate in the manner described in Section 11.2, the Company shall act through its sole proprietor or partners if unincorporated, its Board of Directors if incorporated, or its shareholders if a "close corporation" without Board of Directors.

11.2 Company Administration - The Plan shall be operated and administered on behalf of the Company by an Administrator. The Administrator shall be deemed to be the "Named Fiduciary" for purposes of the Retirement Security Act, and shall be governed by the following:

(a) In the absence of any designation to the contrary pursuant to Section 11.3, and subject to the power to delegate pursuant to this Section, the Administrator shall be the President of Company, or any successor duly appointed by the Company. Except as the Company shall otherwise expressly determine, the Administrator shall have full authority to act for the Company before all persons in any matter directly pertaining to the Plan, including the exercise of any power or discretion otherwise granted to the Company pursuant to the terms of the Plan, other than the power to amend or terminate the Plan, to determine Company contributions, to exercise authority to direct the Trustees pursuant to Section 10.3, to affect the employer-employee relationship between the Company and any Employee, and to retain and/or discharge the Trustees, all of which powers are

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reserved to the Company unless expressly granted to the Administrator. Fiduciary duties, powers and responsibilities (other than those reserved to the Trustees, with respect to management or control of Trust assets) may be allocated among the fiduciaries (if there be more than one) to whom such duties, powers and responsibilities have been delegated, so long as such allocation is pursuant to action of the Company or by written agreement executed by the involved fiduciaries and approved by the Company, in which case, except as may be required by the Retirement Security Act, no such fiduciary shall have any liability, with respect to any duties, powers or responsibilities not allocated to him, for the acts or omissions of any other fiduciary. Any person may serve in more than one fiduciary capacity under the Plan, including those of Administrator and Trustee.

(b) The Administrator may appoint any persons or firms, or otherwise act to secure specialized advice or assistance, as it deems necessary or desirable in connection with the administration and operation of the Plan; the Administrator shall be entitled to rely conclusively upon, and shall be fully protected in any action or omission taken by it in good faith reliance upon, the advice or opinion of such firms or persons. **The Administrator shall have the power and authority to delegate from time to time by written instrument all or any part of its duties, powers or responsibilities under the Plan, both ministerial and discretionary, as it deems appropriate, to any person,** and in the same manner to revoke any such delegation of duties, powers or responsibilities. Any action of such person in the exercise of such delegated duties, powers or responsibilities shall have the same force and effect for all purposes hereunder as if such action had been taken by the Administrator. Further, the Administrator may authorize one or more persons to execute any certificate or document on behalf of the Administrator, in which event any person notified by the Administrator of such authorization shall be entitled to accept and conclusively rely upon any such certificate or document executed by such person as representing action by the Administrator until such third person shall have been notified of the revocation of such authority. **The Administrator shall not be liable** for any act or omission of any person to whom the Administrator's duties, powers or responsibilities have been delegated, **nor shall any person to whom any duties,** powers or responsibilities have been delegated have any liabilities with respect to any duties, powers or responsibilities not delegated to him, except to the extent required by the Retirement Security Act.

(c) **All representatives of the Company,** and/or members of the Retirement Plan Committee if one be appointed, shall use **ordinary care and diligence** in the performance of their duties pertaining to the Plan, but, except to the extent required by the Retirement Security Act, no **such individual shall incur any liability:** (i) by virtue of any contract, agreement, bond or other instrument made or executed by him or on his behalf in his official capacity with respect to the Plan, (ii) **for any act or failure to act,** or any mistake or judgment made, in his **official capacity** with

respect to the Plan, unless resulting from his gross negligence or willful misconduct, or (iii) for the neglect, omission or wrongdoing of any other person involved with the Plan. The Company shall indemnify and hold harmless each such individual from the effects and consequences of his acts, omissions and conduct in his official capacity with respect to the Plan, except to the extent that such effects and consequences shall result from his own willful misconduct or gross negligence.

(d) The Plan may purchase, as an expense of the Plan, liability insurance for the Plan and/or for its fiduciaries to cover liability or losses occurring by reason of an act or omission of a fiduciary, providing such insurance contract permits recourse by the insurer against the fiduciary in the case of breach of fiduciary obligation by such fiduciary. Any fiduciary may purchase, from and for his own account, insurance to protect himself in the event of a breach of fiduciary duty and the Company may also purchase insurance to cover the potential liability of one or more persons who serve in a fiduciary capacity with regard to the Plan.

(e) Nothing in the Plan shall be construed so as to prevent any fiduciary from: (i) receiving any benefit to which he may be entitled as a Participant or Beneficiary, or (ii) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly incurred in the performance of his duties under the Plan (except that no person so serving who receives compensation as an Employee shall receive compensation from the Plan, except for reimbursement of expenses properly incurred), or (iii) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of the Company or any related entity.

11.3 Retirement Plan Committee - The Company shall have the right to designate and appoint a committee, to be known as the Retirement Plan Committee, as Administrator. Except to the extent that the Company has retained any power or authority, or allocated duties and responsibilities to another administrator or other fiduciary, said Committee shall have full power and authority to administer and operate the Plan in accordance with its terms and in particular the authority contained in this ARTICLE XI, and, in acting pursuant thereto, shall have full power and authority to deal with all persons in any matter directly connected with the Plan, including, but not limited to, the Trustees, other fiduciaries, insurance companies, investment advisors, other advisors and specialists, Participants, Beneficiaries and their representatives, in accordance with the following provisions:

(a) The Committee shall consist of one or more individuals designated by the Company. Subject to his right to resign at any time, each member of the Committee shall serve at the pleasure of the Company, and the Company may appoint, and may revoke the appointment of, additional members to serve with the Committee as may be determined to be necessary or desirable from time to time.

Each member of the Committee, by accepting his appointment to the Committee, shall thereby be deemed to have accepted all of the duties and responsibilities of such appointment, and to have agreed to the faithful performance of his duties thereunder.

(b) The Committee shall adopt such formal organization and method of operation as it shall deem desirable for the conduct of its affairs. The Committee shall act as a body, and the individual members of the Committee shall have no powers and duties as such, except as provided herein; the Committee shall act by vote of a majority of its members at the time in office, either at a meeting or in writing without a meeting.

(c) Except as set forth in Section 11.9, the determination of the Committee on any matter pertaining to the Plan within the powers and discretion granted to it shall be final and conclusive on the Company, the Trustees, all Participants and Beneficiaries and all those persons dealing in any way or capacity with the Plan.

(d) Unless otherwise determined by the Company, the members of the Committee shall serve without compensation for services as such, but all expenses of the Committee shall be paid in accordance with Section 11.8; such expenses shall include any expenses incident to the administration and operation of the Plan and to the functioning of the Committee, including, but not limited to, fees and other compensation to firms or persons retained for advice and assistance pursuant to Section 11.2(b).

(e) The Committee shall have the same powers of appointment and delegation as are set forth in Section 11.2(b).

11.4 Mutual Exclusion of Responsibility - Neither the Trustees nor the Company shall be obliged to inquire into or be responsible for any act or failure to act, or the authority therefor, on the part of the other.

11.5 Uniformity of Discretionary Acts - Whenever in the administration or operation of the Plan discretionary actions by the Company, the Administrator or the Trustees are required or permitted, such action shall be consistently and uniformly applied to all persons similarly situated, and no **such action shall be taken which shall discriminate in favor of officers, shareholders or other owners of the Company, or highly-compensated** employees.

The sole criterion for determining whether or not, pursuant to any applicable provision of the Plan, the Company exercises its discretion to transfer all or any part of a Participant's Accrued Benefit to a Segregated Account shall be whether the Company determines it to be in the best interests of the Participant to insulate such Accrued Benefit from fluctuations in market value of Trust assets, and the Company shall have no liability by reason of any increase in said market value in which the funds transferred to the Segregated Account do not share.

11.6 Fiduciary Standards - The Administrator, Trustees and all other persons in any fiduciary capacity with respect to the Plan shall discharge their duties with respect to the Plan: (i) solely in the interest of the Participants and Beneficiaries and for the exclusive purposes of providing benefits to Participants and their Beneficiaries and defraying reasonable expenses of administering and operating the Plan, (ii) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, (iii) with respect to fiduciaries charged with management and control over Trust assets, by diversifying the investments of the Trust so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, and (iv) in accordance with the documents and instruments governing the Plan to the extent consistent with the provisions of the Retirement Security Act.

11.7 Litigation - In any action or judicial proceeding affecting the Plan and/or the Trust, it shall be necessary to join as parties only the Trustees and the Company. Except as may be otherwise required by law, no Participant or Beneficiary shall be entitled to any notice or service of process, and any final judgment entered in such action shall be binding on all persons interested in, or claiming under, the Plan.

11.8 Payment of Administration Expenses - Expenses (other than those referred to in Section 10.6) incurred in the administration and operation of the Plan shall be paid by the Trustees out of the Trust unless the Company, in its discretion, elects to pay them.

11.9 Claims Procedure - In the event that any Participant or Beneficiary (hereinafter referred to as the "Claimant") believes that he is entitled to a benefit under the Plan, and such benefit has not been paid or commenced, or if such benefit has been paid or commenced under terms or in an amount with which the Claimant is not in agreement, said Claimant shall have the right to file a written claim with the Company setting forth the reason he believes he is entitled to the benefit, or setting forth the nature of his dispute with the terms or amount of the benefit, as the case may be. Such claim shall be delivered or mailed to the Company (to the attention of the President or such other person as shall have been delegated to receive such claim).

Unless it is determined that the matter is to be resolved in accordance with the wishes of the Claimant as set forth in the claim, the Administrator shall provide the Claimant with a written notice setting forth the specific reason or reasons for the denial, specific reference to pertinent Plan provisions on which the denial is based, a description of any additional material or information necessary for the Claimant to perfect his claim and an

explanation of why such material or information is necessary, and an explanation of the Plan's claim review procedure. If such a notice has not been provided to the Claimant within 90 days after the claim was received by the Company, and the claim has not been granted within such period of time, the claim shall be deemed denied and the Claimant shall be entitled to institute review procedures as hereinafter set forth, except that the 90 day period may in special circumstances be extended to 180 days provided that the Company so notifies the Claimant, before expiration of the initial 90 day period, in a written notice setting forth the reason for the extension and the estimated decision date.

For a period of 60 days following the date on which a Claimant has been provided with a notice of denial as aforesaid, the Claimant may appeal the denial by submitting to the Administrator a written request for a review by the Administrator of the denial. At any time prior to the filing of such an appeal, the Claimant shall have a right to review all pertinent documents (which shall be made available to the Claimant during normal business hours at his place of employment or such other place as may be reasonably designated by the Company). The Claimant shall have the right to submit to the Administrator, at any time during the pendency of the review procedure, any written statement of issues and comments which the Claimant believes it relevant for the Administrator to consider. A decision by the Administrator shall be made promptly, and not later than 60 days after the Administrator's receipt of the request for review, unless special circumstances require an extension of time for processing, and the Administrator so notifies the Claimant in writing prior to the expiration of the initial 60 day period, in which case a decision shall be rendered as soon as possible but not later than 120 days after such receipt of a request for review. The Administrator's decision shall be set forth in writing and delivered to the Claimant and shall include specific reasons for the decision and specific references to the pertinent Plan provisions on which the decision is based. The Administrator's decision shall be final and binding on the Company, the Claimant, and all other parties claiming any interest under the Plan, and their heirs and assigns.

Any reference herein to the "Claimant" shall be deemed to include any person named by the Claimant as his duly authorized representative, provided that such representative delivers to the Company a written power of attorney or otherwise satisfies the Company that he has been duly authorized to act for the Claimant.

END OF ARTICLE XI

ARTICLE XII

Amendment

12.1 Right to Amend - The Company, by written instrument executed by the Trustees and by the Company, shall have the right to amend the Plan and Trust, at any time, and with respect to any provisions thereof (subject to the provisions of Section 10.11 and the last paragraph of Section 7.4), and all parties thereto or claiming any interest thereunder shall be bound thereby.

12.2 Amendment Required by Federal Law - Notwithstanding the provisions of Section 12.1, the Plan and Trust may be amended at any time, retroactively if required, if found necessary in order to conform to the provisions and requirements of the Internal Revenue Code or the Retirement Security Act, or any similar act or any amendments thereto or regulations promulgated thereunder; no such amendment shall be considered prejudicial to any interest of a Participant or Beneficiary hereunder.

END OF ARTICLE XII

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ARTICLE XIII

Termination

13.1 Right to Terminate - It is the present intention of the Company to maintain the Plan throughout the Company's corporate existence. Nevertheless, the Company reserves the right, at any time, to terminate its obligation to make further contributions to the Trust or to terminate the entire Plan.

13.2 Automatic Termination of Contributions - The liability of the Company to make contributions to the Trust shall automatically terminate upon dissolution of the Company, upon its adjudication as a bankrupt or upon the making of a general assignment for the benefit of creditors.

13.3 Successor to Company - In the event of the dissolution, merger, consolidation, sale of all or substantially all the assets, or reorganization of the Company, provision may be made by which the Plan will be continued by the successor employer, in which case such successor shall be substituted for the Company under the Plan. The substitution of the successor shall constitute an assumption of Plan liabilities by the successor and the successor shall have all of the powers, duties and responsibilities of the Company under the Plan. If such action has not been taken within 90 days from the effective date of such transaction, the Plan shall terminate as of the effective date of the transaction, and the provisions of Section 13.4 shall become operative.

13.4 Allocation and Distribution - This Section shall become operative in any of the following events: (a) a complete termination of the Company's liability to make further contributions to the Trust; (b) a complete discontinuance of contributions by the Company to the Trust; or (c) a complete termination of the Plan. Upon the effective date of any such event, then, notwithstanding any other provisions of the Plan, any persons who were not theretofore Participants shall not be eligible to become Participants, and, if such event is a termination of the Plan, all interests of Participants not theretofore vested shall become fully vested. The provisions of this Section shall also become applicable in the event of a partial termination of the Plan, but only with respect to that portion of the Plan attributable to the Participants to whom the termination is applicable. The value of the interests of all Participants and Beneficiaries shall be determined and distributed to them as soon as practicable after such termination, and the Company shall have the same powers to direct the Trustees in making payments as are contained in Section 8.2.

As an alternative to immediate distribution of the Trust, the Company, in its discretion, and subject to its option at any time to require the complete distribution of the Trust to the then Participants, may defer commencement of benefits to each Participant until such Participant reaches his Distribution Date, at which time the Company shall have the same powers to direct the Trustees in making payments as are contained in Section 8.2.

The provisions set forth in this Section shall be subject to such modification, retroactively if required, without necessity of formal amendment to the Plan, as may be necessary in order to cause the termination of the Plan and/or Trust, and any distributions made pursuant thereto, to conform to any requirements which may be imposed by the Internal Revenue Service to prevent disqualification of the Plan and/or Trust or which may be imposed by the Pension Benefit Guaranty Corporation pursuant to the Retirement Security Act, and no such modification shall be deemed prejudicial to the interest of any Participant or Beneficiary.

13.5 Plan Combinations and Transfers - In the case of any merger or consolidation of the Plan with, or transfer of assets or liabilities of the Trust to, any other plan, the transaction shall be structured so that each Participant in the Plan would (if the Plan then terminated) receive a benefit immediately after the transaction which is at least equal to the benefit he would have been entitled to receive immediately before the transaction (if the Plan had then terminated.)

END OF ARTICLE XIII

ARTICLE XIV

Miscellaneous

14.1 Limitations on Liability of Company - Neither the establishment of the Plan or Trust nor any modification thereof, nor the creation of any fund or account, nor the payment of any benefits, shall be construed as giving to any Participant or other person any legal or equitable right against the Company (or any person connected therewith), the Trustees or any insurance company, except as provided by law, by any Plan provision, or by the terms of any Policy. The Company does not in any way guarantee the Trust from loss or depreciation, nor does the Company guarantee the payment of any money which may be or become due to any person from the Trust. Any person having a right or claim under the Plan shall look solely to the Trust assets, and in no event shall the Company (or any person connected therewith) be liable to any person on account of any claim arising by reason of the provisions of the Plan or of any instrument or instruments implementing its provisions, or for the failure of any Participant, Beneficiary or other person to be entitled to any particular tax consequences with respect to the Plan, the Trust or any contribution thereto or distribution therefrom. The Company shall not be liable to any person for failure on its part to make contributions as provided in Section 5.1, nor shall any action lie to compel the Company to make such contributions. The Company (or any person connected therewith) shall not have any liability to any person by reason of the failure of the Plan to attain and/or maintain qualified status under Section 401(a) of the Internal Revenue Code, or the failure of the Trust to attain and/or maintain tax exempt status under Section 501(a) of the Internal Revenue Code, regardless of whether or not such failure is due to any act or omission (willful, negligent or otherwise) of the Company (or any person connected therewith). The provisions of this Section shall apply only to the extent not inconsistent with the provisions of the Retirement Security Act.

14.2 Construction - The Plan is intended to comply with all requirements for qualification under Section 401(a) of the Internal Revenue Code and, if any provision of the Plan is subject to more than one interpretation or construction, such ambiguity shall be resolved in favor of that interpretation or construction which is consistent with the Plan being so qualified. In case any provision of the Plan shall be held to be illegal or void, such illegality or invalidity shall not affect the remaining provisions of the Plan, but shall be fully severable, and the Plan shall be construed and enforced as if said illegal or invalid provisions had never been inserted herein. For all purposes of the Plan, where the context admits, words in the masculine gender shall include the feminine and neuter genders, the singular shall include the plural, and the plural shall include the singular. Headings of Articles and Sections are inserted only for convenience of reference and are not to be considered in the construction of the Plan. The laws of the United

States of America and the State of Maryland shall govern, control and determine all questions arising with respect to the Plan and the interpretation and validity of its respective provisions. If the indefinite continuance of the Plan would be in violation of the law, then the Plan shall continue for the maximum period permitted by law and shall then terminate, whereupon distribution of the Trust shall be made as provided in Section 13.4 hereof. Participation under the Plan will not give any Participant the right to be retained in the service of the Company nor any right or claim to any benefit under the Plan unless such right or claim has specifically accrued hereunder.

END OF ARTICLE XIV

WITNESS the hands and seals of the parties hereto this 15th day of March, 1985.

CATALINA ENTERPRISES, INC.

Witness

By: _____ (SEAL)

Witness

_____ (SEAL)
Richard Shofer, Trustee

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CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	
	*	

* * * * * * * * *

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

The Stuart Hack Company and Stuart Hack, defendants, by their attorneys, Daniel W. Whitney, Janet M. Truhe, and Semmes, Bowen & Semmes, file the following reply to plaintiff's response to defendant's motion to dismiss Count IV of the Amended Complaint for lack of subject matter jurisdiction.

In his Response, plaintiff concedes that claims against fiduciaries for breaches of their fiduciary duties can be prosecuted only in federal court. See Response at p. 6. In order to bring his Count IV claim for breach of fiduciary duty within the narrow area of concurrent jurisdiction set forth in subsection (a)(1)(B) of 29 U.S.C. § 1132(e), however, plaintiff is claiming that he had a right to competent advice from Stuart Hack and that he is,

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250 W. Pratt Street
Baltimore, Md. 21201

therefore, suing Hack to enforce that right under the Plan. See Response at p. 4.[1]

No matter how the plaintiff chooses to characterize his claim in Count IV, the plain language of the allegations in that count are controlling here. In Count IV, plaintiff has alleged that these defendants were "fiduciaries" to the Catalina plan and, as such, "were required to discharge their duties with respect to the Plan with ... care, skill, prudence, and diligence." See Amended Complaint at paragraph 34. The plaintiff goes on to state in Count IV that these defendants "were at all relevant times retained by Catalina under the terms of the Plan and therefore charged with the fiduciary duties imposed under the Plan." See, id. at paragraph 35. Plaintiff then states that as a participant in the plan he was entitled to the benefit "of the fiduciary obligations imposed by the Plan on Hack and The Stuart Hack Company." See, id. at paragraph 36. The plaintiff concludes Count IV by stating that "the advice at issue in this case, rendered by Stuart Hack and The Stuart Hack Company, was rendered in violation of the fiduciary duties imposed on Hack and The

[1] As set forth in defendants' motion to dismiss, subsection (a)(1)(B) provides that state courts have concurrent jurisdiction to determine actions by a participant: "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

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Baltimore, Md. 21201

Stuart Hack Company by the Plan." See, id. at paragraph 37 (emphasis added). As a result of these acts and omissions, the plaintiff requests compensatory damages and attorney's fees (which are recoverable in an ERISA breach of fiduciary claim) from these defendants.

It would be hard to imagine a more precisely drafted claim for breach of fiduciary duty than the one set forth by the plaintiff in Count IV, which the statute and case law indicates is the type of claim relegated to the exclusive jurisdiction of the federal courts under 29 U.S.C. § 1132(e).[2] In Count IV, the plaintiff is not suing "to recover benefits due to him under the terms of his plan," or "to enforce his rights under the terms of the plan" (it is undisputed by all parties that plaintiff had the right under the Plan to take the loans), nor is the plaintiff suing to "clarify his rights to future benefits under the terms of the plan." Indeed, the plaintiff is not

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[2] The Count IV claim for professional negligence against these defendants as constituting a breach of fiduciary duties under ERISA, is not as plaintiff asserts in his Response, "a case of first impression." Several of the cases cited by defendants in their Motion to Dismiss involved instances where this was exactly the type of breach of fiduciary duty committed. See Duffy v. Brannen, 529 A.2d 643 (Vt. 1987) (action against plan administrator for breach of fiduciary duty to provide plaintiff-employee with required summary plan descriptions and annual reports); Goldberg v. Caplan, 277 Pa. Super. 47, 419 A.2d 653 (1980) (action against trustee-fiduciary for personal gross negligence and misconduct in the operation of the Plan).

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Baltimore, Md. 21201

suing the Plan at all, nor is he claiming that he is entitled to any benefits under the Plan. Rather, he is suing these defendants and requesting compensatory damages from them arising out of their failure to advise him of the personal tax consequences of taking loans from the pension plan above a certain amount (which the plaintiff claims is a breach of fiduciary duty).

Section 1132(e) does not confer upon state courts jurisdiction to determine this type of claim and expressly confines jurisdiction over such claims to the federal courts. Both the allegations pertaining to liability and the request for damages reveal that Count IV is a claim for breach of fiduciary duty against these defendants and in no way can be interpreted as an action to recover pension benefits or enforce benefit rights under the Plan. Thus, this Court does not have subject matter jurisdiction to determine the claim asserted by the plaintiff in Count IV.[3]

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[3] Plaintiff's request that he be allowed to amend Count IV so as to recast it as a claim "to enforce his rights under the Plan" (thereby bringing it within the concurrent jurisdiction of this Court) is no solution. The fact of the matter is that the plaintiff is not suing these defendants under ERISA to enforce or clarify his right to benefits under the Plan. Instead, he is seeking damages from these defendants caused by their alleged breach of fiduciary duties. See Young v. Sheet Metal Workers' Inter. Ass'n., 447 N.Y.S.2d 798, 803 (1981) wherein the Court stated:

> A resolution of this motion to dismiss [for lack of subject matter

(continued...)

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Baltimore, Md. 21201

For the aforegoing reasons and the reasons previously set forth in defendants' Motion to Dismiss, The Stuart Hack Company and Stuart Hack respectfully request that this Court grant defendants' Motion to Dismiss Count IV of plaintiff's Amended Complaint for lack of subject matter jurisdiction.

Daniel W. Whitney

Daniel W. Whitney

Janet M. Truhe

Janet M. Truhe

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[3](...continued)
jurisdiction] rests then upon whether plaintiff's action may properly be characterized as one to "clarify ... rights to benefits under the terms of the plan." This Court finds that this is not such an action. Rather, plaintiff's action places directly into question the propriety of fiduciary conduct and calls for the construction and implementation of standards of conduct established by ERISA.

This is precisely the type of action brought by the plaintiff in the instant case. Indeed, each of the four counts (legal theories) in the Amended Complaint finds its origin in how these defendants breached their fiduciary duties to the plaintiff and the Plan, by failing to advise plaintiff about the personal tax consequences of taking loans from the Plan above a certain amount. And for this failure the plaintiff is not seeking anything from the Plan; he is seeking damages from these defendants personally.

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Semmes, Bowen & Semmes

Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201
(301) 539-5040

Attorneys for Defendants,
The Stuart Hack Company and
Stuart Hack

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of March, 1990, a copy of the foregoing Defendants' Reply to Plaintiff's Response to Motion to Dismiss was mailed to Thomas A. Bowden, Esquire, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201; and Linda Schuett, Esquire, Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

Janet M. Truhe
Janet M. Truhe

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CIRCUIT COURT FOR
BALTIMORE CITY

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	
	*	

* * * * * * * *

PLAINTIFF'S INTERROGATORIES TO THE STUART HACK COMPANY

Richard Shofer, Plaintiff ("Shofer"), by Lloyd S. Mailman, Thomas A. Bowden, and Blum, Yumkas, Mailman, Gutman & Denick, P.A., his attorneys, propounds the following Interrogatories to The Stuart Hack Company, Defendant.

Definitions

"You" means The Stuart Hack Company, all its officers, directors, employees, servants, agents, and attorneys, all its predecessors and successors, and all other persons acting or purporting to act on its behalf.

"Communication" means any transmittal of information, in any form whatever, from one or more persons to one or more other persons.

"Document" means every tangible thing from which information can be obtained, perceived, or reproduced, and includes any written, recorded, or graphic matter, however produced or reproduced and whether or not now in existence, and also includes the original, all file copies, all other copies no matter how prepared, and all drafts prepared in connection with such document, whether used or not, and further includes but is not limited to papers; books; records; catalogs; price lists; pamphlets; periodicals; letters; correspondence; scrap books; note books; bulletins; circulars; forms; notices; post cards; telegrams; deposition transcripts; contracts; agreements; leases; reports; studies; working papers; charts; proposals; graphs; sketches; diagrams; indexes; maps; analyses; statistical records; reports; results of investigations; reviews; ledgers; journals; balance sheets; accounts; books of accounts; invoices; vouchers; purchase orders; receipts; expense accounts; cancelled checks; bank checks; statements; sound and tape recordings; videotapes;

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computer disks; electrical recordings; magnetic recordings; memoranda (including any type or form of notes memoranda or sound recordings of personal thoughts, recollections, or reminders, or of telephone or other conversations, or of acts, activities, agreements, meetings, or conferences); photostats; microfilms; instruction lists or forms; computer printouts or other computed data; minutes of director or committee meetings; inter-office or intra-office communications; diaries; calendar on desk pads; stenographers' notes; appointment books; and other papers or matters similar to any of the foregoing, however denominated, whether or not received by you or prepared by you for your own use or transmittal. If a document has been prepared in several copies or additional copies have been made, and the copies are not identical (or, by reason of subsequent modification or notation, are no longer identical), each nonidentical copy is a separate "document."

"Person" includes the plural as well as the singular and means any natural person, partnership, firm, association, corporation, business, joint venture, government or government agency, or any other form of private or public entity.

"Identify" or "identity" used with reference to an individual or party to a contract means to state his, her, or its full name and last known address and telephone number.

"Identify" or "identity" used with reference to a corporation, partnership, joint venture, unincorporated association, or other entity other than a natural person means to state wherever applicable:

a. the organization's name, address, and telephone number;

b. the resident agent's name and address;

c. state and date of incorporation or registration of the entity.

"Identify" or "identity" used with reference to a document means to state the:

a. date of the document;

b. identity of the author of the document;

c. identity of each person to whom it was addressed or distributed;

d. the type of document (e.g. letter, memorandum, telegram, chart, note, application, etc.) or other means of identification;

e. the document's present location and custodian.

If any such document is no longer in your possession or subject to your control, state what disposition was made of it. NOTE: The person to whom these Interrogatories are directed may, in lieu of submitting the information listed in the first sentence of this paragraph, make available for inspection and copying by the party propounding these Interrogatories the documents requested to be identified.

"Identify" or "identity" used with reference to a communication, conference, or meeting means to state:

a. the date, time, and location of the communication, conference or meeting;

b. the identity of all parties to, and persons present during, the communication, conference or meeting;

c. the subject matter of the communication, conference or meeting, and the general substance of what was said and/or transpired.

Instructions

A. These Interrogatories are of an ongoing nature, and should you acquire additional information responsive to these Interrogatories, the answers shall be updated to provide the additional information.

B. If a privilege not to answer is claimed, identify each matter as to which the privilege is claimed, the nature of the privilege, and the legal and factual basis for each such claim.

C. If a refusal to answer an Interrogatory is stated on the grounds of burdensomeness, identify the number and nature of documents needed to be searched, the location of the documents, and the number of person hours and costs required to con duct the search.

D. Answer each Interrogatory on the basis of your entire knowledge, including information in the possession of your officers, directors, employees, consultants, representatives, agents, attorneys, subsidiaries, and subcontractors.

E. If any Interrogatory cannot be answered in full, answer to the extent possible and specify reasons for inability to answer.

Interrogatories

1. State in detail the factual basis for your Third Defense that Plaintiff's claims are barred by the statute of

limitations.

2. State in detail the factual basis for your Fourth Defense that Plaintiff's damages were caused by his own sole or contributory negligence.

3. State in detail the factual basis for your Fifth Defense that Plaintiff assumed the risk of the damages he suffered.

4. State in detail the factual basis for your Sixth Defense that Plaintiff is estopped to complain about any advice rendered by the defendants.

5. State in detail the factual basis for your Seventh Defense that Plaintiff has waived any claim arising out of advice rendered by the defendants.

6. State in detail the factual basis for your Eighth Defense that Plaintiff's claims are barred by laches.

7. State in detail the factual basis for your Tenth Defense that Plaintiff's reliance on advice rendered by the Defendants was unjustified when Plaintiff proceeded to borrow from the Plan in 1984, 1985, and 1986.

8. Identify all persons with personal knowledge of the events at issue in this case.

9. Briefly state the substance of the knowledge held by each person identified in the previous Interrogatory.

10. If on the basis of your own knowledge you disagree with the factual accuracy of any of Plaintiff's Answers to Interrogatories in this matter, please state the factual basis for said disagreement.

11. If on the basis of your own knowledge you disagree with the factual accuracy of any of the statements in Plaintiff's Amended Complaint, as amended, please state the factual basis for said disagreement.

12. Describe in detail the research, study, or investigation that you performed prior to mailing the August 9, 1984 letter (the "Letter") to Richard Shofer, directed at ensuring the completeness and accuracy of the advice you were giving.

13. Identify each person with whom you discussed the subject matter of the Letter prior to mailing it.

14. Describe in detail the research, study, or investigation that you performed after mailing the "Letter" to Richard Shofer, directed at determining the completeness and accuracy of the advice you had given.

15. Identify every person from whom you have a signed statement regarding the matters at issue in this case.

16. If there came a time when you concluded that part or all of the advice you gave in the Letter was incorrect or incomplete, describe how you became aware of said incorrectness or incompleteness, beginning with your first awareness that the particular problem might exist.

17. Identify every person who ever suggested to you that the Letter might be inaccurate or incomplete in any respect, even if you eventually concluded that such suggestion was itself incorrect or unfounded.

18. Briefly describe the nature of each suggested

inaccurate or incompleteness in the previous Interrogatory.

19. If there came a time when you concluded that the Letter was in any respect inaccurate or incomplete, describe in detail your efforts, if any, directed at informing Plaintiff, or his employees or agents, of said inaccuracy or incompleteness.

20. If there came a time when you concluded that the Letter was in any respect inaccurate or incomplete, describe in detail your efforts, if any, directed toward ensuring that Plaintiff was compensated for any loss or injury he or others may have sustained as a result of said inaccuracy or incompleteness.

21. State each date upon which you became aware of any incorrectness or incompleteness described in the previous two Interrogatories.

22. If you contend that a person not a party to this action acted in such a manner as to cause or contribute to the damages suffered by Plaintiff, give a concise statement of the facts upon which you rely.

23. Identify each document, not produced to Plaintiff by you or any other party, that you believe is relevant to this case or that you intend to use at trial.

24. Identify each communication, occurring prior to the start of this litigation, between you and the Plaintiff or his agents concerning the subject matter of the Letter.

25. Please describe any acts or omissions of Plaintiff or his agents in dealing with any taxing authorities that, in your estimation, have caused, contributed to, or exacerbated the Plaintiff's damages.

26. Describe all procedures, customs, practices, checklists, standing orders, and other mechanisms, if any, in place as of August 9, 1984, by which you attempted to ensure that all opinion letters issued to clients by you would be accurate and complete.

27. For every expert whom you expect to call as an expert witness at trial, identify the expert, state the subject matter on which the expert is expected to testify, state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and produce any written report made by the expert concerning those findings and opinions.

28. Identify each document that you have been requested to produce but which document cannot be produced because it was inadvertently or intentionally misplaced, discarded, or destroyed.

29. For every insurance agreement under which any person carrying on an insurance business might be liable to satisfy part or all of a judgment that might be entered in this action, or to indemnify or reimburse for payments made to satisfy the judgment, identify each underwriter, agent, or broker involved in issuing the policy, state the policy number and the date that the policy became effective, and state the policy limits.

30. If, at the trial of this case, you will rely upon any oral or written communication or admission against interest by the party propounding these Interrogatories, please identify such communication or admission against interest.

Lloyd S. Mailman

Lloyd S. Mailman

Thomas A. Bowden

Thomas A. Bowden
1200 Mercantile Bank &
Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 385-4000
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I CERTIFY that on this 7th day of May, 1990, a copy of this document was mailed, postage prepaid, to each person listed below:

Janet M. Truhe, Esquire
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201

Attorneys for Defendants

Linda M. Schuett, Esq.
Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202

Attorneys for Third-Party Defendant

Thomas A. Bowden

G:07904009.IN1

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RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	
	*	Case No. 88102069/CL79995

ANSWERS TO
THIRD-PARTY DEFENDANT'S
INTERROGATORIES TO PLAINTIFF

Richard Shofer, Plaintiff, by his attorneys, files these Answers to the Third-Party Defendant's Interrogatories to Plaintiff.

a. The information supplied in these Answers is not based solely on the knowledge of the executing party, but includes the knowledge of the party, agents, representatives and attorneys unless privileged.

b. The word usage and sentence structure may be that of the attorney assisting in the preparation of these Answers and thus does not necessarily purport to be the precise language of the executing party.

ANSWERS

INTERROGATORY NO. 1: Identify in accordance with Instruction E the person or persons signing the Answers to these Interrogatories and in accordance with Instructions E and J any person or persons aiding in the answering of these Interrogatories.

ANSWER NO. 1:

a. Person answering these Interrogatories:

(1) Richard Shofer;

(2) Birth date: June 21, 1933. Age as of the date these interrogatories are being answered: 56;

(3) Present home address: 216 St. Dunstan's Road, Baltimore, Maryland 21212;

(4) Resident telephone number: 323-3337;

(5) Present business address: Catalina Enterprises, Inc., 5006 Liberty Heights Avenue, Baltimore, Maryland 21207;

(6) Business telephone number: 466-3337;

(7) President of Catalina Enterprises, Inc.;

b. Persons assisting in answering these interrogatories: None (other than counsel).

INTERROGATORY NO. 2: Identify in accordance with Instruction E all persons known to you to have personal knowledge of any allegation, fact, event, transaction, or occurrence on which you rely or which forms a basis for your Answers to these Interrogatories or which is in any other manner relevant to this case, including in your Answer an identification of the particular subject matter or areas of their knowledge.

ANSWER NO. 2:

a. The parties to this case;

b. Alan Marvel (middle name unknown);

(1) Age unknown;

(2) Home address unknown;

(3) Home telephone unknown;

(4) Business address: Grabush, Newman & Co., P.A., 515 Fairmount Avenue, Suite 400, Baltimore, Maryland 21204;

(5) Business telephone: 296-6300;

(6) Accountant;

(7) Subject matter or area of knowledge:

(a) Discovery of the tax consequences of the loans that Shofer took out from the pension plan;

(b) Grabush Newman's efforts to ascertain the tax consequences of the loans that Shofer took out from the pension plan;

(c) Tax laws pertaining to borrowing from pension plans;

c. Kenneth Larash;

(1) Age unknown;

(2) Home address unknown;

(3) Home telephone number unknown;

(4) Business address: Grabush, Newman & Co., P.A., 515 Fairmount Avenue, Suite 400, Baltimore, Maryland 21204;

(5) Business telephone: 296-6300;

(6) Accountant;

(7) Subject matter or area of knowledge:

(a) Discovery of the tax consequences of the loans that Shofer took out from the pension plan;

(b) Grabush Newman's efforts to ascertain the tax consequences of the loans that Shofer took out from the pension plan;

(c) Tax laws pertaining to borrowing from pension plans;

(d) Tax laws pertaining to individual income;

(e) Individual tax filings of Richard Shofer and Shofer's relationship with Grabush Newman over the years;

d. Pamela Beauchamp Sommers;

(1) Age: date of birth is November 9, 1950;

(2) Home address: 4612 Woodlea Avenue, Baltimore, Maryland, 21206;

(3) Home telephone: 352-2790;

(4) Business address unknown;

(5) Business telephone unknown;

(6) Occupation: Miscellaneous office procedures;

(7) Area of knowledge:

(a) Preparation of data for submission to Grabush Newman and Stuart Hack in regard to preparation of pension tax filings and other reports and documentation;

e. Sara "Sally" McHale;

(1) Age: 50

(2) Home address: 216 St. Dunstan's Road, Baltimore, Maryland 21212;

(3) Home telephone: 323-3337

(4) Business address: Catalina Enterprises, Inc., 5006 Liberty Heights Avenue, Baltimore, Maryland 21207

(5) Business telephone number: 466-3337

(6) Occupation: Bookkeeper

(7) Area of knowledge:

(a) Checkbook for pension plan;

f. Barry D. Berman, Esq.

(1) Age unknown;

(2) Home address unknown;

(3) Home telephone unknown;

(4) Business address: Weinberg & Green, 15th Floor, 100 South Charles Street, Baltimore, Maryland 21201;

(5) Business telephone: 332-8809;

(6) Occupation: lawyer;

(7) Area of knowledge:

(a) Advice given to Stuart Hack in August 1984 and thereafter regarding taxability of Shofer's contemplated loans;

g. Judith Reed:

(1) Age unknown;

(2) Home address unknown;

(3) Home telephone unknown;

(4) Last known business address: The Stuart Hack Company, 4623 Falls Road, Baltimore, Maryland 21209;

(5) Business telephone unknown;

(6) Occupation: lawyer;

(7) Area of knowledge:

(a) Efforts by Stuart Hack to write memoranda purporting to explain issues regarding the taxability of the loans from the pension plan;

h. Louis Omansky;

(1) Age unknown;

(2) Home address unknown;

(3) Home telephone unknown;

(4) Last known business address: The Stuart Hack Company, 4623 Falls Road, Baltimore, Maryland 21209;

(5) Business telephone unknown;

(6) Occupation: lawyer;

(7) Area of knowledge:

(a) Catalina Enterprises and Richard Shofer contacts with Stuart Hack Company regarding pension matters too numerous and detailed to describe adequately in an interrogatory answer;

i. Janelle Hardy;

(1) Age unknown;

(2) Home address unknown;

(3) Home telephone unknown;

(4) Last known business address: The Stuart Hack Company, 4623 Falls Road, Baltimore, Maryland 21209;

(5) Business telephone unknown;

(6) Occupation: unknown;

(7) Area of knowledge:

(a) Interaction between Catalina Enterprises and Richard Shofer and the Stuart Hack Company regarding pension plan matters;

j. Katherine Goldsmith, first name unknown;

(1) Age unknown;

(2) Home address unknown;

(3) Home telephone unknown;

(4) Last known business address: The Stuart Hack Company, 4623 Falls Road, Baltimore, Maryland 21209;

(5) Business telephone unknown;

(6) Occupation: unknown;

(7) Area of knowledge:

(a) Interactions among Catalina Enterprises and the Stuart Hack Company regarding pension plan matters;

k. Alan Vandendreissche;

(1) Age unknown;

(2) Home address unknown;

(3) Home telephone unknown;

(4) Last known business address: The Stuart Hack Company, 4623 Falls Road, Baltimore, Maryland 21209;

(5) Business telephone unknown;

(6) Occupation: unknown;

(7) Area of knowledge:

(a) The Stuart Hack Company's handling of the Catalina Enterprises pension plan;

l. Nicholas Giampetro;

(1) Age unknown;

(2) Home address unknown;

(3) Home telephone unknown;

(4) Business address: Giampetro & Tralins, P.C., 920 Providence Road, Suite 407, Towson, Maryland 21204;

(5) Business telephone unknown: 339-7466;

(6) Occupation: lawyer;

(7) Area of knowledge:

(a) Discovery of taxability of Shofer's loans from the pension plan;

m. George H. Hubschman;

(1) Age: Born in 1926;

(2) Home address unknown;

(3) Home telephone unknown;

(4) Business address: 5-6 Kongens Gade, Charlotte Amalie, St. Thomas, U.S. Virgin Islands

(5) Business telephone unknown;

(6) Occupation: lawyer;

(7) Area of knowledge:

(a) Purchase of condominiums in Virgin Islands;

n. Glen Wilson;

(1) Age unknown;

(2) Home address unknown;

(3) Home telephone unknown;

(4) Business address: Maryland National Bank, 10 Light Street, Baltimore, Maryland 21201

(5) Business telephone unknown:

(6) Occupation: loan officer;

(7) Area of knowledge:

(a) Financial transactions between Catalina Enterprises and Maryland National Bank, also involving Richard Shofer.

INTERROGATORY NO. 3: Identify in accordance with Instruction E any experts whom you propose to call as witnesses with regard to any matter or issue relating to this action, including in your Answer the nature of each expert's specialty, the subject matter of each expert's testimony, the substance of the findings and opinions to which each expert is expected to testify, the facts upon which each expert's opinions are based, and a summary of the grounds for each opinion. Attach to your Answers a copy of any and all expert opinions.

ANSWER NO. 3: Edward J. Kabala, Esq., The Waterfront, 200 First Avenue, Pittsburgh, Pennsylvania, 15222 will be called as an expert. Plaintiff hasn't any idea how old he is. Nor does Plaintiff know his home address and telephone number. His specialty is pension plan consulting. He is a lawyer. His business telephone number is (412) 391-1334. He will testify as to the duties of a pension plan consultant in accordance with the opinions and foundations set forth in several written reports that have already been produced along with these answers to interrogatories.

INTERROGATORY NO. 4: Describe in detail any facts or circumstances that may constitute an admission made by any of the

parties to this action, including in your Answer an identification in accordance with Instruction E of any document in which the purported admission was made.

ANSWER NO. 4: Plaintiff objects and refuses to answer this interrogatory on the grounds that it is overly burdensome, vague, and broad. Every single relevant thing that a party says or writes can come into evidence as an admission. There was a course of dealing among all the parties over many years. Thus, this interrogatory would require plaintiff to catalog every single piece of evidence in this case uttered by a party.

INTERROGATORY NO. 5: Identify in accordance with Instruction E all documents and other sources of information that you have used or consulted to answer these Interrogatories, whether or not information was actually obtained from those sources.

ANSWER NO. 5: Plaintiff objects and refuses to answer this interrogatory on the grounds that it is overly burdensome, vague, and broad. There are hundreds of documents in the files of the various parties in this case that Plaintiff's counsel has consulted in preparing this case. There was a course of dealing among all of the parties over many years. All of this knowledge permits answers to these interrogatories to be prepared. It would be absurd to require these documents to be cataloged. This would require dozens of man hours and would serve no legitimate discovery purpose, since access to all these documents is being granted to all counsel.

INTERROGATORY NO. 6: Identify in accordance with Instruction E all persons who have given written or recorded statements concerning the subject matter of this action, including in your Answer the date of each such statement, the identity of the person taking the statement, and the identity of its present custodian.

ANSWER NO. 6: None known at the time these interrogatory answers were prepared.

INTERROGATORY NO. 7: If you have any knowledge about or are aware of any written or oral statements concerning the subject matter of this action made by Grabush or any agent, representative, or employee of Grabush, describe the substance of each such statement, the place and date that the statement was made, the identify of the person making the statement, the identity of the person to whom it was made, and an identification in accordance with Instruction E of all documents concerning the statement.

ANSWER NO. 7: Plaintiff objects to and refuses to answer this interrogatory on the grounds that it is overly broad, vague, and burdensome. There was a course of dealing among all the parties over many years. They said many things to each other that may concern the subject matter of this action. Without a more focused interrogatory, Plaintiff is at a loss to determine what is requested here.

INTERROGATORY NO. 8: Describe in detail your policy with respect to retention and destruction of documents and business records, including in your Answer and identification in accordance with Instruction E of each document that sets forth any such policy or change in policy.

ANSWER NO. 8: Documents that are deemed important, in the judgment of Richard Shofer and/or Sara McHale, are retained as long as they seem important.

INTERROGATORY NO. 9: Identify in accordance with Instruction E any documents that refer or in any way relate to the subject matter of this action that are known to you to be missing, destroyed, or otherwise disposed of, including in your Answer the disposition made of each document, the date of disposition, whether such disposition was consistent with any policy you may have for the retention or destruction of documents, the identity of the person last known to have the documents in his or her possession or subject to his or her control, and the identity of each person you have reason to believe had knowledge of its contents or who received a copy of any such document.

ANSWER NO. 9: None.

INTERROGATORY NO. 10: Itemize in detail all damages you claim in this action.

ANSWER NO. 10:

A. Liabilities for taxes and associated charges.

1. Federal

a. 1984

(1)	Income taxes	$23,360.00
(2)	Penalties and interest	14,300.67

b. 1985

(1)	Income taxes	34,838.00
(2)	Penalties and interest	14,815.44

c. 1986

(1)	Income taxes	7,220.00
(2)	Penalties and interest	987.26

2. State of Maryland

a. 1984

(1)	Income taxes	5,597.00
(2)	Penalties and interest	4,177.00

b. 1985

(1)	Income taxes	6,032.00
(2)	Penalties and interest	3,618.97

c. 1986

(1)	Income taxes	3,557.00
(2)	Penalties and interest	1,924.85
	SUBTOTAL:	$120,428.19

B. Professional fees.

1. Accountants and pension consultants

a.	Grabush, Newman & Co., P.A.	6,965.60
b.	Prusky & Giampetro, P.C.	10,770.50
c.	The Stuart Hack Company	1,435.00
2.	Attorneys	
a.	Murphy & McDaniel	618.80
b.	Blum, Yumkas, Mailman, Gutman & Denick, P.A.	36,746.93
c.	Edward J. Kabala	3,904.50
d.	Jeffrey Robinson	800.00
	SUBTOTAL:	$61,241.33

C. Contingent liabilities.

1. Loss of deduction for interest paid on plan loans;
2. Disqualification of plan;
3. Cost of "undoing" prohibited transactions;
4. Excise tax on prohibited transactions.

D. Prejudgment interest.

To be calculated as of the date of trial upon the relevant tax, interest, and penalty amounts.

Explanatory Notes

1. Penalties on federal and state taxes include:
   a. Late filing penalty;

c. Underpayment of estimated tax penalty;

d. Delinquent fees.

2. Grabush, Newman & Co., P.A. charges include:

a. Initial discovery and investigation of taxable loans;

b. Legal research regarding taxability of loans;

c. Discussions with The Stuart Hack Company regarding taxability of loans;

d. Provision of background information and documents to Plaintiff's counsel.

3. Prusky & Giampetro, P.C. charges include:

a. Opinion letters as to taxability of loans;

b. Negotiations with taxing authorities regarding tax liens, payment schedules;

c. Provisions of background information and documents to Plaintiff's counsel.

4. The Stuart Hack Company charges include:

a. Preparation of opinion letter of August 9, 1984;

b. "Research";

c. Preparation of Judith Reed's memorandum of December 16, 1986;

d. Discussion of taxability of pension loans with representatives of Grabush, Newman & Co., P.A.

5. Charges for Murphy & McDaniel, Blum, Yumkas, Mailman, Gutman & Denick, P.A., Edward J. Kabala, and Jeffrey Robinson include research of applicable law, drafting of pleadings, extensive document review, preparation

for and conducting of discovery, attending conferences with experts and various witnesses, ongoing settlement conferences, and other tasks.

7. The amounts of damages shown are not necessarily current, are subject to daily change, and will be updated before trial of this matter and upon reasonable request.

I SOLEMNLY AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true.

Richard Shofer

BLUM, YUMKAS, MAILMAN, GUTMAN
& DENICK, P.A.

Lloyd S. Mailman

Thomas A. Bowden
1200 Mercantile Bank &
Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 385-4000
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I CERTIFY that on this 6th day of June, 1990, a copy of this document was mailed, postage prepaid, to each person listed below:

Janet M. Truhe, Esquire
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201

Attorneys for Defendants

Linda M. Schuett, Esq.
Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202

Attorneys for Third-Party Defendant

Thomas A. Bowden

G:07904009.ai2

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
	*	
Defendants	*	

* * * * * * * *

RESPONSE TO THIRD-PARTY
DEFENDANT'S FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS TO PLAINTIFF

Richard Shofer, Plaintiff, by Lloyd S. Mailman, Thomas A. Bowden, and Blum, Yumkas, Mailman, Gutman & Denick, P.A., his attorneys, in Response to the Third-Party Defendant's First Request for Production of Documents to Plaintiff, states:

DOCUMENTS TO BE PRODUCED

REQUEST NO. 1: Each document identified in any Answers to Interrogatories filed by you in this case.

RESPONSE NO. 1: These documents, if any, will be produced.

REQUEST NO. 2: Each document referred to in preparing any Answers to Interrogatories filed by you in this case.

RESPONSE NO. 2: These documents will be produced to the extent they are non-privileged.

REQUEST NO. 3: Each document that constitutes, evidences, refers, or relates to any admission of any of the parties concerning any issue in this case.

RESPONSE NO. 3: These documents will be produced.

REQUEST NO. 4: Each document that constitutes, evidences, refers, or relates to any of the allegations or issues raised in your Complaint.

RESPONSE NO. 4: These documents will be produced.

REQUEST NO. 5: Each document that constitutes, evidences, refers or relates to any reports by any expert whom you expect to call as a witness at trial.

RESPONSE NO. 5: These documents will be produced to the extent they are non-privileged.

REQUEST NO. 6: The most recent resume or curriculum vitae of each expert whom you expect to call as an expert witness at trial.

RESPONSE NO. 6: These documents will be produced when they are made available to Plaintiff.

REQUEST NO. 7: All notes, diagrams, or other documents prepared or reviewed in this case by each person whom you expect to call as an expert witness at trial.

RESPONSE NO. 7: These documents, if any, will be produced.

REQUEST NO. 8: All written or recorded statements by Grabush, or by any agent, representative, or employee of Grabush, concerning the subject matter of this action.

RESPONSE NO. 8: These documents will be produced.

REQUEST NO. 9: Each document that constitutes, evidences, refers or relates to your policy with respect to retention and destruction of documents and business records.

RESPONSE NO. 9: There are no such documents.

REQUEST NO. 10: Each document that constitutes, evidences, refers, or relates in any way to any correspondence or other communication between you and Grabush which refers or in any way relates to the subject matter of this action.

RESPONSE NO. 10: These documents will be produced.

REQUEST NO. 11: Each document that constitutes, evidences, refers, or relates in any way to any correspondence or other communication between you and The Stuart Hack Company or Stuart Hack ("Hack") which refers or in any way relates to the subject matter of this action.

RESPONSE NO. 11: These documents will be produced.

REQUEST NO. 12: Each document that constitutes, evidences, refers, or relates in any way to any correspondence or other communication between you and any other person which refers or in any way relates to the subject matter of this action.

RESPONSE NO. 12: These documents will be produced.

REQUEST NO. 13: All documents produced by you to Hack in connection with Hack's Request for Production of Documents.

RESPONSE NO. 13: These documents will be produced.

REQUEST NO. 14: An identification in accordance with Instruction G of any documents withheld from production on a claim of privilege, either in response to Hack's Request for Production of Documents or in response to this Request.

RESPONSE NO. 14: Plaintiff objects to and refuses to answer this Request because it is more properly an Interrogatory.

REQUEST NO. 15: Any other documents provided by you to Hack that refer or in any way relate to the subject matter of this action.

RESPONSE NO. 15: These documents will be produced.

REQUEST NO. 16: All documents produced by Hack to you in connection with your Requests for Production of Documents.

RESPONSE NO. 16: These documents will be produced.

REQUEST NO. 17: All documents provided by Hack to you that refer or in any way relate to the subject matter of this action.

RESPONSE NO. 17: These documents will be produced.

REQUEST NO. 18: All 1099's issued in connection with the Catalina Enterprises, Inc. Pension Plan from its inception to the present time.

RESPONSE NO. 18: Plaintiff objects to and refuses to produce documents in response to this Request on the grounds that it is vague, overbroad, and burdensome. Plaintiff does not know precisely what documents are requested. Nor does Plaintiff understand how such documents could lead to the discovery of admissible evidence.

REQUEST NO. 19: All documents not otherwise requested in this Request for Production of Documents upon which you rely or intend to rely to support any claim or allegation asserted by you in this case.

RESPONSE NO. 19: These documents will be produced.

BLUM, YUMKAS, MAILMAN, GUTMAN
& DENICK, P.A.

Lloyd S. Mailman

Thomas A. Bowden
1200 Mercantile Bank &
Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 385-4000
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I CERTIFY that on this 6th day of June, 1990, a copy of this document was mailed, postage prepaid, to each person listed below:

Janet M. Truhe, Esquire
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201

Attorneys for Defendants

Linda M. Schuett, Esq.
John J. Ryan, Esq.
Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202

Attorneys for Third-Party Defendant

Thomas A. Bowden

G: 07904009. RP3

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED 06/19/90

37

PRESIDING JUDGE .....

COURTROOM CLERK .....

STENOGRAPHER .....

ASSIGNMENT FOR MONDAY JULY 02, 1990 P19 3 30

CASE NUMBER - 88102069
CASE TITLE - SHOFER V STUART HACK COMPANY CL79993 CL
CATEGORY - CONTRACTS
PROCEEDING - MOTION HEARING - GENERAL

RYAN, JOHN J	DEFENSE ATTORNEY	625-3500
SCHUETT, LINDA M	DEFENSE ATTORNEY	625-3500
WHITNEY, DANIEL	DEFENSE ATTORNEY	539-5040
ZABEN, LEE	DEFENSE ATTORNEY	
BOWDEN, THOMAS A	PLAINTIFF ATTORNEY	385-4000
MAILMAN, LLOYD	PLAINTIFF ATTORNEY	539-4151

Δ's motion to dismiss count 4 of Complaint is granted and count 4 is dismissed w/ leave to amend.

TYPE OF PROCEEDING: (___ JURY) (___ NON-JURY) (___ OTHER)

DISPOSITION (CHECK ONE)

(___ SETTLED) (___ CANNOT SETTLE) (___ NEXT COURT DATE)

(___ VERDICT) (___ REMANDED) (___ NON PROS/DISMISSED)

(___ JUDGEMENT NISI) (___ ORDER/DECREE SIGNED) (___ OTHER)
PLEASE EXPLAIN:

(___ JUDGEMENT ABSOLUTE) (___ ORDER/DECREE TO BE SIGNED)

(___ POSTPONED) (___ MOTION GRANTED)

(___ SUB CURIA) (___ MOTION DENIED)

JUDGE SIGNATURE _____ DATE 7/2/90

DAVID ROSS
JUDGE

331.

II-E

FILED

RICHARD SHOFER	*	IN JUL 50 1990
Plaintiff	*	CIRCUIT COURT
v.	*	CIRCUIT COURT FOR FOR BALTIMORE CITY
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	
	*	

* * * * * * * * *

THIRD PARTY PLAINTIFF'S
ANSWERS TO INTERROGATORIES

Third party plaintiff, The Stuart Hack Company, by its attorneys, Janet M. Truhe, Lee B. Zaben, and Semmes, Bowen & Semmes, answers the third-party defendant's interrogatories as follows:

INTERROGATORY NO. 1

Identify in accordance with Instruction E the person or persons signing the Answers to these Interrogatories and in accordance with Instructions E and J any person or persons aiding in the answering of these Interrogatories.

ANSWER

Stuart Hack; 51; The Stuart Hack Company, 4623 Falls Road, Baltimore, Maryland 21209-4990; president, The Stuart Hack Company; pension consultant.

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

INTERROGATORY NO. 2

Identify in accordance with Instruction E all persons known to you to have personal knowledge of any allegation, fact, event, transaction, or occurrence on which you rely or which forms a basis for your Answers to these Interrogatories or which is in any other manner relevant to this case, including in your Answer an identification of the particular subject matter or areas of their knowledge.

ANSWER

The third-party plaintiff; the plaintiff; Harvey Newman; Ken Larash; Alan Marvel; Janelle Hardy (address unknown); Sara McHale; Barry D. Berman, Weinberg & Green, 15th Floor, 100 S. Charles Street, Baltimore, Maryland 21201; Alan Vandendreissche; Pamela Somers, 4612 Woodlea Avenue, Baltimore, Maryland 21206; Katherine Goldsmith (address will be supplied); Judith Reed (address unknown); Bernard Denick; Nicholas Giampetro; and Glenn Wilson, 10 Light Street, Baltimore, Maryland 21201. The third-party plaintiff refuses to answer the remainder of this interrogatory to the extent that it calls for facts known by each witness. See Siegel v. Green Acres Courts Apartments, Inc., Md. Discovery Op. at p. 109.

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Baltimore, Md. 21201

INTERROGATORY NO. 3

Identify in accordance with Instruction E any experts whom you propose to call as witnesses with regard to any matter or issue relating to this action, including in your Answer the nature of each expert's specialty, the subject matter of each expert's testimony, the substance of the findings and opinions to which each expert is expected to testify, the facts upon which each expert's opinions are based, and a summary of the grounds for each opinion. Attach to your Answers a copy of any and all expert reports.

ANSWER

This defendant has not consulted an expert whom it presently intends to call at the time of trial. When such an expert is consulted, counsel for the third-party defendant will be advised and furnished with a copy of any report rendered.

INTERROGATORY NO. 4

Identify in accordance with Instruction E all documents and other sources of information that you have used or consulted to answer these Interrogatories, whether or not information was actually obtained from those sources.

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Baltimore, Md. 21201

ANSWER

The Stuart Hack Company's complete file for the Catalina Enterprises, Inc. pension plan has been produced. The third-party plaintiff did not consult any other documents in the course of completing these answers to interrogatories.

INTERROGATORY NO. 5

Identify in accordance with Instruction E all persons who have given written or recorded statements concerning the subject matter of this action, including in your Answer the date of each such statement, the identity of the person taking the statement, and the identity of its present custodian.

ANSWER

None.

INTERROGATORY NO. 6

If you have any knowledge about or are aware of any written or oral statements concerning the subject matter of this action made by Grabush or any agent, representative, or employee of Grabush, describe the substance of each such statement, the place and date that the statement was made, the identity of the person making the statement, the identity of the person to whom it was made, and an identification in accordance with Instruction E of all documents concerning the statement.

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Baltimore, Md. 21201

ANSWER

With regard to written statements, see answer to interrogatory no. 5. The third-party plaintiff refuses to answer the remainder of this interrogatory for the reason that oral statements are not subject to discovery. See Caplan v. Zalis, Maryland Discovery Op. at p. 58.

INTERROGATORY NO. 7

Describe in detail your policy with respect to retention and destruction of documents and business records, including in your Answer an identification in accordance with Instruction E of each document that sets forth any such policy or change in policy.

ANSWER

With regard to existing clients, there is no destruction policy. Files are permanently retained. With regard to former clients, records are destroyed after six years. All records pertaining to the Catalina Enterprises, Inc. pension plan which is the subject matter of this litigation have been retained and made available for inspection.

INTERROGATORY NO. 8

Identify in accordance with Instruction E any documents that refer or in any way relate to the subject matter of this action that are known to you to be missing, destroyed, or otherwise disposed of, including in your

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Answer the disposition made of each document, the date of disposition, whether such disposition was consistent with any policy you may have for the retention or destruction of documents, the identity of the person last known to have the document in his or her possession or subject to his or her control, and the identity of each person you have reason to believe had knowledge of its contents or who had received a copy of any such document.

ANSWER

None.

INTERROGATORY NO. 9

Describe in detail the factual basis for your Third-Party Claim against Grabush.

ANSWER

The third-party plaintiff is not required to "describe in detail" the factual basis of its claim against Grabush. The following is a concise statement of the facts upon which the third-party plaintiff relies in contending that Grabush is liable to Mr. Shofer for damages in this case. The plaintiff had retained Grabush to prepare his personal federal and state income tax returns. Mr. Shofer's 1984 and 1985 tax returns were incorrectly prepared by Grabush in that they failed to report certain income which Grabush knew the plaintiff had received during each of those years when he borrowed money from his pension

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plan. In addition, as the plaintiff's tax advisors, Grabush should have advised him of the taxability of loans taken from his pension plan. Grabush also failed to advise Mr. Shofer that he was under no legal duty to amend his tax returns.

INTERROGATORY NO. 10

Describe in detail the factual basis for the allegations in paragraphs 4 and 5 of the Third-Party Claim that plaintiff's damages were caused entirely or solely by the negligence of Grabush.

ANSWER

Mr. Shofer's damages were caused by his own negligence as well as by the negligence of Grabush.

INTERROGATORY NO. 11

Describe in detail the factual basis for the allegations in paragraph 4 of the Third-Party Claim that Grabush failed to properly prepare the plaintiff's personal federal and state income tax returns for the years in question.

ANSWER

See answer to interrogatory no. 9.

INTERROGATORY NO. 12

Describe in detail the factual basis for your claim in paragraph 6 of the Third-Party Claim for counsel fees, expenses, and interest, including in your Answer an

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Baltimore, Md. 21201

itemization of the counsel fees, expenses, and interest sought.

ANSWER

No such claim is being made at this time.

INTERROGATORY NO. 13

Itemize in detail all damages you claim in this action against Grabush.

ANSWER

Grabush is liable for all damages referenced in plaintiff's answer to third-party defendant's interrogatory 10.

INTERROGATORY NO. 14

State your belief as to whether Barry Berman is responsible for all or any part of plaintiff's damages, including in your Answer the basis for that belief.

ANSWER

No such contention is being made at this time.

INTERROGATORY NO. 15

Describe in detail any agreements between you and Barry Berman and/or his law firm that refer or in any way relate to the subject matter of this suit, including but not limited to any agreements relating to the damages sought in this case.

ANSWER

None.

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Baltimore, Md. 21201

INTERROGATORY NO. 16

State whether it was your responsibility to issue Forms W-2P and Forms 1099, including but not limited to Forms 1099-R and 1099-MISC, upon the happening of taxable events relating to the Catalina Enterprises, Inc. Pension Plan including in your Answer all reasons for the response given.

ANSWER

The Stuart Hack Company customarily issues the forms referred to in interrogatory no. 16 when there is a distribution as a result of severance of employment. Where there is any issue as to whether an action constitutes a distribution, the Stuart Hack Company traditionally defers to the client's own counsel before issuing such forms.

INTERROGATORY NO. 17

State whether you have ever advised a client not to amend a tax return on the ground that the statute of limitations had run, including in your Answer a detailed description of the circumstances surrounding any such advice.

ANSWER

In late 1986 this defendant raised the issue of whether Mr. Shofer had a duty to amend any of the tax returns for the years in question. Mr. Hack raised this issue with Mr. Shofer, his accountants who prepared his tax

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Baltimore, Md. 21201

returns, and Mr. Shofer's tax attorney. The decision to amend these returns was left entirely to Mr. Shofer, his accountants, and his attorney. The third-party plaintiff objects to the remainder of the interrogatory to the extent that it seeks information pertaining to clients other than the plaintiff for the reason that such information is irrelevant to any issue in this case. Without waiving this objection, the third party plaintiff was involved in many other situations where he raised this issue with a client's tax attorney and/or accountant for their consideration. The third party plaintiff never prepared any client's return and did not hold himself out as a tax advisor.

INTERROGATORY NO. 18

State whether you have ever advised a client to amend a tax return even though the statute of limitations had run, including in your Answer a detailed description of the circumstances surrounding any such advice.

ANSWER

The third-party plaintiff refuses to answer this interrogatory on the grounds that it is irrelevant to any issue in this litigation.

INTERROGATORY NO. 19

State whether you have ever advised a client to amend a tax return prior to the running of the statute of limitations, including in your Answer a detailed

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Baltimore, Md. 21201

description of the circumstances surrounding any such advice.

ANSWER

See answer to interrogatory no. 17.

INTERROGATORY NO. 20

State your understanding as to the length of the statute of limitations applicable to the loans taken by Shofer in 1984, 1985, and 1986.

ANSWER

Three years or six years depending upon the percentage of income being unreported each year.

Janet M. Truhe
Janet M. Truhe

Lee B. Zaben
Lee B. Zaben

Semmes, Bowen & Semmes
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201
(301) 539-5040

Attorneys for Defendants,
The Stuart Hack Company

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

I, Stuart Hack, President of The Stuart Hack Company, do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing document are true and correct.

THE STUART HACK COMPANY

By _____
Stuart Hack

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of July, 1990, a copy of the foregoing Third-Party Plaintiff's Answers to Interrogatories was mailed to Thomas A. Bowden, Esquire, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201; and Linda Schuett, Esquire, Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

_____
Janet M. Truhe

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& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

FILED

JUL 30 1990

CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	
	*	

* * * * * * * * *

DEFENDANT STUART HACK COMPANY'S
ANSWERS TO INTERROGATORIES

Defendant, The Stuart Hack Company, by its attorneys, Janet M. Truhe, Lee B. Zaben, and Semmes, Bowen & Semmes, answers the plaintiff's interrogatories as follows:

INTERROGATORY NO. 1

State in detail the factual basis for your third defense that plaintiff's claims are barred by the statute of limitations.

ANSWER

No such contention is being made at this time.

INTERROGATORY NO. 2

State in detail the factual basis for your fourth defense that plaintiff's damages were caused by his own sole or contributory negligence.

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Baltimore, Md. 21201

ANSWER

This defendant is not required to "state in detail" the factual basis of his claim. The following is a concise statement of the facts upon which this defendant relies in contending that the plaintiff's damages were caused by his own negligence. In August of 1984 the plaintiff asked Mr. Hack whether he could borrow money from his pension plan. Mr. Hack advised the plaintiff that he could borrow from his pension plan. At no time did the plaintiff ever advise Mr. Hack that he was going to in fact take a loan nor did he ever advise Mr. Hack how much money he wanted to borrow, for what purpose, or whether he was going to borrow money on more than one occasion. In addition, Mr. Shofer never consulted with Mr. Hack about the proper procedure for taking a loan from his pension plan. Mr. Shofer then proceeded to borrow nine times from his pension plan for a total of $375,000 over the course of the next three years without ever informing Mr. Hack or checking back with him to ascertain any relevant tax law changes, pension plan changes, or other circumstances affecting the legality of these loans. Moreover, Mr. Shofer failed to submit timely plan data to Mr. Hack which would have revealed the fact of these loans.

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Baltimore, Md. 21201

INTERROGATORY NO. 3

State in detail the factual basis for your fifth defense that plaintiff assumed the risk of the damages he suffered.

ANSWER

This defendant is not required to "state in detail" the factual basis of its claim. The following is a concise statement of the facts upon which this defendant relies in contending that the plaintiff's damages were caused by his own negligence. See answer to interrogatory no. 2. In addition, the plaintiff assumed the risk of his damages in that he voluntarily amended his 1984, 1985, and 1986 tax returns when he was under no legal obligation to do so.

INTERROGATORY NO. 4

State in detail the factual basis for your sixth defense that plaintiff is estopped to complain about any advice rendered by the defendants.

ANSWER

This defendant is not required to "state in detail" the factual basis of its claim. See answers to interrogatories 2 and 3.

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Baltimore, Md. 21201

INTERROGATORY NO. 5

State in detail the factual basis for your seventh defense that plaintiff has waived any claim arising out of advice rendered by the defendants.

ANSWER

This defendant is not required to "state in detail" the factual basis of its claim. See answers to interrogatories 2 and 3.

INTERROGATORY NO. 6

State in detail the factual basis for your eighth defense that plaintiff's claims are barred by laches.

ANSWER

No such contention is being made at this time.

INTERROGATORY NO. 7

State in detail the factual basis for your tenth defense that plaintiff's reliance on advice rendered by the defendants was unjustified when plaintiff proceeded to borrow from the plan in 1984, 1985, and 1986.

ANSWER

This defendant is not required to "state in detail" the factual basis of his claim. See answers to interrogatories 2 and 3.

INTERROGATORY NO. 8

Identify all persons with personal knowledge of the events at issue in this case.

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ANSWER

The third-party plaintiff; the plaintiff; Harvey Newman; Ken Larash; Alan Marvel; Janelle Hardy (address unknown); Sara McHale; Barry D. Berman, Weinberg & Green, 15th Floor, 100 S. Charles Street, Baltimore, Maryland 21201; Alan Vandendreische; Pamela Somers, 4612 Woodlea Avenue, Baltimore, Maryland 21206; Katherine Goldsmith (address will be supplied); Judith Reed (address unknown); Bernard Denick; Nicholas Giampetro; and Glenn Wilson, 10 Light Street, Baltimore, Maryland 21201. The third-party plaintiff refuses to answer the remainder of this interrogatory to the extent that it calls for facts known by each witness. See Siegel v. Green Acres Courts Apartments, Inc., Md. Discovery Op. at p. 109.

INTERROGATORY NO. 9

Briefly state the substance of the knowledge held by each person identified in the previous interrogatory.

ANSWER

This defendant refuses to answer interrogatory no. 9. See Siegel v. Green Acres Courts Apartments, Inc., Md. Discovery Op. at p. 109.

INTERROGATORY NO. 10

If on the basis of your own knowledge you disagree with the factual accuracy of any of plaintiff's

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answers to interrogatories in this matter, please state the factual basis for said disagreement.

ANSWER

This defendant refuses to answer interrogatory no. 10 because it seeks the disclosure of impeachment evidence which is not subject to discovery. See Stone v. Marine Transport Lines, Inc., 23 F.R.D. 222 (D. Md. 1959).

INTERROGATORY NO. 11

If on the basis of your own knowledge you disagree with the factual accuracy of any of the statements in plaintiff's Amended Complaint, as amended, please state the factual basis for said disagreement.

ANSWER

See answer to interrogatory no. 10.

INTERROGATORY NO. 12

Describe in detail the research, study, or investigation that you performed prior to mailing the August 9, 1984 letter to Richard Shofer, directed at ensuring the completeness and accuracy of the advice you were giving.

ANSWER

This defendant has testified at length as to the investigation he performed prior to mailing the August 9, 1984 letter in his deposition of March 16, 1989 beginning

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at p. 170. Defendant would incorporate this testimony herein by reference.

INTERROGATORY NO. 13

Identify each person with whom you discussed the subject matter of the letter prior to mailing it.

ANSWER

See answer to interrogatory no. 12.

INTERROGATORY NO. 14

Describe in detail the research, study, or investigation that you performed after mailing the letter to Richard Shofer, directed at determining the completeness and accuracy of the advice you had given.

ANSWER

This defendant has testified at length as to the investigation he performed after mailing the letter in his deposition of August 18, 1989 beginning at p. 378. Defendant would incorporate this testimony herein by reference.

INTERROGATORY NO. 15

Identify every person from whom you have a signed statement regarding the matters at issue in this case.

ANSWER

None.

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INTERROGATORY NO. 16

If there came a time when you concluded that part or all of the advice you gave in the letter was incorrect or incomplete, describe how you became aware of said incorrectness or incompleteness, beginning with your first awareness that the particular problem might exist.

ANSWER

The letter of August 9, 1984 accurately answered Mr. Shofer's question with regard to loans from his pension plan. This defendant denies that the letter was inaccurate or incomplete in any way on this issue of rights by a participant to take a loan from his pension plan.

INTERROGATORY NO. 17

Identify every person who ever suggested to you that the letter might be inaccurate or incomplete in any respect, even if you eventually concluded that such suggestion was itself incorrect or unfounded.

ANSWER

See answer to interrogatory no. 16. Alan Marvel and Nicholas Giampetro.

INTERROGATORY NO. 18

Briefly describe the nature of each suggested inaccurate or incompleteness in the previous interrogatory.

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ANSWER

See deposition of Stuart Hack at p. 378 (Aug. 18, 1989).

INTERROGATORY NO. 19

If there came a time when you concluded that the letter was in any respect inaccurate or incomplete, describe in detail your efforts, if any, directed at informing plaintiff, or his employees or agents, of said inaccuracy or incompleteness.

ANSWER

See answer to interrogatory no. 16.

INTERROGATORY NO. 20

If there came a time when you concluded that the letter was in any respect inaccurate or incomplete, describe in detail your efforts, if any, directed toward ensuring that plaintiff was compensated for any loss or injury he or others may have sustained as a result of said inaccuracy or incompleteness.

ANSWER

See answer to interrogatory no. 16.

INTERROGATORY NO. 21

State each date upon which you became aware of any incorrectness or incompleteness described in the previous two interrogatories.

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ANSWER

See answer to interrogatory no. 16.

INTERROGATORY NO. 22

If you contend that a person not a party to this action acted in such a manner as to cause or contribute to the damages suffered by plaintiff, give a concise statement of the facts upon which you rely.

ANSWER

No such contention is being made at this time.

INTERROGATORY NO. 23

Identify each document, not produced to plaintiff by you or any other party, that you believe is relevant to this case or that you intend to use at trial.

ANSWER

None.

INTERROGATORY NO. 24

Identify each communication, occurring prior to the start of this litigation, between you and the plaintiff or his agents concerning the subject matter of the letter.

ANSWER

This defendant has testified extensively as to the communications between himself, the plaintiff, and plaintiff's agents concerning the subject matter of the letter at his depositions on March 16, 1989, April 21, 1989, and August 18, 1989.

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INTERROGATORY NO. 25

Please describe any acts or omissions of plaintiff or his agents in dealing with any taxing authorities that, in your estimation, have caused, contributed to, or exacerbated the plaintiff's damages.

ANSWER

This defendant is not required to answer this interrogatory except with respect to such acts or omissions about which plaintiff has advised this defendant. The plaintiff's damages were caused when the plaintiff amended his 1984 and 1985 tax returns when he was under no legal obligation to do so. In addition, the plaintiff has failed to pay back each of the loans he took from his pension plan and has not paid the additional taxes which he was assessed during the years in question. The plaintiff also failed to take loans from his pension plan in accordance with proper procedure.

INTERROGATORY NO. 26

Describe all procedures, customs, practices, check lists, standing orders, and other mechanisms, if any, in place as of August 9, 1984, by which you attempted to ensure that all opinion letters issued to clients by you would be accurate and complete.

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ANSWER

This defendant has testified at length as to the issues raised in interrogatory no. 26 and would refer the plaintiff to his deposition testimony of March 16, 1989.

INTERROGATORY NO. 27

For every expert whom you expect to call as an expert witness at trial, identify the expert, state the subject matter on which the expert is expected to testify, state the substance of the findings and the opinions to which the expert is expected to testify and the summary of the grounds for each opinion, and produce any written report made by the expert concerning those findings and opinions.

ANSWER

This defendant has not consulted an expert whom it presently intends to call at the time of trial. When such an expert is consulted, counsel for the plaintiff will be advised and furnished with a copy of any report rendered.

INTERROGATORY NO. 28

Identify each document that you have been requested to produce but which document cannot be produced because it was inadvertently or intentionally misplaced, discarded, or destroyed.

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ANSWER

None.

INTERROGATORY NO. 29

For every insurance agreement under which any person carrying on an insurance business might be liable to satisfy part or all of a judgment that might be entered in this action, or to indemnify or reimburse for payments made to satisfy the judgment, identify each underwriter, agent, or broker involved in issuing the policy, state the policy number and the date that the policy became effective, and state the policy limits.

ANSWER

International Surplus Lines Insurance Company; policy no. 524084224; policy period - 11/1/86 - 11/1/87; $500,000.

INTERROGATORY NO. 30

If, at the trial of this case, you will rely upon any oral or written communication or admission against interest by the party propounding these interrogatories, please identify such communication or admission against interest.

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ANSWER

This defendant refuses to answer interrogatory no. 30 for the reason that it calls for a legal conclusion.

Janet M. Truhe
Janet M. Truhe

Lee B. Zaben
Lee B. Zaben

Semmes, Bowen & Semmes
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201
(301) 539-5040

Attorneys for Defendants,
The Stuart Hack Company

I, Stuart Hack, President of The Stuart Hack Company, do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing document are true and correct.

THE STUART HACK COMPANY

By _____
Stuart Hack

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& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of July, 1990, a copy of the foregoing Third-Party Plaintiff's Answers to Interrogatories was mailed to Thomas A. Bowden, Esquire, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201; and Linda Schuett, Esquire, Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

Janet M. Truhe

Janet M. Truhe

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Baltimore, Md. 21201

part 2 of 2

FILED

AUG 1 1990

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	
	*	

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* * * * * * * *

PLAINTIFF'S INTERROGATORIES TO STUART HACK

Richard Shofer, Plaintiff ("Shofer"), by Lloyd S. Mailman, Thomas A. Bowden, and Blum, Yumkas, Mailman, Gutman & Denick, P.A., his attorneys, propounds the following Interrogatories to Stuart Hack, Defendant.

Definitions

"You" means Stuart Hack, all his employees, servants, agents, and attorneys, and all other persons acting or purporting to act on his behalf.

The "Company" means The Stuart Hack Company, all its officers, directors, employees, servants, agents, and attorneys, all its predecessors and successors, and all other persons acting or purporting to act on its behalf.

The "Letter" means the letter dated August 9, 1984 (attached as Exhibit A) from you to Richard Shofer.

The "Reed Memo" means the memorandum dated December 16, 1986 from Judith Reed to you.

"Governing Law" means all applicable statutes, regulations, and other laws applying to the Plan during the month of August, 1984, unless otherwise noted.

The "Code" means the Internal Revenue Code as it was in force during the month of August, 1984, unless otherwise noted.

"Section 72(p)" means Section 72(p) of the Code.

"Shofer" means Richard Shofer, Plaintiff.

The "Plan" means the Catalina Enterprises, Inc. Pension Plan in all of its various forms, from its inception to the present.

The "Plan Documents" means the plan documents of the Catalina Enterprises, Inc. Pension Plan in all of its various forms, from its inception to the present.

The "Restated Plan" means the Plan in all its various forms including and following the 1984 Amending Restatement.

The "Original Plan" means the Plan in all its various forms from its inception but prior to the Restated Plan.

The "Voluntary Account" means Shofer's voluntary account in the Plan.

The "Employer Account" means Shofer's employer account in the Plan.

"Plan Loan" means a loan transaction in which a participant, such as Shofer, receives cash from the Plan and the Plan uses as collateral the participant's account(s) in the Plan.

"Third-Party Loan" means a loan transaction in which a participant, such as Shofer, receives cash from a third-party lender who accepts as collateral the participant's account(s) in the Plan.

"Communication" means any transmittal of information, in any form whatever, from one or more persons to one or more other persons.

"Document" means every tangible thing from which information can be obtained, perceived, or reproduced, and includes any written, recorded, or graphic matter, however produced or reproduced and whether or not now in existence, and also includes the original, all file copies, all other copies no matter how prepared, and all drafts prepared in connection with such document, whether used or not, and further includes but is not limited to papers; books; records; catalogs; price lists; pamphlets; periodicals; letters; correspondence; scrap books; note books; bulletins; circulars; forms; notices; post cards; telegrams; deposition transcripts; contracts; agreements; leases; reports; studies; working papers; charts; proposals; graphs; sketches; diagrams; indexes; maps; analyses; statistical records; reports; results of investigations; reviews; ledgers; journals; balance sheets; accounts; books of accounts; invoices; vouchers; purchase orders; receipts; expense accounts; cancelled checks; bank checks; statements; sound and tape recordings; videotapes; computer disks; electrical recordings; magnetic recordings; memoranda (including any type or form of notes memoranda or sound recordings of personal thoughts, recollections, or reminders, or of telephone or other conversations, or of acts, activities, agreements, meetings, or conferences); photostats; microfilms;

instruction lists or forms; computer printouts or other computed data; minutes of director or committee meetings; inter-office or intra-office communications; diaries; calendar on desk pads; stenographers' notes; appointment books; and other papers or matters similar to any of the foregoing, however denominated, whether or not received by you or prepared by you for your own use or transmittal. If a document has been prepared in several copies or additional copies have been made, and the copies are not identical (or, by reason of subsequent modification or notation, are no longer identical), each nonidentical copy is a separate "document."

"Person" includes the plural as well as the singular and means any natural person, partnership, firm, association, corporation, business, joint venture, government or government agency, or any other form of private or public entity.

"Identify" or "identity" used with reference to an individual or party to a contract means to state his, her, or its full name and last known address and telephone number.

"Identify" or "identity" used with reference to a corporation, partnership, joint venture, unincorporated association, or other entity other than a natural person means to state the organization's name, address, and telephone number and the resident agent's name and address.

"Identify" or "identity" used with reference to a document means to state the:

a. date of the document;

b. identity of the author of the document;

c. identity of each person to whom it was addressed or distributed;

d. the type of document (e.g. letter, memorandum, telegram, chart, note, application, etc.) or other means of identification;

e. the document's present location and custodian.

If any such document is no longer in your possession or subject to your control, state what disposition was made of it. NOTE: The person to whom these Interrogatories are directed may, in lieu of submitting the information listed in this paragraph, make available for inspection and copying by the party propounding these Interrogatories the documents requested to be identified.

"Identify" or "identity" used with reference to a communication, conference, or meeting means to state:

a. the date, time, and location of the communication,

conference or meeting;

b. the identity of all parties to, and persons present during, the communication, conference or meeting;

c. the subject matter of the communication, conference or meeting, and the general substance of what was said and/or transpired.

Instructions

A. These Interrogatories are of an ongoing nature, and should you acquire additional information responsive to these Interrogatories, the answers shall be updated to provide the additional information.

B. If a privilege not to answer is claimed, identify each matter as to which the privilege is claimed, the nature of the privilege, and the legal and factual basis for each such claim.

C. If a refusal to answer an Interrogatory is stated on the grounds of burdensomeness, identify the number and nature of documents needed to be searched, the location of the documents, and the number of person hours and costs required to con duct the search.

D. Answer each Interrogatory on the basis of your entire knowledge, including information in the possession of your officers, directors, employees, consultants, representatives, agents, attorneys, subsidiaries, and subcontractors.

E. If any Interrogatory cannot be answered in full, answer to the extent possible and specify reasons for inability to answer.

Interrogatories

1. State your full name, your address, your Social Security Number, your marital status, and your date and place of birth.

2. For every crime, other than a minor traffic violation, of which you have every been convicted, or to which you ever pleaded guilty, state the date nature of the crime and state the case number and the court in which the case was litigated.

3. Identify each person who gave a report in the ordinary

course of business concerning the events or circumstances at issue in this case.

4. State the reasons why you were unable to admit or deny Plaintiff's Request for Admission No. 3, the text of which is: "The text of Exhibit B (attached) contains the language of Section 72(p) of the as it was in effect during the month of August, 1984."

5. Give a concise statement of your purpose(s) in writing the Letter.

6. If you contend that Section 72(p), the Code, or Governing Law contained or implied any distinction between voluntary accounts and employer accounts that was relevant to the issues you addressed in the Letter, please state the basis for your contention.

7. If you deny that the reference in Section 72(p)(1)(A) to "a qualified employer plan" included both the Voluntary Account and the Employer Account, please state the basis for your denial.

8. Please state the basis for your denial of Plaintiff's Request for Admission No. 41, the text of which is: "You did not read any portion of Section 72(p) for the purpose of preparing, drafting, or finalizing the Letter."

9. Please describe the collateral that is or was normally utilized to provide the type of "collateral in addition to the value of the account itself" to which you referred in Paragraph 2, Sentence 3 of the Letter.

10. Please give a concise statement, referring where

appropriate to Section 72(p), the Code, and Governing Law, of the basis for the opinions stated in Paragraph 3, Sentence 1 of the Letter.

11. Please give a concise statement, referring where appropriate to Section 72(p), the Code, and Governing Law, of the basis for the opinions stated in Paragraph 3, Sentence 2 of the Letter.

12. Please give a concise statement, referring where appropriate to Section 72(p), the Code, and Governing Law, of the basis for the opinions stated in Paragraph 3, Sentence 3 of the Letter.

13. Please give a concise statement, referring where appropriate to Section 72(p), the Code, and Governing Law, of the basis for the opinions stated in Paragraph 3, Sentence 4 of the Letter.

14. Please give a concise statement, referring where appropriate to Section 72(p), the Code, and Governing Law, of the basis for the opinions stated in Paragraph 3, Sentence 5 of the Letter.

15. Please give a concise statement, referring where appropriate to Section 72(p), the Code, and Governing Law, of the basis for the opinions stated in Paragraph 4, Sentence 1 of the Letter.

16. Please give a concise statement, referring where appropriate to Section 72(p), the Code, and Governing Law, of the basis for the opinions stated in Paragraph 4, Sentence 2 of the Letter.

17. Please give a concise statement, referring where appropriate to Section 72(p), the Code, and Governing Law, of the basis for the opinions stated in Paragraph 4, Sentence 3 of the Letter.

18. Please give a concise statement, referring where appropriate to Section 72(p), the Code, and Governing Law, of the basis for the opinions stated in Paragraph 4, Sentence 4 of the Letter.

19. Please give a concise statement, referring where appropriate to Section 72(p), the Code, and Governing Law, of the basis for the opinions stated in Paragraph 4, Sentence 5 of the Letter.

20. When you wrote the Letter, did you foresee that Shofer might rely on the opinion stated in Paragraph 4, Sentence 4 in entering into future loan transactions?

21. State the factual basis for your denial of Request for Admission No. 69, the text of which is: "Neither you nor the Company ever advised Shofer, orally or in writing, to consult with you in the event that he decided to enter into any of the types of loan transactions discussed in the Letter."

22. State the basis for your denial of Request for Admission No. 78, the text of which is: "You knew on August 9, 1984 that the balance in the Voluntary Account exceeded $200,000.00."

23. If you believe it would have been unreasonable for Shofer to conclude from the Letter in August, 1984 that no adverse tax consequences would flow from the types of loan

transactions discussed in the Letter, state the reasons for your belief.

24. State the factual basis for your denial of Request for Admission No. 83, the text of which is: "Neither you nor the Company advised Shofer in August, 1984, that the loan transactions discussed in the Letter, if entered into by Shofer, could possible lead to the disqualification of the Plan."

25. If you agree with the contention of The Stuart Hack Company in its answer to Interrogatory No. 25 propounded by Plaintiff, stating that Plaintiff's damages were caused when Plaintiff amended his 1984 and 1985 tax returns when he was under no legal obligation to do so, give a concise statement of the basis for said agreement.

26. If you agree with the contention of The Stuart Hack Company in its answer to Interrogatory No. 25 propounded by Plaintiff, stating that Plaintiff failed to take loans from his pension plan in accordance with proper procedure, identify each proper procedure with which Plaintiff failed to comply.

27. For every insurance agreement under which any person carrying on an insurance business might be liable to satisfy part or all of a judgment that might be entered in this action, or to indemnify or reimburse for payments made to satisfy the judgment, identify each underwriter, agent, or broker involved in issuing the policy, state the policy number and the date that the policy became effective, and state the policy limits.

Lloyd S. Mailman

Thomas A. Bowden
1200 Mercantile Bank &
Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 385-4000
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I CERTIFY that on this 31st day of July, 1990, a copy of this document was mailed, postage prepaid, to each person listed below:

Janet M. Truhe, Esquire
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201

Attorneys for Defendants

Linda M. Schuett, Esq.
Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202

Attorneys for Third-Party Defendant

Thomas A. Bowden

G:07904009.IN2

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	Case No. 88102069/CL79993

* * * * * * * *

THE STUART HACK COMPANY, et al.	*
Third Party Plaintiffs	*
v.	*
GRABUSH, NEWMAN & CO., P.A.	*
Third Party Defendant	*

* * * * * * * * * * * * *

SECOND AMENDED COMPLAINT

Richard Shofer, Plaintiff ("Shofer"), by Lloyd S. Mailman, Thomas A. Bowden, and Blum, Yumkas, Mailman, Gutman & Denick, P.A., files this Second Amended Complaint.

Facts Common to All Counts

1. The Stuart Hack Company is a corporation organized under the law of Maryland which holds itself out as professional actuaries and consultants who provide professional advice to trustees and beneficiaries of pension plans as to the proper use of assets of such plans.

2. Stuart Hack is an attorney licensed to practice in Maryland and is an employee of the Stuart Hack Company and holds himself out as a professional actuary and consultant who provides professional advice to trustees and beneficiaries of pension plans as to the proper use of assets of such plans.

3. Richard Shofer ("Shofer") is the sole stockholder and president of Catalina Enterprises, Inc. t/a Crown Motors ("Catalina").

4. Catalina Enterprises, Inc. Pension Plan (the "Plan") is a qualified pension plan established by Defendants in 1971 for employees of Catalina.

5. At all relevant times, Shofer was the Plan's sole trustee.

6. From 1971 through 1985, The Stuart Hack Company prepared certain of the Plan's annual federal returns as well as its statements to participants.

7. During the course of their relationship with Catalina, Shofer, and the Plan, Defendants held themselves out as expert in the tax aspects of pension planning and frequently rendered advice in this area.

8. Based on this course of dealing and on Defendants' representations as to their expertise, Shofer reasonably expected that any possible tax consequences resulting from their advice would be brought to his attention by Defendants.

9. By December 31, 1983, Shofer had accumulated $209,415.95 in his own voluntary account in the Plan.

10. At some time prior to August 9, 1984, Shofer sought Defendants' advice as to whether it would be advisable to borrow money from the Plan or to use the Plan's assets as collateral for a loan.

11. Defendants responded with an opinion letter dated August 9, 1984, stating that Shofer could borrow up to 100% of

his voluntary account and making no mention of any adverse tax consequences of such a transaction.

12. Reasonably relying on this advice, and not knowing or suspecting that a loan advance could generate liability for income tax, excise tax, or other liabilities, or constitute a premature distribution, or expose the plan to disqualification, Shofer proceeded to borrow $260,000.00 from his voluntary account in the Plan in 1984, $80,000.00 in 1985, and $35,000.00 in 1986.

13. Because these borrowings were in fact taxable to Shofer as income and also constituted prohibited transactions and premature distributions, Shofer incurred and continues to incur substantial federal and state tax liabilities and risk of additional liabilities as a result of these transactions.

14. Shofer has also incurred expenses for accountants, pension consultants, and other professionals to rectify his tax filings.

15. If he had been properly advised by Defendants as to the tax consequences of these transactions, Shofer would not have borrowed from his voluntary account in the Plan.

16. The Stuart Hack Company continued to render incorrect advice concerning the loan transactions as late as December 16, 1986, when The Stuart Hack Company issued a memorandum attempting to persuade Shofer's accountants that the risk of tax liability was very low.

COUNT I

(Negligence)

17. Plaintiff incorporates paragraphs 1 through 16 in this count.

18. At all times relevant to the allegations of this Complaint, Defendants held themselves out to the public in general, and represented themselves to Shofer in particular, as possessing that degree of knowledge, experience, skill, and judgment in the area of advising as to the tax consequences of transactions involving voluntary accounts in pension funds that was to be expected of a reasonably competent actuary and consultant in such business in Maryland in 1984.

19. Defendants owed a duty of reasonable care to Shofer to provide him with reasonably competent advice as to the tax consequences of borrowing from his voluntary account in the Plan.

20. Defendants breached their duty to Shofer by advising him that he could borrow up to 100% of his voluntary account in the Plan without incurring tax liability or endangering the qualification of the plan, when a reasonably competent actuary and professional in this area would have known and advised Shofer he could not legally do so.

21. As a direct and proximate result of the acts and omissions of Defendants Shofer has incurred, and will in the future incur additional income tax, excise tax, interest, penalties, attorney's fees, accountant's fees, and other expenses and damages he would otherwise not have incurred.

WHEREFORE, plaintiff Richard Shofer demands judgment against Defendants The Stuart Hack Company and Stuart Hack in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) compensatory

damages, plus prejudgment interest; his costs in this case, including a reasonable attorney's fee; and such other and further relief as justice may require.

COUNT II

(Breach of contract)

22. Plaintiff incorporates paragraphs 1 through 21 in this count.

23. Shofer hired Defendants to provide Shofer with expert and reasonably competent advice as to the tax consequences of borrowing from Shofer's voluntary account in the Plan.

24. Defendants breached that contract by, among other things, neglecting to inform Shofer that his borrowings against his voluntary account would cause him to incur tax and other liabilities.

25. As a direct and proximate result of the acts and omissions of Defendants, Shofer has incurred, and will in the future incur additional income tax, excise tax, interest, penalties, attorney's fees, accountant's fees, and other liabilities and expenses he would otherwise not have incurred.

WHEREFORE plaintiff Richard Shofer demands judgment against Defendants The Stuart Hack Company and Stuart Hack in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) compensatory damages, plus prejudgment interest; his costs in this case, including a reasonable attorney's fee; and such other and further relief as justice may require.

COUNT III

(Breach of fiduciary duty)

26. Plaintiff incorporates paragraphs 1 through 25 in this count.

27. Defendants represented to Shofer that Shofer was justified in reposing special trust and confidence in the expertise and competence of Defendants in matters relating to the tax consequences of withdrawals from voluntary pension accounts, and invited Shofer to enter into a special relationship.

28. Shofer relied upon the representation of Defendants that Defendants possessed special expertise and knowledge, and Shofer reposed special trust and confidence in Defendants to advise Shofer as to the tax consequences of borrowing from his voluntary account in the Plan.

29. As a result of the relationship of special trust and confidence between Defendants and Shofer, as alleged herein, Defendants owed Shofer a fiduciary duty.

30. Defendants breached that duty to Shofer by advising him he could borrow up to 100% of his voluntary account in the Plan without incurring tax liability, when a reasonably competent actuary and professional in this area would have advised Shofer he could not do so.

31. As a direct and proximate result of the acts and omissions of Defendants, as alleged herein, Shofer has incurred, and will in the future incur additional income tax, excise tax, interest, penalties, attorney's fees, accountant's fees, and other liabilities and expenses he would otherwise not have

incurred.

WHEREFORE, plaintiff Richard Shofer demands judgment against Defendants The Stuart Hack Company and Stuart Hack in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) compensatory damages and Two Hundred Fifty Thousand Dollars ($250,000.00) punitive damages, plus prejudgment interest; his costs in this case, including a reasonable attorney's fee; and such other and further relief as justice may require.

COUNT IV

(Enforcement of Participant's right to fiduciary care under the terms of the 1976 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

32. All of the other allegations and Counts of this Complaint are incorporated by reference in this Count as if fully reproduced herein.

33. Shofer was at all relevant times a Participant in the Plan.

34. Defendants drafted all versions of the Plan that were operative at any relevant times. The intention of Catalina in sponsoring the Plan was to provide for the welfare of Catalina's employees through lawful pension planning, and all the Participants in the Plan were the intended beneficiaries of each and ever provision in the Plan.

35. Defendants drafted the version of the Plan that, by its own terms, became effective as of January 1, 1976, although executed on October 18, 1976 (the "1976 Plan"). The 1976 Plan was controlling and effective until such time as it was

superseded by the version of the Plan which, by its own terms, became effective retroactively as of January 1, 1984, although executed on March 15, 1985 (the "1984 Plan").

36. Under the terms of the 1976 Plan at Page 13, Paragraph 2.18, the definition of "fiduciary" includes a person who:

a. "exercises any discretionary authority or discretionary control respecting the management of the Plan";

b. "has any . . . discretionary responsibility in the administration of such Plan";

c. "when designated by a named Fiduciary pursuant to authority granted by the Plan, . . . acts to carry out a fiduciary responsibility";

d. "assumes any Fiduciary responsibilities pursuant to Section 16.07, subject to any exceptions granted directly or indirectly by [the ERISA statute] or any Regulations promulgated pursuant to the authority contained therein."

37. Under the terms of the 1976 Plan at Page 54, Paragraph 15.04, Catalina was empowered to retain necessary professional assistance from a "professional administrator."

38. Under the terms of the 1976 Plan at Page 51, Paragraph 15.01, Catalina was empowered to "designate that person or entity to serve as Administrator who shall signify their acceptance of this responsibility in writing as a named Fiduciary of the Plan."

39. Shofer delegated to Defendants the duties of Plan Administrator, and Defendants signified their acceptance of this

fiduciary responsibility in a letter dated August 21, 1975, and ratified from year to year thereafter until approximately 1987, in which Defendants stated: "We will accept full responsibility as the plan administrator."

40. Among the duties of the Administrator, listed on Pages 53-54, Paragraph 15.03 of the 1976 Plan, which were delegated to Defendants, were the following duties:

a. "(e) To interpret the provisions of the Plan . . .";

b. "(g) To advise, counsel and assist any Participant regarding any rights, benefits or elections available under the Plan".

41. Shofer, as Trustee of the Plan, also retained Defendants pursuant to the authority granted in Paragraph 12.02(j), Page 44 of the 1976 Plan to provide counsel and assistance as to the Trustee's carrying out of the ability to make loans to Participants. Said loan powers are contained in Paragraph 12.02(m) at Page 44 of the 1976 Plan.

42. The delegation of administrative and trust responsibility to Defendants was consistent with the terms of the 1976 Plan at Page 59, Paragraph 16.07, which stated: "Other areas of responsibility not specifically allocated shall be allocated as the Employer, the Administrator and the Trustee may mutually agree."

43. Shofer relied utterly upon Defendants for advice, counsel and assistance regarding his rights, if any, under the terms of the Plan to borrow money from his accounts in the Plan.

44. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their fiduciary duty under the terms of the 1976 Plan, advised Shofer inter alia that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

45. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to the fiduciary care and services of the Defendants.

46. As a proximate result of this deprivation of Shofer's rights under the terms of the Plan, Shofer has suffered and will suffer damages in the form of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may require.

COUNT V

(Enforcement of Participant's right to ordinary care under the terms of the 1976 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

47. All of the other allegations and Counts of this Complaint are incorporated by reference in this Count as if fully reproduced herein.

48. Under the terms of the 1976 Plan at Pages 52-53, Paragraph 15.03, Defendants, in their capacity as Plan Administrator, had the following responsibilities, among others:

a. "to administer the Plan for the exclusive benefit of the Participants and their Beneficiaries";

b. "to determine all questions of interpretation or policy in a manner not inconsistent with this Agreement";

c. "(g) To advise, counsel and assist any Participant regarding any rights, benefits or elections available under the Plan".

49. By accepting "full responsibility as the plan administrator," Defendants assumed a duty of ordinary care toward all Participants in the exercise of administrative duties set out in the Plan.

50. Shofer, as Trustee of the Plan, also retained Defendants pursuant to the authority granted in Paragraph 12.02(j), Page 44 of the 1976 Plan to provide counsel and assistance as to the Trustee's carrying out of the ability to make loans to Participants. Said loan powers are contained in Paragraph 12.02(m) at Page 44 of the 1976 Plan.

51. Shofer relied utterly upon Defendants for advice, counsel and assistance regarding his rights, if any, under the terms of the Plan to borrow money from his accounts in the Plan.

52. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their duty to use ordinary care, advised Shofer inter alia that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

53. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to the exercise of ordinary care by the Defendants, who had assumed duties under the terms of the Plan.

54. As a proximate result of this deprivation of Shofer's rights under the terms of the Plan, Shofer has suffered and will suffer damages in the form of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may require.

COUNT VI

(Enforcement of Participant's right to fiduciary care under the terms of the 1984 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

55. All of the other allegations and Counts of this Complaint are incorporated by reference in this Count as if fully reproduced herein.

56. Under the terms of the 1984 Plan at Page 11-5, Paragraph 11.6, the Administrator and all other persons in a fiduciary capacity with respect to the Plan "shall discharge their duties with respect to the Plan: (i) solely in the interest of the Participants and Beneficiaries and for the exclusive purposes of providing benefits to Participants and their Beneficiaries . . . (ii) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, . . . and (iv) in accordance with the documents and instruments governing the Plan and the extent [sic] consistent with the provisions of the Retirement Security Act.

57. Under the terms of the 1984 Plan at Page 11-2, Paragraph 11.2(b), the Administrator was granted "power and authority to delegate from time to time by written instrument all or any part of its duties, powers or responsibilities under the Plan, both ministerial and discretionary, as it deems appropriate, to any person . . . .

58. Shofer delegated to Defendants the duties of Plan Administrator, and Defendants signified their acceptance of this

fiduciary responsibility in a letter dated August 21, 1975, and ratified from year to year thereafter until approximately 1987, in which Defendants stated: "We will accept full responsibility as the plan administrator."

59. Among the duties of the Administrator, listed on Page 11-1, Paragraph 11.1 of the 1984 Plan, which were delegated to Defendants, were the following duties:

a. "(i) resolve and determine all disputes or questions arising under the Plan, including the power to determine the rights of Employees, Participants and Beneficiaries . . . and to remedy any ambiguities, inconsistencies or omissions;"

b. "(iii) implement the Plan in accordance with its terms and such rules and regulations."

60. Shofer relied utterly upon Defendants for advice, counsel and assistance regarding his rights, if any, under the terms of the Plan to borrow money from his accounts in the Plan.

61. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their fiduciary duty under the terms of the 1976 Plan, advised Shofer inter alia that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

62. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to the fiduciary care and services of the Defendants.

63. As a proximate result of this deprivation of Shofer's rights under the terms of the Plan, Shofer has suffered and will suffer damages in the form of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may require.

COUNT VII

(Enforcement of Participant's right to ordinary care under the terms of the 1984 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

64. All of the other allegations and Counts of this Complaint are incorporated by reference in this Count as if fully reproduced herein.

65. By assuming the duties of Plan Administrator as delegated by Shofer (in his capacity as president of Catalina) and as detailed in other Counts, Defendants became a representative of Catalina with respect to Defendants' dealings with Participants.

66. Under the terms of the 1984 Plan at Page 11-2, Paragraph 11.2(c), all representatives of Catalina "shall use ordinary care and diligence in the performance of their duties pertaining to the Plan . . . ."

67. Shofer relied utterly upon Defendants for advice,

counsel and assistance regarding his rights, if any, under the terms of the Plan to borrow money from his accounts in the Plan.

68. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their duty of ordinary care and diligence toward Participants under the terms of the 1984 Plan, advised Shofer inter alia that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

69. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to the ordinary care and diligence of the Defendants.

70. Said failure by Defendants to advise, counsel and assist Shofer with regard to his rights under the Plan and under applicable law constituted gross negligence because of the facts and circumstances surrounding the acts and omissions of Defendant.

71. As a proximate result of the deprivation of Shofer's rights under the terms of the Plan, Shofer has suffered and will suffer damages in the form of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may

require.

COUNT VII

(Enforcement of Participant's right to loans under the terms of the 1984 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

72. All of the other allegations and counts of this Complaint are incorporated by reference in this Count as if fully reproduced herein.

73. As a Participant in the Plan, Shofer had the right to benefit of loans from the Plan pursuant to Paragraph 10.16, beginning on Page 10-12 of the Plan, which states: "Notwithstanding any other provision in the Plan to the contrary, the Trustees, upon direction of the Company, shall make loans to Participants."

74. In order to carry out his duty to make such loans, the Trustee is empowered under the terms of the 1984 Plan to "appoint any persons or firms (including but not limited to . . . consultants, professional plan administrators and other specialists) . . . to secure specialized advice or assistance, as they deem necessary or desirable in connection with the management of the Trust . . . ." Page 10-3, Paragraph 10.2(n).

75. Defendants were consultants and professional plan administrators within the meaning of Paragraph 10.2(n), hired by the Shofer as Trustee for specialized advice and assistance in the area of tax implications of pension transactions.

76. Shofer as Trustee relied upon Hack to give specialized aid and assistance inter alia with regard to the tax aspects of

loan transactions from his voluntary account.

77. Therefore, under the terms of the 1984 Plan, Shofer as Participant had the right to expect and rely upon the efforts of all those retained to give specialized advice and assistance in making such loans.

78. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their duty to assist in the making of proper loans under the terms of the 1984 Plan, advised Shofer inter alia that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

79. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to borrow from his voluntary account.

80. Said failure by Defendants to advise, counsel and assist Shofer with regard to his rights under the Plan and under applicable law constituted gross negligence because of the facts and circumstances surrounding the acts and omissions of Defendant.

81. As a proximate result of the deprivation of Shofer's rights under the terms of the Plan, Shofer has suffered and will suffer damages in the form of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees

pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may require.

Lloyd S. Mailman /B

Lloyd S. Mailman

Thomas A. Bowden

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CERTIFICATE OF SERVICE

I CERTIFY that on this 8th day of August, 1990, a copy of this document was mailed, postage prepaid, to each person listed below:

Janet M. Truhe, Esquire
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201

Attorneys for Defendants

Linda M. Schuett, Esq.
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300 East Lombard Street
Baltimore, Maryland 21202

Attorneys for Third-Party Defendant

Thomas A. Bowden

g:07904009.cm2

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	
	*	

* * * * * * * * *

DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

The Stuart Hack Company and Stuart Hack, Defendants, by their attorneys, Daniel W. Whitney, Janet M. Truhe and Semmes, Bowen & Semmes, pursuant to Maryland Rule 2-324(b), move this Court for an Order dismissing the Plaintiff's Second Amended Complaint on the following grounds:

1. The common law counts of the Second Amended Complaint (Counts I, II and III) are preempted by the Employee Retirement Income Security Act of 1974 (ERISA), because they "relate to" an employee benefit plan. 29 U.S.C. §1144(a); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549 (1987).

2. The remaining counts of the Second Amended Complaint, which purport to allege claims for failure to provide competent advice concerning the plan in violation of ERISA, fall within the exclusive jurisdiction of the

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federal courts, and this Court therefore lacks subject matter jurisdiction over these claims. 29 U.S.C. §1132(e)(1).

WHEREFORE, for the reasons stated herein and in the Memorandum filed herewith, Defendants request that the Plaintiff's Second Amended Complaint should be dismissed with prejudice.

Daniel W. Whitney
Daniel W. Whitney

Janet M. Truhe
Janet M. Truhe

Semmes, Bowen & Semmes
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Attorneys for Defendants

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August, 1990, copies of the foregoing Defendants' Motion to Dismiss the Second Amended Complaint, Memorandum in Support, Request for Hearing and Order were hand delivered to Lloyd S. Mailman, Esquire and Thomas A. Bowden, Esquire, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201 and Linda Schuett, Esquire, Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

Daniel W. Whitney

Daniel W. Whitney

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RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	
	*	

* * * * * * * * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

The Stuart Hack Company and Stuart Hack, Defendants, by their attorneys, Daniel W. Whitney, Janet M. Truhe, and Semmes, Bowen & Semmes, have moved to dismiss the common law counts (Counts I, II, and III) of the Plaintiff's Second Amended Complaint because they are preempted by the Employee Retirement Income Security Act of 1974 (ERISA), and to dismiss the ERISA counts (Counts IV, V, VI, VII and VIII) for lack of subject matter jurisdiction. The Defendants submit this Memorandum in Support of their Motion to Dismiss.

BACKGROUND

The Second Amended Complaint alleges that the Stuart Hack Company and Stuart Hack were the administrator of an employee benefit plan, the Catalina Enterprises, Inc. Pension Plan (the "Plan"), and that, in the course of administering the plan, the Defendants improperly failed to

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inform the Plaintiff of the tax consequences of the loans he took from the plan. (Second Amended Complaint attached hereto).

The Supreme Court has made it absolutely clear that claims, such as the Plaintiff's claims, which "relate to" an employee benefit plan, such as the Plan at issue in this case, fall within the broad scope of ERISA preemption. See, e.g., Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549 (1987); 29 U.S.C. §1144(a). Moreover, the state courts are excluded from jurisdiction over ERISA cases except "where the sole issue is whether, as a matter of contract law, a plaintiff is entitled to benefits under the terms of the plan"; federal courts have exclusive jurisdiction over claims for negligence or breach of fiduciary duty in relation to an employee benefit plan. Duffy v. Brannen, 529 A.2d 643 (Vt. 1987); 29 U.S.C. §1132(e)(1).

By Order dated July 2, 1990, this Court dismissed Plaintiff's fiduciary duty claim, but permitted the Plaintiff an opportunity to try to amend his First Amended Complaint to comply with the statute. In his Second Amended Complaint, the Plaintiff has failed to state any claim upon which relief can be granted in this court. The subject matter of Plaintiff's ERISA claims fall squarely within those provisions of ERISA which are the sole

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province of the federal courts. The Plaintiff has attempted to drive a square peg into a round hole by styling his various breach of fiduciary duty claims as claims for breach of duty under the Plan. Simply changing the style of the claims, however, cannot confer subject matter jurisdiction on this Court. For the reasons stated herein, the Plaintiff's claims must be dismissed.

ARGUMENT

I. THE COMMON LAW COUNTS OF THE COMPLAINT (COUNTS I, II AND III) ARE PREEMPTED BY ERISA.

Count I of the Complaint is a claim alleging common law negligence by the Defendants in providing advice concerning the Plan. Count II is a claim for breach of an alleged contract to provide the Plaintiff with competent advice concerning the Plan. Count III is a claim for a breach of an alleged fiduciary duty by the Defendants to the Plaintiff to provide competent advice concerning the Plan. Because all three common law counts relate directly to the Defendants' advice concerning the Plan, they are preempted under 29 U.S.C. §1144(a), which provides that ERISA preempts all state laws which "relate to any employee benefit plan."

The scope and force of ERISA preemption is virtually unparalleled. As Judge Niemeyer of the United

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States District Court for the District of Maryland recently observed:

> ERISA preemption is not merely a defense which may be waived. Rather, it is jurisdictional and deprives the state court of the power to adjudicate. The preemptive force is of such power that the state law is displaced, state jurisdiction is extinguished, and any judgment entered is void ab initio.

Weiner v. Blue Cross of Maryland, Inc., 730 F. Supp. 674, 678 (D. Md. 1990).

The Supreme Court in Pilot Life v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549 (1987), laid to rest any argument that state common law claims pertaining to employee benefit plans survived this federal preemption. In Pilot Life, the plaintiff sued the defendant insurance company for "tortious breach of contract," "breach of fiduciary duties," and "fraud in the inducement." The trial court granted summary judgment for the defendant, finding all of the plaintiff's claims preempted. The Supreme Court affirmed, holding unambiguously that: "if a state law "relate[s] to . . . employee benefit plan[s]", it is preempted." Pilot Life, 481 U.S. at 48, 107 S.Ct. at 1552, quoting, 29 U.S.C. §1144(a). The Supreme Court emphasized that the preemption clause is not limited to "state laws specifically designed to affect employee benefit plans," but includes state common law of general applicability. Pilot Life, 481 U.S. at 49, 107 S.Ct. at 1553, citing, Shaw

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v. Delta Airlines, 463 U.S. 85, 98, 103 S.Ct. 2890, 2900 (1983). The Court therefore held that the plaintiff's common law counts were preempted. See also, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542 (1987) (state law claims for breach of contract, wrongful discharge and termination of benefits preempted); Powell v. C&P Telephone Co. of Va., 780 F.2d 419 (4th Cir. 1985) (state law claims involving breach of fiduciary duty under plan, including claims for intentional infliction of emotional distress, breach of contract and breach of good faith preempted under ERISA).

The three common law counts set forth in the Second Amended Complaint, Counts I, II, and III, all relate to the Defendants' alleged failure to give good advice concerning the Plan. All three common law counts, unarguably "relate to" an employee benefit plan and are thus preempted under the Pilot Life doctrine.

II. THE ERISA COUNTS OF THE COMPLAINT (COUNTS IV THROUGH VIII) ARE NOT SUBJECT TO STATE COURT JURISDICTION.

A. All of the Plaintiff's ERISA Claims Allege Breach of Fiduciary Duties Within the Meaning of 29 U.S.C. §1104(a)

All of the Plaintiff's ERISA counts are based on the same fundamental allegation: that the Defendants, acting in their capacity as plan administrator, gave bad advice to the Plaintiff concerning the Plan, which caused

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the Plaintiff to incur tax liabilities. The Plaintiff has never alleged that he was deprived of any economic right or benefit under the Plan. Count IV of the Complaint alleges deprivation of the Plaintiff's right to "the fiduciary care and services of the Defendants." Second Amended Complaint at para. 45. Count V of the Complaint alleges a deprivation of the Plaintiff's right "to the exercise of ordinary care by the Defendants." Id. at para. 53. Count VI is another count alleging a deprivation of the Plaintiff's right "to the fiduciary care and services of the Defendants." Id. at para. 62. Count VII is another claim alleging a deprivation of the Plaintiff's right "to the ordinary care and diligence of the Defendants. Id. at para. 69. Finally, the last count (labelled Count VII but actually Count VIII) is yet another claim for "gross negligence" by the Defendants. Id. at para. 80.

Under ERISA, the duty of ordinary care is one of the fiduciary duties enumerated under the statute, so there is no substantive legal difference between the claims for breach of fiduciary duty and the claims for negligence. The "Fiduciary Duties" section of ERISA, 29 U.S.C. §1104, establishes a "prudent man" standard of care for fiduciaries:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and...with the care,

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> skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims....

29 U.S.C. §1104(a)(1)(B). Each of the Plaintiff's ERISA claims for negligence and breach of fiduciary duty directly concern and implicate duties owed under this section. As all of the Plaintiff's ERISA claims involve breach of fiduciary duty within the meaning of 29 U.S.C. §1104(a)(1)(B), this case does not fall within that narrow category of ERISA cases over which state courts have concurrent jurisdiction with the federal courts.

B. ERISA Claims for Breach of Fiduciary Duty, However Characterized, Fall Under the Exclusive Jurisdiction of the Federal Courts

The jurisdictional provision of ERISA, 29 U.S.C. §1132(e)(1), limits state court jurisdiction as follows:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

The class of cases over which state courts have concurrent jurisdiction with the federal courts is thus restricted to

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suits for benefits under 29 U.S.C. §1132(a)(1)(B), which provides that:

> A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

All other ERISA claims, including claims for violations of fiduciary obligations and other obligations with respect to employee benefit plans falling under the other remedial provisions of ERISA are specifically excluded from the jurisdiction of state courts.

State courts which have considered this issue have consistently accorded a narrow scope to state court jurisdiction over ERISA claims.

> We think that the language of and policy underlying ERISA's jurisdictional provisions mandates a restrictive interpretation of the words "under the terms of the plan" contained in 29 U.S.C. §1132(a)(1)(B). We hold, therefore, that a state court's jurisdiction under this provision is limited to claims . . . where the sole issue is whether, as a matter of contract law, a plaintiff is entitled to benefits under the terms of the plan. Any pendent claim, related or unrelated to the main contract claim, and challenging the propriety of conduct otherwise regulated by ERISA, is beyond the jurisdiction of state courts. Our restrictive interpretation of the words "under the terms of the plan" is supported by the holdings of the majority of courts that have addressed the question.

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Duffy v. Brannen, 529 A.2d 643, 651 (Vt. 1987) (citing cases) (emphasis added). See also, Richland Hosp., Inc. v. Ralyon, 516 N.E. 2d 1236 (Ohio 1987) (state court lacked jurisdiction to consider claims for consequential damages); Lembo v. Texaco, Inc., 182 Cal. App. 3d 299, 227 Cal. Rptr. 289, 293 (1986) ("actions involving breaches of fiduciary duties . . . are within the exclusive jurisdiction of the federal courts."); Pierce v. P.J.G. & Associates, Inc., 128 Ill. App. 3d 471, 470 N.E.2d 1096, 1098 (1984) ("the appropriate forum for civil actions involving fiduciary responsibilities, as here, is exclusively in federal courts."); Young v. Sheet Metalworkers' International, 112 Misc. 2d 692, 700, 447 M.Y.S. 2d 798, 803 (Sup. Ct. 1981) (actions alleging breach of fiduciary duty are within the exclusive jurisdiction of federal courts); Goldberg v. Caplan, 277 Pa. Super. 47, 419 A.2d 653, 657 (1980) (ERISA "does not confer jurisdiction on state courts to determine actions . . . against fiduciaries for the breach of their duties under ERISA.").

The federal courts concur that claims for breach of duty in connection with an ERISA plan are within the exclusive jurisdiction of the federal courts. See, e.g., Levy v. Lewis, 635 F.2d 960, 967 (2d Cir. 1980) (claim for breach of fiduciary duties is one which carries with it exclusive federal jurisdiction); Central States, Southeast

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and Southwest Areas Health and Welfare Fund v. Old Securities Life Ins. Co., 600 F.2d 671, 676 (7th Cir. 1979) (that the federal courts have exclusive jurisdiction over ERISA claims for breach of fiduciary duty is settled); Green v. Indal, Inc., 565 F. Supp. 805, 806 (S.D. Ill. 1983) (breach of fiduciary duty is a claim that is committed to the exclusive jurisdiction of the federal district courts); Wong v. Bacon, 445 F. Supp. 1177, 1185-86 (N.D. Cal. 1977) (Congress has given federal courts exclusive jurisdiction over claims involving breach of fiduciary duties).

The legislative history of the exclusive jurisdiction provisions of 29 U.S.C. §1132(e)(1) support a restrictive interpretation of state court jurisdiction. Early drafts of the ERISA statute provide that all civil actions "might be brought in any court of competent jurisdiction, state or federal." See H. R. Rep. No. 533, 93d. Cong., 1st. Sess. §503(g)(1) (1973). The final version of the statute, however, vests exclusive jurisdiction in the federal courts with the single exception for actions brought under 29 U.S.C.A. §1132(a)(1)(B). See, Cartledge v. Miller, 457 F. Supp. 1146, 1151 n. 22 (S.D.N.Y. 1978). In the final Conference Report, the joint conference committee of the House and Senate emphasized that state court jurisdiction over ERISA

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suits should be strictly limited to suits for benefits and that state courts should not be involved in claims for breach of fiduciary duty:

> The U.S. district courts are to have exclusive jurisdiction with respect to actions involving breach of fiduciary responsibility as well as exclusive jurisdiction over other actions to enforce or clarify benefit rights provided under title I [29 U.S.C. §§ 1001-1145]. However, with respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts, but also in State courts of competent jurisdiction.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. and Ad. News 4639, 5038, 5107. The Plaintiff's ERISA claims clearly involve claims of breach of fiduciary duty under title I of ERISA, particularly 29 U.S.C. §1104(a)(1)(B) (quoted supra at p. 6-7). They are thus exactly the type of claims Congress intended to limit to the exclusive jurisdiction of the federal courts. Where such exclusive jurisdiction is granted to the federal courts, the state court has no power to adjudicate the subject matter of the case. Pilot Life, 481 U.S. at 54-56, 107 S.Ct. at 1556-57; see also International Longshoreman's Assn. v. Davis, 476 U.S. 380, 106 S.Ct. 1904 (1986) (NLRA preemption).

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Apparently recognizing this limitation, the Plaintiff has attempted to circumvent the express statutory limitations on state court jurisdiction by alleging that the fiduciary duties he claims have been breached are imposed by the Plan itself, and therefore that his suit is "under the terms of the plan." This argument does not bear scrutiny. Under ERISA, all duties and obligations arise from a written plan. Title I, Part 4 of ERISA, entitled "Fiduciary Responsibility", 29 U.S.C. §1101, et seq., requires that the plan be in writing and that the persons with fiduciary responsibilities be named in the plan:

> Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

29 U.S.C. §1102(1). ERISA further requires that the written plan must "describe any procedure under the plan for the allegation of responsibilities for the operation and administration of the plan. . . " 29 U.S.C. §1102(a)(B)(2). To permit a suit for breach of such duties to be labelled a suit to enforce rights under the terms of the plan within the meaning of 29 U.S.C. §1132(a)(1)(B) would effectively nullify the exclusion of state court jurisdiction over ERISA title I claims under 29 U.S.C. §1132(e). Since all obligations under ERISA ultimately

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arise from the creation of a written plan, all rights under ERISA could ultimately be said to arise under the terms of the plan, and the breach of any obligation under ERISA could be said to be a breach of an obligation under the plan. This, however, was clearly not Congress' intent, nor have courts so construed the jurisdictional statute.

Finally, the damages Plaintiff seeks are not recoverable under ERISA in state court. The Plaintiff has received all benefits due him under the Plan, but now seeks special or consequential damages from the Defendants personally as compensation for his alleged increased tax liability. Such damages are generally not recoverable at all under ERISA except possibly in cases of intentional misconduct. See, Powell v. C&P Tele. Co. of Va., 780 F.2d 419 (4th Cir. 1985) (state law claims preempted; special damages not recoverable; cf, Vogel v. Independence Federal Sav. Bank, 592 F.Supp 587 (D. Md. 1988) (special damages recoverable in case involving interference with attainment of benefits or intentional misconduct.). See also, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 139, 105 S.Ct. 3085, 3088 (1985) (special damages not recoverable for breach of fiduciary duty under ERISA). Intentional misconduct is not, however, alleged in this case.

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No matter how Plaintiff attempts to cast his claims, no matter how he titles the counts of his Second Amended Complaint, the Plaintiff cannot disguise from this Court that his suit is for consequential damages based entirely on the alleged failure of the Defendants to advise him of the personal tax consequences of taking loans from the pension plan above a certain amount. The plain language of 29 U.S.C. §1132(e), the legislative history of that section, and the case law developed under that section all compel the conclusion that such claims are under the exclusive jurisdiction of the federal courts. In determining subject matter jurisdiction, this Court must look at the subject matter of the claims, not their form, and looking to the subject matter of these claims, subject matter jurisdiction is not present.

CONCLUSION

Because Counts I, II, and III of the Second Amended Complaint are preempted by ERISA, and Counts IV through VIII of the Second Amended Complaint fall within the exclusive jurisdiction of the federal courts, the Plaintiff's Second Amended Complaint must be dismissed in its entirety.

Respectfully submitted,

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8-9-90

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	Case No. 88102069/CL79993
* * * * * * * *		
THE STUART HACK COMPANY, et al.	*	
Third Party Plaintiffs	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third Party Defendant	*	

* * * * * * * * * * * * * * * *

SECOND AMENDED COMPLAINT

Richard Shofer, Plaintiff ("Shofer"), by Lloyd S. Mailman, Thomas A. Bowden, and Blum, Yumkas, Mailman, Gutman & Denick, P.A., files this Second Amended Complaint.

Facts Common to All Counts

1. The Stuart Hack Company is a corporation organized under the law of Maryland which holds itself out as professional actuaries and consultants who provide professional advice to trustees and beneficiaries of pension plans as to the proper use of assets of such plans.

2. Stuart Hack is an attorney licensed to practice in Maryland and is an employee of the Stuart Hack Company and holds himself out as a professional actuary and consultant who provides professional advice to trustees and beneficiaries of pension plans as to the proper use of assets of such plans.

3. Richard Shofer ("Shofer") is the sole stockholder and president of Catalina Enterprises, Inc. t/a Crown Motors ("Catalina").

4. Catalina Enterprises, Inc. Pension Plan (the "Plan") is a qualified pension plan established by Defendants in 1971 for employees of Catalina.

5. At all relevant times, Shofer was the Plan's sole trustee.

6. From 1971 through 1985, The Stuart Hack Company prepared certain of the Plan's annual federal returns as well as its statements to participants.

7. During the course of their relationship with Catalina, Shofer, and the Plan, Defendants held themselves out as expert in the tax aspects of pension planning and frequently rendered advice in this area.

8. Based on this course of dealing and on Defendants' representations as to their expertise, Shofer reasonably expected that any possible tax consequences resulting from their advice would be brought to his attention by Defendants.

9. By December 31, 1983, Shofer had accumulated $209,415.95 in his own voluntary account in the Plan.

10. At some time prior to August 9, 1984, Shofer sought Defendants' advice as to whether it would be advisable to borrow money from the Plan or to use the Plan's assets as collateral for a loan.

11. Defendants responded with an opinion letter dated August 9, 1984, stating that Shofer could borrow up to 100% of

his voluntary account and making no mention of any adverse tax consequences of such a transaction.

12. Reasonably relying on this advice, and not knowing or suspecting that a loan advance could generate liability for income tax, excise tax, or other liabilities, or constitute a premature distribution, or expose the plan to disqualification, Shofer proceeded to borrow $260,000.00 from his voluntary account in the Plan in 1984, $80,000.00 in 1985, and $35,000.00 in 1986.

13. Because these borrowings were in fact taxable to Shofer as income and also constituted prohibited transactions and premature distributions, Shofer incurred and continues to incur substantial federal and state tax liabilities and risk of additional liabilities as a result of these transactions.

14. Shofer has also incurred expenses for accountants, pension consultants, and other professionals to rectify his tax filings.

15. If he had been properly advised by Defendants as to the tax consequences of these transactions, Shofer would not have borrowed from his voluntary account in the Plan.

16. The Stuart Hack Company continued to render incorrect advice concerning the loan transactions as late as December 16, 1986, when The Stuart Hack Company issued a memorandum attempting to persuade Shofer's accountants that the risk of tax liability was very low.

COUNT I

(Negligence)

17. Plaintiff incorporates paragraphs 1 through 16 in this count.

18. At all times relevant to the allegations of this Complaint, Defendants held themselves out to the public in general, and represented themselves to Shofer in particular, as possessing that degree of knowledge, experience, skill, and judgment in the area of advising as to the tax consequences of transactions involving voluntary accounts in pension funds that was to be expected of a reasonably competent actuary and consultant in such business in Maryland in 1984.

19. Defendants owed a duty of reasonable care to Shofer to provide him with reasonably competent advice as to the tax consequences of borrowing from his voluntary account in the Plan.

20. Defendants breached their duty to Shofer by advising him that he could borrow up to 100% of his voluntary account in the Plan without incurring tax liability or endangering the qualification of the plan, when a reasonably competent actuary and professional in this area would have known and advised Shofer he could not legally do so.

21. As a direct and proximate result of the acts and omissions of Defendants Shofer has incurred, and will in the future incur additional income tax, excise tax, interest, penalties, attorney's fees, accountant's fees, and other expenses and damages he would otherwise not have incurred.

WHEREFORE, plaintiff Richard Shofer demands judgment against Defendants The Stuart Hack Company and Stuart Hack in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) compensatory

damages, plus prejudgment interest; his costs in this case, including a reasonable attorney's fee; and such other and further relief as justice may require.

COUNT II

(Breach of contract)

22. Plaintiff incorporates paragraphs 1 through 21 in this count.

23. Shofer hired Defendants to provide Shofer with expert and reasonably competent advice as to the tax consequences of borrowing from Shofer's voluntary account in the Plan.

24. Defendants breached that contract by, among other things, neglecting to inform Shofer that his borrowings against his voluntary account would cause him to incur tax and other liabilities.

25. As a direct and proximate result of the acts and omissions of Defendants, Shofer has incurred, and will in the future incur additional income tax, excise tax, interest, penalties, attorney's fees, accountant's fees, and other liabilities and expenses he would otherwise not have incurred.

WHEREFORE plaintiff Richard Shofer demands judgment against Defendants The Stuart Hack Company and Stuart Hack in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) compensatory damages, plus prejudgment interest; his costs in this case, including a reasonable attorney's fee; and such other and further relief as justice may require.

COUNT III

(Breach of fiduciary duty)

26. Plaintiff incorporates paragraphs 1 through 25 in this count.

27. Defendants represented to Shofer that Shofer was justified in reposing special trust and confidence in the expertise and competence of Defendants in matters relating to the tax consequences of withdrawals from voluntary pension accounts, and invited Shofer to enter into a special relationship.

28. Shofer relied upon the representation of Defendants that Defendants possessed special expertise and knowledge, and Shofer reposed special trust and confidence in Defendants to advise Shofer as to the tax consequences of borrowing from his voluntary account in the Plan.

29. As a result of the relationship of special trust and confidence between Defendants and Shofer, as alleged herein, Defendants owed Shofer a fiduciary duty.

30. Defendants breached that duty to Shofer by advising him he could borrow up to 100% of his voluntary account in the Plan without incurring tax liability, when a reasonably competent actuary and professional in this area would have advised Shofer he could not do so.

31. As a direct and proximate result of the acts and omissions of Defendants, as alleged herein, Shofer has incurred, and will in the future incur additional income tax, excise tax, interest, penalties, attorney's fees, accountant's fees, and other liabilities and expenses he would otherwise not have

incurred.

WHEREFORE, plaintiff Richard Shofer demands judgment against Defendants The Stuart Hack Company and Stuart Hack in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) compensatory damages and Two Hundred Fifty Thousand Dollars ($250,000.00) punitive damages, plus prejudgment interest; his costs in this case, including a reasonable attorney's fee; and such other and further relief as justice may require.

COUNT IV

(Enforcement of Participant's right to fiduciary care under the terms of the 1976 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

32. All of the other allegations and Counts of this Complaint are incorporated by reference in this Count as if fully reproduced herein.

33. Shofer was at all relevant times a Participant in the Plan.

34. Defendants drafted all versions of the Plan that were operative at any relevant times. The intention of Catalina in sponsoring the Plan was to provide for the welfare of Catalina's employees through lawful pension planning, and all the Participants in the Plan were the intended beneficiaries of each and ever provision in the Plan.

35. Defendants drafted the version of the Plan that, by its own terms, became effective as of January 1, 1976, although executed on October 18, 1976 (the "1976 Plan"). The 1976 Plan was controlling and effective until such time as it was

superseded by the version of the Plan which, by its own terms, became effective retroactively as of January 1, 1984, although executed on March 15, 1985 (the "1984 Plan").

36. Under the terms of the 1976 Plan at Page 13, Paragraph 2.18, the definition of "fiduciary" includes a person who:

a. "exercises any discretionary authority or discretionary control respecting the management of the Plan";

b. "has any . . . discretionary responsibility in the administration of such Plan";

c. "when designated by a named Fiduciary pursuant to authority granted by the Plan, . . . acts to carry out a fiduciary responsibility";

d. "assumes any Fiduciary responsibilities pursuant to Section 16.07, subject to any exceptions granted directly or indirectly by [the ERISA statute] or any Regulations promulgated pursuant to the authority contained therein."

37. Under the terms of the 1976 Plan at Page 54, Paragraph 15.04, Catalina was empowered to retain necessary professional assistance from a "professional administrator."

38. Under the terms of the 1976 Plan at Page 51, Paragraph 15.01, Catalina was empowered to "designate that person or entity to serve as Administrator who shall signify their acceptance of this responsibility in writing as a named Fiduciary of the Plan."

39. Shofer delegated to Defendants the duties of Plan Administrator, and Defendants signified their acceptance of this

fiduciary responsibility in a letter dated August 21, 1975, and ratified from year to year thereafter until approximately 1987, in which Defendants stated: "We will accept full responsibility as the plan administrator."

40. Among the duties of the Administrator, listed on Pages 53-54, Paragraph 15.03 of the 1976 Plan, which were delegated to Defendants, were the following duties:

a. "(e) To interpret the provisions of the Plan . . .";

b. "(g) To advise, counsel and assist any Participant regarding any rights, benefits or elections available under the Plan".

41. Shofer, as Trustee of the Plan, also retained Defendants pursuant to the authority granted in Paragraph 12.02(j), Page 44 of the 1976 Plan to provide counsel and assistance as to the Trustee's carrying out of the ability to make loans to Participants. Said loan powers are contained in Paragraph 12.02(m) at Page 44 of the 1976 Plan.

42. The delegation of administrative and trust responsibility to Defendants was consistent with the terms of the 1976 Plan at Page 59, Paragraph 16.07, which stated: "Other areas of responsibility not specifically allocated shall be allocated as the Employer, the Administrator and the Trustee may mutually agree."

43. Shofer relied utterly upon Defendants for advice, counsel and assistance regarding his rights, if any, under the terms of the Plan to borrow money from his accounts in the Plan.

44. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their fiduciary duty under the terms of the 1976 Plan, advised Shofer inter alia that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

45. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to the fiduciary care and services of the Defendants.

46. As a proximate result of this deprivation of Shofer's rights under the terms of the Plan, Shofer has suffered and will suffer damages in the form of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may require.

COUNT V

(Enforcement of Participant's right to ordinary care under the terms of the 1976 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

47. All of the other allegations and Counts of this Complaint are incorporated by reference in this Count as if fully reproduced herein.

48. Under the terms of the 1976 Plan at Pages 52-53, Paragraph 15.03, Defendants, in their capacity as Plan Administrator, had the following responsibilities, among others:

a. "to administer the Plan for the exclusive benefit of the Participants and their Beneficiaries";

b. "to determine all questions of interpretation or policy in a manner not inconsistent with this Agreement";

c. "(g) To advise, counsel and assist any Participant regarding any rights, benefits or elections available under the Plan".

49. By accepting "full responsibility as the plan administrator," Defendants assumed a duty of ordinary care toward all Participants in the exercise of administrative duties set out in the Plan.

50. Shofer, as Trustee of the Plan, also retained Defendants pursuant to the authority granted in Paragraph 12.02(j), Page 44 of the 1976 Plan to provide counsel and assistance as to the Trustee's carrying out of the ability to make loans to Participants. Said loan powers are contained in Paragraph 12.02(m) at Page 44 of the 1976 Plan.

51. Shofer relied utterly upon Defendants for advice, counsel and assistance regarding his rights, if any, under the terms of the Plan to borrow money from his accounts in the Plan.

52. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their duty to use ordinary care, advised Shofer inter alia that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

53. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to the exercise of ordinary care by the Defendants, who had assumed duties under the terms of the Plan.

54. As a proximate result of this deprivation of Shofer's rights under the terms of the Plan, Shofer has suffered and will suffer damages in the form of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may require.

COUNT VI

(Enforcement of Participant's right to fiduciary care under the terms of the 1984 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

55. All of the other allegations and Counts of this Complaint are incorporated by reference in this Count as if fully reproduced herein.

56. Under the terms of the 1984 Plan at Page 11-5, Paragraph 11.6, the Administrator and all other persons in a fiduciary capacity with respect to the Plan "shall discharge their duties with respect to the Plan: (i) solely in the interest of the Participants and Beneficiaries and for the exclusive purposes of providing benefits to Participants and their Beneficiaries . . . (ii) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, . . . and (iv) in accordance with the documents and instruments governing the Plan and the extent [sic] consistent with the provisions of the Retirement Security Act.

57. Under the terms of the 1984 Plan at Page 11-2, Paragraph 11.2(b), the Administrator was granted "power and authority to delegate from time to time by written instrument all or any part of its duties, powers or responsibilities under the Plan, both ministerial and discretionary, as it deems appropriate, to any person . . . .

58. Shofer delegated to Defendants the duties of Plan Administrator, and Defendants signified their acceptance of this

fiduciary responsibility in a letter dated August 21, 1975, and ratified from year to year thereafter until approximately 1987, in which Defendants stated: "We will accept full responsibility as the plan administrator."

59. Among the duties of the Administrator, listed on Page 11-1, Paragraph 11.1 of the 1984 Plan, which were delegated to Defendants, were the following duties:

a. "(i) resolve and determine all disputes or questions arising under the Plan, including the power to determine the rights of Employees, Participants and Beneficiaries . . . and to remedy any ambiguities, inconsistencies or omissions;"

b. "(iii) implement the Plan in accordance with its terms and such rules and regulations."

60. Shofer relied utterly upon Defendants for advice, counsel and assistance regarding his rights, if any, under the terms of the Plan to borrow money from his accounts in the Plan.

61. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their fiduciary duty under the terms of the 1976 Plan, advised Shofer inter alia that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

62. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to the fiduciary care and services of the Defendants.

63. As a proximate result of this deprivation of Shofer's rights under the terms of the Plan, Shofer has suffered and will suffer damages in the form of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may require.

COUNT VII

(Enforcement of Participant's right to ordinary care under the terms of the 1984 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

64. All of the other allegations and Counts of this Complaint are incorporated by reference in this Count as if fully reproduced herein.

65. By assuming the duties of Plan Administrator as delegated by Shofer (in his capacity as president of Catalina) and as detailed in other Counts, Defendants became a representative of Catalina with respect to Defendants' dealings with Participants.

66. Under the terms of the 1984 Plan at Page 11-2, Paragraph 11.2(c), all representatives of Catalina "shall use ordinary care and diligence in the performance of their duties pertaining to the Plan . . . ."

67. Shofer relied utterly upon Defendants for advice,

counsel and assistance regarding his rights, if any, under the terms of the Plan to borrow money from his accounts in the Plan.

68. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their duty of ordinary care and diligence toward Participants under the terms of the 1984 Plan, advised Shofer inter alia that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

69. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to the ordinary care and diligence of the Defendants.

70. Said failure by Defendants to advise, counsel and assist Shofer with regard to his rights under the Plan and under applicable law constituted gross negligence because of the facts and circumstances surrounding the acts and omissions of Defendant.

71. As a proximate result of the deprivation of Shofer's rights under the terms of the Plan, Shofer has suffered and will suffer damages in the form of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may

require.

COUNT VII

(Enforcement of Participant's right to loans under the terms of the 1984 Plan pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g))

72. All of the other allegations and counts of this Complaint are incorporated by reference in this Count as if fully reproduced herein.

73. As a Participant in the Plan, Shofer had the right to benefit of loans from the Plan pursuant to Paragraph 10.16, beginning on Page 10-12 of the Plan, which states: "Notwithstanding any other provision in the Plan to the contrary, the Trustees, upon direction of the Company, shall make loans to Participants."

74. In order to carry out his duty to make such loans, the Trustee is empowered under the terms of the 1984 Plan to "appoint any persons or firms (including but not limited to . . . consultants, professional plan administrators and other specialists) . . . to secure specialized advice or assistance, as they deem necessary or desirable in connection with the management of the Trust . . . ." Page 10-3, Paragraph 10.2(n).

75. Defendants were consultants and professional plan administrators within the meaning of Paragraph 10.2(n), hired by the Shofer as Trustee for specialized advice and assistance in the area of tax implications of pension transactions.

76. Shofer as Trustee relied upon Hack to give specialized aid and assistance inter alia with regard to the tax aspects of

loan transactions from his voluntary account.

77. Therefore, under the terms of the 1984 Plan, Shofer as Participant had the right to expect and rely upon the efforts of all those retained to give specialized advice and assistance in making such loans.

78. Defendants, as a result of grossly inadequate research and failure to give proper attention to the matter, all in breach of their duty to assist in the making of proper loans under the terms of the 1984 Plan, advised Shofer inter alia that he could borrow 100% of the value of his voluntary account without adverse tax consequences.

79. Said failure by Defendants to properly interpret the Plan and advise, counsel and assist Shofer regarding his rights under the Plan constituted a deprivation of Shofer's right, under the terms of the Plan, to borrow from his voluntary account.

80. Said failure by Defendants to advise, counsel and assist Shofer with regard to his rights under the Plan and under applicable law constituted gross negligence because of the facts and circumstances surrounding the acts and omissions of Defendant.

81. As a proximate result of the deprivation of Shofer's rights under the terms of the Plan, Shofer has suffered and will suffer damages in the form of taxes, penalties, interest, and other damages.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Defendants in the amount of $250,000.00 compensatory damages, plus costs and reasonable attorney fees

pursuant to 29 U.S.C.A. § 1132(a)(1)(B) and § 1132(g), and grant such other and further relief as the nature of the case may require.

Lloyd S. Mailman /B

Lloyd S. Mailman

Thomas A. Bowden

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CERTIFICATE OF SERVICE

I CERTIFY that on this 8th day of August, 1990, a copy of this document was mailed, postage prepaid, to each person listed below:

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Attorneys for Third-Party Defendant

Thomas A. Bowden

g:07904009.cm2

4:P

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	
	*	

* * * * * * * * *

REQUEST FOR HEARING

The Stuart Hack Company and Stuart Hack, Defendants, request a hearing on their Motion to Dismiss the Second Amended Complaint filed in the above-captioned case.

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Janet M. Truhe

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RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	
	*	

* * * * * * * * *

ORDER

Upon consideration of the Defendants' Motion to Dismiss the Second Amended Complaint, and counsel for the parties having been heard, it is this __ day of _____, 1990, by the Circuit Court for Baltimore City, hereby ORDERED:

1. That the Defendants' Motion to Dismiss the Second Amended Complaint be and the same hereby is granted; and

2. That the Plaintiff's Second Amended Complaint be and the same hereby is dismissed with prejudice.

_____
Judge,
Circuit Court for Baltimore City

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& SEMMES
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Baltimore, Md. 21201

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	Case No. 88102069/CL79993
* * * * * * * *		
THE STUART HACK COMPANY, et al.	*	
Third Party Plaintiffs	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third Party Defendant	*	

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* * * * * * * * * * * * *

MOTION FOR ORDER COMPELLING DISCOVERY

Richard Shofer ("Shofer"), Plaintiff, by Lloyd S. Mailman, Thomas A. Bowden, and Blum, Yumkas, Mailman, Gutman & Denick, P.A., his attorneys, files this Motion for Order Compelling Discovery against The Stuart Hack Company ("Hack"), Defendant.

Motion

Plaintiff moves for an order compelling discovery, directing Defendant to give substantive written answers to Interrogatory Nos. 12, 13, 14, 18, 24, and 26, and prohibiting Defendant from incorporating deposition testimony by reference into its Answers.

Rule 2-431 Certificate

On August 15, 1990, Plaintiff's counsel initiated a telephone conversation with Defendant's counsel in a good faith

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attempt to resolve this discovery dispute. After a discussion of the merits of the dispute, Defendant's counsel stated that she was not willing to amend the disputed answers without a Court order.

Text of Interrogatories and Answers

NOTE: All of the disputed interrogatories share the same infirmity. Hence, Plaintiff's argument and authorities will appear at the end of all the text, rather than being repeated after each Interrogatory.

TEXT OF INTERROGATORY NO. 12. Describe in detail the research, study, or investigation that you performed prior to mailing the August 9, 1984 letter (the "Letter") to Richard Shofer, directed at ensuring the completeness and accuracy of the advice you were giving.

ANSWER TO INTERROGATORY NO. 12. This defendant has testified at length as to the investigation he performed prior to mailing the August 9, 1984 letter in his deposition of March 16, 1989 beginning at p. 170. Defendant would incorporate this testimony herein by reference.

TEXT OF INTERROGATORY NO. 13. Identify each person with whom you discussed the subject matter of the Letter prior to mailing it.

ANSWER TO INTERROGATORY NO. 13. See answer to interrogatory no. 12.

TEXT OF INTERROGATORY NO. 14. Describe in detail the research, study, or investigation that you performed after

mailing the "Letter" to Richard Shofer, directed at determining the completeness and accuracy of the advice you had given.

ANSWER TO INTERROGATORY NO. 14. This defendant has testified at length as to the investigation he performed after mailing the letter in his deposition of August 18, 1989 beginning at p. 378. Defendant would incorporate this testimony herein by reference.

TEXT OF INTERROGATORY NO. 18. Briefly describe the nature of each suggested inaccurate or incompleteness in the previous Interrogatory. [NOTE: The text of the previous interrogatory is as follows: "Identify every person who ever suggested to you that the Letter might be inaccurate or incomplete in any respect, even if you eventually concluded that such suggestion was itself incorrect or unfounded."]

ANSWER TO INTERROGATORY NO. 18. See deposition of Stuart Hack at p. 378 (Aug. 18, 1989).

TEXT OF INTERROGATORY NO. 24. Identify each communication, occurring prior to the start of this litigation, between you and the Plaintiff or his agents concerning the subject matter of the Letter.

ANSWER TO INTERROGATORY NO. 24. This defendant has testified extensively as to the communications between himself, the plaintiff, and plaintiff's agents concerning the subject matter of the letter at his depositions on March 16, 1989, April 21, 1989, and August 18, 1989.

TEXT OF INTERROGATORY NO. 26. Describe all procedures, customs, practices, checklists, standing orders, and other

mechanisms, if any, in place as of August 9, 1984, by which you attempted to ensure that all opinion letters issued to clients by you would be accurate and complete.

ANSWER TO INTERROGATORY NO. 26. This defendant has testified at length as to the issues raised in interrogatory no. 26 and would refer the plaintiff to his deposition testimony of March 16, 1989.

Statement of Grounds and Authorities

The ideal to be observed in answers to interrogatories is that the answers be "responsive, full, complete and unevasive. Insofar as practical they should be complete within themselves. Material outside the answers and their addendum ordinarily should not be incorporated by reference." Pilling v. General Motors Corp., 45 F.R.D. 366, 369 (D. Utah 1968) (quoted in 8 C. Wright & A. Miller, Federal Practice and Procedure § 2176 at 559-60 (1970)).

"Incorporation by reference of portions of a deposition of a witness, much of it discursive, or of allegations of a pleading is not a responsive answer." J.J. Delaney Carpet Co. v. Forrest Mills, Inc., 34 F.R.D. 152, 153 (S.D.N.Y. 1963). "Answers to interrogatories should be in such form that they may be used upon a trial, as Rule 33 contemplates." Id.

By its very nature, deposition testimony is discursive. It moves back and forth from question to answer. Often, the questioning must circle around an issue several times, from several perspectives, before the deponent provides a suitable

answer. Sometimes, the deponent manages to evade answering altogether. In many cases, the nugget of substance in ten pages of deposition testimony can be distilled into a sentence or two of plain text. Furthermore, what may seem to be a clear answer to a question on one page may have been qualified by a disclaimer on another page.

Interrogatory answers, by contrast, are not discursive. They consist of flat, declaratory statements that state exactly what the responding party believes is true with respect to the particular issues raised by the interrogatory. For exactly this reason, interrogatory answers are far superior to deposition excerpts for conveying evidence of an opposing party's posture to the Court at trial, and for use in impeaching an opponent.

In Smith v. Danvir Corp., 188 A.2d 118 (Del. 1963), the Supreme Court of Delaware ruled on a factual situation very similar to the one at bar. The language of the governing rule in that case was identical to Maryland's Rule 2-421 and Fed. R. Civ. P. 33, requiring that interrogatories shall be answered "separately and fully in writing under oath." Id. at 119. In answer to one interrogatory, the defendant in that case stated that it "relies upon the testimony of Stephen John White taken in said proceedings on November 3, 1962, and the testimony of plaintiffs taken on December 1, 1962." In answer to another interrogatory, the defendant stated: "The facts concerning this aspect were set forth in the testimony of plaintiffs and White above referred to and the inferences to be drawn therefrom." Id.

The Court granted Plaintiffs' motion to compel further

answers. The Court began its analysis by noting two basic purposes served by interrogatories: "(1) to narrow and clarify the basic issues between the parties; and (2) to permit the ascertainment of the facts relative to those issues." Id. at 120. Because further answers to the disputed interrogatories may serve to narrow and clarify the issues, the Court ruled that such further answers should be provided.

The Court proceeded to stress another reason (a "very compelling one") why the defendant's answers were inadequate: "As defendant's answers to the particular interrogatories are now couched, it would be impossible for plaintiffs to make use of the answers 'for the purpose of contradicting or impeaching' the person who executed the answers on behalf of defendant." Id. The Court concluded: "The Court's specific ruling is that a party cannot answer an interrogatory otherwise than as required by the Rule and by making reference to a deposition or depositions or to other documents that may appear otherwise in the case." Id. at 121.

Hack's answers in the case at bar share the same infirmities as the defendant's answers in Smith v. Danvir Corp. It would be impossible for Shofer to make use of Hack's answers for the purpose of contradicting or impeaching the testimony of Hack's owners, officers, or employees at trial. Shofer would have to wade through dozens of pages of deposition testimony in order to find relevant passages. Then, at trial, Shofer's counsel would have to notify Hack's counsel (and the third-party defendant's counsel) of the excerpts to be quoted, and these counsel would be

accorded the opportunity to designate additional portions of the deposition to be read for clarity. The testimony itself, consisting of questions and answers extending over several pages that would have to be read to the trial judge, would not have the same impact as a direct statement of facts, written and signed under oath by Hack's representative.

Furthermore, Hack's answers evade the other key purpose of interrogatories: to narrow and clarify the issues. It commonly happens that during deposition testimony, many issues may be raised, dropped, or left hanging. How is Plaintiff to know which issues Defendant believes are still current? Only concise answers to interrogatories can serve this purpose.

Chief Judge Niles expressed antipathy to the practice of incorporation by reference in Brooker v. Harry M. Stevens, Inc., 1 Md. Rules Decisions 22 (1955). In that personal injury case, the defendant asked two interrogatories seeking a description of the plaintiff's injuries. The plaintiff answered as follows: "See attached medical reports of (three named doctors)." Id. The Court sustained the defendant's exceptions, stating: "It would seem to the Court that the defendant is entitled to a definite answer from plaintiff in regard to these points, rather than merely a reference to certain reports of doctors which differ in scope and detail." Id. at 22-23. In a later case, DeWingaerde v. Fine, 1 Md. Rules Decisions 198 (1961), reaching a similar result, Chief Judge Niles expanded on his reasoning:

> The Court has heretofore ruled a number of times that reference to medical reports is insufficient, for the reason that it requires the person to whom the answer is made to work

> through or examine one or more medical reports and to determine for himself what the true contention of the opposite party is. The function of the answer to an interrogatory is to clarify whatever complications or inconsistencies there may be, and to make a litigant's position clear and definite.

Id. at 199 (emphasis added).

The case at bar is, of course, distinguishable in that the respondent seeks to incorporate deposition testimony rather than medical reports into its Answers. However, the essential defect in such a response is identical: Incorporation by reference forces Shofer to sift through the extraneous material and make his own judgment as to what Hack's true contentions are. This defeats Shofer's right to use interrogatories for the purpose of requiring Hack to "clarify whatever complications or inconsistencies there may be." Perhaps more than any other type of discovery, deposition testimony generates such "complications" and "inconsistencies" that require clarification. By its evasive method, Defendant leaves it up to Plaintiff to decide the following inter alia:

a. Where the discussion regarding a particular issue starts and stops;

b. What portions of any contradictory testimony Defendant currently subscribes to and which it rejects;

c. The weight to be given to doubtful or ambiguous phrasings of questions and answers.

Permitting Defendant to place these burdens on Plaintiff would, in effect, deny Plaintiff the benefits of interrogatories as a

discovery tool. This would be unfair and prejudicial to Plaintiff's ability to prepare its case and proceed to trial with a clear understanding of Defendant's positions on the issues.

WHEREFORE, Plaintiff prays that this Honorable Court enter an Order compelling further answers to Interrogatory Nos. 12, 13, 14, 18, 24, and 26.

Respectfully submitted,

Lloyd S. Mailman

Thomas A. Bowden

Lloyd S. Mailman
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1200 Mercantile Bank &
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(301) 385-4000
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I CERTIFY that on this 24th day of August, 1990, a copy of this document was mailed, postage prepaid, to each person listed below:

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Attorneys for Defendants

Linda M. Schuett, Esq.
Frank, Bernstein, Conaway & Goldman

300 East Lombard Street
Baltimore, Maryland 21202

Attorneys for Third-Party Defendant

Thomas A. Bowden

g:07904009.mo1

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	Case No. 88102069/CL79993
* * * * * * * *		
THE STUART HACK COMPANY, et al.	*	
Third Party Plaintiffs	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third Party Defendant	*	

* * * * * * * * * * * * *

ORDER COMPELLING DISCOVERY

This matter having come before the Court on Plaintiff's Motion for Order Compelling Discovery, the Court having read and carefully considered said Motion and any response thereto, it is, this _____ day of _____, 1990, by the Circuit Court for Baltimore City,,

ORDERED, that Plaintiff's Motion be, and it is hereby, GRANTED, and it is further

ORDERED, that on or before the _____ of _____, 1990, The Stuart Hack Company shall file supplemental Answers to Interrogatory Nos. 12, 13, 14, 18, 24, and 26 in accordance with Rule 2-421 and without incorporating deposition testimony by reference.

_____
JUDGE

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FILED

FILED

SEP 4 1990

CIRCUIT COURT FOR BALTIMORE CITY

CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	Case No. 88102069/CL79993

* * * * * * * *

THE STUART HACK COMPANY, et al.	*
Third Party Plaintiffs	*
v.	*
GRABUSH, NEWMAN & CO., P.A.	*
Third Party Defendant	*

* * * * * * * * * * * * *

MOTION FOR RECONSIDERATION

Richard Shofer ("Shofer"), Plaintiff, by Lloyd S. Mailman, Thomas A. Bowden, and Blum, Yumkas, Mailman, Gutman & Denick, P.A., his attorneys, files this Motion for Reconsideration with respect to continuance of the trial of the above-captioned matter.

1. This matter is currently scheduled for trial on October 22, 1990.

2. On August 28, 1990, The Honorable Kathleen O'Ferrall Friedman denied Plaintiff's motion for a continuance of the case.

3. Plaintiff respectfully requests a reconsideration of said denial because of the extreme prejudice to Plaintiff's case that will occur if trial begins as scheduled. Plaintiff should not be required to go to trial while his damages are still unliquidated due to forces beyond his control, namely, an audit

by the Internal Revenue Service.

4. This case involves inter alia claims of professional malpractice against the Defendants, who are pension consultants. It is alleged that they rendered improper advice as to Plaintiff's ability to borrow money from his pension plan, and that Plaintiff acted on said advice to his detriment.

5. Most of Plaintiff's damages are in the form of taxes, penalties, and interest. The income tax damages have already been assessed by the IRS and the State of Maryland. However, there remain several other categories of damage that the IRS has the power to assess but has refused as of this time to assess. These damages include:

a. 5% excise tax on prohibited transactions;

b. 10% excise tax on premature distributions from a pension plan;

c. Loss of tax deferral benefits due to disqualification of the pension plan.

6. These are very real damages that could total tens of thousands of dollars, or more. Moreover, if assessed, they will have been proximately caused by the acts and omissions of the Defendants.

7. The decision on these damages is in the hands of the Internal Revenue Service auditor, Cindy Lawson. Attached to this Motion is the Affidavit of Nicholas Giampetro, who is the attorney representing Plaintiff before the IRS in the ongoing audit. This Affidavit supports the particulars of this Motion and makes it clear that the audit will not be completed prior to

the scheduled trial date.

8. Plaintiff cannot fairly be expected to prove his damages in this situation, because said damages have not been assessed by the Internal Revenue Service. Thus, if forced to trial in October, 1990, Plaintiff may lose the opportunity to obtain a judgment for substantial damages, proximately caused by the wrongful acts of the Defendants, in the event such damages are assessed by the Internal Revenue Service after the trial. This would be grossly unfair to the Plaintiff, who has already gone more than two years without a judgment and who has no desire to prolong these proceedings any longer than is necessary to obtain a judgment for the full amount of damages caused by the Defendants.

9. There is no good reason to proceed to trial at this time. Neither the Defendants nor the Third-Party Defendant has made any showing that they will be prejudiced by a continuance of this matter.

10. This is not a case in which Plaintiff has been lax in asserting his rights or prosecuting his case. Discovery, by way of depositions, interrogatories, and document production, was initiated by Plaintiff early in this case and is still ongoing. Furthermore, Plaintiff has pending a motion to compel discovery against one of the Defendants.

11. Moreover, this case has been vigorously contested by the Defendants, who have filed two motions to dismiss and whose own discovery is ongoing.

12. Therefore, this is not a "stale" case or one that is

languishing. The need for a continuance is not due to any fault or omission of the Plaintiff, and neither of the other parties to this case have suggested that it is. It is due entirely to "foot-dragging" by the Internal Revenue Service, over which the Plaintiff obviously exercises no authority or control. Plaintiff finds himself in a caught in a pincer movement between this Honorable Court's insistence on an October, 1990 trial and the IRS's refusal to apprise Plaintiff of his damages before said trial. This situation is unfair to Plaintiff and should not be allowed to continue.

Statement of Grounds and Authorities

13. The granting or denial of a continuance lies in the discretion of the trial judge. Greenstein v. Meister, 279 Md. 275, 294 (1977). In that case, the Court of Appeals held that a trial judge who allowed the parties to present their conflicting positions for and against the requested continuance and demonstrated "patience in seeking an effective solution" was not acting arbitrarily. Id.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court enter an Order continuing the trial of this case until such date as the Court may deem proper.

Respectfully submitted,

Lloyd S. Mailman

Lloyd S. Mailman

Thomas A. Bowden

Thomas A. Bowden
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44

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I CERTIFY that on this 31st day of August, 1990, a copy of this document was mailed, postage prepaid, to each person listed below:

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Frank, Bernstein, Conaway & Goldman
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Baltimore, Maryland 21202

Attorneys for Third-Party Defendant

Thomas A. Bowden

g:07904009.mo2

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	
	*	

* * * * * * * *

AFFIDAVIT OF NICHOLAS J. GIAMPETRO

I, Nicholas J. Giampetro, state as follows:

1. I am over 18 years of age and competent to testify in this case.

2. I am an attorney licensed to practice law in the State of Maryland. I am also a principal in the law firm of Giampetro & Tralins, P.C., of Baltimore.

3. Giampetro and Tralins, P.C. has been retained to represent Richard Shofer and the Catalina Enterprises, Inc. Pension Plan and Trust with respect to the audit of said Plan and Trust by the Internal Revenue Service for the plan year ending December 31, 1986 (the "Audit").

4. The Audit began in May, 1988 and is still ongoing. The Internal Revenue Service has the power to impose severe sanctions upon the Plan and Trust in conjunction with the Audit, including but not limited to additional taxes, penalties, and interest. The Internal Revenue Service is also empowered to partially or totally "disqualify" the Plan, which sanction could result in more than $1 million in losses due to the loss of tax

deductibility and shelter aspects of the pension plan.

5. Such sanctions, if imposed by the Internal Revenue Service, would be damages cognizable in the above-captioned lawsuit against Stuart Hack and The Stuart Hack Company.

6. Cindy Lawson is employed by the Internal Revenue Service as an auditor and has been assigned responsibility for the Audit.

7. I have been advised by Cindy Lawson on more than one occasion that she has been instructed not to close the Audit until such time as the audit of Catalina Enterprises, Inc. has been completed by the Income Tax Division of the Internal Revenue Service.

8. At the present time it would be difficult to prognosticate regarding the results of the Audit.

9. However, with regard to the timing of the Audit, I can state with virtual certainty that the Audit will not be completed prior to the scheduled trial date for the above-captioned action, October 22, 1990.

10. It is impossible to predict when the Internal Revenue Service will actually complete the Audit. However, based on my general experience and on my dealings with the Internal Revenue Service during this particular Audit, I believe there is a substantial probability that the Audit will be completed on or before October of 1991.

Nicholas J. Giampetro, Affiant

g:07904009.af2

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RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
	*	Case No. 88102069/CL79993
Defendants	*	

* * * * * * * * *

FILED
SEP 5 1990
CIRCUIT COURT FOR BALTIMORE CITY

DEFENDANT STUART HACK COMPANY'S RESPONSE TO PLAINTIFF'S MOTION FOR ORDER COMPELLING DISCOVERY

Stuart Hack Company, Defendant, by its attorneys, Janet M. Truhe and Semmes, Bowen & Semmes, submits the following Response to Plaintiff's Motion to Compel.

INTRODUCTION

On May 8, 1990, Plaintiff served interrogatories on Defendant Stuart Hack Company. Several of the interrogatories were overly broad and unduly burdensome in that they asked for detailed descriptions of the Defendant's thoughts, words and actions.[1] In addition, these six improper interrogatories had been the subject of detailed and lengthy questioning during the three depositions of Defendant Stuart Hack which Plaintiff had previously taken.[2] In the interest of full and complete discovery, however, Defendant answered the interrogatories

[1] The interrogatories at issue are Nos. 12, 13, 14, 18, 24 and 26. The text of the interrogatories and Defendant's Answers are appended to this Response.

[2] The Plaintiff deposed Stuart Hack on March 16, 1989, April 21, 1989, August 18, 1989.

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Baltimore, Md. 21201

by referring Plaintiff to those portions of the various depositions which addressed the subject matter of the improper interrogatories. In every instance, Defendant referred Plaintiff to a specific deposition or to specific portions of a particular deposition.

Although Plaintiff has received a thorough and sufficient response to the questions at issue, Plaintiff is nonetheless now moving for an order compelling Defendant to give additional answers to the six disputed interrogatories. As is discussed further below, such an order is neither required nor appropriate.[3]

LEGAL ARGUMENT

One of the principal purposes of pre-trial discovery is to ascertain the contentions of the adverse party and thereby avoid confusion or surprise at trial. Baltimore Transit Company v. Mezzanotti, 227 Md. 8, 174 A.2d 768 (1961). In this case, the Defendant has fully complied with all proper discovery requests and has given Plaintiff ample opportunity to ascertain its contentions. Indeed, Plaintiff deposed Defendant Stuart Hack on no less than three occasions before filing interrogatories, and has fully explored and received answers concerning the subject matter of the disputed interrogatories. Thus, the

[3] As Defendant's response to Plaintiff's Motion is the same as to each interrogatory, Defendant will address the interrogatories as a whole.

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Baltimore, Md. 21201

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Plaintiff already has the information he is now seeking to compel. To require the Defendant to further answer the interrogatories or respond to this request would be a waste of time and expense which this court should not permit.

Moreover, the disputed interrogatories are themselves improper in that they are overly broad, unduly burdensome and more appropriately the subject of deposition questioning. A number of the interrogatories ask the Defendant to "describe in detail" its actions or conversations. A witness' thoughts, words and actions can be more fully explored and explained during deposition than in answers to interrogatories. The very nature of the interrogatories do not lend themselves to short declaratory statements. Requiring Defendant to further answer the interrogatories is neither required nor appropriate in this particular case.

Plaintiff does not allege that he does not know what Defendant's contentions in this case are. Rather, he objects to the form of Defendant's answers. Nothing in the Maryland Rules of Procedure or Maryland statutory or common law, however, prohibits a party from incorporating deposition testimony by reference into its answers to interrogatories.

Moreover, it is sufficient for an answering party to incorporate deposition testimony into answers to

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interrogatories when the party "state[s] specifically and identif[ies] precisely which documents will provide the desired information." Martin v. Easton Publishing Co., 85 F.R.D. 312, 315 (1980). In this regard, the cases which Plaintiff relies on in his Motion are neither controlling nor applicable to the facts of the instant case.[4] The cases are factually inapposite in that the answering party in each of those cases incorporated by reference one or more entire depositions without specifically referring the party seeking discovery to a particular deposition or place in a deposition where the requested information could be found. In this case, on the other hand, Defendant stated specifically and identified precisely which depositions or pages of the relevant depositions contained the desired information.

Further, in Smith v. Danvir Corp., the case on which Plaintiff primarily relies, the answering party had referred the discovering parties to the depositions of a third party witness as well as the discovering parties themselves. Thus, the answering party was incorporating deposition testimony of parties other than itself. Here,

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[4] Plaintiff relies on Pilling v. General Motors Corp., 45 F.R.D. 366 (D. Utah 1968); J.J. Delaney Carpet Co. v. Forrest Mills, Inc., 34 F.R.D. 152 (S.D.N.Y. 1963); and Smith v. Danvir Corp., 188 A.2d 118 (Del. 1963). There is no Maryland statute or case law dealing with this precise issue.

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of course, Defendant is incorporating the deposition testimony of its own president, Stuart Hack.

In contrast to the cases cited by Plaintiff, the basic purposes served by interrogatories have been achieved in this case. Plaintiff had ample opportunity during the three depositions to follow up on Defendant's answers and to narrow and clarify the basic issues in this case and ascertain facts relative to those issues. Moreover, despite Plaintiff's contentions to the contrary, Plaintiff may use Defendant's answers for the purpose of contradicting or impeaching the testimony of Defendant's owners, officers, or employees at trial as provided for by Maryland Rule 2-419. Plaintiff is thus in no way prejudiced by the use of answers to interrogatories which incorporate by reference specific deposition testimony.

Finally, the Court of Appeals Standing Committee on Rules of Practice and Procedure has specifically amended Maryland Rule 2-421(c) to permit a party to incorporate business records by reference in answers to interrogatories. The incorporation of deposition testimony, though not specifically referred to in Rule 2-421, is in practice identical to the option to produce business records. Thus, the Plaintiff's reliance on the holdings and reasoning of Brooker v. Harry M. Stevens, Inc., 1 Md. Rules Decisions 22 (1955) and DeWingaerde v.

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Fine, 1 Md. Rules Decisions 198 (1961) is misplaced and misleading. Further, contrary to Plaintiff's assertion, he is not forced to sift through extraneous material in order to determine what the Defendant's contentions are. Defendant has specifically referred Plaintiff to particular depositions or places in the various depositions from which the desired information may be derived or ascertained.

CONCLUSION

Plaintiff has been provided, on numerous occasions, with the information he seeks yet again from Defendant. Having already received sufficient answers to the questions at issue, Plaintiff can make no claim of unfairness or prejudice with regard to Defendant's incorporation of deposition testimony by reference in answers to interrogatories. It is clear that, when viewed in context, Defendant has fully complied with the intent and purpose of pre-trial discovery. For the reasons stated above, this Defendant requests that the Court deny Plaintiff's Motion to Compel Discovery.

Respectfully submitted,

Janet M. Truhe

Janet M. Truhe

Semmes, Bowen & Semmes

Semmes, Bowen & Semmes
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(301) 539-5040

Attorneys for Defendants

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& SEMMES
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Baltimore, Md. 21201

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 1990, copies of the foregoing Defendant's Response to Plaintiff's Motion for Order Compelling Discovery, with proposed Order Denying Discovery, were mailed to Lloyd S. Mailman, Esquire and Thomas A. Bowden, Esquire, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201 and Linda Schuett, Esquire, Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

Janet M. Truhe

Janet M. Truhe

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Baltimore, Md. 21201

APPENDIX

INTERROGATORY NO. 12

Describe in detail the research, study, or investigation that you performed prior to mailing the August 9, 1984 letter to Richard Shofer, directed at ensuring the completeness and accuracy of the advice you were giving.

ANSWER

This defendant has testified at length as to the investigation he performed prior to mailing the August 9, 1984 letter in his deposition of March 16, 1989 beginning at p. 170. Defendant would incorporate this testimony herein by reference.

INTERROGATORY NO. 13

Identify each person with whom you discussed the subject matter of the letter prior to mailing it.

ANSWER

See answer to interrogatory no. 12.

INTERROGATORY NO. 14

Describe in detail the research, study, or investigation that you performed after mailing the letter to Richard Shofer, directed at determining the completeness and accuracy of the advice you had given.

ANSWER

This defendant has testified at length as to the investigation he performed after mailing the letter in his deposition of August 18, 1989 beginning at p. 378. Defendant would incorporate this testimony herein by reference.

INTERROGATORY NO. 18

Briefly describe the nature of each suggested inaccurate or incompleteness in the previous interrogatory. [The text of Interrogatory No. 17 is as follows: "Identify every person who ever suggested to you that the letter might be inaccurate or incomplete in any respect, even if you eventually concluded that such suggestion was itself incorrect or unfounded."]

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Baltimore, Md. 21201

APPENDIX (CONT'D.)

ANSWER

See deposition of Stuart Hack at p. 378 (Aug. 18, 1989).

INTERROGATORY NO. 24

Identify each communication, occurring prior to the start of this litigation, between you and the plaintiff or his agents concerning the subject matter of the letter.

ANSWER

This defendant has testified extensively as to the communications between himself, the plaintiff, and plaintiff's agents concerning the subject matter of the letter at his depositions on March 16, 1989, April 21, 1989, and August 18, 1989.

INTERROGATORY NO. 26

Describe all procedures, customs, practices, check lists, standing orders, and other mechanisms, if any, in place as of August 9, 1984, by which you attempted to ensure that all opinion letters issued to clients by you would be accurate and complete.

ANSWER

This defendant has testified at length as to the issues raised in interrogatory no. 26 and would refer the plaintiff to his deposition testimony of March 16, 1989.

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250 W. Pratt Street
Baltimore, Md. 21201

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	

* * * * * * * * *

FILED
SEP 10 1990
CIRCUIT COURT FOR BALTIMORE CITY

45A

THIRD PARTY
PLAINTIFF'S INTERROGATORIES

TO: Grabush Newman & Co., P.A.

FROM: Stuart Hack

These Interrogatories are propounded pursuant to the Rules of Procedure which require that they be signed and answered under oath. Where the name or identity of a person is requested, please state the full name and home and business address. Unless otherwise indicated, these Interrogatories refer to the time, place and circumstances of the occurrence or accident mentioned or complained of in the pleadings. Knowledge or information of a party shall include that of the party's agent, representatives and, unless privileged, attorneys. These Interrogatories are continuing in character, so as to require you to file supplemental answers if you obtain further or different information before trial.

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& SEMMES
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Baltimore, Md. 21201

1. State the full name, business address, and position of the individual answering these Interrogatories on behalf of the third-party defendant.

2. If you contend that a person not a party to this action acted in such a manner as to cause or contribute to the plaintiff's damages, give a concise statement of the facts upon which you rely.

3. State the content of and the name and address of any person to whom the third-party plaintiffs or anyone on their behalf made any oral statement which constitutes an admission with reference to any of the issues raised in this case.

4. State the names and addresses of all experts whom you propose to call as witnesses, the subject mater of their testimony, and attach to your answer copies of all written reports perceived from the same.

5. State the names and addresses of all persons from whom you have written or signed or recorded statements, attaching to your answer a copy of any such statement in your control given by the third-party plaintiffs, or any agent thereof.

Janet M. Truhe

Janet M. Truhe

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
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250 West Pratt Street
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(301) 539-5040

Attorneys for Third-Party
Plaintiffs,
The Stuart Hack Company
and Stuart Hack

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of September, 1990, a copy of the foregoing Third-Party Plaintiff's Interrogatories was mailed to Thomas A. Bowden, Esquire, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201; and Linda Schuett, Esquire, Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

Janet M. Truhe

Janet M. Truhe

JUDGE Thomas Ward
Sitting as Discovery Judge

46

Title of Case:

RICHARD SHOFER

vs.

THE STUART HACK COMPANY,
et al.

Circuit Court for Baltimore City

L #: 79993

Computer #: 88 102 069

Date of hearing:

No hearing, date of ruling:
September 13, 1990

Appearances:

LLOYD S. MAILMAN, ESQUIRE
THOMAS A. BOWDEN, ESQUIRE

For Plaintiff

JANET M. TRUHE, ESQUIRE
DANIEL W. WHITNEY, ESQUIRE
LEE B. ZEBEN, ESQUIRE

For Defendant

LINDA M. SCHUETT, ESQUIRE

For third party Defendant

Ruling by the Court:

Plaintiff's Motion For Order Compelling Discovery is **DENIED** with respect to Answers to Interrogatories Nos. 12, 14, 18, and 24.

Plaintiff's Motion For Order Compelling Discovery is **GRANTED** with respect to Answers to Interrogatories Nos. 13, 26, and the Defendant, The Stuart Hack Company, shall have twenty (20) days in which to respond.

Thomas Ward

THOMAS WARD, Judge

1040-10-27 REV. 1/89

461

FILED

SEP 18 1990

CIRCUIT COURT FOR
BALTIMORE CITY

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	

* * * * * * * * *

ENTRY OF APPEARANCE

Dear Clerk:

Please enter the appearance of Anthony P. Palaigos in the above-captioned case.

Lloyd S. Mailman

Lloyd S. Mailman

Anthony P. Palaigos

Thomas A. Bowden

Thomas A. Bowden
1200 Mercantile Bank &
Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 385-4000
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I CERTIFY that on this 12th day of September, 1990, a copy of this document was mailed, postage prepaid, to each person listed below:

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Attorneys for Defendants

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Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
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Attorneys for Third-Party Defendant

Thomas A. Bowden

g:07904009.en1

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	
	*	

* * * * * * * *

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Richard Shofer, Plaintiff ("Shofer"), by Lloyd S. Mailman, Anthony P. Palaigos, Thomas A. Bowden, and Blum, Yumkas, Mailman, Gutman & Denick, P.A., his attorneys, files this Plaintiff's Response in Opposition to Defendants' Motion To Dismiss the Second Amended Complaint filed by Stuart Hack and The Stuart Hack Company, Defendants.

A. Factual background and procedural posture.

The Second Amended Complaint alleges that Stuart Hack and The Stuart Hack Company (collectively referred to herein as "Hack") were professional pension consultants, hired by Catalina Enterprises, Inc. ("Catalina") to administer Catalina's pension plan (the "Plan").

Shofer was a participant in the Plan. Desiring to borrow some of the money that had accumulated in his voluntary account in the Plan, Shofer asked Hack whether that could be done. Hack replied with a letter dated August 9, 1984 (the "Letter") in which he told Shofer that such loans could be made.

The Letter mentioned no adverse tax consequences of such loan transactions. In fact, however, the loans were, by law, taxable as ordinary income and as prohibited transactions under the Internal Revenue Code. When Shofer took out several loans in reliance on Hack's advice, Shofer suffered serious adverse tax consequences, including but not limited to income and excise taxes, penalties, interest, and liens on his property.

Based upon Hack's previous performance under the contract and on Hack's professed expertise, Shofer reasonably relied upon Hack to alert Shofer as to any negative tax consequences of such transactions. Hack's failure to advise Shofer of these tax consequences forms the basis for the three state law counts of the Second Amended Complaint: negligence (Count I), breach of contract (Count II), and breach of fiduciary duty (Count III).

Hack's motion to dismiss the Second Amended Complaint urges this Court to dismiss Counts I-III on grounds of pre-emption by the Employee Retirement Income Security Act, 29 U.S.C.A. 1001 et seq., as amended ("ERISA"), and to dismiss Counts IV-VIII for lack of subject matter jurisdiction.

B. ERISA Does Not Pre-Empt Shofer's Negligence and Contract Counts.

Two essential facts, whose legal basis will be explained below, should be kept in mind throughout the following discussion: This is not a suit that seeks benefits from an ERISA plan, nor is this a suit against an ERISA fiduciary. If Shofer merely sought retirement benefits due to him under an ERISA-covered pension plan, and if Hack were the party with power to

deny the payment, Shofer's state law claims would clearly be pre-empted by ERISA. Or, if Shofer were suing Hack for breach of a fiduciary duty imposed on Hack by ERISA, Shofer's state law claims would likewise be pre-empted by ERISA to that extent. See, e.g., Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987).

Rather, the gravamen of this case is a professional malpractice claim by Shofer against Hack, seeking reimbursement of Shofer's personal tax liabilities and other personal damages sustained by Shofer by virtue of his reasonable reliance on wrong tax advice given by Hack. Shofer does not claim retirement benefits, and the Catalina pension plan will not affected at all by this Court's judgment. These simple facts distinguish the case at bar from virtually all of the reported cases cited by Hack in his Motion to Dismiss.

1. The Doctrine of Federal Pre-Emption.

The Supreme Court has enunciated several general rules for determining whether federal pre-emption has deprived the states of their power to act in a given area. "'The question whether a certain state action is pre-empted by federal law is one of congressional intent. "'The purpose of Congress is the ultimate touchstone.'"' [Citations]." Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 45 (1987); see also Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983).

"'Pre-emption may be either express or implied, and "is compelled whether the Congress' command is explicitly stated in

the statute's language or implicitly contained in its structure and purpose." [Citation].'" Id.

Pre-emption also occurs to the extent that state law "actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

Finally, pre-emption results "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Id.

2. Power of State Courts To Adjudicate Pre-Emption Issues.

In a recent opinion for the United States District Court for the District of Maryland, Judge Niemeyer stated for the court: "[W]hen under one set of facts jurisdiction is preempted by federal law and under another it is not, or when under a given set of facts jurisdiction depends on a legal interpretation, a state court has the power, and when confronted with the issue, the duty, to apply federal law and determine the issue of preemption." Weiner v. Blue Cross of Maryland, Inc., 730 F. Supp. 674, 682 (D. Md. 1990). Thus, the Circuit Court for Baltimore City may properly determine the pre-emption issue presented in Hack's Motion to Dismiss.

3. The ERISA Pre-Emption Clause.

ERISA provides as follows:

> Except as provided in subsection (b) of this section [not applicable here], the provisions of this subchapter [§§ 1001-1145] and subchapter III of this chapter [§§ 1301-

> 1461] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C.A. § 1144(a). (The so-called "savings clause" and "deemer clause" which follow the quoted text are not applicable in the instant case.)

The Supreme Court has criticized the ERISA pre-emption clauses, noting that they "perhaps are not a model of legislative drafting." Pilot Life, 481 U.S. at 46, quoting Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 739 (1985), and Justices Brennan and Marshall have termed that criticism "understated," Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 67 n.* (Brennan, J., concurring). In the absence of unambiguous statutory language, the task of interpreting when state actions "relate to" an ERISA pension plan has fallen to the courts.

Despite the broad interpretation that has been given to the phrase "relate to," the Supreme Court has recognized that the scope of § 1144(a) is not unlimited. "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw, 463 U.S. at 100 n.21; see also Quigley v. Unum Life Insurance Co., 688 F. Supp. 80, 82 (1988).

In a recent case, Pizlo v. Bethlehem Steel Corp., 884 F.2d 116 (4th Cir. 1989), the Fourth Circuit Court of Appeals had occasion to summarize the types of state actions that "relate to" an employee benefit plan. Such pre-empted state actions include

those that (1) expose employers to conflicting obligations, (2) expose employers to variable standards of recovery, (3) determine whether any benefits are paid, or (4) directly affect the administration of benefits under the plan. Id. at 120.

The Fifth Circuit, based on a review of cases, has identified a principal factor that determines whether a state law of general application affects pension plans in too tenuous, remote, or peripheral a manner to be pre-empted:

> [T]he courts are more likely to find that a state law relates to a benefit plan if it affects relations among the principal ERISA entities--the employer, the plan, the plan fiduciaries, and the beneficiaries--than if it affects relations between one of these entities and an outside party, or between two outside parties with only an incidental effect on the plan.

Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1467 (5th Cir. 1986).

To like effect is the statement of the court in Jordan v. Reliable Life Insurance Co., 694 F. Supp. 822, 834 (N.D. Ala. 1988): "One of the major purposes of ERISA is to protect employee benefit plans from being adversely affected." The court added: "Many cases follow Shaw in holding that actions which have no appreciable effect on an 'employee benefit plan' do not 'relate to' that plan and therefore are not 'superseded,' i.e., preempted." Id.

In the case at bar, Shofer's negligence and contract claims threaten to cause none of the impact on an ERISA plan deemed crucial by the Fourth Circuit in Pizlo. Catalina, the employer/sponsor of the Plan, is not a party to the suit;

therefore, any judgment against Hack will pose no danger of exposing the employer to conflicting obligations or variable standards of recovery. Moreover, because there is no claim for benefits at issue, the outcome of this case cannot determine whether any benefits are paid, or in what amounts. And there can be no effect on the administration of the Plan, because Hack has no more connection with its administration.

Following the Fifth Circuit's reasoning in Sommers, it is clear that Shofer's suit does not affect relations among any of the principal ERISA entities, but rather between one of those entities and an outside party, namely, Hack. Finally, to paraphrase the Jordan opinion, Shofer's suit cannot affect the Plan adversely.

4. Congress Did Not Intend To Pre-Empt State-Law Claims Against Non-Fiduciary Service Providers.

a. Reported Cases on Similar Facts Have Found Pre-Emption To Be Lacking Because State Action Did Not "Relate To" an ERISA Plan.

Reported cases on similar facts illustrate the principle enunciated in Shaw that certain state actions may affect pension plans in "too tenuous, remote, or peripheral" a manner for pre-emption to occur. In Isaacs v. Group Health, Inc., 668 F. Supp 306 (S.D.N.Y. 1987), a pension fund's trustees sued the fund's actuary along with a computer services provider, asserting state-law claims of negligence and breach of contract. The plaintiffs alleged that the computer company's programming error had understated the plan participants' average years of service by 40%. This understatement in turn caused the actuary to

miscalculate the necessary dollar amount of contributions, and consequently the plan was underfunded. The Internal Revenue Service required the pension fund to obtain large increases in contributions from the fund's employers, who, having no legal obligation, refused to comply. The fund's trustees then turned to the non-fiduciaries for damages.

In its defense, the actuary asserted that ERISA pre-empted the plaintiffs' state-law claims, but the court disagreed. The court first pointed out that resolution of the breach of contract claim would not require substantial reference to or interpretation of ERISA, and that state courts are just as competent to resolve contract disputes as are federal courts. Id. at 312. Regarding the negligence claim, the court pointed out that the defendants could be found negligent on the basis of their conduct "without reference to ERISA." Id.

After considering the Supreme Court's admonition in Shaw to give a broad interpretation of the phrase "relate to," the Isaacs court pointed to the "necessary limits" of pre-emption and quoted the Second Circuit to the effect that ERISA's pre-emption clause is "'neither all encompassing . . . nor unlimited.'" Id. at 312, quoting Rebaldo v. Cuomo, 749 F.2d 133, 138 (2d Cir. 1984), cert. denied 472 U.S. 1008 (1985). The Isaacs court then paused to distinguish both Pilot Life and Metropolitan Life, pointing out that those cases involved claims for benefits, whereas "no such claim for benefits" was involved in Isaacs. 668 F. Supp at 312 n.8.

The court also observed that the actuary's attempt to

broaden the scope of pre-emption proved too much. If, for example, "ERISA mandated that every pension fund have an attorney on retainer, the negligence of such attorney, by like reasoning, would be deemed governed by a federal common law . . . ." Id. at 312-13. The court rejected such reasoning.

The Isaacs court concluded: "Inasmuch as ERISA nowhere provides for exclusive federal jurisdiction over claims against non-fiduciary service providers who commit malpractice or breach of contract, there is no basis for this Court to find that plaintiffs' state law claims actually present questions of federal law governed exclusively by ERISA." Id. at 313. The court held that the plaintiffs' claims did not "'relate to'" the administration of the pension plan except in a "'tenuous, remote, or peripheral'" manner. Isaacs, 668 F. Supp. at 312, quoting Shaw, 463 U.S. at 100 n.21.[1]

In Sappington v. Covington, 768 P.2d 354 (N.M. Ct. App. 1988), the court considered a state law claim by an insured under an ERISA-type health insurance policy against the insurance agent who had recommended the policy to the insured's employer. The plaintiff alleged that the insurance agent negligently failed to discover that the health insurance company was not licensed to do business in the State of New Mexico, and that insolvency proceedings had begun against it in Texas. Id. at 355. The

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1. In a lengthy footnote, the Isaacs court cited Retail Shoe Health Commission v. Reminick, 476 N.Y.S.2d 276 (N.Y. 1984) and other authority in support of its holding. Isaacs, 668 F. Supp. at 313 n.9. In Retail Shoe, the decision implicitly found no pre-emption of a state law claim by plan trustees against the plan's accountants on the theory that the accountants had failed to detect certain misappropriations.

plaintiff sought damages measured by the benefits he would have received if the insurance company had been solvent. Considering the pre-emption issue in light of the Supreme Court's decisions in Shaw and Pilot Life, the Sappington court concluded that the state law action would not impinge upon areas that Congress intended to be pre-empted by ERISA. "The relief sought by plaintiff does not affect the administration of any plan," the court said, "nor is plaintiff's claim of liability against defendant predicated on any right or standard contained in ERISA." Id. at 357. "Moreover, plaintiff's claim for compensatory damages, if successful, would be subject to payment by the defendant and not from ERISA funds." Id. at 357-58 (emphasis added).

As was the case in Isaacs, Shofer is suing one who provides services to a pension plan but who is not an ERISA fiduciary. As was true in Isaacs, the trial court in Shofer's case can resolve the negligence and contract claims without substantial reference to ERISA. Shofer makes no claim for benefits such as were present in Shaw and Pilot Life. Finally, ERISA does not include a statutory remedy for the type of malpractice alleged against Hack. Therefore, the conclusion of the Isaacs court, that ERISA did not pre-empt the state law causes of action, should be applied to the case at bar.

With respect to the reasoning in the Sappington case, Shofer's negligence and contract claims against Hack are not predicated upon any right or standards contained in ERISA. The advice that Hack gave to Shofer related primarily to

misinterpretation of the Internal Revenue Code (Title 26 of the United States Code) and not ERISA (found in Title 29, Labor).[2] The trial court will refer to ERISA only in passing, if at all, when adjudicating Hack's liability. Moreover, any judgment entered in this litigation will be paid by Hack, not by the Catalina Plan. For these reasons, the Sappington court's conclusions also support a finding of no pre-emption.

b. ERISA Provides No Remedy Against Misconduct Such As That Alleged Against Hack.

Further evidence that Congress did not intend to pre-empt state law claims such as Shofer's may be found in the absence of any ERISA remedy for misconduct such as that alleged against Hack. Whether Hack is characterized as a non-fiduciary under ERISA or as a fiduciary,[3] ERISA evidences no intent to provide plaintiffs such as Shofer a remedy for personal harm caused by a pension consultant's malpractice.

Courts have repeatedly stressed the importance of a federal remedy as evidence of a Congressional intent to pre-empt state remedies. The Supreme Court in Silkwood, discussing whether federal law pre-empts state actions to recover for radiation-induced injuries at a nuclear plant, said: "It is difficult to

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2. Moreover, a mere reference in a complaint to ERISA for purposes of defining the parties, will not be construed as a request for federal jurisdiction. Isaacs, 668 F. Supp. at 312.

3. Shofer's arguments as to Hack's fiduciary status and the availability vel non of ERISA remedies for Hack's alleged malpractice are made herein for the purposes of this Motion and Response only, without prejudice to or intent to waive the right to pursue in another context any and all relief to which Shofer may be entitled.

believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U.S. at 251. In an ERISA context, one court stated: "It would be anomalous if Congress eliminated the protections offered by state law without providing comparable federal protections." Brock v. Self, 632 F. Supp 1509, 1521 (W.D. La. 1986), quoting Russell v. Massachusetts Mutual Life Insurance Co., 722 F.2d 482, 488 (9th Cir. 1983), rev'd on other grounds, 473 U.S. 134 (1985). Similar reasoning appears in Pratt v. Delta Air Lines, Inc., 675 F. Supp. 991 (D. Md. 1987), where the plaintiff alleged that her employer dismissed her in order to prevent her retirement benefits from vesting, and that a wrongful discharge resulted under Maryland law. In holding that ERISA pre-empted the plaintiff's claims, the keystone of Judge Harvey's analysis was that "ERISA specifically provides a remedy for this type of wrong. Id. 29 U.S.C. § 1140."[4] Id. at 998. By contrast, ERISA provides no remedy for the type of malpractice alleged against Hack.

(1) ERISA Lacks Remedies for Non-Fiduciary Misconduct.

ERISA's fundamental focus is on the establishment of fiduciary duties and remedies for their breach. See 29 U.S.C.A. § 1001(b) ("It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of

4. Section 1140 reads in pertinent part: "It shall be unlawful for any person to discharge . . . a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . ."

participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans . . . ." (Emphasis added.))[5]

"The fact that ERISA is a comprehensive statute and yet does not provide a remedy for nonfiduciary misconduct is a good indication that Congress did not intend to regulate such behavior, but rather, that Congress believed regulation of fiduciary behavior would sufficiently protect benefit plans." Southern California Meat Cutters Unions v. Investors Research Co., 687 F. Supp. 506, 509 (C.D. Cal. 1988). In the Meat Cutters case, a pension fund sued its investment company, brokerage firm, and individual broker. The plaintiffs alleged that the investment company (an ERISA fiduciary) made a contract with the brokerage firm and broker (non-fiduciaries) providing that the latter would handle most trades of fund assets, regardless of reasonable cost to the fund. An issue was whether ERISA pre-empted the state law claims against the non-fiduciaries. After examining the statute, the court concluded that ERISA provided no remedies against the non-fiduciary brokerage firm and broker, and hence the state law claims against these defendants were not pre-empted. The court stated that "ERISA preemption was only intended to go as far as the remedies for which ERISA provides, i.e., fiduciary misconduct." Id.

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5. ERISA may, however, pre-empt suits against non-fiduciaries who knowingly participate in a breach of duty by a fiduciary. Vilas v. Lyons, 702 F. Supp. 555, 563 (1988). No such allegations are present in the Second Amended Complaint.

In Munoz v. Prudential Insurance Co., 633 F. Supp. 564 (D. Colo. 1986), the court considered a plaintiff's state-law claims against a non-fiduciary plan administrator. After quoting with approval the Ninth Circuit Court of Appeals in Russell v. Massachusetts Mutual Life Insurance Co., 722 F.2d 482, 488 (9th Cir. 1983), rev'd on other grounds, 473 U.S. ..... (1985), the court said: "Erisa clearly only involves the regulation of fiduciary conduct relating to employee benefit plans. It does not purport to regulate non-fiduciary conduct such as that presently at issue."[6] Id. at 571. The court concluded with a clear delineation of where ERISA's pre-emptive scope should end:

> I am not unmindful of the open-ended "relate to" language of the Act's pre-emption provision, § 1144(a), nor the expansive interpretation courts have given this language. However, the broad pre-emption language is limited by the Act's declarations of purpose which indicate the Erisa was intended to combat only fiduciary misconduct. I do not find it to be Congress' intent to allow one who has willfully insulated itself from Erisa liability to violate its common law duties with impunity. I do not find it to be Congress' intent to pre-empt state common law liabilities where there is no federal regulation to fill the void. In this vein, the state common law invoked by plaintiff does not denigrate the objectives of Erisa because regulation of non-fiduciary conduct is not an Erisa objective.

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6. The breadth of this holding arguably may have been narrowed by the Supreme Court's decision in Pilot Life, where a plaintiff suing an insurance company for failure to pay benefits was required to sue under ERISA, not state law. Pilot Life does not discuss whether the insurance company was a fiduciary, whereas in Munoz the court held that the insurance company was definitely not a fiduciary. However, even if the specific holding in Munoz would not apply to a claim for benefits against a non-fiduciary, the Munoz court's reasoning concerning non-fiduciaries against whom there is no claim under ERISA remains compelling when applied to Shofer's claims against Hack.

Id. at 571 (emphasis added). The court held: "[S]ince Erisa does not regulate non-fiduciary conduct, it does not pre-empt plaintiff's state common law claims." Id. at 570.

In the case at bar, it was purely fortuitous that Hack had a relation to the Plan as a pension consultant. Assuming, for the sake of argument, that Shofer had consulted an independent tax lawyer with no relation whatsoever to the Plan, and that Shofer had then asked the very same questions that he asked of Hack, and that the tax lawyer had made the same mistakes Hack did, would ERISA pre-empt a state malpractice claim against the tax lawyer? Such a result seems unlikely in view of existing case law.

(2) ERISA's Remedies Against Fiduciaries Do Not Include Relief for Personal Damages Suffered by Participants.

In Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985), the Supreme Court considered a suit by a plan participant against a plan fiduciary that had delayed payment of benefits. Although the participant eventually received all her benefits, she claimed extra-contractual damages (compensatory damages for psychological distress and further physical harm, and punitive damages for intentional breaches of fiduciary duties) under state law. The Supreme Court held not only that the state law claims were pre-empted by § 409 of ERISA, 29 U.S.C.A. § 1109, but that "the entire text of § 409 persuades us that Congress did not intend that section to authorize any relief except for the

plan itself."[7] Id. at 144 (emphasis added). In other words, a plan participant who can prove a breach of fiduciary duty has no remedy for personal harm caused by that fiduciary's breach; the most that such a plan participant can do is force the fiduciary to restore the plan to its previous position.

In the case at bar, the pension plan has suffered no damages whatsoever from Hack's negligence. Thus, even if Hack were to be deemed a fiduciary under ERISA, and Shofer could prove that Hack breached Hack's own fiduciary duties, Shofer would be pursuing an empty cause of action, because he could not recover from Hack the tax liability that constitutes his damages. Moreover, Hack has denied under oath that he is a fiduciary (see Exhibit A, attached to this Response, consisting of excerpts from Hack's deposition),

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7. The Russell Court specifically addressed the "catchall" language at the end of § 409, which provides for "such other equitable or remedial relief as the court may deem appropriate." The Court held that the "catchall" language must be read in the context of the entire section, which is wholly devoted to providing relief for the plan. "A fair contextual reading of the statute," the Court stated, "makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." Id. at 142 (emphasis added). In a footnote to this statement, the Court referred to "Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole." Id. n.9. Although the concurring opinion of four Justices points to the possibility of extracontractual damages under § 502(a)(3), 29 U.S.C.A. § 1132(a)(3), it is difficult to see how an award of money damages for tax liability would qualify as "equitable relief." Three years after the decision in Russell, Judge Ramsey expressed a similar doubt, noting that "Congress, when it drafted the enforcement sections, expressly granted equitable relief as a remedy but did not similarly grant legal relief." Vogel v. Independence Federal Savings Bank, 692 F. Supp 587, 594 (D. Md. 1988); see also Trogner v. New York Life Insurance Co., 633 F. Supp. 503 (D. Md. 1986).

and case law casts doubt upon his fiduciary status.[8]

C. Shofer Intends to Dismiss Counts II through VIII of the Second Amended Complaint.

Based on the facts elucidated in discovery to date, combined with research as to the ERISA statute and relevant federal and state case law, Shofer has concluded that Hack was not acting as a fiduciary with respect to Shofer or the Plan when he gave the incorrect advice on which the Second Amended Complaint is based. As insufficient grounds exist for such a claim, Shofer intends to dismiss the five ERISA claims (Counts IV through VIII) as well as the state law fiduciary duty claim (Count III) at the earliest possible time, and prior to the hearing on Defendants' Motion to Dismiss scheduled for October 12, 1990.

Defendants' Motion to Dismiss will thereby be rendered moot with respect to Counts III through VIII.

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8. The ERISA definition of a fiduciary, found at 29 U.S.C.A. § 1002(21)(A), provides that fiduciary status will be ascribed to one who exercises any discretionary authority or control respecting management or administration of a plan or its assets. "[I]t is a person's ability to make policy decisions outside of a pre-existing or separate framework of policies, practices and procedures which saddles that person with Erisa fiduciary liability." Munoz, 633 F. Supp. at 568. Department of Labor Interpretive Bulletin 75-5 (29 CFR § 2509.75-5) states that an accountant or actuary who renders accounting or actuarial services to an employee benefit plan is not considered a fiduciary solely by virtue of the rendering of such services, absent a showing that such consultant exercises discretionary authority or control respecting the administration of the plan; see Isaacs, 668 F. Supp at 313 n.9. Several cases have held that pension consultants, accountants, and attorneys who render services to ERISA plans are not fiduciaries. See, e.g., Yeseta v. Baima, 837 F.2d 380 (9th Cir. 1988); Nieto v. Ecker, 845 F.2d 868 (9th Cir. 1988); Anoka Orthopaedic Associates v. Mutschler, 709 F. Supp. 1475 (D. Minn. 1989).

D. Conclusion.

For the reasons above stated, Plaintiff respectfully requests this Honorable Court to deny Defendants' Motion to Dismiss the Second Amended Complaint with respect to Counts I and II (negligence and breach of contract).

Respectfully submitted,

Lloyd S. Mailman /B
Lloyd S. Mailman

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CERTIFICATE OF SERVICE

I CERTIFY that on this 20th day of September, 1990, a copy of this document was mailed, postage prepaid, to each person listed below:

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ORIGINAL

VOLUME II

RICHARD SHOFER : IN THE

Plaintiff : CIRCUIT COURT

vs. : FOR

THE STUART HACK COMPANY : BALTIMORE CITY
and
STUART HACK

Defendants : No. 88102069-CL79993

Continued deposition of STUART HACK, was taken on Friday, April 21, 1989, at Hopkins Plaza, Baltimore, Maryland, commencing at 9:15 a.m., before SUSAN FARRELL SMITH, Notary Public.

APPEARANCES:

THOMAS A. BOWDEN, ESQUIRE

On behalf of the Plaintiff.

JANET M. TRUHE, ESQUIRE
LEE B. ZABEN, ESQUIRE

On behalf of the Defendants.

ALSO PRESENT: Richard Shofer

REPORTED BY: Susan Farrell Smith

A

as to the questions I'm going to ask today.

Q Do you recall previously testifying about the concept of fiduciary as it applies in this case?

A Yes.

Q Do you recall testifying that you were in a quandry as to whether you are a fiduciary in this case?

MS. TRUHE: Objection. In this case?

A Yes.

MS. TRUHE: Again, now, Tom, I don't want to throw you off; hold your next question. I would object to this entire line of questioning about whether Mr. Hack is a fiduciary at all in this case, but you may ask your questions.

Q I would like to ask you why you are in a quandry as to whether you'rea fiduciary?

A I am no longer in a quandry; I've given a lot of thought to it.

Q Good. Please educate me.

MS. TRUHE: Objection. What is your question?

Q The question is what has he thought about in relation to that issue?

MS. TRUHE: Objection. Again it calls for a legal conclusion; but if Mr. Hack wishes to clarify a previous answer, he may do so.

A I am not a fiduciary because I did not have control over the assets; I did not have discretion over the assets, did not have discretion over the plan.

Q Is there a difference between having discretion over the assets and having discretion over the plan?

A That's a legal conclusion.

MS. TRUHE: Do you know the answer to that question?

A I don't know the answer to that question.

Q You just used the two terms and I'm just trying to find out whether you meant them synonymously or to mean something different?

A Well, obviously the plan and the assets are not identical. And, so, I said I did not have control over either, did not have discretion over either.

Q Referring your attention to Exhibit H 8 at Page 11 dash 2, particularly in Paragraph B counting down approximately seven lines, I'm going to read that sentence

RICHARD SHOFER	:	IN THE
Plaintiff	:	CIRCUIT COURT
vs.	:	FOR
THE STUART HACK COMPANY, et al	:	BALTIMORE CITY
	:	Case No. 88102069/CL79993
Defendants	:	

: : : : : : : : :

DEFENDANT STUART HACK COMPANY'S
SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 27

Defendant, The Stuart Hack Company, by its attorneys, Janet M. Truhe, Lee B. Zaben, and Semmes, Bowen & Semmes, supplements its answer to plaintiff's interrogatory no. 27 as follows:

INTERROGATORY NO. 27

For every expert whom you expect to call as an expert witness at trial, identify the expert, state the subject matter on which the expert is expected to testify, state the substance of the findings and the opinions to which the expert is expected to testify and the summary of the grounds for each opinion, and produce any written report made by the expert concerning those findings and opinions.

ANSWER

Richard A. Intner, 117 Water Street, Baltimore, Maryland 21202 (Curriculum Vitae attached hereto) will testify

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

on the subject of the third-party defendant's negligence in this case. Mr. Intner will testify that the third-party defendant was negligent in three areas: (1) it failed to identify and bring to the attention of Mr. Shofer the fact that there could have been tax consequences as a result of borrowing from the pension plan; (2) it was negligent in the preparation of the 1985 tax return because it was still uncertain as to the taxability of the pension plan loans and failed to disclose this problem or uncertainty to the I.R.S.; and (3) it failed to advise Mr. Shofer of the fact that he was under no statutory duty to amend his tax return.

Janet M. Truhe

Janet M. Truhe

Lee B. Zaben

Lee B. Zaben

Semmes, Bowen & Semmes

Semmes, Bowen & Semmes
250 W. Pratt Street
Baltimore, Maryland 21201
539-5040
Attorneys for Defendants
The Stuart Hack Company
and Stuart Hack

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

I, Stuart Hack, president of The Stuart Hack Company, do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing document are true and correct.

THE STUART HACK COMPANY

By _____
Stuart Hack

I HEREBY CERTIFY that on this 20th day of September, 1990, a copy of the foregoing Defendant's Supplemental Answer to Interrogatory No. 27 was mailed to Thomas A. Bowden, Esq., Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201 and Linda Schuett, Esq., Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

_____
Janet M. Truhe

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

CURRICULUM VITAE

Richard A. Intner
Baltimore, Maryland

Education

Undergraduate degrees in business administration from the Wharton School, University of Pennsylvania (1969) and accounting from Adelphi University (1972)

Professional Licensing

Certified Public Accountant - State of New York 1975
Certified Public Accountant - State of Maryland 1976

Professional Affiliations

American Institute of Certified Public Accountants
Maryland Association of Certified Public Accountants
New York State Society of Certified Public Accountants
Association of Insolvency Accountants

Professional Qualifications

President, Richard A. Intner, P.A., Certified Public Accountants, a full service accounting firm serving a broad and diverse clientele.

President, Valuation & Litigation Support Services, Inc., a company providing valuation services for all types of financial matters, including valuations of businesses, retirement plans and income levels, and providing litigation support as requested.

Expert witness qualified in federal and various state courts.

Discussion leader/lecturer of accredited Continuing Professional Education seminars for Certified Public Accountants.

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RICHARD SHOFER	:	IN THE
Plaintiff	:	CIRCUIT COURT
vs.	:	FOR
THE STUART HACK COMPANY, et al	:	BALTIMORE CITY
	:	Case No. 88102069/CL79993
Defendants	:	

: : : : : : : : :

THIRD-PARTY PLAINTIFF'S SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 3

Third-party plaintiff, The Stuart Hack Company, by its attorneys, Janet M. Truhe, Lee B. Zaben, and Semmes, Bowen & Semmes, supplements its answer to the third-party defendant's interrogatory no. 3 as follows:

INTERROGATORY NO. 3

Identify in accordance with Instruction E any experts whom you propose to call as witnesses with regard to any matter or issue relating to this action, including in your Answer the nature of each expert's specialty, the subject matter of each expert's testimony, the substance and findings and opinions to which each expert is expected to testify, the facts upon which each expert's opinions are based, and a summary of the grounds for each opinion. Attach to your answers a copy of any and all expert reports.

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

ANSWER

Richard A. Intner, 117 Water Street, Baltimore, Maryland 21202 (Curriculum Vitae attached hereto) will testify on the subject of the third-party defendant's negligence in this case. Mr. Intner will testify that the third-party defendant was negligent in three areas: (1) it failed to identify and bring to the attention of Mr. Shofer the fact that there could have been tax consequences as a result of borrowing from the pension plan; (2) it was negligent in the preparation of the 1985 tax return because it was still uncertain as to the taxability of the pension plan loans and failed to disclose this problem or uncertainty to the I.R.S.; and (3) it failed to advise Mr. Shofer of the fact that he was under no statutory duty to amend his tax return.

Janet M. Truhe

Janet M. Truhe

Lee B. Zaben

Lee B. Zaben

Semmes, Bowen & Semmes

Semmes, Bowen & Semmes
250 W. Pratt Street
Baltimore, Maryland 21201
539-5040
Attorneys for Defendants
The Stuart Hack Company
and Stuart Hack

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

I, Stuart Hack, president of The Stuart Hack Company, do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing document are true and correct.

THE STUART HACK COMPANY

By _____
Stuart Hack

I HEREBY CERTIFY that on this 20th day of September, 1990, a copy of the foregoing Third Party Plaintiff's Supplemental Answer to Interrogatory No. 3 was mailed to Thomas A. Bowden, Esq., Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201 and Linda Schuett, Esq., Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

_____
Janet M. Truhe

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

CURRICULUM VITAE

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President, Valuation & Litigation Support Services, Inc., a company providing valuation services for all types of financial matters, including valuations of businesses, retirement plans and income levels, and providing litigation support as requested.

Expert witness qualified in federal and various state courts.

Discussion leader/lecturer of accredited Continuing Professional Education seminars for Certified Public Accountants.

IN THE CIRCUIT COURT FOR BALTIMORE CITY

50 pd.

RICHARD SHOFER, *

Plaintiff *

v. * Case No. 88102069/
CL79993

THE STUART HACK COMPANY, et al., *

Defendants *

* * * * * * * * *

MOTION FOR SUMMARY JUDGMENT ON THIRD-PARTY CLAIM

Plaintiff, Richard Shofer ("Shofer"), has filed this action against Defendants, The Stuart Hack Company (the "Hack Co.") and Stuart Hack ("Hack"), seeking damages allegedly caused by poor advice given to Shofer by the Hack Defendants.[1] In August, 1984, the Hack Defendants advised Shofer that he could borrow up to 100 percent of his voluntary account from the Catalina Enterprises, Inc. Pension Plan (the "Plan"). Complaint ¶11. The Hack Defendants did not, however, inform Shofer of the tax consequences of any loans from the Plan. Id.

Approximately one year after Shofer filed this action, the Hack Defendants filed a Third-Party Claim against Grabush, Newman & Co., P.A. ("Grabush") seeking indemnification or, in the alternative, contribution. The Third-Party Claim alleges

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[1]For convenience, the Hack Co. and Hack will sometimes be referred to collectively as the Hack Defendants.

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that Grabush, an accounting firm, "failed to properly prepare [Shofer's] personal federal and state income tax returns...." Third-Party Claim, ¶4.

Grabush, by its attorneys, Linda M. Schuett and John J. Ryan, moves pursuant to Rule 2-501 for summary judgment on the Third-Party Claim filed by the Hack Defendants. There is no genuine dispute as to any material fact, and the law clearly establishes that the Hack Defendants are not entitled to indemnification or contribution from Grabush. Accordingly, Grabush is entitled to judgment as a matter of law.

I. UNDISPUTED FACTS

A. The Hack Defendants Are Experienced Pension Planners With Expertise In Tax Related Issues.

Hack is an attorney who has been a member of the Bar since 1965. See Deposition Transcript of Stuart Hack at 33-34 ("Hack Depo. at ___").[2] Since 1961, he has been providing pension planning advice to his clients. Hack owns 70 percent of the Hack Co.; 30 percent is owned in equal shares by three key employees. Hack Depo. at 50-54.

Hack's involvement in pension planning has its roots in the early years of that industry in Baltimore. Hack Depo. at 20-25. When Hack began his practice, he had only two competitors, neither of whom still conducts business. Hack Depo. at 21. In those early years, Hack had to convince people

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[2]The relevant portions of the Hack deposition transcript are attached as Exhibit 1.

of the tax advantages of having pension plans which were "qualified" -- or approved -- by the Internal Revenue Service. Hack Depo. at 22-23. The "primary advantages" of qualified plans "were the tax advantages, the ability to get a current tax deduction" and to accumulate assets on a tax deferred basis. Hack Depo. at 23. Indeed, most pension plans in which Hack has been involved have been formed for tax benefit purposes. Hack Depo. at 26.

Tax expertise is one area in which Hack has a great deal of experience. In addition to his legal training, Hack became a Chartered Life Underwriter (CLU) in 1966 or 1967. Hack Depo. at 24-27. Taxation was part of the expertise Hack acquired while studying to become a CLU. Id. Hack's expertise in tax issues is sufficient that he teaches seminars on the subject:

> **Q.** Have you ever given seminars on the tax aspects of pension planning?
>
> **A.** Absolutely. Yes.
>
> **Q.** Have you ever given seminars in which you discussed, as part of the seminar, the tax implications of loans from pension plans to participants?
>
> **A.** I am sure I did.

Hack Depo. at 31. In short, in the nearly 30 years that Hack has been involved in pension planning, the tax benefits and tax implications of pension planning have played a major role in his practice.

B. The Hack Defendants Have Been Providing Pension Planning Advice, Including Tax Advice, To Richard Shofer For Over Fifteen Years.

Hack first met Shofer in the early 1970's. Hack Depo. at 76. See also Deposition Transcript of Richard Shofer at 49-50 ("Shofer Depo. at ___").[3] It was Grabush that referred Shofer to Hack because of Hack's creativity and knowledge about qualified plans. Hack Depo. at 76-77. Catalina Enterprises already had a pension plan, but Shofer sought Hack for his expertise in pension planning and tax issues:

> **Q.** And for what purpose did you retain Mr. Hack?
>
> **A.** To take over the supervision and accurate -- well, to take over reviewing and bringing into absolute conformity all of the, all matters regarding the profit sharing and pension plan and to give me advice regarding keeping both plans in compliance with the law, tax advice regarding the plans and advice on how to maximize use of the plans effectively as a shelter.
>
> **Q.** What kind of shelter?
>
> **A.** Tax shelter.

Shofer Depo. at 51. See also Hack Depo. at 80. Hack's first undertaking for Shofer was to re-draft the document governing the Plan. Hack Depo. at 82.

During the years that followed, the Hack Defendants provided professional assistance to Shofer and Catalina Enterprises in administering the Plan. Hack Depo. at 144. As Hack described it:

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[3]The relevant portions of the Shofer deposition transcript are attached as Exhibit 2.

A. ... Our relationship was that Dick [Shofer] would typically call with problems needing a solution and a creative one, and my job was to try to figure out how to say yes within the law as to what he was trying to accomplish. I think that was my particular value to them.

Q. Did you say "creative solutions"?

A. That's correct. Come up with an answer that permits him within the law to do what he wants to do.

Q. Is it fair to say that you sold yourself and your company as a creative -- as a source of creative advice then?

A. Absolutely true.

Q. But always within the law?

A. That is absolutely true.

Hack Depo. at 81. Part of the role of the Hack Defendants was to provide Shofer with tax advice on any contemplated transactions:

Q. Prior to August 9th, 1984, had you advised Mr. Shofer or Catalina, as to the tax implications of other transactions that they were contemplating?

A. I think I did. Yes.

Q. So that was a normal part of your business relationship?

A. Yes. It was.

Hack Depo. at 154. Indeed, Shofer had come to rely on the Hack Defendants for tax advice concerning the Plan. Shofer Depo. at 249-250. The Hack Defendants knew that Shofer relied upon them for tax advice and believed that Shofer's reliance was reasonable:

Q. Would it have been reasonable for Mr. Shofer, in August of 1984, to assume that if there were adverse tax consequences of a contemplated pension transaction, that you would advise him of same?

***

A. Yes.

Q. Would it have been a reasonable thing for him to assume, then?

***

A. Yes.

Hack Depo. at 154-155.

C. It Was Hack, Not Grabush, Who Advised Shofer That He Could Withdraw Up To 100 Percent Of His Voluntary Account Without Advising Him Of The Tax Consequences.

In early August, 1984, Shofer telephoned Hack seeking advice, including tax advice, concerning loans from the Plan. Hack Depo. at 167. See also Shofer Depo. at 57. Specifically, Shofer wanted to know whether he could borrow money directly from the Plan or whether he could use the Plan as collateral if he borrowed the money from a third party. Hack Depo. at 202. When Shofer made the inquiry, Hack believed that he was expected to advise Shofer about the tax consequences of the loans:

Q. Did you feel at the time, after receiving his request, that you should advise him as to the tax implications of the contemplated loan?

A. Yes.

Hack Depo. at 168. Not surprisingly, Shofer also believed that Hack would have informed him of any tax consequences. Shofer Depo. at 106.

By a letter dated August 9, 1984, the Hack Defendants responded to Shofer's inquiry.[4] A copy of the letter is attached as Exhibit 3. The letter distinguished between voluntary accounts (money contributed by participants) and employer accounts (money contributed by the employer). The Hack Defendants told Shofer that he could not use the employer account as collateral for a loan, and that any loans made to participants against that account would be limited to $50,000 for up to a maximum of five years.[5] Their advice with respect to voluntary accounts was just the opposite:

> There is an entirely different treatment for voluntary accounts. First there is no limit on the amount which can be borrowed against the account or the length of time for which it can be outstanding.... Further, the voluntary account can be put up as collateral for a loan from a bank or other source.

(Emphasis added.) In the last paragraph of the letter, the Hack Defendants re-emphasized the lack of restrictions on loans from Shofer's voluntary account:

> The TEFRA provisions on the limits on loans apply only to employer accounts and specifically do not apply to employee voluntary accounts. In my opinion, you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account. The terms of the loan must be reasonable as to the interest rate and pay back period.

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[4]Prior to sending the letter dated August 9, 1984, Hack called Barry Berman, Esquire, at Weinberg & Green, to discuss the matter. Hack Depo. at 170.

[5]There is an exception to the five year limit for the length of the loan, but it is not applicable here.

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The advice given by the Hack Defendants to Shofer in the August 9, 1984 letter was wrong. In 1982, the law governing loans from pension plans changed. In 1984, when the advice was given, Section 72(p)(1) of the Internal Revenue Code stated the general rule that loans from a plan, and pledges or assignments, are treated as distributions (i.e., as income) to the participant.[6] As an exception to that general rule, Section 72(p)(2)(A) and (B) provided that loans for less than $50,000 in the aggregate are not treated as distributions so long as the loans, by their terms, are required to be repaid within five years. The Internal Revenue Code did not distinguish between employer and voluntary accounts.

Shofer did not discuss the propriety of the loans -- or the tax consequences of them -- with anyone at Grabush. Shofer Depo. at 87-89; 273-274. Shofer did not think it was necessary to do so because he was relying on Hack's advice:

> **Q.** Is it fair to say, Mr. Shofer, that you were relying on Mr. Hack to advise you as to the taxability of the loans from the pension plan?
>
> * * *
>
> **A.** Advise me as to the taxability of the loans? If there was a taxability, yes.
>
> **Q.** You expected Mr. Hack to tell you that?

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[6]The entire amount of the loan may not constitute income. For example, the actual amount contributed by the employee does not, as a general rule, constitute taxable income.

A. Certainly.

Shofer Depo. at 274. Hack admits that Shofer's question was within his expertise:

Q. But Mr. Shofer's question was within your area of expertise; was it not?

A. Yes, it was.

Q. And you held yourself out as being able to answer the question?

A. Yes, I did.

Hack Depo. at 277.

D. Shofer Alleges That In Reliance On Hack's Advice, He Borrowed $375,000 From The Plan In 1984, 1985, And 1986.

In 1984, 1985, and 1986, Shofer took out nine loans totalling $375,000 from the Plan. See Shofer's Answer to Hack's Interrogatory No. 3. From the date of Hack's letter until the end of 1984, Shofer took three loans totalling $260,000. Id. In 1985, Shofer took five loans totalling $80,000. Id. In 1986, he took one loan of $3,500. Id. Shofer has testified that he would not have taken these loans from the Plan had Hack informed him of the tax consequences:

Q. By the way, Mr. Shofer, back in August of 1984 if Mr. Hack had told you that any amount you borrowed from your pension plan over fifty thousand would be taxable to you as income, what would you have done?

A. I certainly wouldn't have borrowed any amount over fifty thousand.

Shofer Depo. at 223.

E. In June, 1985, Grabush Learned That Shofer Had Borrowed Money From The Plan; In Late 1986, Grabush Questioned The Taxability Of The Loans.

Shofer has used Grabush for certain accounting services since the early 1970's. Shofer Depo. at 31. Since 1985, Kenneth E. Larash has been the partner at Grabush with primary responsibility for the rendering of those services. Deposition Transcript of Kenneth E. Larash at 33-34 ("Larash Depo. at ____").[7] Grabush prepares Shofer's personal tax returns, the returns for his company, and a Form 990T for the Plan.[8] Larash Depo. at 14-16.

In June, 1985, Larash became aware that Shofer had taken certain loans from the Plan. Larash Depo. at 38-39. He did not research the taxability of these loans because Shofer told him that he had discussed the loans with Hack, and Shofer produced a document from Hack stating that it was permissible to take the loans. Larash Depo. at 45-47. Larash relied on Hack's opinion about the loans because Hack was an expert in the area of pension plans, including tax matters relating to pension plans, and Larash was not.[9] Larash Depo. at 49-50;

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[7]The relevant portions of the Larash deposition transcript are attached as Exhibit 4.

[8]As a general rule, a qualified pension plan pays no taxes. Hack Depo. II at 44. When a plan engages in certain types of investment activity, the 990T is filed to show the taxable amount. Id. The loans at issue here have nothing to do with the filing of the 990T. Hack Depo. II at 45.

[9]Hack's Third-Party Claim is based, in large part, on Grabush's knowledge of loans in June, 1985 and its failure to report them as income. Of course, Hack knew about the loans in late December 1985, and he did nothing to correct the situation that he himself had created. Hack Depo. II at 146-148.

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56-58. In addition, Larash believed that Hack was responsible for the issuance of a Form 1099 if Shofer experienced a taxable event relating to the Plan. Larash Depo. at 112-114. Hack admits to this responsibility. Hack Depo. II at 55. Grabush did not receive any 1099's. Larash Depo. at 112-114.

In late June, 1986, Alan Marvel joined the tax department at Grabush. Larash Depo. at 68. In the fall, during a meeting relating to the effect of the 1986 Tax Reform Act on Shofer's affairs, Marvel learned about Shofer's loans from the Plan. Larash Depo. at 69. Because of a previous experience he had had with a loan from a pension plan, Marvel questioned the taxability of the loans taken by Shofer. Larash Depo. at 73-74.

After Grabush discovered the potential problem, it acted quickly to assist Shofer. Grabush contacted Shofer and the Hack Defendants to inform them about the potential problem. Hack Depo. at 173; Shofer Depo. at 210. Because of its lack of specific expertise in this area, Grabush advised Shofer to hire an attorney experienced in pension tax law to aid in determining whether the loans were taxable events. Larash Depo. at 82; Shofer Depo. at 68. Shofer hired Nick Giampetro, Esq. for that purpose. Shofer Depo. at 68-69. Although the Hack Defendants made every effort to unearth some argument that the loans did not constitute taxable income, they could not do so. Hack Depo. at 469-470. The best they could do was the suggestion that Shofer not amend his returns, hope that the IRS would not discover the problem, and let the statute of limitations run.

Hack Depo. at 408. As it was ethically required to do, Grabush advised Shofer to amend his returns. Larash Depo. at 86. Shofer decided to do so. Larash Depo. at 100-101.

II. THE HACK DEFENDANTS ARE NOT ENTITLED TO INDEMNITY FROM GRABUSH FOR THEIR OWN NEGLIGENCE.

The Hack Defendants claim that Grabush should indemnify them in the event Shofer succeeds in his case against them. To support this specious claim, the Hack Defendants allege that any damages suffered by Shofer were caused by Grabush's failure to report the loans on Shofer's income tax returns and by its later suggestion that those returns be amended when the problem was discovered. Assuming for the sake of argument that these allegations are sound,[10] they simply do not support a claim for indemnity.

A right of indemnification arises in two ways -- either by express agreement or by implication. Hanscome v. Perry, 75 Md. App. 605, 615 (1988). In the absence of an express agreement, an active-passive analysis is used to determine whether indemnity is appropriate. Board of Trustees of Baltimore County Community Colleges v. RTKL Associates, Inc., 80 Md. App. 45, 56 (1989). A party may be entitled to indemnification only if his own conduct, although negligent, is considered to be passive or secondary:

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[10]Grabush vigorously contests any argument that it was negligent. For purposes of this Motion, however, Grabush's alleged negligence or lack thereof is irrelevant.

> The area in which a party held liable for negligence may pass that liability on to another negligent party is closely circumscribed. It encompasses a group of special situations and relationships where it has seemed reasonable to impose an ultimate responsibility on a party seeming to have played the active role in the negligence situation in favor of one who is made answerable to the injured party, but whose part in the event is passive or arises from the effect of public policy, contract, or status.

Pyramid Condominium Assn. v. Morgan, 606 F.Supp. 592, 595-96 (Md. 1985), quoting from Blockston v. United States, 278 F.Supp. 576, 585 (Md. 1968). Stated another way, indemnity may be granted where, although both parties are negligent, the negligence of the indemnitee is not considered as serious as that of the indemnitor. Pyramid Condominium, 606 F.Supp. at 596, quoting from Jennings v. United States, 374 F.2d 983, 987 n.7 (4th Cir. 1967).[11]

The Hack Defendants have no basis whatsoever for pursuing a claim of indemnity against Grabush. The Hack Defendants admit - as they must - that there is no express agreement between Grabush and the Hack Defendants relating to

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[11] See also Crockett v. Crothers, 264 Md. 222, 227 (1972) (indemnity disallowed if the negligence of the person seeking indemnity was not passive or secondary); Blockston, 278 F.Supp. at 584-85 (indemnity allowed only if the wrongful act of one person results in liability being imposed on another); Pyramid Condominium, 606 F.Supp. at 596 (defendant may seek indemnification only when its liability is passive or secondary, which liability is rooted in the concept of imputed or constructive fault).

indemnity. Hack Depo. II at 128-129. Thus, the Hack Defendants must show that they were not actively or primarily at fault and that their alleged negligence was passive or secondary. Clearly, they are unable to make this showing.

Shofer's suit is plainly based on the active and primary negligence of the Hack Defendants in giving Shofer incorrect and incomplete advice about loans from the Plan. Without doubt, it was Hack's bad advice that caused Shofer to take the loans and, thus, to incur tax liabilities. Shofer relied on Hack, not Grabush, to tell him about any tax consequences relating to loans from the Plan. Grabush was never consulted about the loans in August of 1984 - or at any other time. Indeed, by the time Grabush happened upon the fact that Shofer had taken loans from the Plan, almost $300,000 in loans had already been taken. By this time, the major portion of Shofer's tax consequences was already fixed, and there was nothing Grabush could have done to undo the taxable event. As a matter of law, Hack's alleged negligence is not passive or secondary. As a matter of law, the Third-Party Claim for indemnity fails.

III. THE HACK DEFENDANTS HAVE NO RIGHT TO CONTRIBUTION FROM GRABUSH BECAUSE THEY ARE NOT JOINT TORTFEASORS LIABLE FOR THE SAME INJURY.

In the alternative, the Hack Defendants ask that Grabush share the burden of this lawsuit. However, their effort to seek contribution from Grabush is equally flawed. The undisputed facts positively establish that Grabush and the

Hack Defendants are not "joint tortfeasors" liable for the "same injury."

The right to contribution among joint tortfeasors is a creature of statute that did not exist at common law. Baltimore Transit Co. v. State ex rel Schriefer, 183 Md. 674 (1944). See also, Central GMC v. Helms, 303 Md. 266 (1985); Baltimore County v. Stitzel, 26 Md. App. 175 (1975). In 1941, the Maryland legislature created the right:

> (a) Right exists.--The right of contribution exists among joint tortfeasors.

Md. Code Ann., Art. 50, Section 17(a) (1986 repl. vol.) (the "Act"). The Act defines joint tortfeasors as "two or more persons jointly or severally liable in tort for the same injury...." Art. 50, Section 16(a).[12]

At common law, only tortfeasors acting in common or "in concert" were considered to be joint tortfeasors. Morgan v. Cohen, 309 Md. 304, 311 (1987) (discussing the history of joint tortfeasor law). The rationale behind holding them jointly liable was that, although there were two actors, there was but one injury. Id. Over the years, the term "joint tortfeasor" has also been used to describe concurrent

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[12]The Act is closely patterned after the Uniform Contribution Among Tortfeasors Act, approved by the National Conference of Commissions on Uniform State Laws and the American Bar Association. Uniform Contribution Among Tortfeasors Act (U.L.A. Vol. 12). Maryland adheres to the 1939 version and has not adopted the 1955 revisions.

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tortfeasors in addition to those acting in concert.[13] Morgan, 309 Md. at 312. Unfortunately, the term "joint tortfeasor" has led to a great deal of confusion among various courts and has carried many different meanings. Prosser and Keaton on Torts, Chapter 8 (1984). Dean Prosser has identified a variety of methods employed by courts to determine whether parties are "joint tortfeasors," including:

> ... the identity of a cause of action against each of two or more defendants; the existence of a common, or like duty; whether the same evidence will support an action against each; the single, indivisible nature of the injury to the plaintiff; identity of the facts as to time, place or result; whether the injury is direct and immediate, rather than consequential; responsibility of the same defendants for the same injuria as is distinguished from the same damnum. (Citations omitted.)

Prosser at 322.

Although concurrent tortfeasors under current law are considered to be joint tortfeasors, even if not acting in concert, Maryland has specifically stopped short of expanding the joint tortfeasor concept to include successive tortfeasors. Morgan, 309 Md. at 315. Other states which have passed the Uniform Act have held that successive wrongdoers are

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[13]Concurrent tortfeasors are tortfeasors who simultaneously, but independently, cause precisely the same injury. See, e.g., Lanasa v. Beggs, 159 Md. 311 (1930), discussed in Morgan at 313-315, in which a woman was injured when the taxicab in which she was a passenger collided with a truck. If both drivers were negligent, they were concurrent tortfeasors - but not joint tortfeasors at common law - because they did not act in concert.

not joint tortfeasors. See e.g. TVSM, Inc. v. Alexander & Alexander, Inc., 583 F.Supp. 1089 (E.D. Pa. 1984); Harka v. Nabati, 487 A.2d 432 (Sup. Ct. Pa. 1985); Tesch v. United States, 564 F.Supp. 326 (E.D. Pa. 1982); Carroll v. Carroll, 164 S.E.2d 72 (N. Caro. 1968); and New Milford Board of Education v. Juliano, 530 A.2d 43 (N.J. Super. A.D. 1987). For similar results in states which have not yet enacted the Uniform Contribution Among Tortfeasors Act, see Alexander v. Hammarberg, 230 P.2d 399 (Cal. 1951), Salt River Valley Water Users' Assn. v. Cornum, 63 P.2d. 631 (Ariz. 1937), and Stuart v. The Hertz Corp., 351 So.2d 703 (Fla. 1977). In fact, the courts in TVSM, Tesch, and Stuart each dismissed third-party claims on the ground that successive tortfeasors are not joint tortfeasors.

Here, without doubt, Grabush and Hack did not act in concert or concurrently. The poor advice allegedly given by Hack was given in August of 1984. Grabush had no knowledge of the advice and did not in any way participate in it. Indeed, Grabush did not learn about any loans from the Plan until June, 1985. Thus, to the extent that Grabush is a tortfeasor at all (which it categorically denies), it is a successive tortfeasor and, thus, not a joint tortfeasor.

Application of Prosser's tests clearly reveals that Grabush and the Hack Defendants are not joint tortfeasors. If Shofer has any cause of action against Grabush, it clearly is not identical to the causes of action that Shofer has asserted

against Hack. A cause of action for failure to report loans as income is very different from causes of action alleging bad advice that caused the taking of loans in the first instance. The theories of the two cases are different, the times of the alleged injuries are different, and the amounts in controversy are different. There simply is no identity as to the time, place, or result.

Similarly, any duties owed by the Hack Defendants and Grabush to Shofer were not common or like duties. Hack owed Shofer the duty to use reasonable care in the giving of advice about loans from the Plan. Grabush did not owe Shofer this duty because Shofer did not rely on Grabush for any such advice. Furthermore, the same evidence does not support each potential claim. The evidence required to support Shofer's action against Hack involves conversations with Hack, the August 9, 1984 letter from Hack, and evidence concerning the nature of Shofer's relationship with Hack. None of this evidence is in any way probative of any claim against Grabush.

The remaining tests identified by Prosser focus in on the nature of the injury - whether it is indivisible, whether it is direct and immediate or consequential, and whether there is joint liability for the same injury as opposed to the same damages. The Court of Appeals construes the term "same injury" as used in the statutory definition of joint tortfeasors very narrowly. In Central GMC, Inc. v. Helms, 303 Md. 266 (1985), Helms bought a truck from Sanitation Specialists Company, Inc.

for $15,000. Prior to delivery of the truck, Sanitation was to make certain repairs, so it delivered the truck to Central GMC for that purpose. On two occasions, before and after delivery of the truck to Helms, Central made repairs. Sanitation refused to pay Central's bills because the repairs were ineffective. Helms continued to experience problems, so Sanitation directed him to have the truck repaired by Blue Ridge Kenworth, Inc. While the truck was at Blue Ridge, Central took possession of it and later sold the truck to satisfy the debt. Helms sued Sanitation for breach of warranty, and that case settled for $15,000 - the purchase price of the truck. Helms then sued Central for conversion and recovered a judgment against it for compensatory damages, also in the amount of $15,000. On appeal, Central argued that it was entitled to contribution based on the Act. The Court of Appeals disagreed, holding that Central and Sanitation were not joint tortfeasors within the meaning of the Act because they had not caused the same injury. 303 Md. at 276-277. See also Huff v. Harbaugh, 49 Md. App. 661 (1981).

Here, the nature of the alleged injury is very different. As discussed above, by the time Grabush happened upon the fact in June of 1985 that Shofer had been taking loans from the Plan since August of 1984, Shofer had already borrowed almost $300,000. His injury - i.e., the taxes owed on those loans - was already fixed, and there was nothing that Grabush could have done at that point to undo Shofer's tax liability. Grabush has no liability for the taxes owed on those loans and,

thus, the injury alleged by Shofer is clearly divisible. All of the loans were taken as the direct and immediate result of Hack's advice. Grabush's failure to report the loans as income was simply a consequence of that bad advice. As a matter of law, the injury is not the same, and there is no joint liability, either for the same injury or for the same damages.

Baltimore & Ohio Railroad v. Howard County, 113 Md. 404 (1910), is directly on point. There, a widow had obtained a judgment against Howard County because her husband's death was caused by the County's negligent failure to maintain a road. The County then obtained a judgment against the Railroad for indemnity because the Railroad had created the dangerous condition on the road. On appeal, the Railroad argued that the County was not entitled to indemnity because it had actual knowledge of the dangerous condition from the time it was created. According to the Railroad, the County's actual knowledge, coupled with its failure to repair when it had a duty to do so, made the Railroad and the County joint tortfeasors. The Court of Appeals disagreed, holding that actual knowledge and failure of duty are insufficient to create joint tortfeasor status. 113 Md. at 414. The Court affirmed the judgment for indemnity in favor of the County.

Here, at best, Grabush had actual knowledge of the loans in June, 1985, long after Hack gave the initial bad advice and long after Shofer took the initial loans from the Plan. Even assuming (a) the existence of a duty on the part of

Grabush to "repair" the "dangerous condition" created by Hack and (b) a failure by Grabush to fulfill that duty (two major assumptions), under Baltimore & Ohio Railroad, Grabush and Hack are not joint tortfeasors. No matter how viewed, the undisputed material facts in this case establish that Grabush and the Hack Defendants are not joint tortfeasors. Accordingly, the Hack Defendants have no claim for contribution, and their Third-Party Claim should be dismissed as a matter of law.

IV. CONCLUSION.

The Hack Defendants have no claim for indemnity because the alleged negligence of the Hack Defendants was active rather than passive. The Hack Defendants have no claim for contribution because Grabush and the Hack Defendants are not "joint-tortfeasors" as contemplated by the Act. The Third-Party Claim by the Hack Defendants is nothing more than an attempt by them to recover for what they - and they alone - perceive as negligence in the relationship between Shofer and Grabush. The Hack Defendants should know full well, however, that only a client may sue a professional for a negligent act or omission in the absence of third-party beneficiary status. Flaherty v. Weinberg, 303 Md. 115 (1985). Shofer has not sued Grabush, and the Hack Defendants are not entitled to do so. See also Jacques v. First National Bank, 307 Md. 527 (1986); Weisman v. Connors, 312 Md. 428 (1988); Ultramares Corp. v. Touche, 174 N.E. 441 (1931). For all of these reasons, Grabush

is entitled to judgment as a matter of law on the Third-Party Claim.

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(301) 625-3500

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CERTIFICATE OF SERVICE

I CERTIFY on this 21st day of September, 1990, that a copy of the Motion for Summary Judgment on Third-Party Claim was mailed, postage prepaid, to:

Thomas A. Bowden, Esquire
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& Denick, P.A.,
1200 Mercantile Bank & Trust Bldg.
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Attorney for Plaintiff

and hand delivered to:

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250 West Pratt Street
Baltimore, Maryland 21201

Attorney for Defendants/Third-Party Plaintiffs

Linda M. Schuett

8656L/2

515

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER, Plaintiff	*	
v.	*	Case No. 88102069/ CL79993
THE STUART HACK COMPANY, et al., Defendants	*	

* * * * * * * * *

REQUEST FOR HEARING

Grabush, Newman & Co., P.A., by its attorneys, respectfully requests a hearing on its Motion for Summary Judgment on Third-Party Claim.

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Linda M. Schuett

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER,	*	
Plaintiff	*	
v.	*	Case No. 88102069/ CL79993
THE STUART HACK COMPANY, et al.,	*	
Defendants	*	

* * * * * * * * *

ORDER

Upon consideration of all papers relating to the Motion for Summary Judgment on Third-Party Claim filed by Third-Party Defendant, Grabush, Newman & Co., P.A., and having heard oral argument, it is this _____ day of _____, 1990, by the Circuit Court for Baltimore City,

DETERMINED that there is no genuine dispute as to any material fact; and it is

DETERMINED that the Third-Party Defendant is entitled to judgment as a matter of law; and it is

ORDERED that Third-Party Defendant's Motion for Summary Judgment is GRANTED; and it is

DETERMINED that there is no just reason for delaying the entry of a final judgment for the Third-Party Defendant because the granting of the Motion determines all claims against it; and it is

ORDERED that the clerk shall enter a final judgment in favor of Grabush, Newman & Co., P.A. for costs.

JUDGE

09-21-90
8656L/1

Ex. 1 -
Hack Depo.

ORIGINAL

RICHARD SHOFER	*	IN THE
Plaintiff,	*	CIRCUIT COURT
vs.	*	FOR
THE STUART HACK COMPANY	*	BALTIMORE CITY
and STUART HACK	*	Case No 88102069-
Defendants.	*	CL7993

- - - - - -

Deposition or STUART HACK, was taken on Thursday, March 16, 1989, commencing at 9:00 a.m., at 2 Hopkins Plaza, Baltimore, Maryland, before DEBBIE K. LAMBERT, Notary Public.

APPEARANCES:

THOMAS A. BOWDEN, ESQUIRE
on behalf of the Plaintiff

JANET M. TRUHE, ESQUIRE and
LEE B. ZABEN, ESQUIRE
on behalf of the Defendants

ALSO PRESENT: Thomas Shofer

REPORTED BY: Debbie Karen Lambert

Q. Did you work during the day?

A. That's what I did.

Q. I am firmly convinced that only night students know what it's like to really work.

A. Well, there were some guys there who were judge's clerks during the day, at night school, who went to work for the federal government and I think they had an easier time of it than I did.

Q. Where did you work?

A. I worked for my father and his insurance agency and then I started my pension consulting firm while I was in law school.

Q. What year was that?

A. I started a pension consulting firm in '61, I believe -- '60 or '61.

Q. That was right in downtown Baltimore?

A. Yes.

Q. Where were your offices then?

A. Commerce Street -- No, that's not correct. First it was on Lexington Street and the building isn't there any more, 110 East Lexington. And then

we moved to -- I think it is 11 Commerce Street in the old Chamber of Commerce Building.

Q. What year did your graduate from law school?

A. I think it was '63.

Q. So your last couple of years in school you were running a pension consulting firm in the daytime?

A. That's correct.

Q. So you got in on the ground floor then?

A. Yes, I did.

Q. Do you have any recollection of how many competitors you had when you started?

A. Two. Two real competitors in the city when I started.

Q. Are they still around?

A. Neither one of them is around.

Q. You have outlasted them all?

A. I am not sure that that's a testimony -- a positive testimony, or not.

Q. What was the biggest challenge to a pension

consultant in 1961, when you started? I imagine the legal framework was substantially different then?

A. The biggest challenge was to have positive relationships, or interviews, with potential clients. That was the biggest step. That was the biggest challenge.

Q. To convince them of a need for pension consultants?

A. Well, to have somebody who would listen to the reasons of why a qualified plan would be useful to them. And to -- I think, to get the believability of the law firms and the accounting firms, that what we were doing was useful.

Q. So even in 1961, the -- it was desirable to have a qualified plan?

A. Well, it was desirable under the right circumstances to have a qualified plan, yes.

Q. By "qualified", do you mean qualified by the Internal Revenue Service?

A. That's correct. Qualified by the Internal Revenue Service.

Q. Does that mean that the plan is in compliance with relevant tax laws?

A. Well, not specifically. What it means is that as presented to the Internal Revenue Service, the document and the information presented to them would lead them to conclude that it was qualified with applicable law. At that time, there was not a lot of applicable law. So getting approval of a plan was more of an art form.

Q. What was the advantage back then of having a qualified plan?

A. Well, that depends upon who is using it and for what purposes. The primary advantages that we were suggesting to clients were the tax advantages, the ability to get a current tax deduction. And the assets accumulate in a trust on a tax deferred basis and at that time, capital gains tax upon withdrawal and no estate taxes upon death.

And most of the plans had seventy percent or more of the assets going to the owners of the business. Delayed vesting for employees, their

chances of getting anything out of the plans were not very likely unless they stayed all the way until retirement. The world has changed since then.

Q. Back when you started this business, what role did the actuarial work play in a typical client/service situation?

A. Well, in this particular case, there was no actuarial work. This is not a defined benefit plan.

Q. When you say, "this particular case", are you --

A. We're talking about the Catalina Enterprises's money purchase plan and profit sharing plan; neither one of them the actuarial work done on them.

Q. I am still back in 1961, before the Beatles and I am just wondering -- trying to get some idea of your background. You are now, I believe -- you have the initials CLU after your name?

A. That's Chartered Life Underwriter.

Q. Does that have anything to do with actuarial work?

A. None whatsoever. If your question is, am I a Actuary, I am not.

Q. My previous question was, what role did actuarial calculations play, around 1961, in your pension consulting services?

A. Well, initially we did no actuarial work at all. It was all done for us by insurance companies. And then suddenly, we were saddled with the responsibility of doing our own work so I became a quote, "Actuary", unquote.

That is, I did the mathmatical calculations and there was no legal definition of an Actuary at that time. It was not until 1974, ERISA, that they defined what an Enrolled Actuary was, which I was not one of.

Q. Are you now?

A. No.

Q. So is it fair to say that from the beginning of your career as an pension consultant, your sales pitch -- if you can call it that -- to potential clients, was your ability to gain tax

advantages for them?

A. I think that's largely true. Not entirely, but largely.

Q. What is there that makes you hesitate about that?

A. Well, there are clients who put in retirement plans because they wanted to accumulate money for retirement, not withstanding the fact that the tax benefits were favorable.

There were clients who put in retirement benefits because they honestly wanted to do something for their employees, not withstanding that they were tax benefits.

You asked me to give you as honest and complete an answer as I can and that's it. The bulk of the plans were put in primarily for the tax benefits though.

Q. Other than law school, have you taken any courses since your graduation from college?

A. I have been to seminars. I took some actuarial courses. I took some -- I am trying to

think -- other than going to seminars -- I have done a lot of reading. You know, most of the education is continuous reading. I passed the CLU exams and took one or two courses to do that.

Q. What is involved in becoming an CLU?

A. Well, at that time there was a five part exam, five different subjects and you had to pass all five in order to get the designation.

Economics -- it's know something like -- they have broken that into fifteen topics. But anyhow, I remember the economics because that's the only course I took. That's the only one I wasn't prepared for, out of my own knowledge, to deal with it.

Q. When did you become a CLU?

A. I think it was '66, or '67. I am not positive about it.

Q. Was taxation any part of the the expertise?

A. Oh, yes. Oh, yes. Estate planning. Very little on employee benefits at that time.

Q. You did not take courses in the other

Q. Is knowledge of tax laws any part of the the examination for a licensed insurance consultant?

A. I don't recall. I don't know.

Q. You mentioned earlier that you have attended seminars since graduating from school. Have any of those led to credit toward any type of a certificate?

A. I don't think so. They are valuable seminars. I don't recall any.

Q. Have your ever given seminars?

A. Many of them.

Q. Have you given seminars on tax aspects of pension planning?

A. Absolutely. Yes.

Q. Have you given any seminars in which you discussed, as part of the seminar, the tax implications of loans from pension plans to participants?

A. I am sure I did.

Q. When you give these seminars, do you prepare a outline or notes?

do since 1986. Not as valuable as it had -- had been previously.

Q. Would you mind checking your files to see if you have any such outlines?

A. Be happy to do so.

Q. Your biography reflects that you are a member of the American Society of Pension Actuaries?

A. That's correct.

Q. But you are not an Actuary?

A. That's correct.

Q. How does one manage that?

A. One doesn't have to be an Actuary to be a member of the American Society of Pension Actuaries. They have various classes of membership and one of them happens to be an actuary member.

Q. What is your class of membership?

A. I think, as of current, I am a -- called a Professional Member because I am a attorney.

Q. You are a member of the Bar?

A. Yes, sure am.

Q. When did your first take the Bar exam?

A. '64, I think.

Q. Did you pass it the first time?

A. No, I didn't.

Q. Did you pass it the second time?

A. Yes, I did.

Q. What year was that?

A. I think that was '65.

Q. Have you been the member of the Bar continuously, since 1965?

A. I certainly have.

Q. Have you ever been disciplined or disbarred by the Court of Appeals?

A. Never.

Q. Have you ever the a claim filed against you with the Attorney Grievance Commission?

A. There was -- many, many years ago, a letter written, complaining that I was giving legal advice -- no. Complaining that I was using -- I was -- I was on my stationery and my cards, the fact that I was an attorney and yet I wasn't practicing law.

And in fact, I never put "Attorney" on my

A. I am also the head of my own insurance agency.

Q. What is the name of that company?

A. Hack Insurance Group. H-A-C-K, Insurance Group, Inc.

Q. When was that started?

A. It was started three years ago. It was a successor to Commerce Insurance Agency.

Q. Have you ever worked for another person since 1961?

A. Well, I was working during that time, both for myself and for my father. But, no one else.

Q. Have you ever testified as an expert witness in the area of pension planning, in any court proceding or deposition?

A. Nope.

Q. Was your company incorporated in 1961, when you started?

A. I think that's the date, yes.

Q. Is it a P.A., Professional Association?

A. No, it is not. It's a regular corporation.

Q. Who are the stockholders?

A. I own seventy percent of the stock and then there are three other shareholders.

Q. Who are they?

A. Maryanne Dubbs, D-U-B-B-S.

Q. D-U-B-B-S?

A. That's correct. "B" as in boy. Donna Barhan-Welsh, B-A-R-H-A-N--W-E-L-S-H. And Allan Vandenbreissche -- are you ready for this -- V-A-N-D-E-N-B-R-E-I-S-S-C-H-E.

Q. Vandenbreissche?

A. Uh-huh.

Q. Are these people employees of yours?

A. Well, they are co-shareholders of mine.

Q. Are they also employees of the company?

A. They are employees of the company.

Q. What is Maryann Dubb's position?

A. She is a Vice-President and responsible for the administration of defined benefit plans and responsible for client contact with approximately a third of my clients.

Q. How about Donna Welsh?

A. She is Vice-President, responsible for -- as best described, as special services. Right know, primarily dealing with plan terminations because of the law change and also is responsible for contact with approximately a third of the clients.

Q. How about Allan?

A. Allan is a Vice-President, responsible for the administration of defined contribution plans and also has about a third of the clients as his contact responsibility.

Q. Did you tell me that the Catalina plans are defined contribution plan?

A. That is correct.

Q. So they would come under Allan Vandenbreicche's responsibility?

A. That's correct.

Q. Are you President of the company?

A. Yes, I am.

Q. Who were the other officers?

A. I think my sister is Secretary. Her name

is Seema, S-E-E-M-A, Goldbergh, G-O-L-D-B-E-R-G-H.

Q. Is there a Treasurer?

A. I don't think so.

Q. Is there a Vice-President?

A. I gave you the three Vice-Presidents.

Q. Are the three of those people equal ten percent stockholders?

A. They each own ten percent of the stock.

Q. As of January 1st, 1984 -- and I am not going to hold you to that particular date --

A. Give me the date again.

Q. The first of 1984.

A. Okay.

Q. Could you estimate for me how many employees the company had?

A. Yes. Probably at that time -- maybe thirty.

Q. Were they divided into departments?

A. No. I don't remember whether we had them functioning by type of plan, or functioning by a division of the clients, in '84. I would have to

find out. It was probably functioning by division of plan, just as I have described to you now.

Q. By division of plan?

A. Yes.

Q. In other words, one person might have -- one department might have defined contribution plans?

A. Um-hmm.

Q. The other would have defined benefit plans?

A. I think that's the way it was, January 1st of '84.

Q. Did Allan Vandenbreissche have defined contribution plans at that time also?

A. I think so, but I am not positive. We have made many changes over the years.

Q. Did Judith Reed work for you in 1984?

A. I don't think so. I think she worked for me in '86 and maybe part of '87.

Q. So she came to you in 1986?

A. I think so, but I am not positive of that.

Q. So you wouldn't remember what month?

A. No, not that. No way, No.

It is true, isn't it, that there are laws that govern the qualifications of pension plans?

A. That is correct.

Q. Where are those laws found in the United State's code?

A. Within section 401, mainly. Section -- in the 400 area, of 401 through 415 or 420, I guess.

Q. And is that a subdivision of the Internal Revenue code?

A. Yes, it is.

Q. When did you first have any contact with Richard Shofer or Catalina Enterprises?

A. It goes back to the early '70's, I believe.

Q. Was Mr. Shofer somebody that you had to sell on your company, in the way that you mentioned, as such, sales were your biggest challenge in the 1960's?

A. Well, he was referred to me by his accountants and I think his accountants introduced me to him as being a person knowledgeable in qualified plans and creative and able to be helpful to him and

in fact, that is what I held myself out to to be and continue to hold myself out to be.

Q. Do you remember who his accountants were that you --

A. Grabush -- Grabush, Lichter, Newman at the time, I believe.

Q. Could you spell -- well --

A. Grabush is G-R-A-B-U-S-H. Lichter is L-I-C-H-T-E-R. And Newman is N-E-W-M-A-N.

Q. Was there a particular attorney there who recommended you?

A. Not a attorney.

Q. Excuse me. A accountant?

A. I think it was Harvey Newman. That is what I recall.

Q. Did you have a good relationship with Harvey Newman, in the sense it he sent you referrals on a regular basis?

A. That's correct.

Q. Does he still send you referrals?

A. I get very little referrals from him.

the record)

MR. BOWDEN: We are ready to go back on the record.

Q. Would you want to go back and clarify your recollection as to when you first did work for Catalina?

A. Yes. It was ERISA. Not TEFRA.

Q. It would have been in the early 1970's?

A. Around 1974.

Q. Did Catalina already have a pension plan at that point?

A. I think they did. I think it was an existing plan -- and this is vague recollection now -- but there was discontent about the way they were being operated and the need for some expertise and I was brought in for that purpose.

Q. Did you personally serve as the accountant at that point?

A. Well, work that I have done for Dick -- and this of true for virtually all my clients -- is that I do the consulting work and the administration work

was done by staff.

Q. You would have had initial contact when he first came to you?

A. Yes.

Q. And you would consult on special problems?

A. That is correct. Our relationship was that Dick would typically call with problems needing a solution and a creative one, and my job was to try to figure out how to say yes within the law as to what he was trying to accomplish. I think that was my particular value to them.

Q. Did you say "creative solutions"?

A. That's correct. Come up with an answer that permits him within the law to do what he wants to do.

Q. Is it fair to say that you sold yourself and your company as a creative -- as a source of creative advice then?

A. Absolutely true.

Q. But always within the law?

A. That is absolutely true.

Q. So you -- as you recall-- you redrafted the plan as your first assignment?

A. That is correct.

Q. Would you remember when the next draft of the plan was made?

A. Yes. I think we did a TEFRA restatement for him, which was -- '82. '82 law, done in '84. The restatement was done in '84.

Q. Was there one in the 1970's, around 1976 or 1977?

A. There was amendment to the document in -- around '77, for some law changes.

Q. Maybe this is a good time to ask you this question, because it is one that puzzles me a little bit.

I take it from looking at the files that what normally happens is that there is a plan in effect at a given time and then the law changes and then it takes pension consultants several months or even years to accumulate all of the information from explanatory reports, of technical changes and so

whether he had the right to make a loan against the plan, but, what effect it would have upon him personally.

Q. Referring to page 54, section 15.04. The first sentence refers to the employer's discretion in retaining necessary professional assistance from a professional administrator. Is the Stuart Hack Company a professional administrator under the meaning of that term in that paragraph?

A. Yes, it is.

Q. Did you routinely render professional assistance to Catalina Enterprises?

A. Yes, we did.

Q. Referring your attention to page 51, the first paragraph. Would you read that first paragraph into the record?

A. "15.01 designation and acceptance; the employer may designate that person or entity, to serve as Administrator -- that's a capital "A"-- Administrator -- who shall signify their acceptance of this responsibility in writing, as a named

in portions of their 5500 forms and then file the forms at the Internal Revenue Service before you had a chance to look at them?

A. There was from time to time, a position that we took when the form was due and we didn't know the answers to the questions, to send the form to the client with a cover letter, telling them what questions we didn't know the answer to and to suggest to the client that he fill in those answers and sign and file by the filing date.

Q. Prior to August 9th, 1984, had you advised Mr. Shofer or Catalina, as to the tax implications of other transactions that they were contemplating?

A. I think I did. Yes.

Q. So that was a normal part of your business relationship?

A. Yes. It was.

Q. Would it have been reasonable for Mr. Shofer, in August of 1984, to assume that if there were adverse tax consequences of a contemplated pension transaction, that you would advise him of

came across anything?

A. Well, I did not specifically look for that, so I don't know.

Q. Regarding Exhibit H-Two, the letter of August 9th, 1984. Do you remember how that came to be written?

A. Yes. I do.

Q. What was the first contact with anyone in the gestation of that letter?

A. Richard called me and asked me to tell him whether he could borrow against his voluntary -- make a loan -- put up his voluntary account as collateral and make a loan against it and which -- which was best for him.

Q. Do you remember the date of that call?

A. No. I do not.

Q. Do you remember roughly how long it was prior to writing the letter?

A. I think it would have been a matter of days prior.

Q. Did Richard Shofer specifically request any

advice on the taxibility of that kind of a loan?

A. It is a good question. If he -- if he -- I think he wanted to know whether he could do the loan and what effect it would have upon him and I would assume somewhere in there that taxibility was a issue. I don't -- I don't think I felt that it wasn't, when he called me.

Q. You don't feel that it was not?

A. That's correct. I feel that it was.

Q. I take it you feel that way now. Did you also feel that way at the time of the phone call?

A. Yes.

Q. Did you feel at the time, after receiving his request, that you should advise him as to tax implications of the contemplated loan?

A. Yes.

Q. At that first phone call, he asked the question that you just mentioned. What else happened during that phone call?

A. We went back and forth on what the possibilities were and I think -- to the best of my

A. I think during that conversation I gave him the advice that I -- that was -- that I was aware of at the time and singled in on the voluntary account as the likely best candidate, but that I would have to check and get back to him.

Q. So it was left that you gave a tentative answer, but not a final answer?

A. That is correct.

Q. Did you mention the issue of taxability at all in that conversation?

A. I do not specifically recall.

Q. Did Mr. Shofer mention the issue of taxability at all?

A. I do not specifically recall.

Q. What happened after that phone call?

A. I called Barry Burman at Weinberg and Green and posed the question to him.

Q. Same day?

A. It may have been the same day, or it may not have been. I can't tell you that because I don't remember. But it was very close proximity.

and looking at 72-P, it is not true.

Q. When did you find that out?

A. I found it out when I got a call from Dick Shofer's accountant saying, "We got a memo from Judy -- well -- yes, Judy Reed and we disagree with it and we think you better get involved in this." And that is what I did. No -- I'm sorry. It happened before then.

They called me and told me there was a problem and that I better get involved in it. I asked Judy Reed to do the research on it and Judy came back with 72-P and said, in fact, it depends on the dates of the loans, when the loans were taken and how much basis Dick had in his account, that the general rule was that amounts in excess of $50,000.00 would be taxable.

Q. So it was when Judy came back in 1986 with the memo that you discovered that there was not that special treatment for voluntary accounts?

A. That is correct.

Q. Did you look at 72-P before writing the

borrowing against it. Are those synonyms or are those different procedures?

A I had intended to distinguish between making a loan directly from the plan using his account as collateral for the plan loan, versus his putting up his account as collateral for a loan which he would get from a third party source.

Q So when you use the term put up his account as collateral, you meant which of those?

A I am not sure at this point; I think the easiest thing I can do is tell you exactly what I meant. What I meant was that he had among choices, there were two that were apparent that we discussed.

One being that Dick could use his account as collateral to borrow money from a bank or another third party, or he could use his account as collateral to borrow against his account from the plan.

So, in one case the plan would be the source of the cash and would take his account back as collateral; and the other case a third party would be the source of cash and would use his account as collateral.

A That's not fair to say. I read constantly. And there is a body of knowledge that sits inside of my head which is as a result of reading articles, code, regulations, Lou book.

Q Well, to rephrase my question, is it fair to say you did not consult any of those six sources specifically in response to Mr. Shofer's question?

A I have no direct recognition, recollection of what I did at that time.

Q But Mr. Shofer's question was within your area of expertise; was it not?

A Yes, it was.

Q And you held yourself out as being able to answer the question?

A Yes, I did.

Q Did you tell Shofer that you consulted with Berman?

A I doubt it.

Q At any time before this lawsuit?

A I doubt that I did.

Q You testified previously, and let me refer you to

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER,	:	
Plaintiff,	:	
vs.	:	CASE NO. 88102069-CL79993
THE STUART HACK COMPANY and STUART HACK,	:	
Defendant.	:	

Friday, August 18, 1989

Deposition of

STUART HACK,

a Defendant, called for examination by counsel for the Plaintiff, pursuant to Notice, at the law offices of Blum, Yumkas, Mailman, Gutman & Denick, P.A., Two Hopkins Plaza, 1200 Mercantile Bank & Trust Building, Baltimore, Maryland 21201-2914, commencing at 9:26 a.m., there being present on behalf of the respective parties:

ON BEHALF OF THE PLAINTIFF:

THOMAS A. BOWDEN, ESQUIRE
Blum, Yumkas, Mailman, Gutman & Denick, P.A.
Two Hopkins Plaza
1200 Mercantile Bank & Trust Building
Baltimore, Maryland 21201-2914

been confronted with a client who had engaged in a transaction that led to a taxable event?

A Yeah, the --

Q That was unanticipated?

A The general law that I thought existed, and what I suggested to Richard and to his accountant and the attorney representing him, was that if it was not necessary for him to report it, because he had done nothing fraudulent. He had relied on expert advice that I had given him. That they not report it. And allow the statute of limitations to run.

Q As far as you knew, that was proper under the tax laws?

A I thought it was quite likely it was proper under the tax law. But I was not an expert on it, and that's why I suggested it to them for their consideration.

Q When you say, "them," who are you speaking of?

A His attorney and his accountant.

Q His attorney being Giampetro, and his accountant being --

BY MR. BOWDEN:

Q In your -- I believe you testified that it was after receiving the letter from Richard Shofer, that's Exhibit H-36, it was directly after receiving that letter that you put your insurance carrier on notice?

MS. TRUHE: I object.

MR. BOWDEN: Was that your testimony?

MS. TRUHE: You may answer.

THE WITNESS: I think so. I may have put them on notice before that letter.

BY MR. BOWDEN:

Q In your discussions with the insurance company immediately thereafter, did you apprise the insurance company of your view whether your advice was right or wrong in August of 1984?

A Yes.

MS. TRUHE: Objection.

THE WITNESS: Yes, I did.

BY MR. BOWDEN:

Q At a certain point all of these discussions with Larash, Marvel, Giampetro had occurred, and you had

come to the conclusion there was no way out, did you communicate that to the insurance company?

MS. TRUHE: Objection. You may answer.

THE WITNESS: I think I did, yes.

MR. BOWDEN: Nothing further.

MS. SCHUETT: Ms. Truhe and I have an agreement that -- to continue this deposition to a later day in order for the third-party defendant to ask questions.

MS. TRUHE: I have no questions.

(Whereupon, at 12:30 p.m., the deposition was continued.)

(Signature not waived.)

(Filing waived.)

(Exhibits not attached.)

CARBON COPY

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER :

Plaintiff :

-vs- : Case No. 88102069/CL7993

THE STUART HACK COMPANY :

or :

STUART HACK :

Defendant :

Deposition of STUART HACK, taken on Thursday, August 30, 1990, at 10 a.m. at the offices of Frank, Bernstein, Conaway & Goldman, 300 East Lombard Street, Baltimore, Maryland, before Susan D. Ashe, Notary Public.

Reported by:

Susan D. Ashe, RPR

A. In general, a qualified plan trust that holds assets of the plan for benefit of the participants -- pays no taxes.

The exception is when that trust engages in an investment activity which would create a taxable event, as an exception to the rule -- such as conducting a business, such as borrowing money to reinvest money. And when that occurs, you have to file a 990T form to show the taxable amount. And you have to pay taxes on the taxable amount.

It's fairly complicated because there is a minimum --

Q. You need to speak up a little bit.

A. It is fairly complicated.

Q. Was the 990T form required with respect to the Catalina pension plan?

Well, why was it needed, if you know?

A. Well, initially it was needed because the plan engaged in the purchase of real estate on a leveraged basis.

Q. Any other reasons why it was ever needed?

A. Ultimately, I think, they got involved in having also to report some income because of the financing of paper on the sale of automobiles.

Q. The loans that Mr. Shofer took in 1984 and 1985 and 1986 did not in any way trigger the need to file a 990T; is that correct?

A. No. That would not give rise to a 990T.

Q. Do you have any knowledge as to why you or your firm did not prepare the 990Ts for Mr. Shofer?

A. Yes. We said we didn't have specific knowledge in that area and suggested that their accountants do that work.

Q. And who was it within your firm that suggested that their accountants do that work?

A. It was probably me.

Q. And what is it about your company that would lead you to conclude that your company should not be involved in the preparation of the 990T?

A. We're not accountants.

Q. Well, what is it about the preparation of or doing the work for the 990T or the actual

to process distributions, I take it that you would include within that job the preparation of the 1099s for those employees who were either retired or terminated?

A. That is -- well, we usually do it. Not always.

There are times when the bank trust department, if there is a bank trust involved -- there are times when their accountants do it.

Q. I understand that; but my question is very specific to Mr. Shofer. You considered it your job to process the 1099s for his employees?

A. Yes.

Q. Did you consider it to be your job to prepare 1099s for any distributions from the plan?

A. Yes.

Q. Did you expect that the participants in the plan receiving those distributions would rely on you to issue the 1099s?

A. Yes.

Q. Back in February of this year, I sent to

Q. So, in that respect you are a tax advisor; is that correct?

A. Well, we're a limited tax advisor. We're limited to the issues involved in the qualified plans.

Q. That's why I said, "in that respect."

A. Yes. Okay.

Q. But, generally speaking, in terms of the individuals who may participate in that plan or the owners of companies, you don't hold yourself out as their personal tax advisors? Is that what this sentence means -- is my question.

A. Yes. Yes.

MS. SCHUETT: Okay.

THE WITNESS: I'm for a break. I need to use the men's room.

MS. SCHUETT: Yes. Let's take a break.

(Brief recess taken in the deposition.)

BY MS. SCHUETT:

Q. Mr. Hack, I am fairly confident I know the answer to this question; but I need to ask it

anyway. There weren't any contracts, written contracts, between you -- you or your company -- and Graybush, are there?

A. None.

Q. And there are no oral agreements that would in any way relate to indemnity, as we discussed it before?

A. No.

Q. Did you ever discuss the 1984 letter with anybody at Graybush at any time before late 1986?

A. No.

Q. You know what the BNA Pension Reporter is, don't you?

A. Yes.

Q. Is that a reporter that's received by your office?

A. Yes.

Q. And how long has your office been receiving it?

A. Ever since it was available. And I'm trying to remember whether BNA was available in '84 -- but

Shofer, of Exhibit 22 is dated at the bottom, December 18, 1985. Do you see that?

A. Yes.

Q. Would you expect that your firm would have received that information shortly thereafter?

A. Yes.

MS. SCHUETT: Would you mark this as the next deposition exhibit, please.

(Whereupon, Deposition Exhibit H-44 was marked for identification.)

BY MS. SCHUETT:

Q. I have had a letter dated January 13, 1986, from Janelle Hardy to Mr. Shofer marked as Hack Deposition Exhibit 44. That letter encloses the annual statement, among other things.

Well, let me read what it says. "I am enclosing the annual statement and the participants' progress reports for the plan year ending 12/31, 1984."

Is Exhibit H-21, which is marked as the annual statement for Catalina Enterprises, Inc.,

pension plan year ending 12/31/84, the annual statement that's referred to in Exhibit H-44?

A. I believe it is.

Q. Exhibit H-22 on the third-to-the-last page -- and I believe you've testified to this before -- is an exhibit which reveals the existence of $200,000 in notes receivable participant; is that correct?

A. Yes.

Q. So, on the date that your firm received -- well, on the date that Ms. Hardy prepared this, or whoever it was that did prepare it --

A. Yes.

Q. -- obviously your firm had knowledge that there were loans from the plan to participants. Is that correct?

A. Yes.

Q. So, at the latest, your firm had knowledge of loans from the plan to a participant by January 13, 1986; is that correct?

A. Yes.

Q. What, if anything, did your firm do when it learned about theses loans sometime, let's say, between December 19 of 1985 and January 13 of 1986, in terms of advising Mr. Shofer about those loans?

A. To the best of my knowledge -- nothing.

Q. Is there any more reason for Graybush, Newman to have taken any action with respect to these loans when it learned of them, let's say, in June of 1985, when you did not do so when you learned about them in late December or early January of 1986?

MS. TRUHE: Excuse me. I did not hear that whole question. Could you read it back?

(Question read.)

MS. TRUHE: Objection.

You may answer.

THE WITNESS: No.

MS. SCHUETT: The objection that you made, Janet, was an objection to something I could correct?

Ex. 2 -
Shofer Depo.

RICHARD SHOFER		:	IN THE
	Plaintiff	:	CIRCUIT COURT
v.		:	FOR
THE STUART HACK COMPANY, et al.		:	BALTIMORE CITY
	Defendants	:	Case No. 88102069/CL79993

Baltimore, Maryland

February 2, 1990

Deposition of RICHARD SHOFER, Plaintiff, called for oral examination by counsel for the Defendants, taken at the law offices of Semmes, Bowen & Semmes, Conference Room 17-A, 250 West Pratt Street, beginning at 10:12 a.m.

A P P E A R A N C E S

THOMAS A. BOWDEN, ESQ., on behalf of the Plaintiff.

JANET M. TRUHE, ESQ., and LEE B. ZABEN, ESQ., on behalf of the Defendants.

LINDA M. SCHUETT, ESQ., on behalf of the Third-Party Defendant, Grabush & Newman.

Reported By: Dawn M. Hart, CSR
Riggleman, Turk & Nelson
(301) 539-6398

EXHIBIT 2

575

MS. TRUHE: Well, send me whatever you're going to send me and we'll go from there.

Q (By Ms. Truhe) Okay. Mr. Shofer, I'd like to ask you now about your accountants. Do you have an accountant for personal matters?

A Yes.

Q Who is that?

A Ken LaRash.

Q At Grabush?

A Yes.

Q And how long has the firm of Grabush Newman represented you?

A I'm going to approximate, I think approximately fifteen years.

Q Who else have you dealt with other than Mr. LaRash at Grabush Newman?

A Initially Harvey Newman.

Q How long did you deal with Mr. Newman?

A Probably the first four or five years.

Q Then who did you deal with?

A Ken LaRash.

before she, before she left or months after she left.

Q All right. Approximately when did Ms. Summers. leave your office?

A When did she leave our employ?

Q Yes.

A Well, it was a gradual thing, I used to just pay her by the hour and left it up to her to keep a record of her own time, and she used to come in and leave when she wanted. Sometimes she wouldn't come in until five o'clock in the afternoon when everybody else was leaving and she'd work to nine, sometimes she'd show up at three and she kept a record of this.

Q When did she leave once and for all?

A Probably a couple -- two years ago. And even before that she put in less than two hundred hours in a whole year, the year before she left.

Q Now, how long has Sara been the bookkeeper?

A I think since '71.

Q All right. Mr. Shofer, when did you first meet Stuart Hack, approximately?

A I think '7 -- I'm going to guess '73, I -- I'm not

sure. '72 or 3, perhaps.

Q All right. And what were the circumstances under which you came to meet Mr. Hack?

A We had -- in -- I think it was '71, I think, someone, I can't think of his name and in a minute it will come to me. Someone sold me on the idea of starting a profit sharing plan and I did, and then that same individual the following year suggested that it would be appropriate to add a pension plan, and he talked me into it. So now I had a profit and pension plan and I think that was '72, and somewhere within a year or so after that, I could see that the pension plan was going to be something of real significance and I don't know if it was before or after I had ideas of purchasing real estate within the pension plan, but I got the feeling that the individual who helped me start both plans or who suggested that I start them and who was taking care of them wasn't competent to do an adequate job given the importance of doing an accurate job, so I personally saw the need to get someone with more credibility in that area.

And I don't remember how I came to choose Stuart

Hack, I don't know if it was recommended to me or not. I think my accountant at that time would have been, it might have been Peter Engelman still or it might have already been Harvey Newman and it may have been either of those two who recommended Stuart Hack, I don't know.

Q And for what purpose did you retain Mr. Hack?

A To take over the supervision and accurate -- well, to take over reviewing and bringing into absolute conformity all of the, all matters regarding the profit sharing and pension plan and to give me advice regarding keeping both plans in compliance with the law, tax advice regarding the plans and advice on how to maximize use of the plans effectively as a shelter.

Q What kind of shelter?

A Tax shelter.

Q Anything else?

A Well, I just considered that I was entering into a long-term relationship with Stuart Hack and Company regarding all matters having to do, regarding that he would advise me and keep me straight regarding all matters regarding pension and profit sharing.

called Stuart, or someone else, to find out the status of the government's intentions on continuing or discontinuing with that.

Q Okay. You mentioned before there were, I believe a couple of special situations which had arisen which required more frequent contact with Mr. Hack, were there any other situations other than the one you've described?

A Well, the only other situation that comes to my mind now is -- okay. There were two situations.

Q Two in addition to the one you've described?

A Yes. One -- okay. The first situation, I believe and I believe in the order of the situations, the first situation was when I wanted advice on the feasibility and appropriateness of borrowing from my voluntary account in the pension.

Q When did you seek that advice?

A My recollection is August of '84.

Q All right. We'll go back to that. Tell me about the other situation.

A The other situation and I don't remember who I talked to, I'm not sure it was even Stuart Hack, I think

Q All right. And Mr. Giampetro for the same reason?

A Yes. Well, not just -- yeah, about that.

Q Well, the first time you -- tell me when the first time was that you consulted with Mr. Giampetro with regard to a pension matter.

A Well, my recollection is that my first communication with him was very late in, in, in December of '86.

Q All right.

A This is, my recollection is that Alan Marvel suggested, I was not -- I couldn't believe what Alan Marvel was telling me about my exposure to a large tax liability. In fact, I was so disbelieving of it that it is possible that he suggested that I get in touch with another tax lawyer and when he recommended Nick Giampetro, he didn't tell me that Nick Giampetro provided a whole range of services like that he administered plans as well, he just spoke of him as a or a pension lawyer.

Q Was this the first time you contacted Mr. Giampetro?

A Yes, but it was -- my recollection is that it was

so late in December of '86, and I was due to start a planned vacation early in '87 that I may or may not have had more than a phone conversation with him in that year. I don't know whether there was a phone conversation or a short meeting that may have been even an hour or less, I don't remember and that was at the tail end of '86, so the first meeting of any significance or time span occurred in, after my vacation in '87.

Q All right. Let's get back to your contact with Mr. Hack's firm. You've already described for me the types of matters that his firm handled for you and the frequency of your contact with Mr. Hack with three notable exceptions where you would confer with him more frequently. Tell me about the form of contact you would have with Mr. Hack, did you go down to his office, would you pick up the phone, would you write him a letter, what was your contact like?

A It was generally a telephone contact. I think I probably went to Mr. Hack's offices only two or three times during my entire relationship with him.

Q Now, when you requested advice from Mr. Hack with regard to, for example, the dissolution of the profit sharing

mentioned or not.

Q But you think you probably, you mentioned the amount to Mr. Wilson?

A Probably, yes, I -- I can't imagine that there was any part of any major financial transaction I would have had that I wouldn't have made him privy to or aware of.

Q Let me get back to my earlier question. Did you discuss this loan from your pension plan idea with anyone other than Mr. Hack and Mr. Wilson in August of 1984?

A Probably others at the bank. There, if there were any other -- let's see, Mr. Wilson had a supervisor, I think the supervisor may have been Barry Blumberg, and I'm not sure, but -- by this time, see, my relationships with the loan officer sort of changed from time to time and I think I had such a good relationship and good working relationship with Mr. Wilson that I didn't, I might not have even spoke with others at Maryland National then, I, it might have just been him. And other than he, Sally.

Q Anyone else?

A I don't think so.

Q Did you ever discuss this idea with anyone at

Grabush Newman?

A I don't think so.

Q With regard to personal tax questions, generally who would you go to for tax advice during this period, during 1984?

A Just Grabush Newman.

Q So it would be your habit whenever you had a personal tax question to contact Grabush Newman?

A Yes. Another name comes up to me now that I sort of forgot before lunch.

Q Who is he?

A He's a tax man at Grabush Newman's that I have great faith in. I --

Q You discussed --

A I would initially always go to Ken LaRash but would suggest to Ken if it was an important issue would he pass it by Phil Matz. There may have been one or two occasions where some issue came up that I requested Phil Matz to be involved in.

Q Did you consult with Mr. Matz at anytime in August of '84 with regard to this idea of borrowing money from your

pension plan?

A No.

Q Why not?

A I didn't think there was a tax issue involved in it.

Q Other than those that you have identified, Mr. Wilson, perhaps Mr. Blumberg and others at Maryland National Bank, Sara, and Mr. Hack, did you discuss your loan idea with anyone else in August of 1984?

A I can't think of anyone right now.

Q All right.

MR. BOWDEN: Did you say Sara or Sally?

Q One in the same?

A Sara is her proper name.

MR. BOWDEN: Is that what it is?

MS. TRUHE: Sally is the alias.

MR. BOWDEN: Same woman.

MS. SCHUETT: That clears up a couple of questions I had.

(Discussion off the record.)

MR. BOWDEN: Sara is her proper name and Sally

taxable issue.

Q If there had been a tax issue, would you have expected Mr. Hack to advise you on that?

A Yes.

Q Do you recall anything about what Mr. Hack said during that first conversation?

A No.

Q Did Mr. Hack mention whether he was going to contact any other people or consult any sources for you?

A I don't remember anything about the conversation.

Q Do you recall when your next contact with Mr. Hack was on this issue of borrowing from the pension plan?

A No.

Q Did you have another contact with Mr. Hack on this issue?

A From memos I've seen as part of production of documents, I understand that there was a second telephone conversation.

Q Do you remember anything about that second telephone conversation?

A No, I don't remember anything about it, but I

VOLUME II

RICHARD SHOFER : IN THE

Plaintiff : CIRCUIT COURT

v. : FOR

THE STUART HACK COMPANY, et al. : BALTIMORE CITY

Defendants : Case No. 88102069/CL79993

February 9, 1990

Baltimore, Maryland

Continued deposition of RICHARD SHOFER, Plaintiff, called for oral examination by counsel for the Defendant, Stuart Hack Company, taken at the law offices of Semmes, Bowen & Semmes, 250 West Pratt Street, before Rebecca A. Heath, Notary Public, beginning at 9:30 o'clock a.m.

APPEARANCES

THOMAS A. BOWDEN, ESQ., on behalf of the Plaintiff.

JANET M. TRUHE, ESQ., and LEE B. ZABEN, ESQ., on behalf of the Defendant, Stuart Hack Company.

LINDA SCHUETT, ESQ., on behalf of the Defendant, Grabush Newman.

Reported By: Rebecca A. Heath
Riggleman, Turk & Nelson
(301) 539-6398

income; is that correct?

A It would be taxable but I don't consider it income because it is a debt I have to pay back. I mean, I personally, my viewpoint is that it is not income.

Q Well, regardless of your own personal viewpoint, does that refresh your recollection as to the nature of the thirty-four hundred dollars listed on the tax return?

MS. SCHUETT: Objection.

A No, I don't even think that is related to that. I don't think that thirty-four hundred is related to the issue of loans from the pension. I don't know what it is, yet.

Q All right. I am just looking for that item on another page of this return, but I don't see it.

Q Mr. Shofer, showing you what was previously marked as Shofer Deposition 1-F, this is your amended 1984 return. How did that return come to be amended?

A Excuse me, should I stop looking at this thirty-four hundred now?

Q Yes, yes.

A I can assure you I have no idea what it is.

Q All right, let me have that back.

the company to you?

A I don't recall specific dialogue on that issue.

MR. BOWDEN: I am a little confused about the foundation. Have we established that there are adverse consequences and what they are?

Q Well, Mr. Shofer, are you aware -- let's talk about your knowledge first, that there may be adverse tax consequences which flow from the fact that you have such large loans from your company to yourself.

A No. There is one type of adverse tax consequence that I am aware of now, and that is that any interest that I pay personally is not deductible. That is an adverse tax consequence.

Q By the way, Mr. Shofer, back in August of 1984 if Mr. Hack had told you that any amount you borrowed from your pension plan over fifty thousand would be taxable to you as income, what would you have done?

A I certainly wouldn't have borrowed any amount over fifty thousand.

Q Where would you have gotten the rest of the money?

A Is there an assumption that I would have needed

A It may be a demand loan, I would have to look back at the documents and get an interpretation from my bank officer on the type of loan it is. I think it is just a demand loan that is allowed to go on, and I just pay monthly, that is my arrangement with them. We pay the interest on it once a month.

Q All right. You listed that the current debts of the business include I believe it is your 1989 salary of two hundred thousand dollars and rent to you in the amount of approximately thirty to forty thousand dollars. My question is why hasn't the corporation paid you these amounts?

A It doesn't have the money. So, in fact, just to be more specific, this year, in 1989, I took my 1988 salary, which was two hundred thousand dollars, but the corporation didn't even pay me the entire 1988 salary. I think it was somewhere around fifteen thousand dollars short of paying me the whole 1988 salary. So it still owes me some 1988 salary going into 1990, as well as the 1989 salary.

Q I believe your testimony previously, and if I am incorrect please correct me, was that when you had a tax question, a general tax question you would call your

accountants, Grabush Newman. If you had a specific question concerning the Plan you would call Mr. Hack; is that correct?

A Yes.

Q My question is if you had a tax question regarding the Plan who would you call?

A Who would I have called? Probably Mr. Hack. And if it was a tax question about the Plan, depending on the complexity and importance of it, I might have called Grabush Newman also. I mean, if it was a real important issue it is possible I would have called both, I don't know. But I principally, certainly would have called Mr. Hack first.

Q I know you have at least testified today that you now know that interest on loans that you have to the corporation are not fully deductible by you; did you ever consult with any professional concerning deductibility of interest on the loans you took from the plan?

MS. SCHUETT: Objection. Are --

A There has been an objection. Does that mean I answer or don't answer?

MR. BOWDEN: Yes.

THE WITNESS: And the question was again?

between a 990-T and a 5500, much less who was to do it. I didn't concern myself with noticing. I perhaps should have as a trustee, but didn't.

Q I believe you previously testified that you never asked Phil Matz at Grabush Newman about the tax consequences of these loans; is that correct?

A Correct.

Q Did you ever ask anyone at Grabush Newman about the tax consequences of these loans, to the best of your recollection?

A Not until it was evident that there were tax consequences sometime in '87.

Q I am saying prior to the time that Alan Marvel brought the potential tax consequences to your attention --

A I didn't know there were tax consequences so it wouldn't have been a question to come up.

Q Do you recall having any discussions with anyone at Grabush Newman prior to the conversations in late 1986 when Mr. Marvel tells you there may be a problem about the loans generally?

A Do I recall any conversations?

Q Yes, prior to late 1986, do you recall any conversations with anybody at Grabush Newman about the loans from the pension plan?

A No, I don't recall any conversations.

Q Is it fair so say, Mr. Shofer, that you were relying on Mr. Hack to advise you as to the taxability of the loans from the pension plan?

MS. TRUHE: Objection. You may answer.

A Advise me as to the taxability of the loans? If there was a taxability, yes.

Q You expected Mr. Hack to tell you that?

A Certainly.

Q Is it also fair to say, Mr. Shofer, that with the exception of the preparation of the 990-T, you were relying on Mr. Hack for pension advice generally and not on Grabush Newman?

A Yes.

Q To the best of your recollection, Mr. Shofer, did Grabush Newman ever at any time do any research on pension matters for you prior to December, 1986?

A Yes.

Exhibit 3

THE STUART HACK COMPANY
Consultants & Actuaries
8600 Falls Road
Baltimore, Maryland 21208
(301) 366-8700
Washington, DC 621-4064

Writer's Direct Dial No.

August 9, 1984

PERSONAL AND CONFIDENTIAL

Mr. Richard Shofer
Crown Motors
5006 Liberty Heights Avenue
Baltimore, Maryland 21207

Cross-Pl Pension Section Catch-up

Dear Dick:

You questioned whether assets of your money purchase pension plan and profit sharing plans can be used as collateral for loans, whether you can borrow against these plans and whether there is any special treatment for your voluntary account under these plans.

First of all, let's distinguish between the voluntary account and the employer account. The employer account cannot be put up as collateral for a loan, and loans to participants against their employer account are limited to a total of $50,000 for all plans for up to a maximum of five years (for a longer period of time if used for the purchase or substantial improvement to a primary residence). Further, we would recommend that any loans against an employer account should be fully collateralized (this means collateral in addition to the value of the account itself).

There is an entirely different treatment for voluntary accounts. First, there is no limit on the amount that can be borrowed against the account or the length of time for which it can be outstanding. Also, the account, itself, can stand as collateral for the loan against the voluntary account. Further, the voluntary account can be put up as collateral for a loan from a bank or other source. The loan agreement will have to include a provision that you cannot withdraw money from your voluntary account, and thus dissapate the collateral, however.

The law is pretty clear on the inability to use employer account values as collateral for a loan. There is no law on restrictions of using voluntary account money for collateral for a loan. The TEFRA provisions on the limits on loans apply only to employer accounts and specifically do not apply to employee voluntary accounts. In my opinion, you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account. The terms of the loan must be reasonable as to the interest rate and pay back period.

Cordially,

Stuart Hack

CH:mn

EXHIBIT 3

EXHIBIT H-2 3-16-89 OL

585.

Ex. 4 -
Larash Depo.

RICHARD SHOFER	:	IN THE
Plaintiff	:	CIRCUIT COURT
v.	:	FOR
THE STUART HACK COMPANY, et al.	:	BALTIMORE CITY
	:	Case No. 88102069/ CL79993
Defendants		
* * * * * * * * * * :		
THE STUART HACK COMPANY, et al.	:	
	:	
Third-Party Plaintiffs	:	
v.	:	
GRABUSH, NEWMAN & CO., P.A.	:	
	:	
Third-Party Defendant	:	

Reported By: Dawn M. Hart, CSR
Riggleman, Turk & Nelson
(301) 539-6398

RIGGLEMAN, TURK & NELSON

EXHIBIT 4

587

Baltimore, Maryland

August 2, 1990

Deposition of KENNETH EUGENE LARASH, C.P.A., a Witness, called for oral examination by counsel for the Defendants and Third-Party Plaintiffs, taken at the law offices of Semmes, Bowen & Semmes, Conference Room 17-A, 250 West Pratt Street, beginning at 10:50 a.m.

A P P E A R A N C E S

THOMAS A. BOWDEN, ESQ., on behalf of the Plaintiff.

JANET M. TRUHE, ESQ., and LEE B. ZABEN, ESQ., on behalf of the Defendants and Third-Party Plaintiffs.

LINDA M. SCHUETT, ESQ., on behalf of the Third-Party Defendant.

A I don't know but somebody in our firm.

Q But you have no idea who?

A No.

Q Did that person give you any files or information or did you just start from scratch?

A Well, when I start a job I always review last year's files, so they would have been available.

Q But you have no idea who worked on this file at Grabush, Newman prior to you, is that correct?

A No.

Q All right.

A I mean yes, that's correct.

Q What was your understanding as to the services Grabush had been retained to perform prior to your involvement if any for Mr. Shofer or his business?

A To prepare financial statements, tax returns for the corporation, Catalina Enterprises, Inc., to prepare a tax form No. 990T for the pension plan and to prepare his individual Form 1040.

Q Now, these financial statements were for the corporation?

A Yes.

Q Now, when you came along either in 1979 or 1980, what were you doing with that account, what types of services were you performing for Mr. Shofer?

A Well, I remember working on the, as I said the financial statements and the tax returns for the corporation and the Form 990T for the pension plan. I don't remember whether I started out working on his individual return at that time.

Q All right. Do you know who would have worked on the individual return at that time?

A No, I don't.

Q Would that have been someone at Grabush?

A Oh yes.

Q All right. So, when you first started performing accounting services for Mr. Shofer and his business -- or his business I should say, these services were confined to the preparation of financial statements and tax returns for the corporation and the 990T for the pension plan; is that correct?

A Right.

Q Now, at this time were you giving any type of advice to Mr. Shofer, tax advice or any other kind of advice on a financial matter, on financial matters generally?

MS. SCHUETT: Can I hear that question again?

Q Let me clean up that question. When you first started working for Mr. Shofer, or started working on Mr. Shofer's file, were you giving any type of financial advice to Mr. Shofer?

MS. SCHUETT: Janet, do you mind telling me what you mean by financial advice?

MS. TRUHE: Maybe I'm not using the right word.

Q Would you give him advice on any matter pertaining to his own finances?

MS. SCHUETT: I don't know if that clears it up for me. Do you understand the question, Ken?

A On, well, if, if you're talking about whether he should borrow money or anything like that, the answer would be no, I didn't give him, I wouldn't have given him any advice as to how to borrow money, et cetera, if that's what you're talking about by finances.

point or we would resolve the point then the return would go back into the tax department.

If I made any changes they'd double-check the changes, and from there, it would go to processing which would normally be Xeroxing and typing up a letter of instruction to the client. From that point, once it was processed, it would have gone back to the tax return reviewer, the tax return reviewer would double-check the assembly, make sure that the Federal, State returns are there, the pages are in order, whatever.

Q Was this tax return reviewer someone in the tax department?

A Yes.

Q And then what would happen?

A It would go to the partner in charge of the account who would sign it and put it in the mail.

Q And you were the partner in charge of the account?

A I became an officer or partner in the company in the Fall of 1985. From what I could tell from the records I reviewed the past couple of days, Harvey Newman who was the partner in charge signed most of the returns prior to that,

and it looks like I signed the returns especially for the 1985 year-ends and thereafter.

Q All right. Approximately how long would this entire process last from the time you pull last year's file until the time the partner in charge of the account signs off on the return?

A It could vary depending on the number of questions, depending on whether I had time to work on it right away or whether it was put on the shelf for awhile, and it also depended on the tax department, whether there was a backlog, they would try to do work in the tax department on a first-come/first-serve basis, unless there were emergencies. So it could be, if I was doing the tax return by hand, it could, it could be a week or two as a minimum turnaround and a maximum turnaround could be a couple of months.

Q Okay. Let's go to a specific year, 1984. Well, tax year 1984. This was previously marked as Shofer Deposition Exhibit 1-E and I don't think we need to have it marked again, it's already been identified. Can you identify that document, though, for the purposes of this record?

A How am I supposed to identify it?

is?

A It's headed Richard Shofer 1040, 1984, and in the upper right-hand corner are my initials, KEL, with the date 7/29 and it's the, part of the information that I would have taken on the initial interview with Richard Shofer concerning his Form 1040 for 1984.

Q Mr. Larash, were you aware that Mr. Shofer had taken loans from his pension plan prior to the preparation of this return?

MS. SCHUETT: Objection to the form of the question. Oh, well, I thought it assumed a fact that had not yet been in evidence.

MS. TRUHE: I think we can all agree that Mr. Shofer took loans in 1984 from his pension plan.

MS. SCHUETT: That's not what I meant. You can go ahead and answer the question if you remember it by now.

A Maybe you'd better say it again.

Q Were you aware of the fact that Mr. Shofer had taken loans from his pension plan in 1984 prior to --

MS. SCHUETT: Object to the form.

Q -- prior to the preparation of this tax return?

A Prior to the preparation of this tax return?

Q Yes.

MS. SCHUETT: Objection to the form of the question. Go ahead.

A Go ahead, oh. The earliest document that's dated and initialed by me that I could find in the files indicated that I worked on the pension plan general ledger for 1984 and it's, I believe it's a page of journal entries dated June 17th of '85, so that appears to be the first time I became aware.

MR. BOWDEN: What was that date again, excuse me?

THE WITNESS: June 17th, 1985.

Q And you stated that was in the course of preparing the ledger for the pension plan?

A Yes, well, the work -- it's called working trial balance, yes.

Q That's when you first became aware that Mr. Shofer had taken loans from his pension plan in 1984?

A Right, correct.

of this return?

A To my knowledge no one did.

Q All right. You previously testified that you did not conduct any research into this issue, why not?

A The loan had been discussed, according to Richard Shofer, between himself and Stuart Hack and he had a document, I'm not quite -- I don't quite remember whether it was a letter or a memo from Hack, that said it was all right to take out the loans.

Q Well, that gets back to one of my earlier questions as to whether you had any conversation with Mr. Shofer about the tax treatment of these loans, and now you're saying that you were aware that he, Mr. Shofer had had discussions with Mr. Hack about the tax treatment of these loans.

MS. SCHUETT: I object to the tone of your question, Janet, because I thought I interpreted your last question and I think that Mr. Larash did too, to be, to be about conversations on the interest deductibility of the, on the loans from the plan. So, you know, I don't mind you going, you can go ahead and ask him whatever you want, I

don't have any problem with that but the tone that he has somehow said something that's different than what he previously testified to I object to.

Q I believe my earlier question to you on this subject was prior to the completion of this return by Grabush, did you speak with anyone including Mr. Shofer about the tax treatment of these loans from the pension plan.

Did you understand that as being my earlier question?

A Yes, I may have misinterpreted it because I would not have raised the question initially. It would have been raised, you know, from Mr. Shofer to me as it --

Q Okay.

A -- as, I should say, as a statement of fact.

Q All right. Tell me about your conversations with Mr. Shofer concerning the tax treatment of the monies taken by him in 1984 from his pension plan, tell me what you recall.

MS. SCHUETT: We're talking about conversations and we're not talking about all conversations up to date, we're talking about 1985 conversations?

MS. TRUHE: No, any conversations Mr. Larash had with Mr. Shofer prior to the completion of this 1984 return.

MS. SCHUETT: Okay. Prior to the return.

A All I remember is a discussion of that document from Hack and I would, I would be guessing as to what was actually said in any conversation.

Q Did Mr. Shofer --

A I don't remember.

Q -- show you a copy of that document?

A To my knowledge, he did, yes.

Q Did you keep a copy of that document?

A I was looking through my files in the last two days to refresh for this and I didn't run across a copy of that document.

Q Do you recall whether you asked him for a copy of that document?

A I can only say that I probably did.

Q Do you recall --

MS. SCHUETT: Just to clarify the record, in the file that we talked about prior to the beginning of this

loans?

A It was my understanding that the loans would be considered as a legitimate loan and there was nothing more to be concerned about from a tax point of view.

Q So let me see if I understand what your understanding was in, I believe 1985 as to the tax treatment of these loans.

It was your impression from your conversation with Mr. Shofer and your reading of this letter from Mr. Hack that it was Mr. Hack's opinion that Mr. Shofer could borrow without limitation from his pension plan and that there would be no tax consequences to him; is that correct?

A Yes.

Q And again you did not research this issue any further, is that correct?

A Not until we decided we had to amend returns or not until 1986, a year down the road or so.

Q Why did you decide, again I'm talking about prior to the completion of the 1984 return, why did you decide not to do any research and rely on Mr. Hack's opinion?

A Well, it concerned an area of pension plans which

I certainly was not an expert in and I don't believe anybody in our tax department considered themselves to be an expert in taxation of transactions that originated from a pension plan, so therefore we had to rely on outside professional consultation which would have been in this case Stuart Hack.

Q All right. Let's pursue that subject a little bit further right now. In 1984 -- well, no, let's not limit this as to time frame.

What if any relationship did you or anyone at Grabush have with Mr. Hack, and let's say beginning in 1980?

A I don't understand the question. What do you mean by relationship?

Q Did you have any contact with him?

A Yes, in order to do all this work.

Q All right. How often would you have to contact him?

MS. SCHUETT: Can you answer that question on a general -- I mean on a year by year basis; is that your question? --

Q Yes, on an annual basis, yes.

A Are we just talking about the individual tax

A Mr. Shofer would provide Hack's company with a trial balance showing assets, liabilities, income and expenses of the pension plan, and Mr. Hack's company would from that information and I believe also a questionnaire that he normally sent out, develop the Form 5500 and calculate a participant's interest by employee and calculate the pension expense that the corporation would have to pay to the, to the plan.

Q Anything else?

A I don't recall anything else.

Q Now, at that time, did you regard Mr. Hack or anyone at his firm as an expert or as a tax expert in pension matters?

A I would have to say yes.

Q Why?

A Because of his general reputation in the community.

Q What was his general reputation in the community in that regard?

A Well, my fellow partners, and I always respect my fellow partners' opinions as most of them have more years of

experience than me, always regarded Stu as very conservative and a good pension consultant.

Q Well, why did you consider tax expertise within the area of pension consultant?

A I don't think I understand the question.

Q Well, you said that you, and correct me if I'm wrong, I believe you testified earlier that you did regard Mr. Hack as a tax expert in pension matters, is that correct?

A Yes.

Q And I asked you why and you said it was because of his general reputation in the community; is that correct?

A Yes.

Q And I asked you how you knew about his general reputation and you said, my partners regarded Stu as a good pension consultant?

A Correct.

Q And my question to you is, what does pension consulting have to do with tax aspects of pension matters?

A Well, again, I'm not an expert, but in, I believe Stu Hack wrote the pension plan we're talking about and he, I believe he writes many plans. Those plans have to be filed

with the IRS. It would seem logical to me that he would have, have to have tax expertise in that area in order just to get the plan approved by the IRS.

Q Anything else?

A I can't think of anything offhand.

Q Let me make sure I understand what your opinion was at that time and the basis for it. Were you assuming that because Mr. Hack was regarded in the community by your partners, et cetera, as a good pension consultant and because Mr. Hack had drafted the pension plan for Mr. Shofer, were you assuming from that or those things that this necessarily meant Mr. Hack was an expert in tax matters pertaining to pension plans?

MS. SCHUETT: Objection to the form of the question, you may answer it.

A Well, there may have been other reasons why I considered him an expert but none come to mind, so --

Q All right. So there may have been other reasons but you can't recall them right now?

A That's correct.

Q Showing you what has been previously marked as

Q Mr. Marvel.

A No doubt Richard Shofer.

Q Anyone else?

A I don't recall anyone else.

Q Did you do any independent, and by independent I mean any research yourself into this issue prior to the completion of this return?

A I would say no, I left it all up to Alan Marvel.

Q Let's get into this issue of the taxability of these loans and the discovery of a problem with regard to their tax treatment. When did you or anyone at Grabush learn that there was any problem with regard to Grabush's tax treatment of loans Mr. Shofer had taken from his pension plan in 1984, 1985, or 1986?

MS. SCHUETT: Objection to the form of the question, you can answer it.

A It would have been through my discussions with Alan Marvel, again probably in the Fall of 1986.

Q When did Alan Marvel come to the firm?

A I think it was June 30th, '86.

Q How did he come to have anything to do with Mr.

Shofer's account?

A Well, he was in the tax department, I think at that time he was classified as a manager, he's now an officer. The 1986 Tax Act was, had either been passed or was in the heavy discussion stage, and I was aware of certain things that had either been proposed or already passed in the tax act that affected at least the corporate tax return to a tremendous extent and I was concerned that if we didn't act quickly and do some tax planning for 1987, Richard, the corporation would be faced with dire tax consequences.

So, I started talking with Alan Marvel in that regard. The rest, the getting into the taxability of the loans would have come from a general discussion I had with Alan to give him a history or background of the account and what was happening in the various areas because I thought it would be unfair for him to do tax research wearing blinders, so I tried to explain Richard Shofer's personal situation and the pension plan and the corporation and although I'm not certain, I probably turned over the accounting files that we had to that extent so he could do his own research and review.

affect him.

MS. SCHUETT: Could I stop you a minute. Your question was to, for him to tell you about conversations about the loans?

MS. TRUHE: About the loans.

MS. SCHUETT: The taxability of the loans?

MS. TRUHE: Yes.

MS. SCHUETT: Sorry.

A Can you reword the question again?

Q Tell me everything you remember about your conversations with Mr. Marvel about, during this time about the tax problem concerning these loans?

A Just concerning the loans?

Q Yes.

A Well, he told me that within the past year or two before that he had a case with one of his own clients when he was at another firm where the other client had gone in excess of fifty thousand dollars and they had run into problems and found out that, that it was not allowed by the tax laws to take out more than fifty thousand dollars, or perhaps I'm not wording it right as to what he said but there was a limit in

the tax law that you could not go over fifty thousand. So, we would have discussed that limit and he would have asked me when Shofer took out these loans, which we could easily research in our pension files, not as to specific dates but as to what year, what years were involved, and I believe I said something to him like, I hope you're wrong. And then he would, and that probably was the end of the conversation other than I assigned him the task of what is the taxable situation, what should have been done with the loans.

Q And did he agree to perform that task?

A Yes.

Q Do you know whether he ever consulted with anyone else at Grabush in the course of his determining what the proper tax treatment of these loans should have been?

A I don't remember him telling me of any -- -- when he was discussing it with --

MS. SCHUETT: At Grabush?

A At Grabush.

Q All right. Did Mr. Marvel report back to you after he had performed his research?

A Well, we're not talking about clear-cut meetings

this meeting what you were going to do about this problem, what either you at Grabush or Mr. Shofer should do about this problem?

A Well, I know that Richard found it unbelievable that these loans were taxable, so we came into that meeting, from my recollection anyway, prepared to recommend that he see a specific tax attorney to handle any of these problems, number one, hoping that if we're wrong and the thing is not taxable, we'd have another party to bounce the facts of the case off. And then presuming that that party came back and told us things are not taxable, we would let the issue drop.

Q Let me interrupt you right there. You stated that you recommended to Mr. Shofer that he see a tax attorney about this problem specifically; is that correct?

A Yes, I may not have used the term tax attorney, right, but an expert in pension plans, et cetera, with tax emphasis.

Q Did you give him the name of any specific individual?

A Alan Marvel came up with the name of Nick Gianpetro and I believe he gave him one or two other names,

A It would have been Alan Marvel with his consultation of Nick Gianpetro, and that 1984 would have to be amended for the same reasons. At some point along in this scenario, we sent a letter out to Richard Shofer advising him to amend.

Q Let me stop --

A I think --

Q Let me stop you right there. Is this the letter you sent to Mr. Shofer?

A Yes, yes, that is the letter.

Q Let's have this marked as -- well, on second thought this has already been marked as Shofer Deposition Exhibit No. 4, so we all know how to identify it, we don't need to mark it again. Would you just identify this letter for the record?

A This is a letter to Richard Shofer from myself dated February 20th, 1987, and it concerns our recommendation to amend his Form 1040 for 1984.

Q Now, as of the date of that letter, had you also determined that a change would be necessary to the 1985 return as well?

Alan Marvel's hands and whoever he was discussing the situation with, Nick Gianpetro and the research they were doing.

Q Do you recall how soon before December 9th, 1987, the date that you signed off on that document, do you recall how soon before that time Alan Marvel came to you and said this is it, this is what's taxable, go ahead and start preparing the amended return?

A No, but again, it would have been a transmittal sheet on the top of this tax return and it would have indicated the date I completed putting the numbers on the return, so I can, I can only presume that he would have told me either that date or sometime prior to that date.

Q Okay. I also found this document in your file. Does that help refresh your recollection?

A Yes, this says that, or indicates that I prepared the return on November the 9th. So I would have been told by Alan, at least on November 9th, possibly earlier than that, to amend the return.

Q Whose decision was it ultimately to have Grabush prepare such an amended return, in other words was it Mr.

Shofer's decision to direct you to prepare this return?

A Well, yes, because we wouldn't have prepared the return if the client wasn't going to be willing to pay for it. So it would have been his ultimate response.

Q Do you recall when he made --

MS. SCHUETT: Response?

THE WITNESS: Request, excuse me.

MS. SCHUETT: Okay. I'm sorry.

Q Do you recall in between February 20th, 1987 and the date you signed off on that document which is December 9th, 1987, do you recall approximately when Mr. Shofer communicated to you his request that this return should be amended?

A No, I don't know exactly when he did it.

Q Do you recall approximately?

A No, I know that he authorized us to do the research because I feel certain that the research was quite expensive and that we billed Dick for all of it. I can only assume that it was oral over the telephone, but I have no idea when.

Q Okay. And how were the monies taken by Mr. Shofer

MS. SCHUETT: That may be. May I see the return?

MS. TRUHE: Sure.

A You remember better than I do.

Q Let's go back to that 1984 return.

A Yeah, 1984 was prepared by a member of the tax department, Dave Lane.

MR. ZABEN: If I can help here I think what we determined was Mr. Larash took the initial information on his note sheet but then Dave Lang (sic) prepared the return.

MS. SCHUETT: And Harvey Newman signed it.

MS. TRUHE: Signed off on it, that's correct.

MS. SCHUETT: So what's the question?

MS. TRUHE: I'll make the question a little more broad.

MS. SCHUETT: Good idea.

Q (By Ms. Truhe) I'll include those other guys. With regard to the original 1984 return, do you believe that Grabush, Newman did a competent job of preparing that return?

A Yes.

Q Why?

MS. SCHUETT: Oh that's way too broad, Janet. Why was everything on the return done in a competent way?

Q Oh, well, I'll narrow it down, with regard to the tax treatment of the loans specifically.

MS. SCHUETT: Okay.

A With regard to the tax treatment of the loan, we had not been notified through, normally through the use of a Form 1099, I'm not too sure, there's a letter behind the 1099 that involves what, taxable income from a retirement plan, but we did not have one of those documents, so as far as we were concerned, the loans between Richard Shofer and the pension plan stood as they were, as legitimate loans.

Q Where does the 1099 form come from?

MS. SCHUETT: Objection. You may answer.

A It's -- well, I could -- I would say it normally comes from the pension consultant while they're preparing the 5500 but since I'm not a pension consultant I can't swear to that side of the business.

Q Who would have given you the 1099 form, was that something Mr. Shofer --

A Yes.

Q -- your client would have given you?

A Yes. Normally 1099 forms would be in the possession of the tax preparer and they would, you know, if he had any, he would turn those over to me.

Q With regard to the preparation of a 1099 form, and I believe you stated you thought this would be done by a pension consultant, wouldn't the pension consultant have to know, and again I'm referring to 1984, in order to prepare that form, wouldn't the pension consultant have to know that in fact there were loans taken from the pension plan during that year and the precise amounts?

MS. SCHUETT: Objection, but you may answer.

A I would presume yes, he would have to know that.

MS. SCHUETT: If -- can we go off the record?

(Discussion off the record.)

(Brief recess taken.)

MS. TRUHE: Let's have this document marked as Larash Deposition Exhibit No. 5.

(Document was marked Larash Deposition Exhibit No. 5.)

A Do you want me to identify this?

Came into our office 10/17/90

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Part II

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88102069/CL79993
Defendants	*	
	*	

FILED
OCT 5 1990
CIRCUIT COURT FOR
BALTIMORE CITY

* * * * * * * * *

REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Stuart Hack and the Stuart Hack Company, Defendants, by their undersigned attorneys, file the following Reply to the Plaintiff's Opposition to Defendants' Motion to Dismiss the Second Amended Complaint. In short, the Plaintiff has failed to allege any relationship with the Defendants which would give rise to any duty owed by the Defendants other than the relationship existing by reason of the Defendants' role in the administration of the Plan. Moreover, the Defendants' negligence and some of the Plaintiff's damages cannot be determined by the trier of fact without making reference to the terms of the pension plan at issue in the case. As such, this suit by a plan participant against a plan administrator for allegedly giving bad advice concerning the use of plan monies clearly relates to an employee benefit plan and is, therefore, pre-empted by the Employee

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

Retirement Income Security Act of 1974 (ERISA). Thus, the remaining common law counts for negligence (Count I) and breach of contract (Count II) should be dismissed.[1]

I. Defendants Had No Relationship With Plaintiff Apart From The Plan.

A review of the Second Amended Complaint conclusively demonstrates that the only relationship between Plaintiff and Defendants was the relationship existing because of Defendants' role in the administration of the Catalina Enterprises, Inc. Pension Plan (the Plan). In his Opposition, the Plaintiff concedes the nature of this relationship - "Stuart Hack and the Stuart Hack Company were professional pension consultants, hired by Catalina Enterprises, Inc. to administer Catalina's pension plan." See Plaintiff's Opposition at p. 1 (emphasis added). And the Complaint, itself, notes that the Stuart

[1] Defendants had also moved to dismiss Counts III through VIII of the Second Amended Complaint on the grounds that these claims (for Defendants' failure to provide competent advice concerning the Plan in violation of ERISA) fell within the exclusive jurisdiction of the federal courts. Recognizing that these counts lacked adequate factual as well as legal foundation, the plaintiff stated in his Opposition that he would voluntarily move to dismiss these claims at the earliest possible time prior to the hearing on Defendants' Motion to Dismiss scheduled for October 12, 1990. See Plaintiff's Opposition at p. 17. Because the only counts which remain in the Plaintiff's Second Amended Complaint are Counts I and II for negligence and breach of contract respectively, the instant Reply will focus exclusively on these claims and why they are nevertheless subject to preemption under the ERISA statute as previously argued in Defendants' Motion to Dismiss.

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Hack Company and Stuart Hack held themselves out as "professional actuaries and consultants who provide professional advice to trustees and beneficiaries[2] of pension plans as to the proper use of assets of such plans." Second Amended Complaint ("Facts Common to all Counts") at paragraphs 1 and 2 (emphasis added). In the course of rendering services to the Plan and its participants, Defendants also prepared tax returns for the Plan and statements to participants in the Plan. Second Amended Complaint at paragraph 6.

Although Plaintiff has elected to dismiss Counts III through VIII of the Complaint, the admissions contained in these Counts shed further light on the nature of the relationship between Plaintiff and Defendants. First, Defendants were retained to perform the duties of plan administrator. Second Amended Complaint at paragraphs 37-40, 48 - 49, 56 - 59, 65 - 66, and 74 - 75. In addition to their responsibilities as plan administrator, Defendants were retained by the Plan "to provide counsel and assistance as to the Trustee's carrying out of the ability to make loans to participants." Second Amended Complaint at paragraphs 41, 50, and 74. The fiduciary responsibilities of the plan administrator allegedly

[2] The plaintiff was the Plan's sole trustee as well as a participant. Second Amended Complaint at paragraphs 4, 5, and 9.

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included, inter alia, a duty to "advise, counsel, and assist any Participant regarding any rights, benefits or elections available under the Plan". Second Amended Complaint at paragraphs 40, 48, 69, 75-77.

Unless Plaintiff is now contending that Counts III through VIII were filed without any factual basis whatsoever, it is impossible to avoid the conclusion that: (1) Defendants were retained by the Plan, not by the Plaintiff individually, and (2) that Defendants' advice to the Plaintiff regarding loans from the pension was rendered in Defendants' capacity as plan administrator in response to the Plaintiff in his capacity as a trustee and participant.[3] Even if the Plaintiff is conceding that these Counts were meritless, the aforementioned points are

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[3] The response from Mr. Hack to Mr. Shofer's inquiry regarding loans from his pension plan is contained in a letter dated August 9, 1984 attached hereto as Exhibit A. The letter's failure to address tax consequences is the sole factual predicate of each and every one of the Plaintiff's counts set forth in the Second Amended Complaint. It is clear from the very first sentence of the letter that the Defendants in their role as pension consultants to the Plan were responding to a series of questions by the Plaintiff who as a participant wondered how he could use the monies in his pension plan:

> You questioned whether assets of your money purchase pension plan and profit sharing plans can be used a collateral for loans, whether you can borrow against these plans and whether there is any special treatment for your voluntary account under these plans. (Emphasis added).

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still contained in paragraphs 1-16 of the "Facts Common to All Counts."

II. The Plaintiff Has Not Alleged Facts Supporting A Common Law Duty Owed By The Defendants To The Plaintiff.

Other than the Plan itself, which is undisputedly governed by ERISA,[4] the Plaintiff had no contract or client relationship with the Defendants. The Defendants were not the Plaintiff's personal tax or financial advisors. They were not his accountant or his attorney.[5] They did not prepare Plaintiff's tax returns. The Defendants' sole legal relation with the Plaintiff was by virtue of the Plan which the Defendants had been retained to administer.

In cases of professional negligence, professionals do not owe a duty to the world at large, but only to those in strict privity with them and to third party beneficiaries. Flaherty v. Weinberg, 303 Md. 116, 492 A.2d 618 (1985). See also, Jacques v. First National Bank, 307 Md. 527, 515 A.2d 756 (1986) (where the failure to exercise due care creates risk of economic loss only, an

---

[4] The Employee Income Retirement Security Act (ERISA) is a federal statute which regulates all employee benefit plans established by an employer engaged in interstate commerce or in any industry affecting interstate commerce. 29 U.S.C.A. § 1003(a)(1). The Catalina Enterprises, Inc. plan which is the subject of the instant case is thus fully governed by ERISA.

[5] It is undisputed that the third-party defendant Grabush, Newman & Co., P.A. was the plaintiff's accountant and general tax advisor at all times relevant in this case.

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intimate nexus between the parties is a condition to the imposition of tort liability). In the absence of a specific legal relationship, there can be no liability ("Negligence in the air, so to speak, will not do."). Id. at p. 532 quoting Prosser and Keeton, The Law of Torts, § 53 at 357 (1984).

There is no basis in fact, nor is any basis alleged in the Second Amended Complaint, to support a claim that Defendants owed any duty to the Plaintiff in any capacity other than as plan administrator. There is no allegation that Defendants breached any duty other than duties which were clearly related to the Plan. Because Defendants' duties with respect to the Plan are pre-empted by ERISA as argued more fully below, the Plaintiff's case should be dismissed.

III. Because The Claims Against Defendants Relate To The Plan, The Claims Are Pre-empted.

In this case, the Plan, in accordance with ERISA, created and defined the Defendants' responsibilities. At a minimum, the Defendants' responsibilities in this case necessarily "relate to" the Plan. It is beyond dispute that common law claims which "relate to" an employee benefit plan are pre-empted under 29 U.S.C.A. §1144(a), which provides that the provisions of ERISA "shall supersede any and all state laws insofar as they may now or

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hereafter relate to any employee benefit plan...."[6] As the Supreme Court emphasized in Pilot Life v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549 (1987), ERISA pre-emption is not limited to "state laws specifically designed to effect employee benefit plans," but includes state common law of general applicability. Pilot Life, 481 U.S. at 49, 107 S.Ct. at 1553. The Plaintiff's common law claims are thus pre-empted.

The Plaintiff, himself, identifies in his Opposition a "principal factor" used by the courts to determine whether there is pre-emption.

> [T]he courts are more likely to find that a state law relates to a benefit plan if it affects relations among the principal ERISA entities -- the employer, the plan, the plan fiduciaries, and the beneficiaries-- than if it affects relations between one of these entities and an outside party, or between two outside parties with only an incidental effect on the plan.

Somers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1467 (5th Cir. 1986) (emphasis added). Clearly, a communication between a trustee/participant (the Plaintiff in this case) and a plan administrator (the Defendants) on the issue of loans from

---

[6] The term "state law" is also defined in the statute to include "all laws, decisions, rules, regulations, or other state action having the effect of law, of any state." 29 U.S.C.A. § 1144(c)(1).

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the pension plan to that participant involves a relation "among principal ERISA entities" on a subject discussed at length in the Plan at issue in this case. See Catalina Enterprises, Inc. Pension Plan 1984 Amending Restatement at p. 10-12 (10.16 "Loans to Participants") (attached hereto as Exhibit B).

As if to remove any doubt about whether the remaining counts for negligence and breach of contract are integrally bound up with the Plan in this case such that they can only be resolved with reference to it, the Plaintiff will be claiming that some of the Defendants' negligence concerns their failure to amend the loan provisions properly in the 1984 Amending Restatement. See deposition of Edward Kabala at pp. 37 and 40 (attached hereto as Exhibit C). Moreover, the Plaintiff's pension expert will also testify that as a result of the defendants' failure to advise the Plaintiff correctly about the tax consequences of loans and the proper procedure for taking them from the pension, the Plan is under the potential of being disqualified thereby causing the Plaintiff to suffer additional tax damages. See, id. at p. 104.

In addition, the Plaintiff will be seeking damages in the form of certain excise taxes which will be imposed if his loans are deemed prohibited transactions by

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the I.R.S. See Plaintiff's answer to third-party defendant's interrogatory no. 10. Whether there was a prohibited transaction will depend upon an interpretation of the loan provisions of the Plan document. Contrary to the Plaintiff's assertion that his negligence and contract claims are not pre-empted because they are not "predicated upon any right or standard contained in ERISA," (Plaintiff's Opposition at p. 10), both the liability and damage claims contained within these counts will depend upon whether the terms of the Plan were violated thereby resulting in a prohibited transaction under ERISA.

IV. Professional Malpractice Claims Which Relate To A Plan Are Pre-empted.

The Plaintiff's contention that professional malpractice claims are beyond the scope of ERISA is directly contradicted by the ERISA statute itself and by the Plan at issue in this case.

ERISA specifically imposes a duty of due care on plan fiduciaries, including plan administrators such as the Defendants. An ERISA fiduciary is obligated to discharge his duties "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims...." 29 U.S.C.A. §1104(a)(1)(B).

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In this case, as Plaintiff alleges in his Complaint, the Defendants were entrusted under the terms of the Plan with a fiduciary responsibility to, inter alia, "advise, counsel and assist any Participant regarding any rights, benefits or elections available under the Plan." Second Amended Complaint at 40, 48, 69, and 75-77.[7] The Plan further stipulated that, in accord with 29 U.S.C.A. Section 1104(a)(1)(B), Defendants were to exercise due care in carrying out these duties. See, e.g., Second Amended Complaint at paragraphs 49, 56, and 66.

It is thus clear from the standard of due care set forth in 29 U.S.C.A. §1104(a)(1)(B) and from the fiduciary duties defined and enumerated in the Plan itself, (see 1984 Amending Restatement at p. 11-5, paragraph 11.6 attached hereto as Exhibit D), all of which are alleged and admitted in the Second Amended Complaint, that the allegations that the Defendant plan administrators in this

---

[7] Even in the remaining Counts I and II, the plaintiff speaks in terms of defendants' duty to function as a "reasonably competent actuary and consultant" with reference to "the area of advising as to the tax consequences of transactions involving voluntary accounts in pension funds." See Second Amended Complaint at paragraphs 18 and 24 ("Defendants' breached [their] contract by, among other things, neglecting to inform Shofer that his borrowings against his voluntary account would cause him to incur tax and other liabilities."). Clearly the Defendants were seeking to "advise, counsel and assist" the Plaintiff as to rights he enjoyed under the terms of the Plan in connection with borrowing pension monies.

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case failed to exercise due care in providing advice to a plan participant fall squarely within the scope of ERISA regulation and pre-emption.

Plaintiff's contention that ERISA might not provide a remedy for his malpractice claims has no bearing on the issue of whether the claims are pre-empted. The Supreme Court, in Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549 (1987) flatly rejected the contention that state law relating to employee benefit plans could be construed to supplement ERISA:

> The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA plan participants and beneficiaries were free to obtain remedies under state law the Congress rejected in ERISA.

Pilot Life, 107 S. Ct. at 1556 (state common law causes of action alleging improper processing of a claim for benefits were pre-empted). See also, Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542 (1987) (state law claims for breach of contract, wrongful discharge and termination of benefits pre-empted). Thus, the ERISA pre-emption provision "was intended to displace all state laws that fall within its sphere, even including state laws that are consistent [or inconsistent] with ERISA's substantive requirements." Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 739 (1985).

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Likewise, Plaintiff's argument that Defendants were not ERISA fiduciaries is irrelevant, because ERISA's pre-emption doctrine applies to preclude the assertion of state law claims even against non-fiduciary defendants where the claims relate to an employee benefit plan. For example, in Howard v. Parisian, Inc., 807 F.2d 1560 (11th Cir. 1987), the Eleventh Circuit held that the plaintiffs' state law claims were pre-empted against a plan administrator who performed only claim-processing, investigatory, and record-keeping duties. Those services were performed under an independent contract with the plaintiff just as in the case here. The Eleventh Circuit relied on the broad language of § 1144(a) and the Supreme Court's opinion interpreting that section in holding that § 1144(a) pre-empts "all state laws insofar as they relate to employee benefit plans and is not limited to state laws as applied only to plan fiduciaries." Id. at p. 1565 (emphasis in original). The Court went on to state that:

> Congress endowed ERISA with this broad pre-emptive effect to ensure exclusive federal regulation of employee benefit plans. Allowing plan beneficiaries to assert state law claims against non-fiduciary plan administrators for the wrongful termination of benefits would upset the uniform regulation of plan benefits intended by Congress.

Id. In reaching its decision in the Howard case, the Eleventh Circuit relied on the Fifth Circuit case of Light

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v. Blue Cross and Blue Shield of Alabama, Inc., 790 F.2d 1247 (5th Cir. 1986) which likewise held that ERISA pre-empts the assertion of state law claims against non-fiduciary administrators. In sum, the plaintiff simply cannot maintain his state law causes of action against these Defendants in the instant case.

CONCLUSION

A review of the Second Amended Complaint demonstrates beyond any doubt that Plaintiff's claims "relate to" the employee benefit plan at issue in this case. A significant portion of his liability and damage claims contained in Counts I and II will turn on an interpretation of the loan provisions in the Plan document. The law is well settled that state law claims which "relate to an employee benefit plan" are pre-empted by ERISA. Plaintiff's sole remedy in this case is under ERISA. For the aforegoing reasons and the reasons previously set forth in Defendants' Motion to Dismiss, Defendants request that the remaining Counts of the Complaint, Count I for common law negligence and Count II for common law breach of contract, be dismissed pursuant to 29 U.S.C. §1144(a).

Respectfully submitted,

Janet M. Truhe

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Lee B. Zaben

Semmes, Bowen & Semmes

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250 West Pratt Street
Baltimore, Maryland 21201
(301) 539-5040

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October, 1990, a copy of the foregoing Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss was delivered to Lloyd S. Mailman, Esquire and Thomas A. Bowden, Esquire, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201 and Linda Schuett, Esquire, Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

Janet M. Truhe

Janet M. Truhe

THE STUART HACK COMPANY
Consultants & Actuaries
4623 Falls Road
Baltimore, Maryland 21209
(301) 366-8700
Washington, D.C. 621-4064

Writer's Direct Dial No

August 9, 1984

PERSONAL AND CONFIDENTIAL

Mr. Richard Shofer
Crown Motors
5006 Liberty Heights Avenue
Baltimore, Maryland 21207

Dear Dick:

You questioned whether assets of your money purchase pension plan and profit sharing plans can be used as collateral for loans, whether you can borrow against these plans and whether there is any special treatment for your voluntary account under these plans.

First of all, let's distinguish between the voluntary account and the employer account. The employer account cannot be put up as collateral for a loan, and loans to participants against their employer account are limited to a total of $50,000 for all plans for up to a maximum of five years (for a longer period of time if used for the purchase or substantial improvement to a primary residence). Further, we would recommend that any loans against an employer account should be fully collateralized (this means collateral in addition to the value of the account itself).

There is an entirely different treatment for voluntary accounts. First, there is no limit on the amount that can be borrowed against the account or the length of time for which it can be outstanding. Also, the account, itself, can stand as collateral for the loan against the voluntary account. Further, the voluntary account can be put up as collateral for a loan from a bank or other source. The loan agreement will have to include a provision that you cannot withdraw money from your voluntary account, and thus dissapate the collateral, however.

The law is pretty clear on the inability to use employer account values as collateral for a loan. There is no law on restrictions of using voluntary account money for collateral for a loan. The TEFRA provisions on the limits on loans apply only to employer accounts and specifically do not apply to employee voluntary accounts. In my opinion, you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account. The terms of the loan must be reasonable as to the interest rate and pay back period.

Cordially,

Stuart Hack

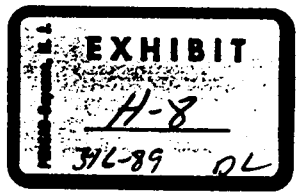
SH:mn

Exhibit A

DEPOSITION EXHIBIT
Larash #5
631
PENCAD-Bayonne, N. J.

THE STUART HACK COMPANY

CATALINA ENTERPRISES, INC. PENSION PLAN
1984 AMENDING RESTATEMENT



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Washington, D.C. 621-4064

10.16 Loans to Participants - Notwithstanding any other provision in the Plan to the contrary, the Trustees, upon direction of the Company, shall make loans to Participants. Each such loan shall be deemed to be, and shall be accounted for as, a specific investment of the borrowing Participant's Accrued Benefit. Each loan shall be based upon a written application made to the Company by the Participant setting forth the desired loan amount and such other information as may be deemed pertinent by the Company. The Company shall have the final and exclusive right to determine the propriety, amount and terms of any loan to be made.

In addition to such rules and regulations as the Company may from time to time adopt, all loans shall comply with the following terms and conditions:

(a) Except as otherwise permitted by the Company and permitted on a non-distributive basis under the Internal Revenue Code, the amount of any loan, when added to the outstanding balance of all other loans to the Participant from the Plan or any other qualified retirement plan of the Company or any related employer (as defined in Section 414(b), (c) or (m) of the Internal Revenue Code), shall not exceed the lesser of: (i) $50,000, or (ii) the greater of $10,000 or 50% of, but not to exceed 75% of, the vested portion of the Participant's Accrued Benefit, valued as of the Participation Date or Special Valuation Date, whichever last occurred, preceding the date on which the loan is approved (adjusted for subsequent contributions and/or distributions).

(b) Loans shall be permitted only for extraordinary or emergency expenditures and shall not exceed the actual amount needed therefor.

(c) The period of repayment for any loan shall be arrived at by mutual agreement between the Company and the Participant, but, except for home loans (as defined in Section 72(p)(2)(B)(ii) of the Internal Revenue Code), shall in no event exceed five years.

(d) Each loan shall be secured by the Participant's promissory note for the amount of the loan, including interest, payable to the order of the Trustees, and, in the sole discretion of the Company, by an assignment (notwithstanding the provisions of Section 10.12) of all or any portion of the Participant's right, title and interest in and to his Accrued Benefit; provided, however, that, in the absence of a Private Letter Ruling or a public position of the Internal Revenue Service to the effect that the qualified status of the Plan will not be adversely affected, the terms of the assignment may not permit the Trustees, prior to the

RICHARD SHOFER		:	IN THE
	Plaintiff	:	CIRCUIT COURT
vs.		:	FOR
THE STUART HACK COMPANY, et al		:	BALTIMORE CITY
	Defendants	:	Case No. 88102069/CL79993

Baltimore, Maryland

September 13, 1990

Deposition of EDWARD J. KABALA, A Witness, called for oral examination by counsel for the Defendant, The Stuart Hack Company, taken at the law offices of Semmes, Bowen & Semmes, 250 West Pratt Street, 17th Floor, before Kathleen R. Turk, Notary Public, beginning at 2:08 o'clock p.m.

Reported By:

Kathleen R. Turk, RPR-CM
Riggleman, Turk & Nelson
(301) 539-6398

contend fell below the level of care for a pension administrator?

A Yes. I think the annual administration services that we just talked about fell below in preparing the '84 and '85 annual reports.

I think the amendment of the plan in 1985, retroactive to 1984, fell below the standard in that it would appear that standard 72(p) type employer account only loan provisions were inserted in a plan without checking to see whether, in fact, there were loans outstanding and whether one was, in fact, retroactively making something which may have been all right at the time into a prohibited transaction.

Q Now, should Mr. Hack have checked about these other possible loans regardless of the conversations he was having with Mr. Shofer in August of 1984?

A You mean regardless?

Q Yes.

A Absolutely. I think he should have known or should have asked whether there were plan loans in doing the annual administration. There should have been checklists

tell Mr. Hack that he had been taking loans and how do these new amendments with regard to the loan issues specifically affect me?

A It would have been Mr. Hack's responsibility to craft a document in accordance with the client's facts as they appeared in the file, and he should have asked before he used standard loan language.

Q Well, assuming that as of March 15th, 1985, Mr. Hack had no information whatsoever in his file that any participant had taken a loan from his pension plan --

A He had a letter dated August 9.

MR. BOWDEN: Let her finish -- excuse me, let her finish the question.

With that assumption, what's the question?

Q If you take issue with one of those assumptions, I'd like to hear about that.

A The assumptions are?

Q The assumption that Mr. Hack had no information in his file whatsoever that a participant had, in fact, taken a loan from the pension plan.

Do you have any information to dispute that fact?

In addition, since the notes and loans themselves violate the prohibited transaction rules, I think the plan is under the potential to be disqualified, and that generates a substantial number of tax consequences, penalties, and interest which would visit themselves upon the Plaintiff in this case and upon the other plan participants.

Those damages on the prohibited transactions come from, I think, four areas; failure to read the original plan when doing the August 9, 1984, letter; failure to adhere to the original plan; amending the plan so that even if they were okay, because there was some flux about whether you had to amend your loan provisions at the time, to, to put all the 72(p) materials in, so that even if they were okay when taken, they were made prohibited transactions, and then failing to have adequate systems to ascertain that there were plan loans and control them, or properly instruct the participants as soon as the first loans became known.

In addition, to the extent that there are any problems for failure, for filing incorrect 5500C's or 5500R's, you know, I don't know that there are any at this point, but they would be a potential.

THE STUART HACK COMPANY

CATALINA ENTERPRISES, INC. PENSION PLAN
1984 AMENDING RESTATEMENT

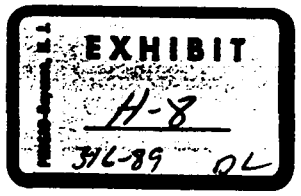

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Exhibit D

11.6 Fiduciary Standards - The Administrator, Trustees and all other persons in any fiduciary capacity with respect to the Plan shall discharge their duties with respect to the Plan: (i) solely in the interest of the Participants and Beneficiaries and for the exclusive purposes of providing benefits to Participants and their Beneficiaries and defraying reasonable expenses of administering and operating the Plan, (ii) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, (iii) with respect to fiduciaries charged with management and control over Trust assets, by diversifying the investments of the Trust so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, and (iv) in accordance with the documents and instruments governing the Plan to the extent consistent with the provisions of the Retirement Security Act.

11.7 Litigation - In any action or judicial proceeding affecting the Plan and/or the Trust, it shall be necessary to join as parties only the Trustees and the Company. Except as may be otherwise required by law, no Participant or Beneficiary shall be entitled to any notice or service of process, and any final judgment entered in such action shall be binding on all persons interested in, or claiming under, the Plan.

11.8 Payment of Administration Expenses - Expenses (other than those referred to in Section 10.6) incurred in the administration and operation of the Plan shall be paid by the Trustees out of the Trust unless the Company, in its discretion, elects to pay them.

11.9 Claims Procedure - In the event that any Participant or Beneficiary (hereinafter referred to as the "Claimant") believes that he is entitled to a benefit under the Plan, and such benefit has not been paid or commenced, or if such benefit has been paid or commenced under terms or in an amount with which the Claimant is not in agreement, said Claimant shall have the right to file a written claim with the Company setting forth the reason he believes he is entitled to the benefit, or setting forth the nature of his dispute with the terms or amount of the benefit, as the case may be. Such claim shall be delivered or mailed to the Company (to the attention of the President or such other person as shall have been delegated to receive such claim).

Unless it is determined that the matter is to be resolved in accordance with the wishes of the Claimant as set forth in the claim, the Administrator shall provide the Claimant with a written notice setting forth the specific reason or reasons for the denial, specific reference to pertinent Plan provisions on which the denial is based, a description of any additional material or information necessary for the Claimant to perfect his claim and an

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FILED

OCT 9 - 1990

CIRCUIT COURT FOR
BALTIMORE CITY

RICHARD SHOFER	*	IN THE
Plaintiff	*	
v.	*	
THE STUART HACK COMPANY, et al.	*	CIRCUIT COURT
Defendants	*	FOR
* * * * *	*	BALTIMORE CITY
THE STUART HACK COMPANY, et al.	*	Case No. 88101069/ CL79993
Third-Party Plaintiffs	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third-Party Defendant	*	

* * * * * * * * *

DEFENDANTS' AND THIRD-PARTY PLAINTIFFS' OPPOSITION TO THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendants and third-party plaintiffs, Stuart Hack and The Stuart Hack Company, by their undersigned attorneys, file the following Opposition to the Third-Party Defendant's Motion for Summary Judgment. This motion must be denied as it fails to establish that there is no genuine dispute of material fact and that the third-party defendant is entitled to judgment as a matter of law.

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INTRODUCTION

It is well settled under Maryland law that a party who moves for summary judgment has the burden of demonstrating clearly the absence of any genuine issue of fact. E.g., Merchant's Mortgage Co. v. Lubow, 275 Md. 208, 339 A.2d 664 (1975). In assessing the merits of a motion for summary judgment, all inferences from the pleadings, depositions, admissions, and affidavits must be considered in a light most favorable to the party opposing the motion. Peck v. Baltimore County, 286 Md. 368, 410 A.2d 7 (1979). Summary judgment is not proper or permissible where there are conflicting factual contentions to be resolved, or, at the least, differing inferences that could be drawn from what the various witnesses testified had been said and done. Mayor of Baltimore v. Allied Contractors, Inc., 236 Md. 534, 204 A.2d 546 (1964).

Such is the case here where disputed facts pertaining to the conduct of various parties abound and, as such, necessitate resolution by the trier of fact. Not only has the third-party defendant failed to meet its burden of demonstrating decisively the absence of any dispute of fact, its motion is supported by only the most deceptive reading of depositions and pleadings. Moreover, its application of legal authority to its unique interpretation of the facts is equally misleading. Any one

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of these errors alone is sufficient to preclude its Motion for Summary Judgment. Collectively, they certainly compel this Court to deny the third-party defendant's motion.

DISCUSSION

The merits of the third-party defendant's motion must be put into the factual context of this case as a whole. The plaintiff, Richard Shofer, has filed a Complaint in state court against The Stuart Hack Company and Stuart Hack. At the present time, there are only two counts for negligence (Count I) and breach of contract (Count II) which remain. The gist of each of these claims is that these defendants failed to advise the plaintiff about tax consequences which would occur when the plaintiff borrowed money from his pension plan.

The Catalina Enterprises, Inc. pension plan (the "Plan") is a qualified pension plan established by the defendants in 1971 for employees of Catalina Enterprises, Inc., a car dealership owned and operated by the plaintiff. See Second Amended Complaint at paragraph 4. The Stuart Hack Company and Stuart Hack thereafter provided various pension consulting services to the Plan and its trustee. See, id. at paragraphs 1 and 2. The plaintiff is a shareholder and employee of Catalina, a beneficiary of the Plan, and is named in the Plan as trustee. See, id. at paragraphs 3 and 5.

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At some time prior to August 9, 1984, the plaintiff contacted Stuart Hack and inquired whether he could borrow money from the Plan or use the Plan's assets as collateral for a loan. Mr. Hack responded in a letter dated August 9, 1984 which letter failed to make any mention of possible adverse tax consequences. It is undisputed, however, that at the time the plaintiff made this inquiry in August of 1984, he did not tell Mr. Hack: 1) how much he was intending to borrow from the Plan; 2) how often he was intending to borrow from the Plan; and 3) whether in fact he was going to borrow from the Plan at all. See Deposition of Stuart Hack at pp. 301, 349. The plaintiff's inquiry of Mr. Hack was brief and general. See Deposition of Richard Shofer at p. 103. It is also undisputed that the plaintiff never asked Mr. Hack about tax consequences specifically. See, id. at p. 105. Mr. Shofer had previously testified that he consulted with Kenneth Larash and Phil Matz at the accounting firm of Grabush, Newman & Co., P.A. whenever he had a personal tax question. See, id. at p. 88. After advising the plaintiff that he could in fact borrow money from his pension plan, Mr. Hack heard nothing further from the plaintiff in this regard until sometime in the fall of 1986. Deposition of Stuart Hack at p. 349. At that time, he discovered that the plaintiff had borrowed $260,000.00 from the Plan in

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1984, $80,000.00 in 1985, and $35,000.00 in 1986. See Second Amended Complaint at paragraph 12.

As a result of these borrowings from the Plan, the plaintiff incurred additional tax liability in 1984, 1985, and 1986 for which he is seeking damages from the defendants in the form of additional taxes, penalties, and interest. This is because none of the monies borrowed in 1984 and 1985 were properly reported as income on the plaintiff's tax returns. However, these defendants were not the plaintiff's tax preparers.

It is undisputed by any party in this case that the third-party defendant, Grabush, Newman & Co., P.A. ("Grabush"), were the plaintiff's accountants and had performed a variety of accounting services since the early 1970's. See Deposition of Richard Shofer at p. 31. Since 1985, Kenneth E. Larash has been the partner at Grabush with primary responsibility for the rendering of those services. See Deposition of Kenneth E. Larash at pp. 33-34. In this regard, the Grabush firm provided the following accounting services: 1) prepared the plaintiff's personal and corporate tax returns, 2) prepared a Form 990T for the Plan,[1] and 3) rendered tax advice generally. See Deposition of Kenneth E. Larash at pp. 14-17. These facts

[1] A Form 990T is filed whenever a pension plan has taxable income.

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are undisputed. In 1984, Grabush maintained a tax department through which a client's tax return would be routed after its initial preparation. See Deposition of Kenneth E. Larash at pp. 31-32. In 1984, Grabush had approximately six members in this tax department. See Deposition of Kenneth E. Larash at p. 8. Despite following this procedure with regard to the plaintiff's 1984 and 1985 tax returns, the monies taken from the Plan were not properly reported as income on these returns. See Deposition of Kenneth Larash at pp. 37 and 60.

It is also undisputed in this case that these defendants were not the plaintiff's tax preparers and did not play any role in the preparation of his income tax returns. See Deposition of Stuart Hack at pp. 126-127. Moreover, neither Mr. Hack nor his company held themselves out as personal tax advisors. See Deposition of Stuart Hack at pp. 127-128. Moreover, Mr. Hack has testified that he was aware that Grabush was providing all of the aforementioned services to the plaintiff. See Deposition of Stuart Hack at pp. 254-55. It was also his understanding that Grabush had generalized knowledge about tax law relating to pension plans. See Deposition of Stuart Hack at p. 43.

The defendants' pension expert will testify that at the time Mr. Hack received the loan question from the

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plaintiff in August of 1984, he met the standard of care for pension consultants when he responded with the August 9, 1984 letter (which omitted any discussion of tax consequences). See third-party plaintiffs' supplemental answer to interrogatory no. 3. Thus, there will be evidence that these defendants committed no negligence at all in this case.

Even assuming some negligence on the part of these defendants in this regard, the defendants' accountant expert will testify that Grabush was negligent in failing to prepare the tax returns at issue properly and in failing to advise the plaintiff that it was his option not to amend his returns in 1986 (when the errors were first discovered by Grabush -- see Deposition of Kenneth Larash at pp. 73-74) because he was under no legal duty to do so in the absence of fraud. See third-party plaintiff's supplemental answer to interrogatory no. 3. All of the plaintiff's damages in this case were triggered by the amending of his 1984 and 1985 tax returns. Thus, all of these damages could have been avoided but for the negligence of Grabush in failing to advise the plaintiff properly in this area. In addition, Grabush knew as early as June 1985 that the plaintiff was taking loans from his pension. See Deposition of Kenneth Larash at pp. 38-39. The defendants' accountant expert will testify that upon learning this

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information Grabush was under a duty to bring the issue of the taxability of these loans to the attention of their client, the plaintiff. If Grabush had done so, the plaintiff might not have taken an additional four loans thereby triggering additional tax liability.

A. These defendants' negligence, if any, was secondary to that of Grabush, thus Grabush is liable to indemnify the defendants.

"Indemnity requires that, where one of the wrongdoers is primarily liable, that wrongdoer must bear the whole loss." Board of Trustees v. RTKL Associates, 80 Md. App. 45, 55 (1989); Parks Circle Motor Co. v. Willis, 201 Md. 104 (1952); Baltimore and Ohio R Co. v. Howard County, 113 Md. 404 (1910).

Where work is done negligently, the party who actually did the work is considered to be the actively negligent party, and is primarily responsible for any resulting damage. In RTKL Associates, for example, the court found that where an architect was negligent in supervising construction of a building, it could receive indemnification from the builders because its negligence would be "of a passive character." 80 Md. App. at 57. Similarly, in Gardenvillage Realty v. Russo, 34 Md. App. 25 (1976), the court applied this active-passive analysis to hold that, in a suit arising out of the collapse of a negligently constructed porch, the subcontractor who

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actually built the porch was liable to indemnify the owner/builder of the house. Id. at 40. The court pointed out that the owner/builder did not exercise any direction, supervision or control over the subcontractor. Id. at 25.

In this case, Grabush was clearly the active party. It was Grabush, not the defendants, who prepared the plaintiff's tax returns, and it was Grabush's professional responsibility to insure the accuracy of those returns. The defendants did not and could not exercise any discretion, control, or supervision over what Grabush chose to deduct and declare on the tax returns. Certainly, it would be patently unfair to hold defendants primarily responsible for Grabush's mistakes, but that is exactly what Grabush seeks to accomplish in its Motion for Summary Judgment.

Grabush argues that the reason it made mistakes on the plaintiff's tax returns was that it relied on the defendants' failure to discuss the issue of the tax consequences of the plaintiff's loans in communications with plaintiff. Based on this failure to discuss tax consequences, Grabush claims to have assumed that there were no tax consequences. It is well established, however, that Grabush has no legal right to rely on defendants' advice to the plaintiff (let alone defendants' lack of advice to the plaintiff), because Grabush had no privity of

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contract with the defendants. See, e.g., Flaherty v. Weinberg, 303 Md. 116 (1985); Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y. 1931). Moreover, Grabush, as plaintiff's accountant, tax preparer and tax advisor, should have been alert to the possible tax consequences of a $375,000.00 transaction.

Grabush failed to do its job properly in preparing the plaintiff's tax returns and in failing to advise the plaintiff properly when the question of whether to amend arose (where the plaintiff had the opportunity to perhaps avoid all of the damages he has sustained in this case). If Grabush had declared the loans as income when it prepared the returns or if Grabush had taken prompt steps to amend the returns when it discovered the problem, much of the damage could have been averted. As between Grabush and the defendants, Grabush should not be permitted to escape the responsibility for its active negligence in preparing the plaintiff's tax returns and failure to advise him properly.

Finally, at a minimum, should Grabush dispute the nature and degree of its negligence, a serious factual issue is presented, rendering summary judgment inappropriate. Certainly, the defendants have presented enough evidence that Grabush, as the plaintiff's tax preparer and adviser, was primarily responsible for the

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plaintiff's injury. Accordingly, Grabush's Motion for Summary Judgment as to Defendants' Claims for Indemnification should be denied.

B. Assuming the truth of the plaintiff's allegations, the defendants and Grabush are joint tortfeasors who are liable to the plaintiff for the same injury, thus, defendants may recover contribution from Grabush.

In addition to their common law right to indemnification against Grabush, defendants have a statutory right to contribution from Grabush under the Maryland Uniform Contribution Among Tortfeasors Act, Maryland Code Annotated, Article 50, §16, et seq. Grabush attempts to evade responsibility under this Act by arguing that defendants and Grabush are not joint tortfeasors under the Act because they are not liable for the same injury. In fact, the injury caused by Grabush's negligence and alleged to be caused by defendant's negligence is precisely the same: damages resulting from plaintiff's failure to report the loans from his pension plan. There is no other injury alleged.

No injury existed in this case until after Grabush filed the plaintiff's tax returns and the IRS assessed the taxes, penalties and interest. All of the alleged damage in this case flows from that assessment. Even assuming that defendants alone were responsible for the additional tax liability (not interest or penalties,

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however) on the first few loans taken by the plaintiff until Grabush discovered these in June of 1985, Grabush is incorrect when it states in its motion that there is no right of contribution between successive joint tortfeasors at least to the extent that they have caused some of the same damages.

As the Maryland Court of Appeals recently pointed out, "careless analysis and statutory change have led to the confusion of jointly liable concurrent or successive tortfeasors with true "joint tortfeasors" at common law." Morgan v. Cohen, 309 Md. 304, 311 (1987). Although the Court has never squarely confronted the issue, it did point out in Trieschman v. Eaton, 224 Md. 111, 115 (1961) that the Act's definition of joint tortfeasors "literally embraces successive wrongdoers liable for the same harm even though one may also be liable to the injured person for additional damages." Thus, the plain language of the Act, which defines joint tortfeasors as "two or more persons jointly or severally liable in tort for the same injury..., " flatly contradicts Grabush's argument that successive tort-feasors are not liable under the Act.

Grabush may also argue that it is only responsible for part of the plaintiff's injury, and thus it is not liable for the same injury as the defendants. In Morley v. Cohen, 888 F.2d 1006, 1012 (4th Cir. 1989), the

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plaintiff sued under RICO and various fraud theories to recover money lost in investments in a coal mining limited partnership owned by the defendant. The Fourth Circuit, applying Maryland law, held that the broker who sold the shares was a joint tortfeasor under the Act with the owner of the partnership, notwithstanding the plaintiff's argument that the damages recoverable from the owner were much broader than the damages recoverable from the broker alone. Likewise, in this case, the fact that Grabush may argue that the damages owed by defendants are somehow more extensive than the damages it owes does not affect its liability as a joint tortfeasor.

Moreover, assuming that a jury could make a rational division of damages between damages solely caused by the defendants and damages caused partly by the defendants and partly by Grabush, Grabush would still be liable for contribution with respect to at least the joint portion of the liability. See, Morgan, 309 Md. at 316. Unless Grabush can show beyond dispute that it has no responsibility whatsoever for the errors it made in preparing the plaintiff's tax returns, its motion must be denied.

The Maryland Uniform Contribution Among Tortfeasors Act is designed to apportion liability in precisely such a situation, where more than one tortfeasor

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is alleged to contribute to the plaintiff's injury. The underlying purpose of the Act is particularly clear in a case such as this where the plaintiff has chosen to sue only one joint tortfeasor. Although the plaintiff may be entitled to recover for his injury, he should not, for reasons of spite or whim or collusion, be permitted to require that one joint tortfeasor should bear the whole burden of paying the damage.

Grabush's reliance on Baltimore and Ohio R. Co. v. Howard Co., 113 Md. 404 (1910), is misplaced because Maryland Contribution Among Joint Tortfeasors Act, enacted 1941, changed the common law rule that joint tortfeasors must act in concert. In the B&O case, Howard County's liability was entirely vicarious, hence Howard County was not a joint tortfeasor under common law. Id. at 416. In this case, however, both the defendants and Grabush are both alleged to have acted negligently (albeit at different times), causing the plaintiff to incur tax liabilities.

Finally, the issue of whether the defendants and Grabush are liable for the same injury or whether and how that injury can be divided, are factual issues which must be resolved by the trier of fact, not on a motion for summary judgment.

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CONCLUSION

Because Grabush's negligence in preparing the plaintiff's tax returns and in advising the plaintiff was the primary cause of the plaintiff's damage and because the injury which the plaintiff suffered as a result of Grabush's negligence was the same injury as that allegedly caused by the defendants and third-party plaintiff, Grabush should be liable to indemnify and/or pay contribution to the defendants in the event that the plaintiff prevails on his claims. Accordingly, Grabush's Motion to Dismiss Defendants' Third-Party Complaint must be denied.

Respectfully submitted,

Janet M. Truhe

Lee B. Zaben

Semmes, Bowen & Semmes

Janet M. Truhe
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250 West Pratt Street
Baltimore, Maryland 21201
(301) 539-5040

Attorneys for Defendants
and Third-Party Plaintiff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October, 1990, a copy of the foregoing Defendants' and Third-Party Plaintiffs' Opposition to Third-Party Defendant's Motion for Summary Judgment was delivered to Lloyd S. Mailman, Esquire and Thomas A. Bowden, Esquire, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201 and Linda Schuett, Esquire, Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

Janet M. Truhe

Janet M. Truhe

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RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
	*	Case No. 88102069/CL79993
Defendants	*	

* * * * * * * * *

THIRD-PARTY PLAINTIFF'S SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 3

Third-party plaintiff, The Stuart Hack Company, by its attorneys, Janet M. Truhe, Lee B. Zaben, and Semmes, Bowen & Semmes, supplements its answers to the third-party defendant's interrogatory no. 3 as follows:

INTERROGATORY NO. 3

Identify in accordance with Instruction E any experts whom you propose to call as witnesses with regard to any matter or issue relating to this action, including in your Answer the nature of each expert's specialty, the subject matter of each expert's testimony, the substance and findings and opinions to which each expert is expected to testify, the facts upon which each expert's opinions are based, and a summary of the grounds for each opinion. Attach to your answers a copy of any and all expert reports.

ANSWER

Richard A. Intner, 117 Water Street, Baltimore, Maryland 21202 (Curriculum Vitae previously supplied) will

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testify on the subject of the third-party defendant's negligence in this case. Mr. Intner will testify that the third-party defendant was negligent in three areas: (1) it failed to identify and bring to the attention of Mr. Shofer the fact that there could have been tax consequences as a result of borrowing from the pension plan; (2) it was negligent in the preparation of the 1984 and 1985 tax returns; and (3) it failed to advise Mr. Shofer of the fact that he was under no statutory duty to amend his tax return.

Edward E. Burrows, 260 Bear Hill Road, Waltham, Massachusetts 02154 (Curriculum Vitae previously supplied) will testify on the subject of a pension consultant's duty of care in this case. Mr. Burrows will be expressing opinions in the following areas: (1) the August 9, 1984 letter which stated that Mr. Shofer could take loans from his pension plan but which failed to give the tax consequences of such loans was within the standard of care for pension consultants; (2) in the completion of a Form 5500 it is proper for a pension consultant to use the information available to him and that it is proper to report no prohibited transactions unless these have been specifically brought to his attention; (3) it was the responsibility of the trustee to see that the 1984 Plan Amendments concerning loans conformed to the circumstances

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then existing and that Mr. Shofer should have advised Mr. Hack that he was taking loans at the time of this amendment; (4) the plaintiff's expert is using an inapplicable standard of care in expressing his opinions with reference to Mr. Hack's negligence in this case; (5) the Plan will not be disqualified; and (6) that no excise taxes will be imposed because no prohibited transactions occurred.

Janet M. Truhe

Lee B. Zaben

Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201
(301) 539-5040

Attorneys for Defendants

I, Stuart Hack, do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing document are true and correct.

THE STUART HACK COMPANY

Stuart Hack

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of October, 1990, a copy of the foregoing Third-Party Plaintiff's Supplemental Answer to Interrogatory No. 3 was mailed to Thomas A. Bowden, Esquire, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201; and Linda Schuett, Esquire, Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

Janet M. Truhe

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CARBON COPY

VOL. IV

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER :

Plaintiff :

-vs- : Case No. 88102069/CL7993

THE STUART HACK COMPANY :

or :

STUART HACK :

Defendant :

Deposition of STUART HACK, taken on Thursday, August 30, 1990, at 10 a.m. at the offices of Frank, Bernstein, Conaway & Goldman, 300 East Lombard Street, Baltimore, Maryland, before Susan D. Ashe, Notary Public.

Reported by:

Susan D. Ashe, RPR

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so, what type of plan is appropriate for that client, and to do actuarial calculations, projections, and make recommendations -- okay -- adopting a qualified plan.

And it was -- in almost all cases during that period of time, it was tax generated. It was not employee-benefit generated. It was part of a tax-planning arrangement.

Q. I may have asked you this question before, Mr. Hack; but excuse me if I did.

Is it fair to say, then, from what you've just testified to, that Graybush, like many accountants, had a generalized knowledge about pension plans and perhaps some generalized knowledge about tax law relating to pension plans? True?

A. That's correct.

Q. And that your role, perhaps, like the role of other pension specialists, was to have specialized knowledge about those areas?

A. That is correct.

Q. What is the purpose of a 990T, Mr. Hack?

return and you've got five years to go, that's a little more difficult to do -- or to decide, that's what I'm going to do. You got a longer period of time in which you may have an audit, and the statute of limitations won't run. Or if you have one, two years to go, that's a -- it's a -- you know, you might make the decision one way or the other, depending upon how many years are involved.

Q. If you only have to wait two more days --

A. Absolutely. You do it.

Q. You decide -- what the heck?

A. Yes.

Q. Your answer to Interrogatory Number 17 states that you and your company never prepared any client's return; and I presumed by that you mean, you never prepared their personal tax returns?

A. I think that's what the question was, and -- do you know what the question was?

Q. Sure, I know what the question was, since I wrote it.

A. Okay. Thank you.

Q. The question was: "State whether you've ever told a client not to amend a tax return on the ground that the statute of limitations had run and describe it."

And your answer goes on to say that you raised it with Mr. Shofer and with Mr. Shofer's tax attorney. And in connection with answering that question, you say that you, yourself -- and, I presume, your company -- never prepared any client's tax return?

A. That's correct.

Q. And you did not hold yourself out -- and I presume you also meant your company did not hold itself out -- as a tax advisor?

A. That's correct.

Q. By that do you mean that you don't hold yourself out as a tax advisor for the individuals -- I mean, you certainly do a lot of tax work in connection -- and give a lot of tax advice in connection with pension plans. Right?

A. That is correct.

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Q Well, assuming that Mr. Shofer made loans totaling $315,000 -- you can assume that fact --

MS. TRUHE: When?

MR. BOWDEN: -- for the purposes of this question.

THE WITNESS: As of what date?

MR. BOWDEN: After your letter.

MS. TRUHE: When? After --

THE WITNESS: As of what date?

MR. BOWDEN: After August 9, 1984, and --

MS. TRUHE: When?

MR. BOWDEN: -- prior to the end of 1986.

THE WITNESS: I want you to know that I had no knowledge of him taking a loan or the amount of his loan until his data came in some time in 1986.

BY MR. BOWDEN:

Q I'm not asking that question right now.

A That's what it sounded like to me.

Q I'm asking you to assume that he made such loans, whether --

VOL. I.

RICHARD SHOFER		:	IN THE
	Plaintiff	:	CIRCUIT COURT
v.		:	FOR
THE STUART HACK COMPANY, et al.		:	BALTIMORE CITY
	Defendants	:	Case No. 88102069/CL79993

Baltimore, Maryland

February 2, 1990

Deposition of RICHARD SHOFER, Plaintiff, called for oral examination by counsel for the Defendants, taken at the law offices of Semmes, Bowen & Semmes, Conference Room 17-A, 250 West Pratt Street, beginning at 10:12 a.m.

A P P E A R A N C E S

THOMAS A. BOWDEN, ESQ., on behalf of the Plaintiff.

JANET M. TRUHE, ESQ., and LEE B. ZABEN, ESQ., on behalf of the Defendants.

LINDA M. SCHUETT, ESQ., on behalf of the Third-Party Defendant, Grabush & Newman.

Reported By: Dawn M. Hart, CSR
Riggleman, Turk & Nelson
(301) 539-6398

MS. TRUHE: Well, send me whatever you're going to send me and we'll go from there.

Q (By Ms. Truhe) Okay. Mr. Shofer, I'd like to ask you now about your accountants. Do you have an accountant for personal matters?

A Yes.

Q Who is that?

A Ken LaRash.

Q At Grabush?

A Yes.

Q And how long has the firm of Grabush Newman represented you?

A I'm going to approximate, I think approximately fifteen years.

Q Who else have you dealt with other than Mr. LaRash at Grabush Newman?

A Initially Harvey Newman.

Q How long did you deal with Mr. Newman?

A Probably the first four or five years.

Q Then who did you deal with?

A Ken LaRash.

Grabush Newman?

A I don't think so.

Q With regard to personal tax questions, generally who would you go to for tax advice during this period, during 1984?

A Just Grabush Newman.

Q So it would be your habit whenever you had a personal tax question to contact Grabush Newman?

A Yes. Another name comes up to me now that I sort of forgot before lunch.

Q Who is he?

A He's a tax man at Grabush Newman's that I have great faith in. I --

Q You discussed --

A I would initially always go to Ken LaRash but would suggest to Ken if it was an important issue would he pass it by Phil Matz. There may have been one or two occasions where some issue came up that I requested Phil Matz to be involved in.

Q Did you consult with Mr. Matz at anytime in August of '84 with regard to this idea of borrowing money from your

Q Over an hour or under an hour?

A Oh, I don't think any -- excuse me. But I don't think any telephone conversation with Stuart lasted more than, I can't ever remember talking more than, I think twenty minutes at the most, I -- and you know, it could have been five minutes or ten, but I don't -- you know, a half an hour was a long, or more is a long conversation and I don't think, I can't remember having that much of a conversation with Stuart ever.

Q All right. On this particular occasion --

A At least on the telephone.

Q Okay. Generally speaking, I understand that, on this particular occasion when you first mentioned this idea to Mr. Hack, what did you say to him?

A I don't know what I said because I don't remember the conversation.

Q All right. At all?

A Not really, you know, I can surmise what I must have, that what the subject matter must have been but I can't really specifically remember.

Q So you can only speculate as to what you might

have said?

A That's right. Now, I can't remember whether it was morning or afternoon.

Q All right. Do you recall telling Mr. Hack why you wanted to borrow money from your pension plan?

A I don't recall if I did or didn't.

Q Do you have any notes concerning your telephone conversation with Mr. Hack this first occasion?

A No.

Q Do you have any notes concerning telephone conversations with Mr. Hack on this matter at all prior to the first time you borrowed money?

A No. I've seen memos from people and normally it's not my habit to -- I don't, I don't have a memo calendar, diary, and don't take notes like a lot of professionals do. I -- I do sometimes scribble names on folders or something if it's something that I know that I have to remember that I can't commit to normal memory, that if a new person called me that I didn't know him about an issue and he wanted to give me a phone number, I had a file on an issue I might scratch it on a piece of paper and put it in that file so I'd know

his name and phone number. But if it's about an issue that I can commit to memory and I know or I feel that I can commit it satisfactorily to memory, I don't make notes.

Q Why did you call Stuart Hack on this matter?

A Because he was the logical one to call.

Q Well, what were you trying to get from him, what type of information?

A I wanted to know the appropriateness and feasibility of borrowing from the pension if I could.

Q In other words you wanted to know whether it was lawful?

A I wanted to know anything about it that was relevant to borrowing and lawful particularly.

Q Do you recall whether you asked him about any personal tax consequences to you of borrowing money from your pension plan?

A I don't remember whether I did or didn't, but I can almost assuredly surmise that I didn't.

Q Why do you think you didn't?

A Because I didn't imagine that there would be any tax consequences. I didn't think it was a tax issue or a

Baltimore, Maryland

August 2, 1990

Deposition of KENNETH EUGENE LARASH, C.P.A., a Witness, called for oral examination by counsel for the Defendants and Third-Party Plaintiffs, taken at the law offices of Semmes, Bowen & Semmes, Conference Room 17-A, 250 West Pratt Street, beginning at 10:50 a.m.

A P P E A R A N C E S

THOMAS A. BOWDEN, ESQ., on behalf of the Plaintiff.

JANET M. TRUHE, ESQ., and LEE B. ZABEN, ESQ., on behalf of the Defendants and Third-Party Plaintiffs.

LINDA M. SCHUETT, ESQ., on behalf of the Third-Party Defendant.

Q More than a hundred, less than a hundred?

A Oh definitely less than a hundred. Yes, the firm's right now the biggest it's ever been and we have say sixty to sixty-five people now, so in '84, if you'll accept a guess, maybe forty.

Q All right. And in 1984, how many departments were there within Grabush, Newman?

A Well, departments that produced billable hours that would work on clients directly, there would have been three, tax department, management advisory services department, and the auditing and accounting department, which we combine under one title.

Q Approximately again, how many persons were within each of these three departments in 1984, starting with tax?

A I'll say about six.

Q All right. And in management advisory services?

A Two.

Q And in auditing?

A Perhaps fifteen to twenty.

Q All right. And how does that compare with today, first of all how many departments do you have at Grabush,

A I don't know but somebody in our firm.

Q But you have no idea who?

A No.

Q Did that person give you any files or information or did you just start from scratch?

A Well, when I start a job I always review last year's files, so they would have been available.

Q But you have no idea who worked on this file at Grabush, Newman prior to you, is that correct?

A No.

Q All right.

A I mean yes, that's correct.

Q What was your understanding as to the services Grabush had been retained to perform prior to your involvement if any for Mr. Shofer or his business?

A To prepare financial statements, tax returns for the corporation, Catalina Enterprises, Inc., to prepare a tax form No. 990T for the pension plan and to prepare his individual Form 1040.

Q Now, these financial statements were for the corporation?

A Yes.

Q Now, when you came along either in 1979 or 1980, what were you doing with that account, what types of services were you performing for Mr. Shofer?

A Well, I remember working on the, as I said the financial statements and the tax returns for the corporation and the Form 990T for the pension plan. I don't remember whether I started out working on his individual return at that time.

Q All right. Do you know who would have worked on the individual return at that time?

A No, I don't.

Q Would that have been someone at Grabush?

A Oh yes.

Q All right. So, when you first started performing accounting services for Mr. Shofer and his business -- or his business I should say, these services were confined to the preparation of financial statements and tax returns for the corporation and the 990T for the pension plan; is that correct?

A Right.

Q Now, at this time were you giving any type of advice to Mr. Shofer, tax advice or any other kind of advice on a financial matter, on financial matters generally?

MS. SCHUETT: Can I hear that question again?

Q Let me clean up that question. When you first started working for Mr. Shofer, or started working on Mr. Shofer's file, were you giving any type of financial advice to Mr. Shofer?

MS. SCHUETT: Janet, do you mind telling me what you mean by financial advice?

MS. TRUHE: Maybe I'm not using the right word.

Q Would you give him advice on any matter pertaining to his own finances?

MS. SCHUETT: I don't know if that clears it up for me. Do you understand the question, Ken?

A On, well, if, if you're talking about whether he should borrow money or anything like that, the answer would be no, I didn't give him, I wouldn't have given him any advice as to how to borrow money, et cetera, if that's what you're talking about by finances.

Q Well, that's part of what I'm talking about. Did you give him any tax advice?

A If the question was simple enough that he came to me with I could answer it, normally I would refer him to the tax department.

Q Now, what types of tax questions was he coming to you with, were these tax questions with reference to his own tax problems or was it with reference to his business?

A They would have been both types, plus hypothetical questions.

Q Did he start doing this right away when you took over the file?

A I don't remember.

Q All right. How often would he contact you with these types of questions?

A Oh pretty regularly throughout the year, I don't know how many times, though.

Q Okay. When you say pretty regularly throughout the year would that be, would that be once a month or twice a month, can you estimate?

A Oh, maybe five times a year.

If I was, again if I was doing the return, I would then take the information, put it on the form, I don't remember when we switched putting his tax return on computer, but we, in the early days we were putting, we were doing everything by pencil on his individual return so I would put it in by pencil and then the return and the related information and the prior year's tax return and related information would go to the tax department for review. If somebody else was preparing the return, they would have turned the tax return over for review. I just am not too sure about the steps that they would have followed.

Q All right. So if someone else were taking this data that you gave them that you had collected from Mr. Shofer, they would make, or fill out a tentative tax return and send it to the tax department for its review?

A Right.

Q And if you were doing all of these steps, you would send the tentative tax return to the tax department for review; is that correct?

A That's right.

Q And was that done every year?

A Yes, so far as I know every year.

Q What happened after it was sent to the tax department for review?

A Somebody would have been assigned to review it.

Q Do you know who that was?

A It varied from year to year, but their initials would be on the transmittal sheet.

Q All right.

A Do you want their process, their procedures that they followed or --

Q Yes.

A I'm not specifically familiar with how they go down item by item other than I know they trace in, from whatever work papers are there, trace the numbers in. If they've spotted something that's a question, they may just call me on the phone for a brief conversation but normally they would list out their questions on the back of that transmittal form and put the return back on my desk. Then I would try to resolve the points or have a little meeting with the party, sometimes I would be, I would have to follow up with a phone call to Dick Shofer, we'd try to resolve the

point or we would resolve the point then the return would go back into the tax department.

If I made any changes they'd double-check the changes, and from there, it would go to processing which would normally be Xeroxing and typing up a letter of instruction to the client. From that point, once it was processed, it would have gone back to the tax return reviewer, the tax return reviewer would double-check the assembly, make sure that the Federal, State returns are there, the pages are in order, whatever.

Q Was this tax return reviewer someone in the tax department?

A **Yes.**

Q And then what would happen?

A It would go to the partner in charge of the account who would sign it and put it in the mail.

Q And you were the partner in charge of the account?

A I became an officer or partner in the company in the Fall of 1985. From what I could tell from the records I reviewed the past couple of days, Harvey Newman who was the partner in charge signed most of the returns prior to that,

and it looks like I signed the returns especially for the 1985 year-ends and thereafter.

Q All right. Approximately how long would this entire process last from the time you pull last year's file until the time the partner in charge of the account signs off on the return?

A It could vary depending on the number of questions, depending on whether I had time to work on it right away or whether it was put on the shelf for awhile, and it also depended on the tax department, whether there was a backlog, they would try to do work in the tax department on a first-come/first-serve basis, unless there were emergencies. So it could be, if I was doing the tax return by hand, it could, it could be a week or two as a minimum turnaround and a maximum turnaround could be a couple of months.

Q Okay. Let's go to a specific year, 1984. Well, tax year 1984. This was previously marked as Shofer Deposition Exhibit 1-E and I don't think we need to have it marked again, it's already been identified. Can you identify that document, though, for the purposes of this record?

A How am I supposed to identify it?

(Discussion off the record.)

Q (By Ms. Truhe) (Handing document), can you tell from that?

A This sheet I would have prepared at the time of the interview with Richard which is dated, part of the date is obliterated, but July 29th, presumably July 29th of 1985, so I would have done the initial interview and it looks like I turned the job over to Dave Lane in the tax department to prepare the return.

Q And then was that return prepared thereafter in accordance with the same process you described a few moments ago?

A Yes.

MS. SCHUETT: Can we go off the record?

(Discussion off the record.)

MS. TRUHE: Let's mark this as Larash Deposition Exhibit No. 1.

(Document was marked Larash Deposition Exhibit No. 1.)

Q (By Ms. Truhe) And for the record would you just briefly describe again what Larash Deposition Exhibit No. 1

is?

A It's headed Richard Shofer 1040, 1984, and in the upper right-hand corner are my initials, KEL, with the date 7/29 and it's the, part of the information that I would have taken on the initial interview with Richard Shofer concerning his Form 1040 for 1984.

Q Mr. Larash, were you aware that Mr. Shofer had taken loans from his pension plan prior to the preparation of this return?

MS. SCHUETT: Objection to the form of the question. Oh, well, I thought it assumed a fact that had not yet been in evidence.

MS. TRUHE: I think we can all agree that Mr. Shofer took loans in 1984 from his pension plan.

MS. SCHUETT: That's not what I meant. You can go ahead and answer the question if you remember it by now.

A Maybe you'd better say it again.

Q Were you aware of the fact that Mr. Shofer had taken loans from his pension plan in 1984 prior to --

MS. SCHUETT: Object to the form.

Q -- prior to the preparation of this tax return?

A Prior to the preparation of this tax return?

Q Yes.

MS. SCHUETT: Objection to the form of the question. Go ahead.

A Go ahead, oh. The earliest document that's dated and initialed by me that I could find in the files indicated that I worked on the pension plan general ledger for 1984 and it's, I believe it's a page of journal entries dated June 17th of '85, so that appears to be the first time I became aware.

MR. BOWDEN: What was that date again, excuse me?

THE WITNESS: June 17th, 1985.

Q And you stated that was in the course of preparing the ledger for the pension plan?

A Yes, well, the work -- it's called working trial balance, yes.

Q That's when you first became aware that Mr. Shofer had taken loans from his pension plan in 1984?

A Right, correct.

Q Now, did anyone other than you participate in the preparation of that 1985 return?

A I was the one that put the numbers on it originally. I can see that some numbers may have been changed. They were probably changed by the tax reviewer if he caught an error that I did.

Q Was this one of those situations where you prepared the initial return and then sent it off to the tax department for its review?

A Yes.

Q Now, prior to the completion of this return, the 1985, the original 1985 return for Mr. Shofer, were you aware of the fact that Mr. Shofer had taken money from his pension plan in 1985?

A Yes.

Q Did you know how much he had taken?

A Yes, I would have known.

Q When did you first become aware that he had taken this money?

A I don't know the date, but it should be on my work papers when I was working on the pension plan for 1985.

affect him.

MS. SCHUETT: Could I stop you a minute. Your question was to, for him to tell you about conversations about the loans?

MS. TRUHE: About the loans.

MS. SCHUETT: The taxability of the loans?

MS. TRUHE: Yes.

MS. SCHUETT: Sorry.

A Can you reword the question again?

Q Tell me everything you remember about your conversations with Mr. Marvel about, during this time about the tax problem concerning these loans?

A Just concerning the loans?

Q Yes.

A Well, he told me that within the past year or two before that he had a case with one of his own clients when he was at another firm where the other client had gone in excess of fifty thousand dollars and they had run into problems and found out that, that it was not allowed by the tax laws to take out more than fifty thousand dollars, or perhaps I'm not wording it right as to what he said but there was a limit in

the tax law that you could not go over fifty thousand. So, we would have discussed that limit and he would have asked me when Shofer took out these loans, which we could easily research in our pension files, not as to specific dates but as to what year, what years were involved, and I believe I said something to him like, I hope you're wrong. And then he would, and that probably was the end of the conversation other than I assigned him the task of what is the taxable situation, what should have been done with the loans.

Q And did he agree to perform that task?

A Yes.

Q Do you know whether he ever consulted with anyone else at Grabush in the course of his determining what the proper tax treatment of these loans should have been?

A I don't remember him telling me of any -- -- when he was discussing it with --

MS. SCHUETT: At Grabush?

A At Grabush.

Q All right. Did Mr. Marvel report back to you after he had performed his research?

A Well, we're not talking about clear-cut meetings

IN THE CIRCUIT COURT FOR BALTIMORE CITY

SJ

RICHARD SHOFER,	*	
Plaintiff	*	
v.	*	Case No. 88102069/ CL79993
THE STUART HACK COMPANY, et. al.,	*	
Defendants	*	

FILED
11 1990
CIRCUIT COURT
MORE

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THIRD-PARTY CLAIM

In its Motion for Summary Judgment on Third-Party Claim, Grabush argues that the Hack Defendants are not entitled to indemnity because Shofer's claim against them is based on active negligence by the Hack Defendants. Grabush also argues that the Hack Defendants are not entitled to contribution because the Hack Defendants and Grabush are not "joint tortfeasors" liable for the "same injury." In their Opposition to the Motion, the Hack Defendants argue that factual disputes preclude the entry of summary judgment and that Grabush is incorrect in its legal arguments. For all of the reasons set forth in the Motion and in this Reply Memorandum, Grabush's Motion for Summary Judgment should be granted.

A. THERE ARE NO FACTUAL DISPUTES WHICH ARE MATERIAL TO A RESOLUTION OF GRABUSH'S MOTION FOR SUMMARY JUDGMENT.

In their Opposition, the Hack Defendants claim that factual disputes preclude the granting of Grabush's Motion for

Summary Judgment.[1] The "disputes" they raise all relate to whether or not Grabush was negligent in the preparation of Shofer's tax returns. They claim that if Grabush disputes "the nature and degree of its negligence, a serious factual issue is presented ...." Opposition at 10. See also Opposition at 13. This argument is a blatant attempt to create the appearance of a dispute where none in fact exists.

For a disputed fact to preclude summary judgment, it must be material to a resolution of the legal issues involved. See King v. Bankerd, 303 Md. 98 (1985); Woodward v. Newstein, 37 Md. App. 285 (1977); Lynx, Inc. v. Ordnance Prods., Inc., 273 Md. 1 (1977). Here, without doubt, there is no genuine dispute as to any material fact. Rule 2-501. Grabush's negligence, or lack thereof, is entirely irrelevant to this Motion for Summary Judgment. Over and over again, Grabush stated in its Motion that it assumed, for purposes of the Motion, that it was negligent. Motion at 12, 17, and 20-21. The Hack Defendants' effort to cloud the legal issues with

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[1]The Hack Defendants attempt to call the integrity of Grabush's counsel into question. They characterize Grabush's statement of facts as "the most deceptive reading of depositions and pleadings." Opposition Memorandum at 2. Despite this offensive accusation, the Hack Defendants do not point to one fact, one quote, or one paraphrase which Grabush has mischaracterized. Obviously, the accusation is entirely unfounded.

immaterial "disputes" about Grabush's negligence should be ignored.[2]

B. THE HACK DEFENDANTS ARE NOT ENTITLED TO INDEMNITY BECAUSE SHOFER'S CLAIM AGAINST THEM IS BASED ON ACTIVE NEGLIGENCE.

In their Opposition, the Hack Defendants attempt to argue that their negligence was passive, rather than active. They claim that Grabush was the primary wrongdoer in this case because it was Grabush, not the Hack Defendants, who improperly prepared Shofer's original and amended tax returns. Their argument is incorrect as a matter of law.

As fully demonstrated by the cases cited in the Motion, indemnity is typically allowed, at least in the absence of a contractual provision, when one party is liable for another party's negligence, even though the person held liable had little or no involvement in the negligent act itself (e.g., employer/employee, supervising architect/builder). Shofer's suit is not based on any theory of vicarious liability. Rather, his lawsuit is based on the active and participatory negligence of the Hack Defendants - i.e., on their bad advice concerning loans from the Plan. Shofer's suit alleges that Hack's negligence was the direct cause of his harm because he would not have taken any loans from the Plan in the absence of the bad advice given by the Hack Defendants.

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[2]The Hack Defendants' characterization of the facts does not differ in any significant way from the facts asserted by Grabush. Even assuming the truth of the factual allegations, as asserted by the Hack Defendants, Grabush is entitled to judgment as a matter of law.

On the other hand, it is undisputed that Shofer did not take loans from the Plan in 1984 or early 1985 based on any act or omission on the part of Grabush. It is undisputed that Grabush was never contacted about the propriety of taking the loans or about any tax consequences relating to them.[3] The attempt by the Hack Defendants to characterize their negligence as "passive" is absurd.

The Hack Defendants' reliance on Board of Trustees v. RTKL Associates, 80 Md. App. 45 (1989), and Gardenvillage Realty v. Russo, 34 Md. App. 25 (1976), to establish that their negligence was purely passive makes no sense. Both cases stand for the proposition that one whose liability stems from his supervision of a negligent actor may be found to be passively negligent. Liability based on supervision has nothing to do with this case.[4] Shofer's suit against Hack is not - in

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[3]Apparently, in an effort to raise the implication that Shofer also sought advice about the loans from Grabush, the Hack Defendants state that "Shofer ... consulted with ... Grabush ... whenever he had a personal tax question." Opposition Memorandum at 4. (Emphasis in original.) As the Hack Defendants well know, Shofer never discussed the loans with anyone at Grabush. Shofer Depo. at 87-89; 273-274. No one in this litigation has ever asserted, or even implied, that Shofer consulted with Grabush about the loans.

[4]The Hack Defendants have alleged that Grabush should have discovered their error in the poor advice that they gave to Shofer. This allegation is akin to an allegation that Grabush somehow had a duty to supervise the work of the Hack Defendants and correct their errors. If RTKL Associates and Gardenvillage Realty support any claim for indemnification, it would be a claim by Grabush against the Hack Defendants.

any way, shape, or form - based on an allegation that the Hack Defendants negligently supervised Grabush's work.

The Hack Defendants make two arguments that have nothing to do with any right to indemnity. First, they argue that Grabush should have alerted Shofer to the taxability of these loans in June of 1985 when Grabush first happened upon their existence. Had Grabush done that, according to the Hack Defendants, Shofer may have stopped taking loans from the Plan and, as a result, he may have avoided a small portion of the damages claimed. Opposition at 7-8. Second, the Hack Defendants argue that "all" of Shofer's damages were caused by the fact that he amended his 1984 and 1985 tax returns to report the loans as income. In other words, the Hack Defendants argue that Shofer could have elected not to amend his returns in the hope that the IRS would not discover the loans prior to the running of limitations. When reduced to their basic form, these two arguments are (1) that any liability on the part of the Hack Defendants cuts off as of June, 1985 because Grabush, as an accounting firm, had the duty to notify Shofer about the taxability of these loans and (2) that the Hack Defendants have no liability whatsover because Shofer's damages were caused by the amendment of the tax returns, not by any negligence of the Hack Defendants. If this Court accepts those arguments as valid at trial, they will constitute a causation defense to Shofer's claim, not a basis for indemnity against Grabush. In other words, if the Hack

Defendants prevail on these arguments, Shofer will not be able to prevail against them for any damages suffered after June of 1985, or, in the alternative, Shofer will not be able to recover any damages at all. If Shofer loses all or part of his claim against the Hack Defendants, the Hack Defendants have no basis for any recovery on a Third-Party Claim against Grabush.

In short, as fully argued in the Motion, the Hack Defendants' claim of indemnity against Grabush must fail. Accordingly, summary judgment should be granted.

C. THE HACK DEFENDANTS' ARE NOT ENTITLED TO CONTRIBUTION BECAUSE THE HACK DEFENDANTS AND GRABUSH ARE NOT JOINT TORTFEASORS LIABLE FOR THE SAME INJURY.

In its Motion, Grabush demonstrates that it is not liable for contribution to the Hack Defendants because the Hack Defendants and Grabush are not "joint tortfeasors" liable for the "same injury." Although the Hack Defendants claim that Grabush is incorrect in its analysis, the cases they cite simply do not support their assertions.

In its Motion, Grabush demonstrates that a successive tortfeasor is not a joint tortfeasor.[5] As their sole response, the Hack Defendants offer Trieschman v. Eaton, 224 Md. 111 (1961), in support of the proposition that a successive tortfeasor is a "joint tortfeasor" within the "plain" meaning of the Maryland Contribution Among Joint Tortfeasors Act (the

[5]Again, Grabush has assumed that it is a successive tortfeasor for purposes of this Motion only.

"Act"). However, they never mention that the Court of Appeals in 1987 interpreted Trieschman's language as mere dicta. Morgan v. Cohen, 309 Md. 304, 315 (1987). Morgan specifically finds that Maryland has not yet decided whether a successive tortfeasor is a joint tortfeasor. In view of Morgan, a successive tortfeasor is not a joint tortfeasor by virtue of the plain meaning of the definition contained in the Act.

Significantly, the Hack Defendants never even mention the cases that Grabush cites from other jurisdictions which hold that a successive tortfeasor is not a joint tortfeasor. See Motion at 16-17. The Hack Defendants never even mention the tests identified by Prosser to determine joint tortfeasor status. They make no attempt of any kind to apply those tests to the facts of this case. Their failure to do so is understandable because they cannot dispute that the damages, if any, are divisible, that the times of the alleged wrongdoings are separate, and that there was no concert of action. The Hack Defendants have presented nothing in opposition to Grabush's argument that a successive tortfeasor is not a joint tortfeasor.[6] On this basis alone, summary judgment should be

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[6]Ironically, after accusing Grabush of misleading "application of legal authority," the Hack Defendants attempt to dismiss Grabush's use of Baltimore and Ohio Railroad v. Howard County, 113 Md. 404 (1910) by claiming that the case involved vicarious liability. Opposition at 14. That simply is not true. That case, like here, involved the issue of whether a party with knowledge of a hazardous condition who fails to correct it despite a duty to do so is a joint tortfeasor with the person who created the condition. The court held that they were not joint tortfeasors.

granted in favor of Grabush on the Hack Defendants' claim for contribution.[7]

D. CONCLUSION

There is no genuine dispute as to any material fact, and Grabush is entitled to judgment as a matter of law. Grabush respectfully requests that its Motion for Summary Judgment on Third-Party Claim be granted.

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John J. Ryan
Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202
(301) 625-3500

Attorneys for Grabush, Newman & Co., P.A.

[7]Grabush rests upon its original Motion in support of the argument that the Hack Defendants and Grabush have not caused the "same injury." Motion at 18-20. The Hack Defendants make no attempt to distinguish the Court of Appeals decision in Central GMC, Inc. v. Helms, 303 Md. 266 (1985), or the Court of Special Appeals decision in Huff v. Harbaugh, 49 Md. App. 661 (1981). Rather, they rely on Morley v. Cohen, 888 F.2d 1006 (4th Cir. 1989), which cites Huff but distinguishes it on the particular facts of that case.

CERTIFICATE OF SERVICE

I CERTIFY on this 11th day of October, 1990, that a copy of the Reply Memorandum in Support of Motion for Summary Judgment on Third-Party Claim was hand-delivered to:

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Blum, Yumkas, Mailman, Gutman
& Denick, P.A.,
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Attorney for Plaintiff

and

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Attorney for Defendants/Third-Party Plaintiffs

John J. Ryan

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695

Appeals 10/17/90 Ltr Part II

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October 11, 1990

HAND DELIVERY

Clerk, Circuit Court for
Baltimore City
Room 462, Courthouse East
111 North Calvert Street
Baltimore, Maryland 21202

Re: Richard Shofer v. The Stuart Hack Company, et al., Case No. 88102069/CL79993

Dear Clerk:

Please file the enclosed Reply Memorandum in Support of Motion for Summary Judgment on Third-Party Claim.

Thank you for your anticipated cooperation.

Very truly yours,

Linda M. Schuett

Linda M. Schuett

LMS/lat

Enclosure

cc: Counsel of Record

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED 09/28/90

PRESIDING JUDGE .....

COURTROOM CLERK .....

STENOGRAPHER .....

ASSIGNMENT FOR FRIDAY OCTOBER 12, 1990 P19 11 40

CASE NUMBER - 88102069
CASE TITLE - SHOFER V STUART HACK COMPANY CL79993 CL
CATEGORY - CONTRACTS
PROCEEDING - MOTION HEARING - GENERAL

RYAN, JOHN J	DEFENSE ATTORNEY	625-3500
SCHUETT, LINDA M	DEFENSE ATTORNEY	625-3500
WHITNEY, DANIEL	DEFENSE ATTORNEY	539-5040
ZABEN, LEE	DEFENSE ATTORNEY	
BOWDEN, THOMAS A	PLAINTIFF ATTORNEY	385-4000
MAILMAN, LLOYD	PLAINTIFF ATTORNEY	539-4151
PALAIGOS, ANTHONY	PLAINTIFF ATTORNEY	385-4000

△ Hacks' motion to dismiss is granted and the second amended complaint is dismissed w/o leave to amend.

TYPE OF PROCEEDING: (___ JURY) (___ NON-JURY) (___ OTHER)

DISPOSITION (CHECK ONE)

(___ SETTLED)	(___ CANNOT SETTLE)	(___ NEXT COURT DATE)
(___ VERDICT)	(___ REMANDED)	(___ NON PROS/DISMISSED)
(___ JUDGEMENT NISI)	(___ ORDER/DECREE SIGNED)	(___ OTHER) PLEASE EXPLAIN:
(___ JUDGEMENT ABSOLUTE)	(___ ORDER/DECREE TO BE SIGNED)	
(___ POSTPONED)	(___ MOTION GRANTED)	
(___ SUB CURIA)	(___ MOTION DENIED)	

JUDGE SIGNATURE _____ DATE 10/12/90

DAVID ROSS
JUDGE

697

FILED OCT [illegible] 1990

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	Case No. 88102069/CL79993
* * * * * * * *		
THE STUART HACK COMPANY, et al.	*	
Third Party Plaintiffs	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third Party Defendant	*	

* * * * * * * * * * * * *

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NOTICE OF APPEAL

Dear Clerk:

Please enter an appeal on behalf of the Plaintiff to the Court of Special Appeals from the Order of October 12, 1990, dismissing Plaintiff's Second Amended Complaint without leave to amend.

Anthony P. Palaigos

Thomas A. Bowden

Thomas A. Bowden
1200 Mercantile Bank &
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Attorneys for Plaintiff

10/16/90
Pltf Info Report +
Mems mailed (68)
given:
Malinski Kraus - Magis

68

CERTIFICATE OF SERVICE

I CERTIFY that on this 16th day of October, 1990, a copy of this document was mailed, postage prepaid, to each person listed below:

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October 16, 1990

HAND DELIVERED

Clerk, Circuit Court for
Baltimore City
111 North Calvert Street
Appeals Office
Room 409
Baltimore, Maryland 21202

Re: Shofer v. The Stuart Hack Company, et al.
Case No. 88102069/CL79993

Dear Clerk:

Enclosed for filing in the above-referenced case please find a Notice of Appeal, along with three checks:

1. $50.00 to Clerk, Circuit Court for Baltimore City, for filing fee;

2. $15.00 to Clerk, Circuit Court for Baltimore City, for open court costs;

3. $50.00 to Clerk, Court of Special Appeals, for filing fee.

Thanks very much for your attention to this matter.

Very truly yours,

Thomas A. Bowden

Enclosures
cc: Mr. Richard Shofer

700

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October 23, 1990

Ms. Rita Taggart
Court Reporter
Room 507
Clarence M. Mitchell, Jr. Courthouse
100 North Calvert Street
Baltimore, Maryland 21202

Re: Shofer v. The Stuart Hack Company, et al.
Case No. 88102069/CL79993

Dear Ms. Taggart:

Would you please prepare a transcript of the motions hearing that took place at approximately 11:40 a.m. on October 12, 1990, in Judge Ross' conference room concerning the above-referenced case? The transcript should then be filed with the Clerk of the Circuit Court for Baltimore City for inclusion in the record on appeal to the Court of Special Appeals.

Please let me know if you have any questions or concerns.

Very truly yours,

Thomas A. Bowden

Thomas A. Bowden

cc: Mr. Richard Shofer
✓Clerk, Circuit Court for Baltimore City
Janet Truhe, Esq.
Linda Schuett, Esq.

701

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OCT [illegible] 1990

CSA/PHC Form No. 2 Mailed: October 30, 1990

IN THE COURT OF SPECIAL APPEALS

RICHARD SHOFER *

vs. * PHC No. 804

* September Term, 1990

THE STUART HACK COMPANY, et al. *

O R D E R

The Court of Special Appeals, pursuant to Maryland Rule 8-206(a)(1), orders and directs that the above captioned appeal proceed without a Prehearing Conference.

Due date 29 Nov. 90

BY THE COURT

JUDGE

Date: October 30, 1990

cc: *Saundra E. Banks, Clerk
Circuit Court for Baltimore City
Anthony P. Palaigos, Esq.; Thomas A. Bowden, Esq.
Janet M. Truhe, Esq.
Linda M. Schuett, Esq.

*Mr./Ms. Clerk: Will you kindly place this Order with the record in this cause (Your 88102069/CL79993). The date of this Order establishes commencement of the 10 day period under Md. Rule 8-411(b) and the 60 day period for transmittal of the record under Md. Rule 8-412(a).

Leslie D. Gradet

Leslie D. Gradet, Clerk

FILED DEC 19 1990

82.50

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

82.50 (57)

SHOFER

CASE NO. 88102069/CL7993

VERSUS

THE STUART HACK COMPANY, ET AL.

_____/ OCTOBER 12, 1990

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

BEFORE:

THE HONORABLE DAVID ROSS, JUDGE

APPEARANCES

ON BEHALF OF THE PLAINTIFF:

ANTHONY PALAIGOS, ESQUIRE

ON BEHALF OF THE DEFENDANTS:

JANET TRUHE, ESQUIRE.
LINDA SCHUETT, ESQUIRE

REPORTED BY:
Rita M. E. Taggart
Official Court Reporter
507 Courthouse West
Baltimore, Maryland 21202

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P R O C E E D I N G S

October 12, 1990

THE COURT: All right, Ms. Truhe, this is your motion to dismiss.

MS. TRUHE: Your Honor, Lee Zaben and I represent the Defendants, Stuart Hack and The Stuart Hack Company who have moved to dismiss the Plaintiff's second amended complaint for two reasons. The first counts, four through eight, are claims for breach of fiduciary duty under the ERISA Statute and as such are subject to the exclusive jurisdiction of the Federal Court and second counts, one through three, which are claims for state common law negligence, breach of contract and breach of fiduciary duty based upon exactly the same conduct complained of in counts four through eight, are pre-empted under Section 1144 (a) of the ERISA Statute which pre-empts all state laws that relate to any employee benefit plan.

Now, my argument this morning will focus only on the second portion of the Defendant's motion which deals with pre-emption of counts one and two. This is because the Plaintiff in his response to my motion to dismiss has agreed solely

to dismiss counts three through eight, which are the ERISA breach of fiduciary duty claims and the state breach of fiduciary duty claim because he has concluded that Mr. Hack was not functioning as a fiduciary in this case, but the Plaintiff hasn't done that yet, because he so far has refused to dismiss the claims with prejudice as I requested.

The reason I have made that request is because this is not the first time I've moved to dismiss such claims. The first time, you may recall, was with reference to a single ERISA breach of fiduciary claim that was set forth in the first amended complaint. This Court granted my motion and dismissed the claim on July 2nd. Then the Plaintiff --

THE COURT: With prejudice?

MS. TRUHE: With leave to amend.

THE COURT: With leave to amend?

MS. TRUHE: With leave to amend.

THE COURT: What did I dismiss with prejudice or am I again confusing --

MS. TRUHE: Nothing.

THE COURT: All right. I note ten files I went through. I'm confusing this one with something else then.

MS. TRUHE: Okay. Then the Plaintiff filed his second amended complaint which added five new breach of fiduciary duty claims which I'm again moving to dismiss on the grounds that they're subject to the exclusive jurisdiction of the federal courts. The Plaintiff agrees with that argument but will dismiss his claims without prejudice only.

I'm requesting that the Court itself dismiss these claims with prejudice now because the Plaintiff admits they do not have any evidentiary support and I frankly don't feel that the Defendants should be put to the task of yet filing another motion in the event the Plaintiff decides to amend his complaint again.

Now, turning to the merits of my argument as to pre-emption of counts one and two. I think it is very important to note that the gist of all of these causes of action is that these Defendants, who were pension consultants retained specifically by the Catalina Enterprises Pension Plan to provide plan administration services and advice to the trustee, they failed to tell the Plaintiff, who is the trustee, about tax consequences which might occur if he borrowed more

than a certain amount from the pension plan. The Plaintiff had previously called Mr. Hack to find out whether he could borrow from the plan.

The sole factual predicate of each and every cause of action in the second amended complaint is that Mr. Hack violated his duties as a plan administrator when he failed to advise the Plaintiff properly on this issue. It is undisputed by any party in this case that Mr. Hack has no other legal relationship with or duty towards the Plaintiff except in this context of Mr. Hack as plan administrator and Mr. Shofer as trustee. Mr. Hack was not the Plaintiff's attorney. He was not the Plaintiff's consultant, tax preparer or personal tax adviser. Mr. Shofer individually was not a client of Mr. Hack's firm and he has never alleged or contended that he was.

Now, by suddenly dismissing counts three through eight, which are the breach of fiduciary duty claims under ERISA and state law breach of fiduciary duty claim, the Plaintiff is attempting to salvage his case here in State Court by converting it into one for simple malpractice, but I would contend that the Plaintiff cannot do this

simply by relabeling Mr. Hack's conduct as occurring outside the ERISA context for this reason.

The Supreme Court has made it very clear in the recent case of Pilot Life Insurance Company versus Dedeaux that state common law claims which relate to an employee benefit plan such as the one in the case here are pre-empted under 29 U.S.C.A. Section 1144 (a), which provides that the provisions of ERISA, quote, shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.

The Supreme Court stated in Pilot Life that state law relates to a benefit plan in the normal sense of the phrase if it has a connection with or reference to such a plan.

There can be no dispute about the fact that the Plaintiff's liability and damage claims set forth in counts one for negligence and two for breach of contract have a connection with and must be resolved with reference to the plan for these reasons.

First, the original inquiry from the Plaintiff concerned whether he could make a loan under the plan. The second, the Plaintiffs expert

will testify that the Defendants were negligent when they failed to properly amend the plan in 1985 in accordance with the loan advice professionally given in 1984. Third, the Plaintiff will be seeking damages in the form of excise taxes that will be imposed by the IRS if his loans are deemed prohibited transactions.

Now, whether the loans are deemed prohibited transactions depends upon whether the Plaintiff violated the terms of the plan which placed certain restrictions on borrowing that the Defendants also allegedly didn't tell the Plaintiff about.

The Plaintiff's expert will also testify that the plan may be disqualified by the IRS because of all of this thereby causing the Plaintiff additional damages.

Your Honor may recall that the Plaintiff's were before you three days ago requesting a postponement of the trial date so that the IRS could complete its investigation of the plan and assess these plan related damages.

Now, the Plaintiff does not dispute the holding of Pilot Life but it attempts to argue under the authority of the Sommer Drug Store case

that its negligence and breach of contract claims are somehow too remote, peripheral to the plan at issue in the case. Not only does the evidence I just summarized dispute that fact, the Sommer Drug Store case also supports pre-emption here. The Fifth Circuit stated in Sommers that the Courts are more likely to find that state law relates to a benefit plan if it affects relations among the principal ERISA entities--the employer, the plan, the plan fiduciaries and the benificiaries--than if it affects relations between one of these entities and an outside party or between two outside parties with only incidental effect on the plan.

Clearly, the communication between the trustee and the plan administrator here about the issue of whether that trustee had the right under the plan to take a loan involves a relation among principle ERISA entities on a subject discussed at length in the plan.

The Sommers case is also distinguishable on its facts and the Fifth Circuit permitted a corporate common law state, common law breach of corporate fiduciary duty claim to go forward because the case concerned negligence on the part

of the Defendant in a separate legal capacity as a director of the corporation towards the Plaintiff in his separate legal capacity as a shareholder.

There is no such separate legal relation here. Mr. Hack has never been more than a plan administrator and has no relationship with the Plaintiff in any other legal capacity.

Similarly in the Pizlo versus Bethlehem Steel case, also cited by the Plaintiff in his opposition, that case is distinguishable because the Court permitted a claim for alleged wrongful termination of an oral contract to go forward because again it could be resolved without the necessity of having to view the terms of the plan. What the Plaintiff didn't say though about Pizlo is that the Fourth Circuit found pre-emption on a claim involving improper amendment of the plan just as the Plaintiff is alleging in the case here.

The Isaacs versus Group Health Plan case, Southern District for New York, 1987 case, cited by the Plaintiff, is also distinguishable for the same reason. There the Federal District Court found no pre-emption of a state contract in negligence claim against the Defendants for a

programing error because that again -- again that claim. those two claims would be resolved with reference to a private contract between the parties and not the plan as in the case here.

And, finally, in the Sappington versus Covington case, the New Mexico appellate case, that is also distinguishable because there the New Mexico Court pointed out that there is a separate body of law in New Mexico, just as in Maryland by the way, governing a relationship between an insurance agent and his insured. He is bound to obtain adequate insurance coverage for the insured with a solvent company, and in that particular case the insurance agent found a rather lousy employees' benefits package for the Plaintiff's employer and the Plaintiff was permitted to sue the insurance agent for negligence and breach of contract.

Here any negligence committed by Mr. Hack was committed solely in his capacity as a plan administrator who failed to advise the trustee properly and amend the plan properly. There is no separate body of Maryland law governing the duties of a plan administrator vis a vis his trustee.

Finally, Your Honor, turning to the Plaintiff's other argument in favor of no pre-emption which is strictly an equitable one, despite claiming for the past two years in litigation Mr. Hack was a fiduciary when he rendered his advice to the Plaintiff, and, by the way, the Plaintiff concedes in his opposition that if Mr. Hack were such a fiduciary, then his state common law negligence and breach of contract claims would indeed pre-empted, be pre-empted.

The Plaintiff has now suddenly concluded that Mr. Hack wasn't a fiduciary at the time he advised the Plaintiff about the loans. Therefore, because his claim is against a non fiduciary, who the Plaintiff says is not regulated by ERISA, he should be permitted to go forward in state court, otherwise he would be left without a remedy in either jurisdiction.

He cites in favor of that proposition the Southern California Meat Cutters case where the California District Court found no pre-emption of state laws, state claims for fraud and intentional infliction of emotional distress against non fiduciary, not because there was this gap in ERISA and that, therefore, the Plaintiff

should be allowed to go forward under state law, but because the claims against could be resolved by reference to a private contract between the parties and had nothing to do with the plan or any obligation thereunder.

He also cites, finally, the case of Munoz versus, M-u-n-o-z, versus Prudential. That is a District Court for Colorado, 1986, case. It is pre Pilot Life, which specifically rejected and held that the ERISA pre-emption doctorine is broad enough to preclude assertion of state law claims even against non fiduciaries where such claims relate to an employee benefit plan.

What the other federal courts, including the Fourth Circuit, have done in this situation since Pilot Life, where ERISA does not seem to furnish an answer on its face, and is a category that the Plaintiff is claiming his case now falls into, is not to nevertheless permit the state law claim to go forward but, rather, to allow Plaintiffs to bring their claims in Federal Court only against non fiduciaries pursuant to 28 U.S.C.A. 1331, which is the federal questions statute, and to recover personal damages under 29 U.S.C.A., 1132 (a) 3, which is the other equitable

relief provision of the ERISA Statute, and to fashion principles of federal common law to deal with these types of claims.

I would cite in support of that the Fourth Circuit case that I was referring to, the very recent Fourth Circuit case of Provident Life and Accident Insurance Company versus Waller, appearing at 906 F. 2d 985, Fourth Circuit, 1990, which held that an insurance company could maintain a federal common law claim for unjust enrichment against a non fiduciary participant who had been overpaid on pension benefits and the Fourth Circuit's analysis of this situation is important because it is what the Plaintiff is claiming is the case here.

In Provident the Court said there is little question that Provident's claim of unjust enrichment may not be predicated on state law given ERISA's broad pre-emption provision, citing Pilot Life. The Supreme Court has interpreted this provision to pre-empt state common law contract and tort claims because they relate to an employee benefit plan. Then the Fourth Circuit noted that ERISA did not exactly provide an express remedy, however, for this situation. So

the Court stated, although it has been rejected for years, both the Supreme Court and this Circuit recently gave express authorization for federal courts to develop a federal common law of rights and obligations under ERISA regulated plans. So in that case the Fourth Circuit permitted Provident to maintain its federal common law claim for unjust enrichment because it related to an employee benefits plan, to go forward in federal court under the principles of common federal law, pursuant to the Federal Question Statute.

To summarize very briefly these arguments, the Defendants are seeking dismissal of counts one and two for negligence and breach of contract because they relate to an employee benefit plan given the facts of the case here and are, therefore, pre-empted by ERISA under the Supreme Court's ruling in Pilot Life. These claims necessarily have a connection with and reference to the plan in this case because, one, the Plaintiff's original inquiries pertained to whether he had a right under the plan to take the loan. Mr. Hack allegedly improperly amended the plan in accordance with his loan advice. The Plaintiff may have violated the terms of the plan

when he borrowed money thereby causing a prohibited transaction and both experts will be talking about the specific terms of the plan in that regard, and the plan may be disqualified.

There is just no getting around the fact that these negligence and breach of contract claims necessarily will relate to the plan here.

Finally, as pointed out by the Defendant in their reply, the Defendants had no relationship with and owed no duty to the Plaintiff apart from their role in administering the pension plan. If the Plaintiff wants to divorce himself entirely from the plan as he is attempting to do now in an effort to avoid any suggestion of federal law, then he has failed to set forth any legal relationship or duty which would permit him to recover for any of Mr. Hack's alleged negligence.

Negligence in a vacuum cannot or does not exist. There must be a legal duty owed and the only one owed here was in the context of a plan administrator who failed to discharge his duties properly in advising the trustee. Therefore, the Defendants would request that counts one and two be dismissed.

THE COURT: And that leaves nothing.

MS. TRUHE: That would leave a remedy in federal court for --

THE COURT: Leaves nothing in this court.

MS. TRUHE: That leaves notthing in this court.

THE COURT: What did I do and what was before me previously in this case?

MS. TRUHE: Your Honor, that was a single breach of fiduciary duty claim brought under the ERISA Statute. The ERISA section specifically states --

THE COURT: It was a one count claim.

MS. TRUHE: One count claim -- Well, it was, yes, a one count claim. There were many other counts in there for common law causes of action, breach of contract, breach of fiduciary duty, negligence.

THE COURT: That were not related to --

MS. TRUHE: They were not as related as this second amended complaint, negligence and breach of contract claim are now. That is why I moved to dismiss based on pre-emption.

THE COURT: The last time you moved to dismiss only the fiduciary --

MS. TRUHE: Only the fiduciary duty claim.

THE COURT: -- claims?

MS. TRUHE: Right.

THE COURT: This time you say they brought the whole thing within --

MS. TRUHE: They brought the whole thing within.

THE COURT: -- the ERISA pre-emption?

MS. TRUHE: That's right.

THE COURT: Pilot Life is Supreme Court Reporter, what volume?

MS. TRUHE: Is 107 Supreme Court 1549. Your Honor, I've got a copy of the case here too.

THE COURT: On what page and under what heading is the magic language?

MS. TRUHE: 1553. Under roman numeral three, section, roman numeral 3.

THE COURT: What is relevant here?

MS. TRUHE: Yeah, this is where I took the quote, what the phrase relate to --

THE COURT: Well --

MS. TRUHE: -- means.

THE COURT: -- let me look at it.

MS. TRUHE: Sure. Your Honor, my other

quote in the case came from the page right before that, 1552. After the paragraphs that says, to summarize the pure mechanics of the provisions quoted above, the state law relates to employee benefit plans, it is pre-empted, then the court goes on talk about the meaning of that and its legislative --

THE COURT: Page 1552.

MS. TRUHE: Right. First full paragraph to summarize the pure mechanics.

THE COURT: I got it.

MS. TRUHE: That's the other place.

THE COURT: Okay. Who has the other side?

MR. PALAIGOS: Yes, Your Honor, Anthony Palaigos on behalf of the Plaintiff, Richard Shofer. May I proceed, Your Honor.

THE COURT: Please.

MR. PALAIGOS: Your Honor, counsel for the Defendant in this case very eloquently recited to you a host of cases, including the Pilot Life Insurance case, in an attempt to focus your attention on the plan itself as opposed to the underlying principles of pre-emption.

Your Honor, you must examine this case

first starting with the pre-emption provision within the ERISA Statute, which is Section 1144 of Article 29 in the U.S. Code Annotated. That is the pre-emption statute as it arises under ERISA and it very simply says, Your Honor, that ERISA has pre-empted all state laws and shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.

One must focus on what this case is all about to determine whether or not the causes of action under counts one and two relate to an employee benefit plan.

Now, the Pilot Life Insurance Company rendered by the Supreme Court stands for the exact proposition of what pre-emption is all about, but the Supreme Court was quick to identify in the Pilot Life case that the underlying causes of action filed by the Defendant, by the Plaintiff in that case under her state law claims was for the improper processing of a claim for benefits under an employee benefit plan.

The processing of benefits is clearly one of the expressed objectives of what ERISA was trying to accomplish, and that is to protect the financial integrity of pension plans, and to

protect the rights of participants into their vested benefit plans.

The Pilot case does not stand for the proposition that in this particular case the state causes of action relate to a plan such as to order pre-emption by this Court. Counsel very eloquently started to address some of the cases that --

THE COURT: I'm sorry, what's the qualification you put on?

MR. PALAIGOS: Well, looking at the decision of the Pilot case, I have the U.S. Reporter Section, Your Honor, and it clearly identified that the common law causes of action raised in the complaint each based on alleged improper processing of a claim for benefits.

THE COURT: No, but you qualified relate to.

MR. PALAIGOS: One must examine what is meant under the pre-emption statute as whether or not a claim relates to an employee benefit plan.

My argument to this Court this morning in this motion to dismiss is that in the Pilot case it related to a plan. It found relation --

THE COURT: I know how it related there

but what I'm trying to understand is your argument. Quoting from Pilot in both cases the phrase relate to was given its broad common sense meaning, such that a state law relates to a benefit plan in the normal sense of the phrase if it has a connection with or reference to such a plan.

MR. PALAIGOS: Yes, Your Honor, and the cases that we have recited in our memo that I would like to review for this court in today's argument have addressed directly what is meant by relate to an employee benefit plan under the pre-emption statute.

THE COURT: Okay.

MR. PALAIGOS: The first --

THE COURT: I can't recapture what I thought I heard but go ahead.

MR. PALAIGOS: The first case was that Pizlo versus Bethlehem Steel, which was cited in 884 Federal 2d 116. In that particular case, Your Honor, and it was a 1989 decision, Fourth Circuit, in that particular case, Your Honor, there was a claim filed by the Plaintiffs in state law, under state law causes of action on the basis of breach of contract, promissory estoppel and negligence

and what the Court said specifically --

THE COURT: What --

MR. PALAIGOS: This is the Pizlo case.

THE COURT: I am sorry, what did the breach of contract and promissory estoppel arise out of?

MR. PALAIGOS: In those particular -- they were for damages arising for the wrongful termination of her employment. Had nothing to do with an examination of what her benefits may have been under an employee benefit plan.

THE COURT: It didn't relate to the employee benefit plan then?

MR. PALAIGOS: The Court, Your Honor, had an opportunity to examine the language of 1144, and it noted examples of where state causes of action would relate to a plan and it gave a check list of examples of state causes of action sufficient to relate to a plan.

THE COURT: Do any of your cases involve such situations that relate to the plan the way this one does which says that under ERISA it is not pre-empted?

MR. PALAIGOS: I believe it does, Your Honor, because under these the factual --

THE COURT: No?

MR. PALAIGOS: -- the factual pattern is not the same. We don't have the same identity of Defendants but what we have, Your Honor --

THE COURT: In other words the answer to my question is you have no case that relates to a plan the way this case relates and in which it was held there was no --

MR. PALAIGOS: That's correct.

THE COURT: -- no pre-emption?

MR. PALAIGOS: That's correct, Your Honor, but these cases go to what are the indicies, what are -- what do we look to to determine under this expansive language --

THE COURT: The trouble I'm having with your argument is the example you gave me, in a common sense way had no relation to an ERISA plan or a pension plan?

MR. PALAIGOS: That is correct.

THE COURT: But the argument that is made by Hack here is that if you take the pension plan out of your case, there is nothing there?

MR. PALAIGOS: And arguably if you take her argument, my adversary's argument, that even if the advice were given by a pension consultant

concerning a plan that he had no relationship with, he would never be held liable for a state cause of action for malpractice because he didn't have anything to do with the plan itself on which he gave advice.

THE COURT: I understand it isn't a question of whether you have a remedy. It's a question of where.

MR. PALAIGOS: Well --

THE COURT: I mean, that's the issue. It's not a question of whether the remedy exists or not. The question is where do you seek your remedy.

MR. PALAIGOS: Well, there may very well not be a remedy under ERISA by virtue of advice given by a non fiduciary that involves only remotely a pension plan. Your Honor, this case --

THE COURT: How can you say remotely?

MR. PALAIGOS: It is remote, Your Honor, because this case is not necessarily factually how Mrs. Truhe presented it.

She is assuming that the advice given by Hack was in the nature of a plan administrator to the trustee of the plan when the letter that gave the advice was simply addressed to Mr. Shofer

individually. It could have been as to the trustee --

THE COURT: I am sorry. You folks talk about these people by name.

MR. PALAIGOS: The Plaintiff.

THE COURT: And I have never -- I have not today at least gotten the parties straight. Shofer is just a simple sole who is an employee or he was.

MR. PALAIGOS: He's more than that. He is the individual who is the sole stockholder of the company. He is the trustee under the plan, and he is one of the participants in the plan, along with other employees of his company and he asked for certain advice about whether he could make loans.

We allege, Your Honor, that the advice given by Hack did not meet the standard of care as to what should have been told to him about the personal tax consequences of making loans from a plan. The damages that are being sought have nothing and the causes of action that are alleged under counts one and two have nothing to do with the determination of benefits, has nothing to do with the determination of how benefits are

processed, has nothing to do with the administration of the plan.

It has -- the plan will not be subject to Mr. Shofer for damages. The only relate -- the only relationship to the plan itself is that there is a plan in this case but that the causes of action alleged for the malpractice only remotely apply to the plan, and that is what the cases indicated. The cases indicate what is involved in the underlying cause of action.

THE COURT: Mr. Hack would not have been consulted but for the fact that Mr. Hack is the one that created the plan?

MR. PALAIGOS: In this case, that is correct.

THE COURT: Now, I'm reading again from Pilot. In both cases the phrase relate to was given its broad common sense meaning such as a state law relates to a benefit plan in the normal sense of the phrase if it has a connection with or reference to a plan.

Now, Miss Truhe, is there a difference between a state law that relates to the plan and the cause of action which relates to the plan?

MS. TRUHE: No, Your Honor, there

isn't. The term state law is itself defined in the ERISA Statute.

THE COURT: To include causes of action?

MS. TRUHE: Yes. Is defined as, quote, all laws, decisions, rules, regulations, or other state action having the effect of law of any state.

THE COURT: But this, I mean, what relates to the plan is the claim?

MS. TRUHE: Are the claims, yes.

THE COURT: But the claims aren't laws. The law --

MS. TRUHE: The claims are created by virtue of common law, state common law negligence and breach of contract. They would fall, this cause of action, or those two torts would fall, the tort and breach of contract would fall within the definition in statute of state law. As state laws they do relate to the employee benefit plan at issue in this case because --

THE COURT: The state law relied upon relates to this plan because the cause of action relates to the plan?

MS. TRUHE: Yes.

THE COURT: That's the distinction --

MS. TRUHE: Exactly.

THE COURT: -- I'm pursuing.

MS. TRUHE: It relates, for example, because the legal duty asserted in the negligence count is one that hinges on Mr. Hack in his sole capacity as a plan administrator vis a vis Mr. Shofer in his capacity as the trustee. Again, those causes of action only have meaning with reference to the facts of this case which are the plan administrator vis a vis --

THE COURT: I don't think there's any question about that. If we give the common ordinary meaning of relate to --

MS. TRUHE: Right.

THE COURT: -- to the cause of action, it obviously relates to it. But what I am pursuing in trying to understand fully the Plaintiff's position is whether or not we can separate the cause of action relating to from the state law relied upon to establish the cause of action.

MS. TRUHE: I don't think you can because, Your Honor, that quote on page 1553 that states relate to is the antecedent of that. What

the Supreme Court is referring to there is state common law claims. They were looking at Plaintiffs' claims for negligence and breach of contract in this Pilot Life case finding that they related to the plan and were, therefore, pre-empted.

So it is clear when the Courts are talking about a state law relating, they were talking about two of the Plaintiffs' claims relating to the benefit plan.

MR. PALAIGOS: But, Your Honor, it related to the processing of benefits which was the underlying cause. Your Honor, in the Shaw versus Delta Airlines case, which is a Supreme Court case, 463 U.S. 85, the Court specifically recognized that, and if I may quote, some state action may affect employee benefit plans in too tenous, remote or peripheral a manner to warrant a finding that the law relates to the plan.

My argument today, Your Honor, is, yes, there is a plan involved in this case. Yes, the plan will have to be interpreted in its loan provisions with respect to whether or not loans were a prohibited transaction as defined under the internal revenue code in this case, but that this

cause of action for the malpractice for the advice given is too remote. It doesn't deal with those areas that are exclusively to be protected under ERISA, the processing of benefits, the determination of benefits, the method of paying benefits, the fiduciary conduct, standards of fiduciaries in the plan. It doesn't deal with any of those causes of action.

THE COURT: Okay. Now, who are the parties in this case? Who are all these people?

MR. PALAIGOS: Mr. Bowden is with me, and will not be speaking.

THE COURT: So that's the Plaintiff?

MR. PALAIGOS: Yes, Your Honor.

THE COURT: This is Stuart Hack?

MS. TRUHE: The Defendants.

THE COURT: Corporate and individual?

MS. TRUHE: Yes.

THE COURT: Who --

MS. SCHUETT: We represent the third party Defendant brought in by the Stuart Hack Company and Stuart Hack, the third party Defendant.

THE COURT: Are you the ones that messed up the returns according to Stuart Hack?

MS. SCHUETT: My name is Linda Schuett and this is John Ryan. We are both from Frank Bernstein and we represent Grabush and Newman Company.

THE COURT: Okay.

MS. TRUHE: Your Honor, if I may jump in just while we are on that train of thought. Mr. Palaigos pointed out only causes of action which specifically pertain to processing of benefits are pre-empted. The Supreme Court said also on page 1553, in particular we have emphasized that the pre-emption clause is not limited to state laws specifically designed to effect employee benefit plans, the common law causes of action raised in the Dedeaux complaint, each based on alleged improper processing of a claim for benefits under a plan, undoubtly meet the criteria for pre-emption. So the Court is not confining it to strictly the improper processing of a benefits type claim.

THE COURT: Okay. Well, if I grant Hack's motion, that moots your motion?

MS. SCHUETT: Yes, it does, Your Honor.

THE COURT: And puts the Plaintiffs totally out of this Court?

MR. PALAIGOS: That's correct, Your Honor.

MS. SCHUETT: Yes.

THE COURT: Is this a second amended complaint?

MS. TRUHE: Yes.

THE COURT: The Defendant Hack's motion to dismiss is granted and the second amended complaint is dismissed without leave to amend.

MS. TRUHE: Thank you, Your Honor.

THE COURT: I think under the broad language of the ERISA Statute as interpreted by the Supreme Court, these claims necessarily relate to ERISA, relate to the pension plan and, therefore, are pre-empted.

Miss Schuett, did you get a copy?

MS. SCHUETT: No, Your Honor.

THE COURT: Pass that down please? Thank you, folks.

MS. TRUHE: Thank you, Your Honor.

MR. PALAIGOS: Thank you, Your Honor.

(Proceedings concluded.)

REPORTER'S CERTIFICATE

I, Rita M. E. Taggart, an Official Court Reporter of the Circuit Court for Baltimore City, do hereby certify that I recorded stenographically the proceedings in the matter of Shofer versus The Stuart Hack Comapany, et al, on October 12, 1990.

I further certify that the aforegoing pages constitute the official transcript of proceedings as transcribed by me to the within typewritten matter in a complete and accurate manner.

In Witness Whereof, I have hereunto subscribed my name this 15th day of December, 1990.

Rita M. E. Taggart
Official Court Reporter

F.L.
2-23-10
530 Pages

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MSA SC 5458-82-152

Dates: 2010/02/17
Description: Case numbers received from J. Hollander -

BALTIMORE CITY CIRCUIT COURT (Paternity Papers) Arrington v. Rodriguez, 1989, Box 169 Case No. 119070 [MSA T3351-923, CW/16/31/25]
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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Rolnik v. Union Labor Life Ins. Co., 1987, Case No. 87313071
Case is split between 2 boxes:
Box 387 [MSA T2691-2026, HF/8/35/8]
Box 388 [MSA T2691-2027, HF/8/35/9]
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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Shofer v.The Stuart Hack Co., Box 128 Case No. 88102069 [MSA T2691-2232, HF/11/30/3] 88102069-7
See also for "brick binders":
Box 527 [MSA T2691-2631, HF/11/38/18]
Box 528 [MSA T2691-2632, HF/11/38/19]
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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Attorney Grievance Commission v. Yacono, 1992, Box 1953 Case No. 92024055 [MSA T2691-4591, OR/12/14/65] **File not in Box**
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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Feldmann v. Coleman, 1993, Box 391 Case No. 93203022 [MSA T2691-5466, OR/22/08/037]
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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Jefferson v. Ford Motor Credit Corp., 1993, Box 470 Case No. 93251040 [MSA T2691-5545, OR/22/10/20]

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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Shofer v. The Stuart Hack Co. and Blum, Yumkas, Mailman, 1993, Box 518 Case No. 93285087 [MSA T2691-5593, OR/22/11/20]
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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Booth v. Board of Appeals, 1993, Box 589 Case No. 93330026 [MSA T2691-5665, OR/22/12/45]
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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Stubbins v. Md. Parole Comm'n., 1993, Box 616 Case No. 93354003 [MSA T2691-5692, OR/22/13/24]
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BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Fitch v. DeJong, 1994, Box 109 Case No. 94077005 [MSA T2691-5817, OR/28/9/2]
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BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Bowden, 1987, Box 142 Case No. 18721501 [MSA T3372-984, CW/2/23/13]
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BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Redmond, 1988, Box 191 Case No. 48828071 [MSA T3372-1282, HF/11/23/43]
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BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Parker, 1990
Box 100 Case Nos. 290213034,35 [MSA T3372-1476, OR/16/16/8]
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BALTIMORE CITY CIRCUIT COURT (Criminal Transcripts) State v. Monk, 1991, Box 78 Case No. 591277019 [MSA T3657-403, OR/17/11/21]
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BALTIMORE CITY CRIMINAL COURT (Transcripts) Eraina Pretty, 1978, Box 43 Case Nos. 57811846, 57811847, 57811848, 57811858, 57811859, 57811860 [MSA T496-3990, OR/18/22/41]
Case 57811847 and Case 57811858 have pull slips in the record center box that indicate the files were sent back to Baltimore City Circuit Court attn: Jack Blake in 1993.
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BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Johnson (or Johnson-Bey),

1987, Box 11 Case No. 28701917 [MSA T3372-853, CW/2/20/26]

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System design by Dr. Edward C. Papenfuse and Nancy Bramucci.
Programmed in *Microsoft SQL Server* and *Cold Fusion 7.0* by Nancy Bramucci.
Technical support provided by Wei Yang, Dan Knight, Tony Darden, and Matt Davis.
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