UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

| Case No. | LA CV14-03911 JAK (AGRx) | Date | July 25, 2016 |
|---|---|---|---|
| Title | Thomas E. Perez v. Scott Brain, et al. | | |

| Present: The Honorable | JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE |
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| Andrea Keifer | Not Reported |
|---|---|
| Deputy Clerk | Court Reporter / Recorder |
| Attorneys Present for Plaintiffs: | Attorneys Present for Defendants: |
| Not Present | Not Present |

**Proceedings:** **(IN CHAMBERS) ORDER RE BENCH TRIAL;**

**EX PARTE APPLICATION FOR RECONSIDERATION OF THE ORDER GRANTING SUMMARY JUDGMENT ( DKT. 307)**

## I. Introduction

The Department of Labor ("DOL"), with U.S. Secretary of Labor Thomas Perez as the named plaintiff, brought this action in which it contends that defendants violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* The defendants, who are associated with the Southern California Cement Masons Trust Funds ("Trust Funds"), are trustees Scott Brain ("Brain") and Jaime Briceno ("Briceno"), and counsel to the Trust Funds, Melissa Cook ("Cook") and Melissa W. Cook & Associates PC (collectively, "Cook Defendants").[1] The DOL contends that Defendants took certain adverse employment actions against Cheryle Robbins ("Robbins"), Cory Rice ("Rice") and Louise Bansmer ("Bansmer"), in retaliation for the actions each took in connection with a DOL investigation of Brain.

A five-day bench trial in this matter was conducted from May 17, 2016 to May 24, 2016. Dkt. 446-449, 451. The DOL presented the following claims during the trial: (i) violation of 29 U.S.C. § 1140 by all Defendants for retaliation against Robbins;[2] (ii) violation of 29 U.S.C. § 1140 by Brain and the Cook

[1] All of these parties are referred to collectively as "Defendants."

[2] On January 8, 2016, the motions for summary judgment of Brain and Briceno were granted with respect to the § 1140 retaliation claim premised on the decision by third-party administrator Zenith not to rehire Robbins. Dkt. 247. On January 19, 2016, the DOL filed an Ex Parte Application for Reconsideration of the Order granting summary judgment to Brain on that basis ("Application"). Dkt. 307. A ruling on the Application was deferred until a consideration of the evidence presented at trial. Dkt. 394. A final ruling on the Application is addressed in this Order.

Defendants for retaliation against Rice and Bansmer; and (iii) violations of 29 U.S.C. §§ 1104(a)(1)(A) & (B) and 29 U.S.C. § 1105(a), against Brain and Briceno for breach of fiduciary duty and against the Cook Defendants for their knowing participation in that conduct.

Following trial, each party filed a closing brief and a reply brief. Defendants' Post-Trial Briefs (Dkt. 481, 482, 485); DOL Post-Trial Briefs (Dkt. 483, 484, 486). Based on the evidence presented at trial and the post-trial filings, this Order sets forth findings of fact and conclusions of law with respect to the claims brought by the DOL. Fed. R. Civ. P. 52(a).

For the reasons stated in this Order, the DOL has demonstrated the following by a preponderance of the evidence: (i) Brain and the Cook Defendants retaliated against Robbins for her communications with the DOL by placing her on administrative leave; (ii) Brain and the Cook Defendants retaliated against Robbins by causing the work performed by the department that Robbins previously managed to be outsourced to Zenith and by causing Zenith not to hire Robbins to participate in its work; (iii) Brain and the Cook Defendants retaliated against Rice by causing Zenith to terminate him; and (iv) Brain breached his fiduciary duty by retaliating against Robbins and causing her to be placed on administrative leave, and Cook knowingly participated in that breach. The DOL has not shown by a preponderance of the evidence that: (i) Brain and the Cook Defendants retaliated against Bansmer; (ii) Briceno retaliated against Robbins; (iii) Brain or Briceno breached his fiduciary duty by failing to investigate Robbins' allegations against Brain; or (iv) Briceno breached his fiduciary duty by voting to use assets of the Trust Funds to pay the cost of the settlement of the civil action brought by Robbins. Further, the newly asserted claim that Brain breached his fiduciary duty by failing to collect all monies owed to the Trust Funds, which was not timely made, is not considered for that reason.

## II. Pre-Trial and Trial Proceedings with Respect to Trial Evidence

The parties presented trial evidence through live testimony, declarations and exhibits. Prior to the trial, each of the parties submitted proposed direct testimony of witnesses through declarations. Each of the parties was permitted to make evidentiary objections to the declarations offered by an opposing party. The Court ruled on these evidentiary objections prior to trial. Dkt. 399-422, 429, 439, 440, 442, 443.

The declarations of the following witnesses were presented by the parties prior to trial:

> DOL: David Allen; David Baldwin; Louise Bansmer; Scott Berg; Frank Crouch; Fitzgerald Jacobs; Bill Lee; Jesse Mendez; Larry Nodland; Jerome Raguero; Cory Rice; Cheryle Robbins; Phil Salerno; and Mac Tarrosa.
>
> Defendants: David Allen; Scott Berg; Scott Brain; Jaime Briceno; Melissa Cook; Frank Crouch; Tom Donnelly; Pat Finley; Richard Galvan; Jeffrey Goss; Adrian Hoyle; Fitzgerald Jacobs; John Kitson; William Lujan; Jesse Mendez; David Moore; Ellyn Moscowitz; Larry Nodland; Enrico Prieto; Thomas F. Reed; C. Frederick Reish; Phil Salerno; Mac Tarrosa; and Anne Tsai.

At trial, the following witnesses testified: David Baldwin; Melissa Cook; Bill Lee; Cheryle Robbins; Scott Brain; Marcos Enriquez; Jeffrey Goss; Jaime Barton; Kathryn Halford; Thomas F. Reed; Jaime Briceno; Matt Chandler; David Allen; and Thomas Mora.

Each declarant who testified at trial was cross-examined with respect to his or her declaration, and then testified on re-direct examination. Following the close of evidence, deposition testimony from the following witnesses was admitted: Sun Chang; John Corapi; Francey George; John Merchant; Jesse Meldru; Scott Brain; Jaime Briceno; and Melissa Cook.

## III. Summary of Trial Evidence and Assessment of Witnesses

### A. Background

The Trust Funds are five employee benefit trust funds established by Cement Masons Local 600, Cement Masons Local 500, and four employer contractor associations pursuant to collective bargaining agreements. Each of the Trust Funds is controlled and administered by a Board of Trustees whose members are appointed by management or labor. The trustees for each of the five trusts formed a Joint Board of Trustees ("Joint Board") to coordinate the administration of the Trust Funds.

Brain is the Business Manager and Financial Secretary for the Cement Masons Local 600 ("Local 600"), a trustee of each of the Trust Funds and a member of the Joint Board. Briceno is a business agent of Local 600, a Trustee of one of the Trust Funds and a member of the Joint Board. Cook is an attorney who acted as counsel for the Trust Funds from August 2005 through May 2013.

During the relevant time period, Robbins was the director of the Field Audit and Collections Department ("A&C Department") of the Trust Funds. The A&C Department was responsible for auditing employers and collecting employer contributions to the Trust Funds that were overdue or otherwise unpaid. In 2006, the Joint Board established the Cement Masons Southern California Administrative Corporation ("Administrative Corporation"). The A&C Department staff was employed by the Administrative Corporation. The Joint Delinquency Committee ("JDC"), whose members were trustees, was responsible for overseeing the operations of the A&C Department.

For approximately the last 30 years, American Benefit Plan Administrators, Inc. ("ABPA") and its successor Zenith American Solutions, Inc. ("Zenith")[3] have provided third-party administrative services to the Trust Funds. Zenith and the Trust Funds each has offices in the same building. Bansmer and her son, Rice, were both Zenith employees who worked on Trust Funds matters.

[3] ABPA and Zenith are collectively referred to as "Zenith."

**B. Summaries of the Positions of the Parties**

1. The DOL Presentation

The evidence presented by the DOL was offered to support the claim that Defendants retaliated against Robbins following her contact with the DOL. It included evidence to support the claim that this retaliation included placing her on administrative leave. It also included evidence that Brain and the Cook Defendants: (i) retaliated against Robbins by causing the Administrative Corporation to be dissolved and Zenith to deny Robbins a position with its operation that took over the functions of the A&C Department; and (ii) retaliated against Rice and Bansmer by causing Zenith to terminate their employment.

The DOL also presented evidence to support its contention that Brain and Briceno each breached his fiduciary duties. It also presented evidence to support the claim that the Cook Defendants knowingly participated in that wrongful conduct, by placing Robbins on administrative leave, and failing to investigate the allegations that Robbins had made as to the conduct of Brain. Finally, the DOL presented evidence to support its claim that Brain and Briceno each breached his fiduciary duty -- or that, as a co-fiduciary, each is liable for the conduct of the other -- because Brain failed to pursue all monies owed to the Trust Funds, and Briceno voted to use cash from the Trust Funds to make a payment to Robbins as part of the settlement of the civil action that she had brought.

In support of these positions, the DOL offered evidence that Brain and Cook were in an undisclosed, romantic relationship. The DOL also presented evidence to support its claim that this relationship caused Cook, in particular, to retaliate against Robbins for her contacts with the DOL about Brain. Evidence was also offered to support the view that Brain, as the subject of Robbins' statements to the DOL, was equally motivated to retaliate against her. The DOL also offered evidence to support its position that Brain and Cook each used his or her power and influence over other trustees and Zenith to cause adverse actions to be taken against Robbins, Rice and Bansmer.

2. Summary of Defendants' Presentation

The evidence presented by Defendants was offered to support their position that they engaged in no misconduct. Defendants assert that Robbins' allegations as to any misconduct by Brain, and the substance of her corresponding discussions with the DOL, were meritless. They offered evidence to support their position that the communications by Robbins were not the result of genuine concerns, but were instead made in bad faith as part of an effort by Robbins to prevent an audit of the A&C Department. They claimed that she was motivated to do so because she feared that the negative results of the audit that she anticipated would cause her to lose her job.

Defendants also presented evidence to support their claim that each of the allegations made by Robbins as to the supposed misconduct by Brain was discussed by the JDC and determined to lack merit. Defendants also presented evidence that the A&C Department was poorly managed and operated. This resulted in problems and inefficiencies. Defendants presented evidence that the trustees were

contemplating an audit of the A&C Department in early 2011, and in the fall of 2011, formalized the decision to proceed with it. They contend that the evidence shows that, in response to this decision, Robbins "schemed" to prevent the audit by complaining to the DOL about Brain. Defendants contend that the audit showed that the performance of the A&C Department under Robbins was very poor. They also claim that this was the reason the Joint Board decided to dissolve the Administrative Corporation and outsource the collections work to Zenith.

Defendants also presented evidence that all employment decisions made by Zenith were independent ones that were not influenced by Brain or Cook. To support this position, Defendants presented evidence that both Rice and Bansmer were terminated by Zenith for violation of company policy and that the decision to eliminate Robbins' position, and ultimately not to rehire her, was made by Zenith for financial reasons.

### C. Chronology of Events

The following is a timeline that summarizes many of the material events that occurred during the relevant time period:

| Date | Event | Docket / Exhibit |
|---|---|---|
| | **Pre-2006** | |
| 1987 | Robbins began working for the Trust Funds. | |
| 1999 | Robbins became director of the A&C Department. | |
| | **2006** | |
| Early | The A&C Department was transferred to the Administrative Corporation. | |
| Prior to November | Miller Kaplan was engaged to do an agreed-upon procedures analysis of the Trust Funds, including the suspense account[4] that was overseen by the A&C Department. | Dkt. 271 |
| November 17, 2006 | Miller Kaplan presented its findings to the Trust Funds with detailed comments about several improper internal controls and recordkeeping in connection with the suspense account. | Dkt. 271 |
| | **2011** | |
| March 10, 2011 | Administrative Corporation Board meeting held. Trustees discussed hiring an independent company to do a compliance audit of the A&C Department. | Ex. 1 |
| April 14, 2011 | Administrative Corporation Board meeting held. Trustees continued discussion of the A&C Department audit. | Ex. 2 |

[4] The suspense account is where funds collected by the A&C Department were held temporarily before final distribution to the Trust Funds.

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| March/April/May 2011 | Operative Plasterers' and Cement Masons' International Association ("OPCMIA") Vice President Thomas Mora first contacted the DOL to report in a confidential manner what he considered improper conduct by Brain. | |
| June 9, 2011 | Brain asked accountant Jeffrey Goss to do an analysis comparing the collection costs of the Trust Funds with those of other trust funds. Goss did the analysis and concluded that the Trust Funds were too small to employ their own collections department and should have a third-party administrator perform that function. | Ex. 27 |
| July 2011 | Brain asked Cook to begin attending JDC meetings. | |
| September 8, 2011 | JDC meeting held. Trustees voted to move forward with a compliance audit of the A&C Department. Cook was instructed to solicit bids for the JDC to review. Cook drafted procedures for the audit that would be sent with the solicitations, which were called Requests for Proposals ("RFP"). | Ex. 3 |
| September 22-23, 2011 | Counsel Kathy Halford reviewed the draft RFP and sent proposed edits to Cook by email. | Ex. 95 |
| September 26, 2011 | Cook forwarded Halford's proposed edits to Cook's associate, Sun Chang, and stated that Halford was "watering it down." | Ex. 109 |
| September 27, 2011 | Mora spoke with DOL investigator Matt Chandler and told him Brain was helping contractors evade payment of required fringe benefits. | Ex. 149 |
| September 29, 2011 | After the draft audit procedures were approved, Cook sent a RFP to five potential candidates. | |
| October 11, 2011 | Robbins, trustee David Allen and Rice met in Robbins' office to discuss Brain's alleged wrongdoing and whether to send a letter on this issue to the leadership of the OPCMIA. Rice agreed to send Allen an email using the sender name "Brock Landers" to detail certain conduct of Brain that would be included in the letter. | Ex. 19 |
| October 13, 2011 | JDC meeting held. Trustees reviewed five bids made in response to the RFP to complete the audit of the A&C Department and determined that Bond Beebe and Hemming Morse would be the two finalists for selection. The trustees agreed to have a specially called JDC meeting in November to interview representatives of the two companies to facilitate the selection of the one that would perform the audit. | Ex. 14 |
| October 14, 2011 | Chandler contacted Robbins on her cell phone and told her he was conducting a criminal investigation of Brain. Robbins immediately informed Halford about this call. | Dkt. 296 |
| Around October 21, 2011 | Robbins told Allen about the DOL contact through Chandler. | |
| October 26, 2011 | Allen told Cook about Robbins' DOL contact through Chandler. | |

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| October 28, 2011 | Brain and Cook exchanged a substantial amount of flirtatious comments. For example, in an email Brain sent to Cook he wrote: "You figured you couldn't get in enough trouble with your own gorgeous self!" Similar emails and text messages continued to be exchanged in the months that followed. | Ex. 505; Ex. 514 |
| November 7-9, 2011 | Cook and Allen exchanged several text messages and phone calls about Robbins. Cook and Brain also had several phone calls.<br><br>During a conversation between Cook and Allen on November 8, they discussed having Zenith take over the services then provided by the A&C Department. | Ex. 516; Ex. 517; Ex. 527 |
| November 9, 2011 | Allen and Lee spoke about Zenith taking over the services of the A&C Department. | Ex. 507 |
| Early November 11, 2011 | Cook sent an email to Allen in which she wrote that she believed a Joint Board meeting should be called before any action was taken on whether the services of the A&C Department should be outsourced to Zenith. Cook suggested having the Joint Board meeting on November 18, 2011, in connection with the JDC meeting that was already scheduled for that date. | Ex. 517 |
| Later November 11, 2011 | Allen told Lee there should be a Joint Board meeting to discuss the possible engagement of Zenith to take over the services provided by the A&C Department. Lee then sent an email to all trustees in which he wrote that there would be a Joint Board meeting on November 18, 2011 "to discuss the Administrative Corporation and considerations of alternatives to the existing operations." | Ex. 506; Ex. 507 |
| November 12, 2011 | Trustee Jaime Barton sent an email to Brain in which he asked about the purpose of the scheduled Joint Board meeting. Brain sent a response, with a copy also sent to Cook, in which he stated: "That's your friend David Allen, I will call you and get u up to speed. You need to talk with your sister also!" Cook later sent an email to Brain in which she stated: "I think [J]aime used up all his cell minutes today. I think he is fired up for this. He said he lined up his peeps and talked to you several times. I like it!" Brain later replied to Cook: "Between you and I, Jaime should be good to go! Thank you! Filthy Philys and Mr. Baldwin are wild cards. I will have a serious talk with Baldwin before Friday!" | Ex. 173 |
| Unspecified date between November 14-18, 2011 | Robbins told Chandler that he should move promptly to have a subpoena issued to the Trust Funds regarding the DOL investigation of Brain if he wanted her assistance with it. | |
| November 15, 2011 | Cook forwarded an email to Brain that Allen wrote and sent to a Zenith employee. In the email, Allen wrote that he thought the Joint Board meeting was necessary to discuss outsourcing the work of the A&C Department. In Cook's email to Brain, she stated: "It was [Allen]'s idea to do it this way! HA! Revisionist history is amazing!" Brain responded: "We couldn't make this up, I smell a book deal, you will be on the best sellers list! U go girl!" | Ex. 507 |

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| November 17, 2011 to early morning November 18, 2011 | 2:30 p.m.: Robbins received a subpoena from the DOL and forwarded it to Cook and Halford in an email, in which she stated that she was told it was a criminal investigation of Brain, not the Trust Funds.<br><br>2:42 p.m.: Cook forwarded the subpoena to Chang in an email in which she wrote: "Those bitches!" in reference to Robbins and Halford.<br><br>4:32 p.m.: Cook forwarded the subpoena to counsel Jeff Cutler in an email, in which she stated "there is NO WAY in my mind that this agency was not fed the exact language of what documents to ask for . . . ."<br><br>9:05 p.m.: Cook sent the following text message to Brain: "Glad you are meeting with the boys before! Fire them up!"<br><br>9:10 p.m.: Cook sent an email to Chang in which she wrote: "Dreading my day tomorrow with this freaking investigation! Can't believe she went there!"<br><br>9:16 - 9:18 p.m.: In a responsive email Chang asked: "How you are you going to handle the subpoena situation?" In a reply email Cook stated: "I am going to distribute copies for the board's info. I have talked to Jeff Cutler multiple times tonight. I think [Robbins] should be put on paid admin leave. What are your thoughts? The language of what is being requested in the subpoena and the problem cases clearly came from her."<br><br>9:22 p.m.: Chang responded by email and stated: "I agree the info came from her and if she believed something shady was going on she should have brought it to the board. However I think we need to review whistleblower statutes before taking action."<br><br>12:38 a.m.: Cook sent an email to Chang in which she stated: "[S]he is probably protected by fed law. Check it out first thing. Meeting starts at 1 p.m. I want to put her on paid admin leave asap. I learned Mayona was moving out boxes to her car this afternoon - before the subpoena came. How coincidental is all of this??? [Brain] was in DC at his intl headquarters all week, do you think this was meant to embarrass him slightly if it came out while he was still there??? He and I knew something BIG would happen this week. But this is crap and I want her out of there."<br><br>7:41 a.m.: Cook emailed Chang and asked whether Robbins could be put on paid administrative leave "without violating erisa [sic]?" Chang responded by email stating: "I don't know if paid admin leave would be considered the same as suspension since none of the cases mention an instance in which someone | Ex. 111;<br>Ex. 171;<br>Ex. 172;<br>Ex. 175;<br>Ex. 514 |

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| | was put on paid leave (almost all dealt with discharges). . . . It turns out that the DOL also can bring an ERISA 510 action. Anyway, I was thinking if we put her on paid admin leave assuming she has standing (participant or fiduciary) or the DOL sues, what would be the damages or equitable relief [ ] since she was paid and is still an employee. Thus, I think she should be put on paid leave to at least prevent her from taking out documents. I also[ ] think the Corp should proceed with the independent audit and it will find that the Corp is costly/inefficient etc and the directors can then get bids from TPAs to perform collection and audit work and I am sure the bids will be alot [sic] less than what the Corp cost and Jt. Board can just hire a tpa and the directors can dissolve the corporation since it has no clients/revenues." | |
| November 18, 2011 | 1:10 p.m.: JDC meeting held. Bond Beebe and Hemming Morse presented their respective bids to the trustees. Trustees then selected Bond Beebe to do the compliance audit of the A&C Department.<br><br>2:30 p.m.: Joint Board meeting held. Trustees voted and agreed to solicit RFPs for the collection services then performed by the A&C Department once the compliance audit was complete. Cook then informed trustees of the subpoena from the DOL and Robbins' contact with the DOL. The trustees voted to engage Cook to represent the Trust Funds with respect to response to, and compliance with, the subpoena. Barton stated he believed Robbins should be placed on paid administrative leave "given her improper handling of this matter." Brain then asked Allen whether Robbins had asked him to write a letter to the OPCMIA president. Allen said she had been asking him to do so for several months, and that "[w]hen it appeared the [compliance audit] would proceed, Ms. Robbins attempted to exert even further pressure on Mr. Allen to send the letter . . . ." After further discussion, the trustees voted unanimously to put Robbins on immediate paid administrative leave "until such time as the matter pending before the DOL is resolved." Brain recused himself from the vote but remained in the room while the matter was discussed and the votes cast. | Ex. 16;<br>Ex. 17 |
| November 22, 2011 | Lee forwarded an email to his supervisor, Teresa Warren, with an attachment written by Bansmer. It detailed a list of problems with the Emerald Trac System used by Zenith and the Trust Funds. Bansmer had given the list to Halford and/or Allen. In his email Lee stated: "I had a talk with [Bansmer] as I was angry enough to fire her but I had to get over myself. I just can not [sic] add any more drama to this place. Give me your thoughts." The email was forwarded to other Zenith managers and on December 1, 2011 was sent to Francey George, a Zenith human resources ("HR") employee. | Ex. 194;<br>Ex. 140 |
| November 30, 2011 | Joint Board meeting held. Trustees discussed the Brock Landers email and voted to replace Halford with Cook as collections counsel. | Ex. 18 |

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| Early December 2011 | Cook and Lee discussed Rice's role in the Brock Landers draft letter to the OPCMIA. | Dkt. 292 |
| December 1, 2011 | Brain told Lee that Zenith's work with the Trust Funds was being put out to bid. | Dkt. 292 |
| December 6, 2011 | George sent an email to Warren in which she wrote that she had been "conducting fact-finding meetings to learn more about the issues that have occurred in Monrovia between the Trustees and two of our employees, Louise Bansmer and Corey Rice." | Ex. 198 |
| December 13 & 19, 2011 | Cook and Brain exchanged emails as to the decision by Rice to decline to sign an affidavit regarding the Brock Landers email and his likely termination from Zenith. Cook stated that she believed Rice and Bansmer "are blindly loyal" to Robbins. | Ex. 504 |
| December 20, 2011 | Cook received an email that reflected that Bansmer communicated with Robbins after being instructed not to do so because Robbins was on leave. Cook forwarded the email to Lee and stated: "she is still calling Cherylee???"<br><br>Lee sent an email to George in which he wrote that he had discussed Rice and Bansmer with his supervisors, and that he also had discussed them with Cook. Lee expressed his concern that terminating Rice at that time was not in the best interest of the client, but that Bansmer needed to be dismissed.<br><br>In a later email to George, Lee wrote that Cook informed him that Bansmer had spoken to Robbins and that Cook was unhappy about that. | Ex. 178; Ex. 179; Ex. 208 |
| December 22, 2011 | Lee sent an email to George in which he wrote that he had spoken to Cook who said Rice and Bansmer should be "terminated together due to the mother/son connection" because Cook was fearful of retaliation by Rice. Lee stated he was not comfortable with terminating Rice at that time. | Ex. 179 |
| December 30, 2011 | Lee sent an email to his supervisors at Zenith in which he wrote that he had spoken to Cook who still expressed concerns about retaliation from Rice if Bansmer were terminated first. He also wrote that Cook asked Lee to speak with Brain, who Lee identified as "the Trustee with the major concerns/ issue with the handling of [Rice]."<br><br>In a follow up email, Lee wrote that he had called Brain who still had his "doubts" regarding Rice and felt Rice would retaliate, but that Rice was a Zenith employee and Brain would not interfere with Zenith's decision. Warren responded that Zenith has to do the right thing for the client and she was not sure that Rice was "the right thing. Especially after your conversation with [Brain]." | Ex. 207 |
| | **2012** | |
| January 4, 2012 | Lee sent an email to the trustees to inform them that Rice and Bansmer had | Ex. 87 |

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| | been terminated. Lee wrote that "Rice's actions in an e-mail exchange to discredit a Trustee[] as well as his ongoing communication with Cheryle Robbins . . . continues to violate [Zenith] policies of confidentiality."<br><br>With respect to Bansmer, Lee wrote that she "continues to speak with Cheryle Robbins, regarding Trust Fund matters, after being counseled on several occasions not to do so. In addition, [Bansmer] has not embraced moving forward with the new Emerald Trac system." | |
| January 19, 2012 | Joint Board meeting held. Trustees discussed the possibility of dissolving the Administrative Corporation and having Zenith take over its services. Trustees voted to have Cook prepare and send out RFPs to take over the work of the A&C Department. | Ex. 29 |
| February 13, 2012 | Zenith submitted proposal to Joint Board, drafted by Lee and Zenith President John Corapi, to take over the collections work previously performed by the A&C Department. Allen told Lee and Corapi that Zenith needed to "sharpen their pencil" and submit a revised proposal. | Ex. 35 |
| February 25-26, 2012 | Cook reviewed Robbins' phone records and exchanged emails with Brain about them. Cook highlighted Robbins' calls with Mora, Baldwin, Allen and Halford, as well as the calls made in connection with the DOL investigation, including the subpoena. Cook referred to the phone records as a "treasure trove." Cook also stated: "The fact that [Robbins] called Mora right after she got canned is really key. Remember I told her that one of the reasons for the leave was her conspiring to have one of the labor trustees disciplined by the International." | Ex. 177; Ex. 186 |
| March 12, 2012 | Cook sent an email to John Merchant of Bond Beebe while he was conducting the audit of the A&C Department. She asked him to review hard drives to look for certain things including any emails between Robbins and Mora, Halford, Allen and others, any emails related to the DOL investigation, any emails containing "opcmia.org" and any emails referring to Brain, all during the period of September 16-November 18, 2011. Cook forwarded the Merchant email to Brain and asked if there were any other search terms that Merchant should use. Brain responded that all JDC trustees should be listed so no one could say that he was "picked on." He also added emails to or from Cory Rice and a few other terms to the planned search by Merchant. | Ex. 176 |
| March 27, 2012 | Lee sent an email to Corapi in which he stated that Allen had called Lee and had stated that Allen and Corapi previously had discussed that Zenith could reduce the dollar amount in its proposal to take over the services of the A&C Department by hiring replacement staff at Zenith. Lee also wrote that Allen had told Lee that he "sees" Zenith lowering its quote by lowering salaries of the current A&C Department staff and replacing them if they do not agree with the reductions. Corapi, Warren and Lee all agreed to revise the bid to include this proposal. | Ex. 37; Ex. 73 |

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| | Lee then submitted the revised proposal to the Joint Board. It stated: "If Zenith American Solutions is able to hire qualified staff at a lower salary rate than the current staff we will pass the savings on to the Trust Funds. If we are not able to lower salaries (through new people or reduced salaries of current staff) our current fee quote would stand." | |
| April 12, 2012 | Joint Board meeting held. Merchant presented the findings of the audit. He gave the A&C Department a "D" grade. Merchant stated he did not speak to Robbins during the audit. After Merchant left, the trustees discussed the findings of the audit. Cook stated the report was objective and showed that the A&C Department was inefficient and lacked adequate supervision over its personnel and that both of these concerns "cannot be overlooked." Cook stated that a sub-committee had reviewed the proposals from Zenith and others to take over the services of the A&C Department and Zenith was recommended. The trustees voted to contract with Zenith to take over those services and to dissolve the Administrative Corporation. Baldwin then asked whether the services were put out to bid "in an effort to get rid of Cheryle Robbins." Trustees Nodland and Allen said no, and that the audit had been discussed before Robbins was put on leave. | Ex. 23 |
| April 14, 2012 | Lee sent an email to his supervisors at Zenith that informed them of the new work with the Trust Funds. He stated that he told Cook that Zenith may "need to hire all current employees (with the exception of Cheryle Ann Robbins) to ensure a seamless transition." | Ex. 239 |
| | **2013** | |
| 2013 | DOL interviewed Cook and others, during its investigation. | |
| | **2014** | |
| January 28, 2014 | Reed sent an email to the Joint Board trustees with a proposal to settle the private, civil action previously brought by Robbins for wrongful termination. In the email, Reed proposed that the settlement be funded with cash provided by the Trust Funds. Briceno voted in favor of the proposed settlement. Brain voted against the proposed settlement. | Ex. 1030; Ex. 1048; Ex. 1049 |

**D. Witnesses**[5]

1. David Baldwin

Baldwin was a credible witness. His tone and demeanor while testifying contributed to this conclusion. However, Baldwin did not have a clear memory as to many of the relevant events. Therefore, his

[5] The following summaries of the live testimony of the trial witnesses focus on what was presented as to disputed facts. Thus, they do not discuss all of the evidence presented in the pre-trial declarations or at trial by each witness.

testimony about them carried little, if any, weight. For example, Baldwin could not clearly recall whether Brain pressured him on how to cast his vote at the November 18, 2011 Joint Board meeting. Nor could he recall how he voted at the April 12, 2012 Joint Board meeting with respect to Zenith taking over the functions of the A&C Department and the corresponding dissolution of the Administrative Corporation. That Baldwin conceded that he did not recall all of these matters, added to his credibility. In that regard, it is significant that Baldwin testified with confidence as to statements by Cook at the November 18 meeting and the effect that they had on him.

Baldwin's live testimony was not entirely consistent with his declaration. For example, at trial he testified that he had no personal knowledge of Brain's alleged misconduct, but in his declaration he stated that he had observed Brain acting improperly with a contractor at Diablo Canyon. In his declaration Baldwin also stated that Brain stopped sending him to training sessions and seminars, but at trial testified that he was permitted to attend such a conference in 2015. However, Baldwin also testified that he was automatically invited to that conference due to his position. On balance, these inconsistencies were quite modest and as to tangential issues. Therefore, they did not affect the overall impression that Baldwin presented as an honest and credible witness.

In his declaration, Baldwin stated the following:

1. Baldwin was a labor trustee. He and Robbins are good friends.
2. Robbins expressed concerns to Baldwin from at least 2006 through November 2011 regarding what she viewed as Brain's interference with the collection of contractor contributions by the A&C Department. In or about May 2011, Allen also expressed to Baldwin his view that Brain was improperly handling relationships with contractors.
3. Baldwin had one experience with Brain in 2009 or 2010 during which he believed Brain improperly took the side of a contractor, rather than the corresponding trust, who performed work at the Diablo Canyon Power Plant, which Baldwin oversaw.
4. Baldwin attended the November 18, 2011 Joint Board meeting, which focused largely on Robbins. During the discussion of the contact by Robbins with the DOL, Cook took the lead in the discussion and spoke more than anyone else. She told the trustees that it was improper for an employee of the Trust Funds to have contacted the government without informing the trustees. Cook stated more than once that Robbins must have called the DOL because the DOL was not likely to initiate contact with someone on the person's cell phone. Brain asked Allen to discuss the incident in which Robbins pressed him to write a letter to the OPCMIA regarding Brain's alleged misconduct. By the end of the November 18 meeting, the atmosphere among those present in the room was very hostile toward Robbins. Cook said: "Come on. You're all smart people here. Do the right thing."
5. Baldwin believed that Cook used the Bond Beebe report to justify removing Robbins from her position. Baldwin opposed replacing the A&C Department until the DOL completed its investigation and the trustees had sufficient time to review the Bond Beebe report.
6. Beginning in or about late 2011, Cook began playing a more active role in preparing the minutes for the Joint Board meetings. Baldwin believed that some of the minutes drafted by Cook were

incomplete.

7. Starting no later than mid-2011, Baldwin observed incidents from which he inferred that Brain and Cook were engaged in some personal relationship that went beyond their professional ties. Baldwin believed that, because of his fiduciary duties and potential liability should he fail to act on a matter of concern, it was necessary to have this issue investigated. Baldwin, Robbins and Mora hired a private investigator to do so. Baldwin feared that Cook and Brain would retaliate against him if they learned about this investigation into the nature of their relationship.
8. Brain removed Baldwin as a trustee on July 24, 2013.
9. Baldwin resigned as a business agent on December 2, 2015. He did so because he believed that, beginning early 2012, Brain singled him out for unfair treatment. For example, Brain stopped sending Baldwin to training sessions and other educational seminars.

As noted, Baldwin's trial testimony generally conformed to the statements in his declaration. His trial testimony included the following:

1. At the November 18, 2011 Joint Board meeting, statements by Cook and Allen about Robbins affected Baldwin's decision to vote in favor of placing Robbins on paid administrative leave. Their statements cast Robbins in a poor light.
2. Baldwin paid approximately $1000 to the investigator to investigate the nature of the relationship between Brain and Cook. Baldwin did not want Brain and Cook to know about his investigation because he had observed that people who took positions adverse to either of them lost their positions. He was concerned about such potential retaliation.

2. Melissa Cook

Cook testified intelligently and coherently. She is both. However, her testimony was often presented in a defensive manner, and occasionally in a combative one. This reduced her credibility. Similarly, Cook often provided answers to questions that exceeded their scope. Her words, demeanor and attitude reflected a witness who sought to control the narrative. That Cook took these actions was neither unexpected nor unusual. She was facing serious allegations about the propriety of her conduct as an attorney.

Notwithstanding the foregoing, Cook generally presented as a credible witness. However, there were some inconsistencies in her testimony with respect to when Cook told Chandler about the start date of her romantic relationship with Brain. Thus, Cook told Chandler the relationship did not begin until May 2012, but text messages and other evidence suggest that it likely started as early as November 2011. Moreover, in May 2013, when asked by Chandler about the nature of her relationship with Brain, Cook did not disclose that it was a personal, romantic one as well as a professional one. Cook also testified that she was not concerned about Brain on a personal level while serving as counsel to the Trust Funds. However, in many of her emails and text messages to Brain about the DOL investigation and allegations against Brain, she used personal and casual language that was quite different than customary for attorney-client communications in a business setting. These reflect a level of concern about Brain that

went beyond a professional relationship, which likely affected the manner in which Cook was evaluating the DOL investigation and its potential effect on Brain.

Furthermore, the evidence showed that Cook and Brain concealed their relationship from other trustees and that Cook continued to represent the Trust Funds, notwithstanding the clear showing of what was at least an apparent conflict of interest due to her personal relationship with Brain. That there was no disclosure, and continued representation, presented serious concerns about the overall credibility of Cook's testimony. Among other things, she had a substantial motivation to justify her professional conduct in connection with the matters raised during the trial.

In her declaration, Cook provided evidence as to the following matters:

1. On November 15, 2011, Cook spoke with Robbins about the DOL call to Robbins. Robbins told Cook the representative of the DOL said that the DOL was investigating Brain, and that she had informed Halford of the DOL contact.
2. After receiving the DOL subpoena, Cook became concerned that Robbins had access to the requested records. Cook thought that such access could compromise the ability of the Trust Funds to respond appropriately to the subpoena. Cook concluded that it was not a coincidence that the subpoena was served the day before the November 18, 2011 Joint Board meeting. She believed that this timing was the result of efforts by Robbins to prevent the audit of the A&C Department. Cook asked Chang to research the issue of what options were available to the trustees with respect to Robbins. She and Chang concluded that no adverse employment action could be taken against Robbins that was related to her communication with the DOL.
3. At the November 18, 2011 Joint Board meeting, Cook expressed concerns about the circumstances under which the subpoena was served, including the timing of service, *i.e.*, just prior to the meeting to select an auditor. Cook told the trustees that Robbins may have qualified for protections because she could be deemed a whistleblower.
4. Following the November 18 meeting, Cook asked Briceno and Lee to accompany her when she told Robbins about the vote to place her on paid administrative leave. Halford also joined them. Cook informed Robbins that the trustees had voted to place on her paid administrative leave as a result of her apparent actions to cause a trustee to be disciplined. She did not say it was because of Robbins' contact with the DOL.
5. Cook's firm was engaged to represent the Trust Funds and respond to the subpoena. Her firm then requested copies of the contractor files from the offices of the Trust Funds so that they could be reviewed, and if responsive to the subpoena and appropriate, provided to the DOL. Cook and her associates reviewed all files and investigated all claims previously asserted by Robbins with respect to the conduct of Brain.
6. Cook met with Rice to discuss his role in the draft letter to the OPCMIA. Cook was informed by Lee in December 2011 that Zenith had decided to terminate Rice and Bansmer. Cook thought that was unfortunate because she liked Rice.
7. At the April 12, 2012 Joint Board meeting, Cook stated that it would be prudent for the trustees to outsource the services of the Administrative Corporation given the results of the audit.

8. Cook and Brain grew close in late 2011 and began a romantic relationship in May 2012.

At the trial, Cook generally testified consistently with her declaration. Her trial testimony included the following:

1. Cook received a call from Chandler on May 6, 2013. He asked her if she was in a personal relationship with Brain. She responded that Brain was a client and a friend. After her conversation with Chandler, Cook had several phone calls with Brain before returning Chandler's call the next day and leaving a message.
2. Cook took over as collections counsel on November 30, 2011. This was following the termination of Halford. She did not disclose her relationship with Brain to the trustees at the time that she was hired as collections counsel.
3. Cook did not have any role in calling for the November 18, 2011 Joint Board meeting or planning its agenda. At the meeting, Cook told the trustees that it was not appropriate for Robbins to have contact with the DOL without reporting it to them. Prior to this meeting, Cook did not discuss putting Robbins on paid leave with anyone except Chang and Cutler.
4. After the November 18 meeting, Cook told Robbins that she was being placed on paid administrative leave because she had pressured a trustee to make false allegations about Brain in order to prevent the audit from moving forward.
5. Cook believed that the timing of the DOL subpoena was not a coincidence. Instead it was the result of efforts by Robbins to stop the audit of the A&C Department. Cook wanted to put Robbins on paid administrative leave due to what she considered to be insubordinate conduct by Robbins, *i.e.*, Robbins contacting the DOL in bad faith to cause the service of a subpoena on the Trust Funds the day before the scheduled interviews of candidates to perform the audit.
6. Cook knew that the A&C Department was inefficient, and she drafted procedures for an audit to measure that deficiency.
7. Allen once approached Cook to ask about how he could have Brain removed as a trustee.
8. Cook was aware that Robbins and Rice were friends. Cook talked to Lee more than once about Rice's involvement in the preparation of the OPCMIA letter. She told Lee about the concerns of Brain and Allen that Rice might retaliate in some way if his mother was terminated before him.
9. After Robbins was placed on paid leave the Administrative Corporation Board directed that the hard drive of Robbins' work computer be reviewed. This review was performed by Bond Beebe.
10. At the April 12, 2012 Joint Board meeting, after Merchant gave his report, Cook told the trustees that it would be a breach of their fiduciary duty to allow the Administrative Corporation to continue to operate as in the past, given its inefficiencies.

3. Bill Lee

Lee was a very credible witness. He presented thoughtful and clear answers, and generally recalled the relevant events clearly. His coherent testimony was presented promptly in response to both direct and cross-examination, thereby adding to its weight. His demeanor and attitude while testifying also showed that he was credible and believable.

There was some inconsistency between statements in Lee's declaration and his earlier deposition testimony. For example, in his declaration Lee stated that, after Robbins was placed on leave, Cook told Robbins it was because of her contact with the DOL. However, during his deposition and at trial, Lee could not recall what Cook said to Robbins regarding why she was being placed on leave. In response to other questions by defense counsel, Lee testified at trial that he was a target of a criminal investigation related to this case. Lee testified that he learned about that investigation in 2015. Lee was granted immunity in that investigation on October 20, 2015. Lee's deposition was taken before he was aware of the criminal investigation, and his declaration was signed after he had been granted immunity. These facts are relevant to assessing the weight of Lee's testimony. However, even with these factors in mind, his tone, demeanor, attitude and responses all showed him to be very credible and coherent. His testimony was, therefore, reliable and warranted substantial weight.

In his declaration, Lee stated the following:

1. Lee's duties at Zenith included supervising Rice and Bansmer, and servicing and maintaining the relationship between Zenith and the trustees and staff of the Trust Funds.
2. Lee's responsibilities included attending JDC and Joint Board meetings. During the JDC meetings Brain would, in general, recommend that contractors who owed delinquent funds be given more "breathing room" to pay late, or to "cut contractors some slack" by delaying formal efforts to collect. Brain also advocated for the waiver of liquidated damages to the Trust Funds if the delinquent employer paid the interest associated with a late payment. He implemented such waivers on certain occasions. Robbins and Halford often took positions contrary those advanced by Brain.
3. Cook called Lee on several occasions prior to November 18, 2011, to state that she was upset that Robbins had been in contact with the DOL. Brain also told Lee both before and after November 18, 2011, that he was displeased that Robbins had made contact with the DOL.
4. Cook asked Lee to assume the duties that Robbins had performed prior to her placement on administrative leave. Lee did so. In that role, Lee regularly communicated with Cook and Brain from November 18, 2011 to April 2012. On several occasions Cook and Brain each stated that he or she was upset about Robbins' contact with the DOL. In a series of conversations, Cook told Lee that Robbins should not return to her position as director of the A&C Department.
5. Between November 2011 and January 2012, Lee was concerned that Zenith was at risk of losing its contract with the Trust Funds. On December 1 or 2, 2011, Brain informed Lee that the Joint Board had decided to put out for bids the work that Zenith had been performing. At about the same time, Cook told Lee that Rice had written an email that was critical of Brain, and that it would be in Zenith's best interest to terminate Rice.
6. Cook instructed Lee that the Zenith employees should not contact Robbins after she was placed on administrative leave. On December 20, 2011, Cook forwarded to Lee an email from Bansmer stating that she had spoken with Robbins recently.
7. On December 22, 2011, Cook told Lee that Bansmer and Rice should both be terminated because of the "mother-son connection."

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

| Case No. | LA CV14-03911 JAK (AGRx) | Date | July 25, 2016 |
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| Title | Thomas E. Perez v. Scott Brain, et al. | | |

8. On or about December 30, 2011, Cook asked Lee to speak to Brain about terminating Rice and Bansmer. Brain told Lee he wanted Rice terminated. Brain echoed Cook's view that Rice and Bansmer should be terminated simultaneously, to prevent Rice from retaliating in some way.
9. Lee agreed that Rice should not have sent the email to Allen, but he did not want to terminate Rice whom he thought to be an essential person in the office.
10. On February 10, 2012, after Zenith presented its bid to the Joint Board to take over the A&C Department, Allen instructed Zenith to "sharpen their pencil." In response, Zenith submitted a revised bid that reduced costs by eliminating the director position that was held by Robbins. After Zenith was awarded the bid, it hired all staff of the A&C Department except Robbins. Cook recommended to Lee a candidate to replace Robbins.

At trial, Lee testified to the following additional facts:

1. Lee was not part of the decision by Zenith to decline to offer Robbins her prior position.
2. Lee believed the primary reason Rice was terminated was for sending the "Brock Landers" e-mail to Allen. Lee believed that this conduct violated Zenith's unwritten, general policy of remaining neutral as a third-party administrator in the politics of clients like the Trust Funds.
3. Lee did not play any role in the final determination whether to terminate Rice. However, the HR personnel asked Lee for his opinion on this issue. Lee told HR that he was concerned about terminating Rice at that time, because Rice provided many services to the client.
4. At some time in November or December 2011, Lee learned that Bansmer had written an email critical of a new system put in place by Zenith -- the Emerald Trac System. Lee observed that Bansmer had difficulty adapting to the new system. Lee observed that Robbins also had a negative attitude about the implementation of this new system. Zenith also had difficulty implementing the new system.
5. On or about December 30, 2011, Brain told Lee that he was concerned Rice might retaliate if Bansmer were terminated before he was. But, Brain said this was a decision for Zenith to make, and that he would not interfere.
6. Lee heard Robbins say on more than one occasion that she did not want the compliance audit of the A&C Department to go forward. Robbins expressed concern that she would lose her job if the audit were completed.
7. On November 10, 2011, Lee spoke with Allen. At that time, Allen expressed his interest in having Zenith take over the services then provided by the A&C Department. This surprised Lee because he had not considered Zenith taking over that work.
8. Allen called for a special Joint Board meeting to be held on November 18, 2011. Brain seconded the request. Cook also had a role in calling for the meeting.
9. Lee and Corapi drafted Zenith's proposal to take over the collection services of the A&C Department. Allen then told Lee and Corapi that Zenith needed to "sharpen their pencil." Corapi then presented a lower figure by eliminating the director position that Robbins previously held. This was the highest paid position in the office. Lee was not involved in Corapi's revision of the proposal.
10. When Zenith took over the A&C Department in May 2012, it was in poor condition. Lee was

involved in improving the A&C Department starting after May 2012, and continuing through August 2015. As of August 2015, some improvements had been made, but Zenith was still working to implement all recommendations made by Bond Beebe.

11. Between November 2011 and April 2012, Lee provided reports to his superiors at Zenith regarding the Trust Funds.

4. Cheryl Robbins

Robbins was a credible witness. It is clear that she has some personal stake in the outcome of the matter, inasmuch as her prior performance in the A&C Department is at issue. Apparently as a result, like Cook, her answers to questions often exceeded their scope as she tried to tell her version of events. However, she was neither defensive nor hostile when her testimony was limited by the Court.

Robbins also had a clear memory about the key underlying events. However, there were some inconsistencies in her testimony. Most notable was her testimony that she spoke with DOL investigator Cynthia Spatz on or about August 5, 2013, and told her about a chance encounter with Chang at a Nordstrom store in Arcadia in mid-July. When Robbins spoke to Chandler on or about February 4, 2015, she told him about the same encounter with Chang. Robbins told him that Chang said "I'm sorry for what's happened" and that her eyes welled up with tears. However, later in 2015 Robbins told Chandler that it might not have actually been Chang whom she met.

Notwithstanding this puzzling testimony, a consideration of all of the testimony by Robbins, as well as her demeanor, attitude and tone, led the Court to find her very credible. Therefore, it is appropriate to give substantial weight to those portions of her testimony where no similar issues were raised as to its reliability.[6] Thus, this inconsistency does not significantly affect Robbins' credibility or the weight of her testimony.

In her declaration, Robbins presented the following statements:

1. Prior to November 18, 2011, Robbins never had been disciplined or reprimanded in any way by the Trust Funds or Administrative Corporation.
2. Before Robbins was director of the A&C Department, the policy was that if a contractor's payment check to the A&C Department was returned for non-sufficient funds, the contractor was not assessed interest or liquidated damages, so long as immediate payment was made. After becoming director, at several JDC meetings, Robbins recommended that interest and liquidated damages be assessed under those circumstances because the bad check resulted in a delay in the payment to the Trust Funds and increased work for the A&C Department. Halford agreed. Each time the issue was raised, Brain stated he thought that would be unfair.
3. Robbins believed that Brain interfered with the work of the A&C Department in making collections

[6] *See* Ninth Circuit Model Jury Instruction 1.11 "Credibility of Witnesses," a finder of fact may believe "everything a witness says, or part of it, or none of it."

from certain contractors. They included A&G, Santa Clarita Concrete, Beta Construction and Kitson Specialties.

4. Robbins believed that Brain interfered with collections by advocating before the JDC in an effort to have a policy adopted that would have reduced the amounts that would be due from delinquent contractors who were signatories to contracts with Local 600. For example, when Robbins reported delinquent payments by B&M at a JDC meeting, Brain stated that B&M should not be audited because it was simply mistaken about its obligations to the Trust Funds. Similarly, Pima, a Local 600 contractor, was audited several times. When this was discussed at a JDC meeting, Brain stated that certain workers should be classified as apprentices because they had not notified Pima that they were entitled to an increased level of benefits as journeymen. Nevertheless, Pima eventually paid the full amount owed.
5. Finally, Robbins believed that Brain interfered with collections by improperly assisting Local 600 contractors during the audit and collections process. She testified that he did so by promoting action that would have reduced the amounts found due. For example, Pima became delinquent a second time and an audit was scheduled. Pima requested the audit be postponed on more than one occasion. Robbins discussed this at a JDC meeting because she was concerned Pima was trying to sidestep the audit. Brain told the JDC he had spoken to Pima and the audit must be postponed because one or more Pima employees were traveling or out of the office. The audit was ultimately delayed for more than nine months. As another example, Robbins contacted Local 600 contractor Cano to schedule an audit. Cano's owner told Robbins that Brain had told her that Cano would not be subject to an audit. At a JDC meeting, Brain told the JDC that Cano should not have to pay liquidated damages. Robbins also testified about having observed Brain attend an arbitration over the effort by the Trust Funds to collect delinquent fees from HB Parkco, a Local 600 contractor. During the arbitration Brain argued that the findings of the audit by the A&C Department were inaccurate, and that HB Parkco did not owe the full amount claimed. Other similar examples included issues with Local 600 contractors Icon West and California High Tech.
6. Robbins testified about the following matters, which are considered for the limited purpose of their effect on her, and not for the truth of the matters asserted: (i) A&G's owner told Robbins that Brain told him that A&G did not have to pay benefits to the Trust Funds as long as he worked within the geographic area covered by Local 600, and if he worked in the jurisdiction of Local 500 he would have to "fly under the radar"; (ii) the owner of Santa Clarita told Robbins that Brain told him that Santa Clarita had to pay into only certain of the Trust Funds, and that Robbins' contrary position was wrong; (iii) representatives of Beta told Robbins several times that Brain had told them Beta did not have to cooperate with Robbins or the A&C Department, and that they could take their time submitting their required reports; (iv) a Kitson representative attended a JDC meeting and told the trustees that Brain had told him that Kitson did not need to pay into all of the Trust Funds; (v) an owner of B&M told Robbins that Brain had told him not to worry about contributions owed because Brain would ensure no audit was conducted; and (vi) a representative of California High Tech told Robbins that Brain had told its president not to listen to Robbins or worry about any delinquencies because Brain would use his influence to reduce the amount owed.
7. Robbins reported her concerns at JDC meetings, and the trustees then discussed the issues. Robbins believes that the JDC never investigated her concerns as to Brain's conduct and Brain

was never reprimanded.

8. Robbins believed Brain had substantial influence over the JDC and Joint Board. Brain was the most vocal trustee at meetings. Brain was also the supervisor of the Local 600 trustees and had appointed them to the Joint Board.
9. Robbins observed that, beginning in 2011, Cook and Brain appeared to have a close relationship. When Robbins raised concerns at JDC meetings about Brain's interference with collections, Cook reacted to protect Brain by defending his actions.
10. When Robbins met with Rice and Allen on or about October 11, 2011, Allen asked Rice and Robbins to send him a list of examples of Brain's alleged misconduct. Allen suggested sending the letter to Finley at the OPCMIA. Robbins wanted Finley to be aware of what was going on, but did not believe sending a letter would be useful. She never asked Allen to send the letter.
11. Rice and Bansmer are friends of Robbins.
12. Chandler contacted Robbins on her cell phone on October 14, 2011. Robbins did not want to tell Cook about the call because she thought Cook would not believe that the DOL contacted her. When Cook learned about the call, she contacted Robbins. Cook sounded very angry, cursed at Robbins and called her a "c--t."
13. Robbins believed former trustees Jerry Meacham and Larry Jenkins had complained to the DOL because both previously had expressed concerns to Robbins about Brain. In particular they spoke about his actions that caused contractors to underpay the Trust Funds.
14. Robbins obtained her own counsel after the DOL contact. She then contacted Chandler and told him that, on advice of counsel, she would not provide any records to the DOL without a subpoena. She also told Chandler that if he wanted her to respond to a subpoena he should act quickly, because Cook had told Robbins she had no right to talk to the DOL and Robbins feared Cook would try to remove Robbins from her position.
15. On December 17, 2011, after Robbins was placed on administrative leave, Lee called her to wish her a happy birthday. During the conversation, he told her to look for a new job because Cook and the trustees were going to be eliminating the A&C Department. Lee also relayed that Cook had told him that Zenith would not get the contract to perform the work of the A&C Department if it hired Robbins. However, Robbins also had hand-written notes from December 17, 2011, which mention her conversation with Lee. They do not contain any entries about the aforementioned comments by Cook. Ex. 1050.

During her trial testimony, Robbins testified to the following additional matters:

1. Robbins was surprised when she learned the Joint Board was considering alternatives to the A&C Department. She was also concerned about the jobs of everyone employed by the A&C Department, including her own.
2. Robbins spoke with Chandler approximately six times between October 14, 2011, and November 18, 2011, about the contractors she thought Brain was assisting to avoid paying benefits to the Trust Funds. Robbins specifically mentioned B&M and A&G to Chandler because each was involved in litigation with the Trust Funds. Consequently, Chandler could examine the details of the matters by reviewing court records that were available to the public. Robbins was not

comfortable sharing any other information with Chandler at that point.

3. Robbins had ongoing conversations with Allen about Brain's assistance to contractors. She started doing so when Allen was appointed as a trustee in 2009. They discussed B&M, A&G, Beta Construction, Pima, Icon West, HB Parkco, California High Tech Floors, S.J. Sousa and Lemay General Engineering.
4. The A&C Department audited each of these contractors. The audits concluded that B&M and A&G each owed $1-$3 Million to the Trust Funds.
5. With respect to Santa Clarita, an audit was performed. It showed that certain amounts were owed. Brain had told Santa Clarita it did not have to pay into all of the Trust Funds. The JDC discussed the issue and then approved a motion to require Santa Clarita to pay in full, which it did. Robbins recalls that Brain did not agree with the amount to be paid because he interpreted the governing agreement differently than Halford and other trustees.
6. With respect to Kitson, an audit was performed. It showed that Kitson failed to make contributions for cement masons. Kitson responded by saying they were not cement masons. The JDC discussed the issue and ultimately decided not to pursue payment by Kitson, thereby voiding the findings of the audit. Brain agreed with the outcome because he opposed pursuing payment by Kitson.
7. With respect to B&M, an audit was performed in 2008. It showed that B&M had failed to make contributions for cement masons. Brain opposed having an audit performed. He also told the trustees he would have the contract abrogated. Robbins interpreted this statement to mean that if this occurred, B&M would no longer owe any money to the Trust Funds. B&M refused to pay. The JDC then initiated civil litigation, which later settled.
8. With respect to A&G, an audit was performed. It showed a failure to make contributions for cement masons. A&G disputed the findings. The JDC then initiated civil litigation, which later settled.
9. With respect to Pima, numerous audits were performed. They showed a failure to make contributions for cement masons. The matter was unresolved at the time Robbins was placed on leave.
10. With respect to Icon West, an audit was performed. It showed a failure to make contributions for cement masons. The matter was resolved by the JDC.
11. With respect to HB Parkco, three different audits were performed. They showed a failure to make contributions for cement masons. An arbitration was conducted that Brain attended. The matter was later resolved.
12. Robbins believed Brain's conduct was not in the best interest of the Trust Funds based on her many years of experience with the JDC and training in ERISA. She believed that Brain was taking actions that interfered with or impeded the efforts by the Trust Funds to collect funds from the aforementioned entities. This did not advance the interests of the plan participants.
13. After Robbins was placed on leave, Cook told her it was because she had encouraged Allen to write a letter to the OPCMIA about Brain.

5. Scott Brain

Brain did not present as a credible witness, particularly when compared with others who testified. His tone, demeanor and attitude led to this conclusion. However, his testimony showed that he valued his positions with the Trust Funds, which provided a basis for his attitude and concerns as to the allegations of his professional misconduct. Brain presented some testimony that was inconsistent with the testimony of Baldwin. Because Baldwin was more credible on these issues, his testimony warrants greater weight. Brain also testified about details of matters that occurred as many as 10-15 years ago; some of that testimony lacked force given concerns about Brain's actual recollection of all such events. Further, like Cook, Brain failed timely to disclose his personal relationship with Cook to his fellow trustees. This relationship would have been relevant to the evaluation by other trustees of the judgment and positions of Brain and Cook as to decisions significant to the Trust Funds. Therefore, Brain's failure to disclose it also affected the assessment of his credibility as a trial witness. For all of these reasons, Brain's testimony on certain key matters is given little weight.

In his declaration, Brain stated the following:

1. Brain is a member of the Joint Board and JDC. Brain understands that in his role as a trustee he is obligated to act to protect the interests of plan participants by making sure contractors pay the required amounts to the Trust Funds. He also knows that he is obligated to ensure that contractors are treated fairly during any audit and collections process.
2. Brain contends that the allegations of his misconduct lack force.[7] With respect to HB Parkco, Brain stated that he attended the arbitration at the request of this contractor, but he did not offer any testimony or opinions during the proceedings. However, he did discuss with HB Parkco that it would inform the arbitrator that it was not a signatory to the agreement that applied to the project that was at issue at the arbitration.
3. The JDC investigated each of the claims made by Robbins as to Brain's alleged misconduct. Halford and/or Cook were present at these discussions. Neither advised the JDC that any further investigation was necessary.
4. On November 18, 2011, Brain seconded Allen's call for a Joint Board meeting to discuss an alternative to the Administrative Corporation. He did so because, from the time that it was established, he always believed that to have done so was an error. He was also concerned that the A&C Department was neither performing well nor cost effective. Whether to place Robbins on leave following her contact with the DOL was not discussed prior to the Joint Board meeting.
5. Prior to the November 18 Joint Board meeting, Brain discussed with Barton certain matters related to the agenda for the meeting. In particular, they discussed replacing the Administrative Corporation, which Barton favored. Between November 12-17 Brain also spoke to the Joint Board trustees of the Local 600 -- Baldwin, Briceno, Jacobs and Mendez. These conversations also concerned the replacement of the Administrative Corporation.

[7] The testimony in paragraphs 20-30 of Brain's declaration was admitted for the limited purpose of its effect on Robbins' state of mind, and not for the truth of the matters asserted. Brain testified at trial that these matters were all discussed at JDC meetings between 2005-2010, at which Robbins was present.

6. Brain told Lee that he was concerned that Rice might retaliate in some manner due to the termination of Bansmer. The basis for this view was that Rice and Bansmer previously worked for a rival union trust fund and Rice had access to IT systems and personal information about union members. Brain never suggested to Lee that he thought Rice or Bansmer should be terminated.

During trial, Brain testified as to the following:

1. Brain appoints certain trustees and has the ability to remove them from those positions.
2. On some occasions, Brain communicates with contractors who have been audited by the Trust Funds.
3. Brain attended the HB Parkco arbitration. He had discussed his position on HB Parkco at earlier JDC meetings when Robbins was present. He does not recall whether he told Robbins in advance that he would be present at the arbitration. He did not discuss with HB Parkco representative Hoyle what it should present at the arbitration. However, at his prior deposition, he testified that he did discuss this with Hoyle.
4. Brain routinely made motions at JDC meetings to waive liquidated damages for contractors.
5. Brain does not recall whether, prior to the November 18, 2011 Joint Board meeting, Cook told him about Robbins' contact with the DOL. But, Brain confirmed that the relevant call records reflect calls between Brain and Cook on October 27, 2011, and November 8, 2011.
6. Before the November 18, 2011 meeting, Brain wanted all of the trustees whom he had appointed to know that he favored placing the work of the Administrative Corporation under Zenith.
7. Brain does not recall having a conversation with Baldwin prior to the meeting on November 18, 2011. But, in his earlier deposition testimony he stated that he believed Baldwin might not support having the functions of the Administrative Corporation placed with Zenith because Baldwin usually supported Robbins.
8. Allen approached Brain immediately prior to the November 18, 2011 Joint Board meeting and told him that Robbins had been pressuring Allen to write a letter to the OPCMIA. During the meeting, Brain asked Allen to discuss this matter, and he did so. The trustees expressed displeasure with Robbins due to what was seen as an act of insubordination.
9. The trustees did not vote to have a search made of Robbins' work computer. This decision was made by the Administrative Corporation. Nor did the trustees vote to search Robbins' phone records. The Administrative Corporation did not authorize that search.
10. Brain testified that his romantic relationship with Cook began in May 2012. But, at his earlier deposition, he testified that their first kiss was on December 5, 2011.
11. Brain removed Baldwin as a trustee in 2013. He did so because Baldwin was not productive, and had failed to attend a staff meeting.
12. Brain denied making any of the statements to contractors described by Robbins in her declaration.

6. Marcos Enriquez

Enriquez was a credible witness. His tone, demeanor, attitude and responses support this finding. It is significant, however, that many of his responses to questions were very short and narrow. This warranted giving less weight to some of his testimony.

At trial, Enriquez testified about the following:

1. He has served as a trustee for 10 years, and was a member of the JDC for four or five years.
2. He began working with Robbins about 15 years ago, and never had any problems working with her. He conferred with her on issues of concern with respect to the Trust Funds. These included matters related to contractors who were delinquent in making required payments. Robbins provided straightforward answers to his questions.
3. Robbins complained to Enriquez about Brain. She stated that Brain was doing favors for contractors by assisting them in not reporting hours worked to the Trust Funds. Enriquez always thought there was some tension between Robbins and Brain, perhaps for some personal reasons.
4. Enriquez believes Brain was doing favors for contractors. In 2008, A&G was a union contractor about which Enriquez had concerns. The owner of A&G told Enriquez that Brain had told him to "fly under the radar" and not pay certain benefits owed to the Trust Funds. On the same day, Enriquez called Robbins and told her what the owner had said, and asked her to check on the hours reported by A&G.
5. Enriquez did not talk to Brain about the A&G incident until the next JDC meeting. When the issue was raised, Brain became angry and told Enriquez that he could "destroy" him, and cause him to lose his "job" for making that statement.
6. The principal issue addressed at the November 18, 2011 Joint Board meeting, was Robbins' contact with the DOL. At the meeting, Cook stated that Robbins was not performing her job adequately. Chang said that the DOL would not contact someone on the person's cell phone, thereby suggesting that Robbins' statement was not reliable.
7. There was a lot of chaos at the meeting. This caused Enriquez to vote in favor of the motion to place Robbins on leave.
8. Cook's statements at the November 18, 2011 meeting regarding what was happening at the Trust Funds seemed ones that reflected views based on matters that were personal to her. Her statements did not appear to Enriquez to be ones that were only based on her professional judgment.
9. There was no discussion at the November 18, 2011 meeting as to whether Robbins could be deemed a whistleblower to the DOL, and as such, entitled to certain protection.
10. Enriquez voted in favor of soliciting RFPs for the services previously provided by the A&C Department. He also voted in favor of having Lee present a bid for having Zenith take over the A&C Department. He voted in favor of this motion because he wanted to ensure that the expenses of the Trust Funds were as low as possible so that they could perform their functions effectively.

7. Jeffrey Goss

In general, Goss was a credible witness. At times he appeared a bit aggressive or defensive in responding to questions about the work that he performed. However, this did not have a significant effect on his overall credibility because he had a professional interest in defending the quality of his work. His testimony also raised some concerns about his ability accurately to recall conversations that occurred during meetings held approximately 10 years ago. That warranted less weight being given to that testimony than to the rest of the matters that he addressed.

In his declaration, Goss stated the following:

1. In 2006, he was engaged to do an agreed-upon procedures analysis of the internal controls and financial management of the Trust Funds. Goss prepared a report regarding the suspense account of the Trust Funds. That account was overseen by the A&C Department. The report identified a few deficiencies with respect to the procedures that applied to the account.
2. Based on Goss's experience, he believed that the Trust Funds were too small to have an independent audit and collections department. Instead, in his opinion, a third party administrator should have been engaged to perform these functions.
3. On June 9, 2011, Goss attended a JDC meeting. At that meeting, Brain asked him if he could compare the costs of collections incurred by the Trust Funds with those incurred by similar funds. Following the meeting, Goss sent an email to his colleagues in which he requested information responsive to Brain's inquiry, *i.e.*, the collection costs incurred by other trust funds. Based on the information he received, he prepared a spreadsheet comparing the costs. He concluded that the Trust Funds were spending significantly more than other similar ones for the functions performed by the A&C Department.
4. Robbins provided Goss with a document that contained a cost analysis of the A&C Department. Goss did not believe the figures in that document were accurate because they showed that the A&C Department collected 15% of the total contributions for 2009. Goss thought that this figure overstated the amount.

At trial, Goss testified to the matters in his declaration, as well as the following:

1. Between 2006-2011, Goss reached the conclusion that Robbins was not the right person to lead the A&C Department. He expressed his opinion to Brain, Cook and Lee at various times.
2. The June 2011 cost comparison was not based on any pre-existing work program because it is not a typical part of an audit. It was hard to select trust funds for comparison because each fund has unique characteristics. But Goss did his best to design this process based on his 21 years of experience in the field.
3. Robbins suggested an alternative cost comparison be performed that used a cost per dollars collected metric. Goss declined to do so because he did not think the information she provided was accurate.
4. Following the 2006 agreed-upon procedures analysis, Goss was never asked to do any follow up

work. Thus, he did not measure whether there had been any improvement in performance as to the issues he had raised.

8. Jaime Barton

Barton could not recall much information in response to questions. When he could respond, he often could not recall any pertinent details. For example, he could not recall with certainty the events at any Joint Board meeting about which he was questioned, including how he had voted on relevant motions. In light of these issues, his testimony is given very little weight.

At trial, Barton testified to the following:

1. At about the time he became a trustee, Allen called him and requested that he attend a meeting in Robbins' office. He went to the meeting. Also present were Robbins and Halford. Allen said they were looking for a way to remove Brain from his position as a trustee.
2. At the November 18, 2011 Joint Board meeting, Barton did not make the motion to put Robbins on leave. Nor does he remember who made the motion. He also does not recall that anyone at the meeting gave any legal advice to the trustees about whistleblowers and the protection that they may receive.

9. Kathryn Halford

Halford presented as a very knowledgeable and credible witness. She had a calm demeanor, and answered questions clearly. Her tone and attitude added further weight to her credibility. Due to her substantial experience as collections counsel, Halford was quite knowledgeable about many of the issues that are central to this action. For all of these reasons, her testimony warrants, and is given substantial weight.

At trial, Halford testified about the following:

1. Halford was employed as either the "plan counsel" or "collection counsel" for the Trust Funds beginning in 1975. Her services were terminated in November 2011, but she was rehired in May or June 2013. Her primary area of practice is ERISA. Almost all of her clients are multi-employer benefit pension and health plans.
2. Halford attended JDC meetings. There were usually at least one or two requests to waive liquidated damages against a contractor at each JDC meeting.
3. Halford observed Brain make motions to waive liquidated damages at JDC meetings. He was generally in favor of waiving liquidated damages once a contractor became current with its financial obligations to one or more of the Trust Funds.
4. Prior to 1997, it was the practice of the JDC to allow delinquent contractors to petition the JDC for a waiver of liquidated damages. However, the waivers were not for multiple periods in a row. When a waiver was granted it was conditioned on the contractor remaining current as to all

financial obligations to the Trust Funds for a specified time period. From 2001 to 2011, the JDC began waiving liquidated damages repeatedly without imposing such conditions. The waivers were always granted, so long as the contractor was current in making required payments.

5. Enforcement of the liquidated damages remedy is important. It provides an incentive to contractors or employers to make timely payments of their obligations to the Trust Funds. It also helps to cover the cost of a collections department.
6. Halford heard Brain make statements at JDC meetings in support of delaying action by the JDC on collection efforts. For example, when Cano Construction was delinquent, Brain stated that it was impossible for Ms. Cano to pay on time because of the method by which she received payment from the general contractors. Brain also advocated for delayed collection efforts as to B&M and Samrod.
7. Unions who are parties to the collective bargaining agreements were obligated to enforce their terms, including contribution obligations. Unions would cooperate with the Trust Funds in connection with collection efforts. They did so by providing information from the field as to whether contractors were performing work and not reporting it. The Unions also provided backup documentation to the Trust Funds that supported a claim as to a delinquent contribution. Halford observed that Local 500 cooperated in this manner with the A&C Department when it was led by Robbins. After Brain became the business manager for Local 600, Halford did not observe the same level of cooperation. Halford noticed this change in 2002.
8. At a JDC meeting, Brain asked Halford to get a second legal opinion as to whether Santa Clarita Concrete was required to pay on core employees before taking action.
9. Halford recalled another JDC meeting at which Brain opined about the appropriate rate for a contribution as to a contractor that was unaware that an apprentice had been promoted to a higher position. Brain believed the contractor should not be assessed the higher rate unless and until the apprentice informed the contractor of the change in his job level. Halford advised the JDC that the terms of the collective bargaining agreement had to apply regardless of whether the apprentice had notified the employer.
10. Allen expressed to Halford his view that he was opposed to a complete waiver of liquidated damages and believed some should be collected to offset the cost of collections. Allen also told Halford that Brain was revealing to contractors what was being said at JDC meetings.
11. Halford was in favor of a compliance audit of the A&C Department. However, she had concerns about the nature of the audit that was ultimately performed. Halford believed that to evaluate the collection program effectively, other areas should also be examined. They included Zenith's role in collections inasmuch as the A&C Department was just one component of the collection process. She also believed that many of the issues with the A&C Department, which were ultimately identified in the audit, were caused by technology problems at Zenith. Halford expressed this view to Cook. Halford believed that the audit procedures for the A&C Department, which Cook drafted, targeted the Department as to issues that were not necessarily within its control.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

| Case No. | LA CV14-03911 JAK (AGRx) | Date | July 25, 2016 |
|---|---|---|---|
| Title | Thomas E. Perez v. Scott Brain, et al. | | |

10. Jaime Briceno

Briceno testified in a sincere manner, but his testimony was frequently inconsistent with what he stated during his deposition. Further, Briceno could not remember several material facts. Nor did his tone, demeanor or words show that his testimony as to certain matters reflected his actual recall of them. Overall Briceno's testimony was not persuasive or convincing. It warrants little weight.

In his declaration, Briceno stated the following:

1. During the November 18, 2011 Joint Board meeting, that Robbins had allegedly pressured Allen to write a letter to the OPCMIA about Brain was discussed. Thereafter, Briceno recalls that Barton stated, as a result of her conduct, Robbins should be fired. He also recalls that Cook responded that Robbins could not be fired for this conduct.
2. Briceno voted to place Robbins on leave because she had pressured Allen to write the letter. If Cook had advised Briceno that it was a violation of ERISA to put Robbins on leave for that reason, he would not have voted as he did.
3. At the April 12, 2012 Joint Board meeting, Briceno voted to engage Zenith to perform the services previously provided by the A&C Department. He did so because the Bond Beebe report made clear to him that the A&C Department was not operating in an efficient or appropriate manner. Therefore, the trustees needed to make a change.
4. In late January 2014, Briceno voted to approve the settlement of the civil action brought by Robbins, and to use cash from the Trust Funds to make the monetary payment set forth in the settlement agreement. He did so notwithstanding his personal view that no money should be paid to Robbins. Reed, who represented the Trust Funds with respect to the action brought by Robbins, advised the trustees that they should approve the settlement agreement, including the payment to Robbins. If Reed had advised Briceno that it was a violation of ERISA to pay Robbins with money from the Trust Funds, he would not have voted to approve this payment.

At trial, Briceno testified about the following additional matters:

1. Brain appointed Briceno as a Local Business Agent and a trustee. Brain had the authority to remove him from either or both positions.
2. At the November 18, 2011 meeting, Briceno relied on what Cook said regarding Robbins' contact with the DOL.
3. Briceno did not investigate any of Robbins' allegations against Brain.
4. Brain never instructed Briceno to vote in a particular manner on any motion presented to the Joint Board.

11. David Allen

Allen was not a very credible witness. His declarations contained some inconsistencies. For example, in one of them, which was presented by the DOL, he stated that the November 18, 2011 meeting was

specially called to discuss the contact of the DOL by Robbins. However, in his declaration submitted by Defendants, Allen stated that the meeting was specially called to discuss alternatives to the A&C Department. Similarly, in the declaration offered by the DOL, Allen stated that Robbins asked him to write a letter about Brain. But, in the declaration submitted by Defendants, Allen repeatedly stated that Robbins was pressuring him to write the letter and that he was tired of her requests. Moreover, the statements in both declarations conflict with testimony by other witnesses to the effect that Allen wanted to write the letter, but Robbins opposed it. For all of these reasons, Allen's testimony warrants, and is given, little weight.

As noted, each side submitted a declaration by Allen. The relevant testimony in each is as follows:

DOL Declaration:

1. There was conflict between Robbins and Brain on issues related to the Trust Funds.
2. In late October or early November 2011, Allen told Cook about Robbins' contact with the DOL. Cook responded by screaming and yelling, and told Allen that it was inappropriate for Robbins to have contacted the DOL without notifying her.
3. In October 2011, Robbins asked Allen to send a letter to the OPCMIA leadership about Brain's alleged wrongdoing. Rice offered to send Allen an email containing information to be used in the proposed letter.
4. Around October 27, 2011, Allen told Cook about the proposed letter. Cook became upset and raised her voice. Cook said that the conduct of Robbins and Rice was inappropriate.
5. On several occasions in November 2011, Cook told Allen that she was upset about Robbins' contact with the DOL.
6. Allen called for a Joint Board meeting on November 18, 2011. Its purpose was to discuss Robbins' contact with the DOL. Allen consulted Cook before doing so, and she agreed a meeting should be called on that issue. Brain seconded the vote. At the meeting, Cook led the discussion of Robbins' contact with the DOL. Cook told the trustees it was inappropriate for Robbins to have contacted the DOL without notifying Cook. Brain asked Allen to tell the trustees about Robbins' request that Allen write a letter to the OPCMIA leadership. Cook told the trustees Robbins' involvement in that was improper.
7. Allen reviewed the audit procedures drafted by Cook. He did not believe they were adequate to allow Bond Beebe to perform a review of the Administrative Corporation. Thus, he concluded that they were too narrow and inappropriately directed the auditor rather than have it rely on the expertise of its personnel. He reached this view based, in part, on his own experience in accounting. Allen expressed these concerns at a JDC meeting and by email to Cook and Halford.
8. Allen was not aware that Cook had arranged to search the phone and computer used by Robbins. To the best of his knowledge no trustee had approved or authorized such searches.
9. Bansmer sent Allen a list of issues about the operation of the Emerald Trac System. Allen did not think Bansmer's behavior was inappropriate because he frequently spoke with Zenith staff about concerns, and encouraged them to communicate problems to him.

Defendants' Declaration:

1. Allen and Robbins were friends. From 1997 to early 2014, Robbins repeatedly told Allen that she did not like Brain, and that he appeared to be helping contractors in connection with their obligations to the Trust Funds. Robbins told Allen that Brain was contacting contractors after JDC meetings to tell them how to reduce the amount they owed to the Trust Funds.
2. Robbins frequently made statements and offered supporting information about Brain's alleged wrongdoing to the JDC. Each time, the trustees on the JDC would review the evidence. Each time they concluded that it did not substantiate Robbins' claims of wrongdoing by Brain.
3. Robbins told Allen she did not want the compliance audit to proceed. She stated that she was afraid she would lose her job.
4. Robbins pressured Allen to write a letter to the OPCMIA leadership about Brain's questionable conduct. He told her he would not do so without documentation that supported the claims.
5. In October 2011, Robbins told Allen she had been contacted by Chandler. She told Allen Chandler said he was investigating Brain. Allen told Robbins she should tell Cook. A few weeks later, in late October or early November, Allen told Cook what he had heard about the DOL contact.
6. On November 10, 2011, Allen talked to Lee about the possibility of having Zenith take over the services then provided by the A&C Department. On November 11, 2011, Allen called for a Joint Board meeting to consider alternatives to the A&C Department.
7. At the November 18, 2011 Joint Board meeting, Allen voted in favor of the motion to put Robbins on paid administrative leave. He did so because he viewed Robbins' attempts to pressure him to write the letter to the OPCMIA that would be critical of Brain, as a form of insubordination.

During his live testimony, Allen testified about the following:

1. At JDC meetings Allen observed that Brain was not in favor of assessing liquidated damages to contractors. He favored a complete waiver of them so long as the contractor was current in its payment obligations to the Trust Funds. Waiving liquidated damages completely decreased revenue for the Trust Funds. Among other things, this meant that there would be less money to offset the costs of collections. This had an adverse effect on the Trust Funds.

12. Thomas Mora

Mora was largely credible in his testimony. His memory was not very good as to some issues, so little weight is given to the testimony on those matters. There was also evidence that Mora has been a long-time friend of Robbins, and that Brain had complained to the DOL about Mora prior to 2011. However, Mora testified that he did not know about Brain's complaint to the DOL until Mora testified at his deposition in this case. Moreover, Mora's demeanor and tone did not reflect that these potential sources of animosity or disagreement affected the content of his testimony.

At trial, Mora testified to the following:

1. Mora was the vice president of the OPCMIA from approximately1997 to the end of 2014.
2. In early 2011, Robbins told Mora that Allen wanted to meet with him. He then met with Allen on two occasions. Each time they discussed Brain. During the second meeting, Allen told Mora he wanted to have Brain removed as a trustee. Mora told him that could not be accomplished. However, he said Allen could write a letter to Finley, the OPCMIA president, to seek to have an investigation of Brain initiated.
3. Mora would have had a vote on any motion to remove Brain as trustee.
4. Mora first contacted the DOL regarding Brain in or about March-May 2011. When he contacted the DOL, he did not have any direct knowledge about any wrongdoing by Brain. He had gathered some information from his conversations with Robbins. But, in his view, she did not intentionally provide Mora with information with the plan that he would relay it to the DOL. At various times between 2009 and 2011, Mora also spoke to others about Brain's alleged wrongdoing toward the Trust Funds. These contacts included Halford, Art Martinez, Jr., Allen and Jeremy Meacham.
5. Jeremy Meacham was a trustee of the Trust Funds and member of the JDC until he passed away in or about 2009. He gave Mora files on certain contractors that were the beneficiaries of the alleged improper conduct by Brain. Meacham asked Mora to give these documents to the DOL. Meacham told Mora that he intended to contact the DOL himself. After Meacham passed away, Mora decided to contact the DOL. He did so because he felt that there was no one else who would do so and that this was the only means by which the truth could be discovered.
6. Mora spoke with Chandler on September 27, 2011. He told him that Brain was helping contractors to avoid paying the required fringe benefits. He gave Chandler a list of some of these contractors. The list included A&G, HB Parkco, Icon West, Delta and Beta. Mora testified that Robbins did not give him those names. However, during his prior deposition testimony Mora testified that he had received from Robbins the names of certain contractors that were delinquent in their payment obligations to the Trust Funds. He also testified during his deposition that Robbins disagreed with calling the DOL and had asked Mora not to do so.
7. Mora gave Robbins' cell phone number to Chandler.

## IV. Legal Standards

### A. Retaliation under ERISA, 29 U.S.C. § 1140

Section 510 of ERISA makes it "unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter . . . ." 29 U.S.C. § 1140. "[T]he section refers to 'any person,' not just to an employer." *Tingey v. Pixley-Richards W., Inc.*, 953 F.2d 1124, 1132 n.4 (9th Cir. 1992); *see also Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 80 F.3d 348, 350 n.5 (9th Cir. 1996) (rejecting argument that § 510 does not support a cause of action against a non-employer for conspiring with an employer to interfere with ERISA-protected benefits), *vacated on other grounds*, 520 U.S. 510 (1997). To establish a claim for retaliation in violation of § 510 requires a

showing that: (i) an employee participated in a statutorily protected activity; (ii) an adverse employment action is taken against the employee; and (iii) there is a causal connection between the two. *Felton v. Unisource Corp.*, 940 F.2d 503, 510 (9th Cir. 1991).

As stated in a prior Order (Dkt. 247), the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting analysis applies to ERISA retaliation claims. This burden-shifting analysis also applies to bench trials. *See Norris v. City & Cty. of S.F.*, 900 F.2d 1326, 1329 (9th Cir. 1990); *Yonemoto v. McDonald*, 114 F. Supp. 3d 1067, 1103 (D. Haw. 2015) ("[The *McDonnell Douglas*] burden-shifting framework applies to bench trials where the court is the finder of fact."). As *Norris* explained in the context of an alleged Title VII retaliation claim that was addressed in a bench trial:

> the plaintiff must first prove a prima facie case of discrimination by a preponderance of the evidence. Once a prima facie case has been established, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. If the defendant meets this burden of production, then the plaintiff must be afforded the opportunity to show that the employer's proffered rationale is pretextual and that the disputed action was in fact motivated by impermissible discrimination.
>
> While the plaintiff retains the ultimate burden of proving discrimination throughout the litigation, the purpose of the shifting burdens is to promote the orderly presentation of evidence and to "bring the litigants and the court expeditiously and fairly to this ultimate question." Moreover, requiring the employer to articulate a nondiscriminatory rationale for its actions serves to sharpen the factual dispute so that the plaintiff has "a full and fair opportunity to demonstrate pretext."

*Id.* (internal citations omitted).

"At the third step of the *McDonnell Douglas* scheme, the plaintiff must show that the articulated reason is pretextual either directly by persuading the court that a [retaliatory] reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1126-27 (9th Cir. 2009) (internal quotation marks omitted).

Elements of the process were also discussed in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000):

> Although intermediate evidentiary burdens shift back and forth under this framework, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." And in attempting to satisfy this burden, the plaintiff—once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision—must be afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons

> offered by the defendant were not its true reasons, but were a pretext for discrimination." That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence." Moreover, although the presumption of discrimination "drops out of the picture" once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual."

*Id.* at 143 (internal citations omitted).

"The trier of fact may infer the ultimate fact of intentional discrimination from the plaintiff's prima facie case and disbelief of the defendant's explanation for the action. However, a trier of fact is not required to infer discrimination even if the employer's proffered explanation is unpersuasive." *Beck v. United Food & Comm. Workers Union, Local 99*, 506 F.3d 874, 883 (9th Cir. 2007) (internal citations omitted).

### B. Breach of Fiduciary Duty under ERISA, 29 U.S.C. § 1104

Section 404(a)(1)(A) of ERISA requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and [] for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). Section 404(a)(1)(B) of ERISA requires that these duties be discharged "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. § 1104(a)(1)(B). Based on this language, "the prudent person test" applies to fiduciary obligations under ERISA. *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983). Under that test, a district court must consider "whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the [transactions]." *Id.* at 1232.

"A fiduciary has a duty to act in the best interests of the plan participants and beneficiaries." *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995). The policy of the Ninth Circuit is to "interpret[] the fiduciary duty broadly . . . ." *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1468 (9th Cir. 1995). Pursuant to § 502(a)(5) of ERISA , the Secretary may seek to enjoin any act or practice which violates this provision, or seek other appropriate equitable relief to redress such violation or enforce such provision. 29 U.S.C. § 1132.

## V. Application of the Evidence to the Claims and Defenses

### A. Attorney Immunity

The Cook Defendants argue that they cannot be liable under the theories advanced by the DOL because these claims are based on Cook's actions as an attorney. Dkt. 482. The Cook Defendants argue that courts have rejected attempts to impose on attorneys a duty to third-parties that arises from an attorney's legal representation of a client. The rationale for this rule is that it would "chill an attorney's role in advising her client," forcing attorneys to temper their advice so as to avoid personal liability to themselves. *Id.* at 5. The Cook Defendants argue that all of the activities that are the basis of the DOL's claims, *i.e.*, investigation, information gathering, legal research, advice and attendance at board meetings, were performed by Cook solely in her capacity as an attorney for the Trust Funds and the Administrative Corporation. *Id.* at 5-6.

The Cook Defendants made the same arguments earlier in these proceedings, and they were rejected. Order on Defendants' Motion to Dismiss (Dkt. 104 at 13-16); Order on Motion for Summary Judgment (Dkt. 247 at 14). No arguments have been presented in connection with the present application that were not previously advanced. Nor is there any citation to any additional legal authority. The Order on Defendants' Motion to Dismiss concluded that ERISA imposes duties on the Cook Defendants independent of those that arise from Cook's role as an attorney: "[Cook] is not knowingly to aid fiduciaries in actions that violate ERISA § 404(a)(1), and is not to retaliate against a person for giving information, testifying or preparing to testify in any inquiry or proceeding relating to ERISA." Dkt. 104 at 16. Although the Order left open the question whether acts or omissions by Cook solely in her capacity as an attorney would be actionable under ERISA, it stated that the allegations in the SAC that Cook "orchestrated the suspension and termination of Robbins, Rice and Bansmer" in retaliation for their reporting of Brain's alleged violations of ERISA were sufficient to state a claim for relief pursuant to § 510. *Id.* at 15. Such actions are clearly distinct from providing legal advice. Cook's position as an attorney does not immunize her from liability for any actions she takes in violation of duties imposed on her by ERISA.

Moreover, now that the trial has been completed, it is appropriate to consider this argument in light of the evidence presented. The DOL showed by a preponderance of the evidence that the actions taken by Cook went beyond providing legal advice. It showed that she partnered with Brain to take certain actions adverse to Robbins and Rice. It also reflected that she took the lead in connection with certain of these actions, including the decision to place Robbins on leave. It demonstrated that some of her actions were the result of her personal relationship with Brain. Therefore, the argument fails because the challenged conduct was significantly more than providing legal advice.[8]

[8] In this regard, it is significant that California Rule of Professional Conduct 3-310(B) requires that an attorney disclose to a client any personal relationship or interest that he or she knows, or with the exercise of reasonable diligence should know, could substantially affect his or her professional judgment in advising the client. *Oasis W. Realty, LLC v. Goldman*, 250 P.3d 1115, 1121-22 (Cal. 2011). There is no evidence that Cook made such a disclosure to the Trust Funds about her personal relationship with Brain,

No different result is warranted by the cases cited by the Cook Defendants. All are distinguishable from the facts in the present action. *Whitehead v. Rainey, Ross, Rice & Binns*, 997 P.2d 177 (Okla. Civ. App. 1999) involved "proper and legal" advice given to ERISA plan clients that had the potential to harm non-party company employees. As noted, the actions here do not involve "proper" legal advice, but advice and actions motivated by a desire by Cook to retaliate against Robbins and Rice. *Whitehead* cited decisions by the Oklahoma Supreme Court holding that there may be "potential third-party liability of attorneys on allegations of a clear, actionable breach of the duty of ordinary care by an attorney to his/her client which, foreseeably harming a third-party, gives rise to an additional duty of care imposed on the attorney to avoid such third-party harm." *Id.* at 181. That describes the claims asserted.

An analysis of *Goodman v. Kennedy*, 18 Cal. 3d 335 (1976) leads to a similar result. *Goodman* involved a common-law tort action for negligence and fraud. Like *Whitehead*, it is distinguishable from the facts in this action which concern intentional conduct that, under ERISA, is actionable against "any person." The cautionary statement in *Goodman*, that "mak[ing] an attorney liable for negligent confidential advice not only to the client who enters into a transaction in reliance upon the advice but also to the other parties to the transaction with whom the client deals at arm's length would inject undesirable self-protective reservations into the attorney's counselling role" does not apply here. *Id.* at 344. The Cook Defendants did more than provide legal advice.

Finally, the other cases cited by the Cook Defendants are distinguishable because they involve conspiracy claims. For this reason, they were subject to the rule adopted by certain Circuits that no conspiracy claim can be stated as to an attorney and his or her client that is premised on the attorney's legal advice. *See Heffernan v. Hunter*, 189 F.3d 405 (3d Cir. 1999) (claiming attorney and investigator acted together to intimidate plaintiff government official from carrying out his official duties); *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108 (7th Cir. 1990) (that a lawyer, accountant, or other adviser provided advice to a client in connection with the formulation of a business plan, cannot form the basis for conspiracy under 42 U.S.C. § 1985). No conspiracy claim has been advanced by the DOL. Instead, the claims and the supporting evidence concerned actions taken by each of the defendants in violation of ERISA.

For the foregoing reasons, the Cook Defendants have not provided any other grounds for reconsideration of the earlier determinations rejecting the defense that the claims are barred by attorney or agent immunity.

**B. Retaliation Against Robbins**

1. Whether Robbins Was Engaged in Good Faith Protected Activity under ERISA

"[A]n employee engages in protected activity where (1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is possibly" engaging in activity prohibited by the statute. *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845 (9th Cir. 2002) (addressing whistleblower provision as to False Claims Act); *see also Trent v.*

*Valley Elec. Ass'n Inc.*, 41 F.3d 524, 526 (9th Cir. 1994) (protected activity under Title VII requires employee's "reasonable belief" that employer engaged in unlawful employment practice).

The DOL contends that Robbins engaged in two types of protected activity. First, she participated in a DOL investigation. Second, she participated in an effort to have a letter prepared and sent to Finley, the president of the OPCMIA, about Brain's alleged misconduct. Two prior Orders concluded that each of these actions constitute protected activity under § 510. Dkt. 104 at 12; Dkt. 247 at 14-15.

Defendants adhere to their prior, unsuccessful position that the effort to have a letter prepared and sent is not a protected activity. But, their only new argument is that Finley was not the appropriate person to receive complaints about potential violations of ERISA. From this they contend that an internal complaint reported to him is not protected activity. Dkt. 481 at 24-26. Defendants then rely on the following language in *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 411 (9th Cir. 1993): "The normal first step in giving information or testifying in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers of the ERISA plan." Defendants contend Finley is not a "manager" of an ERISA plan, *i.e.*, "someone with authority to correct an alleged ERISA violation." Dkt. 481 at 26.

a) Findings of Fact

The DOL has demonstrated the following by a preponderance of the evidence:

1. Robbins was concerned for several years about Brain's interference with the collection efforts of the A&C Department. She expressed her concerns to other trustees in conversations with them and at JDC meetings.
2. Robbins had difficulty in the collection of payments to the Trust Funds from, and/or observed Brain advocating for smaller contributions by, at least nine contractors -- A&G, Santa Clarita Concrete, Beta Construction, Kitson Specialties, B&M, Pima, HB Parkco, Icon West and California High Tech. Robbins believed Brain interfered in the collections process as to certain of these contractors because of statements made to her by their representatives. This included the statement by several that Brain had told them to "fly under the radar," not to worry about certain contributions owed to the Trust Funds, or to ignore the demands by Robbins.
3. Robbins' concern about collecting contributions from each of these contractors was discussed at JDC meetings. Although Brain's alleged conduct was sometimes mentioned at these meetings, there was never an investigation into what actions he may have taken and whether such conduct was in violation of his duties as a trustee.
4. Brain interpreted certain of the collective bargaining agreements in a manner that reduced the amount owed by covered contractors. Brain's interpretations were often inconsistent with those of Robbins or Halford. Brain's interpretations were often later determined to be incorrect.
5. Those contractors who raised the most issues with Robbins as to payments owed to the Trust Funds, performed work with the jurisdiction of Local 600. Brain oversaw that jurisdiction.
6. Brain appeared at an arbitration brought by the Trust Funds against HB Parkco. He did so at the

request of HB Parkco, and without informing Robbins that he would attend. During the proceedings, he assisted the contractor in presenting its defense to the collection efforts of the Trust Funds. Trustees did not normally appear at these arbitrations with the contractor. Subsequently, at a JDC meeting held on April 15, 2010, Robbins spoke about the arbitration. She stated that, upon learning that Brain was a member of the JDC, the arbitrator appeared uncomfortable with Brain's presence at the proceeding, and directed him to recuse himself from any subsequent JDC discussion about the matter. The basis for this ruling was that Brain should not have been present at the arbitration. Brain stated at the JDC meeting that he had later spoken with his attorney, who advised him that he could appear at the arbitration, notwithstanding that he was a member of the JDC. Ex. 1086.

7. Brain regularly spoke out about issues presented at JDC meetings, at which Robbins was present. This included the statement of his position that there should be a complete waiver of liquidated damages potentially due from delinquent contractors once they had become current in their payment obligations to the Trust Funds. This position conflicted with the prior practice of the Trust Funds. It allowed contractors to petition for a waiver of liquidated damages, which could be granted conditionally, but not for several consecutive years.
8. The availability of liquidated damages as a remedy was designed to discourage delinquent contributions. The imposition of such damages was a means of recovering the cost of collection efforts.
9. Robbins was aware through conversations with other trustees, that they shared her concerns about Brain's conduct. These trustees included Jerry Meacham, Larry Jenkins, Allen and Mora. Others, including Art Martinez, Jr., Jeremy Meacham, Baldwin and Enriquez also had concerns about Brain's conduct.
10. Robbins was not the original "whistleblower" to the DOL. Indeed, she expressed reservations to Mora about reporting Brain's conduct to the DOL. Robbins' first communication with the DOL occurred when Chandler called her. Robbins told Chandler to have the DOL issue a subpoena for records of the Trust Funds because she had been told both by Cook and her personal counsel not to provide any records voluntarily to the DOL. She also told Chandler to move quickly to have the subpoena served because she feared she would soon lose her position with the Trust Funds.
11. Robbins did not initiate the idea of having a letter prepared and sent to the OPCMIA. This was Allen's idea.
12. The OPCMIA could have acted to remove Brain as a Local 600 Business Manager. If it had done so, he would have lost his position as a trustee.
13. The goal for those involved in writing the letter was to have Brain removed as a trustee. They sought this result due to their belief that he was engaged in misconduct in violation of ERISA.

b) Conclusions of Law

The DOL has shown by a preponderance of the evidence that Robbins' conduct with respect to the letter to the OPCMIA was a protected activity. Thus, her involvement in having the letter prepared was prompted by Robbins' view that it would provide information about a potential violation of ERISA to a person whom she believed to be in a position to remedy the misconduct. Therefore, the efforts associated

with the preparation of the letter were protected activity under § 510.

The DOL has also shown by a preponderance of the evidence that Robbins reasonably believed that: (i) Brain was engaged in conduct that could be deemed in violation of his duties under ERISA; and (ii) her actions were taken in good faith. Robbins' belief that Brain was engaged in misconduct was based on her observations that he was interfering with the collection efforts of the A&C Department, improperly assisting contractors in avoiding payments and routinely advocating on behalf of contractors in connection with collection efforts by the Trust Funds. Among other things, Brain advocated for the waiver of liquidated damages as well as the postponement of audits. The reasonableness of Robbins' belief is also supported by the statements and concerns expressed by others who also observed Brain's conduct. Defendants presented evidence to support the position that Brain's conduct was not improper. This included Brain's testimony and interpretation of events, copies of meeting minutes at which certain issues were discussed, and the declaration of expert Ellyn Moscowitz. However, a consideration of this and all related evidence as a whole, does not rebut the showing by the DOL that Robbins' belief of misconduct was reasonable. That several others similarly situated to Robbins believed Brain was engaging in misconduct, notwithstanding his contrary assertions at JDC meetings, also supports the finding that Robbins' belief was reasonable.

Finally, the DOL has shown by a preponderance of the evidence that Robbins' protected activity was not motivated by a bad faith desire to prevent the audit of the A&C Department or because of her fear that the audit would lead to her termination. As stated, Robbins' belief that Brain was engaged in misconduct was reasonable, and supported by evidence independent of the possibility of the audit. It is also significant that Robbins was not the original whistleblower. Indeed, she did not communicate with the DOL until Chandler called her. If Robbins were motivated by a desire to prevent an audit of the A&C Department it would be expected that she would have taken a more active role in communicating with the DOL. By doing so she would have had greater control over the information that the DOL received and the timing of its investigation. Similarly, the evidence demonstrates that the Joint Board was considering an audit of the A&C Department in March and April 2011. However, it also shows that there was no set plan to do so at that time. Thus, there was no reasonable basis for Robbins to fear losing her job due to an unscheduled audit. It was not until September 2011 that the trustees decided to move forward with the audit. By that time it had been several months since Mora had made his first contact with the DOL. Although Robbins told Chandler to act quickly and to have a subpoena served prior to the November 18, 2011 Joint Board meeting, the evidence shows that she did so not to prevent the audit of the A&C Department, but in order to facilitate providing information to Chandler before she could be limited in her ability to do so, *i.e.*, were she terminated from her position. No persuasive evidence was presented that suggested or showed that Robbins believed that the issuance of a subpoena by the DOL would cause the Joint Board to defer any audit of the A&C Department. Robbins had concerns about Brain's misconduct for several years. This was well before an audit of the A&C Department was even discussed. Therefore, there has not been a showing that she concocted issues about Brain because she feared an audit would result in her termination for poor performance.

2. Whether Robbins Suffered Adverse Employment Actions

The DOL contends that Robbins suffered two adverse employment actions. First, she was placed on paid administrative leave. Second, her position was terminated after Zenith assumed the responsibilities for providing the services previously performed by the A&C Department, and the Administrative Corporation was dissolved. Two prior Orders concluded that each constitutes an adverse employment action under § 510. Dkt. 104 at 11-12; Dkt. 247 at 15-17. Defendants have presented no basis for a different outcome at this time.

3. Whether Cook, Brain and Briceno Retaliated Against Robbins for Engaging in Protected Activities

a) Legal Standard

The parties disagree whether causation in an ERISA retaliation case can be shown by applying the more lenient "motivating factor" test or is instead subject to the more stringent "but for" test. This issue has not been directly addressed by either the Supreme Court or the Ninth Circuit

The Ninth Circuit has concluded that, to establish that a person violated ERISA § 510, it must be shown that he or she acted with "specific intent to interfere with an employee's benefit rights." *Ritter v. Hughes Aircraft Co*., 58 F.3d 454, 457 (9th Cir. 1995); *see also Dytrt v. Mountain States Tel. & Tel. Co.*, 921 F.2d 889, 896 (9th Cir. 1990). This requires evidence that the protected activity "was the motivating force" for the adverse actions he or she suffered. *Kimbro v. Atl. Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989). No action lies where the alleged loss of rights "is a mere consequence, as opposed to a motivating factor behind the termination." *Dytrt*, 921 F.2d at 896. Although these cases use the terms "motivating force" or "motivating factor," they qualify them with the articles "a" and "the" without directly addressing whether the term relates to the "but-for" causation standard. If the protected activity must be "the" motivating factor, then it would be appropriate to conclude that the but-for test applies to causation. However, if something needs to be only "a" motivating factor, the test for causation would be less stringent.

It is also significant that each of these cases arose under a portion of § 510 that is not the one at issue in this action. Section 510 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and

> Pension Plans Disclosure Act.

29 U.S.C. § 1140.

*Dytrt* and *Kimbro* address claims as to an alleged violation of the first sentence of § 510. It makes unlawful taking action against a person "for exercising any right" under the plan, or "for the purpose of interfering" with the securing such rights. That is not the premise of the claim in this action. Instead, it arises from the second sentence of § 510. It states that it is unlawful to take action against a person "because" he has given information or testified. The use of the word "because" is significant in light of two recent decisions by the Supreme Court. Each is consistent with the view that the use of the term "because" shows that but-for causation is the correct standard of proof. That standard is stated as follows: But for the protected activity, would the defendant have effected the adverse employment action?[9]

In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Court held that but-for causation is the appropriate standard for disparate treatment claims made under the Age Discrimination in Employment Act, 29 U.S.C.A. § 623 ("ADEA"). *Id.* at 176. This rule was based on a textual analysis of the operative statute. Thus, the words "because of" were interpreted to mean that a plaintiff had to show by a preponderance of the evidence that, but for his or her age, no adverse employment action would have been taken by the employer. *Id.* at 177-78. The relevant portion of the ADEA provides:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age.

29 U.S.C. § 623(a)(1) (emphasis added).

This language parallels that of ERISA § 510, which uses the word "because" in connection with the required showing of a causal nexus between protected activity and adverse employment action. 29 U.S.C. § 1140 ("It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person *because* he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter . . . ." (emphasis added)).

This outcome is also consistent with *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). There, applying the rationale of *Gross*, the Supreme Court held that the proper standard for Title VII retaliation claims is but-for causation. *Id.* at 2524-28. As the Court explained:

> In *Gross*, the Court was careful to restrict its analysis to the statute before it and withhold

[9] Although the first sentence of § 510 does not include the word "because," the but-for test still is consistent with the frequently-cited language in *Kimbro.* It states that the protected activity must be "the" motivating force for the adverse employment action and that the defendant must have acted with "specific intent" to interfere with the plaintiff's rights under ERISA. 889 F.2d at 881.

> judgment on the proper resolution of a case, such as this, which arose under Title VII rather than the ADEA. But the particular confines of *Gross* do not deprive it of all persuasive force. Indeed, that opinion holds two insights for the present case. The first is textual and concerns the proper interpretation of the term "because" as it relates to the principles of causation underlying both [ADEA, 29 U.S.C.] § 623(a) and [Title VII, 42 U.S.C.] § 2000e-3(a). The second is the significance of Congress' structural choices in both Title VII itself and the law's 1991 amendments.[10] These principles do not decide the present case but do inform its analysis, for the issues possess significant parallels.

*Id.* at 2527-28.

Thus, although the Court acknowledged that its decisions apply only to the particular statutes at issue, it also explained that its textual analysis of the term "because" may apply to other statutes that contain similar language. As the Court explained:

> This enactment, like the statute at issue in *Gross*, makes it unlawful for an employer to take adverse employment action against an employee "because" of certain criteria. Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action.

*Id.* at 2528 (internal citation omitted).

The statutory language of Title VII that applied in *Nassar* is:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . *because* he has opposed any practice made an unlawful employment practice by this subchapter, or *because* he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added).

[10] The "structural choices" of Congress relate to the Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and the subsequent passage of the Civil Rights Act of 1991, in which Congress codified in part and abrogated in part the mixed-motive framework set forth in *Price Waterhouse*. In *Price Waterhouse*, the Supreme Court held that a plaintiff may establish a prima facie case of status-based employment discrimination if he or she could prove mixed-motive. *Id.* at 258. The defendant could then avoid liability completely by proving that the discriminatory motive was not a but-for cause of the adverse employment decision. The Civil Rights Act of 1991 added § 2000e-2(m), which clarified that unlawful discrimination need only be a "motivating factor," and § 2000e-5(g)(2), which limited a defendant's liability to declaratory relief, injunctive relief and/or attorney's fees and costs if the defendant could prove that discriminatory motive was not a but-for cause of the decision.

This language, like that in the ADEA, is similar to the words used in ERISA. Thus, there is no "meaningful textual difference" between ERISA and those two statutes.

Neither party has cited to any case decided since *Gross* and *Nassar* in which a court considered whether the "motivating factor" or "but-for" test applies in an ERISA retaliation claim. Although the DOL identifies three recent cases that use the term "motivating factor," each is repeating the language from *Dytrt*, *Kimbro* and other earlier decisions by the Ninth Circuit. None addresses *Gross* or *Nassar. See Giles v. Transit Emps. Fed. Credit Union*, 794 F.3d 1, 5 (D.C. Cir. 2015); *Orfano v. NV Energy, Inc.*, 2015 WL 430425, at *5 (D. Nev. Feb. 3, 2015); *Maxfield v. Brigham Young Univ.–Idaho*, 27 F. Supp. 3d 1077, 1091 (D. Idaho 2014).

There are no material differences in the relevant language of ERISA, Title VII and the ADEA. Therefore, the appropriate standard for ERISA retaliation claims is but-for causation. However, but-for causation does not require that the protected activity be the only cause of the retaliation. *Westendorf v. W. Coast Contractors of Nev., Inc.*, 712 F.3d 417, 422 (9th Cir. 2013). To satisfy the but-for standard, the DOL must show "by a preponderance of the evidence that engaging in the protected activity was one of the reasons for [the adverse employment actions] and that but for such activity" the adverse actions would not have been taken. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064-65 (9th Cir. 2002).

b) Findings of Fact

The findings of fact set forth in Section V.B.1.a are incorporated by this reference. In addition, the DOL has shown the following by a preponderance of the evidence:

1. Robbins worked for the Trust Funds for almost 25 years. She had not previously been disciplined.
2. Cook and Brain were in a close, personal relationship by October 2011. That relationship became romantic either then, or very shortly thereafter. Both Brain and Cook misled the trustees of the Trust Funds about the nature of their relationship during this time period.
3. Cook's actions and advice as counsel were both substantially affected by her relationship with Brain. She did not act in the objective, detached manner that is expected of counsel. When allegations about Brain were presented to Cook, she responded with an emotional approach rather than with an analytical one. She did not act impartially, but instead continuously agreed with Brain's positions.
4. The Joint Board had been considering an audit of the A&C Department since spring 2011. However, there had not been any discussion as to whether Robbins should be removed from her position, or whether the collection work of the A&C Department should be outsourced to an outside party. Neither of these issues was raised until early November 2011. That was approximately two weeks after Cook and Brain learned of Robbins' contact with the DOL.
5. Allen, Cook and Brain each played an equal role in the decision to hold a special Joint Board meeting on November 18, 2011 to discuss alternatives to the Administrative Corporation and the A&C Department.

6. The November 18, 2011 special Joint Board meeting was called in reaction to the DOL investigation.
7. In the days before the November 18 meeting, Cook and Brain had several discussions with other trustees. In those communications they urged these trustees to vote in support of the positions advanced by Cook and Brain on the issues that were to be addressed at the November 18 meeting.
8. After receiving the DOL subpoena on November 17, 2011, Cook was very angry with Robbins. She wanted to put Robbins on paid administrative leave because of Robbins' role in causing the DOL subpoena to be issued. Cook knew that putting Robbins on paid administrative leave could be deemed a violation of the whistleblower protections under ERISA, and had that issue researched in preparation for the Joint Board meeting.
9. Cook and Brain led the discussion at the November 18 Joint Board meeting regarding the DOL investigation. Each contributed to creating an environment hostile to Robbins. Cook stated that Robbins' conduct was inappropriate. Brain prompted Allen to discuss Robbins "pressuring" him to write a letter to the OPCMIA regarding Brain. Although Brain recused himself from the vote, he remained in the meeting room. Given his authority as to other trustees, his continued presence was both coercive and inconsistent with his recusal.
10. Briceno voted to place Robbins on leave because she had pressured Allen to write the letter. If Cook had advised Briceno that it was a violation of ERISA to put Robbins on leave for that reason he would not have voted in favor of placing her on leave.
11. Other reasons stated by the trustees for their respective votes in favor of placing Robbins on paid administrative leave included: (i) Robbins had been presenting unsubstantiated charges against Brain for years; (ii) Robbins was not doing a good job with the A&C Department; (iii) the audit would go more smoothly if Robbins were not present; (iv) to keep other unions from learning what was happening; (v) Robbins might remove documents from the offices of the Trust Funds; (vi) to protect plan participants; (vii) to address problems at the Trust Funds caused by Robbins; (viii) due to the chaos at the meeting; (ix) it would be safer for Robbins to be away while the DOL investigated matters related to the Trust Funds; and (x) Robbins should have informed Cook and the Joint Board when the DOL first contacted her.
12. Both Cook and Brain held substantial influence over the Joint Board trustees.
13. Cook admitted to Robbins that one of the reasons she was placed on leave was her role in drafting the letter to the OPCMIA.
14. Cook drafted the procedures for Bond Beebe to use in conducting its audit of the A&C Department. Bond Beebe was independent and neutral in its audit. However, the procedures as drafted by Cook were too narrow, and were not neutral. They were designed with the expectation that the results of the audit would be unfavorable to Robbins.
15. The Joint Board solicited bids from outside parties to perform the collection services that had been provided by the A&C Department before Bond Beebe had completed its audit.
16. Lee and Corapi prepared Zenith's proposal. At the February 13, 2012 Joint Board meeting, the trustees reviewed it. They voted to have a subcommittee of four trustees -- Allen, Norling, Brain and Barton -- review the three proposals submitted. Lee and Corapi then gave a presentation as to their proposal. Ex. 34.

17. After the February 13 Joint Board meeting, Allen told Lee and Corapi that Zenith needed to "sharpen their pencil" and submit a revised proposal. No other company was asked to revise its proposal. Allen later spoke with Lee, before the revised proposal was submitted. Allen suggested that costs could be reduced by hiring Zenith staff members to replace the A&C Department staff, or by reducing the salaries of the current staff members and terminating those who would not consent to the reduction. Zenith was influenced by this discussion and the revised proposal contained conditional language on this approach to reducing costs.
18. In the course of its audit, Bond Beebe interviewed each employee of the A&C Department except Robbins. She was not made available to Bond Beebe because she was on leave.
19. During the Bond Beebe audit process, Cook investigated Robbins' role in contacting the DOL as a whistleblower. She did so by reviewing Robbins' phone records and having Bond Beebe search Robbins' hard drive for DOL-related material. Cook invited Brain to participate in this investigation. Thus, she sought his input about appropriate search terms for the review of the hard drive. She also reported to him privately about the results of the investigation. No one at the Trust Funds authorized Cook to engage in this review of Robbins' records. It was also inappropriate for Cook to have brought Brain into the process because she had been told that the DOL investigation centered on his conduct. These actions also confirm the conflict of interest for both Brain and Cook that arose from their close, personal relationship.
20. The audit by Bond Beebe was critical of the A&C Department and concluded that it was poorly managed and operated. However, the audit results and corresponding recommendations by Bond Beebe did not address whether the services that had been provided by the A&C Department should be outsourced. Instead it made recommendations about improvements that should be made as to the operations of the A&C Department.
21. After the results of the Bond Beebe audit were presented to the Joint Board, it voted to engage Zenith to perform the services previously provided by the A&C Department. This vote was consistent with the recommendation by the subcommittee that had reviewed the RFPs. At the meeting Cook was adamant in presenting the view that the trustees should vote in favor of this resolution. Baldwin believed that the decision to solicit bids by outside firms to perform the services previously provided by the A&C Department was likely part of an effort to terminate Robbins. He stated this position at the Joint Board meeting.
22. Lee and his superiors at Zenith knew that Cook and Brain were quite dissatisfied with Robbins, and that both did not want her to return to work for the Trust Funds. They also knew that Cook and Brain had significant influence over the business decisions made by the trustees as to the Trust Funds. Lee's primary contacts at the Trust Funds were Cook and Brain. When Zenith took over the services of the A&C Department, Robbins was the only former employee of the A&C Department who was not hired to work with Zenith, and was the only one who was, therefore, discharged. This termination was the result of the actions by Brain and Cook.

c) Conclusions of Law

(1) Administrative Leave

The DOL has, by a preponderance of the evidence, established the elements of a prima facie case that Robbins was placed on administrative leave because of her protected activity. As noted, Robbins engaged in two forms of protected conduct. The trustees knew of both at the time that they voted to place Robbins on administrative leave. The prima facie showing of causation is established by the close temporal proximity between the protected activities and the adverse employment action. *See Davis v. Team Elec. Co.*, 520 F.3d 1080, 1094 (9th Cir. 2008) ("We have held that 'causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity.'").

Turning to the next step in the analysis, Defendants have not met their burden to "articulate some legitimate, nondiscriminatory reason" for placing Robbins on leave. *McDonnell Douglas*, 411 U.S. at 802. The reasons advanced to justify placing Robbins on administrative leave are discussed in Section V.B.3.b, *supra.* Several of them are consistent with the finding of retaliation. For example, they include that Robbins was placed on leave because she was involved in seeking to have the letter to the OPCMIA prepared, and for her alleged improper handling of her communications with the DOL.

As to the OPCMIA letter, Cook testified that it was among the reasons that Robbins was placed on leave. Defendants argue that Robbins' actions with respect to the letter showed that she was "insubordinate" because she was "pressuring" a trustee to take action adverse to another trustee solely to avoid the compliance audit of the A&C Department. Defendants did not establish a factual basis for this position by a preponderance of the evidence. Thus, they did not show that Robbins acted in an effort to sidestep the audit. Also unpersuasive is the claim of "insubordination." As previously discussed, Robbins' communications with Allen about the letter constituted protected activity. Defendants must present a legitimate non-retaliatory reason for the adverse action "*absent that [protected] conduct*." *N.L.R.B. v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 267 (9th Cir. 1995) (emphasis in original); *accord Yazdian v. ConMed Endoscopic Techs., Inc.*, 793 F.3d 634, 648 (6th Cir. 2015) (that employer "specifically referenced Yazdian's protected statements as examples of insubordination" constitutes direct evidence that employer terminated plaintiff for protected conduct); *Wrighten v. Metro. Hospitals, Inc.*, 726 F.2d 1346 (9th Cir. 1984) (rejecting employer's claim that public complaints by a nurse about employer's treatment of African-American patients were "insubordination" justifying termination in Title VII retaliation case); *Griffin v. JTSI, Inc.*, 654 F. Supp. 2d 1122, 1135-36 (D. Haw. 2008) ("An employer cannot argue that the protected conduct itself created a reason for termination other than a retaliatory one." (citing *N.L.R.B.*, 53 F.3d at 267 (an employer "misses the point" and "failed to meet its burden" where it argued that employees who engaged in the protected conduct of refusing to work an extra hour had been insubordinate thereby warranting sanctions))).

Defendants' position also fails because the DOL showed, by a preponderance of the evidence, that Robbins did not "pressure" Allen to write the OPCMIA letter. Although Allen testified that Robbins had done so, his testimony was not persuasive. It included some inconsistent statements. And, Defendants concede that, prior to the contact by Robbins, Allen had discussed with Cook and Mora his desire to have

Brain removed as a trustee. Robbins and Rice each testified that Allen wanted to write the letter and that he was working with them to do so.

Given the credibility of the various witnesses who testified on this issue, and the evidence each presented, the most reasonable interpretation is that Allen, Robbins and Rice had a common interest in writing the letter to the OPCMIA. It also shows that, once Cook and Brain discovered Robbins' contact with the DOL and the investigation of Brain, Allen tried to distance himself from Robbins by suggesting that the letter was her idea, and that he did not approve of it. This finding is also consistent with an email that Cook sent to Brain in February 2012. There, Cook discussed her review of Robbins' phone records. She then wrote that, after being placed on leave, Robbins called Mora. Cook concluded that the purpose of this call was for Robbins to tell Mora about the administrative leave "and figure out how they were gonna get out of this one after realizing [David Allen] betrayed them!" Ex. 177.

Other proffered non-retaliatory reasons for the action of the trustees, including that there was "chaos" during their meeting, to "protect plan participants," and to keep other unions from learning about the events related to the Trust Funds, are vague explanations. None is sufficient to state a legitimate, non-retaliatory reason for placing Robbins on leave.[11]

Finally, Defendants' contend that even if Robbins were placed on administrative leave in retaliation they cannot be held liable for two reasons. First, neither the Cook Defendants nor Brain was involved in the vote to put Robbins on leave, and neither affected the decision by any of the trustees who voted. Second, Briceno relied on the advice of counsel in casting his vote. These arguments are addressed in this sequence.

*(a) Cook Defendants and Brain*

The DOL has shown by a preponderance of the evidence that both the Cook Defendants and Brain caused the Joint Board trustees to vote to place Robbins on leave. That these Defendants did not themselves vote is not dispositive. As stated in the prior Order on Defendants' Motion for Summary Judgment, under the "cat's-paw" theory, "liability may be imposed where an individual with discriminatory animus, who does not have ultimate decisionmaking authority, influences the decisionmaker to take an adverse action." Dkt. 247 at 22. Here, the DOL showed by a preponderance of the evidence that the Cook Defendants and Brain "set in motion" the decision by the Joint Board to put Robbins on leave due to her protected activity. By this same standard, the DOL showed that the Cook Defendants and Brain were "involved in or influenced [the trustees'] decision" to put Robbins on leave. *Hill v. Booz Allen Hamilton, Inc.*, 2011 WL 6000501, at *10 (D. Guam Nov. 16, 2011) (citing *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1060-61 (9th Cir. 2011)). These conclusions are adopted for several reasons.

[11] The reasons proffered by the trustees for placing Robbins on administrative leave were provided through the deposition testimony of certain of them at a time when all of the trustees remained defendants in this action. That these witnesses faced potential liability for their actions can reasonably be seen as affecting the weight of their testimony as to the non-retaliatory nature of the decision.

*First*, the Cook Defendants had an angry and negative reaction upon learning that Robbins had spoken with the DOL and that the DOL had served a subpoena on the Trust Funds. In the emails exchanged by Cook and Chang immediately after these events, Cook refers to Robbins as a "bitch," accuses Robbins of assisting the DOL in drafting the subpoena based on its language, and states that she wants Robbins put on paid administrative leave immediately so that she will be away from the Trust Funds. The evidence clearly shows that Cook wanted Robbins put on paid administrative leave because of her communications with the DOL. Thus, there was no evidence that, prior to the disclosure of Robbins' contact with the DOL, the Joint Board, Cook or any trustee had considered any discipline of Robbins, or placing her on leave.

*Second*, although Brain was not shown as a recipient of the emails between Cook and Chang in which administrative leave was discussed, the most reasonable interpretation of all pertinent trial evidence is that Brain and Cook worked together and coordinated efforts to retaliate against Robbins. There is substantial evidence that Cook and Brain frequently communicated through phone calls, text messages and emails during the weeks prior to the November 18, 2011 meeting at which Robbins was put on leave. Cook, Brain and Allen called that special meeting. Cook and Brain were also in a romantic relationship at the time, which supports the reasonable inference that they communicated about matters within the Trust Funds in which each had an interest. That the Cook Defendants were providing legal advice to the Trust Funds also showed the likelihood of communications between Cook and Brain on matters about which such advice would be provided. Further, the DOL was investigating Brain, at least in part, due to the allegations made by Robbins. This provided an incentive for Brain, as well as Cook, to retaliate.

*Third*, the evidence showed that Brain and the Cook Defendants coordinated efforts to talk with other trustees with whom they had positive relationships prior to the November 18, 2011 Joint Board meeting. It showed that they did so in an effort to line up their votes at the meeting for the positions that they planned to advance. Messages between Brain and Cook included statements that the two were "firing up" other trustees, "lin[ing] up [Brain's] peeps" and informing them of the actions planned for the November 18 meeting. Brain and Cook presented competing evidence on this issue. Each stated that the purpose of their efforts prior to the meeting was to be prepared to discuss alternatives to the Administrative Corporation. This testimony was not credible and warrants little weight. The animated conversations that occurred prior to the November 18 meeting show that Brain and Cook were "firing up" their allies for the actions that would be taken in response to Robbins' contacts with the DOL, not for a more pedestrian discussion about a potential change to the performance of the functions of the A&C Department. The evidence did not show that there was a need for a specially scheduled meeting to address that topic. Other communications between Brain and Cook confirm these conclusions. For example Brain sent an email to Cook on November 15, 2011, in which he stated that he "smell[ed] a book deal." Ex. 507. On February 25, 2012, after Cook reviewed Robbins' phone records as to whom she had called on November 18, after the vote to place her on leave, Cook wrote an email to Brain. In it she asked: "Can Cameron Diaz play me in the movie??" Ex. 186.

*Fourth*, the evidence showed that Brain and the Cook Defendants took the lead at the November 18 Joint

Board meeting with respect to the discussion of Robbins' contact with the DOL. It also showed that their statements critical of Robbins created an environment that was hostile to her. This in turn caused the trustees to vote to place her on leave. Trial testimony and the November 18 meeting minutes show that Cook and Chang informed the trustees about the DOL subpoena and Robbins' role in its investigation. They also show that the two believed that Robbins' behavior was inappropriate and insubordinate. They also made statements from which the trustees would reasonably conclude that Robbins had initiated the contact with the DOL, as opposed to the DOL first contacting her. The evidence also showed that they did so in an effort to cause the trustees to be upset with Robbins, and regard her as disloyal for encouraging the DOL investigation into matters related to the Trust Funds. Testimony by several trustees, including Baldwin, Berg, Mendez and Salerno, also supports this finding. Thus, it included that when Cook discussed whether Robbins should be placed on leave, she made statements that included: "Come on. You're all smart people here. Do the right thing," making clear that in her view it was appropriate to place Robbins on leave. Brain took similar actions. They included prompting Allen to talk about the draft letter to the OPCMIA and Robbins' role in repeatedly "pressuring" him to write it. Although Brain abstained from voting on the motion to place Robbins on leave, he remained in the room while that issue was discussed and decided. Given his recusal, Brain should have left the room in order to ensure that he did not have an effect on either the discussion or the vote. Given the evidence about his influence over, and authority with respect to, other trustees, his mere presence could have influenced others.

*Fifth*, the evidence showed that Brain and Cook each had substantial influence over the other trustees. Brain had the power to remove Local 600 trustees, or have them terminated from their jobs with the union. As an attorney who was experienced and had given advice on significant issues related to the operations of the Trust Funds, Cook was also influential. These findings are also supported by the testimony of Baldwin and other trustees. They testified that, in their view, there were serious consequences for those who did not cooperate with Brain or Cook. For example, Enriquez testified that when he confronted Brain about an incident in which Brain appeared to have caused a contractor to underpay the Trust Funds, Brain threatened to take away Enriquez's job. Robbins, Nodland and Crouch also testified that Brain had substantial influence over the other trustees, and that he was among the most vocal of trustees at their meetings. As noted, in light of his influence, it was inappropriate for Brain to have remained in the room during the discussion and vote about a matter on which he had a substantial, personal interest.

In sum, a preponderance of the evidence shows that Brain and the Cook Defendants were very upset with Robbins due to her contact with the DOL and, in response, wanted her placed on administrative leave. They then used their positions and influence to cause the other trustees to vote in favor of that action. Therefore, the preponderance of the evidence showed that, but-for the conduct of Brain and the Cook Defendants, the trustees would not have voted to place Robbins on administrative leave. Consequently, the DOL has shown by a preponderance of the evidence that Brain and the Cook Defendants violated § 510 of ERISA by causing Robbins to be placed on administrative leave in retaliation for her protected activity.

*(b) Briceno*

The DOL has established by a preponderance of the evidence that Briceno retaliated against Robbins for her protected conduct when he voted to place her on administrative leave. Thus, his admitted reason for voting as he did was due to Robbins' role in the draft letter to the OPCMIA. But for Robbins' role in drafting that letter, Briceno would not have voted to place her on leave.

Briceno has not offered a legitimate, nondiscriminatory reason for voting to place Robbins on leave. He argues that he is insulated from liability because he relied on the advice of counsel when he voted. Thus, if Cook had told him that placing Robbins on leave would violate ERISA, Briceno would not have voted as he did. Although reliance on the advice of legal counsel may present a defense to impropriety under ERISA, it is not a "whitewash." *Howard v. Shay*, 100 F.3d 1484, 1489 (9th Cir. 1996) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982)). To support a defense based on advice of counsel with respect to alleged improper conduct under ERISA, a fiduciary must have: (i) investigated the qualifications of the counsel; (ii) provided counsel with complete and accurate information about the matter on which the advice was provided; and (iii) reasonably relied on the advice given the circumstances presented. *Id*. Ultimately, a fiduciary still "has a duty to exercise his own judgment in the light of the information and advice he receives." *Crowhurst v. Cal. Inst. of Tech.*, 1999 WL 1027033, at *19 (C.D. Cal. July 1, 1999), *aff'd*, 11 F. App'x 827 (9th Cir. 2001).

In light of the circumstances presented in this action, Briceno has shown that he reasonably relied on the advice of counsel when he voted to place Robbins on paid administrative leave. There is no evidence that would support a showing that Briceno acted with the specific intent to interfere with Robbins' rights under ERISA. Briceno did testify that he voted to place her on paid administrative leave due to her role in connection with the draft letter to the OPCMIA. That conduct by Robbins qualified as protected activity. However, that vote is not a sufficient, independent basis to impose liability on Briceno for several reasons.

*First*, the evidence here shows that the three factors in *Howard* were satisfied. Thus, Briceno relied on the advice of the Cook Defendants, who had been acting as counsel to the Trust Funds for a substantial period of time. Consequently, Briceno had no reason to doubt their qualifications to provide counsel as to ERISA and related matters. The evidence also shows that Briceno could reasonably have concluded that the Cook Defendants had sufficient, relevant information regarding the DOL investigation and Robbins' role in it. The evidence also shows that, inasmuch as the Cook Defendants had not disclosed the conflict presented by the personal relationship between Cook and Brain, Briceno acted reasonably in relying on the advice provided by the Cook Defendants. In this regard, the evidence showed that Cook and Chang researched ERISA and other federal statutes with respect to the protection of whistleblowers prior to the November 18, 2011 meeting. At the meeting, Cook informed the trustees that, under ERISA, Robbins could not be terminated for her communications with the DOL. This evidence shows that Briceno could reasonably have concluded that the Cook Defendants had researched the propriety of what actions, if any, could be taken as to Robbins in view of her contacts with the DOL. It also shows that there was no reason for him to question the expertise or objectivity of the Cook Defendants in advising him and the other trustees that Robbins could be placed on paid administrative leave during an inquiry as to her

conduct, including the alleged pressuring one trustee to write a letter critical of another.

*Second*, the DOL has not presented any evidence to support a showing that Briceno had the level of sophistication or experience as to legal issues related to ERISA that it was unreasonable for him to rely on the advice of the Cook Defendants. Indeed, whether an internal complaint like that contemplated by the draft letter to the OPCMIA is protected activity, and whether paid administrative leave is an adverse action, were not clearly settled legal issues at that time. Thus, even if Briceno had doubts about the advice by the Cook Defendants, and as a result had sought a second opinion from other counsel, there is no showing that it would have varied from the advice provided by Cook.

*Third*, as noted above, the evidence shows that Cook had not disclosed her personal relationship with Brain, who was the subject of Robbins' communications to the DOL. The evidence is consistent with the finding that when advising the trustees as to how to respond to Robbins' role in the DOL investigation, Cook was motivated both by a desire to protect Brain and to retaliate against Robbins. Both Cook and Brain created a climate hostile to Robbins at the meeting.

*Fourth*, Cook and Brain took steps, including by scheduling the special meeting, to create the need for an immediate decision by the trustees. Thus, the November 18, 2011 Joint Board meeting had been scheduled only a week earlier. The trustees were told that they needed to attend to address significant issues. Further, the DOL subpoena was issued just one day before the meeting. For this and related reasons, the meeting was somewhat chaotic with respect to the consideration of how to respond to the subpoena and Robbins' related conduct. Some trustees expressed concern that Robbins could remove documents from the files of the Trust Funds. All of these factors contributed to the general view that it was important to make an immediate decision as to what action should be taken as to Robbins. Under these circumstances, it was not unreasonable for Briceno to join others in the vote about Robbins. For example, it would not have been reasonable to expect that he would decline to vote until he had received independent advice from another attorney whom he would have to identify, interview, select and inform about the exigent circumstances that were presented as to Robbins.

*Finally*, the DOL has failed to present any evidence that Briceno had any personal animus towards Robbins because of her involvement in the DOL investigation. Nor has it presented evidence that he had any reason to retaliate against her. Instead, the evidence shows that both Brain and Cook acted with a retaliatory motive, and that each had significant influence over Briceno. As noted, the DOL has presented no reason to believe that Briceno knew about the relationship between Brain and Cook or their reasons to retaliate against Robbins. In short, there is no evidence that Briceno voted with the "specific intent" to interfere with Robbins' rights under ERISA or to retaliate against her for exercising those rights. *Ritter*, 58 F.3d at 457.

(2) Zenith's Failure to Rehire Robbins

*(a) Prima Facie Case and Legitimate Non-Retaliatory Motive*

The DOL has, by a preponderance of the evidence, established a prima facie case that the position that Robbins held at the Trust Funds was eliminated and that she was not rehired by Zenith because of her protected activity. Thus, the protected activity, which has been discussed above, occurred shortly before these adverse actions. *See Ho-Chuan Chen v. Dougherty*, 225 F. App'x 665, 667 (9th Cir. 2007) (unpublished) (six-month gap between protected activity and adverse action not too long to preclude an inference of retaliatory motive).

Defendants have presented sufficient evidence as to legitimate, non-retaliatory reasons to meet their burden as to the second step in the *McDonnell Douglas* analysis. They contend that the duties of the A&C Department were outsourced, and the Administrative Corporation dissolved, due to the findings of the Bond Beebe audit. Thus, it supported the view that outsourcing to Zenith would be more efficient and cost effective. They also assert that Zenith independently decided not to rehire Robbins to reduce costs and due to her poor performance in managing the A&C Department during the time period covered by the Bond Beebe audit.

*(b) Pretext and Causation*

Turning to the third step of the *McDonnell Douglas* analysis, the DOL has established by a preponderance of the evidence that Defendants' proffered reasons for the adverse employment actions are pretextual, and that both Brain and the Cook Defendants caused these adverse actions.[12]

*First*, as discussed previously, Brain, Allen and Cook were responsible for calling the special November 18, 2011 meeting at which the trustees voted to place Robbins on leave. Defendants concede that the purpose of the meeting was to discuss "alternatives" to the Administrative Corporation and outsourcing its work. However, Defendants have not offered evidence that shows why it was necessary to call a special meeting on an expedited basis to discuss these issues. There is evidence that the trustees had been considering conducting a compliance audit of the A&C Department for some time. But, that only confirms that it was unusual to schedule a special meeting in this manner, inasmuch as the issue of an audit had been present for so long. Further, there is no evidence that, at the time that the potential audit was being discussed, there was a significant, parallel discussion about the potential to outsource the services then provided by the A&C Department or to dissolve the Administrative Corporation. On the contrary, the evidence presented at trial shows that these issues were not substantively considered prior to when Allen and Cook discussed them soon after they learned about Robbins' contact with the DOL. This finding is also supported by the testimony to the effect that Baldwin, Lee and Robbins were surprised to learn that the special meeting was called to discuss this issue. To be sure, evidence was presented that Goss had conducted an informal cost analysis of the A&C Department during summer 2011, and had recommended that the collections services be outsourced to a third-party. But, what is missing is

[12] In light of the evidence presented at trial as to Brain's role in causing these adverse employment actions to be taken against Robbins, the DOL's Ex Parte Application for Reconsideration of the Order on the Motion for Summary Judgment is **GRANTED**. Dkt. 307.

evidence that this possibility was presented to, or considered by, the trustees prior to the November 18, 2011 meeting. And, once again, there was no evidence as to why this matter needed to be addressed on an expedited basis, several months after Goss completed his work.

*Second*, Defendants concede that Brain and Cook spoke with several trustees to get them "fired up" for the discussion of alternatives to the Administrative Corporation. They also made efforts to have these trustees support the position of Brain and Cook on that issue.

*Third*, emails exchanged by Cook and Chang prior to the November 18, 2011 meeting make clear that each saw the proposed dissolution of the Administrative Corporation as a means of separating Robbins through an action that would not be deemed a violation of ERISA. For example, Cook sent an email to Chang in which she asked whether Robbins could be put on paid administrative leave "without violating erisa [sic]?" Chang responded:

> I don't know if paid admin leave would be considered the same as suspension since none of the cases mention an instance in which someone was put on paid leave (almost all dealt with discharges). . . . It turns out that the DOL also can bring an ERISA 510 action. Anyway, I was thinking if we put her on paid admin leave assuming she has standing (participant or fiduciary) or the DOL sues, what would be the damages or equitable relief [ ] since she was paid and is still an employee. Thus, I think she should be put on paid leave to at least prevent her from taking out documents. I also[ ] think the Corp should proceed with the independent audit and it will find that the Corp is costly/inefficient etc and the directors can then get bids from TPAs to perform collection and audit work and I am sure the bids will be alot [sic] less than what the Corp cost and Jt. Board can just hire a [third-party administrator] and the directors can dissolve the corporation since it has no clients/revenues.

Ex. 175.

This email exchange is direct evidence that supports a finding that the Cook Defendants wanted to use the ongoing audit to provide what could be claimed as a legitimate, non-retaliatory reason to end Robbins' affiliation with the Trust Funds, *i.e.*, one that was not tied to her contacts with the DOL. Cook testified that Chang's email was simply a "prediction" of what was likely to happen, rather than a plan. However, that explanation warrants little weight in light of the overall concerns about the credibility of Cook's testimony, the context in which it was written and Cook's animus toward Robbins.

*Fourth*, the evidence presented supports the conclusion that the audit procedures designed by Cook were not completely objective and neutral. Instead, the evidence shows that they appear to have been created in an effort to influence the outcome by increasing the likelihood of a finding that the A&C Department was not well run. Although there was no evidence of her expertise in this area, Cook drafted the audit procedures. They were then reviewed by Halford, who made proposed changes. After receiving these proposals, Cook asked Chang if Halford were "watering down" the audit procedures. There is also

evidence that both Allen and Halford were concerned about the manner in which the audit procedures were drafted. Halford, who was very credible, testified that she believed that the audit procedures that Cook drafted appeared to target certain matters related to the A&C Department, but over which it had little or no control. Similarly, Allen sent an email to Cook and Halford on October 3, 2011. In it, he stated that, based on his auditing and accounting background, he was concerned about the proposed audit procedures. He also wrote that the procedures included a "directive to the auditor" as to what he or she should do. As to this Allen wrote that "[w]e cannot tell the auditor what or how to do their job, and this service request is a violation of [Generally Accepted Accounting Procedures] in my opinion in its purest sense." Allen also stated that he was concerned about eliminating any review of Zenith's role in the collections process. Ex. 110. Further evidence as to the shortcomings of the audit was that Robbins was not made available for an interview by Bond Beebe when it conducted the audit because she remained on leave. However, Bond Beebe interviewed all other employees of the A&C Department.

*Fifth*, the Defendants' argument that the vote to outsource the A&C Department's work was based on the results of the Bond Beebe audit is not persuasive. The Joint Board voted to move forward with soliciting bids to outsource the A&C Department's work on January 19, 2012. This was prior to the audit. The Joint Board then established a subcommittee -- which included Brain and Allen -- to review the proposals on February 13, 2012. On that day, Zenith presented its proposal. In response, Allen told Corapi and Lee that Zenith should "sharpen their pencil." Zenith's proposal was resubmitted in March 2012. The subcommittee then reviewed all proposals and recommended that Zenith be selected. Thus, all of the preliminary steps related to whether to outsource the work of the A&C Department occurred before the audit was completed and its results presented. Although the vote to outsource the A&C Department's work occurred on April 12, 2012, which is after the Bond Beebe audit results had been finalized, the evidence shows that the trustees first learned of the results of the audit at that meeting. Moreover, the entire presentation of the issues at the meeting took approximately 95 minutes. Ex. 23. During that time Bond Beebe presented the results of the audit for 60 minutes. This was followed by a discussion of appropriate, responsive steps, and then a final vote on outsourcing the work to Zenith. Such a compressed consideration of this issue is consistent with the view that the audit was designed, at least in part, to provide "cover" for Brain and the Cook Defendants, as to the separation of Robbins. This conclusion is also consistent with the evidence that the stated purpose of the audit was not to determine whether the operations of the A&C Department were too costly, or whether they should be outsourced. Instead, Defendants stated that the purpose of the audit was "to determine whether the corporation is operating in compliance with its written audit and collection policies and procedures." Dkt. 481 at 31; Merchant Depo. at 17:11-21. The final report from Bond Beebe focused on deficiencies in the procedures within the A&C Department. It made recommendations for how those inefficiencies could be addressed with internal changes. It did not suggest that the work should be outsourced, or conclude that the A&C Department was too expensive to maintain.

*Sixth*, prior to the April 12, 2012 meeting at which the Bond Beebe report was presented, Cook and Brain shared their enthusiasm about the anticipated decision by the Joint Board to outsource the services that had been provided by the A&C Department. They also shared that if this occurred, it would end Robbins' position. Cook forwarded to Brain an email from Lee in which he suggested that Baldwin -- a close friend

to Robbins -- had requested that John Merchant, who had performed the audit, should attend the Joint Board meeting on April 12 to discuss its results. In forwarding this email Cook wrote to Brain: "There's your boy!" Brain responded: "The kids right on time! That's good though! He can't say due process was not afforded all trustees. Cut him some slack! Its [sic] a lot of work covering [Robbins'] tracks or lack thereof, would be more appropriate! ;) Thursday should be good! Get some rest Counselor!" Cook then replied to Brain: "This ought to be good!" Ex. 511. These statements, including the reference to Robbins and "due process" are appropriately interpreted to show that Cook and Brain planned to use the results of the audit as a means of removing Robbins. The tone and approach supports the view that the audit was, therefore, a pretext for that predetermined, and expected, outcome. Similarly, in an earlier email that Cook wrote to Brain in February 2012, she referred to Robbins' "termination." Ex. 509. This is consistent with the foregoing finding that Cook and Brain were working to cause Robbins to be terminated.

*Seventh*, at the April 12 meeting, Cook encouraged the trustees to support outsourcing the services of the A&C Department and to eliminate Robbins. Enriquez testified that, during the meeting, Cook said that the quality of Robbins' work was subpar, and that she "had to go." Cook testified that she told the trustees it would be a breach of their fiduciary duty to allow "the existing situation" to continue in light of the deficiencies identified by the audit. The meeting minutes reflect that Cook stated that the findings by Bond Beebe were "independent and objective," and showed a "lack of efficiency and supervision of collections and payroll auditing which can not [sic] be overlooked." Ex. 23.

*Eighth*, Brain and Cook manipulated the Zenith relationship in an effort to ensure that Robbins would not be rehired by Zenith if it took over the functions of the A&C Department. As discussed in detail in Section V.C.2.b.(2) *infra*, during December 2011, Zenith faced a substantial risk of losing all its work with the Trust Funds. Mindful of this, Lee and his superiors at Zenith were eager to please the client so that Zenith could retain the Trust Funds as a client. Lee's primary contacts with the Trust Funds were Brain and Cook. Therefore, to satisfy the client involved maintaining the approval and support of Brain and Cook. Cook and Brain spoke frequently with Lee about Zenith's takeover of the A&C Department. The evidence shows that this issue was discussed in a way that each felt that this outcome was ensured, notwithstanding that the Joint Board had not yet voted on this issue. This evidence shows that Zenith knew that the Cook Defendants and Brain supported its bid to take over the work of the A&C Department, and that it was in its best interest to please the Cook Defendants and Brain. Lee knew that Brain and Cook were upset with Robbins because of her involvement in the DOL investigation. Thus, each had told him that more than once. Lee also knew that they did not want Robbins to return to work for the Trust Funds. Lee, who was a credible witness, testified that in the weeks after Robbins was placed on leave, Cook told him during several conversations that Robbins should not return to her position as director of the A&C Department. Dkt. 292, ¶ 25. Lee relayed to his superiors at Zenith these views about Robbins, including that Cook and Brain were upset that Robbins had communicated with the DOL. *Id.* ¶ 31.

*Ninth*, further evidence of the influence of Brain and Cook as to Zenith's decision not to rehire Robbins is reflected by the evidence of conversations among Brain, Cook, Allen and Lee while Lee was preparing both the initial, and the revised proposal by Zenith to provide the services previously handled by the A&C Department. In a January 11, 2012 email that Lee sent to his superiors at Zenith, he mentioned his

several conversations with Cook during which she told him that the trustees were "looking at Zenith" to take over the A&C Department, including decisions about its staffing. Ex. 74. On January 20, 2012, Cook sent an email to Brain in which she stated that she had "a long chat with [Lee] this afternoon about the staff issues." It also stated that Baldwin had called Lee and told him that he believed Brain and Allen "are out to fire all of the admin corp employees by this move to shut down the Admin Corp." Ex. 180.

Zenith and two other companies submitted proposals for providing the services that were then handled by the A&C Department. However, in February 2012, Zenith alone was asked to submit a revised proposal. As part of that process, Allen told Lee that Zenith should "sharpen their pencil," *i.e.*, reduce the amount of its bid. Allen had been working closely with Cook and Brain since November 2011 and was on the subcommittee reviewing the proposals with Brain. Subsequent emails between Lee and his supervisors support the finding that Allen directed Lee to cut costs by making personnel changes. Thus, on March 27, Lee sent an email to Corapi summarizing a call from Allen. Lee wrote that Allen said that he and Corapi had discussed how Zenith could reduce the amount of its proposal by replacing the staff of the A&C Department. Lee also reported that Allen said that he "sees" Zenith reducing its bid by lowering salaries of the current A&C Department staff or replacing them with other less expensive personnel if they did not agree to the pay cuts. Corapi, Warren and Lee then agreed to revise the Zenith bid to include such language. Ex 73. Lee then submitted the revised proposal to the Joint Board. It presented a quote in the same dollar amount for providing the services of the Administrative Corporation but added: "If Zenith [ ] is able to hire qualified staff at a lower salary rate than the current staff we will pass the savings on to the Trust Funds. If we are not able to lower salaries (through new people or reduced salaries of current staff) our current fee quote would stand." Ex. 37. This evidence shows the influence of Cook, Brain and Allen in the decision later made by Lee that Robbins would not be retained. The evidence also shows that she was the only person in the A&C Department who was not rehired by Zenith.

An email that Lee sent to Corapi on April 15, 2012, which was a few days after the vote by the Joint Board to select Zenith to provide the collection services of the A&C Department, is also significant. Lee described the process of taking over the services of the A&C Department and having its employees hired by Zenith. Lee stated that he believed they should offer employment to the current employees for at least a transitional period. He then stated: "For now, Mayona Crain needs to be hired as she is the only employee in the department that knows where all reports are and how they work. Although she has strong ties to Cheryle Robbins, she can be an asset." Ex. 76. This reference to "strong ties" to Robbins is reasonably seen as a recognition by Lee that Cook and others disliked or distrusted Robbins, and did not want her to remain on staff.

*Tenth*, the claim by Defendants that Zenith decided not to hire Robbins only for financial reasons is not persuasive. It is inconsistent with the evidence discussed above. It also inconsistent with the evidence that, after electing not to hire Robbins, Zenith continued to look for a person to take on the responsibilities she previously handled. Moreover, Cook assisted Zenith in that search. In an email that Lee sent to Corapi on April 15, 2012, he wrote that Cook had suggested a candidate "as a possibility to 'clean-up' and supervise the department." Ex. 76. In another email that Lee sent to Cook on the same day he wrote: "I know you sent me a candidate's resume for a possibility to take Cheryle's place as Director/Supervisor,

but I can not [sic] put my hands on it. Is the candidate still a possibility? Can you please forward the resume to me again?" Ex. 77. There is no evidence that, in looking for someone to take over for Robbins, Zenith was proposing a lower salary. Nor is there any evidence that, notwithstanding Zenith's statements that it would consider offering lower salaries to the current employees, it ever presented that choice to Robbins. Furthermore, although Lee testified that Corapi decided to eliminate Robbins' position based on costs, at his deposition, Corapi did not recall this.

*Finally*, Defendants' assertion that Zenith decided not to rehire Robbins because of her poor performance is not persuasive. This theory is not supported by substantial evidence sufficient to rebut the foregoing explanations for her termination. Nor was evidence presented that Zenith considered the performance of all of those personnel of the A&C Department whom it hired. This is significant in light of the finding in the Bond Beebe audit that with the exception of one employee, all personnel of the A&C Department had performed poorly. It is also significant that Zenith decided not to rehire Robbins when Lee was the only person at Zenith who had seen the results of the Bond Beebe audit. Ex. 76 (Lee email to Zenith supervisors on April 14, 2012, stating that he had the results of the audit, they will be helpful in assessing the needs of the A&C Department, he will send them to his supervisors soon; and that he told Cook that "initially we may need to hire all current employees (with the exception of Cheryle Ann Robbins) to ensure a seamless transition."). There was also no evidence that Lee or any other person at Zenith decided not to hire Robbins due to the quality of her work as director of the A&C Department.

In sum, the DOL has demonstrated by a preponderance of the evidence that the Cook Defendants and Brain decided to begin the process of outsourcing the A&C Department's work and dissolving the Administrative Corporation in response to Robbins' protected activities and that they caused Zenith to elect not to hire Robbins. But-for the DOL investigation and Robbins' role in it, there is no showing that the Joint Board would have taken these same steps. For example, the Joint Board could have voted to implement the recommendations made by Bond Beebe about necessary changes to the A&C Department. This is a reasonable conclusion because, following a similar, critical review of the A&C Department that Goss presented in 2006, no action was taken to consider outsourcing its work. Nor were any operational changes made as to the services provided by the A&C Department. Similarly, but-for the influence of Brain and the Cook Defendants, the evidence shows that Zenith likely would have hired Robbins. Lee and others at Zenith stated more than once that the transition to having Zenith provide collection services would be more seamless if it initially rehired all of the present staff of the A&C Department. For that reason, and in light of the evidence discussed above, it is reasonable to conclude that, but-for the continuous communications by Brain and Cook to Lee that Robbins was not welcome at the Trust Funds, Zenith would have rehired Robbins at the time that it initially took over the services of the A&C Department.

### C. Retaliation Against Rice and Bansmer

1. Whether Rice and Bansmer were Engaged in Protected Activity under ERISA and

Suffered Adverse Employment Actions

The DOL contends that Rice was involved in a protected activity when he participated in the effort to write the letter to Finley, the president of the OPCMIA. For the same reasons discussed above with respect to the conduct of Robbins as to this letter, Rice's actions constitute a protected activity.

The DOL also contends that Rice was terminated because of his close relationship with Robbins. In a Title VII action, the Supreme Court has held that a claim for employment discrimination may be stated where a plaintiff suffers an adverse employment action in retaliation for the protected activity of another person. *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 178 (2011). Such conduct is unlawful where there is a reasonably close relationship between the plaintiff and the person who engaged in the protected activity. *Id.* at 175 ("We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize."). This analysis may be considered in connection with a retaliation claim under ERISA. *See Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 866 (9th Cir. 2014) (pursuant to *Thompson*, "any plaintiff with an interest arguably sought to be protected by a statute with an anti-retaliation provision has standing to sue under that statute" (internal quotation marks omitted)). Therefore, the close friendship of Robbins and Rice could form the basis for a claim as to the termination of Rice. It would require a showing that Rice suffered an adverse employment action as an "intended means of harming" Robbins, and not as "an accidental victim of the retaliation." *Thompson*, 562 U.S. at 178.

The DOL contends that Bansmer was terminated both because of her relationship with Robbins and her relationship with Rice. For the same reasons stated above, this is a sufficient protectable interest if it is shown that these relationships were the reason for her termination.

The parties do not dispute that Rice and Bansmer were both terminated. This is a sufficient showing of an adverse employment action to satisfy the first step in the *McDonnell Douglas* analysis.

2. Whether Cook and Brain Retaliated Against Rice and Bansmer for Engaging in the Protected Activities

a) Findings of Fact

The DOL has demonstrated the following by a preponderance of the evidence:

1. Cook and Brain knew that Rice was involved with the letter to be sent to the OPCMIA.
2. Cook and Brain were aware that Rice, Bansmer and Robbins were friends, and Cook believed Rice and Bansmer were "blindly loyal" to Robbins.
3. By November 22, 2011, Lee had become aware that Bansmer had written an email critical of the Emerald Trac System. He also knew that Bansmer had sent it directly to the Trust Funds, without discussing it with Zenith. As a result, Lee was very upset.

4. Bansmer generally had trouble implementing the Emerald Trac System.
5. On December 1, 2011, Brain informed Lee that Zenith's work had been put out to bid. As a result, throughout December, Lee was concerned that Zenith might lose the Trust Funds as a client.
6. In early December 2011 Cook informed Lee that Rice had also been involved with the OPCMIA letter. Cook discussed the issue with Lee on several occasions in December 2011.
7. On several occasions in December 2011, Cook and Brain told Lee that they were concerned that Rice would retaliate against the Trust Funds if Bansmer were terminated.
8. Lee understood that Brain had "major concerns/ issue[s] with the handling" of Rice.
9. Lee communicated the content of most of his conversations with Cook and Brain to his supervisors at Zenith and to George. Those persons were responsible for the final decision as to whether to terminate Rice and Bansmer.
10. Lee was not involved in the final decision to terminate Rice or Bansmer, but those who did make the decision sought his input. The final decision makers also knew that Zenith was at risk of losing the Trust Funds as a client.
11. Lee did not want to terminate Rice.
12. Cook told Lee that Zenith employees should not communicate with Robbins while she was on leave. Cook was angry when she discovered that Bansmer was still communicating with Robbins and so informed Lee.
13. With respect to terminating Rice, Lee sent an email to the trustees in which he wrote: "Cory Rice's action in an e-mail exchange to discredit a Trustee[] as well as his ongoing communication with Cheryle Robbins, who has been placed on administrative leave by the Board, continues to violate ABPA policies of confidentiality."
14. With respect to terminating Bansmer, Lee sent an email to the trustees in which he wrote: "Louise Bansmer, who is Cory's mother, continues to speak with Cheryle Robbins, regarding Trust Fund matters, after being counseled on several occasions not to do so. In addition Louise has not embraced moving forward with the new Emerald Trac system. Louise has failed to understand the additional steps/safeguards in place in the Emerald Trac system are there to protect errors from occurring thereby protecting the Trust Funds and herself."

The DOL has not demonstrated the following by a preponderance of the evidence:

1. That but-for Bansmer's relationship and communications with Robbins and relationship with Rice, Zenith would not have terminated her.

b) Conclusions of Law

(1) <u>Prima Facie Case and Legitimate Non-Retaliatory Motive</u>

The DOL has established by a preponderance of the evidence a prima facie case of retaliation by both Brain and the Cook Defendants against Rice and Bansmer. Thus, Rice engaged in protected activity through his role in the letter to the OPCMIA about Brain, and he had a close, personal relationship with Robbins. Bansmer also had a close relationship with Robbins and Rice. Both Rice and Bansmer were

terminated. And, the DOL has made a prima facie showing as to causation given that the protected conduct is cited by Zenith as a reason for the termination of Rice and Bansmer, and due to the close temporal proximity between the protected conduct and the adverse employment action. *See Kimbro*, 889 F.2d at 881 ("[T]he timing of a discharge may in certain situations create the inference of reprisal.").

Defendants have also presented sufficient evidence to articulate a legitimate, non-retaliatory reason for Bansmer's termination. Thus, they presented evidence that Bansmer violated Zenith policy by complaining about its Emerald Trac System to Trust Fund employees without first discussing the matter with Zenith.

Defendants have not presented sufficient evidence to articulate a legitimate, non-retaliatory reason for Rice's termination. Thus, the stated reason for his termination was his involvement with the OPCMIA letter, and that is protected activity. However, Brain and the Cook Defendants contend that they cannot be held liable for the termination of either Rice or Bansmer because Zenith made those decisions on its own.

(2) Causation as to Rice

The DOL has established by a preponderance of the evidence that the claim that Zenith unilaterally decided to terminate Rice is without merit. It also showed that Zenith terminated Rice based on his protected conduct, and due to the pressure from Brain and Cook.

Rice was terminated due to his role in the preparation of the letter to the OPCMIA. Lee stated that this was the reason in his email to the Trust Funds, and Defendants have not presented any contrary evidence. Although deemed by Zenith to have violated its policies, the OPCMIA letter remains protected activity. Further, a review of all of the relevant evidence shows that the DOL has demonstrated by a preponderance of the evidence that Defendants' position is not persuasive. As stated in a previous Order under the "cat's-paw" theory, "liability may be imposed where an individual with discriminatory animus, who does not have ultimate decisionmaking authority, influences the decisionmaker to take an adverse action." Dkt. 247 at 22. Here, the DOL has shown by a preponderance of the evidence that both Cook and Brain influenced Zenith's decision to terminate Rice, and that but-for that influence, Zenith would not have done so.

*First*, Cook first brought to Lee's attention that Rice was involved with the letter to the OPCMIA. Lee understood that Cook was very unhappy about this conduct, and Lee testified that Cook told him that because of Rice's involvement with the letter, it would be in Zenith's best interest to terminate Rice.

*Second*, at this same time, Brain informed Lee that the Joint Board had decided to put Zenith's work out to bid. Throughout the month of December 2011, when deciding what to do about Rice's involvement with the OPCMIA letter, Lee knew that Zenith was at risk of losing the Trust Funds as a client. Lee told this to his supervisors who then shared his concern. For example, in an email on December 6, 2011, Warren wrote that she wanted to be on a call about Rice and Bansmer because "this client is at risk." Corapi

responded stating: "Yes, client is definitely at risk. I need to be consulted prior to any action taken with these staff." Ex. 80.

*Third*, those involved in the decision to terminate Rice knew that Cook and Brain wanted Rice to be terminated. Both Cook and Brain repeatedly told Lee -- who relayed the information to his superiors -- that they were concerned about Rice's potential to retaliate if he were terminated prior to Bansmer. Lee knew that both Cook and Brain had strong feelings about terminating Rice. The evidence shows that Zenith was influenced by the positions of Cook and Brain because it wanted to retain the client. For example, on December 30, 2011, Lee wrote an email stating that Cook and Brain were concerned about the possibility that Rice would retaliate if he were terminated after Bansmer. But, Lee did not want to terminate Rice at that time. Warren responded stating: "Yes, we have to do what is right for the client but I am not sure [Rice] is the right thing. Especially after your conversation with [Brain]." Ex. 207. Defendants presented evidence that Brain told Lee in one conversation that he would support any decision by Zenith made with respect to whether Rice should be terminated. However, that statement by Brain must be viewed in context. Zenith was aware of Brain's position on the matter, *i.e.*, that Rice should be terminated, and wanted to please him to ensure continued good relations and opportunities for Zenith. That Cook and Brain caused Zenith's decision is also supported by the evidence that Lee repeatedly expressed concern to his superiors about terminating Rice.

In sum, the trial evidence shows that Cook and Brain were dissatisfied about Rice's involvement in the OPCMIA letter. It also shows that they knew that Rice was close with Robbins -- Cook described him as "blindly loyal." Cook made sure that Lee, and through him Zenith, was informed of Rice's conduct. Cook and Brain repeatedly expressed concerns to Lee about Rice's continued employment at Zenith during a period in which Zenith was at risk of losing the Trust Funds' business entirely. Although George stated in her deposition testimony that Zenith made an independent decision to terminate Rice, the evidence makes clear that the positions taken by Brain and Cook on the issue were the deciding factor for Zenith management, and that but-for these communications to Lee, Rice would not have been terminated.[13] Therefore, the DOL has demonstrated by a preponderance of the evidence that Cook and Brain retaliated against Rice in violation of ERISA.

(3) Pretext and Causation as to Bansmer

The DOL has not demonstrated by a preponderance of the evidence that the proffered reason for terminating Bansmer -- that she wrote a complaint about the Emerald Trac System in violation of Zenith policy -- is pretextual. Nor has the DOL shown by a preponderance of the evidence that Brain or Cook caused Bansmer to be terminated, or that but-for Bansmer's relationship with Rice and/or Robbins she would not have been terminated.

[13] It is also significant that no evidence was presented to show that the termination of Rice reflected compliance with any applicable disciplinary procedures. Thus, no evidence showed that Zenith had a clearly established policy that barred the challenged conduct by Rice, or that it was customary for Zenith to terminate an employee for such an action, as opposed to imposing a less drastic sanction.

*First*, there is very limited evidence that Brain or Cook communicated with Lee about Bansmer during late-2011 or suggested that they wanted her terminated. Although Cook suggested to Lee that she was upset when she discovered Bansmer was in contact with Robbins, by that time Zenith had for several weeks been considering whether to discipline Bansmer for her role in the Emerald Trac System complaint. Similarly, although both Brain and Cook expressed concerns about the familial connection between Rice and Bansmer, and the potential retaliation by Rice, those conversations focused on whether and when Rice, not Bansmer, should be terminated.

*Second*, although in the email sent by Lee, Bansmer's communication with Robbins was given as a reason for her termination, Defendants have presented evidence that those in charge of the decision to terminate Bansmer were focused on the Emerald Trac System. In George's deposition testimony, she stated that Zenith had decided to terminate Bansmer because of a "loss of customer goodwill" because Bansmer had acted in a way "that would have negatively impacted our relationship with the [Trust Funds]." George Depo. at 78:5-7. George referred to the fact that Bansmer did not "elevate her concerns or what she wanted to send to the client to either her manager, supervisor, VP, director, HR, any of the sources that she could report it to," and instead went directly to the trustees. *Id.* at 78:13-20. At no point did George refer to Bansmer's communications with Robbins as a basis for the decision to terminate Bansmer.

*Third*, the DOL has not shown that Bansmer was engaged in protected activity, but instead argues that she is protected because of her relationships with Robbins and Rice. However, the evidence presented does not show that Cook and Brain caused Bansmer to be terminated as an "intended means of harming" Robbins. *Thompson*, 562 U.S. at 178. To the extent that Bansmer was mentioned in the context of the DOL investigation and the retaliation against Robbins, Bansmer was no more than "an accidental victim of the retaliation." *Id*. The evidence supports the claim that Bansmer was terminated due to her handling of the Emerald Trac System complaint. It does not support a showing that there was meaningful pressure or influence by Brain or Cook, much less that it was the "but for" cause of the termination.

For the foregoing reasons, the DOL has failed to demonstrate by a preponderance of the evidence that Bansmer was the victim of retaliation by any of the Defendants.

### D. Breach of Fiduciary Duty

The DOL contends that Brain and Briceno each breached his fiduciary duty imposed by § 404 of ERISA because: (i) Brain failed to pursue all monies the Trust Funds were entitled to collect; (ii) Brain and Briceno failed to investigate any of Robbins' allegations; (iii) Brain and Briceno retaliated against Robbins; and (iv) Briceno voted to settle Robbins' civil action with assets of the Trust Funds. The DOL argues that as to the second and third grounds, Brain and Briceno are also liable for the breach as a co-fiduciary who knowingly participated in or enabled the breaching conduct of the other, pursuant to § 405 of ERISA. The DOL contends that the Cook Defendants are liable for the same reasons.

As previously stated, §§ 404(a)(1)(A) & (B) of ERISA require a fiduciary to "discharge his duties with

respect to a plan solely in the interest of the participants and beneficiaries and [] for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." The duties are to be discharged "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. § 1104(a)(1)(A) & (B). Additionally, § 405(a) establishes liability for the breach of a co-fiduciary if a person "participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach" or "if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach." 29 U.S.C. §§ 1105(a)(1) & (3). As stated in a previous Order, such liability may be extended to non-fiduciaries, such as the Cook Defendants. Dkt. 104 at 13-14.

1. Failure to Pursue All Monies to Which Trust Funds May Have Been Entitled

This basis for asserting a breach of fiduciary duty was not previously pleaded. The DOL contends that Brain "put at issue at trial whether his conduct concerning contractors 'was improper and violated ERISA.'" Dkt. 483 at 31. Thus, the DOL contends that it may proceed on this theory of liability pursuant to Fed. R. Civ. P. 15(b)(2) which states: "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." The DOL argues that Brain introduced evidence intended to respond to this new issue, and thereby impliedly consented to the assertion of the claim.

The DOL has not shown that Defendants impliedly consented to the assertion of this claim. Indeed, the core evidence now cited as a basis for this claim was admitted for a limited purpose, *i.e.*, its effect on Robbins' state of mind. That was relevant in assessing the reasonableness of her complaints to the DOL. Although Defendants presented competing evidence about the conduct of Brain, its purpose was to rebut the claim that Robbins had a good faith belief in the allegations of misconduct she presented to the DOL. The DOL had more than sufficient time and opportunity to advance this as a basis for its breach of fiduciary duty claim against Brain before trial. For example, it could have been presented through briefing that was supported by declarations or other proffered evidence, to which Defendants could have responded at trial. Under these circumstances, it would be unfair to permit this untimely claim.

2. Failure to Investigate Robbins' Claims Against Brain

a) Findings of Fact

The findings of fact set forth in Section V.B.1.a are incorporated by this reference. In addition, the DOL has shown by a preponderance of the evidence that:

1. Brain, Briceno and Cook each was aware of the DOL investigation of Brain by November 18, 2011. Each also had a copy of the subpoena issued by the DOL, which included a list of contractors involved in the investigation.

2. By November 30, 2011, Brain, Briceno and Cook each had a copy of the letter to be sent to the OPCMIA that contained allegations about misconduct by Brain.
3. Neither Brain nor Briceno proposed an investigation of Brain's conduct after viewing the subpoena and the OPCMIA letter. Nor did the Joint Board discuss having such an investigation.
4. Any investigation conducted by Cook into the allegations against Brain was not independent or impartial.

b) Conclusions of Law

The DOL has failed to show by a preponderance of the evidence that Brain or Briceno violated his fiduciary duty by failing adequately to investigate Robbins' allegations against Brain. As an initial matter, the DOL has not shown that Brain had any duty to investigate claims of misconduct made against him. Although the misconduct itself may be grounds for a breach of fiduciary duty claim, as stated above, that claim was not timely presented. The DOL has provided no authority to show that a fiduciary has a duty to investigate himself. Moreover, if there were to be any discussion among the trustees regarding allegations of misconduct by Brain and whether to take any corresponding action, Brain would have to recuse himself given his plain conflict of interest.[14] Nor has the DOL cited any legal authority that supports this unusual position. For these reasons, the DOL has not shown that Brain's failure to investigate himself was a breach of his fiduciary duty.

This claim against Briceno also fails. The DOL has not shown by a preponderance of the evidence that Briceno was aware of the allegations against Brain until November 2011. That is when he was first provided with the DOL subpoena and the draft letter to the OPCMIA outlining allegations of Brain's misconduct. Although evidence was presented that concerns about Brain's misconduct had been raised at JDC meetings for many years, the DOL has not presented evidence that Briceno attended these JDC meetings or otherwise knew, or should have known, about the discussion of this issue. The minutes of the meetings, which were presented as trial exhibits, in which Brain's alleged misconduct was discussed, list all of the trustees who were present. Briceno is never identified. *E.g.*, Exs. 1061-63, 1065, 1074, 1077, 1079, 1081-83, 1086-87. He was shown as a "guest" at only one such meeting. Ex. 1084.

The DOL has also failed to show that, once Briceno became aware of the DOL investigation into Brain, his failure to pursue, or call for an investigation about Robbins' allegations was a breach of his fiduciary duty. The DOL has cited to no authority that supports a finding that a fiduciary is obligated to take such steps under these circumstances. Moreover, the evidence shows that, when Briceno first learned of the allegations against Brain, he was also informed that the DOL was investigating them. Briceno then joined other trustees in voting to engage Cook as counsel to represent the Trust Funds with respect to the DOL subpoena and its investigation. There is no showing, or citation to legal authority, that this was an unreasonable response, and that an independent, parallel investigation should have been commenced by the Trust Funds. Once again, that course would have required that Briceno conclude that he should

[14] This parallels the claim made by the DOL as to Brain's presence during the discussion of what actions to take as to Robbins.

have obtained independent counsel to advise him whether having Cook -- who had not disclosed her personal relationship with Brain to the Joint Board -- proceed in the manner she deemed reasonable was appropriate. This is not a course of action that can be deemed reasonable or appropriate given the circumstances presented. Therefore, the DOL has not shown a breach of fiduciary duty.

3. Placing Robbins on Administrative Leave

a) Findings of Fact

The findings of fact set forth in Section V.B.3.b are incorporated by this reference.

b) Conclusions of Law

The DOL has shown by a preponderance of the evidence that Brain breached his fiduciary duty by engaging in retaliatory conduct against Robbins, and that the Cook Defendants knowingly participated in that breach. The requirement in § 404 of ERISA that a fiduciary discharge duties "solely in the interest of the participants and beneficiaries" includes an obligation not to violate other ERISA provisions to the detriment of the plan participants and beneficiaries. The obligations of a fiduciary include a duty to "deal fairly" with others in transactions. *See Peralta v. Hispanic Bus., Inc.*, 419 F.3d 1064, 1070 n.7 (9th Cir. 2005). This includes a duty not to interfere with the exercise by another person of his or her rights under ERISA.

The DOL has not shown by a preponderance of the evidence that Briceno breached his fiduciary duty. As stated in Section V.B.3.b.(1).(b) *supra*, the DOL has not shown that Briceno had a specific intent to retaliate against Robbins, nor that Briceno acted unreasonably in his reliance on the advice of counsel in voting to place Robbins on leave.

4. Vote to Use Trust Fund Assets to Finance Robbins' Settlement

a) Findings of Fact

The DOL has demonstrated the following by a preponderance of the evidence:

1. Attorney Reed sent an email to all Joint Board trustees on January 28, 2014. It described the terms of a proposed settlement agreement as to Robbins' civil lawsuit.
2. The proposed agreement included the payment of $287,500 to Robbins that would be funded by four of the five Trust Funds.
3. Reed told the Joint Board that it had to decide whether to agree to these terms by the next morning. They could call him, but there was no time for a Joint Board meeting. Reed encouraged the trustees to accept the proposed offer.
4. Briceno voted in favor of the settlement. Brain voted against it.
5. Money from the Trust Funds was not ultimately used to pay Robbins the $287,500.

The DOL has failed to demonstrate by a preponderance of the evidence:

1. By voting to use assets of the Trust Funds to settle with Robbins, Briceno was attempting to shield himself from liability, rather than act in the interests of the Trust Funds and their participants and beneficiaries.
2. Briceno did not reasonably rely on the advice of counsel.

b) Conclusions of Law

In the prior Order on Defendants' Motion for Summary Judgment it was determined that by voting to use the assets of the Trust Funds to finance the settlement with Robbins "Brain and Briceno may be found to have attempted to shield themselves from liability. Such an action would violate § 410." Dkt. 247 at 32. However, the DOL has not shown by a preponderance of the evidence that by voting to use the assets of the Trust Funds Briceno was attempting to shield himself from liability in violation of § 410.

*First*, the evidence does not show that Briceno voted as he did to shield himself from liability, rather than to act in the best interest of the Trust Funds. The email sent by Reed discussing the proposed settlement agreement indicated that there could be serious consequences if the settlement offer were rejected. Among other things, Robbins or the DOL could sue the Trust Funds, which are uninsured, and the DOL could seek redress from one or more trustees personally, for which there is no insurance coverage, including as to attorney's fees incurred to defend such an action. Reed stated:

> Bottom line, there are strong reasons to settle this matter in full now and, although we are not happy with this higher amount, we recommend that the Trustees authorize contributing $287,500 toward the settlement (plus the pension credit). The certainty of a DOL lawsuit and the lack of insurance coverage on that is something to be taken very seriously.

Ex. 1030.

Reed added that there was a high likelihood that the DOL would bring an action against the Trust Funds, and that it could seek an award of $650,000 or more from the Trust Funds, "and possibly the Trustees personally." *Id.* Thus, although Reed mentioned that personal liability against certain trustees was a potential consequence of declining the settlement offer, he focused on the potential liability of the Trust Funds. Therefore, it has not been shown that, by voting to use assets of the Trust Funds to settle the litigation, Briceno was not acting "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1).

*Second*, the evidence shows that Briceno reasonably relied on the advice of counsel. As stated above, Reed urged the trustees to accept the settlement offer. In his reply email, Briceno stated: "I vote yes to the proposal, as recommended." Ex. 1049. As previously stated, reliance on the advice of legal counsel may

present a defense to a breach of fiduciary duty claim when the fiduciary has: (i) investigated the expert's qualifications; (ii) provided the expert with complete and accurate information; and (iii) made certain that reliance on the expert's advice was reasonably justified under the circumstances. *Howard*, 100 F.3d at 1489. Those criteria are satisfied here.

Reed had been serving as counsel to the Trust Funds for approximately six months at the time that he evaluated this proposal. This made it reasonable for Briceno to rely on his qualifications. Reed had been defending Robbins' action on behalf of the Trust Funds and had been involved in the settlement negotiations. Therefore, he had all of the necessary information. Finally, it was reasonable for Briceno to rely on Reed's recommendation about settlement. In Reed's email he stated that the DOL was a party to the settlement discussions. From this it was reasonable to assume that the settlement agreement had been approved by the DOL. Moreover, Reed made clear that there were strong reasons to accept the offer, and that there was no time for further discussion. He stated:

> Unfortunately, we do not have time to debate these issues because the matter is scheduled to begin trial Wednesday morning in the absence of a settlement. I understand that we have until mid-morning to get back to them. It cannot be settled without Trustee approval. . . . If we can't get the requisite majorities by the time needed, I am informed that it will proceed to trial. There is not time for a Joint Board meeting, nor even a conference call in the morning (it's just too late to schedule that). I apologize but you must get back to me before 10:00 am on Wednesday.

Ex. 1030.

For the foregoing reasons, Briceno's vote was reasonable. Therefore, the DOL has failed to show that he breached his fiduciary duty.

## VI. Remedies

### A. The Positions of the Parties

The DOL seeks several forms of equitable relief. First, it seeks the removal of Brain and the Cook Defendants from their current positions at the Trust Funds. It also seeks to bar each permanently from serving as either fiduciary or a provider of services to any ERISA-covered plan. Second, it seeks an order that the Cook Defendants be required to pay the following amounts of restitution: (i) $61,480.62, which is the amount of attorney's fees paid to them by the Trust Funds in connection with actions that constituted violations of ERISA; and (ii) $66,000, which is the cost of the Bond Beebe audit. Jerome Raguero, a Senior Investigator for the Employee Benefits Security Administration of the DOL, presented a declaration in support of these requests. He states that he reviewed all of the billing records of the Cook Defendants for the relevant period. They reflected total charges to the Trust Funds of $188,871.68 in connection with Cook's role as delinquency counsel. Dkt. 295, ¶ 8; Ex. 512. Based on his review of these records, Raguero concluded that a total of $61,480.62 was charged, and paid, in connection with the

unlawful conduct of the Cook Defendants that forms the basis for the claims advanced in this proceeding. Dkt. 285, ¶ 7; Ex. 513. This includes charges starting on November 15, 2011 -- three days before the November 18, 2011 Joint Board meeting during which Robbins was placed on leave. It also includes charges for actions taken by Cook related to the DOL investigation, her investigation into Robbins after she was placed on leave, and her work related to the Bond Beebe audit. The amount requested by the DOL also includes work by the Cook Defendants beginning in mid-2012 through April 2013 related to defending the Trust Funds in response to the civil action brought by Robbins.

The DOL states that the $66,000 should also be disgorged by the Cook Defendants because Merchant testified at his deposition that that was the amount paid by the Trust Funds for the Bond Beebe audit, exclusive of travel costs. Merchant Depo. at 142:1-6. The theory is that this cost, although not an amount paid to the Cook Defendants, would not have been incurred but for their misconduct.

Defendants respond that the removal of either or both Brain or Cook is not warranted. They contend in those cases in which this remedy has been applied, the challenged conduct involved "egregious" self-dealing, and repeated violations leadings to the loss of funds to a protected entity. They argue that those circumstances are not presented here. Dkt. 485 at 20. Defendants also contend that the request for disgorgement should be denied because there is no evidence that the amount was received in connection with violations of ERISA by the Cook Defendants. Finally, they claim that the evidence shows that the Bond Beebe audit was necessary and appropriate.

### B. Legal Standard

"Where there has been a breach of fiduciary duty, ERISA grants to the courts broad authority to fashion remedies for redressing the interests of participants and beneficiaries." *Donovan*, 716 F.2d at 1235. "Courts also have a duty to enforce the remedy which is most advantageous to the participants and most conducive to effectuating the purposes of the trust." *Id.* (internal quotation marks omitted).

Section 502(a)(5) of ERISA provides that the Secretary of the DOL may bring a civil action to enjoin any act or practices in violation of ERISA, or "to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter." 29 U.S.C. § 1132(a)(5). Section 1109 of ERISA provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. § 1109(a).

"[T]rustees may be removed for imprudent, but not necessarily improper, conduct." *Shaver v. Operating Eng'rs Local 428 Pension Tr. Fund*, 332 F.3d 1198, 1203 (9th Cir. 2003); *accord Donovan*, 716 F.2d at 1238-39 ("Under the broad remedial provision of ERISA courts have also found removal of fiduciaries to be an appropriate remedy upon findings of imprudence, divided loyalties, and prohibited transactions. Thus, in the present case where the trustees committed numerous ERISA violations, the district court acted well within its broad discretion in divesting the individual appellants of their investment functions as trustees of the Pension Fund." (internal citation omitted)). *Shaver* cited *Dairy Fresh Corp. v. Poole*, 108 F. Supp. 2d 1344, 1361 (S.D. Ala. 2000). *Dairy Fresh* found two defendants liable for breach of their fiduciary duties, ordered their removal as fiduciaries of the Dairy Fresh Employee Stock Ownership Plan, and permanently enjoined each from acting in the future as fiduciaries for that plan. *Id.*

Other Circuits have reached parallel results. *See Martin v. Feilen*, 965 F.2d 660, 673 (8th Cir. 1992) ("In addition to engaging in the actionable self-dealing we have described, Henss's trial testimony displayed an appalling insensitivity to the proper role of ESOPs and ESOP fiduciaries. . . . Therefore, although we are most reluctant to impose such a stringent limitation on a person's livelihood, we agree with the Secretary that the district court abused its discretion in not further enjoining Henss from acting as a service provider to ERISA plans."); *Beck v. Levering*, 947 F.2d 639, 641 (2d Cir. 1991) ("Although we have never ruled that permanent injunctions are available as a remedy under ERISA, it is self-evident that such a remedy may be appropriate where individuals participate in the kind of egregious self-dealing proved in *Lowen*. Congress intended to make the full range of equitable remedies available. . . . Permanent injunctions are among the remedies available under the law of trusts. To deny the power in federal courts to issue permanent injunctions would, therefore, fly in the face of both precedent, Congressional intent, and common sense. . . . We reject the argument that ERISA fiduciaries and their associates must be allowed to loot a second pension plan before an injunction may be issued. ERISA imposes a high standard on fiduciaries, and serious misconduct that violates statutory obligations is sufficient grounds for a permanent injunction.").

ERISA also permits equitable relief that involves the payment of money under some circumstances. 29 U.S.C. § 1109(a); *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-52 (2000). Thus, a "surcharge may be an appropriate form of equitable relief to redress losses of value or lost profits to the trust estate and to require a fiduciary to disgorge profits from unjust enrichment." *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 958 (9th Cir. 2014). "[A] trustee (or a fiduciary) who gains a benefit by breaching his or her duty must return that benefit to the beneficiary." *Id.*

### C. Analysis

The evidence showed that both Brain and the Cook Defendants engaged in specific and intentional retaliatory conduct against Robbins and Rice in violation of § 510. Consequently, each breached the fiduciary obligations imposed by ERISA. These serious violations of ERISA warrant corresponding remedies. Therefore, the following remedies are found to be reasonable and appropriate:

1. Brain shall be removed as trustee for the Trust Funds and permanently enjoined from acting as a fiduciary to them. In addition, in connection with any future application by Brain for a prospective fiduciary position with, or on behalf of, any ERISA-covered plan, and prior to accepting any such position that is offered whether or not in response to such an application, Brain shall disclose the terms of the present injunction;

2. To the extent that the Cook Defendants continue to represent the Trust Funds, that attorney-client relationship shall be terminated. In addition, they shall be permanently enjoined from providing services to the Trust Funds in the future;

3. The Cook Defendants shall disgorge $61,480.62 to the Trust Funds for fees received as a result of work performed that was prohibited conduct.[15]

The outcome is different with respect to the cost of the Bond Beebe audit. Thus, the DOL has not shown that its cost constituted a loss to the Trust Funds, that it was incurred due to the actions of the Cook Defendants, or that it resulted in their unjust enrichment. The audit was planned before the DOL investigation began, and it provided useful information to the Trust Funds with respect to potential improvements to their audit and collection procedures. Moreover, Bond Beebe billed the Trust Funds for the audit, and was paid for this work. No payment was made to the Cook Defendants.

## VII. Conclusion

For the reasons stated in this Order, the DOL has demonstrated the following by a preponderance of the evidence:

1. Brain and the Cook Defendants retaliated against Robbins for her communications with the DOL by placing her on administrative leave;

2. Brain and the Cook Defendants retaliated against Robbins by causing the work performed by the A&C Department to be outsourced to Zenith and by causing Zenith not to hire Robbins to participate in its work;

3. Brain and the Cook Defendants retaliated against Rice by causing Zenith to terminate him; and

[15] Defendants argue that there is no evidence showing that the amount to be disgorged was received in connection with the ERISA violations presented as to the Cook Defendants. However, Defendants have made no evidentiary showing to support this claim. For example, they did not challenge the propriety of including the charges associated with any of the billing entries identified in the Raguero Declaration. That declaration presented a detailed schedule of each billing entry by the Cook Defendants, along with a description of the associated work that was undertaken. Ex. 513. A review of these entries confirms that each is reasonably related to the conduct by the Cook Defendants that has been found to have been in violation of ERISA. Moreover, the clear conflict of interest that arose for counsel due to the undisclosed, personal relationship between Cook and Brain, provides a separate basis to challenge the propriety of the amounts billed starting on the date when that conflict arose.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

| Case No. | LA CV14-03911 JAK (AGRx) | Date | July 25, 2016 |
|---|---|---|---|
| Title | Thomas E. Perez v. Scott Brain, et al. | | |

4. Brain breached his fiduciary duty by retaliating against Robbins by causing her to be placed on administrative leave, and the Cook Defendants knowingly participated in that breach.

The DOL has failed to show by a preponderance of the evidence that:

1. Brain and the Cook Defendants retaliated against Bansmer;

2. Briceno retaliated against Robbins;

3. Brain or Briceno breached his fiduciary duty by failing to investigate Robbins' allegations against Brain; or

4. Briceno breached his fiduciary duty by voting to use assets of the Trust Funds to pay the cost of the settlement of the civil action brought by Robbins.

The newly advanced basis for the claim of a breach of fiduciary duty asserted by the DOL against Brain -- that he failed to collect all monies owed to the Trust Funds -- is rejected because it was not timely advanced.

Brain and the Cook Defendants shall be removed and permanently enjoined from acting as fiduciary or counsel to the Cement Masons Southern California Trust Funds. In connection with any future application by Brain for a prospective fiduciary position with, or on behalf of, any plan that is subject to regulation under ERISA, and prior to accepting any such position that is offered whether or not in response to such an application, Brain shall disclose the terms of the present injunction. The Cook Defendants shall disgorge $61,480.62 to the Trust Funds within 30 days after the entry of judgment in this matter. The DOL shall lodge a proposed judgment on or before August 8, 2016, after conferring with Defendants to seek an agreement as to its form. If the parties cannot agree as to the form, within 10 days after the proposed judgment is lodged by the DOL, Defendants shall lodge any objections.

**IT IS SO ORDERED.**

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