IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, *et. al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. H-01-3913 (Consolidated)
ENRON CORP., an Oregon Corporation, *et. al.*,	)	
Defendants.	)	

THE SPARK INSTITUTE'S AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT NORTHERN TRUST COMPANY'S MOTION TO DISMISS

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, et. al. Plaintiffs, v. ENRON CORP., an Oregon Corporation, et. al., Defendants.	)	Civil Action No. H-01-3913 (Consolidated)

THE SOCIETY OF PROFESSIONAL ADMINISTRATORS AND RECORDKEEPERS' AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT NORTHERN TRUST COMPANY'S MOTION TO DISMISS

The Society of Professional Administrators and Recordkeepers ("SPARK") was founded in 1989 as an inter-industry association of service providers to employee benefit plans, particularly defined contribution plans, such as 401(k) plans. SPARK represents over 250 member companies, including banks, insurance companies, mutual fund managers, third party administrators and benefit consultants. These member companies provide services to plans holding more than 95% of all 401(k) plan assets. Thus, SPARK is uniquely situated to help the Court understand the complex role played by service providers and recordkeepers ("Recordkeepers") in the

administrative structure of employee benefit plans governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

Prior to the last decade, Americans typically received pensions from defined benefit pension plans which measure benefits with respect to a formula usually based on final average pay and years of service. The administrative focus of such plans is on the plan rather than the participant: cash flows are predictable and stable, plan accounting is performed annually, investments are made for the long term and changed only after lengthy consideration, and the service providers responsible for administration generally interact with a few persons at the plan sponsor.

The predominant form of retirement plan today, however, is the individual account plan, especially the 401(k) plan, such as the Enron Savings Plan. There are over 350,000 such plans, with more than $1.5 trillion in assets, covering more than 38 million Americans. This explosive growth could not have happened without a massive change in the retirement services business. The relatively simple defined benefit plan administrative business has become a transaction-intense business of following directions from millions of individual participants. With the help of recent technological advances in voice response systems and the Internet, Recordkeepers have the ability to execute hundreds of thousands of instructions every day quickly and accurately. And that is their job -- to do today what a participant or plan fiduciary tells them to do today. Indeed, 401(k) plans simply could not exist

without the ability to handle this exponential increase in the level of administrative complexity.

Consistent with the transactional nature of the work, most recordkeeping agreements explicitly state that the Recordkeeper is instructed to follow certain terms and procedures in carrying out its duties and responsibilities, and that its duties are purely ministerial and nondiscretionary. These agreements also typically contain an acknowledgement from the plan sponsor and the plan's named fiduciary that the Recordkeeper is not a fiduciary under ERISA. This is not intended as a limitation on liability. Rather, it assures that everyone is clear on whose job it is to give orders and whose job it is to carry them out.

Plaintiffs' briefs and the DOL amicus brief both refer to Northern Trust as the directed trustee of the Enron Plan, but in fact, Northern Trust Co. was a directed trustee and an affiliate --Northern Trust Retirement Consulting, Inc. ("NTRC") -- was the Recordkeeper. Plaintiffs acknowledge the separate roles played by Northern Trust and NTRC in their complaint (at ¶ 710), but both Plaintiffs and the DOL consistently refer to Northern Trust—the directed trustee—when describing recordkeeping activities which were actually carried out by NTRC.

One of the principal reasons SPARK is filing this brief is to clarify that the allegations made against Northern Trust arise out of NTRC's role as Recordkeeper to the Enron Plan and not in Northern Trust's role as directed

trustee. The implementation of a conversion, including the work that occurs during a blackout period, falls squarely and exclusively into the domain of the Recordkeeper. This is not a "Directed Trustee" responsibility or a "Directed Trustee" transaction and it never has been. A typical directed trustee agreement will make no reference to conversions or blackout periods, while a recordkeeping agreement will almost always address that occurrence.

No one disputes that the participants in the Enron Savings Plan, like all of the company's shareholders, suffered large losses, but the real tragedy would be if the courts react to those losses by taking extreme legal positions based on what we believe are misleading arguments. In particular, the Court should not even reach the heart of DOL's argument -- that there was a "direction" here that Northern Trust, as a "directed trustee fiduciary," had some legal obligation to ignore. That is because the case is really about Northern Trust's duties as a "non-fiduciary Recordkeeper." Once Northern Trust's true role is recognized, the Court will see that by arguing that the law requires Recordkeepers to second-guess directions given to them, the Plaintiffs and the Department of Labor are offering a radical re-interpretation of the role of Recordkeepers that is fundamentally inconsistent with the nature of 401(k) plan administration and existing law, including DOL pronouncements. We urge the Court to recognize the dangers inherent in the DOL's position and reaffirm the legal principles that have played such a significant role in expanding our retirement system.

The Role of the 401(k) Plan Recordkeeper

A 401(k) plan is a form of "individual account plan" as defined by Section 3(34) of ERISA, 29 U.S.C. § 1002(34), because it is a plan –

> which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and forfeitures of accounts of other participants which may be allocated to such participant's account.

Many 401(k) plans are also intended to qualify as "Section 404(c)" plans, a savings plan that "provides for individual accounts and . . . permits a participant and beneficiary to exercise control over assets in his account." See 29 U.S.C. § 1104(c). The responsibility for keeping track of all these individual accounts, amounts contributed, income, expenses, gains, losses, forfeitures, allocations, and exercises of investment control belongs to the Recordkeeper.

More specifically, each participant account in a 401(k) plan may consist of several sub-accounts holding salary deferrals, employer matching contributions, profit sharing contributions, after tax participant contributions, and monies that have been rolled-over from a previous employer's 401(k) plan (roll-over funds may also include salary deferrals, employer match, profit sharing contributions, and after tax contributions by the employee). Every dollar of every participant account must be tagged to a specific source, and each source may be applied to virtually any combination of investment

options available, including company stock. For federal tax purposes, each source of participant funds must be accounted for in terms of basis and earnings. In addition, sources may have special restrictions imposed by law or by the terms of the plan. For instance, pre-tax salary deferral money in a participant account is subject to a 10% early withdrawal penalty, while after-tax participant contributions are not subject to such penalties.

Expenses of administering the plan and managing investment vehicles offered under the plan may be paid for by the employer or by participants. The Recordkeeper must keep track of all the expenses and accurately record which ones are allocable to the employer, and, for those paid by participants, which ones are allocable to which participant. When employees leave before vesting occurs, the Recordkeeper calculates how much of the account is to be forfeited (distinguishing between moneys that were contributed by the employee versus those contributed by the employer), and then references the plan document to ascertain how forfeitures are used (i.e., reallocated, used to pay plan expenses or to reduce employer contributions). Most plans also allow participants to borrow against their account balances, and the Recordkeeper must keep track of separate rates of interest, repayments, and if the loan is not paid back, forfeitures.

Based on market expectations, most recordkeepers process transactions on a daily basis (e.g., in-service withdrawals, such as loans, financial hardships, and rollovers), which creates a complex processing environment.

As an example, consider a Recordkeeper that supports 159,000 participants from 135 plans. If each plan allows for four (4) different types of in-service withdrawals, then there is the potential for the Recordkeeper to receive 85,860,000 in-service withdrawal requests. This number of potential transactions is exclusive of investment exchanges, salary deferral modifications or beneficiary designation changes, which are further examples of transactions that can occur every day.

On the investment side, the vast majority of 401(k) plans allow for daily valuation and trading and most allow individual participants to direct their investments from among a list of investment options (including company stock) chosen by the plan's named fiduciary. As the Court can imagine, on any given day, many hundreds of thousands of participants may be directing multiple transactions for each of the thousands of plan customers of any one Recordkeeper. Each of these transactions must be received, recorded, processed, transmitted, executed, and the gains and losses accounted for.

Not surprisingly, all of this time-sensitive administrative activity cannot take place without substantial automation, and, at the small profit margins demanded by customers, must be handled in large measure by systems and not individual employees. Thus, Recordkeepers have invested millions of dollars in voice response and computer systems to respond to, and execute, directions without the need for human intervention.

While our members strive to provide high-quality service to their customers, the recordkeeping business is extremely competitive and plans routinely evaluate whether to switch Recordkeepers. Indeed, plan fiduciaries are required by DOL's ERISA regulations to ensure that they can terminate any service provider relationship on reasonably short notice. See 29 C.F.R. § 2550.408b-2(c). Thus, a typical recordkeeping contract requires that a Recordkeeper cooperate with the plan sponsor and successor Recordkeeper to effect an orderly transition.

As the Court can appreciate, a conversion transaction is an extremely complex process that requires careful planning and execution. Appendix A contains a sample Implementation Task Schedule for a conversion involving a typical 401(k) plan. It enumerates over 70 tasks that must be completed by the Recordkeeper in order to effect a conversion.

One necessary aspect of every conversion is a "blackout" period, during which some, but not all activities are frozen to allow information to be preserved while transition processing occurs.[1] For instance, salary deferrals, employer matching contributions and monthly payments to retirees are usually

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[1] Plaintiffs and DOL frequently refer to a "lockdown." That is not a term used in the retirement services industry. A "conversion" is the appropriate term identifying the transaction where a plan is transferring the administration plan from one vendor to another. A "blackout" is a cessation of trading activity with respect to plan investments that allows the transition to occur without errors.

not frozen and continue as normal. Other activities, such as exchanges from one investment option to another, in-service withdrawals, loans, and lump-sum final distributions are frozen during a typical blackout period. At the start of the conversion process, the plan sponsor or named fiduciary will communicate to participants and beneficiaries about the impending recordkeeping change, including the blackout period. The communication gives a definite date and time when all participant-initiated transactions are temporarily suspended and the estimated number of days plan transactions will continue to be suspended. The blackout timeframe is an estimate because there are a variety of factors that determine the actual blackout period; however, generally, participant-initiated transactions are only suspended for a brief period of time, which is usually shorter than what has been communicated to participants. In short, despite Plaintiffs' and the DOL's statements that a Recordkeeper (or directed trustee) can "impose" a blackout on unsuspecting plan participants, a blackout is merely one phase of a conversion that happens when one Recordkeeper is replaced by another -- a decision controlled by the plan sponsor and named fiduciary, not the Recordkeeper.

As should be apparent, all of this activity cannot take place without a clear decision-making mechanism in place. The Recordkeeper must know what the rules are, and more importantly, who has the authority to give directions on behalf of a plan. The Recordkeeper does not create any of the

rules governing these transactions; rather, plan documents adopted by the plan sponsor set forth the rules and procedures governing the plan, including any and all rules governing the handling of employer securities. Named fiduciaries (and in self-directed plans, the participants) give the orders. The only role of the Recordkeeper is to faithfully execute the rules written in the plan and the directions it is given.

ARGUMENT

The DOL's brief is an exercise in misdirection. DOL is hoping that the Court will ignore Northern Trust's role as Recordkeeper by stating over and over again that Northern Trust was the trustee of the Enron plan. This is disingenuous as a matter of law and in light of the facts of this case because the blackout activities that are the focus of the allegations have nothing to do with Northern Trust's role as directed trustee and everything to do with its role as the Recordkeeper.

As we argue below, this is a critical distinction because no one, including DOL, has ever suggested that Recordkeepers are fiduciaries under ERISA. Indeed, given that the nature of the business is the speedy and accurate execution of directions, the business simply cannot exist if there is any suggestion in the law that Recordkeepers have some duty to second-guess directions they receive from plan fiduciaries or participants.

Second, service providers routinely occupy dual roles with respect to a plan, one of which may be as a fiduciary and the other as a non-fiduciary.

Until the DOL's brief here, neither it nor the courts had ever taken the position that that fact is dispositive or even necessarily relevant. Rather, the only issue is which role the defendant is undertaking with respect to the allegations actually being made in the case.

Finally, this would be a strange case in which to depart from these accepted legal principles. As noted, the only decision that anyone made here was to change recordkeepers; the blackout was merely a consequence of the conversion. Thus, the only "direction" that Northern Trust could refuse to follow is the order to cease working for the plan. To suggest that any service provider has a right, indeed an obligation, to violate its contract by refusing to be replaced is an extraordinary interpretation of ERISA.

I. RECORDKEEPERS ARE NOT ERISA FIDUCIARIES.

Prior to the DOL's brief in this case, no one had ever suggested that a 401(k) Recordkeeper assumed fiduciary responsibilities for carrying out the directions of a plan fiduciary. On the contrary, shortly after ERISA was passed, the DOL provided guidance to the fledgling retirement plan industry that a variety of plan service providers are not fiduciaries. See Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8. Specifically, DOL stated that persons who perform purely ministerial functions within a framework of policies, procedures and rules developed by others are not fiduciaries, and further clarified that the maintenance of service and employment records as well as the collection and allocation of contributions in accordance with plan terms

are not fiduciary functions. 29 C.F.R. 2509.75-8, D-2. As we have discussed, 401(k) plan Recordkeepers in the pension arena perform precisely these types of quintessentially nondiscretionary services.

Courts have likewise recognized that nondiscretionary plan service providers are not ERISA fiduciaries. See, e.g., Wilkinson v. Haworth, 186 F. Supp. 2d 687 (S.D. Miss. 2002) (service provider to 401(k) plan was not a fiduciary when it provided recordkeeping services); Depalma Hotel Corp. v. Third Party Admins., Inc., No: 3:99-CV-00227-R, 2000 U.S. Dist. LEXIS 15095 (N.D. Tex. Oct. 11, 2000) (third party administrator was not a fiduciary because services agreement did not give it discretionary authority or control with respect to plan management, administration, or investments); CSA 401(k) Plan v. Pension Professionals Inc., 195 F.3d 1135, 1139 (9th Cir. 1999) (service provider's accounting of plan investments was not fiduciary function); Beddall v. State Street Bank and Trust Co., 137 F.3d 12, 20 (1st Cir. 1998) ("Without more, mechanical administrative responsibilities (such as retaining the assets and keeping a record of their value) are insufficient to ground a claim of fiduciary status."); Arizona State Carpenters Pension Trust Fund v. Citibank, 125 F.3d 715, 721 (9th Cir. 1996) (bank service provider to pension fund was not fiduciary when its services were limited to receiving, holding and investing trust fund monies at direction of others and furnishing reports on fund assets). See also Board of Trustees of Western Lake Superior Piping Industry Pension Fund v. American Benefit Plan Admins., Inc., 925 F.

Supp. 1424 (D. Minn. 1996) (development of computerized recordkeeping system for plan is not fiduciary function).

As we argue below, given the nature of the direction Northern Trust was supposed to ignore – its own replacement as Recordkeeper – this would hardly be the factual context in which to hold that Recordkeepers have a right, indeed an obligation, to ignore directions whenever they feel that the action would not be in the best interests of the participants. But one of our major concerns is that the DOL's position cannot be confined to conversion situations; it would presumably apply to <u>any</u> direction, including investment instructions from participants. And the DOL urges the Court even further down this already treacherous road when it asserts that a Recordkeeper must not only assess a direction on the basis of information it knows, but also in light of what it should know, thus requiring a Recordkeeper to undertake an investigation before following a direction.

As discussed above, the essence of 401(k) administration is the quick and accurate execution of directions, and, in order to accomplish that goal, Recordkeepers have created systems that automate the process to the greatest extent possible. The DOL's argument would make that impossible; instead, transaction after transaction would require a lengthy process of evaluation as the Recordkeeper would have to assess whether it would be prudent to substitute one investment fund for another, or eliminate a fund, or accept a match of employer stock, or even make a particular trade. Moreover, the

argument assumes that the Recordkeeper has information which would allow it to determine the prudence of any particular direction. Given the millions of participant accounts and the myriad of investment options available under each account, it is literally impossible for Recordkeepers to have the necessary information to carry out the task DOL would assign them.

DOL's attempt to make Recordkeepers liable as fiduciaries under ERISA is contrary to its own regulations and pronouncements, and would make 401(k) plan administration, and therefore 401(k) plans themselves, impossible to maintain. We urge the Court to recognize the mischief inherent in the DOL's position.

II. THE LAW RECOGNIZES THAT PERSONS CAN BE SUBJECT TO THE FIDUCIARY PROVISIONS WHEN ACTING IN ONE CAPACITY AND NOT SUBJECT TO THEM WHEN ACTING IN ANOTHER.

The plaintiffs and the DOL seek to conflate Northern Trust's separate and distinct roles in the hopes of enticing the Court into holding that when a directed trustee performs recordkeeping activities, the directed trustee's alleged fiduciary status necessarily converts all of its other, clearly non-discretionary activities, into fiduciary activities as well. This is not the law.

The fact that one may be a fiduciary for some purposes does not make one a fiduciary for all of his or her activities. This follows naturally from the definition of "fiduciary" in ERISA Section 3(21), 29 U.S.C. § 1002(21), which states that a person is a fiduciary "to the extent" that he or she

undertakes certain activities. See Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1459-60 (5th Cir. 1986). Thus, the courts have always recognized that persons can act in both a fiduciary and non-fiduciary capacity with respect to a plan and that that fact has important legal consequences. See John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank, 510 U.S. 86 (1993) ("people may be fiduciaries when they do certain things but be entitled to act in their own interests when they do others."); Beddall v. State Street Bank and Trust Co., 137 F.3d 12 (1st Cir. 1998) ("fiduciary status is not an all or nothing proposition."). As the Supreme Court has held

> In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to the complaint.

Pegram v. Herdrich, 120 S. Ct. 2143, 2152-53 (2000).

We urge the Court to look behind the rhetoric and focus on precisely what is being alleged in this case: that Northern Trust "exercised authority and control over the plan assets by imposing" the blackout, that it had both the authority and the ability to stop the blackout, and that by not delaying the blackout, it breached its duty to plan participants. DOL Brief at 45-46. Conversion activities, such as the ones complained of by the Plaintiffs and the DOL, are conducted exclusively by Recordkeepers. Even to the extent that

Northern Trust has some fiduciary exposure as a directed trustee for some of its activities, it had no duties in its capacity as Recordkeeper with respect to the conversion.

Under DOL's theory, any activities, even those quintessential recordkeeping activities associated with plan conversions, when carried out by a directed trustee or its affiliate, acting under a separate contract, would transform Recordkeepers into fiduciaries liable under ERISA. We urge the Court to recognize that this is simply not the law.

III. ERISA CANNOT BE READ TO ALLOW SERVICE PROVIDERS TO IGNORE A DIRECTION TO BE RELACED, MUCH LESS REQUIRE THEM TO DO THAT.

While the Plaintiffs and DOL concentrate on the "decision" to "impose" the blackout, there was no separate direction to impose a blackout period; it is a mandatory part of the very complicated task of terminating one Recordkeeper's services and converting plan records to a successor Recordkeeper. In other words, the only way to stop the blackout was to stop the conversion. Given that the reason for the conversion was the replacement of Northern Trust, Plaintiffs and DOL are actually arguing that a Recordkeeper has the right, if not an obligation, to refuse to be removed, whenever it feels that that action is not in the interest of the plan participants. This is a very odd assertion coming from an agency that places a high priority on fiduciaries not acting in their own interest.

We do not dispute that Northern Trust could have refused to cooperate in its replacement; our concern is the argument that ERISA required it to do that. In our view, there are numerous reasons why it would be both bad law and bad policy to impose the ERISA fiduciary responsibility rules in such a situation.

First, for Northern Trust to refuse this particular direction would require it to breach its contract with Enron. As noted, virtually all recordkeeping contracts require a Recordkeeper to cooperate in its replacement by transferring data to its successor. To suggest that service providers can invoke ERISA to evade their contracts is to invite chaos.

That was the conclusion of the Court of Appeals for the Second Circuit in a case decided this past August. In response to the argument that a person who was admittedly a fiduciary for some purposes should be held liable for adhering to its contract terms, the court reasoned:

> Here, Hancock did not contractually or otherwise retain 'discretion' over whether or on what terms to permit a rollover of free funds; instead the opposite is true: Hancock surrendered that discretion when it agreed to the provision in the amended contract that provided for a specific rollover mechanism. . . . Were we to accept the district court's conclusion [that Hancock was a fiduciary because it could have acted contrary to the contract] there would be no limit to the scope of a fiduciary's duties under ERISA. . . .

Harris Trust and Sav. Bank v. John Hancock Mut. Life Ins. Co., No. 01-7608, 2002 WL 1902607, at *7 (2d Cir. Aug. 20, 2002) (citing, among other cases, Ed Miniat, Inc. v. Globe Life Ins. Co., 805 F.2d 732, 737 (7th Cir. 1987) ("If a

specific term (not a grant of power to change terms) is bargained for at arm's length, adherence to that term is not a breach of fiduciary duty").

Second, DOL's position is contrary to its own regulations. As noted, consistent with Congress' express purpose to promote reasonable plan services arrangements and to prohibit plans from being locked into service provider agreements that have become disadvantageous over time, all such contracts must be terminable on reasonably short notice. See H.R. Conf. R. No. 93-1280, at 312 (1974); 29 C.F.R. § 2550.408b-2.

Finally, we have considerable difficulty with the standards which Northern Trust, or any Recordkeeper, is supposed to use when deciding whether to refuse to be fired. Hindsight shows that the Enron shares held for investment in the Plan lost value during the blackout period. Plaintiffs claim that most of the loss might have been avoided had they had the opportunity to sell their Enron stock during the blackout period. No one disputes that selling high is better than selling low. However, during any given blackout period, some investments will increase in value and some decrease, and, depending on the decisions a particular participant might have made during any blackout period, the existence of the blackout might have harmed or benefited him. For example, for the Enron employee who would have bought more stock if the blackout would not have occurred (as thousands of investors did during that period), imposing the blackout was a beneficial action.

The point is that, even if Recordkeepers were equipped to evaluate the investment merits of each direction that they receive – or as discussed above, could perform that job and still make the administration of 401(k) plans possible – there is no way of determining in advance whether a blackout will be good, bad or indifferent for any particular participant or even subclass of participants. As one court so aptly put it, even ERISA's duty of care "requires prudence, not prescience." DeBruyne v. Equitable Life Assurance Society, 920 F.2d 457, 465 (7th Cir. 1990) (quoting district court opinion).

CONCLUSION

Our members believe in the 401(k) plan as a means towards improving the retirement security of all Americans. When a well-publicized loss occurs in a plan as it has here, we are concerned about the potential loss of faith in these plans. But the way to restore faith in the process is not to bend and twist the law to make the participants of the plan whole from the consequences of their company's mismanagement, particularly when the result would be to

severely impede, if not stop in its tracks, the growth of 401(k) plans. In this, as in every case, everyone is best served by following the law.

Respectfully submitted,

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The undersigned hereby certifies that on the 7th day of October, 2002, a true and correct copy of the foregoing Interest of the Society of Professional Administrators and Recordkeepers was: (1) served on all counsel on the attached service list electronically via serve@esl3624.com; (2) sent via facsimile to:

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