

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.)	

**MOTION FOR LEAVE TO FILE AND
SUPPLEMENTAL BRIEF OF AMICUS CURIAE
THE SPARK INSTITUTE**

The SPARK Institute ("SPARK") by and through the undersigned counsel, hereby moves for leave to file the following supplement to its *amicus curiae* brief in the above captioned case.

On October 7, 2002, the SPARK Institute filed its *amicus curiae* brief in this case to answer the novel legal theories advanced by the United States Department of Labor ("DOL") in its amended brief of *amicus curiae*, filed September 3, 2002.¹ SPARK Institute has since become aware of a very recent

¹ Plaintiffs filed an opposition to SPARK's motion for leave to file its *amicus* brief on October 15, 2002. The SPARK Institute replied to Plaintiffs' opposition on October 23, 2002, and Plaintiff's filed a response to the SPARK Institute on October 31, 2002. The Court struck Plaintiffs' response by order dated October 31, 2002.

case, Freimark & Thurston Agency, Inc. v. National City Bank of Dayton, No. C-3-99-427, 2002 WL 31367856 (S.D. Ohio Sept. 5, 2002) (attached) which we believe is important to bring to the Court's attention.

Freimark confirms that retirement plan recordkeepers (so-called third party administrators) are not fiduciaries when they participate in a transfer of plan assets from one custodian to its successor. Freimark at *8. In Freimark, an employer hired a new custodian for its 401(k) plan, and also hired a recordkeeper to provide administrative services to the plan. Id. at *1. One of these services was the transfer of plan information in a conversion transaction. Id. at *2. Because of problems with the information, the plan's assets were not reinvested until three weeks following the direction to transfer funds. Id. The recordkeeper was sued on the basis that it had breached its fiduciary duties by causing a delay in reinvesting the plan's assets. Id. at *3.

The court had little difficulty concluding that the recordkeeper played no fiduciary role in the transfer, and that the only discretionary decision was that of the employer in determining to move the plan's funds. Id. at *7. Further, the court adhered to the longstanding view that only discretionary acts give rise to fiduciary status. Id. at *6. On the basis of the contractual duties assumed, it found that the recordkeeper lacked any discretion in the conduct at issue. Id. at *7. The court opined that "contractual obligations, without more, do not give rise to fiduciary

obligations... ." Id. at *8.

The very same acts and responsibilities in dispute in Freimark are before this court with regard to Northern Trust. The recordkeeper in Freimark was sued because it did not end a blackout period by reconciling participant accounts based on out-dated information. Id. at *7. Plaintiffs and DOL here allege 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; see also Complaint at ¶¶ 753-763.

The Freimark court found that the recordkeeper could not end the blackout period without either: (1) investment directions and accurate individual account information, or (2) a specific direction from the plan fiduciary to end the blackout period. Freimark at *7-8. In fact, the court found that had the recordkeeper acted without direction to end the blackout period, such action may arguably have given rise to fiduciary responsibility. Id. at *8.

So it is with Northern Trust. Plaintiffs and the DOL claim that Northern Trust was a fiduciary because it did not end the blackout period. As the court in Freimark found, the fact is that activities related to blackouts and conversions are quintessential recordkeeping activities, and that no plan service provider (as a directed trustee or recordkeeper) has the authority or responsibility to act outside of

its contractual terms and outside of the directions of the plan sponsor to end a blackout period.

Thus, we think that the recent Freimark decision is supportive of our basic proposition that Northern Trust was not a fiduciary (either as a directed trustee or recordkeeper) because it failed to postpone the blackout period. It is simply not realistic to assert that a plan service provider, particularly one that has been recently fired, would have the kind of authority that is required to become a fiduciary under ERISA.

Finally, we feel compelled to respond to plaintiff's recent assertion that the SPARK Institute brief is "nothing but an exercise in obfuscation." Plaintiffs' Response at 7. To the contrary, we filed our brief to bring into focus how the retirement industry really works and to urge the Court to concentrate on the role actually played by Northern Trust. As noted, plaintiffs and DOL state that that the circumstances giving rise to Northern Trust's fiduciary status is its failure to postpone the blackout period. Complaint at ¶¶ 753-763; DOL Brief at 44-46. This is a quintessential recordkeeping activity. It is not a directed trustee activity. Plaintiffs and DOL have obfuscated this fact by labeling traditional recordkeeping activities as trustee activities in order to convince this Court to depart from the

accepted precedent exemplified by the Freimark decision.²

Given the scope and national importance of the present case, the SPARK Institute seeks permission to provide the court with a copy of the attached case, which we feel is very closely related and helpful to this Court's understanding of the issues involved in this litigation. In addition, the SPARK Institute respectfully requests that its motion for leave to file this supplemental *Amicus Curiae* Brief be granted.

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² Caselaw reveals that the fiduciary status of directed trustees is unclear. Compare, e.g., Grindstaff v. Green, 946 F. Supp. 540 (E.D. Tenn. 1996), aff'd, 133 F.3d 416 (1998) (directed trustee not a fiduciary), and Maniace v. Commerce Bank of Kansas City, 40 F.3d 264 (8th Cir. 1994), cert. denied, 514 U.S. 1111 (1999) (same), with Firstier Bank v. Zeller, 16 F.3d 907 (8th Cir. 1994) (directed trustee has fiduciary duty to act prudently, to remedy known breaches, and to avoid prohibited transactions).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of November, 2002, a true and correct copy of the foregoing Reply to Plaintiffs' Opposition Motion 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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