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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

R. ALEXANDER ACOSTA,  
Secretary of Labor, United States  
Department of Labor,

Plaintiff,

v.

JAMES DEWALT; ROBERT G.  
BAKIE; JACK L. FALLIS, JR.;  
JEFFREY A. BARTON;  
ASSOCIATED INDUSTRIES  
MANAGEMENT SERVICES, INC.;  
THE ASSOCIATED INDUSTRIES  
OF THE INLAND NORTHWEST; and  
THE ASSOCIATED EMPLOYERS  
HEALTH AND WELFARE TRUST,

Defendants.

NO: 2:17-CV-0082-TOR

ORDER DENYING DEFENDANTS'  
MOTIONS TO DISMISS

BEFORE THE COURT are Defendants' Motion to Dismiss for Lack of  
Subject Matter Jurisdiction (ECF No. 12) and Defendants' Motion to Dismiss for  
Failure to State a Claim (ECF No. 15). These matters were submitted for  
consideration with oral argument. The Court held a hearing on July 25, 2017. At

1 the hearing, Eirik J. Cheverud appeared on behalf of Plaintiff R. Alexander Acosta,  
2 Secretary of Labor, Department of Labor, and Amanda S. Amert, Christopher J.  
3 Rillo, and Thomas W. McLane appeared on behalf of Defendants James DeWalt,  
4 Robert G. Bakie, Jack L. Fallis, Jr., Jeffrey A. Barton, Associated Industries  
5 Management Services, Inc., Associated Industries of the Inland Northwest, and the  
6 Associated Employers Health and Welfare Trust (collectively, “Defendants”). The  
7 Court has reviewed the record and files herein, and is fully informed. For the  
8 reasons discussed below, Defendants’ Motion to Dismiss for Lack of Subject  
9 Matter Jurisdiction (ECF No. 12) and Motion to Dismiss for Failure to State a  
10 Claim (ECF No. 15) are denied.

## 11 **BACKGROUND**

12 Plaintiff R. Alexander Acosta, United States Secretary of Labor, Department  
13 of Labor (“Secretary”) brings this action under the Employment Retirement  
14 Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. §§ 1001 et seq.,  
15 against Defendants for alleged breaches of their fiduciary duties committed in the  
16 course of managing the Associated Employers Health and Welfare Trust (“Trust”)  
17 and ERISA-covered employee benefit plans that participate in the Trust (“Plans”).

18 Defendants move to dismiss the Complaint under Federal Rule of Civil  
19 Procedure 12(b)(1) for lack of subject matter jurisdiction. *See* ECF No. 12.

20 Defendants also seek dismissal under Rule 12(b)(6) for Plaintiff’s failure to plead

1 sufficient facts to support the ERISA claims. *See* Fed. R. Civ. P. 12(b)(6); ECF  
2 No. 15.

### 3 **FACTS**

4 The following facts are drawn from Plaintiff’s complaint, and are accepted  
5 as true for purposes of the instant motions. Defendant Associated Industries of the  
6 Inland Northwest (the “Association”), a Washington non-profit corporation,  
7 established the Trust to receive monetary contributions from more than 300  
8 participating employers (“Participating Employers”) and employees. ECF Nos. 1  
9 at 6, ¶ 14; 15-1 at 7, Art. I ¶ 2. In turn, the Participating Employers and their  
10 employees contributed to the Trust to fund various employee health and welfare  
11 benefit ERISA plans (the “Plans”) by paying (1) insurance premiums to an  
12 insurance company to provide insured medical benefits, and (2) the Plan’s  
13 administrative expenses. ECF No. 1 at 2, ¶ 1; 11, ¶ 28.

14 The Association had the authority to and did appoint trustees (the  
15 “Trustees”) to administer the Plans for the participating employees. *Id.* The  
16 Association also had the authority to remove the Trustees. ECF No. 1, 4 at ¶ 5.  
17 The Trustees received the Participating Employers’ contributions, which were held  
18 by the Trust for the exclusive benefit of the participating employees and their  
19 beneficiaries. *Id.* at 2, ¶ 1. The Trustees also had the authority to and did maintain  
20 a reserve fund for future contingencies. *Id.* at 11, ¶ 28.

1 Defendant Associated Industries Management Services, Inc. (“AIMS”), a  
2 for-profit corporation wholly owned by the Association, provided administrative  
3 services for the Plans. *Id.* at 2, ¶ 2; 4 at ¶ 5. Defendant James DeWalt was the  
4 President, CEO, and a director of AIMS, and the President and CEO of the  
5 Association; Defendant Robert G. Bakie was the CFO of AIMS. *Id.* at 5-6, ¶¶ 10-  
6 11. Both were Trustees, in addition to Defendants Jack L. Fallis, Jr. and Jeffrey A.  
7 Barton. *Id.*; 6, ¶¶ 12-13; 12, ¶¶ 31-32. The Trust paid AIMS a fee for its  
8 administrative services using contributions made by the Participating Employers.  
9 ECF No. 1 at 14, ¶ 38. In 2009, AIMS’s fee equaled 2% of the total insurance  
10 premiums paid through the Trust. *Id.*

11 Generally, from December, 31 2009, through February 2014, the Trustees  
12 purported to approve a series of increases in AIMS’s fees from the 2% fee to as  
13 high as 7% of paid insurance premiums, and caused the Trust to pay those  
14 increased fees. *Id.* at 15-22, ¶¶ 39-58. The Participating Employers and their  
15 employees were never informed about the increases or that the Trustees took  
16 money from the Trust’s reserve fund to pay the fee increases to AIMS. *Id.* at 17,  
17 19-20, 23, ¶¶ 44-45, 51-52, 61-62. The Trust paid AIMS over \$3 million more in  
18 fees than the 2% fee rate would have allowed. *Id.* at 22, ¶ 59.

19 The Secretary asserts that the Trustees and the Association were ERISA  
20 fiduciaries who violated their duties of prudence and loyalty to the Plans by

1 engaging in prohibited transactions in violation of ERISA sections 406(a)(1)(C)  
2 and (D), 29 U.S.C. § 1106(a)(1)(C), (D), because the Trustees retained and paid  
3 AIMS, repeatedly increased those fees, and caused the Trust to pay such fees with  
4 the Plans' assets. *Id.* at 24-27, ¶¶ 63-68. The Secretary also alleges that the  
5 Association failed to properly monitor the Trustees' actions, and that the Trustees  
6 and the Association are liable as co-fiduciaries for each other's violations. *Id.* at  
7 25-27, 29, ¶¶ 66, 67, 72-73. The Secretary further contends that the Trustees'  
8 conduct constituted prohibited self-dealing with the Plans' assets and violated their  
9 ERISA fiduciary duties of loyalty, prudence, and fidelity to the Plans' participants  
10 and beneficiaries. *Id.* at 3, ¶ 2. Similarly, the Secretary contends that AIMS is  
11 liable under ERISA section 502(a)(5), 29 U.S.C. § 1132(a)(5), for disgorgement of  
12 its unjust enrichment because it knowingly participated in these fiduciary breaches.  
13 *Id.* at 4, ¶ 5.

## 14 DISCUSSION

15 In their motions to dismiss the Complaint pursuant to Fed. R. Civ. P.  
16 12(b)(1) and 12(b)(6), Defendants factually challenge whether the Trust contains  
17 ERISA-covered assets and dispute that Defendants are fiduciaries with respect to  
18 the various Plans because—according to Defendants—they did not exercise control  
19 or discretionary authority over the Plans' assets. ECF No. 12 at 10-11; 15 at 8-14.

1 With respect to its Rule 12(b)(1) motion, Defendants argue that the Court  
2 lacks subject matter jurisdiction because the Secretary’s Complaint does not  
3 “present a federal question on [its] face.” ECF No. 12 at 5. Similarly, Defendants  
4 argue in their Rule 12(b)(6) dismissal motion that (1) the Secretary failed to state  
5 prohibited-transaction and knowing participation claims because the Trust’s assets  
6 were not ERISA-covered plan assets; (2) the Secretary failed to allege facts to  
7 support the failure-to-monitor claim against the Association; and (3) all claims  
8 arising before May 27, 2010, are time-barred. ECF No. 15 at 14–19.

9 Defendants initially argued that the Court also lacks jurisdiction because the  
10 Trust is not itself an ERISA plan. *See* ECF No. 12 at 6-10. The Secretary’s  
11 responsive memorandum clarifies that this alternative position was pled based on  
12 Defendants’ position taken in other litigation. *See* ECF No. 18 at 8.

### 13 **A. Subject Matter Jurisdiction**

14 Federal courts have subject-matter jurisdiction over “all civil actions arising  
15 under the . . . laws . . . of the United States.” 28 U.S.C. § 1331. The Secretary  
16 asserts that this Court has subject matter jurisdiction pursuant to ERISA  
17 § 502(e)(1), 29 U.S.C. § 1132(e)(1). ECF No. 1 at ¶ 7. ERISA section 502(e)(1)  
18 provides, in relevant part, that “the district courts of the United States shall have  
19 exclusive jurisdiction of civil actions under this subchapter brought by the  
20 Secretary . . . .” 29 U.S.C. § 1132(e)(1). Pursuant to ERISA section 502(a)(2) and

1 (5), 29 U.S.C. § 1132(a)(2) and (5), Congress cloaked the Secretary with the  
2 authority to enjoin acts that violate ERISA provisions, obtain other appropriate  
3 equitable relief, and enforce the fiduciary responsibility provisions of Title I of  
4 ERISA. The Secretary may also bring an action under ERISA section 502(a)(5)  
5 against a non-fiduciary that knowingly participates in an ERISA fiduciary  
6 violation. 29 U.S.C. § 1132(a)(5).

7 Thus, the Secretary invoked federal-question jurisdiction under § 1331 and  
8 the case arises under a federal law, ERISA section 502(e)(1). 29 U.S.C.  
9 § 1132(e)(1). However, as a preliminary matter, whether the Trust contains  
10 ERISA-covered plan assets and whether Defendants are subject to ERISA are  
11 “question[s] on the merits of the claim, not an issue of subject matter jurisdiction.”  
12 *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 997 (9th Cir. 2010) (quoting *Trs.*  
13 *of the Screen Actors Guild–Producers Pension & Health Plans v. NYCA, Inc.*, 572  
14 F.3d 771, 775 (9th Cir. 2009)). Because the Secretary alleges causes of action  
15 “arising under” ERISA, this Court unequivocally has subject matter jurisdiction.  
16 *See* 28 U.S.C. § 1331; 29 U.S.C. § 1132(e)(1), ERISA § 502(e)(1); *Daniels-Hall*,  
17 629 F.3d at 997.

18 Accordingly, Defendants’ Motion to Dismiss for Lack of Subject Matter  
19 Jurisdiction is **denied**. The Court will address whether the Secretary’s allegations  
20

1 properly state a claim under ERISA. *Daniels-Hall*, 629 F.3d at 998 (citation  
2 omitted).

3 **B. Failure to state a claim**

4 Fed. R. of Civ. P. 12(b)(6) provides that a defendant may move to dismiss  
5 the complaint for “failure to state a claim upon which relief can be granted.” To  
6 survive dismissal, a plaintiff must allege “sufficient factual matter, accepted as  
7 true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556  
8 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570  
9 (2007)). This requires the plaintiff to provide “more than labels and conclusions,  
10 and a formulaic recitation of the elements[.]” *Twombly*, 550 U.S. at 555.

11 When deciding, the Court may consider the plaintiff’s allegations and any  
12 “documents incorporated into the complaint by reference . . . .” *Metzler Inv.*  
13 *GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) (citing  
14 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). A  
15 plaintiff’s “allegations of material fact are taken as true and construed in the light  
16 most favorable to the plaintiff[.]” but “conclusory allegations of law and  
17 unwarranted inferences are insufficient to defeat a motion to dismiss for failure to  
18 state a claim.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir. 1996)  
19 (citation and brackets omitted). In addition, a federal court may dismiss a  
20 complaint for failure to comply with the statute of limitations where “the running



1 of the statute is apparent on the face of the complaint.” *Huynh v. Chase Manhattan*  
2 *Bank*, 465 F.3d 992, 997 (9th Cir. 2006) (quoting *Jablon v. Dean Witter & Co.*,  
3 614 F.2d 677, 682 (9th Cir. 1980); citing *Supermail Cargo, Inc. v. United States*,  
4 68 F.3d 1204, 1206 (9th Cir. 1995)). “[A] complaint cannot be dismissed unless it  
5 appears beyond doubt that the plaintiff can prove no set of facts that would  
6 establish the timeliness of the claim.” *Supermail Cargo, Inc.*, 68 F.3d at 1207  
7 (citation omitted).

8 Defendants argue that the Secretary fails to sufficiently allege that  
9 Defendants administered or exercised discretion or control over any of the  
10 Participating Employers’ Plans’ assets. ECF No. 12 at 11. Defendants contend  
11 that the Plans never had an ownership interest in any of the money remitted to the  
12 Trusts by the Participating Employers; therefore, as a notion of property rights law,  
13 the Trust did not contain the Plans’ assets. *Id.* at 9-10. In turn, Defendants argue  
14 that they had no fiduciary duties to the Plans. ECF No. 15 at 8-9. Defendants  
15 reason that because the Plans had no ownership interest in the Trust funds,  
16 Defendants could not have breached a fiduciary duty and, in tandem, cannot be  
17 liable as non-fiduciaries that knowingly participated in such violations. *Id.* at 10-  
18 13, 18. Defendants also contend that even if the Court finds that the Trust contains  
19 Plan assets, the Secretary fails to plausibly allege how Associated breached its duty  
20 to monitor the Trustees, which compels dismissal of that claim. *Id.* at 14.

1           The Secretary responds that when employers and/or employees contribute  
2 assets to a multiple-employer trust—like the Trust, here—the assets are plan assets  
3 in which the ERISA plans, and their participants and beneficiaries, have a  
4 beneficial interest under the terms of the governing trust agreement, even though  
5 the trustee possesses legal title. *See* ECF No. 15 at 7. The Secretary explains that  
6 Defendants are properly considered both service providers and fiduciaries because  
7 the Trust’s assets were Plan assets, and they possessed authority or control over  
8 those assets. *Id.*

9           Here, the parties agree that the various Participating Employers each  
10 established and maintained an employee welfare benefit plan covered by ERISA.  
11 *See* ECF No. 1 ¶¶ 18–22. It is also undisputed that the Participating Employers  
12 paid contributions to the Trust, and the Trust used some of those contributions to  
13 pay insurance carriers to insure the medical benefits provided by the Plans’  
14 insurance coverage, to pay entities providing the Plans with administrative  
15 services, and to maintain the remaining funds in the Trust’s reserve fund. *See id.* at  
16 ¶¶ 28, 38. To decide whether the Secretary has alleged sufficient factual matter to  
17 state a plausible claim to relief under ERISA, the Court must first determine  
18 whether the Secretary sufficiently pled that the Trust contained Plan assets. *See*  
19 *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

1                   **i. The Secretary sufficiently alleges causes of action under**  
2                   **ERISA related to ERISA-covered Plan assets held by the**  
3                   **Trust.**

4                   ERISA protects “the interests of participants in employee benefit plans and  
5 their beneficiaries.” 29 U.S.C. § 1001(b). ERISA applies to “any employee  
6 benefit plan if it is established or maintained . . . by any employer . . . or . . . by any  
7 employee organization . . . or by both.” *Id.* § 1003(a)(1)-(3). “Employee benefit  
8 plans” come in two types. *Id.* § 1002(3). The first category, the “employee  
9 welfare benefit plan,” provides medical benefits and any benefits “other than  
10 pensions on retirement or death.” *Id.* § 1002(1). The second category, the  
11 “employee pension benefit plan,” “provides retirement income” or “results in a  
12 deferral of income [until retirement].” *Id.* § 1002(2)(A)(i)-(ii). The first type of  
13 benefit plan is at issue here. *See* ECF No. 1 at ¶ 19. The Participating Employer  
14 Plans were a “multiple employer welfare arrangement.” *See* § 1002(40); ECF No.  
15 1 at ¶ 21.

16                   ERISA imposes strict fiduciary duties on persons who administer employee  
17 welfare benefit plans. *See* § 1002(21)(A) (defining persons qualifying as plan  
18 fiduciaries); *see also id.* § 1101 *et seq.* (establishing specific fiduciary duties and  
19 liability for breaches of these duties). Specifically, ERISA defines a fiduciary as  
20 anyone who:

- (i) . . . exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or

1 control respecting management or disposition of its assets, (ii) . . .  
2 renders investment advice for a fee or other compensation, direct or  
3 indirect, with respect to any moneys or other property of such plan, or  
4 has any authority or responsibility to do so, or (iii) . . . has any  
5 discretionary authority or discretionary responsibility in the  
6 administration of such plan.

7 § 1002(21)(A). “[A] person’s actions, not the official designation of his role,  
8 determine whether he enjoys fiduciary status.” *Acosta v. Pac. Enterprises*, 950  
9 F.2d 611, 618 (9th Cir. 1991). Importantly, an ERISA plan cannot serve as its own  
10 fiduciary with respect to its own assets. *Id.*

11 ERISA “plan assets” are defined “by such regulations as the Secretary may  
12 prescribe . . . .” 29 U.S.C. § 1002(42). Importantly, the relevant regulation  
13 provides that “[w]hen a plan acquires or *holds an interest in any entity* . . . which is  
14 established or maintained for the purposes of offering or providing any benefit . . .  
15 to the participants or beneficiaries of the investing plan, its assets will include its  
16 investment and *an undivided interest in the underlying assets of that entity.*” 29  
17 C.F.R. § 2510.3-101(h)(2) (emphasis added). Although the Ninth Circuit has yet  
18 “to delineate the precise boundaries” of the “plan assets” phrase, “ERISA’s  
19 legislative history makes clear that ‘the crucible of congressional concern was  
20 misuse and mismanagement of plan assets by plan administrators and that ERISA  
was designed to prevent these abuses in the future.’” *Acosta*, 950 F.2d at 620  
(quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985))

1 (citing 120 Cong. Rec. 29,932, 29,951, 29,954, 29,957, 29,961, 29,194, 29,196–97,  
2 29,206 (1974)). The Department of Labor interprets the phrase as “any property,  
3 tangible or intangible, in which the plan has a beneficial ownership interest.” U.S.  
4 Dep’t of Labor, Off. Pension & Welfare Benefit Programs, Advisory Opinion, 93-  
5 14A, 1993 WL 188473, at \*4 (May 5, 1993). Defendants concede as much. ECF  
6 No. 15 at 9.

7       Here, Defendants argue that the Secretary insufficiently pled ERISA claims  
8 because funds used to purchase insurance policies for the Plans are not ERISA plan  
9 assets. *See id.* at 9-10. However, Defendants’ reliance on *Bos v. Bd. of Trs.*, 795  
10 F.3d 1006, 1010 (9th Cir. 2015) is unavailing because there, the Ninth Circuit  
11 merely held that “unpaid contributions to employee benefit funds are not plan  
12 assets[.]” *Bos*, 795 F.3d at 1012. This is not a case where the Participating  
13 Employers failed to remit contributions to the Trust. Defendants’ argument also  
14 ignores the fact that the Trust funds also included funds used to pay administrative  
15 costs and a reserve fund meant for the “exclusive purpose” of providing benefits to  
16 the participating employees and their beneficiaries for future contingencies. *See*  
17 ECF No. 15-1 at 13, Art. V ¶ 4.

18       Defendants’ other argument, that because the Trustees held legal title to the  
19 Plans’ assets, the Trust held the entire ownership interest leaving no room for the  
20 Plans to hold a beneficial interest, is equally unpersuasive. The Ninth Circuit has

1 counseled that “[t]o determine whether a particular item constitutes an ‘asset of the  
2 plan,’ it is necessary to determine whether the item in question may be used to the  
3 benefit (financial or otherwise) of the fiduciary at the expense of plan participants  
4 or beneficiaries.” *Acosta*, 950 F.2d at 620.

5 Here, the Trust Agreement unambiguously provides that “the assets of the  
6 Trust Fund . . . shall be held for the exclusive purposes of providing benefits to  
7 participating employees and their beneficiaries and defraying expenses of  
8 administering the plan.” ECF No. 15-1 at 13, Art. V § 4 (emphasis added). As  
9 fiduciaries, “[t]he Trustees shall . . . administer the Trust Fund solely in the interest  
10 of the participating employees and their beneficiaries and for the exclusive purpose  
11 of (a) providing benefits to participating employees and their beneficiaries and (b)  
12 defraying reasonable expenses of benefit plan administration.” *Id.* § 5 (emphasis  
13 added).

14 Simply because the Trust held the Plans’ assets does not mean that the Plans  
15 relinquished all interest in those assets. The Secretary’s Complaint explains that  
16 the Trust Agreement explicitly reflects that the Plans maintained a beneficial  
17 ownership interest in the Trust’s assets, exclusively intended to benefit the Plans’  
18 participants and beneficiaries, not the fiduciaries. *See id.*; *see also Acosta*, 950  
19 F.2d at 620; ECF No. 1 at 2, ¶ 1.

1           Accordingly, the Court finds that the Secretary has sufficiently alleged that  
2 the Trust's funds contained the Plans' assets, which is sufficient to support the  
3 breach of fiduciary duty claims, if the Court accepts that allegation as true. *Iqbal*,  
4 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570). The Complaint contains far  
5 "more [than a] formulaic recitation of the elements" sufficient to survive dismissal.  
6 *See Twombly*, 550 U.S. at 555.

7                           **ii. The Secretary sufficiently alleges causes of action under**  
8                           **ERISA related to Defendants' alleged breaches of their**  
9                           **fiduciary duties.**

10           Defendants next argue that the Secretary's breach of fiduciary duty claims  
11 must fail because the Secretary has failed to plead facts to support that Defendants  
12 were fiduciaries over the Plans. The Secretary argues that its Complaint alleges  
13 that the Trustees were ERISA fiduciaries under ERISA sections 3(21)(i) and (iii),  
14 29 U.S.C. § 1002(21)(i), (iii), because they (1) exercised discretionary authority or  
15 control respecting management of the Plans; (2) exercised authority or control  
16 respecting management or disposition of the Plans' assets; and/or (3) had  
17 discretionary authority or discretionary responsibility for administration of the  
18 Plans. ECF Nos. 1 ¶ 33; 18 at 9. Defendant argues that the Complaint does not  
19 state a claim that is facially plausible, but Defendants' sole bases for rebutting the  
20 Secretary's allegations are that the assets in the Trusts were not the Plans' assets

1 and, therefore, they did not exercise discretionary managerial or administrative  
2 control over the Plans or the Plans' assets. ECF No. 19 at 4.

3 It is undisputed that the Trust Agreement governs the terms of the Trust.  
4 ECF No. 15-1. The Trust Agreement defines "employee welfare benefit plan" as  
5 any lawful employee benefit plan administered by the Trust's Trustees. *Id.* at 7,  
6 Art. II § 3. The Association is identified as the "Plan Sponsor" for those plans. *Id.*  
7 at 8, Art. III, at § 3. Here, both the Trust and the Plans were to be administered by  
8 the Board of Trustees, which was to be comprised of six trustees identified as in  
9 the Trust Agreement "as 'named fiduciaries', 'fiduciaries', and the 'plan  
10 administrator', as those terms are used in [ERISA]." *Id.* at §§ 1-2. Regardless of  
11 whether the Trust acted as a "service provider" for the Plans, the Trust's Trustees  
12 are explicitly considered fiduciaries as defined in the Trust Agreement and in  
13 harmony with the ERISA-defined fiduciary definition, 29 U.S.C. § 1002(21)(A).  
14 *See* ECF No. 15-1 at 7, Art. I ¶ 2 (purpose is to provide an entity to which  
15 contributions can be paid to the Trust and through which the Trustees can create  
16 and administer the Plans); 12, Art. V ¶¶ 1, 5 (Trustees' fiduciary duties, as imposed  
17 by ERISA, require administration of the Trust to provide benefits and defray  
18 benefit plan administration expenses). The Secretary's Complaint sufficiently  
19 alleges both contentions to support his claims. *See also* ECF No. 1 at 10, ¶ 23, 25.



1           Notwithstanding, Defendants also argue that the Secretary fails to allege  
2 exactly how the Association breached its duty to monitor the Trustees. ECF No.  
3 15 at 14. The Secretary alleged that the Association knew about the Trustees’  
4 ERISA violations, had authority to remove the Trustees it appointed, yet failed to  
5 undertake action to remedy those known violations. *See* ECF Nos. 18 at 26; 1  
6 ¶ 67. The Secretary further alleged that the Association “failed to properly monitor  
7 the Trustees’ actions” in violation of its fiduciary duties (loyalty, prudence and  
8 fidelity) under ERISA sections 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A),  
9 (B), (*id.* ¶ 67), and that the Trustees and the Association are liable as co-fiduciaries  
10 for each other’s violations under ERISA section 405(a), 29 U.S.C. § 1105(a), (*id.*  
11 ¶¶ 66, 67(c), 73).

12           As such, the Secretary’s breach of fiduciary duty and duty-to-monitor claims  
13 are sufficiently pled to withstand the relatively low threshold to survive  
14 Defendants’ motion to dismiss for failure to state a claim. *See Iqbal*, 556 U.S. at  
15 678 (citing *Twombly*, 50 U.S. at 570).

16                           **iii. The Secretary sufficiently alleges that his claims are within the**  
17                           **applicable statute of limitations period.**

18           The Court may dismiss a claim under Fed. R. Civ. P. 12(b)(6) on the ground  
19 that it is barred by a statute of limitations, but only when “the running of the statute  
20 is apparent on the face of the complaint.” *Von Saher v. Norton Simon Museum of*

1 *Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (internal quotation marks  
2 omitted). ERISA claims with respect to a fiduciary’s breach of any responsibility,  
3 duty, or obligation must be brought within six years of a breach of an ERISA  
4 violation. 29 U.S.C. § 1113(1)(A).

5 Here, the Secretary filed his Complaint in this action on February 24, 2017.  
6 ECF No. 1. As part of Defendants’ Rule 12(b)(6) motion, Defendants argue that  
7 the Secretary’s claims arising from events before May 27, 2010, should be  
8 dismissed because those claims are untimely. *See* Fed. R. Civ. P. 12(b)(6); ECF  
9 No. 15 at 18. Even though the parties executed tolling agreements that apply to  
10 claims arising after May 27, 2010 (*see* ECF No. 1 at 7, ¶ 17), Defendants argue  
11 that ERISA’s six-year statute of limitations bars claims arising before that date.  
12 ECF No. 15 at 19.

13 The Secretary responds that Defendants’ argument conflicts with ERISA, in  
14 that, the statute of limitation period runs “six years after . . . *the date of the last*  
15 *action* which constituted a part of the breach or violation.” ECF No. 18 at 23  
16 (citing 29 U.S.C. §1113(1) (emphasis added)). Although the initial act of the  
17 Trustees’ vote to increase the fees it paid to AIMS occurred on December 31,  
18 2009, it was not until June 28, 2010, when the Trustees “caused the Trust to pay”  
19 the fee increase to AIMS. *See* ECF No. 1 ¶ 39.

1 In other words, it is apparent on the face of the Complaint that the “date of  
2 the last action which constituted a part of the breach or violation” relates to the first  
3 payment, which occurred on June 28, 2010. *Id.*; *see also* 29 U.S.C. §1113(1).  
4 Accordingly, based on a review of the Complaint on its face, the applicable statute  
5 of limitation does not bar the allegations.

6 **ACCORDINGLY, IT IS HEREBY ORDERED:**

7 1. Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction  
8 (ECF No. 12) is **DENIED**.

9 2. Defendants’ Motion to Dismiss for Failure to State a Claim (ECF No. 15)  
10 is **DENIED**.

11 The District Court Executive is directed to enter this Order and provide  
12 copies to the parties.

13 **DATED** July 31, 2017.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE  
Chief United States District Judge