IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

R. ALEXANDER ACOSTA, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR	:	CIVIL ACTION
v.	:	
JOHN J. KORESKO, V, et al.	:	NO. 09-988

REPORT AND RECOMMENDATION
ON DISTRIBUTION PLAN PHASE TWO

ELIZABETH T. HEY, U.S.M.J. August 9, 2017

I. FACTUAL AND PROCEDURAL BACKGROUND

In response to the Department of Labor's ("DOL") Motion for Equitable Distribution of the assets of the Regional Employers Assurance Leagues Voluntary Employees' Beneficiary Association ("REAL VEBA") Trust and the Single Employer Welfare Benefit Plan ("SEWBP") Trust (together "the Trusts"), Doc. 1384, I issued an Order explaining that the court's consideration of the DOL's motion would proceed in two stages to ensure that the plans that had contributed to the Trusts had an opportunity to consider both the methodology for disbursement and the accounting of each plan's individual assets. Doc. 1395.[1]

The first phase of the court's consideration was completed on March 15, 2017, when the Honorable Wendy Beetlestone adopted the Unified Model of Distribution ("the Unified Model") developed by Marcum, LLP, the court-appointed forensic accountant

[1]For a detailed discussion of the events that led to the decision to dissolve the Trusts and equitably distribute the remaining assets, see the Honorable Mary A. McLaughlin's opinion in Perez v. Koresko, 86 F. Supp.3d 293 (E.D. Pa. 2015) ("Perez").

("Marcum"), and directed Marcum to develop the individual plan accountings. Doc. 1471.[2] The second phase of the process began on June 9, 2017, when, at my direction, the court sent a notice to the plan sponsors of all the open plans, advising them to expect documentation from Marcum the following week, which would include a plan-specific transactional history.[3] I advised the plan sponsors that if they had any objection to the information sent by Marcum, they were to mail objections to the Court no later than June 26, 2017. See http://www.paed.uscourts.gov/documents/koresko/Perez%20v.%20Koresko%20-%20Notice%20re%20Plan%20Specific%20Accountings.pdf.

On June 12, Marcum emailed each open plan: (1) an Explanation of Account Statements, (2) a Plan Sponsor Statement which contained (a) a Liquidating Trust Summary summarizing the Trusts' assets and liabilities subject to distribution, (b) a Plan Summary summarizing the assets and liabilities of the particular plan, (c) an Equitable Distribution Calculation estimating the cash distribution for the plan, (d) a plan-specific Transaction Detail history, and (e) an Insurance Policy Detail listing all policies associated with the plan with current cash values and outstanding loan amounts; and (3) a

[2]The Unified Model of Distribution is described in detail in prior opinions and is posted to the court's website devoted to the distribution process. See Hugler v. Koresko, Civ. No. 09-988, 2017 WL 1030219, Report and Recommendation (E.D. Pa. Feb. 17, 2017), approved and adopted, 2017 WL 1021476 (E.D. Pa. Mar. 16, 2017); http://www.paed.uscourts.gov/documents/koresko/Perez%20v.%20Koresko%20-%20Unified%20Model.pdf.

[3]Email addresses were gathered for all open plans by the court-appointed Administrator, the Wagner Law Group ("Wagner"), Marcum, and my chambers' staff.

Distribution Election form to be returned to Marcum in which the plan sponsor declared whether the plan wanted a cash distribution, distribution of the related insurance policy(ies), or a combination of cash/policy(ies). The court received twenty objections[4] to the individual Plan Sponsor Statements and I held hearings on July 10 and 11 to consider each objection. The DOL was present, as was Marcum to clarify any questions

[4]The court received objections from the following plans: Complete Medical Care Service of New York, P.C. ("Complete Care") (Doc. 1524), Hazlet Pharmacy (Doc. 1525), Haddon Orthodontics, P.C. ("Haddon Orthodontics") (Doc. 1526), Dick's Double D, Inc. (Dick's Double D") (Doc. 1527), Michael O'Brien, D.M.D., P.C. ("Michael O'Brien plan") (Doc. 1528), Waterloo Contractors, Inc. ("Waterloo") (Doc. 1529), Briarpatch, Inc. ("Briarpatch") (Doc. 1522), Quantic Group, Ltd. ("Quantic") (Doc. 1523), James M. LaRose, D.O. & Associates ("James LaRose plan") (Doc. 1539), Terry S. Wood, M.S., D.D.S., P.C. ("Terry Wood plan") (Doc. 1534), Winchester Land and Development Corp. ("Winchester Land") (Doc. 1535), Harry H. Monokian, D.M.D., P.A. ("Harry Monokian plan") (Doc. 1536), Carson's Steak Warehouse and Saloon, Inc. ("Carson's Steak Warehouse") (Doc. 1537), Wilshire Palisades Law Group, P.C. ("Wilshire Palisades") (Doc. 1531), Resource Realizations, Inc. ("Resource Realizations") (Doc. 1530), A-Tech Concrete, Co. ("A-Tech") (Doc. 1533), DVB Management, Inc. ("DVB") (Doc. 1538), and Angela Leung, D.D.S., P.C. ("Angela Leung plan") (Doc. 1543).

In addition, the court received an objection from a group of plan sponsors represented by Ira Silverstein, Esq. ("Silverstein Plans") (Doc. 1532), which includes some of the above plans (the Harry Monokian pan, Carson's Steak Warehouse, Wilshire Palisades, Resource Realizations, A-Tech, and DVB) and also: Energy Alternatives Studies, Inc., GP Construction Services, Mida, Inc., Howard Greils, M.D., Inc., Mario Magcalas, M.D., P.A., Charles Parsons & Assoc., Chtd., LGS Specialty Sales, Ltd., U.E. Systems, M&E Zenni, Inc., Tobey Karg Sales Agency, Inc, David C. Spokane Orthodontic Assoc., P.C., Morgen & Oswood Construction Co., Inc., Harvey A. Kalan, M.D., Inc., Olouakan Comluct, Inc., Powercom Electrical Services, Inc., Engineered Systems & Products, Pamela K. Erdman, M.D., Inc., and Anthem Medical Management

Finally, a question regarding the payee appeared on the Distribution Election Form returned by Wuest Estate Company. As previously found, the question posed by Wuest is moot. Doc. 1541.

and provide additional information regarding the individual inquiries.[5] On July 26, 2017, the DOL responded to the objections. Doc. 1551.

II. DISCUSSION

For ease of discussion and brevity, I will address objections raising similar issues together. The objections break down roughly into five topic areas, and some plans' objections fall into more than one category.

A. Distribution to Individual or Entity Other than the Plan

The most frequent question or objection goes to whether cash and/or policy(ies) can be distributed to an individual or entity other than the plan.[6] Judge McLaughlin found the Koresko entities liable to the Trusts "and the constituent employer-level employee benefit plans." Doc. 1149 ¶ 1 (Judgment and Order). Likewise, in appointing the forensic accountant, Judge McLaughlin directed the forensic accountant to determine "the balance of the individual Plan's interests in the Trusts," and the valuation for the "individual employer member accounts." Doc. 1240 ¶¶ 1(c), 2(b)(2). Moreover, the DOL acknowledges that it has advocated a plan-based distribution. Doc. 1551 at 21. Therefore, this process has always been directed at the plans and plan sponsors.

A number of plan sponsors assert that the assets associated with their plans should be distributed to the individual owners of the employer sponsor, the intended beneficiary

[5]Some objecting plans appeared by telephone. The only objecting plan that did not participate in the hearings was Winchester Land because the Plan Sponsor was out of the country.

[6]In almost all instances, the policies held by the Trusts identify the policy owner as either the REAL VEBA or SEWBP Trust. Upon distribution of the Trusts' assets and the dissolution of the Trusts, the policies will have to be retitled.

of the relevant insurance policy, or a separate trust created by a living or deceased individual employer owner. Docs. 1522 (Briarpatch), 1523 (Quantic), 1524 (Complete Care), 1525 (Hazlet Pharmacy),1527 (Dick's Double D), 1532 (Silverstein Plans), 1534 (Terry Wood plan). The reasons for these requests vary, and include dissolution of the employer due to death or retirement of the owner(s), and for tax planning.

As a general matter, it is not feasible to take individual tax concerns, which vary by plan and plan beneficiary, or other plan-specific requests, into account in the distribution process, and the court will not micromanage distribution beyond the plan level. Nevertheless, as expressed at the hearing, in certain cases, there may be competing claims for a plan's assets by its beneficiaries or other designees. N.T. 7/10/17 at 108-10 (Terry Wood plan), 7/11/17 at 94 (Silverstein Objections).

In responding to the objections the DOL notes that "[u]pon distribution, the plan sponsors or other trustees responsible for overseeing plan assets will be responsible for determining any subsequent distribution or payment of benefits to the participants of each plan." Doc. 1551 at 21. Having reviewed the many requests for other-than-plan-sponsor distributions, the DOL "agrees that the employer, acting as the trustee of the participating plan, may direct the independent fiduciary to distribute the plan's share of assets to an individual or another trust by providing an appropriate affidavit to the Court." Id. at 22; see also N.T. 7/11/17 at 98 (DOL agreeing in principle to the idea of individual distribution). The DOL's proposed declaration requires the plan sponsor or a designee of the plan sponsor to state under penalty of perjury that "no other employee or former employee of the plan sponsor, nor any beneficiary of any employee or former employee,

is covered by or a beneficiary of the insurance policy [at issue]." Doc. 1551-7. The suggested declaration would ease the court's concerns that the efforts for an equitable distribution at the plan level would be defeated at the beneficiary level.

Adoption of this general rule will satisfy many of the objections that fall into this category. Specifically, certain of the objecting plan sponsors ask that the policy(ies) and/or cash be distributed to specific individuals who were either the named insured or the principal of the employer company or S-corporation. Docs. 1522 (Briarpatch), 1523 (Quantic), 1524 (Hazlet Pharmacy), 1527 (Dick's Double D), 1532 (Silverstein Plans).[7] In these cases, the court is satisfied that the plan sponsor's execution of a declaration as suggested by the DOL will be sufficient to allow the plan sponsor to designate a beneficiary for the distributed assets consistent with the terms of the governing plan. Similarly, at the time of distribution, there may be other plans that ask to direct distribution to a named insured or principal. The plan sponsor's attestation that there are no other claims to the distributed assets would be sufficient to allow such request. Therefore, I will recommend that the court sustain the objections of Briarpatch, Quantic, Hazlet Pharmacy, Dick's Double D, and the Silverstein Plans to the extent they seek distribution of Trust assets to individuals rather than to the plan provided the plan sponsors provide a declaration as discussed above. I will also recommend that other plan

[7]Briarpatch and Quantic specifically request that the principal of the S-corporation and named insured on the policy(ies) be permitted to purchase the policy(ies) because the cash value of the policy(ies) exceeds the cash distribution to which the plan is entitled. See Docs. 1522 & 1523.

sponsors be permitted to use the declaration form at the time of distribution, and a form will be posted to the court's website for this purpose.

Two objections require more detailed analysis because the plans have asked that the policies related to their plans be distributed to an insurance trust. Complete Care requests that the court permit distribution of the only insurance policy associated with the plan (a policy insuring the life of Aric Hausknecht) to the Aric Hausknecht Irrevocable Life Insurance Trust U/A dated 4/16/2010 ("Hausknecht Life Insurance Trust"). Doc. 1524; N.T. 7/11/17 at 17-18. After the hearing, Complete Care's counsel provided the court with a copy of the fully executed April 16, 2010 Trust Agreement which created the Hausknecht Life Insurance Trust. See Doc. 1524-1. The Trust Agreement identified the policy at issue as one of the policies transferred by Dr. Hausknecht to the Hausknecht Life Insurance Trust. Id. Sch. A. On July 1, 2010, Larry Townsend, an employee of Koresko-owned Penn Public Trust, sent an email to Dr. Hausknecht's counsel acknowledging the transfer and noting that the plan beneficiary was "irrevocably designated as [the Hausknecht Life Insurance Trust]." See Doc. 1524-2.

The DOL does not oppose Complete Care's request to have ownership of the policy transferred to the Hausknecht Life Insurance Trust. Doc. 1551 at 22. However, "to ensure that no employees of Complete Care lose any benefit under the plan as a result of this request transfer, the [DOL] requests that Complete Care [ ] file an affidavit" that there are no other individuals or entities who have a claim to the policy or its proceeds. Id. I agree and will recommend that Complete Care's objection be sustained to the extent

it seeks distribution of the life insurance policy to the Hausknecht Life Insurance Trust provided the plan sponsor executes an declaration as previously discussed.

The last objection in this category concerns the Terry Wood plan. Doc. 1534. Dr. Wood died in July of 2016, triggering payment of life insurance proceeds to the Trusts, where they remain awaiting distribution. See Terry S. Wood, M.D., D.D.S., P.C., Plan Sponsor Statement, Transaction History (11/8/16). William Jeffrey Mardaga, D.D.S., as the trustee of the Terry Sprott Wood Insurance Trust ("Wood Insurance Trust"), requests that the life insurance proceeds be paid to the Wood Insurance Trust. Doc. 1534.

At the hearing, Dr. Mardaga and Cynthia Wood Trott, the decedent's first ex-wife, testified about the creation and purpose of the Wood Insurance Trust. N.T. 7/10/17 at 90-117. According to Dr. Mardaga, the only assets of the Wood Insurance Trust are two insurance policies, one of which is the policy at issue. Id. at 93. Dr. Mardaga provided a copy of the Wood Insurance Trust, which Dr. Wood executed on December 10, 1997,[8] and which states that the property described in Exhibit A attached to the Trust Agreement is transferred to the trustee (Dr. Mardaga). See Doc. 1534-2 at 1. However, Exhibit A was left blank. Thus, Dr. Wood's Insurance Trust did not identify any property that was placed in the trust. See id. at 27. The beneficiaries of the Wood Insurance Trust were Dr. Wood's children, id. ¶ 3.05, and Dr. Mardaga testified that, at the time the Insurance Trust was created, Dr. Wood intended to contribute assets in the future. N.T. 7/10/17 at

[8]Dr. Mardaga's signature was witnessed on December 9, 1997, and Dr. Wood's signature was witnessed on December 10, 1997, but the first-page section identifying the date of the trust was left blank. Doc. 1534-2 at 25-26.

99. However, no document has been submitted evidencing which assets or the transfer of any assets.

The DOL argues that absent any identifiable property to be transferred to the Wood Insurance Trust, the attempt to create a trust failed. Doc. 1551 at 23 (citing George Bogert, *The Law of Trusts and Trustees* § 111 (West 2017) ("It is elementary, therefore, that a settlor must select a defined or definable interest in certain or ascertainable property interest if he is to succeed in the creation of a trust.")).

The only documented indication that Dr. Wood intended the relevant policy to be part of his insurance trust is a Beneficiary Nomination form in the records that PennMont maintained on the Terry Wood plan. The Beneficiary Nomination was executed on March 13, 2000, and named the Wood Insurance Trust as the beneficiary of the plan benefits. See Doc. 1534-1. However, it is unclear who executed the Beneficiary Nomination form because the signature is unidentified, illegible, and does not appear similar to Dr. Wood's signature on the Insurance Trust Agreement.

Designation of Dr. Wood's Insurance Trust as recipient of the insurance proceeds is further complicated by Dr. Wood's divorce from his second wife, Lanee Suzanne Wood, which became final on November 15, 2010. See Doc. 1534-3 (Final Divorce Decree). In the divorce decree, Dr. Wood agreed to maintain his ex-wife Lanee as the irrevocable beneficiary of a portion of the death benefit provided by the policy held by the REAL VEBA. Id. at 27 ¶ W-7; see also N.T. 7/10/17 at 108 (testimony of Dr.

Mardaga).[9] Such action is inconsistent with an irrevocable transfer of the policy to the Wood Insurance Trust, which named his children as the beneficiaries, thirteen years earlier.

Considering this uncertainty regarding entitlement to Dr. Wood's insurance proceeds, the DOL argues that it would be improper to distribute the proceeds to Dr. Wood's Insurance Trust. Doc. 1551 at 25. I agree, and must determine to what person or entity the proceeds should be distributed.

Ordinarily, distribution would be made to the plan sponsor to determine entitlement to the proceeds. Here, however, that is impossible because Dr. Wood, the plan sponsor, died last year. Under the circumstances, the DOL argues that the executor of Dr. Wood's estate is "the only party remaining to take responsibility for the assets to determine where they appropriately belong." Id. Here, the executor of Dr. Wood's will is his eldest son, Christopher Elkins Wood. N.T. 7/10/17 at 104 (testimony of Ms. Trott). As the DOL noted, "[i]f any person, whether Dr. Mardaga as trustee or Dr. Wood's ex-spouse, asserts a right to the insurance proceeds, they can make a claim against Dr. Wood's estate, which will be resolved by the executor and the probate court." Doc. 1551 at 26.

Considering the flaws in the Dr. Wood's Trust Agreement, the confusion with the Beneficiary Nomination form, and the divorce decree, all of which undermine Dr. Wood's intention to transfer the policy to the Insurance Trust, I will recommend that the

[9]The insurance policy identified in the divorce decree is the policy that was owned by the REAL VEBA, as confirmed by the policy number identified.

court overrule Dr. Mardaga's objection and proceed to direct payment of the proceeds of the insurance policy as calculated by the court-appointed Administrator, the Wagner Law Group ("Wagner"), and Marcum to Dr. Wood's estate.

B. Requests for Additional Information

Certain objections address the amount of plan-specific information disclosed to the plans in Marcum's Plan Sponsor Statements. I addressed this issue in part by directing that, upon request, Wilmington Trust, the court-appointed trustee of the Trusts ("Wilmington"), via Wagner, provide to the Plan Sponsors the most recent policy illustration(s) for their plan's related insurance policy(ies).[10] Doc. 1520. Despite these efforts to provide information to the Plan Sponsors, several filed objections seeking additional information to aid them in determining whether to opt for a cash distribution or a policy distribution. See Docs. 1525 (Hazlet Pharmacy), 1528 (Michael O'Brien plan), 1522 (Briarpatch), 1523 (Quantic), 1532 (Silverstein Plans).

In his objection, the plan sponsor for Hazlet Pharmacy specifically requested information regarding the tax consequences of the distribution. Doc. 1535. One of the difficulties with this request is that each plan may have different tax concerns based on its unique history and circumstances, and the court is not in a position to anticipate or aid in tax planning. In its response, the DOL noted that it cannot provide tax advice. Doc. 1551 at 3. As noted in Marcum's description of the Unified Model as adopted by the

[10]In preparation for the distribution process and to obtain current and specific values for each of the insurance policies in the Trusts, from February to April, 2017, Wilmington contacted the insurers to obtain a current policy illustration for each of the policies in the Trusts. Marcum used summary information from the illustrations in the relevant section of the Plan Sponsor Statements.

court, the Unified Model "and related analysis does not consider the tax issues that may arise in the proposed distribution methodology, including the taxability of liquidating distributions and/or life insurance policies." http://www.paed.uscourts.gov/documents/koresko/Perez%20v.%20Koresko%20-%20Unified%20Model.pdf at 8 n.15. And, as I stated during the hearings, the Court will not offer any opinion on the tax consequences of the distribution. N.T. 7/10/17 at 8 (Hazlet Pharmacy), 97 (Terry Wood plan), 148 (Quantic and Briarpatch); 7/11/17 at 18 (Complete Care). Each Plan Sponsor is encouraged to seek advice from a tax professional regarding the taxability of any distribution, and the objection on this ground should be overruled.[11]

Counsel for Quantic and Briarpatch was present at the hearing on July 10, 2017. Each plan seeks assurance that the cash value of the policy(ies) associated with the plans is as indicated in the Plan Sponsor Statement. Docs. 1522 ¶ 10, 1523 ¶ 10; N.T. 7/10/17 at 149. Marcum's valuation of the policy(ies) was confirmed earlier this year when Wilmington obtained policy illustrations from the insurance carriers. Considering the history of this case and the misdeeds of Mr. Koresko in overseeing the Trusts as outlined in Judge McLaughlin's decision, see Perez, 86 F. Supp.3d 293, the court understands the plans' concern regarding the value of policies. However, since the court took over

[11]The Silverstein Plans have also objected to the nomenclature being used to describe the dissolution of the Trusts and the distribution of the assets, arguing that this will be seen as a change in ownership for tax purposes. Doc. 1532 at 4-5. The court will not venture into the waters of tax consequences. With the dissolution of the Trusts, the policies must be retitled Whether this will be viewed as evidence of a conveyance is not for this court's determination.

administration of the Trusts, the only encumbrances on policies have been to keep policies in force.[12] The court has made clear that the figures that appear in the Plan Sponsor Statements may change for a variety of reasons, including market fluctuations and the court's determination of the objections, which may require the reallocation of assets if the court determines that withdrawals from the funds or policies associated with a plan were not legitimate.[13] N.T. 7/10/17 at 149. Such changes in value, however, would be reflected in the PennMont Internal Balance ("PIB"), not in the cash value of the policies.[14] The court can offer no more assurance regarding the value of the policies upon distribution. Therefore this aspect of the objection should be overruled.

Dr. Michael O'Brien, sponsor of the plan bearing his name, requests additional information regarding a life insurance policy. He asserts that the policy contains both an insurance component and an investment component, and seeks information regarding the cost of the insurance component and the cost if he were to reduce the face amount of the

[12]In such a case, the loan taken from the policy is to pay premium to keep a policy from lapsing. Thus, the loan is merely taking the place of insurance premium for which the plan is responsible.

[13]Under the Unified Model, if a loan or expense is determined to be improper (i.e., for the benefit of Koresko and not the plan), by reversing that expenditure, the Trusts as a whole bear the loss, not the individual plan.

[14]The PIB is the internal accounting system behind the Trusts and is built into the Unified Model. The PIB reflects the transactions that directly affect each plan's balance, with additions for a plan's payment to the Trusts and deductions for the Trusts' payment of an insurance premium for a policy related to that plan. See http://www.paed.uscourts.gov/documents/koresko/Perez%20v.%20Koresko%20-%20Unified%20Model.pdf at 5-6.

policy or convert the policy to a term policy, as well as the performance of the funds in which the investment component has been invested. Doc. 1528; N.T. 7/10/17 at 34.

The DOL does not oppose the "release of further policy-related information to the specific plan sponsors who lodged this request during the current round of objections." Doc. 1551 at 4. In light of the hybrid nature of the policy associated with Dr. O'Brien's plan, I will grant his request to a limited extent and direct Wagner to request the insurance carrier to provide a breakdown of the annual premium (insurance versus investment). To the extent Dr. O'Brien seeks to convert his policy to another type of insurance, he may inquire of his own broker the ability to and cost of doing so.

The Silverstein Plans also request additional information, arguing that the information authorized by the court to be provided to the plan sponsors by the Wilmington and Wagner is insufficient to advise the Plan Sponsors' decisions to maintain the policies. Doc. 1532 at 3. "An educated decision would require illustrations based on differing amounts of planned future premium payments." Id. The Silverstein Plan Sponsors ask that the court instruct the "Independent Fiduciary . . . to direct the insurance companies to respond to plan sponsor requests for information and illustrations." Id. In essence, the Silverstein Plans request direct access to the insurance carriers regarding the policies associated with their plans.

At an early stage in this process, the court determined that plans should be given the option, if feasible, to receive their policies if desired, but to balance this option against the cost and delay that could come with full release of all plan and policy-associated records over the Trusts' decades-long history. Although the DOL does not

oppose the request, Doc. 1551 at 4, I conclude that it should not be permitted. There are over 200 open plans and 350 associated insurance policies, and all plans are dealing with making decisions in light of limited policy information. In the absence of unusual circumstances, the court should avoid any additional basis for delay and potential confusion with the policies at this point. Until distribution, the policies belong to the Trusts and the court should continue to require that contact with the carriers occur only with Wagner and Wilmington. Therefore, I recommend that this portion of the objection be overruled.

The Silverstein Plans also seek access to the information from which the Transaction Detail portion of the Plan Sponsor Statements was derived:

> The Objecting Plan Sponsors are not suggesting the Transaction Detail is inaccurate and presume that it probably is accurate; however, they simply do not have access to sufficient information to verify this presumption. The Objecting Plan Sponsors request that a procedure be established to enable any plan sponsor to obtain copies of or access to the source records on which their Transaction Detail is based so they can both "trust and verify" if they so desire.

Doc. 1532 at 3. The DOL does not address this aspect of the Silverstein Plans' objection and Mr. Silverstein did not focus on it during the hearing, noting instead that "most, if not almost all of the information . . . that plan sponsors and participants might want is information they could obtain from the carriers." N.T. 7/11/17 at 91. Thus, it is not clear that the plans still seek full discovery of records underlying the Transaction Detail.

In any event, the request should not be granted. The court has overseen nearly two years of work by Marcum, which has compiled data from numerous databases kept by the

Koresko entities and compared this data with banking records and information obtained from insurance companies.[15] The Transaction Detail included in the Plan Sponsor Statement includes line-by-line entries for every credit or debit that was included in the databases and verified by bank statements and policy transactions. Allowing the Plan Sponsors to comb through the databases evidencing more than 80,000 transactions would considerably delay the distribution process and further diminish the assets in the Trusts available for distribution. I therefore recommend that the objection be overruled.

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[15]In its description of the Unified Model, Marcum explained the data that was reviewed to support its accounting.

> Beginning with our appointment as forensic accountants in August 2015 and over the course of the last year, Marcum has identified and analyzed various types of accounting, financial and other supporting records maintained by PennMont, including an extensive database of transactions and records associated with more than 3,000 insurance policies. Through our review of these records, including most particularly the PennMont database, we were able to determine that the records were substantially complete and reliable.
>
> Collectively, Marcum assembled four "generations" of data, spanning a period of more than 20 years that formed the content of its "Forensic Database." The Forensic Database includes more than 80,000 individual transactions, representing more than a billion dollars in transactional value. While there is a general uniformity as to the nature of the programs offered, there are many separate individual circumstances attached to each of the Plan Sponsors, the benefits offered and claims paid. Marcum believes that the accounting procedures that it has employed are reasonable in the context of the attendant circumstances that the conclusions that it has reached are sound.

See http://www.paed.uscourts.gov/documents/koresko/Perez%20v.%20Koresko%20-%20Unified%20Model.pdf (internal footnotes omitted).

C. Accounting Entries

The objections to the transaction entries in the Plan Sponsor Statements can be grouped into three sub-categories; requests for clarification, objections to accounting decisions (other than legal fees), and objections to legal fees.

1. Requests for Clarification

A-Tech questions the use of the term "viaticated" to describe eight policies associated with the plan, and expresses concern that the label indicates that the values of the policies were affected. Doc. 1533. "Viatication" is a term of art referring to the sale of a life insurance policy on a secondary market. It involves

> the transfer of ownership and entitlement to life insurance policy death benefits from the insured person (the "viator") to investors who provide immediate payment for those rights. Upon the viator's death, the life insurance policy proceeds would be distributed to the investor. This investment practice is known as viatical settlements, and the process of transferring such rights is referred to as "viaticating" a life insurance policy.

United States v. Falkowitz, 214 F. Supp.2d 365, 370 (S.D.N.Y. 2002).

At the hearing, a representative from Marcum stated that the term "viaticated" as used in the Plan Sponsor Statement was merely a label used in the PennMont database, and explained that the term was used routinely for policies that Mr. Koresko viewed as belonging to the Trusts. N.T. 7/11/17 at 65. The Marcum representative confirmed that, from their review, there was no "life settlement transaction that resulted in a cash flow to the trust." Id. Thus, despite the term "viaticated" appearing on the Insurance Policy Detail, the policies are available to A-Tech and the information regarding their value was

verified by Marcum in the policy illustrations obtained earlier this year. Therefore, I will recommend that the objection be overruled.

Angela Leung, plan sponsor for the Angela Leung plan, questioned certain entries in the Plan Sponsor Statement; 1) a policy loan of $9,390 on March 22, 2011, 2) a partial surrender of the same policy on November 1, 2012, resulting in a deduction of $15,281.29 from the policy, and 3) an outstanding policy loan amount of $22,208.89. Doc. 1543.[16] The DOL responds that the entries were sufficiently explained at the hearing and that the plan was properly credited back $12,996 to account for improper fees charged by Mr. Koresko. Doc. 1551 at 5.

The Marcum representative explained at the hearing that the policy loan taken out on March 22, 2011, satisfied administrative fees that had previously been charged to the account. Those fees were consistent with administrative fees charged to the other plans and considered legitimate. N.T. 7/11/17 at 9-10; see also http://www.paed.uscourts.gov/documents/koresko/Perez%20v.%20Koresko%20-%20Unified%20Model.pdf at 13 (discussion in Unified Model of administrative fees). The total policy loan amount was based on the March 22, 2011 loan, and an earlier policy loan that was taken on February 7, 2007, for $6,140, and the accrued interest. Id. at 13.

As for the partial surrender that occurred on November 1, 2012, the Marcum representative explained that a portion of the partial surrender was used to pay legitimate fees totaling $2,285, which appear in the Transaction Detail. N.T. 7/11/17 at 10-11. The

[16]I permitted the objection despite its being filed late, in light of the plan sponsor's representation that she did not receive the Plan Sponsor Statement until after the objection due date because of a change in address.

remaining $12,996.29 from the partial surrender did not serve any legitimate purpose and was credited back to the plan's PennMont Internal Balance and appears as the last entry in the Transaction Detail and also on line B3 of the Plan Summary. Id. at 10-12; Plan Sponsor Statement for Angela Leung plan; http://www.paed.uscourts.gov/documents/koresko/Perez%20v.%20Koresko%20-%20Unified%20Model.pdf at 15 (discussion in Unified Model of the policies partially surrendered in October and November 2012). I am satisfied that Marcum's accounting is accurate and conforms to the Unified Model and will recommend that the objection be overruled.

The plan sponsor of the Winchester Land plan, David Stradinger, challenges an entry that does not appear on the plan's Transaction Detail or Plan Sponsor Statement. Doc. 1535. Mr. Stradinger has provided a Transaction Confirmation from his insurance company showing that there was a $50,000 withdrawal from the policy on July 17, 2013, and states that the withdrawal was not authorized by the plan sponsor. Id.[17] The Plan Sponsor Statement does not reflect this withdrawal apparently because the last entry in the Transaction Detail is on March 23, 2010.[18] The DOL asks that the court sustain this objection. Doc. 1551 at 6.

[17]Mr Stradinger does not challenge other policy loans (8/15/07 and 3/17/10) that appear on the Transaction Detail of the Plan Sponsor Statement.

[18]This loan remains a mystery, and the only apparent explanation is that Koresko or a cohort was able to remove these funds shortly before Wagner had full control of the Trusts, without making an entry in the PennMont database. Wagner took control of the Trusts effective July 9, 2013, when Judge McLaughlin entered the temporary restraining order. Doc. 407.

Considering that Winchester has provided evidence of a withdrawal that is not explained by Marcum's review of the plan history, and there being no indication that the money was used for a legitimate plan expense, I will recommend that Winchester's objection be sustained and the court direct Marcum to credit the amount of the unauthorized withdrawal back to the plan.

2. Accounting Decisions (other than Legal Fees)

This sub-category encompasses specific accounting entries such as premiums and medical expenses, as well as the treatment of interest payments and a prior request to terminate a plan.

Dr. Ronald Clark, plan sponsor of the Haddon Orthodontics plan, has filed an objection challenging a premium payment reflected on the plan's Transaction Detail on March 31, 1996, in the amount of $75,299.65. Doc. 1526. Dr. Clark did not recall having made such a large premium payment. Id.; N.T. 7/10/17 at 73-74, 76. The DOL responds that the payment appears accurate and legitimate, and without any evidence to the contrary, the DOL requests the court overrule the objection with respect to the premium payment. Doc. 1551 at 6-7.

The entry at issue states that it is an "assumed premium payment based on an unreconciled item adjustment." A Marcum representative explained at the hearing that they based their assumption on a reconciliation of data sets from the PennMont database, as well as documents in PennMont's file for the plan. N.T. 7/10/17 at 74-75. Moreover, contrary to Dr. Clark's recollection, the Plan Sponsor Statement reveals multiple premium payments equaling or exceeding $75,000. See Haddon Orthodontics, P.C. Plan

Sponsor Statement, Transactional Detail (3/18/98, 1/15/99, 12/4/02). In addition, payments on the same policy were made in amounts above $65,000 in January 2000, and January 2001. Id. All of these payments were made on a policy with a cash surrender value of more than $1 million. Thus, the history of the policy premium actually falls in line with premium payments during the first quarter of the year in amounts similar to that challenged, and tend to corroborate Marcum's analysis. I will therefore recommend that the court overrule this objection.

Resource Realizations filed an objection through counsel challenging the medical expenditures identified in its Plan Sponsor Statement and also arguing that it was not properly credited for interest accruing on improper loans taken out by Mr. Koresko. Doc. 1530. The DOL argues that there "is no reason to reverse the charges for medical expenses," and did not address the interest calculation. Doc. 1551 at 6.

Turning first to the medical expenses, Resource Realizations' plan sponsor recalls only one medical expenditure that was made on its behalf, whereas the Transaction Detail shows nine claims for medical benefits that were paid by the plan. See Doc. 1530; N.T. 7/10/17 at 123; Resource Realizations, Inc. Plan Sponsor Statement, Transaction Detail (1/19/09, 8/18/09, 2/2/10 – 2 entries, 9/20/10 – 2 entries, 12/14/10, 2/23/11, and 7/14/11). The Marcum representative stated at the hearing that the electronic folder related to Resource Realizations contains "a number of payments for medical expenses with forms attached that appear to be signed by [the Plan Sponsor]." N.T. 7/10/17 at 122. Marcum provided several such documents that were discussed at the hearing. Id.

Resource Realizations has provided no basis to reject these expenses beyond a lack of recall, and I will recommend that this portion of the objection be overruled.

Resource Realizations also objects to the credit it is receiving for "max loan interest,"[19] arguing that it is entitled to an interest credit of $422,829.13, rather than the $328,171 that it was credited. Doc. 1530. At the hearing, counsel suggested that the difference in the calculation may have arisen from nomenclature in the Plan Sponsor Statement, focusing on the fact that some payments detailed in the Transaction Detail state "max loan interest" whereas others state "max loan grace notice." N.T. 7/10/17 at 126; see e.g., Resource Realizations, Inc. Plan Sponsor Statement, Transaction Detail (3/4/14, 5/24/10).

At the hearing, the Marcum representative explained that in certain cases, not limited to this plan, proceeds from the max loans were used to pay insurance premiums. N.T. 7/10/17 at 124-25. In such cases, the interest was treated as a benefit to the plan and the plan was not given a credit for the portion of the loan interest that was used to fund the policy. Id. at 124. The Marcum representative explained that they "did [their] best to . . . try to parse out the portion that would have benefitted [the plan]." Id. at 125. Marcum was able to confirm that payments identified in the database as interest payments were, in fact, credited as premium payments by the insurance company,

[19]The term "max loans" refers to improper loans taken by Mr. Koresko which resulted in the diversion of the Trusts' assets. For a detailed discussion of the max loans, see Perez, 86 F. Supp.3d at 348-49 (¶¶ 117-122), and Marcum's description of the Unified Model, http://www.paed.uscourts.gov/documents/koresko/Perez%20v.%20Koresko%20-%20Unified%20Model.pdf at 14-15 (describing treatment of max loans and max loan interest).

benefitting the plan. Id. at 126-27. The Marcum representative explained that their calculation was guided by the periodic statements by the insurance company.

> What we did was look at periodic statements. . . . And if we see the loan balance increasing . . . , we're treating that as part of the max loan interest adjustment. We know, too, that . . . there were payments made, and when that happens, we generally see the balance not changing or decreasing, and we're counting those as interest payments.
>
> And between what was either paid or, I'll call it accrued, meaning that it increased the balance, . . . that's what comprised the maximum interest adjustment.

Id. at 128-29.

After considering the objection and Marcum's explanation, I will recommend that the objection be overruled.

The James LaRose plan filed an objection through counsel, supported by an affidavit of the plan sponsor Dr. James LaRose. Doc. 1539. Dr. LaRose presents the unique objection that Koresko paid unauthorized premiums on policies associated with the plan. He states that he directed Koresko and PennMont to cease paying premiums in May of 2006 and reiterated this direction in May of 2007. Id. at 2; LaRose Affidavit ¶ 11; N.T. 7/10/17 at 177.[20] He also asserts that he was unaware of the premium payments until he received the Plan Sponsor Statement, which confirms that premium payments totaling $127,280.33 were made between May 2007 and May 2012. LaRose Affidavit ¶ 13; N.T. 7/10/17 at 178; James M. LaRose, D.O. & Associates Plan Sponsor Statement, Transaction Detail (5/7/07, 5/29/07, 9/30/09 – 2 entries, 4/5/11 – 2 entries,

[20]Dr. LaRose states that, once the policies had sufficient cash value to satisfy premium obligations, he refused to make additional contributions and instructed Koresko not to make premium payments. LaRose Affidavit at 2.

4/6/11, 5/17/11, 2/8/12, 5/23/12). Dr. LaRose asks the court to withdraw this amount from the cash value of the policy and credit his PIB with the unauthorized premium payments. Doc. 1539 at 3; N.T. 7/10/17 at 180-81. The DOL supports sustaining the objection and describes the transaction as "simply an accounting adjustment specific to LaRose's plan that will not affect the distribution amount for other plans." Doc. 1551 at 8.

Under the circumstances of this case, with Dr. LaRose's sworn statement that he directed Mr. Koresko and PennMont to cease premium payments on the policy, Dr. LaRose's request is equitable and will not negatively impact the other plans. I will recommend that the LaRose objection be sustained and that the court direct the Wilmington to contact the insurance carrier to withdraw $127,280.33 from the cash value of the policies and direct Marcum to credit the LaRose plan's PennMont Internal Balance with that amount.

Hamid Mohsseni, plan sponsor of Carson's Steak Warehouse, filed a counseled objection alleging that he sought to terminate the plan on August 29, 2006, and arguing that the plan is entitled to an increase in its PIB of $207,988.79, the cash value of the policy on that date. Doc. 1537.[21] According to Mr. Mohsseni's testimony at the hearing, he sent a certified letter and called several times to cancel his plan's participation in the

[21]The plan has a negative PIB and the only policy associated with the plan has zero cash value. Carson's Steak Warehouse and Saloon, Inc. Plan Sponsor Statement, Plan Summary and Insurance Policy Detail. According to a Termination Calculation attached to the objection and prepared by PennMont on August 29, 2006, the policy "cash surrender value" was $151,003.50. Doc. 1537 at 7. Mr. Mohsseni's figure of $207,988.79 is the "gross cash value" of the policy, not the cash surrender value. Id.

VEBA arrangement, understanding that the insurance policy would also be cancelled. N.T. 7/11/17 at 49-51, 53.

The DOL argues that granting the plan's request would result in the plan being treated as separate from the Trusts, a result that would be inequitable to the plans that remain. Doc. 1551 at 8. The court has previously rejected a similar argument in ruling on objections raised in the first phase of the distribution process. See Doc. 1471-1 at 13 (rejecting request for rescission of plan). In short, Carson's Steak Warehouse's request ignores the amounts paid by the Trusts to maintain the insurance policy after the termination request, the value of the insurance coverage extending beyond the date of the termination request, and the effect such payments have on the Trusts as a whole.

The DOL offers a compromise, recognizing both Carson's Steak Warehouse's request to terminate the plan and the benefit the plan received as a result of the Trusts' payment of insurance premiums and fees on its behalf after the request to terminate. The plan's termination calculation illustrated a net distribution of $144,587.50. Doc. 1537 at 7.[22] Deducting the negative PIB, which resulted from Trust payments on this plan's behalf, $66,824.79 remains.

[22]Carson's Steak Warehouse's use of the gross cash value of the policy at the time of the termination calculation is improper. As noted in the Termination Calculation, the Cash Surrender Value of the policy was $151,003.50, from which PennMont deducted a number of fees to reach a net distribution amount of $144,587.50. Doc. 1537 at 7. Carson's Steak Warehouse has not argued that the termination fees were incorrectly calculated under its plan, and I conclude that use of the net distribution amount is fair to all concerned.

The DOL's suggestion is equitable, recognizing both the plan's request and the monies expended on the plan's behalf. I will therefore recommend that this objection be sustained in part and the court direct Marcum to increase the PIB to $66,824.79, subject to the other deductions noted in the Plan Sponsor Statement.

DVB presents a different challenge to premium charges. In its counseled objection, DVB asserts that it paid premiums on two term policies, intending to convert them to cash value policies. Doc. 1538. According to plan sponsor Donald Ball, although the plan sent PennMont the premium payment for the two term policies in June or July 2012, PennMont failed to make the payment to the insurance carrier and the policies lapsed. N.T. 7/11/17 at 73.[23] Mr. Ball then paid the carrier directly in August 2012, to reinstate the policies. Doc. 1538 at 5-6 (cancelled checks to Lincoln Financial Group). Mr. Ball then made the required payment to PennMont for these policies on October 24, 2012. Id. at 4,7 (cancelled checks to PennMont); N.T. 7/11/17 at 73-74, 78. These checks appear as credits on the Transaction Detail on October 30, 2012, although Mr. Ball alleges that PennMont failed to pay the carrier, and the policies lapsed and could not be reinstated.[24] N.T. 7/11/17 at 74, 79. DVB seeks the return of the $48,844 it spent on premiums for the life of the two policies. Doc. 1538.

[23]The last premium payments made on these two policies reflected in the Plan Sponsor Statement were made on June 21, 2011. DVB Management, Inc. Plan Sponsor Statement, Transaction Detail.

[24]According to Mr. Ball, the insurance company would not reinstate the policies without medical assessments and, considering the decline in his health, the policies could not be reinstated. N.T. 7/11/17 at 74.

The DOL responds that DVB is not entitled to the return of the premiums. Doc. 1551 at 26-27. I agree. DVB paid for term insurance coverage on Mr. Ball, which it received. Although the plan's intention was to convert the policies to whole life cash value instruments, it received the benefit of its term-insurance bargain and did not lose any premiums. Mr. Ball alleges that he sent checks to PennMont in June or July 2012, but the only evidence of checks during that period are the checks he sent to the insurer directly in August, which kept the policies in force. The only premiums to which DVB is entitled a refund are those that were not paid to the carrier that resulted in the final lapse. Those amounts are included in the plan's PIB. DVB Management, Inc. Plan Sponsor Statement, Transaction Detail (10/30/12 – 2 entries). Therefore, I will recommend that the court overrule DVB's objection.

Finally, the Silverstein Plans challenge the amount of the reserve. Doc. 1532 at 2. The purpose of setting a conservative reserve (12.5%) is to account for market fluctuations, the costs to fund the dissolution of the Trusts and distribution of their assets, and to handle the fee petitions pending before the court related to this and related actions. Once the Trusts are dissolved and the distributions made, any remainder will be distributed to the plans. Therefore, I will recommend that the court overrule this portion of the Silverstein Plans' objection.

3. Legal Fees

The Unified Model provides that legal fees incurred by PennMont and passed onto the individual plans would be credited back to the plans. See http://www.paed.uscourts.gov/documents/koresko/Perez%20v.%20Koresko%20-

%20Unified%20Model.pdf at 15.[25] As noted by the DOL, Marcum credited back to the plans the legal fees charged by Mr. Koresko in connection with his litigation against the DOL. Doc. 1551 at 9. However, legal fees Mr. Koresko charged in connection with litigation on behalf of individual plans are treated differently under the Unified Model. That is, fees charged in relation to IRS disputes, including audits, were determined to be plan specific and those legal fees are to be borne by the individual plan.[26] Although Koresko and the plans were unsuccessful in most if not all of the tax litigation, the fact remains that the purpose of the litigation from the plan's perspective was to benefit the plans.

In response to all of the challenges to legal fees, the DOL acknowledges Koresko's wrongdoing in charging the fees to the plans as well as the error in Koresko's

[25]Originally, the Unified Model provided for the return of all legal fees charged to the plans. However, as the Model evolved, the court determined that there was a distinction between Koresko raiding a plan to cover his legal costs in the DOL and other legal challenges, and fees Koresko charged the plans for legal services provided in relation to Internal Revenue Service ("IRS") proceedings, including audits of individual taxpayers regarding the deductions taken for their VEBA contributions. The court determined that such legal fees should be borne by the individual plan, rather than all of the plans. This is consistent with the language of the Unified Model, which returned legal fees charged by PennMont, and with the spirit of the Unified Model that fees that benefitted a single plan would be borne by that plan. Therefore, the Plan Sponsor Statements refund legal fees that were determined to be related to the DOL litigation, but do not refund fees determined to be related to IRS litigation.

[26]In her decision, Judge McLaughlin discussed transfers of assets from the Trusts to the Koresko Law Firm. Perez, 86 F. Supp.3d at 341(¶¶ 72-75). Jeanne Bonney, an attorney in the Koresko Law Firm, provided an explanation of these asset transfers to F&M Trust, the Trustee at the time. She explained that the fees, charged from July 22, 2002, to August 25, 2008, were in relation to six test cases in the tax court that would impact the other plans in the Trusts. Id. ¶ 74.

arguments, but points out that attempting to undo the plan-related legal fees would serve no purpose:

> Many plan sponsors were charged legal fees to fund Koresko's skirmishes with the IRS and others. If the Court allows add-backs for legal fees to the plans who lodge objections on this issue, it would only be fair to grant add-backs to all plans for legal fees. But this option would simply achieve much of the same result already accomplished under Marcum's model of leaving the legal fees where they appear in Penn Mont's internal accounting. Thus, the [DOL] supports Marcum's model of spreading the cost of the legal fees across plan sponsors in terms of the accounting Marcum already provided, which advocates equitably distributing the risk and loss that all employers assumed in seeking tax favored treatment through the REAL VEBA.

Doc. 1551 at 11. I agree with the DOL's assessment and, as a general matter, see no reason to deviate from the Unified Model. I will address specific objections one at a time.

Dr. Clark of Haddon Orthodontics challenges a legal fee charged on September 29, 2008. Doc. 1526. The DOL responds that Dr. Clark provided no information about the nature of the legal fee he challenged, and without any evidence that the entry is inaccurate, requests the court to overrule the objection. Doc. 1551 at 10.

The plan was charged a legal fee $4,203.71 on September 29, 2008, which Marcum treated as a fee to be borne by the plan, as opposed to a legal fee that benefited all of the plans. N.T. 7/10/17 at 65-66; Haddon Orthodontics, P.C., Plan Sponsor Statement, Transaction Detail (9/29/08). Dr. Clark testified that he received letters and spoke to people in Mr. Koresko's office who threatened him with termination of his participation in the REAL VEBA if he refused to pay the legal fee. N.T. 7/10/17 at 67.

Although he remembered being told that the fee was for "fighting the government," he could not remember what governmental entity was being confronted. Id. at 69.[27] At one point in his testimony, he said that it was probably the IRS, but later testified that he believed the fees were related to the "VEBA brand." Id. at 69, 71. He remembers that he was audited by the IRS regarding the deduction he had taken related to his contributions, but believes the audit was concluded by the time he was charged the legal fee. Id. at 70.

Without evidence to establish that the legal fee was different from the legal fees charged to other plans under the Unified Model, the objection should be overruled. Although the court does not condone the Koresko tactics and threats, without evidence regarding the purpose for the legal fee, the legal fee should be borne by the plan.

The Harry Monokian plan, through counsel, also objects to a legal fee of $5,000 that was charged to the plan on August 5, 2008. Doc. 1536 at 1. Cynthia Monokian, wife of Dr. Monokian and bookkeeper for the business, testified that she had a conversation concerning legal fees with Jeanne Bonney, an attorney in Mr. Koresko's office. N.T. 7/11/17 at 30. Mrs. Monokian was told that the plan had to pay $5,000 in fees "if they wanted to receive any of [their] money at any point." Id. at 31. Mrs. Monokian was never told what the legal services were for. Id.

The timing of this fee suggests, consistent with Judge McLaughlin's decision, that the legal fee charged to the Monokian plan was in relation to the test tax cases. Without

[27] As previously discussed, Mr. Koresko was known to charge legal fees for the defense of individual plans when they were audited by the IRS. Because such legal representation benefitted only that particular plan, such legal fees are to be borne by the individual plan under the Unified Model and not spread among all of the plans.

any evidence to rebut this presumption, I will recommend that the court overrule this objection, consistent with the prior discussion.[28]

Wilshire Palisades objects through counsel to two policy loans totaling $6,924.57 with accrued interest. Doc. 1531. Review of the Plan Sponsor Statement reveals that these loans were taken out to pay a $5,000 legal fee charged to the plan on November 10, 2008. Wilshire Palisades Law Group, P.C., Plan Sponsor Statement, Transaction Detail (11/10/08 – 3 entries). At the hearing, the DOL stipulated that the plan had not authorized the legal fees. N.T. 7/11/17 at 62.

Like the legal fee charged to the Monokian plan, there is no evidence as to what legal services were performed. Considering the timeframe and the amount, it is logical to conclude that the fee is also related to the test tax cases. The Unified Model does not provide for the return of legal fees related to IRS litigation. For the reasons discussed, I will recommend that the Wilshire Palisades' objection be overruled.

D. Calculation of Death Benefits

Two plans filed objections regarding the calculation of death benefits. Dr. Clark of Haddon Orthodontics challenges two aspects of the death benefit to which his plan is

[28]The Harry Monokian plan also objects to the characterization of a long-term care policy as suspended. Doc. 1536 at 2; N.T. 7/10/17 at 38. The Monokians had previously filed a Motion to Intervene, seeking transfer of ownership of this long-term care policy to them as it was mistakenly transferred to the Trusts in 2007. Doc. 1470. The Monokians have continuously paid the premiums on the policy outside of the auspices of the Trusts. Id. Although the DOL had no objection to the transfer of the policy back to the Monokians, Doc. 1487, I denied the motion without prejudice and directed that it be brought as an objection to the plan accountings. Doc. 1502. At the recent hearing, I directed counsel to prepare an Order transferring the policy. N.T. 7/11/17 at 39. The objection should be sustained as to this ground, and once I receive such an Order, I will direct the transfer of the policy.

entitled. First, he argues that that distribution of the death benefit should not be subject to the asset shortfall discount ("ASD"). Doc. 1526 ¶ 3. As I explained at the hearing, this objection should have been made in the first phase of the court's consideration of the distribution, and the objection should be overruled as to this ground. N.T. 7/10/17 at 79. The Unified Model clearly explained that post–temporary restraining order death claims were subject to the ASD.[29]

http://www.paed.uscourts.gov/documents/koresko/Perez%20v.%20Koresko%20-%20Unified%20Model.pdf at 9 (discussing treatment of death benefits).

Second, Dr. Clark questions the death benefit figure that appeared in the Insurance Policy Detail section of the Plan Sponsor Statement. By way of context, shortly after Marcum prepared the Plan Sponsor Statement, Dr. Clark's mother, an insured in the plan, passed away. N.T. 7/10/17 at 76. Marcum acknowledged at the hearing that in the Plan Sponsor Statement came from the PennMont database and was outdated. Id. at 80. Based on figures provided to the court by Wagner, the death benefit as calculated by utilization of the plan documents resulted in a death benefit of $258,000, which is subject to reduction for the ASD and the reserve. I will recommend that this aspect of the objection be denied.

[29]The court previously rejected a related challenge to applying the ASD to post-TRO death benefits in ruling on the phase-one objections. Doc. 1471-1 at 22-25.

Counsel for Waterloo filed an objection to the calculation of the death benefit due the plan following the deaths of Norman and Doris Lutz. Doc. 1529.[30] This issue is significant considering the facts. The policy at issue originally had a face value of $2.8 million. N.T. 7/10/17 at 164. The carrier paid $2,018,416.36 to the Trusts on May 17, 2012.[31] Waterloo Contractors, Inc., Plan Sponsor Statement, Transaction Detail (5/17/12). Using Mr. Lutz's salary ($77,906) and the plan multiplier set forth in the plan documents (16.47), Wagner calculated the plan death benefit as $1,283,111.82, and paid half of that ($641,555.91) to the plan. Doc. 1529 at 53. Marcum's calculations adopt Wagner's, identifying the unpaid pre-TRO benefit as $641,556. Waterloo Contractors, Inc., Plan Sponsor Statement, Equitable Distribution Calculation. Waterloo presents several challenges to this calculation including reliance on the plan documents.

By way of background, the calculation of death benefits has been a recurrent issue in this litigation. The governing documents of the plans that were in the Trusts determine the death benefit based on a calculation that is reverse-engineered and based on a multiplier of compensation. See e.g., Doc. 807 (order directing Wagner to pay a death benefit). The multiplier seems to be the last piece of the equation and was derived by dividing the face amount of the policy purchased by the amount of compensation. That

[30]This was a second-to-die policy. Mr. Lutz died on December 3, 2010, and Doris Lutz passed on March 6, 2012. Doc. 1529 at 1; N.T. 7/10/17 at 171.

[31]In the objection, Waterloo states that it has no explanation for the shortfall between the face value and the death payment by the insurance company. Doc. 1529 at 2 n.2. The Transaction Detail indicated that a max loan was taken out on the policy on September 28, 2009, in the amount of $659,339.83. Waterloo Contractors, Inc., Plan Sponsor Statement, Transaction Detail (9/28/09). Under the Unified Model, the amount of that loan is included in the PIB.

is, in most cases, salary times multiplier results in a number close to the face amount of the policy. The court has previously held that the death benefit calculation is governed by the plan's documents. On August 3, 2012, in interpreting three Adoption Agreements for plans in the Trusts, Judge McLaughlin found that the Adoption Agreements "defined the death benefit as calculated based on a set multiple of the participating employee's salary." Solis v. Koresko, 884 F. Supp.2d 261, 270 (E.D. Pa. 2012); see also Sec'y U.S. Dept. of Labor v. Koresko, 646 F. App'x 230, 233 (3d Cir. 2016) ("Benefits were then paid according [to] the adopting employers' individual adoption agreement and the governing documents for the trust."); Koresko v. United States, 123 F. Supp.3d 654, 664 (E.D. Pa. 2015) (Stengel, J.) (noting that under the arrangement, "[t]he amount of the death benefit was based on a multiple of the employee's compensation"). Thus, I will recommend rejecting any general challenge to the use of the plan documents to determine the benefits.

Here, Waterloo presents several additional arguments challenging the calculation of the death benefit. First, Waterloo argues that Mr. Lutz rejected the death benefit calculation formula. Doc. 1529 at 2. The Adoption Agreement executed by Mr. Lutz included a preprinted multiplier of 11.76. Id. at 29 ("Employee-Participants receive a life benefit equal to 11.76 times the Employee's Benefit Base."). It appears that Mr. Lutz crossed out "11.76" and initialed the cross-out. Doc. 1529 at 29. This copy of the Adoption Agreement was not yet signed by Mr. Koresko. Id. at 30. Counsel argues that

this establishes Mr. Lutz's intention not to be bound by the multiplier. N.T. 7/10/17 at 164.[32]

A copy of the same Adoption Agreement, which does bear Mr. Koresko's signature, has additional writing next to Mr. Lutz's initials, indicating that the number 11.76 was replaced with 16.48. Doc. 1529 at 43; N.T. 7/10/17 at 165. At the hearing, counsel noted that "16.47 times the amount of compensation that Mr. Lutz listed for himself [$170,000], just happens to equal the face value of the death benefit in the insurance policy that issued a few months later." N.T. 7/10/17 at 166. This discrepancy in the Adoption Agreement certainly raises a question as to which, if any, benefit calculation applies.[33]

However, determination of the death benefit to which Waterloo is entitled does not require the court to invalidate the Adoption Agreement. Both versions of the Adoption Agreement provide that the multiplier be applied to the "Employee's Benefit Base," defined as "his compensation with adjustments." Doc. 1529 at 29, 43. As noted, Wagner used Norman Lutz's salary ($77,906) as his benefit base. This number appears to be derived from Mr. Lutz's 2000 tax return indicating that Mr. Lutz had a salary of that amount. Id. at 36. In its alternative argument, Waterloo argues that the death benefit calculation should not be limited to Mr. Lutz's salary. Doc. 1529 at 3. He is correct in

[32]It is not at all clear that removing a multiplier would be to the plan's benefit. Without a multiplier, the benefit is "equal to . . . the Employee's Benefit Base," which obviously would be less than that amount multiplied. Doc. 1529 at 29.

[33]The DOL suggests that Waterloo and the REAL VEBA may not have formed a contract because the parties never executed a document containing the same terms. Doc. 1551 at 18-19.

noting that there is nothing in the Adoption Agreement that limits the benefit base to salary. Therefore, it is appropriate to look to other "adjustments" to his compensation.

There are other indications of the appropriate benefit base. First, Waterloo's census form for year 1999 listed a "salary" for Mr. Lutz of $170,000, and identified him as a 60% owner. Doc. 1529 at 34. This tends to corroborate that he earned more than salary. Also, his 2000 tax return shows that he received distributions from Waterloo, an S-corporation, including a stock increase of over $300,000. Doc. 1529 at 38; N.T. 7/10/17 at 167. Thus, even utilizing the smaller multiplier, the calculation exceeds the death proceeds the Trusts received from the insurance carrier. Therefore, under the Unified Model, Waterloo is entitled to $2,018,416.36. See http://www.paed.uscourts.gov/documents/koresko/Perez%20v.%20Koresko%20-%20Unified%20Model.pdf at 10 (defining the determined death benefit as the lesser of the death benefit calculated by use of the Adoption Agreement, or the face amount of the policy less reductions for loans or partial surrenders excluding interest payments).

Because both of the insureds passed away before the entry of the temporary restraining order, the death benefit is not subject to reduction by the ASD. Therefore, I will recommend that the court sustain the Waterloo plan's objection and direct Wilmington to pay the death claim in accordance with the discussion above, recognizing that a partial payment of $641,555.91 has previously been made.

E. Additional Time and Revocation Allowance

Several plans have asked for additional time to complete their Distribution Election Forms.[34] I have also been informed by Marcum that plans have contacted them to file Amended Distribution Election Forms as they have obtained additional financial or tax advice. I have permitted such amendments, but as we approach the distribution dates, I will not be able to permit any further changes. I recommend that the Plan Sponsors with reservations about their Distribution Elections, if they have not already done so, contact Wagner to obtain the policy illustrations prepared earlier this year. Understandably, the plans whose distributions are affected by the outcome of their objections were not in a position to make informed choices. In light of that I recommend that the court permit the plans to return final Distribution Election Forms until October 11, 2017. The court can offer no additional time because that is the date on which we will begin allowing plans to purchase the policies they have chosen to purchase.[35]

[34]The Distribution Election Form is available on the court's website. http://www.paed.uscourts.gov/documents/koresko/Perez%20v.%20Koresko%20-%20Plan%20Sponsor%20Distribution%20Election%20Request%20and%20Declaration%20Form.pdf.

[35]I believe this also addresses the Silverstein Plan Sponsors' request that their elections be revocable.

For the reasons discussed at length in the accompanying Report, I make the following:

R E C O M M E N D A T I O N

AND NOW this 9th day of August, 2017, upon consideration of the Department of Labor's Motion for Equitable Distribution, Doc. 1384, the Unified Model of Distribution, the Objections filed by various plan sponsors to their plans' individual accountings, Docs. 1522-1539, 1543, the Response by the Department of Labor, Doc. 1551, the Plan Sponsor Statements sent to the plans, the hearings held on July 10 & 11, 2017, and for the reasons stated in the attached Report, IT IS RESPECTFULLY RECOMMENDED that:

1. All open plans in the Trusts shall have until October 11, 2017, to email Amended Distribution Election forms to Marcum.

2. All plan sponsors shall have the ability to direct the distribution of plan's assets to the employee-owner or named insured on an insurance policy provided the Plan Sponsor or representative of the Plan Sponsor provides a declaration that there are no other claims to the distribution, using the court's designated form, which will be made available on the website.

With respect to the specific objections filed by the plan sponsors, IT IS RESPECTFULLY RECOMMENDED that:

3. The objections by **Briarpatch, Inc.**, and **Quantic Group, Ltd.**, (Docs. 1522 & 1523) be **sustained in part and overruled in part**. To the extent these objectors seek distribution of the plan's assets to an individual, the objections should be sustained. See ¶ 2 above. To the extent Briarpatch, Inc., and Quantic Group, Ltd., seek additional assurances regarding the value of the policies, the objections should be overruled.

4. The objection by **Complete Medical Care Services of New York, P.C.**, (Doc. 1524) be **sustained** and the court allow the policy to be distributed to the Aric Hausknecht Irrevocable Life Insurance Trust U/A dated 4/16/2010.

5. The objection by **Hazlet Pharmacy** (Doc. 1525) be **sustained in part and overruled in part**. To the extent Hazlet seeks distribution of the policies to the insured parties, the objection should be sustained. See ¶ 2 above. To the extent Hazlet seeks additional information regarding the taxability of the distribution, the objection should be

overruled. To the extent Hazlet seeks additional time to return the Distribution Election Form, the objection should be sustained. See ¶ 1 above.

6. The objection by **Haddon Orthodontics, P.C.**, (Doc. 1526) be **overruled**.

7. The objection by **Dick's Double D, Inc.**, (Doc. 1527) be **sustained**. See ¶ 2 above.

8. The objection by **Michael O'Brien, D.M.D, P.C.**, (Doc. 1528) be **sustained in part and overruled part**. To the extent the Plan Sponsor requests additional information regarding the policy associated with the plan, I will direct Wagner to request the insurance carrier to provide a breakdown of the amounts paid for the insurance and investment components of the policy. To the extent the Plan Sponsor seeks information regarding the conversion of the policy to another type of insurance, I recommend the objection be overruled. To the extent the O'Brien Plan asks for additional time to complete the Distribution Election form, I recommend that the objection be sustained. See ¶ 1 above.

9. The objection by **Waterloo Contractors, Inc.**, (Doc. 1529) be **sustained,** and the court direct Wilmington to pay the remaining amount of the life insurance proceeds received by the Trusts.

10. The objection by **Resource Realizations, Inc.**, (Doc. 1530) be **overruled**.

11. The objection by **Wilshire Palisades Law Group, P.C.**, (Doc. 1531) be **overruled**.

12. The objection by the **Silverstein Plan Sponsors** (Doc. 1532) be **sustained in part and overruled in part**. To the extent these objectors challenge the reserve, the objection should be overruled. To the extent these objectors want access to the source records underlying the Plan Sponsor Statements and direct access to the insurance companies to obtain additional information, the objection should be overruled. To the extent these objectors challenge the terminology used for the dissolution of the Trusts and distribution of the assets, the objection should be overruled. To the extent these objectors seek distribution of the plan's assets to an individual, the objection should be sustained. See ¶ 2 above. To the extent these objectors seek additional time to return the Distribution Election form, I recommend that the objection be sustained. See ¶ 1 above.

13. The objection by **A-Tech Concrete Co.**, (Doc. 1533) be **overruled**.

14. The objection by **Terry S. Wood, M.S., D.D.S., P.C.**, (Doc. 1534) be **overruled**. The distribution due this plan should be made to Dr. Wood's estate.

15. The objection by **Winchester Land and Development Corp**. (Doc. 1535) be **sustained** and the court should instruct Marcum to credit this plan's PennMont Internal Balance with $50,000.

16. The objection by **Harry H. Monokian, D.M.D., P.A.**, (Doc. 1536) be **overruled in part and sustained in part**. To the extent the plan challenges a legal fee, the objection should be overruled. To the extent the plan seeks return of a long-term care policy, the objection should be sustained.

17. The objection by **Carson's Steak Warehouse and Saloon, Inc.**, (Doc. 1537) be **sustained in part and overruled in part**, and the court instruct Marcum to credit the plan's PennMont Internal Balance with $66,824.79.

18. The objection by **DVB Management, Inc.**, (Doc. 1538) be **overruled**.

19. The objection by **James M. LaRose, D.O. & Associates** (Doc. 1539) be **sustained** and the court direct Wilmington to withdraw the amount of the invalid premium payments ($127,280.33) from the policy and direct Marcum to credit the plan's PennMont Internal Balance with this amount.

20. The objection by **Angela Leung, D.D.S., P.C**., (Doc. 1543) be **overruled**.

BY THE COURT:

/s/ Elizabeth T. Hey

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ELIZABETH T. HEY, U.S.M.J.