

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

SUSAN DeFELICE, WILLIAM : CIVIL ACTION  
DIADDEZIO, ARTHUR FISCHER, :  
JOHN LARKINS, ANDREW MARCHIONI, :  
MICHAEL MEDVIDIK, CHARLES :  
MOUZANNAR, ALLEN POLMANN, :  
TERENCE ROSFELDER, ERIC STAHL :  
and ROBERT TUCKEY, JR. :  
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 :  
v. :  
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 :  
EDWARD MICHAEL DASPIN, :  
EMPLOYEE PERSONNEL MANAGEMENT, :  
INC., MICHELE KAUFMANN, JOSEPH :  
KILRANE and HAROLD LEE : No. 01-1760

M E M O R A N D U M

WALDMAN, J.

June 25, 2002

I. Introduction

Plaintiffs have asserted claims for violation of the Employee Retirement Income Security Act ("ERISA"), the Pennsylvania Wage Payment and Collection Law ("WPCL") and New Jersey wage law.

Plaintiffs are eleven former employees of G.A. Group, Inc. ("GA Group") or its subsidiaries.<sup>1</sup> Seven plaintiffs worked at the Eddystone, Pennsylvania office of subsidiary GAES (the

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<sup>1</sup> GA Group is the immediate parent company of GA Northeast ("GANE") which is the immediate parent company of GA Environmental Services, Inc. (GAES).

"Pennsylvania plaintiffs").<sup>2</sup> Three plaintiffs worked at the Trenton, New Jersey office of GAES and one worked for GA Group or its subsidiaries from East Brunswick, New Jersey (the "New Jersey plaintiffs").<sup>3</sup> The four individual defendants are Edward Michael Daspin, Michele Kaufman, Joseph Kilraine, and Harold Lee.<sup>4</sup> The corporate defendant is Employee Personnel Management, Inc. ("EPMI") which administered the GAES payroll and was responsible for making payments to the GAES 401(k) Plan and Health Plan administrator.<sup>5</sup>

Presently before the court are the motions of the individual defendants to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction and failure to state a cognizable claim.<sup>6</sup>

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<sup>2</sup> Plaintiffs Susan DeFelice, William DiAddezio, Andrew Marchioni, Michael Medvidik, Charles Mouzannar, Terence Rosfelder, and Robert Tuckey, Jr. worked at GAES in Eddystone, Pennsylvania.

<sup>3</sup> Plaintiffs Arthur Fischer, Allen Polmann and Eric Stahl worked at the GAES Trenton office. Plaintiff John Larkins worked at the East Brunswick office.

<sup>4</sup> Kilraine is misspelled as "Kilrane" and Kaufman is misspelled as "Kaufmann" in the complaint. No party, however, has filed a motion to correct the caption.

<sup>5</sup> The current viability of EPMI is unclear. In any event, no good cause has been proffered for the failure to effect service of process on this defendant for over a year and it is subject to dismissal pursuant to Fed. R. Civ. P. 4(m).

<sup>6</sup> While each individual defendant has moved to dismiss, defendants Kaufman and Lee elected to adopt and join in the motions submitted by Messrs. Daspin and Kilraine.

## II. Facts

The facts as alleged by plaintiffs are as follow.

Defendant Daspin was at all material times an officer of GANE, a director of GA Group and an owner or partner of Return on Equity ("ROE"), a company that provided financial management services to GAES. In those capacities, Mr. Daspin provided management services to GAES, exercised control over the management of GAES and had discretionary authority regarding the administration of employee benefit plans sponsored by the GA Group or its subsidiaries including the GAES 401(k) and Group Health Plans.<sup>7</sup>

Defendant Kaufman was an officer and shareholder of EPMI. Defendant Kilraine was an officer of GANE, an officer of GA Group, a director of GAES and a partner in ROE. Defendant Lee was an officer of GANE, an officer of GA Group, an officer and director of GAES and an officer and shareholder of EPMI. EPMI is or was a corporate subsidiary of GA Group located in Parsippany, New Jersey and administered payroll during the period relevant to this dispute. EPMI was controlled at various times by defendants Kaufman, Lee and Kilraine who exercised discretionary authority regarding the management of and disposition of funds owed to the 401(k) and Health Plans.

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<sup>7</sup> Under the terms of the 401(k) Plan, GAES or GA Group was obligated to contribute matching funds equal to 50% of each employee's contribution with a cap of 6%.

Prior to January 1999, GAES had retained Employee Solutions, Inc. ("ESI") to provide payroll services and administrative record-keeping services for employee benefit plans sponsored by GAES. In January 1999, GAES terminated ESI and retained EPMI to provide the services previously provided by ESI. Under the direction of GA Group and the individual defendants, EPMI issued each employee's paycheck and W-2 forms and managed their fringe benefit plans.

During plaintiffs' employment at GAES, defendants withheld FICA, state, local and federal taxes, Health Plan premiums and employee contributions to the 401(k) Plan. At some undisclosed point in 1999, defendants ceased to pay the withheld funds and employer contributions to the various governmental agencies and benefits plan administrators. They used the funds instead to satisfy the operational cash flow needs of GA Group and affiliated entities. On January 13, 2000, plaintiffs were informed that GAES would not be able to meet its payroll scheduled for January 14, 2000 and that all GAES employees were laid off until further notice. GAES failed to pay any wages owed and earned from December 10, 1999 through January 14, 2000.<sup>8</sup>

In Count I, plaintiffs claim that defendants' failure to make or deposit the 401(k) contributions deprived them of an

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<sup>8</sup> GAES later declared bankruptcy. What, if any, claims for wages or benefits were submitted in the subsequent bankruptcy court proceedings is unclear.

opportunity to invest those funds and constituted a breach of fiduciary duty under Section 404 of ERISA, 29 U.S.C. § 1104, a prohibited transaction under Section 406 of ERISA, 29 U.S.C. § 1106(b)(1), and a wrongful denial of benefits in violation of Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). Plaintiffs seek judgment in their favor for the amount of unpaid contributions and the earnings each plaintiff lost.

Plaintiffs claim in Count II that defendants' failure to forward Health Plan contributions to the administrator resulted in a denial of health benefits in violation of § 1132(a)(1)(B), was a breach of fiduciary duty and constituted a prohibited transaction. Plaintiffs seek judgment in their favor for the amount of medical bills incurred for which they were not reimbursed by the Health Plan.

In Count III, plaintiffs claim that because EPMI was unable to provide administrative and record-keeping duties necessary to maintain the 401(k) Plan or the Health Plan, defendants engaged in a prohibited transaction and breached the fiduciary duties of care and loyalty by retaining EPMI to provide these services. Plaintiffs seek judgment in their favor on this count for the amount of the losses each sustained as a result of the retention of EPMI to provide services.

The Pennsylvania plaintiffs also seek to recover under state law<sup>9</sup> for lost wages during the period they worked for GAES but were never compensated (Count IV), bonuses promised and earned but never paid by GAES for 1997 through 1999 (Count V), the value of vacation time earned but never taken as of January 14, 2000 (Count VI), unreimbursed medical costs incurred due to defendants' failure to pay medical insurance premiums in 1999 and 2000 (Count VII), two weeks of severance pay in lieu of notice of layoff (Count VIII), unused sick and personal time and unreimbursed expenses incurred on behalf of GAES (Count IX) and garnished wages withheld by GAES but not paid to the Internal Revenue Service (Count X).

In Count XI, the New Jersey plaintiffs seek to recover under state law<sup>10</sup> regular wages earned but never paid, unpaid earned bonuses, the value of vacation time earned but never taken, unreimbursed medical costs incurred by defendants' failure to pay medical insurance premiums, severance pay, the value of unused sick and personal time, and unreimbursed business expenses incurred on behalf of GAES.

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<sup>9</sup> See 43 Pa. C.S.A. § 260.1 et seq.

<sup>10</sup> See N.J. Stat. Ann. § 34:11-2 et seq.; Mulford v. Computer Leasing, Inc., 759 A.2d 887, 891 (N.J. Super. 1999) (recognizing implied private right of action).

### III. DISCUSSION

#### A. Subject Matter Jurisdiction

Defendants essentially contend that plaintiffs have failed to present proper ERISA claims and that there is no independent basis upon which to exercise subject matter jurisdiction over the state law claims.<sup>11</sup>

The court has jurisdiction to entertain claims arising under ERISA. See 29 U.S.C. § 1132(e). The "absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction." Steel Co. v. Citizens For a Better Environment, 523 U.S. 83, 89 (1998). An action may be dismissed for lack of subject matter jurisdiction due to the inadequacy of a federal claim only where the claim is so insubstantial, implausible or frivolous as not to involve a federal controversy. Id.; Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-09 (3d Cir. 1991). Plaintiffs' federal claims do not fall into that category.

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<sup>11</sup> There is not complete diversity of citizenship and the amount in controversy does not exceed \$75,000 exclusive of interest and costs. The total amounts of the claims of each plaintiff, including even the amounts claimed under ERISA, range from \$8,841.30 to \$71,763.20. The claims of multiple plaintiffs, each with his own separate demand, who have joined in one suit for convenience or economy may not be aggregated to satisfy the requisite jurisdictional amount. See Zahn v. International paper Co., 414 U.S. 291, 294-95 (1973); Gilman v. BHC Securities, Inc., 104 F.3d 1418, 1422 (2d Cir. 1997); Griffith v. Sealite Corp., 903 F.2d 495, 498 (7th Cir. 1990) (claims of employees for wages due may not be aggregated).

Defendant Daspin in a sur-reply asks the court to entertain "an expansion of my argument that this Court does not have jurisdiction over this case" by considering § 502(e)(2) of ERISA. Defendant confuses jurisdiction and venue. The subsection relied upon provides that "[w]here an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found." 29 U.S.C. § 1132(e)(2).

Mr. Daspin asserts that the plan was administered in New Jersey, that he works and resides only in New Jersey, and that any "breach" would have occurred in New Jersey. It has been held that an ERISA defendant "may be found" in any district with which he had the minimum contacts necessary for an exercise of personal jurisdiction. See Ranson v. Administrative Committee, 820 F. Supp. 1429, 1432-33 (N.D. Ga. 1993); McFarland v. Yegen, 699 F. Supp. 10, 14 (D.N.H. 1988). Defendant Daspin's de facto control of a firm that employed plaintiffs in this district where they earned rights under benefit plans over which he exercised some authority would satisfy the minimum contacts test for claims arising from those activities. Courts have also found that a breach resulting in a denial of benefits occurs where the benefits are to be received by the beneficiary. See Keating v. Whitmore Mfg. Co., 981 F. Supp. 890, 892 (E.D. Pa. 1997); The

Brown Schools, Inc. v. Florida Power Corporation 806 F. Supp. 146, 151 (W.D. Tx. 1992); McFarland, 699 F. Supp. at 12-13; Wallace v. American Petrofina, Inc., 659 F. Supp. 829, 832 (E.D. Tx. 1987); Bostic v. Ohio River Company (Ohio Division) Basic Pension Plan, 517 F. Supp. 627, 635-36 (S.D. W. Va. 1981).

In any event, an objection to venue is not properly asserted in a sur-reply brief. It is waived if not asserted in an initial responsive pleading. See Fed. R. Civ. P. 12(h); Pilgrim Badge & Label Corp. v. Barrios, 857 F.2d 1, 3 (1st Cir. 1988)(defendant waived objection to personal jurisdiction by failing to assert it in Rule 12 motion to dismiss for improper venue); Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 909-910 (5th Cir. 1993) (defendant which "failed to raise in its first motion [to dismiss] a specific objection to venue [is] precluded under Rule 12(g) from raising the objection in a second pretrial motion to dismiss"); 17 James Wm. Moore et al., Moore's Federal Practice § 111.36 (3d ed. 2001) ("improper venue is waived if the defendant makes a pre-answer motion to dismiss on any of the other grounds specified in Rule 12(b) and does not specifically raise improper venue as a grounds for dismissal in the same motion"). See also Stjernholm v. Peterson, 83 F.3d 347, 349 (10th Cir.), cert. denied, 519 U.S. 930 (1996); Phillips v. Rubin, 76 F. Supp. 2d 1079, 1082 (D. Nev. 1999); Allied Signal v. Blue Cross of California, 924 F. Supp. 34, 37 (D.N.J. 1996).

**B. Personal Jurisdiction**

Defendants Daspin and Lee reside in New Jersey, defendant Kilraine resides in Connecticut and defendant Kaufman resides in South Carolina. There is no suggestion that they have any presence or property in Pennsylvania. The only connection between defendants and Pennsylvania alleged by plaintiffs is by virtue of their role in the management of GAES which maintained an Eddystone office where the Pennsylvania plaintiffs were employed or in EPMI which administered the payroll.

As ERISA provides for nationwide service of process, see 29 U.S.C. § 1132(e)(2), the constitutional reach of personal jurisdiction is governed by the due process clause of the Fifth Amendment which incorporates the two-prong test established under the Fourteenth Amendment. See Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 293 (3d Cir), cert. denied, 474 U.S. 980 (1985). The court must determine whether sufficient minimum contacts exist between the defendant and the forum and whether maintenance of the suit would offend traditional notions of fairness and substantial justice. See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

While the Supreme Court has expressly declined to decide the issue, see Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, 480 U.S. 102, 111 n\* (1987), many courts have concluded that where a federal statute provides

for nationwide service of process, the relevant forum for purposes of minimum contacts analysis is the United States. See Medical Mut. of Ohio v. Desoto, 245 F.3d 561, 567 (6th Cir. 2001); Board of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc., 212 F.3d 1031, 1035 (7th Cir. 2000); Federal Fountain, Inc. v. KR Entertainment, Inc., 165 F.3d 600, 601-602 (8th Cir. 1999); Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 946-47 (11th Cir. 1997); Bellaire Gen. Hosp. v. Blue Cross Blue Shield, 97 F.3d 822, 825-826 (5th Cir. 1995); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056-1057 (2d Cir. 1993). Although the Third Circuit has not squarely adopted the national contacts test, it has stated that the "constitutional validity of the national contacts test as a jurisdictional base is confirmed by those statutes which provide for nationwide service of process." Max Daetwyler, 762 F.2d at 294 n.3.<sup>12</sup>

Although the relevant forum under the national contacts test is the United States, notions of fundamental fairness should not be discarded when jurisdiction is asserted under a federal

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<sup>12</sup> Where personal jurisdiction exists to adjudicate a federal claim under a statute providing for nationwide service of process, the court may exercise personal jurisdiction over the parties to adjudicate related state law claims which arise from the same nucleus of operative facts. See Robinson Eng. Co. Pension Plan & Trust v. George, 223 F.3d 445, 449-50 (7th Cir. 2000); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056-57 (2d Cir. 1993).

statute. See Republic of Panama, 119 F.3d at 945 n.18; DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 286 n.3 (3d Cir. 1981) (suggesting that some geographic limitation may be implicit in the "fairness" component of the Fifth Amendment). It would not, however, be unfair or unjust to require defendants to litigate the ERISA claims in this district.

Defendants held significant positions in GANE or GAES which employed the plaintiffs, most of them in this district, and was responsible for making plan contributions, or in EPMI which was responsible for properly directing those contributions. It would be no more inconvenient for defendant Kaufman to defend here than in New Jersey, the only other logical jurisdiction, and only marginally more inconvenient for the other defendants. Discovery would have to be conducted in Pennsylvania as well as New Jersey. Defendants' activities had an impact in this district and they could reasonably anticipate being called to answer here for the use of their positions to deprive persons here of rights earned under a benefit plan. See Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 203 (E.D. Pa. 1974). Defendants have not remotely demonstrated that litigating this action here would impose such an unfair burden or such a great inconvenience as to trigger due process concerns. See Holland v. King Knob Coal Co., Inc., 87 F. Supp. 2d 433, 437-38 (W.D. Pa. 2000).

### C. Failure to State a Claim

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim while accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987); Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A court may also consider any document referenced in or integral to the complaint on which plaintiff's claim is based. See In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426 (3d Cir. 1997); In re Westinghouse Securities Litigation, 90 F.3d 696, 707 (3d Cir. 1996). A court, however, need not credit conclusory allegations or legal conclusions in deciding such a motion to dismiss. See General Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 333 (3d Cir. 2001); Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997); L.S.T., Inc. v. Crow, 49 F.3d 679, 683-84 (11th Cir. 1995). A complaint may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

Defendants argue that as a matter of law they are not liable under ERISA for the relief plaintiffs seek. Their contention has force.

ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests-not all in favor of potential plaintiffs." Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993). It is not the role of the courts to rewrite or tamper with the enforcement scheme embodied in the remedial provision, Section 502(a). See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985).

The parties devoted much of their time to a dispute of whether defendants qualify as fiduciaries. Fiduciaries include persons who exercise any authority or control respecting management or disposition of plan assets. See 29 U.S.C. § 1002(21); Board of Trustees of Bricklayers & Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin, 237 F.3d 270, 275 (3d Cir. 2001).

While there is a dearth of caselaw on the subject, it would seem as a matter of logic that fungible monies in the hands of an employer who fails to make its plan contributions is no more of a plan asset than an asset of the landlord to whom the employer owes overdue rent or an asset of a bank to which the employer owes delinquent credit line payments. On the other hand, contributions of a plan participant which are withheld from his paycheck by the employer and earmarked for a benefit plan qualify as plan assets. See 29 CFR § 2510.3-102(a). An

individual who exercises any control over the disposition of such withheld contributions thus qualifies as a fiduciary. See LoPresti v. Terwilliger, 126 F.3d 34, 40 (2d Cir. 1997).

Although in somewhat conclusory terms, plaintiffs sufficiently allege that each defendant played a role in the diversion of withheld contributions.

A plan participant or beneficiary may sue to recover benefits due pursuant to § 1132(a)(1)(B). The only proper party defendants in such an action, however, would be the plan and plan administrator or trustee in his capacity as such. See Laves v. Mead Corp., 132 F.3d 1246, 1249 (8th Cir. 1998); Garren v. John Hancock Mut. Life Ins. Co., 114 F.3d 186, 187 (11th Cir. 1997); Hall v. Nat'l Gypsum Co., 105 F.3d 225, 230 (5th Cir. 1997); Leonelli v. Pennwalt Corp., 887 F.2d 1195, 1199 (2d Cir. 1989); Parelli v. Bell Atlantic-Pennsylvania, 1999 WL 1060706, \*4 (E.D. Pa. Nov. 22, 1999). See also Ratner v. Local 29 RWDSU Health and Welfare Fund, 2001 WL 11072, \*2 (S.D.N.Y. Jan. 4, 2001) ("plan administrators and trustees may not be held personally liable for unpaid benefits").

Section 1132(a)(1)(B) is the only remedial provision referenced by plaintiffs. An action under § 1132(a)(1)(B) is not available for breach of a fiduciary duty. See Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Retirement Plan, 24 F.3d 1491, 1501 (3d Cir. 1994), cert. denied, 513 U.S. 1149 (1995).

Plan participants or beneficiaries may sue a plan fiduciary for breach of a fiduciary duty pursuant to § 1132(a)(2). They may not do so, however, to obtain individual relief but only for the benefit of the plan. See Massachusetts Mut. Life, 473 U.S. at 140; McMahon v. McDowell, 794 F.2d 1000, 109 (3d Cir. 1986). They may sue under § 1132(a)(3) but only for "appropriate equitable relief." Relief is generally not appropriate if otherwise provided elsewhere under ERISA. A claim to obtain a judgment imposing personal liability on a defendant to pay a sum of money owed or as compensation for the plaintiff's loss is legal and not equitable in nature. An equitable claim may lie for restoration of specific funds in a defendant's possession rightfully belonging to the plaintiff.<sup>13</sup> Where the funds sought to be recovered have been dissipated, however, the only appropriate relief is a claim at law. See Great-West Life & Annuity Insurance Co. V. Knudson, 122 S. Ct. 708, 714-15 (2002).

Plaintiffs thus may not recover unpaid benefits from movants or obtain individual compensatory relief from them for breach of fiduciary duty.

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<sup>13</sup> There is no factual averment that any defendant currently possesses the diverted funds or property clearly traceable thereto.

#### **IV. Conclusion**

The court has subject matter and personal jurisdiction. Plaintiffs have failed to present cognizable ERISA claims against the moving defendants.

The court will grant defendants' motions to dismiss the federal claims pursuant to Fed. R. Civ. P. 12(b)(6) and decline supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(c)(3), without prejudice to any plaintiff to assert any cognizable claim he or she may have in an appropriate court.

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EMPLOYEE PERSONNEL MANAGEMENT, :  
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KILRANE and HAROLD LEE : No. 01-1760

O R D E R

AND NOW, this            day of June, 2002, upon  
consideration of defendants' Motions to Dismiss (Docs. #4, #5 and  
#17), and plaintiffs' response thereto, consistent with the  
accompanying memorandum, **IT IS HEREBY ORDERED** that said Motions  
are **GRANTED** and the above action is **DISMISSED**, without prejudice  
to any plaintiff to assert any cognizable claim he or she may  
have in an appropriate court.

BY THE COURT:

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JAY C. WALDMAN, J.