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CC: LOS ANGELES SUPERIOR COURT BC 360730  
remand order, docket and remand letter

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JESSE R. VILLEGAS, an an individual and on behalf of others similarly situated,	)	Case No. CV 06-07642 DDP (VBKx)
	)	
Plaintiff,	)	<b>ORDER DENYING FINAL APPROVAL OF SETTLEMENT AND REMANDING TO STATE COURT</b>
	)	
v.	)	[Motion filed on April 21, 2008]
	)	
THE PEP BOYS MANNY MOE & JACK OF CALIFORNIA, a California corporation, THE PEP BOYS - MANNY, MOE & JACK, a Pennsylvania corporation, PEPBOYS AUTO, an entity unknown,	)	[Objection filed on April 11, 2008]
	)	
Defendants.	)	
	)	

This matter is before the Court on Plaintiff Jesse R. Villegas' Motion for Final Approval of Class Action Settlement and class member Jose Machado's Objection to Class Action Settlement. Villegas and Machado have brought similar actions against Defendant Pep Boys. Villegas v. Pep Boys, CV06-07642-DDP-VBK; Machado v. Pep Boys, CV08-01469-DDP-VBK. After considering the papers submitted and considering the arguments therein, the Court finds that it lacks subject matter jurisdiction and remands both the Villegas and

1 the Machado cases to state court. The Court, therefore, denies the  
2 motion for final approval of the class settlement.

3

4 **I. BACKGROUND**

5 Plaintiff Jesse R. Villegas ("Villegas") filed a Complaint in  
6 Los Angeles Superior Court on October 20, 2006 against Defendant  
7 Pep Boys of California, his former employer. In his Complaint,  
8 Villegas alleged class-wide violations of California Labor Code 227  
9 and California Business and Professions Code 17200 arising from  
10 Defendant's failure to pay employees their accrued vacation pay.  
11 Defendant removed the case to this Court on November 30, 2006 on  
12 the grounds of ERISA preemption.<sup>1</sup>

13 Soon thereafter, this Court issued an Order to Show Cause  
14 asking the parties to brief whether the vacation leave provisions  
15 of the "Pep Boys Welfare Benefit Plan" was governed by ERISA.  
16 (Order to Show Cause, March 7, 2007.) In response, Plaintiff  
17 argued that the Plan is not subject to ERISA because the vacation  
18 pay constitutes an exempted "payroll practice" pursuant to 29  
19 C.F.R. §§ 2510.3-1(b)(2), 2510.3-1(b)(3)(I). Defendant argued that  
20 its Plan is governed by ERISA, that the vacation benefits are not a  
21 payroll practice, and that its Plan meets the United States  
22 Department of Labor's guidelines for ERISA applicability.

23 Following briefing and oral argument on the Order to Show  
24 Cause, the Court found that the Plan was governed by ERISA. The  
25 Court found it was appropriate to apply the Department of Labor's  
26 four-part factor test for determination whether a vacation benefits

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28 <sup>1</sup>Employee Retirement Income Security Act of 1974, 29 U.S.C. §  
1002 et seq.

1 plan is governed by ERISA. In applying that test, the Court held  
2 "that the balance tips slightly in favor of ERISA-preemption."  
3 (Order, at 6) (emphasis in original). Recognizing that "this case  
4 is close and that the law on this issue is far from clear," the  
5 Court concluded as follows: "[T]he Court currently finds that  
6 Defendants' vacation benefits plan falls under ERISA. This finding  
7 is made without prejudice to any subsequent motion by Plaintiff."  
8 (Order, at 8.)

9 Subsequently, the parties commenced formal discovery and then  
10 proceeded to engage in settlement negotiations. These negotiations  
11 included a one-day mediation session and numerous telephone and  
12 written exchanges facilitated by the mediator. The parties were  
13 able to agree on settlement terms and jointly submitted a request  
14 for preliminary settlement approval. (Joint Motion for Order  
15 Granting Preliminary Approval of Class Action.)

16 The Court granted preliminary approval of the class settlement  
17 on January 28, 2008. The settlement class was certified pursuant  
18 to Federal Rules of Civil Procedure 23(a) and 23(b)(1), meaning  
19 that absent class members were permitted to object to settlement  
20 but did not have opt-out rights. (See Preliminary Approval Order,  
21 at 2, 5.) The class definition provides:

22 Class means each and every California employee of the Company  
23 from October 20, 2002, through the present (i) who is or was a  
24 participant in the Plan, and (ii) whose rights to vacation  
25 benefits as an employee were determined according to the Plan  
26 rather than according to provisions of California law that  
27 govern vacation pay.

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1 (Declaration of Daniel Feinberg ("Feinberg Decl."), Class Notice,  
2 Exh. C.) Among its provisions, the settlement requires that  
3 Defendant to pay \$1,350,000, with an allocation of \$1 million to  
4 the class and \$337,500 to attorney's fees.

5 Meanwhile, Jose Machado, who objects to the current proposed  
6 settlement, filed a class action against Defendant in San Diego  
7 Superior Court on December 27, 2007. That action alleges the same  
8 claims as those alleged in Villegas' Complaint. Defendant removed  
9 Machado's action to the Southern District of California. Machado  
10 and Defendant then stipulated to transfer to this Court as a  
11 related case and to stay proceedings pending the outcome of  
12 Villegas' final approval hearing.

13 Machado objects to the proposed settlement in the Villegas'  
14 action on several grounds. First, Machado argues that the Court  
15 lacks jurisdiction to approve settlement based upon the  
16 inapplicability of ERISA preemption and must remand to state court.  
17 Second, Machado raises objections to the adequacy of settlement,  
18 including the absence of opt-out rights where the proposed  
19 settlement certifies a mandatory class pursuant to Rule 23(b)(1)  
20 and the failure of class notice to inform class members of the  
21 attorney's fees that would be awarded upon approval of the  
22 settlement.

23

24 **II. DISCUSSION**

25 A district court's approval of a class action settlement is  
26 contingent on "finding that it is fair, reasonable, and adequate."  
27 Fed. R. Civ. Pro. 23(e)(2); see also Molski v. Gleich, 318 F.3d  
28 937, 953 (9th Cir. 2003). A district court is required to consider

1 class members' objections to a class action settlement. Fed. R.  
2 Civ. Pro. 23(e)(5); Devlin v. Scardelletti, 536 U.S. 1, 14 (2002).

3 A. ERISA Preemption

4 The Court must remand to state court if it determines, as  
5 Machado urges, that ERISA preemption does not apply because it  
6 would thereby lack subject matter jurisdiction. See, e.g., Kelton  
7 Arms Condo. Ass'n, Inc. V. Homestead Ins. Co., 346 F.3d 1190, 1192  
8 (9th Cir. 2003). Given Machado's jurisdictional objection, the  
9 Court will revisit the issue of ERISA preemption.

10 1. The Court's Order on the Order to Show Cause

11 The Court has reviewed its previous Order, the papers  
12 submitted in connection with its earlier Order to Show Cause, and  
13 the papers submitted with respect to the proposed class settlement.  
14 The Court adopts the following analysis from its previous Order:

15 The issue before the Court is whether Defendants'  
16 vacation benefits plan is an ERISA-regulated plan. Section  
17 3(1) of ERISA defines an employee welfare benefit plan as "any  
18 plan, fund, or program which was heretofore or is hereafter  
19 established or maintained by an employer . . . to the extent  
20 that such plan, fund, or program was established or is  
21 maintained for the purpose of providing for its participants  
22 or their beneficiaries . . . vacation benefits . . . ." 29  
23 U.S.C. § 1002(1). ERISA does not further define "plan, fund,  
24 or program" or "vacation benefits," and does not specify  
25 whether every policy to provide vacation benefits falls within  
26 its ambit.

27 The Supreme Court clarified this ambiguity somewhat in  
28 Massachusetts v. Morash, 490 U.S. 107 (1989). In Morash, the

1 Court held that an employer's practice of paying employees'  
2 vacation benefits from the employer's general assets did not  
3 implicate ERISA and was an exempted "payroll practice" under  
4 29 C.F.R. 2510.3-(1)(b). Id. at 117-18. The Court explained  
5 that when vacation benefits are payable from the general  
6 assets of an employer and not a separate trust, the employees  
7 are not afforded the protections from fund mismanagement that  
8 Congress sought to regulate through ERISA. The Court reasoned  
9 that because ordinary vacation payments are typically fixed,  
10 due at known times, and do not depend on contingencies outside  
11 the employee's control, they present none of the risks that  
12 ERISA was intended to address, and thus fell outside its  
13 scope. Id. at 115.

14 The Morash court also noted, however, that the creation  
15 of a separate fund to pay employees vacation benefits would  
16 subject a single employer to the regulatory provisions of  
17 ERISA. Id. at 114. But as the Ninth Circuit explained in  
18 Alaska Airlines, Inc., v. Oregon Bureau of Labor, 122 F.3d 821  
19 (9th Cir. 1997), an employer must do more than create a  
20 separate fund for benefits payments to qualify for ERISA  
21 preemption; that separate fund must be actually liable for the  
22 benefits. For example, in Alaska Airlines, the airline  
23 created a welfare plan for the payment of sick leave and other  
24 employee benefits. Id. at 813. It also created a trust to  
25 administer the benefits payments. Id. Instead of paying sick  
26 leave benefits directly from the trust, however, the airline  
27 entered into a repayment agreement with the trust, under which  
28 the airline paid sick leave benefits directly to employees

1 from its general funds and then sought reimbursement from the  
2 trust. Id. The Ninth Circuit held that the airline's system  
3 of benefits payments was not an ERISA-regulated plan. The  
4 Court explained that the airline was not transmitting funds  
5 the trust had given it to pay the employee; rather, it was  
6 paying first, and seeking reimbursement later. Id. at 814.  
7 The Court held that the airline's payment from its general  
8 assets qualified as a payroll practice under the plain words  
9 of ERISA. Id.

10 The Court did not, however, end its analysis there. The  
11 Court also concluded that the "substance" of the airline's  
12 plan was not necessarily one of a funded benefit program. Id.  
13 For example, there was no clear relation between the amount of  
14 funds in the trust and the sick leave liability accrued by the  
15 airline's employees. Id. Under the airline's plan, employees  
16 were depending on the financial health of their employer,  
17 rather than the financial health of the trust, for their  
18 benefits payments. Id. Accordingly, the Court found that the  
19 airlines system had more of the characteristics of an unfunded  
20 payment than of an ERISA trust fund payment. Id.

21 After the Morash and Alaska Airlines decisions, the  
22 Department of Labor ("DOL") issued several advisory opinions  
23 explaining when a vacation benefits plan would qualify as an  
24 ERISA-regulated plan. See DOL Advisory Opinion 2004-10A  
25 (12/30/2004), 2004 ERISA LEXIS 11 ("Adv. Op. 2004-10A"); DOL  
26 Advisory Opinion 2004-08A (7/2/2004) 2004 ERISA LEXIS 9 ("Adv.  
27 Op. 2004-08A"). The Ninth Circuit has held that advisory  
28 opinions interpreting an ambiguous Labor regulation - such as

1 the one before the Court - are controlling unless they are  
2 "plainly erroneous or inconsistent with the regulation."  
3 Bassiri v. Xerox Corp., 463 F.3d 927, 931 (9th Cir. 2006)  
4 (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)). Thus,  
5 providing that the DOL's interpretation of when a vacation  
6 benefits plan is ERISA-regulated is not plainly erroneous nor  
7 inconsistent with ERISA, the Court will apply the DOL test for  
8 ERISA-applicability to Defendants' plan.

9 (Order Re: Remand, at 3-5.)

10 After offering this analysis in its previous Order, the Court  
11 found that the DOL's interpretations in its advisory opinions,  
12 regarding when a vacation benefits plan is governed by ERISA, were  
13 not plainly erroneous or inconsistent with 29 C.F.R. 2510.3-  
14 (1)(b).<sup>2</sup> The Court, therefore, proceeded to apply the DOL's four-  
15 part test, articulated in the aforementioned advisory opinions, for  
16 determining whether a separate trust to pay vacation benefits is an  
17 "employee benefit plan" under ERISA. Finding that Defendant's Plan  
18 satisfied the DOL test, the Court also indicated that the law in  
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20 <sup>2</sup>The Court did not explicitly determine whether the regulation  
21 was ambiguous as a predicate to its finding that the DOL  
22 interpretations were entitled to deference. See Christensen v.  
23 Harris County, 529 U.S. 576, 588 (2000) ("Auer deference is  
24 warranted only when the language of the regulation is ambiguous. .  
25 . . . To defer to the agency's position [where the regulation is not  
26 ambiguous] would be to permit the agency, under the guise of  
27 interpreting a regulation, to create de facto a new regulation.").  
28 Nevertheless, proceeding to consider whether the DOL  
interpretations were erroneous or inconsistent with the regulation  
was appropriate because 29 C.F.R. 2510.3-(1)(b) is ambiguous. The  
meaning of "an employer's general assets" is not so "free from  
doubt" as to be unambiguous. See Bassiri, 463 F.3d at 931 (finding  
the same for the phrase "normal compensation") (citing Providence  
Health Sys.- Wash. v. Thompson, 353 F.3d 661, 665 (9th Cir. 2003).

1 this area is unclear and that Villegas was entitled to raise the  
2 issue of jurisdiction in a later motion. (Order, at 6-8.)

3 2. Machado's Objection

4 The issue of jurisdiction based upon ERISA preemption is again  
5 before the Court, albeit on class member Machado's objection to  
6 settlement. Class member Machado argues that Defendant's trust is  
7 an ERISA-exempt "payroll practice" under 29 C.F.R. 2510.3-(1)(b)  
8 because it utilizes an "advance and recapture" system for vacation  
9 payments, which means it pays employees their vacation benefits,  
10 the trust reimburses Defendant for disbursed funds, and Defendant  
11 deposits contributions into the trust for subsequent  
12 reimbursements. Plaintiff Villegas and Defendant counter that the  
13 settlement is appropriate. Defendant, in particular, contends that  
14 the Court's earlier jurisdictional ruling was correct in finding  
15 that the trust was governed by ERISA.

16 Notably, class member Machado directs the Court to relevant  
17 case law from this district not previously addressed by the Court  
18 in connection with the Order to Show Cause. The Court finds this  
19 case law instructive. In Lombardo v. Broadway, Inc., 1996 U.S.  
20 Dist. LEXIS 22369 (C.D. Cal. 1996), the employer operated its trust  
21 on an "advance and recapture" basis. Id. at \*3. In holding that  
22 the trust was not an ERISA plan,<sup>3</sup> the court reasoned:

23 "Advance and recapture" plans do not implicate Congress'  
24 concern about mismanagement of accumulated funds, because the  
25 benefits are paid directly by the employer from its general

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27 <sup>3</sup>The court in Lombardo also stated the rule that "an  
28 employer's policy of paying vacation benefits out of its general  
assets is a 'payroll practice' and not an 'employee welfare benefit  
plan.'" Id. at \*5 (citing Morash, 490 U.S. at 116-117.)

1 funds. Therefore, the amount of assets in the trust is  
2 irrelevant; the main purpose of the trust fund is to reimburse  
3 the employer. Likewise, Congress' concern regarding the  
4 failure to pay benefits from accumulated funds is not  
5 applicable to this case. The risk of a failure to pay  
6 benefits is identical to the risk of non-payment of wages for  
7 work performed, because the vacation benefits are paid to  
8 employees by Broadway, and the employees do not look to the  
9 Fund for reimbursement.

10 Id. at \*8 (citations omitted).

11 In Gilbert v. Securitas Security Servs., CV06-1981 CAS (MANx)  
12 (C.D. Cal. February 27, 2007), the court similarly addressed an  
13 "advance and recapture" system for vacation payments. The court  
14 followed Lombardo in rejecting an employer-defendant's contention  
15 that the VEBA trust, in having sufficient assets to cover vacation  
16 benefits during a particular period, thereby qualified as an ERISA  
17 plan. Id. at 4-5. Relying on Alaska Airlines instruction to  
18 literally apply the exemption from ERISA regulation for "payroll  
19 practices," the court held that the "advance and recapture" system  
20 was not an ERISA plan. Id. at 5.

### 21 3. The DOL Opinions

22 In light of this case law and other controlling authority, the  
23 Court is convinced that further consideration of the DOL advisory  
24 opinions is warranted. The DOL advisory opinions attempt to  
25 address the same question at issue here: when a trust or other  
26 separate fund for payment of vacation benefits qualifies as an  
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1 "employee benefit plan" subject to ERISA.<sup>4</sup> In the Denny's Advisory  
2 Opinion, 2004 ERISA LEXIS 11 ("Denny's opinion"), cited in the  
3 Court's previous Order, the DOL considered a trust that did not  
4 operate as an "advance and recapture" system, but rather, made  
5 vacation payments directly to employees. Id. at \*2-\*4.<sup>5</sup> The DOL  
6 determined:

7 [A]ssets held in a separate trust with terms such as those  
8 described above in the Plan's VEBA Trust document do not  
9 constitute general assets of the employer for purposes of the  
10 Department's regulation at 29 C.F.R. 2510.3-(1)(b).

11 Accordingly, the Plan would not be exempt payroll practice  
12 under that regulation.

13 Id. at \*6. Presumably, the DOL's finding was based upon the facts  
14 that the trust made payments directly to employees from the trust  
15 account and issued those payments in checks separate from an  
16 employee's normal paycheck. See id. at \*4.

17 Notwithstanding its finding, the DOL explained that an  
18 employer's vacation plan, even if considered a separate trust that  
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20 <sup>4</sup>This issue remains an unsettled question for reasons  
21 articulated in the Lombardo decision:  
22 The dicta in both Morash and Henning on which [defendant] relies is  
23 to the effect that if an employer pays vacation benefits out of a  
24 separate fund, instead of its general assets, this could, in some  
25 circumstances, be considered an "employee welfare benefits plan"  
26 within the meaning of ERISA. Neither opinion articulated the  
methods of funding it contemplated in proffering these  
27 observations. Lombardo, 1996 U.S. Dist. LEXIS 22369, at \*6. The  
28 Ninth Circuit in Alaska Airlines also acknowledged the language in  
Morash, but did not give clear guidance as to when a separate fund  
for paying vacation benefits could qualify as an ERISA plan. See  
Alaska Airlines, 122 F.3d at 814.

27 "Participants must submit a request to the Plan prior to  
28 taking vacation in order to receive vacation pay from the  
Plan." Id. at \*1-2.

1 does not pay vacation benefits from its general assets under 29  
2 C.F.R. 2510.3-(1)(b), was required to meet independent requirements  
3 under section 3(1) of ERISA to qualify as an "employee benefit  
4 plan." Id. at \*6-7. The DOL articulated these independent  
5 requirements in the four-part test applied by this  
6 Court in its previous Order. The test provides: (1) the trust  
7 paying the benefits must be a bona fide separate fund; (2) the  
8 trust must have a legal obligation to pay plan benefits; (3) the  
9 employer must have a legal obligation to make contributions to the  
10 trust; and (4) the contributions must be actuarially determined or  
11 otherwise bear a relationship to the plan's accruing liability. Id.  
12 at \*9. Applying that test in the Denny's opinion, the DOL was  
13 "unable to conclude" that the vacation benefits plan was an ERISA  
14 plan. That there was a separate trust with a legal obligation to  
15 pay benefits and an obligation on Denny's to make contributions to  
16 the trust did not "operate to change the essential nature of the  
17 Trust as a mere pass-through vehicle for the employer's payment of  
18 ordinary vacation wages or result in the Trust constituting a  
19 separate fund that provides genuine protections for [the accrued  
20 benefits] under the plan each year." Id. at \*9-10.

21 The DOL again applied this test in the May Company advisory  
22 opinion. DOL Advisory Opinion 2004-08A, 2004 ERISA LEXIS 11 ("May  
23 Company opinion"). The trust there used an "advance and recapture"  
24 system with the employer disbursing vacation benefits through its  
25 normal payroll system and later seeking reimbursement from the  
26 trust. The DOL was "unable to conclude" that the employer's system  
27 was a payroll practice under 29 C.F.R. 2510.3-(1)(b), reasoning as  
28 follows: "Although the vacation pay is distributed directly from

1 the general assets of May Company, in the Department's view, the  
2 regulation's safe harbor for general asset vacation pay payroll  
3 practices does not reach programs such as the May Company's that  
4 include a VEBA Trust dedicated to the vacation pay benefits." Id.  
5 at \*6. Nevertheless, applying the four-part test, the DOL  
6 determined that the trust, while a separate fund, was not an ERISA  
7 plan because the trust was not liable for payment of vacation wages  
8 and was primarily designed to reimburse the employer, and the  
9 employer was not obligated to fund the trust, although it made  
10 voluntary annual contributions. Id. at \*9-10.

#### 11 4. Analysis

12 Having reviewed the case law identified by class member  
13 Machado and the DOL advisory opinions, the Court is prepared to  
14 reconsider its earlier jurisdictional ruling. Were the Court to  
15 base its decision solely on the case law, it would not hesitate to  
16 rule that Defendant's "advance and recapture" method of paying  
17 vacation benefits does not constitute an ERISA plan. The Ninth  
18 Circuit in Alaska Airlines found no ERISA plan based upon the plain  
19 language of 29 C.F.R. 2510.3-(1)(b); where an employer first paid  
20 the employee directly and then sought reimbursement later, vacation  
21 benefits were paid "out of the employer's general assets." 814.  
22 Several district court decisions, including Lombardo and most  
23 recently the Gilbert case, have followed use of a literal  
24 application of the regulation in finding that an "advance and  
25 recapture" method of paying vacation benefits is not governed by  
26 ERISA. Insofar as the "actual methods of payment" for Defendant's  
27 trust mirrors the "advance and recapture" systems in those cases,  
28 see Alaska Airlines, 122 F.3d at 814, the appropriate conclusion

1 under the relevant case law seems to be that Defendant's vacation  
2 payments qualify as a "payroll practice" under the regulation and  
3 its trust does not constitute an ERISA plan.

4 The DOL opinions, however, give the Court pause. Both  
5 opinions take the position that a separate VEBA trust is not an  
6 ERISA-exempt payroll practice under 29 C.F.R. 2510.3-(1)(b). This  
7 suggests at first glance a position contrary to the case authority  
8 holding that a separate fund, at least where it operates according  
9 to an "advance and recapture" scheme, is not an ERISA plan because  
10 vacation payments are made from "an employer's general assets"  
11 under the regulation. To the extent the DOL opinions are  
12 controlling, Defendant's trust would not fall under the 29 C.F.R.  
13 2510.3-(1)(b) exemption. Before turning to Defendant's trust, the  
14 Court must first determine the appropriate level of deference for  
15 the DOL opinions.

16 In its previous Order, the Court followed the DOL's four-part  
17 test based upon Auer deference. That rule provides that "where an  
18 agency interprets its own regulation, even if through an informal  
19 process, its interpretation of an ambiguous regulation is  
20 controlling under Auer, unless 'plainly erroneous or inconsistent  
21 with the regulation.'" Bassiri, 463 F.3d at 931 (citing Auer, 519  
22 U.S. at 461). However, at that time, the parties did not address  
23 whether the alternative standard of deference from Christensen v.  
24 Harris County, 529 U.S. 576 (2000) would be appropriate. Under  
25 Christensen, an agency's interpretation of a statute, rather than  
26 one of its own regulations, receives a lesser degree of deference;  
27 it remains "entitled to respect" but "only to the extent that those

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1 interpretations have 'the power to persuade.'" See Christensen,  
2 529 U.S. at 587.

3 The Court finds that the DOL opinions, at least in part,  
4 interpret when vacation benefits are paid from an employer's  
5 "general assets" under 29 C.F.R. 2510.3-(1)(b), and insofar as  
6 those opinions interpret the regulation, they are entitled to Auer  
7 deference. The DOL opinions first find that separate VEBA trusts  
8 are not ERISA-exempt payroll practices. That finding is entitled  
9 to Auer deference because it involves an interpretation of what  
10 qualifies as payment from an "employer's general assets" under the  
11 regulation. Both DOL opinions continue that "such programs are  
12 subject to further evaluation under section 3(1) of ERISA to  
13 determine whether the program [is an ERISA plan]" and then  
14 articulate the four-part test. Because the four-part test arises  
15 from an interpretation of the statute itself, that test receives  
16 the lesser Christensen deference.

17 Applying Auer deference, the DOL's interpretation of 29 C.F.R.  
18 2510.3-(1)(b) in the Denny's opinion is not clearly erroneous nor  
19 inconsistent with the regulation. It is apparent that payments of  
20 vacation benefits made directly by a separate trust are not "out of  
21 an employer's general assets." See Denny's opinion, at \*6. The  
22 Court cannot, however, say the same for the DOL's interpretation in  
23 the May Company opinion. It is inconsistent with the plain  
24 language of the regulation to find, on the one hand, that "the  
25 vacation pay is distributed directly from the general assets of May  
26 Company," yet conclude that those payments do not arise "out of the  
27 employer's general assets." See May Company opinion, at \*6.  
28 Accordingly, the Court does not follow that interpretation.

1 To give meaning to the Supreme Court's observation in Morash  
2 that "the creation of a separate fund to pay employees vacations  
3 benefits" would trigger ERISA regulation, 490 U.S. at 114 (emphasis  
4 added), it makes sense to have a threshold requirement that the  
5 separate fund in fact make the payments to employees, as opposed to  
6 serving as conduit to reimburse for payments actually made by the  
7 employer. Such a rule adheres to the plain language of the  
8 regulation finding payments "out of an employer's general assets"  
9 to be exempt from ERISA, and is consistent with Alaska Airlines and  
10 the several district court cases considered here. While a separate  
11 fund paying vacation benefits does not by itself establish an ERISA  
12 plan, as recognized by the DOL in the Denny's opinion, this type of  
13 arrangement serves to distinguish a fund that might qualify as an  
14 ERISA plan from the payment of normal compensation "out of an  
15 employer's general assets." See 29 C.F.R. 2510.3-(1)(b).

16 Here, "[t]he Trust Agreement instructs Pep Boys to act as the  
17 Trustee's agent by advancing benefit payments owed to participants,  
18 and then to request reimbursement for these amounts from the Trust,  
19 without benefit of any interest or other finance charges." (See  
20 Def.'s Joinder 5, citing Daga Decl. 3, Exh. 1 (Trust Agreement, at  
21 26-27.) In other words, Defendant operates an "advance and  
22 recapture" system similar to the trusts in Alaska Airlines,  
23 Lombardo, and Gilbert that were found not to be ERISA plans for  
24 making payments from "general assets." The Court agrees that such  
25 plans not only are exempt under the plain terms of the regulation,  
26 but also, do not implicate the two principal abuses that Congress  
27 sought to address when including vacation benefits within ERISA:  
28 mismanagement of funds accumulated to finance such benefits and

1 failure to pay employees the benefits promised. See Lombardo, 1996  
2 U.S. Dist. LEXIS 22369, at \*6; see also Morash, 490 U.S. at 115.  
3 Accordingly, the Court finds that Defendant's "advance and  
4 recapture" system is an ERISA-exempt "payroll practice" that does  
5 not qualify as an ERISA plan.

6 Defendant argues that its trust is governed by ERISA based  
7 upon the DOL's four-part test. Given its analysis of the advisory  
8 opinions, the Court does not consider the four-part test applicable  
9 here. Even if the Court were persuaded to apply the DOL's four-  
10 part test for arrangements such as the one considered in the  
11 Denny's opinion, the Court finds it inconsistent to suggest that an  
12 "advance and recapture" scheme falls outside the "general assets"  
13 exemption in the regulation. Under circumstances such as those  
14 here, the Court need not reach the four-part test. Where, as here,  
15 the trust is part of an "advance and recapture" arrangement and the  
16 vacation payments come from the employer's general assets," the  
17 regulation is dispositive.

18 Even if the Court were to apply the test here, the Court no  
19 longer considers Defendant's trust to satisfy that test. Defendant  
20 argues that its trust is distinguishable from those in Alaska  
21 Airlines, Lombardo, and other cases because it has maintained  
22 around \$13,000,000 in funds, whereas the trusts in the other cases  
23 maintained lower trust balances that were unable to cover accrued  
24 benefits.<sup>6</sup> These larger balances, however, do not establish a  
25 relationship between the fund and employee's accrued benefits. In

26 \_\_\_\_\_  
27 <sup>6</sup>For example, the trust in Alaska Airlines maintained between  
28 \$1,000 and \$7,000,000. The trust in Lombardo maintained between  
\$495,000 and \$2,000,000. The trust in Czechowski never held more  
than \$1,000.

1 fact, the evidence shows that on or around the dates when the trust  
2 transfers funds to Defendant, Defendant in turn makes contributions  
3 to the trust to cover future reimbursements. (Feinberg Decl. Exh.  
4 B; see also Daga Decl. Exhs. 4, 5.)<sup>7</sup> While the trust is separate  
5 in form, the substance of Defendant's arrangement is the same as  
6 any employer that reserves funds for purposes of paying employee  
7 compensation. The trust may have liability for vacation payments  
8 and Defendant may have the legal obligation to contribute to the  
9 fund, but the principal purpose of the trust is reimbursement, not  
10 funding vacation benefits. That Defendant contributes large sums  
11 for vacation payments is irrelevant. This is not the kind of  
12 separate trust that constitutes an ERISA plan.

13 B. CAFA

14 Plaintiff Villegas and Defendant argue that the Court has  
15 jurisdiction, even if it finds no ERISA preemption, under the Class  
16 Action Fairness Act ("CAFA"). See 28 U.S.C. 1332(d)(1)(B) & 28  
17 U.S.C. 1453. However, Defendant did not remove to federal court on  
18 the basis of CAFA. The sole basis for Defendant's removal to  
19 federal court was ERISA preemption. (Def.'s Notice of Removal.)

20 A removal petition must be filed within thirty days of  
21 receiving a complaint and must state the basis for removal to  
22 federal court. 28 U.S.C. 1446. The notice of removal "cannot be  
23 amended to add a separate basis for removal jurisdiction after the  
24 thirty day period." O'Halloran v. Univ. of Washington, 856 F.2d

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26 <sup>7</sup> Although the evidence of Defendant's contributions and the  
27 trust's reimbursements were before the Court on the Order to Show  
28 Cause, this evidence was not offered to the Court in the manner  
presented by class member Machado. This presentation gives the  
Court a new appreciation of Defendant's "advance and recapture"  
arrangement.

1 1375, 1381 (9th Cir. 1988). The Court finds that it lacks  
2 jurisdiction since this case was removed on the basis of ERISA, not  
3 CAFA, there is no jurisdiction based upon ERISA preemption, and the  
4 time for amending the removal petition has long passed.

5 At oral argument, Defendant pointed to authority that it  
6 suggested would allow the Court to approve the settlement so long  
7 as the jurisdictional defect - here, no ERISA preemption - was  
8 cured, by finding in this instance jurisdiction under CAFA. See  
9 Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996); Parrino v. FHP,  
10 Inc., 146 F.3d 699 (9th Cir. 1998); see also Soliman v. Philip  
11 Morris, Inc., 311 F.3d 966 (9th Cir. 2002). However, those cases  
12 only stand for the proposition that a judgment will not be reversed  
13 and remanded by an appellate court when a procedural defect at the  
14 time of removal is cured at the time of judgment. See, e.g.,  
15 Parrino, 146 F.3d at 703. The case law does not say that a  
16 district court should not remand upon finding a jurisdictional  
17 defect.

18 In any event, based on the current record, the Court also  
19 finds that Defendant has not carried its burden on removal of  
20 proving by a preponderance of the evidence that the \$5,000,000  
21 amount in controversy requirement for CAFA jurisdiction has been  
22 established.<sup>8</sup> See McNutt v. General Motors Acceptance Corp., 298

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24 \_\_\_\_\_  
25 <sup>8</sup> Villegas has represented that the class's total claim  
26 amounted to around \$5,000,000 although the precise amount has been  
27 disputed. Defendant cannot rely on Villegas' bare assertions to  
28 carry its burden of showing the amount in controversy has been met.  
Furthermore, it appears that this figure may include amounts that  
should not be considered in calculating the amount in controversy.  
Either way, the Court does not consider the assertion of a  
\$5,000,000 amount to show that it is more likely than not that the  
amount in controversy has been met.

1 U.S. 178, 189 (1936). Because the Court has determined that ERISA  
2 preemption does not provide a basis for jurisdiction, the Court  
3 remands to state court.

4

5 **III. CONCLUSION**

6 A court either has jurisdiction or it does not. Having  
7 determined that it lacks jurisdiction, the Court is unable to  
8 approve the settlement. See Jones v. Giles, 741 F.2d 245, 248 (9th  
9 Cir. 1984) (explaining that the "absence of subject matter  
10 jurisdiction may render a judgment void where a court wrongfully  
11 extends its jurisdiction beyond the scope of authority. . . .").

12 The Court is aware of the parties' diligent efforts to reach  
13 settlement in this case and understands that this jurisdictional  
14 ruling will for the moment delay concluding this matter. The Court  
15 also acknowledges that the parties may have engaged in settlement  
16 with certain expectations based upon the previous ruling on the  
17 Order to Show Cause. In receiving an objection to the settlement,  
18 however, the Court was required to reconsider the basis for federal  
19 jurisdiction. Having gained through review a deeper appreciation  
20 of the relevant law and facts of this case, the Court finds its  
21 decision to remand for lack of jurisdiction appropriate. The Court  
22 cannot approve a settlement knowing of the jurisdictional defect.  
23 The Court encourages the parties, even with the change in  
24 procedural posture of this case, to continue in their efforts to  
25 reach settlement.

26 For the foregoing reasons, the Court concludes that it lacks  
27 subject matter jurisdiction. The Court REMANDS Villegas v. Pep  
28 Boys, CV06-07642-DDP-VBK, to state court. Machado v. Pep Boys,

1 CV08-01469-DDP-VBK, was stayed pending resolution of Villegas. For  
2 the reasons that Villegas is remanded to state court, the Court  
3 removes the stay and remands the Machado case to state court. The  
4 Court, therefore, DENIES the motion for final approval of the  
5 settlement in Villegas.

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7 IT IS SO ORDERED.

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10 Dated: May 6, 2008

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DEAN D. PREGERSON  
United States District Judge