**POP 2023**

**Characters:**

Narrator

Mary Jane Oxford – HR Director for Miss Peach Cobbler, LLC

David Slingback – CFO Miss Peach Cobbler

Norman Body – Controller of Miss Peach, Former CFO of Plum Lucky Shoes

Anna Espadrille – HR Director Col. Mustard Condiments

Regina King – TPA Administrator

FBLC Attorney

Georgia Green

Miriam Mustard

**Introduction Script – M&A set-up (MA Script #1)**

Narrator: Welcome to Ferenczy Benefits Law Center, where every day presents new challenges, and the attorneys look forward to being their client’s ERISA solution. Regina King, a long-time TPA, has arranged for a conference call to introduce her client, Miss Peach Cobbler, LLC. Miss Peach Cobbler has recently undergone a number of changes. Regina is aware of at least one acquisition in the past year. Regina also knows enough to know when she needs help. Having read so many of the Ferenczy Solutions and Flash newsletters on BenefitsLink, she brought in her friends at FBLC.

FBLC: Regina, it’s lovely to speak with you again. Thank you for introducing us to your client, Miss Peach Cobbler.

Regina: Thank you for taking the time to talk with us. I’d like to introduce you to Mary Jane Oxford. She’s the HR Director of Miss Peach and a terrific client to work with. She recently let me know that her company is undergoing some growth. I’ll let her tell the story.

Mary Jane: Regina, thank you for the introduction. We’re so glad to engage you, Ferenczy, because I’m not sure what to do.

FBLC: Well, start at the beginning and tell me about your company.

Mary Jane: Miss Peach has about 140 employees. We have two locations that we work from, one here in Atlanta and one in Florida. I just returned from maternity leave and was just told that we bought another company, Plum Lucky Shoes, back in September. Somehow, we bought this company and my boss only now got around to letting me know, so nothing has been done. And I’ve recently been told that we are closing on another deal soon to purchase Col. Mustard Condiments.

FBLC: Don’t worry. We can help you through this. As a large plan, you have your Form 5500 audited each year, correct?

Mary Jane: Yes, we use Moore Colson and love working with them.

FBLC: Definitely a great firm to work with. What sort of Plan do you currently have?

Regina: Miss Peach has a pretty standard 401(k) Plan with a discretionary match, which they fund 50% up to 6%. There is also a discretionary profit sharing provision, but they haven’t made such a contribution in years. The assets and RK are currently with Transamerica.

FBLC: Thanks, Regina. What about Plum Lucky? Do we know if they have a Plan?

Regina: I looked it up on eFast once Mary Jane told me about the purchase. The Plum Lucky Shoes, Inc. 401(k) Plan exists. I haven’t seen any documents, so I can’t tell you much about it.

Mary Jane: I don’t know anything about it either.

FBLC: Do we know if Plum Lucky was purchased as an asset sale or a stock purchase?

Mary Jane: It was an asset sale.

FBLC: That’s good. It is likely that the Plan was left with the Seller and that your company just bought the main assets. What about that other purchase?

Regina: Yes, that’s something new. I haven’t heard about this one.

Mary Jane: They told me that I need to enroll the Col. Mustard employees on June 1, so we should have some time to figure that out.

FBLC: Do you know if they are going to buy it as an asset sale or a stock purchase?

Mary Jane: I have no idea. Is that important?

FBLC: Yes, the type of transaction is really important. If we are lucky enough to find out about the purchase in advance, it gives us an opportunity to make strategic decisions. I’m assuming that Col. Mustard also has a retirement plan. Whether your company wants to keep the plan and merge it into yours, or whether you want to force a termination prior to the sale, entirely depends on the type of transaction and the timing. You should find out as much information as you can about this purchase.

Mary Jane: I’ll see about getting our CFO, David Slingback, on the next call. He should know all of the details.

FBLC: And see if you can get copies of plan documents for each of the plans so that we know what we’re working with. When was the purchase of Plum Lucky again?

Mary Jane: I heard that it closed on September 15th.

FBLC: How have the employees been getting paid since then?

Mary Jane: They only joined our payroll as of January 1. Prior to that, they were being handled on a separate payroll.

FBLC: Do you know if they were continuing to participate in the Plum Lucky Plan during that time?

Mary Jane: I honestly don’t know.

FBLC: Regina, what is eligibility for the Miss Peach Plan?

Regina: Age 21 with 1 Year of Service.

FBLC: Did you amend the Plan to credit any service with Plum Lucky?

Regina: No, we haven’t done anything yet.

FBLC: Have the Plum employees started participating in the Miss Peach Plan?

Mary Jane: Yes, we enrolled them as of the January payroll change.

FBLC: Well, we may have some issues here that will need to be addressed. I recommend that our immediate plan of action is to get more information about the purchase of Col. Mustard, get copies of the Plum Lucky and Col. Mustard plans, and let’s regroup next week sometime. Regina – can you send us the plan documents for Miss Peach?

Regina: Sure. I’ll load them into the PensionPro secure portal and send you a link so that you can download.

FBLC: We really appreciate that.

**Character Notes**

* **Mary Jane Oxford (HR) with Miss Peach Cobbler, LLC and Regina King (TPA)**
	+ Plan Provisions, 2021 Testing & Form 5500

 **White Board Notes of where we are at this point**

* How is it possible we had an asset purchase in September (i.e., Plum Lucky), but the employees who are following the asset purchase did not become Peach employees until January 1? (Did we “lease” them from Plum in the interim?)
* If we have an asset purchase, we don’t care about the Plum plan, other than if we want to accept rollovers.
* With a 1 year wait, they either need to give credit for service with Plum or they need to lower the eligibility requirements in the Peach Plan to let the employees in by January 1, 2023.
* What about using an Open Entry Date instead?
* What does Peach plan say about: 410(b)(6) employees; leased employees?
* We need to find out about the Col. Mustard acquisition.

**Interim Script – M&A surprise #1 \*Cow Bell\* (MA Script #2)**

Narrator: FBLC gets a call from Mary Jane prior to the scheduled follow-up call.

FBLC: Hi Mary Jane! How are you doing?

Mary Jane: Well, I’m not sure. I think you’re going to have to tell me.

FBLC: Ok, that’s ominous. What’s going on?

Mary Jane: I spoke with David in preparation for our call tomorrow. He told me that Plum Lucky was actually a stock sale, not an asset sale, as I had originally thought. Is that going to be a problem?

FBLC: Yes, that does cause some complications. Do you know anything about the Plum Lucky Plan and what’s going on with it now?

Mary Jane: David wasn’t sure. There was something about the termination of the plan. He suggested that I talk with Norman Body, the former CFO of Plum Lucky. He’s going to be working as our new Controller. Did you want to talk with him?

FBLC: Yes, let’s get that call set-up immediately. You have to get word to the folks in your team, especially Mr. Body, to let them know that the Plum Lucky Plan can’t be terminated and definitely shouldn’t be permitted to have people take distributions.

Mary Jane: Oh. Ok. I’ll see what I can do.

**Character Notes**

* **Mary Jane Oxford (HR) with Miss Peach Cobbler, LLC and Regina King (TPA)**
	+ Plan Provisions, 2021 Testing & Form 5500

**White Board Notes of Where We Are Now**

* Do we want to merge the Plum plan into Peach?
* What does the Plum plan say about related employers and 410(b)(6)? (In other words, did it cover the PEACH employees at the acquisition or later?)
* Still concerned about Peach eligibility requirements vis-à-vis the Plum employees. Did they only enroll people with 1 year of service with Plum or did they enroll everyone who participated in the Plum Plan before? Or, did they enroll everyone? FAILURE: Early Entry
* Can’t terminate Plum Plan, as noted above. Do we have a problem?
* We still care what the Peach plan says about 410(b)(6) and crediting of service with acquired companies.

**Plum Lucky Discoveries (MA Script #3)**

Narrator: FBLC gets a call scheduled with Mary Jane, David Slingback, and Norman Body to discuss the situation with Plum Lucky Shoes. Regina is respectfully left out of the call so that the discussion can be kept under privilege.

FBLC: I really want to thank you all for coming together on such short notice. I want to start with a confirmation of the facts since I’m concerned that we may not have gotten accurate information. When was the purchase of Plum Lucky and what type of purchase was it? Asset or stock sale?

David: The purchase occurred on September 21st last year and it was a stock sale, and Plum employees became Peach employees as of January 1.

FBLC: A stock sale changes some things. What is the status of the plan?

Norman: We signed the paperwork to have it terminated at the end of November and just started paying people out. A group called Penchecks has been handling the payments and will do the tax reporting in January 2024.

FBLC: We need to stop that process immediately. Because the transaction was a stock sale, and Miss Peach has its own 401(k) plan, there is something called the successor plan rule. Since you didn’t terminate the Plum Lucky Plan before the stock sale, you can’t distribute the 401(k) funds on termination. Therefore, your only real choice is to merge the Plum Plan into the Miss Peach Plan. We’re going to have to reverse the termination.

Mary Jane: Is there no other choice?

FBLC: Well, we could consider freezing the Plum Lucky Plan and just maintaining it without any ongoing contributions. You’d be paying twice the fees, and managing the loan repayments between the two plans can be complicated. For participants, they’d have balances in two places, and I can see where this would be very frustrating for them. It’s not what I would recommend.

David: I agree. We don’t want to maintain another plan.

Norman: What do we do about distributions that have already occurred?

FBLC: How many people have been paid out? Are they still employed with Miss Peach or Plum Lucky?

Norman: Some of them no longer work for us. There were layoffs after the sale. But, some of them, like mine – were done already.

FBLC: We’re going to have to get a list of the folks that were paid out, determine their employment status, and start communicating to get the funds returned, if people choose to do that. There are advantages to having the funds in the Plan rather than in an IRA. The good news is that with the new Overpayment rules, for non-Key employees that choose to keep their distributions in the IRA, or as a lump sum, we don’t have to chase them down and force them to return the money. The money in the IRA can still keep its tax-deferred status.

Norman: That will make things much easier, I think.

David: When do we have to merge the plans?

FBLC: It would make sense to do it as quickly as possible. Were there participant loans in the Plum Lucky Plan?

Norman: Yes, a few, but we stopped repayments when we terminated the Plan.

FBLC: We’re going to need a list of those loans and get repayments started back up for those that are still actively employed. Since no repayments have been made since November, the loans may already be in default. And, anyone with a loan that took an improper distribution may have had the loan offset. To avoid that tax bill, those folks may want to reverse their distributions and get their loans reinstated.

Norman: I can get you a list of the loans.

FBLC: Mary Jane, were you able to get plan documents for the Plum Lucky Plan? We really need those as soon as possible.

Mary Jane: Yes, Norman was able to get me a set. I’ll forward them on to you.

FBLC: Where is the money currently and who has been doing the administration of the Plan?

Norman: The Plum Lucky Plan funds are at John Hancock and we use a local TPA.

FBLC: We’d like to get copies of the 2022 nondiscrimination testing, if it’s completed. If not, the 2021 testing will work for now. Are there any issues that we should know about with the operations of the Plum Lucky Plan?

Norman: Not to my knowledge.

David: We’ll make it a priority to get you the necessary testing and documentation. Can you help us with the communications to the Plum Lucky participants?

FBLC: Yes, that’s one of the biggest priorities. We need to clearly communicate to participants what’s going to happen, the options for distributions that have already occurred, and why new distributions won’t be permitted if they are still employed.

**Character Notes**

* **Mary Jane Oxford (HR) with Miss Peach Cobbler, LLC and Regina King (TPA)**
	+ Plan Provisions, 2021 Form 5500 & Testing
* **David Slingback (CFO) with Miss Peach Cobbler, LLC**
	+ Stock Purchase Agreement (for Plum Lucky Shoes)
	+ Stock Purchase Agreement (for Col. Mustard)
* **Norman Body (CFO/HR) with Plum Lucky Shoes, Inc.**
	+ Plan Provisions, 2021 Form 5500 and Testing
	+ Termination Amendment, Distribution Detail

**Notes of Where We Are Now**

* Can’t terminate/pay out Plum Plan – need to merge. So we need to reverse the 11/2022 termination of the plan (but we can’t reverse 100% vesting)
* There are failures by paying out current employees from Plum – EPCRS issue/Discussion of Overpayment Rules.
* Loans defaulted 3/31/2023. Need to correct through EPCRS.
* Termination amendment terminated the Transition Period for Plum Plan
* If we amend Peach Plan to let in the Plum employees, that terminates TP
* There were layoffs at Plum after the sale. Was there a PPT of the Plum Plan (do we care, since termination amendment 100% vests everyone anyway)?
	+ RK will need to keep separate money types to track the vesting

**M&A Surprise #2**  **(MA Script #4)**

Narrator: Thing are moving along with the Plum plan situation. David calls FBLC.

David: I want to introduce you to Anna Espadrille. She’s the HR Director with Col. Mustard Condiments. We discovered that they have a 401(k) Plan, as well.

FBLC: Lovely to meet you, Anna. How can I help you?

David: Well, since the purchase of Col. Mustard is closing in a little over a month, based on our conversation the other day with Norman, I thought it would be prudent to get to work on this merger.

FBLC: Okay, so you are confirming the acquisition will take place on June 1.

Mary Jane: June 1st will also be the date that the Mustard employees will join our plan. The Mustard employees will remain under a separate payroll, but it will get run through this office.

FBLC: If they will be on a separate payroll, is that because you intend to keep Mustard as a separate taxable entity?

David: Yes, they’ll retain their own separate EIN and be a subsidiary of Cobbler LLC.

FBLC: David, can you tell me what kind of sale it will be? Stock or asset?

David: This will be a stock acquisition. I’ve looked at the agreement and it appears to be silent about what we should do with the Mustard Plan. Is that common?

FBLC: Yes, often the attorneys handing the acquisition don’t have the experience or the desire to deal with the retirement benefits. They go as far as confirming there are no defined benefit plans, but after that, they don’t bother with the 401(k) plans. So, Peach will be managing the payroll processing for the Mustard employees, and they will remain separate from the Peach employees, but the intent is to have the Mustard employees participate in the Miss Peach Plan. Correct?

Anna: Yes, we will remain a separate company and the employees will be paid by Mustard using the same payroll processor that Peach does. Also, by the way, we’ve already communicated to our employees that our plan is going to be merging into the Miss Peach Plan.

David: You did?

FBLC: When did you tell them this?

Anna: When the acquisition was announced, late last month. I was told that that was the agreement.

David: That’s news to me.

Mary Jane: Me, too.

FBLC: Can you get us a copy of the communication? David, can you confirm with the owners that this was their intention? It’s not a problem and we can certainly do the merger. However, there is still time to terminate the Mustard plan if you prefer to do so. You can still permit employees to roll over their benefits, if you would like, or they can take them in cash or roll to an IRA. I just don’t want to start drafting the merger documentation until everyone is in agreement that this is what they want.

David: I’ll do that right away. I’ve already sent off an email. However, I’m sure that the company does not want people to take their money out now. We want them to have it for retirement. Also, we don’t want the employees to use a plan payout as a way to finance them quitting their jobs.

FBLC: Okay, that makes sense. I appreciate your confirming all this. Anna, what can you tell us about the Mustard Plan?

Anna: We permit 401(k) and Roth. We have a discretionary match, but we haven’t funded that since before the pandemic. And there are participant loans available.

FBLC: We’ll need to put together a communication to the participants as soon as we see what they’ve already received. We also need to get copies of the Mustard Plan documents immediately. Can you email those right way?

Anna: Uhh….I’m not sure where they are, but I can look around or I’ll ask our recordkeeper, Automations R Us.

FBLC: So, we intend to enroll the Mustard employees in the Miss Peach Plan as of June 1, when the deal closes. We’re going to need to properly communicate that, so the Mustard employees know what to expect and how the transition to the new plan and payroll system is going to work. We also need to make sure the various plan documents are amended if needed. Where do things stand with getting Peach Plan enrollment materials for the Mustard employees?

Mary Jane: I have them being mailed out by Transamerica to the Mustard employees. I didn’t know that there were loans outstanding. How are we going to handle that?

FBLC: Anna, can you get your recordkeeper to send over all loan documentation? We need a list of all outstanding loans, and as much of the loan documentation as possible. That means amortization schedules, promissory notes, and repayment history.

Anna: Sure. I’ll ask.

FBLC: I think we need to bring Regina back in right away. She’s going to need to amend the Miss Peach Plan to allow for the Mustard employees to start participating as of June 1. We can help coordinate that piece.

David: It looks like we have another problem to deal with. We appreciate your help.

FBLC: Not a problem. We’ll outline the project plans for both Plum Lucky and Mustard. I know it seems confusing, but we can get this cleaned up. Anna, we’ll look for your emails.

**Character Notes**

* **Mary Jane Oxford (HR) with Miss Peach Cobbler, LLC and Regina King (TPA)**
	+ Plan Provisions, 2021 Form 5500 & Testing
* **David Slingback (CFO) with Miss Peach Cobbler, LLC**
	+ Stock Purchase Agreement (for Plum Lucky Shoes)
	+ Stock Purchase Agreement (for Col. Mustard)
* **Norman Body (CFO/HR) with Plum Lucky Shoes, Inc.**
	+ Plan Provisions, 2021 Form 5500 and Testing
	+ Termination Amendment, Distribution Detail
* **Anna with Col. Mustard Condiments**
	+ Unsigned Cycle 3 document, Notice to Employees re: Merger into Miss Peach Plan, and erroneous 2021 Form 5500

**Notes of Where We Are Now**

* Col. Mustard acquisition to close as of June 1.
* Stock acquisition
	+ We can either terminate the plan or merge it, as was communicated, but a short window if we want to terminate.
	+ For Mustard employees to join Peach plan in June, need to credit past service or change eligibility requirements – depending on what Peach plan said about 410(b)(6) employees
* If we amend the Peach Plan to add in Mustard employees, Transition Period ends at that time.
* Need to get the loans transferred to the Peach plan in time to avoid defaults. Is there a difference in payroll periods from Mustard, so that we need re-amortizations?
* Can the RK handle the transfer of loans?
* Employee communication is really needed here.

**The Mustard Hits the Fan**  **(MA Script #5)**

Narrator: Having only received an unsigned Third Cycle document for the Mustard Plan, the team regroups to review the Mustard mess.

FBLC: Thanks for making time so quickly on your schedule for this call. We have some significant issues that we need to address.

David: Your email didn’t make it sound good.

FBLC: Based on your discussions with Miss Peach, are you still committed to the merger?

David: Yes, Miss Peach doesn’t want to start the relationship with the Col. Mustard employees by backing away from the announcement that already went out.

FBLC: I don’t want to overly concern you, but there are serious problems with the Mustard Plan that will prevent us from merging it for many months. We have to get it cleaned up first.

Anna: What’s wrong with it?

FBLC: The plan document that you sent us is the Summary Plan Description, which is for participants and not the actual plan document. When we contacted Automations R Us, your bundled service provider, they told us that they don’t keep any prior copies of your documents and the only other piece they could provide is an unsigned Third Cycle adoption agreement.

David: How is that possible?

Anna: I made sure that we signed anything they sent us.

FBLC: If you can keep looking to see what you may have kept in your files, that would be great. But, according to the call center person we spoke to, Automations has nothing to provide. Well, at any rate, I contacted Automations about preparing an amendment to freeze or terminate the Mustard plan as of May 31. They said it would take them 6 – 8 weeks, which puts us way past our June 1 deadline for having new deferrals go to the Peach Plan or to change course and terminate.

Regina: If you can get me the unsigned Third Cycle document, I can draft any amendment we may need.

FBLC: Thanks, Regina.

Mary Jane: Anna, the employee list that you provided me seems to be missing people on it when I compared it to the listing I got for the plan participants.

Anna: Really?

Mary Jane: Yes, you gave me a list of 57 people that are to be added to the payroll on the June 1 closing date. But, Regina told me that there are 71 active participants in the Mustard Plan.

Anna: Oh – I’m sorry. I must have forgotten to give you the list of employees at Miss Scarlet’s Hot Sauce.

Mary Jane: Miss Scarlet’s Hot Sauce?

Anna: Yes, that’s our subsidiary in Charleston.

Mary Jane: That’s the first I’m hearing about them.

FBLC: There is no mention of a controlled group member participating in the plan either in the Summary Plan Description or the Third Cycle document and no Participating Employer Agreements.

Anna: There should have been. They have been part of the company since we started the plan in 2018.

FBLC: And they are in the Mustard Plan?

Anna: Yes, they have been since 2018.

FBLC: That’s something that we’ll have to fix when we correct the plan documents.

Mary Jane: We haven’t arranged for the Scarlet employees to get enrollment packages for the Miss Peach Plan like the other Mustard employees. I need to get that list ASAP. I hope Transamerica can turn it around quickly for us.

David: I’m sure that our Rep there will make it happen. I’ll call Transamerica once we’re done here. I just need to get a rough number.

Anna: There should be 38 employees at Scarlet.

David: Thanks.

FBLC: Additionally, we pulled down the Form 5500 for the Mustard Plan. There are a number of items there that will need attention. First, there is no reference to a fidelity bond. Anna, did you have a fidelity bond in place for the plan?

Anna: I’m sorry. What’s a fidelity bond? Automations never told me we needed a bond.

FBLC: You should talk to your insurance agent who handles your other insurance and see if maybe you have it anyway. If not, we can put you in contact with Colonial Surety, which is a great company to work with and can help with a retroactive bond.

Anna: Ok, I can do that.

FBLC: There are also some issues with how the Form 5500 is coded.

Regina: I noticed that, too. Do the participants direct their own assets?

Anna: Yes.

Regina: Well, that code was completely missing.

FBLC: It also didn’t identify your organization as a member of a controlled group and it used the automatic enrollment code, but neither the SPD nor the Third Cycle document indicates that you have this.

Anna: Oh no. We’d never have that in our plan.

FBLC: Ok, good. It just means that we should really scrutinize the prior Forms 5500, as well, and see if any of these are so critical that we should file amended returns.

Regina: I’d also like to review the annual testing that Automations has been performing. I’m suspicious that there may be mistakes in there, as well. Can you get those downloaded if you don’t already have them in your files?

Anna: You mean the annual package that they send me?

Regina: Yes, the ADP testing should be part of that. Can get the 2021 package, and the 2022 package, if it’s done?

Anna: 2022 isn’t done yet, but I can get you the 2021 package.

FBLC: Thank you, Anna. I know we’re asking for a lot of data, but we really have to make sure that the Mustard Plan is in clean shape before we merge it into Miss Peach’s Plan. David, in light of all of this, you may want to reconfirm with Miss Peach that this is how she wants to move forward. But, even if we terminate the Mustard plan instead, we don’t want to have the Peach Plan accept rollovers from that plan unless the plan is cleaned up. So, if you want to avoid giving the Mustard employees a chance to take the money and run, we need to clean up that plan.

David: I’ll definitely do that, but I’m 90% sure we’re still going to move forward with the merger.

**Character Notes**

* **Mary Jane Oxford (HR) with Miss Peach Cobbler, LLC and Regina King (TPA)**
	+ Plan Provisions, 2021 Form 5500 & Testing
* **David Slingback (CFO) with Miss Peach Cobbler, LLC**
	+ Stock Purchase Agreement (for Plum Lucky Shoes)
	+ Stock Purchase Agreement (for Col. Mustard)
* **Norman Body (CFO/HR) with Plum Lucky Shoes, Inc.**
	+ Plan Provisions, 2021 Form 5500 and Testing
	+ Termination Amendment, Distribution Detail
* **Anna with Col. Mustard Condiments**
	+ Unsigned cycle 3 document, Notice to Employees re: Merger into Miss Peach Plan, and erroneous Form 5500

**Notes of Where We Are Now**

* Lacking Mustard plan documents – EPCRS issue
* Still merging Mustard plan versus freezing it.
* Fidelity bond missing
* No participating employer agreement
* Testing may have been done incorrectly
* Form 5500 sloppiness – fatal or let it go
* Need to finish 2022 administration for Mustard, including any refunds, etc.

**Wrapping Up for Now**  **(MA Script #6)**

FBLC: Regina has gotten the amendment done for the Miss Peach Plan to allow for the predecessor service by the Plum Lucky employees, and service and the participating employer agreements for Col. Mustard and Miss Scarlet employees, and to have those companies adopt the Peach Plan as participating employers. Did that get signed?

Regina: Yes, David got it all signed right away, so we’re in good shape there.

FBLC: Are we on track for enrollment with the June 1 group?

Mary Jane: Yes, Transamerica was great and came through with the enrollment kits for the additional Scarlet employees. We have meetings scheduled on site for those groups next month.

FBLC: Did we arrange to get the deferrals and loan repayments started up for the Mustard and Scarlet folks in the Peach Plan, Anna? The loan repayments will need to keep going to the Mustard Plan until we coordinate the merger, so might be a while.

Anna: Yes, we got the communication out to everyone and we’re starting to take deferrals as of the first payroll after June 1. I’m not looking forward to the loan drama.

FBLC: Regina, were you able to draft the freeze amendment for the Mustard plan so that we don’t have deferrals for those employees due to two plans?

Regina: Yep!

FBLC: Have we gotten what we needed from John Hancock for Plum Lucky?

Regina: Yes, Mr. Body’s service rep at Hancock has been great. They’ve gotten us all of the loan data we needed and a full set of documents and valuations.

FBLC: Sounds like we have things back under control. Mary Jane – we really recommend that we do a proper controlled group analysis on Miss Peach at this point. From what we’ve been learning, there were prior acquisitions and additional entities that Miss Peach may have some partial ownership in.

Regina: Yes, this is something that I’ve recommended to them for a while now. I have real concerns about whether we have the right entities included in the plan and in the testing.

Mary Jane: David and I have been talking with Miss Peach and she agrees that we need to do this. Somehow, we went from a small company to this big thing so quickly, no one really stopped to think about the impact on benefits.

FBLC: That’s incredibly common. But, easy enough to do. We’re going to bring in Derrin Watson for this portion of the project. He’s the man who literally wrote the book on controlled and affiliated service groups and can quickly help make sure that the plan is being operated correctly. In preparation for this meeting, I’m going to need you and David to put together a complete organization chart. I need the names of all entities, the type of entity (like LLC taxed as an S Corp or Partnership), the total ownership for each entity, which should equal 100%, information about relationships of individual owners, and any notes about how the entities all interact. Do you have something like this?

Mary Jane: I think so. I’ll ask David.

FBLC: Ok, once we have that, we’ll schedule another call.

**Notes of Where We Are Now.**

* We amended Peach Plan for past service/eligibility to let in Plum employees retroactively to 1/1/2023, and Mustard and Scarlet employees as of 6/1/2023.
* We froze Mustard Plan as of 5/31/2023, because the employees will participate in the Peach Plan at that point.
* We are merging Plum and Mustard plans as of when? Do you do this pre-VCP or post-VCP?
* What corrections did we end up needing for each of the plans?

**[POP – DAY 2]**

**CHARACTERS**

Derrin – The Big Kahuna

Adriana – The Little Kahuna

David – CFO Miss Peach

Mary Jane – HR Miss Peach

**Let the Controlled Group Fun Begin!!**  **(CG Script #1)**

Narrator: David Slingback and Mary Jane Oxford worked together to create an ownership schedule for the post-sales Peach empire. They sent over a brief organization chart as they believe things exist.

Derrin: Good Morning all! I’m Derrin Watson. I want to thank you for sending me the organization chart and ownership information. With me on the call is my associate, Adriana Starr, who works with me on these types of analyses.

Adriana: Nice to meet you both.

Mary Jane: Lovely to meet you, too.

David: We appreciate the time you are taking to help us with this. The company has continued to grow and Regina has been very clear that we need to make sure we know how things should be organized for our plan.

Derrin: Absolutely. It’s entirely common for companies to continue to grow without necessarily considering the impact on the retirement plans.

Derrin: So, let’s start with the top line and go from there. Miss Peach personally owns Miss Peach Cobbler, LLC. Correct?

Mary Jane: Yes, that’s correct.

Derrin: And how is Miss Peach Cobbler taxed? As a sole proprietorship, S Corp, or a C Corp?

David: It’s an S Corp.

Adriana: And does Miss Peach receive a W-2 as part of her compensation?

David: Not from Cobbler.

Derrin: I noticed on the chart that Miss Peach also owns 100% of another entity, Peacock’s Pumps.

Mary Jane: I’ve never heard of that.

David: It’s an outside entity that operates separately out in California.

Derrin: Does Peacock’s Pumps have employees?

David: Oh, absolutely.

Derrin: Does Peacock have a retirement plan?

David: I think they do, but I’m not entirely sure. They really operate separately. Separate financials. Separate management.

Derrin: So, there is a thing called a controlled group. If five or fewer owners--and in this case, it’s just Miss Peach--own at least 80% of two entities, they are considered to be a controlled group. The impact of this is that both Cobbler and Peacock are treated like one single employer for retirement plan purposes. How long has Miss Peach owned Peacock?

David: I think Miss Peach bought Peacock 4 or 5 years ago.

Derrin: We should get copies of the Peacock plan documents and the nondiscrimination testing for the past 4 years. We’re going to need to look to see how it would have looked from a coverage perspective when the two entities are considered as a single employer.

Adriana: We’d really like to get the exact purchase date if you can find out.

David: I can do that.

Adriana: One of the first things we’re also going to look at is whether the plans have the Transition Period that would allow us to keep them separate for a period of time.

Mary Jane: I can get the testing results for the Miss Peach Plan from Regina.

Derrin: What sort of entity is Peacock? Is it owned by Miss Peach personally or by the Peach company?

David: It’s another LLC, owned by Miss Peach individually.

Derrin: And how is it taxed: Sole Proprietorship, S Corp…?

David: It’s also an S Corp.

Derrin: Does Miss Peach receive W-2 compensation from Peacock?

David: I have no idea, but I can find out.

Adriana: Does Miss Peach participate in the Peach Plan?

Mary Jane: Yes. She tries to contribute as much as she can, based on the testing restriction, but she is eligible for catch-up contributions, which helps.

Derrin: There is going to be another issue that we’re going to have to resolve. When you have an S Corp, the only compensation that counts for plan purposes is W-2. The S Corp K-1 doesn’t count. Based on what you just told us, Miss Peach doesn’t have Plan eligible compensation, so she shouldn’t have been allowed to defer or receive employer contributions.

Mary Jane: Oh no. She’s not going to be happy with that.

Adriana: And we also need to see what she did, if anything, in the Peacock Plan. We need to confirm that we don’t have any issues with what is called the 415 limit – that is the total amount that can be contributed on behalf of an employee each year.

David: We’ll get you the information you need. Does this mean that we’re going to have to merge yet another plan into the Miss Peach Plan?

Derrin: Not necessarily. We first need to see the testing results and then look prospectively at what the demographics will look like for 2023 with Plum and Mustard in the mix. If the two plans can pass separately, we may not need or want to merge them. But that’s down the road.

Mary Jane: This sounds like it’s going to be complicated.

Derrin: Our team can help you get through the process. Don’t worry. Now, I noticed that, after the stock sale, Plum Lucky is owned 80% by Miss Peach individually and the remaining 20% is owned by Professor Plum.

David: Yes, that is correct.

Derrin: And I understand from Adrienne that we’re already working on including the Plum employees in the Miss Peach Plan and merging the Plum plan into the Miss Peach Plan.

Mary Jane: Yes, we really appreciated her help with that.

Derrin: There is also the ownership of Col. Mustard’s Condiments. Miss Peach LLC will own 80% of that entity as of June 1, correct? And are the Mustard employees going to be on the Peach payroll or will they stay on the Mustard payroll?

David: The ownership is correct. Mustard will remain as a subsidiary with its own tax ID and will be on a separate payroll, although it will be run through our HR department.

Derrin: What type of entity is Col. Mustard?

David: All of our entities are S Corps.

Derrin: The other 20% is owned by Col. Mustard and Miriam Mustard. What is the relationship between them?

David: I think that’s his wife, but I’m not sure.

Mary Jane: Are you sure it’s not his daughter?

David: I honestly don’t know.

Derrin: We’re going to need to talk to someone who knows the relationship there. Do they both get paid from Mustard, LLC?

Mary Jane: They aren’t on payroll from what I’ve seen.

David: Col. Mustard gets a K-1, but no W-2. Mary Jane – do they participate in the Mustard plan to your knowledge?

Mary Jane: Not to my knowledge.

Adriana: There is also Miss Scarlet. How does that fit in?

David: Miss Scarlet has been a 70% subsidiary of Col. Mustard’s for 4 years or so. I don’t know the precise dates. Honestly, I don’t know much about how that whole relationship works.

Derrin: Can you connect me with someone who would know the details?

David: Absolutely. We’ll get another call arranged.

**Notes of Where We Are Now**

* Miss Peach (the individual) owns 100% of Miss Peach Cobbler, LLC and 100% of Peacock’s Pumps, LLC. They are B-S CG.
* Miss Peach (the individual) owns 80% of Plum Lucky Shoes, Inc. – another B-S CG member.
* After the acquisition, Miss Peach LLC owns 80% of Mustard, LLC – parent-subsidiary CG – as of June 1, 2023.
* Miss Scarlet is owned by Mustard, LLC 70% - the other 30% is owned by Miss Sandra Scarlet, an unrelated individual. No CG here ….. at least preliminarily … we need to see what happens in re disregarding employee ownership.
* As of June 1, Peach LLC, Plum Inc., Mustard LLC, and Scarlet LLC are going to participate in the Peach Plan. Effect (do we have a multiple employer plan with Scarlet LLC? We don’t know yet)

**ASG/CG – Script #2 (The CEO Strikes Back)**

Derrin

Adriana

David Slingback

Georgia Green

Narrator: Ferenczy gets an email from David requesting a quick call. The CEO of Miss Peach, Georgia Green, has some questions and concerns about the analysis so far.

David: Derrin and Adriana, I’m really glad that you were able to make some time so quickly. I was filling in the executive board on all of the analysis that we’ve been doing. Our CEO, Georgia Green, had some specific questions I couldn’t answer.

Derrin: Of course, fire away. How can we help you?

Georgia: We appreciate your help in sorting out the plan and its issues.

Derrin: We’re happy to be of service.

Georgia: I’ve contacted my counterpart at Peacock’s Pumps and she has agreed to cooperate fully and get us all documents requested. We should have them by the end of this week.

Adriana: Great. I’ll email David with a link for our secure portal that you can use to get us the documents.

David: Thank you.

Georgia: What I’m concerned about is how much money this is going to cost the company?

Derrin: The analysis or the correction?

Georgia: Both actually.

Derrin: We will send you a fee estimate after we finish this talk. It depends a lot on how many entities there are, and any additional curve balls you may throw at this today. I can tell you that a key component in keeping costs down is giving us complete and accurate information.

Georgia: And the correction?

Derrin: We have no idea yet until we get the testing and census data, and the plan documents. We’ll certainly keep you informed once we can start calculations.

Georgia: I understand that. I appreciate that feedback.

Adriana: Are there any other plans or companies that we need to know about?

Georgia: Well, Miss Peach doesn’t own anything else other than what David put on the Excel sheet.

Derrin: Are there any entities that aren’t owned fully by Miss Peach, Professor Plum, or Col. Mustard?

Georgia: I don’t think so. I have my own SEP, but I don’t think that’s relevant.

Derrin: You have a SEP! Tell me more about that. How is that sponsored?

Georgia: Miss Peach engages my personal PC for my CEO services.

Derrin: Does your PC get paid through Form 1099 from Miss Peach?

Georgia: Yes, and then my PC pays my salary and I’m able to maximize my contributions into the SEP.

Adriana: Do you perform services for any other entity except Miss Peach LLC?

Georgia: Oh no. Miss Peach keeps me very busy.

Derrin: I hate to be the bearer of bad tidings, but your SEP is going to be a problem.

Georgia: How so? My tax guy was the one that recommended this arrangement. He said it was the best way to help save on my taxes and maximize for retirement.

Derrin: In the Internal Revenue Code, there is a concept called a management function group. It exists when the principal business purpose of one company, such as your PC, is providing management functions to another company, such as Miss Peach. The impact of that is that your PC would be considered part of the Miss Peach organization for plan purposes. As a result, you’d be prohibited from having your own SEP, which excludes all other employees. When did you start your SEP?

Georgia: Only a few years ago. I think it was as of 2019.

Adriana: Well, that’s good news. So, only a few years to look at. Have you made any contributions for either 2022 or 2023?

Georgia: No, I haven’t funded anything yet for either year.

Adriana: Even better. We recommend that you don’t fund anything further to help stop the bleeding.

Georgia: Why would my tax guy have told me to set up the SEP then?

Derrin: Often, tax preparers don’t understand the affiliated service group relationships. This is something that we can fix. Can you get us a history of the contributions you made to the SEP? And the plan document? It is probably a Form 5305-SEP. And, can you confirm when you started your contract with Miss Peach Cobbler, LLC?

Georgia: Yes, I can get you those things.

Derrin: I would also recommend that you might want to engage us separately to advise on this matter for you. I’ll send you our intake form.

Georgia: Well, I appreciate that. I can’t say, though, that I’m not disappointed.

**Notes**

* Mgmt Org with Green. Who’s at risk?
* When is it appropriate to use 1099 for an employee

**Script #3 (Mustard on Rye)**

Derrin

Adriana

David Slingback

Miriam Mustard

Narrator: David has come through once again and set up a call between Derrin, Adriana, and Miriam Mustard.

David: Derrin and Adriana, I want to introduce you to Miriam Mustard, Col. Mustard’s wife. She has all of the history and information about the Mustard and Scarlet entitles that you should probably need.

Derrin: Greetings and Salutations. It’s a pleasure to meet you. Thank you for helping to answer our questions.

Miriam: I’m happy to help. Monty and I are so happy to be part of the Miss Peach organization. We want things to run as smoothly as possible. I understand from Anna that our retirement plan is causing a bit of a fuss. I had no idea that it was such a mess.

Derrin: Our colleague, Adrienne, is working with Anna to get that sorted out. What we’d like to just cover today is the ownership of Col. Mustard Condiments and Miss Scarlet’s Hot Sauce.

Miriam: Well, right now, Miss Peach LLC owns 80% of Condiments. Monty and I each retained 10% ownership each.

Derrin: Besides the ownership, do you both perform services for the company and receive compensation?

Miriam: I don’t actually work for the company. I have my own company.

Derrin: And what is your company?

Miriam: I own 100% of Miriam’s Aglets.

Derrin: What’s an aglet?

Miriam: It’s the plastic tip on the end of shoelaces.

Derrin: Does your company work with any of the other companies?

Miriam: No, we work directly with sneaker companies. Miss Peach only makes high end dress shoes, but we might start working together on the men’s dress shoes that use laces.

Derrin: Before the sale to Miss Peach, how was the ownership in Mustard Condiments arranged?

Miriam: Monty and I each owned 50%.

Derrin: Do you have any employees at Miriam’s Aglets?

Miriam: Yes. About 15 employees now.

Derrin: Does your company have a retirement plan?

Miriam: No, not yet, but we’ve been talking about possibly getting one set up this year.

Derrin: Do you have any children?

Miriam: Yes, we have 2.

Derrin: Are they under age 21?

Miriam: Yes, they are 12 and 14.

Derrin: Ok, so we need to talk about a current rule in the Code regarding marital spouses and ownership for controlled group purposes. As of today, if two people have a minor child, when they own separate companies, each company’s ownership is deemed to be owned by the child. The result can be that you end up with a controlled group, the effect of which is that the entities are considered to be a single employer for retirement plan purposes. This means that Mustard Condiments and Miriam’s Aglets should have been treated as a single employer.

Miriam: Oh dear. We never did that.

Derrin: The good news is that, starting in 2024, this rule is going away, so if you want to have a separate retirement plan after that, you’re fine.

Miriam: But, what about the prior years?

Adriana: We can do an analysis of the population over the past several years and see the impact. We’re getting the census information for Mustard Condiments, so we’ll just need the information on your employee population for Miriam’s Aglets. I’ll email you a spreadsheet template and a link to upload the information securely.

Miriam: Thank you. I’ll get it completed quickly for you.

Derrin: What can you tell me about Miss Scarlet’s Hot Sauce?

Miriam: Monty bought the controlling interest in Scarlet about 5 years ago. Mustard Condiment’s has owned 70% of Scarlet. Miss Scarlet retained 30% ownership and management control.

Derrin: I understand Miss Scarlet is an S Corp. Is that correct?

Miriam: Yes.

Derrin: In the Operating Agreement, can Miss Scarlet sell her ownership to anyone else?

Miriam: Absolutely not. When she wants to retire, she will have to sell her 30% back to Col. Mustard LLC.

Derrin: How is Miss Scarlet paid?

Miriam: She receives both a K-1 and W-2 for her position as CEO.

Derrin: Ok, so now I need to explain the Exclusion Rule found in the law. When you have an owner that receives a W-2 from an organization where an owner’s interests are subject to transfer restrictions that run in favor of the parent, in this case Mustard’s Condiments, their ownership is excluded for controlled group purposes. So, this means that really, Miss Scarlet’s Hot Sauce is considered to be owned 100% by Mustard’s Condiments.

Miriam: How is that relevant to this analysis?

Derrin: Well, as we understand it, Miss Scarlet was participating in the Mustard Condiments Plan, correct?

Miriam: Yes, they joined the plan when we purchased them.

Derrin: With only 70% ownership, they normally wouldn’t be considered a controlled group. So, Miss Scarlet should have been tested separately and the Mustard’s Condiment Plan would have had to operate as a multiple employer plan. But, with this Exclusion Rule, when we have to exclude Miss Scarlet’s 30%, we create a controlled group. Did they get tested together?

Miriam: I don’t know. There was only one test each year to my knowledge.

Adriana: Which means there is nothing to correct with respect to these entities being tested together for 5 years.

David: For once, we don’t have a correction to do.

Derrin: Yes, we have a good outcome here.

**Notes of Where We Are Now**

* OK, we do NOT have a MEP (whew!)
* We do, however, have issues with not covering Miriam’s in the Mustard Plan. (BTW, the noninvolvement exception w/n have worked with these companies anyway, because Miriam had actual ownership, not just attributed ownership, in Mustard. But the minor kids just cinches it.)

**CG Script #4 (Another problem?)**

Derrin

David

Narrator: This last shoe needs to drop. David picks up the phone and calls Derrin to confirm something.

David: Derrin, I just thought of something that may be nothing, but at this point, I trust nothing.

Derrin: Better to check and I’m happy to talk it through with you.

David: So, Miss Peach has a minority interest in another entity that I just found out about. Miss Peach personally owns 20% of White Accounting Services. Bette White is a friend of Georgia’s. Georgia owns 30% and Bette owns the remaining 50%.

Derrin: What does White Accounting Services specifically do, besides the obvious – accounting.

David: She’s a CPA and does taxes and consults from a financial and tax perspective with various entities.

Derrin: Does she perform services for Miss Peach LLC?

David: Yes, which is what made me think about her. We just finished our quarterly meeting with her.

Derrin: And she performs these services for other entities unrelated to Miss Peach?

David: Yes, as I understand it, she has a dozen or so corporate clients.

Derrin: Do you know if Green’s PC is one of her clients?

David: Perhaps.

Derrin: White Accounting Services would be considered a service organization, as accounting is specifically listed as a field in the proposed Treasury Regs. But, Miss White doesn’t appear to have any ownership in any of our other organizations. Let me verify my understanding of something. Green’s PC does not work for anyone other than Miss Peach, right?

David: That’s what she said.

Derrin: Good. That takes care of one issue, but I want to review another possible affiliated service group issue and the impact it may have on both Green and Peach.

David: Here we go again!

**Notes of Where We Are Now**

* We should have Derrin explain to the audience WHY there is no A-Org ASG when Peach owns part of White and Georgia (an HCE in Peach) owns part of White
* But what about Georgia’s company and White? Does White provide services to Georgia? If so, is Georgia’s co and White in an ASG?
* And, if Georgia’s co is part of a Management Org with Miss Peach LLC, what does that mean with regard to White and Miss Peach LLC?