UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JULIE A. SU, Secretary of Labor,[1] United States Department of Labor,	)	
Plaintiff,	)	Case No. 1:22-cv-01030
v.	)	Hon. Nancy L. Maldonado
DAVID FENSLER ET AL.	)	
Defendants.	)	

SECRETARY OF LABOR'S MOTION FOR
A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

JULIE A. SU, Acting Secretary of the United States Department of Labor (the "Secretary"), through her undersigned attorneys, hereby applies to the Court, pursuant to Rule 65(a) and (b) of the Federal Rules of Civil Procedure for entry of a Temporary Restraining Order and a Preliminary Injunction, to remove Defendants **JOHN FERNANDEZ AND GARY MEYERS** ("Defendant Trustees") from all positions whereby they have or exercise any authority or control over the administration, management, and assets of the ERISA-covered employer-sponsored plans ("Participating Plans") participating in the **UNITED EMPLOYEE BENEFIT FUND TRUST**, a multiple employer welfare arrangement ("MEWA") referred to herein as the "Fund," and the Fund itself, and appointing an independent fiduciary, Receivership Management Inc., with exclusive authority and control over the administration, management, and assets of the Fund and Participating Plans. The Secretary seeks the extraordinary relief requested in order to safeguard the Fund and Participating Plans' assets covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and to prevent

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[1] By operation of law, Julie A. Su is substituted *sub nom.* for former Secretary of Labor Martin J. Walsh. *See* Fed. R. Civ. P. 25(d).

imminent violations of ERISA and further losses to the Fund and Participating Plans' assets. The Secretary requests that if the Court cannot immediately rule on the Secretary's Motion for Temporary Restraining Order and Preliminary Injunction, that the Court issue an immediate order freezing all the assets of the United Employee Benefit Fund until such time that the Court rules on the Motion for Temporary Restraining Order and Preliminary Injunction.

In support of the motion, the Secretary filed concurrently a Memorandum in Support with attached exhibits as evidence.

1. The Secretary's complaint alleges violations of ERISA based upon breaches of fiduciary duties by John Fernandez (Trustee); Gary Meyers (Trustee); David Fensler (Fund Manager); Herbert O. McDowell III (Trustee and service provider); L. Steven Platt (Fund Counsel), Robbins, Salomon & Patt, Ltd. (Platt's law firm) ("RSP"); Robbins DiMonte (the current iteration of RSP); David Schwalb (real estate attorney); and United Preferred Companies, Ltd. (an entity wholly owned and operated by McDowell as his alter ego) (collectively, "Defendants"). The Fund is named as a defendant in this action pursuant to Federal Rule of Civil Procedure 19(a) solely to assure that complete relief can be granted. *See* Fed. R. Civ. P. 19(a).

2. The complaint alleges Defendants breached their fiduciary duties by failing to administer the Fund and Participating Plans prudently and loyally on behalf of the participants, in violation of ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B); and, by paying excessive and unnecessary fees to themselves and to other service providers, Defendants engaged in self-dealing and conflict of interest transactions, prohibited transactions specifically barred by ERISA § 406(a)(1)(D) and (b)(1), 29 U.S.C. § 1106(a)(1)(D) and (b)(1), including egregious prohibited transactions like using fund assets to purchase Defendant McDowell's house out of foreclosure.

3. The relief sought is necessary because Defendants Fernandez, Meyers, and the Fund continue to have authority and control over the Fund and Participating Plans' assets and continue to exercise authority and control over the Fund and Participating Plans for their own purposes, not for the sole and exclusive benefit of the participants and beneficiaries of the Plan as required by ERISA. Without extraordinary relief, Defendants will continue to siphon off the Fund and Participating Plans' assets for their own benefit to the further detriment and harm of the Fund, the Participating Plans, and their participants and beneficiaries. Extraordinary relief, removal of the trustees and appointing an independent fiduciary, Receivership Management Inc., is necessary to prevent further losses to the Fund and Participating Plans by stopping the depletion of assets and to prevent the Defendant Trustees from terminating the Fund in order to use the Fund's plan assets to pay their own attorney's fees, payment of excessive administrative fees and the improper indemnification of attorneys' fees to themselves and other defendants in this matter.

4. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), authorizes the Secretary to seek relief pursuant to ERISA § 409, 29 U.S.C. § 1109, which states that fiduciaries who violate their ERISA duties "shall be subject to . . . equitable or remedial relief as the court may deem appropriate, including removal of such fiduciar[ies]." ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5) also broadly authorizes the Secretary to bring an action to "enjoin any act or practice which violates [ERISA]" and to "obtain other equitable relief . . . to enforce any provision of [ERISA]." The relief requested herein seeks to remove the Defendant Trustees from all positions whereby they have or are able to exercise any authority or control over the Fund and Participating Plans, the assets of the Fund and Participating Plans, or over the management and administration of the Fund and Participating Plans. The appointment of an independent fiduciary in the Defendant

Trustees' place falls within the type of relief authorized by ERISA. The removal of the Defendants and the appointment of the independent fiduciary, Receivership Management Inc., are necessary for the reasons set forth herein and in the Memorandum in Support, supported by the attached exhibits.

5. The evidence presented with this motion demonstrates: (a) there exists a substantial likelihood that the Secretary will prevail at trial on his claims that the Defendant Trustees violated ERISA;[2] (b) in the absence of preliminary relief, the Fund and Participating Plans, and their participants, will suffer irreparable harm because the Defendants will allow their attorneys to continue to siphon off the Fund and Participating Plans' assets to pay themselves and other service providers; (c) the balance of the equities weighs heavily in favor of injunctive relief; and (d) an injunction is in the public interest.

WHEREFORE, to maintain the Fund and Participating Plans' assets and to secure meaningful equitable relief before the conclusion of this action, the Secretary moves the Court to issue an Temporary Restraining Order removing Defendants from all positions in which they have or exercise any authority or control over the Fund, Participating Plans, and their assets, and appointing an independent fiduciary, Receivership Management Inc., with exclusive authority and control over the Fund, Participating Plans, and their assets, as detailed in the proposed Temporary Restraining Order. In addition, the Secretary moves this Court to issue a Preliminary Injunction to the same effect to be entered upon the expiration of the Temporary Restraining Order and for all other just and proper relief.

The Secretary requests that if the Court cannot immediately rule on the Secretary's Motion for Temporary Restraining Order and Preliminary Injunction, that the Court issue an

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[2] Because this Motion seeks to remove the Trustees and none of the other Defendants are involved in the Fund, the evidence presented only relates to the violations committed by the Trustees.

immediate order freezing all the assets of the United Employee Benefit Fund until such time that the Court rules on the Motion for Temporary Restraining Order and Preliminary Injunction.

Dated: June 15, 2023

Respectfully submitted,

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