

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELAINE L. CHAO, :
SECRETARY OF LABOR, :
UNITED STATES DEPARTMENT OF LABOR, :

Plaintiff, :

v. :

Civil Action

No. _____

CALEB A. GRAY-BURRIS, 3838 Carpenter :
Street SE, Washington DC 20020; NATIONAL :
ASSOCIATION OF SPECIAL POLICE :
AND SECURITY OFFICERS, :
1101 30th Street NW, Washington DC, 20020; :
NATIONAL ASSOCIATION OF :
SPECIAL POLICE :
AND SECURITY OFFICERS PENSION FUND, :
1101 30th Street NW, Washington DC, 20020; :
NATIONAL ASSOCIATION OF :
SPECIAL POLICE :
AND SECURITY OFFICERS HEALTH PLAN :
AND TRUST, :
1101 30th Street NW, Washington DC, 20020; :
THE HARBOR BANK OF :
MARYLAND, 6820 Riverdale Road, :
Riverdale, MD 20737; :
DECO SECURITY SERVICES, 14275 Golf :
Course Drive, Suite 250, Baxter, MN 56425; :
SECTEK, INC., 11413 Isaac :
Newtown Square, Reston, VA 20190; and :
AMERICAN SECURITY PROGRAMS, INC. :
22900 Shaw Road, No. 101-1, Dulles, VA 20166, :

Defendants. :

APPLICATION FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNCTION

Plaintiff, Elaine L. Chao, Secretary of Labor, United States Department of Labor

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Defendants. :

PLAINTIFF'S MEMORANDUM IN SUPPORT OF APPLICATION FOR A
TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY
PRELIMINARY INJUNCTION SHOULD NOT BE ISSUED

interview statements obtained by the EBSA during its investigation into the operation and administration of the NASPSO Pension Plan and Health Plan. Most recently, on July 18, 2006, defendants Burriss and NASPSO have withdrawn Pension Plan assets and deposited those assets into a union account despite being told by Investigator Criswell that such conduct violates ERISA and despite agreeing to no longer transfer assets out of the Pension account.

For these reasons, and as set forth more fully below, the Secretary seeks a temporary restraining order and preliminary injunction removing Burriss and NASPSO as fiduciaries of the Pension Plan and Health Plan and enjoining them from exercising any custody, control, or decision-making authority with respect to these Plans; freezing all assets of defendants Burriss and NASPSO that contain assets of the NASPSO Pension Plan; appointing an independent fiduciary, David Lipkin of Metro Benefits, Inc., to manage and administer the Pension Plan; ordering the lone employer that continues to contribute to the Pension Plan not to forward contributions to Burriss and NASPSO and instead forward the contributions to the independent fiduciary; and ordering the two employers that contribute to the Health Plan not to forward contributions to Burriss and NASPSO and instead contribute to the current third party administrator, FCE Benefit Administrators, Inc.

II. FACTUAL BACKGROUND

Burriss and NASPSO established the Pension Plan on or about June 2004. NASPSO and Burriss opened a Pension Plan account with the Harbor Bank of Maryland ("Harbor Bank") on or about June 16, 2004. The Pension Plan account is known as the "National Association of Special Police & Security Officers Pension Fund" (Acct. No. 1100058674). There are no formal, written Pension Plan document associated with the Plan. The Plan is operated and administered solely by

The employers generally sent the contributions to NASPSO, along with the names of the employees and the contribution amount for each employee. The pay stubs of the employees reflect the contribution amounts forwarded by the employer for the Pension Plan. (Govt. Exh. 1, ¶ 31).

Harbor Bank records reflect that NASPSO and Burriss have deposited \$122,635.66 into the Pension Plan account since the inception of the Pension Plan. However, since that time, Burriss has withdrawn a total of \$95,997.73 from the Pension Plan account. There have been twenty-one withdrawals payable to "cash," five to "Caleb A. Gray-Burriss," and eleven payable to NASPSO. There have also been a total of eleven checks or transfers directly from the Pension Plan into another account at Harbor Bank. This account is identified as the NASPSO Membership Dues account (Acct. No. 1100058633). (Govt. Exh. 1, ¶¶ 3n-3p).

Investigator Criswell informed Burriss during interviews with Burriss on June 22, 2006 and June 26, 2006 that taking money from the Pension Plan and depositing it into the Membership Dues account constituted a violation of ERISA. Although Burriss agreed not to take any more withdrawals from the Pension Plan account, on July 18, 2006 Burriss again took money from the Pension Plan and deposited it into the Membership Dues account. More specifically, on July 18, 2006, Burriss performed an internet banking transfer in which he removed \$2,500 from the Pension Plan and deposited the money into the Membership Dues account. (Govt. Exh. 1, ¶¶ 3q-3r).

In addition to the Pension Plan account, Burriss and NASPSO also have discretion and control over the assets of at least one other union-sponsored plan, a health and welfare benefit plan. In fact, Burriss has represented that he has taken assets of the Pension Plan, purchased

of health claims. (Govt. Exh. 1, ¶¶ 3u-3w).

The Health Plan account is identified in Harbor Bank account statements as "NASPSO Health and Welfare." (Acct. No. 1100058682). As of July 25, 2006, the Health Plan account balance was \$112,142.22. (Govt. Exh. 1, ¶¶ 3y).

III. ARGUMENT

A. ERISA: An Overview

ERISA is a comprehensive remedial statute designed to promote and protect the interests of participants and their beneficiaries in employee benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983); *Nachman Corp. v. Pension Ben. Guaranty Corp.*, 446 U.S. 359, 361-62 (1980). Congress intended to ensure the equitable character and financial soundness of employee benefit plans "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b). Those fiduciary standards of conduct are codified in ERISA § 404(a), 29 U.S.C. § 1104(a). The fiduciary obligations imposed by ERISA are "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982), and are to be interpreted and applied "bearing in mind the special nature and purpose of employee benefit plans." *Donovan v. Cunningham*, 716 F.2d 1455, 1464 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

Fiduciaries of ERISA covered plans must comport their actions and conduct to the standards enunciated in sections 404(a) and 406 of the Act. The duties relevant to the present action are: the duty to act solely in the interest of the plan's participants and for the exclusive

effectuates the purpose of the trust. *Donovan v. Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984). Because defendants Burriss and NASPSO have failed to adhere to ERISA standards outlined above, the Secretary is requesting the relief set forth in her application for a temporary restraining order and preliminary injunction.

B. The Violations of ERISA

1. NASPSO's Pension Plan is an ERISA-covered Plan

Under Section 3(2)(A) of ERISA, a pension plan is defined as:

"any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

- (i) provides retirement income to employees, or
- (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. 29 U.S.C. § 1003(2)(a).

While Section 402 of ERISA requires the settler of the Plan to create a written document, a plan can nevertheless be covered by ERISA even though the plan is not memorialized. Burriss and NASPSO are fiduciaries of an ERISA-covered pension plan even though it appears that no formal, written plan documents exist. It is well established that coverage can exist without a formal, written plan. Instead, in determining whether a plan exists, a court is to determine whether a reasonable person could ascertain from the surrounding circumstances: 1) intended benefits, 2) intended beneficiaries, 3) source of financing, and 4) procedures for receiving benefits. *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982). In applying the factors established in *Dillingham*, the Circuit Court for the District of Columbia has found that coverage exists even if

respecting management of such plan or exercises any authority or control respecting management or disposition of assets, . . .

29 U.S.C. § 1002(21)(A) (i). The United States Circuit Court for the District of Columbia has noted that there are two classes of fiduciaries under this definitional section: a) those who exercise any discretionary authority or discretionary control respecting management of the plan or b) those who exercise any authority or control respecting management or disposition of assets. *Chao v. Day*, 436 F.3d 234, 235 (D.C. Cir. 2006). In this case, defendants Burriss and NASPSO clearly qualify as fiduciaries under either of the fiduciary clauses. They both clearly exercised the requisite authority or control respecting the management of the assets in the Pension Plan.

Under ERISA, a person may become a fiduciary if she or he exercises *de facto* control over a fiduciary function. *See Concha v. London*, 62 F.3d 1493 (9th Cir. 1995) (“there need not be an express delegation of fiduciary [authority] for persons performing duties of a fiduciary nature to be considered fiduciaries”), *cert. dismissed*, 517 U.S. 1183 (1996). Courts have found persons to become *de facto* fiduciaries in a variety of contexts. *See LoPresti v. Terwilliger*, 126 F.3d 34 (2d Cir. 1997) (officer and owner of a closely held corporation was fiduciary because he exercised control and authority over plan funds by commingling plan assets with corporate assets and using plan assets to pay creditors or corporation); *Yeseta v. Baima*, 837 F.2d 380, 385-86 (9th Cir. 1988) (power over withdrawals from plan confers fiduciary status on person not designated as fiduciary by plan); *Bannistor v. Ullmann*, 287 F.3d 394 (5th Cir. 2002) (parent corporations and officers of corporate debtor became fiduciaries by permitting commingled plan assets to be used to pay corporate creditors); *Metzler v. Solidarity of Labor Organizations Health and Welfare Fund*, 1998 WL 477964 at *5 (S.D. N.Y. 1998) (fiduciary status properly imposed where individual exercises “any authority or control respecting...disposition of [a plan’s] assets”).

since its inception, Burriss and NASPSO have made withdrawals totaling \$95,997 during that time. Defendants Burriss and NASPSO have disregarded their obligation to the participants.

As fiduciaries, therefore, defendant Burriss and NASPSO have engaged in self-dealing of precisely the type outlawed by ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1). Burriss and NASPSO are not free to direct plan assets to themselves or to the union as they see fit. Burriss and NASPSO, through transactions such as those described above, have violated ERISA by taking these plan assets.

4. Defendants Burriss and NASPSO violated ERISA by engaging in transactions with parties in interest specifically prohibited by ERISA Section 406(a), 29 U.S.C. § 1106(a).

Section 406(a) of ERISA prohibits fiduciaries from entering into certain "direct or indirect" transactions with "parties in interest" because of the inherent conflicts of interest presented by these transactions. Section 406(a)(1)(D) provides: "A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if [s]he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . ." 29 U.S.C. § 1106(a)(1)(D). Congress enacted section 406(a)(1) of ERISA in order to "categorically bar certain transactions deemed 'likely to injure a pension plan.'" *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, supra 530 U.S. at 241-42 Here, defendants Burriss and NASPSO engaged in prohibited transactions with parties in interest involving the transfer of plan assets to, or use of plan assets by or for, the benefit of the party in interest (29 U.S.C. § 1106(a)(1)(D)).

Essentially, the same conduct and actions described in the preceding section with respect to the violation under § 406(b) also constitutes a violation of ERISA § 406(a). Both defendants

By taking plan assets for their own use, defendants Burriss and NASPSO have wholly failed to meet these high standards. Defendants Burriss and NASPSO knew that they were taking the assets of the Pension Plan when making withdrawals from the Pension Plan. Defendants Burriss and NASPSO use the money from the Pension Plan for their own use. The conduct of defendants Burriss and NASPSO was not prudent. Accordingly, defendants breached their fiduciary duties of loyalties and prudence under ERISA §§ 404(a)(1)(A) and (B).

C. Temporary Restraining Order and Preliminary Injunction

ERISA is a remedial statute that specifically authorizes the Secretary to bring civil actions for injunctive relief. ERISA § 502 (a)(5), 29 U.S.C. § 1132 (a)(5). To demonstrate entitlement to a preliminary injunction, the moving party must show: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will result in the absence of the requested relief; (3) other interested parties will not suffer substantial harm if the injunction is granted; and (4) that the public interest favors entry of the injunction. *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1065 (D.C. Cir. 1998); *Role Models America, Inc. v. White*, 193 F. Supp. 2d 76, 79-80 (D.D.C. 2002)(citations omitted). The Court must balance the four factors. *Role Models America, Inc.*, 193 F. Supp. 2d at 80, citing *Grigsby Brandford & Co., Inc. v. United States*, 869 F. Supp. 984, 1003 (D. D.C. 1994). A court may balance weakness in one or more of the four factors against a particularly strong showing in one of the other factors. *Id.*, citing *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C.Cir. 1995). The standards for granting a temporary restraining order are the same as those for a preliminary injunction. *Morgan Stanley D.W., Inc. v. Rothe*, 150 F. Supp. 2d 67, 71(D. D.C. 2001), citing *see Vencor Nursing*

from Deco Security Services that are earmarked for the Pension Plan, or withdraw assets from the Health Plan. Defendants Burriss and NASPSO have committed serious breaches of their fiduciary duties and have harmed many people who believed that their retirements funds are secure. The potential for future harm is great. As the Second Circuit noted in the context of issuing a permanent injunction against fiduciaries under ERISA, "ERISA imposes a high standard on fiduciaries, and serious misconduct that violates statutory obligations is sufficient grounds for a permanent injunction." *Beck v. Levering*, 947 F.2d 639, 641 (2d Cir. 1991). Defendants Burriss and NASPSO do not have a vested right to serve as fiduciaries under ERISA or to administer a Plan. The balance of equities clearly favors issuance of an injunction barring Burriss and NASPSO from further activities with respect to ERISA plans.

Moreover, any harm that defendants Burriss and NASPSO allegedly suffer is outweighed by the harm presented by their conduct. The conduct of Burriss and NASPSO in obtaining and retaining Plan assets for their own use is so outrageous and severe that this impact is outweighed by the potential for future harm. Accordingly, a temporary restraining order is appropriate.

- 2. The Secretary will likely succeed on the merits and the public interest will be served.**

The facts and discussion above demonstrate a substantial likelihood that the Secretary will prevail on the merits. The facts set forth in the attached declaration demonstrate a substantial likelihood that the Secretary will prevail on the merits in this action. As argued above, the defendants have engaged in serious ERISA violations which have resulted in the loss of Plan assets. If Burriss and NASPSO are permitted to continue this conduct, more employees of participating employers will be harmed. Defendants Burriss and NASPSO have transferred Plan

The relief requested is within the broad ambit of the Court's authority and is clearly designed to promote the public interest and redress the violations of ERISA. By enjoining the defendants from additional unlawful activity under ERISA and freezing the assets of the Burriss and NASPSO, the Court can prevent the further misuse of assets and fraudulent conduct by defendants. A freeze is appropriate to preserve the assets for the plans and to maintain the status quo while the Secretary investigates the source and amount of available assets. *See Commodity Futures Trading Commission v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 678 (S.D. N.Y. 1979); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1480 (9th Cir. 1994)(finding that district court did not abuse its discretion by providing injunctive relief to prevent the transferring, secreting, or dissipating of assets). The production of complete financial and business records will enable the Secretary to determine whether additional assets exist which could be productively marshaled for the benefit of the Pension and whether additional plans, such as the Health Plan, have been harmed by defendants' conduct. Money flowed directly from the Pension Plan to Burriss and NASPSO as a result of ERISA violations, and the Secretary's complaint seeks recovery of the resulting losses. It is essential that the accounts of Burriss and NASPSO be frozen so that money will remain available for the Pension Plan and the Health Plan. At the very least, the burden should shift to Burriss and NASPSO to demonstrate that any of their funds are not the fruits of their fiduciary breaches. *See U.S. v. William Savran & Associates, Inc.*, 755 F. Supp. 1165 (E.D. N.Y. 1991).

The danger that Burriss and NASPSO will continue to breach their fiduciary duties and dissipate any remaining assets is amply demonstrated by the history of the defendants' actions as fiduciaries. They must be enjoined from undertaking any additional activities with respect to