

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

ELAINE CHAO, SECRETARY OF
LABOR, UNITED STATES
DEPARTMENT OF LABOR,

Plaintiff,

vs.

MICHAEL SAUVE, KATHLEEN
SAUVE, and THE DISTRIBUTION
CONTRACTORS, INC., 401(K)
SAVINGS AND PROFIT SHARING
PLAN,

Defendants.

No. C03-2041 LRR

**ORDER REGARDING PLAINTIFF'S
MOTION FOR DEFAULT
JUDGMENT**

Presently pending before the court is Plaintiff Elaine Chao's, Secretary of Labor, United States Department of Labor (the "Secretary"), Motion for Default Judgment (docket no. 11). The Secretary's unresisted Motion seeks entry of a default judgment against Defendants Michael Sauve, Kathleen Sauve, and the Distribution Contractors, Inc., 401(k) Savings and Profit Sharing Plan (the "Plan").

I. FACTUAL BACKGROUND

Distribution Contractors, Inc., is an employer whose employees were covered by the Plan. The Plan, established on October 1, 1992, is a defined contribution, deferred compensation plan which allows an employee to defer a portion of his or her compensation and have that amount contributed to the Plan by Distribution Contractors, Inc. The Plan is an employee benefit plan within the meaning of ERISA. Michael Sauve and Kathleen Sauve are fiduciaries and the named trustees to the Plan.

During the pay period ending in August 1999 to and including the pay period ending

June 30, 2000, Michael Sauve and Kathleen Sauve withheld \$5,759.98 and \$7,723.33, respectively, from the paychecks of Plan participants as elective salary deferrals for contribution to the Plan and as the repayment of loans made by the Plan to Plan participants. These amounts were not forwarded to the Plan and are still due and owing to the Plan.

The total amount owed to the accounts of Plan participants, including employee contributions, loan repayments, and lost earnings on such contributions and loan repayments which were not forwarded to the Plan, to and including November 21, 2003, the date of the clerk's entry of default, total \$16,974.21. The Plan has assets of approximately \$17,800.00. The Plan is an "Orphan Plan" in that Defendants have failed to take any steps to administer the Plan, to pay the fees incurred by the third party administrator, or to terminate the Plan and distribute its assets to the Plan's participants

II. PROCEDURAL HISTORY

On August 1, 2003, the Secretary filed a Complaint against Defendants Michael Sauve, Kathleen Sauve, and the Plan for alleged violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, *et seq.* In her Complaint, the Secretary claims Michael Sauve and Kathleen Sauve violated ERISA in the following respects:

- a. by failing to cause Plan assets to be held in trust, in violation of 29 U.S.C. § 1103(a);
- b. by permitting the assets of the Plan to inure to the benefit of an employer, in violation of 29 U.S.C. § 1103(c)(1);
- c. by failing to discharge their fiduciary duties with respect to the Plan solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries, in violation

- of 29 U.S.C. § 1104(a)(1)(A);
- d. by failing to discharge their fiduciary duties with respect to the Plan with the care, skill, prudence and diligence, under the circumstances, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aim, in violation of 29 U.S.C. § 1104(a)(1)(B);
 - e. by causing the Plan to engage in transactions that they knew or should have known constituted the direct or indirect transfers of Plan assets to, or use by or for the benefit of a party in interest, in violation of 29 U.S.C. § 1106(a)(1)(D);
 - f. by dealing with assets of the Plan in their own interest or for their own account, in violation of 29 U.S.C. § 1106(b)(1); and
 - g. by acting in transactions involving the Plan on behalf of themselves and/or Distribution Contractors, Inc., whose interests were adverse to the interests of the Plan or of the Plan participants and beneficiaries, in violation of 29 U.S.C. § 1106(b)(2).

On October 17, 2003, service of the Complaint was made on the Plan by personal service on Michael Sauve as Trustee for the Plan. On that same date, Michael Sauve and Kathleen Sauve were personally served with the Complaint and Summons. Defendants have failed to answer or otherwise respond to the Complaint. On November 21, 2003, the Secretary requested that the clerk of court enter default against Defendants. The clerk of court granted the Secretary's request for entry of default on November 21, 2003.

The Secretary now seeks a default judgment against Defendants as follows:

- a. that Michael Sauve and Kathleen Sauve be ordered to pay to the Plan \$16,974.21;

- b. that Michael Sauve and Kathleen Sauve take all necessary steps to terminate the Plan and distribute its assets to the participants of the Plan, or in the alternative, that the Secretary be allowed to file a motion for the appointment of an independent trustee to terminate the Plan; and
- c. After the payment of such judgment and the termination of the Plan, that Michael Sauve and Kathleen Sauve be permanently enjoined and restrained from serving as a fiduciary for any plan covered by ERISA.

In support of her claims, the Secretary submitted an affidavit by Mark Underwood, an investigator for the Employee Benefits Security Administration, United States Department of Labor.

III. DISCUSSION

A. Legal Standard for Default Judgment

The entry of a default judgment is a matter in the trial court's discretion. *Swink v. City of Pagedale*, 810 F.2d 791, 792 (8th Cir. 1987). The Eighth Circuit Court of Appeals adheres to the strong judicial policy against default judgments. *Oberstar v. Federal Deposit Ins. Corp.*, 987 F.2d 494, 503-04 (8th Cir. 1993) (citing *Marshall v. Boyd*, 658 F.2d 552, 554 (8th Cir. 1981), and noting that this judicial preference for adjudication on the merits "goes to the fundamental fairness of the adjudicatory process.").

When a party moves for entry of a default judgment, the court must exercise sound judicial discretion in determining whether the judgment should be entered. 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2685 (hereinafter "Wright & Miller"). In exercising its discretion, the court should consider:

the amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue; whether the default is largely technical; whether plaintiff has been substantially prejudiced by the delay involved; and

whether the grounds for default are clearly established or are in doubt. Furthermore, the court may consider how harsh an effect a default judgment might have, or whether the default was caused by a good-faith mistake or by excusable or inexcusable neglect on the part of the defendant.

Wright & Miller § 2685. After the court finds that a judgment by default should be entered, it must determine the amount of damages to be awarded. “If defendant does not contest the amount prayed for in the complaint and the claim is for a sum certain that can be made certain by computation, the judgment generally will be entered for that amount without any further hearing.” Wright & Miller § 2688.

B. Analysis

Defendants have failed to plead or otherwise defend this action. Consequently, the clerk of court entered default pursuant to Federal Rule of Civil Procedure 55. The Secretary now moves for entry of default judgment and supports her request with an affidavit.

ERISA provides the following definition of a fiduciary:

[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). In this case, there is no question that Michael Sauve and Kathleen Sauve are fiduciaries to the Plan.

ERISA imposes upon fiduciaries certain responsibilities. For example, 29 U.S.C.

§ 1103(a) requires all assets of an employee benefit plan be held in trust. Additionally, Section 1103(c)(1), which sets forth the duties of trustees, provides that “the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.” 29 U.S.C. § 1103(c)(1). A fiduciary is obligated to discharge his duties solely in the interest of the participants and beneficiaries. 29 U.S.C. § 1104(a)(1)(A). The court finds that Michael Sauve and Kathleen Sauve violated their fiduciary duties by demonstrating acts of disloyalty to the Plan.

ERISA imposes a prudent man standard upon fiduciaries. Section 1104(a)(1)(B) provides that a fiduciary shall discharge his duties, “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.” The court finds that Michael Sauve and Kathleen Sauve have not acted prudently in this case.

In addition, 29 U.S.C. § 1106 prohibits transactions with “parties in interest.” Specifically, § 1106(a)(1) states that, “[a] fiduciary with respect to the plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.” A party in interest includes fiduciaries of an employee benefit plan and corporations. *See* 29 U.S.C. § 1002(14). ERISA further prohibits a fiduciary from “deal[ing] with the assets of the plan in his own interest or for his own account” and from “act[ing] in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.” 29 U.S.C. § 1106(b)(1), (b)(2). By failing

to forward employee contributions and loan repayments to the Plan, the court finds that Michael Sauve and Kathleen Sauve breached their fiduciary duties under ERISA.

C. Remedies

The resolution of the foregoing issues in favor of the Secretary requires that the court fashion relief. Section 1109(a) provides that an ERISA fiduciary who breaches any duty is liable to the plan (i) for “any losses to the plan resulting from each such breach,” (ii) for “any profits . . . made through use of assets of the plan by the fiduciary,” and (iii) for “such other equitable or remedial relief as the court may deem appropriate.” 29 U.S.C. § 1109(a). The court shall therefore require that Michael Sauve and Kathleen Sauve pay to the Plan \$16,974.21.

The Secretary also seeks the removal of both Michael Sauve and Kathleen Sauve as fiduciaries and seeks to have both permanently enjoined from serving in such capacity to any employee benefit plans. ERISA permits injunctive relief, including the removal of a fiduciary, as a remedy for a violation of its provisions. *See* 29 U.S.C. § 1109(a). Based on the record, the court finds it proper to enjoin Michael Sauve and Kathleen Sauve from future participation in ERISA plans. Accordingly, Michael Sauve and Kathleen Sauve are prohibited from serving as fiduciary to any plan subject to ERISA.

IV. CONCLUSION

IT IS THEREFORE ORDERED that:


1. Plaintiff’s Motion for Default Judgment (docket no. 11) is GRANTED.
2. Defendants Michael Sauve and Kathleen Sauve are jointly and severally liable for and shall pay \$16,974.21 to the Distribution Contractors, Inc., 401(k) Savings and Profit Sharing Plan.
3. Michael Sauve and Kathleen Sauve are immediately and permanently enjoined from acting as fiduciaries on behalf of the Distribution Contractors, Inc., 401(k) Savings

and Profit Sharing Plan. As soon as practicable, the Secretary of Labor shall submit the names of independent fiduciaries proposed to serve as trustee to terminate the Distribution Contractors, Inc., 401(k) Savings and Profit Sharing Plan.

4. Michael Sauve and Kathleen Sauve are permanently enjoined from serving as fiduciaries to any ERISA plan.

5. The clerk of court shall mail copies of this Order to Defendants at 1325 Jersey Ave., Rudd, Iowa 50471.

SO ORDERED this 16th day of March, 2004.


LINDA R. READE
JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA