

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor.

Plaintiff,

v.

MEMORANDUM AND ORDER
06-C-309-S

DAVID L. RUFENACHT, WILLIAM B.
RUFENACHT, MONROE CHEESE CORPORATION
RETIREMENT SAVINGS PLAN and MONROE
CHEESE CORPORATION PREMIUM ONLY PLAN,

Defendants.

Plaintiff Elaine Chao, United States Secretary of Labor, commenced this action alleging that defendants David L. and William B. Rufenacht (collectively "Rufenancht defendants"), as fiduciaries of defendants Monroe Cheese Corporation Retirement Savings Plan ("Retirement Plan") and Monroe Cheese Corporation Premium Only Plan ("Health Plan"), withheld plan contributions from employee salaries but failed to remit the contributions to the plans in violation of various provisions of the Employee Retirement Income Security Act (ERISA). In their answer to the complaint the Rufenacht defendants admitted their failure to remit contributions to defendant plans, but denied knowledge as to the amount of contributions not properly remitted. Jurisdiction is based on 28 U.S.C. § 1331.

Plaintiff filed the present motion for summary judgment on October 16, 2006. Pursuant to the Court's scheduling order,

defendants response to plaintiff's summary judgment motion was due on November 6, 2006. Defendants have failed to respond to the motion. The following facts are those proposed by plaintiff in support of her motion for summary judgment which are taken as true in light of defendants' failure to oppose the motion.

FACTS

Monroe Cheese Corporation ("MCC") is a Wisconsin corporation that sponsored the Monroe Cheese Corporation Retirement Plan ("Retirement Plan"), an employee benefit plan providing retirement benefits, which was established on July 1, 1985. MCC was the Retirement Plan's Administrator and the employer of the Retirement Plan's participants. The Rufenacht defendants were owners of MCC and signed the retirement plan adoption agreement as trustees.

During the period May 1, 2000 through October 31, 2004, MCC withheld employee salary deferrals totaling \$104,814.67 from the employees' paychecks, as contributions to the Retirement Plan and maintained such monies in its general corporate account. The Rufenacht defendants, who jointly controlled MCC corporate accounts at all relevant times, did not remit \$104,814.67 in employee contributions to the Retirement Plan's asset custodian, but instead used these funds to pay MCC's general operating expenses. As of October 6, 2006, based on the Internal Revenue Code ("IRC") interest rate, the lost opportunity costs associated with the aforementioned unremitted contributions totaled \$23,814.98.

During the period from November 1, 1999 through October 31, 2004, the Rufenacht defendants failed to transfer \$114,949.93 in employee salary deferrals to the Retirement Plan by the fifteenth business day following the month after the employees' contributions were deducted from their paychecks. As of October 6, 2006, based on the IRC interest rate, the lost opportunity costs associated with the untimely remittance of employee salary deferrals violation totaled \$1,068.11.

From July 1, 1999 through June 30, 2002, the Rufenacht defendants sent documents to the participants in the Retirement Plan and the Secretary that misstated the amounts contained in the Retirement Plan's account. The Summary Annual Report ("SAR) transmitted to the Retirement Plan's participants during the relevant period failed to disclose all unremitted participant contributions. On the Form 5500 Annual Report of Employee Benefit Plan, filed with the U.S. Department of Labor, during the relevant period, defendants Rufenacht answered that the employer did not fail to transmit participant contributions within the maximum time period.

The Health Plan provided medical benefits to eligible employees of MCC. The Health Plan was a fully insured plan through United Healthcare of Wisconsin, Inc., funded by voluntary employee and employer contributions. During the period February 1, 2004 through March 31, 2005, MCC withheld employee salary deferrals

totaling \$5,418.15 from its employees' paychecks, intended for premiums to the Health Plan and maintained such monies in its general corporate account. The Rufenacht defendants did not remit the \$5,418.15 to the Health Plan's insurance carrier, but instead used these funds to pay MCC's general operating expenses. The Rufenacht defendants exercised authority and control over Health Plan assets when they decided to pay MCC's corporate expenses instead of remitting the employee salary deferrals intended for premiums to the Health Plan.

MEMORANDUM

Plaintiff seeks summary judgment that the Rufenacht defendants actions violated several ERISA provisions. She seeks judgement barring the Rufenacht defendants from continuing to act as plan fiduciaries and requiring them to restore all losses to the plans. No defendant has opposed the motion.

The Rufenacht defendants were fiduciaries of the Retirement Plan and Health Plan pursuant to 29 U.S.C. § 1002(21)(A). The Rufenacht defendants' failure to remit employee salary deferrals to the Retirement and Health Plans violated 29 U.S.C. §§ 1103, 1104 and 1106. The Rufenacht defendant's misstatements on documents sent to Retirement Plan participants and the U.S. Department of Labor constituted fraud or concealment within the meaning of 29 U.S.C. §1113, and tolled the statute of limitations.

29 U.S.C. § 1109(a) provides as follows:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan and losses to the plan resulting from each such breach ... and shall be subject to other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

Accordingly,

ORDER

IT IS ORDERED that plaintiff's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of plaintiff against defendants with prejudice and costs: (1) requiring that defendants David Rufenacht and William Rufenacht pay to Monroe Cheese Corporation Retirement Plan \$129,697.76 plus interest; (2) requiring that defendants David Rufenacht and William Rufenacht return \$5,418.15 to participants and beneficiaries of Monroe Cheese Corporation Premium Only Plan who made unremitted contributions; (3) removing defendants David Rufenacht and William Rufenacht as trustees of the defendant plans and permanently enjoining them from serving as fiduciaries or service providers to any ERISA-covered employee benefit plan.

Entered this 30th day of November, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge