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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THOMES E PEREZ,

Plaintiff,

v.

LANCE SILVA, et al.,

Defendants.

Case No. 15-cv-01771-EMC

**ORDER GRANTING PLAINTIFF’S
MOTION FOR DEFAULT JUDGMENT**

Docket No. 14

United States District Court
For the Northern District of California

Plaintiff Thomas E. Perez, in his capacity as Secretary of Labor for the United States Department of Labor (“DOL”), has filed suit against Defendants Lance Silva, National Upholstering Company, Inc. (“NUC”), and the National Upholstering Company 401(k) Plan (“NUC Plan” or “Plan”)¹ (collectively, “Defendants”) pursuant to the Employee Retirement Income Security Act (“ERISA”). *See* 29 U.S.C. § 1132(a)(5) (providing that the Secretary may bring a civil action “(A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title”). After the Secretary served the complaint, Defendants made no appearance and failed to respond. Accordingly, the Secretary sought entry of default against Defendants, and their default was entered on July 9, 2015. *See* Docket No. 10 (notice). The Secretary now seeks a default judgment. Having considered the papers submitted,² as well as the oral argument of counsel, the Court hereby **GRANTS** the motion for default judgment.

¹ As stated in the Secretary’s complaint, the Plan was named as a defendant “solely to assure that complete relief can be granted.” Compl. ¶ 10.
² No written opposition was filed. Nor did Defendants appear at the hearing.

1 **I. FACTUAL & PROCEDURAL BACKGROUND**

2 The Secretary's complaint and papers submitted in support of his motion for default
3 judgment reflect as follows.

4 NUC is a suspended California corporation. It ceased operations in June 2010. Prior to
5 ceasing operations, NUC manufactured furniture. *See* Compl. ¶ 4. Mr. Silva was, at some point,
6 the president of NUC. *See* Compl. ¶ 5.

7 NUC sponsored and was the plan administrator for the NUC Plan, an employee pension
8 benefit plan as defined under ERISA. *See* Compl. ¶¶ 3-4, 9 (citing 29 U.S.C. § 1002(3)). Because
9 NUC exercised discretionary authority and control with respect to the management of the Plan,
10 NUC was a fiduciary of the Plan, as well as a party in interest to the Plan, within the meaning of
11 ERISA. *See* Compl. ¶ 9 (citing 29 U.S.C. §§ 1002). For the same reason, Mr. Silva was also a
12 fiduciary of and a party in interest to the Plan. *See* Compl. ¶ 8.

13 After NUC ceased operations, Mr. Silva

14
15 began to engage in a pattern of unauthorized transactions wherein he
16 accessed other participants' Plan accounts and caused several
17 participants' account balances, or portions thereof, to be transferred
18 to himself. Specifically, between September 10, 2011, and
November 14, 2011, [Mr.] Silva improperly caused Fidelity
Investments to distribute \$43,326.36 from four other participant's
accounts to himself, without authorization, with the checks payable
to [himself].

19 Compl. ¶ 13. Mr. Silva ultimately "pled guilty to criminal charges for the theft of the funds at
20 issue." Hesik Decl. ¶ 6.

21 As for NUC, after it ceased operations, it "failed to take the proper steps to ensure that Plan
22 participants received distributions of their account balances. For example, NUC failed to update
23 the Plan's online account to allow participants to access their benefits as required by governing
24 Plan documents." Compl. ¶ 15; *see also* Compl. ¶ 20 (alleging that Plan "participants are unable
25 to access their Plan accounts, either to reinvest them in other tax-qualified retirement savings
26 vehicles before retirement, or to draw them down upon retirement"). Approximately \$270,000 in
27 assets remain in the Plan. *See* Compl. ¶ 15; Hasik Decl. ¶ 7.

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1 **II. DISCUSSION**

2 A. Service of Process

3 “As a threshold matter in considering a motion for default judgment, the Court must first
4 ‘assess the adequacy of the service of process on the party against whom default is requested.’”
5 *Bd. of Trs. of the Laborers Health & Welfare Trust Fund for N. Cal. v. Montes Bros. Constr., Inc.*,
6 No. C-14-1324, 2014 U.S. Dist. LEXIS 156659, at *4 (N.D. Cal. Nov. 5, 2014).

7 The Secretary has provided evidence that it personally served the summons and complaint
8 on Mr. Silva in May 2015. *See* Docket No. 6 (proof of service). Thus, service was properly
9 effected on him pursuant to Federal Rule of Civil Procedure 4(e)(2)(A). *See* Fed. R. Civ. P.
10 4(e)(2)(A) (allowing for service by “delivering a copy of the summons and of the complaint to the
11 individual personally”).

12 As for NUC and the Plan, the Secretary effected service by serving Mr. Silva in May 2015.
13 *See* Docket No. 6 (proof of service). Rule 4(h)(1)(B) allows for service on a corporation as well as
14 an unincorporated association “by delivering a copy of the summons and of the complaint to an
15 officer, a managing or general agent, or any other agent authorized by appointment or by law to
16 receive service of process.” Fed. R. Civ. P. 4(h)(1)(B). The Ninth Circuit has explained that, in
17 spite of the language of the rule,

18
19 service of process is not limited solely to officially designated
20 officers, managing agents, or agents appointed by law for the receipt
21 of process. The rules are to be applied in a manner that will best
22 effectuate their purpose of giving the defendant adequate notice.
23 Thus, the service can be made “upon a representative so integrated
with the organization that he will know what to do with the papers.
Generally, service is sufficient when made upon an individual who
stands in such a position as to render it fair, reasonable and just to
imply the authority on his part to receive service.”

24 *Direct Mail Specialists, Inc. v. Eclat Comp. Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988). Here,
25 the Court finds that the Secretary has adequately established a prima facie case for service on
26 NUC and the Plan via Mr. Silva. Mr. Silva, though not the most recent president of NUC, was
27 formerly a president and he apparently still had an active role in the company as a fiduciary of the
28 Plan. In the absence of any evidence suggesting that Mr. Silva would not know what to do with

1 the papers, the Court finds that service was properly effected on the two entities.

2 B. Eitel Analysis

3 As noted above, after Defendants failed to respond to the complaint served upon them, the
4 Clerk of the Court entered their default on July 9, 2015. *See* Docket No. 10 (notice). After entry
5 of a default, a court may grant a default judgment on the merits of the case. *See* Fed. R. Civ. P.
6 55. “The district court’s decision whether to enter a default judgment is a discretionary one.”
7 *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Factors that a court may consider in
8 exercising that discretion include:

9
10 (1) the possibility of prejudice to the plaintiff; (2) the merits of
11 plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4)
12 the sum of money at stake in the action, (5) the possibility of a
dispute concerning material facts, (6) whether the default was due to
excusable neglect, and (7) the strong policy underlying the Federal
Rules of Civil Procedure favoring decisions on the merits.

13 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Because default has already been
14 entered in this case, the Court must construe as true all factual allegations in the Secretary’s
15 complaint except for those related to the amount of damages or other relief sought. *See Televideo*
16 *Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

17 The Court finds that the *Eitel* factors largely weigh in favor of granting default judgment,
18 at least as to Mr. Silva and NUC. As to the first factor, if the motion for default judgment were to
19 be denied, then the participants in the Plan, including but not limited to those whose funds were
20 taken by Mr. Silva, would likely be without a remedy. *See Walters v. Shaw/Guehnemann Corp.*,
21 No. C 03-04058 WHA, 2004 U.S. Dist. LEXIS 11992, at *7 (N.D. Cal. Apr. 15, 2004) (“To deny
22 plaintiff’s motion [for default judgment] would leave them without a remedy. Prejudice is also
23 likely in light of the merits of their claims.”); *Pepsico, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d
24 1172, 1177 (C.D. Cal. 2002) (“If Plaintiffs’ motion for default judgment is not granted, Plaintiffs
25 will likely be without other recourse for recovery.”). Also, the sum of money at stake in the action
26 is appropriate as it is tailored to the specific alleged misconduct of Mr. Silva. *See id.* at 1176
27 (stating that “the court must consider the amount of money at stake in relation to the seriousness of
28 Defendant’s conduct”). In addition, there is nothing to suggest that there is a possibility of a

1 dispute concerning material facts.³ Further, there is no indication that Mr. Silva and NUC’s
 2 default was due to excusable neglect. Finally, while public policy favors decisions on the merits,
 3 *Eitel*, 782 F.2d at 1472, Defendants’ refusal to defend this action renders a decision on the merits
 4 “impractical, if not impossible.” *PepsiCo*, 238 F. Supp. 2d at 1177.

5 The only factors that deserve closer analysis are the second and third factors – that is, the
 6 merits of the Secretary’s substantive claims and the sufficiency of the complaint. The Court
 7 agrees that Mr. Silva’s conduct in taking assets from Plan participants’ without their consent
 8 constitutes a violation of several ERISA provisions. *See* 29 U.S.C. § 1104(a)(1)(A) (providing
 9 that a fiduciary shall discharge his duties for the exclusive purpose of “providing benefits to
 10 participants and their beneficiaries”); *id.* § 1104(a)(1)(B) (providing that a fiduciary shall
 11 discharge his duties “with the care, skill, prudence, and diligence under the circumstances then
 12 prevailing that a prudent man acting in a like capacity and familiar with such matters would use in
 13 the conduct of an enterprise of a like character and with like aims”); *id.* § 1106(a)(1)(D)
 14 (providing that a fiduciary shall not engage in a transaction that transfers assets of a plan to a party
 15 in interest); *id.* § 1106(b)(1) (providing that a fiduciary shall not “deal with the assets of the plan
 16 in his own interest or for his own account”).

17 The Court further agrees that NUC’s failure to take steps to ensure that Plan participants
 18 received distributions of their account balances (after NUC ceased operations) also constitutes a
 19 violation of several ERISA provisions. *See id.* § 1104(a)(1)(A) (providing that a fiduciary shall
 20 discharge his duties for the exclusive purpose of “providing benefits to participants and their
 21 beneficiaries”); *id.* § 1104(a)(1)(B) (providing that a fiduciary shall discharge his duties “with the
 22 care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man
 23 acting in a like capacity and familiar with such matters would use in the conduct of an enterprise
 24 of a like character and with like aims”); *id.* § 1104(a)(1)(D) (providing that a fiduciary shall
 25 discharge his duties “in accordance with the documents and instruments governing the plan”).
 26

27 ³ For example, the Secretary served the motion for default judgment on Defendants (more
 28 specifically, on Mr. Silva, both individually and as a representative of NUC and the Plan), but no
 written opposition was ever filed by any Defendant.

1 The only issue that gives the Court some pause is the Secretary's attempt to hold NUC
2 liable for the acts of Mr. Silva. Title 29 U.S.C. § 1105 addresses liability for breach by a co-
3 fiduciary. It provides in relevant part as follows:

4
5 In addition to any liability which he may have under any other
6 provision of this part [29 U.S.C. § 1101 *et seq.*], a fiduciary with
7 respect to a plan shall be liable for a breach of fiduciary
8 responsibility of another fiduciary with respect to the same plan in
9 the following circumstances:

10

- 11 (2) if, by his failure to comply with section 404(a)(1) [29 U.S.C.
12 § 1104(a)(1)] in the administration of his specific
13 responsibilities which give rise to his status as a fiduciary, he
14 has enabled such other fiduciary to commit a breach; or
15
16 (3) if he has knowledge of a breach by such other fiduciary,
17 unless he makes reasonable efforts under the circumstances
18 to remedy the breach.

19 *Id.* § 1105(a). According to the Secretary,

20 NUC is liable as a co-fiduciary . . . because (1) NUC enabled [Mr.]
21 Silva to commit such breaches by its failure to comply with §
22 404(a)(1)(A) and (D) . . . and (2) NUC had knowledge of [Mr.]
23 Silva's breaches and failed to make reasonable efforts under the
24 circumstances to remedy such breaches.

25 Compl. ¶ 19.

26 The first theory of liability, however, is tenuous. It is questionable whether NUC's failure
27 to take steps to ensure that Plan participants received distributions of their account balances (after
28 NUC ceased operations) enabled Mr. Silva's theft. As for the second theory, the Court has
concerns because the Secretary has not explained *how* NUC had knowledge of Mr. Silva's theft
and then failed to make reasonable efforts to remedy the situation.

 At the hearing, the Secretary argued for the first time that NUC had knowledge of the Mr.
Silva's breaches because Mr. Silva's knowledge (of his own breaches) could be imputed to NUC,
especially as he was a high-level employee of NUC. But the language used in § 1105 suggests to
the contrary – *i.e.*, there is co-fiduciary liability where one fiduciary has knowledge of the *other*
fiduciary's breaches. Furthermore, the Secretary has not offered any authority to support his

1 position. Finally, there is at least some authority to the contrary. *See Harris v. Fich, Pruyn & Co.,*
 2 *Inc.*, No. 1:05-CV-951 (FJS/RFT), 2008 U.S. Dist. LEXIS 39033, at *26 (N.D.N.Y. May 13,
 3 2008) (stating that “Plaintiffs may not rely on the theory that Defendant Finch Pruyn acquired
 4 knowledge of the breaches by virtue of Defendant Benway’s and Defendant Levandosky’s
 5 knowledge” because, “[i]n ERISA co-fiduciary cases, an agent’s knowledge cannot be imputed to
 6 the principal” – “[t]o allow knowledge to be imputed pursuant to traditional agency theory would .
 7 . . . circumvent [ERISA’s fiduciary liability] scheme by imposing virtually strict liability on
 8 principals for breaches of their agents, thus extending co-fiduciary liability beyond the strictly-
 9 delimited categories of 29 U.S.C. § 1105(a)”).

10 As for the Plan, the Court shall not enter a default judgment against it because, as the
 11 Secretary himself concedes in his complaint, the Plan has not engaged in any wrongdoing itself
 12 but has simply been named to ensure that complete relief can be obtained. That being said,
 13 because the Plan was given notice of the suit, but failed to appear, it cannot protest the relief that
 14 the Court shall grant, as discussed below.

15 C. Relief

16 Having concluded that a default judgment against Mr. Silva and NUC is appropriate, the
 17 Court now turns to the relief sought by the Secretary. As noted above, under ERISA, the
 18 Secretary has the authority to bring a civil action “(A) to enjoin any act or practice which violates
 19 any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such
 20 violation or (ii) to enforce any provision of this title.” 29 U.S.C. § 1132(a)(5). Furthermore,
 21 ERISA provides that

22
 23 [a]ny person who is a fiduciary with respect to a plan who breaches
 24 any of the responsibilities, obligations, or duties imposed upon
 25 fiduciaries by this title shall be personally liable to make good to
 26 such plan any losses to the plan resulting from each such breach, and
 to restore to such plan any profits of such fiduciary which have been
 made through use of assets of the plan by the fiduciary, and shall be
 subject to such other equitable or remedial relief as the court may
 deem appropriate, including removal of such fiduciary.

27 *Id.* § 1109(a).

28 Consistent with his complaint, the Secretary asks for the following relief:

- 1 (1) An order requiring Mr. Silva and NUC to restore \$55,838.84 to the NUC Plan;
- 2 (2) An order removing Mr. Silva and NUC as fiduciaries of the Plan;
- 3 (3) An order appointing Metro Benefits, Inc. as an independent fiduciary to the Plan;
- 4 (4) An order requiring Mr. Silva and NUC to pay the independent fiduciary \$5,950 to cover its
- 5 reasonable fees;
- 6 (5) A permanent injunction enjoining Mr. Silva and NUC from future violations of ERISA;
- 7 (6) A permanent injunction enjoining Mr. Silva from future service as a fiduciary of, or service
- 8 provider to, any ERISA-covered plan.
- 9 (7) An order assessing a 20% civil penalty on any amounts recovered under the judgment.

10 1. Restoring Funds to the Plan

11 The Secretary asks first for an order requiring Mr. Silva and NUC to restore \$55,838.84 to

12 the NUC Plan. This figure is based on the \$43,326.36 that Mr. Silva stole from the Plan

13 participants, plus \$12,412.48 in what the Secretary calls “lost earnings” (*i.e.*, return that would

14 have been earned had the funds not been stolen by Mr. Silva in the first place). Mot. at 10. The

15 Secretary calculated the lost earnings by using the interest rate specified in 26 U.S.C. § 6621.⁴ *See*

16 Hesik Decl. ¶ 10. In the alternative, the Secretary asks for the interest rate to be based on 28

17 U.S.C. § 1961,⁵ which would yield a total interest of \$452.94. *See* Hesik Decl. ¶ 11.

18 As a preliminary matter, the Court shall order Mr. Silva only to restore funds, as it is not

19 holding NUC liable for the breach of its co-fiduciary. As to Mr. Silva, it is equitable to order the

20 restoration of \$43,326.36, as that represents the money stolen by Mr. Silva.

21 With respect to lost earnings, the Court deems it equitable to make an award of

22 prejudgment interest given that the Plan and/or the Plan participants were deprived of the use of

23 the \$43,326.36.

24

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26 ⁴ Section 6621 provides in relevant part that “[t]he underpayment rate established under this

27 section shall be the sum of (A) the Federal short-term rate determined under subsection (b), plus

28 (B) 3 percentage points.” 26 U.S.C. § 2261(a)(2).

⁵ Section 1961 provides in relevant part: “Such interest shall be calculated . . . at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.” 28 U.S.C. § 1961.

1 The only question remaining is which interest rate should apply – that provided under §
 2 6621 or that provided under § 1961.⁶ The Ninth Circuit has stated that, “[g]enerally, ‘the interest
 3 rate prescribed for post-judgment interest under 28 U.S.C. § 1961 is appropriate for fixing the rate
 4 of pre-judgment interest unless the trial judge finds, on substantial evidence, that the equities of
 5 that particular case require a different rate.’” *Blankenship v. Liberty Life Assur. Co.*, 486 F.2d
 6 620, 628 (9th Cir. 2007). In his motion, the Secretary contends that § 6621 should apply instead
 7 of § 1961 because the § 1961 interest “rate is at historically low levels. Therefore, awarding pre-
 8 judgment interest at the 28 U.S.C. § 1961 rate would not effectuate the remedial purpose of
 9 ERISA to put the Plan in the position it would have been but for the breaches of the Default
 10 Defendants.” Mot. at 11. The Court finds that the Secretary has adequately stated a basis for
 11 applying the higher interest rate. *See Russo v. Unger*, 845 F. Supp. 124, 126 (S.D.N.Y. 1994)
 12 (stating that “the district court has discretion to apply the Section 6621 rate, provided it finds,
 13 based on the evidence before it, that that rate is an appropriate one consistent with Section 409’s
 14 standard of making the plan whole, and the court must make specific determination as to that
 15 appropriateness”). Furthermore, the Court notes that the equities weigh in favor of a higher
 16 interest rate given that Mr. Silva, in essence, stole from the Plan.

17 2. Removal as Fiduciaries

18 ERISA specifically contemplates that removal of a fiduciary may be appropriate equitable
 19 or remedial relief where the fiduciary has breached its responsibilities. *See* 29 U.S.C. § 1109(a).
 20 Here, the Court finds that removal of Mr. Silva and NUC is appropriate, as requested by the
 21 Secretary. Mr. Silva, as noted above, stole from the Plan/Plan participants. As for NUC, it has
 22 “failed to take the proper steps to ensure that Plan participants received distributions of their
 23 account balances.” Compl. ¶ 15; *see also* Compl. ¶ 20 (alleging that Plan “participants are unable
 24 to access their Plan accounts, either to reinvest them in other tax-qualified retirement savings
 25 vehicles before retirement, or to draw them down upon retirement”). Failing to satisfy such a

26 _____
 27 ⁶ The Secretary has not made the argument that prejudgment interest should be based on, *e.g.*, the
 28 rate of return that the Plan made on funds that were not misappropriated during or about that same
 time period. *See Russo v. Unger*, 845 F. Supp. 124, 126-27 (S.D.N.Y. 1994) (considering
 historical rates of return of ERISA plan).

1 basic duty counsels against its continued role as a fiduciary for the Plan.

2 3. Appointment of Independent Fiduciary and Payment of Independent Fiduciary's
3 Fees

4 In place of Mr. Silva and NUC, the Secretary asks that the Court appoint an independent
5 fiduciary and that Mr. Silva and NUC be compelled to pay for the reasonable fees of the
6 independent fiduciary. The Court agrees that such relief is appropriate. As Mr. Silva and NUC
7 are no longer fiduciaries, and there is nothing to indicate that there is another fiduciary who will
8 take on responsibility for the Plan, an independent fiduciary shall be appointed. The DOL has
9 obtained bids from three potential fiduciaries (to terminate the Plan and distribute assets to
10 participants and beneficiaries) and determined that Metro Benefits, Inc. is the best candidate.
11 Metro Benefits's fee for the scope of work is \$5,950. *See* Hesik Decl. ¶ 8. Because the DOL has
12 acted reasonably in its selection process and Metro Benefits's fee is not unreasonable, the Court
13 shall appoint Metro Benefits as the independent fiduciary, with the understanding that its services
14 shall not cost more than \$5,950. *See generally Perez v. Bar-K, Inc.*, No. 14-cv-05549-JSW (JSC),
15 2015 U.S. Dist. LEXIS 94226 (N.D. Cal. June 4, 2015) (report and recommendation) (removing
16 fiduciary and appointing independent fiduciary), *adopted by* 2015 U.S. Dist. LEXIS 94225 (N.D.
17 Cal. July 20, 2015). In addition, the Court finds it equitable for Mr. Silva and NUC to pay for the
18 cost of the independent fiduciary because it was their failure to comply with their fiduciary
19 obligations that necessitated the appointment of an independent fiduciary.

20 4. Enjoining Future Violations of ERISA

21 The Secretary asks next for an injunction enjoining Mr. Silva and NUC from future
22 violations of ERISA. While the request is not without any merit, the Court shall not impose the
23 injunction as it is tantamount to an obey-the-law injunction. *See EEOC v. AutoZone, Inc.*, 707
24 F.3d 824, 841 (7th Cir. 2013) (noting that "[a]n injunction that does no more than order a defeated
25 litigant to obey the law raises several concerns" – *e.g.*, overbreadth and vagueness).

26 5. Enjoining Future Service as Fiduciary or Service Provider

27 The Court, however, shall grant the Secretary's request for an injunction enjoining Mr.
28 Silva from future service as a fiduciary of, or service provider to, any ERISA-covered plan. Given

1 the seriousness of Mr. Silva’s conduct, such relief is appropriate. *See, e.g., Chao v. Merino*, 452
 2 F.3d 174, 185-86 (2d Cir. 2006) (noting that relief under § 1109 “may include a permanent
 3 injunction barring a former ERISA fiduciary from providing services or acting as a fiduciary to
 4 any employee benefit plan in the future” and that such relief “is not limited to cases in which the
 5 fiduciary has engaged in self-dealing”).

6 6. Assessment of 20% Civil Penalty

7 Finally, the Secretary asks that the Court’s order include a provision that “[t]he Secretary
 8 will assess a civil penalty of 20% to amounts recovered under this Judgment as required by” 29
 9 U.S.C. § 1132. Prop. Order ¶ 9. Section 1132(l) provides in relevant part as follows:

10 (1) In the case of –

11 (A) any breach of fiduciary responsibility under (or other
 12 violation of) part 4 [29 U.S.C. § 1101 *et seq.*] by a
 13 fiduciary, or

14 (B) any knowing participation in such a breach or
 15 violation by any other person,

16 the Secretary shall assess a civil penalty against such
 17 fiduciary or other person in an amount equal to 20 percent of
 18 the applicable recovery amount.

19

20 (3) The Secretary may, in the Secretary’s sole discretion, waive
 21 or reduce the penalty under paragraph (1) if the Secretary
 22 determines in writing that –

23 (A) the fiduciary or other person acted reasonably and in
 24 good faith, or

25 (B) it is reasonable to expect that the fiduciary or other
 26 person will not be able to restore all losses to the plan
 27 (or to provide the relief ordered pursuant to
 28 subsection (a)(9)) without severe financial hardship
 unless such waiver or reduction is granted.

29 U.S.C. § 1132(l). Given the mandatory language in § 1132(l), the Court shall include in its
 order the 20% civil penalty. The order, however, shall be applicable to Mr. Silva only, as he is the
 only defendant liable for monetary damages. Moreover, the Court’s ruling here shall not bar Mr.
 Silva from asking for, or the Secretary from deciding that, a waiver is appropriate under the

1 circumstances.

2 **III. CONCLUSION**

3 For the foregoing reasons, the Court **GRANTS** the Secretary's motion for default
4 judgment and orders as follows:

- 5 (1) Within sixty (60) days of entry of final judgment, Mr. Silva shall make restitution to the
6 Plan by restoring \$55,838.84, which includes \$43,326.36 in principal loses and \$12,512.48
7 in prejudgment interest;
- 8 (2) Mr. Silva and NUC are immediately removed as fiduciaries of the NUC Plan;
- 9 (3) Metro Benefits, Inc. (of 8150 Perry Highway, Suite 311, Pittsburgh, Pennsylvania 15237)
10 is appointed as independent fiduciary of the NUC Plan and has sole responsibility for
11 administering the Plan;
- 12 (4) Within sixty (60) days of entry of final judgment, Mr. Silva and NUC shall pay Metro
13 Benefits \$5,950 to cover its reasonable fees;
- 14 (5) Mr. Silva is permanently enjoined from future service as a fiduciary of, or service provider
15 to, any ERISA-covered plan; and
- 16 (6) The Secretary shall assess a civil penalty of 20% to amounts recovered under this
17 judgment as required by 29 U.S.C. § 1132.

18 As to Metro Benefits's powers, duties, and responsibilities as appointed independent
19 fiduciary, the Court hereby orders as follows:

- 20 A. The Independent Fiduciary shall have full fiduciary authority and shall have all the powers,
21 rights, discretion, and duties of a trustee, fiduciary, and Plan Administrator under ERISA;
- 22 B. The Independent Fiduciary's responsibilities shall include, but shall not be limited to,
23 establishment or continuation of trust accounts for the benefit of the Plan's participants and
24 beneficiaries, communication with participants regarding their account disbursement
25 options, collection of any necessary information from those persons or entities in custody
26 of such information including bankruptcy trustees, calculation of the participants' and
27 beneficiaries' account balances, and shall file a final Form 5500;
- 28 C. The Independent Fiduciary shall have responsibility and authority to collect, liquidate, and

1 manage the Plan's assets for the benefit of the eligible participants and beneficiaries who
2 are entitled to receive such assets, until such time that the Plan's assets are distributed to
3 those participants and beneficiaries;

4 D. The Independent Fiduciary shall exercise reasonable care and diligence to identify and
5 locate each participant or beneficiary who is eligible to receive a distribution under the
6 terms of the Plan. Further, the Independent Fiduciary shall make distributions to each
7 eligible participant and beneficiary of the Plan;

8 E. The Independent Fiduciary shall have full access to all data, information and calculations
9 in the Plan's possession or under its control, including information and records maintained
10 by the Plan's custodial trustee, service providers, and Mr. Silva;

11 F. Mr. Silva shall fully cooperate with all reasonable requests by the Independent Fiduciary to
12 facilitate the administration, liquidation and/or termination of the Plan;

13 G. As soon as administratively practicable after appointment, the Independent Fiduciary shall
14 provide for the orderly termination and liquidation of the Plan, including making all
15 distributions and/or rollovers to the participants and beneficiaries;

16 H. The Independent Fiduciary shall have full authority to amend the Plan as necessary to
17 effectuate its termination and the processing of all participant distributions; and

18 I. The Independent Fiduciary shall provide to the Secretary any and all information he
19 requests concerning the Plan, including but not limited to information concerning the
20 assets remaining in the plan and the status of distributions. All information shall be mailed
21 to the Regional Director at this address:

22 Regional Director, EBSA

23 90 7th Street, Suite 11-300

24 San Francisco, CA 94103

25 J. Should Mr. Silva and/or NUC default under their obligation to pay the Independent
26 Fiduciary's fees as set forth in Paragraph 4 above, the Independent Fiduciary may obtain
27 payment from the Plan of no more than \$5,950.00 to cover the Independent Fiduciary's
28 reasonable fees. Mr. Silva and NUC shall remain liable for these amounts and any

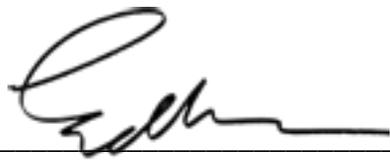
1 amounts subsequently obtained from Mr. Silva and/or NUC in satisfaction of this debt
2 shall be restored to the Plan.

3 The Clerk of the Court is instructed to enter judgment in accordance with the above and
4 close the file in the case.

5
6 This order disposes of Docket No. 14.

7
8 **IT IS SO ORDERED.**

9
10 Dated: November 11, 2015



EDWARD M. CHEN
United States District Judge

United States District Court
For the Northern District of California

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