

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

JULIE A. SU, Acting Secretary of Labor,)
United States Department of Labor,)
)
Plaintiff,)

v.)

Case No. 1:22-cv-01030

DAVID FENSLER; JOHN FERNANDEZ;)
GARY MEYERS; L. STEVEN PLATT;)
HERBERT O. MCDOWELL III;)
DAVID SCHWALB; ROBBINS,)
SALOMON, & PATT, LTD.;)
ROBBINS DIMONTE, LTD.; UNITED)
PREFERRED COMPANIES, LTD.;)
and the **UNITED EMPLOYEE BENEFIT**)
FUND TRUST;)
)
Defendants.)

Hon. Nancy L. Maldonado

CONSENT ORDER AND JUDGMENT BETWEEN
THE ACTING SECRETARY OF LABOR AND DEFENDANT DAVID SCHWALB

Plaintiff Julie A. Su, Acting Secretary of Labor, United States Department of Labor (“Acting Secretary”), pursuant to the provisions of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. § 1001, et seq., filed a complaint against defendants David Fensler, John Fernandez, Gary Meyers, L. Steven Platt, Herbert O. McDowell III, David Schwalb (“Schwalb”), Robbins, Salomon & Patt, Ltd. (“RSP”), Robbins DiMonte, Ltd. (“Robbins DiMonte”), and United Preferred Companies, Ltd. (“UPC”), alleging breaches of their fiduciary responsibilities under ERISA §§ 403, 404, and 406, with respect to the United Employee Benefit Fund Trust (“Fund”).

Defendant Schwalb, having waived service of process and answer of the complaint, admits to the jurisdiction of this Court over him and the subject matter of this action. Defendant Schwalb neither admits nor denies the remaining allegations in the Secretary's Complaint.

The Secretary and Defendant Schwalb have agreed to resolve all matters in controversy in this action between them and said parties do now consent to entry of a Consent Order and Judgment by this Court in accordance therewith.

Between August 13, 2021, and November 3, 2021, before this litigation was initiated, Defendant Schwalb paid \$1,407,504 to the Fund. These monies represented the restoration of \$1,385,000 in principal losses to the Fund (Counts Six and Nine of the Complaint) and \$22,504 in lost opportunity costs to the Fund. Defendant Schwalb has provided the Secretary with satisfactory proof of these payments to the Fund.

Upon consideration of the record herein, and as agreed to by the parties, the Court finds that it has jurisdiction to enter this Consent Order and Judgment.

IT IS THEREFORE ORDERED, ADJUDICATED, AND DECREED that:

1. Defendant Schwalb is hereby permanently enjoined and restrained from violating the provisions of Title I of ERISA, 29 U.S.C. § 1001 *et seq.*

2. Defendant Schwalb is permanently barred from serving as a fiduciary, trustee, or administrator to any ERISA-covered Plan and is permanently barred from acting as a service provider to the Fund.

3. Defendant Schwalb shall pay to the Fund the total amount of \$136,363.64, consisting of disgorged profits during the period of November 9, 2016, to November 28, 2016.

4. Defendant Schwalb shall remit payments totaling the amount set forth in Paragraph 3 as follows:

a. Within 30 days of the entry of the Consent Order and Judgment, Defendant Schwalb shall restore \$75,000 to the Fund, which represents a portion of disgorged profits during the period of November 9, 2016, to November 28, 2016.

b. Defendant Schwalb shall remit six monthly restorative payments of \$10,227.28 to the Fund at least every 30 days beginning not later than 60 days after the entry of the Consent Order and Judgment. As a result of these payments, within 210 days of the entry of the Consent Order and Judgment, Defendant Schwalb shall have restored an additional \$61,363.64 to the Fund, which also represents a portion of disgorged profits during the period of November 9, 2016, to November 28, 2016.

c. Defendant Schwalb shall remit all payments to the Fund in the care of the Independent Fiduciary, Receivership Management, Inc. (“Independent Fiduciary”);

d. Within 10 days of each restorative payment, Defendant Schwalb shall provide to Ruben R. Chapa, Regional Director of the Employee Benefits Security Administration, Chicago Regional Office, 230 S. Dearborn St., Room 2160, Chicago, IL 60604 (“Regional Director”) satisfactory proof¹ of each remittance pursuant to paragraph 4(c) above;

e. In the event the Fund is terminated before all payments required by this paragraph have been made, Defendant Schwalb will coordinate with the Independent Fiduciary to make any remaining payments under paragraph 4(b).

5. Defendant Schwalb may not seek direct or indirect contribution or indemnification from the Fund.

¹ Satisfactory proof includes electronic proof of cancelled checks, ACH, wire transfers, or other method of payment.

6. Defendant Schwalb will not assert any claims under ERISA or under any other state or federal law against the Fund regarding this litigation, litigation filed by the Fund, and litigation filed by participants or beneficiaries against the Fund, including, but not limited to, claims for breach of contract or negligence.

7. Upon reasonable notice, Defendant Schwalb shall provide all reasonable assistance to the Secretary of Labor, U.S. Department of Labor (“Secretary”) in her litigation relating to the Fund, including:

- a. providing truthful testimony to the Secretary, and her representatives in this litigation;
 - b. meeting with the Secretary’s representatives;
 - c. serving as a deponent without subpoena;
 - d. serving as a witness without subpoena at any hearings or trials in this litigation;
- and
- e. Accepting electronic service of all subpoenas and other documents on his counsel.

8. Upon restoring the amount in paragraph 3 above, the Secretary has determined Defendant Schwalb shall be and hereby is assessed a total penalty under ERISA § 502(l), 29 U.S.C. § 1132(l), of \$27,272.73. Based on the information provided by Defendant Schwalb, the Secretary will reduce the amount of the penalty by 50% to \$13,636.36. Therefore, the Secretary hereby does and will accept as full satisfaction of the assessed penalty, the amount of \$13,636.36. Defendant Schwalb waives his right to a separate notice of assessment of the penalty under ERISA § 502(l), 29 U.S.C. § 1132(l), the service requirement of 29 C.F.R. § 2570.83, and his right to seek any further reductions of or relief from the penalty under ERISA § 502(l), 29 U.S.C. § 1132(l). Defendant Schwalb shall pay the penalty under ERISA § 502(l), 29 U.S.C. §

1132(l) within five calendar days of payment of the amount in paragraph 3 above, by ACH transfer, PayPal, or debit card at <https://www.pay.gov/public/form/start/1063197296>.

9. Each party agrees to bear his, her or its own attorneys' fees, costs and other expenses incurred by such party in connection with any stage of this proceeding to date including, but not limited to, attorneys' fees which may be available under the Equal Access to Justice Act, as amended.

10. Nothing in this Order is binding on any government agency other than the United States Department of Labor.

11. The Court shall maintain jurisdiction over this matter only for purposes of enforcing this Consent Judgment and Order.

DATED: December 19, 2023



NANCY L. MALDONADO
UNITED STATES DISTRICT JUDGE

SEEMA NANDA
Solicitor of Labor

CHRISTINE Z. HERI
Regional Solicitor

/s/Lydia J. Faklis

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