

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

PENSION BENEFIT GUARANTY  
CORPORATION,

Plaintiff

v.

Civil No. 99-246-P-C

PAUL D. MORIN,

Defendant

Gene Carter, District Judge

**MEMORANDUM OF DECISION AND ORDER**

Now before the Court is Plaintiff Pension Benefit Guaranty Corporation's ("PBGC") Motion for Partial Summary Judgment (Docket No. 4) on Count I of its Complaint. Defendant Paul D. Morin has not responded to PBGC's motion.

**I. FACTS<sup>1</sup>**

Since approximately 1977, Paul Morin has owned 100% of the stock in J.L. Morin Company, Inc., a construction company specializing in suspended acoustical ceilings. Plaintiff's Statement of Material Facts ("PSMF") (Docket No. 5) ¶ 1; Declaration of Merrill D. Boone (Docket No. 6) Exhibit 15 at 5, 7. Effective no later than April 1, 1984, the J.L. Morin Co. defined Benefit Pension Plan and Trust, by its express terms, provided retirement income to

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<sup>1</sup>The undisputed facts are taken from Plaintiff PBGC's statement of facts.

employees of J.L. Morin. PSMF ¶ 2; Boone Dec. Ex. 1 at 1, 20, 24-26. J.L. Morin was the Plan Administrator. Boone Dec. Ex. 16 at 31884 at 2a; Boone Dec. Ex. 17 at 2a; Boone Dec. Ex. 18 at 31751 at 2a; Boone Dec. Ex. 19 at 2a. Paul Morin was the Plan's trustee from the Plan's inception until August 8, 1996. PSMF ¶ 3; Boone Dec. Ex. 1 at 77; Boone Dec. Exs. 4-6; Boone Dec. Ex. 11 at 2005-07; Boone Dec. Ex. 15 at 12-13. PBGC was appointed as trustee of the Plan on August 8, 1996.<sup>2</sup> PSMF ¶ 4; Boone Dec. Ex. 20. Since the Plan's inception, Morin has exercised sole discretion over the withdrawal of funds from any accounts belonging to the Plan. PSMF ¶ 5; Boone Dec. Ex. 9 at 1001; Boone Dec. Ex. 11 at 2004-05; Boone Dec. Ex. 15 at 12; Boone Dec. Ex. 26 ¶ 14. The Plan's annual valuations and annual IRS returns for the years 1986, 1987, 1988, and 1989 have been prepared by Baldwin & Clarke Pension Consultants, Inc.<sup>3</sup> PSMF ¶ 6; Boone Dec. Ex. 15 at 12-13.

By letters dated March 25, 1991, and September 12, 1991, Baldwin & Clarke asked Morin to provide it with year-end values of particular Plan assets for the Plan year ending March 31, 1991, so that Baldwin & Clarke could perform the annual valuation for the Plan and file Internal Revenue Service forms for the Plan. PSMF ¶¶ 11, 12; Boone Dec. Exs. 21, 22. By

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<sup>2</sup>PBGC was appointed trustee of the Plan by this Court's Default Judgment Order. As Plan trustee, PBGC is empowered to collect for the Plan any amounts due the Plan, and to commence on behalf of the Plan any suit or proceeding involving the Plan. 29 U.S.C. § 1342(d)(1)(B)(ii), (iv).

<sup>3</sup>The year-end values of particular Plan assets for 1986-87 as shown on Exhibit 4 were reported by Morin to Baldwin & Clarke. PSMF ¶ 7; Boone Dec. Ex. 15 at 33-34. The year-end values of particular Plan assets for 1987-88 as shown on Exhibit 5 were reported by Morin to Baldwin & Clarke. PSMF ¶ 8; Boone Dec. Ex. 15 at 34. The year-end values of particular Plan assets for 1988-89 as shown on Exhibit 6, except for "Net Receivables," were reported by Morin to Baldwin & Clarke. PSMF ¶ 9; Boone Dec. Ex. 15 at 37-38. The year-end values of particular Plan assets for 1989-90 as shown on Exhibit 8 were reported by Morin to Baldwin & Clarke. PSMF ¶ 10; Boone Dec. Ex. 15 at 41-42.

certified letter dated December 27, 1991, Baldwin & Clarke again asked Morin to provide the Plan's year-end valuation information. PSMF ¶ 13; Boone Dec. Ex. 23. The certified letter of December 27, 1991, from Baldwin & Clarke to Morin was returned unclaimed. PSMF ¶ 14; Boone Dec. Ex. 23. Morin never provided Baldwin & Clarke with year-end values of Plan assets for any Plan year after the Plan year ending March 31, 1990. PSMF ¶ 15; Boone Dec. Ex. 21-23.

Morin transferred money to himself from a Plan account with Merrill Lynch, Pierce, Fenner & Smith by checks that cleared on the dates and in the amounts as follows:

August 1, 1988	\$ 6,000
October 31, 1988	17,000
December 19, 1988	8,000
August 9, 1989	9,400
August 11, 1989	8,000
August 17, 1989	6,000
November 30, 1990	4,600
December 7, 1990	4,800
December 14, 1990	3,000
January 28, 1991	800
July 5, 1991	4,800
August 9, 1991	4,800
August 30, 1991	9,600
September 13, 1991	4,800
September 18, 1991	3,000
September 23, 1991	4,000
September 30, 1991	18,000
October 2, 1991	9,500
October 21, 1991	6,000
October 31, 1991	3,000
November 14, 1991	4,600
November 29, 1991	1,500
January 24, 1992	560

PSMF ¶¶ 16-38; Boone Dec. Ex. 15 at 55, 57, 64. In aggregate, Morin transferred \$141,760 from the Plan account with Merrill Lynch, Pierce, Fenner & Smith to himself. PSMF ¶ 39; Boone Dec. Ex. 11 at 2004-05, 2034, 2045, 2049, 2075, 22122, 2125, 2129, 2150, 2153, 2158,

2162, 2166, 2172. In addition, Morin transferred \$1,200 from the Plan's account by a check that cleared April 27, 1990, to the Baywoods Development Group, Inc. ("Baywoods"). PSMF ¶ 40; Boone Dec. Ex.11 at 2004-05, 2100. Morin, directly or through J.L. Morin, owned 100% of the stock of Baywoods. PSMF ¶ 41; Boone Dec. Ex.15 at 58-59. Morin has never repaid any of the money he transferred from the Plan to himself. PSMF ¶ 87; Boone Dec. Ex. 15 at 69.

J.L. Morin and Baywoods both ceased business operations in approximately 1991. PSMF ¶¶ 48, 49; Boone Dec. Ex. 15 at 9, 58-59. Morin continued to occupy the J.L. Morin Building after J.L. Morin ceased operations, until he was locked out of the J.L. Morin Building. PSMF ¶ 50; Boone Dec. Ex. 15 at 20-21. On October 29, 1992, Fleet Bank of Maine ("Fleet") commenced an action against Paul and Suellen Morin, seeking to foreclose on the J.L. Morin Building. PSMF ¶ 51; Boone Dec. Ex. 24. On March 16, 1993, Fleet obtained a Judgment of Foreclosure as to the J.L. Morin Building. PSMF ¶ 52; Boone Dec. Ex. 24, 25 ¶ 3. Paul and Suellen Morin did not redeem their interest in the J.L. Morin Building within the statutory redemption period. PSMF ¶ 53; Boone Dec. Ex. 25 ¶ 3. Fleet sold the J.L. Morin Building at a public auction on August 31, 1993. PSMF ¶ 54; Boone Dec. Ex. 25 ¶¶ 3, 5.

On November 22, 1993, the PBGC auditor assigned to PBGC's case on the Plan, Emil Meny-Plunkett ("Meny-Plunkett"), sent a letter to Morin requesting that he provide Meny-Plunkett with a list of all Plan assets and their locations. PSMF ¶ 61; Boone Dec. Ex. 26 ¶ 6; Boone Dec. Ex. 27. On March 10, 1994, Meny-Plunkett sent another letter to Morin, again requesting that he provide Meny-Plunkett with a list of all Plan assets and their locations. PSMF ¶ 62; Boone Dec. Ex. 26 ¶ 7; Boone Dec. Ex. 28. During an April 12, 1994, telephone conversation, Morin told Meny-Plunkett that he would provide Meny-Plunkett with the account

numbers of all of the Plan's investments. PSMF ¶ 63; Boone Dec. Ex. 13; Boone Dec. Ex. 26 ¶ 8. On April 21, 1994, Meny-Plunkett visited Morin at his residence, and Morin told Meny-Plunkett that he would provide the information requested by Meny-Plunkett. PSMF ¶ 64; Boone Dec. Ex. 13; Boone Dec. Ex. 26 ¶ 9.

During an April 25, 1994, telephone conversation, Morin told Meny-Plunkett that the following week, he would provide Meny-Plunkett with the account numbers of all of the Plan's investments. PSMF ¶ 65; Boone Dec. Ex. 13; Boone Dec. Ex. 26 ¶ 10. Meny-Plunkett remained assigned to PBGC's case on the Plan until May 1998, when he was transferred to a higher-graded position in a different PBGC department. PSMF ¶ 66; Boone Dec. Ex. 16 ¶ 11. Meny-Plunkett never received any correspondence from Morin, and he did not receive any oral communications from Morin subsequent to their conversation on April 25, 1994. PSMF ¶ 67; Boone Dec. Ex. 26 ¶ 13. Morin never provided Meny-Plunkett with the account numbers of any Plan investments. PSMF ¶ 68; Boone Dec. Ex. 26 ¶ 14.

On May 26, 1995, PBGC issued a subpoena to Morin ("Subpoena"), demanding that he produce, within 30 days from the service of the Subpoena, documents relating to Plan assets. PSMF ¶ 69; Boone Dec. Ex. 29 at Exhibit A, pp. 3, 5. On June 2, 1995, the Subpoena was served upon Morin. PSMF ¶ 70; Boone Dec. Ex. 29 at Ex. B. In telephone conversations of August 23, 1995, and September 27, 1995, Morin informed counsel for PBGC that he would respond to the Subpoena imminently. PSMF ¶ 71; Boone Dec. Ex. 29 at Ex. C. By letter of September 29, 1995, counsel for PBGC asked Morin to respond to the Subpoena as soon as possible and threatened to commence litigation to enforce the Subpoena, if necessary. PSMF ¶ 72; Boone Dec. Ex. 29 at Exhibit C. On April 5, 1996, PBGC filed a Petition for Enforcement

of Administrative Subpoena (“Petition”). PSMF ¶ 73; Boone Dec. Ex. 29. On May 10, 1996, the Petition and supporting documents were served on Paul Morin. PSMF ¶ 74; Boone Dec. Ex. 32. Morin did not respond to the Petition. PSMF ¶ 75; Boone Dec. Ex. 33.

## II. DISCUSSION

Summary judgment shall be entered if “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The fact that Morin failed to interpose timely opposition to the Motion for Partial Summary Judgment is not conclusive. The failure of the nonmoving party to respond to a summary judgment motion does not in itself justify summary judgment. *Jaroma v. Massey*, 873 F.2d 17, 20 (1st Cir. 1989). Rather, before granting an unopposed summary judgment motion, “[t]he court must first inquire whether the moving party has met its burden to demonstrate undisputed facts entitling it to summary judgment as a matter of law.” *Id.*

Morin was the Plan’s trustee from the Plan’s inception until August 8, 1996. PSMF ¶ 3; Boone Dec. Ex. 1 at 77; Boone Dec. Exs. 4-6; Boone Dec. Ex. 11 at 2005-07; Boone Dec. Ex. 15 at 12-13. As plan trustee, he had exclusive authority and discretion to manage and control the assets of the pension plan, 29 U.S.C. §§ 1002(21), 1103(a), and Morin did, in fact, exercise authority and control over Plan assets, PSMF ¶ 5; Boone Dec. Ex. 9 at 1001; Boone Dec. Ex. 11 at 2004-05; Boone Dec. Ex. 15 at 12; Boone Dec. Ex. 26 ¶ 14. By the nature of his position as trustee, Morin was a fiduciary. *See* 29 C.F.R. § 2509.75-8 at D-3.

ERISA explicitly provides the duties to which pension plan fiduciaries must adhere. *See* 29 U.S.C. §§ 1104, 1106. As Plan trustee, Paul Morin was responsible for investing, managing, and controlling the Plan’s assets. PSMF ¶ 55; Boone Dec. Ex. 1 at 53. As Plan trustee, Paul

Morin was responsible for maintaining records of the Plan's receipts and disbursements. PSMF ¶ 56; Boone Dec. Ex. 1 at 53. A plan fiduciary who is found to have breached his fiduciary duty is personally liable to the plan for all the losses to the plan that result from the breach. *See* 29 U.S.C. § 1109(a). PBGC alleges that with respect to the insider transfers, Morin breached two of his fiduciary duties: his duty not to deal with the Plan's assets in his own interest or for his own account, *see* 29 U.S.C. § 1106(b)(1); and his duty not to cause the Plan to lend money or transfer assets to a party in interest, *see* 29 U.S.C. § 1106(a)(1)(D).<sup>4</sup> The Court will deal with each alleged breach in turn.

**A. Fiduciary Dealing in Assets of the Plan in His Own Interest  
in violation of 29 U.S.C. § 1106(b)(1)**

Section 1106(b)(1) provides that a plan fiduciary shall not deal with the assets of the pension plan in his own interest or for his own account. *See* 29 U.S.C. § 1106(b)(1). The undisputed factual record establishes that Morin, as Plan trustee, dealt with the assets of the pension plan in his own interest or for his own account by transferring \$141,760 to himself, and an additional \$1,200 to Baywoods, a corporation wholly-owned, either directly or indirectly, by Morin. Morin did not provide any consideration to the Plan in exchange for any of the transfers of money to himself. Morin did not make any repayment to the Plan on account of any of the transfers to himself. PSMF ¶ 87; Boone Dec. Ex. 15 at 69. Furthermore, despite persist efforts by PBGC to establish the location of the Plan assets, Moran has not responded.

Section 1108 affords a limited number of exceptions to the prohibitions of section 1106.

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<sup>4</sup>Count I of PBGC's Complaint also alleges that Morin breached his fiduciary duty to use Plan assets for the exclusive purpose of providing benefits of defraying administrative costs, 29 U.S.C. § 1104(a)(1)(A). Because PBGC does not pursue this claim in its Motion for Partial Summary Judgment, the Court will not address it either.

But a fiduciary engaging in a transaction claimed to be within section 1106 has the burden of proving his allegation that the transaction falls within one or more of the section 1108 exceptions. *See, e.g., Howard v. Shay*, 100 F.3d 1484, 1488 (9<sup>th</sup> Cir. 1996) (fiduciary engaging in self-dealing transaction on the fiduciary because it has a virtual monopoly of information concerning the transaction); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1213 (2<sup>nd</sup> Cir. 1987) (burden is on fiduciary because it has a virtual monopoly on information concerning the transaction). Morin has not responded to PBGC's Motion for Partial Summary Judgment and, thus, has failed to meet his burden of showing that he satisfies one of the section 1108 exceptions. Therefore, in causing the Plan to make the insider transfers, Morin breached his duties under section 1106(b)(1) not to deal with the assets of the pension plan in his own interest or for his own account.

**B. Fiduciary Transferring Assets of the Plan to a Party In Interest  
in Violation of 29 U.S.C. § 1106(a)(1)(D)**

A plan fiduciary shall not cause the plan to engage in a transaction if he knows or should know that such a transaction constitutes the transfer of plan assets to a "party in interest." 29 U.S.C. § 1106(a)(1)(D). Morin was a Plan fiduciary; and he was the owner of 100% of the stock of J.L. Morin, the employer whose employees were covered by the Pension Plan. Morin was a party in interest as to the Pension Plan by virtue of the positions he held with respect to the Plan and the company itself. *See* 29 U.S.C. § 1002(14)(A), (E). Baywoods was also a party in interest, being owned, directly or indirectly, by Morin. *See* 29 U.S.C. § 1002(14)(G). Morin knew or should have known that he was breaching his fiduciary duty to the Plan by transferring the assets to a party in interest since he was, or owned, the party in interest.

Just as the insider transfers are not excepted from section 1106(b)(1) by virtue of section 1108, they are not excepted from section 1106(a)(1)(D). By causing the Plan to make the insider transfers, Morin breached his duties under section 1106(a)(1)(D) to not knowingly transfer Plan assets to parties in interest. The undisputed record in this case establishes that by causing the Plan to transfer \$142,960 of Plan assets to himself and Baywoods, Morin effectuated the transfer of those assets to parties in interest.

By causing the Plan to make the transfers to himself in the amount of \$142,960, Morin breached his fiduciary duty not to transfer plan assets to a party in interest, *see* 29 U.S.C. § 1106(a)(1)(D), and not to deal with assets of the Plan in his own interest, *see* 29 U.S.C. § 1106(b)(1). The Court will, therefore, grant summary judgment for PBGC on Count I of its Complaint.

### **C. Losses Resulting from Transfers**

Morin is liable under 29 U.S.C. § 1109(a) for all the Plan's losses resulting from his breaches of fiduciary duty. This includes \$142,960 plus the return that the Plan would have earned on the amounts transferred since the dates of the transfers. *See* 29 U.S.C. § 1109(a). It is undisputed that Morin transferred \$142,960 from the Pension Plan to himself and Baywoods from August 1, 1988, through January 24, 1992. *See* Ex. 11. Morin has never restored any of the money he transferred from the Plan to himself. PSMF ¶ 87; PBGC Ex. 15 at 69. Absent Morin's breach of fiduciary duty, the Pension Plan would not only have had as assets \$142,960 that Morin transferred to himself and Baywoods, it would have realized the gain on those amounts over the past 8 to 11½ years.

PBGC suggests that the way in which this Court should calculate the lost opportunity cost

of the money that Morin transferred is to use the interest rate set by the Secretary of Treasury, pursuant to 26 U.S.C. §§ 6601(a), 6621 and 6622 (“IRS Rate”), from the date of each transfer to the date of judgment. *See McLaughlin v. Cohen*, 686 F. Supp. 454, 458 (S.D.N.Y. 1988); *Benvenuto v. Schneider*, 678 F. Supp. 51, 55 (E.D.N.Y. 1988); *Brock v. Gillikin*, 677 F. Supp. 389, 402 (E.D.N.C. 1987). The Court acknowledges that the IRS Rate is not necessarily an accurate reflection of the average profit which the investment market would have paid over the last 8 to 11½ years. Given the record in this case, however, the Court finds it to be an acceptable measure of the loss. In addition, because of the character of the breach and the degree of fault exemplified in this case, the Court further finds that Morin should also be subject to the equitable remedy of set-off against his benefit under the Plan, if any, in the amount of \$142,960, plus the return that the Plan would have earned on the amounts transferred since the dates of the transfers, and subject to the survivor annuity provisions of section 1056(d)(4)(C)(iii). *See* 29 U.S.C. § 1132(a)(3)(B) (authorizing appropriate equitable relief); 29 U.S.C. § 1056(d)(4)(C)(iii) (exempting survivor annuity).

### III. CONCLUSION

Accordingly, it is ORDERED that Plaintiff Pension Benefit Guaranty Corporation’s Motion for Partial Summary Judgment be, and it is hereby, **GRANTED** as to Count I of the Complaint in the amount of One Hundred Forty-Two Thousand Nine Hundred Sixty Dollars (\$142,960) plus the return that the Plan would have earned on the amounts transferred since the dates of the transfers, calculated by utilizing the IRS Rate. It is further **ORDERED** that Morin’s benefit under the Plan, if any, be off set in the amount of One Hundred Forty-Two Thousand Nine Hundred Sixty Dollars (\$142,960) plus the return that the Plan would have earned on the amounts

transferred since the dates of the transfers, calculated by utilizing the IRS Rate and subject to the survivor annuity provisions of 29 U.S.C. § 1056(d)(4)(C)(iii).

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GENE CARTER  
District Judge

Dated at Portland, Maine this 24<sup>th</sup> day of April, 2000.

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