

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

HILDA L. SOLIS, Secretary of the
United States Department of Labor,

Plaintiff,

v.

MATTHEW D. HUTCHESON, et al

Defendants.

Case No. 1:12-CV-00236-EJL

ORDER

Pending before the Court in the above-entitled matter is Plaintiff's Application for Temporary Restraining Order ("TRO") and Order to Show Cause Why a Preliminary Injunction Should not be Granted. (Dkt. 2.) Defendants have not had an opportunity to respond to the Application but due to the expedited nature of this matter, the Court issues the following Order.

FACTUAL AND PROCEDURAL BACKGROUND

On May 15, 2012, Plaintiff Hilda L. Solis, Secretary of the United States Department of Labor, filed the Complaint in this case alleging claims for violations of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et*

seq. (“ERISA”). (Dkt. 1.) The claims relate to Defendant Matthew D. Hutcheson’s alleged wrongful transfer of \$3.276 million dollars of ERISA-covered plan assets to accounts controlled by him in late 2010 and subsequent use of those funds for his personal benefit. (Dkt. 1.) At the time of the transfer, the Complaint states, Mr. Hutcheson was a fiduciary of the ERISA-covered plans whose assets are held by an entity known as the Retirement Security Plan and Trust, f/k/a Pension Liquidity Plan and Trust (“RSPT”). The transfer in question in the Complaint was made from RSPT. As a result of the transfer, the Complaint alleges, there appears to be insufficient funds in RSPT to provide all of the benefits due to the participants and beneficiary of the plans for which RSPT holds ERISA-covered plan assets. Plaintiff seeks declaratory and injunctive relief, including TRO and Preliminary Injunctions, removing Defendants Hutcheson and HWA as fiduciaries of the Plans and appointing an independent fiduciary over RSPT and the Plans. The Court finds as follows.

Analysis

The instant Application for TRO asks that the Court preclude Defendants Mr. Hutcheson and Hutcheson Walker Advisors LLC (“HWA”) from all positions whereby they have or exercise any authority or control over the RSPT, the assets of the ERISA-covered plans held by RSPT and the plans for which RSPT holds pension assets (the “Plans”). (Dkt. 2.) The Motion also asks that the Court appoint Jeanne B. Bryant of Receivership Management, Inc. as independent fiduciary with exclusive authority and control over RSPT, the assets of the ERISA-covered plans it holds, and the Plans.

Temporary restraining orders are governed by Federal Rule of Civil Procedure 65(b) which requires the moving party to show that “it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party . . . can be heard in opposition....”

A court may issue a TRO without notice only if “specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition” and “the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.” Fed. R. Civ. P. 65(b)(1). Under Rule 65(b) and Ninth Circuit case law, a plaintiff may obtain a temporary restraining order and preliminary injunction only where he or she can “*demonstrate* immediate threatened injury.” *See, e.g., Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis in original).

In support of the TRO, Plaintiff has filed a Declaration of J. Michael Ebbesen, Senior Investigator for the Employee Benefits Security Administration of the United States Department of Labor. (Dkt. 2, Ex. 2.) Mr. Ebbesen has conducted an investigation concerning the alleged misuse of the \$3,276,000 in funds from the RSPT trust by Mr. Hutcheson. This investigation purports to show that Mr. Hutcheson directed for the transfer of funds in order to purchase a note, (the “PCB Note”)¹, which was secured by a

¹ It appears “PCB” refers to Pacific Continental Bank, located in Eugene, Oregon. (Dkt. 2, Ex. 2 at ¶ 30.)

golf course at Tamarack, for the benefit of Green Valley Holdings, LLC. (Dkt. 2, Ex. 2.) The PCB Note was later pledged as collateral to another individual for a loan to pay Mr. Hutcheson's legal bills. Mr. Hutcheson defaulted on the loan and, as a result, may have lost title to the PCB Note. Mr. Ebbesen contends that Mr. Hutcheson concealed pertinent details about the transactions concerning the PCB Note. The Declaration goes on to detail the commencement of the Government's involvement and knowledge concerning the transfer of funds by Mr. Hutcheson including the filing of Form 5500 and the findings of the Independent Auditor's Report finding of a "Prohibited Transaction." (Dkt. 2, Ex. 2 at ¶¶ 28-32.) Mr. Ebbesen concludes with the statement that HWA has continued to make distributions from RSPT knowing that \$3,276,000 in assets are missing. (Dkt. 2, Ex. 2 at ¶ 33.) Attached to Mr. Ebbesen's Declaration are several Exhibits that support the conclusions made therein. (Dkt. 2-3, 5.)²

Based on the foregoing, the Court finds the Plaintiff has demonstrated the type of immediate and irreparable injury necessitating entry of a TRO. Plaintiff has clearly shown by way of Mr. Ebbesen's Declaration and the attachments thereto, specific facts evidencing a real threat of immediate and irreparable injury, loss, or damage will result if the TRO is not issued before the Defendant can be heard in opposition; that Mr. Hutcheson and HWA will continue to mismanage and misappropriate ERISA-covered

² The Exhibits are appropriately filed under seal so the Court has not discussed the details of their content in this Order. The Court has, however, reviewed the documents in relation to the claims made in Mr. Ebbesen's Declaration and the claims raised in the Complaint in reaching its decision on this Application for TRO.

assets. Though a great deal of funds have already been transferred from the particular funds at issue, there is a danger that the remaining ERISA-covered assets could be further diminished by additional mismanagement and misappropriates by these Defendants. Accordingly, the Court finds grounds have been shown upon which to grant the temporary restraining order. The Court will set a briefing schedule on the Motion for Preliminary Injunction. After the briefing has been filed, the Court will consider the same and determine whether a hearing on the Motion for Preliminary Injunction is needed.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED as follows:

- 1) Plaintiff's Motion for Temporary Restraining Order is (Dkt. 2) is **GRANTED**. Matthew D. Hutcheson and Hutcheson Walker Advisors LLC are precluded from all positions whereby they have or exercise any authority or control over the RSPT, the assets of the ERISA-covered plans held by RSPT and the plans for which RSPT holds pension assets.
- 2) Jeanne B. Bryant of Receivership Management, Inc. is **HEREBY APPOINTED** as the independent fiduciary with exclusive authority and control over RSPT, the assets of the ERISA-covered plans it holds, and the Plans.
- 3) Plaintiff shall serve this Order upon all Defendants immediately.
- 4) Plaintiff's Motion for Preliminary Injunction (Dkt. 2) is **UNDER ADVISEMENT**. Defense counsel to filed their response brief on or before **June 5, 2012**. Any reply brief is due on **June 20, 2012**. After reviewing the briefing on the Motion, the Court will determine whether a hearing date is necessary and, if so, contact the parties to schedule a hearing on the Motion.

SO ORDERED.



DATED: May 16, 2012

A handwritten signature in black ink that reads "Edward J. Lodge". The signature is written in a cursive style and is positioned above a horizontal line.

Honorable Edward J. Lodge
U. S. District Judge