

PARTIES

2. The Secretary is responsible for the administration and enforcement of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 et seq. In her capacity as such, the Secretary has the authority, pursuant to ERISA §§502(a)(2) and (5), 29 U.S.C. §§1132(a)(2) and (5), to bring actions to enjoin acts and practices which violate the provisions of Title I of ERISA and to obtain other appropriate relief to redress violations and enforce the provisions of that Title. The Secretary is responsible for protecting the interests of participants in, and beneficiaries of, employee benefit plans and the plan assets held by those plans.

3. Defendant David B. Welliver ("Welliver") is a debtor in this Chapter 7 bankruptcy proceeding.

4. The Secretary, through the Employee Benefit Security Administration ("EBSA"), has carried out an investigation, pertaining to violations of ERISA, of D.B. Welliver & Co., Retirement Savings Plan ("Plan"). The Plan is an employee benefit plan within the meaning of ERISA §3(3), 29 U.S.C. §1002(3), which is subject to the provisions of Title I of ERISA pursuant to ERISA §4(a), 29 U.S.C. §1003(a). D.B. Welliver & Co., Inc. ("Company") is a corporation that sponsored the Plan.

5. At all relevant times, Welliver was 100% owner of the Company, was a trustee of the Plan and exercised authority and control over the Plan assets, and was a fiduciary with respect to the Plans within the meaning of ERISA §§3(21)(A)(i) and (iii), 29 U.S.C. §§1002(21)(A)(i) and (iii), and a party in interest to the Plan within the meaning of ERISA §§3(14)(A), (E), and (H), 29 U.S.C. §§1002(14)(A), (E), and (H).

ALLEGED VIOLATIONS OF ERISA

(Transfer of Plan Assets to Welliver Personal Account)

6. The allegations contained in paragraphs 1 through 5, are hereby incorporated in these allegations.

7. On January 21, 1998, Welliver established his personal checking account at US Bancorp.

8. Welliver was the sole individual authorized to issue directions on the aforementioned checking account.

9. On May 29, June 2, and June 15, 1998, Welliver authorized wire transfers from the Plan trust fund to his personal checking account.

10. The total amount transferred from the Plan trust fund to Welliver's personal checking account was \$28,750.

11. By the conduct described in paragraphs 6 through 10 above, Welliver:

a. violated ERISA §403(a), 29 U.S.C. §1103(a), which requires that all assets of an employee benefit plan be held in trust;

b. failed to act solely in the interest of the participants and beneficiaries of the Plan and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of plan administration, in violation of ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A);

c. failed to discharge his duties with respect to the Plan solely in the interests of plan participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such

matters would use in the conduct of an enterprise of a like character and with like aims in violation of ERISA §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B);

d. failed to discharge his duties with respect to the Plan solely in the interest of the participants and beneficiaries in accordance with the documents and instruments governing the Plan, in violation of ERISA §404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D);

e. caused the Plan to engage in transactions which he knew or should have known constituted a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of assets of the Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D); and

f. dealt with assets of the Plan in his own interest or acted on behalf of a party whose interests are adverse to the interests of the Plan or the interests of its participants and beneficiaries, in violation of ERISA §§406(b)(1) and (2), 29 U.S.C. §§1106(b)(1) and (2).

12. The transfer of Plan assets by Welliver to his personal account, as described in paragraphs 6 through 10 above, constitutes a defalcation by Welliver while acting in a fiduciary capacity for the Plan and, therefore, he owes all Plan assets that have not been repaid to the Plan participants. The aforementioned debt is non-dischargeable under the provisions of 11 U.S.C. §523(a)(4).

WHEREFORE, the Secretary prays that this court determine that the aforesaid debts resulting from Welliver's fiduciary breaches involving diversion of Plan assets are non-dischargeable and that the Secretary have such other and further relief as is just and proper.

Respectfully submitted,

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