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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

MONTRY MCNALLY; RUBY BELL; and KENNETH BALES,)	1:09-CV-1184 AWI SMS
)	
Plaintiffs,)	ORDER GRANTING
)	PLAINTIFF'S MOTION FOR A
v.)	PRELIMINARY INJUNCTION
)	
EYE DOG FOUNDATION FOR THE BLIND, INC.,)	(Document # 28)
)	
Defendants.)	
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BACKGROUND

This is an action concerning whether Plaintiffs are entitled to benefits under ERISA. Plaintiffs are the beneficiaries of the estate of Lequita McKay, Defendant Eye Dog Foundation for the Blind, Inc.'s previous employee. Plaintiffs allege violations of ERISA and several state tort claims. Plaintiffs contend that, despite Defendants' denial that an ERISA Plan exists, they have discovered a Plan with assets valued at \$254,950.48. Because Defendants have recently removed \$49,000.00 from this account, Plaintiffs request a temporary restraining order requiring Defendants to return the \$49,000.00 and an order freezing the account until the resolution of this action.

On May 7, 2010, the court denied Plaintiffs' motion to the extent it had been filed as an *ex parte* temporary restraining order because Plaintiffs had not shown sufficient injury if Defendants were heard in opposition. However, the court construed Plaintiffs' motion as a

1 request for a noticed motion for a preliminary injunction. The court ordered that Defendants
2 could file any opposition on or by May 14, 2010. The court set a hearing on Plaintiffs' motion
3 for May 24, 2010, at 1:30 p.m.

4 Defendants have not file any opposition to Plaintiffs' motion.

5 On May 18, 2010, Plaintiffs filed a notice that they had not received any opposition from
6 Defendants.

7 On May 24, 2010, at 1:30 p.m. the court held a hearing. Plaintiffs' attorneys attended the
8 hearing. The case was called after 1:30 p.m. Neither Defendants nor anyone acting on their
9 behalf appeared at the hearing. At the hearing, the court granted Plaintiffs' motion.

10 LEGAL STANDARD

11 A party seeking a preliminary injunction must demonstrate that the party is likely to
12 succeed on the merits, that the party is likely to suffer irreparable harm in the absence of
13 preliminary relief, that the balance of equities tips in the party's favor, and that an injunction is in
14 the public interest. Winter v. Natural Res. Def. Council, Inc., – U.S. –, 129 S.Ct. 365, 374
15 (2008); National Meat Ass'n v. Brown, 599 F.3d 1093, 1097 (9th Cir. 2010). “In each case, courts
16 must balance the competing claims of injury and must consider the effect on each party of the
17 granting or withholding of the requested relief.” Indep. Liv. Cntr. of Southern Cal., Inc. v.
18 Maxwell-Jolly, 572 F.3d 644, 651 (9th Cir. 2009) (quoting Winter, 129 S.Ct. at 376) (internal
19 quotation marks omitted)). Following the Supreme Court's holding in Winter, the Ninth Circuit
20 has held that, “[t]o the extent that our cases have suggested a lesser standard, they are no longer
21 controlling, or even viable.” Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009)
22 (internal quotes omitted).

23 DISCUSSION

24 Title 29 U.S.C. § 1132(a)(1)(A) allows for a civil action by an ERISA participant or
25 beneficiary for relief if an ERISA plan administrator fails to comply with ERISA's requirements
26 or fails to supply requested information. 29 U.S.C. § 1132(a)(1)(A). Section 1132(a)(1)(B)
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1 allows an ERISA participant or beneficiary to recover benefits due under the terms of a plan, to
2 enforce rights under a plan, or to clarify future benefits under a plan. 29 U.S.C. § 1132 (a)(1)(B).
3 Section 1133 requires a plan to: (1) provide adequate notice in writing to any participant or
4 beneficiary whose claim for benefits under the plan has been denied, setting forth the specific
5 reasons for such denial, written in a manner calculated to be understood by the participant,” and
6 (2) “afford a reasonable opportunity to any participant whose claim for benefits has been denied
7 for a full and fair review by the appropriate named fiduciary of the decision denying the claim.”
8 29 U.S.C. § 1133.

9 Lequita McKay was employed by Defendant Eye Dog Foundation for the Blind, Inc.
10 Plaintiffs are the beneficiaries of Ms. McKay’s estate. Plaintiffs claim that they are entitled to
11 Ms. McKay’s ERISA benefits. In this action, Defendants have taken the position that no legally
12 valid ERISA plan exists. However, Plaintiffs provide evidence of an ERISA plan for
13 Defendants’ employees. Specifically Plaintiffs have provided evidence from Stephanie Copner
14 of Retirement Plan Consultants in Fresno showing that a Plan exists and the value of the Plan.
15 Plaintiffs provide evidence that they received an April 2008 statement (Morgan Stanley account
16 number 238 133040 151) which showed the total asset value of the Plan as \$254,950.48. In
17 2008, the account was in the name of Lequita McKay/Eye Dog Foundation. Plaintiffs provide
18 evidence that on Wednesday, April 28, 2010, Plaintiffs’ counsel received a March 2010
19 statement from Stephanie Copner. The account name has now been changed to Michael
20 Hannon, Lucille Gibbons and Gwen Brown/Eye Dog Foundation and the account number was
21 changed to 238 133040 165. Plaintiffs provide evidence that the March 2010 statement showed
22 \$49,000 had been removed from the Morgan Stanley account by Defendants on or about March
23 8, 2010. Plaintiffs provide evidence that Defendants have failed to provide Plaintiffs with
24 written or electronic notification of why Plaintiffs are not entitled to benefits under the Plan.

25 Plaintiffs have shown they are likely to succeed on the merits of their ERISA claims.
26 The evidence provided shows that Defendants have an ERISA Plan, which is contrary to
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1 Defendants' position that no Plan exists. Plaintiffs have requested benefits under the Plan, and
2 their request has been ignored. Given the evidence of a Plan, at a minimum, Plaintiffs have
3 shown they are likely to succeed on their ERISA claim concerning Defendants' failure to provide
4 notification as to why Ms. McKay is not eligible for benefits under the Plan.¹

5 The court also finds that Plaintiffs are likely to suffer irreparable harm in the absence of
6 preliminary relief and that the balance of equities tips in Plaintiffs' favor. The evidence shows
7 that Defendants have withdrawn money from the Plan to make a payment unrelated to ERISA
8 benefits. Given Defendants ability to withdraw funds from the Plan's account, Plaintiffs will
9 suffer irreparable harm if all money is withdrawn from the Plan prior to the resolution of this
10 action.

11 Finally, the court finds that an injunction is in the public interest. The evidence indicates
12 that at this time no one else is receiving benefits from the Plan's accounts. Thus, an injunction
13 freezing the account will not harm the interests of third parties.

14 Accordingly, the court finds a preliminary injunction should be issued to freeze the assets
15 in the Morgan Stanley accounts relating to the Plan and to enjoin and restrain Defendants, their
16 officers, agents, employees, representatives, and all persons acting in concert or participating
17 with them from withdrawing funds from Morgan Stanley account numbers 238 133040 151 and
18 238 133040 165 or any other accounts relating to the Plan. However, the court will deny
19 Plaintiffs' motion to the extent it also requests this court order Defendants to return the \$49,000
20 taken from the Plan's assets. Plaintiffs have failed to provide sufficient evidence of the amount
21 they are owed pursuant to the ERISA Plan.²

24 ¹ Because Plaintiffs have shown a likelihood of success on the ERISA claims, the court
25 finds it is unnecessary to determine if Plaintiffs are also likely to succeed on their state law
26 claims.

27 ² The court notes that the \$49,000 can be traced because it was given to Plaintiffs to
28 settle another legal action.

1 **ORDER**

2 Accordingly, the court ORDERS that:

- 3 1. Plaintiffs' motion for a preliminary injunction is GRANTED;
- 4 2. Defendants and Defendants' officers, agents, servants, employees, attorneys and
5 those in active concert or participation with them are HEREBY ENJOINED,
6 pending trial of this action, from withdrawing funds from Morgan Stanley account
7 numbers 238 133040 151 and 238 133040 165 or any other accounts relating to
8 the Eye Dog Foundation for the Blind Profit Sharing Plan;
- 9 3. Plaintiffs SHALL pay a bond in the amount of \$5,000; and
- 10 4. This order takes effect upon Plaintiffs' payment of the bond.

11
12 IT IS SO ORDERED.

13 **Dated:** May 26, 2010

/s/ Anthony W. Ishii
CHIEF UNITED STATES DISTRICT JUDGE