

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NORTHWEST ADMINISTRATORS,
INC.,

Plaintiff,

v.

NATIONAL EXPRESS TRANSIT
SERVICES CORPORATION,

Defendant.

No. 2:19-cv-00744 WBS AC

FINDINGS AND RECOMMENDATIONS

This matter is before the court on plaintiff's motion to compel compliance by defendants Durham School Services and National Express, LLC ("Added Defendants") with an audit request for payroll records pursuant to the National Labor Relations Act, 29 U.S.C. § 185, the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and certain benefit plan documents. ECF No. 48. This motion was referred to the undersigned pursuant to Local Rule 302(c)(19). The motion came before the undersigned for hearing on August 14, 2019. ECF No. 22.

Plaintiff contends that National Express Transit, originally the sole defendant in this lawsuit, is obligated to submit to an audit under the terms of the Western Conference of Teamsters Pension Trust Fund's Agreement and Declaration of Trust, which National Express Transit accepted under the terms of the collective bargaining agreement with the Local. On

1 plaintiff's motion, the court previously issued an order for National Express Transit to comply
2 with the audit, but National Express Transit failed to comply with the Court's order. ECF Nos.
3 24, 25; ECF No. 48 at 3. On January 28, 2020, plaintiff filed a First Amended Complaint adding
4 defendants Durham School Services and National Express as defendants. ECF No. 36. Plaintiff
5 now argues the Added Defendants are alter egos of National Express Transit. The Added
6 Defendants failed to respond to the first amended complaint, and plaintiff now seeks an identical
7 partial default judgment order as the one already entered against the original defendant against the
8 two additional Added Defendants compelling them to comply with an audit.

9 I. RELEVANT BACKGROUND

10 Plaintiff Northwest Administrators, Inc. is the authorized administrative agency and
11 assignee of the Western Conference of Teamsters Pension Trust Fund ("Trust Fund")—a Taft-
12 Hartley employee benefits trust fund providing retirement benefits to eligible participants.¹ ECF
13 No. 1 at 2. On April 30, 2019, plaintiff filed a Complaint to Compel Audit alleging as follows.

14 Defendant National Express is a Delaware corporation engaged in the public
15 transportation business in Solano County, California. ECF No. 1 at 2. National Express is bound
16 by a collective bargaining agreement with Local 315 of the International Brotherhood of
17 Teamsters. Id. at 3. As part of that collective bargaining agreement, National Express accepted
18 the Trust Fund's Agreement & Declaration of Trust ("Trust Agreement"), which requires
19 National Express (and the other subject employers) to report for and pay monthly contributions to
20 the Trust Fund at specific rates for each hour of compensation paid to its employees who are
21 members of the bargaining unit represented by Local 315. Id. The Trust Agreement requires as
22 follows with respect to employer payroll records:

23 Section 1. – Employer Records and Audits:

24 Each Employer shall promptly furnish to the Trustees or their
25 authorized representatives on demand any and all records of his past
26 or present Employees concerning the classification of such
Employees, their names, Social Security numbers, amount of wages
paid and hours worked or paid for, and any other payroll records and
information that the Trustees may require in connection with the

27
28 ¹ The Trust Fund operates pursuant to Section 302 of the Labor Management Relations Act of
1947, as amended, 29 U.S.C. § 186(c)(5), and ERISA, 29 U.S.C. §§ 1001 *et seq.*

1 administration of the Trust Fund, and for no other purpose. . . . The
2 Trustees or their authorized representatives may examine any books
3 and records of each Employer which the Employer is required to
4 furnish to the Trustees on demand whenever such examination is
5 deemed necessary or desirable by the Trustees in the proper
6 administration of the Trust. . . .

7 ECF No. 15 at 29 (Plummer Decl., Exhibit B).

8 At some point, the Trustees of the Trust Fund deemed it necessary and advisable to the
9 proper administration of the Trust that their authorized representatives examine National
10 Express's books and records going back to October 1, 2013 to evaluate its reported payments.
11 ECF No. 1 at 3-4. Despite notice to defendant of the Trustees' desire to conduct this audit, and
12 demands made to examine the records, defendant failed to make its records available. Id. at 4.
13 Plaintiff's complaint seeks the production of various documents in connection with the requested
14 audit as well as attorney's fees and costs related to accessing the records. Id. at 5.

15 On May 10, 2019 plaintiff served the summons and complaint on defendant National
16 Express Transit, via its designated agent for service of process. ECF No. 5. Defendant has failed
17 to file an answer or otherwise respond. On June 11, 2019, the Clerk of Court entered default
18 against defendant. ECF No. 8. On July 12, 2019, plaintiff filed a motion to compel compliance
19 with the audit and noticed the motion for hearing before the District Judge assigned to this case.
20 ECF No. 9. Notice of the motion was served on defendant's designated agent. ECF No. 12. On
21 July 15, 2019, at the direction of the District Judge, plaintiff refiled the motion to be heard before
22 the undersigned. ECF Nos. 13, 14. On July 16, 2019, plaintiff filed an amended notice of
23 hearing, a copy of which was also served on defendant. ECF Nos. 18, 19. Defendant did not
24 respond to the motion. Partial default judgment against defendant was ordered on September 16,
25 2019. ECF No. 25.

26 On January 28, 2020, plaintiff filed a first amended complaint against Durham School
27 Services, LP, and National Express LLC, to add the two new defendants. ECF No. 35. The
28 Added Defendants were served. ECF Nos. 40, 41. The clerk of Clerk of Court entered default
against both Added Defendants. ECF Nos. 43.

////

1 Before instituting this action, plaintiff sought and obtained in the U.S. District Court for
2 the Western District of Washington an order virtually identical to the one sought here. Northwest
3 Administrators, Inc. v. National Express Transit Servs. Corp., No. 2:18-cv-00880-RSM, ECF
4 No. 11. Although that order was served on defendant at its Chicago, Illinois office, defendant
5 failed to respond. Id. at ECF No. 12. At plaintiff's request, that suit was dismissed without
6 prejudice on January 28, 2019. Id. at ECF No. 13.

7 II. MOTION

8 By this motion, plaintiff seeks an order compelling defendants to make the following
9 documents available to plaintiff's authorized representatives:

- 10 1. All tax documents listed on the contract and confirmation
11 letter
 - 12 a. State Employer Security Reports
 - 13 b. State Industrial Insurance Reports
 - 14 c. Quarterly FICA and Federal Income Tax Reports
(941/941A)
 - 15 d. Annual Federal Unemployment Reports (FUTA 940)
- 16 2. Complete employee roster that includes the route-type for
each driver
- 17 3. Payroll for all employees for 10/01/2013 to 6/30/2019
- 18 4. Job descriptions for each iteration of the Driver and Mechanic
19 position (Teamsters, ATUs, None's, Trainees and any others
20 that do driving or mechanic work).

21 ECF No. 48 at 8.

22 This court has jurisdiction pursuant to Section 301(a) of the Labor Management Relations
23 Act, 1947, 29 U.S.C. § 185(a), and Section 502(e) of ERISA, 29 U.S.C. § 1132(e). At the hearing
24 on the motion for default judgment against defendant National Express Transit, counsel agreed
25 with the court that the motion effectively sought partial default judgment and is properly analyzed
26 under Federal Rule of Civil Procedure 55. The court already found that the analysis under Rule
27 55 favored entry of partial default judgment against National Express Transit. Plaintiff now asks
28 the court to find that the same rationale and judgment should apply to the Added Defendants
because they are alter egos of National Express Transit.

////

////

////

1 III. DISCUSSION

2 A. Legal Standard: Corporate Alter Egos

3 An employer may not avoid liability under ERISA by simply showing that it has not
4 signed the applicable collective bargaining agreement. Trs. of the Screen Actors Guild-Producers
5 Pension & Health Plans v. NYCA, Inc., 572 F.3d 771, 776 (9th Cir. 2009). A non-signatory
6 company may be liable if the non-signatory is the alter ego of the signing company, if the two
7 entities are a single employer, or if the interests of the nonsignatory and signatory parties are
8 materially inseparable. Id. Plaintiff argues that Durham School Services and National Express
9 should be held liable to the Trust Agreement and compelled to comply with an audit as “alter
10 egos” of National Express Transit.

11 Federal courts apply the law of the forum state to determine whether a corporation is an
12 alter ego. S.E.C. v. Hickey, 322 F.3d 1123, 1128 (9th Cir. 2003, opinion amended on denial of
13 reh’g, 335 F.3d 834 (9th Cir. 2003) (quoting Towe Antique Ford Found. v. I.R.S., 999 F.2d 1387,
14 1391 (9th Cir. 1993)). In California, “in order to prevail on an alter-ego theory, the plaintiff must
15 show that “(1) there is such a unity of interest that the separate personalities of the corporations
16 no longer exist; and (2) inequitable results will follow if the corporate separateness is respected.”
17 Zoran Corp. v. Chen, 185 Cal. App. 4th 799, 811(2010) (quoting Tomaselli v. Transamerica Ins.
18 Co., 25 Cal. App. 4th 1269, 1285 (1994)).

19 Several factors may be relevant in determining whether business entities are alter egos.
20 These include whether the company was used as an undercapitalized “shell” to conduct business
21 for individuals who dominated and controlled it to shield them from liability for their actions.
22 See Zoran, 185 Cal.App.4th at 811-813. An alter ego status also may be shown by “the disregard
23 of legal formalities and the failure to maintain arm's length relationships” between the entities and
24 the individuals. Id. Other factors may include failing to segregate the funds of the separate
25 entities, diverting corporate assets for the benefit of individual shareholders, using the same
26 employees for the different entities, and the lack of any independent and separate corporate
27 management structure. Id. There are numerous other factors that may be considered. “No single

28 ///

1 factor is determinative, and instead a court must examine all the circumstances to determine
2 whether to apply the doctrine.” Id. at 812.

3 B. Added Defendants’ Alter Ego Status

4 Several factors in this case weigh in favor of finding the Added Defendants alter egos of
5 defendant National Express Transit. There exists a strong unity of interest and ownership
6 between National Express, Durham School Services and National Express Transit because there
7 is no separation of the entities’ funds and a lack of any independent and separate corporate
8 management structure. First, Durham School Services has always paid the pension contributions
9 to Plaintiff on behalf of National Express Transit. Schumacher Decl. at ¶ 6, Exh. A (sample
10 check). Second, Durham School Services has always paid the salaries of employees in the
11 bargaining unit represented by Teamsters Local 315, who are the beneficiaries of the pension
12 contributions to the Trust. Baumbach Decl. at ¶ 7. Thus, based on the representations and
13 evidence presented by plaintiff, undisputed by any response from the Added Defendants or
14 National Express Transit, National Express Transit has never paid its employee salaries or
15 pension contributions through its own assets. Instead, Durham School Services is the sole source
16 for National Express Transit’s labor costs for the employees whose pension contributions Plaintiff
17 seeks to audit.

18 Third, the business address registered with the California Secretary of State for National
19 Express Transit (2601 Navistar Drive, Lisle, Illinois 60532) is the same business address
20 registered with the California Secretary of State for Durham School Services. Hammer Decl.
21 Exhs. F and G. Both National Express Transit and Durham School Services are entirely owned
22 and operated by the same company, National Express LLC, which also has the same business
23 address. See <https://www.nelc.com/> (showing National Express Transit and Durham School
24 Services as two of National Express LLC’s “home-to-school companies.”). Durham School
25 Services and National Express Transit are wholly owned by National Express and part of the
26 same national transportation organization. Id.

27 Fourth, Defendants share the same in-house legal counsel and upper management.
28 Richard Cozza, who responded to Plaintiff’s counsel on behalf of National Express Transit, is

1 Vice President, Assistant General Counsel Labor & Employment for National Express LLC.
2 Hammer Decl. at ¶ 4-5, Exh. C. These facts clearly establish that National Express Transit is an
3 uncapitalized shell entity operated entirely by National Express and Durham School Services to
4 conduct the business of National Express and Durham School Services.

5 The result here will be inequitable if the act in question, National Express Transit's
6 compliance with the pension contribution audit, is treated as that of National Express Transit
7 alone. First, National Express Transit failed to respond to two separate lawsuits and to two court
8 orders to comply with the audit. Second, as an empty shell corporation, National Express Transit
9 apparently does not have any assets through which plaintiff could seek to enforce the Court's
10 order against National Express Transit. Simply, plaintiff has no means to enforce the Trust
11 Agreement with National Express Transit. Moreover, National Express and Durham School
12 services have similarly failed to respond to the FAC.

13 Therefore, it is appropriate and proper to pierce National Express Transit's corporate veil
14 and hold Durham School Services and National Express jointly and severally liable for National
15 Express Transit's obligations under the Trust Agreement.

16 C. Application of Prior Default Judgment Analysis

17 Because the undersigned finds that the Added Defendants are corporate alter egos of
18 defendant National Express Transit, the rationale regarding default judgment articulated as to
19 National Express Transit (ECF No. 25) applies equally to the Added Defendants and shall be
20 considered incorporated herein. An identical judgment is therefore recommended as to the Added
21 Defendants.

22 IV. CONCLUSION

23 Based on the foregoing, the undersigned RECOMMENDS THAT:

- 24 1. Plaintiff's motion for partial default judgment (ECF No. 48) is GRANTED;
- 25 2. Within 15 days of the date of entry of the District Court's order, defendants Durham
26 School Services and National Express LLC, through their officers, agents, employees,
27 and attorneys, be ordered to make available to plaintiff's Trust Fund's authorized
28 representatives the following documents:

- 1 a. All tax documents listed on the contract and confirmation letter:
 - 2 i. State Employer Security Reports
 - 3 ii. State Industrial Insurance Reports
 - 4 iii. Quarterly FICA and Federal Income Tax Reports (941/941A)
 - 5 iv. Annual Federal Unemployment Reports (FUTA 940);
- 6 b. Complete employee roster that includes the route-type for each driver;
- 7 c. Payroll for all employees for 10/01/2013 to 6/30/2019; and
- 8 d. Job descriptions for each iteration of the Driver and Mechanic position
9 (Teamsters, ATUs, None's, Trainees and any others that do driving or
10 mechanic work).

11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
13 after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Id.; see also Local Rule 304(b). Such a
15 document should be captioned "Objections to Magistrate Judge's Findings and
16 Recommendations." Failure to file objections within the specified time may waive the right to
17 appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez
18 v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

19 DATED: November 23, 2020

20 
21 ALLISON CLAIRE
22 UNITED STATES MAGISTRATE JUDGE
23
24
25
26
27
28