

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SHEET METAL WORKERS' NATIONAL PENSION :
FUND ET AL., : ORDER
: :
Plaintiffs, : 10-CV-2825 (ENV)
: :
-against- : :
: :
CARDRONA, INC. and ULTAN GALLIGAN, : :
: :
Defendants. : :
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GOLD, STEVEN M., U.S.M.J.:

By Order dated October 20, 2010, the Honorable Eric N. Vitaliano referred plaintiffs' motion for default judgment to me for a report and recommendation on what relief should be awarded to plaintiffs. Docket Entry 9. The court will consider all previous submissions in determining an appropriate award but requests a courtesy copy of plaintiff's motion, Docket Entry 5.

In addition, plaintiffs shall submit the following documentation, or cite to where in any prior submissions such documents are located, in support of their demand for damages:

- 1) letters of assent or signed Collective Bargaining Agreements ("CBAs") indicating that defendants agreed to be bound to the CBAs;
- 2) any remittance forms or other records maintained by the plaintiffs documenting unpaid or delinquent contributions or any audits of defendants' books and records supporting the amount in unpaid contributions that plaintiffs seek; and
- 3) the basis for an award of interest at the rate of 8.5% on all of the funds. *See* Compl. Wherefore cl. ¶ 6(a). ERISA provides that interest is calculated "using the rate provided for under the plan, or, if none, the rate prescribed under section 6621 of Title 26." 29 U.S.C. § 1132(g)(2). *Compare* NPF Trust Agreement V.2.c, Docket Entry 5-14 at 19 (providing that interest shall accrue at the rate of .0233% compounded daily, which amounts to approximately 8.5% per annum) *with* SASMI Trust Agreement V.4.c, Docket Entry 5-15 at 18 (providing for interest at the 6621 rate) *with* ITI Trust Agreement VII.8.b, Docket Entry 5-16 at 22-23 (providing simply that the Trustees shall fix the rate without specifying the percentage); SMOHI Trust Agreement VII.8.b, Docket Entry 5-17 at 21-22 (same); NEMI Trust Agreement VII.8.b, Docket Entry 5-18 at 22 (same).

In addition, plaintiffs shall supplement their memorandum of law explaining Galligans' individual liability as a fiduciary under ERISA, addressing in particular how liability against Galligan under ERISA is established where plaintiffs' complaint contains mere "labels and conclusions" and "a formulaic recitation of the elements" of an ERISA fiduciary claim. *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). *See* Compl. ¶ 11 (stating that Galligan is "a

principal owner” of Cardrona and that, “[u]pon information and belief,” Galligan “exercises control over the activities and operations of corporate defendant and determines whether or not corporate defendant makes contributions to the Benefits Funds”). *See also Finkel v. Romanowicz*, 577 F3d 79, 86 (2d Cir. 2009) (holding that a defendant’s status as an officer of the corporate defendant, who signed checks on behalf of the company, was insufficient to establish fiduciary liability of the individual defendant under ERISA).

Plaintiffs shall make their submission in support of the damages they seek no later than November 16, 2010. Any submission that defendants wish to make in response is due no later than November 30, 2010. Any reply that plaintiffs wish to make should be filed no later than December 6, 2010.

Upon receipt of this Order, plaintiffs are hereby directed promptly to serve a copy of this Order by certified mail, return receipt requested, on defendants at their last known addresses, and to provide the Court with a copy of the return receipt.

SO ORDERED.

_____/s/_____
STEVEN M. GOLD
United States Magistrate Judge

Dated: Brooklyn, New York
November 1, 2010