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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CARPENTERS RETIREMENT TRUST OF  
WESTERN WASHINGTON, et al.,  
  
  Plaintiffs,  
  
  v.  
  
LARRY D. MILLER, et al.,  
  
  Defendants.

No. C10-145 RSL

ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS’  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT

This matter comes before the Court on plaintiffs’ motion for partial summary judgment against defendant Larry Miller. Dkt. #28. Plaintiffs move for summary judgment on their claims of breach of fiduciary duty under ERISA, breach of fiduciary duty under RCW 49.52.010, conversion, and violation of RCW 49.52.050 and 49.52.070.<sup>1</sup> Defendant has not responded. Having reviewed the memorandum, declarations, exhibits, and the record herein, the Court GRANTS in part and DENIES in part plaintiffs’ motion for partial summary judgment.

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<sup>1</sup>Plaintiffs did not move for summary judgment on their fifth claim for relief based on alter ego.

1 **STATEMENT OF UNDISPUTED FACTS**

2 Plaintiffs are joint labor-management trust funds created pursuant to section 302(c) of  
3 the Labor Management Relations Act, 29 U.S.C. § 186(c), and governed by the Employee  
4 Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* (“ERISA”). Dkt. #29  
5 (Parker Decl.) ¶2. The trust funds are collectively known and administered as the Carpenters  
6 Trusts of Western Washington (“Carpenters Trusts”). *Id.* Plaintiff Carpenters-Employers  
7 Vacation Trust of Western (“Vacation Trust”) was established under ERISA to receive and  
8 administer amounts withheld as vacation pay benefits from wages of employees of Evergreen  
9 Environmental, Inc., among others, pursuant to a collective bargaining agreement. *Id.* ¶3.  
10 Plaintiff Carpenters Health and Security Trust of Western Washington (“Medical Trust”) was  
11 established under ERISA to receive contributions from Evergreen, among others, to provide  
12 hospital, medical, dental, vision, disability or death benefits and any other similar benefits to its  
employees. *Id.* ¶4.

13 Defendant is the President, Vice President, Secretary, Treasurer, Chairman of the Board,  
14 and Director of Evergreen. Dkt. #30 (Brown Decl.), Ex. A-1 at 7. In April 1995, defendant  
15 executed a Compliance Agreement on behalf of Evergreen. Dkt. #29 (Parker Decl.) ¶¶5-6.  
16 Pursuant to the Compliance Agreement, Evergreen became bound to a collective bargaining  
17 agreement and various trust agreements that created the Carpenters Trust. *Id.* ¶¶5-7, Exs. 3-4.  
18 Pursuant to the collective bargaining agreement and various trust agreements, defendant was  
19 required to make certain monthly payments on behalf of its employees to the Carpenters Trusts.  
*Id.* ¶¶7-8.

20 On January 16, 2009, the King County Superior Court entered judgment against  
21 Evergreen in the amount of \$179,652.98, which included the principal amount of \$129,079.56<sup>2</sup>

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22  
23 <sup>2</sup>The \$129,079.56 principal consisted of \$9,493.67 that Evergreen deducted from its  
24 employees’ wages for unpaid vacation contributions to the Vacation Trust; \$62,282.55 that Evergreen  
25 owed to the Medical Trust as contributions toward its employees’ medical benefits; and \$12,541.09  
that Evergreen deducted from its employees’ after-tax wages for Union dues and failed to pay to the  
Carpenters Trusts as collection agent for the Union. *Id.* ¶8.

1 in employer contributions and employee wage deductions that Evergreen failed to pay to  
2 plaintiffs. Id. ¶8; dkt. #30 (Brown Decl.), Ex. C at 21. Plaintiffs claim that Evergreen failed to  
3 pay the judgment and that Evergreen is now out of business. Dkt. #28 (Mot.) at 4. On January  
4 25, 2010, plaintiffs filed their complaint against defendant seeking to hold him personally liable  
5 for the debt owed by Evergreen.<sup>3</sup>

## 6 ANALYSIS

7 Summary judgment is appropriate if there is no genuine dispute as to any material fact  
8 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The  
9 moving party bears the initial burden of demonstrating the absence of a genuine issue of  
10 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the moving party will  
11 have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of  
12 fact could find other than for the moving party. Calderone v. United States, 799 F.2d 254, 259  
13 (6<sup>th</sup> Cir. 1986). If the moving party meets the initial burden, the opposing party must set forth  
14 specific facts showing that there is a genuine issue of fact for trial in order to defeat the motion.  
15 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Court must view the evidence  
16 in the light most favorable to the nonmoving party and draw all reasonable inferences in that  
17 party's favor. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150-51 (2000). However,  
18 if a party fails to file papers in opposition to a motion, such failure may be considered by the  
19 Court as an admission that the motion has merit. Local Civ. R. 7(b).

### 18 I. Breach of Fiduciary Duty under ERISA

19 ERISA permits suits for breach of fiduciary duty only against ERISA defined  
20 fiduciaries. Az. State Carpenters Pension Trust Fund v. Citibank, 125 F.3d 715, 719 (9th Cir.

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21  
22 <sup>3</sup>On August 3, 2010, the Court ordered defendants to pay plaintiffs \$980.50 in attorney's fees  
23 incurred in moving for a default judgment. Plaintiffs claim that defendants have not made payment.  
24 Dkt. #30 (Brown Decl.) ¶5. Rather than move to enforce the Court Order and seek sanctions, plaintiffs  
25 move for partial summary judgment against defendant Miller seeking an Order requiring him to pay  
26 plaintiffs the sum of \$980.50 within ten days of this Order. The Court GRANTS plaintiffs' request.

1 1997). Fiduciary status under ERISA is to be construed liberally, consistent with ERISA’s  
2 policies and objectives. Id. at 720. A person is a fiduciary with respect to a plan to the extent  
3 “he exercises any discretionary authority or discretionary control respecting management of  
4 such plan or exercises any authority or control respecting management or disposition of its  
5 assets.” 29 U.S.C. §1002(21)(A). Contributions deducted from an employee’s wages become  
6 plan assets as soon as they can feasibly be segregated from the employer’s other assets, but not  
7 more than ninety days after withholding. See 29 C.F.R. §2510.3-102(a)(1). Those assets must  
8 “be held for the exclusive purposes of providing benefits to participants in the plan.” 29 U.S.C.  
9 §1103(c)(1). Plan fiduciaries must discharge their duties “with the care, skill, prudence, and  
10 diligence under the circumstances then prevailing that a prudent man acting in a like capacity  
11 and familiar with such matters would use.” Id. §1104(a)(1)(B). Fiduciaries must also discharge  
12 their duties “solely in the interest of the participants and beneficiaries and . . . for the exclusive  
13 purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying  
14 reasonable expenses of administering the plan.” Id. §1104(a)(1)(A). An ERISA fiduciary is  
15 prohibited from dealing with assets of a trust fund in his own interest or for his own account.  
16 Id. §1106(b)(1).

17 Defendant is the President, Vice President, Secretary, Treasurer, Chairman of the Board,  
18 and Director of Evergreen. Dkt. #30 (Brown Decl.), Ex. A-1 at 7. In their complaint, plaintiffs  
19 allege that defendant “was responsible for the day-to-day operations of Evergreen and for all or  
20 a majority of its decisions as to the payment of contributions and employee wage deductions to  
21 the Carpenters Trusts, including decisions whether or not, and if so, when to make such  
22 payments to the Carpenters Trusts, and if not, what to do with the amounts deducted from  
23 Evergreen’s employees’ wages.” Dkt. #1 (Compl.) ¶8. Plaintiffs also allege that defendant  
24 “exercised his discretion to use for his own purposes the sum of \$9,493.67 deducted for  
25 Vacation Trust contributions from Evergreen’s employee wages.” Id. ¶9. In his answer to  
26 paragraphs 8 and 9, defendant responded “the allegations ask for a legal conclusion and  
therefore Defendants deny.” Dkt. #6 (Ans.) ¶¶8-9. Although there were legal conclusions

1 within paragraphs 8 and 9 of the complaint, the statements quoted above are factual allegations,  
2 not legal conclusions. Since defendants did not deny the factual allegations and defendant  
3 Miller has failed to respond to the motion, they are deemed admitted. Fed. R. Civ. P. 8(b)(6);  
4 Local Civ. R. 7(b); Legal Aid Society of Alameda Cnty. v. Brennan, 608 F.2d 1319, 1334 (9th  
5 Cir. 1979) (“The allegations are to be treated as admitted since not denied.”).

6 The Court finds that defendant Miller exercised authority and control over the  
7 management and disposition of the assets of the Vacation Trust. Accordingly, Defendant is a  
8 fiduciary within the meaning of 29 U.S.C. §1002(21)(A). The Court also finds that defendant  
9 breached his fiduciary duty by failing to ensure the proper disposition of the Vacation Trust  
10 assets.

## 11 **II. Breach of Fiduciary Duty under RCW 49.52.010**

12 RCW 49.52.010 provides that “all money to be paid by an employer as his or her  
13 contribution for furnishing . . . medical or surgical treatment, nursing, hospital service,  
14 ambulance service, dental service, burial service, or any or all of the above enumerated services  
15 . . . are hereby declared to be a trust fund for the purposes for which the same are collected.  
16 The Medical Trust agreement defines fiduciary as “any person or party who exercises any  
17 discretionary authority or discretionary control with respect tot he management of the Fund or  
18 the management or disposition of any assets of the Fund . . . or who has any discretionary  
19 authority or discretionary responsibility in the administration of the Fund or its Plan.” Dkt. #29  
20 (Parker Decl.), Ex. 2 at 10. The Court notes that the Medical Trust agreement appears to  
21 provide for individual employer liability, but plaintiffs have not provided the Court with the  
22 entire agreement. Id.

23 In their complaint, plaintiffs allege that under “RCW 49.52.010, the contributions owing  
24 to the Medical Benefits Trust in the principal amount of \$62,282.55 constituted a trust as to  
25 which Miller was a fiduciary.” Dkt. #1 (Compl.) ¶10. Defendants denied this allegation  
26 because it called for a legal conclusion. Dkt. #6 (Ans.) ¶10. The allegation that “Miller was a  
27 fiduciary” is a legal conclusion. Plaintiffs have not produced any evidence that defendant

1 Miller was a fiduciary within the meaning of the Medical Trust agreement. Additionally,  
2 plaintiffs have not provided the Court with, and the Court is unaware of, any legal authority that  
3 a breach of a collective bargaining agreement constitutes wrongful conduct imposing personal  
4 liability on defendant. But see, Grayson v. Nordic Constr. Co., 92 Wn.2d 548, 554 (1979)  
5 (corporate officer who participated in violation of Consumer Protection Act is personally liable  
6 for wrongful conduct). Accordingly, the Court finds that plaintiffs have not sustained their  
7 burden with respect to their claim for breach of fiduciary duty under RCW 49.52.010.

### 8 **III. Conversion**

9 Conversion is the unjustified, willful interference with a chattel which deprives a person  
10 entitled to the property of possession. In re Marriage of Langham, 153 Wn.2d 553, 564 (2005).  
11 Money may be the subject of conversion if it was wrongfully received by a person charged with  
12 conversion, or if a person was obligated to return the specific money to the person claiming it.  
13 Westview Invs., Ltd. v. U.S. Bank, Nat'l Assoc., 133 Wn. App. 835, 852 (2006). An officer is  
14 personally liable for conversion where he performs an act or series of acts which would amount  
15 to conversion if he acted for himself alone. Consulting Overseas Mgmt., LTD v. Shtikel, 105  
16 Wn. App. 80, 84 (2001).

17 The collective bargaining agreement obligated Evergreen to make deductions for union  
18 dues out of the after-tax wages of its employees, and to pay the monthly deductions to  
19 Carpenters Trust. Dkt. #29 (Parker Decl.) ¶6, Ex. 4. The judgment establishes that Evergreen  
20 owed \$12,541.09 to Carpenters Trust in deductions for union dues. Dkt. #29 (Parker Decl.) ¶8.  
21 Defendant Miller, as the President, Vice President, Secretary, Treasurer, Chairman of the  
22 Board, and Director of Evergreen, was obligated to pay \$12,541.09 on behalf of Evergreen to  
23 the Carpenters Trust, and failed to do so. Accordingly, the Court finds defendant Miller  
24 personally liable to plaintiffs for \$12,541.09. Consulting Overseas, 105 Wn. App. at 84.

### 25 **IV. Double Damages under RCW 49.52.050 and 49.52.070**

26 RCW 49.52.070 provides that any employer who violates any provision of RCW  
49.52.050(1) or (2) will be liable in a civil action by the aggrieved employee or his assignee to

1 judgment for twice the amount of wages unlawfully rebated or withheld by way of exemplary  
2 damages. RCW 49.52.050(2) provides, in relevant part, that any employer or officer who  
3 “[w]ilfully and with intent to deprive the employee of any part of his or her wages, shall pay  
4 any employee a lower wage than the wage such employer is obligated to pay such employee by  
5 any statute, ordinance, or contract” shall be guilty of a misdemeanor. RCW 49.52.050(2).  
6 Willful means that the person knows what he is doing, intends to do what he is doing, and is a  
7 free agent. Schilling v. Radio Holdings, Inc., 136 Wn. 2d 152, 159-60 (1998). Lack of intent  
8 may be established either by a finding of carelessness or by the existence of a bona fide dispute  
9 regarding the payment of wages. Id. at 160.

10 Plaintiffs have not presented any evidence as to whether defendant’s failure to pay was  
11 willful, careless, or for some other reasons. Plaintiffs have not sustained their burden on  
12 summary judgment with respect to their claim for violation of RCW 49.52.050 and 49.52.070.

### 12 CONCLUSION

13 For all the foregoing reasons, the Court GRANTS plaintiffs’ motion against defendant  
14 Larry Miller with respect to plaintiffs’ claim for breach of fiduciary duty under ERISA in the  
15 amount of \$9,493.67, and for conversion in the amount of \$12,541.09. The Court also  
16 GRANTS plaintiffs’ request to Order defendant to pay plaintiffs the sum of \$980.50 within ten  
17 days of this Order. The Court DENIES plaintiffs’ motion on their claims for breach of  
18 fiduciary duty under RCW 49.52.010 and violations of RCW 49.52.050 and 49.52.070.

19 DATED this 28<sup>th</sup> day of February, 2011.

20 

21 Robert S. Lasnik  
22 United States District Judge