

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA (INDIANAPOLIS)

FILED

JUN 29 2011

U.S. CLERK'S OFFICE
INDIANAPOLIS, INDIANA

HILDA L. SOLIS, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

JAMES H. TROTTER, SR., SYLVIA TROTTER,
TROTTER CONSTRUCTION COMPANY, INC.,
TROTTER DEVELOPMENT GROUP, NC, LLC, and
the TROTTER CONSTRUCTION COMPANY, INC.
401(k) PLAN,

Defendants.

CIVIL ACTION

1:11-cv-0881 RLY-TAB

Case No.

COMPLAINT

Plaintiff, Hilda L. Solis, Secretary of Labor, United States Department of Labor (the Secretary), alleges as follows:

1. This cause of action arises under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. §§1001, et seq., and is brought by the Secretary under ERISA §§502(a)(2) and (5), 29 U.S.C. §§1132(a)(2) and (5), to enjoin acts and practices which violate the provisions of Title I of ERISA, to obtain appropriate relief for breaches of fiduciary duty under ERISA §409, 29 U.S.C. §1109, and to obtain such further equitable relief as may be appropriate to redress violations and to enforce the provisions of Title I of ERISA.

2. This court has jurisdiction over this action pursuant to ERISA §502(e)(1), 29 U.S.C. §1132(e)(1).

COVERAGE

3. The Trotter Construction Company, Inc. 401(k) 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).

4. Trotter Construction Company, Inc. (Trotter Construction) established an employee welfare plan on January 1, 2005 to provide health care benefits to employees of Trotter Construction and the Trotter Development Group NC, LLC (TDG).

5. Trotter Construction contracted with Anthem Insurance Companies, Inc. d/b/a Anthem Blue Cross and Blue Shield (Anthem) to provide health care benefits to employees of Trotter Construction and TDG during the period from January 1, 2005 through December 22, 2008. Anthem ultimately cancelled the coverage effective December 22, 2008.

6. TDG established an employee welfare plan on March 1, 2009 to provide health care benefits to employees of Trotter Construction and TDG.

7. TDG contracted with American Community Mutual Insurance Company (American) to provide health care benefits to employees of Trotter Construction and TDG during the period from March 1, 2009 through September 30, 2009. American ultimately cancelled the coverage effective September 30, 2009.

8. Trotter Construction established an employee welfare plan on February 1, 2004 to provide group vision benefits to employees of Trotter Construction and TDG.

9. Trotter Construction contracted with Humana CompBenefits Insurance Company to provide vision benefits to employees of Trotter Construction and TDG from February 1, 2004 through July 1, 2009. The vision benefits were cancelled on July 1, 2009 due to non-payment of premiums.

10. Trotter Construction established an employee welfare plan on February 1, 2004 to provide group dental benefits to employees of Trotter Construction and TDG.

11. Trotter Construction contracted with Humana CompBenefits Insurance Company to provide group dental benefits to employees of Trotter Construction and TDG from February 1, 2004 through August 1, 2009. The dental benefits contract was cancelled on August 1, 2009 for non-payment of premiums.

12. The welfare plans that Trotter Construction and TDG established to provide health, vision, and dental benefits, collectively referred to hereafter as the Trotter Group Health Plans are employee benefit plans within the meaning of ERISA §3(3), 29 U.S.C. §1002(3), which are subject to the provisions of Title I of ERISA pursuant to ERISA §4(a), 29 U.S.C. §1003(a).

13. During the relevant periods, Trotter Construction and TDG determined the eligibility requirements for coverage under the Trotter Group Health Plans, selected the insurance carriers who would provide benefits under the plans and set employee contribution rates.

14. The 401(k) Plan is named as a defendant herein pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

15. Venue of this action lies in the Southern District of Indiana pursuant to ERISA §502(e)(2), 29 U.S.C. §1132(e)(2), because the 401(k) Plan and Trotter Group Health Plans were administered in Indianapolis, Indiana, in Marion County, within this district.

DEFENDANTS AND PARTIES

16. At all relevant times, Defendant James H. Trotter, Sr. (J. Trotter) was the sole owner and President of Trotter Construction and TDG, Trustee of the 401(k) Plan, a fiduciary to the 401(k) and Trotter Group Health Plans within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A) and a party in interest to the 401(k) Plan and Trotter Group Health Plans within the meaning of ERISA §3(14)(A), (E) and (H), 29 U.S.C. §1002(14)(A), (E) and (H).

17. At all relevant times, Defendant Sylvia Trotter (S. Trotter) was the Vice President of Human Resources for the Trotter Construction, Trustee of the 401(k) Plan, a fiduciary to the 401(k) Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A) and a party in interest to the 401(k) within the meaning of ERISA §3(14)(A) and (H), 29 U.S.C. §1002(14)(A) and (H).

18. At all relevant times, Trotter Construction was an Indiana corporation, was the 401(k) Plan sponsor and Plan Administrator, was a participating employer in the Trotter Group Health Plans, was a fiduciary to the 401(k) Plan and Trotter Group Health Plans within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A) and a party in interest to the 401(k) Plan and the Trotter Group Health Plans within the meaning of ERISA §3(14)(A) and (C), 29 U.S.C. §1002(14)(A) and (C).

19. From January 1, 2002 through December 31, 2009, TDG was a participating employer in the 401(k) Plan and the Trotter Group Health Plans, was a fiduciary to the 401(k) Plan and Trotter Group Health Plans within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A) and a party in interest to the 401(k) Plan and Trotter Group Health Plans within the meaning of ERISA §3(14)(A) and (C), 29 U.S.C. §1002(14) and (C).

VIOLATIONS

COUNT I: Failure to Remit Employee Contributions and Loan Repayments to the 401(k) Plan

20. Paragraphs 1-3, 14-19 above are realleged and incorporated herein by reference.

21. The 401(k) Plan was established effective August 1, 1999 and restated effective January 1, 2008 by Trotter Construction, the plan sponsor, to provide retirement benefits to Trotter Construction's and TDG's employees and their beneficiaries.

22. At all relevant times, the 401(k) Plan's governing documents, which were adopted by Trotter Construction, provided in pertinent part that participants could make pre-tax contributions from their compensation to the Plan in an amount up to the contribution limitations set by the Internal Revenue Code on a yearly basis.

23. Defendants Trotter Construction and/or TDG withheld employee contributions from their employees' paychecks for contribution to the 401(k) Plan. These contributions were retained in Trotter Construction's and/or TDG's corporate bank account until they were remitted to the 401(k) Plan's account.

24. Section 5.16 of the 401(k) Plan's governing document provides that participants of the 401(k) Plan may take loans from their plan accounts, subject to certain conditions. At certain times, employees of Trotter Construction had loan repayments withheld from their paychecks to repay their participant loans.

25. During the period August 22, 2008 through May 15, 2009, Defendants Trotter Construction and/or TDG withheld \$27,799.46 from its employees' pay in employee contributions and failed to remit the amounts so withheld to the employees' 401(k) Plan accounts.

26. During the period August 22, 2008 through May 15, 2009, Defendant J. Trotter caused Trotter Construction and/or TDG to retain the employee contributions it had withheld in their

corporate accounts and failed to ensure that the amounts withheld from employees' pay were deposited into the employees' 401(k) Plan accounts.

27. During the period from August 22, 2008 through May 15, 2009, Defendants Trotter Construction and/or TDG withheld \$9,490.20 from their employees' pay in loan repayments and failed to remit the amount so withheld to the employees' 401(k) Plan accounts.

28. Defendant J. Trotter caused Trotter Construction and/or TDG to retain the employee loan repayment withheld from August 22, 2008 through May 15, 2009 in their corporate accounts and failed to ensure that the amount so withheld from the employees' pay was deposited into their 401(k) Plan accounts.

29. Defendant S. Trotter failed to ensure that the amounts so withheld from employees' pay, as set forth in paragraphs 26 and 28, were deposited into the employees' 401(k) Plan accounts.

30. By the conduct described in paragraphs 21 through 28 above, Defendants Trotter Construction, TDG and J. Trotter:

a. failed to ensure that all assets of the 401(k) Plan were held in trust and did not inure to the benefit of Trotter Construction and/or TDG, in violation of ERISA §403(a) and (c)(1), 29 U.S.C. 1103(a) and (c)(1);

b. failed to act solely in the interest of the participants and beneficiaries of the 401(k) Plan and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of 401(k) Plan administration, in violation of ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A);

c. caused the 401(k) Plan to engage in transactions which they 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 401(k) Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D); and

d. dealt with assets of the 401(k) Plan in their own interest in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1); and

e. acted on behalf of a party whose interests are adverse to the interests of the 401(k) Plan or in the interests of its participants and beneficiaries, in violation of ERISA §406(b)(2), 29 U.S.C. §1106(b)(2).

31. Defendant S. Trotter is liable, pursuant to ERISA §405(b)(1), 29 U.S.C. §1105(b)(1) for the breaches of fiduciary responsibility, as described in paragraphs 23-29, above, by Defendant J. Trotter, a co-Trustee, because: (A) she failed to use reasonable care to prevent a co-trustee from committing a breach, and (B) she is liable as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee.

**COUNT II: Failure to Timely Remit Employee Contributions
and Loan Repayments to the 401(k) Plan**

32. Paragraphs 1-3, 14-24 above are realleged and incorporated herein by reference.

33. During some of the period from January 1, 2004 through August 21, 2008, Defendants Trotter Construction and/or TDG withheld \$322,008.84 from their employees' pay in employee contributions and failed to timely remit the amounts so withheld to the employees' 401(k) Plan accounts.

34. During some of the period from January 1, 2004 through August 21, 2008, Defendant J. Trotter caused Trotter Construction and/or TDG to retain the employee contributions they had withheld in their corporate accounts and failed to ensure that the amounts withheld from employees' pay were timely deposited into the employees' 401(k) Plan accounts.

35. During some of the period from January 1, 2004 through August 21, 2008, Defendant Trotter Construction withheld \$46,657.54 from its employees' pay in employee loan repayments and failed to timely remit the amounts so withheld to the employees' 401(k) Plan accounts.

36. During some of the period from January 1, 2004 through August 21, 2008, Defendant J. Trotter caused Trotter Construction to retain the employee loan repayments it had withheld in its corporate account and failed to ensure that the amounts withheld from employees' pay were timely deposited into the employees' 401(k) Plan accounts.

37. Defendant S. Trotter failed to ensure that the amounts so withheld from employees' pay, as set forth in paragraphs 34 and 36, were deposited into the employees' 401(k) Plan accounts.

38. By the conduct described in paragraphs 33 through 36 above, Defendants Trotter Construction, TDG and J. Trotter:

a. failed to ensure that all assets of the 401(k) Plan were held in trust and did not inure to the benefit of Trotter Construction and/or TDG, in violation of ERISA §403(a) and (c)(1), 29 U.S.C. 1103(a) and (c)(1);

b. failed to act solely in the interest of the participants and beneficiaries of the 401(k) Plan and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of 401(k) Plan administration, in violation of ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A);

c. caused the 401(k) Plan to engage in transactions which they 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 401(k) Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D); and

d. dealt with assets of the 401(k) Plan in their own interest in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1); and

e. acted on behalf of a party whose interests are adverse to the interests of the 401(k) Plan or in the interests of its participants and beneficiaries, in violation of ERISA §406(b)(2), 29 U.S.C. §1106(b)(2).

39. Defendant S. Trotter is liable, pursuant to ERISA §405(b)(1), 29 U.S.C. §1105(b)(1) for the breaches of fiduciary responsibility, as described in paragraphs 23-29, above, by Defendant J. Trotter, a co-Trustee, because: (A) she failed to use reasonable care to prevent a co-trustee from committing a breach, and (B) she is liable as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee.

**COUNT III: Failure to Remit Employee Premium Contributions
for Health, Dental, and Vision to the Trotter Group Health Plans**

40. Paragraphs 1-2,4-13,15-16,18-19, above, are realleged and incorporated herein by reference.

41. During some of the period from December 22, 2008 through December 31, 2009, Defendants Trotter Construction and/or TDG withheld \$18,517.44 in employee health premium contributions and failed to remit them to the Trotter Group Health Plan.

42. During the period from December 22, 2008 through December 31, 2009, Defendant J. Trotter caused Trotter Construction and/or TDG to retain the employee contributions for health premiums in Trotter Construction and/or TDG's corporate account and failed to ensure that the amounts so withheld from employees' pay were remitted for health care coverage.

43. During the period from July 1, 2009 through December 31, 2009, Trotter Construction and/or TDG withheld \$496.62 from employees' pay for vision premiums and failed to remit them to Humana CompBenefits Insurance Company.

44. During the period from July 1, 2009 through December 31, 2009, Defendant J. Trotter caused Trotter Construction and/or TDG to retain the employee contributions for vision premiums in its corporate account and failed to ensure that the amounts so withheld from employees' pay were remitted for vision care coverage.

45. During the period from August 1, 2009 through December 31, 2009, Trotter Construction and/or TDG withheld \$2,560.38 from employees' pay for dental premiums and failed to remit them to Humana CompBenefits Insurance Company.

46. During the period from August 1, 2009 through December 31, 2009, Defendant J. Trotter caused Trotter Construction and/or TDG to retain the employee contributions for dental premiums in its corporate account and failed to ensure that the amounts so withheld from employees' pay were remitted for dental care coverage.

47. By the conduct described in paragraphs 41-46, Defendants J. Trotter, Trotter Construction and TDG:

a. failed to ensure that all assets of the Trotter Group Health Plans were held in trust and did not inure to the benefit of Trotter Construction and/or TDG, in violation of ERISA §403(a) and (c)(1), 29 U.S.C. 1103(a) and (c)(1);

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

c. caused the Trotter Group Health Plans to engage in transactions which they 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 Trotter Group Health Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D); and

d. dealt with assets of the Trotter Group Health Plan in their own interest in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1); and

e. acted on behalf of a party whose interests are adverse to the interests of the Trotter Group Health Plan or in the interests of its participants and beneficiaries, in violation of ERISA §406(b)(2), 29 U.S.C. §1106(b)(2).

PRAYER FOR RELIEF

WHEREFORE, the Secretary prays for judgment:

A. Permanently enjoining Defendants J. Trotter, S. Trotter, Trotter Construction and TDG from violating the provisions of Title I of ERISA;

B. Ordering Defendants J. Trotter, S. Trotter, Trotter Construction and TDG to make good to the 401(k) Plan and Trotter Group Health Plans any losses, including interest, resulting from fiduciary breaches committed by them or for which they are liable;

C. Ordering Defendants J. Trotter, S. Trotter, Trotter Construction and TDG to correct the prohibited transactions in which they engaged;

D. Permanently enjoining Defendants J. Trotter and S. Trotter from serving as a fiduciary or service provider to any ERISA-covered Plan;

E. Appointing an Independent Fiduciary to administer the plans;

F. Awarding the Secretary the costs of this action; and

G. Ordering such further relief as is appropriate and just.

M. PATRICIA SMITH
Solicitor of Labor

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