

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

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THOMAS E. PEREZ,	:	
SECRETARY OF LABOR,	:	
UNITED STATES	:	
DEPARTMENT OF LABOR,	:	
	:	
	:	
Plaintiff,	:	Civil Action No:
v.	:	
	:	
	:	
TIMOTHY A. CLARK,	:	
CENTRAL PENNSYLVANIA	:	
PULMONARY ASSOCIATES, LLC, AND	:	
CENTRAL PENNSYLVANIA	:	
PULMONARY	:	
ASSOCIATES, LLC 401(K) PLAN	:	
	:	
Defendants.	:	
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**COMPLAINT**

Secretary of Labor, United States Department of Labor, hereby alleges:

**Jurisdiction and Venue**

1. This cause of action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and is brought by the Secretary under Sections 404, 406 and 502 of ERISA, 29 U.S.C. §§ 1104, 1106 and 1132, and 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

Section 409, 29 U.S.C. § 1109, and to obtain such other further relief as may be appropriate to redress violations and enforce the provisions of Title I of ERISA.

2. This Court has subject matter jurisdiction over this action pursuant to Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).

3. Central Pennsylvania Pulmonary Associates, LLC 401(k) Plan (the “Plan”) is an employee benefit plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3), and is therefore subject to the coverage of the Act, pursuant to Section 4(a) of ERISA, 29 U.S.C. § 1003(a). The Plan is administered in Enola, Pennsylvania.

4. Venue with respect to this action lies in Middle District of Pennsylvania, pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

### **The Parties**

5. The Secretary, pursuant to Sections 502(a)(2) and (5) of ERISA, 29 U.S.C. §§ 1132(a)(2) and (5), has the authority to enforce the provisions of Title I of ERISA by, among other means, the filing and prosecution of claims against fiduciaries and others who commit violations of ERISA.

6. Central Pennsylvania Pulmonary Associates, LLC. is the Plan Sponsor and Plan Administrator of the Plan (the “Company”). At all relevant times, the Company exercised discretionary authority and discretionary control respecting

management of the Plan, exercised authority and control respecting management or disposition of the Plan's assets, and had discretionary authority or discretionary responsibility in the administration of the Plan. The Company, therefore, is a fiduciary of the Plan within the meaning of Section 3(21) of ERISA, 29 U.S.C. § 1002(21), and a party-in-interest as that term is defined in Sections 3(14)(A) and (C) of ERISA, 29 U.S.C. §§ 1002(14)(A) and (C).

7. At all relevant times, Timothy A. Clark ("Clark") was President of the Company and a trustee of the Plan. At all relevant times, Clark exercised discretionary authority and discretionary control respecting management of the Plan, exercised authority and control respecting management or disposition of the Plan's assets, and had discretionary authority and discretionary responsibility in the administration of the Plan. Clark, therefore, is a fiduciary of the Plan within the meaning of Section 3(21) of ERISA, 29 U.S.C. § 1002(21), and a party-in-interest as that term is defined in Sections 3(14) (A) and (E) of ERISA, 29 U.S.C. §§ 1002(14) (A) and (E).

8. The Plan is joined as a party defendant pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

### General Allegations

9. The Company established the 401(k) Plan in 2005. The Plan permitted participants to contribute a portion of their pay to the Plan as elective salary deferrals (“employee contributions”) through payroll deductions.

10. For payroll periods between June 15, 2010 and April 30, 2011 (“the relevant period”), Clark deducted money from the participants’ pay as employee contributions or participant loan repayments to the Plan. During the relevant period, Clark and the Company failed to remit employee contributions and participant loan repayments to the Plan. In addition, Clark and the Company remitted certain employee contributions and participant loan repayments late without interest.

11. Unremitted employee contributions and participant loan repayments are assets of the Plan within the meaning of ERISA. Defendants Clark and the Company failed to segregate the Plan assets from the general assets of the Company.

12. Clark and the Company failed to ensure that the Plan assets described in paragraph 11, *supra*, were collected by the Plan.

13. Clark and the Company participated knowingly in or knowingly undertook to conceal acts or omissions by each other that they knew to be violations of ERISA.

14. Clark and Company failed to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and each enabled the other to commit a breach of ERISA.

15. Clark and the Company knew that the other had violated ERISA, but did not make reasonable efforts under the circumstances to remedy the breaches.

### **Violations**

16. Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, the Secretary adopts by reference the averments and allegations of paragraphs 9-15 inclusive.

17. By the actions and conduct described in paragraphs 9-15, Defendants Clark and the Company, as fiduciaries of the Plan:

- a. failed to ensure that all assets of the Plan were held in trust by one or more trustees, in violation of Section 403(a) of ERISA, 29 U.S.C. § 1103(a);

- b. failed to ensure that the assets of the Plan did not inure to the benefit of the company in violation of Section 403(c)(1) of ERISA, 29 U.S.C. § 1103(c) (1);
- c. failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plan, in violation of Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A);
- d. failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of Section 404(a)(1)(B) of ERISA, 29 U.S.C. § 1104(a)(1)(B);
- e. caused the Plan to engage in transactions which they knew or should have known constituted the direct or indirect transfer of Plan assets to, or use of Plan assets by or for the benefit of a

party-in-interest, in violation of Section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D); and

- f. dealt with assets of the Plan in their own interest or for their own account, in violation of Section 406(b)(1) of ERISA, 29 U.S.C. § 1106(b) (1).

18. By participating knowingly in the fiduciary breaches of one another, knowing such acts or omissions to be breaches of fiduciary duty, Clark and the Company are each liable for the other's breaches of fiduciary responsibility, pursuant to Section 405(a)(1) of ERISA, 29 U.S.C. § 1105(a)(1).

19. Clark failed to comply with Section 404(a) in the administration of his specific duties which gave rise to his status as a fiduciary, and thus enabled the Company to commit breaches of ERISA and is liable for the Company's breaches pursuant to 405(a)(2) of ERISA, 29 U.S.C. § 1105(a)(2).

20. Clark and the Company, as fiduciaries of the Plan, by failing to make reasonable efforts under the circumstances to remedy the breaches of which they had knowledge, are each liable for the other's fiduciary breaches, pursuant to Section 405(a) (3) of ERISA, 29 U.S.C. § 1105(a)(3).

### **Prayer for Relief**

WHEREFORE, the Secretary prays that this Court issue an order:

- a. Ordering the defendants to restore to the Plan all losses, including interest or lost opportunity costs and the costs of the independent fiduciary, which were caused by their fiduciary misconduct;
- b. Requiring the Plan to set off any individual account balance of Clark against the amount of losses, including interest or lost opportunity costs and the costs of the independent fiduciary, resulting from his fiduciary breaches, as authorized by 29 U.S.C. § 1056(d)(4), and reallocate it to the non-breaching participants, if the losses are not otherwise restored to the Plan by defendants;
- c. Removing Clark and the Company as fiduciaries of the Plan and of any employee benefit plan for which they act as fiduciaries;
- d. Permanently enjoining Clark and the Company from acting directly or indirectly, in any fiduciary capacity, with respect to any employee benefit plan subject to ERISA;
- e. Permanently enjoining Clark and the Company from exercising any custody, control, or decision making authority with respect to the assets of any employee benefit plan covered by ERISA;
- f. Appointing an independent fiduciary with plenary authority and control with respect to the management and administration of the

Plan, including the authority to marshal assets on behalf of the Plan, to pursue claims on behalf of the Plan, and to take all appropriate action for the termination of the Plan and the distribution of benefits to the Plan's participants and beneficiaries, with all costs to be borne by the defendants;

- g. Ordering the defendants, their agents, employees, service providers, banks, accountants, and attorneys to provide the Secretary and the independent fiduciary with all of the books, documents, and records relating to the finances and administration of the Plan, and to make an accounting to the Secretary and to the independent fiduciary of all contributions to the Plan and all transfers, payments, or expenses incurred or paid in connection with the Plan;

- h. Awarding plaintiff, Secretary of Labor, the costs of this action;

and

- i. Awarding such other relief as is equitable and just.

Respectfully submitted,

M. Patricia Smith  
Solicitor of Labor

Catherine Oliver Murphy  
Regional Solicitor

/s/ Jodeen M. Hobbs

Jodeen M. Hobbs

Attorney

Suite 630E, The Curtis Center

170 S. Independence Mall West

Philadelphia, PA 19106

(215) 861-5143, (215) 861-5162 (fax)

Hobbs.Jodeen@dol.gov

PA 80200

U.S. DEPARTMENT OF LABOR