

as defined in ERISA §502, which "applicable recovery amount" in this case is \$8,646.00. Defendant agrees to pay said penalty as directed by the assessment letter, except to the extent that Defendant seeks and is granted a waiver in the Secretary's sole discretion, pursuant to ERISA § 502(l)(3)(B).

The parties now move for entry of this Consent Judgment and Order which constitutes a full and complete resolution of all claims and issues arising between them in connection with this action.

Now, therefore, by consent of the parties hereto,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Defendant is permanently enjoined from violating ERISA Sections 404 and 406, 29 U.S.C. Sections 1104 and 1106.
2. Defendant shall pay to the Central NY Weight Loss, LLC Employee Savings and Retirement Plan and Trust ("the Plan") the total amount of \$8,646.00, representing outstanding monies due and owing to the non-fiduciary Plan participants and/or beneficiaries.

Payment shall be made on a monthly installment basis for twenty-four (24) months in accordance with the following schedule:

Month 1:	\$250.00
Month 2:	\$260.00
Month 3:	\$270.00
Month 4:	\$280.00
Month 5:	\$290.00

Month 6:	\$300.00
Month 7:	\$310.00
Month 8:	\$320.00
Month 9:	\$330.00
Month 10:	\$340.00
Month 11:	\$350.00
Month 12:	\$360.00
Month 13:	\$415.50
Month 14:	\$415.50
Month 15:	\$415.50
Month 16:	\$415.50
Month 17:	\$415.50
Month 18:	\$415.50
Month 19:	\$415.50
Month 20:	\$415.50
Month 21:	\$415.50
Month 22:	\$415.50
Month 23:	\$415.50
Month 24:	\$415.50

Interest shall accrue on any unpaid balance at a post-judgment rate of .13% until the full amount due is paid. Monthly payments are due on or before the 15th date of each month, and shall commence no later than January 15, 2015.

Defendant shall ensure that the non-fiduciary plan participants receive their share consistent with their entitlements to these contributions, plus a pro rata share of the accrued interest.

3. Defendant shall submit the following, setting forth evidence of compliance with the provisions of Paragraph 2 of this Consent Judgment and Order.

Within thirty (30) days of each payment, Defendants shall submit a written report to Plaintiff showing a full accounting of the proceeds allocated to the participants' and/or beneficiaries' accounts. Proof of payments and reports of compliance shall be sent to the following address:

Susan A. Hensley, Regional Director
Employee Benefit Security Administration
U.S. Department of Labor, J. F. Kennedy Federal Building,
Room 575
Boston, MA 02203

4. Each party shall bear its own fees and expenses with respect to this action.

5. The Court shall retain jurisdiction of this matter for purposes of enforcing this Consent Judgment and Order.

6. Nothing in this Judgment is binding on any governmental agency other than the United States Department of Labor.

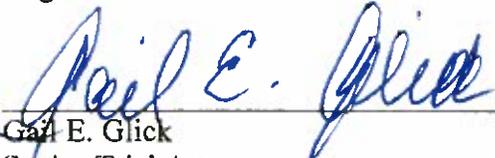
IT IS SO ORDERED THIS _____ day of _____, _____.

Consented to by:

For the Plaintiff, Thomas E. Perez, Secretary of Labor:

M. Patricia Smith
Solicitor of Labor

Michael D. Felsen
Regional Solicitor



Gail E. Glick
Senior Trial Attorney



Dated

U.S. Department of Labor
Office of the Solicitor
John F. Kennedy Federal Building
Room E-375
Boston, MA 02203
TEL: 617-565-2500

For Defendant:



Richard Curtis Herring



Dated

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

THOMAS E. PEREZ, Secretary of Labor, *
United States Department of Labor, *

Plaintiff, *

v. *

RICHARD CURTIS HERRING, *

Defendant. *

CIVIL ACTION

FILE NO. 1:15-cv-10034

COMPLAINT

Thomas E. Perez, Secretary of the United States Department of Labor, hereby alleges:

(1) This action arises under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, and is brought to obtain appropriate relief, to redress violations, to obtain restitution from employee benefit plan fiduciaries and parties in interest, and to obtain other equitable relief necessary to enforce the provisions of Title I of ERISA, pursuant to ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5).

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

(3) Venue of this action lies in the District of Massachusetts pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

(4) During the pertinent period, June 2012 to October 2012, Central NY Weight Loss, LLC ("the Company"), had been an employer, within the meaning of ERISA § 3(5), 29 U.S.C. § 1002(5), and was registered in Massachusetts with a registered agent address of 14 Francis Road, Wellesley, MA, within the jurisdiction of this Court.

(5) Until it ceased operations on or about January 8, 2014, the Company was in the business of providing weight loss assistance through a Jenny Craig franchise with eight locations in New York State. Defendant Richard Curtis Herring ("Herring") was the sole Member and Business Manager of the Company.

(6) On May 1, 2012, the Company established the Central NY Weight Loss, LLC Employee Savings and Retirement Plan and Trust ("the Plan"), an employee pension benefit plan within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), and which is covered under ERISA pursuant to § 4(a), 29 U.S.C. § 1003(a).

(7) The purpose of the Plan was, and is, to provide retirement benefits for the exclusive benefit of its participants and their beneficiaries, employees of the Company.

(8) The Company was, and is, the sponsor of the Plan, as defined by ERISA § 3(16)(B)(i), 29 U.S.C. § 1002(16)(B)(i), and acted as Plan Administrator for the Plan during the pertinent period and, as such, was a fiduciary with respect to the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

(9) During the pertinent period, the Company, as a Plan fiduciary and sponsoring employer, was a party in interest within the meaning of ERISA § 3(14)(A) and (C), 29 U.S.C. § 1002(14)(A) and (C).

(10) During the pertinent period, Defendant Richard Curtis Herring was, and is, the Named Fiduciary and Trustee to the Plan, pursuant to the Plan Adoption and Trust

Agreements. Also, Defendant was, and is, the functional fiduciary of the Plan in that he exercised discretionary authority or control respecting management of the Plan and exercised authority or control respecting management or disposition of assets of the Plan by making administrative and funding decisions regarding the Plan, signing all Plan documents, and having sole authority to transfer funds from the Company account to the Plan account. As such, Herring was, and is, a fiduciary with respect to the Plan within the meaning of ERISA §3(21)(A)(i), 29 U.S.C. §1002(21)(A)(i).

(11) Defendant Herring, as Trustee of the Plan and sole Member of the Company, was, and is, a party in interest with respect to the Plan within the meaning of ERISA § 3(14)(A) and (H), 29 U.S.C. § 1002(14)(A) and (H). Defendant Herring resides at 14 Francis Road, Wellesley, Massachusetts, within the jurisdiction of this Court.

(12) The Plan was funded by means of salary deferrals from employees' paychecks, which were to be remitted as contributions to the participants' Plan accounts.

(13) Because the contributions to the Plan were withheld from employees' pay, they became assets of the Plan by operation of 29 C.F. R. § 2510.3-102.

(14) During the pertinent period, Defendant Herring, as Plan Trustee, was solely responsible for remitting any and all monies and other property due to the Plan, including contributions, and for properly managing the assets of the Plan.

(15) During the pertinent period, Defendant Herring failed to take appropriate measures to remit all employee contributions due to the Plan, and to ensure that the withheld employee contributions, as assets of the Plan, were properly forwarded to the participants' Plan accounts.

(16) Specifically, Defendant failed to remit withheld employee contributions to the Plan for pay periods ending on June 11, 2012; June 25, 2012; July 10, 2012; September 27, 2013; and October 1, 2013.

(17) As a result, contributions totaling \$8,646.00 are due and owing to the Plan.

(18) As a result of the conduct set forth at paragraphs 14-17, Defendant Herring failed to discharge his fiduciary duties for the exclusive purpose of providing benefits to participants and their beneficiaries, and defraying reasonable expenses of administering the Plan, in violation of ERISA §404(a)(1)(A), 29 U.S.C. §104(a)(1)(A).

(19) As a result of the conduct set forth at paragraphs 14-17, Defendant Herring failed to discharge his fiduciary duties with care, skill, prudence and diligence, in violation of ERISA §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B).

(20) As a result of the conduct set forth at paragraphs 14-17, Defendant Herring engaged in prohibited transactions by causing or permitting the transfer to or use by parties in interest, Defendant Herring and/or his Company, of Plan assets, in violation of ERISA §406(a)(1)(B), 29 U.S.C. §1106(a)(1)(B).

(21) As a result of the conduct set forth at paragraphs 14-17, Defendant Herring engaged in prohibited transactions by causing or permitting the Plan to engage in transactions constituting a direct or indirect transfer to or use of plan assets for the benefit of Defendant Herring and/or his Company, parties in interest with respect to the Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D).

(22) As a result of the conduct set forth at paragraphs 14-17, Defendant Herring engaged in prohibited transactions by dealing with the assets of the plan in his own interest or his own account, in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1).

(23) As a result of the conduct set forth at paragraphs 14-17, Defendant Herring breached his fiduciary responsibilities to the Plan by acting in his individual capacity and in his capacity as a representative of his Company where those interests were adverse to the interests of the Plan's participants and beneficiaries, in violation of ERISA §406(b)(2), 29 U.S.C. §1106(b)(2).

(24) On May 28, 2014, Defendant Herring filed under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Massachusetts (Case No.: 14-12482).

On October 24, 2014, Plaintiff filed an Adversary Complaint in the matter of *Perez v. Richard Curtis Herring* (Adv. Pro. No. 14-01209) in U.S. Bankruptcy Court for the District of Massachusetts asserting that Debtor Richard Curtis Herring's debts for losses resulting from his breaches of fiduciary duty under ERISA are non-dischargeable under the Bankruptcy provisions of 11 U.S.C. §523 (a)(4).

On November 17, 2014, the parties filed a "Stipulation For Order Regarding Adversary Proceeding Brought By The Secretary of Labor," which the Bankruptcy Court entered the same day. Defendant stipulated that his fiduciary breaches under ERISA constituted defalcation while acting in a fiduciary capacity, and that the debt Defendant owes to the Plan is non-dischargeable in his personal bankruptcy, which was entered by the Court on November 21, 2014.

Plaintiff now files this Complaint in U.S. District Court for the District of Massachusetts to seek a judgment finding Defendant Herring liable for the underlying ERISA violations and for monies due and owing to the Plan.

WHEREFORE, the Secretary of Labor prays that this Court enter an Order:

- (1) Permanently enjoining Defendant from violating, or knowingly participating in violations of, the provisions of ERISA §§ 404 and 406, 29 U.S.C. §§ 1104 and 1106;
- (2) Requiring Defendant to undo the prohibited transactions in which he engaged and to restore to the Plan any and all losses incurred as a result of breaches of his fiduciary duties and violations he committed or for which he is liable, with appropriate interest;
- (3) Appointing an independent fiduciary for the purpose of having appropriate allocations and disbursements made to each of the non-fiduciary Plan participants whose Plan accounts were underfunded, and for the purpose of terminating the Plan;
- (4) Awarding to Plaintiff the costs of this action, and other relief as is equitable and just.

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DATE: 1/8/2015