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FILED

OCT 28 2014

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Plaintiff, vs. ALL AMERICAN RENTALS, INC., a California corporation; MICHAEL CARTER, an individual; and the AAR, INC. INC. 401(K) PLAN, an employee pension benefit plan, Defendants.	Case No. C 12-02758(JST/NC) CONSENT JUDGMENT & ORDER

Plaintiff THOMAS E. PEREZ, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR ("Secretary") pursuant to his authority under §§ 502(a)(2) and (5) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(2) and (5), has filed a

Complaint against Defendants ALL AMERICAN RENTALS, INC., ("AAR, INC."), a California Corporation, MICHAEL CARTER, Secretary and a Director of the Company, and AAR, INC. 401(k) PLAN ("401(k) Plan" or "Plan") an employee pension benefit plan as defined under ERISA Section 3(3), 29 U.S.C. § 1002(3).[1]

A. The Secretary, AAR Inc., Carter, and Plan (collectively, "the parties") admit that the Court has jurisdiction over this action pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), and that venue lies in the Northern District of California pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

B. The parties agree to the entry of this Consent Judgment & Order. The parties further agree that this Consent Judgment & Order shall fully settle all claims of the Secretary asserted in the Complaint filed in this matter.

C. This Consent Judgment & Order is intended to restore losses to eligible Plan participants and beneficiaries other than Michael Carter and Lisa Cravalho Carter ("Eligible Plan Participants") as identified on Exhibit A to this Consent Judgment & Order.

D. All parties expressly waive Findings of Fact and Conclusions of Law.

E. Defendants neither admit nor deny the Secretary's allegations in the Complaint and contained herein.

F. The parties have agreed that this Consent Judgment & Order shall fully settle all claims of the Secretary asserted in the Complaint and further agree to the entry of this Consent Judgment & Order.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

1. Defendants AAR Inc. and Carter violated ERISA and caused $143,158.68 in losses to the 401(k) Plan through unremitted and untimely remitted employee contributions, uncollected Safe Harbor Non-Elective Contributions, and lost-opportunity costs. Defendants have made restorative payments to the Plan prior to and since the filing of the Plaintiff's Complaint. Taking into consideration these payments, at the time of the parties' execution of the

[1] The Plan is named in the Secretary's Complaint solely as a party necessary for complete relief pursuant to Fed. R. Civ. P. 19(a).

Consent Judgment & Order, Defendants AAR, Inc. and Carter are jointly and severally liable for further restoring to the Plan losses and lost-opportunity costs in the amount be of $66,091.39. This outstanding amount of $66,091.39, plus $6,265.00 in reasonable fees and costs of the Independent Fiduciary appointed under the terms of this Consent Judgment & Order shall, for a total $72,356.39 to be paid as set forth in Paragraph 7, *infra*. Judgment shall be entered against them in said amount.

2. Defendants AAR Inc. and Carter are permanently enjoined and restrained from violating the provisions of Title I of ERISA, 29 U.S.C. §§ 1001 -1191c.

3. Defendant Carter is hereby permanently enjoined and restrained from future service as a fiduciary of, or service provider to, any ERISA-covered employee benefit once he is removed as a fiduciary from the Plan and the appointment of an Independent Fiduciary is effective. *See* Paragraph 5, *infra*.

4. Jeanne Barnes Bryant, J.D., CIR, of Receivership Management, Inc., 783 Old Hickory Blvd, Suite 255 Brentwood, TN 37027 shall be, and hereby is, appointed Independent Fiduciary of the Plan, who:

a. Shall collect, marshal, pay out and administer all of the assets of the Plan and take further action with respect to the Plan as appropriate, including terminating the Plan when all of its assets have been distributed to all Eligible Plan Participants;

b. Shall, pursuant to the procedures outlined in the Employee Benefits Security Administration's Field Assistance Bulletin 2004-02, exercise reasonable care and diligence to identify and locate each participant and beneficiary of Plan who is eligible to receive a distribution under the terms of the Plan;

c. Shall have all the rights, duties, discretion, and responsibilities of a trustee, fiduciary, and Plan Administrator under ERISA;

d. Is authorized to delegate or assign fiduciary duties as appropriate and allowed under the law and may retain such as assistance as she may require, including attorneys, accountants, actuaries, and other service providers;

e. Shall be entitled to reasonable fees and costs in the amount of $6,265.00 from Defendants AAR and Carter for her services as Independent Fiduciary to the Plan—no Plan assets will be used to pay for such reasonable compensation;

f. The Independent Fiduciary shall have full access to all data, information, and calculations in the possession of the Plan and under their control, including information and records maintained by the custodial trustees or service providers of the Plan;

g. The Independent Fiduciary is authorized to give instructions respecting the disposition of assets of the respective Plans; and

h. The Independent Fiduciary shall comply with all applicable rules and laws.

5. Upon the appointment of the Independent Fiduciary *infra,* Defendants AAR, Inc. and Carter are hereby removed from their positions as trustee, fiduciary and/or administrator to the Plan.

6. Defendants AAR Inc. and Carter shall pay the total $72,356.39 judgment entered in this matter by:

a. Within thirty (30) days following the entry of this Consent Judgment & Order, shall pay the Independent Fiduciary her $6,265.00 in reasonable fees and costs to administer, wind down and terminate the Plan;

b. Thereafter, restore to the Plan the amount of $66,091.39, plus interest, in accordance with the following payment schedule:

i. One week after paying the Independent Fiduciary her reasonable fees and costs in the amount of $6,265.00, Carter shall submit weekly payments in the amount of $1,750.00 per week by submitting same to the Independent Fiduciary until the identified losses to the Plan totaling $66,091.39, plus applicable interest at the rate of five percent (5%) per annum is paid in full. Payments shall be applied first to accrued interest and then to remaining principal balance owed. There is no penalty to pay all required Plan losses plus applicable interest in full at any time, in advance of the required payment schedule, and no interest shall be

assessed for the first thirty days following entry of this Consent Judgment & Order. Thereafter, interested shall be assessed at five percent (5%) per annum.

ii. Within ten days of entry of an Order to this Consent Judgment, Defendant Carter shall provide a copy of this Consent Judgment & Order to the Plan custodian and Independent Fiduciary;

iii. Within fifteen business days of each action required under Paragraphs 6(a) and (b), supra, Defendant Carter shall provide to the Secretary documentary proof or other appropriate evidence that each required action has been taken.

c. No Plan assets may be used to pay the reasonable fees and expenses of the Independent Fiduciary.

7. Defendant Carter hereby forfeits any interest he may have in any amounts restored to the Plan as a result of this Complaint and Consent Judgment & Order. In addition, a spousal waiver has been executed by Lisa Cravalho Carter who may claim through Defendant Carter any interest in any amounts restored to the Plan under this Complaint and Consent Judgment & Order. An executed copy of the spousal waiver, the terms of which are incorporated into this Consent Judgment & Order by reference, is attached as Exhibit B.

8. It is ORDERED, that in the event of default by Defendant Carter in the payment of the amount due the Independent Fiduciary or any of the weekly installments identified *supra* at Paragraph 6, the total balance remaining unpaid shall then become due and payable and interest shall be assessed against such remaining unpaid balance at a five percent per annum (5%) from the date of this judgment until the total amount of outstanding losses to the Plan is paid in full.

9. Defendants AAR, Inc. and Carter grant the Plan a security interest in AAR Inc.'s accounts receivable in sufficient amounts to secure the indebtedness to the Plan as long as money is owed to the Plan pursuant to this Consent Judgment & Order. Defendant Carter shall properly record the Security Agreement (attached hereto as Attachment C) in accordance with the laws of the State of California within twenty-four (24) hours of the entry of this Consent Order &

Judgment by the Court and documentation of same will be provided to Plaintiff within fourteen days of the entry of this Consent Order & Judgment by the Court.

10. The Secretary and Defendants shall each bear their own costs, expenses, and attorneys' fees incurred to date in connection with any stage of this proceeding, including but not limited to attorneys' fees which may be available under the Equal Access to Justice Act, as amended.

11. Defendants expressly waive any and all claims of any nature which they have or may have against the Secretary, the Department of Labor, or any of its officers, agents, attorneys, employees or representatives, arising out of or in connection with the allegations contained in the Complaint on file in this action, any other proceedings or investigation incident thereto or based on the Equal Access to Justice Act, as amended.

12. Upon Defendants AAR, Inc. and Carter's restoration of losses to the Plan, as outlined in Paragraph 6, *supra*, the Defendants shall be assessed and are jointly and severally liable to pay a penalty under ERISA § 502(l), 29 U.S.C. § 1132(l) in the amount of twenty percent of the applicable recovery amount. Within fifteen (15) days after all losses, plus applicable interest, are restored to the Plan, the Independent Fiduciary shall provide to the Secretary the total amount restored to the Plan (including interest). This amount shall be considered the applicable recovery amount and twenty percent of such amount shall be considered the penalty amount ("Penalty Amount"). The Defendants waive the notice of assessment and service requirement of 29 C.F.R. § 2570.83 and unless the Defendants file a petition for waiver or reduction of the penalty as provided for in 29 C.F.R. §§ 2570.83–2570.87, and the Secretary agrees to waive or reduce the Penalty Amount, within sixty days following the last payment date outlined in Paragraph 6, *supra*, Defendants AAR. Inc. and Carter shall pay the Penalty Amount to the U.S. Department of Labor, by sending a certified or cashier's check payable to the United States Department of Labor (please write EBSA Case No. 70-014222 (48) on the check) to:

<u>Regular U.S. Mail</u>
ERISA - Civil Penalties
P.O. Box 71360
Philadelphia, PA 19176-1360

13. All submissions to Plaintiff required by this Consent Judgment & Order shall be sent to the following address:

Regional Director
Employee Benefits Security Administration
San Francisco Regional Office
90 7th Street, Suite 11-300
San Francisco, CA 94103

14. Defendant Carter agrees that, in the event that he files for bankruptcy protection under any chapter of the United States Bankruptcy Code prior to restoring all payments due under the terms of this Consent Judgment & Order, within thirty (30) calendar days of filing a petition in any U.S. Bankruptcy Court, he will (i) notify the Secretary of his bankruptcy; and (ii) execute a stipulation with the Secretary and consent to the entry of an Order that the any outstanding amounts due the Plan under this Consent Judgment & Order plus interest calculated through the date on which he files for bankruptcy is a non-dischargeable debt pursuant to section 523(a)(4) of the U.S. Bankruptcy Code, 11 U.S.C. § 523(a)(4) ("Stipulation"). The Stipulation and entry of a subsequent Order shall further provide that lost-opportunity costs will continue to accrue at the rate set forth in 26 U.S.C. § 6621 from the date the relevant non-dischargeability order is issued until such time as the Loss Amount is paid to the Plan in full.

15. This Court retains jurisdiction of this action for purposes of enforcing compliance with the terms of this Consent Judgment & Order.

16. By signing their names to this Consent Judgment & Order, the parties represent that they are informed and understand the effect and purpose of this Consent Judgment & Order.

17. This Consent Judgment & Order may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same instrument.

The Court directs the entry of this Consent Judgment & Order as a final order.

IT IS SO ORDERED.

Dated: 10/28/14

UNITED STATES DISTRICT JUDGE

Entry of this Consent Judgment is hereby consented to:

Dated:_____,2014

M. PATRICIA SMITH
Solicitor of Labor

JANET M. HEROLD
Regional Solicitor

DANIELLE L. JABERG
Counsel for ERISA

By_____
LEON PASKER
Senior Trial Attorney

Attorneys for the Plaintiff

Defendants consent to the entry of this Consent Judgment.

Dated:_____

_____
MICHAEL CARTER, in his individual capacity and as President of AAR INC.

Dated: _____

_____
AAR INC.
401(k) PROFIT SHARING PLAN, Trustee

EXHIBIT A

Ahmed, Saiyad
Barajas, Hector
Barajas, Hector E.
Brown, Vernolt
Bueno, Elvis
Buenrostro, Hector
Cao, Chau Minh
Chisholm, Patrick
Contreras, Juan
Daniel, James
Diaz, Alexander
Hanson, Warren
Hibbs, Richard
Imtyaz, Jackie
Lee, Dae S.
Lehmann, Bruce
Muffen, Eric
Nakashima, David
Nakashima, Mike
Ogata, Jason
Osby, Reginald
Perry, Craig
Peru, Lorenzo
Poggetti, Nicholas J.
Prakash, Rajnesh
Ruiz, Juan
Sandoval, Edgardo
Silk, Roger
Szalai, Richard A

EXHIBIT B

WAIVER OF BENEFITS AND SPOUSAL CONSENT

I, Linda Cravalho-Carter, am married to Michael Carter, who is a party to the Consent Judgment in Perez v. AAR Inc. et al., No. 12- 02758 (N. D. CA. _____, 2014), and who is a participant in the AAR INC. 401(k) Plan. In consideration of the Department of Labor's agreement to resolve its allegations against my spouse, and to the extent that my spouse opts to offset assets in his participant account in the AAR INC. 401(k) Plan against his liability to the same, I renounce and agree not to pursue any claims or interest that may have accrued or vested to me, or may later accrue or vest to me in Michael Carter's participant account as community property, as the spouse or beneficiary of Michael Carter, or otherwise. I understand that as a result of my consent to this waiver, I may receive reduced benefits or distributions from Michael Carter's participant account in the AAR INC. 401(k) Plan.

This _____ day of _____, 2014.

_____
LINDA CRAVALHO-CARTER

EXHIBIT C

SECURITY AGREEMENT

This Security Agreement is entered into this _____ day of March, 2014, by All American Rentals, Inc., a California corporation, and Michael Carter, an individual, in consideration of the debt they owe to the AAR Inc. 401(k) Profit Sharing Plan as adjudicated in *Perez v. AAR Inc. et al.,* No. 12- 02758 (N. D. CA. _____,2014).

Within this Security Agreement:

a AAR Inc. will be referred to as "the Corporation."

b AAR Inc. and Michael Carter will be referred to collectively as "the Judgment Debtors."

c The AAR Inc. 401(k) Profit Sharing Plan will be referred to as "the Plan."

d Thomas E. Perez, the Secretary of Labor will be referred to as "the Secretary"

e The Consent Judgment & Order entered in *Perez v. AAR Inc.,et al,* No. 12- 02758 (N. D. Cal. _____, 2014) will be referred to as "the Consent Judgment & Order." A copy of the Consent Judgment & Order is attached hereto and incorporated herein by this reference.

The Judgment Debtors hereby grant to the Plan a Security Interest in the Accounts of the Corporation including all rights which they have now or may have in the future to the payment of money, payments for goods sold or leased or for services rendered whether or not now earned or due, rights to payment arising out of all present and future debt instruments, loans and obligations receivable.

The Judgment Debtors further agree as follows:

1. This Security Agreement secures any debt they now or later may have to the Plan as set forth in the Consent Judgment & Order and will continue in effect until the underlying debt to the Plan is paid in full and discharged in writing by a Satisfaction of Judgment filed by the Secretary.

2. The Judgment Debtors represent that they own the Accounts of the Corporation. The Secretary may examine and inspect the account books of the Judgment Debtors at any reasonable time.

3. That the Secretary may prepare and file a UCC-1 Financing Statement with the California Secretary of State, and/or any appropriate agency or other body and sign the same on Judgment Debtor's behalf.

Dated:_____

_____
MICHAEL CARTER, in his
individual capacity and as President of
AAR INC.