

UNITED STATES DISTRICT COURT

FILED

FOR THE EASTERN DISTRICT OF TENNESSEE

MAR 27 2015

NORTHERN DIVISION

Clerk, U. S. District Court  
Eastern District of Tennessee  
At Knoxville

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

Plaintiff, )

v. )

JAMES H. CARMICHAEL, AN INDIVIDUAL; )  
THE SPECIALTY RESTAURANT GROUP, LLC )  
401(k) PLAN; AND THE SPECIALTY )  
RESTAURANT GROUP, LLC GROUP )  
HEALTH PLAN )

Defendants. )

FILE NO.  
3:15-CV-134  
VARLANI AUSTON

**COMPLAINT**  
**(Injunctive Relief Sought)**

Plaintiff THOMAS E. PEREZ, 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”), 29 U.S.C. § 1001, et seq., and is brought by the Secretary under Sections 502(a)(2) and (5) of ERISA, 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 Section 409 of ERISA, 29 U.S.C. § 1109, and to obtain such other further relief as may be appropriate to redress violations and enforce the provisions of that Title.

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. Venue lies in the Eastern District of Tennessee, pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

4. The Specialty Restaurant Group, LLC 401(k) Plan (hereinafter “the 401(k) Plan”) is an employee benefit plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3), subject to coverage under ERISA pursuant to Section 4(a) of ERISA, 29 U.S.C. § 1003(a), and is joined as a party defendant herein pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to ensure that complete relief may be granted.

5. The Specialty Restaurant Group, LLC Group Health Plan (hereinafter “the Health Plan”) is an employee benefit plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3), subject to coverage under ERISA pursuant to Section 4(a) of ERISA, 29 U.S.C. § 1003(a), and is joined as a party defendant herein pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to ensure that complete relief may be granted.

6. The Specialty Restaurant Group, LLC (“SRG”) is or was at all relevant times a Tennessee corporation wholly owned by Defendant James H. Carmichael, an individual.

7. SRG was the sponsor and administrator of the 401(k) Plan.

8. SRG was at all relevant times a “fiduciary” to the 401(k) Plan within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

9. SRG was at all relevant times a “party in interest” to the 401(k) Plan within the meaning of Sections 3(14)(A), (C), and (G) of ERISA, 29 U.S.C. §§ 1002(14)(A), (C), and (G).

10. SRG was the sponsor and administrator of the Health Plan.

11. SRG was at all relevant times a “fiduciary” to the Health Plan within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

12. SRG was at all relevant times a “party in interest” to the Health Plan within the meaning of Sections 3(14)(A), (C), and (G) of ERISA, 29 U.S.C. §§ 1002(14)(A), (C), and (G).

13. James H. Carmichael (“Carmichael”) was at all relevant times the President and sole owner of SRG and the named Trustee to the 401(k) Plan.

14. Carmichael was at all relevant times a “fiduciary” to the 401(k) Plan within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

15. Carmichael was at all relevant times a “party in interest” to the 401(k) Plan within the meaning of Sections 3(14)(A), (E), and (H) of ERISA, 29 U.S.C. §§ 1002(14)(A), (E), and (H).

16. Carmichael made all decisions with respect to the Health Plan on behalf of SRG.

17. Carmichael was at all relevant times a “fiduciary” to the Health Plan within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

18. Carmichael was at all relevant times a “party in interest” to the Health Plan within the meaning of Sections 3(14)(A), (E), and (H) of ERISA, 29 U.S.C. §§ 1002(14)(A), (E), and (H).

19. The 401(k) Plan was established by SRG on January 1, 2008.

20. The 401(k) Plan was terminated and all of its assets distributed to the participants as of June 26, 2013.

21. The Health Plan was established by SRG in conjunction with the health insurance provider, Humana, effective on December 1, 2010.

22. On information and belief, SRG ceased operations in April 2013.

ALLEGATIONS CONCERNING FIDUCIARIES’ FAILURE TO REMIT EMPLOYEE  
CONTRIBUTIONS TO THE 401(K) PLAN

23. At all relevant times, SRG and Carmichael (hereinafter referred to collectively as “Defendants”) were the only entities or individuals with authority and discretion to manage and control assets of the 401(k) Plan.

24. The 401(k) Plan permitted participants to contribute a portion of their pay to the 401(k) Plan through payroll deductions.

25. The 401(k) Plan permitted participants to borrow from their accounts and repay the loan through payroll deductions.

26. In accordance with 29 C.F.R. § 2510.3-102, SRG was required to forward participant contributions and loan repayments to the 401(k) Plan on the earliest date on which such contributions could reasonably be segregated from SRG's general assets.

27. At all relevant times, Carmichael was the only one who could authorize SRG to remit participant contributions and loan repayments to the 401(k) Plan.

28. From January 2008 through May 2012, SRG withheld participant contributions and loan repayments from employees' compensation and failed to timely forward them to the 401(k) Plan.

29. From January 2008 through May 2012, Carmichael caused or allowed SRG to withhold participant contributions and loan repayments and not timely forward them to the 401(k) Plan.

30. From January 2, 2008 until May 26, 2012, SRG withheld from employees' compensation contributions and loan repayments totaling \$63,351.63, failed to segregate the funds from SRG's general assets, and failed to forward the contributions and loan repayments to the 401(k) Plan.

31. From January 2, 2008 until May 26, 2012, Carmichael caused or allowed SRG to withhold from employees' compensation contributions and loan repayments totaling \$63,351.63, to fail to segregate the funds from SRG's general assets, and to fail to forward the contributions and loan repayments to the 401(k) Plan.

32. During the periods that participant contributions and loan repayments were not remitted to the 401(k) Plan, Defendants caused or allowed the funds to be commingled with the general assets of SRG.

33. During the periods that participant contributions and loan repayments were not remitted to the 401(k) Plan, Defendants caused or allowed the funds to be used to for SRG's purposes and obligations or to pay its expenses.

34. Defendants failed to take action to restore to the 401(k) Plan the full amount of the un-remitted participant contributions and loan repayments plus lost interest that would have accrued but for the actions described in the preceding paragraphs.

35. At all relevant times, the Plan was not covered by a fidelity bond.

36. On information and belief, the 401(k) Plan is now closed and all of the remaining funds have been disbursed to the participants.

37. On information and belief, Defendants have still not reimbursed the missing funds and accrued interest to the affected 401(k) Plan participants.

38. At all relevant times, Defendants failed to monitor, control, or attempt to rectify the acts of one another with respect to the 401(k) Plan.

ALLEGATIONS CONCERNING FIDUCIARIES' FAILURE TO REMIT EMPLOYEE  
CONTRIBUTIONS TO THE HEALTH PLAN

39. The Health Plan was funded by monthly insurance premiums consisting of employee premium contributions withheld from employees' compensation and employer contributions, which were remitted to Humana via ACH transfer.

40. At all relevant times, Carmichael was the only one who could authorize SRG to remit the health insurance premium payments to Humana.

41. At all relevant times, SRG remitted health insurance premiums to Humana via ACH transfer only after Carmichael authorized or approved the payment to be made.

42. At all relevant times, Humana processed and paid the participant's health claims as long as SRG remitted the monthly insurance premiums to Humana in a timely manner.

43. At all relevant times, SRG and Carmichael were the only entities or individuals with authority and discretion to manage and control the assets of the Health Plan.

44. In accordance with 29 C.F.R. § 2510.3-102, participant contributions were required to be forwarded to the Health Plan on the earliest date on which such contributions could reasonably be segregated from the employer's general assets.

45. From September 2011 through December, 2011, SRG withheld from employees' compensation insurance premium contributions totaling \$11,099.02, failed to segregate the funds from SRG's general assets, and failed to timely forward the contributions to Humana.

46. From September 2011 through December, 2011, Carmichael caused or allowed SRG to withhold from employees' compensation their insurance premium contributions totaling \$11,099.02; failed to segregate the funds from SRG's general assets, and failed to forward the contributions to Humana.

47. During the periods that employee insurance premium contributions were not remitted to Humana, Defendants caused or allowed the contributions to be commingled with the general assets of SRG.

48. During the periods that employee insurance premiums contributions were not remitted to Humana, Defendants caused or allowed the funds to be used for SRG's purposes and obligations or to pay its expenses.

49. On approximately November 22, 2011, Humana informed Defendants that the Health Plan was being retroactively terminated, effective September 30, 2011, due to the lack of payment of premiums for September and October 2011.

50. On information and belief, participants have incurred unpaid medical claims totaling \$23,485.89 as a result of the cancellation of insurance for non-payment of the premiums.

51. On information and belief, Defendants have failed to take action to restore to the participants the full amount of their un-remitted employee premium contributions plus the unpaid medical claims that would not have occurred but for the actions described in the preceding paragraphs.

52. At all relevant times, Defendants failed to monitor, control, or attempt to rectify the acts of one another with respect to the employee Group Health Plan.

#### CLAIMS

53. By the actions described in paragraphs 23 through 38, Defendants, as fiduciaries of the 401(k) Plan,

a. failed to ensure that all assets of the 401(k) Plan be 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 401(k) 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 401(k) 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 401(k) 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 401(k) 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 401(k) Plan to engage in transactions which they knew or should have known constituted the direct or indirect transfer of 401(k) Plan assets to, or use of 401(k) 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);

f. dealt with assets of the 401(k) 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); and

g. acted in the transactions described involving the 401(k) Plan on behalf of a party whose interests were adverse to the interests of the plan or the interests of its participants and beneficiaries in violation of Section 406(b)(2) of ERISA, 29 U.S.C. § 1106(b)(2).

54. By the actions described in paragraphs 39 through 52, Defendants, as fiduciaries of the Health Plan,

a. failed to ensure that the assets of the Health 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);

b. failed to discharge their duties with respect to the Health 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 Health Plan, in violation of Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A);

c. failed to discharge their duties with respect to the Health 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);

d. caused the Health Plan to engage in transactions which they knew or should have known constituted the direct or indirect transfer of Health Plan assets to, or use of Health 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).

55. Defendants are each liable for the breaches of the other, pursuant to Section 405(a) of ERISA, 29 U.S.C. § 1105(a), in that they either (1) participated knowingly in an act of the other fiduciary, knowing such act was a breach, in violation of Section 405(a)(1), 29 U.S.C. § 1105(a)(1); (2) failed to monitor or supervise the other fiduciary and thereby enabled the breach, in violation of Section 405(a)(2), 29 U.S.C. § 1105(a)(2); or (3) had knowledge of a breach by the other fiduciary and failed to make reasonable efforts under the circumstances to remedy the breach, in violation of Section 405(a)(3), 29 U.S.C. § 1105(a)(3).

WHEREFORE, pursuant to Sections 502(a)(2) and (5) of ERISA, 29 U.S.C.

§§ 1132(a)(2) and (5), Plaintiff prays that the Court:

A. Order Carmichael to restore to the 401(k) Plan all losses, including interest/ lost opportunity costs, which occurred as a result of their breaches of fiduciary obligations;

B. Order Carmichael to restore to the Health Plan participants all of their withheld insurance premiums for the relevant time period, further or in the alternative, to reimburse all of the affected Group Health Plan participants their unpaid medical bills which occurred as a result of Defendants' breaches of their fiduciary obligations;

C. Permanently enjoin Carmichael from serving as fiduciary, administrator, officer, trustee, custodian, agent, employee, representative, or having control over the assets of any employee benefit plan subject to ERISA;

D. Enjoin Carmichael from engaging in any further action in violation of Title I of ERISA;

E. Award Plaintiff the costs of this action; and

F. Provide such other relief as may be just and equitable including, but not limited to, surcharge.

Respectfully submitted,

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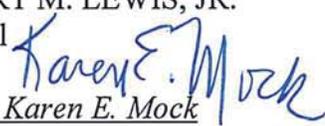
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