

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

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

FILE NO.

v.)

CV 415 - 050

MASSEY WHOLESALE COMPANY,)
INC., LARRY W. MASSEY as Executor)
of the Estate of MARY S. MASSEY,)
LARRY W. MASSEY, and MASSEY)
WHOLESALE COMPANY,)
INC. SIMPLE RETIREMENT PLAN,)
)
Defendants.)

COMPLAINT
(Injunctive Relief Sought)

Plaintiff THOMAS E. PEREZ, Secretary of Labor, UNITED STATES

DEPARTMENT OF LABOR ("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 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 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 Southern District of Georgia pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

4. The Massey Wholesale Company, Inc. SIMPLE Retirement Plan (hereinafter "the 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), 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. Massey Wholesale Company, Inc. ("the Company"), a company located in Dawson, Georgia and the sponsor of the Plan, was at all relevant times a "fiduciary" to the Plan within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), and a "party in interest" to the Plan within the meaning of Sections 3(14)(A) and (C) of ERISA, 29 U.S.C. §§ 1002(14)(A) and (C).

6. Larry W. Massey is or was at all times relevant to this action the owner of the Company and acted, on behalf of the Company, as an Administrator of the Plan. Mr. Massey determined the eligibility of employees, executed documents associated with the administration of the Plan, remitted employee contributions to the custodian, determined the timing of the remittance of employee contributions to the custodian, showed the amount to be allocated to each participant's SIMPLE IRA, assisted with the coordination of distributions from the Plan, and had the authority and responsibility to make any and all administrative decisions with respect to the Plan. Therefore, he is or was at all relevant times a "fiduciary" to the Plan within the

meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), and a "party in interest" to the Plan within the meaning of Sections 3(14)(A) and (C) of ERISA, 29 U.S.C. §§ 1002(14)(A) and (C).

7. Mary S. Massey was at all times relevant to this action the Secretary of the Company. On behalf of the Company, Mrs. Massey prepared and remitted employee contributions to the Plan, and determined the timing of the remittance of employee contributions to the Plan. Therefore, she was at all relevant times a "fiduciary" to the Plan within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), and a "party in interest" to the Plan within the meaning of Sections 3(14)(A) and (C) of ERISA, 29 U.S.C. §§ 1002(14)(A) and (C).

8. Larry W. Massey is the executor of Mary S. Massey's estate 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

9. The Plan was established by the Company on December 5, 2001.

10. The Plan permitted participants to contribute a portion of their pay to the Plan through payroll deductions.

11. The Plan required the Company to provide for an employer contribution equal to 100 percent of the elective deferrals up to three (3) percent of the employee's compensation for the calendar year.

12. At all relevant times, the Company, Larry W. Massey, and Mary S. Massey (hereinafter referred to collectively as "Defendants") were the only entities or individuals with authority and discretion to manage and control assets of the Plan.

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

14. From January 4, 2008 through August 3, 2012, Defendants withheld employee contributions and failed to timely forward them to the Plan in accordance with ERISA resulting in \$19,471.35 in lost earnings owed to the non-fiduciary Plan participants.

15. From October 3, 2008 through August 3, 2012, in the approximate amount of \$38,986.70, Defendants withheld non-fiduciary employee contributions and completely failed to segregate and forward the contributions from Company assets to the Plan in accordance with ERISA.

16. During the periods that participant contributions were not remitted to the Plan as required, Defendants caused or allowed the Company to retain the use of unremitted participant contributions as described in paragraphs 14 – 15 above, which they knew or should have known constituted a direct or indirect transfer of Plan assets to or use for the benefit of the Company, a party in interest, in violation of Section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D).

17. During the periods that participant contributions were not remitted to the Plan as required, Defendants dealt with the assets of the Plan in their own interest and for their own account by engaging in transactions described in paragraphs 14 – 15 above, in violation of Sections 406(b)(1) and (2) of ERISA, 29 U.S.C. §§ 1106(b)(1) and (2), by,

among other things, causing the Company to retain the use of unremitted participant contributions for its daily business operations.

18. Defendants have failed to take action to restore to the Plan the full amount of the un-remitted employee contributions plus lost interest that would have accrued but for the actions described in the preceding paragraphs.

19. Defendants either knew or easily could have known the facts alleged in paragraphs 14 – 18 above.

CLAIMS

20. By the actions described in paragraphs 14 through 19, Defendants, as fiduciaries of the Plan,

(a) failed to discharge their duties with respect to the Plan by failing to segregate and forward plan assets to the Plan and by allowing the assets to be used for the benefit of the Company, in violation of Sections 403(a) and 403(c)(1) of ERISA, 29 U.S.C. §§ 1103(a) and 1103(c)(1);

(b) 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 ERISA Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);

(c) 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 ERISA Section 404(a)(1)(B), 29 U.S.C.

§ 1104(a)(1)(B);

(d) 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 ERISA Section 406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D);

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

(f) acted in the transactions described involving the 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).

21. Defendants are each liable for the breaches of the other, pursuant to § 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) of ERISA, 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) of ERISA, 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) of ERISA, 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 Defendants to restore to the Plan all losses, including interest or lost opportunity costs, which occurred as a result of their breaches of fiduciary obligations;

B. Order that the Plan set off the individual Plan accounts of any Defendant against the amount of losses, including lost opportunity costs, resulting from their fiduciary breaches, as authorized by Section 1502(a) of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1502(a), 111 Stat. 788, 1058-59 (1997) (codified at 29 U.S.C. § 1056(d)(4)), if the losses are not otherwise restored to the Plan by the Defendants and reallocated to the non-breaching participants;

C. Permanently enjoin Defendants 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 Defendants 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.

Respectfully submitted,

ADDRESS:

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M. PATRICIA SMITH
Solicitor of Labor

STANLEY E. KEEN
Regional Solicitor

ROBERT M. LEWIS, JR.
Counsel

By: /s/Kristina T. Harrell
KRISTINA T. HARRELL
Attorney

Office of the Solicitor
U. S. Department of Labor
Attorneys for Plaintiff.

SOL Case No. 14-00525

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2015, I electronically filed a Complaint with the Clerk of Court using the CM/ECF system and caused a true and accurate copy of the same to be mailed to Defendants by U.S. first class mail proper postage affixed and addressed as follows:

James L. Coursey, Jr., Esquire
114 Barnard Street, Suite 2B
Savannah, GA 31401

/s/Kristina T. Harrell
KRISTINA T. HARRELL
Attorney for Plaintiff

SOL Case No. 14-00525

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
 THOMAS E. PEREZ, Secretary of Labor,
 United States Department of Labor,

 (b) County of Residence of First Listed Plaintiff _____
 (EXCEPT IN U.S. PLAINTIFF CASES)

 (c) Attorneys (Firm Name, Address, and Telephone Number)
 United States Department of Labor, Office of the Solicitor,
 61 Forsyth Street, SW, Room 7T10, Atlanta, GA (404)302-5435

DEFENDANTS
 MASSEY WHOLESALE COMPANY, INC.; LARRY W. MASSEY as
 Executor of the Estate of MARY S. MASSEY, LARRY W. MASSEY,
 and MASSEY WHOLESALE CO., INC SIMPLE RETIREMENT PLAN
 County of Residence of First Listed Defendant Dawson
 (IN U.S. PLAINTIFF CASES ONLY)
 NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
 THE TRACT OF LAND INVOLVED.

 Attorneys (If Known) **CV 415 - 050**
 James L. Coursey, Jr., Esquire
 114 Barnard Street, Suite 2B, Savannah, GA 31401

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff
 2 U.S. Government Defendant
 3 Federal Question (U.S. Government Not a Party)
 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input checked="" type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
29 U.S.C. section 1001, et seq.

Brief description of cause:
to enjoin acts & practices which violate the provisions of Title I of ERISA (NOT a claim for benefits).

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$** _____ CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE: 02/26/2015 SIGNATURE OF ATTORNEY OF RECORD: /s/Kristina T. Harrell

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____