UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

THOMAS E. PEREZ, Secretary Of Labor, United States Department Of Labor, Plaintiff,	:	Case No. 5:14-cv-366
v.	:	
THE ANESTHESIA & PAIN CENTER OF AKRON, INC. and FRANK KOUSAIE, individually and as fiduciaries of THE ANESTHESIA & PAIN CENTER OF AKRON, INC. 401(k) AND PROFIT SHARING PLAN and THE ANESTHESIA & PAIN CENTER OF AKRON, INC. 401(k) AND PROFIT SHARING PLAN Defendants.	:	JUDGE

COMPLAINT

Plaintiff, Thomas E. Perez, Secretary of Labor, United States Department of Labor (the "Secretary"), alleges:

JURISDICTION AND VENUE

1. This action arises under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§1001, *et seq*., and is brought by the Secretary under ERISA §§502(a)(2) and (5), 29 U.S.C. §§1132(a)(2) and (5), to enjoin acts and practices that violate the provisions of Title I of ERISA, to obtain appropriate equitable relief for breaches of fiduciary duty under ERISA §409, 29 U.S.C. §1109, and to obtain such further equitable relief as may be appropriate to redress violations and to enforce the provisions of Title I of ERISA.

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

3. The Anesthesia & Pain Center of Akron, Inc. 401(k) and Profit Sharing Plan ("Plan") is an employee benefit plan within the meaning of ERISA §3(3), 29 U.S.C. §1002(3), which is subject to the provisions of Title I of ERISA pursuant to ERISA §4(a), 29 U.S.C. §1003(a).

4. Venue of this action lies in the Northern District of Ohio, pursuant to ERISA §502(e)(2), 29 U.S.C. §1132(e)(2), because the Plan was administered in Summit County, Ohio within this district.

DEFENDANTS

1. At all relevant times, the Anesthesia & Pain Center of Akron, Inc. (the "Company"), an Ohio corporation, was the Plan sponsor, within the meaning of ERISA §3(16)(B), 29 U.S.C. §1002(16)(B); the Plan administrator, within the meaning of ERISA §3(16)(A), 29 U.S.C. §1002(16)(A); a fiduciary of the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A); and a party in interest to the Plan within the meaning of ERISA §§3(14)(A) and (C), 29 U.S.C. §§1002(14)(A) and (C).

2. At all relevant times, Defendant Frank Kousaie was the sole shareholder of the Company; a fiduciary of the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A); and a party in interest to the Plan within the meaning of ERISA §§3(14)(A) and (H), 29 U.S.C. §§1002(14)(A) and (H).[1]

3. The Plan is named as a defendant herein pursuant to Rule 19(a) of the

[1] Frank Kousaie filed for personal bankruptcy on October 18, 2013, in the U.S. Bankruptcy Court, Northern District of Ohio, Case No. 13-53034-mss. Because the Secretary is prosecuting this civil action pursuant to the Department of Labor's police and regulatory power under Title I of ERISA, the Secretary's action is "an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police or regulatory power," and is excluded from the operation of the automatic stay provisions of the Bankruptcy Code pursuant to 11 U.S.C.§362(b)(4). The Secretary's efforts to enforce any monetary portion of any judgment obtained against Defendants will be consistent with the Bankruptcy Code. The Secretary filed an adversary complaint in Kousaie's bankruptcy case to have his debt to the Plan be deemed non-dischargeable.

Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

COUNT I

Failure to Segregate and Timely Remit Employee Contributions

4. Paragraphs 1 through 3 are realleged and incorporated herein by reference.

5. From February 28, 2007, through at least November 16, 2011, Kousaie and the Company withheld money from the paychecks of employees as contributions to the Plan but did not segregate these contributions from the Company's general assets as soon as they reasonably could do so and did not remit all of these contributions to the Plan. These monies remained commingled with the general assets of the Company and were used for the Company's general operating expenses.

6. Kousaie and the Company used the Plan assets mentioned in Paragraph 5 for their own benefit and not for the sole benefit of the Plan's participants and beneficiaries.

7. Kousaie and the Company failed to ensure that plan assets were paid into the Plan.

8. By the conduct described in Paragraphs 5 through 7, Kousaie and the Company:

a. allowed Plan assets to inure to the benefit of the employer and failed to hold the Plan assets for the exclusive purpose of providing benefits to participants and their beneficiaries, in violation of ERISA §403(c)(1), 29 U.S.C. §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 §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A);

c. caused the Plan to engage in transactions that they knew or should have known constituted a direct or indirect transfer to, or use by or for the benefit of, parties in interest, of any assets of the Plan in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D);

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

e. in their individual or other capacity acted in transactions involving the Plan on behalf of parties (or represented parties) whose interests were adverse to the interests of the Plan, or the interests of its participants or beneficiaries, in violation of ERISA §406(b)(2), 29 U.S.C. §1106(b)(2).

9. As a direct and proximate result of these breaches committed by Kousaie and the Company, the Plan has suffered injury and losses for which it is entitled to equitable relief, pursuant to ERISA §409, 29 U.S.C. § 1109.

<u>COUNT II</u>

Failure to Maintain Fidelity Bond

10. Paragraphs 1 through 9 are realleged and incorporated herein by reference.

11. Kousaie and the Company received, handled, disbursed, or otherwise exercised custody or control of plan assets while not bonded.

12. By the conduct described in Paragraph 11, Kousaie and the Company violated ERISA §§412(a) and (b), 29 U.S.C. §§1112(a) and 1112(b).

13. As a direct and proximate result of such acts by Kousaie and the Company, the Plan has suffered injury and losses for which it is entitled to equitable relief, pursuant to ERISA § 409, 29 U.S.C. § 1109.

COUNT III

Failure to Maintain Records

14. Paragraphs 1 through 13 are realleged and incorporated herein by reference.

15. Kousaie and the Company failed to maintain documents setting forth the calculations and deposit records of safe harbor employer contributions allegedly made by the Company.

16. By the conduct described in Paragraph 15, Kousaie and the Company violated ERISA §107, 29 U.S.C. §1027.

17. As a direct and proximate result of such acts by Kousaie and the Company, the Plan has suffered injury and losses for which it is entitled to equitable relief, pursuant to ERISA §409, 29 U.S.C. § 1109.

PRAYER FOR RELIEF

WHEREFORE, the Secretary prays for judgment:

A. Permanently enjoining Kousaie and the Company from violating the provisions of Title I of ERISA;

B. Ordering Kousaie and the Company to make good to the Plan any losses, including lost opportunity costs, resulting from fiduciary breaches committed by them or for which they are liable;

C. Ordering Kousaie and the Company to correct the prohibited transactions in which he or it engaged, restore any losses to the Plan, and pay appropriate interest;

D. Requiring the Plan to set off from Kousaie's individual account the amount of losses, including lost opportunity costs, resulting from his and the Company's fiduciary breaches, as authorized by Section 1502(a) of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, Section 1502(a), 111 Stat. 788, 1058-59 (1997) (codified at 29 U.S.C. §1056(d)(4)), if the losses to the Plan are not otherwise restored to the Plan by Kousaie or the Company;

E. Ordering Kousaie and the Company, as parties in interest, to disgorge any profits received as a result of prohibited transactions in which they engaged;

F. Ordering Kousaie and the Company to obtain and maintain evidence of a fidelity bond;

G. Permanently enjoining Kousaie and the Company from serving as fiduciaries or service providers to any ERISA-covered employee benefit plan;

H. Ordering the appointment of an independent fiduciary to administer and terminate the Plan after the trustee is removed;

I. Awarding the Secretary the costs of this action; and

J. Ordering such further relief as is appropriate and just.

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M. PATRICIA SMITH
Solicitor of Labor

CHRISTINE Z. HERI
Regional Solicitor

BENJAMIN T. CHINNI
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*/s/ Hema Steele*____________

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