

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THOMAS E. PEREZ,)	
SECRETARY OF LABOR,)	
UNITED STATES DEPARTMENT OF)	
LABOR,)	
)	
Plaintiff,)	CIVIL ACTION NO. 8:14-cv-143
v.)	
MARK TINCHER and)	
TINCHER CHEVROLET)	
OLDSMOBILE 401(k) PLAN,)	
Defendants,)	

COMPLAINT

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

This action arises under the Employment Retirement Income Security Act of 1974 (“ERISA” or the “Act”) as amended, 29 U.S.C. § 1001 et seq., and is brought by the Secretary against Defendant Mark Tinchler, as the Trustee and fiduciary of the Tinchler Chevrolet Oldsmobile 401(k) Plan (the “Plan”). The Secretary brings this action to obtain the appointment of an independent fiduciary to administer the Plan as well as to obtain appropriate relief in order to redress violations and to enforce the provisions of Title I of ERISA.

PARTIES

1. Plaintiff is the Secretary of the United States Department of Labor, who has authority to bring civil action under ERISA §§ 502(a)(2) and (5), 29 U.S.C. § 1132(a)(2) and (5) to enjoin acts and practices which violate the provisions of Title I of ERISA and to obtain appropriate relief for breaches of fiduciary duty under ERISA section 409, 29 U.S.C. § 1109.

2. At all times relevant to this action, Defendant Mark Tinchler was the named Trustee of the Plan and sole Owner and President of the Plan’s Sponsor, Tinchler Chevrolet Oldsmobile in Plattsmouth, Nebraska. Tinchler Chevrolet Oldsmobile operated within the State of Nebraska until ceasing operations in July 2011.

3. Defendant Tincher Chevrolet Oldsmobile 401(k) Plan is an employee benefit plan within the meaning of § 3(3) of ERISA, 29 U.S.C. § 1002(3). An employee benefit plan may be sued by service of process on the plan trustee or administrator. ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1). The Plan is only named as a defendant pursuant to Fed. R. Civ. P. 19(a) to assure that complete relief may be granted.

JURISDICTION AND VENUE

4. Jurisdiction over this action pursuant is conferred upon this Court by Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).

5. Venue with respect to this action lies in the District of Nebraska, where Defendant Tincher resides and where the Plan was administered, pursuant to Section § 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

GENERAL ALLEGATIONS

6. The Plan is an employee benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3), and subject to coverage of the Act under ERISA § 4(a), 29 U.S.C. § 1003(a). The Plan is a defined contribution, 401(k) deferred compensation plan that was administered in Nebraska. The Plan was established by Tincher Chevrolet Oldsmobile, the employer and Plan Sponsor on January 1, 1993. The Plan allowed employees of Tincher Chevrolet Oldsmobile to elect to defer a portion of their compensation and have that amount contributed to the Plan.

7. Defendant Tincher solely owned and operated Tincher Chevrolet Oldsmobile and served as the sole officer. Defendant Tincher was also the sole named Trustee of the 401(k) Plan in the Adoption Agreement.

8. At all times relevant herein, Defendant Tincher, as named Trustee of the 401(k) Plan and as President and Owner of the sponsoring employer, was vested with and exercised discretionary authority or control respecting the management of the 401(k) Plan, or exercised authority or control respecting the management or disposition of the assets of the 401(k) Plan, or had discretionary authority or discretionary responsibility in the administration of the 401(k)

Plan. Therefore, Defendant Tincher, at all times relevant herein, has been a fiduciary with respect to the 401(k) Plan pursuant to ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and (iii).

9. At all times relevant herein, Defendant Tincher was sole Officer and Owner of Tincher Chevrolet Oldsmobile and a fiduciary of the Plan. Therefore, Defendant Tincher is a party in interest with respect to the Plan, pursuant to ERISA §§ 3(14)(A) and (H), 29 U.S.C. §§ 1002(14)(A) and (H).

10. Assets of the Plan are held by Principal Financial Group as third party custodian.

11. Upon information and belief, the Plan currently possesses assets totaling approximately \$183,146.48 and has a total of five participants or their beneficiaries.

12. The Plan Document states that the Plan shall be terminated if the business is dissolved or terminated and that the Plan must be kept in compliance with current laws and regulations until all assets have been distributed. As the Trustee, it is the duty of Defendant Tincher to follow the directions of the Plan Document to terminate the Plan and to ensure that participants have access to their accounts for distribution or rollover.

13. Tincher Chevrolet Oldsmobile ceased all operations in 2011. Neither Defendant Tincher nor the company appointed a discretionary fiduciary to administer and manage the Plan or to ensure the orderly termination and liquidation of the Plan.

14. The Plan now stands abandoned by the Trustee, Defendant Tincher, who has refused to administer said Plan. The Plan has no other named fiduciary with the authority of administration. Participants are unable to access their accounts or to obtain distribution or rollover of Plan accounts. Principal Financial Group can only disburse assets at the direction of Plan Administrator, Trustee, named fiduciary or court-appointed successor fiduciary.

15. After an independent bidding process, Grabel, Schnieders, Hollman & Co., an independently owned trust company located at 206 W Argonne Dr., Suite 200, Kirkwood, MO 63122, has agreed to be appointed as an Independent Fiduciary to administer the Plan in order to effectuate its termination and the distribution of the Plan's assets to the participants and beneficiaries. Grabel, Schnieders, Hollman & Co. will complete the distributions and

termination of the Plan for a fee of \$1,500.00. In accordance with the Plan documents, the Plan will pay the expenses incurred by the Independent Fiduciary to administer the Plan and to accomplish the distributions.

VIOLATIONS OF ERISA

16. The Defendant employer has ceased operations and is no longer in existence. The named Trustee of the Plan, Defendant Tincher, failed to provide written authorization to allow distribution or rollover of the Plan's participant accounts after the business ceased to exist. Since the company ceased operations, no individual or entity has taken fiduciary responsibility for the operation and administration of the Plan and its assets. As a result of the cessation of this business and as a result of the failure of Trustee Tincher to respond to inquiries and requests related to participant distributions, there exists no one to administer the Plan. Participants and beneficiaries of the Plan are unable to gain access to their individual account balances. Defendant Tincher has failed to discharge his fiduciary duties and has abandoned the Plan.

17. Because of the facts and circumstances set forth above, the Plan does not have named fiduciaries or trustees with exclusive authority and discretion to manage and control its assets as required by ERISA § 402(a), 29 U.S.C. § 1102(a); and ERISA § 403(a), 29 U.S.C. § 1103(a).

18. Because of the facts and circumstances set forth above, participants are unable to access their account balances, either to reinvest them in other tax-qualified retirement savings vehicles before retirement, or to draw them down upon retirement. Because of the basis upon which payments are made from the Plan are not and cannot be specified without a trustee, the Plan exists in violation of ERISA § 402(b)(4), 29 U.S.C. § 1102(b)(4).

19. By the conduct described above, Defendant Tincher has failed to discharge his fiduciary duties with respect to the Plan in accordance with the documents and instruments governing the Plan, in violation of ERISA §§ 404(a)(1)(A), (B), and (D), 29 U.S.C. §§ 1104(a)(1)(A), (B), and (D).

20. Because Defendant resides in Cass County, the Secretary requests a trial location in Omaha, Nebraska.

WHEREFORE, the Secretary prays that this Court:

1. Remove Mark Tincher as Trustee of the Tincher Chevrolet Oldsmobile 401(k) Plan.
2. Appoint Grabel, Schnieders, Hollman & Co. as the Independent Fiduciary of the Plan with plenary authority to administer the Plan, to effectuate the distribution of Plan assets to the participants and beneficiaries, and to terminate the Plan, for a fee of \$1,500.00;
3. Require the Plan to pay the \$1,500.00 fee for administrative expenses and fees to Grabel Schnieders, Hollman & Co.;
4. Provide such other relief as may be just and equitable.

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