

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

Thomas E. Perez, Secretary of Labor,)
United States Department of Labor,)
)
Plaintiff,)
)
v.)
)
GULF SHORES MARINA, L.L.C.; LAURA M.)
PRIOLI, an Individual; STEPHEN C. MAIN; an)
Individual and the GSM/RYS 401(k) PLAN;)
)
Defendants.)

FILE NO.

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 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 U.S. District Court, Middle District of Florida, where the alleged breaches occurred, pursuant to section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

4. The GSM/RYS 401(k) Plan (hereinafter “the Plan”) is an employee benefit plan within the meaning of section 3(3) of ERISA, 29 U.S.C. § 1002(3); is 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. Gulf Shores Marina, L.L.C., the Employer who sponsored the Plan, and the Plan Administrator, 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).

6. Laura M. Prioli (“Prioli”), named Plan Trustee, administrator of the Plan on behalf of the Company, and Controller and Managing Member of the Company, 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 (H) of ERISA, 29 U.S.C. § 1002(14)(A) and (H).

7. Stephen C. Main (“Main”), named Plan Trustee and Managing Member of the Company, 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 (H) of ERISA, 29 U.S.C.

§ 1002(14)(A) and (H).

8. Gulf Shores Marina, L.L.C. (the “Company”) is a Florida corporation located in the City of Naples, Collier County, Florida.

9. At all times relevant to this action, Prioli is or was a Managing Member and the Controller of the Company, a named trustee to the Plan, and administered the Plan on behalf of the Company.

10. At all times relevant to this action, Main is or was a Managing Member of the Company and a named trustee to the Plan.

11. At all times relevant to this action, Prioli and Main had signature authority on the Company’s bank accounts.

12. During the period October 9, 2009 through September 21, 2012, the Company was having liquidity problems and/or difficulty meeting its financial obligations.

13. The Plan was established by the Company for the benefit of its employees with an effective date of January 1, 2009.

14. The Plan was not covered by a fidelity bond.

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

16. The Plan permitted participant loans, which could be repaid through payroll deductions.

17. In accordance with 29 C.F.R. § 2510.3-102, employee contributions and participant loan repayments withheld from wages become assets of the Plan and are required to be forwarded to the Plan on the earliest date such contributions and loan repayments can reasonably be segregated from the Company's general assets.

18. For payroll periods between October 9, 2009 and September 21, 2012, Defendants withheld employee contributions to the Plan in the amount of \$111,211.13, failed to segregate the contributions from Company assets as soon as they reasonably could do so, and failed to timely forward them to the Plan.

19. For payroll periods between October 9, 2009 and September 21, 2012, Defendants withheld participant loan repayments to the Plan in the amount of \$16,745.32, failed to segregate the repayments from Company assets as soon as they reasonably could do so, and failed to timely forward them to the Plan.

20. For payroll periods between October 9, 2009 and September 21, 2012, Defendants withheld employee contributions to the Plan in the amount of \$67,600.46, failed to segregate the contributions from Company assets as soon as they reasonably could do so, and never forwarded them to the Plan.

21. During the periods that participant contributions and loan repayments were not remitted to the Plan as required, Defendants caused or allowed the contributions and loan repayments to be commingled with the general assets of the Company.

22. Defendants caused or allowed the commingled funds referred to in the preceding paragraph to be used for the Company's purposes and obligations rather than for the exclusive benefit of the Plan and the participants.

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

24. Defendants failed to monitor, control, or attempt to rectify the acts of one another with respect to the Plan.

25. By the actions described in paragraphs 14 and 18 through 24, Defendants, as fiduciaries of the Plan,

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

(b) 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 section 404(a)(1)(B) of ERISA, 29 U.S.C. § 1104(a)(1)(B); and

(c) failed to maintain an adequate fidelity bond, in violation of section 412(a) of ERISA, 29 U.S.C. § 1112(a).

26. By the actions described in paragraphs 18 through 24, Defendants, as fiduciaries of the Plan,

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

(b) dealt with assets of the 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);

(c) and 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);

(d) failed to ensure that all assets of the Plan be held in trust by one or more trustees, in violation of section 403(a) of ERISA, 29 U.S.C. § 1103(a); and

(e) failed to ensure that the assets of the 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).

27. 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) 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, jointly and severally, 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 Defendants Prioli and Main 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. Appoint a successor fiduciary or administrator, at Defendants' expense;

D. Permanently enjoin Defendants from serving, directly or indirectly, for compensation or otherwise, in any capacity, including as fiduciary, administrator, officer,

trustee, custodian, agent, employee, representative, or having control over the assets of any employee benefit plan subject to the coverage of ERISA;

- E. Enjoin Defendants from engaging in any further action in violation of Title I of ERISA;
- F. Award Plaintiff the costs of this action; and
- G. Provide such other relief as may be just and equitable.

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