

**UNITED STATES DISTRICT COURT  
OF MINNESOTA**

**JULIE A. SU**, Acting Secretary of Labor, )  
United States Department of Labor, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
**VIRTUAL MATRIX CORPORATION,** )  
**SUMAN THOTAKURA**, and **VIRTUAL** )  
**MATRIX 401(K) P/S Plan,** )  
Defendants. )

**Civil Action No.**

**COMPLAINT**

Plaintiff Julie A. Su, Acting Secretary of Labor, United States Department of Labor (“Secretary”), alleges as follows:

**JURISDICTION AND VENUE**

1. This cause of 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 Virtual Matrix 401(K) P/S Plan (the “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 District of Minnesota, pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Plan is administered in Edina, Hennepin County, Minnesota, within this district.

### **DEFENDANTS**

5. Defendant Virtual Matrix Corporation (“Virtual”) was incorporated in Minnesota on September 23, 2002.

6. From January 1, 2014, to present, pursuant to the terms of the Plan, Defendant Virtual was the Plan Sponsor and Plan Administrator of the Plan and had total and complete discretionary power and authority over the Plan assets.

7. Pursuant to the terms of the Plan, Virtual’s CEO, Defendant Suman Thotakura (“Thotakura”), was named the special trustee for purposes of determining and collecting contributions under the Plan.

8. At all relevant times, Defendant Virtual exercised authority or control respecting management or disposition of the Plan’s assets when it controlled the unremitted and untimely remitted employee salary deferral contributions and loan repayments in the corporate account. Defendant Virtual is therefore 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).

9. At all relevant times, Defendant Virtual also had discretionary authority and control in the administration of the plan within the meaning of ERISA § 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii).

10. Defendant Thotakura was a named special trustee of the Plan from at least January 1, 2014 until present. Defendant Thotakura was the chief executive officer of Defendant

Virtual from Virtual's inception. From at least January 1, 2014 to present, Defendant Thotakura exercised authority or control respecting management or disposition of the Plan's assets when he caused Virtual to control the unremitted and untimely remitted employee salary deferral contributions and loan repayments in the corporate account. Defendant Thotakura is therefore 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(A) and (H).

11. At all relevant times, Defendant Thotakura also had discretionary authority and control in the administration of the plan within the meaning of ERISA § 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii)

12. The Plan is named as Defendant pursuant to Rule 19(a)(1)(A) of the Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

### **GENERAL ALLEGATIONS**

13. Defendant Virtual established the Plan on January 1, 2014, to provide retirement benefits to its employees and their beneficiaries.

14. The Plan was funded by employee pre-tax salary deferral contributions withheld from its employees' wages.

15. The Plan's governing documents also provided, in pertinent part, that participants could take participant loans from the Plan and repay the participant loans through payroll salary deductions.

### **COUNT ONE Failure to Remit Employee Contributions and Participant Loan Repayments to the 401(k) Plan**

16. Paragraphs 1 through 15 above are realleged and incorporated in these allegations.

17. For certain payroll periods between at least April 1, 2021, through October 31, 2022, Defendant Virtual withheld \$45,972.08 from its employees' pay as employee salary deferral contributions for remittance to the Plan. Defendant Virtual retained these employee salary deferral contributions and did not remit these assets to the Plan.

18. Pursuant to 29 C.F.R. § 2510.3-102(a)(1)-(b)(1), participant contributions are to be remitted as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets or no later than the 15th business day of the month following the month in which the participant contribution amounts are received by the employer.

19. For certain payroll periods between at least April 1, 2021 through October 31, 2022, Defendant Virtual withheld \$759.70 in participant loan repayments to the Plan. Defendant Virtual retained the withheld participant loan repayments in its bank account and never remitted these assets to the Plan.

20. From at least January 1, 2014 through the present, Defendant Thotakura had authority and control over whether Defendant Virtual remitted withheld employee salary deferral contributions and participant loan repayments to the Plan, and exercised such authority and control.

21. Defendant Thotakura caused Defendant Virtual to retain \$45,972.08 in employee salary deferral contributions and \$759.70 in participant loan repayments in Virtual's general operating account and use those unremitted monies for Virtual's business expenses.

22. Based on the facts described in Paragraphs 16 through 21 above, Defendants Virtual and Thotakura:

- a. failed to hold all assets of an employee benefits plan in trust, in violation of ERISA § 403(a), 29 U.S.C. § 1103(a);

b. permitted the Plan's assets to inure to the benefit of the employer and failed to hold them for the exclusive purpose of providing benefits to the Plan participants and their beneficiaries and defraying reasonable expenses of plan administration in violation of ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1);

c. failed to act solely in the interest of the participants and beneficiaries of the Plan and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of plan administration, in violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);

d. failed to discharge their duties with the care, skill, prudence, and diligence that a prudent man acting in a like capacity and familiar with such matters would use for the same conduct in violation of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B);

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

f. dealt with the 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

g. acted on behalf of a party whose interests are adverse to the interest of the Plan or the interests of its participants and beneficiaries, in violation of ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2).

23. Defendant Virtual is liable pursuant to ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2), from April 1, 2021, through October 31, 2022, for the breaches of fiduciary responsibility by its co-fiduciary Defendant Thotakura, as described in Paragraphs 16 through 21

above, because Defendant Virtual enabled its co-fiduciary to commit a breach by breaching its own fiduciary duties under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

24. As a direct and proximate result of Defendants Virtual and Thotakura's fiduciary breaches, the Plan suffered injury and losses for which they are personally liable and subject to appropriate equitable relief, pursuant to ERISA § 409, 29 U.S.C. § 1109.

**PRAYER FOR RELIEF**

**WHEREFORE**, the Secretary prays that this Court enter a judgment:

- A. Permanently enjoining Defendants Virtual and Thotakura from violating the provisions of Title I of ERISA;
- B. Permanently enjoining Defendants Virtual and Thotakura from serving or acting as fiduciaries or service providers to any ERISA-covered employee benefit plan and removing them from any positions they now hold as fiduciaries of the Plan;
- C. Ordering Defendants Virtual and Thotakura to make good to the Plan all losses, including lost opportunity costs, resulting from fiduciary breaches committed by them for which they are liable;
- D. Ordering Defendants to correct the prohibited transactions in which they engaged;
- E. Ordering the Plan to be amended to allow for the set-off of Defendant Thotakura's individual Plan account, as authorized by § 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)], to restore the losses caused by his fiduciary breach;
- F. Requiring the Plan to set-off Defendant Thotakura's individual Plan account against the amount of the Plan's losses, including lost opportunity costs, resulting from Defendant Thotakura's fiduciary breaches, as authorized by § 1502(a) of the Taxpayer Relief Act

of 1997, Pub. L. No. 195-34, § 1502(a), 111 stat. 788, 1058-59 (1997) [codified at 29 U.S.C. § 1056(d)(4)], if losses are not otherwise restored to the Plan;

- G. Awarding the Secretary the costs of this action; and
- H. Ordering such further relief as is appropriate and just.

**SEEMA NANDA**  
Solicitor of Labor

**CHRISTINE Z. HERI**  
Regional Solicitor

*s/ Maulik Sharma*  
**MAULIK SHARMA**  
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