UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Plaintiff, v. DIRECT HR SERVICES, INC.; COMMERCE BENEFITS GROUP AGENCY, INC.; HEALTHSMART BENEFIT SOLUTIONS, INC.; JASON SYREK, an individual; SUZANNE BURROW, an individual; and the DIRECT HR SERVICES, INC., EMPLOYEE HEALTH AND WELFARE PLAN, Defendants.	)	FILE NO. **COMPLAINT** **(Injunctive Relief Sought)**

Plaintiff THOMAS E. PEREZ, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR ("the 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 §§ 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 §§ 403(a) and (c)(1); §§ 404(a)(1)(A), (B) and (D); and §§ 406(a)(1)(D), (b)(1) and (b)(2), 29 U.S.C. §§ 1103(a) and (c)(1), 1104(a)(1)(A), (B) and (D), §§ 1106(a)(1)(D) and (b)(1), 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 ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

3. Venue lies in the Middle District of Florida, Tampa Division, pursuant to § 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

4. The Direct HR Services, Inc. Employee Welfare Plan (hereinafter "the DHR Plan" or "the Plan") at all relevant times is or was a "multiple employer welfare arrangement" (hereinafter "MEWA") within the meaning of § 3(40) of ERISA, 29 U.S.C. § 1002(40), because it was established and maintained for the purpose of offering and/or providing an employee welfare benefit plan within the meaning of § 3(1) of ERISA, to the employees of two or more employers, 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. Defendant Direct HR Services, Inc. ("DHR" or the "Company"), a Florida Corporation with a principal address at 6000 Marina Drive, Suite 108, Holmes Beach, Florida which is located in Manatee County, and the Plan Sponsor, Administrator and Named Fiduciary, was at all relevant times a "fiduciary" to 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), (C) and (G), 29 U.S.C. §§ 1002(14)(A), (C), and (G).

6. Defendant Suzanne Burrow ("Burrow"), an individual and DHR's majority owner, President and Registered Agent, exercised discretionary authority or

discretionary control regarding management of the Plan, exercised authority or control respecting management or disposition of Plan assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan. Accordingly, Burrow was at all relevant times a "fiduciary" to 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), (C), and (H), 29 U.S.C. §§ 1002(14)(A), (C) and (H).

7. Defendant Jason Syrek ("Syrek"), an individual, worked closely with Burrow as an advisor and mentor regarding operation of the Plan, and thus exercised discretionary authority or discretionary control regarding management of the Plan, exercised authority or control respecting management or disposition of Plan assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan. Accordingly, Syrek was at all relevant times a "fiduciary" to 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), 29 U.S.C. § 1002(14)(A).

8. In April 2007, Syrek entered a guilty plea in the U.S. District Court, Northern District of Ohio, Western Division, for a violation of Title 18. U.S.C. § 1344 - Bank Fraud.

9. On May 15, 2013, Syrek pleaded guilty in the United States District Court, Eastern District of Michigan, Southern Division, for violations of Title 18 U.S.C. § 1347 - Health Care Fraud and Title 26 U.S.C. § 7206(1) - Filing a False Tax Return. These charges resulted from Syrek's activities while operating another MEWA, as described in

Paragraphs 19-20 below, and diverting $1.75 million in premiums from that MEWA for personal use.

10. In March 2014, the Secretary notified Syrek that, as a result of Syrek's guilty pleas noted above, Syrek is prohibited from, among other things, serving or being permitted to serve as a fiduciary, consultant, advisor, or in any decision-making capacity with respect to monies, funds, assets or property of any ERISA-covered plans for 13 years pursuant to ERISA § 411, 29 U.S.C. § 1111.

11. Defendant Commerce Benefits Group Agency, Inc. ("CBG") is an Ohio corporation with its principal office located in Avon Lake, Ohio.

12. Defendant HealthSmart Benefit Solutions, Inc. ("HealthSmart") is an Illinois corporation with its principal place of business in Irving, Texas.

13. On information and belief, on or about April 28, 2014, HealthSmart acquired CBG.

14. CBG/HealthSmart exercised discretionary authority or discretionary control regarding management of the Plan, exercised authority or control respecting management or disposition of Plan assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan. Accordingly, CBG/HealthSmart was at all relevant times a "fiduciary" to 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 (B), 29 U.S.C. §§ 1002(14)(A) and (B).

15. DHR was a Professional Employer Organization ("PEO") that provided human resources services to employers of various industries, including offering the employer-clients participation in the Plan.

16. Syrek assisted and directed his girlfriend, Burrow, in setting up DHR.

17. DHR ceased operations on or about September 30, 2014.

18. Prior to the creation of DHR, Syrek operated another PEO, CAS Resources, Inc. ("CAS") with his ex-wife, Kristie Knueve, in Adrian, Michigan.

19. CAS offered the CAS Resources, Inc. Employee Health and Welfare Plan ("CAS Plan") to CAS's employer-clients.

20. Syrek hired a third party administrator called Employee Benefits Concepts, Inc. ("EBC"), which established the CAS Plan on January 1, 2010.

21. Syrek had decision-making authority with respect to the CAS Plan.

22. Syrek directed EBC to establish the DHR Plan, and the Plan was established on January 1, 2011.

23. Burrow, Syrek and DHR did not use an actuary or underwriter to set up and/or monitor the Plan.

24. Burrow, Syrek and DHR did not use an actuary or underwriter to set up a claims reserve for the Plan.

25. The Plan offered participants four options within multiple Preferred Provider Organization ("PPO") networks, including but not limited to, MultiPlan, Inc.; American Healthcare Alliance, LLC; and Cigna.

26. The Plan was funded through employer-client and employee contributions.

27. As of August 2014, DHR provided services to approximately seventy-nine (79) employer-clients and the Plan had approximately 323 participants.

28. Syrek and/or Burrow had final decision-making authority on participation in the Plan. Syrek often made final, overriding decisions with respect to the Plan.

29. Between January 1, 2011 and August 1, 2011, the CAS and DHR Plans were two separate health plan contracts.

30. On or about August 1, 2011, the CAS Plan ceased operations, and all participants and unprocessed claims from the CAS Plan were merged into the DHR Plan.

31. CAS Plan participants were not informed that they now were under the DHR Plan.

32. The CAS Plan was a self-insured MEWA.

33. The DHR Plan was a self-insured MEWA.

34. When DHR applied for its PEO license in the State of Florida, it did not disclose to the Florida Department of Business and Professional Regulations that DHR

operated a self-insured health plan, which would have disqualified DHR from obtaining a Florida PEO license under Florida statute.

35. On or about September 1, 2011, a representative of EBC informed Syrek and Burrow that the Plan, as a self-insured MEWA, was not legal in any state in which the Plan had participants.

36. Since at least September 1, 2011, Syrek, Burrow, and DHR knew that the Plan operated unlawfully as a self-insured MEWA in the State of Florida.

37. After September 1, 2011, Syrek and Burrow continued to actively market the Plan to employer-clients as a fully-insured health plan.

38. Burrow and DHR terminated EBC and began using CBG/HealthSmart as the Plan's third party administrator from on or about August 1, 2011 until the Plan terminated.

39. Among other things, CBG/HealthSmart was responsible for issuing Explanations of Benefits ("EOB") and COBRA[1] notices to Plan participants.

40. At least as early as 2013, CBG/HealthSmart became aware that the Plan operated unlawfully as a self-insured MEWA in the State of Florida.

41. Syrek, Burrow, DHR, and CBG/HealthSmart did not make Plan participants aware that the Plan was self-insured and was being operated illegally.

42. On or about September 11, 2014, the Plan's participants were notified that the Plan was terminated retroactive to September 1, 2014.

[1] The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 29 U.S.C. § 1161 et seq.

43. On information and belief, when the Plan was retroactively terminated as of September 1, 2014, it left a total of approximately $3,654,690.59 in unpaid claims due participants as a result of claims that were never processed, claims that were processed and approved but unfunded, and claims that were improperly denied.

44. DHR, Burrow, and Syrek did not process claims totaling approximately $1,640,067.06 that accrued during the time period of March 11, 2011 through October 10, 2014.

45. On information and belief, Syrek, Burrow, and/or DHR improperly denied medical claims of four (4) participants, by, among other things, retroactively terminating the participants' employment to a date preceding their previously approved medical claims, causing these participants to suffer personal losses totaling approximately $1,244,505.66.

46. On information and belief, claims approved by DHR and/or Syrek totaling approximately $770,117.87 remain unpaid.

47. Syrek, Burrow, and DHR did not timely pay medical claims in accordance with Plan Documents and contracts with providers.

48. Between at least September 2011 through present, Syrek, Burrow, DHR, and CBG/HealthSmart had actual knowledge that the Plan was underfunded.

49. By the end of 2011, Burrow and Syrek were warned, and thus knew, that the premiums Syrek had set were too low to adequately fund the Plan and that health plan claims were unfunded.

50. In October 2013, Syrek directed CBG to change payment of claims from the PPO discount network rates to Usual and Customary Rates ("UCR") for all in-network and out-of-network claims, which aided the Plan but resulted in the participants' costs rising.

51. CBG/HealthSmart continued to pre-approve doctor visits and/or medical procedures knowing that there were inadequate funds available to pay for the visits and/or procedures. This resulted in Plan participants being balance-billed for their claims.

52. Syrek made decisions regarding balance-billed participants on a case-by-case basis.

53. Syrek, Burrow, DHR, and CBG/HealthSmart did not make Plan participants aware that the Plan was underfunded.

54. CBG/HealthSmart did not issue EOBs for claims that were not funded or not processed. As a result, Plan participants were not notified that their medical claims were not funded or processed.

55. CBG/HealthSmart did not timely issue COBRA notices.

56. According to the Plan Document, DHR was responsible for COBRA administration.

57. At all relevant times, Syrek, Burrow, and DHR did not monitor CBG/HealthSmart to ensure timely issuance of EOBs and/or COBRA notices.

58. Syrek exercised discretion regarding approval and denial of COBRA coverage with respect to the Plan.

59. On information and belief, Syrek instructed CBG/HealthSmart to not provide COBRA to specific participants based on the expense of their medical claims.

60. Through their actions described herein, Burrow, Syrek, DHR and CBG/HealthSmart misled and/or knowingly participated in misleading Plan participants by promoting the Plan as a fully-insured and viable plan, while aware that premiums were set too low to adequately fund the Plan and that health plan claims were unfunded.

61. On or about August 8, 2011, CBG/HealthSmart established a bank account in DHR's name for the payment of claims for the Plan at Whitney/Hancock Bank ("Whitney/Hancock Account").

62. CBG/HealthSmart coordinated with Syrek and Burrow in establishing the Whitney/Hancock Account.

63. Burrow was an authorized signor on the Whitney/Hancock Account.

64. On or about February 26, 2013, CBG/HealthSmart opened and controlled a Plan bank account in DHR's name for the payment of claims for the Plan at First Merit Bank ("First Merit Account").

65. On information and belief, CBG/HealthSmart's chief operating officer, Thomasina Patton, was the sole authorized signor on the First Merit Account.

66. None of the aforementioned bank accounts for the Plan were held in trust.

67. On information and belief, between at least August 2011 and September 3, 2013, Burrow, Syrek, and/or DHR caused at least $1,230,905.20 to be diverted from the Whitney/Hancock Account to other non-Plan bank accounts and used for non-Plan purposes.

68. On or about January 20, 2012, Burrow, Syrek, and DHR caused $40,356.18 to be diverted from the Whitney/Hancock Account to be used to pay DHR's tax liability to the Internal Revenue Service.

69. On or about March 28, 2013, CBG/HealthSmart caused $25,000 to be diverted from the 2013 First Merit Account and used for non-Plan purposes, specifically payment of a debt of another company owned by one or more of CBG/HealthSmart's officers.

70. In March 2013, Syrek directed CBG/HealthSmart to divert $555,000.00 from the First Merit Account, purportedly to pay for Plan claims. On information and belief, to date $277,538.35 of that amount has not been repaid.

71. Defendants knowingly participated in the fiduciary breaches of one another and improperly received assets of the Plan as a result of such participation.

72. By their actions described in paragraphs 15 through 71,

(a) Defendants failed to hold the Plan's assets in trust, in violation of ERISA § 403(a), 29 U.S.C. § 1103(a);

(b) Defendants allowed Plan assets to inure to the benefit of the employer and failed to hold Plan assets for the exclusive purposes of providing benefits

to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan, in violation of ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1);

(c) Defendants 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);

(d) Defendants 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 § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B);

(e) Defendants failed to discharge their duties in accordance with the documents and instruments governing the Plan, in violation of § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D);

(f) Defendants 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 § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D);

(g) Defendants DHR and Burrow dealt with assets of the Plan in their own interests or accounts, in violation of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1); and

(h) Defendants acted in the described transactions 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 § 406(b)(2) of ERISA, 29 U.S.C. § 1106(b)(2).

73. 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 § 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 § 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 § 405(a)(3) of ERISA, 29 U.S.C. § 1105(a)(3).

74. Defendants, when providing services to the Plan, knowingly participated in and contributed to Defendants' fiduciary breaches.

WHEREFORE, pursuant to §§ 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 reimburse the Plan and/or participants for all losses that resulted from the collection of participants' contributions and failure to use them to either fund claims or to pay PPO network premiums;

B. Order Defendants to reimburse Plan participants for the amounts of all unpaid medical claims that resulted from Defendants' failure to process participants' medical claims, failure to fund approved medical claims, and/or improper denial of participants' medical claims;

C. Permanently bar Defendants from serving as a fiduciary or service provider for, or having control over the assets of, any employee benefit plan subject to ERISA;

D. Appoint an independent, successor fiduciary – at the fiduciaries' expense – to determine the exact amounts owed to each Plan participant, to distribute those monies, and to ultimately wind down the Plan.

E. Enjoin Defendants from engaging in any further violations of Title I of ERISA;

F. Reverse each prohibited transaction described herein;

G. Disgorge all fees and profits received through Defendants' knowing participation in fiduciary breaches;

H. Award Plaintiff the costs of this action; and

I. Provide other appropriate equitable relief as may be necessary.

Respectfully submitted,

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