UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

HILDA L. SOLIS, Secretary of Labor, United States Department of Labor, Plaintiff v. DIETRICH & ASSOCIATES, INC., AND KURT E. DIETRICH, Defendants	Civil Action No. ________________

COMPLAINT

Plaintiff Hilda L. Solis, Secretary of the United States Department of Labor (the "Secretary"), alleges:

The Secretary files this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001, et seq., against an annuity consultant and insurance brokerage firm, Dietrich & Associates, and its chief executive and sole shareholder, Kurt E. Dietrich, for violations of ERISA in connection with the purchase of a group annuity for a pension plan (the "Pension Plan") sponsored and administrated by Memorial Hospital – West Volusia, Inc. ("Memorial Hospital").

The ERISA violations arise from Dietrich & Associates' receipt of a $522,047 payment from the insurance carrier in connection with the annuity purchase. The payment far exceeded the $50,000 that Memorial Hospital had agreed the Pension Plan would pay for Dietrich & Associates' services and violated a contractual provision specifically barring Dietrich & Associates from receiving compensation from any insurer for the Pension Plan's annuity. Unbeknownst to the Pension Plan, its trustees, or Memorial Hospital, Dietrich & Associates had separately entered into a contract with the Hartford Life Insurance Company ("Hartford"), which provided for payment of additional compensation to Dietrich & Associates based on a percentage of the annuity's purchase price. When the Defendants presented final bids for the annuity purchase to the Pension Plan and Memorial Hospital, they falsified the final bids of Hartford's competitors so that the Hartford bid was the lowest bid.

By deceiving the Pension Plan and its fiduciaries, and by receiving and retaining impermissible compensation from the insurer, Dietrich & Associates and Kurt E. Dietrich were unjustly enriched by violations of ERISA. Moreover, they prevented the Pension Plan and its sponsor from knowing the true cost of Dietrich & Associates' services; concealed their financial arrangement with Hartford and the resulting conflict of interest with respect to the Hartford bid; and deprived the Pension Plan and its sponsor of the opportunity to negotiate the amount of any insurer-paid commission or other payment as an element of the total cost of the annuity. Instead of honoring their contractual commitments and adhering to their fiduciary obligations under ERISA, Dietrich & Associates and Kurt E. Dietrich pocketed more than a half-million dollars in unjust profits, representing ten times more than their agreed upon fee.

JURISDICTION AND VENUE

1. This action arises under Title I of the Employee Retirement Income Security Act of 1974 as amended ("ERISA"), 29 U.S.C. §§ 1001-1191,,and the Secretary brings this action to obtain relief under ERISA §§ 409(a) and 502(a)(2) and (5), 29 U.S.C. §§ 1109(a) and 1132(a)(2) and (5), to redress violations of and enforce Title I of ERISA.

2. This Court has subject matter jurisdiction over this action under ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), and under 28 U.S.C. § 1331.

3. Venue of this action lies in the Eastern District of Pennsylvania, under ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). The alleged ERISA violations took place in this federal judicial district, and both defendants may be found here.

PARTIES

4. Under ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5), the Secretary has authority to enforce Title I of ERISA by, among other acts, filing and prosecuting civil actions against persons who violate Title I of ERISA.

5. Defendant Dietrich & Associates, Inc., is a Pennsylvania corporation with its principal place of business in Plymouth Meeting, Pennsylvania. At all relevant times, Dietrich & Associates was an insurance brokerage firm that specialized in brokering the purchase, by defined benefit pension plans, of single-premium group annuities from insurance companies.

6. At all relevant times, defendant Kurt E. Dietrich was the president, treasurer, sole director, and sole owner of Dietrich & Associates. He also used the title of chief executive officer of Dietrich & Associates.

GENERAL ALLEGATIONS

7. Memorial Hospital – West Volusia, Inc. ("Memorial Hospital"), maintained the Pension Plan to provide pension benefits for employees of Memorial Hospital. The Pension Plan was an employee benefit plan as defined by ERISA § 3(3), 29 U.S.C. § 1002(3).

8. Memorial Hospital also administered the Pension Plan and therefore was a fiduciary of the Pension Plan within the meaning of ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. § 1002(21)(A)(i) and (iii).

9. In 2003, in anticipation of terminating the Pension Plan, Memorial Hospital sought to purchase a single-premium group annuity to fund the Pension Plan's liability for all pension benefits that were vested under the Pension Plan's terms.

10. In September 2003, Dietrich & Associates and Memorial Hospital, on behalf of the Pension Plan, entered into an agreement, titled "Annuity Consultant Agreement." Pursuant to the terms of the Annuity Consultant Agreement, Dietrich & Associates contracted to solicit and negotiate – for the Pension Plan – bids from insurance companies for the Pension Plan's purchase of a single-premium group annuity.

11. Kurt E. Dietrich testified under oath that he signed the Annuity Consultant Agreement for Dietrich & Associates in or about July of 2003.

12. The Annuity Consultant Agreement required Dietrich & Associates to select the insurers to be solicited for bids, to negotiate with each insurer to obtain its lowest premium quote possible and to recommend a bid or bids for acceptance by the Pension Plan.

13. The Annuity Consultant Agreement provided that Dietrich & Associates would be paid $50,000 for its services on behalf of the Pension Plan. The Agreement further provided that Dietrich & Associates "has not and will not accept any . . . form of consideration from any insurance company . . . dealing with the [Pension] Plan with respect to any asset of the [Pension] Plan."

14. The Annuity Consultant Agreement delegated to Dietrich & Associates, among other things, the duty to "negotiate each insurance company to its lowest price" and the duty to "interpret the Plan provisions contained in the Plan document and structure bid specifications consistent with the Plan provisions." In connection with these and other obligations under the Annuity Consultant Agreement, Dietrich & Associates "acknowledge[d] that it is a 'fiduciary' as defined in Section 3(21) of [ERISA] with respect to the Plan." Dietrich & Associates also obligated itself to discharge its duties under the Annuity Consultant Agreement "in a manner consistent with the standards of fiduciary conduct prescribed in Section 404 of ERISA, and the

rules and regulations thereunder." These were material terms of the agreement, and the Pension Plan reasonably relied on the terms in entering into the agreement with Dietrich & Associates.

15. Pursuant to the fully executed Annuity Consultant Agreement, the Agreement became effective on September 24, 2003.

16. For the single-premium group annuity sought by the Pension Plan, Dietrich & Associates selected the insurance companies from which to solicit bids. After soliciting and receiving preliminary bids, Dietrich & Associates then negotiated final bids from six insurance companies, including the Hartford Life Insurance Company ("Hartford")

17. On the day final bids were due, December 19, 2003, Dietrich & Associates received final bids from Hartford and five other insurers.

ERISA VIOLATIONS

18. Of the six final bids received from carriers for the purchase of the Pension Plan's group annuity, Hartford’s bid was the second highest. As Kurt E. Dietrich indicated in sworn testimony, the Hartford bid included an additional 2% of the actual cost of the annuity to be remitted to Dietrich & Associates as part of an "Expense Reimbursement" arrangement between Hartford and Dietrich & Associates. As Kurt E. Dietrich further testified, Dietrich & Associates increased the reported bids from the other carriers by 2% before presenting the final bids to the Pension Plan.

19. After increasing the other final bids by 2%, Hartford’s bid presented to the Pension Plan was the lowest bid. Neither the Pension Plan nor Memorial Hospital was informed that the Hartford bid included payments earmarked for Defendants.

20. Kurt E. Dietrich did not inform the bidders that Dietrich & Associates was increasing their final bids by 2%. Neither Dietrich & Associates nor Kurt E. Dietrich informed the Pension Plan that 2% was added to each final bid except the Hartford bid.

21. On December 19, 2003, Dietrich & Associates sent to the Pension Plan a report that listed a single-premium figure for each of the six final bidders. For each final bidder other than Hartford, Dietrich & Associates reported to the Pension Plan a single-premium figure that was approximately 2% higher than the insurer's final bid figure received by Dietrich & Associates. In this manner, the Defendants misled the Pension Plan about the cost of the annuity and their fees, which were limited to a total of $50,000 from all sources by the terms of the Annuity Consultant Agreement.

22. In reliance on the integrity of the bidding process and the accuracy of the quoted bids, the Pension Plan selected Hartford to provide the annuity for the Pension Plan for Hartford’s final bid amount of $26,102,374 on or about December 19, 2003. By giving the Plan a false list of bids, the Defendants effectively exercised discretionary authority over the Plan's selection of Hartford as the annuity provider.

23. In or around February 2004, Dietrich & Associates received from Hartford payments denominated "expense reimbursements" that included $522,047 specifically attributable to the annuity purchased by the Pension Plan. This payment, however, was calculated as a simple percentage of the cost of insurance placed, bearing no relationship to any actual expenses incurred by Dietrich & Associates.

24. The Pension Plan did not authorize Dietrich & Associates to receive compensation from the winning bidder for the Plan's annuity, and, in fact, the Annuity Consultant Agreement specifically prohibited Dietrich & Associates from receiving any third party payments in connection with the Pension Plan’s annuity purchase.

25. As Kurt E. Dietrich admitted in sworn testimony, Dietrich & Associates did not comply with the Annuity Consultant Agreement after execution. Additionally, he testified that in his own view neither Dietrich & Associates nor he was bound by the Agreement. At no time

did Dietrich & Associates or Kurt E. Dietrich inform the Pension Plan that Dietrich & Associates declined to assume fiduciary responsibility as required by the Annuity Consultant Agreement. At no time did Dietrich & Associates or Kurt E. Dietrich inform the Pension Plan that Dietrich & Associates had opted to collect an extra payment from the carrier with the winning bid in addition to the $50,000 fee provided for in the Agreement.

26. Through his 100% ownership of Dietrich & Associates, Kurt E. Dietrich received the $522,047 commission that Hartford paid to Dietrich & Associates.

27. Kurt E. Dietrich caused or authorized Dietrich & Associates' receipt of the $522,047 payment by, among other things:

a. authorizing conduct by Dietrich & Associates that constituted a breach of Dietrich & Associates' fiduciary duties to the Pension Plan as well as a breach of the terms of the annuity contract;

b. misleading the Pension Plan by having Dietrich & Associates increase the final bids of all bidders other than Hartford by approximately 2%, without disclosing that fact to the Plan;

c. misleading the Pension Plan by having Dietrich & Associates execute a contract that limited its fees from all sources to $50,000 while secretly accepting more than ten times that amount from the winning bidder;

d. causing Dietrich & Associates, a company of which Kurt E. Dietrich was the sole director and sole owner, to receive the $522,047 attributable to the purchase of the Pension Plan's annuity from Hartford; and

e. manipulating the bidding process by presenting false bids amounts to the Pension Plan, thereby effectively exercising discretionary authority over the ultimate selection of Hartford as the Plan's annuity provider.

28. Dietrich & Associates and Kurt E. Dietrich prevented any Pension Plan representative independent of Dietrich & Associates from knowing the full cost of Dietrich & Associates' services to the Pension Plan; concealed their financial arrangement with Hartford and the resulting conflict of interest with respect to the Hartford bid; and deprived the Pension Plan and its sponsor of the opportunity to negotiate the amount of any insurer-paid commission as an element of the Plan's total cost for its annuity.

29. Dietrich & Associates and Kurt E. Dietrich deprived the Pension Plan and its sponsor of the benefit of the firm's contractual promise not to take a commission from any insurer on the Plan's annuity.

FIRST CLAIM FOR RELIEF
(Against Dietrich & Associates and Kurt E. Dietrich as Fiduciaries)

30. Under Fed. R. Civ. P. 10(c), the Secretary incorporates here by reference the paragraphs 1 through 29 above.

31. The Defendants exercised authority or control respecting disposition of Pension Plan assets in connection with the Pension Plan's purchase of the annuity and, thereby, acted as fiduciaries to the Pension Plan as defined in ERISA § 3(21)(i), 29 U.S.C. § 1002(21)(i), through, among other things, one or more of the following acts:

a. selecting the insurers to be solicited for bids on the single-premium group annuity sought by the Pension Plan;

b. for each final bidder other than Hartford, reporting to the Pension Plan a single-premium figure that was approximately 2% higher than the insurer's final bid received by Dietrich & Associates, without disclosing this fact to the Pension Plan;

c. by receiving and not disclosing to the Pension Plan the receipt of $522,047 in connection with the annuity purchased by the Pension Plan from Hartford;

d. by presenting false bid numbers to the Plan, and thereby exercising authority over the final selection of the Annuity Provider; and

e. by receiving and exercising authority with respect to the placement of insurance for the Pension Plan as set forth in the Annuity Consultant Agreement, and by acknowledging in the Annuity Consultant Agreement that Dietrich & Associates was a fiduciary as defined under Section 3(21) of ERISA, 29 U.S.C. § 1001(21) and further agreeing to discharge its duties under the Agreement in a manner consistent with the standards of fiduciary conduct prescribed in ERISA § 404, 29 U.S.C. § 1104, and the rules and regulations promulgated under Section 404.

32. Because the Defendants held Dietrich & Associates out as an ERISA fiduciary, and the Plan reasonably relied upon the representations of fiduciary status, the Defendants are stopped from denying their fiduciary status. Moreover, to the extent that Dietrich & Associates failed to comply with the terms of the Annuity Consultant Agreement, or took action not authorized by the Agreement, it did so under the authority and with the approval of Kurt Dietrich and through his actions.

33. By falsifying the final bids to the Pension Plan, rather than presenting the actual bids submitted by the carriers, Dietrich and Associates and Kurt Dietrich imprudently caused the Pension Plan to pay more than a reasonable amount for Hartford annuity in breach of their fiduciary duties.

34. By failing to secure the lowest price for the Pension Plan, Dietrich & Associates and Kurt Dietrich acted imprudently and disloyally in breach of their fiduciary duties, and were unjustly enriched.

35. The Annuity Consultant Agreement established that $50,000 was a reasonable fee and the only fee for the services Dietrich & Associates agreed to provide. By receiving and

retaining compensation from Hartford, the amount of which was not properly disclosed to or specifically authorized by the Pension Plan or by a Pension Plan fiduciary independent of Dietrich & Associates, Dietrich & Associates and Kurt E. Dietrich used their fiduciary authority to affect their own compensation.

36. By receiving and retaining undisclosed, unauthorized compensation in connection with the Pension Plan's annuity purchase, Dietrich& Associates and Kurt E. Dietrich acted imprudently, disloyally, committed a prohibited transaction, and acted in their own interest and contrary to the interests of the Pension Plan's participants and beneficiaries.

37. As the Pension Plan’s fiduciaries that received undisclosed, unauthorized compensation in connection with the annuity purchase, Dietrich & Associates and Kurt E. Dietrich:

a. violated ERISA § 404(a)(1)(A), which requires a fiduciary in plan matters "to act solely in the interest of the plan's participants and beneficiaries . . . for the exclusive purpose of providing the [plan's] benefits" and "defraying [the plan's] reasonable expenses," 29 U.S.C. § 1104(a)(1)(A) (duty of loyalty);

b. violated ERISA § 404(a)(1)(B), which requires a fiduciary in plan matters to act "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," 29 U.S.C. § 1104(a)(1)(B);

c. violated ERISA § 406(a)(1)(C), which prohibits a fiduciary from causing a plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect "furnishing of goods, services, or facilities between the plan and a party in interest," 29 U.S.C. § 1106(a)(1)(C), unless exempted by ERISA § 408, 29 U.S.C. § 1108;

d. violated ERISA § 406(b)(1), which prohibits a fiduciary from "dealing with assets of the plan his own interest or for his own account," 29 U.S.C. § 1106(b)(1); and

e. violated ERISA § 406(b)(3), which prohibits a fiduciary from "receiving consideration for his own account from any party dealing with such plan in connection with a transaction involving the assets of the plan," 29 U.S.C. § 1106(b)(3).

38. As a result of the breaches of fiduciary duty which they committed, Defendants Dietrich & Associates and Kurt E. Dietrich each is liable for injunctive and other appropriate equitable relief under ERISA § 502(a)(2) and (5), 29 U.S.C. § 1132(a)(2) and (5), including but not limited to disgorgement of any unlawful fees and profits received in connection with the Pension Plan's annuity purchase and an injunction against serving as a fiduciary or performing services for ERISA-covered employee benefit plans.

SECOND CLAIM FOR RELIEF

(Alternative Claim Against Defendants Dietrich & Associates and Kurt E. Dietrich as Parties in Interest Who Engaged in a Transaction Prohibited by ERISA § 406(a)(1)(c))

39. Under Fed. R. Civ. P. 10(c), the Secretary incorporates here by reference the paragraphs 1 through 38 above.

40. By providing services to the Pension Plan, Dietrich & Associates was a party in interest, within the meaning of ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B), with respect to the Pension Plan.

41. By providing services to the Pension Plan, Kurt E. Dietrich was a party in interest with respect to the Pension Plan, within the meaning of ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B).

42. As an officer, sole director, and sole owner of Dietrich & Associates, Kurt E. Dietrich also was a party in interest with respect to the Pension Plan, within the meaning of ERISA § 3(14)(H), 29 U.S.C. § 1002(14)(H).

43. ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C), prohibits a fiduciary from causing a plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect "furnishing of goods, services, or facilities between the plan and a party in interest," unless exempted by ERISA § 408, 29 U.S.C. § 1108. (Defendants will have the burden of proving any ERISA § 408 exemption claimed as a defense. E.g., In re Unisys Savings Plan Litig., 74 F.3d 420, 446 (3rd Cir. 1996)).

44. Dietrich & Associates and Kurt E. Dietrich cannot rely upon the exemption in ERISA § 408(c)(2) for "reasonable arrangements" with service providers because they received and retained undisclosed, unauthorized compensation that was more than ten times greater than the quoted price; deceived the Plan about the insurers' actual bids, thereby depriving the Plan of the ability to choose between insurers on an informed basis; and failed to provide services that were necessary, "appropriate and helpful in to the [P]lan . . . in carrying out the purposes for which the [P]lan is established or maintained." 29 C.F.R. § 2550.408b-2(b). Consequently, they violated ERISA's prohibited transaction provisions by engaging in the non-exempt furnishing of services between the Plan and parties in interest as prohibited by ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C).

45. By engaging in the conduct above, Dietrich & Associates and Kurt E. Dietrich, even if not fiduciaries, are liable as parties in interest who engaged in a prohibited transaction in violation of ERISA § 406(a)(1)(C).

46. To remedy the prohibited transaction, Dietrich & Associates and Kurt E. Dietrich each is liable for injunctive and other appropriate equitable relief under ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5), including, but not limited to disgorgement of any unlawful fees and profits received in connection with the Pension Plan's annuity purchase and an injunction against performing services for ERISA-covered employee benefit plans.

PRAYER FOR RELIEF

WHEREFORE, the Secretary respectfully requests that this Court:

1. Require Dietrich & Associates and Kurt E. Dietrich to disgorge the foregoing $522,047, plus interest.

2. Permanently enjoin Dietrich & Associates and Kurt E. Dietrich from, directly or indirectly, acting as fiduciaries or other service providers to any ERISA-covered employee benefit plan.

3. And grant such other relief as may be just and equitable.

Respectfully submitted.

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