

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

**ROBERT ROTON AND JACQUELINE  
JUAREZ**

**Plaintiffs,**

**VS.**

**PEVETO FINANCIAL GROUP, LLC  
and LEGACY COUNSELING  
CENTER, INC.**

**Defendants.**

§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§

**CIVIL ACTION NO. \_\_\_\_\_**

COME NOW Plaintiffs, Robert Roton and Jacqueline Juarez (collectively “Plaintiffs”) complaining of Defendants Peveto Financial Group, LLC and Legacy Counseling Center, Inc. (collectively “Defendants”), and for cause of action would show the Court as follows:

**I.  
NATURE OF CLAIMS**

1.01 This lawsuit concerns failures by Defendants related to their roles as the sponsor, plan designer, drafter, administrator, third party administrator and fiduciary of Legacy Counseling Center, Inc.’s 403(b) plan (“The Plan”).

1.02 The Plan is a retirement plan to provide benefits for Legacy Counseling Center’s high-level employees.

1.03 Plaintiffs were denied an opportunity to participate in The Plan in violation of Internal Revenue Code Section 403(b)(12)(A)(ii), also known as the “universal availability” rule.

1.04 Plaintiffs hereby seek damages for the denial of such an opportunity to participate.

**II.  
PARTIES**

2.01 Plaintiff Robert Roton (“Roton”) is an individual citizen of Texas residing in the Northern District of Texas.

2.02 Plaintiff Jacqueline Juarez (“Juarez”) is an individual citizen of Texas residing in the Northern District of Texas.

2.03 Defendant Legacy Counseling Center, Inc. is a Texas corporation with its principal place of business located at 4054 McKinney Avenue, Suite 102, Dallas, Texas 75204. Defendant Legacy Counseling Center is a plan fiduciary in its role as plan sponsor of The Plan. Defendant Legacy Counseling Center may be served via its registered agent Melissa J. Grove at the following address of 4054 McKinney Avenue, Suite 102, Dallas, Texas 75204.

2.04 Defendant Peveto Financial Group, LLC is a Texas limited liability company located at 4200 South Hulen Street, Suite 314, Fort Worth, Texas 76109. Defendant Peveto may be served via its registered agent K. Clark Peveto at the following address of 3816 Riverhills View Drive, Fort Worth, Texas 76109.

2.05 At all relevant times, Peveto Financial Group, LLC was a plan fiduciary because it exercised discretionary authority and/or discretionary control respecting management of The Plan and/or exercised any authority or control respecting management or disposition of its assets, and had discretionary authority and/or discretionary responsibility in the administration of the Plan.

### **III. VENUE AND JURISDICTION**

3.01 Venue of this action is proper in the Northern District of Texas because all or a substantial part of the events or omissions that give rise to this claim occurred in the Northern District of Texas, specifically Dallas.

3.02 Venue is also proper in Northern District of Texas, specifically Dallas because Defendant Legacy Counseling Center, Inc. is a resident of Dallas County.

3.03 This Court has personal jurisdiction over Defendants because they do business and maintain businesses in Texas.

3.04 This Court has subject matter jurisdiction over this lawsuit in accordance with federal law.

#### **IV. CONDITIONS PRECEDENT**

4.01 All conditions precedent to recovery by Plaintiffs herein have been performed, have occurred, or have been excused.

#### **V. FACTS OF CASE**

***A. The Universal Availability Rule Requires That All Employees Be Given the Opportunity to Participate in a Section 403(b) Plan and that a 403(b) Plan be Governed by a Written Plan Document.***

5.01 Section 403(b) is a provision of the Internal Revenue Code that allows certain education institutions and non-profit employers to offer tax-advantaged plans to their employees.

5.02 A 403(b) plan is similar in nature to the more popularly known 401(k) plan in that it allows plan participants to save for retirement on a tax deferred basis, and can also provide benefits such as employer matching contributions.

5.03 In July 2007, the US Treasury Department promulgated final regulations applicable to Section 403(b) arrangements that became effective for the January 1, 2009 calendar year.

5.04 These Regulations brought Section 403(b) in line with retirement plans such as 401(k) plans, which require that all employees be given an opportunity to participate in such plans.

5.05 As such, now all Section 403(b) plans must meet the requirements of Internal Revenue Code Section 403(b)(12)(A)(ii), also known as the “universal availability” rule.

5.06 Under the “universal availability rule,” if any employee is given the opportunity to participate in a Section 403(b) plan, then all employees (with limited exceptions) must similarly be given the opportunity to participate.

5.07 Plaintiffs Roton and Juarez were eligible and entitled to participate under the terms and guidelines established by the “universal availability rule.”

5.08 Treasury Regulations make clear that employees must be given an “effective opportunity” to participate in a 403(b) plan.

5.09 The Section 1.403(b)-5 nondiscrimination rules provide that employees who are not provided with a yearly opportunity to make deferred elective contributions have been denied the “effective opportunity” to participate in a 403(b) plan under applicable law.

5.10 Specifically, the Regulations provide “A section 403(b) plan satisfies the effective opportunity requirement of this paragraph...**only if**, at least once during each plan year, the plan provides an employee with an effective opportunity to make (or change) a cash or deferred election...between cash or a contribution to the plan.”

5.11 These regulations made clear that 403(b) plans cannot discriminate in favor of highly compensated employees, and must be offered to all employees working more than 20 hours per week.

5.12 The Regulations also state that 403(b) plans which do not offer a yearly opportunity to participate run afoul of the Regulations.

5.13 Additionally, the Regulations require that 403(b) plans have a written plan document, which outlines the material terms and conditions for eligibility, benefits, limitations and contracts available under the plan.

***B. The Plan Violated that Universal Availability Rule Because It Was Only Offered to High-Level Employees and Has No Written Document.***

5.14 Legacy Counseling Center, Inc.’s 403(b) Plan (“The Plan”) has been in place for nearly 20 years, and certainly since 2010.

5.15 However, The Plan was never offered to many of Legacy's employees, including Roton and Juarez.

5.16 In fact, The Plan is believed to have only been offered to Legacy Counseling Center, Inc.'s top officers and directors.

5.17 Upon information and belief, The Plan lacks a written plan document governing its material terms and conditions for eligibility, benefits, limitations and contracts.

5.18 Accordingly, there are no guidelines in place to ensure that The Plan is offered to rank and file employees.

5.19 Moreover, there are no guidelines in place to make sure that employees are offered a yearly chance to participate or are made aware of The Plan's deferred compensation opportunities.

5.20 Peveto Financial makes executive decisions about The Plan for Legacy.

5.21 Peveto Financial is listed on plan application forms as The Plan financial advisor and makes decisions regarding the investments of The Plan, thus taking an active role in the finances of The Plan.

5.22 When employees of Legacy Counseling Center inquired about The Plan, these employees were told by Legacy Counseling Center that Peveto Financial made decisions about The Plan and determined whether employees could participate.

5.23 Indeed, when Juarez asked about The Plan, she was told that Peveto Financial would answer any question about The Plan and Peveto Financial confirmed to her that no written plan document existed.

5.24 These acts make clear that Peveto Financial is a plan fiduciary under ERISA.

5.25 Despite being a fiduciary, Peveto Financial failed to ensure that The Plan complied with ERISA requirements, including the universal availability requirements.

5.26 Peveto Financial also failed to ensure that The Plan maintained a written plan document.

***C. Plaintiffs Were Denied An Effective Opportunity to Participate in The Plan.***

5.27 Plaintiffs Roton and Juarez were never provided with any meaningful opportunity to participate in the Legacy 403(b) Plan and were only recently made aware of the Legacy 403(b) Plan.

5.28 Plaintiffs Roton and Juarez were never fully apprised of The Plan, its details, its tax advantages and other benefits of The Plan.

5.29 Plaintiffs Roton and Juarez were never provided with a 403(b) plan opt in/opt out form that described the benefits provided and allowed Plaintiffs Roton and Juarez to make an informed decision to participate or decline participation.

5.30 The Plan was only made available to Legacy Counseling Center, Inc.'s high-level officers.

5.31 As such, under applicable law, Plaintiffs Roton and Juarez have been wrongfully denied an "effective opportunity" to make elective deferrals and participate in the Legacy 403(b) Plan with corresponding company contributions made for their benefit.

**VI.**  
**FIRST CAUSE OF ACTION: ERISA CLAIM PER 29 USC § 1132 (ERISA § 502)**

6.01 Plaintiffs repeat and re-allege the material allegations in the preceding paragraphs.

6.02 This is a claim under ERISA § 502(a)(1)(B) to recover benefits due to them under the terms of any plan in accordance with law, enforce rights under the terms of any plan in

accordance with law, or clarify rights to future benefits under the terms of any plan in accordance with law.

6.03 Department of Labor Regulation 2510.3-2(f) makes clear that Section 403(b) plans such as The Plan are subject to ERISA.

6.04 For its first cause of action, Plaintiffs would show that Defendants violated ERISA by its restriction utilization of The Plan, including the lack of a written plan document and the failure to comply with ERISA's universal availability requirement.

6.05 Plaintiff is entitled to all appropriate relief under 29 U.S.C. §1132, including enforcement of damages in the form of benefits due to Plaintiffs, an injunction against any act or practice which violates ERISA or the terms of The Plan and any other appropriate equitable relief to redress such violations to enforce the provision of ERISA, including attorneys' fees.

**VII.**  
**SECOND CAUSE OF ACTION: BREACH OF FIDUCIARY DUTY UNDER ERISA**

7.01 Plaintiffs repeat and re-allege the material allegations in the preceding paragraphs.

7.02. These are claims by participants and/or eligible participants for relief under ERISA § 409 for breach of fiduciary duty pursuant to ERISA § 502(a)(2).

7.03 Defendants breached their fiduciary duties arising out of their roles as sponsor, provider, administrator and/or third-party administrator exercising control and/or ownership over the assets, and as trustee.

7.04 Defendant Legacy Counseling Center agreed to allow Peveto Financial Group control and authority over assets in The Plan, knowingly participating in this decision.

7.05 Additionally, Peveto Financial Group is a fiduciary because it exercised control and authority over the management of Plan assets.

7.06 It also exercised discretionary authority and responsibility in the administration of The Plan.

7.07 Peveto Financial Group knowingly participated in determining who would be eligible for The Plan and controlling access to The Plan, also rendering it a fiduciary.

7.08 Peveto Financial Group's exercise of this authority and participation in Plan functions was not ministerial in nature.

7.09 Defendants failed to comply with their own duties, including fiduciary duties, in allowing Legacy Counseling Center to restrict access to The Plan.

7.10 Defendants are co-fiduciaries, who failed to comply with their fiduciary duties in ensuring that The Plan was written by a governing plan document and ensuring that The Plan was offered to all employees and otherwise satisfied the universal availability requirement.

7.11 As a result of these breaches of fiduciary duty, Plaintiffs have suffered monetary damages.

## **VIII. DAMAGES**

8.01 Plaintiffs Roton and Juarez have suffered damages from being denied participation in the Legacy 403(b) Plan.

8.02 These damages include the missed elective deferral contribution, the mandatory corrective IRS earnings calculation associated with such contributions, along with a lost opportunity cost associated with being denied the opportunity to invest their funds in The Plan.

8.03 The elective deferral contribution and catch up contributions, along with the mandatory corrective IRS earnings for Robert Roton for years 2010 to 2019 total \$231,500.00.

8.04 The elective deferral contribution, along with the mandatory corrective IRS earnings for Jacqueline Juarez for years 2017 to 2019 total \$59,349.17.

8.05 In addition to these damages, Plaintiffs have not been able to realize the market gains on such earnings and therefore have a lost opportunity cost as damages.

8.06 Plaintiffs are also entitled to attorneys' fees under ERISA § 502(g)(1).

**IX.  
JURY DEMAND**

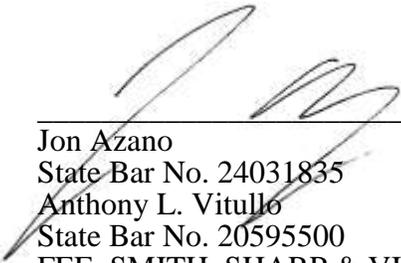
9.01 Plaintiffs demand trial by jury.

**X.  
RELIEF REQUESTED**

WHEREFORE, Plaintiffs Roton and Juarez request that:

1. Defendants be cited to appear and answer;
2. Plaintiffs Roton and Juarez recover their damages from Defendants, along with applicable interest;
3. Plaintiffs Roton and Juarez recover their attorney's fees;
4. Plaintiffs Roton and Juarez recover costs of suit; and
5. Plaintiffs Roton and Juarez be awarded other and further relief to which Plaintiffs may be justly entitled.

Respectfully submitted,



---

Jon Azano  
State Bar No. 24031835  
Anthony L. Vitullo  
State Bar No. 20595500  
FEE, SMITH, SHARP & VITULLO, L.L.P  
Three Galleria Tower  
13155 Noel Road, Suite 1000  
Dallas, Texas 75240  
(972) 934-9100 Telephone  
(972) 934-9200 Facsimile  
[lvitullo@feesmith.com](mailto:lvitullo@feesmith.com)  
[jazano@feesmith.com](mailto:jazano@feesmith.com)

**ATTORNEYS FOR PLAINTIFFS**