



DEPARTMENT OF THE ATTORNEY GENERAL

News Release

LINDA LINGLE
GOVERNOR

Mark J. Bennett, Attorney General
Phone: (808) 586-1500
Fax: (808) 586-1239

For Immediate Release: December 5, 2005

News Release No. 2005-58

State of Hawaii DOE files legal action against Plan Compliance Group, Ltd.

(HONOLULU) The State of Hawaii Department of Education (DOE) has filed a lawsuit in California state court against Plan Compliance Group, Ltd. and its president, Francis W. (Bill) Reimers. PCG is the company based in Walnut Creek, California that the DOE has retained since 2002 to distribute the Tax-Sheltered Annuity Plan contributions made by DOE employees.

Under its contract with DOE, PCG has been responsible for collecting DOE employees' Tax-Sheltered Annuity contributions that are deducted from employees' paychecks, and for distributing those funds to various insurance companies for the employees' retirement accounts. In recent months, the DOE discovered various discrepancies and delays in the deposits of these retirement funds that PCG was obligated to make to those service providers.

When the DOE discovered that its employees' retirement contributions had not been deposited for the month of September 2005, the DOE used its own funds to ensure that the amounts were deposited to the appropriate funds on behalf of its employees.

The lawsuit, filed by a San Francisco-based law firm in cooperation with the Hawaii Department of the Attorney General, alleges that PCG and Reimers have improperly taken and converted the funds sent to PCG by the DOE on behalf of its employees. The complaint alleges that \$2,280,194.60 was improperly taken and converted.

In addition to seeking the return of these funds and other damages in this civil action in the courts of California, the investigation by the Attorney General and the Federal Bureau of Investigation regarding possible criminal charges continues.

“We are deeply concerned at this apparent breach of trust, and will work with the Attorney General to do everything possible to recover the missing money,” Superintendent of Schools Patricia Hamamoto said. “We will also do everything possible to insure that the interests of our employees are protected.”

“We will take all actions necessary to protect the interests of the State of Hawaii,” Attorney General Mark Bennett said. “Our investigation into these matters continues.”

A copy of the complaint is attached.

###

For more information, contact:

Bridget Holthus
Special Assistant to the Attorney General
(808) 586-1284
hawaiiag@hawaii.gov
www.hawaii.gov/ag

1 authorized to do and doing business in the State of California, with its principal place of business at
2 1850 Mt. Diablo Boulevard, Suite 470, Walnut Creek, California.

3 3. Plaintiff is informed and believes, and on that basis alleges, that defendant Reimers
4 is and was at all relevant times the president and controlling shareholder of PCG and a member of
5 PCG's board of directors. Plaintiff is informed and believes, and on that basis alleges, that
6 Reimers resides in Contra Costa County, California.

7 4. Plaintiff is informed and believes, and on that basis alleges, that at all relevant
8 times, there was a unity of interest and ownership between Reimers and PCG, such that any
9 separateness between defendants PCG and Reimers has ceased, and PCG is the alter ego of
10 Reimers by virtue of the facts that PCG is, and at all relevant times was, so inadequately
11 capitalized that, compared to the business to be done by PCG and the risks of loss, its capitalization
12 was trifling; Reimers completely dominated, managed and controlled PCG; and Reimers caused
13 PCG to commingle funds held by PCG for Hawaii DOE with the assets of PCG and others and
14 with Reimers' personal assets. Plaintiff is informed and believes, and on that basis alleges, that
15 PCG did not observe corporate formalities and that Reimers used PCG as a mere shell, instrument
16 and conduit through which Reimers conducted business. Adherence to the fiction of the separate
17 existence of PCG as an entity distinct from Reimers would permit an abuse of the corporate
18 privilege, sanction fraud and promote injustice.

19 5. Plaintiff is ignorant of the names and capacities of defendants sued herein as Does I
20 through X, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will
21 amend this complaint to allege their true names and capacities when ascertained. Plaintiff is
22 informed and believes, and on that basis alleges, that each of the defendants is responsible in some
23 manner for the actions and events alleged herein, and that Plaintiff's damages as alleged herein
24 were proximately caused by such defendants.

25 6. Plaintiff is informed and believes, and on that basis alleges, that at all relevant
26 times, each defendant was the agent or employee of the other defendants and was acting within the
27 course and scope of said agency or employment, and with the permission, consent or ratification of
28 the other defendants.

FACTS

1
2 7. Hawaii DOE sponsors a Tax-Sheltered Annuity Plan for its eligible employees
3 pursuant to Internal Revenue Code section 403(b) (the "403(b) Plan"). Under the 403(b) Plan,
4 Hawaii DOE employees are able to purchase annuities offered primarily by insurance companies
5 ("Service Providers"). In 2001, Hawaii DOE requested proposals for entities to serve as the third
6 party administrator of the 403(b) Plan. PCG submitted a lengthy and detailed proposal on or about
7 December 21, 2001. In its proposal, PCG opined that it had "the most complete and
8 comprehensive 403(b) Compliance and Administration program in the country," and represented
9 that it had extensive 403(b) compliance and administration experience and was nationally
10 recognized as a leader in 403(b) compliance and administration.

11 8. In reliance on the truth of the statements and information in PCG's proposal, in or
12 about March 2002, Hawaii DOE entered into a written contract with PCG (the "Contract") under
13 which PCG agreed to serve as the third party administrator for the 403(b) Plan and to collect from
14 the Service Providers monthly program administration fees for each employee enrolled in the Plan.
15 A true and correct copy of the Contract is attached hereto as Exhibit A.

16 9. Under the Contract, PCG agreed to receive from Hawaii DOE employee
17 contributions to the 403(b) Plan and to promptly use those contributions to make premium
18 payments to the Service Providers selected by the employee participants under the 403(b) Plan.
19 PCG further agreed that all DOE funds would be held in a separate account effective March 20,
20 2005, with the Bank of the West, 2035 Fresno Street, Fresno, CA 93721-1704.

21 10. The Contract was periodically renewed and was in full force and effect throughout
22 the events alleged herein. Hawaii DOE at all times duly and fully performed all of its obligations
23 under the Contract.

24 11. On or about September 2, 2005, as provided under the Contract, Hawaii DOE
25 forwarded to PCG \$1,910,648.73 in employee contributions to the 403(b) Plan for the pay period
26 ending September 3, 2005. On or about September 20, 2005, as provided under the Contract,
27 Hawaii DOE forwarded to PCG \$1,923,277.38 in employee contributions to the 403(b) Plan for the
28 pay period ending September 17, 2005. PCG was required under the Contract promptly to remit

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

1 said contributions in payment of premiums to the Service Providers selected to provide the
2 annuities under the 403(b) Plan.

3 12. In or about late September 2005, Hawaii DOE learned that PCG had been
4 improperly delaying the payment of premiums under the 403(b) Plan for 30 days or more
5 beginning with the transfer of funds on July 20, 2005, and that PCG had entirely failed to transmit
6 \$2,280,194.60 in employee contributions to the Service Providers as required under the Contract.

7 13. Hawaii DOE is informed and believes, and on that basis alleges, that PCG stopped
8 making payments on all premium payments to Service Providers under the 403(b) Plan in
9 September 2005.

10 14. Hawaii DOE has made repeated demands on PCG and Reimers to account for and
11 return all monies received from Hawaii DOE that have not been paid to Service Providers, and
12 specifically to account for and return \$2,280,194.60 in 403(b) Plan contributions that PCG did not
13 use to make premium payments. PCG and Reimers have represented to Plaintiff that the funds
14 were erroneously levied upon by the IRS, but PCG and Reimers have refused to provide further
15 information about or documentation of the levy or to account for or return the missing funds.

16 15. Plaintiff is informed and believes, and on that basis alleges, that defendants failed to
17 maintain a separate account for monies received for Hawaii DOE employee contributions to the
18 403(b) Plan and, instead, commingled such funds with defendants' own funds and/or other funds.

19 16. To protect its employees' rights and interests under the 403(b) Plan, Hawaii DOE
20 arranged to make the past due premium payments to the 403(b) Plan Service Providers and to
21 continue to administer all other 403(b) Plan payments until other arrangements can be made.

22 17. Under the Contract, PCG was required to maintain at least \$2 million in errors and
23 omissions coverage, in addition to general liability and employee dishonesty coverage. Plaintiff is
24 informed and believes, and on that basis alleges, that defendants failed to procure errors and
25 omissions coverage for the duration of the Contract, and that there currently is no errors and
26 omissions coverage for defendants' acts and omissions alleged herein. Plaintiff has demanded that
27 defendants make a claim under PCG's existing policies, but is informed and believes that
28 defendants have failed and refused to do so.

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

FIRST CAUSE OF ACTION

(Breach Of Contract)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

18. Hawaii DOE realleges and incorporates by reference as though fully set forth herein the allegations in paragraphs 1-17.

19. At all relevant times, the Contract was a valid and enforceable contract between PCG and Hawaii DOE.

20. At all relevant times, Hawaii DOE fully performed each and every obligation imposed upon it under the Contract, except to the extent that the performance of any such obligation was excused.

21. PCG materially breached the Contract by delaying some premium payments and failing to make others, by commingling Hawaii DOE funds with other funds, by failing to maintain errors and omissions insurance and by failing to account for or return DOE contributions that were not forwarded to Service Providers, among other things.

22. As a direct and proximate result of PCG's breach of the Contract, Hawaii DOE suffered damages from lost and delayed premium payments, lost investment income and interest, and administrative costs, in an amount not less than \$2,280,194.60.

SECOND CAUSE OF ACTION

(Breach Of Fiduciary Duty)

23. Hawaii DOE realleges and incorporates by reference as though fully set forth herein the allegations in paragraphs 1 through 22.

24. At all relevant times, PCG and Reimers were the fiduciaries of Hawaii DOE and its employees with respect to the administration of the 403(b) Plan, and therefore had a duty to act with the utmost candor, good faith, honesty and loyalty toward Hawaii DOE and its employees, to preserve and protect the Hawaii DOE contributions for the benefit of Hawaii DOE and its employees, to refrain from securing any personal benefit from its custody of the Hawaii DOE 403(b) Plan funds except as provided by the Contract, and to properly account for all Hawaii DOE funds.

25. Defendants breached their fiduciary duties to Plaintiff by failing to use

1 \$2,280,194.60 in DOE contributions to make premium payments to Service Providers; failing to
2 maintain the funds paid by Hawaii DOE on behalf of its employees in a separate account and
3 protect those funds against any and all third-party claims or interference; failing to notify Hawaii
4 DOE immediately upon PCG's failure to timely make the premium payments required under the
5 Contract; failing to account for and remit to Hawaii DOE the full amount of the unpaid premiums
6 despite Hawaii DOE's repeated demands for such payment; and failing to make premium payments
7 promptly upon receipt of Hawaii DOE contributions, among other things.

8 26. As a direct and proximate result of defendants' breaches of their fiduciary duties,
9 Plaintiff has suffered damages of not less than \$2,280,194.60.

10 27. Defendants' acts were willful, wanton, malicious and oppressive, and justify the
11 award of exemplary and punitive damages.

12 **THIRD CAUSE OF ACTION**

13 **(Negligence)**

14 28. Hawaii DOE realleges and incorporates by reference as though fully set forth herein
15 the allegations in paragraphs 1 through 27.

16 29. At all relevant times, defendants and each of them owed a duty of care to Hawaii
17 DOE and its employees, including a duty timely to make all payments required under the Contract,
18 to notify Hawaii DOE if any such payment could not be timely made, and to maintain the funds
19 paid by Hawaii DOE on behalf of its employees in trust so as to protect such funds from any third
20 party claims or interference.

21 30. PCG breached its duties to Plaintiff by failing to use Hawaii DOE contributions to
22 make premium payments to Service Providers; failing to maintain the funds paid by Hawaii DOE
23 on behalf of its employees in a separate account and to protect those funds against any and all
24 third-party claims or interference; failing to notify Hawaii DOE immediately upon PCG's failure to
25 timely make the premium payments required under the Contract; failing to account for and remit to
26 Hawaii DOE the full amount of the unpaid premiums despite Hawaii DOE's repeated demands for
27 such payment; failing to obtain errors and omissions insurance and failing to make premium
28 payments promptly upon receipt of DOE contributions, among other things.

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

SIXTH CAUSE OF ACTION

(Fraudulent Concealment)

39. Hawaii DOE realleges and incorporates by reference as though fully set forth herein the allegations in paragraphs 1 through 38.

40. At all relevant times, defendants had a duty to disclose to Plaintiff any and all material facts respecting the payments made to PCG under the Contract and the payments required to be made by PCG under the Contract. It was at all times essential to the protection of the rights of Hawaii DOE and its employees that defendants immediately inform Hawaii DOE of any delay in or inability to make the payments required under the Contract, of any exposure of the Hawaii DOE funds to levy or other interference by third parties or defendants, and to notify Plaintiff immediately of any such levy or interference by third parties or defendants.

41. Hawaii DOE reasonably relied upon defendants to disclose to Hawaii DOE all material facts affecting the 403(b) Plan and payments thereunder.

42. Defendants concealed from Plaintiff material facts known to them, i.e., that defendants did not promptly remit funds to the Service Providers; that defendants did not use approximately \$2,280,194.60 in DOE funds to make premium payments; that defendants had commingled or otherwise failed to protect the funds paid by Hawaii DOE on behalf of its employees from levy or other interference by third parties or defendants; and that the funds had been removed from PCG's bank accounts by levy or otherwise.

43. As a direct and proximate result of defendants' concealment of these material facts, Hawaii DOE has suffered damage of not less than \$2,280,194.60.

44. Defendants' acts were willful, wanton, malicious and oppressive, and justify the award of exemplary and punitive damages.

SEVENTH CAUSE OF ACTION

(Fraud)

45. Hawaii DOE realleges and incorporates by reference as though fully set forth herein the allegations in paragraphs 1 through 44.

46. At all relevant times, defendants made the material representation on the PCG

1 website that "Funds [paid by employers] are held in a retirement plan trust account at a financial
2 institution." Defendants further represented that PCG would maintain errors and omissions
3 coverage of at least \$2 million for the duration of the Contract. Hawaii DOE is informed and
4 believes, and on that basis alleges, that defendants intended that Hawaii DOE rely upon these
5 representations as an assurance that defendants would appropriately segregate and protect funds
6 provided by Hawaii DOE on behalf of its employees and that Hawaii DOE and its employees were
7 adequately protected from risk of loss due to errors and omissions.

8 47. Hawaii DOE reasonably relied on defendants' representations that they would hold
9 Hawaii DOE's contributions in a retirement plan trust account and thereby protect such funds from
10 third-party levy or other interference and that PCG maintained errors and omissions coverage.

11 48. Hawaii DOE is informed and believes, and on that basis alleges, that the statements
12 referenced above in paragraph 46 were false and that, in fact, defendants did not maintain errors
13 and omissions coverage for PCG and, further, that defendants did not hold Hawaii DOE's funds in
14 a retirement plan trust account, but commingled Hawaii DOE's funds with the funds of other
15 employers, with defendants' own funds and/or with funds of other entities affiliated with
16 defendants, thereby rendering Hawaii DOE's funds vulnerable to third-party levy or other
17 interference.

18 49. On or about October 3, 2005, Reimers and PCG made the material representation
19 that all Hawaii DOE funds that had been sent to PCG would be accounted for and returned to DOE
20 by the second week of October, 2005. The funds were not accounted for or returned as represented
21 by defendants. Plaintiff is informed and believes, and on that basis alleges, that defendants knew at
22 the time such representation was made that it was false and that the funds would not be accounted
23 for or returned as represented. Hawaii DOE reasonably relied on defendants' representation.

24 50. As a direct and proximate result of defendants' fraud and deceit, Hawaii DOE has
25 suffered damages of not less than \$2,280,194.60.

26 **EIGHTH CAUSE OF ACTION**

27 **(Conversion)**

28 51. Plaintiff realleges and incorporates by reference as though fully set forth herein

1 paragraphs 1 through 50.

2 52. Plaintiff is informed and believes, and on that basis alleges, that defendants took
3 approximately \$2,280,194.60 in DOE contributions to the 403(b) Plan and converted the same to
4 their own use.

5 53. Plaintiff has demanded the immediate return of the missing funds but defendants
6 have failed and refused to return the DOE funds.

7 54. As a proximate result of defendants' conversion, Plaintiff has suffered damages of
8 not less than \$2,280,194.60.

9 55. Defendants' acts were willful, wanton, malicious, and oppressive, and justify the
10 award of exemplary and punitive damages.

11 **NINTH CAUSE OF ACTION**

12 **(Express Contractual Indemnity)**

13 56. Plaintiff realleges and incorporates by reference as though fully set forth herein
14 paragraphs 1 through 55.

15 57. The contract between Hawaii DOE and PCG requires PCG to indemnify, defend
16 and hold harmless Hawaii DOE from and against claims or demands arising from the acts or
17 omissions of PCG or its employees, officers, agents or subcontractors in the performance of the
18 Contract or from the non-observance or non-performance of any of the terms, covenants and
19 conditions in the Contract or the rules, regulations, ordinances and laws of the federal, state
20 municipal or county governments.

21 58. By virtue of defendants' conduct as alleged herein, Hawaii DOE was required to
22 make \$2,280,194.60 in premium payments to cover the amounts wrongfully withheld by
23 defendants.

24 59. By reason of the foregoing, Plaintiff is entitled to be indemnified by defendants in
25 the sum of \$2,280,194.60 but defendants have not paid any part of this sum to Plaintiff.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiff prays for judgment against defendants, and each of them, as
28 follows:

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3598

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. For compensatory damages according to proof at trial, in the principal amount of not less than \$2,280,194.60 plus lost return on investment, administrative costs and other consequential damages;
2. For punitive and exemplary damages;
3. For an order declaring that defendants, and each of them, hold Hawaii DOE funds in trust for Plaintiff;
4. For an order requiring defendants, and each of them, to indemnify Hawaii DOE from any and all losses it suffers as a result of acts, omissions or breaches of contract by defendants, their agents, officers, employees and subcontractors;
5. For prejudgment interest as provided by law;
6. For costs of suit, including reasonable attorneys' fees, incurred herein; and
7. For such other and further relief herein as the Court may deem just and proper.

DATED: November 30, 2005

SHARTSIS FRIESE LLP

By *Tracy Salisbury*
TRACY L. SALISBURY

Attorneys for Plaintiff
DEPARTMENT OF EDUCATION,
STATE OF HAWAII

TLS\7085\001\1327722.01