



2. This court has jurisdiction over this action pursuant to ERISA §502(e)(1), 29 U.S.C. §1132(e)(1).

3. The Home Valu Interiors Employee Benefit Plan (the “Health Plan”) was established on April 1, 1968. At all relevant times, the Health Plan was a self-insured plan which was established by Home Valu, Inc., d/b/a Home Valu Interiors (“Home Valu”) to provide health benefits to its eligible employees.

4. The Health 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). The Health Plan was partially funded through contributions from its participating employees.

5. The Home Valu Interiors Self-Insured Voluntary Dental Plan (the “Dental Plan”) was established on March 1, 1994. At all relevant times, the Dental Plan was a self-insured plan which was established by Home Valu to provide dental health benefits to its eligible employees.

6. The Dental 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). The Dental Plan was partially funded through contributions from its participating employees.

7. The Home Valu, Inc. Group Insurance Plan (the “Life Insurance Plan”) was established on April 1, 1965. At all relevant times, the Life Insurance Plan was a plan which was established by Home Valu to provide life insurance benefits to its participating employees.

8. The Life Insurance 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).

9. The Home Valu Flexible Reimbursement Plan (the “Flex Plan”) was established on February 1, 1997. At all relevant times, the Flex Plan was established by Home Valu to allow its employees to set aside pre-tax contributions to cover eligible medical, dental and dependent care expenses.

10. The Flex 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).

11. 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 Health Plan, Dental Plan, Life Insurance Plan and Flex Plan (collectively the “Plans”) were administered in Fridley, Anoka County, Minnesota within this district.

**DEFENDANTS AND PARTIES IN INTEREST UNDER ERISA**

12. During the relevant time period, Home Valu, Inc., d/b/a Home Valu Interiors (“Home Valu”), was a Minnesota corporation formed on September 20, 1963. Home Valu sold home and remodeling products at its various retail store locations in Minnesota, Wisconsin, Iowa and Indiana and also provided installation services to its clients.

13. In January 2010, Home Valu ceased operations due to financial difficulties. On or about January 8, 2010, Home Valu notified all of its employees regarding Home Valu’s closing.

14. On January 29, 2010, three creditors of Home Valu filed an Involuntary Petition for Chapter 7 bankruptcy against Home Valu in the U.S. Bankruptcy Court for the District of

Minnesota (Minneapolis), Case No. 10-4064-NCD. The bankruptcy proceeding is currently ongoing.<sup>1</sup>

15. During the relevant time period, Home Valu was the Plans' Sponsor and Administrator, exercised authority and control over the disposition of assets of the Plans; was a fiduciary to the Plans within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A); and was a party in interest to the Plans within the meaning of ERISA §§3(14)(A) and (C), 29 U.S.C. §§1002(14)(A) and (C).

16. During the relevant time period, Gerald Boschwitz was Chief Executive Officer, President and Director of Home Valu; exercised authority and control over assets of the Plans, was a fiduciary of the Plans, within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A); and was a party in interest to the Plans within the meaning of ERISA §§3(14)(A) and (H), 29 U.S.C. §§1002(14)(A) and (H).

17. During the relevant time period, Thomas Boschwitz was Vice President and Chief Operating Officer of Home Valu; exercised authority and control over assets of the Plans, was a fiduciary of the Plans, within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A); and was a party in interest to the Plans within the meaning of ERISA §§3(14)(A) and (H), 29 U.S.C. §§1002(14)(A) and (H).

18. The Plans are named as defendants pursuant to Rule 19(a)(1)(A) of the Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

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<sup>1</sup> Because the Secretary is prosecuting this civil action pursuant to the Department of Labor's police and regulatory power under Title I of ERISA, the Secretary's action will be "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power," and it is therefore excluded from the operation of the automatic stay provisions of the Bankruptcy Code pursuant to 11 U.S.C. § 362(b)(4). The Secretary's efforts to enforce any monetary portion of any judgment obtained against defendant Home Valu will be consistent with the Bankruptcy Code.

**ALLEGATIONS**

**Count I**

**(Failure to use Health Plan assets for ongoing Health Plan coverage)**

19. The allegations contained in paragraphs 1 through 4 and 11 through 18, are hereby incorporated in this Count.
20. On information and belief, the last checks issued by Home Valu for the payment of any Health Plan claims were dated December 24, 2009. Subsequent to December 24, 2009, Home Valu ceased payment of health claims on behalf of Health Plan participants.
21. On or about January 12, 2010, the fiduciaries of the Health Plan began discussing formal termination of the Health Plan.
22. On January 21, 2010, Home Valu formally notified participants that the Health Plan was terminated effective January 22, 2010. However, based on its failure to pay any Health Plan claims subsequent to December 24, 2009, Home Valu effectively terminated the Health Plan coverage on December 25, 2009.
23. Despite having effectively terminated the Health Plan on December 25, 2009, Home Valu withheld \$12,265.47 in Health Plan contributions from its employees' paychecks on January 14, 2010 and January 29, 2010 and failed to use the amounts so withheld for ongoing Health Plan coverage.
24. On pay dates January 14, 2010 and January 29, 2010, Home Valu, Gerald Boschwitz and Thomas Boschwitz caused Home Valu to retain \$12,265.47 in participant contributions it had withheld from employees' pay, in its corporate account; failed to ensure that the amounts withheld from employees' pay were used for ongoing Health Plan coverage; and used the amounts withheld from employees' pay to pay general operating expenses of Home Valu.

25. On information and belief, Home Valu failed to pay approximately \$494,754.61 in Health Plan claims incurred by Health Plan participants, primarily in the months of November 2009, December 2009 and January 2010.

26. During the relevant time period, the Health Plan document provided for continued health coverage for qualified beneficiaries under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"). Eide Bailly LLP, d/b/a Eide Bailly Employee Benefits ("Eide Bailly") provided billing administration for Home Valu's COBRA-qualified beneficiaries under the Health Plan.

27. On January 29, 2010, subsequent to the Health Plan's termination, Eide Bailly electronically deposited into Home Valu's corporate account \$4,327.55 in COBRA health plan premiums received from the Company's former employees, applicable to the period beginning January 1, 2010.

28. Despite having effectively terminated the Health Plan on December 25, 2009, Home Valu allowed Eide Bailly to deposit the COBRA health plan premiums into its corporate account and failed to use these amounts for ongoing Health Plan coverage.

29. As a result, Home Valu, Gerald Boschwitz and Thomas Boschwitz caused Home Valu to retain the \$4,327.55 in COBRA Health Plan premiums deposited into Home Valu's corporate account; failed to ensure that the amounts were used for ongoing Health Plan coverage; and instead used the amounts to pay general operating expenses of Home Valu.

30. By the conduct described in paragraphs 20 through 29, Home Value, Gerald and Thomas:

a. failed to ensure that the assets of the Health Plan did not inure to the benefit of Home Valu in violation of ERISA §403(c)(1), 29 U.S.C. §1103(c)(1);

b. failed to act solely in the interest of the participants and beneficiaries of the Health 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);

c. caused the Health 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 Health Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D);

d. dealt with assets of the Health Plan in their own interest in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1); and,

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

31. As a direct and proximate result of Home Valu's, Gerald Boschwitz's and Thomas Boschwitz's breaches, the Health Plan suffered injury and losses for which it is entitled to equitable relief pursuant to ERISA §409, 29 U.S.C. §1109.

**Count II**

**(Failure to use Dental Plan assets for ongoing Dental Plan coverage)**

32. The allegations contained in paragraphs 1, 2, 5, 6 and 11 through 18 are hereby incorporated in this Count.

33. On information and belief, the last checks issued by Home Valu for the payment of any Dental Plan claims were dated December 30, 2009. Subsequent to December 30, 2009, Home Valu ceased payment of any dental claims on behalf of Dental Plan participants.

34. On or about January 12, 2010, the fiduciaries of the Dental Plan began discussing formal termination of the Dental Plan.

35. On January 21, 2010, Home Valu formally notified participants that the Dental Plan was terminated effective January 22, 2010. However, based on its failure to pay any Dental Plan claims subsequent to December 30, 2009, Home Valu effectively terminated the Dental Plan coverage on December 31, 2009.

36. Despite having effectively terminated the Dental Plan on December 31, 2009, Home Valu withheld \$1,935.70 in Dental Plan contributions from its employees' paychecks on January 14, 2010 and January 29, 2010 and failed to use the amounts so withheld for ongoing Dental Plan coverage.

37. On pay dates January 14, 2010 and January 29, 2010, Home Valu, Gerald Boschwitz and Thomas Boschwitz caused Home Valu to retain \$1,935.70 in participant contributions it had withheld from employees' pay, in its corporate account; failed to ensure that the amounts withheld from employees' pay were used for ongoing Dental Plan coverage; and used the amounts withheld from employees' pay to pay general operating expenses of Home Valu.

38. On information and belief, Home Valu failed to pay \$5,437.12 in Dental Plan claims incurred by Dental Plan participants, primarily in the months of November 2009, December 2009 and January 2010.

39. During the relevant time period, the Dental Plan document provided for continued dental coverage for qualified beneficiaries under COBRA. Eide Bailly provided billing administration for Home Valu's COBRA-qualified beneficiaries under the Dental Plan.

40. On January 29, 2010, subsequent to the Dental Plan's termination, Eide Bailly electronically deposited into Home Valu's account \$226.87 in COBRA Dental Plan premiums received from the Company's former employees, applicable to the period beginning January 1, 2010.

41. Despite having effectively terminated the Dental Plan on December 31, 2009, Home Valu allowed Eide Bailly to deposit the COBRA dental plan premiums into its corporate account and failed to use the amounts for ongoing Dental Plan coverage.

42. As a result, Home Valu, Gerald Boschwitz and Thomas Boschwitz caused Home Valu to retain the \$226.87 in COBRA Dental Plan premiums deposited into its corporate account; failed to ensure that the amounts were used for ongoing Dental Plan coverage; and used the amounts to pay general operating expenses of Home Valu.

43. By the conduct described in paragraphs 33 through 42, Home Value, Gerald Boschwitz and Thomas Boschwitz.

a. failed to ensure that the assets of the Dental Plan did not inure to the benefit of Home Valu in violation of ERISA §403(c)(1), 29 U.S.C. §1103(c)(1);

b. failed to act solely in the interest of the participants and beneficiaries of the Dental 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);

c. caused the Dental 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 Dental Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D);

d. dealt with assets of the Dental Plan in their own interest in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1); and,

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

44. As a direct and proximate result of Home Valu's, Gerald Boschwitz's and Thomas Boschwitz's breaches, the Dental Plan suffered injury and losses for which it is entitled to equitable relief pursuant to ERISA §409, 29 U.S.C. §1109.

**Count III**

**(Failure to remit employee contributions to the Life Insurance Plan)**

45. The allegations contained in paragraphs 1, 2, 7, 8 and 11 through 18, are hereby incorporated in this Count.

46. During the relevant time period, Sun Life Insurance Company of Canada was the insurance carrier for the Life Insurance Plan.

47. During the relevant time period, the premiums for the life insurance coverage were due to Sun Life Insurance Company of Canada on the first day of each month.

48. On information and belief, the last insurance premium payment made by Home Valu to Sun Life Insurance Company was for the December 2009 premium, via a check dated December 29, 2009. Subsequent to December 29, 2009, Home Valu ceased payment of any additional Life Insurance Plan premiums.

49. Nevertheless, on pay date January 14, 2010, Home Valu withheld \$662.59 in Life Insurance Plan contributions from its employees' paychecks and failed to remit the amounts so withheld to the Life Insurance Plan.

50. On pay date January 14, 2010, Home Valu, Gerald Boschwitz and Thomas Boschwitz caused Home Valu to retain \$662.59 in participant contributions it had withheld in its corporate account; failed to ensure that the amounts withheld from employees' pay were remitted to the Life Insurance Plan; and used the amounts withheld from employees' pay to pay general operating expenses of Home Valu.

51. On January 21, 2010, Home Valu formally notified participants that the Life Insurance Plan was terminated effective January 22, 2010.

52. During the relevant time period, the Life Insurance Plan document provided for continued life insurance coverage for qualified beneficiaries under COBRA. Eide Bailly provided billing administration for Home Valu's COBRA-qualified beneficiaries under the Life Insurance Plan.

53. On January 29, 2010, subsequent to the Life Insurance Plan's termination, Eide Bailly electronically deposited into Home Valu's corporate account \$42.44 in COBRA Life Insurance Plan premiums received from the Company's former employees, applicable to the period beginning January 1, 2010.

54. Despite having terminated the Life Insurance Plan on January 22, 2010, Home Valu allowed Eide Bailly to deposit the COBRA Life Insurance Plan premiums into its corporate account on January 29, 2010, and failed to remit these amounts to the Life Insurance Plan or reimburse participants the COBRA Life Insurance Plan premiums.

55. As a result, Home Valu, Gerald Boschwitz and Thomas Boschwitz caused Home Valu to retain the \$42.44 in COBRA Life Insurance Plan premiums deposited into its corporate account; failed to ensure that the amounts were remitted to the Life Insurance Plan or reimbursed to the participants; and used the amounts to pay for general operating expenses of Home Valu.

56. By the conduct described in paragraphs 46 through 55, Home Value, Gerald Boschwitz and Thomas Boschwitz:

- a. failed to ensure that the assets of the Life Insurance Plan did not inure to the benefit of Home Valu in violation of ERISA §403(c)(1), 29 U.S.C. §1103(c)(1);
- b. failed to act solely in the interest of the participants and beneficiaries of the Life Insurance 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);
- c. caused the Life Insurance 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 Life Insurance Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D);
- d. dealt with assets of the Life Insurance Plan in their own interest in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1); and,
- e. acted on behalf of a party whose interests are adverse to the interests of the Life Insurance Plan or the interests of its participants and beneficiaries in violation of ERISA §406(b)(2), 29 U.S.C. §1106(b)(2).

57. As a direct and proximate result of Home Valu's, Gerald Boschwitz's and Thomas Boschwitz's breaches, the Life Insurance Plan suffered injury and losses for which it is entitled to equitable relief pursuant to ERISA §409, 29 U.S.C. §1109.

**Count IV**

**(Failure to reimburse participants for eligible claims from their salary deferrals which were retained in the Home Valu's general assets)**

58. The allegations contained in paragraphs 1, 2, and 9 through 18, are hereby incorporated in this Count.

59. At all relevant times, the Flex Plan document provided that employees could defer a portion of their wages for contribution to the Flex Plan. For the 2009 Flex Plan year, participants had until February 29, 2010 to incur eligible expenses and until March 31, 2010 to file claims for reimbursement under the Flex Plan.

60. During the 2009 Flex Plan year, Home Valu withheld \$147,351.00 from its employee's paychecks for contribution to the Flex Plan.

61. During 2009, Home Valu paid eligible claims in the amount of \$124,048.44, leaving a balance of \$23,302.56 in the Flex Plan.

62. In January 2010, employees filed claims for reimbursement for eligible expenses incurred under the Flex Plan. Home Valu failed to reimburse the participants for these claims.

63. At all relevant times, Home Valu failed to use the remaining balance of \$23,302.56 to reimburse the Flex Plan participants for eligible claims, and instead retained the amounts in its corporate account and used the amounts to pay general operating expenses of Home Valu.

64. At all relevant times, Home Valu, Gerald Boschwitz and Thomas Boschwitz caused Home Valu to retain \$23,302.56 in participant contributions it had withheld from employees' pay in its corporate account and failed to ensure that the amounts withheld from employees' pay were used to reimburse the Flex Plan participants for the payment of eligible claims.

65. By the conduct described in paragraphs 59 through 64, Home Valu, Gerald Boschwitz and Thomas Boschwitz:

a. failed to ensure that the assets of the Flex Plan did not inure to the benefit of Home Valu in violation of ERISA §403(c)(1), 29 U.S.C. §1103(c)(1);

b. failed to act solely in the interest of the participants and beneficiaries of the Flex 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);

c. caused the Flex 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 Flex Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D);

d. dealt with assets of the Flex Plan in their own interest in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1); and,

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

66. As a direct and proximate result of Home Valu's, Gerald Boschwitz's and Thomas Boschwitz's breaches, the Flex Plan suffered injury and losses for which it is entitled to equitable relief pursuant to ERISA §409, 29 U.S.C. §1109.

**PRAYER FOR RELIEF**

Wherefore, the Secretary prays for judgment:

A. Permanently enjoining Defendants Home Valu, Gerald Boschwitz and Thomas Boschwitz from violating the provisions of Title I of ERISA;

B. Permanently enjoining Defendants Home Valu, Gerald Boschwitz and Thomas Boschwitz 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 a fiduciary of the Plans;

C. Appointing an independent fiduciary to ensure the proper administration of the Plans;

D. Ordering Defendants Home Valu, Gerald Boschwitz and Thomas Boschwitz, to correct the prohibited transactions in which Home Valu, Gerald Boschwitz and Thomas Boschwitz engaged or for which they are liable;

E. Ordering Defendants Home Valu, Gerald Boschwitz and Thomas Boschwitz, to restore to the Plans all losses, including lost opportunity costs, resulting from Home Valu's, Gerald Boschwitz's and Thomas Boschwitz's fiduciary breaches committed by them or for which they are liable;

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

**M. PATRICIA SMITH**  
Solicitor of Labor

**CHRISTINE Z. HERI**  
Regional Solicitor

P.O. Address:  
U.S. Department of Labor  
Office of the Solicitor  
8th Floor  
230 S. Dearborn St.  
Chicago, IL 60604  
Telephone: (312) 886-5260  
Fax: (312)353-5698  
E-mail: [casas.carla@dol.gov](mailto:casas.carla@dol.gov)

s/Carla M. Casas  
**CARLA M. CASAS**  
Trial Attorney

Attorneys for **THOMAS E. PEREZ**,  
Secretary of Labor, United States  
Department of Labor