UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

HILDA L. SOLIS, Secretary of Labor, United States Department of Labor, Plaintiff,	:	
v.	:	File No.:
ODELL JONES, III; **CECILY HOAGLAND**; and **JOMAR BUILDING COMPANY, INC. 401(k) PLAN**, Defendants.	:	

COMPLAINT

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

1. This action arises under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§1001, et seq., and is brought by the Secretary under ERISA §§502(a)(2) and (5), 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 equitable relief for breaches of fiduciary duty under ERISA §409, 29 U.S.C. §1109, and to obtain such further equitable relief as may be appropriate to redress and to enforce the provisions of Title I of ERISA.

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

COVERAGE

3. The Jomar Building Company, Inc. 401(k) Plan (the "401(k) 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).

4. The Jomar Building Company, Inc. ("Jomar Building"), a Michigan Corporation, established an employee welfare plan on November 24, 1997 to provide health care benefits to employees of Jomar Building.

5. Jomar Building contracted with Blue Cross Blue Shield of Michigan and Blue Care Network of Michigan to provide health care benefits to employees of Jomar Building during the period from 1997 through 2008.

6. Blue Cross Blue Shield of Michigan cancelled the coverage effective March 1, 2008, due to Jomar Building's nonpayment of premiums.

7. Blue Care Network of Michigan cancelled the coverage effective December 31, 2007, due to Jomar Building's nonpayment of premiums.

8. The welfare plan that Jomar Building established to provide health benefits, referred to hereafter as the Jomar Building Company Inc. Benefit Plan (the "Benefit 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 401(k) Plan is named as a defendant herein pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

10. Venue of this action lies in the Eastern District of Michigan pursuant to ERISA §502(e)(2), 29 U.S.C. §1132(e)(2), because the 401(k) Plan and Benefit Plan were administered in Detroit, Wayne County Michigan, within this district.

DEFENDANTS AND PARTIES IN INTEREST

11. At all relevant times, defendant Odell Jones, III was the President and sole owner of Jomar Building, a fiduciary of the 401(k) Plan and the Benefit Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A) and a party in interest to the 401(k) Plan and Benefit Plan within the meaning of ERISA §3(14)(A) and (H), 29 U.S.C. §1002(14)(A) and (H).

12. At all relevant times, defendant Cecily Hoagland was the Vice-President of Jomar, the spouse of defendant Odell Jones, III, a fiduciary of the 401(k) Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A), and a party in interest to the 401(k) Plan and Benefit Plan within the meaning of ERISA §3(14)(A) and (F), 29 U.S.C. §1002(14)(A) and (F).

13. At all relevant times, Jomar Building was the sponsor of the 401(k) Plan and Benefit Plan, the administrator of the 401(k) Plan pursuant to §3(16)(A) of ERISA, 29 U.S.C. §1002(16)(A), a fiduciary of the 401(k) Plan and Benefit Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A), and a party in interest to the 401(k) Plan and Benefit Plan within the meaning of ERISA 3(14)(A) and (C), 29 U.S.C. 1002(14)(A) and (C).

COUNT ONE
(Failure to remit employee contributions to the 401(k) Plan)

14. Paragraphs 1 through 13 above are realleged and incorporated herein by reference.

15. The 401(k) Plan was established in 2001 by Jomar Building, the Plan sponsor, to provide benefits to its employees upon retirement, disability, or death.

16. During the relevant period, the 401(k) Plan's governing documents, which were adopted by Jomar Building, provided in pertinent part that participants could make pre-tax

contributions from their compensation to the 401(k) Plan in an amount up to the contribution limitations set by the Internal Revenue Code on a yearly basis.

17. During the period January 12, 2007 through March 14, 2008, Jomar Building withheld from employees' pay pre-tax $39,624.90 in participant contributions and $9,654.92 in participant loan repayments to the 401(k) Plan and failed to remit the amounts so withheld to the 401(k) Plan's accounts. Jomar Building retained in its own general assets the salary reduction contributions to the 401(k) Plan withheld from employees' pay.

18. During the period January 12, 2007 through March 14, 2008, defendant Odell Jones, III caused Jomar Building to retain the salary reduction contributions to the 401(k) Plan withheld from the employees' pay and failed to ensure that the amounts withheld from employees' pay were deposited in the 401(k) Plan's accounts.

19. During the period January 12, 2007 through March 14, 2008, defendant Cecily Hoagland failed to ensure that the amounts withheld from employees' pay were deposited in the 401(k) Plan's accounts.

20. By the conduct described in paragraphs 17 through 18 above, defendant Odell Jones, III:

a. failed to ensure that all assets of the 401(k) Plan were held in trust and did not inure to the benefit of Jomar Building, in violation of ERISA §403(a) and (c)(1), 29 U.S.C. 1103(a) and (c)(1);

b. failed to act solely in the interest of the participants and beneficiaries of the 401(k) 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. failed to discharge his duties with respect to the 401(k) 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 man 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);

d. caused the 401(k) Plan to engage in transactions which he 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 401(k) Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D);

e. dealt with assets of the 401(k) Plan in his own interest in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1); and

f. acted on behalf of a party whose interests are adverse to the interests of the 401(k) Plan or the interests of its participants and beneficiaries, in violation of ERISA §406(b)(2), 29 U.S.C. §1106(b)(2).

21. By the conduct described in paragraph 19 above, defendant Cecily Hoagland failed to act solely in the interest of the participants and beneficiaries of the 401(k) 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).

22. Defendant Cecily Hoagland is liable, pursuant to ERISA §405(a)(2), 29 U.S.C. §1105(a)(2), for the breaches of fiduciary responsibility by a cofiduciary, as described in paragraph 20 above, because by failing to comply with ERISA §404(a)(1) in the administration

of her specific responsibilities which gave rise to her status as a fiduciary of the 401(k) Plan, she enabled such other fiduciary to commit a breach.

COUNT TWO
(Failure to remit employee contributions to the 401(k) Plan in a timely manner)

23. Paragraphs 1 through 13 and 15 through 16 above are realleged and incorporated herein by reference.

24. During the period January 6, 2006 through October 29, 2007, Jomar Building withheld from its employees' pay pre-tax contributions to the 401(k) Plan and failed to remit the amounts so withheld to the 401(k) Plan's accounts in a timely manner. Jomar Building retained in its own general assets the salary reduction contributions to the 401(k) Plan withheld from employees' pay until they were remitted.

25. During the period January 6, 2006 through October 29, 2007, defendant Odell Jones, III caused Jomar Jomar Building to retain the salary reduction contributions to the 401(k) Plan withheld from the employees' pay and failed to ensure that the amounts withheld from employees' pay were deposited promptly in the 401(k) Plan's accounts.

26. During the period January 6, 2006 through October 29, 2007, defendant Cecily Hoagland failed to ensure that the amounts withheld from employees' pay were deposited promptly in the Plan's accounts.

27. By the conduct described in paragraphs 24 through 25 above, defendant Odell Jones, III:

a. failed to ensure that all assets of the 401(k) Plan were held in trust and did not inure to the benefit of Jomar Building, in violation of ERISA §403(a) and (c)(1), 29 U.S.C. 1103(a) and (c)(1);

b. failed to act solely in the interest of the participants and beneficiaries of the 401(k) 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. failed to discharge his duties with respect to the 401(k) 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 man 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);

d. caused the 401(k) Plan to engage in transactions which he 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 401(k) Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D);

e. dealt with assets of the 401(k) Plan in his own interest in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1); and

f. acted on behalf of a party whose interests are adverse to the interests of the 401(k) Plan or the interests of its participants and beneficiaries, in violation of ERISA §406(b)(2), 29 U.S.C. §1106(b)(2).

28. By the conduct described in paragraph 26 above, defendant Cecily Hoagland failed to act solely in the interest of the participants and beneficiaries of the 401(k) 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).

29. Defendant Cecily Hoagland is liable, pursuant to ERISA §405(a)(2), 29 U.S.C. §1105(a)(2), for the breaches of fiduciary responsibility by a cofiduciary, as described in paragraph 27 above, because by failing to comply with ERISA §404(a)(1) in the administration of her specific responsibilities which gave rise to her status as a fiduciary of the 401(k) Plan, she enabled such other fiduciary to commit a breach.

COUNT THREE
(Failure to remit employee contributions to the Benefit Plan)

30. Paragraphs 1 through 13 above are realleged and incorporated herein by reference.

31. During the period from January 4, 2008 through March 14, 2008, Jomar Building withheld $1,755.47 in employee health premium contributions and failed to remit them to the Benefit Plan or any insurance carrier.

32. During the period from January 4, 2008 through March 14, 2008, Defendant Odell Jones, III caused Jomar Building to retain the employee contributions for health premiums in Jomar Building's corporate account and failed to ensure that the amounts so withheld from employees' pay were remitted for health care coverage.

33. By the conduct described in paragraphs 31 through 32, Defendant Odell Jones, III:

a. failed to ensure that all assets of the Benefit Plan were held in trust and did not inure to the benefit of Jomar Building, in violation of ERISA §403(c)(1), 29 U.S.C. § (c)(1);

b. failed to act solely in the interest of the participants and beneficiaries of the Benefit 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 Benefit Plan to engage in transactions which he 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 Benefit Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D);

d. dealt with assets of the Benefit Plan in his 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 Benefit Plan or in the interests of its participants and beneficiaries, in violation of ERISA §406(b)(2), 29 U.S.C. §1106(b)(2).

COUNT FOUR
(Defalcation)

34. Paragraphs 1 through 13; 15 through 17; 19; 21 through 22; 24; 26; and 28 through 29 above are realleged and incorporated herein by reference.

35. Cecily Hoagland filed for Chapter 7 Bankruptcy protection in the United States Bankruptcy Court for the Eastern District of Michigan on September 30, 2009, case no. 09-70290-tjt. The case was closed on November 3, 2010.

36. Cecily Hoagland did not list her debt to the 401(k) Plan on her bankruptcy filings nor did she list the Secretary of Labor as a creditor.

37. The Secretary received no notice of Cecily Hoagland's bankruptcy filing prior to the date that it closed on November 3, 2010.

38. Defendant Cecily Hoagland's conduct, as described in Paragraphs 21 through 22 and 28 through 29 above, constitutes a defalcation by her while acting in a fiduciary capacity for the 401(k) Plan and, therefore, all unremitted employee contributions and loan repayments plus

any lost opportunity costs owed to the Plan are nondischargeable pursuant to 11 U.S.C. §523(a)(4).

PRAYER FOR RELIEF

WHEREFORE, the Secretary prays for judgment:

A. Permanently enjoining Defendants Odell Jones, III and Cecily Hoagland from violating the provisions of Title I of ERISA;

B. Ordering Defendants Odell Jones, III and Cecily Hoagland to make good to the 401(k) Plan and the Benefit Plan any losses, including interest, resulting from fiduciary breaches committed by them or for which they are liable;

C. Ordering Defendants Odell Jones, III and Cecily Hoagland to correct the prohibited transactions in which they engaged;

D. Ordering the 401(k) Plan to set off funds from defendant Odell Jones, III and Cecily Hoagland's individual Plan accounts to cover any plan losses, including lost opportunity costs, resulting from fiduciary breaches committed by them or for which they are liable, as authorized by §1502(a) of the Taxpayer Relief Act of 1997, codified at 29 U.S.C. §1056(d)(4), if they do not otherwise restore the losses to the 401(k) Plan;

E. Permanently enjoining Defendants Odell Jones, III and Cecily Hoagland from serving as a fiduciary or service provider to any ERISA-covered Plan;

F. Appointing an Independent Fiduciary to administer the plans;

G. Awarding the Secretary the costs of this action; and

H. Ordering such further relief as is appropriate and just.

Dated: September 8, 2011

M. PATRICIA SMITH
Solicitor of Labor

JOAN E. GESTRIN
Regional Solicitor

_/s Matthew M. Scheff___
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