

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS E. PEREZ,
SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

STEPHEN SCOTT DANBY, JR.;
DANBY LUMBER AND MILLWORK
COMPANY, INC.; and
DANBY LUMBER AND MILLWORK
COMPANY, INC. 401(K) PROFIT
SHARING PLAN,

Defendants.

Civil Action

No. 2:14-cv-02920-JHS

FILED

APR 20 2015

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

CONSENT JUDGMENT

Plaintiff, Thomas E. Perez , Secretary of Labor, United States Department of Labor ("Secretary"), has filed a Complaint in this action pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, alleging certain violations by Defendant Stephen Scott Danby, Jr. and Defendant Danby Lumber and Millwork Company, Inc. ("Danby Lumber"). The Danby Lumber and Millwork Company, Inc. 401(K) Profit Sharing Plan ("Plan") was joined as a party defendant under Fed. R. Civ. P. 19(a) solely to assure that complete relief could be granted.

Counsel for the Secretary has engaged in settlement discussions with Stephen Scott Danby, Jr. ("Danby") on behalf of himself, Danby Lumber and the Plan ("the Defendants"). The Secretary and the Defendants have agreed to resolve this case without further litigation. The Defendants admit to the jurisdiction of this Court over the Defendants and the subject matter of this action. The Defendants consent to the entry of this Consent Judgment against the

Defendants by this Court, the terms of which are set forth herein:

1. The Secretary's Complaint alleges that Defendants violated Sections 403, 404 and 406 of ERISA, 29 U.S.C. §§ 1103, 1104 and 1106.
2. The Secretary has agreed to resolve all claims asserted in the Complaint against the Defendants for the equitable relief set forth below.
3. The Secretary and the Defendants understand and agree that entry of this Consent Judgment is without prejudice to the Secretary's right to investigate and redress violations of ERISA, if any, not alleged in the Complaint, including the Secretary's right to institute future enforcement actions with respect to any other such matter. It is further understood that this paragraph shall not constitute a waiver by the Defendants of any defenses, legal or equitable, to any such future action.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that:

- a. This Court has jurisdiction over this action and Defendants.
- b. Danby is removed as the Plan Administrator of the Plan.
- c. Lefoldt & Co., P.A. ("Lefoldt") is appointed as the independent fiduciary of the Plan with plenary authority over Plan administration, management and disposition of the Plan's assets, including termination of the Plan and distribution of the Plan's assets to participants. Lefoldt shall be compensated in accordance with the proposal attached as Government Exhibit 1. That amount may be paid with Plan assets.
- d. Danby previously restored \$100,000.00 to the Plan as restitution. This amount shall be re-apportioned appropriately across the accounts of the other participants as determined by Lefoldt. Defendant Danby shall not be entitled to a distribution of any

plan assets, including this money, until every other participant is made whole as determined by Lefoldt.

- e. Danby's personal account balance in the Plan shall be reduced by the following amounts before any distributions from the Plan are made: \$100,000.00 (representing the loan to George Harlan identified in the Complaint); \$35,000.00 (representing the purchase of the golf course share identified in the Complaint); \$111,882.78 (representing the Plan's assets used for non-Plan expenses identified in the Complaint). These amounts shall be re-apportioned appropriately across the accounts of the other participants as determined by Lefoldt. Defendant Danby shall not be entitled to a distribution of any plan assets, including this money, until every other participant is made whole as determined by Lefoldt.
- f. The independent fiduciary shall be the decision-making person with regard to the acceptance of any offers of sale and any terms of the listing for sale for the Lot 5 Carnation Lane real estate property which is currently owned by the Plan and listed for sale for \$375,000.00. All proceeds from the sale of this property are plan assets and shall be re-apportioned appropriately across the accounts of all other participants as determined by Lefoldt. Defendant Danby shall not be entitled to a distribution of any plan assets, including this money, until every other participant is made whole as determined by Lefoldt.
- g. The Plan's assets currently being held by the Clerk of the Court pursuant to the Court's Order of July 1, 2014 shall be transferred to the independent fiduciary at the address listed in subparagraph (d). These plan assets shall be re-apportioned appropriately across the accounts of all other participants as determined by Lefoldt.

Defendant Danby shall not be entitled to a distribution of any plan assets, including this money, until every other participant is made whole as determined by Lefoldt.

- h. The Plan shall redistribute the amounts described in subparagraphs (d), (e), (f) and (g) to the Plan participants in amounts necessary to restore their losses incurred as a result of the fiduciary breaches alleged in the Complaint. Danby waives his right to receive any portion of these amounts until and unless all other Plan participants are made whole for all losses caused by the Defendants' fiduciary breaches. Danby's spouse, Debora W. Danby, has agreed to waive her rights to receive any portion of these amounts until and unless all other Plan participants are made whole for all losses caused by the Defendants' fiduciary breaches pursuant to Section 205(c) of ERISA, 29 U.S.C. § 1055(C), and her waiver is attached hereto as Exhibit 2.
- i. The Plan shall provide to the Regional Director of EBSA satisfactory proof of the reallocations of Danby's account, within 7 days of such reallocation. Satisfactory proof of the reallocation shall include, at a minimum, copies of records maintained by the Plan's third party record keeper before and after the reallocation demonstrating the reallocation from Danby's account to the accounts of other participants, or (in the case of reallocation to former participants or their beneficiaries) checks written to those participants, or transfers of funds to IRAs established in their names, together with a statement in writing from the Plan Administrator that appropriate 1099Rs will be issued reflecting the reallocations.
- j. Upon receiving proof of the reallocation payment in subparagraph (e), the Secretary shall assess a penalty against Danby representing 10 percent of the applicable recovery amounts described in subparagraph (e) pursuant to ERISA § 502(l), 29

U.S.C. § 1132(l). Danby waives his right to contest said penalty but preserves his right to request a penalty waiver. Unless Danby applies for a waiver, Danby shall pay the penalty within ten (10) days of receipt of the notice of assessment. If Danby applies for a waiver to reduce or eliminate the penalty amount pursuant to ERISA § 502(l)(3), 29 U.S.C. § 1132(l)(3), and is denied such waiver by the Secretary, Danby shall pay any applicable penalty amount within ten (10) days of the Secretary's denial.

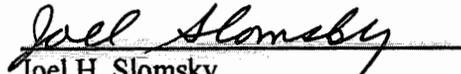
- k. The Defendants, their agents, representatives, servants and employees and all persons acting by or under their authority shall cooperate with the independent fiduciary in the performance of its duties. The Defendants shall provide their full cooperation to the independent fiduciary relative to any need for participant or financial data that may exist with regard to any record of the Plan.
- l. Danby and Danby Lumber are permanently enjoined from serving as trustee, fiduciary, advisor, or administrator to any employee benefit plan, as that term is defined at Section 3(3) of ERISA, 29 U.S.C. § 1002(3). Danby and Danby Lumber are permanently enjoined from serving in any capacity that involves decision-making authority or custody or control of the moneys, funds, assets, or property of any employee benefit plan.
- m. Danby and Danby Lumber are permanently enjoined from violating any provisions of ERISA in the future.
- n. If Danby or Danby Lumber files for any form of bankruptcy prior to the full payment of restitution to the Plan, neither Danby nor Danby Lumber will oppose any proof of claim that the Secretary files in the bankruptcy proceeding for any amount still owing.

- o. If Danby files for any form of bankruptcy prior to the full payment of restitution to the Plan, Danby will not oppose an adversarial action that the Secretary may file to have the debt to the Plan declared non-dischargeable.
- p. The Secretary and the Defendants shall each bear their own costs, expenses, and attorneys' fees incurred to date in connection with any stage of this proceeding, including but not limited to, attorneys' fees which may be available under the Equal Access to Justice Act, as amended.
- q. This Consent Judgment shall operate as a final disposition of all claims asserted by the Secretary against Defendants in the Complaint.
- r. Nothing in this Consent Judgment is binding on any governmental agency other than the United States Department of Labor.
- s. This Court retains jurisdiction of this action for purposes of enforcing compliance with the terms of this Consent Judgment.

t. The Court directs the entry of this Consent Judgment as a final order for the Plaintiff Secretary of Labor and against Defendants.

Date: 5/20/15

SO ORDERED:
April 20, 2015


Joel H. Slomsky
United States District Judge


For: Danby Lumber and Millwork
Company, Inc. 401(K) Profit Sharing
Plan

M. Patricia Smith
Solicitor of Labor

Oscar Hampton III
Regional Solicitor


For: Danby Lumber and Millwork
Company, Inc.


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PA Bar No. 74-611


For: Stephen Scott Danby, Jr.

Attorneys for Plaintiff
U.S. DEPARTMENT OF LABOR



April 14, 2015

Ms. Eloise M. Fulton, Supervisory Investigator
U.S. Department of Labor – EBSA
Philadelphia Regional Office

VIA EMAIL: fulton.eloise@dol.gov

RE: Danby Lumber and Millwork Co., Inc.
401(k) Profit Sharing Plan

Dear Ms. Fulton:

Enclosed is a task list to take over as Independent Fiduciary to administer and terminate the above referenced plan in accordance with ERISA and the plan documents for a fee, including expenses, not to exceed \$19,782.50.

Please note that the task list is based on the following assumptions:

1. The above fee amount is based on The Hartford completing the distributions, 1099R/1096 and 945 reporting for the 401(k) portion of plan assets. If this is not the case, additional fees will apply.
2. All participants in the 401(k) portion of the plan will be paid in 2015.
3. The bid assumes that the remaining parcel of land will be sold within a short-term in 2015, and the profit sharing assets of the plan will be distributed when the last parcel of property is sold, and hopefully the plan will be closed in 2015 or 2016, depending on the sale date of the final parcel of real estate. If the property is not sold in a relatively short period of time and a partial distribution is to be made to participants of the profit sharing portion of the plan before the property is sold, additional fees may apply.
4. The Independent Fiduciary will prepare and file a final Form 5500 and supporting schedules.
5. The Independent Fiduciary will bring the participant valuations in the profit sharing portion of the plan current based on the assets currently held by National Penn Bank, the restitution paid into the plan, the offset of the former trustee's account, and the sale of the real estate utilizing on the best information available from the prior valuations and records provided by the former third-party administrator.
6. The bid does not include time and expenses of the Independent Fiduciary in the event of any required travel to Philadelphia regarding the sale of the remaining parcel of property.
7. In the case of missing participants, the Independent Fiduciary will follow the standards set in the DOL Field Assistance Bulletin 2014-01 that addresses this issue.



Ms. Eloise M. Fulton
Page Two
April 14, 2015

I want to thank you for considering Lefoldt & Co., P. A. to be the Independent Fiduciary, and we look forward to working with you in the successful administration and termination of this plan.

Sincerely,



Larry Lefoldt, CPA

MLL:dw
enclosure

**Danby Lumber and Millwork Co., Inc. 401(k) Profit Sharing Plan
Estimated Task List for Administration and Plan Termination**

- Review DOL packet and work with The Hartford, National Penn Bank and the court on asset control, administration, reporting, compliance, fees, and other issues
Senior Staff Accountant (15.00 hr.)
Trustee (7.50 hr.)
- Communicate, review and secure funding on final parcel of land to be sold and work with realtor on sale, closing and payment for Profit Sharing Plan
Senior Staff Accountant (15.00 hr.)
Trustee (12.00 hr.)
- Bring participant allocations up to date and complete participant spreadsheets with census, balances, distribution information
Senior Employee Benefits Accountant (10.00 hr.)
Support Staff (2.00 hr.)
Trustee (2.00 hr.)
- Prepare and send distribution packets and second requests to 48 participants
Senior Employee Benefits Accountant (3.00 hr.)
Support Staff (2.00 hr.)
- Coordinate distributions through the Hartford for 46 participants on 401(k) portion of assets
Senior Employee Benefits Accountant (8.00 hr.)
Trustee (2.50 hr.)
- Complete distributions for 48 participants on profit sharing portion of assets, including 945 deposits
Senior Employee Benefits Accountant (12.00 hr.)
Trustee (3.00 hr.)
- Locate missing participants using Westlaw, internet searches, calls, etc.
Senior Employee Benefits Accountant (3.00 hr.)
Support Staff (1.50 hr.)
- Complete and file forms 1099R/1096 and 945 for profit sharing portion of assets
Senior Employee Benefits Accountant (5.00 hr.)
Trustee (.50 hr.)
- Miscellaneous troubleshooting, research, participant and broker calls, administrative matters, status updates
Senior Employee Benefits Accountant (8.00 hr.)
Support Staff (2.00 hr.)
Trustee (6.50 hr.)
- Complete and file 2015 5500 and supporting schedules (small plan)
Senior Employee Benefits Accountant (6.00 hr.)
Support Staff (.25 hr.)
Senior Tax Partner (1.50 hr.)
Trustee (.75 hr.)

<u>Tasks</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
Senior Employee Benefits Accountant	85.00	130.00	\$11,050.00
Support Staff	7.75	80.00	620.00
Senior Tax Partner	1.50	210.00	315.00
Trustee	34.75	210.00	7,297.50
	<u>129.00</u>		<u>\$ 19,282.50</u>
Out-of-Pocket Expenses (copies, postage, bond, tax filings, etc.)			500.00
TOTAL			<u>\$ 19,782.50</u>

CONSENT OF SPOUSE TO WAIVER OF BENEFITS
Danby Lumber and Millwork, Inc. 401(k) Profit Sharing Plan
(hereinafter, the "Plan")

I, Deborah W. Danby declare that:

1. I am the wife of Stephen Scott Danby, Jr. and hereby consent to my husband's forfeiture of any amount owed the Plan that is sufficient to completely satisfy the terms of the Consent Judgment that he entered into with the United States Department of Labor and that is attached hereto ("judgment amount"). I waive all rights to receive benefit payments and return of contributions from the Plan, including my interest in receiving survivorship benefits under the Plan for the judgment amount.

2. This waiver constitutes an effective waiver of any right I may have to that portion of the qualified joint and survivor annuity and/or qualified preretirement survivor annuity form of benefit, pursuant to Section 205(c) of ERISA, 29 U.S.C. § 1055(c).

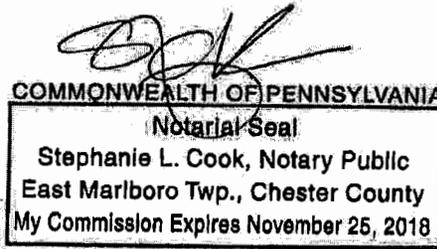
Date: 3.23.15

Deborah W. Danby
Signature

Sworn and subscribed before me

this 23 day of March, 2015

NOTARY PUBLIC



My Commission Expires: 11/25/18

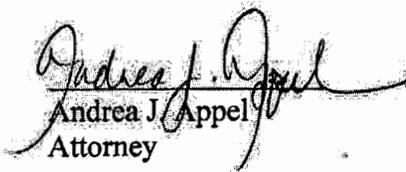
(Knowingly and willfully making false, fictitious, or fraudulent statements to the United States Department of Labor is punishable under Title 18, § 1001, United States Code.)



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Consent Judgment was served by U.S. Mail and electronic mail, to the following:

Stephen Scott Danby, Jr.
Danby Lumber and Millwork Company, Inc.
Danby Lumber and Millwork Company Inc. 401(k)
Profit Sharing Plan
2 Arrow Lane
Chadds Ford, PA 19317
sdanby459@yahoo.com


Andrea J Appel
Attorney