

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

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THOMAS E. PEREZ,	:	
SECRETARY OF LABOR,	:	
UNITED STATES DEPARTMENT OF LABOR,	:	
	:	
Plaintiff,	:	Civil Action
	:	
v.	:	No. _____
	:	
	:	
STEPHEN SCOTT DANBY, JR.;	:	
DANBY LUMBER AND MILLWORK	:	
COMPANY, INC.; and	:	
DANBY LUMBER AND MILLWORK	:	
COMPANY, INC. 401(K) PROFIT	:	
SHARING PLAN,	:	
Defendants.	:	

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**COMPLAINT**

Thomas E. Perez, Secretary of Labor, United States Department of Labor, hereby alleges:

**Jurisdiction and Venue**

1. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA" or "the Act"), 29 U.S.C. § 1001, et seq., and is brought to obtain relief under Sections 409 and 502 of ERISA, 29 U.S.C. §§ 1109 and 1132, in the form of remedies that will redress violations to obtain appropriate relief for breaches of fiduciary duty under ERISA Section 409, 29 U.S.C. § 1109, and to obtain such further relief as may be appropriate to enforce the provisions of Title I of ERISA.

2. This Court has subject matter jurisdiction over this action pursuant to Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).

3. The Danby Lumber and Millwork Company, Inc. 401(k) Profit Sharing Plan ("the

Plan”) is a single-employer, profit sharing, defined benefit plan which provides retirement benefits to employees. The Plan is an employee benefit plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3), and is therefore subject to the coverage of the Act pursuant to Section 4(a) of ERISA, 29 U.S.C. § 1003(a). The Plan is administered in Kennett Square, Pennsylvania.

4. Defendant Danby Lumber and Millwork Company, Inc. (“the Company”) operated in Kennett Square, Pennsylvania, from 1978 through 2011.

5. Defendant Stephen Scott Danby, Jr. resides in Chadds Ford, Pennsylvania.

6. Venue with respect to this action lies in the Eastern District of Pennsylvania, pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

7. The relevant time period is May 2008 to the present.

#### **The Parties**

8. The Secretary, pursuant to Sections 502(a)(2) and (5) of the Act, 29 U.S.C. §§1132(a)(2) and (5), has the authority to enforce the provisions of Title I of ERISA by, among other means, the filing and prosecution of claims against fiduciaries and others who commit violations of ERISA.

9. The Company is the sponsor and Plan Administrator of the Plan. At all relevant times, the Company exercised discretionary authority or discretionary control respecting management of the Plans, exercised authority or control respecting management or disposition of the Plans’ assets and had discretionary authority or discretionary responsibility in the administration of the Plans. The Company is therefore a fiduciary of the Plans within the meaning of ERISA Section 3(21), 29 U.S.C. § 1002(21), and a party in interest as that term is

defined in ERISA Section 3(14)(A), 29 U.S.C. § 1002(14)(A). As an employer whose employees are covered by the Plan, the Company is also a party in interest as that term is defined in ERISA Section 3(14)(C), 29 U.S.C. § 1002(14)(C).

10. At all relevant times, Danby was President and majority shareholder of the Company and Trustee of the Plan. In addition, at all relevant times, Danby performed the duties and functions of the Plan Administrator of the Plan. At all relevant times, Danby exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets and had discretionary authority or discretionary responsibility in the administration of the Plan. He is therefore a fiduciary of the Plan within the meaning of ERISA Section 3(21), 29 U.S.C. § 1002(21), and a party in interest as that term is defined in ERISA Section 3(14)(A), 29 U.S.C. § 1002(14)(A). At all relevant times, as an Owner of more than 50% of the Company and a Director of the Company, Danby was a party in interest as that term is defined in ERISA Sections 3(14)(E) and 3(14)(H), 29 U.S.C. §§ 1002(14)(E) and 1002(14)(H).

11. The Plan is joined as a party defendant pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

### **General Allegations**

12. Beginning in 1978, the Company provided lumber and other building materials to professional commercial and residential contractors.

13. On or about June 1, 1980, the Company established the Plan as a means to provide income to its employees beyond their working years. Originally, the Plan included a defined benefit component, but that component was never funded. On May 1, 2007, the Company

restated and amended the Plan to establish both a 401(k) portion and a defined contribution portion. The Company retained both the 401(k) portion and the defined benefit portion when the Plan was again restated and amended on April 29, 2010.

14. The 401(k) portion of the Plan is funded only by participant contributions through payroll deductions. The Company did not provide any matching contributions to the participants' 401(k) accounts. The participants' 401(k) accounts are held in trust with The Hartford and the investment and withdrawal options are controlled by the individual participants.

15. The Profit Sharing portion of the Plan is funded only by discretionary contributions from the Company. The assets of the Profit Sharing portion of the Plan include cash held in trust with National Penn and Merrill Lynch and under the control of the Plan Administrator and the Trustee, as well as investments made by the Plan Administrator and the Trustee.

16. Although the Company was the named Plan Administrator for the Plan, at all relevant times, Danby performed the functions of the Plan Administrator and made the decisions regarding the administration of the Plan and the disposition of the Plan's assets. Danby made all decisions regarding the investment of the Plan's Profit Sharing assets.

17. The Plan has not provided any benefits statements to participants or filed any required Form 5500s with the Employee Benefits Security Administration, United States Department of Labor, since 2007. As of December 31, 2007, approximately 30 participants were fully vested in their Profit Sharing accounts, with account balances totaling approximately \$840,000.00.

18. In April 2011, the Company terminated all of its employees. As a result, all

participants became eligible for distributions from their fully vested Profit Sharing accounts.

19. The majority of participants were denied their requested distributions from their fully vested Profit Sharing accounts because the Plan had insufficient liquid assets to satisfy the requested distributions.

20. On or about December 30, 2008, Danby and the Company invested approximately \$175,000.00 of the Plan's Profit Sharing assets in an undeveloped lot at 33 Orchard View Drive in Chadds Ford, Pennsylvania. The Plan purchased this lot from the Company. In this transaction, Danby acted as the seller as the President of the Company and the buyer as the Trustee of the Plan. The Plan also paid approximately \$4,900.00 in settlement costs for this transaction. On March 8, 2011, the Orchard View lot was independently appraised at a Fair Market Value of \$145,000.00.

21. Since December 30, 2008, Danby and the Company have continuously used the assets of the Profit Sharing portion of the Plan to satisfy property and other taxes for the Orchard View lot. For example, a Plan check was written on July 5, 2011 in the amount of \$2,519.45 to pay school taxes for the Orchard View lot.

22. On February 6, 2009, Danby and the Company executed a Promissory Note for a loan of \$100,000.00 of the Plan's Profit Sharing assets to George Harlan, a construction contractor and customer of the Company. The Promissory Note provides that the loan has an interest rate of 8.5% and required monthly "interest only" payments of \$708.33 beginning on March 10, 2009 and continuing the tenth day of each month thereafter until March 10, 2010, when the full amount was due. The Promissory Note provides that the loan is secured by the mortgage on an apartment building owned by George Harlan in a statement of collateral to be

executed simultaneously with the Promissory Note. However, a mortgage was never obtained to secure the Promissory Note.

23. On or about February 19, 2010 and June 24, 2010, Danby and the Company deposited payments from George Harlan resulting from the Promissory Note, but they deposited this \$16,628.28 in Plan assets into a Company bank account rather than a Plan bank account.

24. Danby and the Company did not receive any payments from George Harlan with regard to the Promissory Note after June 24, 2010. Danby and the Company did not take any actions to attempt collection from George Harlan or to enforce the re-payment terms of the Promissory Note.

25. On or about December 10, 2010, Danby and the Company sold the Plan's undeveloped lot at 34 Gibble Road in Cochranville, Pennsylvania in a transaction that was contingent upon Danby retaining property rights on the lot for Danby and his family. While this lot was owned by the Plan, the Danby family used the lot for hunting. When the Plan sold the Gibble property to an unrelated third party, the sale specifically included provisions that Danby, his wife and his son maintained their hunting rights on the property for the seller's lifetime and that the Danbys had the right of first refusal to purchase the property from the seller upon any future offer of purchase made to the seller. The Gibble property had been purchased by the Plan on August 22, 1996 for \$180,000.00 and was independently appraised at a Fair Market Value of \$420,000.00 in February 2008. Danby and the Company sold the Gibble property in December 2010 for \$270,000.00 and the retention of the Danby family's property rights.

26. Between December 2010 and April 2011, Danby and the Company used more than \$111,000.00 of the Plan's Profit Sharing assets to satisfy Danby's personal expenses and the

Company's expenses. These transactions include using the Plan's assets to pay Danby's parents for a loan they made to the Company, to pay Danby's personal legal expenses, and to pay the Company's legal expenses, utility bills, health insurance premiums, payroll, vendor bills and banking fees. These transactions were made after the Plan received approximately \$266,000.00 for the sale of the Gibble property on December 6, 2010.

27. On or about December 22, 2010, Danby and the Company transferred approximately \$35,000.00 of the Plan's Profit Sharing assets to Danby for the purchase of a membership share in the Fieldstone Golf Course from Danby. Danby had originally purchased the golf course share in his own name with his own assets. To date, the share in the Fieldstone Gold Course remains titled to Danby rather than the Plan. This transaction occurred shortly after the Plan received approximately \$266,000.00 for the sale of the Gibble property on December 6, 2010.

28. At least one participant requested his fully vested distribution from the Profit Sharing portion of the Plan prior to September 14, 2010 and was unable to obtain such distribution until September 2011. However, Danby and the Company made \$10,000.00 distributions from the Profit Sharing portion of the Plan to Danby's mother on or about December 10, 2010 and January 25, 2011 and to Danby on May 18, 2011.

29. By September 6, 2011, approximately \$12,000.00 of the approximately \$266,000.00 deposit from the sale of the Gibble property remained in the Plan's account. By December 31, 2011, the Profit Sharing portion of Plan had a cash balance of \$7,120.90.

30. Participants are still awaiting their requested distributions of their fully vested Profit Sharing account balances from the Plan.

31. Danby and the Company participated knowingly in or knowingly undertook to conceal acts or omissions by each other that they knew to be violations of ERISA.

32. Danby failed to comply with the Section 404(a)(1) of ERISA in the administration of his fiduciary duties as *de facto* Plan Administrator and as Trustee and enabled the Company to commit a breach of ERISA. The Company failed to comply with the Section 404(a)(1) of ERISA in the administration of its fiduciary duty as Plan Administrator and enabled Danby to commit a breach of ERISA.

33. Danby knew that the Company had violated ERISA, but did not make reasonable efforts under the circumstances to remedy the breaches. The Company knew that Danby had violated ERISA, but did not make reasonable efforts under the circumstances to remedy the breaches.

### **Violations**

34. Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, the Secretary adopts by reference the averments and allegations of paragraphs 1-33, inclusive.

35. By the actions and conduct described in paragraphs 12-33, defendants Danby and the Company, as fiduciaries of the Plan,

- a. failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plans, in violation of ERISA Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);
- b. failed to discharge their duties with respect to the 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 person 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 Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B);

c. failed to ensure that all assets of the Plan be held in trust by one or more trustees, in violation of ERISA Section 403(a), 29 U.S.C. § 1103(a);

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

e. caused the Plan to engage in transactions which it knew or should have known constituted the direct or indirect transfer of plan assets to, or use of plan assets by or for the benefit of a party in interest, in violation of ERISA Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D); and

f. dealt with assets of the Plans in their own interest or for their own account, in violation of ERISA Section 406(b)(1), 29 U.S.C. § 1106(b)(1).

36. Danby and the Company acted in a transaction involving the Plan on behalf of a party who interests are adverse to the interests of the Plan and the Plan's participants, in violation of ERISA Section 406(b)(2), 29 U.S.C. § 1106(b)(2).

37. By the actions and conduct described in paragraphs 12-30, defendants Danby and the Company, as fiduciaries,

a. participated knowingly in, or knowingly undertook to conceal, the acts or omissions of each other, knowing such acts or omissions were breaches of ERISA

and are liable for each other's breaches pursuant to ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1);

b. failed to comply with Section 404(a)(1) in the administration of their specific duties which gave rise to their status as fiduciaries, and thus enabled the other fiduciary to commit breaches of ERISA and are liable for each other's breaches pursuant to ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2); and

c. had knowledge of each other's breaches of ERISA and failed to make reasonable efforts to remedy each other's breaches and are each liable each other's fiduciary breaches, pursuant to ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3).

**Prayer for Relief**

38. WHEREFORE, the Secretary prays that this Court issue an order:

a. Removing Danby and the Company as fiduciaries of the Plan and of any employee benefit plan for which they act as fiduciaries;

b. Permanently enjoining Danby and the Company from acting directly or indirectly, in any fiduciary capacity, with respect to any employee benefit plan subject to ERISA;

c. Permanently enjoining Danby and the Company from exercising any custody, control, or decision making authority with respect to the assets of any employee benefit plan covered by ERISA;

d. Appointing an independent fiduciary with plenary authority and control with respect to the management and administration of the Plan, including the authority to marshal assets on behalf of the Plan, to pursue claims on behalf of the Plan, and

to take all appropriate action with respect to the Plan and the distribution of benefits to the Plan's participants and beneficiaries, with all costs of the independent fiduciary to be paid by the defendants;

e. Ordering the defendants, their agents, employees, service providers, banks, accountants, and attorneys to provide the Secretary and the independent fiduciary with all of the books, documents, and records relating to the finances and administration of the Plan, and to make an accounting to the Secretary and to the independent fiduciary of all contributions to the Plan and all transfers, payments, or expenses incurred or paid in connection with the Plan;

f. Ordering Danby and the Company to disgorge all monies received and to restore all losses, including lost opportunity costs, to the Plans caused by their fiduciary misconduct;

g. Requiring the Plan to set off any individual account balance of Danby against the amount of losses, including lost opportunity costs, resulting from his fiduciary breaches, as authorized by 29 U.S.C. § 1056(d)(4), if the losses are not otherwise restored to the Plan by defendants;

h. Awarding plaintiff, Secretary of Labor, the costs of this action; and

i. Awarding such other relief as is equitable and just.

Respectfully Submitted,

M. Patricia Smith  
Solicitor of Labor

Linda Thomasson  
Acting Regional Solicitor

Joanne Roskey  
Regional Counsel, ERISA

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U.S. DEPARTMENT OF LABOR

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