

1 JANET M. HEROLD
Regional Solicitor
2 DANIELLE L. JABERG (S.B. #256653)
Counsel for ERISA
3 LAURA C. BREMER (S.B. #162900)
Trial Attorney
4 Office of the Solicitor
UNITED STATES DEPARTMENT OF LABOR
5 90 7th Street, Suite 3-700
San Francisco, California 94103
6 Telephone: (415) 625-7757
Facsimile: (415) 625-7772
7 Email: bremer.laura@dol.gov

8 Attorneys for Plaintiff
United States Department of Labor
9

10
11 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

12 THOMAS E. PEREZ, Secretary of Labor,
United States Department of Labor,

13
14 Plaintiff,

15 vs.

16 STORMS & LOWE ASSOCIATES, INC.,
a California corporation; JAMES R.
17 MANNING, an individual; ROGER
AGUILERA, an individual; and, STORMS
18 & LOWE 401(K) PLAN, an employee
benefit plan,

19
20 Defendants.

Case No.

COMPLAINT FOR VIOLATIONS
OF ERISA

21 Plaintiff Hilda L. Solis, Secretary of Labor, United States Department of Labor (the
22 “Secretary”), alleges:

23 1. This action arises under Title I of the Employee Retirement Income Security
24 Act of 1974 (“ERISA”), as amended, 29 U.S.C. §§ 1001-1191c, and is brought by the Secretary
25 under ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5), to enjoin acts and practices
26 that violate the provisions of Title I of ERISA, to obtain appropriate equitable relief for
27 breaches of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109, and to obtain such further
28 equitable relief as may be appropriate to redress and to enforce the provisions of Title I of

1 ERISA.

2 2. This Court has subject matter jurisdiction over this action under ERISA §
3 502(e)(1), 29 U.S.C. § 1132(e)(1), and under 28 U.S.C. § 1331.

4 3. Venue of this action lies in the Central District of California, pursuant to ERISA
5 § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Defendants reside and may be found in Los
6 Angeles County, the Storms & Lowe 401(k) Plan was administered in Los Angeles, California,
7 and the breaches took place in Los Angeles County, within this district.

8 **DEFENDANTS**

9 4. The Storms & Lowe 401(k) Plan (the “Plan” or “401(k) Plan”) is an employee
10 benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3), which is subject to the
11 provisions of Title I of ERISA pursuant to ERISA § 4(a), 29 U.S.C. § 1003(a). By an
12 Agreement to Appoint an Independent Fiduciary, effective July 10, 2015, Alpha & Omega was
13 appointed the Independent Fiduciary of the Plan.

14 5. At all relevant times, Defendant Storms & Lowe Associates, Inc. (“Storms &
15 Lowe” or “Company”), was the sponsor and Plan Administrator of the 401(k) Plan, a fiduciary
16 of the Plan within the meaning of ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i)
17 and (iii), and a party in interest to the Plan within the meaning of ERISA §§ 3(14)(A) and (C),
18 29 U.S.C. §§ 1002(14)(A) and (C). By an Agreement to Appoint an Independent Fiduciary,
19 effective July 10, 2015, the Company was removed as Plan Administrator and fiduciary of the
20 Plan.

21 6. At all relevant times, Defendant Roger C. Aguilera, was and is the 51% owner
22 of Storms & Lowe; exercised discretionary authority and control respecting the management
23 and disposition of the 401(k) Plan and its assets; exercised discretionary authority and
24 responsibility in the administration of the 401(k) Plan, was a fiduciary of the Plan within the
25 meaning of ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and (iii); and was and
26 is a party in interest to the Plan within the meaning of ERISA §§ 3(14)(A), (E) and (H), 29
27 U.S.C. §§ 1002(14)(A), (E) and (H). By an Agreement to Appoint an Independent Fiduciary,
28 effective July 10, 2015, Roger Aguilera resigned as a fiduciary to the Plan.

1 15. At all relevant times, Defendants James Manning and Roger Aguilera had
2 signatory authority to withdraw funds from the Storms & Lowe corporate bank account(s), and
3 to withdraw funds or make distributions from the 401(k) Plan's account(s).

4 16. At all relevant times, Defendant Roger Aguilera exercised discretionary control
5 and authority over the management of the Plan, Storms & Lowe's payroll, employees'
6 contributions, and the disposition of Plan assets.

7 17. During the period from approximately January 11, 2008 through at least
8 October 17, 2008, Defendants Roger Aguilera caused Storms & Lowe to withhold
9 approximately \$55,000 from employees' pay for salary reduction contributions and
10 approximately \$9,700 in loan repayments to the 401(k) Plan, but failed to timely remit the
11 amounts so withheld into the 401(k) Plan's account, and instead retained and commingled the
12 withheld contributions with the company's accounts and used the amounts withheld for non-
13 Plan purposes. To date, over \$41,000 in employee contributions and loan repayments have
14 neither been repaid to Plan participants nor restored to the 401(k) Plan.

15 18. Pursuant to 29 C.F.R. § 2510.3-102, employee contributions must be remitted to
16 the Plan on the earliest date that they could reasonably be segregated from the assets of Storms
17 & Lowe, the Employer, but no later than the fifteenth business day of the month following the
18 month in which the Contributions would have been paid in cash to the participant. During the
19 period from at least January 11, 2008 through October 17, 2008, Defendant Roger Aguilera
20 caused Storms & Lowe to fail to timely remit owing employee contributions to the Plan.

21 **Improper Withdrawal of Plan Assets from 401(k) Plan by Defendants Storms & Lowe,**
22 **Roger Aguilera, and James Manning**

23 19. Paragraphs 1 through 18 above are realleged and incorporated herein by
24 reference.

25 20. At all relevant times, Defendants James Manning and Roger Aguilera exercised
26 authority and control over the management of the Plan, and the disposition of Plan assets.

27 21. Prior to June 21, 2012, the Plan had approximately \$166,395 in assets.

28 22. On or about June 21, 2012, James Manning and Roger Aguilera signed a

1 request to the Plan's custodian, Met Life Insurance Company of Connecticut, that all Plan funds
2 held by the custodian be wired to Storms & Lowe's corporate account. In accordance with
3 these instructions, on June 21, 2012, a withdrawal of \$166,395.53 was made from the Plan's
4 account, leaving a balance of \$0 in the Plan's account.

5 23. On or about July 30, 2012, James Manning and Roger Aguilera authorized the
6 withdrawal of \$166,395.53 from the Storms & Lowe corporate account into an account for
7 Storms & Lowe, Inc.

8 24. On or about July 31, 2012, Roger Aguilera signed two checks drawn on the
9 Storms & Lowe, Inc. account – one to James Manning for \$83,197.77 and one to Roger
10 Aguilera for \$83,197.76. More than \$123,000 has neither been restored to the 401(k) Plan by
11 the fiduciaries nor paid to Plan participants

12 25. Defendants Storms & Lowe, Roger Aguilera, and James Manning improperly
13 withdrew Plan assets from the 401(k) Plan and used them for non-Plan purposes.

14 **VIOLATIONS OF ERISA**

15 26. By the conduct described in paragraphs 9-18 above, Defendants Storms &
16 Lowe and Roger Aguilera, acting in their fiduciary capacities:

17 a. failed to act solely in the interest of the participants and beneficiaries of the
18 401(k) Plan and for the exclusive purpose of providing benefits to participants and their
19 beneficiaries and defraying reasonable expenses of 401(k) Plan administration, in violation of
20 ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);

21 b. failed to act with care, skill, prudence, and diligence under the circumstances then
22 prevailing that a prudent person acting in a like capacity and familiar with such matters would
23 use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA
24 § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B);

25 c. caused the 401(k) Plan to engage in transactions which Defendants knew or
26 should have known constituted a direct or indirect lending of money or other extension of credit
27 between the Plan and a party in interest, in violation of ERISA § 406(a)(1)(B), 29 U.S.C.
28 § 1106(a)(1)(B);

1 d. caused the 401(k) Plan to engage in transactions which they knew or should have
2 known constituted a direct or indirect transfer to, or use by or for the benefit of, a party in
3 interest, of assets of the Plan, in violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D);
4 and

5 e. dealt with assets of the Plan in their own interests and acted on behalf of a party
6 whose interests are adverse to the interests of the Plan or the interests of its participants and
7 beneficiaries, in violation of ERISA § 406(b)(1) and (2), 29 U.S.C. § 1106(b)(1) and (2).

8 27. As a direct and proximate result of the breaches of fiduciary duties committed
9 by Storms & Lowe and Roger Aguilera, as described in paragraphs 9-18 above, the 401(k) Plan
10 has suffered losses, including lost-opportunity income, for which Storms & Lowe and Roger
11 Aguilera are jointly and severally liable pursuant to ERISA § 409, 29 U.S.C. § 1109.

12 28. By the conduct described in paragraphs 19-25 above, Defendants Storms &
13 Lowe, Roger Aguilera, and James Manning, acting in their fiduciary capacities:

14 a. failed to act solely in the interest of the participants and beneficiaries of the
15 401(k) Plan and for the exclusive purpose of providing benefits to participants and their
16 beneficiaries and defraying reasonable expenses of 401(k) Plan administration, in violation of
17 ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A); and,

18 b. failed to act with care, skill, prudence, and diligence under the circumstances then
19 prevailing that a prudent person acting in a like capacity and familiar with such matters would
20 use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA
21 § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B);

22 c. caused the 401(k) Plan to engage in transactions which Defendants knew or
23 should have known constituted a direct or indirect lending of money or other extension of credit
24 between the Plan and a party in interest, in violation of ERISA § 406(a)(1)(B), 29 U.S.C.
25 § 1106(a)(1)(B);

26 d. caused the 401(k) Plan to engage in transactions which they knew or should have
27 known constituted a direct or indirect transfer to, or use by or for the benefit of, a party in
28 interest, of assets of the Plan, in violation of ERISA § 406(a)(1)(D), 29 U.S.C.

1 § 1106(a)(1)(D);

2 e. dealt with assets of the Plan in their own interests and acted on behalf of a party
3 whose interests are adverse to the interests of the Plan or the interests of its participants and
4 beneficiaries, in violation of ERISA § 406(b)(1) and (2), 29 U.S.C. § 1106(b)(1) and (2); and

5 f. participated knowingly in the breaches of fiduciary duty of other fiduciaries
6 and/or had knowledge of such breaches by a co-fiduciary and failed to take reasonable efforts to
7 remedy such breaches, in violation of ERISA § 405(a), 29 U.S.C. § 1105(a).

8 29. As a direct and proximate result of the breaches of fiduciary duties committed
9 by Storms & Lowe, Roger Aguilera, and James Manning as described in paragraphs 19-25
10 above, the 401(k) Plan has suffered losses, including lost-opportunity income, for which
11 Storms & Lowe, Roger Aguilera, and James Manning are jointly and severally liable pursuant
12 to ERISA § 409, 29 U.S.C. § 1109.

13
14 **PRAYER FOR RELIEF**

15 WHEREFORE, the Secretary prays for judgment:

16 A. Reestablishing the Plan to collect employee contributions, plus lost-opportunity
17 income;

18 B. Permanently enjoining Defendants Roger Aguilera and James Manning from
19 serving as fiduciaries of, or service providers to, any ERISA-covered employee benefit plan;

20 C. Appointing or retaining an independent fiduciary with full discretionary authority
21 to collect and distribute the 401(k) Plan's assets to the participants and beneficiaries, terminate
22 the 401(k) Plan, and conclude any Plan-related matters connected with the proper termination of
23 the Plan;

24 D. Requiring the Defendants to cooperate with the independent fiduciary;

25 E. Ordering a full accounting of the Plan as a result of the fiduciary breaches;

26 F. Ordering Defendants Storms & Lowe and James Manning to restore to the 401(k)
27 Plan any losses to the Plan resulting from their fiduciary breaches in failing to remit or timely
28 remit employee contributions and loan repayments to the Plan, including \$34,932.06 in

1 unremitted employee contributions, \$6,433.70 in unremitted loan repayments, and lost-
2 opportunity income earnings of \$12,219.72 as of March 31, 2015, which continues to accrue;

3 G. Ordering Defendants Storms & Lowe, James Manning, and Roger Aguilera to
4 restore to the 401(k) Plan any losses to the Plan resulting from their fiduciary breaches in
5 improperly withdrawing Plan assets from the 401(k) Plan, including \$123,097.28 in improper
6 withdrawals, and \$14,377.80 in lost opportunity income as of March 31, 2015, which continues
7 to accrue;

8 H. Requiring the Defendants to pay for all costs associated with the appointment and
9 retention of the independent fiduciary;

10 I. Ordering Defendants Storms & Lowe, Roger Aguilera, and James Manning to
11 correct the prohibited transactions in which they engaged or in which they caused the Plan to
12 engage;

13 J. Permanently enjoining Defendants Storms & Lowe, Roger Aguilera, and James
14 Manning from violating the provisions of Title I of ERISA;

15 K. Awarding the Secretary the costs of this action; and

16 L. Ordering such further relief as is appropriate and just.

17 Dated: August 6, 2015

18 M. PATRICIA SMITH
Solicitor of Labor

19 JANET M. HEROLD
Regional Solicitor

20 DANIELLE L. JABERG
Counsel for ERISA

21 By: /s/ Laura C. Bremer
22 LAURA C. BREMER
23 Senior Trial Attorney

24 Attorneys for Plaintiff
25 United States Department of Labor
26
27
28