

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION (DAYTON)**

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<b>HILDA L. SOLIS</b> , Secretary of Labor,	:	
United States Department of Labor,	:	Case No.
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
<b>BRUCE E. SPENCER; TANNILE</b>	:	
<b>ELIZABETH ORTIZ; PAUL</b>	:	
<b>OLZESKI; and SPENCER &amp;</b>	:	
<b>ASSOCIATES, LLC PROFIT</b>	:	
<b>SHARING AND 401(K) PLAN,</b>	:	
	:	
Defendants.	:	

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**COMPLAINT**

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

**JURISDICTION AND VENUE**

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 violations 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).

3. The Spencer & Associates, LLC Profit Sharing and 401(k) Plan (the “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. Venue of this action lies in the Southern District of Ohio, Western Division (Dayton), pursuant to ERISA §502(e)(2), 29 U.S.C. §1132(e)(2), and L.R. 82.1, because the Plan is administered in Springfield, Clark County, Ohio, within this district and division.

5. The Plan is named as a defendant pursuant to Rule 19(a)(1)(A) of the *Federal Rules of Civil Procedure* solely to assure that complete relief can be granted.

#### **DEFENDANTS AND PARTIES IN INTERESTS**

6. Spencer & Associates, LLC (“Spencer & Associates”) was an Ohio limited liability company that was formed on February 25, 2002 and dissolved on September 16, 2010.

7. At all relevant times, Spencer & Associates was the Plan’s sponsor; the Plan Administrator; the employer of the employees who were covered by the Plan; a fiduciary to the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A); and a party in interest to the Plan within the meaning of ERISA §§3(14)(A) and (C), 29 U.S.C. §§1002(14)(A) and (C).

8. At all relevant times, Bruce Spencer was President, Chief Executive Officer, and sole owner of Spencer & Associates; a trustee of the Plan; a fiduciary of the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A); and a party in interest to the Plan within the meaning of ERISA §§3(14)(A), (E), and (H), 29 U.S.C. §§1002(14)(A), (E), and (H).

**9.** Bruce Spencer filed for relief under Chapter 7 of the Bankruptcy Code on January 11, 2011, in the United States Bankruptcy Court for the Southern District of Ohio, Western Division, Case No. 11-30118. On March 6, 2012, the Bankruptcy Court entered a *Judgment and Order Granting Motion for Default Judgment and Denying Debtors' Discharge By Default*, and therefore, the automatic stay is no longer operative.

**10.** At all relevant times, Tannile Elizabeth Ortiz ("Ortiz") was an officer of Spencer & Associates; a fiduciary of the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A); and a party in interest to the Plan within the meaning of ERISA §§3(14)(A) and (H), 29 U.S.C. §§1002(14)(A) and (H).

**11.** At all relevant times, Paul Olzeski ("Olzeski") was an officer of Spencer & Associates; a trustee of the Plan; a fiduciary of the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A); and a party in interest to the Plan within the meaning of ERISA §§3(14)(A) and (H), 29 U.S.C. §§1002(14)(A) and (H).

### **THE PLAN**

**12.** The Plan was established in January 2008 by Spencer & Associates to provide retirement benefits to its employees and their beneficiaries. The assets of the Plan were held in trust by John Hancock Life Insurance Company (U.S.A.) ("John Hancock"). Bruce Spencer and Paul Ozeski have been trustees of the Plan since its inception.

**13.** At all relevant times, the Plan's governing documents provided in pertinent part that participants could make pre-tax contributions to the Plan from their compensation on a payroll basis.

**14.** At all relevant times, Spencer & Associates has withheld employee contributions from its employees' pay for remittance to the Plan. These withholdings were

retained in Spencer & Associates' corporate bank account until they were remitted to the Plan's asset custodian, John Hancock.

15. At all relevant times, Ortiz was responsible for causing participant withholdings to be remitted by Spencer & Associates to the Plan's asset custodian, John Hancock.

**COUNT I**  
**UNTIMELY REMITTED**  
**EMPLOYEE CONTRIBUTIONS TO THE PLAN**

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

17. During the period from April 4, 2008 through June 25, 2010, Spencer & Associates withheld \$8,378.36 from its employees' pay in participant contributions to the Plan and remitted the amounts so withheld to the Plan up to 163 calendar days after they should have been remitted. Spencer & Associates retained the withheld employee contributions in its own corporate bank account until they were remitted to the Plan.

18. During the period from April 4, 2008 through June 25, 2010, Ortiz caused Spencer & Associates to retain in its corporate account \$8,378.36 in employee contributions it had withheld from its employees' pay until they were remitted to the Plan and failed to ensure that the withheld contributions were deposited into the employees' Plan accounts in a timely manner.

19. By the conduct described in Paragraphs 17 through 18, Spencer & Associates and Ortiz:

A. violated ERISA §§403(a) and (c)(1), 29 U.S.C. §§1103(a) and (c)(1), which requires that all assets of an employee benefit plan shall be held in trust and never inure to the benefit of the employer;

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

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

**20.** Defendants Bruce Spencer and Olzeski failed to act solely in the interest of the participants and beneficiaries of the Plan, for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of the Plan's administration, 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, when they failed to ensure that employee contributions were remitted to the Plan in a timely manner, in violation of ERISA

§404(a)(1), 29 U.S.C. §1104(a)(1), thus allowing Spencer & Associates and Ortiz to engage in the actions set forth in paragraphs 17 through 18 above.

**21.** Defendants Bruce Spencer and Olzeski are liable, pursuant to ERISA §405(a)(2), 29 U.S.C. §1105(a)(2), for the breaches of fiduciary responsibility by co-fiduciaries Spencer & Associates and Ortiz, as described in paragraphs 17 through 18 above, because by failing to comply with ERISA §404(a)(1), 29 U.S.C. §1104(a)(1), they enabled such other fiduciaries to commit a breach.

**COUNT II**  
**UNREMITTED EMPLOYEE**  
**CONTRIBUTIONS TO THE PLAN**

**22.** Paragraphs 1 through 15 above are realleged and incorporated herein by reference.

**23.** During the period from March 7, 2008 to July 11, 2010, Spencer & Associates withheld \$8,330.40 from its employees' pay in participant contributions to the Plan and failed to remit the amounts so withheld to the employees' Plan accounts.

**24.** During the period from March 7, 2008 to July 11, 2010, Ortiz caused Spencer & Associates to retain \$8,330.40 in participant contributions to the Plan in its corporate account and failed to ensure that the withheld contributions were deposited into the employees' Plan accounts.

**25.** By the conduct described in Paragraphs 23 through 24, Spencer & Associates and Ortiz:

**A.** violated ERISA §§403(a) and (c)(1), 29 U.S.C. §§1103(a) and (c)(1), which requires that all assets of an employee benefit plan shall be held in trust and never inure to the benefit of the employer;

**B.** failed to act solely in the interest of the participants and beneficiaries of the 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 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 Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D);

**D.** dealt with assets of the 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 were adverse to the interests of the Plan or the interests of its participants and beneficiaries, in violation of ERISA §406(b)(2), 29 U.S.C. §1106(b)(2).

**26.** Defendants Bruce Spencer and Olzeski failed to act solely in the interest of the participants and beneficiaries of the Plan, for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of the Plan's administration 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, when they failed to ensure that employee contributions were remitted to the Plan in a timely manner, in violation of ERISA §404(a)(1), 29 U.S.C. §1104(a)(1), thus allowing Spencer & Associates and Ortiz to engage in the actions set forth in paragraphs 23 through 24 above.

**27.** Defendants Bruce Spencer and Olzeski are liable, pursuant to ERISA §405(a)(2),

29 U.S.C. §1105(a)(2), for the breaches of fiduciary responsibility by co-fiduciaries Spencer & Associates and Ortiz, as described in paragraphs 23 through 24 above, because by failing to comply with ERISA §404(a)(1), 29 U.S.C. §1104(a)(1), they enabled such other fiduciaries to commit a breach.

**COUNT III**  
**FAILURE TO DISTRIBUTE ASSETS TO PLAN PARTICIPANTS**  
**UPON TERMINATION OF PLAN AND PERSONAL USE OF PLAN ASSETS**

**28.** Paragraphs 1 through 9 and paragraph 12 above are realleged and incorporated herein by reference.

**29.** By letter dated August 24, 2010, Bruce Spencer notified John Hancock that Spencer & Associates had ceased operations and terminated all employees, and requested that John Hancock “close all accounts.”

**30.** On August 26, 2010, Bruce Spencer faxed a “Request for Contract Termination” to John Hancock, requesting that all funds in the Plan be distributed through individual participant payouts.

**31.** On October 11, 2010, Bruce Spencer faxed a change of address request to John Hancock, changing all addresses associated with the Plan to his home address on Wildwood Drive, Springfield, Ohio.

**32.** On October 14, 2010, John Hancock issued a check in the amount of \$34,295.55, representing all remaining funds in the Plan, to Bruce Spencer at his home address. The check was payable to “The Trustees of the Spencer & Associates LLC 401(k) & Profit Sharing Plan.”

**33.** Bruce Spencer endorsed the check as trustee, and deposited the check in

his personal checking account on October 18, 2010. Bruce Spencer then used the funds for non-Plan purposes, such as a mortgage payment to U.S. Bank, and debit card purchases at gas stations, restaurants, a bridal store, and the Basketball Hall of Fame.

**34.** On April 16, 2012, the U.S. Bankruptcy Court for the Southern District of Ohio entered judgment by default, finding that Bruce E. Spencer's debt of \$34,621.23,<sup>1</sup> owed to the Spencer & Associates, LLC Profit Sharing and 401(k) Plan, is nondischargeable.

**35.** By the conduct described in Paragraphs 29 through 33, Spencer:

**A.** violated ERISA §403(a), 29 U.S.C. §1103(a), which requires that all assets of an employee benefit plan shall be held in trust;

**B.** failed to act solely in the interest of the participants and beneficiaries of the 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 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 Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D);

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

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<sup>1</sup> Judgment in the amount of \$34,621.23 was requested by the Secretary, which was based on the \$34,295.55 that was misappropriated from the Plan by Spencer, plus lost opportunity costs of \$325.68, calculated through the date of the bankruptcy filing, January 11, 2011.

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

**PRAYER FOR RELIEF**

WHEREFORE, the Secretary prays for judgment:

- A. Permanently enjoining defendants Bruce Spencer, Ortiz, and Olzeski from violating the provisions of Title I of ERISA;
- B. Ordering defendants Bruce Spencer, Ortiz, and Olzeski to make good to the Plan any losses, including interest, resulting from fiduciary breaches committed by them or for which they are liable;
- C. Ordering defendants Bruce Spencer, Ortiz, and Olzeski to correct the prohibited transactions in which they engaged;
- D. Permanently enjoining defendants Bruce Spencer and Ortiz from serving as a fiduciary or service provider to any ERISA-covered employee benefit plan;
- E. Awarding the Secretary the costs of this action; and
- F. Ordering such further relief as is appropriate and just.

Respectfully submitted,

Dated: August 21, 2012

/s/ Matthew M. Scheff  
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Trial Attorney

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