

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THOMAS E. PEREZ ,)	
SECRETARY OF LABOR,)	
UNITED STATES DEPARTMENT OF LABOR,)	
Plaintiff,)	CIVIL ACTION
)	NO. 8:13-cv-378
v.)	
)	
DAVID E. DOLL,)	
Defendant.)	

COMPLAINT

Plaintiff, Thomas E. Perez, Secretary of Labor, United States Department of Labor ("Secretary"), alleges the following:

This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA" or the "Act") as amended, 29 U.S.C. § 1001 et seq., and is brought by the Secretary against Defendant David E. Doll ("Doll") as Trustee and fiduciary of the Double D Excavating, LLC 401(k) Plan ("401(k) Plan"), and as fiduciary of the Double D Excavating, LLC Group Health Plan ("Health Plan"), and Double D Excavating, LLC Dental Plan ("Dental Plan"), and collectively referred to as the Plans. The Secretary brings this action to obtain all appropriate relief in order to redress violations and to enforce the provisions of Title I of ERISA.

PARTIES

1. Plaintiff is the Secretary of the United States Department of Labor, who has authority to bring this civil action 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 and to obtain appropriate relief for breaches of fiduciary duty under ERISA section 409, 29 U.S.C. § 1109.

2. At all times relevant to this action, Defendant Doll was sole officer and owner of Double D Excavating, LLC (“DDE”), a Nebraska limited liability corporation doing excavating, light construction and demolition work. DDE was located in Omaha, Nebraska and operated within the State of Nebraska until ceasing operations in early 2013. DDE was the sponsor of the Plans, and Defendant Doll was the named Trustee of the 401(k) Plan.

JURISDICTION AND VENUE

3. Jurisdiction over this action pursuant is conferred upon this Court by Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).

4. Pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2), venue with respect to this action lies in the District of Nebraska, where Defendant Doll resides, where DDE, the business that sponsored the Plans, operated, and where the Plans were administered.

GENERAL ALLEGATIONS

5. Double D Excavating, LLC 401(k) Plan is an employee benefit plan within the meaning of § 3(3) of ERISA, 29 U.S.C. § 1002(3) and subject to coverage of the Act under ERISA § 4(a), 29 U.S.C. § 1003(a). The Plan is a defined contribution, 401(k) deferred compensation plan that was administered in Nebraska. The Plan allowed

employees of DDE to elect to defer a portion of their compensation and have that amount contributed to the 401(k) Plan. The 401(k) Plan was established by DDE, the employer and Plan Sponsor, in January 2007 as a 401(k) deferred compensation plan.

6. The Double D Excavating, LLC Group Health Plan operates pursuant to a Point of Service contract for health care coverage and was originally established through United Healthcare until May 1, 2012, and then through Coventry Health Care beginning on June 1, 2012. The Health Plan provided health benefits for employees of DDE. The Double D Excavating, LLC Dental Plan provided dental insurance benefits through Guardian Life Insurance Company to the employees of DDE from 2007 through November 1, 2012.

7. The Health Plan and the Dental Plan are employee benefit plans within the meaning of § 3(3) of ERISA, 29 U.S.C. § 1002(3) and subject to coverage of the Act under ERISA § 4(a), 29 U.S.C. § 1003(a). The Health and Dental Plans were cancelled in 2012 for lack of payment of premiums. DDE was the employer sponsor for the Health Plan and the Dental Plan. Defendant Doll was the owner and officer of DDE, and he exercised discretionary authority over assets of the Plans by withholding premiums from employee pay each period for forwarding to the Health Plan and to the Dental Plan to continue insurance coverage.

8. Defendant Doll solely owned and operated DDE and served as the sole officer. Defendant Doll was named Trustee of the 401(k) Plan in the Adoption Agreement.

9. At all times relevant herein, Defendant Doll, as named Trustee of the 401(k) Plan and as President and Owner of the sponsoring employer, DDE, was vested with and exercised discretionary authority or control respecting the management of the 401(k) Plan, or exercised authority or control respecting the management or disposition of the assets of the 401(k) Plan, or had discretionary authority or discretionary responsibility in the administration of the 401(k) Plan. Therefore, Defendant Doll, at all times relevant herein, has been a fiduciary with respect to the 401(k) Plan pursuant to ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and (iii).

10. At all times relevant herein, Defendant Doll, as President and Owner of the sponsoring employer, DDE, was vested with and exercised discretionary authority or control respecting the management of the Health Plan, or exercised authority or control respecting the management or disposition of the assets of the Health Plan, or had discretionary authority or discretionary responsibility in the administration of the Health Plan. Therefore, Defendant Doll, at all times relevant herein, has been a fiduciary with respect to the Health Plan pursuant to ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and (iii).

11. At all times relevant herein, Defendant Doll, as President and Owner of the sponsoring employer, DDE, was vested with and exercised discretionary authority or control respecting the management of the Dental Plan, or exercised authority or control respecting the management or disposition of the assets of the Dental Plan, or had discretionary authority or discretionary responsibility in the administration of the Dental

Plan. Therefore, Defendant Doll, at all times relevant herein, has been a fiduciary with respect to the Dental Plan pursuant to ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and (iii).

12. At all times relevant herein, DDE was an employer whose employees were covered by the 401(k) Plan, the Health Plan and the Dental Plan. Therefore, DDE is a party in interest with respect to the Plans pursuant to ERISA § 3(14)(C), 29 U.S.C. § 1002(14)(C).

13. At all times relevant herein, Defendant Doll was sole Officer and Owner of DDE, and a fiduciary of the Plans. Therefore, Defendant Doll is a party in interest with respect to the Plans pursuant to ERISA §§ 3(14)(A) and (H), 29 U.S.C. §§ 1002(14)(A) and (H).

14. At varying times from August 2012 through April 2013, Defendant Doll and DDE withheld and failed to forward \$6,965.36 in employee elective deferrals for contribution into participant 401(k) Plan accounts. Defendant Doll failed to segregate said withholdings from the general assets of the company and forward them to the 401(k) Plan. Therefore, the withheld amounts are assets of the 401(k) Plan pursuant to 29 C.F.R. § 2510.3-102, because such amounts were not transferred to the 401(k) Plan on the earliest date that they could be reasonably segregated, not later than the fifteenth business day of the month following the month in which the amounts would otherwise have been payable to the participant in cash.

15. At varying times from 2008 through 2011, Defendant Doll and DDE withheld and failed to forward employee elective deferrals in a timely manner for contribution into participant 401(k) Plan accounts, causing \$3,724.30 in lost earnings to 401(k) Plan participants for the missing contributions. Defendant Doll failed to segregate said withholdings from the general assets of the company and forward them to the 401(k) Plan. Therefore, the withheld amounts are assets of the 401(k) Plan pursuant to 29 C.F.R. § 2510.3-102, because such amounts were not transferred to the 401(k) Plan on the earliest date that they could be reasonably segregated, not later than the fifteenth business day of the month following the month in which the amounts would otherwise have been payable to the participant in cash.

16. At varying times in May 2012 through April 2013, Defendant Doll and DDE also withheld and failed to forward \$2,608.05 in payroll withholdings of health insurance premiums intended for payment of health care premiums for individuals participating in the Health Plan. Defendant Doll and DDE failed to segregate said insurance withholdings from the general assets of the company and forward them to the Health Plan. Therefore, the withheld amounts are assets of the Plan pursuant to 29 C.F.R. § 2510.3-102, because such amounts were not transferred to the Plan on the earliest date that they could be reasonably segregated. By not forwarding the insurance premiums by the first of the month in which coverage was in force, or within the grace period allowed under the Health Plan policy, Defendant Doll caused cancellation of the company's health insurance coverage retroactively to May 1, 2012 and lost earnings of \$111.97.

17. At varying times in January 2012 through April 2013, Defendant Doll and DDE also withheld and failed to forward \$2,067.98 in payroll withholdings of dental insurance premiums intended for payment of dental premiums for individuals participating in the Dental Plan. Defendant Doll and DDE failed to segregate said insurance withholdings from the general assets of the company and forward them to the Dental Plan. Therefore, the withheld amounts are assets of the Plan pursuant to 29 C.F.R. § 2510.3-102, because such amounts were not transferred to the Plan on the earliest date that they could be reasonably segregated. By not forwarding the dental insurance premiums by the first of the month in which coverage was in force, or within the grace period allowed under the Dental Plan policy, Defendant Doll caused cancellation of the company's dental insurance and lost earnings of \$60.69.

VIOLATIONS OF ERISA

18. During the relevant time period herein, Defendant Doll failed to act to secure the transfer, or cause the transfer to the 401(k) Plan of \$6,965.36 in withheld amounts described in paragraph 14. The \$6,965.36 was withheld from the wages of employees of DDE as elective salary deferrals from August 2012 through April 2013.

19. During the relevant time period herein, Defendant Doll failed to act to secure the transfer, or cause the transfer to the 401(k) Plan withheld amounts described in paragraph 15 in a timely manner, causing \$3,724.30 in lost earnings for untimely remittances in 2008 through 2011.

20. During the relevant time period herein, Defendant Doll failed to take action to determine the assets of the 401(k) Plan, to assert control over the 401(k) Plan assets or to insure that the 401(k) Plan assets would be protected from losses.

21. During the relevant time period herein, Defendant Doll failed to act to secure the transfer, or cause the transfer to the Health Plan \$ 2,608.05 in withheld amounts described in paragraph 16, which were withheld from the wages of employees of DDE as payment of premiums to the Health Plan.

22. During the relevant time period herein, Defendant Doll failed to act to secure the transfer, or cause the transfer to the Dental Plan \$ 2,067.98 in withheld amounts described in paragraph 17, which were withheld from the wages of employees of DDE as payment of premiums to the Dental Plan

23. During the relevant time period herein, Defendant Doll failed to take action to determine the assets of the Health Plan and to the Dental Plan, to assert control over the Health Plan and Dental Plan assets or to insure that the Health Plan and Dental Plan assets would be protected from losses, causing lost earnings of \$111.97 and \$60.69 for the Health Plan and Dental Plan.

24. By the conduct described above in paragraphs 18 through 23 Defendant Doll:

(a) failed to discharge his fiduciary duties with respect to the 401(k) Plan, the Health Plan, and the Dental Plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the Plan, in violation of

ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

(b) failed to discharge his fiduciary duties with respect to the 401(k) Plan, the Health Plan, and the Dental Plan 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 like character and with like aims, in violation of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

(c) caused the 401(k) Plan, the Health Plan, and the Dental Plan to engage in transactions that he knew or should have known constituted direct or indirect transfers to, or use by or for the benefit of, a party in interest, of assets of the Plans, in violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

(d) dealt with assets of the 401(k) Plan, the Health Plan, and the Dental Plan in his own interest or for his own account, in violation of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1).

(e) acted in transactions involving the 401(k) Plan, the Health Plan, and the Dental Plan on behalf of a party whose interests were adverse to the interests of the Plans or of the Plans' participants and beneficiaries, in violation of ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2).

(f) permitted the assets of the 401(k) Plan, the Health Plan, and the Dental Plan to inure to the benefit of an employer in violation of ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1).

WHEREFORE, the Secretary prays that this Court:

1. Permanently enjoin Defendant Doll from violating the provisions of Title I of ERISA;
2. Order Defendant Doll to restore to the 401(k) Plan and to the participants in the Health Plan and Dental Plan all losses attributable to his fiduciary breaches, including foregone earnings to the date of judgment, and post-judgment interest;
3. Award Plaintiff the costs of this action; and
4. Provide such further relief as is just and equitable.

M. Patricia Smith
Solicitor of Labor
Connecticut Bar No. 371708

Christine Z. Heri
Regional Solicitor
Illinois Bar No. 6204656

H. Alice Jacks
Associate Regional Solicitor
Missouri Bar No. 24482

s/ Susan J. Willer
Susan J. Willer
Oklahoma Bar No. 017798
Attorneys for Plaintiff, U.S. Secretary of Labor
Office of the Solicitor
Two Pershing Square
Suite 1020
2300 Main Street
Kansas City, MO 64108
Telephone: (816) 285-7260
Fax: (816) 285-7287
E-mail: willer.susan@dol.gov