

**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,	:	
	:	
Petitioner,	:	Civil Action
v.	:	
	:	No. _____
	:	
A. KENNETH BELANGER,	:	
JO-ANN I. BELANGER ,	:	
and BELANGER AND CO., INC.	:	
	:	
Respondents.	:	
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**COMPLAINT**

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

**Jurisdiction and Venue**

1. This cause of action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and is brought by the Secretary under Sections 502(a)(2) and (5) of ERISA, 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 relief for breaches of fiduciary duty under ERISA Section 409, 29 U.S.C. § 1109, and to obtain such other further relief as may be appropriate to redress violations and 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. Belanger and Company, Inc. ("the Company") is the administrator of employee benefit plans within the meaning of Sections 3(3) and (16) of ERISA, 29 U.S.C. §§ 1002(3), (16).

4. The Company administered these plans in Montgomery County, Pennsylvania.

5. 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).

6. The relevant period is January 1, 2010, to date.

**The Parties**

7. The Secretary, pursuant to Sections 502(a)(2) and (5) of ERISA, 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.

8. At all relevant times, the Company served as an administrator to employee benefit plans.

9. During all or part of the relevant time period, the Company administered the following plans (“the Plans”):

- a. Advanced Telecommunications 401(k) Plan (“ATI Plan”);
  - b. Edward P. Shamy, Jr. 401(k) Plan (“Shamy Plan”);
  - c. Fabricated Alloy, Inc. 401(k) Profit Sharing Plan (“Faballoy Plan”);
  - d. Heller Huron 401(k) Profit Sharing Plan (“Heller Plan”);
  - e. Mercer Eye Associates 401(k) Profit Sharing Plan (“Mercer Plan”);
  - f. Ambulatory Care Center 401(k) Plan (“Ambulatory Plan”);
  - g. Willow Street Yoga Center 401(k) Profit Sharing Plan and Trust (“WYSC Plan”);
- and
- h. Bleach and Associates Plan (“Bleach Plan”).

10. These Plans were employee benefit plans within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3), and therefore subject to the coverage of the Act, pursuant to Section 4(a) of ERISA, 29 U.S.C. § 1003(a).

11. At all relevant times, the Company has exercised authority or control respecting management or disposition of the assets of the Plans which the Company administered and had discretionary authority or discretionary responsibility in the administration of those Plans. The Company was able to transfer money from the Plans' accounts to the Company's corporate account without the consent of each Plan's sponsor. The Company, therefore, is a fiduciary of the Plans which it administered within the meaning of Section 3(21) of ERISA, 29 U.S.C. § 1002(21), and a party-in-interest as that term is defined in Sections 3(14) (A) and (C) of ERISA, 29 U.S.C. §§ 1002(14) (A) and (C).

12. At all relevant times, A. Kenneth Belanger ("K. Belanger") has been the President of the Company. K. Belanger made decisions regarding the Plans which the Company administered, including decisions as to the disposition of plan assets. K. Belanger also performed other plan administrator functions for these Plans, such as allocating dividend interest and trading stocks. At all relevant times, K. Belanger has exercised authority or control respecting management or disposition of the assets of the Plans the Company administered and had discretionary authority or discretionary responsibility in the administration of those Plans. K. Belanger, therefore, is a fiduciary of the Plans within the meaning of Section 3(21) of ERISA, 29 U.S.C. § 1002(21), and a party-in-interest as that term is defined in Sections 3(14) (A), (B), and (F) of ERISA, 29 U.S.C. §§ 1002(14) (A), (B) and (F).

13. At all relevant times, Jo-Ann I. Belanger ("J. Belanger") has been the Vice-President of the Company. At all relevant times, J. Belanger made decisions about the

disposition of Plan assets, transferred employee contributions to the Plans, and communicated with plan sponsors and participants regarding the Plans. She also used assets she knew had been withdrawn from certain Plans. At all relevant times, J. Belanger exercised authority or control respecting management or disposition of the assets of the Plans which the Company administered and had discretionary responsibility in the administration of those Plans. J. Belanger, therefore, is a fiduciary of the Plans within the meaning of Section 3(21) of ERISA, 29 U.S.C. § 1002(21), and a party-in-interest as that term is defined in Sections 3(14) (A), (B), and (F) of ERISA, 29 U.S.C. §§ 1002(14) (A), (B) and (F).

14. J. Belanger served as the Company's de facto bookkeeper. Thus she has knowledge of all deposits to and withdraws from the Company's corporate bank account.

#### **Transferring Plans' Assets to the Company**

15. During the relevant period, the Company, K. Belanger, and J. Belanger (collectively, "the Defendants") had the ability to withdraw Plan assets from each Plan's custodial account. This included the ability to transfer Plan assets to the Company. The Defendants were able to make these transfers without notifying the Plans' sponsors.

#### **The Shamy Plan**

16. In 2009, the employer that sponsored the Shamy Plan, Edward P. Shamy Law Offices ("Shamy"), decided to cease having the Company perform any administrative services for the Shamy Plan beyond preparing the Shamy Plan's annual IRS Form 5500. As a result, Shamy directed the Company to transfer the plans assets to a new service provider.

17. In 2009, the Company and K. Belanger did not transfer all of the Shamy Plan assets to the new service provider. Instead, approximately \$30,000 was left in the Shamy Plan's account. Shamy was not notified of this action.

18. In 2011, the Company and K. Belanger transferred the money remaining in the Shamy Plan's account to the Company's account with the plan's asset custodian and then transferred those funds to the Company's corporate bank account. Shamy was not notified of this action.

**The Bleach Plan**

19. According to J. Belanger, the Bleach Plan was terminated in 2005. However, as of November 1, 2010, assets remained in the Bleach Plan's account. In November 2010, all of the assets remaining in the Bleach Plan's account were transferred to the Company's account with the plan's asset custodian and then transferred to the Company's corporate bank account.

**The Ambulatory Plan**

20. Ambulatory Care Center, P.A. ("Ambulatory") terminated the Ambulatory Plan on August 30, 2010.

21. In 2011 and 2012, an Ambulatory Plan participant repeatedly contacted the Company in an effort to get a distribution of her plan benefits. In April 2012, the participant was finally given a plan distribution. However, all of her benefits were not included in the distribution. The Company and K. Belanger kept a portion of the participant's benefits in the Ambulatory Plan account.

22. In May 2012, the Company and K. Belanger transferred the remaining funds in the Ambulatory Plan account to the Company's account with the plan's asset custodian and then transferred those funds to the Company's corporate bank account. The Plan sponsor was never notified of these actions and did not consent to them.

**The Faballoy Plan**

23. In 2012, the Faballoy Plan was terminated. Prior to the plan's termination, the Defendants charged the Plan approximately \$1,050 in fees, purportedly for the termination, and transferred additional money from the Faballoy Plan's account to the Company's account with the plan's asset custodian and then transferred those funds to the Company's corporate bank account. The Plan sponsor was never notified of these actions, and never agreed to it or authorized any termination fee.

**The ATI Plan**

24. During 2013, K. Belanger transferred plan assets from the ATI Plan to the Company's account with the plan's asset custodian and then transferred those funds to the Company's corporate bank account.

25. The Defendants did not notify the ATI Plan or its sponsor of the money which was transferred from the Plan to the Company, and the transfers were never authorized by the sponsor or otherwise justified.

26. The Company and K. Belanger did not report the transfer of the money from the ATI Plan to the Company during 2013 as fees on the ATI Plan's 2013 IRS Form 5500.

**Failing to Fully Disclose Fees**

27. K. Belanger prepared the IRS Form 5500 for the Plans the Company administered during the relevant period.

28. During the relevant period, the Company and K. Belanger did not disclose on the IRS Form 5500 the full fees that it charged the ATI Plan, the Shamy Plan, or the Fallaboy Plan.

**Failing to Timely Remit Assets to the Plan**

29. From September 2012 through April 2013, the Company received funds from the sponsor of the Heller Plan, Heller, Huron, Chertkof, and Salzman PLLC (“Heller”). Heller instructed that these funds be deposited into the Heller Plan as Plan assets. The Defendants did not remit those assets to the Heller Plan in a timely fashion. When the Defendants finally remitted those assets to the Heller Plan they did so without interest

**Failing to Fully and Timely Terminate Plans and Process Plan Distributions**

**The Ambulatory Plan**

30. Following the termination of the Ambulatory Plan in 2010, a plan participant provided the Company with benefit election forms in March 2011, October 2011, and April 2012. K. Belanger did not process the participant’s first two benefit election forms. When the third benefit election form was finally processed, the participant received a distribution that was less than her full account balance.

**The Mercer Plan**

31. In 2012, Mercer Eye Associates (“Mercer”), the sponsor of the Mercer Plan, decided to transfer administration of the Mercer Plan to a new service provider.

32. The Defendants refused to transfer the Mercer Plan’s assets for a period of approximately eight months.

33. The Defendants blamed the delay in transferring the Mercer Plan’s asset on a computer server crash in March of 2011. The Defendants claimed that due to the server crash they could not reconcile the Mercer Plan’s account records with the Mercer Plan’s assets.

34. However, prior to Mercer's decision to transfer administration of the Mercer Plan, the Defendants had not notified Mercer of the computer server crash or of any problems with their ability to reconcile the Mercer Plan's account records with the Mercer Plan's assets.

#### **The WSYC Plan**

35. In September 2012, Willow Street Yoga Center ("WYSC"), the sponsor of the WSYC Plan, requested that the Company transfer administration of the WSYC Plan to a new service provider. This transfer did not occur until approximately July 15, 2013.

36. Despite repeated requests from WSYC, the Defendants failed to provide the new plan administrator with any benefit statements or other valuation reports to aid the new administrator in allocating the WSYC Plan's assets to each participant's individual account.

#### **Destruction of Documents**

37. In 2011, the Defendants moved office space. During the move, the J. Belanger destroyed plan documents for some of the plans which had been administered by the Company. K. Belanger knew that J. Belanger was destroying documents during the move. Some of those plans had been administered by the Company after 2005.

#### **Errors in Plan Administration**

38. In June 2011, the Company and K. Belanger erroneously deposited approximately \$33,000 in the Heller Plan account. J. Belanger knew of this error. The Defendants did not inform Heller of this error. The Defendants then corrected the error by failing to remit many of Heller's contributions to the Plan from June 2011 through November 2013. Heller intended for these contributions to be plan assets. J. Belanger was the person responsible for remitting Heller's contributions to the Heller Plan. Heller was not aware that its contributions were not being remitted to the Plan.

**Violations**

39. Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, the Secretary adopts by reference the averments and allegations of paragraphs 1 to 38 inclusive.

40. By the actions and conduct described above, the Defendants, as fiduciaries of the Plan:

- a. failed to discharge their duties with respect to the Plans 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 Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A);
- b. failed to discharge their duties with respect to the Plans 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 Section 404(a)(1)(B) of ERISA, 29 U.S.C. § 1104(a)(1)(B);
- c. caused the Plans to engage in transactions which they knew or should have known constituted the direct or indirect transfer of the Plans' assets to, or use of the Plans' assets by or for the benefit of a party-in-interest, in violation of Section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D);
- d. dealt with assets of the Plans in their own interest or for their own account, in violation of Section 406(b)(1) of ERISA, 29 U.S.C. § 1106(b)(1); and

- e. failed to maintain a copy of such reports and records on the matters of which disclosure is required for a period of no less than six years after the filing date of the documents, in violation of Section 107 of ERISA, 29 U.S.C. § 1027.

41. By the actions and conduct described in paragraphs 1 through 26, 29, and 31 through 38, the Defendants participated knowingly in or knowingly undertook to conceal acts or omissions by the others that they knew to be violations of ERISA. By each participating knowingly in these fiduciary breaches of the other, the Defendants are each liable for the other's breaches of fiduciary responsibility, pursuant to Section 405(a)(1) of ERISA, 29 U.S.C. § 1105(a)(1).

42. By the actions and conduct described in paragraphs 1 through 26 relating to the transfer of certain Plans' assets to the Company, the Defendants failed to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and enabled the others to commit breaches of ERISA. By failing to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and thereby enabling the others to commit breaches of ERISA, the Defendants are each liable for the other's breaches of fiduciary responsibility, pursuant to Section 405(a)(2) of ERISA, 29 U.S.C. § 1105(a)(2).

43. By the actions and conduct described in paragraphs 1 through 14 and 29 relating to the failure to timely remit assets to the Heller Plan, the Defendants failed to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and enabled the others to commit breaches of ERISA. By failing to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and thereby enabling the others to commit breaches of ERISA, the Defendants are each liable for the other's breaches of fiduciary responsibility, pursuant to Section 405(a)(2) of ERISA, 29 U.S.C. § 1105(a)(2).

44. By the actions and conduct described in paragraphs 1 through 14 and 31 through 36 relating to failure to fully and timely terminate plans and process plan distributions, the Defendants failed to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and enabled the others to commit breaches of ERISA. By failing to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and thereby enabling the others to commit breaches of ERISA, the Defendants are each liable for the other's breaches of fiduciary responsibility, pursuant to Section 405(a)(2) of ERISA, 29 U.S.C. § 1105(a)(2).

45. By the actions and conduct described in paragraphs 1 through 14 and 38 relating to the errors in administering the Heller Plan, the Defendants failed to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and enabled the others to commit breaches of ERISA. By failing to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and thereby enabling the others to commit breaches of ERISA, the Defendants are each liable for the other's breaches of fiduciary responsibility, pursuant to Section 405(a)(2) of ERISA, 29 U.S.C. § 1105(a)(2).

46. By the actions and conduct described in paragraphs 1 through 26, 29, and 31 through 38, the Defendants knew that the other had violated ERISA, but did not make reasonable efforts under the circumstances to remedy the other's breaches. By failing to make reasonable efforts under the circumstances to remedy the others breaches of which they had knowledge, the Defendants, as fiduciaries of the Plan, are each liable for each other's fiduciary breaches, pursuant to Section 405(a) (3) of ERISA, 29 U.S.C. § 1105(a)(3).

**Prayer for Relief**

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

1. Requiring each of the fiduciary defendants, the Company, K. Belanger, and J. Belanger, jointly and severally to restore to the Plan all losses, including interest or lost opportunity costs and the costs of the independent fiduciary, which were caused by their fiduciary breaches;
2. Requiring each of the fiduciary defendants, the Company, K. Belanger, and J. Belanger, to disgorge to the Plan any and all unjust enrichment they have received as a result of their fiduciary breaches;
3. Removing the Defendants as fiduciaries of any employee benefit plan for which they acts as fiduciaries;
4. Removing the Defendants as service providers of any employee benefit plan for which they act as service providers.
5. Permanently enjoining the Defendants from acting directly or indirectly, in any fiduciary capacity, with respect to any employee benefit plan subject to ERISA;
6. Permanently enjoining the Defendants from exercising any custody, control, or decision making authority with respect to the assets of any employee benefit plan covered by ERISA;
7. Permanently enjoining the Defendants from acting directly or indirectly, as a service provider for any employee benefit plan subject to ERISA;
8. 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 the independent fiduciary of all contributions to the Plan and all transfers, payments, or expenses incurred or paid in connection with the Plan;

9. Barring the Defendants from engaging in any future violations of ERISA;

10. Awarding plaintiff, Secretary of Labor, the costs of this action; and Awarding such other relief as is equitable and just.

Respectfully submitted,

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