

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

---

JULIE A. SU,	)	CIVIL ACTION
ACTING SECRETARY OF LABOR,	)	
U.S. DEPARTMENT OF LABOR,	)	
	)	
Plaintiff,	)	
	)	No. 2:24-cv-1414
v.	)	
	)	
JOSEPH SILVESTRI & SON, INC.	)	
DONNA M. FECONDO, and	)	
JOSEPH SILVESTRI & SON, INC.	)	
PROFIT SHARING PLAN,	)	
	)	
	)	
Defendants.	)	

---

**COMPLAINT**

Julie A. Su, Acting 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”), 29 U.S.C. § 1001, *et seq.*, and is brought by the Acting Secretary under Sections 409 and 502(a)(2) and (5) of ERISA, 29 U.S.C. §§ 1109, 1132(a)(2) and (5), to obtain equitable remedies that will redress violations, obtain appropriate equitable relief for breaches of fiduciary duty under ERISA Section 409, 29 U.S.C. § 1109, and obtain such further equitable relief as may be appropriate to enforce the provisions of Title I of ERISA. Under 29 U.S.C. § 1132(a)(2) and (5), the Acting Secretary has the authority to enforce Title I of ERISA by filing civil actions to obtain remedies for violations of the statute.

2. The Court has subject matter jurisdiction under Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).

3. The Joseph Silvestri & Son, Inc. Profit Sharing Plan (“Plan”) is an employee benefit plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3), that offers retirement benefits to its participants and beneficiaries, who were employees of Joseph Silvestri & Son, Inc. (the “Company”), the Plan’s sponsor. As such, the Plan is subject to the coverage under Section 4(a) of ERISA, 29 U.S.C. § 1003(a). The Plan is joined as a party defendant under Rule 19(a) of the Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

4. The Company’s and Plan’s last known address is 1168 Naamans Creek Road, Garnet Valley, PA 19060. Because the Plan is located in Garnet Valley, PA, venue lies in the Eastern District of Pennsylvania under Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

### **ALLEGATIONS**

5. Donna Fecondo (“Fecondo”), the president and owner of the Company, controlled and operated the Company as a mushroom farm located in Garnet Valley, PA.

6. The Company established the Plan on or around July 1, 1984. The Plan was principally funded through discretionary Company contributions and rollover contributions from participants.

7. At all relevant times, the Company acted as the Plan Administrator. Fecondo carried out the Plan Administrator role on behalf of the Company and was also named in the Plan documents as a named fiduciary and a trustee.

8. Fecondo and the Company, by virtue of being named fiduciaries and being vested with or exercising discretionary authority and control over the Plan’s assets and the management and disposition of those assets, as well as discretionary authority or responsibility in the administration of the Plan, were fiduciaries to the Plan under ERISA Sections 402(a) and

3(21)(A) of ERISA, 29 U.S.C. §§ 1102(a) and 1002(21)(A). Fecondo, by virtue of her fiduciary status and her ownership of the Company, and the Company, by virtue of its fiduciary status and sponsorship of the Plan, were also parties in interest to the Plan under ERISA Sections 3(14)(A), (C), and (E), 29 U.S.C. §§ 1002(14)(A), (C), and (E).

9. On information and belief, Fecondo and the Company were the only Plan fiduciaries with responsibilities for its administration, distribution of assets, and day-to-day management.

10. Throughout its existence, the Plan has retained service providers to assist with administration, record-keeping, and related functions. Until approximately 2014, the Plan retained Continental Benefit Group as a record-keeper. There has been no third-party record-keeper for the Plan since 2014.

11. The current custodian of Plan assets is Morgan Stanley Smith Barney, LLC. Morgan Stanley's records as of July 31, 2022 show that the Plan's trust held \$597,351.42 in assets, which belong to approximately 70 participants, including Fecondo. Morgan Stanley's records also indicate that there have been no contributions to the Plan since May 2012.

12. The Plan has not filed a Form 5500 since the Plan Year ending 2012.

13. The Company ceased operation in 2019.

14. Fecondo was indicted on January 13, 2022 and charged with two counts of failure to collect and pay over employment taxes (26 U.S.C. § 7202), and four counts of failure to file tax returns (26 U.S.C. § 7203). *See United States v. Donna Fecondo*, No. 22-cr-00011 (E.D. Pa.). The indictment alleges that, in multiple years, Fecondo failed to file tax returns and also failed remit taxes relating to the Company and its employees. Fecondo subsequently entered a guilty

plea and was sentenced to, *inter alia*, 46 months of incarceration and ordered to pay \$599,159.94 in restitution.

15. The Plan has not been terminated. Since at least 2019, neither Fecondo nor the Company has carried out their obligations under ERISA with respect to the Plan. This includes, among other things, a failure to ensure distribution of the Plan's assets to the participants and beneficiaries or, alternatively, retaining a fiduciary to manage the Plan and oversee the distribution of its assets. No individuals or entities have come forward to assume fiduciary responsibility for the Plan or to distribute its assets, and there is no fiduciary actively functioning on behalf of the Plan. As such, the Plan currently exists without oversight or control by responsible fiduciaries with the authority to operate and manage the Plan. Thus, the Plan is "abandoned," in violation of ERISA.

16. Under the terms of the Plan, Plan participants are entitled to distribution of their account balances. However, because Fecondo and the Company did not initiate termination of the Plan and distribution of the assets, or secure the appointment of a fiduciary to do so, Plan participants and beneficiaries have been denied access to their vested account balances and have no way to transfer or otherwise gain control of their promised benefits. Without a fiduciary in place with the authority to direct the Plan's custodian, the custodian will not process any requests made to it by any participants or beneficiaries until it receives proper direction from a bona fide court-appointed Plan fiduciary.

## VIOLATIONS

17. By the actions and conduct described above, Fecondo 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 beneficiaries and defraying reasonable expenses of administering the Plan, in violation of Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A); and
- 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 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, in violation of Section 404(a)(1)(B) of ERISA, 29 U.S.C. § 1104(a)(1)(B); and
- c. Failed to discharge their duties with respect to the Plan in accordance with the documents and instruments governing the Plan, in violation of Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D).

### **CONSENT JUDGMENT**

18. On March 4, 2024, the Acting Secretary, Fecondo, and Fecondo's criminal counsel executed a consent judgment and order. The consent judgment and order refers to the ERISA violations alleged in this Complaint and contains the parties' agreement to resolve those violations. This includes, among other things:

- a. The parties' agreement to cooperate in the filing of this suit and to seek entry of the executed consent judgment and order by the Court;
- b. Removal of Fecondo and the Company as Plan fiduciaries and entry of a permanent injunction to prevent either from serving as a trustee, fiduciary,

advisor, or administrator to any employee benefit plan, as that term is defined at Section 3(3) of ERISA, 29 U.S.C. § 1002(3), or from serving in any capacity that involves decision-making authority or custody or control of the monies, funds, assets, or property of any employee benefit plan subject to ERISA;

- c. The parties' request that the Court appoint AMI Benefit Plan Administrators, Inc. as the independent fiduciary for the Plan, including vesting AMI with all authority necessary to marshal the Plan's assets, conduct an accounting of the Plan, and distribute the Plan's assets to the participants and beneficiaries;
- d. Fecondo's agreement to forfeit her individual Plan account to satisfy restitution due in *United States v. Donna Fecondo*, No. 22-cr-00011 (E.D. Pa.), and;
- e. Other relief necessary to redress Fecondo's and the Company's violations of ERISA.

### **PRAYER FOR RELIEF**

WHEREFORE, the Acting Secretary prays for judgment:

- A. Entering the parties' executed consent judgment and order, which the parties will jointly seek entry of promptly after the filing of this Complaint.
- B. Ordering such further relief as is appropriate and just.

Dated: April 4, 2024

Respectfully Submitted,

**UNITED STATES DEPARTMENT OF LABOR**

Mailing Address:

U.S. Department of Labor  
Office of the Regional Solicitor

Seema Nanda  
Solicitor of Labor

1835 Market Street  
Mailstop SOL/22  
Philadelphia, PA 19103-2968

215-861-5136 (voice)  
215-861-5162 (fax)

[herrera.alejandro.a@dol.gov](mailto:herrera.alejandro.a@dol.gov)

Samantha N. Thomas  
Acting Regional Solicitor

Usha Rengachary  
Counsel for ERISA

/s/ Alejandro A. Herrera  
Alejandro A. Herrera  
Senior Trial Attorney  
PA 326897; NY 5235601