

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

THOMAS E. PEREZ, SECRETARY OF LABOR, :	:	
UNITED STATES DEPARTMENT OF LABOR, :	:	
	:	
Plaintiff, :	:	Civil Action
	:	
v. :	:	No. _____
	:	
	:	
TARRY BRATTON, BC, INC., and :	:	
BC, INC., 401(k) PLAN, :	:	
	:	
Defendants. :	:	
	:	

**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. The BC, Inc., 401(k) Plan (the “Plan”) is an employee benefit plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3), and is therefore subject to the coverage of the Act, pursuant to Section 4(a) of ERISA, 29 U.S.C. § 1003(a). The Plan is administered in Brogue, Pennsylvania.

4. Venue with respect to this action lies in the Middle District of Pennsylvania, pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

### **The Parties**

5. 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.

6. At all relevant times, BC, Inc. (“the Company”) has been the Plan Sponsor and Plan Administrator of the Plan. At all relevant times, the Company has exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan’s assets and had discretionary authority or discretionary responsibility in the administration of the Plan. The Company, therefore, is a fiduciary of the Plan 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).

7. At all relevant times, Tarry Bratton (“Bratton”) has been the President and sole owner of the Company, and a plan trustee. Bratton made decisions regarding the Plan, including decisions as to the disposition of plan assets, and performed functions of the Plan Administrator. At all relevant times, Bratton has exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan’s assets and had discretionary authority or discretionary responsibility in the administration of the Plan. Bratton, therefore, is a fiduciary of the Plan 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 (H) of ERISA, 29 U.S.C. §§ 1002(14) (A) and (H).

8. The Plan is joined as a party defendant pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

### **General Allegations**

9. The Company established the Plan on or about October 1, 2004.

10. The Plan required that the company make contributions equal to the

amount of fringe benefits paid under various prevailing-wage contracts, pursuant to the Davis-Bacon Act, 40 U.S.C. § 276a et seq.

11. During the period from January 2009 to July 2012 Bratton and the Company failed to remit mandatory employer contributions to the Plan and failed to take any action to collect the contributions from the Company payable to the Plan.

12. As fiduciaries, Bratton and the Company were obligated to collect all employer contributions but failed to make efforts to collect the contributions beginning in January 2009 through the present.

13. Bratton and the Company could have successfully collected contributions at the time that they were due because the funds were available through the prevailing wage and fringe benefit provisions of the Davis-Bacon Act, supra., and the financial health of the Company at that time.

14. Bratton and the Company participated knowingly in or knowingly undertook to conceal each other's acts or omissions that they knew to be violations of ERISA.

15. Bratton and the Company failed to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and each enabled the other to commit breaches of ERISA.

16. Bratton and the Company knew that the other had violated ERISA, but did not make reasonable efforts under the circumstances to remedy the other's breaches.

### **Violations**

17. Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, the Secretary adopts by reference the averments and allegations of paragraphs 1-16 inclusive.

18. By the actions and conduct described above, Defendants Bratton 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 their 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);
- 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 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. failed to discharge their duties in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of Title I and IV of ERISA in violation of Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D);
- d. dealt with assets of the Plan 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).
- e. acted on both sides of a transaction in violation of Section 406(b)(2) of ERISA, 29 U.S.C. § 1106(b)(2).

19. By participating knowingly in the fiduciary breaches of the others, knowing such acts or omissions to be breaches of fiduciary duty, Bratton and the Company are each liable for the others' breaches of fiduciary responsibility, pursuant to Section 405(a)(1) of ERISA, 29 U.S.C. § 1105(a)(1).

20. 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, Bratton and the Company are liable for the others' breaches of fiduciary responsibility, pursuant to Section 405(a)(2) of ERISA, 29 U.S.C. § 1105(a)(2).

21. By failing to make reasonable efforts under the circumstances to remedy the others breaches of which they had knowledge, Bratton and the Company, as fiduciaries of the Plan, are 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**

22. WHEREFORE, the Secretary prays that this Court issue an order:
- a. Ordering Bratton and the Company to restore to the Plan all losses, including interest or lost opportunity costs, which were caused by their fiduciary misconduct;
  - b. Ordering the defendants, their agents, employees, service providers, banks, accountants, and attorneys to provide the Secretary 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 of all contributions to the Plan and all transfers, payments, or expenses incurred or paid in connection

with the Plan;

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

Respectfully submitted,

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