

U.S. Department of Labor

Employee Benefits Security Administration  
61 Forsyth Street SW  
Atlanta, Georgia 30303

MAR 07 2007

**BY CERTIFIED MAIL AND FACSIMILE**

██████████, Trustee  
 ██████████, Inc. Profit Sharing Plan  
 ██████████  
 ██████████

Dear Mr. ██████████:

The Department of Labor has responsibility for administration and enforcement of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Title I establishes standards governing the operation of employee benefit plans such as the ██████████, Inc. Profit Sharing Plan ("Plan").

This office has concluded its investigation of the Plan and of your activities as a trustee. Based on the facts gathered in this investigation, and subject to the possibility that additional information may lead us to revise our views, it appears that, as a trustee, you may have violated several provisions of ERISA. The purpose of this letter is to advise you of our findings and to give you an opportunity to comment before the Department determines what, if any, action to take.

Identification of Fiduciaries

Page 23 of the Summary Plan Description names ██████████, Inc. ("██████████") as the Employer, Plan Sponsor, and Plan Administrator. As Plan Administrator, ██████████ exercised discretionary authority respecting the administration of the Plan and the disposition of employee contributions. ██████████ is a fiduciary and a party in interest as defined in ERISA sections 3(21)(A) and 3(14)(A) and (C).

Page 24 of the Summary Plan Description names you as Plan Trustee. Page 75 of the plan document provides that "the Trustee shall be responsible for the safekeeping of assets held in the Trust." You are also the President and an owner of ██████████. In your company owner/officer capacities, you have exercised discretionary authority and control over the administration of the Plan. Thus, you are a fiduciary as defined in ERISA section 3(21)(A), which states:

ERISA Sections 3(21)(A) (i) and (iii) defines a "fiduciary" as follows:

...a person is a fiduciary with respect to a plan to the extent

- (i) he exercises any discretionary authority or discretionary control respecting management or disposition of its assets.

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- (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

You are also a party in interest within the meaning of ERISA sections 3(14)(A), (E) and (H).

#### Valuations of Real Estate Investments

The investigation disclosed that the Plan currently maintains investments in two parcels of real estate. We understand that additional land parcels held by the Plan were sold in previous Plan years.

The two parcels currently held for investment are described as follows:

- [REDACTED] Lot 79 (.3959 acres) Purchased by the Plan and [REDACTED] Profit Sharing Plan for \$65, [REDACTED] on [REDACTED], 1988. The plan owns 50% of this property.
- Lot 7-A [REDACTED] Purchased by the Plan in the late 1980s.

Forms 5500 for Plan Years ending December 31, 2004 and December 31, 2005 report the above listed properties' value at \$74,000. Letters of estimates were provided by [REDACTED] Remark [REDACTED]. These letters, dated February 11, 2004, February 15, 2005, and February 6, 2006 list the value of the [REDACTED] 29 and Lot 7-A [REDACTED] at \$100,000.00 and \$19,000.00 respectively. In our opinion, the letters provided by Mr. [REDACTED] are not a sufficient determination of the fair market value of the investments.

Further, Mr. [REDACTED] asserts in his letters of estimates that he is valuing the properties based on his experience as a real estate broker in Commercial Land Sales in the areas where the properties are located. We have no evidence that Mr. [REDACTED] is customarily engaged to perform valuations of such, that he is certified to perform appraisals, and that he has had related appraisal work demonstrating experience or expertise in performing either similar or other valuations of any kind.

In the Department of Labor Proposed Regulation §2510.3-18, as published in the *Federal Register* on May 17, 1988, the Department stated that it will not view a fiduciary as having acted in good faith unless the fiduciary has arrived at fair market value by way of a prudent investigation of circumstances prevailing at the time of the valuation and the application of sound business principles of evaluation, to include written documentation of the valuation. Further, the fiduciary making the valuation must either be independent or rely on the report of an appraiser who is independent.

It is our view that the failure to take reasonable steps to ascertain the current fair market value of the Plan's investments in accordance with plan documents and to properly record the fair market value on the Plan's annual report Form 5500 violates ERISA sections 103(b)(3)(A) and 404(a)(1)(A), (B), and (D), which state:

103(b) An annual report under this section shall include a financial statement containing the

following information:

(3) with respect to all employee benefit plans, the statement shall have attached the following information in separate schedules:

(A) a statement of assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan...

404(a)(1)... a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(A) for the exclusive purpose of

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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;

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title of Title IV.

#### Conclusion

The violations of ERISA discussed above will continue so long as the violations noted in this letter remain uncorrected. Therefore, we invite you to discuss with us immediately what actions have been, or will be, taken to protect the interest of the participants with respect to the violations discussed above.

We have provided the foregoing statement of our views to help you evaluate its obligations as a fiduciary within the meaning of ERISA. Should you fail to take corrective action, this matter may be referred to the Office of the Solicitor of Labor for possible legal action. In addition to any possible legal action by the Department, you should also be aware that the Secretary, pursuant to Section 504(a) of ERISA, is authorized to furnish information to "any person ... affected by any matter which is the subject" of an ERISA investigation. Further, even were the Secretary to decide not to take any legal action in this matter, you would nonetheless remain subject to suit by other parties, including plan fiduciaries and plan participants or their beneficiaries.

If you take proper corrective action, the Department will not bring a lawsuit with regard to these issues. However, ERISA Section 502(l) requires the Secretary of Labor to assess a civil penalty against a fiduciary who breaches a fiduciary responsibility under, or commits any other violation of, part 4 of Title I of ERISA or any other person who knowingly participates in such breach or

violation. The penalty under Section 502(l) is equal to 20 percent of the "applicable recovery amount," a term which means any amount recovered from a fiduciary or other person with respect to a breach or violation either pursuant to a settlement agreement with the Secretary or ordered by a court to be paid in a judicial proceeding instituted by the Secretary.<sup>1</sup> Further, you should understand that the Department is speaking only for itself and only with regard to the issues discussed above; the Department has no authority to restrain any third party or any other governmental agency from taking any action it may deem appropriate.

We hope this letter will be helpful to you in the execution of your fiduciary duties, and that, in respect to the specific matters discussed, you will promptly discuss with us how the violations may be corrected and the losses restored to the Plan. Please advise me, in writing, within 10 days of your receipt of this letter what action you propose to take with respect to the specific matters discussed.

If you have any questions, you may contact [REDACTED] of this office at [REDACTED]

Sincerely,

[REDACTED]  
Regional Director

<sup>1</sup>The Department may, in its sole discretion, waive or reduce the penalty if it determines in writing that the fiduciary or knowing participant in the breach acted reasonably and in good faith, or it is reasonable to expect that the fiduciary or knowing participant will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted. The Department may, in its sole discretion, agree to such a waiver or reduction in conjunction with entering into a settlement agreement. The procedure for applying for a waiver or reduction of the civil penalty is set forth in an interim regulation promulgated by the Department at 29 C.F.R. 2570.80 to 2570.88. A petition for a waiver or reduction of the civil penalty should be directed to this office. The Department has also issued a proposed regulation regarding implementation of the civil penalty at 29 C.F.R. 2560.5021-1.