

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MBA ENGINEERING, INC., as Sponsor and Administrator of the MBA Engineering, Inc. Employees 401(k) Plan and the MBA Engineering, Inc. Cash Balance Plan, and Craig Meidinger, as Trustee of the MBA Engineering, Inc. Employees 401(k) Plan and the MBA Engineering, Inc. Cash Balance Plan,

Plaintiffs,

vs.

VANTAGE BENEFITS ADMINISTRATORS, INC., JEFFREY A. RICHIE, WENDY K. RICHIE, and MATRIX TRUST COMPANY

Defendants.

Case No: 3:17-cv-03300-L

FIRST AMENDED COMPLAINT FOR BREACH OF ERISA FIDUCIARY DUTY, INJUNCTIVE RELIEF, CO-FIDUCIARY LIABILITY, WRIT OF ATTACHMENT, AND COMMON LAW FRAUD, PROFESSIONAL NEGLIGENCE, NEGLIGENT MISREPRESENTATION, NEGLIGENCE, TEXAS THEFT LIABILITY ACT AND BREACH OF CONTRACT

Plaintiffs MBA Engineering, Inc. (“MBA”), as sponsor and administrator of the MBA Engineering, Inc. Employees 401(k) Plan (a.k.a. the MBA Engineering, Inc. Retirement Plan) and the MBA Engineering, Inc. Cash Balance Plan (collectively, the “Plans”) and Craig Meidinger (“Meidinger”), as the Plans’ Trustee (MBA and Meidinger are collectively referred to as the “Plaintiffs”) for their First Amended Complaint against Defendants Vantage Benefits Administrators, Inc. (“Vantage Benefits”), Jeffrey A. Richie, Wendy K. Richie (the “Richies”) (Vantage Benefits and the Richies are collectively referred to as the “Vantage Defendants”) and Matrix Trust Company (“Matrix”) declare and state as follows:

NATURE OF ACTION

1. The Vantage Defendants stole approximately \$2,269,653.43 in retirement assets from the employee participants of the Plans, which are subject to the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). The Vantage Defendants misappropriated the Plans’ assets through thirty-five fraudulent transfers made by Matrix to Vantage Benefits over the course of twelve months. Matrix made these numerous and substantial transfers of ERISA plan assets directly to Vantage Benefits without any direction or authorization of any kind from MBA or Meidinger as the ERISA administrator and the Trustee, respectively, of the Plans. During the entire time of the fraudulent transfers, the assets of the Plans were in Matrix’s possession and under its responsibility. By holding the assets of the Plans without any authorization from the Plaintiffs and by making the transfers of assets of the Plans to Vantage Benefits without any authorization or direction by Plaintiffs, Matrix exercised authority and control over the assets of the ERISA governed Plans and held fiduciary status as to the Plans under ERISA. Matrix knew that all of the thirty-five fraudulent transfers were made to the same business bank account held in the name of Vantage Benefits itself, and not in the name of the Plans, and that the transfers depleted nearly the entire multi-million dollar account balance held in the names of the Plans at Matrix. Many of the transfers used fake participant names and Social Security numbers, and the nature of the transfers violated the terms of the Plans. Matrix took no action to protect the MBA ERISA Plan assets held within its possession and control. Upon information and belief, Matrix made similar transfers to Vantage Benefits of assets totaling more than \$11,000,000 from the accounts of approximately twenty other retirement plans.

2. Prior to making the fraudulent transfers to Vantage Benefits, Matrix took possession and control of millions of dollars of assets of the Plans without there being any written, or even oral, agreement between Matrix and the Plaintiffs or the Plans. There is no, and

never has been, any agreement whatsoever between Plaintiffs or the Plans, on one hand, and Matrix, on the other hand, concerning the Plans and the assets of the Plans. There is no, and never has been, any agreement between Plaintiffs or the Plans and Matrix that authorized Matrix to make transfers of the assets of the Plans at the instruction or direction of the Vantage Defendants. The Matrix accounts that held the Plans' assets were established by Matrix in the name of the Plans, and Matrix was aware that MBA was the depositor of the funds. But, without any authorization from Plaintiffs, as the Plan administrator and Trustee of the Plans, Matrix unilaterally completed each fraudulent transfer of assets of the Plans into the Vantage Benefits bank account solely at the instruction and direction of the Vantage Defendants. Matrix never informed the Plaintiffs that the transfers were being made. Matrix never provided the Plaintiffs with the monthly trust account statements it produced for the Plans and Matrix never communicated at all with the Plaintiffs either orally or in writing. There was never any agreement between the Plaintiffs and the Vantage Defendants that authorized the Vantage Defendants to instruct or direct Matrix to make the subject transfers from the Plan to Vantage Benefits.

3. The Vantage Defendants disguised their fraud from Plaintiffs and the Plans' participants for nearly a year by falsifying Plan participant account statements and participant accessible website information to make it appear that participant account balances were whole and accurate. All the while, the Vantage Defendants systematically transferred millions of dollars in retirement benefits from the Plans to their own bank account, and for their own gain.

4. At the sole direction of the Vantage Defendants, and without informing the Plaintiffs, Matrix suppressed, on its account administration systems, and failed to provide the Plans' trust statements to Plaintiffs and the Plans, even though it had no authority from the Plaintiffs to follow such an instruction from the Vantage Defendants. Again at the sole direction

of the Vantage Defendants, and without any authority from the Plaintiffs, Matrix completed each fraudulent transfer on a non-reportable basis for federal and state tax purposes, even though these types of retirement plan distributions are required to be reported to the Internal Revenue Service (“IRS”). Without receiving trust statements showing the actual and depleted balances of the Plans’ accounts at Matrix and without receiving copies of IRS required reporting documents, Plaintiffs did not, and could not have, reasonably discovered the theft until the Vantage Defendants had stolen nearly all of the Plans’ assets. Plaintiffs, in fact, did not discover the theft of the Plans’ assets until federal law enforcement authorities raided the Vantage Benefits office and shut down the operation of Vantage Benefits.

5. At all relevant times, the Vantage Defendants and Matrix were fiduciaries with respect to the Plans, and therefore, owed the highest duties known in the law to the Plans and the Plans’ participants. But instead of acting in the exclusive interests of the Plans and the Plans’ participants, the Vantage Defendants surreptitiously carried out a series of self-dealing, fraudulent acts designed to line their own pockets with the hard earned retirement assets of MBA employees. In doing so, the Vantage Defendants and Matrix breached their fiduciary duties of loyalty and prudence under ERISA with respect to the Plans and the Plans’ participants, and engaged in transactions that ERISA strictly prohibits.

6. In carrying out their fraudulent scheme, the Vantage Defendants misrepresented the value of participant account balances in the Plans by falsifying account statements and information on the Vantage Benefits participant website in order to maintain the appearance that the participant accounts contained the appropriate funds. These material misrepresentations were made with the intent to defraud the Plans’ participants and Plaintiffs and to hide the Vantage Defendants’ fraudulent conduct. Plaintiffs and the Plans’ participants relied on the Vantage Defendants’ misstatements to their extreme detriment: during a twelve-month period between

June 2016 and June 2017, the Vantage Defendants siphoned off to their own use millions of dollars from the assets of the Plans.

7. Matrix completed each of the thirty-five fraudulent transfers of assets of the Plans to the Vantage Benefits bank account unilaterally and without Plaintiffs' authorization, in breach of Matrix's fiduciary duties under ERISA and in breach of Matrix's professional and common law duties to Plaintiffs, the Plans, and the Plans' participants. These breaches resulted in almost a total loss of the assets of the ERISA protected Plans. Prior to the Vantage Defendants' theft, the Plans' total asset value was approximately \$2.5 million. But after a twelve-month period, the Vantage Defendants had stolen roughly \$2,269,653.43, nearly all of the Plans' assets, through unauthorized transfers by Matrix. This injury was catastrophic to the Plans.

8. The Vantage Defendants and Matrix must repay the assets stolen and unilaterally transferred from the Plans, with lost earnings or interest. And in light of the depravity of the Vantage Defendants' fraudulent scheme, Plaintiffs seeks exemplary damages against the Vantage Defendants based on their outright fraud. Plaintiffs also seek an injunction to stop the Vantage Defendants from further illegally transferring the Plans' assets, and barring the Vantage Defendants from performing services to any employee benefit plans in the future. And Plaintiffs seek a writ of attachment of any property or Plan assets in the Vantage Defendants' possession or control, in an amount necessary to secure the Vantage Defendants' debt to Plaintiffs. Plaintiffs seek this attachment to prevent further damage to the Plans.

THE PARTIES

9. Plaintiff MBA Engineering, Inc. is a corporation organized and existing under the laws of Minnesota, with its principal place of business in Shoreview, Minnesota. Plaintiff MBA Engineering, Inc. is the Plans' Sponsor under ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(A), the Plans' Administrator under ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A), and a fiduciary of the

Plans under ERISA §§ 3(21)(A), 402, 29 U.S.C. §§ 1002(21)(A), 1102. As a fiduciary with respect to the Plans, Plaintiff MBA Engineering, Inc. may bring this action against the Vantage Defendants and Matrix pursuant to ERISA § 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3).

10. Plaintiff Craig Meidinger is an individual. Mr. Meidinger is the owner of MBA, and Trustee of the Plans. As Trustee of the Plans, Mr. Meidinger is a fiduciary with respect to the Plans under ERISA §§ 3(14)(A), 402, 29 U.S.C. §§ 1002(14)(A), 1102. As a fiduciary with respect to the Plans, Mr. Meidinger may bring this action against the Vantage Defendants and Matrix pursuant to ERISA § 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3).

11. Defendant Vantage Benefits Administrators, Inc. is a corporation organized and existing under the laws of California, with its principal place of business at 1201 Elm Street, Suite 1600, Dallas, Texas 75270. At all relevant times, Vantage Benefits was the Plans' third-party administrator and recordkeeper. Vantage Benefits was a *de facto* fiduciary with respect to the Plans pursuant to ERISA §§ 3(21)(A), 402, 29 U.S.C. §§ 1002(21)(A), 1102, because it exercised authority and control respecting management or disposition of the Plans' assets. *See Chao v. Day*, 436 F.3d 234, 235 (D.C. Cir. 2006) (finding a third-party service provider who misappropriated the assets of an ERISA plan was a fiduciary under ERISA because he exercised "authority or control over the disposition of the plans assets," and that in "order to qualify as a fiduciary with respect to a plan's assets, a person must simply exercise any authority or control over their management or disposition.") (internal quotations marks omitted); *Bannistor v. Ullman*, 287 F.3d 394, 401 (5th Cir. 2002) (finding that the "term 'fiduciary' is liberally construed in keeping with the remedial purpose of ERISA," and a "'fiduciary' should be defined not only by reference to particular titles, . . . but also by considering the authority which a particular person has or exercises over an employee benefit plan."). At all relevant times,

Vantage Benefits was a “party in interest” to the Plans pursuant to ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B), because it provided services to the Plans.

12. Defendant Jeffrey A. Richie is an individual residing at 2414 S. Westmoreland Rd., Red Oak, Texas 75154, and is an Owner, President, and Chief Executive Officer of Vantage Benefits. Jeffrey A. Richie was a *de facto* fiduciary with respect to the Plans pursuant to ERISA §§ 3(21)(A), 402, 29 U.S.C. §§ 1002(21)(A), 1102, because he exercised discretionary authority and control respecting management or disposition of the Plans’ assets. At all relevant times, Jeffrey A. Richie was a “party in interest” to the Plans pursuant to ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B), because he provided services to the Plans.

13. In 2008, Defendant Jeffrey Richie was “sanctioned by the federal Securities and Exchange Commission and barred from the investment business for three years ‘for conducting an unregistered and fraudulent offering’ of securities in the retirement-services company he was running at the time.” Terri Langford, *FBI raids Dallas financial office amid allegations of missing retirement funds*, Dallas News (Oct. 31, 2017), <https://www.dallasnews.com/news/downtown-dallas/2017/10/31/fbi-raids-dallas-office-401k-manager-vantage-benefits>; FINRA Broker Check JEFFREY ALAN RICHIE CRD#: 1870849 <https://brokercheck.finra.org/individual/summary/1870849>.

14. Defendant Wendy K. Richie is an individual residing at 2414 S. Westmoreland Rd., Red Oak, Texas 75154, and is an Owner, Secretary, and Chief Financial Officer of Vantage Benefits. Wendy K. Richie was a *de facto* fiduciary with respect to the Plans pursuant to ERISA §§ 3(21)(A), 402, 29 U.S.C. §§ 1002(21)(A), 1102, because she exercised discretionary authority and control respecting management or disposition of the Plans’ assets. At all relevant times, Wendy K. Richie was a “party in interest” to the Plans pursuant to ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B), because she provided services to the Plans.

15. Defendant Matrix Trust Company is a wholly-owned subsidiary of Matrix Financial Solutions, Inc., which is a corporation existing under the laws of Delaware, with its principal place of business located at 717 17th Street, Suite 1300, Denver, Colorado 80202. Matrix Financial Solutions, Inc. operates as a subsidiary of Broadridge Financial Solutions, Inc., which is a corporation existing under the laws of Delaware, with its principal place of business located at 5 Dakota Drive, Suite 300, Lake Success, New York 11042. Matrix is a fiduciary to the Plans pursuant to ERISA §§ 3(21)(A), 402(a)(1), 403(a), 29 U.S.C. §§ 1002(21)(A), 1102(a)(1), 1103(a), because it, in fact, exercised authority and control over the management or disposition of the Plans' assets by, among other acts, unilaterally completing each fraudulent transfer of assets of the Plans to the Vantage Defendants without authorization or direction from the Plaintiffs. Matrix "will, by definition, always be a fiduciary under ERISA as result of its authority or control over plan assets." Employee Benefits Security Administration, United States Department of Labor, Field Assistance Bull. No. 2004-03, Fiduciary Responsibilities of Directed Trustees (2004).

JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction over Plaintiffs' claims pursuant to ERISA § 502(e) and (f), 29 U.S.C. § 1132(e) and (f) and 28 U.S.C. § 1331.

17. This Court has supplemental jurisdiction over Plaintiffs' claims for Common Law Fraud, Professional Negligence, Negligent Misrepresentation, Negligence, Texas Theft Liability Act, Breach of Contract, and Writ of Attachment because it has original jurisdiction under ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), and Plaintiffs' claims for Common Law Fraud, Professional Negligence, Negligent Misrepresentation, Negligence, Texas Theft Liability Act, Breach of Contract, and Writ of Attachment are so related to their ERISA claims, which fall within such original jurisdiction, that they form part of the same case or controversy under

Article III of the United States Constitution (28 U.S.C. § 1367).

18. Venue is proper in this District under ERISA § 502(e)(2), 29 U.S.C. §1132(e)(2), because this is the District where Matrix's and the Vantage Defendants' breaches took place and where the Vantage Defendants reside or may be found.

FACTUAL ALLEGATIONS

A. Background.

19. The MBA Engineering, Inc. Employee 401(k) Plan (a.k.a. the MBA Engineering, Inc. Retirement Plan) (the "MBA 401(k) Plan") became effective on January 1, 1998, and was amended and restated on January 1, 2016. The MBA Engineering, Inc. Cash Balance Plan (the "MBA Cash Balance Plan") became effective on January 1, 2015. The Plans were created for the benefit of the employees of MBA, and are employee benefit plans as defined by ERISA § 3(3), 29 U.S.C. § 1002(3), and are subject to ERISA pursuant to ERISA § 4(a)(1), 29 U.S.C. § 1003(a)(1).

20. The MBA 401(k) Plan is funded through elective deferrals of the MBA 401(k) Plan's participants, 401(k) "ADP test safe harbor contributions," matching and discretionary profit sharing contributions by MBA, and rollover contributions.

21. At all relevant times, Matrix accepted and held possession of the entire balance of the Plans' assets under its authority and control. There is no written agreement between Plaintiffs or the Plans, on one hand, and Matrix, on the other hand, with respect to Matrix's taking possession of the Plans' assets and there is no such written agreement between Matrix and the Vantage Defendants either. Matrix had no authorization or direction of any kind from Plaintiffs or the Plans to make the transfers of the Plans' assets to the Vantage Defendants based solely on the instruction or direction of the Vantage Defendants and Matrix thereby acted unilaterally in making the transfers.

22. At all relevant times, Matrix was a functional fiduciary with respect to the Plans because it, in fact, exercised authority and control over the Plans' assets. Matrix accepted possession of millions of dollars of the Plans' assets, and Matrix exercised authority and control over the Plans' assets by unilaterally disbursing those assets without any authorization or direction from Plaintiffs. To say that Matrix did not have control over the Plans' assets while Matrix held them is to say that no one had control during this time. Matrix's actions constitute actual exercise of authority and control over the Plans' assets within the meaning of ERISA § 3(21)(A)(i).

23. The Matrix accounts, which held the Plans' assets, were established in the Plans' names. The Plans were named as the depositor of the funds on the Matrix account titles. The Vantage Defendants, however, made the instructions and directions to Matrix to complete the transfers, not Plaintiffs or the Plans. The fraudulent transfers were made to a business bank account held by Vantage Benefits, not Plaintiffs or the Plans. Even though Matrix knew that the Vantage Defendants were not the account holders or depositors of the Plans' assets it held, Matrix completed each fraudulent transfer solely at the instruction of the Vantage Defendants, without authority or direction from the Plaintiffs or the Plans. This unauthorized disposition of ERISA plan assets renders Matrix an ERISA fiduciary. Matrix exercised unilateral control over the assets of the Plans by transferring Plan funds to a business bank account held by Vantage Benefits without any authorization or direction from the Plans or Plaintiffs.

24. In a November 25, 2014 "Letter of Acceptance" sent from Matrix (then known as MG Trust Company) to Fidelity Investments, which then served as the MBA 401(k) Plan's trustee, Matrix acknowledged that it was the "Successor Trustee for MBA Engineering Inc. Employees 401k Plan." Matrix further stated in the letter that it had "been appointed to serve as successor trustee for the *MBA Engineering Inc. Employees 401k Plan* effective *January 30,*

2015. MG Trust Company LLC will accept responsibility for the assets for the plan as of **January 30, 2015.**” Matrix alleges that this document was forged, but has not provided Plaintiffs with any evidence to date that supports this claim.

25. Should Matrix take the position that it is a custodian of the MBA 401(k) Plan’s assets and not a trustee, the MBA 401(k) Plan document states that a “Custodian has the same powers, rights and duties as a nondiscretionary Trustee. Any reference in the Plan to a Trustee also is a reference to a Custodian unless the context of the Plan indicates otherwise.” Plan Document, Article VII(4).

B. The Vantage Defendants’ Fraudulent Scheme.

26. At some time prior to October 25, 2017, an actuary employed by Vantage Benefits named Charles Leggette detected abnormalities with certain accounts for which Vantage Benefits provided recordkeeping services, including the Plans.

27. Upon discovery of these abnormalities, Mr. Leggette filed a Form 211 with the Internal Revenue Service (“IRS”) under the IRS’s whistleblower program. The IRS acknowledged receipt of Mr. Leggette’s Form 211 by letter dated August 23, 2017. Around this time, another Vantage Benefits employee filed a similar claim with the United States Department of Labor (“DOL”).

28. Investigation into Vantage Benefits’ bookkeeping revealed that, over the course of a twelve-month period between June 2016 and June 2017, the Vantage Defendants had systematically misrepresented the balances of the accounts held by Matrix in the Plans to Plaintiffs and the Plans’ participants to hide the fact that the Vantage Defendants were instructing Matrix to transfer millions of dollars of the Plans’ assets to the Vantage Defendants’ own business bank account, for their own gain.

29. The Vantage Defendants fabricated account statements and information on the

Vantage Benefits website to hide the fact that they were fraudulently transferring millions of dollars in retirement assets from the Plans to a Vantage Benefits business bank account held at Bank of America. Plaintiffs and the Plans' participants relied on these material misrepresentations to their extreme detriment: from their perspective, it appeared that the Plans' accounts were at all times accurate.

30. Utilizing a TPA customer portal provided by Matrix, the Vantage Defendants electronically instructed Matrix to complete wire transfers of assets from the accounts of the Plans' participants purportedly to an entity called Hilltop Securities, Inc. ("Hilltop Securities"). The bank routing and bank account numbers that the Vantage Defendants provided for these instructions to Matrix, however, corresponded to a Vantage Benefits business bank account that was held at Bank of America. There is no evidence that Hilltop Securities received any assets of the Plans through these wire transfers.

31. All of the fraudulent wire transfers by Matrix of assets from the Plans were sent using the same Bank of America routing and account numbers. The Vantage Defendants may have instructed Matrix to complete other fraudulent transfers of assets from the Plans to the same Bank of America account by ACH transfers.

32. Between June 3, 2016 and June 7, 2017, the Vantage Defendants improperly instructed Matrix to make, and Matrix made, approximately thirty-five (35) fraudulent wire transfers from participant accounts in the Plans to a Vantage Benefits bank account held at Bank of America. Matrix's certified trust statements show that thirty-four (34) of these fraudulent transfers were made from the MBA 401(k) Plan, totaling approximately \$2,174,903.43, and one of these fraudulent transfers was made from the MBA Cash Balance Plan, totaling approximately \$94,750.00. Matrix was never authorized or instructed in any manner by the Plaintiffs or the Plans to make these transfers of assets of the Plans.

33. The fraudulent distributions were labeled and structured by the Vantage Defendants in their instructions to Matrix so that there was no reporting of the distributions to the IRS. This allowed the Vantage Defendants to conceal and hide their thefts from Plaintiffs and the federal authorities. Matrix knew that Vantage Benefits was instructing that these wire transfers be made on a non-reportable basis, and that if these wire transfers were valid participant distributions, it was required that these distributions be reported to the IRS, such as by the filing of Forms 1099. Matrix was never authorized or instructed in any manner by the Plaintiffs or the Plans to make these transfers on a non-reportable basis.

34. During this period, Matrix suppressed the Plans' trust statements and did not provide the statements to Plaintiffs at the direction of the Vantage Defendants, without any authority or instruction from Plaintiffs or the Plans to not provide them with trust statements for the Plans' accounts at Matrix. Without receiving the Plans' trust statements, Plaintiffs remained unaware that funds had been fraudulently transferred from the Plans to the Vantage Defendants' business bank account.

35. Matrix completed the fraudulent wire transfers to the Vantage Defendants of retirement plan assets from participant accounts in the Plans, even though Matrix knew or should have known that the transfers were unauthorized and illegal because the wire transfers were being made to a Bank of America bank account in the name of Vantage Benefits and not to Hilltop Securities, the purported transferee in the instructions received by Matrix from the Vantage Defendants.

36. Pursuant to its own trust statements, Matrix was aware that MBA 401(k) Plan participants could only direct their retirement assets into one money market fund or a series of mutual funds that were offered as investment options by the MBA 401(k) Plan. Accordingly, Matrix was aware that transferring assets to a self-directed brokerage account, as may be offered

by an entity like Hilltop Securities, was not an option under the MBA 401(k) Plan, but it completed these wire transfers anyway, without inquiring as to their validity.

37. Many of the wire transfers were made from participant accounts in the Plans in amounts that greatly exceeded the actual value of the accounts from which the transfers were made.

38. The Vantage Defendants completed twenty-five (25) of the total thirty-five (35) fraudulent wire transfers using fake names and Social Security numbers of purported Plan participants. With respect to these fake names and Social Security numbers, Matrix knew or had reason to know that the purported individuals associated with these wire transfers were not participants in the Plans.

39. Matrix completed these wire transfers despite the frequency and magnitude of the transfers. For instance, roughly thirty-four (34) large wire transfers were made from the MBA 401(k) Plan over the course of a twelve-month period, from a Plan that had only forty (40) active participants at the end of the 2015 Plan year, as shown by the publicly available Form 5500 for the MBA 401(k) Plan.

40. Matrix knew that each of these transfers was made using the same bank routing number and same bank account number, which was connected to a Vantage Benefits business bank account held at Bank of America.

41. Matrix completed these transfers when it knew or had reason to know that the distributions were nearly draining the entire balance of the Plans' assets held by Matrix. Without these fraudulent transfers, the MBA 401(k) Plan would have a total value today of at least \$2,469,000.00. The transfers made by Matrix at the sole direction of the Vantage Defendants depleted nearly 88% of the MBA 401(k) Plan's total value between June 2, 2016 and June 3, 2017. Likewise, Matrix transferred \$94,000 from the MBA Cash Balance Plan at the sole

direction of the Vantage Defendants, even though the total previous account balance of that Plan was only \$210,504.86 by the end of 2016. This transfer amounted to a 45% decrease in the total value of the MBA Cash Balance Plan.

42. The MBA 401(k) Plan, from which thirty-four of the thirty-five fraudulent transfers were made, only allows participants to receive distribution of their vested benefits upon: (i) termination of employment for reasons other than death, disability or retirement; (ii) normal retirement; (iii) disability; and (iv) death. Likewise, the MBA Cash Balance Plan only allows for distribution of benefits upon the death or retirement of a participant. Nevertheless, Matrix facilitated fraudulent transfers from participant accounts that were categorized as “distributions” over the course of one year, even though Matrix was aware that some of these participants continued to make contributions into the Plans afterwards.

43. In total, the Vantage Defendants stole approximately \$2,269,653.43 from the Plans between June 3, 2016 and June 7, 2017. Prior to the Vantage Defendants’ fraudulent transfers, the Plans’ total combined balance was approximately \$2.5 million, so the Vantage Defendants’ scheme was simply catastrophic to the Plans and the participants’ retirement savings. Matrix, as a fiduciary to the Plans, had a duty to act only solely in the interest of the Plans’ participants, perform its duties prudently, and to not engage in any transactions prohibited by ERISA. Matrix’s role in making the transfers of funds out of the Plans’ accounts held by Matrix as part of the Vantage Defendants’ fraudulent scheme, and Matrix’s failure to take any action to protect the Plans’ assets, is a breach of Matrix’s fiduciary duties to the Plans and the participants in the Plans. Matrix is equally responsible and liable for the losses suffered by the Plans.

44. Where a “directed trustee knows or should know that a direction from a named fiduciary is not made in accordance with the terms of the plan or is contrary to ERISA, the

directed trustee may not, consistent with its fiduciary responsibilities, follow the direction.” Employee Benefits Security Administration, United States Department of Labor, Field Assistance Bull. No. 2004-03, Fiduciary Responsibilities of Directed Trustees (2004). Matrix transferred \$2,269,653.43 in Plan assets from participant accounts in response to the Vantage Defendants’ instructions over the course of a twelve-month period, even though Matrix had no authorization or directions from the Plaintiffs or the Plans to make the transfers and Matrix had reason to know that the Vantage Defendants’ wire transfers instructions violated the terms of the Plans and ERISA, and were therefore improper.

45. On October 25, 2017, the Federal Bureau of Investigation (“FBI”) executed a search warrant at Vantage Benefits’ offices in Dallas, Texas. Terri Langford, *FBI raids Dallas financial office amid allegations of missing retirement funds*, Dallas Morning News (October 31, 2017), <https://www.dallasnews.com/news/downtown-dallas/2017/10/31/fbi-raids-dallas-office-401k-manager-vantage-benefits>.

46. Upon information and belief, Plaintiffs allege that the United States Department of Labor and United States Department of Justice have shut down Vantage Benefits and seized all of its accounts, including the Bank of America bank account into which the fraudulent wire transfers were made.

47. Upon discovery of the theft of the Plans’ assets, Plaintiffs took immediate action to remedy the fiduciary breaches of Matrix and the Vantage Defendants, and restore losses to the Plans and the Plans’ participants. Plaintiffs established new Plan trust accounts, transferred any remaining assets from Matrix’s possession to the new accounts, and loaned additional funds into these trust accounts to make the Plans whole. Plaintiffs have retained industry specialists in their continued effort to restore all losses to the Plans’ participants resulting from the fiduciary breaches of Matrix and the Vantage Defendants.

48. Plaintiffs deposited funds into these new trust accounts pursuant to DOL Prohibited Transaction Class Exemption 80-26 and promissory notes, which provide that the Plans agree to repay MBA only from the proceeds (by judgment, settlement, or otherwise) of litigation for damages sustained by the Plans. The notes further provide that, if the amount of recovery in any such litigation is less than the amount loaned to the Plans by MBA, the unpaid balance will be forgiven. If the amount of recovery in any such litigation exceeds the loan amount, the excess will be paid to the Plans.

49. The Vantage Defendants did not limit their fraudulent scheme to Plaintiffs and the Plans. Plaintiff is aware that the Vantage Defendants stole over \$10 million, by transfers made by Matrix, from a 401(k) Plan sponsored by Oklahoma corporations named Caldwell and Partners, Inc., Midlands Claim Administrators, Inc., and Midlands Management Corporation, and a Texas corporation named Midlands Management of Texas, Inc. (collectively, "CPI"). *See* Dallas County District Court Case No. DC-17-15265, Docket No. 2. CPI filed a petition on November 6, 2017 against Vantage Benefits and Jeffrey Richie that asserted claims under the Texas Civil Remedies and Practice Code § 134.003, Uniform Fraudulent Transfers Act, and for Negligent Misrepresentation. *Id.* CPI's petition seeks monetary and exemplary damages. *Id.*

50. CPI's petition also requested a temporary restraining order and temporary injunction to enjoin Vantage Benefits and Jeffrey Richie from "transferring any assets held in account controlled, directly or indirectly, by Vantage [Benefits], Richie." *Id.* And CPI requested an attachment under Chapter 61 of the Texas Civil Practice and Remedies Code and the Texas Uniform Fraudulent Transfers Act for "all amounts of assets and/or cash shown at hearing to be reasonably tailored to protect the Plan during the pendency" of its lawsuit. *Id.*

51. On November 29, 2017, the Dallas County District Court granted CPI's application for a temporary injunction, and found that "the evidence demonstrates a probable

right to recovery for unlawful transfers of assets of the [CPI] 401(k) Plan.” *Id.* at Docket No. 42. The Court found that this order was “necessary to preserve the status quo and prevent further transfer of assets or funds” because “further transfers would comprise an irreparable injury.” *Id.*

52. On December 20, 2017, CPI filed a complaint in the United States District Court for the Northern District of Texas entitled *Caldwell and Partners, Inc., as sponsor and on behalf of the Caldwell and Partners, Inc. 401(k) Plan v. Vantage Benefits Administrators, Inc., et al.* (Case No. 3:17-cv-03459-N). CPI’s federal complaint asserts claims against the Vantage Defendants under ERISA and Texas common law.

53. Plaintiffs are also aware that the Vantage Defendants’ fraudulently transferred assets from a number of other plans as well, in amounts yet to be determined, and, in most instances, Matrix had custody over these assets at the time of the theft.

FIRST CLAIM FOR RELIEF

(Against the Vantage Defendants for Damages for Breach of Fiduciary Duty of Loyalty, ERISA §502(a)(2), 29 U.S.C. §1102(a)(2))

54. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

55. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(a), provides that a fiduciary shall discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of (i) providing benefits to participants and their beneficiaries, and (ii) defraying reasonable expenses of administering the plan.

56. At all relevant times, the Vantage Defendants were fiduciaries with respect to the Plans pursuant to ERISA §§ 3(21)(A), 402, 29 U.S.C. §§ 1002(21)(A), 1102, because they exercised authority and control respecting management or disposition of the Plans’ assets. *See Day*, 436 F.3d at 235); *Bannistor*, 287 F.3d at 401.

57. The Vantage Defendants exercised authority and control over the Plans’ assets by

improperly instructing Matrix to make wire transfers of assets from the Plans to the Vantage Defendants' business bank account held at Bank of America. This exercise of authority and control over the Plans' assets, and the Vantage Defendants' misappropriation of the Plans' funds, requires that the Vantage Defendants be deemed fiduciaries under ERISA.

58. Between June 3, 2016 and June 7, 2017, the Vantage Defendants stole roughly \$2,269,653.43 from the Plans for their own personal gain. The Vantage Defendants improperly instructed Matrix to transfer funds from participant accounts under the false pretense that the transfers were being made to Hilltop Securities and were non-tax reportable distributions from the Plans. The Vantage Defendants disguised their theft by creating falsified account statements and website information about the balance of the participants' accounts, with the intent to defraud Plaintiffs and the Plans' participants. Plaintiffs and the Plans' participants relied on these misrepresentations to their great detriment because, while it appeared that their accounts contained the proper amount of funds, the Vantage Defendants directed disbursements of millions of dollars from the Plans to their own business bank account at Bank of America.

59. In creating, orchestrating, facilitating, and/or participating in this fraudulent scheme, and with each act of fraud, the Vantage Defendants violated the terms of the Plans and their fiduciary duty of loyalty to act solely in the interest of the Plans' participants. By virtue of these breaches of the fiduciary duty of loyalty, the Plans were damaged in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

SECOND CLAIM FOR RELIEF

(Against Matrix for Damages for Breach of Fiduciary Duty of Loyalty, ERISA §502(a)(2), 29 U.S.C. §1102(a)(2))

60. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

61. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(a), provides that a fiduciary shall discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of (i) providing benefits to participants and their beneficiaries, and (ii) defraying reasonable expenses of administering the plan.

62. At all relevant times, Matrix had possession of the Plans' assets, and it unilaterally completed each of the fraudulent wire transfers to the Vantage Benefits business bank account without any authorization or direction from the Plaintiffs or the Plans. Matrix, therefore, was a functional fiduciary with respect to the Plans pursuant to ERISA §§ 3(21)(A), 402, 29 U.S.C. §§ 1002(21)(A), 1102, because it exercised actual authority and control over the Plans' assets. *See Day*, 436 F.3d at 236. And "any authority or control is enough." *Id.* (citing *David P. Coldesina, D.D.S., P.C., Empl. Profit Sharing & Trust v. Estate of Simper*, 407 F.3d 1126, 1132-35 (10th Cir. 2005); *Srein v. Frankford Trust Co.*, 323 F.3d 214, 220-22 (3d Cir. 2003)). Matrix had "practical control over an ERISA plan's money," so it had "fiduciary responsibility to the plan's beneficiaries." *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir. 1997).

63. The Plans' assets were held in accounts at Matrix that were established in the name of the Plans, and the Plans were the depositors of the funds. Matrix, however, completed each of the fraudulent wire transfers based solely on the instruction and direction of the Vantage Defendants. The Vantage Defendants were neither the account holder nor the depositor of the Plans' assets with Matrix. There is no written agreement between Matrix, on one hand, and Plaintiffs or the Plans, on the other hand. Matrix had no authority of any kind to make the wire transfers at the instruction of the Vantage Defendants. Matrix disposed of the Plans' assets even though it had no authority to do so, which was an exercise of unilateral control over the Plans' assets. ERISA "fiduciary status [is] applicable to a plan custodian exerting unilateral control

over plan assets.” *McLemore v. Regions Bank*, 682 F.3d 414, 423 (6th Cir. 2012).

64. Matrix failed to provide trust account statements to Plaintiffs and completed the fraudulent transfers on a non-reportable basis without authority from Plaintiffs or the Plans, which prevented Plaintiffs and the Plans’ participants from discovering the theft until nearly all of the Plans’ assets were stolen.

65. The Vantage Defendants stole approximately \$2,269,653.43 from the Plans between June 3, 2016 and June 7, 2017. Matrix made the fraudulent transfers, without any authority or direction from Plaintiffs or the Plans, even though it knew or had reason to know that: (i) thirty-five (35) transfers were requested over the course of twelve months, (ii) these transfers resulted in a nearly eighty-eight percent (88%) depletion of the assets of the MBA 401(k) Plan and a forty-five (45%) depletion of the assets of the MBA Cash Balance Plan during this period, (iii) each of these transfers was made using the same bank routing number and account number of a bank account at Bank of America held by the Vantage Defendants, (iv) twenty-five (25) of the thirty-five (35) transfers were made using fake names and Social Security numbers of Plan participants, and (v) these transfers violated the terms of the Plans.

66. Matrix, as a fiduciary to the Plans, had a duty to act solely in the interest of the Plans’ participants. By the actions set out above and by allowing the Vantage Defendants to steal nearly all of the assets of the Plans over the course of one year despite actual or constructive knowledge of the theft, Matrix breached this duty.

67. By virtue of this breach of the fiduciary duty of loyalty by Matrix, the Plans were damaged in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

THIRD CLAIM FOR RELIEF

(Against the Vantage Defendants for Damages for Breach of Fiduciary Duty of Prudence,
ERISA §502(a)(2), 29 U.S.C. §1102(a)(2))

68. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

69. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), provides that a fiduciary shall discharge his or her duties with respect to a 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.

70. At all relevant times, the Vantage Defendants were fiduciaries with respect to the Plans pursuant to ERISA §§ 3(21)(A), 402, 29 U.S.C. §§ 1002(21)(A), 1102, because they exercised authority and control respecting management or disposition of the Plans' assets. *See Day*, 436 F.3d at 235); *Bannistor*, 287 F.3d at 401.

71. The Vantage Defendants exercised authority and control over the Plans' assets by improperly instructing Matrix to make wire transfers from the assets of the Plans to the Vantage Defendants' business bank account held at Bank of America. This exercise of authority and control over the Plans' assets, and the Vantage Defendants' misappropriation of the Plans' funds, requires that the Vantage Defendants be deemed fiduciaries under ERISA.

72. Between June 3, 2016 and June 7, 2017, the Vantage Defendants stole roughly \$2,269,653.43 from the Plans for their own personal gain. The Vantage Defendants improperly instructed Matrix to transfer funds from participant accounts under the false pretense that the transfers were being made to Hilltop Securities and were non-tax reportable distributions from the Plans. The Vantage Defendants disguised their theft by creating falsified account statements and website information about the balance of the participants' accounts, with the intent to

defraud Plaintiff and the Plans' participants. Plaintiff and the Plans' participants relied on these misrepresentations to their great detriment because, while it appeared that their accounts contained the proper amount of funds, the Vantage Defendants directed disbursements of millions of dollars from the Plans to their own business account at Bank of America.

73. In creating, orchestrating, facilitating, and/or participating in this fraudulent scheme, and with each act of fraud, the Vantage Defendants violated the terms of the Plans and their fiduciary duty of prudence to act 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.

74. By virtue of these breaches of the fiduciary duty of prudence, the Plans were damaged in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

FOURTH CLAIM FOR RELIEF

(Against Matrix for Damages for Breach of Fiduciary Duty of Prudence, ERISA §502(a)(2), 29 U.S.C. §1102(a)(2))

75. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

76. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), provides that a fiduciary shall discharge his or her duties with respect to a 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.

77. At all relevant times, Matrix had possession of the Plans' assets, and it unilaterally completed each of the fraudulent wire transfers to the Vantage Benefits business bank account without any authorization or direction from the Plaintiffs or the Plans. Matrix,

therefore, was a functional fiduciary with respect to the Plans pursuant to ERISA §§ 3(21)(A), 402, 29 U.S.C. §§ 1002(21)(A), 1102, because it exercised authority and control over the Plans' assets.

78. The Plans' assets were held in accounts at Matrix that were established in the name of the Plans, and the Plans were the depositors of the funds. Matrix, however, completed each of the fraudulent wire transfers based solely on the instruction and direction of the Vantage Defendants. The Vantage Defendants were neither the account holder nor the depositor of the Plans' assets with Matrix. There is no written agreement between Matrix, on one hand, and Plaintiffs or the Plans, on the other hand. Matrix had no authority of any kind to make the wire transfers at the instruction of the Vantage Defendants. Matrix disposed of the Plans' assets even though it had no authority to do so, which was an exercise of unilateral control over the Plans' assets. ERISA "fiduciary status [is] applicable to a plan custodian exerting unilateral control over plan assets." *McLemore*, 682 F.3d at 423.

79. The Vantage Defendants stole approximately \$2,269,653.43 from the Plans between June 3, 2016 and June 7, 2017. Matrix made the fraudulent transfers, without any authority or directions from Plaintiffs or the Plans, even though it knew or had reason to know that: (i) thirty-five (35) transfers were requested over the course of twelve months, (ii) these transfers resulted in a nearly eighty-eight percent (88%) depletion of the assets of the MBA 401(k) Plan and a forty-five (45%) depletion of the assets of the MBA Cash Balance Plan during this period, (iii) each of these transfers was made using the same bank routing number and account number of a bank account at Bank of America held by the Vantage Defendants, (iv) twenty-five (25) of the thirty-five (35) transfers were made using fake names and Social Security numbers of Plan participants, and (v) these transfers violated the terms of the Plans.

80. Matrix, as a fiduciary to the Plans, had a duty to act 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. By the actions set out above and by allowing the Vantage Defendants to steal nearly all of the assets of the Plans over the course of one year, Matrix breached this duty.

81. By virtue of this breach of the fiduciary duty of prudence by Matrix, the Plans were damaged in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

FIFTH CLAIM FOR RELIEF

(Against the Vantage Defendants for violation of ERISA's Prohibited Transaction Provisions, ERISA § 406(b)(1) and (3), 29 U.S.C. § 1106(b)(1) and (3); ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D))

82. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

83. ERISA § 406(b), 29 U.S.C. § 1106(b), provides, in relevant part, that “[a] fiduciary with respect to a plan shall not –

(1) deal with the assets of the plan in his own interest or for his own account, . . . or

* * *

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.”

84. The Vantage Defendants exercised authority and control over the Plans' assets by improperly instructing Matrix to make wire transfers of assets from the Plans to the Vantage Defendants' business bank account held at Bank of America. This exercise of authority and control over the Plans' assets, and the Vantage Defendants' misappropriation of the Plans' funds, requires that the Vantage Defendants be deemed fiduciaries under ERISA.

85. Between June 3, 2016 and June 7, 2017, the Vantage Defendants stole roughly

\$2,269,653.43 from the Plans for their own personal gain. The Vantage Defendants improperly instructed Matrix to transfer funds from participant accounts under the false pretense that the transfers were being made to Hilltop Securities and were non-tax reportable distributions from the Plans. The Vantage Defendants disguised their theft by creating falsified account statements and website information about the balance of the participants' accounts, with the intent to defraud Plaintiffs and the Plans' participants. Plaintiffs and the Plans' participants relied on these misrepresentations to their great detriment because, while it appeared that their accounts contained the proper amount of funds, the Vantage Defendants directed disbursements of millions of dollars from the Plans to their own business bank account at Bank of America.

86. In creating, orchestrating, facilitating, and/or participating in the fraudulent transfer of the Plans' assets, the Vantage Defendants dealt with the Plans' assets for their own interest. The Vantage Defendants directed the wiring of these funds to their own Vantage Benefits bank account held at Bank of America. In so doing, the Vantage Defendants engaged in a transaction prohibited by ERISA § 406(b), 29 U.S.C. § 1106(b) on each occasion that the Vantage Defendants fraudulently transferred funds from the Plans' participants' accounts to their own Bank of America account.

87. Moreover, as parties in interest to the Plan, the Vantage Defendants engaged in transactions prohibited by ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), on each occasion on which they fraudulently obtained the Plans' assets through the transfer of the Plans' assets to their own accounts in that they transferred assets of the Plans to, for the use by or for the benefit of, a party in interest.

88. By virtue of engaging in these prohibited transactions, the Vantage Defendants violated the terms of the Plans, and breached their fiduciary duties held to the Plans, Plaintiffs,

and the Plans' participants, and damaged the Plans in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

SIXTH CLAIM FOR RELIEF

(Against Matrix for violation of ERISA's Prohibited Transaction Provisions, ERISA § 406(b)(1) and (3), 29 U.S.C. § 1106(b)(1) and (3); ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D))

89. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

90. ERISA § 406(b), 29 U.S.C. § 1106(b), provides, in relevant part, that “[a] fiduciary with respect to a plan shall not –

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries,

91. ERISA § 406(a)(1)(D) states that a “fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of a party in interest, of any assets of the plan.”

92. To state a valid claim under ERISA § 406(a)(1)(D), Plaintiffs must plausibly allege that,

The following five elements are satisfied: (1) the person or entity is a fiduciary with respect to the plan; (2) the fiduciary causes the plan to engage in the transaction at issue; (3) the transaction uses plan assets; (4) the transaction's use of the assets is for the benefit of a party in interest; and (5) the fiduciary knows or should know that elements three and four are satisfied.

Reich v. Compton, 57 F.3d 270, 278 (3d Cir. 1995) (internal quotations marks omitted).

93. Matrix was a functional fiduciary with respect to the Plans. At all relevant times, Matrix had possession of the Plans' assets, and it completed each of the wire transfers to the

Vantage Benefits business bank account unilaterally without authority or direction from Plaintiffs.

94. At all relevant times, the Vantage Defendants were parties in interest with respect to the Plans. Under ERISA § 3(14)(A) and (B), 29 U.S.C. § 1002(14)(A) and (B), a party in interest is defined as “any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian)” as to any employee benefit plan, or “a person providing services to such plan.” The Vantage Defendants were both fiduciaries and service providers to the Plans.

95. Matrix completed all of the fraudulent transfers, thereby causing the transactions. Each of the transactions involved the Plans’ assets. Matrix knew or had reason to know that each transactions was for the benefit of the Vantage Defendants, because the transfers were made to the same business bank account held in Vantage Benefits’ name. The Vantage Defendants were at all times parties in interest with respect to the Plans.

96. By virtue of engaging in these prohibited transactions, Matrix breached its fiduciary duties to the Plans, Plaintiffs, and the Plans’ participants, and damaged the Plans in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

SEVENTH CLAIM FOR RELIEF

(Against the Vantage Defendants for Surcharge, ERISA § 502(a)(3), 29 U.S.C. §1132(a)(3))

97. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

98. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), provides that a fiduciary may bring a civil action to “(A) ... enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.”

99. During the time of the divided bench, courts sitting in equity “possessed the power to provide relief in the form of monetary ‘compensation’ for a loss resulting from a trustee’s breach of duty, or to prevent the trustee’s unjust enrichment.” *CIGNA Corp. v. Amara*, 563 U.S. 421, 441–42 (2011).

100. This “surcharge remedy extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary.” *Id.* The surcharge remedy “fall[s] within the scope of the term ‘appropriate equitable relief’ in § 502(a)(3).” *Id.*

101. The Vantage Defendants exercised authority and control over the Plans’ assets by improperly instructing Matrix to make wire transfers from the Plans to the Vantage Defendants’ business bank account held at Bank of America. This exercise of authority and control over the Plans’ assets, and the Vantage Defendants’ misappropriation of the Plans’ funds, requires that the Vantage Defendants be deemed fiduciaries under ERISA.

102. Between June 3, 2016 and June 7, 2017, the Vantage Defendants stole roughly \$2,269,653.43 from the Plans for their own personal gain. The Vantage Defendants improperly instructed Matrix to transfer funds from participant accounts under the false pretense that the transfers were being made to Hilltop Securities and were non-tax reportable distributions from the Plan. Return of the \$2,269,653.43 is required to prevent the Vantage Defendants’ unjust enrichment.

103. Plaintiffs and the Plans’ participants must be compensated for the loss resulting from the Vantage Defendants’ breaches of fiduciary duty in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

EIGHTH CLAIM FOR RELIEF

(Against Matrix for Surcharge, ERISA § 502(a)(3), 29 U.S.C. §1132(a)(3))

104. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

105. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), provides that a fiduciary may bring a civil action to “(A) ... enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.”

106. At all relevant times, Matrix had possession of the Plans’ assets, and it unilaterally completed each of the fraudulent wire transfers to the Vantage Benefits business bank account without any authorization or direction from the Plaintiffs or the Plans. Matrix, therefore, was a functional fiduciary with respect to the Plans pursuant to ERISA §§ 3(21)(A), 402, 29 U.S.C. §§ 1002(21)(A), 1102, because it exercised actual authority or control over the Plans’ assets.

107. The Plans’ assets were held in accounts at Matrix that were established in the name of the Plans, and the Plans were the depositors of the funds. Matrix, however, completed each of the fraudulent wire transfers based solely on the instruction and direction of the Vantage Defendants. The Vantage Defendants were neither the account holder nor the depositor of the Plans’ assets. There is no written agreement between Matrix, on one hand, and Plaintiffs or the Plans, on the other hand. Matrix had no authority of any kind to make the fraudulent wire transfers at the instruction of the Vantage Defendants.

108. The Vantage Defendants stole approximately \$2,269,653.43 from the Plans between June 3, 2016 and June 7, 2017. Matrix made the fraudulent transfers, without any authority or direction from Plaintiffs or the Plans, even though it knew or had reason to know that: (i) thirty-five (35) transfers were requested over the course of twelve months, (ii) these transfers resulted in a nearly eighty-eight percent (88%) depletion of the assets of the MBA 401(k) Plan and a forty-five (45%) depletion of the assets of the MBA Cash Balance Plan during this period, (iii) each of these transfers was made using the same bank routing number and

account number of a bank account at bank of America held by the Vantage Defendants, (iv) twenty-five (25) of the thirty-five (35) transfers were made using fake names and Social Security numbers of Plan participants, and (v) these transfers violated the terms of the Plans.

109. Plaintiffs, the Plans, and the Plans' participants must be compensated for the loss resulting from Matrix's breaches of fiduciary duty in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

NINTH CLAIM FOR RELIEF

(Against the Vantage Defendants Inclusive, for Injunctive Relief, ERISA § 502(a)(3), 29 U.S.C. §1132(a)(3))

110. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

111. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), provides that a participant, beneficiary or fiduciary may bring a civil action to "(A) ... enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

112. Under ERISA equitable relief includes "those categories of relief which were typically available in equity (such as injunction, mandamus, and restitution ...)." *Brown v. Nationsbank of Georgia, NA*, 161 F.3d 8 (5th Cir. 1998) (citing *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993)).

113. The Vantage Defendants exercised authority and control over the Plans' assets by improperly instructing Matrix to make wire transfers from the Plans to the Vantage Defendants' business bank account held at Bank of America. This exercise of authority and control over the Plans' assets, and the Vantage Defendants' misappropriation of the Plans' funds, requires that the Vantage Defendants be deemed fiduciaries under ERISA.

114. Through a system of fraud and deceit, the Vantage Defendants stole millions of dollars from the Plans' participants. The Vantage Defendants orchestrated, facilitated, or participated in the transfer of these funds from the Plans to a Bank of America bank account held by Vantage Benefits for their own gain. In so doing, the Vantage Defendants violated the terms of the Plans and breached their fiduciary duties, as described in detail above.

115. Plaintiffs request an injunction: (i) enjoining the Vantage Defendants from further transferring, disposing of, or otherwise dealing in any of the Plans' assets, (ii) ordering the Vantage Defendants, and each of them, to return any assets that were fraudulently transferred from the Plans back to the Plans; and (iii) permanently barring the Vantage Defendants, and each of them, from acting as a fiduciary for or providing any services for any employee benefit plan governed by ERISA.

TENTH CLAIM FOR RELIEF

(Against the Vantage Defendants Inclusive, for Co-Fiduciary Liability)

116. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

117. ERISA § 405(a), 29 U.S.C. §1105(a), provides that, “[i]n addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

- (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
- (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
- (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.”

118. The Vantage Defendants exercised authority and control over the Plans' assets by

improperly instructing Matrix to make wire transfers of assets from the Plans to the Vantage Defendants' business bank account held at Bank of America.

119. Between June 3, 2016 and June 7, 2017, the Vantage Defendants stole roughly \$2,269,653.43 from the Plans for their own personal gain. The Vantage Defendants improperly instructed Matrix to transfer Plan assets from participant accounts under the false pretense that the transfers were being made to Hilltop Securities and were non-tax reportable distributions from the Plans. The Vantage Defendants, and each of them, disguised their theft by creating falsified account statements and website information about the balance of the participants' accounts, with the intent to defraud Plaintiffs and the Plans' participants. Plaintiffs and the Plans' participants relied on these misrepresentations to their great detriment because, while it appeared that their accounts contained the proper amount of funds, the Vantage Defendants directed disbursements of millions of dollars from the Plans to their own business bank account at Bank of America. As a result of these activities, the Vantage Defendants breached their fiduciary duties of prudence and loyalty, and engaging in prohibited transactions.

120. Each of the Vantage Defendants knowingly participated in, enabled, and failed to make reasonable efforts to remedy the other Defendants' breaches of fiduciary duty despite knowledge of their breaches. For instance, each of the Defendants knew that approximately \$2,174,903.43 was transferred from the MBA 401(k) Plan over the course of one year, resulting in a nearly 88% reduction in the MBA 401(k) Plan's value. The Vantage Defendants instructed that these wire transfers be styled as "distributions" to be made on a non-reportable basis, but each of the Defendants knew that if these wire transfers were valid participant distributions, these distributions were required to be reported to the IRS. And each of the Vantage Defendants knew or should have known that the Plans only allowed distributions to participants in the event of termination, retirement, disability, or death, but that the participants continued to make

contributions into the Plans.

121. Each of the Vantage Defendants, therefore, knew that the other Defendants were failing to discharge their fiduciary obligations in accordance with the Plans' terms and ERISA.

122. To the extent that any of the Vantage Defendants are not deemed to be fiduciaries, or are not deemed to be acting as fiduciaries for any and all applicable purposes, any such Vantage Defendants are liable for these breaches of fiduciary duty, since such Vantage Defendants knowingly participated in the fiduciary breaches.

123. By virtue of these breaches of fiduciary duty, the Plans were damaged in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

ELEVENTH CLAIM FOR RELIEF
(Against Matrix for Co-Fiduciary Liability)

124. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

125. ERISA § 405(a), 29 U.S.C. §1105(a), provides that, "[i]n addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

- (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
- (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
- (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach."

126. At all relevant times, Matrix had possession of the Plans' assets, and it completed each of the fraudulent wire transfers to the Vantage Benefits business bank account. Matrix,

therefore, was a functional fiduciary with respect to the Plans pursuant to ERISA §§ 3(21)(A), 402, 29 U.S.C. §§ 1002(21)(A), 1102, because it exercised control over the Plans' assets.

127. Between June 3, 2016 and June 7, 2017, the Vantage Defendants stole roughly \$2,269,653.43 from the Plans for their own personal gain. At the instruction of the Vantage Defendants, Matrix transferred Plan assets from participant accounts to the Vantage Defendants' business bank account held at Bank of America under the false pretense that the transfers were being made to Hilltop Securities. At the sole direction of the Vantage Defendants, and without informing the Plaintiffs, Matrix suppressed, on its account administration systems, and failed to provide the Plans' trust statements to Plaintiffs and the Plans, even though it had no authority from the Plaintiffs to follow such an instruction from the Vantage Defendants. Again at the sole direction of the Vantage Defendants, and without any authority from the Plaintiffs, Matrix completed each fraudulent transfer on a non-reportable basis for federal and state tax purposes, even though these types of retirement plan distributions are required to be reported to the Internal Revenue Service. As a result of these activities, the Vantage Defendants breached their fiduciary duties of prudence and loyalty, and engaging in prohibited transactions.

128. Matrix knowingly participated in, enabled, and failed to make reasonable efforts to remedy the Vantage Defendants' breaches of fiduciary duty despite knowledge of their breaches. For instance, Matrix knew that approximately \$2,174,903.43 was transferred from the MBA 401(k) Plan over the course of one year, resulting in a nearly 88% reduction in the MBA 401(k) Plan's value. The Vantage Defendants instructed that these wire transfers be styled as "distributions" to be made on a non-reportable basis, but Matrix knew that if these wire transfers were valid participant distributions, these distributions were required to be reported to the IRS. And Matrix knew or should have known that the Plans only allowed distributions to participants

in the event of termination, retirement, disability, or death, but that the participants continued to make contributions into the Plans.

129. Matrix, therefore, knew that the Vantage Defendants were failing to discharge their fiduciary obligations in accordance with the Plans' terms and ERISA.

130. To the extent that Matrix is not deemed to be fiduciary of the Plans, or is not deemed to be acting as a fiduciary for any and all applicable purposes, Matrix is liable for these breaches of fiduciary duty by the Vantage Defendants, since Matrix knowingly participated in the fiduciary breaches.

131. By virtue of these breaches of fiduciary duty, the Plans were damaged in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

TWELFTH CLAIM FOR RELIEF

(Against the Vantage Defendants Inclusive, for Writ of Attachment, Section 61.001 of the Texas Civil Practice and Remedies Code and the Texas Uniform Fraudulent Transfers Act ("UFTA"))

132. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

133. Plaintiffs seek a writ of attachment based on the extreme circumstances involving the Vantage Defendants' fraudulent conduct, and the indeterminate status of the solvency of Jeffrey A. Richie, Wendy K. Richie, and Vantage Benefits. A writ of attachment is required to prevent further loss to the Plans and ensure recovery of the participants' retirement benefits.

134. "Federal Rule of Civil Procedure 64, which is applicable here pursuant to Federal Rule of Bankruptcy Procedure 7064, [] provides that in a civil action 'every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of [a] potential judgment.'" *In re Atlas Fin. Mortg., Inc.*, No. 13-32683-BJH-7, 2014 WL 172283, at *1 (Bankr. N.D. Tex. Jan. 14, 2014) (citing FED. R. CIV. P.

64(a)). Plaintiffs seek a writ of attachment under Section 61.001 of the Texas Civil Practice and Remedies Code, and Sections 24.005 and 24.008(a)(2) of the Texas Business & Commercial Code.

135. Under Texas law, “it is possible for a plaintiff to obtain a writ of attachment against a defendant’s property to secure the plaintiff’s debt before a court issues a judgment.” *In re Atlas Fin. Mortg., Inc.*, 2014 WL 172283, at *1 (citing *E.E. Maxwell Co., Inc. v. Arti Decor, Ltd.*, 638 F. Supp. 749, 753 (N.D. Tex 1986)).

136. Under Section 61.001 of the Texas Civil Practice and Remedies Code, a writ of original attachment is available to a plaintiff in a suit if: “(1) the defendant is justly indebted to the plaintiff; (2) the attachment is not sought for the purpose of injuring or harassing the defendant; (3) the plaintiff will probably lose his debt unless the writ of attachment is issued; and (4) specific grounds for the writ exist under Section 61.002.” *Id.* at *1–2 (citing Tex. Civ. Prac. & Remedies Code § 61.001 (Vernon 1997)).

137. There are nine grounds under Section 61.002, at least one of which must be present before a prejudgment writ of attachment can be issued:

- (1) the defendant is not a resident of this state or is a foreign corporation or is acting as such;
- (2) the defendant is about to move from this state permanently and has refused to pay or secure the debt due the plaintiff;
- (3) the defendant is in hiding so that ordinary process of law cannot be served on him;
- (4) the defendant has hidden or is about to hide his property for the purpose of defrauding his creditors;
- (5) the defendant is about to remove his property from this state without leaving an amount sufficient to pay his debts;
- (6) the defendant is about to remove all or part of his property from the county in which the suit is brought with the intent to defraud his creditors;

- (7) the defendant has disposed of or is about to dispose of all or part of his property with the intent to defraud his creditors;
- (8) the defendant is about to convert all or part of his property into money for the purpose of placing it beyond the reach of his creditors; or
- (9) the defendant owes the plaintiff for property obtained by the defendant under false pretenses.

Id. (citing Tex. Civ. Prac. & Remedies Code § 61.001).

138. Under Texas law, “a plaintiff may obtain a writ of attachment by filing an affidavit (or offering other evidence) that satisfies each of the elements of Section 61.001 and establishes the amount that the plaintiff demands.” *Id.* (citing Tex. Civ. Prac. & Remedies Code § 61.022). “If granted, a writ of attachment ‘creates a lien from the date of levy on the real property attached, on the personal property held by the attaching officer, and on the proceeds of any attached personal property that may have been sold.’” *Id.* (citing Tex. Civ. Prac. & Remedies Code § 61.061).

139. Through a system of false pretenses and deceit, the Vantage Defendants stole millions of dollars in retirement assets from the Plans’ participants. The Vantage Defendants orchestrated the fraudulent transfer of funds from the Plans to a business account held by Vantage Benefits. Upon information and belief, Plaintiff alleges that this business account had a balance of \$0 at the time it was seized by the DOJ. The Vantage Defendants are most certainly justly indebted to the Plaintiffs and the Plans’ participants, and Plaintiffs do not seek this writ of attachment for the purpose of injuring or harassing the Vantage Defendants. Given the indeterminate status of the Vantage Defendants’ solvency, and any property under their possession or control, it is likely that Plaintiffs will lose this debt unless the writ of attachment is issued.

140. Plaintiffs understand that, on October 25, 2017, the FBI executed a search warrant at Vantage Benefits’ offices in Dallas, Texas. Terri Langford, *FBI raids Dallas financial office*

amid allegations of missing retirement funds, Dallas Morning News (October 31, 2017), <https://www.dallasnews.com/news/downtown-dallas/2017/10/31/fbi-raids-dallas-office-401k-manager-vantage-benefits>. Upon information and belief, Plaintiff alleges that the DOL and DOJ shut down Vantage Benefits and seized all of its accounts, including the Bank of America business account into which the fraudulent wire transfers were routed.

141. The Vantage Defendants stole millions of dollars from the Plans under false pretenses. Vantage Benefits is a foreign corporation existing under the laws of the State of California. Upon information and belief, Plaintiffs allege that Defendants Jeffrey A. Richie and Wendy K. Richie may be in hiding, and have hidden or are about to hide the millions of dollars of retirement assets that the Vantage Defendants fraudulently stole from the Plans. And upon information and belief, Plaintiffs allege that the Vantage Defendants are about to dispose of all or part of their property with the intent to defraud Plaintiffs, the Plans and the participants in the Plans.

142. In light of the extreme circumstances surrounding the Vantage Defendants' fraudulent activity, the uncertainty as to the whereabouts of Jeffrey A. Richie and Wendy K. Richie, and the location of the funds that the Vantage Defendants stole from the Plans, the immediate issuance of a writ of attachment is necessary to secure the debt the Vantage Defendants owe to the Plans.

143. Plaintiffs seek a temporary and immediate injunction for an attachment against any of the Plans' assets that the Vantage Defendants systematically and fraudulently transferred in violation of the Uniform Fraudulent Transfer Act ("UFTA"). Tex. Bus. & Com. Code §§ 24.005 and 24.008(a)(2).

144. The Plans are creditors under the UFTA's statutory definition: a "creditor" is any person who has a claim. Tex. Bus. & Com. Code § 24.002(4). A "claim" is any "right to

payment or property, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” Tex. Bus. & Com. Code § 24.002(3).

145. Plaintiffs on behalf of the Plans have a claim to all of the assets that the Vantage Defendants fraudulently stole from the Plans. Plaintiffs seek a writ of attachment because, upon information and belief, Plaintiffs allege that the Vantage Defendants have or intend to transfer assets that the Vantage Defendants stole from the Plans out of the Plaintiffs’ reach. A temporary injunction is necessary to “preserve the status quo of the litigation’s subject matter pending a trial on the merits.” *Loye v. Travelhost, Inc.*, 156 S.W.3d 615, 622 (Tex. App.—Dallas 2004) (where the Dallas Court of Appeals affirmed a temporary injunction based on the danger the defendant would not be able to satisfy a judgment).

146. For purposes of ordering a temporary injunction “the legal issues before the trial judge . . . are whether the applicant showed a probability of success and irreparable injury; the underlying merits of the controversy are not presented.” *Id.*

147. Upon information and belief, Plaintiffs allege that the Vantage Defendants have or will attempt to dispose of the assets that the Vantage Defendants stole from the Plans. Upon information and belief, Plaintiffs allege that, at the time it was seized by the DOJ, the Bank of America business account into which the fraudulently transferred Plan assets were routed had a balance of \$0. A temporary injunction establishing a writ of attachment to any remaining assets taken from the Plans, or any properly under the Vantage Defendants’ possession or control, is necessary to prevent further irreparable injury to the Plans.

148. Moreover, a Dallas County District Court has already granted an application for a temporary injunction in a case against Vantage Benefits and Jeffrey Richie, which involves nearly identical facts. *See* Dallas County District Court Case No. DC-17-15265, Docket No. 42.

In that case, the Court found that “the evidence demonstrates a probable right to recovery for unlawful transfers of assets of the [CPI] 401(k) Plan.” *Id.* The Court found that this order was “necessary to preserve the status quo and prevent further transfer of assets or funds” because “further transfers would comprise an irreparable injury.” *Id.* The same is true here.

THIRTEENTH CLAIM FOR RELIEF

(Against the Vantage Defendants for Common Law Fraud)

149. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

150. The elements of common law fraud include: “(1) a misstatement or omission; (2) of material fact; (3) made with the intent to defraud; (4) on which the plaintiff relied; and (5) which proximately caused the plaintiff’s injury.” *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997) (citing *Cyrak v. Lemon*, 919 F.2d 320 (5th Cir. 1990)). To plead fraud with particularity, Plaintiff must show the “time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby.” *Id.* (citing *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994); *Melder v. Morris*, 27 F.3d 1097, 1100 n. 5 (5th Cir. 1994)).

151. Between June 3, 2016 and June 7, 2017, the Vantage Defendants, and each of them, directed approximately thirty-five (35) fraudulent transfers from participant accounts in the Plans to a Vantage Benefits account held at Bank of America. Thirty-four (34) of these fraudulent transfers were made from the MBA 401(k) Plan, totaling approximately \$2,249,079.99. And one of these fraudulent transfers was made from the MBA Cash Balance Plan, totaling approximately \$94,750.00. In total, the Vantage Defendants stole approximately \$2,269,653.43 from the Plans between June 3, 2016 and June 7, 2017.

152. The Vantage Defendants improperly instructed Matrix to complete these fraudulent wire transfers using, at times, fake participant names and Social Security numbers.

These wire transfers were completed using bank routing and bank account numbers that corresponded to a Vantage Benefits business account held at Bank of America. Matrix completed these wire transfers even though it knew or should have known that the transfers were fraudulent because the wire transfers were being made to the Bank of America account in the name of Vantage Benefits and not to Hilltop Securities, the purported transferee in the instructions received by Matrix from the Vantage Defendants. In addition, many of the wire transfers were made from participant accounts in in the Plans in amounts that greatly exceeded the actual value of the accounts from which the transfers were made. And Matrix completed these wire transfers despite the frequency of the transfers over the course of roughly twelve months, and the fact that Matrix was at all times aware that the transfers nearly drained the entire balance of the Plans.

153. The Vantage Defendants disguised their theft by creating falsified account statements and participant website information about the balance of the participants' accounts, with the intent to defraud Plaintiffs and the Plans' participants. Plaintiffs and the Plans' participants relied on these misrepresentations to their great detriment because, while it appeared that their accounts contained the proper amount of funds, the Vantage Defendants directed disbursements of millions of dollars from the Plans to their own business account at Bank of America. Plaintiffs, the Plans, and consequently the Plans' participants, were injured by approximately \$2,269,653.43 as a result of the Vantage Defendants' fraudulent scheme.

154. Under Texas law “[f]raudulent misrepresentations . . . coupled with damages caused by the misrepresentation, will support an award for exemplary damages.” *Quest Med., Inc. v. Aprill*, 90 F.3d 1080, 1090 (5th Cir. 1996) (citing *Artripe v. Hughes*, 857 S.W.2d 82, 87 (Tex. App.—Corpus Christi 1993, writ denied); *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d

432, 436 (Tex. 1986); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983)). These “exemplary damages are recoverable under . . . common-law fraud causes of action.” *Id.*

155. Where exemplary damages are awarded, “a ratio of approximately 3 to 1 provided a good rule of thumb for reviewing the reasonable proportional relationship of exemplary damages to actual damages under Texas law.” *Id.* (citing *Maxey v. Freightliner Corp.*, 665 F.2d 1367 (5th Cir. 1982)).

156. Through a system of fraud and deceit, the Vantage Defendants stole millions of dollars from the Plans and the Plans’ participants. Due to the extreme depravity of the Vantage Defendants’ conduct, Plaintiffs seek damages in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon, and exemplary damages in the amount of \$6,808,960.29.

FOURTEENTH CLAIM FOR RELIEF

(Against Vantage Benefits Administrators, Inc. Inclusive, for Common Law Professional Negligence)

157. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

158. “Under Texas law, negligence consists of four essential elements: (1) a legal duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) an actual injury to the plaintiff; and (4) a showing that the breach was the proximate cause of the injury.” *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 314 (5th Cir. 2002) (citing *Gutierrez v. Excel Corp.*, 106 F.3d 683, 687 (5th Cir. 1997)).

159. To “establish liability for professional negligence, the plaintiff must show the existence of a duty, a breach of that duty, and damages arising from the breach.” *Id.* (citing *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1198 (5th Cir. 1995)). The “duty owed by a professional to his client derives from their contractual relationship and requires that the

professional use the skill and care in the performance of his duties commensurate with the requirements of his profession.” *In re Capco Energy, Inc.*, 669 F.3d 274, 279 (5th Cir. 2012) (internal quotation marks omitted). “In an action for professional negligence in Texas, the question whether a defendant owes a duty to the plaintiff is a question of law.” *Fed. Sav. & Loan Ins. Corp. v. Texas Real Estate Counselors, Inc.*, 955 F.2d 261, 265 (5th Cir. 1992) (where the Court noted, “[w]hile all individuals owe a duty to exercise reasonable care to avoid foreseeable injury to others, professionals, by virtue of their special skill and expertise, are held to a higher standard of reasonable care.”).

160. Between June 3, 2016 and June 7, 2017, Vantage Benefits caused the fraudulent transfer of roughly \$2,269,653.43 from the Plans to a Vantage Benefits business account held at Bank of America. Vantage Benefits caused this fraudulent activity by creating falsified account statements and website information about the balance of the participants’ accounts to hide the fact that millions of dollars in the Plans’ assets were being siphoned out of the Plans.

161. Plaintiffs and the Plans’ participants relied on these misrepresentations to their great detriment because, while it appeared that their accounts contained the proper amount of funds, Vantage Benefits directed disbursements of millions of dollars from the Plans to its own business account at Bank of America. By facilitating these fraudulent transfers and creating falsified account statements and website information, Vantage Benefits breached the high standard of professional care it owed to Plaintiffs and the Plans. Plaintiffs and the Plans were severely damaged as the direct proximate result of Vantage Benefits’ breaches.

162. By virtue of these breaches, Plaintiffs and the Plans were damaged in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

FIFTEENTH CLAIM FOR RELIEF

(Alternative Claim Against Matrix for Common Law Professional Negligence)

163. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

164. In the event that the Court finds that Matrix was not a functional fiduciary under ERISA, at all relevant times, Matrix had custody, control, and responsibility over the Plans' assets. In its performance of its functions as a custodian of the Plans' assets, Matrix owed a duty to Plaintiffs, the Plans, and the Plans' participants consistent with current industry standards applicable to custodians and service providers in the benefits administration industry. By taking the Plans' assets under its control and possession, Matrix created a custodial and trust arrangement with Plaintiff, the Plans, and the Plans' participants. And by way of this relationship, Matrix owed Plaintiffs and the Plans a duty to perform its services for the Plans with the skill and care commensurate with the requirements of its profession.

165. Between June 3, 2016 and June 7, 2017, Vantage Benefits caused the fraudulent transfer of roughly \$2,269,653.43 from the Plans to a Vantage Benefits business account held at Bank of America. Matrix completed these fraudulent transfers without authority from Plaintiffs, and even though it had actual or constructive knowledge that Vantage Benefits was misappropriating the funds.

166. By virtue of these breaches, Plaintiffs and the Plans were damaged in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

SIXTEENTH CLAIM FOR RELIEF

(Against Vantage Benefits Administrators, Inc. for Common Law Negligent Misrepresentation)

167. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

168. Texas has “adopted the common law cause of action for negligent misrepresentation that results in pecuniary loss as set out in the RESTATEMENT (Second) of TORTS § 552 (1977).” *Engle v. Dinehart*, 213 F.3d 639 (5th Cir. 2000). Section 552(1) of the Restatement provides:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance on the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

169. And the liability stated in Section 522(1) is limited to loss suffered:

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Id. at §552(2). The Texas Supreme Court intended to “adopt section 552 as a whole,” and the Fifth Circuit “has interpreted the decisions accordingly.” *Id.* (citing *Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.*, 81 F.3d 606, 612-14 (5th Cir. 1996)).

170. In the course of its business and profession as third-party administrator and recordkeeper for the Plans, Vantage Benefits supplied false information to Plaintiffs and the Plans’ participants with respect to the value of the Plans’ assets and the participants’ accounts.

171. Plaintiffs and the Plans’ participants were the intended beneficiaries of the information that Vantage Benefits supplied. Plaintiffs and the Plans’ participants justifiably relied on these misrepresentations to their great detriment because, while it appeared that their accounts contained the proper amount of funds, Vantage Benefits directed disbursements of millions of dollars from the Plans to its own business account at Bank of America. The Plans were severely damaged as the direct proximate result of Plaintiffs’ and the participants’ justifiable reliance on the false representations made by Vantage Benefits.

172. Vantage Benefits failed to exercise reasonable care and competence in obtaining and communicating accurate information about the actual value of the Plans' assets to Plaintiffs and the Plans' participants.

173. By virtue of Vantage Benefits' failure to exercise reasonable care and competence, Plaintiffs and the Plans were damaged in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

SEVENTEENTH CLAIM FOR RELIEF

(Against the Vantage Defendants for Common Law Negligence)

174. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

175. Under Texas law, “[t]o sustain a negligence action, the plaintiff must produce evidence of a legal duty owed by the defendant to the plaintiff, a breach of that duty, and damages proximately caused by that breach.” *Shakeri v. ADT Sec. Servs., Inc.*, 816 F.3d 283, 292 (5th Cir. 2016) (citing *Lee Lewis Const., Inc. v. Harrison*, 70 S.W. 3d 778, 782 (Tex. 2001)). A breaching party’s “conduct may often ostensibly implicate both contractual obligations and various tort duties.” *Id.* (citing *Mem’l Hermann Healthcare Sys. Inc. v. Eurocopter Deutschland, GMBH*, 524 F.3d 676, 678 (5th Cir. 2008)).

176. A party may state a negligence claim sounding in tort “when the duty allegedly breached is independent of the contractual undertaking and the harm suffered is not merely the economic loss of a contractual benefit.” *Id.* (internal quotation marks omitted). In this circumstance, the “nature of the injury most often determines which duty or duties are breached.” *Id.* (citing *Jim Walter Homes, Inc. v. Reed*, 711 S.W. 2d 617, 618 (Tex. 1986). And “[i]f the injury would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff’s claim may also sound in tort.” *Id.* (internal quotation marks omitted).

177. The Vantage Defendants had authority and control over the disposition of the

Plans' assets. By virtue of this authority and control, the Vantage Defendants owed Plaintiffs and the Plans a duty of care by virtue of their responsibility for the Plans' assets.

178. Between June 3, 2016 and June 7, 2017, the Vantage Defendants facilitated and/or failed to prevent the fraudulent transfer of roughly \$2,269,653.43 from the Plans to a Vantage Benefits business account held at Bank of America. In so doing, the Vantage Defendants breached the duty of care they owed to Plaintiffs and the Plans.

179. As a direct result of the Vantage Defendants breach, Plaintiffs and the Plans were severely damaged. By virtue of these breaches, Plaintiffs and the Plans were damaged in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

EIGHTEENTH CLAIM FOR RELIEF

(Alternative Claim Against Matrix for Common Law Negligence)

180. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

181. In the event that the Court finds that Matrix was not a functional fiduciary under ERISA, at all relevant times, Matrix had custody of the Plans' assets, and it completed each of the fraudulent wire transfers to the Vantage Benefits business account.

182. The Plans' assets were held in accounts at Matrix that were established in the name of the Plans, and the Plans were the depositors of the funds. Matrix, however, completed each of the fraudulent wire transfers based on the instruction and direction of the Vantage Defendants. The Vantage Defendants were neither the account holder nor the depositor of the Plans' assets and Matrix had no authority of any kind to complete the wire transfers at the instruction of the Vantage Defendants. Matrix disposed of the Plans' assets even though it had no authority to do so.

183. Between June 3, 2016 and June 7, 2017, Vantage Benefits caused the fraudulent

transfer of roughly \$2,269,653.43 from the Plans to a Vantage Benefits business bank account held at Bank of America. Matrix completed these fraudulent transfers without authority or direction from Plaintiffs, and even though it had actual or constructive knowledge that Vantage Benefits was misappropriating the funds.

184. By virtue of completing the fraudulent wire transfers, Matrix breached its duties held to Plaintiffs, the Plans, and the Plans' participants. As a direct result of Matrix's breach, Plaintiffs and the Plans were severely damaged in an amount to be shown according to proof, but in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon.

NINETEENTH CLAIM FOR RELIEF

(Against the Vantage Defendants for Violation of the Texas Theft Liability Act)

185. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

186. Through the fraudulent scheme that systematically transferred millions of dollars in retirement benefits from the Plans, the Vantage Defendants unlawfully appropriated, secured and stole monies from Plaintiffs in violation of Texas Penal Code § 31.01 and § 31.03 with the intent to deprive Plaintiffs of such property. Plaintiffs have sustained damages as a result of such theft and sues herein for recovery of no less than \$2,269,653.43 plus pre-judgment interest and attorneys' fees pursuant to the Texas Theft Liability Act, Texas Civil Practice and Remedies Code § 134.001 *et seq.*

JURY DEMAND

187. Plaintiffs request that this matter be tried before a jury with respect to the Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth and Nineteenth Claims for Relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in its favor as follows:

1. On Plaintiffs' First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Claims for Relief, for losses to the Plans in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon;
2. On Plaintiffs' Ninth Claim for Relief, for an injunction: (i) enjoining the Vantage Defendants from further transferring, disposing of, or otherwise dealing in any of the Plans' assets, (ii) ordering the Vantage Defendants, and each of them, to return any assets transferred from the Plans back to the Plans; and (iii) permanently barring the Vantage Defendants, and each of them, from acting as a fiduciary for or providing any services for any employee benefit plan governed by ERISA;
3. On Plaintiffs' First through Eleventh Claims for Relief, for an award of Plaintiffs' reasonable attorney's fees and costs pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g);
4. On Plaintiffs' Twelfth Claim for Relief, a temporary injunction ordering a writ of attachment against any property under the Vantage Defendants' custody or control, and any of the Plans' assets that the Vantage Defendants received through their fraudulent scheme, to secure debt that the Vantage Defendants owe to Plaintiffs in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon;
5. On Plaintiffs' Thirteenth Claim for Relief, for damages in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon, and exemplary damages in

the amount of \$6,808,960.29;

6. On Plaintiffs' Fourteenth through Eighteenth Claims for Relief, for damages in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon;
7. On Plaintiffs' Nineteenth Claim for Relief, for damages in the amount of at least \$2,269,653.43, plus lost earnings or interest thereon, attorneys' fees and exemplary damages;
8. On all of Plaintiffs' Claims for Relief:
 - a. Avoidance of all fraudulent transfers from the Plans;
 - b. For costs of suit herein; and
 - c. For such other and further relief as the Court may deem just and proper.

DATED: March 23, 2018

Respectfully submitted,

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