

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

RAYMOND J. MANDLI and
MANDLI COMMUNICATIONS, INC.,

Plaintiffs,

v.

Case No: 21-cv-18

AMERICAN TRUST COMPANY,

Defendant.

COMPLAINT

Plaintiffs Raymond J. Mandli and Mandli Communications, Inc., by their undersigned attorneys, for their Complaint against American Trust Company, allege as follows:

PARTIES

1. Plaintiff Raymond J. Mandli (“Mr. Mandli”) is an adult domiciled in the state of Wisconsin residing in McFarland, Wisconsin.

2. Plaintiff Mandli Communications, Inc. (“Mandli Communications”) is a Wisconsin corporation with its principal place of business at 2655 Research Park Drive, Fitchburg, Wisconsin.

3. Defendant American Trust Company (“American Trust”) is a Tennessee corporation organized as a trust company with its principal place of business at 51 Germantown Court, Suite 203, Cordova, Tennessee, and was formerly known as First Mercantile Trust Company.

JURISDICTION AND VENUE

4. The Court has subject matter jurisdiction over this action by virtue of 28 U.S.C. § 1331 in that Plaintiffs' claims arise under the laws of the United States and under 29 U.S.C. § 1132(e)(1), which provides the district courts of the United States with exclusive jurisdiction over claims brought under 29 U.S.C. § 1132(a)(3)(B).

5. Venue in the Western District of Wisconsin is proper by virtue of 29 U.S.C. § 1132(e)(2).

NATURE OF CASE

6. American Trust is in the business of providing retirement plan services, including service as a trustee and providing a full array of other fiduciary services with respect to employer-sponsored retirement plans.

7. American Trust, like its predecessor American Trust & Savings Bank, has marketed its services and promoted the American Trust brand by touting its willingness to serve as a fiduciary in all aspects of the services it provides and to assume the responsibility and the risk of liability for the fiduciary obligations of employers with respect to the retirement plans they sponsor and maintain for their employees.

8. Mandli Communications sponsors and maintains, for the benefit of its eligible employees, the Mandli Communications, Inc. 401(k) Plan and Trust ("Plan").

9. The services provided by American Trust to Mandli Communications include serving as trustee of the Plan assets and serving as fiduciary for the purpose of reviewing and approving all distributions from the Plan.

10. On February 14, 2020, American Trust made an unauthorized distribution in the total amount of \$124,105 from Mr. Mandli's Plan account in response to a request for a distribution from an unknown third party.

11. Despite marketing and branding itself as a fiduciary willing to assume responsibility and the risk of liability with respect to the employer sponsored retirement plans for which it provides fiduciary service, American Trust has refused to take responsibly for its unauthorized distribution from Mr. Mandli's Plan account by reimbursing the account for the amount of the unauthorized distribution.

12. Further, American Trust failed to timely inform Mr. Mandli and Mandli Communications of its unauthorized distribution from Mr. Mandli's Plan account, has concealed facts, and has "declined" to provide Mr. Mandli and Mandli Communications with "copies of *any* of the requested documentation" related to the details of American Trust's unauthorized distribution from Mr. Mandli's Plan account.

13. Accordingly, in this action, Mr. Mandli asserts federal law breach of fiduciary duty claims against American Trust.

FACTUAL BACKGROUND

A. Mandli Communications.

14. Mr. Mandli is the President and founder of Mandli Communications, which was incorporated in 1984.

15. Mandli Communications is an industry leader in providing specialized highway data collection and the integration of 3D pavement technology, mobile LiDAR (a mapping system using lasers, cameras and position/navigation technology), and geospatial

data collection equipment to various departments of transportation throughout the United States.

16. Mandli Communications currently has 59 employees and its subsidiaries Roadview, Inc. and Digilog, Inc.—which operate out of same facility as Mandli Communications—have 44 and 9 employees, respectively. Thus, Mandli Communications and its subsidiaries employ 112 people in Fitchburg, Wisconsin.

17. Mandli Communications provides its employees with a full range of employee benefits including paid holidays, personal days, vacation time, company-paid health and dental insurance, long-term disability insurance, and the Plan, a defined-contribution section 401(k) retirement plan with company matching of employee contributions.

B. Mandli Communications, Inc. 401(k) Profit Sharing Plan and Trust.

18. On or about January 1, 1995, Mandli Communications established the Plan.

19. The Plan is a defined-contribution “employee pension benefit plan” and a “pension plan” as defined by 29 U.S.C. § 1002(2)(A) and an “employee benefit plan” as defined by 29 U.S.C. § 1002(3).

20. Therefore, the Plan is governed by the Employee Retirement Income Security Act of 1974 (“ERISA”), Pub. L. 93-406, Sept. 2, 1974, 88 Stat. 829 (29 U.S.C. § 1001 et seq.).

21. Mandli Communications is the “administrator” and “plan sponsor,” as defined by 29 U.S.C. § 1002(16)(A) and (B), respectively, of the Plan.

C. American Trust's Role As A Fiduciary.

1. American Trust & Savings Bank's Role As A Fiduciary.

22. From approximately 2009 through August 25, 2014, Mandli Communications contracted with Paychex, Inc, in West Henrietta, New York, to provide certain retirement plan services with respect to the Plan, and with Mid-Atlantic Capital Group, Inc, in Pittsburgh, Pennsylvania, to serve as a "directed trustee" of the Plan.

23. In the summer of 2014, Mandli Communications decided to engage American Trust & Savings Bank, an Iowa-based bank with its principal place of business at 855 Main Street, Dubuque, Iowa to serve as a "discretionary trustee" of the Plan and to provide certain other retirement plan services with respect to the Plan beginning August 26, 2014.

24. Mandli Communications' primary motivation in engaging American Trust & Savings Bank as a trustee of the Plan and to provide other retirement plan services was that American Trust & Savings Bank touted itself as being willing to serve as a "fiduciary" and to assume the responsibility and the risk of liability for many of the fiduciary obligations of Mandli Communications as plan sponsor and administrator of the Plan.

25. Filed herewith as Exhibit A is document titled "Guide to Services and Compensation," dated July 10, 2014, that describes the services American Trust & Savings Bank had agreed to provide to Mandli Communications beginning August 26, 2014, and stating, among other things, as follows:

The following is a guide to important information that you should consider in connection with the services to be provided by American Trust & Savings Bank...and the costs associated with those services. This guide represents the fees and services as of August 26, 2014.

26. Among other things, the Guide to Services and Compensation, dated July 10, 2014, filed herewith as Exhibit A, shows that the services that American Trust & Savings Bank agreed to provide to Mandli Communications pursuant to a Service Agreement/Fee Disclosure document included acting as a “Discretionary Trustee,” “ERISA 3(38) Investment Manager,” and “Recording and Compliance Services.”

27. The Guide to Services and Compensation, dated July 10, 2014, filed herewith as Exhibit A, also provided that American Trust & Savings Bank would be compensated “for providing administrative oversight of plan distributions” pursuant to a “Distribution Oversight Addendum.”

28. Filed herewith as Exhibit B is a document titled “Acceptance of Office of Trustee” that was executed by American Trust & Saving Bank on August 25, 2014, stating:

We, the undersigned, accept the appointment to the office of Trustee of the Mandi Communications, Inc. 401(k) Profit Sharing Plan and Trust (“Plan”) and agree to all of the obligations, responsibilities and duties imposed upon the Trustee under the Plan and Trust Agreement, effective August 26, 2014.

29. Filed herewith as Exhibit C is a document titled “Distribution Oversight Addendum” that was executed by Mr. Mandli as President of Mandli Communications and by American Trust & Savings Bank, on August 20, 2014, and August 25, 2014, respectively.

30. In the Distribution Oversight Addendum, a copy of which is filed herewith as Exhibit C, Mr. Mandli, as President of Mandli Communications, stated:

I hereby designate American Trust & Savings Bank to serve in the capacity of Plan Administrator for the specific purpose of reviewing and approving all plan distributions as described in this addendum.

31. The Distribution Oversight Addendum, filed herewith as Exhibit C, describes American Trust & Savings Bank's duties with respect to severance from employment, death, disability, and in-service withdrawal distributions as follows:

American Trust & Savings Bank

- Provide participant with appropriate distribution paperwork and tax information.
- Review the participant's distribution request and verify the participant is eligible for the specific type of distribution requested.
- Approve or deny distributor request (if denied, a letter will be sent to the participant explaining any reason for denial.)

32. The Distribution Oversight Addendum, filed herewith as Exhibit C, also provides as follows:

Distribution Oversight:

American Trust as Trustee will be responsible for reviewing all requests for distributions, which may include (based on plan provisions):

- Hardship Withdrawal
- In-service withdrawal
- Loan Withdrawal
- Death
- Disability
- Severance From Employment

American Trust will approve or deny a request based on provisions of the plan document, IRS/DOL rules and established procedures. *American Trust & Savings Bank will sign off on distribution forms as the Plan Administrator and will be considered a plan fiduciary in this regard.*

(emphasis added).

33. Filed herewith as Exhibit D is document titled "Guide to Services and Compensation," dated September 13, 2018, that American Trust & Savings Bank provided to Mandli Communications, stating, among other things, as follows:

The following is a guide to important information that you should consider in connection with the services to be provided by American Trust & Savings Bank to the Mandli Communications, Inc. 401(k) Profit Sharing Plan and Trust. This guide is intended to assist you in identifying the services provided to you by American Trust & Savings Bank, as well as the costs associated with those services. This guide represents the fees and services as of October 1, 2018.

34. The Guide to Services and Compensation, dated September 13, 2018, filed herewith as Exhibit D, shows that American Trust & Savings Bank would be compensated “for providing administrative oversight of plan distributions” pursuant to a “Distribution Oversight Addendum.”

35. The Distribution Oversight Addendum filed herewith as Exhibit C has been in effect at all times from August 26, 2014, through the date of the filing of this Complaint.

36. When Mandli Communications engaged American Trust & Savings Bank to serve as trustee of the Plan and to provide other retirement plan services with respect to the Plan, Mandli Communications amended and restated the terms of the Plan by adopting by reference the provisions of the American Trust & Savings Bank Defined Contribution Volume Submitter Plan & Trust (the “Volume Submitter Plan and Trust provisions”).

37. In the Volume Submitter Plan and Trust provisions, as amended from time to time, which reflect the terms of the Plan, American Trust & Savings Bank has acknowledged that, as Trustee of the Plan, it is a fiduciary of the Plan and that, as such, it is required:

to act: (a) solely in the interest of Participants and Beneficiaries for the exclusive purposes of providing benefits under the Plan and defraying the reasonable expenses of Plan administration; (b) with the care, skill, prudence and diligence under the circumstances then prevailing as would a prudent person acting in a like capacity and familiar with such matters; (c) by diversifying Trust investments so as to minimize the risk of large losses unless not prudent under the circumstances to do so; and (d) in accordance with the Plan to the extent that the Plan is consistent with ERISA.

38. Prior to June 2017, American Trust & Savings Bank began doing business as “American Trust Retirement” with respect to the services it provided to the Plan.

39. Filed herewith as Exhibit E is a copy of an email dated July 18, 2017, from Mandli Communications' Relationship Manager at American Trust & Savings Bank with an attached June 2017 newsletter from American Trust Retirement's Compliance Department providing Mandli Communications with information about a new Department of Labor rule expanding the scope of who is considered a fiduciary as a result of providing investment advice.

40. American Trust's email dated July 18, 2017, and newsletter from American Trust Retirement's Compliance Department, filed herewith as Exhibit E, touted American Trust & Saving Bank's longstanding role as a fiduciary as follows:

American Trust has always served in the capacity of a Fiduciary. As such, we have designed our policies and procedures to follow the Fiduciary standard of care to act in a prudent manner and in the best interest of our clients.

American Trust is and has been a fiduciary to your plan. American Trust serves as a §3(21) fiduciary in our role as discretionary trustee and as a §3(38) fiduciary as an investment manager. As such, we have always been subject to the fiduciary standard of care that is now being imposed on an investment advice fiduciary. Our service agreement/fee disclosure statement acknowledges our status as a fiduciary, identifies the services that we provide to your plan and the fees associated with those services.

41. Filed herewith as Exhibit F is a copy of an August 6, 2018, letter from Kurt D. Wedewer, American Trust & Savings Bank's Senior Executive Vice President, to Mandli Communications, and an attached May 15, 2018, memorandum written by The Wagner Law Group titled "Opinion of Counsel Summary – Discretionary Trustee Services" further touting American Trust & Savings Bank's role as a fiduciary.

42. Specifically, in American Trust & Savings Bank's Senior Executive Vice President's August 6, 2018, letter to Mandli Communications, filed herewith as a part of Exhibit F, American Trust & Savings Bank further touted its role as a fiduciary as follows:

Now more than ever, retirement plan sponsors like you depend on our expertise to shoulder full liability for investment options for their plans. As a trust company, we are able to offer services that most plan providers cannot. We greatly alleviate plan sponsors of legal responsibilities under ERISA by providing the full array of discretionary trustee, §3(38) and §3(16) fiduciary services.

Recently, the Wagner Law Group, one of the largest and most prestigious ERISA law practices in the U.S., issued a formal Opinion of Counsel regarding the discretionary trustee services offered by American Trust Retirement.

We are very pleased to share these Opinion of Counsel Summaries. American Trust Retirement excels at heavy lifting when it comes to making prudent decisions for your company, your plan, and your participants.

Thank you for your trust and your business.

43. The Wagner Law Group’s May 15, 2018, Opinion of Counsel Summary - Discretionary Trustee Services, filed herewith as a part of Exhibit F, further touted American Trust Retirement’s rule as a fiduciary as follows:

Every plan sponsor of a retirement plan is a Fiduciary under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). Not only do companies face litigation risk, but their employees who act as ERISA Fiduciaries can be held personally liable for breaches of fiduciary duty. It is highly critical that plan sponsors who seek to delegate responsibility and risk to service providers distinguish the different roles of a discretionary trustee, a 3(38) Fiduciary, and a directed trustee.

American Trust offers discretionary trustee services, 3(38) and 3(16) Fiduciary services, recordkeeping and compliance services in a turnkey, bundled retirement solution (“ATAdvantage”). As a bank, American Trust has trust powers and accepts in writing the role of 3(38) Fiduciary and discretionary trustee to the plan. While these two roles share some common responsibilities – such as the selection, monitoring and replacement of the plan’s investment lineup – the fiduciary obligations of the discretionary trustee are much broader and encompass all aspects relating to plan assets: appointment of the investment committee, responsibility for 404(c) compliance, creation and adherence to the plan’s investment policy statement, monitoring of contribution submissions, 408(b)(2) fee disclosures, QDIA notice submissions, and more. The key distinction between a discretionary trustee and a 3(38) Fiduciary is the reduced role of the 3(38) Fiduciary. A plan sponsor who hires a qualified discretionary trustee which includes 3(38) Fiduciary services, such as American Trust, shifts substantial liability and litigation risk for safeguarding and maintaining plan assets to the discretionary trustee.

By contrast, a directed trustee has little or no discretionary authority with respect to the plan. In order to operate, it must rely on direction from the plan sponsor or an authorized plan fiduciary. Consequently, the value of a directed trustee as a fiduciary is limited. In fact, directed trustees often reject general ERISA fiduciary status. Today, the

vast majority of institutional plan trustees are directed, rather than discretionary, trustees. The use of a discretionary trustee that includes 3(38) Fiduciary services can provide more comprehensive protection over plan assets than the use of a directed trustee and a 3(21) investment advisor or 3(38) Fiduciary and, thus, a very high degree of fiduciary protection under ERISA.

We have completed a comprehensive review of the materials provided to us regarding ATAdvantage and its complementary features and services, including ATBlueprint and ATArchitect. It is our opinion that American Trust Retirement is structured to provide the full array of fiduciary services available to a plan sponsor under ERISA.

2. *American Trust (F/K/A First Mercantile Trust Company) As A Successor To American Trust & Savings Bank.*

44. In early February 2019, Mandli Communications received a letter from Kurt D. Wedewer, American Trust & Saving Bank's Senior Executive Vice President, a copy of which is filed herewith as Exhibit G, announcing First Mercantile Trust Company's acquisition of American Trust & Savings Bank's American Trust Retirement business as follows:

We are thrilled to announce that on February 8, 2019, we entered into a purchase agreement with First Mercantile Trust Company ("First Mercantile"), pursuant to which First Mercantile will acquire our retirement services business, which you may know as American Trust Retirement (the "Proposed Transaction").

The Proposed Transaction is, of course, subject to customary closing conditions and is expected to be completed in the second quarter of 2019. The consummation of the Proposed Transaction will result in the assignment of the Plan's service agreement with us, including, to the extent applicable, any administrative and recordkeeping service agreement, trust agreement, or collective investment trust declaration of trust and participation agreement (collectively, the "Service Agreement") to First Mercantile, who will assume all of our rights and responsibilities under the Service Agreement.

Moving forward, while our retirement business will be owned by First Mercantile, it is planned that the American Trust Retirement staff and operations will continue to be located in Dubuque, Iowa.

For your convenience, we have provided additional information as it relates to this assignment below. You need not do anything further at this time unless you would like to transfer your plan services to another provider. If you do not take any action, then, as indicated in the attached form, you will be deemed to have consented to such assignment and appointed First Mercantile to perform the services currently provided by us.

45. An attachment to American Trust & Savings Bank's letter of early February 2019 titled "Appointments and Disclaimers," a copy of which is filed herewith as a part of Exhibit G, provided as follows:

Appointments and Disclaimers

On account of the Proposed Transaction and the transfer of the Service Agreement, you will be required to appoint First Mercantile to perform the services currently provided by American Trust with respect to the Plan, including, to the extent applicable, services provided in certain fiduciary capacities. Unless you otherwise terminate the Service Agreement, the below appointments will be effective as of the closing of the Proposed Transaction.

Effective as of the closing of the Proposed Transaction, to the extent as described under, and as consistent with the terms of your current Service Agreement with American Trust, on behalf of the duly authorized responsible fiduciary of the Plan, you hereby (as applicable):

- Appoint First Mercantile as "successor trustee" to the Plan;
- Appoint First Mercantile as "successor trustee" with respect to any collective investment trusts in which the Plan is invested, for which American Trust currently acts as trustee;
- Appoint First Mercantile as an "investment manager" (within the meaning of Section 3(38) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA")) to the Plan;
- Appoint First Mercantile as "administrator" (within the meaning of Section 3(16) of ERISA) to the Plan, including (as applicable) for the specific purpose of signing and filing the Plan's annual Form 5500; and/or
- Engage First Mercantile to provide the recordkeeping and administrative services to the Plan identified in the Service Agreement.

Provided that you do not otherwise terminate the Service Agreement, effective as of the closing of the Proposed Transaction, to the extent as described under, and as consistent with the terms of, the Service Agreement, First Mercantile hereby (as applicable):

- Acknowledges its status as a "fiduciary" to the Plan (within the meaning of Section 3(21) of ERISA) to the Plan;
- Acknowledges and accepts its appointment to the office of trustee of the Plan and agrees to all the obligations, responsibilities and duties imposed upon the trustee under the Plan's trust agreement;
- Acknowledges and accepts its appointment to the office of trustee of any collective

investment trusts in which the Plan is invested, and agrees to all the obligations, responsibilities, and duties imposed upon the trustee under such trust's declaration of trust and participation agreement;

- Acknowledges and accepts its appointment as an "investment manager" (within the meaning of Section 3(38) of ERISA) of the Plan and agrees to all the obligations, responsibilities and duties imposed upon it as "investment manager" to the Plan;
- Acknowledges and accepts its appointment as "administrator" (within the meaning of Section 3(16) of ERISA) to the Plan, including (as applicable) for the specific purpose of signing and filing the Plan's Annual Form 5500; and/or
- Acknowledges and accepts its engagement to provide the recordkeeping and administrative services identified in the Service Agreement.

If you wish for your Service Agreement to be transferred to First Mercantile, you are NOT required to take any further action and this non-action will serve as your consent to transfer all of American Trust's rights and responsibilities under the Service Agreement to First Mercantile and your appointment of First Mercantile in fiduciary capacities to the Plan as described in this notice.

If you *do not* wish for your Service Agreement and the performance of the services set forth in your Service Agreement to be transferred to First Mercantile, you must complete the below termination of services form and return it to the address set forth below by April 11, 2019.

To terminate services please complete the following:

By signing below, you are indicating that you do not want your Service Agreement to be transferred to First Mercantile. You hereby acknowledge and agree that unless you indicate an earlier date, your Service Agreement will be terminated in its entirety as of the closing of the Proposed Transaction and you will assume sole responsibility for providing all services to the Plan.

46. Filed herewith as Exhibit H is a copy of an April 29, 2019, email to Mandli Communications from Kurt Wedewer, Regional President of American Trust Retirement, a division of First Mercantile Trust, titled "Acquisition Announcement" stating as follows:

In early February, we communicated an exciting announcement about American Trust Retirement being acquired by First Mercantile Trust Company, a subsidiary of EdgeCo Holdings, Inc. As a follow up to that early communication, we are pleased to announce that the transaction recently closed and we are officially announcing the acquisition publically [sic] later today. Consistent with our commitment to all of our partners, we wanted you to hear this first from us.

Our team at American Trust Retirement is excited about the investment into our business, people and technology. This growth is consistent with our mission of creating better

retirement outcomes for American workers. Over the next couple of months, you will see more about our enhancement to the brand of American Trust Retirement and ultimately how that will translate into additional services and capabilities to enhance our relationship.

47. After April 29, 2019, until approximately July 2, 2020, American Trust Retirement, as a division of First Mercantile Trust Company, operating out of the same facilities at 855 Main Street, 4th Floor, Dubuque, Iowa, as did American Trust & Savings Bank, and with the same employees as did American Trust & Savings Bank, continued to serve as Trustee of the Plan and continued to provide other retirement plan services with respect to the Plan.

48. On or about approximately July 2020, First Mercantile Trust Company changed its name to American Trust Company.

49. After July 2, 2020, American Trust Company, formerly known as First Mercantile Trust Company, and referred to herein as “American Trust,” operating out of the same facilities at 855 Main Street, 4th Floor, Dubuque, Iowa, as did American Trust & Savings Bank, and with the same employees as did American Trust & Savings Bank, continued to serve as Trustee of the Plan and continued to provide other retirement plan services with respect to the Plan.

50. Accordingly, American Trust is the successor of American Trust & Savings Bank and has the same obligations to the Plan, to participants of the Plan, and to Mandli Communications as the plan sponsor and plan administrator as did American Trust & Savings Bank prior to April 29, 2019.

51. Among other things, since April 29, 2019, American Trust has been providing administrative oversight of plan distributions pursuant to the Distribution Oversight Addendum, a copy of which is filed herewith as Exhibit C.

52. American Trust's duties and responsibilities with respect to providing administrative oversight of plan distributions are as set forth in the Distribution Oversight Addendum, a copy of which is filed herewith as Exhibit C, which further provides as follows:

American Trust will approve or deny a request based on provisions of the plan document, IRS/DOL rules and established procedures. American Trust & Savings Bank will sign off on distribution forms as the Plan Administrator and will be considered a plan fiduciary in this regard.

D. Mr. Mandli's Role As A Plan Participant.

53. In addition to being President of Mandli Communications, Mr. Mandli is a "participant" of the Plan as defined by 29 U.S.C. § 1002(7).

E. American Trust's Unauthorized Distribution From Mr. Mandli's Plan Account.

54. On February 14, 2020, American Trust approved an unauthorized request from an unknown third party for an in-service distribution, and made an unauthorized distribution to an unknown third party who had requested a distribution in the amount of \$124,000 from Mr. Mandli's Plan account.

55. Because American Trust has concealed facts and "decline[d] to provide [Mr. Mandli and Mandli Communications] with copies of any of the requested documentation," Mr. Mandli and Mandli Communications are not able to allege all of the details of

American Trust's unauthorized distribution from Mr. Mandli's Plan account, but the following facts are known:

(a) upon information and belief, on February 11, 2020, the unknown third party called American Trust and requested distribution paperwork from Mr. Mandli's Plan account;

(b) American Trust forwarded distribution paperwork to the unknown third party;

(c) upon information and belief, American Trust forwarded the distribution paperwork requested by the unknown third party to an email address that was not in American Trust's records as being Mr. Mandli's email address or by mail or overnight delivery to a physical address that was not in American Trust's records as being Mr. Mandli's address;

(d) on February 12, 2020, American Trust received a completed Mandli Communications, Inc. 401(k) PS Plan and Trust In-Service Withdrawal Election form ("In-Service Withdrawal Election form"), a copy of which is filed herewith as Exhibit I (with certain information redacted for filing with the Court), submitted by the unknown third party requesting a distribution of \$124,000 from Mr. Mandli's Plan account;

(e) the In-Service Withdrawal Election form submitted by the unknown third party included a "Daytime Phone Number" that was not any phone number that was ever Mr. Mandli's or Mandli Communications' phone number and that was

not any phone number in American Trust's records as being Mr. Mandli's or Mandli Communications' phone number;

(f) the In-Service Withdrawal Election form submitted by the unknown third party requesting a distribution of \$124,000 from Mr. Mandli's Plan account purportedly contained Mr. Mandli's signature;

(g) the purported signature of Mr. Mandli on the In-Service Withdrawal Election form submitted by the unknown third party requesting a distribution of \$124,000 from Mr. Mandli's Plan account appeared as follows:

6. My Approval (signature required below):

Representation. I Understand:

- * My election is irrevocable.
- * The Trustee of the Plan will hold the portion of my Account Balance, which I am not withdrawing until I otherwise would receive a distribution of my Account Balance under the Plan, generally upon my termination of employment.
- * I should consult my own tax adviser with respect to the proper method of reporting any distributions I receive from the Plan.

Waiver of minimum notice period. I consent to an immediate distribution of the elected portion of my Vested Account Balance. I affirmatively waive my unexpired portion of the minimum 30-day notice period during which I may consent to a distribution from the Plan.

Fee Disclosure. The Plan Administrator will charge your account \$75.00 to process your distribution (refer to the plan's annual fee disclosure). If you elected a wire transfer, check or overnight delivery of your distribution (above), the fee for this service will be in addition to the processing fee.

Signature: Raymond J Mandli Date: 02/12/2020

(h) American Trust had multiple exemplars of Mr. Mandli's signature in its records including those shown on Exhibits B and C filed herewith;

(i) the purported signature of Mr. Mandli on the In-Service Withdrawal Election form submitted by the unknown third party requesting a distribution of \$124,000 from Mr. Mandli's Plan account was not similar to any of the exemplars of Mr. Mandli's signature in American Trust's records;

(j) upon information and belief, an American Trust employee who reviewed the purported signature of Mr. Mandli on the In-Service Withdrawal Election form submitted by the unknown third party recognized that the purported

signature was an not an actual handwritten signature of Mr. Mandli but rather was an “electronic” signature;

(k) in fact, the purported signature of Mr. Mandli on the In-Service Withdrawal Election form submitted by the unknown third-party requesting a distribution of \$124,000 from Mr. Mandli’s Plan account is identical to the default electronic signature that can be added to a .pdf document using the “Add Signature” feature of Adobe Acrobat or the DocuSign program, which appears as follows:



(l) upon information and belief, American Trust had no protocols in place for verifying that an electronic signature added to an In-Service Withdrawal Election form submitted was actually placed on the form by the purported signatory;

(m) upon information and belief, an employee of American Trust made the following notations on the In-Service Withdrawal Election form submitted by the unknown third party requesting a distribution of \$124,000 from Mr. Mandli’s Plan account:

Signature: Raymond J. Mandli Date: 02/12/2020
Electronic?
Doesn't match.
Ppt Services. PPT called in to ck status. Spoke w/
provided voided ck. ✓

(n) as shown by the below excerpt from the In-Service Withdrawal Election form submitted by the unknown third party, the unknown third party

requested a “Partial Cash Payment” of \$124,000 with “the remaining [amount] to be left in [Mr. Mandli’s] account until further notice;”

2. My Withdrawal Election:

After reading the Participant Distribution Notice and the Special Tax Notice Regarding Plan Payments I, the undersigned Participant, make the following withdrawal election:

Note: If your Vested Account Balance includes Roth deferrals (and earnings), the rollover of the Roth deferrals (and earnings) must be to a Roth IRA or to a plan that permits Roth deferrals, and you should complete Section 3 below for the rollover Roth IRA, Roth 401(k) plan or Roth 403(b) plan.

Cash Payment: I elect to receive the following portion of my account as a cash payment:

Lump Sum Cash Payment: pay me the entire available amount, less any income tax withholding.

Partial Cash Payment: pay me the following amount:
 \$ 124,000 and the remaining to be left in my account until further notice.

Gross up: Increase the amount of my payment to be applied toward income tax withholding. If this box is not checked, income taxes will be withheld from the above stated amount and I will receive a check less any applicable income taxes.

Combination: Direct Rollover/Lump Sum Cash Payment:

I elect \$ _____ or _____ % to be paid as:

Direct Rollover to my employer's retirement plan or an IRA
 Lump Sum Cash Payment Gross Up, as described above

AND the remainder of my account to be paid as:

Direct Rollover to my employer's retirement plan or an IRA
 Lump Sum Cash Payment Gross Up, as described above

Direct Rollover: Full or Partial Rollover: I elect to rollover:

My total available account balance as indicated below:
 to my employer's retirement plan or an IRA

\$ _____ or _____ as indicated below and the remaining to be left in my account until further notice:
 to my employer's retirement plan or an IRA

RECEIVED
FEB 12 2020
American Trust Retirement

(o) the Mandli Communications, Inc. 401(k) PS Plan and Trust In-Service Withdrawal Election form did not include a provision for requesting that a distribution in the form of a Partial Cash Payment be made by direct deposit (ACH) or wire transfer to a checking or savings account, but, as a shown by the excerpt of the form shown above, provided that, unless the participant elected to “gross up” the amount of the distribution to apply to income tax withholding, the participant “[would] receive a *check* less any applicable income taxes” (emphasis added);

(p) in the case of “Lump Sum Cash Payment” (which is a request to “pay [the participant] the entire available amount, less any income tax withholding”), the Mandli Communications, Inc. 401(k) PS Plan and Trust In-Service Withdrawal

Election form, however, included a provision for requesting that the distribution be made by direct deposit (ACH) or wire transfer to a checking or savings account;

(q) indeed, the section of the Mandli Communications, Inc. 401(k) PS Plan and Trust In-Service Withdrawal Election form relating to a request for a distribution be made by a direct deposit (ACH) or wire transfer, explicitly stated, ***“[o]nly complete this section if you are receiving all or a portion of your payment as a lump sum cash payment”*** (all emphasis added);

(r) nevertheless, as shown by the below excerpt of the In-Service Withdrawal Election form, the unknown third party requested that the Partial Cash Payment in the amount of \$124,000 from Mr. Mandli’s Plan account be made by a direct deposit (ACH) or wire transfer to a Citibank checking account for which the unknown third party provided an “ABA Number” and an “Account Number:”

5. Information About My Lump Sum Cash Payment:

Only complete this section if you are receiving all or a portion of your payment as a lump sum cash payment.

Payment Method for the cash portion of my distribution: *(If no election is made, then the check will be mailed to your home address.)*

PLEASE NOTE THERE IS A \$5 FEE FOR EACH CHECK ISSUED IN ADDITION TO ANY FEES LISTED BELOW

- Check mailed to me (Any check over \$25,000 will be sent overnight delivery, \$50 fee, and will require a signature to receive)
- Overnight Delivery: **(\$50 FEE)** (Street address required. If not provided, indicate under "My Information.") (Normal processing timing applies)
- Direct Deposit (ACH) to my account **(NO FEE) (Requires a copy of a voided check.)**
- Wire Transfer to my account **(\$30 FEE) (Requires a copy of a voided check.)**

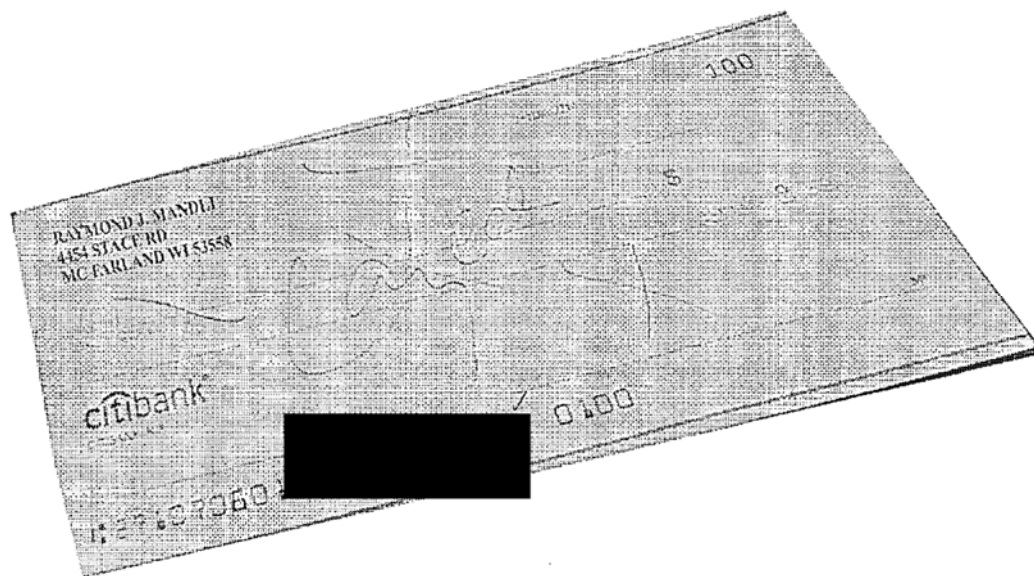
Please complete the following if you chose Direct Deposit (ACH) or Wire Transfer:

Checking Account or Savings Account
Name of Bank: CITIBANK ABA Number: 271070801 (9 digits) Account Number: [REDACTED]

Note: If you do not include a copy of a voided check your distribution will be issued by check and a \$5 FEE will be charged.)

(s) the unknown third party also submitted an electronic image of a purported copy of a voided check for the checking account into which the unknown third party requested that the Partial Cash Payment in the amount of \$124,000 from

Mr. Mandli's Plan account be distributed by direct deposit (ACH) or wire transfer that appeared as follows:



(t) the check number on the purported electronic image of the voided check was “100,” suggesting that the checking account was a *new* (i.e., recently opened) checking account.

(u) before American Trust approved the unauthorized request from an unknown third party for an in-service distribution and made the unauthorized distribution from Mr. Mandli's Plan account, American Trust knew that Mr. Mandli was 60 years old;

(v) upon information and belief, American Trust made no inquiries to ascertain why a 60-year old Plan participant would desire for funds distributed from his Plan account to be deposited into a *new* checking account;

(w) Mr. Mandli has never made any request for a distribution from his Plan account;

(x) American Trust did not mail or email any acknowledgement of receipt of the In-Service Withdrawal Election form submitted by the unknown third party to Mr. Mandli or Mandli Communications, by telephone using a telephone number in its records known to be the phone number of Mr. Mandli or Mandli Communications, or otherwise contact Mr. Mandli or Mandli Communications to verify that the In-Service Withdrawal Election form requesting an in-service distribution of \$124,000 from Mr. Mandli's Plan account was legitimate;

(y) upon information and belief, an employee of American Trust took a phone call checking on the status of the in-service distribution request from the unknown third party purporting to be Mr. Mandli but failed to determine that the unknown third party was an imposter;

(z) despite the foregoing facts, on February 14, 2020, an employee of American Trust, "as an as ERISA 3(16) Administrator," approved the unknown third party's request for a distribution of \$124,000 from Mr. Mandli's Plan account by signing the In-Service Withdrawal Election form submitted by the unknown third-party as follows:

7. Administrator Approval:

American Trust Retirement as ERISA 3(16) Administrator hereby approves this In-Service Withdrawal Election.

American Trust Retirement 3(16) Signature: Austyn M. Burns Date: 2/14/2020

(aa) accordingly, on or about February 14, 2020, American Trust liquidated \$124,105.00 from Mr. Mandli's Plan account, consisting of \$24,800 in required federal withholding taxes, a \$105 distribution fee, and \$99,200 that, upon

information and belief, American Trust distributed by direct deposit (ACH) or wire transfer to the Citibank checking account as requested by the unknown third party.

F. American Trust's Concealment Of Facts Related To The Unauthorized Distribution From Mr. Mandli's Plan Account.

56. Upon information and belief, after the unknown third party successfully obtained the unauthorized distribution from Mr. Mandli's Plan account described above, the unknown third party made additional attempts to obtain additional unauthorized distributions from Mr. Mandli's Plan account, but American Trust recognized that those requests were not legitimate and did not honor them.

57. Upon information and belief, the last attempt by the unknown third party to obtain additional unauthorized distributions from Mr. Mandli's Plan account occurred on March 3, 2020, when the unknown third party submitted a Mandli Communications, Inc. 401(k) PS Plan and Trust In-Service Withdrawal Election form, a copy of which is filed herewith as Exhibit J (with certain information redacted for filing with the Court), requesting that American Trust make a "Lump Sum Cash Payment" of the "entire available amount" in Mr. Mandli's Plan account "less any income tax withholding" by a distribution by direct deposit (ACH) or wire transfer to the Citibank checking account identified by the unknown third party.

58. Upon information and belief, on March 3, 2020, when American Trust received the In-Service Withdrawal Election form filed herewith as Exhibit J, it knew that the unknown third party who received the unauthorized distribution from Mr. Mandli's

Plan account on February 14, 2020, was in the midst of attempting to receive another unauthorized distribution from Mr. Mandli's Plan account.

59. Nevertheless, upon information and belief, American Trust did not immediately contact the Federal Bureau of Investigation ("FBI") or any other law enforcement agency with cyber security and money-tracking resources.

60. Moreover, American Trust did not inform Mr. Mandli or Mandli Communications of American Trust's unauthorized distribution from Mr. Mandli's Plan account on February 14, 2020, or any subsequent request for a distribution from Mr. Mandli's Plan account until March 11, 2020.

61. On March 11, 2020, Michael Jerrett ("Mr. Jerrett"), the American Trust employee responsible for American Trust's relationship with Mandli Communications, first informed Mr. Mandli and Mandli Communications of American Trust's unauthorized distribution from Mr. Mandli's Plan account on February 14, 2020.

62. On March 11, 2020, Mr. Jerrett, apparently referring to the "Daytime Phone Number" on the In-Service Withdrawal Election form that American Trust received from the unknown third-party on February 12, 2020, stated to a Mandli Communications employee that he tried calling the number and "it is clearly not his number."

63. On May 12, 2020, Mr. Jerrett informed Mr. Mandli that, to process a claim for reimbursement of American Trust's unauthorized distribution from Mr. Mandli's Plan account, an insurance company for American Trust requested that a police report be filed with respect to American Trust's unauthorized distribution from Mr. Mandli's Plan account

and offered “to help with the Police report” and to see if “it will allow [him] to file it online.”

64. Because Mr. Mandli did not have any details about American Trust’s unauthorized distribution from Mr. Mandli’s Plan account, he accepted Mr. Jerrett’s proposal that Mr. Jerrett file a police report.

65. On June 5, 2020, Mr. Jerrett reported American Trust’s unauthorized distribution from Mr. Mandli’s Plan account to the Fitchburg Police Department, but the police report shows that Mr. Jerrett claimed to be “an employee of Mandli Communications” and that he did not mention American Trust or the details of its consideration and approval of the In-Service Withdrawal Election form submitted by the unknown third party requesting a distribution of \$124,000 from Mr. Mandli’s Plan account.

66. Upon information and belief, other than making a report to the Fitchburg Police Department on June 5, 2020, American Trust did not inform the FBI or any other law enforcement agency of its unauthorized distribution from Mr. Mandli’s Plan account on February 14, 2020, or of any subsequent attempt (including the March 3, 2020, attempt) by the unknown third party to attempt to receive an unauthorized distribution from Mr. Mandli’s Plan account.

67. American Trust’s June 5, 2020, report to the Fitchburg Police Department, in which Mr. Jerrett claimed to be an employee of Mandli Communications, was done without an expectation that the Fitchburg Police Department would actually be able to identify the unknown third party who received the unauthorized distribution from Mr. Mandli’s Plan account or that it would be able to recover the funds, but instead, as the

police report shows, Mr. Jerrett made the police report to comply with a requirement of American Trust's insurance company, which it had requested to cover the loss resulting from its unauthorized distribution from Mr. Mandli's Plan account.

68. On July 24, 2020, Mandli Communications' General Counsel left a voicemail message for Mr. Jerrett asking for an update on the reimbursement of American Trust's unauthorized distribution from Mr. Mandli's Plan account, but Mr. Jerrett did not respond.

69. On August 24, 2020, Mandli Communications' General Counsel left another voicemail message for Mr. Jerrett asking for an update on the reimbursement of American Trust's unauthorized distribution from Mr. Mandli's Plan account, but Mr. Jerrett did not respond.

70. On September 9, 2020, Mandli Communications' General Counsel left another voicemail message for Mr. Jerrett asking for an update on the reimbursement of American Trust's unauthorized distribution from Mr. Mandli's Plan account, but Mr. Jerrett did not respond.

71. Instead, on September 9, 2020, American Trust's Chief Revenue Officer, Micah S. DiSalvo ("Mr. DiSalvo"), sent a letter to Mr. Mandli stating, among other things:

We are pleased to let you know that we have been able to recoup from the Internal Revenue Service the \$24,800.00 paid in taxes in connection with the distribution. Additionally, we will reimburse our \$105.00 distribution fee. ***All other efforts to recover any of the stolen funds will need to be performed by you.***

Please let us know if you have any additional questions or concerns.

(emphasis added).

72. On September 11, 2020, Mr. Jerrett—who, upon information and belief was disappointed in American Trust’s management’s refusal to reimburse Mr. Mandli for its unauthorized distribution from his Plan account and Mr. DiSalvo’s statement that “[a]ll other efforts to recover any of the stolen funds will need to be performed by you”—told an employee of Mandli Communications “I hope you fight this.”

73. On September 17, 2020, Mandli Communications’ General Counsel sent a letter to Mr. DiSalvo stating as follows:

Mr. DiSalvo:

I am receipt of your September 9, 2020 to Mr. Raymond Mandli regarding your company’s response to the theft from Mr. Mandli’s 401(k) retirement account. In short, your response is long overdue and thoroughly insufficient.

I have reviewed the In-Service Withdrawal Election form your company received from the individual behind the theft. Despite inaccuracies in the information provided, incomplete responses, an electronic signature, and an apparent computer generated canceled check, your company approved the withdrawal of \$124,000. Your refusal to correct this error is unacceptable.

My review of all relevant information in this matter leads me to one conclusion: American Trust must return \$99,200 plus earnings to Mr. Mandli’s 401(k) retirement account in an expeditious manner. Be advised that unless this matter is settled to Mr. Mandli’s satisfaction by close of business on September 24, 2020, Mr. Mandli will immediately pursue his available legal remedies.

Mandli Communications and American Trust have worked together for nearly five years. This partnership has been mutually beneficial to both parties. I hope this matter can be resolved short of formal legal action.

I look forward to hearing from you.

74. On September 25, 2020, American Trust’s Vice President and General Counsel, Erin F. Timmerman (“Ms. Timmerman”), sent a letter to Mandli Communications’ General Counsel stating, among other things:

[W]e dispute your assertion that American Trust must return to Mr. Mandli the \$99,200 distribution plus earnings. This demand is unacceptable to American Trust.

75. On October 29, 2020, Mr. Mandli and Mandli Communications' General Counsel sent a letter to Ms. Timmerman stating, among other things:

[W]e would like to have copies of the following materials to make available to the police and to further evaluate your September 25, 2020, letter:

- (1) All documents reflecting and reviewed in connection with the “thorough review of the events that took place surrounding the distribution from Mr. Mandli’s 401(k) plan account” referred to in your letter;
- (2) All documents reflecting or related to the “details” of the unauthorized request or requests, including, but not limited to, all paper documents submitted by the person making the unauthorized request or requests; records of any on-line or other electronic information submitted by the person making the unauthorized request or requests; all paper or electronic notes or other documents created by American Trust in the course of considering, processing, and/or investigating the unauthorized request or requests; and all recordings of any communications with the person making the unauthorized requests or others related to the unauthorized requests; and
- (3) All documents reflecting the “protocol” and the “training” referred to in your letter.

We appreciate your anticipated cooperation in providing the requested information to us. If there is any reason why you are not able to do so within ten (10) days of this letter, please immediately let us know. Otherwise, please send the requested information to Jeff Healy by email or overnight delivery.

Thank you.

76. Despite American Trust’s refusal to engage in any further efforts to recover the unauthorized distribution and its position that “[a]ll other efforts to recover any of the stolen funds will need to be performed by [Mr. Mandli and Mandli Communications]”—on November 9, 2020, Ms. Timmerman sent a letter to Mandli Communications’ General Counsel stating, among other things, “we respectfully decline to provide you with copies of any of the requested documentation.”

G. Mr. Mandli And Mandli Communications' Exhaustion Of Efforts To Obtain Reimbursement Of American Trust's Unauthorized Distribution Of Funds From Mr. Mandli's Plan Account.

77. American Trust has continued to refuse to reimburse Mr. Mandli's Plan account for American Trust's unauthorized distribution of funds from his Plan account.

78. In their October 29, 2020, letter to Ms. Timmerman, Mr. Mandli and Mandli Communications General Counsel stated, among other things:

[I]t is our understanding that there is no further administrative review procedure available to Mr. Mandli to seek recovery from American Trust for the unauthorized distribution from his account. If our understanding is not correct, please provide us with the details regarding any such procedure.

79. Neither Ms. Timmerman nor anyone else has provided Mr. Mandli or Mandli Communications with any information suggesting that there is any further review procedure available to Mr. Mandli to seek recovery from American Trust for American Trust's unauthorized distribution of funds from his Plan account.

**FIRST CLAIM FOR RELIEF
(Liability For Breach Of Fiduciary Duty
Pursuant To 29 U.S. Code §§ 1109 And 1132(a)(2))**

80. Plaintiffs reallege and incorporate by reference paragraphs 1 through 79 above.

81. When the events described above occurred, American Trust was acting as a fiduciary of the Plan and owed a fiduciary duty to the Plan, to Mr. Mandli as a participant of the Plan, and to Mandli Communications as the plan sponsor and administrator of the Plan.

82. 29 U.S.C § 1104 provides as follows:

(a) PRUDENT MAN STANDARD OF CARE

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

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

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

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

83. American Trust's fiduciary duties include the duty to administer the Plan in accordance with its terms and purpose; the duty of loyalty; the duty to act solely in the interest of the participants of the Plan; the duty to administer the Plan as a prudent person would, by exercising reasonable care, skill, and caution; the duty to act in good faith; and the duty of honesty and candor including by promptly disclosing relevant information to Mr. Mandli and to Mandli Communications.

84. The above-described conduct of American Trust constitutes a breach of fiduciary duty by American Trust in violation of the requirements of 29 U.S.C. § 1104(a).

85. The Plan was harmed by American Trust's breach of fiduciary duties in that American Trust's breach of fiduciary duty impaired the value of the Plan assets in Mr. Mandli's Plan account.

86. 29 U.S.C. § 1109(a) provides as follows:

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. . . .

87. 29 U.S.C § 1132(a)(2) provides that “[a] civil action may be brought . . . by a participant or fiduciary for appropriate relief under section 1109 of this title.”

88. Therefore, Mr. Mandli, as a participant of the Plan, and Mandli Communications, as the plan sponsor and plan administrator of the Plan, are entitled to bring a claim against American Trust pursuant to 29 U.S.C. § 1132(a)(2) and 29 U.S.C. § 1109(a) for American Trust’s breach of fiduciary duty in violation of 29 U.S.C § 1104.

89. American Trust should be held liable to make good to the Plan for the losses resulting to the Plan from each breach of fiduciary duty in an amount not less than \$99,200.00 plus lost earnings after February 14, 2020, and other equitable or remedial relief as the court may deem appropriate.

**SECOND CLAIM FOR RELIEF
(Equitable Relief Pursuant to 29 U.S. Code § § 1132(a)(3))**

90. Plaintiffs reallege and incorporate by reference paragraphs 1 through 89 above.

91. 29 U.S.C. § 1132(a)(3) provides that “A civil action may be brought . . . by a participant . . . beneficiary, or fiduciary (A) to 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.”

92. Therefore, Mr. Mandli, as a participant of the Plan, and Mandli Communications, as the plan sponsor and plan administrator of the Plan, are entitled to bring an action to obtain appropriate equitable relief to redress American Trust's breach of fiduciary duty.

93. Appropriate equitable relief may include surcharging American Trust in an amount sufficient to make the Plan and Mr. Mandli whole.

WHEREFORE, Plaintiffs Raymond J. Mandli and Mandli Communications, Inc. respectfully request a judgment of the Court against Defendant American Trust as follows:

A. holding American Trust liable to make good to the Plan for the losses resulting to the Plan from each breach of fiduciary duty in an amount not less than \$99,200 plus lost earnings after February 14, 2020;

B. providing appropriate equitable relief which may include surcharging American Trust in an amount sufficient to make Mr. Mandli whole;

C. providing other appropriate equitable relief as may be necessary to redress the harm to Mr. Mandli and/or Mandli Communications caused by American Trust's breach of its fiduciary duties;

D. awarding Mr. Mandli and Mandli Communications reasonable attorneys' fees and costs pursuant to 29 U.S.C. § 1332(g); and/or

E. granting such other relief to which Mr. Mandli and Mandli Communications may be entitled under applicable law or as the Court determines to be just and equitable.

Respectfully submitted this 12th day of January 2021.

DEWITT LLP



By: _____

Robert E. Shumaker (WI # 1005214)

Jordan Rohlfing (WI # 1088042)

Two East Mifflin Street, Suite 600

Madison, WI 53703-2865

Tel: (608) 255-8891

Fax: (608) 252-9243

res@dewittllp.com

Attorneys for Plaintiffs