

Ilene H. Ferenczy
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(678) 399-6602

December 12, 2018

[REDACTED]

Re: Law Offices of T. Mae Yoshida 401(k) Plan & Trust (the "Plan")

Dear [REDACTED]

We have been asked to communicate with you on behalf of the Law Offices of T. Mae Yoshida, the sponsor and Plan Administrator of the above referenced Plan.

Through an inadvertent error, an amount was distributed to you from the Plan that was in excess of the Plan benefit to which you were entitled. In particular, on July 26, 2018, you received a check in the net amount of \$17,533.12, which originally represented an overpayment of \$22,628.39, reduced by withholding of Federal income tax of \$4,495.68, state income tax withholding of \$449.59, and a processing fee of \$150.00. We understand that Ms. Yoshida has communicated with you regarding this overpayment previously, and that you have indicated that you do not intend to return the overpayment to the Plan.

Since that time, the financial institution that holds the funds for the Plan, American Funds, has been able to recredit the amount of the tax withholding to the Plan. Therefore, the only remaining amount outstanding is the \$17,533.12 that was incorrectly paid to you.

This letter represents a demand that the total amount distributed to you in excess of your Plan benefit be returned immediately to the Plan. These funds represent an accidental overpayment of funds that are not due to you and your continued retention of these funds is unlawful. Furthermore, as these are appropriately Plan funds, it is possible that you could be deemed to be a fiduciary of these funds under Section 3(21) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and your failure to return these funds could constitute a breach of the duties you have engendered by retaining and exercising discretion and control over these funds.

It is critical that you safeguard these funds immediately, and that you take no further action to dissipate these amounts. The Plan intends, if your immediate cooperation in returning the funds is not forthcoming, to proceed to reclaim the amount by all legal means available to it, including a lawsuit in Federal court.

LEGAL SERVICES
of
NORTHERN CALIFORNIA

Ilene Ferenczy
Ferenczy Benefits Law Center
2635 Century Parkway NE, Suite 200
Atlanta, GA 30345

Monday, March 04, 2019

RE: Law Offices of T. Mae Yoshida 401(k) Plan & Trust

Dear Ilene Ferenczy,

The Western States Pension Assistance Project, part of Legal Services of Northern California, is a law office that assists individuals with questions regarding their pension and retirement savings plans. I am writing on behalf of our client, [REDACTED] and have enclosed an authorization for your convenience.

In September 2018, [REDACTED] received a letter from the Nicholas Pension Consultants on behalf of the Law Offices of T. Mae Yoshida 401(k) Plan & Trust ("the Plan") alleging that in July 2018, the Plan mistakenly paid funds to [REDACTED] to which she was not entitled and requested a repayment of \$22,628.39. In December 2018, [REDACTED] received a letter from the Ferenczy Benefits Law Center on behalf of the Plan stating that the Plan has since recovered the federal and state taxes withheld from the payment and requested the repayment of \$17,533.12.

The funds in question were dissipated in August 2018, prior to [REDACTED] receipt of the above referenced letters. At that time, [REDACTED] had no reason to believe that the funds were erroneously distributed. She used most of money to purchase a much-needed automobile and used the remaining funds to take her family on a weekend trip. Because [REDACTED] is no longer in possession of the funds, immediate repayment is not possible. Therefore, [REDACTED] respectfully requests the Plan stop all further attempts to recover the funds from her.

Please note that because [REDACTED] is no longer in possession of the funds, the Plan's ability to recover from [REDACTED] is limited. ERISA § 502(a)(3) permits plan fiduciaries to file civil suits in order to:

"(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;" (Emphasis added.)

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A Legal Services Corporation Program



In *Montanile v. Board of Trustees of National Elevator Industry Health Benefit Plan*, 136 S.Ct. 651 (2016) the Supreme Court examined whether a Plan fiduciary can sue under § 502(a)(3) to recover from a participant's general assets when the funds in question have been dissipated. The court held that under § 502(a)(3) the Plan is limited to equitable remedies which are "as a general rule, directed at some specific thing; they give or enforce a right to or over some particular thing...rather than a right to recover a sum of money generally out of the defendant's assets." Therefore, Plan fiduciaries are limited to seeking recovery from specific identifiable funds or assets traceable to the Plan's funds and cannot seek recovery from [REDACTED] general assets, as "recovering out of those assets is a *legal* remedy, not an equitable one." *Id.*

Because [REDACTED] is no longer in possession of the funds and the Plan is not permitted to recover from [REDACTED] general assets, she requests that the Plan immediately stop all further attempts to recover the funds from her.

If you have any questions regarding this letter, please feel free to contact me directly at (916) 551-2146 or by email at cmcallister@lsnc.net.

Best Regards,



Chris McAllister

Staff Attorney, Western States Pension Assistance Project

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FERENCZY
BENEFITS LAW CENTER
ERISA
We are your solution

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March 27, 2019

BY FAX: 916-551-2197

Chris McAllister, Esq.
Western States Pension Assistance Project
Legal Services of Northern California
501 12th Street
Sacramento, CA 95814

Re: Law Offices of Mae Yoshida 401(k) Plan & Trust ("Plan")
[REDACTED]
Your letter dated March 4, 2019

Dear Mr. McAllister:

Thank you for your letter dated March 4, 2019, regarding the [REDACTED] matter in relation to the Plan. The trustee of the Plan has asked that we respond to your letter.

We are aware of the *Montanile* case that you cited in your letter. That case dealt with the ability of a plan to access funds that are part of a constructive trust created in relation to a subrogation claim by the plan against a participant. The facts of the matter at hand are significantly different, and the legal limitations on the recoupment of assets in the *Montanile* case do not apply to our situation.

First, unlike in *Montanile*, there is no doubt that the funds are not [REDACTED] and [REDACTED] has no colorable claim to the funds. [REDACTED] account in the Plan received an allocation of funds that were not hers and that she knew were not hers at the time of the deposit. The funds at issue resulted from a deposit of \$22,500 of salary deferrals *in error* into [REDACTED] account in the Plan. [REDACTED] was never eligible for the Plan, and had never contributed to the Plan on her own behalf. She terminated employment nearly four years prior to the time that the deposit occurred. Suddenly, she began receiving statements of account reflecting a balance that had never been there before and for which there was no expectation.

Chris McAllister, Esq.
March 27, 2019
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The funds were deposited in error in late 2017, and ██████ requested a distribution of those funds in mid-2018 after receiving a participant statement that reflected a deposit of a salary deferral that she could not have made and knew she could not have made, as she had no salary with the Plan Sponsor from which that deposit could have been taken. Yet, ██████ requested a distribution of those funds without ever questioning whether she was entitled to them, despite knowing that her account should not have contained those funds. There is no good faith here.

Not only is a fiduciary permitted to ask for a return of overpaid funds, she is obligated to do so by the fiduciary requirements under ERISA.

Furthermore, the *Montanile* case involved an equitable lien on funds subject to a subrogation by a health plan in relation to benefits paid for which Mr. Montanile received reimbursement from a tortfeasor. This case involves neither subrogation nor an equitable lien. In this case, we are requesting restitution, which is also an equitable remedy available under ERISA, and one that does not invoke the same tracing requirements as an equitable lien. Therefore, the limits on the assets available from Mr. Montanile are inapplicable in this case.

Even assuming *arguendo* that the limitations on assets available to satisfy the Plan's claim against ██████ were limited as outlined in the *Montanile* case, those limits would not deter the ability of the Plan to obtain relief. Whereas the funds in the *Montanile* case had been dissipated in a way that was not traceable, your letter specifically notes that most of the funds were used to obtain an automobile. That is a traceable asset and can be accessed by the Plan in a claim for repayment of overpaid funds.

Needless to say, the trustee of the Plan would prefer not to exercise a judgment against ██████ car. On the other hand, the idea that ██████ can keep more than \$17,000 simply because she knowingly and rapidly spent funds that she knew were not hers is both unacceptable to the trustee and unsupported by the law.

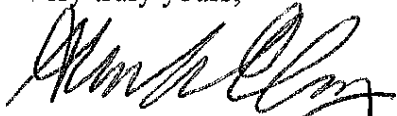
The Plan and its trustee renew their demand that ██████ make arrangements for the repayment of the overpaid funds immediately to avoid further legal action. If ██████ takes no action to do so before April 30, 2019, the trustee of the Plan intends to avail itself of the remedies available at law and equity. Furthermore, the trustee demands that ██████ take no further action to dissipate or otherwise put her assets out of reach of the Plan in litigation.

Finally, the trustee reminds ██████ that the amount withheld from the distribution was reclaimed by the Plan. Therefore, there has been no withholding taken from the amount actually received by ██████ She should prepare her 2018 tax return accordingly.

Chris McAllister, Esq.
March 27, 2019
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If you have any questions, please let me know. We expect to hear from you or your client soon.

Very truly yours,



ILENE H. FERENCZY

cc: Mae Yoshida, Esq.