

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

SEVERSTAL WHEELING, INC. )  
RETIREMENT COMMITTEE, TIMOTHY )  
S. ROGERS, RICHARD CARUSO and )  
WILLIAM DREW LANDON, as named )  
fiduciaries of the Wheeling Corrugating )  
Company Retirement Security Plan, the )  
Salaried Employees’ Pension Plan of )  
Severstal Wheeling, Inc., the WHEELING )  
CORRUGATING COMPANY )  
RETIREMENT SECURITY PLAN, and the )  
SALARIED EMPLOYEES’ PENSION )  
PLAN OF SEVERSTAL WHEELING, )

**THIRD AMENDED  
COMPLAINT**

Civil Action No. 10-cv-954  
(LTS)(GWG)

Judge Laura Taylor Swain

ECF CASE

Plaintiffs,

v.

WPN CORPORATION, in its own capacity )  
and as named fiduciary of the Wheeling )  
Corrugating Company Retirement Security )  
Plan and the Salaried Employees’ Pension )  
Plan of Severstal Wheeling, Inc.; RONALD )  
LABOW, in his individual capacity and as )  
named fiduciary of the Wheeling Corrugating )  
Company Retirement Security Plan and the )  
Salaried Employees’ Pension Plan of )  
Severstal Wheeling, Inc.; and WHX )  
CORPORATION, )

Defendants.

**THIRD AMENDED COMPLAINT**

Plaintiffs Severstal Wheeling, Inc. Retirement Committee (the “Severstal Retirement Committee”), Timothy S. Rogers (“Rogers”), Richard Caruso (“Caruso”), William Drew Landon (“Landon”), Wheeling Corrugating Company Retirement Security Plan, and the Salaried Employees’ Pension Plan of Severstal Wheeling (together, “DC Plans”) (collectively, the “Plaintiffs”), hereby commence this civil action against Defendants WPN Corporation (“WPN”),

LaBow and WHX Corporation (collectively, the “Defendants”). In support of their civil action, Plaintiffs allege as follows:

**I. Jurisdiction and Venue**

1. This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiffs assert claims under Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. § 1132(a)(2) and, therefore, Plaintiffs’ claims arise under federal law. This court has supplemental jurisdiction over Plaintiffs’ pendant claims under New York state law pursuant to 28 U.S.C. § 1367.

2. Venue is proper in this judicial district pursuant to both ERISA’s venue provision, 29 U.S.C. § 1132(e)(2), and the general federal venue provisions of 28 U.S.C. § 1391 because both Defendants reside in this district.

**II. Parties**

A. Plaintiffs

3. Plaintiff Severstal Retirement Committee is a committee currently composed of Timothy Rogers, Richard Caruso and William Drew Landon. The Severstal Retirement Committee is responsible for the general administration and for carrying out the applicable provisions of all of Severstal Wheeling’s employee retirement plans.

4. The DC Plans are retirement plans sponsored by Severstal Wheeling and covered by ERISA that were previously funded and maintained through a trust sponsored by the WHX Corporation.

B. Defendants

5. Defendant WPN is and at the time of the events in this Complaint was a corporation organized under the laws of the State of New York and maintains its principal place of business at 110 East 59<sup>th</sup> Street, 30<sup>th</sup> Floor, New York, New York 10022.

6. Ronald LaBow is an individual residing in the State of New York. Upon information and belief, Defendant LaBow is the principal and only executive officer of WPN.

7. Upon information and belief, WHX Corporation is a corporation organized under the laws of the State of New York and maintains its principal place of business at 1133 Westchester Avenue, Suite N222, White Plains, NY 10604.<sup>1</sup>

### III. The Relevant Benefit Plans

8. Severstal Wheeling operates and is the “sponsor” (within the meaning of ERISA Section 3(16)(B), 29 U.S.C. § 1002(16)(B)) of three retirement plans which it operates for the benefit of its employees. All three plans are “employee benefit pension plans” within the meaning of ERISA Section 3(2)(A), 29 U.S.C. § 1002(2)(A).

9. The Wheeling Corrugating Company Retirement Security Plan (the “Wheeling Corrugating Plan”) is a defined contribution plan regulated by ERISA. Hourly-paid production and maintenance employees of Wheeling Corrugating Company (which is a Division of Severstal Wheeling), including those employees who are subject to a collective bargaining agreement, are eligible to participate in the Wheeling Corrugating Plan. The Wheeling Corrugating Plan Documents are attached hereto as **Exhibit A**.

10. The Salaried Employees’ Pension Plan of Severstal Wheeling, Inc. (the “Salaried Employees Plan”) is a defined contribution plan regulated by ERISA. Salaried employees of Severstal Wheeling are eligible to participate in the Salaried Employees Plan, provided that they

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<sup>1</sup> Plaintiffs recognize that all counts against WHX have been dismissed from this lawsuit, but include this paragraph and related allegations to preserve their rights on appeal.

are not subject to a collective bargaining agreement. The Salaried Employees Plan Documents are attached hereto as **Exhibit B**.

11. The Severstal Wheeling, Inc. Pension Plan (the “DB Plan”) is a defined benefit plan regulated by ERISA. Some of the participants in the DB Plan are also participants in the Salaried Employees Plan. The two Plans are arranged in a “floor offset” arrangement, meaning that the benefits to which common participants are entitled under the DB Plan are “offset” by the value of their individual accounts in the Salaried Employees Plan. The DB Plan Documents are attached hereto as **Exhibit C**.

12. The Wheeling Corrugating and Salaried Employees Plans (the “DC Plans”) are legal entities which can sue or be sued pursuant to ERISA Section 502(d)(1), 29 U.S.C. § 1132(d)(1).

#### **IV. Fiduciary Allegations**

13. ERISA requires every plan to provide one or more named fiduciaries who will have “authority to control and manage the operation and administration of the Plan.” 29 U.S.C. § 1102(a)(1).

14. In accordance with Section 402(a)(1), 29 U.S.C. § 1102(a)(1), ERISA treats as fiduciaries all persons explicitly named as fiduciaries in the Plan. In addition, ERISA treats as fiduciaries all persons who perform fiduciary functions. Thus, a person is a fiduciary to the extent “(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets; (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or

responsibility to do so; or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.” 29 U.S.C. § 1002(21)(A).

15. Plaintiffs Severstal Retirement Committee, Rogers, Caruso and Landon are all named fiduciaries of the Wheeling Corrugating Plan and the Salaried Employees Plan pursuant to paragraph 8.010 of the Wheeling Corrugating Plan and paragraph 9.1 of the Salaried Employees Plan and are filing Counts I and II in that capacity.

16. At all times relevant to Plaintiffs’ claims, Defendant WPN was a named fiduciary of the Wheeling Corrugating Plan and the Salaried Employees Plan pursuant to ERISA Section 402(a), 29 U.S.C. § 1102(a).

17. Defendant WPN is not and has never been a fiduciary of the DB Plan.

18. At all times relevant to Plaintiffs’ claims, Defendant LaBow was a named fiduciary of the Wheeling Corrugating Plan and the Salaried Employees Plan pursuant to ERISA Section 402(a), 29 U.S.C. § 1102(a).

19. Defendant LaBow is not and has never been a fiduciary of the DB Plan.

20. Until at least March 31, 2009, Defendant WHX was a fiduciary of the Wheeling Corrugating Plan and the Salaried Employees Plan pursuant to ERISA Section 402(a), 29 U.S.C. § 1102(a), because WHX controlled a part of the assets of the Wheeling Corrugating Plan and the Salaried Employees Plan until that time.

21. Defendant WHX is not and has never been a fiduciary of the DB Plan.

22. As fiduciaries of the Wheeling Corrugating Plan and the Salaried Employees Plan, Defendants were required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), to manage and administer the two Plans, and the Plans’ investments solely in the interest of the Plans’ participants and beneficiaries and with the care, skill, prudence, and diligence under the

circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.

**V. Facts Underlying Plaintiffs' Claims**

A. Severstal Wheeling's Corporate Background

23. Severstal Wheeling produces and manufactures cold-rolled and hot-rolled sheet steel and steel coated products.

24. The corporate predecessor of Severstal Wheeling was Wheeling-Pittsburgh Steel Corporation. Prior to August 1, 2003, Wheeling-Pittsburgh Steel Corporation was a wholly-owned subsidiary of Wheeling-Pittsburgh Corporation, which, in turn, was a wholly-owned subsidiary of WHX Corporation. Defendant LaBow was, at one time, the Chairman of the Board of Directors of WHX Corporation.

25. Prior to August 1, 2003, the Wheeling Corrugating Plan and the Salaried Employees Plan were funded and maintained through the WHX Pension Plan Trust (the "WHX Pension Trust"). The Wheeling Corrugating Plan and the Salaried Employees Plan constituted approximately 10% of the total assets in the WHX Pension Trust. Upon information and belief, the remaining 90% of the assets in the WHX Pension Trust constituted benefit or retirement plans sponsored and/or maintained by WHX Corporation and/or its subsidiaries.

26. On August 1, 2003, after a period of bankruptcy, Wheeling-Pittsburgh Corporation became an independently traded public company and was no longer owned by WHX Corporation.

27. On November 27, 2007, Wheeling-Pittsburgh Corporation and Esmark Steel Service Group, Inc. combined to form Esmark Incorporated.

28. On August 4, 2008, Esmark Incorporated became a wholly-owned subsidiary of OAO Severstal, a corporation located in the Russian Federation. As a result of this business combination, Esmark Incorporated was renamed Severstal Wheeling Holding Company, Wheeling-Pittsburgh Corporation was renamed Severstal Wheeling Steel Group, Inc. and Wheeling-Pittsburgh Steel Corporation was renamed Severstal Wheeling, Inc. As such, Severstal Wheeling became the corporate successor in interest to Wheeling-Pittsburgh Steel Corporation.

29. Despite the corporate changes following the 2003 emergence from bankruptcy, the Wheeling Corrugating Plan and the Salaried Employees Plan continued to remain invested in the WHX Pension Trust.

B. The Decision to Divide the WHX Pension Trust

30. On February 1, 2004, Defendant WPN entered into an Investment Consulting Agreement (the “WHX Investment Agreement”) with WHX Corporation on behalf of the WHX Pension Trust. Under the terms of that Agreement, from February 1, 2004 forward, WPN was vested with “complete, unlimited and unrestricted management authority with respect to” the assets in the WHX Pension Trust. The WHX Investment Agreement was modified by a First Amendment on May 11, 2007 and by a Second Amendment in or around September 2008. The Investment Consulting Agreement, with the first two Amendments, is attached hereto as **Exhibit D**.

31. After being notified by Citibank, N.A. that it would no longer serve as trustee of the WHX Pension Trust, WHX Corporation advised Severstal Wheeling that it must transfer the Wheeling Corrugating Plan and the Salaried Employees Plan into a Trust separate and apart from the WHX Pension Trust.

32. On or about September 29, 2008, the WHX Corporation Retirement Committee and Plaintiff Severstal Retirement Committee jointly requested that Citibank, N.A., the trustee of the WHX Pension Trust, remove the assets of the Wheeling Corrugating Plan and the Salaried Employees Plan from the WHX Pension Trust to a new Severstal Wheeling Pension Plan Trust (the “Severstal Trust”):

Pursuant to the terms of the respective trust agreements, [the Severstal Wheeling, Inc. Retirement Committee] . . . hereby directs the Trustee to transfer the assets of the [Wheeling Corrugating Plan and the Salaried Employees Plan] from the WHX Pension Plan Trust into the [Severstal Trust].

33. On or about September 30, 2008, Michael DiClemente (“Mr. DiClemente”), then a member of the Severstal Retirement Committee, informed Mr. Glen Kassan, the chairman of WHX Corporation’s Pension Investment Committee, that the assets in the Wheeling Corrugating Plan and the Salaried Employees Plan should be transferred to the Severstal Trust in the same percentage investment allocations as had existed in the WHX Pension Trust. Mr. DiClemente’s instructions were as follows:

Dear Mr. Kassan:  
. . . Pursuant to Section 4.4 of the aforementioned Trust Agreement, please direct Citibank, N.A. as trustee of the Trust, to transfer [the assets comprising the Wheeling Corrugating Plan and the Salaried Employees Plan] in the same percentage allocations as existed in the WHX Pension Trust, on or about September 30, 2008, to account no. 312933 at Citibank, N.A., as trustee of the [Severstal Trust].

34. In other words, Mr. DiClemente requested that the investment portfolios of the Wheeling Corrugating Plan and the Salaried Employees plan remain the same in the Severstal Trust as they had been in the WHX Pension Trust.

35. Mr. DiClemente’s instructions were not followed and the transfer did not occur on September 30, 2008.

36. On or about October 22, 2008, Defendant LaBow sent a letter to Mr. DiClemente advising him that the transfer was not accomplished on September 30, 2008 due to market volatility, but that the transfer would occur on November 3, 2008. This letter was drafted, unbeknownst to Plaintiffs, by James McCabe, an officer of WHX Corporation, or by Manes Merritt, an outside counsel to WHX Corporation and sent to Defendant LaBow with instructions to print it on WPN letterhead and send it to Severstal Wheeling.

37. As of October 31, 2008, the WHX Pension Trust was heavily diversified and was invested in a total of twenty-one (21) different accounts. The total value of the WHX Pension Trust at that time was \$395,077,777.93. The largest single investment account in the WHX Pension Trust was invested with Mason Capital Management and contained \$90,055,365.39 in assets.

38. As of October 31, 2008, the total combined value of the Wheeling Corrugating Plan and the Salaried Employees Plan was \$38,147,879.00. As part of the WHX Pension Trust, these assets were diversified as described in Paragraph 36.

39. On or about October 31, 2008, Defendant LaBow directed David Riposo, then Treasurer of WHX Corporation, to transfer all of the assets in an account that was managed by Neuberger Berman LLC while it was part of the WHX Pension Trust (the “Neuberger Berman Account”)<sup>2</sup> to the Severstal Trust at market opening on November 3, 2008. This correspondence

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<sup>2</sup> Once the assets in the Neuberger Berman Account were transferred to the Severstal Trust, they were apparently no longer managed by Neuberger Berman LLC and Plaintiffs did not have any inherent obligation to have them managed by Neuberger Berman LLC. Therefore, technically speaking, the account was no longer the “Neuberger Berman Account” once the transfer occurred on November 3, 2008. The assets, which consisted of 13 stocks, 11 of which were energy stocks, would more properly be referred to as “assets formerly in the Neuberger Berman Account” that were held in trust for Plaintiffs. For ease of reference, however, these assets will be referred to as the “Neuberger Berman Account” in this Second Amended Complaint.

was never sent to or received by any of the Plaintiffs. In the e-mail string that is part of this correspondence, Defendant LaBow informed Glen Kassan, CEO of WHX Corporation, that he would prefer to “leave it alone” unless there was a “violation of ERISA.” This decision was made without any input from Plaintiffs.

40. On November 1, 2008, the Third Amendment to the WHX Investment Agreement (the “Third Amendment”) became effective between Severstal Wheeling, as successor to Wheeling-Pittsburgh Steel Corporation, and WPN. The Third Amendment is attached hereto as **Exhibit E**.

41. Michael DiClemente signed the Third Amendment on behalf of Severstal Wheeling and had authority to bind Severstal Wheeling as an officer of the corporation.

42. Under the terms of the Third Amendment, WPN was named the investment manager of the Severstal Trust with sole discretionary management authority over the assets in the Severstal Trust, including the assets of the Wheeling Corrugating Plan and the Salaried Employees Plan. Moreover, LaBow “ha[d] the primary responsibility for performing the services of the Manager [WPN] with respect to the Investment Fund . . . .” **Exhibit E**, p. 3, ¶ (1).

43. The Wheeling Corrugating Plan and Salaried Employees Plan specifically provide that any “Investment Manager” (such as WPN and LaBow) “shall be solely liable for all investment actions taken concerning the assets of this Plan.” **Exhibit A**, p. 31 ¶ 8.110; **Exhibit B**, p. 29 ¶ 9.11.

44. In addition, the Third Amendment obligated WPN to manage the Severstal Trust assets in accordance with the Severstal Wheeling Pension Plan Investment Policy (the “Severstal Investment Policy”). The Severstal Investment Policy is attached hereto as **Exhibit F**.

45. The Severstal Investment Policy became effective on November 1, 2008 and was implemented because the WHX Pension Plan Investment Policy (WHX Investment Policy”), which became effective in March 2004 and applied to the investments in the WHX Pension Trust, needed to be replaced with regard to the Wheeling Corrugating Plan and the Salaried Employees Plan after the Severstal Trust was separated from the WHX Pension Trust. The Severstal Investment Policy is, as to all relevant provisions, including the provisions regarding diversification, identical to the WHX Investment Policy. Thus, the Severstal Investment Policy is a “successor” policy to the WHX Investment Policy.

46. The Severstal Investment Policy, like the WHX Investment Policy before it, required WPN to, among other things, “ensure that the [Severstal Trust’s] assets are well-diversified with respect to the type of assets, investment strategies employed and number of investment managers used.” See **Exhibit F**, p. 2.

C. Defendants’ Failure to Diversify the Severstal Trust

47. On or about November 3, 2008, Mr. DiClemente authorized Citibank, N.A., as part of the general transfer of assets from the WHX Pension Trust to the Severstal Trust, to the Neuberger Berman Account from the WHX Pension Trust to the Severstal Trust:

As part of transferring [the assets of the Wheeling Corrugating Plan and Salaried Employees Plan] from the WHX Corporation trust to Severstal Wheeling’s existing trust at Citibank, we direct Citibank to transfer, prior to market opening on November 3, all assets in the Neuberger Berman account . . . to our account . . . .

The language of this letter was drawn from language provided by WHX, which was made part of the letter described in Paragraph 53, below. At the time of this communication, WPN and LaBow had the duty to actively manage the assets in the Severstal Trust.

48. Also on or about November 3, 2008, James F. McCabe (an officer of WHX Corporation), on behalf of the WHX Pension Administration Committee, advised Citibank, N.A. that all assets in the Neuberger Berman Account were to be transferred from the WHX Pension Trust to the Severstal Trust. In other words, the WHX Pension Trust divested itself entirely from the Neuberger Berman Account.

49. In accordance with these November 3, 2008 communications, \$31,446,845.00 – the entirety of which was invested in the Neuberger Berman account, was transferred from the WHX Pension Trust to the Severstal Trust. The difference between this value and the \$38,147,879.00 value of the assets in the Wheeling Corrugating Plan and Salaried Employees Plan as of October 31, 2008 (hereinafter the “True-Up Amount”) was left in the WHX Pension Trust without the concurrent knowledge or agreement of the Severstal Retirement Committee. Defendants, however, as fiduciaries and investment managers, failed to ensure that the entire difference was fully and immediately transferred from the WHX Pension Trust to the Severstal Trust. WHX Corporation remained a fiduciary of the Wheeling Corrugating Plan and Salaried Employees Plan because it retained the True-Up Amount in the WHX Pension Trust.

50. Upon information and belief, Neuberger Berman, LLC was not actively managing the assets in the Neuberger Berman Account. Despite being responsible for the management of the assets in the Severstal Trust pursuant to the Third Amendment, Defendants WPN and LaBow failed to enter into an agreement with Neuberger Berman, LLC for the management of the assets in the Neuberger Berman Account and/or failed to prudently manage the investments themselves.

51. At the time the Severstal Retirement Committee requested transfer of the Neuberger Berman Account to the Severstal Trust, the Severstal Retirement Committee intended

and expected that either the Severstal Trust would receive only a portion of the Neuberger Berman Account along with a portion of all of the other investments comprising the WHX Pension Trust, or that, if the Severstal Trust would receive the entire Neuberger Berman Account, the Neuberger Berman Account would be liquidated and the Severstal Trust assets diversified. Either way, the Severstal Retirement Committee expected that the Severstal Trust would be appropriately diversified in accordance with the Severstal Investment Policy and ERISA Section 404(a), 29 U.S.C. § 1104(a).

52. Unbeknownst to any of the Plaintiffs, Defendants WPN and LaBow left the Severstal Trust invested entirely in the Neuberger Berman Account, which, due to Defendants WPN's and LaBow's failure to adequately manage and prudently invest the Severstal Trust assets, was not under active investment management at that time.

53. Also unbeknownst to any of the Plaintiffs, at the time of the transfer of the Neuberger Berman Account to the Severstal Trust, the Neuberger Berman Account was composed of thirteen stocks, the overwhelming majority of which were energy stocks. This investment portfolio did not meet the standards of diversification required by the Third Amendment, the relevant Plan Documents, the Severstal Investment Policy, or ERISA Section 404(a), 29 U.S.C. § 1104(a).

54. On November 25, 2008, unbeknownst to any of the Plaintiffs, WHX Corporation requested that Defendant LaBow sign an indemnification agreement which would indemnify WHX against the exact kind of claim that has been brought here by Plaintiffs. Specifically, the agreement, which was drafted by representatives of WHX and/or WHX's outside counsel Manes Merritt, asked LaBow and WPN to indemnify WHX "in connection to" "the determination . . . as

to which assets of the WHX Pension Trust were transferred, or should have been transferred, to the [Severstal] Trust.”

55. There can be no doubt that Defendants LaBow and WPN conspired with Defendant WHX in this regard. In response to WHX’s request for indemnification, Defendant LaBow specifically stated, in reference to WHX’s counsel: “Why a lawyer would overreach to such an extent *after my good faith agreement to protect the [WHX Pension Trust]* because of the transfer of assets to Severstal is beyond my comprehension.” (emphasis added).

56. Defendant LaBow was a former investment banker with Neuberger Berman, LLC. Upon information and belief, LaBow left the Severstal Trust assets solely invested in the Neuberger Berman Account – which LaBow knew to be undiversified – because of his previous relationship with Neuberger Berman, LLC and/or because of pecuniary or other benefits that were being conferred upon him by Neuberger Berman, LLC.

57. Defendant LaBow was, between 1991 and 2004, the Chairman of the Board of WHX Corporation.

58. WPN and WHX Corporation once shared an address at 110 E. 59<sup>th</sup> Street, New York, NY 10022.

59. According to records submitted to the Securities and Exchange Commission, as of June 30, 2003, WPN and LaBow owned stock options equivalent to 6.8% of the common stock of WHX Corporation.

60. WHX Corporation, on multiple occasions, indicated that it desired to have no association with the Neuberger Berman Account. First, as set forth in Paragraph 43 above, WHX was complicit in the decision to transfer only the assets in the Neuberger Berman Account to the Severstal Trust in the first place. Second, as set forth in Paragraph 52 above, James

McCabe on behalf of the WHX Pension Administration Committee, advised Citibank, N.A. that all assets in the Neuberger Berman Account were to be transferred from the WHX Pension Trust to the Severstal Trust. Third, Glen Kassan (CEO of WHX), in a joint telephone conference call with and among WHX and Severstal Wheeling representatives, described the Neuberger Berman Account as a “toxic asset” and specifically indicated that WHX wanted nothing to do with it.

61. By investing the Severstal Trust in the Neuberger Berman Account while at the same time divesting the WHX Pension Trust from the Neuberger Berman Account, WPN and LaBow accomplished exactly what WHX wanted to the detriment of the Severstal Trust. This further represents the culmination of Defendant LaBow’s and WPN’s clandestine and secretive “agreement” with WHX to protect the assets of the WHX Pension Trust to the detriment of the Severstal Trust as set forth in Paragraph 59 above.

62. Based on the the allegations set forth above it is plausible to infer that Defendants gave preferential treatment to the WHX Pension Trust – by divesting the WHX Pension Trust of the “toxic assets” in the Neuberger Berman Account and instead investing those “toxic assets” in the Severstal Trust – because of WPN’s and LaBow’s prior relationships and connections to WHX. The WHX Pension Trust was substantially larger than the Severstal Trust. Defendants transferred the Neuberger Berman Account from the WHX Pension Trust to the Severstal Trust and left the former diversified while failing to diversify the latter because Defendants favored the WHX Pension Trust.

63. On or about December 29, 2008, the then-existing members of the Severstal Retirement Committee became aware that Defendants WPN and LaBow had left the entirety of the assets in the Severstal Trust invested in the Neuberger Berman Account.

64. On December 30, 2008, Mr. DiClemente contacted Defendant LaBow via e-mail and informed him that the Severstal Retirement Committee had learned of the complete transfer and of the Neuberger Berman Account solely to the Severstal Trust:

I just learned yesterday from Mercer that you have allocated your entire position in the Neuberger Berman account solely to the Severstal Wheeling pension plans as part of the transition of the WHX and [Severstal Trust] to separate trusts.

Prior to the transition, you asked me on multiple occasions whether Wheeling wanted to continue to utilize your services and I responded that we definitely desired to do so, with the understanding that you continue to implement the same strategies that you have been using on behalf of both [WHX and Severstal Wheeling] when the funds were managed as part of the same portfolio . . . .

We are further disturbed that this situation has been compounded by the fact that we did not learn until this month that Neuberger Berman has not been managing the assets . . . .

65. At the time of his December 30, 2008 correspondence, Mr. DiClemente was only aware that the Severstal Trust was invested solely in the Neuberger Berman Account. He was not yet aware that the Neuberger Berman Account itself was an undiversified account comprised almost entirely of energy stocks. Mr. DiClemente was only made aware of this troubling fact late in the day on December 30, 2008.

66. To remedy Defendants' failure to properly diversify, Mr. DiClemente and Plaintiff Severstal Retirement Committee asked Defendants verbally on or about December 30, 2008, January 7, 2009 and January 16, 2009 and in writing on or about January 20, 2009 to prepare a written plan to retroactively re-allocate the assets in both the WHX Pension Trust and the Severstal Trust so that the percentage allotment of the various investments was the same in both Trusts:

Confirming our continuing discussions and in accordance with ERISA requirements, it is critical that the Severstal Wheeling, Inc. (SWI) Pension Plan Trust and its participants continue to benefit from a diversified portfolio, equivalent, to the extent feasible, to the portfolio that existed prior to the trustee transition that occurred as of the beginning of November 2008. Therefore, we would expect that the assets that were allocated between the [WHX Pension trust] and the [Severstal Trust] as of the trustee transition date will be reallocated to produce two separate portfolios, with the [Severstal Trust] continuing its proportionate share of the undivided interest in the WHX master trust portfolio prior to the transition, recognizing that there may be certain limitations to achieving an identical allocation.

Please prepare a written plan to reallocate the assets retroactively as of the transition date . . . .

This was consistent with Defendants' ongoing representations to Mr. DiClemente and what Mr. DiClemente intended and expected as a result of the split between the two Trusts.

67. On or about February 4, 2009, Defendant LaBow, on behalf of Defendant WPN, sent a letter to representatives of Plaintiff Severstal Retirement Committee admitting that it was Defendants' decision, based on alleged "market conditions," to "transfer the entire Neuberger Berman account" to the Severstal Trust.

68. In that letter, Defendant LaBow indicated that he could not have allocated a *pro rata* share of each investment in the WHX Pension Trust to the Severstal Trust in the first place because he "ran across major roadblocks," with the implication that no such re-allocation was even possible.

69. Initially, the Defendants represented that a retroactive reallocation would be accomplished which would restore to the Severstal Trust a balanced portfolio. Plaintiffs relied on this representation and assumed that Defendants could be taken at their word. Eventually, however, Defendants told Plaintiffs that they could not actually perform a retroactive

reallocation. Defendants' initial representations caused a significant delay which compounded the damages to the Severstal Trust.

70. On information and belief, Defendants reneged on their representation regarding the retroactive reallocation because to retroactively reallocate the assets would have resulted in the WHX Pension Trust re-assuming its proportionate share of the "toxic" assets in the Neuberger Berman Account.

71. Throughout February 2009, Plaintiff Severstal Retirement Committee was in communication with Defendants, asking them to provide information such as a report regarding an audit by J.H. Cohn of the valuation of the assets in both the WHX Pension Trust and the Severstal Trust and all other available financial information on the assets in the WHX Pension Trust as of October 31, 2008.

72. On or about March 31, 2009, Defendant WHX transferred what it represented to be the last of the True Up Amount to the Severstal Trust.

73. Defendants WPN and LaBow continued their failure or refusal to properly diversify the Severstal Trust.

D. The Aftermath of Defendants' Failure to Diversify the Severstal Trust

74. As of March 31, 2009, the Severstal Trust's investments in the Neuberger Berman Account were valued at \$24,276,162.00. When compared to their value of \$31,446,845.00 as valued on October 31, 2008, the Severstal Trust's holdings in the Neuberger Berman Account were devalued by approximately 19% during this time period.

75. Between October 31, 2008 and March 24, 2009, had the assets of the Severstal Trust been properly diversified by, for instance, being invested in the same assets and

proportions as the WHX Pension Trust (including the Neuberger Berman Account), the Severstal Trust would have lost approximately 1.0% of its value.

76. Between October 31, 2008 and March 24, 2009, had the assets of the Severstal Trust been properly diversified by, for instance, being invested in the same assets and proportions as the WHX Pension Trust (assuming that it excluded the Neuberger Berman Account), the Severstal Trust would have *increased in value* by approximately 1.2%, which matches the performance of the WHX Pension Trust over this period.

77. Had Defendants done what Michael DiClemente asked and understood would be done – namely, to invest the Severstal Trust assets in the same accounts and the same proportions as existed in the WHX Pension Trust, the Severstal Trust would not have incurred the losses that the Plans, in fact, incurred.

78. On March 23, 2009, Defendant LaBow left a voicemail message for Sally Doubet King, Plaintiffs' previous counsel, stating that he "still [hadn't] diversified the Severstal Trust, that he was going to "liquidate the account when I think it's appropriate turning the whole thing into cash and go to diversification . . . ." In that same voicemail message, Defendant LaBow also admitted that "the responsibility is completely mine."

79. Also on March 23, 2009, Defendant LaBow left a voicemail message for Dennis Halpin, then a member of the Severstal Retirement Committee, admitting that it was his decision that "we're not diversified" and that he was "taking responsibility" and "accept[ed] responsibility."

80. On March 24, 2009, Defendants WPN and LaBow liquidated the Severstal Trust's holdings in the Neuberger Berman Account.

81. The assets in the Severstal Trust were not reinvested by Defendants WPN and LaBow, but were instead left in holdings of cash.

82. Between March and May 2009, Defendants WPN and LaBow, despite being given multiple opportunities to do so, failed to reinvest the Severstal Trust assets in a way that comported with the diversification standards of ERISA and the Severstal Investment Policy.

83. Accordingly, on May 19, 2009, Severstal Wheeling and/or the Severstal Retirement Committee terminated the Third Amendment and severed all agreements between Defendant WPN and Severstal Wheeling. The termination was justified under Section 18(b)(i) of the Third Amendment because Defendants' failure to properly diversify the Severstal Trust was "conduct which is materially injurious" to Severstal Wheeling and/or the Plans.

84. Between March 2009 and today, the financial markets have rebounded, resulting in broad-based gains across most indices.

85. Because the Severstal Trust suffered an approximate 19% loss between November 2008 and March 2009, it had approximately 19% less in investment assets to accrue gains since the account was liquidated on March 24, 2009. Accordingly, the Severstal Trust's gains have been reduced since March 24, 2009 as a direct result of Defendants' conduct. Simply, if the Severstal Trust had 19% more in assets, its gains would have been higher.

86. Because Defendants WPN and LaBow failed to reinvest the assets in the Severstal Trust in a properly diversified account between the liquidation of the Neuberger Berman Account on March 24, 2009 and the termination of Defendants WPN and LaBow as investment managers on May 19, 2009, the Severstal Trust did not accrue gains that it would have accrued had it been properly invested. Moreover, had the Severstal Trust accrued such gains, it would

have accrued even more gains after May 19, 2009 because, again, there would have been more assets and more assets accrue more gains.

87. The estimated amount of losses are set forth in the report of Plaintiffs' expert.

## **VI. Claims For Relief**

### **A. Claims for Relief Under ERISA**

88. At all relevant times, Defendants LaBow and WPN were fiduciaries of the Wheeling Corrugating Plan and the Salaried Employees Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A).

89. Until at least March 31, 2009, Defendant WHX was a fiduciary of the Wheeling Corrugating Plan and the Salaried Employees Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) because it controlled some Wheeling Corrugating Plan and Salaried Employees Plan assets (the True Up Amount) until at least that date.

90. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) provides, in pertinent part, that a civil action may be brought by a fiduciary for relief under ERISA Section 409, 29 U.S.C. § 1109.

91. ERISA § 409(a), 29 U.S.C. § 1109(a), "Liability for Breach of Fiduciary Duty," provides, in pertinent part, that "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 title 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."

92. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), provides, in pertinent part, that fiduciaries are to manage and administer the plan, and the plan's investments solely in the

interest of the plan's participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.

93. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), specifically obligates a fiduciary to act on behalf of the plan solely for the purpose of providing benefits to plan participants and beneficiaries or for the purpose of defraying the reasonable administrative expenses of the plan.

94. ERISA § 406(b), 29 U.S.C. § 1106(b) specifically prohibits a fiduciary from “deal[ing] with the assets of the plan in his own interest.”

95. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C), specifically obligates a fiduciary to diversify “the investments of the plan so as to minimize the risk of large losses . . . .”

### **COUNT I**

#### **BREACH OF FIDUCIARY DUTY UNDER SECTION 502(A)(2) OF ERISA BY FAILING TO LOYALLY MANAGE PLAN ASSETS IN VIOLATION OF ERISA SECTION 404(A)(1)(A) AND 406(B)**

**Severstal Wheeling, Inc. Retirement Committee, Timothy S. Rogers, Richard Caruso, and William Drew Landon**

**v.**

**All Defendants**

96. Plaintiffs incorporate the allegations contained in the foregoing paragraphs as if set forth in full herein.

97. At all relevant times, Defendants LaBow and WPN were fiduciaries of the Wheeling Corrugating Plan and the Salaried Employees Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), and Defendant WHX was a fiduciary of the

Wheeling Corrugating Plan and the Salaried Employees Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) until at least March 31, 2009.

98. Under ERISA, fiduciaries are required to manage plan assets solely in the interests of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits to plan participants and beneficiaries or to defray the reasonable administrative expenses of the plan. Moreover, fiduciaries are forbidden to deal with the assets of a plan for their own interest.

99. During the relevant time period, Defendants breached their duty to loyally manage the assets of the Wheeling Corrugating Plan and the Salaried Employees Plan by, *inter alia*, failing to disclose Defendant LaBow's previous relationship and dealings with Neuberger Berman, LLC, particularly in light of the fact that Defendant LaBow invested the entirety of the Severstal Trust assets transferred on November 3, 2008 in the Neuberger Berman account.

100. During the relevant time period, Defendants breached their duty to loyally manage the assets of the Wheeling Corrugating Plan and the Salaried Employees Plan by, *inter alia*, investing the entirety of the Severstal Trust in the Neuberger Berman Account because of Defendant LaBow's previous relationship and dealings with Neuberger Berman, LLC. Accordingly, Defendants were not managing the Wheeling Corrugating Plan assets or the Salaried Employees Plan assets solely in the interests of the Plans' participants and beneficiaries.

101. During the relevant time period, Defendants breached their duty to loyally manage the assets of the Wheeling Corrugating Plan and the Salaried Employees Plan by, *inter alia*, giving preferential treatment to the WHX Pension Trust over the Severstal Trust because of LaBow's prior relationship with WHX and the fact that the WHX Pension Trust was substantially larger than the Severstal Trust.

102. The preferential treatment that WPN and LaBow gave to the WHX Pension Trust consisted of divesting the WHX Pension Trust from the Neuberger Berman Account – which WHX management employees referred to as “toxic assets” – and investing those same “toxic assets” instead in the Severstal Trust. In so doing, WPN (which once shared an address with WHX) and LaBow (who was the Chairman of the Board at WHX for 13 years and who, together with WPN, owned 6.8% of WHX’s common stock) did exactly what WHX desired to the detriment of the Severstal Trust.

103. WHX, as a fiduciary of both its own plans in the WHX Pension Trust and, at least until March 31, 2009, of the Wheeling Corrugating Plan and Salaried Employees Plan, had an inherent conflict of interest once the decision was made to separate the Severstal Trust from the WHX Pension Trust. WHX secretly conspired with Defendants LaBow and WPN in making these decisions – without Plaintiffs’ knowledge or input and to the exclusion of Plaintiffs – constitutes a breach by WHX of its fiduciary duty to manage the assets in the Severstal Trust solely for the benefit of the participants therein and beneficiaries thereof.

104. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Wheeling Corrugating Plan and the Salaried Employees Plan, in addition to the participants in both Plans, lost a significant portion of their retirement investment. Had Defendants invested the assets in the Severstal Trust appropriately and solely in the interests of the Plans’ participants and beneficiaries, the Plans’ losses of 19% could have instead been a 1.2% gain, as set forth herein.

105. Pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a) and ERISA § 409, 29 U.S.C. § 1109(a), Defendants in this Count are liable to restore the losses to the Wheeling Corrugating

Plan and Salaried Employees Plan caused by Defendants' breach of fiduciary duties alleged in this Count.

106. Plaintiffs Severstal Retirement Committee, Rogers, Caruso and Landon bring this Count in their capacities as named fiduciaries of the Wheeling Corrugating Plan and the Salaried Employees Plan and for the benefit of those Plans.

**COUNT II**

**BREACH OF FIDUCIARY DUTY UNDER SECTION 502(A)(2) OF ERISA BY FAILING TO ADEQUATELY DIVERSIFY PLAN ASSETS IN VIOLATION OF ERISA SECTION 404(A)(1)(C).**

**Severstal Wheeling, Inc. Retirement Committee, Timothy S. Rogers, Richard Caruso, and William Drew Landon**

v.

**All Defendants**

107. Plaintiffs incorporate the allegations contained in the foregoing paragraphs as if set forth in full herein.

108. At all relevant times, LaBow and WPN were fiduciaries of the Wheeling Corrugating Plan and the Salaried Employees Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), and Defendant WHX was a fiduciary of the Wheeling Corrugating Plan and the Salaried Employees Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) until at least March 31, 2009.

109. Under ERISA, fiduciaries are required to adequately diversify plan assets in order to minimize the risk of large losses to plan assets.

110. During the relevant time period, Defendants breached their fiduciary duties to the Wheeling Corrugating Plan and the Salaried Employees Plan by, *inter alia*:

- a. permitting all of the assets of the Severstal Trust to be invested in the Neuberger Berman Account as of November 3, 2008;
- b. by failing to inform Plaintiffs that the assets in the Severstal Trust were allocated solely in the Neuberger Berman Account;
- c. by failing to inform Plaintiffs that the Neuberger Berman Account itself was an undiversified account comprised almost entirely of energy stocks; and
- d. by failing to diversify the Severstal Trust after the original transfer of the Neuberger Berman Account was made.

111. WHX Corporation was complicit and conspired with Defendants LaBow and WPN Corp. – without Plaintiffs’ knowledge or input and to the exclusion of Plaintiffs – in deciding to transfer the undiversified assets in the Neuberger Berman Account solely to the Severstal Trust. This represented the culmination of LaBow’s clandestine “agreement” with WHX to protect the WHX Pension Trust.

112. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Wheeling Corrugating Plan and the Salaried Employees Plan, in addition to the participants in both Plans, lost a significant portion of their retirement investment. Had Defendants invested the assets in the Severstal Trust appropriately and solely in the interests of the Plans’ participants and beneficiaries, the Plans’ losses of 19% could have instead been a 1.2% gain, as set forth in Paragraphs 67-70.

113. Pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a) and ERISA § 409, 29 U.S.C. § 1109(a), Defendants are liable to restore the losses to the Wheeling Corrugating Plan and Salaried Employees Plan caused by Defendants’ breach of fiduciary duties.

114. Plaintiffs Severstal Retirement Committee, Rogers, Caruso and Landon bring this Count in their capacities as named fiduciaries of the Wheeling Corrugating Plan and the Salaried Employees Plan and for the benefit of those Plans.

**COUNT III**<sup>3</sup>

**CAUSE OF ACTION FOR A KNOWING PARTICIPATION OF A FIDUCIARY  
BREACH BY A NON-FIDUCIARY UNDER SECTION 502(A)(3) OF ERISA.**

**Severstal Wheeling, Inc. Retirement Committee, Timothy S. Rogers, Richard Caruso, and  
William Drew Landon**

v.

**WHX Corporation**

115. Plaintiffs incorporate the allegations contained in the foregoing paragraphs as if set forth in full herein.

116. Regardless of whether Defendant WHX was a fiduciary of the Salaried Employees Plan and/or the Wheeling Corrugating Plan at least until March 31, 2009, Defendant WHX also knowingly conspired with, collaborated with, and participated in the breaches of fiduciary duty committed by Defendants LaBow and WPN.

117. WHX Corporation was complicit and collaborated with Defendants LaBow and WPN Corp. – without Plaintiffs’ knowledge or input and to the exclusion of Plaintiffs – in deciding to transfer the assets in the Neuberger Berman Account solely to the Severstal Trust. This represented the culmination of LaBow’s clandestine “agreement” with WHX to protect the WHX Pension Trust.

118. WHX knew or should have known that this transfer of assets – which was a transfer of an undiversified account composed almost exclusively of energy stocks – was a *per se*

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<sup>3</sup> Plaintiffs recognize that this Count against WHX has been dismissed from this lawsuit, but continue to include this paragraph and related allegations to preserve their rights on appeal.

breach of Defendants LaBow's and WPN's fiduciary duties imposed by ERISA, which require on their face that ERISA fiduciaries properly diversify plan assets.

119. Further, WHX knew or should have known that Defendants LaBow and WPN were improperly favoring the WHX Pension Trust over the Severstal Trust in transferring an account which, according to WHX's clear indications, was undesirable to WHX.

120. WHX's clandestine cooperation with Defendants LaBow and WPN in committing various breaches of LaBow's and WPN's fiduciary duties under ERISA constitutes unlawful and knowing participation by a non-fiduciary in a fiduciary breach.

B. State Law Claims for Relief

**COUNT IV**

**BREACH OF CONTRACT**

**Wheeling Corrugating Company Retirement Security Plan and the Salaried Employees' Pension Plan of Severstal Wheeling**

v.

**WPN Corp.**

121. Plaintiffs incorporate the allegations contained in the foregoing paragraphs as if set forth in full herein.

122. Pursuant to Paragraph 8 of the Second Amendment to the WHX Corporation Investment Consulting Agreement, which modified Paragraph 19 of the WHX Corporation Investment Consulting Agreement, WPN was required to "obtain and maintain in effect a fiduciary liability insurance policy or policies for the benefit of the Client . . . ." **Exhibit D.**

123. Paragraph 8 of the Second Amendment was not altered by the Third Amendment. As such, it remains in full force and effect between WPN and the Wheeling Corrugating Company Retirement Security Plan and the Salaried Employees' Pension Plan.

124. In their initial disclosures submitted pursuant to Federal Rule of Civil Procedure 26(a)(1), Defendants indicated that they have no insurance policy applicable to this action, in direct violation of the Third Amendment (as it encompasses the changes from the Second Amendment).

125. WPN has therefore breached the Third Amendment by failing to maintain a fiduciary insurance policy which breach has caused and will cause Plaintiffs to suffer losses and damages in an amount to be determined at trial.

#### **VII. Prayer for Relief**

WHEREFORE, Plaintiffs pray for the following relief:

(A) That this Court order Defendants to restore to the Wheeling Corrugating Plan and the Salaried Employees Plan their losses – in an amount to be proven at trial – as a result of Defendants’ breach of fiduciary duties to both Plans;

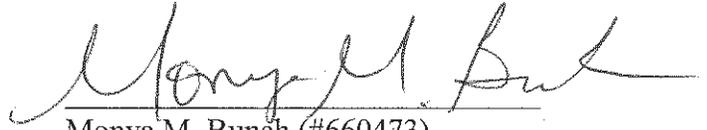
(B) That this Court enter declaratory and injunctive relief as necessary and appropriate, including restoring all losses to the Wheeling Corrugating Plan and the Salaried Employees Plan as a result of Defendants’ breach of fiduciary duties to both Plans;

(C) That this Court order, in the event that Defendants lack the assets necessary to satisfy a monetary award because of their failure to procure a fiduciary insurance policy in violation of the Third Amendment, that the assets and income of WPN and LaBow be garnished to the extent necessary to make Plaintiffs whole;

(D) That this Court order any further relief which the Court deems to be just and appropriate, including taxable costs and interest, as provided by law;

(E) That this Court order Defendants to pay Plaintiff's reasonable attorney's fees incurred as a result of initiating and prosecuting this action in accordance with ERISA Section 502(g)(1).

Dated: May 7, 2013



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