

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

THOMAS E. PEREZ, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

PAUL WAX, and the **KINETIC SOLUTIONS,
INC. EMPLOYEE STOCK OWNERSHIP
PLAN**,

Defendant.

CIVIL ACTION

Case No. 0:15-cv-03945-MJD-HB

CONSENT ORDER AND JUDGMENT

Plaintiff Thomas E. Perez, Secretary of Labor, United States Department of Labor (the “Secretary”), pursuant to the provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* (“ERISA”), filed a complaint against Defendant Paul Wax (“Defendant”) alleging breaches of his fiduciary responsibilities under ERISA §§ 403, 404, and 406 with respect to the Kinetic Solutions, Inc. Employee Stock Ownership Plan (“ESOP” or “Plan”).

Defendant waived service of process of the complaint, waived filing an answer, and has admitted to the jurisdiction of this Court over him and the subject matter of this action.

Plaintiff and Defendant agreed to resolve all matters in controversy in this action between them (except for the imposition by Plaintiff of any penalty pursuant to ERISA § 502(l), 29 U.S.C. § 1132(l), and any proceedings related thereto), and the parties do now consent to entry of a Consent Order and Judgment by this Court in accordance therewith.

The parties agree that, if the Secretary assesses a penalty pursuant to ERISA § 502(I) in connection with the violations alleged in this matter, the “applicable recovery amount” shall include all amounts paid in accordance with this Consent Order and Judgment.

Upon consideration of the record herein, and as agreed to by the parties, the Court finds that it has jurisdiction to enter this Consent Order and Judgment.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. Defendant is permanently enjoined and restrained from violating the provisions of Title I of ERISA;

2. Defendant is permanently enjoined from serving or acting as a fiduciary or service provider with respect to any employee benefit plan subject to ERISA;

3. Defendant is liable to the Plan in the amount of \$146,183.05, for his fiduciary breaches related to the prohibited transactions that occurred from March 20, 2008, through May 16, 2008;

4. Within 5 business days of the entry of this Consent Order and Judgment, Defendant shall utilize \$17,600 from his ESOP participant account at Lake Area Bank to restore the losses owed all participants harmed by his fiduciary breach. The \$17,600 restoration shall be paid to the ESOP participants who were participants in the ESOP from March 20, 2008, through May 16, 2008, with the exclusion of Defendant, in pro rata shares based on the respective participants’ percentage shares of the ESOP assets on March 19, 2008. The \$17,600 may only be used to restore the losses owed all participants harmed by Defendant’s fiduciary breach;

5. Within 5 business days of the entry of this Consent Order and Judgment, Defendant shall provide the Secretary with satisfactory proof of the restorations described in paragraph 4 above by sending documentation to the Regional Director, Employee Benefits Security

Administration, United States Department of Labor, 2300 Main Street, Suite 1100, Kansas City, Missouri 64108 (the “Regional Director”);

6. Within 45 days of the entry of this Consent Order and Judgment, Defendant shall provide satisfactory proof that checks have been mailed to the ESOP participants described in paragraph 4 above for whom a valid mailing address is presently available;

7. Within 120 days of the entry of this Consent Order and Judgment, Defendant shall provide to the Regional Director satisfactory proof, including the front and back of cleared checks, that checks to the ESOP participants described in paragraph 4 above have been cashed or that the participant’s balance has been rolled over to an IRA in accordance with EBSA Field Assistance Bulletin 2014-1, Fiduciary Duties and Missing Participants in Terminated Defined Contribution Plans (Aug. 21, 2014), *available at* <http://www.dol.gov/ebsa/regs/fab2014-1.html>;

8. Defendant shall exercise reasonable care and diligence to identify and locate each participant and beneficiary of the Plan who is eligible to receive a payment under the terms of this Consent Order and Judgment and to disburse to each such eligible participant or beneficiary the payment to which he or she is entitled. Defendant shall comply with the guidance in EBSA Field Assistance Bulletin 2014-01 in attempting to locate participants and handling missing participants;

9. Defendant shall be responsible for all fees, costs, and expenses associated with the restoration to the ESOP participants described in paragraph 4 above, including any fees, costs, or expenses associated with locating participants and handling missing participants;

10. Defendant shall notify the Regional Director at the address listed in paragraph 5 above of any change in his job, home address, or telephone number within 7 days of such change

until Defendant provides the Secretary with satisfactory proof of the distributions to the ESOP participants described in paragraph 4 above;

11. In reliance on the representations made by Defendant, including the Chapter 7 Bankruptcy Petition he filed in Case No. 10-30171, his executed Declarations of Financial Status, and his 2012 and 2013 U.S. tax returns, which show that he is unable to pay the total restitution amount to the Plan, the Secretary agrees to forbear full collection of the \$146,183.05 restitution amount owed to the Plan and agrees to accept the \$17,600 as set forth in paragraph 4 above in full satisfaction of this \$146,183.05 plus lost opportunity costs owed to the Plan subject to the conditions in paragraph 12 below;

12. If Defendant fails to comply with the requirements of this Consent Order and Judgment or if it is found that the documents he provided, including the Chapter 7 Bankruptcy Petition he filed in Case No. 10-30171, his executed Declarations of Financial Status, and his 2012 and 2013 U.S. tax returns, are incomplete or falsified, the full amount of the \$146,183.05 of losses owed to the Plan in paragraph 3 (minus payments made by the Defendant towards these amounts), shall immediately become due and payable by Defendant together with post-judgment interest pursuant to 28 U.S.C. § 1961;

13. Each party agrees to bear his own attorneys' fees, costs, and other expenses incurred by such party in connection with any stage of this proceeding to date including, but not limited to, attorneys' fees which may be available under the Equal Access to Justice Act, as amended;

14. The Court shall maintain jurisdiction over this matter only for purposes of enforcing this Consent Order and Judgment; and

15. Nothing in this Order is binding on any government agency other than the United States Department of Labor.

DATED November 16, 2015

s/Michael J. Davis
UNITED STATES DISTRICT JUDGE

The parties hereby consent to the entry of this Consent Order and Judgment:

FOR THE SECRETARY OF LABOR:

M. PATRICIA SMITH
Solicitor of Labor

CHRISTINE Z. HERI
Regional Solicitor

s/Kevin M. Wilemon
KEVIN M. WILEMON
Attorney

DATED: 10/26/2015

P.O. ADDRESS:
Office of the Solicitor
U.S. Department of Labor
230 S. Dearborn St., Room 844
Chicago, IL 60604

FOR THE DEFENDANT:

FOR PAUL WAX:

Dated: October 22, 2015

s/Paul Wax
PAUL WAX

Dated: October 24, 2015

s/Michael G. Paton
MICHAEL G. PATON, ESQ.

