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United States Department of Labor, Plaintiff

9
10 UNITED STATES DISTRICT COURT FOR THE
11 EASTERN DISTRICT OF CALIFORNIA AT FRESNO

12 THOMAS E. PEREZ, Secretary of Labor,) NO.
13 United States Department of Labor,)
14 Plaintiff,) COMPLAINT FOR VIOLATIONS OF
15 vs.) ERISA
16 JAMES BRUNK, BRUNK)
17 INDUSTRIES, INC. and the)
18 CONTRACTORS AND EMPLOYEES)
401(k) PLAN,)
19 Defendants.)

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21 Plaintiff Thomas E. Perez, Secretary of Labor, United States Department of
22 Labor (the “Secretary”), alleges:

23 **JURISDICTION**

24 1. This action arises under Title I of the Employee Retirement Income
25 Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. §§ 1001-1191c, and is
26 brought by the Secretary under ERISA §§ 502(a)(2) and (5), 29 U.S.C.

1 §§ 1132(a)(2) and (5), to enjoin acts and practices that violate the provisions of
2 Title I of ERISA, to obtain appropriate equitable relief for breaches of fiduciary duty
3 under ERISA § 409, 29 U.S.C. § 1109, and to obtain such further equitable relief as
4 may be appropriate to redress and to enforce the provisions of Title I of ERISA.

5 2. This court has jurisdiction over this action pursuant to ERISA
6 § 502(e)(1), 29 U.S.C. § 1132(e)(1).

7 3. Venue of this action lies in the Eastern District of California pursuant
8 to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), and in the Fresno Division of this
9 Court, because the first named Defendant, James Brunk, resides in Oakdale,
10 Stanislaus County, California, within this district.

11 DEFENDANTS

12 4. The Contractors and Employees 401(k) Plan (the “Plan” or “401(k)
13 Plan”) is an employee benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. §
14 1002(3), which is subject to the provisions of Title I of ERISA pursuant to ERISA §
15 4(a), 29 U.S.C. § 1003(a).

16 5. At relevant times, Defendant James Brunk was a President, owner and
17 officer of Brunk Industries, Inc.; was a named Employer Trustee of the Plan; acted
18 with respect to the Plan on behalf of Defendant Brunk Industries, Inc. in carrying
19 out the duties of Defendant Brunk Industries, Inc. as Plan Administrator, Employer
20 and Employer Trustee; exercised discretionary authority and control respecting the
21 management and disposition of the 401(k) Plan and its assets; exercised
22 discretionary authority and responsibility in the administration of the 401(k) Plan,
23 and was and is a fiduciary of the Plan within the meaning of ERISA §§ 3(21)(A)(i)
and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and (iii).

24 6. At all relevant times, Brunk Industries, Inc. was and is the Plan
25 Administrator, Employer, and Employer Trustee of the 401(k) Plan; exercised
26 discretionary authority and control respecting the management and disposition of the

1 401(k) Plan and its assets; exercised discretionary authority and responsibility in the
2 administration of the 401(k) Plan; was and is a fiduciary of the Plan within the
3 meaning of ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and (iii).

4 7. The 401(k) Plan is named as a Defendant pursuant to Rule 19(a) of the
5 Federal Rules of Civil Procedure, solely to ensure that complete relief can be
6 granted.

7 **ALLEGATIONS**

8 **Failure To Act Prudently and Solely in the Interest of the Plan's Participants** 9 **and Beneficiaries**

10 8. Paragraphs 1 through 7 above are realleged and incorporated herein by
11 reference.

12 9. At relevant times, Defendants James Brunk and Brunk Industries, Inc.
13 had authority over the Contractors and Employees 401(k) Plan.

14 10. The 401(k) Plan's governing documents identify Brunk Industries, Inc.
15 as Employer Trustee of the Plan, with exclusive responsibility for collecting
16 contributions that are delinquent under the terms of the Plan.

17 11. The 401(k) Plan's governing documents identify Brunk Industries, Inc.
18 as the Plan Administrator.

19 12. The 401(k) Plan's governing documents provided that fringe benefit
20 contributions from contracts compensating services rendered under prevailing wage
21 laws which provide for a specific amount in fringe benefits in addition to the
22 required hourly wage rate, be contributed to the Plan for each such employee who
23 performed work on such a contract.

24 13. The 401(k) Plan's governing Plan documents required mandatory
25 employer fringe benefit prevailing wage contributions ("prevailing wage
26 contributions") to be made by the Employer to the Plan on an annual basis for
employees employed on certain public works construction projects, no later than the

1 due date for the Employer's federal income tax return for the year for which the
2 contributions are due.

3 14. During the period from July 1, 2009 through June 30, 2013, Defendants
4 James Brunk and Brunk Industries, Inc. failed to collect mandatory employer
5 prevailing wage contributions to the 401(k) Plan, in the amount of at least
6 \$108,120.08, as required by the Plan, and instead retained and commingled the
7 funds with Company assets.

8 15. Upon Defendants James Brunk and Brunk Industries, Inc.'s failure to
9 collect mandatory employer prevailing wage contributions on behalf of the Plan, the
10 right to collect said contributions became and remains an asset of the Plan.

11 16. Pursuant to its public works construction contracts, the Company had
12 the ability to pay said mandatory employer prevailing wage contributions as it had
13 received payment(s) for such contributions and instead allowed the funds to be
14 retained and commingled with Company assets and same was used for non-Plan
15 purposes.

16 17. Defendants' James Brunk and Brunk Industries, Inc.'s failure to collect
17 and remit mandatory employer prevailing wage contributions resulted in lost-
18 opportunity costs to the Plan.

18 **VIOLATIONS OF ERISA**

19 18. By the conduct described in paragraphs 8-17 above, Defendants James
20 Brunk and Brunk Industries, Inc., acting in their fiduciary capacities:

21 a. failed to act solely in the interest of the participants and beneficiaries of
22 the 401(k) Plan and for the exclusive purpose of providing benefits to participants
23 and their beneficiaries and defraying reasonable expenses of 401(k) Plan
24 administration, in violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);

25 b. failed to act with care, skill, prudence, and diligence under the
26 circumstances then prevailing that a prudent person acting in a like capacity and

1 familiar with such matters would use in the conduct of an enterprise of a like
2 character and with like aims, in violation of ERISA § 404(a)(1)(B), 29 U.S.C.
3 § 1104(a)(1)(B), and;

4 c. failed to act in accordance with the documents and instruments
5 governing the Plan as required by ERISA § 404(a)(1)(D), 29 U.S.C.
6 § 1104(a)(1)(D).

7 19. As a direct and proximate result of the breaches of fiduciary duties
8 committed by Defendants James Brunk and Brunk Industries, Inc., as described in
9 paragraphs 11-26 above, the 401(k) Plan has suffered losses, including lost
10 opportunity income, for which the Defendants are jointly and severally liable
11 pursuant to ERISA § 409, 29 U.S.C. § 1109.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, the Secretary prays for judgment:

14 A. Ordering Defendants James Brunk and Brunk Industries, Inc. to restore
15 to the 401(k) Plan any losses, including lost-opportunity costs, resulting from
16 fiduciary breaches committed by them or for which they are liable;

17 B. Permanently enjoining Defendants James Brunk and Brunk Industries,
18 Inc. from violating the provisions of Title I of ERISA;

19 C. Removing Defendant James Brunk as fiduciary of the 401(k) Plan and
20 permanently enjoining Defendants James Brunk from serving as a fiduciary of, or
21 service provider to, any ERISA-covered employee benefit plan;

22 D. Appointing an independent fiduciary to marshal the assets of the 401(k)
23 Plan, to distribute any proceeds which accrue to the 401(k) Plan, to terminate the
24 401(k) Plan, if necessary and feasible to do so, and conclude any Plan-related
25 matters connected with the proper termination of the Plan;

26 E. Requiring the Defendants to pay for all costs associated with the
appointment and retention of the independent fiduciary;

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- F. Requiring the Defendants to cooperate with the independent fiduciary;
- G. Awarding the Secretary the costs of this action;
- H. Awarding post-judgment interest; and
- I. Ordering such further relief as is appropriate and just.

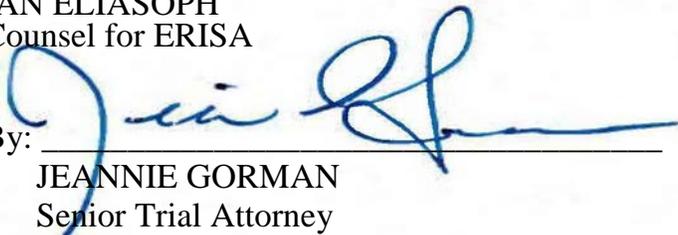
Dated: June 29, 2015

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