UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Plaintiff, v. AMY DEMMY, DEMMY SAND & GRAVEL, LLC, and the DEMMY SAND & GRAVEL, LLC RETIREMENT SAVINGS PLAN, Defendants.	Civil Case No. 1:16-cv-567

COMPLAINT

Plaintiff, Thomas E. Perez, Secretary of Labor, United States Department of Labor (the "Secretary"), alleges:

JURISDICTION AND VENUE

1. This action arises under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§1001, et seq., and is brought by the Secretary under ERISA §§502(a)(2) and (5), 29 U.S.C. §§1132(a)(2) and (5), to enjoin acts and practices which violate the provisions of Title I of ERISA, to obtain appropriate equitable relief for breaches of fiduciary duty under ERISA §409, 29 U.S.C. §1109, and to obtain such further equitable relief as may be appropriate to redress violations and to enforce the provisions of Title I of ERISA.

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

3. Demmy Sand & Gravel, LLC Retirement Savings Plan ("Plan") is an employee benefit plan within the meaning of ERISA §3(3), 29 U.S.C. §1002(3), which is subject to the provisions of Title I of ERISA pursuant to ERISA §4(a), 29 U.S.C. §1003(a).

4. Demmy Sand & Gravel, LLC ("the Company"), an Ohio corporation, is the sponsor of the Plan.

5. Venue of this action lies in the Southern District of Ohio, pursuant to ERISA §502(e)(2), 29 U.S.C. §1132(e)(2), because the Plan was administered in Clark County, Ohio within this district.

DEFENDANTS

6. At all relevant times, Defendant Amy Demmy, was President of the Company and a fiduciary of the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A) and a party in interest to the Plan within the meaning of ERISA §§3(14)(A), (E), and (H); 29 U.S.C. §§1002(14)(A), (E), and (H).

7. At all relevant times, the Company was the Plan Administrator and a fiduciary of the Plan within the meaning of ERISA §§3(16)(A) and (21)(A), 29 U.S.C. §1002(16)(A) and (21)(A) and a party in interest to the Plan within the meaning of ERISA §§3(14)(A) and (C); 29 U.S.C. §§1002(14)(A) and (C).

8. The Plan is named as a defendant herein pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

COUNT I

Failure to Segregate and Remit Employee Contributions and Loan Repayments and Failure to Timely Remit Loan Repayments

9. Paragraphs 1 through 8 above are realleged and incorporated herein by reference.

10. During the period January 5, 2011 through May 22, 2013, the Plan documents stated that participants could elect to defer a portion of their wages to be contributed to the Plan and could take out loans from the Plan.

11. During the period January 5, 2011 through May 22, 2013, Defendant Amy Demmy ("Demmy") had the authority and control over whether the Company remitted withheld employee contributions and loan repayments to the Plan and exercised this authority.

12. During the period January 2, 2013 through October 30, 2013, Defendant Demmy and the Company withheld $2,409.65 from its employees' pay as contributions to the Plan. The Company retained the withheld employee contributions in its general assets.

13. During the period January 2, 2013 through October 30, 2013, Defendant Demmy caused the Company to retain $2,409.65 in employee contributions to the Plan that had been withheld from its employees' pay, and failed to ensure that these withholdings were remitted to the Plan.

14. During the period January 2, 2013 through October 30, 2013, Defendant Demmy caused the Company to keep the $2,409.65 in unremitted employee contributions to the Plan in the general assets of the Company.

15. During the period January 5, 2011 through May 22, 2013, loan repayments were withheld from employees' pay to be forwarded to the Plan. The Company retained the withheld loan repayments in its general assets.

16. During the period January 5, 2011 through May 22, 2013, Defendant Demmy caused the Company to retain these loan repayments

17. During the period January 5, 2011 through May 22, 2013, these loan repayments were held in the Company's corporate account up to 180 workdays after they were withheld before some of them were forwarded to the Plan.

18. During the period January 5, 2011 through May 22, 2013, Defendant Demmy caused the Company to hold loan repayments to the Plan, in the general assets of the Company.

19. On July 18, 2012, August 1, 2012 through March 27, 2013 and from April 24, 2013 through May 22, 2013, loan repayments were withheld from employees' pay to be forwarded to the Plan. The Company retained the withheld loan repayments in its general assets.

20. On July 18, 2012, August 1, 2012 through March 27, 2013 and from April 24, 2013 through May 22, 2013, Defendant Demmy caused the Company to retain $32,883.34 in loan repayments to the Plan that had been withheld from its employees' pay, and failed to ensure that these withholdings were remitted to the Plan.

21. On July 18, 2012, August 1, 2012 through March 27, 2013 and from April 24, 2013 through May 22, 2013, Defendant Demmy caused the Company to keep the $32,883.34 in loan repayments to the Plan in the general assets of the Company.

22. Defendants Demmy and the Company used these plan assets mentioned in paragraphs 10 and 21 above for their own benefit, not for the benefit of the participants and beneficiaries.

23. Defendants Demmy and the Company failed to ensure that plan assets were paid into the Plan.

24. By the conduct described in paragraphs 9 through 23 above, Defendants Demmy and the Company:

a. failed to ensure the assets of the Plan never inured to the benefit of the employer and were held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries in violation of ERISA §403(c)(1), 29 U.S.C. §1103(c)(1);

b. failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plan, in violation of ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A);

c. failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and 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, in

violation of ERISA Sec. 404(a)(1)(B), 29 U.S.C. Sec. 1104(a)(1)(B);

d. caused the Plan to engage in transactions that they knew or should have known constituted a direct or indirect transfer to, or use by or for the benefit of, parties in interest, of any assets of the Plan in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D);

e. dealt with assets of the Plan in their own interest or for their own account, in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1).

f. in their individual or other capacity acted in transactions involving the Plan on behalf of parties (or represented parties) whose interests were adverse to the interests of the Plan, or the interests of its participants or beneficiaries in violation of ERISA §406(b)(2), 29 U.S.C. §1106(b)(2).

25. As a direct and proximate result of these breaches committed by defendants, the Plan has suffered injury and losses for which it is entitled to equitable relief, pursuant to ERISA §409, 29 U.S.C. §1109.

COUNT II

Failure to Collect Prevailing Wage Contributions Timely if at All.

26. Paragraphs 1 through 8 above are realleged and incorporated herein by reference.

27. On information and belief, pursuant to several state, federal, or municipal government contracts subject to the Davis Bacon Act ("DBA"), 40 U.S.C. §§276(a) *et. seq.*, Service Contract Act ("SCA"), 41 U.S.C. §§351, *et. seq.*, or state or municipal prevailing wage laws collectively, "prevailing wage contracts"), the Company agreed to utilize part of the money it received under the state and federal contracts to pay employer contributions as prevailing wage

fringe benefits to the Plan.

28. On information and belief, the Company received funds pursuant to prevailing wage contracts for work it performed from January 5, 2011 through May 22, 2013. The amounts received were sufficient to pay the prevailing wage rate contributions.

29. According to the Plan's governing documents, the Company may make prevailing wage contributions in order to satisfy the employer's obligations under the Davis-Bacon Act, the Service Contract Act, or any other federal, state or municipal prevailing wage law, to the Plan. The prevailing wage contributions are to be made by the Company for the benefit of participants. Moreover, timing of the allocation of these contributions is determined by the applicable prevailing wage laws. For example, the Davis Bacon Act requires quarterly remittances of prevailing wage contributions.

30. Between January 5, 2011 and May 22, 2013, $264,750.36 in prevailing wage contributions was never remitted to the Plan or given to the employees in cash.

31. To date, Defendants Demmy and the Company have failed to take any actions on behalf of the Plan to collect the delinquent prevailing wage contributions owed to the Plan.

32. By failing to collect the delinquent prevailing wage contributions, Defendant Demmy allowed the Company to keep the ear-marked money from the various state, federal and municipal government contracts in its own account for the use and benefit of the Company and its shareholders.

33. Based on the facts described in paragraphs 26 through 32 above, Defendants Demmy and the Company:

a. failed to discharge their duties with respect to the Plan solely in the

interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plan, in violation of ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A);

b. failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and 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, in violation of ERISA §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B);

c. Failed to act in accordance with the documents and instruments governing the plan in violation of ERISA §404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D);

34. As a direct and proximate result of these breaches committed by defendants, the Plan has suffered injury and losses for which it is entitled to equitable relief, pursuant to ERISA §409, 29 U.S.C. §1109.

PRAYER FOR RELIEF

WHEREFORE, the Secretary prays for judgment:

A. Permanently enjoining defendants from violating the provisions of Title I of ERISA;

B. Ordering defendants to make good to the Plan any losses, including lost opportunity costs, resulting from fiduciary breaches committed by such defendant or for which such defendant is liable;

C. Ordering defendants to correct the prohibited transactions in which he or it engaged, restore any losses to the Plan, and pay appropriate interest;

D. Permanently enjoining the defendants from serving as fiduciaries or service providers to any ERISA-covered employee benefit plan;

F. Ordering the appointment of an independent fiduciary to oversee the Plan after the trustees are removed;

G. Ordering the defendants, as parties in interest, to disgorge any profits received as a result of prohibited transactions in which they engaged;

H. Awarding the Secretary the costs of this action; and

I. Ordering such further relief as is appropriate and just.

M. PATRICIA SMITH
Solicitor of Labor

CHRISTINE Z. HERI
Regional Solicitor

BENJAMIN T. CHINNI
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