

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

HILDA L. SOLIS , Secretary of Labor,	:	
United States Department of Labor,	:	
	:	
Plaintiff,	:	
	:	Case No.: 2:12-cv-15285
v.	:	
	:	
	:	
BRIAN KIRSHNER; BENNETT W. SIPES; and FIRST PROFIT SHARING PLAN AND TRUST OF SUNSET HEATING & COOLING, INC.,	:	
	:	
Defendants.	:	

COMPLAINT

Plaintiff Hilda L. Solis, Secretary of Labor, United States Department of Labor (the “Secretary”), alleges:

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. The First Profit Sharing Plan and Trust of Sunset Heating & Cooling Inc. (the “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. 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.

5. Venue of this action lies in the Eastern District of Michigan, pursuant to ERISA §502(e)(2), 29 U.S.C. §1132(e)(2), because the Plan is administered in Walled Lake, Oakland County, Michigan, within this district.

DEFENDANTS

6. Brian Kirshner (“Kirshner”) was the President and 50% owner of Sunset Heating & Cooling, Inc. (“Sunset”); sole trustee of the Plan; and a fiduciary of the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A).

7. Bennett W. Sipes (“Sipes”) was the Secretary/Treasurer and 50% owner of Sunset; 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).

COUNT ONE **(Abandonment of Plan)**

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

9. Sunset was a Michigan corporation that was incorporated in 1989 and dissolved by the State of Michigan in 2006. Sunset is the Plan’s administrator and a fiduciary of the Plan within the meaning of ERISA §3(21)(A)(ii), 29 U.S.C. §1002(21)(A)(ii).

10. The Plan’s governing documents named Sunset as the Plan’s Administrator. As such, Sunset was authorized to direct the disbursement of the Plan’s assets.

11. The Plan’s governing documents provide that Sunset has the authority to appoint

and remove the Plan's trustee and the administrator of the Plan as necessary. Pursuant to this authority, Sunset named Kirshner as the Plan's trustee.

12. Except as described in paragraphs 18-22 below, no individual or entity has taken fiduciary responsibility for the operation and administration of the Plan and its assets since at least 2007, and the Plan has not been formally terminated.

13. Except as described in paragraphs 18-22 below, the individuals and entities designated to act on behalf of the Plan have failed to administer the Plan, and therefore, participants and beneficiaries of the Plan have not been able to obtain distributions from the Plan of their individual account balances.

14. As of December 31, 2001, the Plan had five active participants, and total assets of \$20,106.

15. By the conduct described in paragraphs 8 through 14 above, defendant Kirshner:

a. failed to discharge his 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 its 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 his 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); and

c. failed to discharge his duties with respect to the Plan solely in the interests of the participants and beneficiaries and in accordance with the documents and instruments

governing the Plan insofar as such documents and instruments are consistent with ERISA, in violation of ERISA §404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D).

COUNT TWO
**(Failure to hold Plan assets in trust
and improper allocation and distribution of Plan assets)**

16. Paragraphs 1 through 7, above are realleged and incorporated herein by reference.
17. The Plan's assets were held in trust by Davis Funds and Putnam Investments.
18. On May 1, 2009, Sipes wrote to Davis Funds and Putnam Investments, requesting that the Plan's assets be liquidated and the proceeds sent to Sipes as "successor trustee" of the Plan.
19. On June 3, 2009, Davis Funds liquidated the Plan's investments.
20. In December 2009, Davis Funds sent Sipes checks in the amount of \$5,748.71 and \$6,244.82.
21. Between December 7, 2009 and January 9, 2009, Sipes distributed \$7,267.52, consisting of some of the proceeds received from Davis Funds, to Plan participants, including himself. Sipes' distribution was based on his inaccurate recollection of each participant's balance, and therefore, participants did not receive the correct amounts.
22. Sipes retained the remaining proceeds from the liquidation of the Plan's account with Davis Funds in cash until August 15, 2011, when he returned the proceeds to the Plan by sending a check to Putnam Investments.
23. By the conduct described in paragraphs 16 through 22 above, defendant Sipes:
 - a. failed to ensure that all assets of the Plan were held in trust, in violation of ERISA § 403(a), 29 U.S.C. § 1103(a);
 - b. failed to act solely in the interest of the participants and beneficiaries of the Plan

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

c. failed to discharge his 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); and

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

PRAYER FOR RELIEF

WHEREFORE, the Secretary prays for judgment:

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

B. Ordering defendant Sipes to make good to the Plan any losses, including interest, resulting from fiduciary breaches committed by him or for which he is liable;

C. Ordering defendant Sipes to correct the prohibited transactions in which he engaged;

D. Removing defendants Kirshner and Sipes from their position as fiduciaries with respect to the Plan and permanently enjoining them from acting or serving as fiduciaries or service providers to any ERISA-covered employee benefit plan;

E. Appointing an independent fiduciary to administer the Plan in order to effectuate

its termination, and the distribution of Plan assets to the participants and beneficiaries;

- F. Ordering Kirshner to pay the costs of the independent fiduciary;
- G. Awarding the Secretary the costs of this action; and
- H. Ordering such further relief as is appropriate and just.

Dated: November 30, 2012

/s/ Matthew M. Scheff
MATTHEW M. SCHEFF (0082229)
Trial Attorney

United States Department of Labor,
Office of Solicitor
1240 East Ninth St., Room 881
Cleveland, OH 44199
(216) 522-3878
(216) 522-7172 (Fax)
scheff.matthew@dol.gov

OF COUNSEL:

M. PATRICIA SMITH
Solicitor of Labor

JANET M. GRANNEY
Acting Regional Solicitor

BENJAMIN T. CHINNI
Associate Regional Solicitor

LOCAL COUNSEL:

BARBARA L. McQUADE
United States Attorney

PETER A. CAPLAN
Assistant U.S. Attorney

211 W. Fort Street, Suite 2001
Detroit, MI 48226
(313) 226-9784
P-30643
Email: peter.caplan@usdoj.gov