

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS**

THOMAS E. PEREZ , Secretary of Labor,	:	
United States Department of Labor,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	
ROGER D. FERGUSON ,	:	File No.
INDUSTRIAL SURFACING CORP. , and	:	
INDUSTRIAL SURFACING CORP.	:	
401(k) PLAN ,	:	
Defendants.	:	

COMPLAINT

Plaintiff, **THOMAS E. PEREZ**, Acting Secretary of Labor, United States Department of Labor ("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. The Industrial Surfacing Corp. 401(k) 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. Venue of this action lies in the Central District of Illinois, pursuant to ERISA §502(e)(2), 29 U.S.C. §1132(e)(2), because the Plan was administered in Urbana, Champaign County, Illinois, which is within this District.

5. 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.

DEFENDANTS

6. During the relevant time period, Industrial Surfacing Corp. (“Industrial Surfacing”), was the Plan’s Sponsor and its Administrator; exercised authority and control over the disposition of assets of the Plan; was a fiduciary to the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A); and was 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).¹

7. During the relevant time period, Roger D. Ferguson was the President of Industrial Surfacing; was the sole trustee of the Plan; exercised authority and control over assets of the Plan; was a fiduciary to the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A); and was a party in interest to the Plan within the meaning of ERISA §§3(14)(A) and (H), 29 U.S.C. §§1002(14)(A) and (H).

1 On May 6, 2011, defendant Industrial Surfacing filed for Chapter 7 bankruptcy in the United States Bankruptcy Court in the Central District of Illinois, case no. 11-90916. Industrial Surfacing ceased operations sometime in 2011 and was dissolved on October 12, 2012. Because the Secretary is prosecuting this civil action pursuant to the Department of Labor’s police and regulatory power under Title I of ERISA, the Secretary’s action will be “an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power,” it is excluded from the operation of the automatic stay provisions of the Bankruptcy Code pursuant to 11 U.S.C. § 362(b)(4). The Secretary’s efforts to enforce any monetary portion of any judgment obtained against defendant corporation Sister Rosalind will be consistent with the Bankruptcy Code.

ALLEGATIONS

(Failure to Remit Participant Contributions to the Plan)

8. Paragraphs 1 through 7 above are realleged and hereby incorporated in these allegations.

9. The Summary Plan Description stated that participants could elect to defer a portion of their wages to the Plan.

10. From May 28, 2010 through April 8, 2011, Industrial Surfacing withheld from its employees' pay \$47,636.44 in contributions for the Plan.

11. The participant Plan contributions withheld by Industrial Surfacing from employee' wages between May 28, 2010 and April 8, 2011 were retained in Industrial Surfacing's general operating account and were used by Roger Ferguson and Industrial Surfacing for non-Plan purposes.

12. During periods between May 28, 2010 through April 8, 2011, Roger Ferguson caused Industrial Surfacing to retain the participant's contributions to the Plan that had been withheld from their pay in the company's general account and failed to ensure that the amounts withheld from the employee's pay were deposited in the Plan's accounts.

13. By the facts described in paragraphs 10 through 12 above, Roger Ferguson and Industrial Surfacing:

a. failed to ensure that the assets of the Plan were held in trust and did not inure to the benefit of Industrial Surfacing in violation of ERISA §§403(a) and (c)(1), 29 U.S.C. §§1103(a) and (c)(1);

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. caused the Plan to engage in transactions which they 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);

d. dealt with assets of the Plan in their own interest in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1); and

e. acted on behalf of a party whose interests are adverse to the interests of the Plan or the interests of its participants and beneficiaries in violation of ERISA §406(b)(2), 29 U.S.C. §1106(b)(2).

14. As a direct and proximate result of the breaches committed by the 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 a judgment:

A. Permanently enjoining Roger Ferguson and Industrial Surfacing from violating the provisions of Title I of ERISA;

B. Ordering Roger Ferguson and Industrial Surfacing to make good to the Plan all losses, including lost opportunity costs, resulting from fiduciary breaches committed by them or for which they are liable;

C. Ordering Roger Ferguson and Industrial Surfacing to correct the prohibited transactions in which they engaged relating to the Plan;

- D. Permanently enjoining Roger Ferguson and Industrial Surfacing from serving as a fiduciary or service provider 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. Awarding the Secretary the costs of this action; and
- G. Ordering such further relief as is appropriate and just.

M. PATRICIA SMITH
Solicitor of Labor

CHRISTINE Z. HERI
Regional Solicitor

s/ Mark H. Ishu

MARK H. ISHU
Attorney

P.O. ADDRESS:

Office of the Solicitor
U.S. Department of Labor
230 South Dearborn Street
Eighth Floor
Chicago, Illinois 60604
Telephone: (312) 353-6972
Email: Ishu.Mark.H@dol.gov

Attorneys for **THOMAS E. PEREZ**,
Secretary, United States Department
of Labor, Plaintiff