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15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA
17 WESTERN DIVISION

18 THOMAS E. PEREZ, Secretary of
19 Labor, UNITED STATES
20 DEPARTMENT OF LABOR,

21 Plaintiff,

22 v.

23 NICKSON'S MACHINE SHOP, INC., a
24 corporation; DENNIS W. LEAL, an
25 individual; and the NICKSON'S
26 MACHINE SHOP 401(K) SAVINGS
27 PLAN, an employee pension benefit
28 plan.

Defendants.

Case No. 2:14-cv-00235

**COMPLAINT FOR VIOLATIONS
OF ERISA**

1 Plaintiff Thomas E. Perez, United States Secretary of Labor (the
2 “Secretary”), alleges:

3 1. This action arises under Title I of the Employee Retirement Income
4 Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. §§ 1001-1191c, and is
5 brought by the Secretary under ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§
6 1132(a)(2) and (5), to enjoin acts and practices that violate the provisions of Title I
7 of ERISA, to obtain appropriate equitable relief for breaches of fiduciary duty
8 under ERISA § 409, 29 U.S.C. § 1109, and to obtain such further equitable relief
9 as may be appropriate to redress and to enforce the provisions of Title I of ERISA.

10 2. This court has jurisdiction over this action pursuant to ERISA §
11 502(e)(1), 29 U.S.C. § 1132(e)(1).

12 3. Venue of this action lies in the Central District of California pursuant
13 to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Nickson’s Machine
14 Shop 401(k) Savings Plan was administered in Santa Maria, California, within this
15 district.

16 **DEFENDANTS**

17 4. The Nickson’s Machine Shop 401(k) Savings Plan (the “Plan”) is an
18 employee benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3),
19 which is subject to the provisions of Title I of ERISA pursuant to ERISA § 4(a), 29
20 U.S.C. § 1003(a).

21 5. At all relevant times, Defendant Nickson’s Machine Shop, Inc.
22 (“Nickson’s”) a California corporation, was and is the sponsor and Plan
23 Administrator of the Plan, a fiduciary of the Plan within the meaning of ERISA §
24 3(21)(A)(i) and (iii), 29 U.S.C. § 1002(21)(A)(i) and (iii), and a party in interest to
25 the Plan within the meaning of ERISA § 3(14)(A) and (C), 29 U.S.C. §
26 1002(14)(A) and (C).

27 6. At all relevant times, Defendant Dennis W. Leal (“Leal”), President
28 and co-owner of Nickson’s and named trustee of the Plan, was and is a fiduciary of

1 the Plan within the meaning of ERISA § 3(21)(A)(i) and (iii), 29 U.S.C. §
2 1002(21)(A)(i) and (iii), and a party in interest to the Plan within the meaning of
3 ERISA § 3(14)(A), (E) and (H), 29 U.S.C. § 1002(14)(A), (E) and (H).

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

6 **ALLEGATIONS:**

7 **FAILURE TO REMIT AND TIMELY REMIT EMPLOYEE**

8 **CONTRIBUTIONS AND LOAN REPAYMENTS TO THE PLAN**

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

11 9. Nickson's, the Plan sponsor, established the Plan on July 1, 2006 to
12 provide benefits to its employees upon retirement, death or disability.

13 10. The Plan's governing documents, which were adopted by Nickson's,
14 provide that participants could make salary reduction contributions to the Plan, and
15 that such deferred amount would be contributed to the Plan and allocated to the
16 individual participants' accounts. The Plan's governing documents also permit an
17 individual participant to borrow money from his or her 401(k) account balance for
18 certain purposes. The participant may repay the loan through salary reduction
19 contributions to the Plan.

20 11. During the period from July 2006 and July 15, 2011, Defendant Leal
21 caused Nickson's to withhold at least \$47,745.66 from employees' pay for salary
22 reduction contributions and loan repayments to the Plan, but failed to remit the
23 amounts so withheld into the Plan's accounts, and instead, retained and
24 commingled the withheld contributions with Nickson's company assets.

25 12. The Plan's governing Plan documents required that employee
26 contributions be remitted to the Plan on the earliest date that they could reasonably
27 be segregated from the Company's assets. Based on a review of the Company's
28 demonstrated pattern and practice, the employee contributions could be reasonably

1 segregated from Nickson's assets within four business days of withholding.
2 During the period from July 2006 and July 15, 2011, Defendant Leal caused
3 Nickson's to fail to timely remit at least \$129,157.64 in owing employee
4 contributions and employee loan repayments to the Plan.

5 13. By the conduct described in paragraphs 11 and 12 above, Leal caused
6 the Plan at least \$57,991.36 in losses, including lost-opportunity income.

7 14. By the conduct described in paragraphs 11 and 12 above, Defendants
8 Nickson's and Leal, acting in their fiduciary capacities:

9 a. failed to hold the assets of the Plan in a trust in violation of
10 ERISA § 403(a), 29 U.S.C. § 1103(a);

11 b. permitted the assets of the Plan to inure to the benefit of the
12 Company, in violation of ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1);

13 c. failed to act solely in the interest of the participants and
14 beneficiaries of the Plan and for the exclusive purpose of providing benefits to
15 participants and their beneficiaries and defraying reasonable expenses of Plan
16 administration, in violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);

17 d. failed to act with care, skill, prudence, and diligence under the
18 circumstances then prevailing that a prudent person acting in a like capacity and
19 familiar with such matters would use in the conduct of an enterprise of a like
20 character and with like aims, in violation of ERISA § 404(a)(1)(B), 29 U.S.C. §
21 1104(a)(1)(B);

22 e. caused the Plan to engage in transactions which they knew or
23 should have known constituted a direct or indirect lending of money or other
24 extension of credit between the Plan and a party in interest, in violation of ERISA
25 § 406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B);

26 f. caused the Plan to engage in transactions that they knew or
27 should have known constituted a direct or indirect transfer to, or use by or for the
28 benefit of, a party in interest, of assets of the Plan, in violation of ERISA

1 § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D); and

2 g. dealt with assets of the Plan in their own interests and acted on
3 behalf of a party whose interests are adverse to the interests of the Plan or the
4 interests of its participants and beneficiaries, in violation of ERISA § 406(b)(1) and
5 (2), 29 U.S.C. § 1106(b)(1) and (2).

6 15. As a direct and proximate result of the breaches of fiduciary duties
7 committed by Nickson's and Leal, as described in paragraphs 11 and 12 above, the
8 Plan has suffered losses, including lost-opportunity income, for which Defendants
9 Nickson's and Leal are jointly and severally liable pursuant to ERISA § 409, 29
10 U.S.C. § 1109.

11 16. Defendants Nickson's and Leal are liable as co-fiduciaries pursuant to
12 ERISA § 405(a), 29 U.S.C. § 1105(a), for the violations alleged in paragraphs 11
13 and 12 above because: (1) they knowingly participated in, or knowingly undertook
14 to conceal, acts or omissions of the other, knowing such acts or omissions were
15 breaches; (2) they enabled each other to commit such breaches by their failure to
16 comply with ERISA §§ 403(a) and (c)(1), 404(a)(1)(A) and (B), and 406(a)(1)(B)
17 and (D), 29 U.S.C. §§ 1103(a) and (c)(1), 1104(a)(1)(A) and (B), and
18 1106(a)(1)(B) and (D), in the administration of their specific responsibilities which
19 gave rise to their status as fiduciaries; or (3) they had knowledge of the other's
20 respective breaches and failed to make reasonable efforts under the circumstances
21 to remedy such breaches.

22 17. As a direct and proximate result of the breaches and violations set
23 forth in paragraphs 11 and 12 above, the Secretary is entitled to such equitable or
24 remedial relief as the Court may deem appropriate, including restoration of Plan
25 losses, including lost-opportunity income that continues to accrue, and
26 appointment of an independent fiduciary with discretionary authority over the
27 administration and management of the Plan, pursuant to ERISA § 409, 29 U.S.C. §
28 1109.

PRAYER FOR RELIEF

WHEREFORE, the Secretary prays for judgment:

A. Ordering Nickson’s and Leal to restore to the Plan any losses, including lost-opportunity income, resulting from fiduciary breaches committed by them or for which they are liable;

B. Ordering Nickson’s and Leal to correct the prohibited transactions in which they engaged or which they caused the Plan to engage;

C. Permanently enjoining Nickson’s and Leal from violating the provisions of Title I of ERISA;

D. Permanently enjoining Leal from serving as a fiduciary of, or service provider, to any ERISA-covered employee benefit plan and removing him from any position he now holds as a fiduciary of the Plan;

E. Appointing an independent fiduciary to distribute the Plan’s assets to the participants and beneficiaries, terminate the Plan, and conclude any Plan-related matters connected with the proper termination of the Plan;

F. Requiring Nickson’s and Leal to pay for all costs associated with the appointment and retention of the independent fiduciary;

G. Requiring Defendants to cooperate with the independent fiduciary;

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

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

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Dated: January 10, 2014

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