

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY**

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HILDA L. SOLIS, Secretary of Labor,	:
United States Department of Labor,	:
Plaintiff,	:
	:
v.	:
	:
WILLIAM H. KISER and MARY SUE KISER,	:
individually and as trustees and fiduciaries of the	:
IROTAS MANUFACTURING COMPANY, LLC	:
401(K) PLAN, IROTAS MANUFACTURING	:
COMPANY, LLC and the IROTAS	:
MANUFACTURING COMPANY, LLC	:
401(K) PLAN	:
	:
Defendants.	:

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**COMPLAINT**

Plaintiff, Hilda L. Solis, 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. Secs. 1001, et seq., and is brought by the Secretary under ERISA Secs. 502(a)(2) and (5), 29 U.S.C. Secs. 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 Sec. 409, 29 U.S.C. Sec. 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 Sec. 502(e)(1), 29 U.S.C. Sec. 1132(e)(1).

3. Irotas Manufacturing Company, LLC 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. Irotas Manufacturing Company, LLC ("Irotas" or "Company"), a Kentucky corporation, is the sponsor of the Plan.

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

#### DEFENDANTS

6. At all relevant times, Defendant William H. Kiser was an officer, member of the Irotas board of directors, and owner of Irotas and a trustee and 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), (C), (E) and (H), 29 U.S.C. §1002(14)(A), (C), (E) and (H).<sup>1</sup>

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<sup>1</sup> William H. Kiser and Mary Sue Kiser filed for personal bankruptcy on May 23, 2011 in the U.S. Bankruptcy Court, Middle District of Florida, Case Nos. 9:11-bk-09809 and 9:11-bk-09810. 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 is "an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police or regulatory power," and is excluded from the operation of the automatic stay provisions of the Bankruptcy Code pursuant to 11 U.S.C. Sec. 362(b)(4). The Secretary's efforts to enforce any monetary portion of any judgment obtained against Defendants will be consistent with the Bankruptcy Code.

7. At all relevant times, Defendant Mary Sue Kiser was an officer, member of the Irotas board of directors, and owner of Irotas and a trustee and 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), (C), (E) and (H), 29 U.S.C. §1002(14)(A), (C), (E) and (H).

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

9. 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**

#### **Transfer of \$487,138.08 to non-participants of the Plan.**

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

11. Upon information and belief, from on or about June 1, 1980 to on or about December 6, 2007, assets were held in an American Funds Investments account in the name of the Plan. These assets were plan assets within the meaning of ERISA.

12. Upon information and belief, on or about December 6, 2007, Defendant William H. Kiser and/or Defendant Mary Sue Kiser transferred or caused to be transferred the Plan's funds into a checking account in the Plan's name at Commonwealth Bank & Trust Company ("Commonwealth"). Defendants William H. Kiser and Mary Sue Kiser knew about this transfer.

13. Upon information and belief, on or about March 24, 2008, Defendant William H. Kiser and/or Defendant Mary Sue Kiser transferred or caused to be transferred the Plan's funds into a money market account at Commonwealth. Defendants William H. Kiser and Mary Sue Kiser knew about this transfer.

14. On or about June 17, 2008, Defendant William H. Kiser transferred \$129,376.90 from the Plan to National Tube Supply Company ("NTS"), a supplier of raw materials for the Company's manufacturing process. Defendant Mary Sue Kiser knew about this transfer and did nothing to stop or reverse this transfer.

15. On or about July 9, 2008, Defendant William H. Kiser transferred \$127,761.18 from the Plan to NTS. Defendant Mary Sue Kiser knew about this transfer and did nothing to stop or reverse this transfer.

16. On or about July 25, 2008, Defendant William H. Kiser withdrew \$60,000.00 from the Plan and this sum was deposited into the Company's checking account that same day. Defendant Mary Sue Kiser knew about this withdrawal and did nothing to stop or reverse this withdrawal.

17. On or about July 31, 2008, Defendant William H. Kiser withdrew \$60,000.00 from the Plan and deposited this sum into the Company's checking account on August 1, 2008. Defendant Mary Sue Kiser knew about this withdrawal and subsequent deposit and did nothing to stop or reverse this withdrawal.

18. On or about August 14, 2008, Defendant Mary Sue Kiser withdrew \$110,000.00 from the Plan and deposited this amount into the Company's checking account that same day. Defendant William H. Kiser was aware of this withdrawal and subsequent deposit and did nothing to stop or reverse this withdrawal.

19. By the conduct described in paragraphs 10 through 18 above, Defendants William H. Kiser, Mary Sue Kiser and Irotas:

a. violated ERISA §403(a) and (c)(1), 29 U.S.C. §1103(a) and (c)(1), which requires that all assets of an employee benefit plan shall be held in trust and never inure to the benefit of the employer;

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 their duties with respect to the Plan solely in the interests 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);

d. 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);

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).

20. Defendants William H. Kiser and Mary Sue Kiser are liable, pursuant to ERISA §405(b)(1), 29 U.S.C. §1105(b)(1), during the time periods when they acted as trustees of the Plan.

21. Defendants William H. Kiser and Mary Sue Kiser are liable, pursuant to ERISA §405(a), 29 U.S.C. §1105(a), during the time periods when they acted as fiduciaries of the Plan.

**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 each defendant to correct the prohibited transactions in which he or it engaged, restore any losses to the Plan, and pay appropriate interest;

**D.** Requiring the Plan to set off from the trustees' individual accounts the amount of losses, including lost opportunity costs, resulting from the trustees' fiduciary breaches, as authorized by Section 1502(a) of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, Section 1502(a), 111 Stat. 788, 1058-59 (1997) (codified at 29 U.S.C. §1056(d)(4)), if the losses to the Plan are not otherwise restored to the Plan by the defendants;

**E.** 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;

**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

JOAN E. GESTRIN  
Regional Solicitor

BENJAMIN T. CHINNI  
Associate Regional Solicitor

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