

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
KNOXVILLE DIVISION

THOMAS E. PEREZ, )  
Secretary of Labor, )  
United States Department of Labor, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
DITCH WITCH EQUIPMENT OF )  
TENNESSEE, INC., )  
AUBREY NEEDHAM, an individual, )  
DITCH WITCH EQUIPMENT OF )  
TENNESSEE PROFIT SHARING PLAN, )  
 )  
Defendants. )

FILE NO.

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**COMPLAINT**  
**(Injunctive Relief Sought)**

Plaintiff THOMAS E. PEREZ, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR (“Secretary”) alleges as follows:

1. This cause of action arises under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001, et seq. One of the goals set forth in ERISA is to ensure “the soundness and stability of plans with respect to adequate funds to pay promised benefits.” ERISA § 2(a), 29 U.S.C. § 1001(a). To protect plan investments, ERISA requires that those who manage the investments act solely, exclusively and prudently in the interest of plan participants, and in

accordance with Plan documents. ERISA §§ 404(a)(1)(A), (B) & (D), 29 U.S.C. §§ 1104(a)(1)(A), (B) & (D).

2. This action is brought to enjoin acts and practices which violate the provisions of Title I of ERISA, and to obtain other appropriate equitable relief to redress violations and enforce the provisions of that Title, pursuant to §§ 409 and 502(a)(5) of ERISA, 29 U.S.C. §§ 1109, 1132(a)(5).

### **I. JURISDICTION**

3. Jurisdiction hereof is conferred upon the Court by § 502 (e) (1) of ERISA, 29 U.S.C. § 1132 (e) (1).

4. The Ditch Witch Equipment of Tennessee Profit Sharing Plan (hereinafter “the Profit Sharing Plan” or “the Plan”) is or was at all times relevant to this action an employee benefit plan within the meaning of § 3(3) of ERISA, 29 U.S.C. § 1002(3).

### **II. VENUE**

5. Venue of this action lies in the Eastern District of Tennessee, the district where the Plan is or was administered, pursuant to § 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

### **III. DEFENDANTS**

6. Each of the following is a "fiduciary" with respect to the Plan within the meaning of § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A):

A. Defendant Aubrey Needham was the named Trustee of the Plan at all relevant times and exercised discretionary authority or discretionary control respecting the management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or or had discretionary authority or discretionary responsibility in the administration of the Plan.

B. Defendant Ditch Witch Equipment of Tennessee, Inc. ("Ditch Witch" or "the Company"), was the Plan Sponsor at relevant times and exercised discretionary authority or discretionary control respecting the management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or responsibility in the administration of the Plan.

7. Each of the following is a "party in interest" to the Plan within the meaning of § 3(14) of ERISA, 29 U.S.C. § 1002(14):

A. As a fiduciary to the Plan, a person providing services to the Plan, and President and owner of Ditch Witch Equipment of Tennessee, Inc., Defendant Aubrey Needham is or was a party in interest with respect to the Plan within the meaning of §§ 3(14)(A), (B), and (H) of ERISA, 29 U.S.C. § 1002(14)(A), (B),

and (H).

B. As fiduciary to the Plan and an employer any of whose employees were covered by the Plan, Ditch Witch Equipment of Tennessee is or was a party in interest with respect to the Plan within the meaning of § 3(14)(A) and (C) of ERISA, 29 U.S.C. § 1002(14)(A) and (C).

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

#### **IV. FACTS REGARDING THE PROFIT SHARING PLAN AND ITS INVESTMENTS**

9. Ditch Witch was at all times relevant to this action a Tennessee corporation that offered a full line of Ditch Witch and other manufacturers' new and used products, including underground construction and compact utility equipment.

10. Defendant Needham founded, owned, and operated Ditch Witch until he sold the Company in December 2010.

#### ***The Establishment of the Plan and Background Investment Transactions***

11. Ditch Witch established the Profit Sharing Plan in 1994 and funded it through employer contributions.

12. The Plan, as amended, provided for distribution to participants at normal retirement, termination of employment for reasons other than death, and distribution on account of death.

13. The Plan is a defined contribution employer profit sharing pension plan, as described in ERISA § 3(3).

14. In late 2004 or early 2005, Defendant Needham decided to transfer Plan assets to stock broker Jeremy Gorelick after one meeting with Gorelick. Gorelick was with the brokerage firm, the Maxim Group, at the time.

15. On May 25, 2005, Defendant Needham signed a Margin Agreement with Maxim Group allowing the Plan account to make purchases on margin.

16. As of September 30, 2005, the Maxim Group Plan Account statement (Plan account # 56976690) reflected a negative cash and cash equivalent margin balance of \$420,768.15, with 62 percent of the portfolio invested in mutual funds, and 38 percent invested in common stocks. All of the investments, except for one mutual fund, were margin investments.

17. In December 2005, Defendant Needham began authorizing the Plan to invest in stock warrants or derivative securities, purchasing 10,000 stock warrants in the publicly-traded company, Star Maritime Acquisition Corporation (SMAC) for \$100,000, which comprised 62 percent of the Plan's assets. As of December

31, 2005, the Maxim Group Plan Account statement reflected the Plan's negative balance of \$583,204.89, and net assets of \$159,981.

18. In early 2006, Defendant Needham continued to authorize the purchase of SMAC stock warrants. As of March 2006, SMAC warrants comprised 75 percent of Plan assets. By December 2006, all Plan assets were invested in SMAC warrants.

19. In October 2006, Defendant Needham transferred Plan assets to follow Gorelick to the brokerage firm Ladenburg, Thalman, and Company.

20. On December 11, 2006, Defendant Needham wrote Gorelick that he (Needham) was solely responsible for acting on behalf of the Plan. Defendant Needham signed a "Trustee Certification of Investment Powers" stating that only Needham had discretion over the Plan account.

21. In January 2007, Defendant Needham transferred Plan assets to follow Gorelick to the brokerage firm Gunn Allen Financial.

22. In January 2007, Defendant Needham authorized the investment of \$100,039 of Plan assets in mutual funds, bringing percentage of Plan assets invested in stock warrants from 100 percent to 54 percent.

***Investment Transactions Involving  
PharmAthene, Inc., Stock and Stock Warrants***

23. In April 2007, Defendant Needham authorized the sale of all holdings of SMAC stock warrants and began purchasing stock warrants of another publicly-traded company, Health Care Acquisition Company (HCAC), which became PharmAthene, Inc., in August 2007.

24. From April 2007 through July 2007, Defendant Needham authorized the Plan to purchase 294,500 HCAC stock warrants (with an expiration date of July 27, 2009) for \$308,725.70. By July 2007, Defendant Needham had authorized the sale of all mutual fund investments by the Plan. The Plan did not own cash or mutual funds from this time forward.

25. PharmAthene stock traded at \$7.49 per share in April 2007, and at \$5.30 per share in August 2007.

26. In eight transactions in August 2007, Defendant Needham authorized the Plan to purchase 90,300 PharmAthene stock warrants (with an expiration date of July 27, 2009) for \$48,671.70.

27. By the end of August 2007, 100 percent of Plan assets were invested in PharmAthene stock warrants.

28. In 2008, Defendant Needham authorized several sales and purchases of PharmAthene stock warrants. Over numerous transactions, the Plan purchased

278,100 PharmAthene stock warrants for \$77,520.10, and sold 362,881

PharmAthene stock warrants, for \$88,373.92 in proceeds.

29. As of May 1, 2008, PharmAthene stock traded at \$2.60 per share.

30. In January 2009, the Plan had a negative margin balance of \$14.54 and net worth of \$48,003.04. The Plan's assets consisted only of 300,019

PharmAthene stock warrants.

31. In April 2009, Defendant Needham authorized the Plan to purchase 135,000 shares of PharmAthene stock for \$413,215.68. Defendant Needham purchased the majority of the shares (110,000) on margin for \$344,445.68.

32. By the end of April 2009, Defendant Needham authorized the Plan to sell all of its remaining PharmAthene stock warrants (300,019), generating \$15,730.59 in proceeds.

33. Also by the end of April 2009, Defendant Needham authorized the Plan to sell all of its shares of PharmAthene stock (135,000), generating \$357,634.76 in proceeds.

34. The Plan suffered losses and lost opportunity costs as a result of the transactions in PharmAthene stock warrants and stocks authorized by Defendant Needham between April 2007 and April 2009.

35. By authorizing the transactions in PharmAthene stock warrants and stocks, Defendant Needham failed to give appropriate consideration to whether the

investments or investment course of action were reasonably designed to further the purposes of the Plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investments or investment course of action. Defendant Needham failed to appropriately consider: the composition of the Plan's investment portfolio with regard to diversification; the liquidity and return of the portfolio relative to the anticipated cash flow requirements of the Plan; and the projected return of the portfolio relative to the funding objectives of the Plan. See 29 C.F.R. § 2550.404a-1(b)(2)(i)-(ii).

## **V. BREACHES OF FIDUCIARY DUTIES**

By the acts and omissions described above in Paragraph IV, Defendants Needham and Ditch Witch, the fiduciaries of the Plan:

A. Failed to discharge their duties solely in the interest of the participants and beneficiaries of the Plan and for the exclusive purpose of providing benefits and defraying reasonable expenses of plan administration, in violation of § 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A). Said conduct includes Defendants' authorization of investments of Plan assets, primarily on margin, without conducting a thorough and independent investigation into the purchase of the derivative securities/stock warrants, and without structuring the investment of Plan assets to ensure diversification and the liquidity, anticipated cash flow requirements, and funding objectives of the Plan.

B. Failed to discharge their duties with the requisite degree of 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 § 404(a)(1)(B) of ERISA, 29 U.S.C. § 1104(a)(1)(B). Said conduct includes Defendants' authorization of investments of Plan assets, primarily on margin, without conducting a thorough and independent investigation into the purchase of the derivative securities/stock warrants, and without structuring the investment of Plan assets to ensure diversification and the liquidity, anticipated cash flow requirements, and funding objectives of the Plan.

C. Failed to diversify the investments of the Plan so as to minimize the risk of large losses, in violation of § 404(a)(1)(C) of ERISA, 29 U.S.C. § 1104(a)(1)(C). Said conduct includes Defendants' authorizations of investments of Plan assets entirely in stock warrants of a single company and/or a combination of stock warrants and stocks of a single company, which failed to structure the investment of Plan assets to ensure diversification and the liquidity, anticipated cash flow requirements, and funding objectives of the Plan.

D. Defendants are liable for the fiduciary breaches of the co-fiduciaries with respect to the Plan, pursuant to § 405(a) of ERISA, 29 U.S.C. § 1105(a), to the extent that Defendants participated knowingly in, or knowingly undertook to

conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach, in violation of § 405(a)(1) of ERISA, 29 U.S.C. § 1105(a)(2); or failed to comply with section 404(a)(1) in the administration of specific responsibilities which give rise to status as a fiduciary and thereby enabled such other fiduciaries to commit a breach, in violation of § 405(a)(2) of ERISA, 29 U.S.C. § 1105(a)(2); or had knowledge of a breach by the other fiduciaries and failed to make reasonable efforts under the circumstances to remedy the breach, in violation of § 405(a)(3) of ERISA, 29 U.S.C. § 1105(a)(3).

WHEREFORE, Plaintiff prays that the Court:

- A. Order Defendants to restore to the Plan all losses, including interest and/or lost opportunity costs, which occurred as a result of the breaches of their fiduciary obligations;
- B. Order that the Plan set off the individual Plan account of Needham against the amount of losses, including lost opportunity costs, resulting from his fiduciary breaches, as authorized by Section 1502(a) of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §1502(a), 111 Stat. 788, 1058-59 (1997) (codified at 29 U.S.C. §1056(d)(4)), if the losses are not otherwise restored to the Plans by Needham, and reallocated to the non-breaching participants;
- C. Order disgorgement of any benefits or profits received by a fiduciary as a result of fiduciary violations;

D. Appoint a successor fiduciary or administrator, at Needham's expense, to receive any funds recovered as a result of this action and to distribute the proceeds to the participants as appropriate;

E. Permanently enjoin Needham from serving as fiduciary, administrator, officer, trustee, custodian, agent, employee, representative, or having control over the assets of any employee benefit plan subject to ERISA;

F. Enjoin Needham from engaging in any further action in violation of Title I of ERISA;

G. Award the Secretary the costs of this action; and

H. Provide such other relief as may be just and equitable.

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