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 14 United States Secretary of Labor

15 UNITED STATES DISTRICT COURT
 16
 17 NORTHERN DISTRICT OF CALIFORNIA

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

21 Plaintiff,

22 v.

23 ANIMAL CLINIC OF ALAMO, INC., a
 24 corporation; DEBORAH KNIBB, an
 25 individual; JOHN C. BAINE, III, an
 26 individual; and the ANIMAL CLINIC
 27 OF ALAMO PROFIT SHARING
 28 PLAN, an employee pension benefit
 plan.

Case No. 3:14-cv-667

**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 11, and is brought by the Secretary
4 under ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5), to enjoin acts
5 and practices that violate the provisions of Title I of ERISA, to obtain appropriate
6 equitable relief for breaches of fiduciary duty under ERISA § 409, 29 U.S.C. §
7 1109, and to obtain such further equitable relief as may be appropriate to redress
8 and to enforce the provisions of Title I of ERISA.

9 **JURISDICTION**

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

12 **VENUE**

13 3. Venue lies in the Northern District of California under ERISA §
14 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Animal Clinic of Alamo Profit
15 Sharing Plan was administered in Alamo, California, within this district.

16 **INTRADISTRICT ASSIGNMENT**

17 4. This case should be assigned to the San Francisco Division or the
18 Oakland Division of this Court under Civil Local Rule 3-2(c) and (d) because a
19 substantial part of the events or omissions which give rise to the Secretary’s claims
20 occurred in Contra Costa County.

21 **DEFENDANTS**

22 5. The Animal Clinic of Alamo Profit Sharing Plan (the “Plan”) is an
23 employee benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3),
24 which is subject to the provisions of Title I of ERISA pursuant to ERISA § 4(a), 29
25 U.S.C. § 1003(a). The Plan is named as a defendant under Federal Rule of Civil
26 Procedure 19(a) solely to assure that complete relief can be granted.

27 6. At all relevant times, Defendant Animal Clinic of Alamo, Inc.
28 (“Animal Clinic”), a California corporation, was and is the sponsor and Plan

1 Administrator of the Plan, a fiduciary of the Plan within the meaning of ERISA §
2 3(21)(A)(i) and (iii), 29 U.S.C. § 1002(21)(A)(i) and (iii), and a party in interest to
3 the Plan within the meaning of ERISA § 3(14)(A) and (C), 29 U.S.C. §
4 1002(14)(A) and (C).

5 7. At all relevant times, Defendant John C. Baine, III (“Baine”), co-
6 owner of the Animal Clinic and named trustee of the Plan, was and is a fiduciary of
7 the Plan within the meaning of ERISA § 3(21)(A)(i) and (iii), 29 U.S.C. §
8 1002(21)(A)(i) and (iii), and a party in interest to the Plan within the meaning of
9 ERISA § 3(14)(A), (E) and (H), 29 U.S.C. § 1002(14)(A), (E) and (H).

10 8. At all relevant times, Defendant Deborah Knibb (“Knibb”), co-owner
11 of the Animal Clinic and named trustee of the Plan, was and is a fiduciary of the
12 Plan within the meaning of ERISA § 3(21)(A)(i) and (iii), 29 U.S.C. §
13 1002(21)(A)(i) and (iii), and a party in interest to the Plan within the meaning of
14 ERISA § 3(14)(A), (E) and (H), 29 U.S.C. § 1002(14)(A), (E) and (H).

15 **ALLEGATIONS:**

16 **A. DEFENDANT KNIBB’S MISAPPROPRIATION AND** 17 **COMMINGLING OF PLAN ASSETS**

18 9. Paragraphs 1 through 8 above are realleged and incorporated herein
19 by reference.

20 10. The Animal Clinic, the Plan sponsor, established the Plan on January
21 1, 1993 to provide benefits to its employees upon retirement, death or disability.

22 11. The Plan’s governing documents, which were adopted by the Animal
23 Clinic, provide that the Plan is a defined contribution profit sharing plan funded by
24 discretionary employer contributions.

25 12. On June 2, 2010, Knibb instructed Charles Schwab & Co., Inc.
26 (“Schwab”), a custodian of Plan assets, to issue six checks totaling \$150,000 in her
27 name from the Plan’s pooled retirement account. Pursuant to this request, on the
28 same day, Schwab issued six checks in Knibb’s name totaling \$150,000. Knibb

1 deposited these funds in her personal Schwab individual retirement account
2 (“IRA”).

3 13. On October 26, 2011, Knibb instructed Schwab to issue a check from
4 the Plan’s pooled account for an additional \$2,338.12. Schwab issued a check for
5 this amount and Knibb again deposited the funds in her personal Schwab IRA.

6 14. No less than \$32,580.82 of these funds belonged to non-fudiciary Plan
7 participants other than Knibb or Baine.

8 15. Knibb used the withdrawn Plan funds for non-Plan purposes,
9 including the Animal Clinic’s business expenses and Knibb’s personal expenses.

10 16. By the conduct described in paragraph 12, 13 and 15 above,
11 Defendant Knibb, acting in her fiduciary capacity:

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

14 b. failed to perform her duties to the plan solely in the interest of
15 the participants and beneficiaries and for the exclusive purpose of providing
16 benefits to participants and their beneficiaries and defraying reasonable expenses
17 of Plan administration, in violation of ERISA § 404(a)(1)(A), 29 U.S.C. §
18 1104(a)(1)(A);

19 c. failed to act with care, skill, prudence, and diligence under the
20 circumstances then prevailing that a prudent person acting in a like capacity and
21 familiar with such matters would use in the conduct of an enterprise of a like
22 character and with like aims, in violation of ERISA § 404(a)(1)(B), 29 U.S.C. §
23 1104(a)(1)(B);

24 d. failed to act in accordance with Plan documents, in violation of
25 ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D);

26 e. caused the Plan to engage in transactions that she 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 f. dealt with assets of the Plan in her 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 17. As a direct and proximate result of the breaches of fiduciary duties
7 committed by Knibb described in paragraph 12 above, as of February 3, 2014,
8 Knibb caused the Plan at least \$36,925.93 in losses, including lost-opportunity
9 income, which continues to accrue.

10 **B. FAILURE TO TIMELY DISTRIBUTE PARTICIPANT BENEFITS**

11 18. Paragraphs 1 through 17 above are realleged and incorporated herein
12 by reference.

13 19. The Plan's governing documents provide that vested account balances
14 of \$5,000 or less must be distributed in a lump sum as soon as administratively
15 feasible after the participant's termination date.

16 20. All Plan participants were terminated from the Animal Clinic on or
17 before July 1, 2011, when the Animal Clinic ceased operating. To date, however,
18 Defendants Animal Clinic, Knibb, and Baine have failed to make distributions to
19 three participants with balances of less than \$5,000 in the Plan's account held at
20 Citibank, N.A., a custodian of Plan assets.

21 21. By the conduct described in paragraph 20 above, Defendants Animal
22 Clinic, Knibb, and Baine, acting in their fiduciary capacities, failed to act in
23 accordance with Plan documents, in violation of ERISA § 404(a)(1)(D), 29 U.S.C.
24 § 1104(a)(1)(D).

25 **C. FAILURE TO MAINTAIN A FIDELITY BOND**

26 22. Paragraphs 1 through 21 above are realleged and incorporated herein
27 by reference.

1 and retention of the independent fiduciary;

2 G. Requiring all Defendants to cooperate with the independent fiduciary;

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

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

5
6 Dated: February 12, 2014

M. PATRICIA SMITH
Solicitor of Labor

JANET M. HEROLD
Regional Solicitor

DANIELLE L. JABERG
Counsel for ERISA

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12 By: /s/ Benjamin R. Botts
13 BENJAMIN R. BOTTTS
14 Trial Attorney
15 Attorneys for Plaintiff,
16 United States Secretary of Labor
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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and sub-categories with checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$

CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

05/4+

(Place an "X" in One Box Only)

() SAN FRANCISCO/OAKLAND () SAN JOSE () EUREKA

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.