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 11 Secretary of Labor, United States
 Department of Labor

12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 OAKLAND DIVISION

16	THOMAS E. PEREZ, Secretary of Labor,)	Case No. 4:14-cv-5549
17	UNITED STATES DEPARTMENT OF)	
18	LABOR,)	COMPLAINT FOR VIOLATIONS OF
19	Petitioner,)	ERISA
20	v.)	
21	BAR-K, INC., a corporation; WALTER NG,)	
22	an individual; BRUCE HORWITZ, an)	
23	individual; and the BAR-K 401(K) PLAN, an)	
24	employee pension benefit plan;)	
25	Defendants.)	

26 Plaintiff Thomas E. Perez, Secretary of Labor, United States Department of Labor (the
 27 “Secretary”), alleges:
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1 6. At all relevant times, Defendant Walter Ng exercised discretionary authority and
2 control respecting the management and disposition of the Plan and its assets and has been a
3 fiduciary of the Plan within the meaning of ERISA § 3(21)(A)(i) and (iii), 29 U.S.C. §
4 1002(21)(A)(i) and (iii); and party in interest to the Plan within the meaning of ERISA §
5 3(14)(A), and (H), 29 U.S.C. § 1002(14)(A), and (H).

6 7. From at least December 1, 2002, until on or around November 1, 2007, Defendant
7 Bruce Horwitz, as manager of B-4 Partners LLC, a California partnership, exercised
8 discretionary authority and control respecting the management and disposition of the Plan and its
9 assets and was a fiduciary of the Plan within the meaning of ERISA § 3(21)(A)(i) and (iii), 29
10 U.S.C. § 1002(21)(A)(i) and (iii); and a party in interest to the Plan within the meaning of
11 ERISA § 3(14)(A), 29 U.S.C. § 1002(14)(A).

12 8. The Plan is named as a Defendant herein pursuant to Rule 19(a) of the Federal
13 Rules of Civil Procedure, solely to assure that complete relief can be granted. The Plan was
14 established effective January 1, 1996 by the Company, the Plan Sponsor, to provide benefits to
15 eligible employees upon retirement, death or disability.

16 **FIRST VIOLATION: IMPRUDENT INVESTMENT IN RE LOANS LLC**

17 9. Paragraphs 1 through 8 above are re-alleged and incorporated herein by reference.

18 10. Beginning on or around December 1, 2002, the Plan began investing in RE Loans
19 LLC until on or around June 30, 2008.

20 11. Since at least October 2007, by continuing to invest in RE Loans LLC,
21 Defendants Walter Ng and the Company, acting in their fiduciary capacities failed to act with the
22 care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person
23 acting in a like capacity and familiar with such matters would use in the conduct of an enterprise
24 of a like character and with like aims, in violation of ERISA § 404(a)(1)(B), 29 U.S.C. §
25 1104(a)(1)(B).

26 12. As a direct and proximate result of the breaches of fiduciary duties committed by
27 Defendants Walter Ng and the Company, as described in paragraphs 9 through 11 above, the
28

1 Plan has suffered losses, including lost-opportunity income, for which Defendants Walter Ng and
2 the Company are jointly and severally liable pursuant to ERISA § 409, 29 U.S.C. § 1109.

3 **SECOND VIOLATION: PROHIBITED EXTENSION OF CREDIT TO RE LOANS LLC**

4 13. Paragraphs 1 through 8 above are re-alleged and incorporated herein by reference.

5 14. Since on or around November 1, 2007, the Plan RE Loans LLC has been a party
6 in interest to the Plan within the meaning of ERISA § 3(14)(G), 29 U.S.C. § 1002(14)(G), as an
7 entity with at least fifty percent of the voting power held by Walter Ng, a fiduciary to the Plan.

8 15. Between approximately November 1, 2007 and June 30, 2008, the Plan lent
9 money to RE Loans LLC in exchange for promissory notes.

10 16. By the conduct described in paragraphs 13 through 15, Defendants Walter Ng and
11 the Company, acting in their fiduciary capacities:

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

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

19 17. As a direct and proximate result of the breaches of fiduciary duties committed by
20 Defendants Walter Ng, and the Company, as described in paragraphs 13 through 16 above, the
21 Plan has suffered losses, including lost-opportunity income, for which Defendants Walter Ng and
22 the Company are jointly and severally liable pursuant to ERISA § 409, 29 U.S.C. § 1109.

23 **THIRD VIOLATION: DIVERSION OF PARTICIPANT LOAN REPAYMENTS**

24 18. Paragraphs 1 through 8 above are re-alleged and incorporated herein by reference.

25 19. The Plan has a participant loan program, whereby Plan participants can take loans
26 from their Plan accounts. When participant loans are repaid, Plan documents require repayments
27 be placed in a segregated account.
28

1 20. Since on or around September 30, 2008, Plan fiduciary Walter Ng and the
2 Company diverted participant loan repayments instead of placing those repayments in the
3 segregated account required by Plan documents.

4 21. By the conduct described in paragraphs 18 through 20, Defendants Walter Ng and
5 the Company, acting in their fiduciary capacities:

6 a. failed to act solely in the interest of the participants and beneficiaries of
7 the Plan and for the exclusive purpose of providing benefits to participants and their beneficiaries
8 and defraying reasonable expenses of Plan administration, in violation of ERISA § 404(a)(1)(A),
9 29 U.S.C. § 1104(a)(1)(A);

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

14 c. failed to act in accordance with the documents and instruments governing
15 the Plan as required by ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

16 22. As a direct and proximate result of the breaches of fiduciary duties committed by
17 Defendants Walter Ng, and the Company, as described in paragraphs 18 through 21 above, the
18 Plan has suffered losses, including lost-opportunity income, for which Defendants Walter Ng and
19 the Company are jointly and severally liable pursuant to ERISA § 409, 29 U.S.C. § 1109.

20 **FOURTH VIOLATION: IMPRUDENT INVESTMENT IN MORTGAGE FUND 08 LLC**

21 23. Paragraphs 1 through 8 above are re-alleged and incorporated herein by reference.

22 24. Beginning on or around July 1, 2008, the Plan began investing in Mortgage Fund
23 08 LLC (“MF08”) until on or around May 31, 2009.

24 25. By the conduct described in paragraphs 23 through 25, Defendants Walter Ng and
25 the Company, acting in their fiduciary capacities failed to act with the care, skill, prudence, and
26 diligence under the circumstances then prevailing that a prudent person acting in a like capacity
27 and familiar with such matters would use in the conduct of an enterprise of a like character and
28 with like aims, in violation of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

1 35. From on or around December 1, 2002, until November 1, 2007, B-4 Partners LLC
2 (“B-4”) collected fees as the investment manager of RE Loans LLC.

3 36. From on or around December 1, 2002, until November 1, 2007, Walter Ng and
4 Bruce Horwitz, as the managers of B-4 with decision-making authority, were fiduciaries and
5 parties in interest to the Plan.

6 37. By the conduct described in paragraphs 33 through 36, Defendants Walter Ng
7 and Bruce Horwitz, acting in their fiduciary capacities, dealt with assets of the Plan in their own
8 interests, in violation of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1).

9 38. Defendant the Company is liable for the violations of ERISA described in
10 paragraphs 33 through 37 because it participated knowingly in the breaches of fiduciary duty of
11 other fiduciaries and/or had actual or constructive knowledge of such breaches by a co-fiduciary
12 and failed to take reasonable efforts to remedy such breaches, in violation of ERISA § 405(a), 29
13 U.S.C. § 1105(a).

14 39. As a direct and proximate result of the breaches of fiduciary duties committed by
15 Defendants Walter Ng, Bruce Horwitz, and the Company, as described in paragraphs 33 through
16 38 above, the Plan has suffered losses, including lost-opportunity income, for which the named
17 Defendants are jointly and severally liable pursuant to ERISA § 409, 29 U.S.C. § 1109.

18 **EIGHTH VIOLATION: PLAN HAS HAD NO TRUSTEE SINCE AUGUST 29, 2010**

19 40. Paragraphs 1 through 8 above are re-alleged and incorporated herein by reference.

20 41. Effective August 29, 2010, Carrie Johns resigned as Trustee to the Plan.

21 42. The governing Plan documents, which were adopted and restated on January 1,
22 2009, gave the Company the authority to remove and appoint trustees to the Plan.

23 43. Since August 29, 2010, the Company has not appointed a trustee to the Plan.

24 44. By the conduct described in paragraphs 40 through 43, the Company has failed to
25 hold the assets of the Plan in a trust in violation of ERISA § 403(a), 29 U.S.C. § 1103(a).

26 45. Defendant Walter Ng is liable for the violations of ERISA described in
27 paragraphs 40 through 44 because he participated knowingly in the breaches of fiduciary duty of
28 other fiduciaries and/or had actual or constructive knowledge of such breaches by a co-fiduciary

1 and failed to take reasonable efforts to remedy such breaches, in violation of ERISA § 405(a), 29
2 U.S.C. § 1105(a).

3 **PRAYER FOR RELIEF**

4 WHEREFORE, the Secretary prays for judgment:

5 A. Ordering Defendants Walter Ng, Bruce Horwitz, and the Company to restore to
6 the Plan any losses, including lost-opportunity costs, resulting from fiduciary breaches
7 committed by them or for which they are liable;

8 B. Ordering Defendants Walter Ng, Bruce Horwitz, and the Company to correct the
9 prohibited transactions in which they engaged in or which they caused the Plan to engage in,
10 including reimbursing the Plan for all fees collected during the relevant time period;

11 C. Ordering a full accounting of the Plan as a result of the fiduciary breaches;

12 D. Permanently enjoining Defendants Walter Ng, Bruce Horwitz, and the Company
13 from violating the provisions of Title I of ERISA;

14 E. Removing the Company as fiduciary to the Plan and permanently enjoining
15 Defendants Walter Ng and Bruce Horwitz from serving as a fiduciary of, or service provider to,
16 any ERISA-covered employee benefit plan and removing them from any positions they now hold
17 as fiduciaries of the Plan;

18 F. Appointing an independent fiduciary with full discretionary authority to
19 administer the Plan, and if appropriate, distribute the Plan's assets to the participants and
20 beneficiaries, terminate the Plan, and conclude any Plan-related matters connected with the
21 proper termination of the Plan;

22 G. Requiring Defendants Walter Ng, Bruce Horwitz and the Company to pay for all
23 costs associated with the appointment and retention of the independent fiduciary;

24 H. Requiring the Defendants to cooperate with the independent fiduciary;

25 I. Awarding the Secretary the costs of this action; and
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1 J. Ordering such further relief as is appropriate and just.
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3 Dated: December 19, 2014

M. PATRICIA SMITH
Solicitor of Labor

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Regional Solicitor

6 DANIELLE L. JABERG
7 Counsel for ERISA

8 By: /s/ Joseph M. Lake
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