

1 JANET M. HEROLD
Regional Solicitor
2 IAN H. ELIASOPH (CSBN 227557)
Counsel for ERISA
3 GRACE A. KIM, Trial Attorney (CSBN 247456)
Office of the Solicitor
4 United States Department of Labor
350 S. Figueroa St., Suite 370
5 Los Angeles, California 90071
Direct: (213) 894-3950
6 Facsimile: (213) 894-2064
7 Email: kim.grace@dol.gov

8 Attorneys for Plaintiff
United States Department of Labor
9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 **THOMAS E. PEREZ**, Secretary of Labor,
United States Department of Labor,

14 Plaintiff,

15 v.

16 **DRAEGER CONSTRUCTION, INC.**,
a California corporation;

17 **DRAEGER CONSTRUCTION, LLC**,
a Nevada limited liability company;

18 **DRAEGER CONSTRUCTION, INC.**
19 **HEALTH AND WELFARE PLAN**,
20 an employee benefit plan;

21 **JEFFREY DRAEGER**, an individual.
22

23 Defendants.
24

) **Case No. CV 15-4668**

) **COMPLAINT FOR VIOLATIONS
OF ERISA**

25 Plaintiff THOMAS E. PEREZ, Secretary of Labor, United States Department of
26 Labor (“Plaintiff” or the “Secretary”), brings this action against DRAEGER
27 CONSTRUCTION, INC., a California corporation (“DCI”); DRAEGER
28 CONSTRUCTION, LLC, a Nevada limited liability company (“DCL”) (collectively,

1 DCI and DCL are hereafter referred to as the “Corporate Defendants”); JEFFREY
2 DRAEGER, an individual (“Draeger”); and the DRAEGER CONSTRUCTION, INC.
3 HEALTH AND WELFARE PLAN (the “Plan”), an employee benefit plan as defined by
4 the Employee Retirement Security Act of 1974 (“ERISA”) (all aforementioned defend-
5 ants are collectively referred to as “Defendants”), and hereby alleges:

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

13
14 **JURISDICTION & VENUE**

- 15 2. This Court has jurisdiction over this action pursuant to ERISA § 502(e)(1), 29
16 U.S.C. § 1132(e)(1).
- 17 3. Venue of this action lies in the district court for the Northern District of Califor-
18 nia pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because at all rele-
19 vant times, the Plan has been administered in or around San Jose, California,
20 and the breaches took place in or around San Jose, California, which lies within
21 this district.

22
23 **DEFENDANTS**

- 24 4. The Plan is an employee benefit plan within the meaning of ERISA § 3(3), 29
25 U.S.C. § 1002(3), which is subject to the provisions of Title I of ERISA pursu-
26 ant to ERISA § 4(a), 29 U.S.C. § 1003(a).
- 27 5. At all relevant times, DCI was and is a fiduciary of the Plan within the meaning
28 of ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and (iii); and a

1 party in interest to the Plan within the meaning of ERISA §§ 3(14)(A) and (C),
2 29 U.S.C. §§ 1002(14)(A) and (C); and exercised discretionary authority and
3 control respecting the management and disposition of the Plan and its assets and
4 exercised discretionary authority and responsibility in the administration of the
5 Plan.

6 6. At all relevant times, DCL was and is a fiduciary of the Plan within the meaning
7 of ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and (iii); and a
8 party in interest to the Plan within the meaning of ERISA §§ 3(14)(A) and (C),
9 29 U.S.C. §§ 1002(14)(A) and (C); and exercised discretionary authority and
10 control respecting the management and disposition of the Plan and its assets and
11 exercised discretionary authority and responsibility in the administration of the
12 Plan.

13 7. At all relevant times, Draeger was and is a fiduciary of the Plan within the
14 meaning of ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and
15 (iii); and a party in interest to the Plan within the meaning of ERISA § 3(14)(A),
16 29 U.S.C. § 1002(14)(A); and exercised discretionary authority and control re-
17 specting the management and disposition of the Plan and its assets and exercised
18 discretionary authority and responsibility in the administration of the Plan.

19 8. The Plan is named as a Defendant pursuant to Rule 19(a) of the Federal Rules of
20 Civil Procedure, solely to ensure that complete relief can be granted.

21
22 **ALLEGATIONS**

23 **Draeger and the Corporate Defendants Failed to Forward Withheld Employee**
24 **Contributions and COBRA Payments to the Plan**

25 9. Paragraphs 1-8 above are realleged and incorporated herein by reference.

26 10. At all relevant times, the Corporate Defendants were related construction com-
27 panies based in San Jose, California (DCI) and Las Vegas, Nevada (DCL).

28 11. The Corporate Defendants ceased operations on or about October 11, 2012.

- 1 12. Prior to ceasing operations, the Corporate Defendants specialized in building
2 and repairing common interest developments, such as condominiums and town-
3 homes.
- 4 13. The Plan was a fully insured health and welfare plan that was established by the
5 Corporate Defendants on or around July 1, 1998 for their employees. The Plan
6 most recently offered its employees medical, dental, vision, life, and other cov-
7 erage. The Plan was funded by 50% employee contributions and 50% employer
8 contributions for health and dental coverage, and 100% employee contributions
9 for vision and life insurance coverage.
- 10 14. The Corporate Defendants were named as Plan Sponsor and Plan Administrator
11 and were responsible for collecting and forwarding employee contributions
12 withheld from participants' paychecks to the Plan and for the satisfaction of no-
13 tice, disclosure, and other obligations placed on administrators pursuant to
14 ERISA.
- 15 15. The Corporate Defendants also acted as Consolidated Omnibus Budget Recon-
16 ciliation Act ("COBRA") administrator and were responsible for forwarding
17 COBRA payments received from participants to the Plan.
- 18 16. Defendant Draeger was DCI's CEO and an authorized signatory to the Corpo-
19 rate Defendants' bank accounts with the authority to transfer funds to and from
20 these accounts. Among other duties, Draeger signed payroll checks and checks
21 sent on the Corporate Defendants' behalf to pay the Plan's insurance premiums.
- 22 17. During the period from at least August 3, 2012 through October 19, 2012, Drae-
23 ger and the Corporate Defendants engaged in a practice where they withheld
24 employee contributions totaling not less than \$60,080.07 from Plan participants'
25 weekly paychecks but failed to forward these amounts to the Plan. The employ-
26 ee contributions were reasonably segregable from the Corporate Defendants' as-
27 sets in thirty (30) days.
- 28

- 1 18. Instead of remitting these withheld employee contributions to the Plan, Draeger
2 and the Corporate Defendants retained and commingled these Plan assets within
3 the Company's general banking account such that these amounts could be used
4 for non-Plan purposes.
- 5 19. During the period from at least August 3, 2012 through October 19, 2012, Drae-
6 ger and the Corporate Defendants engaged in a practice where they received not
7 less than \$3,264.96 in COBRA payments from participants but failed to forward
8 these amounts to the Plan.
- 9 20. Instead of remitting these COBRA payments to the Plan, Draeger and the Cor-
10 porate Defendants retained and commingled these Plan assets within the Com-
11 pany's general banking account such that these amounts could be used for non-
12 Plan purposes.

13
14 **Draeger and the Corporate Defendants Failed to Provide Participants With**
15 **Timely Notice That They Were at Risk of Losing Their Insurance Cover-**
16 **age, and in Fact Lost Their Insurance Coverage, Due to the Fiduciaries'**
17 **Nonpayment of Insurance Premiums**

- 18 21. Paragraphs 9-20 above are realleged and incorporated herein by reference.
- 19 22. During the relevant time period, insurance providers, including but not limited
20 to Anthem Blue Cross and Coventry (now Aetna), sent the Corporate Defend-
21 ants invoices on a monthly basis notifying Corporate Defendants of the period
22 of insurance coverage for the Plan and its participants, amounts previously re-
23 ceived for insurance premiums, and current balance for insurance premiums.
24 These insurance providers also sent the Corporate Defendants delinquency no-
25 tices when they did not receive timely payment from the Corporate Defendants,
26 highlighting the amounts still due for insurance premiums for the Plan and its
27 participants.
- 28

- 1 23. During the period from at least August 3, 2012 through when the Corporate De-
2 fendants ceased operations and stopped issuing payroll checks on or around Oc-
3 tober 19, 2012, Draeger and the Corporate Defendants failed to pay the monthly
4 insurance premiums due to these providers to ensure that Plan participants main-
5 tained their insurance coverage. As a result, these insurance providers cancelled
6 their coverage for Plan participants due to non-payment of premiums. Anthem
7 cancelled its insurance coverage for Plan participants via letter dated October 8,
8 2012, with a retroactive cancellation date of September 1, 2012. Coven-
9 try/Aetna cancelled its insurance coverage via letter dated November 21, 2012
10 with a retroactive cancellation date of September 1, 2012.
- 11 24. Despite receiving numerous delinquency notices reminding them that insurance
12 premiums had not been paid and that Plan participants' insurance coverage was
13 at risk of being cancelled, Draeger and the Corporate Defendants failed to time-
14 ly notify Plan participants of this risk so that participants could have arranged
15 alternate insurance coverage and/or have delayed elective treatment. Draeger
16 and the Corporate Defendants further failed to timely notify Plan participants
17 that their insurance coverage had, in fact, been cancelled. As a result of Draeger
18 and the Corporate Defendants' failure to provide timely notice, Plan participants
19 incurred not less than \$62,494.12 in uncovered medical claims due solely to the
20 fact that they lacked insurance coverage due to the fiduciaries' non-payment of
21 premiums.
22

23 **VIOLATIONS OF ERISA**

- 24 25. By the conduct described in paragraphs 9-20 above, Draeger and the Corporate
25 Defendants, acting in their fiduciary capacities:
- 26 a. Failed to hold Plan assets for the exclusive purpose of providing benefits to
27 Plan participants and their beneficiaries and defraying reasonable expenses
28

1 of administering the Plan, in violation of ERISA § 403(c)(1), 29 U.S.C. §
2 1103(c)(1);

3 b. Failed to act solely in the interest of the participants and beneficiaries of the
4 Plan and for the exclusive purpose of providing benefits to participants and
5 beneficiaries and defraying reasonable expenses of Plan administration, in
6 violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);

7 c. Failed to act with the care, skill, prudence, and diligence under the circum-
8 stances then prevailing that a prudent man acting in a like capacity and fa-
9 miliar with such matters would use in the conduct of an enterprise of a like
10 character and with like aims, in violation of ERISA § 404(a)(1)(B), 29
11 U.S.C. § 1104(a)(1)(B);

12 d. Caused the Plan to engage in transactions which they knew or should have
13 known constituted a direct or indirect transfer to, or use by or for the benefit
14 of, a party in interest, of assets of the Plan, in violation of ERISA
15 § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D);

16 e. Dealt with assets of the Plan in their own interests and acted on behalf of a
17 party whose interests are adverse to the interests of the Plan or the interests
18 of its participants and beneficiaries, in violation of ERISA § 406(b)(1) and
19 (2), 29 U.S.C. § 1106(b)(1) and (2).

20 26. By the conduct described in paragraphs 21-24 above, Draeger and the Corporate
21 Defendants, acting in their fiduciary capacities:

22 a. Failed to act solely in the interest of the participants and beneficiaries of the
23 Plan and for the exclusive purpose of providing benefits to participants and
24 beneficiaries and defraying reasonable expenses of Plan administration, in
25 violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);

26 b. Failed to act with the care, skill, prudence, and diligence under the circum-
27 stances then prevailing that a prudent man acting in a like capacity and fa-
28 miliar with such matters would use in the conduct of an enterprise of a like

1 character and with like aims, in violation of ERISA § 404(a)(1)(B), 29
2 U.S.C. § 1104(a)(1)(B).

- 3 27. As a direct and proximate result of the breaches of fiduciary duties committed
4 by Draeger and the Corporate Defendants, as described above, the Plan has suf-
5 fered losses, for which Draeger and the Corporate Defendants are jointly and
6 severally liable, pursuant to ERISA § 409, 29 U.S.C. § 1109.
- 7 28. DCI is liable as a co-fiduciary pursuant to ERISA § 405(a), 29 U.S.C. § 1105(a),
8 for the violations alleged above because: (1) it knowingly participated in, or
9 knowingly undertook to conceal, acts or omissions, of the other Defendants; (2)
10 it enabled the other Defendants to commit such breaches by its failure to comply
11 with ERISA § 404(a)(1)(A), (B), 29 U.S.C. § 1104(a)(1)(A), (B), in the admin-
12 istration of its specific responsibilities which gave rise to its status as a fiduci-
13 ary; or (3) it had knowledge of the other Defendants' breaches and failed to
14 make reasonable efforts under the circumstances to remedy such breaches.
- 15 29. DCL is liable as a co-fiduciary pursuant to ERISA § 405(a), 29 U.S.C. §
16 1105(a), for the violations alleged above because: (1) it knowingly participated
17 in, or knowingly undertook to conceal, acts or omissions, of the other Defend-
18 ants; (2) it enabled the other Defendants to commit such breaches by its failure
19 to comply with ERISA § 404(a)(1)(A), (B), 29 U.S.C. § 1104(a)(1)(A), (B), in
20 the administration of its specific responsibilities which gave rise to its status as a
21 fiduciary; or (3) it had knowledge of the other Defendants' breaches and failed
22 to make reasonable efforts under the circumstances to remedy such breaches.
- 23 30. Draeger is liable as a co-fiduciary pursuant to ERISA § 405(a), 29 U.S.C. §
24 1105(a), for the violations alleged above because: (1) he knowingly participated
25 in, or knowingly undertook to conceal, acts or omissions, of the other Defend-
26 ants; (2) he enabled the other Defendants to commit such breaches by his failure
27 to comply with ERISA § 404(a)(1)(A), (B), 29 U.S.C. § 1104(a)(1)(A), (B), in
28 the administration of his specific responsibilities which gave rise to his status as

1 a fiduciary; or (3) he had knowledge of the other Defendants' breaches and
2 failed to make reasonable efforts under the circumstances to remedy such
3 breaches.

4 31. As a direct and proximate result of the breaches of fiduciary duties committed
5 by Draeger and the Corporate Defendants, as described above, the Plan has suf-
6 fered harm, in the form of uncovered medical claims for its participants, for
7 which Draeger and the Corporate Defendants are jointly and severally liable.

8 32. As a direct and proximate result of the breaches and violations set forth above,
9 the Secretary is entitled to such equitable or remedial relief as the Court may
10 deem appropriate, including restoration of all Plan losses, pursuant to ERISA §§
11 409 and 502(a)(2), 29 U.S.C. § 1109 and § 1132(a)(2), and payment of Plan par-
12 ticipants' uncovered medical claims during participants' period of lapsed cover-
13 age resulting from Draeger and the Corporate Defendants' fiduciary breaches,
14 pursuant to ERISA §502(a)(5), 29 U.S.C. §§ 1132(a)(5).

15
16 **PRAYER FOR RELIEF**

17 WHEREFORE, the Secretary prays for judgment:

- 18 A. Ordering Draeger and the Corporate Defendants to restore to the Plan any losses
19 resulting from fiduciary breaches committed by them or for which they are lia-
20 ble;
- 21 B. Ordering Draeger and the Corporate Defendants to correct the prohibited trans-
22 actions in which they engaged or in which they caused the Plan to engage;
- 23 C. Permanently enjoining Draeger and the Corporate Defendants from violating the
24 provisions of Title I of ERISA;
- 25 D. Removing Draeger and the Corporate Defendants as fiduciaries to the Plan;
- 26 E. Permanently enjoining Draeger from serving as a fiduciary to any ERISA cov-
27 ered plans;
- 28

- 1 F. Ordering Draeger and the Corporate Defendants to pay all uncovered medical
2 claims incurred by Plan participants as a result of the aforementioned fiduciary
3 breaches;
- 4 G. If necessary, ordering the appointment of an independent fiduciary to distribute
5 recovered amounts to Plan participants;
- 6 H. Awarding the Secretary the costs of pursuing this action; and
- 7 I. Ordering such further relief as the Court deems to be appropriate and just.
- 8

9 M. PATRICIA SMITH
10 Solicitor of Labor

11 JANET M. HEROLD
12 Regional Solicitor

13 IAN H. ELIASOPH
14 Counsel for ERISA

15
16 Dated: October 8, 2015

17 /s/ Grace A. Kim
18 GRACE A. KIM
19 Trial Attorney
20 Attorneys for the Secretary
21
22
23
24
25
26
27
28