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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HILDA L. SOLIS, Secretary of Labor,
United States Department of Labor,

Plaintiff,

vs.

KINETICSWARE, INC., a Washington
corporation; KINETICSWARE, INC.,
401(k) SAVINGS PLAN, an employee
benefit plan; JEFFREY SAMPSON,
an individual; and RICHARD BARNETT,
an individual,

Defendants.

Case No.: 2:10-cv-01852

COMPLAINT FOR VIOLATIONS
OF ERISA

Plaintiff Hilda L. Solis, Secretary of Labor, United States Department of Labor (the
“Secretary”), alleges:

1. This action arises under Title I of the Employee Retirement Income
Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. §§ 1001-1191c, and is brought by
the Secretary under ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5), to enjoin
acts and practices that violate the provisions of Title I of ERISA, to obtain appropriate
equitable relief for breaches of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109, and to

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2 obtain such further equitable relief as may be appropriate to redress and to enforce the
3 provisions of Title I of ERISA.

4 2. This court has jurisdiction over this action pursuant to ERISA § 502(e)(1),
5 29 U.S.C. § 1132(e)(1).

6 3. Venue of this action lies in the Western District of Washington, pursuant to
7 ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Kineticsware 401(k) Plan was
8 administered in Kirkland, Washington, within this district.

9
10 **DEFENDANTS**

11 4. The Kineticsware 401(k) Plan (the “Plan” or “401(k) Plan”) is an employee
12 benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3), which is subject to
13 the provisions of Title I of ERISA pursuant to ERISA § 4(a), 29 U.S.C. § 1003(a).

14 5. At all relevant times, Defendant Kineticsware, Inc., was and is the sponsor
15 and Plan Administrator of the 401(k) Plan, a fiduciary of the Plan within the meaning of
16 ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and (iii), and a party in
17 interest to the Plan within the meaning of ERISA §§ 3(14)(A) and (C), 29 U.S.C. §§
18 1002(14)(A) and (C).

19 6. At all relevant times, Defendant Jeffrey Sampson, was and is Chief
20 Executive Officer and co-owner of Kineticsware, Inc., a named Trustee of the Plan;
21 exercised discretionary authority and control respecting the management and disposition of
22 the 401(k) Plan and its assets; exercised discretionary authority and responsibility in the
23 administration of the 401(k) Plan, was and is a fiduciary of the Plan within the meaning of
24 ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and (iii); and was and is a
25 party in interest to the Plan within the meaning of ERISA §§ 3(14)(A), (E) and (H), 29
26 U.S.C. §§ 1002(14)(A), (E) and (H).

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2 7. At all relevant times, Defendant Richard Barnett, was Chief Marketing
3 Officer and a corporate officer of Kineticsware, Inc., a named Trustee of the Plan;
4 exercised discretionary authority and control respecting the management and disposition of
5 the 401(k) Plan and its assets; exercised discretionary authority and responsibility in the
6 administration of the 401(k) Plan, was and is a fiduciary of the Plan within the meaning of
7 ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and (iii); and was and is a
8 party in interest to the Plan within the meaning of ERISA §§ 3(14)(A), (E) and (H), 29
9 U.S.C. §§ 1002(14)(A), (E) and (H).

10 8. The 401(k) Plan is named as a Defendant pursuant to Rule 19(a) of the
11 Federal Rules of Civil Procedure, solely to ensure that complete relief can be granted.

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13 **ALLEGATIONS**

14 **Failure To Remit Employee Contributions To The Plan In A Timely Manner**

15 9. Paragraphs 1 through 7 above are realleged and incorporated herein by
16 reference.

17 10. At all relevant times, Defendants Jeffrey Sampson and Richard Barnett had
18 and exercised authority over the Kineticsware, Inc. corporate bank account(s).

19 11. The 401(k) Plan was established effective January 1, 2007, by Defendant
20 Kineticsware, Inc., the 401(k) Plan sponsor, to provide benefits to its employees upon
21 retirement, death or disability.

22 12. The 401(k) Plan's governing documents, which were adopted by
23 Kineticsware, Inc. and signed by Defendants Jeffrey Sampson and Richard Barnett, identify
24 Defendants Jeffrey Sampson and Richard Barnett as Trustees of the Plan, subject to the
25 direction of, *inter alia*, the Plan Administrator, the Employer, or a named fiduciary.

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13. The 401(k) Plan's governing documents identify Kineticsware, Inc., as the Plan Administrator and the Plan's named fiduciary.

14. The 401(k) Plan's governing documents also identify that the Employer is Kineticsware, Inc.

15. Defendants Jeffrey Sampson and Richard Barnett exercised pervasive control over the administration of the Plan.

16. The 401(k) Plan's governing documents provide that participants could make salary reduction contributions to the Plan, and that such deferred amount would be contributed to the Plan and allocated to the individual participants' accounts.

17. During the period from November 30, 2007 through October 31, 2008, Defendants Jeffrey Sampson, Richard Barnett, and Kineticsware, Inc. caused Kineticsware, Inc. to withhold at least \$141,696 from employees' pay for salary reduction contributions to the 401(k) Plan, but failed to remit the amounts so withheld into the 401(k) Plan's account, and instead retained and commingled the withheld contributions with the company's accounts and used same for non-Plan purposes.

18. The 401(k) Plan's governing Plan documents required that employee contributions be remitted to the Plan on the earliest date that they could reasonably be segregated from the assets of Kineticsware, Inc., the Employer. Based on a review of the Employer's demonstrated pattern and practice, the employee contributions could be reasonably segregated from Kineticsware, Inc.'s assets within five business days. During the period from November 30, 2007 through October 31, 2008, Defendants Jeffrey Sampson and Richard Barnett caused Kineticsware, Inc. to fail to timely remit owing employee contributions to the Plan.

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2 **Failure To Collect Employer Matching Contributions To The Plan**

3 19. Paragraphs 1-18 above are realleged and incorporated herein by reference.

4 20. The 401(k) Plan's governing Plan documents also required mandatory
5 employer matching contributions to be made by the Employer to the Plan on a quarterly
6 basis.

7 21. As Plan Administrator and named fiduciary, Kineticsware, Inc. had a duty
8 to: 1) appoint a trustee of the Plan with the full discretion, responsibility and authority to
9 collect and remit contributions owed to the Plan; 2) appoint a directed trustee subject to the
10 direction of named fiduciary, who is not also a trustee, to collect and remit contributions
11 owed to the Plan; or 3) appoint or name an investment manager who has authority to
12 manage, acquire and dispose of assets of the Plan, including the collection and remittance
13 of contributions owed to the Plan.

14 22. During the period from November 30, 2007 through October 31, 2008,
15 Defendants Kineticsware, Inc., Jeffrey Sampson, and Richard Barnett, with pervasive
16 control over the administration of the Plan and as functional fiduciaries thereto and as co-
17 fiduciaries of the Plan, caused mandatory employer contributions not to be collected in the
18 amount of \$72,296, as required by the Plan, and instead allowed the funds to be retained
19 and commingled with Company assets and used for non-Plan purposes.

20 23. A review of the Company's assets indicates that the Company had the
21 ability to pay said employer matching contributions. On March 31, 2008, the Company's
22 bank balance was \$89,375 and employer contributions owed were \$11,740; on June 30,
23 2008, bank balance was \$59,817 and contributions owed were \$24,149; and on September
24 30, 2008, bank balance was \$37,249 and contributions owed were \$22,825.

25 24. During the period from November 30, 2007 through October 31, 2008,
26 Defendants Kineticsware, Inc., Jeffrey Sampson, and Richard Barnett failed to appoint a

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2 trustee who would accept responsibility for the monitoring and collection of delinquent
3 mandatory employer contributions to the 401(k) Plan.

4 25. During the period from November 30, 2007 through October 31, 2008,
5 mandatory employer matching contributions from Kineticsware, Inc., in the amount of
6 \$72,296 due and owing to the 401(k) Plan, remained uncollected and instead such
7 mandatory employer matching contributions were retained and commingled with the assets
8 of Defendant Kineticsware, Inc. and used for non-Plan purposes.

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10 **VIOLATIONS OF ERISA**

11 26. By the conduct described in paragraphs 8-25 above, Defendants
12 Kineticsware, Inc., Jeffrey Sampson, and Richard Barnett, acting in their fiduciary
13 capacities:

14 a. failed to hold the assets of the 401(k) Plan in a trust in violation of ERISA
15 § 403(a), 29 U.S.C. § 1103(a);

16 b. failed to: 1) appoint a trustee of the Plan with the full discretion,
17 responsibility and authority to collect and remit contributions owed to the Plan; 2) appoint a
18 directed trustee subject to the direction of the named fiduciary, who is not also a trustee, to
19 collect and remit contributions owed to the Plan; or 3) appoint or name an investment
20 manager who has authority to manage, acquire and dispose of assets of the Plan, including
21 the collection and remittance of contributions owed to the Plan in violation of ERISA
22 § 403(a), 29 U.S.C. § 1103(a).

23 c. permitted the assets of the 401(k) Plan to inure to the benefit of the Company,
24 in violation of ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1);

25 d. failed to act solely in the interest of the participants and beneficiaries of the
26 401(k) Plan and for the exclusive purpose of providing benefits to participants and their

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2 beneficiaries and defraying reasonable expenses of 401(k) Plan administration, in violation
3 of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);

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

8 f. caused the 401(k) Plan to engage in transactions which Defendants knew or
9 should have known constituted a direct or indirect lending of money or other extension of
10 credit between the Plan and a party in interest, in violation of ERISA § 406(a)(1)(B), 29
11 U.S.C. § 1106(a)(1)(B);

12 g. caused the 401(k) Plan to engage in transactions which they knew or should
13 have known constituted a direct or indirect transfer to, or use by or for the benefit of, a
14 party in interest, of assets of the Plan, in violation of ERISA § 406(a)(1)(D), 29 U.S.C.
15 § 1106(a)(1)(D);

16 h. 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 of its
18 participants and beneficiaries, in violation of ERISA § 406(b)(1) and (2), 29 U.S.C.
19 § 1106(b)(1) and (2); and

20 i. participated knowingly in the breaches of fiduciary duty of other fiduciaries
21 and/or had knowledge of such breaches by a co-fiduciary and failed to take reasonable
22 efforts to remedy such breaches, in violation of ERISA § 405(a), 29 U.S.C. § 1105(a).

23 27. As a direct and proximate result of the breaches of fiduciary duties
24 committed by Kineticsware, Inc., Jeffrey Sampson, and Richard Barnett, as described in
25 paragraphs 8-26 above, the 401(k) Plan has suffered losses, including lost opportunity-

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2 income, for which the Defendants are jointly and severally liable pursuant to ERISA § 409,
3 29 U.S.C. § 1109.

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5 **PRAYER FOR RELIEF**

6 WHEREFORE, the Secretary prays for judgment:

7 A. Ordering Defendants Kineticsware, Inc., Jeffrey Sampson, and Richard
8 Barnett to restore to the 401(k) Plan any losses, including lost interest earnings, resulting
9 from fiduciary breaches committed by them or for which they are liable;

10 B. Ordering Defendants Kineticsware, Inc., Jeffrey Sampson, and Richard
11 Barnett to correct the prohibited transactions in which they engaged or in which they
12 caused the Plan to engage;

13 C. Permanently enjoining Defendants Kineticsware, Inc., Jeffrey Sampson, and
14 Richard Barnett from violating the provisions of Title I of ERISA;

15 D. Removing Defendants Kineticsware, Inc., Jeffrey Sampson, and Richard
16 Barnett as fiduciaries of the 401(k) Plan and permanently enjoining Defendants Jeffrey
17 Sampson and Richard Barnett from serving as a fiduciary of, or service provider to, any
18 ERISA-covered employee benefit plan;

19 E. Appointing an independent fiduciary to distribute the 401(k) Plan's assets to
20 the participants and beneficiaries, terminate the 401(k) Plan, and conclude any Plan-related
21 matters connected with the proper termination of the Plan;

22 F. Ordering the independent fiduciary to modify the Plan in such a manner as to
23 ensure that a fiduciary authorized pursuant to ERISA § 403, 29 U.S.C. § 1103, becomes
24 responsible for the monitoring and collection of delinquent contributions to the Plan, if any,
25 until the Plan is terminated;

26 G. Requiring the Defendants to pay for all costs associated with the appointment

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and retention of the independent fiduciary;

- H. Requiring the Defendants to cooperate with the independent fiduciary;
- I. Awarding the Secretary the costs of this action; and
- J. Ordering such further relief as is appropriate and just.

Dated: November 15, 2010

M. PATRICIA SMITH
Solicitor of Labor

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