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 10 UNITED STATES DISTRICT COURT
 11 DISTRICT OF ARIZONA

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

13
 14 Plaintiff,

15 vs.

16 SONORA ENVIRONMENTAL,
 L.L.C., an Arizona corporation; LEE
 17 JOLLEY, an individual; and SONORA
 ENVIRONMENTAL, L.L.C. 401(K)
 18 PROFIT SHARING PLAN, an
 employee benefit plan,

19
 20 Defendants.

Case No.

COMPLAINT FOR VIOLATIONS
 OF ERISA

21
 22 Plaintiff Hilda L. Solis, Secretary of Labor, United States Department of Labor
 (the “Secretary”), alleges:

23
 24 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
 25 by the Secretary under ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5), to
 26 enjoin acts and practices that violate the provisions of Title I of ERISA, to obtain
 27 appropriate equitable relief for breaches of fiduciary duty under ERISA § 409, 29
 28

1 U.S.C. § 1109, and to obtain such further equitable relief as may be appropriate to
2 redress and to enforce the provisions of Title I of ERISA.

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

5 3. Venue of this action lies in the United States District for Arizona pursuant
6 to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Defendants reside and may
7 be found in Pima County, the Sonora Environmental, L.L.C. 401(k) Profit Sharing Plan
8 was administered in Tucson, Arizona, and the breaches took place in Pima County,
9 within this district.

10 **DEFENDANTS**

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

15 5. At all relevant times, Defendant Sonora Environmental, L.L.C. (“Sonora
16 Environmental” or “Company”) was and is the Plan Sponsor, Named Fiduciary, and
17 Plan Administrator of the 401(k) Plan, a fiduciary of the Plan within the meaning of
18 ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and (iii), and a party in
19 interest to the Plan within the meaning of ERISA §§ 3(14)(A) and (C), 29 U.S.C. §§
20 1002(14)(A) and (C).

21 6. At all relevant times, Defendant Lee Jolley was and is the President and
22 owner of Sonora Environmental; was and is Named Fiduciary, and Plan Trustee of the
23 401(k) Plan, exercised discretionary authority and control respecting the management
24 and disposition of the 401(k) Plan and its assets, exercised discretionary authority and
25 responsibility in the administration of the 401(k) Plan, was and is a fiduciary of the Plan
26 within the meaning of ERISA §§ 3(21)(A)(i) and (iii), 29 U.S.C. §§ 1002(21)(A)(i) and
27 (iii), and was and is a party in interest to the Plan within the meaning of ERISA §§
28 3(14)(A), (E) and (H), 29 U.S.C. §§ 1002(14)(A), (E) and (H).

1 Environmental's demonstrated pattern and practice, the employee contributions so
2 withheld from the employees' pay could have reasonably been segregated from the
3 Company's assets within six business days.

4 15. During the period from January 1, 2005 through at least October 2008,
5 Defendants Lee Jolley and Sonora Environmental caused Sonora Environmental to
6 withhold at least \$38,000 from employees' pay for salary reduction contributions and
7 loan payments to the 401(k) Plan, but failed to timely remit such amounts so withheld
8 into the 401(k) Plan's account in accordance with the Plan's governing documents and
9 29 C.F.R. § 2510.3-102(a).

10 **Failure of Defendants Sonora Environmental and Lee Jolley to Remit Employee**
11 **Contributions and Loan Payments to the Plan in Whole**

12 16. Paragraphs 1 through 15 above are realleged and incorporated herein by
13 reference.

14 17. During the period from October 28, 2005 through at least October 2008,
15 Defendants Lee Jolley and Sonora Environmental caused Sonora Environmental to
16 withhold at least \$2,000 from employees' pay for salary reduction contributions and
17 loan payments to the 401(k) Plan, but failed to remit the amounts so withheld into the
18 401(k) Plan's account. Instead, Defendants retained and commingled the withheld
19 contributions and loan payments with the Company's accounts and used the amounts
20 withheld for non-Plan purposes.

21 **Failure of Defendants Sonora Environmental and Lee Jolley to**
22 **Diligently Administer the Plan**

23 18. Paragraphs 1-17 above are realleged and incorporated herein by reference.

24 19. Starting in at least January 1, 2005, Defendants failed to administer the
25 Plan as required by ERISA, including failing to file Annual Report Forms 5500 pursuant
26 to ERISA § 104, and failing to secure a fidelity bond as required by ERISA § 412.

27 20. Article 9.2 of the Plan and Trust Agreement—the document that governs
28

1 the Plan and came into effect on January 1, 2005—states that upon termination of the
2 Plan, the Trustee with continue to administer the Plan until distribution of all Plan assets
3 has been made to the participants, which distribution must occur as promptly and
4 administratively feasible as possible after termination of the Plan.

5 21. Defendants have failed to take sufficient steps to provide for the prudent
6 and complete termination of the Plan, including determining whether participants
7 received proper notice or the Plan distributions to which they were entitled.

8 VIOLATIONS OF ERISA

9 22. Because of the facts and circumstances set forth in Paragraphs 8-21
10 above, Defendants Sonora Environmental and Lee Jolley, acting in their fiduciary
11 capacities:

12 a. permitted the assets of the 401(k) 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 act solely in the interest of the participants and beneficiaries of the
15 401(k) Plan and for the exclusive purpose of providing benefits to participants and their
16 beneficiaries and defraying reasonable expenses of 401(k) Plan administration, in
17 violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);

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

22 d. caused the 401(k) Plan to engage in transactions which Defendants knew or
23 should have known constituted a direct or indirect lending of money or other extension
24 of credit between the Plan and a party in interest, in violation of ERISA § 406(a)(1)(B),
25 29 U.S.C. § 1106(a)(1)(B);

26 e. caused the 401(k) Plan to engage in transactions which they knew or should
27 have known constituted a direct or indirect transfer to, or use by or for the benefit of, a
28 party in interest, of assets of the Plan, in violation of ERISA § 406(a)(1)(D), 29 U.S.C.

1 § 1106(a)(1)(D); and

2 f. dealt with assets of the Plan in their own interests and acted on behalf of a
3 party whose interests are adverse to the interests of the Plan or the interests of its
4 participants and beneficiaries, in violation of ERISA § 406(b)(1) and (2), 29 U.S.C.
5 § 1106(b)(1) and (2).

6 23. Because of the facts and circumstances set forth in Paragraphs 8-22
7 above, Defendants Sonora Environmental and Lee Jolley, acting in their fiduciary
8 capacities:

9 a. failed to act solely in the interest of the participants and beneficiaries of the
10 401(k) Plan and for the exclusive purpose of providing benefits to participants and their
11 beneficiaries and defraying reasonable expenses of 401(k) Plan administration, in
12 violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A); and

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

17 24. As a direct and proximate result of the breaches of fiduciary duties
18 committed by Sonora Environmental and Lee Jolley, as described in Paragraphs 8-23
19 above, the 401(k) Plan has suffered losses, including lost-opportunity income, for
20 which Defendants Sonora Environmental and Lee Jolley are jointly and severally liable
21 pursuant to ERISA § 409, 29 U.S.C. § 1109.

22 25. Defendant Sonora Environmental is liable as a co-fiduciary pursuant to
23 ERISA § 405(a), 29 U.S.C. § 1105(a), for the violations alleged in Paragraphs 8-24
24 above because the Company (1) knowingly participated in, or knowingly undertook to
25 conceal, acts or omissions of Defendant Lee Jolley, while knowing such acts or
26 omissions were breaches; (2) enabled Defendant Lee Jolley to commit such breaches by
27 its failure to comply with § 404(a)(1)(A)&(B) and (a)(1)(D), 11 U.S.C. §
28 1104(a)(1)(A)&(B) and (a)(1)(D), in the administration of its specific responsibilities

1 which gave rise to its status as a fiduciary; and (3) had knowledge of Defendant Lee
2 Jolley's breaches and failed to make reasonable efforts under the circumstances to
3 remedy such breaches.

4 26. Defendant Lee Jolley is liable as a co-fiduciary pursuant to ERISA §
5 405(a), 29 U.S.C. § 1105(a), for the violations alleged in Paragraphs 8-24 above
6 because he (1) knowingly participated in, or knowingly undertook to conceal, acts or
7 omissions of Defendant Sonora Environmental, while knowing such acts or omissions
8 were breaches; (2) enabled Defendant Sonora Environmental to commit such breaches
9 by his failure to comply with § 404(a)(1)(A)&(B) and (a)(1)(D), 11 U.S.C. §
10 1104(a)(1)(A)&(B) and (a)(1)(D), in the administration of his specific responsibilities
11 which gave rise to his status as a fiduciary; or (3) had knowledge of Defendant Sonora
12 Environmental's breaches and failed to make reasonable efforts under the
13 circumstances to remedy such breaches.

14 27. As a direct and proximate result of the breaches and violations set forth in
15 Paragraphs 18-26 above, the Secretary is entitled to such equitable or remedial relief as
16 the Court may deem appropriate, including reestablishment of the Plan to collect and
17 distribute employer contributions and lost-opportunity income, and appointment of an
18 independent fiduciary with discretionary authority over the administration and
19 management of the Plan, pursuant to ERISA § 409, 29 U.S.C. § 1109.

20 **PRAYER FOR RELIEF**

21 WHEREFORE, the Secretary prays for judgment:

22 A. Ordering Defendants Sonora Environmental and Lee Jolley to restore to the
23 401(k) Plan any losses, including lost-opportunity income earnings, resulting from
24 fiduciary breaches committed by them or for which they are liable;

25 B. Ordering a full accounting of the Plan as a result of the fiduciary breaches;

26 C. Ordering Defendants Sonora Environmental and Lee Jolley to correct the
27 prohibited transactions in which they engaged or in which they caused the Plan to
28 engage;

