

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

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

Case No. 8:13-cv-1360-MSS-AEP

Plaintiff,

vs.

NOHL CREST HOMES CORPORATION;
KENNETH R. EMERY, an Individual;
PETER G. TIBMA, an Individual; and the
NOHL CREST HOMES CORPORATION
EMPLOYEE STOCK OWNERSHIP PLAN,

Defendants.

_____/

PETER G. TIBMA,

Defendant/Third Party Plaintiff,

vs.

JOSE FERNANDEZ,

Third Party Defendant

_____/

**CONSENT JUDGMENT AND ORDER AS TO DEFENDANT PETER G. TIBMA
AND THIRD PARTY DEFENDANT JOSE FERNANDEZ**

Plaintiff, Thomas E. Perez, Secretary of Labor, United States Department of Labor (“the Secretary”), pursuant to his authority under sections 502(a)(2) and 502(a)(5), 29 U.S.C. §§ 1132(a)(2) and 1132(a)(5), of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq., (“ERISA”) has filed a Complaint against Nohl Crest Homes Corporation (“Nohl Crest”); Kenneth R. Emery (“Emery”), an individual; and Peter G.

Tibma (“Tibma”), an individual. The Nohl Crest Homes Corporation Employee Stock Ownership Plan (which, together with its associated trust and any and all independent or successor fiduciaries acting on its behalf, are hereafter referred to as “the Plan”) is a named defendant pursuant to Fed. R. Civ. P. 19(a) solely to assure complete relief may be granted. Tibma has filed a cross claim against Defendant Emery and a third party claim against Third Party Defendant Jose Fernandez (“Fernandez”). Tibma and the Secretary have agreed to resolve all matters in controversy in their action except for the imposition by the Secretary of any penalty pursuant to ERISA section 502(l), 29 U.S.C. § 1132(l), and any proceedings related thereto, and said parties do now consent to entry of a Judgment and Order by this Court in accordance herewith. Tibma and Fernandez have agreed to resolve all matters in controversy in their action and said parties do now consent to entry of a Judgment and Order by this Court in accordance herewith.

Specifically, the parties have agreed:

- A. Tibma and Fernandez admit to the jurisdiction of the Court over them and over the subject matter of this action. Tibma and Fernandez admit that this Court has the authority to enforce this Order and that this Court is the most appropriate venue for any enforcement action which may be required as a result of this Order.
- B. The Secretary’s Complaint alleges that Nohl Crest, Emery, and Tibma were fiduciaries and parties in interest to the Plan within the meaning of ERISA sections 3(21)(A) and 3(14), 29 U.S.C. §§ 1003(21)(A) and (14), and that Defendants breached their fiduciary duties with respect to the Plan by violating the provisions of ERISA sections 403, 404, 406, and 412, 29 U.S.C. §§ 1103, 1104, 1106, and

1112, as set forth in the Secretary's Complaint. In his cross and third party claims, Tibma alleges the same as to Emery and Fernandez.

C. The Secretary alleges that as a result of their fiduciary breaches, Nohl Crest, Emery, and Tibma caused the Plan losses of \$870,946.15 as of April 22, 2014, for which they are jointly and severally liable. Of the total losses to the Plan, \$740,748.42 is allocated to participants other than Emery and Tibma. The Secretary, Fernandez, and Tibma agree that for settlement purposes the losses to the Plan total \$700,000.00 as of April 22, 2014.

D. In his cross claim and third party claim, Tibma alleges that Emery and Fernandez are liable to him for contribution and/or indemnity. As part of the consideration for the settlement described in this Consent Judgment, Tibma agrees to dismiss his cross claim against Emery without prejudice and third party claim against Fernandez with prejudice.

E. Tibma agrees to make restitution to the Plan in the amount of \$275,000.00 within twenty (20) calendar days of entry of this Order by delivering a check in this amount payable to the Plan, to the Independent Fiduciary identified in paragraph 14, below. No later than twenty (20) calendar days after the Independent Fiduciary receives this payment, the Secretary shall execute and deliver to Tibma's counsel of record the satisfaction of this Consent Judgment as it relates to Tibma, a copy of which is attached to this Consent Judgment as Exhibit A. Tibma's counsel shall then file the satisfaction with the Court and record in the public records of Hillsborough County, Florida. The filing and recording of this satisfaction shall signify that Tibma

has fully satisfied and performed all of his financial obligations under this Consent Judgment, and is free of any further monetary liability to the Secretary (except with respect to any penalty assessed pursuant to ERISA section 502(l), 29 U.S.C. § 1132(l)), the Plan, and Fernandez.

F. Tibma admits that he is, or was at all times relevant to this action, acting as a fiduciary within the meaning of 11 U.S.C. § 523(a)(4). Tibma further admits that his conduct with respect to the Plan and with respect to Plan's assets constitutes defalcation while acting in a fiduciary capacity within the meaning of 11 U.S.C. § 523(a)(4). Tibma agrees that if he fails to make restitution to the Plan in the amount of \$275,000.00 within twenty (20) calendar days of the entry of this Order he is indebted to the Plan in the amount of \$275,000.00 as of April 22, 2014, plus interest calculated pursuant to paragraph 7, below, and this debt is non-dischargeable pursuant to 11 U.S.C. § 523(a)(4) in this or any future proceeding between the parties. Tibma further agrees that, should he file for bankruptcy before making restitution to the Plan in the amount of \$275,000.00, he will: a) list the Plan as a creditor in his petition and show any outstanding balance due the Plan as the amount of the claim; b) send a copy of his petition to the Plan's Independent Fiduciary identified in paragraph 14, below, within ten (10) days of filing the petition; and c) send a copy of his petition to the Secretary at the following address within ten (10) days of filing the petition:

United States Department of Labor
Employee Benefits Security Administration
61 Forsyth Street, SW, Suite 7B54
Atlanta, GA 30303

Tibma further agrees that he will not contest the Plan's claim for \$275,000 in bankruptcy or otherwise try to avoid re-payment of this debt to the Plan during the pendency of his bankruptcy case or thereafter.

G. Tibma and Fernandez expressly waive any and all claims of whatsoever nature that they have or may have had against the Secretary, or any of his officers, agents, employees, or representatives, arising out of or in connection with the filing, prosecution, and maintenance of this civil action or any other proceeding and investigation incident thereto. Tibma and Fernandez also release and waive all claims that they have or may have against one another (including, without limitation, claims for indemnity and/or contribution).

H. This Order represents a complete settlement of all the Secretary's claims asserted in this action against Tibma (with the exception of any potential civil money penalties that may be assessed under ERISA section 502(l), 29 U.S.C. § 1132(l)), and all claims that Tibma and Fernandez asserted or could have asserted against one another in this action. This Order is not binding upon any government agency other than the United States Department of Labor and only resolves claims arising out of this action as between the Secretary and Tibma.

I. The Secretary, Tibma, and Fernandez expressly waive Findings of Fact and Conclusions of Law, except as otherwise set forth and addressed herein, and consent to the entry of this Order as a full and complete resolution of all claims and issues which were, or might have been, alleged in this action without trial or adjudication of any issue of fact or law raised in the Complaint.

Accordingly, it is **ORDERED ADJUDGED AND DECREED** that:

1. The Court has jurisdiction over the parties to this Order and the subject matter of this action and is empowered to provide the relief herein.
2. Upon the filing and recording of the satisfaction of judgment described in Paragraph 7, below, Tibma's cross claim against Emery shall be deemed dismissed without prejudice and third party claim against Fernandez shall be deemed dismissed with prejudice.
3. Tibma, his agents, servants, and all persons in active concert or participation with him, upon receiving actual or constructive notice of this Consent Judgment, are hereby permanently enjoined and restrained from violating the provisions of Title I of ERISA.
4. Tibma should be and he hereby is permanently enjoined from acting as a fiduciary, trustee, agent, or representative in any capacity to any employee benefit plan, as defined by ERISA.
5. As a result of his fiduciary breaches, Tibma caused the Plan losses in a disputed amount but that, for purposes of the settlement memorialized in this Consent Judgment, are determined to be \$700,000.00 as of April 22, 2014. Tibma's liability for these losses is limited by this Consent Judgment to \$275,000.00.
6. Tibma shall remit to the Independent Fiduciary within ten (10) days of entry of this Order the Plan's assets in Wells Fargo Account No. 2700706132075 totaling approximately \$30,181.28, including all accrued interest, which are currently on deposit at Wells Fargo.
7. Tibma shall make restitution to the Plan in the amount of \$275,000 within twenty (20) calendar days of entry of this Order by delivering a check in this amount payable

to Plan to the Independent Fiduciary identified in paragraph 14 below. No later than twenty (20) calendar days after the Independent Fiduciary receives this payment, the Secretary shall execute and deliver to Tibma's counsel of record the satisfaction of this Consent Judgment as it relates to Tibma, a copy of which is attached to this Consent Judgment as Exhibit A. Any failure to make restitution to the Plan in accordance with this Order shall result in the total balance of the \$275,000 then remaining, plus interest accrued thereon at the U.S. Treasury underpayment rate referenced in 26 U.S.C. § 6621(c)(1) from the date of entry of this Consent Judgment and Order, to become due and payable immediately, without further notice or demand required by Independent Fiduciary or the Secretary. The Secretary reserves his right to initiate contempt proceedings against Tibma in the event he fails to make restitution to the Plan in accordance with this Order.

8. Tibma certifies to this Court under penalty of perjury pursuant to 28 U.S.C. § 1746, that Nohl Crest is out of business, has no intention of resuming operations, and is presently unable to make full restitution to the Plan. Tibma acknowledges that the Secretary expressly relies on his representation with respect to Nohl Crest in entering into this Consent Judgment, and that his representation as to the operations and financial condition of Nohl Crest is a necessary and material condition precedent to the Secretary's agreement to the terms in this Consent Judgment and Order.

9. By his signature below, Tibma agrees to allow any participant interest he may have in any existing or future assets of the Plan to be applied as an offset against the amounts that the Secretary has alleged are due to the Plan, as authorized by ERISA section 206(d)(4), 29 U.S.C. § 1056(d)(4).

10. By his signature below, Tibma hereby declares and affirms that the terms of this Consent Judgment and Order are not now inconsistent with any qualified domestic relations order of any court of competent jurisdiction wherein any domestic relations matter between him and a former spouse has been filed, or is pending; that he will not enter into any qualified domestic relations order that is inconsistent with the terms of this Consent Judgment and Order; and that this Consent Judgment and Order constitutes a settlement described by ERISA section 206(d)(4)(A)(iii), 29 U.S.C. § 1056(d)(4)(A)(iii).

11. By her signature below, Millicent Markels Tibma waives any claims that she may currently have for her spouse's benefits under the Plan with respect to Tibma's account, which will be redistributed to other participants, and acknowledges she understands that: (a) the effect of such consent may be to forfeit the benefits that she would be entitled to receive upon her spouse's death; (b) her spouse's waiver is not valid without her consent; and (c) her consent is irrevocable upon the entry of this Order.

12. The governing documents for the Plan are hereby deemed amended to permit the offset of Emery and Tibma's participant interest, as provided herein. A full executed copy of this Consent Judgment and Order shall be maintained by the Plan's administrator with all other documents and instruments governing the Plan.

13. Once the corrective actions required in this Consent Judgment and Order are complied with, the Secretary is required to assess a civil penalty pursuant to ERISA section 502(l), 29 U.S.C. § 1132(l). The penalty under section 502(l) is equal to 20 percent of the "applicable recovery amount" as that term is defined by ERISA. The Secretary and Defendant Tibma agree that the "applicable recovery amount" is \$275,000.00 with respect to Tibma. A

party against whom a penalty is assessed may seek a waiver or reduction pursuant to ERISA section 502(l)(3), 29 U.S.C. § 1132(l)(3).

14. M. Larry Lefoldt, C.P.A., of Lefoldt & Co., P.A., 690 Towne Center Boulevard, Ridgeland, Mississippi 39157, is hereby appointed as successor Independent Fiduciary for the Plan and:

- a. The successor fiduciary shall collect, marshal, and administer all of the Plan's assets and take such further actions with respect to the Plan as may be appropriate, including but not limited to terminating the Plan.
- b. The successor fiduciary shall have all the rights, duties, and responsibilities of any fiduciary or trustee described under the Plan's documents or the applicable law, with respect to the successor fiduciary's duties, provided, however, that neither the successor fiduciary nor his designee shall initiate any claim or action against Tibma or Fernandez for any acts or omissions that predate the entry of this order, the Plan's claims against them having been completely resolved in this Consent Judgment.
- c. The successor fiduciary is authorized to delegate or assign fiduciary duties as appropriate and allowed under the law.
- d. The successor fiduciary shall be entitled to receive reasonable fees and expenses for his services from the assets of the Plan. Tibma and Fernandez shall have no liability or responsibility for payment of the successor fiduciary's fees or expenses. Prior to obtaining payment for services and expenses authorized pursuant to this Consent Judgment and Order, the

successor fiduciary shall file with the Court invoices for such fees and expenses at such times and on such a schedule as the successor fiduciary, in his sole discretion, deems appropriate.

- e. If no party objects within 15 days of service of any invoice, full payment of such invoice shall be made from the assets of the Plan, and received by the successor fiduciary, not later than the 16th day following the date of the invoice. If any party or the Court objects to any payment, the matter should be resolved by the Court prior to payment.
- f. Tibma and Fernandez shall deliver or otherwise make available to the successor fiduciary any information, documents, files or other compilations that are in their possession or reasonably available to them and that are reasonably necessary to perform the duties of the successor fiduciary.
- g. The successor fiduciary is authorized to give instructions respecting the disposition of assets of the Plan.
- h. The successor fiduciary in the performance of his duties may retain such assistance as she may require, including attorneys, accountants, actuaries and other service providers.
- i. The payment of administrative expenses and all fees to the successor fiduciary, his assistants, attorneys, accountants, actuaries and other necessary service providers are to be considered priority administrative expenses of the Plan.

- j. The successor fiduciary or his agents, employees or representatives may not be held personally responsible for any claims against the Plan which existed, arose, matured or vested prior to the appointment of the successor fiduciary.
- k. The successor fiduciary is to comply with all applicable rules and laws.

15. This Consent Judgment and Order resolves all claims of the Secretary's Complaint against Tibma, and all of Tibma's and Fernandez's claims against one another, with the following exceptions:

- a. This Consent Judgment and Order does not adjudicate or otherwise affect any potential civil money penalties that may be assessed under ERISA section 502(l), except to confirm that, as to Tibma, the "applicable recovery amount" is \$275,000.00.
- b. This Consent Judgment and Order does not affect or bind any governmental agency other than the United States Department of Labor.

16. This Court retains jurisdiction for purposes of enforcing compliance with the terms of this Consent Judgment and Order.

17. Each party shall bear its own costs and expenses, including attorneys' fees, arising in connection with any stage of the above-referenced proceeding including but not limited to, attorney's fees which may be available under the Equal Access to Justice Act, as amended.

SO ORDERED this _____ day of September 2014.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

THE UNDERSIGNED PARTIES HEREBY CONSENT TO ENTRY OF THIS CONSENT
JUDGMENT AND ORDER:

NOHL CREST HOMES CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN

By: 
PETER G. TIBMA, Trustee


PETER G. TIBMA, Individually

JOSE FERNANDEZ, Third Party Defendant

s/ Brett J. Preston
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Attorneys for Defendant/Third Party Plaintiff Peter G. Tibma

THE UNDERSIGNED PARTIES HEREBY CONSENT TO ENTRY OF THIS CONSENT
JUDGMENT AND ORDER:

NOHL CREST HOMES CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN

By: _____
PETER G. TIBMA, Trustee

PETER G. TIBMA, Individually

JOSE FERNANDEZ, Third Party Defendant

s/ Brett J. Preston

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Attorneys for Defendant/Third Party Plaintiff Peter G. Tibma

PLAINTIFF THOMAS E. PEREZ, SECRETARY OF LABOR, CONSENTS TO AND
MOVES FOR ENTRY OF THIS CONSENT JUDGMENT AND ORDER

M. PATRICIA SMITH
Solicitor of Labor

STANLEY E. KEEN
Regional Solicitor

ROBERT M. LEWIS, JR.
Counsel

s/ Karen E. Mock
KAREN E. MOCK
Senior Trial Attorney

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Mock.Karen@dol.gov

Attorneys for Plaintiff Thomas E. Perez, Secretary of Labor

PARTICIPANT CONSENT

I, Peter G. Tibma, hereby consent to entry of this Order, and specifically affirm and consent to the terms set forth in paragraphs 9 and 10 of the Order.



PETER G. TIBMA

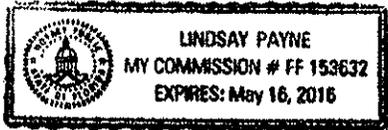
State of Florida)
)
County of Pinellas)

SWORN TO and SUBSCRIBED before me this 16th day of September, 2014.

Notary Public: Lindsay Payne
Lindsay Payne
Printed Name

My Commission Expires: 5-16-2016.

(SEAL)



SPOUSAL CONSENT

I, Millicent Markels Tibma, spouse of Peter G. Tibma, hereby consent to entry of this Order, and specifically consent to the terms set forth in paragraph 11 of the Order.

Millicent Markels Tibma
Millicent Markels Tibma

State of Florida }
County of Pinellas }

SWORN TO and SUBSCRIBED before me this 17 day of Sept, 2014.

Notary Public: [Signature]
Nathan Stout
Printed Name

My Commission Expires: 9-1-2015

(SEAL)

