

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

R. ALEXANDER ACOSTA, Secretary of Labor, United States Department of Labor,)	
)	CASE NO.
)	3:14-cv-00171-TAV-CCS
)	
Plaintiff,)	
)	
v.)	
)	
DITCH WITCH EQUIPMENT OF TENNESSEE, INC., AUBREY NEEDHAM, an individual, DITCH WITCH EQUIPMENT OF TENNESSEE PROFIT SHARING PLAN,)	
)	
Defendants.)	

CONSENT JUDGMENT AND ORDER

Plaintiff, Secretary of Labor, United States Department of Labor, 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 Defendants Ditch Witch Equipment of Tennessee, Inc. (the "Company") and Aubrey Needham ("Needham") (jointly "the Fiduciary Defendants"), along with the Ditch Witch Equipment of Tennessee Profit Sharing Plan (the "Plan").¹ The Fiduciary Defendants and the Secretary have agreed to resolve all matters in controversy between them in this action, except for the imposition by Plaintiff of any penalty pursuant to ERISA Section 502(l), 29 U.S.C. Section 1132(l), and any proceedings related thereto. The Fiduciary Defendants consent to entry of a

¹ The Plan has been joined as a party defendant pursuant to Rule 19 of the Federal Rules of Civil Procedure, solely to ensure that complete relief may be granted.

Judgment and Order by this Court in accordance herewith.

A. The Secretary's Complaint alleges that the Fiduciary Defendants are fiduciaries and parties-in-interest to the Plan, within the meaning of those terms under ERISA, and breached their fiduciary duties with respect to the Plan by failing to discharge their duties under the Plan and by violating provisions of sections 403, 404 and 406 of ERISA, 29 U.S.C. § 1103, 1104 and 1106, as set forth in the Complaint.

B. The Fiduciary Defendants hereby admit to the jurisdiction of the Court over them and over the subject matter of this action. The Fiduciary Defendants 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.

C. The Fiduciary Defendants admit that they are, or were at all times relevant to this action, acting as fiduciaries within the meaning of 11 U.S.C. § 523(a)(4). For purposes of this consent judgment, the Fiduciary Defendants further agree that they are indebted to the non-fiduciary participants of the Plan, jointly and severally, in the amount of \$195,084.00 as of May 23, 2017, and this debt is non-dischargeable pursuant to 11 U.S.C. § 523(a)(4) in this or any future proceeding between the parties (hereinafter, sometimes the "Debt").

D. Fiduciary Defendant Needham agrees to waive his right to recover any losses suffered by his participant account as a result of his fiduciary breaches.

E. The Fiduciary Defendants neither admit nor deny the allegations in the Complaint.

F. The Fiduciary Defendants expressly waive any and all claims of whatsoever nature that they have or may have 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.

F. This Order represents a complete settlement of all the Secretary's claims asserted in this action against the Fiduciary Defendants, with the exception of any potential civil money penalties that may be assessed under Section 502(l) of ERISA, 29 U.S.C. § 1132(l). The Fiduciary Defendants neither admit nor deny liability in this Consent Judgment. This Order is not binding upon any government agency other than the U.S. Department of Labor and only resolves claims arising out of this action as between the Secretary and the Fiduciary Defendants.

G. The Secretary and the Fiduciary Defendants 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 against the Fiduciary Defendants 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. The Fiduciary Defendants, their agents, servants, employees and all persons in active concert or participation with them are permanently enjoined and restrained from violating the provisions of Title I of ERISA.

3. The Fiduciary Defendants are removed from any fiduciary or administrative roles they currently occupy with regard to the Plan. The Fiduciary Defendants are also enjoined from becoming fiduciaries, trustees, agents, or representatives in any capacity to any additional

employee benefit plans, as defined by ERISA.

4. As a result of their fiduciary breaches, the Fiduciary Defendants have caused the Plan losses of \$195,084.00, for which they are jointly and severally liable.

5. Receivership Management is appointed as successor fiduciary of the Plan (“Successor Fiduciary”).

6. Fiduciary Defendants will sell the property owned by the Defendant Needham, consisting of 14.5 acres of commercial land located on Singleton Station Road and Topside Road, Blount County, Tennessee, Map 008, Parcel 090.00 (the “Property”):

a. Fiduciary Defendants shall act reasonably and expeditiously to effectuate the sale of the property;

b. Fiduciary Defendants shall inform Successor Fiduciary of any and all offers made on the property;

c. Fiduciary Defendants shall accept the first reasonable offer made on the Property;

d. The Fiduciary Defendants shall resolve any liens against the Property;

e. Until the Property is sold, the Fiduciary Defendants shall not encumber the Property in any way, including, but not limited to, using the Property to secure loans or other debt;

f. Until the Property is sold, the Fiduciary Defendants shall pay all taxes and other expenses related to the Property.

7. Until the Property is sold, Fiduciary Defendants will make monthly

payments of \$2,000.00 to the Successor Fiduciary, commencing on August 1, 2017. Fiduciary Defendants shall thereafter make subsequent monthly payments by the first of each month. After application to pay the fees of the Successor Fiduciary, any remaining amounts shall be applied to the balance of the Debt then existing. Fiduciary Defendants may make payments in an accelerated manner, and Fiduciary Defendants shall notify Plaintiff of all accelerated payments. In the event that Fiduciary Defendants fail to make a payment to Receivership Management, post judgment interest shall be assessed against any remaining unpaid balance of the Debt, in accordance with 28 U.S.C. § 1961, from the date hereof until paid in full.

8. Within 30 days after the Property is sold, Fiduciary Defendants shall immediately pay to the Successor Fiduciary the remaining balance of the Debt to the Successor Fiduciary. In the event of Fiduciary Defendants' non-compliance with this Consent Judgment and Order, the entire sum of the Debt due to the Plan participants, then unpaid, shall be immediately due and payable.

9. In the event that Fiduciary Defendants fail to sell the property within ninety (90) days from the date this consent judgment is executed, post judgment interest shall be assessed against any remaining unpaid balance of such amount, in accordance with 28 U.S.C. § 1961, from the date hereof until paid in full

10. Upon completion of the sale of the Property and receipt of any additional recovery from Fiduciary Defendant Needham, Receivership Management will distribute the Plan assets as appropriate among the non-fiduciary participants of the Plan, and will take all actions with respect to the Plan as may be appropriate in order to terminate the Plan and distribute its assets.

11. The Successor Fiduciary shall have all the rights, duties, and responsibilities of any fiduciary or trustee described under the Plan documents or the applicable law with respect to the Successor Fiduciary's duties except that the Successor Fiduciary shall have no responsibility for preparing or filing 5500 forms for plan years preceding the Successor Fiduciary's appointment.

12. The Successor Fiduciary is authorized to delegate or assign fiduciary duties as appropriate and allowed under the law.

13. The Successor Fiduciary shall be entitled to receive reasonable fees and expenses for its services. The Fiduciary Defendants will pay Successor Fiduciary's fees for any work it performs in relation to the Property or to the Plan. These fees are estimated to be \$8,300 and will be paid out of the \$2,000 monthly payments made by Fiduciary Defendants. Fiduciary Defendants will have liability for any additional fees to the extent that these monthly payments are insufficient.

14. 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 § 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 parties agree that the "applicable recovery amount" is \$195,084.00, the amount described in paragraph C above. The Fiduciary Defendants neither admit nor deny liability in this Consent Judgment.

15. This Consent Judgment resolves all claims of Plaintiff's Complaint against the Fiduciary Defendants, with the following exceptions:

a. This Judgment does not adjudicate or otherwise affect any potential

civil money penalties that may be assessed under Section 502(l) of the Act.

b. This Judgment does not affect or bind any governmental agency other than the United States Department of Labor.

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

16. 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, attorneys' fees which may be available under the Equal Access to Justice Act, as amended.

ENTER this 6th day of July, 2017.

s/ Thomas A. Varlan
CHIEF UNITED STATES DISTRICT JUDGE

ENTERED AS A JUDGMENT

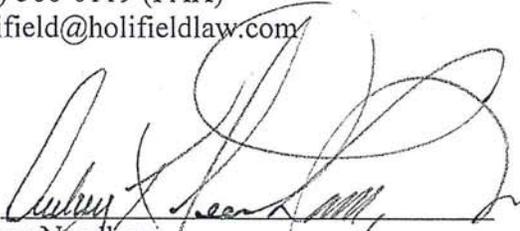
s/ Debra C. Poplin
CLERK OF COURT

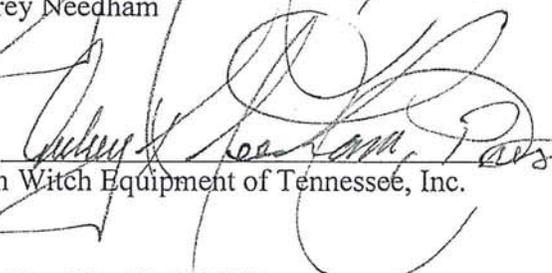
Defendants Ditch Witch Equipment of Tennessee, Inc.
and Aubrey Needham consent to entry of the foregoing Judgment:

Counsel

By: /s/ Al Holifield
AL HOLIFIELD
Attorney for Defendants

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By: 
Aubrey Needham

By: 
Ditch Witch Equipment of Tennessee, Inc.

SOL Case No. 13-001107

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