

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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

Plaintiff,

 \mathbf{V}_s

**DAVID FISHER,
FISHER & PARTNERS STRUCTURAL
ENGINEERS, INC., and
FISHER & PARTNERS STRUCTURAL
ENGINEERS, INC. SIMPLE IRA PLAN,**

Defendants.

CIVIL ACTION
Case No: 1:13-cv-6170

CONSENT ORDER AND JUDGMENT

Plaintiff Thomas E. Perez, Secretary of Labor, United States Department of Labor (“Secretary”), pursuant to the provisions of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. §1001, *et seq.*, filed a complaint against defendants David Fisher, Fisher & Partners Structural Engineers, Inc. and Fisher & Partners Structural Engineers, Inc. SIMPLE IRA Plan (collectively “Defendants”) alleging breaches of their fiduciary responsibilities under ERISA §§403(c)(1), 404(a)(1)(A) and (D), 406(a)(1)(B) and (D) and 406(b)(1) and (2), 29 U.S.C. §§1103, 1104(a)(1)(A) and (D), 1106(a)(1)(B) and (D) and 1106(b)(1) and (2), with respect to the Fisher & Partners Structural Engineers, Inc. SIMPLE IRA Plan (“Plan”).

Defendants waive service of process and answer and admit to the jurisdiction of this Court over them and the subject matter of this action. Defendants neither admit nor deny the allegations of the Secretary's complaint in the action.

The Secretary and Defendants have agreed to resolve all matters in controversy in this action between them (except for the imposition by the Secretary of any penalty pursuant to ERISA §502(l), 29 U.S.C. §1132(l), and any proceedings related thereto), and said parties do now consent to entry of this Consent Order and Judgment ("Judgment") by this Court in accordance therewith.

The parties agree that, if the Secretary assesses a penalty pursuant to ERISA §502(l) in connection with the violations alleged in this matter, the "applicable recovery amount" shall include all amounts paid in accordance with this Judgment.

Upon consideration of the record herein, and as agreed to by the parties, the Court finds that it has jurisdiction to enter this Judgment.

WHEREAS, the Secretary and the Defendants, having agreed to the terms of this Judgment, subject to its approval by the Court, and with due consideration and being fully advised of the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Defendants David Fisher and Fisher & Partners Structural Engineers, Inc. are permanently enjoined and restrained from violating the provisions of Title I of ERISA, 29 U.S.C. §1001, *et seq.*

2. Defendants David Fisher and Fisher & Partners Structural Engineers, Inc. are liable to the Plan in the total amount of \$33,409.80 (the "Entire Restitution Amount"), representing \$9,640.96 in unremitted employee contributions from January 1, 2008,

through December 31, 2008, owed to the Plan, \$21,852.94 in unremitted employer contributions from December 31, 2008, through January 1, 2011, owed to the Plan, and \$1,915.90 in lost opportunity costs related to the aforementioned fiduciary breaches calculated through August 15, 2013, plus interest accruing after August 15, 2013, calculated at the rate of interest as set forth at 26 U.S.C. § 6621(a)(2) (“Accruing Interest”).

3. In reliance on the representations made by Defendant David Fisher in the documents provided by him to the Secretary (including a financial declaration and tax returns), which show that he is currently unable to restore to the Plan the Entire Restitution Amount of \$33,409.80, the Secretary agrees to forbear immediate collection of the Entire Restitution Amount and Accruing Interest and agrees that Defendant David Fisher shall pay the Entire Restitution Amount plus Accruing Interest in accordance with the schedule set forth below:

a. Payment to the Plan of \$2,000.00 shall be made on or before August 15, 2013. Defendant David Fisher shall provide the Secretary with satisfactory proof of the payment.

b. On the fifteenth day of each month, starting on or before September 15, 2013, Defendant David Fisher agrees to make consecutive monthly payments to the Plan of \$500 per month until such time as the Entire Restitution Amount plus Accruing Interest is paid in full. Nothing herein shall prevent Defendant David Fisher from making payments to the Plan on an accelerated basis.

c. Defendant David Fisher agrees to pay 100% of any amounts over \$1,000 that he may receive in bequests, inheritances, gifts, lottery and gambling

winnings, and proceeds of all life insurance policies, per annum, until such time as the Entire Restitution Amount plus Accruing Interest is paid in full.

d. Defendants David Fisher and Fisher & Partners Structural Engineers, Inc. agree to pay 100% of any amounts that Defendant Fisher & Partners Structural Engineers, Inc. and Defendant David Fisher, individually, may receive as a result of the collection of accounts receivable or other debts owed to Defendant Fisher & Partners Structural Engineers, Inc., until such time as the Entire Restitution Amount plus Accruing Interest is paid in full.

4. In return for the Secretary's forbearance, Defendant David Fisher agrees to submit on or before May 15th of each year for the prior year, until the Entire Restitution Amount plus Accruing Interest is paid, to the Regional Director of the Employee Benefits Security Administration, 230 South Dearborn, Suite 2160, Chicago, Illinois 60604 ("EBSA Regional Director"), a current completed annual financial declaration for the preceding calendar year, 1099 IRS Form(s), W-2 form(s), and his annually filed federal tax return, beginning with his federal income tax return for 2013 which is to be provided by May 15th of the year the tax return is filed.

5. In return for the Secretary's forbearance, Defendant Fisher & Partners Structural Engineers, Inc. further agrees to submit to the EBSA Regional Director on or before May 15th of each year for the prior year, until the Entire Restitution Amount plus Accruing Interest is paid, a current completed annual financial declaration for Defendant Fisher & Partners Structural Engineers, Inc. for the preceding calendar year and Defendant Fisher & Partners Structural Engineers, Inc.'s annually filed federal tax return, beginning with Defendant Fisher & Partners Structural Engineers, Inc.'s federal income

tax return for 2013 which is to be provided on or before May 15th of the year the tax return is filed.

6. If it is found that the documents Defendant David Fisher provided regarding his financial status are untrue, the Entire Restitution Amount plus Accruing Interest (minus payments made pursuant to this Judgment) shall immediately become due and payable by him.

7. In restoring monies to the Plan, Defendant David Fisher has agreed to retain PenChecks, Inc. ("PenChecks") for the purpose of locating and making distributions to the Plan participants and for the establishment of IRA accounts for such Plan participants that cannot be located. Defendant David Fisher shall:

a. Forward all agreements with PenChecks entered into pursuant to this Judgment to the EBSA Regional Director within seven (7) calendar days of executing said agreements.

b. Establish an account with PenChecks ("PenChecks Account") to hold any monies to be restored to the Plan pursuant to this Judgment. Defendant David Fisher shall forward all restorative payments to the PenChecks Account for allocation among the Plan participants, proportionally, based on the amounts actually due to each participant. See Exhibit A. Under no circumstances will defendant David Fisher benefit in any way from the amounts he pays into the Plan pursuant to this Judgment.

c. Provide PenChecks with any requested assistance and/or documentation necessary in locating the Plan participants, in distributing restorative payments to each participant, or which may otherwise be necessary for the operation and administration of the PenChecks Account.

d. Pay all of PenChecks' fees associated with actions required by this Judgment. The Plan shall not pay any such fees.

e. Provide, on a quarterly basis, within seven (7) calendar days of the end of the quarter, to the EBSA Regional Director written satisfactory proof that the Penchecks Account has received all of the restorative payments made by Defendant David Fisher during the quarter.

8. Should Defendant David Fisher fail to pay any of the installment payments described in Paragraph 3 above on or before the dates set forth therein, the Entire Restitution Amount plus Accruing Interest (minus payments made pursuant to this Judgment) shall become due and payable immediately with no further notice or demand required by the Secretary to Defendant David Fisher.

9. Defendant David Fisher agrees that he will notify the EBSA Regional Director in writing within seven (7) days of any change of his name, residential address, mailing address, telephone numbers (home, work, and cell phone numbers) email addresses, and employment; filing for bankruptcy by Defendant David Fisher; and receipt of any amount over \$1,000 in bequests, inheritances, gifts, lottery and gambling winnings, and proceeds of all life insurance policies, per annum, until such time as the Entire Restitution Amount plus Accruing Interest is repaid in full.

10. Defendant Fisher & Partners Structural Engineers, Inc. agrees that it will notify the EBSA Regional Director within seven (7) days of any change of its name, business address, mailing address, telephone numbers, and email addresses; filing for bankruptcy by Defendant Fisher & Partners Structural Engineers, Inc.; collection of accounts receivable owed to Defendant Fisher & Partners Structural Engineers, Inc.; and

changes in Defendant Fisher & Partners Structural Engineers, Inc.'s capitalization, until the Entire Restitution Amount recited in this Judgment, plus Accruing Interest, is repaid.

11. Defendant David Fisher agrees to cooperate with the Secretary. Such cooperation will include speaking and/or meeting with representatives of the Secretary for interviews and disclosure of information as requested.

12. Upon the entry of this Judgment, Defendants David Fisher and Fisher & Partners Structural Engineers, Inc. shall immediately be removed as fiduciaries of the Plan and shall be permanently enjoined from serving or acting as fiduciaries or service providers with respect to any employee benefit plan subject to ERISA, except for the purposes of restoring and allocating the monies owed to the Plan.

13. Each party agrees to bear his or its own attorneys' fees, costs and other expenses incurred by such party in connection with any stage of this proceeding to date including, but not limited to, attorneys' fees which may be available under the Equal Access to Justice Act, as amended.

14. The Court shall maintain jurisdiction over this matter only for purposes of enforcing this Judgment.

15. Nothing in this Order is binding on any government agency other than the United States Department of Labor.

DATED: September 17, 2013



UNITED STATES DISTRICT JUDGE

The parties hereby consent to the entry of this consent order and judgment:
FOR THE SECRETARY OF LABOR:

M. PATRICIA SMITH
Solicitor of Labor

CHRISTINE Z. HERI
Regional Solicitor

/s/ Elizabeth M. Kruse
Elizabeth M. Kruse
Trial Attorney, Bar No.: TX 24070088

DATED: 8/29/13

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FOR THE DEFENDANTS:

FISHER & PARTNERS STRUCTURAL ENGINEERS, INC.

By:

/s/ David Fisher
DAVID FISHER
President

DATED: 7/30/2013

FISHER & PARTNERS STRUCTURAL ENGINEERS, INC. SIMPLE IRA PLAN

By:

/s/ David Fisher
DAVID FISHER
Fiduciary

DATED: 7/30/2013

DAVID FISHER

/s/ David Fisher
Individually

DATED: 7/30/2013

Exhibit A

Fisher & Partners Structural Engineers Inc. SIMPLE IRA Case No. 50-030634(48)

Summary of Delinquent Employee Contributions, Delinquent Employer Contributions,
and Lost Interest Owed as of August 15, 2013

Participant	Total owed for delinquent employee contributions	Total owed for lost opportunity costs on employee contributions	Total owed for delinquent employer contributions	Total owed for lost opportunity costs on employer contributions	Total owed for employee and employer contributions and lost opportunity costs	Percent of Total
Berg, Jamie	\$1,500.00	\$0.00	\$2,834.70	\$115.41	\$4,450.11	13%
Brandenburg, Adam	\$520.00	\$0.00	\$3,573.27	\$510.29	\$4,603.56	14%
Faron, Michael	\$0.00	\$0.00	\$1,200.00	\$189.99	\$1,389.99	4%
Keller, Kathryn	\$1,200.00	\$0.00	\$2,031.33	\$70.84	\$3,302.17	10%
Lane, Andrew	\$2,006.55	\$0.00	\$4,808.31	\$259.43	\$7,074.29	21%
Sanchez, Rigoberto	\$2,407.86	\$0.00	\$4,216.85	\$203.20	\$6,827.91	20%
Wagner, Andreas	\$2,006.55	\$458.16	\$3,188.48	\$108.58	\$5,761.77	17%
	\$9,640.96	\$458.16	\$21,852.94	\$1,457.74	\$33,409.80	100%

**Total
delinquent
amounts
owed. \$31,493.90**

**Total lost
opportunity
costs owed as
of August 15,
2013. \$1,915.90**