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 Secretary of Labor, United States
 Department of Labor

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

THOMAS E. PEREZ, SECRETARY OF
 LABOR, UNITED STATES DEPARTMENT
 OF LABOR,

Plaintiff,

vs.

BAR-K, INC., a corporation; WALTER NG,
 an individual; BRUCE HORWITZ, an
 individual; and the BAR-K, INC. 401(k)
 PLAN, an employee benefit plan;

Defendants.

Hon. Jeffrey S. White

Case No. 3:14-cv-05549-JSW

**CONSENT JUDGMENT & ORDER AS
 TO DEFENDANT BRUCE HORWITZ**

This action was filed by Plaintiff Thomas E. Perez, Secretary of Labor, United States Department of Labor (the “Secretary”), alleging that Defendants Walter Ng, Bruce Horwitz, and Bar-K, Inc. breached their fiduciary duties under Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001 – 1191c, in connection with the Bar-K

1 401(k) Plan (the “Plan”), and seeking to enjoin further violations of ERISA and to obtain other
2 equitable relief.

3 Defendant Bruce Horwitz admits that this Court has jurisdiction over him and that this
4 Court has jurisdiction over this action pursuant to ERISA section 502(e)(1), 29 U.S.C.
5 § 1132(e)(1), and that venue lies with the United States District Court for the Northern District of
6 California pursuant to ERISA section 502(e)(2), 29 U.S.C. § 1132(e)(2). Defendant Bruce
7 Horwitz further acknowledges receipt of the Secretary’s Complaint in this action and hereby
8 waives service of process of the Summons and Complaint.
9

10 The Secretary and Defendant Bruce Horwitz have agreed that this Consent Judgment &
11 Order as to Bruce Horwitz (“Consent Judgment”) shall fully settle all claims of the Secretary
12 asserted against Horwitz in the Complaint.

13 The Secretary and Defendant Bruce Horwitz waive the entry of findings of fact and
14 conclusions of law and agree to the entry of this Consent Judgment in settlement of this action.
15

16 Defendant Bruce Horwitz neither admits nor denies the allegations alleged in the
17 Complaint or contained herein.

18 The parties hereto having agreed to the entry of this Consent Judgment, and it appearing
19 that the Court has jurisdiction over the parties and subject matter of this action and that the Court
20 is empowered to provide the following equitable relief,

21 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

22 1. Based on improperly collecting fees in violation of ERISA § 406(b)(1), 29 U.S.C. §
23 1106(b)(1), Defendant Bruce Horwitz is liable to the Plan for \$30,718.72 (“Amount Due”) in
24 losses and lost-opportunity costs to the Plan for the period December 1, 2002, to October 31,
25 2007.
26

27 2. Defendant Bruce Horwitz shall restore the Amount Due to the Plan within ten (10) days
28 following direction from the Secretary to send the Amount Due to an identified Plan account.

1 Should Defendant Horwitz fail to remit the Amount Due within ten days in accordance with the
2 Secretary's direction, interest on the Amount Due shall accrue at the rate set forth in 26 U.S.C. §
3 6621, and this judgment shall not be satisfied until Horwitz has remitted both the Amount Due
4 and any interest accrued pursuant to this provision.

5 3. Within five business days of making the payment set forth in Paragraphs 1 and 2,
6 Defendant Bruce Horwitz shall provide a copy of the front and back of the remittance check, or
7 other appropriate evidence that such payment has been made, to the Employee Benefits Security
8 Administration's San Francisco Regional Director at:
9

10 Regional Director
11 U.S. Department of Labor
12 Employee Benefits Security Administration
13 90 Seventh Street, Suite 11-300
14 San Francisco, California 94103-1516
15 Telephone number: (415) 625-2481
16 Facsimile number: (415) 625-2450

17 4. Defendant Bruce Horwitz shall be permanently enjoined from serving as a fiduciary or
18 service provider to any employee benefit plan subject to ERISA.

19 5. Defendant Bruce Horwitz shall be permanently enjoined from any violations of the
20 provisions of Title I of ERISA, 29 U.S.C. §§ 1001-1191c.

21 6. Upon entry of judgment against Defendant Bar-K, Inc., the Court shall appoint an
22 Independent Fiduciary for the Plan. Defendant Bruce Horwitz shall cooperate fully with the
23 Independent Fiduciary appointed by the Court in providing documents or information he may
24 have relevant to the Plan's administration and management.

25 7. Defendant Bruce Horwitz agrees that, in the event that he files for bankruptcy protection
26 under any chapter of the United States Bankruptcy Code prior to remitting the Amount Due in its
27 entirety, within thirty (30) calendar days of filing a petition in any United States Bankruptcy
28 Court, he will execute a stipulation with the Secretary and consent to the entry of an Order that
the identified Amount Due plus lost-opportunity costs calculated through the date that Horwitz

1 files a bankruptcy petition is a nondischargeable debt pursuant to § 523(a)(4) of the Bankruptcy
2 Code, 11 U.S.C. § 523(a)(4) (“Stipulation”). The Stipulation and entry of a subsequent Order
3 shall further provide for the continued accrual of lost-opportunity costs at the rate set forth in 26
4 U.S.C. § 6621 from the date the relevant nondischargeability Order is issued until such time as
5 the Amount Due plus applicable interest is paid to the Plan in full.

6 8. Each party to this Consent Judgment agrees to bear his/its own fees and other expenses
7 incurred by such party in connection with any stage of this proceeding, including but not limited
8 to attorneys’ fees which may be available under the Equal Access to Justice Act, as amended.

9 9. The parties to this Consent Judgment expressly waive any and all claims of any nature
10 which each may have against the other, or any of their officers, agents, attorneys, employees or
11 representatives, arising out of or in connection with the allegations contained in the Complaint
12 on file in this action, any other proceedings or investigation incident thereto or based on the
13 Equal Access to Justice Act, as amended.

14 10. Nothing in this Consent Judgment is binding on any governmental agency other than the
15 United States Department of Labor, Employee Benefits Security Administration.

16 11. This Consent Judgment does not in any manner affect the right of the United States
17 Department of Labor to assess a civil penalty of twenty percent (\$6,143.74) on amounts
18 recovered pursuant to ERISA § 502(l), 29 U.S.C. § 1132(l). Defendant Bruce Horwitz agrees to
19 waive the notice of assessment and service requirement of 29 C.F.R. § 2570.83. Upon
20 assessment, payment shall be made immediately unless the Defendant files a petition for waiver
21 or reduction of the penalty as provided for in 29 C.F.R. §§ 2570.83–2570.87 and the Secretary
22 agrees to waive or reduce the penalty. Defendant may not challenge the applicable recovery
23 amount, the validity of the violations alleged, or his liability for the violations.

24 12. This Court shall retain jurisdiction of this matter for purposes of enforcing this Consent
25 Judgment.
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1 13. By signing their names to this Consent Judgment, the parties hereto represent that they
2 are informed and understand the effect and purpose of this Consent Judgment.

3 14. This Consent Judgment may be executed in counterparts, each of which shall be deemed
4 to be an original, but all of which, taken together, shall constitute one and the same instrument.

5 The Court directs the entry of this Consent Judgment as a final order.

6 IT IS SO ORDERED

7 Dated: January 6, 2015


UNITED STATES DISTRICT JUDGE

8
9
10 Entry of this Consent Judgment is hereby consented to:

11 For Plaintiffs

12 Dated:

13 12/18/14

M. PATRICIA SMITH
Solicitor of Labor

JANET M. HEROLD
Regional Solicitor

DANIELLE L. JABERG
Counsel for ERISA

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18 
19 JOSEPH M. LAKE
Senior Trial Attorney

20 Attorneys for Plaintiff Secretary of Labor,
21 U.S. Department of Labor

22 For Defendant Bruce Horwitz

23 Dated: 7/30/14

24 
25 JOSH COHEN
Clarence, Dyer, & Cohen LLP

26 Attorneys for Defendant Bruce Horwitz
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