twenty-five percent of the assets of the Plan or of any of the Accounts at any time during the duration of the Lease; (c) an independent, qualified fiduciary approved of the Lease on behalf of the Plan and the Accounts and has monitored the Lease throughout its entirety; (d) the rental amount received by the Plan and the Accounts was based upon the fair market rental value of the Lathe; and (e) within ninety days of the publication in the **Federal Register** of the grant of this exemption, Masik files Forms 5330 with the Internal Revenue Service and pay all applicable excise taxes that are due by reason of the past prohibited transactions, which are not subject to this exemption.

(2) With respect to the prospective Sale—

(a) the terms and conditions of the Sale are at least as favorable to the Accounts as those obtainable in an arm's length transaction with an unrelated party; (b) the Sale is a onetime cash transaction; (c) the Accounts are not required to pay any commissions, costs or other expenses in connection with the Sale; (d) the Sale price for the Lathe is based upon its fair market value on the date of the Sale as determined by an independent, qualified appraiser; and (e) within ninety days of the publication in the Federal Register of the grant of this exemption, Masik files Forms 5330 with the Internal Revenue Service and pay all applicable excise taxes that are due by reason of the past prohibited transactions, which are not subject to this exemption.

EFFECTIVE DATE: This exemption, if granted, will be effective as of June 1, 1988 with respect to the Lease. The proposed exemption will be effective as of the date of the grant of the exemption with respect to the Sale.

Summary of Facts and Representations

1. The Plan is a profit sharing plan sponsored by Masik, a closely-held Wisconsin corporation engaged in the business of manufacturing, rebuilding, and repairing tools and dies for industrial manufacturers in Southeastern Wisconsin, Joseph Masik, Jr. and his wife, Patricia Masik, hold 100 percent of Masik's stock and are its only directors. Mr. Masik, Mrs. Masik and David Zirkelbach serve, respectively, as President, Secretary/Treasurer and Vice President of Masik. In addition to being officers of Masik, Mr. Masik, Mrs. Masik and Mr. Zirkelbach have been the trustees for the Plan (the Trustees) from the inception of the Lease until the present time.

On May 31, 1990, the Trustees amended the Plan to provide for participant directed investment. As of May 30, 1992, the Plan had twenty-one participants and \$322,693 in assets. Such assets are primarily invested in life insurance annuity contracts and certificates of deposit.

2. Among the assets of the Plan is the Lathe, which is a seventy-six inch, used Bullard-Dynatrol Vertical Turret Lathe, serial number 31820. The Lathe weighs 130,000 pounds and measures twenty feet in height. Within six months of the Plan's purchase of the Lathe, Masik mounted the Lathe in the concrete floor of Masik's plant and attached a \$20,000 "tracer unit" to the Lathe at no cost to the Plan. As of August 15, 1994, the Lathe remained mounted in the concrete floor.

3. The Trustees acquired the Lathe, on behalf of the Plan, in January of 1987 from the George Meyer Manufacturing Company, an unrelated party, for a purchase price of \$33,250.6 The Trustees represent that they purchased the Lathe because, based upon their experience in the industry, they believed that the purchase price of the Lathe was less than one-half of its fair market value.⁷

4. The Trustees represent that the exact date that the Lathe was first placed into the service of Masik is unknown. However upon a review of the Plan's records, partial installation of the Lathe occurred sometime prior to February 4, 1987. Masik formally commenced leasing the Lathe from the Plan under a written lease (the Lease) executed June 2, 1988 with an initial five-year term expiring May 31, 1993. Masik represents that it compensated the Plan for its use of the Lathe which occurred prior to June 2, 1988. As of June 1, 1987, the Plan had in excess of \$200,000 in assets thereby involving sixteen percent of the Plan's assets in the Lathe. Masik represents that from June 2, 1988 until the termination of the Lease on May 31, 1993, the Plan and the Accounts received \$105,540, which represents an annualized rate of return of sixty-three percent.

5. In March of 1989, Masik applied to the Department for exemptive relief with respect to the Lease but withdrew that application in June of 1989. The directed more than twenty-five percent

of his or her account balance to the

Trustees represent that the reason for

Lease. 6. Roger McManus represents that he served as an independent, qualified fiduciary on behalf of the Plan and the Accounts with respect to the Lease beginning in June of 1988. Mr. McManus' qualifications include twenty-five years of experience practicing law, primarily in the area of small business. Mr. McManus represents that he was unrelated to, and independent of, Masik. Mr. McManus states that he understood and acknowledged his duties, responsibilities, and liabilities in acting as a fiduciary with respect to the Plan based upon his familiarity with the fiduciary responsibility provisions of the Act.

Mr. McManus states that, in 1988, he reviewed the investment portfolio of the Plan and considered the diversification of the Plan's assets as well as its liquidity needs. Mr. McManus represents that the Lease did not represent more than twenty-five percent of the assets of any of the Accounts. Mr. McManus believed that the Lease would be in the best interests of the Plan and its participants and beneficiaries as an investment for the Plan's portfolio based on the Lease's rate of return, the stability of the lessee, the character and diversification of the Plan's other assets, and the projected liquidity needs of the

Mr. McManus states that, based upon his previous representation of other businesses and involvement in numerous leasing transactions, he believed that the Lease provisions were quite favorable to the Plan participants and were at least comparable to an arm's length transaction. In addition, Mr. McManus represents that he evaluated the term of the Lease to assure that the Lease satisfied the established standards for commercial reasonableness. Mr. McManus represents that the monthly

the withdrawal was the mistaken belief that amending the Plan to allow for participant directed investments (see Representation #1) would result in correction of the past prohibited transaction and would ensure that no future prohibited transactions would occur. Masik represents that in response to this Plan amendment, all of the eligible participants chose to direct their account balances (the Accounts) on September 20, 1990 towards the purchase of the Lathe and the leasing arrangements. Masik and the Trustees amended the Lease to reflect these participant investment elections. The Trustees represent that no participant

⁶The Department is expressing no opinion in this proposed exemption on whether the acquisition and holding of the Lathe by the Plan violated any of the fiduciary responsibility provisions of Part 4 of Title I of the Act.

⁷Subsequently, Russ Bottoni (Mr. Bottoni), the owner of Russco Sales, Inc., a company specializing in used equipment, appraised the Lathe. Based upon comparable sales, Mr. Bottoni placed the fair market value of the Lathe as of February 22, 1989 at \$79.500.