

JUDGE KARAS

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

v.

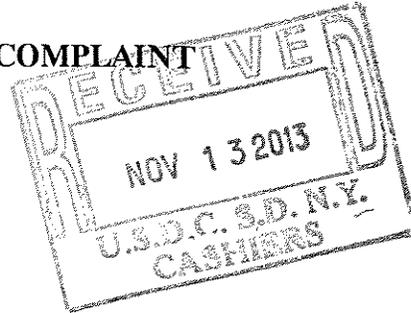
MARK PASDON,
OXYGEN ELECTRONICS, LLC,
and the OXYGEN ELECTRONICS, LLC 401(k)
PROFIT SHARING PLAN,

Defendants.

13 CV 8060

Civil File No.

COMPLAINT



THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor (the
“Secretary”), alleges as follows:

JURISDICTION AND VENUE

1. This action arises under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 *et seq.*, and is brought by the Secretary under ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132 (a)(2) and (5), to obtain relief for breaches of fiduciary duty under ERISA § 409, to enjoin acts and practices which violate the provisions of Title I of ERISA, and to obtain other appropriate equitable and injunctive relief to redress violations and enforce provisions of Title I of ERISA.

2. The Court has jurisdiction over this action pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

3. Venue of this action lies in the Southern District of New York pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because each defendant resides in the Southern District of New York and the breaches took place in the Southern District of New York.

PARTIES

4. Pursuant to §§ 502 (a)(2) and (5) of ERISA, the Secretary has authority to enforce the provisions of Title I of ERISA by, among other means, the filing and prosecution of claims against fiduciaries and other parties who are in violation of ERISA.

5. At all relevant times herein, defendant Oxygen Electronics, LLC 401(k) Profit Sharing Plan (the "Plan"), was an employee benefit plan within the meaning of ERISA §§ 3(2) and (3), 29 U.S.C. § 1002(2) and (3), and is covered by Title I of ERISA pursuant to ERISA § 4(a)(1). The Plan was sponsored by defendant Oxygen Electronics, Inc. ("Oxygen"), an employer of employees covered by the Plan, which maintained its principal place of business at 56 Lafayette Avenue, White Plains, NY 10603. The Plan is named as a defendant pursuant to Rule 19 of the Federal Rules of Civil Procedure to assure that complete relief can be granted.

6. At all relevant times, defendant Mark Pasdon ("Pasdon") was the owner of Oxygen.

7. At all relevant times, Pasdon exercised discretionary authority or discretionary control respecting the management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan, and thus, was a fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21).

8. Since at least June 1, 2009, and by information and belief at all relevant times, Pasdon was the designated Trustee of the Plan, and thus, was a fiduciary within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21).

9. At all relevant times herein, Oxygen exercised discretionary authority or discretionary control respecting the management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan, and thus, was a fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21).

10. Since at least June 1, 2009, and by information and belief at all relevant times, Oxygen was the designated Plan Administrator of the Plan, and thus, was a fiduciary within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21).

FACTUAL ALLEGATIONS

11. Pursuant to the documents governing the Plan, participating employees would contribute to their individual accounts within the Plan by means of payroll deductions (the "Employee Contributions").

12. Pursuant to the documents governing the Plan, Oxygen was required to deposit the Employee Contributions of each participant into his or her respective accounts within the Plan.

13. Between December 28, 2007 through December 31, 2008 and June 6, 2009 through July 16, 2010, defendants Oxygen and Pasdon failed to timely remit Employee Contributions into the Plan (the "Delinquent Employee Contributions"), causing lost earnings in the amount of at least \$2,795.10.

14. Upon information and belief, the Delinquent Employee Contributions were not segregated from Oxygen's general assets.

15. By reason of the defendants Oxygen and Pasdon's failure to forward the Delinquent Employee Contributions in the time specified in the Plan's documents, the Plan's participants lost the opportunity to realize reasonable interest and an effective rate of return for those sums.

16. Between January 16, 2009 through May 8, 2009 and July 30, 2010 through December 31, 2011, defendants Oxygen and Pasdon withheld Employee Contributions from employees' wages but failed to deposit at least \$23,501.60 in Employee Contributions (the "Unforwarded Employee Contributions") into the Plan.

17. Upon information and belief, the Unforwarded Employee Contributions were not segregated from Oxygen's general assets.

18. By reason of the defendants Oxygen and Pasdon's failure to forward the Unforwarded Employee Contributions, the Plan's participants lost the opportunity to realize reasonable interest and an effective rate of return for those sums.

VIOLATIONS

19. By the conduct described in paragraphs 11-18 above, defendants Oxygen and Pasdon allowed the assets of the Plan to inure to the benefit of Oxygen, in violation of ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1).

20. By the conduct described in paragraphs 11-18 above, defendants Oxygen and Pasdon failed to administer the Plan's assets for the exclusive purpose of providing benefits to the Plan's participants and beneficiaries and defraying reasonable expenses of administering the Plan, in violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

21. By the conduct described in paragraphs 11-18 above, defendants Oxygen and Pasdon failed to administer the Plan's assets with the care, skill and diligence that a prudent fiduciary would have used in like circumstances, in violation of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

22. By the conduct described in paragraphs 11-18 above, defendants Oxygen and Pasdon caused the Plan to enter into transactions which they knew or should have known constituted a direct or indirect transfer to or use by or for the benefit of a party-in-interest of Plan assets, in violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

23. By the conduct described in paragraphs 11-18 above, defendants Oxygen and Pasdon dealt with assets of the Plan in their own interest and/or for their own account, in violation of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1).

24. By the conduct described in paragraphs 11-18 above, defendants Oxygen and Pasdon acted in transactions involving the Plan on behalf of a party (or represented a party) whose interests were adverse to the interests of the Plan or the interests of its participants and beneficiaries, in violation of ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2).

25. The breaches of fiduciary duty committed by defendants Oxygen and Pasdon caused a loss to the Plan and to the Plan participants who lost money due to Oxygen and Pasdon's failure to timely remit and/or deposit employee contributions into the Plan that were deducted from employees' salaries.

PRAYER FOR RELIEF

WHEREFORE, the Secretary requests that the Court enter an Order:

1. Permanently enjoining defendants Pasdon and Oxygen from violating ERISA §§ 404 and 406, 29 U.S.C. §§ 1104 and 1106;
2. Permanently enjoining defendant Pasdon from serving as a fiduciary or service provider to any employee pension benefit plan or employee benefit plan covered by the provisions of ERISA;
3. Ordering Oxygen, Pasdon, the Plan, their agents, employees, service providers, banks, accountants, and attorneys to preserve and provide the Secretary all of the books, documents, and records relating to the finances and administration of Oxygen and the Plan;
4. Ordering Oxygen and Pasdon to restore all losses, plus interest and/or lost opportunity earnings, incurred by the Plan as a result of their violation of ERISA;
5. Removing Pasdon as Trustee of the Plan;
6. Appointing an independent fiduciary for the Plan with plenary authority and control over the Plan, including but not limited to, the authority to marshal assets on behalf of the Plan, pursue claims on behalf of the Plan, receive and distribute any restitution paid pursuant to the judgment in this case, and, if necessary, terminate the Plan; and

7. Providing such other appropriate relief as is equitable and just.

DATED: November 12, 2013
New York, New York

Respectfully submitted,

/S/M. Patricia Smith

M. PATRICIA SMITH
Solicitor of Labor

/S/Patricia M. Rodenhausen

PATRICIA M. RODENHAUSEN
Regional Solicitor

/S/Darren Cohen

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