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UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

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| THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, | : | |
| | : | Civil Action File |
| Plaintiff, | : | |
| | : | No. 1:15-CV-93 [FJS/RFT] |
| v. | : | |
| | : | |
| DANIEL M. BYRNES & the FORT ORANGE CAPITAL MANAGEMENT, INC. PROFIT SHARING PLAN | : | |
| Defendants. | : | |

COMPLAINT

Plaintiff, Thomas E. Perez, Secretary of Labor, United States Department of Labor (the “Secretary”), to the best of his knowledge, information and belief alleges:

1. This action arises under Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. §§ 1001 *et seq.*, and is brought by the Secretary against Daniel M. Byrnes (“Byrnes” or “Defendant”) and the Fort Orange Capital Management, Inc. Profit Sharing Plan (the “Plan”) to enjoin practices in violation of Title I of ERISA and to obtain such further equitable relief as may be appropriate to redress violations and to enforce the provisions of Title I of ERISA.

JURISDICTION AND VENUE

2. This 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 Northern District of New York pursuant to ERISA § 502(e)(2), 29 U.S.C. §1132(e)(2), because the Plan was administered in Albany, New York, within the Northern District of New York.

THE PARTIES

4. The Secretary, pursuant to ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5), has the 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 Title I of ERISA.

5. The Plan is an employee pension benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3) and is covered by ERISA, pursuant to ERISA § 4(a), 29 U.S.C. § 1003(a). The Plan was sponsored by Fort Orange Capital Management, Inc. (the “Company”). The Plan’s last known address was 100 State Street, Albany, New York 12207-1801.

6. The Plan was established on or about January 1, 2003 by the Company as an amendment and restatement of a preexisting Plan which was originally effective January 1, 1997. The original plan was the Fort Orange Capital Management, Inc. Money Purchase Plan and Trust, which merged into the Plan, effective as of March 31, 2002.

7. Defendant Daniel Byrnes (“Byrnes”) is and was at all relevant times a named trustee of the Plan. Byrnes exercised discretionary authority or discretionary control respecting 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. Byrnes was a fiduciary of the Plan within the meaning of ERISA § 3 (21)(i) and (iii), 29 U.S.C. § 1002(21)(i) and (iii).

8. Defendant Byrnes also was the sole owner and officer of the Company when it was operational.

9. The Plan is named as a defendant for the purpose of ensuring complete relief among the parties under Federal Rule of Civil Procedure 19.

FACTUAL ALLEGATIONS

Background

10. The Company, an investment management and commodity trading firm, operated from approximately 1996 to 2005.

11. The Company was the Plan Administrator, responsible for the day-to-day operation of the Plan, at all times relevant to this action.

12. Wells Fargo Advisors, located at 80 State Street, Albany, New York 12207, is and has been the custodian of Plan assets at all times relevant to this action.

13. Jeff Lashway is an Investment Advisor at Wells Fargo Advisors and has at all relevant times managed the Plan's account.

14. On or about 2005, the Company ceased operations due to poor performance and a loss of clients.

15. To date, Byrnes has not voluntarily dissolved the Company.

16. On or about July 2010, the Company was "dissolved by proclamation" of the New York State Secretary of State.

17. The Plan has not been terminated.

The Violative Conduct: Purchases of Stock in Sarissa Resources Inc.

18. Sarissa Resources, Inc. ("Sarissa") is a mineral exploration company.

19. Sarissa is incorporated under the laws of the state of Nevada.

20. Sarissa's head office is located in Oakville, Ontario, Canada.

21. Sarissa is traded over the counter on PINKSHEETS as SRSR.

22. Sarissa is a penny stock. The United States Securities and Exchange Commission defines penny stocks as low-priced shares of small companies.

23. Ormston List Frawley LLP is a Canadian law firm that collects the funds for private placements of Sarissa stock purchases.

24. At all relevant times, Sarissa was on Wells Fargo Advisor's list of prohibited securities, which means that Wells Fargo's computer system will automatically prevent its employees from trading in Sarissa stock.

25. Wells Fargo Advisors Investment Advisor Jeff Lashway advised Byrnes not to invest in Sarissa.

26. On March 31, 2011, Byrnes requested that Wells Fargo Advisors make a wire transfer from the Plan's account in the amount of \$100,000.00 to the Bank of Montreal.

27. Byrnes specified to Wells Fargo Advisors that the \$100,000.00 transfer was for the benefit of Ormston List Frawley, LLP. On or about March 31, 2011, Wells Fargo Advisors transferred \$100,000.00 from the Plan's account in accordance with Byrnes' request.

28. The \$100,000.00 transferred from the Plan's account on or about March 31, 2011 was used to purchase five (5) million shares of stock in Sarissa.

29. Sarissa issued a stock certificate, dated April 15, 2011, to the Plan showing that the Plan is the owner of five (5) million shares of Sarissa common stock.

30. The \$100,000.00 transfer of Plan assets to purchase Sarissa stock was an investment of the Plan's assets.

31. On August 1, 2012, Byrnes requested that Wells Fargo Advisors make a wire transfer in the amount of \$120,000.00 from the Plan's account to the Bank of Montreal.

32. Byrnes specified to Wells Fargo Advisors that the \$120,000.00 transfer was for the benefit of Ormston List Frawley, LLP in trust for Sarissa Resources, Inc.

33. On or about August 1, 2012, Wells Fargo Advisors transferred \$120,000.00 from the Plan's account in accordance with Byrnes' request.

34. The \$120,000.00 transfer of Plan assets to purchase Sarissa stock was an investment of the Plan's assets.

35. The \$120,000.00 Wells Fargo transferred from the Plan's account on or about August 1, 2012 was used to purchase six (6) million shares of stock in Sarissa.

36. Sarissa issued a stock certificate to the Plan, dated August 3, 2012, that shows that the Plan is the owner of six (6) million shares of Sarissa common stock.

37. Byrnes has been a personal investor in Sarissa since 2008.

38. Prior to ever using the Plan's assets to purchase shares of Sarissa, Byrnes' children and other family also held shares of stock in Sarissa.

39. As of September 2014, Byrnes is Sarissa's President and Interim Chief Financial Officer.

40. As of December 31, 2010, prior to the wire transfers referred to in paragraphs 26 and 31, the assets in the Plan's Wells Fargo account totaled \$221,128.90.

41. As of December 31, 2012, the assets in the Plan's Wells Fargo account totaled \$8,230.75.

42. As of December 31, 2012, approximately 96% of the Plan's assets are held in the form of stock in Sarissa.

43. On March 21, 2013, Byrnes told an investigator for the Employee Benefits Security Administration that the Plan's eleven (11) million shares of Sarissa stock are not liquid.

44. On October 3, 2014, Sarissa announced the final closing of its non-brokered private placement. The closing consisted of the issuance of 31,250,000 of common shares at a price of \$0.008 per common share from existing shareholders, for gross proceeds of \$250,000.00.

45. The Plan has suffered a loss as a result of its investments in Sarissa.

The Violative Conduct: Plan Abandonment

46. The Plan has not filed an annual Form 5500 since the fiscal year beginning January 2002 and ending December 2002, contrary to the requirements of ERISA § 104, 29 U.S.C. § 1024(a)(1).

47. The Plan has not issued individual benefits statements to plan participants, as required by ERISA § 105(a), 29 U.S.C. § 1025(a), since 2003.

48. The Plan's Summary Plan Description has not been updated, as required by ERISA § 104(b)(1)(B), 29 U.S.C. § 1024(b)(1)(B), since January 1, 2003.

49. The Plan fiduciaries have not been bonded, as required by ERISA § 412, 29 U.S.C. § 1112, since 2003.

50. Plan participants are unable to obtain distributions of their Plan assets at this time.

VIOLATIONS

51. By the conduct and circumstances described in paragraphs 18-50, defendant Byrnes has:

- (a) failed to discharge his fiduciary duty with respect to the Plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of

providing benefits to participants of the Plan and their beneficiaries and defraying reasonable expenses of administering the Plan, in violation of ERISA § 404(a)(1)(A)(i), 29 U.S.C. § 1104(a)(1)(A)(i);

(b) failed to discharge his fiduciary duty with respect to the Plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B); and

(c) failed to diversify the Plan's investments so as to minimize the risk of large losses, in violation of ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C).

PRAYER FOR RELIEF

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

- A. Requiring Byrnes to provide an equitable accounting of the whereabouts and status of the Plan's assets and liabilities, any gains and losses in the Plan's investments, and any income earned or payments received by the Plan, between January 1, 2011 and the present;
- B. Requiring Byrnes to restore to the Plan all losses attributable to his fiduciary breaches plus interest;
- C. Requiring the offset of benefits due under the Plan to Byrnes against the amounts Byrnes owes to the Plan;
- D. Removing Defendant Byrnes as fiduciary to the Plan;
- E. Permanently enjoining Byrnes from violating ERISA § 404, 29 U.S.C. § 1104;

- F. Permanently enjoining Byrnes from serving as a fiduciary or service provider to any employee pension benefit plan or employee benefit plan covered by the provisions of ERISA;
- G. Appointing an independent fiduciary for the Plan with plenary fiduciary 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, and take all appropriate actions for the rehabilitation or liquidation of the Plan and distribution of the Plan's assets to the Plan's participants, beneficiaries, and creditors as may be necessary and proper;
- H. Ordering Byrnes, his agents, employees, service providers, banks, accountants, and attorneys to preserve and provide the Secretary and the independent fiduciary all of the books, documents, and records relating to the finances and administration of the Plan;
- I. Awarding the Secretary the costs of this civil action; and
- J. Providing such further relief as is just and equitable.

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DATED: January 26, 2015
New York, NY

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

s/ Jeffrey S. Rogoff
JEFFREY S. ROGOFF
Regional Solicitor

BY: **s/ Allison L. Bowles**
ALLISON L. BOWLES
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