



### **III. THE PLAN**

Defendant TSPA Holding, Inc. 401(k) Profit Sharing Plan (“Plan”) is, and at all times hereinafter mentioned was, an employee benefit plan within the meaning of ERISA Section 3(3), 29 U.S.C. § 1002(3). The Plan was established by, and at all times hereinafter mentioned was maintained by, Defendant TSPA Holding, Inc., an employer engaged in commerce or in an industry or activity affecting commerce, and is subject to Title I, including Title I, Part 4 of ERISA, pursuant to ERISA Sections 4(a)(1) and 401(a), 29 U.S.C. §§ 1003(a)(1) and 1101(a). At all relevant times, the Plan was administered in Austin, Texas, within the jurisdiction of this Court.

### **IV. THE DEFENDANTS**

A. Defendant TSPA Holding, Inc. was, at all times relevant to this action, a Texas corporation engaged in the business of public relations and had a place of business at 1221 South Mopac Expressway, Suite 365, Austin, Texas 78746, within the jurisdiction of this Court. At all times hereinafter mentioned, Defendant TSPA Holding, Inc. has been an employer and a Plan Sponsor with respect to the Plan within the meaning of ERISA Sections 3(5) and 3(16)(B), 29 U.S.C. §§ 1002(5) and 1002(16)(B). At all times hereinafter mentioned, Defendant TSPA Holding, Inc. was the named Plan Administrator and thus had or exercised discretionary authority, control and responsibility over Plan management and administration and had actual control over Plan assets. Accordingly, Defendant TSPA Holding, Inc. has been a fiduciary with respect to the Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A). In addition, at all times hereinafter mentioned, Defendant TSPA Holding, Inc. was a party in interest to the Plan within the meaning of ERISA Sections 3(14), 29 U.S.C. § 1002(14).

B. Defendant Derlis Salinas was, at all times relevant to this action, the president and owner of TSPA Holding, Inc. Further, Defendant Salinas was the named Trustee of the Plan and on behalf of Defendant TSPA Holding, Inc. acted as the Plan Administrator with respect to the Plan in Austin, Texas, within the jurisdiction of this Court. With respect to the Plan, Defendant Salinas was responsible for making financial decisions on whether and when to remit 401(k) contributions to the Plan. Accordingly, under ERISA Section 3(21)(A)(i) and at all times hereinafter mentioned, Defendant Derlis Salinas had and exercised discretionary authority, control, and responsibility over Plan management and administration and had actual control over Plan assets. Thus, Defendant Derlis Salinas was a fiduciary and a party in interest with respect to the Plan within the meaning of ERISA Sections 3(14) and 3(21)(A), 29 U.S.C. §§ 1002(14) and 1002(21)(A).

C. Defendant TSPA Holding, Inc. 401(k) Profit Sharing Plan, as described in paragraph III above, is named as a defendant pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

## **V. VIOLATIONS**

A. During the period July 15, 2009 through the present, Defendants, fiduciaries with respect to the Plan, violated the provisions of ERISA, in that they:

(1) Caused the assets of the Plan to inure to the benefit of the Employer and Plan Sponsor and failed to hold Plan assets for the exclusive purposes of providing benefits to participants in the Plan and their beneficiaries in violation of Section 403(c)(1) of ERISA, 29 U.S.C. §1103(c)(1);

(2) Failed to discharge their duties with respect to the Plan solely in the

interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries in violation of Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A);

(3) Failed to discharge their duties with respect to the Plan with the care, skill, prudence and diligence under the circumstances 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 Section 404(a)(1)(B) of ERISA, 29 U.S.C. § 1104(a)(1)(B);

(4) Failed to discharge their duties with respect to the Plan in accordance with the documents and instruments governing the Plan insofar as such documents and instruments are consistent with the provisions of ERISA in violation of Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D).

(5) Caused the Plan to engage in transactions which they knew or should have known constitute a direct or indirect transfer to, or use by or for the benefit of a party in interest of the assets of such Plan in violation of Section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D);

(6) Dealt with the assets of the Plan in their own interests or for their own account in violation of Section 406(b)(1) of ERISA, 29 U.S.C. § 1106(b)(1); and

(7) Engaged in transactions involving the Plan on behalf of a party whose interests were adverse to the interests of such Plan and the interests of its participants and beneficiaries in violation of Section 406(b)(2) of ERISA, 29 U.S.C. § 1106(b)(2).

B. Specifically, the Defendants engaged in the aforementioned violations and continue to violate ERISA by:

- (1) failing to remit employee salary deferrals to the Plan during the period of July 1, 2011, to May 31, 2012;
- (2) failing to collect or otherwise take appropriate action to protect the Plan's interest in mandatory safe harbor employer matching contributions owed to the Plan during the period of July 1, 2011, to May 31, 2012;
- (3) failing to timely remit employee salary deferrals to the Plan during the period of July 15, 2009, to June 15, 2011, by remitting contributions months and sometimes almost a year after being withheld from employee paychecks;
- (4) permitting Defendants, both parties in interest, to use Plan assets for their own interests and for their own commercial interests and benefits to alleviate financial difficulties during the period from July 15, 2009 to the present;
- (5) failing to segregate Plan assets during the period of July 15, 2009, to the present; and
- (6) failing to properly administer the Plan during the period of December 2012 to the present by not making distributions to terminated participants as soon as administratively feasible, as required by the Plan.

## **VI. DIRECT LIABILITY**

As a result of engaging in breaches of their fiduciary responsibilities, obligations or duties and by engaging in transactions prohibited by ERISA, as described in Part V above, Defendants have caused the Plan to suffer financial losses for which they each are liable pursuant to ERISA Section 409(a), 29 U.S.C. § 1109(a).

## **VII. CO-FIDUCIARY LIABILITY**

Pursuant to the provisions of ERISA Section 405, 29 U.S.C. § 1105, Defendants are personally liable for the breaches of fiduciary responsibility set forth in paragraph V above committed by any co-fiduciaries with respect to the Plan.

## **VIII. PRAYER**

WHEREFORE, cause having been shown, Plaintiff prays that this Court:

1. Order Defendants to restore all losses to the Plan, with interest thereon, resulting from their breaches of fiduciary obligations and to correct all prohibited transactions and, if necessary, to offset any claims which they may have against or with the Plan against the amount of losses, including lost opportunity costs, resulting from their violations;
2. Order Defendants to appoint an independent fiduciary to the Plan to be approved by Plaintiff and the Court for the limited purpose of ensuring that Plan assets recovered in this action are disbursed to Plan participants with quarterly progress reports to the Plaintiff, and once all funds have been disbursed, to terminate the Plan;
3. Order that any expenses associated with the appointment of an independent fiduciary and the subsequent administration and termination of the Plan be paid by Defendants;
4. Permanently enjoin Defendants from violating the provisions of ERISA;
5. Permanently enjoin Defendants from acting as a fiduciary to the Plan or any other employee benefit plan covered by ERISA;
6. Award Plaintiff costs of this action; and
7. Provide such other remedial relief as may be appropriate.

Respectfully Submitted,

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