

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

SETH HARRIS,)
Acting Secretary of Labor,)
United States Department of Labor,)
)
Plaintiff,)

FILE NO.

v.)

KIP CORPORATION RETIREMENT)
SAVINGS PLAN, KIP)
CORPORATION, EUGENE KISER)
and MONIQUEA SCOTT,)
)
Defendants.)

COMPLAINT
(Injunctive Relief Sought)

Plaintiff **SETH HARRIS**, Acting Secretary of Labor, **UNITED STATES DEPARTMENT OF LABOR** (“the Secretary”) alleges as follows:

1. This cause of action arises under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq., and is brought to enjoin acts and practices which violate the provisions of Title I of ERISA, and to obtain other appropriate equitable relief to redress violations and enforce the provisions of that Title pursuant to § 502(a)(2) and (5) of ERISA, 29 U.S.C. § 1132(a)(2) and (5).

2. Jurisdiction hereof is conferred upon the Court by § 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).

3. Venue of this action lies in the Western District of North Carolina pursuant to § 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

4. The **KIP Corporation Retirement Savings Plan** (“the Plan”) is a single-employer employee benefit plan within the meaning of § 3(3) of ERISA, 29 U.S.C. § 1002(3), subject to coverage under ERISA pursuant to § 4(a), 29 U.S.C. § 1003(a), and is joined as a party defendant herein pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to ensure that complete relief may be granted.

5. Defendant **KIP Corporation** (“the Company”) is or was at all times relevant to this action the Employer, Plan Administrator and Plan Sponsor and, therefore, a “fiduciary” within the meaning of § 3(21)(a) of ERISA, 29 U.S.C. § 1002(21)(A) and a “party in interest” within the meaning of § 3(24) of ERISA, 29 U.S.C. § 1002(14)(A) and (C).

6. Defendant **Eugene Kiser** (“Kiser”) is or was at all times relevant to this action the sole owner and President of the Company and acted, on behalf of the Company, as an Administrator of the Plan. Kiser was also the signer of the Plan documents, had the authority and responsibility to make any and all administrative decisions with respect to the Plan and its assets.

Therefore, he is a “fiduciary” within the meaning of § 3(21)(a) of ERISA, 29 U.S.C. § 1002(21)(A) and a “party in interest” within the meaning of § 3(14) of ERISA, 29 U.S.C. § 1002(14)(A) and (C). Upon information and belief, Kiser resides at 223 Beverly Drive, Charlotte, North Carolina 28209.

7. Defendant **Moniquea Scott** (“Scott”) is or was at all times relevant to this action the office manager for the Company, the named “404(c) contact” in the Summary Plan Description, and the primary contact regarding the Plan’s contract with Principal Life Insurance Company. Further, Scott had the authority and responsibility to make any and all administrative decisions with respect to the Plan and its assets. Therefore, she a “fiduciary” within the meaning of § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A) and a “party in interest” within the meaning of 3(14) of ERISA, 29 U.S.C. § 1002(12)(A) and (C). Upon information and belief, Scott resides at 11815 Killrush Drive Charlotte, North Carolina 28214.

8. According to the corporate records on file with the North Carolina Secretary of State, KIP Corporation is active and its registered agent is Eugene Kiser.

9. Eugene Kiser, acting on behalf of the Company, signed documents establishing the Plan as a “Safe Harbor 401(k) Plan” funded with both participant contributions and mandatory and discretionary matching

employer contributions, with an effective date of November 1, 1995.

10. Under documents establishing the Plan, the Company was required to make mandatory matching employer contributions to the account of each participant in an amount equal to 100% of the participant's contribution, up to 4% of the participant's compensation.

11. In or around May 10, 2010, the Plan was amended to revoke the safe harbor election; thus, after that date, the Company was no longer required to make mandatory matching contributions.

12. The Plan is still in existence; however, as of March 27, 2010, the Company stopped withholding contributions from employee paychecks.

13. Pursuant to DOL Regulation at 29 C.F.R. § 2510.3-102(b)(1), employee contributions become assets of the Plan as soon as they can reasonably be segregated from the assets of the employer.

14. Between March 2009 through March 2010, the Company, Kiser and Scott failed to ensure that employee contributions which were withheld from employee paychecks were timely remitted to the Plan. Instead, these contributions were diverted for the use of the Company in its daily operations.

15. Between March 2009 through March 2010, the Company, Kiser and Scott failed to ensure that mandatory matching employer contributions

were timely made to the Plan. Instead, these funds were used by the Company in its daily operations.

16. Between March 2009 and March 2010, the Company had sufficient cash assets to collect and submit the mandatory matching employer contributions when they became due.

17. In total, Defendants failed to ensure that employee contributions and employer matching contributions totaling approximately **\$85,142.00**, were timely remitted to the Plan.

18. Defendants the Company, Kiser and Scott have breached their fiduciary obligations by failing to discharge their duties with respect to the Plan solely in the interest of the Plan participants and beneficiaries, for the exclusive purpose of providing benefits and defraying reasonable expenses of plan administration, with the requisite degree of care, skill and prudence, and in accordance with the documents and instrument governing the Plan, in violation of §§ 404(a)(1)(A), (B) and (D) of ERISA, 29 U.S.C. §§ 1104(a)(1)(A), (B) and (D), by, among other things, failing to ensure that participant contributions were timely remitted to the Plan, failing to remit all participant contributions, failing to collect and submit mandatory matching employer contributions as required under the Plan documents, and failing to administer the Plan in a prudent manner.

19. Defendants the Company, Kiser and Scott have caused the Company to retain the use of unremitted participant contributions as described in paragraph 14 above, which they knew of should have known constituted a direct or indirect transfer of Plan assets to or use for the benefit of the Company, a party in interest, in violation of § 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D).

20. Defendants the Company, Kiser and Scott have dealt with the assets of the Plan in their own interest and for their own account by engaging in the transactions described in paragraph 14 above, in violation of § 406(b)(1) and (2) of ERISA, 29 U.S.C. 1106(b)(1) and (2), by, among other things, causing the company to retain the use of unremitted participant contributions for its daily business operations.

WHEREFORE, Plaintiff prays the Court:

A. Order that the Plan set off the individual Plan accounts of any Defendant against the amount of losses, including lost opportunity costs, resulting from their fiduciary breaches, as authorized by § 1502(a) of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1502(a), 111 Stat. 788, 1058-59 (1997) (codified at 29 U.S.C. § 1056(d)(4)), if the losses are not otherwise restored to the Plan by the Defendants and reallocated to the non-breaching participants;

B. Permanently enjoin Defendants from serving as fiduciary, administrator, officer, trustee, custodian, agent, employee, representative, or having control over the assets of any employee benefit plan subject to ERISA;

C. Enjoin Defendants from engaging in any further violations of Title I of ERISA;

D. Order Defendants, jointly and severally, to restore to the Plan all losses, including lost earnings and interest, which occurred as a result of the breaches of their fiduciary obligations;

E. Appoint an independent fiduciary to administer the Plan;

F. Award Plaintiff the costs of this action; and

G. Provide such other relief as may be just and equitable.

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