

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

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

FILE NO.

v.)

COVENANT EQUIPMENT CO.,)
d/b/a WHOLESALE FORK LIFTS, INC., the)
COVENANT EQUIPMENT CORPORATION)
SIMPLE IRA PLAN, and MARK SOWKA,)
an individual,)
)
Defendants.)

COMPLAINT
(Injunctive Relief Sought)

Plaintiff HILDA L. SOLIS, Secretary of Labor, UNITED STATES

DEPARTMENT OF LABOR ("Secretary") alleges as follows:

1. This cause of 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 §§502(a)(2) and (5) of ERISA, 29 U.S.C. §§1132(a)(2) and (5), to enjoin acts and practices which violate the provisions of Title I of ERISA, to obtain appropriate relief for breaches of fiduciary duty under ERISA §409, 29 U.S.C. §1109, and to obtain such other further relief as may be appropriate to redress violations and enforce the provisions of that Title.

2. This court has subject matter jurisdiction over this action pursuant to ERISA §502(e)(1), 29 U.S.C. §1132(e)(1).

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

4. The Covenant Equipment Corporation SIMPLE IRA Plan (hereinafter "the Plan") is an 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. Covenant Equipment Corporation ("CEC"), a South Carolina corporation and the Plan administrator, was at all relevant times a "fiduciary" to the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A), and a "party in interest" to the Plan within the meaning of ERISA §3(14)(A) and (C), 29 U.S.C. §1002(14)(A) and (C). On information and belief, CEC is no longer a going concern, but is still listed as a corporation in Good Standing by the South Carolina Secretary of State's website.

6. Mark Sowka, an individual and President of CEC, was at all relevant times a "fiduciary" to the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A), and a "party in interest" to the Plan within the meaning of ERISA §3(14)(A) and (C), 29 U.S.C. §1002(14)(A) and (C). On information and belief, Mr. Sowka is a resident of Union County, North Carolina.

7. The Plan was established by CEC in February of 2005.

8. The Plan permitted participating employees to contribute a portion of their pay to the Plan through payroll deductions, and the Plan required CEC to collect and remit an employer matching contribution in an amount equal to each participating employees' contribution up to 3% of that employee's yearly compensation.

9. At all relevant times, Defendants CEC and Mark Sowka were the only entities or individuals with authority and discretion to manage and control assets of the Plan.

10. In accordance with 29 C.F.R. §2510.3-102, participant contributions were required to be forwarded to the Plan on the earliest date on which such contributions could reasonably be segregated from the employer's general assets.

11. From 2007 through 2009, Defendants CEC and Mark Sowka withheld employee contributions in the approximate amount of \$21,348.14, failed to segregate the contributions from Company assets as soon as they reasonably could do so and failed to timely forward them to the Plan in accordance with ERISA.

12. During the periods that participant contributions were not remitted to the Plan as required, Defendants caused or allowed the contributions to be commingled with the general assets of CEC.

13. Defendants have failed to take action to restore to the Plan the full amount of the un-remitted contributions plus lost interest that would have accrued but for the actions described in the preceding paragraphs.

CLAIMS

14. By the actions described in paragraphs 11 through 13, Defendants, as fiduciaries of the Plan,

(a) 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 and defraying reasonable expenses of administering the Plan, in violation of ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A);

(b) failed to discharge their duties 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);

(c) failed to ensure that the assets of the Plan did not inure to the benefit of CEC, in violation of ERISA §403(c)(1), 29 U.S.C. §1103(c)(1);

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

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

(f) acted in the transactions described involving the Plan on behalf of a party whose interests were adverse to the interests of the plan or the interests of its participants and beneficiaries in violation of §406(b)(2) of ERISA, 29 U.S.C. §1106(b)(2).

15. Defendants are each liable for the breaches of the other, pursuant to §405(a) of ERISA, 29 U.S.C. §1105(a), in that they either (1) participated knowingly in an act of the other fiduciary, knowing such act was a breach, in violation of §405(a)(1) or ERISA, 29 U.S.C. §1105(a)(1); (2) failed to monitor or supervise the other fiduciary and thereby enabled the breach, in violation of §405(a)(2) of ERISA, 29 U.S.C. §1105(a)(2); or (3) had knowledge of a breach by the other fiduciary and failed to make reasonable efforts under the circumstances to remedy the breach, in violation of §405(a)(3) of ERISA, 29 U.S.C. §1105(a)(3).

WHEREFORE, pursuant to §502(a)(2) and (5) of ERISA, 29 U.S.C. §1132(a)(2) and (5), Plaintiff prays that the Court:

A. Order Defendants to restore to the Plan all losses, including interest or lost opportunity costs, which occurred as a result of her breaches of fiduciary obligations;

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 action in violation of Title I of ERISA;

- D. Award Plaintiff the costs of this action; and
- E. Provide such other relief as may be just and equitable.

Respectfully submitted,

ADDRESS:

Office of the Solicitor
U. S. Department of Labor
61 Forsyth Street, S.W.
Room 7T10
Atlanta, GA 30303

Telephone:
(404) 302-5476
(404) 302-5438 (FAX)
E-mail:
fisher.jeremy@dol.gov
ATL.FEDCOURT@dol.gov (Primary)

M. PATRICIA SMITH
Solicitor of Labor

STANLEY E. KEEN
Regional Solicitor

ROBERT M. LEWIS, JR.
Counsel

By: s/ Jeremy K. Fisher
JEREMY K. FISHER
Attorney

Office of the Solicitor
U. S. Department of Labor
Attorneys for Plaintiff.

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