



fiduciary duty under ERISA §409, 29 U.S.C. §1109, and to obtain such further equitable relief as may be appropriate to redress violations and to enforce the provisions of Title I of ERISA.

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

3. The Cargill Heating & Air Conditioning Co., Inc. Saving Plan (“Plan”) is an employee benefit plan within the meaning of ERISA §3(3), 29 U.S.C. §1002(3), which is subject to the provisions of Title I of ERISA pursuant to ERISA §4(a), 29 U.S.C. §1003(a).

4. Venue of this action lies in the Western District of Wisconsin, pursuant to ERISA §502(e)(2), 29 U.S.C. §1132(e)(2), because the Plan was administered in La Crosse, La Crosse County, Wisconsin, which is within this District.

5. The Plan is named as a defendant herein pursuant to Federal Rule of Civil Procedure 19(a) solely to assure that complete relief can be granted.

#### **DEFENDANTS**

6. From May 31, 2008 through September 26, 2013, Cargill Heating & Air Conditioning Co., Inc. (“Cargill”), was the Plan’s Sponsor and Administrator; exercised authority and control over the disposition of assets of the Plan; was a fiduciary to the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A); and was 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).

7. From May 31, 2008 through September 26, 2013, Michael E. Galstad (“Galstad”) owned ninety-six percent (96%) of Cargill and served as its President; exercised authority and control over assets of the Plan; was a fiduciary to the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A); and was a party in interest to the Plan within the meaning of ERISA §§3(14)(A), (E), and (H), 29 U.S.C. §§1002(14)(A), (E), and (H).

**ALLEGATIONS**

**COUNT I:**

**Failure to Remit Employee Contributions**

8. Paragraphs 1 through 7 above are re-alleged and hereby incorporated in these allegations.

9. During the period from June 25, 2009 through April 12, 2012, the Plan documents stated that participants could elect to defer a portion of their wages to be contributed to the Plan.

10. During the period from June 25, 2009 through April 12, 2012, Defendant Galstad had the authority and control over whether Cargill remitted withheld employee contributions to the Plan and exercised such authority.

11. During the period from June 25, 2009 through April 12, 2012, Cargill withheld \$27,812.90 from its employees' pay as contributions to the Plan. Cargill retained the withheld employee contributions in its general assets.

12. During periods from June 25, 2009 through April 12, 2012, Defendant Galstad caused Cargill to retain \$27,812.90 in employee contributions to the Plan that had been withheld from its employees' pay, and failed to ensure that these withholdings were remitted to the Plan.

13. During periods from June 25, 2009 through April 12, 2012, Defendant Galstad caused Cargill to use the \$27,812.90 in unremitted employee contributions to the Plan, held in the general assets of Cargill, to pay Cargill's corporate expenses.

14. On December 21, 2012, Defendant Galstad restored \$23,657.86 in unremitted employee contributions to the Plan, however, \$4,155.04 in employee contributions remain outstanding.

15. Based on the facts described in paragraphs 9 through 14 above, Defendants Galstad and Cargill:

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

b. failed to act solely in the interest of the participants and beneficiaries of the Plan and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of plan administration in violation of ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A);

c. caused the Plan to engage in 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 assets of the Plan, in violation of ERISA §406(a)(1)(D), 29 U.S.C. §1106(a)(1)(D);

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

e. acted on behalf of a party whose interests are 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).

16. As a direct and proximate result of Defendants Galstad and Cargill's fiduciary breaches, the Plan has suffered injury and losses for which they are personally liable and subject to appropriate equitable relief, pursuant to ERISA §409, 29 U.S.C. §1109.

## **COUNT II:**

### **Failure to collect Prevailing Wage Contributions**

17. Paragraphs 1 through 7 above are re-alleged and hereby incorporated in these allegations.

18. Pursuant to several state and federal contracts subject to the Davis Bacon Act (“DBA”), 40 U.S.C. §§276(a) *et. seq.*, Service Contract Act (“SCA”), 41 U.S.C. §§351 *et. seq.*, or state prevailing wage laws (collectively, “prevailing wage contracts”), Cargill agreed to utilize part of the money it received under the state and federal contracts to pay employer contributions as prevailing wage fringe benefits to the Plan.

19. On information and belief, Cargill received funds pursuant to prevailing wage contracts for the work it performed during the months June 30, 2009 and April 30, 2012. The amounts received were sufficient to pay the majority of the prevailing wage rate contributions. These amounts were not paid in cash to the employees who were owed the fringe benefits.

20. The Plan’s governing documents mandated that Cargill pay the required prevailing wage contributions to the Plan.

21. According to the Plan’s governing documents, wage rate contributions were to be calculated monthly and remitted to the Plan on the last day of each month, during which hours were worked on prevailing wage projects, and for which wage rate contributions were calculated for payroll.

22. Pursuant to the Plan’s governing documents, these contributions were due to the Plan at the end of each month during the period from June 30, 2009 through April 30, 2012.

23. Between June 30, 2009 and April 30, 2012, \$236,738.12 in prevailing wage contributions was owed to the Plan.

24. On December 21, 2012, Defendant Galstad, on behalf of the Plan, collected \$38,500.00 in unremitted prevailing wage contributions and remitted such sums to the Plan, however, \$198,238.12 in prevailing wage contributions remain outstanding.

25. To date, Defendants Galstad and Cargill have failed to take any actions on behalf of the Plan to collect the delinquent prevailing wage contributions owed to the Plan.

26. By failing to collect the delinquent prevailing wage contributions, Defendant Galstad allowed Cargill to keep the ear-marked money from the various state and federal contracts in its own account for the use and benefit of Cargill and its shareholders.

27. Based on the facts described in paragraphs 18 through 26 above, Defendants Galstad and Cargill:

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 in violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);

b. failed to act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man 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 discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and in accordance with the documents governing the Plan in violation of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D);

d. caused the Plan to engage in transactions which they knew or should have known constituted a direct or indirect lending of money or other extension of credit between the Plan and a party in interest, in violation of ERISA §406(a)(1)(B), 29 U.S.C. §1106(a)(1)(B); and

e. acted on behalf of a party whose interests are 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).

28. As a direct and proximate result of Defendants Galstad and Cargill's fiduciary breaches, the Plan has suffered injury and losses for which they are personally liable and subject to appropriate equitable relief, pursuant to ERISA §409, 29 U.S.C. §1109.

### **COUNT III:**

#### **Failure to collect Employer Contributions**

29. Paragraphs 1 through 7 above are hereby re-alleged and incorporated herein.

30. The Plan provided for annual non-discretionary employer contributions in an amount equal to 2% of the participant employee's annual compensation. Employer contributions are made annually on May 31.

31. During the period from May 31, 2008 through May 31, 2010, Cargill failed to remit employer contributions to the Plan.

32. Defendants Cargill and Galstad failed to collect employer contributions owed to the Plan from May 31, 2008 through May 31, 2010, resulting in a loss of \$59,009.31 to the Plan.

33. Based on the facts described in paragraphs 30 through 32 above, Defendants Galstad and Cargill:

- a. failed to act solely in the interest of the participants and beneficiaries of the Plan and for the exclusive purpose of providing benefits to participants and

their beneficiaries and defraying reasonable expenses of plan administration in violation of ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A);

- b. failed to discharge their duty with respect to the Plan in accordance with the documents and instruments governing the Plan in violation of ERISA Section 404(a)(1)(D), 29 U.S.C. Section 1104;
- c. caused the Plan to engage in transactions which they knew or should have known constituted a direct or indirect lending of money or other extension of credit between the Plan and a party in interest, in violation of ERISA §406(a)(1)(B), 29 U.S.C. §1106(a)(1)(B);
- d. acted on behalf of a party whose interests are 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).

34. As a direct and proximate result of Defendants Galstad and Cargill's fiduciary breaches, the Plan has suffered injury and losses for which they are personally liable and subject to appropriate equitable relief, pursuant to ERISA §409, 29 U.S.C. §1109.

**PRAYER FOR RELIEF**

WHEREFORE, the Secretary prays for a judgment:

- A. Permanently enjoining Michael E. Galstad and Cargill from violating the provisions of Title I of ERISA;
- B. Ordering Michael E. Galstad and Cargill to make good all losses to the Plan, including lost opportunity costs, resulting from fiduciary breaches committed by them or for which they are liable;

C. Ordering Michael E. Galstad and Cargill to correct the prohibited transactions in which they engaged;

D. Ordering Michael E. Galstad and Cargill to disgorge all ill-gotten gains resulting from their violations of Title I of ERISA;

E. Permanently enjoining Michael E. Galstad and Cargill from serving as a fiduciary or service provider to any ERISA-covered employee benefit plan;

F. Awarding the Secretary the costs of this action; and

G. Ordering such further relief as is appropriate and just.

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