

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

HILDA L. SOLIS, Secretary of Labor	§	
United States Department of Labor,	§	
	§	
Plaintiff,	§	
v.	§	
	§	Civil Action No. _____
CALYPSO WATERJET SYSTEMS, INC.,	§	
CALYPSO WATERJET SYSTEMS, INC. 401(k)	§	
PROFIT SHARING PLAN AND TRUST,	§	
DENIS LUFKIN, AND JOHNNIE HOWARD	§	
	§	
Defendants.	§	
	§	

COMPLAINT

Plaintiff, Hilda L. Solis, Secretary of Labor, United States Department of Labor, brings this action against Defendants, Calypso Waterjet Systems, Inc., Calypso Waterjet Systems, Inc. 401(k) Profit Sharing Plan and Trust, Denis Lufkin and Johnnie Howard, pursuant to Sections 502(a)(2) and 502(a)(5), 29 U.S.C. §§ 1132(a)(2) and 1132(a)(5), of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 et seq. (“ERISA”), for appropriate equitable and remedial relief under ERISA Sections 409 and 502(a)(5), 29 U.S.C. §§ 1109 and 1132(a)(5); to enjoin violations of the provisions of Title I of ERISA; and to obtain other appropriate relief to redress violations and to enforce the provisions of Title I of ERISA.

I.

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

II.

Venue of this action lies in the United States District Court for the Northern District of Texas pursuant to ERISA Section 502(e)(2), 29 U.S.C. § 1132(e)(2).

III.

Calypso Waterjet Systems, Inc. 401(k) Profit Sharing Plan and Trust (“Plan”) is, and at all times hereafter 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, and maintained by Calypso Waterjet Systems, Inc. (“CWJS”), 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). During all times hereinafter mentioned, the Plan has been administered in Dallas, Texas, within the jurisdiction of this Court.

IV.

A. Defendant Denis Lufkin (“Lufkin”) was, at all times relevant to this action, President and Owner of Defendant, CWJS, which engaged in business and had a place of business at 14086 Proton Rd., Dallas, Texas 75244, within the jurisdiction of this Court. At all times hereinafter mentioned, Defendant Lufkin has had and exercised discretionary authority, control, and responsibility over Plan management and administration and had actual control over Plan assets. Thus, Defendant Lufkin is and at all relevant times has been 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).

B. Defendant Johnnie Howard (“Howard”) was, at all times relevant to this action,

CEO and Chairman of CWJS, which engaged in business and had a place of business at 14086 Proton Rd., Dallas, Texas 75244, within the jurisdiction of this Court. At all times hereinafter mentioned, Defendant Howard has been the named plan trustee, and has had and exercised discretionary authority, control, and responsibility over Plan management and administration and had actual control over Plan assets. Thus, Defendant Howard is and at all relevant times has been 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 CWJS is and at all times hereinafter mentioned was, a Texas corporation doing business within the jurisdiction of this Court. At all times hereinafter mentioned, Defendant CWJS 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 CWJS has been the named Plan Administrator and had or exercised discretionary authority, control and responsibility over Plan management and administration and had actual control over the Plan's assets. Thus, Defendant CWJS has been a fiduciary with respect to the Plan within the meaning of ERISA Sections 3(21)(A), 29 U.S.C. § 1002(21)(A). Defendant CWJS also is a party in interest to the Plan ~~within the meaning of ERISA Sections 3(14), 29 U.S.C. § 1002(14).~~

D. The Plan is joined as a party Defendant pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

V.

A. During the period January 1, 2007, through and including December 31, 2009, Defendants Lufkin, Howard, and CWJS were fiduciaries with respect to the Plan and each

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) 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, assets of such plan in violation of Section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D);

~~(5) 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

(6) 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. The aforementioned violations occurred in, but were not limited to, the following

Plan transactions: For the time period January 1, 2007, to January 1, 2009, the Defendants each failed to remit employee 401(k) contributions, employee loan payments and Plan assets to the Plan; failed to segregate the Plan's assets; permitted parties in interest to use employee 401(k) contributions and employee loan payments for their own benefit; and failed to properly administer the Plan.

VI.

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, Defendants Lufkin, Howard, and CWJS have caused the Plan to suffer financial losses for which they are liable pursuant to ERISA Section 409(a), 29 U.S.C. § 1109(a).

VII.

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

VIII.

~~WHEREFORE, cause having been shown, Plaintiff, Secretary of Labor, prays that this~~
Court:

1. Permanently enjoin Defendants Lufkin, Howard, and CWJS from violating the provisions of ERISA;
2. Order Defendants Lufkin, Howard, and CWJS 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 off set any claims which they may have against or with the Plan against the amount of losses, including lost opportunity costs, resulting from their violations;

3. Order Defendants Lufkin and Howard to continue to serve as fiduciaries to the Plan for the limited purpose of ensuring that Plan assets recovered in this action are disbursed to Plan participants with monthly progress reports to the Plaintiff and the Court, and once all funds have been disbursed, to terminate the Plan;

4. Upon full disbursement of funds and termination of the Plan, remove Defendants Lufkin and Howard as fiduciaries to the Plan and permanently enjoin Defendants Lufkin and Howard from acting as a fiduciaries to the Plan or any other employee benefit plan covered by ERISA;

5. Award Plaintiff costs of this action; and

6. Provide such other remedial relief as may be appropriate.

Respectfully Submitted,

M. PATRICIA SMITH
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