

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SETH D. HARRIS, Acting Secretary of Labor,)
United States Department of Labor,)
)
Plaintiff,)
)
v.)
)
NOHL CREST HOMES CORPORATION;)
KENNETH R. EMERY, an Individual;)
PETER G. TIBMA, an Individual; and the)
NOHL CREST HOMES CORPORATION)
EMPLOYEE STOCK OWNERSHIP PLAN;)
)
Defendants.)

FILE NO.

COMPLAINT
(Injunctive Relief Sought)

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

1. The Secretary is charged with enforcing the provisions of Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001, et seq. One of the goals set forth in ERISA is to ensure “the soundness and stability of plans with respect to adequate funds to pay promised benefits.” ERISA § 2(a), 29 U.S.C. § 1001(a). ERISA requires that those who manage the investments act solely, exclusively and prudently in the interest of plan participants and beneficiaries. ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B).

2. Title I of ERISA also creates per se prohibitions barring conflict of interest transactions between a plan and a party in interest. ERISA §§ 406-408, 29 U.S.C. §§ 1106-1108. Congress concluded that certain transactions present such grave opportunities for abuse that,

except in narrowly-defined circumstances, they should be prohibited. Thus, subject to certain narrow exceptions, ERISA prohibits a fiduciary from causing a plan to engage in the sale or exchange of property between the plan and a party in interest, ERISA § 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A); and the transfer to, or use by or for the benefit of a party in interest, the plan's assets, ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D). ERISA also prohibits a fiduciary from dealing with assets of a plan in his own interest or for his own account, ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1); and prohibits a fiduciary from acting in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan in his individual or any other capacity, ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2).

3. This cause of action is brought by the Secretary under ERISA §§ 502(a)(2) and (5), 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.

JURISDICTION AND VENUE

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

5. Venue lies in the Middle District of Florida pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

THE DEFENDANTS AND FIDUCIARIES

6. The Nohl Crest Home Corporation Employee Stock Ownership Plan (hereinafter "the Plan") is an employee benefit plan within the meaning of ERISA § 3(3), 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.

7. Defendant Nohl Crest Home Corporation (“Nohl Crest” or “the Company”) is a Florida corporation that was last located in Oldsmar, Pinellas County, Florida.

8. Nohl Crest sponsored the Plan for the benefit of its employees.

9. Nohl Crest established the Plan effective January 1, 2002.

10. Pursuant to the Plan Document, Nohl Crest is or was a “named fiduciary” and “Plan Administrator.”

11. Nohl Crest 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), (C), and (G), 29 U.S.C. §§ 1002(14)(A), (C), and (G).

12. Defendant Kenneth R. Emery (“Emery”) is or was the president, secretary, a member of the Board of Directors, and part owner of Nohl Crest.

13. Defendant Peter G. Tibma (“Tibma”) is or was the chairman of the Board of Directors and part owner of Nohl Crest.

14. On or about December 30, 2002, Nohl Crest’s Board of Directors appointed Emery and Tibma as Trustees of the Plan and members of the Plan Committee.

15. Pursuant to the Plan Document, the Plan Committee is or was a “named fiduciary” to the Plan.

16. Kenneth R. Emery 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 (H), 29 U.S.C. §§ 1002(14)(A) and (H).

17. Peter G. Tibma 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 (H), 29 U.S.C. §§ 1002(14)(A) and (H).

GENERAL ALLEGATIONS

18. Nohl Crest was established by Emery and Tibma in 1985 as a builder of semi-custom homes serving the Tampa Bay area.

19. When it was established, Nohl Crest had 10,000 authorized shares of common stock, 5,000 of which were issued.

20. At all relevant times, Emery owned 2,500 shares of Nohl Crest stock.

21. At all relevant times, Tibma owned 2,500 shares of Nohl Crest stock.

22. Due to the downturn of the housing market, Nohl Crest was struggling financially in the 3rd quarter of 2007.

23. Nohl Crest ceased operations on or about April 2008.

24. According to the Plan’s Annual Report (Form 5500) dated March 9, 2005, the Plan had 49 participants and cash assets valued at \$400,967 as of December 31, 2003.

25. According to the Plan’s Annual Report (Form 5500) dated November 7, 2005, the Plan had 57 participants and cash assets valued as \$654,382 as of December 31, 2004.

26. On September 15, 2006, the Nohl Crest Board of Directors authorized the issuance of 174 shares of common stock and the contribution of the stock to the Plan effective December 31, 2005.

27. According to the Plan’s Annual Report (Form 5500) dated October 12, 2006, the Plan had 59 participants and assets valued as \$1,394,642 as of December 31, 2005.

28. According to the Plan's Annual Report (Form 5500) dated October 10, 2007, the Plan had 63 participants and assets valued as \$1,212,753, including Company stock valued at \$535,967 and \$676,786 in cash as of December 31, 2006.

29. On or about October 16, 2007, Emery and/or Tibma caused \$650,000 to be transferred by wire from the Plan's trust account at Wachovia to Nohl Crest's operating account at Bank of America.

30. Defendants caused or allowed the Plan's assets totaling \$650,000 referred to in the preceding paragraph to be used for Company purposes and obligations rather than for the exclusive benefit of the Plan and its participants and beneficiaries.

31. To the extent the \$650,000 transfer was for the purchase of Company stock, the Trustees did not determine, in good faith, the fair market value of the stock as of October 16, 2007 before completing the transaction.

32. To the extent the \$650,000 transfer was for the purchase of Company stock, there is no stock certificate reflecting the Plan's ownership of any shares of stock.

33. Defendants have failed to take action to restore to the Plan the \$650,000 plus lost interest that would have accrued but for the actions described in the preceding paragraphs.

34. Defendants have failed to distribute the Plan's remaining assets to participants and beneficiaries, in accordance with the Plan Document.

35. Defendants failed to ensure that the Plan was adequately covered by a fidelity bond.

36. Defendants failed to monitor, control or attempt to rectify the acts of one another with respect to the Plan.

37. By the actions described in paragraphs 29 through 36, Defendants, as fiduciaries to 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 discharge their duties with respect to Plan in accordance with the documents and instruments 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 the direct or indirect sale or exchange of any property between the Plan and a party in interest, in violation of ERISA § 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A);

(e) 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);

(f) 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);

(g) 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 ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2);

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

(i) failed to ensure the Plan was adequately covered by a fidelity bond, in violation of ERISA § 412(a), 29 U.S.C. § 1112(a).

38. Defendants are each liable for the breaches of the other, pursuant to ERISA § 405(a), 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 ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1); (2) failed to monitor or supervise the other fiduciary and thereby enabled the breach, in violation of ERISA § 405(a)(2), 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 ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3).

WHEREFORE, pursuant to ERISA §§ 502(a)(2) and (5), 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 their breaches of fiduciary obligations;

B. Order that the Plan set off the individual Plan accounts of Defendants Emery and Tibma against the amount of losses, including lost opportunity costs, resulting from

their fiduciary breaches, as authorized by section 1502(a) of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, section 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;

C. Appoint a successor fiduciary or administrator, at Defendants' expense;

D. 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;

E. Enjoin Defendants from engaging in any further action in violation of Title I of ERISA;

F. Award Plaintiff the costs of this action; and

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

ADDRESS:

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

Telephone:
(404) 302-5435
(404) 302-5438 (FAX)

SOL Case No. 13-00232

M. PATRICIA SMITH
Solicitor of Labor

STANLEY E. KEEN
Regional Solicitor

ROBERT M. LEWIS, JR.
Counsel

By: 
KAREN E. MOCK
Senior Trial Attorney

Attorneys for Plaintiff