

**IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF WEST VIRGINIA  
HUNTINGTON DIVISION**

MARTIN J. WALSH, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO. 3:22-cv-00256
	:	
v.	:	
	:	
JEFFREY A. HOOPS, DREW KESLER, and DONALD P. HETRICK,	:	
	:	
Defendants.	:	
	:	
	:	
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**COMPLAINT**

Martin J. Walsh, Secretary of Labor, United States Department of Labor (“the Secretary”), hereby alleges:

**Jurisdiction and Venue**

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 Sections 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 Section 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 Title I of ERISA.
2. This Court has subject matter jurisdiction over this action pursuant to Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).
3. The Blackjewel LLC 401(k) Plan (formerly known as the Revelation Energy

401(k) Plan) (“Plan”) is an employee benefit plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3), that offers retirement benefits to its participants, who were employees of Blackjewel, LLC (formerly operating under the name Revelation Energy, LLC) (the “Company”), and therefore is subject to the coverage of the Act, pursuant to Section 4(a) of ERISA, 29 U.S.C. § 1003(a). The Plan was administered in Cabell County, West Virginia.

4. Venue with respect to this action lies in the Southern District of West Virginia, pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

### **The Parties & Relevant Background**

5. The Secretary, pursuant to Sections 502(a)(2) and (5) of ERISA, 29 U.S.C. §§ 1132(a)(2) and (5), has the authority to enforce the provisions of Title I of ERISA by, among other means, the filing and prosecution of claims against fiduciaries and others who commit violations of ERISA.

6. Blackjewel, LLC’s and its affiliates’ principal business was mining and processing metallurgical, thermal and other specialty and industrial coals. In or around January 2009, the Company established the Plan. At all relevant times, the Company was the Plan Sponsor and Plan Administrator, and it was designated as the Plan’s Named Fiduciary. Through this authority, at all relevant times the Company held and exercised discretionary authority and discretionary control respecting management of the Plan, held and exercised authority and control respecting management or disposition of the Plan’s assets, and had discretionary authority and discretionary responsibility in the administration of the Plan. The Company, therefore, was a fiduciary of the Plan within the meaning of Section 3(21) of ERISA, 29 U.S.C. § 1002(21), and a party-in-interest as that term is defined in Sections 3(14) (A) and (C) of ERISA, 29 U.S.C. §§ 1002(14) (A) and (C).

7. In July 2019, the Company and affiliates filed a voluntary bankruptcy petition under Chapter 11 of Title 11 of the United States Code. *See In re: Blackjewel, LLC, et al.*, No. 3:19-bk-30289 (Bankr. S.D. W. Va.). On March 22, 2021, the Bankruptcy Court confirmed the Chapter 11 Plan of Liquidation for the Company. *In re: Blackjewel, LLC, et al.*, No. 3:19-bk-30289, ECF No. 3147 (Bankr. S.D. W. Va.).

8. At all relevant times, Defendant Jeffrey A. Hoops was the President and CEO of the Company. In conjunction with the other Defendants, Mr. Hoops carried out the Plan Administrator role on behalf of the Company. Among other powers and activities, Mr. Hoops signed as the Plan Administrator on Forms 5500 submitted on the Plan's behalf during the relevant period, had authority to sign on the Plan's behalf, exercised decision-making and supervisory authority over the Plan's operations, such as in selecting the Plan's service providers, and supervised and approved the conduct of other Company personnel, including the other Defendants, with respect to administration and funding of the Plan. Mr. Hoops also served as a non-discretionary trustee to the Plan, which obligated him under the Plan's terms to, *inter alia*, hold and receive Plan contributions in trust and act in the Plan participants' and beneficiaries' interest in asserting claims over Plan assets. Through his authority as Plan Administrator and trustee, Mr. Hoops held and exercised discretionary authority and discretionary control respecting management of the Plan, held and exercised authority and control respecting management and disposition of the Plan assets, and had discretionary authority and discretionary responsibility in the administration of the Plan. Mr. Hoops, therefore, is a fiduciary of the Plan within the meaning of Sections 3(21), 402(a), and 403(a) of ERISA, 29 U.S.C. §§ 1002(21), 1102(a), and 1103(a), and a party-in-interest as that term is defined in Section 3(14) (A), (E) and (H) of ERISA, 29 U.S.C. § 1002(14) (A), (E) and (H).

9. At all relevant times, Defendant Drew Kesler served as a senior Company officer, including as the Controller and later the CFO. As the CFO, Mr. Kesler had principal authority over the Company's payroll process, including check-signing authority on the Company's paychecks. In conjunction with the other Defendants, Mr. Kesler carried out the Plan Administrator role on behalf of the Company. Among other powers and activities, Mr. Kesler had authority to sign on the Plan's behalf, exercised decision-making and supervisory authority over the Plan's operations, such as in identifying and selecting the Plan's service providers, supervised and monitored the Plan's funding, including the Company's remittance of contributions, and supervised and approved the conduct of other Company personnel with respect to administration and funding of the Plan. Mr. Kesler also served as a non-discretionary trustee to the Plan, which obligated him under the Plan's terms to, *inter alia*, hold and receive Plan contributions in trust and act in the Plan participants' and beneficiaries' interest in asserting claims over Plan assets. Through his authority as Plan Administrator and trustee, Mr. Kesler held and exercised discretionary authority and discretionary control respecting management of the Plan, held and exercised authority and control respecting management and disposition of the Plan assets, and had discretionary authority and discretionary responsibility in the administration of the Plan. Mr. Kesler, therefore, is a fiduciary of the Plan within the meaning of Sections 3(21), 402(a), and 403(a) of ERISA, 29 U.S.C. §§ 1002(21), 1102(a), and 1103(a), and a party-in-interest as that term is defined in Section 3(14) (A), (E) and (H) of ERISA, 29 U.S.C. § 1002(14) (A), (E) and (H).

10. At all relevant times, Defendant Donald P. Hetrick served as a senior Company officer, including as the Controller. In conjunction with the other Defendants, Mr. Hetrick carried out the Plan Administrator role on behalf of the Company. Mr. Hetrick served as a

principal point of contact within the Company with respect to the Plan and, in conjunction with Mr. Kesler, carried out the Company's payroll process and monitored the Plan on a day-to-day basis. Among other powers and activities, Mr. Hetrick had authority to sign on the Plan's behalf, exercised decision-making and supervisory authority over the Plan's operations, such as liaising with the Plan's service providers, and supervised the conduct of other Company personnel with respect to administration and funding of the Plan. Mr. Hetrick also served as a non-discretionary trustee to the Plan, which obligated him under the Plan's terms to, *inter alia*, hold and receive Plan contributions in trust and act in the Plan participants' and beneficiaries' interest in asserting claims over Plan assets. Through his authority as Plan Administrator and trustee, Mr. Hetrick held and exercised discretionary authority and discretionary control respecting management of the Plan, held and exercised authority and control respecting management and disposition of the Plan assets, and had discretionary authority and discretionary responsibility in the administration of the Plan. Mr. Hetrick, therefore, is a fiduciary of the Plan within the meaning of Sections 402(a), and 403(a) of ERISA, 29 U.S.C. §§ 1002(21), 1102(a), and 1103(a), and a party-in-interest as that term is defined in Section 3(14) (A), (E) and (H) of ERISA, 29 U.S.C. § 1002(14) (A), (E) and (H).

11. As part of the Chapter 11 Bankruptcy, the Company received permission to "terminate" the Plan, and it provided notice of its intent to liquidate the Plan's trust. On information and belief, Plan's trust does not currently hold any cash or other assets.

### **Allegations**

#### **a. Missing Employee Contributions**

12. The Plan permitted participants to contribute a portion of their pay to the Plan as an elective salary deferral ("employee contributions") through payroll deductions. The Plan also

required Safe Harbor contributions from the Company. Under the Plan's terms, the amount of these Safe Harbor contributions varied depending on the amount of each participant's employee contributions.

13. Between at least January 2017 and July 2019 (the "Relevant Period"), Defendants and the Company withheld compensation from employees' paychecks every payroll period based on instructions from the employees to withhold a portion of their wages for the purpose of making contributions to the Plan.

14. During the Relevant Period, Defendants and the Company failed to timely remit all of the withheld employee contributions to the Plan. While Defendants and the Company ultimately remitted some of these employee contributions, they failed to remit all of them. Instead of being timely deposited in the Plan, these funds—Plan assets under ERISA—remained in the Company's business operating account and were used to pay the Company's operating expenses and debts.

15. During this period, employee contributions deducted from payroll but not forwarded to the Plan amounted to at least \$423,589.78. Interest owed on the employee contributions that were not timely remitted as of July 1, 2019—the date that the Company filed for Chapter 11 bankruptcy—is \$11,929.92.

16. Unremitted employee contributions are assets of the Plan within the meaning of ERISA. 29 C.F.R. § 2510.3-102(a)(1). Defendants and the Company exercised discretion and control over these Plan assets and, through that authority, failed to segregate them from the Company's general assets.

17. Defendants, in their capacities as the Plan Administrator and trustees, and the Company failed to ensure that the Plan assets described in paragraph 15, *supra*, were timely

remitted to the Plan.

**b. Missing Employer Contributions**

18. The Plan's terms required the Company to make Safe Harbor contributions to Plan participant accounts, according to a set formula. However, during the Relevant Period, the Company failed to remit the full amount of these promised employer contributions. Instead of being timely deposited in the Plan, these funds remained in the Company's business operating account and were used to pay the Company's operating expenses and debts.

19. During the Relevant Period, Safe Harbor contributions were deficient by at least \$290,485.32.

20. During the Relevant Period, the Company had sufficient assets to make the Safe Harbor contributions identified in paragraph 19, *supra*. Notwithstanding this financial ability to pay, the Company failed to timely pay these required employer contributions.

21. As Plan fiduciaries and trustees, Defendants had a duty to consider whether pursuit of the missing Safe Harbor contributions was warranted. Further, Defendants had a duty to pursue claims on behalf of the Plan for which there was a reasonable likelihood of recovery. Notwithstanding these duties, and the reasonable likelihood of recovery—demonstrated by the Company's financial ability to pay—Defendants failed to take any actions to ascertain the viability or propriety of seeking the missing Safe Harbor contributions or to compel the Company to pay the missing Safe Harbor contributions.

**c. Failure to File a Claim on the Plan's Fidelity Bond**

22. During the Relevant Period, the Plan was protected by a \$1,000,000 fidelity bond. Defendants had a duty as fiduciaries and trustees to consider and, if warranted, pursue all claims on the Plan's behalf, including with respect to coverage under the fidelity bond. However,

Defendants failed to file a claim under this policy on the Plan's behalf, notwithstanding their awareness of the losses to the Plan caused by untimely and unremitted employee contributions, unremitted Safe Harbor contributions, and the underlying fiduciary misconduct that enabled those losses to occur and persist.

### **Violations**

23. The Secretary re-alleges and incorporates by reference Paragraphs 1 through 22 of this Complaint.

24. Unremitted employee contributions are assets of the Plan within the meaning of ERISA. 29 C.F.R. § 2510.3-102(a)(1).

25. Defendants and the Company, as fiduciaries of the Plan, failed to ensure that these Plan assets were timely remitted to the Plan's trust after the Company withheld these funds from Plan participants' paychecks during the Relevant Period.

26. With regard to Safe Harbor contributions, the Plan's terms required the Company to pay those amounts into Plan participants' accounts. The Company, however, did not pay the full amount of these employer contributions due. Recovery of these missing contributions was a claim belonging to the Plan, and there was a reasonable likelihood of recovery. Defendants, as fiduciaries and trustees of the Plan, therefore had a duty to consider and pursue remittance of these missing funds on the Plan's behalf. By failing to take action to investigate and compel the Company to pay missing employer contributions, Defendants breached their fiduciary duties to the Plan.

27. Defendants and the Company each knowingly participated in or knowingly undertook to conceal acts or omissions of the other that they knew were violations of ERISA.

28. Defendants and the Company each failed to comply with ERISA Section



404(a)(1) in the administration of their specific fiduciary responsibilities and each enabled the other to commit breaches of ERISA.

29. Defendants and the Company each knew that the other had violated ERISA, but they did not make reasonable efforts under the circumstances to remedy the breaches.

30. By the actions and conduct described in this Complaint, Defendants and the Company, as fiduciaries of the Plan:

- a. failed to hold all assets of the Plan in trust in violation of Section 403(a) of ERISA, 29 U.S.C. § 1103(a);
- b. failed to ensure that the assets of the Plan did not inure to the benefit of the Company in violation of Section 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1);
- c. 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 Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A);
- d. 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 Section 404(a)(1)(B) of ERISA, 29 U.S.C. § 1104(a)(1)(B);
- e. failed to discharge their duties with respect to the Plan in accordance with the documents and instruments governing the Plan, in violation of Section

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

- f. 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 Section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D);
- g. dealt with assets of the Plan in their own interest or for their own account and acted in transactions involving the Plan on behalf of a party whose interests were adverse to the interests of the Plan and its participants and beneficiaries, in violation of Section 406(b)(1) and (2) of ERISA, 29 U.S.C. § 1106(b)(1) and (2);
- h. participated knowingly in, or knowingly undertook to conceal, acts or omissions by the other that they knew to be violations of ERISA, which renders them liable for the other's breaches of fiduciary responsibility under Section 405(a)(1) of ERISA, 29 U.S.C. § 1105(a)(1);
- i. failed to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and each enabled the other to commit breaches of ERISA, which renders them liable for the other's breaches of fiduciary responsibility under Section 405(a)(2) of ERISA, 29 U.S.C. § 1105(a)(2); and
- j. knew that the other had violated ERISA, but did not make reasonable efforts under the circumstances to remedy the other's breaches, which renders them liable for each other's fiduciary breaches under Section 405(a)(3) of ERISA, 29 U.S.C. § 1105(a)(3).

**Prayer for Relief**

WHEREFORE, the Secretary prays that this Court issue an order:

1. Ordering Defendants, jointly and severally, to restore to the Plan all losses, including interest or lost opportunity costs and the cost of an independent fiduciary, which were caused by their fiduciary misconduct;

2. Ordering the Plan to set off any individual account balances of Defendants against the amount of losses, including interest or lost opportunity cost, and the cost of an independent fiduciary, resulting from their fiduciary breaches, as authorized by 29 U.S.C. § 1056(d)(4), and reallocating the account balance to the non-breaching participants, if the losses are not otherwise restored to the Plan by Defendants;

3. Removing Defendants as fiduciaries of the Plan and of any employee benefit plan for which they act as fiduciaries;

4. Permanently enjoining Defendants from acting directly or indirectly, in any fiduciary capacity, with respect to any employee benefit plan subject to ERISA;

5. Permanently enjoining Defendants from exercising any custody, control, or decision-making authority with respect to the assets of any employee benefit plan covered by ERISA;

6. Appointing an independent fiduciary with plenary authority and control with respect to the management and administration of the Plan, including the authority to marshal assets on behalf of the Plan, to pursue claims on behalf of the Plan, and to take all appropriate actions for the administration, termination, and distribution of the Plan, with all costs to be borne by Defendants;

7. Ordering Defendants, their agents, employees, service providers, banks, accountants, and attorneys to provide the Secretary and the independent fiduciary with all of the books, documents, and records relating to the finances and administration of the Plan, and to

make an accounting to the Secretary and the independent fiduciary of all contributions to the Plan and all transfers, payments, or expenses incurred or paid in connection with the Plan;

8. Barring Defendants from engaging in any future violations of ERISA; and

9. Awarding the Secretary the costs of this action; and such other relief as is

equitable and just.

Respectfully Submitted,

**UNITED STATES DEPARTMENT OF LABOR**

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