

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

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JULIE SU, ACTING SECRETARY OF )  
LABOR, UNITED STATES )  
DEPARTMENT OF LABOR, )  
) )  
Plaintiff, )  
) )  
v. )  
) )  
JEFFREY A. HOOPS, DREW KESLER, )  
and DONALD P. HETRICK )  
) )  
Defendants. )  
) )  
) )  
) )  
) )

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CIVIL ACTION NO. 3:22-cv-00256

**CONSENT JUDGMENT AND ORDER**

This action was brought by Plaintiff, the Acting Secretary of Labor, United States Department of Labor (the “Acting Secretary”) against Defendants Jeffrey A. Hoops (“Hoops”), Drew Kesler (“Kesler”), and Donald P. Hetrick (“Hetrick”) (collectively “Defendants”) under Sections 409 and 502(a)(2) and (5) of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1109, 1132(a)(2) and (5), to obtain equitable remedies that will redress violations, obtain appropriate equitable relief for breaches of fiduciary duty under ERISA Section 409, 29 U.S.C. § 1109, and obtain such further equitable relief as may be appropriate to enforce the provisions of Title I of ERISA.

The parties have agreed to resolve the claims in the Complaint without further litigation. Defendants agree to the entry of this Consent Judgment against them by the Court, the terms of which are set forth herein:

- A. For the purposes of this Consent Judgment, Defendants admit that the Court has jurisdiction over them and the subject matter of this action.
- B. The Acting Secretary has agreed to resolve all claims asserted in the Complaint

against Defendants for the relief set forth below. The parties agree that neither will appeal this Order as written and entered.

C. The parties intend for this Consent Judgment, combined with the separate settlement agreement concerning certain health plan claims incurred under the Revelation Energy, LLC Welfare Benefit Plan (the “Health Plan Case Settlement Agreement”) (attached hereto as Exhibit A; *see infra* at Paragraph 22), to resolve all ERISA violations that the Acting Secretary is currently aware of with respect to these Defendants and the Respondents in the Health Plan Case Settlement Agreement. However, should the Acting Secretary obtain actual knowledge of any new ERISA violations, the Acting Secretary and Defendants understand and agree that entry of this Consent Judgment is without prejudice to the Acting Secretary’s right to investigate and redress any such new violations of ERISA it has obtained actual knowledge of, if any, not alleged in the Complaint or not underlying the Health Plan Case Settlement Agreement with respect to the Health Plan, including the Acting Secretary’s right to institute future enforcement actions with respect to any other such matter. It is further understood that this paragraph shall not constitute a waiver by Defendants of any defenses, legal or equitable, to any such future action.

D. This Consent Judgment may be signed in multiple counterparts and transmitted by facsimile or by electronic mail or by any other electronic means intended to preserve the original graphic and pictorial appearance of a party’s signature, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument. This Consent Judgment is only valid if signed by the Acting Secretary and Defendants, or their designated representatives.

E. The Acting Secretary and Defendants intend this Consent Judgment to constitute the complete, exclusive, and fully integrated statement of their agreement. As such, this Consent Judgment is the sole repository of the agreement between the Acting Secretary and Defendants.

The parties are not bound by any other agreements, promises, statements, representations, or writings of any kind or nature.

Accordingly, it is hereby **ORDERED, ADJUDGED, AND DECREED** that:

1. This Court has jurisdiction over this action.
2. This Court has jurisdiction over Defendants.
3. Defendants shall remit \$435,519.70 in equitable restitution to the independent fiduciary appointed to act on behalf of the Blackjewel LLC 401(k) Plan (the "Plan"), representing \$423,589.78 in employee contributions due to the Plan and \$11,929.92 in interest due on those contributions. Defendants shall also remit up to \$101,494.80 in additional equitable restitution to the independent fiduciary appointed to act on behalf of the Plan, representing the costs and expenses associated with the appointment of an independent fiduciary as set forth in Paragraph 10 below. Defendants shall remit the equitable restitution set forth in this Paragraph to the Plan in \$50,000 installment payments each month as instructed by the independent fiduciary appointed to act on behalf of the Plan until the equitable restitution set forth in this Paragraph is fully paid. The first monthly installment payment shall be made on or before January 15, 2024 or within ten (10) days after the entry of this Consent Judgment, whichever is later.

4. Defendants also shall remit up to an additional \$100,000 in equitable restitution to the independent fiduciary appointed to act on behalf of the Plan, representing employer contributions due the Plan. Notwithstanding the foregoing, Defendants' obligation to remit the additional \$100,000.00 in employer contributions to the Plan is subject to reduction, dollar for dollar, for amounts paid in equitable restitution to satisfy the Health Plan Case Settlement Agreement (*see infra* at Paragraph 22). Neither the equitable restitution due under this Consent Judgment nor the equitable restitution due under the Health Plan Case Settlement Agreement is otherwise subject to reduction. Defendants shall remit the amount due for employer contributions (*i.e.*, \$100,000 less any relevant reductions) to the Plan as set forth in this Paragraph on or before

the later of (1) June 1, 2024, or (2) ninety (90) days after the March 1, 2024 claims deadline set forth in Paragraphs 6 and 7 of the Health Plan Case Settlement Agreement.

5. The Plan is deemed amended to allow forfeiture of Defendants' individual Plan accounts to the extent necessary to satisfy the costs and expenses of the independent fiduciary, as set forth in Paragraph 10 below. Further, the Plan shall set off Defendants' individual Plan accounts against the amount of losses resulting from the fiduciary breaches alleged in the Complaint, as authorized by 29 U.S.C. § 1056(d)(4). Unless all losses resulting from the fiduciary breaches alleged in the Complaint are fully remedied and all costs and expenses of the independent fiduciary are fully satisfied, no amounts restored under this Consent Judgment shall be allocated to the Plan accounts of Defendants.

6. Defendants are removed as fiduciaries of the Plan, and Defendant Hoops is also removed from the role(s) of trustee, fiduciary, advisor, or administrator that he holds with respect to any other employee benefit plan, as that term is defined at Section 3(3) of ERISA, 29 U.S.C. § 1002(3).

7. Defendant Hoops is permanently enjoined from serving as a trustee, fiduciary, advisor, or administrator to any employee benefit plan, as that term is defined at Section 3(3) of ERISA, 29 U.S.C. § 1002(3), or from serving in any capacity that involves decision-making authority or custody or control of the moneys, funds, assets, or property of any employee benefit plan subject to ERISA.

8. Within ninety (90) days of entry of this Consent Judgment, Defendant Kesler will complete the "Fiduciary Responsibility for ERISA Plans" E-Learning Course sponsored by the International Foundation of Employee Benefit Plans, at his own expense. Within seven (7) days of completing this Course, Defendant Kesler will provide proof of that completion to the Acting Secretary.

9. The Court appoints Receivership Management, Inc. as the independent fiduciary for the Plan. Receivership Management, Inc. shall have plenary authority over the administration, management, and assets of the Plan and be subject to ERISA's fiduciary duties. Receivership Management, Inc. is directed to take all appropriate action for distribution of benefits to the Plan's participants and beneficiaries, including the development of a distribution plan based on, *inter alia*, the assets received under this Consent Judgment and the Plan records it is able to obtain through reasonable efforts. Receivership Management, Inc. has discretion to complete the distribution of benefits through direct payments to participants and beneficiaries and through placement of unclaimed benefits in an IRA account pertaining to the individual to whom the unclaimed benefits belong. Receivership Management, Inc. is empowered to instruct the custodians of the Plan's assets and the Plan record keepers respecting the performance of its duties as independent fiduciary, including as to disposition of the Plan's assets. Receivership Management, Inc. is further empowered to seek Plan records or records bearing on Plan assets from third parties, including relevant tax records from the IRS, as it determines in its discretion. If necessary, Receivership Management, Inc. has authority to perform all actions necessary to wind down and terminate the Plan, consistent with the Plan documents and ERISA. No third-party service provider is permitted to refuse Receivership Management, Inc.'s instructions on the basis of fees they claim to be owed relating to the Plan.

10. Receivership Management, Inc. shall be compensated for the performance of its duties and costs incurred, as described in the attached proposal, up to the amount of \$101,494.80 payable solely from the Plan accounts of Defendants, from funds remitted under this Consent Judgment, and/or from the Plan.

11. A copy of this Consent Judgment shall be filed with the Plan records.

12. The Court orders Defendants, along with their agents, employees, service providers, banks, accountants, and attorneys, to provide Receivership Management, Inc. with all

of the books, documents, and records relating to the finances and administration of the Plan not otherwise already produced to the Acting Secretary, and, if possible, to make an accounting to the Plan of all contributions to the Plan, and all transfers, payments, or expenses incurred or paid in connection with those Plan.

13. The Court orders all third-party service providers to the Plan, including the Plan custodian, along with their agents, employees, service providers, banks, accountants, and attorneys, to provide Receivership Management, Inc. with all of the books, documents, and records relating to the finances and administration of the Plan, not otherwise already produced to the Acting Secretary.

14. Defendant Kesler will provide up to twenty-five (25) hours of consulting assistance via remote means to Receivership Management, Inc. to facilitate completion of its duties under this Consent Judgment. This includes responding in good faith and to the best of his knowledge and ability to any questions from Receivership Management, Inc. regarding the Plan.

15. In the event that any Defendant files for bankruptcy protection at any time before satisfaction of the amounts due under Paragraphs 3, 4, and 10 above, no Defendant shall oppose any proof of claim that the Acting Secretary files in the bankruptcy proceeding for any amounts still owing under this Consent Judgment.

16. In the event that any Defendant files for bankruptcy protection at time before satisfaction of the amounts due under Paragraphs 3, 4, and 10 above, that Defendant shall stipulate that the unpaid amounts shall be treated as a non-dischargeable debt under 11 U.S.C. § 523(a)(4).

17. With respect to the Plan, Defendants will be assessed a penalty of 20 percent of the “applicable recovery amount” under ERISA § 502(l), 29 U.S.C. § 1132(l), less any applicable reduction pursuant to 29 U.S.C. § 1132(l)(4). The amount of the assessment will be due within sixty (60) days of the date of EBSA’s notice of the penalty. At any time prior to the

due date, Defendants may request a conference to discuss the penalty calculation. The 60-day payment period will not, however be tolled upon such request. In addition, at any time prior to the expiration of the 60-day period, Defendants may petition the Acting Secretary to waive or reduce the assessed penalty. If a petition for waiver or reduction is submitted during the 60-day payment period, the payment period for the penalty will be tolled pending the Acting Secretary's consideration of the petition. Payment of the penalty should be made online at <https://www.pay.gov/public/form/start/1063197296>. Payment shall include reference to EBSA Case No. 20-013870(48).

18. No assets of the Plan will be used to pay the attorney fees, costs, and other litigation expenses incurred by any of the Defendants in this action.

19. Each Defendant, as well its agents, beneficiaries, representatives, assigns, and successors in interest, hereby releases the Acting Secretary and the Acting Secretary's officers, agents, attorneys, employees, and representatives, both in their individual and official capacities, from all actions, claims, and demands of whatsoever nature, including those arising under any statute, rule, or regulation, that relate in any manner to the filing, prosecution, and maintenance of this civil action or any other proceeding or investigation relating to or in connection with this civil action. Each Defendant expressly waives any and all such claims of any nature that it may have against the Acting Secretary or any of the Acting Secretary's officers, agents, attorneys, employees, or representatives arising under the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412.

20. This Consent Judgment shall operate as a full, final, and complete judicial resolution and disposition of all claims asserted in the Complaint by the Acting Secretary against Defendants.


21. Nothing in this Consent Judgment is binding on any governmental agency other than the U.S. Department of Labor, Employee Benefits Security Administration.

22. The parties will continue to work in good faith to resolve the Acting Secretary's health plan claims involving affiliated or previously affiliated entities which arose as consequence of the Blackjewel bankruptcy. The parties' agreements as to those claims are reflected in the Health Plan Case Settlement Agreement attached hereto as Exhibit A.

23. This Court retains jurisdiction over this action for purposes of enforcing compliance with the terms of this Consent Judgment.

24. The Court directs the entry of this Consent Judgment as a final order pursuant to Federal Rule of Civil Procedure 54.

DATED THIS 8<sup>th</sup> DAY OF January, 2024

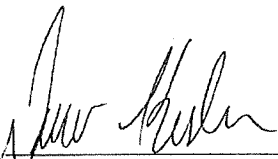
  
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HONORABLE ROBERT C. CHAMBERS  
UNITED STATES DISTRICT JUDGE



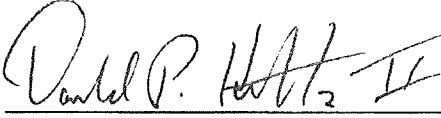
The parties approve the Consent Judgment and Order as to form and substance:

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| <p>For Plaintiff:</p> <p>Secma Nanda<br/>Solicitor of Labor</p> <p>Samantha N. Thomas<br/>Acting Regional Solicitor</p> <p>Usha Rengachary<br/>Counsel for ERISA</p> <p><i>Alejandro A. Herrera</i><br/>By: Alejandro A. Herrera<br/>Senior Trial Attorney<br/>U.S. Department of Labor<br/>Office of the Solicitor, Region III<br/>1835 Market Street<br/>Mailstop SOL/22<br/>Philadelphia, PA 19103<br/>herrera.alejandro.a@dol.gov</p> <p>Dated: 12/22/2023</p> <p><i>Attorneys for Plaintiff</i></p> | <p><i>Jeffrey A. Hoops</i><br/>Jeffrey A. Hoops</p> <p>Drew Kesler</p> <p>Donald P. Hetrick</p> <p>As to form and for purposes of submission only (the Undersigned is not a party to the above judgment):</p> <p><i>Mindy G. Barfield</i><br/>Mindy G. Barfield (<i>pro hac vice</i>)<br/>DINSMORE &amp; SHOHL LLP<br/>100 West Main Street, Suite 900<br/>Lexington, KY 40507<br/>mindy.barfield@dinsmore.com</p> <p>William C. Brown, III<br/>West Virginia State Bar # 13592<br/>DINSMORE &amp; SHOHL LLP<br/>611 Third Street<br/>Huntington, WV 25701<br/>william.brown@dinsmore.com</p> <p>Dated: 12/22/2023</p> <p><i>Attorneys for Defendants</i></p> |
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| <p>For Plaintiff:</p> <p>Seema Nanda<br/>Solicitor of Labor</p> <p>Samantha N. Thomas<br/>Acting Regional Solicitor</p> <p>Usha Rengachary<br/>Counsel for ERISA</p> <hr/> <p>By: Alejandro A. Herrera<br/>Senior Trial Attorney<br/>U.S. Department of Labor<br/>Office of the Solicitor, Region III<br/>1835 Market Street<br/>Mailstop SOL/22<br/>Philadelphia, PA 19103<br/>herrera.alejandro.a@dol.gov</p> <p>Dated:</p> <p><i>Attorneys for Plaintiff</i></p> | <hr/> <p>Jeffrey A. Hoops</p>  <hr/> <p>Drew Kesler</p> <hr/> <p>Donald P. Hetrick</p> <p>As to form and for purposes of submission only (the Undersigned is a not a party to the above judgment):</p> <hr/> <p>Mindy G. Barfield (<i>pro hac vice</i>)<br/>DINSMORE &amp; SHOHL LLP<br/>100 West Main Street, Suite 900<br/>Lexington, KY 40507<br/>mindy.barfield@dinsmore.com</p> <p>William C. Brown, III<br/>West Virginia State Bar # 13592<br/>DINSMORE &amp; SHOHL LLP<br/>611 Third Street<br/>Huntington, WV 25701<br/>william.brown@dinsmore.com</p> <p>Dated: 01/03/2024</p> <p><i>Attorneys for Defendants</i></p> |
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| <p>For Plaintiff:</p> <p>Seema Nanda<br/>Solicitor of Labor</p> <p>Samantha N. Thomas<br/>Acting Regional Solicitor</p> <p>Usha Rengachary<br/>Counsel for ERISA</p> <hr/> <p>By: Alejandro A. Herrera<br/>Senior Trial Attorney<br/>U.S. Department of Labor<br/>Office of the Solicitor, Region III<br/>1835 Market Street<br/>Mailstop SOL/22<br/>Philadelphia, PA 19103<br/>herrera.alejandro.a@dol.gov</p> <p>Dated:</p> <p><i>Attorneys for Plaintiff</i></p> | <hr/> <p>Jeffrey A. Hoops</p> <hr/> <p>Drew Kesler</p> <p></p> <hr/> <p>Donald P. Hetrick</p> <p>As to form and for purposes of submission only (the Undersigned is a not a party to the above judgment):</p> <hr/> <p>Mindy G. Barfield (<i>pro hac vice</i>)<br/>DINSMORE &amp; SHOHL LLP<br/>100 West Main Street, Suite 900<br/>Lexington, KY 40507<br/>mindy.barfield@dinsmore.com</p> <p>William C. Brown, III<br/>West Virginia State Bar # 13592<br/>DINSMORE &amp; SHOHL LLP<br/>611 Third Street<br/>Huntington, WV 25701<br/>william.brown@dinsmore.com</p> <p>Dated: 12/22/2023</p> <p><i>Attorneys for Defendants</i></p> |
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