

3. The Mitchellace, Inc. Employee Flexible Benefits Plan (the 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. The Plan is named as a defendant herein pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

5. Venue of this action lies in the Southern District of Ohio pursuant to ERISA §502(e)(2), 29 U.S.C. §1132(e)(2), because the Plan was administered in Portsmouth, Ohio, in Scioto County within this district.

DEFENDANTS AND PARTIES

6. At all relevant times, Defendant Thomas Keating (Defendant Keating) was the Chief Financial Officer and Treasurer of Mitchellace, Inc. (Mitchellace), a fiduciary to the Plan within the meaning of ERISA §3(21)(A)(i), 29 U.S.C. §1002(21)(A)(i) 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).

7. At all relevant times from November 5, 2008 through June 10, 2009, Mitchellace, the Plan sponsor, was a fiduciary to the Plan within the meaning of ERISA §3(21)(A)(i), 29 U.S.C. §1002(21)(A)(i) and 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).

VIOLATIONS (Failure to Remit Employee Contributions to the Plan)

8. Paragraphs 1 through 7 above are realleged and incorporated herein by reference.

9. The Plan was established effective February 1, 1982 by Mitchellace, the plan sponsor, and amended and restated on January 1, 2008.

10. The Plan was a self-funded group plan that was established to provide health and disability benefits to the employees of Mitchellace.

11. At all relevant times, the Plan was funded through employee contributions that were deducted from Mitchellace employees' wages for contribution to the Plan.

12. During the period November 5, 2008 through June 10, 2009, Defendant Keating caused Mitchellace to withhold \$14,615.94 from employees' pay in employee health premium contributions and failed to remit the amounts so withheld to the Plan.

13. During the period November 5, 2008 through June 10, 2009, Defendant Keating caused Mitchellace to retain the employee health premium contributions in its corporate account and failed to ensure that the amounts withheld from employees' pay were forwarded to the Plan.

14. By the conduct described in paragraphs 9 through 13 above, Defendant Keating:

- a. failed to ensure that all assets of the Plan were held in trust and did not inure to the benefit of Mitchellace, 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 he 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); and

- d. dealt with assets of the Plan in his 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).

PRAYER FOR RELIEF

WHEREFORE, the Secretary prays for judgment:

- A. Permanently enjoining Defendant Keating from violating the provisions of Title I of ERISA;
- B. Ordering Defendant Keating to make good to the Plan any losses, including interest, resulting from fiduciary breaches committed by him or for which he is liable;
- C. Ordering Defendant Keating to correct the prohibited transactions in which he engaged;
- D. Removing Defendant Keating from his position as a fiduciary with respect to the Plan and appointing an independent fiduciary to administer the Plan;
- E. Permanently enjoining Defendant Keating from acting as a fiduciary or service provider to any ERISA-covered employee benefit plan;
- F. Appointing an independent fiduciary, if necessary, to administer or terminate the Plan; and
- G. Requiring the Plan to set off Defendant Keating's individual Plan account, if any, against the amount of the Plan's losses, including lost opportunity costs, resulting from his fiduciary breaches, as authorized by Section 1502(a) of the Taxpayer Relief Act of 1997, Pub.L.No. 105-34, §1502(a), 111stat. 788, 1058-59 (1997) [codified at 29 U.S.C. §1056(d)(4)], if the losses are not otherwise restored to the Plan;
- H. Awarding the Secretary the costs of this action; and

I. Ordering such further relief as is appropriate and just.¹

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¹ On April 12, 2010, Defendant Keating filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Southern District of Ohio, case number 10-bk-12371, where the case is still pending. Because the Secretary is prosecuting this civil action pursuant to the Department of Labor's police and regulatory power under Title I of ERISA, the Secretary's action will be "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power," and it is excluded from the operation of the automatic stay provisions of the Bankruptcy Code pursuant to 11 U.S.C. §362(b)(4). The Secretary's efforts to enforce any monetary portion of any judgment obtained against Defendant Keating will be consistent with the Bankruptcy Code.