

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE**

SETH HARRIS, ACTING SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

Civ. A. No.

MICHAEL HIRST, PEG HIRST, PROGRESSIVE SERVICES, INC., and PROGRESSIVE SERVICES, INC. 401(k) PLAN

Defendants.

2013 JUN 17 P 3:35

U.S. DEPT OF JUSTICE

**CONSENT JUDGMENT**

Plaintiff, Seth Harris, Acting Secretary of Labor, United States Department of Labor (“Secretary”), has filed a Complaint in this action pursuant to the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 *et seq.*, alleging certain violations by each of the above-captioned defendants.

Counsel for the Secretary has engaged in settlement discussions with defendants Michael Hirst (“Mr. Hirst”), Peg Hirst (“Mrs. Hirst”), and Progressive Services, Inc. (“the Company” or “Progressive”). The parties have agreed to resolve this case without further litigation. The defendants waive service, answering the Complaint, and consent to the entry of this Consent Judgment against them by this Court, the terms of which are set forth herein:

1. The Secretary’s Complaint alleges that defendants Mr. Hirst, Mrs. Hirst, and Progressive violated Sections 403, 404, and 406 of ERISA, 29 U.S.C. §§ 1103, 1104, and 1106, and are liable as co-fiduciaries under §405 of ERISA, 29 U.S.C. § 1105. The Progressive Services, Inc. 401(k) Plan (“the Plan”) was included in the Complaint as a Rule 19 defendant only so that complete relief could be granted.

2. For purposes of this Consent Judgment, the defendants admit that the Court has jurisdiction over them and the subject matter of this action.

3. The Secretary has agreed to resolve all claims asserted in the Complaint against the defendants for the relief set forth below.

4. The Secretary, Mr. Hirst, Mrs. Hirst, and the Company understand and agree that entry of this Consent Judgment is without prejudice to the Secretary's right to investigate and redress violations of ERISA, if any, not alleged in the Complaint, including the 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 the defendants of any defenses, legal or equitable, to any such future action.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that:

- a. This Court has jurisdiction over this action and the defendants.
- b. Mr. Hirst and Mrs. Hirst shall restore \$53,809.37 in unremitted employee contributions and loan repayments, \$11,346.35 in unremitted employer safe harbor contributions, and \$5,579.76 in pre-judgment interest to the Plan as restitution. The total amount to be restored to the Plan is \$70,735.42.
- c. Mr. Hirst and Mrs. Hirst are participants in the Plan. The Plan is hereby amended to allow forfeiture of the individual Plan accounts of Mr. Hirst and Mrs. Hirst to the extent necessary to satisfy paragraph (b) and to permit the reallocation and distribution of the restitution to Plan participants. This Order shall be attached to the Plan document as an amendment.
- d. The Plan shall set off the individual account balance of Mr. Hirst and Mrs. Hirst,

- if any, against the amount of the losses, including lost opportunity costs, resulting from their fiduciary breaches, as authorized by 29 U.S.C. § 1056(d)(4), if the losses are not otherwise restored to the Plan by defendants Mr. and Mrs. Hirst.
- e. If the individual Plan accounts of Mr. and Mrs. Hirst are less than the total amount necessary to restore the full amount of \$70,735.42 to the Plan, Mr. and Mrs. Hirst shall pay the deficiency out of other personal assets within sixty (60) days of entry of this consent judgment.
- f. Mr. Hirst and Mrs. Hirst represent and warrant that they are married. Each has waived any right he or she may have had to any qualified joint and survivor annuity/or qualified preretirement survivor annuity form of benefit, pursuant to Section 205 (c) of ERISA, 29 U.S.C. § 1055(c). A copy of their executed waivers are attached as Exhibits A and B.
- g. The Plan shall redistribute the restitution to the Plan participants in amounts necessary to restore their losses incurred as a result of the fiduciary breaches alleged in the Complaint. Mr. Hirst and Mrs. Hirst waive their right to receive any restitution which is owed to them as a result of their fiduciary breaches. No part of the restitution amount shall be redistributed to the individual accounts of Mr. Hirst or Mrs. Hirst.
- h. The Plan shall provide to the Regional Director of EBSA satisfactory proof of the reallocations of the Defendants accounts and satisfactory proof of each subsequent payment made to the Plan, within 7 days of such reallocation and each subsequent payment. Satisfactory proof of the reallocation shall include, at a minimum, copies of records maintained by a the Plan's third party record keeper before and after the reallocation demonstrating the reallocation from the

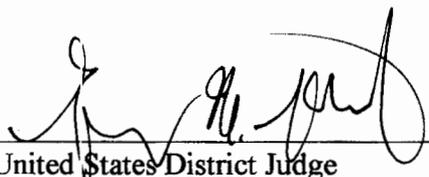
Defendants' accounts to the accounts of other participants, or (in the case of reallocation to former participants or their beneficiaries) checks written to those participants, or transfers of funds to IRAs established in their names, together with a statement in writing from the Plan Administrator that appropriate 1099Rs will be issued reflecting the reallocations. Satisfactory proof of the payments by the Defendants shall consist, at a minimum, of documentation obtained from a third party service provider that confirm that the Defendants have made payments to the plan in the form of wire transfers or checks that have cleared, and the amount of such payments. Such proof shall be sent to the Regional Director, EBSA, U.S. Department of Labor, 170 S. Independence Mall West Suite 870 West, Philadelphia, PA 19106.

- i. Upon receiving proof of the restitution payment, the Secretary shall assess a penalty against Mr. Hirst and Mrs. Hirst of \$14,147.08 which represents 20 percent of the applicable recovery amount of \$70,735.42 pursuant to ERISA § 502(l), 29 U.S.C. § 1132(l). Mr. Hirst and Mrs. Hirst waive their right to contest the assessment of said penalty. Mr. and Mrs. Hirst, however, reserve their right to request a waiver of said penalty based on financial hardship.
- j. Defendants are permanently enjoined from violating any provisions of ERISA in the future.
- k. If Mr. Hirst, Mrs. Hirst, or the Company files for any form of bankruptcy prior to the full payment of restitution to the Plan, they will: (1) ensure that any assets of the Plan are segregated from and not commingled with the debtor's estate; (2) not oppose any proof of claim that the Secretary files in the bankruptcy proceeding for any amount still owing; and (3) not oppose an adversarial action that the

Secretary may file against Mr. or Mrs. Hirst to have the debt to the Plan declared non-dischargeable.

- l. The Secretary and the defendants shall each bear their own costs, expenses, and attorneys' fees incurred to date in connection with any stage of this proceeding, including but not limited to, attorneys' fees which may be available under the Equal Access to Justice Act, as amended.
- m. This Consent Judgment shall operate as a final disposition of all claims asserted by the Secretary against the defendants in the Complaint.
- n. Nothing in this Consent Judgment is binding on any governmental agency other than the United States Department of Labor.
- o. This Court retains jurisdiction of this action for purposes of enforcing compliance with the terms of this Consent Judgment.
- p. The Court directs the entry of this Consent Judgment as a final order.

Date: 6/5/2013

  
United States District Judge

Defendants Michael Hirst, Peg Hirst,  
Progressive Services, Inc., and the Progressive  
Services, Inc. 401(k) Plan waive service and  
answer of the Complaint and consent to entry  
of this Consent Judgment

  
Michael Hirst

M. Patricia Smith  
Solicitor of Labor

Catherine Oliver Murphy  
Regional Solicitor

Joanne Roskey  
Counsel for ERISA

  
\_\_\_\_\_  
Peg Hirst

  
\_\_\_\_\_  
Ashton S. Phillips  
Attorney

Progressive Services, Inc.

By:   
\_\_\_\_\_  
Michael Hirst, President

Progressive Services, Inc., 401(k) Plan

By:   
\_\_\_\_\_  
Michael Hirst, Plan Administrator

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Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF DELAWARE**

SETH HARRIS, ACTING SECRETARY OF :  
LABOR, UNITED STATES DEPARTMENT OF :  
LABOR, :

Plaintiff, :

v. :

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MICHAEL HIRST, PEG HIRST, :  
PROGRESSIVE SERVICES, INC., and :  
PROGRESSIVE SERVICES, INC. 401(k) PLAN :

Defendants. :

**EXHIBIT A**

**CONSENT OF SPOUSE TO WAIVER OF BENEFITS**

**The Progressive Services, Inc., 401(K) Plan  
(hereinafter, the "Plan")**

I, Peg Hirst, declare that:

1. I am the wife of Michael Hirst and hereby consent to my husband's waiver of all rights to receive any benefit payments and return of contributions from the Plan, including my interest in receiving survivorship benefits under the Plan for that amount.

2. This waiver constitutes an effective waiver of any right I may have to that portion of the qualified joint and survivor annuity and/or qualified preretirement survivor annuity form of benefit, pursuant to Section 205(c) of ERISA, 29 U.S.C. § 1055(c)

Date: 6/5/2013

*Reg Christ*  
Signature

Sworn and subscribed before me

this 5 day of June, 2013

*Cheryl A. Baker*  
NOTARY PUBLIC  
*Cheryl A. Baker*



My Commission Expires: 4/19/2015

(Knowingly and willfully making false, fictitious, or fraudulent statements to the United States Department of Labor is punishable under Title 18, §1001, United States Code.)

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MICHAEL HIRST, PEG HIRST, :  
PROGRESSIVE SERVICES, INC., and :  
PROGRESSIVE SERVICES, INC. 401(k) PLAN :

Defendants. :

**EXHIBIT B**

**CONSENT OF SPOUSE TO WAIVER OF BENEFITS**

**The Progressive Services, Inc., 401(K) Plan**  
(hereinafter, the "Plan")

I, Michael Hirst, declare that:

1. I am the husband of Peg Hirst and hereby consent to my wife's waiver of all rights to receive any benefit payments and return of contributions from the Plan, including my interest in receiving survivorship benefits under the Plan for that amount.

2. This waiver constitutes an effective waiver of any right I may have to that portion of the qualified joint and survivor annuity and/or qualified preretirement survivor annuity form of benefit, pursuant to Section 205(c) of ERISA, 29 U.S.C. § 1055(c).

Date: 6/5/2013

Michael W. Hus  
Signature

Sworn and subscribed before me

this 5<sup>th</sup> day of June, 2013

Cheryl A. Baker  
NOTARY PUBLIC  
Cheryl A. Baker



My Commission Expires: 4/19/2015

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