UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Plaintiff,	
v.	CIVIL ACTION
HEATECH, INC.	
and	FILE NO. 1:14-cv-11536
MICHAEL FITZEMEYER, In their capacity as fiduciaries of the Heatech, Inc. Retirement Plan. Defendants.	

COMPLAINT

Thomas E. Perez, Secretary of the United States Department of Labor, hereby alleges:

(1) This action arises under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq*., and is brought to obtain equitable relief, to redress violations, to obtain restitution from employee benefit plan fiduciaries and parties in interest, and to obtain other appropriate relief necessary to enforce the provisions of Title I of ERISA, pursuant to ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5).

JURISDICTION AND VENUE

(2) The Court has jurisdiction over this action pursuant to ERISA § 502(e)(1), 29 U.S.C. §1132(e)(1).

(3) Venue of this action lies in the District of Massachusetts pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

PARTIES AND BACKGROUND

(4) The Secretary is vested with authority to enforce the provisions of Title I of ERISA by, among other means, the filing and prosecution of claims against fiduciaries and other parties who commit violations of ERISA. ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5). The Secretary has the authority to seek relief under ERISA §§ 409(a) and 502(a)(2) & (5), 29 U.S.C. §§ 1109(a) and 1132(a)(2) & (5), to restore pension plan losses, to recover unjust profits and to obtain other remedial and equitable relief as the court may deem appropriate. The Secretary may also seek injunctions to prevent those who have violated their fiduciary duties from managing or providing services to employee pension benefit plans in the future.

(5) During the pertinent period, January 3, 2009 to the present ("pertinent period"), Defendant Heatech, Inc. ("Heatech" or "the company") has been an employer within the meaning of ERISA § 3(5), 29 U.S.C. §1002(5), and a corporation having an office and place of business at 116 Essex Street, Melrose, MA, within the jurisdiction of this Court.

(6) On January 1, 2002, the company established the Heatech, Inc. Retirement Plan ("the Plan"), an employee pension benefit plan within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), and which is covered under ERISA pursuant to § 4(a),

29 U.S.C. § 1003(a). Upon information and belief, the Plan was suspended on December 31, 2011.

(7) The purpose of the Plan is to provide pension benefits for the exclusive benefit of its participants, employees of the company, and their beneficiaries. The Plan is characterized as a "safe harbor" 401(k) Plan and, according to Plan documents, was to be funded by (a) employee elective deferrals deducted and withheld from employee salaries and remitted for investment in accordance with each employee participant's election; and (b) safe harbor matching contributions of 3 percent (3%) of each active participant's compensation for each plan year. These safe harbor contributions were discontinued in December 2010. The Plan also permits the employer to make discretionary contributions.

(8) Defendant Heatech is the sponsor of the Plan, as defined by ERISA §3(16)(B)(i), 29 U.S.C. § 1002(16)(B)(i), and, during the pertinent period, acted as the Plan Administrator and, as such, was and is a fiduciary with respect to the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Furthermore, at all times relevant hereto, the company was and is a party in interest with respect to the Plan within the meaning of ERISA §§ 3(14)(A) and (C), 29 U.S.C. §§ 1002(14)(A) and (C).

(9) During the pertinent period, Defendant Michael Fitzemeyer ("Fitzemeyer") was and is the owner and President of Heatech, and, as set forth in the Plan documents, a Named Trustee of the Plan, during which time material hereto, he has exercised authority or control respecting management or disposition of assets of the Plan. As such, Defendant Fitzemeyer was and is a fiduciary with respect to the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Furthermore, during the pertinent period, Defendant Fitzemeyer was and is a party in interest with respect to the

Plan within the meaning of ERISA §§ 3(14)(A), (E) and (H), 29 U.S.C. §§ 1002(14)(A), (E) and (H). Defendant Fitzemeyer resides at XXXXXXXXXXXX, Lynnfield, Massachusetts, within the jurisdiction of this Court.

ALLEGATIONS

(10) Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, the Secretary adopts by reference the averments and allegations of paragraphs 1-9 inclusive.

(11) During the pertinent period, Defendants were and continue to be responsible for receiving and collecting any and all monies and other property due to the Plan, and for properly managing the assets of the Plan; furthermore, Defendants were and continue to be responsible for undertaking measures to collect any and all employer contributions due to the Plan, including the employer contributions for Plan years 2009 and 2010.

(12) During the pertinent period, Defendants failed to remit withheld employee contributions to the Plan in a timely manner causing the Plan lost opportunity earnings.

(13) During the pertinent period, Defendants also failed to remit withheld employee contributions in their entirety in the amount of $19,881. Pursuant to DOL Regulation 29 C.F.R. § 2510.3-102, the employee contributions became assets of the Plan as of the earliest date on which such contributions could reasonably be segregated from the employer's general assets.

(14) During the pertinent period, Defendants failed to take appropriate measures to collect all employer contributions due and owing to the Plan. As a result, employer contributions totaling $16,397 plus interest, are due and owing to the Plan.

(15) As a result of the conduct set forth at paragraphs 11-14, Defendants failed to discharge their fiduciary duties 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. § 104(a)(1)(A).

(16) As a result of the conduct set forth at paragraphs 11-14, Defendants failed to discharge their fiduciary duties with care, skill, prudence and diligence, in violation of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

(17) As a result of the conduct set forth at paragraphs 11-14, Defendants acted with respect to the Plan in a transaction involving the Plan on behalf of a party (or represent a party) whose interests were adverse to the interests of the Plan or the interests of its participants or of its beneficiaries, in violation of ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2).

(18) As a result of the conduct set forth at paragraph 13, Defendants engaged in prohibited transactions by using the assets of the Plan for the benefit of the parties in interest, Fitzemeyer and/or Heatech, in violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

(19) As a result of the conduct set forth at paragraphs 13, Defendants dealt with assets of the Plan in their own interest, in violation of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1).

(20) Defendants failed to have a fidelity bond in violation of ERISA § 412(a), 29 U.S.C. § 1112(a).

PRAYER FOR RELIEF

WHEREFORE, the Secretary of Labor prays that this Court enter an Order:

(1) Permanently enjoining Defendants from violating, or knowingly participating in violations of, the provisions of ERISA §§ 404 and 406, 29 U.S.C. §§ 1104 and 1106;

(2) Permanently enjoining Defendant Fitzemeyer from serving as a fiduciary to the Plan or any other employee benefit plan covered by ERISA;

(3) Requiring Defendants to undo the prohibited transactions in which they engaged and to restore to the Plan any and all losses incurred as a result of breaches of their fiduciary duties and violations they committed or for which they are liable, with appropriate interest;

(4) Appointing an independent fiduciary for the purpose of having appropriate allocations and disbursements made to each of the non-fiduciary Plan participants whose Plan accounts were underfunded;

(5) Requiring Defendants to acquire a fidelity bond pursuant to the provisions of ERISA § 412(a), 29 U.S.C. § 1112(a).

(6) Awarding to Plaintiff the costs of this action, and other relief as is equitable and just.

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Solicitor of Labor

Michael D. Felsen
Regional Solicitor

/s/ Theresa Schneider Fromm
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