



4. Venue of this action lies in the Western District of Wisconsin, pursuant to ERISA §502(e)(2), 29 U.S.C. §1132(e)(2), because the Plan was administered in Mt. Horeb, Dane County, WI, within this district.

5. The Plan was sponsored by Mt. Horeb Plumbing, Inc. (“Mt. Horeb”) for the benefit of employees of Mt. Horeb.

6. 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.

### **DEFENDANTS**

7. At all relevant times, Defendant Mt. Horeb was the Plan Administrator of the Plan, was a “named fiduciary” to the Plan within the meaning of ERISA §402(a)(2), 29 U.S.C. §1002(21)(A), was a fiduciary to the Plan within the meaning of ERISA §3(21)(A), 29 U.S.C. §1002(21)(A), 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).

8. At all relevant times, Defendant Michael D. O’Connell (“O’Connell”) was President of Mt. Horeb, a fiduciary to the Plan within the meaning of ERISA §3(21)(A)(i) and (iii), 29 U.S.C. §1002(21)(A)(i) and (iii) and a party in interest to the Plan within the meaning of ERISA §3(14)(A), (E) and (H), 29 U.S.C. §1002(14)(A), (E) and (H).

### **VIOLATIONS**

#### **Failure to Remit and Timely Remit Employee Contributions to the Plan**

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

10. For certain time periods from January 3, 2006 through October 6, 2009, Defendants Mt. Horeb and O’Connell caused Mt. Horeb to withhold and failed to remit \$30,120.65 in employee voluntary salary deferral contributions to the Plan. Upon information and belief, Defendants Mt.

Horeb and O'Connell commingled these funds with Mt. Horeb's general assets and used these funds for the corporation's general operating expenses. There are also lost opportunity costs owed to the Plan as a result of the unremitted employee contributions.

11. For certain time periods from January 3, 2006 through October 6, 2009, Defendants Mt. Horeb and O'Connell caused Mt. Horeb to withhold and failed to timely remit \$49,235.15 in employee voluntary salary deferral contributions to the Plan. Upon information and belief, Defendants Mt. Horeb and O'Connell commingled these funds with Mt. Horeb's general assets and used them for the corporation's general operating expenses. There are lost opportunity costs owed to the Plan as a result of the untimely remitted employee contributions.

12. By the conduct described in paragraphs 10 through 11 above, Defendants Mt. Horeb and O'Connell:

a. failed to ensure that all assets of the Plan were held in trust and did not inure to the benefit of the employer, 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. engaged in transactions which they 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);

d. dealt with assets of the Plan in their own interest or for their own account, in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1); and

e. acted in their individual or other capacity in a transaction involving the Plan on behalf of a party whose interests were adverse to the interests of the Plan or the interests of its participants or 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. Requiring Defendants Mt. Horeb and O'Connell to restore to the Plan all losses incurred as a result of their breaches of fiduciary duties and for which they are liable, with appropriate interest;

B. Permanently enjoining Defendants Mt. Horeb and O'Connell from violating the provisions of Title I of ERISA;

C. Permanently removing Defendants Mt. Horeb and O'Connell from serving as fiduciaries for the Plan;

D. Permanently enjoining Defendants Mt. Horeb and O'Connell from serving as fiduciaries or service providers to any ERISA-covered plan;

E. Appointing an independent fiduciary, if necessary, to distribute the assets of the Plan and to terminate said Plan;

F. Requiring Defendants Mt. Horeb and O'Connell to undo any prohibited transaction in which they engaged or for which they are liable, including disgorgement of any profits derived there from;

G. Requiring the Plan to set off Defendant O'Connell's individual Plan account, if any, against the amount of the Plan's losses, including lost opportunity costs, resulting from their 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.<sup>1</sup>

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<sup>1</sup> On 2/22/2010, Defendant O'Connell filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Western District of Wisconsin, case number 3-10-11190-rdm, 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," 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 O'Connell will be consistent with the Bankruptcy Code.