

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

MICHAEL A. LEWIS,	)	
	)	Bankruptcy Petition No. 15-23963
	)	
Debtor.	)	Chapter 13
-----	)	
	)	Hon. Jack B. Schmetterer
THOMAS E. PEREZ, Secretary of Labor,	)	
United States Department of Labor,	)	Adv. No.
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
MICHAEL A. LEWIS,	)	
	)	
Defendant.	)	

**COMPLAINT FOR DETERMINATION OF DISCHARGEABILITY OF DEBT**

Plaintiff Thomas E. Perez, Secretary of Labor, United States Department of Labor (“Secretary”), acting by and through his attorneys, pursuant to Federal Rule of Bankruptcy Procedure 7001(6), alleges:

1. This adversary proceeding is being brought in connection with Michael A. Lewis’s case under Chapter 13 of Title 11, Case No. 15-23963, and constitutes a core proceeding. This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 157(b)(2)(i) and 11 U.S.C. § 523.

**PARTIES**

2. The Secretary is responsible for the administration and enforcement of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. §§ 1001, *et seq.*, § 502(e)(1), 29 U.S.C. § 1132(e)(1). In his capacity as such, the Secretary has the

authority, pursuant to ERISA § 502(a)(2) and (5), 29 U.S.C. § 1132(a)(2) and (5), to bring actions to enjoin acts and practices which violate the provisions of Title I of ERISA and to obtain such further equitable relief as may be appropriate to redress and to enforce the provisions of that Title. The Secretary is responsible for protecting the interests of participants in, and beneficiaries of, employee benefit plans and the plan assets held by those plans.

3. Defendant Michael A. Lewis (“Defendant Lewis”) is a debtor in this personal bankruptcy proceeding.

4. The Secretary, through the Employee Benefits Security Administration, carried out an investigation under ERISA of the Acme Orthotics and Prosthetic Laboratories, Inc. Profit Sharing 401(k) Plan and Trust (the “Plan”). The Plan is an employee benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3), that is subject to the provisions of Title I of ERISA pursuant to ERISA § 4(a), 29 U.S.C. § 1003(a).

5. From at least January 1, 2008, through December 31, 2015, Defendant Lewis was the president and sole owner of Acme, sole named trustee of the Plan, and a fiduciary of 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 (E), 29 U.S.C. § 1002(14)(A) and (E).

## **FACTUAL ALLEGATIONS AND RESULTING ERISA VIOLATIONS**

### **COUNT ONE**

#### **Failure to Remit Employee Salary Deferral Contributions and Loan Repayments to the Plan**

6. Paragraphs 1 through 5 above are realleged and incorporated in these allegations.

7. From at least August 1, 2008, through at least October 15, 2015, Acme was the sponsor of the Plan; the administrator of the Plan pursuant to ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A); a fiduciary of 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)(C) and (G), 29 U.S.C. § 1002(14)(C) and (G).

8. On August 1, 1966, Acme established the Plan to provide retirement benefits to its employees.

9. The Plan was restated effective as of August 1, 2009.

10. From at least January 1, 2008, through December 31, 2015, the Plan's governing documents, which were adopted by Acme, provided in pertinent part that the Plan would be funded through employees' pre-tax salary deferral contributions to the Plan and through contributions from Acme to the Plan.

11. From at least January 1, 2008, through December 31, 2015, the Plan's governing documents, which were adopted by Acme, provided in pertinent part that participants could obtain loans from the Plan.

12. During the period from July 9, 2010, through April 27, 2012, Acme withheld from employees' pay \$24,000 in employee salary deferral contributions to the Plan.

13. During the period from July 9, 2010, through April 27, 2012, Acme withheld from employees' pay \$15,391.17 in participant loan repayments to the Plan.

14. The salary deferral contributions and participant loan repayments withheld by Acme from employees' wages between July 9, 2010, and April 27, 2012, were not used for Plan purposes.

15. The salary deferral contributions and participant loan repayments withheld by Acme from employees' wages between July 9, 2010, through April 27, 2012, were retained in Acme's own general operating account and used to pay Acme's expenses.

16. During the period from at least July 9, 2010, through at least April 27, 2012, Defendant Lewis had authority to sign and issue checks from Acme's own general operating account.

17. During the period from July 9, 2010, through April 27, 2012, Defendant Lewis caused Acme to retain the employee salary deferral contributions and loan repayments to the Plan that were withheld from participating employees' pay and used that money to pay Acme's expenses.

18. By the allegations described in paragraphs 12 through 17 above, Defendant Lewis:

- a. failed to ensure that all Plan assets were held in trust, in violation of ERISA § 403(a), 29 U.S.C. § 1103(a);
- b. failed to ensure that all Plan assets did not inure to the benefit of Acme, in violation of ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1);
- c. 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);
- d. 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);
- e. 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

f. 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).

**COUNT TWO**

**Defendant Lewis's Transfer of Plan Assets to Himself and Acme**

19. Paragraphs 1 through 5 above are realleged and incorporated in these allegations.

20. As sole named trustee of the Plan, Defendant Lewis had the discretionary and signatory authority to receive, manage, and dispose of Plan assets.

21. During periods from April 19, 2012, to March 5, 2015, Defendant Lewis liquidated \$66,431.99 in Plan assets, to which he was not entitled, from the Plan trust account at UBS Financial Services, Inc.

22. Funds transferred from the Plan's assets, as described in paragraph 21 above, were used to pay for Acme's operating expenses.

23. Funds transferred from the Plan's assets, as described in paragraph 21 above, were not used for Plan purposes.

24. By the allegations described in paragraphs 20 through 23 above, Defendant Lewis:

a. failed to ensure that all Plan assets were held in trust, in violation of ERISA § 403(a), 29 U.S.C. § 1103(a);

b. failed to ensure that all Plan assets did not inure to the benefit of Acme, in violation of ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1);

c. 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);

d. 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);

e. dealt with Plan assets in his own interest in violation of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1); and

f. 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).

#### **DEFALCATION**

25. The diversion of the Plan's assets by Defendant Lewis as described in paragraphs 12 through 17 and 20 through 23 above constitutes a defalcation by him while acting in a fiduciary capacity for the Plan and, therefore, all amounts owed to the Plan are nondischargeable under the provisions of 11 U.S.C. § 523(a)(4).

#### **PRAYER FOR RELIEF**

WHEREFORE, the Secretary prays that this court determine that the aforesaid debts resulting from Michael A. Lewis's fiduciary breaches relating to the Plan assets are

nondischargeable and that Plaintiff have such other and further relief as is just and proper.

Date: March 31, 2016

Respectfully submitted,

**M. PATRICIA SMITH**  
Solicitor of Labor

**CHRISTINE Z. HERI**  
Regional Solicitor

/s/ Kevin M. Wilemon  
**KEVIN M. WILEMON**  
Trial Attorney

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