

JS

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS E. PEREZ, SECRETARY OF LABOR, :
UNITED STATES DEPARTMENT OF LABOR, :

Plaintiff, :

v. :

STEVEN KEARES, INC., HARRY S. KEARES, :
and STEVEN KEARS, INC. 401(K) :
RETIREMENT PLAN, :

Defendants. :

Civil Action

No.

16 5072

A TRUE COPY CERTIFIED TO FROM THE RECORD

DATED: SEP 22 2016

ATTEST: Steve Tomas

DEPUTY CLERK, UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

COMPLAINT

Thomas E. Perez, Secretary of Labor, United States Department of Labor, (the
“Secretary”) hereby alleges:

Jurisdiction and Venue

1. This cause of action arises under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001, *et seq.*, and is brought by the Secretary under Sections 502(a)(2) and (5) of ERISA, 29 U.S.C. §§ 1132(a)(2) and (5), to enjoin acts and practices which violate the provisions of Title I of ERISA, to obtain appropriate relief for breaches of fiduciary duty under ERISA Section 409, 29 U.S.C. § 1109, and to obtain such other further relief as may be appropriate to redress violations and enforce the provisions of Title I of ERISA.

2. This Court has subject matter jurisdiction over this action pursuant to Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).

3. The Steven Keares, Inc. 401(k) Retirement Plan (the “Plan”) is an employee benefit plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3), and is therefore

subject to the coverage of the Act, pursuant to Section 4(a) of ERISA, 29 U.S.C. § 1003(a). The Plan is administered in Exton, Pennsylvania.

4. Venue with respect to this action lies in the Eastern District of Pennsylvania pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

The Parties

5. The Secretary, pursuant to Sections 502(a)(2) and (5) of ERISA, 29 U.S.C. §§ 1132(a)(2) and (5), has the authority to enforce the provisions of Title I of ERISA by, among other means, the filing and prosecution of claims against fiduciaries and others who commit violations of ERISA.

6. At all relevant times, Steven Keares, Inc. (“the Company”) has been the Plan Sponsor, Plan Administrator, and Named Fiduciary of the Plan. At all relevant times, the Company has exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan’s assets, and had discretionary authority or discretionary responsibility in the administration of the Plan. The Company, therefore, is a fiduciary of the Plan within the meaning of Section 3(21) of ERISA, 29 U.S.C. § 1002(21), and a party-in-interest as that term is defined in Sections 3(14)(A) and (C) of ERISA, 29 U.S.C. §§ 1002(14) (A) and (C).

7. At all relevant times, Harry S. Keares (“Mr. Keares”) has been the President of the Company and Plan Trustee. Mr. Keares made decisions regarding the Plan, including decisions as to the disposition of Plan assets, and performed functions of the Plan Administrator. At all relevant times, Mr. Keares has exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or

disposition of the Plan's assets, and had discretionary authority or discretionary responsibility in the administration of the Plan. Mr. Keares, therefore, is a fiduciary of the Plan within the meaning of Section 3(21) of ERISA, 29 U.S.C. § 1002(21), and a party-in-interest as that term is defined in Sections 3(14) (A) and (H) of ERISA, 29 U.S.C. §§ 1002(14) (A) and (H).

8. The Plan is joined as a party defendant pursuant to Rule 19(a) of the Federal Rules of Civil Procedure solely to assure that complete relief can be granted.

General Allegations

9. The Company adopted the Plan on or about August 1, 1998. The Plan permitted participants to contribute a portion of their pay to the Plan as elective salary deferrals ("employee contributions") through payroll deductions. The Plan is also funded through mandatory employer prevailing wage contributions.

Missing Employee Contributions

10. During the period from on or about April 27, 2012 through on or about December 26, 2014, Mr. Keares and the Company deducted certain sums from the participants' pay for employee contributions and loan repayments to the Plan but failed to remit them to the Plan.

11. Unremitted employee contributions and loan repayments are assets of the Plan within the meaning of ERISA. Mr. Keares and the Company failed to segregate the unremitted employee contributions and loan repayments from the general assets of the Company and failed to hold them in trust as Plan assets.

Missing Employer Contributions

12. During the period from on or about December 28, 2011 through on or about April 18, 2014, Mr. Keares and the Company failed to remit certain mandatory employer prevailing

wage contributions to the Plan.

13. Mr. Keares as Plan Trustee was responsible for collecting the mandatory employer prevailing wage contributions for the Plan but failed to do so. The Company had the funds available to pay the employer contributions because those amounts were included as part of employee compensation in the Company's prevailing wage rate contracts.

Violations

Count I – Missing Employee Contributions

14. Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, the Secretary adopts by reference the averments and allegations of paragraphs 1-13 inclusive.

15. By the actions and conduct described in paragraphs 10-11 above, Mr. Keares and the Company, as fiduciaries of the Plan:

- a. failed to hold all assets of the Plan in trust in violation of Section 403(a) of ERISA, 29 U.S.C. § 1103(a);
- b. failed to ensure that the assets of the Plan did not inure to the benefit of the Company in violation of Section 403(c)(1) of ERISA, 29 U.S.C. § 1103(c) (1);
- c. failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plan, in violation of Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A);
- d. failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence

under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of Section 404(a)(1)(B) of ERISA, 29 U.S.C. § 1104(a)(1)(B);

- e. failed to discharge their duties in accordance with the documents and instruments governing the Plan insofar as such documents and instruments are consistent with the provisions of Title I and IV of ERISA, in violation of Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D);
- f. caused the Plan to engage in transactions which they knew or should have known constituted the direct or indirect transfer of Plan assets to, or use of Plan assets by or for the benefit of a party-in-interest, in violation of Section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D);
- g. dealt with assets of the Plan in their own interest or for their own account, in violation of Section 406(b)(1) of ERISA, 29 U.S.C. § 1106(b)(1); and,
- h. acted in their individual or in any other capacity in a transaction involving the Plan on behalf of a party whose interests are adverse to the interests of the Plan, or the interests of its participants or beneficiaries, in violation of ERISA Section 406(b)(2), 29 U.S.C. § 1106(b)(2).

Count II – Failure to Collect Prevailing Wage Contributions

16. By the actions and conduct described in paragraphs 12-13 above, Mr. Keares, as a fiduciary of the Plan:

- a. failed to discharge his duties with respect to the Plan solely in the interest of the

participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plan, in violation of Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A);

- b. failed to discharge his duties with respect to the Plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of Section 404(a)(1)(B) of ERISA, 29 U.S.C. § 1104(a)(1)(B); and,
- c. failed to discharge his duties in accordance with the documents and instruments governing the Plan insofar as such documents and instruments are consistent with the provisions of Title I and IV of ERISA, in violation of Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D).

Count III – Co-fiduciary Liability

17. Mr. Keares and the Company participated knowingly in or knowingly undertook to conceal acts or omissions by the other that they knew to be violations of ERISA. By each participating knowingly in the fiduciary breaches of the other, Mr. Keares and the Company are each liable for the other's breaches of fiduciary responsibility, pursuant to Section 405(a)(1) of ERISA, 29 U.S.C. § 1105(a)(1).

18. Mr. Keares and the Company failed to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and enabled the other to commit

breaches of ERISA. By failing to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and thereby enabling the other to commit breaches of ERISA, Mr. Keares and the Company are each liable for the other's breaches of fiduciary responsibility, pursuant to Section 405(a)(2) of ERISA, 29 U.S.C. § 1105(a)(2).

19. Mr. Keares and the Company each knew that the other had violated ERISA, but did not make reasonable efforts under the circumstances to remedy the other's breaches. By failing to make reasonable efforts under the circumstances to remedy the other's breaches of which they had knowledge, Mr. Keares and the Company, as fiduciaries of the Plan, are liable for each other's fiduciary breaches, pursuant to Section 405(a)(3) of ERISA, 29 U.S.C. § 1105(a)(3).

Prayer for Relief

WHEREFORE, the Secretary prays that this Court issue an order:

1. Requiring Mr. Keares and the Company, jointly and severally to restore to the Plan all losses, including interest or lost opportunity cost and the cost of an independent fiduciary, which were caused by their fiduciary breaches;

2. Requiring Mr. Keares and the Company to disgorge to the Plan any and all unjust enrichment they have received as a result of their fiduciary breaches;

3. Requiring the Plan to set off any individual account balance of Mr. Keares against the amount of losses, including interest or lost opportunity cost, and the cost of an independent fiduciary resulting from his fiduciary breaches, as authorized by 29 U.S.C. § 1056(d)(4), and reallocating the account balance to the non-breaching participants, if the losses are not otherwise restored to the Plan by Mr. Keares and the Company;

4. Removing Mr. Keares and the Company as fiduciaries of the Plan and of any

employee benefit plan for which they act as fiduciaries;

5. Permanently enjoining Mr. Keares and the Company from acting directly or indirectly, in any fiduciary capacity, with respect to any employee benefit plan subject to ERISA;

6. Permanently enjoining Mr. Keares and the Company from exercising any custody, control, or decision making authority with respect to the assets of any employee benefit plan covered by ERISA;

7. Appointing an independent fiduciary with plenary authority and control with respect to the management and administration of the Plan, including the authority to marshal assets on behalf of the Plan, to pursue claims on behalf of the Plan, and to take all appropriate actions for the administration, termination, and distribution of the Plan, with all costs to be borne by Mr. Keares and the Company;

8. Ordering Mr. Keares and the Company, their agents, employees, service providers, banks, accountants, and attorneys to provide the Secretary and the independent fiduciary with all of the books, documents, and records relating to the finances and administration of the Plan, and to make an accounting to the Secretary and the independent fiduciary of all contributions to the Plan and all transfers, payments, or expenses incurred or paid in connection with the Plan;

9. Barring Mr. Keares and the Company from engaging in any future violations of ERISA;

10. Awarding the Secretary the costs of this action; and,

11. Awarding such other relief as is equitable and just.

Respectfully Submitted,

Post Office Address:

Oscar L. Hampton III
Regional Solicitor
Office of the Solicitor
Suite 630 East, The Curtis Center
170 South Independence Mall West
Philadelphia, PA 19106-3306
Telephone: (215) 861-5145
Facsimile: (215) 861-5162
Strawn.john@dol.gov
zz-sol-phi-docket@dol.gov

Date: September 22, 2016

M. Patricia Smith
Solicitor of Labor

Oscar L. Hampton III
Regional Solicitor



John M. Strawn
Attorney (PA ID No. 49,789)

U.S. DEPARTMENT OF LABOR

Attorneys for Plaintiff