UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor,	:
Plaintiff	:
v.	:
CLARK V. HAYES, individually and as fiduciary of the **APPLIED TECHNOLOGY SYSTEMS, INC. RETIREMENT PLAN, APPLIED TECHNOLOGY SYSTEMS, INC.** and the **APPLIED TECHNOLOGY SYSTEMS, INC. RETIREMENT PLAN,**	:
Defendants	:

COMPLAINT

Plaintiff, Thomas E. Perez, Secretary of Labor, United States Department of Labor (the "Secretary"), alleges:

JURISDICTION AND VENUE

1. This action arises under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. Secs. 1001, et seq., and is brought by the Secretary under ERISA Secs. 502(a)(2) and (5), 29 U.S.C. Secs.1132(a)(2) and (5), to enjoin acts and practices which violate the provisions of Title I of ERISA, to obtain appropriate equitable relief

for breaches of fiduciary duty under ERISA Sec. 409, 29 U.S.C. Sec. 1109, and to obtain such further equitable relief as may be appropriate to redress violations and to enforce the provisions of Title I of ERISA.

2. This court has jurisdiction over this action pursuant to ERISA Sec. 502(e)(1), 29 U.S.C. Sec. 1132(e)(1).

3. Applied Technology Systems, Inc. Retirement Plan ("Plan") is a defined contribution pension plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. Sec. 1002(3), and is, therefore, subject to the coverage of the Act pursuant to Section 4(a) of ERISA 29 U.S.C. Section 1003(a).

4. Applied Technology Systems, Inc. ("ATSI"), a Maryland corporation, is the sponsor of the Plan. ATSI is registered with the State of Ohio.

5. Clark V. Hayes is the chief executive officer of ATSI and Mr. Hayes filed for personal bankruptcy under Chapter 7 on June 13, 2013 (U.S. Bankruptcy Court, Northern District of Ohio, Eastern Division; case no. 13-51782). [1]

6. Venue of this action lies in Northern District of Ohio, pursuant to ERISA Sec. 502(e)(2), 29 U.S.C. Sec. 1132(e)(2) because the Plan was administered in Cuyahoga County, Ohio, within this district.

---

[1] 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. Section 362(b)(4). The Secretary's efforts to enforce any monetary portion of any judgment obtained against Defendant Hayes will be consistent with the Bankruptcy Code. The Secretary filed an adversary complaint in Mr. Hayes's bankruptcy case to have his debt to the Plan be deemed non-dischargeable. The bankruptcy trustee and the debtor have moved to dismiss the bankruptcy case.

DEFENDANTS

7. At all relevant times, Defendant Clark V. Hayes was a fiduciary of the Plan within the meaning of ERISA Sec. 3(21)(A), 29 U.S.C. Sec. 1002(21)(A) and a party in interest to the Plan within the meaning of ERISA Secs. 3(14)(A), (C), (E) and (H); 29 U.S.C. Sec. 1002(14)(A), (C), (E) and (H).

8. At all relevant times, Applied Technology Systems, Inc. (ATSI) was an employer and Plan Administrator and therefore a fiduciary of the Plan within the meaning of ERISA Sec. 3(21)(A) and a party in interest to the Plan within the meaning of ERISA Secs. 3(14)(A) and (C).

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

Failure to Segregate and Remit Employee Contributions and Loan Repayments

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

11. For ATSI payroll pay dates January 21 and 28 and February 4, 18, and 25, 2011, Defendants Clark V. Hayes and ATSI withheld money from the paychecks of ATSI employees as elective salary deferrals for contribution to the Plan. The amount withheld was $12,216.08. Defendants Clark V. Hayes and ATSI did not segregate these contributions from ATSI's general assets as soon as they reasonably could do so and did not remit these employee contributions to the Plan. These monies remained commingled with the general assets of the ATSI and were used for the ATSI's general operating expenses.

12. For ATSI payroll pay dates January 21 and 28 and February 4, 18, and 25, 2011, Defendants Clark V. Hayes and ATSI withheld money from the paychecks of ATSI employees as loan repayments (in the amount of $1,607.21) to the Plan. Defendants Clark V. Hayes and ATSI did not segregate these loan repayments from ATSI's general assets as soon as they reasonably could do so and did not remit these loan repayments to the Plan. These monies remained commingled with the general assets of the ATSI and were used for the ATSI's general operating expenses.

13. The withheld amounts, described in paragraphs 11 and 12 above, commingled with the general assets of ATSI, were assets of the Plan within the meaning of ERISA.

14. Defendants Clark V. Hayes and ATSI used these plan assets for the benefit of themselves, not for the benefit of the participants and beneficiaries.

15. Defendants Clark V. Hayes and ATSI failed to ensure that plan assets were paid into the Plan.

16. By the conduct described in paragraphs 10 through 15 above, Defendants Clark V. Hayes and ATSI:

a. failed to hold the assets of the Plan in trust in violation of ERISA Section 403(a), 29 U.S.C. Section 1103(a);

b. permitted the assets of the Plan to inure to the benefit of an employer in violation of ERISA Sec. 403(c)(1), 29 U.S.C. Sec. 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 ERISA Sec. 404(a)(1)(A), 29 U.S.C. Sec. 1104(a)(1)(A);

d. caused the Plan to engage in transactions that 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 any assets of the Plan in violation of ERISA Sec. 406(a)(1)(D), 29 U.S.C. Sec. 1106(a)(1)(D);

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

f. in their individual or other capacity acted in transactions involving the Plan on behalf of parties (or represented parties) whose interests were adverse to the interests of the Plan, or the interests of its participants or beneficiaries in violation of ERISA Sec. 406(b)(2), 29 U.S.C. Sec. 1106(b)(2).

Failure to Administer the Plan

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

18. After ATSI ceased operating, Defendants Clark V. Hayes and ATSI failed to notify Fidelity Management Trust Company, the Plan's trustee, that six employees had been terminated.

19. These six former ATSI employees were unable to secure their distributions from the Plan.

20. By the conduct described in paragraphs 17, 18, and 19, Defendants Clark V. Hayes and ATSI 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 ERISA Sec. 404(a)(1)(A), 29 U.S.C. Sec. 1104(a)(1)(A).

PRAYER FOR RELIEF

WHEREFORE, the Secretary prays for judgment:

A. Permanently enjoining Defendants Clark V. Hayes and ATSI from violating the provisions of Title I of ERISA;

B. Ordering Defendants Clark V. Hayes and ATSI to make good to the Plan any losses, including lost opportunity costs, resulting from fiduciary breaches committed by such defendant or for which such defendant is liable;

C. Ordering each defendant to correct the prohibited transactions in which he or it engaged, restore any losses to the Plan, and pay appropriate interest;

D. Requiring the Plan to set off from Defendant Clark V. Hayes's individual accounts the amount of losses, including lost opportunity costs, resulting from the defendants' fiduciary breaches, as authorized by Section 1502(a) of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, Section 1502(a), 111 Stat. 788, 1058-59 (1997) (codified at 29 U.S.C. Section 1056(d)(4)), if the losses to the Plan are not otherwise restored to the Plan by the defendants;

E. Permanently enjoining defendants from serving as fiduciaries or service providers to any ERISA-covered employee benefit plan;

F. Ordering the appointment of an independent fiduciary to oversee the Plan after the fiduciaries are removed;

G. Ordering the defendants, as parties in interest, to disgorge any profits received as a

result of prohibited transactions in which they engaged;

H. Awarding the Secretary the costs of this action; and

I. Ordering such further relief as is appropriate and just.

M. PATRICIA SMITH
Solicitor of Labor

CHRISTINE Z. HERI
Regional Solicitor

BENJAMIN T. CHINNI
Associate Regional Solicitor

/s/ Maureen M. Cafferkey
MAUREEN M. CAFFERKEY
Senior Trial Attorney
(Ohio reg. no. 0031165)

U.S. Department of Labor
Office of Solicitor
1240 East Ninth Street, Room 881
Cleveland, Ohio 44199
Phone: (216) 522-3872
Fax: (216) 522-7172
Email: cafferkey.maureen@dol.gov