

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

JULIE A. SU , Acting Secretary of Labor,)	
United States Department of Labor, ¹)	
)	
Plaintiff,)	
)	CIVIL ACTION
v.)	Case No. 1:21-cv-05774
)	
CHICAGO METROPOLITAN OBSTETRICIANS AND GYNECOLOGISTS, LTD., DR. ERNEST HAYES, and CHICAGO METROPOLITAN OBSTETRICIANS AND GYNECOLOGISTS, LTD. 401(k) PLAN,)	
)	
)	
Defendants.)	

CONSENT ORDER AND JUDGMENT

Plaintiff, Julie A. Su, Acting Secretary of Labor, United States Department of Labor (“Secretary”), pursuant to the provisions of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. § 1001, *et seq.*, filed a complaint against Chicago Metropolitan Obstetricians and Gynecologists, Ltd. (“Chicago Metropolitan”), Dr. Ernest Hayes (“Hayes”), and Chicago Metropolitan Obstetricians and Gynecologists, Ltd.401(k) Plan (collectively “Defendants”), alleging breaches of their fiduciary responsibilities under ERISA §§ 403, 404, and 406, with respect to the Metropolitan Obstetricians and Gynecologists, Ltd.401(k) Plan (“Plan”).²

Defendants waived service of process of the complaint and admitted to the jurisdiction of this Court over them and the subject matter of this action.

¹ By operation of law, Julie A. Su is substituted *sub nom.* for former Secretary of Labor Martin J. Walsh. *See* Fed. R. Civ. P. 25(d).

² The Plan is named as a defendant herein pursuant to Federal Rule of Civil Procedure 19(a) solely to assure that complete relief can be granted.

The Secretary and Defendants have agreed to resolve all matters in controversy in this action between them and said parties do now consent to entry of a Consent Order and Judgment by this Court in accordance therewith.

Defendants expressly acknowledge and represent that they have read this Consent Order and Judgment and understand its provisions.

Upon consideration of the record herein, and as agreed to by the parties, the Court finds that it has jurisdiction to enter this Consent Order and Judgment.

IT IS THEREFORE ORDERED, DECREED, and ADJUDGED that:

1. Defendants Chicago Metropolitan and Hayes are jointly and severally liable to the Plan in the amount of \$90,000 (“Restoration Amount”). The Restoration Amount represents: (a) unremitted employee salary deferral contributions and employer contributions due to the Plan during the period of January 1, 2014 through December 31, 2017; (b) lost opportunity costs thereon; and (c) lost opportunity costs that accrued when employee salary deferral contributions were untimely remitted to the Plan during the period June 23, 2014 through December 31, 2017.

2. In reliance on the representations made by Defendants Chicago Metropolitan and Hayes, in the documents provided by Defendant Hayes to the Secretary (including declarations of financial status) which show that they are currently unable to immediately restore to the Plan the Restoration Amount of \$90,000, the Secretary agrees to forebear immediate collection of the full Restoration Amount and agrees that Defendants shall pay the Restoration Amount in accordance with the schedule set forth below:

a. On April 17, 2023, Defendants Chicago Metropolitan and Hayes have caused \$10,000 to be restored to the Plan by depositing the monies into an account held on behalf of the Plan at American Funds, the Plan’s asset custodian, and provided allocation

- instructions to the asset custodian to allocate the monies to the individual investment accounts of the Plan's participants, except Defendant Hayes, who: (1) were employees of Chicago Metropolitan; (2) Plan participants during the period of June 23, 2014 through December 31, 2017; (3) had voluntary employee salary deferral contributions withheld from their pay for contribution to the Plan during this period and such contributions were remitted to the Plan in an untimely manner or not remitted at all; (4) had employer contributions due to them during this period that were not remitted to the Plan; and (5) who have not received a distribution of their full vested account balance as of the date of the entry of this Consent Order and Judgment. The \$10,000 was allocated on a pro rata basis, based on the percentages of unremitted and untimely remitted employee contributions owed to each participant.
- b. Payment to the Plan of \$2,500 per month for 12 consecutive months commencing on or before May 16, 2023, and continuing to or before May 1, 2024. After the first payment the monthly payment to the Plan shall be made on or before the first day of each month.
 - c. Payment to the Plan per month of \$2,777.78, commencing on June 1, 2024 and continuing consecutively for the next 18 months. Payment to the Plan shall be made on or before the first date of each month.
 - d. Payments made pursuant to paragraphs 2(b) and 2(c) shall be remitted to the Plan via certified check in the name of the Plan and delivered to the independent fiduciary appointed pursuant to paragraph 9 below.
 - e. Within seven days of each restoration payment cited in paragraph 2(a), (b), or (c) Defendants Chicago Metropolitan and Hayes shall provide the Regional Director of

- the Employee Benefits Security Administration (“EBSA”), 230 South Dearborn, Suite 2160, Chicago, Illinois 60604 (“EBSA Regional Director”) with documentary proof of the restoration.
- f. Nothing herein shall prevent Defendants Chicago Metropolitan and Hayes from making restoration payments to the Plan on an accelerated basis.
 - g. If during the thirty month period noted in paragraphs 2(b) and (c) above Defendant Hayes receives any bequests, inheritances, gifts, lottery and gambling winnings, and/or proceeds of any life insurance policies, then 100% of any bequests, inheritances, gifts, lottery and gambling winnings, and/or proceeds of all life insurance policies, over \$1,000 shall be remitted to the Plan, within ten days of Defendant Hayes receiving such monies. Payments made pursuant to this subparagraph will be used to offset amounts still owed under subparagraphs 2(b) and (c) above, until such time as the entire \$80,000 is restored.
 - h. Upon receipt of each restoration payment the independent fiduciary, AMI, shall deposit the monies into the Plan’s account. The independent fiduciary shall also update and keep an accurate accounting of the pro rata allocation of these monies among the Plan participants, except Defendant Hayes, who: (1) were employees of Chicago Metropolitan; (2) Plan participants during the period of June 23, 2014 through December 31, 2017; (3) had voluntary employee salary deferral contributions withheld from their pay for contribution to the Plan during this period and such contributions were remitted to the Plan in an untimely manner or not remitted at all; (4) had employer contributions due to them during this period that were not remitted to the Plan; and (5) have not received a distribution of their full vested account

balance as of the date of the entry of this Consent Order and Judgment. The independent fiduciary will keep an accurate accounting of the allocation of each restoration amount among the Plan participants on a pro rata basis, based on the percentages of unremitted and untimely remitted employee contributions owed to each participant. The lost opportunity cost amount shall also be allocated among the Plan participants on a pro rata basis, based on the percentages of unremitted and untimely remitted employee contributions owed to each participant. participant. The lost opportunity cost amount shall also be allocated among the Plan participants on a pro rata basis, based on the percentages of unremitted and untimely remitted employee contributions owed to each participant.

3. In return for the Secretary's forbearance, Defendant Hayes agrees to submit on or before May 15th of each year, to the EBSA Regional Director, a current completed annual financial declaration for the preceding calendar year, 1099 IRS Form(s), W-2 form(s), and his annually filed federal tax return, beginning with his federal income tax return for 2022 which is to be provided by May 15th of the year the tax return is filed. This obligation will continue until the restoration amount has been paid in its entirety.

4. If Defendants Chicago Metropolitan or Hayes' representations, as referenced in paragraph 2 above, relating to their ability to immediately restore the Restitution Amount to the Plan are false, the parties agree that the Secretary can unilaterally amend this Judgment to require Defendants Chicago Metropolitan and Hayes to immediately restore the Entire Restoration Amount plus accrued interest pursuant to 28 U.S.C. §1961 from the date of execution of this Judgment (minus payments made pursuant to this Consent Order and Judgment).

5. Should Defendants Chicago Metropolitan and Hayes fail to make any of the

installment restoration payments described in Paragraphs 2(b) and (c) above on or before the dates set forth therein, the entire amount of the balance remaining shall become due and payable immediately with no further notice or demand required by the Secretary to Defendants Chicago Metropolitan and Hayes.

6. Defendants Chicago Metropolitan and Hayes agree that they will notify in writing the EBSA Regional Director within seven days of any change of name, residence, telephone number, mailing address or employment until the amounts recited in this Judgment are repaid.

7. Defendants Chicago Metro and Hayes are permanently enjoined and restrained from violating the provisions of Title I of ERISA, 29 U.S.C. § 1001 *et seq.*

8. Defendant Chicago Metropolitan and Hayes are removed from all positions they currently hold as fiduciaries to the Plan, except to the extent necessary to effectuate this Consent Order and Judgment and shall be permanently enjoined from serving or acting as fiduciaries or service providers with respect to employee benefit plans subject to ERISA.

9. AMI Benefit Plan Administrators, Inc. (“AMI”) is hereby appointed as the independent fiduciary for the Plan. See Exhibit A, biography of AMI, attached hereto and made a part hereof. The independent fiduciary shall have the following powers, duties and responsibilities:

- a. Will commence distribution of the Plan assets to the Plan participants and termination of the Plan within 30 days after receipt of the last restoration payment set forth in this Judgment, in accordance with ERISA and the Plan’s governing documents;
- b. The independent fiduciary shall have responsibility and authority to collect, liquidate, and manage such assets of the Plan for the benefit of the eligible participants and beneficiaries for the Plan who are entitled to receive such assets, until such time that

- the assets of the Plan are distributed to the eligible participants and beneficiaries of the Plan;
- c. The independent fiduciary shall exercise reasonable care and diligence to identify and locate each participant and beneficiary of the Plan who is eligible to receive a payment under the terms of this Consent Order and Judgment and to disburse to each such eligible participant or beneficiary the payment to which he or she is entitled;
 - d. The independent fiduciary shall have full access to all data, information and calculations in the Plan's possession or under its control, including that information contained in the records of the Plan's custodial trustees and other service providers, bearing on the distribution of benefit payments, participant balances and current Plan assets;
 - e. The independent fiduciary may retain such persons and firms including but not limited to accountants and attorneys, as may be reasonably required to perform his duties hereunder;
 - f. For the services performed pursuant to this consent judgment, the independent fiduciary shall receive compensation not to exceed \$3,520 for fees and expenses reasonably and necessarily incurred in administering and terminating the Plan, plus an additional \$250 per plan year if an annual Form 5500 is required. Chicago Metropolitan and Hayes shall be jointly and severally liable for paying these fees. AMI shall issue invoices to Chicago Metropolitan and Hayes for its fees. If after 30 days after the issuance of the invoice Defendants fail to make such payments the fees shall be paid by the Plan, and the Defendants are liable to the Plan for those fees;
 - g. The independent fiduciary shall obtain bonding for the Plan in an amount that meets

the requirements of ERISA §412, 29 U.S.C. §1112;

- h. Within 60 days of the distribution of all of the Plan’s assets, the independent fiduciary shall provide the Regional Director of the Employee Benefits Security Administration (“EBSA”), 230 South Dearborn, Suite 2160, Chicago, Illinois 60604 (“EBSA Regional Director”), with a report identifying the distributions made by the Plan since the independent fiduciary’s appointment;
- i. The independent fiduciary’s appointment shall terminate upon the first to occur of: 1) removal by the Court; 2) its resignation after finding an acceptable replacement, agreed to by all parties or the Court, providing notice to all parties to this matter, and approval by the Court to have the replacement independent fiduciary appointed; or 3) the liquidation and distribution of the Plan’s assets and the completion of all related tasks.

10. Defendants Chicago Metropolitan and Hayes agree to fully cooperate with the independent fiduciary and all other service providers to the Plan that relate to the administration and termination of the Plan.

11. Upon payment of all Restoration Amounts in paragraphs 2(a), 2(b), and 2(c) above, Defendants Chicago Metropolitan and Hayes shall be and hereby are assessed a total penalty under ERISA § 502(l), 29 U.S.C. § 1132(l) of 20% of the applicable recovery amount, totaling \$18,000.00. For purposes of calculating the total penalty, the parties agree that the applicable recovery amount as set forth above is \$90,000.³

- a. Defendants hereby waive the notice of assessment and service requirements of 29

³ As noted in paragraph 4 above if Defendants Chicago Metropolitan or Hayes representations were false then the applicable recovery amount will be computed based on the additional amounts that Defendants Chicago Metropolitan or Hayes restore in accordance with this Judgment.

C.F.R. § 2570.83.

- b. Defendants agree to pay the penalty assessed by the Secretary pursuant to ERISA §502(l), 29 U.S.C. §1132(l) within 30 days of the final payment of the Restoration Amount in paragraph 2 of this Consent Order and Judgment unless Defendants request a financial hardship waiver pursuant to ERISA §502(l)(3)(B) as provided herein. Defendants agree to waive any other defenses or appeals if their financial hardship waiver is denied or if they fail to seek said waiver within the time set forth in this paragraph. This document or a copy thereof can be used as evidence of his or its waiver of further defenses or appeals pursuant to ERISA §502(l).
- c. Defendants shall provide information in support of any financial hardship waiver petition of the full amount assessed as a 502(l) penalty or a portion thereof to the EBSA Regional Director within 30 days of the final payment of the Restoration Amount in paragraph 2 of this Consent Order and Judgment.
- d. The Secretary shall notify Defendants within 90 days of receiving the information identified in paragraph 11(b) and (c) above of his decision to grant or deny a financial hardship waiver (in full or part). If the Secretary grants Defendants a financial hardship waiver, but only agrees to reduce the originally assessed 502(l) penalty identified in this paragraph, the Secretary shall accept the reduced amount as full satisfaction of the total assessed penalty identified in this paragraph. Defendants shall pay the reduced 502(l) penalty under this paragraph within 30 days of the Secretary notifying defendants of his decision to grant or deny a financial hardship waiver.
- e. If the Secretary denies the Defendants' petition for a financial hardship waiver in its entirety, Defendants shall pay the full 502(l) penalty identified herein within 30 days

of the Secretary's notification of his decision to deny a financial hardship waiver.

- f. Defendants shall pay the penalty owed under this paragraph by remitting a check or money order payable to the United States Department of Labor. The check should be mailed to the following address:

Standard (Regular U.S. Mail)

ERISA Civil Penalty

P.O. Box 6200-36

Portland, OR 97228-6200

Express or Commercial Overnight Mail

U.S. Bank

Attn: ERISA Civil Penalty #6200-36

17650 NE Sandy Blvd.

PD-OR-C1GL

Portland, OR 97230

The check or money order referenced in this paragraph shall refer to EBSA Case No. 50-034438.

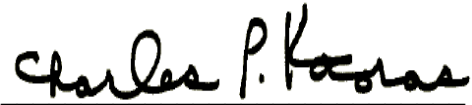
12. Nothing in this Consent Order and Judgment is binding on any government agency other than the United States Department of Labor, Employee Benefits Security Administration.

13. Each party agrees to bear his or its own attorneys' fees, costs and other expenses incurred by such party in connection with any stage of this proceeding to date including, but not limited to, attorneys' fees which may be available under the Equal Access to Justice Act, as amended.

14. The Court shall maintain jurisdiction over this matter only for purposes of enforcing this Consent Order and Judgment.

SO ORDERED.

DATED May 25, 2023



CHARLES P. KOCORAS
UNITED STATES DISTRICT JUDGE

The parties hereby consent to the entry of this consent order and judgment.

FOR THE SECRETARY OF LABOR:

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FOR DR. ERNEST HAYES:

Dr. ERNEST HAYES

**FOR CHICAGO METROPOLITAN
OBSTETRICIANS AND GYNECOLOGISTS,
LTD. PLAN:**

By: Dr. Ernest Hayes
Title: Chief Executive Officer

**FOR CHICAGO METROPOLITAN
OBSTETRICIANS AND GYNECOLOGISTS,
LTD. PLAN:**

By: Dr. Ernest Hayes
Title: Fiduciary of the Plan

FOR THE INDEPENDENT FIDUCIARY:

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