IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS E. PEREZ, SECRETARY, UNITED STATES DEPARTMENT OF LABOR,	:	
Plaintiff,	:	
v.	:	**CIVIL NO.** 3:16-cv-255
MATTHEW KENNETH SMITH, WIND TURBINE SOLUTIONS, LLC, WIND TURBINE SOLUTIONS, LLC RETIREMENT TRUST,	:	
Defendants.	:	

COMPLAINT

Plaintiff Thomas E. Perez, Secretary of Labor (the "Secretary"), brings this civil action under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001, *et seq*., to obtain relief in the form of money damages and equitable remedies to redress violations and breaches of fiduciary duties under ERISA, and to obtain such further equitable relief as may be appropriate to enforce Title I of ERISA. 29 U.S.C. §§ 1109, 1132.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction under 29 U.S.C. § 1132(e)(1) over this civil action brought by the Secretary to enforce Title I of ERISA.

2. Venue lies in this district under 29 U.S.C. § 1132(e)(2) and 28 U.S.C. § 1391(d) because Defendant Wind Turbine Solutions, LLC was organized under the laws of Pennsylvania and conducted business from and stored equipment at a location in Somerset County, which is located within this district.

THE PARTIES

3. Under 29 U.S.C. §§ 1132(a)(2), (5), the Secretary has the authority to enforce Title I of ERISA by filing civil actions to obtain remedies redressing violations of the statute.

4. Wind Turbine Solutions, LLC (the "Company") was an entity formed on November 17, 2008 under the laws of Pennsylvania, with offices located at 204 Hanalei Drive, Morgantown, West Virginia 26508. The Company also stored equipment and conducted business at 187 Maple Valley Drive, Meyersdale, Pennsylvania 15552, and employed several Pennsylvania residents. Upon information and belief, the Company was organized as a member-managed organization. The Company ceased operating in April 2014. The Company is the subject of a bankruptcy court discharge order (16-bk-372 (Bkrpt. N.D.W.V.)).

5. Matthew Kenneth Smith resides in Morgantown, West Virginia. Smith was a member and fifty (50) percent owner of the Company. As a member of the Company, Smith possessed actual and apparent authority to enter into binding agreements on behalf of the Company. As a member of the Company, Smith possessed authority to hold and dispose of the Company's assets. As a member of the Company, Smith possessed authority to cause the Company to make representations regarding the Company's intentions and proposed actions. Smith is the subject of a bankruptcy court discharge order, which is qualified by a prior consent order providing that a portion of Smith's debts relating to the administration of the Wind Turbine Solutions, LLC Retirement Trust are non-dischargeable (16-bk-372 (Bkrpt. N.D.W.V.), ECF No. 31).

6. The Wind Turbine Solutions, LLC Retirement Trust (the "Trust") is an employee pension benefit plan, as defined under ERISA. 29 U.S.C. § 1002(2). Smith and the Company created the Trust with the primary purpose of providing deferred compensation and retirement benefits for the Company's employee participants based on employee participants' contributions

and other matching contributions from the Company. The Trust is named as a defendant in this action for the purpose of ensuring complete relief among the parties under Federal Rules of Civil Procedure 19.

FACTUAL ALLEGATIONS

7. On or about October 1, 2011, Smith, acting as a member of the Company, created the Trust by signing a document entitled "Adoption Agreement For Non-Standardized 401(k) Profit Sharing Plan," effective October 1, 2011 (the "Adoption Agreement"). The Adoption Agreement names Smith as the trustee with responsibility over the Trusts' assets. The Adoption Agreement also names the Company as the Trust Administrator.

8. On or about October 1, 2011, Smith, acting as a member of the Company, adopted a document entitled "Defined Contribution Prototype Plan and Trust" (the "Trust Document"), which governs the administration and management of the Trust and its assets.

9. The Adoption Agreement and Trust Document establish the Trust as a defined contribution plan by providing a formula for employees to make contributions to the Trust based on a portion of their wages and earnings through employment with the Company. The primary purpose of the Trust is to provide deferred compensation and retirement benefits for employee participants based on employee participants' contributions.

10. For the years 2011 until the Company ceased operations in April 2014, the Company employed approximately seventeen employees who participated in the Trust and requested that Smith and the Company transfer the employee participants' deferred compensation to the Trust.

11. Under the Trust Document, the employee participants' deferred compensation that they contribute to the Trust along with any Company matching contributions are to be held in a separate Trust account for each participating employee. Under the Adoption Agreement and the

Trust Document, all employees qualifying for participation in the Trust are fully vested upon electing to participate in the Trust.

12. Under the Trust Document, the Company as the Trust Administrator was responsible for ensuring that employee participants' contributions are deposited into a separate Trust account.

13. At all times after October 1, 2011, Smith personally assumed the role of Trust Administrator by collecting and exercising control over employee participants' deferred compensation contributions.

14. On September 25, 2011, Smith signed a custodial account agreement with MG Trust Company, LLC ("MG Trust") in which MG Trust agreed to take, hold, invest, and distribute all Trust assets at the direction of Smith.

15. For the years 2011 until the Company ceased operations in April 2014, the Company and Smith withheld approximately $78,000 from employee participants' wages and salary, which the employee participants specifically requested be transferred to the Trust. For the years 2011 until the Company ceased operations in April 2014, the Company and Smith failed to transfer the entire amount of the employees' contributions to the Trust.

16. Smith failed to transfer the entire amount of the employee participants' deferred compensation to the Trust or to MG Trust. Rather, Smith knowingly appropriated employee participants' deferred compensation for his own use and for the use of the Company to cover operating costs and to meet his obligations to the Company as a member.

17. From 2011 until the Company ceased operations in 2014, the Company knowingly received and used for its benefit employee participants' deferred compensation knowing such deferred compensation was intended by the employee participants and promised by Smith and

the Company to be transferred to the Trust for the benefit of the employee participants. The Company knew that it had received Trust assets in the form of employee participants' deferred compensation through the actions and knowledge of Smith who as a member of the Company acted on the Company's behalf in taking and appropriating employee contributions.

18. To date, neither Smith nor the Company has transferred the missing employee participants' deferred compensation to the Trust.

CAUSES OF ACTION

COUNT I

19. Paragraphs 1 through 18 are re-alleged and incorporated by reference.

20. By the terms of the Adoption Agreement, the Trust Document, the Trust constitutes an employee pension benefit plan under ERISA. 29 U.S.C. § 1002(2)(A).

21. The employee participants' deferred compensation that they elected to have withheld by the Company and paid into the Trust are plan assets. 29 C.F.R. § 2510.3-102(a).

22. As a named trustee under the Adoption Agreement and the Trust Document, Smith is a fiduciary of the Trust. 29 U.S.C. § 1102(a).

23. By exercising control over Trust assets in the form of employee participants' deferred compensation, Smith assumed the role of a de facto fiduciary of the Trust. 29 U.S.C. § 1002(21)(A).

24. By exercising discretionary control over the administration and management of the Trust through directing how to take, hold, and dispose of trust assets, Smith assumed the role of a de facto fiduciary of the Trust. 29 U.S.C. § 1002(21)(A).

25. By appropriating plan assets in the form of employee participant elective deferred compensation for his own benefit and use and for the use of an entity other than the Trust

beneficiaries, Smith breached his fiduciary duties to the Trust to act solely in the interest of the participants and beneficiaries 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 ERISA. 29 U.S.C. §§ 1104(a)(1)(A) and (B).

26. As a result of the foregoing breaches of fiduciary duty, Smith caused a loss to the Trust for which he is personally liable. 29 U.S.C. § 1109(a).

COUNT II

27. Paragraphs 1 through 26 are re-alleged and incorporated by reference.

28. As a named fiduciary under the Adoption Agreement and the Trust Document, the Company is a fiduciary of the Trust. 29 U.S.C. § 1102(a).

29. By exercising control over Trust assets in the form of employee participants' deferred compensation, the Company assumed the role of a de facto fiduciary of the Trust. 29 U.S.C. § 1002(21)(A).

30. By exercising discretionary control over the administration of the Trust through directing how to take, hold, and dispose of trust assets, the Company assumed the role of a de facto fiduciary of the Trust. 29 U.S.C. § 1002(21)(A).

31. The employee participants' deferred compensation that they elected have withheld by the Company and paid into the Trust are plan assets. 29 C.F.R. § 2510.3-102(a).

32. By appropriating plan assets in the form of employee participant elective deferred compensation for its own benefit and use and for the use, the Company breached its fiduciary duties to the Trust to act solely in the interest of the participants and beneficiaries 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 ERISA 29 U.S.C. §§ 1104(a)(1)(A) and (B).

33. As a result of the foregoing breaches of fiduciary duty, the Company caused a loss to the Trust for which it is liable. 29 U.S.C. § 1109(a).

COUNT III

34. Paragraphs 1 through 33 are re-alleged and incorporated by reference.

35. As a member and fifty percent owner of the Company, Smith is a party in interest under ERISA. 29 U.S.C. § 1002(14)(E), (H).

36. As a fiduciary of the Trust, Smith is a party in interest. 29 U.S.C. § 1002(14)(A).

37. As the employer and Trust Administrator, the Company is a party in interest. 29 U.S.C. § 1002(14)(A), (C).

38. By taking and disposing of plan assets in the form of employee participant elective deferred compensation for his own personal use and for the use of the Company, Smith engaged in a non-exempt prohibited transaction under ERISA by causing the Trust to engage in a transaction that he knew was a direct transfer of assets between the Trust and a party in interest. 29 U.S.C. § 1106(a)(1)(A).

39. By taking and disposing of plan assets in the form of employee participant elective deferred compensation for his own benefit while acting as a fiduciary of the Trust, Smith engaged in a prohibited transaction between the Trust and himself in violation of ERISA. 29 U.S.C. §1106(b)(1).

40. As a result of the foregoing prohibited transactions, as a fiduciary and party in interest, Smith must restore to the Trust the assets he received from the Trust in violation of the prohibited transaction restrictions along with any profits he derived. 29 U.S.C. § 1132(a)(5).

COUNT IV

41. Paragraphs 1 through 40 are re-alleged and incorporated by reference.

42. As a named fiduciary under the Adoption Agreement and the Trust Document, the Company is a fiduciary of the Trust. 29 U.S.C. § 1102(a).

43. By taking and disposing of plan assets in the form of employee participant elective deferred compensation for its own benefit while acting as a fiduciary of the Trust, the Company engaged in a prohibited transaction between the Trust and itself in violation of ERISA. 29 U.S.C. §1106(b)(1).

44. As a result of the foregoing prohibited transactions, as a fiduciary and party in interest, the Company must restore to the Trust the assets it received from the Trust in violation of the prohibited transaction restrictions along with any profits it derived. 29 U.S.C. § 1132(a)(5).

COUNT V

45. Paragraphs 1 through 44 are re-alleged and incorporated by reference.

46. By knowingly receiving and appropriating for its own use and benefit employee participant elective deferred compensation, the Company acted as a knowing participant in prohibited transactions between the Trust and a party in interest.

47. As a result of its knowing participation in prohibited transactions, the Company must restore to the Trust the assets it received from the Trust in violation of the prohibited transaction restrictions along with any profits it derived. 29 U.S.C. § 1132(a)(5).

PRAYER FOR RELIEF

WHEREFORE, the Secretary prays that this Court enter an Order:

A. Requiring each of the fiduciary defendants, Smith and the Company, jointly and severally to restore all losses caused to the Trust as a result of their fiduciary breaches;

B. Requiring each of the fiduciary defendants, Smith and the Company, to disgorge to the Trust any and all unjust enrichment they received as a result of their fiduciary breaches;

C. Requiring the Company to disgorge to the Trust any and all profits it received as a result of its knowing participation in fiduciary breaches or prohibited transactions;

D. Enjoining Smith from serving as a fiduciary or service provider to any ERISA plan in the future;

E. Enjoining the Company from serving as a fiduciary or service provider to any ERISA plan in the future;

F. Awarding the Secretary the costs incurred in this civil action; and

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

Dated: December 2, 2016

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

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