

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

INFORMATION SYSTEMS AND
NETWORKS CORPORATION,
10411 Motor City Drive, Suite 700
Bethesda, Maryland 20817,

Plaintiff,

v.

INTERNAL REVENUE SERVICE,
1111 Constitution Avenue NW
Washington, DC 20224,

and

JOHN A. KOSKINEN, in his official capacity
as Commissioner of Internal Revenue,
1111 Constitution Avenue NW
Washington, DC 20224,

Defendants.

Civil Case No. 14-2019

COMPLAINT

Plaintiff Information Systems and Networks Corporation (“ISN”) for its Complaint against Defendants the Internal Revenue Service (the “Service”) and the Honorable John A. Koskinen, in his official capacity as Commissioner of Internal Revenue (“Commissioner”), alleges, by and through its attorneys, as follows:

INTRODUCTION

1. Plan sponsors that offer retirement plans to their employees are entitled to substantial tax benefits, so long as their retirement plans satisfy certain qualification standards prescribed by statute.

2. From time to time, however, retirement plans will run afoul of qualification

requirements. Instead of taking the dramatic step of disqualifying retirement plans whenever there is a lapse in qualification compliance, the Service has established a number of programs for identifying and correcting compliance failures.

3. One of these programs is the Voluntary Correction Program (“VCP”). Under the VCP, plan sponsors that are not currently being audited may disclose compliance failures to the Service and work with the Service to preserve the plan’s tax preference.

4. This is an action under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (“APA”) arising from the Service’s arbitrary refusal to meaningfully consider, and issue a ruling in connection with, ISN’s VCP submission (“the VCP Submission”) related to the Information Systems and Networks Corporation Employees’ Pension Plan (the “Plan”).

5. Specifically, after ISN filed for VCP review, the Service agreed to review certain errors committed by the Plan’s independent fiduciary on the condition that ISN engage a consultant to perform specific analyses related to these errors. But after ISN supplied the requested analyses, the Service arbitrarily and capriciously refused to review or address the errors in the Plan’s administration and declined to consider the VCP Submission further.

6. With respect to other errors in the administration of the Plan, the Service refused to consider the VCP Submission on the erroneous grounds that problems related to the Plan’s independent fiduciary should be addressed to the Department of Labor (the “DOL”). The Service mistakenly believed that the independent fiduciary was appointed by (and was therefore answerable to) the DOL. DOL does not control or exercise oversight of the independent fiduciary.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

8. ISN has standing to bring this suit because it is specifically and personally harmed by the IRS's refusal to consider or issue a ruling on the significant errors in Plan administration described in ISN's VCP Submission.

9. Specifically, ISN, as Plan sponsor, has interests in maintaining the qualified status of the Plan and in ensuring that the Plan is administered according to its terms in a manner that does not obligate ISN to make excessive contributions and has a statutory right to seek approval of its VCP submission. The Service's failure to issue a ruling on ISN's VCP Submission injures each of those interests.

10. This matter is ripe because the issues ISN presents stem from final agency decisions regarding the VCP Submission.

11. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e). The Commissioner's principal office and the Service's headquarters are located in the District of Columbia.

12. This case arises under causes of action created by the judicial review provisions of the APA, 5 U.S.C. §§ 701-706.

13. Proper forms of relief in the action include, but are not limited to, the following:

- a. issuing preliminary and permanent injunctions under 5 U.S.C. § 703;
- b. issuing non-monetary declaratory relief under 5 U.S.C. § 703 and 28 U.S.C. §§ 2201-2202;
- c. holding unlawful and setting aside the Service's action as arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law (*i.e.*, issuing a vacatur remedy) under 5 U.S.C. § 706(2); and
- d. compelling the Service to perform its duty under 28 U.S.C. § 1361.

THE PARTIES

14. Petitioner is a Maryland corporation with its principal place of business at 10411 Motor City Drive, Suite 700, Bethesda, Maryland 20817. Petitioner is the “plan sponsor” of the Plan within the meaning of Section 3(16)(B) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), 29 U.S.C. § 1002(16)(B).

15. Defendant Service is an administrative agency of the United States Department of the Treasury. The Service’s headquarters is located at 1111 Constitution Avenue, NW, Washington D.C., 20224. The Service is responsible for administering the taxation of employee-sponsored pension plans, including issues related to plan qualification under the Internal Revenue Code.

16. Defendant John A. Koskinen is the Commissioner of Internal Revenue and is named in his official capacity.

FACTS GIVING RISE TO THE ACTION

A. The Independent Fiduciary’s Actions Jeopardize the Qualification of the Plan.

17. Petitioner adopted the Plan as a money purchase defined contribution pension plan for the benefit of its employees effective January 1, 1982. The Plan has been put into effect in accordance with Code Section 7476(b)(4).

18. In July 2002, the U.S. District Court for the District of Maryland, on a motion by the DOL based on ERISA Section 409, removed ISN and ISN’s chief executive officer, Roma P. Malkani (“Malkani”), as Plan fiduciaries and appointed an independent fiduciary “with authority to administer the Plan.” This order was affirmed by the Fourth Circuit in 2006. *See Chao v. Malkani*, 216 F. Supp.2d 505 (D. Md. 2002), *aff’d*, 452 F.3d 290 (4th Cir. 2006).

19. The current independent fiduciary is Nicholas Saakvatine (together with his

predecessors, the “Independent Fiduciary”). He was appointed by the U.S. District Court for the District of Maryland, on the DOL’s motion, on December 15, 2009.

20. The district court appointed the Independent Fiduciary to replace ISN as “fiduciary” and “plan administrator,” not to replace it as “plan sponsor.” This was consistent with ERISA Section 409, which allows a court to replace a plan fiduciary, but not the plan sponsor.

21. The Independent Fiduciary used incorrect data on compensation and dates of birth, hire and termination to calculate service and benefits under the Plan.

22. In April 2007, ISN audited a limited set of employee data provided by the Independent Fiduciary on which the Independent Fiduciary was relying to calculate accrued benefits, noted several errors resulting in larger accrued benefits than were called for, and notified the Independent Fiduciary of the errors.

23. The Independent Fiduciary made no attempt to correct these errors. In an email dated June 15, 2007, the Independent Fiduciary stated that it had reviewed the individual participant benefits ISN had contested and “[i]n none of those cases have your interpretation of plan provisions or circumstances of individual participants supported a change in benefits.”

24. The use of incorrect data continued and for these purposes constitutes a failure to follow the terms of the Plan and thus potentially disqualifies the Plan. *See* Revenue Procedure 2013-12, 2013-4 IRB 313 (“Rev. Proc. 2013-12”), § 5.01(2)(b) (“The term ‘Operational Failure’ means a Qualification Failure (other than an Employer Eligibility Failure) that arises solely from the failure to follow plan provisions.”).

25. The use of incorrect data for these purposes has resulted in a depletion of the funds in the Plan.

26. The Independent Fiduciary prepared a report in April 2007 that purported to list all Plan participants in 2006 and the changes in their account balances during that year. The last account balance was labeled “Ineligible Employees” but also “Expense Reserve.” It had an end-of-year value of \$375,000. This Independent Fiduciary also told ISN orally in the spring of 2007 that this expense reserve account was intended to cover any of its own fees and expenses that it may be unable to collect from ISN, although that amount was substantially more than the Independent Fiduciary’s usual fees and expenses.

27. The maintenance of the unallocated expense account violated the definite allocation formula requirement that applies to money purchase plans, which must provide for distributions in accordance with amounts stated or ascertainable and credited to participants. Rev. Rul. 80-155, 1980-1 C.B. 84; 26 C.F.R. § 1.401-1(b)(1)(i). If in fact the purpose of the account was to pay the Independent Fiduciary, it also violated the requirement that all plans be maintained for the exclusive benefit of employees and their beneficiaries.

28. On June 29, 2012, the Service issued its second 10-year favorable determination letter to ISN with respect to the Plan as restated to include all amendments adopted through January 31, 2011.

29. The June 29, 2012 favorable determination letter stated that “[c]ontinued qualification of the plan under its present form will depend on its effect in operation. . . We will review the status of the plan in operation periodically.”

B. The Service Agreed to Review the Use of Incorrect Compensation and Birth, Hire and Termination Dates by the Independent Fiduciary.

30. On December 4, 2012, ISN filed its VCP Submission pursuant to the Voluntary Compliance Program of the Employee Plans Compliance Resolution System (the “EPCRS”) with the National Office of the Service, SE:T:EP:RA:VC.

31. The principles and rules of the EPCRS at the time of the VCP Submission were set forth in Revenue Procedure 2008-50, 2008-35 I.R.B. 464 (“Rev. Proc. 2008-50”).

32. Rev. Proc. 2008-50 was subsequently superseded by Rev. Proc. 2013-12, effective April 1, 2013.

33. The VCP Submission described four operational failures in the Independent Fiduciary’s administration of the Plan: (1) miscalculation of “years of service” for vesting purposes, (2) use of incorrect compensation and birth, hire and termination dates, (3) maintenance of unallocated reserve account for the payment of fees, and (4) improper forfeiture of Malkani’s benefit.

34. By letter dated April 1, 2013, George Patterson (“Patterson”), the Group Coordinator for Employee Plans Voluntary Compliance Group 7553, stated that the Service would consider the “Use of Incorrect Compensation and Birth, Hire and Termination Dates” in the Plan’s administration.

35. Patterson acknowledged that ISN intended to engage a consulting firm to perform an analysis of a report prepared by the Independent Fiduciary. Patterson and ISN collaborated on a statement of work describing the analysis to be undertaken by the consulting firm.

C. The Service Returned the Information and Analysis it Requested and Refused to Rule on the VCP Submission.

36. ISN engaged the consulting firm Mercer LLC to undertake this analysis and testing of the Plan.

37. In November of 2013, ISN submitted the report and analysis prepared by Mercer LLC (the “Mercer Report”) to the Service.

38. The Service responded on our around December 19, 2013, with requests for analysis and information related to the Mercer Report and the Independent Fiduciary’s use of

incorrect data.

39. On or around January 10, 2014, the Service repeated its request for additional information.

40. On two occasions in or around February and March of 2014, ISN submitted to the Service additional information related to the Mercer Report and additional Plan errors.

41. ISN's submissions made in or around February and March of 2014 included detailed analysis of the Independent Fiduciary's errors related to Plan participants' compensation and dates of birth, hire, and termination, as requested by the Service.

42. The Service returned the additional information submitted by ISN.

43. In a letter to Malkani dated March, 19, 2014, the Service indicated it would not rule on the VCP Submission because "the application of VCP would be inappropriate or impracticable," citing section 10.07(2) of Rev. Proc. 2008-50.

D. The Service Refused to Consider or Rule on Other Errors in the Administration of the Plan.

44. The Service refused to consider an additional error in the Plan's administration that had been raised by ISN in its VCP Submission: the maintenance of an unallocated reserve account for the payment of fees.

45. In Patterson's letter to Malkani dated April 1, 2013, the Service refused to consider this error on the ground that it "should be addressed to the United States Department of Labor and not to the Internal Revenue Service since this is a fiduciary issue and that [sic] the Independent Fiduciary was appointed by the Department of Labor."

46. The Independent Fiduciary was appointed by the U.S. District Court for the District of Maryland and the DOL does not exercise authority over the Independent Fiduciary.

47. The error related to the maintenance of an unallocated reserve account for the

payment of fees constitutes an Operational Failure within the meaning of section 5.01(2)(b) of Rev. Proc. 2013-12. Consideration of such errors is within the scope of the Service's authority related to the qualification of employee-sponsored pension plans under 26 U.S.C. § 401 *et seq.*

**FIRST CLAIM FOR RELIEF: REVIEW UNDER THE ADMINISTRATIVE
PROCEDURE ACT, 5 U.S.C. § 706(2)(A), OF DEFENDANTS' REFUSAL TO
CONSIDER AND RULE ON THE VCP SUBMISSION**

48. ISN incorporates the preceding paragraphs as if set forth fully herein.

49. ISN has exhausted all administrative remedies available to it prior to filing this Complaint.

50. Defendants' refusal to meaningfully consider or rule on ISN's VCP Submission constituted "final agency action[s] for which there is no other adequate remedy in a court" under 5 U.S.C. § 704.

51. Defendants' refusal to meaningfully consider or rule on ISN's VCP Submission was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of 5 U.S.C. § 706(2)(A).

52. Defendants' refusal to meaningfully consider or rule on ISN's VCP Submission was in violation of their duty under the APA to engage in reasoned decision-making and to provide a reasoned explanation for their actions.

53. ISN will be injured if the errors in the Independent Fiduciary's administration of the Plan are left unaddressed because these errors threaten the qualification of the Plan under the Internal Revenue Code.

**SECOND CLAIM FOR RELIEF: REVIEW UNDER THE ADMINISTRATIVE
PROCEDURE ACT, 5 U.S.C. § 706(2)(A), OF DEFENDANTS' UNEXPLAINED
CHANGE IN POSITION**

54. ISN incorporates the preceding paragraphs as if set forth fully herein.

55. Defendants' change in position on whether it would consider Plan errors related to

the Independent Fiduciary's use of incorrect compensation and birth, hire and termination dates, after requesting and being provided with substantial data and analysis related to such errors, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of 5 U.S.C. § 706(2)(A).

56. Defendants' unexplained change in position with respect to the Independent Fiduciary's use of incorrect data was in violation of their duty under the APA to engage in reasoned decision-making and to provide a reasoned explanation for their actions.

PRAYER FOR RELIEF

WHEREFORE, ISN prays for judgment against Defendants as follows:

- A. Hold unlawful and set aside the Defendants' refusal to consider and rule on the VCP Submission as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (*i.e.*, issuing a vacatur remedy) under 5 U.S.C. § 706(2);
- B. Issue any writs necessary to compel the Defendants to perform neglected or unlawfully unperformed duties with respect to the VCP Submission; and
- C. Grant such further and other relief as this Court deems appropriate.

Dated: November 28, 2014

William G. McGarrity
(*application to appear pro hac vice to be filed*)
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Respectfully Submitted,

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