

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

FILED

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U.S. DISTRICT COURT
N.D. OF ALABAMA

THOMAS E. PEREZ,)
Secretary of Labor,)
United States Department of Labor,)
)
Plaintiff,)
)
vs.)
)
LIFECARE OF ALABAMA, INC.;)
LIFECARE OF ALABAMA 401(k) PLAN;)
And SUSAN CLINGMAN-BANKS,)
AN INDIVIDUAL;)
)
Defendants.)
)

CASE NO. CV-12-S-2147-NE

CONSENT JUDGMENT AND ORDER

Plaintiff Thomas E. Perez, the Secretary of Labor, United States Department of Labor (“the Secretary”), pursuant to his authority under sections 502(a)(2) and 502(a)(5), 29 U.S.C. §§ 1132(a)(2) and 1132(a)(5), of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.*, (“ERISA”) has filed a Complaint against Defendants LifeCare of Alabama, Inc. (“LifeCare”); Susan Clingman-Banks (“Clingman-Banks”); and, pursuant to Fed. R. Civ. P. Rule 19(a), the LifeCare of Alabama 401(k) Plan (collectively, “the Defendants”). Defendants and the Secretary have agreed to resolve all matters in controversy in this action (except for the imposition by the Secretary of any penalty pursuant to section 502(l) of ERISA, 29 U.S.C. § 1132(l), and any proceedings related thereto), and said parties do now consent to entry of a Judgment and Order by this Court in accordance herewith.

A. The Secretary's Complaint alleges that Defendants LifeCare and Clingman-Banks breached their fiduciary duties with respect to the LifeCare of Alabama 401(k) Plan (the "Plan") by failing to discharge their duties under the Plan and by violating provisions of sections 403, 404 and 406 of ERISA, 29 U.S.C. §§ 1103, 1104 and 1106, as set forth in the Complaint.

B. Defendants hereby admit to the jurisdiction of the Court over them and over the subject matter of this action. Defendants admit that this Court has the authority to enforce this Order and that this Court is the most appropriate venue for any enforcement action which may be required as a result of this Order.

C. Defendants admit the allegations in the Complaint except as to the amounts owed to the Plan.

D. Defendant LifeCare admits that it is, or was at all times relevant to this action, acting as a fiduciary within the meaning of 11 U.S.C. § 523(a)(4). Defendant LifeCare further admits that its conduct with respect to the Plan and with respect to Plan assets constitutes defalcation while acting in a fiduciary capacity within the meaning of 11 U.S.C. § 523(a)(4).

E. Defendant Clingman-Banks admits that she is, or was at all times relevant to this action, acting as a fiduciary within the meaning of 11 U.S.C. § 523(a)(4). Defendant Clingman-Banks further admits that her conduct with respect to the Plan and with respect to Plan assets constitutes defalcation while acting in a fiduciary capacity within the meaning of 11 U.S.C. § 523(a)(4).

F. Defendants expressly waive any and all claims of whatsoever nature that they have or may have against the Secretary, or any of his officers, agents, employees, or

representatives, arising out of or in connection with the filing, prosecution, and maintenance of this civil action or any other proceeding and investigation incident thereto.

G. This Order represents a complete settlement of all the Secretary's claims asserted in this action against Defendants with the exception of any potential civil money penalties that may be assessed under section 502(l) of ERISA, 29 U.S.C. § 1132(l). This Order is not binding upon any government agency other than the U.S. Department of Labor and only resolves claims arising out of this action as between the Secretary and Defendants.

H. The Secretary and Defendants expressly waive Findings of Fact and Conclusions of Law, except as otherwise set forth and addressed herein, and consent to the entry of this Order as a full and complete resolution of all claims and issues which were, or might have been, alleged in this action without trial or adjudication of any issue of fact or law raised in the Complaint.

Accordingly, it is **ORDERED ADJUDGED AND DECREED** that:

1. The Court has jurisdiction over the parties to this Order and the subject matter of this action and is empowered to provide the relief herein.
2. Defendants LifeCare and Clingman-Banks, their agents, servants, employees and all persons in active concert or participation with them be and they hereby are permanently enjoined and restrained from violating the provisions of Title I of ERISA.
3. Defendant LifeCare be and hereby is permanently enjoined from acting as a fiduciary, trustee, agent, or representative in any capacity to any employee benefit plan, as defined by ERISA.

4. Defendant Clingman-Banks be and hereby is permanently enjoined from acting as a fiduciary, trustee, agent, or representative in any capacity to any employee benefit plan, as defined by ERISA.

5. As a result of their fiduciary breaches, Defendants have caused the Plan losses of \$63,934.69, plus interest on those funds of \$14,945.88 through November 30, 2013, calculated at the higher of the applicable Internal Revenue Code section 6621 Rate or the plan's rate of return, for which they are jointly and severally liable.

6. Defendants shall make restitution to the Plan in the sum of \$78,880.97, plus interest as calculated by the successor fiduciary, identified in paragraph 8, below. Post judgment interest shall be assessed on the \$78,880.97 until paid in full and calculated by the independent fiduciary in accordance with the U.S. Treasury underpayment rate referenced in 26 U.S.C. § 6621(c)(1) beginning December 1, 2013. Defendants shall restore \$39,000.00 to the Plan on or before January 15, 2014 and the remaining unpaid balance and accrued interest by March 31, 2014. Defendants shall pay a retainer of \$5,000.00 to the Plan's successor fiduciary within ten (10) days of entry of this Order. Checks shall be made payable to the Plan and remitted to the Plan's successor fiduciary. Failure to pay the retainer within ten (10) days of entry of this Order or to make restitution to the Plan in accordance with the payment plan set forth above shall result in the total balance then remaining to become due and payable immediately, with no further notice or demand required from the successor fiduciary or the Secretary.

7. Once the corrective actions required in this Consent Judgment and Order are complied with, the Secretary is required to assess a civil penalty pursuant to section 502(l) of ERISA, 29 U.S.C. § 1132(l). The penalty under section 502(l) is equal to 20 percent of the

“applicable recovery amount” as that term is defined by ERISA. The parties agree that the “applicable recovery amount” is the amount specified in paragraph 6, above.

8. M. Larry Lefoldt, CPA, of Lefoldt & Co., P.A. in Ridgeland, Mississippi, is appointed as successor fiduciary for the Plan and:

a. The successor fiduciary shall collect, marshal, and administer all of the Plan’s assets and take such further actions with respect to the Plan as may be appropriate.

b. The successor fiduciary shall have all the rights, duties, and responsibilities of any fiduciary or trustee described under the Plan documents or the applicable law, with respect to the successor fiduciary’s duties.

c. The successor fiduciary is authorized to delegate or assign fiduciary duties as appropriate and allowed under the law.

d. The successor fiduciary shall be entitled to receive reasonable fees and expenses for his services, payable from the assets of the Plan. Defendants shall be responsible for reimbursing the Plan for the entire successor fiduciary’s reasonable fees and expenses with respect to services performed for the Plan. Prior to obtaining payment for services and expenses authorized pursuant to this consent judgment, the successor fiduciary shall file with the Court, with copies to all parties, invoices for such fees and expenses at such times and on such a schedule as the successor fiduciary, in his sole discretion, deems appropriate. The Defendants LifeCare and Clingman-Banks acknowledge and agree that the invoice will be considered properly delivered if it is deposited in the United States mail, addressed to:

LifeCare of Alabama, Inc.
532-A Sparkman Street, SW
Hartselle, AL 35640

Susan Clingman-Banks
P.O. Box 1105
Hartselle, AL 35640

e. If no party or the Court objects within 15 days of service of any invoice, full payment of such invoice shall be made by Defendants LifeCare and Clingman-Banks to the Plan, and received by the successor fiduciary, not later than the 16th day following the date of the invoice. Interest shall accrue on any past due amount at the rate of 18% per annum, compounded daily. Defendants LifeCare and Clingman-Banks shall be responsible, jointly and severally, for all costs, including reasonable attorneys' fees and expenses, incurred by the successor fiduciary and/or the Plan in the course of collecting such past due amounts. If any party or the Court objects to any payment, the matter should be resolved by the Court prior to payment.

f. Defendants shall deliver or otherwise make available to the successor fiduciary any information, documents, files or other compilations, wherever and however stored, that are reasonably necessary to perform the duties of the successor fiduciary.

g. The successor fiduciary is authorized to give instructions respecting the disposition of assets of the Plan.

h. The successor fiduciary in the performance of his duties may retain such assistance as he may require, including attorneys, accountants, actuaries and other service providers.

i. The payment of administrative expenses and all fees to the successor fiduciary, his assistants, attorneys, accountants, actuaries and other necessary service providers are to be considered priority administrative expenses of the Plan.

j. The successor fiduciary or his agents, employees or representatives may not be held personally responsible for any claims against the Plan which existed, arose, matured or vested prior to the appointment of the successor fiduciary.

k. The successor fiduciary is to comply with all applicable rules and laws.

9. This Consent Judgment resolves all claims of the Secretary's Complaint with the following exceptions:

a. This Judgment does not adjudicate or otherwise affect any potential civil money penalties that may be assessed under ERISA § 502(l).

b. This Judgment does not affect or bind any governmental agency other than the United States Department of Labor.

c. This Court retains jurisdiction for purposes of enforcing compliance with the terms of this Consent Judgment and Order.

10. Each party shall bear its own costs and expenses, including attorneys' fees, arising in connection with any stage of the above-referenced proceeding including but not limited to, attorney's fees which may be available under the Equal Access to Justice Act, as amended.

SO ORDERED this 9th day of December 2013.



LYNWOOD SMITH
United States District Judge