

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

THOMAS E. PEREZ,)
Secretary of Labor,)
United States Department of Labor,)
)
Plaintiff,)
)
v.)
) Civil Action No.: 8:13-cv-00522 MGL
ROBERT MACK DURHAM,)
SHARON KAYE R. DURHAM, PALMETTO)
FAMILY MEDICAL GROUP, P.C., and)
PALMETTO FAMILY MEDICAL GROUP,)
PC 401(k) PROFIT SHARING PLAN,)
)
Defendants.)

CONSENT JUDGMENT AND ORDER

Plaintiff, Secretary of Labor, United States Department of Labor, pursuant to his authority under §§ 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 Robert Mack Durham, Sharon Kaye R. Durham, and Palmetto Family Medical Group, P.C. (collectively, "Defendants"). Defendants and the Secretary have agreed to resolve all matters in controversy in this action, and said parties do now consent to entry of a Judgment and Order by this Court in accordance herewith.

1. The Secretary's Complaint alleges that Defendants breached their fiduciary duties with respect to the Palmetto Family Medical Group, PC 401(k) Profit

Sharing Plan (the "Plan") by failing to discharge their duties under the Plan and by violating provisions of §§ 403, 404, 405 and 406 of ERISA, 29 U.S.C. §§ 1103, 1104, 1105, and 1106, as set forth in the Complaint.

2. 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.

3. Defendants admit that they are, or were at all times relevant to this action, acting as a fiduciary within the meaning of 11 U.S.C. § 523(a)(4). Defendants further admit that the amount that they owe to the Plan is not dischargeable pursuant to 11 U.S.C. § 523(a)(4) of the Bankruptcy Code.

4. 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.

5. This Order represents a complete settlement of all the Secretary's claims asserted in this action against Defendants, with the exception of any civil money penalties that may be assessed under § 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.

6. 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:

A. 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.

B. Defendants, 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.

C. Defendants are permanently enjoined from acting as a fiduciary, trustee, agent, or representative in any capacity to any employee benefit plan, as defined by ERISA, except as required to fulfill the terms of this Consent Judgment and Order.

D. Defendants shall make restitution to the Plan's participants or their beneficiaries of the total sum of **\$47, 567.63** (which includes interest) in the manner set forth herein to the participants and in the amounts and payment due dates set forth in Exhibit A (attached hereto). Defendants may make restitution payments in an accelerated manner, and Defendants shall notify Plaintiff of all accelerated payments. In the event that Defendants fail to make restitution to each participant and beneficiary in the amount ordered, post judgment interest shall be assessed against any remaining unpaid balance of such amount, in accordance with 28 U.S.C. § 1961, from the date hereof until paid in full. In the event of Defendants' non-compliance with the payment schedule described in Exhibit A, the entire sum due to all Plan participants, then unpaid, shall be immediately due and payable.

E. A full executed copy of this Consent Judgment and Order shall be maintained by the Plan administrator with all other documents and instruments governing the Plan.

F. 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 ERISA § 502(l), 29 U.S.C. § 1132(l). The penalty under § 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 D. Unless Defendants apply for a waiver, they shall pay the applicable penalty within ten days. If Defendants apply for a waiver to reduce or eliminate the penalty amount pursuant to ERISA § 502(l)(3), 29 U.S.C. § 1132(l)(3), and is denied such waiver by the Secretary, they shall pay any applicable penalty amount within ten days of the Secretary's denial.

G. Defendants may continue to act as a fiduciary and trustee only to the Plan and only until the Plan assets are distributed or a successor fiduciary is appointed as described herein. The Plan shall be terminated and its assets distributed as follows and in accordance with Plan provisions:

a. The Plan's assets shall be distributed to the Plan's participants and beneficiaries as soon as possible, but in no event later than **November 30, 2014** for participants Abernathy, Newman and all remaining participants with Plan balances at Nationwide Trust Company, FSB ("Nationwide"). Defendants shall make full restitution to participant Simpson as soon as possible, but in no event later than **October 1, 2015**;

b. Upon termination of the Plan, to the extent termination is necessary and applicable, Defendants shall give Plaintiff written confirmation of such within five (5) business days of the termination. Defendants shall distribute all participant account balances held at Nationwide. Upon termination of the Plan, Defendants shall provide proof of all distributions from Nationwide, which shall be mailed to the Deputy Regional Director, Employee Benefits Security Administration, 61 Forsyth Street, SW, Room 7B54, Atlanta, Georgia 30303, within 15 days of distribution from Nationwide and no later than December 15, 2014;

c. Defendants shall provide Plaintiff a written accounting of the asset distributions to the Plan participants and beneficiaries before the Plan assets are, in fact, distributed. The accounting shall include the participants' and beneficiaries' names, addresses, social security numbers, dates of employment, and the allocation amounts. The accounting shall be delivered to the Deputy Regional Director, Employee Benefits Security Administration, 61 Forsyth Street, SW, Room 7B54, Atlanta, Georgia 30303;

d. Defendants shall provide proof of each payment made to each Plan participant by sending a copy of the check issued to the participant on the day such payment is made, in accordance with the payment schedule described in Exhibit A. Proof of each payment shall be mailed to the Deputy Regional Director, Employee Benefits Security Administration, 61 Forsyth Street, SW, Room 7B54, Atlanta, Georgia 30303. Additionally, proof of each check clearing, showing each payment successfully deposited with each participant, shall be mailed to the Deputy Regional Director, Employee Benefits Security

Administration, 61 Forsyth Street, SW, Room 7B54, Atlanta, Georgia 30303, within 15 days of each scheduled payment outlined in Exhibit A;

e. In the event that Defendants fail to distribute all of the Plan's assets to participants Abernathy, Newman and all remaining participants with Plan balances at Nationwide, on or before **November 30, 2014**, Defendants, at the discretion of the Plaintiff, may be removed as trustee and fiduciary. Should the Plaintiff determine that it is necessary to remove Defendants, the Plaintiff shall identify a successor fiduciary who shall be appointed by the Court upon the Plaintiff's motion.

f. In the event a successor trustee is appointed, Defendants shall pay any and all reasonable costs and fees associated with the appointment and services provided by the successor trustee.

g. This Consent Judgment resolves all claims of Plaintiff'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 § 502 (l) of the Act

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 Order and Judgment.

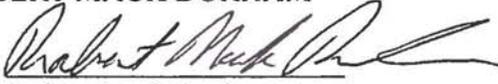
H. Each party shall bear its own costs and expenses, including attorneys' fees, arising in connection with any stage of the above-referenced proceeding including but

not limited to, attorney's fees which may be available under the Equal Access to Justice Act, as amended.

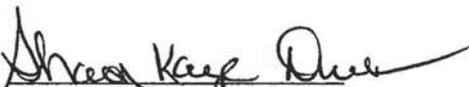
This 31st day of March, 2014.

Defendants Robert Mack Durham, Sharon Kaye R. Durham, Palmetto Family Medical Group, P.C. consent to entry of the foregoing Judgment:

ROBERT MACK DURHAM

By: 
Robert Mack Durham

SHARON KAYE R. DURHAM

By: 
Sharon Kaye R. Durham

PALMETTO FAMILY MEDICAL GROUP, P.C.

By: 

s/Mary G. Lewis

United States District Judge
Plaintiff moves entry of the foregoing Judgment:

Date: 4/18/14

M. PATRICIA SMITH
Solicitor of Labor

STANLEY E. KEEN
Regional Solicitor

ROBERT M. LEWIS, JR.
Counsel

By: 
YASMIN YANTHIS-BAILEY
Attorney

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