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

FILED

SEP 15 2010

ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY KE, DEPUTY

FLOYD SEIBERT, individually, and as TRUSTEE FOR THE CENTRAL HOME CARE SERVICES, INC., and AFFILIATES 401(K) PLAN,
Plaintiff,

vs.

Case No. 5:06-cv-01330-F

(1) CENTRAL HOME CARE SERVICES, INC., and AFFILIATES 401(K) PLAN;
(2) MATTHEWS BENEFIT GROUP, ADMINISTRATOR OF THE CENTRAL HOME CARE SERVICES, INC., and AFFILIATES;
(3) CENTRAL HOME CARE SERVICES, INC.;
(4) EXTENDED CARE SERVICES OF OKLAHOMA, INC.;
(5) CENTRAL OKLAHOMA CARE AT HOME, INC.;
(6) CENTRAL TEXAS HOME HEALTH SERVICES, INC.;
(7) CENTRAL TEXAS EXTENDED CARE SERVICES, INC.;
(8) WESTERN MEDICAL SUPPLIES AND EQUIPMENT, INC.;
(9) SECRETARY OF LABOR FOR THE UNITED STATES OF AMERICA;
(10) JOHN HANCOCK LIFE INSURANCE COMPANY (USA),

Defendants.

SUCCESSOR FIDUCIARY'S RESPONSE TO MARY CATHERINE WILDER'S OBJECTION TO REPORT AND PROPOSAL TO DISTRIBUTE ASSETS OF THE TRUSTEE-DIRECTED PORTION OF THE CENTRAL HOME CARE INC. AND AFFILIATES 401(K) PLAN

Comes now Jeanne Barnes Bryant, Successor Fiduciary of the Central Home Care Inc. and Affiliates 401(K) Plan and responds to the objection of participant Mary Catherine Wilder (D.E. #51).[1]

1. Ms. Wilder has argued that the termination date should not be 12-31-2001 because it creates a windfall "to those that left early while punishing those of us who stayed with the companies working hard to try and save them." There is no doubt that many people worked during the companies' troubled times during the period of 2002 through 2004. However, the company did not make verifiable contributions to the Trustee-directed portion of the CHC Plan, at least from the information currently available to the Successor Fiduciary. The money Ms. Wilder is seeking to add to her balance is most likely contributions reported to her in statements prepared by or from source documents created by Mr. Siebert.

2. Even though Ms. Wilder argues that those who left get a "windfall," this is not entirely accurate. Those who are getting the "windfall" are actually participants who received less than their truly vested share. The vesting rules changed by Mr. Siebert which the Successor Fiduciary does not believe was done in the best interests of the CHC Plan, created a situation that short changed those employees who sought their balances upon leaving Central Home Care Inc. and its affiliates. It is true that vesting schedules do create a way of rewarding loyalty to a company. But essentially those vesting schedules were not created as an incentive for people to keep working for the sponsor companies. They in effect punished anyone who sought to leave the financially troubled companies. Mr. Siebert essentially took what had been a vested balance, reduced that balance through a vesting schedule change, and paid out a smaller amount than what

[1] The Successor Fiduciary was not served a copy of Ms. Wilder's objection; however the Successor Fiduciary has no objection to her filing being considered by the Court.

would have been paid. The participant that left then is not now receiving a windfall, but is receiving what should have been paid at the time.

3. Ms Wilder has requested the Court to compel the Successor Fiduciary to make distributions based on the full and true vested balances brought up to date through 2005 when the companies closed. Essentially Ms. Wilder wants the Plan to pay the expenses to verify what <u>should have been</u> in the CHC Plan for all participants. (emphasis added) and then pay that amount. That would call for the Successor Fiduciary to attempt to verify contribution figures, but without bank account information for the sponsoring companies to verify those amounts were actually paid to the CHC Plan. Ms. Wilder wants the CHC Plan to spend money to verify a fiction. The information the Successor Fiduciary has indicates, at Mr. Siebert's direction, the sponsoring companies made no contributions to the CHC Plan after 2001. At least one third-party administrator, Florida Pension Consultants, resigned, among other issues, because contributions and investments to the Trustee-directed portion of the CHC Plan could not be verified. (See **Exhibit 1).**

4. Assuming for argument the Successor Fiduciary adopted Ms. Wilder's approach, the amounts due for 2002, 2003, and 2004 (and apparently additional figures for 2005), those numbers would increase the payable owed by the CHC Plan, but because available assets to pay these balances did not increase, the pro-rata percentage would decrease, most likely substantially. This may in turn result in a smaller check for Ms. Wilder and other participants as well.

5. Ms. Wilder, without suggesting how, states there are plenty of ways to verify vested balances and bring the forward. To inform the Court, this verification would require at least the following actions be taken:

a) Request a copy of the W-2 for years 2002, 2003, 2004, and 2005 from all participants to verify actual compensation reported by Central Home Care Inc. and affiliates.

b) Review all bank records of the sponsoring companies to determine if the compensation reported was the compensation paid.

c) Compute the contributions due to the participants based upon the compensation each participant received (this is the allocation method for the Trustee-Directed portion of the CHC Plan)

d) Determine from all bank records of the sponsoring companies to verify amounts paid to the CHC Plan

e) Apply vesting schedules.[2]

6. The result of this activity would probably indicate that the sponsoring companies did not make the level of contributions as would have been required under the previous vesting schedule. Again this would increase the payable amount. But without substantial additional funds coming from restitution, the pro-rata percentages would be smaller than what is anticipated for this first distribution.

[2] Here the Successor Fiduciary would apply the earlier vesting schedules since the Successor Fiduciary believes the second vesting schedule was not adopted in the best interests of the CHC Plan or its participants.

CONCLUSION

The Successor Fiduciary respectfully disagrees with Ms. Wilder's request. To expend funds to verify a fiction ultimately resulting in a smaller pro-rata payment to participants would not, in the Successor Fiduciary's opinion, be a prudent use of CHC Plan assets.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing document and exhibit has been or will be mailed by U.S. Mail and/or faxed if number available by the 14 day of Sept, 2010 to the parties noted below:

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