

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

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EUGENE SCALIA, Secretary of Labor, :
United States Department of Labor, :

Plaintiff :

v. :

CIVIL ACTION NO. :
2:20-cv-00106-RWS :

ADVANCE BENEFIT MANAGEMENT :
SYSTEMS USA, INC., a South Carolina :
corporation; **C. KENNETH JOHNSON**, an :
individual; and **RANDY MILTON WRIGHT**, :
an individual, :

Defendants. :
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ORDER APPOINTING INDEPENDENT FIDUCIARY

Plaintiff, Eugene Scalia, Secretary of Labor, Department of Labor (the “Secretary of Labor”), has moved for appointment of an independent fiduciary. Defendants C. Kenneth Johnson and Randy Milton Wright do not oppose entry of this Order, but do not waive any statutory or constitutional rights as a result. Good cause having been found, it is hereby ORDERED:

1. Larry Magarik is appointed as Independent Fiduciary over the employee health plans formerly administered by ABMS (“Participating Plans”) with

respect to: a) all times when ABMS was the individual Participating Plan's third-party administrator, and b) all claims incurred by the participants and beneficiaries of the Participating Plans through May 3, 2019 (the "Covered Claims"). Mr. Magarik's resume is attached as Exhibit A. The Independent Fiduciary shall have the following responsibilities and authority:

- a. to marshal and exclusively manage all assets of the Participating Plans held by ABMS;
- b. to create a trust and move assets of the Participating Plans into said trust;
- c. to exclusively manage and treat as assets of the Participating Plans all assets held in Account Number 7853252182 at Wells Fargo Bank, N.A.;
- d. to conduct an accounting of, adjudicate, and pay or deny all Covered Claims;
- e. to reimburse participants and beneficiaries of Participating Plans for claims they paid but for which ABMS was responsible;
- f. to reimburse sponsors of Participating Plans for claims they paid that should have been paid from contributions they tendered to ABMS;
- g. where the assets of any Participating Plan, combined with any stop loss insurance payments related to Covered Claims of that Plan, are

insufficient to pay that Plan's Covered Claims, to devise and follow a fair and equitable plan for paying Covered Claims to the extent possible;

- h. to negotiate Covered Claims with medical providers;
- i. to negotiate with service providers and other entities;
- j. to communicate with the sponsors, service providers, and participants and beneficiaries of the Participating Plans and other people and entities as necessary to administer the Participating Plans and perform all other responsibilities assigned to the Independent Fiduciary hereunder;
- k. to pursue and negotiate all claims for recovery to the Participating Plans from third-parties, including insurers of former fiduciaries to the Participating Plans;
- l. to file stop loss and any other applicable insurance claims that ABMS was contractually required to file, whether on behalf of the Participating Plans or some other entity, related to the Covered Claims;
- m. to pursue and negotiate recovery of any monies owed and due to the Participating Plans from any person or entity obligated to make such payments under the terms of the Participating Plans;

- n. to identify, pursue, and negotiate any other claims the Participating Plans may have against any person or entity;
- o. to engage in all activities required or permitted of ABMS as the Participating Plans' third-party administrator;
- p. to appoint, replace, and remove such administrators, trustees, attorneys, employees, assigns, agents, and service providers as the Independent Fiduciary shall, in the Independent Fiduciary's sole discretion, determine are necessary to aid the Independent Fiduciary in the exercise of the Independent Fiduciary's powers, duties, and responsibilities to the Participating Plans;
- q. except as provided herein, to delegate to such administrators, trustees, attorneys, employees, agents, assigns, and service providers such fiduciary responsibilities as the Independent Fiduciary shall determine appropriate. The Independent Fiduciary may not, however, delegate the authority to appoint, replace and remove such administrators, trustees, attorneys, employees, agents, assigns, and service providers;
- r. to cooperate fully with the Secretary of Labor in the exercise of his enforcement responsibilities under ERISA, including

sharing all information and documents requested by the Secretary of Labor;

- s. to provide the Secretary of Labor a quarterly report of all major activity, including the number and total amount of claims paid, the claims negotiated, the number and amount of remaining unpaid claims, the number of claims for stop loss reimbursement made, the amount of stop loss reimbursement paid to the Participating Plans, and the fees, costs, and the fees and expenses paid on behalf of the Participating Plans, addressed to:

U.S. Department of Labor
Employee Benefits Security Administration
Attn: Isabel Culver, Regional Director
Sam Nunn Atlanta Federal Center
61 Forsyth Street, S.W., Suite 7B54
Atlanta, GA 30303

- t. to comply with any necessary reporting requirements; and
- u. to pay himself reasonable and necessary fees and expenses, in the amounts set forth and consistent with the document attached as Exhibit B, to pay the reasonable and necessary fees of service providers, and to pay other reasonable expenses of conducting the

duties and responsibilities assigned herein from the assets of the Participating Plans. Before causing assets of the Participating Plans to be used to pay his own compensation, fees or expenses, the Independent Fiduciary shall provide written notice by filing with this Court a Fee Notice supported by an itemized statement of work and by serving a copy on the Secretary of Labor at:

U.S. Department of Labor
Employee Benefits Security Administration
Attn: Isabel Culver, Regional Director
Sam Nunn Atlanta Federal Center
61 Forsyth Street, S.W., Suite 7B54
Atlanta, GA 30303

If no objection to the Fee Notice is filed within twenty (20) calendar days, such compensation, fees, and expenses shall be deemed reasonable expenses. If an objection is filed and cannot be resolved between the IF and the Secretary, the Court shall decide what fees and expenses are reasonable and payable to the IF.

2. Defendants shall, within ten business days of this order, inform the Independent Fiduciary and provide the Independent Fiduciary with any documents they have not already provided to the Secretary related to the following:
 - a. identity of each Participating Plan;

- b. contact information for the sponsor of each Participating Plan;
 - c. identity and contact information for each participant and beneficiary of each Participating Plan;
 - d. any bank accounts containing assets of the Participating Plans;
 - e. all assets of the Participating Plans;
 - f. all unpaid Covered Claims;
 - g. all paid Covered Claims for plan years 2016, 2017, 2018, and 2019;
 - h. all stop loss insurance coverage for each Participating Plan;
 - i. all stop loss claims paid for plan years 2016, 2017, 2018, and 2019;
 - j. all stop loss claims denied for plan years 2016, 2017, 2018, and 2019;
 - k. all contributions and premiums paid by any Participating Plan or Participating Plan sponsor for plan years 2016, 2017, 2018, and 2019; and
 - l. any communications regarding unpaid Covered Claims from Participating Plan sponsors, participants, and beneficiaries or their representatives, including brokers and agents.
3. Defendants shall provide any additional information requested by the

Independent Fiduciary within ten business days of request if possible. If Defendants cannot reasonably provide the additional requested information within ten business days, Defendants shall notify the Independent Fiduciary of the delay and a proposed timeframe, and shall provide the information as soon as reasonably possible. Where requested information is not within the Defendants' custody, Defendants will cooperate with the Independent Fiduciary and take all reasonable steps necessary to allow the Independent Fiduciary to obtain the requested information.

4. Defendants shall otherwise cooperate with the Independent Fiduciary as necessary to enable the Independent Fiduciary to perform his duties and responsibilities herein.
5. Defendants shall execute such documents necessary to allow the Independent Fiduciary to place all assets of the Participating Plans in trust.
6. Within ten days of this Order, Defendants shall provide notice (the "Notice") of this Order to all Participating Plans. The Notice shall include a copy of this Order and advise that the Independent Fiduciary has been appointed to administer the Participating Plans, and shall

provide the Independent Fiduciary's name, address, telephone number, and website. The Notice shall further instruct the sponsors of the Participating Plans that they should relay this information to all participants and beneficiaries. Finally, the Notice shall advise all Participating Plans and their sponsors that they may be fiduciaries under ERISA and that nothing in this Order relieves any fiduciary of their responsibilities under ERISA. Defendants may send this Notice by electronic mail or by regular United Postal Service mail.

7. Within ten (10) days of this Order, Defendants shall also provide Notice and a copy of this Order to the South Carolina Department of Insurance ("SCDOI") and request that SCDOI deliver to the Independent Fiduciary any assets the SCDOI is holding concerning ABMS and the Participating Plans.
8. The Secretary of Labor may provide to the Independent Fiduciary any documents or information the Independent Fiduciary requires to comply with the requirements herein. To the extent any privilege or confidentiality applies to such documents and information, the privilege or confidentiality is not waived by the provision of the documents or information to the Independent Fiduciary and is hereby preserved. The

Independent Fiduciary shall act diligently to protect and preserve the privilege or confidentiality of any documents or information provided by the Secretary of Labor.

9. The payment of administrative expenses and fees to the Independent Fiduciary are priority administrative expenses of the Participating Plans, superior to any other class of obligation. The payment of such expenses and fees from the assets of the Participating Plans does not waive the Secretary of Labor's or Participating Plans' claim that such costs should be reimbursed by the Defendants herein. Defendants do not waive any defenses they might assert to the Secretary's or the Participating Plans' claim for reimbursement.
10. The terms of the documents governing the Participating Plans are hereby amended to include the terms of this Order relating to the Independent Fiduciary. This Order shall supersede all provisions in the documents governing the Participating Plans that are inconsistent with the terms of this Order.
11. Nothing in this Order shall be construed:
 - a. to limit the powers and responsibilities of any officer or employee of the United States under ERISA or any other law; or

b. to relieve the Participating Plans or any of their administrators, fiduciaries, officers, trustees, custodians, attorneys, agents, employees, assigns, advisors, providers of goods or services, representatives, or persons who serve in any capacity that involves decision making authority or custody or control of the assets of any of the Participating Plans of any duty, responsibility, or liability under ERISA or any other law.

So ORDERED this 21st day of May, 2020.



RICHARD W. STORY
United States District Judge