IN THE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI

IN RE:
Lay *et al.* v. Singing River Health System *et al.* Cause No. 30CH1:15-cv-00060

ORDER GRANTING REQUEST OF SPECIAL FIDUCIARY FOR AUTHORITY TO SEEK VOLUNTARY DISMISSAL OF CLAIM AFTER FIRST SEEKING STAY

Traci M. Christian, Special Fiduciary of the Singing River Health System Employees' Retirement Plan and Trust (the "Plan"), moved the Court for entry of an order granting leave to dismiss a cause of action against KPMG LLP ("KPMG") and Transamerica Retirement Solutions Corporation ("Transamerica"), pending in the Circuit Court of Jackson County, Mississippi. The Court heard the motion on September 11, 2020 and finds as follows:

Management of the Plan is under the supervision of this Court. Traci M. Christian was appointed by this Court to serve as the Special Fiduciary for the Plan.

On October 27, 2017, Interim Special Fiduciary Josh Eldridge filed Cause No. 2017-087-SR in the Circuit Court of Jackson County, Mississippi, against KPMG and Transamerica, setting out causes of action for breach of contract, breach of fiduciary duty, negligence, fraud, deceit, and misrepresentation. All counts relate to these defendants' alleged role in causing damages to the Plan and its members.

Since the filing of that suit, the Special Fiduciary and the defendants have engaged in mediation and subsequent discussions. It is evident that the parties have widely different views of the extent of the defendants' liability, if any, as well as of the settlement value of the Special Fiduciary's claims against them.

During the pendency of the Special Fiduciary's cause of action against KPMG and Transamerica in State Court, some members of the Plan maintained their own separate causes of action against these defendants in the United States District Court for the Southern District of Mississippi, Consolidated Cause No. 117-cv-00319-LG-RHW, styled Jones v. Singing River Health Services Foundation, *et al.*

On December 18, 2019, the District Court entered its Memorandum Opinion and Order Granting KPMG LLP's Motion to Dismiss [Without Prejudice]. In it, the District Court ruled that the plaintiffs in the Martha Ezell Lowe ("Lowe") class action against KPMG and Transamerica lacked standing to maintain their action against KPMG, on the grounds that "[s]ince Lowe is a beneficiary to the trust at issue and KPMG is a third party, Lowe may only maintain a lawsuit against [it] if (a) she 'is in possession, or entitled to immediate distribution, of the trust property involved; or (b) the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary's interest.'" Mem. Op. and Order at 3 (quoting Restatement (Third) of Trusts § 107). The District Court cited as additional authority Miss. Code Ann. § 91-8-811 ("A trustee shall take reasonable steps to enforce claims of the trust [but a] trustee may abandon or assign any claim that it believes is unreasonable to enforce to one or more of the beneficiaries of the trust holding the claim.") *Id.* The District Court further noted that the Special Fiduciary has an action against KPMG pending in State Court. *Id.*

On February 21, 2020, the District Court entered its Memorandum Opinion and Order Granting Transamerica Retirement Solutions Corporation's Motion to Dismiss for Lack of Jurisdiction "for the reasons stated in (the) Court's Memorandum Opinion and

Order granting KPMG's Motion to Dismiss for Lack of Jurisdiction," Mem. Op. and Order at 2, "and the Court's Order denying Lowe's Motion to Alter Judgment," *Id.*

Counsel for the Special Fiduciary explained in his motion that during the pendency of the class litigation in District Court, the Special Fiduciary did not prosecute her case against KPMG and Transamerica, in effect "piggybacking" on the class action litigation in order to reduce expense to the Plan.

The financial condition of the Plan is precarious. Pursuit of the pending action by the Special Fiduciary against KPMG and Transamerica will necessitate the Plan expending enormous sums of money in litigation costs and expenses, including hourly attorneys' fees, court reporters' charges for multiple depositions, expert witness fees (for testimony on pension administration, auditing, and accounting), travel, lodging and meals, all of which would have to be paid out of the Plan to the detriment of its members who are already suffering benefit cuts in excess of 25%. Under extant circumstances, the Special Fiduciary is unable to protect the interests of the beneficiaries of the Plan by way of expensive and time-consuming litigation against KPMG and Transamerica—a task the Plan simply cannot afford.

A more financially sound and prudent alternative is available. W. Harvey Barton of Barton Law Firm, PLLC, in Pascagoula, represents a number of Plan members in claims against KPMG and Transamerica. Likewise, Reeves & Mestayer, PLLC, in Biloxi represent Plan beneficiaries. Both firms appear to be willing to represent Plan members who wish to pursue litigation against KPMG and Transamerica on a contingency basis.

The choice is not a difficult one: Either the Plan incurs tremendous litigation costs

and expenses to the financial detriment of its beneficiaries, or the Special Fiduciary spares the Plan tremendous and prohibitive costs and expenses by stepping aside and clearing the path for capable, experienced—and financially able—plaintiffs' counsel to bear that burden. Granting leave to the Special Fiduciary to dismiss her cause of action would satisfy the standard articulated by the District Court that individual beneficiaries of the Plan would have standing and may pursue individual causes of action against KPMG and Transamerica in the event "the trustee is unable . . . to protect the [beneficiaries'] interest[s]." The Mississippi Uniform Trust Code gives the Special Fiduciary the authority to "abandon . . . any claim that [she] believes is unreasonable to enforce." Miss. Code Ann. § 91-8-811.

The Court agrees with the position of the Special Fiduciary that the option of the Special Fiduciary retaining counsel on a contingency basis to pursue causes of action against KPMG and Transamerica on behalf of the Plan is unreasonable because it is fraught with complications. It may bring about objections and other legal challenges, including lawsuits, over the Special Fiduciary's choice of counsel, which would cause delay, expense, and may result in irreparable harm due to potential statute of limitations issues. Additionally, the amount of the contingency fee the Special Fiduciary may pay may be an issue of contention. The Special Fiduciary has been advised by Reeves & Mestayer that undertaking litigation on behalf of the Special Fiduciary on a contingency basis would be cost prohibitive and risky.

Counsel for the Special Fiduciary asserts that the statute of limitations deadline may be near. He states that one position is that the statute of limitations may run April 12, 2021, three years after the Court ordered reductions in Plan benefits. Time is of the

essence for the Special Fiduciary to dismiss her cause of action in the Circuit Court, and for Plan members who wish to do so, to retain the services of counsel of their choosing to initiate and pursue causes of action against KPMG and Transamerica.

The attorneys present at the hearing were reluctant to speak about statute of limitation issues because of the presence of counsel for KPMG and Transamerica. Counsel for Transamerica stated that his client would raise any defense it considered appropriate, including statute of limitations. The outright dismissal of the complaint by the Special Fiduciary may or may not result in a statute of limitations issue. The suit by the Special Fiduciary has been a "place holder" for vested beneficiaries of the Plan, preserving any right they may have against KPMG and Transamerica while parallel litigation was prosecuted by others.

The Court finds that the Special Fiduciary is financially unable to continue to protect the interests of beneficiaries of the Plan in claims they may have against KPMG and Transamerica. Even after eliminating cost of living benefits and cutting retirement benefits by 25%, this Court found it necessary to conduct a follow up hearing to determine whether additional cuts should be made when the stock market crashed this year. Existing benefits, even as reduced, sit on a razors edge with additional cuts on the immediate horizon if the current stock market surge is not sustained.

The Court agrees with the position of the Special Fiduciary that it is unreasonable under the circumstances for her to enforce the theoretical rights of beneficiaries against KPMG and Transamerica with the limited resources of the Plan. Therefore, this Court authorizes her to abandon the claims against KPMG and Transamerica after first giving notice to vested beneficiaries of her intent to dismiss without prejudice so that any

vested beneficiary whose claim was potentially preserved by the Special Fiduciary's suit may have time to join one of the pending cases or file a separate suit.

IT IS THEREFORE ORDERED that the Special Fiduciary is authorized to file a motion in Cause No.2017-087-SR in the Circuit Court of Jackson County, Mississippi, requesting authority to stay the action for up to six months while she provides notice to vested beneficiaries of the intention of the Special Fiduciary to request a voluntary dismissal without prejudice of the suit filed on behalf of the Plan against KPMG and Transamerica so that the vested beneficiaries may join one of the pending actions or file their own action.

Notice may be published in the Special Fiduciary's newsletter and on the Plan website and may be provided by mail to the last address known to the Special Fiduciary of a vested beneficiary. Notice need not be provided to non-vested beneficiaries, as their only interest in the Plan is a return of contribution. Therefore, the reduction in benefits did not affect their rights under the Plan.

After expiration of the period of stay and after notice has been provided to vested beneficiaries of the Plan as described above, the Special Fiduciary is authorized to seek authority from the Circuit Court to voluntarily dismiss without prejudice her claims against KPMG and Transamerica in Cause No. 2017-087-SR in the Circuit Court of Jackson County, Mississippi.

ORDERED this the 14 day of September 2020.

SENIOR STATUS JUDGE