IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

HILDA L. SOLIS, Secretary of Labor, U.S. Department of Labor, Plaintiff, vs. HARRIS N.A., Defendant. ********** MY SMART BENEFITS, INC., and JONATHAN E. HOGGE, Intervenors.	)	No. 2:07-CV-68

ORDER

This matter is before the Court on My Smart Benefits, Inc., and Jonathan Hogge's Motion to Reconsider the Court's Order of December 8th, 2008, Regarding Revised Plan of Distribution, filed on December 20, 2008. The motion is **GRANTED.** This Court has reconsidered its December 8, 2008 order, and for the reasons set forth below, **REAFFIRMS** the order.

DISCUSSION

On December 8, 2008, this Court entered an order addressing the Independent Fiduciary's Revised Plan of Distribution, and a variety of objections to it filed by My Smart Benefits, Inc. ("MSB"), Jonathan

Hogge ("Hogge"), Direct Benefits, LLC., and Daniel Dixon. This is a case of competing interests - there are no clear answers and, at some level, everybody loses. Hogge, perhaps, stands to lose the most, as he faces criminal charges related to this action, and his interests in this case are linked to concerns regarding his pending criminal case, not to mention a variety of other pending legal matters surrounding his involvement with MSB.

One of the objections addressed by this Court's December 8, 2008, order is an objection from MSB and Hogge to the payment of claims where the employer has a negative group balance. MSB and Hogge contended that the plans were employer funded plans, meaning that the plans were entirely funded by the employers. They further contended that they have not guaranteed payment of benefits under these plans in any way. This Court, after noting the absence of evidence on this matter in the record, found that:

> Hogge has not adequately supported his objection to the payment of claims where the employer has failed to adequately fund the account. This is in part because, despite ample opportunity, he has failed to establish with evidence that the plans at issue are employer funded plans. Furthermore, he has failed to account for the allegations of misdeeds pending in his criminal case and how those affect the feasability of his proposal that the Independent Fiduciary exclude claims where the employer has failed to adequately fund its plan. Accordingly, the Independent Fiduciary is directed to proceed with processing claims without regard to the account balance of the employer.

(DE 81 at 9-10).

In their request for reconsideration, MSB and Hogge contend that this Court erred in finding that MSB and Hogge failed to provide sufficient evidence that the plans at issue were employer funded plans, and ask that the Court rescind its ruling that the Independent Fiduciary proceed with processing claims without regard to the ledger balance of the employer funded plans. They note that the fact that the plans were employer funded plans has been uncontested since the inception of these proceedings, and that this Court gave undue weight to the allegations of Direct Benefits, Inc., and Daniel Dixon that MSB sold two types of plans (employer-funded plans and pooled association plans).

After a review of the record, this Court agrees that it has largely been uncontested that the plans at issue here are employer funded plans. As was noted in this Court's order dated December 8, 2008, this seeming agreement between the parties may be more of a result of the Secretary of Labor, Harris and the Independent Fiduciary claiming that this fact is irrelevant. Now, in their motion for reconsideration, MSB and Hogge suggest that the burden of proving the type of plan at issue rests with the Plaintiff. Normally, that is so, but the Plaintiffs are not objecting here - MSB and Hogge are. And, to the extent that they are asking this Court to sustain their objection, they must demonstrate that the objection is well-founded.

Perhaps the confusion here is that this Court merely found that MSB and Hogge failed to demonstrate that they plans at issue were

employer funded plans. Even if that had been firmly established (and this Court acknowledges that this fact has been largely uncontested) it does not answer the question of whether MSB and Hogge nonetheless had obligations to pay the claims at issue for accounts with negative ledger balances. MSB and Hogge have proceeded as if merely applying the label "employer funded plan" is sufficient for the Court to conclude that no such obligation exists. It is not. As is pointed out in the response to the motion to reconsider, the plan documents (or at least some of them) set the following conditions in deciding whether a claim should be paid: (1) whether the applicant was a plan participant; (2) whether the expenses were incurred during the participation period; (3) whether the expenses were provider expenses; (4)whether the expenses were reimbursable expenses; (5) whether the application was timely; and (6) whether payment would exceed the maximum participant yearly allowable amount.

This information is paraphrased from Section B2 of each of the three sample plans provided by the Secretary of Labor in response to the instant motion. If a participant met these criteria, under the plan document for that plan, he would have had a right to expect payment regardless of the level of his plan's funding. Accordingly, if MSB and Hogge had denied payment of such a covered claim because of the lack of funding, they would have done so contrary to the provisions of the participant's plan and the requirements of Section 404(a)(1)(D) of ERISA. 29 U.S.C. § 1104(a)(1)(D). It should be noted

that even if MSB was obligated to pay the claims, they would not have been without a remedy: they could have proceeded against the employers to recover monies owed to them as a result of insufficient funding.

MSB and Hogge, however, suggest that the Plan Document itself is not the only document to be consulted, and point to the group plan applications that coordinate with the plan documents referenced by the Secretary of Labor. These show that employers are to make 100% of the contributions for employees and dependants. The applications also include the following language:

> The first month's contribution must be paid with submission of this application to the Plan Administrator. All following monthly contributions must be paid on the due date provided by the Plan Administrator. If a contribution is 30 days past due, all reimbursements will be put on hold for the employer group. If a contribution is 60 days past due, the employer group's participation in the plan will be terminated.

These documents are signed by an agent for the employer - and there is no indication that this Application (or the information contained in it) was shared with individual plan participants in any way. Although there may be a legal basis for concluding that the terms included in the group application trump the terms in the plan documents provided to employees, MSB and Hogge point to none. This Court can only rule based on the information provided to it, and declines to make arguments for the parties. *Vaughn v. King*, 167 F.3d 347, 354 (7th Cir. 1999)("It is not the responsibility of this court to make arguments for the parties."). Based on the information before this Court, this Court finds that, even if there were no doubts that

every plan at issue in this case was an employer funded plan, MSB and Hogge have not convinced this Court that fact alone is sufficient to reach the conclusion that MSB had no obligation to process and pay claims for accounts with a negative ledger balance. There is no evidence in the record regarding the period of time for which contributions had been past due, or that any of the plans had indeed been terminated in accordance with the terms of the applications relied on by MSB and Hogge. Nor is it clear that the termination referenced in the application occurs automatically, with no action whatsoever on the part of MSB. Such a reading would not give effect to language in the proceeding paragraph of the Group Applications provided to this Court, which provides the following:

> The Plan Sponsor may terminate the Plan providing 90 days written notification to all employer groups. The Plan will still provide reimbursements to all eligible applicants during the 90 days and will complete the 60-day claims runout period.

In short, even if this Court erred in finding that MSB and Hogge had failed to adequately establish that the plans at issue are employer funded, the next step would have been to consider what exactly that means. At that step, too, MSB and Hogge failed to provide this Court with sufficient information on which to sustain their objection. Perhaps they could have done so but, even in response to the allegations of the Secretary of Labor that plan participants would have an expectation of payment regardless of the level of the plan's funding, they did not. The application itself,

without further information, is simply not sufficient for this Court to find that MSB and Hogge had no obligation to pay claims where the employer has a negative ledger balance. And, for those reasons, this Court stands by its December 8, 2008 order.

Furthermore, this Court did not misconstrue MSB and Hogge's objection to suggest that claims should be denied if MSB is owed funds, but the plan is otherwise funded. The Court merely acknowledged that making this distinction, especially given the nature of the criminal allegations regarding mispayment of administrative fees, was one factor that weighed in favor of directing the Independent Fiduciary to disregard negative ledger balances while processing claims.

CONCLUSION

For the reasons set forth above, this Court has reconsidered its December 8, 2008, order, and **REAFFIRMS** the order.

DATED: March 27, 2009

/s/RUDY LOZANO, Judge
United States District Court