EXPERIENTIAL WEALTH
—FIDUCIA PERPETUA—

Julie A. Su vs. Axim et al

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June 22, 2024

On February 20, 2024, a complaint was filed by Julie A. Su, Acting Secretary of Labor of the Department of Labor ("**Plaintiff**" or "Department") against the following entities and individuals (collectively "**Defendants**"). The titles or sub-titles in this summary are for ease of reference only.

1. AXIM SOLUTIONS GROUP, LLC ("**AFSG**")
2. AXIM MANAGED RETIREMENT SYSTEMS, LLC ("**AMRS**")
3. AXIM GLOBAL STRATEGIES GROUP, LLC, ("**AGSG**")
4. JAMES CAMPBELL, MELISSA MCMANES, ("**Cambell/McManes**")
5. FUTURE MIND CONSULTING, LLC, and ("**Future Mind**")
6. BWELL, INC. ("**Bwell**")

for a breach of fiduciary duties under ERISA Section 409, 29 U.S.C. §1109[1]. Cambell is the majority owner of all the companies listed

RELEVANT LAWS & RULES

Please refer to Exhibit A which provides a brief summary to the Employee Retirement Income Security Act of 1974 ("**ERISA**"), the Davis-Bacon and Related Acts Regulations and the McNamara-O'Hara Service Contract Act

ERISA FIDUCIARIES AND OBLIGATIONS

Who Is A Fiduciary?

Broadly under Title I and Title II of ERISA, the statutory definition of a fiduciary at section 3(21)(A), which provides that "a person is a fiduciary with respect to a plan to the extent the person (the final rule focuses on section (ii)):

(i) ***exercises <u>any discretionary authority or discretionary control</u> respecting management of such plan or exercises <u>any authority or control</u> respecting management or disposition of its assets,***

(ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(iii) ***has any <u>discretionary authority or discretionary responsibility</u> in the administration of such plan. The same definition of a fiduciary is in Code section 4975I(3)***

[1] Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

Duties of an ERISA Fiduciary

Fiduciaries have important responsibilities and are subject to standards of conduct because they act on behalf of participants in a retirement plan and their beneficiaries. These responsibilities include:

- Acting *solely in the interest* of plan participants and their beneficiaries and with the *exclusive purpose of providing benefits* to them;
- Carrying out their duties prudently;
- Following the plan documents (unless inconsistent with ERISA);
- Diversifying plan investments; and
- Paying only reasonable plan expenses.

According to the Department's "Meeting Your Fiduciary Responsibility[2]", the duty to act prudently is one of a fiduciary's central responsibilities under ERISA. It requires expertise in a variety of areas. Lacking that expertise, a fiduciary will want to hire someone with that professional knowledge to carry out the functions. Prudence focuses on the process for making fiduciary decisions. Therefore, it is wise to document decisions and the basis for those decisions. For instance, in hiring any plan service provider, a fiduciary may want to survey a number of potential providers, asking for the same information and providing the same requirements. By doing so, a fiduciary can document the process and make a meaningful comparison and selection. For all contributions, employee and employer (if any), the plan must designate a fiduciary, typically the trustee, to make sure that contributions due to the plan are collected. If the plan and other documents are silent or ambiguous, the trustee generally has this responsibility.

In sum, ERISA's fiduciary standards expect employers to (1) establish a prudent process for selecting service providers [*fiduciary duty of due care*]; (2) ensure that fees paid to service providers are reasonable in light of the level and quality of services provided [*control plan expenses*]; and (3) monitor service providers and benefits once selected to make sure they continue to be prudent choices. [*duty to monitor service providers and investments*]

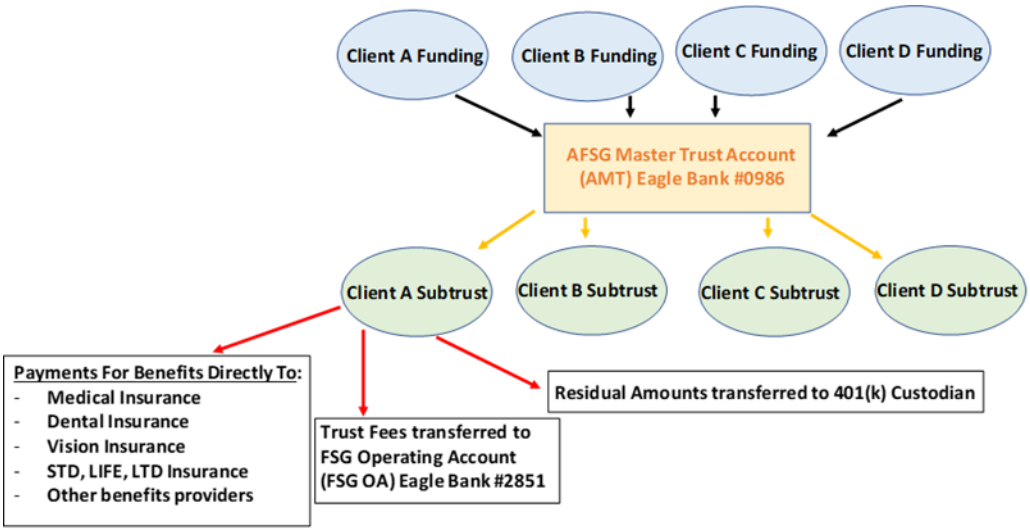
DEFENDENT SUMMARY

- AFSG is an SCA compliance and management firm.
- AFSG markets itself as being able to "help government contractors lower overhead and reduce their compliance burden – all while improving contract profitability" as a "zero-net cost" service provider. Rather than having employers pay the administrative costs associated with providing health and welfare fringe benefits programs to their employees, costs that are normally borne by employers, AFSG deducts its fees from the fringe benefits contributions which its service contractor clients are required to make on behalf of their service employees. This shifts a cost normally borne by the service contractor on to the service employees, reducing the employees' fringe benefits below the amount required by the SCA.
- AFSG clients are employers performing on contracts with the federal government for the principal purpose of providing services, and thus are subject to the SCA's fringe benefit requirements. These employers decided to satisfy part of their SCA fringe benefit

[2] https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf

obligations by providing health insurance or other welfare benefits to their service employees. To do this, the clients established health and welfare benefits plans.[3]

- AFSG helped its service contractor clients administer these ERISA health and welfare plans, paying its own fees from the health and welfare contributions which its clients were required to make on behalf of their employees under the SCA.
- AFSG established the following trust and sub-trust payment deposit and payment scheme:



- AFSG and Campbell commingled the employers' contributions in a single account, the Axim Financial Services Group Master Trust ("**Axim Master Trust**"). The funds in the Axim Master Trust and the Sub-Trusts are plan assets ("**Health and Welfare Plan Assets**"). The Trust Agreements stated that AFSG's clients, identified in the Trust Agreements as "plan sponsors," are plan sponsors contracting with AFSG to establish a trust for the payment of health and welfare insurance benefits. The Trust Agreements name Campbell as the trustee of the trust. The Trust Agreements state that the clients' contributions will be held in trust by AFSG for the exclusive purpose of providing benefits to the ERISA plan participants and their beneficiaries and reasonable administrative expenses.
- For each client, the Defendant established a trust account ("**Sub-Trust**") to hold the client's contributions to these ERISA plans. AFSG and Campbell named themselves as trustees of the Sub-Trusts and agreed to:
    - use the funds in the Sub-Trusts to purchase health and welfare fringe benefits, such as health insurance, for the client's employees.
    - use the funds in the Sub-Trusts to pay fees to AFSG.
- AFSG's Provider Client Agreements specified the services that FSA would provide to its service contractor clients and the fees AFSG charged for its services and provided details on the procedures that AFSG had agreed to follow when providing its services ("the Provider Client Agreements").

[3] https://www.law.cornell.edu/uscode/text/29/1002

- Under these Provider Client Agreements, AFSG agreed to the following duties:
    - billed its clients for monthly welfare benefits costs and forwarded those funds to benefits providers such as health insurance companies;
    - performed accounting and recordkeeping services;
    - generated SCA compliance reports;
    - maintained an online portal for clients and their employees; and
    - responded to certain employee inquiries.

  AFSG had no role in benefit design, claims processing, enrollment, benefit modification, or termination of participant coverage.
- The Provider Client Agreements established a multi-step procedure by which its clients paid for fringe benefits and AFSG's fees.
    - the service contractor would provide "census data" to AFSG showing the number of employees who performed work and the number of hours each employee worked.
    - AFSG would use this information to compute the total amount of fringe benefits owed to each employee under the applicable Wage Determination.
    - AFSG would send an invoice to the service contractor client for the fringe benefits due as well as its per-employee-per-month fee ("PEPM"), which ranged from $10 to $40.
    - service contractors client were to remit the fringe benefit payments and the PEPM fee to the Axim Master Trust account held at Eagle Bank.
    - The Axim Master Trust commingled the contributions from all of AFSG's clients.
    - Upon receipt of the funds in that account, AFSG agreed to forward those funds to the Sub-Trusts created for each employer.
    - From the Sub-Trusts, AFSG agreed to make three payments:
        1) pay premiums to insurance companies;
        2) forward the PEPM fee to the AFSG Operating Account ("AFSG OA"); and
        3) forward residual amounts to a 401(k) retirement account custodian.

- AMRS which collects employer 401(k) contributions and agrees to forward them to various retirement plans [4] The employers' contributions to AMRS plan assets ("**Retirement Plan Assets**").
- AGSG acted as an insurance broker, for a fee, to some of AFSG's clients.

CLAIM SUMMARY

A. FSG's Impermissible Fees and Misappropriation of Health and Welfare Plan Assets

- ERISA fiduciary status established:
    - AFSG exercised discretionary authority and discretionary control over those Health and Welfare Plan Assets, including the payment of health insurance premiums, payment of AFSG's fees, and illegal transfers of the Health and

[4] https://www.law.cornell.edu/uscode/text/29/1002#:~:text=%28A%29%20Except%20as%20provided%20in%20subparagraph%20%28B%29%2C%20the,of%20surrounding%20circumstances%20such%20plan%2C%20fund%2C%20or%20program%E2%80%94

Welfare Plan Assets among various trust accounts including the AFSG, Axim Master Trust, and the Axim OA therefore,

- As a fiduciary, an entity providing services to ERISA plans, and an entity owned by fiduciary Campbell, AFSG was a *party-in-interest* to the plans under ERISA Sections 3(14)(A), (B), and (G)
- McManes is the Director of Compliance Accounting at AFSG. She exercised discretionary authority and control over the Health and Welfare Plan Assets and Retirement Plan Assets. As such McManes was a fiduciary pursuant to ERISA Section 3(21)(A). Specifically, McManes exercised authority and control over ERISA plan assets by transferring them among the AFSG MT, various Sub-Trust accounts, the AMRS MT, and the AFSG OA. McManes used Health and Welfare Plan Assets to pay AFSG's fees. As a fiduciary and a provider of services to the various ERISA plans, McManes is a party-in-interest to the ERISA plans pursuant to ERISA Section 3(14)(A) and (B).
- Campbell was the named trustee to the AFSG Sub-Trusts and exercised discretionary authority and control over the Health and Welfare Plan Assets and the Retirement Plan Assets and was therefore a fiduciary pursuant to ERISA Section 3(21)(A). Specifically, Campbell exercised authority and control over ERISA plan assets by transferring them among the AFSG Trust, various Sub-Trust accounts, the AMRS Master Trust, and the AFSG OA. Campbell used Health and Welfare Plan Assets to pay AFSG's fees. As a fiduciary, a provider of services to ERISA plans, and the owner of AFSG and AMRS, Campbell is a party-in-interest pursuant to ERISA §§ 3(14)(A), (B), and (H)

- Self-dealing and Conflict of Interest
  - From December 2015 to present, AFSG, Campbell, and McManes transferred Health and Welfare Plan Assets to the AFSG OA in amounts greater than the fees that AFSG's clients had agreed to pay.
- Non-Exclusive Purpose and Disloyalty
  - While AFSG's Provider Client Agreements required that employer contributions be forwarded to the employer's Sub-Trusts for the payment of the health and welfare insurance premiums and the PEPM fees, AFSG often did not forward the contributions to the Sub-Trusts and failed to keep accurate records of which funds in the Axim Master Trust belonged to particular clients. Instead, AFSG, as directed by McManes and Campbell, set up a single account in the name of one of its clients, Central Research, Inc. (the "CRI Account"), and often allocated funds from the Axim Master Trust, through employer sub-trusts, to the CRI Account on an ad hoc basis when needed to pay insurance premiums for various clients and paid the health and welfare premiums from the CRI Account. CRI was unaware of that its account was being used in this way.
- Conflict of Interest, Prohibited Transactions – Party of Interest, Self-dealing
  - AFSG, as directed by McManes and Campbell, routinely took large withdrawals from the Axim Master Trust, transferring those funds to the AFSG OA. Between December 2015 and January 2021, AFSG took 139 withdrawals totaling $5,878,608.03 directly from the Axim Master Trust. They have failed to provide any invoices correlating these withdrawals with the fees AFSG's clients had

agreed to pay. By August 2022, AFSG had transferred only $629,988.71 from the AFSG OA back to the Master Trust.

  - Because of these large and impermissible withdrawals from the Axim Master Trust, the AFSG OA frequently ran short on funds that it needed to meet payroll and other business expenses. AFSG, Campbell, and McManes, exercising discretionary authority and control over the Health and Welfare Plan Assets, frequently moved those assets between the Axim Master Trust and the AFSG OA as needed to meet AFSG's own expenses and to pay the health and welfare premiums.
  - Since January 2016, the AFSG OA transferred $909,125.00 to Future Mind and transferred $142,574.00 to Bwell. Both companies occasionally transferred funds back to the AFSG OA. Future Mind paid Campbell's salary.

- Exclusive Purpose, Prohibited Transactions, Self-dealing
  - Campbell, McManes, AFSG, and AMRS violated their fiduciary obligations by routinely transferring Retirement Plan Assets to and from the AMRS Master Trust ("**AMRS Master Trust**") to and from the Axim Master Trust.
  - In multiple transactions between November 2020 to August 2022, AFSG, AMRS, Campbell, and McManes, exercising fiduciary authority and control over Health and Welfare Plan Assets as well as Retirement Plan Assets, transferred $1,236,200.00 from the AMRS Master Trust to Axim Master Trust, booking these transfers as "Loan[s] Per JVC ames V. Campbell]."
  - During the same period, exercising fiduciary authority and control over Health and Welfare Plan Assets as well as Retirement Plan Assets, AFSG, AMRS, McManes and Campbell transferred $1,288,000.00 from the Axim Trust back to the AMRS Master Trust. Most of these transactions were labeled as "reimbursements." Neither trust paid interest on the transferred funds.
- Self-dealing, Prohibited Transaction – Party-in-Interest
  - Campbell, exercising discretionary authority and control over the Health and Welfare Plan Assets, and used those assets to pay commissions to a company that he owned, in violation of ERISA.
  - AGSG as the insurance broker to the health and welfare plans. AGSG is a party-in-interest to the retirement plans pursuant to ERISA Section 3(14)(B) and (G).
  - From January 1, 2018, to August 12, 2021, Campbell, as trustee of the Axim Master Trust and sub-trusts, used Health Plan Assets to pay insurance brokerage fees to AGSG. AGSG took commissions and received fees for its services from those Health Plan Assets but often did not disclose these fees to the plans or AFSG's clients.
- Self-dealing, Prohibited Transactions
  - Campbell and McManes transferred Health and Welfare Plan Assets and Retirement Plan Assets from the Axim Master Trust to Future Mind and Bwell (these are non-service providers).

B. AMRS's Mismanagement of Retirement Plan Assets

- AMRS provided third-party administration services for defined contribution retirement benefits plans sponsored by federal service contractor employers.

- Exclusive Purpose and Self-Dealing Prohibited transactions
    - Many of these employers were clients of both FSG and AMRS. In such cases, FSG computed the amount of fringe benefits remaining after payment of health and welfare insurance premiums and PEPM fees and provided that information to the service contractors. The service contractors were then to remit the health and welfare payments, plus the PEPM fee, to the FSG MT and pay any residual amount to the AMRS Master Trust ("**AMRS MT**"), which was to allocate these funds to 401(k) benefits custodians. The amounts remitted to the AMRS Master Trust are Retirement Plan Assets. FSG, Campbell, and McManes, exercising fiduciary authority and fiduciary control of the Retirement Plan Assets, often deviated from that procedure by routing the 401(k) contributions through the FSG MT
- Self-Dealing, Prohibited Transactions
    - In multiple transactions between November 2020 to August 2022, FSG, AMRS,
    - Campbell, and McManes, exercising fiduciary authority and control over Health and Welfare Plan Assets as well as Retirement Plan Assets, transferred $1,236,200.00 from the AMRS MT to the FSG MT, booking these transfers as "Loan[s] Per JVC [James V. Campbell]." During the same period, exercising fiduciary authority and control over Health and Welfare Plan Assets as well as Retirement Plan Assets, FSG, AMRS, McManes and Campbell transferred $1,288,000.00 from the FSG Master Trust back to the AMRS Master Trust. Most of these transactions were labeled as "reimbursements." Neither trust paid interest on the transferred funds.

C. Campbell's Use of GSG to Receive Health and Welfare Plan Assets as Commissions

- GSG served as an insurance broker to the health and welfare plans sponsored by clients of FSG. Campbell owns 97% of GSG and controls the company. From January 1, 2018, to August 12, 2021, Campbell, as trustee of the FSG trusts, used Health Plan Assets to pay insurance brokerage fees to GSG. GSG took commissions and received fees for its services from those Health Plan Assets but often did not disclose these fees to the plans or FSG's clients.

COUNTS

1. Impermissible Use of Health and Welfare Plan Assets to Pay Employer's Expenses

a. Exclusive Purpose Rule

Plan assets may only be used for the exclusive benefit of plan participants and their beneficiaries. Therefore, plan assets may not be used to pay expenses incurred primarily for the benefit of an employer or plan sponsor.

Plan vs Settlor's[5] Expenses[6]

The SCA regulations prohibit service contractors from taking credit towards their fringe benefit obligations for any cost that is "properly a business expense of the contractor" or "primarily for the benefit or convenience of the contractor." 29 C.F.R.§ 4.171(e). Although the costs incurred by a service contractor's insurance carrier, third-party trust fund, or other third-party administrator that are directly related to the actual administration and delivery of benefits can be credited towards the contractor's fringe benefit obligations, administrative costs incurred by a service contractor in connection with merely providing fringe benefits to its service employees "are properly a business expense of the employer" that may not be deducted from the required fringe benefit rate: "No deduction from the specified amount may be made to cover any administrative costs which may be incurred by the contractor in providing the benefits, as such costs are properly a business expense of the employer. 29 C.F.R. § 4.172[.]")[7].

b. Keeping Records

The SCA regulations also specifically require service contractors to keep records of, among other items, the "rate or rates of monetary wages paid and fringe benefits provided," and "total daily and weekly compensation of each employee." 29 C.F.R. § 4.6(g)(1).

c. Paying for Settlor's Functions

FSG, McManes, and Campbell charged PEPM fees to the FSG MT and the Sub-Trusts to perform administrative tasks that were principally for the benefit or the convenience of its service contractor clients, including recordkeeping obligations specifically imposed on their service contractor clients by the SCA. FSG, McManes, and Campbell thus used the Health and Welfare Plan Assets to pay their clients' business expenses, thereby using ERISA plan assets for the benefit of those employers rather than the plans' participants and beneficiaries; which violated ERISA Section 403(c)(1)[8].

d. Prudent Man Rule Violation

FSG, Campbell, and McManes used plan assets to pay fees that were not reasonable expenses of administering the trusts, in violation of ERISA Section 404(a)(1)(A)[9]; and failed to loyally discharge their fiduciary duties, in violation of ERISA Section 404(a)(1)(B).

e. Plan Sponsor Clients are Culpable

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[5] Settlers' functions: according to the DOL, there is a class of discretionary activities which relate to the formation, rather than the management, of plans. These so called "settlor" functions include decisions relating to the establishment, termination and design of plans and are not fiduciary activities subject to Title I of ERISA https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/03-13-1986

[6] https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/settlor-expense-guidance

[7] https://www.law.cornell.edu/cfr/text/29/4.172#:~:text=%C2%A7%204.172%20Meeting%20requirements%20for%20particular%20fringe%20benefits%E2%80%94in,be%20provided%20by%20the%20employer%20for%20the%20employee.

[8] https://www.law.cornell.edu/uscode/text/29/1103

[9] https://www.law.cornell.edu/uscode/text/29/1104

FSG's clients are fiduciaries to the plans under ERISA Section 2(21)(A). FSG, Campbell, McManes, and FSG's plan sponsor liable as co-fiduciaries under ERISA Section 405(a), because they knowingly participated in the use of plan assets to pay employers' expenses, enabled each other to commit these breaches, and knew of the breaches but failed to make reasonable efforts under the circumstances to remedy them.

f. Transactions Between Plan and arty-in-interest
By charging PEPM fees to the trusts, Defendants FSG, Campbell, and McManes and Plan sponsors engaged in a "direct … furnishing of goods, services, or facilities between the plan and a party in interest," in violation ERISA Section 406(a)(1)(C). Further, FSG and Campbell dealt with the plan assets in their own interest or for their own account, in violation of ERISA Section 406(b)(1) and (2). Their actions required the plans to suffer losses for which they are liable and received unjust profits which they must disgorge to the plans, pursuant to ERISA Section 409(a).

2. Misappropriation of Plan Assets

a. Trust Assets Remain in Trust
Defendants FSG, Campbell, and McManes failed to hold the plan assets in trust, which violated ERISA Section 403(a).

b. Prudent Man Rule Violation
FSG, Campbell, and McManes also failed to prudently discharge their fiduciary duties, in violation of ERISA Section 404(a)(1)(A); and failed to loyally discharge their fiduciary duties, in violation of ERISA Section 404(a)(1)(B).

c. Asset Used for the Benefit of a Party-in-Interest
FSG, Campbell, and McManes caused the ERISA plans to engage in transactions that these Defendants knew or should have known constituted direct or indirect transfers of plan assets to, or use by, or for the benefit of a party in interest, in violation of ERISA Section 406(a)(1)(D). Also dealt with the plan assets in their own interest or for their own account, in violation of ERISA Section 406(b)(1), and received compensation for their own personal accounts, in violation of ERISA Section 406(b)(2). These defendants are liable for equitable relief pursuant to ERISA Section 409(a) for losses to the plans.

d. Breaches to Fiduciary Duties
FSG, Campbell, and McManes are jointly and severally liable for the breaches of their co-fiduciaries alleged herein pursuant to ERISA Section 405(a), because (a) they knowingly participated in their co-fiduciaries' misconduct; (b)their failure to comply with their own fiduciary duties enabled their co-fiduciaries to commit the breaches alleged herein; and (c) they had knowledge of the breaches of their co-fiduciaries alleged herein and failed to make reasonable efforts under the circumstances to remedy the breaches.

e. Self Dealing
Campbell dealt with plan assets in his own interest or for his own account, in violation of ERISA Section 406(b)(1) either directly or through Future Mind and Bwell.

3. **Unlawful Use of Third-Party Trust Accounts**
   FSG, Campbell, and McManes transferred plan assets from the FSG MT to the Sub-Trust of one of their clients, Capital Resources, Incorporated, paying their clients' health insurance premiums through the CRI Account rather than each client's Sub-trust. Separately, transferred plan assets from the AMRS MT to a CRI Sub-Trust, forwarding plan assets to employers' 401(k) accounts through that CRI Sub-Trust rather than each client's Sub-Trust. AMRS, FSG, Campbell, and McManes failed to hold the plan assets in trust for the exclusive benefit of the participants and beneficiaries of the plans, which violated ERISA Section 403(a) and (c). They also led to prudently discharge their fiduciary duties, in violation of ERISA § 404(a)(1)(A) and failed to loyally discharge their fiduciary duties, in violation of ERISA Section 404(a)(1)(B).

4. **Unlawful Transfers Between the AMRS Master Trust and the FSG Master Trust**
   a. Exclusive Purpose Rule
      The FSG MT contained Health and Welfare Plan Assets, and the AMRS MT held Retirement Plan Assets. Contributions to retirement plans are ERISA plan assets that must be used for **the exclusive purpose of** providing retirement benefits to plan participants and their beneficiaries and defraying reasonable expenses of administering the plans. AMRS, FSG, Campbell and McManes assets from the FSG MT to the AMRS MT. During the same period, they transferred assets from the AMRS MT back to the FSG Master Trust. In doing so, AMRS, FSG, Campbell, and McManes failed to hold the plan assets in trust for the exclusive benefit of plan participants and beneficiaries, which violated ERISA Sections 403(a) and (c).
   b. Fiduciary Duty Breaches
      AMRS, FSG, Campbell, and McManes failed to:
      - prudently discharge their fiduciary duties, in violation of ERISA Section 404(a)(1)(A)[10]
      - loyally discharge their fiduciary duties, in violation of ERISA Section 404(a)(1)(B), 29, and
      - meet the terms of the plans' trust agreements with FSG, in violation of ERISA Section 404(a)(1)(D).

5. **Undisclosed fees charged by GSG**
   a. While acting as fiduciaries, FSG and Campbell used Health Plan Assets to pay commissions to GSG, a company that Campbell owned. In doing so they have failed to meet their fiduciary responsibilities under ERISA 404(a)(1)A and (1)B.
   b. Campbell engaged in prohibited transactions when he used Health Plan Assets to
      - pay commissions to GSG. Campbell dealt with the Health Plan Assets in his own interest or for his own account, in violation of ERISA Section 406(b)(1);
      - use plan assets for his own personal accounts, in violation of ERISA Section 406(b)(2); and

[10] https://www.law.cornell.edu/uscode/text/29/1104

- receive consideration for his own personal account from a party dealing with the plans in connection with a transaction involving the assets of the plan, in violation of ERISA Section 406(b)(3).

c. GSG was a knowing participant in these breaches because it knew, or had reason to know, that FSG's payment of its commissions was illegal.

JUDGEMENT

On May 23, 2024, The U.S. District Court judge, Peter J. Messitte, for the District of Maryland Issued a Consent Judgement and Order. The Defendants agree to the judgement against the, with the following terms without appeal:

A. Defendants shall pay or cause to be paid the following:
   - The total sum of $4,444,989.32 on or before 60 days from the entry of this Consent Judgment into an interest-bearing account ("the Distribution Account").
   - The total sum of $100,000 in additional equitable restitution to the independent fiduciary to be appointed, representing the costs and expenses associated with the appointment of an independent fiduciary on or before 5 days from the entry of this Consent Judgment.
   - These amounts set forth above, shall be payable solely from funds remitted by Defendants and shall not be paid, in part or in whole, from plan assets, including from any master trusts or sub-trusts. Defendants shall produce all documents, including complete bank statements, showing the source of these restitution payments within 10 days of payment. The Department and Defendants agree that all monies due or remitted under this Consent Judgment constitute equitable relief under ERISA.

B. Axim Fringe Solutions Group, LLC, Axim Managed Retirement, Solutions, LLC, James Campbell, and Melissa McManes are removed:
   - as fiduciaries to any employee benefit plan they currently service, and
   - from the role(s) of trustee of an employee benefit plan, fiduciary, or plan administrator that they hold with respect to any other employee benefit plan

C. Axim Fringe Solutions Group, LLC, Axim Managed Retirement, Solutions, LLC, James Campbell, and Melissa McManes are permanently enjoined from serving as
   - a trustee of an employee benefit plan fiduciary or
   - plan administrator to any employee benefit plan or
   - in any capacity that involves decision-making authority or custody or control of the moneys, funds, assets, or property of any employee benefit plan subject to ERISA.

D. Axim Fringe Solutions Group, Axim Managed Retirement Solutions, LLC, and James Campbell are permanently enjoined from
   - soliciting or accepting any fees, payment, reimbursements, or assets of any kind taken from fringe benefits owed to employees, including but not limited to fringe benefits owed to employees pursuant to the Service Contract Act of 1965, as amended, and
   - using any fringe benefits owed to employees for payment of any expenses of any employers.

E. In the event that any of the Defendants files for bankruptcy protection at any time before satisfaction of the monies and payments he owes under this Consent Judgment, that

Defendant shall not oppose any proof of claim that the Department files in the bankruptcy proceeding for any amounts still owing under this Consent Judgment. In addition, the Defendants stipulate that the unpaid amounts shall be treated as a non-dischargeable debt under l 1 U.S.C. § 523(a)(4).

F. The amounts paid by Defendants pursuant to this Agreement are understood by the parties to this Agreement to be the "applicable recovery amounts" for purposes of civil penalty assessment pursuant to ERISA § 502(1)[11]. It is further understood that the penalties which will be assessed will be equal to twenty percent (20%) of the "applicable recovery amounts." Defendants agree (1) to pay the assessed penalty within 60 days of service of notice of the assessment, or (2) to timely file a request for a waiver to reduce or eliminate the penalty amount pursuant to ERISA § 502(1)(3), 29 U.S.C. § 1132(1)(3).

OBSERVATIONS

The Julie A. Su vs. Axim Solutions Group et al case demonstrates the importance of an employer's fiduciary duty of developing and maintaining a prudent process in selecting service providers in delivering health and welfare and retirement benefit plans to covered employees. In the case where the employer is subject to the Service Contract Act, additional duties are owed to meet fringe benefits, timely funding, and recordkeeping requirements. It is important to understand that employers can never relinquish their fiduciary responsibilities to the employe benefit plans they establish. Plan sponsors can always engage professionals to take on functional duties to fulfill their day-to-day functions or even share fiduciary responsibilities as co-fiduciaries to the benefit plans. However, plan sponsors always retain the duty for prudent selection and monitoring of the hired professionals and appointed co-fiduciaries.

Many unsuspecting employers, especially in the government contractor sector, engage a single service provider, such as Axim Fringe Solutions Group and its affiliates or subsidiaries, as a third party to manage their entire fringe benefit administration and processing. These types of "bundled" service providers, directly or via their affiliates or subsidiaries, typically offer the following services or fulfill the following functions:

- Fringe accounting and recordkeeping services,
- Plan design and selection for health & welfare plan,
- Acting as the commissioned broker for all group insurance products,
- In the case of a self-funded health and welfare plan, acting as the claims adjudicator, processor and recordkeeper,
- Acting as the retirement plan (commissioned) broker or (fee based) consultant. Sometimes, the entity offers a Pooled Employer Plan where the entity is the (fee based) Pooled Plan Provider (PPP),
- COBRA, HSA, and/or Section 125 Cafeteria Plan administrator for additional per head fee, and/or
- Acting as the directed trustee to the health and welfare plan to meet SCA requirements.

For employers, especially those who are strapped for resources or new to the SCA mandates, giving all fringe dollars to a single provider who can take on all these duties is very

[11] https://www.law.cornell.edu/uscode/text/29/1132

attractive. Compensation to a bundled service provider is often not fully understood or vetted. There is also often a lack of full transparency of direct and indirect compensation with revenue sharing. As this case shows, there is a lack of checks and balance in this arrangement and James Campbell was able to take whatever discretionary actions that he wished. Trust is a double-edged sword.

Secondly, even if the service provider is not a bad actor, he/she may not be a competent provider of every service offered and for which he is engaged by the plan sponsor. Every business owner wants to increase revenue and profit margin. However, for ERISA plans, the plan sponsor and all fiduciaries must serve "solely in the interest of participants and use the assets for the exclusive purpose of the plan". It is the plan sponsor employer's responsibility to balance efficiency with fiduciary duty. The simplest and most convenient bundled service provider approach may not be the prudent approach as service providers tend to always overreach and expand their services without necessarily doing so with the highest competence and through a fiduciary lens.

This case has also shined a light on what types of fees are permissible to be absorbed by the fringe dollars and what types of fees are deemed employer expenses and cannot be paid by the fringe assets. There is actually nothing new in this discussion. It is well understood under ERISA that there are two types of expenses. The first is often referred to as expenses for meeting "settlor" functions. These are activities which relate to the establishment, termination, and design of plans and are not fiduciary activities. However, activities related to plan management are fiduciary decisions, and "reasonable" costs in providing the services could be paid for by the fringe assets (e.g. in retirement plans, recordkeeping fees, advisory fees, mutual fund expenses, audit fees, etc. are often paid by plan assets). This entire topic has created much confusion as a result of this case, and an employer should seek ERISA and benefits legal counsel to clearly assist in understanding and implementing payment approaches.

Finally, the DOL vs Axim is a case of showing how unchecked and unmonitored discretionary power given to anyone or any one organization significantly increases the opportunity for corruption. Inserting independent service providers to serve in different roles for a health & welfare and a retirement plan under an SCA fringe accounting environment with an independent trustee significantly reduces the likelihood of an Axim experience.

EXHIBIT A – Laws & Regulations

Employee Retirement Income Security Act of 1974 (ERISA)

ERISA is a federal statute that regulates employee benefits such as pensions, 401(k) plans, health care, and disability—collectively some of the most important property and contract rights that working Americans have. Passed in 1974, ERISA preempts state law and imposes fiduciary duties on those who administer employee benefits. ERISA fiduciary duties largely track the duties of a trustee. For example, ERISA requires employers to set aside funds in trust to pay pension benefits. Employers need not, however, set aside funds to pay non-pension benefits (called welfare benefits), but may do so if they wish or to satisfy the demands of a labor union or other applicable federal statute and Department regulations. The legal entity that pays ERISA-covered benefits is the "plan," and any associated funds are "plan assets." An ERISA fiduciary who harms or abuses plan assets must make the plan whole by paying either damages or restitution.[12]

Davis-Bacon and Related Acts Regulations[13]

Under the Davis-Bacon and Related Acts and Reorganization Plan No. 14 of 1950, the Department is responsible for determining prevailing wages, issuing regulations and standards to be observed by federal agencies that award or fund projects subject to Davis-Bacon labor standards, and overseeing consistent enforcement of the Davis-Bacon labor standards.

The Davis-Bacon "prevailing wage" is the combination of the basic hourly rate and any fringe benefits listed in a Davis-Bacon wage determination. The contractor's obligation to pay at least the prevailing wage listed in the applicable wage determination can be met by paying each laborer and mechanic the applicable prevailing wage entirely as cash wages or by a combination of cash wages and employer-provided bona fide fringe benefits. Prevailing wages, including fringe benefits, must be paid for all hours worked on the site of the work.

McNamara-O'Hara Service Contract Act ("SCA")[14]

The SCA requires contractors and subcontractors performing services on prime contracts in excess of $2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement. The Department issues wage determinations on a contract-by-contract basis in response to specific requests from contracting agencies. These determinations are incorporated into the contract.

[12] Redressing All ERISA Fiduciary Breaches Under Section 409(a), 2010 Eric D. Chason, William & Mary Law School https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2181&context=facpubs

[13] https://www.dol.gov/agencies/whd/fact-sheets/66-dbra

[14] https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/serv01.pdf

PROBIBITED TRANSACTIONS[15]

ERISA section 406(a)[16] prohibits various types of transactions between a plan and **parties in interest**. ERISA states that a plan fiduciary shall not cause the plan to engage in a transaction if the plan fiduciary knows or should know that such transaction constitutes a direct or indirect—

406(a) Transactions between plan and party-in-interest

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party-in-interest;

(B) lending of money or other extension of credit between the plan and a party-in-interest;

(C) furnishing of goods, services, or facilities between the plan and a party-in-interest;

(D) transfer to, or use by or for the benefit of a party-in-interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

406 (b)Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

406 (c)Transfer of real or personal property to plan by party-in-interest

PARTY-IN-INTEREST[17] - ERISA Section 3(14)

Under ERISA, the term "party-in-interest" means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

[15] https://www.aicpa-cima.com/resources/download/parties-in-interest-and-prohibited-transactions

[16] https://www.law.cornell.edu/uscode/text/29/1106

[17] https://www.law.cornell.edu/uscode/text/29/1002

(D) an employee organization any of whose members are covered by such plan;
(E) an owner, direct or indirect, of 50 percent or more of—
  (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation.
  (ii) the capital interest or the profits interest of a partnership, or
  (iii) the beneficial interest of a trust or unincorporated enterprise, which is an employer or an employee organization described in subparagraph (C) or (D);
(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);
(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—
  (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,
  (ii) the capital interest or profits interest of such partnership, or
  (iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);
(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or
(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Labor Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Labor Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party-in-interest with respect to a plan to which a trust described in section 501(c)(22) of title 26 is permitted to make payments under section 1403 of this title shall be treated as a party-in-interest with respect to such trust.