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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

GREGORY JOHNSON, et al.,	)	
	)	No. 2:05-cv-02046 RRB KJM
Plaintiffs,	)	(Lead Case-Consolidated)
	)	
v.	)	
	)	
CLAIR R. COUTURIER, JR., et al.,	)	
	)	
Defendants.	)	
	)	
	)	

DARLEEN STANTON, Plaintiff, v. CLAIR R. COUTURIER, JR., et al., Defendants.	)))))))))))	No. 2:07-cv-01208 WBS-JFM (Consolidated under 2:05-cv-02046 RRB KJM)

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

1. The plaintiffs in this case, participants in an employee stock ownership plan (ESOP) sponsored by a 100% ESOP-owned company, brought suit claiming that defendants, who were officers and directors of the company as well as fiduciaries of the ESOP, violated their fiduciary duties under both state law (to the ESOP as a shareholder) and ERISA (as plan fiduciaries of the ESOP). Since 2004, the Employee Ownership Holding Company (TEOHC) Employee Stock Ownership Plan (ESOP) has owned 100% of the shares of the company. Plaintiffs allege (among other things) that between 2004 and 2007, defendants breached their fiduciary duties to TEOHC and the ESOP by leveraging most of TEOHC's assets to provide Clair Couturier (the company's president) an excessive retirement package equal to 70% of the total equity of the company. Plaintiffs' Amended Complaint ("Amend. Compl.") at ¶¶ 34, 40, 121-155 (Docket No. 150); Plaintiffs' Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction ("Plaintiffs' Memo") at 1 (Docket No. 321).

Plaintiffs filed an ERISA action in October of 2005 against Couturier, David Johanson and Robert Eddy in their capacities as ESOP fiduciaries and in their capacities as corporate fiduciaries. In defending themselves in the private litigation since 2005, defendants have already exhausted the proceeds of a $5 million insurance policy and are now looking to the company (the funds in the accounts) to continue to pay for their defense. Plaintiffs' Memo at 1, 3-5; Declaration of Gary Greenwald ("Greenwald Dec.") at 6 (Docket No. 321); Plaintiffs' Proposed Supplemental Complaint ("Supp. Compl.") at ¶¶ 4-6 (Docket No. 322).

After the private action was filed, and as the insurance policy was dwindling, the company entered into an agreement in 2007 with Gibraltar Industries, Inc., under which Gibraltar acquired all of the assets of TEOHC. The net proceeds of this asset sale were approximately $20 million and, sometime thereafter, about $5 million was distributed to the accounts of ESOP participants. The remaining amount – $15.8 million – was placed in interest bearing accounts where it remains today. Plaintiffs' Memo at 2; Supp. Compl. at ¶¶ 4, 5.

The Asset Purchase Agreement governing the sale to Gibraltar provided that TEOHC would be responsible for any liability that might arise under the terms of pre-existing indemnification agreements issued to, among others, the defendants in the private action. The indemnification agreements at issue consist of multiple, overlapping agreements for each defendant that were executed on different dates, ranging from June 12, 2001 through August 8, 2005. The June 2001 agreements provide that the company will pay for:

> Any and all past, present or future losses, claims, damages, expenses or liabilities (including, but not limited to court costs, judgments, fines, excise taxes related to litigation or aggregate amount paid in reasonable settlement of any actions, suits, proceedings, or claims) (hereinafter referred to as "Loss") incurred in connection with actions, proceedings, or suits of any kind or nature whatsoever, which arises as a result of acts or omissions of Board Member within the scope of his activities for the Company and which do not involve deliberate wrongful acts or gross negligence by Board Member of the Company's Board of Directors.

See Exhibit 5 to Plaintiffs' Motion (Docket No. 321). The August 8, 2005 agreements use substantially similar language. Id. In addition, the agreements specify that they will cover "reasonable attorney's fees." The 2005 agreements also provide for mediation and arbitration in the event of any controversy or claim arising out of the agreement. Id. None of the agreements provide for recourse by TEOHC against any of the defendants if they are found to have breached their fiduciary obligations under ERISA.

In April 2008, defendants filed two separate arbitration actions against TEOHC, one involving Defendant Couturier and the other involving Defendants Johanson and Eddy, to determine whether the agreements are valid and whether TEOHC will assume and advance the defendants' litigation costs. In May 2008, the ESOP's independent fiduciary (David Heald) informed ESOP participants that the proceeds from the asset sale would not be distributed to them until issues relating to the indemnification agreements were resolved. Plaintiffs' Memo at 3-5; Greenwald Dec. at 5; Supp. Compl. at ¶¶ 6-9.

On September 18, 2008, the arbitrator in the Couturier matter ordered the payment of several hundred thousand dollars in fees from the remaining assets of the ESOP owned company unless there is an order within 20 days (October 8, 2008) that such payment would be improper. Attached hereto as Exhibit 1. On the same date, the arbitrator in the Johanson and Eddy proceeding issued an order (attached hereto as Exhibit 2) declaring that those defendants are entitled to advancement of their legal fees incurred in this case, and ordering TEOHC to pay all outstanding invoices for legal fees and expenses incurred by these defendants within 30 days.

This court granted the plaintiffs' request for a temporary restraining order on September 19, 2008, enjoining the arbitration proceedings in order to maintain the status quo ante pending the court's consideration of the motion for preliminary injunction. (Docket No. 367). The court further issued an order for the defendants to show cause why the court should not grant a preliminary injunction enjoining the defendants or any person acting in concert with them from advancing any fees or expenses incurred by the defendants in defending this suit or any suit by the Department of Labor and restraining the defendants from completing the arbitration proceedings. Id. The Secretary of Labor, who has primary authority for enforcing Title I of ERISA, submits this brief as amicus curiae to assist the court in its consideration of whether to restrain the payment of expenses incurred in defending the suit for fiduciary breach under

ERISA.

ARGUMENT

THIS COURT SHOULD GRANT THE PRELIMINARY INJUNCTION BECAUSE PAYMENT OF LEGAL FEES INCURRED IN THE DEFENSE OF THE ERISA CLAIMS AGAINST DEFENDANTS WOULD VIOLATE ERISA SECTION 410

1. The indemnification arrangements at issue in this case are void as applied to the plaintiffs' ERISA claims. Subject to certain exceptions not applicable here, ERISA section 410, 29 U.S.C. § 1110, invalidates instruments and agreements that exculpate plan fiduciaries from liability for their misconduct. It would be wholly inconsistent with section 410's text and protective purposes to enforce indemnification provisions which would operate to require an injured plan and its participants to foot the entire bill for a fiduciary defendant's misconduct. However, that is precisely the outcome that the defendants seek by asking the court to authorize their use of the liquidation proceeds for the defense and satisfaction of the plaintiffs' ERISA claims.

Because the company is entirely owned by the ESOP, and because the company's plan of liquidation provides for the payment of remaining funds in the accounts to ESOP participants as company shareholders, any proceeds that are used to pay for the defendants' legal expenses – the same defendants accused of fiduciary misconduct with respect to the ESOP – will come dollar for dollar out of the distributions that the ESOP participants will receive for their shares at the end of the liquidation, even if the defendants are ultimately found liable under ERISA. Such an outcome is plainly contrary to the protective purposes of ERISA which section 410 is designed to further, and to traditional trust law principles from which section 410 is drawn. Indeed, because the indemnification agreements purport to cover not only expenses such as legal fees, but also "damages" and "liabilities," "including . . . judgments . . . incurred in connection with actions, proceedings or suits of any kind or nature whatsoever," in the context of a 100% ESOP-owned company, the agreements would effectively make it impossible for the ESOP to recover the "losses to the plan" despite ERISA section 409's express authorization for such recovery. 29 U.S.C. § 1109. If these agreements were read to apply to the ERISA claims, every dollar paid to the ESOP pursuant to a money judgment would come out of the plan's equity in the company and the breaching fiduciaries found liable under that judgment would evade all liability. In that circumstance, a judgment in favor of the plaintiffs would be of no value to the plan and no consequence to the breaching defendants. Even if the plaintiffs won, the net result would merely be an order compelling the fiduciaries to pay money to the ESOP that the fiduciaries would take from the liquidation proceeds that serve as the ESOP's sole funding source. Thus, the judgment would have no more economic substance than an order requiring the plan to pay itself for its own losses, and the plan's fiduciaries would be wholly excused from their statutory obligation to make the plan whole for the losses caused by their misconduct.[1]

ERISA forbids fiduciaries from evading their duties and liabilities in this manner. Thus, ERISA section 410(a) provides that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a). Moreover, while

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[1] Section 410 of ERISA only invalidates provisions or agreements that purport to relieve fiduciaries from responsibility or liability under ERISA. Accordingly, the Secretary limits her argument in this brief to the validity of the indemnification provisions with respect to the plaintiffs' ERISA claims, as opposed to the other claims asserted by the plaintiffs under state laws. Similarly, the Secretary takes no position on whether, by their terms, the indemnification agreements even purport to require indemnification of fees in an ERISA suit, or indeed, whether they are valid at all or have been superseded by a later agreement, as is alleged to be the case.

Section 410 describes a set of exceptions to the Act's broad prohibition on exculpatory provisions, none are applicable here. Section 410(b) explains that:

> (b) Nothing in this subpart shall preclude –
>
> (1) a plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of the breach of a fiduciary obligation by such fiduciary;
>
> (2) a fiduciary from purchasing insurance to cover liability under this part from or for his own account;
>
> (3) an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.

Thus, although some forms of indemnification through the purchase of insurance plainly are allowed under this provision, the Ninth Circuit has recognized that contracts or agreements that exonerate ERISA fiduciaries from ERISA responsibilities are "void as a matter of law" under section 410, IT Corp. v. General Am. Life Ins. Co., 107 F.3d 1415, 1418 (9th Cir. 1997). "In rendering void as against public policy certain exculpatory agreements, ERISA § 410 seeks to avoid provisions which circumvent express statutory requirements to the detriment of Plan participants." Wells Fargo Bank v. Bourns, Inc., 860 F. Supp. 709, 716 (N.D. Cal. 1994).

Shortly after ERISA was enacted, the Department of Labor issued Interpretive Bulletin 75-4, 29 C.F.R. § 2509.75-4, to specifically address indemnification agreements under ERISA. There, the Department interpreted section 410 "to permit indemnification agreements which do not relieve a fiduciary of responsibility or liability" under ERISA. Id. The Department reasoned that such provisions "which leave the fiduciary fully responsible and liable, but merely permit another party to satisfy any liability incurred by the fiduciary in the same manner as insurance purchase under section 410(b)(3), are therefore not void under section 410(a)." Id. However, where "indemnification of a fiduciary of an employee benefit plan [is made] by the plan" the

Department concluded that "[s]uch an arrangement would have the same result as an exculpatory clause [and], in effect, relieve the fiduciary of responsibility and liability to the plan by abrogating the plan's right to recovery from the fiduciary for breaches of fiduciary obligations." Id.; see also Dardaganis v. Grace Capital, Inc., 889 F.2d 1237, 1243 (2d Cir. 1989) (discussing interpretive bulletin); Donovan v. Cunningham, 541 F. Supp. 276, 289 (S.D. Tex. 1982) (ERISA will not allow indemnification of an ESOP plan fiduciary by the plan itself, but does not preclude another party from satisfying a liability incurred by a fiduciary in the same manner as insurance under section 410(b)(3)), affirmed in part, vacated in part, reversed in part, on other grounds, 716 F.2d 1455 (5th Cir. 1983).

There is no real question that payment of defense fees here does not come within the literal terms of that part of section 410(b) permitting the purchase of non-recourse insurance because the arrangements here do not involve the purchase of the insurance by the plan or any other party. However, because the Department's longstanding interpretive bulletin allows other forms of indemnification that are akin to the purchase of insurance expressly permitted by the statute, the question in this case requires the court to decide whether the payment of defense fees from the accounts "merely permits[s] another party [other than the plan] to satisfy any liability incurred by the fiduciary in the same manner as insurance purchased under section 410(b)(3)." 29 C.F.R. § 2509.75-4. The reality of the situation in this case is that, if these agreements are given effect, it will be the plan rather than any other party that will "satisfy any liability incurred by the fiduciar[ies]." Although the underlying assets of an ESOP-owned company are not generally plan assets, the payment of the fiduciaries' fees to defend ERISA claims from the accounts would directly reduce the amount available to the plan and reduce the benefits available for distribution to participants and beneficiaries.[2]

In fact, the Department has previously expressed objections to agreements purporting to indemnify ESOP fiduciaries out of the assets of an ESOP-owned company for liabilities they incurred as a result of ERISA fiduciary breaches. See DOL Letter, Re: Raymond International, Inc., Sept. 12, 1983 ("assuming the ESOP acquires the contemplated ownership interest in Holdings, it is our preliminary view that any agreement purporting to indemnify the ESOP fiduciaries out of the assets of Holdings or Raymond for liabilities that may incur as a result of breaches of their fiduciary duties under ERISA would be void under section 410 of ERISA, 29 U.S.C. § 1110") (Attached hereto as Exhibit 3).

Moreover, the majority of district courts to have considered the issue have also concluded that ERISA section 410 should be interpreted in this fashion. For instance, the court in Delta Star, Inc. v. Patton, 76 F. Supp. 2d 617, 640-641 (W.D. Pa. 1999), held that an indemnification between ESOP plan fiduciaries and the company, which, as here, was 100% owned by the ESOP, was "prohibited by law" under section 410. The district court in Cunningham reached the same conclusion in a case in which the company was not completely owned by the ESOP and the ESOP would thus only indirectly bear the financial costs. There, the district court held that

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[2] Although the Department has concluded under its plan asset regulation that, generally, where a plan "owns all of the outstanding equity interest [] in an entity, its assets include those equity interests and all of the underlying assets of the entity," the regulation exempts the assets of an entity where, as here, an ESOP or other eligible individual account plan owns all of the outstanding equity interests in the form of "qualifying employer securities" (employer stock), and where "substantially all of the participants in the plan(s) are, or have been, employed by the issuer of such securities." 29 C.F.R. § 2510.3-101(h)(3). Consequently, we do not argue in this brief that the amount in the accounts constitutes ESOP assets, or that the defendants here engaged in prohibited transactions under ERISA section 406(b), 29 U.S.C. § 1106(b), which forbids a fiduciary from dealing "with the assets of the plan in his own interest or for his own account."

where an ESOP owned a substantial portion of the sponsoring company's stock, it would be inconsistent with the intentions of ERISA to allow a trustee who has breached his fiduciary duties to the ESOP to be indemnified by the sponsoring company, because the ESOP would indirectly bear the financial burden. 541 F. Supp. at 289. Noting that allowing such payments would be more than "a mere shifting of liability incurred by a fiduciary in the same manner as insurance," the court concluded that section 410 was designed "to protect the ESOP from suffering any expense of this suit," a goal that "cannot be met by requiring [the company] to indemnify any party to this suit." Id. See also Leigh v. Engle, 619 F. Supp 154, 159 (D.C. Ill 1985) (citing, with approval, the Department of Labor's position that "indemnification for legal expenses, after a finding of breach of fiduciary duty, is not allowed and any advances made would have to be returned"), aff'd, 858 F.2d 361 (7th Cir. 1988); Bourns, 860 F. Supp. at 716 (in upholding an indemnification agreement that required the plan sponsor, and not the plan or the beneficiaries, to reimburse the fiduciary for certain expenses, the court relied on its conclusion that "there is no possibility that the beneficiaries themselves would suffer as a result of enforcement of the Agreement").

These decisions support a conclusion that the indemnification agreements in this case are invalid under section 410 because they do not merely permit a party other than the plan to satisfy a liability incurred by the fiduciary in the same manner as insurance purchased under section 410(b)(3). Requiring that the fiduciaries' defense fees be paid out of the accounts that will otherwise be used entirely to pay benefits under the plan would directly harm the plan at the participants' expense. The ESOP and its participants would pick up the tab even if the court found that the defendants had engaged in misconduct, and the plan fiduciaries would be impermissibly excused from "liability for any responsibility, obligation, or duty under" ERISA.

ERISA section 410, 29 U.S.C. § 1110. Every dollar paid to indemnify the defendants would be one less dollar that would go to the ESOP participants upon liquidation, without recourse to the defendants and without regard to their culpability. The direct harm that indemnification would cause to ESOP participants under these circumstances makes such indemnification void as against public policy under ERISA section 410. ERISA's goal of "providing for appropriate remedies, sanctions and ready access to the Federal courts" to remedy fiduciary breaches, 29 U.S.C. § 1001(b), would be thwarted if breaching fiduciaries who control an ESOP-owned company could legitimately enter into or benefit from such arrangements.

These payments do not come within the exception of section 410(b)(1), which allows a plan to purchase "insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, <u>if such insurance permits recourse by the insurer against the fiduciary in the case of the breach of a fiduciary obligation by such fiduciary</u>." 29 U.S.C. § 1110(b)(1) (emphasis added). As we have said, the indemnification agreements at issue here do not involve the purchase of insurance at all and so do not come within the literal terms of that provision. Nor are they analogous to an insurance policy with a recourse provision because the agreements at issue here do not provide for recovery of the fees from the fiduciary defendants in the case of fiduciary breach. The agreements specify that the defendants will be indemnified unless they engage in deliberate wrongful acts, intentional misconduct, and/or gross negligence. But a fiduciary's actions with respect to a plan need not rise to this level to constitute a fiduciary breach. A fiduciary breaches his duties under ERISA where he fails to act with "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." <u>See</u> 29 U.S.C. § 1104(a). Fiduciaries need not engage in intentional misconduct or gross negligence to be found guilty of an ERISA violation. Therefore, by their terms, the agreements purport to indemnify the defendants even where their actions violate ERISA. The agreements would effectively require the ESOP and its participants to pay breaching fiduciaries for the expense of defending and satisfying their liability under ERISA, thereby absolving the fiduciaries of full responsibility for their misconduct. Because the agreements would impermissibly exonerate the defendants from their ERISA responsibilities in this manner, they are void as a matter of law. See, e.g., IT Corp., 107 F.3d at 1418.

Thus, the indemnification agreements' further failure to ensure a means of recovering advanced fees prevents them from taking advantage of the exception at ERISA section 410(b)(1). This is true even though, in 2007, the defendants each signed undertakings in which they agree to pay back the fees if it is ultimately determined that such indemnification is not authorized by section 145 of the General Corporation Law of the State of Delaware, which allows a corporation to indemnify its officers and directors for lawsuits so long as the officers and directors were found to have acted reasonably and in good faith under state corporate law. These undertakings do not purport to provide for the recovery of fees if the defendants are found to have violated ERISA, but only if they are prohibited under state corporate law, which imposes different and indeed lower standards upon corporate officers than those imposed upon plan fiduciaries by ERISA.

For this reason, the undertakings executed by the defendants differ from the undertakings which were found permissible in DOL Opinion Letter 77-66/67A (cited by the defendants in opposition to the plaintiffs' motion). The indemnification agreements discussed in the Opinion Letter provided that "the Fund shall not be liable in any such case to the extent that in the final judgment of a court of competent jurisdiction such person is found to have breached this

Agreement or breached any duties or responsibilities undertaken pursuant to this Agreement," unlike the undertakings in this case that do not by their terms require that fees be reimbursed if the defendants are found to have violated ERISA. Furthermore, the agreements at issue in the Opinion Letter permitted advancement of legal defenses only "upon receipt of an undertaking by such person to repay such amount plus reasonable interest in the event that in the final judgment of a court of competent jurisdiction such person is found to have breached this Agreement or any duties or responsibilities undertaken pursuant to this Agreement, and proof satisfactory to the Trustees that such person is financially capable of repaying such amount in the event it is found liable for the amount alleged as damages in the action." Here, there is no proof or requirement that the defendants prove that they are financially capable of repaying the funds.

The remaining cases cited by the defendants in opposition to the plaintiffs' motion are similarly distinguishable. Defendants cite just one case, an unpublished decision from the Northern District of Illinois, which discussed payment of fiduciary defense fees by an ESOP-owned company pursuant to an indemnification agreement. Pudela v. Swanson, 1995 WL 77137 (N.D. Ill. 1995). In Pudela, the company's bylaws provided for indemnification of corporate officers upon termination of a successful defense, and advancement of expenses while a lawsuit is still pending upon receipt of an undertaking. 1995 WL 77137, at *3. The parties cross-moved for summary judgment – the plaintiffs arguing that the company's indemnification bylaw was an invalid exculpatory provision under section 410 because the plan was an ESOP, and the defendants arguing that the bylaw was "per se valid." Id. at *5. The court refused to grant summary judgment to either side because it found that the company's bylaw could be interpreted as leaving plan fiduciaries fully responsible and liable for any fiduciary breach. Id. Thus, the fact that the court declined to treat ESOPs differently than other plans for purposes of section

410 in the context of an indemnification agreement that could be read to allow recourse is of little use to the defendants here. 1995 WL 77137 at *17 n.4.

In its unpublished opinion in Martinez v. Barasch, the Southern District of New York held that indemnification clauses in the plan's service agreements that expressly provided that indemnification was only allowed to the extent permitted by ERISA did not, by it terms, run afoul of ERISA section 410, and because the case settled before the plaintiffs established any fiduciary liability on the part of the service providers, the indemnification agreements were enforceable. 2006 WL 435727 (S.D.N.Y. 2006). While we do not necessarily agree with the court's reasoning with regard to settlements, the holding has no applicability here, in a case that has not settled, with regard to broadly worded indemnification agreements that do not purport to be consistent with ERISA, and that, on their face, would illegally permit the indemnification of expenses and judgment amounts even after the fiduciaries were found to have violated their duties under ERISA. Finally, Pfaler v. Nat'l Latex Prod. Co., 517 F.3d 816, 837 (6th Cir. 2007), held that ERISA section 410 did not invalidate an agreement by an employer that sponsored a welfare plan to indemnify its business consultants in an ERISA action for fiduciary breach. It provides no support for the proposition that indemnification agreements in which an ESOP would effectively be the indemnifying party are consistent with ERISA section 410 when, if enforced, they would exculpate breaching fiduciaries and harm plan participants and beneficiaries by directly reducing the value of plan assets and diminishing benefit payments on a dollar for dollar basis.

2. For these reasons, the court should enjoin the current arbitration proceedings on the questions whether the indemnification agreements are valid and whether the defendants are entitled to advancement of their legal defenses related to the ERISA claims. These arbitration

proceedings, in which neither the participants nor the independent fiduciary/special trustee have been allowed to participate, may nevertheless, if allowed to proceed, moot the ability of the participants and the trustee to establish that the indemnification agreements violate section 410 of ERISA. In effect, the participants and beneficiaries – whose distributions will be significantly reduced if the arbitrator concludes that the defendants' legal costs must be paid out of the remaining accounts of the liquidated company – have no voice in the proceeding, yet may be purportedly bound by its outcome. "It goes without saying that a contract cannot bind a nonparty." E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 294 (2002) (determining validity of arbitration agreement under the Federal Arbitration Act). In California, "the strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement." Buckner v. Tamarin, 98 Cal. App. 4th 140 (2002). Thus, the arbitration proceedings certainly should not stand as an obstacle to the ERISA action.

Moreover, there is a strong basis in state law for staying the arbitration in this case based on the indemnification agreements themselves. Although the Federal Arbitration Act (FAA) generally prohibits courts from staying arbitration agreements, the California Code of Civil Procedure expressly permits the court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where "there is a possibility of conflicting rulings on a common issue of law or fact." Cal. Civ. Proc. Code Ann. § 1281.2(c). The Supreme Court has held that the application of this provision of California law is not pre-empted by the Federal Arbitration Act where the parties have agreed that their arbitration agreement will be governed by the law of California. Volt Info. Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ., 489 U.S. 468 (1989). In Volt, a University brought action against a contractor for fraud and breach of contract, and sought indemnity from two companies involved in design and management of the project. The contractor filed a petition to compel arbitration and stay prosecution of the suit, and the university filed a motion to stay the arbitration, which the Superior Court granted and the Court of Appeals affirmed. The U.S. Supreme Court agreed, reasoning that "[b]y incorporating the California rules of arbitration into their agreement, the parties . . . agreed that arbitration would not proceed in situations which fell within the scope of Calif. Code Civ. Proc. Ann. § 1281.2(c)." 489 U.S. at 475. The Court acknowledged that the "contract fell within the coverage of the FAA, since it involves interstate commerce, and that the FAA contains no provision authorizing a stay of arbitration in this situation." Id. at 476. However, the court concluded that the FAA does not prevent application of the California Code provision to stay arbitration where the parties have agreed to arbitrate in accordance with California law. Id. at 477. "Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." Id. at 479.

The indemnification agreements at issue here specify that "the validity, construction, and operation of this Agreement shall be governed by the laws of the State of California to the extent not preempted by federal law." Accordingly, in determining the validity of the agreements, the parties have agreed to abide by state rules of arbitration, including section 1281.2(c). It is clearly well within the court's authority to enjoin the arbitration from proceeding pending the outcome of this litigation. As explained above, resolution of the questions whether the indemnification agreements are valid and whether the company should pay the defendants' litigation expenses will have a direct impact on this case and the ability of the ESOP plan participants and beneficiaries to recover benefits under the plan. The court should not permit the arbitration to proceed because the potential outcome will have a dramatic impact on the legal rights of third parties who have no voice in the arbitration proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 24, 2008,

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF MOTION FOR PRELIMINIARY INJNCTION, APPENDIX, AND EXHIBITS 1-3 THERETO, and

THE SECRETARY OF LABOR'S MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND REQUEST TO BE HEARD

were filed electronically. Notice of this filing will be sent to all parties listed below through the Court's system.

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