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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

MARK DELL DONNE, individually, as a participant in THE JOURNEY ELECTRICAL TECHNOLOGIES, INC. 401K PLAN, and as trustee of THE JOURNEY ELECTRICAL TECHNOLOGIES, INC. 401K PLAN; THE JOURNEY ELECTRICAL TECHNOLOGIES, INC. 401K PLAN; and THE JOURNEY ELECTRICAL TECHNOLOGIES, INC., a California corporation, Plaintiffs, v. HERBERT W. HARDT, an individual; L. DAVID BRANDON, an individual; LISA PLANK, an individual; and DOES 1-200, Defendants.	Civil Action No. 1:10-cv-2341 AWI JLT **SECRETARY OF LABOR'S AMICUS CURIAE BRIEF IN RESPONSE TO COURT ORDER** Honorable Judge Anthony Ishii

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STATEMENT OF THE ISSUES

1. Whether the Secretary is a required party who can be joined in Plaintiffs' action under Fed.R.Civ. P. 19(a), and, if she cannot be joined, whether equity and good conscience allow for Plaintiffs' suit to proceed in her absence.

2. Whether Plaintiffs' action on behalf of their plan alleging a fiduciary breach and seeking recovery of losses stemming from such breach contravenes the Ninth Circuit's bar against an action for contribution seeking to reduce the plaintiff-fiduciary's own liability as a breaching fiduciary.

STATEMENT OF INTEREST

On May 23, 2011, this Court issued an order inviting the Secretary of Labor ("Secretary") to file a brief addressing two issues that were of concern to the Court: (1) whether a finding that defendants are not liable to the Plaintiff Plan would bind the Department of Labor, and, if it would not, whether the Secretary is a required party in the plaintiff's action, and (2) whether allowing the suit to move forward with ERISA claims would, in any conceivable way, constitute contribution in contravention of Kim v. Fujikawa, 871 F.2d 1427, 1432 (9th Cir. 1989). The Secretary files this brief in response to the Court's order.

STATEMENT OF THE CASE

This case involves, among other allegations, claims of fiduciary breaches concerning the Journey Electrical Technologies, Inc. ("JET") 401(k) Plan ("Plan"). JET was a subsidiary of Hardel Enterprises, Inc., which was formed in November 2002 by Mark Dell Donne ("Dell Donne") and Timothy Hardt. Doc. 1 at 3:10-16.

JET's primary business activities were providing electrical and network services, as a subcontractor, on large construction projects, both privately financed construction projects, as

well as public or prevailing wage contracts. Doc. 1 at 3:20-22. Dell Donne was an officer of JET and responsible for JET sales and business contracts until March 2006, when he sold his Hardel shares to Timothy Hardt and left the company. Doc. 1 at 3:28; 4:1-4. Timothy Hardt was an officer of JET and responsible for JET operations between 2002 and June 2007, when he left the company due to health reasons. Doc. 1 at 3:23-27; 7:9-13. Dell Donne returned to JET in June 2007 to serve as the director of the corporation and the chairman of the Board. Doc. 1 at 7:14-16.

The JET Plan was funded by employee contributions and discretionary employer-matching contributions, as well as prevailing wage contributions for those employees that performed under public works contracts. Doc. 1 at 4:8-10. Dell Donne and Timothy Hardt agreed to act as trustees for the Plan. Doc. 1 at 4:7-8. Brandon, the Chief Financial Officer of JET, had responsibilities for administering the Plan. Doc. 1 at 4:11-12.

On August 3, 2010, Dell Donne filed his complaint in the United States District Court for the Central District of California. Doc. 1 at 1:7-8. Dell Donne brought the suit "individually, as a participant in the [JET Plan] and as a trustee of the [JET Plan] and [JET]." Doc. 1 at 1:9-13. Defendants in the suit are Brandon, Herbert W. Hardt (father of Timothy Hardt), and Lisa Plank (collectively, “Private Defendants”).[1] As relevant to the questions posed by the Court, the complaint alleges that Defendant Brandon was a fiduciary who breached his duties to the JET Plan under 29 U.S.C. § 1109 by diverting and embezzling funds belonging to the Plan and by failing to make employee contributions and prevailing wage contributions to the Plan. Doc. 1 at 8:18-26. The complaint further alleges that Brandon's breaches resulted in damages of

[1] Plank has since been voluntarily dismissed from the lawsuit. Doc. 30. JET and the JET Plan are also named plaintiffs. Doc. 1 at 1:11-13. This brief will refer to the plaintiffs as "Dell Donne" or "Plaintiffs."

$1,109,567.00 owed to "the Plan, the Plan participants and beneficiaries." Doc. 1 at 9:1-6. The ERISA claim against Herbert Hardt alleges that he had actual knowledge that his son, Timothy Hardt, and Brandon were breaching their fiduciary duties by diverting JET Funds belonging to the Plan, and that he aided and abetted Brandon and Timothy Hardt in their breach of fiduciary duties. Doc. 1 at 9:8-28.[2] Plaintiffs also sued the Private Defendants for RICO violations, corporate breaches of fiduciary duty, and conspiracy. Doc. 1 at 10-12.

On October 6, 2010, the Secretary of Labor ("Secretary") separately filed suit against Dell Donne and Timothy Hardt for violations of ERISA.[3] See Solis v. Timothy Hardt et al., 1:10-cv-02283 (Doc. 1 at 1:11-19). The Secretary alleges that Dell Donne and Timothy Hardt ("the Secretary's Defendants") breached their fiduciary duties by failing to remit employee contributions, prevailing wage contributions, and participant loan payments to the JET Plan. Doc. 1 at 7:19-23. The Secretary's complaint alleges losses of $18,784.44 in employee contributions and loan payments, $78,186.92 in lost earnings on delinquent contributions and loan payments, $692,672.42 in prevailing wage contributions not forwarded to the plan, and $319,923.31 in lost earnings on unremitted prevailing wage contributions. Doc. 1 at 7:24-28; 8:1. The Secretary asked for an order requiring the Secretary's Defendants to restore these losses to the Plan and barring them from serving as fiduciaries or service providers in the future. See Solis v. Timothy Hardt et al., 1:10-cv-02283 (Doc. 1. at 8:21-26; 9:1-5).

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[2] Plaintiffs, however, did not sue Timothy Hardt, despite alleging his participation as a fiduciary in fiduciary breaches.

[3] The Secretary originally filed suit in the United States District Court for the Central District of California, and the case has since been moved to the Eastern District of California, where it has been docketed in this Court.

The Private Defendants filed a motion to dismiss Plaintiffs' complaint on February 25, 2011. Doc. 31. Among other things, they argued that the suit should be dismissed because Plaintiffs failed to join the Secretary of Labor as a required party under Fed. R. Civ. P. 19. Doc. 31 at 2:13-15, 17-18. They also argued that Dell Donne and the other named plaintiffs lacked the requisite standing to prosecute the action. Doc. 31 at 2:15-16.

On May 23, 2011, this Court issued an order requesting Plaintiffs to submit additional briefing in order to show that standing exists for each Plaintiff. Doc. 42 at 3:2-3. The Court's order also invited the Secretary of Labor to address two issues: (1) whether a finding that Private Defendants are not liable to the Plan would bind the Department of Labor, and, if it would not, whether the Secretary is a required party in the private action; and (2) whether allowing the suit to move forward with ERISA claims would, in "any conceivable way," constitute contribution in contravention of Kim v. Fujikawa, 871 F.2d at 1432. Doc. 42 at 3:17-25.

SUMMARY OF THE ARGUMENT

I. The Court should allow the lawsuit to proceed among the existing parties because the Secretary is not a required party under Rule 19(a), the Secretary's involuntary joinder is prohibited by sovereign immunity, and continuing the lawsuit in the Secretary's absence does not prejudice the existing parties or the Secretary, who has chosen not to voluntarily join this lawsuit. The Secretary is not a required party under Rule 19(a) because her presence is not required for the Court to award complete relief among the existing parties. Moreover, even if the Secretary were a required party, her involuntary joinder in this private lawsuit is prohibited by sovereign immunity, which Congress has not waived in this matter. The inability to join the Secretary, however, should not prevent the lawsuit from continuing in her absence. Dismissal of the action would clearly prejudice Plaintiffs since they would be unable to bring suit in another

forum; no party, however, will be prejudiced if the Secretary is not joined as a party in this lawsuit.

Moreover, the prospect of a separate suit against the Private Defendants (who are different from the Secretary's Defendants in the suit separately brought by the Secretary) is presently remote. The Secretary does not intend to sue the Private Defendants based on the evidence the Secretary has obtained to date, which does not establish fiduciary liability.[4] The Court must assume, therefore, that Private Defendants in this case likely face the same potential liability, and no more, whether the Secretary is joined to the Plaintiffs' action or not, and that Private Defendants thus do not face a realistic possibility of inconsistent decisions. But even if there were such a possibility, this Court should follow other courts in placing the Secretary's ability to bring independent suits under ERISA to vindicate the Secretary's interests above concerns about the potential for inconsistent adjudications of the defendants' obligations. The Court's discretion to fashion and offset remedies, resulting in a single monetary recovery equal to the losses, is a more refined instrument for avoiding the excesses of multiple lawsuits than the blunt, and quite inappropriate one, of dismissing the first one during the pendency of the second one (or, more accurately here, in anticipation of a hypothetical second action that would be sheer speculation at this point).

Finally, the Secretary's interests are not prejudiced by her absence from this litigation, not only because the absence is of her own choosing, but because she is not barred by res judicata or collateral estoppel from bringing the same claims or addressing the same issues in another

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[4] The Secretary, however, reserves the right to change course if she discovers evidence suggesting that they are liable.

forum. In any event, potential prejudice to the Secretary would not be grounds either to mandate her joinder or dismiss this case to the prejudice of the Plaintiffs.

II. Dell Donne's fiduciary breach claim against Brandon is the only claim that possibly raises the Court's contribution question because Brandon is the only Private Defendant who is being sued in his capacity as an ERISA fiduciary. Insofar as it is brought under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), on behalf of the Plan and to recover losses for the Plan, this claim does not contravene the Ninth Circuit's decision in Kim v. Fujikawa barring a breaching fiduciary's right to contribution. Under section 502(a)(2), fiduciaries have standing to sue other fiduciaries on behalf of the plan, and there is no exclusion from that provision for fiduciaries, like plaintiff Dell Donne, who have potentially committed their own breaches. If successful in his claim against Brandon, Brandon will have to reimburse the Plan for its losses which could, in turn, reduce the amount Dell Donne might have to pay for the same losses if the Secretary proves that he breached his fiduciary duties. Such an outcome is entirely consistent with Kim since Kim was concerned only with making the plan whole and rejected the premise that ERISA contained any provision that might address how the responsibility for losses should be divided among breaching fiduciaries.

ARGUMENT

I. THE PLAINTIFFS' LAWSUIT SHOULD PROCEED DESPITE THE NONJOINDER OF THE SECRETARY

A. Secretary's joinder is not required

Under the Fed. R. Civ. P., a Rule 19(a) motion requires the court to make two separate determinations: (1) whether an absent party is required to be joined in the action to afford complete relief to the parties in the case; and (2) if the party is required to be joined, but cannot

be joined, whether an action may proceed "in equity and good conscience" without the absent party. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony v. City of Los Angeles, 637 F.3d 993, 1000 (9th Cir. 2011). Rule 19(a) states in full:

> Required Joinder of Parties
>
> (a) Persons Required to Be Joined if Feasible.
>
> (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

1. Rule 19(a)(1)(A)

Under Fed. R. Civ. P. 19(a)(1)(A), the Court must initially determine whether the Secretary's joinder is required for "complete relief among existing parties." With respect to the ERISA-related claim of failure to make contributions to the JET Plan, the relevant "existing parties" for purposes of the 19(a)(1)(A) analysis are plaintiff Dell Donne (acting in a representative capacity on behalf of the Plan) and defendant Brandon. Dell Donne alleges that Brandon breached his fiduciary duties when he failed to transmit contributions to the Plan and diverted funds belonging to the Plan for his own personal benefit. Doc. 1 at 8:23-26. The issue to be resolved by the Court is whether Brandon acted as a fiduciary who caused losses to the Plan and, if so, the amount of the loss. ERISA imposes joint and several liability on fiduciaries. See Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 1157 (9th Cir. 2000). If

found to be liable for the alleged failure to transmit contributions in his capacity as Plan fiduciary, the Court can hold Brandon solely responsible for the breach and consequent losses to the Plan. 29 U.S.C. § 1109. The Secretary's participation is therefore clearly not required for the Court to determine Brandon's liability and provide complete relief to the Plan.[5]

In addition, a private suit against a fiduciary for causing losses to a plan that proceeds without the Secretary also being a party in the case is expressly contemplated by ERISA section 502(a)(2), which authorizes a civil action to be brought "by the Secretary, or by a participant, beneficiary, or fiduciary for appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2) (emphases added); see 29 U.S.C. § 1109 (titled "liability for breach of fiduciary duty"). This civil remedy provision allows private parties and the Secretary to independently bring actions on behalf of ERISA-covered plans to recover losses and to obtain other equitable relief, but does not require the Secretary or the private parties to become involved in the other's litigation for purposes of awarding relief. "ERISA gives plan beneficiaries and the Secretary independent rights of action, does not require private plaintiffs to file charges with the Secretary before suing, and nowhere forecloses private actions after the Secretary files suit, or the Secretary's suit after a private action commences." Herman v. South Carolina National Bank, 140 F.3d 1413, 1427 (11th Cir. 1998). Finding that the Secretary's participation is necessary to provide complete relief among the existing parties would not only contradict the language of the statute, but would also defeat the purpose of private ERISA litigation, which is to allow injured parties to obtain remedies in court without requiring the Secretary's involvement. See id.; compare, e.g., Baughman v. Bradford Coal Co., 592 F.2d 215, 217 (3d Cir. 1979) (under Clean

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[5] Presumably, if joined as a party, the Secretary would be brought in as an involuntary plaintiff, since there is absolutely no basis to make her a defendant.

Air Act, no action by private citizen to enforce statute may be commenced if EPA administrator or state has commenced and is diligently prosecuting a civil action). Thus, neither the facts of the case nor the ERISA standing requirements mandate the Secretary's presence for purposes of the Court's award of relief on the fiduciary breach claim in the case.

2. Rule 19(a)(1)(B)(i)

The first part of the 19(a)(1)(B) analysis requires courts to consider whether the absent party's interests will be negatively affected by non-joinder. Fed. R. Civ. P. 19(a)(1)(B)(i). The Secretary's interests will not be negatively affected because she has an independent right to bring suit against private parties for violations of ERISA regardless of whether the same issues or claims have been decided in prior litigation. Indeed, if the Secretary, who has been well aware of this lawsuit from its inception, thought her interests were being adversely affected by her absence, she could have sought intervention under ERISA § 502(h), 29 U.S.C. § 1132(h) (emphasis added), which provides the Secretary with "the right in his discretion to intervene in any action," brought under ERISA section 502(a) (with the exception of actions to recover benefits under subsection (a)(1)(B)). The Secretary could have also sought to join the private litigation pursuant to Fed. R. Civ. P. 20(a) (permissive joinder) or 24(b)(2) (permissive intervention). The Secretary, however, as a matter of prosecutorial discretion, has not so moved. Moreover, the Secretary has not asserted any claims against Brandon or Herbert Hardt in her own lawsuit, so the determination of their liability in this case does not affect the prosecution of the Secretary's separate case against Dell Donne and Timothy Hardt. [6]

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[6] If the Court finds Brandon liable and orders him to restore losses to the Plan, assuming he is able to do so, the Secretary's interest in ensuring that the Plan is made whole with respect to transactions common to both lawsuits is vindicated (although she could still pursue Donne and Timothy Hardt for injunctive relief). If the Court does not find Brandon liable and dismisses the

The effect of private litigation on the Secretary's parallel litigation under ERISA has been adjudicated in related contexts. In South Carolina National Bank, the court considered whether the Secretary was in privity with private plaintiffs for purposes of applying res judicata or collateral estoppel to bar the Secretary from pursuing an independent suit against fiduciary defendants who had already settled with the private plaintiffs on similar claims.[7] 140 F.3d at 1424. The court found that res judicata and collateral estoppel did not apply to bar the Secretary's suit because "the Secretary was not a party to the [private] settlement and has national public interests separate and distinct from those of the . . . private litigants." Id.. Similarly, in Donovan v. Cunningham, the Fifth Circuit rejected defendants' contention that a private settlement agreement was res judicata of the Secretary's fiduciary breach lawsuit or that the Secretary was "precluded from relitigating certain issues resolved by the settlement." 716 F.2d 1455, 1462 (5th Cir. 1983) (distinguishing between private plaintiffs' interest "in recouping only their own economic losses" and the Secretary's interest in determining "the legality of specific conduct and [preventing] those who have engaged in illegal activity from causing loss to any future plan participant"). And in Secretary of Labor v. Fitzsimmons, the en banc Seventh

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fiduciary breach claim against him, the Secretary could continue to pursue her claims for losses and injunctions against Donne and Timothy Hardt. Either way, joinder of the Secretary in this lawsuit is not necessary to protect her interests, which she can protect in other forums.

[7] Res judicata generally applies where a party can show: (1) that there is an identity of the parties or their privies; (2) that the earlier action resulted in a final judgment on the merits, and (3) that there is an identity of the cause of action. See Chao v. A-One Medical Services, Inc., 346 F.3d 908, 921 (9th Cir. 2003). Collateral estoppel, on the other hand, generally operates to make a prior court's decision on a factual or legal issue "conclusive in a subsequent suit based on a different cause of action involving a prior party to the litigation." Montana v. United States, 440 U.S. 147, 153 (1973); see Pension Trust Fund For Operating Engineers v. Triple A Machine Shop, Inc., 942 F.2d 1457, 1462 (9th Cir. 1991) ("California applies collateral estoppel when: (1) the issue decided in the prior adjudication is identical to the issue presented in the second action; (2) there was a final judgment on the merits; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication.")

Circuit similarly concluded that res judicata did not bar the Secretary's fiduciary breach claim despite the resolution of the claim through a private settlement. 805 F.2d 682, 692, 694 (7th Cir.1986) (en banc) (noting that Congress enacted ERISA to address national concerns beyond the welfare of individual beneficiaries, and it was these national interests the Secretary would be prevented from addressing if she were barred by private litigation). See also U.S. v. Mendoza, 464 U.S. 154, 159 (1984) ("Government is not in a position identical to that of a private litigant"); Wilmington Shipping Company v. New England Life Insurance Company, 496 F.3d 326, 340 (4th Cir. 2007) (finding that while the Pension Benefit Guaranty Corporation might be bound by the results reached by private litigants in ERISA suits, the Secretary of Labor is not); Beck v. Levering, 947 F.2d 639, 642 (2d Cir. 1991); cf. Chao v. A-One Medical Services, Inc., 346 F.3d 908, 923 (9th Cir. 2003) (applying res judicata to bar Fair Labor Standards Act claim for individual overtime recoveries by Secretary on grounds that Secretary and plaintiffs were in privity because Secretary was not asserting broader interests); Bechtel Petroleum Inc. v. Webster, 636 F. Supp. 486 (N.D. Cal. 1984), aff'd and adopted, 796 F.2d 252, 253 (9th Cir. 1986) (no privity between Secretary who brought FLSA claim and individuals bringing state wage claims because Secretary was protecting broader public interest and employees had different remedies under state law).[8]

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[8] A-One recognized that, even under the FLSA, the Secretary may be considered in privity with an individual employee in some contexts and not in others. See 346 F.3d at 922-923 (distinguishing Bechtel Petroleum Inc., which held, 636 F. Supp. 486 at 500, the Secretary not to be in privity with individual employees because "while the Secretary's interests do in fact overlap to a significant degree with the interests of the employees, the overlap is not so great that the requisite closeness of interests can be established"). The A-One court reasoned that "[i]n this context, the Secretary seeks only to recoup [the individual's] economic loss, not to vindicate broader governmental interests by, for example, seeking an injunction." 346 F.3d at 923. In the ERISA context, however, the Secretary can only act under the "broader governmental interests" that A-One found to be the distinguishing characteristic of Bechtel.

Accordingly, the Secretary cannot be bound, under the doctrines of res judicata or collateral estoppel, by the outcome of separate proceedings brought by a different plaintiff against different parties than those named in the Secretary's own lawsuit (Dell Donne is the only common party to both cases, but he is not the one asserting a Rule 19 concern about potentially inconsistent decisions). Moreover, as noted in Mendoza, 464 U.S. at 158, allowing collateral estoppel to apply to the government when the parties involved in the two suits are different "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." Id. Mendoza held that estoppel does not apply to the government when there is no mutuality of parties, as is the case here. Id. at 164. Therefore, the Secretary's ability to protect her interests through separate litigation renders her joinder unnecessary as a Rule 19(a)(1)(B)(i) matter.

3. Rule 19(a)(1)(B)(ii)

The second part of the 19(a)(1)(B) analysis requires the Court to also assess whether, if the Secretary is not joined, the interests of existing parties will be prejudiced by "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Fed. R. Civ. P. 19(a)(1)(B)(ii). Theoretically, the Private Defendants could be exposed to multiple and

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Indeed, the proper analogy to the overtime claim at issue in A-One would be an ERISA claim for benefits under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). But the Secretary is not one of the parties with standing to bring such an action, and her right to intervene in private actions under section 502(h), id. § 1132(h), explicitly excludes intervention in a section 502(a)(1)(B) suit. By contrast, as explained in South Carolina National Bank, Fitzsimmons, and Cunningham, the Secretary can pursue a section 502(a)(2) action on behalf of a plan in the public interest, independent of whether a participant, beneficiary, or fiduciary has brought or will bring a parallel action; and while recovering losses to the plan is typically the gravamen of all such actions, it is also commonly the case that the Secretary pursues broader injunctive relief than do the private plaintiffs. Thus, if any FLSA circuit precedent is applicable here, it is Bechtel and not A-One. In any event, in the case-specific context of this case, the Secretary is clearly not in privity with Dell Donne, the private plaintiff in this case but one of two defendants in the Secretary's case.

inconsistent obligations if the Secretary is not joined in this action and later brings suit against them. As noted earlier, however, it is very unlikely that these Defendants will face inconsistent obligations since the Secretary has already brought suit on these same facts and has not named Brandon or Herbert Hardt as defendants.

Moreover, the decision of whether or not to intervene in private litigation, whether to protect herself or an existing party, is committed to the Secretary's discretion. 29 U.S.C. § 1132(h) (committing Secretary's right to intervene to his discretion); see South Carolina National Bank, 140 F.3d at 1425 (finding that the Secretary's required involvement in the plaintiffs' litigation would "impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention."); Fitzsimmons, 805 F.2d at 694 ("Although Congress gave the Secretary of Labor the responsibility and authority to investigate and monitor employee benefit plans, it never mandated that the Secretary must intervene in each and every piece of litigation or forever be barred by the doctrine of res judicata"); see also EEOC v. KDM School Bus Co., 612 F. Supp. 369, 372 (S.D.N.Y. 1985) (rejecting defendants' "estoppel by failure to intervene" argument since it would "in effect, require the EEOC to intervene and become a party in every individual action or risk potentially preclusive factual determinations, placing an enormous burden upon a federal agency which has limited resources and is charged with the protection of the public interest").

Given how the litigation in this case has proceeded to this point, it is most unlikely that the Private Defendants will face multiple or conflicting obligations from a separate suit brought by the Secretary. Independently, however, the general common law principle limiting remedies against breaching fiduciaries and other tortfeasors to a single recovery equivalent to 100 percent

of the losses operates to restrict the amount or kind of recovery the Secretary can obtain if private plaintiffs have succeeded in obtaining monetary relief for a fiduciary breach through settlement or judgment. See Beck v. Levering, 947 F.2d 639, 642 (2d Cir. 1991); Call v. Sumitomo, 881 F.2d 626, 633 (9th Cir. 1989). This tool of judicial management is better suited to protecting the parties' interests in the parallel or successive lawsuit situation than Rule 19 dismissal. In any case, in light of the strong policy in favor of allowing the Secretary to pursue independent actions regardless of the existence or outcome of related private litigation, the Court should reject any suggestion that it throw out an actual case based on the mere possibility of a hypothetical future case.

B. Secretary's joinder is not feasible due to sovereign immunity

Even if the Secretary were a required party under Rule 19(a), she cannot be joined in this action because of the doctrine of sovereign immunity. See Paiute-Shoshone Indians, 637 F.3d at 998. Compelling the Secretary to join the private parties' lawsuit constitutes a suit against a sovereign entity because "the effect of the judgment would be 'to restrain the Secretary from acting or to compel it to act.'" Dugan v. Rank, 372 U.S. 609, 620 (1963) (quoting Larson v. Domestic & Foreign Corp., 337 U.S. 682, 704 (1949)). Unless it has expressly waived its immunity, the federal government cannot be sued. See F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); see also Dawavendewa v. Salt River Project Agr. Imp. and Power Dist., 276 F.3d 1150, 1159 (9th Cir. 2002).

The Secretary has not waived her right to sovereign immunity. 28 U.S.C. § 1346(b) (Federal Torts Claims Act) grants the federal district courts jurisdiction over a limited category

of claims for which the United States has waived its sovereign immunity and "render[ed]" itself liable. Richards v. United States, 369 U.S. 1, 6 (1962). This includes claims that are:

> [1] against the United States, [2] for money damages, ... [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Secretary [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

This case, including the request to join the Secretary under consideration here, does not involve any of these kinds of claims. Nor does ERISA provide for a waiver of sovereign immunity under the circumstances of this case. ERISA section 502(k) provides for suit against the Secretary, but only for a narrow range of actions, including "to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this title." 29 U.S.C. § 1132(k). There is no provision in ERISA that would require the Secretary's involvement in the private litigation; indeed, as noted, she has discretion under section 502(h) not to involve herself in this litigation. Accordingly, Congress has not waived the Secretary's sovereign immunity and she cannot be joined to Plaintiffs' suit.

C. This case can proceed in equity and good conscience without the Secretary

Where, as here, suit against the Secretary is barred by sovereign immunity, making joinder not feasible, the question of whether the action should proceed turns on the factors outlined in Rule 19(b). Rule 19(b) provides:

> When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
>
> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

The Supreme Court has interpreted Rule 19(b) as requiring courts to consider at least four interests: (1) the plaintiff's interest in having a forum; (2) the defendant's interest in not proceeding without the required party; (3) the interest of the non-party to "the extent to which the judgment may as a practical matter impair or impede [its] ability to protect [its] interest in the matter"; and (4) the interests of the courts and the public in "complete, consistent, and efficient settlement of controversies." See Paiute-Shoshone Indians, 637 F.3d at 1000, quoting Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-11 (1968). In making a Rule 19(b) inquiry, a court "must examine, to some extent, the claims presented and the interests

likely to be asserted both by the joined parties and the absent entities or persons." Republic of Philippines v. Pimentel, 553 U.S. 851, 868 (2008). Application of the rule is fact-specific, and the primary consideration in applying the rule is whether "in equity and good conscience, the action should proceed or should be dismissed." Id. at 862-63.

Examining the first Supreme Court factor, Plaintiffs' interest in having a forum, the fact that Plaintiffs would have no other forum in which to bring their claims if this suit were dismissed weighs heavily in favor of allowing the suit to proceed. The issue of the Secretary's joinder would arise in every forum in which the Plaintiffs attempted to bring the case (assuming there is another such forum with the requisite jurisdiction and venue), as would the potential for dismissal of the suit based on the Secretary's non-joinder. See General Refractories Co. v. First State Ins. Co., 500 F.3d 306, 321 (3d Cir.2007) (finding that plaintiff's inability to sue effectively in another forum where better joinder would be possible "counsels strongly against dismissal").

The second, third and fourth Supreme Court factors also militate in favor of continuation of the suit. The second factor is the defendant's interest in not proceeding without the Secretary. The third factor is the degree to which continuing the litigation will prejudice the Secretary. The fourth factor is the court's and public's interest in efficiency. As explained supra, the Secretary does not intend to sue the Private Defendants based on the evidence the Secretary has obtained to date, with the caveat that discovery could conceivably yield evidence that could compel the Secretary to change course. Accordingly, their interest in this suit should not be affected by whether the Secretary is joined as a party. Additionally, the Secretary's ability to bring a separate action regardless of the outcome of the private parties' litigation means that her interests are not prejudiced by her exclusion from the litigation. Finally, courts have correctly held that the Secretary's interests are not the same as private plaintiffs and that the Secretary's ability to

bring an independent lawsuit is necessary to vindicate broader public interests. See generally Mendoza, 464 U.S. at 162-63 ("The conduct of governmental litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the government."). Accordingly, equity and good conscience dictate letting the case proceed, while dismissing the case on Rule 19 grounds would not serve those preeminent judicial goals.

II. PLAINTIFFS' CLAIMS ARE NOT FOR CONTRIBUTION IF THEY ARE MADE ON BEHALF OF THE PLAN FOR RELIEF TO THE PLAN

In Kim v. Fujikawa, 871 F.2d at 1432, the Ninth Circuit held that a breaching fiduciary who was found liable for the full amount of the plan's losses could not seek contribution from his co-fiduciaries. Cf. Black's Law Dictionary, p.328 (6th ed. 1990) ("Under principle of contribution, a tort-feasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff.") (citing Dawson v. Contractors Transport Corp., 467 F.2d 727, 729 (D.C. Cir. 1972).[9] The Kim Court reasoned that ERISA only provides

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[9] Kim treated contribution and indemnification interchangeably when it stated that "[t]he substantive basis for Fujikawa' s third-party complaint is a personal claim for contribution or indemnity under ERISA." (emphasis added). Kim, 871 F.2d at 1434. See also Meoli v. American Medical Services of San Diego, 35 F. Supp. 2d 761, 764 (S.D. Cal 1999) (rejecting a right to indemnification under ERISA and noting that "there appears no reason to imply a right by a fiduciary to indemnification when there is no right to contribution"). The rationale underlying Kim that ERISA makes each fiduciary personally liable for the losses caused by their breach of fiduciary duty applies equally to contribution or indemnification. There is joint and several liability under ERISA which means that a single fiduciary can be held liable for the entire amount of the loss regardless of whether there are other breaching fiduciaries and the degree to which each fiduciary was responsible for the breach. See Stewart, 207 F.3d at 1157. The circuits are divided on the contribution question. The Eighth and Ninth Circuits have held that there is no right to contribution under ERISA. See Travelers Casualty and Surety Co. of

remedies for the benefit of the plan and its participants, and "cannot be read as providing for an equitable remedy of contribution in favor of a breaching fiduciary." Id. at 1432. The Court further noted that implying a right to contribution in favor of fiduciaries did not make sense "where there is no indication in the legislative history 'that Congress was concerned with softening the blow on wrongdoers.'" Id. at 1433 (quoting Texas Industries, Inc. v. Radcliff Materials, Inc., 451 US 630, 639 (1981)). Thus, the contribution question here turns on whether Dell Donne is seeking a personal recovery for some or all of his own indebtedness to the Plan in the event that he is found personally liable to the Plan, or whether, alternatively, he is seeking to recover a judgment payable to the Plan and measured by the amount of losses caused by other fiduciaries' alleged misconduct.

According to the complaint, Dell Donne brings suit against Defendants "individually, as a participant in the [JET Plan] and as a trustee of the [JET Plan] and [JET]." Doc. 1 at 1:9-14. He asserts that Defendant Brandon is a former JET plan administrator who breached his fiduciary duties under ERISA section 409, 29 U.S.C. § 1109, by diverting and embezzling JET funds belonging to the Plan and by failing to make employee contributions and prevailing wage contributions to the Plan. Doc. 1 at 8:23-26. Dell Donne further asserts that Plaintiffs "have sustained damages in excess of $1,109,567.00 in funds owed to the Plan, the Plan participants and beneficiaries." Doc. 1 at 9:4-6.

On its face, the complaint states a claim under section 502(a)(2) for a breach of fiduciary duty under section 409. ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), provides

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America v. IADA Services, Inc., 497 F.3d 862, 866 (8th Cir. 2007); Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995). The Second and Seventh Circuits have held that there is such a right. See Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 15 (2d Cir. 1991); Lumpkin. v. Envirodyne Indus. Inc., 933 F.2d 449, 464 (7th Cir. 1991).

that a civil action may be brought "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under [section 409]." Section 409, id. § 1109, provides, in relevant part: "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." Thus, section 409 requires that a section 502(a)(2) claim be brought for relief to the plan to restore losses to the plan. See Friend v. Sanwa Bank Cal., 35 F.3d 466, 469 (9th Cir. 1994) ("ERISA holds a trustee liable for a breach of fiduciary duty only to the extent that losses to the plan result from the breach."); Haddock v. Nationwide Financial Services, Inc., 570 F.Supp.2d 355, 365 (D.Conn.2008) ("Put simply, to survive a motion to dismiss, a plausible claim for breach of fiduciary duty must allege some type of actual harm or loss to the Plans.").

Properly understood as a section 502(a)(2) claim brought on behalf of the Plan and alleging that the Plan suffered "some type of actual harm or loss," Dell Donne's complaint is not an action for contribution. First, no judgment has been rendered against Dell Donne against which he could seek contribution from another liable fiduciary. Second, if Dell Donne is successful in recovering "damages in excess of $1,109,567.00 in funds owed to the Plan" (or any lesser amount determined by the Court to be the Plan's losses from Brandon's asserted breach), the Court can and should ensure that none of the recovered sums would go to Dell Donne personally, in contradiction of Kim. Rather, the Plan alone should receive any recovery.

To be sure, there is some ambiguity in the way Dell Donne has framed the complaint and litigated the case. In his complaint, for example, Dell Donne identifies Plaintiffs, rather than the Plan specifically, as sustaining damages. Doc. 1 at 9:4-6. ("Plaintiffs have sustained damages . . .") Additionally, Dell Donne's response to the Court's request for additional briefing

on the question of standing does not explicitly identify the Plan as the injured party or seek to ensure that the Private Defendants restore losses to the Plan. See Doc. 44 at 9:13-15; 18-20 (stating that "Plaintiffs seek not only return of funds owed to each of them personally but seek to ensure that all parties responsible for diverting funds from the Plan and from JET are held liable under ERISA" and that "Plaintiffs' position in regard to the Court's concern is that Plaintiffs are not seeking contribution, but rather an independent action to recover funds embezzled by Defendants and return [them] to JET, who in all likelihood will fund the Plan and reduce Defendants' liability."). Dell Donne further adds to this confusion by arguing that the Plan itself has standing to bring the lawsuit against Brandon and Herbert Hardt. Id. at 7:7-18. However, JET is not the proper recipient of losses to the Plan, and the Plan does not have standing itself because ERISA grants standing only to the Secretary, participants, beneficiaries, and fiduciaries. Steen v. John Hancock Mut. Life Ins. Co., 106 F.3d 904, 917 (9th Cir.1997) (ERISA plan).[10]

Nonetheless, even if it is determined that Dell Donne has brought the claim to recover losses in part for the benefit of the Plan, and in part to benefit the other Plaintiffs, i.e., him or JET individually, the claim states a cause of action under section 502(a)(2) to the extent of the losses to the Plan. District courts have the power to grant any relief to which a party may be entitled regardless of the party's request for relief, including re-characterizing or limiting it exclusively to plan-wide relief under section 502(a)(2). See, e.g., Smith v. Hundley, 190 F.3d 852 (8th Cir. 1999). Such relief is, by definition, not contribution for the benefit of the breaching fiduciary.

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[10] To the extent Dell Donne is seeking to return embezzled funds to JET, that claim lies outside ERISA since JET is the employer and plan sponsor; it is not the Plan on whose behalf ERISA authorizes a suit under section 502(a)(2). A cause of action brought on behalf of the company to recover losses allegedly suffered by the company might be cognizable under another statute or federal or state common law but could, as an ERISA matter, be dismissed for failure to state a claim.

Dell Donne has standing to seek such relief under section 502(a)(2) both in his capacity as a participant and a fiduciary. Indeed, even a breaching fiduciary can bring a claim against another breaching fiduciary to restore losses to the plan; what he cannot do under Kim is seek contribution from a breaching co-fiduciary to reduce his own liability. But allowing Dell Donne to reduce his potential liability through the Plan's recoupment of its losses is consistent with Kim, insofar as it ensures that the Plan will be made whole regardless of which breaching fiduciary is liable to restore losses to the Plan. See Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995) (dismissing claims by breaching fiduciaries against co-fiduciaries for contribution but allowing breaching fiduciary's claims under 502(a)(2) for restoration of losses to the Plan to go forward).

Moreover, a fiduciary breach claim on behalf of a plan to recover losses to the plan caused by the breach does not run afoul of the Kim bar on contribution claims if the Plan's recovery is allocated to the various participant accounts, including the account of a participant who may have contributed to the breach in his capacity as fiduciary. Thus, Donne's potential receipt of funds recovered by the Plan in his capacity as a Plan participant i.e., into his Plan account, does not implicate contribution since "the fact that damages awarded to the Plan may provide plaintiffs with an indirect benefit, the payment of their claims, does not convert their derivative suit into an action for individual relief." Pfahler v. National Latex Products Co., 517 F.3d 816, 826 (6th Cir. 2007); accord LaRue v. DeWolff, Boberg & Associates, Inc., 552 U.S. 248, 256 (2008).

Accordingly, assuming Brandon's alleged fiduciary breach can be proved, the Court should determine that Dell Donne can recover the resulting losses on behalf of the Plan, even if the recovery of those losses has the ultimate effect of decreasing the amount that Dell Donne

might have to pay to the Plan if he is later found in the Secretary's suit or a hypothetical future private suit to have also breached his fiduciary duties.[11] The Court should preclude, however, any individual recovery to Donne personally or to JET.

CONCLUSION

For the foregoing reasons, the Secretary asks the Court to find that the litigation (1) can proceed without joinder of the Secretary, and (2) is not a prohibited action for contribution.

Respectfully submitted,

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[11] As previously stated, the Plan cannot recover more than 100 percent of its losses if both the private plaintiffs and the Secretary are successful in their suits on behalf of the Plan. By the same token, in circumstances like those presented here, the Plan should not be made to risk recovering a lesser amount by the inappropriate dismissal of one suit before there has been a final judgment resulting in the full payment of all the Plan's losses.