Nos. 08-17369, 08-17373, 08-17375, 08-17631
(Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREGORY JOHNSON, et al.,
Plaintiffs – Appellees,

v.

CLAIR R. COUTURIER, JR., et al.,
Defendants – Appellants.

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING APPELLEES AND REQUESTING AFFIRMANCE

On Appeal from the United States District Court
for the Eastern District of California

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

This case raises an important issue concerning the scope of section 410 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1110, which voids any agreements or instruments that purport to relieve fiduciaries of their liabilities and responsibilities under ERISA. The Secretary of Labor has primary authority for enforcing and interpreting Title I of ERISA and, therefore, a direct interest in supporting the district court's decision to enjoin implementation of indemnification arrangements which it held were void under section 410. Moreover, on November 13, 2008, the Secretary brought her own suit against the appellants in this case, making additional and related allegations against them. Because this Court's ruling is likely to have a significant impact on the ability of the plan participants who are plaintiffs in this case to recover anything even if their ERISA suit is successful, and may likewise affect the Secretary's related suit with regard to the plan in this case, the Secretary has a strong interest in presenting her views on the proper resolution of the indemnification issue. She has authority to file this brief under Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUES

The Secretary's brief addresses the following two issues:

1. Whether the district court correctly held that section 410 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1110, forbids the enforcement of indemnification agreements that require a company that is wholly owned by its ESOP to pay the defense costs of the ESOP's fiduciaries in a case alleging fiduciary breaches under ERISA.

2. Whether the district court properly granted the plaintiffs' motion for a preliminary injunction freezing the assets of an ESOP-owned company and forbidding advancement of fees under the indemnification agreements.

STATEMENT OF THE CASE

A. Background

The plaintiffs in this case, participants in an ESOP which owns 100% of the stock of the sponsoring company (The Employee Ownership Holding Company or "TEOHC"), brought suit claiming that the defendants, all of whom were fiduciaries of the ESOP, violated their fiduciary duties under ERISA, as well as state law obligations imposed upon them as corporate officers and directors.[1] Since 2001, the ESOP has owned 100% of the

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[1] An ESOP is an individual account or defined contribution plan that, among other things, is "designed to invest primarily in qualifying employer securities." 29 U.S.C. § 1107(d)(6).

shares of the company. Plaintiffs allege (among other things) that between 2004 and 2007, defendants breached their ERISA fiduciary duties to the ESOP, as well as related state law obligations, by engaging in a series of transactions that were calculated to improperly divert TEOHC's assets (and most of the company's equity value) to defendant Clair Couturier (the company's president). The defendants allegedly permitted and actively participated in the diversion of at least 70% of the equity value of the company to Mr. Couturier, even though all three were plan fiduciaries, the ESOP's sole investment was TEOHC stock, and the ESOP was the 100% owner of TEOHC. Moreover, despite their fiduciary status, each of the defendants allegedly promoted his own personal financial interests by engaging in the transactions. Eddy, for example, signed off on the transfer of more than $34 million in cash notes and property to Couturier on the ESOP's behalf, at the same time that he was negotiating with Couturier to manage much of the transferred money for a fee. No fiduciary took appropriate action to protect the ESOP's interest as TEOHC's sole shareholder. Johanson Record Excerpt (Johanson R.E.) VI, Tab 3 at ¶¶ 34, 40, 121-155.[2]

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[2] Similarly, the Secretary's suit alleges, among other things, that ESOP trustee Eddy hired an appraiser who had a felony conviction for embezzling from a trust to approve the transfer of $34.4 million to Couturier (in the form

Plaintiffs filed an ERISA action in October of 2005 against Couturier, David Johanson and Robert Eddy in their capacities as ESOP fiduciaries, as well as in their related capacities as corporate fiduciaries. In defending themselves in the private litigation defendants have already exhausted the proceeds of a $5 million insurance policy and are now looking to the company to continue to pay for their defense, and ultimately, under the terms of the agreements, to pay for any liability that they are found to have so long as they are not found to have violated the less stringent duties of state law. Couturier Record Excerpt (Couturier R.E.) 10.

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,

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of cash, real estate valued at $5.5 million, and a $200,000 car), notwithstanding the appraiser's prior felony conviction, and lack of a college education or relevant training or qualifications; that plan fiduciaries, Johanson, Couturier, and Eddy all sought to profit financially from the transfers to Couturier; that the fiduciaries failed to obtain a reliable opinion on the value of Couturier's compensation package before transferring tens of millions of dollars to him based upon that package; and that the fiduciary defendants committed additional breaches in connection with a 2007 transaction. The Secretary's suit also challenges the approval by Eddy of the indemnification agreements at issue in this case as being unfair to the plan and thus in further violation of his fiduciary duties to the ESOP. See Secretary's Amended Complaint in Chao v. Couturier (E.D. Ca.) (No. 2:08-cv-02732-FCD-GGH) (Doc. 26 filed Dec. 22, 2008).

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. Johanson R.E. V, Tab 2 at 2. If it is not paid to the defendants pursuant to their indemnification claims, the ESOP, as the sole shareholder and remaining claimant, is entitled to these proceeds under the plan of liquidation. Appellees' Record Excerpt (Appellees' R.E.) 15.

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 continuing validity of which the parties dispute.[3] The agreements broadly provide that the company will pay for all expenses and liabilities, including court costs and judgments incurred in any lawsuits in relation to the defendants' roles as corporate Board members, so long as they "do not involve deliberate wrongful acts." In addition, the agreements specify that they will cover "reasonable attorney's fees." See Johanson R.E.

[3] There is evidence that some of the agreements, even if valid when executed, are no longer in effect because the defendants executed a mutual general release on August 22, 2005. See Appellees' R.E. 1-2 (Appendix 7).

V, Tab 2-B. The 2005 agreements also provide for mediation and arbitration in the event of any controversy or claim arising out of the agreement. Id. Although the plan documents that govern the ESOP provide that the members of the board of directors are plan fiduciaries in that they may appoint the trustees to the ESOP, Appellant R.E. 868-918, 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.

On June 28, 2007, however, each of the defendants executed undertakings "to repay to the Company any expenses paid by it on [the defendants'] behalf in advance of the final disposition of the . . . suits, if it shall ultimately be determined that [the defendants are] not entitled to be indemnified by the Company as authorized by Section 145 of the General Corporation Law of the State of Delaware." Johanson R.E. V, Tab 1-K.

Shortly after defendants Johanson and Eddy filed an arbitration action against TEOHC in April 2008 to determine whether the indemnification agreements are valid as a matter of state law and whether TEOHC must advance the defendants' litigation costs, 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. Johanson R.E. V, Tab 2 at 3-5;

Johanson R.E. V, Tab 2-A at 5. Neither Heald nor the plaintiffs nor the Secretary of Labor were parties to the arbitration proceedings.

B. Preliminary Injunction and Arbitration Award

On August 18, 2008, plaintiffs filed a motion for a temporary restraining order and a preliminary injunction in the district court asking the court, among other things, to preserve the remaining proceeds from the sale of the TEOHC assets and to enjoin the advancement of litigation expenses under the indemnification agreements. Johanson R.E. V, Tab 2.

On September 18, 2008, the arbitrator in the Johanson and Eddy proceeding issued an order requiring TEOHC to pay all outstanding invoices for legal fees and expenses incurred by these defendants within 30 days. Johanson R.E. IV, Tab 3-A.

The following day the district court granted the plaintiffs' request for a temporary restraining order enjoining the arbitration proceedings in order to maintain the status quo ante pending the court's consideration of the motion for preliminary injunction. Johanson R.E. I, Tab 4. On September 26, 2008, the district court granted the preliminary injunction. Couturier R.E. 1-18.

First, the court held that the plaintiffs had carried their burden of showing probable success on the merits of their ERISA claims. Among other things, according to the court, the apparent level of Couturier's

compensation, when compared to the overall value of the company, "would, if proven, be strong evidence by itself of either willful misconduct or at least a lack of prudence by the individual defendants in their capacities as plan fiduciaries." Couturier R.E. 6.

The court agreed with the plaintiffs and the Secretary that advancement of funds would violate ERISA section 410 by exculpating the plan fiduciaries from liability for their misconduct, and noted that the agreements did not provide for recourse by TEOHC against any of the defendants if they are found to have breached their ERISA fiduciary duties. The court also found that the plaintiffs had shown irreparable harm because the defendants faced a potential judgment of tens of millions of dollars and full repayment of the advanced fees seemed very unlikely. The court pointed out that Couturier's assertion that he could not pay his legal bills without advancement of funds was "difficult to square with his further assertion that his promise of repayment (should he lose this litigation) is sufficient to prevent irreparable harm to the plaintiffs." Couturier R.E. 5-8. In the alternative, the court concluded that the preliminary injunction was warranted because the plaintiffs had established that there were serious questions on the merits and the balance of hardship tipped sharply in their favor. Id.

On these bases, the court granted the motion for a preliminary injunction placing the remaining assets of TEOHC in escrow and prohibiting TEOHC from advancing legal expenses during the pendency of the case.[4] Following an appeal to this Court, both the district court and this Court denied the defendants' request for a stay of the district court proceedings or a stay of the order enjoining advancement of defense costs pending a decision by the Ninth Circuit on the preliminary injunction appeal.

SUMMARY OF THE ARGUMENT

ERISA section 410, which was designed, like the statute itself, to protect employee benefit plans and their participants and to ensure that the fiduciaries that manage such plans are held to the highest standards of conduct, voids any agreements that let such fiduciaries escape liability when they have failed to live up to those standards. Here, the defendants are accused of numerous serious breaches of fiduciary duties for participating in, and profiting from, an improper series of transactions that channeled most of

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[4] Furthermore, shortly after they obtained the preliminary injunction with regard to fees, the plaintiffs also moved for and obtained a second preliminary injunction, freezing certain disputed assets in Couturier's possession, and requiring Couturier to make an accounting of the assets he received from the company in the disputed transactions. This order, however, allows Couturier to pay for his living expenses and his attorney's fees with these disputed funds. Couturier R.E. 19-25. The Secretary's brief does not address the merits of this order.

the assets of the company, which is wholly owned by the pension plan at issue, into the pockets of the company president, leaving the pension plan with a only a tiny percentage of the value of the company. They now seek to have their defense fees advanced to them from the remaining liquidated assets of the now defunct company under indemnification agreements that purport to require the company to bear such costs, as well as to pay for any liability that they incur so long as they have not engaged in intentional or willful wrongdoing.

Section 410(a), by its plain terms, forbids enforcement of these agreements under the facts of this case because it is clear that enforcement would leave the plan, as owner of the company, without adequate remedy and would let the fiduciaries, even if they are adjudged to have breached their duties under ERISA, shift their liability back to the company and ultimately to the plan. Nor do these arrangements come within the terms of the three enumerated exceptions in the statute to the broad prohibition of section 410(a) or within the similar exceptions to section 410(a) that the Secretary of Labor has recognized as an interpretive matter. As several courts have correctly held, requiring the company to bear the burden of defending a lawsuit for fiduciary breach where the company is wholly owned by the plan is forbidden by section 410.

Because section 410 forbids enforcement of these indemnification agreements, the court was correct to grant a preliminary injunction forbidding payment under the agreements, and the court could have ended its analysis there without addressing the plaintiffs' likelihood of success on the merits. However, this does not mean, as defendants suggest, that the court's analysis in this regard was wrong. Here, the defendants are accused of directly failing in their fiduciary duties by, for example, approving deals for the ESOP that were severely disadvantageous to it. Moreover, ERISA fiduciaries have an obligation to affirmatively act to protect plan assets from dissipation, which, in the context of an ESOP that is the company's sole shareholder, may include a fiduciary obligation to bring a shareholder derivative action, rather than stand idly by while all the equity value is siphoned off for the benefit of corporate insiders to the detriment of the plan as the company's sole shareholder.

ARGUMENT

THE DISTRICT COURT PROPERLY ENJOINED THE ADVANCEMENT OF FEES TO THE DEFENDANTS-APPELLANTS UNDER THE INDEMNIFICATION AGREEMENTS BECAUSE ADVANCEMENT HERE WOULD VIOLATE ERISA SECTION 410

ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. Shaw v. Delta

Air Lines, Inc., 463 U.S. 85, 90 (1983). To this end, 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). Thus, ERISA section 410 invalidates any instruments or agreements that exculpate plan fiduciaries from liability for their misconduct, thereby seeking "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).

A. Enforcement of the indemnification agreements under the circumstances of this case would violate ERISA section 410, as the district court held

All three of the appellants in this lawsuit were fiduciaries of the ESOP both because they were ESOP trustees and because the governing plan documents gave the members of TEOHC's Board of Directors the power to appoint trustees to the ESOP. See Appellant R.E. 868-918; 29 C.F.R. § 2509.75-8, D-3, D-4 (Secretary's interpretive bulletin explaining that plan trustees are fiduciaries by nature of their position, and that company board members are fiduciaries if responsible for the selection and retention of plan fiduciaries). Moreover, all three are alleged to have committed various breaches of their duties as ERISA fiduciaries through participation in, and

profiting from, a series of transactions that greatly harmed the ESOP. Yet they seek to have their defense of this suit paid from the remaining assets of the now defunct ESOP-owned company. As the district court held, ERISA section 410 does not allow this, but rather "void[s]" the indemnification agreements in this case because they purport to relieve the defendants of their liability for numerous serious breaches of their fiduciary duties to the ESOP that the plaintiffs allege. Couturier R.E. 7. It would be wholly inconsistent with section 410's text and protective purposes to enforce indemnification provisions that would operate to require an injured plan and its participants to foot the bill for a fiduciary defendant's misconduct and for the defense of a case involving such misconduct. However, that is precisely the outcome that the defendants seek by asking the court to reverse the preliminary injunction and authorize their use of the liquidation proceeds for the defense and satisfaction of the plaintiffs' ERISA claims.

Here, because the company is entirely owned by the ESOP, and because the company's plan of liquidation provides for the payment of TEOHC's remaining funds to ESOP participants as company shareholders, any proceeds that are used to pay for the defendants' legal expenses – to defend in a suit in which they are accused of fiduciary misconduct with respect to the ESOP – will reduce, dollar for dollar, the distributions that the

ESOP participants will receive, even if the defendants are ultimately found liable under ERISA, as long as they are not adjudged grossly negligent or liable under state law, see, supra, at 5 (describing indemnification agreements and undertakings), a standard much lower than the exacting fiduciary standards imposed by ERISA. See Donovan v. Bierwirth, 680 F.2d 263, 272 n. 8 (2d Cir. 1982) ("The fiduciary obligations of the trustees to the participants and beneficiaries of [an ERISA] plan are those of trustees of an express trust-the highest known to the law.").[5]

Such an outcome is plainly contrary to the protective purposes of ERISA, which section 410 is designed to further. See IT Corp. v. General Am. Life Ins. Co., 107 F.3d 1415, 1418 (9th Cir. 1997) (recognizing "that contracts or agreements that exonerate ERISA fiduciaries from ERISA responsibilities are 'void as a matter of law' under section 410"); Wells Fargo Bank, 860 F. Supp. at 716 ("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.").

[5] Indeed, even if the agreements and undertakings had not limited reimbursement to egregious cases, the ESOP would be repaid only if the defendants had the financial wherewithal to repay the sums advanced, a prospect the district court rightly found to be highly unlikely.

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," Johanson R.E. V, Tab 2-B, the agreements would effectively make it impossible for the ESOP to recover fully 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 until the company's $15 million in remaining assets is exhausted, and the breaching fiduciaries found liable under that judgment would evade liability to that extent, so long as, at the end of the day, their conduct is found to have met the less stringent requirements of state law.

Thus, the judgment would amount to an order requiring the plan to pay itself for its own losses to the extent of the remaining, limited resources of the no longer operational company, and the plan's fiduciaries would be excused to the extent of those resources from their statutory obligations to make the plan whole for the losses caused by their misconduct. ERISA does not allow fiduciaries to evade their duties and liabilities at the expense of the

plan and its participants in this manner, and ERISA section 410 was designed to forbid such arrangements.

B. Enforcement of the indemnification agreements is not permissible under the statutory exceptions to section 410 or by the terms of Interpretive Bulletin 75-4

For these reasons – because the economic substance of enforcing these provisions would be that the very fiduciaries accused of breaching their duties to the ESOP would have their defense costs (and liability) paid out of the corporate accounts that would otherwise be paid to plan participants and beneficiaries – it is not surprising that none of Section 410's exceptions to ERISA's broad prohibition on exculpatory provisions is applicable here. Section 410(b) explains that:

> 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;
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> (2) a fiduciary from purchasing insurance to cover liability under this part from or for his own account; or
>
> (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.

29 U.S.C. § 1110(b). Thus, section 410 allows some forms of indemnification through the purchase of insurance in certain enumerated circumstances.

The payment of defense fees here does not come within the literal terms of section 410(b), however, because the arrangements here do not involve the purchase of the insurance by the plan or any other party. Thus, defendants cannot rely on these statutory provisions to justify advancement of fees under the indemnification agreements.

Nor is enforcement justified under the Secretary's longstanding interpretive bulletin, which allows other forms of indemnification that are akin to, and as protective of the plan, as the purchase of insurance expressly permitted by the statute. Interpretive Bulletin 75-4, 29 C.F.R. § 2509.75-4. In that bulletin, the Secretary interpreted section 410 "to permit indemnification agreements which do not relieve a fiduciary of responsibility or liability" under ERISA, reasoning that 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 purchased under section 410(b)(3), are therefore not void under section 410(a)." Id. According to the bulletin, one "example" of such a provision is the indemnification of a plan fiduciary by an employer.

The bulletin emphasized, however, that it was not intended to cover arrangements which "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," and the bulletin rejected, on that basis, arrangements where "indemnification of a fiduciary of an employee benefit plan [is made] by the plan." 29 C.F.R. § 2509.75-4. In the context of a company wholly owned by an ESOP, indemnification by the company of a fiduciary's legal expenses in defending a suit for fiduciary breach violates section 410 for the same reasons that indemnification by a plan violates 410 – it relieves the fiduciary of liability for the consequences of its wrongdoing and deprives the plan of its statutory right to recovery for its losses. Such arrangements therefore run afoul of the interpretation of section 410 set forth in the bulletin, and the Secretary's interpretation of this regulation is entitled to controlling deference. See Kennedy v. Plan Administrator for DuPont Sav. & Inv. Plan, 2009 WL 160440, at *6 & n.7 (2009).

Although the underlying assets of an ESOP-owned company are not generally plan assets, 29 C.F.R. § 2510.3-101(h)(3), the advancement of fees from the remaining assets of the liquidated company in this case would have precisely the "effect" of "reliev[ing] the fiduciaries" of liability by

"abrogating the plan's right to recover," and, consequently, cannot be said to "merely permit[] 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)," as contemplated in our interpretation. 29 C.F.R. § 2509.75-4 (emphasis added). In other words, "[i]t is inconsonant with the intentions of section 410 of ERISA and with the regulations [at 29 C.F.R. § 2509.75-4] to permit indemnification" where, as here, "the ESOP would indirectly bear the financial burden." Donovan v. Cunningham, 541 F. Supp. 276, 289 (S.D. Tex. 1982), affirmed in part, vacated in part, reversed in part, on other grounds, 716 F.2d 1455 (5th Cir. 1983).

In fact, the Secretary 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. 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 a wholly ESOP-owned company could legitimately enter into or benefit from such arrangements.

C. The Secretary's position is consistent with the district court decisions addressing the issue

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 also reached the same conclusion in a case in which the company was not completely owned by the ESOP. There, the district court held that 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); Wells Fargo Bank, 860 F. Supp. at 716 (in upholding an indemnification agreement that required payment by plan sponsor where "there is no possibility that the beneficiaries themselves would suffer as a result of enforcement of the Agreement").

Defendants rely heavily on 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. Because the court in Pudela read the

indemnification agreement as allowing recourse, it is of little use to the defendants here because their agreements do not allow for recourse in the relevant sense and because they are unlikely to have the financial ability to repay the sums advanced, as discussed below, infra, at 25-27.[6]

Furthermore, it makes no difference to the analysis that an ESOP's assets generally consist of its stock, and not the underlying assets of the company. 29 C.F.R. § 2510.3-101(h)(3). Section 410 makes no mention of plan assets whatsoever, but instead broadly "void[s] as against public policy" any agreement that purports "to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under" ERISA. Where, as here, the company is 100% owned by the ESOP, all of the company's assets have been sold, and the company effectively exists in name only, it is clear that every dollar spent on defense costs pursuant to the indemnification agreements is one less dollar for the plan and ultimately for the plan participants. As numerous courts have held, it would be inconsistent with

[6] The defendants also cite the unpublished opinion of the Southern District of New York in Martinez v. Barasch, 2006 WL 435727 (S.D.N.Y. 2006), a case permitting indemnity where the case settled before fiduciary liability was established. The holding has no applicability here, in a case that has not settled, but instead involves broadly worded indemnification agreements that would illegally permit the indemnification of expenses and judgment amounts even after the fiduciaries were found to have violated their duties under ERISA.

the broad terms of, and public policy expressed in, ERISA section 410 to allow a trustee who has breached his fiduciary duties to the ESOP to be indemnified by the sponsoring company under such circumstances, because the ESOP would indirectly bear the financial burden and the fiduciary would be "reliev[ed] from . . . liability" at the expense of the plan and its participants in precisely the way section 410 forbids. See discussion of Interpretive Bulletin 75-4, Delta Star, Cunningham, Engle, Wells Fargo, supra.

D. The defendants' agreements to repay, in limited circumstances, the fees advanced to them are insufficient to save the void indemnification arrangements

The defendants are also incorrect in their assertion that the agreements are permissible because they are akin to arrangements that "permit[] recourse by the insurer against the fiduciary in the case of the breach of a fiduciary obligation by such fiduciary." 29 U.S.C. § 1110(b)(1). The indemnification agreements themselves 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." See 29 U.S.C. § 1104(a)(1)(B). 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.

Moreover, because the indemnification agreements fail to ensure a means of recovering advanced fees, the defendants may not rely on the exception in ERISA section 410(b)(1) authorizing the purchase of recourse insurance by a plan, or the Secretary's interpretive gloss on that exception. 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. This provision of state law

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. The undertakings, however, 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, which is cited by the defendants in their opening briefs. 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." In stark contrast, the undertakings in this case 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, and the district court has found that they are very likely unable to make the repayments.

E. The district court properly granted the preliminary injunction

Thus, the district court properly granted the preliminary injunction here for the simple reason that the payment of fees that the defendants seek – to allow them to defend against charges of fiduciary breach under ERISA – is forbidden by section 410. While it is true that the complaint also alleges state-law breaches of corporate duties and malpractice claims to which ERISA section 410 does not apply, it does not follow, as defendants contend, see Opening Brief of Appellant Couturier at 21, that the court erred in enjoining advancement of fees with regard to defense of all the claims.[7]

[7] The defendants are also incorrect to the extent that they seem to suggest that only one out of the four indemnification agreements relates to valid ERISA claims. See Opening Brief of Appellant Couturier at 2. The other three agreements cover the defendants' activities as directors, and the governing plan document specifically gives the directors the authority to

The state law and ERISA claims are intertwined, and the ERISA claims predominate in this action which is brought by plan participants against defendants who were impressed with an obligation to protect their interests, but instead actively worked to deprive the plan's sole asset (the stock) of its value for the benefit of Couturier and themselves. Both the ERISA and the state-law claims involve precisely the same defendants and the same transactions that ultimately resulted in the payout to Couturier of most of the value of the company. Johanson R.E. VI, Tab 3. The district court certainly acted within the bounds of its discretion in forbidding indemnity here where the defendants have not even attempted to distinguish costs associated with defending the ERISA claims and costs associated with defending the state law claims.

Because the district court could have ended its analysis and granted the preliminary injunction based on its correct holding that the agreements were void under section 410, the court need not have weighed the plaintiffs' likelihood of success on the merits of their ERISA claims and the relative hardships. Nevertheless, the defendants are incorrect that challenges to the

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appoint the fiduciary trustees to the ESOP Board, Section 16, thus making the directors themselves fiduciaries. See, supra, at 12. Moreover, however one reads the agreements, the defendants are claiming entitlement to all their fees to defend against all charges, including the predominant ERISA charges, in this case.

amount of corporate compensation fall outside of ERISA altogether and that the court's assessment of the merits is therefore flawed. For one thing, all of the defendants in this case were fiduciaries and are alleged to have directly participated in breaches when acting as ERISA fiduciaries, including by signing off on transactions on behalf of the Plan, and advantaging themselves at the expense of the Plan. See, e.g., Answering Brief of the Appellees, p. 22-23 (describing Eddy's imprudent and disloyal approval on behalf of the ESOP of the 2004 transaction). Moreover, even aside from such direct fiduciary breaches, in the ESOP context, the plan's fiduciaries have an obligation to safeguard the plan's stock investment, and if necessary, to bring a shareholder derivative action if the fiduciaries are aware that the officers and directors of the company had breached or threatened to breach fiduciary duties owed to the shareholders. Martin v. Feilen, 965 F.2d 660, 667 (8th Cir. 1992); Canale v. Yegen, 782 F. Supp. 963, 968 (D.N.J. 1992). In such a context, ERISA fiduciaries, such as the defendants, may be sued for damages under ERISA for failing to assert a derivative claim on behalf of the Plan. Feilen, 965 F.2d at 667. The defendants are incorrect that claims of excessive compensation are not actionable under ERISA.

Nor are there any other factors that call into question the validity of the preliminary injunction. The defendants resurrect their meritless

argument, based on Grupo de Mexicano de Dessarollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999), that a preliminary injunction may not be used to secure assets and prevent their transfer before a trial court adjudicates a pending legal cause of action. In that case, the Supreme Court held that the district court lacked authority under Federal Rule of Civil Procedure 65 to issue a preliminary injunction preventing a company from disposing of its assets pending resolution of a state-law contract claim brought against it in federal court by a debtor asserting diversity jurisdiction. The Court reasoned that the district court's jurisdiction under Rule 65 is to administer suits in equity, and because, historically, a judgment fixing a debt was necessary in a contract dispute before a court in equity would interfere with the debtor's use of his property, the court did not properly grant a preliminary injunction under the facts of that case. 527 U.S. at 318-33.

In this case, however, the plaintiffs do not seek to preemptively enforce contract rights or to interfere with an owner's lawful control of its own property. Instead, the plaintiffs seek to enjoin the defendants from engaging in illegal conduct which, if countenanced, would directly injure the interest of the company's sole owner – the ESOP. Nothing in Grupo remotely suggests that the Court intended to deprive lower courts of their settled authority to halt the unlawful agreements forbidden by section 410

through the issuance of a preliminary injunction under Rule 65. Instead, many courts have limited Grupo to legal claims when a statute does not authorize equitable relief, but ERISA subsections 502(a)(2) and (a)(3), 29 U.S.C. § 1132(a)(2), (a)(3), the provisions under which the plaintiffs have sued, expressly authorize equitable relief. See Kennedy Bldg. Assocs. v. CBS Corp., 476 F.3d 530, 535 (8th Cir. 2007); SEC v. Cavanagh, 445 F.3d 105, 116-117 (2d Cir. 2006) (granting freeze where SEC seeks disgorgement); SEC v. ETS Payphones, Inc., 408 F.3d 727, 734 (11th Cir. 2005) (same).

Finally, the defendants and their amici suggest that invalidating the agreements will have far-reaching, negative policy implications, and that the district court erred in failing to consider the public interest strongly favoring indemnification of corporate directors and ERISA fiduciaries. Opening Brief of Appellant Couturier at 22; Opening Brief of Appellant Johanson at 47; Brief of Amici Curiae in Support of Defendants at 2. However, for all the reasons set forth above, the specific concerns presented in this case, and the specific policies of ERISA in general and section 410 in particular, which expressly "void[s]" such agreements as "against public policy," override the general policy in favor of honoring contractual agreements to indemnify corporate officers and directors. Fiduciaries cannot be permitted

to negate section 410 and ERISA's remedial provisions by the simple expedient of having a wholly ESOP-owned company indemnify them for any breaches.

CONCLUSION

The order of the district court granting the plaintiffs' motion for preliminary injunction with respect to the payment of fees under the indemnification agreements should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2009, I electronically filed the foregoing Brief for the Secretary of Labor as Amicus Curiae Supporting Appellees and Requesting Affirmance with the Clerk of the Court in the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, is set in Times New Roman Font, has a typeface of 14 points or more, and contains 6,946 words.

Dated: January 30, 2009

By: *\/s/ Robyn M. Swanson*
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CERTIFICATE

I, Robyn M. Swanson, certify that this brief is identical to the version submitted electronically on January 30, 2009, pursuant to Rule 6(c) of the Administrative Order Regarding Electronic Filing in all Ninth Circuit Cases.

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