

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

Paul Laidig, Peter Lewis, and Derek Kemp, as
representatives of a class of similarly situated
persons, and on behalf of the Vi-Jon
Employee Stock Ownership Plan,

Plaintiffs,

v.

GreatBanc Trust Company, Berkshire Fund
VI, Limited Partnership, John G. Brunner,
John G. Brunner Revocable Trust dated 06-
09-1992, and John and Jane Does 1-20,

Defendants.

Civil No. 1:22-cv-01296

Hon. LaShonda A. Hunt

Hon. Heather K. McShain

**DEFENDANT BERKSHIRE FUND VI, LIMITED PARTNERSHIP’S OBJECTIONS
TO PLAINTIFFS’ OPPOSED MOTION FOR PRELIMINARY APPROVAL
OF PARTIAL CLASS ACTION SETTLEMENT**

Defendant Berkshire Fund VI, Limited Partnership (“Berkshire”) hereby sets forth its objections to the preliminary approval of partial class action settlement sought by Plaintiffs in their Opposed Motion for Preliminary Approval of Partial Class Action Settlement (ECF No. 256) (“Motion”).

INTRODUCTION

First, Berkshire objects to the Motion and the papers filed with it insofar as they do not make clear that non-settling defendants have continued rights of contribution, indemnification, and set-off against the settling defendants (collectively “Brunner Defendants”).¹ Second, Berkshire

¹ Berkshire will continue to meet and confer with counsel for Plaintiffs and counsel for Brunner concerning the relief sought in the Motion. However, Berkshire received a copy of the Motion for the first time on the afternoon of Sunday, January 26th, 2025, one day before Plaintiffs filed the Motion. Berkshire therefore was not in a position to evaluate the Motion and meet and confer with Plaintiffs and Brunner Defendants prior to the date the Motion was filed.

objects to the timing of the settlement approval process because the pleadings are not yet closed in this matter and the potential addition of numerous other parties renders the Motion premature. Third, non-settling defendants should not have to retain and potentially pay an independent fiduciary to approve the proposed partial settlement, nor should they otherwise be prejudiced by an independent fiduciary's participation at this point in the litigation.

ARGUMENT

1. **Non-settling defendants will be prejudiced if the partial settlement interferes with their contribution rights.**

In the Seventh Circuit, ERISA fiduciary defendants have a right of contribution against each other for certain fiduciary breaches. *See Chesemore v. Fenkel*, 829 F.3d 803, 810 7th Cir. 2014). The proposed settlement does not account for such a right. Berkshire does not believe any defendant bears any liability in this matter; however, if this Court were to determine that Berkshire is liable, Berkshire should be permitted to seek contribution or indemnification from the Brunner Defendants, set-off of any judgment, or both.

The “district court’s remedial authority under ERISA includes the power of courts under the law of trusts, which vests in them the authority to fashion ‘traditional equitable remedies.’” *Id.* (citing *CIGNA Corp. v. Amara*, 563 U.S. 421, 440, 131 S. Ct. 1866 (2011)). “Indemnification and contribution are among those remedies.” *Id.* at 810-11. Indeed, “ERISA’s grant of equitable remedial power and its foundation in principles of trust law permit the courts to order contribution or indemnification among cofiduciaries based on degrees of culpability.” *Id.* at 812.

Here, however, the Motion does not address the rights of non-settling defendants (including the new potential defendants named in the proposed Second Amended Complaint, *see* ECF No. 162), and Berkshire therefore does not know to what extent the proposed settlement would

compromise Berkshire's rights to indemnification, contribution, or set-off. Without a clear understanding concerning these rights, Berkshire could be severely prejudiced.

2. The Motion is premature.

Plaintiffs' Opposed Motion for Leave to File Second Amended Complaint (ECF No. 163) remains pending before the Court. Plaintiffs' proposed Second Amended Complaint adds a claim and seeks to add sixteen (16) additional defendants to this case. At the time of filing of this Opposition, it is not clear whether fact discovery will be reopened in this case or to what extent the proposed partial settlement would prejudice Berkshire's rights vis-a-vis Plaintiffs and the parties who might be added if the Court grants the Opposed Motion for Leave to File Second Amended Complaint.²

Berkshire is not objecting to Plaintiffs' and the Brunner Defendants' ability to settle their dispute. However, the Court need not address the settlement at this juncture. The minimal prejudice, if any, to the settling parties caused by a brief delay in the process of approval of their settlement is far outweighed by the possible prejudice to the non-settling defendants in the event that the settlement is preliminarily approved now.

3. Non-settling defendants should not have to pay for nor cooperate with an independent fiduciary

If the Court grants the Motion, the non-settling defendants could be compelled to retain and give information to an independent fiduciary to approve the settlement. However, approval by that independent fiduciary would insulate only the Brunner Defendants from a conclusion that the partial settlement triggered a prohibited transaction pursuant to ERISA §406(a)(1)(A), (B) and (D)

² At a recent telephonic status hearing before Judge McShain on February 7, 2025, Judge McShain indicated that fact discovery might be reopened depending on the resolution of Plaintiffs' Opposed Motion for Leave to File Second Amended Complaint.

(29 U.S.C. §1106(a)(1)(A), (B) and (D)) or Internal Revenue Code §4975(a) and (b) pursuant to the provisions of Prohibited Transaction (“PTE”) 2003-39.

PTE 2003-39, which Plaintiffs do not discuss in their Motion, provides an exemption under ERISA for a plan to receive consideration from parties in interest to partially or completely settle litigation. 68 Fed. Reg. 75632 (Dec. 31, 2003), *as amended*, 75 Fed. Reg. 33830. In relevant part, PTE 2003-39 requires that: (i) “[t]he fiduciary that authorizes the settlement has no relationship to, or interest in, any of the parties involved in the litigation, other than the plan, that might affect the exercise of such person’s best judgment as a fiduciary”; (ii) “[t]he settlement is reasonable in light of the plan’s likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone”; and (iii) “[t]he terms and conditions of the transaction are no less favorable to the plan than comparable arms-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.” *Id.*

Plaintiffs assert that, “[a]s required under ERISA, Defendants will retain an Independent Fiduciary to review and authorize the Settlement on behalf of the Plan.” ECF No. 257 at 6 (emphasis added). Plaintiffs do not cite to any provisions of ERISA (as none exist) that would impose this obligation upon Berkshire. Rather, PTE 2003-39 (not ERISA itself) provides the process for obtaining a conditional exemption from the prohibited transaction provisions of ERISA and the Internal Revenue Code in connection with settlements entered into on behalf of employee benefit plans.

Nothing in PTE 2003-39 requires that the non-settling defendants retain or pay for an independent fiduciary to review and authorize the proposed settlement. Further, if an independent fiduciary is retained, it would only serve to potentially insulate the Brunner Defendants – not any other defendant – from a finding that the settlement constituted a prohibited transaction. Indeed,

with respect to the proposed settlement, the settling defendants do not share a common interest with the non-settling defendants. For example, the non-settling defendants may assert claims for contribution or indemnification, or other claims that may come to light if the Second Amended Complaint is filed and fact discovery is reopened, against the Brunner Defendants. Additionally, some of the information that could be relevant to the independent fiduciary, in the possession of non-settling defendants, is privileged. Accordingly, Berkshire respectfully requests that the Court deny Plaintiffs' Motion to the extent it purports to impose upon non-settling defendants the burden to retain and potentially pay for and provide information to an independent fiduciary to approve the proposed partial settlement.

CONCLUSION

Plaintiffs' Opposed Motion for Preliminary Approval of Partial Class Action Settlement (ECF No. 256) is premature and the non-settling defendants may be prejudiced if the Court grants it at this time. Accordingly, for the reasons set forth above, Berkshire respectfully requests that the Court deny the Motion.

Respectfully submitted,

//s/ J. Christian Nemeth

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Counsel for Defendant Berkshire Fund VI, L.P.

CERTIFICATE OF SERVICE

I, J. Christian Nemeth, hereby certify that, on February 10, 2025, I caused the foregoing *Opposition to Plaintiffs' Opposed Motion for Preliminary Approval of Partial Class Action Settlement* to be filed electronically using this Court's CM/ECF system, thereby serving such filing on all registered participants identified in the Notice of Electronic Filing in this matter on this date.

/s/ J. Christian Nemeth
J. Christian Nemeth