

**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 GREATBANC TRUST COMPANY'S OBJECTION TO PLAINTIFFS'
OPPOSED MOTION FOR PRELIMINARY APPROVAL OF PARTIAL CLASS
ACTION SETTLEMENT**

I. GreatBanc Objects to Plaintiffs’ Motion to the extent it purports to impose on GreatBanc and other non-settling Defendants the burden to retain and potentially pay an independent fiduciary to approve the proposed settlement.

Plaintiffs’ Motion for Preliminary Approval of Partial Class Action Settlement (“Motion”) should be denied to the extent it would require, if granted, Defendant GreatBanc Trust Company (“GreatBanc”) and other non-settling Defendants to retain and potentially pay an independent fiduciary to approve the proposed partial settlement.¹ GreatBanc makes this Objection because it would suffer plain legal prejudice were it forced to incur any expense associated with retaining an independent fiduciary, or participate in any way with the process to be engaged in by that fiduciary, with respect to a settlement in which it is not participating. The partial settlement at issue here is only between Plaintiffs and the Brunner Defendants.² If the Motion is granted in its present form, the non-settling Defendants, including GreatBanc, could be compelled to retain an independent fiduciary to approve the settlement. That independent fiduciary approval, in turn, would presumably 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) (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

¹ In all other respects, GreatBanc does not object to the proposed partial settlement.

² The Brunner Defendants include Defendants John Brunner, the John G. Brunner Revocable Trust dated 06-09-1992, and eleven affiliated family trusts.

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 in their Motion that, "[a]s required under ERISA, Defendants will retain an Independent Fiduciary to review and authorize the Settlement on behalf of the Plan." Motion, p. 6. Plaintiffs do not cite any provisions of ERISA (as none exist) that would impose this obligation upon GreatBanc, or on any other party for that matter. 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.

On December 19, 2024, approximately five weeks before Plaintiffs filed the instant Motion, counsel for Plaintiffs contacted counsel for GreatBanc and stated her belief that "... we may also need GreatBanc to select an independent fiduciary to review the terms of the partial settlement." (Declaration of Joseph C. Faucher ["Faucher Dec."], ¶2, Exh. 1.) Counsel for GreatBanc responded that he did not "... understand why GreatBanc should play any role with respect to selecting an independent fiduciary to review the terms of the partial settlement. GreatBanc played no role in the settlement discussions and has not taken any position with respect to the terms of the settlement." *Id.* Plaintiff's counsel responded saying that it was her "... understanding that a current plan fiduciary typically selects the independent fiduciary." Although Plaintiffs' counsel indicated that she would "double check with the team and circle back," there were no further communications regarding any potential role that GreatBanc might play regarding

retaining an independent fiduciary before Plaintiffs filed the instant Motion on January 27, 2025.
Id.

The Motion filed by Plaintiffs, as indicated above, purported to impose upon “Defendants” (presumably including GreatBanc) the obligation of retaining an independent fiduciary. Although counsel for the parties met and conferred regarding this issue on February 3, no proposed resolution to this issue has been agreed to as of the date on which this Opposition is due to be filed. (Counsel for Plaintiffs and the Brunner Defendants have suggested that, perhaps, Plaintiffs could modify the relief they seek to require that the Court could “approve” the retention of an independent fiduciary, and that the cost of the independent fiduciary could be paid out of the proceeds of the partial settlement, but it remains uncertain who would be responsible for “retaining” the independent fiduciary. (Faucher Dec., ¶3.) The Motion as submitted – if granted – would still leave it in the hands of “Defendants,” notwithstanding the fact that GreatBanc is not a party to the proposed settlement.

Nothing in PTE 2003-39 requires that GreatBanc (or any Defendant) 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 GreatBanc – from a finding that the settlement constituted a prohibited transaction.

Lastly, Plaintiffs’ Motion is premature. Plaintiffs’ Opposed Motion for Leave to File Second Amended Complaint (Dkt. 163) is currently pending before the Court. Through that motion, Plaintiffs seek to add 16 new defendants and an additional claim for relief. None of these as-yet unserved potential defendants have had an opportunity to be heard with regard to the proposed partial settlement. Moreover, expert discovery has not yet closed, fact discovery could be reopened, and Plaintiffs have not moved for class certification.

On February 10, 2025, as counsel for GreatBanc was preparing to file this Opposition, they received from counsel for the Brunner Defendants what appears to be a redlined version of the settlement agreement. (Faucher Dec., ¶4.) However, the redlined version does not sufficiently address the concerns raised in this Objection. GreatBanc remains open to discussing these issues with counsel for Plaintiffs and counsel for the Brunner Defendants, but its Objection to the Motion as filed still stands. *Id.*

Accordingly, GreatBanc respectfully requests that the Court deny Plaintiffs' Motion to the extent it purports to impose upon GreatBanc and other non-settling Defendants the burden to retain and potentially pay an independent fiduciary to approve the proposed partial settlement.

[illegible]

DATED: February 10, 2025

Respectfully submitted,

By: /s/ Joseph C. Faucher

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on February 10, 2025, he caused a copy of the foregoing document to be filed with the Court's CM/ECF system, which provides notice to all counsel of record via electronic mail.

Dated: February 10, 2025

/s/ Joseph C. Faucher

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