UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Paul Laidig, Peter Lewis, Michael Robbins, 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.	Case No. 1:22-cv-1296 Hon. LaShonda A. Hunt Hon. Heather K. McShain **THE BRUNNER DEFENDANTS' CONSOLIDATED RESPONSE TO DEFENDANT BERKSHIRE FUND VI, LIMITED PARTNERSHIP'S AND GREATBANC TRUST COMPANY'S OBJECTIONS TO PLAINTIFFS' OPPOSED MOTION FOR PRELIMINARY APPROVAL OF PARTIAL CLASS ACTION SETTLEMENT**

Defendants John G. Brunner and John G. Brunner Revocable Trust dated 06-09-1992 (collectively, the "Brunner Defendants"), through their undersigned counsel, respectfully submit this Memorandum in Response to Defendant Berkshire Fund VI, Limited Partnership's ("Berkshire") Objections to Plaintiffs' Opposed Motion for Preliminary Approval of Partial Class Action Settlement (ECF 264) and GreatBanc Trust Company's Objection to Plaintiffs Opposed Motion for Preliminary Approval of Partial Class Action Settlement (ECF 265).

ARGUMENT

I. The Brunner Defendants' settlement will not affect Berkshire's contribution or indemnification rights.

The Court should reject Berkshire's objection to the Brunner Defendants' settlement. Although Berkshire is correct that the Seventh Circuit recognizes a right of ERISA fiduciaries to seek contribution or indemnification from other fiduciaries, under appropriate circumstances, *see* ECF 264 at 2, *citing Chesemore v. Fenkell*, 829 F.3d 803, 812 (7th Cir. 2016), Berkshire

acknowledges that the right of contribution or indemnification under ERISA applies to joint and several "liabilities of co-trustees" or "cofiduciaries." *Id.* (referring to contribution rights of cofidicuaries) *Free v. Briody*, 732 F.2d 1331, 1338 (7th Cir. 1984) (quoting George Bogert, Trusts & Trustees § 862 (2d ed. 1962) for the notion that co-trustees have rights of contribution).

Here, Berkshire is not being sued in a fiduciary capacity. (*See* ECF 116 at 23-24.) And, presumably, Berkshire does not want to take the position that it was a fiduciary. Thus, Berkshire has no right to contribution or indemnification from the Brunner Defendants in the first instance.

Even if Berkshire had been sued in a capacity as a fiduciary, the Brunner Defendants' settlement would not prejudice Berkshire. The Seventh Circuit has long recognized that among settling defendants and non-settling defendants in ERISA cases, the "comparative-fault" rule should be applied to protect any contribution or indemnification rights the non-settling defendants might have. *See Donovan v. Robbins*, 752 F.2d 1170, 1180-81 (7th Cir. 1985); *see also Lumpkin v. Envirodyne Indus., Inc.*, 933 F.2d 449, 464 (7th Cir. 1991) (affirming comparative-fault rule from *Donovan*). Under the comparative-fault rule, non-settling defendants may not seek contribution or indemnification from a settling defendant. Instead, the factfinder apportions fault among the remaining parties at trial. Under this approach, the final judgment as to non-settling parties is reduced by the value of the settlement multiplied by the percentage of fault apportioned to the settling parties. *Donovan*, 993 F.2d at 1180. In other words, the non-settling defendants will never be liable for more than their proportionate share. To the extent his matter should reach a final judgment, Berkshire and any other non-settling defendants would receive a set-off for a portion of the judgment commensurate with the Brunner Defendants' apportionment of liability.

This approach encourages settlements as a means of resolving claims, because it provides finality to the settling defendants. To this end, the Brunner Defendants will be requesting that the Court enter an order clarifying that any non-settling defendants' rights to contribution or indemnification from any of the settling Brunner parties (which includes the Brunner Defendants and others identified in the Settlement Agreement) must be addressed by way of a comparative-fault assessment in this case. Because courts in the Seventh Circuit apply the comparative-fault rule in assessing liability under ERISA, Berkshire's objection that the Brunner Defendants' settlement does not respect their right to contribution or indemnification lacks merit, and the Court should reject it.

II. The Brunner Defendants' Motion is not premature.

Berkshire and GreatBanc object on the grounds that the settlement is premature, because there currently is pending a motion by Plaintiffs to file a second amended complaint that, if granted, would add new parties. (ECF 264 at 3; ECF 265 at 3.) This objection also lacks merit. As a general rule, non-settling defendants do not have standing to object to another defendant's settlement. *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 246 (7th Cir. 1992). A non-settling defendant may object if a co-defendant's settlement would cause the non-settling defendants "plain legal prejudice." *Id.* For purposes of objecting to a co-defendant's settlement, plain legal prejudice occurs when a settlement "strips the [non-settling] party of a legal claim or cause of action" or "the right to present relevant evidence at trial." *Id.* at 247.

To the extent Berkshire and GreatBanc are arguing that non-parties to this case who might be added as parties in the future might suffer some prejudice, that is not their argument to make. For Berkshire's part, it argues only that "Berkshire's rights vis-a-vis Plaintiffs" might be affected, but Berkshire fails to articulate any particular prejudice, and merely referring to some

unspecified rights "vis-à-vis" Plaintiffs does not constitute plain legal prejudice. (ECF 264 at 3.) Neither party has explained how approving settlement before deciding the motion to amend would result in any plain legal prejudice to anyone, nor have they cited any authority supporting their position.

In any event, the comparative-fault approach discussed above resolves any concerns any non-settling fiduciary might have with legal prejudice that might result if their contribution or indemnification rights are affected.

Finally, the objecting defendants argue that some prejudice might result because discovery may be reopened, or certain deadlines have passed, or certain motions have been filed. (ECF 264 at 3 ("[I]t is not clear whether fact discovery will be reopened . . . ."); ECF 265 at 3 ("Moreover, expert discovery has not yet closed, fact discovery could be reopened, and Plaintiffs have not moved for class certification.").) But in every case where only some defendants settle, some discovery, or motion, or hearing will, or may, occur in the future. Taking these arguments to their logical conclusion, the fact that any discovery is pending or that certain motions have not been filed would prevent a co-defendant from settling. Such a categorical bar would be improper and lacks legal support.

For the foregoing reasons, the Court should overrule Berkshire's and GreatBanc's prematurity objections.

III. Berkshire's and GreatBanc's concerns about paying for an independent fiduciary will be mooted.

Berkshire and GreatBanc object to the Brunner Defendants' settlement to the extent that the settlement purports to require them to retain, pay, or provide information to an independent fiduciary. (ECF 264 at 3-5; ECF 265 at 1-3.) The Brunner Defendants acknowledge that Berkshire and GreatBanc, as non-settling parties, will not be bound to retain or pay for an independent

fiduciary under PTE 2003-39. The Brunner Defendants also acknowledge that the non-settling defendants will not be obligated to provide information to an independent fiduciary or otherwise assist with the independent fiduciary's determination.

All of the parties have been discussing modifications to the settlement agreement to clarify that selecting, paying for, and working with the independent fiduciary will not be the obligation of any non-settling defendant.

PROPOSAL

The Brunner Defendants request that Berkshire's Objections to Plaintiffs' Opposed Motion for Preliminary Approval of Partial Class Action Settlement (ECF 264) and GreatBanc's Objection to Plaintiffs' Opposed Motion for Preliminary Approval of Partial Class Action Settlement (ECF 265) be overruled, and that the Court grant Plaintiffs' Motion subject to two modifications the Brunner Defendants intend to address with all counsel. The first is to clarify that the non-settling defendants will incur no costs or obligations in connection with the independent fiduciary. The second is to clarify that any claims against the settling Brunner parties for contribution or indemnification will be addressed by means of a comparative-fault approach among the remaining parties in this case, and that no non-settling defendant may bring a claim against any settling Brunner party for contribution or indemnification.

Dated: February 17, 2025

Respectfully submitted,

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Counsel for Brunner Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically on February 17, 2025, and is being served via the court filing system on all parties registered in the above-captioned matter.

/s/ Richard J. Pearl