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, JOHN AND JANELL BRUNNER FAMILY TRUST DATED MAY 27, 2020, GERALD BOWE, JANE BROCK-WILSON, GREGORY DELANEY, GERALD GREIMAN, SHARLYN C. HESLAM, EDWARD KOLODZIESKI, LAWRENCE J. LEGRAND, SPENCER MUNAY, RICH KOULOURIS, KEITH GRYPP, SCOTT MEKUS, VJCS HOLDINGS, INC., VI-JON, INC., and VJ HOLDING CORP.,

Defendants.

Case No. 22 C 1296

Hon. LaShonda A. Hunt

ORDER

For the reasons set forth in the accompanying statement, Plaintiffs' motion for preliminary approval of partial class action settlement with Defendant John G. Brunner, John G. Brunner Revocable Trust dated 06-09-1992, John and Janell Brunner Family Trust Dated May 27, 2020 (the "Brunner Defendants") [256] is granted and the objections of Defendants Berkshire Fund VI, Limited Partnership ("Berkshire") [264] and GreatBanc Trust Company ("GreatBanc") [265] are overruled.

STATEMENT

In August 2020, Berkshire and the Brunner Defendants sold Vi-Jon, a hand sanitizer manufacturer, to the Vi-Jon Employee Stock Ownership Plan (the "Plan") for $398,512,583. GreatBanc was appointed to act as a trustee for the Plan with respect to the transaction. Because the Plan had no capital prior to the transaction, it borrowed 100% of the purchase price from

Vi-Jon, to be repaid with interest over the next 49 years. Shares of stock in the company are to be released to participating Vi-Jon employees in proportion to the amount of total debt paid each year.

According to Plaintiffs, the Plan is now stuck paying 49 years of installments on a sales price that was artificially inflated by the temporary surge in demand for hand sanitizer during the COVID-19 pandemic. Plaintiffs bring this putative class action against Berkshire, the Brunner Defendants, GreatBanc, Vi-Jon, and several individuals involved in the transaction, alleging that they orchestrated a prohibited transaction for inadequate consideration in violation of Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA").

Through the instant motion, Plaintiffs seek preliminary approval of a settlement agreement under which the Brunner Defendants will pay $1 million to resolve Plaintiffs' claims against the Brunner Defendants. Berkshire and GreatBanc originally objected to the motion based on its procedural posture, provisions regarding an independent fiduciary, and any effect that settlement approval would have on their rights against the Brunner Defendants. After briefing and a hearing on the matter, the parties filed a joint status report [276] outlining the only remaining issue[1] in dispute: whether non-settling defendants have a right to seek contribution and indemnification from settling defendants in ERISA actions.

According to Plaintiffs, the Court need not address the issue because, as non-settling Defendants, Berkshire and GreatBanc have no standing to object absent a showing of prejudice. In this regard, Plaintiffs assert that "the Settlement makes no mention of any defendant's right to contribution, indemnification, or set[ ]off precisely because it takes no position on those issues." [270]. The Brunner Defendants, however, request "that the Court enter an order clarifying that any non-settling defendants' rights to contribution or indemnification from any of the settling Brunner parties . . . must be addressed by way of a comparative-fault assessment in this case." [271]. The Brunner Defendants rely on Seventh Circuit precedent that uses the comparative fault method to assess liability under ERISA, whereby "no party pays more than its adjudicated fair share." *Lumpkin v. Envirodyne Indus., Inc.*, 933 F.2d 449, 464 (7th Cir. 1991). Essentially, the settling parties argue that non-settling Defendants should be allowed to seek determination of comparative fault and reduction of any judgment against them accordingly but would not have the right to seek contribution or indemnification directly from the settling Defendants. For example, if it is determined at trial that the total liability is $100 million, the non-settling Defendants are 75% at fault, and the settling Defendants are 25% at fault, then the non-settling Defendants would be liable for only $75 million.

Berkshire and GreatBanc object to the settlement to the extent that it affects their contribution, indemnification, and set off rights against the settling Defendants. Berkshire and

[1] The procedural issue is now moot because Plaintiffs were granted leave to amend the complaint to add defendants. The independent fiduciary issues are resolved because the parties have agreed to amend the relevant provisions of their settlement agreement to reflect that the parties will ask the Court to appoint the independent fiduciary, Plaintiffs will not seek to admit the independent fiduciary's work product against any non-settling defendants in this proceeding, and the non-settling defendants will not incur any cost in connection with the independent fiduciary.

GreatBanc assert that, at the very least, non-settling Defendants should be able to set off or reduce any judgment in this matter by the amount paid by the settling Defendants, meaning that the amount of any judgment against non-settling Defendants would be reduced by $1 million, even if the settling Defendants' comparative share of the total liability is adjudicated to be less than that amount.

The Court agrees with Plaintiffs that the settlement agreement itself does not expressly affect any contribution, indemnification, or set off rights of any non-settling Defendants. But because the Brunner Defendants ask for an order clarifying that any such rights would need to be addressed through a determination of comparative fault, the objections of Berkshire and GreatBanc are properly before the Court. As a matter of practical case management, it also makes sense to address the issue now, before the settlement and settlement approval process proceeds, because it is necessary for the Brunner Defendants to have clarity regarding whether they will have remaining exposure to liability in this action.

Having considered the parties' briefs [257], [264], [265], [270], [271], arguments at the 3/4/25 hearing [273], and joint status report [276], the Court agrees that the appropriate method for assessing liability among settling and non-settling Defendants in this case is through a determination of comparative fault. *See Lumpkin*, 933 F.2d at 464 (explaining that while "a non-settling defendant does possess a right of contribution under ERISA[,]" the proper method for determining such rights is through comparative fault) (citing *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985)). "Under a comparative fault regime . . . the court fixes the percentage of the plaintiff's damages that is attributable to the fault of the settling defendants, multiplies that percentage by the judgment against the non[-]settling defendants, and deducts the resulting amount from the judgment." *Lumpkin*, 933 F.2d at 464 (quoting *Donovan*, 752 F.2d at 1170). In support of its position that non-settling defendants have a right to seek contribution or indemnification from settling defendants, Berkshire points to the Seventh Circuit's recent confirmation that "indemnification and contribution are available equitable remedies under [ERISA][.]" *Chesemore v. Fenkell*, 829 F.3d 803, 813 (7th Cir. 2016). But Berkshire reads the case too broadly. *Chesemore* considered whether such rights exist, not the proper method for allocating them for purposes of crafting a remedy against non-settling defendants. *Lumpkin* addresses the proper method for allocation—to the extent that a non-settling defendant has any contribution rights against a settling defendant, such rights should be addressed through a determination of comparative fault, not as direct claims against the settling defendants. *See Lumpkin*, 933 F.2d at 464 (stating that the non-settling defendant "no longer ha[d] any possible claim" against the settling defendant). At this juncture, the Court need not opine whether Berkshire or GreatBanc are entitled to contribution, indemnification, or set off vis-à-vis the Brunner Defendants in this case. It is enough to say that, *to the extent such rights are determined to exist*, comparative fault is the proper allocation method.

In addition, Berkshire and GreatBanc have not cited any authority in support of their argument for setting a lower limit of $1 million (based on the settlement amount) as the minimum threshold for any judgment reduction after a comparative fault determination. The Court is unaware of any support for that position and thus need not consider it further for purposes of the instant dispute. *See Crespo v. Colvin*, 824 F.3d 667, 674 (7th Cir. 2016) (declining to consider undeveloped and unsupported arguments). If the issue of whether the non-settling Defendants have rights of contribution, indemnification, or set off is fully briefed later in this proceeding, the request

for a lower limit on adjustments to any judgment amount may be reraised at that time if there is authority to support such an argument.

For the reasons stated above, Plaintiffs' motion for preliminary approval of partial settlement [256] is granted, and the objections of Berkshire [264] and GreatBanc [265] are overruled. Plaintiffs are ordered to submit a revised proposed order reflecting any changes resulting from the parties' negotiations (e.g., the independent fiduciary provisions) to proposed_order_hunt@ilnd.uscourts.gov by May 9, 2025.

DATED: May 2, 2025, 2025

ENTERED:

/s/ LaShonda A. Hunt
LASHONDA A. HUNT
United States District Judge