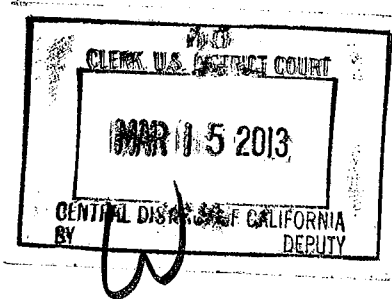


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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SETH D. HARRIS, Acting Secretary of
the United States Department of Labor,

Plaintiff,

v.

GREATBANC TRUST COMPANY, et
al.,

Defendants.

Case No. EDCV12-1648-R (DTBx)

**[PROPOSED] ORDER GRANTING
DEFENDANTS' MOTIONS TO
DISMISS COUNT II OF
COMPLAINT WITHOUT LEAVE
TO AMEND AND DENYING
PLAINTIFF'S MOTION TO STRIKE
DEFENDANT GREATBANC TRUST
COMPANY'S AFFIRMATIVE
DEFENSES**

[PROPOSED] ORDER
EDCV12-1648-R (DTBx)

1 **I. INTRODUCTION**

2 On September 28, 2012, plaintiff Seth D. Harris, Acting Secretary of the
3 United States Department of Labor (“Secretary”), filed a Complaint against
4 GreatBanc Trust Company (“GreatBanc”), Sierra Aluminum Company (“Sierra
5 Aluminum”), and, nominally, the Sierra Aluminum Company Employee Stock
6 Ownership Plan (the “ESOP”) (Sierra Aluminum and the ESOP collectively are
7 referred to as the “Sierra Defendants”). The Secretary alleges claims for violations
8 of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C.
9 § 1001, *et seq.*) (“ERISA”) and seeks relief under ERISA §§ 409 and 502(a)(2) &
10 (a)(5) (29 U.S.C. §§ 1109 and 1132(a)(2) & (5)).

11 Presently before the Court are the following motions: 1) GreatBanc’s Motion
12 to Dismiss Count II of the Complaint pursuant to Rule 12(b)(6) of the Federal Rules
13 of Civil Procedure; 2) Sierra Defendants’ Motion to Dismiss Count II of the
14 Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure; and
15 3) the Secretary’s Motion to Strike GreatBanc’s Affirmative Defenses.

16 The Motions came on regularly for hearing on March 4, 2013 at 10:00 a.m.
17 After full consideration of the pleadings, the papers, and arguments of counsel, and
18 good cause appearing, the Court hereby GRANTS GreatBanc’s and the Sierra
19 Defendants’ Motions to Dismiss without leave to amend and DENIES the
20 Secretary’s Motion to Strike.

21 **II. RELEVANT ALLEGATIONS**

22 Sierra Aluminum is a California corporation located in Riverside, California,
23 that produces extruded aluminum products. (Compl. ¶ 6.) Sierra Aluminum
24 sponsors the ESOP, which it established on March 31, 2001. (Compl. ¶¶ 7, 10.)
25 The ESOP is funded exclusively through employer contributions, as determined by
26 Sierra Aluminum’s Board of Directors, in the form of cash or shares of Sierra
27 Aluminum stock. (Compl. ¶ 11.) The ESOP is governed by ERISA. (Compl. ¶ 7.)

28 On April 1, 2005, Sierra Aluminum entered into an engagement agreement

1 with LaSalle Bank, pursuant to which LaSalle became Trustee of the ESOP.
2 (Compl. ¶ 12.) LaSalle served as Trustee for seven months until October 31, 2005,
3 when GreatBanc replaced it and assumed all of LaSalle's rights and responsibilities.
4 (Compl. ¶ 13.)

5 GreatBanc's engagement agreement with Sierra Aluminum contains the
6 following indemnification provision ("Indemnification Agreement"):

7 14. Indemnification.

8 For purposes of this Section 14, the term "Indemnitees," shall
9 mean [GreatBanc] and its officers, directors, employees, and
10 agents. Subject to the applicable provisions of ERISA, [Sierra
11 Aluminum] shall indemnify the Indemnitees for any loss, cost,
12 expense or other damage, including attorney's fees, suffered by
13 any of the Indemnitees resulting from or incurred with respect
14 to any legal proceedings related in any way to the performance
15 of services by any one or more of the indemnitees pursuant to
16 this Agreement, the Plan or the Trust. The indemnification
17 provided for in this Section 14 shall include, but not be limited
18 to: (a) any action taken or not taken by any of the Indemnitees
19 at the direction or request of [Sierra Aluminum], any agent of
20 [Sierra Aluminum], or any committee or fiduciary under the
21 Plan or Trust; and (b) all costs and expenses incurred by the
22 Indemnitees in enforcing the indemnification provisions of this
23 Section 14, including attorney's fees and costs. However,
24 these indemnification provisions shall not apply to the extent
25 that any loss, cost, expense, or damage with respect to which
26 any of the Indemnitees shall seek indemnification is held by a
27 court of competent jurisdiction, in a final judgment from which
28 no appeal can be taken, to have resulted either from the gross

1 negligence or willful misconduct of one or more of the
2 Indemnitees or from the violation or breach of any fiduciary
3 duty imposed under ERISA on any one or more of the
4 Indemnitees. An Indemnitee who receives an advancement of
5 fees or expenses from [Sierra Aluminum] pursuant to this
6 paragraph shall make arrangements reasonably satisfactory
7 to [Sierra Aluminum] to ensure that such Indemnitee will
8 reimburse [Sierra Aluminum] for such advancements in the
9 event it is determined the Indemnitee is not entitled to retain
10 such amounts hereunder.

11 (Compl. ¶ 61.)

12 Count II of the Secretary's complaint alleges that Section 410(a) of ERISA
13 (29 U.S.C. § 1110(a)) invalidates the Indemnification Agreement. (Compl. ¶¶ 61-
14 62.) The Secretary alleges that because the ESOP owns 100% of Sierra Aluminum,
15 enforcement of the Indemnification Agreement would harm the ESOP because
16 payments of defense costs or indemnification would decrease Sierra Aluminum's
17 assets and, therefore, the value of its stock. (*Id.* ¶ 64.) In addition, the Secretary
18 alleges that the Indemnification Agreement improperly permits Sierra Aluminum to
19 indemnify GreatBanc even if it breached its fiduciary duties under ERISA in the
20 event the parties settle the case rather than obtain a final, non-appealable judgment.
21 (*Id.* ¶¶ 72, 75.)

22 **III. LEGAL STANDARD**

23 To withstand a motion to dismiss, a plaintiff's "[f]actual allegations must be
24 enough to raise a right to relief above the speculative level" and must state "enough
25 facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v.*
26 *Twombly*, 550 U.S. 544, 555, 570 (2007). In resolving a Rule 12(b)(6) motion, the
27 Court must construe the complaint in the light most favorable to the plaintiff and
28 must accept all well-pleaded allegations as true. *See Cahill v. Liberty Mutual Ins.*

1 Co., 80 F.3d 336, 337-38 (9th Cir. 1996). “Assertions that are mere ‘legal
2 conclusions,’ however, are not entitled to the assumption of truth.” *Adams v. I-Flow*
3 *Corp.*, No. CV 09-09550 R (SSx), 2010 WL 1339948, at *2 (C.D. Cal. Mar. 30,
4 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

5 As to the Secretary’s motion to strike, Federal Rule of Civil Procedure 12(f)
6 provides that “the court may strike from a pleading [on its own or upon motion
7 made by a party] an insufficient defense or any redundant, immaterial, impertinent,
8 or scandalous matter.” “Redundant” means allegations “that are needlessly
9 repetitive or wholly foreign to the issues involved in the action.” *State of*
10 *California Dep’t. of Toxic Substances Control v. Alco Pacific, Inc.*, 217 F. Supp.2d
11 1028, 1033 (C.D. Cal. 2002) (citation omitted). “Immaterial” means “that which
12 has no essential or important relationship to the claim for relief or the defenses
13 being pleaded.” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993),
14 *rev’d on other grounds*, 510 U.S. 517 (1994) (citation omitted). “Impertinent”
15 matters consist of statements that do not pertain, and are not necessary to the issues
16 in question. *Id.*

17 **IV. DISCUSSION**

18 **A. The Secretary’s Second Claim For Relief To Void The**
19 **Indemnification Agreement Under ERISA § 410(a).**

20 Defendants seek dismissal of the Secretary’s Second Claim for Relief on the
21 grounds that the Secretary has failed to allege plausible facts supporting its claim
22 that ERISA § 410(a) voids the Indemnification Agreement. The Court agrees.

23 Under ERISA § 410(a), “any provision in an agreement or instrument which
24 purports to relieve a fiduciary from responsibility or liability for any responsibility,
25 obligation or duty under this part shall be void as against public policy.”

26 The Indemnification Agreement at issue in this case expressly prohibits
27 indemnification if a court enters a final judgment from which no appeal can be
28 taken finding GreatBanc liable for breach of its fiduciary duties under ERISA, and

1 therefore the Indemnification Agreement does not run afoul of ERISA 410(a). The
2 indemnification agreement that was at issue in *Johnson v. Couturier*, 572 F.3d 1067
3 (9th Cir. 2009) is different than the Indemnification Agreement in this case, in that
4 the Couturier indemnification agreement did not exclude indemnification for
5 breaches of fiduciary duty under ERISA. In *Couturier*, the plaintiffs sought to
6 preliminarily enjoin a company's advancement of defense costs to ESOP trustees
7 under an indemnification agreement, where the ESOP owned 100% of the
8 company. *Id.* at 1075. The *Couturier* court's decision to invalidate the
9 indemnification agreement turned on three factors not alleged here: (1) the
10 agreement did not exclude indemnification for breaches of fiduciary duties under
11 ERISA; (2) plaintiffs had met their burden of proving all of the requisite elements
12 for a preliminary injunction, including that they would likely succeed in proving
13 that the defendants breached their ERISA fiduciary duties; and (3) the plan sponsor
14 no longer was an operating company, had sold substantially all its assets to another
15 company, and had adopted a plan of liquidation pursuant to which the ESOP
16 participants would receive the net cash proceeds. Were it not for the rather unique
17 circumstances present in the *Couturier* case, under which payments to indemnitees
18 would reduce dollar-for-dollar the funds to be distributed to the ESOP participants
19 pursuant to the plan of liquidation, the plan asset regulations, 29 C.F.R. Section
20 2510—3.101(a)(2) and 3.101(h)(3), would have applied and the assets of the plan
21 sponsor company would not have been treated as assets of the ESOP and no basis
22 under ERISA would have existed for concluding that the indemnification
23 agreement would harm the ESOP. *Id.* at 1078-81. *Couturier* is inapplicable to this
24 case, as the Complaint here does not allege facts consistent with any of the above-
25 mentioned factors present in *Couturier*.

26 Notwithstanding that the Indemnification Agreement in this case precludes
27 indemnification if a court enters a final non-appealable judgment concluding that
28 GreatBanc breached its fiduciary duties under ERISA, the Secretary argues that the

1 Indemnification Agreement is void under ERISA § 410(a) for two reasons: (1) in
2 the event of a settlement, GreatBanc could obtain the benefit of defense and
3 indemnification from Sierra Aluminum even if GreatBanc admits it breached its
4 fiduciary duties under ERISA; and (2) the Indemnification Agreement does not
5 specify how GreatBanc will reimburse Sierra Aluminum for advanced defense costs
6 if a court ultimately determines that GreatBanc breached its duties under ERISA.

7 1. Settlement Agreements.

8 The Secretary argues for an extension of the anti-exculpatory language of
9 Section 410(a) to settlement agreements. The Secretary cites no legal authority that
10 supports extending the reach of Section 410(a) to preclude advancement of defense
11 costs incurred by a fiduciary in defending an action alleging fiduciary breach
12 because of the mere possibility that the parties may settle the case rather than obtain
13 an adjudication on the merits. Indeed, the only case cited by the parties addressing
14 this contention rejected it. *See Martinez v. Barasch*, 01 Civ. 2289 (MBM)(JCF),
15 2006 WL 435727, at *4-5 (S.D.N.Y. Feb. 22, 2006) (holding that “settling
16 defendants may generally enforce contractual indemnity rights without running
17 afoul of ERISA,” so long as the “specific contract provisions do not violate Section
18 410(a)’s prohibition against exculpatory indemnity clauses”). Furthermore,
19 notwithstanding that defendants rarely admit liability in a settlement agreement, this
20 is the Secretary’s lawsuit and as the plaintiff, the Secretary is free to condition its
21 consent to any settlement of this case on any terms it believes are appropriate.

22 2. Reimbursement of Advanced Attorneys’ Fees and Costs.

23 If the Secretary is concerned about GreatBanc’s ability to reimburse
24 advanced defense costs in the event that a court ultimately determines that
25 GreatBanc breached its duties under ERISA, the Secretary may seek a bond.
26 Setting aside the indemnification agreement is not necessary or appropriate.

27 **B. The Secretary’s Motion To Strike GreatBanc’s Affirmative**
28 **Defenses.**

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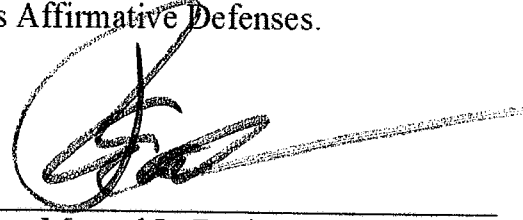
In light of the Court granting GreatBanc's and the Sierra Defendants' Motions to Dismiss, the Court denies the Secretary's Motion to Strike GreatBanc's Affirmative Defenses.

V. CONCLUSION

In light of the foregoing, the Court GRANTS GreatBanc's and Sierra Defendants' Motions to Dismiss without leave to amend, and DENIES the Secretary's Motion to Strike GreatBanc's Affirmative Defenses.

IT IS SO ORDERED.

Dated: March 15, 2013



Hon. Manuel L. Real
United States District Judge