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As of: Jul 08, 2011

Chao v. Graf

CV-N-01-0698-DWH(RAM)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

2002 U.S. Dist. LEXIS 28329

February 1, 2002, Decided

February 1, 2002, Filed; February 1, 2002, Entered &amp; Served

**OPINION****ORDER**

Before the court is the Secretary's motion for preliminary injunction <sup>1</sup> (# 3) and defendants Employers Mutual, William Kokott, Nicholas E. Angelos, and American Benefit Society's opposition [\*3] (# 21). This court granted the Secretary's request for a temporary restraining order on December 13, 2001. A hearing concerning the preliminary injunction was held on January 8 & 17, 2002. <sup>2</sup> Also before the court is defendants Employers Mutual, Kokott, and Angelos' challenge in open court to this court's subject matter jurisdiction. For the reasons discussed below, the court finds it has subject matter jurisdiction and grants the Secretary's motion for preliminary injunction.

<sup>1</sup> Citations to the following parts of the Secretary of Labor's Motion for Preliminary Injunction will be as follows: (1) Application for T.R.O. will be "T.R.O. App."; (2) Memorandum of Points and Authority in Support of Application will be "Mem. of P. & A."; (3) Declaration of Michael Zehr will be "Zehr Decl.P X"; and (4) Exhibits attached to Zehr's Declaration will be "Decl. Ex. X."

<sup>2</sup> Present at the hearing were William Scott and Paul Adair on behalf of the Secretary of Labor ("Secretary"), Mark Cullen and Beth Blechman

on behalf of defendants Employers Mutual, William Kokott, and Nicholas Angelos, and Stephen Kent on behalf of American Benefit Society. Defendants James Graf, Kari Hanson, Associated Agents of America, [\*4] and Sierra Administration were not represented at the hearing. In addition, the entities owned by defendants Graf, Kokott, Angelos, and Hanson, namely Western Health Network, Colombia Health Network, WRK Investments, Graf Investments, and the sixteen Associations, were also not represented at the hearing. (1/8/02 Tr. at 2.)

**I. Factual Background**

The Secretary of Labor ("Secretary") has brought this ERISA action for breach of various fiduciary responsibilities and duties. The named defendants include Employers Mutual, the organization that oversaw the management of the employee benefit plans; the sixteen Associations <sup>3</sup> (collectively "the Associations") that created employee benefit plans for Association members to join; the various service providers to the plans (namely, Colombia Health Network, Western Health Network, WRK Investments, Graf Investments, Associated Agents of America, American Benefit Society and Sierra Administration); and the individuals responsible for running Employers Mutual, the Associations and certain service providers (namely, Graf,

Kokott, Angelos and Hanson). The Secretary alleges that the plans established by the Associations were employee welfare benefit plans [\*5] and the four individual defendants were fiduciaries who breached their duties and responsibilities outlined in ERISA. The Secretary ultimately seeks permanent injunctive relief.

3 The "Associations" include the following defendants: American Association of Agriculture, Association of Automotive Dealers and Mechanics, Association of Barristers and Legal Aids, Communication Trade Workers Association, Construction Trade Workers Association, American Coalition of Consumers, Association of Cosmetologists, Culinary and Food Services Workers Association, Association of Educators, Association of Health Care Workers, National Alliance of Hospitality and Innkeepers, Association of Manufacturers and Wholesalers, Association of Real Estate Agents, Association of Retail Sellers, National Association of Transportation Workers, and National Association of Independent Truckers.

The following facts concerning the defendants and the employee welfare benefit plans offered by the Associations were adduced from the motions and exhibits presented to the court as well as from testimony at the hearing.<sup>4</sup>

4 Since the parties only ordered the transcript to the first part of the hearing, any citations to the second [\*6] day of the hearing will be only to the hearing in general.

Defendants Kokott and Angelos established Employers Mutual in Nevada on July 28, 2000.<sup>5</sup> (Decl. Ex. 36.) Between December 27, 2000 and February 15, 2001, Kokott and Angelos also established the sixteen Association defendants. (Decl. Ex. 8.) In all of these organizations, Kokott and Angelos are named as the managing members. (Decl. Exs. 8 & 36.)

5 Employers Mutual was initially named ANKO, LLC in the Articles of Organization filed with the Nevada Secretary of State. However, on September 8, 2000, ANKO was changed to Employers Mutual. (Decl. Ex. 36.)

Around January 29, 2001, Angelos, on behalf of each of the Associations, executed identical trust agreements

with Employers Mutual. Kokott signed the agreements on behalf of Employers Mutual. The agreements established ERISA-covered plans as well as trusts for each Association to fund the plans effective September 1, 2000. Under the agreements, Employers Mutual is named the "trustee" of the Association plans, and is to manage the plans. In performing these duties, Employers Mutual is allowed to use 25% of premiums collected for its administrative expenses, while the other 75% of premiums [\*7] is to be used for claims. The agreement further provides that any left over monies intended for claims at the end of the year are to be paid to Employers Mutual as additional compensation. (Decl. Ex. 9.)

According to the Summary Plan Descriptions, each plan's purpose is to "protect its Participants and their Dependents against certain catastrophic health expenses by providing reimbursement for certain medical expenses described in this plan." (Decl. Ex. 10.) The plan further provides that it is fully-funded and governed by ERISA, and that individuals are eligible to participate in the Association Benefit Program if they are United States residents and either self-employed, or a regular part-time or full-time employee of an employer who has chosen to sponsor the individual's participation in an Association. (Decl. Ex. 10.) With the necessary organizations and plans established, the defendants proceeded to set up shop and enroll participants.

Employers Mutual operates out of two offices, one in Glendale, California, and the other in Canyon Lake, California. The Glendale office is responsible for customer service, such as reviewing applications and distributing copies of summary plan descriptions. [\*8] Until the entry of the T.R.O., defendant Angelos was in charge of the Glendale office. Angelos also operated his construction company, Angelos Construction, out of this office without paying rent. The Canyon Lake office handles the claims end and performs repricing of claims, certifying, pre-certifications, etc. Defendant Graf was in charge of the Canyon Lake office until the T.R.O. was issued. (1/8/02 Tr. at 12:16-22.) Graf was named Vice President of Employers Mutual and signed agreement in that capacity on behalf of Employers Mutual. (Decl. Ex. 3.) In addition, Graf was the primary contact for some service providers. (Decl. Exs. 17, 18.) According to Penny Forbes of defendant Sierra Administration, Graf did the underwriting for the plans and made determinations of employer group's eligibility. (Decl. Ex. 17.) Defendant Kokott was in charge of the finances.

Defendant Hanson was an employee of Employers Mutual and held herself out as the operations manager in dealings on behalf of Employers Mutual. (*See, e.g.*, Exs. 17, 32.) The defendants' monthly salaries from Employers Mutual were as follows: Graf, \$ 8,000.00; Kokott, \$ 5,000.00; Hanson, \$ 5,000.00; and Angelos, 5,000.00 until October [\*9] 2001 and then \$ 6,500.00. (1/17/02 Hrg. (Angelos' Testimony); Decl. Ex. 39.)

In undertaking steps to enroll members, defendants set the premium rates and contracted with agents to market the plans. First, Graf, though not a licensed actuary and without formal training, set the premium rates by averaging sample rates posted on the Internet and then reducing them to enable Employers Mutual to compete with other providers. (1/17/02 Hrg. (Graf's Testimony).) Through contracts with agents, namely defendants American Benefit Society and Associated Agents of America, the agents agreed to market the plans for a commission. Under their contracts, Associated Agents was to receive 15%, while American Benefit Society received 7%. (Decl. Exs. 13, 14.) As of October 31, 2001, Associated Agents had received at least \$ 959,574.00 in fees; and American Benefit Society had received at least \$ 418,000.00. Based upon the eligibility requirements and testimony of Al Cooke and Patricia Canter, it appears that the plans were marketed to employers who then enrolled employees. (1/17/02 Hrg; *see also* Decl. Exs. 10, 11.) As a result of the competitive rates and marketing, over 22,000 individuals were enrolled [\*10] in plans. (Decl. Ex. 12.)

According to the Secretary's abstracts of defendants' bank statements, approximately \$ 15,000,000.00 in premiums had been received by October 31, 2001. (Decl. Ex. 1.) According to Kokott, premiums checks were sent to Resident Agents of Nevada who then forwarded them to the Canyon Lake office. From Canyon Lake, the checks were forwarded to Kokott at the Glendale office and Kokott would deposit them into bank accounts he established for Employers Mutual. (Decl. Ex. 3.)

Employers Mutual uses several regional and national provider networks, including defendant Colombia Health Network, Inc. ("Colombia"). (Decl. Ex. 46.) Colombia is owned by defendant Hanson, and Hanson is also listed as President, Secretary, and Treasurer. Hanson incorporated Colombia in Nevada on May 2, 2001 (Decl. Ex. 43.) While listed as a national provider network by Employers Mutual, Colombia's status as a provider network was

pending as of August 20, 2001. The bank records indicate that Colombia was paid \$ 830,395.00 between January and October 2001. (Decl. Ex. 42.) Additionally, defendant Western Health Network ("Western") also received payments and was characterized as a provider network. [\*11] Western was established in Nevada by Kokott on May 11, 2001 with Kokott and Angelos listed as the managing members. (Decl. Ex. 47.) According to Kokott, Graf and Hanson were to set up contracts between Western and providers, but Kokott never saw any contracts. Western did not have any employees, per Kokott. (Decl. Ex. 3.) Western received \$ 216,451.00 between January and October 2001. (Decl. Ex. 42.) Kokott admitted he authorized the payments to Colombia and Western without reviewing any invoices to verify services were actually rendered. (Decl. Ex. 3.) Employers Mutual also had a prescription service provider, RxAmerica. According to Forbes of Sierra Administration, RxAmerica shut off all participants' prescription cards due to nonpayment on October 3, 2001. Forbes estimates that Employers Mutual owes RxAmerica approximately \$ 900,000.00 in reimbursement for claims incurred. (Decl. Ex. 17.)

Additionally, Employers Mutual hired defendants Graf Investments and WRK Investments to provide investment services to the plans. Kokott established both of these organizations. (Decl. Ex. 41.) However, Kokott maintains that he established Graf Investments at Graf's request. (Decl. Ex. 3.) At the [\*12] hearing, Graf testified he had nothing to do with Graf Investments. (1/17/02 Hrg.) According, to Kokott, he and Graf each received approximately \$ 225,000.00 from these arrangements. (Decl. Ex. 3.) The Secretary's abstracts of defendants' bank records indicate that WRK Investments and Graf Investments were paid \$ 187,484.00 and \$ 132,484.00, respectively, between January and October 2001. (Decl. Ex. 42.) No contracts formalizing these agreements were presented into evidence, and no information was introduced concerning the services these organizations performed for the plans.

For claims processing, Employers Mutual hired defendant Sierra Administration ("Sierra"). Sierra worked for Employers Mutual from January 2001 until it terminated its services on October 3, 2001 for non-payment of a bill. Sierra was responsible for maintaining certain plan records, receiving and reviewing claims, adjudicating claims, customer service, maintaining eligibility records, notifying plan sponsors of

amounts required to pay claims, informing claimants of ineligible claims, and generating various claims and COBRA reports. (Decl. Ex. 17.) According to the bank record abstracts, Sierra was paid \$ 416,295.00 [\*13] between January and August 2001 for its services. (Decl. Ex. 2.)

In October 2001, an actuary retained by Employers Mutual estimated there were \$ 4,500,000.00 in outstanding claims. (Zehr Decl. P 26). Kokott estimates the figure is closer to \$ 6,500,000.00. (Decl. Ex. 3.) Through the transactions described above as well as additional entries in bank records, the Secretary contends that defendants have diverted \$ 2,500,000.00 of the almost \$ 15,000,000.00 in premiums collected to entities directly owned and controlled by them or for other expenditures unrelated to payment of claims. (Zehr Decl. P 65.) Overall, the Secretary alleges that almost \$ 6,000,000.00 of the collected premiums have been used for purposes other than payment of claims and that Employers Mutual may have less than \$ 2,000,000.00 in its accounts. (*Id.* PP 4-5.)

Following an extensive investigation of Employers Mutual's operations, the Secretary filed this suit on December 12, 2001 under 29 U.S.C. § 1132(a)(2) & (5) alleging that Graf, Kokott, Angelos and Hanson breached their various fiduciary duties and responsibilities under ERISA. The Secretary is seeking permanent injunctive relief against all named defendants. (Compl. [\*14] (# 2).)

## II. Analysis

### A. Subject Matter Jurisdiction

A court's first step in an ERISA suit is to satisfy itself of its subject matter jurisdiction. ERISA governs all employee benefit plans that are established or maintained by an employer engaged in commerce or activities or industries affecting commerce or by employee organizations representing employees who are engaged in commerce or activities or industries affecting commerce. 29 U.S.C. § 1003(a).<sup>6</sup> Except as allowed under statute, ERISA supercedes any state laws that relate to employee benefit plans. *See* 29 U.S.C. § 1144.

<sup>6</sup> There are narrow exceptions to this rule with regard to government or church established plans, plans established to comply with workers' rights laws, plans maintained outside the U.S. that pertain to nonresident aliens, and excess benefit

plans that are unfunded. 29 U.S.C. § 1003(b).

Employee benefit plans include employee welfare benefit plans, employee pension benefit plans, and plans that have the characteristics of both. 29 U.S.C. § 1002(3). Since this case does not involve pension funds, the critical inquiry is whether an employee welfare benefit plan is involved to establish this court's jurisdiction. The Secretary [\*15] contends that subject matter jurisdiction exists by virtue of the employee welfare benefit plans established by the employers who subscribed to the Associations. According to the Secretary, the employers, by entering into an arrangement to secure group health benefits, established a plan for employees to obtain health benefits and that these plans are "employee welfare benefit plans." The Secretary further argues that the defendants were fiduciaries to these plans and were required to meet their fiduciary responsibilities under ERISA. The defendants maintain that there is no employee welfare benefit plan, and as such this court lacks subject matter jurisdiction.

ERISA defines an "employee welfare benefit plan" to include

any plan, fund, or program ... established or maintained by an employer or by an employee organization, or by both, ... for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship [\*16] funds, or prepaid legal services.

29 U.S.C. § 1002(1). Employer is defined as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5). Employee organization includes a variety of groups, including labor unions and employee representation committees, where employees participate and its purpose is to represent employees in matters incidental to employment relationships. 29 U.S.C. § 1002(4).

**1. As a for-profit entrepreneurial enterprise, Employers Mutual and the Associations are not employee welfare benefit plans.**

The defendants maintain that the proper inquiry in evaluating subject matter jurisdiction is whether Employer's Mutual or the Associations established "employee welfare benefit plans." In answering this question, the defendants say they do not because they recruited unrelated, heterogenous employers to join with no preexisting relationship between them. As other courts have recognized, multiple employer trusts are not employee welfare benefit plans because the trusts do not fit within the statutory [\*17] definition of "employer." See, e.g., *Moideen v. Gillespie*, 55 F.3d 1478, 1481-1482 (9th Cir. 1995) (determining that a trust was not an employer because its members lacked a pre-existing organizational relationship); *MDPhysicians & Associates, Inc. v. State Bd. of Ins.*, 957 F.2d 178 (5th Cir. 1992) (holding that a multiple employer plan was not an employer since there was no pre-existing relationship and the plan was not acting in the interest of subscribers).

In keeping with their traditional position on for-profit multiple employer benefit arrangements, the Secretary agrees with defendants' conclusion. See also *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (explaining that the Secretary has joined numerous courts in concluding that the actual multiple employer trusts are not employee welfare benefit plans). Rather, the Secretary maintains that subject matter jurisdiction exists because the employers in subscribing to a trust's benefit plan established employee welfare benefit plans.

**2. This court has subject matter jurisdiction by virtue of the employee welfare benefit plans established by employers.**

ERISA's purpose is "to protect working men and women from abuses in the administration [\*18] and investment of private retirement plans and employee welfare plans." *Donovan*, 688 F.2d at 1370 (citing H.R. Rep. No. 93-533 (1974)). In fulfilling this purpose, ERISA enumerates minimal standards for vesting of benefits, funding of benefits, performing fiduciary responsibilities, reporting to the government and disclosures to participants, and mandates that these standards apply to all employee welfare benefit plans with limited exceptions. *Id.* Accordingly, while a multiple employer trust is not an employee welfare benefit plan, ERISA's fiduciary obligations still apply to

the trust if it is a fiduciary to employee welfare benefit plans established by others. See *id.* at 1375-1376 (holding that multiple employer welfare arrangements, while not themselves employee welfare benefit plans under ERISA, may be subject to ERISA's fiduciary responsibilities if they are fiduciaries to employee benefit plans established or maintained by others).

As noted above, a plan is an employee welfare benefit plan if it is: (1) plan, fund, program; (2) established or maintained; (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing medical, surgical, hospital [\*19] care, sickness, accident, disability, death, unemployment, or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services or severance benefits; (5) to participants or their beneficiaries. See *id.* at 1371. The existence of an employee benefit plan is determined by whether a reasonable person, in considering all the surrounding facts and circumstances, would find that an ERISA plan exists. *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 492 (1989).

A useful tool to gauge whether an employer established an employee benefit plan are the Department of Labor's regulations interpreting ERISA. See *Crull v. Gem Ins. Co.*, 58 F.3d 1386, 1389-1390 (9th Cir. 1995). Pursuant to its regulations, the Department does not consider a plan to be an employee benefit plan if: (1) the employer makes no contributions; (2) employee participation in the program is completely voluntary; (3) the employer's sole functions with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; [\*20] and (4) the employer does not receive any consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs. 29 C.F.R. § 2510.3-1(j). In relying on these regulations, prior courts have recognized that employers "can establish an ERISA plan rather easily. Even if an employer does no more than arrange for a 'group-type insurance program,' it can establish an ERISA plan, unless it is a mere advertiser who makes no contributions on behalf of its employees." *Credit Managers Ass'n of S. Cal. v. Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617,

625 (9th Cir. 1987) (citing to Dep't of Labor regulations).

In considering the purpose of ERISA in conjunction with the surrounding facts and circumstances, it appears that the employers here established employee welfare benefit plans. First, contrary to defendants' assertions, it appears that the plans were marketed to employers and required employer participation. The application materials were directed to employers to complete and employers had to affirm in their application that [\*21] they joined an Association and were enrolling their employees. (See Decl. Ex. 11.) Employees were only eligible once their employers sponsored them. (Decl. Ex. 10 (summary plan description provisions regarding eligibility).) These actions indicate that employers more likely endorsed the program than simply allowed defendants to publicize it to employees.

Additionally, the testimony of Mrs. Canter, the accountant for Parker's Model T indicates that Parker's Model T played a substantial role in securing health benefits for its employees. As Mrs. Canter related, she oversaw deductions from employee wages for premiums, and she monitored the status of employee claims. Similarly, Al Cook, the director of finance for Tripp Enterprises, indicated that he selected Employers Mutual to provide health benefits to Tripp Enterprises' employees, that Tripp Enterprises paid their employees' health insurance premiums, and that he oversaw deductions from employee wages for insurance premiums for their dependents. (1/17/02 Hrg. (testimony of Canter & Cook).)

## B. Secretary's Motion for Preliminary Injunction

### 1. Ninth Circuit Standard for Preliminary Injunction

A preliminary injunction is "an extraordinary [\*22] remedy, which should be granted only in limited circumstances." *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir. 1989) (quoting *Frank's GMC Truck Center, Inc. v. G.M.C.*, 847 F.2d 100, 102 (3d Cir. 1988)). This remedy should only be granted where the merits of the case clearly favor one party over the other. See *Remlinger v. Nevada*, 896 F.Supp. 1012, 1015 (D. Nev. 1995). As the *Remlinger* court explained

"The cases best suited to preliminary relief are those in which the important facts are undisputed, and the parties

simply disagree about what the legal consequences are of those facts. The court in such a case can take the undisputed facts, apply the law to them, and fairly easily decide which party is likely to prevail."

*Id.*

A party seeking a preliminary injunction must fulfill one of two standards, described in the Ninth Circuit as "traditional" and "alternative." See *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). Under the traditional standard, a court may issue preliminary relief if it finds that (1) the moving party will probably prevail on the merits; (2) the moving party will suffer irreparable injury if the relief is denied; (3) the balance of [\*23] the hardships favor the moving party; and (4) the public interest favors granting relief. *Id.*

Under the alternative standard, the moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) that serious questions exist and the balance of hardships tips sharply in its favor. See *id.* This latter formulation represents two points on the sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. See *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

The formulation is altered in actions brought by the government pursuant to a statute. *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 175 (9th Cir. 1987). Specifically, where a statute authorizes injunctive relief and the statutory conditions are satisfied, the agency authorized to enforce the statute is not required to show irreparable injury. Rather, the court is to presume that the government will suffer irreparable injury if their motion is denied. This lesser standard is consistent with the notion that "the passage of the statute is itself [\*24] an implied finding by Congress that violations will harm the public." *Miller for and on Behalf of N.L.R.B. v. California Pac. Med. Ctr.*, 19 F.3d 449, 459 (9th Cir., 1994). However, where the government can only make a "colorful evidentiary showing" of a violation, the court must also consider irreparable harm. *Id.*

Since ERISA provides for injunctive relief, this altered standard is appropriate if the Secretary is able to establish a likelihood of prevailing on the merits. 29

*U.S.C. § 1132(a)(5)* (authorizing Secretary of Labor to bring an action to enjoin any act or practice that violates ERISA or seek any other appropriate equitable relief). As discussed below, the Secretary has made the requisite showing of statutory violations and irreparable injury should appropriately be presumed. Accordingly, the court finds that the Secretary satisfied the alternative standard and is entitled to injunctive relief.

## 2. Success on the Merits

To presume irreparable injury in a statutory enforcement action, the court need only find some chance of probable success on the merits. *Odessa Union Warehouse Co-Op*, 833 F.2d at 176. In that regard, the Secretary must show they are likely to succeed on the merits [\*25] and not just a "colorable evidentiary showing" of a violation. *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 398 (9th Cir. 1992).

### a. Defendants Graf, Kokott, Angelos & Hanson are likely fiduciaries to the employee welfare benefit plans.

Since the Secretary is alleging that defendants breached their various fiduciary responsibilities and duties, it must first be determined whether each of these defendants are likely fiduciaries as defined in ERISA. For purposes of ERISA, a fiduciary is anyone who "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets ... [or] has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A)(i) and (iii).

The Ninth Circuit liberally construes this definition. See *Arizona State Carpenters Pension Trust Fund v. Citibank*, 125 F.3d 715, 720 (9th Cir. 1997). Determinations of whether a party is a fiduciary focus on the party's functional control and authority over a plan rather than how their duties are formally characterized. *CSA 401(K) Plan v. Pension Prof'ls, Inc.*, 195 F.3d 1135, 1138, (9th Cir. 1999). [\*26] Moreover, in applying the definition, courts have distinguished the different levels of control required to establish fiduciary status: While a party is only a fiduciary if they have discretionary authority over the management and administration of a plan, a party who exerts any control over the management or disposition of plan assets is a fiduciary. See *IT Corp. v. General Am. Life Ins. Co.*, 107 F.3d 1415, 1421-1422

(9th Cir. 1997). See also *Patelco Credit Union v. Sahni*, 262 F.3d 897, 909 (9th Cir. 2001) (citing several cases). The right to write checks with plan funds is a clear demonstration of authority over plan assets. *IT Corp.*, 107 F.3d at 1421.

Accordingly, to determine whether defendants are fiduciaries, it must be determined whether employee welfare benefit plans and plan assets exist, and, if so, whether the defendants exercised the requisite control over these plans and assets. The first requirement is easily established since, as discussed above, the arrangements between employers with the Associations created employee welfare benefit plans. Employee wage deductions and employer contributions to fund the benefit programs are clearly plan assets.

In evaluating the defendants' [\*27] conduct with respect to the plans, all defendants are likely fiduciaries because it appears that they all exerted some control over plan assets, and some were also involved in the management and administration of plans. First, with regard to Graf, he conceded at the hearing that he set the premium rates for the plans, and that he set defendant Hanson's rate of compensation to be paid out of plan assets. (1/17/02 Hrg.) Additionally, it appears that Graf negotiated his own salary that was also paid out of plan assets and signed an agreement on behalf of Employers Mutual as Vice President with Spectrum Review Services to obtain pre-certification and utilization review services. (Decl. Ex. 38.) These examples evidence Graf's significant control over the plans and plan assets. Similarly, Kokott's management and control over the plans and his significant control over their assets is demonstrated by his status as a managing member of the Associations and his admissions in an interview that he was issuing compensation checks to himself as well as entities owned by him. (Decl. Ex. 3.) Angelos also appears to be a fiduciary as a managing member of the Associations, and through his involvement [\*28] at the Glendale office. To illustrate, as a managing member, Angelos executed trust agreements on behalf of all the Associations that vested control of the plans and the plan assets in Employers Mutual. (Decl. Ex. 9.) As such, these transactions evidence Angelos' control over the disposition and management of plan assets. Finally, Hanson is likely a fiduciary since she has exerted discretionary control over the management and administration of the plans. For instance, she issued a memorandum, as director of operations, assuring all

association representatives that each participant's policy was fully funded and insured. (Decl. Ex. 32.) Additionally, Hanson established Colombia as a preferred provider network and arranged for Colombia to provide Employers Mutual with access to its preferred provider network for compensation. (Decl. Ex. 44.)

**b. Graf, Kokott, Angelos & Hanson likely violated 29 U.S.C. § 1106(a)(1)(C)-(D) & 29 U.S.C. § 1106(b)(1)-(3).**

In her first claim for relief, the Secretary alleges that Graf, Kokott, Angelos and Hanson made several payments to themselves or entities owned and controlled by them in violation of 29 U.S.C. §§ 1106(a)(1)(C) & (D) and 1106(b)(1)-(3).

**i. Alleged [\*29] 29 U.S.C. 1106(b)(1)-(3) Violations**

Under 29 U.S.C. § 1106(b), fiduciaries are prohibited from: (1) dealing with plan assets to benefit themselves; (2) representing parties with interests adverse to the plan or its participants or beneficiaries in transactions concerning the plan; or (3) receiving any form of consideration from any party dealing with the plan in a transaction involving its assets.

It is a per se violation of 29 U.S.C. § 1106(b) for a fiduciary to engage in any of these transactions regardless of whether bad faith or the reasonableness of the transaction has been demonstrated. *See Patelco Credit Union*, 262 F.3d at 911 (concluding that § 1106(b) creates a per se ERISA violation and that the exemptions contained in 29 U.S.C. § 1108(b) do not apply to § 1106(b)).<sup>7</sup>

<sup>7</sup> While, under 29 U.S.C. § 1108(c)(2), a fiduciary is permitted to receive "reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan," the Ninth Circuit also held in *Patelco Credit Union* that 29 U.S.C. § 1108(c) does not apply if the fiduciary engaged in self-dealing to secure the payment to themselves. 262 F.3d at 911. [\*30] This is consistent with the regulations implementing ERISA. *See* 29 C.F.R. § 2550.408b-2.

The Secretary alleges Graf, Kokott and Angelos

violated § 1106(b)(1)-(3), and highlights numerous transactions involving the defendants as examples of self-dealing. (Mem. of P. & A. (# 3), at 16-18.) In short, the Secretary alleges that defendants set their own compensation and determined their own expenses from plan assets, and used their discretionary authority and control to cause the Associations and Employers Mutual to contract with each other and with Colombia, Western, WRK Investments and Graf Investments, entities owned and controlled by these defendants.

It appears the Secretary will prevail on the merits of her 29 U.S.C. § 1106(b) claims. Chiefly, Kokott and Angelos hired Employers Mutual to manage the Associations' plans by entering into trust agreements. (Decl. Ex. 9.) Employers Mutual and the Associations are owned by Kokott and Angelos. (Decl. Exs. 8, 36.) Subsequent to this arrangement, Kokott and Angelos received payments from Employers Mutual. (*See* Decl. Ex. 2.) Angelos testified that he initially received \$ 5,000.00 each month from Employers Mutual and was given a raise in October [\*31] 2001 to \$ 6,500.00. (1/17/02 Hrg.)

Additionally, Graf, Kokott and Angelos entered into contracts on behalf of the Associations with Western and Colombia to acquire access to their provider networks. Western is owned and controlled by Angelos and Kokott. (Decl. Ex. 47.) Graf testified Hanson owns Colombia and Hanson is listed as Colombia's President, Secretary and Treasurer. (1/17/02 Hrg.; Decl. Ex. 43.) According to the Secretary's abstracts of Employers Mutual checking statements, Western received \$ 216,451.00 and Colombia was paid \$ 830,395.00. (Decl. Ex. 42.) It appears from the abstracts that, despite receiving several payments for acting as a preferred provider network, Colombia's status as a provider network for Employers Mutual was still pending as of August 20, 2001. (Decl. Ex. 46.) Moreover, additional evidence indicates that Colombia and Western were paid despite not rendering any services. As Kokott related in his interview, he did not know if Western had a provider network because he had never seen a provider list for Western, nor did he see any contracts between Western or any providers. Western also does not have any employees. Additionally, Kokott admitted that he signed [\*32] the checks to Western and Colombia without verifying that services were actually rendered. (Decl. Ex. 3.) Since the defendants do not offer any explanation for these discrepancies, the Secretary has likely established that Graf, Kokott, Angelos and Hanson

engaged in self-dealing through these arrangements between the Associations, Employers Mutual, Colombia, and Western.

Similarly, the fiduciary defendants hired WRK Investments and Graf Investments to perform investment services for the plans. Both were established by Kokott and he is listed as the sole managing member. (Decl. Ex. 41.) These two entities have received payments for unspecified services. Kokott, in an interview, admitted that he and Graf, as of November 29, 2001, had each received approximately \$ 225,000.00 from the payments received by WRK Investments and Graf Investments. (Decl. Ex. 3.)

Given that fiduciary self-dealing is a per se ERISA violation, it further appears that Graf, Kokott, Angelos and Hanson violated ERISA's self-dealing provisions by writing checks from Trust accounts to themselves and to other entities they control. (See Decl. Ex. 2 (listing the checks written from the Bank of America and Cal Fed accounts [\*33] between January and August 2001).) According to Angelos, his construction company was allowed to use Employers Mutual offices rent free in exchange for performing maintenance services. (1/17/02 Hrg.) However, Angelos failed to explain the approximately \$ 5,000.00 that his construction company received from Employers Mutual. (Decl. Ex. 2.) Similarly, Kokott admitted that Employers Mutual hired his construction company, Pacific Overland Construction, to perform repairs without ever requesting bids from competitors. Additionally, the invoices submitted by Pacific Overland do not include itemized charges for the costs of construction but only the expenses. (See Decl. Ex. 3.) These transactions also likely establish violations of 29 U.S.C. § 1106(b). See *Patelco Credit Union*, 262 F.3d at 911 (finding the fiduciary who determined his own administrative fees and collected them from the plan's funds engaged in self-dealing prohibited by 29 U.S.C. § 1106(b)(1)).

#### ii. Alleged 29 U.S.C. § 1106(a)(1)(C)-(D) Violations

The Secretary also maintains that the transactions with Western, Colombia, WRK Investments, and Graf Investments violated 29 U.S.C. § 1106(a)(1)(C) and (D). These two provisions prohibit [\*34] fiduciaries to ERISA plans from being involved in transactions where he knows or should know the transaction is a direct or indirect: (1) furnishing of goods, services, facilities

between the plan and a party in interest; or (2) transfer to, or use by, or for the benefit of, a party in interest of any plan assets. 29 U.S.C. § 1106(a). To demonstrate a violation, the Secretary must show that the following is likely true: (1) the person receiving the goods or plan assets is a party in interest; (2) plan assets are involved (in § 1106(a)(1)(C) claims); and (3) the fiduciary knew or should have known the transaction involved the transfer or furnishing of plan assets.

First, ERISA includes the following individuals as "parties in interest" to an employee benefit plan:

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

...

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of--

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such [\*35] corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

29 U.S.C. § 1002(14).

Colombia appears to be a party in interest because it

provides services to the employee benefit plans and is a corporation which 50% or more is owned by Hanson, a person described above in (A) & (B). 29 U.S.C. § 1002(14)(B) & (G). Similarly, WRK Investments, Graf Investments and Western are likely parties in interest because they provide services to the plans covered and are LLC's which 50% or more is owned by Kokott, a person described above in (A) & (B). *Id.* Second, these transactions involved transfers of plan assets since they involved premium monies. Finally, since it appears that the fiduciaries own and control these organizations, common sense dictates that they knew or should have known that these were transfers of plan assets to parties in interest. Accordingly, it is likely that the Secretary has also established a violation of 29 U.S.C. § 1106(a).<sup>8</sup>

<sup>8</sup> While 29 U.S.C. § 1108(b)(2) insulates transactions with parties [\*36] in interest where the arrangements are reasonable and necessary for the establishment and operation of the plan, it appears to the court that it does not apply here since the purposes of these payments are unknown, the payments are large, and it appears that minimal services, if any, were provided.

The court has authority to require parties in interest to return any payments received through a prohibited transaction. As discussed above, it appears that Colombia, Western, WRK Investments, and Graf Investments participated in "prohibited transactions" by receiving excessive compensation for providing minimal, if any, services in violation of 29 U.S.C. §§ 1106(a)(1), 1108(b). Because these transactions likely violate ERISA, the court is authorized by 29 U.S.C. § 1132(a)(5) to issue equitable relief, including restitution, "to redress such violation[s]." *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 248-249, 120 S. Ct. 2180, 147 L. Ed. 2d 187 (2000) (explaining that the Secretary of Labor may bring actions under 29 U.S.C. § 1132(a)(5) against non-fiduciaries involved in prohibited transactions with fiduciaries); *Reich v. Stangl*, 73 F.3d 1027, 1031 (10th Cir. 1996) (holding that 29 U.S.C. § 1132(a)(5) [\*37] allows Secretary to bring equitable action against parties in interest who participated in prohibited transactions). The Ninth Circuit has reached a similar conclusion with respect to 29 U.S.C. § 1132(a)(3), which contains language similar to 29 U.S.C. § 1132(a)(5), in concluding that (a)(3) authorizes fiduciaries, participants and beneficiaries to bring actions in equity against parties in interest that participated in

prohibited transactions. *Nieto v. Ecker*, 845 F.2d 868, 873- 874 (9th Cir. 1988). As the court explained, "[c]ourts may find it difficult or impossible to undo such illegal transactions unless they have jurisdiction over all parties who allegedly participated in them." *Nieto*, 845 F.2d at 874.

**c. Graf, Kokott & Angelos likely violated 29 U.S.C. § 1106(a)(1)(C)-(D) by paying excessive compensation to parties in interest.**

The Secretary also asserts that Graf, Kokott and Angelos violated 29 U.S.C. § 1106(a)(1)(C)-(D) by making excessive payments to other party in interest defendants, namely Associated Agents, American Benefit Society and Hanson.

Under the above definition, it also appears that these organizations and Hanson are parties in interest since Associated Agents and [\*38] American Benefit Society provided marketing services to the plans, and Hanson has already been determined to be a fiduciary. *See* 29 U.S.C. § 1002(14)(A)-(B).

As discussed above, ERISA prohibits transfers of plan assets or furnishing of goods or services to parties in interest unless it is reasonable compensation for the rendering of necessary services to the plan. *See* 29 U.S.C. § 1106(a)(1)(C)-(D); 29 U.S.C. § 1108(b)(2). The regulations implementing ERISA highlight three elements for determining whether § 1108(b)(2) insulates a transaction: (1) the service is necessary to the operation or establishment of a plan; (2) the service was provided under a contract or other reasonable arrangement; and (3) the party in interest received no more than reasonable compensation for the service. The regulations further instruct that a service is necessary where it is appropriate and helpful to the plan in carrying out its purposes, 29 C.F.R. § 2550.408b-2, and that determining the reasonableness of compensation is a case specific inquiry that requires consideration of all the relevant facts and circumstances. 29 C.F.R. § 2550.408c-2. The defendants carry the burden to establish compensation was [\*39] reasonable. *Moreland v. Behl*, 1996 U.S. Dist. LEXIS 5653, 1996 WL 193843 (N.D. Cal. 1996). Accordingly, it must be determined whether the payments in question represented reasonable compensation for services necessary to the operation or establishment of the plan in light of these guidelines.

With regard to American Benefit Society and

Associated Agents, the issue hinges on whether they received excessive compensation. Their services appear to be necessary as they provided marketing services pursuant to agreements with Employers Mutual and the Associations to market the plans for a commission. (See Decl. Exs. 13, 14.) The marketing of the plans was appropriate and helpful to the establishment of the plans. However, it does appear that the payments to them were excessive. According to the Secretary's abstracts of defendants' bank records, Associated Agents received \$ 959,574.00, representing 21.86% of Employers Mutual's total expenditures, between January and August 2001. (Decl. Ex. 2.) In addition, under its agreement with Employers Mutual, American Benefit Society was to receive 7% of all premiums it collected. (Decl. Ex. 14 at P 4 & fee schedule.) To date, the Secretary estimates that American Benefit Society [\*40] had collected \$ 2,711,593.00 in employer premiums. (See Decl. Ex. 1.) It appears from testimony at the hearing that American Benefit Society received at least \$ 400,000.00 in payments.<sup>9</sup> Defendants have offered no evidence as to the reasonableness of these fees. Moreover, these payments seem excessive. In accepting the Secretary's figures as true, it appears that of the approximate \$ 15,000,000.00 in premiums collected between January and October 2001, American Benefit Society and Associated Agents received almost ten percent. (Decl. Exs. 1, 2.)

<sup>9</sup> This observation is based upon Thomas Dillon's testimony that American Benefit Society had returned \$ 418,000.00 in fees paid by Employers Mutual. (1/8/02 Tr. 33:10-13.) While the Secretary alleges that American Benefit Society received over \$ 500,000.00 in fees, the evidence presented by the Secretary does not support this. Additionally, at one point in his declaration, Zehr states that the amounts received by American Benefit Society are unknown. (Decl. P 63.)

It also appears that the payments to Hanson likely violate 29 U.S.C. § 1106(a). Chiefly, it is unknown what services she performed since there was no employment contract and no evidence [\*41] has been presented as to her job duties. According to the Secretary's abstracts of defendants' bank records, Hanson received \$ 107,951.00 between January and August 2001. (Decl. Ex. 2.) This amount is more than double her listed salary. (See Decl. Ex. 39 (Employers Mutual Payroll Info. as of July 1,

2001 (listing Hanson's salary as \$ 5,000.00 per month).) For these reasons, the Secretary has also likely established a violation as to the payments to Hanson.

As with the payments made to Colombia, Western, WRK Investments and Graf Investments, should the court determine the payments to American Benefit Society, Associated Agents, and Hanson constituted prohibited transactions, the court may authorize these parties to pay restitution. 29 U.S.C. § 1132(a)(5).

**d. Graf, Kokott, & Angelos likely violated 29 U.S.C. § 1104(a)(1)(A)-(B).**

The Secretary further alleges that Graf, Kokott and Angelos by engaging in these prohibited transactions as well as other conduct breached their fiduciary duties under ERISA. In its prudent standard of care requirement, ERISA imposes several specific duties, including: (1) requiring fiduciaries to act exclusively for the benefit of participants and beneficiaries [\*42] and limit administrative expenses (29 U.S.C. § 1104(a)(1)(A)); and (2) requiring fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims" (29 U.S.C. § 1104(a)(1)(B)).

The first duty has been described as the "exclusive purpose" rule and places an exacting standard on fiduciaries. As the statute indicates, the fiduciary is to act exclusively in the interest and purpose of providing benefits and defraying administrative expenses. The Ninth Circuit liberally construes this duty to protect participants and beneficiaries. *Board of Trustees of Airconditioning & Refrigeration Indus. Health & Welfare Trust Fund v. J.R.D. Mechanical Services, Inc.*, 99 F.Supp.2d 1115, 1122 (C.D. Cal. 1999).

The second duty of prudence includes the requirement that the fiduciaries make thorough investigations and fully consider transactions before entering into them. *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996); *Donovan v. Mazzola*, 716 F.2d 1226, 1231-1232 (9th Cir. 1983). ERISA's legislative history [\*43] further instructs courts to interpret the rule in light of "the special nature and purpose of employee benefit plans." *Id. at 1231* (quoting H.R. Rep. No. 93-1280 (1974).)

Based upon the prior violations already discussed, it appears the Secretary is also likely to prevail on this claim since a finding of fiduciary self-dealing also establishes a breach of fiduciary duties. *Patelco Credit Union*, 262 F.3d at 911. Thus, since the alleged violations are likely true, it appears that Graf, Kokott, and Angelos have violated their fiduciary duties outlined in 29 U.S.C. § 1104(a)(1)(A)-(B) through their self-dealing.

Since the Secretary has shown a likelihood of prevailing on the merits, irreparable injury is presumed. *Miller for and on behalf of N.L.R.B.*, 19 F.3d at 459. Accordingly, the court finds the Secretary is entitled to preliminary relief.

### III. Conclusion

**IT IS ORDERED** that the Secretary's motion for preliminary injunction (# 3) be **GRANTED**.

**IT IS FURTHER ORDERED** that:

1. All assets of Defendants James Lee Graf ("Graf"), William Kokott ("Kokott"), Nicholas Angelos ("Angelos"), Kari Hanson ("Hanson"), Colombia Health Network, Inc., Western Health Network, Inc., Employers Mutual, LLC, American [\*44] Association of Agriculture, Association of Automotive Dealers and Mechanics, Association of Barristers and Legal Aids, Communication Trade Workers Association, Construction Trade Workers Association, American Coalition of Consumers, Association of Cosmetologists, Culinary and Food Services Workers Association, Association of Educators, Association of Health Care Workers, National Alliance of Hospitality and Innkeepers, Association of Manufacturers and Wholesalers, Association of Real Estate Agents, Association of Retail Sellers, National Association of Transportation Workers, and National Association of Independent Truckers, (referred to collectively as the "Associations") including all accounts wherever located which contain their assets, be and hereby are frozen and Defendants, their officers, directors, fiduciaries, agents, employees, service

providers, depositories, banks, accountants, attorneys, and any other party acting in concert with or at the direction of any Defendant be and hereby are enjoined from expending transferring, encumbering, hypothecating, secreting or otherwise disposing of any Defendants' assets, except as ordered by this Court or its duly appointed receiver [\*45] or Independent Fiduciary. The bank accounts frozen include, but are not limited to, California Federal Bank account numbers 893-4221980; 893-4203988; 893-4207708; 893-4203996; 893-4207716; 893-4217988; 893-4207526; 893-4218994; 893-4207583; 893-4221998; 893-42079674; 893-4221972; 893-4207666; 893-4217996; 893-4207534; 893-4219950; 893-4207591; 893-4218952; 893-4207542; 893-4218960; 893-4207559; 893-4219968; 893-4207682; 893-4217970; 893-4207617; 893-4218986; 893-4207567; 893-4218978; 893-4207575; 893-4222954; 893-4207609; 893-4224968; and 893-4207690; Bank of America, N.A. account numbers 004961861669; 004961861656; 004961861643; and 004961861685; City National Bank account numbers 0411957985 and 0411958434; and, Bancfirst Bank (Oklahoma City, Oklahoma) account number 4005054522;

2. Defendants James Graf, William Kokott, Nicholas Angelos, and Kari Hanson and any companies or entities they own or control, including Defendant in this action, are removed from any position they may currently hold with respect to Employers Mutual, LLC, the Associations, and the Employers Mutual Plans, and are enjoined from exercising any authority or control with respect to said entities, and from providing [\*46] any services to or receiving any compensation from them except as ordered by this Court;

3. Defendant James Graf, William Kokott, Nicholas Angelos, and Kari Hanson are enjoined from, directly or indirectly, accepting or soliciting any person, employer, or group thereof for participation in any plan or arrangement offering employee benefits covered by ERISA;

4. Defendants James Graf, William Kokott, Nicholas Angelos, and Kari Hanson are ordered to provide this Court, the Secretary of Labor's counsel, and the Independent Fiduciary with the name, account number, and location of their personal bank accounts and any other accounts containing their assets within five (5) business days of the entry of this Order and are further ordered to make an accounting to the Secretary and the Independent Fiduciary of all personal monies in excess of \$ 100.00 (one hundred dollars) expended or personal assets transferred between December 13, 2001, and the entry of this Order;

5. All Defendants and their agents, employees, service providers, depositories, banks, accountants, attorneys, and any other person or entity with actual notice of this Order are enjoined to preserve, secure, and produce to the Independent [\*47] Fiduciary upon his request, all books, records, and documents which relate to the administration and operation of Employers Mutual, LLC, the Associations, the Employers Mutual Plans, and their assets and to comply in good faith with the terms of this Order;

6. Thomas A. Dillon shall continue to serve as the Court's receiver or Independent fiduciary of Employers Mutual, LLC, the Associations, and the Employers Mutual Plans with plenary authority to administer said entities and, if necessary, to implement their orderly termination. The Independent Fiduciary shall collect, marshal, and administer the assets of Employers Mutual, LLC, the

Associations, and the Employers Mutual Plans, including those sums owing and payable to them, process the Employers Mutual Plans' unadjudicated claims and pay those which are found to be legitimate, identify all creditors of the entities and the amount of their claims, and take such further actions with respect to said entities which may be appropriate. The Independent Fiduciary shall exercise full authority and control with respect to the management or disposition of the assets of the Employers Mutual Plans and other entities, including authority over [\*48] all accounts frozen pursuant to any Order of this Court;

7. All Defendants are enjoined from coercing, intimidating, interfering with or attempting to coerce, intimidate, or interfere with the Independent Fiduciary or with the agents, employees or representative of the Independent Fiduciary and are ordered to cooperate fully with the Independent Fiduciary or his successors, agents, employees or representative. Rule 19(a) Defendant Sierra Administration, Inc., is to cooperate fully with the Independent Fiduciary and make available to him upon demand all books, records, data, claims files, financial records and other documents within its possession or under its control which relate, directly or indirectly, to the Employers Mutual Plans, their administration or their assets;

8. All Defendants are to deliver or otherwise make available to the Independent Fiduciary all books, records, bank accounts, and documents of every nature relating in any manner to the management and operation of the Employers Mutual Plans and the other entities under the receivership of the Independent Fiduciary;

9. The Independent Fiduciary has the authority to determine whether Employers Mutual, the Associations, [\*49] and the

Employers Mutual Plans can continue as viable entities and, if so, the Independent Fiduciary is to prepare and present to the Court an appropriate plan of reorganization. If not, the Independent Fiduciary is to terminate the Employers Mutual Plans, marshal the assets of Employers Mutual, the Associations, and the Employers Mutual Plans and implement an orderly plan of liquidation. In either case, the Independent Fiduciary is authorized to pursue all legitimate claims Employers Mutual, the Associations, and the Employers Mutual Plans may have against Defendants or third parties which, in his judgment, are likely to result in a meaningful recovery of assets to pay participant claims or costs of administration. The Independent Fiduciary's authority includes the authority to seek relief in this Court under the All Writs Act, 28 U.S.C. § 1651, to obtain quasi-bankruptcy protection for the Employers Mutual Plans if appropriate. The Independent Fiduciary need not pursue claims which are being pursued by the Plaintiff in this action;

10. The Independent Fiduciary in the performance of his duties may retain such assistance as he may require, including attorneys, accountants, actuaries, [\*50] and other service providers;

11. The payment of administrative expenses and all fees to the Independent Fiduciary, his assistants, attorneys, accountants, actuaries and other necessary service providers are to be considered priority administrative expenses of the Employers Mutual Plans and its related entities, superior to any other class of expense or obligation of the Employers Mutual Plans or its related entities and the Independent Fiduciary's second priority is to be the payment of legitimate claims;

12. The Independent Fiduciary may not be held personally responsible for any claims against the Employers Mutual

Plans or the related entities which existed, arose, matured or vested prior to the appointment of the Independent Fiduciary;

13. The Independent Fiduciary is to comply with all applicable rules and laws;

14. The Independent Fiduciary is to maintain the bond obtained pursuant to *ERISA* § 412, 29 U.S.C. § 1112;

15. The Independent Fiduciary shall be subject to such orders as the Court may direct, including the filing of interim and final reports. Upon application and appropriate documentation, the Independent Fiduciary shall receive monthly such reasonable compensation as the Court [\*51] may from time to time approve, in addition to reimbursement of reasonable expenses actually incurred in the performance of his duties;

16. The Independent Fiduciary shall provide such funds to the Defendants James Graf, William Kokott, Nicholas Angelos, and Kari Hanson as are necessary to pay reasonable living expenses and reasonable attorneys' fees. Such funds may only come from the requesting Defendant's personal assets. No assets of the Employers Mutual Plans may be used for these purposes. Any Defendant who requires a partial release of the assets frozen by the Court for the purpose of living expenses and/or legal representation shall file with the Court a statement of their anticipated monthly expenses. Such monies shall be released by the Independent Fiduciary to said Defendant and from same's personal accounts within ten (10) working days unless objected to by the Secretary or the Independent Fiduciary. Any objection shall be resolved by the Court;

17. All Defendants shall cooperate fully with the Independent Fiduciary or his successors, and with the agents, employees or representatives of the Independent Fiduciary and to deliver or

otherwise make available to the Independent [\*52] Fiduciary all books, records, bank accounts, and documents of every nature relating in any manner to the management and operation of Employers Mutual;

18. Defendants James Graf, William Kokott, Nicholas Angelos, and Kari Hanson are enjoined from:

a. Exercising, or attempting to exercise, directly or indirectly, any discretionary authority or control with respect to the management or administration of Employers Mutual, the Associations, and the Employers Mutual Plans, or, except as expressly provided by this Court, any other employee benefit plan or Trust holding assets of employee benefit plans subject to the coverage of ERISA, and from providing any services, directly or indirectly, for compensation or otherwise to any such employee benefit plan or Trust holding the assets of such plans unless specifically authorized by this Court;

b. Serving or acting, directly or indirectly, for compensation or otherwise, as a trustee, fiduciary, service provider, agent, consultant, or representative with respect to any employee benefit plan subject to ERISA; and

c. Occupying any position that involves, directly or indirectly,

decision making authority with respect to, or custody or control of, the assets [\*53] or administration of any employee benefit plan subject to ERISA;

19. Defendants James Graf, William Kokott, Nicholas Angelos, and Kari Hanson shall immediately terminate any contracts or agreements for services that they jointly and severally, have or have had with Employers Mutual, or any of its officers, agents, employees, or representatives acting on behalf of Employers Mutual, and may not receive additional monies or compensation due under any such contracts or agreements for services and any other claims they may have against Employers Mutual and the Associations;

20. Any and all state and federal civil proceeding against Defendants Employers Mutual, LLC, the Associations, James Graf, William R. Kokott, Nicholas E. Angelos, Kari Hanson, WRK Investments, Graf Investments, Colombia Health Network, and Western Health Network, concerning Employers Mutual, LLC, the Associations, or the Employers Mutual Plans which have been or will be commenced are stayed except said stay:

a. Does not prevent any state or state agency from seeking non-monetary injunctive relief against any Defendant (excluding Employers Mutual and the Associations) or from seeking a recovery from any Defendant (excluding [\*54] Employers Mutual and the Associations) for payment of claims incurred in their respective states or freezing or otherwise seizing any Defendant's assets in aid of the

Independent Fiduciary, provided that such recovery for payment of claims or assets are given to the Independent Fiduciary;

b. Does not prevent any state or state agency from bringing an enforcement action against any Defendant (excluding Employers Mutual and the Associations) for non-monetary relief, including, but not limited to, an action for suspension or revocation of a license, an action to bar or limit any Defendant from engaging in any regulated activity, or an action to prohibit any Defendant from assisting the sale of, offer, or sale of any health care coverage (including coverage denominated as governed by ERISA);

c. Does not prevent any state or state agency from bringing an enforcement action against any Defendant (excluding Employers Mutual and the Associations) for any penalty or forfeiture imposed for a violation of state law, provided that either: (1) any money collected as penalties or forfeitures is given to the Independent Fiduciary to be used for purposes consistent with this Order, or (2) collection [\*55] of any judgment or assessment for penalties or forfeitures is deferred until the final conclusion of this case and the full collection

of any judgment against such defendant in this case;

d. Does not prevent the Independent Fiduciary from bringing and maintaining any legal action of any kind against any Defendant or any other person pursuant to his authority under this Order, and;

e. Does not prevent plaintiffs in *First Coast Premier Group, et al v. Employers Mutual, LLC*, Case No. 01-07998 CA (Fla. Cir. Ct. filed Dec. 13, 2001), from notifying participants in the Employers Mutual Plans that they may pay their premiums into the escrow account pursuant to the Temporary Injunction issued in that case on Dec. 6, 2001, and does not prevent the participants from paying such premiums into the escrow account, provided that plaintiffs give all money paid into the escrow account to the Independent Fiduciary to be used for purposes consistent with this Order, including the payment of a reasonable fee to the escrow agent for services rendered in managing the escrow account;

21. All hospitals, physicians, pharmacists, and other health care providers ("Providers"), including their agents, employees, [\*56] representatives, and assigns, are enjoined from commencing or continuing any judicial,

administrative, enforcement, or other proceeding, asserting any lien, providing negative reports to any credit rating or credit reporting entity, and threatening to take any such action against any participant, beneficiary, or insured covered or intended to be covered by Employers Mutual, LLC, any Employers Mutual Association, or any health plan or insurance arrangement sponsored by, administered by, or affiliated with Employers Mutual, LLC or any Employers Mutual Association related to any debt or to any claim for payment for medical or health care services rendered to any such participant, beneficiary or insured;

22. The Court retains such jurisdiction over the parties hereto as may be necessary for enforcement of this Order,

23. This Order shall remain in effect until the final resolution of this case, including any appeals.

IT IS SO ORDERED.

DATED: This 1st day of FEBRUARY, 2002.

/s/ David W. Hagen

UNITED STATES DISTRICT JUDGE

David W. Hagen