CASES & MATERIALS

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The Tenth Circuit affirms the denial of a motion to compel arbitration of putative class action alleging that the administration of corporation's employee stock ownership plan amounted to financial misconduct in violation of ERISA.

Harrison v. Envision Management Holding, Inc. Board of Directors, -- F.4th ---, 2023 WL 1830446 (10th Cir. February 9, 2023):

The plaintiff, a former employee of Envision Management, LLC ("Envision"), a diagnostic imaging company that employs approximately 1,000 people, filed suit alleging six causes of action under ERISA against Envision and its affiliated shell corporation, Envision Management Holding, Inc. ("Envision Holding"). Envision created an employment stock ownership plan ("ESOP"), and an ERISA-protected, defined contribution plan under which Envision made contributions to employee-participants into the plan to be invested in Envision's stock. As an "eligible employee" under the plan, Harrison was automatically a plan participant. Under the management of Envision Holding, the ESOP purchased $163.7 million in Envision's stock, depending on $103 million in direct loans from members of the ESOP committee, at 12% interest, and another $50 million in debt to Envision itself. Harrison alleges that the sale was at a stock price far in excess of the stock's market value. "In sum, Harrison alleges that the Seller Defendants … were able to financially benefit by selling Envision to the ESOP for significantly more than it was worth, while at the same time leaving the ESOP with a $154.4 million debt," and brought claims under ERISA for declaratory, injunctive, and compensatory relief.

The Defendants moved to compel arbitration under the Plan Document's ERISA arbitration and class action waiver. Harrison argued that the Plan Document's class waiver and arbitration provision conflicted with ERISA's provision to seek multiple remedies on behalf of the Plan as a whole under 29 U.S.C. § 1132(a)(2). The district court denied the Defendants' motion to compel arbitration.

The Tenth Circuit affirmed under the "effective vindication" exception. "This exception, which rests on public policy grounds, 'finds its origin in the desire to prevent prospective waiver of a party's *right to pursue* statutory remedies.' The key question is whether 'the prospective litigant effectively

may vindicate its statutory cause of action in the arbitral forum.'" 2023 WL 1830446, at *4 (quoting *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 235 (2013)). The Court identified that four of the six causes of action brought by Harrison specifically sought relief under ERISA §§ 502(a)(2) and (a)(3). The Court then held that the Plan Document's arbitration provision prevents Harrison from obtaining those statutory remedies:

> The second sentence of Section 21(b) states that "[e]ach arbitration shall be limited solely to one Claimant's Covered Claims, *and that Claimant may not seek or receive any remedy which has the purpose or effect of providing additional benefits or monetary or other relief to any Eligible employee, Participant or Beneficiary other than the Claimant*." The emphasized portion of this sentence would clearly prevent Harrison from obtaining at least some of the forms of relief that he seeks in his complaint pursuant to § 1132(a)(2)[.] … That is because all of these forms of relief would clearly "ha[ve] the purpose or effect of providing additional benefits or monetary or other relief to" all of the Plan participants and beneficiaries and would thus be barred by the second sentence of Section 21(b) of the Plan Document.

Id. at *11 (emphasis in original). The Court went on to hold that the arbitration provision in the Plan Documents "is not problematic because it requires Harrison to arbitrate his claims, but rather because it purports to foreclose a number of remedies that were specifically authorized by Congress in the ERISA provisions cited by Harrison." *Id.* at *12.

The Court rejected the defendants' argument that this result would make it so that an individual claim could never be arbitrated because the participant would not be able to waive the ERISA provision for plan-wide remedies. "[B]oth the nature of the claims and the specific relief sought by the complainant matter. Thus, an ERISA complainant who is asserting a claim unique to himself or herself could not, simply by citing to the same ERISA provisions cited by Harrison, avoid arbitration in reliance on the effective vindication exception." *Id.* at *14.

The Fifth Circuit reversed the dismissal of plaintiff institutional investor's claim against amusement park company for securities fraud, examining the utility of confidential-informant-based allegations, the parameters of the PSLRA's safe harbor provision for forward-looking statements, the line between actionable misrepresentations and inactionable puffery, and the particularity requirement with regard to scienter.

Oklahoma Firefighters Pension & Retirement System v. Six Flags Entertainment Corporation, 58 F.4th 195 (5th Cir. January 18, 2023):

The plaintiff labor union retirement system brought suit against an amusement park company, alleging that the company and two of its executives had made material misrepresentations about the company's development of amusement parks in China. The district court had granted the company's motion to dismiss the plaintiff's Securities Exchange Act claims.

Because the plaintiff's complaint was based in large part on facts divulged from a confidential source, the district court had "generally" discounted those allegations, and "significantly" discounted allegations about the financial health of the amusement park company's Chinese partner. The Court of Appeals recognized that, under the PSLRA heightened pleading standard, the process of weighing the strength of the plaintiff's favored inference against other possible inferences "is obstructed when the witness is anonymous, so courts must apply a discount to confidential witness allegations"; but the Court then held, "Discount does not mean unfettered discretion to disregard." 58 F.4th at 209. Because the complaint provided particular detail about the person who was the confidential source and about their position relative to the facts being alleged, there was "reason to credit the informant's reliability." *Id.* The Court also held that the allegations based on the confidential informant's knowledge were sufficiently particular, and that the company's particularity arguments were actually disagreements about the merits of those allegations. *Id.* at 213-14.

The Court then examined the district court's finding that the company's statements about the progress of the development of the Chinese parks were "forward-looking" and had the appropriate cautionary language to fit within the PSLRA's safe harbor provision. The Court held that the statement that, "right now, barring some other decisions that's made, all our parks are progressing nicely towards their anticipated opening dates," was a mixed present/future statement outside the scope of safe-harbor protection. The Court did hold, however, that other statements that just stated an anticipated park opening date without any commentary on present construction progress were purely prospective. But the Court held that there was not appropriate

cautionary language, rejecting as such language both the general cautionary statements at the beginning of each earnings call and Form 10-Ks, as well as company-specific language that nevertheless failed to identify specific factors that could cause actual results to differ materially from the prospective statement. *Id.* at 211-12.

The Court held that forward-looking statements are subject to a higher pleading standard for scienter, requiring particular allegations of actual knowledge of the falsity of the forward-looking statements. *Id.* at 214. The Court held that the "collective weight" of the complaint's allegations of the company's financial motives for making the statements in question, the internal corporate reports of the reality of the construction progress, and the allegations of specific presentations for the benefit of the company's executives who made the representations was sufficient to particularly allege scienter. *Id.* at 215-16.

The Court then turned to whether certain statements were mere puffery or were actionable misrepresentations:

> Some of the general, abstract statements about the prospect of future parks, such as, "[w]e will not be stopping at 10 parks," and "we're already at 11, I think 20 parks is possible," are vague, optimistic generalizations that would not convey to a reasonable investor such aspirations are guaranteed or even likely. … On the other hand, other identified statements were made in the context of announcing projected park opening dates and are therefore too specific to categorize as general corporate optimism. Statements such as, "[t]he timing of the parks remains exactly the same as previously discussed" or that the "parks are progressing nicely" are not "vague" or "generalized, positive statements," because they confirmed the projections previously provided by Defendants.

Id. at 220. The Court held, therefore, that the district court had applied "too broad a definition of that concept" regarding inactionable puffery. *Id.*

The Ninth Circuit affirmed the denial of a motion to compel arbitration of a putative class action brought by the buyer of a lifetime tire balancing and rotation service agreement, holding that the service agreement was not an interrelated agreement with transaction to buy the tires themselves, which transaction had included an arbitration agreement.

Johnson v. Walmart Inc., 57 F.4th 677 (9th Cir. January 10, 2023):

The plaintiff had purchased a set of tires from Walmart's website, which transaction subjected him to the Terms of Use that included an arbitration provision. Subsequently, while the plaintiff was having the tires installed at a Walmart Auto Care Center, he separately purchased a lifetime tire balancing and rotation service agreement, which did not contain an arbitration provision. After he was denied the tire balancing and rotation service on multiple occasions, he commenced this putative class action. The district court denied Walmart's motion to compel arbitration.

Because the plaintiff contested the existence, rather than the scope, of an arbitration agreement encompassing his dispute as to the service agreement, the Court held that the district court appropriately ruled on the arbitrability question. 57 F.4th at 681. The Court then held that the tire purchase Terms of Use and the service agreement were not so interrelated that the arbitration provision in one applied to the other. *Id.* at 682. The Court noted that the Walmart Auto Care Center did not fall under the definition of a "Walmart Site" under the website Terms of Use, and that "[n]o provision of the Terms of Use addresses any form of in-store engagement with Walmart. … As the Terms of Use cover a defined subset of consumer interaction with Walmart—access to and use of Walmart Sites—the nested arbitration provision of the Terms of Use cannot apply to the controversy over the in-store purchase of the Service Agreement." *Id.*

The Court also rejected the interrelated-agreements argument because the purchase of the tires and the purchase of the service agreement were separately negotiated and entered into, involved separate consideration, and were not mutually dependent (*i.e.*, the service agreement did not depend on the tires subject to the agreement being tires purchased from Walmart).

The Ninth Circuit affirmed the denial of a motion to compel arbitration of a putative class action brought by users of an online cryptocurrency exchange who had opted into the exchange's sweepstakes, on basis that the sweepstakes rules superseded the user agreement and its arbitration clause under California law.

Suski v. Coinbase, Inc., 55 F.4th 1227 (9th Cir. December 16, 2022):

Plaintiffs created Coinbase accounts under a User Agreement that included an arbitration provision. Subsequently, they opted into a sweepstakes that included Official Rules that included a forum selection clause mandating exclusive jurisdiction by California courts. The plaintiffs brought consumer claims arising from the marketing and administration of the sweepstakes, and the district court denied Coinbase's motion to arbitrate.

The Court held that the delegation clause in the User Agreement, which delegated questions of the existence, scope, and validity of the arbitration provision to the arbitrator, did not apply to strip the district court of jurisdiction to determine if the plaintiffs' sweepstakes-related claims were subject to arbitration. 55 F.4th at 1230. The Court held that the question was as to the existence of an arbitration provision applicable to the sweepstakes, and not the scope of the arbitration provision in the User Agreement. *Id.*

The Court then held that the Official Rules of the sweepstakes superseded the User Agreement's arbitration clause. *Id.* Under California law, the Court held that a forum selection clause in a subsequent agreement will be held to supersede an arbitration provision in an earlier agreement where the forum selection clause sufficiently manifests the parties' intent to do so. *Id.* The Court held that the integration clause in the User Agreement did "not preclude a superseding contract from being formed in the future." *Id.* at 1231. "By including the forum selection clause, … the Official Rules evince the parties' intent not to be governed by the User Agreement's arbitration clause when addressing controversies concerning the sweepstakes." *Id.*