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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ROBERT A. BROWN, an individual Plaintiff, v. GOOGLE, INC.; PAYROLLING.COM; MARISSA MAYER; and DOES 1 through 20, Defendants.	No. C05 01779 PVT **PLAINTIFF ROBERT BROWN'S REPLY BRIEF IN SUPPORT OF HIS MOTION TO REMAND** Date: July 15, 2005 Time: 9:00 a.m. Dept.: 6 Judge: Hon. Ronald M. Whyte

SUPPLEMENTAL POINTS AND AUTHORITIES

A. ERISA Preemption Cannot Occur Without the State Claims Arising Out of an Actual Administration of the Plan Terms

Though "ERISA preempts all state laws insofar as they apply to employee benefit plans … some state laws affect employee benefit plans too tenuously to be characterized fairly as relating to employee benefit plans." *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389 (9th Cir. 1988), quoting *Howard v. Parisian, Inc.*, 807 F.2d 1560,1563 (11th Cir.1987). Therefore, a claim for recovery of denied employee benefits is not preempted by ERISA if the denial was in no way the result of any action taken on behalf of the plan or as part of the *administration* of the plan. *Ethridge,* 861 F.2d 1389. Put in the affirmative, state law claims, whether under common law or state statute, will only be deemed preempted by ERISA "when the claims arise from the *administration* of such plans." *Id*. at 1404, citing *Scott v. Gulf Oil Corp*., 754 F.2d 1499, 1504 (9th Cir.1985).

In *Ethridge*, the plaintiff made a claim in state court against defendant Harbor House for tortious discharge and alleged that such discharge caused damages to plaintiff including a "loss of employment and benefits together with prejudgment interest thereon …". Like defendants here, Harbor House removed on the grounds of ERISA preemption based on the appearance of the word "benefits" in Ethridge's Complaint. The *Ethridge* court emphasized that the "crucial inquiry" for preemption was whether the claim "relates to" a covered plan consequent to the claim somehow arising out of the actual administration of that plan. *Id.* In *Ethridge*, there was no dispute that Harbor House had a covered plan. However, like defendants here do not and cannot, Harbor House did "not argue that Ethridge was a participant in the plan or that the plan will bear the burden of paying any recovery obtained by Ethridge." *Id.* at 1405. The *Ethridge* decision also concluded that the loss of benefits was a mere consequence of Ethridge's termination and not the motivation for such termination. *Id.* Under these circumstances *Ethridge* held that, "[g]iving the phrase 'relates to' its common-sense construction, we agree with the district court that Ethridge's claim for tortious discharge is not preempted by ERISA simply because Ethridge sought to recover lost salary and benefits." *Id.* It further held that the simple request for benefits, as damages

consequent to the tortuous discharge, provided "no sense in which Ethridge's complaint can be said to 'relate to' a covered plan or its administration." *Id.* On these grounds, *Ethridge* reversed the denial of Ethridge's Motion to Remand and remanded the case back to State court.

The facts are nearly identical in this case. Plaintiff Brown filed a state claim for Google's breach of contract with him and simply requested the value of certain benefits as damages for that breach. Like *Ethridge*, Brown does not identify any facts that suggest his claim arose out of *administration* of the benefits plan. Also like *Ethridge*, there is no claim or argument that Brown was a participant in the plan or that the plan would bear the burden of paying any recovery by Brown. In this case, plaintiff's damages did not result from any administration of Google's ERISA benefits plan. Indeed, since he was never a plan participant or recognized by the plan in any way, plaintiff did not ever receive any consideration by the administrators of Google's ERISA benefits plan nor did he ever even request such consideration. It was Google, the corporation, that made the decision to breach their contract with plaintiff and it was Google's breach, not any benefits plan administration, that caused damages in the nature of benefits. The administrators and/or fiduciaries of the alleged Google ERISA plan simply never gave an ounce of thought to whether or not plaintiff was entitled to benefits under the plan. On these facts alone, remand should be ordered based upon the direction and holding of *Ethridge*.

Similarly, on nearly identical facts as here, *Ethridge* went to additional lengths to further distinguish their current rationale and holding from the myriad other cases (many cited by defendants here) where the benefits damage was consequent to a claim of an unlawful administration of the terms of the ERISA plan itself. *Id*. citing *Clorox v. U.S. District Court for No. District of Cal.* (1985) 779 F.2d at 517, 521 ["ERISA preempts state claims involving improper handling of claims for benefits."] Defendant Google acknowledges by reference in its Opposition, a multitude of other cases that identify preemption of a benefits claim results only when the claim is made by a plan participant and the alleged damage is consequent to the administration of terms of an ERISA plan. *Sorosky v. Burroughs Corp*., 826 F.2d 794, 800 (9th Cir. 1987) [wrongful

discharge/breach of contract claims preempted by ERISA where theories specifically arose out of an administration of benefits plan]; *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985) [state law claims preempted for arising out of administration of covered benefit plans]; *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S.Ct. 2488 (2004) [state claim by plan participants for improper denial of medical coverage by plan administrators preempted because arising out of plan decision and falling under administrative enforcement provisions of Section 502(a)]; *Metropolitan Life Ins. v. Taylor* (1987) 481 U.S. 48 [claim denying coverage for medical care preempted where claimant is plan participant and claimed coverage exists only under terms of plan].

The distinction between preempting benefits claims arising out of the administration of a plan versus those arising out of unrelated conduct of the employer directly was well defined in *Scott*, supra, 754 F.2d. In *Scott*, the Court based this discussion on the difference between a claim for benefits already accumulated as an employee plan participant and those benefits to which the claimed loss was consequent to the employer's independent action in preventing the employee's participation in the plan. In finding the latter type of claim was not preempted, the Court reasoned that "[t]he claim for prospective benefits does not allege the denial of benefits under a benefit plan; rather, it alleges that [the employer's] tortious actions prevented the existence of such a plan in plaintiffs' employment…" *Id*. at 1505. The Court further reasoned that a claim for benefits lost consequent to an act of the employer independent of the plan or its administration "does not allege the violation of duties created by any welfare plan; rather it alleges the violation of [employer's] duties as a past employer." *Id.* As in this case, "[t]he conduct giving rise to the claim was the negotiation of an employment contract," which had the effect of preventing plaintiff Brown any access to the Google ERISA plan. *Id*. On these facts, the Court concluded that "[t]he claim does not raise any issues concerning the matters regulated by ERISA, namely, the administration, reporting, disclosure, funding, vesting, and enforcement of benefit plans." *Id.* Under this specific guidance from *Scott*, preemption must be found lacking as it was Google's

independent action that prevented plaintiff access to the plan and prevented any consequent administration of the plan as to plaintiff.

Under this same authority, and for the same exact reasons, plaintiff cannot be accused of "circumventing" the plan's administrative remedies in order to avoid ERISA preemption. (Google's Opposition at 5, fn. 3.) Plaintiff is not suing to enforce his claimed rights under the alleged Google benefits plan, because he is not a plan participant for the very reasons he alleged in his Complaint. Google has prevented plaintiff from being recognized by the plan at all. He has no rights under the plan upon which to sue, not because of any decision by the plan or any interpretation of the terms of the plan but because of an unlawful breach by Google to deny him any rights of an employee of Google (wholly and completely unrelated to the existence or the terms of the plan.). Therefore it is Google's unlawful conduct that has prevented plaintiff from access to the administrative remedies of the plan and not plaintiff's artful pleading.

B. Claiming Benefits as Damages Does Not Require Preempted Interpretation of Plan Terms

The fact that plaintiff is claiming damages equivalent to plan related benefits does not require the sort of interpretation of plan terms triggering exemption. The precedent of *Scott* and *Pilot Life* make this clear as the Court held that the fact those plaintiff's claimed benefits as a measure of damages did not "relate to" the plan and did not trigger preemption. (See, *Pilot Life Ins. Co. v. Dedeaux* (1981) 481 U.S. 41.) Plaintiff Brown's claims for the *value* of benefits as damages is no different from the claims of *Scott* and *Pilot Life* in that regard and whatever analysis is required to identify the value of the claimed lost benefits does not trigger preemption consequent to the possibility of that analysis. Were Google's arguments valid, there would be no precedential distinction between preempted benefits claims arising from the plan administration and those, as here, that do not.

Similarly, Google cannot manufacture a ground for preemption by raising the issue that plaintiff's claims will require a determination of eligibility under the plan. First, it is noteworthy that defendants never advance the argument that Brown would not be eligible if recognized as a

Google employee with the status of his peers. Brown worked full time both in hours per week and weeks per year. Brown has alleged that he completed his work in identical fashion to individuals recognized by Google as employees and as eligible for benefits. For the same reasons an analysis of benefits valuation does not trigger preemption, neither does the "eligibility" argument by Google.

C. Plaintiff Requests Oral Argument and Alternative Leave to Amend

Plaintiff respectfully requests further oral hearing should this Court decline to remand the case to California Superior Court without the need of any further hearing. Moreover, if, and only if, this Court denies the Motion to Remand, plaintiff requests and will seek leave to amend his Complaint to include claims consistent with this Court's ruling.

Dated: June 30, 2005

Respectfully Submitted,
THE SHEFFER LAW FIRM

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ROBERT A. BROWN