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July 5, 2017

VIA ELECTRONIC FILING

The Honorable Susan Richard Nelson
United States District Court
774 Federal Building
316 N. Robert Street
St. Paul, MN 55101

Re: *Thrivent Financial for Lutherans v. R. Alexander Acosta and U.S. Department of Labor*
Court File No. 0:16−cv−03289−SRN−HB

Dear Judge Nelson:

Thrivent Financial for Lutherans ("Thrivent") writes to alert the Court to a significant development in this case arising from a brief filed by the Department of Labor ("DOL") on July 3, 2017, in the related U.S. Court of Appeals for the Fifth Circuit case of *Chamber of Commerce v. United States Department of Labor*, Case No. 17-10238. A copy of DOL's brief is attached hereto as Exhibit A.

As the parties have previously informed the Court (see, e.g., ECF No. 24 at 17-18; ECF No. 37 at 12 n.6), there are five other pending actions challenging various aspects of DOL's Fiduciary Rule and related exemption rules. Of these, only the *Chamber of Commerce* action even peripherally addresses the BIC Exemption's anti-arbitration condition, as part of a broad challenge to DOL's new rules. (See ECF No. 37 at 12 n.6.) That action is currently on appeal to the Fifth Circuit, where it has been consolidated with two other actions.

To Thrivent's surprise, given DOL's most recent arguments to this Court, DOL recently filed a brief with the Fifth Circuit stating that the United States Government "is no longer defending" the validity of the BIC Exemption's anti-arbitration condition—the specific condition that is at issue in this case. Br. at 59. DOL further tells the Fifth Circuit that it is "no longer defending the BIC Exemption's condition restricting class-litigation waivers insofar as it applies to arbitration agreements," because the condition is "a discriminatory obstacle to arbitration that cannot be harmonized with the FAA and *Concepcion*." (DOL Br. at 63.) And DOL acknowledges that the condition should therefore be invalidated and severed from the BIC Exemption.[1] (DOL Br. at 2-3; 63-65; 108.)

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[1] Although DOL has now acknowledged that the BIC Exemption's anti-arbitration condition is inconsistent with the FAA's commands, the condition remains part of a duly-promulgated

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All of this is entirely consistent with Thrivent's arguments—and fundamentally irreconcilable with DOL's arguments to this Court as recently as four weeks ago. The legal position DOL has taken in the Fifth Circuit makes clear that DOL has abandoned the arguments that it previously made to this Court, and DOL thus acknowledges that the legal contentions made in support of its cross-motion for summary judgment and in opposition to Thrivent's summary judgment motion are not warranted by existing law. Rather, as the following representative examples illustrate, DOL now recognizes the validity of ***Thrivent's*** legal contentions to this Court:

DOL's Stated 5th Circuit Position	**Thrivent Position**
"[T]he FAA would forbid States from doing what the BIC Exemption has done: conditioning a regulatory exemption on a regulated party's refraining from entering into an arbitration agreement that would prevent class litigation. Indeed, such a condition arguably poses an even more serious obstacle to arbitration than the state law invalidated in *Concepcion*." - DOL Br. at 60-61.	"It is difficult to imagine a clearer-cut case of anti-arbitration discrimination, which the Supreme Court has made clear is prohibited by the FAA. … DOL's policy strongly incentivizes institutions to submit to class actions, which 'interferes with fundamental attributes of arbitration.'" (quoting *Concepcion*). - Thrivent Br., ECF 16 at 23-24.
"To be sure, a fiduciary could choose not to comply with the condition by entering into an agreement that included a binding arbitration provision applicable to class claims, so that the fiduciary could then insist on arbitration of the claims. But the fiduciary would then be subject to a regulatory disadvantage—here, losing the exemption and the associated relief from the prohibited-transactions provisions—for having entered into an arbitration agreement. Such a result is a significant obstacle to the FAA under *Concepcion*." - DOL Br. at 61.	"[R]egardless whether Thrivent truly has a choice, there is no conceivable dispute that the BIC Exemption's anti-arbitration condition creates a disincentive against entering into agreements that require individual arbitration as the sole means of resolving disputes. Choice or not, DOL's anti-arbitration condition violates the FAA because it interferes with the 'fundamental attributes of arbitration' and penalizes only those financial institutions who do not accept this condition." (quoting *Concepcion*). - Thrivent Reply Br., ECF 37 at 15.

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regulation that, absent relief, Thrivent must comply with as of January 1, 2018. Of course, Thrivent needs to prepare to comply with DOL's Fiduciary Rule and related BIC Exemption rule well in advance of that January 1 date.

Accordingly, and as Thrivent has previously argued to the Court, this Court should enter summary judgment and a permanent injunction in Thrivent's favor. Further, DOL should withdraw its cross-motion for summary judgment (or the Court should deny it) because DOL no longer stands behind the legal arguments asserted therein.

Prior to sending this letter, counsel for Thrivent spoke with DOL's counsel regarding their approach to this case in light of the position they have now taken in the Fifth Circuit. DOL's counsel requested that Thrivent agree to an indefinite stay of this litigation. Any such stay would be inappropriate for several reasons. Most importantly, DOL has abandoned its own legal arguments and announced that it agrees with Thrivent. DOL's change of position supports entry of judgment in Thrivent's favor, *not* an indefinite stay of this matter. Staying this litigation would only prolong Thrivent's business uncertainty about its compliance obligations, in a manner that would be highly prejudicial to Thrivent. The fact that DOL has abandoned its legal defense of the BIC Exemption's anti-arbitration condition does not, in and of itself, mean that the condition will not otherwise go into effect as scheduled. Indeed, the Court has already denied a similar request by DOL to stay these proceedings. (ECF No. 44.) Thrivent has expended considerable time and resources in seeking resolution of a matter that is extremely important to Thrivent's operations and governance structure, and this action remains ripe for adjudication. In that respect, should DOL further seek to stay this case and ask this Court to reconsider its prior Order, Thrivent would oppose that request and seek to be heard in opposition to a noticed motion filed by DOL.

We appreciate the Court's consideration of this matter.

Very truly yours,

Mark L. Johnson

MLJ/sdm
Enclosure