IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT — STATE OF MINNESOTA

In re: Trust Under Little Six, Inc. Retirement Plans	)	
Robert Burns, John Somers,	)	
Plaintiff-Interpleaders,	)	
v.	)	Court File No. 055-95
Little Six Inc.,	)	
Defendant-Intevenor,	)	
v.	)	
Leonard Prescott, F. William Johnson, and Peter Riverso,	)	
Defendant-Intervenors.	)	

MEMORANDUM OPINION AND ORDER

SUMMARY

Nature of the Case. This is an interpleader action. In it, I am called on to decide whether this Court has subject matter jurisdiction over a dispute involving a trust instrument, entitled "Trust Under Little Six, Inc. Retirement Plans" ("the Trust") which,

on its face states that it was established by Defendant-Intervenor Little Six, Inc. ("LSI") to fund and support certain employee benefit programs ("the Plans") for select LSI employees. The Plaintiffs ("the Trustees") are two of the named trustees, under the Trust. LSI and the Defendant-Intervenors Leonard Prescott, William Johnson, and Peter Riverso ("the Claimants") state conflicting claims to the assets of the Trust. LSI contends the Trust either was never validly created, or if it was created, nonetheless is revocable, and has been revoked, and therefore any assets held by the Trustees should be paid over to LSI. The Claimants, on the other hand, assert that the Trust is irrevocable, that the Plans all were properly created, that they are beneficiaries of the Plans, and that this Court lacks jurisdiction to hear any matter relating to them by virtue of the provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1500 (1994).

Procedural History. The Trustees commenced this action by filing a "Petition", on April 6, 1995. Thereafter, for a considerable period of time it appeared that the issues which the Trustees raised would necessarily be resolved in the context of broader litigation between LSI and Claimants Prescott and Johnson; but, as I noted in a Memorandum and Order filed in this matter on January 19, 1999, the resolution of that other litigation ultimately turned on issues (the official immunity of the Defendants) which have no dispositive effect on the questions raised by the Trustees. See Little Six, Inc., et al v. Prescott and Johnson, Nos. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000). Therefore, this case requires its own resolution.

In accordance with my January 19, 1999 Memorandum Opinion and Order, the Trustees recast this litigation as an Interpleader action by filing a Complaint in

Interpleader[1], on February 17, 1999; and in that framework they sought guidance as to how they should proceed in the face of the conflicting claims of LSI and the Claimants. LSI filed an Answer Nunc Pro Tunc, generally denying that the Trust was properly created by LSI and praying that any assets held by the Trustees be returned to LSI. The Claimants filed an Answer asserting that the Trust was validly created and, as just noted, that this Court is without jurisdiction to grant the Plaintiff's their requested relief.

In my January 19, 1999 Memorandum Opinion I expressed the view that the issue of this Court's jurisdiction and the issue of the validity of the Trust and the Plans appeared be identical. That is, if the Trust and the Plans were validly created, then they would likely be subject to ERISA and to the exclusive jurisdiction of the Federal courts[2], whereas if the Trust and the Plans had not been validly established then ERISA would have no applicability and this Court would have jurisdiction over assets in the possession of the Trustees. Hence, I concluded that an evidentiary hearing was required to ascertain the circumstances surrounding the creation or non-creation of the Trust and the Plans. That hearing was held on October 4, 5, and 5, 1999. Ten witnesses testified, and several thousand pages of documents were received into evidence. Thereafter, LSI and the Claimants each submitted two sets of briefs, discussing their views of the meaning of this mass of evidence.

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[1] Actually, the Trustees termed their pleading a "Complaint in Intervention", notwithstanding my explicit guidance in the January 19, 1999 Memorandum and Order; but it is plain enough that the pleading fits within Rule 18 of the Rules of Civil Procedure of this Court, which incorporate Rule 22 of the Federal Rules of Civil Procedure relating to Interpleader.

[2] Throughout these proceedings LSI has argued that ERISA does not apply to Federally acknowledged Indian tribal governments or to corporations created by such governments. In my January 19, 1999 Memorandum Opinion and Order I discussed LSI's arguments and concluded to the contrary view -- albeit tentatively, because I was not obliged at that time to make a final decision on the issue. Today, I adopt my earlier view as the decision of the Court.

Plans at Issue in the Litigation. In its post-hearing briefs, LSI argued for the first time that, whatever else this Court might have jurisdiction to decide, this case does not properly present any issues with respect to two of the Plans -- the so-called "Separation Pay Plan" and the "Life Insurance Plan". LSI notes that the Plaintiff's Interpleader Complaint alleges that the Trust may be used to provide deferred compensation to LSI employees under three specific plans, called the "Supplemental Retirement Plan" (sometimes called the "SERP" plan, or "SERP I"), the "Executive 457 Plan", and the "Retention Plan" (sometimes called "SERP II"). (Complaint, ¶13.) The Complaint makes no mention of either the Separation Pay Plan or the Life Insurance Plan, apparently because those two Plans were not funded by the Trust. Likewise, the Claimants' Answer, responding to the allegations in the Complaint, does not identify the Separation Pay Plan or the Life Insurance Plan as being at issue in this matter.

LSI asserts that this silence requires the conclusion that no issues properly have been placed before the Court relating to the Separation Pay Plan or the Life Insurance Plan. The Claimants disagree, citing considerations of judicial economy and arguing that, during the hearing on this matter LSI did not object to the presentation of evidence with respect to the Separation Pay Plan and the Life Insurance Plan.

In my view, the Claimants are correct. The validity of all five of the Plans clearly was understood by all participants to be at issue during the three days of evidentiary hearing conducted on October 5 - 7, 1999. This case began only after the Claimants had sought relief in the United States District Court for the District of Minnesota, claiming that LSI improperly was denying them benefits under all five of the Plans. LSI resisted that action, contending that neither the Trust nor the Plans had been validly established under the laws of the Community. The United States District Court

dismissed the Claimants' action to permit the exhaustion of remedies in this Court with respect to the issue the validity of all of the plans put at issue by the Claimants. Prescott v. Little Six, 897 F.Supp. 1217 (D. Minn. 1995). The first paragraph on the first page of the Claimants' Hearing Brief stated the Claimants' view of the issues as follows:

> As this Court has previously directed, the sole issue to be resolved at the hearing is whether or not five separate employee-benefit plans established or maintained by Little Six, Inc. ("LSI") and a related "rabbi trust" created to fund LSI's obligations under some of its plans are governed by [ERISA].

Throughout the three days of the hearing in this matter evidence on all five of the Plans was introduced and discussed both by LSI and the Claimants. There was not a breath of a suggestion by anyone that, in fact, the issue before the Court concerned only three of the five Plans. Nor, in its post-hearing briefs does LSI suggest that any relevant evidence, testimony, or argument exists, or might exist, with respect to the validity of the Separation Pay Plan and the Life Insurance Plan which was not submitted in this proceeding.

In my view, then, the validity of the establishment of all of the five Plans has been placed before this Court. To hold otherwise would subject LSI and the Claimants to an entire new round of litigation -- perhaps more than one round -- which would involve only re-processing old documents, old testimony, and old arguments, at vast additional expense and to no purpose at all.

Conclusion. I have reviewed all of the materials and arguments submitted by the parties, and have concluded that the Trust and all five of the Plans were, in fact, validly created and approved as a matter of law by the LSI Board of Directors. Their procedural and documentary history may be muddled, but from the testimony and the documents

which I review in detail below, it is clear to me that the Trust and the Plans had an actual reality for LSI and its employees, and this fact was understood and accepted by the LSI Board. So, although there may exist no sheet of paper memorializing their approval by the Board of Directors, nonetheless the legal reality is that they were approved by the Board. It is the actual reality of the Trust and the Plans, not any mere paper formality, that controls here.

I also have concluded, as I discuss below, that the Trust and the Plans are governed by the ERISA. The comprehensive sweep of that legislation seems to me to permit no other conclusion. And under ERISA, this Court lacks subject matter jurisdiction over all aspects of the Trust and the Plans, and therefore I cannot provide the Trustees with the relief they seek. Their Complaint in Intervention is therefore dismissed.

FACTUAL BACKGROUND

LSI is a corporation chartered under the laws of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"). LSI operates under the Community's Corporation Ordinance, Ordinance No. 11-05-92-001, and is wholly owned by the Community. See Article of Incorporation of Little Six, Inc. § 4, Little Six, Inc. Exhibit ("LSI Ex.") 4. It was incorporated in March, 1991. Id. It is subject to the ultimate governance of its Board of Directors, and its corporate purpose is to seek to improve the "business, financial, or general welfare of the Corporation, the Members of the Corporation, and the Community." Id. To further this purpose, LSI conducts gaming on the Community's reservation under the terms of the Indian Regulatory Gaming Act (IGRA), 25 U.S.C. § 2701 et. seq. Opening Post Hearing Brief of LSI ("LSI Op. Br.")

at 2.

The salient period of LSI's history, for this litigation, is the period from the corporation's creation through early 1995. During that time, the Claimants served variously as officers, directors and/or managers of the corporation, and during that time the Trust and the Plans were created. Those years saw remarkable success for LSI's businesses, astonishing growth in the corporation's gross revenues and profitability, and concomitant growth in the complexity and demands of its administration. It was a vigorous, turbulent, and often disorganized time.

Not surprisingly, the parties offer markedly different interpretations of the events of that time, and particularly of the circumstances surrounding the creation of the Trust and the Plans. On the one hand, the Claimants presented evidence indicating that the Trust and the Plans were created by LSI in response to competition that the corporation began to experience for qualified high level employees. According to the Claimants, the Trust and the Plans were attempts to deal with the restrictions placed on the ability of a tribal corporation to offer standard employee benefit programs, such as stock options or (at that time) 401K pension plans[3]. Transcript of 10/5/99-10/7/99 Hearing ("Tr.") at 632, 247, 732; Prescott, Johnson, and Riverso Exhibit (PJR Ex.) 1008, 1015, 1077, 1220. Particularly relevant in this regard was the testimony of Mr. David Gilbertson, a former employee of LSI's Human Resources Department who was largely responsible for developing the Plans at issue in this suit. He testified that he was hired in 1992 at least in part to work on developing severance and benefits packages to retain key people

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[3] Given the fact that LSI is wholly owned by the Community, it has no ability to offer stock in itself to its employees; and throughout the time here in question Indian tribes and their corporations were not explicitly included within the universe of entities which were authorized by the Internal Revenue Code to offer 401(k) retirement plans. That latter situation was changed by subsequent Act of Congress.

in the LSI executive structure. Tr. 729-36. Mr. Gilbertson's testimony was corroborated by other contemporaneous documents that indicate a general concern at LSI about retaining key employees. See, e.g., LSI Ex. 39; PJR Ex. 1008, 1015, 1077, 1220. In particular, he testified that each of the Plans at issue in this suit were approved by the LSI Board of Directors at different points in time, and that the main motivation for these benefits packages was the Board's desire to retain top executives. Tr. 729-736 and 743-747.

LSI, on the other hand, is of the view that during the period at issue the corporation was being improperly managed by the Claimants Leonard Prescott and William Johnson, and that the Trust and many of the Plans were hidden from the LSI Board and were never properly approved or adopted by the corporation. LSI points out, and the Claimants admit, that no resolution of the LSI Board of Directors ever has been found which formally approves the Trust, or formally initiates and adopts any of the Plans, or clearly and explicitly delegates to any other entity (i.e., LSI's Executive Committee) the authority to do any of those things. LSI presented testimony by James St. Pierre, Melvin Campbell, Sr., Ronald Welch, and Allene Ross -- each of the persons, other than Mr. Prescott, who served on the LSI Board of Directors during the relevant time period -- and each testified, in one fashion or another, to having no recollection of any Board approval of the Trust or the Plans. LSI argues that the Plans were in fact largely attempts by Mr. Prescott and Mr. Johnson to covertly compensate themselves with little scrutiny from others within LSI or the Community. See Post Hearing Brief of LSI at 4-5. LSI's evidence on this latter point is mostly circumstantial, however: the argument is that Mr. Prescott and Mr. Johnson acted outside of the scope of their authority in creating these plans, and since they themselves benefited from these plans,

their actions must have been motivated purely by self-interest.

But regardless of the motivation Mr. Prescott and Mr. Johnson, in my view the evidence clearly establishes that the Trust and the Plans did, in fact, exist, and that at the time in question the LSI Board of Directors approved of their creation and existence. The evidence shows that until January, 1995, LSI administered and either paid actual cash benefits, or credited cash amounts to deferred accounts, for various LSI employees under all five Plans. See, e.g., LSI Ex. 19-21, 54; PJR Ex. 1039-1047, 1094-95, 1101, 1105-06, 1115-1119. The evidence also shows that each of the Plans included more beneficiaries than just the Claimants Prescott, Johnson, and Riverso. See, e.g., Original Trust Petition, PJR Ex. 1199; LSI Ex. 19, 20, 21; PJR Ex. 1039, 1040, 1043, 1115-1116, 1155-1158, 1165, 1171, 1171-1174. The Life Insurance Plan was available to LSI Senior Vice Presidents, Executive Vice Presidents, and Executive Management employees. PJR Ex. 1051 § D.2(1.1). Under it, LSI paid the insurance premiums and the employee's beneficiaries and LSI divided the death benefit. PJR Ex. 1051 § D.2(1.3). The LSI Executive 457 Plan was designed to be a deferred compensation plan similar to a 401(k) plan. It was open to employees who were in a senior management level or higher class. Ex. 1051 § E at 6. The Separation Pay Plan provided severance benefits when a high-ranking employee left LSI. PJR Ex. § A.2, parts 2-3. Participants in it were to be selected by the LSI Executive Committee. PJR Ex. 1051 § A.2, part 1. The Supplemental Retirement Plan provided deferred retirement benefits for LSI employees holding the title of Vice President, Senior Vice President, Executive Vice President, or Executive Management. PJR Ex. §C.2, part I. Under this plan, LSI put aside a certain percentage of the employee's compensation in an investment account, and these funds would be given to the employee six months after he or she left LSI. PJR Ex.

§ C.2, part 2-4. Finally, the Retention Plan was a deferred compensation plan similar to the 457 Plan. Ex. 1051 § J(1). Participation in it was restricted to upper level management employees who had been with LSI for more than 6 months, and who were selected by the Executive Committee. Ex. 1051 § J(2).

LSI developed detailed descriptions of each Plan. LSI Ex. 457; PJR Ex. 1023, 1024, 1028, 1029, 1032, 1033, 1036, 1051. The descriptions eventually were placed in an employee manual that was prepared by outside counsel for LSI. PJR Ex.1051. The written materials accompanying these Plans, either explicitly or implicitly, indicate that each, and the Trust itself, were considered to be subject to ERISA. See, e.g., LSI Ex. 5, 9, 12, 34; PJR Ex. 1049, 1051 (letter dated February 24, 1993 transmitting manual). LSI distributed copies of plan summaries to participants (Tr., 756-757), and provided participants with detailed annual summaries of the benefits accrued under the plans to date. See, e.g., PJR Ex. 1117, 1118, 1119, 1163.

LSI periodically placed money in the Trust, and Trust assets were used to pay claims under the 457 Plan, SERP I, and the Retention Plan. Tr. 151, 576, 593; LSI Ex. 19, 20, 21; PJR Ex. 1198. Under the Plans, if Trust assets were not sufficient to meet the corporation's liabilities under the plans, LSI was responsible for the remainder, presumably out of its general funds. LSI Ex. 5 at §2(c).

The events which prompted LSI to cease placing money in the Trust began to unfold in 1994. During that year, investigations were launched by Community officials into aspects of the administration of LSI. Mr. Prescott's gaming license was suspended and ultimately revoked by the Community's Gaming Commission (see In re Leonard Prescott Appeal from July 1, 1994 Gaming Commission Final Order, No. 015-97 [SMS(D)C Ct. App. July 30, 1999]). By early 1995, Mr. Prescott, Mr. Johnson, and

Mr. Riverso all had left LSI. Also by that time, a new Board of Directors had been installed, and on January 14, 1995 that new Board passed a resolution specifically stating that LSI never had adopted or approved any of the Plans, and never had formally adopted the Trust. LSI Ex. 26. The Board directed the Trustees to return the funds in the Trust to the Community. Id. The January 14, 1995 Resolution did acknowledge, however, that LSI had incurred liabilities under the 457 Plan and the Supplemental Retirement Plan (or SERP I) for the period from January 1, 1993 and December 31, 1994, and that LSI would authorize payments for these periods under the terms of those Plans. Id. But the Resolution stated that no additional amounts would be credited to participants in these Plans after December 31, 1994, and unilaterally terminated the Life Insurance Plan. Id. The Claimants' litigation in Federal Court and the instant proceedings followed.

DISCUSSION

1. The Validity of the Trust. In my view, all of the elements of a validly formed trust exist here. The Trust instrument states that it shall be governed and construed in accordance with the laws of Minnesota. LSI Ex. 5 at § 13(c). In Minnesota:

> In order to constitute an express trust there must be: (1) a designated trustee subject to enforceable duties, (2) a designated beneficiary vested with enforceable rights, and (3) a definite trust res wherein the trustee's title and estate is separated from the vested beneficial interest of the beneficiary.

Bush v. Crowther, 81 N.W.2d 615, 620 (Minn. 1942).

The Trust instrument in this case clearly indicates that there will always be specifically named Trustees, see LSI Ex. 5 preamble (a) and §§ 9-10, who have defined

duties, see LSI Ex. §§ 3, 5-8, which duties can be enforced in accordance with the laws of Minnesota, see LSI Ex. § 13(c). The Trust provides for designated beneficiaries, see LSI Ex. 5 § 1(c), § 2, who have enforceable rights, see LSI Ex. § 13(c). The Trust also provides for a *res* over which the Trustees hold legal title and the beneficiaries hold a beneficial interest. LSI Ex. 5 § 1. Beyond the four corners of the trust instrument, there is extrinsic evidence in the record too voluminous to catalog which indicates LSI did in fact provide funds for a *res*, which was managed by the Trustees, and which was paid out to members of the beneficiary class under the terms of the Trust and the associated Plans.

None of the parties seriously dispute these facts. But LSI argues that the Trust nonetheless was not validly formed for at least two reasons. First, LSI contends that Prescott and Johnson acted outside of the scope of their authority in executing the Trust agreement on behalf of LSI, and that the corporation should not be bound by their actions. Second, LSI points to the January 12, 1995 Resolution of the Board of Directors declining to adopt the Trust as evidence that the Trust is revocable under §1(b) of the Trust instrument -- which provides that the Trust will become irrevocable upon approval of the LSI Board -- and that LSI should therefore be able to reclaim the Trust funds and cancel the Trust.

In support of both arguments, LSI strongly argues that the Trust was never approved by the LSI Board of Directors, because there is no record of the Trust having even been submitted to or discussed by the Board. The Trust indisputably was signed by the Claimants Prescott and Johnson, purportedly on behalf of LSI; but LSI's contention is that Prescott and Johnson had no authority to bind LSI, because § 8.6 of the LSI Articles of Incorporation reserves the right to set officer compensation

exclusively to the LSI Board of Directors. See LSI Post Hearing Brief at 17; LSI Ex. 4. Section 8.6 states, "The officers [of LSI] shall receive such salary or compensation as may be fixed by the Board of Directors." LSI Ex. 4. And LSI asserts that Prescott and Johnson were not acting with the approval of the Board when they entered into the Trust and, therefore, LSI should not be bound by their actions.

But although no written Board resolution approving the Trust has been located by any of the parties, and although former Board members testified that they had no recollection of knowing about either the Trust of the Plans (e.g., Tr. 33-38, 369-370), in my view the preponderance of substantial and credible evidence is to the effect that the Trust and the Plans were in fact approved by the Board.

Mr. Gilbertson, who was hired in 1992 to develop benefits plans precisely of the kind involved in this suit, testified that the Board knew about the Trust and each of the Plans, and that the Board approved of each. Tr. 732-33, 738, 743-44. The state of the LSI recordkeeping from 1991 to 1994 leaves open the possibility that the Trust and the Plans actually were formally approved by the Board, but that a written record of that approval was never recorded or did not survive.[4] Tr. 446, 450-51. But in any case, whether or not there was formal approval by Board resolution, repeated references in the existing minutes of the Board and Board's Executive Committee, and numerous other aspects of the evidence, compel the conclusion that the Board in fact was aware that the Plans and the legal machinery necessary to implement them were effective and in operation. PJR Ex. 1056, 1091, 1102, 1121, 1144, 1162. At least three of the former

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[4] Allene Ross, former LSI Vice President, testified that during the relevant time period that LSI records were poorly kept and that "there were incomplete records or incomplete documents," with many meeting minutes and resolutions "created after the fact." Tr. at 446. Ms. Ross agreed that it was possible that resolutions implementing Board action might have been lost or not kept in the official LSI records. (Tr. 450-51).

Board members were beneficiaries under at least one of the Plans supported by the Trust (Tr. 124, 241, and 435). Two of the former Board members also were members of the Executive Committee, a subcommittee of the Board that took the initiative to address salary and compensation issue; and the evidence shows that those directors attended an Executive Committee meeting in August, 1993 where modification of some aspects of the Plans was discussed. PJR Ex. 1091. Finally and fundamentally, the Board allowed the Trust and the Plans to operate for a period ranging from more than one year to nearly two years. PJR Ex. 1056, 1091, 1102, 1121, 1144, 1162.

Whether or not the Board had complete knowledge of the details of Trust and each of the five Plans, at the very least it had "inquiry notice" of the Trust and the Plans by virtue of which knowledge must be imputed to it. At numerous Executive Committee and Board meetings, employee compensation and the need for benefit plans, and the specific terms of the Plans involved in this suit, were discussed. LSI Ex. 39; PJR Ex. 1008, 1015, 1056, 1077, 1091, 1102, 1121, 1144, 1162, 1220. LSI hired Mr. Gilbertson precisely to develop the Plans in this suit. Mr. Gilbertson met repeatedly with the Board and discussed the Plans. He contracted with outside counsel to develop the Plans. Reams of plan documents were published and distributed within LSI. And large sums of actual Plan benefits were distributed to a number of different beneficiaries within the LSI management structure. Under these circumstances, LSI cannot now claim that the Trust and the Plans are invalid.

It could be argued that the Board at that time lacked extensive education or training in the operation of large and complex businesses (Tr. 28-30, 75-77, 196-198, and 316-317), and that the any imputing of knowledge to them should be tempered by their lack of experience. But the fact is that the former Board members who testified,

and other members of the Community who at various times have served to steer and govern the Community's businesses, have done a remarkable and admirable job of developing the corporation. The Community's businesses have an enviable track record. And just as full credit for that business record should be given to the Community and its officials, so too must the obligation to act upon all of the information they possess.

Having concluded that the Trust and the Plans were properly adopted under Community law, it seems clear that, taken together, they constitute an ERISA plan subject to the exclusive jurisdiction of the federal courts. ERISA broadly covers any plan that is established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce. See 29 U.S.C. § 1003. To determine if an ERISA plan exists, the pivotal inquiry is whether an employer has established a separate, ongoing, administrative scheme to administer plan benefits. Kulinski v. Medtronic Bio-Medicus, 21 F.3d 254, 257 (8th Cir. 1994). As discussed above, in this case the evidence shows that LSI specifically hired Mr. Gilbertson to develop and administer the benefit programs in question. Numerous plan documents were published and distributed to employees, making it clear that LSI thought ERISA applied to the Plans. Significant cash benefits have been distributed or allocated under the Plans. Given all these circumstances, I conclude that LSI has established a separate, ongoing administrative scheme to deliver these benefits, and the Trust and all five Plans constitute an ERISA plan.

LSI has argued throughout these proceedings that ERISA in fact does not apply to plans set up by Indian tribal governments. But the fact remains that the federal courts that have considered the matter have held that ERISA applies to benefit programs administered by tribes or tribal entities. See, Lumber Indus. Pension Fund v. Warm

Springs Forest Prod. Indus., 939 F.2d 683 (9th Cir. 1991); Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989). Therefore, I conclude that any action brought by a fiduciary (such as the Trustees) or beneficiary (such as the Claimants) of the Plans or the Trust is subject to the exclusive jurisdiction of the federal courts. See 29 U.S.C. § 1132(e).

ORDER

For the foregoing reasons, the Interpleader Complaint filed by the Plaintiffs is dismissed.

Dated: March 29, 2000

John E. Jacobson
Judge