THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE ERISA INDUSTRY COMMITTEE, Plaintiff, v. CITY OF SEATTLE, Defendant.	Case No. 2:18-cv-01188 **PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** **NOTE ON MOTION CALENDAR: DECEMBER 6, 2018**

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INTRODUCTION

The most telling sentence in Seattle's reply in support of its motion to dismiss and in opposition to ERIC's summary judgment motion comes early on: "If multi-state uniformity of plan terms and/or plan administration is a hotel's over-riding policy goal, it may simply pay additional compensation to its Seattle employees and make no changes to any ERISA plan." Def.'s Reply in Supp. of Mot. to Dismiss & Opp'n to Pl.'s Mot. for Summ. J. (Doc. 23) at 2 ("Seattle Opp."). In Seattle's view, employers and the ERISA plans they sponsor can enjoy the nationwide uniformity that was *Congress's overriding policy goal* when enacting ERISA's preemption provision, so long as they pay for it. Or, to reiterate language ERIC used in its initial brief, a state or locality apparently can put a "bounty" on ERISA preemption, exacting a sum of money from employers if they want to offer a nationwide health benefit plan whose provisions Seattle dislikes. In reality, nothing in ERISA's text or the lengthy history of ERISA preemption jurisprudence authorizes such a frustration of Congress's purposes by the states.

From that misguided starting point, Seattle then doubles down on its derisive view of ERISA preemption with a series of erroneous arguments, including: (1) that there is a presumption against preemption for a state law that outright targets employee benefit plans; (2) that ERISA plans are not essential to a state law – thereby avoiding a "reference to" employee benefit plans – even when the law's operation is conditioned on the plans' substantive terms; and (3) that a state law has no "connection with" employee benefit plans where, based on the undisputed facts, it presents no meaningful alternative other than to alter ERISA-plan terms in order to comply. As with Seattle's theme that it can extract a dividend from those seeking the protection of ERISA preemption, the Court should reject these various arguments and, in so doing, grant ERIC's motion for summary judgment (as well as deny Seattle's motion to dismiss).

ARGUMENT

I. THERE IS NO PRESUMPTION AGAINST THE PREEMPTION OF PART 3

Seattle starts its presentation regarding a presumption against preemption with a strawman argument – namely, by saying ERIC seeks, based on concurring and dissenting

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Supreme Court opinions, "to have this Court reject clear and continuing Supreme Court precedent" that state "police powers are presumed not to be preempted." Seattle Opp. at 7. In fact, ERIC was careful to note, oppositely, that the Ninth Circuit *does* still apply a presumption against preemption in an appropriate case, even where an express preemption provision exists. ERIC's point was just that there has been enough criticism from a majority of the Supreme Court Justices that, at a minimum, it is unfitting to default unwaveringly to a presumption against preemption in express-preemption cases. *See Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 948 (2016) (Thomas, J., concurring) ("our interpretation of ERISA's express pre-emption provision [in *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995)] has become increasingly difficult to reconcile with our pre-emption jurisprudence").

In any event, as ERIC showed in its earlier brief, even assuming an undiluted presumption still endures in express-preemption cases, no presumption here applies under the very test the courts have developed for imposing the presumption. *See* Pl.'s Opp'n to Def.'s Mot. to Dismiss & Pl.'s Mot. for Summ. J. (Doc. 19) at 15-19 ("ERIC Mot."). Because Part 3 (*i.e.*, the part of the Seattle ordinance at issue) "target[s]" employee benefit plans, which are subject to exclusively federal regulation under ERISA, it falls outside of the traditional areas of state regulation that can trigger the presumption. *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 903 F.3d 829, 848 (9th Cir. 2018). Seattle balks, saying that Part 3 is just a simple "regulation of public health and wages," not a law designed "to provide *benefits*." Seattle Opp. at 11. But Seattle ultimately must, and does, admit that Part 3 is intended to remedy what Seattle sees as the purportedly inadequate benefit plans offered in the hospitality industry, evincing that Part 3's target *really* is benefit plans. *See id.* ("the Ordinance was necessary, in part, because the hospitality industry failed to provide low-income employees with access to affordable health coverage") (emphasis omitted); ERIC Mot. at 16-17 (noting that, as stated in "Intent" section, Part 3 was enacted because supposedly "'hospitality industry employers are the least likely to offer health insurance to employees'" and, when employers do, they require too much contribution from employees for "'employer-offered plan[s]'") (quoting SMC § 14.25.110).

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Nor can Seattle claim Part 3 to be a general police-power enactment merely because it was included in a legislative package with measures arguably qualifying as general health and safety regulations. Under that reasoning, no provision might ever be deemed "targeted" at a federal area so long as it were part of an omnibus local bill. In this respect, *Glazing Health* outlines the appropriate path: a state-law provision that "encroaches" on employee benefit plans typically enjoys no presumption against preemption; however, the presumption might apply if that provision is part of a multi-faceted statute in which the individual parts "are . . . all of a piece regulating [those] . . . who are not parties to ERISA plans." 903 F.3d at 848, 849. Thus, in *Glazing Health*, at issue was an amendment to a general statute that governed liability of general contractors for subcontractors' debts, with the particular amendment adding a notice requirement for employer-plan trusts to invoke the general statute. The presumption operated, the Ninth Circuit said, because the amendment tied back to the general statute and, further, applied to trusts the same "pre-lien notice requirements as [for] other entities and individuals." *Id.* at 854. In contrast, Part 3 is not linked to any other aspect of Chapter 14.25 (indeed, it is far afield from the topics of sexual harassment and panic buttons addressed elsewhere in Chapter 14.25); likewise, Part 3 is not merely a tweak to a general statute applicable to all businesses.[1]

II. PART 3 IMPERMISSIBLY MAKES A "REFERENCE TO" ERISA PLANS

In contesting ERIC's showing that Part 3 impermissibly references ERISA plans, and therefore "relate[s] to" them under 29 U.S.C. § 1144(a), Seattle initially criticizes ERIC for invoking the legal standard that a state law will refer to ERISA plans if it "makes 'mention' of or 'allusion' to ERISA plans" and has "'some effect'" on them. Seattle Opp. at 13 (quoting ERIC Mot. 20, 19). Seattle sees this test as somehow contrary to Supreme Court precedent and too

[1] Though Seattle relies on *Golden Gate Restaurant Ass'n v. County of San Francisco*, 546 F.3d 639, 644 (9th Cir. 2008), the decision provides no comfort for a presumption against preemption here. The San Francisco ordinance addressed expenditure*s* by employers for employee healthcare, and employer contributions were not deemed by the court to be an area of central ERISA interest. But "[r]ules governing collection of premiums [from employees and] . . . definition of benefits" *are* "areas of federal concern," so that a state law (like Part 3) aiming at them is not entitled to a presumption against preemption. *Glazing Health*, 903 F.3d at 848 (internal quotation marks and citation omitted); *e.g., Aloha Airlines v. Ahue*, 12 F.3d 1498, 1501, 1505 (9th Cir. 1993) (holding that Hawaii law "requir[ing] employers to pay any costs associated with mandatory examinations," such as airline pilot physicals, "*does not represent a regulation of traditional state authority*").

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"preemption-expansive." *Id.* But it is the Ninth Circuit (not ERIC) that devised the test. *See Glazing Health*, 903 F.3d at 852, 853; *see also WSB Elec., Inc. v. Curry*, 88 F.3d 788, 793 (9th Cir. 1996). It is the Ninth Circuit's further refinement of the "reference to" prong, accounting for the various state laws that the Supreme Court has invalidated. *See Glazing Health*, 903 F.3d at 852 (using test to define when a state law "acts upon" ERISA plans under *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997)). With Seattle having nowhere contested that Part 3 fails the "mentions/alludes to and has some effect on ERISA plans" standard, the Court can begin and end the preemption analysis (in ERIC's favor) based on lack of dispute over application of a governing legal standard.

Yet, even if the Court wishes to proceed exclusively based on the "reference to" test that Seattle says governs, Part 3 is no less preempted (as ERIC also earlier showed, *see* ERIC Mot. at 19). That is, Part 3 fails *Dillingham*'s test that a state law impermissibly references ERISA plans where the state statute "'acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation.'" *Gobeille*, 136 S. Ct. at 943 (quoting *Dillingham*, 519 U.S. at 325); *see* Seattle Opp. at 8-16. Starting with the second part of the test (and the *Dillingham* test is stated in the disjunctive), ERISA plans are essential to Part 3's *full* operation. As ERIC delineated in its opening brief, Part 3 has two principal parts: subsection A of § 14.25.120 requires the payment of additional compensation to affected workers *unless*, under subsection B, "the hotel employer provides health and hospitalization coverage at least equal to a gold-level policy on the Washington Health Benefit Exchange at a premium or contribution cost to the employee of no more than five percent of the employee's gross taxable earnings." SMC § 14.25.120.B. ERIC has described subsections A and B as "facially tied" (ERIC Mot. at 19-20), since subsection A's operation depends on the non-satisfaction of subsection B; and Seattle in its *official* descriptions of Part 3 has described them similarly.[2] On

[2] *See* SHRR § 150-250.4.a. (rules requiring employee notification of the following right: "The right to additional compensation to cover medical and insurance costs *unless* the employee pays 5% or less of their monthly wages (from the hotel employer) towards an employer-offered gold-level insurance policy (for the employee and enrolled household members)") (emphasis added); Seattle Office of Labor Standards, *Hotel Employees Health and Safety Initiative – SMC 14.25*, Key Requirements, https://www.seattle.gov/laborstandards/ordinances/hotel-employees-

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the other hand, Seattle – for this litigation – presents subsections A and B as two options or "alternatives" from which an employer can choose for compliance. Seattle Opp. at 17-18.

Certainly under ERIC's and Seattle's official description of Part 3, ERISA plans are essential to Part 3's operation: Subsection B turns on the benefit levels offered and the employee contribution levels required in the ERISA plans (*i.e.*, in the "coverage" that the employer offers), and subsection A's application is not triggered where subsection B provides haven. But ERISA plans are also essential to Part 3 even under Seattle's litigation position that Part 3 offers two separate alternatives for compliance. In this respect, whether an employer has two alternatives (subsections A *and* B) or just one (subsection A) to comply with Part 3 depends on the existence of ERISA plans. Part 3, as Seattle now reads it, puts the employer to *a choice*, but a choice would exist only if the employer has an ERISA plan (since subsection B turns on the terms of an employer's "coverage" for employees, which necessarily constitutes an ERISA plan, *see* ERIC Mot. at 20-22, 24). In short, because Seattle saw fit to enact a Part 3 with two components, and because both components have relevance only for hotel employers with ERISA plans, ERISA plans are integral to the statute's operation *as enacted* and *in its entirety*.

Though Seattle believes that ERISA plans are not "essential" to Part 3's operation because an employer could elect (in Seattle's current view of things) to comply with subsection A and never reach subsection B (*see* Seattle Opp. at 18), Seattle misses the key point. The fact that *only employers with ERISA plans* would have the ability to make the election proves that "the existence of a [health] plan is a critical element of [the local] law." *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 815 (1997).[3]

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health-and-safety-initiative#Key%20Requirements (last visited on Dec. 5, 2018) ("Large hotel employers must provide additional compensation reflective of the cost of medical care to low-income hotel employees *unless* the employee pays no more than 5% of their monthly gross taxable earnings toward an employer-sponsored gold-level insurance premium for themselves or any enrolled family member") (emphasis added).

[3] It might be thought that Seattle sought to give an advantage to employers with ERISA plans by offering them two options for compliance (instead of just subsection A). But "[l]egislative 'good intentions' do not save a state law within the broad pre-emptive scope of § [1144(a)]." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 830 (1988). Anyway, Seattle's intentions and the effect of its law on ERISA plans are hardly "good." Subsection B's purpose – for which the "Intent" section of Chapter 14.25 provides the clue – was to prompt enhancement to hotel employers' ERISA plans, and hotel employers (true to Seattle's goal) have been compelled

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Aside from ERISA plans being essential to Part 3's full operation, Part 3 also satisfies, under similar reasoning, the other (disjunctive) part of the *Dillingham* test, as acting immediately and exclusively upon ERISA plans. In fact, subsection B of Part 3 acts *only* upon ERISA plans (since it turns on the terms and employee contribution levels in employer "coverage"). While Seattle now appears to wish it had enacted an ordinance that had just subsection A in Part 3, the reality is that it enacted a two-subsection Part 3. Subsection B cannot have any life absent ERISA plans and thus is exclusively applicable to them. And since the two subsections are properly viewed as facially tied (as ERIC has shown and Seattle's official promulgations likewise describe), Part 3 *as a whole* cannot "'function[] irrespective of[] the existence of an ERISA plan.'" *De Buono*, 520 U.S. at 815 n.14 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139-40 (1990)). Furthermore, if Part 3 is viewed instead as having two separate options (consistent with Seattle's litigation position), it still acts immediately and exclusively upon ERISA plans, because employers with ERISA plans – and only them – have two alternatives.

Seattle responds on this segment of the *Dillingham* test by contending that subsection B makes no reference to employee benefit plans but only to employers. Seattle Opp. at 15. It is a head-scratcher as to why Seattle continues to press this point. On its face, subsection B mentions employer-based "coverage," giving safe-harbor where the coverage qualifies as gold-level and requires minimal employee contributions. The Supreme Court held expressly in *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 130 (1992), that a reference to an employer's health benefits "coverage" is a reference to ERISA plans. *See* ERIC Mot. at 24. In addition, the divide that Seattle creates throughout its opposition brief between laws addressed to employers and laws addressed to employee benefit plans is unsustainable. The Ninth Circuit has emphasized that ERISA preemption analysis focuses on state laws that affect relationships between the "traditional ERISA entities," which include "*the employer*, the plan and its fiduciaries, and the participants and beneficiaries." *The Meadows v. Emp'rs Health Ins.*, 47 F.3d

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to offer Seattle-specific health plans consistent with Seattle's likes, to the detriment of nationally uniform plan administration. *See* ERIC Mot. at 29; *see also infra* pp. 10, 12.

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1006, 1009 (9th Cir. 1995) (emphasis added); *see Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1082-83 (9th Cir. 2009) (explaining "relationship test" for preemption and including relationship between employer and employee and employer and plan).

In a last-ditch effort to defeat preemption under the "reference to" strand, Seattle egregiously mischaracterizes the holding in the venerable *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). *See* Seattle Opp. at 21. Seattle says the decision stands for the proposition that a state law survives preemption when it gives employers "the option of either making amendments to their existing ERISA plans or complying with the ordinance completely independent of their ERISA plans." *Id.* at 21 n.14. Not true. *Shaw* held that a New York law governing disability plans exempt from ERISA (under 29 U.S.C. § 1003(b)) related to *those plans*, not to the type to which ERISA's preemption provision is addressed – namely, to "any employee benefit plan described in [29 U.S.C.] section 1003(a) and *not exempt* under section 1003(b)." 29 U.S.C. § 1144(a) (emphasis added). Thus, New York could regulate as it wished the plans outside of ERISA's scope; but it could "not require an employer to alter its ERISA plan." *Shaw*, 463 U.S. at 108. Part 3 does not relate to exempt disability plans or any other sort excepted from ERISA.[4]

III. PART 3 HAS AN IMPERMISSIBLE "CONNECTION WITH" ERISA PLANS

ERIC showed, in its earlier brief, that Part 3 has a "connection with" ERISA plans because it mandates benefit structures – *i.e.*, through subsection B, it dictates eligibility for benefits, a certain level of benefits, and specific employee contribution levels. And because compliance with subsection B is far less expensive (as shown via affidavit evidence) than the

[4] In its earlier brief, ERIC showed that Part 3 makes another impermissible reference to ERISA plans by excepting from Part 3's scope Taft-Hartley plans. *See* ERIC Mot. at 26-27. In response, Seattle asserts that one of the cases on which ERIC relies – *Mackey* – is no longer good law (*see* Seattle Opp. at 22-23), notwithstanding that the Supreme Court has reaffirmed *Mackey*'s outcome repeatedly and the Ninth Circuit has continued to apply *Mackey* where the state law alludes to ERISA plans and has some effect on them (as the Taft-Hartley exception here does, *see* ERIC Mot. at 27). *E.g.*, *De Buono*, 520 U.S. at 815 n.15; *Dillingham*, 519 U.S. at 324-25; *Glazing Health*, 903 F.3d at 844. Seattle also faults ERIC for relying on an on-point out-of-Circuit precedent (from the Eighth Circuit), though Seattle mentions no Ninth Circuit case to the contrary. *See* Seattle Opp. at 23. And Seattle, erroneously, maintains that the exception mentions only employers, not employee benefit plans, despite the exception overtly singling out a type of ERISA plan (*i.e.*, Taft-Hartley plans). *See id.* Based on ERIC's presentation in its earlier brief, and because Seattle's responses are infirm, the Court should hold that the regulations' exception for Taft-Hartley plans constitutes an impermissible reference to ERISA plans.

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direct-payment requirement in subsection A (as much as eight times less expensive), Part 3 effectively forces employers to alter their ERISA plans to conform to subsection B's criteria so as to avoid subsection A. Indeed, the affidavit evidence shows that ERIC members have done exactly what Part 3 intended: ERIC members have created Seattle-specific plans conforming to subsection B's mandates, frustrating the nationally uniform ERISA-plan administration that ERISA's preemption provision is designed to accomplish. *See* ERIC Mot. at 34, 36.

Seattle marshals three general responses, none successfully. *First*, it contends that Part 3 compels nothing, since an employer may "choose" with which subsection to comply. Seattle Opp. at 26. This is where Seattle especially presses the notion that it can place a bounty on ERISA preemption: "if uniformity of plan terms and/or plan administration is an important enough consideration to a hotel, it may simply pay additional compensation to its Seattle employees and make no changes to any ERISA plan." *Id.* at 27. However, a state law is preempted if it is "telling employers how to write their ERISA plans, *or conditioning some requirement on how they write their ERISA plans*"; it is not preempted when it is "telling them that *regardless of how they write their ERISA plans*, they must do something else outside and independently of the ERISA plans." *Operating Eng'rs Health & Welfare Tr. Fund v. JWJ Contracting Co.*, 135 F.3d 671, 679 (9th Cir. 1998) (emphasis added). Here, Part 3 does *not* insist on direct payment irrespective of how employers write their ERISA plans; rather, if they write them in conformance with subsection B, then subsection A is neutralized.

Moreover, courts have rejected the proposition that a statute read to provide options, only one of which might preserve uniformity, survives the "connection with" prong of preemption. A leading recent example is *Merit Construction Alliance v. City of Quincy*, 759 F.3d 122 (1st Cir. 2014). There, a Quincy, Massachusetts ordinance mandated that bidders on city contracts have an apprenticeship program with certain standards. ERISA covers apprenticeship programs, but not if they are funded through a company's general assets as opposed to "'funded through a separate fund.'" *Id.* at 130 (quoting *Dillingham*, 519 U.S. at 326). Quincy contended that a general-fund apprenticeship program "can be used to comply with the Ordinance and, in the

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City's view, the availability of this non-ERISA avenue to compliance ought to pretermit a finding that the Ordinance relates to ERISA plans." *Id.*

> Rejecting the argument, the First Circuit said:
>
> Even though a non-ERISA option might be available for compliance with the Ordinance, the availability of such an option *does not save the Ordinance*: its mandate still has the effect of destroying the benefit of uniform administration that is among ERISA's principal goals.

Id. at 131 (emphasis added); *accord Minn. Chapter of Associated Builders & Contractors, Inc. v. Minn. Dep't of Pub. Safety*, 267 F.3d 807, 817 (8th Cir. 2001). The problem, the First Circuit reasoned, was that an employer otherwise with a nationally uniform separate-fund (and thus ERISA-governed) apprenticeship program out of sync with Quincy's standards would, in order to maintain that nationally uniform plan, *also* need to keep track of the measures it had to take in various localities (such as, in Quincy, establishing a general-fund apprenticeship program) to avoid upsetting the nationally-uniform plan; in that manner, "[a] plan administrator put to such a choice is still '[f]aced with the difficulty or impossibility of structuring administrative practices according to a set of uniform guidelines.'" *Merit Constr.*, 759 F.3d at 130 (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 13 (1987)); *see also id.* (citing *Egelhoff v. Egelhoff*, 532 U.S. 141, 150-51 (2001), for support and distinguishing *Golden Gate Restaurant Ass'n*).

Seattle's theory on supposed "alternatives" in Part 3 saving the law from preemption is analogous to Quincy's, and it should suffer the same fate. For instance, following Seattle's line of argument, if uniformity were crucial to a hotel employer and it wanted to preserve its national plan, the national plan would become freighted with the necessity of making additional payments in Seattle to keep the uniform structure. If Portland passed a law with different options, and San Francisco another set of options, and Los Angeles still more, the uniform national plan would become burdened, for its continued operation, with conditions from any number of jurisdictions. "'Requiring ERISA administrators to master the relevant laws of 50 States . . . would undermine the congressional goal of "minimiz[ing] the administrative and financial burden[s]" on plan administrators – burdens ultimately borne by the beneficiaries.'" *Gobeille*, 136 S. Ct. at 944

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(quoting *Egelhoff*, 532 U.S. at 149-50, quoting *Ingersoll-Rand*, 498 U.S. at 142).[5]

Second, Seattle argues that Part 3 lacks a "connection with" ERISA plans, because ERIC supposedly has not alleged or shown that "every ERIC-member hotel covered by [Part 3], let alone every non-ERIC member covered hotel, would be forced to adopt or amend an ERISA plan when faced with paying the additional compensation to its employees that the Ordinance requires." Seattle Opp. at 31. Though the complaint does, in fact, make the allegation (Compl. (Doc. 1) ¶¶ 7, 49), no such universal allegation or showing is needed. Indeed, ERISA's text forecloses Seattle's argument. ERISA's preemption provision states that "the provisions of [ERISA] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to *any* employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a) (emphasis added). The statute does not say ERISA preempts only state laws that relate to *every* employee benefit plan. And *Gobeille* found a Vermont law preempted, despite just one company suing about the law's effect on its plan's administration and the state arguing the company "ha[d] not demonstrated that the reporting regime in fact has caused it to suffer economic costs." 136 S. Ct. at 945.

Third, Seattle complains that ERIC's declarations are insufficient to sustain and prove the allegation that ERIC members have been forced to alter their ERISA plans as a result of Part 3 (though, the Court can, again, find that Part 3 has a "connection with" ERISA plans even absent compulsion to adopt certain benefit structures, *see supra* n.5). To review the evidence, one ERIC-member declarant attested that altering the company's ERISA plan to comply with the mandates of subsection B was two to eight times cheaper than making the direct payments under subsection A; another ERIC member attested that making changes pursuant to subsection B was less expensive than making the subsection A direct payments; and both declarants unqualifiedly state that their companies have already changed their ERISA plans for Seattle employees (and

[5] Decisions like *Merit Construction* doom Part 3, even if the Court were to determine that Part 3 does not, in effect, force employers to alter their ERISA plans. Because Seattle at a minimum complicates plan administration by adding a fee (through subsection A) to keep an ERISA plan nationally uniform, and other cities and states could adopt any number of similar "fees" or other conditions, the employer who "chooses" compliance through subsection A has potentially hundreds of "asterisks" accompanying its ERISA plan. The situation is intolerable given "the central design of ERISA, which is to provide a single uniform national scheme for the administration of ERISA plans without interference from laws of the several States." *Gobeille*, 136 S. Ct. at 947.

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only them) in conformance with subsection B in order to avoid the cost of subsection A. *See* ERIC Mot. at 9. In response, Seattle's attorney has filed a Rule 56(d) declaration, stating that ERIC's declarations do not include enough back-up information and that Seattle "requires discovery to test the 'facts and reasonable projections' upon which the declarations are purportedly based." Decl. of Jeffrey Lewis (Doc. 24) ¶ 6 (quoting ERIC Decl.).

In this Circuit, however, "[a] party requesting a continuance pursuant to Rule 56(d) must identify by affidavit 'the *specific* facts that further discovery would reveal, and explain why those facts would preclude summary judgment,'" and it must be likely that those facts will be discovered. *SEC v. Stein*, 906 F.3d 823, 833 (9th Cir. 2018) (quoting *Tatum v. City & Cty. of S.F.*, 441 F.3d 1090, 1100 (9th Cir. 2006)). The evidence must be "more than the object of mere speculation." *Ohno v. Yasuma*, 723 F.3d 984, 1013 n.29 (9th Cir. 2013). Further, suspicions of untruthfulness are insufficient to meet the test to stave off summary judgment under Rule 56(d). In the very recent *Stein* case, the Ninth Circuit addressed an affidavit in which the affiant stated that further discovery would allow him to "confirm or deny the existence of . . . allegedly made up individuals." 906 F.3d at 833. The court rejected the Rule 56(d) request, explaining that the affidavit failed to identify facts "likely to be discovered." *Id.* (internal quotation marks and citation omitted). In another case, the Ninth Circuit approved the lower court's rejection of a "broad" Rule 56(d) request pursuant to which the party sought documents to "investigate the validity of the [agreements at issue]." *Russell Rd. Food & Beverage, LLC v. Spencer*, 829 F.3d 1152, 1157 (9th Cir. 2016). Finally, an "unspecified hope of undermining" an affiant's credibility will not satisfy the Rule 56(d) standard "unless other evidence about an affiant's credibility raises a genuine issue of material fact." *United States v. $5,644,540.00 in U.S. Currency*, 799 F.2d 1357, 1364 (9th Cir. 1986) (internal quotation marks and citation omitted).

Seattle's Rule 56(d) declaration easily fails these standards. Seattle does not state how the facts sought would preclude summary judgment and instead simply speculates on the potential unreliability of ERIC's declarants. In effect, Seattle suggests that the ERIC declarants are potentially lying, with no supporting facts or any evidence outside of their declarations to

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question the declarants' credibility. Most important, Seattle nowhere questions the truth of the ERIC declarants' key statement that the high cost of compliance with subsection A has resulted in their companies *already having changed their ERISA plans in Seattle* in accord with subsection B. That fact alone proves Part 3 has *compelled* changes to ERISA plans, absent Seattle alleging the companies are irrational actors (which Seattle nowhere says its discovery will show).[6]

Under these circumstances, the unrebutted evidence shows that Part 3's direct-payment requirement has more than an "indirect influence" on ERIC members (*Dillingham*, 519 U.S. at 329) and instead has "acute" economic effects, so as to have already "force[d]" them to "adopt a certain scheme of coverage." *Gobeille*, 136 S. Ct. 943 (internal quotation marks and citations omitted). "The path from influence to coercion amounts to a continuum," and Seattle's Rule 56(d) declaration identifies no facts that Seattle can elicit to undermine that Part 3 falls on the coercion side of the continuum. *Merit Constr.*, 759 F.3d at 129.

CONCLUSION

The Court should grant ERIC's motion for summary judgment, declare that Part 3 and its implementing regulations are preempted by ERISA, and enjoin their enforcement.

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[6] In reality, Seattle cannot offer specific facts that it could elicit, because there are none to undermine ERIC's declarations. For example, though Seattle implies ambiguity is created by the ERIC declarant's statement of two to eight times greater cost associated with subsection A, the statement simply reflects that the declarant's employer has numerous hotels in Seattle, with each one experiencing different plan costs due to the number of enrollments induced by Part 3. Finally, it is also worth noting that Seattle nowhere disputes the publicly available evidence from Seattle's own "Toolkit" accompanying Part 3 and the local union website establishing the high cost of complying with Subsection A. *See* ERIC Mot. at 9-10 & n.7.

CERTIFICATE OF SERVICE

I, Gwendolyn C. Payton, hereby certify under penalty of perjury of the laws of the State of Washington and the United States of America, that on December 6, 2018, I caused to be served a copy of the attached document PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT to the following person(s) in the manner indicated below at the following address(es):

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