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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 RANDAL ANDERSEN, et. al.

11 Plaintiffs,

12 v.

13 DHL RETIREMENT PENSION PLAN,
14 et. al.,

15 Defendants.

CASE NO. C12-439 MJP

ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS

16 This matter comes before the Court on Defendants' motion to dismiss for failure to state
17 a claim. (Dkt. No. 23.) This case involves claims for benefits under two retirement plans
18 governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). Plaintiffs are
19 former Airborne Express, Inc. ("Airborne") employees, who claim a 2004 plan amendment to the
20 pension plan, violated ERISA's anti-cut back law by eliminating their right to transfer between a
21 defined benefits plan and defined contribution, thus reducing their monthly annuity pensions.
22 Defendants, the ERISA plans, move to dismiss, arguing a Department of Treasury regulation
23 specifically permits the amendment. Having reviewed the motion, Plaintiffs' response (Dkt. No.
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1 27), Defendants' reply (Dkt. No. 27), all related filings, and having heard oral argument, the
2 Court GRANTS the motion.

3 **Background**

4 Plaintiffs worked for Airborne in 2003, when the company was acquired by DHL
5 Holdings (USA), Inc., now called DPWN Holdings (USA), Inc. ("DHL"). During their
6 employment at Airborne, Plaintiffs had participated in the Airborne Retirement Income Plan
7 ("RIP") and Profit Sharing Plan ("PSP"). The RIP was a defined benefit plan with a floor-offset
8 feature. The benefit formula was based on a participant's years of service and final average
9 compensation, with an offset for any benefits earned under the PSP.

10 The PSP was an individual-account defined contribution plan. Under the PSP, a retiree
11 would receive the amount he contributed over the years modified by any gains or losses on the
12 investments in the account. Under both the RIP and the PSP, a participant could elect to receive
13 his benefits as a single life annuity or as a lump sum. Before the 2004 amendment, the RIP
14 contained a provision allowing its receipt of a transfer of the PSP's account balance.

15 After DHL acquired Airborne, it made changes to the retirement plan. On December 31,
16 2004, DHL merged the PSP into the DHL equivalent, the DHL Retirement Savings Plan. It also
17 eliminated the right of participants to transfer their DHL Retirement Savings Plan balance to the
18 RIP, effective January 1, 2005. In 2006, DHL merged the RIP into the DHL equivalent, the
19 DHL Retirement Pension Plan ("Pension Plan").

20 On March 14, 2012, Plaintiffs brought this suit against DPWN Holdings (USA), Inc.,
21 DHL Retirement Pension Plan, and the DHL Retirement Pension Plan Committee, raising claims
22 for denial of benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (Count I); breach
23 of fiduciary duty under ERISA §502(a)(2), 1132(a)(Count II); and injunctive and declaratory
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1 relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (Count III). (Dkt. No. 1.) On July 23,
2 2012, Defendants filed a motion to dismiss the complaint in its entirety for failure to state a claim
3 upon which relief may be granted, Fed.R.Civ.P. 12(b)(6). (Dkt. No. 23.)

4 **Analysis**

5 A. Legal Standard

6 When considering motion to dismiss for failure to state a claim under Federal Rule of
7 Civil Procedure 12(b)(6), “the court is to take all well-pleaded factual allegations as true and to
8 draw all reasonable inferences there from in favor of the plaintiff.” Wylar Summit P'ship v.
9 Turner Broad. Sys., Inc., 135 F.3d 658, 663 (9th Cir. 1998). Facts alleged in the complaint are
10 assumed to be true. See Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1030 n. 1 (9th Cir. 2002).
11 The issue to be resolved on a motion to dismiss is whether the plaintiff is entitled to continue the
12 lawsuit to establish the facts alleged, not whether the plaintiff is likely to succeed on the merits.
13 See Marksman Partners L.P. v. Chantal Pharm. Corp., 927 F.Supp. 1297, 1304 (C.D.Cal. 1996).

14 A complaint must provide more than a formulaic recitation of the elements of a cause of
15 action and must assert facts that “raise a right to relief above the speculative level.” Bell Atlantic
16 Corp. v. Twombly, 550 U.S. 544, 545 (2007). The Ninth Circuit has summarized Twombly's
17 plausibility standard to require that a complaint’s “nonconclusory ‘factual content,’ and
18 reasonable inferences from that content, must be plausibly suggestive of a claim entitling the
19 plaintiff to relief.” Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (citing Ashcroft
20 v. Iqbal, 556 U.S. 662, 677 (2009). “Threadbare recitals of the elements of a cause of action,
21 supported by mere conclusory statements, do not suffice.” Iqbal, 556 U.S. at 677.

22 B. Anti-cutback provision

23 The Supreme Court has recognized that “[t]here is no doubt about the centrality of
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1 ERISA's object of protecting employees' justified expectations of receiving the benefits their
2 employers promise them.” Cent. Laborers' Pension Fund v. Heinz, 541 U.S. 739, 742 (2004).

3 This object is made explicit in the provision known as the statute's “anti-cutback rule,” which
4 provides in relevant part:

5 (1) The accrued benefit of a participant under a plan may not be decreased by an
6 amendment of the plan, other than an amendment described in section 1082(d)(2)
7 or 1441 of this title.

8 (2) For purposes of paragraph (1), a plan amendment which has the effect of-

9 (A) eliminating or reducing an early retirement benefit or a retirement-type
10 subsidy (as defined in regulations), or

11 (B) eliminating an optional form of benefit, with respect to benefits attributable to
12 service before the amendment shall be treated as reducing accrued benefits.

13 ERISA § 204(g), 29 U.S.C. § 1054(g). The Internal Revenue Code contains a duplicate
14 provision, conditioning the eligibility of pension plans for tax breaks on compliance with the
15 anti-cutback rule. 26 U.S.C. § 411(d)(6); Cent. Laborer's Pension Fund, 541 U.S. at 746.

16 Plaintiffs’ core claim is that Defendants violated ERISA’s anti-cutback provision by
17 eliminating the right of plan participants to transfer funds from the PSP to the RIP. Defendants
18 argue the claim fails as a matter of law, because the elimination of the transfer option is
19 explicitly permitted by Department of Treasury Regulations, which directly address the transfer
20 rights at issue in this case.

21 i. Treasury Regulations

22 The Secretary of the Treasury has ultimate authority to interpret the overlapping anti-
23 cutback provisions of ERISA and the Internal Revenue Code. See Cent. Laborer's Pension Fund,
24 541 U.S. at 746-47 (citing Reorganization Plan No. 4 of 1978, § 101, 43 Fed.Reg. 47713 (1978),
92 Stat. 3790). Under that authority, the IRS has promulgated a regulation that directly
addresses the transfer right at the center of this case: “Provisions for transfer of benefits between
and among defined contribution plans and defined benefit plans. A plan may be amended to

1 eliminate provisions permitting the transfer of benefits between and among defined contribution
2 plans and defined benefit plans.” 26 C.F.R. § 1.411(d)-4, Q & A-2(b)(2)(viii). The intersection
3 of ERISA’s anti-cutback provisions and the Treasury regulation, 26 C.F.R. § 1.411(d)-4, is an
4 issue of first impression in this circuit.

5 The First Circuit in Tasker v. DHL, 621 F.3d 34 (1st Cir. 2010), in reviewing identical
6 claims as those asserted here and the identical 2004 plan amendment as the one challenged here,
7 held the unambiguous language of the Treasury regulation allowed the defendants to eliminate
8 the transfer option. The Court explained, “[i]ncluded in the compendium of relevant Treasury
9 Department regulations [26 C.F.R. § 1.411(d)-4] is a clear grant of safe passage for plan
10 amendments that eliminate transfer options (even when the elimination may have the incidental
11 effect of reducing benefits).” Tasker, 621 F.3d at 39. Applying the Treasury regulation to the
12 challenged plan amendment, the Court held:

13 In this instance, both the profit-sharing plan and the retirement plan were
14 “amended to eliminate provisions permitting the transfer of benefits” from one
15 plan to the other. At first blush, then, resolving this case seemingly requires only
16 that we travel the path that the Secretary already has beaten. The question posed
17 here directly tracks Q–2 of the regulation: did the defendants violate the anti-
18 cutback rule, ERISA § 204(g), by eliminating the transfer option, when that
19 elimination had the incidental effect of significantly lowering the plaintiff’s
20 projected benefit? The answer, a clear “no,” directly tracks the teachings of A–2:
21 “[a] plan may be amended to eliminate provisions permitting the transfer of
22 benefits between and among ... plans,” even if that elimination reduces an accrued
23 (but unclaimed) benefit. Accordingly, as the district court recognized, the
24 regulation insulates the challenged plan amendments from the anti-cutback rule.

Id. at 40 (emphasis added).

20 Tasker’s reasoning is persuasive. This Court finds the Treasury regulation means exactly
21 what it says: a plan may be amended to eliminate the right to transfer funds between plan
22 accounts. Therefore, the 2004 plan amendment did not violate ERISA’s anti-cutback provisions,
23 even if eliminating the transfer option reduced an accrued (but unclaimed) benefit. Foley-
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1 Wismer Becker v. NLRB, 682 F.2d 770, 775 (9th Cir. 1982)(where the Ninth Circuit has not
2 reached the issue, as is the case here, decisions from other circuits should be given “great weight
3 and precedential value.”)

4 ii. Reduction of an “Accrued Benefit”

5 Plaintiffs argue that Tasker is wrongly decided, because the regulation allows the
6 elimination of the right to transfer funds, but only so long as such an amendment does not reduce
7 the monthly annuity benefit. Plaintiffs are mistaken.

8 The structure and text of the Treasury regulation plainly permits elimination of the
9 transfer option, even if it has the incidental effect of reducing benefits. First, the regulation asks,
10 “to what extent may section 411(d)(6) benefits be reduced or eliminated?” 26 C.F.R. §4.11(d)-4,
11 A-2(b)(2)(viii) (emphasis added). The regulation answers:

12 Provisions for the transfer of benefits between and among defined contribution
13 plans and defined benefit plans of the employer. A plan may be amended to
14 eliminate provisions permitting the transfer of benefits between and among
15 defined contribution plans and defined benefit plans.

16 Id. Together, these provisions can only logically be read to mean the regulation allowing the
17 elimination of the ability to transfer funds contemplates that such a transfer may reduce or
18 eliminate protected benefits. As the Tasker Court explained, in addressing this identical
19 argument:

20 The plaintiff's suggestion that this earlier language [26 C.F.R. §1.411(d)-4, Q & A
21 A-2(b)(1)] somehow derails a straightforward application of the transfer option
22 exception...Section 1.411(d)-4, Q & A-2(b)(2)(viii) asks and answers the precise
23 question on which the plaintiff's claim turns. It states unambiguously that transfer
24 options may be eliminated even if such an action reduces a section 411(d)(6)
benefit.

25 Tasker, 621 F.3d at 41. And, in addressing the other ERISA regulations cited by Tasker, many
26 of the same regulations Plaintiffs refer to, the First Circuit noted:

1 The plaintiff's indignation is understandable, but his reliance on the cited
2 regulations is misplaced. They merely recapitulate the anti-cutback rule,
3 illustrating its application to plan mergers, transfers, and amendments. They do
4 not deal, directly or inferentially, with the transfer option exception. To construe
5 these general regulations to override a separate, highly specific regulation that
6 clearly and unambiguously permits the elimination of a transfer option even when
that elimination would have the incidental effect of reducing an accrued benefit
would turn the regulatory scheme on its head. "It is a conventional canon of legal
interpretation that specific provisions trump more general ones," Harry C.
Crooker & Sons, Inc. v. OSHRC, 537 F.3d 79, 84 (1st Cir. 2008), and that canon
applies here.

7 Id. at 43. Like Tasker, this Court finds no reason to depart from a straightforward reading of the
8 Treasury regulation. Section 1.411(d)-4, Q&A-2(b)(2)(viii) addresses the precise question on
9 which Plaintiffs' claims turn. It governs the outcome of this case. Morales v. Trans World
10 Airlines, Inc., 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the
11 specific governs the general").

12 Plaintiffs also cite Allen v. Honeywell Retirement Earnings Plan, 382 F. Supp. 2d 1139
13 (D. Ariz. 2005), to support their theory that any reduction in benefits is impermissible. But,
14 Allen did not address the elimination of options at issue here. Instead, it addressed a wholly
15 separate issue: amendments to the actuarial formula in two plans subject to a floor offset
16 arrangement. It did not contemplate the Treasury regulation, 26 C.F.R. § 1.411(d)-4, Q & A-
17 2(b)(2)(viii), which plainly give safe harbor to plan amendments eliminating transfer options.
18 Nonetheless, attempt to Plaintiffs shoe-horn the holding of Allen onto the facts of this case by
19 arguing the plan amendment had the effect of reducing more favorable actuarial assumptions.
20 Plaintiffs' contention is not supported by the record before this Court because the 2004
21 amendment did not modify the actuarial assumptions of either the PSP or the RIP.

22 Because the Treasury regulation explicitly permitted Defendants to eliminate the transfer
23 option, Plaintiffs have failed as a matter of law to state viable claim under ERISA's anti-cutback
24 provision. This Court DISMISSES Count I.

1 C. Remainder of the Case

2 Plaintiff's two remaining claims also derive from their anti-cutback claim. Because,
3 Defendants lawfully eliminated the transfer option under the Treasury regulation, these claims
4 are also resolved. Count II and III are DISMISSED.

5 **Conclusion**

6 Because the Treasury regulation, 26 C.F.R. § 1.411(d)-4, Q & A-2(b)(2)(viii), insulates
7 the 2004 plan amendment from the anti-cutback rule, Plaintiffs fail to allege a viable ERISA
8 claim. Consequently, the Court GRANTS Defendants' motion to dismiss for failure to state a
9 claim (Dkt. No. 23) and dismisses all three of Plaintiffs' claims with prejudice. The clerk is
10 ordered to provide copies of this order to all counsel.

11 Dated this 2nd day of November, 2012.

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13 Marsha J. Pechman
14 Chief United States District Judge