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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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PAUL LEHR and COLLEEN LEHR,

Plaintiffs,

v.

FRANK M. PERRI; PERRI ELECTRIC,
INC., a California Corporation;
PERRI ELECTRIC INC. PROFIT
SHARING PLAN; PERRI ELECTRIC
INC. PROFIT SHARING TRUST FUND;
and DOES 1-50,

Defendants.

No. 2:17-cv-1188 WBS AC

MEMORANDUM & ORDER RE: MOTION
FOR SUMMARY JUDGMENT

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Plaintiffs Paul and Colleen Lehr brought this action against defendants Frank M. Perri ("Frank Jr."), Perri Electric, Inc. ("Perri Electric"), Perri Electric Inc. Profit Sharing Plan, Perri Electric Inc. Profit Sharing Trust Fund,¹ and Does 1-50,

¹ The court refers to the Profit Sharing Plan and the Profit Sharing Trust Fund collectively as the Profit Sharing Plans.

1 alleging violations of the Employee Retirement Security Act of
2 1974 ("ERISA"), 29 U.S.C. §§ § 1001 et seq. Before the court is
3 defendants Frank Jr.'s and Perri Electric's Motion for Summary
4 Judgment. (Docket No. 40.)

5 I. Factual and Procedural Background

6 On September 1, 1961, defendant Perri Electric
7 established the Perri Electric, Inc. Profit Sharing Plan for the
8 exclusive benefit of all eligible employees and their
9 beneficiaries. (Decl. of Carol Perri ("Carol Decl.") Ex. J,
10 Perri Electric, Inc. Profit Sharing Plan Summary Plan Description
11 (Docket No. 45-7).) Plaintiff Colleen Lehr started working at
12 Perri Electric in 1977 and did so for approximately three
13 decades. (See Decl. of Colleen Lehr ¶ 3 (Docket No. 49-4).)
14 During her time at Perri Electric, Colleen was a trustee and
15 participant in the Profit Sharing Plan.² (Carol Decl. Ex. H,
16 Account Balance Statement (Docket No. 45-5).)

17 In March 2007, Perri Electric discovered that Colleen
18 had embezzled over one million dollars from the company and its
19 Profit Sharing Plans. (See Decl. of Frank M. Perri ("Frank Jr.
20 Decl.") ¶ 3 (Docket No. 44).) Perri Electric terminated
21 Colleen's employment on March 11, 2007 (Malysiak Decl. Ex. V,
22 Colleen Lehr's Resp. to Req. for Admis. Nos. 9 & 10 (Docket No.
23 46-8)) and removed her as trustee of the Profit Sharing Plan
24 later that year (Carol Decl. Ex. M, Resolution of Board of
25 Directors (Docket No. 45-10)). In 2009, Perri Electric filed a

26 ² Colleen never made any employee contributions to the
27 Profit Sharing Plan during the course of her employment. (Decl.
28 of Spencer T. Malysiak ("Malysiak Decl.") Ex. Z, Colleen Lehr's
Resp. to Special Interrog. No. 46 (Docket No. 46-12).)

1 civil suit against Colleen in Sacramento Superior Court. In
2 2011, Colleen filed a voluntary petition for a Chapter 7
3 bankruptcy in the Eastern District of California. (Req. for
4 Judicial Notice Ex. 00, Chapter 7 Pet. Case No. 11-40159 (Docket
5 No. 48-11).)³ On February 25, 2014, Colleen pled guilty in the
6 Eastern District of California to making false statements in
7 ERISA documents, in violation of 18 U.S.C. § 1027, and was
8 ordered to pay Perri Electric \$326,846 in restitution. (Req. for
9 Judicial Notice Exs. MM & LL, Plea Agreement & Judgment, Case No.
10 2:12-CR-0022 LKK (Docket Nos. 48-9 & 48-8).)

11 In response to Colleen's bankruptcy petition, Perri
12 Electric filed an amended complaint in the bankruptcy case for an
13 adversarial proceeding against Colleen and plaintiff Paul Lehr,
14 Colleen's husband. (Req. for Judicial Notice Ex. II, Compl. to
15 Determine Debt Nondischargeable and Obj. to Dischargability Case
16 No. 11-02749 (Docket No. 48-5).) The bankruptcy court entered a
17 judgment in favor of Perri Electric for \$1,257,395 and held the
18 amount to be non-dischargeable. (Req. for Judicial Notice Ex.
19 KK, Am. J. Regarding Civil Minute Order Dated Sept. 27, 2013 Case
20 No. 11-02749 (Docket No. 48-7).) The bankruptcy court itemized
21

22 ³ The court GRANTS moving defendants' request that the
23 court take judicial notice of material from the related
24 bankruptcy and criminal proceedings to the extent the underlying
25 facts are undisputed. (See Docket Nos. 48-2, 48-5, 48-7, 48-8,
26 48-9 & 48-11.) Public records are proper subjects of judicial
27 notice. See, e.g., United States v. Black, 482 F.3d 1035, 1041
28 (9th Cir. 2007) ("[Courts] may take notice of proceedings in
other courts, both within and without the federal judicial
system, if those proceedings have a direct relation to matters at
issue."); MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th
Cir. 1986) (finding that courts can take judicial notice of
pleadings and court orders that are matters of public record).

1 the following the damages: \$802,887 for unauthorized payments for
2 personal use, \$6,004 for avoidable bank charges, \$78,668 for
3 company receipts deposited into Colleen's personal account,
4 \$42,995 for fraudulent charges on the company's MasterCard, and
5 \$326,851 for unauthorized retirement and company profit sharing
6 distributions. (Id.) The order made these amounts directly
7 payable to Perri Electric. (See id.)

8 On August 25, 2015, Paul sent \$326,000 on behalf of
9 Colleen's estate to the bankruptcy trustee. (See Decl. of Paul
10 Lehr ¶ 5 (Docket No. 49-5); Frank Jr. Decl. Ex. C (Docket No. 44-
11 2).) On October 5, 2015, the bankruptcy trustee sent a check in
12 the amount of \$326,846 to Perri Electric. (Frank Jr. Decl. Ex.
13 C.) Perri Electric used the funds for its own business expenses,
14 with a substantial portion going towards legal fees related to
15 the adversarial proceedings. (Frank Jr. Decl. ¶ 6.) None of the
16 \$326,000 went to the company's Profit Sharing Plans. (See id.)

17 On January 27, 2017, plaintiffs sent a letter to
18 defendant requesting they provide them with information about the
19 Profit Sharing Plans as required by ERISA. (See Req. for
20 Judicial Notice Ex. EE, Compl. ¶ 20 (Docket No. 48-1).)⁴
21 Defendants did not respond to the request for information. In
22 response to defendants' conduct, on June 07, 2017, plaintiffs
23

24 ⁴ The court GRANTS moving defendants' request that the
25 court take judicial notice of plaintiffs' complaint filed in this
26 action. Documents previously filed with the court in the instant
27 litigation are subject to judicial notice. See Asdar Group v.
28 Pillsbury, Madison and Sutro, 99 F.3d 289, 290 n.1 (9th Cir.
1996) (taking judicial notice of undisputed facts contained in
complaint). All remaining Requests for Judicial Notice (Docket
No. 48) are DENIED as MOOT.

1 filed the Complaint, alleging the following causes of action
2 under ERISA against all defendants: (1) violation of duty of
3 loyalty regarding concealment or misstatement of information; (2)
4 violation of duty of loyalty regarding misapplication of funds
5 paid to Perri Electric by the bankruptcy estate; (3) breach of
6 duty to act in accordance with the documents and instruments
7 governing the plan; and (4) breach of prohibition on transactions
8 between fiduciary and a party in interest. (Docket No. 1.) On
9 July 27, 2017, defendants Frank Jr. and Perri Electric filed a
10 motion to dismiss. (Docket No. 10.) The court denied the motion
11 on October 17, 2017. (Docket No. 17.) These same defendants now
12 move for summary judgment.

13 II. Discussion

14 A. Legal Standard

15 Summary judgment is proper "if the movant shows that
16 there is no genuine dispute as to any material fact and the
17 movant is entitled to judgment as a matter of law." Fed. R. Civ.
18 P. 56(a). A material fact is one that could affect the outcome
19 of the suit, and a genuine issue is one that could permit a
20 reasonable jury to enter a verdict in the non-moving party's
21 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
22 (1986).

23 The party moving for summary judgment bears the initial
24 burden of establishing the absence of a genuine issue of material
25 fact and can satisfy this burden by presenting evidence that
26 negates an essential element of the non-moving party's case.
27 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

28 Alternatively, the movant can demonstrate that the non-moving

1 party cannot provide evidence to support an essential element
2 upon which it will bear the burden of proof at trial. Id. Any
3 inferences drawn from the underlying facts must, however, be
4 viewed in the light most favorable to the party opposing the
5 motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475
6 U.S. 574, 587 (1986).

7 B. Statutory Standing

8 To establish standing under ERISA, a former employee
9 such as Colleen must make a "colorable claim" that she is a plan
10 participant. See Leeson v. Transam. Disability Income Plan, 671
11 F.3d 969, 977 (9th Cir. 2012) (citing 29 U.S.C. § 1132(a)(1)(B));
12 see also 29 U.S.C. § 1132(a)(3). An ERISA plan participant is
13 "any employee or former employee of an employer . . . who is or
14 may become eligible to receive a benefit of any type from an
15 employee benefit plan which covers employees of such employer."
16 29 U.S.C. § 1002(7). A claimant is a participant for the
17 purposes of ERISA if the claimant has (1) "a reasonable
18 expectation of returning to covered employment" or (2) "a
19 colorable claim to vested benefits." Firestone Tire & Rubber Co.
20 v. Bruch, 489 U.S. 101, 103 (1989). A plaintiff must be a
21 participant at the time they file their complaint to have
22 standing under ERISA. See Crotty v. Cook, 121 F.3d 541, 547 (9th
23 Cir. 1997). Colleen bears the burden of proving her participant
24 status and thus her statutory standing. See Horton v. Reliance
25 Standard Life Ins. Co., 141 F.3d 1038, 1040 (11th Cir. 1998) ("A
26 plaintiff . . . bears the burden of proving [her] entitlement to
27 contractual benefits."); see also Leeson, 671 F.3d at 971
28 (holding that participant status is a substantive element of a

1 plaintiff's claim).

2 Colleen maintains that she has a colorable claim to
3 vested benefits. Colleen asserts that her interest in the Profit
4 Sharing Plans was \$79,040.85⁵ in 2007, which was the last time
5 she had access to plan information. While Colleen concedes that
6 she embezzled \$326,851 from Perri Electric's Profit Sharing
7 Distributions, she contends that she reimbursed the Profit
8 Sharing Plans for any losses when the bankruptcy trustee tendered
9 the \$326,846 check to Perri Electric.⁶ Colleen asserts that her
10 claim to benefits, and thus her standing, revested upon that
11 payment. In order to ascertain whether Colleen has standing
12 under ERISA, the court must first determine whether Frank Jr. and
13 Perri Electric had any obligation to remit the payment from
14 Colleen's bankruptcy estate to the Profit Sharing Plans.

15 1. The Application of the Restitution Amount

16 Plaintiffs maintain that they made this payment to
17 Perri Electric to satisfy the restitution order in the criminal
18 proceeding. They argue that this money belongs to the Profit
19 Sharing Plans because the amount of restitution is based directly
20 on losses suffered by the plan.

21 The court discerns no mandate, however, in either the
22 criminal case or the bankruptcy proceeding that required that
23 this initial payment to Perri Electric be remitted to the Profit
24

25 ⁵ Even though moving defendants dispute the validity of
26 this figure, the court assumes, without deciding, that this
figure is accurate for the purposes of this motion.

27 ⁶ Plaintiffs do not claim that they have paid back the
28 rest of the money Colleen owes Perri Electric under the judgment
in the bankruptcy case.

1 Sharing Plans. Notably, the restitution order in the criminal
2 case and the payee line on the check make the money payable to
3 Perri Electric, not the Profit Sharing Plans. (See Req. for
4 Judicial Notice Ex. FF, Order Granting Mot. to Approve Compromise
5 and Authorize Interim Distribution Case No. 11-02749 ¶¶ 7-8
6 (Docket No. 48-2).) Even though the amount of restitution may be
7 based on losses suffered by the Profit Sharing Plans, plaintiffs
8 concede that Colleen misappropriated \$930,549 from Perri Electric
9 in addition to the money she took from the Profit Sharing Plans,
10 and that she has an obligation to pay back that money as well.
11 (See Req. for Judicial Notice Ex. KK, Am. J. Regarding Civil
12 Minute Order Dated Sept. 27, 2013 Case No. 11-02749.)
13 Accordingly, the court cannot conclude, based on the orders in
14 the bankruptcy and criminal cases, that it was improper for Perri
15 Electric to use this initial distribution to satisfy Colleen's
16 separate obligation to repay the company.

17 Plaintiffs next claim that, by not remitting this
18 payment to the Profit Sharing Plans, defendants breached their
19 fiduciary duties--including a duty to act solely in the interest
20 of the plan participants and beneficiaries. Even though Frank
21 Jr. also insists that he is not a fiduciary of the plan, moving
22 defendants maintain that they were not acting as fiduciaries when
23 they used this payment to satisfy Perri Electric's business
24 expenses.

25 ERISA defines a fiduciary "not in terms of formal
26 trusteeship, but in functional terms of control and authority
27 over the plan." Mertens v. Hewitt Assocs., 508 U.S. 248, 262
28 (1993). Fiduciary status is not an all-or-nothing concept and

1 applies only when a party is performing a fiduciary duty. See
2 Depot, Inc. v. Caring for Montanans, Inc., 915 F.3d 643, 654 (9th
3 Cir. 2019) (citations omitted). Parties that formally serve as
4 fiduciaries may also act in other capacities, even capacities
5 that conflict with their fiduciary duties. See Trs. of the
6 Graphic Commc'ns Int'l Union Upper Midwest Local 1M Health &
7 Welfare Plan v. Bjorkedal, 516 F.3d 719, 732 (8th Cir. 2008); see
8 also Depot, Inc., 915 F.3d at 654 (“[A party] may be a fiduciary
9 with respect to some actions but not others.”). “ERISA does
10 require, however, that the fiduciary with two hats wear only one
11 at a time, and wear the fiduciary hat when making fiduciary
12 decisions.” Pegram v. Herdrich, 530 U.S. 211, 225 (2000).
13 Accordingly, “the threshold question” is whether moving
14 defendants “perform[ed] a fiduciary function” when they used the
15 disputed funds for Perri Electric’s business expenses. See
16 Santomenno v. Transam. Life Ins. Co., 883 F.3d 833, 840 (9th Cir.
17 2018) (citation omitted). Whether an entity performed a
18 fiduciary function in the relevant factual circumstances is a
19 legal question that the court can resolve on summary judgment.
20 See Varsity Corp. v. Howe, 516 U.S. 489, 492 (1996).

21 The Tenth Circuit’s decision in Holdeman v. Devine, 474
22 F.3d 770 (10th Cir. 2007) is instructive on this point. In
23 Holdeman, plaintiffs brought a class action against the chief
24 executive officer of a company, alleging that he breached his
25 fiduciary duties when he failed to allocate proper funding to the
26 employees’ medical benefit plan. See id. at 774-75. Plaintiffs
27 challenged, in part, defendant’s decision to distribute
28 substantial amounts of the company’s money to its principals

1 instead of the plan. See id. at 780. The Tenth Circuit held
2 that it was "clear that [defendant] was acting in his capacity as
3 CEO . . . and not in his capacity as plan fiduciary" when he
4 decided how to allocate the company's funds. Id. The panel
5 affirmed the district court's conclusion that defendant did not
6 breach any fiduciary duty to the plan because he could make
7 allocation-of-funding decisions only in his role as CEO of the
8 company. Id.

9 The facts of this case compel a similar conclusion. It
10 is undisputed that the check issued by Colleen's bankruptcy
11 trustee made the funds directly payable to Perri Electric. (See
12 Frank Jr. Decl. Ex. C.) Because the money then belonged to the
13 company, only in his role as president of Perri Electric did
14 Frank Jr. have the authority to use these funds to cover Perri
15 Electric's business expenses. Indeed, like in Holdeman, Frank
16 Jr. did not have any authority, in his alleged role as plan
17 fiduciary, to make any decisions regarding the company's
18 allocation of its assets. Plaintiffs' arguments require the
19 court to assume that these funds became assets of the Profit
20 Sharing Plans upon payment. As explained above, however, all
21 relevant and undisputed evidence counsels against such a
22 conclusion. Because Frank Jr. was exercising discretionary
23 control over assets of the company and not assets of the plan, he
24 acted in a corporate capacity in deciding to use this money to
25 satisfy Colleen's monetary obligations to the company.
26 Accordingly, moving defendants did not breach a fiduciary duty in
27 refusing to remit Colleen's payment to the Profit Sharing Plans.

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2 2. Status of Colleen's Benefits

3 Given the above conclusion, defendants argue that
4 Colleen cannot establish participant status, and thus standing,
5 because the amount she owes the Profit Sharing Plans, \$326,851,
6 exceeds the amount she claims in vested benefits, \$79,040.85.

7 In Parker v. Bain, 68 F.3d 1131 (9th Cir. 1995), the
8 Ninth Circuit affirmed the district court's holding that a
9 plaintiff lacked standing under ERISA where he breached his
10 fiduciary duty to the plan by embezzling funds in excess of his
11 claimed account balance. See id. at 1139. First, the Ninth
12 Circuit held that the district court correctly concluded that the
13 plaintiff was a de facto fiduciary of the plan when he directed
14 employees of the company to transfer assets of the plan to a
15 general operating account. Id. Plaintiff's actions breached his
16 fiduciary duty to the plan because they were clearly contrary to
17 the interests of plan participants and beneficiaries. See id. at
18 1140 (citing 29 U.S.C. §§ 1104(a)(1)(A) & 1106(b)(2)). Second,
19 the panel concluded that the district court properly set off
20 plaintiff's interest in the plan against the damages resulting
21 from the breach. Id. Where the amount embezzled exceeds the
22 amount the plan owes the plaintiff, the plaintiff cannot bring a
23 claim as a participant and thus lacks statutory standing. See
24 id. at 1141.

25 Parker controls the court's analysis in this case.
26 First, plaintiffs cannot and do not dispute that Colleen acted as
27 a de facto fiduciary when she misappropriated \$326,851 from the
28 plan and that such misappropriation constitutes a breach of her

1 fiduciary duty to the plan. See also Cent. States, Se. & Sw.
2 Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 571
3 (1985) (observing that fiduciaries have a duty to ensure that "a
4 plan receives all funds to which it is entitled"). Second,
5 consistent with ERISA, the court can set off the money Colleen
6 owes to the plan against the money owed to her by the plan.⁷
7 Even though defendants did not plead set off as an affirmative
8 defense, the bankruptcy judge already ordered Colleen to pay
9 \$326,851 in damages for money she took from the company's Profit
10 Sharing Distributions. (Req. for Judicial Notice Ex. KK, Am. J.
11 Regarding Civil Minute Order Dated Sept. 27, 2013 Case No. 11-
12 02749.) This amount dwarfs what she claims she had in vested
13 benefits in 2007. Colleen provides the court with no evidence
14 that shows that her vested benefits at the time of filing this
15 complaint exceed the amount she embezzled from the plan. See
16 Horton, 141 F.3d at 1040 (placing the burden on the plaintiff to
17 prove their entitlement to benefits).

18 Consistent with Parker, the court finds that the money
19 Colleen owes the plan exceeds any money the plan may owe her.
20 Accordingly, Colleen has no colorable claim to benefits and, as a
21 result, cannot bring a claim as a participant⁸ in the plan

22 ⁷ Plaintiff argues that 29 U.S.C. 1056(d)(4) prohibits
23 this court from offsetting Colleen's benefits from the amount she
24 owes the Profit Sharing Plan. To the contrary, in Parker, the
25 Ninth Circuit concluded that ERISA's antialienation provision
26 does not prevent a company from withholding benefits from a
27 participant it believes to have wronged the plan. 68 F.3d at
28 1140 (citing Coar v. Kazimir, 990 F.2d 1413, 1419 (3d Cir.
1993)).

⁸ Plaintiffs contend that the judgment Perri Electric has
against Colleen is irrelevant because the present action is

1 against moving defendants for the breach of fiduciary duty. The
2 court will thus grant summary judgment for moving defendants on
3 the grounds that plaintiffs⁹ lack statutory standing under
4 ERISA.¹⁰

5 IT IS THEREFORE ORDERED that Frank M. Perri's and Perri
6 Electric, Inc.'s Motion for Summary Judgment (Docket No. 40) be,
7 and the same hereby is, GRANTED as to these defendants only.¹¹

8 Dated: April 9, 2019

9 

10 **WILLIAM B. SHUBB**
11 **UNITED STATES DISTRICT JUDGE**

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18 brought on behalf of the plan participants, not just Colleen.
19 Plaintiffs' argument fails because they have not joined any other
20 plaintiffs and did not move for class certification.

21 ⁹ Plaintiffs concede that Paul's standing, as Colleen's
22 spouse and beneficiary, is entirely dependent upon Colleen's
23 status as a participant. Accordingly, because the court holds
24 that Colleen does not have standing under ERISA, Paul also does
25 not have standing to bring any of these claims.

26 ¹⁰ Because the court concludes that plaintiffs do not have
27 standing under ERISA, it does not address the other grounds put
28 forth in moving defendants' motion for summary judgment.

¹¹ Although defense counsel has implied elsewhere in the
docket that he also represents the Profit Sharing Plans (see
Docket Nos. 9, 10 & 11), he clarified at oral argument that he
represents only Frank Jr. and Perri Electric.