

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AUTOMOTIVE INDUSTRIES PENSION
TRUST FUND, JAMES H. BENO,
Trustee, BILL BRUNELLI, Trustee,
STEPHEN J. MACK, Trustee, JON
ROSELLE, Trustee, DOUG CORNFORD,
Trustee, and JAMES V. CANTERBURY,
Trustee,

Plaintiffs,

v.

FITZPATRICK CHEVROLET INC., a
California corporation; and FITZPATRICK
FAMILY LLC, a Nevada limited liability
company, and DOES 1–10,

Defendants.

No. C 11-00195 WHA

**ORDER DENYING
DEFENDANT’S MOTION
TO DISMISS**

INTRODUCTION

In this action to recover withdrawal liability and for injunctive relief under ERISA, defendant’s motion to dismiss is **DENIED**.

STATEMENT

Plaintiff Automotive Industries Pension Trust Fund is a multiemployer employee pension benefit plan established pursuant to ERISA. Plaintiffs are each members of the board of trustees of Trust Fund, the “plan sponsor” under ERISA. Defendant Fitzpatrick Chevrolet Inc. was a participant in the Automotive Industries Pension Plan, which provided pension funding for

1 members of Automotive Machinists Lodge No. 1173 pursuant to a collective bargaining
2 agreement with Machinists Automotive Trades District Lodge No. 190 of Northern California.
3 Defendant Fitzpatrick Family LLC leased to defendant Fitzpatrick Chevrolet the real property on
4 which defendant Fitzpatrick Chevrolet was located. Defendant Fitzpatrick Chevrolet was
5 obligated to make and made contributions to the trust on behalf of its employees covered by the
6 collective bargaining agreement (Sec. Amd. Compl. ¶¶ 6–7, 14).

7 In May 2009, defendant Fitzpatrick Chevrolet ceased business operations. It made a
8 complete withdrawal from participation in the trust under 29 U.S.C. 1383(a). Plaintiffs allege that
9 defendants were under common control and thereby jointly and severally assumed withdrawal
10 liability to the trust fund under Section 1301(b)(1) (Sec. Amd. Compl. ¶¶ 7, 9). Plaintiffs seek
11 (1) a judgment against defendants in the amount of their alleged withdrawal liability pursuant to
12 Section 1399(c)(5), including interest, liquidated damages, and attorneys fees and costs pursuant
13 to Section 1132(g)(2), and (2) an injunction compelling defendants to provide documentation of
14 all trades or businesses that are within the control group as defined in Section 1301(b)(1) and all
15 information regarding potential transactions to evade or avoid withdrawal liability in violation of
16 Section 1392(c) (Sec. Amd. Compl. ¶¶ 32, 34–36).

17 Defendant Fitzpatrick Chevrolet made no appearance in this action and its default was
18 entered on May 31. It did not join the instant motion. A stipulated judgment was entered as to
19 defendant Fitzpatrick Chevrolet on June 9. The judgment was in the amount of \$4,284,901.37
20 and included interest, liquidated damages, and attorney’s fees and costs (Dkt. No. 49 ¶ 3a).

21 Defendant FFLLC filed the instant motion on May 10, 2011. Defendant moves to dismiss
22 the entirety of plaintiffs’ first amended complaint pursuant to Rule 12(b)(6) for failure to allege
23 facts sufficient to state a claim that (1) Fitzpatrick Chevrolet and FFLLC were part of the same
24 “control group” such that both defendants should be jointly and severally liable for any
25 withdrawal liability incurred by Fitzpatrick Chevrolet, and (2) because plaintiffs have failed to
26 sufficiently so allege, FFLLC is not required to provide any information to plaintiffs pursuant
27 to ERISA. This order follows full briefing and a hearing on the motion.
28

1 ANALYSIS

2 In ruling on a motion brought under Rule 12(b)(6), “dismissal is only appropriate where
3 the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal
4 theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). A
5 complaint “attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
6 allegations, [but] a plaintiff’s obligation to provide the grounds of his entitle[ment] to relief
7 requires more than mere labels and conclusions, and a formulaic recitation of the elements of a
8 cause of action will not do. Factual allegations must be enough to raise a right to relief above the
9 speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and internal
10 quotations omitted). The complaint must contain sufficient factual matter to “state a claim for
11 relief that is plausible on its face.” *Id.* at 570. In evaluating a motion brought under
12 Rule 12(b)(6), the allegations in the complaint and reasonable inferences drawn therefrom are
13 taken as true. *Walter v. Drayson*, 538 F.3d 1244, 1247 (9th Cir. 2008).

14 **1. WITHDRAWAL LIABILITY AND COMMON CONTROL.**

15 Section 1381(a) states that if an employer withdraws from a multiemployer plan in a
16 complete or partial withdrawal, then that employer is liable to the plan for the amount of its
17 withdrawal liability. Section 1301(b)(1) provides that “all employees of trades or businesses
18 (whether or not incorporated) which are under common control shall be treated as employed by a
19 single employer and all such trades and businesses as a single employer.” Thus, all employers
20 under common control are jointly and severally liable for all such employers’ withdrawal
21 liability. *See Bd. of Trs. of W. Conference of Teamsters Pension Trust Fund v. Lafrenz*,
22 837 F.2d 892, 893 (9th Cir. 1988).

23 Common control for purposes of Section 1301(b) is defined in 26 C.F.R. 1.414(c)-2
24 and 1.414(c)-4 (“the regulations prescribed [to determine common control] shall be consistent and
25 coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury
26 under section 414(c) of Title 26.”) Common control requires that the same group of people or
27 organizations (1) own a *controlling interest* in each business alleged to be under common control,
28 and (2) accounting only for identical ownership, the same group of people or organizations are in

1 *effective control* of each business alleged to be under common control.

2 26 C.F.R. 1.414(c)-2(a), (c). Section 1.414(c)-2(a) defines common control as “any group of
3 trades or businesses which is . . . a brother-sister group of trades or businesses under common
4 control as defined in paragraph (c) of this section” (internal quotations omitted).

5 Section 1.414(c)-2(c) defines a brother-sister group as “two or more organizations conducting
6 trades or businesses if (i) the same five or fewer persons who are individuals, estates, or trusts
7 own (directly and with the application of § 1.414(c)-4) *a controlling interest in each*
8 *organization*, and (ii) taking into account the ownership of each such person only to the extent
9 such ownership is identical with respect to each such organization, such persons are in *effective*
10 *control* of each organization” (emphasis added).

11 Fitzpatrick Chevrolet undertook a complete withdrawal pursuant to Section 1383(a) when
12 it ceased all operations in May 2009 (First Amd. Compl. ¶ 5). Defendant does not dispute this.
13 Therefore, plaintiffs have sufficiently alleged that Fitzpatrick Chevrolet incurred withdrawal
14 liability under Section 1381(a). If Fitzpatrick Chevrolet and FFLLC are common controlled, then
15 they are jointly and severally liable for Fitzpatrick Chevrolet’s alleged withdrawal liability. *See*
16 *Lafrenz*, 837 F.2d at 893.

17 **A. Controlling Interest.**

18 A controlling interest in a corporation is defined in 26 C.F.R. 1.414(c)-2(b)(2)(A) as
19 “ownership of stock possessing at least 80 percent of total combined voting power of all classes
20 of stock entitled to vote of such corporation or at least 80 percent of the total value of shares of all
21 classes of stock of such corporation.” Therefore, a group of corporations alleged to be under
22 common control must be owned by the same group that has at least a combined eighty percent
23 ownership share of all such corporations.

24 Plaintiffs allege that the F. Gerard Fitzpatrick Trust, Dennis P. Fitzpatrick, and Francis G.
25 Fitzpatrick own a combined total of 100 percent of both Fitzpatrick Chevrolet and FFLLC (First
26 Amd. Compl. ¶ 7). Taking this allegation as true, plaintiffs have sufficiently alleged that the
27 above-referenced persons and organizations own a controlling interest in Fitzpatrick Chevrolet
28

1 and FLLC. Thus, plaintiffs have alleged that the same group of persons or entities owns a
2 controlling interest in Fitzpatrick Chevrolet and FLLC.

3 **B. Effective Control.**

4 Effective control of a corporation is defined in 26 C.F.R. 1.414(c)-2(c)(2)(i) as when the
5 group of people owning the corporations alleged to be in common control “own stock possessing
6 more than 50 percent of the total combined voting power of all classes of stock entitled to vote or
7 more than 50 percent of the total value of shares of all classes of stock of such corporation.”
8 Section 1.414(c)-2(c)(ii) requires that effective control be determined by identical ownership,
9 which is demonstrated in Section 1.414(c)-2(e): each person’s identical ownership is the lowest
10 common amount of individual ownership in all organizations alleged to be in common control.
11 Thus, the combined identical ownership of all organizations alleged to be in common control
12 must be more than fifty percent.

13 Plaintiffs allege that the F. Gerard Fitzpatrick Trust, Dennis P. Fitzpatrick, and Francis G.
14 Fitzpatrick own an 86.41 percent combined identical interest in Fitzpatrick Chevrolet and FLLC
15 (First Amd. Compl. ¶ 7). Taking this allegation as true, plaintiffs have alleged that the same group
16 of persons or entities is in effective control of Fitzpatrick Chevrolet and FLLC. Because
17 plaintiffs have sufficiently alleged that the same group of persons or organizations have a
18 controlling interest in and effective control of Fitzpatrick Chevrolet and FLLC, plaintiffs have
19 alleged that both such corporations are under common control for purposes of
20 29 U.S.C. 1301(b)(1). Therefore, plaintiffs further have sufficiently alleged that Fitzpatrick
21 Chevrolet and FLLC are jointly and severally liable for any withdrawal liability incurred by
22 either entity. *Lafrenz*, 837 F.2d at 893.

23 * * *

24 Defendant’s contention that plaintiffs’ allegation of ownership percentages is a mere legal
25 conclusion is also incorrect. The percentage allegations may be exceedingly brief, but they are
26 factual. Defendant further contends that plaintiffs have failed to allege sufficient facts to meet the
27 requirements of 26 C.F.R. 1.414(c)-2(c)(2), because one of the alleged owners of Fitzpatrick
28 Chevrolet and FLLC is a trust. The regulation states in relevant part:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(1) In general. The term “brother-sister group of trades or businesses under common control” means two or more organizations conducting trades or businesses if

(i) the same five or fewer persons who are individuals, estates, or trusts own (*directly and with the application of § 1.414(c)-4*) a controlling interest in each organization, and

(ii) taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such organization, such persons are in effective control of each organization. The five or fewer persons whose ownership is considered for purposes of the controlling interest requirement for each organization must be the same persons whose ownership is considered for purposes of the effective control requirement.

(2) Effective control defined. For purposes of this paragraph, persons are in “effective control” of an organization if—

(i) In the case of an organization which is a corporation, such persons own stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of such corporation;

(ii) In the case of an organization which is a trust or estate, such persons own an aggregate actuarial interest of more than 50 percent of such trust or estate[.]

26 C.F.R. 1.414(c)-2(c) (emphasis added).

Defendant argues that the parenthetical in Section 1.414(c)-2(c) stating “directly and with the application of § 1.414(c)-4” creates a requirement that plaintiffs must plead sufficient facts to satisfy the requirements of Section 1.414(c)-4 for determining a controlling interest. At the hearing, defendant argued specifically that plaintiff pled insufficient facts to meet the requirements of Section 1.414(c)-4(b)(3), which governs how ownership of an organization by a trust is to be attributed to the beneficiaries of that trust.

Defendant is correct that, under Section 1.414(c)-2(c)(1)(i), common control of a brother-sister group of corporations must be determined with respect to any beneficiaries’ actuarial interests held by a trust in accordance with Section 1.414(c)-4. Defendant is also correct that if the beneficiaries of the F. Gerard Fitzpatrick Trust do not meet the combined actuarial interest requirements in Section 1.414(c)-4, the same group of people may not be in common control of Fitzpatrick Chevrolet and FFLLC. This order finds, however, that plaintiffs have pled sufficient

1 facts to make plausible, not merely possible, their well-pled allegation that the F. Gerard
2 Fitzpatrick Trust owned 50.75 percent of Fitzpatrick Chevrolet and 64.34 percent of FFLLC taking
3 into account actuarial interests in the trust. This order, however, does not find that the
4 beneficiaries of the F. Gerard Fitzpatrick Trust necessarily did own a sufficient actuarial interest to
5 satisfy Section 1.414(c)-4. It is appropriate to move forward to discovery on this issue. Defendant
6 will have another chance to make its argument on Section 1.414(c)-4 at summary judgment with
7 the benefit of a fully developed evidentiary record.

8 **2. REQUIREMENT TO FURNISH INFORMATION.**

9 Pursuant to 29 U.S.C. 1399(a), “an employer shall, within 30 days after a written request
10 from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be
11 necessary to enable the plan sponsor to comply with the requirements of this part.” Plaintiffs
12 allege that both Fitzpatrick Chevrolet and FFLLC failed to do so (First Amd. Compl. ¶ 34).
13 Plaintiffs allege that Fitzpatrick Chevrolet actually employed employees, and is thus liable as an
14 “employer,” and that FFLLC is additionally liable under Section 1399(a) because under
15 Section 1301(b), all entities under common control are treated as a single employer (*ibid.* at ¶ 9).
16 Plaintiff has sufficiently alleged that Fitzpatrick Chevrolet was the actual employer, that
17 Fitzpatrick Chevrolet and FFLLC were under common control, and, taking plaintiffs’ allegations
18 as true, that FFLLC is also liable to plaintiffs under Section 1399(a) by virtue of Section 1301(b)’s
19 treatment of all entities under common control as a single employer.

20 Building on its assertion that Fitzpatrick Chevrolet and FFLLC were not under common
21 control, defendant contends that FFLLC was not an “employer” because it had no employees,
22 citing *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980), for the proposition
23 that the definition of “employer” contained in Title I of ERISA does not apply to Title IV.

24 This argument fails. In *Lafrenz*, decided eight years after *Nachman*, the defendants argued
25 that because their truck-leasing operation had no employees, Section 1301(b), which held
26 “employers” liable for withdrawal liability, did not apply. Defendant makes the same mistake as
27 did the defendants in *Lafrenz*. Our court of appeals held that “liability as a single employer . . .
28 does not hinge on whether they independently hired employees . . . but on whether [the two


1 organizations] are treated as a single business entity under the statute.” *Lafrenz*, 837 F.2d at 894.
2 Here, plaintiffs have sufficiently alleged that Fitzpatrick Chevrolet and FFLLC should be so
3 treated. The fact that FFLLC only leased property to Fitzpatrick Chevrolet and allegedly had no
4 employees is of no importance to FFLLC’s potential liability under Section 1399(a), just as the
5 fact of having no employees is of no importance to its potential liability under Section 1301(b).
6 Defendant’s citations to out-of-circuit decisions defining “employee,” both generally and in the
7 context of Title IV of ERISA, are inapplicable and unpersuasive.

8 **CONCLUSION**

9 As stated above, plaintiffs have alleged sufficient facts that, if true, state claims for relief
10 under Sections 1381(a) and 1399(a). Defendant’s motion to dismiss is **DENIED**.

11 **IT IS SO ORDERED.**

12
13
14 Dated: June 17, 2011.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE