UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CYNTHIA MARIE VESPA,

Plaintiff,

v.

SINGLER-ERNSTER INC., et al.,

Defendants.

Case No. 16-cv-03723-RS

ORDER DENYING MOTIONS TO DISMISS

Pursuant to Civil Local Rule 7-1(b), defendants' motions to dismiss the First Amended Complaint are suitable for disposition without oral argument, and the hearing set for April 7, 2017 is hereby vacated. The motions will be denied.

In this putative class action, plaintiff Cynthia Maria Vespa brings claims under ERISA on behalf of participants in an Employee Stock Ownership Plan ("ESOP"), formerly administered by defendant Singler-Ernster, Inc. ("The Company").[1] The Company was founded by Peter Singler, Sr. and a partner. The Company originally owned and operated a number of Round Table Pizza franchises in the San Francisco Bay area, on the Peninsula and in the North Bay. Vespa alleges, in essence, that upon the retirement and subsequent death of Peter Singler, Sr., his son, defendant Peter Singler, Jr., assumed control of the business and, through a series of imprudent management

[1] The original complaint also advanced claims under state law. Those claims have been omitted from the First Amended Complaint.

decisions, involving attempts to operate restaurants other than Round Table Pizza franchises, destroyed the value of the Company—thereby rendering the putative class's interest in the ESOP worthless. Vespa particularly challenges defendants' decision to have the ESOP expend $250,000—cash acquired in a bequest from Peter Singler, Sr.—to purchase additional Company stock at a time when they allegedly knew the value of the Company and its stock was collapsing.

A prior motion to dismiss brought by Peter Singler, Jr. was granted, with leave to amend. A primary basis for that dismissal was the fact the majority of the substantive allegations in the complaint were qualified as being made "on information and belief." As explained in the prior order, despite how commonplace that phrase may be in practice, it is not a recognized pleading device under the Federal Rules. Rather, Rule 11(b) of the Federal Rules of Civil Procedure provides that by submitting a pleading to the court, the signatory is always certifying that, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." While use of the phrase therefore can often be dismissed as mere surplusage, in some circumstances it gives rise to an inference that the pleader lacks knowledge of underlying facts to support the allegations made, and is instead engaging in speculation to an undue degree.

The prior order directed that in any amended complaint, plaintiff would be required to "make her averments without caveat and/or with additional detail explaining the basis of her beliefs." The order further noted, however, that plaintiff would remain "free to invoke the provision of Rule 11 that permits a party specifically to identify averments as ones which it in good faith believes, 'will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.'"

Plaintiff's amended complaint liberally invokes that provision of Rule 11. The vast majority of the critical factual allegations are presented with a claim that plaintiff in good faith believes further investigation and discovery will lead to supporting evidence. Defendants' present

motions to dismiss[2] argue that plaintiff has thereby effectively admitted she lacks facts sufficient to state a plausible claim, and that the complaint should now be dismissed with prejudice.

Defendants' argument would render the provision of Rule 11 on which plaintiff relies a nullity. To be sure, a plaintiff should not be permitted to evade the pleading requirements of Twombly and Iqbal[3] by making wholly conclusory allegations and then invoking a mantra that he or she hopes evidence supporting those allegations will subsequently emerge. Here, however, plaintiff has adequately stated—as assertions of fact—the elements of her claims. Indeed, defendants' motions virtually concede the facts are alleged; they instead argue those allegations should be disregarded in light of plaintiffs' admission that she does not presently possess supporting evidence.

Plaintiff's counsel, of course, has taken responsibility under Rule 11 for having a good faith basis to believe evidentiary support for those claims likely will be discovered. Because the allegations are now backed by that representation, they cannot simply be disregarded, as defendants urge.

The prior order also dismissed the second claim for relief—now embodied in the third and fourth claims of the First Amended Complaint—on grounds that the allegations of the complaint only supported a conclusion that the ESOP had no ownership interest in the allegedly mismanaged Company assets. Although the question remains close, plaintiff has adequately shown it to be a factual issue, not suitable for disposition at the pleading stage, whether those claims are tenable. Again, the fact that plaintiff has invoked Rule 11 does not warrant disregard of her factual averments.

Finally, Carol Singler's separate argument that no basis for her liability has been

[2] Peter Singler, Jr., again is a moving party. By separate motion, defendants Singler-Ernster, Inc., Carol S. Singler, and the Singler-Ernster, Inc. Employee Stock Ownership Plan and Trust both join in Peter Singler, Jr.'s arguments and contend that Carol Singler would not be liable in any event.

[3] See Bell Atlantic Corp. v. Twombly, 550 US 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

adequately pleaded fails. While the allegation that Carol Singler had knowledge of Peter Singler's conduct is indeed somewhat conclusory, under all the factual circumstances presented it is sufficiently plausible as to not require further evidentiary detail at the pleading stage. Accordingly, the motions to dismiss are denied.

IT IS SO ORDERED.

Dated: April 5, 2017

RICHARD SEEBORG
United States District Judge

United States District Court
Northern District of California