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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MANLEY GOUGH, et al.,
Plaintiffs,
v.
MICHAEL A. TENNYSON, et al.,
Defendants.

Case No. 17-cv-2215-PJH

**ORDER DENYING MOTION TO
DISMISS**

Defendants' motion to dismiss the first amended complaint ("FAC") came on for hearing before this court on August 9, 2017. Plaintiffs appeared by their counsel Dan Feinberg, and defendants appeared by their counsel Joseph Faucher. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby DENIES the motion.

BACKGROUND

This is an ERISA case, filed as a proposed class action. Plaintiffs Manley Gough, John Gouveia, and Curtis Bryant are former employees of defendant Tennyson Electric, Inc. ("Tennyson"), a California corporation headquartered in Livermore, California. FAC ¶¶ 6, 10-11. Plaintiffs are/were participants in the Tennyson Electric, Inc. Employee Stock Ownership Plan ("Tennyson ESOP"), an employee benefit plan as defined by ERISA § 3(3), 29 U.S.C. § 1002(3), and an "employee stock ownership plan" within the meaning of ERISA § 407(d)(6), 29 U.S.C. § 1107(d)(6). FAC ¶¶ 2, 6.

Defendants Michael A. Tennyson, President and Secretary of Tennyson, and Cathleen W. Tennyson, Vice President of Tennyson, are members of defendant Plan

1 Committee of the Tennyson ESOP ("Plan Committee"), and are Trustees and fiduciaries
2 of the ESOP. FAC ¶¶ 7-10. Tennyson is the sponsor and Administrator of the ESOP,
3 and allegedly delegated its duties as Plan Administrator to the Plan Committee. FAC
4 ¶ 10.

5 From 2005 to 2015, Tennyson was owned 100% by the Tennyson ESOP, which
6 had purchased it from Michael and Cathleen Tennyson for \$7.425 million in a 100%
7 leveraged transaction. FAC ¶¶ 12-13. Plaintiffs allege that although the ESOP owned
8 Tennyson from 2005 to 2015, Michael and Cathleen Tennyson continued to exercise
9 "complete control" over the company during that time. FAC ¶ 14.

10 Tennyson experienced a downturn in work as a result of the 2008 recession. FAC
11 ¶ 15. According to Tennyson's Form 5500s filed with the IRS, the value of the ESOP's
12 company stock declined from \$2.1 million in 2008 to \$1.355 million in 2009, to \$300,000
13 in 2010, but then rebounded to \$2.637 million in 2012. FAC ¶¶ 15-16.

14 In 2014, Michael Tennyson decided to buy out the ESOP, and plaintiffs allege that
15 "[d]efendants manipulated the value of the Tennyson stock to lower the share price to
16 their advantage." FAC ¶ 17. Plaintiffs assert that while Tennyson's business remains
17 strong, the ESOP valuation reported on the Plan's 2014 Form 5500 stated that the
18 company stock was worth only \$100,000. FAC ¶ 17.

19 In 2015, Michael and Cathleen Tennyson, or "an entity controlled by them,"
20 purchased the ESOP's company stock for \$100,000, and distributed the proceeds to the
21 ESOP participants. FAC ¶ 18. Plaintiffs claim that the valuation used for this transaction
22 included "improper discounts, including a minority interest discount even though the
23 ESOP owned 100% of the company." FAC ¶ 19. They allege that Michael and Cathleen
24 Tennyson also caused Tennyson to engage in "numerous transactions with related
25 parties, i.e., other companies owned by Michael and Cathleen Tennyson[,]" and that
26 these "related party" transactions were not in the best interests of Tennyson or the
27 ESOP. FAC ¶ 20.

28 Plaintiffs claim that defendants did not provide pension benefit statements or

1 summary annual reports to plaintiffs in the years 2011-2014 as required by ERISA.
2 FAC ¶¶ 21-23. Thus, plaintiffs assert, they were unaware of any valuation of the ESOP's
3 company stock after 2010. FAC ¶ 21. Plaintiffs allege that Michael Tennyson told them
4 he would provide the statements, which had been delayed by accounting issues and
5 needed to be revised, and asked plaintiffs to "trust him." FAC ¶ 22-23.

6 Plaintiffs allege that in fact, the Plan's third-party administrator had prepared
7 pension benefit statements for ESOP participants, including plaintiffs, and provided them
8 to defendants in a timely manner, but defendants withheld the pension statements from
9 Plan participants in order to conceal their manipulation of the value of Tennyson stock
10 owned by the ESOP, and other fiduciary violations. FAC ¶¶ 24-26. Plaintiffs claim that
11 they were unaware of the true state of facts until after they finally received the pension
12 benefit statements in November 2015. FAC ¶ 27. Plaintiffs also assert that Michael and
13 Cathleen Tennyson "ignored provisions in Plan documents and the stock purchase
14 agreement requiring the appointment of independent directors and/or ESOP trustees."
15 FAC ¶ 29.

16 Plaintiffs allege that they have been deprived of retirement benefits as a result of
17 violations of ERISA's fiduciary duty rules by the fiduciaries entrusted with overseeing the
18 Plan. FAC ¶ 1. Plaintiffs filed the complaint in the present action on April 20, 2017, and
19 filed the FAC on May 12, 2017. Plaintiffs seek to represent a class of approximately 35
20 participants in the ESOP during the proposed class period, and an equal number of
21 beneficiaries. FAC ¶ 31.

22 The FAC alleges three causes of action – (1) a claim of breach of fiduciary duty
23 under ERISA §§ 502(a)(2) and 502(a)(3), 29 U.S.C. §§ 1132(a)(2) and 1132(a)(3), arising
24 from defendants' valuation of Tennyson ESOP stock and the implementation of
25 defendants' decision to terminate the Plan; (2) a claim of engaging in a prohibited
26 transaction forbidden by ERISA § 406(a)-(b), 29 U.S.C. § 1106(a)-(b), arising from the
27 2015 transactions whereby Michael and Cathleen Tennyson regained ownership of
28 Tennyson through Tennyson's purchase of the ESOP participants' stock for \$100,000,

1 asserting that the transactions constituted "a direct or indirect exchange . . . between the
2 plan and a party in interest" or a party "whose interests are adverse to the interests of the
3 plan or the interests of its participants;" and (3) a claim for statutory penalties under
4 ERISA § 502(c)(1)(A), 29 U.S.C. § 1132(c)(1)(A), based on defendants' alleged failure to
5 provide pension benefit statements for 2011-2014 until November 2015.

6 Defendants now seek an order dismissing the FAC for failure to state a claim.

7 **DISCUSSION**

8 A. Legal Standard

9 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims
10 alleged in the complaint. Ileto v. Glock, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). A
11 complaint may be dismissed under Rule 12(b)(6) if the plaintiff fails to state a cognizable
12 legal theory, or has not alleged sufficient facts to support a cognizable legal theory.
13 Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013).

14 While the court is to accept as true all the factual allegations in the complaint,
15 legally conclusory statements, not supported by actual factual allegations, need not be
16 accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009); see also In re Gilead Scis.
17 Secs. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008). The complaint must proffer sufficient
18 facts to state a claim for relief that is plausible on its face. Bell Atlantic Corp. v. Twombly,
19 550 U.S. 544, 555, 558-59 (2007) (citations and quotations omitted).

20 A claim has facial plausibility when the plaintiff pleads factual content that allows
21 the court to draw the reasonable inference that the defendant is liable for the misconduct
22 alleged. See Iqbal, 556 U.S. at 678-79. Where dismissal is warranted, it is generally
23 without prejudice, unless it is clear the complaint cannot be saved by any amendment.
24 Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005).

25 Review is generally limited to the contents of the complaint, although the court can
26 also consider a document on which the complaint relies if the document is central to the
27 claims asserted in the complaint, and no party questions its authenticity. See Sanders v.
28 Brown, 504 F.3d 903, 910 (9th Cir. 2007). That is, the court may consider matters that

1 are properly the subject of judicial notice, Knieval v. ESPN, 393 F.3d 1068, 1076 (9th Cir.
2 2005); Lee v. City of L.A., 250 F.3d 668, 688-89 (9th Cir. 2001), and may also consider
3 exhibits attached to the complaint, see Hal Roach Studios, Inc. v. Richard Feiner & Co.,
4 Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989), and documents referenced in the
5 complaint that form the basis of a the plaintiff's claims. See No. 84 Emp'r-Teamster Jt.
6 Counsel Pension Tr. Fund v. Am. W. Holding Corp., 320 F.3d 920, 925 n.2 (9th Cir.
7 2003).

8 B. Defendants' Motion

9 Defendants argue that the first two causes of action should be dismissed because
10 the facts as pled do not state a claim under ERISA. They assert that contrary to the
11 description of the structure of the ESOP's termination in the FAC, the governing plan
12 documents for the ESOP show that the ESOP was first terminated, and that the shares
13 were then distributed from the ESOP to Plan Participants. Thus, they assert, at the time
14 of the sale of the shares, the shares were no longer ERISA Plan assets, and that their
15 fiduciary role ended with the termination of the ESOP.

16 Defendants argue that because the shares were no longer Plan assets at the time
17 of the sale, it was the Internal Revenue Code ("IRC") – not ERISA – which supplied the
18 applicable law. They argue that pursuant to IRC § 409(h)(2), the participants' shares
19 could immediately be repurchased under a "fair valuation" formula. They argue further
20 that while the IRC is similar to ERISA in that it sets forth requirements for employee
21 benefit plans, the IRC does not provide for a private right of action, and thus, plaintiffs
22 cannot bring a claim to enforce the IRC's "fair valuation" requirement.

23 Defendants contend that the second cause of action (claim of “prohibited
24 transactions”) should be dismissed for the further reason that there are no facts pled that
25 satisfy the requirements of § 406(a) and/or § 406(b). Specifically, defendants argue,
26 there are no facts pled showing any sale or exchange of property between the ESOP and
27 a "party in interest," nor showing that any fiduciary dealt with any assets of the Plan in his
28 or her own interest or for his or her own account.

