

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 15-1507 JVS (JCGx) Date February 22, 2016

Title Carter v. San Pasqual Fiduciary Trust Co.

Present: The Honorable James V. Selna

Karla J. Tunis

Deputy Clerk

Not Present

Court Reporter

Attorneys Present for Plaintiffs:

Not Present

Attorneys Present for Defendants:

Not Present

Proceedings: (IN CHAMBERS) Order GRANTING in PART and DENYING in PART Defendants' Motion to Dismiss

The Court, having been informed by the parties that they submit on the tentative ruling previously issued, hereby GRANTS IN PART and DENIES IN PART Defendants' Motion to Dismiss and rules in accordance with the tentative ruling as follows:

Defendants Strategic Equity Group, Christopher Kramer, Shoreline Capital, Inc., and Edgewater Capital, LLC (collectively, "Strategic Equity") filed a motion to dismiss the first amended complaint filed by Plaintiffs Pamela Carter, Deborah Martin, Christine Morales, Stanley Caraker, Stanley Nicks, Michaela Vecht, Bert Schorling, Jeanette Breiten, Raymond Bachar, Katherine Mitchell, Stephanie Castro, Bruce Hinsley, and Arlene Pounds on behalf of themselves and all others similarly situated (collectively, "Plaintiffs"). Docket No. 25. Plaintiffs filed an opposition. Docket No. 34. Strategic Equity filed a reply. Docket No. 35.

For the following reasons, the Court **grants in part** and **denies in part** Strategic Equity's motion to dismiss.

1. Background

Plaintiffs are vested participants in the Fleet Card Fuels Employee Stock Ownership Plan ("Plan"), a program that allowed Fleet Card Fuels employees to purchase stock in the company. Docket No. 25 ¶¶ 9-21. The Plan hired Strategic Equity, a financial services firm, to act as its investment advisor in a stock redemption agreement with Fleet Card Fuels. *Id.* ¶¶ 26-29, 48. As a condition of the redemption agreement, Strategic

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 15-1507 JVS (JCGx)	Date	February 22, 2016
Title	<u>Carter v. San Pasqual Fiduciary Trust Co.</u>		

Equity was required to provide the Plan with a fairness opinion finding that the stock purchase price was not less than fair market value and the redemption agreement was fair to the Plan from a financial point of view. Id. ¶ 49.

Plaintiffs allege that Strategic Equity breached their fiduciary duties to Plaintiffs because they acted under a conflict of interest when issuing their fairness opinion: Strategic Equity was a long-time client of two Fleet Card Fuels officers and directors who also served on the board of trustees for the Plan, id. ¶¶ 52-56, and because of the conflict of interest, Strategic Equity valued the stock below fair market value. Id. ¶ 57.

Plaintiffs have now brought a putative class action complaint against Strategic Equity and others¹ on behalf of themselves and other vested Plan participants alleging: (1) breach of fiduciary duty in violation of the federal Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001 et seq., (2) engaging in prohibited transactions in violation of ERISA; (3) co-fiduciary liability in violation of ERISA; (4) breach of fiduciary duty in violation of state law; (5) aiding and abetting breach of fiduciary duty in violation of state law; and (6) negligence. Id. ¶¶ 85-165. Strategic Equity has moved to dismiss the complaint in its entirety for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). See Docket No. 25.

2. Legal Standard on Rule 12(b)(6) Motion to Dismiss

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To overcome a motion to dismiss under Rule 12(b)(6), a plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has “facial plausibility” if the plaintiff pleads facts that “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

¹ Plaintiffs have also sued the San Pasqual Fiduciary Trust Company, which provided trust services to the Plan; Fleet Card Fuels, which served as the Plan sponsor; William Davies, who is an officer and director for Fleet Card Fuels and member of the Plan’s board of trustees; and Richard Davies, who is also an officer and director for Fleet Card Fuels and member of the Plan’s board of trustees. See generally Docket No. 25. Plaintiffs’ claims against these defendants are not subject to this motion to dismiss.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 15-1507 JVS (JCGx) Date February 22, 2016

Title Carter v. San Pasqual Fiduciary Trust Co.

In resolving a 12(b)(6) motion under Twombly and Iqbal, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true. Second, and assuming the well-pleaded factual allegations are true, the Court must “determine whether they plausibly give rise to an entitlement to relief.” Iqbal, 556 U.S. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense. There is no plausibility, however, “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.” Id.

3. Analysis

Strategic Equity seeks to dismiss Plaintiffs’ complaint on three grounds: (1) Strategic Equity is not a fiduciary under ERISA; (2) Strategic Equity is not subject to liability under ERISA as a non-fiduciary; and (3) ERISA preempts Plaintiffs’ state law claims. See Docket No. 27-1 at 3.

3.1. Plaintiffs fail to allege fiduciary status under ERISA.

To state a claim for breach of fiduciary duty, participation in a prohibited transaction, and co-fiduciary liability in violation of ERISA, the plaintiff must allege that the defendant was a fiduciary. See 29 U.S.C. §§ 1109 (breach of fiduciary duty), 1106(a) (prohibited transactions), 1195(a) (co-fiduciary liability). Strategic Equity argues that these claims must be dismissed because Plaintiffs fail to allege that Strategic Equity is a fiduciary under ERISA. Docket No. 27-1 at 9-15.

An individual can become an ERISA fiduciary in two ways. First, an individual may be named as a fiduciary under the terms of an ERISA plan. 29 U.S.C. § 1102(a)(2). Second, an individual can acquire functional or de facto fiduciary status by: (1) exercising discretionary authority or control over management of an ERISA-regulated plan or disposition of its assets; (2) rendering investment advice for a fee or other compensation; or (3) exercising discretionary authority in the administration of the plan. 29 U.S.C. § 1002(21)(A). Whether an individual is a functional fiduciary is a factual question, see Steen v. John Hancock Mut. Life Ins. Co., 106 F.3d 904, 913 (9th Cir. 1997), that focuses on the individual’s action, authority, control, and discretion, see Parker v. Bain, 68 F.3d 1131, 1139 (9th Cir. 1995) (“ERISA’s definition of fiduciary is functional rather than formal.”) (internal quotations removed).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 15-1507 JVS (JCGx) Date February 22, 2016

Title Carter v. San Pasqual Fiduciary Trust Co.

Here, Plaintiffs allege that Strategic Equity is a functional fiduciary under 29 U.S.C. § 1002(21)(A)(i)-(ii) because Strategic Equity (1) had discretionary authority to value Fleet Card Fuels stock when issuing its fairness opinion and (2) rendered investment advice to the Plan when issuing its fairness opinion.² Plaintiffs fail to allege fiduciary status under either prong.

3.1.1. Discretionary authority or control

To allege discretionary authority or control under § 1002(21)(A)(i) by a professional services firm, the party must allege that the firm exercised actual decision-making power with respect to a plan or its assets. Mertens v. Hewitt Associates, 948 F.2d 607, 610 (9th Cir. 1991) (“A party rendering professional services to a plan is not a fiduciary so long as he does not exercise any authority over the plan in a manner other than by usual professional functions.”) (internal quotations omitted); see also Pappas v. Buck Consultants, Inc., 923 F.2d 531, 535-538 (7th Cir. 1991) (finding that actuary was not fiduciary when party failed to allege that it had “actual decision-making power”).

Plaintiffs do not allege that Strategic Equity had discretionary authority or control to enter the redemption agreement. Plaintiffs allege only that Strategic Equity had discretionary authority to value Fleet Card Fuels stock when issuing its fairness opinion in connection with the redemption agreement. See, e.g., Docket No. 25 ¶ 48 (“Defendant Strategic Equity had discretionary authority or discretionary responsibility in determining the valuation of the [Plan] shares.”). Discretion to value plan assets in connection with a stock transfer agreement do not constitute discretionary authority to enter the agreement. Keach v. U.S. Trust Co. N.A., 240 F. Supp. 2d 832, 836 (N.D. Ill. 2002) (holding that valuation firm retained by employee stock ownership plan trustee to provide financial advice in connection with stock purchase transaction was not fiduciary because there was no evidence that firm asserted actual control over plan assets in the challenged transaction). Accordingly, Plaintiffs have failed to allege that Strategic Equity was a fiduciary on the grounds that it had discretionary authority or control to enter the

² Plaintiffs do not allege that Strategic Equity was a named fiduciary under 29 U.S.C. § 1102(a)(2). See Docket No. ¶ 48 (“[Strategic Equity was . . . a fiduciary of the [Plan] under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); see also Docket No. 34 at 9 (“Plaintiffs allege in the FAC that [Strategic Equity] was a fiduciary of the [Plan] under sections (i) and (ii) of . . . 29 U.S.C. § 1002(21)(A).”)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 15-1507 JVS (JCGx) Date February 22, 2016

Title Carter v. San Pasqual Fiduciary Trust Co.

redemption agreement.

3.1.2. Investment advisor

Plaintiffs have also failed to allege that Strategic Equity is a fiduciary investment advisor. To allege that an investment advisor is a fiduciary under 29 U.S.C. § 1002(21)(A)(ii), the plaintiff must allege that: (1) the defendant provided individualized investment advice; (2) the advice was given under a mutual agreement with the plan; (3) the advice was provided on a regular basis; (4) the advice pertained to the value of the property or consisted of recommendations as to the advisability of investing in certain property; and (5) the advice was rendered for a fee. See 29 C.F.R. § 2510.3-21(c)(1)(i). “All five factors are necessary to support a finding of fiduciary status.” Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3d 1114, 1117 (9th Cir. 1994). Plaintiffs have failed to allege at least two of the five factors.

First, Plaintiffs have failed to allege that Strategic Equity rendered investment advice. Under ERISA, an entity renders “investment advice” when it (1) renders advice as to the value of securities or other property or (2) recommends the advisability of investing in, purchasing, or selling securities or other property. 29 C.F. R. § 2510.3-21(c)(1). Fairness opinions issued to employee stock ownership plans in connection with a redemption agreement do not constitute “investment advice.” Keach, 240 F. Supp. at 839 (finding that fairness opinion and post-transaction valuation issued to an employee stock ownership plan in connection with a stock purchase agreement does not constitute “investment advice”). This case law is consistent with the longstanding approach taken by the Department of Labor on this issue: since 1976, the Department of Labor has provided that “valuations of employer securities in connection with [employee stock ownership plan] are not considered investment advice.” Dep’t of Labor, Fiduciary Investment Advice: Regulatory Impact Analysis at 20 (Apr. 14, 2015), available at <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf> (citing Dep’t of Labor, Advisory Opinion 76-65A (June 7, 1976) (“AO 76-75A”)). The Department of Labor reaffirmed this approach in April 2015 in its proposed amendments to ERISA’s fiduciary investment advice provisions. See Dep’t of Labor, Fiduciary Investment Advice: Regulatory Impact Analysis at 36 (“[Employee stock ownership plan] valuations . . . will continue to be excepted consistent with AO 76-75A”).

Second, even if the fairness opinion constituted investment advice, Plaintiffs have

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 15-1507 JVS (JCGx)	Date	February 22, 2016
Title	<u>Carter v. San Pasqual Fiduciary Trust Co.</u>		

failed to allege that Strategic Equity rendered regular investment advice. 29 C.F.R. § 2510.3-21(c)(1)(ii)(B) (requiring that party render advice on a “regular basis”). Plaintiffs allege that Strategic Equity offered one fairness opinion in connection with one transaction. See, e.g., Docket No. 25 ¶ 38. One instance of investment advice is insufficient to allege regularity. See Advanced Salon Visions, Inc. v. Lincoln Benefit Life Co., 2010 WL 3341803, at *5 (S.D. Cal. Aug. 25, 2010) (collecting cases).

Plaintiffs have failed to allege fiduciary status under § 1002(21)(A). Plaintiffs’ claims against Strategic Equity under ERISA are therefore dismissed with prejudice.

3.2. Preemption

Plaintiffs also bring three state law claims for breach of fiduciary duty and negligence. Strategic Equity argues that all three claims must be dismissed because (1) ERISA’s civil enforcement mechanism completely preempts state law, 29 U.S.C. § 1132(a), and (2) Section 514(a) of ERISA expressly preempts Plaintiffs’ state law claims because Plaintiffs’ claims “relate to” an ERISA plan. 29 U.S.C. § 1144(a). Docket No. 27-1 at 24-25.

3.2.1. Complete preemption

The Ninth Circuit uses a two-part test to determine whether ERISA’s civil enforcement provisions preempt state law. Fossen v. Blue Cross & Blue Shield of Montana, Inc., 660 F.3d 1102, 1107-1108 (9th Cir. 2011). Under this test, ERISA completely preempts a state law claim if (1) the plaintiff could have brought the claim under ERISA’s civil enforcement provisions and (2) defendant’s actions do not implicate another independent legal duty. Marin Gen. Hosp. v. Modesto & Empire Traction Co., 581 F.3d 941, 944-947 (9th Cir. 2009). As relevant here, ERISA’s civil enforcement provisions enumerate two possible claims that may be brought by plan participants: (1) an action to recover benefits due under the plan and (2) an action for breach of fiduciary duty. Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003, 1008 (9th Cir. 1998).

Plaintiffs’ two state law claims for breach of fiduciary duty are subject to complete preemption. The two claims for breach of fiduciary duty appear to be based solely on their theory that Strategic Equity is an ERISA fiduciary. See Docket No. 25 ¶ 48 (“[Strategic Equity] was . . . a fiduciary of the [Plan] under ERISA § 3(21)(A), 29 U.S.C.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 15-1507 JVS (JCGx) Date February 22, 2016

Title Carter v. San Pasqual Fiduciary Trust Co.

§ 1002(21)(A).”). Indeed, Plaintiffs’ first amended complaint provides no allegations expressly supporting the existence of a fiduciary relationship between Strategic Equity and Plaintiffs under state law, see Docket No. 25 ¶¶ 137-140 (fourth claim for relief for state law breach of fiduciary duties), and Plaintiffs’ opposition does not otherwise argue for the existence of a such a fiduciary relationship under state law.³ See Lupo v. Human Affairs Int’l, Inc., 28 F.3d 269, 273 (2d Cir. 1994) (“We note first that Lupo’s claim is based upon an alleged fiduciary relationship between Lupo and Foster under state common law, not a fiduciary relationship derived from ERISA.”). ERISA’s civil enforcement provisions expressly provide a cause of action to plan participants against an alleged ERISA fiduciary for breach of fiduciary duty, 29 U.S.C. §§ 1109, 1132(a)(2). Because Plaintiffs’ two state law claims for breach of fiduciary duty are brought against Defendants solely in their capacity as ERISA fiduciaries, these claims are subject to complete preemption under ERISA’s civil enforcement provisions. See Cox v. Eichler, 765 F. Supp. 601, 606-07 (C.D. Cal. 1990) (“Because ERISA establishes a standard of care for ERISA fiduciaries . . . state law standards of care as applied to the conduct of ERISA fiduciaries are preempted.”). The Court therefore dismisses these claims. The Court grants Plaintiffs leave to amend to allege the existence of a fiduciary relationship under state law, however.

By contrast, Plaintiffs’ state law claim for negligence is not subject to complete preemption. This claim seeks tort damages payable to the putative class based on duties owed to them under state law, and not for benefits payable under the Plan. See Paulsen v. CNF Inc., 559 F.3d 1061, 1085 (9th Cir. 2009) (finding no complete preemption when plan participants sued actuary for professional negligence in performing valuation

³ Plaintiffs’ opposition appears to confirm that their state law breach of fiduciary duty claims are based solely on their theory that Strategic Equity is an ERISA fiduciary. For example, in the section entitled “Plaintiffs’ State Law Claims Are Not Preempted, If [Strategic Equity] Is Not Found To Be A Fiduciary Pursuant to ERISA,” Plaintiffs state that “[Strategic Equity] claims that it is not a fiduciary under ERISA. On the other hand, [Strategic Equity] argues that Plaintiffs cannot assert a claim for negligence because such a claim is preempted by ERISA. [Strategic Equity] cannot have it both ways. If [Strategic Equity] is not a fiduciary to the [Plan], then it is a third party service provider”). Docket No. 34 at 18-19. On that basis, Plaintiffs argue that there is no express preemption because the state law claims would not encroach on an ERISA-regulated relationship. Id. at 22 (“If [Strategic Equity] is not an ERISA fiduciary, Plaintiffs’ claims for negligence, breach of fiduciary duty, and aiding and abetting do not encroach on an ERISA regulated relationship.”). Plaintiffs nowhere argue that, in the alternative, Strategic Equity is a fiduciary under state law.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 15-1507 JVS (JCGx) Date February 22, 2016

Title Carter v. San Pasqual Fiduciary Trust Co.

services for ERISA-regulated plan).

3.2.2. Express preemption

Section 514(a) of ERISA expressly preempts “any and all State laws insofar as they . . . relate to any [ERISA] plan.” 29 U.S.C. § 1144(a). A state law cause of action “relate[s] to” an ERISA plan if it either makes “reference to” or holds a “connection with” an ERISA plan. Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 324 (1997). Plaintiffs’ remaining state law claim for negligence is not subject to express preemption under either prong.

The “Reference To” Prong. A state law claim makes “reference to” an ERISA plan if (1) the claim acts “immediately and exclusively” upon ERISA plans and (2) adjudication of the claim requires the existence of an ERISA-regulated plan. Golden Gate Rest. Ass’n v. City & County of San Francisco, 546 F.3d 639, 657 (9th Cir. 2008). Here, Plaintiffs’ negligence claim is based on a state law of general application unrelated to ERISA-regulated plans. This claim therefore is not expressly preempted under the “reference to” prong. See Paulsen, 559 F.3d at 1082 (finding no express preemption under the “reference to” prong when the plaintiff’s professional negligence claims were based on common law negligence principles).

The “Connection With” Prong. To determine whether a state law claim holds a “connection with” an ERISA plan, the Ninth Circuit uses a “relationship test.” Paulsen, 559 F.3d at 1082-1083. The “relationship test” asks whether the plaintiff’s state law claim intrudes on an ERISA-regulated relationship. Id. When applying the relationship test, “[t]he key to distinguishing between what ERISA preempts and what it does not lies . . . in recognizing that the statute comprehensively regulates certain relationships: for instance, the relationship between plan and plan member, between plan and employer, between employer and employee (to the extent an employee benefit plan is involved), and between plan and trustee.” Gen. Am. Life Ins. Co. v. Castonguay, 984 F.2d 1518, 1521 (9th Cir. 1993).

The Plaintiffs’ negligence claim does not encroach on an ERISA-regulated relationship. As alleged by Plaintiffs, the duty giving rise to the negligence claim runs from Strategic Equity (as a third-party financial services firm) to Plaintiffs (as the intended third-party beneficiaries) under a service agreement between Strategic Equity

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 15-1507 JVS (JCGx) Date February 22, 2016

Title Carter v. San Pasqual Fiduciary Trust Co.

and the Plan. Docket No. 25 ¶¶ 48, 148. This claim would not interfere with the relationship between the Plan and Plaintiffs, the Plan and Fleet Card Fuels, and Fleet Card Fuels and Plaintiffs. And although the claim may interfere with the relationship between the Plan and Strategic Equity, interference between an ERISA-regulated plan and a non-fiduciary third-party service provider is insufficient to establish express preemption. Paulsen, 559 F.3d at 1083 (finding no express preemption when “[a]t most [the claims] might interfere with a relationship between the plan and its third-party service provider”); see also Arizona State Carpenters Pension Trust Fund v. Citibank, 125 F.3d 715, 723-24 (9th Cir. 1997) (finding that ERISA did not expressly preempt state law claims for breach of contract, breach of common law duties, negligence, and fraud against third-party non-fiduciary bank). Plaintiffs’ state law claim for negligence therefore is not expressly preempted under the “connection with” prong.

4. Conclusion

For the reasons stated above, the Court **grants in part** and **denies in part** Strategic Equity’s motion to dismiss as follows:

The Court **dismisses** the following claims with prejudice: (1) breach of fiduciary duty in violation of ERISA; (2) engaging in prohibited transactions in violation of ERISA; and (3) co-fiduciary liability in violation of ERISA.

The Court **dismisses** the following claims with leave to amend: (4) breach of fiduciary duty in violation of state law and (5) aiding and abetting breach of fiduciary duty in violation of state law.

The Court **denies** the motion with respect to the negligence claim.

Plaintiffs shall file their amended complaint within 14 days after issuance of this order.

IT IS SO ORDERED.

Initials of Preparer

kjt