

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Matthew T. Zilhaver and Sascha Linn,

Plaintiffs,

vs.

UnitedHealth Group Incorporated, L.
Robert Dapper, James A. Johnson,
William G. Spears, Mary O. Munding,
William W. McGuire, and Stephen J.
Hemsley,

Defendants.

Court File No. 06-2237 JMR/FLN

**DECLARATION OF
STEVE W. GASKINS**

I, the undersigned, Steve W. Gaskins, do hereby declare under the penalty of perjury pursuant to 28 U.S.C. § 1746 as follows:

1. I am a partner with the law firm of Flynn, Gaskins & Bennett, LLP, 333 South Seventh Street, Suite 2900, Minneapolis, Minnesota 55402, (612) 333-9500, attorneys of record for Defendant William W. McGuire in the above-captioned litigation. I am admitted to, and am in good standing in, the Bars of the State of Minnesota and of this Court. I respectfully submit this declaration in support of Defendant William W. McGuire's Reply to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and for summary judgment on all claims by Sascha Linn pursuant to Federal Rule of Civil Procedure 56(b).

2. Attached hereto are true and correct copies of the following documents:

Exhibit A: *In re ADC Telecoms., Inc.*, No. 03-2989, 2004 WL 1683144 (D. Minn. July 26, 2004)

Exhibit B: *Pipefitters Local 636 v. Blue Cross & Blue Shield*, 213 Fed. Appx. 473, 476 (6th Cir. 2007)

Exhibit C: Dep't of Labor, Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8.

Dated: October 1, 2007

s/Steve W. Gaskins
Steve W. Gaskins



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InreADC Telecommunications, Inc., ERISA
Litigation
D.Minn.,2004.

United States District Court,D. Minnesota.
Inre: ADC TELECOMMUNICATIONS, INC.,
ERISA LITIGATION.
No. MASTER FILE, 03-2989 ADM/FLN.

July 26, 2004.

Joseph H. Meltzer, and Edward W. Chang, Schiffrin & Barroway, LLP, Bala Cynwyd, PA, Vernon J. Vander Weide, Head, Seifert & Vander Weide, Minneapolis, MN, Erin Green Comite, Scott & Scott, LLC, Colchester, CT, and Scott E. Poynter, Emerson Poynter, LLP, Little Rock, AR, for and on behalf of Plaintiffs.

Stephen P. Lucke, and Heather J. Klaas, Dorsey & Whitney, LLP, Minneapolis, MN, for and on behalf of Defendants.

MEMORANDUM OPINION AND ORDER
MONTGOMERY, J.

I. INTRODUCTION

*1 On May 28, 2004, this matter came before the undersigned United States District Judge on Defendants' Motion to Dismiss [Docket No. 33] Plaintiffs' allegations of breach of fiduciary duty. Defendants argue that Plaintiffs' Complaint fails to meet the particularity required for allegations of fraud or to state any valid claims under the Employee Retirement Income Securities Act ("ERISA"), 29 U.S.C. § 1001 et seq. For the reasons set forth as follows, Defendants' Motion is denied.

II. BACKGROUND

Defendant ADC Telecommunications, Inc. ("ADC"), based in Eden Prairie, Minnesota, supplies network equipment and software and integration services for telecommunications networks. Plaintiffs^{FN1} were ADC employees and participants in ADC's Retirement and Savings Plan ("the Plan"), which the company offers to its employees for retirement investment. Consolidated Compl. Ex. A. ADC is

sponsor and administrator of the Plan, which was established under section 401(k) of the Internal Revenue Code and is an eligible individual account plan ("EIAP"), as defined by ERISA. *See* 29 U.S.C. § 1107(d)(3). Among other investment options, the Plan offers an ADC Stock Fund that consists primarily of ADC's own common stock. Employees designate the percentage of their earnings, within the specified limit, they wish to invest in the Plan and ADC provides matching contributions up to 6% of a participant's total compensation.

FN1. The named Plaintiffs of the consolidated actions bring this suit on behalf of all participants in or beneficiaries of the ADC Retirement and Savings Plan "between February 24, 2000 and the present ... whose accounts included investments in ADC stock." Consolidated Compl. ¶ 50.

The Consolidated Complaint ("Complaint") [Docket No. 30] divides the Defendants into four groups: ADC, the Board of Directors ("Director Defendants"), the members of the Retirement Savings Plan Committee ("Retirement Committee"), and various individual employees alleged to have performed fiduciary functions with respect to the Plan ("Employee Defendants"). Compl. ¶¶ 10-39. Director Defendants include: William Cadogan, President and CEO from 1991-2001, current President and CEO Richard R. Roscitt, John P. Blanchard III, John J. Boyle III, James C. Castle, B. Kristine Johnson, Jean-Pierre Rosso, John D. Wunsch, Charles D. Yost, Mickey P. Foret, Robert Annunziata, and Larry W. Wangberg.^{FN2} The Retirement Committee Defendants include: Chief Financial Officer Robert E. Switz, Charles T. Roehrick, Laura Owen, Gokul Hemmady, Jeffrey D. Pflaum and Bradley V. Crary. The named Employee Defendants are: Patricia Gilroy, Teresa Lund, Debra L. Raths, Mark Veldey, Scott Johnson and Shelby Nelson.

FN2. Director Defendants John W. Sidgmore, Thomas E. Holloran, and Alan E. Ross have been dismissed. Notice of 1/30/04 [Docket No. 32]. All remaining Defendants jointly bring this Motion, with the exception of Employee Defendants Mark Veldey and

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Shelby Nelson, who may not have been served with the Complaint. Defs.' Mem. at 5 n. 2.

The Complaint alleges four counts: failure to prudently and loyally manage plan assets, failure to monitor, failure to provide complete and accurate information, and breach of the duty to avoid conflicts of interest. As bases for these claims, the Complaint avers that despite a general downturn in the telecommunications industry, and specifically in ADC's business, ADC disseminated optimistic and unrealistic predictions that concealed the company's true financial woes. Plaintiffs assert that "Defendants imprudently permitted the Plan to invest in ADC stock while ignoring ADC's (i) own internally generated negative forecasts; (ii) improper shifting of revenues from future quarters into current quarters in order to meet earnings forecasts; and (iii) dramatically rising inventory levels." Pls.' Mem. at 2; Compl. ¶ 91. They contend that in order to artificially inflate the price of ADC stock, the company engaged in accounting practices violative of internal and professional standards, and hid excess inventory. The Complaint also alleges that several of the Defendants sold their own shares of ADC stock for large financial gains while continuing to invest employees' earnings in the Plan. Eventually, on March 28, 2001, ADC issued a press release announcing the lowering of its expectations for fiscal 2001, a large scale worldwide layoff and other cost cutting measures.

*2 As of December 31, 2000, ADC stock comprised 58% of the holdings of the Plan, with the percentage steadily decreasing since that time. Between February 2000 and November 2003 the company stock price plummeted, losing almost 95% of its value. Plaintiffs allege that continued investment of Plan funds in ADC under such circumstances constituted a breach of various fiduciary duties by Defendants.

III. DISCUSSION

Rule 12 of the Federal Rules of Civil Procedure provides that a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). In considering a motion to dismiss, the pleadings are construed in the light most favorable to the nonmoving party, and the facts alleged in the complaint must be taken as true. *Hamm v. Groose*, 15 F.3d 110, 112 (8th Cir.1994); *Ossman v. Diana Corp.*, 825 F.Supp. 870, 879-80 (D.Minn.1993). Any

ambiguities concerning the sufficiency of the claims must be resolved in favor of the nonmoving party. *Ossman*, 825 F.Supp. at 880. "A motion to dismiss should be granted as a practical matter ... only in the unusual case in which the plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir.1995).

In addition to the contents of the pleadings, on a motion to dismiss a court may properly consider documents that are referenced in and central to the allegations of the complaint. *E.g., In re Sears Roebuck & Co. ERISA Litigation*, No. 02 C 8324, 2004 U.S. Dist. LEXIS 3241, at *10-11 (N.D.Ill. Mar. 3, 2004).

A. Rule 9(b)

Defendants argue that although ERISA actions are not generally subject to heightened pleading requirements, the basis for the alleged breaches of fiduciary duty "sound in fraud" and therefore must conform to Federal Rule of Civil Procedure 9(b). *Vivien v. Worldcom, Inc.*, No. C 02-01329, 2002 WL 31640557, at *7 (N.D.Cal. July 26, 2002). Plaintiffs respond that the majority of courts to decide this issue have applied the liberal standard of Rule 8 and have required the fraud particularity standard be met only when the purported breach is the misrepresentation itself.

Parties must plead all averments of fraud with particularity, even if the claims are not expressly labeled as "fraud." *See* Fed. R. Civ. Pro. 9(b); *e.g., Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-08 (9th Cir.2003). Several recent suits that similarly allege ERISA breaches of fiduciary duty for maintaining employer stock in pension plans when the business is making positive announcements in the face of hidden financial difficulties, reveal varying approaches to Rule 9's applicability. Although a split in authority exists on this issue, multiple cases, including one from this district, have held that when the actual breach alleged is imprudent investment choices, rather than a straightforward claim of breach by misrepresentation, Rule 9 need not be invoked. *See, e.g., LaLonde v. Textron, Inc.*, No. 03-2033, No. 03-2039, 2004 U.S.App. LEXIS 8977, at * 13-15 (1st Cir. May 7, 2004); *In re Xcel Energy, Inc. Sec., Derivative and "ERISA" Litig.*, Master File: Civil 02-2677, MDL No. 1511 (D.Minn. Mar. 10, 2004) ("Xcel"), at 20 (Vander Wiede Aff. Ex. A); *Vivien*, 2002 WL 31640557, at * 4-5; *cf. Sears*, 2004 U.S. Dist.

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LEXIS 3241, at *16 (applying Rule 9 to concealment allegations).

*3 Rule 9(b), by its terms, applies to allegations, rather than causes of action, of fraud. As such, Plaintiffs' non-specific claims that certain Defendants engaged in "a scheme to deceive" by improperly booking revenues to inflate stock value do not supply adequate detail to meet the particularity requirements of who, what, when, where, and how. *See Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 549-50 (8th Cir.1997). Although courts have separated alleged breaches by failure to act in the face of fraudulent or improper conduct from alleged breaches "by making false ... disclosures," this distinction does not save Plaintiffs' averments that Defendants themselves artificially inflated ADC stock, which, without some objective corroborating evidence to render particularity unnecessary, must be plead with specificity.^{FN3} *Vivien*, 2002 WL 31640557, at *4-5, *6-7 (emphasis added).

FN3. As Defendants note, many cases in which Rule 9 was not applied to claims of securities inflation or other misconduct involved public acknowledgments of wrongdoing or complete collapse of the corporation. *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F.Supp.2d 511, 535 n. 11, 652-53 (S.D.Tex.2003); *In re Worldcom, Inc. ERISA Litig.*, 263 F.Supp.2d 745, 752 (S.D. N.Y.2002); *see also Xcel* at 5-6 (noting public disclosure of SEC investigation of round-trip trading).

However, in the context of an ERISA suit, "where a fraud, misrepresentation or omission is alleged to have occurred but is not itself the basis for the alleged breach, Rule 9(b) is not applied." *Xcel* at 20. Thus, even stripping Plaintiffs' allegations of direct fraudulent conduct by Defendants, the Complaint's assertions that Defendants breached their duty of prudence by continuing investment in ADC stock despite knowledge of substantial cuts in large customer accounts, rising inventories and premature revenue recognition pass muster at this juncture. *See In re Electronic Data Sys. Corp. "ERISA" Litig.*, 6:03-MD-1512, 2004 U.S. Dist. LEXIS 2631, at *23-30 (E.D.Tex. Feb. 2, 2004); *see also LaLonde*, 2004 U.S.App. LEXIS 8977, at *3-4, 16.^{FN4} Because the fundamental basis for Defendants' breach of their fiduciary duty is "failure to act in light of the adverse circumstances," allegations of failing to investigate and evaluate "and failing to monitor the

appropriateness of [ADC] stock as an investment" state a cognizable claim under the ERISA duty of prudence. *Xcel* at 20; *Vivien*, 2002 WL 31640557, at *5.

FN4. "[N]ot every [omission in] breach of a fiduciary duty to inform is a scheme to defraud," and Count III, failure to provide information, likewise does not depend on the Defendants themselves perpetrating the alleged fraud. *Electronic*, 2004 U.S. Dist. LEXIS 2631, at *39; *see infra* part E.

While the knowledge of fraud/commission of fraud distinction may be more of form than substance, it is the approach courts have recently accepted for preliminary motion to dismiss assessments of the sufficiency of ERISA, as opposed to securities, claims. Notably, many of the cases on which Defendants rely involve claims of misrepresentation, rather than imprudent investment, as the alleged breach of ERISA fiduciary duty. *See Adamczyk v. Lever Bros. Co.*, 991 F.Supp. 931, 939 (N.D.Ill.1997) (misrepresentation regarding retirement package benefits); *Torchetti v. IBM Corp.*, 986 F.Supp. 49, 50 (D.Mass.1997) (fraudulent benefits denial); *see also Vivien*, 2002 WL 31640557, at *5, 7 (applying Rule 9(b) only to claim of "making false, misleading, incomplete and inaccurate disclosures," not to claim of purchasing employer stock with knowledge of fraud). By contrast, Plaintiffs' authority includes several analogous cases in which companies allegedly hid adverse circumstances from plan participants and the public, and despite the inevitable drop in stock value, continued to invest too heavily in employer stock. *In re Sprint Corp. ERISA Litig.*, No. 03-2202, 2004 U.S. Dist. LEXIS 9622, at *28, *35-41 (D.Kan. May 27, 2004); *Xcel* at 6, 20 (stating that "plaintiffs allege that defendants failed to disclose material information and ... misled and ultimately defrauded the investment community, including plaintiffs and other plan participants"; rejecting application of Rule 9(b)); *Electronic*, 2004 U.S. Dist. LEXIS 2631, at *23-33. Though the majority of these cases involved publicly disclosed accounting errors, bankruptcy, or a companion securities action,^{FN5} Plaintiffs should not be denied an opportunity to pursue their allegations merely because they have more limited access to the facts surrounding the purported stock manipulation. *Cf. In re Ikon Office Solutions, Inc. Sec. Litig.*, 86 F.Supp.2d 481, 489 (E.D.Pa.2000) (applying Rule 9(b) flexibly given that the relevant information was "largely in the defendants' control").

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FN5. The related securities action brought against ADC was recently dismissed as untimely. *See In re ADC Secs. Litig.*, United States District Court District of Minnesota, No. 03-1194.

*4 As alluded to in other similar cases, there is admittedly a potential discord between securities and ERISA causes of action premised on or involving the same averments of corporate malfeasance. *See Stein v. Smith*, 270 F.Supp. 157, 167 (D.Mass.2003). However, they are distinct causes of action premised on different misconduct and relationships, and underlying fraud is not an essential element of a prima facie ERISA action. *See Rankin v. Rots*, 278 F.Supp.2d 853, 865-66 (E.D.Mich.2003) (citing *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir.1995)). ERISA fiduciary protections are to be broadly construed, and at this stage of the pleadings the law requires only allegations that Defendants were fiduciaries of the Plan and that they breached a fiduciary duty imposed by ERISA and “related to matters within his or her discretion and control.” *Stein*, 270 F.Supp. at 166; *Xcel* at 8 (citing 29 U.S.C. § 1109); *see In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F.Supp.2d 511, 544 (S.D.Tex.2003). “The odds of [P]laintiffs succeeding on their breach of fiduciary claims ... might be very long, but ‘that is not the test,’ ” and, of course, Plaintiffs must substantiate their numerous allegations to survive summary judgment. *LaLonde*, 2004 U.S.App. LEXIS 8977, at *16.

B. Fiduciary Status

Defendants contend the Complaint improperly merges the groups of Defendants and makes general, conclusory assertions of fiduciary status without specifying individual duties, actions or omissions that show each Defendant's responsibility for the fiduciary obligation in question. They concede the Retirement Committee managed and administered the Plan, but contend the other Defendants are absolved from liability for the actions at issue because the Plan delegated the selection of investments exclusively to the Retirement Committee. Compl. ¶¶ 69-70; Plan § 4.1. Therefore, Defendants argue Count I must be dismissed as to ADC, the Director Defendants and the Employee Defendants.

An entity or individual is deemed a fiduciary within the parameters of ERISA either by express

designation in the Plan or by assuming control or authority over plan or asset management. *In re Enron*, 284 F.Supp.2d at 543. Thus, to proceed against a defendant who is not a named fiduciary, a plaintiff may allege de facto, or functional, fiduciary status. *See id.*; 29 U.S.C. § 1002(21)(A).^{FN6}

FN6. As relevant here, a person acquires functional fiduciary status under ERISA to the extent:

(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets ... or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A).

Although this Complaint is not a model of specificity, it explicitly pleads that ADC, the Board Defendants, the chief executive officer and the Retirement Committee are all named fiduciaries under the Plan. Compl. ¶¶ 10, 59, 63, 67 (citing Plan § § 4.1, 12.7). While the Plan expressly empowers the Retirement Committee to “determine the general investment characteristic and objectives of each Subfund” for investment of participants' accounts, Defendants' delegation argument does not excuse all other named fiduciaries. Plan § 4.1.1. In addition to reciting the Plan's designation of fiduciaries, the Complaint avers that the individual Defendants exercised discretionary authority over Plan administration and/or management and disposition of the Plan's assets, such that they functioned as fiduciaries and maintained de facto control over the actions of the Retirement Committee. Compl. ¶¶ 11-23, 28-39.

*5 To set forth the de facto fiduciary status of ADC, the Director and the individual Defendants, the Complaint merely parrots the language of ERISA without much factual elaboration. However, recent cases permit such basic allegations to defeat dismissal. *Sears*, 2004 U.S. Dist. LEXIS 3241, at *10-11; *Vivien*, 2002 WL 31640557, at *4. Additionally, the Complaint avers that ADC is the designated overall Plan administrator and that the Retirement Committee is to “serve at the pleasure of” ADC, and the parties cite no complete relinquishment of power or prohibition from ADC directing or advising the actions of the Retirement Committee. Plan § 12.2.1. Plaintiffs also allege that the Plan gave the Director Defendants the power to appoint and remove

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members of the Retirement Committee and therefore established the concomitant duty to monitor the appointees, the breach of which is averred in Count II. Compl. ¶¶ 11, 65, 145, 148. Because the scope and practical effect of this duty will not be determined on a motion to dismiss, it is premature to absolve the Directors of liability for imprudent investments.^{FN7} *See infra* part D. Furthermore, the Plan provides the CEO with broad authority to allocate and delegate administrative functions. Plan § 12.1.2; Compl. ¶ 64. With respect to the Employee Defendants, Plaintiffs aver that the Retirement Committee delegated certain of its functions to them and, with the exception of Lund, that each had authority to direct the Plan's trustee.^{FN8} Compl. ¶¶ 34-39, 79.

FN7. However, to the degree that Plaintiffs rely on the Plan's assignment to the Director Defendants to terminate, merge or amend the Plan, such obligations are not fiduciary in nature and cannot support a breach of fiduciary duty. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999); Compl. ¶ 65 (quoting Plan § 12.1.3).

FN8. Plaintiffs concede that ADC employees who did nothing more than engage in ministerial duties are not fiduciaries and counsel represented at oral argument that certain Human Resource Department Defendants may properly be dismissed if the evidence shows such a lack of involvement in Plan and asset management. *See* 29 C.F.R. § 25.09-8, D-2.

On a 12(b)(6) motion, the court should not endeavor to interpret the extent of delegation or the fiduciary interrelationships under the Plan. *See Electronic*, 2004 U.S. Dist. LEXIS 2631, at *19. At this stage, given the mixed factual and legal questions involved in the determination and the liberal interpretation of ERISA fiduciary status, such allegations of named and functional status suffice. *Id.* at *17-18, 25-26; *see also Sears*, 2004 U.S. Dist. LEXIS 3241, at *10-11; *Xcel* at 17-19; *Enron*, 284 F.Supp.2d at 544; *Vivien*, 2002 WL 31640557, at *4. Without the opportunity for discovery, Plaintiffs cannot fairly be expected to ascertain all the factual details of Defendants' precise responsibilities and actions. *See Rankin*, 278 F.Supp.2d at 879. "[W]hether the evidence will bear out the allegations ... will be a separate question addressable on summary judgment." *Vivien*, 2002 WL 31640557, at *4.

C. Failure to Allege Breach of Duty

Defendants allege that without a detailed showing of fraud or allegations of impending collapse of the company, Plaintiffs cannot state a claim for breach of duty. They attempt to invoke the presumption of prudence that attaches to an EIAP's investment in employer securities. Additionally, Defendants contend the Complaint fails to show the individual Defendants knew of the purported adverse conditions at ADC that rendered its stock an imprudent investment.

*6 These arguments do not presently warrant dismissal. First, there exists no uniform rule that a plaintiff must plead that the defendant company's viability was in jeopardy to state a claim for imprudent investment in company stock. *See Sprint*, 2004 U.S. Dist. LEXIS 9622, at *40-41. As Defendants concede, where fraudulent practices are alleged there is no need to plead impending collapse of the corporation. Defs.' Reply Mem. at 1. Accordingly, Plaintiffs' inability to show ADC filed bankruptcy or was on the verge of imploding does not preclude the present suit.

Second, although ERISA exempts EIAPs from the duty to diversify plan assets with respect to employer stock, the overriding fiduciary duties of prudence and loyalty still apply and "when the failure to [divest] is not in the best interests of beneficiaries" a breach may occur despite the statutory exemption. *Xcel* at 24.

ERISA's general fiduciary obligation to diversify investments does not apply to EIAP's acquisition and holdings of employer securities. 29 U.S.C. § 1104(a)(1)(c), (a)(2). To give effect to this exemption and balance the competing interests at stake, several courts have endorsed a presumption of prudence regarding employer stock funds, requiring plaintiffs to establish an abuse of discretion by the fiduciaries. *See Moench v. Robertson*, 62 F.3d 553, 569-71 (3d Cir.1995); *In re McKesson HBOC, Inc. ERISA Litig.*, 2002 U.S. Dist. LEXIS 19473, at *6 (N.D.Cal. Sept. 30, 2002). While the Court is sensitive to the danger of deterring the very type of investment in employer stock Congress intended to foster, recent decisions have refrained from applying the presumption at this procedural juncture, finding that such evidentiary rules should not be applied on a motion to dismiss. *Xcel* at 24; *Electronic*, 2004 U.S. Dist. LEXIS 2631, at * 32-33. *But see Wright v. Or.*

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Metallurgical Corp., 360 F.3d 1090, 1097-99 (9th Cir.2004) (affirming grant of motion to dismiss based in part on presumption of prudence). Determination of whether Defendants “could not have believed reasonably that continued adherence” to heavy investment in ADC stock was prudent under the circumstances is better decided after greater elucidation of the facts. *Moench*, 62 F.3d at 571.

Finally, Plaintiffs sufficiently allege Defendants knew or should have known of the actual financial condition of ADC and resultant risk in heavy investment in its stock. Unlike the pleadings cited in the cases referenced by Defendants, the instant Complaint states that ADC's Chief Financial Officer, Defendant Switz, was a member of the Retirement Committee and had “substantial knowledge of the business plans, operations, and finances” of ADC. *Sears*, 2004 U.S. Dist. LEXIS 3241, at *13-14. As Plaintiffs emphasize, at this early phase of the litigation it would be unjust to allow Defendants to disclaim all fiduciary responsibility except with regard to the Retirement Committee, and simultaneously disavow any knowledge by Committee members of the economic difficulties the company faced. Accordingly, Plaintiffs have adequately asserted breach of the fiduciary duty of prudence.

D. Breach of Duty to Monitor

*7 Defendants next contend Plaintiffs cannot state a claim for breach of duty to monitor because such a claim is limited to situations of known wrongdoing by or unfitness of a delegate, and there is no duty to disclose adverse information to administering fiduciaries.

ERISA opinions and the position of the Department of Labor make clear that the power to appoint and remove plan fiduciaries implies the duty to monitor appointees “to ensure that their performance is in compliance with the terms of the plan and statutory standards.” *Sears*, 2004 U.S. Dist. LEXIS 3241, at *22 (citing 29 C.F.R. § 2509.75-8, FR-17); *In re Worldcom, Inc. ERISA Litig.*, 263 F.Supp.2d 745, 765 (S.D.N.Y.2002). Though Plaintiffs make broad allegations under the rubric of the ill-defined and limited duty to monitor, courts have been unwilling to delineate and probe the scope of defendants' monitoring duties on motions to dismiss, and have permitted such claims to proceed forward to discovery. *Sears*, 2004 U.S. Dist. LEXIS 3241, at *22-23; *Electronic*, 2004 U.S. Dist. LEXIS 2631, at

*35-36. Plaintiffs offer no legal support for the assertions in the Complaint that ADC and the Director Defendants' duty to monitor includes a duty to provide information and make certain disclosures separate from the actions required by the general duty to act with prudence and loyalty. However, for present purposes they “have sufficiently pled a possible cause of action” for duty to monitor, to be tested by further factual development. *Electronic*, 2004 U.S. Dist. LEXIS 2631, at *36.

E. Duty to Inform

Count III asserts a breach of the duty to inform plan participants with accurate and complete disclosures. The obligation to inform has been recognized as a component of the duties of prudence and loyalty. *Xcel* at 27-28; *Electronic*, 2004 U.S. Dist. LEXIS 2631, at *37-41. In this case the Complaint also references the Plan's internal requirement that the Retirement Committee communicate periodically with Plan participants to provide beneficial and helpful information. Compl. ¶ 76 (quoting Investment Policy Statement); *see Electronic*, 2004 U.S. Dist. LEXIS 2631, at *40.

Defendants' argument that they are immune from this type of claim because they were acting in a corporate, rather than a fiduciary, capacity, is not supported by case law. *See, e.g., Electronic*, 2004 U.S. Dist. LEXIS 2631, at *41-42. Company officers who act as plan fiduciaries may be required to draw upon their “corporate” knowledge to properly fulfill their obligations to protect and prioritize the interests of plan beneficiaries. *Worldcom*, 263 F.Supp.2d at 765; *see also* 29 U.S.C. § 1104(a)(1) (a fiduciary officer must discharge his or her duties “solely in the interests” of the plan); *Enron*, 284 F.Supp.2d at 550-51. Additionally, courts have held that fiduciary liability may attach based upon public disclosures, such as Securities and Exchange Commission filings. *Sears*, 2004 U.S. Dist. LEXIS 3241, at *18; *Worldcom*, 263 F.Supp.2d at 767.

*8 Plaintiffs assert Defendants failed to adequately and accurately inform ADC employee/investors of the significant risks and perils involved with ADC stock and that they concealed important facts necessary for making informed investment decisions. The Complaint sufficiently apprises Defendants of how they allegedly breached their duty to disclose. *E.g.*, Compl. ¶¶ 108, 114-16. Like most areas of contention in the present Motion, this issue has been subject to divergent rulings and evolution, and is

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“more amenable to resolution on a motion for summary judgment” with the benefit of further factual detail and determination. *Xcel* at 27. As such, dismissal of Count III at this time is not warranted. *See Electronic*, 2004 U.S. Dist. LEXIS 2631, at *40.

END OF DOCUMENT

F. Conflict of Interest

Defendants offer little challenge to Count IV, which alleges violation of ERISA due to conflict of interest. Their argument that mere ownership of company stock by a fiduciary does not amount to conflict of interest is inapposite to Plaintiffs' allegations that the compensation of the Director and other individual Defendants was tied to the value of ADC stock so as to create a strong incentive for their continued investment of Plan assets in the company. Compl. ¶¶ 124-27. Plaintiffs also assert that several executives sold their own ADC holdings for large gains based on information that should have been, but was not, shared with Plan participants. *Id.* ¶¶ 12, 15, 17, 18, 29, 126-28. The averments that because of this inherent conflict, Defendants breached their fiduciary responsibilities by failing to engage independent advisors and otherwise protect Plan funds state a claim for breach of the duty of loyalty. *See Sears*, 2004 U.S. Dist. LEXIS 3241, at *15; *Electronic*, 2004 U.S. Dist. LEXIS 2631, at *43-44.

G. Co-fiduciary Allegations

Lastly, Defendants argue the co-fiduciary claims should be dismissed for failure to establish primary breaches. Based on the above analysis finding sufficient preliminary averments to maintain the ERISA breaches alleged, the co-fiduciary allegations also survive for the time being. *See In re CMS Energy ERISA Litig.*, No. 02-CV-72834, 2004 U.S. Dist. LEXIS 8713, at *28 (Mar. 31, 2004).

IV. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss [Docket No. 33] is DENIED.

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Pipefitters Local 636 v. Blue Cross & Blue Shield of Michigan
C.A.6 (Mich.),2007.

This case was not selected for publication in the Federal Reporter. NOT RECOMMENDED FOR FULL--TEXT PUBLICATION Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

United States Court of Appeals, Sixth Circuit.
PIPEFITTERS LOCAL 636, Trustees of Pipefitters Local 636 Insurance Fund; John R. Green; Charles Inman; John O'Neil; Greg Sievert; E. Thomas Devlin; Gerald Hoover, Plaintiffs-Appellants,
v.

BLUE CROSS & BLUE SHIELD OF MICHIGAN,
Defendant-Appellee.

No. 05-2580.

Jan. 17, 2007.

Background: Multiemployer trust fund sued administrator for breach of fiduciary duties under Employee Retirement Income Security Act (ERISA) for imposing and failing to disclose cost transfer subsidy fee and for refusing to provide claims-related information, as well as state law claims for breach of contract, negligence, and misrepresentation. The United States District Court for the Eastern District of Michigan granted administrator's motion to dismiss, and fund appealed.

Holdings: The Court of Appeals, Restani, Judge, sitting by designation, held that:

(1) fund's complaint set forth sufficient allegations that administrator acted as a fiduciary under ERISA in assessing and failing to disclose subsidy fees, but

(2) fund's ERISA claim with respect to requested claims-related information was not sufficiently set forth by allegations.

Affirmed in part, reversed in part, and remanded.
West Headnotes

[1] Labor and Employment 231H 649

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk649 k. Pleading. Most Cited Cases
Multiemployer trust fund sufficiently alleged that administrator acted as an ERISA fiduciary with regard to the imposition of and failure to disclose cost transfer subsidy fee; fund alleged in its complaint and attached documents that it entrusted administrator with the authority to control and disburse fund assets, that administrator exercised such authority by allocating a portion of the money to itself in the form of subsidy fee and by failing to disclose this allotment to fund, and that administrator's unilateral decision to discontinue imposing fee further demonstrated its control and authority over the assets' disposition. Employee Retirement Income Security Act of 1974, § § 3(21)(A), 409(a), 29 U.S.C.A. § § 1002(21)(A), 1109(a).

[2] Labor and Employment 231H 649

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk649 k. Pleading. Most Cited Cases
Allegations of multiemployer trust fund that administrator was in possession of claims records and that it "refused to provide access" to these records when requested outside of the agreed-upon audit procedure were insufficient to establish that administrator was acting as a fiduciary under ERISA when it decided not to release such information. Employee Retirement Income Security Act of 1974, § 3(21)(A)(i), 29 U.S.C.A. § 1002(21)(A)(i).

*474 On Appeal from the United States District Court for the Eastern District of Michigan.

Ronald S. Lederman, Sharon S. Almonrode, Sullivan, Ward, Asher & Patton, Southfield, MI, for Plaintiffs-Appellants.

Francis R. Ortiz, Dickinson, Wright, PLLC, Joseph W. Murray, Blue Cross & Blue Shield of Michigan, Detroit, MI, for Defendant-Appellee.

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213 Fed.Appx. 473, 2007 WL 128773 (C.A.6 (Mich.)), 39 Employee Benefits Cas. 2643, 2007 Fed.App. 0043N

(Cite as: 213 Fed.Appx. 473)

Before: DAUGHTREY and COLE, Circuit Judges, and RESTANI,^{FN*} Judge.

FN* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

RESTANI, Judge.

****1** Plaintiffs-Appellants Pipefitters Local 636 Insurance Fund, et al. (“Fund”) appeal from a judgment of the United States District Court for the Eastern District of Michigan. The district court granted a motion to dismiss in favor of Defendant-Appellee Blue Cross & Blue Shield of Michigan (“BCBSM”) on federal claims of breach of fiduciary duties under the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. § 1001, et al., and related claims under Michigan law. The motion to dismiss was granted on the grounds that the complaint did not state adequate claims that BCBSM acted as a fiduciary under ERISA with regard to the actions in question.

On appeal, the Fund argues that BCBSM acted as an ERISA fiduciary with respect to its use of fund assets to pay for an “Other Than Group” (“OTG”) subsidy and its refusal to provide claims-related records as requested by the Fund. The district court granted BCBSM’s motion to dismiss, holding that the dispute concerns contractual duties under state law rather than fiduciary duties under ERISA.

For the reasons that follow, we conclude that the Fund’s complaint sets forth sufficient allegations that BCBSM was acting as a fiduciary in control of fund assets when it assessed and failed to disclose the OTG subsidy fees. As to BCBSM’s refusal to release requested claims-related information, however, we conclude that the Fund’s complaint does not set forth sufficient allegations to establish a separate basis for fiduciary liability under ERISA. Accordingly, we reverse in part and remand to the district court to further consider BCBSM’s status as a fiduciary with respect to the OTG subsidy fee. We affirm the district court’s dismissal of the Fund’s claims arising from BCBSM’s refusal to release the requested claims-related information.

The Appellant is a multiemployer trust fund ^{FN1} administered pursuant to ERISA ^{FN2}*475 and the Labor Management Relations Act, 29 U.S.C. § 186,

for the purpose of providing health and welfare benefits to its participants and beneficiaries. For several years, the Fund was an insured group customer of BCBSM, purchasing insurance coverage by paying premiums. The Fund converted in June 2002 to a self-funded plan, providing benefits by using fund assets. At that time, the Fund entered into an Administrative Services Contract (“ASC”) with BCBSM for services including: claims processing; financial management and reporting; negotiation of participating provider agreements; cost containment initiatives; maintenance of all necessary records; and provision of information through established audit procedures. *See* J.A. at 171-73 (ASC at 3-5).

FN1. The complaint states that the Fund intends to pursue class status on behalf of other similarly situated funds. The district court properly considered a motion to dismiss prior to considering class certification. *See Heckler v. Ringer*, 466 U.S. 602, 610 n. 5, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984).

FN2. ERISA defines applicable employee welfare benefits plans to include “any plan, fund, or program which ... [is] maintained by an employer or by an employee organization ... for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise ... medical, surgical, or hospital care or benefits.” 29 U.S.C. § 1002(1). ERISA also covers employee pension benefit plans. *Id.* § 1002(2)(A).

Under the terms of the ASC, the Fund agreed to pay claims and administrative charges, including amounts billed during the year, hospital prepayments, actual administrative charges and group conversion fee, any late payment charges, statutory and/or contractual interest, and “[a]ny other amounts which are the Fund’s responsibility pursuant to this Contract.” *Id.* at 178 (ASC at 10). The ASC also states that “[t]he Provider Network Fee, contingency, and any cost transfer subsidies or surcharges ordered by the State Insurance Commissioner as authorized pursuant to [Michigan law] will be reflected in the hospital claims cost contained in Amounts Billed.” *Id.*

****2** From June 2002 to January 2004, BCBSM collected from the Fund an OTG fee ^{FN3} to subsidize coverage for non-group clients. The OTG subsidy

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was regularly collected from BCBSM's group clients. Self-insured clients, however, were not always required to pay the fee, and the parties dispute whether Michigan law authorized the imposition of OTG subsidy fees on such clients.^{FN4} In January 2004, BCBSM unilaterally eliminated the OTG subsidy charge to the Fund.

FN3. The parties appear to agree that the OTG subsidy is a type of "cost transfer subsidy."

FN4. The Fund argues that "M.C.L. 550.1221 forbids entities such as [BCBSM] from imposing a cost transfer subsidy/OTG against administrative services clients such as the Plaintiff Fund." Appellant's Br. 8-9. BCBSM asserts that the OTG subsidy "is a charge required by the State Insurance Commissioner to help fund Medigap coverage for senior citizens." Appellee's Br. 5. Neither of these positions has been clearly established.

The Fund alleges that BCBSM breached its fiduciary duties under ERISA by imposing the OTG subsidy from June 2002 to January 2004, and by failing to disclose the fee in its quarterly statements. The Fund also alleges that BCBSM improperly refused to provide claims-related information for evaluation at the Fund's request. In district court, the Fund brought claims against BCBSM for: 1) breach of fiduciary duties under ERISA for imposing and failing to disclose the OTG subsidy fee; 2) breach of fiduciary duties under ERISA for refusing to provide claims-related information; and 3) breach of contract, negligence and misrepresentation under state law.

BCBSM moved for dismissal pursuant to Rules 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. BCBSM argued that it was not acting as a fiduciary under ERISA when it took the actions in question. The district court granted the motion to dismiss,^{FN5} and the Fund appeals. This court has jurisdiction over a final decision of the district court pursuant to 28 U.S.C. § 1291, and *476 review of a district court's decision on a motion to dismiss is generally *de novo*. See *Simon v. Pfizer Inc.*, 398 F.3d 765, 772 (6th Cir.2005).

FN5. The district court did not specify whether it granted the motion to dismiss under Rule 12(b)(1), Rule 12(b)(6), or both.

I. Evaluating ERISA Fiduciary Status

Under ERISA, a third-party administrator such as BCBSM is deemed a fiduciary^{FN6} to the extent that it exercises "discretionary authority or discretionary control respecting management of [a] plan or ... any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i). A fiduciary under ERISA is required to perform its actions with the utmost "care, skill, prudence, and diligence ... [and] in accordance with the documents and instruments governing the plan." *Id.* § 1104(a)(1)(B)-(D).

FN6. ERISA defines "person" and "fiduciary" to include a corporation. See 29 U.S.C. § 1002(9).

ERISA defines "fiduciary" in functional terms with regard to each action in question. See *Hamilton v. Carell*, 243 F.3d 992, 998 (6th Cir.2001). An ERISA fiduciary is permitted to make business decisions in its own interest, so long as it is not acting as a fiduciary at that time. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999). When acting as a fiduciary, however, "ERISA does require ... that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." *Pegram v. Herdrich*, 530 U.S. 211, 225, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000). ERISA "does not describe fiduciaries simply as administrators of the plan," but evaluates the fiduciary role "to the extent that [an administrator] acts in such a capacity in relation to the plan." *Id.* (quotation marks and citation omitted).

**3 In order to determine whether ERISA applies to the instant case, the threshold inquiry is whether, when taking each action in question, BCBSM exercised: 1) any authority or control over plan assets, or 2) discretionary authority over plan management. See *Briscoe v. Fine*, 444 F.3d 478, 490-91 (6th Cir.2006).

II. The Fund Sufficiently Alleges that BCBSM Acted as an ERISA Fiduciary With Regard to the Imposition of and Failure to Disclose the OTG Subsidy Fee

[1] The Fund seeks relief on the claim that BCBSM breached a fiduciary duty under ERISA by using fund assets to pay the OTG subsidy fee, and by failing to disclose the fee on its quarterly statements. ERISA § § 1132(a)(2) and 1109(a) provide a cause of action against a fiduciary “who breaches any of the responsibilities, obligations, or duties imposed ... [for] any losses to the plan resulting from each such breach.” 29 U.S.C. § 1109(a). In reviewing the motion to dismiss, the question is not whether BCBSM actually breached a fiduciary duty under ERISA, but whether the plaintiff has set forth sufficient allegations that such a duty existed and that it was breached. We therefore turn to the issue of whether the Fund has sufficiently alleged that BCBSM acted as a fiduciary with respect to the OTG subsidy fee.

Under ERISA, fiduciary duties arise where an administrator exerts “any authority or control respecting management or disposition of [a fund’s] assets.” *Id.* § 1002(21)(A). An administrator is deemed a fiduciary when it exercises “ ‘practical control over an ERISA plan’s *477 money.’ ” *Briscoe*, 444 F.3d at 494 (quoting *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir.1997)). The administrator’s “disposition of funds held in an account over which it exerted control makes it a fiduciary to the extent that it exercised such control.” *Id.* at 490. Discretion in the disposition of plan assets is not required; it is “irrelevant whether [the administrator] exercised ‘discretion’ [A]ny authority or control’ is enough.” *Chao v. Day*, 436 F.3d 234, 236 (D.C.Cir.2006).

A fiduciary relationship does not exist, however, where an administrator “performs purely ministerial functions such as processing claims, applying plan eligibility rules, communicating with employees, and calculating benefits.” *Baxter v. C.A. Muer Corp.*, 941 F.2d 451, 455 (6th Cir.1991). Fiduciary authority must amount to more than “mere possession, or custody over the plan [’s] assets.” *Briscoe*, 444 F.3d at 494 (quotations omitted). In addition, fiduciary status under ERISA does not apply where “parties enter into a contract term at arm’s length and where the term confers on one party the ... right to retain funds as compensation for

services rendered with respect to an ERISA plan.” *Seaway Food Town, Inc. v. Med. Mut. of Ohio*, 347 F.3d 610, 619 (6th Cir.2003). Fiduciary status does not extend to an administrator that exercised authority solely over funds that “belonged to [itself] and not to the plan.” *Id.* at 618.

**4 Therefore, in order to overcome BCBSM’s motion to dismiss, the Fund must set forth sufficient allegations that BCBSM exercised any authority or control over plan assets, and that it performed more than a mere ministerial or contractually compelled function in assessing the OTG subsidy fee. *See Briscoe*, 444 F.3d at 494.

The Fund’s complaint sets forth allegations that BCBSM’s role in assessing the OTG subsidy fee was an exercise of authority and control over the fund assets, and was not merely ministerial or contractual in nature. The complaint alleges that the monetary assets at issue were “entrusted” to BCBSM, which administered them within its authority as “a fiduciary under ERISA.” J.A. at 153-54 (Pl.’s First Am. Compl. ¶ 32, ¶ 44). The complaint further states that BCBSM “improperly imposed an OTG subsidy on these funds,” Pl.’s First Am. Compl. at ¶ 63, and that it “imposed the fee ... claiming it was a mandatory fee.” *Id.* at ¶ 42. The complaint alleges that “[t]he ASC contracts prohibit the OTG subsidy ... [and] BCBSM was not legally required to assess this OTG fee.” *Id.* at ¶ 37, ¶ 41. According to the complaint, BCBSM “selectively elected to assess [the] OTG fee,” *id.* at ¶ 33, and “in its discretion indicated it would unilaterally stop charging the OTG subsidy [on January 1, 2004].” *Id.* at ¶ 39.

In addition, the ASC attached to the complaint states that BCBSM acquired control over Fund assets by an initial transfer of funds to cover the first two quarters of projected claims and expenses, followed by monthly prepayments in accordance with BCBSM-issued quarterly statements. J.A. at 180 (ASC at 12); *see also id.* at Sched. A. The ASC authorizes BCBSM to allocate and dispose of the transferred funds while the assets are within BCBSM’s control. *See id.* at 9-14. In addition, under the terms of the contract, the Fund would be unable to access the transferred funds for a period even beyond the termination of the agreement. *Id.* at 14. Both parties also acknowledge that the OTG subsidy fee was “part of the allocation of the fund’s money,” J.A. at 280 (Mot. to Dismiss First Am. Compl. Hr’g Tr. 15:17, Sept. 26, 2005), and that BCBSM collected the fee “by keeping a portion of *478 the hospital discount.” J.A. at 220 (Letter from Ernie Kafcas, Account

Manager, BCBSM, to John M. Shoemaker, Plan Manager, JMS Administrators, Inc. (Jan. 6, 2004)).

In sum, the Fund has alleged in its complaint and attached documents that it entrusted BCBSM with the authority to control and disburse fund assets, and that BCBSM exercised such authority by allocating a portion of the money to itself in the form of the OTG subsidy fee and by failing to disclose this allotment to the Fund. The Fund's complaint also alleges that BCBSM's unilateral decision to discontinue imposing the fee further demonstrates BCBSM's control and authority over the assets' disposition. Therefore, the Fund has set forth sufficient allegations that BCBSM owed a fiduciary duty under ERISA with regard to its disposal of these assets, and that BCBSM breached its duty by imposing and failing to disclose the fee. As in *Briscoe*, whether BCBSM actually breached any resulting "duty that it owed [under ERISA] is a question that the parties may address on remand." *Briscoe*, 444 F.3d at 495.

****5** Although BCBSM asserts that this dispute is merely contractual in nature, we find that the Fund's allegations place its OTG fee claims within the scope of ERISA. BCBSM argues that the dispute arises solely from the ASC, and that the meaning of the provision in question should be construed in state court. BCBSM argues specifically that the Fund must have known that the OTG subsidy fees would be assessed because the Fund asked for a waiver of the provision allowing a "Provider Network Fee, contingency, and any cost transfer subsidies or surcharges ordered by the State Insurance Commissioner." J.A. at 178 (ASC at 10). The Fund responds that the subsidy fee could not have been included in the above provision because there is no evidence that the fee was ordered by the State Commissioner, or even that it was permitted under Michigan law. The Fund's knowledge of the fee, however, would not necessarily negate the exercise of control or authority by BCBSM in its imposition because such knowledge would not alter BCBSM's control over the funds. See *Briscoe*, 444 F.3d at 492 ("The terms of the Agreement may have limited [the administrator's] discretion over the remaining funds, but did not affect its control over those funds.... [T]he Agreement does not alter the fact that [the administrator] acted as a signatory and unilaterally disposed of the remaining funds." (emphasis omitted)). While this contractual term is relevant to the trial court's determination of the extent of BCBSM's duties under the agreement, there is nothing at this early stage that negates the Fund's assertions set forth in the complaint. The Fund has

set forth sufficient allegations that BCBSM acted as a fiduciary under ERISA with respect to the OTG fee.

III. The Fund Fails to Set Forth Sufficient Allegations that BCBSM Acted as an ERISA Fiduciary With Regard to its Refusal to Provide Claims-Related Information

[2] The Fund also asserts a claim against BCBSM on the ground that BCBSM acted as a fiduciary under ERISA by refusing to provide claims information unrelated to the OTG fee and requested outside of contractually agreed-upon audit procedures. J.A. at 156 (Pl.'s First Am. Compl. ¶¶ 50-52). When a third-party administrator exercises authority over non-monetary elements of a plan, ERISA confers fiduciary status only where the administrator exercises "discretionary authority or discretionary control." 29 U.S.C. § 1002(21)(A)(i).

***479** As indicated previously, discretionary authority under ERISA requires more than a showing of "any authority or control" and requires the exercise of authority to make administrative decisions beyond stringent contractual or policy limitations. See *Briscoe*, 444 F.3d at 490-91. Such discretion is typically found where an administrator has the authority to make benefits determinations or construe the terms of a plan. See *Voyk v. Bhd. of Locomotive Engrs*, 198 F.3d 599, 604 (6th Cir.1999); see also *Tregoning v. Am. Cmty. Mut. Ins. Co.*, 12 F.3d 79, 83 (6th Cir.1993). Discretionary authority does not exist where a party merely decides to adhere to an existing contract term, see *Seaway*, 347 F.3d at 619, or makes business decisions on its own behalf, outside of its role as plan administrator. See *Hughes*, 525 U.S. at 443-44, 119 S.Ct. 755.

****6** In the instant case, the Fund's complaint states only that BCBSM was "in possession of the [requested] Claims Records," J.A. at 155 (Pl.'s First Am. Compl. at ¶ 48), and that it "refused to provide access" to these records when requested. *Id.* at ¶ 51. The complaint does not specify how BCBSM was exercising discretionary authority in deciding not to release the records, and offers only the conclusion that "BCBSM is a fiduciary under ERISA." *Id.* at ¶ 47. Although the complaint clearly indicates the types of records sought, *id.* at ¶ 49, it does not allege facts to establish that BCBSM was acting as a fiduciary when it decided not to release such information.

Contrary to its own assertions regarding BCBSM's

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fiduciary status, the Fund's complaint acknowledges that BCBSM refused to provide the requested information in order to "retain its competitive advantage by limiting the ability of the Fund[] to compare its costs with alternate service providers." *Id.* at ¶ 52. BCBSM confirmed this reasoning in correspondence to the Fund, stating that "[w]e do not share provider specific charge and payment information with anyone even ... for purposes of claim and benefit analysis. We are not required to and choose not to for legitimate business reasons and we will not do so for the particular purpose of comparing or shopping the price." J.A. at 227 (Email from Jeffrey Rumley, BCBSM, to Jacqueline Kelly (Apr. 30, 2003, 08:05:00 AM)). These statements are consistent with BCBSM's position that it was acting in a business capacity, rather than as an ERISA fiduciary, when it decided not to release the information.

In addition, the ASC provides for an established audit procedure for the disclosure and monitoring of relevant claims-related information. The ASC states that "[t]he Fund, at its own expense, shall have the right to audit Enrollee claims ... however, audits will not occur more frequently than once every twelve (12) months and will not include claims from previously audited periods." J.A. at 174 (ASC at 6). The agreement requires that the Fund provide sixty to ninety days notice of its intent to pursue an audit, and that "[p]rior to any audit, the Fund and BCBSM must mutually agree upon any independent third party auditor ... to perform the audit." ASC at 7. The case relied upon by the Fund to show a fiduciary obligation to release accounting information on demand is distinguishable from the current dispute, as in that case the applicable agreement was "silent on the right to an audit." *Libbey-Owens-Ford Co. v. Blue Cross and Blue Shield Mut. of Ohio*, 982 F.2d 1031, 1035 (6th Cir.1993). It is not clear why the Fund sought the claims information at issue outside of the agreed-upon audit procedure; the complaint states only that the Fund "need[s] access to the Claims Records to ... properly monitor costs." J.A. at 156 (Pl.'s First *480 Am. Compl. at ¶ 50). As mentioned previously, discretionary authority does not arise where a party was simply adhering to a bargained-for contractual provision; in such a case, a claim for breach of fiduciary duty under ERISA would not lie. *See Seaway*, 347 F.3d at 619.

****7** In this case, the Fund's complaint and supporting documents indicate that BCBSM was simply adhering to the contractually agreed-upon audit procedures in refusing to release the information, and

that it decided not to release the requested documents in its own business capacity rather than as a fiduciary under ERISA. Therefore, the complaint does not sufficiently allege a claim for relief under ERISA with regard to BCBSM's decision not to release the specified claims-related information in the manner requested.

For the foregoing reasons, we find that the Fund's complaint sets forth sufficient allegations that BCBSM acted as a fiduciary under ERISA in assessing and failing to disclose the OTG subsidy fees. The Fund's ERISA claim with respect to the requested claims-related information, however, is not sufficiently set forth by the allegations of the complaint and does not provide a separate basis for federal subject matter jurisdiction.

Accordingly, the district court's dismissal of the Fund's claims arising from BCBSM's refusal to release claims-related information is affirmed. We reverse the district court's dismissal of the Fund's claims arising from BCBSM's imposition of the OTG subsidy fee and remand for further proceedings consistent herewith, including consideration of the status of related state law claims. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

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END OF DOCUMENT



29 C.F.R. § 2509.75-8

Effective: [See Text Amendments]

Code of Federal Regulations [Currentness](#)
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter XXV. Employee Benefits Security Administration, Department of Labor ([Refs & Annos](#))
 [Subchapter A](#). General
 [Part 2509](#). Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974 ([Refs & Annos](#))

→§ 2509.75-8 Questions and answers relating to fiduciary responsibility under the Employee Retirement Income Security Act of 1974.

Pending the issuance of regulations or other guidelines, persons may rely on the answers to these questions in order to resolve the issues that are specifically considered. No inferences should be drawn regarding issues not raised which may be suggested by a particular question and answer or as to why certain questions, and not others, are included. Furthermore, in applying the questions and answers, the effect of subsequent legislation, regulations, court decisions, and interpretive bulletins must be considered. To the extent that plans utilize or rely on these answers and the requirements of regulations subsequently adopted vary from the answers relied on, such plans may have to be amended.

An index of the questions and answers, relating them to the appropriate sections of the Act, is also provided.

The Department of Labor today issued questions and answers relating to certain aspects of fiduciary responsibility under the Act, thereby supplementing ERISA IB 75-5 (29 CFR 2555.75-5) which was issued on June 24, 1975, and published in the Federal Register on July 28, 1975 ([40 FR 31598](#)).

Index

Key to question prefixes: D--refers to definitions; FR--refers to fiduciary responsibility.

Section No.	Question No.
3(21)(A)	D-2, D-3, D-4, D-5.
3(38)	FR-15.
402(c)(1)	FR-12.
402(c)(2)	FR-15.
402(c)(3)	FR-15.
403(a)(2)	FR-15.
404(a)(1)(B)	FR-11, FR-17.
405(a)	FR-13, FR-14, FR-16.
405(c)(1)	FR-12, FR-15.
405(c)(2)	D-4, FR-13, FR-14, FR-16.
412	D-2.

Note: Questions D-2, D-3, D-4, and D-5 relate to not only section 3(21)(A) of Title I of the Act, but also [section 4975\(e\)\(3\) of the Internal Revenue Code](#) (section 2003 of the Act). The Internal Revenue Service has indicated its concurrence with the answers to these questions.

decisions as to plan policy, interpretations, practices or procedures, but who perform the following administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, fiduciaries with respect to the plan:

D-2 Q: Are persons who have no power to make any

(1) Application of rules determining eligibility for

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participation or benefits;

(2) Calculation of services and compensation credits for benefits;

(3) Preparation of employee communications material;

(4) Maintenance of participants' service and employment records;

(5) Preparation of reports required by government agencies;

(6) Calculation of benefits;

(7) Orientation of new participants and advising participants of their rights and options under the plan;

(8) Collection of contributions and application of contributions as provided in the plan;

(9) Preparation of reports concerning participants' benefits;

(10) Processing of claims; and

(11) Making recommendations to others for decisions with respect to plan administration?

A: No. Only persons who perform one or more of the functions described in section 3(21)(A) of the Act with respect to an employee benefit plan are fiduciaries. Therefore, a person who performs purely ministerial functions such as the types described above for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such person does not have discretionary authority or discretionary control respecting management of the plan, does not exercise any authority or control respecting management or disposition of the assets of the plan, and does not render investment advice with respect to any money or other property of the plan and has no authority or responsibility to do so.

However, although such a person may not be a plan fiduciary, he may be subject to the bonding requirements contained in section 412 of the Act if he handles funds or other property of the plan within the meaning of applicable regulations.

The Internal Revenue Service notes that such persons

would not be considered plan fiduciaries within the meaning of [section 4975\(e\)\(3\) of the Internal Revenue Code](#) of 1954.

D-3 Q: Does a person automatically become a fiduciary with respect to a plan by reason of holding certain positions in the administration of such plan?

A: Some offices or positions of an employee benefit plan by their very nature require persons who hold them to perform one or more of the functions described in section 3(21)(A) of the Act. For example, a plan administrator or a trustee of a plan must, be the very nature of his position, have "discretionary authority or discretionary responsibility in the administration" of the plan within the meaning of section 3(21)(A)(iii) of the Act. Persons who hold such positions will therefore be fiduciaries.

Other offices and positions should be examined to determine whether they involve the performance of any of the functions described in section 3(21)(A) of the Act. For example, a plan might designate as a "benefit supervisor" a plan employee whose sole function is to calculate the amount of benefits to which each plan participant is entitled in accordance with a mathematical formula contained in the written instrument pursuant to which the plan is maintained. The benefit supervisor, after calculating the benefits, would then inform the plan administrator of the results of his calculations, and the plan administrator would authorize the payment of benefits to a particular plan participant. The benefit supervisor does not perform any of the functions described in section 3(21)(A) of the Act and is not, therefore, a plan fiduciary. However, the plan might designate as a "benefit supervisor" a plan employee who has the final authority to authorize or disallow benefit payments in cases where a dispute exists as to the interpretation of plan provisions relating to eligibility for benefits. Under these circumstances, the benefit supervisor would be a fiduciary within the meaning of section 3(21)(A) of the Act.

The Internal Revenue Service notes that it would reach the same answer to this question under [section 4975\(e\)\(3\) of the Internal Revenue Code](#) of 1954.

D-4 Q: In the case of a plan established and maintained by an employer, are members of the board of directors of the employer fiduciaries with respect to the plan?

A: Members of the board of directors of an employer which maintains an employee benefit plan will be

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fiduciaries only to the extent that they have responsibility for the functions described in section 3(21)(A) of the Act. For example, the board of directors may be responsible for the selection and retention of plan fiduciaries. In such a case, members of the board of directors exercise "discretionary authority or discretionary control respecting management of such plan" and are, therefore, fiduciaries with respect to the plan. However, their responsibility, and, consequently, their liability, is limited to the selection and retention of fiduciaries (apart from co-fiduciary liability arising under circumstances described in section 405(a) of the Act). In addition, if the directors are made named fiduciaries of the plan, their liability may be limited pursuant to a procedure provided for in the plan instrument for the allocation of fiduciary responsibilities among named fiduciaries or for the designation of persons other than named fiduciaries to carry out fiduciary responsibilities, as provided in section 405(c)(2).

The Internal Revenue Service notes that it would reach the same answer to this question under [section 4975\(e\)\(3\) of the Internal Revenue Code](#) of 1954.

D-5 Q: Is an officer or employee of an employer or employee organization which sponsors an employee benefit plan a fiduciary with respect to the plan solely by reason of holding such office or employment if he or she performs none of the functions described in section 3(21)(A) of the Act?

A: No, for the reasons stated in response to question D-2.

The Internal Revenue Service notes that it would reach the same answer to this question under [section 4975\(e\)\(3\) of the Internal Revenue Code](#) of 1954.

FR-11 Q: In discharging fiduciary responsibilities, may a fiduciary with respect to a plan rely on information, data, statistics or analyses provided by other persons who perform purely ministerial functions for such plan, such as those persons described in D-2 above?

A: A plan fiduciary may rely on information, data, statistics or analyses furnished by persons performing ministerial functions for the plan, provided that he has exercised prudence in the selection and retention of such persons. The plan fiduciary will be deemed to have acted prudently in such selection and retention if, in the exercise of ordinary care in such situation, he has no reason to doubt the competence, integrity or responsibility of such persons.

FR-12 Q: How many fiduciaries must an employee benefit plan have?

A: There is no required number of fiduciaries that a plan must have. Each plan must, of course, have at least one named fiduciary who serves as plan administrator and, if plan assets are held in trust, the plan must have at least one trustee. If these requirements are met, there is no limit on the number of fiduciaries a plan may have. A plan may have as few or as many fiduciaries as are necessary for its operation and administration. Under section 402(c)(1) of the Act, if the plan so provides, any person or group of persons may serve in more than one fiduciary capacity, including serving both as trustee and administrator. Conversely, fiduciary responsibilities not involving management and control of plan assets may, under section 405(c)(1) of the Act, be allocated among named fiduciaries and named fiduciaries may designate persons other than named fiduciaries to carry out such fiduciary responsibilities, if the plan instrument expressly provides procedures for such allocation or designation.

FR-13 Q: If the named fiduciaries of an employee benefit plan allocate their fiduciary responsibilities among themselves in accordance with a procedure set forth in the plan for the allocation of responsibilities for operation and administration of the plan, to what extent will a named fiduciary be relieved of liability for acts and omissions of other named fiduciaries in carrying out fiduciary responsibilities allocated to them?

A: If named fiduciaries of a plan allocate responsibilities in accordance with a procedure for such allocation set forth in the plan, a named fiduciary will not be liable for acts and omissions of other named fiduciaries in carrying out fiduciary responsibilities which have been allocated to them, except as provided in section 405(a) of the Act, relating to the general rules of co-fiduciary responsibility, and section 405(c)(2)(A) of the Act, relating in relevant part to standards for establishment and implementation of allocation procedures.

However, if the instrument under which the plan is maintained does not provide for a procedure for the allocation of fiduciary responsibilities among named fiduciaries, any allocation which the named fiduciaries may make among themselves will be ineffective to relieve a named fiduciary from responsibility or liability for the performance of fiduciary responsibilities allocated to other named fiduciaries.

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FR-14 Q: If the named fiduciaries of an employee benefit plan designate a person who is not a named fiduciary to carry out fiduciary responsibilities, to what extent will the named fiduciaries be relieved of liability for the acts and omissions of such person in the performance of his duties?

A: If the instrument under which the plan is maintained provides for a procedure under which a named fiduciary may designate persons who are not named fiduciaries to carry out fiduciary responsibilities, named fiduciaries of the plan will not be liable for acts and omissions of a person who is not a named fiduciary in carrying out the fiduciary responsibilities which such person has been designated to carry out, except as provided in section 405(a) of the Act, relating to the general rules of co-fiduciary liability, and section 405(c)(2)(A) of the Act, relating in relevant part to the designation of persons to carry out fiduciary responsibilities.

However, if the instrument under which the plan is maintained does not provide for a procedure for the designation of persons who are not named fiduciaries to carry out fiduciary responsibilities, then any such designation which the named fiduciaries may make will not relieve the named fiduciaries from responsibility or liability for the acts and omissions of the persons so designated.

FR-15 Q: May a named fiduciary delegate responsibility for management and control of plan assets to anyone other than a person who is an investment manager as defined in section 3(38) of the Act so as to be relieved of liability for the acts and omissions of the person to whom such responsibility is delegated?

A: No. Section 405(c)(1) does not allow named fiduciaries to delegate to others authority or discretion to manage or control plan assets. However, under the terms of sections 403(a)(2) and 402(c)(3) of the Act, such authority and discretion may be delegated to persons who are investment managers as defined in section 3(38) of the Act. Further, under section 402(c)(2) of the Act, if the plan so provides, a named fiduciary may employ other persons to render advice to the named fiduciary to assist the named fiduciary in carrying out his investment responsibilities under the plan.

FR-16 Q: Is a fiduciary who is not a named fiduciary with respect to an employee benefit plan personally liable for all phases of the management and administration of the plan?

A: A fiduciary with respect to the plan who is not a named fiduciary is a fiduciary only to the extent that he or she performs one or more of the functions described in section 3(21)(A) of the Act. The personal liability of a fiduciary who is not a named fiduciary is generally limited to the fiduciary functions, which he or she performs with respect to the plan. With respect to the extent of liability of a named fiduciary of a plan where duties are properly allocated among named fiduciaries or where named fiduciaries properly designate other persons to carry out certain fiduciary duties, see question FR-13 and FR-14.

In addition, any fiduciary may become liable for breaches of fiduciary responsibility committed by another fiduciary of the same plan under circumstances giving rise to co-fiduciary liability, as provided in section 405(a) of the Act.

FR-17 Q: What are the ongoing responsibilities of a fiduciary who has appointed trustees or other fiduciaries with respect to these appointments?

A: At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan. No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and other facts and circumstances relevant to the choice of the procedure.

[[40 FR 47491](#), Oct. 9, 1975. Redesignated at [41 FR 1906](#), Jan. 13, 1976]

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29 C. F. R. § 2509.75-8, **29 CFR § 2509.75-8**

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