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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Patrick R. Pizzella, Acting Secretary of
10 Labor,
Plaintiff,

No. CV-19-03178-PHX-JJT

11

v.

ORDER

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Reliance Trust Company, *et al.*,

13

Defendants.

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15 At issue is the Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) by Defendants
16 Eric Bensen, Randall Smalley and Robert Smalley, Jr. (the Individual Defendants); the
17 Family Trust, Marital Trust and Survivor’s Trust all created under the Smalley Revocable
18 Trust Dated July 8, 2004 (the Trust Defendants); and RVR, Inc. (Doc. 22.) Plaintiff, Acting
19 Secretary of Labor Patrick Pizzella, has filed a Response in opposition (Doc. 26) and RVR,
20 the Individual and Trust Defendants filed a Reply in support. (Doc. 27.) The Court will
21 deny the Motion.

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I. LEGAL STANDARD

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24 When analyzing a complaint for failure to state a claim for relief under Federal Rule
25 of Civil Procedure 12(b)(6), the well-pled factual allegations are taken as true and
26 construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d
27 1063, 1067 (9th Cir. 2009). Legal conclusions couched as factual allegations are not
28 entitled to the assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and

1 therefore are insufficient to defeat a motion to dismiss for failure to state a claim. *In re*
2 *Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010).

3 A dismissal under Rule 12(b)(6) for failure to state a claim can be based on either
4 (1) the lack of a cognizable legal theory or (2) insufficient facts to support a cognizable
5 legal claim. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). “While
6 a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations,
7 a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more
8 than labels and conclusions, and a formulaic recitation of the elements of a cause of action
9 will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)(citations omitted).
10 To survive a Rule 12(b)(6) motion, a complaint must allege “enough facts to state a claim
11 to relief that is plausible on its face.” *Id.* at 570. The complaint must thus contain “sufficient
12 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
13 *Ashcroft*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). “[A] well-pleaded
14 complaint may proceed even if it strikes a savvy judge that actual proof of those facts is
15 improbable, and that ‘recovery is very remote and unlikely.’” *Twombly*, 550 U.S. at 556
16 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

17 **II. ANALYSIS**

18 Collectively, RVR and the Individual and Trust Defendants seek dismissal of five
19 Claims in the Complaint. The Court will group three of those claims which the parties
20 argue turn on analysis of a common issue. In Claim 3, Plaintiff alleges the Individual
21 Defendants breached their fiduciary duty to monitor the Plan Trustee, co-Defendant
22 Reliance Trust Company, as imposed by ERISA Section 404(a)(A), (B) and (D), 29 U.S.C.
23 § 1104(a)(1)(A), (B) and (D). (Doc. 5, Complaint, ¶¶ 72-74.) Plaintiff alleges in Claim 4
24 that the Individual Defendants are liable for Reliance’s breaches as co-fiduciaries pursuant
25 to ERISA Section 405(a)(1-3), 29 U.S.C. § 1105(a)(1-3). (Complaint, ¶¶ 76-79.) And in
26 Claim 5, Plaintiff charges the Individual Defendants are liable for their knowing
27 participation in Reliance’s breaches of its fiduciary duty under Sections 1104(a)(1)(A), (B)
28 and (D) and 1106 (a)(1)(A) and (D), regardless of their own respective fiduciary statuses.

1 (Complaint, ¶¶ 81-83.) The Individual Defendants argue that each of these three claims is
2 infirm for the same reason—Plaintiff has failed to allege sufficient facts that would show
3 their knowledge that the ESOP transaction was illegal under ERISA.

4 **A. Claim 3: Fiduciary Duty to Monitor**

5 As an initial matter, the parties dispute whether liability for failure of a fiduciary
6 duty to monitor under ERISA requires actual knowledge or a “knew or should have known”
7 standard. (Motion at 7-9; Response at 8-10.) While the Court agrees with Plaintiff that the
8 “knew or should have known” standard applies to this question under ERISA Section
9 404(a),¹ that determination is immaterial for purposes of deciding the instant motion,
10 because the Court concludes Plaintiff has alleged sufficient facts to show the Individual
11 Defendants had actual knowledge Reliance breached its fiduciary duties and the transaction
12 violated ERISA. Thus, Plaintiff’s allegations, taken as true and construed in the light most
13 favorable to Plaintiff for purposes of the Rule 12(b)(6) analysis, plead factual content that
14 allows the Court to draw reasonable inferences as to liability. *Iqbal*, 556 U.S. at 678.

15 Plaintiff alleges in his Complaint that the Individual Defendants “controlled every
16 aspect” of RVR as its principal officers, sole shareholders and sole directors. (Complaint
17 ¶¶ 5-6.) All three Defendants are alleged to have appointed Reliance as Trustee. (Complaint
18 ¶¶ 13-15.) RVR, which the Individual Defendants controlled, engaged Chartwell Business
19 Valuation LLC to advise a structure for the transaction between the Individual Defendant
20 sellers and the Plan, estimate RVR’s value, and represent the Individual Defendant sellers
21 in negotiations with trustee Reliance. (Complaint ¶ 19.) At the April 16, 2014 Transaction
22 Kick-Off meeting, the Individual Defendants presented information including an overview

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24 ¹ The parties cite several cases in support of their diametrically opposed positions on the
25 knowledge standard for ERISA Section 404(a). None of the cases are binding on the Court,
26 as they are either orders from our sister districts within the Ninth Circuit, or an unpublished
27 2009 Ninth Circuit memorandum decision. The Court still considers all of the cases cited
28 for persuasive value, and in so doing, finds Judge Mollway’s reasoning in the recently
decided *Acosta v. Saakvitne*, 355 F. Supp. 3d 908 (D. Hawai’i 2019), to be the most
thorough, convincing and ultimately persuasive. The Court also notes a striking similarity
between the facts alleged in *Acosta* and those alleged in this case. Finally, in reaching her
conclusion, Judge Mollway relied in part on another case Plaintiff cites, *Solis v. Couturier*,
No. 2:08-CV-02732-RRB-GGH, 2009 WL 1748724, at *7 (E.D. Cal. June 19, 2009).
Acosta, 355 F.Supp. 3d at 923-24.

1 of RVR operations and outlook to the Trustee and to Stout Risius Ross, Inc. (SRR), the
2 entity selected to appraise and value RVR for purposes of negotiating the sale of Individual
3 Defendants' shares in RVR to the Plan. (Complaint ¶¶ 19-20.) The Individual Defendants
4 set the timeline for the transaction that Plaintiff alleges to have been intentionally rushed.
5 (Complaint ¶¶ 20, 42-43.) Plaintiff alleges that Reliance, as Trustee, caused the Plan to
6 pay "tens of millions of dollars" too much to the Individual Defendants for all of the then-
7 outstanding stock of RVR. (Complaint ¶ 7.) The transaction which the Individual
8 Defendants negotiated with the Trustee resulted in them maintaining their positions as
9 controlling officers and sole members of the board of RVR despite the Plan having paid a
10 control premium for RVR. (Complaint ¶ 7.)

11 From these allegations, taken as true and viewed in the light most favorable to
12 Plaintiff, the Court can draw an obvious inference that the Individual Defendants,
13 controlling RVR and its actions and communicating directly with trustee Reliance and
14 appraiser SRR, controlled and therefore knew of the information both Reliance and SRR
15 received in valuing the company and evaluating the fairness of stock price for the Plan.
16 Because Chartwell was retained to advise RVR, through its directors and officers—the
17 Individual Defendants—on a transaction structure and to negotiate on behalf of the
18 sellers—again the Individual Defendants—the Court can infer that Defendants knew how
19 the information was being used and the price their shares ultimately would fetch. And the
20 Court can infer from the allegations that the Individual Defendants, as the senior officers,
21 sole directors and sole shareholders of RVR, knew its approximate value at least. Finally,
22 the Court can infer from the allegations that the transaction was rushed and completed
23 according to the Individual Defendants' dictated timeline, that there was inadequate review
24 and scrutiny of the transaction by the Trustee and its agent appraiser.

25 These inferences drawn from the allegations in the Complaint would establish the
26 actual knowledge of circumstances demonstrating breach by the trustee. The allegations
27 are thus adequate to state a claim for breach of a fiduciary's duty to monitor. Whether the
28 evidence ultimately developed supports these allegations and inferences at the summary

1 judgment stage or at trial is a wholly different question and one this Court does not
2 approach. But under the Rule 12 standard as clarified by *Twombly*, *Iqbal* and progeny,
3 Plaintiff adequately states his Claim 3.

4 **B. Claims 4 and 5: Breach of Duty of a Co-Fiduciary and Participation in**
5 **a Fiduciary's Breach by a Non-Fiduciary**

6 Although the parties do not squarely address the issue, it is clear to the Court that
7 the necessary standard of knowledge to sustain a claim for breach of the duties of a co-
8 fiduciary under Section 405(a) of ERISA is actual knowledge. *E.g.*, *Acosta*, 355 F.Supp.
9 3d at 924-25. But for the same reasons the Court sets forth above, it concludes at this stage
10 that Plaintiff has adequately alleged facts which, when taken as true, yield inferences that
11 support a claim for breach of duty as co-fiduciary. Similarly, the Court concludes Plaintiff
12 has adequately pleaded actual knowledge as to the Individual Defendants for the non-
13 fiduciary participation claim. The Court thus will deny the motion as to Claims 4 and 5.

14 **C. Claim 7: Avoidance of Indemnification of Individual Defendants**

15 The Complaint sufficiently alleges, and no party contests, that the Individual
16 Defendants are ERISA fiduciaries with respect to the Plan. Because Claims 3 and 4 will
17 survive the Individual Defendants' Motion to Dismiss, the possibility that one or more of
18 the Individual Defendants may be found to have breached his fiduciary duties remains at
19 this stage. Therefore, the Court may still have to evaluate in equity at some later stage
20 Plaintiff's claim that ERISA Sections 409(a) and 410(a) operate to void those provisions
21 of the Plan that would indemnify Defendants for breaches of their fiduciary duties under
22 ERISA. 29 U.S.C. §§ 1109(a), 1110(a). The Court will deny the motion as to Plaintiff's
23 Claim 7.

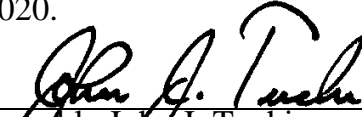
24 **D. Dismissal of RVR as a Defendant**

25 The Court readily concludes, based on Plaintiff's allegations, that RVR is a
26 necessary party to the action under Rule 19(a)(1)(A), Fed. R. Civ. P. The injunctive relief
27 sought in the Complaint includes avoidance of Plan provisions that would require RVR or
28 the Plan to indemnify the Individual Defendants for losses and costs associated with

1 breaches of their ERISA fiduciary duties. While Plaintiff argues alternative bases for
2 finding RVR to be a necessary party, the Court need not reach them. It finds the above to
3 be an adequate basis. The Court will deny Defendants' motion to dismiss RVR.

4 IT IS ORDERED denying the Motion to Dismiss. (Doc. 22.)

5 Dated this 18th day of February, 2020.

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8 Honorable John J. Tuchi
9 United States District Judge
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