

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
**CIVIL MINUTES – GENERAL**

Case No. **LACV 20-05805-VAP (KSx)**Date **October 14, 2020**Title ***Galina Kopelev v. The Boeing Company Voluntary Investment Plan***Present: The Honorable **VIRGINIA A. PHILLIPS, UNITED STATES DISTRICT JUDGE**

Christine Chung  
Deputy Clerk

Not Reported  
Court Reporter

Attorney(s) Present for Plaintiff(s):

None Present

Attorney(s) Present for Defendant(s):

None Present

**Proceedings: MINUTE ORDER GRANTING MOTION TO DISMISS COMPLAINT**

Pending before the Court is Defendant the Boeing Company Voluntary Investment Plan's ("Defendant") "Motion to Dismiss Plaintiff's Complaint" ("Motion"), filed on September 11, 2020. Having considered the papers filed in support of, and in opposition to, the Motion, the Court finds this matter appropriate for resolution without oral argument pursuant to Local Rule 7-15 and VACATES the hearing set on October 19, 2020 at 2:00 p.m. For the following reasons the Court GRANTS the Motion.

**I. Background**

Plaintiff Galina Kopelev ("Plaintiff") filed a Complaint against Defendant on June 29, 2020. The Complaint alleges one claim, for equitable relief under 29 U.S.C. § 1132(a)(3). (See Compl.)

Defendant filed the instant Motion on September 11, 2020 along with a Request for Judicial Notice.<sup>1</sup> Plaintiff filed Opposition to the Motion on September 28, 2020. Defendant filed a Reply to the Opposition on October 5, 2020.

<sup>1</sup> In support of the Motion, Defendant submits a Request for Judicial Notice ("RJN"). Defendant moves the Court to take judicial notice of the Boeing Company Voluntary Investment Plan ("the Plan"), attached as Exhibit A to the RJN. The Court GRANTS the RJN as the Plan is incorporated by reference throughout the Complaint and neither party questions its authenticity or relevance. See Fed. R. Evid. 201(b)(2).

## II. Factual Allegations

Plaintiff alleges she is the widow of Anatoly Kopelev, who was a former employee of Boeing and who died in August 2013 at the age of 71. (Compl. ¶ 4.)

Pursuant to the Boeing Company Voluntary Investment Plan (“the Plan”), Plaintiff’s beneficiary account in the Plan would remain in place until a payment was requested or until December of the year in which Anatoly would have attained the age of 70½ or December of the year that included the fifth anniversary of his death, whichever was later. (*Id.* ¶ 5.) By these terms, December 2018 was the latest Plaintiff’s benefits in the Plan could remain in place. (*Id.*) Plaintiff was unaware of these terms and was never given a copy of the Plan or a summary thereof. (*Id.* ¶ 6.)

In the second half of 2018, Plaintiff was evaluating whether to have her beneficiary account distributed through a rollover to a personal individual retirement account (“IRA”). (*Id.* ¶ 7.) Plaintiff spoke with representatives of the Plan on numerous occasions from September to December 2018; she alleges these representatives were fiduciaries as defined by the Employee Retirement Income Security Act of 1974 (“ERISA”) at the time she spoke with them. (*Id.* ¶¶ 6, 8.) According to Plaintiff, these representatives knew or should have known the Plan would require a distribution to Plaintiff in December 2018. (*Id.*) The representatives never informed her of this requirement and discouraged her from rolling her benefits over to an IRA because the price of Boeing stock “was likely to increase.” (*Id.*)

Without any advance notice, Plaintiff’s beneficiary account in the Plan was distributed to her in the form of a check. (*Id.* ¶ 10.) Plaintiff alleges she suffered actual harm due to Defendant’s breach of its fiduciary duties because the price of Boeing stock had declined significantly, a large income tax withholding was assessed on the distribution, Plaintiff’s federal and state tax liability for 2018 increased, her Social Security benefits were reduced, and she suffered financial losses totaling \$130,000. (*Id.* ¶¶ 11-12.)

## III. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) allows a party to bring a motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6) is read along with Rule 8(a), which requires a short, plain statement upon which a pleading shows entitlement to relief. Fed. R. Civ. P. 8(a)(2); *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (holding the Federal Rules of Civil Procedure require a plaintiff to provide “‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests” (quoting Fed. R. Civ. P. 8(a)(2))); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A motion to dismiss can be based on the failure to allege a cognizable legal theory or the failure to allege sufficient facts under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint – as well as any reasonable inferences to be drawn from them – as true and construe them in the light most favorable to the nonmoving party. *See Doe v. United States*, 419

F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of the Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005); Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994).

To survive a motion to dismiss, a plaintiff must allege facts that state a claim for relief that is plausible, not merely conceivable. Twombly, 550 U.S. at 556, 570. “[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). Then, for all well-pled factual allegations, the court “should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” Id. “[F]or a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (applying Iqbal’s two-step analysis).

A complaint must “contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively” and “the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.” Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011). “If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff’s complaint survives a motion to dismiss under Rule 12(b)(6).” Id.

Although the scope of review is limited to the contents of the complaint, the Court may also consider exhibits submitted with the complaint, Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990), and “take judicial notice of matters of public record outside the pleadings,” Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).

#### IV. Discussion

In the Motion, Defendant argues Plaintiff fails to state a claim for breach of fiduciary duty under ERISA. Specifically, Defendant contends it is not a plan fiduciary under ERISA and no plan fiduciary is identified in the Complaint. In addition, according to Defendant, the Complaint does not identify a fiduciary duty recognized under ERISA.

In Opposition, Plaintiff provides supporting caselaw for the equitable remedy of surcharge, which she seeks in the Complaint, and argues Defendant is a proper defendant in this action. Moreover, Plaintiff argues the Complaint sufficiently states a claim that Defendant, through its representatives who communicated with Plaintiff, was a fiduciary and breached its duties, including a duty of loyalty and disclosure, to Plaintiff. Plaintiff attempts to distinguish the caselaw Defendant cites in support of the Motion by contending Defendant is a proper party to a Section 1132(a)(3) claim pursuant to King v. Blue Cross & Blue Shield of Ill., 871 F.3d 730 (9th Cir. 2017).

“ERISA’s enforcement scheme provides a cause of action against plan fiduciaries for breach of their fiduciary duties, 29 U.S.C. § 1132(a)(2), and a cause of action to remedy plan or ERISA violations—including prohibited interested-party transactions—with “appropriate equitable relief,” id. § 1132(a)(3).” Depot Inc. v. Caring for Montanans, Inc., 915 F.3d 643, 653

(9th Cir. 2019). “There are two types of fiduciaries under ERISA,” a “named fiduciary” in the plan, 29 U.S.C. § 1102(a)(2), and a “functional fiduciary,” 29 U.S.C. § 1002(21)(A). Depot Inc., 915 F.3d at 653. A functional fiduciary is defined as someone who: “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;” “renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so;” or “has any discretionary authority or discretionary responsibility in the administration of such plan.” 29 U.S.C. § 1002(21)(A); see Santomenno v. Transamerica Life Ins. Co., 883 F.3d 833, 837 (9th Cir. 2018).

“To establish an action for equitable relief under ERISA [S]ection 502(a)(3), 29 U.S.C. § 1132(a)(3), the defendant must be an ERISA fiduciary acting in its fiduciary capacity . . . and must ‘violate [] ERISA-imposed fiduciary obligations.’” Mathews v. Chevron Corp., 362 F.3d 1172, 1178 (9th Cir. 2004) (quoting Varity Corp. v. Howe, 516 U.S. 489, 498 (1996)). An ERISA plan may be sued as an entity in a civil action, 29 U.S.C. § 1132(d)(1). An ERISA plan, however, “cannot, as an entity, act as a fiduciary with respect to its own assets” and “cannot be sued for breach of fiduciary duty.” Acosta v. Pac. Enters., 950 F.2d 611, 618 (9th Cir. 1991); see also Berman v. Microchip Tech. Inc., No. 17-cv-01864-HSG, 2018 WL 732667, at \*6 (N.D. Cal. Feb. 6, 2018) (collecting cases). The Ninth Circuit has explained this “does not inexorably lead to the conclusion that a plan cannot be properly named in a suit alleging breach of fiduciary duty.” Acosta, 950 F.2d at 618. Instead, “to the extent that a plaintiff seeks to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan, the plan may be named as a defendant.” Id. (quoting 29 U.S.C. §§ 1132(a)(1)(B), 1132(d)) (internal quotation marks omitted). “[W]hile a plan may not be sued for breach of fiduciary duty under ERISA, it can be named in the lawsuit if the plaintiff also seeks to recover benefits, enforce rights, or clarify future rights under the plan.” Berman, 2018 WL 732667 at \*6.

Here, despite Plaintiff’s arguments to the contrary, she cannot state a claim that Defendant breached its fiduciary duties. See Acosta, 950 F.2d at 618. For example, Plaintiff relies on King v. Blue Cross & Blue Shield of Ill., 871 F.3d 730 (9th Cir. 2017) to no avail. In King, the district court, inter alia, granted summary judgment in favor of the defendants plan and plan administrator on the plaintiff’s breach of fiduciary duty claims. King, 871 F.3d at 744. The Ninth Circuit reversed because it concluded the plan’s summary of modifications did not comply with ERISA’s statutory and regulatory disclosure requirements. Id. at 745. King did not, however, overrule Acosta, nor did it expressly hold that a plaintiff can state a claim for breach of ERISA fiduciary duties against a defendant ERISA plan. Moreover, King is distinguishable factually because it did not involve a complaint alleging a single claim that named only an ERISA plan as a defendant.

Likewise, Plaintiff’s attempts to distinguish Acosta are futile. According to Plaintiff, Acosta should not apply here because it did not concern a claim brought pursuant to 29 U.S.C. § 1132(a)(3), but rather concerned claims for breach of fiduciary duties pursuant to 29 U.S.C. § 1109 and 29 U.S.C. § 1132(a)(2). Plaintiff contends the latter claims are limited necessarily because “the essence of such [] claim[s] is that third-party fiduciaries have done something to ‘harm’ the plan itself. In contrast, a fiduciary breach claim under section 1132(a)(3), such as this

one, arises from harm sustained by the plan participant as the result of actions taken by and on behalf of the ERISA plan.” (Opp’n at 9-10.) Plaintiff’s argument is not persuasive. Plaintiff’s single claim brought pursuant to 29 U.S.C. § 1132(a)(3) is premised on Defendant’s breach of its fiduciary duties and Plaintiff alleges injuries as a result of these alleged breaches. (See Compl.) As such, in order to state a claim that Defendant breached its fiduciary duties, Plaintiff must allege sufficient facts to show plausibly Defendant is an ERISA fiduciary. See Mathews v. Chevron Corp., 362 F.3d at 1178. For the reasons stated supra, she cannot. Even if she could, the Complaint contains no factual allegations to demonstrate Defendant is a “named fiduciary” or “functional fiduciary.” See Depot Inc., 915 F.3d at 653.

Finally, Plaintiff fails to state a claim pursuant to 29 U.S.C. § 1132(a)(3) for another reason. Section 1132(a)(3) allows an action: “(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.” 29 U.S.C. § 1132(a)(3). The Supreme Court has described § 1132(a)(3) as a “‘catchall’ provision[ ] [that] act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that [§ 1132] does not elsewhere adequately remedy.” Varity Corp. v. Howe, 516 U.S. at 512. “Courts have subsequently interpreted Varity to mean that equitable relief under § 1132(a)(3) is not available if § 1132(a)(1)(B) provides an adequate remedy.” Moyle v. Liberty Mut. Ret. Ben. Plan, 823 F.3d 948, 959 (9th Cir. 2016), as amended on denial of reh’g and reh’g en banc, (Aug. 18, 2016). “The term ‘equitable relief,’ as it is used in § 1132(a)(3)(B), is limited to forms of relief ‘that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages).’” Aetna Life Ins. Co. v. Bayona, 223 F.3d 1030, 1033 (9th Cir. 2000), as amended on denial of reh’g, (Nov. 3, 2000) (citing Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993)). “In determining whether an action for equitable relief is properly brought under ERISA, [the Ninth Circuit] look[s] to the ‘substance of the remedy sought . . . rather than the label placed on that remedy.’” Mathews v. Chevron Corp., 362 F.3d at 1185 (citation omitted).

Here, Plaintiff’s Complaint seeks an equitable remedy of surcharge. (See Compl. ¶ 13.) Although styled as seeking an equitable remedy, Plaintiff’s Complaint seeks compensatory damages because she seeks monetary relief for all losses she sustained as the result of Defendant’s alleged breach of its fiduciary duties. (See id. at ¶¶ 11-13.) Money damages are the classic form of legal, not equitable relief. See Mertens, 508 U.S. at 255 (“Although they dance around the word, what petitioners in fact seek is nothing other than compensatory damages—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of legal relief.”) As Plaintiff’s allegations do not seek equitable relief plausibly, Moss v. U.S. Secret Serv., 572 F.3d at 969, Plaintiff fails to state a claim under § 1132(a)(3). See Paulsen v. CNF Inc., 559 F.3d 1061, 1076 (9th Cir. 2009) (a party seeking relief under § 1132(a)(3) must claim equitable rather than legal relief).

## V. Conclusion

For the foregoing reasons, the Court GRANTS Defendant’s Motion to Dismiss the Complaint. The Court also grants Plaintiff leave to file a first amended complaint.

Plaintiff must file any amended complaint by no later than November 9, 2020.

**IT IS SO ORDERED.**