UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHIRLEY MORRISON,

Plaintiff,

Case No. 11-cv-11709

v.

CITIZENS REPUBLIC BANCORP., INC., et al.,

HONORABLE STEPHEN J. MURPHY, III

Defendants.
_____/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS (docket no. 19) **AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUR-REPLY** (docket no. 22).

Shirley Morrison filed her three-count amended complaint pursuant to §§ 409 and 502 of ERISA, 29 U.S.C. §§ 1109 and 1132. She seeks to represent a class of similarly situated plaintiffs against the sponsor and administrator of her 401K plan, Citizens Republic Bancorp, Inc. ("Citizens Republic"), and against other fiduciaries of the plan. Morrison alleges that Defendants breached their duties to her, the plan, and to other class members, in violation of ERISA §§ 404 and 405, by (1) failing to prudently and loyally manage the plan's assets; (2) failing to avoid or resolve conflicts of interest; and (3) failing to adequately monitor other fiduciaries. Defendants moved to dismiss the amended complaint pursuant to Civil Rule 12(b)(6), and the Court held a hearing on the motion. After careful consideration, and for the reasons that follow, the Court will deny in part and grant in part Defendants' motion.

BACKGROUND

Plaintiff was employed by Citizens Republic and held company shares as part of her

retirement package for a portion of the proposed class period. She contends that Defendants should have known that investment in company stock was imprudent based on company performance dating back to the 2006 merger of Citizens Banking Corporation with Republic Bancorp, Inc., which formed Defendant Citizens Republic Bankcorp, Inc. After the merger, Plaintiff claims that "Citizens Republic's financial condition steadily worsened and the value of its stock plummeted, due to non-performing assets acquired from Republic." Am. Compl. ¶ 112, ECF No. 15. By the end of 2008, Citizens Republic's loan loss provision reached $118.5 million, an increase of nearly 1,900% from the previous year, and its nonperforming assets increased by 75%. *Id.* at ¶ 140.

Plaintiff asserts that from 2007 to 2009, Citizens Republic's "provision for loan losses increased over 620% as its net losses grew to over a half billion dollars." *Id.* at ¶ 159 (emphasis omitted). Losses continued into the second quarter of 2010. *Id.* at ¶ 164. According to Plaintiff, from the start of the class period until the complaint was filed, Citizens Republic stock lost over 94% of its value. *Id.* at ¶¶ 64-66, 174. Based on this poor performance, Plaintiff alleges that Defendants knew or should have known that company stock was an imprudent plan investment. Consequently, by failing to protect the plan and its participants from foreseeable loss, Defendants breached their fiduciary duties under ERISA.

Defendants now move to dismiss Plaintiff's amended complaint pursuant to Rule 12(b)(6), arguing that the complaint fails to state a claim for relief under ERISA because (1) Plaintiff fails to allege that she would have been entitled to greater benefits but for Defendants' alleged breaches of fiduciary duties; (2) her allegations do not rebut the presumption of prudence articulated by the Sixth Circuit in *Kuper v. Iovenko*. 66 F.3d

1447,1458 (6th Cir. 1995); (3) she fails to state a claim for misrepresentation or omission; (4) she fails to allege causation because the participant controlled investment decisions; (5) she fails to allege Defendants took any action detrimental to the plan because of alleged conflicts of interest; and (6) she fails to allege any specific facts to support a failure-to-monitor claim.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) allows "a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). "To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Hunter v. Sec'y of the U.S. Army*, 565 F.3d 986, 992 (6th Cir. 2009) (citation omitted).

In assessing a motion brought pursuant to Rule 12(b)(6), a court must presume as true all well-pleaded factual allegations and draw all reasonable inferences from those allegations in favor of the non-moving party. *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008). Although a court must accept as true all factual allegations in the complaint, it need not accept as true any legal conclusion alleged therein, even if couched as a factual allegation. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* The complaint's factual allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

DISCUSSION

There are three components to a fiduciary's duties under ERISA. *Kuper v. Iovenko*, 66 F.3d 1447,1458 (6th Cir. 1995). The first component is the "duty of loyalty." *Id.* This requires the fiduciary to make all decisions regarding an ERISA plan "with an eye single to the interests of the participants and beneficiaries." *Id.* (internal quotation omitted). The second component is the "prudent man" obligation. *Id.* This imposes "an unwavering duty to act both as a prudent person would act in a similar situation and with single-minded devotion to those same plan participants and beneficiaries." *Id.* (internal quotation omitted). Finally, the third component requires the ERISA fiduciary to "act for the exclusive purpose of providing benefits to plan beneficiaries." *Id.* (internal quotation omitted). Plaintiff here has alleged that Defendants failed to fulfill each of these three requirements.

I. Causation

Defendants seek to have the Court dismiss Plaintiff's amended complaint because she does not allege specific facts showing she was a plan participant who invested in Citizens Republic's stock during the class period and was adversely affected by the breaches of fiduciary duty alleged. But Plaintiff does allege that she was a participant in the plan during the class period and that her retirement account in the plan during the class period included Citizens Republic Stock. Am. Compl. ¶ 2. She further alleges that if Defendants had properly discharged their fiduciary duties, the plan and its participants "would have avoided a substantial portion of the losses that they suffered through the Plan's continued investment in Company stock." *Id.* at ¶ 225. Plaintiff sufficiently alleges that Defendants' actions caused harm to the plan and, consequently, to her as a participant.

Additionally, Defendants assert that Plaintiff cannot show causation because plan participants controlled their own investment decisions. Defendants rely on ERISA 404(c), the "safe harbor" provision which provides that a plan trustee is not liable for any loss which results from a participant's exercise of control over investment decisions. *See* 29 U.S.C. §1104(c). But the Sixth Circuit recently addressed this issue in *Pfeil v. State Street Bank & Trust Co.*, and held that "[s]ection 404(c) is an affirmative defense that is not appropriate for consideration on a motion to dismiss when . . . plaintiffs did not raise it in the complaint." 671 F.3d 585, 598 (6th Cir. 2012). Even if this defense were appropriate to consider now, "section 404(c) does not provide a defense to the selection of the menu of investment options that the plan will offer." *Id.* at 601. Accordingly, Defendants' motion to dismiss on this ground will be denied.

II. The *Kuper* Presumption of Prudence

Next, Defendants argue for dismissal based on the Plaintiff's failure to overcome the *Kuper* presumption. In *Kuper*, the Court held that a proper balance between the purpose of ERISA and the nature of an employee stock ownership plan ("ESOP") requires a court to begin its review presuming that an ESOP fiduciary's decision to remain invested in employer securities was reasonable. *Kuper,* 66 F.3d at 1459. A plaintiff can rebut this presumption of reasonableness by showing that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Id.* This issue was also addressed by the Sixth Circuit in the recent *Pfeil* decision. The Court held that the *Kuper* presumption, "is not an additional pleading requirement and thus does not apply at the motion to dismiss stage." *Pfeil,* 671 F.3d at 592. Defendants' motion to dismiss on this ground will, therefore, be denied.

III. Misrepresentation and Omission

Next, Defendants seek to dismiss Plaintiff's claims for misrepresentation because she fails to allege that any specific misrepresentation occurred. Plaintiff does not allege misrepresentation as its own count in the amended complaint, but alleges misrepresentation and omission in the context of count one's breach of fiduciary duty claim.[1] Plaintiff alleges that Defendants breached their duties of loyalty and prudence "by failing to provide accurate information regarding the Company's true financial condition and the Company's concealment of same and, generally, by conveying inaccurate information regarding the Company's future outlook." Am. Compl. ¶ 203.

To establish a claim for breach of fiduciary duty by misrepresentation, Plaintiff must show that (1) Defendant was acting as a fiduciary when the alleged misrepresentation was made, (2) the misrepresentation was material, and (3) Plaintiff relied on the misrepresentation to her detriment. *See James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 449 (6th Cir. 2002). It is unclear from the amended complaint what information Plaintiff believes was misrepresented or withheld. Her allegations of misrepresentation are conclusory and do not satisfy the pleading requirements set forth in *Twombly*. *See Twombly*, 550 U.S. at 555. To the extent Plaintiff seeks to assert a breach of fiduciary duty claim based on misrepresentation, the claim will be dismissed.

IV. Conflict of Interests

[1] The length and structure of Plaintiff's amended complaint make it complicated and partly incoherent. It contains 230 paragraphs. Count one begins at paragraph 196. Each of the three counts incorporates all the previous paragraphs of the complaint. And, because the allegations regarding misrepresentation could be construed as a separate claim, the Court will address it as such.

Next, Defendants seek to dismiss Plaintiff's claim for breach of fiduciary duty based on the Director Defendants' failure to avoid conflicts of interest. Plaintiff alleges that the Director Defendants breached their duty to avoid conflicts of interest by "failing to timely engage independent fiduciaries who could make independent judgments concerning the plan's investments in the Company's own securities and by otherwise placing their own and/or the Company's interests above the interests of the participants with respect to the plan's investment in the Company's securities." Am. Compl. ¶ 210. The ERISA duty of loyalty requires fiduciaries to make all decisions regarding the plan "with an eye single to the interests of the participants and beneficiaries." *Kuper*, 66 F.3d at 1458. A fiduciary breaches this duty by engaging in fiduciary activity while harboring a conflict of interest.

Plaintiff claims that a portion of the directors' and certain officers' compensation was paid in the form of stock option awards and that these payments gave Defendants an incentive to keep the plan's assets invested in Citizens Republic stock. Am. Compl. ¶¶ 184-85. Defendants contend that this is not actually a conflict of interest, and cite *In re Huntington Bancshares Inc.*, for the proposition that rather than creating a conflict, "compensation in the form of company stock aligns the interests of plan fiduciaries with those of plan participants." 620 F.Supp.2d 842, 849, n.6. (S.D. Ohio, 2009). It is not clear at this point whether Defendants actually had a conflict of interest. But at least some courts have held that the allegation that a defendant had significant investment in company stock and that the defendant's pay was tied to the stock's performance is enough to state a conflict-of-interest claim. *See In re Morgan Stanley*, 696 F.Supp.2d 345, 365-66 (S.D.N.Y., 2009); *see also Hill v. BellSouth Corp.*, 313 F.Supp.2d 1361, 1369-70 (N.D. Ga. 2004). Plaintiff has therefore sufficiently alleged that a conflict existed. The question of whether

or not Defendants were actually conflicted is an issue that will be addressed by discovery, and presumably resolved on summary judgment motions or at trial.

V. Failure to Monitor

Finally, Defendants seek to dismiss Plaintiff's claim for breach of fiduciary duty based on a failure to monitor co-fiduciaries because Plaintiff fails to allege any specific facts to support her claim. Plaintiff alleges that the Defendants "knew or should have known that the fiduciaries they were responsible for monitoring were . . . continuing to invest the assets of the [p]lan in Citizens Republic common stock when it was no longer prudent to do so," and that "[d]espite this knowledge" they did not take any action to protect the plan and its participants. Am. Compl. ¶ 219. Plan administrators have a duty to monitor the performance of other fiduciaries under ERISA § 404 and this includes providing necessary information and removing fiduciaries who are not doing their job. *See In re Morgan Stanley*, 696 F. Supp.2d at 366. Plaintiff's allegation on this point is enough to survive the present motion to dismiss. *See In re CMS Energy ERISA Litigation*, 312 F. Supp.2d 898, 916 (E.D. Mich. 2004) (finding that Plaintiffs stated a claim for breach of the duty to monitor by alleging "Defendants knew or should have known" that other fiduciaries were allowing the plan to continue offering company stock as an investment option when it was no longer prudent to do so, but "failed to take action to protect the participants from the consequences of the other fiduciaries' failures.").

CONCLUSION

Plaintiff has failed to state a claim for breach of fiduciary duty based on misrepresentation and the claim will be dismissed. As to Plaintiff's remaining claims,

Defendants' motion will be denied.

WHEREFORE it is hereby **ORDERED** that Defendants' motion to dismiss (docket no. 19) is **DENIED** in part and **GRANTED** in part consistent with the terms of this Order.

It is **FURTHER ORDERED** that Plaintiff's motion for leave to file a sur-reply in opposition to Defendants' motion to dismiss (docket no. 22) is **DENIED** as moot.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: August 20, 2012

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on August 20, 2012, by electronic and/or ordinary mail.

Carol Cohron
Case Manager