UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 20-11234-RGS

NEW ENGLAND BIOLABS, INC.

v.

RALPH T. MILLER

RALPH T. MILLER

v.

COMMITTEE OF NEW ENGLAND BIOLABS, INC. EMPLOYEES' STOCK OWNERSHIP PLAN; PERSONAL REPRESENTATIVE OF DONALD COMB; JAMES V. ELLARD; RICHARD IRELAND; and BRIAN TINGER

MEMORANDUM AND ORDER ON MOTIONS TO DISMISS

May 26, 2021

STEARNS, D.J.

New England Biolabs, Inc. (NEB) sued Ralph T. Miller to recoup an alleged overpayment of $164,580.17 it made in the final cash distribution liquidating Miller's accounts in the NEB Employees' Stock Ownership Plan & Trust (ESOP). On February 16, 2021, Miller filed counterclaims against NEB, asserting that: (1) NEB engaged in transactions prohibited by the

Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, when it failed to ensure Miller received no less than fair market value for his stock (Count I);[1] (2) the 2019 Amendment altering the right of former employees to remain in the ESOP is invalid (Count III); (3) NEB violated ERISA disclosure requirements by failing to provide any updated Summary Plan Description (SPD) between 2003 and 2019 (Count IV); (4) NEB failed to disclose accurate information to Miller regarding his right to remain in the ESOP as a retiree over age 65 (Count VI); (5) NEB failed to monitor its employees and the individuals maintaining the ESOP (Count VII); and (6) NEB unlawfully retaliated against Miller for making an inquiry with the United States Department of Labor (Count VIII).[2]

Miller also filed a Third-Party Complaint against the Committee of New England Biolabs, Inc. Employees' Stock Ownership Plan (the Committee), the Personal Representative of Donald Comb, James V. Ellard, Richard Ireland, and Brian Tinger (collectively, Third-Party Defendants or TPDs) on March 25, 2021. The Third-Party Complaint raises the following

[1] Count II of the Counterclaim asserted a claim against a third-party defendant and was previously stricken by this court.

[2] Miller purports to bring his claims on behalf of himself and all others similarly situated. The court does not address whether class certification is appropriate on the surviving claims because the issue is premature at this stage of the litigation.

claims: (1) Comb, Ellard, and Ireland engaged in transactions prohibited by ERISA when they failed to ensure that Miller received no less than fair market value for his stock (Count I); (2) Comb, Ellard, Ireland, and the Committee breached fiduciary duties to Miller by using a "stale" valuation to calculate the value of his stock and cash accounts, Third-Party Compl. ¶ 90 (Count II); (3) the 2019 Amendment altering the right of former employees to remain in the ESOP is invalid (Count III); (4) the Committee breached its fiduciary duty to Miller by failing to timely liquidate his accounts in accordance with the terms of the Plan (Count IV); (5) Tinger failed to disclose accurate information to Miller regarding his right to remain in the ESOP as a retiree over age 65 (Count V); and (6) Ellard unlawfully retaliated against Miller for making the inquiry with the United States Department of Labor (Count VI).

NEB and Third-Party Defendants move to dismiss all claims pursuant to Fed. R. Civ. P. 12(b)(6). For the following reasons, the court will allow the motions in part and deny the motions in part.

BACKGROUND

The essential facts, drawn from the Counterclaim (Dkt # 59), the Third-Party Complaint (Dkt # 73), and any documents incorporated by reference in these pleadings, as viewed in the light most favorable to Miller, are as follows.

In January of 2017, Miller was working as a stocking clerk for NEB. He ran into Tinger, the Administrator of NEB's ESOP, in an office hallway and had a "face-to-face conversation" with him about a retiree's ability to remain in the ESOP after retirement. Countercl. ¶ 39; Third-Party Compl. ¶ 42. During this conversation, Tinger "advised" Miller that "he could retain his shares after he retired." Countercl. ¶ 41; Third-Party Compl. ¶ 44.

Miller retired from NEB nine months later. At the time, the 2013 version of the Employees' Stock Ownership Plan & Trust document (the Plan) (Dkt # 53-1) controlled. Under the terms of this document, upon retirement, a retiree was eligible to receive a cash distribution from his or her ESOP accounts (a Dollar Account, which was invested in mutual funds, and an Employer Stock Account, which held shares of company stock). To calculate the cash value of a retiree's Employer Stock Account, NEB would use "the valuation as of the last day of the Plan Year preceding the date of the Participant's termination of employment." Plan § 8.3(a)(i); *see also id.* § 2.15 ("Valuation Date means, for purposes of valuing Employer Stock, the last day of the entity's fiscal year applicable to such stock."). To calculate the value of a retiree's Dollar Account, NEB would use "the most recent practicable

Valuation Date preceding the date of payment," *id.* § 8.3(a)(ii), which for Dollar Accounts would be "the last business day of each month in the Plan Year," *id.* § 2.15. A participant could opt to defer his or her retirement distribution to a later date by filing a request form with the Committee. A retiree could not, however, defer his distribution past age 65.

Although the Plan came into effect in 2013, the most recent SPD dated back to 2003. Like the Plan, the 2003 SPD specified that a retiree could not defer his distribution past age 65 and that stock shares would be valued according to the "[V]aluation [D]ate (the last day the Plan year) preceding your termination." Ex. A to Opp'n (the 2003 SPD) (Dkt # 81-2) at 6. It did not, however, identify how Dollar Account values would be determined.

When Miller retired in 2017, he was 67 years old, *i.e.*, over the age of 65. Although the Plan required NEB to make a distribution to Miller, NEB failed to liquidate his accounts, and Miller remained a participant in the ESOP through the fall of 2019.

On August 1, 2019, NEB amended the ESOP to limit the ability of former employees to remain in the ESOP. Twelve days later, Miller reported the amendment to the United States Department of Labor Employee Benefits Security Administration. An attorney from the Employee Benefits Security Administration spoke with Tinger on August 30, 2019. During the call, Tinger "represented . . . 'that participants are not required to take a distribution'" and that the change was intended to recirculate shares of company stock to new employees. Countercl. ¶ 63; Third-Party Compl. ¶ 66.

Ellard called Miller in the wake of Tinger's interview and "threatened to take away two years of contribution out of his ESOP" for reporting the amendment to the government. Countercl. ¶ 65; Third-Party Compl. ¶ 68. Ellard also stated that "NEB should have cashed-out . . . Miller's stock when he turned 65." Countercl. ¶ 65; Third-Party Compl. ¶ 68. Miller informed the Employee Benefits Security Administration of these threats.

On September 9, 2019, Miller submitted forms to cash out his shares of stock in NEB. At the end of the month, NEB distributed $783,823.39 into Miller's individual retirement account (IRA). In calculating the value of Miller's stock, NEB used a valuation dated to September 30, 2018. If NEB had used the September 30, 2019 valuation, however, Miller would have received to at least $183,815.62 more.

In January of 2020, Tinger "demanded" that Miller refund an alleged overpayment of $164,580.17 in the September 30, 2019 distribution to Miller's IRA. Countercl. ¶ 69; Third-Party Compl. ¶ 72. When Miller refused to pay NEB the requested amount, NEB filed suit in the federal district court. Miller filed several counterclaims and third-party claims against NEB and its employees. NEB and Third-Party Defendants moved to dismiss these counterclaims and third-party claims on April 16, 2021.

DISCUSSION

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Two basic principles guide the court's analysis. "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679. A claim is facially plausible if its factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678.

I. Standing

"To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief."[3] *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020), citing

[3] Because standing is the foundation of the court's jurisdiction over the

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-561 (1992). NEB and Third-Party Defendants argue that Miller has not met these elements with respect to Counts I and III of the Counterclaim and Counts I, II, and III of the Third-Party Complaint, which are predicated on the use of the September 30, 2018 valuation and the enactment of the 2019 Amendment to the Plan. They contend that neither the use of this valuation nor the implementation of the 2019 Amendment "had [any] impact whatsoever on Miller or any rights he had under the Plan." Joint Mem. in Supp. of Mot. to Dismiss Countercl. & Mot. to Dismiss Third-Party Compl. (NEB-TPD Joint Mem.) (Dkt # 80) at 6. The court agrees.

Addressing the fair market value claims first, the court looks to Miller's entitlement to benefits under the Plan. By its plain terms, the Plan rendered Miller ineligible to defer his distribution past 2017 because he was over age 65. He thus was (and is) only entitled to receive fair market value for his accounts as of his Plan-defined retirement date (adjusted, perhaps, for interest). Under the Plan, fair market value of the Employer Stock Account is measured by "the valuation as of the last day of the Plan Year preceding

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subject matter asserted, a dismissal for want of standing is the equivalent of a dismissal for lack of jurisdiction and, unlike a judgment on the merits, operates without prejudice. *See Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 728 (1st Cir. 2016).

the date of the Participant's termination of employment," while fair market value of the Dollar Account is measured by "the most recent practicable Valuation Date preceding the date of payment."[4] Plan. § 8.3(a). Miller does not allege that he did not receive these benefits. He accordingly cannot show that use of the September 30, 2018 valuation caused any viable injury to him. *See In re Bos. Sci. Corp. ERISA Litig.*, 254 F.R.D. 24, 31 (D. Mass. 2008) ("Plan participants who benefit from a fiduciary's breach of duty suffer no

[4] To the extent Miller suggests that the Plan provided for fair market value to be measured by some other valuation (*e.g.*, a valuation dated to September 30, 2019 for his Employer Stock Account and a daily valuation for his Dollar Account), the court does not agree. The Plan expressly states that, "[i]f the Participant (or Beneficiary) will receive distribution of his Employer Stock Account in cash" upon retirement, as Miller was required to do, "the amount *will be* based upon the valuation as of the last day of the Plan Year preceding the date of the" retirement. Plan § 8.3(a)(i) (emphasis added); *see also id.* § 2.15. This language does not tolerate any ambiguity about which valuation to use when a retiree ineligible for deferral leaves his or her employment. With respect to the Dollar Account, the Plan provides for use of the most recent valuation unless the retiree elects to instead receive "payment of his or her Dollar Account as soon as practicable following the valuation date of the Dollar Account following termination of employment," *see id.* § 8.3(a)(ii), which Miller does not allege doing. The allegedly contrary provision cited by Miller – § 6.6 – is wholly inapplicable where, as here, the company has not invested a participant's Dollar Account in "shares and fractional shares" of a mutual fund.

To the extent Miller contends that NEB and Third-Party Defendants should have ignored the express terms of the Plan and used a different valuation to assess fair market value, case law is clear that fiduciaries have a duty to "ensur[e] that monies owed to beneficiaries are disbursed *in accordance with the terms of the plan*." *Merrimon v. Unum Life Ins. Co. of Am.*, 758 F.3d 46, 59 (1st Cir. 2014) (emphasis added).

injury and have no constitutional standing."); *cf. Thole*, 140 S. Ct. at 1619 (finding that, in a defined-benefit plan context, plaintiffs lacked a concrete stake in the suit where they "have received all of their monthly benefit payments so far, and the outcome of this suit would not affect their future benefit payments"). *But cf. Vartanian v. Monsanto Co.*, 14 F.3d 697, 703 (1st Cir. 1994) (finding that plaintiff had standing even though he had already received his benefits under Monsanto's existing plan where he retired in reliance on repeated false misrepresentations that the company had no imminent plans to enlarge any retirement initiatives and thus fell within the "zone of interests" that ERISA's fiduciary provisions are designed to protect). The superseding Plan made no changes to the structure of his retirement package.

Turning to passage of the 2019 Amendment, while it is true that NEB effectively allowed Miller to remain in the ESOP for an additional two years despite the prohibition on deferrals past age 65, Miller had no actual right to remain a participant under the terms of the Plan.[5] That being the case, the portion of the 2019 Amendment limiting the right of former employees to

[5] Tinger's alleged assurances during the hallway conversation that Miller could remain in the ESOP could not have given him any such right "because ERISA plans cannot be modified orally." *Guerra-Delgado v. Popular, Inc.*, 774 F.3d 776, 780 (1st Cir. 2014).

remain in the ESOP did not affect him. The court accordingly allows the motion to dismiss for lack of standing as to Counts I and III of the Counterclaim and Counts I, II, and III of the Third-Party Complaint.

II. Failure to State a Claim

a. Disclosure of Plan Information

ERISA §§ 102 and 104, 29 U.S.C. §§ 1022 and 1024, require a plan administrator to furnish participants with current versions of the SPD after plan modifications or in certain other circumstances. Count IV of the Counterclaim alleges that NEB failed to provide the requisite updated SPDs to participants in violation of these provisions for sixteen years. NEB moves to dismiss this claim as insufficiently pled. The court will allow the motion.

Although Miller easily establishes violations of §§ 102 and 104, these provisions are only enforceable through ERISA § 502, 29 U.S.C. § 1132(a). Subsection (a) of § 502 broadly allows a participant to bring an action (1) to enforce subsection (c), which creates a host of statutory penalties for violations of certain notice provisions, § 502(a)(1)(a); (2) "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," § 502(a)(1)(b); (3) "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan," § 502(a)(3); or (4) "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," *id.*

The first legal basis is unavailable to Miller because subsection (c) does not create statutory penalties for the failure to supply an updated SPD except where a participant has made "a request for" that information. § 502(c)(1). Miller has not alleged that he made any such request. *See Laird v. Aetna Life Ins. Co.*, 263 F. Supp. 3d 1231, 1238 (M.D. Ala. 2017) (dismissing a claim for statutory penalties premised on the failure to provide an updated SPD because "Section 1132(c)(1)(B) unambiguously requires a 'request for any information' for the statutory penalty to be appropriate," and "Laird does not claim—either in the amended complaint or in her response brief—that she or Mr. Laird ever made a request for information"). The second legal basis fails because Miller's disclosure claim does not seek to "enforc[e]" any term of the Plan. *CIGNA Corp. v. Amara*, 563 U.S. 421, 436 (2011) (emphasis removed). And the third is not viable because NEB has already issued a current SPD reflecting the 2019 Amendment, and Miller does not challenge the accuracy of any aspect of that document. Thus, there is nothing for the court to enjoin. *Cf. Foster v. Adams & Assocs., Inc.*, 2020 WL 3639648, at *10 (N.D. Cal. July 6, 2020) (declining to enter summary judgment in an action seeking issuance of a current SPD after defendants provided an updated SPD where the parties disputed whether the new version "correctly identifie[d] the Plan Administrator"). Equity therefore seems to provide Miller the only possible basis for relief.

Miller, however, has not shown that his requested form of equitable relief (contract reformation[6]) will redress the disclosure violations or otherwise serve to enforce the requirements of §§ 102 and 104. Even if the court were to reform the Plan to the extent the 2003 SPD "provides information contrary to the terms of the Plan, as amended," Countercl. ¶ 113, the operative terms of the Plan would remain the same. The 2003 SPD indisputably gave notice to Miller and other participants that retirees over age 65 were required to take a distribution upon their retirement and that the stock account distribution would be based on the most recent annual valuation prior to the retirement date. The court accordingly would have no basis to reform these provisions in the Plan. As for the Dollar Account distribution, the 2003 SPD admittedly did not address the valuation mechanism for a participant's Dollar Account. But Miller only seeks

[6] To the extent Miller seeks any other form of equitable relief, *see Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (defining "equitable relief" in the context of § 502 as "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)"); *see also Amara*, 563 U.S. at 440 (citing *Mertens* for this proposition), he has not adequately pled it. Surcharge, for example, as *Amara* makes clear, requires a showing of actual harm.

reformation to the extent that there is a conflict between the 2003 SPD and the Plan, and there can be no conflict between provisions where there is a complete failure to inform. Thus, the court again would have no basis to change the valuation terms set out in the Plan. Reformation, in other words, would not redress any of the alleged statutory violations. As such, the court will dismiss the claim for equitable relief.

b. Breach of Fiduciary Duty

i. The Committee

Count IV of the Third-Party Complaint alleges that the Committee breached its fiduciary duty to Miller by failing to make a distribution when he retired in 2017 (or, "if the Committee was somehow prevented from distributing asserts to Miller or any other Participant within the time required by the terms of the Plan," failing to liquidate his account and invest those assets, Third-Party Compl. ¶ 110). The Committee moves for dismissal on the grounds that its failure to distribute the assets was an administrative error and not a fiduciary breach. The court, however, must view all facts in Miller's favor at this juncture, and Miller pleads something more than mere administrative error – namely, an intentional choice not to cash him out in violation of the Plan terms based on his conversation with Tinger.

The Committee alternatively argues that Miller suffered no "loss" from the failure to liquidate his accounts in 2017 because his assets remained in the ESOP. *See* NEB-TPD Joint Mem. at 14. But the Third-Party Complaint alleges that Miller (or the Committee acting on his behalf) could have invested the liquidated assets from his stock account during the interim between the date he retired and the date he was cashed out, which Miller claims would have enhanced his eventual payout. For present purposes, this allegation is sufficient to plausibly plead loss.[7] The court accordingly declines to dismiss the claim.

ii. NEB and Tinger

Count VI of the Counterclaim and Count V of the Third-Party Complaint allege that NEB and Tinger breached a fiduciary duty to Miller by providing him with inaccurate information regarding his right to remain in the ESOP after retirement. NEB and Tinger move to dismiss on three grounds: (1) that Tinger was not a fiduciary; (2) that Tinger's statements did not constitute a breach; and (3) that Miller has failed to plead harm.

[7] It may be true, as NEB and Third-Party Defendants suggest, that NEB and Third-Party Defendants have adequately accounted for market rate investment returns in crediting Miller with $55,275.00 off their requested refund. The court needs the benefit of further discovery regarding reasonable market rate returns, however, before it makes an informed ruling on the issue.

The court declines to dismiss on any of these bases. As to the first ground, the Counterclaim and Third-Party Complaint expressly allege that Tinger was the Plan Administrator and that, in this capacity, Tinger would communicate with participants about the ESOP and answer any questions they had about its operation. The court can reasonably infer some measure of discretion from these duties – presumably, answering questions about the operation of the ESOP would entail providing participants with information regarding their options under the ESOP – and a Plan Administrator that exercises discretion over the administration of a plan is a fiduciary. *See* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); *Livick v. The Gillette Co.*, 524 F.3d 24, 29 (1st Cir. 2008). NEB and Tinger may dispute the accuracy of this characterization of Tinger's role (and the extent of his discretion over plan administration), but the court must accept Miller's factual allegations as true for the purposes of this motion.

As to the second ground, the court cannot say currently that the provision of incorrect information regarding Miller's eligibility to remain in the ESOP was, as a matter of law, ministerial in nature. Tinger arguably was giving advice about Miller's future benefits when he advised Miller that he could remain in the ESOP after retirement. In *Livick*, in finding a human resources representative's actions calculating future benefits purely ministerial, the First Circuit distinguished cases "in which the employee was given misleading information while seeking advice about the security of his future benefits." 524 F.3d at 29. It would thus be inappropriate to dismiss based on the second ground, at least without further development of the facts.

In a related vein, the court declines to rule as a matter of law that NEB was not liable for any breach of fiduciary duties committed by Tinger. Miller plausibly alleges that NEB designated Tinger to carry out the fiduciary responsibilities of a plan manager, and "a named fiduciary can be liable for the acts and omissions of a person designated to carry out fiduciary responsibilities" under certain circumstances. *Id.* at 30.

Finally, as to the third ground, Miller alleges in the Counterclaim and the Third-Party Complaint that he could have invested the liquidated assets during the interim between his retirement and his eventual payout to achieve a "market rate return[] on his funds." Countercl. ¶ 129; Third-Party Compl. ¶ 119. For the reasons discussed above, this allegation suffices to plausibly demonstrate loss.

c. Failure to Monitor

Miller's failure to monitor claim (Count VII of the Counterclaim) is derivative of his fiduciary duty claims against the Committee and Comb, Ellard, and Ireland (Counts II and IV of the Third-Party Complaint). As only the fiduciary duty claim against the Committee withstands the motions to dismiss, the failure to monitor claim accordingly is limited to the failure to ensure that the Committee liquidated Miller's accounts in 2017 or to take corrective action when it did not. The court will allow this portion of the claim to go forward. Miller pleads that it took two years for the Committee to liquidate his accounts as required by Plan, and the court can reasonably infer from this allegation that NEB was not adequately monitoring the Committee to ensure compliance with the terms of the Plan.

d. Retaliation

Count VIII of the Counterclaim and Count VI of the Third-Party Complaint assert violations of ERISA § 510, 29 U.S.C. § 1140, as brought through § 502. NEB and Ellard move to dismiss these claims for lack of remedy and/or failure to allege an adverse action.

The court cannot say at this early juncture that there is no equitable relief available to Miller for the conduct alleged in his retaliation claims. Although Miller received all funds due to him under the terms of the Plan, he alleges that NEB and Ellard only initiated this action to recover the alleged overpayment as a means of punishing Miller for reporting the 2019 Amendment to the Department of Labor. Assuming Miller proves these allegations true, circumstances may warrant imposition of an injunction preventing NEB and Ellard from any further attempts to seek the recovery of the allegedly overpaid funds.

The court also cannot say that Miller has failed to allege an adverse action (assuming *arguendo* that post-employment threats are actionable under § 510,[8] *see Pawlowski v. Kitchen Expressions Inc.*, 2017 WL 10259773, at *4 (E.D.N.Y. Dec. 15, 2017)). Again, although Miller received all the funds that were due to him under the terms of the Plan, the attempted recovery of the overpayment *could* be viewed as an adverse action if NEB and Miller only undertook this course of action to spite Miller for tattling to the Department of Labor.[9] The court accordingly denies the motion to dismiss the retaliation claims.

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[8] Because NEB and Ellard only cursorily brief this issue, *see* NEB-TPD Joint Mem. at 19 ("Obviously, neither NEB nor Ellard could have taken any adverse employment action against him because he ceased to be a NEB employee in 2017, long before Miller's benefit dispute arose."), the court does not address it in depth and instead assumes for the sake of argument that post-employment acts of retaliation are viable under § 510.

[9] Whether Miller can prove this allegation true in the face of an argument that NEB and Ellard's fiduciary duties to other plan participants (and the ESOP generally) compelled them to attempt to recover an overpayment is a question for future resolution on a more developed record.

ORDER

For the foregoing reasons, defendants' motions to dismiss are ALLOWED IN PART and DENIED IN PART. The court dismisses Counts I, III, and IV of the Counterclaim and Counts I, II, and III of the Third-Party Complaint. Counts VI, VII, and VIII of the Counterclaim and Counts IV, V, and VI of the Third-Party Complaint survive the instant motions.

SO ORDERED.

/s/ Richard G. Stearns
UNITED STATES DISTRICT JUDGE