UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

STEPHANIE WOZNICKI,

Plaintiff,

v. Case No: 6:18-cv-2090-Orl-78GJK

RAYDON CORPORATION, DONALD K. ARIEL, DAVID P. DONOVAN, THE ESOP COMMITTEE OF THE RAYDON CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN, LUBBOCK NATIONAL BANK, DAVID P. DONOVAN 2012 TRUST, ARIEL FAMILY TRUST DATED DECEMBER 18, 2012, PAMELA W. ARIEL, VERNA L. DONOVAN 2012 TRUST, DAVID P. DONOVAN, JR., IRREVOCABLE TRUST DATED JULY 25, 2008, LORI L. WEISS IRREVOCABLE TRUST DATED JULY 25, 2008 and NIKI J. DUNCAN IRREVOCABLE TRUST DATED JULY 25, 2008,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court on Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Doc. 88) and Defendant Lubbock National Bank's Dispositive Motion to Dismiss (Doc. 89). For the reasons set forth herein, the Motions will be granted in part.

I. BACKGROUND

Defendant Raydon Corporation employed Plaintiff from January 2008 until November 2018. (Doc. 67, ¶ 6). Raydon Corporation is a private, closely-held corporation

specializing in military simulation training contracts. (*Id.* ¶¶ 20–21). At all times relevant, Raydon Corporation sponsored an Employee Stock Ownership Plan ("**ESOP**") pursuant to the Employee Retirement Income Security Act of 1974 ("**ERISA**"). (*Id.* ¶ 7). Defendants Donald K. Ariel and David P. Donovan are members of Raydon Corporation's Board of Directors, executive officers, and plan fiduciaries. (*Id.* ¶¶ 8–9). Plaintiff also alleges claims against Ariel and Donovan's trusts, spouses, and descendants that have interests in the ESOP transaction. (*Id.* ¶¶ 10–17). Collectively, the Court will refer to these Defendants as the "**Raydon Defendants**."

Raydon Corporation hired Defendant Lubbock National Bank ("**Lubbock**") as the Trustee of the ESOP in late August 2015. (*Id.* ¶ 46). Shortly thereafter, on September 30, 2015, Lubbock caused the ESOP to purchase 100 percent of Raydon Corporation's stock from the Raydon Defendants for $60,500,000.00 (the "**September 2015 ESOP Transaction**"). (*Id.* ¶ 47). As part of the transaction, Defendants Ariel and Donovan received an additional $5 million from Raydon Corporation in exchange for non-compete agreements. (*Id.* ¶ 63).

Over the year following the September 2015 ESOP Transaction, Raydon Corporation began laying off employees. (*Id.* ¶¶ 49, 51). As of December 31, 2017, Raydon Corporation reported that the fair market value of the stock held by the ESOP had decreased to $4,550,000.00. (*Id.* ¶ 55). Plaintiff alleges that neither Lubbock nor the Raydon Defendants have conducted an investigation into the fairness of the September 2015 ESOP Transaction in light of the drastic decline in value of the shares. (*Id.* ¶ 62). In the Amended Complaint (Doc. 67), Plaintiff alleges that both Lubbock and the Raydon

Defendants committed various breaches of their fiduciary duties under ERISA in connection with the September 2015 ESOP Transaction.

II. LEGAL STANDARD

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." In determining whether to dismiss under Rule 12(b)(6), a court accepts the factual allegations in the complaint as true and construes them in a light most favorable to the non-moving party. *See United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1269 (11th Cir. 2009). Nonetheless, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Furthermore, "[t]o 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.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

III. DISCUSSION

A. Shotgun Pleading

At the outset, Defendants argue that Counts I, II, III, and V should be dismissed as shotgun pleadings because they incorporate by reference nearly every factual allegation

in the Amended Complaint. "The failure to identify claims with sufficient clarity to enable the defendant to frame a responsive pleading constitutes a 'shotgun pleading.'" *Beckwith v. Bellsouth Telecomms. Inc.*, 146 F. App'x 368, 371 (11th Cir. 2005) (per curiam) (citing *Byrne v. Nezhat*, 261 F.3d 1075, 1029–30 (11th Cir. 2001)). The Eleventh Circuit has defined four types of shotgun pleadings. "The most common type—by a long shot—is a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint." *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1321 (11th Cir. 2015). The second most common type "is a complaint that . . . is guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action." *Id.* at 1322. "The third type of shotgun pleading is one that commits the sin of not separating into a different count each cause of action or claim for relief." *Id.* at 1322–23. "Fourth, and finally, there is the relatively rare sin of asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." *Id.* at 1323.

Plaintiff's Amended Complaint is not a shotgun pleading. The Amended Complaint incorporates only factual allegations in the various counts and does not adopt the allegations of all preceding counts. Moreover, it does not appear that the factual allegations incorporated lack any relevance or connection to the claims being alleged. While not perfectly pleaded, the Amended Complaint makes it clear what claims are being brought against what Defendants and the factual allegations supporting those claims. Therefore, Counts I, II, III, and V will not be dismissed as shotgun pleadings.

B. Count I

Lubbock also moves to dismiss Count I, which alleges that Defendants violated §§ 406(a)(1)(A) and (D) of ERISA, for failure to state a claim. Pursuant to § 406, a fiduciary is prohibited from causing the plan to engage in transactions between the plan and any party in interest, except when it is determined that "in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration." 29 U.S.C. §§ 1106(a)(1), 1108(b)(17)(A). Lubbock concedes that the September 2015 ESOP Transaction was between the plan and a party in interest but argues that Plaintiff has not pleaded sufficient facts to allege that Lubbock failed to act with the requisite care in determining the fair market value of the stock.

"[T]he statutory exemptions established by § 1108 are defenses which must be proven by the defendant." *Pledger v. Reliance Tr. Co.*, 240 F. Supp. 3d 1314, 1336 (N.D. Ga. 2017) (citation omitted); *see also Keach v. U.S. Tr. Co.*, 419 F.3d 626, 636 (7th Cir. 2005) ("In order to rely on the adequate consideration exemption, a trustee or fiduciary has the burden to establish that the ESOP paid no more than fair market value for the asset, and that the fair market value was determined in good faith by the fiduciary."); *Baggett v. Woodbury*, No. PCA 84-4268-RV, 1987 WL 383796, at *29 n.31 (N.D. Fla. Jan. 16, 1987) (noting that "the burden was on the defendant to demonstrate that a normally prohibited transaction is exempt under Section 1108 of ERISA"). It is well-settled law in this Circuit that a plaintiff is "not required to negate an affirmative defense in [her] complaint." *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (citation omitted). Thus, Plaintiff was only required to plead that the transaction falls within § 406's

prohibited transactions to state a claim at this stage in the proceedings. Count I will not be dismissed.

C. Count III

In Count III, Plaintiff alleges that Lubbock violated §§ 404(a)(1)(A) and 404(a)(1)(B) of ERISA by failing to conduct an appropriate investigation of the September 2015 ESOP Transaction and failing to remedy the alleged overpayment after the transaction. Lubbock argues that the pleadings fail to meet the standard set forth in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014). Plaintiff argues that *Dudenhoeffer* applies only to publicly-held companies, and therefore, does not apply in this case. This Court agrees.

In *Dudenhoeffer*, the Supreme Court held that fiduciaries are not entitled to a presumption of prudence, but can generally rely on the market value of publicly traded stock absent special circumstances. *Id.* at 425–27. This is because in a liquid market, the market price for stock factors in all publicly available information. *Id.*; *see also Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 679 (7th Cir. 2016) ("As we have just emphasized, however, the Court's holding was limited to publicly traded stock and relies on the integrity of the prices produced by liquid markets."). Additionally, the *Dudenhoeffer* Court imposed pleading requirements regarding non-public information to avoid fiduciaries running afoul of securities laws. *Dudenhoeffer*, 573 U.S. at 428–29.

However, similar concerns do not apply to closely-held corporations like the one at issue in this litigation. There is no liquid market for the stock of closely-held corporations, and the securities laws regarding inside information and corporate disclosure do not generally apply. Simply put, the concerns and rationales that led the Supreme Court to call for a heightened pleading standard in *Dudenhoeffer* are

inapplicable in the case of privately-held corporations. Accordingly, this Court holds that *Dudenhoeffer* is inapplicable to the claims at issue in this litigation, and Lubbock's arguments with respect to Count III fail.

D. Count IV

Count IV alleges claims against the Raydon Defendants and Lubbock arising out of non-compete agreements allegedly entered into between Ariel, Donovan, and Raydon Corporation during or contemporaneously with the September 2015 ESOP Transaction. Defendants argue that because the payments came from the company, and not the ESOP, Count IV fails to state a claim under ERISA. Pursuant to § 406(a)(1)(D) of ERISA, "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(D). Plaintiff also alleges that the Raydon Defendants violated § 406(b), which prohibits a fiduciary from "deal[ing] with the assets of the plan in his own interest or for his own account"; "in his individual or in any other capacity[,] act[ing] in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries"; or "receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(1)–(3).

The Amended Complaint alleges that Defendants Ariel and Donovan received $5 million "from Raydon" in exchange for the non-compete agreements. (Doc. 67, ¶ 63). Plaintiff alleges that the agreements were "part of the September 2015 ESOP

Transaction." (*Id.*). "On its face § 1106 applies only to transactions to which the plan itself is a party or in which the monies, property or fiscal assets of the plan are involved, and it has been construed accordingly." *Phillips v. Amoco Oil Co.*, 614 F. Supp. 694, 720 (N.D. Ala. 1985), *aff'd*, 799 F.2d 1464 (11th Cir. 1986). "Thus[,] either of the above-mentioned factors must be present in order for a court to find that the transaction in question is a prohibited one under § 1106." *McGarry v. E. Air Lines, Inc.*, No. 86-2497-Civ-Ryskamp, 1987 WL 13900, at *6 (S.D. Fla. July 6, 1987) (citing *Phillips*, 614 F. Supp. at 721). Plaintiff has not alleged that the ESOP was a party to the non-compete agreements transaction. To the contrary, Plaintiff alleges that Raydon Corporation was the party to the agreement. Additionally, Plaintiff has not alleged that the ESOP's monies, property, or fiscal assets were promised, used, or otherwise encumbered by the transaction. Accordingly, Plaintiff has not pleaded a claim with respect to Count IV and it will be dismissed.

E. Count V

The Raydon Defendants move to dismiss Count V on the basis that Plaintiff has failed to plead an alternative action as required by *Dudenhoeffer*. As set forth above, *Dudenhoeffer* does not apply to the facts of this case. Accordingly, this basis for dismissal is without merit.

Alternatively, the Raydon Defendants argue that Plaintiff failed to allege a breach of ERISA's duty to monitor with respect to the September 2015 ESOP Transaction. In the Amended Complaint, Plaintiff alleges that the Raydon Defendants either knew or should have known that Lubbock "engaged in a prohibited transaction and/or breached fiduciary duties in the September 2015 ESOP Transaction." (Doc. 67, ¶ 134). Plaintiff also alleges that the Raydon Defendants knew or should have known of a settlement between

Lubbock and the Department of Labor regarding its handling of ESOP transactions and should have investigated Lubbock's administration of the ESOP accordingly. (*Id.* ¶¶ 136–38).

To allege a breach of the duty to monitor, "plaintiffs must allege the Director Defendants had notice of possible misadventure by the Trustee Defendants or knowledge of conduct that would warrant removal." *Smith v. Williams*, 819 F. Supp. 2d 1264, 1282 (M.D. Fla. 2011) (quotation omitted). Plaintiff alleged that Lubbock violated various duties under ERISA and that the Raydon Defendants had notice of the alleged violations or the possibility that Lubbock violated its duties. Therefore, Plaintiff has alleged a claim against the Raydon Defendants in Count V.

F. Count VI

Count VI alleges a violation of § 410(a) of ERISA, which provides that, subject to limited exceptions, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a). The Raydon Defendants move to dismiss Count VI on the basis that the indemnification agreements entered into by Defendants Ariel and Donovan are not void and are enforceable as a matter of law.[1]

The indemnification provision at issue states as follows:

> The Corporation shall indemnify and hold harmless the Indemnified Person if considered to be an ERISA fiduciary . . . to the extent not prohibited under applicable law, from and against any losses, claims, costs, expenses,

[1] Lubbock moves to dismiss Count VI as a derivative claim. For the reasons set forth herein, Plaintiff pleaded claims against Lubbock and, therefore, Count VI is not moot. Lubbock did not argue any other basis for dismissal of this Count. Accordingly, Count VI will not be dismissed as against Lubbock.

> damages or liabilities (including actions or proceedings in respect thereto and including without limitation attorneys' fees and litigation expenses) (collectively, "Losses"), related to serving as a fiduciary of the Raydon Corporation Employee Stock Ownership Trust ("ESOT"), which was established pursuant to the Raydon Corporation Employee Stock Ownership Plan (the "Plan", which, together with the ESOT, forms the "ESOP"), including without limitation any legal proceedings, actions, suits, arbitrations and investigations, except to the extent such Losses are determined by a court of competent jurisdiction in a final judgment from which no appeal can be taken to have resulted directly and primarily from gross negligence, willful misconduct or a breach of fiduciary duty under Section 404(a) of [ERISA] on the part of such Indemnified Party.

(Doc. 88-1 at 5).[2]

Defendants argue that the carve-outs for breaches of fiduciary duty render the provisions in the directors' Indemnification Agreements valid and enforceable pursuant to Department of Labor regulation 29 C.F.R. § 2509.75-4. While provisions that do not relieve a fiduciary of its responsibilities under ERISA are not prohibited by § 410(a), "ERISA prohibits any agreement that relieves the fiduciary of responsibility or liability for violating ERISA." *McMaken ex rel. Chemonics Int'l, Inc. Employee Stock Ownership Plan v. GreatBanc Tr. Co.*, No. 17-cv-04983, 2019 WL 1468157, at *3 (N.D. Ill. Apr. 3, 2019). However, the above quoted provision excludes coverage only for violations of § 404(a) of ERISA but allows indemnification for § 406 prohibited transactions, which are alleged in this case. Because § 406 imposes liability on a fiduciary for violations and because § 410 prohibits provisions that "relieve a fiduciary from responsibility or liability for *any*

[2] Although not attached to the Amended Complaint, the Indemnification Agreements are central to Plaintiff's claims in Count VI, and neither party disputes the authenticity of the documents. Therefore, the Court may consider the attached documents in resolving Defendants' motion. *See Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) ("[T]he court may consider a document attached to a motion to dismiss without converting the motion into one for summary judgment if the attached document is (1) central to the plaintiff's claim and (2) undisputed.").

responsibility, obligation, or duty under" ERISA, the provision at least facially runs afoul of § 410. 29 U.S.C. § 1110(a) (emphasis added); *see also McMaken*, 2019 WL 1468157, at *3–4. Accordingly, Plaintiff has alleged a claim against the Raydon Defendants in Count VI.

G. Causation

Finally, Lubbock argues generally that Plaintiff has not alleged that any action or inaction by Lubbock caused Plaintiff or the ESOP to suffer a cognizable loss. At the outset, to the extent Plaintiff alleges violations of § 406, Lubbock has not pointed this Court to any authority stating that a causal connection is required. To the contrary, many courts have held that no such showing of causation is required. *See Perez v. Commodity Control Corp.*, No. 1:16-CV-20245-UU, 2017 WL 1293619, at *5 (S.D. Fla. Mar. 7, 2017) ("Transactions barred by ERISA Section 406(a) are *per se* prohibited 'regardless of whether any harm actually results from the transaction.'" (quoting *Donovan v. Walton*, 609 F. Supp. 1221, 1246 (S.D. Fla. 1985)). Accordingly, with respect to Plaintiff's § 406 claims, Lubbock's motion will be denied.

To prevail on an ERISA § 404 claim, the pleading party must allege, as relevant, that "defendants' conduct damaged the ERISA plan or the ERISA plan suffered a loss subsequent to the breach." *Wagner v. Stiefel Labs., Inc.*, No. 1:12-CV-3234-MHC, 2015 WL 4557686, at *23 (N.D. Ga. June 18, 2015); *see also Williams v. Cordis Corp.*, No. 91-0484-CIV-KEHOE, 1993 WL 373940, at *9 (S.D. Fla. May 13, 1993) ("There must be a causal connection between any alleged breach of fiduciary duty and the losses claimed."). Lubbock does not dispute that Plaintiff pleaded that the ESOP suffered a loss. Rather,

Lubbock argues that Plaintiff has not pleaded that any breaches on its part caused the loss. Plaintiff's allegations are sufficient to withstand a motion to dismiss.

Plaintiff alleges that Lubbock violated its § 404 fiduciary duties by failing to conduct a thorough and independent review of the September 2015 ESOP Transaction, resulting in a purchase price that did not reflect fair market value and caused the ESOP to take on excessive debt. (Doc. 67, ¶¶ 109–10). To support its allegation that Lubbock's review was not thorough and independent, Plaintiff alleges that Lubbock performed its review in less than six weeks and "rushed" the review to meet the September 30, 2015 deadline after it was hired just over a month prior on August 17, 2015. (*Id.* ¶¶ 30, 48). Plaintiff further alleges that in conducting its expedited review, Lubbock failed to investigate Raydon's loss of a major government contract despite knowledge that it had been cancelled prior to the September 2015 ESOP Transaction and effected the financial projections on which the September 2015 ESOP Transaction was based, used financial projections containing speculative revenue projections, and failed to seek information from persons without a financial interest in the September 2015 ESOP Transaction. (*Id.* ¶¶ 37, 40, 44). These allegations are adequate to draw a causal connection between the loss suffered by the ESOP and Lubbock's alleged breaches at the pleading stage.

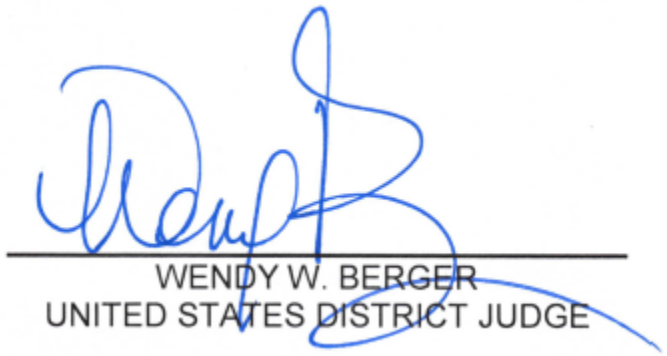
IV. CONCLUSION

For the reasons set forth herein, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Doc. 88) and Defendant Lubbock National Bank's Dispositive Motion to Dismiss (Doc. 89) are **GRANTED in part**.

2. Count IV is **DISMISSED without prejudice**. In all other respects the Motions are **DENIED**.

DONE AND ORDERED in Orlando, Florida on November 4, 2019.



Copies furnished to:

Counsel of Record