Foster et al v. Adams and Associates, Inc. et al

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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

CAROL FOSTER, et al.,

Plaintiffs, v. ADAMS AND ASSOCIATES, INC., et al.,

Defendants.

Case No.18-cv-02723-JSC

ORDER RE: PLAINTIFFS MOTION FOR CLASS CERTIFICATION Re: Dkt. No. 79

Plaintiffs Carol Foster and Theo Foreman bring a class action suit under the Employee et seq., on behalf of participants and beneficiaries of the Adams and Associates Employee Stock Ownership Plan

Daniel B. Norem, Joy Curry Norem, and The Daniel Norem Revocable Trust Dated January 9, ty to the Plaintiffs, participated in prohibited transactions, and failed to make required disclosures. Plaintiffs motion for class certification is now pending before the Court. 1

(Dkt. No. 79.) Defendants only opposition to Plaintiff Carol Foster is not an adequate class representative. (Dkt. No.

29, 2019, the Court GRANTS the motion for class certification as set forth below.

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1 All parties have consented to the jurisdiction of a magistrate judge. (Dkt. Nos. 6, 20, 44, 53, 54.)

BACKGROUND A. Factual Background

2 Plaintiffs are participants in the Adams and Associates ESOP from October 2012 or any time thereafter who vested under the Plan terms.

ch Defendants Roy A. Adams, Leslie G. Adams, and The Daniel Norem Revocable Trust dated January 9, 2002 Adams ESOP as well as alleged subsequent breaches by the Adams ESOP fiduciaries.

(Id. at ¶ 2.)

Plaintiffs allege that the transaction was not in the best interests of the ESOP participants, that it was implemented by a Trustee who was a felon and was later incarcerated for stealing from other ESOPs and caused the ESOP to pay in excess of fair market value. Id.) Adams and Associates and Roy A. Adams, Leslie G. Adams, and Daniel Norem failed to disclose that the ESOP Trustee, Alan Weissman, was a felon. (Id.) As a result of Plaintiffs and the Class have not received all of the hard-earned retirement benefits or the loyal and prudent management of the ESOP to which they are entitled. (Id.)

Plaintiff Carol Foster was employed as a Security Advisor by Adams and Associates from February 2015 through March 2018 at the Treasure Island Job Corps Center in San Francisco, California. (Id. at ¶ 6.) Plaintiff Theo Foreman is a current employee of Adams and Associates, and has worked at the Treasure Island Job Corps Center in San Francisco as a Center Shift Manager since June 2009. (Id. at ¶ 7.) By virtue of Adams and Associates they became participants in the Adams ESOP under ERISA § 3(7), 29

U.S.C. § 1002(7). (Id. at ¶¶ 6-7.) //

2 ECF-generated page numbers at the top of the documents.

B. Procedural Background Plaintiffs filed this action in May 2018 alleging that Defendants collectively committed multiple ERISA violations including (1) prohibited transactions by Roy Adams, Leslie Adams, Daniel Norem, the Norem Trust, and Weissman under 29 U.S.C. § 1106(a); (2) prohibited transactions by Roy Adams, Leslie Adams, Daniel Norem, and the Norem Trust under 29 U.S.C. §§ 1106(a)-(b); (3) breach of fiduciary duty by

Weissman under 29 U.S.C. §§ 1104(a)(1)(A)-(B); (4) breach of fiduciary duty by Roy Adams, Leslie Adams and Daniel Norem under 29 U.S.C. §§ 1104(a)(1)(A)-(B), (D); (5) failure to make required disclosures by Adams and Associates under 29 U.S.C. §§ 1022, 1024(b)(1), 1104(a)(1)(A)-(B); and (6) that Roy Adams, Leslie Adams and Daniel Norem created a prohibited indemnification agreement for Weissman under 29 U.S.C. § 1110(a). 3

(Dkt. Nos. 1 & 40.) Plaintiffs seek to other equitable relief. (Id. ¶ 1.) Plaintiffs also request a long list of additional remedies including: (1) declaratory relief regarding each of the claims; (2) injunctive relief; (3) orders requiring disclosures and pertinent information; (4) monetary damages relating to ESOP losses; (5) equitable relief, including accountings; (6) attorney fees and costs; and (7) any further relief the Court finds appropriate. (Id. at 25-27.)

The Court denied the motion to dismiss of Adams and Associates, Roy A. Adams, Leslie G. Adams, and Daniel B. Norem for failure to state a claim and as barred by the statute of limitations. (Dkt. No

61.) Defendants thereafter answered the complaint. (Dkt. No. 70.) The now pending motion for class certification followed. (Dkt. No. 79.)

DISCUSSION Plaintiffs seek certification of a class of all participants in the Adams and Associates ESOP from October 25, 2012 or any time thereafter, who vested under the terms of the ESOP, along with . The class definition excludes Defendants and their immediate family, any fiduciary of the ESOP, the officers and directors of Adams and Associates, Inc. or of

3 death, but Plaintiffs subsequently voluntarily dismissed all claims as to her. (Dkt. Nos. 36 & 45.) any entity in which a Defendant has a controlling interest, and legal representatives, successors, and assigns of any such excluded persons. I. Legal Standard

Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1124 (9th Cir. 2017). To succeed on their motion for class certification, Plaintiffs must satisfy the threshold requirements of Federal Rule of Civil Procedure 23(a) as well as the requirements for certification under one of the subsections of Rule 23(b). Mazza v. Am. Honda Motor Co., 666 F.3d 581, 588 (9th Cir. 2012). Rule 23(a) provides that a case is appropriate for certification as a class action if:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. red to prove that there are in fact sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, proof at least one of th Comcast v. Behrend, 569 U.S. 27, 133 S.Ct.

1426, 1432 (2013) (internal quotation marks, citations, and emphasis omitted).

Plaintiffs contend that the putative class satisfies Rule 23(b)(1), Rule 23(b)(2) and Rule 23(b)(3). Cer against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their Certification under 23(b)(1) is typical for ERISA class actions. See Harris v. Amgen, Inc., 2016 WL 7626161, at *4 (C.D. Cal. Nov. 29, 2016); Kanawi v. Bechtel Corp., 254 F.R.D. 102, 111 (N.D. Cal. 2008).

Certification under Rule 23(b)(2) For certification under Rule

Wal Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360, 131

S.Ct. 2541, 180 L.Ed.2d 374 (2011).

Finally, certification under Rule 23(b)(3) requires: (i) that the questions of law or fact common to class members predominate over any questions affecting only individual members; and (ii) that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997). The Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1172 (9th Cir. 2010) (quoting Amchem, 521 U.S. at 623 24). II. Analysis

A. Plaintiffs Have Satisfied Rule 23(a) The C members is impracticable; (2) there are questions of law or fact common to the class; (3) the

claims or defenses of the representative parties are typical of the claims or defenses of the class;

R. Civ. P. 23(A). Defendants do not dispute that the numerosity, commonality, and typicality requirements are satisfied.

i. Numerosity

enience of joining all members of Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913 14 (9th Cir. 1964) general matter, a class greater than forty often satisfies the requirement, while one less than twenty- Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 526 (N.D. Cal. Nov. 27, 2012). Defendants participants. (Dkt. No. 79-13 at 4.) The numerosity requirement is thus easily satisfied.

ii. Commonality claims depend on a common contention ssue that is central to the validity of Mazza, 666 F.3d at 588 89 (quoting Dukes plaintiff must demonstrate the capacity of classwide proceedings to generate common answers to

common questions of law Id. (internal quotation marks and citation omitted). To that end, the commonality requirement can be satisfied Trahan v. U.S. Bank Nat l Ass n, No. C 09-03111 JSW, 2015 WL Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). The

]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the Id al issue or a Id Evon v. Law Offices of Sidney Mickell, 688 F.3d

1015, 1029 (9th Cir. 2012) (quoting Dukes, 131 S.Ct. at 2551).

Plaintiffs satisfy the commonality requirement because they share common legal questions: (1) for purposes of the first and second claims for relief: whether the Selling Shareholder Defendants engaged in prohibited transactions under ERISA §§ 406(a)(1)(A), (b), and (d) or § 406(b); (2) for purposes of the third claim for relief: whether the Director Defendants breached their fiduciary duties under ERISA § 404(a); (3) for purposes of the fourth and fifth claims for relief, whether the Director Defendants breached their fiduciary duties under § 404(a) and §§ 102 and 104(b) by failing to

notify the ESOP participants regarding as Trustee and failing to update the Summary Plan Description; and (4) for purposes of the sixth claim for re agreement violates § 410.

Accordingly, the Court finds the commonality requirement satisfied.

iii. Typicality

the nature of the claim or defense of the class representative and not on facts surrounding the Hunt v. Check Recovery Sys., Inc., 241 F.R.D. 505, 510 (N.D. Cal. 2007) (citing Hanon v. Dataprods. Corp whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by Evon, 688 F.3d at 1030 (internal quotation marks and citation omis claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 158 n.13 (1982). Like the

representative -extensive with those of absent class members; they need not be substantially identical Hanlon, 150 F.3d at 1020.

Plaintiffs certification. Plaintiffs allege that Defendants breached their duties as to every ESOP Plan participant and that they have all been injured in the same way. See In re Syncor ERISA Litig., plaintiffs was a Syncor employee and participated in the Plan during the

of conduct. None of the facts or legal claims are unique to the named Plaintiffs. The complaint is

based on allegations and recovery that address the Plan as a whole, not individual claimants. If recovery is received and paid to the Plan, it is the responsibility of the Plan fiduciaries to Kanawi v. Bechtel Corp., 254 F.R.D. 102, 110 (N.D. Cal. 2008).

The typicality requirement is therefore satisfied.

iv. Adequacy of Representation Rule 23(a)(4) imposes a requirement related to typicality: that the class representative will

members and (2) will the named plaintiffs and their counsel prosecute the actions vigorously on behalf of th Evon, 688 F.3d at 1031 (quoting Hanlon, 150 F.3d at 1020); see also Brown v. Ticor Title Ins., 982 F.2d 386, 390 (9th Cir. 1992) (noting that adequacy of representation of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is and adequately represent the interests

the adequacy of Carol Foster as a class representative. Defendants insist that Ms. Foster is inadequate because of her animus toward Adams & Associates and the likelihood that she will refuse

to sign a suitable settlement offer. Defendants emphasize that Ms. Foster submitted written responses/objections to her 2015 and 2016 performance evaluations challenging statements in the evaluations and that she declined to sign her 2016 evaluation. Defendants also cite to Ms. Foster refusal to sign an ergonomic evaluation form and that she referred to exercising her First and Second Amendment rights in her termination letter wherein she stated her intent to report a supervisor to various federal agencies and the media.

Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1464 (9th Cir.1995). Courts consider vindictiveness in evaluating adequacy of representation individuals who possess animus that would preclude the are ineligible to be class representatives. Id.

The issues Ms. Foster had as an employee her dispute regarding her performance evaluations and her allegations of discrimination and retaliation are unrelated to the issues in this ERISA action regarding Defendants alleged breach of fiduciary duty, prohibited transactions, and failure to make required disclosures. See Kayes, 51 F.3d at 1464 (finding that the district court erred in relying on other unrelated litigation against the defendants as a basis for finding the class representative inadequate); see also Koppel v. 4987 Corp., 191 F.R.D. 360, 368 (S.D.N.Y. 2000)

misconduct motivates his lawsuit, it has not prompted any irrational or unduly antagonistic behavior that would impair his vigorous prosecution of this action or prevent his approval of any That Ms. Foster disputed portions of her 2015 and 2016 performance evaluations is not evidence that she would reject a reasonable settlement offer. Her objections to the evaluations have nothing to do with the claims in this action and the defendants named here were not her supervisors indeed she attests that she has never met the individual defendants. (Dkt. No. 81-4 at ¶ 8.) Defendants ergonomic evaluation form is even less availing as she attests that she never saw the form and that -4 at ¶ 11.) Finally reference to exercising her constitutional rights by reporting a supervisor not named as a

defendant in this action to federal agencies and the media for allegedly discriminatory and retaliatory conduct is not evidence of animus that relates to the claims at issue here.

At oral argument, Defendants insisted that this case is analogous , No. C 07-00943 WHA, 2008 WL 1925208 (N.D. Cal. Apr. 29, 2008),

wherein the court found one of the proposed class representatives, Mr. Parrish, inadequate because he compared Gene Upshaw, the executive director of the defendant National Football League Caesar, Napolean, Idi Amin, Hitler, Stalin, Milosevic, Saddam deposition. Id. at *8. Mr. Parrish many racially charged comments on an internet blog

regarding the NFLPA and Upshaw and h ma Id. at *8-9. As a result of these statements, the court concluded that Mr. Parrish would be an inadequate class representative because of his personal vendetta with the defendant and because the personal vendetta Id. at *9.

No such evidence of animosity toward the named Defendants in this action has been presented here. Defendants have not identified any statements Ms. Foster made about Defendants as opposed to her supervisors who are not parties here and Ms. Foster attests that she understands that her obligation as a class representative is to represent all the class members

(Dkt. No. 79-19 at ¶¶ 7,9.) While Defendants insist that comments during eposition suggest that she is still upset about what happened during her tenure at Adams and Associates, Ms. Foster has notably not filed a lawsuit regarding her allegations of discrimination. (Dkt. No. 81-4 at ¶ 9.) Thus, to the extent that she does harbor a vendetta against [Adams and Associates], [Adams and Associates] has nevertheless offered no evidence to suggest that this vendetta would hinder her ability to fairly and adequately represent the class against [Adams and Associates]. Indeed, it more likely would drive [Ms. Foster] to Richter v. Mut. of Omaha Ins. Co., No. CV 05-498 ABC (PJWX), 2005 WL 8154953, at *5 (C.D. Cal. Nov. 28, 2005). rticipation in the litigation thus far reviewing and responding to interrogatories, providing documents, sitting for a deposition, and attending the class certification hearing suggests just that; she will diligently pursue this ligation on behalf of the class. (Dkt. No. 79-19 at ¶ 10.) Accordingly, Ms. Foster has demonstrated that she is an adequate class representative under Rule 23(a)(4).

class. The Court concludes that he too is an adequate representative there is no evidence of any

conflict of interest with the class, Mr. Foreman has actively participated in the litigation, and he attests that he understands his duty to consider the interests of the class in addition to his own and he that he will accept any resolution that is in the best interests of the class as a whole. (Dkt. No. 79-17 at ¶¶ 9-11.)

as class counsel. The co- lead counsels, Feinberg, Jackson, Worthman & Wasow LLP and Block and Leviton LLP are experienced class actions lawyers who specialize in employee benefit cases. (Dkt. No. 14 at ¶¶ 2- 5; Dkt. No. 16 at ¶¶ 3-4.) Under these circumstances, the Court concludes that class counsel will fairly and adequately represent the interests of the class. See Brown v. Ticor Title Ins., 982 F.2d

counsel for the representatives, an absence of antagonism, a sharing of interests between rly and adequately represent the

B. Plaintiffs have Satisfied Rule 23(b) Plaintiffs contend that certification is proper under any of the three prongs of Rule 23(b), but only seek certification under 23(b)(3) should the Court conclude that certification not proper under 23(b)(1) or 23(b)(2). Defendants do not oppose certification under any prong of Rule 23(b).

i. Certification Under Rule 23(b)(1) Rule 23(b)(1) calls for certification in either of two distinct situations where separate incompatible standards of conduct for the party opposing the class, see

Rule 23(b)(1)(A), or

would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair their ability to protect their interest, see Rule 23(b)(1)(B). Plaintiffs contend that certification is proper under both.

Alday v. Raytheon Co., 619 F. Supp. 2d 726, 736 (D. Ariz. 2008)

(citing Amchem Products Inc. v. Windsor 23(b)(1)(A) prevents the prosecution of separate actions that would create the risk of inconsistent or varying adjudications ... that would establish incompatible standards of conduct for the party opposing the Moyle v. Liberty Mut. Ret. Ben. Plan, 823 F.3d 948, 965 (9th Cir. 2016), as amended on

who must apply unifo Wit v. United Behavioral Health, 317 F.R.D. 106, 132 33 (N.D. Cal. 2016) (internal citation omitted).

Here, Plaintiffs allege that Defendants breached their fiduciary duties and engaged in prohibited transactions and failed to make disclosures under ERISA. , and obligations pursuant to the ESOP. Conflicting interpretations by separate tribunals could result in Hurtado v. Rainbow Disposal Co., 2019 WL 1771797, at *10 (C.D. Cal. Apr. 22, 2019) (finding that certification under Rule 23(b)(1)(A) was proper). This result would be inconsistent with federal law which requires that pension plan terms and conditions be applied in a manner consistent to all participants. See 26 U.S.C. § 401(a)(4). Kanawi, 254 F.R.D. at 112 (internal citation and quotation marks omitted).

Certification under Rule 23(b)(1)(B) is likewise appropriate. Rule 23(b)(1)(B) applies to cases in which judgme La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 467 (9th y an indenture trustee or other fiduciary similarly affecting the members of a large class of beneficiaries, Ortiz v. Fibreboard Corp., 527 U.S. 815, 833-34 (1999) (internal citation and quotation marks omitted). In

adjudication by a class member disposes of, or substantially affects, the interests of absent class Id. at 834.

s will affect the rights of all the other ESOP participants. Thus, certification under 23(b)(1)(B) is also appropriate.

ii. Certification Under Rule 23(b)(2)

grounds that apply generally to the class, so that final injunctive relief or corresponding declara 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class

Wal Mart when members of a putative class seek uniform injunctive or declaratory relief from policies or Parsons, 754 F.3d at 688 (citing Rodriguez v. Hayes, 591 F.3d 1105, 1125 (9th Cir. 2011)). Here, as noted supra, Plaintiffs seek the same relief for all members of the class based on Defendants actions and inactions towards the class as a whole such that certification under Rule 23(b)(2) is also proper. See Hurtado, 2019 WL 1771797 at *11 (finding that the requirements of Rule 23(b)(2) were satisfied for the same satisfied the requirements of Rule 23(b)(1)).

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23(b)(3).

CONCLUSION For the reasons stated above, No. 79.) The Court certifies a class of: all participants in the Adams and Associates ESOP from October 25, 2012 or any time thereafter who vested under the terms of the ESOP and their beneficiaries. Plaintiffs Carol Foster and Theo Foreman are appointed as Class Representatives. Feinberg, Jackson, Worthman & Wasow LLP and Block & Leviton LLP are appointed as Co-Lead Counsel for the Class pursuant to Rule 23(g) of the Federal Rules of Civil Procedure.

The Court sets a further Case Management Conference for September 10, 2019 at 1:00 p.m. in Courtroom F, 450 Golden Gate Ave., San Francisco, California. In advance of the Case Management Conference, the parties shall meet and confer regarding possible notice to the class and their ADR preferences. The parties shall file an updated Case Management Conference Statement regarding these matters by the close of business September 9, 2019.

IT IS SO ORDERED. Dated: September 3, 2019

JACQUELINE SCOTT CORLEY United States Magistrate Judge