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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 06-174-RGK (PLAx) Date April 14, 2006
Title TRUSTEES OF THE SCREEN ACTORS GUILD-PRODUCERS PENSION PLAN, et al. v. J. WALTER THOMPSON COMPANY, et al.

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams

Not Reported

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings:

(IN CHAMBERS) DEFENDANT SALTON, INC.'S MOTION TO
DISMISS PURSUANT TO FRCP 12(b)(1) AND (6) (DE 60)
12

I. INTRODUCTION

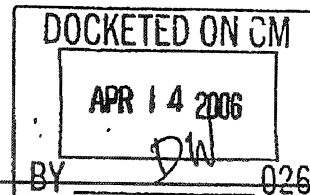
Trustees of the Screen Actors Guild-Producers Pension Plan and Trustees of the Screen Actors Guild-Producers Health Plan ("Plaintiffs") brought suit against J. Walter Thompson Company ("JWT") and Salton, Inc. ("Salton" or "Defendant") to recover unpaid contributions under § 502(e)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA") and § 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) for breach of a collective bargaining agreement. Presently before the Court is Defendant Salton's Motion to Dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). For the following reasons, the Court grants Defendant's Motion.

II. FACTUAL BACKGROUND

This action involves delinquent trust fund contributions. Plaintiffs are Trustees and Enforcement Administrators of the various labor management trust funds created under Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5) ("The Plans").

Plaintiffs allege the following facts in the Complaint:

Defendant JWT, an advertising agency, is a signatory to a collective bargaining agreement ("CBA") and trust agreement ("Trust Agreement") (collectively "the Agreements") with the Screen Actors' Guild ("SAG").



Defendant Salton, a manufacturer and marketer of various household products, entered into an agency agreement with JWT to produce commercials involving SAG member and celebrity athlete George Foreman ("Foreman") ("Agency Agreement"). The commercials were made by JWT, which hired Foreman to perform in the commercials pursuant to written contracts, incorporating, by reference, the terms and conditions of the CBA ("Performer's Contracts"). Salton is neither a signatory to the CBA, the Trust Agreement, nor the Performer's Contracts.

Among other things, the Agreements required JWT to make pension and health contributions to the Plans on behalf of SAG members based on a percentage of all gross compensation paid for services covered by the CBA. In addition, the Agreements held JWT liable for the Plan's enforcement expenses including all reasonable accountant's fees, auditor's fees, attorney's fees, and liquidated damages.

Subsequently, only the union scale wages paid to Foreman by JWT were used to make pension and health contributions. As a result of JWT's non-payment of benefit contributions based on the gross compensation in the amount of \$642,637.33 as promulgated in the Agreements, Plaintiffs contend that JWT and Salton, as joint employers, breached their contractual duties in violation of Section 515 of ERISA, 29 U.S.C. § 1145.

III. JUDICIAL STANDARD

A. Motion to Dismiss Standards

1. Rule 12(b)(1) Motion to Dismiss

Federal courts are courts of limited jurisdiction, and are "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). When a defendant brings a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of establishing jurisdiction. *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994).

A Rule 12(b)(1) motion may be based on a challenge to jurisdiction appearing from the face of the complaint, or based on a challenge to jurisdiction as a matter of fact. In considering a Rule 12(b)(1) motion based on a matter of fact, the court is not limited to considering the allegations of the complaint. The court may consider extrinsic evidence, and if the evidence is disputed, it may weigh the evidence and determine the facts in "evaluating for itself the merits of [the] jurisdictional claims." *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Where the court chooses not to conduct an evidentiary hearing to resolve issues of credibility or disputed materials, and chooses instead to resolve such issues on declarations alone, the complaint's factual allegations must be accepted as true. *McLachlan v. Bell*, 261 F.3d 908 (9th Cir. 2001).

2. Rule 12(b)(6) Motion to Dismiss

A complaint may be dismissed for failure to state claims upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

A complaint should not be dismissed under Rule 12(b)(6) 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' [Cite omitted]. Dismissal can be based on the lack of a cognizable legal theory or the

absence of sufficient facts alleged under a cognizable legal theory.

Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1340 (9th Cir. 1995). Generally, orders granting motions to dismiss are without prejudice unless "allegations of other facts consistent with the challenged pleading could not possibly cure the defect." *Schreiber Dist. v. Serv-Well Furniture*, 806 F.2d 1393, 1401 (9th Cir. 1986).

The sole issue raised by such a motion is whether the facts pleaded would, if established, support a valid claim for relief. Thus, the facts alleged, no matter how improbable, must be accepted as true for purposes of the motion. See *Neitzke v. Williams*, 490 U.S. 319, 328-29 (1989). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

For purposes of a Rule 12(b)(6) motion, the court may consider material properly submitted with the complaint. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 (9th Cir. 1989). Furthermore, the court may consider matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Id.* at 1555. If the court chooses to dismiss the complaint, it must decide whether to grant leave to amend. Courts routinely grant leave to amend unless it is clear that amendment would be futile because the pleading "could not possibly be cured by the allegation of other facts." *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

IV. DISCUSSION

The Court has read the moving and responding papers and carefully considered the parties' arguments. For the reasons set forth below, the Court grants Defendant Salton's Motion to Dismiss Plaintiffs' Complaint in its entirety as to Salton pursuant to Federal Rules of Civil Procedure ("Rule") 12(b)(1) and 12(b)(6).

As a preliminary matter, the first cause of action set forth in the Complaint alleges a violation by JWT of the Agreements. Specifically, the Complaint states that "[JWT] has 'failed to pay pension and health benefit contributions on behalf of [Foreman] in an amount of at least \$642, 637.33.'" (Compl. ¶ 21). As such, the Court need not address whether dismissal of the first cause of action is warranted against Salton.

A. Plaintiffs' Second Cause of Action For Breach of The Agreements

The second cause of action in the Complaint alleges that JWT and Salton, as joint employers of Foreman, are jointly liable for contributions and other damages under the Agreements.

Defendant Salton move to dismiss the second claim because Salton was not a signatory to the CBA nor a joint employer to be obligated under ERISA § 515 to contribute fringe benefits to the Plans. In response, Plaintiffs argue that the policy and purpose of ERISA, as well as the broad definition of "employer" under ERISA does not require a putative employer to be a signatory to the CBA. Plaintiffs further assert that Salton agreed with JWT to be responsible for all costs pursuant to the CBA. For the following reasons, the Court agrees with Defendant and addresses these contentions in turn.

1. Conduct Manifesting Intent To Be Bound

ERISA § 515 imposes the obligation to contribute upon "[e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement" 29 U.S.C. § 1145 (emphasis added). ERISA defines an "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." 29 U.S.C. § 1002(5). Here, Salton is not such an "employer."

There is no question that Salton is not a direct employer within the meaning of ERISA. The question, then, is whether Salton is a putative employer. While the Ninth Circuit has declined to adopt a bright-line rule that an ERISA employer must be a signatory to the CBA,¹ federal courts, including the Ninth Circuit have held that the putative "employer" is not an employer within the meaning of ERISA. See *Carpenters Health & Welfare Trust Fund for Cal. v. Tri Capital Corp.*, 25 F.3d 849, 855 (9th Cir. 1994); *Carpenters Pension Trust Fund v. Underground Constr. Co.*, 31 F.3d 776, 780 (9th Cir. 1994); *Transpersonnel, Inc. v. Roadway Express, Inc.*, 422 F.3d 456, 462 (7th Cir. 2005). In particular, under *Bricklayers*, "[a]ll that is required [for a non-signatory party to be bound] is conduct manifesting an intention to abide and be bound by the terms of an agreement." *Bricklayers Local 21 of Ill. Apprenticeship and Training Program v. Banner Restoration Inc.*, 385 F.3d 761, 766-768 (7th Cir. 2004).² Therefore, prior cases that have held an employer bound to a collective bargaining agreement as a result of conduct have emphasized, among other factors, the payment of union wages, the remission of union dues, the payment of fringe benefit contributions, and the existence of other agreements evidencing assent and the submission of the employer to union jurisdiction. *Id.*; see also *Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988).

In analyzing Salton's conduct for evidence of agreement to the CBA, the Court looked to these and similar factors in the Complaint and conclude that Salton did not manifest assent to the CBA. Salton neither paid union wages nor fringe benefit contributions. Furthermore, Plaintiffs' assertion that the existence of the JWT-Salton Agency Agreement, which, in common industry practice, will hold the advertiser (such as Salton) ultimately responsible for the payment of fringe benefit contributions is arbitrary. To suggest that JWT was merely a conduit through which pension plan payments passed from Salton to the Plans lacks merit.³ For purposes of a Rule 12(b)(6) motion,

¹ The Eleventh Circuit has held that to be a § 1002(5) employer, a company must be a party to the collective bargaining agreement calling for the contributions at issue. *Laborers Local 938 Joint Health & Welfare Trust Fund v. B.R. Starnes Co.*, 827 F.2d 1454, 1457 (11th Cir.1987); see also *Giardiello v. Balboa Ins. Co.*, 837 F.2d 1566, 1570 (11th Cir.1988) (affirming the *B.R. Starnes* holding that signatory status is a prerequisite to qualifying as a § 1002(5) employer). However, the *Tri Capital* court "decline[d] to adopt such a bright-line rule." *Carpenters Health & Welfare Trust Fund for Cal. v. Tri Capital Corp.*, 25 F.3d 849, 855 (9th Cir. 1994).

² Plaintiffs mischaracterizes *Bricklayers* in attempting to draw out of its holding a general principle that a non-signatory employer is liable for contributions under the terms of the CBA. (Opp'n 8:21-23). In *Bricklayers*, the court held that a non-signatory employer manifested assent to a CBA where, among other conducts, the employer submitted monthly contributions reports and payments to ERISA funds for seven years. *Bricklayers*, 385 F.3d at 767. Unlike *Bricklayers*, here, Salton made no such payments to the Plans nor otherwise acted in a manner assenting to the CBA.

³ Plaintiffs request that the Court take judicial notice of JWT's Cross Claim. A court may take judicial notice of a fact that is not subject to reasonable dispute. Fed. R. Evid. 201(b). Courts generally

a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *W. Mining Council*, 643 F.2d at 624. While precedent makes clear that a signature to a collective bargaining agreement is not a prerequisite to finding an employer bound to that agreement, Salton's conduct does not manifest an assent to the CBA

2. Contractual Obligation To Contribute To The Plans

Moreover, the import of the decision in *Central States* and adopted by *Transpersonnel* clearly holds that an ERISA "employer" for purposes of a multiemployer pension plan liability is an entity that has assumed a contractual obligation to make contributions to a pension fund. *Central States, SE & SW Areas Pension Fund v. Central Transport, Inc.*, 85 F.3d 1282, 1287 (7th Cir. 1996) (quoting *Rheem Mfg. Co. v. Cent. States, SE & SW Areas Pension Fund*, 63 F.3d 703, 707 (8th Cir.1995)). While the *Rheem* court involved a lessor-lessee, it is likewise applicable to the present case in an agency-advertiser relationship. Like *Rheem*, Plaintiffs' attempt to impose liability on Salton fails because there were "no document that could create a contractual obligation" for Salton to contribute to [the pension fund]." *Id.*

The court in *Transpersonnel* concluded that the obligation to *reimburse* for contributions made by another is not the equivalent of an obligation to *contribute* in the first instance. *Transpersonnel*, 422 F.3d at 460. Under the same analysis, the Court finds that even if Salton was obligated to indemnify JWT for any claims relating to the CBA, the obligation to indemnify for contributions made by another is not the equivalent of an obligation to contribute in the first case.

Therefore, based on the above findings, Defendant Salton's motion to dismiss Plaintiffs' second cause of action is warranted.⁴

B. Plaintiffs' Third Cause of Action for Breach of the Performer's Contracts

1. ERISA Third-Party Beneficiary Claim Is Unwarranted

Plaintiffs' third cause of action alleges that the Plans were third-party beneficiaries of the Performer's Contracts between JWT and Foreman, and that, by failing to pay contributions to the Plans, Salton breached those Performer's Contracts. Specifically, Plaintiffs argue that the Performer's Contracts obligated Salton to make pension and health contributions to the Plans because the contract language stated that JWT acted as Salton's agent in contracting with Foreman. (Compl. ¶35; Salton Req. for Jud. Notice, Ex. A).⁵ Plaintiffs' contentions are unwarranted. Indeed, Paragraph 6 of the agreement between Salton and Foreman explicitly states that "Foreman is acting

take judicial notice of court filings or pleadings. See, e.g., *Pac. Bell Tel. Co. v. City of Hawthorne*, 188 F. Supp. 2d 1169, 1172 (C.D. Cal. 2001); *Mullis v. United States Bankr. Court*, 828 F.2d 1385, 1388 n. 9 (9th Cir.1987). Accordingly, the Court takes judicial notice of JWT's Cross Claim.

⁴ In light of the Court's finding that Defendant Salton is not an ERISA "employer," the Court need not address Defendant's alternative contention that it had no obligation under LMRA § 301 to contribute to the Plans.

⁵ The Court takes judicial notice of the Salton-Foreman Agreement attached as Exhibit A to Plaintiffs' Request for Judicial Notice In Support of Its Opposition To Defendant Salton's Motion to Dismiss. (Pls.' Req. for Jud. Notice, Ex. A).

as an independent agent under this Agreement and not as an *employee* or agent of Salton." (Pls.' Req for Jud. Notice, Ex. A, ¶ 6) (emphasis added). In addition, Salton is not a party signatory to those Performer's Contracts and in fact, the Performer's Contracts shows that JWT is the sole employer on the documents. Thus, the claim that Salton was the primary obligor of the Agreements and undertook the obligation to pay fringe benefit contributions owed to the Plans lacks merit. (Pls.' Opp'n 4:10-12).

2. LMRA § 301 Jurisdictional Basis Is Unwarranted

Plaintiffs Complaint also asserts LMRA § 301 as a federal jurisdictional basis for their third claim. Under the holding in *Tri Capital* and *Painting & Decorating Contractors*, "[a]ll that is required for jurisdiction to be proper under § 301(a) is that the suit be based on an *alleged breach of contract* between an employer and a labor organization *and* that the resolution of the lawsuit be focused upon and governed by the terms of the contract." *Tri Capital*, 25 F.3d at 858; *Painting & Decorating Contractors Ass'n v. Painters & Decorators Joint Comm., Inc.*, 707 F.2d 1067, 1071 (9th Cir. 1983).

No facts have been alleged in Plaintiffs' Complaint that Salton breached any agreement with Plaintiffs. In fact, the Complaint concedes that Salton is not a signatory to the CBA or any other agreement between Plaintiffs and Salton. Rather, Plaintiffs allege that Salton breached the Performer's Contracts and Agency Agreement. Because the Performer's Contracts and Agency Agreement are not contracts between an "employer" under the meaning of ERISA and a labor organization, the Complaint does not allege facts sufficient to provide § 301 jurisdiction.

C. Plaintiffs' Fourth Cause of Action for Breach of the Agency Agreement

Similar to Plaintiffs' third cause of action, the fourth claim maintains that Salton's failure to pay contributions to the Plans pursuant to the Agency Agreement with JWT, damaged Plaintiffs as third party beneficiaries of that contract. However, Defendant argues that the Court is without jurisdiction to hear the fourth claim under ERISA §515 and LMRA § 301. The Court agrees.

Applying the Court's preceding analysis, Plaintiffs' fourth cause of action is dismissed for lack of jurisdiction. Under *Herman Family Revocable Trust*, if the court dismisses for lack of subject matter jurisdiction, it has no discretion and must dismiss all claims. *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir. 2001). Dismissal on jurisdictional grounds means that the court was without original jurisdiction and had no authority to do anything other than to determine its jurisdiction. *Id.*

D. Plaintiffs' Fifth Cause of Action for Breach of Fiduciary Duty under ERISA

In their fifth cause of action, Plaintiffs contend that, by exercising "discretionary authority in failing to pay contributions owed to the Plans," JWT and Salton became "fiduciaries for purposes of ERISA," and that by breaching their fiduciary obligations, they caused the Plans to incur losses for which they are liable to the Plans under ERISA.⁶ (Compl. ¶¶ 48-51).

⁶ ERISA defines fiduciary status as:

[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or

Based on the Court's above finding that Plaintiffs' Complaint fails to show that Salton is an ERISA employer or fiduciary, or that Plaintiffs are ERISA third party beneficiaries, no set of facts pleaded in the Complaint showed that Salton is in breach of any ERISA duty to form the basis for the Court's jurisdiction over Salton. As such, dismissal is warranted as to the fifth cause of action against Salton.

V. CONCLUSION

In light of the foregoing, Defendant Salton's Motion to Dismiss Plaintiffs' Complaint in its entirety as to Salton is granted without prejudice and Plaintiffs are granted leave to amend within twenty days of this Order.

IT IS SO ORDERED.

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control respecting management or disposition of its assets, (ii) he 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 (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."

29 U.S.C. § 1002(21)(A).