UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TRUSTEES OF THE SCREEN ACTORS GUILD-PRODUCERS PENSION PLAN, TRUSTEES OF THE SCREEN ACTORS GUILD-PRODUCERS HEALTH PLAN

Plaintiffs,

v.

ACCENTURE, INC. AND YOUNG & RUBICAM, INC.

Defendants.

2:07-cv-03249-FMC-RZx

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS

This matter is before the Court on Defendant Accenture's Motion to Dismiss Plaintiffs' First Amended Complaint (docket no. 22) and Defendant Young & Rubicam's Motion to Dismiss Plaintiffs' First Amended Complaint (docket no. 23), filed on September 27, 2007. The Court has read and considered the moving, opposition, and reply documents submitted in connection with these motions. The Court deems this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for November 19, 2007 is removed from the Court's calendar. For the reasons and in the manner set forth below, the Court hereby **GRANTS IN PART AND DENIES IN PART** Defendants' Motions.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Professional golfer Eldrick "Tiger" Woods ("Woods") is a member of the Screen Actors Guild ("SAG"); his appearances in television advertisements are covered by SAG's Commercials Contract.[1] (First Am. Compl. ¶¶ 12-13.) The Commercials Contract, entered into between SAG and producers of television advertising (including Defendant Young & Rubicam ("Y&R")), binds the producers to the terms of SAG's Trust Agreements. (*Id.* ¶ 10.) Together, the two agreements require Y&R to contribute to SAG's Pension and Health Plans ("the Plans") a set percentage of compensation paid to actors for services covered by the Commercials Contract. (*Id.*) Y&R must report the names, total compensation, and contribution amounts to the Plan's Trustees. (*Id.*) Upon request, Y&R must submit its payroll records for an audit so the Trustees may verify that Y&R has made the correct contributions to the Plans. (*Id.*)

Woods (through his loan-out corporation, ETW Inc.) and Defendant Accenture entered into an endorsement agreement, in which Woods would provide Accenture with a variety of services, some of which are covered services under the Commercials Contract. (*Id.* ¶¶ 12-13.) The ETW-Accenture Contract set out Woods's compensation and specified that Accenture would pay the requied contributions to the Trusts, according to the terms of the Commercials Contract and Trust Agreements. (*Id.* ¶ 13.)

Plaintiffs allege that Y&R and Accenture entered into a contract under which they "jointly conceived and implemented" the television advertising campaign pursuant to the ETW-Accenture Contract. (*Id.* ¶ 25.) Both Y&R and Accenture compensated Woods for covered services subject to the Commercials Contract and

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[1] As the Court has not relied on documents for which the parties have requested judicial notice, it declines to rule on those requests. For the same reason, Defendant Young & Rubicam's Motion to Strike Declaration of David E. Ahdoot (docket no. 32) is DENIED.

Trust Agreement contributions. (*Id.*) Plaintiffs contend that Y&R, as the advertising agency, and Accenture, as the advertiser, acted as joint employers of Woods, splitting his compensation payments to "deliberately hide" Woods's total compensation and thus avoid making full contributions to the Plans. (*Id.*)

Plaintiffs seek an audit of Accenture's and Y&R's payments to Woods and the recovery of any unpaid health and pension plan contributions, pursuant to both the Commercials Contract and Trust Agreements and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(g)(2). Accenture now moves to dismiss, arguing that the Court lacks subject matter jurisdiction because Accenture is not an "employer" within the meaning of ERISA or the Labor Management Relations Act ("LMRA"). Y&R moves to dismiss for lack of subject matter jurisdiction and for failure to state a claim for relief.

STANDARD OF LAW

A motion to dismiss an action for lack of subject matter jurisdiction is properly brought under Fed. R. Civ. P. 12(b)(1). The objection presented by this motion is that the Court has no authority to hear and decide the case. When considering a Rule 12(b)(1) motion challenging the substance of jurisdictional allegations, the Court is not restricted to the face of the pleadings, but may review any evidence, such as declarations and testimony, to resolve any factual disputes concerning the existence of jurisdiction. *See McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). The burden of proof on a Rule 12(b)(1) motion is on the party asserting jurisdiction. *See Sopcak v. N. Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995).

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to seek dismissal of a complaint that fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The Court will not dismiss claims for relief unless the plaintiff cannot prove any set of facts in support of the claims that would entitle

her to relief. *Thompson v. Davis,* 295 F.3d 890, 895 (9th Cir. 2002); *see also Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998). All material factual allegations in the complaint are assumed to be true and construed in the light most favorable to the plaintiff. *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1229 (9th Cir. 2004) (citing *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). However, the Court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994) (internal citations omitted).

DISCUSSION

A. Subject Matter Jurisdiction

1. Young & Rubicam

Defendant Y&R argues[2] that the Court lacks subject matter jurisdiction because it is not an "employer" and Woods was not an "employee" within the meaning of ERISA. The Supreme Court has unanimously held that whether a worker is an employee for the purposes of ERISA must be decided using the common law agency test. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 319 (1992). This multi-factor test requires the Court to "consider the hiring party's right to control the manner and means by which the product is accomplished." *Id.* at 323 (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989)). Relevant factors include:

"the skill required; the source of the instrumentalities and tools; the location

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[2]The Court refers Y&R to Local Rule 11.3.1.1 Typeface. Y&R's Motion does not conform. Should Y&R find in the future that its papers run in excess of the allowed length, the Court instructs Y&R to edit its argument rather than reduce its font size.

> of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; the tax treatment of the hired party.

Id. at 323-24 (citing *Reid*, 490 U.S. at 751-52). Thus, the question of whether a worker is an employee or an independent contractor is highly fact-intensive and not suitable for decision on a motion to dismiss.[3] Plaintiffs' complaint sufficiently alleges that Y&R, a signatory to the SAG Commercials Contract and Trust Agreements, acted as Woods's employer for covered services. Therefore, Plaintiffs withstand Defendant Y&R's jurisdictional challenge.

2. Accenture

Accenture argues[4] that it cannot be held liable for contributions to the Plans because it is not a signatory to the Commercials Contract and therefore is not bound by the Trust Agreements. In addition, Accenture argues that a joint employer theory of liability is not cognizable under ERISA. The Court disagrees.

The district courts have exclusive jurisdiction over ERISA actions, except actions to recover benefits arising under 29 U.S.C. § 1132(a)(1)(B), over which they have concurrent jurisdiction with the state courts. 29 U.S.C. § 1132(e)(1). 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; and includes a

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[3] This point is underscored by the case citations on this point in Defendants' motions–the bulk of these cases were decided on summary judgment, not on motions to dismiss. *See* Y&R Mot. at 9.

[4] *See supra* note 1.

group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5). Although the Ninth Circuit has been reluctant to hold liable a nonsignatory party for pension and health plan contributions,[5] it has nonetheless noted that "a nonsignatory may be liable under ERISA for a signatory's contractual obligations" where "the interests of the nonsignatory and the signatory parties are materially inseparable." *Hotel Employees & Rest. Employees Int'l Union Welfare Fund v. Gentner*, 50 F.3d 719, 722 (1995); *see also Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.*, 25 F.3d 849, 856 n.7 (declining to draw a "bright line rule" that a company must be a signatory to a collective bargaining agreement to be liable as an employer under ERISA). This identity of interests may exist where the nonsigning party is a joint employer with the signing party. *Id.* (citing *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 526 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983)).

Plaintiffs here have alleged that Accenture acted as a joint employer with Y&R, which has signed, and is bound by, the terms of the Commercials Contract.[6]

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[5]For example, the Ninth Circuit has held that sureties, "whose obligations are fixed by contract and regulated by state law for the protection of the public" are not employers under ERISA. *Carpenters S. Cal. Admin. Corp. v. D&L Camp Const. Co.*, 738 F.2d 1999 (9th Cir. 1984). Similarly, the Ninth Circuit has held that a union could not use the device of a mechanic's lien (a creature of state law) to hold a general contractor liable for a subcontractor's failure to make contributions pursuant to a collective bargaining agreement to which the general contractor was not a party. *Carpenters S. Cal. Admin. Corp. v. Majestic Housing*, 743 F.2d 1341, 1346 (9th Cir. 1984).

[6]Accenture contends that the terms "single employer" and "joint employer" may be used "interchangeably." Defs' Mot. at 18 n.9 (citing *A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 517 (9th Cir. 1989). This is not entirely accurate. The single employer analysis is employer-focused, while the joint employer analysis looks at who exercises control over a particular employee. Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 959-960 (2005)

They argue that because Woods is a SAG member, the only way Accenture could secure his appearance in television commercials was to partner with Y&R.[7] To dismiss Plaintiffs' claim, the Court would have to find that either: (1) a joint employer cannot be held liable for contributions to benefit funds if it did not sign the collective bargaining agreement; or (2) even if a joint employer may be held

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(explaining that "a single employer differs significantly from a joint employer"). Thus, the single employer analysis is used to determine whether "two nominally separate businesses" are really one entity, based on: "(1) common ownership; (2) common management; (3) centralized control of labor relations; and (4) interrelations of operations." *Int'l Bhd. of Teamsters v. Am. Delivery Serv. Co.*, 50 F.3d 770, 775 (9th Cir. 1995). Two companies are "joint employers if they *share or co-determine* those matters governing the essential terms and conditions of employment." *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1337 (D. Nelson, J., dissenting) (citing *NLRB v. Greyhound Corp.*, 368 F.2d 778, 780 (5th Cir. 1966), *on remand from Boire v. Greyhound Corp.*, 376 U.S. 473 (1964)); *see also* Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 259 (2006).

There is no allegation in Plaintiffs' First Amended Complaint that Accenture and Y&R are essentially the same company merely operating under different names (*i.e.*, a single employer). Rather, Plaintiffs contend that Defendants were *joint employers*, two distinct companies sharing the responsibility for setting the terms and conditions of Woods's employment.

[7]For this reason, Accenture's reliance on *Burrey v. Pacific Gas & Electric Co.*, 1999 U.S. Dist. LEXIS 22619, is misplaced. In *Burrey*, the court declined to hold that Pacific Gas & Electric Co. ("PG&E") was the joint employer of leased employees for the purposes of ERISA. The court reasoned, "The underlying purpose of ERISA is to ensure employees receive benefits to which they are entitled. This purpose is not served by requiring two employers both to provide employee benefits." 1999 U.S. Dist. LEXIS 22619 at *33 (citations omitted). A finding of joint employment would have entitled the leased employees to two sets of benefits: those provided by PG&E and those provided by the employment agency. Here, unlike *Burrey*, there is no question of entitlement to multiple employers' benefits plans. Instead, the issue is whether Accenture and Y&R were responsible jointly for ensuring the payment of contributions to a single benefit plan.

liable for benefit fund contributions, Accenture is not a joint employer. As explained above, the Ninth Circuit has refused to make the first proposition a bright line rule. The second proposition, whether Accenture is a joint employer, requires a fact-intensive inquiry that is not possible at this early stage of the litigation. Accordingly, and in light of the liberal federal pleading standards, the Court holds that Plaintiffs' pleadings have sufficiently alleged subject matter jurisdiction in this case pursuant to ERISA.

Accenture finally argues that there is no jurisdiction in this Court because the case presents a representational question within the primary jurisdiction of the National Labor Relations Board ("NLRB"). Accenture's Mot. at 18-20. Under the Labor Managment Relations Act (LMRA) Section 301(a), "[j]urisdiction exists as long as the suit is for violation of a contract between a union and employer even if neither party is a union or an employer." *Painting and Decorating Contractors Ass'n of Sacramento, Inc. v. Painters and Decorators Joint Comm.*, 707 F.2d 1067, 1071 (9th Cir. 1982) (quoting *Rehmar v. Smith*, 555 F.2d 1362, 1366 (9th Cir. 1976)). This case involves a dispute about obligations under the Commercials Contract, and therefore jurisdiction in this Court is proper.[8]

B. First Cause of Action: ERISA Audit

Y&R argues that the first cause of action, in which Plaintiffs seek to compel an audit of Y&R's payments to Woods, fails to state a claim for which relief may be granted. Y&R contends that Plaintiffs fail to allege Woods is a "principal

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[8]Contrary to Accenture's suggestion, no question of representation arises in this case. A "representational issue" generally refers to questions of bargaining unit membership, *e.g.*, determining an appropriate bargaining unit or designating an exclusive bargaining agent. *See Hotel Employees, Rest. Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (1992). This dispute is one of contract interpretation, not representation.

performer" under the Commercials Contract or that there was an agreement between Woods and Y&R such that the Commercials Contract applied. The Court disagrees. Plaintiffs' first cause of action is sufficiently clear to meet Federal Rule of Civil Procedure 8(a)(2)'s requirement of a "short and plain statement of the claim showing that the pleader is entitled to relief." The legal and factual basis of Plaintiffs' claim is clear. Accordingly, the Court DENIES Y&R's request to dismiss this claim.

C. Second Cause of Action: Joint Employer Liability

Defendants argue that Plaintiff's Second Cause of Action merely alleges a theory of joint employer liability without stating a claim for relief. The Court agrees. While Plaintiffs are free to include allegations that Defendants acted as Woods's joint employers, their pleading mistakenly labels these allegations as a separate cause of action. Therefore, the Second Cause of Action is dismissed without prejudice.

D. Third and Fourth Causes of Action: Breach of Contract

Accenture argues that Plaintiffs' Third and Fourth Causes of Action, which allege breach of contract as third party beneficiaries of the ETW-Accenture Agreement and the Accenture-Y&R Agreement, fail to state a claim because Accenture is not an employer under ERISA or the LMRA. As stated above, the Court rejects this argument. Supplemental jurisdiction over these state law contract claims is appropriate.[9] *See* 28 U.S.C. § 1367(a).

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[9] In its reply, Defendant Accenture belatedly argues that the state law causes of action are preempted by ERISA. This argument should have been made at the outset in Accenture's Motion, so that the parties could fully brief it. Accordingly, the Court declines to consider this argument at this time.

CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' Motions (docket nos. 22 and 23). Plaintiffs are granted twenty days leave to file a second amended complaint. If no amended pleading is filed, Defendants have 20 days after the deadline passes to file an answer.

IT IS SO ORDERED.

Dated: November 14, 2007

FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT