

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:17-cv-02471-SVW-KS

Date August 15, 2017

Title *Acosta v. Wedbush Securities*

Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz

N/A

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

N/A

N/A

Proceedings: IN CHAMBERS ORDER DENYING MOTION TO DISMISS[27]

Plaintiff R. Alexander Acosta, Secretary of the United States Department of Labor (DOL) filed suit against defendants Wedbush Securities, Inc., Edward Wedbush, Gary Wedbush, the Wedbush Securities Inc. Employees' PS Retirement Plan and the Wedbush Securities Inc. Commissioned Employees' PS Retirement Plan (collectively "Wedbush") on March 30, 2017. Wedbush filed a motion to dismiss on July 5, 2017. The DOL filed an opposition on July 28, 2017 and Wedbush filed its reply on August 7, 2017.

For the following reasons, the Court DENIES the motion to dismiss and GRANTS the request to take judicial notice of the forms.

I. Factual Background

The Department of Labor alleges that Wedbush Securities violated its fiduciary duties with respect to two retirement plans that it (Wedbush) maintains for its employees. Wedbush has filed a motion to dismiss alleging that the Department of Labor's claims are time-barred by the relevant statute of limitations. The Secretary's allegations include that Defendants engaged in self-dealing with the Plans' assets by using Plan assets to: (1) pay brokerage fees and commissions to the Company in connection with participant-directed brokerage account investment options (Claims 1 & 2); and (2) invest in two hedge funds affiliated with the Company, resulting in the payment of brokerage commissions to the Company and management and performance fees to Company affiliates which were parties in interest to the Plans (Claims 3 & 4).

Wedbush sponsors the two single-employer defined-contribution retirement plans at issue in this litigation, one for commissioned employees (the "CPS Plan") and one for non-commissioned employees (the "PS Plan").³ (Complaint, ¶¶ 11-13). The first and second causes of action allege that Wedbush received commissions for executing transactions on behalf of participants in the Plans, and that this

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constitutes self-dealing in violation of ERISA. Participants in the Plans could also invest their 401(k) assets in partnership units of two hedge funds managed by parties in interest to the Plan: the Wedbush Opportunity Partners, LP (“WOP”) and the Wedbush Hedged Dividend Fund, LP (“WHDF”). (Complaint, ¶ 32). The DOL’s third cause of action alleges that Defendants breached their fiduciary duties and engaged in prohibited transactions by allowing Wedbush and its subsidiaries to receive compensation, including fees and brokerage commissions, paid from Plan assets in exchange for services they rendered in connection with the investments in the hedge funds. (Complaint, ¶¶ 35-38 and 52).

II. Legal Standard

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. *See* Fed. R. Civ. Proc. 12(b)(6). To survive a motion to dismiss, the plaintiff’s 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 Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Rule 12(b)(6) authorizes a party to assert a statute of limitations defense on a motion to dismiss, including when the defense is based on judicially noticeable materials. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). A motion to dismiss based on the statute of limitations "can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1275 (9th Cir. 1993).

III. Analysis

The issues raised in this motion are very fact-intensive and therefore more suitable to resolution at trial.

A. The WHDF Fund

The question of whether the form 5500 disclosures filed by Wedbush for the WOP fund also provided the DOL with notice of the potential ERISA violations in connection with the WHDF fund is necessarily granular and factual and cannot be resolved in a motion to dismiss. Even if the DOL could theoretically have knowledge of the future WHDF breaches based on the past WOP breaches, whether the past disclosures were sufficient to provide this knowledge is debatable.

B. Forms 5500 Generally

Similarly, whether the disclosures in the forms 5500 were sufficient to notify the DOL that Wedbush was potentially in violation of ERISA requires a careful analysis of the context and nature of the

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transactions and how they relate to the disclosures that were made on the forms 5500. This is true for the claims relating to the individually directed accounts as well as the claim relating to the affiliated hedge funds. Thus, even if the filing of a form 5500 is capable of triggering the statute of limitations, it is not clear if the forms at issue here did so, especially in light of Wedbush's affirmative representations that no non-exempt transactions were taking place.

C. Statute of Limitations

Additionally, the repeated, discrete instances of transaction charges which occurred here are sufficiently distinct from the one-time breach at issue in *Phillips v. Alaska Hotel & Rest. Emps. Pension Fund*, 944 F.2d 509 (9th Cir. 1991) that it is inappropriate to dismiss the claims regarding possible ERISA violations which occurred within three years of the tolling agreements.

The plaintiff has asserted sufficient facts in the complaint which, when "read with the required liberality," show that the suit may not be time barred. *Cervantes*, 5 F.3d at 1275.

IV. Conclusion

The Court DENIES the motion to dismiss and GRANTS the request to take judicial notice of the forms.

It is SO ORDERED.

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