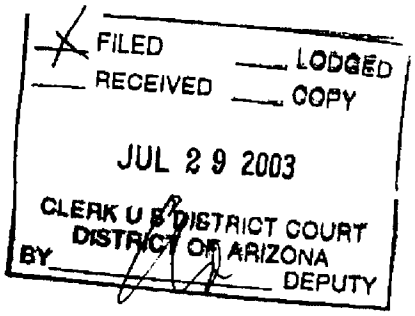

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

STEVEN A. SPRINGBORN, et al., **Plaintiffs,** **vs.** **ARTHUR ANDERSEN, LLP, et al.,** **Defendants.**	**CIV 02-2183 PHX (JWS)** **ORDER FROM CHAMBERS** **[Re: Motions to Dismiss - Dockets 9, 13]**

I. MOTIONS PRESENTED

At docket 9, defendants James H. Bolin and Sandra Lee Bolin (collectively "Bolin" except where circumstances indicate reference only to James H. Bolin) move to dismiss plaintiffs' first amended class action complaint. At docket 13, defendants Rural/Metro Corporation ("Rural/Metro"), and its directors and officers Cor J. Clement, Randall L. Harmsen, Jack E. Brucker, John S. Banas III, Louis J. Jekel, Mary Ann Carpenter, William Turner, Henry G. Walker, Louis A. Witzeman, and Barry Landon, in addition to their respective spouses, move to dismiss plaintiffs' first amended class action complaint. Defendant Warren Rustand joins defendants' motion at docket 15 and defendants John Furman, Robert Hillier, and Mark Liebner join the motion at

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docket 17.[1] Plaintiffs Steven A. Springborn and Jeffrey T. Jenson (collectively "plaintiffs") oppose all these motions in a single Omnibus Response to Defendants' Motions to Dismiss filed at docket 32. The parties requested oral argument on both motions and the joinders thereto.[2] Oral argument was heard on July 16, 2003.

II. BACKGROUND

A. Parties

Plaintiffs are members of the Maricopa County Firefighters Association, IAFF, Local 3878. They bring this action as representatives of present or former employees of Rural/Metro who are members of Rural./Metro's Employee Stock Ownership Plan ("ESOP"), Employee Stock Purchase Plan ("ESPP"), and 401(k) retirement plans.

Defendant Arthur Andersen, LLP ("Andersen") is a limited liability partnership with offices in Phoenix, Arizona. Andersen is alleged to have been the auditor of Rural/Metro's financial statements from 1998 through 2001 and advisor to Rural/Metro on financial matters. Defendant John Doe I ("Doe") is named as the partner at Andersen responsible for providing those services to Rural/Metro. The remaining listed defendants - Brucker, Rustand, Bolin, Furman, Harmsen, Clement, Jekel, Hillier, Banas, Liebner, Landon, Carpenter, Turner, Walker, and Witzeman - are alleged to have been the Officers and Directors during some or all of the time in question.

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[1]All of the individuals who are moving defendants are collectively referred to as "Directors and Officers."

[2]These requests were filed at dockets 11, 14, 16, and 19.

B. Factual Background

This is a civil action arising out of alleged improprieties relating to Rural/Metro's common stock, financial statements, ESOP, ESPP, and 401(k) plan. Plaintiffs' first amended complaint alleges that, starting in 1996, defendants set out to defraud plaintiffs by "knowingly inflat[ing] receivables . . . and caus[ing] the production of false earnings per share statements."[3] Plaintiffs allege that during the time in question defendants sold stock at profit, while restricting sales to defendant, and mis-led the public to believe that Rural/Metro was a healthy company. When the true health of the company was discovered, stock shares dropped from $12.25 per share to $.90 per share, causing plaintiffs to suffer financial losses.

Plaintiffs' first amended complaint[4] asserts the following 18 counts against one or more or all of the defendants:

I. Breach of Fiduciary Duty as Against Andersen

II. Negligence/Professional Malpractice as Against Andersen

III. Aiding and Abetting Fraud as Against Andersen

IV. Aiding and Abetting Breach of Fiduciary Duty as Against Andersen

V. Acting in Concert as Against Andersen

VI. Violations of § 10(b) of the 1934 Act[5] and Rule 10b-5 Promulgated Thereunder as Against All Defendants

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[3]Plaintiffs' Omnibus Response (Doc. 32), at 3.

[4]Doc. 3, Ex. A (filed with amended notice of removal); Doc. 32, Ex. A (filed with Omnibus Response) ("Am. Comp.").

[5]Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b).

VII. Violations of § 20(a) of the 1934 Act as Against All Defendants

VIII. Violations of § 20A of the 1934 Act as Against Defendant Bolin

IX. State Statutory Securities Fraud

X. Consumer Fraud

XI. Breach of Fiduciary Duty by Directors and Officers

XII. Breach of Contract by Rural/Metro - Failure to Make 401(k) Payments

XIII. Breach of Duty by Defendant Directors and Officers as to ESOP, ESPP and 401(k)

XI(2).[6] Common Law Fraud/Negligent Misrepresentation/Omission as Against Individual Defendants[7]

XII(2). Aiding and Abetting Fraud as a Against the Individual Defendants

XIII(2). Aiding and Abetting Breach of Fiduciary Duty as Against the Individual Defendants

XIV(2). Breach of Fiduciary Duty as Against the Individual Defendants

XV. Acting in Concert as Against the Individual Defendants

Plaintiffs' prayer for relief requests an equitable lien and/or constructive trust on the proceeds of defendants' stock sales and an injunction on the sale, conveyance, transfer or other disposition of the property. Plaintiffs also seek recovery of the money they lost

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[6]It appears that plaintiffs incorrectly numbered their counts. Defendants refer to these counts as "second count __". As shorthand, this order will indicate those second counts by designating those with a "(2)" immediately after the count number or, in discussion, adopting defendants' convention.

[7]The complaint uses "Individual Defendants" to refer to the Directors and Officers plus Doe.

as a result of the alleged fraud in addition to punitive damages. Finally, plaintiffs seek pre- and post-judgment interest, costs, and attorneys' fees.

C. Procedural History and Jurisdiction

On September 30, 2002, plaintiffs filed a class action complaint in the Maricopa County Superior Court.[8] The case was removed to U.S. District Court pursuant to 28 U.S.C. §§ 1331, 1441, and 1446, and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. § 77p(b)-(c), 78bb(f)(1)-(2). Those defendants who had been served joined in removal at dockets 2 through 6. At docket 3, defendants presented an amended notice of removal based on plaintiffs' Amended Complaint, which added new claims for relief under the 1934 Act.[9]

III. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim made pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims in the complaint. A dismissal for failure to state a claim can be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."[10] In reviewing a 12(b)(6) motion, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party."[11] The

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[8]Doc. 1, Ex. 1 (Case No. CV2002-019020).

[9]Doc. 3, at 3.

[10]*Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

[11]*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

court is not required to accept every conclusion asserted in the complaint as true; rather, the court examines "whether conclusory allegations follow from the description of facts as alleged by the plaintiff."[12] A claim should only be dismissed if "it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[13]

IV. DISCUSSION

The instant motion concerns only those counts alleged against Rural/Metro and the Directors and Officers - counts VI through XV. At oral argument, plaintiffs conceded their federal securities fraud claims (counts VI, VII, and VIII). Accordingly, these claims are dismissed and this order considers only plaintiffs' state statutory claims (counts VI, VII, and VIII), common law claims (counts IX, X, XI, XI(2), XII(2), XIII(2), XIV and XV) and those concerning the plans (counts XII and XIII).

A. State Law Claims

Count IX of plaintiffs' complaint alleges that defendants violated Arizona's securities fraud statute, A.R.S. § 44-1991, and Count X alleges that defendants violated Arizona's consumer fraud statute, A.R.S. § 44-1522. Rural/Metro and the Directors and Officers move to dismiss these claims on two grounds: (1) that the claims are barred by the statute of limitation, and (2) the claims are preempted by SLUSA.

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[12] *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992) (quoting *Brian Clewer, Inc. v. Pan Am. World Airways, Inc.*, 674 F. Supp. 782, 785 (C.D. Cal. 1986)).

[13] *Vignolo*, 120 F.3d at 1077 (citation omitted).

1. Statute of Limitation

The statute of limitations bars plaintiffs' consumer fraud claim (Count X). Pursuant to A.R.S. § 12-541, the statute of limitation on this claim is one year from the date of discovery. The parties dispute the exact date on which plaintiffs had notice of facts constituting fraud - September 20 or September 28, 2000. Regardless, the claim is untimely, because it was filed nearly two years later.

Timeliness of the state statutory securities fraud claim is more complicated. Defendants argue that the claim should be dismissed because it was not filed within the two-year statute of limitation.[14] Defendants argue that Andersen's "going concern" exception to their audit letter for the fiscal year ending June 30, 2000, shows that plaintiffs had sufficient notice of the facts constituting fraud to commence the running of the statute of limitation. Defendants further assert that this letter was filed on September 20 and, therefore, the statute of limitation began to run on that date. Plaintiffs did allege that this "going concern" statement provided the requisite notice.[15] However, plaintiffs argue that because the "going concern" letter was not published until September 28, the statute of limitation could not begin to run until then and the claims are timely. The issue, therefore, is the precise date on which plaintiffs had notice of the facts constituting fraud.

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[14]Defendants state that A.R.S. § 44-1991 provides that a state securities fraud claim must be brought within two years following discovery of the fraud. Doc. 13, at 25. In fact, the two-year statute of limitation is found in A.R.S. § 44-2004(B). *See Aaron v. Fromkin*, 994 P.2d 1039, 1043 (Ariz. Ct. App. 2000).

[15]Am. Comp., ¶ 35.

The issue of discovery is generally a question of fact for the fact-finder. However, it is not the case that the issue of inquiry notice is never appropriately considered by the court in a motion to dismiss.[16] Nevertheless, defendants' are not entitled to dismissal based on the statements in plaintiffs' first amended complaint because there is an obvious dispute about the date of discovery that cannot be resolved in this motion. Plaintiffs do not, as defendants claim, allege in the complaint that the "going concern" exception was filed on September 20. Rather, the complaint merely alleges that a "going concern" letter was issued for Fiscal Year 2000 and then, in the next paragraph, that the audit certificate was dated September 20.[17] This does not show that discovery occurred on that earlier date.

Defendants' reliance on the September 21, 2000 press release is also of no assistance. Defendants argue that the press release, which discusses the losses over the past year and the issuance of Andersen's "going concern" exception, shows that plaintiffs had notice sufficient to start the running of the statute of limitation on September 21. In attaching this document to the reply, defendants in effect, seek to convert this motion to one for summary judgment pursuant to Rule 56.[18] However, because this document was not introduced until the reply, plaintiffs have had no

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[16]*Taylor v. Prudential Ins. Co. of America*, 2003 WL 21314254 (S.D. Ind. May 7, 2003) at *5. None of the cases that plaintiffs cite stand for this proposition. In fact, *Supermail Cargo, Inc. v. U.S.*, explains that the court may make such a determination on a motion to dismiss where the complaint, when liberally read, supports the argument concerning the statute of limitation. 68 F.3d 1203, 1206 (9th Cir. 1995).

[17]Am. Comp., ¶¶ 116, 117.

[18]*See Parrino v. FHP, Inc.*, 146 F.3d 699, 706 n.4 (9th Cir. 1998).

opportunity to present evidence outside the complaint. Accordingly, the court will not dismiss the state securities law claim based on the statute of limitation.

2. SLUSA Preemption

The state securities fraud claim (Count IX) and the remainder of plaintiffs' state law claims (Counts XI, XI(2), XII(2), XIII(2), XIV, and XV) are preempted by SLUSA. SLUSA provides for dismissal in the following circumstances:

> [when any] covered class action based upon the statutory or common law of any State or subdivision thereof [is brought] in any State or Federal court by any private party alleging -
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.[19]

Plaintiffs concede that this action is a covered class action and that the complaint alleges misrepresentation or omission of material fact.[20] However, plaintiffs argue that defendants are unable to show the three essential elements required for SLUSA preemption: (1) that the case involves a "covered security," (2) that the case concerns

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[19]15 U.S.C. § 78bb(f)(1).

[20]A "covered class" includes cases where:

> one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members. . . .

15 U.S.C. § 78bb(f)(5)(B)(i)(II).

sales or purchases, and (3) that the alleged misrepresentations or omissions were "in connection" with the sale or purchase of covered securities.

Undoubtedly, plaintiffs' statutory securities fraud claim is preempted by SLUSA. Despite plaintiffs' assertion that the claim does not arise in connection with the sale or purchase of covered securities, the express allegations made in the complaint show just the opposite. Count IX specifically alleges that "Plaintiffs' investments in Rural/Metro constitute 'securities,' " and earlier alleged that Rural/Metro's stock is subject to federal securities law.[21] The complaint then alleges that "defendants directly or indirectly *in connection with a transaction*" made material misrepresentations and omissions of fact.[22] Finally, plaintiffs seek to recover from defendants the amount "*paid* for the securities."[23] There can be no other import of these statements than to allege a

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[21] Under SLUSA, a "covered security" is one that is:

> (A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing, on the National Market System of the Nasdaq Stock Market . . .
> (b) listed, or authorized for listing, on a national securities exchange . . . that has listing standards that the Commission determines by rule . . . are substantially similar to the listing standards applicable to securities described in (A) . . .

15 U.S.C. § 773(b)(1)(A)-(B). A security is also a "covered security" if it is "issued by an investment company that is registered, or has filed a registration statement under the Investment Company Act of 1940. 15 U.S.C. § 80a-1, *et seq.*

Defendants argues that Rural/Metro stock is a covered security under federal law because Rural/Metro stock began trading on the Nasdaq National Market System on July 16, 1993, and currently trades on the NASDAQ SmallCap Market. Doc.13, at 6. Further, defendants submit a copy of Rural/Metro's SEC Commission Form 10-K. *See* Affidavit of Maureen Byers (doc. 8), Attachment.

[22]Am. Comp., ¶ 229.

[23]Am. Comp., ¶ 233.

misrepresentation or omission of material fact in connection with the sale or purchase of a covered security.

Plaintiffs argue that their state common law claims are not preempted by SLUSA because they do not concern a "covered security," a "sale or purchase," or meet the "in connection with" requirement. However, the gravaman of plaintiffs' complaint is that defendants affirmatively misled plaintiffs, the SEC, and shareholders as to the financial condition of the company, allowing defendants to sell Rural/Metro stock at inflated prices.[24] Those allegations leave no room to argue that plaintiffs do not allege that defendants' misrepresentations and omissions related to the sale or purchase of a covered security. Plaintiffs' common law fraud, aiding and abetting, and acting in concert claims all incorporate and restate these allegations. Accordingly, as alleged, those claims clearly fall under SLUSA preemption.

Plaintiffs' briefing focuses on matters other than the actual claims pled in the amended complaint. Plaintiffs argue that the ESOP, ESPP, and 401(k) plan are not the proper subject of SLUSA preemption. For example, plaintiffs argue that the EEOP, ESOP, and 401(k) plan are not "covered securities."[25] Plaintiffs further argue that there is no sale or purchase that arises "in connection" with securities related to the ESPP. However, this is not what the amended complaint alleges. With the exception of Counts XII and XIII, discussed separately in the next section, the only mention of the

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[24]Am. Comp., ¶¶ 32-38.

[25]Doc. 32, at 35-36 (relying on *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) for the principles used to determine what relationship constitutes an "investment contract" and subsequent SEC Releases determining the status of employee benefit programs).

plans in the amended complaint occurs in paragraph 10, and that paragraph does not make any allegations concerning the plans.

At oral argument, plaintiffs explained that their discussion of the plans was intended merely to present "alternative" theories for recovery. However, the amended complaint does not plead these theories as claims.

B. Claims Pled Relating to the Plans and ERISA Preemption

Plaintiffs' amended complaint asserts two claims relating to the employee benefit plans. Count XII alleges breach of contract by Rural/Metro for failure to make matching payments to the 401(k) in certain years.[26] Count XIII alleges the Directors and Officers breached their fiduciary duty to the ESPP, ESOP, and 401(k) by causing the assets to be frozen. Defendants argue that these claims are preempted by ERISA, and plaintiffs offer absolutely no argument to the contrary.[27]

ERISA provides that it shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in § 1003(a)."[28] Because of its "expansive sweep," ERISA preempts any state or common law claim that

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[26]There appears to be some confusion as to the exact allegations. The Amended complaint suggests that Rural/Metro had an obligation for numerous years to match the funds but failed to do so every year but one. Am. Comp. ¶¶ 243, 245. The response, however, when discussing the nature of the ERISA claim, suggests that Rural/Metro failed at its obligation for only one year - 2000. Doc. 32, at 46.

[27]At oral argument, plaintiffs specifically stated they do not concede ERISA preemption. Indeed the response does not purport to concede this either. However, plaintiffs' have offered no argument against ERISA preemption.

[28]29 U.S.C. § 1144(a). Section 1003(a) explains that ERISA applies to any plan (1) established by an employer in commerce or industry affecting commerce, or (2) any employee organization representing such employees, or (3) both.

has a "connection with or reference to [an ERISA] plan."[29] Defendants provide evidence that the 401(k) and the ESOP are plans covered under ERISA.[30] Plaintiffs do not refute this with any contrary evidence. Defendants present a compelling argument that the allegations concerning these ERISA plans are of the sort subject to preemption.[31] These claims are preempted.

Plaintiffs ask the court to treat their amended complaint as though it states an ERISA claim.[32] However, the facts as alleged do not state a claim under ERISA, and the court can not speculate about matters not pled.[33] Specifically, the amended complaint does not make any allegations concerning administrative exhaustion.[34]

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[29]*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-48 (1987).

[30]*See* Retirement Saving Plan and Trust and Employee Stock Ownership Plan (attached at Doc. 13, Ex. B) (stating "This Plan is designated as a profit sharing plan . . . for all purposes under the Code and ERISA"). Thus, the court finds counsel's remark at oral argument, that the 401(k) is *not* an ERISA plan, quite puzzling.

Defendants never argue that the ESPP is an ERISA plan subject to ERISA preemption. However, insofar as it is a contributory, voluntary plan, there can be little doubt that any claim arising out of the misrepresentations by the Directors and Officers concerning the value of the Rural/Metro stock are preempted by SLUSA. *See, generally, Falkowski v. Imation Corp.*, 309 F.3d 1123 (9th Cir. 2002). Further, it seems that plaintiffs cannot assert any other common law theory, such as misrepresentation, in light of their admission that they do not allege "any misrepresentation regarding the period during which the [stock options] were exercisable." Doc. 32, at 41.

[31]Doc. 13, at 11-13.

[32]Doc. 32, at 44 (citing *Crull v. GEM Ins. Co.*, 58 F.3d 1386 (9th Cir. 1995)).

[33]Plaintiffs claim that 29 U.S.C. § 1132 provides an analogous claim, providing a remedy for participants or beneficiaries of an ERISA plan. Doc. 32, at 45-46. While this may allow a plan member to sue the employer for the same types of damages that plaintiffs seek here, this does not assist the court in understanding whether plaintiff can state an ERISA claim.

[34]ERISA requires that plaintiffs exhaust administrative remedies where the plan contemplates such remedies. *Diaz v. United Agr. Employee Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995). Defendants claim that the 401(k) does contemplate such

Further, there are various elements of the original claim that cannot be included in an ERISA claim. For example, the oral statements of the Directors and Officers cannot serve as the basis for an ERISA claim.[35] Moreover, plaintiffs cannot recover punitive damages on an ERISA claim.[36]

C. Leave to Amend

Plaintiffs request that, if the court holds the amended complaint to be insufficient that they be entitled to an opportunity to amend. However, plaintiffs are represented by counsel and have already amended their complaint. Furthermore, based on the court's evaluation of the file, it does not appear that plaintiff could plead viable claims at this time.

IV. CONCLUSION

For the reasons stated above, defendants' motions to dismiss at dockets 9 and 13 are **GRANTED**.

DATED at Anchorage, Alaska, this 25th day of July 2003.

JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

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remedies. *Retirement Savings Plan & Trust*, § 13.04 (Reply (unnumbered docket), Ex. A).

[35]*Northwest Administrators, Inc. v. B.V. & B.R., Inc.*, 813 F.2d 223, 226-27 (9th Cir. 1987) (ERISA precludes oral modifications to benefit plans). Although plaintiffs description of the ERISA claim in the response does not contain any allegation concerning the oral representation, it is the complaint that controls.

[36]*Bast v. Prudential Ins. Co. of America*, 150 F.3d 1003, 1009 (9th Cir. 1998).