IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GREG PFEIFER and ANDREW DORLEY,	:	
Plaintiffs,	:	
	:	
v.	:	**Civ. No. 16-497**
	:	
WAWA, INC., et. al.,	:	
Defendants.	:	
	:	

O R D E R

Plaintiffs Greg Pfeifer and Andrew Dorley, on behalf of a putative class of employees who were terminated by Defendant Wawa, challenge a 2015 amendment to Wawa's Employee Stock Ownership Plan that eliminated their right to hold Wawa stock through age 68. I have denied in part Defendants' Motion to Dismiss. (Order, Doc. No. 58.) Defendants ask me to reconsider my refusal to dismiss Counts V and VI of the First Amended Complaint, or to certify those decisions for interlocutory review. (Doc. No. 63.) Plaintiffs have responded and Defendants have replied. (Doc. Nos. 70, 76.) I will deny Defendants' Motion in its entirety.

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." U.S. ex rel. Schumann v. Astrazeneca Pharm. L.P., 769 F.3d 837, 848 (3d Cir. 2014) (quoting Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999)). To warrant reconsideration, Defendants must show "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . . ; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Id. at 848-49 (quoting Quinteros, 176 F.3d at 677). Defendants have not made such a showing.

Count V

Plaintiffs here allege that their right to hold Wawa stock until age 68 was an "accrued benefit" protected by ERISA's anti-cutback provision. 29 U.S.C. § 1054(g); (First Am. Compl., Doc. No. 20, ¶¶ 129-140.) I determined that the anti-cutback provision did not protect Plaintiffs' right to hold Wawa stock. (See Order at 2-3.) Because Defendants also liquidated Plaintiffs' accounts (and imposed liquidation fees), however, I determined that Plaintiffs stated a claim "to the extent that [they] base their anti-cutback claim on the liquidation of their accounts (and not the forced sale of Wawa stock)." (Id. at 4.)

I will not alter that decision. Defendants note that because the Plan Amendment involuntarily transferred Plaintiffs' accounts to Wawa's 401(k) Plan, but permitted Plaintiffs to choose whether to hold the funds within the 401(k) plan or take a distribution, the Plan Amendment was not an involuntary distribution. (Defs.' Br., Doc. No. 63-1, at 10-13; see also Doc. No. 63-2, at 3 ("All liquidated proceeds from the ESOP Stock Account of any such Participant shall be transferred to the Participant's account in the [Wawa] 401(k) Plan . . . .").) Defendants further note that applicable Treasury regulations treat involuntary distributions differently from transfers because, unlike transfers, distributions expose plan participants to immediate taxation. See 26 U.S.C. § 402(a); Compare 26 C.F.R. § 1.411(d)-4(A-2)(a)(3)(i) (governing "transfers" and "transactions amending or having the effect of amending a plan or plans to transfer plan benefits"), with id. § 1.411(d)-4(A-2)(b)(2)(v) (governing "involuntary distributions"). The Plan Amendment constituted an involuntary transfer of Plaintiffs' ESOP accounts to 401(k) accounts, not an involuntary distribution from the ESOP accounts. See Leckey v. Stefano, 501 F.3d 212, 220 (3d Cir. 2007), as amended (Dec. 21, 2007) ("ERISA uses the word 'transfer' to refer to involuntary movements of plan assets by plan administrators, not

to distributions taken and reinvested by plan participants in another ERISA plan."). Because governing regulations require Defendants to obtain the consent of the holders of accounts only for "involuntary distributions," and not "transfers," Defendants were not required to obtain Plaintiffs' consent.

As Defendants concede, however, regulations governing transfers also require "each participant [to] have the same account balance after the transfer as before the transfer." (Defs.' Br. at 13 (citing 26 C.F.R. § 1.414(l)-1(d)(3), (m)(1), (o).) Plaintiffs allege that their account balances were reduced because of a $50.00 distribution fee. (First Am. Compl. ¶ 63.) If true, Plaintiffs' account balances were unlawfully reduced because of the Plan Amendment. Accordingly, Plaintiffs have stated a claim for a violation of the anti-cutback rule.

Count VI

Plaintiffs here allege that the terms of the Plan, including the right to hold Wawa stock until age 68, became fixed when the Plaintiffs were terminated and their rights vested in 2009. (First Am. Compl. ¶¶ 141-146.) By eliminating Plaintiffs' right to hold Wawa stock, the 2015 Plan Amendment purportedly violated Plaintiffs' rights under the Plan in effect at the time of the Amendment. Plaintiffs seek "appropriate equitable relief" to have their benefits determined in accordance with the Plan in effect before the Amendment. 29 U.S.C. § 1132(a). I determined that Plaintiffs could seek to invalidate the Plan Amendment under unilateral contract principles, and, because the pre-Amendment Plan was ambiguous as to whether the Plan Amendment was permitted, that Plaintiffs had stated a claim. (See Order at 4-5.)

I will not change that ruling. Defendants do not present new evidence or identify any clear errors of law or intervening changes in controlling law. Instead, they renew their argument that because I determined that the anti-cutback rule does not protect Plaintiffs' right to hold

Wawa stock through age 68, "that conclusion should additionally foreclose Plaintiffs' common-law, unilateral-contract claims against Wawa challenging the same conduct." (Defs.' Br. at 4.) In effect, Defendants argue that they were permitted to withdraw Plaintiffs' right to hold Wawa stock *even if* withdrawing that right breached the Plan's terms. The cases upon which Defendants rely bely that result. See Hooven v. Exxon Mobil Corp., 465 F.3d 566, 573 (3d Cir. 2006) ("Generally, 'breach of contract principles, applied as a matter of federal law, govern claims for benefits due under an ERISA plan.'" (quoting Kemmerer v. ICI Americas, Inc., 70 F.3d 281, 287 (3d Cir. 1995))); id. at 574 ("[W]e occasionally employ unilateral contract concepts in ERISA cases . . . where 'the asserted unilateral contract is based on explicit promises in the ERISA plan documents themselves.'" (quoting Carr v. First Nationwide Bank, 816 F. Supp. 1476, 1490-91 (N.D. Cal. 1993))).

As Plaintiffs appear to acknowledge, they must show that Defendants breached the Plan to succeed on Count VI. 29 U.S.C. § 1132(a)(3); (Pls.' Resps., Doc. No. 70, at 9 ("Count VI alleges the [Plan Amendment] violated the terms of the Plan applicable to Class Members."); id. ("Defendants violated ERISA by not determining their benefits in accordance with the terms of the ESOP in effect when their employment ended.").) The Plan in effect when Plaintiffs were terminated gave them the option to continue to hold Wawa stock until age 68; the Plan Amendment subsequently took that option away.

Plaintiffs' claim thus turns on whether the Plan in effect in 2015 included a provision permitting Defendants to amend the Plan to eliminate Plaintiffs' right to hold Wawa stock. See Kemmerer, 70 F.3d at 287 ("[A]fter the [participants'] rights had vested when they completed performance, [the company] could not terminate the plan in [the] absence of a specific provision in the plan authorizing it to do so."). Although the Plan reserved to Wawa the right to amend or

modify the Plan "at any time," I determined that this clause was "ambiguous as to whether Wawa could amend the Plan 'after the parties' performance'" (i.e., after Plaintiffs were terminated and their rights vested in 2009). (Order at 5 (quoting Kemmerer, 70 F.3d at 288); see In re New Valley Corp., 89 F.3d 143, 151-52 (3d Cir. 1996) (top-hat plan that reserved to sponsor the right to terminate the Plan "at any time" was ambiguous as to whether sponsor could terminate after participants performed); Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034, 1037, 1041 (3d Cir. 1994), rev'd on other grounds sub nom Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) (interpreting reservation of right to amend welfare benefit plan "at any time," "[t]he district court understandably declined to hold that the . . . plan documents were unambiguous as a matter of law"). Cf. In re Unisys Corp. Retiree Med. Ben. ERISA Litig., 58 F.3d 896, 904 n.11 (3d Cir. 1995) ("We do not hold that a reservation of right [to amend or terminate a plan] will always prevail over a promise of benefits . . . . [E]ach case must be considered fact specific and the court must make its determination of the benefits provided based on the language of the particular plan it has been called upon to review.").

I will not certify an interlocutory appeal, which will not "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292.

AND NOW, this 11th day of January, 2017, upon consideration of Defendants' Motion for Reconsideration, Or In the Alternative, To Certify Interlocutory Appeal (Doc. No. 63), Plaintiffs' Response (Doc. No. 70), Defendants' Reply (Doc. No. 76), and all related submissions, is hereby **ORDERED** that Defendant's Motion is **DENIED**.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.