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OAKLAND

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for
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11
12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

ADD

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18 MARIO L. ORSOLINI and ANDREW M.
LEVINE,

Case No.

C10-04478

MEJ

19 Plaintiffs,

COMPLAINT FOR DECLARATORY,
INJUNCTIVE, AND OTHER EQUITABLE
RELIEF (ERISA)

20 vs.

21 MEAD CLARK LUMBER CO. AKA
22 MEAD CLARK LUMBER COMPANY,
INC. and RANDAL J. DESTRUDEL,

23 Defendants.
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1 **JURISDICTION**

2 1. Plaintiffs bring this action for declaratory, injunctive, and other equitable relief pursuant
3 to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), and the Declaratory Judgment Act, 28 U.S.C. § 2201.
4 This Court has subject matter jurisdiction over Plaintiffs' claims pursuant to ERISA § 502(e)(1), 29
5 U.S.C. § 1132(e)(1), and pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the
6 United States.

7 **VENUE**

8 2. Venue lies in the Northern District of California pursuant to ERISA § 502(e)(2), 29
9 U.S.C. § 1132(e)(2), because the Defendants reside or may be found in this District and/or the breaches
10 alleged took place in this District. Venue is also proper pursuant to 28 U.S.C. § 1391(b), in that a
11 substantial part of the events or omissions giving rise to Plaintiffs' claims occurred within this District.

12 **PARTIES**

13 3. At all relevant times, Plaintiff MARIO L. ORSOLINI ("Mr. Orsolini"), was a
14 participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the Mead Clark Lumber Company Inc.,
15 401(k) Profit Sharing Plan, Plan Number 005 ("Plan"). Mr. Orsolini is a former employee of Defendant
16 MEAD CLARK LUMBER CO. AKA MEAD CLARK LUMBER COMPANY, INC. ("Mead Clark"),
17 where he worked for approximately 9 years, until December 31, 2008. He resides in Cloverdale,
18 California.

19 4. At all relevant times, Plaintiff ANDREW M. LEVINE ("Mr. Levine"), was a participant,
20 as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plan. Mr. Levine is a current employee of
21 Defendant Mead Clark, where he has worked for approximately 20 years. He resides in Forestville,
22 California.

23 5. At all relevant times, the Plan was an employee pension benefit plan within the meaning
24 of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). Beginning on at least January 1, 2004, the Plan was an
25 individual account plan that consisted of two components, neither of which allowed for participant-
26 directed investments: (1) a profit-sharing component, pursuant to which Mead Clark made
27 contributions on behalf of each participant; and (2) a 401(k) component, pursuant to which employees
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1 of Mead Clark could elect to have a portion of their compensation contributed to the Plan.

2 6. At all relevant times, Defendant Mead Clark was a California corporation with its
3 principal place of business in Santa Rosa, California. Defendant Mead Clark is the Plan sponsor, as
4 defined in ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B), and the Plan Administrator as defined in
5 ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A) of the Plan. In addition, Plaintiffs are informed and
6 believe, and based thereon allege, that at all relevant times, Mead Clark was a fiduciary of the Plan
7 within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that it exercised discretionary authority
8 or discretionary control respecting the management of the Plan and/or exercised authority or control
9 respecting management or disposition of Plan assets, and/or in that it had discretionary authority or
10 discretionary responsibility in the administration of the plan.

11 7. At all relevant times, Defendant RANDAL J. DESTRUEL (“Mr. Destruel”) was named
12 in the Plan’s governing instrument as a trustee of the Plan. Plaintiffs are informed and believe, and
13 based thereon allege, that at all relevant times, Mr. Destruel has been Chief Executive Officer of Mead
14 Clark, and a fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that
15 he exercised discretionary authority or discretionary control respecting management of the Plan and/or
16 exercised authority or control respecting management or disposition of the Plan’s assets, and/or in that
17 he had discretionary authority or discretionary responsibility in the administration of the Plan.

18 **PLAN FACTS**

19 8. Mead Clark established the Plan effective May 1, 1994.

20 9. Plaintiffs are informed and believe, and based thereon allege, that Mead Clark amended
21 and restated the Plan in its current form, effective January 1, 2004.

22 10. Mr. Destruel became a trustee of the Plan at least as early as January 1, 2004. Mr.
23 Destruel signed as trustee of the Plan in the Plan’s Adoption Agreement, which was executed on or
24 about November 3, 2003.

25 11. Plaintiffs are informed and believe, and based thereon allege, that prior to January 1,
26 2004, the Plan was known as the Mead Clark Lumber Company Money Purchase Pension Plan, Plan
27 Number 004.

1 31. Plaintiffs are adequate representatives of the class, and therefore satisfy the requirements
2 of Fed. R. Civ. P. 23(a)(4). Defendants have no unique defenses against Plaintiffs that would interfere
3 with their representation of the class. Mr. Orsolini and Mr. Levine are in good health and willing to
4 represent the class. They have engaged counsel with many years of litigation experience, including in
5 ERISA class action litigation.

6 32. The requirements of Fed. R. Civ. P. 23(b)(1) are satisfied, in that the prosecution of
7 separate actions by individual class members would create a risk of inconsistent adjudications that
8 would require Defendants to follow incompatible courses of conduct. For example, the Defendants
9 would not be able to act consistently if their investments are declared imprudent in one case but not
10 another. Additionally, Fed. R. Civ. P. 23(b)(1) is also satisfied in that the prosecution of separate
11 actions by individual class members would create a risk of adjudications that would as a practical
12 matter be dispositive of other members' interests or impair or impede the other members' ability to
13 protect their interests. For example, if one plaintiff litigated against Defendants and received an
14 unfavorable decision, Defendants could invoke defensive collateral estoppel and res judicata against
15 subsequent plaintiffs, assuming subsequent plaintiffs were found to be in privity with the first plaintiff.
16 Thus, subsequent plaintiffs would effectively be bound by the first plaintiff's unfavorable decision, but
17 would not have the opportunity to avail themselves of the protections provided by Fed. R. Civ. P. 23's
18 procedural safeguards.

19 33. Alternatively, the requirements of Fed. R. Civ. P. 23(b)(2) also are satisfied in that the
20 Defendants have acted on grounds generally applicable to the class, thereby making appropriate final
21 declaratory and injunctive relief with respect to the class as a whole. For example, Plaintiffs seek, with
22 respect to the class as a whole, a declaration that Defendants breached their fiduciary duties by
23 investing the Plan's assets in land deeds of trust. Plaintiffs also seek, with respect to the class as a
24 whole, an Order that Defendants make good to the Plan the losses resulting from their breaches.

25 34. Alternatively, the requirements of Fed. R. Civ. P. 23(b)(3) are satisfied, in that a
26 common issue of fact and law – whether, given the duties imposed by ERISA, Defendants breached
27 their fiduciary duties by imprudently investing the Plan's assets and by related acts and omissions –
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1 predominates over any issues affecting only individual members. A class action is superior to other
2 available methods for the fair and efficient adjudication of this dispute because Section 10.06 of the
3 Plan requires that “[a]ny final judgment entered in any [court] proceeding will be binding upon the
4 Employer, the Plan Administrator, the Trustee, Custodian, Participants and Beneficiaries and upon their
5 successors and assigns.”

6 **FIRST CLAIM FOR RELIEF**

7 **Claim for Breach of Fiduciary Duty Against All Defendants**
8 **[ERISA §§ 404(a)(1), 409, 502(a)(2), 29 U.S.C. §§ 1104(a)(1), 1109, 1132(a)(2)]**

9 35. Plaintiffs incorporate Paragraphs 1 through 34, above, as though fully set forth herein.

10 36. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires, *inter alia*, that a plan fiduciary
11 discharge his or her duties with respect to a plan solely in the interest of the participants and
12 beneficiaries and (1) with the care, skill, prudence, and diligence under the circumstances then
13 prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the
14 conduct of an enterprise of a like character and with like aims; (2) by diversifying the investments of
15 the plan so as to minimize the risk of large losses; (3) in accordance with 29 C.F.R. § 2550.404a-1(a),
16 which provides that a fiduciary must act with the “skill, prudence, and diligence under the
17 circumstances then prevailing that a prudent man acting in a like capacity and familiar with such
18 matters would use; and (4) in accordance with 29 C.F.R. § 2550.404a-1(b), which provides that a
19 fiduciary must take into account the “facts and circumstances that, given the scope of such fiduciary’s
20 investment duties, the fiduciary knows or should know are relevant to the particular investment or
21 investment course of action involved.”

22 37. ERISA § 409, 29 U.S.C. § 1109, provides, *inter alia*, that any person who is a fiduciary
23 with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on
24 fiduciaries by Title 1 of ERISA shall be personally liable to make good to the plan any losses to the
25 plan resulting from each such breach, and additionally is subject to such other equitable or remedial
26 relief as the court may deem appropriate, including removal of the fiduciary.

27 38. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant to bring a suit for
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1 relief under ERISA § 409.

2 39. At all relevant times, Mead Clark and Mr. Destruel failed to adequately investigate
3 various investments made with Plan assets, including but not limited to the Carinalli Loan, the
4 Herreshoff Rohrman Loan, and the Balletto Loan.

5 40. At all relevant times, Mead Clark and Mr. Destruel failed to adequately monitor various
6 investments held by the Plan, including but not limited to the Carinalli Loan, the Herreshoff Rohrman
7 Loan, and the Balletto Loan.

8 41. At all relevant times, Mead Clark and Mr. Destruel failed to properly diversify the
9 investments held by the Plan so as to minimize the risk of large losses.

10 42. Defendants, and each of them, have breached their fiduciary duties of prudence and/or
11 loyalty by acts and omissions including but not limited to investing the Plan's assets imprudently and/or
12 failing to investigate investments made with Plan assets and/or failing to monitor investments made
13 with Plan assets.

14 43. Plaintiffs are informed and believe, and based thereon allege, that as a result of
15 Defendants' breaches, the Plan suffered losses which Defendants, and each of them, are liable to restore
16 to the Plan.

17 **PRAYER FOR RELIEF**

18 Wherefore, Plaintiffs pray as follows:

19 1. Declare that Defendants, and each of them, have breached their duties to the Plan's
20 participants and beneficiaries;

21 2. Issue a preliminary injunction prohibiting distribution of the accounts of Defendant
22 Destruel from the Plan until such time as Plaintiffs' claim against him has been finally adjudicated;

23 3. Order that Defendants, and each of them, make good to the Plan the losses resulting from
24 their breaches, including, but not limited to, by forfeiting their Plan accounts, if any;

25 4. Order that Defendant Destruel be removed from his position as fiduciary of the Plan and
26 replaced with an independent fiduciary;

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1 5. Order that Defendants, and each of them, post a bond valued at a minimum of \$704,559,
2 the estimated current value of the Carinalli Loan, the Herreshoff Rohrman Loan, and the Balletto Loan,
3 to protect participants and beneficiaries from future losses to the Plan arising from these investments;

4 6. Order that Defendants, and each of them, post a bond to protect participants and
5 beneficiaries from future losses to the Plan arising from other imprudent investments, according to
6 proof;


7 7. Award Plaintiffs their attorneys' fees and costs pursuant to ERISA § 502(g), 29 U.S.C. §
8 1132(g); and

9 8. Award such other and further relief as the Court deems equitable and just.

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12 Dated: October 4, 2010

Respectfully Submitted,

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