Court Opinions

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

TIM DAVIS, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. SALESFORCE.COM, INC., et al., Defendants.

Case No. 20-cv-01753-MMC

April 15, 2021, Filed

April 15, 2021, Decided

Show Summary

For Tim Davis, Gregor Miguel, Amanda Bredlow, Plaintiffs: Daniel L. Germain, LEAD ATTORNEY, Rosman & Germain LLP, Encino, CA; Donald R. Reavey, PRO HAC VICE, Capozzi Adler, P.C., Harrisburg, PA; Mark K. Gyandoh, Capozzi Adler P.C., Merion Station, PA.

For Salesforce.com, Inc., Board of Directors of Salesforce.com, Inc., Marc Benioff, Investment Advisory Committee, Joseph Allanson, Stan Dunlap, Joachim Wettermark, Defendants: Paul J. Ondrasik, Jr., LEAD ATTORNEY, PRO HAC VICE, Steptoe & Johnson LLP, Washington, DC; Eric G. Serron, Mark Christopher Savignac, PRO HAC VICE, Steptoe & Johnson LLP, Washington, DC; Laurie Edelstein, Steptoe & Johnson LLP, San Francisco, CA.

MAXINE M. CHESNEY, United States District Judge.

MAXINE M. CHESNEY

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS; DISMISSING FIRST AMENDED COMPLAINT WITHOUT FURTHER LEAVE TO AMEND

Before the Court is defendants Salesforce.com, Inc. ("Salesforce"), Board of Directors of Salesforce ("Board"), Marc Benioff ("Benioff"), The Investment Advisory Committee ("Committee"), Joseph Allanson ("Allanson"), Stan Dunlap ("Dunlap"), and Joachim Wettermark's ("Wettermark") Motion, filed December 7, 2020, "to Dismiss Plaintiffs' First Amended Complaint." Plaintiffs have filed opposition, to which defendants have replied. Having considered the papers submitted in support of and in opposition to the motion, the Court rules as follows.[1]

BACKGROUND

Plaintiffs are former Salesforce employees who participated in the Salesforce 401(k) Plan ("the Plan"). (See First Am. Compl. ("FAC") ¶¶ 20-23.) In 2000, the Plan was established by Salesforce to provide benefits to eligible Salesforce and "Salesforce.com, Foundation" employees. (See id. ¶ 51.) The Plan is a "defined contribution plan," i.e., a plan wherein participants' benefits are "based solely upon the amount contributed to [participants'] accounts," as well as "any income, expense, gains and losses, and any forfeitures . . . which may be allocated to such participant's account." (See id. ¶ 53.)

As of December 31, 2018, the Plan had over $2 billion in assets and offered twenty-seven investment options, as well as a brokerage link, through which link participants "had access to additional investment options." (See FAC ¶¶ 63-64.)

By the instant action, plaintiffs allege defendants breached their fiduciary duties to the Plan and Plan participants in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), **29 U.S.C. § 1001** et seq. (See FAC ¶ 10.) In particular, plaintiffs allege the Committee, Allanson, Dunlap, and Wettermark (collectively, "Committee Defendants") breached their fiduciary duty of prudence by selecting and retaining investment options with high costs relative to other, comparable investments, as well as by failing "to investigate the availability of lower-cost share classes of certain mutual funds in the Plan." (See id. ¶ 130.) Plaintiffs also allege the Board, Salesforce, and Benioff (collectively, "Monitoring [*2] Defendants") breached their fiduciary monitoring duty by failing to adequately monitor the Committee Defendants. (See id. ¶¶ 135-38.)

Based on the above allegations, plaintiffs assert two Claims for Relief under ERISA: (1) a claim against the Committee Defendants for breach of the fiduciary duty of prudence; and (2) a claim against the Monitoring Defendants for failing to adequately monitor the Committee Defendants.

LEGAL STANDARD

Dismissal under **Rule 12(b)(6) of the Federal Rules of Civil Procedure** can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. See Balistreri v. Pacifica Police Dep't, **901 F.2d 696** , **699** (9th Cir. 1990). **Rule 8(a)(2)** , however, "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" See Bell Atlantic Corp. v. Twombly, **550 U.S. 544** , **555** , **127 S. Ct. 1955** , **167 L. Ed. 2d 929** (2007) (quoting **Fed. R. Civ. P. 8(a)(2)**). Consequently, "a complaint attacked by a **Rule 12(b)(6)** motion to dismiss does not need detailed factual allegations." See **id.** Nonetheless, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." See **id.** (internal quotation, citation, and alteration omitted).

In analyzing a motion to dismiss, a district court must accept as true all material allegations in the complaint and construe them in the light most favorable to the nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896 , 898 (9th Cir.1986). "To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662 , 678 , 129 S. Ct. 1937 , 173 L. Ed. 2d 868 (2009) (quoting Twombly, 550 U.S. at 570). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" Twombly, 550 U.S. at 555 . Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

DISCUSSION

By order dated October 5, 2020 ("October 5 Order"), the Court dismissed with leave to amend each of the claims asserted in plaintiffs' initial complaint, after which ruling plaintiffs filed the FAC, reasserting imprudence and failure to monitor.[2] By the instant motion, defendants contend plaintiffs' operative pleading is again subject to dismissal for failure to state a claim.

A. First Claim for Relief

As noted, in their First Claim for Relief, plaintiffs allege the Committee Defendants breached their fiduciary duty of prudence by selecting and retaining costly investment options. In that regard, plaintiffs allege the following "factors" demonstrate the Committee Defendants "ran the Plan in an imprudent manner" (see FAC ¶ 67): (1) "almost half of the Plan's core investments" chosen by defendants "were much more expensive than comparable investments found in similarly-sized plans," as demonstrated by comparisons to the "ICI Median Fee" and "ICI Avg. Fee" (see id. ¶ 69);[3] (2) defendants "failed to prudently monitor the Plan to determine whether the Plan was invested in the lowest-cost share class available for the Plan's mutual funds" (see id. ¶ 75); (3) defendants failed to consider passively managed funds as [*3] alternatives to "the actively managed funds in the Plan" (see id. ¶ 108);[4] (4) defendants failed to "investigate the availability of lower cost JPMorgan collective trusts" (see id. ¶ 113);[5] and (5) defendants "failed to select the most prudent investments for the Plan" based on comparisons to the "5-Year Risk/Return Statistics" of "identical lower-cost share funds as well as other materially similar funds" (see id. ¶¶ 115, 119).

Under ERISA, a plan fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries," see 29 U.S.C. § 1104(a)(1) , and must do so "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," see 29 U.S.C. § 1104(a)(1)(B) . To evaluate whether a plan fiduciary has breached his fiduciary duty of prudence, the Court focuses "not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction." See Howard v. Shay, 100 F.3d 1484 , 1488 (9th Cir. 1996). "Because the content of the duty of prudence turns on the circumstances . . . prevailing at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific." Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 , 425 , 134 S. Ct. 2459 , 189 L. Ed. 2d 457 (2014) (internal quotation and citation omitted).

1. ICI Median and Average Fee

In the FAC, plaintiffs assert defendants were imprudent in retaining eleven actively managed funds with expense ratios that were higher than the ICI Median Fee and ICI Average Fee for "comparable investments found in similarly-sized plans." (See FAC ¶ 69.)

As set forth in the October 5 Order, however, the Court previously found plaintiffs failed to state a viable claim based on such comparisons to the ICI Median Fee because "the ICI Median Fee reflects the fees of both passively and actively managed funds" and, as explained in the October 5 Order and later herein, passively managed funds are not "meaningful benchmarks" for actively managed funds. (See Order, filed Oct. 5, 2020, at 6:6-8 & n.9; see also infra Section A.3.)

Although plaintiffs have, in the FAC, added comparisons of expense ratios of actively managed funds offered in the Plan to the ICI Average Fee, those comparisons are insufficient to support an imprudence claim, as the ICI Average Fee, like the ICI Median Fee, reflects the fees of both passively and actively managed funds. SeeThe BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans (2017), https://www.ici.org /pdf/20_ppr_dcplan_profile_401k.pdf at 67.

Accordingly, plaintiffs fail to state an imprudence claim predicated on comparisons to the ICI Median Fee and ICI Average Fee.

2. Lower-Cost Share Classes

In the FAC, plaintiffs assert, as they did in their initial complaint, that defendants were imprudent in failing to substitute the lowest-cost share class for eleven actively managed mutual funds offered in the Plan. In that regard, plaintiffs' allegations remain essentially the same as the allegations previously found deficient by the Court. Specifically, [*4] plaintiffs again identify two lower-cost share classes, Class R5 and R6, as substitutes for nine JPMorgan SmartRetirement Institutional Class funds offered in the Plan, as well as one lower-cost share class for two Fidelity funds offered in the Plan,[6] all of which lower-cost share classes, plaintiffs allege, are "the same in every respect other than price [as] their less expensive counterparts." (See FAC ¶¶ 78, 82.)

As set forth in the October 5 Order, however, judicially noticeable IRS Form 5500 filings for the Plan[7] indicate the fees charged in connection with the JPMorgan SmartRetirement funds "were used to pay for recordkeeping and other administrative services provided to the Plan, an arrangement which frequently inure[s] to the benefit of ERISA plans." (See Order, filed Oct. 5, 2020, at 8:17-9:44 (alteration in original) (internal quotations and citations omitted)). "Known as 'revenue sharing,' this arrangement provides 'an obvious alternative explanation' for why the Plan did not offer the lowest-cost share class for those funds" (see id. at 8:24-9:4 (internal citation omitted)), and plaintiffs' conclusory allegations that, given the "discrepancy in prices of the share classes," there was "no benefit to choosing a more expensive share class" (see FAC ¶¶ 81-82), do not suffice to render plaintiffs' imprudence claim plausible.

Further, as explained in the October 5 Order, the majority of the cases on which plaintiffs rely in arguing courts have accepted allegations similar to those pled in the FAC are readily distinguishable on their facts. (See Order, filed Oct. 5, 2020, at 9:5-20.)

In particular, in a majority of those cases (see Opp. at 9:13-22 & n.9; 12:26-14:12), "the plaintiffs therein had alleged numerous acts of wrongdoing, which, when viewed collectively, were found sufficient to state a claim" (see Order, filed Oct. 5, 2020, at 9:7-9); see, e.g., Bouvy v. Analog Devices, Inc., No. 19-CV-881 DMS (BLM), [2020 BL 234035], 2020 U.S. Dist. LEXIS 110747 , [2020 BL 234035], 2020 WL 3448385 , at *9 (S.D. Cal. June 24, 2020) (denying motion to dismiss where plaintiff, in addition to higher-cost shares, "specifically allege[d] other indicia of imprudence"; noting plan allegedly "retained funds that historically underperformed" and "used expensive, actively managed" funds affiliated with plan's recordkeeper "as default selections"); Lorenz v. Safeway, Inc., 241 F. Supp. 3d 1005 , 1018-19 (N.D. Cal. 2017), abrogated on other grounds by Rollins v. Dignity Health, 338 F. Supp. 3d 1025 (N.D. Cal. 2018) (holding plaintiffs' allegations, when "viewed collectively," were sufficient to state imprudence claim; noting funds offered in plan allegedly were managed by company "affiliated with the [p]lan's recordkeeper" and, when funds were selected for inclusion in plan, "had no meaningful

record of performance"); Urakhchin v. Allianz Asset Mgmt. of Am., No. SACV 15-1614-JLS (JCGx), [2016 BL 255680], 2016 U.S. Dist. LEXIS 104244 , [2016 BL 255680], 2016 WL 4507117 , at *7 (C.D. Cal. Aug. 5, 2016) (finding plaintiffs' allegations, when considered "[t]ogether," were sufficient to state imprudence claim; noting plan offered investment options allegedly affiliated with defendant corporation "to benefit the [defendant corporation] family").

In the remaining cases, wherein courts have held allegations identifying lower-cost share classes are, without more, sufficient to state a claim [*5] for imprudence, the Court, as set forth in the October 5 Order, is not persuaded by the reasoning therein, and, indeed, the Ninth Circuit would appear to hold to the contrary. (See Order, filed Oct. 5, 2020, at 9:21-10:5 (citing Tibble v. Edison Int'l, 729 F.3d 1110 , 1135 (9th Cir. 2013), vacated on other grounds, 575 U.S. 523 , 135 S. Ct. 1823 , 191 L. Ed. 2d 795 (2015) (rejecting argument that, in lieu of "retail-class mutual 7 funds," fiduciary "should have offered only . . . 'institutional' funds";[8] finding "[t]here are simply too many relevant considerations for a fiduciary, for that type of bright-line approach to prudence to be tenable"));[9] see also White, [2017 BL 183229], 2017 U.S. Dist. LEXIS 83474 , [2017 BL 183229], 2017 WL 2352137 , at *13-14 (finding "ample authority holds that merely alleging that a plan offered retail rather than institutional share classes is insufficient to carry a claim for fiduciary breach").[10]

Accordingly, plaintiffs fail to state an imprudence claim predicated on a comparison of share classes.

3. Actively Managed Funds

In the FAC, plaintiffs assert, as they did in their initial complaint, that the Committee Defendants acted imprudently by retaining nine actively managed JPMorgan SmartRetirement funds when less costly passively managed funds were available.

The Court previously dismissed plaintiffs' imprudence claim to the extent such claim was based on a comparison of actively managed funds with passively managed funds because, inter alia, "[p]assively managed funds . . . ordinarily cannot serve as meaningful benchmarks for actively managed funds" given that "the two types of funds have different aims, different risks, and different potential rewards that cater to different investors." (See Order, filed Oct. 5, 2020, at 6:6-8 (internal quotation and citation omitted)); see also Meiners v. Wells Fargo & Co., 898 F.3d 820 , 822 (8th Cir. 2018) (holding, "[t]o show that a prudent fiduciary in like circumstances would have selected a different fund based on the cost or performance of the selected fund, a plaintiff must provide a sound basis for comparison—a meaningful benchmark" (internal quotation omitted)).

In the FAC, plaintiffs have added the following allegations: (1) a number of "statistics bear out the vast underperformance of actively managed funds over passively managed funds over different stretches of 5 to 10 year periods beginning in 2008" (see FAC ¶ 93; see also id. ¶¶ 91-92, 102); (2) JPMorgan offered, at all relevant times, "a target date blend series that had some passive funds underlying it and had an overall lower cost structure" as well as higher returns "than the purely actively managed SmartRetirement counterparts" (see id. ¶¶ 106-07); and (3) "[d]efendants' actions in overwhelmingly favoring actively managed funds[] plausibly show that they failed to consider the pros and cons of offering actively managed investments vs. passively managed investments" (see id. ¶ 105).

As noted above and as set forth in the October 5 Order, however, passively managed funds are not meaningful benchmarks for actively managed funds given their essential differences (see Order, filed Oct. 5, 2020, at 6:6-22), and, indeed, plaintiffs acknowledge in the FAC that "higher-cost mutual funds may outperform a less-expensive option, such as a passively-managed [*6] index fund, over the short term" (see FAC ¶ 90). Thus, although the JPMorgan target date blend funds and JPMorgan SmartRetirement funds may have some similarities, the JPMorgan target date blend funds, which plaintiffs allege have "some passive funds underlying [them]" (see FAC ¶ 106), are not meaningful benchmarks for the actively managed JPMorgan SmartRetirement funds. See Meiners, 898 F.3d at 823 (finding allegation that "cheaper alternative investments with some similarities" to funds offered in plan "exist[ed] in the marketplace" insufficient to state imprudence claim (emphasis omitted)); see also Davis v. Wash. U., 960 F.3d 478 , 485-85 (8th Cir. 2020) (finding claim based on comparison of actively and passively managed funds subject to dismissal; noting, "[c]omparing apples and oranges is not a way to show that one is better or worse than the other").

Even assuming, arguendo, the JPMorgan target date blend funds can be used for purposes of comparison, plaintiffs' allegation that those funds outperformed the JPMorgan SmartRetirement funds is based on one-year, three-year, and five-year returns and, as set forth in the October 5 Order, such returns "are not sufficiently long-term to state a plausible claim of imprudence." (See Order, filed Oct. 5, 2020, at 7:15-16 (internal quotation and citation omitted)); see also Wehner v. Genentech, Inc., No. 20-cv-06894-WHO, [2021 BL 48012], 2021 U.S. Dist. LEXIS 26227 , [2021 BL 48012], 2021 WL 507599 , at *9 (N.D. Cal. Feb. 9, 2021) (holding, "[t]here is nothing presumptively imprudent about a retirement plan retaining investments through periods of underperformance as part of a long-range investment strategy"; finding allegations of underperformance "based on annual returns over three-and five-year periods" insufficient to state imprudence claim (internal quotation and citation omitted)). Moreover, based on the returns alleged in the FAC, the JPMorgan SmartRetirement funds experienced, at most, "a small disparity in performance" over a three-year and five-year period relative to the JPMorgan target date blend funds, the biggest differential being approximately 0.55%. (See FAC ¶ 107); see also Patterson v. Stanley, No. 16-cv-6568 (RJS), [2019 BL 384508], 2019 U.S. Dist. LEXIS 174832 , [2019 BL 384508], 2019 WL 4934834 , at *10 (S.D.N.Y. Oct. 7, 2019) (noting, "consistent, ten-year underperformance may support a duty of prudence claim" if underperformance is "substantial"; finding "difference of less than one percentage point" in average annual return insufficient to support imprudence claim).

Next, as defendants point out, where a 401(k) plan, like the Plan at issue, offers a "variety of investment options," including lower-cost passively managed options, "[t]here is nothing imprudent about offering a concentration of actively managed funds." See Kong v. Trader Joe's Co., No CV2005790PAJEMX, [2020 BL 466869], 2020 U.S. Dist. LEXIS 224835 , [2020 BL 466869], 2020 WL 7062395 , at *4 (N.D. Cal. Nov. 30, 2020) (internal quotations and citations omitted) (dismissing imprudence claim where plan offered both actively and passively managed funds; rejecting plaintiffs' argument that "[d]efendants' actions in overwhelmingly favoring actively managed funds plausibly show that they failed to consider the pros and cons of offering actively managed investments vs. passively managed investments" (internal quotation and citation omitted)).

Accordingly, [*7] plaintiffs fail to state an imprudence claim predicated on a comparison of actively managed funds and passively managed funds.

4. Collective Trusts

In the FAC, plaintiffs assert, as they did in their initial complaint, that the Committee Defendants acted imprudently by failing to investigate collective trusts as less costly alternatives to funds offered in the Plan. (See FAC ¶¶ 109-13.)

The Court previously dismissed plaintiff's imprudence claim to the extent such claim was based on a comparison of mutual funds with collective trusts. In particular, the Court found "plans are under no duty to offer alternatives to mutual funds" and, given that the "essential features" of collective trusts and mutual funds differ "so significantly," it is "inappropriate to compare [such] distinct investment vehicles solely by cost." (See Order, filed Oct. 5, 2020, at 10:12-13, 11:1-2 (internal quotations and citations omitted).)

In the FAC, plaintiffs have added allegations that (1) the Plan, in 2019, replaced the nine JPMorgan SmartRetirement funds with "JPMorgan target date CITs," which had, according to plaintiffs, "the same underlying investments and asset allocations as their mutual fund counterparts" but had "better annual

returns" and "a lower net expense ratio than the mutual funds," and (2) the delay in making such replacement "cost Plan participants millions of dollars." (See FAC ¶¶ 112-13.)

The JPMorgan target date CITs are not, however, a "meaningful benchmark" for the JPMorgan SmartRetirement funds. See Meiners, **898 F.3d at 822** . In particular, collective trusts, such as the JPMorgan target date CITs, are, as plaintiffs themselves allege in the FAC, "[r]egulated by the Office of the Comptroller of the Currency rather than the Securities and Exchange Commission, . . . have simple disclosure requirements, and cannot advertise or issue formal prospectuses" (seeFAC at 34 n.21; see also Order, filed Oct. 5, 2020, at 10:20-11:1 (noting collective trusts, unlike mutual funds, "are not subject to the reporting, governance, and transparency requirements of the **Securities Act** of 1933, **15 U.S.C. § 77a** et seq., and the **Investment Company Act** of 1940, **15 U.S.C. § 80a-1** et seq." (internal quotation and citation omitted)), thereby rendering such comparisons between mutual funds and collective trusts "inappropriate" (see Order, filed Oct. 5, 2020, at 11:*1-2* (internal citation omitted)); see also Tibble, **729 F.3d at 1134** (holding "[m]utual funds . . . have a variety of unique regulatory and transparency features that make it an apples-to-oranges comparison to judge them against" investment alternatives "such as 'commingled pools'").

Even assuming, arguendo, the JPMorgan target date CITs can be used for purposes of comparison, plaintiffs' new allegations regarding those investments are, for the same reasons as set forth above with respect to the JPMorgan target date blend funds, insufficient to state an imprudence claim. Specifically, the periods during which the JPMorgan SmartRetirement funds are alleged to have underperformed relative to the JPMorgan CITs are not of sufficient length to support an inference of imprudence (see Order, filed Oct. 5, 2020, at 7:15-16); see [*8] also Wehner, [**2021 BL 48012**], 2021 U.S. Dist. LEXIS 26227 , [**2021 BL 48012**], 2021 WL 507599 , **at *9** , nor is the degree of alleged underperformance substantial enough to support such an inference (see FAC ¶ 112); see also Patterson, [**2019 BL 384508**], 2019 U.S. Dist. LEXIS 174832 , [**2019 BL 384508**], 2019 WL 4934834 , **at *10** .

Accordingly, plaintiffs fail to state an imprudence claim predicated on a comparison of mutual funds with collective trusts.

5. Other "Materially Similar Funds"

In the FAC, plaintiffs now point to the Plan's Investment Policy, which includes a statement that "[t]he Committee will select investment options that are liquid, diversified, and cost efficient" (see FAC ¶ 114 (quoting Investment Policy at 8)), and allege, "[w]ith respect to cost efficiency, the Committee utterly failed to select the most prudent investments for the Plan based on several criteria under the Modern Portfolio Theory," which theory, according to plaintiffs, utilizes various metrics to evaluate investments (see id. ¶¶ 115, 117). In that regard, plaintiffs allege, the JPMorgan SmartRetirement funds "lagged behind . . . materially similar funds" based on "5-Year Risk/Return Statistics as of the third quarter of 2019." (See id. ¶ 119 (listing funds).)

To the extent the "materially similar funds" are funds previously discussed above, such as the JPMorgan target date blend funds, comparisons between those funds and the JPMorgan SmartRetirement funds are, for the reasons discussed above, insufficient to state a claim for relief. As to the remaining allegedly comparable funds, plaintiffs' allegation that such funds are "materially similar" to the JPMorgan SmartRetirement funds is, as defendants point out, too conclusory to support a claim for relief. See Iqbal, **556 U.S. at 678** (holding "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" do not suffice to state claim for relief); see also Anderson v. Intel Corp., No. 19-cv-04618-LHK, [**2021 BL 22172**], 2021 U.S. Dist. LEXIS 12496 , [**2021 BL 22172**], 2021 WL 229235 , at ***8-9** (N.D. Cal. Jan. 21, 2021) (dismissing imprudence claim based on "fee comparisons" to allegedly "comparable investment alternatives"; finding, where plaintiffs "merely refer[red] to the funds as 'comparable' or 'similar,'" plaintiffs "failed to adequately plead factual allegations to support their claim that [they] have provided a meaningful benchmark against which to compare the fees incurred by the . . . funds" offered in plan).

Accordingly, plaintiffs fail to state an imprudence claim predicated on a comparison of mutual funds with other allegedly materially similar funds.

6. Conclusion: First Claim for Relief

Plaintiffs' having failed to make an adequate showing based on any of the above-discussed challenges to investment options offered in the Plan, whether those challenges are viewed individually or collectively, the First Claim for Relief is subject to dismissal, and, given plaintiffs' failure to cure previously identified deficiencies, such dismissal will be without further leave to amend.

B. Second Claim for Relief

In their Second Claim for Relief, plaintiffs allege, as they did in their initial complaint, that the Monitoring Defendants breached their fiduciary monitoring duties in the following respects: (1) failing to monitor and evaluate the performance of the Committee [*9] Defendants as to "imprudent actions and omissions," (2) failing to monitor the processes by which Plan investments and possible alternatives were evaluated, and (3) failing to remove Committee members whose performances were inadequate. (See FAC ¶ 138.)

In the October 5 Order, the Court, having dismissed plaintiffs' First Claim for Relief, dismissed the Second Claim for Relief as derivative of the First Claim for Relief. (See Order, filed Oct. 5, 2020, at 12:24-28.)

In the FAC, plaintiffs' Second Claim for Relief is, again, derivative of the First Claim for Relief, and, as discussed above, the First Claim for Relief is subject to dismissal. Consequently, the Second Claim for Relief likewise is subject to dismissal, and, as with the First Claim for Relief, such dismissal will be without further leave to amend.

CONCLUSION

For the reasons stated above, the Motion to Dismiss is hereby GRANTED, and the instant action is hereby DISMISSED.

IT IS SO ORDERED.

Dated: April 15, 2021

/s/ Maxine M. Chesney

MAXINE M. CHESNEY

United States District Judge

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fn 1

By order filed March 1, 2021, the Court took the matter under submission.

fn 2

Plaintiffs have not reasserted in the FAC a claim that the Committee Defendants breached their fiduciary duty of loyalty.

fn 3

The ICI Median Fee and ICI Average Fee are, respectively, the median percentile and average "asset-weighted mutual fund expense ratio[] as a percentage of assets among plans with audited 401(k) filings in the BrightScope database by mutual fund investment objective and plan assets." SeeThe BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans (2017), https://www.ici.org/pdf/20_ppr_dcplan_profile_401k.pdf at 74; see also id. at 67.

fn 4

"Actively managed funds, which have a mix of securities selected in the belief they will beat the market, have higher fees, to account for the work of the investment managers of such funds and their associates, whereas passively managed funds, or index funds, are designed to mimic a market index such as Standard & Poor's 500 and offer both diversity of investment and comparatively low fees." (See Order, filed Oct. 5, 2020, at 4 n.3 (internal quotations and citation omitted).)

fn 5

Collective trusts, also known as "CITs" or commingled pools, are "administered by banks or trust companies," consist of "a mix of assets such as stocks, bonds and cash," and have "much lower" costs given their "simple disclosure requirements" and inability to "advertise or issue formal prospectuses." (SeeFAC at 34 n.21, ¶ 109.)

fn 6

The Court notes the lower-cost share classes proposed by plaintiffs as substitutes for the two Fidelity mutual funds appear to be a different investment vehicle. (See FAC ¶ 78 (identifying "Fidelity Contra Commingled Pool" and "Fidelity Diversified International Commingled Pool" as lower-cost share class for "Fidelity Contra Class K" and "Fidelity Diversified International Class K," respectively).)

fn 7

The Court previously granted defendants' unopposed request for judicial notice of **IRS Form 5500** filings from 2012-2018. (See Order, filed Oct. 5, 2020, at 2 n.2.) Defendants have not refiled that request in connection with the instant motion, apparently on the assumption those documents remain before the Court. To the extent plaintiffs now object to the Court's consideration of the documents, on the asserted ground such consideration would convert the instant motion to a motion for summary judgment (seeOpp. at 3 n.6), the objection is overruled for the reason that a court may, without converting a motion to dismiss to a motion for summary judgment, take judicial notice of "an adjudicative fact" that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." See Khoja v. Orexigen Therapeutics, Inc., **899 F.3d 988** , **999** (9th Cir. 2018) (quoting **Fed. R. Evid. 201(b)**). Here, plaintiffs do not dispute the accuracy of any Form 5500 filings and, in their FAC, repeatedly cite to the 2018 Form 5500 filing. (See, e.g., FAC ¶¶ 25, 27); see also White v. Chevron Corp., No. 16-cv-0793-PJH, [**2017 BL 183229**], 2017 U.S. Dist. LEXIS 83474 , [**2017 BL 183229**], 2017 WL 2352137 , at ***5** (N.D. Cal. May 31, 2017), aff'd, **752 F. App'x 453** (9th Cir. 2018) (taking judicial notice of Form 5500 filings).

fn 8

"Retail class shares are generally more expensive share classes . . . targeted at smaller investors with less bargaining power, whereas institutional class shares are lower cost shares . . . targeted at institutional investors with more assets, generally $1 million or more, and therefore greater bargaining power." (See Order, filed Oct. 5, 2020, at 9 n.12 (internal quotations and citation omitted).)

fn 9

Although, as plaintiffs point out, the Ninth Circuit, in Tibble, affirmed the district court's finding that the defendant "had been imprudent in deciding to include retail-class shares of three specific mutual funds in the Plan menu," the Ninth Circuit noted "[t]he basis of liability was not the mere inclusion of retail-class shares," but, rather, the defendant's "fail[ure] to investigate the possibility of institutional-share class alternatives." See **id. at 1137** . Here, however, plaintiffs have failed to allege any facts sufficient to create a plausible inference that defendants failed to investigate the possibility of lower-cost share classes.

fn 10

Although plaintiffs contend White is "distinguishable from the instant case" because plaintiffs here, unlike the plaintiffs in White, "do[] not challenge the overall investment lineup" (see Opp. at 11:11-14 (alteration in original) (internal quotation and citation omitted)), plaintiffs misconstrue the allegations in that case. Specifically, the plaintiffs in White argued they were not seeking to challenge "the entire lineup of funds" offered in the plan at issue, but, instead, like plaintiffs in the instant case, were seeking to challenge "specific funds for which defendants had available lower-cost options." See White, [**2017 BL 183229**], 2017 U.S. Dist. LEXIS 83474 , [**2017 BL 183229**], 2017 WL 2352137 , **at *12** (internal quotation omitted).