UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 19-10942 PA (JEMx)	Date	April 24, 2020
Title	Nicolas R. Marks, et al. v. Trader Joe's Company		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
T. Jackson	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS – COURT ORDER

Before the Court is a Motion to Dismiss ("Motion") filed by defendant Trader Joe's Company ("Trader Joe's"). (Dkt. No. 17.) Plaintiffs Nicholas R. Marks and Lorri L. Bowling (jointly "Plaintiffs") filed an Opposition ("Opp.") (Dkt. No. 21), and Trader Joe's filed a Reply. (Dkt. No. 22.) Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds this matter appropriate for decision without oral argument. The hearing calendared for April 27, 2020, at 1:30 p.m. is vacated, and the matter taken off calendar.

I. Factual and Procedural Background

Plaintiffs bring this case as a proposed class action under the Employee Retirement Income Security Act of 1974 ("ERISA") § 502(a)(2), (3), 29 U.S.C. § 1132(a)(2), (3), alleging a breach of fiduciary duty. Plaintiffs were participants in Trader Joe's Company Retirement Plan (the "Plan"), a 401(k) defined contribution, individual account, employee pension benefit plan under 29 U.S.C. § 1002(2)(A) and § 1002(34). (Dkt. No. 1 ("Compl.") ¶ 13.) As of December 31, 2018, the Plan had approximately $1,629,409,314 in total assets and more than 46,602 participants. (Id. ¶¶ 5, 14.)

According to the Complaint, Trader Joe's is "the Plan sponsor under 29 U.S.C. § 1002(21)(A)(i) and (iii)[,] . . . [and] is a fiduciary to the Plan under 29 U.S.C. § 1002(21)(A)(i) and (iii). (Id. ¶ 16.) The Trader Joe's Investment Committee (the "Committee") consists of five Trader Joe's Committee members who are "charged with ensuring that the Plan [is] administered consistent with all of ERISA's requirements." (Id. ¶ 43.)

Throughout the class period, which is defined as December 20, 2013 through December 31, 2018, Trader Joe's chose Capital Research & Management Co. ("Capital Research") to serve as the Plan's recordkeeper. (Id. ¶¶ 8, 58.) The Plan pays Capital Research for its recordkeeping services. (Id.) Plaintiffs allege Trader Joe's breached its fiduciary duty of prudence to the Plan by: (1) paying Capital Research unreasonable recordkeeping fees; (2) failing to seek competitive recordkeeper bids every three years; (3) choosing higher cost mutual fund share classes; (4) allowing Capital Research to collect and keep excessive fees from Plan participants, invest that money for the benefit of Capital Research, then

refund a portion of the excessive fees to the Plan at the end of the year; and (5) failing to adequately monitor Committee members (Id. ¶¶ 66, 75.)

Plaintiffs first allege Trader Joe's "breached its fiduciary duty . . . by paying excessive recordkeeping fees to the Plan's recordkeeper by failing to limit Capital Research's asset-based fees to a reasonable amount." (Id. ¶ 8.) Plaintiffs claim "Trader Joe's has not disclosed to Plan participants the precise amount of fees and/or income Capital Research collects from the Plan." (Id. ¶ 23.) "However, Trader Joe's has disclosed that Capital Research receives 'direct' and 'indirect' fees and compensation." (Id.) "Discovery is [allegedly] need[ed] to identify exactly how much Capital Research is collecting." (Id. ¶ 23.) Plaintiffs estimate that "[o]ver the past six years, the Plan paid [Capital Research] recordkeeping fees in the amount of roughly $140 per participant." (Id. ¶¶ 26, 39.) According to Plaintiffs, a "reasonable recordkeeping fee for the Plan is $40 per participant." (Id. ¶ 39.) Plaintiffs allege that "[h]ad Trader Joe's negotiated with Capital Research to cap the amount of revenue sharing to a reasonable fee or ensure that all unreasonable fees were returned to the Plan, as other loyally and prudently administered plans do, the Plan participants would have benefitted from the lower administrative costs and fees." (Id. ¶ 42.) According to Plaintiffs, this "breach cost the Plan millions of dollars over the course of the relevant time period." (Id.)

Second, Plaintiffs allege Trader Joe's breached its fiduciary duty by failing to put the Plan's recordkeeping and administrative services out to bid every three years. Plaintiffs claim that "[t]o ensure that plan administrative and recordkeeping expenses are and remain reasonable for the services provided, prudent fiduciaries of large defined contribution plans put the plan's recordkeeping and administrative services out for competitive bidding at regular intervals of approximately three years, and monitor recordkeeping costs regularly within that period." (Id. ¶ 45.) Plaintiffs allege that "[a] competitive bidding process for the Plan's recordkeeping services would have produced a reasonable recordkeeping fee for the Plan," and "would have enabled Trader Joe's to select a recordkeeper charging reasonable fees or negotiate a reduction in recordkeeping fees." (Id. ¶ 46.)

Third, Plaintiffs allege Trader Joe's chose "inappropriate higher cost mutual fund share classes." (Id. ¶ 6.) Plaintiffs allege Trader Joe's chose higher cost "Investor class shares" of mutual funds, instead of "Institutional share classes" that had a lower operating cost. (Id. ¶ 29(a).) Plaintiffs' Complaint states "[t]he principal difference between the classes is that the mutual fund will charge different fees and expenses depending on the class chosen." (Id. ¶ 30.) "For example, an Investor class share in a mutual fund may charge an annual expense ratio of 1% while the Institutional class share in the same fund with the same advisors and the same investments charges an annual expense ratio of 0.50%." (Id. ¶ 31.) Thus, "an investor who purchases an Institutional class share will realize a 0.50% greater annual return on his/her investment compared to an investor who owns an Investor class share." (Id.) Plaintiffs allege "Trader Joe's elected to pay for Capital Research's recordkeeping services by offering retail Investor share classes of American Funds rather than lower priced Institutional class shares." (Id. ¶ 35.) Capital

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Research allegedly "kept the difference between the operating costs of the higher cost Investor class shares and the lower cost Institutional shares." (Id.)

Fourth, Plaintiffs argue that "[i]n what is tantamount to an admission of excessive fees and a breach of the duty of prudence, at the end of each fiscal year, Capital Research returns a portion of the excessive fees that it has been collecting." (Id. ¶ 48.) Plaintiffs argue that "[t]his money . . . should have be[en] in Plan participants' individual accounts and invested in stocks, bonds, and other retirement investment vehicles for the benefit of the Plan participants." (Id. ¶ 49.) Instead, "Capital Research collects excessive fees on a monthly basis, invests the excessive fees for its own benefit, makes money for itself by investing Plan participants' retirement savings, and finally returns a portion of the excessive fees to the Plan at the end of the fiscal year." (Id.) Plaintiffs claim that through this arrangement, "Trader Joe's allows Capital Research to fund its own investment and/or earn interest on money that belongs to Plan participants." (Id. ¶ 50.)

Fifth, Plaintiffs allege Trader Joe's "breached its fiduciary monitoring duties by, among other things: (a) failing to monitor its appointees' fiduciary process, which would have alerted any prudent fiduciary to the potential breach because of the excessive recordkeeping fees in violation of ERISA; and (b) failing to remove [Committee] appointees whose performance was inadequate in that they continued to make imprudent decisions all to the detriment of Plan participants' retirement savings." (Id. ¶ 75.) Plaintiffs claim "Trader Joe's failed to implement or follow any rational process for monitoring the performance of the Committee or determining whether the Committee was[ ]fulfilling its fiduciary duties." (Id. ¶ 76.)

Plaintiffs bring two causes of action: (1) Breach of the Duty of Prudence due to Unreasonable Recordkeeping Fees; and (2) Failure to Monitor Fiduciaries. (Id. ¶¶ 62-77.)

II. Legal Standard

Trader Joe's now seeks to dismiss Plaintiff's complaint pursuant to Federal Rules of Civil Procedure (12)(b)(1) and (12)(b)(6). (Mot. at 2.)

A. Federal Rule of Civil Procedure 12(b)(1)

"Article III of the Constitution requires that a plaintiff have standing to assert claims in federal court." Jones v. Micron Technology Inc., 400 F. Supp. 3d 897, 906 (N.D. Cal. 2019) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). Challenges to "Article III standing implicate a court's subject matter jurisdiction and therefore are properly raised under Federal Rule of Civil Procedure 12(b)(1)." Id. (citing White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)). "Federal courts are courts of limited jurisdiction," and "[i]t is presumed that a cause lies outside this limited jurisdiction," unless otherwise shown. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). Where a challenge is to the plaintiff's standing as alleged, the Court looks only to the allegations in the complaint, and assumes the allegations are true. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004).

"If the plaintiff lacks standing under Article III of the U.S. Constitution, then the court lacks subject matter jurisdiction, and the case must be dismissed." Mollicone v. Universal Handicraft, Inc., 16-cv-07322, 2017 WL 440257, at *5 (C.D. Cal. Jan. 30, 2017). "To establish standing, a plaintiff has the burden to demonstrate (i) that he suffered an injury-in-fact, (ii) which resulted from the defendant's conduct, and (iii) that a favorable ruling would redress the injury." Jones, 400 F. Supp. 2d at 906. If a court finds that a plaintiff lacks standing, the court does not reach the other allegations. See, e.g., Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011) (internal quotations omitted) ("[T]he threshold question of whether plaintiff has standing (and the court has jurisdiction) is distinct from the merits of his claim. Rather, the jurisdictional question of standing precedes, and does not require, analysis of the merits.").

B. Federal Rule of Civil Procedure 12(b)(6)

Generally, plaintiffs in federal court are required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). While the Federal Rules of Civil Procedure allow a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted," Fed. R. Civ. P. 12(b)(6), they also require all pleadings to be "construed so as to do justice," Fed. R. Civ. P. 8(e). The purpose of Rule 8(a)(2) is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

However, in Twombly, the Supreme Court rejected the notion that "a wholly conclusory statement of [a] claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." Twombly, 550 U.S. at 561 (second alteration in original) (quoting Conley). Instead, the Court adopted a "plausibility standard," in which the complaint must "raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction]." Id. at 556. For a complaint to meet this standard, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Id. at 555 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")); see also Daniel v. Cty. of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002) ("All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." (quoting Burgert v. Lokelani Bernice Pauahi Bishop Tr., 200 F.3d 661, 663 (9th Cir. 2000))). "[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." Twombly, 550 U.S. at 555 (internal quotation marks omitted). In construing the Twombly standard, the Supreme Court has advised that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be

supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

If the Court "chooses to dismiss the complaint, it must then decide whether to grant leave to amend." Impress Communications v. Unumprovident Corp., 335 F. Supp. 2d 1053, 1062 (C.D. Cal. 2003). Leave to amend is denied only if it is clear that amendment would be futile, and "that the deficiencies of the complaint could not be cured by amendment." Id. (quoting Noll v. Carlson, 809 F. 2d 1446, 1448 (9th Cir. 1987).

III. Judicial Notice

Trader Joe's asks the Court to take judicial notice of exhibits 1 through 7 attached to the Declaration of Catalina Vergara. (Dkt. No. 18.) These exhibits include (1) the Recordkeeping and Administrative Services Agreement between Trader Joe's and Capital Research, and (2) Form 5500s for the Trader Joe's Retirement Plan for the years 2013 through 2018. (Id.)

While the Court generally may not consider materials outside of the pleadings when resolving a motion to dismiss, it may consider matters that are properly the subject of judicial notice. Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005); Fed. R. Evid. 201(b). Additionally, the Court may consider exhibits attached to the complaint, see Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1989), as well as documents referenced extensively in the complaint and documents that form the basis of the plaintiff's claims. See Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007). The Court 'may take judicial notice on its own motion," and 'must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c).

Here, Plaintiffs do not oppose the request or otherwise claim that the documents are inaccurate. (See Opp. at n. 1 ("Plaintiffs do not object to the Court considering these documents.").) In addition, courts regularly take judicial notice of the types of documents at issue here. See, e.g., Dorman v. Charles Schwab, 17-cv-00285, 2018 WL 6803738, at *5 (N.D. Cal. Sept. 20, 2018) (taking judicial notice of similar documents). Therefore, the Court finds that judicial notice is appropriate.

IV. Discussion

Under ERISA, plan fiduciaries are charged with the duty of loyalty, the duty of prudence, the duty to diversify investments, and the duty to act in accordance with the documents and instruments governing the plan. 29 U.S.C. § 1104(a)(1). Plaintiffs allege Trader Joe's breached its duty of prudence.[1/]

[1/] According to the parties' papers, Plaintiffs confirmed during the Local Rule 7-3 conference that Plaintiffs are not alleging a breach of the duty of loyalty. (See Mot. at n. 2.)

ERISA imposes on fiduciaries a duty to act prudently "under the circumstances then prevailing." 29 U.S.C. § 1104(a)(1)(B). ERISA requires that plan fiduciaries use "the care, skill, prudence, and diligence under the circumstance 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. Id. § 1104(a)(1)(B). Under this "prudent person" standard, courts must determine "whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." Donovan v. Mazzola, 716 F.2d 1226, 1232 (9th Cir. 1983).

This duty of prudence extends to both the initial selection of an investment and the continuous monitoring of investments to remove imprudent ones. Tibble v. Edison Intern., 135 S. Ct. 1823, 1828-29 (2015). The Uniform Prudent Investor Act confirms that "[m]anaging embraces monitoring" and that a trustee has "continuing responsibility for oversight of the suitability of the investments already made." Id. at 128 (citation omitted).

Plaintiffs allege Trader Joe's breached the fiduciary duty of prudence in five ways: by (1) paying Capital Research unreasonable recordkeeping fees; (2) failing to seek competitive bids every three years; (3) choosing higher cost mutual fund share classes; (4) allowing Capital Research to collect and invest excessive fees before giving them back to the Plan; and (5) failing to adequately monitor Committee members (Id. ¶¶ 66, 75.)

A. Capital Research's Recordkeeping Fees

Plaintiffs allege Capital Research charged excessive recordkeeping fees, and that Trader Joe's breached its fiduciary duty of prudence by failing to monitor and control the amount of asset-based revenue sharing fees Capital Research received. In their Complaint, Plaintiffs admit they do not know how much the Plan paid Capital Research in recordkeeping fees. (See Compl. ¶ 23 ("Trader Joe's has not disclosed to Plan participants the precise amount of fees and/or income Capital Research collects from the Plan.").) However, Plaintiffs assume that the Plan paid "roughly $140 per participant" in recordkeeping fees. (Id. ¶ 39.)

In its Motion, Trader Joe's argues "Plaintiffs' pure guess that recordkeeping fees were 'roughly $140 per participant' over the relevant time period cannot carry their claim forward." (Mot. 6.) Trader Joe's argues this is particularly true "where the judicially noticeable facts show that the Plan's recordkeeping fees were nowhere close to $140 per participant over the relevant time period, but instead ranged between $48 and $49 per participant." (Id.) "As specified in the recordkeeping agreement, Capital Research is entitled to an annual flat fee of $11,650 plus $48 per participant in exchange for its recordkeeping services." (Vergara Decl. Ex. 1 at 14.) "Over the relevant time period the recordkeeping agreement has remained the same, and the per-plan participant fee has fluctuated by mere cents." (Id. ¶¶ 3, 10; see also Exs. 2-7, Form 5500s, showing the pre-participant recordkeeping fee for the years 2013 through 2018 ranged from $48.25 to $48.35.) Trader Joe's argues there is "no defensible way to claim . .

. that the Plan's recordkeeping fees were 'roughly $140 per participant' over the relevant period." (Id. 8.)

In their Opposition, Plaintiffs allege "the Recordkeeping Agreement does not show the amount of money Capital Research actually receives from the Plan," and that "Trader Joe's did not provide any proofs of payment to Capital Research." (Opp. 4.) Plaintiffs argue "there are lots of other way Capital Research collects money from Plan participants," including through the "Ancillary Fees" described in the recordkeeping documents." (Opp. 3, 7.) Plaintiffs also argue that "millions and millions of dollars" in additional fees may have gone to Capital Research through subtransfer agency agreements, selling group agreements, and fund distribution agreements. (Opp. 4-5.) In addition, plaintiffs argue Capital Research may receive additional "Fund Revenue" under the terms pertaining to the Plan's "Financial Professionals." (Opp. 5.) Finally Plaintiffs argue that, although the Plan's Form 5500s state Capital Research received $0 in indirect compensation for its recordkeeping services, Plaintiffs argue "[i]t is axiomatic that if Capital Research is receiving indirect compensation, then it must receive more than $0." (Opp. 5.)

In its Reply, Trader Joe's argue "Capital Research received 'Fund Revenue' (i.e. indirect compensation) from certain funds in the Plan lineup - but, with respect to its recordkeeping services, retained only those amounts equivalent to its direct compensation under the recordkeeping contract and returned the remainder to the Plan." (Reply 7.) Trader Joe's argues that Plaintiffs' unfounded speculation in their Opposition to the contrary is not sufficient to survive a motion to dismiss.

The Court finds Plaintiffs' Complaint fails to state a claim for breach of the fiduciary duty of prudence in connection with the recordkeeping arrangement between the Plan and Capital Research from 2013 through 2018. "It is Plaintiffs' obligation to plead facts that create more than a 'sheer possibility that [the Plan fiduciaries] ha[ve] acted unlawfully' to make a plausible claim for relief and to survive a motion to dismiss." White v. Chevron Corp., 16-cv-0793, 2016 WL 4502808, at * 14 (N.D. Cal. Aug. 29, 2016). Plaintiffs' guess that the Plan pays $140 per participant for recordkeeping fees has "no factual basis," and Plaintiffs admit they do not actually know how much the recordkeeping fees are. Id. at *18 (holding plaintiffs failed to state a claim for imprudence pertaining to allegedly unreasonable recordkeeping fees where plaintiffs "offer[ed] a 'guess' as to the per-participant dollar amount for the Plan's recordkeeping arrangement.") (aff'd 752 F. App'x. 453 (9th Cir. 2018)) ("[A]s to each count, the allegations showed only that Chevron could have . . . sought lower fees for administration of the fund. None of the allegations made it more plausible than not that any breach of a fiduciary duty had occurred."). In the absence of any facts pertaining to the alleged unreasonable fee, "all that remains is Plaintiffs' conclusory assertion that fees under a revenue-sharing arrangement are necessarily excessive and unreasonable." Id. "Such a per-se rule is without support." Id. "Revenue sharing is a 'common' and 'acceptable' investment industry practice that 'frequently inure[s] to the benefit of ERISA plans." Id. (citing Tussey v. ABB, Inc., 746 F.3d 327, 336 (8th Cir. 2014); see also Hecker v. Deere & Co., 556 F.3d 575, 585 (7th Cir. 2009) (an arrangement whereby 401(k) plan trustee and recordkeeper "recovered

its [administrative] costs from the [plan] participants" by "assess[ing] asset-based fees against the various mutual funds," and transferring to itself some of the money collected, "violate[d] no statute or regulation"). The Court therefore finds that Plaintiffs' allegations regarding the allegedly excessive recordkeeping fee are insufficient to survive a motion to dismiss.

B. Seeking Competitive Bids

Plaintiffs next argue that "[t]o ensure that plan administrative and recordkeeping expenses are and remain reasonable for the services provided, prudent fiduciaries of large defined contribution plans put the plan's recordkeeping and administrative services out for competitive bidding at regular intervals of approximately three years, to monitor recordkeeping costs regularly within that period." (Compl. ¶ 45.) Plaintiffs allege "[t]his competitive bidding process would have enabled Trader Joe's to select a recordkeeper charging reasonable fees, or to negotiate a reduction in the recordkeeping fees and a proper rebate of any excess expenses paid by Plan participants for recordkeeping services with Capital Research." (Id.) Plaintiffs allege that "[t]he failure by the Committee and Trader Joe's to seek competitive bids and negotiate proper rebates of unreasonable fees, was a breach of their duty of prudence to the Plan and caused the Plan to pay excessive recordkeeping fees." (Id. ¶ 47.)

"[T]he allegation that the Plan fiduciaries were required to solicit competitive bids on a regular basis [alone] has no legal foundation." White, 2016 WL 4502808, at *14. "[N]othing in ERISA compels periodic competitive bidding." Id. Here, Plaintiffs do not allege any facts suggesting a competitive bid would have benefitted the Plan or the Plan participants, as Plaintiffs "do not allege any facts from which one could infer that the same services were available for less on the market." Id.; see also Young v. GM Inv. Mgmt. Corp., 325 Fed. App'x. 31, 33 (2nd Cir. 2009) (Sotomayor) (finding plaintiffs did not plausibly allege that fiduciaries paid excessive fees where plaintiffs "fail[ed] to allege that the fees were excessive relative to the services rendered."); Del Castillo v. Community Child Care Council of Santa Clara County, Inc., 17-cv-07243, 2019 WL 6841222, at *5 (N.D. Cal. Dec. 16, 2019) ("absence of competitive bidding, . . . without more, does not support Plaintiffs' allegations that the [defendants] acted imprudently in violation of §404(a)(1)(B)").

Plaintiffs' Complaint simply recites legal conclusions, and does not allege any facts suggesting that the Plan fiduciaries could have obtained less-expensive recordkeeping services elsewhere through competitive bidding. Further, "there are no facts alleged showing that the Plan fiduciaries failed to consider putting the fee structure out for competitive bidding, or failed to negotiate a reasonable fee structure" with Capital Research. Id. Thus, the Court finds these allegations are insufficient to survive a motion to dismiss.

C. Offering Higher Cost Mutual Fund Share Classes to the Plan

Plaintiffs next allege that "instead of leveraging the Plan's tremendous bargaining power to benefit participants and beneficiaries, Trader Joe's chose inappropriate, higher cost mutual fund share classes." (Id. ¶ 6.) Plaintiffs claim "Capital Research received the difference between the higher

operating cost of investor class shares of mutual funds on the Plan menu and the lower operating cost of institutional share classes of the same funds on the Plan menu." (Id. ¶ 29(c).) Plaintiffs state that "[a] single mutual fund with one portfolio and one investment advisor may offer more than one 'class' of its shares to investors." (Id. ¶ 30.) "Each class represents a similar interest in the mutual fund's portfolio." (Id.) "The principal difference between the classes is that the mutual fund will charge different fees and expenses depending on the class chosen." (Id.) "For example, an Investor class share in a mutual fund may charge an annual expense ratio of 1% while the Institutional class share in the same fund with the same advisors and the same investments charges an annual expense ratio of 0.50%." (Id. ¶ 31.) "Thus, an investor who purchases an Institutional class share will realize a 0.50% greater return on his/her investment compared to an investor who owns an Investor class share." (Id.) Plaintiffs allege "Trader Joe's elected to pay for Capital Research's recordkeeping services by offering retail Investor share classes of American Funds rather than lower priced Institutional class shares." (Id. ¶ 35.) Capital Research allegedly "kept the difference between the operating costs of the higher cost Investor class shares and the lower cost Institutional shares." (Id.)

"[A]mple authority holds that merely alleging that a plan offered retail rather than institutional share classes is insufficient to carry a claim for fiduciary breach." White v. Chevron Corp., 16-cv-0793, 2017 WL 2352137, at *14 (N.D. Cal. May 13, 2017) ("[C]ourts have dismissed claims that fiduciaries are required to offer institutional over retail-class funds, or are required to offer a particular mix of investment vehicles, as well as claims that fiduciaries were imprudent in failing to offer cheaper funds.") "[F]iduciaries have latitude to value investment features other than price (and indeed are required to do so).") Id.; see also Hecker v. Deere & Co., 556 F.3d 575, 586 (7th Cir. 2009) ("[N]othing in ERISA requires [a] fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems.").

The Court finds Plaintiffs have alleged no specific facts to suggest Trader Joe's breached its fiduciary duty of prudence by allegedly failing to offer institutional class shares as opposed to investor class shares. All Plaintiffs have done is offer a hypothetical scenario suggesting an investor class share in a mutual fund "may" in general charge an annual expense ratio higher than an institutional class share in the same fund. Plaintiffs have failed to make any specific allegations as to, for example, whether the investor class share offered by Trader Joe's actually did cost more than an institutional class share in the same fund, or whether the investor class share offered other benefits that may have offset any additional cost. Thus, the Court finds these allegations are insufficient to survive a motion to dismiss.

D. Capital Research's Collection of Fund Revenue

Next, Plaintiffs alleges that "[i]n what is tantamount to an admission of excessive fees and a breach of the duty of prudence, at the end of each fiscal year, Capital Research returns a portion of the excessive fees that it has been collecting on a monthly basis from the Plan and its participants." (Compl. ¶ 48.) Plaintiffs argue that "[r]ather than negotiate a reasonable fee, Trader Joe's allows Capital Research to charge the Plan, by what all parties seem to agree, excessive fees on a monthly basis." (Id. ¶

49.) "This money, the money that Capital Research returns at the end of the year, should have be[en] in Plan participant's individual accounts and invested in stocks, bonds, and other retirement investment vehicles for the benefit of the Plan Participants." (Id.) "Instead, Capital Research collects excessive fees on a monthly basis, invests the excessive fees for its own benefit, makes money for itself by investing Plan participants' retirements savings, and finally returns a portion of the excessive fees to the Plan at the end of the fiscal year." (Id.)

Again, Plaintiffs do not allege any facts to support this conclusory allegation that Capital Research's repayment of money to Plan participants demonstrates an "admission of excessive fees" and in turn a breach of the duty of prudence. Plaintiffs' bare recitation of legal conclusions is insufficient to survive a motion to dismiss.

E. Failure to Monitor Fiduciaries

Next, Plaintiffs allege "Trader Joe's had explicit fiduciary responsibility to appoint and remove the Committee members," and Trader Joe's breached its fiduciary monitoring duties by "among other things: (a) failing to monitor its appointees' fiduciary process, which would have alerted any prudent fiduciary to the potential breach because of the excessive recordkeeping fees in violation of ERISA; and (b) failing to remove appointees whose performance was inadequate in that they continued to make imprudent decisions, all to the detriment of Plan participants' retirement savings." (Id. ¶ 75.) Plaintiffs claim "Trader Joe's failed to implement or follow any rational process for monitoring the performance of the Committee or determining whether the Committee was[ ]fulfilling its fiduciary duties." (Id. ¶ 76.)

Trader Joe's argues that this cause of action fails because it is derivative of the other claims, none of which pled facts sufficient to state a plausible claim. (Mot. 14.)

Trader Joe's is "correct in referring to this claim as 'derivative,' as the claim as pled is wholly dependent on the breaches of duty" previously alleged." White, 2016 WL 6803738, at *19. Thus, because Plaintiffs have failed to plead sufficient facts as to their other allegations, "they cannot maintain a claim that [Trader Joe's] failed to monitor the fiduciaries." Id., see also Dorman, 2018 WL 6803738, at *7 ("The duty to monitor claim is essentially derivative of the breach of fiduciary duty claim. Because the breach of fiduciary duty cause of action fails to state a claim, this cause of action does as well.").

F. Plaintiffs' Standing to Seek Injunctive Relief

Finally, Trader Joe's argues Plaintiffs lack standing to seek injunctive relief "because they are former Plan participants." As alleged in the Complaint, plaintiff Nicolas R. Marks "was a participant in the Plan . . . from April 1, 2016 until February 15, 2017." (Compl. ¶ 18.) Plaintiff Lorri L. Bowling "was a participant in the Plan . . . from August 7, 2014 until September 30, 2015." (Id. ¶ 19.) Neither plaintiff is still an employee at Trader Joe's. (See id, ¶¶ 18-19.)

Plaintiffs argue "[i]t is uncontested that Plaintiffs have Article III and statutory standing to bring claims against Trader Joe's for violation ERISA's duty of prudence and for failure to monitor fiduciary

duties," and "Plaintiffs have not made an express claim for injunctive relief" so "there is no claim for the Court to dismiss under Rule 12(b)." (Opp. 23.)

"Former Plan participants do not have standing to seek injunctive relief because they are not 'realistically threatened' by [a defendant's] future breaches of fiduciary duties." Urakhchin v. Allianz Asset Management of America, L.P., 15-cv-1614, 2017 WL 2655678, at *9 (C.D. Cal. June 15, 2017); Lewis v Wendy's Intern., Inc., 09-cv-07193, 2009 WL 10672265, at *7, n. 46 (C.D. Cal. Dec. 29, 2009), 259 F.3d 996, 1007 (9th Cir. 2000) (citing Clark v. City of Lakewood ("'In the context of injunctive relief, the plaintiff must demonstrate a real or immediate threat of an irreparable injury' to have standing. . . . Because Lewis is no longer an employee of Wendy's, he cannot show that he faces a real or immediate threat of failing to receive rest or meal periods."); Impress Communications v. Unumprovident Corp., 225 F. Supp. 2d 1053, 1060 (C.D. Cal. 2003) ("Plaintiffs no longer participate in Defendants' disability plan. To the extent the named Plaintiffs are seeking to enjoin Defendants from making future misrepresentations, they would obtain no relief from such an injunction and would thus have no standing to pursue it.")

The Court therefore finds Plaintiffs lack standing to pursue injunctive relief. Accordingly, Plaintiffs "may not include this prayer for relief in any amended complaint." Lewis, 2009 WL 10672265, at *7 n. 45.

Conclusion

For all of the foregoing reasons, Trader Joe's Motion to Dismiss is granted. The Court cannot conclude at this point that any amendment would be futile. Therefore, the Court grants Plaintiffs leave to amend. Plaintiffs' First Amended Complaint, if any, is to be filed within 14 days of the date of this Order. The failure to file a First Amended Complaint by this date will result in the dismissal of this action.

IT IS SO ORDERED.