UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 20-05790 PA (JEMx)	Date	September 24, 2020
Title	Richard A. Kong, et al. v. Trader Joe's Company, et al.		

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 defendants Trader Joe's Company ("Trader Joe's), The Board of Directors of Trader Joe's Company (the "Board") and The Investment Committee (the "Committee") (jointly "Defendants"). (Dkt. No. 28.) Plaintiffs Richard A. Kong, Robert A. Cruzalegui, Matthew W. Heiden, and Cashay L. Clayborn (jointly "Plaintiffs") filed an Opposition ("Opp.") (Dkt. No. 29), and Defendants filed a Reply. (Dkt. No. 30.) 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 September 28, 2020, at 1:30 p.m. is vacated, and the matter taken off calendar.

I. Factual 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). Plaintiffs are or were participants in Trader Joe's Company Retirement Plan (the "Plan"), a 401(k) defined contribution, individual account, employee pension benefit plan. (Dkt. No. 1 ¶¶ 13-16.) As of 2018, the Plan had approximately 1.7 billion dollars in assets, and approximately 35,474 participants. (Id. ¶¶ 5, 50.)

According to the Complaint, Trader Joe's is "the Plan sponsor," and is a "fiduciary of the Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A)." (Id. ¶¶ 19-20.) Trader Joe's allegedly "acted through the Board to perform" Trader Joe's "Plan-related fiduciary functions." (Id. ¶ 24.) The Board in turn "appointed members of the Committee," and therefore "had a fiduciary duty to monitor and supervise the Committee while it performed its role as the fiduciary responsible for selection and monitoring of the Plan's investments." (Id.) As alleged in the Complaint, "the Committee is tasked with monitoring the prudence of the Plan investments." (Id. ¶ 27.)

Plaintiffs allege that during the proposed Class Period, which is defined as June 29, 2014 through the date of judgment "Defendants did not act in the best interests of the Plan participants." (Id. ¶ 64.) Plaintiffs allege that, "to the detriment of the plan and their participants and beneficiaries," the Plan's fiduciaries: (1) "selected and retained investment options in the Plan despite the high cost of the funds in relation to other comparable investments," (2) "failed to investigate the availability of lower-cost share

classes of certain mutual finds in the plan," (3) "failed to ensure Capital Research & Management Co. ('Capital Research') charged reasonable recordkeeping fees," (4) failed to put the Plan's recordkeeping arrangement out to bid to receive lower fees, and (5) permitted Plan revenue to be deposited into a compensation recapture account and later rebated to Plan participants. (Id.)

First, Plaintiffs allege that "to the detriment of the Plan and their participants and beneficiaries, the Plan's fiduciaries included and retained in the plan many mutual fund investment options that were more expensive than necessary and otherwise were not justified on the basis of their economic value." (Id. ¶ 64.) Plaintiffs allege that "[w]hen large plans, particularly those with over a billion dollars in assets like the Plan here, have options which approach the retail cost of share for individual investors or are simply more expensive than the average or median institutional shares for that type of investment, a careful review of the plan and each option is needed for the fiduciaries to fulfill their obligations to the plan participants." (Id. ¶ 76.) Plaintiffs allege the Plan "retained several actively-managed funds as Plan investment options despite the fact that these funds charged grossly excessive fees." (Id. ¶ 77.) Plaintiffs include a chart of "expense ratios for funds in the Plan" against the median fee to demonstrate that the expense ratio for the some of the Plan funds was higher than the median fee. (Id. ¶ 79.)

Second, Plaintiffs allege that "[i]n several instances during the Class Period, . . . 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." (Id. ¶ 85.) Plaintiffs include a chart of "2019 and 2020 expense ratios" in an effort to demonstrate the expense ratio for the mutual funds offered compared to other lower cost mutual funds. (Id. ¶ 85.) Plaintiffs allege that utilizing "A-shares for some of the Plan's investments was a particularly egregious failure of fiduciary duty" because they are "considerably more expensive than institutional share classes." (Id. ¶ 87.) According to Plaintiffs, a prudent fiduciary "would have identified the cheaper share classes available and transferred the Plan's investments . . . into the lower share classes at the earliest opportunity." (Id. ¶ 90.)

Third, Plaintiffs allege Defendants "failed to have a proper system in place to ensure that participants in the Plan were being charged appropriate and reasonable fees [by Capital Research] for the Plan's investment options." (Id. ¶ 65.) Plaintiffs allege there is "one glaring fact that demonstrates Defendants' failure to obtain reasonable recordkeeping fees for Plan participants." (Id. ¶ 100.) According to Plaintiffs, "[e]ven though the number of Plan participants continued to grow from 33,537 to 46,602 between 2013 and 2019, the Plan always paid $48 per-participant [in] recordkeeping fees." (Id.) Plaintiffs allege that "under the recordkeeping agreement, even if the Plan doubled in size, it would continue to pay the same per participant recordkeeping fee," and that "[s]uch an arrangement is counter to prevailing fiduciary conduct." (Id.) Plaintiffs include a chart from a 1998 study to suggest that a Plan can negotiate lower recordkeeping fees.

Fourth, Plaintiffs allege that the Plan's arrangement with Capital Research of "placing revenue sharing funds into a compensation recapture account before disbursement to pay for Plan expenses deprived Plan participants of use of their money and millions of dollars in lost opportunity costs." (Id. ¶

98.) Plaintiffs allege that a "more prudent arrangement in this case would have been to select available lower cost investment funds that used little to no revenue sharing and for Defendants to negotiate and/or obtain reasonable per participant recordkeeping/administrative fees." (Id. ¶ 99.)

Finally, Plaintiffs allege that "[t]he fact that the Plan stayed with the same recordkeeper over the course of the Class Period, and paid the same amount in recordkeeping fees," suggests that Defendants did not conduct a "Request for Proposal ('RFP') process at reasonable intervals . . . to determine whether the Plan could obtain better recordkeeping and administrative fee pricing." (Id. ¶ 102.)

Plaintiffs bring claims for: (1) Breach of fiduciary duties of loyalty and prudence (against the Committee), and (2) Failure to adequately monitor other fiduciaries (against Trader Joe's and the Board). (Id. ¶¶ 109-122.)

II. Procedural Background

On December 30, 2019, this Court received a related case alleging claims involving Trader Joe's company retirement plan. See Marks v. Trader Joe's Company, 19-cv-10942, 2020 WL 2504333 (C.D. Cal. Apr. 24, 2020.) The Court dismissed that case with leave to amend on April 24, 2020. Id. The plaintiff in Marks failed to file an amended complaint, and the Court subsequently dismissed the case without prejudice. Plaintiffs filed this case on June 29, 2020.

III. Legal Standard

Defendants now seek to dismiss Plaintiff's complaint pursuant to Federal Rules of Civil Procedure (12)(b)(6). (Mot. at 2.) 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 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (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."). "[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 (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.

IV. Judicial Notice

Defendants ask 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.) These are the same documents the Court took judicial notice of in Marks. 2020 WL 2504333 at *4.

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).

Here, Plaintiffs do not address Defendants' Request for Judicial Notice. 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.

V. Discussion

ERISA Section 404(a)(1) imposes the following duties on plan fiduciaries: the duty of prudence, the duty of loyalty, the duty to diversify the 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 Defendants breached the duty of prudence and the duty of loyalty.

In accordance with the duty of loyalty, "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries- and defraying reasonable expenses of administering the plan." Id. § 1104(a)(1)(A); White v. Chevron Corp. 16-cv-0793, 2016 WL 4502808, at *4 (N.D. Cal. Aug. 29, 2016). The duty of loyalty prohibits trustees from "engaging in transactions that involve self-dealing or that otherwise create a conflict between the trustees fiduciary duties and personal interests." Restatement (Third) of Trusts §78 (2007).

ERISA also requires that a pension plan fiduciary act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] 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." 29 U.S.C. §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).

A. Offering Higher Cost Mutual Fund Shares

First, the Court finds that Plaintiffs' allegations that the Plan offered higher cost mutual funds does not support a claim for breach of fiduciary duty. Fiduciaries "have latitude to value investment features other than price (and indeed, are required to do so), as recognized by the courts." White, 2016 WL 4503808, at *10. In particular, where, as here, a plan offers a diversified array of investment options[1/], the fact that some other funds might offer lower expense ratios is not relevant. ERISA does not require fiduciaries to "scour the market to find and offer the cheapest possible funds (which might, of course, be plagued by other problems)." Id. citing Hecker v. Deere & Co., 556 F.3d 575, 586 (7th Cir. 2009) (The "fact that it is possible that some other finds might have had even lower ratios is beside the point; nothing in ERISA requires every fiduciary to scour the market.").

Other "[c]ourts have dismissed claims that fiduciaries are required to offer institutional-class over retail-class funds, and claims that fiduciaries were imprudent in failing to offer cheaper funds." Id. For example, in Tibble I, the Ninth Circuit found that while it is true that retail class mutual funds generally have higher expense ratios than their institutional-class counterparts, that does not mean that a fiduciary should only offer institutional-class funds. "There are simply too many relevant considerations

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[1/] In the Complaint, Plaintiffs admit that the Plan offered international equity funds, domestic equity funds, index funds, and non-target date balanced funds. (Compl. ¶ 9.)

for a fiduciary, for that type of bright line approach to prudence to be tenable." Id., 729 F.3d at 1135 (noting that a fiduciary might choose funds with higher fees for a number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility). Mutual funds in particular have a "variety of unique regulatory and transparency features" that sometimes results in high costs. Tibble I, 729 F.3d at 1134; see also Renfro v. Unisys Corp., 671 F.3d 314, 318 (3d Cir. 2011) (noting that mutual funds differ from other investment vehicles because they are subject to certain governance, reporting and transparency requirements).

Plaintiffs argue this case is different than Marks because they have alleged "specific funds that were in the wrong share class." (Opp. at 2.) While Plaintiffs do include a chart in their Complaint of certain funds offered in the Plan compared to the funds' I-class or institutional share counterparts, this is still insufficient to state a claim for breach of the fiduciary duty. While Plaintiffs have alleged that the institutional share classes were less expensive than the share classes in the Plan, they still do not allege "whether the investor class share offered other benefits that may have offset any additional costs." Marks, 2020 WL 2504333, at *8. Further, the Complaint only alleges "median" fees, rather than specific fee benchmarks they believe Defendants are required to reach.

B. Defendants' Monitoring of the Plan to Determine Availability of Lower Cost Mutual Funds

Second, the Court finds Plaintiffs fail to allege any facts to support their allegation that Defendants do not adequately monitor the plan or investigate the availability of lower cost mutual funds. By Plaintiffs' own admissions, the Plan offered a diverse array of funds. (Compl. ¶ 79.) The fiduciary duty of prudence requires only that a fiduciary "offer participants meaningful choices about how to invest their retirement savings" and a "range of investment options." Renfro, 671 F.3d at 327-38 (affirming on appeal dismissal of claims that fiduciaries should have selected different investment options). Here, the Complaint lacks any facts to suggest Defendants failed to meet this standard.

In addition, the judicially noticed documents show that the Committee made numerous changes to the Plan lineup during the proposed Class Period. For example, the 2016 and 2017 Form 5500s reveal that the Committee made seven changes to the Plan in that one-year period. During that time period, three funds were added to the Plan, and four funds were removed. (See Ex. 6 at 195.) Similar changes were made during other years. (See Ex. 4 at 120.)

C. Reasonableness of Capital Research's Recordkeeping Fees

Third, the Court finds Plaintiffs have not offered any facts to suggest that a $48 per participant recordkeeping fee is "unreasonable." Whereas in Marks, Plaintiffs assumed for purposes of the Complaint that Capital Research's recordkeeping fee was $140 per participant, here Plaintiffs acknowledge that the recordkeeping fee is approximately $48 per participant. While Plaintiffs affirmatively state what the allegedly excessive recordkeeping fee is, Plaintiffs fail to state any facts as to why this fee is unreasonable.

Courts regularly dismiss imprudence claims such as these for failing to allege an adequate market comparison. For example, in Divane v. Nw. Univ., 953 F.3d 980, 990 (7th Cir. 2020) the Circuit affirmed dismissal finding that defendant "was not required to search for a recordkeeper willing to take $35 per year per participant as [p]laintiffs would have liked," and that the plaintiffs "failed to explain how a hypothetical lower-cost recordkeeper would perform at the same level necessary to serve the best interests of the plans' participants."

Here, Plaintiffs do not allege any facts as to what would constitute a reasonable fee, or any facts suggesting that the fee charged by Capital Research is excessive in relation to the services Capital Research provides. See Young v. GM Inv. Mgmt. Corp., 325 Fed. Appx. 31, 33 (2d Cir. 2009) (Sotomayor, J.) (requiring plaintiffs to "allege that the fees were excessive relative to the services rendered").

In addition, the Court finds the 1998 Department of Labor statistics Plaintiffs' cite to in the Complaint purporting to show that a retirement plan can negotiate lower recordkeeping fees as it goes unpersuasive. One study from 1998 cannot support a claim for excessive fees that occurred starting in 2014.

D. Placing Revenue Sharing Funds Into a Compensation Recapture Account

Next, Defendants argue that "[w]ithout taking into consideration this Court's ruling in Marks, Plaintiffs repeat the same novel and unsupported theory of imprudence that the Marks plaintiffs advanced: that Defendants should not have permitted Fund Revenue to have been deposited in a recapture account that was utilized to pay Plan expenses." (Mot. at 11.) As the Court found in Marks, Plaintiffs "do not allege any facts to support the 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." Marks, 2020 WL 2504333, at *8. Defendants fail to allege any facts from which this Court could infer that the use of a recapture account was not in the interest of Plan participants. "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 excessive recordkeeping fee are insufficient to survive a motion to dismiss.

E. Defendants' Alleged Failure to Put Recordkeeping Fees Out to Bid

As it did in Marks, the Court finds that "nothing in ERISA compels periodic competitive bidding." Marks, 2020 WL 2504333, at *7 citing Chevron I, 2016 WL 4502808, at *14 (dismissing duty of prudence claim despite similar competitive bidding allegations); 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)").

Here, Plaintiffs have failed to allege any facts from which one could infer that a competitive bidding service would have benefitted the Plan. Plaintiffs have failed to allege any facts showing that the same service might have even been available on the market for less. See, e.g. Young, 325 F. App'x at 33 (holding plaintiffs had not plausibly alleged that the fiduciaries agreed to pay excessive fees where they "fail[ed] to allege that the fees were excessive relative to the services rendered"). As the Court held in Marks, "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." 2020 WL 2504333, at *7 (citation and internal quotation marks omitted).

As this Court recognized in Marks, "[i]t 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." Id. (citing White v. Chevron Corp. 16-cv-0793, 2016 WL 4502808, at *14 (C.D. Cal. Aug 29, 2016)). Plaintiffs have failed to meet that burden here. The Court finds Plaintiffs have failed to allege sufficient facts to support a claim for breach of the fiduciary duty of prudence.

F. Plaintiffs' Duty of Loyalty Claim

The Court also finds Plaintiffs do not allege any additional facts to support their duty of loyalty claim outside of those alleged to support their duty of prudence claim. The Court therefore dismisses Plaintiffs' duty of loyalty claim because the Complaint "does not differentiate between breach of the duty of prudence and breach of the duty of loyalty." Chevron I, 2016 WL 4502808, at *5; see also Romero v. Nokia, Inc., 12-cv-6260, 2013 WL 5692324, at *5 (N.D. Cal. Oct. 15, 2013) (dismissing claim for breach of the duty of loyalty where it did not "present any separate allegations regarding any loyalty breach").

While it is true that ERISA imposes on plan fiduciaries an obligation to act "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1)(A), Plaintiffs have not alleged any facts to suggest that the Plan fiduciaries discharged their duties with anything other than "an eye single to the interest of the participants and beneficiaries." Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982).

The Court therefore finds Plaintiffs have failed to allege a breach of the duty of loyalty claim.

G. Failure to Monitor Fiduciaries

Because Plaintiffs fail to plead a duty of prudence or loyalty claim, their second claim for relief, which is a derivative failure to monitor claim, also fails. See Marks, 2020 WL 2504333, at *8 (citing White, 2016 WL 6803738, at *19 ("because Plaintiffs have failed to plead sufficient facts as to their other allegations, 'they cannot maintain a claim that [Defendants] failed to monitor the fiduciaries'")); 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.").

Conclusion

For all of the foregoing reasons, Defendants' 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.