UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No.	CV 16-9321 DSF (MRWx)	Date	5/1/17
Title	Charles Creamer, et al. v. Starwood Hotels & Resorts Worldwide, Inc.		

DALE S. FISCHER, United States District Judge

Debra Plato	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff	Attorneys Present for Defendants
Not Present	Not Present

Proceedings: (In Chambers) Order GRANTING IN PART AND DENYING IN PART Defendant Starwood Hotels and Resorts Worldwide, Inc.'s Motion to Dismiss (Dkt. 31)

Defendant Starwood Hotels & Resorts Worldwide, Inc. (Starwood) moves to dismiss Plaintiffs' complaint. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15.

I. BACKGROUND

Starwood is the sponsor and administrator of a 401(k) pension plan for its employees. Compl. ¶¶ 1, 11, 13, 15. The plan's corporate trustee is State Street Bank & Trust. Id. ¶ 16. Voya Financial provides recordkeeping and administrative services for the plan. Id. Plaintiffs Charles Creamer and Jennifer Trevino worked at Starwood and participated in the plan from 2010 to 2016 and 2010 to 2015, respectively. Id. ¶¶ 17-18. They allege Starwood breached its fiduciary duties under ERISA in its management, operation, and administration of the plan. Id. ¶¶ 1, 20.

II. LEGAL STANDARD

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"Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Erickson v. Pardus, 551 U.S. 89, 93 (2007) (ellipsis in original; internal quotation marks omitted). But Rule 8 "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Federal Rule of Civil Procedure 12(b)(6) allows an attack on the pleadings for failure to state a claim upon which relief can be granted. "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." Erickson, 551 U.S. at 94. However, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." Id. (alteration in original; citation and internal quotation marks omitted). A complaint must "state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. This means that the complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

Ruling on a motion to dismiss will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not show[n] - that the pleader is entitled to relief." Id. at 679 (alteration in original; internal quotation marks and citation omitted).

III. DISCUSSION

Plaintiffs bring a breach of fiduciary duty claim against Starwood based on its alleged failure to (1) ensure reasonable recordkeeping and administrative fees, (2) offer a stable value fund, (3) follow participants' investment instructions, (4) provide adequate disclosure regarding revenue sharing, and (5) exclude the BlackRock LifePath 2050 Index Fund, which charged excessive fees. See Compl. ¶ 6; Opp. at 10-16. Starwood argues the statute of limitations bars Plaintiffs' claim for all five theories of liability.

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A. STATUTE OF LIMITATIONS

"[P]laintiffs ordinarily need not 'plead on the subject of an anticipated affirmative defense.'" Rivera v. Peri & Sons Farms, Inc., 735 F.3d 892, 902 (9th Cir. 2013) (quoting United States v. McGee, 993 F.2d 184, 187 (9th Cir. 1993)). "When an affirmative defense is obvious on the face of the complaint, however, a defendant can raise that defense in a motion to dismiss." Id. (citing Cedars-Sinai Med. Ctr. v. Shalala, 177 F.3d 1126, 1128-29 (9th Cir. 1999)).

The limitations period for an ERISA breach of fiduciary duty claim is:

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation[.]

29 U.S.C. § 1113(a). Starwood contends Plaintiffs had actual knowledge of all alleged breaches based on disclosures provided to Plaintiffs.[1]

Circuits have adopted differing views on what constitutes actual knowledge, see Browning v. Tigers Eye Benefits Consulting, 313 Fed. Appx. 656, 660 (4th Cir. 2009). But in the Ninth Circuit and several others, the "statute of limitations is triggered by the [plaintiffs'] knowledge of the transaction that constituted the alleged violation, not by [their] knowledge of the law." Meagher v. Int'l Ass'n of Machinists and Aerospace

[1] Despite the heading, "ALL CLAIMS ARE TIMELY . . .," Plaintiffs address only excessive fees. Opp. at 16-19. By failing to address Starwood's statute of limitations arguments regarding the stable value fund, investment instructions, and revenue sharing theories of liability, Plaintiffs concede their merit. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995); Brydges v. Lewis, 18 F.3d 651, 652 (9th Cir. 1994); Tatum v. Schwartz, No. CIV S-06-01440-DFL-EFB, 2007 WL 419463, at *3 (E.D.Cal. Feb.5, 2007) (dismissing claim because plaintiff "tacitly concede[d] this claim by failing to address defendants' argument in her opposition."); see also Hopkins v. Women's Div., Gen. Bd. of Global Ministries, 238 F.Supp.2d 174, 178 (D.D.C. 2002) ("It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.") (quoting FDIC v. Bender, 127 F.3d 58, 67-68 (D.C. Cir. 1997)).

Workers Pension Plan, 856 F.2d 1418, 1423 (9th Cir. 1988), citing Blanton v. Anzalone, 760 F.2d 989, 992 (9th Cir. 1985) (receipt of a check triggered the limitations period though claimant may not have known reduction in benefits was unlawful under ERISA); see also Wright v. Heyne, 349 F.3d 321, 330 (6th Cir. 2003) ("to trigger the ERISA statute of limitations, the plaintiff need only have knowledge of the facts or transaction that constituted the alleged violation; it is not necessary that the plaintiff also have actual knowledge that the facts establish a cognizable legal claim under ERISA in order to trigger the running of the statute" (internal citation and quotation marks omitted)); Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078, 1086 (7th Cir. 1992) ("[T]he relevant knowledge for triggering the statute of limitations is knowledge of the f*acts* or *transaction* that constituted the alleged violation. Consequently, it is not necessary for a potential plaintiff to have knowledge of every last detail of a transaction, or knowledge of its illegality.").

In support of its argument that Plaintiffs had actual knowledge, Starwood cites In re Northrop Grumman Corp. Erisa Litig., No. CV 06-06213-MMM-JCx, 2015 WL 10433713 (C.D. Cal. Nov. 24, 2015). Plaintiffs argue the three-year limitations period - based on actual knowledge - does not apply to excessive fees cases like this one, citing Wildman v. Am. Century Servs., LLC, No. 4:16-CV-00737-DGK, 2017 U.S. Dist. LEXIS 31700 (W.D. Mo. Feb. 27, 2017) and Urakhchin v. Allianz Asset Mgmt. of Am., L.P., No. SACV 15-1614-JLS-JCGx, 2016 U.S. Dist. LEXIS 104244 (C.D. Cal. Aug. 5, 2016). Opp. at 16-18. Because Wildman and the cases it relies on are from circuits that have not adopted the Ninth Circuit's more lenient actual knowledge standard, 2017 U.S. Dist. LEXIS 31700 at *11-12, they are not relevant to the Court's analysis. Northrop Grumman and Urakhchin seem inconsistent in their applications of the actual knowledge standard. The court in Northrop Grumman found a breach of fiduciary duty claim time-barred where documents sent to plaintiffs disclosed the fees charged, putting them on notice of the allegedly excessive fees. 2015 WL 10433713 at *21-22. The court in Urakhchin found plaintiffs lacked actual knowledge where they were provided documents that disclosed the amount of the plan's fees but did not show fees of other plans, which – the court concluded - would be material in determining whether the fees in plaintiffs' plan were excessive. 2016 U.S. Dist. LEXIS 104244 at *16-18. The Court finds Northrop Grumman more persuasive and in line with the Ninth Circuit's actual knowledge standard. Plaintiffs do not dispute they received - outside the three-year limitations period - documents disclosing the fees charged by the BlackRock LifePath 2050 Index Fund. See Opp. at 19. Accordingly, Plaintiffs' claim is time-barred to the extent it relies on excessive fees pertaining to this fund.

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The Court next turns to whether Plaintiffs had actual knowledge of the allegedly excessive recordkeeping and administrative fees. Starwood argues the plan statements disclosed the plan's fees. But it is not apparent whether fees shown on the statements represent those allegedly excessive fees. Annual notices for the plan specify that some fees are deducted from the investment returns and do not appear as separate line items on the statements. Compl., Ex. 1 at 37, Ex. 2 at 66, 76 (Dkt. 13). Plaintiffs' account statements also specify that some administrative expenses are paid from the expenses of the investment funds. Id., Ex. 1 at 5, 8, 20, Ex. 2 at 53. Starwood's statute of limitations defense therefore fails as to the breach of fiduciary duty claim based on excessive recordkeeping and administrative fees.[2]

B. FAILURE TO STATE A CLAIM

ERISA § 404(a)(1) imposes a duty of prudence on plan fiduciaries. See 29 U.S.C. § 1104(a)(1)(B). This duty requires that fiduciaries use "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." Id. Courts have recognized a breach of this duty where a fiduciary fails to ensure a pension plan's fees are reasonable. See Tussey v. ABB, Inc., 746 F.3d 327, 336 (8th Cir. 2014); George v. Kraft Foods Global, Inc., 641 F.3d 786, 800 (7th Cir. 2011). "In evaluating whether a fiduciary has acted prudently, we . . . focus on the process by which it makes its decisions rather than the results of those decisions." Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009).

Plaintiffs allege Starwood's median recordkeeping and administrative fees from 2010 to 2015 were approximately $100. Compl. ¶ 29. They submit a survey showing that median recordkeeping costs of 113 employer plans were $64 in 2015. Id. ¶ 27, Ex. 3. Plaintiffs allege that Starwood could have exercised its bargaining power to obtain lower fees, but did not do so for many years. Id. ¶ 24. In 2015, Starwood cut the fees of its fund offerings by $4 million and changed its asset-based recordkeeping fee to a flat fee, further reducing costs. Id. ¶ 24, 32. When viewed in the light most favorable to

[2] In its late-filed reply, Starwood argues Plaintiffs' Opposition shows Plaintiffs relied on publicly-available SEC documents to determine the 2011-2016 recordkeeping and administrative fees disclosed in Plaintiffs' complaint. But this is irrelevant because a statute of limitations defense must be apparent from the face of the complaint to prevail on a motion to dismiss. The Complaint does not show that Plaintiffs had actual knowledge of recordkeeping and administrative fees outside the three-year limitations period.

Plaintiffs, the Court can infer from these facts that Starwood's recordkeeping and administrative fees were excessive prior to 2015 and are still excessive. Although Plaintiffs do not specifically allege how Starwood breached its fiduciary duty through improper decision-making, they have pleaded sufficient facts from which the Court can reasonably infer that Starwood employed a flawed process for selecting recordkeeping and administrative services.[3] See Braden, 588 F.3d at 595-96 (on a motion to dismiss, plaintiff was not required to describe directly the ways in which defendants breached their fiduciary duties); cf. White v. Chevron Corp., No. 16-CV-0793-PJH, 2016 WL 4502808, at *15 (N.D. Cal. Aug. 29, 2016) (failure to state a claim for breach of duty of prudence where plaintiffs did not allege facts (1) showing the amount of recordkeeping fees charged or (2) suggesting the availability of cheaper recordkeeping services). Plaintiffs have stated a claim for breach of fiduciary duty for Starwood's alleged failure to ensure reasonable recordkeeping and administrative fees.

IV. CONCLUSION

The Court DENIES Starwood's motion to dismiss as to the excessive recordkeeping and administrative fees claims. In the absence of an amended complaint, Plaintiffs may not proceed on the other aspects of their breach of fiduciary duty claim.[4] If Plaintiffs believe they can address the deficiencies with regard to these issues, they may file an amended complaint no later than June 1, 2017. They may not add new claims or new defendants except by properly noticed motion.

IT IS SO ORDERED.

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[3] To the extent Starwood contends Plaintiffs' pleadings are deficient because they do not allege the excessive recordkeeping and administrative fees improperly benefitted anyone, the Court notes that such allegations are not required to state a claim for breach of the duty of prudence.

[4] Because Plaintiffs concede - or the Court determines - the statute of limitations bars their other claims, the Court considers here only the issue of excessive recordkeeping and administrative fees. If they choose to amend, Plaintiffs should consider carefully the other alleged defects asserted by Starwood.