

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CLINT FISHER, individually and on behalf of
the participants in Inlandboatmen's Union of
the Pacific National Pension Plan and its
participants,

3:18-cv-1639-JR

FINDINGS & RECOMMENDATION

Plaintiff,

v.

MARINA SECCHITANO; LEE EGLAND;
BRIAN DODGE; DONOVAN DUNCAN;
PETER HART; GAIL MCCORMICK; JOHN
SKOW; ADAM SMITH; ROBERT
ESTRADA; MATT HAINLEY; PATRICK
MURPHY; ALICE NG; MIKE O'CONNOR;
and ROBERT RELLER,

Defendants.

RUSSO, Magistrate Judge:

On September 7, 2018, plaintiff initiated this action against defendant Trustees of the Inlandboatmen's Union of the Pacific National Pension Plan (IBU Plan) alleging they breached

their duty to IBU Plan participants in violation of the Employee Retirement Income Security Act (ERISA), [29 U.S.C. § 1104](#). Plaintiff brings this action on behalf of himself and all other similarly situated IBU Plan participants. On November 1, 2018, plaintiff filed his first amended complaint. On July 9, 2019, the Court dismissed all claims, with leave to amend. On August 5, 2019, plaintiff filed a second amended complaint. Defendants again move to dismiss and for judicial notice of documents incorporated by reference in the second amended complaint and other publicly available documents. For the reasons stated below, the motions should be granted.

ALLEGATIONS

Plaintiff alleges the IBU Plan “is governed by the Board of Trustees of the Trust established by the Trust Agreement and the properly adopted and enforceable Restatements and Amendments thereto (‘Trust Documents’).” Second Amended Class Action Allegation Complaint (ECF # [41](#)) at ¶ 3.

Plaintiff alleges the operative Trust Documents provide that the Trustees will not permit any incurrence of unfunded vested benefit liabilities (UVB). *Id.* at ¶ 6.

Plaintiff alleges the requirement that the Trustees not permit UVB was adopted in 1982 through amendment of the 1981 Trust Agreement in new Section 9.05. Second Amended Class Action Allegation Complaint *Id.* at ¶ 18. Plaintiff further alleges that to amend Section 9.05, the Trustees had to obtain unanimous consent of the participating employers in contrast to other sections which could be amended by agreement between the Union and the entity representing the employers. *Id.* at ¶ 19. Plaintiff asserts the Trustees purportedly replaced the original Trust Agreement with the First Restated Trust Agreement in 1997 deleting certain recitals to the prior amendment, moving Section 9.05 to Section 9.5, and moving the provision requiring unanimous

consent to Article 13. *Id.* at ¶ 21. Plaintiff alleges the Trustees breached their fiduciary duties by failing to obtain unanimous consent of the participating employers thus invalidating the 1997 amendments. Plaintiff asserts the Trustees purportedly amended the Trust agreement again in 2009, eliminating the requirement the Trustees cannot allow the IBU Plan to incur UVB. Plaintiff again alleges the amendment was invalid because the Trustees failed to obtain unanimous consent and that the Trustees have administered the Plan since 2009 as if the Trust Agreement permitted UVB. *Id.* at ¶¶ 24-27.

Plaintiff asserts the requirement that the Plan incur no UVB is a unique rule for a multi-employer pension plan and means that even if the Plan experienced investment losses, the rate of return the Trustees expected to earn on investments fell, or some other event occurred that affected funding, the Trustees still could not permit the plan to incur UVB. *Id.* at ¶¶ 7-9. However, plaintiff alleges the Trustees breached this duty not to incur UVB in each year from 2004 to 2006, and 2009 to at least 2017. *Id.* at ¶¶ 10-12. Plaintiff alleges as of July 1, 2017, the Plan's UVB has grown to an amount in excess of \$73 million. *Id.* at ¶ 6.

Plaintiff specifically alleges:

Each year, the trustees had several options within their authority and control, or a combination of options, to ensure that they would not permit the plan to incur UVB. These options included but were not limited to: i) following the Trust Documents requirement that the trustees not permit the plan to incur UVB; ii) complying with the requirements of the Trust Documents to make any amendments; iii) using a suitable assumed rate of return on plan investments that accounted for the prohibition against permitting the plan to incur UVB and did not require the plan to take on unsuitable risk with its investments; iv) ensuring that fully funding the plan did not require unpredictable returns from risky investments; v) creating a margin or reserve to protect against poor investment performance or changes to plan funding; vi) requiring increased contributions from employers; vii) requiring supplemental contributions from employers; viii) incentivizing employers to make supplemental contributions by crediting those supplemental contributions to the

employer's portion of the UVB; viv) ensuring that the plan's advisors, including actuaries and attorneys, accounted for the requirement that the trustees not permit the plan to incur UVB when advising the trustees; and x) cutting costs.

Id. at ¶ 14.

Plaintiff asserts that despite these options, the Trustees made repeated decisions that permitted the Plan to incur UVB. Id. at ¶ 15. Plaintiff alleges

Every act, omission, or statement by the trustees since 2009 relating to the management and administration of the plan or disposition of assets, such as plan funding, UVB, assets, income, plan solvency, consulting with advisors, and communicating or sharing information with participants was made by the trustees without regard for the requirement that the trustees not permit the plan to incur UVB. The trustees' actions and omissions since 2009 have caused millions of dollars of losses to the plan, including UVB in excess of \$73 million as of July 1, 2017.

Id. at ¶ 29.

Plaintiff alleges the Trustees also breached their fiduciary duties by causing the Plan to miss out on investment earnings due to the underfunding causing tens of millions of dollars in investment loss from 2009 to 2017. Id. at ¶ 31.

Plaintiff alleges the Trustees further breached their fiduciary duties by shifting from primarily low risk bonds to risky individual stocks, mutual funds, limited partnership interests, and the "Cayman Islands Exempt Company" starting at least in 2009. Id. at ¶ 32. Plaintiff further alleges despite the resulting "extremely volatile investment returns," the Trustees did nothing to ensure the Plan would not incur UVB and breached their fiduciary duty to monitor investment returns and remove imprudent investments. Id. at ¶ 36-37.

Plaintiffs argues that because the Trustees were prohibited from permitting UVB, they

should have set aside a margin or reserve to ensure the Plan was fully funded and therefore breached their fiduciary duty to create such a reserve account. Id. at ¶¶ 38-40.

Plaintiff alleges the Trustees also breached their fiduciary duty by assuming too high a rate of return, i.e., 7.5% from 2000 until June 30, 2014; 7.25% from July 1, 2014 to July 1, 2015; and 6.5% thereafter in light of the requirement not to allow UVB. Id. at ¶ 41-44.

Plaintiff argues in all years that the plan had UVB, including 2009, and each year since then, the Trustees breached their fiduciary duties by failing to require, incentivize, or negotiate increased contributions or sufficiently large increased contributions from employers. Id. at 45.

Plaintiff asserts the Trustees breached their fiduciary duties by failing to ensure plan advisors accounted for the requirement not to incur UVB and allowing them to rely on the purported 2005 Trust Agreement. Id. at ¶¶ 46-48.

Plaintiff also asserts the Trustees were required to provide truthful, fair, and full disclosure of all material facts to participants. That disclosure included, but was not limited to, informing participants about circumstances that threatened the funding of benefits. The Trustees failure to do so resulted in a breach of their fiduciary duties. Id. at ¶ 51.

Plaintiff further alleges the Trustees breached their duty to inform participants regarding:

i) the size of the UVB; ii) that the UVB increased in many years; iii) that the Trust Documents prohibited them from permitting the plan to incur UVB, but that they repeatedly violated this requirement; iv) that they did not obtain the requisite unanimous consent of participating employers before purportedly amending and attempting to eliminate the requirement that the trustees not permit the plan to incur UVB; v) that the trustees were taking unsuitable risk with the plan's investments; vi) that the trustees were relying on investment returns from extremely volatile investments to fund the plan; vii) that the trustees were assuming too high of a rate of return on the plan's investments and using this assumption to avoid having to appropriately fund the plan; and viii) that the trustees managed and administered the plan, and disposed of assets, since 2009 as if they could permit the plan to incur

UVB.

Id. at ¶ 52. Additionally, plaintiff alleges the Trustees withheld from participants material facts about actuarial analysis, plan funding, Trust Document requirements, and UVB. Id. at ¶ 53.

In sum, in light of the requirement not to permit UVB, plaintiff alleges the Trustees breached their fiduciary duties in each year from 2004 – 2006, and 2009 – 2017 by:

- (a) Failing to manage and administer the plan, and dispose of its assets, each year in accordance with the Trust Documents, including the requirement that the trustees not permit the plan to incur UVB;
- (b) Allowing the plan to incur UVB each year from 2004 through 2006 and 2009 through at least 2017, in violation of the Trust Documents requirement that the trustees not permit the plan to incur UVB;
- (c) Allowing the plan to incur additional UVB each year, compared with the previous year, from 2004 through 2006, 2009 to 2010, and from 2014 through at least 2017, in violation of the Trust Documents requirement that the trustees not permit the plan to incur UVB;
- (d) Administering the plan as if the Trust Agreement had been amended;
- (e) Purportedly amending the requirement that the Trustees not permit the plan to incur UVB, and Section 9.05 of the Trust Agreement, by purportedly adopting the First Restated Trust Agreement without obtaining the unanimous consent of all the participating employers making contributions to the trust, thereby failing to administer the plan in accordance with the Trust Documents and breaching plan rules with respect to amendments;
- (f) Purportedly amending Article 9.5 of the First Restated Trust Agreement (including the requirement that the trustees not permit the plan to incur UVB) without obtaining the unanimous consent of all the participating employers making contributions to the trust, thereby failing to administer the plan in accordance with the Trust Documents and breaching plan rules with respect to amendments;
- (g) Managing and administering the plan, and disposing of assets, to permit the plan to incur UVB for up to 30 years;
- (h) Managing and administering the plan, and disposing of assets, in ways that caused the IBU Plan's investment earnings to be lower than they would have been if the plan was fully funded, thereby causing losses to the plan and failing to protect the plan from incurring UVB;
- (i) Each year since at least 2009, causing the plan to shift its investment strategy from primarily bonds to riskier stocks and other investments, including in some years something called "Cayman Islands Exempt Company", thereby causing the plan to take on unsuitable and excessive investment risk;

- (j) Mismanaging plan assets by making risky investments, while doing nothing, or failing to do enough, to ensure that the plan would not incur UVB, even if the investments lost value or had poor returns;
- (k) Failing to monitor investments and remove imprudent ones, each year since at least 2009, considering the requirements of the Trust Documents, the “extremely volatile” investment returns, the likelihood that the investments would lose value or otherwise perform below expectations some years, and the trustees’ management and administration of the plan, and disposition of assets, in a way that based plan funding on high returns from risky investments;
- (l) Each year since at least 2003, not causing the IBU Plan to maintain and adequately fund a margin or reserve to protect against adverse plan experience, such as investment losses or investment returns that fell short of forecasts, and ensure that the plan could pay for promised benefits and never had a UVB, no matter what happened in the financial market;
- (m) Each year since at least 2000, mismanaging plan assets by making management and administrative decisions, and decisions about disposing of assets, with the assumption that investments would increase in value at a rate that exceeded the risk free rate of return, despite the requirement that the trustees not permit the plan to incur UVB and the trustees doing nothing to protect plan funding and ensure that the plan would not incur UVB if the actual investment returns fell short of the assumed returns;
- (n) Using too high of an assumed rate of return on investments, the trustees did not keep enough money in the plan to pay for promised benefits, amplifying the negative effects on plan funding and UVB when investment returns failed to meet or exceed the trustees’ assumptions and causing UVB to increase when the trustees lowered the assumed rate of return in 2014 and 2017;
- (o) Not protecting the plan from incurring UVB when the actual rate of return was less than the assumed rate of return;
- (p) Each year since at least 2009, failing to monitor or question the advice of plan advisors and failing to ensure that the advisors—including the plan’s actuaries and attorneys—were accounting for the requirement in the Trust Documents that the trustees not permit the plan to incur UVB when the advisors provided advice to the trustees;
- (q) Failing to require, negotiate, or incentivize increased contributions from employers, or sufficiently large increases;
- (r) Mismanaging plan assets by permitting liabilities to increase beyond the plan’s ability to pay and promising to pay, and in fact paying, for unfunded benefits; and
- (s) Not providing truthful, fair, and full disclosure of all material facts to participants, including informing them about circumstances that threaten the funding of benefits, UVB, the trustees’ failure to comply with Trust Documents requirements relating to incurring UVB, amending the Trust Documents, and the trustees’ management and administration of the plan and disposition of assets since 2009 as if there was no requirement that the trustees not permit the plan to incur

UVB.

Id. at ¶ 54.

Accordingly, plaintiff asserts claims for breach of fiduciary duty pursuant to 29 U.S.C. § 1104(a)(1)(D), 29 U.S.C. § 1104(a)(1)(B). Plaintiff also seeks an injunction enjoining the Trustees from managing the Plan as if UVB were permitted, and an order striking the amendment to the Trust Agreement permitting UVB among other orders related to UVB pursuant to 29 U.S.C. § 1132(a)(3).

DISCUSSION

A. Judicial Notice

On April 4, 2019, with respect to defendants' first motion to dismiss, this Court recommended taking judicial notice of (1) excerpted portions of the Trust Agreement; (2) excerpted portions of the Plan document governing the Inlandboatmen's Union of the Pacific National Pension Plan; (3) 2012 Summary Plan Description regarding the Plan and benefits and funding issues; (4) 2010 Annual Funding Notice, regarding the Plan funding issues, including UVB liability; (5) 2011 Critical Status Notice, regarding the Plan funding issues, including UVB liability; (6) May 2011 ERISA § 204(h) Notice regarding reductions in Plan benefits pursuant to a 2011 Rehabilitation Plan, implemented in connection with the UVB liability; (7-9) Annual Funding Notices for 2013, 2014, and 2017, respectively, regarding the Plan funding issues, including UVB liability; and (10) May 2018 "ERISA § 204(h) Notice" regarding reductions in Plan benefits taking effect after July 1, 2018, pursuant to the 2018 Rehabilitation Plan. Findings and Recommendation (ECF #34) at pp. 3-6 (citing Exhs. 1-10 attached to the Declaration of

Christopher J. Boran (doc. [24-1](#) to10)). Defendants again move the Court to take judicial notice of these documents as well as: (1) the Actuarial Valuation Reports for 2017, 2013, and 2008; (2) the 2017 Summary Plan Description; and (3) the Form 5500 excerpts from the Plan’s 2013 and 2014 form 5500s filed with the U.S. Department of Labor. See Declaration of Christopher Boran (ECF #46) and Exhibits attached thereto.¹

For the reasons stated in the April 4, 2019 Findings and Recommendation, the Court should again take judicial notice of the documents noted, as well as the additional documents. The Actuarial Valuation Reports form part of the basis of plaintiff’s allegations and thus should be incorporated by reference. See [Khoja v. Orexigen Therapeutics, Inc.](#), 899 F.3d 988, 1002 (9th Cir. 2018) (incorporation-by-reference doctrine treats certain documents as though they are part of the complaint itself and prevents plaintiffs from selecting only portions of documents that support their claims, while omitting other portions). The 2017 Summary Plan Description is a statutorily required summary of the Plan’s benefits, requirements and other information that must be provided to participants and beneficiaries. 29 U.S.C. § 1022. Courts routinely take judicial notice of ERISA plan documents. [Terraza v. Safeway Inc.](#), 241 F. Supp. 3d 1057, 1067 (N.D.

¹ The exhibits consist of: (1) Exhibit A, The Plan document governing the Inlandboatmen’s Union of the Pacific National Pension Plan (the “Plan”), available at <https://www.ourbenefitoffice.com/IBU/Benefits/PensionDocuments.aspx>; (2) Exhibit B, 1981 Trust Agreement and amendments; (3) Exhibit C, 1997 First Restated Trust Agreement and amendments; (4) Exhibits D, H, and L, Annual Funding Notices for 2010, 2013, and 2018, respectively, available at <https://www.ourbenefitoffice.com/IBU/Benefits/PensionDocuments.aspx>; (5) Exhibits G, J, and K, Actuarial Valuation Reports (“Actuarial Reports”) for 2017, 2013, and 2008, respectively; (6) Exhibits F and M, 2011 and 2018 “ERISA § 204(h) Notices,” available at <https://www.ourbenefitoffice.com/IBU/Benefits/PensionDocuments.aspx>; (7) Exhibit E, 2011 Critical Status Notice, available at <https://www.ourbenefitoffice.com/IBU/Benefits/PensionDocuments.aspx>; (8) Exhibit N and O, 2012 and 2017 Summary Plan Descriptions (“SPD”), respectively, 2017 SPD available at <https://www.ourbenefitoffice.com/IBU/Benefits/PensionDocuments.aspx>; and (9) Exhibit I, Form 5500 Excerpts, from the Plan’s 2013 and 2014 Form 5500s filed with the U.S. Department of Labor (“DOL”), available at www.efast.dol.gov and <https://www.ourbenefitoffice.com/IBU/Benefits/PensionDocuments.aspx>.

Cal. 2017). Similarly, the 5500s are required to be prepared and filed each year with the Department of Labor and are subject to judicial notice. [Id.](#)

B. Amending the Trust Agreement

The Court previously dismissed the complaint because the alleged breach of fiduciary duty involved modification of Plan benefits to address UVB and the amendment of Plan benefits is not subject to fiduciary review. “ERISA’s fiduciary duty requirement simply is not implicated where ... the Plan’s settlor, makes a decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated.” [Hughes Aircraft Co. v. Jacobson](#), 525 U.S. 432, 444 (1999). A decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer’s fiduciary duties which consist of such actions as administration of the plan’s assets. [Id.](#) Under 29 U.S.C. § 1104(a)(1), the Trustees can only be liable when acting in their capacity as fiduciaries.

In the second amended complaint, all of plaintiff’s claims now depend upon the allegation that the defendant Trustees breached their duty not to incur UVB in the first place based on the 1981 Trust Agreement. [See, e.g.](#), Plaintiff’s Response (ECF #49) at p. 9 (Trustees’ argument that plaintiff has not alleged a breach of fiduciary duty ignores the unique requirement in the Trust documents that prohibits them from permitting the plan to incur UVB); p. 16 (plaintiff has not alleged that this case is about specific imprudent investments, but involves fiduciaries making decisions about how to manage risk while keeping in compliance with a rule that prohibits UVB); p. 18 (rates of return selected by trustees might have been appropriate for a plan that could incur UVB); p. 20 (in light of the prohibition against incurring UVB, failing to create a margin or reserve was a breach of fiduciary duty); p. 21 (Trustees failed to monitor the Plan’s advisors failure to

account for the prohibition against incurring UVB); p. 22 (despite UVB, Trustees failed to request increased contributions from employer participants); p. 23-24 (Trustees failed to keep participants informed of failure to comply with prohibition against UVB and the Trustees failure to administer the Plan accordingly).

ERISA requires that every employee benefit plan provide (1) a “procedure for amending [the] plan;” and (2) “[a procedure] for identifying the persons who have authority to amend the plan.” [Curtiss–Wright Corp. v. Schoonejongen](#), 514 U.S. 73, 82 (1995). A plan sponsor's failure to act in accordance with the amendment procedures of the governing plan document when implementing an amendment constitutes a breach of fiduciary duty possibly warranting judicial annulment of the amendment. [Curtiss–Wright Corp.](#), 514 U.S. at 84–85.

The heart of plaintiff’s claims is the alleged failure of the Trustee to follow the Trust documents amendment procedures and operating as if the Plan had been properly amended to permit the incurrence of UVB. Plaintiff asserts the Trustees improperly amended the Trust Agreement in 1997 and specifically in 2009 to permit UVB. Assuming this constitutes an improper amendment to the Plan in violation of the Trustee’s fiduciary duties, the alleged violation was complete in 2009 and plaintiff could have sought a remedy for that violation through nullification of the amendment. Plaintiff initiated this action in 2018, thus it must be determined if ERISA’s statute of limitations now precludes plaintiff from asserting a breach of fiduciary duty through improper amendment occurring in 2009.

An ERISA action for breach of fiduciary duty must be commenced within “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.” 29

U.S.C. § 1113(1).

In applying the limitations period, courts must first isolate and define the underlying violation upon which the claim is founded. [Meagher v. International Ass'n of Machinists and Aerospace Workers Pension Plan](#), 856 F.2d 1418, 1422 (9th Cir.1988). As noted above, plaintiff asserts his claims pursuant to 29 U.S.C. § 1104(a) and 29 U.S.C. § 1132(a) (which seeks to enjoin the alleged [section 1104](#) violations).

Congress intended to make fiduciaries culpable for certain ERISA violations even in the absence of actual injury to a plan or participant. [Ziegler v. Connecticut Gen. Life Ins. Co.](#), 916 F.2d 548, 551 (9th Cir. 1990). Under 29 U.S.C. § 1104(a), an ERISA plaintiff may prosecute a plan fiduciary who fails to perform for the exclusive benefit of participants and their beneficiaries regardless of cost or loss to the participants and their beneficiaries. [Id.](#) Thus, if any breach occurred via a failure to properly amend the Trust Agreement to permit UVB, that breach took place in 2009. This alleged breach is in turn the basis for the allegations that the Trustees improperly chose investments with volatile returns, improperly failed to create a reserve, improperly failed to monitor Plan advisors, improperly failed to request increased contributions, and improperly failed to keep participants informed of the UVB issues that plaintiff alleges continue to this day. As plaintiff concedes, absent the prohibition to incur UVB, the Trustee's actions would be viewed in a different light.² In essence, plaintiff asserts the prohibition placed a fiduciary duty on the Trustees to invest in only near zero or zero risk investments. Because of

² Plaintiff relies on the declaration of Don Liddle who states the UVB provision is unique and designed to eliminate risk and was so important that the employers and the Union created heightened amendment procedures to change it. Declaration of Don Liddle (ECF #52) at ¶¶ 6, 8-9.

the UVB prohibition, plaintiff does not allege any facts showing that investing in low risk bonds or other similar investment vehicles in perpetuity is any more prudent than the mix chosen by the Trustees in light of factors such as inflation, etc. Plaintiff argues such facts are not necessary to plead a plausible breach of fiduciary duty claim because the case is about how to manage risk while maintaining compliance with the rule prohibiting UVB. Accordingly, plaintiff asserts a violation by amending the Plan to permit UVB, and that plaintiff need not show any losses to demonstrate this alleged ERISA violation.

The alleged ERISA violation constituting a breach of fiduciary duty occurred when the Trust Agreement was amended in 2009. See [Zeigler, 916 F.2d at 551-52](#) (statute of limitations begins to run upon actual knowledge of the amendment rather than actual harm).

The next inquiry, thus, is to determine when actual knowledge of the breach via the amendment to permit UVB occurred. While Plaintiff alleges that participants were not informed the Trustees had failed to comply with the Trust Agreement that existed prior to the 1997 Amendments regarding the prohibition on UVB, plaintiff does not allege any facts showing the participants were not aware the UVB could be incurred pursuant to the amendments in 2009. Indeed, plaintiff alleges the amendment was obtained via consent of the Union representing the Plan participants. Second Amended Class Action Allegation Complaint (ECF # [41](#)) at ¶ 25

Plaintiff also argues that every time the Plan incurs UVB, it is a separate breach of fiduciary duty constituting a continuing violation with the statute of repose beginning to run on the date of the last culpable act. However, as alleged, beginning in 2009, the Trust Agreement the Trustees relied upon allowed the Plan to incur UVB. Thus, incurring UVB would only be a violation if the amendment was invalid. Because the date for asserting that claim commenced in 2009 when

the breach was complete, the subsequent incursion of UVB was not itself a culpable act upon which a breach of fiduciary duty could be asserted. As noted by the Court in previously dismissing the first amended complaint, the incursion of UVB necessitated amendment to Plan benefits which is not a fiduciary function. See Order (ECF #40) at p. 4. Plaintiff merely complains about the lasting effects of the amendments and fails to allege the Trustees continue to make invalid amendments. Absent the alleged improper amendment, plaintiff fails to allege any breach of fiduciary duty as noted below.

Plaintiff alleges the following alleged breaches of fiduciary duty: (1) failure to follow the Trust Documents; (2) imprudent investment strategy involving risk and high assumed rates of return without a reserve fund; (3) failure to require, negotiate, or incentivize employers to increase Plan contributions to eliminate UVB; (4) failure to monitor Plan advisors; and (5) failure to disclose the issues regarding UVB and its prohibition.

1. Failure to Follow Trust Documents

As noted above, plaintiff failed to timely file claims of improper amendment. Moreover, even prior to 1997, while the 1981 Trust Agreement provided the “Trustees will not permit this Trust or any Plan established hereunder to incur any unfunded ‘Vested liability’,” it also provided for the actions the Trustees shall take when UVB is incurred. It specifically provided that when they are informed of UVB, they will “meet and take such action as may be required to modify Plan benefits in order to eliminate and avoid incurring such unfunded vested liability or unfunded vested benefits. The Trustees may rely upon the recommendations of the enrolled actuary in their modification of such Plan.” 1981 Agreement at Article 9.05) (ECF #30-1). As this Court previously determined, the Trustees do not engage in fiduciary conduct when acting to modify the

Plan to eliminate UVB. Order (ECF #40) at p. 4, 5-6. The only breach plausibly alleged is a failure to follow the amendment process and that claim is time-barred.

2. Investment Strategy

As noted above, plaintiff challenges the Trustee's overall investment strategy in light of the alleged prohibition on incurring UVB. Consequently, plaintiff alleges the Trustees must invest in virtually no risk investments, assume conservative rates of return, and create a reserve to stave off UVB. Plaintiff does not allege any facts to plausibly demonstrate his chosen investment strategy is anymore prudent than the strategy employed by the Trustees or how the Trustees knew their strategy was imprudent when implemented. Accordingly, plaintiff fails to allege a breach of fiduciary duty with respect to the Trustees' investment strategy. See Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 722 (2d Cir. 2013) (the complaint offers no insight into how risky those unspecified investments became relative to their price, nor does it allege any facts suggesting that a prudent investor at the time would have viewed this unspecified risk as high enough to render the investments imprudent). In order to establish a claim that a fiduciary has violated its duties under ERISA, the plaintiff must allege facts establishing the fiduciary's investment decisions—in the conditions prevailing at the time, and without the benefit of hindsight—are such that a reasonably prudent fiduciary would not have made that decision as part of a prudent, whole-portfolio, investment strategy that properly balances risk and reward, as well as short-term and long-term performance. Id.

Plaintiff alleges that because of the alleged prohibition on UVB, the Trustees should have adopted much lower rates of return and lower benefits. Lowering benefits, as previously noted,

is not a fiduciary function. Other than an allegation that the prohibition on UVB required ultra-conservative but still unspecified rates of return, plaintiff does not allege why the chosen rates of return were unreasonable at the time they were adopted. See [Reyes v. Bakery & Confectionery Union & Indus. Int'l Pension Fund](#), 170 F. Supp. 3d 1239, 1246 (N.D. Cal. 2016) (allegations that do not specify why any of these assumptions were unreasonable are insufficient to plead a claim). Plaintiff similarly fails to explain how the Trustees could have established a reserve fund, or how that failure was imprudent.

3. Increased Contributions

Plaintiff alleges the Trustees did not request increased employer contributions when faced with UVB. However, such action is not fiduciary conduct related to the amendment of a Plan. [Hughes Aircraft Co. v. Jacobson](#), 525 U.S. 432, 444 (1999) (a decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets.).

4. Monitor Plan Advisors

Plaintiff alleges the Trustees did not ensure that the Plan's advisors accounted for the prohibition on incurring UVB. However, as noted above, plaintiff is time-barred from asserting the Plan was improperly amended to permit UVB.

5. Disclosure

Plaintiff alleges the Trustees failed to disclose a host of issues regarding UVB, rates of return, amendment procedures, and failure to create a reserve. As noted above, to the extent plaintiff asserts the Plan was improperly amended to permit UVB, that claim is time-barred.

An ERISA fiduciary has an affirmative duty to inform beneficiaries of circumstances that

threaten the funding of benefits. [Dellacava v. Painters Pension Fund](#), 851 F.2d 22, 27 (2d Cir. 1988), and to provide an individual faced with termination of plan coverage, upon request, “complete and correct material information on [his] status and options,” [Eddy v. Colonial Life Ins. Co. of America](#), 919 F.2d 747, 751 (D.C.Cir. 1990). A fiduciary need not, however, adhere to stricter deadlines for statutorily required reporting than those provided in the statute. [Porto v. Armco, Inc.](#), 825 F.2d 1274, 1275–76 (8th Cir. 1987). Plaintiff does not identify what disclosures were untimely or misleading. Indeed, the judicially noticed documents show that Plan participants have been timely provided with changes to benefits, funding status, specific reduction in benefits and even possible cuts. E.g., 2011 and 2018 “ERISA § 204(h) Notices,” available at <https://www.ourbenefitoffice.com/IBU/Benefits/PensionDocuments.aspx>; Exhibit E, 2011 Critical Status Notice, available at <https://www.ourbenefitoffice.com/IBU/Benefits/PensionDocuments.aspx>.

Plaintiff’s bare conclusory assertions of disclosure failure are insufficient to state a claim for breach of fiduciary duty. Indeed, there is no general fiduciary duty of disclosure under ERISA. [In re Calpine Corp.](#), 2005 WL 1431506, at *7 (N.D. Cal. 2005). Accordingly, plaintiff fails to plead any plausible breach of fiduciary duty and his complaint should again be dismissed.

CONCLUSION

Defendants’ request for judicial notice (ECF# [45](#)) should be granted. Defendants’ motion to dismiss (ECF # [44](#)) should be granted and this complaint should be dismissed.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of appeals. Any notice of appeal pursuant to [Rule 4\(a\)\(1\), Federal Rules of Appellate Procedure](#), should not be filed until entry of the district court’s judgment or appealable order. The

parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 3rd day of February, 2020.

/s/ Jolie A. Russo
JOLIE A. RUSSO
United States Magistrate Judge