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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CHANDRA V. BROWN-DAVIS, et al., Plaintiffs, v. WALGREEN CO., et al., Defendants.	Case No. 1:19-cv-05392 Judge Charles R. Norgle

ORDER

Defendants' motion to dismiss for failure to state a claim [37] is granted in part and denied in part.

STATEMENT

Plaintiffs, who are participants and beneficiaries of Walgreen Co.'s ("Walgreens") retirement plan, sue Walgreens and the fiduciaries of its plan on behalf of a putative class under the Employee Retirement Income Security Act ("ERISA"). Specifically, Plaintiffs claim that the fiduciaries violated ERISA by acting imprudently[1] by investing in ten underperforming Northern Trust funds (the "NT Funds" or "Funds") and that Walgreens failed to properly monitor the fiduciaries' behavior. Defendants argue that Plaintiffs cannot base their claims solely on fund underperformance and contend that the three separate funds and two indexes that Plaintiffs use to show that the Funds underperformed are not apt comparators. For the following reasons, the motion [37] is granted in part and denied in part.

STANDARD

Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint contain a "short and plain statement of the claim showing that the plaintiff is entitled to relief." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554-557 (2007). This statement must provide sufficient plausible facts to put a defendant on notice of the claims against him. Brooks v. Ross, 578 F. 3d 574, 581 (7th Cir. 2009). The complaint "must provide enough factual information to 'state a claim to relief that is plausible on its face' and 'raise a right to relief above a speculative level.'" Doe v. Village of Arlington Heights, 782 F.3d 911, 914 (7th Cir. 2015) (quoting Twombly, 550 U.S. at 555, 570). Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is

[1]29 U.S.C.A. § 1104(a)(1)(B) (fiduciaries must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims").

liable for the misconduct alleged." Id. (citations and quotation marks omitted). In reviewing a plaintiff's claim, the court "must construe all of the plaintiff's factual allegations as true, and must draw all reasonable inferences in the plaintiff's favor." Virnich v. Vorwald, 664 F.3d 206, 212 (7th Cir. 2011).

DISCUSSION

Plaintiffs rest their claims on the allegedly persistent poor performance of ten Northern Trust Funds offered in the Walgreens retirement plan relative to two benchmark indexes—the S&P Target Date Index and Morningstar Lifetime Moderate Index—and three comparator target-date funds[2]—Fidelity, T. Rowe Price, and Vanguard (the "Comparator Funds"). Dkt. 43 at 9. Plaintiffs base these claims on both the Defendants' "initial selection and subsequent retention of the NT Funds despite the Funds' woeful underperformance, both at the time the Funds were selected and throughout the Class Period." Dkt. 43 at 5.

Defendants argue that the complaint should be dismissed as a matter of law. First, they argue that Plaintiffs' complaint cannot be based solely on the Funds' underperformance, but must include more specific allegations regarding the fiduciaries' conduct and their fund-selection process. Dkt. 38 at 1. Second, Defendants take issue with Plaintiffs' comparison of the NT Funds to the three Comparator Funds and two benchmark indexes, arguing that the proper benchmark is a custom benchmark used by Northern Trust itself that "actually reflects the funds' investment strategy." Dkt. 38 at 12. The fiduciaries, say Defendants, were prudent to include conservative, low-fee funds like the NT Funds in the plan. Finally, Defendants argue that Plaintiffs have no standing to bring suit regarding two of the ten NT Funds because Plaintiffs admittedly did not personally invest in those funds.

The Court first notes that, as Plaintiffs argue, facts are disputed with regard to the similarities between the Funds and Comparator Funds and benchmark indexes. At this stage, the Court must construe all of Plaintiffs' factual allegations as true, and must draw all reasonable inferences in Plaintiffs' favor. Virnich, 664 F.3d at 212. "[W]hether a particular investment choice was imprudent is a particularly fact-sensitive inquiry that would not be appropriate to resolve on a motion to dismiss." Diebold ex rel. ExxonMobil Sav. Plan v. N. Tr. Invs., N .A., No. 09 C 1934, 2010 WL 3700387, at *3 (N.D. Ill. Sept. 7, 2010) (rejecting the argument that Plaintiffs "have offered nothing but conclusory allegations and 20/20 hindsight" and denying motion to dismiss as to the imprudence Count); see also Nicolas v. Trustees of Princeton Univ., No. CV 17-3695, 2017 WL 4455897, at *5 (D.N.J. Sept. 25, 2017). Defendants urge the Court to take judicial notice of various documents and find that the comparisons made by Plaintiffs are not "meaningful benchmark[s]." Meiners v. Wells Fargo & Co., 898 F.3d 820, 822 (8th Cir. 2018). However, even were the Court to take judicial notice of said documents, it is not clear to the Court at this stage that Plaintiffs' comparisons are not apt. Discovery will proceed.

In addition, Defendants cite no binding case law that requires Plaintiffs to plead allegations as to Defendants' conduct or process. As Plaintiffs point out, they need not "describe directly the ways in which [Defendants] breached their fiduciary duties" but can "plead facts indirectly showing unlawful behavior." Allen v. GreatBanc Tr. Co., 835 F.3d 670, 678 (7th Cir. 2016) (internal quotations and citations omitted) (noting that "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences.").

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[2] Target-date funds "are designed to offer a convenient way to invest for a person expecting to retire around a particular date." Dkt. 38 at 3. They become more conservative over time. Id. at 3-4.

Plaintiffs openly confirmed this sentiment in their amended complaint. Dkt. 35, ¶ 11 ("Further, Plaintiffs do not have actual knowledge of the specifics of the Walgreen Defendants' decision-making processes with respect to the Plan . . . because this information is solely within the possession of the Walgreen Defendants prior to discovery.").

The Court finds the cases that Defendant does cite on this point to be inapt or unpersuasive. For one, most are out-of-circuit cases not binding on this Court. See, e.g., Patterson v. Stanley, No. 16-CV-6568 (RJS), 2019 WL 4934834, (S.D.N.Y. Oct. 7, 2019). Even the Patterson Court acknowledged that "courts in this district have recognized that allegations of consistent, ten-year underperformance may support a duty of prudence claim." Id. at *10.[3] That Court, despite granting the motion to dismiss, noted that there was only a one percentage point difference between the fund and its comparator and that the fund "outperformed all of Plaintiffs' suggested alternative investments in 2013." Id. at *10-11. Those facts "d[id] not support th[e] inference that Defendants were imprudent to retain" the fund, but those are not the alleged facts in the present case.

Defendant also cites to non-binding precedent within this District, Divane v. Nw. Univ., No. 16 C 8157, 2018 WL 2388118, (N.D. Ill. May 25, 2018), which dealt primarily with fees, record-keeping, and prohibited transactions. Contrary to Plaintiffs assertion in their Response, the case did in part deal with imprudence and underperformance, as Plaintiffs there alleged fiduciary breach in part due to underperformance. Id. at *5.[4] The Court granted the motion to dismiss, emphasizing that the plans "ke[pt] the CREF Stock Account as an *option* for plan participants." Id. at *6 (noting that this allowed plan participants to "avoid what plaintiffs consider to be the problems with those products (excessive record-keeping fees and underperformance) simply by choosing other options."). This Court disagrees with the notion that a fiduciary can avoid a claim of imprudence based on fund underperformance as a matter of law at this stage so long as it gave plan participants various investment options. See Daugherty v. Univ. of Chicago, No. 17 C 3736, 2017 WL 4227942, at *8 (N.D. Ill. Sept. 22, 2017) (denying motion to dismiss, in part, despite that the Plans offered the "choice to invest . . . in any of 35 investments . . . which include[d] annuities and mutual funds . . . [and] the choice to invest in more than 80 mutual funds . . .", because the Plaintiffs' allegations that the accounts at issue "underperformed for years compared to industry standards . . . sufficiently allege[d] that a prudent fiduciary in like circumstances would have acted differently.").[5]

However, the Court does agree with Defendants that Plaintiffs lack standing to sue regarding funds in which they did not personally invest. Plaintiffs admit that they did not invest in two of the ten NT Funds, the 2010 and 2015 Funds. Dkt. 35, ¶¶ 12-27; Dkt. 38 at 15. Plaintiffs have therefore not suffered any individualized harm as to these funds. See Dezelan v. Voya Ret. Ins. & Annuity Co., No. 3:16-CV-1251, 2017 WL 2909714, at *7 (D. Conn. July 6, 2017) (Plaintiff Dezelan, while bringing a putative class action against Defendant, did not "allege that she was a participant, beneficiary or fiduciary . . . of a general account stable value fund, and therefore d[id]

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[3] As Plaintiffs allege in their Response, their claims "rest on nine years of underperformance by the NT Funds, relative to the benchmarks and to the various alternative investment options Defendants could have selected." Dkt. 43 at 8; see Dkt. 35, ¶ 50.

[4] Defendants allegedly breached by allowing "TIAA-CREF to mandate the inclusion of the [accounts] in the plans" and Plaintiffs "did not want the [accounts] included as an investment option" partly because the fund "underperformed." Divane, 2018 WL 2388118 at *5.

[5] The present case is also distinguishable from Divane because Defendants here made the NT Funds—which included 10 of the 24 offered funds—the default funds in the plan, "meaning that the Plan automatically invest[ed] participants' retirement savings in a NT Fund if they [did] not select another investment." Dkt. 43 at 3.

not have standing to bring claims concerning these products) (internal quotations and citations omitted).

Plaintiff attempts to establish standing by citing out-of-circuit law. See Leber v. Citigroup 401(k) Plan Inv. Comm., 323 F.R.D. 145, 155 (S.D.N.Y. 2017) ("Plaintiffs have standing to assert all of the claims brought in this action even though they did not invest in each of the Affiliated Funds at issue. In this Circuit, plaintiffs do not need to point to individualized injuries with respect to each Plan investment in order to establish constitutional standing in a derivative suit brought pursuant to 29 U.S.C. § 1132(a)(2)." This Court rejects the argument and agrees with other Courts on this issue. "ERISA does authorize plan participants to sue fiduciaries for losses the plan suffers from a breach of their duties . . . [b]ut this statutory authorization does not itself confer Article III standing; Plaintiffs must sufficiently allege they suffered an injury-in-fact." Marshall v. Northrop Grumman Corp., No. CV 16-06794 AB (JCX), 2017 WL 2930839, at *8 (C.D. Cal. Jan. 30, 2017) (internal quotations and citations omitted) (noting that the Plaintiffs did not allege that they "invested in the . . . Fund"). As such, allegations and claims arising from investment in the 2010 and 2015 Funds are dismissed.

Defendants' arguments may prove successful at the summary judgment stage or beyond. Plaintiffs' claims may ultimately fail if they rely solely on evidence of underperformance. See Jenkins v. Yager, 444 F.3d 916, 926 (7th Cir. 2006) ("We have stated that investment losses are not proof that an investor violated his duty of care."); DeBruyne v. Equitable Life Assurance Soc. of the United States, 920 F.2d 457, 465 (7th Cir. 1990). However, what a "reasonably prudent fiduciar[y] would have done when faced with similar information [as Defendants] . . . is a fact-intensive question [that is] not appropriate to resolve on a motion to dismiss." Diebold, 2010 WL 3700387 at *4.

In sum, the Court finds that Plaintiffs have met the notice-pleading requirements at this stage of the litigation, and discovery should proceed on both Counts. Plaintiffs have alleged that a prudent fiduciary would have acted differently. Because Count I survives the motion to dismiss, Count II for failure to monitor also survives, as it is "derivative of Plaintiffs' fiduciary breach claim." Dkt. 38 at 15; see Howell v. Motorola, Inc., 633 F.3d 552, 563 (7th Cir. 2011) ("the question of Motorola's derivative liability, like the question whether it is directly liable for negligent selection and monitoring of Committee members, must be resolved only if the evidence could support a finding of unsatisfactory performance on the part of one or more of the fiduciaries . . .").

CONCLUSION

For the above reasons, the motion [37] is granted in part and denied in part. Discovery shall proceed on both Counts. Allegations and claims regarding the 2010 and 2015 NT Funds are dismissed for lack of standing.

IT IS SO ORDERED.

ENTER:

CHARLES RONALD NORGLE, Judge
United States District Court

DATE: March 16, 2020