UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BRIAN WALDNER, et al., Plaintiffs, v. NATIXIS INVESTMENT MANAGERS, L.P., et al., Defendants.	)	Civil No. 21-10273-LTS

ORDER ON MOTION TO DISMISS (DOC. NO. 24)

December 20, 2021

SOROKIN, J.

Plaintiffs in this putative class action allege various violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq. Doc. No. 19[1] (Amended Complaint, "Complaint"). Plaintiffs sue Defendants for alleged breach of fiduciary duty and failure to monitor fiduciaries on several theories of liability such as excessive fees and underperformance of proprietary funds.

Pending before the Court is Defendants' Motion to Dismiss for failure to state a claim. Doc. No. 24. The motion is fully briefed. Doc. Nos. 24-26, 28-29. For the reasons that follow, Defendants' Motion to Dismiss (Doc. No. 24) is DENIED.

[1] Citations to "Doc. No. __" reference documents appearing on the court's electronic docketing system; pincites are to the page numbers in the ECF header.

I. BACKGROUND

On February 18, 2021, Plaintiff Brian Waldner sued, individually and in a representative capacity, under ERISA against Defendants Natixis Investment Managers, L.P. ("Natixis"), its Retirement Committee (the "Committee"), and John and Jane Does 1–20 (collectively, "Defendants"). Doc. No. 1. Plaintiffs are or were at some point individual participants in the 401(k) Savings and Retirement Plan (the "Plan") offered by Defendants. Doc. No. 19 ¶¶ 18-19. The Plan is an "employee pension benefit plan" within the meaning of 29 U.S.C. § 1002(2)(A) and a "defined contribution plan" within the meaning of 29 U.S.C. § 1002(34), covering all eligible current and former employees of Natixis and its subsidiaries. Id. ¶ 20.

In making investment decisions, participants choose from a variety of options in the Plan and are confined to the options offered by the Committee. Id. ¶ 23. The Plan's options include both Defendants' own proprietary funds as well as non-proprietary funds, and participants who do not affirmatively select an option are automatically invested in a non-proprietary fund. Doc. No. 25 at 3. Defendants describe that the Plan includes more than thirty[2] investment options and somewhere between twelve to fifteen proprietary options. Id. at 1.

Plaintiffs bring several theories of liability under ERISA to allege that Defendants used an imprudent and disloyal process to manage the Plan. Doc. No. 19 at 12. Specifically, Plaintiffs allege that Defendants' use of high-cost proprietary mutual funds led to participants incurring excessive fees, substantially more than the average of comparator funds with similar investment styles. See, e.g., id. at 14. Next, Plaintiffs allege that the proprietary funds underperformed in comparison to prospectus benchmarks and other funds, and Defendants failed

[2] Plaintiffs describe there are twenty-one to twenty-three investment options. Doc. No. 19 ¶ 39. They arrive at this number by counting "the funds suite of target-date funds as a single investment option." Id. at 14 n.11.

to prudently monitor and remove them out of self-interest. See, e.g., id. at 17. Plaintiffs also allege that Defendants employed an imprudent and disloyal fund selection process through only adding proprietary funds to the Plan since 2014. See, e.g., id. at 24. Finally, Plaintiffs claim that Natixis failed to monitor the performance of its fiduciaries, such as the Committee and its members. See, e.g., id. at 31. The Court sets out further facts as necessary in the course of discussing the claims.

II. LEGAL STANDARD

Defendants move to dismiss the Complaint for "failure to state a claim upon which relief can be granted" pursuant to Federal Rule of Civil Procedure 12(b)(6). "[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007)). Rather, to survive a motion to dismiss under Rule 12(b)(6), a "complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face." In re Fid. ERISA Float Litig., 829 F.3d 55, 59 (1st Cir. 2016) (quoting Saldivar v. Racine, 818 F.3d 14, 18 (1st Cir. 2016)). The plausibility question triggers a two-step analysis. Id. First, the Court must "distinguish the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." Id. Second, it "must determine whether the factual allegations are sufficient to support the reasonable inference that the defendant is liable." Id.

III. DISCUSSION

A. Threshold Issue of Standing

Defendants argue that Waldner, as the named Plaintiff, lacks standing to bring claims regarding funds in which he did not invest. This position "erroneously conflate[s] the

requirements of Article III . . . with the procedural requirements of Rule 23[.]" In re Nexium Antitrust Litig., 968 F. Supp. 2d 367, 404 (D. Mass. 2013); see Glass Dimensions, Inc. v. State St. Bank & Tr. Co., 285 F.R.D. 169, 175 (D. Mass. 2012) (noting that the "defendants have conflated standing requirements with class certification analysis," and finding that the plaintiff "has established constitutional standing with respect to the funds that it did not purchase."). It is well-established for the purpose of constitutional standing that a plaintiff need not have invested in each fund at issue but must merely plead an injury implicating defendants' fund management practices. Velazquez v. Massachusetts Fin. Servs. Co., 320 F. Supp. 3d 252, 257 (D. Mass. 2018). That requirement is satisfied here.

Defendants also argue that Waldner lacks standing to bring claims before he became a Plan participant in July 2017. That Waldner brings claims going back to February 2015 does not prevent him from acting in a representative capacity for Plan participants. See In re Biogen, Inc. ERISA Litig., No. 20-CV-11325, 2021 WL 3116331, at *4 (D. Mass. July 22, 2021) (describing that "[t]he fact that only some of these alleged losses manifested themselves in the named plaintiffs' individual accounts does not deprive plaintiffs of their standing to seek redress on behalf of the Plan for the broader injuries the Plan incurred."). Here, Waldner brings suit under 29 U.S.C. § 1132(a)(2). Doc. No. 19 ¶ 67. A plaintiff "may seek relief under § 1132(a)(2) that sweeps beyond his own injury" and is "not necessarily limited to the period in which he personally suffered injury." Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 588 (8th Cir. 2009).

Accordingly, the Court concludes that Waldner has asserted an injury in fact, as he alleges personally investing in multiple options managed by the Defendants and being financially injured due to their conduct.

B. Count I: Breach of Fiduciary Duty Under ERISA

ERISA § 1104(a) imposes on plan fiduciaries a duty of loyalty, which requires fiduciaries to discharge their "duties with respect to a plan solely in the interest of the participants and beneficiaries," and a duty of prudence, which requires plan fiduciaries to act with the prudence that someone "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)(A)-(B). Importantly, the Supreme Court has explained that "the content of the duty of prudence turns on 'the circumstances . . . prevailing' at the time the fiduciary acts." Barchock v. CVS Health Corp., 886 F.3d 43, 44 (1st Cir. 2018) (quoting Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 425 (2014)). This means that "the test of prudence—the Prudent Man Rule—is one of conduct, and not a test of the result of performance of the investment." Barchock, 886 F.3d at 44-45 (quoting Bunch v. W.R. Grace & Co., 555 F.3d 1 (1st Cir. 2009)). In other words, "[w]hether a fiduciary's actions are prudent cannot be measured in hindsight." Id. Nonetheless, "cost-conscious management is fundamental to prudence" and "a fiduciary breaches its duty when it "fail[s] to properly monitor investments and remove imprudent ones." Velazquez, 320 F. Supp. 3d at 259 (quoting Tibble v. Edison Int'l, 843 F.3d 1187, 1829, 1197-98 (9th Cir. 2016) (en banc)).

In determining whether a complaint states a claim of imprudence or disloyalty under ERISA, "the appropriate inquiry will necessarily be context specific." Id. Prudence "involves a balancing of competing interests under conditions of uncertainty" and "rather than emphasizing one factor," courts must consider the totality of the circumstances. Bunch, 555 F.3d at 7 (internal quotations omitted) (quoting Armstrong v. LaSalle Bank Nat'l Ass'n, 446 F.3d 728, 733 (7th Cir. 2006)).

Proprietary funds are permitted under ERISA and "do not, standing alone, support an

inference that a defendant breached its fiduciary duties by including such a fund as an investment option." Bekker v. Neuberger Berman Grp. LLC, No. 16CV6123, 2018 WL 4636841, at *6 (S.D.N.Y. Sept. 27, 2018); see Brotherston v. Putnam Invs., LLC, 907 F.3d 17, 40 (1st Cir. 2018) (explaining that proprietary funds as plan investment options can be a common industry practice). Such allegations, however, can be "coupled with other circumstantial factual allegations" to plausibly suggest that a fiduciary breached the duties of prudence and loyalty. Bekker, 2018 WL 4636841, at *6.

As to excessive fees claims, "'nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund.'" Velazquez, 320 F. Supp. 3d at 259 (quoting Hecker v. Deere & Co., 556 F.3d 575, 586 (7th Cir. 2009)). "A claim of breach is sufficiently made out, however, when a plaintiff plausibly alleges that the higher fees were unjustified or otherwise improper." Velazquez, 320 F. Supp. 3d at 259; see also In re Biogen, 2021 WL 3116331, at *8 (describing that showing a fund "had cheaper alternatives or that it had unreasonably excessive fees . . . may allow a trier of fact to reasonably infer . . . that the [defendant's] process was flawed").

Importantly, where Plaintiffs claim that "a prudent fiduciary in like circumstances would have selected a different fund based on the cost or performance of the selected fund, [Plaintiffs] must provide a sound basis for comparison—a meaningful benchmark." See Meiners v. Wells Fargo & Co., 898 F.3d 820, 822-23 (8th Cir. 2018) (internal quotation omitted) (describing that alleging underperformance by comparing to a fund with a different investment strategy was insufficient to plausibly state a claim). The Court also notes that the exact contours of the pleading standard here is under consideration at the Supreme Court. Divane v. Northwestern University, 953 F.3d 980 (7th Cir. 2020), cert. granted sub nom., Hughes v. Northwestern University, No. 19-

1401, 2021 WL 2742780 (U.S. July 2, 2021).

In this case, Plaintiffs further a series of factual allegations related to Defendants' proprietary funds to urge the Court in reaching an inference of an imprudent and disloyal process in the selection and retention of the proprietary funds:

1. The Plan contains somewhere between twelve to fifteen proprietary funds out of a total of twenty-one to twenty-three options, amounting to approximately 60% of the Plan's funds being Defendants' own.[3] Doc. No. 19 ¶ 39.

2. Defendants added only proprietary funds to the Plan during the statutory period,[4] and in one instance, replaced a non-proprietary fund with a proprietary one (Vaughan Nelson Mid Cap Fund) that underperformed its primary prospectus benchmark and other funds in the time period leading up to the change. Id. ¶¶ 62-64.

3. Among thousands of similarly sized plans with $250 million or more in assets, 83% hold no Natixis-affiliated products. From the remaining 17% of these plans that do hold Natixis-affiliated products, "the average plan holds less than 3% of its assets in Natixis Funds."[5] Id. ¶ 39. At least one fund, the Gateway Fund, is not provided as an option in any similarly sized defined contribution plan. Doc. No. 28 at 13.

4. Plaintiffs provide examples of nine proprietary funds[6] alleging that (1) they are approximately five times as expensive as the Plan's non-proprietary funds, and (2) they exceeded the average expense ratio of the twenty largest actively managed mutual funds

[3] Defendants disagree with the calculations that led to these numbers, contending that the Plan instead offers over thirty funds. Doc. No. 25 at 7. Given that the total number of funds is a question of fact, the Court need not conclusively decide one way or another at this stage. In any case, both sets of numbers suggest that the proprietary funds make up some meaningful proportion of the Plan.

[4] At oral argument, Defendants pointed to a non-proprietary fund, the State Street Fund, that they allegedly added to the Plan during the statutory period. The Court may take judicial notice of the documents describing the addition of this fund. Doc. No. 16-7. The Court considers this in the mix.

[5] The Court acknowledges that the higher percentage of assets in Natixis funds in this Plan may be the result of participants' choices to invest in those funds because all participant investments default to non-proprietary funds unless a participant affirmatively elects to invest in the proprietary funds. Doc. No. 25 at 1.

[6] Loomis Sayles Growth Fund Y, Loomis Sayles Sm Cap Growth I, Loomis Sayles Sm Cap Value I, Natixis Vaughan Nelson Mid Cap A, Gateway Fund Y, Oakmark Equity and Income Investor, Oakmark Investor, Oakmark Select Investor, and Oakmark International Investor. Doc. No. 19 at 16.

under a similar investment style.[7] Doc. No. 19 ¶¶ 44-45.

5. Plaintiffs provide examples of four proprietary funds[8] alleging that they underperformed both (1) their primary prospectus benchmarks, such as the S&P 500 index, and (2) specific comparator funds with similar investment styles and comparable or lower expenses across a variety of three- and five-year periods ending in 2015 and in 2020. See, e.g., id. ¶¶ 49, 51, 54-56, 58-60.

6. Defendants have experienced more than $15 billion in outflows from its "suite of affiliated mutual funds," which Plaintiffs assert resulted in part from prolonged underperformance of the proprietary funds in this Plan. Id. ¶ 10. For example, the Oakmark Investor Fund, a proprietary fund offered in this Plan's menu of funds, experienced over $2.3 billion on average in investor redemptions each year from 2016 to 2020 with outflows of $4.3 billion in 2020. Id. ¶ 54.

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[7] The Court acknowledges Defendants' contention that the Complaint used "incorrect fund expense figures" and made a "series of arithmetic errors." Doc. No. 25 at 9-10. Even assuming, without deciding, that Defendants' calculations are correct, the difference in expense ratios between the Complaint and the corrected numbers ranges from only 0.06%-0.13%. Id. Such differences do not, at this stage in the proceedings, meaningfully affect the Court's conclusion. Plaintiffs also allege that the average expense ratios for these identified actively managed funds exceeded the average expense ratio of 401(k) domestic equity funds at 0.44%. Doc. No. 19 ¶ 44. This is not a meaningful comparison. See Meiners, 898 F.3d at 822-23. The proprietary funds described in the Complaint are actively managed. To say that these funds cost more than the average of a group of funds (domestic equity funds in 401(k) plans) composed of actively and passively managed funds says nothing more than the obvious—that actively managed funds cost more than passively managed funds. See Doc. No. 25 at 11. Merely providing actively managed funds as an option is not imprudent or disloyal.

[8] The four funds are Gateway Fund Y, Oakmark Equity and Income Investor, Oakmark Investor, and Oakmark Select Investor. The Gateway Fund Y does not support the inference described in the text. The duty of prudence focuses on the decisions made by the fiduciary at the time the fiduciary made the decision in light of the information then available. The Gateway Fund is managed by a "low-volatility, hedging strategy . . . to protect investors against losses during a market downturn." Id. at 15. This means that the fund is not intended to perfectly match the S&P 500, but rather designed to underperform it in bull markets and underdecline it in bear markets. Doc. No. 16-11. The Court may take judicial notice of the documents defining the aims of this fund. Id. Absent allegations to the contrary (and there are none), the fiduciaries are presumed to know the fund's investment strategy. Thus, that the fund underperformed against both the S&P 500 and standard equity funds benchmarking the S&P 500 does not assist the inference of imprudence here. Plaintiffs point out that communications to participants sometimes describe the benchmark for this fund as the S&P 500 without limitation, qualification, or reservation. See, e.g., Doc. No. 28 at 12. In this case that is of no significance, as the claims here involve the duties of prudence and loyalty which pertain to the process of investment decisions, 29 U.S.C. § 1104(a)(1)(A)-(B), rather than misrepresentation type claims focused on communications made to the participants.

7. Plaintiffs provide examples of three funds[9] that carried consistently negative alpha across three- and five-year periods ending in both 2015 and 2020. Id. ¶ 52-53, 55, 64.

Ultimately, the test under ERISA is whether a fiduciary acted solely in the interest of the participants, or loyally, and with prudence in its process of managing a plan. See 29 U.S.C. § 1104(a)(1)(A)-(B). Even if the factual allegations do not "directly address[] the process by which the Plan was managed," a Court may reasonably "infer from what is alleged that the process was flawed" through circumstantial evidence. Braden, 588 F.3d at 596. "[C]ourts may draw a reasonable inference of liability when the facts alleged are suggestive of, rather than merely consistent with, a finding of misconduct." In re Biogen, 2021 WL 3116331, at *7 (quoting Pension Ben. Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 719 (2d Cir. 2013) (internal quotations omitted)). Considering the Complaint as a whole, and taking the well-pleaded facts as true under the applicable standard, the Court finds that the Plaintiffs sufficiently state a claim for breach of the duties of prudence and loyalty to survive Defendants' Motion to Dismiss (Doc. No. 24).[10]

Plaintiffs' several factual allegations charted above related to the Plan's lineup of proprietary funds, their underperformance, excessive fees, trends in the marketplace, outflows, and negative alpha over a meaningful number of years are sufficient to "suggest" plausibly that had "Defendants prudently monitored the investments within the Plan, in a process that was not tainted by self-interest," many of the proprietary funds would not have been selected or would have been removed. Doc. No. 19 ¶ 47. Each of these allegations taken individually are not

[9] Gateway Fund, Oakmark Investor Fund, and the Vaughan Nelson Mid Cap A Fund.

[10] Compare to Hecker, which involved an excessive fees claim for a Plan including over 2,500 mutual fund options. 556 F.3d at 578. Hecker found it "untenable to suggest that all of the more than 2500 publicly available investment options had excessive expense ratios." Id. at 581. The meaningfully lower range of options in this Plan makes the claims of imprudence and disloyalty far more plausible.

sufficient to plausibly state a claim—for example, merely claiming that proprietary funds exist within a plan. Under the totality of circumstances, however, these facts taken together have "nudged [Plaintiffs'] claims across the line from conceivable to plausible" that Defendants selected and managed the funds in the Plan with imprudence and disloyalty. See Twombly, 550 U.S. at 547. The Court need not, and does not, decide more.

C. Count II: Failure to Monitor Fiduciaries Under ERISA

Defendants argue that Count II is derivative of Count I. Given the Court's conclusion on Count I, Defendants' Motion to Dismiss (Doc. No. 24) is DENIED for Count II as well.

IV. CONCLUSION

For the foregoing reasons, dismissal is not warranted at this time. Accordingly, the Court DENIES Defendants' Motion to Dismiss (Doc No. 24).

SO ORDERED.

/s/ Leo T. Sorokin

Leo T. Sorokin
United States District Judge