Full docket text for document 69:
District Judge Angel Kelley: ELECTRONIC ORDER entered.

Defendants' [26] motion to dismiss is **DENIED**.

Plaintiffs allege that during their employment at Massachusetts General Hospital, Defendants, as fiduciaries of their pension fund, the Consolidated 403(b) Program of Mass General Brigham and Member Organizations (the "Plan"), did not prudently manage the Plan's administration and recordkeeping fees. The Plan's assets under management, as of September 30, 2020, were $10,264,028,000, making it a "jumbo" plan. [Dkt. 22 ("Am. Cmplt.") at ¶¶ 10, 52]. Participants were charged an annual recordkeeping fee, which covered the Plan's services related to transaction processing, administrative services, participant communications, plan document services, and compliance support, among other areas. [Id. at ¶ 65]. This fee, which ranged from $76 in 2016 to $54 in 2020, was collected directly from plan assets and indirectly from revenue sharing. [Id. at ¶¶ 71, 78].

First, Plaintiffs allege that the Plan's range of fees is excessively high compared to similar jumbo pension funds. [Id. at ¶¶ 78, 84]. Specifically, Plaintiffs list seven similar plans having more than 30,000 participants and approximately $3 billion in assets, whose 2019 direct recordkeeping fees range from of $21 to $30. [Id. at ¶ 84]. Second, Plaintiffs allege that the recordkeeping costs should have been lower because of the large number of participants and the Plan's greater ability to negotiate for lower fees. [Id. at ¶¶ 70, 85 n.13]. Third, Plaintiffs allege that to reveal the Plan's mismanagement, Plaintiffs requested meeting minutes from Mass General and the Plan's Committee prior to filing the lawsuit but received no such documentation or acknowledgment of whether it existed. [Id. at ¶ 57]. Plaintiffs argue that the totality of this circumstantial evidence points to the Defendants' mismanagement of the fund under ERISA. Because of this mismanagement, Plaintiffs allege that the Plan and its participants have lost millions of dollars in retirement savings. On May 16, 2022, Defendants filed their motion to dismiss Plaintiffs ' amended complaint for failure to state a claim. [Dkt. 26].

Viewed "as a whole," Plaintiffs' amended complaint states a plausible claim of breach of fiduciary duty. See García-Catalán v. United States, 734 F.3d 100, 103 (1st Cir. 2013). In ERISA cases, plaintiffs may not have access to the information that would otherwise enable them to make well-pleaded factual allegations, but "allegations are sufficient so long as they make 'reasonable inferences'... based on the information available to them." Sellers v. Trustees of Coll., No. CV 22-10912-WGY, 2022 WL 17968685, at *7 (D. Mass. Dec. 27, 2022) (comparatively high recordkeeping fees gave rise, in part, to plausible claim of breach of duty of prudence). Excessive record keeping fees and the failure to negotiate lower fees in comparison to smaller plans are some factors that may permit a court to make a "reasonable inference" of breach of fiduciary duties based on the facts that are available. Id.; see In re Sutter Health ERISA Litig., 2023 WL 1868865, at *10 (E.D. Cal. Feb. 9, 2023) (denying motion to dismiss in part because it was "unclear why" the larger plan "could not negotiate a much lower fee."). This is especially pertinent where the plan in question is a jumbo plan with assets larger than many of its comparators, as is the case here, and still charges higher recordkeeping fees. [See Am. Cmplt. at ¶¶ 9-10, 52, 84].

Defendant highlights cases from other circuits in which claims of a breach of prudence based on excessive recordkeeping fees required more precise factual allegations to demonstrate that the services of the comparator plans are like the plan at issue. See Smith v. CommonSpirit Health, 37 F.4th 1160, 1169 (6th Cir. 2022); Albert v. Oshkosh Corp., 47 F. 4th 570, 579-80 (7th Cir. 2022), reh'g en banc denied,No. 21-2789, 2022 WL 4372363, (7th Cir. Sept. 21, 2022); Matousek v. MidAmerican Energy Company, 51 F.4th 274, 279-80 (8th Cir. 2022). In the absence of First Circuit authority that directly addresses the question, this Court is persuaded by the trend within the First Circuit's district courts of allowing similar complaints to survive motions to dismiss and proceed to discovery. See, e.g., Sellers, 2022 WL 17968685, at *7; Turner v. Schneider Elec. Holdings, Inc., 530 F. Supp. 3d 127, 137 (D. Mass. 2021) (finding that that the claim that fees were excessive relative to similar plans was sufficient to deny motion to dismiss); Short v. Brown Univ., 320 F. Supp. 3d 363, 371 (D.R.I. 2018) (denying motion to dismiss in part because "[t]he question whether it was imprudent to pay a particular amount of record-keeping fees generally involves questions of fact that cannot be resolved on a motion to dismiss" (alteration in original) (quoting Cassell v. Vanderbilt Univ., 285 F.Supp.3d 1056, 1064 (M.D. Tenn. 2018))); Brown et al. v. Mitre Corp., No. 22-cv-10976-DJC, 2023 WL 2383772 at *3-5, (D. Mass. Mar. 6, 2023) (denying motion to dismiss excessive fee claim and distinguishing Matousek, Smith, and Albert because they contained materially different allegations and conflicted with other District Courts in the First Circuit for pleading standards in an ERISA case); Adams et al v. Dartmouth-Hitchcock Clinic, No. 1:22-cv-00099-LM, (D.N.H. Feb. 10, 2023) (Same).

Accordingly, Plaintiffs have sufficiently stated their claims of breach of duty of prudence and failure to monitor. Defendants' motion to dismiss [Dkt. 26] is thus **DENIED**.

(Pacho, Arnold)