

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARIA KARLA TERRAZA,
Plaintiff,
v.
SAFEWAY INC., et al.,
Defendants.

Case No. 16-cv-03994-JST

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT AON
HEWITT INVESTMENT
CONSULTING, INC.'S MOTION TO
DISMISS**

Re: ECF No. 83

Before the Court is Defendant Aon Hewitt Investment Consulting, Inc.'s ("Aon's") motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. ECF No. 83. The Court will grant the motion in part and deny it in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 13, 2017, the Court denied a motion to dismiss the first amended complaint ("FAC") brought by Defendants Safeway, Inc. and Safeway Benefit Plans Committee ("Safeway Defendants"). ECF No. 65. Terraza subsequently filed a second amended complaint ("SAC") by stipulation of the parties. ECF Nos. 71-72. The SAC names Aon as an additional Defendant, as well as sixteen former and current members of the Safeway Benefit Plans Committee.

The SAC repeats many of the same allegations as the FAC, and the Court will not repeat its summary of those allegations here. See ECF No. 65 at 1-6. In brief, Terraza alleges that she is a participant in Safeway's 401(k) retirement plan ("the Plan"), and that the Safeway Defendants and Aon breached their fiduciary duties under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, et seq., "by failing to fully disclose to participants the expenses and risks of the Plan's investment options"; "by allowing unreasonable expenses to be charged to participants for administration of the Plan"; and "by selecting and retaining opaque, high-cost, and

1 poor-performing investments instead of other available and more prudent alternative investments.”
2 ECF No. 72 ¶ 4. The relevant period is between July 14, 2010, and July 28, 2016. Id. ¶ 34.

3 Allegations specific to Aon include the following: “At all pertinent times, Aon served as
4 the investment adviser for the Plan and acted as a fiduciary of the Plan.” Id. ¶ 27. “Aon was
5 responsible for offering investment advice to Safeway and the Benefit Plans Committee” and,
6 along with the Safeway Defendants, “for offering prudent and sound advice with respect to the
7 investments offered to participants of the Plan in the sole interest of the Plan participants,
8 disclosing necessary information such that the Plan participants could make informed decisions,
9 and ensuring that the fees and expenses charged with respect to these investments were fair and
10 reasonable.” Id. ¶¶ 51-52. “Aon offered little more than boilerplate investment advice in which it
11 generally rubber-stamped the recommendations of JPMCB, while failing to offer meaningful
12 advice regarding available investment alternatives or investment strategies,”¹ and “for the most
13 part, recommended that the other Defendants do little or nothing to improve the investments
14 offered by the Plan and the expenses paid by the Plan and its participants.” Id. ¶¶ 90-91. For
15 example, although Aon “acknowledged that a traditional three tiered structure of a well-diversified
16 defined contribution plan requires” offering target date funds, passively managed funds, and
17 actively managed funds as investment alternatives, “Aon encouraged an investment strategy that
18 failed to consider or offer an opportunity for participants to pursue a passive management
19 investment strategy.” Id. ¶¶ 61-64. “Aon also engaged in virtually no meaningful bench-marking
20 or other studies during the pertinent period to evaluate whether the fees and expenses paid by the
21 Plan were fair and reasonable and whether there were better service providers or investment
22 options available to the Plan.” Id. ¶ 92.

23 Terraza alleges two alternative counts against Aon: first, that it breached its fiduciary
24 duties under ERISA and, second, if Aon is not deemed to be an ERISA fiduciary or co-fiduciary,
25 that it is liable for a knowing breach of trust. Id. ¶¶ 101-07.

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27
28 ¹ JPMCB refers to J.P. Morgan Chase Bank, which manages certain proprietary funds offered
through the Plan. ECF No. 72 ¶ 70.

II. REQUEST FOR JUDICIAL NOTICE

Pursuant to Federal Rule of Evidence 201(b), “[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” On a motion to dismiss, the court may also “consider materials incorporated into the complaint” when “the complaint necessarily relies upon a document or the contents of the document are alleged in a complaint, the document’s authenticity is not in question and there are no disputed issues as to the document’s relevance.” Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010). This is true even if “the plaintiff does not explicitly allege the contents of that document in the complaint.” Kniesel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005). The court “must take judicial notice if a party requests it and the court is supplied with the necessary information.” Fed. R. Evid. 201(c)(2).

Aon requests that the Court take judicial notice of several Plan-related documents: the Plan’s Form 5500 filings submitted to the Department of Labor between 2010 and 2015, the 2008 master services agreement between Safeway and JP Morgan Retirement Plan Services, and the 2005 restatement of the Plan with amendments. ECF Nos. 84 & 84-2 to 84-9. The Court previously granted judicial notice of these documents in connection with the Safeway Defendants’ motion to dismiss and finds it appropriate to do so again here. ECF No. 65 at 7.

Aon also requests that the Court take judicial notice of the 2004 master consulting agreement (“MCA”) between Safeway and Hewitt Associates LLC (a predecessor to Aon), as well as two schedules and an amendment to that agreement. ECF Nos. 84 & 84-10 to 84-13. These documents are also subject to judicial notice because the complaint necessarily relies on them and neither party questions their authenticity or relevance.

Finally, Aon seeks judicial notice of several documents it provided to Safeway pursuant to the MCA: quarterly investment reviews for the fourth quarters of 2012 through 2015 and the third quarter of 2016, a March 2016 “Albertsons & Safeway [Defined Contribution] Investment Structure” document, and an April 2013 Safeway, Inc.’s “401(k) Plans Structure & Cost Review” document. ECF Nos. 84 & 84-14 to 84-20. Although the complaint does not rely on these

documents as clearly as it does the above Plan-related documents, the SAC does reference Aon's reporting to Safeway. E.g., ECF No. 72 ¶ 63. In addition, Terraza does not object to Aon's request for judicial notice or contest the documents' authenticity or relevance. Judicial notice is therefore granted, but only as to the existence and contents of the documents. The Court does not take judicial notice of the truth of any disputed factual matters contained in the documents. E.g., Lee v. City of Los Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001) (courts may not take judicial notice of disputed facts stated in public records); Cal. Sportfishing Prot. All. v. Shiloh Grp., LLC, No. 16-CV-06499-DMR, 2017 WL 3136443, at *5 (N.D. Cal. July 24, 2017) ("Courts cannot take judicial notice of the contents of documents for the truth of the matters asserted therein when the facts are disputed, as they are here for certain exhibits.").

III. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." While a complaint need not contain detailed factual allegations, facts pleaded by a plaintiff must be "enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter that, when accepted as true, states a claim that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (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 liable for the misconduct alleged." Id. While this standard is not a probability requirement, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." Id. (internal quotation marks and citation omitted). In determining whether a plaintiff has met this plausibility standard, the Court must accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the plaintiff. Knievel, 393 F.3d at 1072.

IV. DISCUSSION

A. Breach of Fiduciary Duty Claim

As the Court previously explained, "ERISA Section 404(a)(1) imposes the following

duties on plan fiduciaries: the duty of loyalty, the duty of prudence, the duty to diversify the investments, and the duty to act in accordance with the documents and instruments governing the plan. 29 U.S.C. § 1104(a)(1).” ECF No. 65 at 10. The SAC often refers to “Defendants” generally and does not make clear which fiduciary duties Terraza alleges Aon breached. However, Terraza clarifies in her opposition that she asserts “only a breach of the fiduciary duty of prudence claim against Aon for its role in the selection and monitoring process of the Plan’s investment options,” as well as a breach of the duty to diversify. ECF No. 89 at 12, 25-27. She does not assert any claims against Aon based on “other aspects of Plan administration [including participant disclosures], its duty of loyalty, or its failure to comply with Plan documents.” *Id.* at 12-13.

1. Duty of Prudence

The Court explained the duty of prudence in its order denying the Safeway Defendants’ motion to dismiss:

ERISA also requires that a pension plan fiduciary act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] 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)(B). Under this “prudent person” standard, courts must determine “whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment.” *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983). The prudence analysis “focus[es] on a fiduciary’s conduct in arriving at an investment decision, not on its results.” *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996). “Because the content of the duty of prudence turns on ‘the circumstances . . . prevailing’ at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific.” *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014) (quoting 29 U.S.C. § 1104(a)(1)(B)). This duty of prudence extends to both the initial selection of an investment and the continuous monitoring of investments to remove imprudent ones. *Tibble v. Edison Int’l*, 135 S. Ct. 1823, 1828-29 (2015).

ECF No. 65 at 11.

Offering an overconcentration of common trusts and separately managed accounts instead of mutual funds does not state a claim for breach of the duty of prudence. *Id.* at 18-19. Likewise, it is insufficient to allege only that defendants failed “to offer the investment option with the

lowest expense ratio.” Id. at 20. However, the Court denied the Safeway Defendants’ motion to dismiss the duty of prudence claim because “Terraiza alleges more than that, and the remaining allegations in the complaint create a plausible inference that the Defendants’ decision-making process was flawed.” Id. The Court noted, for example, allegations that the investment options offered through the Plan underperformed compared to their benchmarks, and that this information was known to Defendants every year that they maintained the allegedly unreasonable investment options in the Plan. Id. at 20-21 (citing ECF No. 37 ¶¶ 60-68). Terraiza’s claims against Safeway therefore do not rely on viewing investment decisions “from the vantage point of hindsight”; instead, they allege that Defendants failed to act prudently at the time each investment decision was made. Id. at 21 (quoting Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 716 (2d Cir. 2013)). The Court also noted allegations that, “at the time the Plan selected the JP Morgan target date funds, JP Morgan Chase Bank was trustee of the Plan, JP Morgan Retirement Plan Services was record-keeper for the Plan, and the 2013-2014 financial disclosures state that ‘[c]ertain plain investments are managed or *significantly influenced* by J.P. Morgan Chase Bank N.A.’ Terraiza further alleges that this ‘relationship and influence inappropriately affected and compromised the Plan’s investment options.’” Id. at 21 (quoting ECF No. 37 ¶¶ 51-52). And the Court observed that, as to the JP Morgan target date funds offered by the Plan, Terraiza alleges that Defendants failed to “secure the least expensive share class available, despite the Safeway Plan’s size (making the least expensive share class easily available).” Id. at 21 (quoting ECF No. 37 ¶ 63). Thus, “Terraiza alleges that the Defendants could have offered the exact same investment option for a lower price based on the Plan’s size. The Court can reasonably infer from this allegation that the Defendants acted imprudently by selecting the more expensive option, all else being equal.” Id. at 22. Finally, the Court explained that “Defendants cannot point to the prudence of the portfolio as a whole to evade their duty of prudence with respect to the challenged investment options.” Id. at 25. The SAC repeats all of the allegations in the FAC relied on by the Court to find a plausible claim for breach of the duty of prudence. Compare ECF No. 37 ¶¶ 51-52, 60-68 (FAC) with ECF No. 72 ¶¶ 69-70, 78-86 (SAC).

1 Aon argues that the Court's conclusion that Terraza plausibly states a claim against the
2 Safeway Defendants does not extend to Aon for several reasons, but these arguments are not
3 persuasive. First, Aon contends that its master consulting agreement with Safeway "establish[es]
4 Aon's robust process in providing 'ongoing consulting and performance evaluation,' including
5 detailed quarterly reports addressing fund structure, performance, and other characteristics;
6 quarterly meetings with the client and investment managers; and regular client communications."
7 ECF No. 83 at 15 (citing ECF Nos. 84-10 to 84-12). But the terms of the agreement, standing
8 alone, cannot establish that Aon acted "with the care, skill, prudence, and diligence under the
9 circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with
10 such matters would use in the conduct of an enterprise of a like character and with like aims." 29
11 U.S.C. § 1104(a)(1)(B). That an agreement exists does not prove it was followed, and that it
12 might have been followed does not necessarily satisfy the duty of prudence.

13 Second, Aon argues that its quarterly investment reports to Safeway demonstrate that it
14 acted prudently. Aon overstates the impact of these reports. For example, nothing in the reports
15 establishes the prudence of using custom, non-public JPMCB benchmarks to measure
16 performance of the JPMCB target funds. This is a disputed question of fact to be resolved later in
17 these proceedings. In addition, Aon acknowledges that "[t]he duty of an investment consultant is
18 to provide prudent recommendations to the Plan's ultimate decision-makers (in this case,
19 Safeway)," ECF No. 83 at 24, but the quarterly reports include performance and other data without
20 making recommendations. The scope and content of Aon's recommendations, whether conveyed
21 in other documents or orally, will be revealed during discovery. Likewise, although Aon
22 emphasizes that it recommended to Safeway a tiered investment structure, including "adding two
23 new index funds . . . to offer a complete tier of passive equity options," in April 2013, ECF No. 90
24 at 8-9 (citing ECF No. 84-20 at 5, 7), this single recommendation does not establish that Aon
25 acted prudently. The document says nothing, for example, about whether a prudent person in
26 Aon's position would have made this recommendation more than once or taken other steps to
27 encourage Safeway to adopt the recommendation.

28 Aon also characterizes Terraza's allegations as improperly relying on hindsight evaluations

of investment performance, but Aon falls short in its attempt to distance itself from the allegations this Court found sufficient to state a claim against the Safeway Defendants. First, Aon argues that it had no evidence of any underperformance at the time investment decisions were made. However, Terraza alleges that all Defendants knew that certain investments were underperforming relative to their benchmarks. E.g., ECF No. 72 ¶¶ 78-86. Contrary to Aon’s assertions, the quarterly reports do not disprove these allegations.² E.g., ECF No. 84-16 at 36 (Fourth Quarter 2014 report showing SSgA S&P 500 Index Fund underperforming benchmark for year-to-date and 1, 3, 5, 7, and 10 years); id. at 38 (Dodge & Cox Stock Fund underperforming benchmark for quarter, year-to-date, 1 year, 7 years, and 10 years, but outperforming benchmark for 3 and 5 years); id. at 42 (Wells Fargo Advantage Large Cap Growth Fund underperforming benchmark for year-to-date and 1, 3, 5, 7, and 10 years). Second, Aon contends that “the alleged potential conflicted relationship between JPMCB and Safeway cannot lead to any reasonable inference that Aon engaged ‘in a flawed decision-making process.’” ECF No. 83 at 27 (quoting ECF No. 65 at 12). However, the SAC alleges that “JPMCB has a notorious history of engaging in unlawful product-steering practices to influence its customers to invest in its own proprietary funds, and upon information and belief, JPMCB engaged in the same or similar practices with respect to the Plan, and Defendants allowed those practices to occur without addressing or remedying them.” ECF No. 72 ¶ 70. Terraza thus alleges that Aon was aware of the potential conflict with JPMCB and failed to act on this information. Construed in a light most favorable to Terraza, this is sufficient to allege that Aon acted imprudently. Finally, Aon fails even to address the allegation that, in one instance, “Defendants could have offered the exact same investment option for a lower price based on the Plan’s size,” from which the Court earlier concluded it could reasonably infer “that the Defendants acted imprudently by selecting the more expensive option, all else being

² Terraza’s sur-reply concedes that Aon’s quarterly reports did consider expense ratios when evaluating performance. ECF No. 97 at 2; see, e.g., ECF No. 84-14 at 62 (“The rates of return contained in this report are . . . net of fees unless otherwise indicated.”); ECF No. 84-16 at 63 (“The rates of return contained in this report are shown on an after-fees basis unless otherwise noted.”).

equal.” ECF No. 65 at 22. Aon cites no authority for the proposition that a prudent person in its position would not have recommended a change to the lower-priced investment option in these circumstances. Consequently, the Court’s conclusion as to the Safeway Defendants applies equally to Aon: the company might ultimately persuade the finder of fact that it did not act imprudently, but “Terraza has satisfied her burden at this stage of the litigation by alleging facts from which the Court can reasonably infer that [its] decision-making process was flawed.” ECF No. 65 at 22. Terraza has stated a claim against Aon for breach of the duty of prudence.

2. Duty to Diversify

The Court also previously explained the duty to diversify:

Plan fiduciaries also have a duty to “diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.” 29 U.S.C. § 1104(a)(1)(C). “As a general proposition, ERISA’s duty to diversify prohibits a fiduciary from investing disproportionately in a particular investment or enterprise.” In re Unisys Sav. Plan Litig., 74 F.3d 420, 438 (3d Cir. 1996). “The degree of investment concentration that would violate this requirement to diversify cannot be stated as a fixed percentage, because a fiduciary must consider the facts and circumstances of each case.” Metzler v. Graham, 112 F.3d 207, 209 (5th Cir. 1997) (quoting H.R. Rep. No. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 5038, 5084–85 (Conference report at 304). “To establish a violation, a plaintiff must demonstrate that the portfolio is not diversified ‘on its face.’” Id. (quoting H.R. Rep. No. 93-1280 at 5084).

ECF No. 65 at 11-12. The Court held that the FAC’s “conclusory allegations” – “that the Plan’s investment options ‘were exceptionally limited in number and virtually lacking in the necessary complement of passively managed mutual funds or other investments to make the Plan’s investment portfolio appropriately diversified based upon any reasoned fiduciary review,’” and “that passively-managed funds generally provide better returns the actively-managed funds” – failed to state a claim for breach of the duty to diversify. Id. at 31-32 (quoting ECF No. 37 ¶¶ 40-41).

Terraza argues that allegations relating to the Plan’s offering of relatively expensive and poorly performing investment options state a claim for breach of the duty to diversify, as does the allegation that the Plan’s investments included a 65.2% ownership of outstanding institutional

shares of an undisclosed mutual fund. But these allegations are not new to the SAC, and the Court already found the FAC's allegations insufficient to state such a claim. Compare, e.g., ECF No. 37 ¶¶ 36-43, 58 (FAC) with ECF No. 72 ¶¶ 55-59, 64-66, 76 (SAC). The SAC adds several paragraphs related to diversification, e.g., ECF No. 72 ¶¶ 60-63, but these additions do not change Terraza's basic contention that Aon and the other Defendants breached the duty to diversify by offering too few passive investment options. This Court has already "rejected the notion that offering a majority of actively-managed investment options constitutes a breach of fiduciary duty," ECF No. 65 at 32, and the SAC adds nothing more. The SAC therefore fails to state a claim against Aon for breach of the duty to diversify.

B. Alternative Claim for Knowing Breach of Trust

Finally, Aon moves to dismiss Terraza's alternative claim for knowing breach of trust if Aon is found not to be a fiduciary or co-fiduciary of the Plan.³ Aon argues that this claim is preempted to the extent that it relies on state law, but the Court need not decide that issue because Terraza concedes that her claim is based only on 29 U.S.C. § 1132(a)(3), which allows a participant to obtain an injunction or "other appropriate equitable relief." ECF No. 89 at 27. Terraza "seeks relief in the form of disgorgement of the excessive fees the Safeway Defendants paid to Aon, and/or any related profits that Aon gained through those fees." Id. at 28. Aon argues that such relief is legal and not equitable, and therefore not recoverable under § 1132(a)(3).

Monetary relief is legal – and not equitable – in nature when a plaintiff cannot "assert title or right to possession of particular property, but . . . might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002) (quoting 1 Dobbs, Law of Remedies § 4.2(1), at 571). Relief is equitable in nature when "money or property identified as belonging in good conscience to the plaintiff [can] clearly be traced to particular funds or property in the defendant's possession." Id. Thus, equitable relief requires that the plaintiff seek a lien "against specifically identified funds that remain in the defendant's possession or against traceable

³ Aon concedes in its motion that it owed fiduciary obligations related to provision of investment advice to the Plan, ECF No. 83 at 15-16, so this alternative claim is unlikely to be reached.

1 items that the defendant purchased with the funds (e.g., identifiable property like a car). A
 2 defendant's expenditure of the entire identifiable fund on nontraceable items (like food or travel)
 3 destroys an equitable lien. The plaintiff then may have a personal claim against the defendant's
 4 general assets – but recovering out of those assets is a legal remedy, not an equitable one.”
 5 Montanile v. Bd. of Trustees of Nat'l Elevator Indus. Health Benefit Plan, 136 S. Ct. 651, 658
 6 (2016).

7 In this case, Terraza asserts that the funds she seeks are specifically identifiable, but she
 8 does so only in the most conclusory manner: “Moreover, contrary to Aon's contention, such funds
 9 are *specifically identifiable*.” ECF No. 89 at 29. This is insufficient. Terraza does not point to
 10 any allegations in the SAC indicating that the allegedly excessive fees paid by Safeway to Aon, or
 11 profits gained on those fees, can be traced to particular funds or property in Aon's possession. Her
 12 alternative claim for knowing breach of trust therefore seeks a legal and not equitable remedy, and
 13 such a remedy cannot be obtained under 29 U.S.C. § 1132(a)(3). This claim is dismissed.

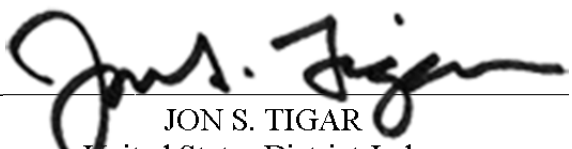
14 CONCLUSION

15 The Court grants in part and denies in part Aon's motion to dismiss the second amended
 16 complaint. The motion is denied as to Terraza's claim for breach of the duty of prudence and
 17 granted in all other respects.

18 Although it seems unlikely that Terraza can cure the identified deficiencies if given leave
 19 to amend, the Court cannot say it is impossible. Dismissal is therefore without prejudice. Any
 20 amended complaint must be filed on or before January 5, 2018.

21 **IT IS SO ORDERED.**

22 Dated: December 11, 2017

23 
 24 JON S. TIGAR
 United States District Judge