UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WINIFRED J. DAUGHERTY et al., on behalf of themselves and a class,	)	
Plaintiffs,	)	**No. 17 C 3736**
v.	)	**Chief Judge Rubén Castillo**
THE UNIVERSITY OF CHICAGO,	)	
Defendant.	)	

ORDER

The University of Chicago ("Defendant" or the "University") again moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of standing, this time seeking dismissal of Count I only as to Plaintiff Walter R. James ("James"). (R. 46, Mot.) For the reasons stated below, Defendant's motion is denied.

BACKGROUND

Winifred J. Daugherty, Gloria Jackson, and James (collectively, "Plaintiffs") bring this suit pursuant to the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(2) and (3). (R. 44, Am. Compl. ¶ 1.) On May 18, 2017, Plaintiffs filed their initial complaint, which alleged that Defendant breached duties of loyalty and prudence by selecting, retaining, and failing to monitor investment options in Defendant's Retirement Income Plan for Employees ("ERIP") and Contributory Retirement Plan ("CRP"). (R. 1, Compl. ¶¶ 103-19.) The complaint also claimed that Defendant engaged in prohibited transactions by offering a Teachers Insurance and Annuity Association ("TIAA") loan program in its retirement plans. (*Id.* ¶¶ 120-33.) Defendant moved to dismiss the complaint, and the Court denied in part and granted in part Defendant's motion. (R. 38, Order.)

The Court dismissed Plaintiffs' duty of loyalty claims for failure to state a claim, and dismissed Plaintiffs' claims related to CRP for lack of standing because Plaintiffs failed to allege that they were CRP participants, beneficiaries, or any other person harmed by a fiduciary breach affecting CRP. (R. 39, Mem. Op. at 12, 18-19.) The Court also dismissed, for lack of standing, Plaintiffs' claims related to the TIAA loan program because Plaintiffs failed to allege that they or any other participant in Defendant's retirement plans participated in this loan program or suffered any injury as a result of its inclusion. (*Id.* at 12-14.) The only claims that survived Defendant's first motion to dismiss were those alleging breach of the duty of prudence related to Defendant's selection, retention, and monitoring of ERIP's investment options. (*Id.* at 15-17, 21.)

On October 27, 2017, Plaintiffs filed an amended complaint. (R. 44, Am. Compl.) The amended complaint adds James as a Plaintiff, who allegedly participated in CRP and invested in, through CRP, the TIAA Traditional Annuity and the TIAA Real Estate Fund. (*Id.* ¶ 21.) In Count I of the amended complaint—the count presently at issue—James alleges breach of fiduciary duty stemming from Defendant's selection and retention of investment offerings in CRP and Defendant's alleged failure to monitor CRP's investment offerings. (*Id.* ¶¶ 103-10.) Defendant subsequently filed the present motion to dismiss, seeking dismissal of Count I as to James for lack of standing. (R. 46, Mot.)

Defendant argues that James lacks standing because he fails to allege that he paid excessive recordkeeping or administrative fees, and therefore fails to allege an injury-in-fact. (R. 47, Mem. at 2-5.) Defendant contends that, based on its independent calculation, James "may have paid approximately $37 per year" in recordkeeping and administrative fees. (*Id.* at 4.) Thus, according to Defendant, James has failed to allege any injury-in-fact as to Count I because paying $37 per year in administrative fees is not excessive or unreasonable based on Plaintiffs'

allegations that the industry benchmark for such fees is $35 per year. (*Id.* at 5.) Plaintiffs oppose Defendant's motion and dispute Defendant's independent calculation. (R. 50, Resp. at 5-6.)

ANALYSIS

A complaint must set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). To survive a motion to dismiss, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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.* "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. In evaluating the sufficiency of a complaint, the Court must "construe it in the light most favorable to the nonmoving party, accept well-pleaded facts as true, and draw all inferences in the nonmoving party's favor." *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 289-90 (7th Cir. 2016) (citation and internal alteration omitted).

A motion to dismiss pursuant to Rule 12(b)(1) challenges the Court's subject-matter jurisdiction over the action. FED. R. CIV. P. 12(b)(1). "[I]f a plaintiff cannot establish standing to sue . . . dismissal under [Rule] 12(b)(1) is the appropriate disposition." *American Federation of Government Employees, Local 2119 v. Cohen*, 171 F.3d 460, 465 (7th Cir. 1999). Defendant argues that James fails to sufficiently plead that he was personally injured by Defendant's alleged failure to prudently select, retain, and monitor CRP's investment options. (R. 47, Mem. at 4-5.) Defendant, therefore, presents a facial challenge to standing because it contends that the amended complaint "lacks sufficient factual allegations to establish standing." *Silha v. ACT, Inc.*,

807 F.3d 169, 173 (7th Cir. 2015). The Court reviews a facial challenge to standing under the same standard set forth above for a motion to dismiss for failure to state a claim. *Id.* at 173-74.

As the Court noted in its opinion on the first motion to dismiss, "[w]here, as here, a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element" of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation and internal alteration omitted), *as revised* (May 24, 2016). "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (internal quotation marks omitted) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). For an injury to be particularized, it must "affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. A "concrete" injury is one that actually exists and is "real," not "abstract." *Spokeo*, 136 S. Ct. at 1548. A plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at 1549.

Defendant argues that James lacks standing as to Count I because he has not alleged an injury affecting him in a personal and individual way. (R. 47, Mem. at 5.) The Court disagrees. The amended complaint alleges that Defendant "selected and retained . . . investment options" in ERIP and CRP "that caused [ERIP and CRP] to incur far higher administrative fees and expenses relative to the size and complexity of [ERIP and CRP]." (R. 44, Am. Compl. ¶ 106.) It further alleges that "[f]or years Defendant failed to engage in a prudent process for the evaluation and monitoring of amounts being charged for administrative expense, allowing [ERIP and CRP] to be charged an asset-based fee for recordkeeping calculated in a manner that was completely inconsistent with a reasonable fee for the service and grossly excessive[.]" (*Id.* ¶ 107.) These claims are supported by further allegations that Defendant selected, retained, or failed to monitor

CRP investment options that charged excessive administrative and recordkeeping fees, which included the TIAA Traditional Annuity and the TIAA Real Estate Fund in which James invested. (*E.g.*, *id.* ¶¶ 33-40 (alleging, among other things, that ERIP and CRP pay millions of dollars per year in administrative expenses, and that the TIAA Traditional Annuity's administrative expenses have cost ERIP and CRP millions of dollars), 43-50 (alleging that Defendant could have selected "institutional" share class funds as opposed to "investor" share class funds to avoid higher administrative fees), 73-75 (alleging that the TIAA Real Estate Fund charges excessive and unnecessary administrative fees).) With respect to Count I, James sufficiently pleads that Defendant's alleged conduct has injured him personally by pleading that Defendant's conduct has "caused the Plaintiffs"—which includes James—"direct economic loss." (*Id.* ¶ 109.)

Accepting as true the allegations that CRP incurs excessive administrative expenses and Defendant failed to monitor CRP's investment offerings, coupled with the allegations that James is a CRP participant and has suffered direct economic loss, (*id.* ¶¶ 21, 109), the Court concludes that James sufficiently alleges as to Count I that he personally suffered an injury-in-fact in the form of a concrete and particularized "direct economic loss" due to Defendant's alleged conduct. *Bell v. City of Chicago*, 835 F.3d 736, 738 (7th Cir. 2016) ("In evaluating a complaint's sufficiency, we construe it in the light most favorable to the nonmoving party, accept well-pleaded facts as true, and draw all inferences in the party's favor." (citation and internal alteration omitted)), *cert. denied sub nom. Bell v. City of Chicago*, 137 S. Ct. 1231 (2017); *Spokeo, Inc.*, 136 S. Ct. at 1548. Accordingly, the Court denies Defendant's motion to dismiss.

Defendant's argument for dismissal hinges on its independent calculation of the administrative fees James "may have paid," which is simply Defendant's calculated average of administrative fees paid by all plan participants. (R. 47, Mem. at 4.) Plaintiffs argue that

Defendant's calculation does not account for the fact that each ERIP and CRP participant pay a different amount of administrative fees, and that each plan participant is invested in a wide variety of funds instead of just the two funds from which Defendant bases its calculations. (R. 50, Resp. at 5-6.) Plaintiffs further contend that Defendant's calculation overlooks allegations that CRP participants, like James, paid $166 on average for administrative fees in 2014. (*Id.* at 6.)

Defendant's independent calculation merely underscores a factual dispute concerning the amount of administrative fees that James paid, which is a point of contention the Court cannot resolve on a motion to dismiss. *See Boyce v. Martella*, No. 13 C 6526, 2014 WL 4947681, at *3 (N.D. Ill. Oct. 1, 2014) ("At the motion to dismiss stage, the Court cannot resolve factual disputes[.]"); *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) ("[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."). Additionally, Defendant calculates the average administrative costs for plan participants, (R. 47, Mem. at 4), but does not calculate what James himself actually paid for administrative fees, which would be the relevant inquiry here. *See Spokeo*, 136 S. Ct. at 1548 ("For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.' " (citation omitted)). The Court, therefore, rejects Defendant's argument that James fails to plead an injury-in-fact based on its calculation of administrative fees.

Defendant also points the Court to *Johnson v. Delta Airlines*, No. 1:17-cv-02608-TCB, slip op. (N.D. Ga. Dec. 12, 2017), (R. 51-1),[1] as legal authority supporting dismissal, (R. 51, Reply at 2), but that case is inapposite. In *Johnson*, the plaintiffs' claims were dismissed for lack of standing because the plaintiffs had "not alleged that they were invested in the criticized funds

[1] The Court notes that this case is an unpublished, out-of-district case that does not bind this Court.

or paid the allegedly excessive fees." (R. 51-1, *Johnson* Slip Op. at 5.) In sharp contrast to *Johnson*, James alleges that he is a CRP participant invested in funds through CRP that carry excessive administrative fees, and that he has suffered direct economic loss as a result. (R. 44, Am. Compl. ¶¶ 21, 33-40, 43-50, 73-75, 109.) Accordingly, Defendant's motion fails to advance any valid grounds for dismissal of Count I as to James for lack of standing at this stage of the lawsuit. The analysis may be different at the conclusion of discovery if Defendant files a motion for summary judgment on the standing issue.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss (R. 46) is DENIED. The parties shall appear for a status hearing on January 31, 2018, at 9:45 a.m. The parties are again DIRECTED to reevaluate their settlement positions in light of this opinion and to exhaust all settlement possibilities prior to the next status hearing.

ENTERED: 

Chief Judge Rubén Castillo
United States District Court

Dated: January 10, 2018