IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

TAMERA S. LECHNER, Individually, on behalf of the Mutual of Omaha 401(k) Long-Term Savings Plan and on behalf of a class of all those similarly situated; REGINA K. WHITE, Individually, on behalf of the Mutual of Omaha 401(k) Long-Term Savings Plan and on behalf of a class of all those similarly situated; and STEVEN D. GIFFORD, Individually, on behalf of the Mutual of Omaha 401(k) Long-Term Savings Plan and on behalf of a class of all those similarly situated;

Plaintiffs,

vs.

MUTUAL OF OMAHA INSURANCE COMPANY, UNITED OF OMAHA LIFE INSURANCE COMPANY, and JOHN DOES 1-50,

Defendants.

8:18CV22

MEMORANDUM AND ORDER

This matter is before the Court on defendants', Mutual of Omaha Insurance Company's ("Mutual") and United of Omaha Life Insurance Company's ("United"), motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), Filing No. 38. This case involves a claim under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. Plaintiffs allege in their amended complaint improper fiduciary self-dealing that harmed both the plaintiffs and the ERISA plan. The Court has carefully reviewed the motion, briefs in support and in opposition, the exhibits attached to the index of evidence, Filing No. 40, and the relevant case law. The Court will deny the motion to dismiss at this time.

BACKGROUND

Mutual sponsors the Mutual Omaha 401(k) Long-Term Savings Plan ("Plan") for the benefit of its employees, and United is a wholly owned subsidiary of Mutual that provides services to qualified retirement plans that contract with a "Separate Account K". Mutual, argues plaintiffs, invested the Plan's assets through Separate Account K and chose the United-managed "Guaranteed Account" as an investment option.[1] Plaintiffs contend that both products were terribly overpriced. These plans, according to plaintiffs, were more expensive than 90% of the plans in the United States. Consequently, Mutual made millions of dollars at the expense of the Plan, says plaintiffs.

STANDARD OF REVIEW

Fed. R. Civ. P. 12(b)(6)

Under the Federal Rules, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 n.3. (2007). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555). In order to survive a motion to dismiss under, Fed. R. Civ. P. 12(b)(6), the plaintiff's obligation to provide the grounds for his entitlement to relief necessitates that the complaint contain "more than labels and conclusions, and a

[1] The Guaranteed Account is a "capital preservation option" designed to provide safety of principal and a "Guaranteed Interest Rate" ("GIR"). Separate Account K, in turn, is made up of "Subaccounts" which hold the assets invested in each option United makes available on its platform and for which separate investment records are maintained.

formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

Determining whether a complaint states a plausible claim for relief is "a context specific task" that requires the court "to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Under *Twombly*, a court considering a motion to dismiss may begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. *Id.* Although legal conclusions "can provide the framework of a complaint, they must be supported by factual allegations." *Id.* Courts follow a "two-pronged approach" to evaluate Rule 12(b)(6) challenges. *Id.* First, a court divides the allegations between factual and legal allegations; factual allegations should be accepted as true, but legal allegations should be disregarded. *Id.* Second, the factual allegations must be parsed for facial plausibility. *Id*.

"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*. at 678 (stating that the plausibility standard does not require a probability, but asks for more than a sheer possibility that a defendant has acted unlawfully). The court must find enough factual matter (taken as true) to suggest that discovery will reveal evidence of the elements of the claim. *Twombly*, 550 U.S. at 558, 556. When the allegations in a complaint, however true, could not raise a claim of entitlement to relief, the complaint should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Twombly*, 550 U.S. at 558; *Iqbal*, 556 U.S. at 679.

ERISA

In cases alleging ERISA fiduciary breach, participant plaintiffs are not "required to describe directly the ways in which [defendants] breached their fiduciary duties," or "the process by which the Plan was managed" or "to plead facts tending to contradict . . . inferences" supporting alleged lawful conduct. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595-96 (8th Cir. 2009). Courts "must be cognizant of the practical context of ERISA litigation," *id*. at 598, and "attendant to ERISA's remedial purpose and evident intent to prevent through private civil litigation 'misuse and mismanagement of plan assets.'" *Id.* at 597 (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985)). "No matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Id.* at 598; *see also Allen v. GreatBanc Trust Co.*, 835 F.3d 670 (7th Cir. 2016) ("[A]n ERISA plaintiff alleging breach of fiduciary duty does not need to plead details to which she has no access, as long as the facts alleged tell a plausible story") (agreeing with the Eighth Circuit).

The Supreme Court has stressed that a motion to dismiss is an "important mechanism" for "weeding out meritless [ERISA] claims." *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2470-71 (2014); *see also Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016) (per curiam). In passing ERISA, Congress intended to create a system that is not "so complex that administrative costs, or litigation expenses" discourage employers from sponsoring benefit plans or individuals from serving as fiduciaries. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (citation omitted). Given the "ominous" prospect of discovery in large ERISA class actions and their potential for

exerting *in terrorem* settlement pressure, PBGC ex rel. *St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 719 (2d Cir. 2013), the Supreme Court has instructed lower courts to engage in "careful, context-sensitive scrutiny of a complaint's allegations," *Fifth Third*, 134 S. Ct. at 2470-71.

DISCUSSION

Fiduciary and Fair Dealing

Plaintiffs allege that by hiring its own subsidiary at above-market rates, defendants breached ERISA's duty of loyalty. ERISA § 404(a)(1)(A), codified at 29 U.S.C. § 1104(a)(1)(A). Section 404(a)(1)(A) provides that a fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." Thus, fiduciaries must act with "an eye single" to the interests of participants, and "must exclude all selfish interest and all consideration of the interests of third persons." *Pegram v. Herdrich*, 530 U.S. 211, 224 and 235 (2000). ERISA's fiduciary duties "have been described as the highest known to the law." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) (citations omitted). Plaintiffs contend that "'Separate Account K' is a group annuity contract designed as a way for United, and hence Mutual, to collect fees from Plan participants beyond what the investment providers charged, and to hide those fees from the Plan (and others)." Plaintiffs' Brief, Filing No. 43, at 5. For example, plaintiffs contends that the "the average per participant fee for comparable plans is $64, which the Plan paid $195 (even excluding the spread on the General Account)". Filing No. 35, Amended Complaint ¶¶ 62-63.

Plaintiffs allege that defendants violated their duty of loyalty and abused their positions as fiduciaries pursuant to ERISA § 404(a)(1)(A); 29 U.S.C. § 1104(a)(1)(A).[2] This resulted, contend plaintiffs, in Mutual taking millions from the Plan. Plaintiffs cite to a number of courts who have found that similar types of claims state a cause of action for fiduciary disloyalty.[3] Plaintiff also alleges that the cost of participant figure in this plan is $195 versus market data showing that $64 per participant is the average. Mutual argues that it has a superior product, and that is why it costs more. Further, plaintiffs contend that the set up used by Mutual allowed United to control the spread which resulted in United keeping more of the investment returns for itself than its paid participants in the Plan. Plaintiff alleges that the fees paid by Mutual to United far exceed the market rates.

Mutual argues that the Department of Labor and Congress permit the use of affiliated service providers. However, as pointed out by the plaintiffs, such use must be inherently fair to the plan. "The burden of proof is always on the party to the self-dealing transaction to justify its fairness." *Braden*, 588 F.3d at 602 (citation omitted). Further, argues plaintiffs, ERISA prohibits between plans and the "parties in interest". ERISA § 406(a)-(b), 29 U.S.C. § 1106(a)-(b).

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[2] 29 U.S.C. § 1104(a)(1)(A) states:
(a) Prudent man standard of care
(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--(A) for the exclusive purpose of:(i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;

[3] E.g., McDonald v. Jones, 2017 WL 372101 (E.D. Mo. January 26, 2017) (denying motion to dismiss disloyalty claims related to selection of affiliated investment products); Wildman v. American Century Services, LLC, 237 F. Supp. 3d 902, 912-13 (W.D. Mo. 2017) (same); Kreuger v. Ameriprise, 2012 WL 5873825 (D. Minn. Nov 20, 2012) (same); Main v. American Airlines, 248 F. Supp. 3d 786, 792-93 (N.D. Tex. 2017) (same); Moreno v. Deutsche Bank, 2016 WL 5957307, *6 (S.D.N.Y.) (same); Urakhchin v. Allianz, 2016 WL 4507117 (C.D. Cal.) (same); Cryer v. Franklin Templeton, 2017 WL 818788 (N.D. Cal.) (same).

Judge John Gerrard has previously found similar allegations sufficient to deny a motion to dismiss. *Muri v. Nat'l Indem. Co.*, 2018 WL 1054326, at *4-7 (D. Neb. Feb. 26, 2018). The Court is cognizant of its role as the gatekeeper in these types of cases, particularly in terms of halting frivolous cases at the outset. Such monitoring and review theoretically keep the cost lower and the payout higher for Plan participants. However, the Court finds that the facts as alleged by plaintiffs constitute a plausible claim of misconduct in the form of a breach of fiduciary duty and loyalty at this point in the lawsuit. Accordingly, the Court will deny the motion to dismiss as to these claims.

Statute of Limitations

Defendants next contend that plaintiff's transaction claims in Count II are untimely under ERISA's six-year limitations period. Defendants also argue that this contract originated prior to the 6-year time limitation, and thus that is when the clock starts. Plaintiffs disagree contending that the ongoing services provided by United are prohibited by 406(a)(1)(C), and the repeated, ongoing transfers of Plan assets to United in the form of periodic contributions, Filing No. 35 ¶¶ 45-47, 67-71, are prohibited by 406(a)(1)(D). Plaintiffs point out, however, that within the 6-year limitation period, Mutual renewed and amended its agreement with United. At least five other reviews took place during that time period. Thus, urges plaintiffs, these are ongoing courses of conduct. Further argued by the plaintiffs, defendants knowingly concealed misconduct from the Plan participants, including the plaintiffs. When a fiduciary conceals its misconduct, ERISA's limitations period is tolled. *See* ERISA § 413; *see also Schaefer v. Arkansas Med. Soc.*, 853 F.2d 1487, 1491 (8th Cir. 1988) (discussing when three or six year statute of limitation is used, depending on fraud or concealment).

The Court finds that the plaintiffs have alleged sufficient facts to establish a plausible claim for relief that occurred inside the state of limitations. Accordingly, the Court will allow the case to progress at this time.

THEREFORE, IT IS ORDERED THAT defendants' motion to dismiss, Filing No. 38, is denied.

Dated this 31st day of December, 2018.

BY THE COURT:

s/ Joseph F. Bataillon
Senior United States District Judge