IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

THADDIUS INTRAVAIA, *et al.*, *Plaintiffs*, v. NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AND THE INSURANCE AND FINANCIAL SERVICES COMMITTEE, *Defendants.*	Case No. 1:19-cv-973 Hon. Liam O'Grady

MEMORANDUM OPINION & ORDER

This matter comes before the Court on Defendants' Motion to Dismiss Plaintiffs' Amended Complaint. Dkt. 42. The motion was fully briefed, and the Court heard argument on December 13, 2019.

I. Background

This is a putative class action brought pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") by participants of an ERISA plan ("the Plan") against the Plan's sponsor, National Rural Electric Cooperative Association ("NRECA"), and the Plan's named fiduciary, the Insurance and Financial Services Committee ("the Committee"). Plaintiffs allege five ERISA violations based on the Plan's increasing administrative costs and the increasing compensation which NRECA allegedly extracts from the Plan. Count 1, against both NRECA and the Committee, alleges breaches of the fiduciary duties of loyalty and prudence, in violation of ERISA, 29 U.S.C. § 1104(a)(1)(A), (B). The allegation is that Defendants failed to properly manage the Plan's administrative expenses by allowing the Plan to pay higher than market fees and by failing to restrain expenses. Counts 2 and 3 allege that NRECA and the Committee

caused unlawful transactions with NRECA, because NRECA is a party in interest and such transactions are prohibited by ERISA, 29 U.S.C. § 1106(a)(1) (Count 2), and because NRECA is a fiduciary, and such transactions are prohibited by ERISA, 29 U.S.C. § 1106(b) (Count 3). Count 4 alleges that NRECA failed to sufficiently monitor the Committee in carrying out their fiduciary duties, in violation of 29 U.S.C. § 1132(a)(3). Count 5 alleges that NRECA, as a co-fiduciary, is liable for the Committee's breaches under the co-fiduciary liability statute, 29 U.S.C. § 1105(a).

II. Legal Standard

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, 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 plausible claim to relief "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). Facially plausible claims have "pleaded factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Because a Rule 12(b)(6) motion tests the sufficiency of a complaint without resolving factual disputes, a district court "'must accept as true all of the factual allegations contained in the complaint' and 'draw all reasonable inferences in favor of the plaintiff.'" *Kensington Volunteer Fire Dep't v. Montgomery County*, 684 F.3d 462, 467 (4th Cir. 2012) (quoting *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011)). Mere labels, conclusions, or a formulaic recitation on elements is insufficient. *Iqbal*, 556 U.S. at 677.[1] A court may consider

[1] The application of Rule 12 pleading standards in ERISA cases is no different from their application in other cases notwithstanding *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009). *Braden* is not binding in this Circuit, and in any case, district courts within this

documents not attached to the complaint in ruling on a motion to dismiss when the document is "integral to and explicitly relied on in the complaint and [] the plaintiffs do not challenge its authenticity." *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999).[2]

III. Analysis

ERISA Fiduciary Duties

"ERISA fiduciaries owe participants duties of prudence and loyalty." *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007). These duties are set out in section 1104(a)(1). *See Fifth Third Bancorp. V. Dudenhoeffer*, 573 U.S. 409, 413 (2014). The duty of prudence is that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence . . . [of] a prudent man . . . ." 29 U.S.C. § 1104(a)(1)(B). The duty of loyalty is that a fiduciary must do so "for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A).

There are two types of fiduciaries: named fiduciaries which are designated in the plan's governing documents, 29 U.S.C. § 1102(a)(2), and functional fiduciaries, *see* 29 U.S.C. § 1002(21). A functional fiduciary:

> is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan . . . (ii) [] renders investment advice for a fee . . . or (iii) [] has any discretionary authority or discretionary responsibility in the administration of such plan.

Circuit have found that "*Braden* does not create a lower pleading standard for ERISA cases." *Reetz v. Lowe's Companies, Inc.*, No. 518CV00075, 2019 WL 4233616, at *3 (W.D.N.C. Sept. 6, 2019); *see also Kruger v. Novant Health, Inc.*, 131 F. Supp. 3d 470, 477 (M.D.N.C. 2015) ("the *Braden* analysis agrees with Fourth Circuit precedent that fiduciaries of an ERISA plan are responsible for monitoring . . .").

[2] Here, Plaintiffs' claims are based upon the Plan, which is explicitly referenced and relied upon in their complaint, and Plaintiffs do not dispute its authenticity. *See* Pls.' Mem. In Opp'n to Defs.' Mot. To Dismiss 14 (disputing the authenticity of the "Administrative Services Agreement" and purported settlement agreement).

29 U.S.C. § 1002(21)(A). The statutory language commands that actors may be "a fiduciary only 'to the extent' that he acts in such a capacity in relation to a plan." *Pegram v. Herdrich*, 530 U.S. 211, 225-26 (2000). Thus, ERISA fiduciaries owe the fiduciary duties identified above "only when they are acting in their capacity as a fiduciary." *DiFelice*, 497 F.3d at 418. Accordingly, to the extent a fiduciary is not named yet exercises or has discretionary authority, that fiduciary is a functional fiduciary. *See Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996). "[T]he threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram*, 530 U.S. at 226; *accord Pender v. Bank of Am. Corp.*, 788 F.3d 354, 362 (4th Cir. 2015).

Counts 1, 2, and 3

Plaintiffs have alleged that the Committee is a named fiduciary responsible for administration of the Plan. Accordingly, the Committee is subject to the ERISA duties of prudence and loyalty. Defendants argue that the Committee's fiduciary liability is precluded by the appointment of an independent fiduciary. While independent fiduciaries *may* absolve a named fiduciary of liability, "independent advice is not a 'whitewash.'" *DiFelice*, 497 F.3d at 421. Instead, appointment of an independent fiduciary merely provides evidence that a fiduciary satisfied their duties. *See id.*

The Complaint alleges that NRECA designed and sponsored the plan. While those facts alone do not confer fiduciary status, *see Coyne & Delany Co.*, 98 F.3d at 1465 (citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996)), and NRECA is not a named fiduciary, the well pleaded facts indicate that NRECA has functional fiduciary duties. Plaintiffs have alleged that

NRECA has the discretion to appoint and remove Committee members, and that discretion constitutes "'discretionary authority' over the management or administration of a plan within the meaning of § 1002(21)(A)." *Coyne & Delany Co.*, 98 F.3d at 1465. It therefore renders NRECA a functional fiduciary to the extent that NRECA exercises that discretionary authority, and further carries with it a duty to monitor those whom are subject to removal. *Id.* Moreover, the Complaint here alleges facts which support the inference that NRECA maintains and exercises control over the administration of the Plan. Accordingly, the Complaint alleges that NRECA is a functional fiduciary functionally responsible for administration of the Plan as well as responsible for the discretionary appointment and removal of Committee members.

The well pleaded facts support an inference of Defendants' imprudent and disloyal conduct. As to imprudence, Plaintiffs have alleged that the Plan's increasing administrative costs, in a marketplace which is otherwise exhibiting a downward trend, show imprudent administration. They also allege that a similarly situated comparator incurs approximately 25% the administrative expenses, per participant, of the Plan here. This comparative fact nudges the claim over the line from merely possible to plausible. As to disloyalty, Plaintiffs' allegations of NRECA's increasing extractions in combination with NRECA's relationship to the Committee, similarly give rise to the inference of a breach of the duty of loyalty. Count 1 is therefore supported by well pleaded facts.

Plaintiffs have also stated a claim for their prohibited transactions claims. The Complaint alleges that the Plan's administration caused unreasonable and improper transactions with NRECA, a party in interest. The pleaded facts support the inference that those transactions were self-interested, or made on behalf of a party with interests adverse to the Plan or participants, or both. The pleaded facts show that over recent years, while NRECA was able to charge other

plans a constant or a decreasing amount, NRECA allegedly unreasonably and improperly charged the Plan more. Counts 2 and 3 are therefore also supported by well pleaded facts.

Counts 4 and 5

The Complaint pleads that NRECA was a functional fiduciary with a duty to monitor the Committee. Appointing fiduciaries, such as NRECA, must review other fiduciaries. *See* 29 C.F.R. § 2509.75-8. The well pleaded facts regarding the relationship and communication between the Committee and NRECA support the inference that NRECA failed to monitor the Committee in violation of the duty to do so. Count 4, therefore, states a claim.

Count 5 also states a claim. ERISA provides that "a fiduciary . . . shall be liable for a breach of fiduciary responsibility of another fiduciary" if, *inter alia*, "he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach." 29 U.S.C. § 1105(a)(3). Plaintiffs have pleaded facts which support this claim because the Complaint alleges that NRECA appoints Committee members, that senior NRECA officials serve on the Committee, and that NRECA and the Committee work closely on matters pertaining to the Plan. These facts give rise to the reasonable inference that communication occurs regarding the Plan's administration, and thus it is reasonable to infer that NRECA knew of the Committee's breaches, if any. The pleaded facts regarding the continually increasing costs extracted by NRECA and the continually increasing costs to participants support the inference that any efforts to remedy the breach were unreasonable.

IV. Conclusion

The Complaint contains sufficient well pleaded facts to survive a motion to dismiss. For the reasons stated above, and for good cause shown, Defendants motion is hereby **DENIED**. Defendants shall file an Answer within ten (10) days of the date of this Order, and a scheduling order shall issue forthwith thereafter.

It is **SO ORDERED**.

January 2, 2020
Alexandria, Virginia

Liam O'Grady
United States District Judge