IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARLON H. CRYER, et al., Plaintiffs, v. FRANKLIN RESOURCES, INC., et al., Defendants.	Case No. 16-cv-04265-CW ORDER ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT (Docket Nos. 124 & 131)

This is a putative class action brought under the Employee Retirement Security Act of 1974 (ERISA) by Plaintiffs Marlon Cryer and Nelly Fernandez, former participants in Defendant Franklin Resources, Inc.'s 401(k) retirement plan. Plaintiff Fernandez has filed a motion for partial summary judgment on her second and third claims for prohibited transactions.[1] Defendants Franklin Templeton Resources, Inc. et al. oppose Plaintiff's motion and have filed a cross-motion for partial summary judgment in their favor on the same claims of prohibited transactions. Defendants also move for summary judgment on both Plaintiff Cryer and Plaintiff Fernandez's breach of fiduciary duty claim, attacking two of Plaintiffs' theories. Lastly, Defendants move for summary judgment on all but two of Plaintiffs' prohibited

[1] All docket entries cited herein will be those in Cryer v. Franklin Resources, Inc., 16-cv-4265 unless otherwise noted. Citations to consolidated case Fernandez v. Franklin Resources, Inc., 17-cv-6409 will be cited as Fernandez Docket. In Cryer, Plaintiff Cryer brought a single claim for a breach of fiduciary duty. In Fernandez, consolidated with Cryer, Plaintiff Fernandez brought a nearly identical claim of a breach of fiduciary duty (claim 1), along with three new claims: prohibited transactions (claims 2 and 3), and failure to monitor (claim 4). Thus, the Fernandez Complaint subsumes the Cryer Complaint.

transactions and breach of fiduciary duty claims as time-barred under ERISA's statute of limitation. Having considered the parties' papers and oral arguments, the Court DENIES Plaintiff Fernandez's and Defendants' cross-motions for partial summary judgment on the prohibited transaction claims (i.e., claims 2 and 3). The Court DENIES Defendants' Motion for Partial Summary Judgment of Plaintiffs' breach of fiduciary duty claim (claim 1) as to Plaintiffs' Stable Value Fund (SVF) theory. The Court GRANTS Defendants' Cross-Motion for Partial Summary Judgment on Plaintiffs' breach of fiduciary duty claim as to the reasonableness of Defendants' administrative fees theory. Lastly, the Court DENIES Defendants' Cross-Motion for Partial Summary Judgment as to the statute of limitation arguments for both the prohibited transaction claims and the breach of fiduciary duty claim.

BACKGROUND

Defendants consist of Franklin Resources Inc. (FRI), and individual Plan committee members and Board of Directors members Penelope Alexander, Samuel Armacost, Peter K. Barker, Alison Baur, Mariann Byerwalter, Dan Carr, Norman Frisbie, Matthew Gulley, Joseph Hardiman, Charles E. Johnson, Gregory E. Johnson, Jennifer Johnson, Rupert H. Johnson, Jr., Kenneth Lewis, Mark C. Pigott, Chutta Ratnathicam, Nicole Smith, Laura Stein, Anne Tatlock, Seth Waugh, and Geoffrey Y. Yang. FRI is a financial services company which provides investment products, including mutual funds, to individual and institutional investors, and which has, since 1981, sponsored a 401(k) plan for its employees (the Plan). Docket No. 1 (Complaint) ¶¶ 14, 18. The Plan is a "defined contribution plan" under 29 U.S.C. § 1002(34) and an "employee pension benefit plan" under 29 U.S.C. § 1002(2). The Plan offers its participants forty mutual funds (the Proprietary Mutual Funds or the Funds),[2] all of which are managed by Defendant FRI or its subsidiaries. Id. at ¶ 22.

A. The Plan's Fiduciary Committees and the Committees' Oversight of the Plan

The Plan has two committees whose members are Plan fiduciaries. These committees oversee the investment and administrative needs of the Plan. Declaration of Brittany Rogers ISO Defendants' Motion for Partial Summary Judgment (Rogers Decl.), Ex. 2 at 17:22-24. The first is the Administrative Committee (AC), which oversees the administrative functions, including the Plan's recordkeeper services and associated fees. Id. at 18:7-14. The second is the Investment Committee (IC), which oversees all investment-related decisions and related fees. Id. at 18:2-6. Each committee has at least five members. Id., Ex. 11 at 37. During the relevant class periods, individual Defendants have served on both committees. Id., Ex. 46.

B. FRI's Funds' Payments of Beneficial Owner Servicing Fees to Third-Party Intermediary Schwab

FRI's Funds' Transfer Agent, Franklin Templeton Investor Services, LLC (FTIS), handles services to the Funds and their shareholders, including maintaining shareholder records, redeeming shares and facilitating payments of shareholders, distributing prospectuses and other shareholder communications,

[2] The Proprietary Mutual Funds or the Funds discussed in this Order refer to the Franklin Templeton funds at issue in this litigation as alleged in Fernandez.

and operating a call center to facilitate transactions. Declaration of Heidi Croel ISO Defendants' Motion for Partial Summary Judgment (Croel Decl.), ¶ 8. These services can be, and were here, provided by third-party intermediaries.[3] The fees for these services, services which the Transfer Agent would otherwise have had to provide, comprise the beneficial owner servicing fees. Id., ¶ 13. The Transfer Agent paid Schwab, as intermediary, to provide beneficial owner services to investors in the Plan.

With Schwab, these payments were calculated at twelve dollars per Fund per participant per year (twelve dollar flat fee structure). Declaration of Sharon Anderson ISO Defendants' Motion for Partial Summary Judgment (Anderson Decl.), ¶ 14. Schwab provided beneficial owner services on behalf of the Funds to both Plan participants and non-Plan investors in the Funds. The Funds contracted with various other third-party intermediaries for 401(k) plans investing in the Funds to provide these beneficial owner services. Croel Decl., ¶¶ 3, 11-13. The Transfer Agent also paid beneficial owner servicing fees to other third-party intermediaries on behalf of other 401(k) plans investing in the Funds. See id., ¶ 14; see also id., Ex. A (Transfer Agency Agreement) at § 3(b).

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[3] To differentiate the two roles played by Schwab and other third parties providing services, a third party providing beneficial owner services to the Funds will be referred to as an "intermediary." A third party providing recordkeeping services for a 401(k) plan will be referred to as a "recordkeeper." Schwab was both an intermediary for the Funds and a recordkeeper for the Plan.

Because FRI's Transfer Agent entered into these other beneficial owner servicing fee agreements with other third-party intermediaries, FRI's Transfer Agent was "aware of the amount of beneficial owner servicing fee payments requested by particular intermediaries." Croel Decl., ¶ 15. Instead of the twelve dollar flat fee structure the Funds had entered into with Schwab, the Funds' Transfer Agent entered into a fifteen basis point fee structure (fifteen bps fee structure) with other third-party intermediaries. Boyko Decl., Ex. 2, n.38. These beneficial owner servicing fees were .15% of the annual revenue generated by each of the Funds.

Separately, the Plan's AC negotiated a recordkeeping fee agreement with Schwab which, for the relevant class periods, was seventy dollars per participant per year. Anderson Decl., ¶ 11. These fees can be paid, in part, by credits from the beneficial owner servicing fees. Id. ¶ 14. Put another way, FRI here had two contracts, one between Schwab and the Plan and one between Schwab and each Fund, with Schwab using the payments from the Funds to Schwab in one contract (the Funds' beneficial owner servicing fees agreement with Schwab) as a credit against the costs owed by the Plan to Schwab under the other contract (the Plan's recordkeeping agreement with Schwab). If the beneficial owner servicing fees were greater than the recordkeeping fees, then the overpayment of the beneficial owner servicing fees would have been rebated to the Plan. Boyko Decl., Ex. 23. The beneficial owner servicing fee payments to Schwab were less than the recordkeeping fees, Croel Decl., ¶ 14, so Schwab never made such rebates to the Plan.

If the Funds had entered into a fifteen bps fee structure instead of the twelve dollar flat fee structure with Schwab, the beneficial owner servicing fees likely would have exceeded the seventy dollar recordkeeping fee and generated a rebate for the Plan. For example, Defendants' independent consultant found that in 2012, the beneficial owner servicing fees were $365,975 under the twelve dollar flat fee structure, Boyko Decl., Ex. 23, and would have been $1,100,000 under a fifteen bps fee structure. Boyko Decl., Ex. 25. In 2012, the Plan's recordkeeping fees were "roughly" $400,000 dollars. Id. Thus, in 2012, if the Funds had negotiated a fifteen bps fee structure with Schwab, the beneficial owner servicing fees would have exceeded the recordkeeping fees and Schwab would have rebated the excess fees back to the Plan. See id.

C. Investment Committee's Evaluation of the Stable Value Fund as an Option for the Plan's Proprietary Mutual Funds

The IC selects the funds offered to the Plan's participants. Rogers Decl., Ex. 12 at 4-5. It selected the Mutual Proprietary Funds, which were managed by FRI subsidiaries. Id.

The IC made its decisions based in part on advice of an independent investment consultant, Callan Associates, Inc. (Callan), which provided detailed quarterly reports, and evaluated returns, risk, fees, and other characteristics of Plan investment options measured against peers and other benchmarks. See Rogers Decl., Ex. 12 at 6–7. Callan was also responsible for identifying options that may have underperformed or should be replaced. Id.

On August 14, 2012, the IC had a meeting at which members discussed the possibility of adding an SVF, noting that "70% of companies offer a stable value fund in lieu of a money fund, but upon further discussion there was a consensus that a stable value fund was not the direction the committee wished to explore. The Committee remain[ed] wary of stable value fund products and expressed its continued to [sic] desire to not offer a stable value product due to ongoing concerns . . . ." Rogers Decl., Ex. 18 at 2. In 2015, upon Callan's recommendation, the IC began a review of the Plan's investment options, but an SVF was not considered before the instant case was initiated. See generally, Rogers Decl., Ex. 27 (Plan Structure Review); Ex. 28 at FRI-0008789. Only on December 6, 2016, after the filing of the Cryer complaint on July 28, 2016, did the IC reconsider the option of offering an SVF. Id., Ex. 30 at 2; Ex. 31. At this December 6, 2016 meeting, the IC requested a "more in depth education session" to investigate SVF options. Id., Ex. 30 at 2. In August 2017, Callan issued a report on SVFs. Id., Ex. 37. Callan recommended a few SVF candidates and, in December 2017, the Galliard SVF was added to the Plan lineup. Anderson Decl., ¶ 23.

D. The Reasonableness of the Recordkeeping Services and Fees

The AC monitors the Plan's administrative fees and records and evaluates reports from the Plan's recordkeepers. Rogers Decl., Ex. 2 at 18:7-19:25. From at least December 1, 2005 to April 1, 2009, the AC retained The 401(k) Company as the Plan's recordkeeping service provider. Anderson Decl., Exs. A & B. On April 1, 2009, The 401(k) Company was acquired by the Schwab

Retirement Plan Services Company (Schwab).[4] Anderson Decl., ¶ 7. As noted above, the recordkeeping fee during the relevant class period was seventy dollars per participant per year. Defendants have offered their administrative fees expert, Steven K. Gissiner, who opined that the administrative expenses incurred by the Plan were reasonable and comparable to those of similarly-sized plans. See Declaration of Steven K. Gissiner, Ex. 1 (Gissiner Expert Report), ¶¶ 40-47. Plaintiffs concede this point.

LEGAL STANDARD

Summary judgment or summary adjudication is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,

[4] For ease of reference, The 401(k) Company and Schwab will be jointly referred to as Schwab, unless the distinction between the two is necessary.

587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

DISCUSSION

ERISA provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and 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). ERISA also requires plan fiduciaries to discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).

I. Prohibited Transactions (Claims 2 and 3)

A. There is a Triable Issue Regarding Whether Defendants' Challenged Prohibited Transactions Fall Under the PTE 77-3 Exemption

Plaintiff Fernandez and Defendants have cross-moved for partial summary judgment on Plaintiff Fernandez's complaint of prohibited transactions under 29 U.S.C. § 1106. "ERISA explicitly prohibits a fiduciary from engaging in self-dealing transactions." Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996) (quoting 29 U.S.C. § 1106(b)). However, ERISA creates certain exemptions to the prohibition of self-dealing transactions. See 42 Fed. Reg. 18,734 (1977). If it is determined that a transaction falls under § 1106, it is the defendant's burden to show that its plan fits under a permissible statutory exemption. Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1215 (2nd Cir. 1987) ("[The] fiduciary charged with a violation . . . must prove by a preponderance of the evidence that the transaction in question fell within an exemption.").

Plaintiff Fernandez argues that Defendants violated § 1106 when the individual Defendants on the AC and IC engaged in self-dealing transactions, causing the Plan to invest in the forty Proprietary Mutual Funds generating excessive fees from which Defendants profited. It is undisputed that individual Defendants were fiduciaries and, as fiduciaries, selected funds that would have benefited FRI. It is also undisputed that offering these Funds would constitute prohibited transactions under § 1106 if these Funds failed to meet any statutory exemptions.

Defendants raise as an affirmative defense the PTE 77-3 exemption, which has four requirements. Plaintiff Fernandez only challenges the PTE 77-3 requirement that:

> All dealings between the Plans and any of the Funds would remain on a basis no less favorable to such Plans than dealings between the Funds and other shareholders holding the same class of shares as the Plans.

42 Fed. Reg. 18,734 (1977). Put differently, the "PTE 77-3 only applies if the investment is made on the same terms that apply to the rest of the investment public." In re M&T Bank Corp. ERISA Litig., 16-cv-374 FPG, 2018 WL 4334807, at *10 (W.D.N.Y. Sept. 11, 2018).

Defendants argue that their Funds' Transfer Agent did not treat shareholders differently because the Transfer Agent made the same options of terms for the beneficial owners servicing fees available to all intermediaries. Second, Defendants argue that under Plaintiff Fernandez's theory that Plan participants were treated less favorably because of potential rebates, she has offered no evidence of any actual rebates made to other plans and, thus, there is no evidence that Plan participants were ever actually treated less favorably. Third, Defendants argue that Plaintiff Fernandez's theory would have required Defendants to breach their fiduciary duties because it would require Defendants to agree to pay more beneficial owner servicing fees than reasonably necessary. Lastly, Defendants argue that the beneficial owner servicing fees are all fees incurred by FRI and are "mutualized" (i.e., incurred equally) amongst shareholders.

Plaintiff Fernandez responds that because the Funds and the Plan were both operated by FRI, Defendants knew they were preventing the Plan from receiving rebates that third-party plans were receiving. Specifically, because FRI's Transfer Agent negotiated beneficial owner servicing agreements with various intermediaries, FRI knew that other 401(k) plans' intermediaries' beneficial owner servicing agreements with the Funds included a fifteen bps fee structure. See Boyko Decl., Ex. 2, n.38. Plaintiff Fernandez introduces evidence that Callan, FRI's consultant, had shown the AC that under a twelve dollar flat fee structure, at least in 2012, beneficial owner servicing fees were $365,975 whereas under a fifteen bps fee structure, beneficial owner servicing fees would have been close to $1,100,000 dollars, which would have generated a rebate to the Plan. Boyko Decl., Ex. 25.

Viewing the evidence in light most favorable to Plaintiff, the Court finds that there is a disputed issue of material fact as to whether the lack of rebates for the Plan placed Plan participants in a less favorable position than other investors, if non-Plan participants' 401(k) plans could receive such rebates.

In Brotherston v. Putnam Investments, LLC, No. CV 15-13825-WGY, 2017 WL 1196648 (D. Mass. Mar. 30, 2017) (Brotherston I), aff'd in part, vacated in part, remanded, No. 17-1711, 2018 WL 4958829 (1st Cir. Oct. 15, 2018) (Brotherston II), the district court found, and the First Circuit affirmed, that a rebate structure analogous to the one at issue here could have treated Putnam's 401(k) plan participants differently from other investors in Putnam stocks. The First Circuit held that non-Plan investors could have been treated more favorably in the form of the purported rebates made to third-party plans. Brotherston II, 2018 WL 4958829, at *7. The First Circuit rejected Putnam's argument that payments made to other third-party intermediaries were not relevant for PTE 77-3 purposes. Id. The First Circuit remanded the case to the district court to determine whether the Putnam plan was "treated any less favorably on net than other comparably situated plans" by comparing the rebates made to third-party plans in context with the fees paid by the third-party plans as compared to the fees paid by the plan itself. Id. The Court finds Brotherston I and II persuasive.

Defendants' arguments that Brotherston I and II are distinguishable from the facts here, and that they are nevertheless exempt under PTE 77-3 as a matter of law are not convincing.

Defendants first argue that FRI's Transfer Agent offered the same terms to all third-party intermediaries and, thus, the investors were not treated differently. Some intermediaries opted for the fifteen bps fee structure while Schwab selected the twelve dollar flat fee structure. Defendants have not introduced evidence that the Funds offered the same terms to Schwab as they did to other intermediaries. See generally Croel Decl. Defendants have only introduced evidence of the Transfer Agent's agreement with Schwab. See id., Ex. B. Even if the Funds offered the same terms to all intermediaries, this does not mean Defendants treated their own Plan participants the same as other investors. Defendants were aware that other intermediaries were entering into agreements with a fifteen bps fee structure. See id., ¶ 15. Callan, Defendants' consultant, had apprised the AC of various fee structures, and a fifteen bps fee structure was presented as an alternative to the twelve dollar flat fee structure. Boyko Decl., Ex. 25. The AC was aware that, in 2012, a rebate could have been made to the Plan if the AC had elected a fifteen bps fee structure. Id. The AC members, as fiduciaries charged with selecting an intermediary and a recordkeeper, had control of whom they selected for the Plan here, and could have negotiated for, or hired an intermediary that utilized, a fifteen bps fee structure.

Second, Defendants argue that even assuming arguendo that Plaintiff Fernandez's rebate theory could have shown that the

Plan's participants were in a less favorable position if rebates were made, there is no evidence in the record of any purported rebates actually made to third-party plans and, thus, there is no evidence that the Plan's participants were treated less favorably than non-Plan investors in the Funds. The absence of any evidence of rebates made does not necessarily mean there is no evidence that Plan participants were treated less favorably. The Funds had a different fee structure with the Plan's intermediary than with the intermediaries of non-Plan investors. The disputed issue is whether Plan participants were treated less favorably than non-Plan investors, viewing in toto the fees other plans incurred in context with any rebates received by these plans. Brotherston II, 2018 WL 4958829, at *7. While Plaintiff Fernandez may need to ultimately prove at trial that such purported rebates were made to third-party plans, and that such rebates in the context of the fees paid by the third-party plans did place the non-Plan participants in a more advantageous position than Plan participants whose Plan never received such rebates, Plaintiff Fernandez has shown there is a disputed issue of material fact sufficient to defeat summary judgment here.

Third, Defendants argue that the fifteen bps fee structure would require the AC to negotiate for higher fees than reasonably necessary, which would violate the AC members' fiduciary duties. Under the twelve dollar flat fee structure, FRI's Funds' beneficial owner servicing fees would offset FRI's Plan's recordkeeping costs. FRI's Plan would then pay the remaining balance of the recordkeeping costs if the beneficial owner servicing fees were less than the recordkeeping fees. See

Anderson Decl., ¶ 13 ("In the rare event that the beneficial owner servicing fees were insufficient to cover the total amount of contracted recordkeeping fees, the extra fees were paid using corporate match forfeitures or by way of direct payments by FRI."). The amount paid by FRI to Schwab does not change whether it comes from the Funds (through beneficial owner servicing fees) or from the Plan (through recordkeeping fees). Under the fifteen bps fee structure, FRI would still pay the seventy dollars per participant per year fee, but this might all be paid through the Funds' beneficial owner servicing fees. Any excess money would then be rebated to the Plan. Thus, the fifteen bps fee structure would not have required Defendants to pay more fees than necessary to Schwab, but it would have required Schwab to rebate money back to the Plan.

Last, Defendants argue that Plan participants were not treated less favorably than non-Plan investors because all these beneficial owner servicing fees were "mutualized." Beneficial owner servicing fees are "mutualized" costs. Mutualized costs are costs incurred in running a mutual fund which are shared equally among the shareholders. Declaration of Erik Sirri ISO Defendants' Motion for Partial Summary Judgment (Sirri Decl.), Ex. 1 at ¶ 19. Thus, Defendants argue that the variations in fees among various intermediaries were all incurred by the Funds, and the administrative costs are built into the Funds, so all investors incurred the costs equally. This argument fails. Plaintiff Fernandez's argument is that FRI has structured the beneficial owner servicing fee agreement and the recordkeeping fee agreement with Schwab to prevent the Plan from receiving rebates. Thus, whether beneficial owner servicing fees are shared equally amongst Plan and non-Plan participants is irrelevant. Even if all participants incurred the same cost of beneficial owner servicing fees, all else being equal, Plan participants could be placed in a less favorable position if the Plan did not receive rebates third-party plans did.

The Court finds that there is a triable issue regarding whether the Plan participants were treated less favorably because the Funds entered into a twelve dollar flat fee structure with Schwab instead of the fifteen bps fee structure it contracted with other intermediaries. The Court DENIES both Plaintiff Fernandez's and Defendants' cross-motions for summary judgement.

B. The Statute of Limitations on Prohibited Transactions

Claims alleging "a fiduciary's breach of any responsibility, duty, or obligation" under ERISA must be brought within "six years after . . . the date of the last action which constituted a part of the breach or violation . . . or three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation" unless there is evidence of "fraud or concealment." 29 U.S.C. § 1113(1)–(2).

Defendants argue in the alternative that all but two of the alleged prohibited transactions are time-barred under ERISA because Plaintiff Fernandez had actual knowledge of when the Proprietary Mutual Funds and their related fees were added to the Plan. Defendants' recordkeeper had notified all active participants of these transactions in September 2014. Anderson Decl., ¶¶ 17-20; <u>see also</u> <u>id.</u>, Ex. C (Sept. 2014 Notice of Investment Rights) and Ex. D (Participant Disclosure of Plan and

Investment Related Information).

However, this does not amount to evidence that Plan participants were notified of any material facts that Defendants may have treated Plan participants less favorably than other investors. Mere knowledge of the purported transaction itself does not amount to knowledge that the transaction would be a violation under § 1106. See Waller v. Blue Cross of California, 32 F.3d 1337, 1340-41 (9th Cir. 1994) ("We decline to equate knowledge of the purchase of annuities . . . with actual knowledge of the alleged breach of fiduciary duty."); see also Ziegler v. Connecticut Gen. Life Ins. Co., 916 F.2d 548, 552 (9th Cir. 1990) ("We stress that an ERISA plaintiff's cause of action cannot accrue and the statute of limitations cannot begin to run until the plaintiff has actual knowledge of the breach, regardless of when the breach actually occurred.").

Defendants argue that actual knowledge for statute of limitations purposes should not require notice of any material facts relating to affirmative defenses; rather, actual notice of the purported prohibited transaction itself is sufficient. The Court does not agree. Defendants cannot argue that they would have fit into a statutory exemption, but simultaneously claim that any facts that would have exempted them from violating § 1106 are not relevant to Plaintiff Fernandez's knowledge that Defendants treated Plan participants less favorably than other investors. See Fish v. GreatBanc Trust Co., 749 F.3d 671, 686-87 (7th Cir. 2014) (rejecting defendant's "unrealistic theory" that "plaintiffs could have and even should have filed suit immediately after the [purported prohibited transaction] took place, without undertaking any investigation of the affirmative defense that the defendants themselves were invoking at the time" and holding that plaintiffs did not have actual knowledge until they could have known that they were treated less favorably than other investors); Schapker v. Waddell & Reed Financial, Inc., 17-cv-2365-JAR-JPO, 2018 WL 1033277, at *6 (D. Kan. Feb. 22, 2018) (agreeing with Fish and requiring "actual knowledge of how any exemptions did or did not apply to the transactions involving parties in interest"). Defendants have not identified evidence that the September 2014 communications would have allowed Plaintiff Fernandez to determine whether she was treated less favorably than other non-Plan investors. See Anderson Decl., Exs. C & D.

Defendants' motion for summary adjudication that the claims of prohibited transactions prior to November 2, 2014 (three years prior to the filing of the Fernandez complaint) are time-barred under ERISA is DENIED.

II. There is a Triable Issue of Material Fact as to Plaintiffs' Breach of Fiduciary Duty Claim

Defendants move for partial summary judgment on two of Plaintiffs' theories in support of their claim of breach of fiduciary duty, and separately argue that some of these purported breaches are time-barred under ERISA's statute of limitation. First, Defendants challenge Plaintiffs' theory that Defendants breached their fiduciary duty because they failed to offer an SVF in 2012. Plaintiffs claim that the money market funds (MMFs) Defendants offered instead were "imprudent investment options . . . unlikely to outperform their benchmarks, and laden with excessive fees" in violation of ERISA § 404(a)(1)(A).

Complaint, ¶¶ 75-76; see also Fernandez First Amended Complaint (FAC), ¶¶ 73-92. Second, Defendants move for summary judgment on Plaintiffs' claim for a breach of fiduciary duty to the extent it is based on Defendants' failure to "monitor the Plan's administrative arrangements," leading to excessive recordkeeping fees. Defendants' Cross-Motion for Partial Summary Judgment (Defs.' Mot.) at 10-11 (citing FAC ¶¶ 42-55, 59-72, 73-92).[5]

As stated above, an ERISA fiduciary must act for the benefit of plan beneficiaries with care, skill, prudence and diligence. 29 U.S.C. § 1104(a)(1)(B). "When applying the prudence rule, the primary question is whether the fiduciaries, '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.'" California Ironworkers Field Pension Trust v. Loomis Sayles & Co., 259 F.3d 1036, 1043 (9th Cir. 2001) (quoting Donovan v. Mazzola, 716 F.2d 1226, 1232 (9th Cir. 1983). Defendants' motion for partial summary judgment is DENIED as to one of Plaintiffs' breach of fiduciary duty theories and GRANTED as to the other. Defendants' motion for partial summary judgment is also DENIED to the extent they argue the breach of fiduciary duty claim is time-barred.

A. There is a Disputed Issue of Material Fact as to Whether Defendants Fulfilled Their Fiduciary Duty in Adequately Considering Their Investment Options

Defendants argue that the IC members acted as reasonably prudent fiduciaries when they considered but ultimately chose not

[5] Defendants do not seek summary judgment on Plaintiffs' fiduciary duty breach claim to the extent it is premised on Defendants' offering of a proprietary money market fund rather than a third-party money market fund.

to add an SVF in 2012, and subsequently added an SVF only in 2017. They also argue that the fact that an SVF performed better than an MMF does not create a triable issue. Plaintiffs respond that Defendants breached their duty because they only considered an SVF at a single meeting on August 14, 2012 and failed to engage in any "critical risk mitigation" at that time. They further argue that Defendants' ultimate action considering an SVF in 2016 and adding one in 2017 should have no bearing because it post-dates the commencement of this suit. Plaintiffs have shown that there is a triable issue of material fact in this regard.

Defendants' IC did not have an absolute duty, as a matter of law, to offer an SVF. The reasonably prudent fiduciary standard merely requires that fiduciaries reach a well-reasoned decision after weighing the risks and benefits and considering other alternatives. Wright v. Ore. Metallurgical Corp., 360 F.3d 1090, 1097 (9th Cir. 2004) (whether or not a fiduciary was prudent requires asking whether it "employed the appropriate methods to investigate the merits of the investment and to structure the investment"). "Whether a fiduciary acted prudently cannot be measured solely from the perspective of hindsight; rather, the question is whether the fiduciary conducted himself in the appropriate manner and considered the appropriate factors when making his decisions." Tibble v. Edison Int'l, 639 F. Supp. 2d 1074, 1114 (C.D. Cal. 2009) (Tibble I), aff'd, 711 F.3d 1061 (9th Cir. 2013), and aff'd, 729 F.3d 1110 (9th Cir. 2013), and aff'd, 820 F.3d 1041 (9th Cir. 2016), and vacated and remanded on unrelated grounds, 843 F.3d 1187 (9th Cir. 2016) (Tibble III).

Defendants argue that they considered adding an SVF as reflected in the August 14, 2012 meeting minutes. There, the IC noted its "war[iness] of stable value fund products" and chose to forego adding an SVF at that time. Rogers Decl., Ex. 18 at 2. The only other evidence Defendants proffer relating to 2012 – the deposition testimony of three witnesses — also refers to this single meeting. The IC "undertook a structural review of the Plan's investment lineup" in 2015 but the IC did not discuss adding an SVF until December 6, 2016. Anderson Decl., ¶ 22; see also Rogers Decl., Ex. 28 at FRI-0008789 (deferring SVF discussion). Only on December 6, 2016 did the IC request an in-depth education session on SVFs. This came after the Cryer complaint was filed on July 28, 2016. Rogers Decl., Ex. 30. Defendants' consultant, Callan, provided an SVF evaluation in August 2017. Id., Ex. 37.

A trier of fact could reasonably view the discussion in the August 14, 2012 meeting insufficient to disprove a breach of Defendants' fiduciary duties because the IC failed to adequately weigh the costs and benefits of an SVF against an MMF. George v. Kraft Foods Global, Inc., 641 F.3d 786, 795 (7th Cir. 2011) ("Despite all this discussion . . . we can find nothing in the record indicating that defendants ever made a decision on these matters – i.e., that they actually determined whether the costs of making changes . . . outweighed the benefits, or vice versa.")

Defendants' evidence of initiating a multi-phase review in 2015 does not show that they began considering an SVF in 2015 prior to the filing of this litigation and thus is insufficient to disprove a breach of their fiduciary duties. While Defendants have established that a multi-phase review of the Plan's investment menu began in early 2015, see Rogers Decl., Ex. 7 at 73:25-74:2 (noting a review date starting in 2015) and Anderson Decl., ¶¶ 21-22 (same), Defendants' evidence of the IC's consideration of SVFs specifically post-dates the filing of the Cryer complaint on July 28, 2016. The earliest discussions of an SVF are reflected in the December 6, 2016 meeting minutes. Taking all evidence in the light most favorable to Plaintiffs as the non-moving parties, a reasonable trier of fact could infer that an SVF was not adequately considered.

Defendants' case law is distinguishable. Just as a defendant's failure to offer an SVF does not establish, as a matter of law, a breach of the defendant's fiduciary duty, the mere consideration of an SVF along with an MMF does not necessarily absolve the defendant from liability for a breach. In Bell v. Pension Committee of ATH Holding Co., LLC, 15-cv-02062-TWP-MPB, 2017 WL 1091248, at *5 (S.D. Ind. Mar. 23, 2017), the court dismissed the plaintiffs' breach of fiduciary duty claim for failure to consider the use of an SVF instead of an MMF because it was conclusory and plaintiffs did not allege sufficient facts to survive a motion to dismiss. Bell, 2017 WL 1091248, at *5. Here, there is evidence that an SVF was discussed, but the question for purposes for summary judgment now is whether there was adequate consideration for Defendants to have fulfilled their fiduciary duties as a matter of law. In Tibble I, 639 F. Supp. 2d at 1118, the factual circumstances differed from the facts here. The funds at issue in Tibble I were not limited to proprietary mutual funds as here. See Tibble I, 639 F. Supp. 2d at 1081. Moreover, Tibble I ultimately held that the MMF "performed satisfactorily over the relevant period." Id. at 1118.

Because the reasonableness of a fiduciary's actions is a fact-intensive inquiry, the Court must take into account all factors and circumstances. Terraza v. Safeway, Inc., 241 F. Supp. 3d 1057, 1078 (N.D. Cal. 2017) ("[T]he prudence inquiry is 'fact intensive.' And, because it involves the application of a reasonableness standard, '[r]arely will such a determination be appropriate on a motion for summary judgment.'") (internal citations omitted). "[I]t is a question for a fact finder to decide whether it is prudent" in the context of all of the defendants' actions. Wildman v. Am. Century Servs., LLC, 16-cv-00737-DGK, 2018 WL 2326627, at *5 (W.D. Mo. May 22, 2018) (defendant's argument that offering a specific type of fund was prudent is unavailing because "Plaintiffs argue Defendants breached their duties through an array of conduct."). Defendants' motion for summary adjudication on this theory is DENIED.

B. There Is No Disputed Issue Over the Reasonableness of the Administrative Committee's Oversight of the Plan's Recordkeeping Efforts and Reasonableness of Fees

Defendants also move for summary adjudication on Plaintiffs' claim of breach of fiduciary duty to the extent it is based on the AC's oversight of the recordkeeping arrangement and fees. Defendants established that their AC had in place a process to determine and subsequently oversee recordkeeping fees. The AC was charged with both recordkeeping and "regularly insuring that the Plan is competitive . . . [by] looking at the Plan relative to the market. . . ." Rogers Decl., Ex. 2 at 18:15-20. In 2005, the AC had solicited a bid for various recordkeeping services through a Request for Proposal (RFP). Anderson Decl., ¶ 6. It ultimately chose Schwab. Anderson Decl., Ex. A (Dec. 1, 2005 Service Agreement). The fee was established at seventy dollars per participant per year. Rogers Decl., Ex. 2 at 153:24-155:7. Around 2011, there were discussions of soliciting bids again. Id. at 150:21-24. The AC issued another RFP in 2012 as part of its responsibilities to solicit and evaluate candidates to provide recordkeeping services. See id. at 151:10-24, 161:23-165:8, 178:23-179:3. With Callan's assistance, the AC evaluated four recordkeeper candidates. Id. During this process, Callan "identif[ied] . . . [a] list[] of suitable recordkeepers for [the AC] to consider." Id. at 151:10-24. Callan also drafted a questionnaire and analyzed the responses for the AC's consideration. Id. at 162:1-21. The AC ultimately switched from Schwab to Bank of America Merrill Lynch (BAML) and secured a lower fee of forty-eight dollars per participant in 2014. See Rogers Decl., Ex. 22 at 1–3; Ex. 24.

Plaintiffs argue that, despite this process, the AC did not engage in any meaningful and real evaluation of recordkeeping fees. Specifically, Plaintiffs complain that Defendants chose BAML over JP Morgan Chase (JPM) although JPM quoted a lower price. Plaintiffs also argue that Defendants' recordkeeping fees and the oversight of such fees were unreasonable because the AC had "criteria for selecting a recordkeeper . . . [that] were skewed to favor Franklin Proprietary Funds." Plaintiffs' Opposition to Defendants' Cross-Motion (Pltfs' Opp.) at 11. However, Plaintiffs' citations do not support these assertions and appear to be misplaced. See Defendants' Reply ISO their Motion for Partial Summary Judgment (Defs.' Reply) at 7, n.9 (summarizing discrepancies).

Further, Defendants present evidence that the Plan's recordkeeping fees are reasonable. Defendants' expert, Gissiner, opines that the administrative expenses incurred by the Plan are comparable to those of similarly-sized plans. See Gissiner, Ex. 1 (Gissiner Expert Report), ¶¶ 40-47. Plaintiffs have not provided any contrary admissible evidence and appear to concede the point. See Pltfs' Opp. at 1 (noting they "concede[] in part" the recordkeeping fees issue without specifying which part), see also id. at 11 (disputing reasonableness of the AC's process but making no reference to excessiveness of fees).

Because Plaintiffs have identified no evidence that the seventy dollars per participant fee was not reasonable and not comparable to similar plans, and appear to concede that the fees were reasonable, it follows that Plaintiffs have not presented evidence that they were harmed by any alleged "unreasonable" recordkeeping process. Defendants' motion for partial summary adjudication of the reasonableness of the recordkeeping fees is GRANTED. The breach of fiduciary duty claim may not rest on this theory.

C. Plaintiffs' Breach of Fiduciary Duty Claim is not Time-Barred

Defendants separately argue that Plaintiffs' breach of fiduciary duty claim is time-barred. Any ERISA claims alleging "a fiduciary's breach of any responsibility, duty, or obligation" must be brought within "six years after . . . the date of the last action which constituted a part of the breach or violation" unless there was evidence of "fraud or concealment." 29 U.S.C. § 1113(1)–(2). However, there is a "continuing duty" to manage and review the funds the Plan invests in, and "'a fiduciary's allegedly imprudent retention of an investment' is an event that triggers a new statute of limitations period." Tibble III, 843 F.3d at 1192 (citing Tibble v. Edison Int'l Inc., 135 S. Ct. 1823, 1826 (2015)); see also In re Northrop Grumman Corporation ERISA Litig., 06-cv-06213, 2015 WL 10433713, at *26 (C.D. Cal. Nov. 24, 2015)(noting that plaintiffs' breach of fiduciary duty claim was not time-barred merely because the funds were added to the plans "outside the limitations period" in that the yearly annual review and approval process within the six-year period triggered a new statute of limitations period).

Here, Defendants concede that "Plaintiffs can pursue [their] fiduciary claim[]" if the "prudent fiduciary would have removed the Fund based on performance or other concerns after July 28, 2010." Defs.' Mot. at 18. Plaintiffs have introduced an expert report of Samuel Halpern, who holds the opinion that "a Governing Fiduciary, observing Reasonable Standards, would have considered replacing [each of the Funds at issue here] by conducting a full blown search across the marketplace." Boyko Decl., Ex. 29-A (Halpern Report), at 24-25. Halpern then identifies year-end reports by Callan dating back to 2010, and concludes that, along with other factors, "a Governing Fiduciary conducting an open manager search according to Reasonable Standards would not have continued retaining any of the Proprietary Funds . . . after receiving and acting on each respective Callan Report." Id.

Defendants had a continuing fiduciary duty. Defendants have not proved that Plaintiffs' breach of fiduciary duty claim is barred even as to the Funds that were added prior to July 28, 2010 (six years before filing the Cryer complaint). Defendants' motion for summary adjudication that the breach of fiduciary claim is barred by the ERISA statute of limitation is DENIED.

CONCLUSION

Plaintiff Fernandez's Motion for Partial Summary Judgment is DENIED. Defendants' Cross-Motion for Partial Summary Judgment is also DENIED as to the prohibited transactions claims. Defendants' motion for partial summary judgment regarding two of the theories supporting Plaintiffs' breach of fiduciary duty claim is GRANTED regarding the recordkeeping fees theory and DENIED regarding the theory of failure to adequately consider the addition of an SVF. Defendants' motion for partial summary judgment that the statute of limitations bars certain prohibited transaction claims and part of the breach of fiduciary duty claim is also DENIED.

IT IS SO ORDERED.

Dated: November 16, 2018

CLAUDIA WILKEN
United States District Judge