

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION**

STEVE MARTIN, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 07-cv-1009
)	
CATERPILLAR, INC., CATERPILLAR INC.)	
BENEFIT FUNDS COMMITTEE, and)	
CATERPILLAR INVESTMENT)	
MANAGEMENT, INC.,)	
)	
Defendants.)	

ORDER

Before the Court are the Motion to Dismiss filed by Defendants [Doc. 71] and the Motion to Strike Extraneous Material filed by Plaintiffs [Doc. 79]. For the reasons that follow, the Motion to Dismiss is DENIED and the Motion to Strike Extraneous Material is DENIED AS MOOT.

BACKGROUND

Plaintiffs have filed a class action lawsuit as participants in a Retirement Plan governed by the Employee Retirement and Income Security Act, commonly known as ERISA. 29 U.S.C. § 1001, *et seq.* They generally allege that Defendants, who are plan administrators, breached fiduciary duties by pursuing investment options with excessive and unreasonable fees, by making investments for their own benefit, and by failing to make certain disclosures to plan participants.

The retirement plan offered by Defendants (commonly called a “401K plan”) allows employees to contribute pre-tax earnings in various investment vehicles. A significant portion of

plan investments are placed in the Caterpillar Investment Trust (referred to as the “Master Trust”) which also contains funds from other Caterpillar sponsored contribution plans. The Master Trust, in turn, allows plan participants to choose from 17 Preferred Groups of Mutual Funds which are investment companies sponsored by Caterpillar Investment Management Ltd. (CIML), a wholly owned subsidiary of Caterpillar, Inc., which acts as an investment advisor.

Plaintiffs first allege that Defendants breached their fiduciary duties by charging excessive fees, by collecting fees to manage the funds, and by collecting other fees in order to participate in “hidden revenue sharing transfers” (Second Amended Complaint [SAC], ¶ 35). Plaintiffs further allege that Defendants collect fees for administrative costs even though such costs should not be borne by plan participants (SAC ¶ 42).

With respect to CIML, Plaintiffs allege that it was created with money invested by plan participants in order to generate a profit for Caterpillar (SAC ¶ 44). Plaintiffs next contend that Defendants invested in a preferred group of mutual funds operated by CIML in order to generate a profit for Caterpillar (SAC ¶ 44). CIML in turn hired others to manage the funds, thus requiring plan participants to pay duplicative fees to CIML and these other sub-managers (like, for example, McKinley Capital Management, mentioned above) (SAC ¶ 47).

Plaintiffs further allege that Defendants failed to reap the benefit of various types of revenue that the Plan generates in the course of investing monies. This revenue includes finders’ fees given to Plan administrators for investing in certain funds or with certain companies. Additionally, Plaintiffs allege that Defendants breached their duty by investing funds in high fee, instead of low fee, investment vehicles, by paying excessive fees for “actively managed mutual funds” and “closet index funds” without reaping any benefit, and by charging excessive fees for investment in Caterpillar Stock funds, which should be minimal (SAC ¶ 51). Besides these

breaches in the manner fund assets are invested, Plaintiffs allege that Defendants concealed material information regarding the fees it charges. In particular, Plaintiffs allege that Defendants failed to disclose their revenue sharing agreements. In Counts I and II, Plaintiffs allege that Defendants violated ERISA sections 502(a)(2) and 502(a)(3).

Defendants have filed a Motion to Dismiss in which they argue that the disclosures made by Defendants are consistent with ERISA and that Plaintiffs' demands for additional disclosures are not warranted by the statute. To support this claim, Defendants have attached various reporting documents including an annual report filed with the Securities and Exchange Commission (Defs' Resp. Ex. 1), a Prospectus containing information on Defendants' preferred groups of mutual funds (Defs' Resp. Ex. 2), a 2005 annual report on the performance of these preferred groups of mutual funds (Defs' Resp. Ex. 3), a copy of Defendants' 401K plan information (Defs' Resp. Ex. 4), and a summary plan description (SPD) and prospectus (Defs' Resp. Ex. 5) (in addition to other documents). Defendants next argue that safe harbor provisions of ERISA relieve them of any liability with respect to alleged breaches of fiduciary duties. Defendants finally argue that Plaintiffs generally fail to state a claim upon which relief may be granted and that the claims are not well-pleaded in a manner consistent with Federal Rule of Civil Procedure 8(a).

Defendants and Plaintiffs also have referred the Court to various other District Court opinions which have dealt with substantially similar allegations [Doc. 86]. In addition, Plaintiffs have provided supplemental authority in support of their position [Docs. 87, 88, and 95].

In addition to the Motion to Dismiss, Plaintiffs seek an order striking the extraneous material attached to the Motion to Dismiss.

STANDARD

In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must view a complaint in a light most favorable to the plaintiff. Williams v. Ramos, 71 F.3d 1246, 1250 (7th Cir. 1995). The Court must accept all well-pleaded factual allegations and draw all reasonable inferences from those facts in favor of the plaintiff. Richards v. Kiernan, 461 F.3d 880, 882 (7th Cir. 2006). A plaintiff is not required to plead extensive facts, legal theories, or to anticipate defenses. Massey v. Merrill Lynch and Co., Inc., 464 F.3d 642, 650 (7th Cir. 2006). However, a plaintiff must “provide the grounds of his entitlement to relief” that are “more than labels and conclusion [] [or] a formulaic recitation of the elements of a cause of action.” Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1964-1965 (2007) (citations and editing marks omitted). In particular, “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Id. at 1965.

DISCUSSION

Motion to Dismiss

Defendants first argue that Plaintiffs’ disclosure claims fail to state a claim because Defendants have made all disclosures required by ERISA. Specifically, Defendants argue that because they complied with the disclosure requirements contained in regulations, they cannot be liable for failing to make the disclosures that Plaintiffs advocate. See 29 U.S.C. § 1021, et seq.; 29 C.F.R. § 2520.101-1, et seq. In response, Plaintiffs do not argue that Defendants failed to make the disclosures required by the statute; rather, they argue that Defendants’ fiduciary duties require the reporting of additional material information, like revenue sharing (that would indicate a conflict of interest).

In Counts I and II, Plaintiffs seek remedies contained in ERISA §§ 502(a)(2) and (3) for breach of fiduciary duties. 29 U.S.C. § 1132. These sections provide that a plan participant may commence a civil action for relief pursuant to ERISA § 409 or for equitable relief. 29 U.S.C. § 1132(a)(2-3). ERISA § 409 provides, in turn,

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a).

These “responsibilities, obligations, or duties” are identified in ERISA § 404. 29 U.S.C. § 1104.

In relevant part, this section provides:

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;

(B) 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 a like character and with like aims

Id. at § 1104(a)(1)(A-B).

To prove breach of fiduciary duty under ERISA, a plaintiff must establish “(1) that the defendants are plan fiduciaries; (2) that defendants breached their fiduciary duties; and (3) that

their breach caused harm to the plaintiffs.” Kannapien v. Quaker Oats Co., 507 F.3d 629, 639 (7th Cir. 2007). Plaintiffs have alleged that Defendants are fiduciaries, that they breached their fiduciary duties, and that they were harmed as a result. Specifically, Plaintiffs allege that Defendants have acted in a manner to benefit themselves and third-parties to the detriment of plan participants – Plaintiffs have thus appeared to state a claim.

Defendants nonetheless first argue that Plaintiffs’ disclosure claims should be dismissed because ERISA does not require the level of disclosure that Plaintiffs demand. Defendants argue that they have made all disclosures required by ERISA and that the regulations, in their current form, do not require the detailed reporting that Plaintiffs require. See 29 U.S.C. §§ 1021-1031. To support this claim, Defendants rely extensively on an opinion by District Judge John C. Shabaz in a factually similar case. Hecker v. Deere & Co., 496 F.Supp.2d 967 (W.D. Wis. 2007). On the claim that “defendants failed to disclose the fact that Fidelity Research shared part of the fees it received with its corporate sibling Fidelity Trust,”¹ Judge Shabaz held that the current regulations and statutes do not require such disclosure. Id. at *4. Judge Shabaz further noted that recent proposals to change the regulations to include the type of reporting plaintiffs seek also “make it apparent that present regulations do not require it.” Id. Finally, Judge Shabaz held that general ERISA fiduciary duties also do not require additional disclosures. Id.

Plaintiffs do not allege that Defendants failed to make disclosures required by ERISA and the Department of Labor (DOL), the entity that enforces and interprets ERISA. Rather, as Defendants point out, Plaintiffs seek disclosures above-and-beyond what current regulations require. In Jensen v. SIPCO, Inc., the Eighth Circuit Court of Appeals considered a similar question of whether an entity and plan governed by ERISA must provide more information than ERISA and the DOL require. The Court first noted that: “Adequate disclosure to employees is

¹ This “revenue sharing” is the same type of claim Plaintiffs make in this case.

one of ERISA's major purposes. Recognizing that employee benefit plans are usually lengthy and highly technical documents, Congress required plan administrators to furnish SPDs [Summary Plan Documents] to each plan participant and beneficiary." 38 F.3d 945, 952 (8th Cir. 1994). In light of the extensive statutory scheme, the Court found that the failure to mandate that certain information be included in an SPD "cannot be an inadvertent omission." Thus, the Court held that it is not a breach of fiduciary duties to fail to include information that is not required by statute. This is similar to Judge Shabaz's conclusion that defendants do not breach their fiduciary duties by failing to make more disclosures than are required by statute.

This Court agrees that Defendants do not breach their fiduciary duties by failing to make disclosures regarding revenue sharing that are not required by the statutory scheme promulgated by Congress and enforced by the DOL.² This conclusion is buttressed by the fact that regulators are currently considering whether to require the disclosures that Plaintiffs demand. This conclusion, however, does not necessitate dismissal of the Complaint since inadequacy of disclosures is only one aspect of Plaintiffs' claim. Parenthetically, to support the assertion that Defendants have made all the required disclosures, a factual assertion, they have attached various documents to the Motion to Dismiss. Plaintiffs seek to strike these documents because they are "redundant, immaterial, impertinent, or scandalous" pursuant to Rule 12(f). Plaintiffs in particular challenge the veracity of the attached documents. In response, Defendants argue that because the documents are referenced in the SAC, they become a part of the pleading and may

² To counter this argument, Plaintiffs rely heavily on Siemers v. Wells Fargo & Co., 2007 WL 760750 (N.D. Ca. 2007). That case is easily distinguishable because during the relevant time period, the disclosures that were alleged to be inadequate were the subject of a "cease and desist" order issued by the Securities and Exchange Commission. In any event, Plaintiffs have not established that the defendant brokerage firm in Siemers was subject to the same reporting requirements as Defendants are in this case.

be considered by the Court. Rule 12(d) provides that if matters outside of the pleadings are “presented to and not excluded by the court” the motion to dismiss must be converted into a motion for summary judgment. Defendants are accurate in noting that material referred to in a complaint, but not attached thereto, which are attached to a motion to dismiss may be considered by the Court without converting the motion. 188 LLC v. Trinity Industries, Inc., 300 F.3d 730, 735 (7th Cir. 2002) (“It is also well-settled in this circuit that documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff’s complaint and are central to his claim. Such documents may be considered by a district court in ruling on the motion to dismiss. This is a narrow exception to the general rule that when additional evidence is attached [to] a motion to dismiss, the court must either convert the 12(b)(6) motion into a motion for summary judgment under Rule 56 or exclude the documents attached to the motion to dismiss and continue under Rule 12.” (quotation marks, editing marks, and citation omitted)).

However, the Court is not convinced that the documents are “central” to Plaintiffs’ claims such that they are automatically a part of the pleadings. To be sure, Plaintiffs do complain that adequate reporting is lacking and certainly the actual reports would be relevant; however, Plaintiffs’ central complaint is that Defendants are breaching their fiduciary duties by failing to act in their best interests and by charging excessive fees in order to generate a profit for themselves. That Defendants make certain public filings as required by ERISA does not appear relevant to this central claim. Moreover, while Plaintiffs do briefly quote from the documents, it is not equivalent to quoting from a contract in a breach of contract case – Plaintiffs do not attempt to adopt the documents. In fact, Plaintiffs dispute the accuracy and veracity of the documents – assertions that should be tested at the summary judgment or trial stage. See Tierney v. Vahle, 304 F.3d 734, 739 (7th Cir. 2002) (indicating that if documents attached “require[]

discovery to authenticate or disambiguate” the court should convert the 12(b)(6) motion to a Rule 56 motion). For these reasons, the Court will exclude the documents attached to the Motion to Dismiss and will not convert the Motion into a Motion for Summary Judgment. This conclusion renders moot Plaintiffs’ Motion to Strike.

To address the other central aspect of Plaintiffs’ breach of fiduciary claim, Defendants rely on the safe harbor provisions of ERISA § 404(c). This section provides:

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account . . . no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant’s or beneficiary’s exercise of control 29 U.S.C. § 1104(c)(1)(A)(ii).

The defense contained in § 404(c) is affirmative, See George v. Kraft Foods Global, Inc., 2007 WL 853998, *4 (S.D. Ill. 2007); Woods v. Southern Co., 396 F.Supp.2d 1351, 1367 (N.D. Ga. 2005); In re Reliant Energy ERISA Litigation, 336 F.Supp.2d 646, 669 (S.D. Tex. 2004) (citing In re Unisys Sav. Plan Litig., 74 F.3d 420, 446 (3rd. Cir. 1996) and Donovan v. Cunningham, 716 F.2d 1455, 1467 n.27 (5th Cir. 1983)), as such Plaintiffs have no obligation to negate the defense, Mosely v. Board of Educ. of City of Chicago, 434 F.3d 527, 533 (7th Cir. 2006), and it is “incorrect” to resolve such a defense on a motion to dismiss. McCready v. eBay, Inc., 453 F.3d 882, 892 n.2 (7th Cir. 2006). It is also far from clear that Plaintiffs have established this defense in the SAC as Defendants contend. At the very least, Defendants would have to prove that Plaintiffs in fact exercised the control contemplated by § 404. They have not done so. As Plaintiffs are alleging more than just the failure to provide a more detailed report and because Defendant’s may not rely on the safe harbor provision of ERISA at this stage, the SAC will not be dismissed on this ground.

Defendants additionally contend that the SAC fails to comply with Federal Rule of Civil Procedure 8(a)(2) by failing to provide enough detail as required by the Supreme Court in Twombly, supra. Defendants overstate the reach of Twombly and the effect on the notice pleading requirements of Rule 8. Plaintiffs need only put Defendants on notice of the claim against them and need not plead with the level of specificity that Defendants appear to demand. See Windy City Metal Fabricators & Supply, Inc. v. CIT Technology Financing Services, Inc., 536 F.3d 663, 667 (7th Cir. 2008). It is apparent from Defendants' brief that they are fully aware of the claim against them, whether or not the claim is viable must be tested at the summary judgment stage and not at the motion to dismiss stage. As such the Motion to Dismiss is DENIED.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss [Doc. 71] is DENIED and Plaintiffs' Motion to Strike [Doc. 79] is DENIED AS MOOT. This matter is referred to Magistrate Judge Gorman for further pre-trial proceedings.

Entered this 25th day of September, 2008

s/ Joe B. McDade

JOE BILLY McDADE
United States District Judge