UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FRED BAUMEISTER, KENNETH BERKEIHISER, DWAYNE CLAUSER, JOHN CONLIN, CARL S. LEHMAN, GREG MATTIONI, and WILLIAM RIALE, individually and on behalf of themselves and all others similarly situated, Plaintiffs, v. EXELON CORPORATION, et al., Defendants.	Case No. 21-cv-6505 Judge John Robert Blakey

ORDER

Plaintiffs, participants and beneficiaries of the Exelon Corporation Employee Savings Plan, filed a putative class action suit alleging that Defendants, fiduciaries of the Plan, breached their fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA"). Defendants move to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). The Court grants Defendants' motion, [30], and dismisses the complaint without prejudice. Plaintiffs may file an amended complaint by October 31, 2022.

STATEMENT

Plaintiffs Fred Baumeister, Kenneth Berkeihiser, Dwayne Clauser, John Conlin, Carl S. Lehman, Greg Mattioni, and William Riale are participants and beneficiaries of the Exelon Corporation Employee Savings Plan ("the Plan").

Defendants Exelon Corporation, the Investment Oversight Committee, the Board of Directors of Exelon Corporation, the Corporate Investment Committee, Vanessa Hecht, Jennifer Franco, Douglas J. Brown, and Jane and John Does 1–30 are all alleged fiduciaries of the Plan. [1] ¶ 5.

Plaintiffs bring this case as a proposed class action under §§ 406, 408, 409, and 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), alleging breach of fiduciary duty and related derivative claims.

Defendants now move this Court to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that Plaintiffs have failed to state a claim. [30].

Plaintiffs' complaint states a single count of breach of fiduciary duty, as well as two derivate counts: one alleging failure to monitor and the other alleging co-fiduciary liability. [1]. Inexplicably, Plaintiffs decided to lump all of the alleged breaches into a single count. *See* Fed. R. Civ. P. 10(b) ("If doing so would promote clarity, each claim founded on a separate transaction or occurrence… must be stated in a separate count or defense."). Nevertheless, a review of the entire complaint confirms that the allegations fail to meet the plausibility threshold required to state a claim.

The plausibility standard of *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662, 868 (2009), applies in ERISA breach of fiduciary duty cases through a context-specific inquiry. *Fifth Third Bancorp v. Dudenhoeffer,* 573 U.S. 409, 425 (2014) ("Courts apply a 'careful, context-sensitive scrutiny of a complaint's allegations' to 'divide the plausible sheep from the meritless goats.'").

As highlighted by the parties' notices of supplemental authority, recent developments affect this Court's consideration of the plausibility standard. [51]-[56]. Earlier this year, the Supreme Court, in *Hughes v. Northwestern University*, cast doubt on the Seventh Circuit's precedent in this area, finding that the court had placed too onerous a burden on plaintiffs. 142 S. Ct. 737 (2022). The Seventh Circuit interpreted *Hughes* narrowly in its recent decision in *Albert v. Oshkosh*, however, reaffirming prior circuit precedent and further clarifying the applicable pleading standard. 2022 WL 3714638 at *6. Because the claims presented in *Albert* closely parallel those asserted here, *Albert* squarely governs the requisite context-specific inquiry.

In *Albert v. Oshkosh*, plaintiff Albert pled three counts of breach of fiduciary duty by the Oshkosh Corporation's 401(k) plan fiduciaries: the first based upon excessive recordkeeping costs, the second based upon excessive investment management expenses, and the third based upon the costs of advisory services for plan participants. *Id.* at *5. All three counts relied upon comparisons between Oshkosh's plan-related costs and fees and the costs and fees of other purportedly comparable 401(k) plans. *Id.* The Seventh Circuit affirmed the district court's dismissal of all three of Albert's breach of fiduciary duty claims. *Id.* at *5–*8.

Albert's complaint featured a series of charts comparing the Oshkosh plan's expenses and fees to the rates paid by selected comparator plans. *Id.* Albert argued that these comparator charts created a reasonable inference that plan fiduciaries had violated their duties of prudence and loyalty by outspending the comparators. *Id.* Albert provided the court with no rationale as to how he selected comparator funds, however, failing to explain whether the funds performed in similar ways, relied on similar strategies, or in any other way resembled the challenged Oshkosh funds such that a fee comparison would be appropriate. The Seventh Circuit emphasized that higher fees are often justified by higher quality services and thus, without more, the court could not reasonably infer breach of fiduciary duty from the fee comparisons alone. *Id.*

Here, Plaintiffs allege three substantially similar theories of breach and offer comparator charts nearly identical to those used in Albert. [1] ¶¶111, 112, 154. Like Albert, Plaintiffs fail to allege facts to plausibly state a claim for breach based upon the selected comparator data. On the matter of recordkeeping fees, Plaintiffs plead no facts to show whether the selected comparators receive recordkeeping services of a similar nature and quality to those offered by the Plan's recordkeeper. Similarly, on the matter of investment advisory services, Plaintiffs plead no facts to show that the services offered by comparator plans are comparable to those offered by the Plan's selected service provider. Thus, *Albert* directs that any claims based upon these theories must be dismissed.

Plaintiffs, however, come closer to stating a claim with regard to fund management costs. Along with tables comparing the fund management costs of Exelon's plan with other selected plans, Plaintiffs assert that the comparator funds are more affordable than Exelon's challenged funds, and they also feature "substantially similar investment mixes," "the same or better performance," and "substantially similar investment strategies and underlying assets." [11] ¶ 111–112. These kinds of factual similarities, if supported by more than conclusory remarks, would provide the context necessary for Plaintiffs' claims. Plaintiffs further provide performance data over 1-, 5-, and 10-year periods to illustrate that the higher fee funds Exelon offered were *not* justified by higher performances than comparators over time. *Id.* ¶111. Nevertheless, in the absence of facts to show that the comparator funds are appropriate benchmarks, the comparative performance data remains insufficient to state a claim.

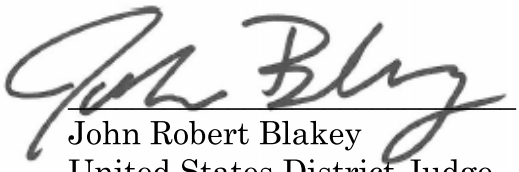
Plaintiffs' single count of breach also suggests that each theory of breach of fiduciary duty described thus far represents a violation of plan fiduciaries' duty of loyalty. [1] ¶¶189–210. But Plaintiffs plead no facts showing a conflict of interest or any other disloyal behavior. As the Seventh Circuit explained in *Albert*, "plaintiffs must do more than recast purported breaches of fiduciary duty as disloyal acts." *Albert* at *3 (quoting *Albert v. Oshkosh*, 2021 WL 3932029 (E.D. Wisc. 2021)). Plaintiffs therefore fail to plead a plausible claim of breach of the duty of loyalty by

any Defendant. Additionally, because Plaintiffs' failure to monitor and co-fiduciary liability claims stem from the alleged breach of the duties of prudence and loyalty, those claims similarly fail as pled.

Consistent with *Albert*, this Court grants Defendants' motion to dismiss [30] and dismisses Plaintiffs' complaint for failure to state a claim. The dismissal is without prejudice, however, and the Court gives Plaintiffs leave to replead in accordance with the requisite *Albert* standard, to the extent they can do so consistent with Rule 11.

Dated: September 22, 2022

Entered:



John Robert Blakey
United States District Judge