UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PAUL ENOS and DAVID FREITAS, individually and as Representatives of a Class of Participants and Beneficiaries on Behalf of the Adidas Group 401(k) Savings and Retirement Plan,

Plaintiffs,

v.

ADIDAS AMERICA, INC.,

Defendant.

Case No. 3:19-cv-01073-YY

FINDINGS AND RECOMMENDATION

YOU, Magistrate Judge:

FINDINGS

In this putative class action, plaintiffs Paul Enos and David Freitas, former participants in defendant adidas's 401K Savings and Retirement Plan ("the Plan"), allege a claim for breach of the duties of loyalty and prudence in violation of 29 U.S.C. § 1104(a)(1)(A-B) and (D). Second Am. Compl., ECF #62. Specifically, plaintiffs contend that "beginning in 2013 or earlier, and continuing to at least 2018, adidas maintained one of the most expensive 401K plans in the country compared to applicable benchmarks and peer groups," thereby "breach[ing] the fiduciary duties owed by adidas to Plan participants and beneficiaries." *Id.* ¶¶ 3, 5.

Defendant has filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on grounds that plaintiffs lack standing and have failed to state a claim for relief under applicable caselaw. Mot. Dismiss, ECF #67. The motion should be granted for the reasons explained below.[1]

I. Constitutional Standing

A. Relevant Law

Federal courts are courts of limited jurisdiction. *See Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) ("Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'") (quoting U.S. Const. art. III, § 2). An "essential element" of the limitations on this court's jurisdiction is that "any person invoking the power of a federal court must demonstrate standing to do so." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The "irreducible constitutional minimum of standing" requires the party invoking federal jurisdiction to establish three elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61 (simplified).

These are "not mere pleading requirements but rather an indispensable part of the plaintiff's case [and] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence

[1] This motion is suitable for decision without oral argument pursuant to LR 7-1(d)(1).

required at the successive stages of the litigation." *Id.* at 561 (citations omitted). "[T]he plaintiff bears the burden of proof" that these elements exist. *Id.*

The Ninth Circuit has adopted the "class certification" approach to standing: "once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met." *Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015). This comports with the Supreme Court's holding that "[t]here is no ERISA exception to Article III," and "plaintiffs who have no concrete stake in [a] dispute . . . lack Article III standing." *Thole v. U.S. Bank. N.A.*, 140 S. Ct. 1615, 1622 (2020). Thus, plaintiffs must initially establish their individual standing[2] for this case to proceed further.

B. Analysis

In their Second Amended Complaint, plaintiffs allege that "the administrative fees charged to Plan participants is near or greater than 90 percent of its comparator fees." Second Am. Compl. ¶ 26, ECF #62. Plaintiffs contend that a "prudent fiduciary would have investigated why the adidas plan expenses were excessive and above the 90th percentile of comparator plan expenses." *Id.* ¶ 28. As an example of allegedly excessive fees, plaintiffs cite to the T. Rowe Price Target Date investment option offered through the Plan. *Id.* ¶ 29. During the relevant period, 2013 through 2018, T. Rowe Price Target Date investment options composed roughly two-thirds of the assets in the Plan, yet constituted over 71% of the total Plan investment fees

[2] Defendant does not dispute that plaintiffs hold standing under ERISA. Section 1132(a)(2) allows participants or beneficiaries of plans to sue for "appropriate relief," under Section 1109, which establishes personal liability for an ERISA fiduciary for breaches of fiduciary duties that result in losses to the plan. *See* 29 U.S.C. § 1109(a), § 1132(a)(2); Second Am. Compl. ¶ 5, ECF #62.

that participants paid in 2017. *Id.* ¶ 29, 31. Plaintiffs contend that this amount is excessive and epitomic of defendant's plan-wide misconduct, and claim that the value of their 401(k) retirement accounts would have been significantly higher had defendants prudently adjusted investments to account for losses. *Id.* ¶¶ 39-40, 43, 45.

Crucially, plaintiffs have invested in just two out of roughly twenty-five Plan offerings: the T. Rowe Price Retirement 2030 target date fund and the Eaton Vance Parametric Structured Emerging Markets investment option ("Eaton Vance option"). Second Am. Compl. ¶¶ 40, 45. Yet plaintiffs seek relief for "*all* losses resulting from adidas's breaches of fiduciary duty," including losses for plans they did not personally invest in. *Id.* ¶ 5 (emphasis added). Defendant argues that plaintiffs lack constitutional standing for any purported injuries to funds in which they held no investments. Mot. Dismiss 19, ECF #67.

The Ninth Circuit has not directly addressed the question presented here—whether plaintiffs who have invested in some funds that allegedly charge excessive fees hold Article III standing to challenge, on behalf of a putative class, alleged issues with other funds the plaintiffs personally did not invest in. However, a majority of other courts have found constitutional standing under similar circumstances; the crux within these cases is that the plaintiffs asserted *plan-wide* misconduct that reached beyond their individualized injury.[3] *See*, *e.g., Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591-92 (8th Cir. 2009) (holding that an ERISA plaintiff "may be able to assert causes of action which are based on conduct that harmed him, but which sweep

[3] As a practical matter, this conclusion makes sense. ERISA lawsuits may be efficiently alleged through class actions because some companies may offer plans with hundreds of investment options. *See, e.g.*, G*lass Dimensions, Inc. v. State Street Bank & Trust Co.*, 285 F.R.D. 169 (D. Mass. 2012) (involving a plan in question with 260 investment choices, of which the plaintiffs personally only held three). Forcing plaintiffs who allege widespread misconduct affecting all investment options to find named plaintiffs who hold every affected offering is arguably contrary to the purpose of a class action suit.

more broadly than the injury he personally suffered"); *Cassell v. Vanderbilt Univ.*, No. 3:16-CV-2086, 2018 WL 5264640, at *3 (M.D. Tenn. Oct. 23, 2018) ("Once an individual has alleged a distinct and palpable injury to himself, he has standing to challenge a practice even if the injury is of a sort shared by a large class of possible litigants.") (citing *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410 (6th Cir. 1998)); *Glass Dimensions, Inc. v. State Street Bank & Trust Co.*, 285 F.R.D. 169, 175 (D. Mass. 2012) (allowing an ERISA plaintiff to sue for injuries on behalf of a class because of an injury "rooted in Defendants' conduct in managing all [] lending funds as a group"); *Moreno v. Deutsche Bank Americas Holding Corp*, 15-CV-09936-LGS, 2017 WK 3868803 (S.D.N.Y. 2017) (allowing ERISA plaintiffs to sue on behalf of a putative class).

Defendant objects to this interpretation with numerous arguments. It primarily cites to *Thole*, in which the Supreme Court held that ERISA plaintiffs that have not sustained any monetary injury lack standing to sue for generalized grievances associated with the plan. 140 S. Ct. at 1622. But *Thole* is distinguishable because the case involved litigants who held a defined-benefit retirement plan; plaintiffs here hold a defined-contribution plan. As Justice Kavanaugh explained in *Thole*, this distinction has "decisive importance":

> In a defined-benefit plan, retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions. By contrast, in a defined-contribution plan, such as a 401(k) plan, the retirees' benefits are typically tied to the value of their accounts, and the benefits can turn on the plan fiduciaries' particular investment decisions.

Id. at 1618.

Unlike the *Thole* litigants, whose defined-benefit payments remained unaffected by the actions of plan fiduciaries, plaintiffs' defined-contribution payments may be injured through the actions (or inaction) of the defendant. Thus, plaintiffs *have* demonstrated a plausible financial injury to their defined-contribution plans, and hold Article III standing for, at minimum, injuries

to the funds they have personally invested in. This injury places plaintiffs beyond the scope of *Thole*, which ruled that plaintiffs *with no financial injury* had no standing to assert generalized grievances associated with the plan. *Id.* at 1622.

Next, defendant provides a list of cases where federal courts denied Article III standing for the injuries of a putative class that extended beyond the investments that a named ERISA plaintiff held. First, they cite to *Patterson v. Morgan Stanley*, 2019 WL 4934834 (S.D.N.Y. 2019), where the court declined to confer standing for seven out of thirteen funds that an ERISA plaintiff had not personally invested in. But courts have characterized *Patterson* as "an outlier; the majority of courts considering similar cases . . . are consistent" with finding standing. *Falberg v. Goldman Sachs Grp., Inc.*, No. 19 CIV. 9910 (ER), 2020 WL 3893285, at *8 (S.D.N.Y. July 9, 2020). Defendant also relies on the decision in *Wilcox v. Georgetown Univ.,* where the district court declined to grant standing in a similar situation. No. CV 18-422 (RMC), 2019 WL 132281 (D.D.C. Jan. 8, 2019). But the *Wilcox* decision also emphasizes that plaintiffs "must show fiduciary breaches that impair his individual account's value" to demonstrate standing. *Id.* at *8. Plaintiffs have done so by demonstrating plausible injury to their own individual accounts.

Defendant's citations to *Bd. Of Trustees of S. Cal. IBEW-NECA Defined Contribution Plan v. Bank of N.Y. Mellon Corp.*, 287 F.R.D. 216 (S.D.N.Y. 2012), and *Dezelan v. Voya Ret. Ins. & Annuity Co*., No. 3:16-CV-1251, 2017 WL 2909714 (D. Conn. July 6, 2017), fare no better: the former involved a litigant who pled a generalized injury that did not apply to his personal investments, while the latter involved a plaintiff who did not suffer a specified injury that other account holders experienced. Plaintiffs here have pled an overarching allegation of misconduct that applies to *both* themselves and other unnamed class plaintiffs.

Lastly, defendant cites a trio of district court cases— *Johnson v. Delta Air Lines, Inc.,* No. 1:17-CV-2608-TCB, 2017 WL 10378320 (N.D. Ga. Dec. 12, 2017); *Barrett v. Pioneer Nat. Res. USA, Inc.*, No. 17-CV-1579-WJM-NYW, 2018 WL 3209108 (D. Colo. June 29, 2018); and *Yost v. First Horizon Nat. Corp.*, No. 08-2293-STA-CGC, 2011 WL 2182262 (W.D. Tenn. June 3, 2011)—that purportedly apply *Thole*'s reasoning to "dismiss similar fiduciary-breach claims." Mot. Summ. J. 21, ECF 67. However, they all involved plaintiffs who sought standing for injuries to funds they lacked investments in, *without* adequately asserting plan-wide misconduct. Plaintiffs have alleged details supporting plan-wide misconduct that affect not just their own funds, but others in the Plan as well. Indeed, *Barrett* provides the crux of this present standing issue: "[A]lthough plaintiffs are sometimes granted standing to assert the rights of parties not before the court, these cases inevitably involve a single practice by the defendant that injures both the plaintiff and a third party, although in different ways." *Barrett*, 2018 WL 3209108, at *4. Plaintiffs' allegations meet this standard.

In sum, plaintiffs have adequately pleaded that they and the putative class suffered financial injuries from defendant's alleged misconduct. While this injury may come in different forms for individuals who possess different plans, they all stem from the plan-wide misconduct alleged by plaintiff here. These injuries, as alleged, are traceable to defendant's conduct, and can be redressed by damages that plaintiffs seek from this court. Thus, plaintiffs have met the elements for Article III standing.

II. Fiduciary Duty

A. Legal Standard for Rule 12(b)(6) Motions

To state a claim for relief, a pleading 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). This standard "does

not require 'detailed factual allegations,'" but does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

A Rule 12(b)(6) motion tests whether there is a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015). To survive a Rule 12(b)(6) motion, "the complaint must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). In evaluating a motion to dismiss, the court must accept all well-pleaded material facts alleged in the complaint as true and construe them in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012).

B. Relevant Law Regarding Fiduciary Duty Claim

Plaintiffs rely on ERISA §§ 1104(a)(1)(A), 1104(a)(1)(B), and 1104(a)(1)(D) as the basis for their breach of fiduciary duty claim. Section 1104(a)(1)(A) requires fiduciaries to discharge their "duties solely in the interest of the participants and beneficiaries" and "defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). Section 1104(a)(1)(B) requires fiduciaries to act "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 a similar situation. 29 U.S.C. § 1104(a)(1)(B). Section 1104(a)(1)(D) requires fiduciaries to discharge their duties "in accordance with the documents and instruments governing the plan" so long as those documents and instruments are consistent with applicable law. 29 U.S.C. § 1104(a)(1)(D).

A court's task in evaluating fiduciary compliance with the duty of prudence is to determine "whether the individual trustees, 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." *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983). To determine whether a fiduciary breach has occurred, courts analyze "a fiduciary's conduct in arriving at an investment decision, not on its results." *Terraza v. Safeway, Inc.*, 241 F. Supp. 3d 1057, 1084 (N.D. Cal. 2017). "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." *Tibble v. Edison Int'l.*, 729 F.3d 1110, 1136 (9th Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1823 (2015).

C. Analysis

Defendant principally contends that the Ninth Circuit's affirmance in *White v. Chevron*, 752 F. App'x 453 (9th Cir. 2018), forecloses all of plaintiffs' alleged breaches of fiduciary duty.[4] While unpublished decisions are not precedent, *see* 9th Cir. Rule 36-3(a), they can be instructive.

In *White*, plaintiffs brought a proposed class-action suit against Chevron for alleged ERISA breaches stemming from Chevron's management of its employee 401(k) plan. *See* No. 16-CV-0793-PJH, 2017 WL 2352137, at *3 (N.D. Cal. May 31, 2017). Included among the allegations were claims that Chevron breached duties of loyalty and prudence by "choosing

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[4] The parties refer to the Ninth Circuit's decision as "*White III*." However, *White* went up on appeal only once. *See* Oregon Appellate Courts Style Manual 27 (Oregon Judicial Department 2021) (using Roman numerals to delineate decisions in cases that have been repeatedly appealed and remanded). On August 29, 2016, Judge Hamilton of the Northern District of California granted the defendants' motion to dismiss the plaintiffs' Complaint, but granted leave to amend. *See* 2016 WL 4502808. Judge Hamilton dismissed the First Amended Complaint on May 31, 2017, *see* 2017 WL 2352137, and the Ninth Circuit affirmed on November 13, 2018, *see* 752 F. App'x 453. Therefore, this court refers to the case as simply "*White*" and distinguishes the decisions in that case by citation and date.

certain funds" that "imposed unreasonably high investment management fees," "failing to monitor" 401(k) plan funds as fees increased, and "imprudently retaining" a specific investment option that "significantly underperformed its benchmark." *Id.* at *2-4.

The District Court for the Northern District of California dismissed these claims, writing:

> A fiduciary may reasonably select an investment alternative in view of its different risks and features, even if that investment option turns out to yield less than some other option. No fiduciary selecting a plan's "safe" option can foresee whether the risks associated with stable value investment will come to fruition, and a fiduciary may reasonably choose to avert those risks in favor of a safer alternative.
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> …
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> Without some facts that raise an inference of imprudence in the selection of the money market fund—apart from the fact that stable value funds may provide a somewhat higher return than money market funds—plaintiffs have failed to state a claim." The return of [certain types of] funds may at certain time periods be lower than the return of [other types of] funds, but that does not change the fact that [certain types of] funds take greater risks [] by investing in [other securities].
>
> …
>
> Plaintiffs continue to base this claim solely on the fact that the Fund did not perform well, which approach the court has already rejected.

Id. at *10, *11, *21 (internal citations omitted).

The *White* plaintiffs fared no better on appeal. The Ninth Circuit affirmed the Northern District of California's decision in a memorandum opinion:

> "[A]s to each count, the allegations showed only that Chevron could have chosen different vehicles for investment that performed better during the relevant period, or sought lower fees for administration of the fund. *None of the allegations made it more plausible than not that any breach of a fiduciary duty had occurred*."

White, 752 F. App'x at 455 (emphasis added).

Defendant alleges that plaintiffs here have "lodged materially identical claims against the fiduciaries of a 401(k) plan" as those raised by the *White* plaintiffs against Chevron. Mot.

Dismiss 10, ECF #67. Plaintiffs counter that their claims are distinguishable from those in *White* because the present allegations are not only directed at the "investment outcomes" that resulted from defendant's decisions, but also defendant's "*process* for evaluating and monitoring investments." Opp. Mot. Dismiss. 13, ECF #69 (emphasis added).

It is true that district courts within the Ninth Circuit have denied motions to dismiss where the complaints have alleged facts suggesting widespread fiduciary misconduct. *See, e.g.*, *Terraza,* 241 F. Supp. 3d at 1076-77 (declining to grant a motion to dismiss because the plaintiffs adequately alleged improper influence from the plan's trustee and record-keeper to retain underperforming funds). However, the Second Amended Complaint contains *no* factual allegations surrounding defendant's *process* for selecting and monitoring investments. Instead, it merely recites concerns on how certain investments either *resulted* in unreasonably high administrative expenses or produced suboptimal results when compared to non-Plan investments. These bare allegations do not sufficiently raise any issues surrounding the *procedure* of selecting investments that would dislodge the application of *White*.

In the alternative, plaintiffs claim that they have pled "more than the allegations contemplated in *White*." Opp. Mot. Dismiss 19, ECF #69. Yet the gravamen of their allegations is virtually identical to that alleged by the *White* plaintiffs: a fiduciary's alleged failure to maintain "a prudent or loyal process [in managing ERISA options] by failing to critically or objectively evaluate the cost and performance of the Plan's investments and fees." Second Am. Compl. ¶¶ 70, 5, ECF #67. Additionally, comparing the present complaint to the allegations raised in *White* reveals strikingly similar terminology used to describe similar alleged breaches.[5]

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[5] For example, the plaintiffs in *White* alleged that Chevron "fail[ed] and refus[ed] to employ appropriate methods to investigate the methods" of certain stock options, "failed . . . to

Crucially, plaintiffs fail to plead facts that suggest misconduct or breaches of fiduciary duty *other than* those already reviewed in *White*. It is true that ERISA plaintiffs, "no matter how clever or diligent," will "generally lack the inside information necessary" to plead their claims with specificity until discovery occurs. *Braden*, 588 F.3d at 598. However, federal courts cannot "unlock the doors of discovery for a plaintiff armed with nothing more than" legal conclusions "couched as a factual allegation." *See Iqbal*, 556 U.S. at 678-79. This court cannot allow litigation to continue when plaintiffs have pleaded *virtually the same allegations* that were previously rejected by the Ninth Circuit, and fail to allege any other distinct claims, such as record-keeping or administrative expenses, for example, that would differentiate the present case from *White*.

Even if the court chose to engage with each of the plaintiffs' unique claims, the same conclusion results: all would be soundly dismissed. In their Second Amended Complaint, plaintiffs associate three problems with the aforementioned inclusion of T. Rowe Price Target Date investment options. First, plaintiffs argue that defendant should have sought out alternative sources of investment target date funds, such as those offered by Fidelity, Schwab, State Street, and Vanguard. Second Am. Compl. ¶ 33, ECF #62. Plaintiffs allege that had defendant offered any of these alternatives, their Plan expenses would have been lowered. *Id.* But plaintiffs fail to acknowledge that their four provided alternative investment options are passively managed

meaningfully investigate [] and evaluate the prudence of retaining" certain funds, "failed to adequately investigate and offer non-mutual fund alternatives, such as collective trusts," and "failed to conduct a prudent process to monitor and remove the fund." Mot. Dismiss, Ex. I, at ¶¶ 45, 68, 76, 89, 139, ECF #67-9. Plaintiffs' claims are virtually the same, alleging breaches of fiduciary duty by failing to "ensuring that the Plan's fees were reasonable," "selecting investment options in a prudent fashion," "critically or objectively evaluating the cost and performance of the Plan's investment and fees," and "engag[ing] in a prudent process for monitoring the Plan's investments." Second Am. Compl. ¶¶ 70-72, ECF #62.

funds, while the T. Rowe Price Target Date investment option is an actively managed fund. This difference is significant:

> Passively managed funds, however, ordinarily cannot serve as meaningful benchmarks for actively managed funds, because the two types of funds have different aims, different risks, and different potential rewards that cater to different investors. As noted, actively and passively managed funds have, for example, different management approaches, and analysts continue to debate whether active or passive management is a better approach. Further, actively managed funds can offer investors the chance to earn superior returns, access specialized sectors, or take advantage of alternative investment strategies while also allow[ing] rapid turnover both in the funds' holdings and the participants' investments, whereas passively managed funds typically disallow[ ] new investments for a month or more following any withdrawal.

Davis v. Salesforce.com, Inc., No. 20-CV-01753-MMC, 2020 WL 5893405, at *3 (N.D. Cal. Oct. 5, 2020) (internal citations and quotations omitted).

At best, plaintiffs' argument boils down to a claim that defendant should have foreseen that the price of T. Rowe Price investment options would go up and accordingly renegotiated its fee arrangement or sought alternative options. But plaintiffs have not raised allegations suggesting that the challenged decision was imprudent at the time the fiduciaries made the decision, nor have they adequately articulated why passively managed funds serve as an appropriate benchmark for measuring the success of an actively managed fund.

Second, plaintiffs claim that defendant could have offered T. Rowe Price Target Date Collective Investment Trusts (CITs) instead of investment funds. CITs and investment funds follow similar investment strategies, but the former offer lower administrative fees. Second Am. Compl. ¶¶ 35, 39, ECF #62. Plaintiffs contend that, although defendant could have offered the T. Rowe Price Target Date CITs, it failed to do so, resulting in higher fees for plan participants. *Id.* ¶ 39. This allegation fails as a matter of both fact and law. As an initial matter, plaintiffs do not allege that they would have invested in passively managed funds even if they were made

available. *See Lujan*, 504 U.S. at 573 (Kennedy, J., concurring) (declining to find standing for plaintiffs that had failed to acquire plane tickets or select a date for their return). But even on the merits, "mutual funds have unique regulatory and transparency features, which make any attempt to compare them to investment vehicles such as collective trusts and separate accounts an apples-to-oranges comparison." *White*, 2016 WL 4502808, at *12 (internal citation omitted). Simply put, "ERISA does not require fiduciaries to scour the market to find and offer the cheapest possible funds." *Id*., 2017 WL 2352137, at *14.

Third, plaintiffs allege that had defendant prudently reviewed its investments, it would have discovered additional fee-reducing opportunities. For example, plaintiffs contend that the Fidelity Emerging Markets Index Fund was a cheaper alternative to the Eaton Vance option, and defendant's failure to prudently monitor its offerings missed an opportunity to provide substantial savings to plan participants by replacing the Eaton Vance option with one from Fidelity. Second Am. Compl. ¶¶ 43-45, ECF #62. However, the Eaton Vance option is an actively managed fund, while the Fidelity Emerging Markets Index Fund is a passively managed option. As explained earlier, this crucial difference renders the comparison—and the claim—inadequate.

III. Leave to Amend

Rule 15(a)(2) requires that this court "should freely give leave [to amend a pleading] when justice so requires." Such leave, however, "is not to be granted automatically." *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990). The court "may exercise its discretion to deny leave to amend due to 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, ... [and] futility of amendment.'" *Carvalho v. Equifax Info. Servs., LLC*, 629

F.3d 876, 892-93 (9th Cir. 2010) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)) (alterations in original) (emphasis added).

Here, plaintiffs have not asked for leave to amend or explained how they could amend their claim to assert a viable claim for relief. Indeed, after three attempts, it appears that plaintiffs cannot plead any set of facts that would entitle them to relief. Because amendment would be futile, any further leave to amend should be denied and this case should be dismissed with prejudice.

RECOMMENDATION

For the reasons set forth above, defendant's motion to dismiss (ECF #67) should be granted and this action should be dismissed with prejudice.

SCHEDULING ORDER

These Findings and Recommendation will be referred to a district judge. Objections, if any, are due Thursday, September 09, 2021. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

NOTICE

These Findings and Recommendation are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED August 26, 2021.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge