IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY K. BOLEY, *et al.*	:	**CIVIL ACTION**
	:	
v.	:	**NO. 20-2644**
	:	
UNIVERSAL HEALTH SERVICES, INC., *et al.*	:	

MEMORANDUM

KEARNEY, J. **March 8, 2021**

Three participants in their former employer's defined contribution plan are suing the plan's fiduciaries for allegedly breaching fiduciary duties owed to them under ERISA. The three plan participants move to certify and represent a class of over 60,000 active participants. The plan participants invested in different funds but focus their allegations on the fiduciaries allegedly retaining more expensive and underperforming funds despite the availability of lower cost funds, failing to monitor excessive record keeping and administrative fees and costs relative to similar plans, offering an excessively expensive menu of investment options, and failing to monitor their appointees. We denied the fiduciaries' partial motion to dismiss four months ago.

The fiduciaries now oppose class certification arguing individualized defenses under ERISA section 404(c), potentially differing limitations periods, and the three participants' investments in different funds render the participants atypical and the defenses create issues unable to be resolved on a class-wide basis. Following discovery, we find the three participants may proceed in representing a class of current and former plan participants. We agree with the persuasive reasoning from courts around the country rejecting the fiduciaries' arguments at this stage. We grant the three participants' motion for class certification.

I. Background

Universal Health Services, Inc. sponsors the Universal Health Services, Inc. Retirement Savings Plan ("Plan"), a defined contribution plan under which its qualified employees can invest a portion of their paycheck in one or more of thirty available investment options. Universal Health Services matches a portion of those contributions.[1] Universal Health Services and its Investment Committee appointed by the Board of Directors serve as the Plan's fiduciaries and administrators.[2] The fiduciaries must administer the Plan under Congress' mandates in the Employee Retirement Income Security Act of 1974 ("ERISA").[3]

The Plan had 60,018 active participants in 2018 with 41,872 holding active account balances.[4] The Plan had net assets totaling over $1.9 billion.[5] From June 5, 2014 through at least last month, the Plan offered participants a menu of thirty-seven investment options including some offered for a limited time.[6]

Former Universal Health Services employees Mary Boley, Kandie Sutter, and Phyllis Johnson ("Participants"), on behalf of the Plan and a purported class of similarly situated Plan participants and beneficiaries, sue Universal Health and its Investment Committee (the "Fiduciaries") under ERISA. The Participants allege the Fiduciaries breached their fiduciary duties, including by: (1) retaining a suite of thirteen expensive and underperforming actively managed target date funds despite the availability of lower cost, passively managed index funds; (2) failing to monitor the excessive recordkeeping fees and administrative costs charged to Plan participants relative to other similarly large plans; (3) offering an excessively expensive menu of investment options; and (4) failing to monitor the Committee's appointees.[7] The Participants are either current or former Plan participants: Ms. Boley invests in the Fidelity Freedom K 2050 target date fund; Ms. Sutter invests in the Fidelity Freedom K 2025 target date fund, the Fidelity

Contrafund, the Fidelity Managed Income Portfolio II, the PIMCO Total Return Fund, and the MetWest Total Return Bond Fund; and Ms. Johnson invested in the Fidelity Freedom K 2045 target date fund.[8]

The Fiduciaries, largely relying on the Supreme Court's recent decision in *Thole v. U.S. Bank, N.A.*,[9] moved to partially dismiss the Participants' claims several months ago arguing they lacked constitutional standing to pursue claims relating to alleged losses in discrete investments they never selected.[10] We denied the Fiduciaries' motion after finding *Thole* to be of limited relevance in the context of defined contribution plans.[11] We found the Participants plead individualized injury – and therefore standing – with respect to each of their claims.[12] The Participants invested in one of the allegedly imprudent investments in target date funds[13] We further found their remaining claims involved the Fiduciaries' decision-making processes impacting all Plan participants.[14]

II. Analysis

The Participants move under Federal Rule of Civil Procedure 23(a) and 23(b)(1) to certify a class of "[a]ll participants and beneficiaries in [the Plan] at any time on or after June 5, 2014 to the present (the "Class Period"), including any beneficiary of a deceased person who was a participant in the Plan at any time during the Class Period."[15] The Participants must satisfy the four requirements of Rule 23(a) and the requirements of either Rule 23(b)(1), (b)(2), or (b)(3). We may grant class certification if, "after a rigorous analysis," we are satisfied the Participants established each of the Rule's requirements by a preponderance of the evidence.[16]

A. The Class satisfies the Rule 23(a) requirements.

Under Rule 23(a), a class may be certified only if "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."[17] The Participants argue they meet Rule 23(a) because the: (1) Plan consisted of over 60,000 participants during the class period; (2) same overarching questions of law and fact apply to all Plan participants' claims; (3) Participants suffered the same or similar injuries the Plan participants did; and (4) class counsel will adequately represent the interests of all Plan participants.[18] The Fiduciaries do not dispute the putative Class satisfies the numerosity and adequacy requirements but argue the Participants' claims are neither common nor typical of the claims of the putative Class for three reasons: (1) the claims of the Participants and putative Class are subject to individualized defenses available to fiduciaries under section 404(c) of ERISA; (2) individualized factual determinations will be required to determine whether the claims are untimely under ERISA's statute of limitations; and (3) the Participants only invested in a few of the investment options available to the Plan. We conclude the putative Class satisfies the requirements of Rule 23(a).

a. The Class satisfies the numerosity requirement.

Rule 23(a)(1) requires a proposed Class be "so numerous that joinder of all members is impracticable."[19] While no threshold number is required, "a plaintiff in this circuit can generally satisfy Rule 23(a)(1)'s numerosity requirement by establishing 'that the potential number of plaintiffs exceeds 40.'"[20] The Plan's Form 5500 demonstrates it had 60,108 active participants as of 2018; 41,872 of those participants had active account balances.[21] The Fiduciaries do not dispute the putative Class satisfies the numerosity requirement. We agree it satisfies the requirement.

b. The Class satisfies the commonality requirement.

Rule 23(a)(2) requires a plaintiff demonstrate "there are questions of law or fact common to the class."[22] This requirement is satisfied if the proposed class members "share at least one question of fact or law with the grievances of the prospective class."[23] "A complaint's mere recital of questions that happen to be shared by class members is 'not sufficient to obtain class certification.'"[24] Commonality instead requires the plaintiff to demonstrate the class members "have suffered the same injury."[25]

The Participants satisfy the commonality requirement. They allege the Fiduciaries breached their duties to the Plan by, among other things, allowing excessive recordkeeping and administrative costs to be charged to Plan participants, retaining high-cost actively managed funds as investments despite the availability of low-cost index funds, and failing to have a prudent investment evaluation process.[26] All Plan participants chose from the same menu of investment options and paid the same administrative and recordkeeping fees. Many common questions of law and fact will drive the resolution of the litigation. The alleged Plan-wide conduct further impacted all Plan participants in a similar way, for example, through the payment of excessive fees.[27]

c. The Class satisfies the typicality requirement.

Rule 23(a)(3) requires a plaintiff demonstrate "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[28] The typicality requirement "ensur[es] that the class representatives are sufficiently similar to the rest of the class . . . so that certifying those individuals to represent the class will be fair to the rest of the proposed class."[29] To determine whether the requirement has been met, we focus on "the similarity in the legal theory and legal claims; the similarity of the individual circumstances on

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