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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACLYN SANTOMENNO; KAREN)	Case No. CV 12-02782 DDP (MANx)
POLEY; BARBARA POLEY,)	
)	ORDER DENYING DEFENDANTS' MOTION
Plaintiffs,)	TO STRIKE CLASS ALLEGATIONS
)	
v.)	[Dkt. No. 143]
)	
TRANSAMERICA LIFE INSURANCE)	
COMPANY; TRANSAMERICA)	
INVESTMENT MANAGEMENT, LLC;)	
TRANSAMERICA ASSET)	
MANAGEMENT INC.,)	
)	
Defendants.)	
)	
)	

Before the court is Defendants Transamerica Life Insurance Company ("TLIC"), Transamerica Investment Management, LLC, and Transamerica Asset Management Inc.'s Motion to Strike Class Allegations in Part. Having considered the parties' submissions, the court adopts the following order.

I. Background

The background of this case is explained in detail in the court's Order of February 19, 2013, Granting in Part and Denying in Part Defendants' Motions to Dismiss. (Dkt. No. 137.) In that

1 Motion, Defendants argued that TLIC is not a fiduciary with respect
2 to the terms of its own compensation because those terms were
3 negotiated by a named fiduciary prior to TLIC assuming a fiduciary
4 duty. This court disagreed and found that Plaintiffs had stated a
5 claim for TLIC's fiduciary duty to Plaintiffs with respect to the
6 fees they charge in their 401(k) plan product.

7 **II. Legal Standard**

8 Under Rule 23, "[a]t an early practicable time after a person
9 sues or is sued as a class representative, the court must determine
10 by order whether to certify the action as a class action." Fed. R.
11 Civ. P. 23(c)(1)(A). In conducting a Rule 23 action, "the court
12 may issue orders that . . . require that the pleadings be amended
13 to eliminate allegations about representation of absent persons and
14 that the action proceed accordingly." Fed. R. Civ. P. 23(d)(1)(D).

15 **III. Defendants' Claims**

16 Defendants move to strike the class allegations "with respect
17 to plans in which Plaintiffs themselves have not participated."
18 (Mot. at 18.) They argue that the class definition improperly
19 excludes from the litigation the named fiduciaries of the employee
20 benefit plans in which putative class members are participants.
21 Defendants maintain that this is improper for a number of reasons.

22 First, Defendants argue that excluding the named fiduciaries
23 undermines ERISA's structure of fiduciary responsibility because it
24 denies those named fiduciaries a voice in the litigation, despite
25 the named fiduciaries' roles in selecting TLIC as a service
26 provider and managing their respective ERISA plans. As a result of
27 this exclusion, TLIC argues, the named fiduciaries will be unable
28 to fulfill their duty to protect the plans from harmful costs of

1 litigation and from the loss of their service plans that would
2 result from the litigation's success.

3 Second, Defendants argue that only the named fiduciaries have
4 the authority to settle or release claims on behalf of plans, and
5 that the relief Plaintiffs seek - which Defendants understand as
6 disgorgement of all or some of the fees they have charged plans -
7 would necessarily require TLIC to terminate its service contracts
8 with the plans, thus requiring the named fiduciaries to obtain
9 replacement service providers.

10 Third, Defendants argue that the only way a multi-plan class
11 would be appropriate is if the named fiduciaries were the class
12 representatives, because those named fiduciaries retained TLIC as a
13 service provider and are responsible for monitoring TLIC's ongoing
14 performance and fees.

15 Finally, Defendants argue that Plaintiffs are not adequate
16 representatives for a class that comprises participants in other
17 employee benefit plans because they have no connection to those
18 plans and would be in effect usurping the role of the named
19 fiduciaries.

20 **IV. Discussion**

21 Defendants seek to limit the class to participants in the
22 employee benefit plans in which the named plaintiffs are also
23 participants. Defendants' logic appears to be that only by
24 limiting the class can the plans' named fiduciaries participate
25 fully in the litigation, and their full participation is required
26 to protect the plans' interests both during and after the
27 litigation.

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1 The court notes, first, that while every employee benefit plan
2 has one or more "named fiduciaries" who are named in the plan
3 instrument and who have certain responsibilities with respect to
4 the plan, 29 U.S.C. § 1102, all parties who have fiduciary duty to
5 the plan are subject to liability for breach of such duty.
6 29 U.S.C. § 1109 ("Any person who is a fiduciary with respect to a
7 plan who breaches any of the responsibilities, obligations, or
8 duties imposed upon fiduciaries . . . shall be personally liable to
9 make good to such plan any losses to the plan resulting from each
10 such breach, and to restore to such plan any profits of such
11 fiduciary which have been made through use of assets of the plan by
12 the fiduciary, and shall be subject to such other equitable or
13 remedial relief as the court may deem appropriate, including
14 removal of such fiduciary.").

15 The court has already determined that Plaintiffs have stated a
16 claim for TLIC's fiduciary duty to them with respect to their fees.
17 This means that Plaintiffs may hold TLIC accountable for the
18 reasonableness of their fees, among other things. Without either
19 acknowledging or disavowing this duty, Defendants propose a litany
20 of reasons why Plaintiffs' claims must nonetheless pass through the
21 named fiduciaries. They argue that as individual participants in
22 employee benefit plans, Plaintiffs do not have the responsibility
23 to consider the interest of the plan but only their interest in
24 pursuing the litigation. Defendants argue that this causes
25 problems for the ERISA structure because a successful outcome of
26 the litigation is likely to involve modifications to or termination
27 of numerous employee benefit plans, which would have adverse

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1 implications for all plan participants, even if it also involved a
2 payout of damages to Plaintiffs.

3 Assuming arguendo that Defendants have breached their
4 fiduciary duty to Plaintiffs and that Plaintiffs are entitled to
5 damages, the issue of such a breach is distinct from the issue of
6 whether the employee benefit plan provisions will need to be
7 modified. Presumably if Plaintiffs are successful, Defendants
8 would feel it is appropriate to modify the plan provisions. That
9 decision is independent of whether Plaintiffs are entitled to
10 damages for past alleged conduct.

11 Defendants make the apocalyptic argument that they will by
12 choice or necessity cease providing any services to employee
13 benefit plans if they are obligated to return or reduce their fees.
14 This sidesteps the issue of Defendants' alleged breach of fiduciary
15 duty. Plaintiffs have alleged that TLIC charges excessive fees.
16 This matter is at an early stage in the proceedings. The court has
17 no opinion on whether any fees charged were excessive and does not
18 presume it to be the case. Defendants are entitled to charge
19 reasonable fees. (Order Granting in Part and Denying in Part
20 Defendants' Motions to Dismiss at 13 (February 19, 2013) ("TLIC is
21 entitled to reasonable fees and profits for the services that it
22 provides to the plans, but as a fiduciary TLIC is accountable for
23 the reasonableness of those fees.")) Defendants' fees may well be
24 reasonable; Plaintiffs have the burden of proof on that issue. But
25 the determination of reasonableness is separate from the subsequent
26 question of how the plans would be modified if a breach were to be
27 found.

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1 Defendants' arguments do not directly challenge the
2 suitability of Plaintiffs' claims for class treatment. Defendants
3 appear to argue that the named fiduciaries are necessary parties to
4 the action and, indeed, are the only proper parties to bring such
5 an action because only they may make all plan decisions and only
6 they can settle and release any claims of the plan. As Plaintiffs
7 point out, this argument is not specific to the class context; to
8 the extent that it is valid, it should apply as much to the
9 individual Plaintiffs as to the putative class. Defendants'
10 argument thus appears to be less a challenge to class allegations
11 and more another 12(b)(6)-type challenge to Plaintiffs' ability to
12 bring their claims at all. Hence, it bears little weight in a
13 motion to strike class allegations.

14 At this stage of the litigation, the court sees no need to
15 amend class allegations by limiting the class to participants in
16 those benefit plans in which Plaintiffs have participated.
17 Plaintiffs have stated a claim for TLIC's fiduciary responsibility
18 to them and to the potential class members. If TLIC is a
19 fiduciary, Plaintiffs may bring an action against TLIC for breach
20 of fiduciary duty. Defendants have not demonstrated that the
21 putative class fails to meet the Rule 23 requirements as a matter
22 of law, or that the issues in the case cannot be handled with
23 common proof. In Vinole v. Countrywide Home Loans, Inc., the
24 district court found that individualized issues would predominate
25 and on that ground denied certification before Plaintiffs had filed
26 a motion to certify. 571 F.3d 935, 946-47 (9th Cir. 2009). Here,
27 in contrast, Defendants' concerns pertain more to the consequences
28 of such litigation and how remedies might be handled. These

1 concerns do not go to the question of whether Plaintiffs' claims
2 that TLIC's fees are excessive are susceptible to class treatment.

3 Defendants will have the opportunity to make factual arguments
4 against certification at a later stage in the litigation. The
5 court has already considered Defendants' arguments regarding their
6 fiduciary duty to Plaintiffs in the Motion to Dismiss. The court
7 declines now to find that despite Defendants' potential fiduciary
8 duty to benefit plan participants, only a plan's named fiduciaries
9 are in a position to challenge TLIC's fees as potentially
10 excessive. To the extent that these issues arise and are developed
11 through facts and then presented in opposition to a class
12 certification motion, the court will address them at that time.

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14 IT IS SO ORDERED.

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17 Dated: May 21, 2013

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DEAN D. PREGERSON

United States District Judge