

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
4 NELLY F. FERNANDEZ,  
5 individually and on behalf of  
6 similarly situated  
7 individuals,

8 Plaintiff,

9 v.

10 FRANKLIN RESOURCES, INC., et  
11 al.,

12 Defendants.

Case No. 17-cv-06409-CW

ORDER DENYING DEFENDANTS'  
MOTIONS TO DISMISS AND FOR  
SUMMARY JUDGMENT

(Dkt. Nos. 33, 34)

13 Plaintiff Nelly F. Fernandez brings this case pursuant to  
14 ERISA § 502(a)(2) against Defendants Franklin Resources, Inc.  
15 (FRI), the Franklin Templeton 401(k) Retirement Plan Investment  
16 Committee, the Franklin Templeton 401(k) Retirement Plan  
17 Administrative Committee, and individual members of the FRI's  
18 Board and Committees. Defendants bring motions to dismiss and  
19 for summary judgment. Plaintiff opposes both motions. The  
20 parties appeared for a hearing on April 3, 2018. Having  
21 considered the papers and the arguments of counsel, the Court  
22 DENIES both motions.

23 BACKGROUND

24 Unless otherwise noted, the factual background is taken from  
25 the First Amended Complaint (FAC).

26 The Franklin Templeton 401(k) Retirement Plan (the Plan) is  
27 a "defined contribution plan" under 29 U.S.C. § 1002(34) and an  
28 "employee pension benefit plan" under 29 U.S.C. § 1002(2). The

1 Plan is sponsored by FRI and managed by the Administrative  
2 Committee and the Investment Committee. Declaration of Catalina  
3 J. Vergara in Support of MTD (Vergara MTD Decl.), Ex. 1 (Plan  
4 Document) at 42-44. The Administrative Committee acts as the  
5 Plan's administrator and the Investment Committee selects and  
6 monitors investments offered by the Plan to participants. Id.;  
7 see also FAC ¶¶ 6-9. Plaintiff alleges that Defendants breached  
8 their fiduciary duties to the Plan by offering underperforming  
9 mutual funds managed by FRI, offering a money market fund rather  
10 than a stable value fund, and charging excessive administration  
11 fees. Plaintiff alleges that Defendants took these actions for  
12 their own benefit and to the detriment of the Plan and its  
13 participants.

14 Plaintiff, who resides in Florida, is a former employee of  
15 FRI. She participated in the Plan from 2011 through 2016. She  
16 invested funds in her Plan account in at least four Proprietary  
17 Mutual Funds: the Mutual Global Discovery Fund, the Income Fund,  
18 the Templeton World Fund, and the Mutual European Fund.

19 On November 2, 2017, Plaintiff filed this suit on behalf of  
20 the Plan against Defendants, asserting four claims: (1) breach of  
21 fiduciary duty, (2) prohibited transactions in violation of 29  
22 U.S.C. § 1106(a), (3) prohibited transactions in violation of 29  
23 U.S.C. § 1106(b), and (4) failure to monitor fiduciaries.

24 Plaintiff seeks to certify a class of all participants in the  
25 Plan from July 28, 2010 to the date of judgment. Among other  
26 things, Plaintiff seeks restoration of all losses to the Plan.

27 Over a year earlier, on July 28, 2016, Marlon Cryer brought  
28 suit on behalf of the Plan against FRI and the Investment

1 Committee, asserting claims for breach of fiduciary duties to the  
2 Plan based on the same actions challenged in this case (offering  
3 underperforming mutual funds managed by FRI, offering a money  
4 market fund rather than a stable value fund, and charging  
5 excessive administration fees). Cryer v. Franklin Resources,  
6 Inc. et al., Case No. 16-cv-4265 (Cryer), Docket No. 1. On  
7 October 24, 2016, the Cryer defendants brought a motion for  
8 summary judgment, contending that Cryer could not advance his  
9 claims because he had released them in his severance agreement.  
10 Cryer, Docket No. 44 (Order Denying Motion for Summary  
11 Adjudication and Motion to Dismiss). The Court denied the  
12 motion, relying on Bowles v. Reade, 198 F.3d 752 (9th Cir. 1999),  
13 and holding that, because Cryer could not “release the breach of  
14 fiduciary duty claims made on behalf of the Plan, such claims are  
15 not covered by the covenant not to sue.” Id. at 7. The Court  
16 also denied the Cryer defendants’ motion to dismiss, finding that  
17 Cryer had adequately alleged a breach of fiduciary duty claim.  
18 Id. at 9. On June 20, 2017, Cryer sought leave to file an  
19 amended complaint to add new claims for prohibited transactions  
20 and failure to monitor and to add as new defendants the FRI Board  
21 and individual members of the Board and Committees. Cryer,  
22 Docket No. 56. The Court denied Cryer’s motion because he did  
23 not demonstrate diligence in seeking leave to amend after  
24 allegedly discovering in a document production the facts giving  
25 rise to his amendment. Cryer, Docket No. 66 at 3. The Court  
26 later certified a class of all participants in the Plan from July  
27 28, 2010 to the date of judgment. Cryer, Docket No. 67.

28       Shortly after the present case was filed, on January 31,

1 2018, the Court found that it was related to Cryer. Docket No.  
2 25.

3 DISCUSSION

4 I. Motion for Summary Judgment

5 Summary judgment is properly granted when no genuine and  
6 disputed issues of material fact remain, and when, viewing the  
7 evidence most favorably to the non-moving party, the movant is  
8 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.  
9 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);  
10 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.  
11 1987).

12 The moving party bears the burden of showing that there is  
13 no material factual dispute. Therefore, the court must regard as  
14 true the opposing party's evidence, if supported by affidavits or  
15 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,  
16 815 F.2d at 1289. The court must draw all reasonable inferences  
17 in favor of the party against whom summary judgment is sought.  
18 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
19 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952  
20 F.2d 1551, 1558 (9th Cir. 1991).

21 Material facts which would preclude entry of summary  
22 judgment are those which, under applicable substantive law, may  
23 affect the outcome of the case. The substantive law will  
24 identify which facts are material. Anderson v. Liberty Lobby,  
25 Inc., 477 U.S. 242, 248 (1986).

26 Where the moving party does not bear the burden of proof on  
27 an issue at trial, the moving party may discharge its burden of  
28 production by either of two methods:

1 The moving party may produce evidence negating an  
2 essential element of the nonmoving party's case, or,  
3 after suitable discovery, the moving party may show  
4 that the nonmoving party does not have enough evidence  
of an essential element of its claim or defense to  
carry its ultimate burden of persuasion at trial.

5 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210  
6 F.3d 1099, 1106 (9th Cir. 2000).

7 If the moving party discharges its burden by showing an  
8 absence of evidence to support an essential element of a claim or  
9 defense, it is not required to produce evidence showing the  
10 absence of a material fact on such issues, or to support its  
11 motion with evidence negating the non-moving party's claim. Id.;  
12 see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990);  
13 Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991).

14 If the moving party shows an absence of evidence to support the  
15 non-moving party's case, the burden then shifts to the non-moving  
16 party to produce "specific evidence, through affidavits or  
17 admissible discovery material, to show that the dispute exists."  
18 Bhan, 929 F.2d at 1409.

19 If the moving party discharges its burden by negating an  
20 essential element of the non-moving party's claim or defense, it  
21 must produce affirmative evidence of such negation. Nissan, 210  
22 F.3d at 1105. If the moving party produces such evidence, the  
23 burden then shifts to the non-moving party to produce specific  
24 evidence to show that a dispute of material fact exists. Id.

25 If the moving party does not meet its initial burden of  
26 production by either method, the non-moving party is under no  
27 obligation to offer any evidence in support of its opposition.  
28 Id. This is true even though the non-moving party bears the

1 ultimate burden of persuasion at trial. Id. at 1107.

2 II. Motion to Dismiss

3 A complaint must contain a "short and plain statement of the  
4 claim showing that the pleader is entitled to relief." Fed. R.  
5 Civ. P. 8(a). The plaintiff must proffer "enough facts to state  
6 a claim to relief that is plausible on its face." Ashcroft v.  
7 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v.  
8 Twombly, 550 U.S. 544, 570 (2007)). On a motion under Rule  
9 12(b)(6) for failure to state a claim, dismissal is appropriate  
10 only when the complaint does not give the defendant fair notice  
11 of a legally cognizable claim and the grounds on which it rests.  
12 Twombly, 550 U.S. at 555. A claim is facially plausible "when  
13 the plaintiff pleads factual content that allows the court to  
14 draw the reasonable inference that the defendant is liable for  
15 the misconduct alleged." Iqbal, 556 U.S. at 678.

16 In considering whether the complaint is sufficient to state  
17 a claim, the court will take all material allegations as true and  
18 construe them in the light most favorable to the plaintiff.  
19 Metzler Inv. GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049,  
20 1061 (9th Cir. 2008). The court's review is limited to the face  
21 of the complaint, materials incorporated into the complaint by  
22 reference, and facts of which the court may take judicial notice.  
23 Id. at 1061. However, the court need not accept legal  
24 conclusions, including threadbare "recitals of the elements of a  
25 cause of action, supported by mere conclusory statements."  
26 Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555).

## DISCUSSION

## I. Motion for Summary Judgment

Defendants assert that Plaintiff's suit is barred by a covenant not to sue in her severance agreement. Declaration of Catalina J. Vergara in Support of MSJ (Vergara MSJ Decl.), Ex. 1 (Severance Agreement).<sup>1</sup> Plaintiff disagrees.

Plaintiff signed a severance agreement on December 17, 2015, after her employment with FRI terminated. The severance agreement contains a release, which states:

(c) **Claims Released.** The Employee understands and agrees that the Employee is releasing to the fullest extent allowed by law all known and unknown, contingent or non-contingent, anticipated or unanticipated claims, promises, obligations, liabilities, causes of action, or similar rights of any type that the Employee may have had, or presently has, against any Released Party (the "Claims"). [ . . . ]

Id. at 3, § 2(c) (emphasis in original). The release goes on to give non-limiting examples of released claims, including "all common law, contract, tort . . . as well as Claims the Employee might have under . . . **the Employee Retirement Income Security Act of 1974.**" Id. (emphasis added).

The release is subject to a carve-out provision, which provides exceptions to the definition of claims released:

(d) **Rights Not Released.** *The Employee understands and agrees that this Release does not release any rights that the law does not permit the Employee to release.* [ . . . ] The Employee further understands and agrees that the Employee is not releasing any right that relates to: [ . . . ] (iii) the Employee's vested participation in any qualified retirement plan; [ . . . ]

---

<sup>1</sup> Defendants contend that the severance agreement is governed by Florida law pursuant to the agreement's choice of law provision. Severance Agreement at 9, § 5(c). Plaintiff does not dispute this point.

1 Id. at 4, § 2(d) (emphasis in original).

2 The release is supplemented by a covenant not to sue:

3 (e) **Promise Not to Litigate Released Claims. Unless**  
4 **contrary to, or prohibited by, applicable, prevailing**  
5 **law,** the Employee represents that the Employee will not  
6 bring any lawsuit, arbitration, or action in the future  
7 in which the Employee seeks to recover any damages from  
8 the Released Parties relating to any Claim other than  
9 (i) an action to enforce the Employee's rights under  
10 this Confidential Agreement pursuant to Section 6,  
11 below, (ii) an action reserved to the Employee by  
12 application of law or regulation, or (iii) an action  
13 outlined in Section 2(d), above.

9 Id. at 4, § 2(e).

10 In Defendants' view, the release and covenant not to sue  
11 broadly promises that the employee, Plaintiff, releases all  
12 claims including ERISA claims and will not bring any lawsuit  
13 relating to those claims. Plaintiff argues, however, that the  
14 release is subject to the carve-out and the carve-out covers this  
15 lawsuit. The carve-out provides an exception for "any right that  
16 relates to: [ . . . ] (iii) the Employee's vested participation  
17 in any qualified retirement plan." Plaintiff argues that her  
18 suit seeks to vindicate rights that relate to her vested  
19 participation in the Plan.

20 Regardless of whether the severance agreement applies to  
21 Plaintiff's claims, the Ninth Circuit's holding in Bowles v.  
22 Reade prevents its enforcement here. In Bowles, the Ninth  
23 Circuit held that a plan participant cannot settle, without the  
24 plan's consent, a § 502(a)(2) breach of fiduciary duty claim  
25 seeking "a return to [the plan] and all participants of all  
26 losses incurred and any profits gained from the alleged breach of  
27 fiduciary duty." 198 F.3d 752, 760 (9th Cir. 1999). Because  
28 Plaintiff seeks to bring the same type of claim to restore value



1 to the Plan, she could not have released the claim (or agreed not  
2 to bring a lawsuit asserting that claim) without the consent of  
3 the Plan. The Court reached the same conclusion with respect to  
4 a substantially identical severance agreement drafted by FRI in  
5 Cryer, Docket No. 83 (Order Denying FRI's Motion for  
6 Reconsideration) at 7. Thus, the severance agreement's release  
7 and covenant not to sue cannot be enforced against Plaintiff's  
8 claims.

9 Defendants attempt to distinguish Bowles v. Reade from the  
10 present case in two main ways. First, Defendants contend that  
11 Bowles dealt with the enforceability of a release, not a covenant  
12 not to sue. The Court rejected this argument in Cryer with  
13 respect to almost identical provisions, observing that "the  
14 covenant not to sue in this case is explicitly a 'Promise Not to  
15 Litigate Released Claims,'" and because "Plaintiff cannot release  
16 the breach of fiduciary duty claims made on behalf of the Plan,  
17 such claims are not covered by the covenant not to sue." Cryer,  
18 Order Denying Motion for Summary Adjudication and Motion to  
19 Dismiss at 7. Moreover, there is no meaningful difference  
20 between a release and a covenant not to sue because bringing suit  
21 is the mechanism by which a party can vindicate a legal claim.

22 Second, Defendants argue that Bowles involved a defined  
23 benefit plan, not a defined contribution plan. But nothing in  
24 Bowles suggests that its holding is dependent on this fact.  
25 Defendants argue that the Supreme Court's holding in LaRue v.  
26 DeWolff, Boberg & Assocs., Inc. provided that § 502(a)(2) claims  
27 as applied to defined contribution plans are necessarily  
28 individual and not on behalf of the plan. 552 U.S. 248 (2008).

1 The Court disagrees. LaRue merely holds that § 502(a)(2)  
2 “authorize[s] recovery for fiduciary breaches that impair the  
3 value of plan assets in a participant’s individual account.” Id.  
4 at 256. The Supreme Court in LaRue rejected the argument that  
5 § 502(a)(2) claims necessarily had to be brought on behalf of the  
6 plan, disavowing an interpretation of its holding in Russell that  
7 § 502(a)(2) was meant to “protect the entire plan, rather than  
8 the rights of an individual beneficiary.” Id. at 254 (quoting  
9 Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142  
10 (1985)). In doing so, the Supreme Court noted that defined  
11 contribution plans were gaining popularity over defined benefits  
12 plans, and that for defined contribution plans, “fiduciary  
13 misconduct need not threaten the solvency of the entire plan” to  
14 give rise to a claim under § 502(a)(2). Id. at 255-56. But  
15 LaRue’s holding that, in the defined contribution context,  
16 § 502(a)(2) permits individual claims, does not mean that all  
17 § 502(a)(2) claims must be individual. A plaintiff may still  
18 bring a § 502(a)(2) claim on behalf of a plan, even if the plan  
19 is a defined contribution plan.

20 In sum, the severance agreement does not bar Plaintiff’s  
21 claims in this lawsuit.

## 22 II. Motion to Dismiss

23 Defendants move to dismiss the FAC on a number of grounds:  
24 (1) the first-to-file doctrine bars Plaintiff’s suit, and  
25 (2) Plaintiff fails to state a claim on all four asserted causes  
26 of action. The Court addresses each in turn.

### 27 A. First-to-file doctrine

28 Defendants first contend that this suit should be dismissed

1 in light of Cryer under the first-to-file doctrine. The first-  
2 to-file rule "is a generally recognized doctrine of federal  
3 comity which permits a district court to decline jurisdiction  
4 over an action when a complaint involving the same parties and  
5 issues has already been filed in another district." Pacesetter  
6 Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 94-95 (9th Cir.  
7 1982). The purpose of the rule "is to promote efficiency and to  
8 avoid duplicative litigation and thus should not be lightly  
9 disregarded." Inherent.com v. Martindale-Hubbell, 420 F. Supp.  
10 2d 1093, 1097 (N.D. Cal. 2006) (citing Alltrade, Inc. v. Uniweld  
11 Prod., Inc., 946 F.2d 622, 625 (9th Cir. 1991)). The first-to-  
12 file doctrine requires the court to consider three factors:  
13 (1) chronology of the action, (2) similarity of the parties, and  
14 (3) similarity of the issues. Id. The Court's decision to  
15 accept or decline jurisdiction is reviewed for abuse of  
16 discretion. Id.

17 Plaintiff argues that the first-to-file doctrine applies  
18 only where a second case is filed in a different district, which  
19 is not the case here. While some district courts have invoked  
20 the first-to-file rule where both cases are filed in the same  
21 district, see Wallerstein v. Dole Fresh Vegetables, Inc., 967 F.  
22 Supp. 2d 1289, 1294 (N.D. Cal. 2013), it is usually used to  
23 transfer the second-filed case to the district where the first-  
24 filed case is already pending or to stay the case in favor of a  
25 ruling in the first-filed case. See, e.g., Inherent.com, 420 F.  
26 Supp. 2d at 1097 (transferring case); Schwartz v. Frito-Lay N.  
27 Am., No. C-12-02740 EDL, 2012 WL 8147135, at \*3 (N.D. Cal. Sept.  
28 12, 2012) (transferring case); Kohn Law Grp., Inc. v. Auto Parts

1 Mfg. Mississippi, Inc., 787 F.3d 1237, 1241 (9th Cir. 2015)  
2 (affirming stay of case).

3 The Court will not apply the first-to-file rule here. Where  
4 two duplicative suits are pending in the same district, the Ninth  
5 Circuit has applied the claim-splitting doctrine rather than the  
6 first-to-file rule. Adams v. California Dep't of Health Servs.,  
7 487 F.3d 684, 689 (9th Cir. 2007) (abrogated on other grounds).  
8 The court reviewed for abuse of discretion a district court's  
9 dismissal of a second suit filed after leave to amend was denied  
10 in the first suit. Id. at 687-88. The court considered whether  
11 the second suit was "duplicative" by "borrow[ing] from the test  
12 for claim preclusion" and analyzing "whether, assuming that the  
13 first suit were already final, the second suit could be precluded  
14 pursuant to claim preclusion." Id. at 689. The test is "whether  
15 the causes of action and relief sought, as well as the parties or  
16 privies to the action, are the same." Id. If the district court  
17 finds two cases to be duplicative, "[a]fter weighing the equities  
18 of the case, the district court may exercise its discretion to  
19 dismiss a duplicative later-filed action, to stay that action  
20 pending resolution of the previously filed action, to enjoin the  
21 parties from proceeding with it, or to consolidate both actions."  
22 Id. at 688. Having concluded that the second suit was  
23 duplicative, the Ninth Circuit affirmed the district court's  
24 dismissal, noting that it was within the court's broad discretion  
25 to do so, given the equities of the case. Id. at 692.

26 Here, the parties involved in both cases are not entirely  
27 identical. The putative class in this case is identical to the  
28 one certified in Cryer: "All participants in the Franklin

1 Templeton 401(k) Retirement Plan from July 28, 2010 to the date  
2 of judgment.” FAC ¶ 116; compare Cryer v. Franklin. On  
3 Defendants’ side, FRI and the Investment Committee have been sued  
4 in both cases, but this case adds the Administrative Committee  
5 and individual members of FRI’s Board and Committees. Defendants  
6 have not argued that these additional defendants are privies of  
7 the original defendants.

8 As for the causes of action and issues of the case,  
9 Plaintiff’s breach of fiduciary duty claim is identical to the  
10 one in Cryer and is supported by nearly the same factual  
11 allegations. Plaintiff’s failure to monitor and prohibited  
12 transactions claims, however, were not asserted in Cryer. In  
13 addition, at least the prohibited transactions claim relies on  
14 new theories and facts discovered after Cryer’s complaint was  
15 filed, including a grandfathered recordkeeping arrangement  
16 whereby FRI offered better terms to other retirement plans as  
17 compared to the Plan.

18 In sum, this suit is not duplicative of Cryer. Considering  
19 the equities<sup>2</sup> and the interests of judicial economy, the Court  
20 declines to dismiss this case and instead consolidates it with  
21 Cryer.

22 B. Failure to state a claim

23 Defendants assert that Plaintiff’s complaint fails to state  
24 a claim for each of the asserted causes of action.

25 \_\_\_\_\_  
26 <sup>2</sup> Defendants assert that Plaintiff’s counsel filed this suit  
27 on Plaintiff’s behalf after Cryer’s motion for leave to amend was  
28 denied for lack of diligence. Because this occurred before the  
class was certified, Cryer’s lack of diligence cannot be used to  
prevent Plaintiff and the rest of the putative class from  
bringing the same claims in a separate suit.

1           1.     First cause of action: breach of fiduciary duty  
2           The Court rejects Defendants' arguments on Plaintiff's  
3 breach of fiduciary duty claim because they are largely  
4 duplicative of the arguments the Court rejected in Cryer. The  
5 thrust of Defendants' argument is that Plaintiff does not provide  
6 facts supporting her contentions that Defendants acted  
7 imprudently or that Defendants' decision-making process was  
8 conflicted. Plaintiff has, however, provided facts supporting  
9 her contentions. See, e.g., FAC ¶¶ 51-52, 56 (describing how  
10 proprietary funds underperformed compared to similar funds in the  
11 market, employed unsuccessful managers, and received poor ratings  
12 from independent agencies such as Morningstar). Defendants  
13 contest Plaintiff's allegations. As stated in Cryer, however,  
14 "[w]hen considering a motion to dismiss, the Court must read the  
15 allegations in the light most favorable to the non-moving party  
16 . . . the Court may not resolve such factual questions at the  
17 motion to dismiss stage." Order Denying Motion for Summary  
18 Adjudication and Motion to Dismiss at 9-10.

19           2.     Second and third causes of action: prohibited  
20 transactions

21 Defendants assert that Plaintiff's prohibited transactions  
22 claims are limited by ERISA's statute of repose. A claim may be  
23 dismissed under Rule 12(b)(6) if it is clear from the face of the  
24 complaint that the statute of limitations or repose has run.  
25 Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980).  
26 ERISA's statute of repose provides, "No action may be commenced  
27 . . . six years after (A) the date of the last action which  
28 constituted a part of the breach or violation, or (B) in the case  
of an omission the latest date on which the fiduciary could have

1 cured the breach or violation." ERISA § 413(a), 29 U.S.C.  
2 § 1113(a). Defendants contend that the complaint is clear that  
3 the prohibited transaction at issue is providing proprietary  
4 funds, which constitutes "furnishing of goods, services, or  
5 facilities" in violation of ERISA § 406. Defendants argue that  
6 judicially-noticeable documents<sup>3</sup> show that at least thirty-nine of  
7 the funds at issue were first offered more than six years ago.

8 Plaintiff responds that her prohibited transactions claims  
9 accrued each time a plaintiff received underpayment of benefits,  
10 or, in the alternative, each time Defendants agreed annually to  
11 adopt the same investments and fees. The Court agrees with  
12 Plaintiff: her prohibited transactions claims are not time-barred  
13 merely because Defendants first offered some of the mutual funds  
14 at issue outside of the limitations period. In In re Northrop  
15 Grumman Corp. Litig., a district court agreed with this view,  
16 reasoning that the defendant had an ongoing duty to monitor the  
17 services it offered and the defendant "reviewed and approved, on  
18 a yearly basis, annual proposals that set forth the schedule of  
19 services [the defendant] planned to provide [] during the  
20 upcoming year." 2015 WL 10433713, at \*26 (C.D. Cal. Nov. 24,  
21 2015) (citing Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828  
22 (2015), which considered a similar issue in the context of a  
23 failure to monitor claim).

24 \_\_\_\_\_  
25 <sup>3</sup> Defendants do not attempt to show that the documents at  
26 issue are in fact judicially noticeable. Lee v. City of Los  
27 Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001) (generally, a court  
28 may not consider any materials not in the pleadings on a motion  
to dismiss, unless the documents' authenticity is not contested  
and the plaintiff's complaint necessarily relies on them, or the  
material is a matter of public record).

1 Defendants attempt to distinguish Northrop Grumman on the  
2 basis that Plaintiff has not alleged in her complaint that  
3 Defendants conducted a review of the services they intended to  
4 provide for the upcoming year. But Plaintiff is not required to  
5 so allege in order to state a prohibited transactions claim. It  
6 is Defendants' burden to show that it is clear from the face of  
7 the complaint that the claim is time-barred, which they have not  
8 done.

9 3. Fourth cause of action: failure to monitor

10 Defendants contend that Plaintiff fails to provide  
11 sufficient facts supporting her claim for failure to monitor. An  
12 appointing fiduciary has a duty to monitor its appointees. See  
13 29 U.S.C. § 1002(21)(A). "To state a claim for failure to  
14 monitor under ERISA, the plaintiff must allege that the defendant  
15 failed to review the performance of its appointees at reasonable  
16 intervals in such a manner as may be reasonably expected to  
17 ensure compliance with the terms of the plan and statutory  
18 standards." Carter v. San Pasqual Fiduciary Tr. Co., No.  
19 SACV1501507JVSJCGX, 2016 WL 6803768, at \*5 (C.D. Cal. Apr. 18,  
20 2016) (internal quotation marks omitted). Defendants argue that  
21 Plaintiff does not allege facts supporting these contentions.  
22 Plaintiff alleges that FRI, the Board, and its members failed to  
23 monitor the committee members, their performance, and their  
24 fiduciary process; failed to ensure that the committee considered  
25 superior investment alternatives; and failed to remove committee  
26 members who continued to offer imprudent proprietary funds, in  
27 spite of the Plan's heavy losses. FAC ¶ 147. Plaintiff also  
28 points out potential conflicts of interest of Board members. Id.



¶¶ 93-97. This is sufficient to state a claim. A plaintiff is not required to plead specific facts about the fiduciary's internal processes because such information is typically in the exclusive possession of a defendant. Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 598 (8th Cir. 2009) ("No matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences.").

CONCLUSION

The Court DENIES Defendants' motion for summary judgment (Docket No. 33) and DENIES Defendants' motion to dismiss (Docket No. 34). The Court CONSOLIDATES this case with Cryer v. Franklin Resources, Inc. et al., Case No. 16-cv-4265. The Court will issue a revised schedule for both cases in a separate order.

IT IS SO ORDERED.

Dated: April 6, 2018



CLAUDIA WILKEN  
United States District Judge

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28