UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MARI GROSS LAU, on behalf of Jupiter Center Retirement Plan and all other similarly situated pension plans,

Plaintiff,

-against-

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.
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15-cv-09469 (PKC)

MEMORANDUM AND ORDER

CASTEL, U.S.D.J.

Plaintiff Mari Gross Lau, on behalf of Jupiter Center Retirement Plans (the "Plans") and all other similarly situated pension plans, commenced this action against defendant Metropolitan Life Insurance Company ("MetLife"). Lau asserts claims pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et seq. Before the Court is MetLife's motion to dismiss (Dkt. No. 13.) For the following reasons, MetLife's motion is denied.

BACKGROUND

For the purposes of this motion, all non-conclusory factual allegations are accepted as true, and all inferences are drawn in favor of the plaintiff, as the non-movant. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Although Lau did not append the group annuity contracts ("GACs") at issue to her complaint, "the court may nevertheless consider" them, because the complaint "'relies heavily upon [their] terms and effect,' which renders the document[s] 'integral' to the complaint." Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002) (quoting Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co., 62 F.3d 69, 72 (2d Cir.

1995)). Where Lau's allegations are contradicted by documents attached to the complaint or incorporated by reference—such as the GACs—the Court credits the attached or incorporated documents. Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 222 (2d Cir. 2004) (rejecting a complaint's allegations that were "belied by the letters attached" to the complaint); L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419, 422 (2d Cir. 2011) (observing that when reviewing a judgment on the pleadings, courts assume facts alleged are true "unless contradicted by more specific allegations or documentary evidence").

Plaintiff Mari Gross Lau is a participant in two ERISA-governed retirement plans offered by her employer (the "Plans"). Lau's employer contracted with MetLife to offer Stable Value Funds, or "SVFs," as an option to participants in the Plans. (Compl. ¶ 9.) Lau, along with other participants in the Plans, could elect to allocate retirement funds to the SVFs by purchasing GACs from MetLife. (Id.) "The [SVFs] are intended to provide investment income to plan participants through which participant assets grow through interest and additional contributions." (Compl. ¶ 12.)

The GACs were originally issued on March 26, 2004. (Jupiter Medical Center 403(b) Retirement Plan (the "403(b) Contract"), Hill Decl. Ex. 1; Jupiter Medical Center 401(a) Retirement Plan (the "401(a) Contract"), Hill Decl. Ex. 2.) Under the GACs, the Plans' participants could make contributions to the SVFs, which are then deposited by MetLife into its "general account, where they are held, pooled and invested by [MetLife] with [MetLife's] other financial assets." (Compl. ¶ 27.) In return, MetLife guarantees the "Guaranteed Value" to the Plans, which equals the amount the Plans' participants contributed to the SVFs, plus interest calculated in accordance with section 3 of the GACs, minus any withdrawals. (401(a) Contract § 1; 403(b) Contract § 1.) The GACs were initially effective for five years, but were subsequently renewed at least once in 2011 for an additional three-year period. (401(a) Contract § 3; 403(b) Contract § 3; 2011 Renewal Letter, Conanan Decl. Ex. 1.)

The rate of interest that MetLife credits the Plans (the "Crediting Rate") is determined by a formula disclosed in the GACs. (401(a) Contract § 3; 403(b) Contract § 3.) The Crediting Rate formula is a function of the current value of the SVFs' assets, the expected net contributions by participants for the upcoming year, the previous year's Crediting Rate, and the lowest current yield of the Lehman Bond Intermediate Aggregate Index minus 100 basis points.[1] (Id.) At the time the GACs were issued, the Crediting Rate was set at 3.0 percent. (Id.) On April 1 each year, the Crediting Rate is recalculated for the following 12-month period based on the Crediting Rate formula. (Id.) The new Crediting Rate is disclosed to the Plans' participants "at least 30 days in advance" of it becoming effective. (Id.) Regardless of what the Crediting Rate is calculated to be, MetLife guarantees that the interest rate credited to the Plans will never be less than 1.5 percent. (Id.)

The GACs also provide a mechanism by which the Plans' participants could convert their accumulated contributions and interest into annuities. (401(a) Contract § 7; 403(b)

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[1] The formula for calculating the Crediting Rate is as follows:

$$CR_t = \left(\frac{A_t}{(A_t + ENC_t)}\right) * \left(CR_{t-1} + 0.15 * (Index_t - CR_{t-1})\right) + \left(\frac{ENC_t}{(A_t + ENC_t)}\right) * (Index_t)$$

Where:

CR_t	=	Crediting Rate
A_t	=	Assets at time *t*
ENC_t	=	Expected Net Contributions (contract deposits minus contract withdrawals) between times *t* and (*t* + 1) year
CR_{t-1}	=	Crediting Rate at (*t*-1) year
$Index_t$	=	Yield to worst at time *t* of the Lehman Bond Intermediate Aggregate Index minus 100 basis points

(401(a) Contract § 3; 403(b) Contract § 3.)

Contract § 8.) Participants are given the option of purchasing a life annuity or a 100 percent joint and survivor annuity. (Id.) The annuities are guaranteed annuities, and MetLife guarantees payments "for the life of persons entitled to plan benefits on a monthly, quarterly, semiannual or annual basis." (Id.)

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). To state a plausible claim for relief, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." Id. In assessing the sufficiency of the complaint, a district court must draw all reasonable inferences in favor of the non-movant. In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007). The court accepts as true all factual allegations in the complaint, "and then determine[s] whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679. Legal conclusions and "[t]hreadbare recitals of the elements of a cause of action," however, are not entitled to the presumption of truth. Id. at 678. Dismissal is appropriate only when "'it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law.'" Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 208-09 (2d Cir. 2014) (quoting Conopco, Inc. v. Roll Int'l, 231 F.3d 82, 86 (2d Cir. 2000)).

DISCUSSION

Lau alleges that MetLife engaged in prohibited transactions and breached its fiduciary duties by setting and resetting the Crediting Rates applied to the SVFs. (Compl. ¶¶ 71, 83, 90.) Doing so, Lau contends, allowed MetLife to set its own compensation, to the detriment of the Plans' participants, by retaining the "price spread"—the difference between the amount MetLife made as a result of investing the contributions by the Plans' participants, and the Crediting Rate that MetLife credited to the Plans. (Compl. ¶¶ 71-73.) MetLife argues that dismissal is warranted because the GACs were "guaranteed benefit policies" as defined by ERISA. Because assets underlying a guaranteed benefit policies are not "plan assets" under ERISA, MetLife contends that it was not a fiduciary with respect to the Plans. The sufficiency of Lau's complaint, therefore, largely depends on whether the GACs are guaranteed benefit policies under ERISA.

I. Guaranteed Benefit Policy Exemption

Under ERISA, "a person is a fiduciary with respect to [an employee benefit] plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). As the statute suggests, "[f]iduciary status under ERISA generally attends the management of 'plan assets.'" John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 89 (1993). "Plan assets" are not defined except by exemption, one of which is for guaranteed benefit policies ("GBP"). 29 U.S.C. § 1101(b)(2). A GBP is "an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account." 29 U.S.C. § 1101(b)(2)(B). The GBP exemption states:

> In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but

> shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer.

29 U.S.C. § 1101(b)(2).

In Harris Trust, the Supreme Court considered the scope of the GBP exemption. 510 U.S. 86. Analogizing from cases construing the insurance policy exemption under the Securities Act of 1933, the Supreme Court instructed courts to determine a contract's eligibility for the GBP exemption by dividing "the contract into its component parts and examin[ing the] risk allocation in each component." Id. at 102. Because Congress exempted contracts only "to the extent" they provide guaranteed benefits, the Court reasoned that "contracts may provide to some extent for something other than guaranteed benefits, and [Congress] expressly declared the exemption unavailable to that extent." Id. at 105. Therefore, an annuity contract may fall outside the GBP exemption during its accumulation phase, but within the GBP exemption "once contractually guaranteed fixed payouts began." Id. at 102-03 (citing SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967)).

Noting that the GBP exemption is "markedly confined," the Court concluded that "[a] component fits within the guaranteed benefit policy exclusion only if it allocates investment risk to the insurer. Such an allocation is present when the insurer provides a genuine guarantee of an aggregate amount of benefits payable to retirement plan participants and their beneficiaries." Id. at 96, 106. Furthermore, with respect to "funds in excess of those that have been converted into guaranteed benefits," courts should look at "the insurer's guarantee of a reasonable rate of return on those funds and the provision of a mechanism to convert the funds into guaranteed benefits at rates set by the contract." Id.

II. Counts Two and Three of Lau's Complaint

MetLife contends that Counts Two and Three of Lau's complaint should be dismissed on the grounds that it is not a fiduciary with respect to the Plans. Count Two alleges that MetLife, as a fiduciary, engaged in a prohibited transaction in violation of ERISA § 406(b)(1) by setting and resetting the Crediting Rate applied to the SVFs. (Compl. ¶ 83.) By doing so, Lau contends, MetLife increased its own compensation and impermissibly dealt "with the assets of the plan in [its] own interest or for [its] own account." 29 U.S.C. § 1106(b)(1). Count Three alleges that MetLife also breached its fiduciary duties in violation of ERISA § 404 by manipulating the Crediting Rate. (Compl. ¶ 90.) By manipulating the Crediting Rate, MetLife failed to "discharge [its] duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A).

Here, Lau does not dispute that the guaranteed payout component of the GACs qualifies under the GBP exemption. (401(a) Contract § 7; 403(b) Contract § 8.) That component of the GACs—which allows the Plans' participants to purchase guaranteed annuities at a specified rate—falls squarely within the GBP exemption. Harris Trust, 510 U.S. at 102-03. However, MetLife also contends that dismissal of the action is appropriate with respect to the accumulation phase of the GACs, because the GACs guarantee a reasonable rate of return and a mechanism to convert funds into a guaranteed benefit. However, the Court cannot conclude at this stage that a guaranteed rate of return of 1.5 percent is reasonable under the circumstances. Of the three cases cited by MetLife in support of its proposition, one predates Harris Trust, and makes no determination regarding the reasonableness of the rate of return. See Associates In Adolescent Psychiatry, S.C. v. Home Life Ins. Co., 941 F.2d 561, 565 (7th Cir. 1991) (affirming grant of summary judgment, where lower court found that a variable annuity with a guaranteed rate of return of at least 4% qualified for the GBP exemption). In another case, which is not binding on this Court, the district court merely concludes that a minimum rate of return of 4% "*appears* to satisfy [Harris Trust's] requirement of a reasonable rate of return." Moreland v. Behl, No. 92 cv 1238 (MHP), 1996 WL 193843, at *7 (N.D. Cal. Apr. 17, 1996) (emphasis added). In the final case cited by MetLife, the district court only observes that the plaintiff "*does not appear* to contest that the . . . contract provides a guaranteed return to individual retirees." Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co., No. 11 cv 282 (JCH), 2012 WL 162361, at *4 (D. Conn. Jan. 19, 2012) (emphasis added).

MetLife also contends that the rate is "unquestionably" reasonable based on "the current interest rate environment." (Def.'s Br. 15.) In so arguing, MetLife asks the Court to take judicial notice of the Federal Reserve rates, three-month Treasury Bills rates, and the national average interest rates. (Def's Br. 15 n.7.) However, MetLife offers no explanation as to why such rates should serve as a benchmark for reasonableness of the rate of return on a contract of the sort at issue in the present case. The Court can discern no correlation between the three-month Treasury Bill rates, for example, and the guaranteed rate of return. As MetLife points out, the 1.5% guaranteed rate of return in the present case is many multiples larger than the recent three-Month Treasury Bill rate; however, the rate is several multiples smaller than the three-Month Treasury Bill rate when the GACs were initially issued. See Board of Governors of the Federal Reserve System, Historical Data, U.S. Government Services, Three-Month Treasury Bills (secondary market), http://www.federalreserve.gov/releases/h15/data.htm. Although the Court reserves judgment regarding the use of these objective rates as benchmarks for reasonableness, at least at this stage, MetLife has failed to show that the 1.5% guaranteed rate of return was unquestionably reasonable.

Moreover, Harris Trust emphasized that Congress intended to impose ERISA fiduciary duties "on persons whose actions affect the amount of benefits retirement plan participants will receive," and that an "examination of risk allocation" should guide a determination of whether a contract qualifies as a GBP. Harris Trust, 510 U.S. at 86, 102. The GACs could plausibly be read to grant MetLife discretion in setting the Crediting Rate—above the 1.5 percent contractual guarantee—applied to the GACs. MetLife rightfully contends that the interest rate applied to the GACs was calculated based on a formula disclosed in the GACs. However, the Crediting Rate is based, at least in part, on the input "Expected Net Contributions," the difference between the present value of the contributions by the Plans' participants, and the *expected value* of the contributions by the Plans' participants for the following year. (401(a) Contract § 3; 403(b) Contract § 3.) At this stage, it is unclear how the "Expected Net Contributions" is calculated, and whether MetLife retained discretion in determining the expected contributions by the Plans' participants. Accepting Lau's allegations as true, MetLife could plausibly have shifted its investment risk onto the Plans' participants by artificially lowering the "Expected Net Contributions."[2] Relatedly, MetLife also reserved the right to "credit a different interest rate" to any additional amounts "that [MetLife] did not anticipate as of the last April 1." (Id.) Any purposeful undervaluing of the "Expected Net Contributions," therefore, would increase the total value of contributions for which MetLife could set an undisclosed interest rate.

[2] Assuming all variables within the Crediting Rate formula remain unchanged, a reduction of the "Expected Net Contributions" would result in a reduction of the Crediting Rate.

The Court notes that while the GACs include the characteristics of GBPs as defined in Harris Trust, Congress intended the exemption to be narrowly construed. At this stage, the Court cannot definitively conclude that the minimum rate of return was reasonable, or that the formula for calculating the Crediting Rate did not allocate some investment risk to the Plans' participants. These determinations involve questions more appropriate for consideration on summary judgment. Because Lau has sufficiently pled that MetLife retained discretion over the Plans' assets, the Court concludes that questions remain as to whether the GACs qualify as GBPs, thereby exempting MetLife from fiduciary responsibilities.

III. Lau's Remaining Prohibited Transaction Claim

MetLife also moves to dismiss Count I of Lau's complaint alleging that MetLife engaged in a prohibited transaction in violation of ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C). ERISA 406(a)(1)(C) prohibits fiduciaries from causing "the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(C). While Count I is also premised on MetLife's status as a fiduciary, Section 1106(a) is subject to a number of statutory and administrative "exemptions." Among them, fiduciaries are permitted to "contract[] or mak[e] reasonable arrangements with a party in interest for . . . other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b)(2). A contract for services between a plan and a "covered service provider," however, is per se unreasonable if the service provider fails to make required regulatory disclosures. 29 C.F.R. § 2550.408b-2(c)(1).

As noted above, at this early stage, Lau has sufficiently alleged that the Plans were not GBPs and that MetLife was a fiduciary with respect to the Plans. Lau has adequately alleged that MetLife retained at least some discretion in setting the Crediting Rate applied to the

Plans, and therefore, it is plausible that MetLife received compensation in the form of a price spread in violation of ERISA § 1106(a)(1)(C). Discovery is necessary to determine whether MetLife's profits can be construed as compensation, and if so, whether that compensation was reasonable such that MetLife would be exempt from ERISA § 406(a) liability under ERISA § 408(b)(2). Discovery is also necessary to determine whether MetLife was a "covered service provider" required to make disclosures pursuant to 29 C.F.R. § 2550.408b-2(c)(1). If MetLife was a covered service provider and failed to make the required disclosures, as Lau contends, any services MetLife provided to the Plans pursuant to the GACs would be per se unreasonable under the Department of Labor's regulations. Id. Whether MetLife was a "covered service provider" depends, at least in part, on its status as a fiduciary. 29 C.F.R. § 2550.408b-2(c)(1)(iii)(A). Accordingly, dismissal is inappropriate at this juncture.

CONCLUSION

For the foregoing reasons, MetLife's motion to dismiss Lau's complaint (Dkt. No. 13) is DENIED.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
August 22, 2016